

## SEPARATE OPINION OF JUDGE GAO

1. Although I have voted, with reluctance, in favour of the Judgment to the effect that the majority of the delimitation line effected by the Judgment represents in principle an equitable solution in the present case, I nevertheless consider that certain significant aspects of the Judgment call for critical comment and further elaboration. These include: the delimitation method, the treatment of St. Martin's Island, and the concept of natural prolongation. However, my main disagreement with the Judgment centres on the delimitation method applied in the present case and the manner in which the provisional equidistance line has been adjusted.

### I. The Delimitation Method

#### A. Main Geographical Features of the Case

2. It is well recognized that there are three main geographical and geological features in the maritime area for delimitation in the present case. These are: the concavity of the Bangladesh coast, St. Martin's Island and the Bengal Depositional System.

3. Of these the most important feature of the geography of the Bay of Bengal is coastal concavity. The concave shape of Bangladesh's coastline extends from the land boundary terminus with India in the west to the land boundary terminus with Myanmar in the east. At the north-eastern end of the Bay, there is a secondary concavity – a concavity within the overall concavity of Bangladesh's coast. Among countries bordering on the Bay of Bengal, Bangladesh is the only one whose coast lies entirely within these concavities. This "double concavity" covers Bangladesh's entire coast, which recedes to the north-east from the land boundary terminus with India and arcs all the way to the land boundary terminus with Myanmar.<sup>1</sup>

4. The second major geographical feature is the coastal island of St. Martin's. Lying opposite the land boundary terminus between Bangladesh and Myanmar, and within five nautical miles (nm) of the mainland coasts of both, Bangladesh's St. Martin's Island is home to more than 7,000 permanent residents and the

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<sup>1</sup> Memorial of Bangladesh, paras. 1.8, 2.2, and 6.30 (hereinafter "MB").

destination of hundreds of thousands of tourists annually. It is also a significant fishing and agricultural centre and the home base of strategic Navy and Coast Guard stations.<sup>2</sup>

5. The third major distinguishing feature in this case is the Bengal Depositional System. It comprises both the landmass of Bangladesh and its uninterrupted geological prolongation into and throughout the Bay of Bengal.<sup>3</sup> Bangladesh states that the Bengal Depositional System is not connected geologically to Myanmar, which sits on a different tectonic plate from most of Bangladesh and the Bay of Bengal, and whose landmass extends geologically no farther than 50 nm into the Bay.<sup>4</sup>

6. These are the three particular features of the coastal geography and geology that characterize and distinguish this case. And they are highly relevant to the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.

#### B. Choice of the Delimitation Method

7. Bangladesh and Myanmar disagree fundamentally as to the appropriate method to be applied in the delimitation between them of the exclusive economic zone and the continental shelf, within 200 nm and beyond, in the Bay of Bengal.

8. While recognizing that the equidistance method may be used in appropriate circumstances as a means to achieve an equitable solution, Bangladesh argues that the equidistance line claimed by Myanmar is inequitable because of the cut-off effect it produces, and that it would prevent Bangladesh's continental shelf from reaching even the 200-nm limit, not to mention its natural prolongation in the outer continental shelf beyond 200 nm.<sup>5</sup> Instead, Bangladesh holds that the angle-bisector method, specifically the 215° azimuth line which it advocates for the delimitation of the maritime area between Myanmar and itself, "avoids the problems inherent in equidistance without itself generating any inequities".<sup>6</sup>

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<sup>2</sup> MB, para. 2.18.

<sup>3</sup> MB, para. 2.32.

<sup>4</sup> MB, para. 2.23.

<sup>5</sup> MB, para. 6.31.

<sup>6</sup> MB, para. 6.74.

9. Myanmar rejects all the arguments advanced by Bangladesh against the equidistance method, and firmly reiterates “that no reason whatsoever justifies recourse to the ‘angle-bisector method’ in the present case”<sup>7</sup>. Myanmar requests the Tribunal to “apply the now well-established methods for drawing an all-purpose line for the delimitation of the maritime boundary between the Parties”.<sup>8</sup>

10. In this regard, the Tribunal observes that the method to be followed in drawing the maritime delimitation line should be considered in light of the circumstances of each case and should be one that, under the prevailing geographic realities and the particular circumstances of each case, can lead to an equitable result.<sup>9</sup> Therefore, the Tribunal decides, in paragraph 239 of the present Judgment:

that in the present case the appropriate method to be applied for delimiting the exclusive economic zone and the continental shelf between Bangladesh and Myanmar is the equidistance/relevant circumstances method.<sup>10</sup>

11. The Tribunal justifies this decision on the ground that “[d]ifferent hypotheses as to the general direction of the respective coasts of the Parties from the terminus of the land boundary will often produce different angles and bisectors”.<sup>11</sup> Its abandonment of the angle-bisector method is expounded in the following terms: “Bangladesh’s approach of constructing the angle at the terminus of the land boundary between the Parties with reference to the ends of their respective relevant coasts produces a markedly different bisector once it is recognized that Myanmar’s relevant coast extends to Cape Negrais, as decided by the Tribunal in paragraph 203. The resultant bisector fails to give adequate effect to the southward projection of the coast of Bangladesh.”<sup>12</sup>

12. For the reasons set out below, I am unable to subscribe to that decision by the majority of the Tribunal with respect to the choice of the equidistance method as the appropriate one to be applied for the delimitation of the exclusive economic zone and the continental shelf between Bangladesh and Myanmar.

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<sup>7</sup> Counter Memorial of Myanmar, para. 5.87 (hereinafter “CMM”).

<sup>8</sup> CMM, para. 5.29.

<sup>9</sup> *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, to be published (hereinafter “Judgment”), para. 235.

<sup>10</sup> Ibid., para. 239.

<sup>11</sup> Ibid., para. 236.

<sup>12</sup> Ibid., para. 237.

### C. The Validity of the Equidistance Method

13. I cannot concur with Myanmar's assertion in both its Counter-Memorial and the oral proceedings that "rights to maritime areas are governed by equidistance" and the equidistance method has become a rule of law of universal application, since such a summation runs counter to the international jurisprudence on this subject. At the inception of judicial determination of maritime boundaries, the International Court of Justice (the "ICJ" or the "Court"), in the 1969 *North Sea Continental Shelf* cases, regarded equidistance as just one method among others, and clearly pointed out "that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at".<sup>13</sup> The Court's position has remained unchanged ever since. A Chamber of the ICJ went on to stress, in the *Gulf of Maine* case, that "this concept [equidistance], as manifested in decided cases, has not thereby become a rule of general international law, a norm logically flowing from a legally binding principle of customary international law, neither has it been adopted into customary law simply as a method to be given priority or preference".<sup>14</sup> The Court elaborated on the same issue in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, explaining that equidistance was "not the only method applicable" and it did "not even have the benefit of a presumption in its favor".<sup>15</sup> The Court added further clarification to its view in 2007, in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, when it stated that the equidistance method "does not automatically have priority over other methods of delimitation...".<sup>16</sup>

14. The ICJ's ruling on the status of the equidistance method has also been followed in arbitral proceedings. In the *Guinea-Guinea Bissau arbitration*, the Arbitral Tribunal followed this jurisprudence closely, and considered "that the

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<sup>13</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 49, para. 90.

<sup>14</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 240, at p. 297, para. 107.

<sup>15</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 47, para. 63.

