

COUNTER-MEMORIAL OF MYANMAR

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

BANGLADESH / MYANMAR

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TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION	1
I. PROCEDURE	1
II. THE DISPUTE SUBMITTED TO THE TRIBUNAL	3
III. THE EXTENT OF THE JURISDICTION OF THE TRIBUNAL	5
IV. OVERALL ASSESSMENT OF THE RESPECTIVE CLAIMS OF THE PARTIES	9
V. STRUCTURE OF THE COUNTER-MEMORIAL	13

CHAPTER 2

THE FACTUAL BACKGROUND	15
I. THE GEOGRAPHICAL SITUATION.....	15
A. The Geography of Myanmar and its Rakhine Coast.....	16
B. The Geography of Bangladesh and its Coastline	22
II. HISTORICAL BACKGROUND	24
III. MARITIME DELIMITATIONS IN THE REGION	27

CHAPTER 3

THE HISTORY OF THE DISPUTE	35
I. THE PARTIES' MARITIME LEGISLATION.....	35
A. Myanmar	35
B. Bangladesh.....	37
II. THE NEGOTIATIONS BETWEEN BANGLADESH AND MYANMAR REGARDING MARITIME DELIMITATION.....	38
A. The First Eight Rounds (1974-1986).....	39
B. The Resumed Talks 2008-2010	49
CONCLUSIONS	54

CHAPTER 4

DELIMITATION OF THE TERRITORIAL SEA	57
I. APPLICABLE LAW	57
A. Summary of Applicable Law	57
B. Absence of Any “Agreement to the Contrary” or of an Estoppel.....	58
1. <i>Bangladesh’s Claim that the 1974 Agreed Minutes Constitute a Binding Agreement</i>	58
2. <i>Bangladesh’s Claim that the Conduct of the Parties Establishes a Tacit or de facto Agreement</i>	69
3. <i>Bangladesh’s Claim that Myanmar is Estopped from Denying the Existence of an Agreement</i>	71
II. THE DELIMITATION BETWEEN THE TERRITORIAL SEAS OF MYANMAR AND BANGLADESH, AND BETWEEN THE TERRITORIAL SEA OF BANGLADESH AND THE EEZ/CONTINENTAL SHELF OF MYANMAR	73
A. St. Martin’s Island as a Special Circumstance.....	73
B. The Delimitation Line Proposed by Myanmar	78
CONCLUSIONS.....	84

CHAPTER 5

DELIMITATION OF THE CONTINENTAL SHELF AND THE EXCLUSIVE ECONOMIC ZONE	87
I. THE APPLICABLE LAW	89
A. The Sources of the Relevant Rules	89
B. Bangladesh’s Distorted Approach of the Applicable Law	90
C. The Applicable Rules of Delimitation	94
D. The Unity of the Method of Delimitation	102
II. THE RELEVANT COASTS AND THE RELEVANT AREA	103
A. Preliminary Remarks	105
B. Bangladesh’s Relevant Coast.....	107
C. Myanmar’s Relevant Coast.....	111
D. The Relevant Area	114
III. THE THREE STAGES OF THE DELIMITATION PROCESS	121
A. Stage 1 – The Provisional Equidistance Line	121
1. <i>The Provisional Equidistance Line beyond Point E</i>	122
2. <i>The Appropriate Base Points</i>	129

B. Stage 2 – (Ir)relevant Circumstances.....	137
1. <i>The Bangladesh Argument Based on its Alleged “Need for Access to its Entitlement in the Outer Continental Shelf”</i>	138
2. <i>The Bangladesh Argument Based on the Alleged “Cut-Off Effect”</i>	143
a. International Courts and Tribunals cannot Refashion Nature.....	145
b. Concavity Does Not as such Result in an Inequitable Application of Equidistance.....	146
c. There is No Right to “Have Broadly Comparable Rights to Extend its Maritime Jurisdiction as Far Seawards as International Law Permits”.....	152
C. Stage 3 – The Test of Disproportionality.....	155
IV. THE DELIMITATION LINE.....	163
A. The Final Direction of the Boundary Line.....	163
B. Description of the Maritime Boundary between Myanmar and Bangladesh.....	167
SUBMISSIONS	171
APPENDIX	
MYANMAR’S ENTITLEMENT TO A CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES	173
I. BANGLADESH’S ERRONEOUS INTERPRETATION OF ARTICLE 76 OF UNCLOS.....	174
A. The Context.....	174
B. The <i>travaux préparatoires</i> of Article 76 of UNCLOS.....	182
C. The Relevant Practice.....	186
II. MYANMAR’S ENTITLEMENT TO A CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES IN ACCORDANCE WITH ARTICLE 76 OF UNCLOS.....	190
A. The Foot of the Continental Slope Points.....	190
B. The Implementation of the Article 76 (4) (a) Formulae.....	197
Conclusion.....	201
III. THE SUBMISSIONS TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF.....	202
A. The Submission made by Myanmar.....	202
B. The Submissions made by Sri Lanka and India.....	205

CHAPTER 1

INTRODUCTION

1.1. By its Order 2010/1 dated 28 January 2010, the International Tribunal for the Law of the Sea (hereinafter “the Tribunal” or “ITLOS”) fixed the dates for the filing of the Memorial and the Counter-Memorial in the present case. The Union of Myanmar (hereinafter “Myanmar”) submits this Counter-Memorial, pursuant to that Order, in response to the Memorial of the People’s Republic of Bangladesh (hereinafter “Bangladesh”) dated 1 July 2010.

1.2. In accordance with article 62 (2) of the Rules of the Tribunal, Myanmar sets out in this Counter-Memorial the grounds of facts and law on which its case is based. Myanmar also responds to the statement of facts and law made by Bangladesh in its Memorial.

I. Procedure

1.3. On 8 October 2009, Bangladesh addressed to Myanmar a written notification instituting arbitral proceedings under article 1 of Annex VII to the 1982 United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or “the Convention”):

“Pursuant to Articles 286 and 287 of the 1982 *United Nations Convention on the Law of the Sea* (‘UNCLOS’), and in accordance with the requirements of Article 1 of Annex VII thereto, Bangladesh hereby gives written notification to Myanmar that, having failed to reach a settlement after successive negotiations and exchanges of views as contemplated by Part XV of UNCLOS, it has elected to submit the dispute concerning the delimitation of its maritime boundary with Myanmar in the Bay of Bengal to the arbitral procedure provided for in Annex VII of UNCLOS.”¹

1.4. In a Note Verbale dated 27 October 2009, Myanmar expressed its surprise at this notification, which had been made without prior notice to Myanmar². Nevertheless, on

¹ This notification of arbitration was addressed to Myanmar in a Note Verbale from the Bangladesh Ministry of Foreign Affairs also dated 8 October 2009.

² Note Verbale No. 44 01 2/7 (432) from the Ministry of Foreign Affairs of Myanmar to the Embassy of Bangladesh, 27 October 2009 (Annex 19).

4 November 2009, Myanmar made a declaration under article 287 of UNCLOS in which it declared that it “accepts the jurisdiction of ITLOS for the settlement of dispute between the Union of Myanmar and the People’s Republic of Bangladesh relating to the delimitation of maritime boundary between the two countries in the Bay of Bengal”³. And, in a Note Verbale of 5 November 2009, Myanmar notified Bangladesh under article 287 of UNCLOS that it had elected to submit the dispute to the Tribunal⁴. Finally, in a Note Verbale dated 12 December 2009, Bangladesh accepted Myanmar’s proposal to submit the dispute to the Tribunal⁵. Bangladesh confirmed its acceptance of the jurisdiction of the Tribunal in a Declaration made the same day⁶. Then it formally seized the Tribunal of the present dispute⁷.

1.5. On 25 and 26 January 2010, consultations were held between the President of the Tribunal and the Parties. In the Minutes of the consultations signed by both Parties, it was noted that “the parties concur that 14 December 2009 is to be considered the date of institution of proceedings before the Tribunal” and that “Myanmar acquiesced to Bangladesh’s decision to discontinue the arbitral proceedings which Bangladesh has instituted concerning the same dispute ... by its notification and statement of claim dated 8 October 2009”⁸.

1.6. By Order 2010/1 of 28 January 2010, the President of the Tribunal fixed the time-limits for the filing of the Memorial by Bangladesh and the Counter-Memorial by Myanmar; and, by Order 2010/2 of 17 March 2010, the Tribunal fixed the time-limits for the filing of the Reply and the Rejoinder.

³ Memorial of Bangladesh (BM), Vol. III, Annex 22.

⁴ Note Verbale No. 44 01 2/7 (459) from the Ministry of Foreign Affairs of Myanmar to the Embassy of Bangladesh, 5 November 2009, p. 1 (Annex 20).

⁵ Note Verbale No. MOFA/UNCLOS/320/2 from the Ministry of Foreign Affairs of Bangladesh to the Embassy of Myanmar, 12 December 2009 (Annex 21).

⁶ BM, Vol. III, Annex 23.

⁷ Letter from the Minister for Foreign Affairs of Bangladesh to the President of the ITLOS, 13 December 2009 (Annex 22); and see Note Verbale No. AE/2009/CASE16/1 from the Registrar of the ITLOS to the Minister of Foreign Affairs of Myanmar, 14 December 2009.

⁸ Minutes of the President’s Consultation with the Representatives of the Parties in the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, 26 January 2010, p. 2 (Annex 24).

1.7. It thus appears that, in spite of some initial hesitations from both Parties as to the appropriate forum for the settlement of the dispute, the case is treated as having been brought before the Tribunal by means of a special agreement between Myanmar and Bangladesh under article 55 of the Rules of the Tribunal, which agreement is reflected in their respective declarations dated 4 November 2009 and 12 December 2009.

II. The Dispute Submitted to the Tribunal

1.8. In its notification of arbitration of 8 October 2009, Bangladesh defined the scope of the dispute as follows:

“The dispute concerns the delimitation of the maritime boundary of Bangladesh with Myanmar in the Bay of Bengal, and unlawful exploratory drilling and other activities by Myanmar’s licensees in maritime areas claimed by Bangladesh.”⁹

Bangladesh based its claims on “the provisions of UNCLOS as applied to the relevant facts, including but not limited to UNCLOS Articles 15, 74, 76 and 83”¹⁰ and “its Territorial Waters and Maritime Zones Act, 1974, and the subsequent Notification No. LT - 1/3/74 of the Ministry of Foreign Affairs of 13 April 1974”¹¹.

1.9. In their respective declarations accepting the jurisdiction of the Tribunal for the settlement of the dispute of 4 November and 12 December 2009, the two Parties stated:

“In accordance with Article 287, paragraph 1 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Government of the Union of Myanmar hereby declares that it accepts the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of dispute between the Union of Myanmar and the People’s Republic of Bangladesh relating to the delimitation of maritime boundary between the two countries in the Bay of Bengal.”¹²

⁹ Notification under Article 287 and Annex VII, Article 1 of UNCLOS and the Statement of the Claim and Grounds on which it is Based in the Dispute Concerning the Maritime Boundary between Bangladesh and Myanmar, submitted by the Foreign Minister of Bangladesh, 8 October 2009, p. 2, para. 3 (Attachment to Annex 22).

¹⁰ *Ibid.*, p. 5, para. 21.

¹¹ *Ibid.*, para. 22.

¹² BM, Vol. III, Annex 22.

“Pursuant to Article 287, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, the Government of the People’s Republic of Bangladesh declares that it accepts the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of the dispute between the People’s Republic of Bangladesh and the Union of Myanmar relating to the delimitation of their maritime boundary in the Bay of Bengal.”¹³

Therefore, the dispute brought before the Tribunal concerns the delimitation of the territorial sea, the continental shelf and the exclusive economic zones of Myanmar and Bangladesh in the Bay of Bengal.

1.10. In its Statement of Claim, Bangladesh also requested the Tribunal to order Myanmar to pay compensation for alleged violations of its obligations under UNCLOS¹⁴. However, Bangladesh has expressly withdrawn its claim for responsibility as set out in its Statement of Claim:

“In the interest of good neighbourliness, and in the spirit of cooperation that has characterized these proceedings thus far, Bangladesh hereby withdraws the claims put forward in paragraph 26 of its Statement of Claim.”¹⁵

And it adds:

“Since the dispute *is exclusively concerned with delimitation of the boundary between the two States* in the territorial sea, exclusive economic zone and continental shelf, it falls squarely within the Articles 15, 74, 76 and 83 of the 1982 Convention and the jurisdiction of ITLOS.”¹⁶

Myanmar takes due note of this withdrawal and, relying upon it, will not discuss these matters in the present Counter-Memorial.

¹³ BM, Vol. III, Annex 23.

¹⁴ Bangladesh’s claim for responsibility reads as follows: “Bangladesh also requests the Tribunal to declare that by authorizing its licensees to engage in drilling and other exploratory activities in maritime areas claimed by Bangladesh without prior notice and consent, Myanmar has violated its obligations to make every effort to reach a provisional arrangement pending delimitation of the maritime boundary as required by UNCLOS Articles 74(3) and 83(3), and further requests the Tribunal to order Myanmar to pay compensation to Bangladesh as appropriate.” (Government of Bangladesh, Statement of Claim and Notification under UNCLOS Article 287 and Annex VII, Article 1, 8 October 2009).

¹⁵ BM, para. 4.19.

¹⁶ *Ibid.*, para. 4.20 (emphasis added).

1.11. It may also be appropriate to indicate by contrast what the case does not concern. This case is, in particular, not about:

- (i) oil exploration and exploitation activities in the disputed maritime areas;
- (ii) any other activities in the disputed maritime areas;
- (iii) the responsibility of the Parties as a consequence of the above-mentioned activities¹⁷.

III. The Extent of the Jurisdiction of the Tribunal

1.12. However, it must be further specified that in the present case, and contrary to what Bangladesh asserts, the Tribunal cannot exercise jurisdiction to delimit hypothetical areas of continental shelf beyond 200 nautical miles from the baselines from which the territorial sea is measured.

1.13. In its Memorial, Bangladesh claims that “Delimitation of the entire continental shelf is covered by Article 83, and ITLOS plainly has jurisdiction to carry out a delimitation beyond 200M”¹⁸. It argues that this jurisdictional claim is supported by the fact that “ITLOS is expressly empowered by UNCLOS to adjudicate disputes between States arising under Article 76 and 83, in regard to delimitation of the continental shelf”, and that UNCLOS “draws no distinction in this regard between jurisdiction over the inner portion of the continental shelf, within 200M and the outer portion of the continental shelf beyond that distance”¹⁹.

1.14. Myanmar does not dispute that, as a matter of principle, the delimitation of the continental shelf, including the shelf beyond 200 nautical miles, could fall within the jurisdiction of the Tribunal. However, Myanmar submits that, in the present case, the

¹⁷ However, Myanmar reserves its right to make a counter-claim in the unlikely event that the Tribunal would accept that it is competent to decide on Bangladesh’s inappropriate allegations as to Myanmar’s responsibility.

¹⁸ BM, para. 4.23.

¹⁹ *Ibid.*

Tribunal does not have jurisdiction with regard to the continental shelf beyond 200 nautical miles.

1.15. To begin, the question does not arise. As it will be shown in Chapter 5 of this Counter-Memorial²⁰, the delimitation line terminates well before reaching the 200-nautical-mile limit from the baselines from which the territorial sea is measured. The Arbitral Tribunal in the *Barbados/Trinidad and Tobago* case stated that “the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nautical miles”²¹. Exactly the same is true in the present case. In these circumstances, the question of the delimitation of the continental shelf beyond 200 nautical miles is moot and need not to be considered further by the Tribunal.

1.16. Even if the Tribunal were to decide that there could be a single maritime boundary beyond 200 nautical miles (*quod non*), the Tribunal would still not have jurisdiction to determine this line because any judicial pronouncement on these issues might prejudice the rights of third parties²² and also those relating to the international seabed area (the area beyond the limits of national jurisdiction)²³.

1.17. In addition, the determination of the entitlements of both States to a continental shelf beyond 200 nautical miles and their respective extent is a prerequisite for any delimitation, and the Commission on the Limits of the Continental Shelf (CLCS) plays a crucial role in this regard. As long as the outer limit of the continental shelf has not been established on the basis of the recommendations of the CLCS, the Tribunal, as a court of law, cannot determine the line of delimitation on a hypothetical basis without knowing what the outer limits are²⁴. Only the determination of the outer limit in accordance to the relevant provisions of article 76,

²⁰ See paras. 5.155-5.162 below.

²¹ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, United Nations, *Reports of International Arbitral Awards (UNRIAA)*, Vol. XXVII, p. 242, para. 368.

²² See paras. 5.155-5.162 below.

²³ See articles 136 and 137 (1) of UNCLOS.

²⁴ *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34.

including the filing of a submission to the CLCS and the determination of the outer limit “on the basis of” the CLCS’ recommendations, can remove this uncertainty²⁵.

