DISSENTING OPINION OF JUDGE LUCKY

Introduction

Upon careful reading of the draft Judgment of the majority of the Tribunal, I find it difficult to concur with all of its findings. Consequently, I feel obliged to cast negative votes on the main operative paragraphs of the Judgment. The procedural history and factual background are set out in the introduction to the Judgment and I shall not repeat them.

This case is properly placed in the category of the more complex and this is evidenced, among other things, by the volume of material submitted for our consideration.

I too have applied with robust rigour the applicable rules of law and principles governing the weight that ought to be given to admissible evidence. Unfortunately, my assessment of the evidence has led to a conclusion different to that of the majority.

That this case would result in at least one or more dissenting opinions should come as no surprise or be the cause for any degree of discomfort, for in my view the ventilation of matters that will be the subject of the highest international scrutiny augurs well for the development of the jurisprudence of this specialised court.

For the reasons explained below, I disagree with the following findings set out in the following paragraphs of the Judgment (specifically, paragraphs 98, 115, 118, 125, 239, 490 and 475).

I do not agree with the finding that the "Agreed Minutes" do not constitute a legally binding agreement (para. 98). I differ with the finding that the affidavits do not provide compelling evidence (para. 115). I do not find that Bangladesh "falls short of proving the existence of a tacit . . . agreement" (para. 118). I differ with the majority on whether the requirements of estoppel have been met (para. 125). I do not agree with the establishment of an equidistance relevant/circumstances line and adjusting same to arrive at an equitable solution; I adhere to the angle-bisector method in this case. I do not agree with the measurement of the coastlines (paras. 202 and 204). For purposes of delimitation, the coast of Myanmar should end at Cape Bhiff. (I note that the line arrived at

in the Judgment is on the 215° azimuth. Nevertheless, I do not agree with the methodology used to determine the provisional equidistance line as adjusted to achieve an equitable solution.)

My approach to the use of the scientific evidence submitted is considerably different to that in the Judgment. I also differ with the manner of interpretation of article 76 of the 1982 United Nations Convention on the Law of the Sea (the Convention) and the jurisdiction of the Commission on the Limits of the Continental Shelf (the CLCS) in relation to the Tribunal. I do not agree with the definition of "natural prolongation" in the Judgment and the interpretation of article 76 in this respect. In my view, the conclusion on the issue of the "grey area" is not entirely satisfactory. My conclusion is different.

Background

Bangladesh and Myanmar are neighbours/adjacent States bordering the Bay of Bengal. Both States have a deep interest in the resources in the sea. Among the resources are natural gas and oil deposits. In the absence of defined maritime boundaries, neither State has been able to make full use of their potential. The reason for this is that Bangladesh was trying to achieve an agreement that would facilitate oil exploration and exploitation in waters over the continental shelf in the Bay of Bengal adjacent to the Myanmar oil fields. This included access to the Naaf River.

The two States had engaged in extensive negotiations with a view to agreeing on a maritime boundary in the Bay of Bengal. In 1974, the States arrived at decisions that were recorded. The decisions arrived at in that meeting are set out in the minutes of 23 November 1974. The leaders of each delegation signed the minutes. Bangladesh alleges that for over 34 years, the Parties adhered to the terms set out in the "Agreed Minutes" and that this adherence demonstrates that there was a *de facto* agreement. Myanmar contends that there was no agreement in law since the decisions in the "Agreed Minutes" were subject to confirmation by their government and needed to be set out in a comprehensive treaty between the States.

Subsequent talks between the Parties were not successful and as a result, the matter was brought to this Tribunal for final determination.

Both States are parties to the Convention.

By a declaration of 4 November 2010, Myanmar accepted the jurisdiction of the Tribunal for the settlement of the dispute relating to the delimitation of the maritime boundary between the two States in the Bay of Bengal. Similarly, Bangladesh by a declaration dated 12 December 2009 accepted the jurisdiction of the Tribunal in similar terms (see articles 280 and 287, paragraph 4, of the Convention).

The dispute

This dispute revolves around complex issues over which the Parties are at variance, as shown by the divergent views and opinions emerging from the pleadings, documentary evidence and oral submissions of learned counsel.

The subject matter of the dispute concerns the delimitation of the maritime boundaries between the two States in the territorial sea, the exclusive economic zone (the EEZ) and the continental shelf in the Bay of Bengal. It also relates to the interpretation, construction and application of the provisions of articles 15, 74, 76, 83 and 121 of the Convention.

The geographical facts with respect to the two States are not disputed. Bangladesh's coast is deltaic; in my opinion, geological and geomorphic factors will therefore play an important part in determining this matter: for example, the application of the Doctrine of Necessity in delimiting the respective areas between the States.

The issues and points of agreement

The following are points of agreement and issues that I have discerned from the Pleadings:

(a) The Convention and other rules of international law not incompatible with it constitute the law applicable in this case. Myanmar contends that the provisions of the Convention must be interpreted in the light of post-Convention practice and case law, i.e., practice and case law post the Convention, not antedating it.

(b) The Tribunal has jurisdiction to delimit the maritime boundary between the Parties up to 200 nm. Unlike Bangladesh, Myanmar questions the Tribunal's jurisdiction to delimit the continental shelf beyond 200 nm.

(c) The straight base lines established by the Parties are irrelevant. In other words, it is for the Tribunal to establish the baselines.

The Parties agree on the geological facts. Nevertheless, there is a reservation with respect to the geological conclusions to be drawn from these facts, specifically those set out in the reports of the experts, Dr. Curray and Dr. Kudrass. I note that in a letter of 14 August 2011 to the Registry, the Agent of Myanmar advised that the "allegations" in the reports of Drs. Curray and Kudrass are "irrelevant for the solution of this case". Myanmar has not specified what it means by "the allegations".

Myanmar expressed the view that if the Tribunal decided to call upon the experts, Myanmar should be informed as soon as possible. Neither Party called the said experts to provide oral testimony, nor did the Tribunal. The experts were present in court throughout the oral hearings.

The Parties also disagree with respect to the definition of "natural prolongation" in article 76 of the Convention.

1. Bangladesh argues that the term "continental shelf" should be given a wide, generous and all-encompassing meaning within the confines of geography and the relevant case law. Myanmar contends that the definition must be construed within the meaning of article 76 as a whole, bearing in mind the provisions of article 76, paragraph 8, which defines the role and function of the CLCS. In fact, Myanmar strongly contends that Bangladesh has no continental shelf beyond 200 nm and that any submissions to an extended continental shelf ought to be made to the CLCS in accordance with article 76, paragraph 8, of the Convention.

2. Bangladesh favours the angle-bisector method of delimitation and argues that this would result in an "equitable solution". Myanmar contends that the equidistance principle, which has been applied by the International Court of Justice (the ICJ) and arbitral tribunals since the coming into force of the Convention, is more relevant to the circumstances of this case, and will result in an equitable solution. Bangladesh contends that: "Equidistance boundaries would frustrate Bangladesh's ability to exercise sovereign rights beyond 200 M and would be inconsistent with the 'equitable solution', for which UNCLOS

calls". Bangladesh claims that because of its unique and disadvantageous coastal geography it will be "shelf locked" by equidistance lines.

Bangladesh submits that the Tribunal can play an important role in clarifying the meaning of an "equitable solution" (see *infra*).

3. The question of base points is crucial; in other words, where should these points be located?

4. What, if any, are the effects of the concavity of the Bangladesh coastline?

5. Further to the above, is Oyster Island an "island" for these purposes? Bangladesh argues that Oyster Island unlike St. Martin's Island, has no permanent population and cannot sustain one; it has no fresh water and no economic life of its own. In other words, Bangladesh contends that Oyster Island is not an island within the meaning of article 121 of the Convention. (I note the ICJ's decision with respect to Serpents' Island and Ascension Island.)

6. The interpretation of article 121 of the Convention in the light of the decisions of the ICJ in *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (*Judgment, I.C.J. Reports 2009*, p. 61, at pp. 122-123, paras. 186-188) is relevant in this case, especially in respect of whether St. Martin's Island is a "special circumstance".

I have read the cases cited and find that the ICJ did not provide a clear and definitive definition of article 121(3). It concluded that uninhabited Serpents' Island should have a 12 nm territorial sea but otherwise should have no impact on the maritime delimitation between the two countries. Geographical circumstances of islands are different. St Martin's Island is not similarly circumstanced to Serpents' Island. It seems to me that islands can have maritime zones but they do not generate full zones when they are opposite or adjacent to continental land areas (see the *North Sea Continental Shelf* cases, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Continental Shelf (Libyan Arab Jamahiriya/Malta), Delimitation of the maritime boundary between Guinea and Guinea-Bissau, Maritime Delimitation in the Black Sea (Romania v. Ukraine))*.

7. Bangladesh has tendered several affidavits in support of its contention that the boundaries set out in the minutes of 1974 were adhered to from then until 2008. Myanmar contends the affidavits are of little or no value especially when the deponent has not been tested by cross-examination.

The evidential value of affidavits in international law will be considered in this Opinion.

8. The locus of St. Martin's Island is crucial: is it a "special circumstance"? Is it adjacent and/or opposite to the coast of Myanmar? Does the island meet the requirements for a territorial sea of 12 nm?

9. Can scientific reports appended to the written pleadings be deemed evidence? Moreover, if they are not challenged, what is their evidential value?

10. What is the evidential value of the Reports of Drs. Kudrass and Curray that are attached to the Pleadings of Bangladesh? Myanmar has not specified the so-called "allegations" in the reports in question and takes no position in this respect for the sole reason that it deems the issues discussed in these reports to be irrelevant for the solution of the case. Is this a subtle objection and/or challenge? Bangladesh did not summon the experts to testify but advised the Tribunal that if it wished to do so, it would make the witnesses available at the oral hearings. Nevertheless, Drs. Kudrass and Curray were present in court during the proceedings.

11. Do the "Agreed Minutes" constitute a binding agreement between the Parties? (Note that Myanmar refused to sign a treaty to that effect.) In addition, does the fact that the Parties seemed to have tacitly agreed, for over 34 years, to the lines set out in the said minutes, and apparently observed, mean that the Parties are thereby bound? The question is: whether in these circumstances or in general, does acquiescence create rights and obligations in international law? Further, is estoppel applicable?

I note that case law instructs that a delimitation agreement is not lightly to be inferred. Evidence of a tacit agreement must be cogent, convincing and compelling. (See the decision of the ICJ in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), I.C.J. Reports 2007*, p. 659, at p. 735, para. 253 (see *infra*)).

12. The Parties disagree with respect to the definition of "natural prolongation" as set out in article 76 of the Convention. Bangladesh argues that the term should be given a wide, generous and all-encompassing meaning within the confines of geography and the relevant case law. Myanmar contends that the definition must be construed within the meaning of article 76 as a whole, bearing in mind the provisions of article 76, paragraph 8. In fact Myanmar strongly contends that Bangladesh has no continental shelf beyond 200 nm.