<sup>16</sup> *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. 742, para. 272.

equidistance method is just one among many and that there is no obligation to use it or give it priority, even though it is recognized as having a certain intrinsic value because of its scientific character and *the relative ease with which it can be applied*.<sup>17</sup>

15. On the other hand, the value and convenience of the equidistance method are equally well recognized in case law and State practice on maritime boundary delimitation. In affirming its decision that the equidistance method does not automatically have priority over other methods of delimitation, the ICJ in *Nicaragua v. Honduras* pointed out that the reason why the equidistance method is widely used in the practice of maritime delimitation is that “it has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied.”<sup>18</sup> The Arbitral Tribunal in *Barbados and Trinidad and Tobago* also referred to “a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified.”<sup>19</sup>

16. Let us now turn to State practice on maritime delimitation and the equidistance method as employed therein. A comprehensive study of 134 instances of State practice in maritime delimitation has found that 103 of those boundaries have been delineated by the method of equidistance, in strict or modified form, accounting for 77 per cent of the total.<sup>20</sup> And yet, the equidistance method is still not a customary obligation, even some four decades after the first ICJ ruling on it was made in the *North Sea Continental Shelf* cases and three decades after conclusion of the United Nations Convention on the Law of the Sea (the Convention). The mere number of instances of State practice upholding a method is thus not sufficient in itself to establish a legal rule. This applies equally to a method of convenience that frequently features in judicial and arbitral decisions. Its use results simply from the particular geographical situations confronting courts and tribunals, not from any force as a rule of customary law. The mere repeated use of a certain method in case law and State practice on maritime delimitation is not enough to establish the existence of a custom. This reasoning

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<sup>17</sup> *Delimitation of the Maritime Boundary between Guinea and Guinea Bissau, Decision of 14 February 1985, ILR, Vol. 77, p. 635, at pp. 680-681, para. 102 (emphasis added).*

<sup>18</sup> *I.C.J. Reports 2007, p. 659, at p. 741, para. 272.*

<sup>19</sup> *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA, volume XXVII, p. 147, at p. 214, para. 242, and at p. 230, para. 306.*

<sup>20</sup> L. Legault and B. Hankey, “Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation”, in: J. Charney and L. Alexander (eds.), *International Maritime Boundaries*, vol. i, Martinus Nijhoff Publishers, 1993, 203, 214.

is backed up by the conclusion of one of the general editors of the study referred to above, reached after consideration of the global and regional papers and the individual boundary reports published in the study:

[N]o normative principle of international law has developed that would mandate the specific location of any maritime boundary line. The state practice varies substantially. Due to the unlimited geographic and other circumstances that influence the settlements, no binding rule that would be sufficiently determinative to enable one to predict the location of a maritime boundary with any degree of precision is likely to evolve in the near future.<sup>21</sup>

17. The above finding had already been confirmed by the Chamber of the ICJ which adopted a similar position in the *Gulf of Maine* case, in stating that “this concept [equidistance], as manifested in decided cases, has not thereby become a rule of general international law, a norm logically flowing from a legally binding principle of customary international law, neither has it been adopted into customary law simply as a method to be given priority or preference”.<sup>22</sup>

18. It is apparent from the above excursion into both the case law and legal literature that the legal status of the equidistance method in international law and jurisprudence is a well-settled issue. It cannot be considered, by itself, either compulsory or superior to any other method. No court or tribunal has ever so ruled. The scholarly opinion in this respect is in clear conformity with the jurisprudence.

19. Therefore, the major reasoning – in fact, the only legal finding – in the Judgment “that jurisprudence has developed in favour of the equidistance/relevant circumstances method”<sup>23</sup> is not convincing at all on the legal ground. Such jurisprudence as relied upon by the majority to justify its adoption of the equidistance/relevant circumstances method in the present case<sup>24</sup> is not decisive either, simply because the geography and relevant circumstances in the present case as described above are so different from those in the so-called mainstream cases.

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<sup>21</sup> Ibid., J. Charney, “Introduction”, xlii.

<sup>22</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 246, at p. 297, para. 107.

<sup>23</sup> Judgment, para. 238.

<sup>24</sup> Ibid., para. 240.

20. When deciding what type of provisional line should be drawn in a given case, the Court and tribunals always keep an open mind, giving special consideration to the practicality and appropriateness of the selected line in the case. Nonetheless, I have the strong impression, from reading the Judgment, that there has been a predetermined mindset and motivation in favour of the equidistance method. It seems to me that the reasons behind this were that there was a need to follow the jurisprudence or to stay in the mainstream of the case law. I find this logic strange and difficult to accept. Since it is well recognized that “each case is unique and requires special treatment . . .”,<sup>25</sup> and the equidistance method “does not automatically have priority over other methods of delimitation . . .”,<sup>26</sup> there should be no reason whatsoever for any court or tribunal in one case to follow the equidistance method as applied in previous cases, and to do so in disregard of the fact that Nature has made the geographical circumstances of the coasts in the world case-specific. Like Myanmar’s assertion, this line of argument is perhaps tantamount to advocating a universal method for all maritime boundary delimitation cases. Thus, the desire to stay in the mainstream of the case law, thereby ignoring the geography and special features of the present case, is legally unfounded.

#### D. Criteria and Appropriateness of the Method

21. After examining the legal status of the equidistance method, I now turn to the issue of the criteria and appropriateness of the method of delimitation. In the 1977 *Anglo-French Continental Shelf* arbitration, the Court of Arbitration observed in explicit terms that:

[I]t is the *geographical circumstances which primarily determine the appropriateness of the equidistance or any other method of delimitation in any given case* (emphasis added).<sup>27</sup>

The arbitral Court went on to stress that:

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<sup>25</sup> Judgment, para. 317.

<sup>26</sup> *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. 742, para. 272.

<sup>27</sup> *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, ILR, Vol. 54, p. 66, para. 96.

[T]he appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case (emphasis added).<sup>28</sup>

In the same case, the United Kingdom also held a similar position, stating that “special circumstances can only mean an exceptional geographical configuration in the sense of a geographical configuration which is highly unusual”.<sup>29</sup>

22. In the *Gulf of Maine* case, the Chamber of the ICJ confirmed that the geographical features of the maritime area to be delimited were at the heart of the delimitation process and that the criteria to be applied were “essentially to be determined in relation to what may be properly called the geographical features of the area.”<sup>30</sup>

23. In the *Black Sea* case, the ICJ held that its choice of the provisional equidistance line in the case was not compelled by the existing agreements in the region.<sup>31</sup> Its choice was instead dictated by the geography of the area subject to delimitation, so that the Court would use “methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place”.<sup>32</sup>

24. The importance of geographical features in relation to the *delimitation method and outcome* has also been emphasized in the following cases: *Saint Pierre and Miquelon*;<sup>33</sup> *Continental Shelf (Libya/Malta)*;<sup>34</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen*;<sup>35</sup> and *Land and Maritime Boundary between Cameroon and Nigeria*.<sup>36</sup>

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<sup>28</sup> Ibid., para. 97.

<sup>29</sup> Ibid., para. 226.

<sup>30</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 278, para. 59.

<sup>31</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 119, para. 174.

<sup>32</sup> Ibid., p. 101, para. 116.

<sup>33</sup> *Delimitation of Maritime Areas between Canada and the French Republic (St Pierre and Miquelon)*, *ILR*, Vol. 95, p. 645, at p. 660, para. 24.

<sup>34</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 42 *et seq.*

<sup>35</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at pp. 74-75.

<sup>36</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 339, para. 49.

25. It is clear from the above examination that the case law on the issue of criteria and appropriateness of the method of delimitation is unanimous. It can therefore be comfortably concluded that the decisive criteria or tests for the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation are two-fold: the geography and other relevant circumstances of each particular case. These are the only criteria for the adoption of a proper method. The majority trend in using the equidistance method has never been accepted in either case law or State practice as a criterion or legal justification for choosing the method of delimitation.

26. As stated, the criteria or tests for the appropriateness of the equidistance method, or any other method, lie in its suitability or appropriateness in the light of the coastal geography and relevant circumstances of a particular case and for the purpose of achieving an equitable solution. Against this backdrop, I wish to point out that the fatal mistake in the reasoning and justification in the present Judgment in support of the equidistance method is that it has failed completely to address such an important issue as appropriateness and suitability: that is to say, how well does the chosen method fit the unique geography of the coastline in this part of the Bay of Bengal; and, more specifically, to what degree does it take due account of the special feature characterizing the present case in the form of a very pronounced concavity. On this critical issue, the Judgment has remained, to my greatest disappointment, completely silent.