1.18. It can be noted in this spirit that the Arbitral Tribunal established to decide the dispute concerning the *Delimitation of maritime areas between Canada and France* (Saint-Pierre-et-Miquelon) rightly relied on the fact that any decision concerning the delimitation of the continental shelf beyond 200 nautical miles between France and Canada would be based on hypothetical entitlements only, and did not, as Bangladesh wrongly asserts²⁶, misapprehend the role of the CLCS still to be set up. It considered:

“The disagreement between the Parties concerning the factual situation, namely, whether at the relevant location the geological and geomorphological data make Article 76 (4) applicable or not, was not elucidated during the oral proceedings. This deficiency strengthens the Court’s decision to abstain from pronouncing on the substance of the matter. It is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist. The French Memorial rightly states in a different context that ‘*il est sûr que le Tribunal ne peut tabler sur des actes futurs au contenu et à la date inconnus de lui*’ (M.F. para. 47).”²⁷

1.19. In the present case, the Commission has made no recommendation concerning the establishment of the outer limits of Bangladesh’s alleged continental shelf, nor that of Myanmar.

1.20. Myanmar has submitted the outer limit of the continental shelf extending beyond 200 nautical miles to the appreciation of the CLCS, but no action has yet been taken by the Commission²⁸. As of now, Bangladesh has not submitted the particulars for the determination

²⁵ See International Law Association, Berlin Conference (2004), *Report on the Legal Issues of the Outer Continental Shelf*, point 6.1 (available at <http://www.ila-hq.org/download.cfm/docid/B5A51216-8125-4A4B-ABA5D2CAD1CF4E98>).

²⁶ BM, para. 4.31.

²⁷ *Delimitation of Maritime Areas between Canada and France (St.-Pierre-et-Miquelon)*, Decision of 10 June 1992, *International Legal Materials (ILM)*, Vol. 31, 1992, p. 1172, para. 81 (see also *UNRIAA*, Vol. XXI, p. 293).

²⁸ See Appendix, paras. A.44-A.47.

of the outer limit of its claim to a continental shelf beyond 200 nautical miles²⁹ and is not required to do so before the end of the written proceedings in this case.

1.21. It is true that the CLCS is not competent to deal with matters of delimitation of the continental shelf between States. As provided for in article 76 (10) of UNCLOS, the provisions of article 76 “are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts”. Article 9 of UNCLOS Annex II confirms that “the actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts”.

1.22. However, contrary to Bangladesh’s assertions³⁰, the establishment of the limits of the continental shelf on the basis of the Commission’s recommendations is a pre-requisite to any decision on maritime delimitation between States. It is precisely *because* the CLCS had not yet made such recommendations that the International Court of Justice (ICJ) expressly refused to delimit the continental shelf beyond 200 nautical miles between Nicaragua and Honduras:

“It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.”³¹

1.23. It is therefore not open to Bangladesh to request the Tribunal to delimit the continental shelf beyond 200 nautical miles before the CLCS has made recommendations concerning both Parties’ entitlements to the part of the continental shelf on which they have claims and limits have been established on the basis thereof. To that end, Bangladesh must have *previously* submitted information to the CLCS in accordance with article 76 (8) of UNCLOS and then established the outer limits of its claimed continental shelf on the basis of the recommendations of the CLCS. In a Note Verbale dated 23 July 2009 to the United

²⁹ See Appendix, para. A.43.

³⁰ See, in particular, BM, para. 4.28.

³¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 759, para. 319.

Nations Secretary-General, Bangladesh accepts that a final delimitation can only be determined once the CLCS has considered Myanmar's and Bangladesh's submissions, by recognizing that it "will make every effort to reach a practical arrangement with Myanmar that will allow the Commission, in accordance with paragraph 5 (a) of Annex I to its Rules of Procedure, to consider both the submission of Myanmar and the submission that Bangladesh will make by July 2011". Bangladesh expressly relied on the possibility offered under article 83 (3) of UNCLOS to "enter into *provisional* arrangements of a practical nature [which] shall be without prejudice to the *final* delimitation"³².

1.24. In any case, Myanmar reiterates that Bangladesh has no continental shelf beyond 200 nautical miles. As provided for in article 76 (2) of UNCLOS: "The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6." Consequently, any entitlement to a continental shelf beyond 200 nautical miles is limited to those States whose continental margins satisfy the geomorphological and geological conditions determined by article 76 (4) to (6) of UNCLOS.

IV. Overall Assessment of the Respective Claims of the Parties

1.25. There are but few points of agreement between the Parties. However:

- subject to the points in paragraphs 1.12 to 1.24 above, the Parties are in agreement that the Tribunal has jurisdiction to delimit the maritime boundary between Myanmar and Bangladesh;
- they also agree in asking the Tribunal to draw a single maritime boundary for the seabed and the superjacent waters – that is for the continental shelf and the exclusive economic zones³³;
- moreover, it is to be noted that Bangladesh pays lip service to the now fundamental rule of delimitation according to which "the standard approach is now to begin by

³² Note Verbale from the Permanent Mission of the People's Republic of Bangladesh to the United Nations Secretary-General, 23 July 2009 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/clcs16_2008_mmr_bgd_e.pdf), BM, Vol. III, Annex 21 (emphasis added).

³³ See BM, para. 6.17.

provisionally drawing an equidistance line and then to consider whether there are ‘special’ or ‘relevant’ circumstances which require an adjustment to – or abandonment of – that line” and it recognizes that “[v]irtually all of the most recent cases, whether before the ICJ or international arbitral tribunals, have adopted this approach” which applies to the territorial sea and also to the continental shelf and the exclusive economic zone³⁴.

1.26. Unfortunately, Bangladesh relies on a completely different approach which consists of undermining by all conceivable means its reluctant acknowledgment of the normal and generally accepted method used for delimiting maritime spaces between adjacent or opposing States. It does so by:

- arbitrarily substituting for the usual “equitable principles/relevant circumstances rule” an “angle-bisector method”;
- emphasizing so-called “relevant circumstances”, the relevance of which is questionable to say the least; and
- alleging, without any plausible ground, that the usual rule does not apply beyond 200 nautical miles from the baselines³⁵.

1.27. For Bangladesh time seems to have stopped in 1969 when the International Court of Justice decided the *North Sea Continental Shelf* cases – that is at a time when it had become obvious that the rules in the 1958 Geneva Convention on the Continental Shelf were no longer appropriate for the new political, technical and economic situation, but no new rules had yet clearly emerged. While the general principle according to which the delimitation of the continental shelf or the exclusive economic zones between States with opposite or adjacent coasts “shall be effected by agreement ... in order to achieve an equitable solution” was embodied in UNCLOS, it soon became clear that more precise rules were necessary in order to ensure the predictability of the solutions to be achieved in respect to maritime delimitation. As noted by the most learned authors, “*le droit de la délimitation des espaces maritimes, tel que fixé par la Cour a connu au cours des quarante dernières années de telles*

³⁴ *Ibid.*, para. 6.18.

³⁵ See however *ibid.*, para. 7.3.

évolutions qu'il est bien difficile de ne pas y voir un revirement de jurisprudence"³⁶. And the former President of the International Court of Justice adds:

“Le droit apparaissait de plus en plus incertain, voire arbitraire.

La Cour en a pris conscience et par touches successives revint sur la jurisprudence [which had started in 1969]. Puis dans l'affaire opposant le Danemark et la Norvège en ce qui concerne la délimitation maritime entre le Groenland et Jan Mayen, elle unifia le droit des délimitations maritimes, qu'il s'agisse du plateau continental, de la mer territoriale ou de la zone économique exclusive en jugeant que dans tous ces cas il convenait de tracer la ligne d'équidistance, puis de la corriger pour tenir compte des facteurs pertinents liés pour l'essentiel au dessin des côtes. Enfin, elle généralisa cette solution en 2001 dans l'affaire Bahreïn/Qatar et la reprit en 2009 dans l'affaire Roumanie/Ukraine.

La solution retenue en 1969 était ainsi condamnée et le droit des délimitations maritimes était unifié et précisé.”³⁷

As the Arbitral Tribunal put it in the case between *Barbados and Trinidad and Tobago*:

“In a matter that has so significantly evolved over the last 60 years, customary law also has a particular role that, together with

³⁶ G. Guillaume, “Le précédent dans la justice et l'arbitrage international”, *Journal du droit international (JDI)*, Vol. 137, 2010, p. 691, para. 30 (“The law of the delimitation of maritime spaces, as fixed by the Court, has undergone over the last forty years such evolutions that it is very difficult not to see in it a complete change of direction in the case law” (Myanmar’s translation)). H. Thirlway also underscored that “the most important element in maritime delimitation has unquestionably come to be the equidistance line”, such a process, “which had already begun when the previous articles in this series were published, constitut[ing] a *revirement de jurisprudence*” in relation to the *North Sea Continental Shelf* cases, in “The Law and Procedure of the I.C.J. (1960-1989)”, Supplement 2007, *British Year Book of International Law (BYBIL)*, Vol. LXXVII, 2007, p. 106. See also D. Anderson, “Developments in Maritime Boundary Law and Practice”, in D.A. Colson and R.W. Smith (eds.), *International Maritime Boundaries*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 2005, Vol. V, pp. 3197-3222, *passim*.

³⁷ G. Guillaume, “Le précédent dans la justice et l'arbitrage international”, *JDI*, Vol. 137, 2010, pp. 691-692, paras. 32-34 (“The law appeared more and more uncertain, not to say arbitrary. The Court has become conscious of this, and by successive adjustments rethought its case law [which had started in 1969]. Then in the case between Denmark and Norway concerning the maritime delimitation between Greenland and Jan Mayen, it unified the law of maritime delimitation, whether it was a question of the continental shelf, of the territorial sea or the exclusive economic zone judging that in all these cases it was appropriate to trace the equidistance line, then to correct it in order to take into account relevant circumstances linked essentially to the line of the coast. Finally, it generalized this solution in 2001 in the *Bahrain/Qatar* case and repeated it in 2009 in the *Romania/Ukraine* case. The solution retained in 1969 was thus condemned and the law of maritime delimitation was unified and clarified.” (Myanmar’s translation)).

judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation.”³⁸

1.28. It is therefore impossible to limit consideration to the very general and imprecise principle embodied in articles 74 and 83 of UNCLOS, which must be completed and interpreted in light of the now well stabilized jurisprudence of the ICJ and arbitral tribunals. And there can be no doubt that the Tribunal should take care not to depart from the modern rules clearly established in the recent case law. As explained by the successive Presidents of the Tribunal, “the Tribunal ... has not hesitated in referring in its decisions, whenever appropriate, to the precedents set by the ICJ. By so doing, the Tribunal has helped strengthening the development of a coherent corpus of jurisprudence. This demonstrates a constructive approach in securing and maintaining consistency in international law and international judicial decisions.”³⁹

1.29. For its part, Myanmar’s case is straightforward. It consists in applying the standard “equidistance/relevant (special) circumstances” method, that is in drawing a strict equidistance line, taking into account the only special circumstance present in this case, the presence of St. Martin’s Island – an island belonging to Bangladesh – lying off the coast of Myanmar, before, finally checking the equity of the line thus obtained.

1.30. Besides this fundamental difference of approach, the Parties have important points of disagreement relating, among other things, to:

- the alleged existence of an “agreement” concerning the delimitation of their territorial sea, which Myanmar firmly denies;
- the possibility for the Tribunal to draw the maritime boundary beyond the point where it reaches the area where the rights of a third State (India in the present case) may be affected; and

³⁸ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, pp. 210-211, para. 223.

³⁹ Statement by Judge Jose Luis Jesus, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 27 October 2009, p. 11 (available on http://www.itlos.org/news/statements/news_president_en.shtml); see also the statements by Judge Rüdiger Wolfrum, 29 October 2007 and by Judge Jose Luis Jesus, 25 October 2010, to the same audience (also available on http://www.itlos.org/news/statements/news_president_en.shtml).

- their respective entitlements to any part of the continental shelf beyond 200 nautical miles from the coast.

V. Structure of the Counter-Memorial

- 1.31. Following this Introduction, this Counter-Memorial is divided in four other Chapters.
- 1.32. In **Chapter 2**, Myanmar introduces the factual background of the dispute by briefly and successively discussing the geographical situation, the historical background, and the various maritime delimitations in the region.
- 1.33. **Chapter 3** explains the history of the dispute. It starts with a short presentation of the Parties' maritime legislation. Then, it describes in some detail the negotiations between Bangladesh and Myanmar regarding maritime delimitation.
- 1.34. Since no agreed delimitation resulted from those negotiations, **Chapter 4** is devoted to the delimitation of the territorial sea to be made by the Tribunal. In the first Section, it deals with the applicable law, which it applies in a second Section to the delimitation line in the vicinity of St. Martin's Island.
- 1.35. Finally, **Chapter 5** is devoted to the delimitation of the continental shelf and of the exclusive economic zones. It is divided in four Sections. Since Bangladesh grossly misrepresents the applicable law in the present case, Section I revisits the issue of applicable law. Section II introduces the respective relevant coasts of the Parties and, consequently the relevant area for the delimitation of the single maritime boundary requested from the Tribunal. On these bases, Section III offers a description of the drawing of this line by following the usual three-stages delimitation process as required by the equidistance/relevant circumstances method (drawing a provisional equidistance line after determining the appropriate base points; checking whether this line must be adjusted if relevant circumstances so require; then applying the disproportionality test). Finally, Section IV describes the delimitation line thus obtained after an indication on its terminal orientation.

1.36. Since there is no doubt that Bangladesh has no continental shelf beyond 200 nautical miles from its coasts (and since in any case, as explained above⁴⁰, the Tribunal could not exercise its jurisdiction on that issue in the present circumstances), Myanmar has not included within this Counter-Memorial any Chapter answering Bangladesh's Memorial, Chapter 7 on the "Delimitation of the continental shelf beyond 200 nautical miles". However, for the sake of completeness, it shows in an **Appendix** that Bangladesh misinterprets article 76 of UNCLOS and that Myanmar is entitled to a continental shelf beyond 200 nautical miles.

⁴⁰ See paras. 1.12-1.24 above.

CHAPTER 2

THE FACTUAL BACKGROUND

I. The Geographical Situation

2.1. The Bay of Bengal is the north-eastern arm of the Indian Ocean. It extends from latitude 5° N to 22° N and from longitude 80° E to 100° E and occupies a surface of approximately 22 million square kilometres. It is bounded in the southwest by Sri Lanka, in the west and northwest by the Indian coast, in the north by the coast of Bangladesh, in the east by a small part of Bangladesh's coast and Myanmar's coast (Rakhine (Arakan) coast), and in the southeast by the Preparis and Coco Islands (Myanmar) and the Andaman Islands (India); to the south, the Bay is open to the Indian Ocean (see sketch-map No. 2.1 at page 17).

2.2. For the purpose of the present case, it is especially Bangladesh's coast in the north and in the northeast of the Bay of Bengal (B), on the one hand, and Myanmar's Rakhine (Arakan) coast in the east of the Bay of Bengal (A), on the other hand, which are particularly controlling.

2.3. It must however be noted in the outset that, contrary to Bangladesh's presentation of the Bay of Bengal region⁴¹, it is not only the Applicant's coast in the north of the Bay which is concave in character. The entire western and northern part of the Bay is marked by an important concavity (see sketch-map No. 2.2 at page 19). In the west, India's coast is concave: it starts in the south near Point Calimere and continues in a south-north direction up to the delta of the Krishna River; it then turns and continues in a southwest-northeast direction and finally ends in a west-east direction joining the Bengal delta. The concave character of the Indian coast is further marked by the island of Sri Lanka in the southern part of the Bay of Bengal. Myanmar's coast is also concave. It does not extend in a "relatively straight northwest-to-southeast"⁴², as claimed by Bangladesh. Myanmar's coast on the Bay of Bengal changes markedly direction from northwest-southeast in the north to northeast-southwest in the south up to Preparis and Coco Islands. It is only to the south of

⁴¹ BM, para. 2.7.