The issue is whether there is an extensive continental margin in the Bay of Bengal. In addition, does the geological and geomorphological evidence show that it is principally the natural prolongation of Bangladesh's land mass, and to a lesser extent India's? This requires proof in written and/or oral evidence, especially if the evidence is challenged by Myanmar. In support of this contention, Bangladesh submits specific geological facts set out in its written pleadings.

Issues to be considered

I think it will be convenient to indicate the issues and the manner in which I shall deal with each, because the conclusions interrelate. I shall deal with the following issues:

1. the "Agreed Minutes" of 1974 and 2008;
2. the geographical factors;
3. the construction of the delimitation line;
4. the significance of St. Martin's Island;
5. the interpretation of article 76 of the Convention; and
6. whether the Tribunal is encroaching on the jurisdiction of the CLCS.

The evidence

The Parties did not call any witnesses to give oral testimony. Bangladesh relied upon the documentary evidence annexed to its pleadings. This includes copies of the "Agreed Minutes" of 1974, the notes verbales between the Parties during the negotiations, the affidavits of fishermen, the naval logs and minutes of a meeting in 2008, the reports of Drs. Curray and Kudrass and maps and charts provided during the oral hearings.

Myanmar relied upon the documents appended to its pleadings and the maps and charts adduced during the oral proceedings.

During their oral presentations, counsel referred to the documents appended to the pleadings/memorials.

Burden of proof

Before proceeding further on the topic of evidence, it will be appropriate to consider the standard of proof required in cases before the Tribunal. I think the standard should be considered on a case-by-case basis because of the differences between common law and civil law requirements in this respect.

In common law there are two main standards: one that is applicable in civil cases and the other in criminal cases.

The standard adopted in common law jurisdictions in criminal cases is proof beyond a reasonable doubt; in civil cases the standard is based on the "preponderance of evidence" or "the balance of probabilities".

In the civil law system, the concept of the standard of proof is different. It is not "on the balance of probabilities" but it is a matter for the personal appreciation of the judge, or "*l'intime conviction du juge*". In other words, if the judge considers himself to be persuaded by the evidence and submissions based on the evidence, then the standard of proof has been met. It would appear from its case law that the ICJ adopts the civil law method.

The burden of proof in most of the issues in this case is initially upon Bangladesh to show, for example, that the "Agreed Minutes" amount to an agreement in law; the angle-bisector method of delimitation is suitable in these circumstances; St. Martin's Island is not a "special circumstance"; the evidence on affidavit is admissible; and the reports of the experts are relevant and must be considered in arriving at a definition of the continental shelf of the two States.

Admissibility of evidence

As a rule, it appears as though all evidence is admissible and the strict rules of the common law are not adhered to in international courts.

In his oral submission, Counsel for Myanmar argued: "the Applicant, at least during the hearing, added to its list of its counsel the name of two geology professors, which is its right, calling them "independent experts". The concept of 'independent experts' who are members of the legal team is very interesting" (see the *Pulp Mills* case, *infra*). The reports of the experts were part of the pleadings of Bangladesh.

Counsel for Myanmar also submitted that: "We are not necessarily in agreement with all the information presented by Bangladesh's 'independent' experts, but it does not seem worthwhile to devote lengthy discussion to irrelevant points".

I do not accept the above submissions of irrelevance, because in my opinion the reports are fair and balanced. They provide valuable scientific geological, physical and geomorphological evidence, which I find very helpful when addressing and determining certain aspects of the case.

Expert evidence

The applicable law

I think the law is set out in the Civil Proceedings Rules 1998 as amended of the Republic of Trinidad and Tobago (Laws of Trinidad and Tobago). These Rules are helpful in considering the expert evidence in this case. They incorporate rules of international law and jurisprudence.

Expert's overriding duty to the court
Rule 33.1 provides:

33.1 (1) It is the duty of an expert witness to help the Court impartially on matters relevant to his expertise.

(2) This duty overrides any obligations to the person from whom he has received instructions.

Experts – way in which duty to court is to be carried out

33.2 (1) Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.

33.3 (2) An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.

(3) An expert witness must state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract him from his concluded view.

(4) An expert witness must make it clear if a particular matter or issue falls outside his expertise.

Contents of report

33.10

(1) An expert's report must-

(a) give details of the expert's qualifications;
(b) give details of any literature or other material which the expert has used in making his report;
(c) say who carried out any test or experiment which the expert has used for the report;
(d) give details of the qualifications of the person who carried out any such test or experiment; and
(e) where there is a range of opinion on the matters dealt with in the report–
    (i) summarise the range of opinion; and
    (ii) give reasons for his opinion.

I am satisfied that the experts have satisfied every requirement set out in the above sections of the Rules and by extension the requirements set out in international jurisprudence.

I am also guided by the dicta in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*; in dealing with expert evidence the judgment reads, in part:

> The Court now turns to the issue of expert evidence. Both Argentina and Uruguay have placed before the Court a vast amount of factual and scientific material in support of their respective claims. They have also submitted reports and studies prepared by the experts and consultants commissioned by each of them, as well as others commissioned by the International Finance Corporation in its quality as lender to the project. Some of these experts have also appeared before the Court as counsel for one or the other of the Parties to provide evidence.
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> The Parties, however, disagree on the authority and reliability of the studies and reports submitted as part of the record and prepared, on the one hand, by their respective experts and consultants, and on the other, by the experts of the IFC, which contain, in many instances, conflicting claims and conclusions. In reply to a question put by a judge, Argentina stated that the weight to be given to such documents should be determined by reference not only to the "independence" of the author, who must have no personal interest in the outcome of the dispute and must not be an employee of the Government, but also by reference to the characteristics of the report itself, in particular the care with which its analysis was conducted, its completeness, the accuracy of the data used, and the clarity and coherence of the conclusions drawn from such data (*I.C.J. Reports 2010*, p. 14, at pp. 71-72, paras. 165-166).

In the instant case the experts in their reports show no personal interest in the outcome of the dispute. They are not employees of the Bangladesh Government. The analysis was apparently conducted with care and supported by references. The reports are complete and thorough, clear and cohesive. The data were not challenged or contradicted. The conclusions in the reports are specific and accurate.

> In its reply to the same question, Uruguay suggested that reports prepared by retained experts for the purposes of the proceedings and submitted as part of the record should not be regarded as independent and should be treated with caution; while expert statements and evaluations issued by a competent international organization, such as the IFC, or those issued by the consultants engaged by that organization should be regarded as independent and given "special weight" (Ibid., at p. 72, para. 166).

167. The Court has given most careful attention to the material submitted to it by the Parties, as will be shown in its consideration of the evidence below with respect to alleged violations of substantive obligations. Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. **The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court** (my emphasis) (Ibid., at p. 72, para. 167).

168. As for the independence of such experts, the Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. **Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed** (my emphasis) (Ibid., at pp. 72-73, para. 168).

With respect to the reports of the experts in this case, and the contents therein, it appears to me that authenticity and veracity are crucial.

The fact that Drs. Curray and Kudrass are the persons who prepared the reports is not disputed. What appears to be disputed is the veracity of the reports in evidential circumstances. In other words, are the contents of scientific and technical findings of the author/witness cogent, convincing and compelling evidence? The authors of the reports were not tested by cross-examination and there is no contradictory evidence. Further, it must be noted that Myanmar did not formally object to the admission of the reports in evidence.

During his oral submission, Counsel for Myanmar posed the question: "the experts are they really independent?"

The experts in this case are renowned scientists in their field. Dr. Curray has studied the Bay of Bengal and its geographical and geomorphic structure. In my opinion, the report is fair to both sides; for example the report mentions a trough that existed some 160 million years ago, but goes on to mention that over the years the Bay has been filled with sediment and rocks from the rivers in a thickness that amounts to over 24 km. This could only mean that there is one continental shelf in the Bay of Bengal. Counsel opined that Bangladesh made an error by "lumping together" science and the law. He added that article 76 of the Convention is a rule of law and not a rule of science. Nevertheless, article 76, paragraphs 4 (a)(i) and (ii), 5 and 6, sets out criteria, which in my view necessitates and provides for geographical evidence.

The evidential value of the reports of Drs. Curray and Kudrass

As I alluded to above, Counsel for Myanmar said: "the Applicant, at least during the hearing, added to its list of its counsel the name of two geology professors, which is its right, calling them 'independent experts'. The concept of 'independent experts' who are members of the legal team is very interesting".

Counsel also said: "We are not necessarily in agreement with all the information presented by Bangladesh's 'independent experts', but it does not seem worthwhile to devote lengthy discussion to irrelevant points".

I do not agree. The experts are two of the world's leading authorities on the geology and geomorphology of the Bay of Bengal.

The reports of the experts were part of the pleadings of Bangladesh. Bangladesh requested the reports. Nevertheless, these are experts in their fields and world-renowned. Counsel for Myanmar seemed to have summarily dismissed the reports and considered that the experts were not "independent experts". However, in the absence of evidence to the contrary, I have accepted the reports of the experts, because the reports stand without contradiction. So, in my opinion while they are not so-called "independent experts" in the strict legal process because their reports form part of the pleadings of Bangladesh, their opinions must be respected and I accept them as part of the evidence to be considered.

These comprehensive reports show that based on geological, geographical, geophysical, hydrographical, geomorphological and scientific evidence both Bangladesh and Myanmar *de facto* and *de jure* have continental shelves in the Bay of Bengal and have rights of entitlement in the Bay of Bengal. In legal terms, based on the interpretation of article 76(1) of the Convention, the term "natural prolongation" has a legal definition that must include science and geography (see *infra*).

I think it will be convenient to mention here two cases, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*Judgment, I.C.J. Reports 1982*, p. 18) and *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*Judgment, I.C.J. Reports 1985*, p. 13), that I think will be helpful and to distinguish these cases from the instant case.

In the abovementioned cases, the ICJ considered extensive written and oral evidence and arguments from both parties concerning the geological nature of the seabed of the continental shelf of the Mediterranean Sea. In the case of *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Libya called a Professor of geology as an expert witness. He was examined in chief and cross-examined. In the instant case, the experts were not examined or cross-examined. In the case with Malta, Libya called three scientific witnesses and Malta two. They were examined in chief and cross-examined. The Court summarised the disagreements but was unable to arrive at a decision and to determine whether the scientific data of one party or the other should be accepted. In the instant case the witnesses were not examined or cross-examined. Their evidence comprised the data in their reports, which are in evidence. In my opinion, the Tribunal had to consider the scientific evidence in the reports and these, being unchallenged, had to be considered. I did so and applied the evidence where necessary in arriving at my conclusions in respect of the continental shelf in the Bay of Bengal and the interpretation of article 76 of the Convention, with specific reference to "natural prolongation". In my view, the test to be applied in defining the term "natural prolongation" involves the consideration of geography and geomorphology. How else could the thickness of sedimentary rock and the foot of the slope be determined except by reference to and acceptance of an unchallenged report on the Bay of Bengal by scientific experts in the context of article 76 of the Convention in respect of "natural prolongation"?