#### E. Application of the Equidistance Method

27. As set out in the paragraphs on the geographical context of the present case, the Bay of Bengal in general and the coast of Bangladesh in particular are uniquely characterized by an exceptional geographical configuration in the form of highly unusual sinuosity and concavity. Concave coasts like those in the northern Bay of Bengal are among the earliest recognized situations where equidistance produces “irrational results”.<sup>37</sup> This was expressly recognized in the *North Sea Continental Shelf* cases, where Bangladesh’s (then East Pakistan’s) situation was specifically compared to the concavity faced by Germany.<sup>38</sup>

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<sup>37</sup> MB, para. 6.56.

<sup>38</sup> MB, paras. 1.9-1.10 and Figures 1.1 and 1.2.

28. While recognizing the equidistance method's intrinsic features and relative convenience in usage, courts and tribunals have also repeatedly pointed out its inherent shortcomings and the possible consequences of its application. The ICJ rightly pointed out in the 1969 *North Sea Continental Shelf* cases that the use of the equidistance method "can under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable."<sup>39</sup> The Court warned in *Continental Shelf (Libya/Malta)* that an equidistance line "may yield a disproportionate result where a coast is markedly irregular or markedly concave or convex" (emphasis added).<sup>40</sup> The same Court stressed recently in *Nicaragua v. Honduras* that "in particular circumstances, there may be factors which make the application of the equidistance method inappropriate."<sup>41</sup>

29. The distorting effects of equidistance on a concave coastline have been widely recognized ever since the *North Sea Continental Shelf* cases. As stated and summarized in the *Handbook on the Delimitation of Maritime Boundaries*, published by the United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea: "The relevance of the convexity or concavity of the relevant coastline was highlighted by the International Court of Justice in the 1969 *North Sea Continental Shelf* cases. The distorting effects of the equidistance method in the presence of a concave or convex coastline [are] shown in the following illustrations".<sup>42</sup>

30. It is therefore clear that both the case law and legal writings recognize the existence of a general exception to the application of the equidistance method, that is to say, in the context of a concave or convex coastline. The Bay of Bengal has been cited as a classic example of such a situation. Both Bangladesh and Myanmar agree on the geography and geology that pertain to this case. Myanmar accepts that the entire coastline of Bangladesh is concave, and that a secondary coastal concavity exists within the extremities of the general concavity.<sup>43</sup>

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<sup>39</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 23, para. 24.

<sup>40</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 35, para. 56.

<sup>41</sup> *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. 742, para. 272.

<sup>42</sup> United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea (DOALOS). *Handbook on the Delimitation of Maritime Boundaries*. New York, 2000 (United Nations publication, Sales No. E.01.V2) at p. 30, para. 143. Figure 6.2. See also MB, para. 6.32.

<sup>43</sup> CMM, para. 2.16.

31. Unfortunately, the majority of the Tribunal seems to have failed to take note of both such a context and the Court's case law on it. Because the entirety of Bangladesh's coast lies within a concavity sandwiched between India and Myanmar and then recedes into an even deeper concavity, the equidistance lines emanating from the Bangladesh/Myanmar and Bangladesh/India land boundaries would intersect in front of Bangladesh's coast and inevitably produce a very noticeable cut-off effect,<sup>44</sup> cutting it off well short of the 200-nm limit, as measured from its normal baselines (see Illustration Map 3).

32. This cut-off result is not unlike, indeed is more much severe than, that faced by the Federal Republic of Germany in the *North Sea Continental Shelf* cases, and it appears, on its face, to be so "extraordinary, unnatural or unreasonable".<sup>45</sup> The provisional equidistance line has completely missed its aim, if the correct target is the 215° line.

33. The complication resulting from the application of the equidistance method in the first stage of the present exercise of delimitation, irrespective of the specific geography of the area to be delimited and of the suitability of the method for this particular area, is two-fold. First, owing to its intrinsic nature and characteristics, the equidistance method is unable and has failed to take account of the concavity as a relevant circumstance. Second, instead of producing a correct provisional line, the application of the equidistance method creates an inequity in the form of the cut-off effect, which did not exist at all before. Therefore, it complicates the situation unnecessarily by creating a double inequity. While the first inequity, borne of the concavity effect, is made by Nature, the second, from the cut-off effect, is a judicial fabrication, one that is entirely avoidable.

34. In this regard, it needs to be pointed out that the Tribunal's application of the equidistance method in the present case is clearly not in conformity with international jurisprudence. In dealing with the issue of cut-off effect, the ICJ's approach has traditionally been cautious. In the *Black Sea* case, regarding the cut-off effect of the boundary lines proposed by the parties to the case, the ICJ declared that its own provisional line avoided the cut-off effect of the lines put forward by the parties. The Court observed that the delimitation lines proposed by the parties, in particular their first segments, each significantly curtailed the entitlement of the other party to the continental shelf and the exclusive economic zone. By contrast, the provisional equidistance line drawn by the Court avoided such a drawback, as it allowed the adjacent coasts of the parties to

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<sup>44</sup> CMM, paras. 5.155-5.162; Rejoinder of Myanmar (hereinafter "RM"), paras. 6.71 and A.2.

<sup>45</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 23, para. 24.

produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way.<sup>46</sup>

35. For the foregoing reasons, it may be concluded that the equidistance method as chosen and applied by the Tribunal in the present case is simply not appropriate at all. And the provisional line following from the equidistance method is highly problematic. At one stage, the Tribunal had an opportunity to opt for a new, different method. Yet it did not do so.

#### F. Evaluation of the Adjustment

36. Notwithstanding the problem of the cut-off effect created in the first stage of the delimitation process, the Tribunal proceeded to the second stage, involving an adjustment of the provisional equidistance line. The Judgment states that “the concavity which results in a cut-off effect on the maritime projection of Bangladesh is a relevant circumstance, requiring an adjustment of the provisional equidistance line”<sup>47</sup>.

37. With respect to the manner in which the adjustment is made and to the adjusted position of the line, the Judgment states that “[i]n the view of the Tribunal the direction of any plausible adjustment of the provisional equidistance line would not differ substantially from a geodetic line starting at an azimuth of 215°.”<sup>48</sup> Thus, the provisional line was simply rotated downwards in a southern direction at the 200 nm limit for a distance of 51 nm to the 215° azimuth position (see Illustration Map 4).

38. Because the provisional equidistance line generated in the first stage is inappropriate, the situation it creates is so extreme as unavoidably to require the exercise of enormous subjective determination and excessive adjustment to offset the cut-off effect created by the provisional line. As a result, “most of the line in the present case” is reconstructed, as recognized in the Judgment.

39. It is also evident that the treatment of the 215° azimuth in the Judgment is exceptionally simplistic. This azimuth is used as the corrected line, but the Judgment offers no explanation as to where it was derived or how it was constructed. Now let us be honest about this. During the proceedings, Bangladesh

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<sup>46</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, at p. 127, para. 201.

<sup>47</sup> Judgment, para. 324.

<sup>48</sup> *Ibid.*, para. 334.

constructed its proposed bisector by depicting the coastal façades of the two Parties. Bangladesh's coastal front is depicted by means of a  $287^\circ$  line. Bangladesh explained that it "could claim that the general direction of its coast is  $270^\circ$ . It recognizes, however, that account must be taken of the small portion of its coast that runs south-southeast from the east bank of the Meghna River to the land boundary terminus with Myanmar in the Naaf River". To take account of this change in direction, Bangladesh rotated the  $270^\circ$  line, resulting in a coastal front having a bearing of  $287^\circ$ . With regard to Myanmar's coast, Bangladesh drew "a line running from the land boundary terminus in the Naaf River southeast past Cheduba Island to the point where it abuts the mainland coast near Gwa Bay". This line follows an azimuth of  $143^\circ$ . In the view of Bangladesh, "it is a simple arithmetic task to determine their bisector:  $215^\circ (287^\circ + 143^\circ) \div 2 = 215^\circ$ ".<sup>49</sup> Hence, it is a material as well as undeniable fact that the  $215^\circ$  azimuth is a bisector line generated by the angle-bisector method (see Illustration Map 1).