⁴² *Ibid.*

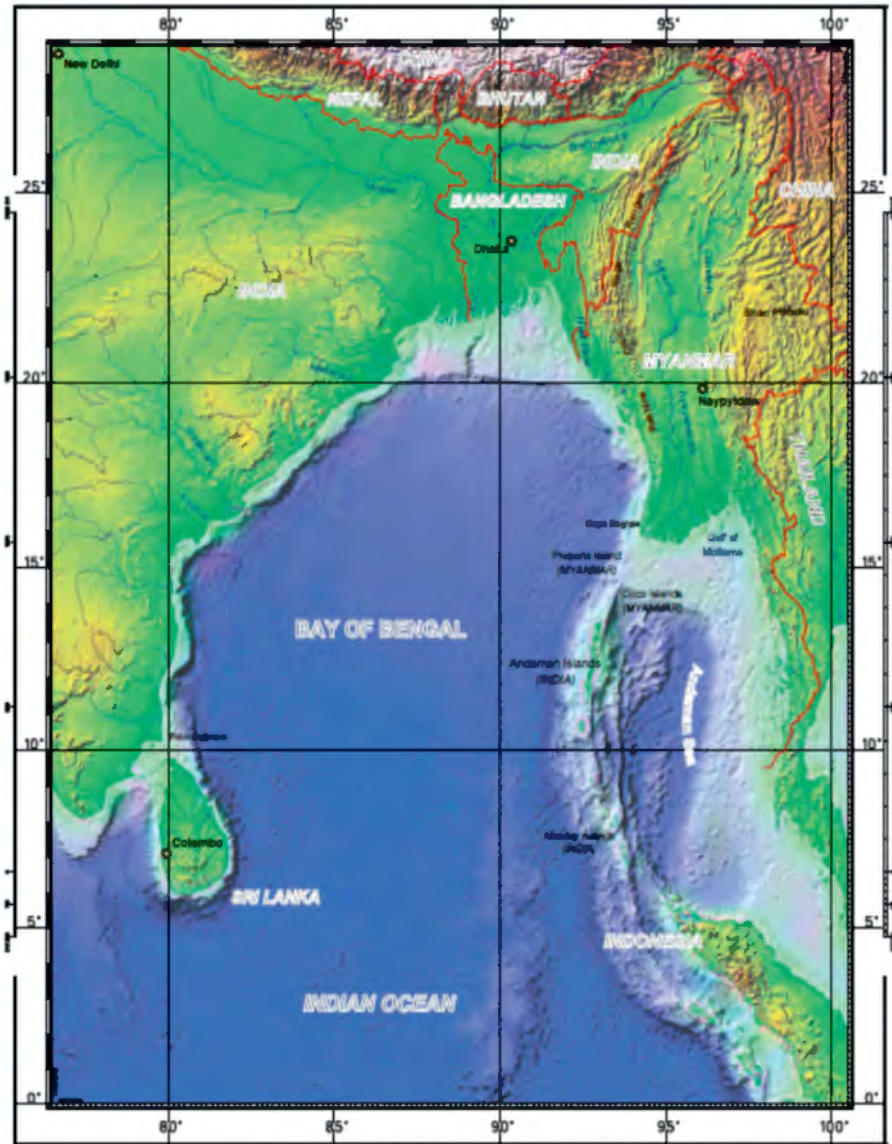
these islands that the Bay of Bengal becomes more convex and extends along the Andaman and Nicobar Islands along the Sunda subduction trench.

A. The Geography of Myanmar and its Rakhine Coast

2.4. With an overall area of 678,000 square kilometres, Myanmar is the largest country in mainland Southeast Asia. It is approximately 2,400 kilometres in length (north-south direction) and extends up to 925 kilometres from east to west. It has a shared boarder with Bangladesh, India, China, Laos and Thailand. In the southeast and south it is limited by the Bay of Bengal and the Andaman Sea.

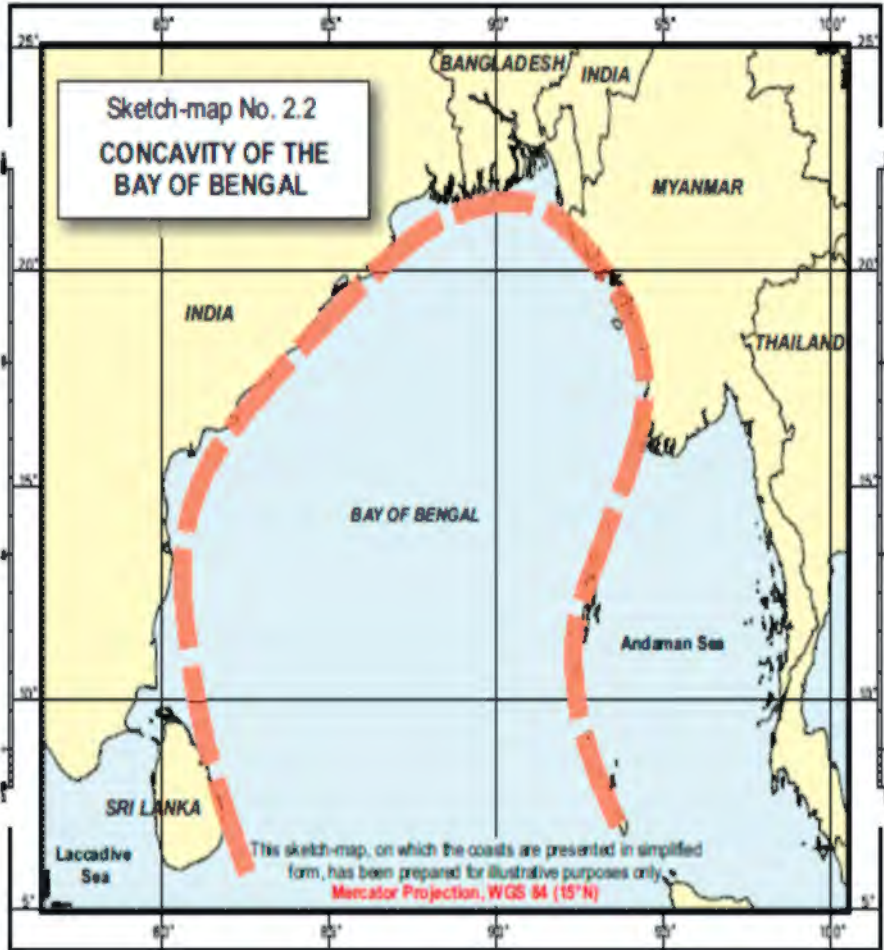
2.5. Myanmar's mainland can be divided into four distinct geomorphological provinces extending mainly in a north-south direction:

- The Eastern Highlands, which are part of the Indo-Malayan mountain system. They are composed of the East Kachin Ranges, the Shan Plateau and Tanintharyi Ranges. The average elevation of the Highlands is between 750 and 1,500 metres.
- The Central Lowlands, which stretch from the Himalaya region in the north to the Andaman Sea in the south; they are dominated by the Ayeyarwaddy River, Chindwin River and Sittaung River valleys. Most of Myanmar's agricultural land and population are concentrated in this region.
- The Western Ranges or Rakhine-Chin-Naga Ranges (also known as Indo-Burman Ranges), formed by the accretionary prism along the subduction zone of the India tectonic plate and the Burma plate. They extend from Myanmar's northern border with India to the south and continue submerged along the subduction zone emerging from time to time forming, *inter alia*, Preparis and Coco Islands. The highest point is Mount Victoria at 3,094 metres.
- The Rakhine (Arakan) coast, which constitutes a narrow coastal belt between the Western Ranges and the Bay of Bengal.



This sketch-map, on which the coasts are presented in simplified form, has been prepared for illustrative purposes only.
Mercator Projection, WGS 84 (14°21'N)

Sketch-map 2.1
THE BAY OF BENGAL



2.6. Myanmar has an extensive coast approximately 2,400 kilometres in length⁴³. From north to south, it may be divided into three coastal regions:

- The Rakhine (Arakan) coast (740 kilometres) extending from the Naaf River to Cape Negrais along the Bay of Bengal.
- The Ayeyarwaddy and Gulf of Mottama (Gulf of Martaban) coast (560 kilometres) in the north of the Andaman Sea.
- The Tanintharyi coast (1,100 kilometres) bordering the Andaman Sea to the east.

2.7. The relevant coast for the purposes of the present delimitation is the first coastal region, i.e., the Rakhine (Arakan) coast, starting at the land boundary between Bangladesh and Myanmar in the mouth of the Naaf River and extending to Cape Negrais.

2.8. The Rakhine (Arakan) coast and the prolongation of the Western Ranges to the south, i.e., Preparis and Coco Islands, do not, as Bangladesh argues in its Memorial, extend in a “relatively straight northwest-to-southeast direction”⁴⁴. Rather, the coast is concave in character. From its starting-point at the mouth of the Naaf River it begins in a northwest-southeast direction and curves gradually in a clockwise direction. Near Gwa Bay, Myanmar’s coast extends clearly in a north-south direction and further to the south in a northeast-southwest direction up to Cape Negrais. The change is even more marked when one takes into account Preparis and Coco Islands, which are located in the southwest of Cape Negrais. There is no reason to exclude the southern part of the Rakhine (Arakan) coast because this part of the coast is allegedly not in the same general direction as the northern part, as Bangladesh suggests⁴⁵. It is an integral and inseparable part of Myanmar’s coast and has to be taken into account in the delimitation process⁴⁶.

⁴³ The coastal lengths have been measured as the sum of the linking lines representing the coastline by a finite set of discrete points. Coastlines alongside the waters lying behind gulfs or deep inlets have not been included for this purpose.

⁴⁴ BM, para. 2.7.

⁴⁵ *Ibid.*, para. 6.69.

⁴⁶ See paras. 5.67-5.69 below.

2.9. Myanmar's Rakhine (Arakan) coast is a rocky coast, with several islands, islets and rocks lying in a generally north-south axis. Some of the important islands are Yanbye Island (Ramree Island), Manaung Island (Cheduba Island), and May Yu Island (Oyster Island). In some places, long sandy beaches and muddy marsh and river-mouths occur. In the northern part, especially in the east and northeast of Yanbye Island (Ramree Island), the low land and mangrove forests adjacent to the mainland's coast are submerged and form wetlands. The coastal belt is covered with mangrove forests and cultivation.

2.10. Within the Rakhine (Arakan) coastal belt there are several rivers originating in the Rakhine-Chin-Naga Ranges and flowing into the Bay of Bengal. Major rivers are Kaladan (Kispanadi), May Yu, Lay Myo (Lemro) and Naaf. The capital of Rakhine State, Sittwe, the most important port on the Rakhine (Arakan) coast, is situated on the estuary of the Kaladan (Kispanadi) River.

B. The Geography of Bangladesh and its Coastline

2.11. Bangladesh covers an area of approximately 144,000 square kilometres and is situated at the northern edge of the Bay of Bengal, on the estuary of the Ganges and Brahmaputra Rivers. It extends 820 kilometres from north to south and 600 kilometres from east to west. It is almost entirely bordered by India, except for a relatively short boundary with Myanmar in the south-east along the Naaf River.

2.12. Most of Bangladesh's mainland is part of the Bengal delta, which has greatly influenced the special geography of the country. The Bengal delta was formed over the centuries, mainly, but not exclusively, by the accumulation of sediments carried by the Ganges and Brahmaputra Rivers and its predecessors from the Himalaya region. The Ganges and Brahmaputra, together with the Meghna, have created the largest fluvial delta in the world. Most of Bangladesh's landmass is formed by sediments deposited by this depositional system onto the oceanic crust of the Indian plate, i.e., beyond the shelf edge of the landmass of this tectonic plate⁴⁷. Active deposition of thick piles of sediments and the resulting

⁴⁷ J.R. Curran, "The Bengal Depositional System: The Bengal Basin and the Bay of Bengal", 23 June 2010, p. 4, BM, Vol. IV, Annex 37. See also BM, p. 22, paras. 2.30-2.31.

progradation have formed, and are still forming, in the most eastern part of the delta, a very shallow plain hardly reaching more than ten metres above sea level.

2.13. The most eastern part of Bangladesh, situated between the Meghna River and the Myanmar-Bangladesh land boundary, is quite different in character. It is the only hilly area of Bangladesh, dominated by the Chittagong Hills. The Chittagong Hills constitute, in effect, the western fringe of the Rakhine-Chin-Naga Ranges in Myanmar and have the same geological origin. They rise steeply, with altitudes from 600 to 900 metres above sea level.

2.14. Bangladesh's coast on the Bay of Bengal is approximately 520 kilometres in length. Its coast is concave, like the entire northern part of the Bay of Bengal⁴⁸.

2.15. Bangladesh's coast starts at the land boundary with India and continues in an easterly direction to the mouth of the Meghna River. This part of the coast is typically deltaic. It is marked by the existence of a vast network of rivers, deep indentations and a great number of islands and low-tide elevations immediately off-shore.

2.16. Further to the east, Bangladesh's coast is fashioned by a deep indentation to the north, the mouth of the Meghna River. The mouth has a maximum extension of 85 kilometres from east to west.

2.17. The most eastern part of Bangladesh's coastline, which starts slightly north of the city of Cox's Bazar, near Kutubdia Island, and extends to the mouth of the Naaf River, is oriented in a northwest-southeast direction. This part of the coast is not influenced by the Bengal delta; it is, rather, similar to Myanmar's Rakhine (Arakan) coast. The coast is relatively straight with several coastal islands in particular near the city of Cox's Bazar.

2.18. Bangladesh's St. Martin's Island is a small island situated 6.5 nautical miles southwest of the land boundary terminus in the Naaf River and approximately 5 nautical miles southwest of Bangladesh's southernmost mainland coast. It lies off Myanmar's Rakhine (Arakan) coast, at a distance of approximately 4.5 nautical miles. The main island is about 5.8 kilometres long and up to one kilometre wide. At high tide its surface measures five

⁴⁸ See para. 2.3 above.

square kilometres; at low tide its surface is eight square kilometres⁴⁹. Especially the western and southern coasts of the island are subject to severe erosion⁵⁰.

2.19. The population of St. Martin's Island has increased rapidly from about 750 in 1958 to about 7,000 at present. Most inhabitants are fishermen, even though the business is not very lucrative, largely due to the absence of the appropriate infrastructure⁵¹. In addition, there is a scarcity of fresh water on the island.

II. Historical Background

2.20. Prior to full annexation by Great Britain following the Third Anglo-Burmese War of 1885, there had been an independent kingdom in Burma for centuries. However, by the Treaty of Yandaboo of 24 February 1826 between the Honourable East India Company and His Majesty the King of Ava⁵², the King had renounced "all claims upon, and will abstain from all future interference with, the principality of Assam and its dependencies, and also with the contiguous petty States of Cachar and Jyntia". Article 3 of the Treaty provides:

"To prevent all future disputes respecting the boundary line between the two great Nations, the British Government will retain the conquered Provinces of Arracan, including the four divisions of Arracan, Ramree, Cheduba, and Sandoway, and His Majesty the King of Ava cedes all right thereto. The Unnoupectoumien or Arakan Mountains (known in Arakan by the name of the Yeomatoung or Pokhingloun Range) will henceforth form the boundary between the two great Nations on that side. Any doubts regarding the said line of demarcation will be settled by Commissioners appointed by the respective governments for that purpose, such Commissioners from both powers to be of suitable and corresponding rank."

2.21. Thus, from the date of the cession of Arakan to the East India Company under the Treaty of Yandaboo, the boundary between Rakhine (Arakan) and Bengal (which had been

⁴⁹ See also BM, para. 2.18.

⁵⁰ BM, Vol. IV, Annex 49, p. 7.

⁵¹ *Ibid.*, p. 2.

⁵² The King of Burma was known at that time as the King of Ava. Ava was the capital of Burma.

ruled by the British since the eighteenth century) became an internal boundary within India. It remained an internal boundary within India until 1 April 1937.

2.22. In 1885 Great Britain invaded and conquered the whole of Burma, overthrowing the monarchy. British troops entered Mandalay on 28 November 1885, and Burma was attached to the British Empire on 1 January 1886. Later in 1886 the whole of Burma became a province of British India.

2.23. Burma remained part of British India until 1 April 1937, when, pursuant to the Government of Burma Act 1935, it was detached from India and become a separate British colony. Section 158 (1) of the Government of Burma Act 1935 provided that, in the Act, unless the context otherwise required,

“‘Burma’ includes ... all territories which were immediately before the commencement of this Act comprised in India, being territories laying to the east of Bengal, the State of Manipur, Assam, and any tribal areas connected with Assam”.

2.24. On 4 January 1948, by virtue of the Burma Independence Act 1947, Burma became an independent State (the Union of Burma). It became a Member of the United Nations on 17 April 1948⁵³.

2.25. The 1947 Constitution of the Union of Burma (the Constitution of Burma upon Independence) provided in its article 2 that

“The Union of Burma shall comprise the whole of Burma, including

- (i) all the territories that were heretofore governed by His Britannic Majesty through the Governor of Burma, and
- (ii) the Karenni States.”

And article 222 (1) further provided that, in the Constitution, unless the context otherwise required, “‘Burma’ has the same meaning as in the Government of Burma Act, 1935”.

⁵³ United Nations General Assembly resolution 188 (II).

2.26. Article 3 of the 1974 Constitution of the Socialist Republic of the Union of Burma⁵⁴ provided that “[t]he territory of the State shall be the land, sea and airspace which constitute its territory on the day this Constitution is adopted”. Likewise, Basic Principle Section 5 of the new Constitution, the 2008 Constitution of the Republic of the Union of Myanmar, provides that “[t]he territory of the State shall be the land, sea, and airspace which constitutes its territory on the day this Constitution is adopted”. There has thus been continuity in the territory of the State since Independence on 4 January 1948.

2.27. In an Agreement dated 9 May 1966, Burma and Pakistan agreed that the land boundary between them would end at Point 1, where the centre of the main navigational channel of the Naaf River meets the sea⁵⁵.

2.28. Bangladesh seceded from Pakistan in 1971, and became a Member of the United Nations on 17 September 1974⁵⁶. The border thus became a border between Myanmar and Bangladesh. This border was essentially the same as the border that had existed between Arakan (Rakhine) and Bengal since the nineteenth century.

2.29. Subsequently, Myanmar and Bangladesh agreed the precise co-ordinates of Point 1 of the land border in a Supplementary Protocol of December 1980⁵⁷. The agreed co-ordinates (when converted to WGS-84) are: 20° 42' 15.8" N, 92° 22' 07.2" E⁵⁸. This Point is also the starting-point of the maritime boundary, in which connection it is referred to in this Counter-Memorial as Point A, and is shown on sketch-map No. 4.1 (at page 81).