The "Agreed Minutes" of 1974

One of the main issues dividing the Parties is whether there is an agreement in force between the Parties concerning the delimitation of the territorial sea.

In order to prove that the "Agreed Minutes" comprise an agreement between the Parties, Bangladesh submitted that there is in force an agreement between them. The delimitation of the territorial sea was negotiated in 1974 and confirmed in the minutes of the meeting on 23 November 1974, which were signed by the heads of both delegations, Ambassador Kaiser of Bangladesh and Commodore Hlaing, the vice-Chief of the Myanmar Naval Staff. The heads of the delegations also signed an appended Chart No. 114, which depicts the agreed boundary line comprising seven points. These points were confirmed with modifications to two points and marked in another agreed chart at a meeting in 2008. It was also agreed that the Parties would continue negotiations toward a comprehensive treaty delimiting the boundaries of the EEZ and the continental shelf between the Parties. Points 1–7 are shown in Admiralty Chart 817. The Parties have accepted the said Admiralty chart in evidence.

In its response, Myanmar contends that the "Agreed Minutes" were not a final agreement and were subject to the conclusion of a comprehensive maritime treaty. Bangladesh argues that this condition is not set out in the minutes. Bangladesh submits that for just over 34 years the Parties adhered to the terms set out in the "Agreed Minutes". The evidence does not disclose that points 1–7 in the "Agreed Minutes" were subject to further negotiation.

In support of its contention, Bangladesh relies upon the following:

1. Copies of the signed minutes of 1974 and 2008 (the Agreed Minutes). The Agreed Minutes are set out in the Judgment, but for purposes of easy reference in my reasons, I have set them out hereunder.

In the course of the discussions, the head of the delegation of Burma (today Myanmar), Commodore Chit Hlaing, and the head of the Bangladesh delegation, Ambassador K.M. Kaiser, signed the 1974 Agreed Minutes on 23 November 1974. These read as follows:

> Agreed Minutes between the Bangladesh Delegation and the Burmese Delegation regarding the Delimitation of the Maritime Boundary between the Two Countries

1. The delegations of Bangladesh and Burma held discussions on the question of delimiting the maritime boundary between the two countries in Rangoon (4 to 6 September 1974) and in Dacca (20 to 25 November 1974). The discussions took place in an atmosphere of great cordiality, friendship and mutual understanding.

2. With respect to the delimitation of the first sector of the maritime boundary between Bangladesh and Burma, i.e., the territorial waters boundary, the two delegations agreed as follows:

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

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

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

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

4. The Bangladesh delegation expressed the approval of their Government regarding the territorial waters boundary referred to in para. 2. The Bangladesh delegation had taken note of the position of the Burmese Government regarding the guarantee of free and unimpeded navigation by Burmese vessels mentioned in para. 3 above.

5. Copies of a draft treaty on the delimitation of the territorial waters boundary were given to the Burmese delegation by the Bangladesh delegation on 20 November 1974 for eliciting views from the Burmese Government.

> 6. With respect to the delimitation of the second sector of the Bangladesh-Burma maritime boundary, i.e., the Economic Zone and Continental Shelf boundary, the two delegations discussed and considered various principles applicable in that regard. They agreed to continue discussions in the matter with a view to arriving at a mutually acceptable boundary.

(Signed)
(Commodore Chit Hlaing)
Leader of the Burmese Delegation
Dated, November 23, 1974.

(Signed)
(Ambassador K.M. Kaiser)
Leader of the Bangladesh Delegation
Dated, November 23, 1974

I think paragraph 3 is significant because the Bangladesh delegation took note of the position of the "Burmese" regarding "the guarantee of free and unimpeded navigation by Burmese vessels" mentioned in paragraph 3. This was confirmed in the response to a question of the Tribunal on this matter. In her response the Agent of Bangladesh said:

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

This clearly shows that the guarantee, though apparently verbal, was adhered to for 34 years. It was amended to read "innocent passage" in the Agreed Minutes of 2008.

On 1 April 2008, the delegations of Bangladesh and Myanmar approved another set of Agreed Minutes. This instrument, which was signed by the head of the Myanmar delegation, Commodore Maung Oo Lwin, and the head of the Bangladesh delegation, Mr M.A.K Mahmood, Additional Foreign Secretary, reads as follows:

> Agreed Minutes of the meeting held between the Bangladesh Delegation and the Myanmar Delegation regarding the delimitation of the Maritime Boundaries between the two countries
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> 1. The Delegations of Bangladesh and Myanmar held discussions on the delimitation of the maritime boundary between the two countries in Dhaka from 31 March to 1st April, 2008. The discussions took place in an atmosphere of cordiality, friendship and understanding.
>
> 2. Both sides discussed the ad-hoc understanding on chart 114 of 1974 and both sides agreed ad-referendum that the word "unimpeded" in paragraph 3 of the November 23, 1974 Agreed Minutes, be replaced with "Innocent Passage through the territorial sea shall take place in conformity with the UNCLOS, 1982 and shall be based on reciprocity in each other's waters".
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> 3. Instead of chart 114, as referred to in the ad-hoc understanding both sides agreed to plot the following coordinates as agreed in 1974 of the ad-hoc understanding on a more recent and internationally recognized chart, namely, Admiralty Chart No. 817, conducting joint inspection instead of previously agreed joint survey:

Serial No.	**Latitude**	**Longitude**
1.	20° -42' -12.3" N	092° -22' -18" E
2.	20° -39' -57" N	092° -21' -16" E
3.	20° -38' -50" N	092° -22' -50" E
4.	20° -37' -20" N	092° -24' -08" E
5.	20° -35' -50" N	092° -25' -15" E
6.	20° -33' -37" N	092° -26' -00" E
7.	20° -22' -53" N	092° -24' -35" E

> **Other terms of the agreed minutes of 1974 will remain the same** (my emphasis).
>
> 4. As a starting point for the delimitation of the EEZ and Continental Shelf, Bangladesh side proposed the intersecting point of the two 12 nautical miles arcs (Territorial Sea limits from respective coastlines) drawn from the southernmost point of St. Martin's Island and Oyster Island after giving due effect

i.e. 3:1 ratio in favour of St. Martin's Island to Oyster Island. Bangladesh side referred to the Article 121 of the UNCLOS, 1982 and other jurisprudence regarding status of islands and rocks and Oyster Island is not entitled to EEZ and Continental Shelf. Bangladesh side also reiterated about the full effects of St. Martin's Island as per regime of Islands as stipulated in Article 121 of the UNCLOS, 1982.

5. Myanmar side proposed that the starting point for the EEZ and Continental Shelf could be the mid point between the line connecting the St. Martin's Island and Oyster Island. Myanmar side referred to Article 7(4), 15, 74, 83 and cited relevant cases and the fact that proportionality of the two coastlines should be considered. Myanmar also stated that Myanmar has given full effect to St. Martin's Island which was opposite to Myanmar mainland and that Oyster Island should enjoy full effect, since it has inhabitants and has a lighthouse, otherwise, Myanmar side would need to review the full-effect that it had accorded to St. Martin's Island.

6. The two sides also discussed and considered various equitable principles and rules applicable in maritime delimitation and State practices.

7. They agreed to continue discussions in the matter with a view to arriving at a mutually acceptable maritime boundary in Myanmar at mutually convenient dates.

(Signed)	*(Signed)*
Commodore Maung Oo Lwin	M.A.K Mahmood
Leader of the Myanmar Delegation	Additional Foreign Secretary
Dated: April 1, 2008	Leader of the Bangladesh
Dhaka	Delegation

The question is: do the above two documents provide conclusive evidence of an agreement delimiting the territorial sea in 1974? The answer in my opinion is affirmative. Firstly, the terms are clear and unambiguous. Their ordinary meaning is that a boundary had been agreed. The text clearly identifies a boundary located midway between St Martin's Island and the coast of Myanmar, from points 1-7 as shown on Chart 114. Secondly, the object and purpose of the agreement and the context in which it was negotiated could not be clearer: to negotiate a maritime boundary. Thirdly, a tacit agreement is in force because of

the evidence that the heads of both delegations signed the said minutes; and the terminology they used – "Agreed Minutes" – supports this view. Fourthly, they are unconditional apart from completing the technicalities required to establish the final co-ordinates resulting from the joint survey.

Myanmar also contends that the Agreed Minutes were not registered with the Secretary-General of the United Nations. Bangladesh did not agree that these minutes should have been registered with the Secretary-General and cited in support of this contention the dicta in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112, at p. 112, para. 29).

I agree with the relevant dicta that read:

> Non-registration or late registration on the other hand, does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties.

In support of its argument that the Agreed Minutes constitute an agreement, Bangladesh submits:

1. that the terms of the Agreed Minutes are self-explanatory; they are clear and succinct;

2. Chart 114, signed by the heads of the delegations and appended to the said minutes; the boundaries are depicted and marked 1-7 in the chart appended to the minutes;

3. the affidavits of eight fishermen who deposed that they knew from their personal knowledge of the maritime boundary and observed same;

4. the naval logs of the navy which reflected arrests of Myanmar fishermen in the Bangladesh territorial sea;

5. Admiralty Chart 817, in which the territorial sea boundary is clearly shown; this chart was accepted in evidence by both Parties;

6. the practice of the States, specifically the adherence to and observance of the territorial sea boundary set out in the Agreed Minutes by both Parties for 34 years;

7. In response to the request from the Tribunal, the Foreign Minister of Bangladesh, its Agent in the present case, stated as follows during the hearing:

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

Counsel for Bangladesh thereafter stated: "What the Foreign Minister and Agent says in response to a direct question from an international tribunal commits the State".

Bangladesh argues that Myanmar is therefore estopped from denying that an agreement is in force and the Tribunal is obliged to conclude that an agreement is in force.

The evidence on affidavits

Myanmar did not provide affidavits in response; neither did it ask to cross-examine the deponents. Counsel argued that the Tribunal should carefully examine the affidavits and then evaluate the evidence therein.

Myanmar's counsel expressed some concerns about affidavits "containing testimony with virtually identical language, produced wholesale and not in the language" of the deponent.

In fairness to Bangladesh, these affidavits were prepared for presentation to a Tribunal where the official languages are English and French. It would certainly create some difficulty if the affidavits were in Burmese and someone had to attend court to translate them into the official languages of the Tribunal. The presumption/maxim *omnia praesumuntur rite esse acta* is applicable. Therefore, it can be presumed that the contents were explained to the deponents and the consequences of swearing to an untruth. In the absence of evidence to the contrary, it must be accepted that the proper method was used in taking the affidavits. Nevertheless, consideration of current jurisprudence suggests that in the absence of cross-examination the contents should still be carefully examined when considering their evidential value. It is well known that affidavits are a unique form of evidence frequently used in common law jurisdictions. The evidence is taken before a Commissioner of Affidavits or a Notary Public and recorded by him in writing and is prepared in accordance with the provisions of the national law of the deponent. In other words, an affidavit is testimonial evidence in written form.