40. A preliminary evaluation of the subsequent correction carried out in the present Judgment reveals a number of surprising facts. First, the distance covered by the rotation of the line from its original provisional position to its final position of  $215^\circ$  azimuth is approximately 51 nm, out of the total distance of 66 nm between the two lines claimed respectively by Bangladesh and Myanmar. Second, the area affected by the adjustment, or allocated by it to Bangladesh, is approximately 10,296 square kilometres. Third, the effect produced by the adjustment in terms of distance at the 200 nm limit is equal to giving 230 per cent effect to St. Martin's Island. Fourth, the adjustment rotation from the provisional line to the final position of the  $215^\circ$  line is approximately 3.4 times (51:15 nm) more than the transposition distance effected by Bangladesh in its preparation of the final claim line. Finally, the adjusted area accounts for roughly 50 per cent of the entire overlapping area claimed by the two Parties (see Illustration Map 4).<sup>50</sup>

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<sup>49</sup> MB, para. 6.73.

<sup>50</sup> All figures used are rounded up. Calculations made by the author of this opinion.

41. Before arriving at any conclusion on whether this subsequent adjustment is justified, a brief excursion into the case law in this regard would be helpful. In the *Gulf of Maine* case, between Canada and the United States of America, in respect of the third segment of the boundary line, which was a provisional line perpendicular to the closing line of the Gulf of Maine, the ICJ Chamber considered one relevant circumstance suggested by the parties, involving historical fishery rights and socio-economic factors in the area subject to delimitation.<sup>51</sup> However, “[i]n short, the Chamber sees in the above findings confirmation of its conviction that in the present case there are absolutely no conditions of an exceptional kind which might justify any correction of the delimitation line it has drawn.”<sup>52</sup>

42. In its judgment of 16 March 2001, the ICJ considered four factors but did not accept any of them as a relevant circumstance. They were: (1) the pearling industry as a historic title; (2) a past colonial decision to divide the seabed; (3) disparity between the coasts of the parties; and (4) the presence of an island.<sup>53</sup> Accordingly, the equidistance line was subject only to a minor adjustment in that case.

43. In its judgment of 10 October 2002, the ICJ considered four factors raised by the parties, i.e., the concavity of the Gulf area, the location of Bioko Island, the disparity of the coastlines and the oil practice of the parties, and found that none was a relevant circumstance.<sup>54</sup> “The Court accordingly decides that the equidistance line represents an equitable result for the delimitation of the area in respect of which it has jurisdiction to give a ruling.”<sup>55</sup> The ICJ, after dismissing the four factors as relevant circumstances, adjusted the provisional equidistance line on account of one fact relevant to the delimitation area, i.e., the 1975 *Maroua Declaration* between the two parties. Consequently, an adjustment was effected in respect of a small section of the provisional equidistance line.<sup>56</sup>

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<sup>51</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 341-45, paras. 235-238.

<sup>52</sup> *Ibid.*, p. 344, para. 241.

<sup>53</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 115, para. 248.

<sup>54</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at pp. 445-447, paras. 297-304.

<sup>55</sup> *Ibid.*, para. 306.

<sup>56</sup> *Ibid.*, para. 307.

44. A similar adjustment of the delimitation line in sector 2 was also made by the ICJ in *Jan Mayen*.<sup>57</sup>

45. In its Award of 11 April 2006 in the *Barbados/Trinidad and Tobago* arbitration, the Arbitral Tribunal had the opportunity to deal with relevant circumstances in relation to the eastern part of the area subject to delimitation. Three factors were considered by the Tribunal: the projection of the relevant coasts and the avoidance of any cut-off effect or encroachment; proportionality of the delimitation area; and the effect of the 1990 *Trinidad-Venezuela Agreement*.<sup>58</sup> The Tribunal adjusted the provisional equidistance line drawn in the case, in consideration of the first and third relevant circumstances.<sup>59</sup> In so doing, the Tribunal noted that there were limits set by the applicable law to its discretion in effecting adjustment.<sup>60</sup>

46. In the Judgment of 8 October 2007, the ICJ considered two factors for adjustment: (1) delimitation of the overlapping continental shelf and EEZs of the parties; and (2) delimitation of the overlapping territorial seas of the cays of the parties.<sup>61</sup> The territorial sea arcs of the cays and the median line between them were deemed relevant circumstances calling for an adjustment of the direction of the bisector line. The effect of this adjustment was defined by the 12-nm limit for the territorial seas and the median line between them.

47. In its Judgment of 3 February 2009, the ICJ considered six factors for adjustment, i.e., disproportion between coastal lengths, the enclosed nature of the sea area, the proper characterization of Serpent's Island, State activities in the relevant area, the cut-off effect of the boundary lines proposed by the parties, and security concerns of the parties, and dismissed them all.<sup>62</sup> The Court held that "the provisional equidistance line drawn by the Court avoids such a drawback as it allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way. That being so, the Court sees no reason to adjust the provisional equidistance line on

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<sup>57</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at pp. 68-81, paras. 68-92.

<sup>58</sup> Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, *Decision of 11 April 2006, RIAA, Vol. XXVII, 2006*, p. 147, at pp. 233-39, paras. 321-48.

<sup>59</sup> *Ibid.*, paras. 371-74.

<sup>60</sup> *Ibid.*, para. 373.

<sup>61</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at pp. 746-749, 752 and 759-760, paras. 287-298, 304, and 320.

<sup>62</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at pp. 116-128, paras. 163-204.

this ground.”<sup>63</sup> The result was that the ICJ did not adjust its provisional line at all in this case.

48. From the preceding discussion, three important conclusions for the purpose of this study may be drawn with respect to relevant circumstances and adjustments in light of them. First, the selection of the type of provisional line, and the base points for it, is absolutely critical, given the tendency of the ICJ and arbitral tribunals to be cautious in recognizing the effect of relevant circumstances. The importance of the selection phase of the delimitation process is plain, in that, afterwards, no drastic change (which is to say nothing beyond limited adjustments) has ever been made to the provisional line in the case law or State practice. Second, among the relevant circumstances most often identified in case law, disparity in the lengths of the relevant coasts and the presence of islands are two that must always be taken into account in the adjustment of the provisional line. Third, geographical factors present in the area for delimitation are predominant not only for the selection of the provisional line of delimitation,<sup>64</sup> but also for the determination of the relevance of other factors for the adjustment of the provisional line.<sup>65</sup> This twin function of relevant circumstances has long been acknowledged.<sup>66</sup>

49. Based on the facts and findings presented in the preceding paragraphs, the following critical comments may be offered. First, using the cut-off effect, as the Tribunal has, as a relevant circumstance to justify making the adjustment is questionable, because, as already pointed out, the cut-off effect was created by the application of the equidistance method in the first stage and the Judgment then seeks to abate it by adjustment in the second stage.

50. Second, as the solution identified and employed in the Judgment, the 215° azimuth would appear to have come out of nowhere. The Judgment says literally nothing about the method by which it was constructed. The truth is that the Tribunal deliberately shies away from admitting that this azimuth was originally the provisional line claimed by Bangladesh as a result of the application of the angle-bisector method.

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<sup>63</sup> Ibid., para. 201.

<sup>64</sup> This is typified by the boundary line established between Thailand and Burma (as it was then called) in 1980, which cut through offshore islands and islets of the two countries by use of an equidistance line: *Agreement on the Delimitation of the Maritime Boundary between the Countries in the Andaman Sea*, 25 July 1980, *Limits in the Seas* No. 102 (1985).

<sup>65</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 278, para. 59.

<sup>66</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 35-36 and 45-46, paras. 55 and 82.

51. Third, what the adjustment does in the present case is simply and subjectively shift the provisional equidistance line to another place. Thus, the position of the adjusted line was not determined on the basis of any geometrical and mathematical calculation or any facts whatsoever. Therefore, the effect of this correction cannot be justified either.

52. Fourth, Bangladesh opposes the equidistance method on two grounds: its failure to take account of the particular geographical feature of the concave coastline and the subjective determination of adjustment to be given in the second stage. The Judgment fails completely to address these issues. It is incorrect for the Tribunal not to turn its attention to such an important concern voiced by one of the parties in both its written and oral pleadings.