2.30. In summary, the territories now forming Myanmar and Bangladesh were administered by British India until 1937. The boundary between Myanmar and Bangladesh was originally a boundary between districts of British India (Arakan and East Bengal). In 1937, when India

⁵⁴ The name of the country was changed to the Union of Myanmar on 18 June 1989.

⁵⁵ *Agreement between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River*, 9 May 1966, United Nations, *Treaty Series (UNTS)*, Vol. 1014, I-14848, p. 4 (also reproduced in Annex 1).

⁵⁶ United Nations General Assembly resolution 3203 (XXIX).

⁵⁷ *Supplementary Protocol between Burma and Bangladesh to the Protocol between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River*, 17 December 1980 (Annex 7).

⁵⁸ BM, para. 3.21.

was divided between British Burma and British India, the border became one between two separate British territories. It became an international border with the independence of India and Pakistan (1947) and Burma (1948), and is now the border between Myanmar and Bangladesh.

III. Maritime Delimitations in the Region

2.31. Although the present case is a strictly bilateral matter, the maritime delimitation between Bangladesh and Myanmar should be viewed within a broader framework. To that end, it is necessary to describe the maritime delimitations established by international agreements in the region.

2.32. As previously indicated⁵⁹, the Bay of Bengal is located in the north-eastern part of the Indian Ocean⁶⁰. In the northern part of the Bay lie three States, namely India, Bangladesh and Myanmar, while in its most southern part lie India and Sri Lanka in the southwest and India (Andaman and Nicobar Islands) and Indonesia (north-western part of the island of Sumatra) in the southeast.

2.33. Two important points should be highlighted with respect to maritime delimitations in this region.

2.34. First, the sole remaining areas (except areas where claims over the continental shelf beyond 200 nautical miles have been put forward) yet to be settled lie in the northern part of the region. They concern the maritime delimitations between India and Bangladesh, on a one hand, and Bangladesh and Myanmar, on the other. The two disputes are currently before international tribunals acting pursuant to UNCLOS. An Annex VII Arbitral Tribunal is seised of the first dispute, as of 8 October 2009⁶¹. The International Tribunal for the Law of the Sea is seised of the present dispute as of 14 December 2009⁶².

⁵⁹ See para. 2.1 above.

⁶⁰ See sketch-map No. 2.1.

⁶¹ See BM, para. 4.37.

⁶² See para. 1.5 above.

2.35. As for the other parts of the region, agreements have been concluded to fix the maritime boundaries between the States concerned. A consolidated overview of these maritime delimitations is shown in sketch-map No. 2.3.

2.36. In the south-western part of the region, four agreements have been concluded by:

- India and Maldives (1976)⁶³;
- India, Maldives and Sri Lanka on the tripoint (1976)⁶⁴;
- India and Sri Lanka (1974 and 1976)⁶⁵.

2.37. In the south-eastern part of the said region, and going northward, eight agreements have been concluded by:

- India (Nicobar Islands) and Indonesia (Sumatra) (1974 and 1977)⁶⁶;
- India, Indonesia and Thailand on the tripoint (1978)⁶⁷;

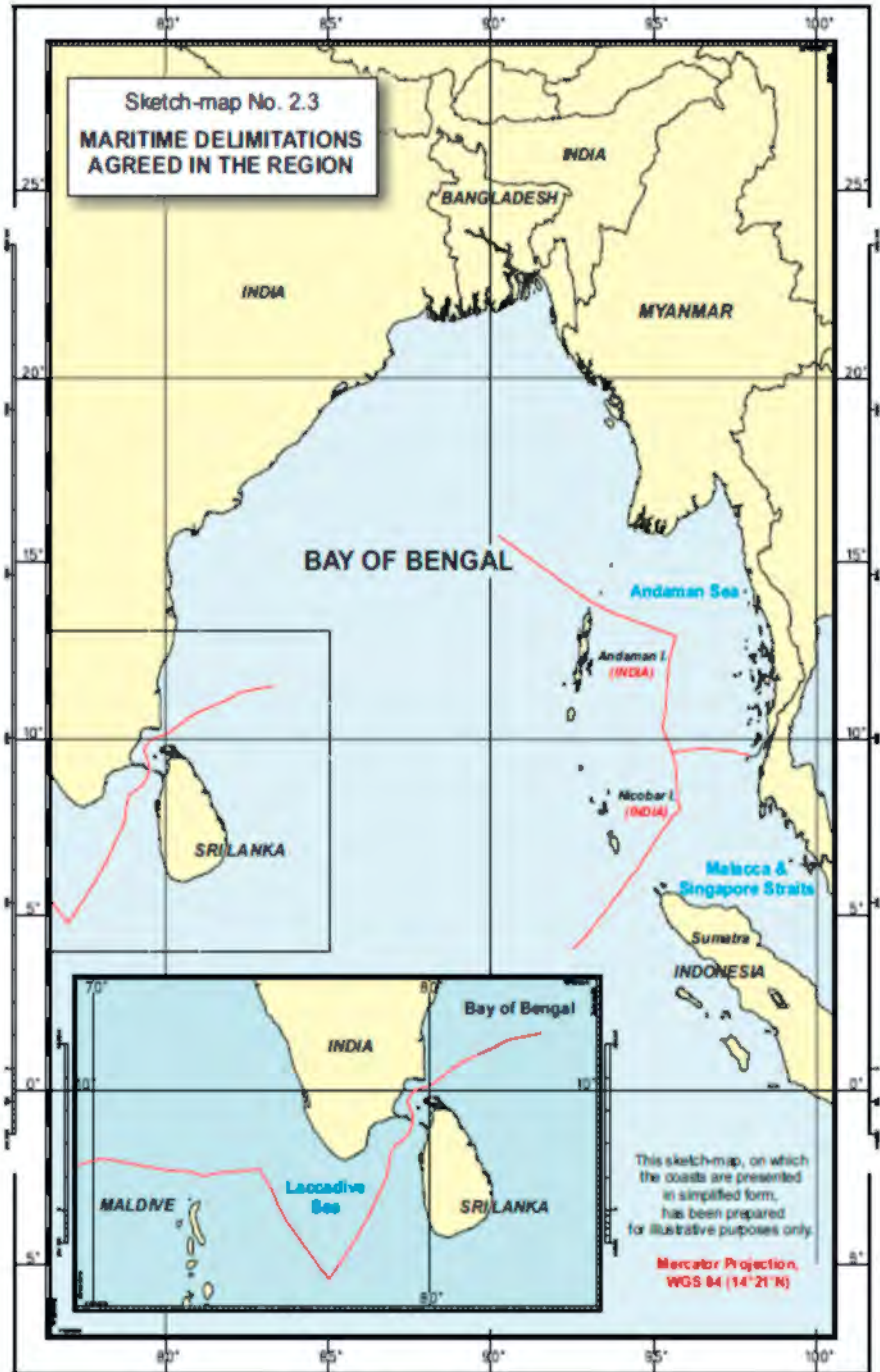
⁶³ *Agreement between India and Maldives on Maritime Boundary in the Arabian Sea and Related Matters*, 28 December 1976 (reproduced in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. II, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 1397).

⁶⁴ *Agreement between Sri Lanka, India and Maldives Concerning the Determination of the Tri-Junction Point between the Three Countries in the Gulf of Manaar*, 23, 24 and 31 July 1976, *UNTS*, Vol. 1049, I-15805, p. 54.

⁶⁵ *Agreement between India and Sri Lanka on the Boundary in Historic Waters between the Two Countries and Related Matters*, 26-28 June 1974, *UNTS*, Vol. 1049, I-15802, p. 26; and *Agreement between India and Sri Lanka on the Maritime Boundary between the Two Countries in the Gulf of Manaar and the Bay of Bengal and Related Matters*, 23 March 1976, *UNTS*, Vol. 1049, I-15804, p. 44.

⁶⁶ *Agreement between the Government of the Republic of India and the Government of the Republic of Indonesia Relating to the Delimitation of the Continental Shelf Boundary between the Two Countries*, 8 August 1974, *UNTS*, Vol. 1208, I-19474, p. 157; and *Agreement between the Government of the Republic of India and the Government of the Republic of Indonesia on the Extension of the 1974 Continental Shelf Boundary between the Two Countries in the Andaman Sea and the India Ocean*, 14 January 1977, *UNTS*, Vol. 1208, I-19475, p. 169.

⁶⁷ *Agreement between the Government of the Republic of India, the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand Concerning the Determination of the Trijunction Point and the Delimitation of the Related Boundaries of the Three Countries in the Andaman Sea*, 22 June 1978, *UNTS*, Vol. 1208, I-19476, p. 186.



- India (Nicobar Islands) and Thailand (1978 and 1993)⁶⁸;
- Myanmar and Thailand (1980)⁶⁹;
- India (Andaman and Nicobar Islands), Myanmar and Thailand on the tripoint (1993)⁷⁰;
- India (Andaman Islands) and Myanmar (1986)⁷¹.

2.38. The second critical feature concerns the method of maritime delimitation resorted to in these agreements. In all the aforementioned agreements it appears that the Parties decided to draw a single line, and to apply the equidistance/special circumstances method even in those areas where coasts are concave as in the Gulf of Mottama (Gulf of Martaban). Recourse to equidistance is specifically mentioned in some of these agreements⁷² while in others, analysis of the maritime boundaries adopted shows that they are formed by an equidistance line, whether a strict or adjusted one⁷³. This uniform practice is of legal significance. As

⁶⁸ *Agreement between the Government of the Republic of India and the Government of the Kingdom of Thailand on the Delimitation of Seabed Boundary between the Two Countries in the Andaman Sea*, 22 June 1978, *UNTS*, Vol. 1122, I-17433, p. 11; and *Agreement between the Government of the Republic of India and the Government of the Kingdom of Thailand on the Maritime Boundary between the Two Countries in the Andaman Sea from Point 7 to the Trijunction Point (Point T) between Thailand, India and Myanmar*, 27 October 1993 (reproduced in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. III, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1998, p. 2380).

⁶⁹ *Agreement between the Government of the Socialist Republic of the Union of Burma and the Government of the Kingdom of Thailand on the Delimitation of the Maritime Boundary in the Andaman Sea*, 25 July 1980, *UNTS*, Vol. 1276, I-21069, p. 448.

⁷⁰ *Agreement between the Government of the Union of Myanmar, the Government of the Republic of India and the Government of the Kingdom of Thailand on the Determination of the Trijunction Point between the Three Countries in the Andaman Sea*, 27 October 1993, *UNTS*, Vol. 1886, I-32099, p. 144.

⁷¹ *Agreement between the Socialist Republic of the Union of Burma and the Republic of India on the Delimitation of the Maritime Boundary in the Andaman Sea, in the Coco Channel and in the Bay of Bengal*, 23 December 1986, *UNTS*, Vol. 1484, I-25390, p. 173 (also reproduced in Annex 11).

⁷² See article I of the 1976 Sri Lanka-India-Maldives Agreement; article I of the 1993 India-Thailand Agreement; article 1 of the 1993 India-Myanmar-Thailand Agreement; and article 1 (1) of the 1980 Myanmar-Thailand Agreement.

⁷³ See, as regards the 1976 India-Maldives Agreement, J.I. Charney and L.M. Alexander (eds.), *op. cit.* (fn. 63), p. 1394; as regards the 1974 and 1976 India-Sri Lanka Agreements, *ibid.*, p. 1409 and p. 1423; as regards the 1974 and 1977 India-Indonesia Agreements, *ibid.*, p. 1363 and p. 1373; as regards the 1978 India-Indonesia-Thailand Agreement, *ibid.*, pp. 1382-1383; and as regards the 1978 India-Thailand Agreement, *ibid.*, p. 1436. The same is true as regards the 1986 India-Myanmar Agreement: on this Agreement, see paras. 2.39-2.42 below.

Myanmar will explain in Chapter 5⁷⁴, this uniform practice corresponds fully with the case law on maritime delimitation⁷⁵.

2.39. The equidistance/special circumstances method has been applied in particular to delimit the maritime boundary between India and Myanmar in the Andaman Sea, the Coco Channel and the Bay of Bengal, where Myanmar's coast is concave (i.e., the Gulf of Mottama (Gulf of Martaban), on the one hand, and the Rakhine (Arakan) coast, in the other hand).

2.40. After four rounds of technical level talks on the delimitation of the maritime boundary between the two States held in March 1976, September 1978, July 1979 and March 1984, India and Myanmar reached an agreement on 23 December 1986 to delimit their maritime boundary in the eastern part of the region. They divided the region into three sectors: the Andaman Sea, the Coco Channel, and the Bay of Bengal⁷⁶.

2.41. As per the delimitation in the Bay of Bengal, the two States adopted a modified equidistance line connecting Points 14 to 16 of the maritime boundary⁷⁷. This line is indicated in "India Chart No. 31 of 1 November 1976" annexed to the Agreement and forming "an integral part of" it, according to its article IV⁷⁸.

2.42. The Agreement only delimits the maritime boundary between the two States up to 200 nautical miles. According to article II (2) of the Agreement, "[t]he extension of the Maritime Boundary beyond Point 16 in the Bay of Bengal will be done subsequently". This last sector has yet to be delimited and the matter is still pending between the two States⁷⁹. Myanmar has indicated to the CLCS that it was ready to negotiate further with India in

⁷⁴ See paras. 5.21-5.32 below.

⁷⁵ See in particular in that regard the recent Judgment of the ICJ in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment, I.C.J. Reports 2009*, p. 101, para. 116.

⁷⁶ See Annex 11.

⁷⁷ See article II of the Agreement.

⁷⁸ The official map is reproduced in Annex 11.

⁷⁹ See on that point, BM, Vol. II, Figure 7.1 (based on the submissions of India and Myanmar to the CLCS: see BM, p. 55, fn. 130).

respect of areas beyond 200 nautical miles⁸⁰ and informed the United Nations Secretary-General, on 4 August 2009, that “Myanmar and India have agreed to discuss bilaterally to further extend the maritime boundary beyond point 16”⁸¹.

2.43. Shortly after the conclusion of the 1986 Agreement, on 6 June 1987 Bangladesh sent a formal note of protest to India and to Myanmar, stating:

“... ii) The straight line connecting points 15 and 16 as per Article II of the Agreement encroaches upon the continental shelf which in accordance with the provisions of the United Nations Convention on the Law of the Sea, 1982, belongs to Bangladesh.

In this connection it is stated that the maritime boundary between Bangladesh and Burma is under discussion and till a mutually acceptable agreement is reached on the delimitation of maritime boundary, neither the provisions of the aforesaid Agreement may be cited nor any action taken to prejudice Bangladesh’s legal and legitimate claims on the continental shelf mentioned in sub-para (ii) above”⁸².

2.44. On 28 July 1987, Myanmar replied that the maritime boundary between India and Myanmar was “a strictly bilateral matter between them” and that Myanmar “cannot accept the claim made ... that the segment of the Burma-India maritime boundary from point (15) to point (16) encroaches upon the continental shelf of Bangladesh”. Myanmar added that Bangladesh’s claim had “no basis whatsoever in law or in fact”⁸³ (a point on which ITLOS does not have jurisdiction⁸⁴).

⁸⁰ See BM, Vol. III, Annex 29, p. 10, para. 38. See also Note Verbale No. NY/PM/443/2/2009 from the Permanent Mission of India to the United Nations to the Secretary-General of the United Nations, 26 March 2009 (Annex 17) (also available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/clcs16_2008_ind_e.pdf).

⁸¹ Note Verbale from the Permanent Mission of the Union of Myanmar to the United Nations to the United Nations Secretary-General, 4 August 2009 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/clcs_48_2009_los_mmr.pdf).

⁸² Note Verbale from the Ministry of Foreign Affairs of Bangladesh to the Embassy of Burma and Note Verbale from the Ministry of Foreign Affairs of Bangladesh to the High Commission of India, 6 June 1987 (Annex 12).

⁸³ Note Verbale from the Ministry of Foreign Affairs of Burma to the Embassy of Bangladesh, 28 July 1987 (Annex 13).

⁸⁴ See paras. 1.12-1.23 above.

CHAPTER 3

THE HISTORY OF THE DISPUTE

3.1. This Chapter describes, *first*, the maritime legislation of Myanmar and Bangladesh, including that relating to straight baselines (**Section I**); and, *second*, the maritime delimitation negotiations, which were conducted between 1974 and 2010 (with an extended interval between 1986 and 2008) (**Section II**).

I. The Parties' Maritime Legislation

A. Myanmar

3.2. On 15 November 1968, Burma published a Declaration as to the extent of Burma's territorial sea⁸⁵. This declared "that the territorial sea of the Union of Burma shall extend into the sea to a distance of twelve nautical miles measured from the appropriate base line"⁸⁶. The Declaration further provided that "[e]xcept as provided in paragraph 3, the low-water line along the coast ... shall be the base line for measuring the breadth of the territorial sea of the Union of Burma"⁸⁷. Paragraph 3 provided for the straight baselines indicated in the schedule annexed to the Declaration "where it is necessary by reason of the geographical conditions prevailing on the Union of Burma coasts, and for the purpose of safeguarding the vital economic interest of the inhabitants of the coastal regions". The straight baselines in the schedule are in three sectors: Rakhine (Arakan) coast, Gulf of Mottama (Gulf of Martaban), and Tanintharyi coast. Only those in the first sector (Rakhine coast) are relevant to the present proceedings.