Each of the eight deponents, some of whom have over 20 years of experience as fishermen operating in the southern coastal waters of Bangladesh, specifically between St. Martin's Island and the coast of Myanmar, deposed that they were aware of the location of the maritime boundary between Bangladesh and Myanmar in the area between St. Martin's Island and the coast of the Myanmar mainland. They also deposed that they understood where the boundary was located and observed the boundary.

The naval officers were more specific in their affidavits with respect to the maritime boundary. They patrolled the area for a number of years. It is true that the deponents were not tested by cross-examination, but there are no affidavits in opposition. It was therefore incumbent upon me to exercise caution and to analyse their evidence on affidavit carefully. I did so and found that they are of assistance to the contention that there is in force a tacit agreement between the Parties. I note that the meaning of "agreement" is not set out in article 15 of the Convention. The submission of Bangladesh and the "proviso" in the article may be relevant. Article 15 provides:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of

historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

The question must be: what then is an "agreement" for purposes of this article? I think the agreement can be in writing and signed by the States through the appointed authority or an agreement set out in a written document such as confirmed and signed minutes to which an initialled chart is appended. Such is the case here. The minutes were signed by the respective heads of delegation obviously representing their country. Hence, there is compliance with article 7 of the Vienna Convention on the Law of Treaties and the accepted jurisprudence. It appears to me that the use of legal semantics in the strict application in these special circumstances is attractive and persuasive but not substantial.

It seems clear to me that the ICJ in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (*Judgment, I.C.J. Reports 2002*, p. 303) sets out certain requirements to be met if a document is to constitute a treaty. I have noted the decision and considered same in arriving at my finding on this issue.

The case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* is not similar to the present case. The ICJ stressed that the commitments made by the Foreign Ministers were to have immediate effect.

The 1974 Agreed Minutes are quite different from the minutes in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* in that the Agreed Minutes were more than a record of proceedings or recommendations since they comprised an agreement that delimited the territorial sea between the States in accordance with article 15 of the Convention.

Myanmar led no evidence but submits that there are certain questions that should be asked when determining the admissibility of affidavits. For example, the affidavits are identical in language and form. Counsel pointed out that they are similar in content and difficult to tell apart.

It is not disputed that the said affidavits were prepared for submission as evidence in the case for Bangladesh. Professor Boyle contends that the affidavits attest to the knowledge of the Bangladeshi fishermen concerning what they deemed to be the boundary in the territorial sea. It must be borne in mind that there are no affidavits in opposition, so one has to exercise caution in assessing their evidential value. On the other hand, one must consider that if a deponent's

testimony on affidavit is similar to others' testimony he may, in the absence of evidence to the contrary and in the absence of cross-examination, be telling the truth.

It is accepted that the Rules of the Tribunal are similar to the Rules of Court of the ICJ. Therefore, it would be helpful to consider the practice of the ICJ in this respect.

The Rules of the Tribunal do not address the issue of the admissibility of affidavits. While affidavits have been treated as admissible evidence in some international courts and tribunals, their evidentiary value in those cases has been questioned.

Myanmar, *inter alia*, cited two articles, the first by Judge Wolfrum and the other by C.F. Amerasinghe (Rejoinder of Myanmar, para. 2.50, footnotes 120 and 121). Judge Wolfrum opines that the ICJ "expressed scepticism" with regard to affidavit evidence. Amerasinghe is of the view that international courts and tribunals have generally attached little or no weight to such evidence, untested by cross-examination. The foregoing are two distinguished jurists but their views are based on an assessment of the decisions of the ICJ and tribunals. Their views are helpful but evidence in cases differ. Evidence on affidavit has to be examined on a case-by-case basis with reference to the jurisprudence for purposes of guidance. Testimony of a witness must be facts directly known to the witness. This is also the view of national courts, but where evidence on affidavit is unchallenged, the weight may be relevant bearing in mind the rule that the contents must be that of the personal knowledge of the deponent.

I am cognisant of the fact that an opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact. It may, in conjunction with other material, assist the court in determining a question of fact, but is not proof in itself. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Merits, Judgment, I.C.J. Reports 2001*, p. 257, at p. 273, para. 36), Bahrain produced affidavit evidence. In his Dissenting Opinion, Judge *ad hoc* Torres Bernárdez said:

> For example, regarding the affidavits, the Court considered them as a form of witness evidence, but one not tested by cross-examination. Its value as testimony is therefore minimal. In any case, the Court has not treated as evidence any part of a testimony which was not a statement of fact, but a mere expression of opinion as to the probability of the existence of such facts, not directly known to the witness, as stated in the 1986 Judgment of the Court in the case concerning Military and Paramilitary Activities in and against Nicaragua (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, (*Merits, Judgment, I.C.J. Reports 1986*, p. 42, para. 68).

I have also considered the decisions in the following cases, which will provide some guidance in assessing the evidence on affidavits in this dispute, especially where it specifically relates to a maritime boundary and practice.

In the *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*) case the ICJ attached little weight to an affidavit given by the Ugandan Ambassador to the Democratic Republic of the Congo, because it had been prepared by a government official of a party to the case and contained only indirect information that was unverified.

In the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* case Honduras produced sworn statements by a number of fishermen attesting to their belief that the 15th parallel represented the maritime boundary between the two States. The ICJ summed up its case law as to the methodology of assessing affidavits in the following terms: "The Court notes . . . that witness statements produced in the form of affidavits should be treated with caution." (*Judgment, I.C.J. Reports 2007*, p. 659, at p. 731, para. 244).

The above is correct but in said case, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, the Court said:

> . . . affidavits prepared even for the purposes of litigation will be scrutinised by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said (*Judgment, I.C.J. Reports 2007*, p. 659, at p. 731, para. 244).

There is no evidence in this case that those taking the deposition influenced the deponents. Learned counsel submitted that the deponents could have been influenced. This allegation is not supported by any evidence. Further, I think it is mere speculation that similarity of language could mean that the deponents were influenced. It could be that the facts are similar and that they had to be, because the deponents were speaking the truth.

Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v. *United States of America*), *Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 42, para. 68.

Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, dissenting opinion of Judge ad hoc Torres Bernárdez, I.C.J. Reports 2001, pp. 274-275, para. 38.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. *Uganda*), *Judgment, I.C.J. Reports 2005*, p. 168, at pp. 218-219, para. 129.

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. *Honduras), Judgment, I.C.J. Reports 2007*, p.659, at p. 731, para. 244.

> In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred. In other circumstances, where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said. Thus, the Court will not find it inappropriate as such to receive affidavits produced for the purposes of a litigation if they attest to personal knowledge of facts by a particular individual. The Court will also take into account a witness's capacity to attest to certain facts, for example, a statement of a competent governmental official with regard to boundary lines may have greater weight than sworn statements of a private person.

Having examined the fishermen's affidavits produced in that case and attesting to their view of where the maritime boundary lay, the ICJ rejected the affidavits' evidentiary value.

In short, it is suggested that a court or tribunal should treat such affidavits with caution. Affidavits before international tribunals are subject to abuse, more so than before domestic courts; determining the value of the affidavits, the Tribunal should take into account their credibility and the interests of those providing the information concerned. In particular, a tribunal should be cautious in giving weight to *pro forma* affidavits, containing testimony with virtually identical language, produced wholesale and not in the native language of the individual providing the information, especially when the other party has not had the chance to cross-examine the deponent.

Bangladesh submitted eight affidavits of fishermen and Bangladesh Navy Patrol Logs. It must be noted that Myanmar did not seek to contest or cross-examine any of the deponents. Counsel asked the Tribunal to consider the evidence in the light of the jurisprudence and the decisions of international courts and tribunals. The "golden thread" in all the decisions is that a court or tribunal must exercise caution. I am of the view that a judge ought to be pragmatic and must recognise that speculation has no place in reality. In my opinion, it would be farfetched to presume or accept, in the absence of cogent, compelling and convincing evidence, that officials of Bangladesh would have deliberately and dishonestly agreed to concoct evidence by drafting affidavits in similar language for production in court. Collusion is a serious allegation as it relates to fabrication of evidence. There is no evidence of collusion or fabrication. A judge is entitled to express his opinion on the evidence and not on theoretical aberrations. It is with this in mind that I have assessed the evidence and, having made a finding, arrived at my conclusion that the contents of the affidavits are not hearsay but are from personal knowledge and are true.

Myanmar argues that the similarity of language in the affidavits and subjectivity in all of them, as well as the interest of naval officers, support the contention that they are of no evidentiary value. In my opinion, this approach suggests speculation as to what might have occurred. Counsel apparently saw no reason for cross-examination of the deponents.

Myanmar did not tender any affidavits to refute those submitted by Bangladesh. Counsel for Myanmar argued that, bearing in mind international jurisprudence on the weight of affidavits and the test set out therein, the affidavits should be rejected. Bangladesh submitted the affidavits in support of its contention that the Agreed Minutes of 1974 amount to an agreement because the boundary was respected and adhered to by both sides. However, bearing in mind that the burden of proving that an agreement exists is high and that evidence of a tacit agreement must be cogent, convincing and compelling (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 735, para. 253), I have carefully considered all the evidence in this regard.

It seems to me that the Tribunal should not strictly follow an approach that is similar to that of the ICJ in the above case, because the facts in the instant case are different. The fishermen seemed to adhere to what they deemed from their personal knowledge to be the location of the maritime boundary between the Parties. Bangladesh policed its side of what it considered the "agreed "boundary, as set out in the navy logs. Myanmar fishermen were arrested when they were caught fishing in what was deemed Bangladeshi waters. Despite this evidence, Myanmar led no evidence to refute the testimony set out in the affidavits. As I alluded to above, Counsel referred to the relevant case law and the standard of proof to discredit what is set out in the affidavits.

It is trite law that the *onus probandi (burden of proof)* is upon Bangladesh. The views of Counsel are helpful but are not evidence and speculation has no place in assessing evidence. I do not think the affidavits tendered in evidence should not be considered. The submissions were attractive and persuasive but a court should not arrive at a finding on this issue based on Counsel's submissions, which are not evidence. However, I am aware that Counsel's references to the relevant law in these circumstances are crucial in arriving at a decision.

I find that the affidavits are evidence in the case and the contents can be accepted as the truth. There is no evidence oral or on affidavit to contradict the contents. Further, consideration must be given to the fact that the deponents were not cross-examined. I have considered the foregoing, but it seems to me

that applying the standard of proof required establishing that the Agreed Minutes amount to an agreement; the requirement has been satisfied.

The evidence on affidavit, *per se*, and the supporting evidence, set out above, meet the required standard to establish that, based on the 1974 Agreed Minutes and evidence in support thereof, an agreed maritime boundary between the Parties has been established.