53. It is now time to draw some conclusions from the above considerations on the issues of the equidistance method and adjustment of the provisional equidistance line. First, the Tribunal's selection and application of the equidistance method in the present case are inconsistent with international case law. Second, both the provisional line and the final adjustment are wrong and unacceptable for the reasons given. Third, the whole adjustment exercise in the Judgment can be considered manipulation based on clearly subjective determinations. Fourth, the magnitude and degree of the adjustment made to the provisional line are excessive and unprecedented. Last but not least, the complete silence, if not intentional denial, in the Judgment in respect of the fact that the final azimuth of  $215^\circ$  is a bisector line rather than one of equidistance has made the case go from bad to worse. The nature of a boundary delimitation line lies in the methodology of its construction, not in the name or interpretation it is given. In the eyes of a professional cartographer, the adjusted equidistance line in the present case is not an equidistance line but a bisector line. The final and overall conclusion on the delimitation method in the present case is that the decision by the Tribunal on the equidistance method and the results of its application in both the first and second stages cannot be right, because it has deliberately ignored the most important and unique features that define the geographical and geological context in which this delimitation case is taking place. What the adjustment does in the present case is to put feathers on a fish and call it a bird. If there is ever a case in the world in which the equidistance methodology should not be applied because of the special geography of a concave coastline, it must be this present case in the Bay of Bengal.

54. Our analysis and evaluation of the adjustment would not be complete without an inquiry into the concept and meaning of the term. The term “adjustment” is not used or defined in the Convention. It is a creation of international courts and tribunals in their case law. Both the term and the method have been frequently used in international maritime boundary delimitation cases over the last few decades, but the term’s meaning and content have not, perhaps, been well defined and elaborated on. Thus circumstanced, the way “adjustment” is understood and practised varies from case to case. This is not a satisfactory situation.

55. Article 31 of the Vienna Convention on the Law of Treaties provides that a treaty must be interpreted in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose. This provision can also apply to the understanding and interpretation of the term “adjustment” in the context of the international law of the sea. According to the *Oxford English Dictionary*, adjustment means “a small alteration or movement made to achieve a desired fit, appearance, or result.”<sup>67</sup> And the *Farlex Dictionary* defines the term as “an amount added or deducted on the basis of qualifying circumstances.”<sup>68</sup> It is apparent that there are two controlling criteria for the term “adjustment”: first, the quality of being small in amount; and second, the existence of qualifying circumstances as a basis for it. According to its ordinary meaning, adjustment can by no means connote, or be construed as, an action to start the construction of something completely different in nature. To put it bluntly: adjustment is adjustment; adjustment is not remaking. An excessive adjustment without a qualifying basis, such as the one made in the present case, is unjustified and unacceptable.

56. As observed, the application of the equidistance method and the construction of the provisional equidistance line in the first stage are absolutely important, since no drastic changes beyond limited adjustment to the provisional line should be permitted afterwards, as evidenced in the case law and State practice. The second stage, in which the adjustment takes place, is even more critical from a procedural point of view, since correct adjustment can serve as a gauge to ensure that the delimitation method provisionally decided upon is appropriate for the case. Otherwise, the court or tribunal should change to another method.

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<sup>67</sup> [Http://oxforddictionaries.com/definition/adjustment?q=adjustment](http://oxforddictionaries.com/definition/adjustment?q=adjustment).

<sup>68</sup> [Http://www.thefreedictionary.com/adjustment](http://www.thefreedictionary.com/adjustment).

57. Before concluding our consideration of the aspects of adjustment, it is imperative to turn our attention to a more fundamental issue. As far as adjustment is concerned, courts and tribunals undoubtedly enjoy a certain discretion for the purpose of ensuring that the delimitation line achieves an equitable solution. That being the case, the discretionary power enjoyed and exercised by courts and tribunals is neither absolute nor unlimited. There will always be limits on how far a court or tribunal can go in the process of adjustment, as recognized by the respected Arbitral Tribunal in the *Barbados and Trinidad and Tobago* case when it stated that the result of equidistance is “subject to its subsequent correction if justified” (*RIAA, 2006, volume XXVII, p. 147, at p. 230, para. 306*).

58. Although the issue of adjusting the provisional line in maritime boundary delimitation is little addressed in case law, and has not been clarified in the provisions of the Convention, some qualifications and requirements can still be discerned from international jurisprudence and State practice on the law of the sea and can serve as guidelines for the purpose of adjustment. These include, but are not limited to, the following:

- 1) Adjustment must be carried out within legal limits. Article 15 of the Convention provides for the median line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each of the two States is measured. Accordingly, the adjusted equidistance line should be a line every point of which is approximately equidistant from the nearest points on the baselines of the two States, as required under the Convention. In the present case, if the provisional equidistance line is rotated counterclockwise over an exceptionally long distance to the 215° position, it no longer qualifies as even an adjusted equidistance line under the legal definition given in the Convention.
- 2) Adjustment must be carried out within geographical limits. The legal limits of the Convention still require, even in the second stage, a degree of approximation in equidistance to the coastlines of the two States, and the proper base points therefore must be available and identified for the construction of the corrected equidistance line. Otherwise, any arbitrary adjustment irrespective of the relevant geography of a given case would lead to a potential risk of refashioning Nature. The Court in *Libya/Malta* declared that the delimitation method ought to “be faithful to the actual

geographical situation” (emphasis added).<sup>69</sup> The Court confirmed this position in *Cameroon v. Nigeria*, stating that “[t]he geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation.”<sup>70</sup>

- 3) Adjustment must be carried out within scientific and mathematical limits. The correction performed to the provisional line must be geometrically objective and mathematically feasible. As it might be exemplified by the present case, the provisional equidistance line may be reasonably adjusted within the equidistance framework between the zero effect line and the full effect line on account of St. Martin’s Island (see Illustration Map 2 ). Any bolder move in an adjustment will result in a new line of a different nature, having nothing to do with the equidistance method. The equidistance framework for adjustment is also explained and illustrated in *Handbook on the Delimitation of Maritime Boundaries*, published by the United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea.<sup>71</sup>
- 4) Adjustment must be carried out within other relevant limits, such as the considerations of reasonableness, qualifying circumstances, effect in measurable terms, and necessary correlation with the provisional line.

In any event, unlike the adjustment in the present case, an adjustment should never be arbitrary, based on subjectivity and a lack of transparency, or produce a result that is far out of proportion.

### G. The Angle-Bisector Method

59. Having considered the validity of the equidistance method and the issues of adjustment, I would turn to the angle-bisector method. In the present case, the angle-bisector method is rejected on two grounds in the Judgment: first, as has been suggested, “different hypotheses as to the general direction of the respective coasts of the Parties from the terminus of the land boundary will often

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<sup>69</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 45, para. 57.

<sup>70</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303 at pp. 443–445, para. 295.

<sup>71</sup> United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea (DOALOS). *Handbook on the Delimitation of Maritime Boundaries*. New York, 2000 (United Nations publication, Sales No. E.01.V2), pp. 52–54.

produce different angles and bisectors”;<sup>72</sup> second, as a result of the Tribunal’s decision that Myanmar’s relevant coast extends beyond Bhiif Cape to Cape Negrais, “[t]he resultant bisector fails to give adequate effect to the southward projection of the coast of Bangladesh.”<sup>73</sup>

60. Nonetheless, the above two reasons, on the basis of which the Judgment seeks to justify the rejection of the bisector method, are not only unconvincing but also questionable. On the first issue, “different hypotheses”, subjectivity is not a problem associated only with the bisector method. The equidistance method is not free from it either, so long as base points have to be selected. As evidenced in the present case, out of the first seven pairs of turning points selected by Bangladesh and Myanmar for the construction of the median line in the territorial sea between them, only the starting points are the same, and the other six pairs differ from one another in location. As a result, the median lines claimed by the Parties are different, because the different base points they have selected are bound to produce different median lines. In another example, the Tribunal is also plagued by subjectivity in its process of selecting base points for the construction of the provisional equidistance line in the exclusive economic zone and the continental shelf. Consequently, it has adopted the five base points selected by Myanmar as the “appropriate base points on the coast of the Parties for constructing the provisional equidistance line.”<sup>74</sup> On the second issue, i.e., the resultant bisector’s blocking effect on the seaward projection of Bangladesh’s coast, this reasoning is also very weak and cannot be cited as a legitimate ground for rejecting the bisector method, since the resultant bisector used by the Tribunal also fails, as did the coastal façade proposed by Bangladesh, to portray the real general direction of the coast in this area, as will be further explained in the subsequent paragraphs.