3.3. On 9 April 1977, Burma enacted the Territorial Sea and Maritime Zones Law⁸⁸. Chapter II of the Law provides for a 12-nautical-mile territorial sea, and for the right of innocent passage. Chapter III provides for a contiguous zone extending to 24 nautical miles

⁸⁵ Union of Burma, Ministry of Foreign Affairs, Territorial Sea Declaration, 15 November 1968 (BM, Vol. III, Annex 9).

⁸⁶ *Ibid.*, para. 1.

⁸⁷ *Ibid.*, para. 2.

⁸⁸ Pyithu Hluttaw Law No. 3 of 9 April 1977 (BM, Vol. III, Annex 12).

from the baselines. Chapter IV provides that the continental shelf of Burma extends to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines where the outer edge does not extend to that distance. Chapter V provides for an exclusive economic zone to a distance of 200 nautical miles from the baselines. An annex to the Law deals with the normal (low-water line) and straight baselines, essentially re-enacting the provisions of the 1968 Declaration⁸⁹.

3.4. On 5 December 2008, Myanmar enacted the Law Amending the Territorial Sea and Maritime Zones Law, establishing straight baselines for Preparis and Coco Islands⁹⁰.

3.5. In its Memorial, Bangladesh asserts that “[n]one of Myanmar’s straight baselines is consistent with the provisions of Article 7 of the 1982 Convention”⁹¹. In fact, Bangladesh then goes on to address only the baselines off the Rakhine (Arakan) coast – from May Yu Island (Oyster Island) to Alguada Reef – since, in its view, the others are well beyond the scope of the present case⁹². It is to be noted that Bangladesh had not raised any objection to these baselines before 2009⁹³.

3.6. It sits ill for a State whose own straight baselines are so clearly contrary to international law (so much so that it has abandoned any reliance upon them in the present proceedings) to criticize those of others. Suffice to say that Myanmar rejects such criticism as wholly unfounded. The straight baselines drawn by Myanmar between the southern point of May Yu Island (Oyster Island) and Alguada Reef off Cape Negrais are fully consistent with article 7 of UNCLOS, as interpreted and applied widely in the practice of States, which applies the criteria in article 7 having regard to local circumstances (as was also the practice

⁸⁹ A chart showing these straight baselines and the territorial sea, which incorporates the geographical co-ordinates, was transmitted for deposit with the Secretary-General of the United Nations on 9 January 1997; M.Z.N.12.1997.LOS of 27 January 1997.

⁹⁰ Law No. 8/2008. On 10 December 2008, Myanmar transmitted to the United Nations Secretary-General the co-ordinates of these straight baselines, together with charts showing the low-water lines (M.Z.N.64.2008.LOS of 23 December 2008).

⁹¹ BM, para. 3.14.

⁹² BM, p. 33, fn. 69.

⁹³ In a Note Verbale dated 30 June 2009, Bangladesh lodged a protest in response to the straight baselines on Preparis and Coco Islands, a protest that was rejected in Myanmar’s Note of 31 August 2009. By contrast, no such protest had previously been made concerning Myanmar’s other straight baselines established since 1968.

under article 4 of the 1958 Territorial Sea Convention)⁹⁴. Myanmar's baselines are certainly not extreme and self-evidently do not depart from the general direction of the coast. Indeed, they follow the general direction of the coast more closely than many straight baselines elsewhere. This is demonstrated by the very small number of protests that have been made against Myanmar's baselines, and even in these few cases it is not clear that the protest was primarily directed to the baselines relevant to the present case⁹⁵. In particular, during the period of more than 40 years since they were first promulgated, and over 30 years since their inclusion in the 1977 Act, neither Bangladesh nor its predecessor State, Pakistan, made any protest in relation to these baselines until 2009, just over three months before the commencement of the present proceedings⁹⁶. The arguments in the Memorial are essentially frivolous, and Myanmar submits that the Tribunal should not entertain them.

B. Bangladesh

3.7. Bangladesh describes its maritime legislation in its Memorial⁹⁷. Myanmar would add only the following. Bangladesh describes at some length its controversial and unique straight baseline system dating from 1974, which has no basis whatsoever in international law. After a half-hearted attempt to justify the system, it states as follows:

“Bangladesh recognizes that because its 1974 baselines were drawn along the 10 fathom line, they do not conform to the terms of the later adopted 1982 Convention. It therefore does not rely on them for purposes of this maritime delimitation with Myanmar. Instead, for delimitation purposes, it relies only on base points along its coast on the Bay of Bengal, in conformity with UNCLOS.”⁹⁸

⁹⁴ The strict view propounded chiefly in the United States of America has not been adopted more widely. See, for example, W.M. Reisman and G.S. Westerman, *Straight Baselines in Maritime Boundary Delimitation*, St. Martin's Press, New York, 1992, an extract from which appears at BM, Vol. III, Annex 31.

⁹⁵ BM, para. 3.17 names only the United States of America and the United Kingdom. W.M. Reisman and G.S. Westerman note that “[p]ortions of the coast of Burma meet the deeply-indented or island fringe tests” and suggest that “[t]he most reasonable part of the system has been established along the Arakan coast on the Bay of Bengal” – though they do go on to express their view that “sections of which ... only arguably meet the deeply indented test” (*op. cit.* (fn. 94), p. 168).

⁹⁶ BM, para. 3.18; see also fn. 93 above.

⁹⁷ BM, paras. 3.2-3.9.

⁹⁸ BM, para. 3.9.

3.8. Whatever may be Bangladesh's motives for abandoning its 1974 baselines, there is no need for the Tribunal to enter into the question of their lawfulness. Bangladesh's crude attempt to suggest some kind of equivalence between its own unlawful baselines, and Myanmar's entirely reasonable baselines along the Rakhine (Arakan) coast, is thoroughly unconvincing. For the avoidance of doubt, Myanmar wishes to make clear its continuing objection to Bangladesh's baselines, which have no basis in the 1982 Convention or in general international law.

II. The Negotiations between Bangladesh and Myanmar regarding Maritime Delimitation

3.9. In its Memorial, Bangladesh refers briefly to the extended negotiations that have taken place since 1974 on maritime delimitation⁹⁹. However, it devotes most of its efforts to describing what it erroneously refers to as "The Parties' Agreement on a Boundary in the Territorial Sea"¹⁰⁰. In response, it is necessary to go into somewhat more detail, both on the talks in general, and in particular for the light they shed on the status of the 1974 agreed minutes, upon which Bangladesh places so much weight.

3.10. The approach will be chronological, covering the eight rounds between 1974 and 1986, and the six rounds of resumed negotiations between 2008 and 2010. The overall picture that emerges is that Myanmar throughout sought to attain a reasonable solution, based on the principles of international law, and was ready to show flexibility. Bangladesh, on the other hand, seemed to approach the negotiations in a rigid manner, ignoring the applicable principles of international law, and even making proposals that took the parties further apart. Considerations of the applicable principles of international law seem to have played little, if any, part in Bangladesh's approach, which insisted throughout on the negotiation of what it termed an "*ad hoc*" or "friendship" line. The so-called agreement on the territorial sea was no more than a conditional understanding at the level of the negotiators as to what might be included as part of an eventual maritime boundary agreement covering the whole of the

⁹⁹ BM, paras. 3.32-3.37.

¹⁰⁰ BM, paras. 3.21-3.31.

maritime delimitation between them (territorial sea, exclusive economic zone, continental shelf)¹⁰¹.

A. The First Eight Rounds (1974-1986)

3.11. The **first round of negotiations** was held in Rangoon between 4 and 6 September 1974. The Myanmar delegation was led by Commodore Chit Hlaing, Vice Chief of Staff, Defence Services (Navy). The Bangladesh delegation was led by the Ambassador to Myanmar, His Excellency Mr. Kwaja Mohammad Kaiser. During the first meeting, Bangladesh introduced its straight baseline method, while Myanmar expressed its objection to Bangladesh's baselines¹⁰².

3.12. At the second meeting of the first round, the parties moved on to discuss the delimitation of the territorial sea. Bangladesh suggested an equidistance line to be drawn along the midpoints between St. Martin's Island and the Myanmar main coast¹⁰³. Later on it suggested terminating the territorial sea boundary at the median point between St. Martin's Island and May Yu Island (Oyster Island)¹⁰⁴.

3.13. During the discussions, Commodore Hlaing stated that

“he would submit the map [produced by the Bangladesh delegation] ... to higher authorities and inform them that it was the Bangladesh proposal drawn on the basis of the median line. Whether they would agree or not was another matter”¹⁰⁵.

Bangladesh then put forward its preferred method for delimiting the exclusive economic zone between the parties, referring to the method of “a median line principle with equidistance points from the Bangladesh basepoints”¹⁰⁶.

¹⁰¹ See paras. 4.11-4.23 below.

¹⁰² Minutes of the First Round, first meeting, paras. 11-19 (Annex 2). Bangladesh no longer relies on its baselines in the present proceedings: see para. 3.7 above.

¹⁰³ *Ibid.*, second meeting, para. 10.

¹⁰⁴ *Ibid.*, third meeting, para. 10.

¹⁰⁵ *Ibid.*, third meeting, para. 11.

¹⁰⁶ *Ibid.*, third meeting, para. 17.

3.14. Similarly, during the fourth and last meeting of the first round of negotiations, Commodore Hlaing, referring to the positions put forward during the talks, again stressed that he would have first to submit the position to senior authorities¹⁰⁷.

3.15. The **second round of negotiations** was held in Dhaka between 20 to 25 November 1974. The delegations were headed by the same officials as the previous round. In the course of the ongoing discussions of the delimitation of the Bay of Bengal, the delegations reached a conditional understanding with respect to the delimitation of the first sector of the line, between their respective territorial seas. This conditional understanding was reflected in agreed minutes signed by the two delegations¹⁰⁸. The agreed minutes read in full 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 on the basis of 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

¹⁰⁷ *Ibid.*, fourth meeting, para. 16.

¹⁰⁸ BM, Vol. III, Annex 4.

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.

3.16. As stated in paragraph 2 of the minutes, the heads of delegation had reached an understanding that a median line would be fixed between the territorial sea of the Myanmar mainland and St. Martin's Island, following a joint survey. Paragraph 3 expressed Myanmar's position that the understanding was subject to the granting of "the right of free and unimpeded navigation through Bangladesh waters around St. Martin's Island" to Myanmar's vessels. Paragraph 4 then recorded the agreement of the Government of Bangladesh to the aforementioned territorial sea boundary, and its taking note of Myanmar's position on "free and unimpeded navigation". Finally, paragraph 5 recorded that

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

3.17. At the end of the second round of negotiations the Bangladesh delegation handed their counterparts a draft treaty with respect to the understanding reached regarding the territorial sea, entitled "Agreement Between the Governments of the People's Republic of Bangladesh

and the Government of the Socialist Republic of the Union of Burma Relating to the Delimitation of the Boundaries of the territorial waters Between the Two Countries”¹⁰⁹.

3.18. Putting into legal language the understanding reflected in the minutes, the draft treaty contained express provision for ratification and entry into force. Article VII of the draft stated that “[t]his Agreement shall be ratified in accordance with the legal requirements of the two countries”¹¹⁰. Article VIII provided that “[t]his Agreement shall, enter into force on the date of the exchange of the Instruments of Ratification”¹¹¹. The draft treaty was in fact not signed by either party.

3.19. During the first meeting of the second round, the head of the Myanmar delegation addressed the understandings reached by the delegations and stated that

“It was not intended to sign a specific treaty on the territorial sea boundary. The question of delimiting a sea boundary between Burma and Bangladesh would have to be dealt with in totality to cover the territorial sea, the continental shelf and economic zone.”¹¹²

3.20. The “Brief Report” prepared by Bangladesh following the second round of negotiations records these same comments by Commodore Hlaing:

“Copies of a Draft Treaty on the delimitation of territorial waters boundary were given to the Burmese delegation by the Bangladesh delegation on November 20, 1974 for eliciting views from the Burmese Government. The initial reaction of the Burmese side was that they were not inclined to conclude a separate treaty/agreement on the delimitation of territorial waters; they would like to conclude a single comprehensive treaty where the boundaries of territorial waters and continental shelf were incorporated.”¹¹³

¹⁰⁹ Minutes of the Second Round, Annexure C (Annex 3).

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*, first meeting, para. 10; see also second meeting, para. 4.

¹¹³ BM, Vol. III, Annex 14, para. 7.

3.21. In fact, when asked if he would be willing to initial any agreement, Commodore Hlaing replied with a clear “no”¹¹⁴.

3.22. The second round also involved negotiations concerning the delimitation of the exclusive economic zone. Ambassador Kaiser of Bangladesh suggested delimiting the economic zone in accordance with the “equidistance with equity” method¹¹⁵. The delegation of Myanmar, in return, proposed drawing a 235° line starting from the agreed boundary point in the Naaf River, taking into account the understanding previously reached in the territorial sea via a latitude line connecting the 235° line to Point 7¹¹⁶. Commodore Hlaing explained that this solution gave full consideration to St. Martin’s Island¹¹⁷.

3.23. The **third round** was held in Rangoon from 14 to 20 February 1975. Commodore Hlaing, referring to the 1974 minutes, recalled that the understanding was conditioned on the right of “unimpeded passage” to Myanmar ships around St. Martin Island¹¹⁸. He further recalled that this “unimpeded passage”

“was a routine followed for many years by Burmese naval vessels to use the channel ... He added that in asking for unimpeded navigation the Burmese side was only asking for existing rights which it had been exercising since 1948”¹¹⁹.

3.24. Commodore Hlaing’s remarks are also reflected in Bangladesh’s account of the third round of negotiations:

“At this session, the Burmese delegation repeated their earlier position that the boundary line was subject to a guarantee of free and unimpeded navigation around St. Martin Island to and from Burmese sectors of the Naaf River without any prior permission/information of the Bangladesh Government. They maintain that they do not want anything new but only existing

¹¹⁴ Minutes of the Second Round, first meeting, para. 11 (Annex 3).

¹¹⁵ *Ibid.*, para. 15.

¹¹⁶ *Ibid.*, para. 18.

¹¹⁷ *Ibid.*, para. 20.

¹¹⁸ Minutes of the Third Round, first meeting, para. 4 (Annex 4).

¹¹⁹ *Ibid.*

navigation practice is to be incorporated in the future boundary treaty.”¹²⁰

3.25. In response, and according to the Bangladesh account, the Bangladesh delegation replied that this concern can be addressed in the treaty that will eventually be signed between the parties:

“Bangladesh delegation stated that they did not see any difficulty in accommodating the Burmese position in the future treaty.”¹²¹

3.26. Moving on, the delegations proposed starting-points for the delimitation of the continental shelf. Myanmar referred again to the 235° line and its joining with the median line drawn between the Myanmar main coast and St. Martin’s Island¹²². Bangladesh, in response, proposed that the delimitation continue from Point 7, the southernmost median point between the territorial sea of Myanmar’s main coast and St. Martin’s Island¹²³. In the alternative Bangladesh suggested that the point of origin be the median points between St. Martin’s Island and May Yu Island (Oyster Island)¹²⁴. Both proposals were rejected by Myanmar¹²⁵. Furthermore, the Bangladesh delegation proposed that the delimitation line stemming from this point of origin would take the angle of 243°, up to a point where the line would be deflected southwards, claiming that it was based on the equidistance method¹²⁶.

3.27. The **fourth round** of talks was held in Rangoon from 29 February to 7 March 1976. The talks resumed on the delimitation of the exclusive economic zone and the continental shelf. Bangladesh proposed a 225° line which was based on “friendship” and equity rather than equidistance¹²⁷. Later, the Bangladesh delegation suggested modifying the angle from

¹²⁰ BM, Vol. III, Annex 15, para. 3.

¹²¹ *Ibid.*

¹²² Minutes of the Third Round, second meeting, para. 3; third meeting, para. 3 (Annex 4).

¹²³ BM, Vol. III, Annex 15, para. 5; Minutes of the Third Round, second meeting, paras. 5 and 7; third meeting, para. 8 (Annex 4).

¹²⁴ BM, Vol. III, Annex 15, para. 5; Minutes of the Third Round, second meeting, paras. 5 and 7; third meeting, para. 8 (Annex 4).

¹²⁵ Minutes of the Third Round, third meeting, para. 12 (Annex 4).

¹²⁶ *Ibid.*, para. 5.

¹²⁷ Minutes of the Fourth Round, first meeting of the technical level, paras. 19-23; first meeting, para. 32 (Annex 5).

225° to 227°¹²⁸. According to the proposal, this line would then extend up to 80 nautical miles, at which point it would be deflected to an angle of 190°¹²⁹.

3.28. Myanmar, for its part, insisted that the equidistance method should be applied to delimitation in the Bay of Bengal¹³⁰. Nevertheless, Myanmar was open to suggestions from Bangladesh regarding a possible deflection of the median line, favourable to Bangladesh¹³¹.

3.29. Bangladesh then modified its proposal and was prepared “to concede a degree further as regards the angle of the first sector of the line from the point of origin to the point of deflection”, i.e., from 227° to 228°¹³². Similarly, the deflection from the turning point (80 nautical miles from the starting-point) would be modified from an angle of 190° to an angle of 195°¹³³.