For purposes of completion on this issue, I have considered the provisions of article 15 of the Convention. Bangladesh argued that the Agreed Minutes of 1974 coupled with the subsequent conduct of the Parties that followed amounted to an agreement within the meaning of the term in article 15. The minutes were signed by the heads of both delegations and an agreed boundary was set out in Chart No. 114. The Agreed Minutes were in respect of an agreement on delimitation of the territorial sea and the boundaries were specified therein. Bangladesh contends that the terms of the agreement are clear; the text identifies the boundaries and the heads of the delegations signed the minutes. Bangladesh further contends that the Parties adhered to the terms set out in the minutes until 2008 "when negotiations on a comprehensive boundary agreement resumed". So it seems to me that even at this stage the Parties were considering a comprehensive agreement and decided that the "agreed minutes of 1974 will remain the same" subject to two minor alterations. Bangladesh argues that the 2008 Agreed Minutes affirmed the agreement reached in 1974. Myanmar did not agree to these Agreed Minutes as a whole five months after the meeting in 2008.

The gist of the argument of Bangladesh is that Myanmar cannot be allowed to change its mind and repudiate part of a boundary after it was adhered to for 37 years in the conduct of the Parties and practice.

It is trite law that minutes of a meeting contain a record of the important discussions of the meeting and the decisions or resolutions made and accepted. The signing of the minutes confirms the accuracy of the minutes. I have considered the decision of the ICJ in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112, at p. 121, para. 23) and agree that a court must "ascertain whether an agreement of that kind has been concluded, [and] 'the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up' ". However, to me a salient point initially arises: paragraph 5 of the 1974 Agreed Minutes reads that "copies of a draft Treaty on the delimitation of the territorial waters boundary were given to the Burmese delegation by the Bangladesh delegation on 20 November 1974 for eliciting views from the Burmese Government". The question must be: why? The

answer seems to be because the draft treaty referred to in the minutes was subject to ratification. Secondly, bearing in mind article 7(1) (b) of the Vienna Convention on the Law of Treaties or the ratification envisaged by article 14, it does not seem to me that the chief delegate had the power to bind his State with respect to the draft treaty, because the draft treaty had to be referred to the government for its views before the treaty could be signed. In my opinion the circumstances in each matter were not similar. The head of each delegation signed the Agreed Minutes and the appended chart.

Article 15 uses the term "agreement". It does not specify the form of agreement, whether it should be in writing, oral or by conduct. Myanmar argues that the opening paragraph of the Minutes opens with the words "[t]he delegations of Bangladesh and Burma held discussions", thus not the "governments", but the delegations representing the governments. It was agreed that the final coordinates of the turning points for delimiting the boundary of the territorial waters would be fixed on the basis collected by a joint survey. The survey never took place. The minutes were not published and registered in accordance with the United Nations procedure under article 102 of the Charter. The draft treaty was handed to the Myanmar delegation in order to solicit the views of the Burmese government. I note here the words "draft treaty", which I understand was a comprehensive document delimiting the territorial sea, the EEZ and the continental shelf, not just the territorial sea. To summarise, Myanmar contends that: there was express conditionality in the 1974 Minutes, the boundary was not settled, Commodore Hlaing was not authorised to conclude a treaty on behalf of Myanmar, the so-called agreement as per the minutes was not ratified by the Myanmar authorities and there were subsequent discussions on point 7. Further, the note verbale does not refer to a boundary based on the 1974 "agreement" set out in the Agreed Minutes.

Article 7 of the Vienna Convention on the Law of Treaties reads:

> 1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

The question must be whether or not Ambassador Kaiser of Bangladesh and Commodore Hlaing, the vice-Chief of the Myanmar Naval Staff, produced full powers. There is no evidence to the contrary and I think it is relatively safe to presume that evidence of full powers was produced or inferred by conduct during the negotiations. I think they must have complied because the minutes reflect fixed boundaries in the territorial sea and it seems from the procedures and acceptance that followed as though each had the full power to bind his State with respect to the boundaries in the territorial sea between the States. To this effect the Agreed Minutes have the force of an agreement in law.

For purposes of completeness, I include paragraph 2 of article 7.

2. In virtue of their functions and **without having to produce full powers,** the following are considered as representing their State (my emphasis):

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
(c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

While the Agreed Minutes may not constitute an agreement per se within the meaning of article 15 of the Convention, they cannot be ignored. The minutes should be considered in conjunction with the evidence submitted in support of the adherence to the decisions recorded therein and that there was an arrangement and tacit agreement that was observed for 34 years. I think the evidence demonstrates an equitable right to conclude an agreement in accordance with the terms set out in the Agreed Minutes that fructified into an agreement by *effluxion* of time.

The law with respect to an agreement in international law is clear and the jurisprudence based on the law is succinct. I am of the view that the Agreed Minutes amount to a tacit agreement: a territorial sea boundary was agreed in 1974, with seven points, marked on Chart No. 114; it was reiterated and confirmed in 2008 with minor modifications to two points, also marked on an agreed chart. Only since September 2008 has Myanmar contested the course of this previously agreed boundary. In Bangladesh's submission, Myanmar cannot now change its mind and unilaterally repudiate part of a boundary agreed definitively and put into effect 34 years ago, and respected thereafter.

"Evidence of a tacit legal agreement must be compelling" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 735, para. 253). If there was an agreement, was it signed by parties who were authorised to sign the agreement on behalf of their State? In this case, I think the heads of the respective delegations were authorised because there is no evidence that the chief negotiator of Myanmar was not an authorised signatory. He signed the minutes as head of a delegation representing Myanmar. This in my view can only mean that he had authority to bind the State.

In the light of the application of the provisions of paragraph 1 and my finding, I do not think paragraph 2 is relevant.

Having considered the evidence and the submissions, I find that the evidential value of the affidavits is substantial.

Bangladesh also argues that based on the adherence to the boundary in the Minutes of 1974 for approximately 34 years, the evidence in the affidavits of the fishermen, the naval logs, the absence of any incidents prior to 2008 and the acquiescence of Myanmar, it can be found that (i) there was an agreement with respect to the boundary set out in the signed minutes, (ii) there was a legitimate expectation on the part of Bangladesh that the said boundary would be an integral part of an agreement in the future, (iii) Myanmar can be estopped from disputing/ignoring the said boundary and (iv) the boundary can be the starting point for the Tribunal to delimit the territorial sea, the EEZ and the continental shelf between the Parties.

It is accepted that the positions taken by parties during diplomatic negotiations do not bind them when an international court or tribunal is called to settle their dispute. In negotiations parties try to find an acceptable global *quid pro quo* solution as a package. This concept is explained in the often-quoted passage from the Permanent Court of International Justice judgment in the *Case concerning the Factory at Chorzow*:

> [The Court] cannot take account of declarations, admissions or proposals which the Parties may have made in the course of direct negotiations which have taken place between them. . . . For the negotiations in question have not . . . led to an agreement between them (*Jurisdiction, Series A, No. 9*, July 26th 1927, p. 19).

However, this case is not similar because the Parties had arrived at an agreement that was recorded in writing and signed as correct.

For the reasons set out above (the terms of the Agreed Minutes of 1974 and 2008, the evidence on affidavit, the practice of the States for over 34 years and the applicable law), I am of the view and find that rights have been created; consequently, there is a tacit agreement in the terms set out in the minutes with the initialled map/chart appended.

The coordinates will be used in this judgment in fixing the respective maritime boundaries.

Acquiescence

In matters of acquiescence a party must claim the area as its own against all other parties and must do so overtly. Bangladesh did exactly that for 34 years and Myanmar did not object. Myanmar continued negotiations toward concluding a comprehensive treaty delimiting the EEZ and the continental shelf between the States. It is noticeable that the delimitation of the territorial sea was not included. Further, in 2008 Myanmar sought a change to the final point, point 7 to point 8A.

Estoppel

The scope of estoppel in international law is not clear. In order to prove or establish estoppel in domestic courts, a party would have to show that on the official record of the minutes there was reference to an agreement or promise to draft an agreement on the terms set out in the minutes. In the instant case, there is no promise to draft a treaty to delimit the territorial sea but a promise to conclude a comprehensive treaty delimiting the EEZ and the continental shelf. It seems to me that there was agreement on the limits of the territorial sea that would be part of the proposed treaty. The treaty would have included delimitation of the EEZ and the continental shelf between the Parties. I have to add here that by confirming and readopting the Agreed Minutes of 1974 in 2008 and implementing them in practice (see the evidence on affidavit of the fishermen and naval officers), Myanmar has waived its right to deny the existence of an agreement and is estopped from changing its position. Bangladesh acted and observed the provisions of the Agreed Minutes for over 34 years. Myanmar fishermen were arrested and the Bangladesh Navy patrolled the area. It will be detrimental if Bangladesh ceases to observe the provisions of the agreement, because, subject to any relevant law of limitation of actions, the arrested fishermen will have rights of action of false arrest, false imprisonment or unlawful detention.

Delimitation of the EEZ and the continental shelves of the Parties where those claims overlap

Geographical features of the Bay of Bengal

The Bay of Bengal is the largest bay in the world. It is a very large body of water, measuring 1,800 kilometres across, from west to east at its widest point, and extending to the south for 1,500 kilometres beginning at its northernmost extremity along the Bangladesh coast. It covers more than two million square kilometres. According to the International Hydrographic Organization (*Limits of Oceans and Seas*, 3rd edition, 1953 at pp. 21-22), the Bay is bounded in the north by the Bangladesh and Indian coasts, in the west by the coasts of peninsular India and Sri Lanka, in the east by the Myanmar coast extending down to Cape Negrais, and from there along the Andaman and Nicobar Islands of India. In the south, the Bay begins its transition into the Indian Ocean at approximately 6° north latitude. It is bounded on the west by the east coast of India and Sri Lanka, on the north by India and Bangladesh and on the north east and east by Myanmar. (See Reports of Drs. Curray and Kudrass.) The Bay is the largest depository system in the world. The Bangladesh coast is deltaic and comprises the largest delta in the world. The Bay encompasses the Bengal Fan, a name

given by Dr. Curray. It is the largest submarine fan in the world (see attached map), having an area of approximately 879 square miles and a depth of 2,586 metres at its deepest part. The continental slope in the Bay terminates at 2,500 metres (see Reports of Drs. Curray and Kudrass, two of the world's leading authorities on the geology and geomorphology of the Bay of Bengal).

The Parties agree on the geographical facts.

I am of the view that the geographical features in the Bay of Bengal and the configuration of the coasts of the States are important because they include the length of the respective coasts, the deltaic coast of Bangladesh, the depository system and the relevance of St. Martin's Island.

The interpretation and definition of article 76 of the Convention

The interpretation of article 76 and the role of the CLCS will now be considered as well as the application of the provisions of articles 74 and 83 of the Convention.

Article 76 provides:

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4(a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobaths, which is a line connecting the depth of 2,500 metres.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. 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.

9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

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

Article 77

Rights of the coastal State over the continental shelf

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Interpretation of article 76

The interpretation of article 76 is crucial to this case because of the views of the Parties.