61. Apart from that, the common allegation that more than one coastal façade can be selected on the respective coasts and different façades will produce different angles and bisectors does not hold much water. Subjectivity in constructing coastal façades for use in the bisector method is oftentimes exaggerated. It is indeed not insurmountable. Yes, there may be several coastal façades that can be picked up from the same coastline, but there can be only one, certainly not every one of them, that is able to represent the genuine general direction of the relevant coast. With today’s maritime boundary delimitation computer software,

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<sup>72</sup> Judgment, para. 236.

<sup>73</sup> *Ibid.*, para. 237.

<sup>74</sup> Judgment, para. 266.

a professional cartographer will be able to produce a more rational coastal façade to depict the correct direction of the coastline, as long as proper instructions are given to him.

62. These examples suffice to show that subjectivity is a common problem faced in both the angle-bisector and equidistance methods, as far as selection of base points is required in the application of both methods. It also needs to be pointed out that for obvious reasons subjectivity in constructing a coastal façade in the case of the angle-bisector method or selecting base points in the case of the equidistance method is often intentional rather than unavoidable: each of the parties in a case will attempt to search for and find an angle or a line in its own favour.

63. In general, there is no generally accepted method for measuring, and compensating for, the distorting effects of a concave coastline on the plotting of an equidistance line. That is why, in the only two prior maritime delimitation cases where the relevant coasts were expressly determined to be concave and equidistance was determined not to be appropriate – the *North Sea Continental Shelf* cases<sup>75</sup> and the *Guinea/Guinea Bissau* arbitration<sup>76</sup> – the ICJ and the arbitral tribunal rejected equidistance as an appropriate methodology. At least, the existing case law shows that the angle-bisector method has been employed as the appropriate method in the context of concave coastlines, albeit the number of such cases is still limited because concave and convex coastlines are very exceptional geographical features in the world.

64. Although concurring with Bangladesh's position on the angle-bisector method, I nevertheless cannot agree with its construction of Myanmar's coastal façade from the land boundary terminus between the two Parties to Cape Negrais. The reason for my rejection of this is that it does not represent the general direction of the relevant coast for the purpose of delimitation in the present case.

65. In the search by the Tribunal for a more suitable method of delimitation in the Bay of Bengal, with a view to arriving at an equitable solution, a correct coastal façade of Myanmar and a new angle bisector are proposed below.<sup>77</sup>

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<sup>75</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3.

<sup>76</sup> *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 *ILM* 252; reproduced in MB, Vol. 5.

<sup>77</sup> This new coastal façade and angle-bisector line are tabled jointly by Judge Gao and Judge Lucky.

66. The correct coastal façade of Myanmar should run from the land boundary terminus in the Naaf River down to the next marked bending point on the coast (at approximately 17°15'N, 94.30°E, not precise), since this relatively longer segment of the coast represents the genuine general direction of Myanmar's coastline in this part of the Bay of Bengal (see Illustration Map 5).

67. The correctness of the new coastal façade of Myanmar can be seen in the following facts. The overwhelming majority of the relevant coast from the Naaf River down to Cape Negrais, roughly four-fifths of the total length, is depicted by the new façade. The remaining coastline, about one-fifth of the total length, changes sharply at the bending point from its original south-west direction towards a north-west direction. The small tail of Cape Negrais together with the mouths of the Irrawaddy River constitutes only a tiny component part of Myanmar's entire territory. The general direction of this small segment of the coastline is significantly different from the general direction of the predominant coastline in the upper Bay of Bengal. It departs from its original 180° direction by an angle of approximately 60°. Therefore, its exclusion in the construction of the coastal façade is adequately justified. To check the correctness of the coastal façade defined as such, a further look at the macro-geography of both the entire Bay of Bengal and Myanmar's land territory is necessary. Such an examination reveals clearly that the whole of the land territory of Myanmar fronting on the Bay of Bengal and the Andaman Sea consistently faces south-westwards, the only exception being that of the tail of Cape Negrais with a short coastline facing north-westwards. Most importantly and if not surprisingly, the new coastal façade from the Naaf River to the bending point, as proposed, coincides precisely with the overall coastal façade of the entire Myanmar continental territory from the land boundary terminus with Bangladesh in the Naaf River to the land boundary terminus between Myanmar and Thailand on the Andaman Sea. The overall coastal façade of Myanmar portrayed by a straight line connecting the two land boundary termini with its two neighbouring States is scientifically correct and legally justified. Once the overall coastal façade of Myanmar is decided, the length of the coastal façade in the relevant area becomes irrelevant. A longer or shorter coastal façade will still produce the very same angle.

68. As such, this new coastal façade should be regarded as representing the genuine general direction of the relevant coast of Myanmar within the area for delimitation. In the process of determining the two base points and constructing the new coastal façade of Myanmar, no subjectivity or manipulation what-

soever is employed. It is based solely on geographical facts of the relevant delimitation area in the present case.

69. The coastal façade so constructed has two advantages: first, it puts the two Parties on an equal footing in terms of base points (land boundary terminus to land boundary terminus); second, it puts the two Parties on an equal footing in terms of coastal façade (mainland coastal front to mainland coastal front).

70. Once the correct coastal façades are defined, bisecting them is merely a matter of arithmetical exercise. The new angle-bisector line follows approximately an azimuth of  $218^\circ$  (Illustration Map 5). It is so evident that the angle-bisector method avoids the problems inherent in the equidistance method without itself generating any new inequity; the provisional  $218^\circ$  azimuth line is far more correct and equitable than the provisional equidistance line and its subsequent adjustment, if any is indeed required, is very reasonable and modest.

71. In addition to the angle-bisector method, another method, as tabled by some Judges, combining the angle-bisector method in terms of a coastal façade on the coast of Bangladesh and the equidistance method in terms of base points on the coast of Myanmar can produce a provisional equidistance line that is almost the same as the  $218^\circ$  azimuth line.

72. For these and other reasons, I am strongly convinced that the angle-bisector method is the most appropriate method to be applied in the present case for achieving an equitable solution.

## II. Effect of St. Martin's Island

73. As noted, St. Martin's Island is the other major geographical feature in the present case. This coastal island, which is 5 kilometres long and has a surface area of some 8 square kilometres,<sup>78</sup> would by itself generate at least 13,000 square kilometres of maritime area for Bangladesh in the framework of the delimitation between the continental masses.<sup>79</sup>

74. Bangladesh and Myanmar are in dispute with each other as to the effect of St. Martin's Island on the delimitation of the territorial sea, the exclusive economic zone (EEZ) and the continental shelf (CS), specifically as to whether it should be given full effect so that it generates areas of the EEZ and CS on its own

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<sup>78</sup> Reply of Bangladesh (hereinafter "RB"), para. 2.76; ITLOS/PV 11/10, P.14, I. 23-25.

<sup>79</sup> ITLOS/PV.11/10, p. 14, I. 23-25.

(Bangladesh) or partial effect in generating such areas to a distance of 12 nm from its coast (Myanmar).

75. After having concluded that St. Martin's Island should be given full effect in the territorial sea, the Tribunal has decided on the following treatment of the island in the Judgment: allowing it to provide base points for the territorial sea delimitation, but giving it zero effect in the CS and EEZ delimitation.

76. Among the circumstances always deemed to be relevant in determining the direction of a delimitation line is the effect of islands, islets, and like features. The effect attributed to such features ranges from full, half or partial effect to a degree of effect determined by the breadth of the marine area surrounding them that is subject to the sovereignty or jurisdiction of the proprietary State.