3.30. As with previous negotiations on these issues, no agreement could be reached.

3.31. The **fifth round** took place in Dhaka on 8 and 9 June 1979. The delegation of Bangladesh voiced its objection to an equidistance line, relying on the *North Sea Continental Shelf* cases and its own (disputed) baselines¹³⁴. Myanmar reiterated its position that any delimitation line should be initially based on equidistance while taking into account relevant circumstances, as required by international law¹³⁵. Essentially, both sides reiterated their previous positions on the delimitation of the maritime boundary¹³⁶.

3.32. In the Memorial, Bangladesh, citing its own record, claims that during the fifth round Myanmar “agreed with the view that Bangladesh is geographically disadvantaged and median

¹²⁸ *Ibid.*, first meeting, para. 17; second meeting, para. 5.

¹²⁹ *Ibid.*, first meeting of the technical level, para. 24; first meeting para. 31.

¹³⁰ *Ibid.*, fourth meeting, paras. 11-12.

¹³¹ *Ibid.*, fourth meeting, para. 3; fifth meeting, para. 5.

¹³² *Ibid.*, third meeting, para. 3.

¹³³ *Ibid.*

¹³⁴ BM, Vol. III, Annex 16, para. 3.

¹³⁵ Fifth Round, Report of Myanmar Delegation (Unofficial Translation), paras. 6, 7, 9 (Annex 6).

¹³⁶ *Ibid.*, paras. 5-8.

line would be very unfair to her”¹³⁷. Myanmar does not accept that this accurately summarises what transpired. Indeed, according to Bangladesh’s own record, immediately after the sentence cited, Myanmar is recorded as saying “But the delimitation cannot ignore state practice and recognised principles ... taking state practice into consideration, median line should be taken as starting point for negotiations.”¹³⁸ Bangladesh also lists certain “common points of agreement” at the fifth round¹³⁹, but these do not accurately reflect the position expressed by the Myanmar delegation during the negotiations. The delegation may in the course of the negotiations have expressed the view that a median line, applied strictly without any adjustments, may damage Bangladesh’s interests¹⁴⁰. Nevertheless, Myanmar was of the view that the basis of delimitation under international law was involved drawing a provisional equidistance line, and it was open to modify the equidistance line as part of the negotiations between the parties¹⁴¹. This was done only as part of the diplomatic negotiations.

3.33. The very different approaches of the two delegations, Myanmar’s based on the principles of international law, that of Bangladesh based purely on expediency, are illustrated very clearly by what was said during the fifth round:

“2. Proceeding to technical level discussion, Bangladesh recalled that at the 4th round of talks Bangladesh has proposed the boundary line (228° - 80 miles - 195°) based on friendship and equity. Bangladesh proposed that proposal to be the basis for the present talks.

3. Burma replied that bilateral maritime boundary delimitation should be based on the rules and principles of international law. In this regard, both sides should negotiate on principles, rules and law to be applied for maritime boundary delimitation. It is not possible to determine maritime boundary delimitation without basing on any legal norms.

4. Bangladesh side stressed that according to the principle of international law, median line is applicable for those countries having coasts opposite each other. Median line is not applicable for adjacent states like Burma and Bangladesh. Therefore both

¹³⁷ BM, para. 3.33.

¹³⁸ BM, Vol. III, Annex 16, para. 4; Fifth Round, Report of Myanmar Delegation (Unofficial Translation), paras. 6-8 (Annex 6).

¹³⁹ BM, para. 3.33.

¹⁴⁰ See also Fifth Round, Report of Myanmar Delegation (Unofficial Translation), paras. 8-10 (Annex 6).

¹⁴¹ *Ibid.*, para. 8.

Bangladesh and Burma must ignore the median line and it is necessary to determine the boundary line based on friendship and equity.”¹⁴²

3.34. The **sixth round** was held in Rangoon on 19 and 20 November 1985. The head of the Myanmar delegation, the Minister of Foreign Affairs, Mr. U Ye Goung, recalling the understanding of 1974, reiterated Myanmar’s position that

“[what] is clearly implied in the text of Agreed Minutes, was that both the territorial sea sector and the continental shelf cum economic zone sector of the common maritime boundary should be settled together in a single instrument”¹⁴³.

3.35. The Minister then reiterated Myanmar’s position that, initially, an equidistance line should be drawn¹⁴⁴. The delegation of Myanmar continued that if the principle of equidistance is agreed upon, then the line should proceed from the midpoint between St. Martin’s Island and May Yu Island (Oyster Island)¹⁴⁵. Following his speech, the Bangladesh Minister of Foreign Affairs reiterated Bangladesh’s objection to an equidistance line or a perpendicular to the general direction of the coast as a basis of delimitation¹⁴⁶.

3.36. The **seventh round** between the parties took place in Dhaka on 11 and 12 February 1986. Bangladesh again rejected the application of the equidistance method for the delimitation of the area in dispute¹⁴⁷. As for the continental shelf, Bangladesh claimed that it was entitled to draw a delimitation line up to 350 nautical miles, in accordance with article 76 (1) of UNCLOS¹⁴⁸.

3.37. The delegation of Myanmar in reply commented that Bangladesh cannot claim a continental shelf of 350 nautical miles, as article 76 (1) is without prejudice to questions of

¹⁴² *Ibid.*, paras. 2-4.

¹⁴³ Sixth Round, Speeches and statements (Annex 8).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Seventh Round, Report of Myanmar Delegation (Unofficial Translation), p. 3 (Annex 9).

¹⁴⁸ *Ibid.*

delimitation between adjacent or opposite States¹⁴⁹. It further stated that the delimitation should be governed by the method of equidistance/special circumstances, or a modified equidistance method¹⁵⁰.

3.38. The **eighth round** took place in Rangoon between 30 June and 5 July 1986. Myanmar reiterated its position that the equidistance/special circumstances method should be used to delimit the maritime boundary between the parties¹⁵¹. For this purpose, Myanmar referred to article 83 of UNCLOS on the delimitation of the continental shelf between two adjacent or opposite States¹⁵².

3.39. Bangladesh, in contrast, referred to the concept of “natural prolongation” found in article 76 (1) of UNCLOS. Relying on that article, Bangladesh maintained that it was entitled to a continental shelf of 350 nautical miles¹⁵³. In fact, on this occasion Bangladesh recognized that Myanmar is entitled to a continental shelf beyond 200 nautical miles¹⁵⁴. It also argued that the equidistance method was not to be used between adjacent States where the coastline of one of these States was concave¹⁵⁵.

3.40. Myanmar then reminded its counterparts that on the one hand, its delegation did not have authority to conclude a treaty, and that a treaty between the parties could only be concluded when the final delimitation of all the areas in dispute is agreed upon¹⁵⁶. On the

¹⁴⁹ *Ibid.*, p. 4.

¹⁵⁰ *Ibid.*

¹⁵¹ Letter from Mustafizur Rahman, Ambassador of Bangladesh to Burma, to Mr. Fakhruddin Ahmed, Foreign Secretary of Bangladesh, 31 July 1986, BM, Vol. III, Annex 17; Eighth Round, Report of Myanmar Delegation, para. 7 (Annex 10).

¹⁵² Letter from Mustafizur Rahman, Ambassador of Bangladesh to Burma, to Mr. Fakhruddin Ahmed, Foreign Secretary of Bangladesh, 31 July 1986, BM, Vol. III, Annex 17; Eighth Round, Report of Myanmar Delegation, para. 7 (Annex 10).

¹⁵³ Letter from Mustafizur Rahman, Ambassador of Bangladesh to Burma, to Mr. Fakhruddin Ahmed, Foreign Secretary of Bangladesh, 31 July 1986, BM, Vol. III, Annex 17; Eighth Round, Report of Myanmar Delegation, para. 7 (Annex 10).

¹⁵⁴ Eighth Round, Report of Myanmar Delegation, para. 4 (Annex 10).

¹⁵⁵ Letter from Mustafizur Rahman, Ambassador of Bangladesh to Burma, to Mr. Fakhruddin Ahmed, Foreign Secretary of Bangladesh, 31 July 1986, BM, Vol. III, Annex 17.

¹⁵⁶ Eighth Round, Report of Myanmar Delegation, para. 11 (Annex 10).

other hand, its delegation did have authorization to sign agreed minutes or records of the meetings¹⁵⁷.

3.41. Once again, no agreement was reached between the parties.

B. The Resumed Talks 2008-2010

3.42. After a suspension for over 20 years, the **first round of resumed talks** between the parties was held between 29 March and 1 April 2008. The two delegations approved agreed minutes (“the 2008 agreed minutes”)¹⁵⁸, which read 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.

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”.

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 the 1974 will remain the same.

¹⁵⁷ *Ibid.*

¹⁵⁸ BM, Vol. III, Annex 7.

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)

Commodore Maung Oo Lwin
Leader of the Myanmar Delegation

(Signed)

M.A.K Mahmood
Additional Foreign Secretary
Leader of the Bangladesh Delegation

Dated: April 1, 2008

Dhaka

3.43. As can be seen, in paragraph 2 of the 2008 minutes the term "unimpeded" was replaced by "innocent passage", thus bringing the previous understanding into conformity with the terminology of UNCLOS. Furthermore, in paragraph 3 the parties updated – "to a more recent and internationally recognized chart, namely, Admiralty Chart No. 817" – the points plotted in the agreed minutes of 1974. In both paragraphs the agreed minutes of 1974 were referred to as an "ad-hoc understanding". The final sentence of paragraph 3 states that "[O]ther terms of the agreed minutes of the 1974 will remain the same".

3.44. The 2008 agreed minutes then reflect the disagreement between the parties concerning the starting-point for the delimitation of the exclusive economic zone and the

continental shelf. Bangladesh suggested starting from the intersecting point of the territorial seas of the southernmost point of St. Martin's Island and Myanmar's coastline¹⁵⁹. In the alternative, Bangladesh suggested the delimitation commence on the line between St. Martin's Island and May Yu Island (Oyster Island), while giving the latter only one-third effect¹⁶⁰. Myanmar, for its part, suggested that both islands should be given full effect and that consideration should be given to the coastal lengths of both countries¹⁶¹. Moreover, it reminded Bangladesh that any previous understanding reached during the negotiations regarding the weight to be given to St. Martin's Island was not binding and could be reopened in the negotiations between the parties¹⁶².

3.45. The **second round of resumed talks** was held in Bagan on 4 and 5 September 2008. Myanmar suggested, as it had previously done, that the starting-point for the delimitation of the continental shelf and exclusive economic zone be the midpoint between St. Martin's Island and May Yu Island (Oyster Island)¹⁶³. To this the delegation added that the minutes reached in the previous round were merely a reiteration of the agreed minutes of 1974, but not in any way their ratification¹⁶⁴. Myanmar further stated that the delimitation line should be governed by the rules contained in UNCLOS¹⁶⁵.

3.46. Bangladesh repeated its previous position concerning the starting-point of the exclusive economic zone and continental shelf delimitation, i.e., that Point 7 or a point which gives May Yu Island (Oyster Island) one-third effect should be used¹⁶⁶. Bangladesh added that the principle of proportionality of coastal length should be applied¹⁶⁷. Myanmar replied that if such a principle were to be applied, the whole coastal length of Myanmar would have

¹⁵⁹ *Ibid.*, para. 4.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*, para. 5.

¹⁶² *Ibid.*

¹⁶³ See BM, Vol. III, Annex 7, para. 5; BM, Vol. III, Annex 18, paras. 5-6; Second Round of Resumed Talks, Report of Myanmar Delegation, para. 6 (Annex 14).

¹⁶⁴ BM, Vol. III, Annex 18, para. 5; Second Round of Resumed Talks, Report of Myanmar Delegation, para. 4 (Annex 14).

¹⁶⁵ Second Round of Resumed Talks, Report of Myanmar Delegation, para. 1 (Annex 14).

¹⁶⁶ *Ibid.*, para. 5; BM, Vol. III, Annex 18, para. 5.

¹⁶⁷ BM, Vol. III, Annex 18, paras. 4 and 7; Second Round of Resumed Talks, Report of Myanmar Delegation, para. 7 (Annex 14).

to be taken into account¹⁶⁸. Finally, as Bangladesh again proposed that the delimitation follow its previously proposed “friendship line” (a 225° line), Myanmar again evoked the equidistance method, in accordance with international law¹⁶⁹.

3.47. The **third round of resumed negotiations** took place in Dhaka on 16 and 17 November 2008. As in previous rounds, Myanmar referred to the equidistance/special circumstances method to delimit the maritime boundary, while Bangladesh suggested that the said boundary should be equitable¹⁷⁰.

3.48. The heads of both delegations signed an Agreed Summary of Discussions¹⁷¹. As mentioned generally in paragraph 2 of the Summary, Myanmar put forward two suggestions for a delimitation line, both starting from the midpoint between St. Martin’s Island and May Yu Island (Oyster Island), at an angle of 243°¹⁷². In the first proposal, the delimitation line would be deflected south after 150 nautical miles to an angle of 209°¹⁷³. The second proposal suggested a deflection to an angle of 201° after 140 nautical miles¹⁷⁴. Both proposals were rejected by Bangladesh, which proposed a delimitation line of 185° starting from Point 7¹⁷⁵. Myanmar responded by stating that this proposal was not in conformity with UNCLOS¹⁷⁶. Myanmar then put forward another proposal, according to which a delimitation line with an angle of 243° could be deflected southward with an angle of 211° at the 122-nautical-mile point¹⁷⁷. This last suggestion was also rejected by Bangladesh, which claimed that this line was inequitable¹⁷⁸.

¹⁶⁸ BM, Vol. III, Annex 18, para. 7; Second Round of Resumed Talks, Report of Myanmar Delegation, para. 7 (Annex 14).

¹⁶⁹ BM, Vol. III, Annex 18, para. 10.

¹⁷⁰ BM, Vol. III, Annex 19, paras. 2, 9, 12, 17 and 24.

¹⁷¹ Third Round of Resumed Talks, Summary of Discussions (Annex 15).

¹⁷² BM, Vol. III, Annex 19, para. 29.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, paras. 29 and 37.

¹⁷⁵ *Ibid.*, para. 37.

¹⁷⁶ *Ibid.*, para. 38.

¹⁷⁷ *Ibid.*, para. 42.

¹⁷⁸ *Ibid.*, para. 43.

3.49. The two delegations also discussed Myanmar's relevant coastal length. In the course of this discussion, according to its own account, Bangladesh stated that "[a]s enunciated in the TALOS [*Technical Aspects of the Law of the Sea*] guidelines, the relevant coastline for Myanmar in the Bay of Bengal is up to Cape Negrais"¹⁷⁹.

3.50. The **fourth round of resumed negotiations** took place in Nay Pyi Taw on 30 and 31 July 2009. Bangladesh proposed a new delimitation line, which it claimed was based on the coastal lengths of both States, starting at Point 7 with an angle of 195°¹⁸⁰. The proposal was not acceptable to the delegation of Myanmar¹⁸¹. A Summary of the Discussion was then signed by the two heads of delegations¹⁸².

3.51. The **fifth round of resumed negotiations** was held in Chittagong on 8 and 9 January 2010. Initially both sides reiterated their positions¹⁸³. Later, Bangladesh proposed a new delimitation line, starting at Point 7 with an angle of 243° for 24 nautical miles, at which point it would be deflected southward to an angle of 200°. Referring to the commencement of arbitral proceedings by Bangladesh, Myanmar then commented that the best way to reach a fair solution to the maritime dispute was by direct negotiations¹⁸⁴.

3.52. The **sixth round of resumed negotiations** took place in Nay Pyi Taw on 17 and 18 March 2010. In an opening statement, Myanmar Deputy Minister for Foreign Affairs, Mr. He U Maung Myint, reaffirmed Myanmar's position that an equitable solution should be reached, in accordance with international law¹⁸⁵. He also explained that the different delimitation proposals made by Myanmar during the negotiations were modified to accommodate Bangladesh, but their similarities are due to their reliance on recognized principles of international law¹⁸⁶. The Deputy Minister then repeated Myanmar's position that

¹⁷⁹ *Ibid.*, para. 21.

¹⁸⁰ Fourth Round of Technical Level Talks, Summary of Discussions (Annex 18).

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Fifth Round of Technical Level Talks, Summary of Discussions, para. 3 (Annex 23).

¹⁸⁴ *Ibid.*, para. 5.

¹⁸⁵ Sixth Round of Technical Level Talks, Opening statement by the Deputy Minister for Foreign Affairs (Annex 25).

¹⁸⁶ *Ibid.*

the delimitation line should be based on equidistance with due respect to special circumstances¹⁸⁷. Finally, the Deputy Minister reminded his counterparts that though St. Martin's Island encroaches on Myanmar's territorial sea, Myanmar has been more than flexible to accommodate Bangladesh's position regarding its effect during the negotiations¹⁸⁸.

3.53. Following the opening statements of the delegations, both parties repeated their proposals put forward in the previous rounds of negotiations. At the end of the round, a Summary of Discussion was signed, which stated that

“[d]uring the talks both sides agreed that both principles of equidistance and equity for maritime boundary delimitation are vital in order to arrive at a just and fair solution”¹⁸⁹.

Nevertheless, the last round of negotiations did not lead to any breakthrough between the two parties.