An historical perspective will be of some assistance.

Article 1 of the 1958 Convention provides:

> For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 76 of the 1982 Convention replaced article 1 of the 1958 Convention with a more comprehensive definition and abolished the exploitability standard.

The article does not define the term "natural prolongation", which is not in my view a strict legal term but a geographical term as well. The article presupposes that a geographical definition will be relevant. Consequently, article 76, paragraph 4, provides for geological evidence. This is confirmed by considering article 76, paragraphs 5 and 6. Article 76 must be construed as a whole and not in part. It does not specify that there is an "inner" and "outer" continental shelf, but the continental shelf to which a coastal State is entitled, subject to the natural prolongation of the land mass, continues to the outer limits of the continental shelf as specified in article 76, paragraphs 4, 5 and 6. As a result, Bangladesh and Myanmar will have entitlements in the continental shelf beyond 200 nm.

The issue of delimitation of a common shelf is a matter for this Tribunal to determine on the evidence, the facts found and the law.

A precise definition of the continental shelf is extremely important in this case. Article 76 of the Convention does not provide a definition of the term "natural prolongation". Article 76 is a rule of law but it includes references to science. "Natural prolongation" is a scientific term. The scientific evidence is set out in the reports of Drs. Kudrass and Curray. The evidence therein clearly shows that there is a geological and geomorphological continuity of the land territory of Bangladesh into the Bay of Bengal. In other words, there is continuity between the Bangladesh land mass and the submarine areas in the Bay of Bengal (See article 76 of the Convention, paras. 1-6, and the reports of Dr. Kudrass and Dr. Curray.).

In order to arrive at a meaning it is necessary to be guided by science and geography. Article 4a(i) and (ii) in my opinion provides for the use of science and technology. Firstly, it speaks of the natural prolongation of the land territory to the outer edge of the continental margin or to a distance of 200 nm from the

baselines from which the breadth of the territorial sea is measured when the continental margin does not extend up to that distance. Secondly, the relevant terms are the contextual and legal interpretation of the terms: "natural prolongation", "outer edge", "200 nm" and "continental margin".

In my opinion, the definition of the continental shelf of a coastal State is dependent on the geographical circumstances applicable to the State. The definition may encompass one or all of the provisions provided. In my opinion the article seems to provide for States that may not be similarly circumstanced to others. Therefore, article 76 must be considered as a whole and the relevant provisions applied on a case-by-case basis. In the instant case, I am of the view that the whole of the article must be applied.

In construing article 76 it is necessary to ask the following questions and having answered them then arrive at a definition:

What is the scientific definition of the continental shelf?

What is the legal definition of the continental shelf? Therefore, what is the basis for the definition in the said article considered as a whole?

The answers to the above provide that the continental shelf is the natural prolongation of the land mass to the outer edge of the continental margin or to a distance of 200 nm. The outer limits shall not exceed 350 nautical miles or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres. Therefore, in this case the 350 nm limit and the 2,500 metre isobath are applicable for both States.

The meaning of "natural prolongation" cannot be construed in isolation. The article has to be construed as a whole and in my opinion in the geographical context. The words that follow "natural prolongation" are "of its land territory to the outer edge of the continental margin . . .". It is therefore crucial to establish whether the land mass continues to the outer edge of the continental margin. This can only be determined if a legal and scientific method is adopted.

Article 76, paragraph 2, specifies that the continental shelf shall not extend beyond the limits provided for in paragraphs 4 to 6. This is applicable in this case.

Article 76, paragraph 3, defines the "continental margin" as "the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise".

In addition, article 76, paragraph 5, is self-explanatory.

Applying the law to the geological facts set out in the reports of the experts, I am of the view that both States are entitled to the continental shelf in the Bay of Bengal.

St. Martin's Island

Article 121 of the Convention provides:

> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
>
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

St. Martin's Island is inhabited. It sustains extensive economic activity, including a vibrant and international tourist industry. It is an important base for the Bangladesh navy and coast guard. Therefore, in accordance with the definition in article 121 of the Convention, St. Martin's is an island, and as such, it must have full effect in the delimitation with a territorial sea of 12 nm. The law, article 121, and the relevant jurisprudence support Bangladesh's claim that St. Martin's has full entitlement to its maritime zones.

The decision of the ICJ in *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (*Judgment, I.C.J. Reports 2009*, p. 61, at p. 131, para. 219) (regarding Serpents' Island) is relevant. In this case, the question is whether St. Martin's Island is a "special circumstance" in the delimitation process.

Geographical circumstances of islands differ and St. Martin's Island is not similar to Serpents' Island. In the light of the law and jurisprudence, the island is not a "special circumstance" and, in this judgment, the island will be the starting point of the bisector line of delimitation (see *infra*).

Having read the above mentioned case, I conclude that the ICJ did not specify a precise definition of an island. The Court concluded that uninhabited Serpents' Island should have a 12-nautical-mile territorial sea, but otherwise should have no impact on the maritime delimitation between the two countries.

Geographical circumstances of islands differ; St. Martin's Island and Serpents' Island are not similarly circumstanced.

It seems to me that islands can have maritime zones but they do not generate full zones when they are opposite or adjacent to continental land areas (See the *North Sea Continental Shelf* cases*, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Continental Shelf (Libyan Arab Jamahiriya/Malta), Delimitation of the maritime boundary between Guinea and Guinea-Bissau, and Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*)).

Consequently, St. Martin's Island is entitled to a territorial sea, continental shelf and EEZ, as part of Bangladesh.

Delimitation of the disputed area by a single maritime boundary

The law

The relevant rules are set out in articles 74 and 83 of the 1982 Convention.

Articles 74, paragraph 1, and 83, paragraph 1, are drafted in similar terms.

Before considering the aforementioned articles, I think it is necessary to examine the relevant provisions in the 1958 Conventions on the Law of the Sea in respect of delimitation. Article 6, paragraph 2, of the Convention on the Continental Shelf provides:

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

It appears as though application of the principle of equidistance has not been strictly followed by international courts and tribunals. The drafters of the 1982 Convention did not follow the provisions set forth in article 6, paragraph 2, of the 1958 Convention. The applicable law is now found in articles 74 and 83 of the 1982 Convention.

With respect to the EEZ, article 74, paragraph 1, provides:

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

For the purpose of delimitation of the continental shelf, article 83, para-graph 1, provides that:

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

The following paragraph in the above articles is worthy of note:

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

I think it is necessary and convenient to consider the meaning of "**equitable solution**" in the context in which is placed in the articles. The word "equitable" as defined in the Concise Oxford Dictionary connotes

> an impartial and fair act or decision. In Law, it is a system of jurisprudence founded on principles of natural justice and fair conduct. It supplements the strictures of the Common Law by providing a remedy where none exists at Law. It provides for an equitable right or claim.

In this case, the law is the relevant articles referred to above, which implies that a court may apply principles of equity in arriving at an equitable solution.

I find guidance on this matter in the ICJ's judgment in the case concerning the *Frontier Dispute* (*Burkina Faso/Republic of Mali*). The Chamber said:

> it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *praeter legem*: On the other hand, it will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes. As the Court has observed: 'It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law.' (*Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 33, para. 78; p. 202, para. 69).

Principles and rules seem to be the predominant factor. However, I must repeat that the definition of the word "equity" is relevant in these circumstances. The Chamber went on to state at paragraph 149 that:

> As it has explained, the Chamber can resort to that equity *infra legem*, which both Parties have recognised as being applicable in this case (see paragraph 27 above). In this respect, the guiding concept is simply that "Equity as a legal concept is a direct emanation of the idea of justice" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya) I.C.J. Reports 1982*, p. 60, para. 71). The Chamber would however stress more generally that to resort to the concept of equity in order to modify an established frontier would be quite unjustified.

I think the following lines from the judgment are helpful in this case:

> Although "Equity does not necessarily imply equality" (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 49, para. 91), where there are no special circumstances the latter is the best expression of the former.

The *North Sea Continental Shelf* cases

Myanmar through learned counsel argues that custom and case law have added considerably to the *North Sea Continental Shelf* cases. Case law of the ICJ post the *North Sea Continental Shelf* cases and the jurisprudence that followed makes those cases "obsolete". Counsel for Bangladesh does not agree and contends that the dicta in the cases are still good law and have been followed in several cases. Counsel contends that articles 74 and 83 of the Convention provide for the development of customary international law. In the *Arbitration between Guyana and Suriname* case (*Award of 17 September 2007, ILM, Vol. 47 (2008)*, p. 116) the Arbitral Tribunal concluded that delimitation of the continental shelf and the EEZ have embraced a clear role for an equidistance line which leads to an equitable solution in the present case. Bangladesh contends that an equidistance line would result in cutting off Bangladesh from its entitlement in the continental shelf beyond 200 nm. It must be borne in mind that Myanmar contends that Bangladesh is not entitled to the continental shelf beyond 200 nm. Consequently Counsel cautioned that the Tribunal must ensure that it does not encroach on the powers of the CLCS. Counsel contends that the definition of the continental shelf in article 76 must be construed in the strictest sense.

I agree with the view Professor Crawford expressed during his oral submission that:

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

Finding an equitable solution is in these terms a matter of procedure, practice and principles, which means that various geographical factors have to be considered, such as the deltaic coastline, the concavity and double concavity in the delta, St. Martin's Island and the specific and unique characteristics of the coastlines of both States. It clearly appears to me that the Tribunal should consider the foregoing in arriving at a decision.

It is noticeable that article 74, paragraph 1, in respect of the EEZ is in the same terms as article 83, paragraph 1. Further it is significant that unlike Article 6, paragraph 2, of the 1958 Convention, article 83, paragraph 1, does not include" equidistance". What it specifies is an equitable solution. The following quotation from the judgment of the ICJ is relevant. It shows a departure from the provision in article 6, paragraph 2, of the 1958 Convention on the Continental Shelf.

> In the new text, any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved. The principles and rules applicable to the delimitation of continental shelf areas are those which are appropriate to bring about an equitable result; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p.18, at p. 49, para. 50.

The angle-bisector method

The geographical factors in this case are unique. These include the twin concavities, the coastal facade and the potential entitlement in the outer continental shelf and St. Martin's Island.

I think that the most suitable method of delimitation, bearing in mind that the Parties differ on the method, is the angle-bisector method. The Parties agree that the correct approach is firstly to delimit the territorial sea up to a limit of 12 nautical miles. That having been done, the Tribunal should consider its obligation to delimit the relevant area in accordance with the principles set out in articles 74 and 83 of the Convention bearing in mind the achievement of an equitable solution. It is in this regard that I do not agree with the application of the equidistance/"provisional relevant circumstances" method of delimitation in the principal judgment. In effect, the angle-bisector method is a modified version of the equidistance method. I agree that the unique coastline of Bangladesh is a relevant circumstance. The coastline is the largest deltaic coast in the world and, for purposes of delimitation, its concavity must be considered.