77. The case law is littered with references to the effect of islands upon the course of delimitation lines.<sup>80</sup> State practice also takes into account the effect of islands and even low-tide elevations. This can be seen from the 1990 *Agreement concerning the Delimitation of the Continental Shelf between France and Belgium* in their delimitation of the CS in the North Sea;<sup>81</sup> the 2000 Treaty between the United States of America and Mexico on the delimitation of the continental shelf in the Western Gulf of Mexico beyond 200 nm;<sup>82</sup> and the 2009 agreement between Greece and Albania for the delimitation of the continental shelf and other maritime zones in the area of the Corfu Channel.<sup>83</sup> Full effect has been given to islands in drawing the delimitation lines in these agreements. It seems that full effect is far more easily conceded in respect of islands and like features in State practice of bilateral treaties, but it is not certain that full effect is therefore obligatory as a matter of customary law. Treatment of islands' effect is basically so diverse that any generalization as to their effect will be hazardous.<sup>84</sup>

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<sup>80</sup> E.g., *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at pp. 759-760, para. 320; *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246, at pp. 336-337, para. 222.

<sup>81</sup> *Agreement concerning the Delimitation of the Continental Shelf*, 8 Oct. 1990, 19 *Law of the Sea Bulletin* (1991) 27.

<sup>82</sup> 44 *Law of the Sea Bulletin* 71 (2001).

<sup>83</sup> T. Scovazzi, I. Papanicolopulu and G. Francalanci, Report No. 8-21, in: D. Colson and R. Smith (eds.), *International Maritime Boundaries*, vol. vi, Martinus Nijhoff Publishers, 2011, 4466 (not yet in force).

<sup>84</sup> D. Bowett, "Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations", in: J. Charney and L. Alexander (eds.), *International Maritime Boundaries*, vol. i, Martinus Nijhoff Publishers, 1993, 131, 150.

78. According to the Judgment, “St. Martin’s Island is an important feature which could be considered a relevant circumstance in the present case. However, because of its location [to the south of the provisional equidistance line and its proximity to that line], giving effect to St. Martin’s Island in the delimitation of the exclusive economic zone and the continental shelf would result in a line blocking the seaward projection from Myanmar’s coast in a manner that would cause an unwarranted distortion of the delimitation line.”<sup>85</sup> This finding in the Judgment with respect to the effect of St. Martin’s Island is two-fold: on the legal level, it says “yes, effect should be given to the island” because it can be considered a relevant circumstance; on the factual level, it says “no” to any effect because the island would block the seaward projection of Myanmar.

79. Based on such a finding, the Tribunal concludes in the Judgment that “St. Martin’s Island is not a relevant circumstance and, accordingly, decides not to give any effect to it in drawing the delimitation line of the exclusive economic zone and the continental shelf.”<sup>86</sup>

80. On the one hand, I subscribe wholeheartedly to the first part of the finding in the Judgment for the following main reasons. First, it goes without saying that St. Martin’s Island can be defined as a coastal island well within the meaning of article 121, paragraphs 1 and 2, of the Convention, and that it is entitled to maritime areas of not only a full 12-nm territorial sea but also the EEZ and CS. Such a legal status of St. Martin’s Island is even recognized by Myanmar. Second, St. Martin’s Island, by reason of its size, its large permanent population, its important economic life, its strategic importance and, most importantly, its geographical position only 4.547 nm from Bangladesh’s mainland territory,<sup>87</sup> cannot be disregarded for the purpose of delimitation. Third, as an important part of Bangladesh’s territory, the island occupies such a commanding position in the heart of the delimitation area. According to the customary rule of international law that “the land dominates the sea”, the island should not be deprived of its legitimate seaward projection into the maritime delimitation area.

81. On the other hand, I disagree strongly with the second part of the finding because of its inconclusiveness. In my view, the Judgment turns its attention only to one side of the coin and forgets about the other. If recognizing St. Martin’s Island would result in blocking the seaward projection from Myanmar’s coast, this same argument also holds very true for Bangladesh, that is to say, refusing to recognize the effect of St. Martin’s Island would result in depriving this important coastal island of its legitimate seaward projection. Furthermore,

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<sup>85</sup> Judgment, para. 318.

<sup>86</sup> *Ibid.*, para. 319.

<sup>87</sup> ITLOS/PV.11/3, p. 16.

if it is considered that the coastline of St. Martin's Island was not used for the purpose of computing the relevant coasts of the two Parties, this already constitutes a detriment to Bangladesh's rights and interests. Should St. Martin's Island be further deprived of its effect on the delimitation line, it amounts to adding insult to injury. This is certainly not fair to Bangladesh because it suffers twice. It is therefore concluded that the decision in the Judgment not to give St. Martin's Island any effect for the purpose of the delimitation of the EEZ and the CS is wrong and unacceptable.

82. Of course, it is recognized at the same time that it would be excessive to treat the coastline of St. Martin's Island as a normal one, as a result of its situation entirely off Myanmar's mainland coast. I therefore deem it appropriate to give the island half effect, so that it is not deprived completely of its legitimate seaward projection. The half effect of St. Martin's Island is an equitable approach for both Parties. Bangladesh will be able to enjoy half of the seaward projection of its island's coast; Myanmar will benefit from the other half of the seaward projection off its mainland coast, as blocked by St. Martin's Island.

### III. Natural Prolongation

#### A. Its Interpretation and Entitlement

83. On the issue of entitlement to the continental shelf beyond 200 nm, the two Parties differ. Bangladesh argues that "[n]atural prolongation beyond 200 M is, at root, a physical concept not purely an abstract legal one [and] must be established by both geological and geomorphological evidence".<sup>88</sup> Myanmar disputes Bangladesh's interpretation of natural prolongation by pointing out that the controlling concept is not that of natural prolongation, but that of "outer edge of the continental margin".<sup>89</sup>

84. On the same issue, "the Tribunal is of the view that the reference to natural prolongation in article 76, paragraph 1, of the Convention, should be understood in light of the subsequent provisions of the article defining the continental shelf and the continental margin. Entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4."<sup>90</sup> I sometimes have the impression in reading the Judgment that it has perhaps gone a

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<sup>88</sup> RB, para. 4.37.

<sup>89</sup> RM, A.43.

<sup>90</sup> Judgment, para. 437.

little bit far in its interpretation of the concept of natural prolongation and its treatment of entitlement to the continental shelf beyond 200 nm.

85. My difficulties in following the Judgment and my disagreement with some of the interpretation in it are exemplified in the following paragraphs. In paragraph 432, the Judgment states: “By contrast, no elaboration of the notion of natural prolongation referred to in article 76, paragraph 1, is to be found in the subsequent paragraphs. In this respect, the Tribunal recalls that, while the reference to ‘natural prolongation’ was first introduced as a fundamental notion underpinning the regime of the continental shelf by the ICJ in the *North Sea Continental Shelf* cases, it has never been defined.” By so reasoning, the Judgment has perhaps gone beyond the reasonable. By way of analogy, the concept of “common heritage of mankind” is enshrined in the Preamble of the Convention, but nowhere in the Convention is a clear and precise definition of the concept found. Yet, that does not prevent it from being one of the most important legal principles of the entire Convention as well as the basis for Part XI on the Area.

86. It is also found that the Judgment contradicts itself at certain places. On the one hand, the Judgment states in paragraph 434: “Thus the notion of natural prolongation and that of continental margin under article 76, paragraphs 1 and 4, are closely interrelated. They refer to the same area”. On the other hand, it arrives at a different conclusion in paragraph 429, where it is observed that “[w]hile the term ‘natural prolongation’ is mentioned in this paragraph, it is clear from its language that the notion of ‘the outer edge of the continental margin’ is an essential element in determining the extent of the continental shelf.” These two contradictory pronouncements easily lend themselves to confusion.

87. Furthermore, in paragraph 435 of the Judgment, “[t]he Tribunal . . . finds it difficult to accept that natural prolongation referred to in article 76, paragraph 1, constitutes a separate and independent criterion a coastal State must satisfy in order to be entitled to a continental shelf beyond 200 nm.” And it goes on in paragraph 437 to conclude: “Entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4. To interpret otherwise is warranted neither by the text of article 76 nor by its object and purpose.” Not only are these bold interpretations of the relevant provisions of the Convention inaccurate in my view, but they are also stated more assertively than anything other courts and tribunals have said in previous cases.