Conclusions

3.54. This Chapter first described the maritime legislation of Myanmar and Bangladesh. In particular, it explained that the straight baselines on the relevant part of Myanmar's coastline are fully in accordance with UNCLOS, whereas Bangladesh's baselines are contrary to international law. It noted that Bangladesh is not seeking to rely on its straight baselines in the present proceedings.

3.55. The Chapter then described the negotiations that took place between 1974 and 1986, and again between 2008 and 2010. No agreement on maritime delimitation was reached during these talks. In particular, the 1974 and 2008 minutes were merely conditional and *ad referendum* understandings of what could eventually be included within an overall maritime delimitation agreement, but no such agreement has been reached. The description of the talks also demonstrates that Myanmar throughout sought actively to attain a reasonable solution, based on principles of international law, and was ready to show flexibility. Bangladesh, on

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*, Summary of Discussion, para. 2.

the other hand, seemed to approach the negotiations in a rigid manner, ignoring the applicable principles on international law, and occasionally even making proposals that took the parties further apart.

CHAPTER 4
DELIMITATION OF THE TERRITORIAL SEA

4.1. The present Chapter concerns delimitation of the territorial seas appertaining to Myanmar and Bangladesh, as well as delimitation between the territorial sea around St. Martin's Island (Bangladesh) and the exclusive economic zone and continental shelf of Myanmar.

4.2. The Chapter is organized as follows. **Section I** describes the applicable law, including the absence of any existing agreement between the parties within the meaning of article 15 of the United Nations Convention on the Law of the Sea (UNCLOS). **Section II** then sets out the delimitation line that results from the application of the law to the circumstances of the present case.

I. Applicable Law

A. Summary of Applicable Law

4.3. Both, Myanmar and Bangladesh are parties to the 1982 United Nations Convention on the Law of the Sea. Myanmar deposited its instrument of ratification on 21 May 1996 and Bangladesh did so on 27 July 2001. The Convention entered into force as between them on 26 August 2001, in accordance with article 308 (2).

4.4. Consequently, "the entry in force of UNCLOS as between the Parties in [2001] means that the principles of maritime delimitation to be applied by the [Tribunal] in this case are determined by paragraph 1 of articles [15], 74 and 83"¹⁹⁰.

4.5. The law on the delimitation of the territorial sea applicable between Myanmar and Bangladesh is thus set out in article 15 of UNCLOS. Article 15 reads as follows:

"Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement

¹⁹⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 78, para. 41.

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.”

4.6. Bangladesh argues that the 1974 agreed minutes constitute an “agreement ... to the contrary” within the meaning of article 15. According to Bangladesh, during the second round of maritime delimitation talks in November 1974, the two sides concluded an agreement on the delimitation of the territorial sea. Further, Bangladesh argues that this understanding was reinforced by subsequent practice, and by its reaffirmation in 2008.

4.7. The form and language of the 1974 agreed minutes, the fact that the understandings set out therein are conditional on an agreement on the delimitation of the entire maritime boundary line between Myanmar and Bangladesh, and the lack of any ratification, all demonstrate that there exists no “agreement ... to the contrary” between Myanmar and Bangladesh within the meaning of article 15 of UNCLOS. Nor has it been suggested that there is any “historic title” in the area in question. Therefore, the delimitation of the territorial seas of Myanmar and Bangladesh is “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”, subject to any relevant special circumstances.

4.8. The presence of St. Martin’s Island, which belongs to Bangladesh, on the “wrong” side of the equidistance line between the coasts of Myanmar and Bangladesh, is an important special circumstance in the present case. St Martin’s Island lies immediately off the coast of Myanmar, south of the agreed point in the Naaf River which is the starting-point of their maritime boundary.

B. Absence of Any “Agreement to the Contrary” or of an Estoppel

1. Bangladesh’s Claim that the 1974 Agreed Minutes Constitute a Binding Agreement

4.9. It is clear from both the *form and the language* of the 1974 agreed minutes that the so-called “1974 Agreement” between the two delegations was merely an understanding reached

at a certain stage of the technical-level talks as part of the ongoing negotiations. It was no doubt intended in due course that Points 1 to 7 would be included in an overall agreement on the delimitation of the entire line between the maritime areas appertaining to Myanmar and those appertaining to Bangladesh. But no such agreement has been reached.

4.10. Case law shows that a delimitation agreement is not lightly to be inferred. In the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, the International Court of Justice stated that “[t]he Court must now determine whether there was a tacit agreement sufficient to establish a boundary. Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed.”¹⁹¹ The Court summarised the position in its unanimous Judgment in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, in the following terms:

“A preliminary issue concerns the burden of proof. As the Court has said on a number of occasions, the party asserting a fact as a basis of its claim must establish it (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 204, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). Ukraine placed particular emphasis on the Court’s dictum in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean sea (Nicaragua v. Honduras)* that “[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed” (Judgment of 8 October 2007, para. 253). That dictum, however, is not directly relevant since in that case no written agreement existed and therefore any implicit agreement had to be established as a matter of fact, with the burden of proof lying with the State claiming such an agreement to exist. In the present case, by contrast, the Court has before it the 1949 Agreement and the subsequent agreements. Rather than having to make findings of fact, with one or other party bearing the burden of proof as regards claimed facts, the Court’s task is to

¹⁹¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 735, para. 253.

interpret those agreements. In carrying out that task, the Court must first focus its attention on the terms of those documents including the associated sketch-maps.”¹⁹²

4.11. In the present case, the ordinary language of the agreed minutes indicates that they were never intended to constitute a legally binding agreement¹⁹³. Paragraph 2, dealing with the delimitation of the territorial sea, states that the minutes only relate to “the first sector of the maritime boundary”, implying that more sectors must be negotiated before a final agreement is reached. In fact, the agreed minutes themselves deal with the overall delimitation talks in paragraph 6. The fact that the agreed minutes were merely a record of a stage reached in the negotiations is further confirmed by the opening words of paragraph 2 (I), which read, using the future tense, “The boundary *will* be formed by a line ...” (emphasis added).

4.12. The conditionality on further developments of the understanding contained in the minutes is wholly inconsistent with the assertion that the minutes were intended to have binding force. The conditionality is twofold. First, paragraph 2 made the understanding between the delegations 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”. Paragraph 4 then merely stated that “[t]he 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”¹⁹⁴. It did not record that Bangladesh accepted the condition. Even if one were to accept Bangladesh’s stance that such “free and unimpeded navigation” was in fact accorded in practice, the language of the agreed minutes shows that no closure was reached on this point. The issue was left for future negotiation and settlement. In fact, as quoted in Chapter 3, according to the Bangladesh account of the subsequent (third) negotiation round,

¹⁹² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 86, para. 68. Writers agree with this: see Ph. Gautier, “Le plateau continental de la Belgique et sa délimitation. Quelques réflexions sur la notion d’accord implicite”, *Revue belge de droit international*, Vol. 28, 1995, pp. 108-122.

¹⁹³ For the text of the agreed minutes, see above, para. 3.15; see also BM, Vol. III, Annex 4.

¹⁹⁴ BM, Vol. III, Annex 4, para. 4.

“Bangladesh delegation stated that they did not see any difficulty in accommodating the Burmese position in the future treaty”¹⁹⁵.

It is evident that with respect to the right of “free and unimpeded navigation” mentioned in paragraph 3 of the 1974 minutes, Bangladesh itself recognized that a treaty would need to be concluded to give this right legal effect.

4.13. The second and crucial condition in the text is found in paragraphs 4 and 5 of the minutes. According to paragraph 4, “[t]he Bangladesh delegation expressed the approval of their Government regarding the territorial waters boundary referred to in para 2”. The paragraph, however, was silent with respect to approval of the Government of Myanmar to any such boundary. Paragraph 5 then stated that

“Copies of a draft Treaty on the delimitation of territorial waters boundary were given to the Burmese delegation by the Bangladesh delegation on 20 November 1974 for eliciting views from the Burmese Government”¹⁹⁶.

4.14. Thus, in an attempt to obtain the agreement of the Government of Myanmar, which was lacking at the time of the drafting of the agreed minutes, Bangladesh prepared a draft treaty and presented it to Myanmar. The Government of Myanmar at no point expressed its consent to the content of the draft treaty or the agreed minutes.

4.15. The draft treaty prepared by Bangladesh, referred to in paragraph 5 of the agreed minutes, stated in article VII that “[t]his Agreement shall be ratified in accordance with the legal requirements of the two countries”¹⁹⁷. Article VIII then added that “[t]his Agreement shall enter into force on the date of the exchange of the Instruments of Ratification”¹⁹⁸. There is no dispute that the understandings reached were never ratified. It is also noteworthy that the head of the Myanmar delegation was unwilling to sign an agreement, or even to initial it¹⁹⁹.

¹⁹⁵ See para. 3.25 above; BM, Vol. III, Annex 15, para. 3.

¹⁹⁶ BM, Vol. III, Annex 4, para. 5.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ See para. 3.21 above; Minutes of the Second Round, first meeting, para. 11 (Annex 3).

4.16. The fact that any partial understandings that might be reached during negotiations were subject to further agreement and ratification by the Government of Myanmar was already evident in the first round of negotiations. On that occasion, Commodore Hlaing, who later signed the 1974 minutes on behalf of Myanmar, stressed more than once that any proposals for delimitation by Bangladesh would have to be submitted to the higher authorities of Myanmar²⁰⁰. In fact, as previously stated, during the second round of negotiations, Commodore Hlaing refused to even initial the draft treaty²⁰¹.

4.17. On several occasions, the delegation of Myanmar made clear that its Government would not sign and ratify a treaty that did not resolve the delimitation dispute in all the different contested areas altogether²⁰². In other words, Myanmar's position was that no agreement would be concluded on the territorial sea before there was agreement regarding the continental shelf/exclusive economic zones. Bangladesh does not claim that such a treaty was ever signed and ratified. Bangladesh was fully aware of Myanmar's position on this point, as it concedes in its Memorial:

“According to the contemporaneous Bangladesh account, Myanmar was ‘not inclined to conclude a separate treaty/agreement on the delimitation of territorial waters; they would like to conclude a single comprehensive treaty where the boundaries of territorial waters and continental shelf were incorporated’.”²⁰³

4.18. Thus, Bangladesh has sought to downplay the legal significance of this crucial condition. Myanmar, for its part, has been throughout consistent and explicit in its refusal to ratify and elevate the status of the agreed minutes in to that of a legally binding agreement.

4.19. For example, during the second round of negotiation, Commodore Hlaing stated that:

“It was not intended to sign a specific treaty on the territorial sea boundary. *The question of delimiting a sea boundary between Burma and Bangladesh would have to be dealt with in totality to*

²⁰⁰ Minutes of the First Round, second meeting, para. 11; fourth meeting, para. 16 (Annex 2); see also paras. 3.13-3.14 above.

²⁰¹ See para. 3.21 above; Minutes of the Second Round, first meeting, para. 11 (Annex 3).

²⁰² Minutes of the Second Round, first meeting para. 10, second meeting para. 4 (Annex 3); see also para. 3.19 above.

²⁰³ BM, para. 3.20; see also BM, Vol. III, Annex 14.

cover the territorial sea, the continental shelf and economic zone.”²⁰⁴

4.20. This statement, which is also reflected in Bangladesh’s account of the meeting²⁰⁵, clarified that the minutes were not an agreement in themselves, but rather an initial understanding that might – subject to further changes – serve as a basis for an element in a legally binding treaty to be concluded in the future.

4.21. Myanmar’s view that the negotiation on an international maritime boundary should result in a single treaty was made clear again during the sixth round of negotiations, when the Minister of Foreign Affairs of Myanmar stated that

“[what] is clearly implied in the text of Agreed Minutes, was that both the territorial sea sector and the continental shelf cum economic zone sector of the common maritime boundary should be settled together in a single instrument”²⁰⁶.

4.22. This position was repeated yet again during the eighth round of negotiations²⁰⁷.

4.23. There is only one possible conclusion: the understanding regarding Points 1 to 7 in the agreed minutes was *conditional on subsequent agreement*, i.e., upon a comprehensive maritime delimitation treaty including the continental shelf and economic zones.

4.24. For the purposes of the 1969 Vienna Convention on the Law of Treaties, a “treaty” is defined as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”²⁰⁸. It is generally accepted that this provision represents customary international law²⁰⁹. The crucial element in the definition

²⁰⁴ See para. 3.19 above (emphasis added); Minutes of the Second Round, first meeting para. 10, see also second meeting, para. 4 (Annex 3).

²⁰⁵ See para. 3.20 above; Bangladesh Brief on negotiation, BM, Vol. III, Annex 14, para. 7.

²⁰⁶ See para. 3.34; Sixth Round, Speeches and statements (Annex 8).

²⁰⁷ See para. 3.40 above.

²⁰⁸ Vienna Convention on the Law of Treaties, 1969, art. 2 (1) (a), *UNTS*, Vol. 1155, I-18232, p. 331.

²⁰⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 429, para. 263. A. Aust, *Modern Treaty Law and Practice*, 2nd ed., Cambridge University Press, 2007, p. 16.

is that the instrument is “an international agreement ... governed by international law”. This embraces the element of an intention to create rights and obligations under international law²¹⁰. In deciding whether an instrument is a treaty, regard must be had “above all to its actual terms and to the particular circumstances in which it was drawn up”²¹¹, not from what the States concerned say afterwards was their intention.

4.25. The International Court of Justice has had occasion to consider whether an instrument is or is not a legally binding treaty in a number of cases. In the *Aegean Sea Continental Shelf* case, for example, the Court was called upon to decide whether the Brussels Communiqué of 1975 was or was not a treaty²¹². In holding that it was not, the Court examined both the text of the Brussels Communiqué and “what light is thrown on its meaning by the context in which the meeting of 31 May 1975 took place and the Communiqué was drawn up”²¹³. The Court held that “it is in that context – a previously expressed willingness on the part of Turkey to submit the dispute to the Court, after negotiations and by a special agreement defining the matters to be decided – that the meaning of the Brussels Communiqué of 31 May 1975 has to be appraised”²¹⁴. The Court also looked to events subsequent to the Communiqué (negotiations between experts and diplomatic exchanges) to confirm its conclusion that the Communiqué did not include a commitment to submit the dispute to the Court²¹⁵.

4.26. It is, of course, accepted that an instrument entitled “agreed minutes” may be legally binding, but whether it is depends upon its terms, its form, and the context in which it was drawn up²¹⁶. The present case may, however, be contrasted with that before the International

²¹⁰ For an account of the work of the International Law Commission and the Vienna Conference on this point, see Ph. Gautier, “Article 2”, in O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, Bruylant, Brussels, 2006, Vol. I, pp. 60-63, paras. 25-28; see also Ph. Gautier, *Essai sur la définition des traités entre États*, Bruylant, Brussels, 1993, pp. 328-331.

²¹¹ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court, Judgment*, *I.C.J. Reports 1978*, p. 39, para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1994*, p. 121, para. 23.

²¹² *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court, Judgment*, *I.C.J. Reports 1978*, pp. 38-45, paras. 94-107.

²¹³ *Ibid.*, p. 41, para. 100.

²¹⁴ *Ibid.*, p. 43, para. 105.

²¹⁵ *Ibid.*, para. 106.

²¹⁶ A. Aust, *Modern Treaty Law and Practice*, 2nd ed., Cambridge University Press, 2007, pp. 51-52.

Court of Justice in *Qatar v. Bahrain*²¹⁷. In that case, clear commitments were written down, listed as matters “agreed” upon by the parties²¹⁸. Furthermore, the 1990 agreed minutes were signed by the Ministers of Foreign Affairs of the three parties involved, persons who by virtue of their office are considered as possessing full powers and credentials for the performance of all acts related to the conclusion of a treaty²¹⁹. In light of these factors, the agreed minutes were considered to be a reaffirmation of prior commitments:

“Thus the 1990 Minutes include a reaffirmation of obligations previously entered into; they entrust King Fahd with the task of attempting to find a solution to the dispute during a period of six months; and, lastly, they address the circumstances under which the Court could be seised after May 1991. Accordingly, and contrary to the contentions of Bahrain, the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement”²²⁰.

4.27. In the present case, by contrast, the agreed minutes were signed, for Myanmar, by the head of Myanmar’s delegation to the second round of negotiations, Commodore Hlaing, who was Vice-Chief of Staff, Defence Services (Navy), who was not vested with full powers to bind the State, and who did not, by virtue of his office, have full powers to bind the State²²¹. Any Cabinet decision was on the clear understanding that Myanmar would only agree territorial sea points as part of a treaty delimiting the whole line. Moreover, Bangladesh unsuccessfully attempted to conclude a treaty in order to give the understanding described in the minutes binding force²²². Also, the 1974 agreed minutes do not contain explicit language expressing consent to be bound as was the case in *Bahrain v. Qatar*, and the conditionality of

²¹⁷ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 121, para. 24.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*; see also Vienna Convention on the Law of Treaties, 1969, art. 7 (2) (a), *UNTS*, Vol. 1155, I-18232, p. 331.

²²⁰ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 121, para. 25.

²²¹ See paras. 3.11 and 3.15 above.