As I alluded to above, articles 74 and 83 provide that the ultimate result of delimitation is the achievement of an equitable solution. Unlike the relevant provision in the 1958 Convention, the said articles do not prescribe any method of delimitation. The principle of equidistance was not included in the said articles.

It appears to me that flexibility and discretion are left to the judges in the respective courts and tribunals.

Counsel for Myanmar contend that international jurisprudence reflected in the decisions of the ICJ and arbitral tribunals has used the equidistance method in arriving at an equitable solution, and that the said principle is a part of customary international law. I do not agree with this view. The decisions were on a case-by-case basis. While it may have been the most suitable method in some cases, it was not in others (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p.18, at p. 79, para. 109). In fact in the *Tunisia/Libya* case, the Court recognised that "equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed" (ibid.). I think the foregoing statement is applicable in this matter. In its judgment in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, the Court said at paragraph 272:

> 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.

See the judgments of the ICJ in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Merits, Judgment, I.C.J. Reports 2001*, p. 40, at pp. 111-112, para. 233) and *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*Judgment, I.C.J. Reports 1985*, p. 13, at p. 47, para. 63). See also *Maritime Delimitation in the Black Sea* (*Romania* v *Ukraine*) (*I.C.J. Reports 2009*, p. 61, at pp. 96-97, paras. 99 and 100).

The angle-bisector method was the method used to delimit the respective areas in the following judgments: *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (cited above) and the Arbitral Award in *Delimitation of the maritime boundary between Guinea and Guinea-Bissau.*

The geographical circumstances in the above case were extremely important in delimiting the maritime boundary. The maps and charts produced by both sides reflect these factors. Further, the reports of the experts confirm this circumstance. It seems to me that equidistance will not be appropriate for the following geographical reasons:

1. the pronounced concavity of the entire coastline of Bangladesh;

2. the extensive Bengal depositional system;

3. the geomorphological prolongation of the Bangladesh coastline; this is clearly set out in the reports of the experts;

4. the location of St. Martin's Island, which is approximately 4.5 miles from the Bangladesh coastline and approximately 5 miles from the Myanmar coastline. St. Martin's Island must be given full effect in the delimitation;

5. the concavity of the Bangladesh coastline is significant because, if the equidistance principle is applied, the seaward projection of Bangladesh will be cut off. In other words, its projection into the continental shelf in the Bay of Bengal will be significantly restricted to a point where access to its entitlement to the continental shelf in the Bay of Bengal is cut off. Myanmar contends that the relevant sector of the Bangladesh coast does not show any concavity and in any event, concavity is not relevant.

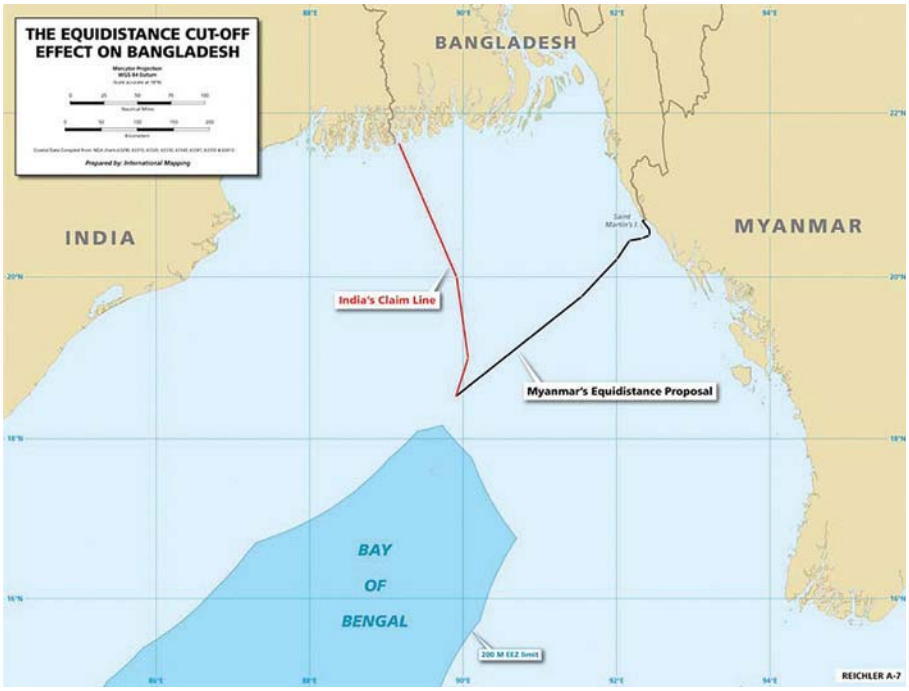
Myanmar's counsel contends that the judgment in the *North Sea Continental Shelf* cases (*Judgment, I.C.J. Reports 1969*, p. 3) is not as authoritative as Bangladesh submits. The Court said that it is "necessary to examine closely the geographical configuration of the coastline of the countries whose continental shelves are to be delimited" (para. 96 of the Judgment). It is my view that although the judgment is prior to the coming into force of the 1982 Convention, the dictum concerning delimitation is persuasive. The Court of Arbitration in the case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (*RIAA, Vol. XVIII*, pp. 3, at p.57, para. 97) found that "an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case". This is why I am of the view that the significance of coastal geography is important in this case and I repeat that the geographical evidence in the accepted maps and charts and the evidence in the reports of the experts are crucial in the determination of the maritime boundaries in this case.

In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* the Court said:

> The Court does not deny that the concavity of the coastline may be a circumstance relevant to delimitation, as it was held to be by the Court in the *North Sea Continental Shelf* cases and as was also so held by the Arbitral Tribunal in the case concerning the *Delimitation of the Maritime Boundary between Guinea and Guinea Bissau* (*Merits, Judgment, I.C.J. Reports 2002*, p. 303, at p. 445, para. 297).

In the above mentioned case (between Guinea and Guinea-Bissau) the arbitral tribunal, for reasons given, did not apply the equidistance method and instead found favour with the angle-bisector method that in the opinion of the tribunal led to an equitable solution.

I alluded to the "cut-off" effect earlier. If the equidistance method is applied, Bangladesh will be denied its entitlement to the continental shelf in the Bay of Bengal (see map). It will also be denied access into the Bay of Bengal. This in my view is not just and equitable.



The Parties have cited the arbitral award in the *Arbitration between Barbados and the Republic of Trinidad and Tobago* (*Decision of 11 April 2006, RIAA, Vol. XXVII*, p. 147) in support of their respective contentions. In that case the arbitral tribunal applied the equidistance method, resulting in a cut-off effect for Trinidad and Tobago into the outer Atlantic. A view was expressed that Trinidad and Tobago brought this upon itself by entering into a delimitation agreement with Venezuela in 1990. Nevertheless, this case has to be distinguished, because Bangladesh has not entered into or concluded an agreement with a third State.

The fact that Myanmar entered into a delimitation agreement with India does not affect Bangladesh in the delimitation between the Parties in this case. In fact, India is not a party in this matter.

The geographical factors in this case are unique. These include the twin concavities, the coastal facade and the potential entitlement up to the outer limits of the continental shelf.

I do not find that the equidistance principle is suitable, because it prevents Bangladesh from enjoying its entitlement to its continental shelf up to the "outer limits" of the shelf. Consequently, any delimitation that denies/prevents Bangladesh from exercising its entitlement to the continental shelf will not be an equitable solution and in conformity with article 74 of the Convention.

The equidistance/relevant circumstances method, in my opinion, seems to be an adjustment of a provisional equidistance line to accommodate a division that is equitable. However, this method as set out in the principal judgment appears to be arbitrary. The line is fixed and then adjusted to meet the requirement of achieving an equitable solution. The angle-bisector method takes into consideration macro-geographical factors, the configuration of the relevant coasts, the measured base lines and mathematical precision. The final measurement ends at Cape Bhiff and not Point Negrais, which is more than 200 nm from the relevant base point. Therefore, I cannot agree with the view that the decision to use the 215° azimuth line to determine the direction of the adjustment to the provisional equidistance line is not based on the angle-bisector methodology either in principle or in the adoption of the particular azimuth calculated by Bangladesh. I have used the angle-bisector which in my view is a clear mathematical calculation based on specific measurements of the relevant coastlines and set base points.

I have found that the angle-bisector method of delimitation is the most suitable in this matter for the reasons set out above.

Most importantly, the requirement in the law set out in articles 74 and 83 of the Convention – "**to achieve an equitable solution**" – is paramount in these circumstances. By using the angle-bisector method, I have been able to achieve a just and equitable solution.

The "grey area"

A "grey area" is an area lying within 200 nm from the coast of one State but beyond a maritime boundary with another State. [See Sketch-map no.7 in the Judgment.]

The following issue was raised with respect to delimitation of the EEZ and continental shelf in the so-called "grey area" [depicted in Sketch-map no. 7 in the Judgment]. In this case the "grey area" stems from the fact that it falls within the continental shelf of Bangladesh and also within the 200-nm EEZ of Myanmar.

The Convention recognises two separate regimes with regard to the EEZ and the continental shelf. The specific legal regime of the exclusive economic zone, the EEZ, is set out in Part V of the 1982 Convention. That of the continental shelf is provided for in Part VI of the Convention.

The relevant articles for this issue are article 56 of Part V and article 76 of Part VI of the Convention.

The question is: How to address this issue?

Several views have been expressed. Firstly, in the oral submissions Bangladesh, through Professor Crawford, submitted that this issue arises whenever there is a departure from the equidistance principle, as has occurred in this case, where the equidistance/relevant circumstances method has been adopted and the angle-bisector method is proposed. In both instances a "grey area" has been created.

Secondly, Myanmar argues that this matter is a *non sequitur*. Professor Pellet submitted: "Equitable delimitation, which the Tribunal is called upon to adjudicate, does not extend beyond 200 M; consequently, there is no need to wonder

what would happen in [the] 'grey area'" (ITLOS PV.11/11, p. 8). He argued "that the solution proposed by Bangladesh is in any case untenable" (ibid.).

In my opinion Counsel for Myanmar has not fully addressed the problem of resolving the issue. He contends that the Tribunal does not have the jurisdiction to delimit any area beyond 200 nm.

Counsel for Bangladesh submitted that there is no jurisprudence to guide the Tribunal on this issue. It was not fully addressed in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Judgment, I.C.J. Reports 1984*, p. 246), where the area is still not resolved, nor by tribunals in several cases including the *Arbitration between Barbados and the Republic of Trinidad and Tobago*. The issue in this matter 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" (ITLOS PV.11/5, p. 13).

The gist of Bangladesh's argument is that the matter cannot be resolved by giving priority to the EEZ over the continental shelf, but by giving priority to the continental shelf over the EEZ.

It seems to me that the result of a strict interpretation of the law set out in Parts V and VI of the Convention prohibits any allocation of one area to the other. Specifically, the waters superjacent to the seabed and its subsoil (i.e., the continental shelf) of one State may not be allocated to another State as part of its EEZ. This interpretation may create difficulties in respect of fishing and exploration and exploitation of the seabed and subsoil.