88. To my regret, I cannot go as far as the Judgment does with regard to the interpretation of article 76 of the Convention. In my honest view, paragraph 1 of article 76 of the Convention, which is the controlling provision, defines the continental shelf and provides two bases for entitlement: natural prolongation and distance. This view was confirmed by the ICJ in *Libya/Malta*, where the Court observed that “the concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf.”<sup>91</sup> Scholarly opinion has also not failed to echo this interpretation: “Where a continental shelf extends beyond 200 miles the concept of natural prolongation determines the outer limit of a State’s continental shelf.”<sup>92</sup> A former Judge of the Tribunal also holds in explicit terms that

[i]n modern law, there are now two fundamental criteria for entitlement to a continental shelf: distance and ‘natural prolongation’ . . . The criterion of natural prolongation is the same as that which stems from the Truman Proclamation, the Convention of 1958 and the North Sea Cases . . . However, this criterion now comes into play only where there exists a natural prolongation of the land territory of the coastal state into and under the sea beyond the distance of 200 nm as far as the point where the natural prolongation ends at the outer edge of the continental margin and the deep ocean floor begins.<sup>93</sup>

89. According to paragraph 447 of the Judgment, the fundamental aspect of the definition of the continental shelf is found in paragraphs 1 and 4 of article 76 of the Convention; however, in reality, it is found in paragraphs 1 and 3. While paragraph 1, serving as the preamble to this article, lays down the foundation for the continental shelf regime, paragraphs 1 and 3 collectively provide for the central aspects of this regime. And, in these together with other provisions the Convention provides in unequivocal terms that the continental shelf comprises

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<sup>91</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 33, para. 34.

<sup>92</sup> S. Lloyd, “Natural Prolongation: Have the Rumors of its Demise Been Exaggerated?” 3 *Afr. J. Int’l & Comp. L.*, 1991, p. 562; see also B. Kunoy, “A Geometric Variable Scope of Delimitations: the Impact of a Geological and Geomorphological Title to the Outer Continental Shelf”, 11 *Austrian Review of International and European Law* 2006, p. 68.

<sup>93</sup> D. H. Anderson, “Some Recent Developments in the Law Relating to the Continental Shelf”, 6 (2) *Journal of Energy and Natural Resources Law*, 1988, pp. 96-97.

the natural prolongation of the coastal State's land territory to the outer edge of the continental margin where it extends beyond 200 nm, and in all events to 200 nm, save where there are maritime boundaries between opposite or adjacent States. In conclusion, article 76 of the Convention ought to be construed as a whole, not piecemeal.

90. Therefore, by stating that “[e]ntitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin”, the Judgment seems to prescribe that the outer edge of the continental margin by itself constitutes a separate and independent criterion of entitlement to a continental shelf beyond 200 nm. This is certainly not a correct interpretation of article 76 of the Convention; I find it to be difficult to accept.

91. It is my firm view that natural prolongation retains its primacy over all other factors and that legal title to the continental shelf is based solely on geology and geomorphology, at least as far as the continental shelf beyond 200 nm is concerned. The statement to the contrary makes one wonder how the jurisdiction of a coastal State can jump so far, without geological and geomorphological continuity from its land mass, to the outer edge of the continental margin up to even 350 nm.

### **B. Delimitation of the Continental Shelf beyond 200 nm**

92. After this consideration of the issues of natural prolongation and entitlement, there is still one more issue worthy of our attention: the delimitation in the continental shelf beyond 200 nm. The Judgment deals with the boundary delimitation, one by one, in the territorial sea, in the EEZ and the CS. In so doing, the Judgment announces in paragraph 240 that it “will follow the three-stage approach, as developed in the most recent case law on the subject.” Accordingly, the Judgment goes on to pronounce that, beyond the 200 nm limit of Bangladesh, “[f]rom point 11, the single maritime boundary continues as a geodetic line starting at an azimuth of 215° until it reaches the area where the rights of third States may be affected.”<sup>94</sup>

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<sup>94</sup> Judgment, para. 505.

93. Yet, there is still another problem of significance to address. The provisional equidistance line produced by the equidistance method in the EEZ and the CS deflects, by a sizable angle, from its original straight direction in a south-westerly direction when the line reaches approximately the 200-nm limit. This apparent deflection is in favour of Bangladesh and should certainly inform the delimitation line in the CS beyond 200 nm. It is unfortunate that the Judgment does not seem to take the slightest note of this fact. Such a lapse in the Judgment certainly happens at the cost of Bangladesh's sovereign right over its continental shelf beyond 200 nm.

94. According to the three-stage delimitation approach, there should also be a second-stage adjustment and a third-stage test of proportionality to be carried out with respect to the delimitation in the continental shelf beyond 200 nm. But the Judgment refrains from so doing and fails to offer any explanation of its omission. Consequently, nobody knows whether this delimitation line of the continental shelf beyond 200 nm will be able to meet the requirements of the proportionality test, or whether it constitutes an equitable solution.

95. In my view, the delimitation line in the continental shelf beyond 200 nm also requires adjustment for the reasons stated above. By taking into account the deflection angle of the original equidistance line, the delimitation line should deflect at the 200 nm limit, by a degree of the said angle, in a south-westerly direction and continue until it reaches the area where the rights and interests of a third party may be affected.

96. As a result of such an adjustment, there will be a small widening of the delimitation line in the continental shelf beyond 200 nm in favour of Bangladesh. Not only is this adjustment in terms of the opening up of the delimitation line in conformity with some of the previous cases,<sup>95</sup> but more importantly, it constitutes an equitable solution in the present case.

97. Finally, I also wish to point out that the equidistance method and provisional equidistance line have been betrayed twice in the Judgment. The first time is in the delimitation of the EEZ and CS when the adjustment abandoned the provisional equidistance line in favour of the angle-bisector line of the 215° azimuth. The second time is in the delimitation of the continental shelf beyond

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<sup>95</sup> Such as in the *North Sea Continental Shelf cases and the subsequent agreements*; see also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, at p. 75, para. 129.

200 nm when no adjustment at all was made, let alone one taking into account the deflection angle of the provisional equidistance line.

#### IV. Conclusion

98. Before arriving at the final conclusion, I wish to briefly outline the major findings from the preceding discussion as follows:

- 1) The equidistance/relevant circumstances method is not appropriate in the present case because it is unable, by its inherent nature, to take due account of the particular feature of concavity in the Bay of Bengal and, more importantly, it produces the new inequity of the cut-off effect.
- 2) The adjustment applied to the provisional equidistance line is subjective and excessive, and not justified in law and by the facts.
- 3) The treatment of St. Martin's Island is flawed and not fully justified.
- 4) The interpretation of article 76 of the Convention in general and the concept of natural prolongation in particular is neither correct nor accurate.
- 5) The delimitation line of the CS beyond 200 nm does not constitute an equitable solution.
- 6) Most of the delimitation line defined by the Judgment in the EEZ and CS both within and beyond 200 nm is in fact a bisector line produced by the angle-bisector method.
- 7) The adjustment of the provisional line and the decision to use the  $215^\circ$  azimuth in the Judgment prove in turn that the angle-bisector method is the appropriate method for achieving an equitable solution in the present case.
- 8) The Judgment should be honest about, and respect, the fact of the  $215^\circ$  azimuth line as well as the method of its construction.

On the basis of these major findings, I could have easily voted against the Judgment had there been a separate vote on the delimitation method.

99. For these reasons, I have voted in favour of paragraphs (4) and (5) of the Operative Clauses on the delimitation line in the territorial sea and in the EEZ

and CS, respectively; I have voted against paragraph (6) of the Operative Clauses on the delimitation line in the continental shelf beyond 200 nm.

100. In the final conclusion, I wish to make it absolutely clear for the record: what I have voted in favour of in paragraph (5) on the delimitation line in the EEZ and CS is the  $215^\circ$  angle-bisector line, rather than the so-called equidistance line generated by the equidistance/relevance circumstances method.

*(signed)* Zhiguo Gao