It is not disputed that there are two separate and distinct regimes. It is also not disputed that Bangladesh is entitled to the continental shelf in the area while Myanmar's 200-nm limit crosses Bangladesh's entitlement to its continental shelf.

There are suggestions that the issue involving "grey areas" should be left unresolved, or to indicate that there is such an area without any comment, and/or to suggest that the Parties negotiate and cooperate in resolving the matter, either by an exchange of rights or by agreeing to use each other's specified area with approved licences for fishing and exploration and exploitation of resources in the seabed and subsoil. I think all of the foregoing may lead to further prob-

lems and issues and may be regarded as a failure on the part of the Tribunal to determine the issue. It must be recalled that the Parties have asked the Tribunal to delimit the overlapping territorial sea, the EEZ and the continental shelves of the Parties by a single line.

While *prima facie* the relevant regimes of the exclusive economic zone and the continental shelf do not supersede each other and, on the contrary, are equal in all respects, in cases of delimitation where the respective regimes apply, a judge has to consider, examine and interpret the provisions carefully and determine whether there is a specific reference in the provisions of one regime that could govern the other.

The Tribunal should deal with the issue and take a robust approach in the interpretation and determine the true purport of the law. *Prima facie* there are no provisions in the Convention for allocation of entitlements over the EEZ and the continental shelf from one State to another. However, I think a wide and generous interpretation of article 56, paragraph 3, of the Convention could resolve the problem.

Article 56, paragraph 3, specifies that: "The rights set out in this article with respect to the seabed and subsoil shall be exercised **in accordance with Part VI**" (my emphasis).

Article 74 provides for delimitation of the EEZ between States with opposite or adjacent coasts.

Article 83 provides for delimitation of the continental shelf between adjacent States.

Both articles provide for the same solution, in that it must be an equitable one. I think the distinctive facts in the case have to be taken into account. In such circumstances the judge has to take a pragmatic approach that involves taking into consideration: the location of the said area; that there is *de facto o*verlapping in the area; that the Parties have been negotiating for over 34 years on other issues without a specific agreement; and the "doctrine of necessity", having regard to the unique geographical circumstances of the Bay of Bengal. Further, the regime of the continental shelf precedes that of the EEZ and specifies rights of entitlement. Such rights are inherent to the coastal State and cannot be taken away.

If the "grey area" is allocated to Myanmar, then Bangladesh will be denied access to the outer continental shelf. If the said area is allocated to Bangladesh, then its entitlement to the outer continental shelf in the Bay of Bengal will not be infringed.It is obvious that if the former is adopted, Bangladesh will suffer the greater loss. Hence in my view here will not be the equitable solution envisaged and prescribed by the relevant articles of the Convention.

The Parties seek a solution to the dispute. Therefore, it seems to me that if rights are to be governed by Part VI, and such rights are in an area that is to be delimited, then article 83 will prevail. It seems to me that continental shelf rights in the special circumstances of this case have priority over EEZ rights. As a result I would allocate the "grey area" to Bangladesh. This is depicted in the appended map.

The regime of the continental shelf began as far back as 1942 in the Gulf of Paria Treaty 1942 between Great Britain and Venezuela. In that Treaty the submarine areas of the Gulf of Paria were divided between the two countries. By Annexation Orders each country annexed the submarine areas as part of their territory.The superjacent waters were not divided then in 1942. However, the real impetus began with the Truman Proclamation of 1945, in which the continental shelf was defined as follows:

> POLICY OF THE UNITED STATES WITH RESPECT TO THE NATURAL RESOURCES OF THE SUBSOIL AND SEABED OF THE CONTINENTAL SHELF.
>
> WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources (10 Fed. Reg. 12,305 (1945)).

A definition was set out in the 1958 Convention on the Continental Shelf (done at Geneva on 29 April 1958):

> Article 1
> For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

The EEZ was established thereafter and set out in Part V of the Convention. The definition is specified in article 55 of the Convention. I think the regime of the continental shelf must take precedence, moreso in cases of delimitation as in the instant case. Article 56, paragraph 3, provides the remedy.

Courts and tribunals should take a robust approach and resolve the matters referred to them. The Bay of Bengal is unique, as I alluded to earlier when dealing with the geographical features of the Bay. The sinuosity of the coastline, the deltaic configuration and the double concavities all contribute to the uniqueness of this area.

In respect of "grey areas", courts and tribunals have been reluctant to make definite pronouncements and have not addressed the matter. The Tribunal has focussed on the crucial issues and left this matter for further adjudication. In other words, the matter is left in abeyance without comment, with a suggestion that the Parties in the case should conduct further negotiations and cooperate towards arriving at a solution.

The law as set out in the Convention is not precise. The Convention provides for two regimes and sets out the manner in which disputed areas in each should be delimited. However, there are no provisions to govern the situation where the very regimes overlap, creating "grey areas".

Where the law is not clear or there are no specific provisions, a judge must be innovative. Where there is ambiguity or confusion with respect to interpretation, the judge should find a solution to resolve the problem. If the law does not specify a solution, then the judge must, by applying the law, find one.

A State is entitled to its continental shelf as defined in the Convention. The regime of the continental shelf existed before the regime of the exclusive economic zone and in my view must take precedence. The continental shelf includes the seabed and subsoil; therefore, it supersedes the EEZ. A judge must be innovative and creative in these circumstances and fill the void if there is one, and here there is. A doctrine similar to the doctrine of necessity is relevant. I therefore allocate the grey area to Bangladesh.

Commission on the Limits of the Continental Shelf (CLCS)

The Tribunal has a duty to adjudicate. Its role is not constrained by the CLCS (Article 76, paragraph 8, of the Convention). The CLCS is not a court. It has an advisory role and makes recommendations. This article clearly prescribes that the Commission can only issue recommendations and that these are only final and binding if the State consents. The said article further stipulates that "[i]n the 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." (Convention, Annex II, Article 8) Therefore, a State may challenge the recommendation of the CLCS. A judgment of this Tribunal cannot be challenged in another court.

I have noted that article 2, paragraph 1, of the Annex to the Convention provides that the Commission members are selected as experts in the field of geology, geophysics or hydrography. The members are not called upon to have any legal expertise. The Tribunal comprises *inter alia* "persons . . . of recognized competence in the field of the law of the sea" (Convention Annex VI, article 2). Judges are qualified to accept and analyse evidence. The scientific evidence before this Tribunal was not challenged; in other words, the scientific evidence is irrefutable.

I also think that it is important to note that disputes under article 76 fall within the purview of Part XV of the Convention. There is even the possibility where a recommendation is challenged by a State that this Tribunal may have to declare whether the recommendation is invalid.

I see no reason why the Tribunal may not use the evidence to arrive at a conclusion.

Article 9 of Annex II to the Convention provides:

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

Therefore, there is no reason for this Tribunal to await any recommendation of the CLCS.

The Tribunal is an independent court. Its decisions are final and binding on the parties in the case. It is not subject to any other court or tribunal. Its primary object is to consider and determine cases, based of course on the applicable law, the Convention and the relevant persuasive jurisprudence. Consideration of evidence is crucial in a court.

I do not and will not agree to any "rider" or proviso to the decision, e.g.: "subject to consideration of the delineation of the outer continental shelf by the CLCS" or "without prejudice to the final decision of the CLCS with respect to the respective applications".

As I alluded to earlier, there is sufficient scientific evidence before the Tribunal to determine the extent of the continental shelf in respect of each Party. (See article 76 of the Convention and the Expert Reports of Drs. Curray and Kudrass.) Therefore, the Tribunal can determine entitlement up to the "outer limits" of the continental shelf.

I find no substance in the argument that this Tribunal does not have the jurisdiction to delimit the continental shelf in the Bay of Bengal beyond 200 nm. The Parties have agreed to the jurisdiction and the scientific and technical evidence is provided in the reports of the experts.

Therefore, I am of the opinion that Bangladesh is entitled to a continental shelf (a continuation of its land mass up to the outer limit of the continental shelf). Once more I repeat: the evidence of the experts, Drs. Kudrass and Curray, is crucial. In fact the Reports and appended documents are sufficient evidence for this Tribunal to determine the extent of the continental shelf up to Bangladesh's outer continental shelf (2,500 metre isobath) (see article 76, paragraph 5, of the Convention).

Sketch-maps are set out in the Judgment, with the exception of a chart depicting a delimitation line based on the angle-bisector method. There is no need to set them out in this Dissenting Opinion.

Conclusion

In conclusion, I find it necessary to set out my findings for the reasons set out above.

1. I find that the 1974 Agreed Minutes as amended in 2008 amount to a tacit agreement with respect to the boundaries of the territorial sea.

2. St. Martin's Island has the full effect of a territorial sea of 12 nm.

3. The equidistance "special circumstance" principle or rule is not applicable in this case for the delimitation of the exclusive economic zone and the continental shelf.

4. Bangladesh's concavity is important in delimiting the area and is the only special circumstance in this case.

5. I find that the maritime boundary between Bangladesh and Myanmar in the territorial sea should be the line first agreed between the Parties set out in the Agreed Minutes of 1974, which was reaffirmed in 2008. The coordinates are:

(a)

No.	Latitude	Longitude
1.	20° 42' 15.8" N	92° 22' 07.2" E
2.	20° 40' 00.5" N	92° 21' 5.5" E
3.	20° 38' 53.5" N	92° 22' 39.2" E
4.	20° 37' 23.5" N	92° 23' 57.2" E
5.	20° 35' 53.5" N	92° 25' 04.2" E
6.	20° 33' 40.5" N	92° 25' 49.2" E
7.	20° 22' 56.6" N	92° 24' 24.2" E

(b) from point 7, the maritime boundary between the Parties follows a line with a geodesic azimuth of 215° to the point located at 17° 25' 50.7" N – 90° 15' 49.0" E.

6. The Reports of the experts are evidence in the case. The reports specify that the continental shelf of both States extends into the Bay of Bengal. I find that, based on the reports of the experts, Myanmar is entitled to its continental shelf beyond 200 nm and shares it with Bangladesh. Consequently, I have divided the said area between the States in accordance with the angle-bisector method. That is from point 7above. The maritime boundary follows a line with the geodesic azimuth of 215°.

7. Scientific evidence is permissible and is crucial in arriving at the meaning of "natural prolongation" in article 76 of the Convention.

8. The continental shelf of Bangladesh is the natural prolongation of the land mass into the Bay of Bengal.

9. The angle-bisector method depicts the line delimiting the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.

10. When the above method is applied, the test of disproportionality is met.

11. The "grey area" must be divided and, for the reasons set out in this opinion, I allocate the "grey area" to Bangladesh.

12. The delimitation line beyond 200 nm is the continuation of the line dividing the EEZ and the continental shelf of the States until it reaches the point where the rights of a third State may be affected.

(signed) Anthony Amos Lucky