²²² See paras. 3.17-3.21 and paras. 4.13-4.18 above.

the understandings on future developments and their *ad hoc* nature are evident and undisputed²²³. In the language of the International Court of Justice, the 1974 agreed minutes merely “give an account of discussions and summarize points of agreement and disagreement”²²⁴. They did no more than encapsulate a stage reached in ongoing negotiations. This was consistent with the general principle that negotiating parties are not bound by proposals made or positions adopted in the course of negotiations. Talks are conducted without prejudice to legal positions. This principle provides “reassurance that concessions offered across the table will not find echo in other contexts such as ... litigation”²²⁵.

4.28. Myanmar’s refusal even to sign, let alone ratify, a draft treaty with respect to the territorial sea, together with the attempt on behalf of Bangladesh to produce the content of the agreed minutes in the form of a binding treaty, confirm, if confirmation were needed, that the minutes were not a binding agreement between the parties, and were not viewed as such by the parties themselves at the time.

4.29. Bangladesh contends in its Memorial that only in September 2008 did Myanmar express its disagreement with the endpoint of the line drawn in the minutes of 1974, plotted again in 2008²²⁶. It argues that between 1974 and September 2008, Myanmar gave no indication that it did not view the 1974 agreed minutes as a valid agreement²²⁷. Yet the facts, as recorded in Bangladesh’s own account of the negotiations and affirmed by its own positions repeatedly taken during the negotiations, indicate otherwise.

4.30. Point 7, the last point on the territorial sea boundary between the parties described in the agreed minutes, is a point equidistant between the southernmost point on the coast of St. Martin’s Island and the mainland coast of Myanmar. Indeed, in the round of negotiations following that at which the 1974 agreed minutes were signed, Bangladesh proposed

²²³ BM, paras. 3.25-3.26 and para. 5.10.

²²⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 121, para. 25.

²²⁵ D. Anderson, “Negotiating Maritime Boundary Agreements”, in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation*, Nijhoff, Leiden, 2006, pp. 121-141, reproduced and slightly updated in D. Anderson, *Modern Law of the Sea: Selected Essays*, Nijhoff, Leiden, 2008, pp. 417-435, at p. 424.

²²⁶ BM, paras. 3.29, 5.16, and 5.17.

²²⁷ BM, para. 5.12.

delimiting the rest of the maritime boundary starting from Point 7²²⁸. But Bangladesh then put forward an alternative that instead of Point 7 there should be used a median point between the coasts of St. Martin's Island and May Yu Island (Oyster Island)²²⁹.

4.31. Moreover, the text of the 2008 minutes, argued by Bangladesh to reflect the binding nature of the 1974 minutes, also negates this very assertion. Paragraph 4 of the 2008 minutes records that Bangladesh had again suggested, as an alternative, to replace Point 7 with a point between St. Martin's Island and May Yu Island (Oyster Island), while giving the latter only one-third effect²³⁰. Myanmar suggested using the exact median point between the two islands²³¹. During the following round of negotiations, the two sides repeated their suggestions for the starting-point for the delimitation of the exclusive economic zone and continental shelf, with both parties offering alternatives to Point 7²³². In any event, the sides were in dispute regarding Point 7, a point allegedly settled by the 1974 minutes, as the starting-point of the delimitation of the areas beyond the territorial sea.

4.32. So Bangladesh's argument that for 34 years both parties viewed the issues covered and points plotted by the 1974 agreed minutes as settled contradicts their own positions during the negotiations.

4.33. Bangladesh has emphasized the fact that the 2008 agreed minutes reaffirmed the previous understandings reached in the 1974 minutes with respect to the territorial sea. However, the 2008 minutes refer the 1974 minutes as an "ad-hoc understanding"²³³. This term was chosen by the parties rather than the term "treaty" or the term "agreement". In fact, in 2008, the two sides once again chose language that fell far short of describing the agreed minutes as binding.

²²⁸ See para. 3.26 above; BM, Vol. III, Annex 15, para. 5; Minutes of the Third Round, second meeting paras. 5 and 7; third meeting, para. 8 (Annex 4).

²²⁹ See para. 3.26 above; BM, Vol. III, Annex 15, para. 5; Minutes of the Third Round, second meeting paras. 5 and 7; third meeting, para. 8 (Annex 4).

²³⁰ BM, Vol. III, Annex 7, para. 4.

²³¹ See para. 3.42 above; BM, Vol. III, Annex 7, para. 5.

²³² See paras. 3.45-3.46 above; BM, Vol. III, Annex 18, para. 6.

²³³ See para. 3.41 above; BM, Vol. III, Annex 7, paras. 2 and 3.

4.34. Furthermore, though the 2008 minutes did indeed revisit the 1974 minutes, they did not add anything to their legal effect, if any. In addition to substituting language for the word “unimpeded” (see below), the 2008 minutes plotted the co-ordinates described in the 1974 minutes on a more recent and internationally recognized chart. They expressly stated that the “other terms of the agreed minutes of the 1974 will remain the same”. This makes clear that the status of the 1974 minutes, and in particular their lack of legal force, was not altered by the 2008 minutes. In fact, paragraph 5 of the 2008 minutes itself (which recorded that Myanmar had proposed a different starting-point for the exclusive economic zone/continental shelf boundary, and had stated that under certain circumstances it would need to review the full-effect accorded to St. Martin’s Island) suggests that Myanmar considered that it could alter its position with respect to the seven points plotted in the 2008 minutes²³⁴.

4.35. Another indication that Myanmar and Bangladesh did not consider either the 1974 or the 2008 minutes to be a binding agreement is that they were not submitted, by either party, for registration with the Secretariat of the United Nations, as required by article 102 (1) of the United Nations Charter. Furthermore, neither party publicized nor did it submit co-ordinates or a chart of the points plotted in the minutes with the Secretary-General of the United Nations, as required by article 16 (2) of UNCLOS. While such submissions, or the absence thereof, are not conclusive, they provide a further indication of intention of Bangladesh and Myanmar with respect to the status of the minutes²³⁵.

4.36. Finally, Bangladesh has not put forward any evidence of any practice confirming the content of the 1974 minutes. Thus, all factors indicate that the 1974 agreed minutes did not constitute an agreement within the meaning of article 15 of UNCLOS.

²³⁴ See para. 3.41 above; BM, Vol. III, Annex 7, para. 5.

²³⁵ See also Ph. Gautier, “Article 2”, *op. cit.* (fn. 210), p. 53, para. 13 (“*Cela dit, il n’en reste pas moins vrai que la dénomination d’un instrument peut dans certains cas apporter un éclairage sur la nature de l’instrument conclu, en tant qu’indice, parmi d’autres, de la volonté de ses auteurs. En pratique, l’on sera en effet moins enclin à reconnaître d’emblée la valeur juridique d’un acte intitulé ‘déclaration d’intention’ que face à un instrument dénommé ‘accord’ ou ‘traité’ par ses auteurs.*”)

2. *Bangladesh's Claim that the Conduct of the Parties Establishes a Tacit or de facto Agreement*

4.37. Bangladesh argues, in the alternative, and in the most general terms, that even if the 1974 minutes did not constitute a legally binding treaty, they constituted a tacit or *de facto* agreement between the parties. To this end, it argues that Bangladesh and Myanmar relied on the agreed minutes to administer their "agreed" territorial sea and that Bangladesh has allowed for Myanmar's naval vessels to navigate freely in the vicinity of St. Martin's Island²³⁶:

"For nearly 35 years, their mutual, consistent, and sustained conduct adhered to the line agreed in 1974. In particular, each Party exercised peaceful and unchallenged administration and control over its agreed territorial sea. As agreed, Bangladesh permitted vessels from Myanmar to navigate freely and without impediment through its territorial waters around St. Martin's Island to and from the Naaf River."²³⁷

Furthermore, Bangladesh has argued that fishermen residing on St. Martin's Island have relied on the agreed minutes to conduct their fishing activities²³⁸. Yet Bangladesh puts forward no evidence to demonstrate its assertion that the parties have administered their waters in accordance with the agreed minutes, or that Myanmar's vessels have enjoyed the right of free and unimpeded navigation in the waters around St. Martin's Island, in accordance with the agreed minutes.

4.38. Moreover, if any such practice existed, it existed regardless of the understandings reached in 1974. As noted above, during the third round of negotiation Commodore Hliang, head of the Myanmar delegation, reminded his counterparts that the passage of Myanmar vessels in the waters surrounding St. Martin's Island

"was a routine followed for many years by Burmese naval vessels to use the channel ... He added that in asking for unimpeded navigation the Burmese side was only asking for existing rights which it had been exercising since 1948."²³⁹

²³⁶ BM, paras. 5.19 and 5.22.

²³⁷ *Ibid.*, para. 5.13.

²³⁸ *Ibid.*, para. 5.22.

²³⁹ See para. 3.23 above; Minutes of the Third Round, first meeting, para. 4 (Annex 4).

4.39. This recollection met with no objection by the delegation of Bangladesh, as is evident by the latter's own account of the negotiations:

“At this session, the Burmese delegation repeated their earlier position that the boundary line was subject to a guarantee of free and unimpeded navigation around St. Martin Island to and from Burmese sectors of the Naaf River without any prior permission / information of the Bangladesh Government. They maintain that they do not want anything new but only existing navigation practice is to be incorporated in the future boundary treaty.”²⁴⁰

4.40. In paragraph 2 of the 2008 minutes, the two sides agreed “ad-referendum” that the word “unimpeded” be replaced with “Innocent Passage through the territorial sea shall take place in conformity with the UNCLOS”²⁴¹. The effect of this substitution is not entirely clear, but it would seem that the intention was to retain the reference to “free navigation”. Nor was the *ad referendum* understanding ever ratified.

4.41. With respect to fishing activities, the sources referred to by Bangladesh merely demonstrate that many inhabitants of St. Martin's Island are fisherman and that the diet of the people of Bangladesh in general consists, among other things, of fish²⁴². These statements do not begin to demonstrate a reliance on the content of paragraph 2 of the 1974 agreed minutes.

4.42. In any event, the International Court of Justice has been explicit in stating that fisheries will rarely be a relevant circumstance for delimiting the maritime border between two States:

“What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned.”²⁴³

²⁴⁰ See para. 3.24 above; BM, Vol. III, Annex 15, para. 3.

²⁴¹ See para. 3.42 above; BM, Vol. III, Annex 7, para. 2.

²⁴² See BM, Vol. III, Annexes 35 and 36.

²⁴³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 342, para. 237.

These sentiments were recently reiterated with approval by the arbitration tribunal in the dispute between *Barbados and Trinidad and Tobago*²⁴⁴. In the case in hand, Bangladesh has failed to provide any proof that the delimitation line in the territorial sea will have a significant impact on its fisherman.

4.43. In summary, the conduct of the parties, including the signing by heads of Delegation of the 1974 minutes, has not established a tacit or *de facto* agreement between the parties with respect to the delimitation of the territorial sea.

3. *Bangladesh's Claim that Myanmar is Estopped from Denying the Existence of an Agreement*

4.44. Bangladesh argues that "fundamental considerations of justice require that Myanmar is estopped from claiming that the 1974 agreement is anything other than valid and binding"²⁴⁵. This argument is far-fetched.

4.45. After citing two short passages from the Court's Judgment in the *Temple of Preah Vihear* case²⁴⁶, Bangladesh asserts that "[t]he ICJ's reasoning and conclusion apply equally to the present case"²⁴⁷. It contends that Myanmar has made unequivocal and voluntary statements affirming the 1974 minutes and that Bangladesh relied on these affirmations to its own detriment²⁴⁸.

4.46. The notion of estoppel in international law, although sometimes questioned, is widely accepted, but its scope is far from clear. Reference is usually made, as in Bangladesh's Memorial, to the *Temple of Preah Vihear* case²⁴⁹. Estoppel may arise if a State has acted or made statements to a certain effect, and another State has relied on that conduct or statements

²⁴⁴ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, p. 214, para. 241.

²⁴⁵ BM, para. 5.20.

²⁴⁶ BM, para. 5.20.

²⁴⁷ *Ibid.*, para. 5.21.

²⁴⁸ *Ibid.*, para. 5.23.

²⁴⁹ *Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6.

to its own detriment²⁵⁰. The former State is then precluded from renegeing on its consistent and unequivocal conduct or statements²⁵¹. As stated by the International Court of Justice in the *North Sea Continental Shelf* cases, the alleged conduct or statements must be clear, consistent and definite²⁵². Likewise, the party claiming estoppel needs to show that the past conduct has caused it “in reliance on such conduct, detrimentally to change position or suffer some prejudice”²⁵³. These strict requirements have particular significance when it comes to the establishment of maritime boundaries²⁵⁴.

4.47. The facts of the present case are such that the conditions for estoppel are not met. As shown above, Myanmar was clear in its statements regarding the non-binding and conditional character of the 1974 minutes²⁵⁵. Moreover, both Bangladesh and Myanmar continued to negotiate sectors of the delimitation line supposedly resolved by the 1974 minutes²⁵⁶. Thus, Myanmar’s statements were far from unequivocally accepting or acquiescing the 1974 minutes, and Bangladesh cannot claim to have relied upon them to its detriment.

4.48. In fact, Myanmar was explicit of its refusal to turn the 1974 minutes into a binding treaty, despite the attempts of Bangladesh²⁵⁷. In the *North Sea Continental Shelf* cases, the Court, in response to claims of acquiescence and estoppel put forward by Denmark and the Netherlands, stressed the fact that Germany could have easily expressed consent to the rule found in Article 6 of the 1958 Geneva Convention by ratifying it²⁵⁸. The Court stipulated that

“it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to

²⁵⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, pp. 304-305, para. 129.

²⁵¹ *Ibid.*

²⁵² *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, pp. 25-26, paras. 28-30.

²⁵³ *Ibid.*, para. 30.

²⁵⁴ See para. 4.10 above.

²⁵⁵ See paras. 4.11-4.23 above.

²⁵⁶ See paras. 4.29-4.32 above.

²⁵⁷ See above, paras. 4.13-4.23.

²⁵⁸ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, pp. 25-26, para. 28.

do so, has nevertheless somehow become bound in another way²⁵⁹.

Similarly, if Myanmar had been ready to accept the substance of 1974 minutes as binding upon it, it could have easily signed and ratified the draft treaty submitted by Bangladesh. Myanmar refused to undertake any action or formalities to this effect, and should not be artificially construed to be bound by an agreement it refused to ratify, via the doctrine of estoppel.

4.49. Finally, Bangladesh has not established that it relied on any conduct of Myanmar to its detriment. First, Bangladesh has not supported its contention – that it allowed for the unimpeded passage of Myanmar’s vessels – with any evidence²⁶⁰. Second, it produced no evidence to show that it adhered to the 1974 minutes with respect to fisheries²⁶¹. Third, it had not shown how any of these alleged facts were to its detriment. It is unclear how any conduct or statements on behalf of Myanmar were relied upon by Bangladesh to its detriment.

4.50. Thus, Myanmar’s actions fall far short from the clear, consistent and definite conduct required to establish the existence of an estoppel.

II. The Delimitation between the Territorial Seas of Myanmar and Bangladesh, and between the Territorial Sea of Bangladesh and the EEZ/Continental Shelf of Myanmar

A. St. Martin’s Island as a Special Circumstance

4.51. The law applicable to the delimitation of the territorial seas of the parties is contained in article 15 of UNCLOS²⁶². It has been shown above that there is no “agreement ... to the contrary” between Myanmar and Bangladesh²⁶³. Therefore, the delimitation line between the territorial seas is “the median line every point of which is equidistant from the nearest points on the baselines from which the territorial sea of each of the two States is measured” except

²⁵⁹ *Ibid.*

²⁶⁰ See para. 4.37 above.

²⁶¹ See para. 4.41 above.

²⁶² See para. 4.5 above.

²⁶³ See paras. 4.9-4.50 above.

“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”.

4.52. There is no historic title relevant to the delimitation. But the presence of St. Martin’s Island, which belongs to Bangladesh, on the “wrong” side of the equidistance line between the coasts of Myanmar and Bangladesh, is an important special circumstance which necessitates a departure from the median line. As has already been pointed out, St Martin’s Island lies immediately off the coast of Myanmar, to the south of the point in the Naaf River which marks the endpoint of the land boundary between Myanmar and Bangladesh and is the starting-point of their maritime boundary.

4.53. St. Martin’s Island cannot be defined as a “coastal island” if only because it lies in front of Myanmar’s coast, not that of Bangladesh, to which it belongs. On the other hand, there can be no doubt that it is an island corresponding to the definition in article 121, paragraphs 1 and 2, of UNCLOS, and that, consequently, it can generate maritime areas. However, the delimitation of such areas must be done “in accordance with the provisions of [the] Convention applicable to other land territory”²⁶⁴. In that respect, St. Martin’s Island must be considered as constituting in itself a special circumstance which calls for shifting or adjusting the median line which otherwise would have been drawn off the coasts of the Parties.

4.54. This approach is in accordance with case law and state practice, relating both to delimitation of the territorial sea and other maritime zones.

4.55. Thus, in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom and France*, the Court of Arbitration decided that the Channel Islands could not generate full maritime zones, but that, due to their position, they must be treated as a “special circumstance” for the purpose of delimitation²⁶⁵. Drawing the median line as between the French and English mainland coasts, the Court did not give them any effect whatsoever²⁶⁶. In the final delimitation, the Islands were limited to a 12-nautical-mile territorial sea enclave of continental shelf to their west and north, and were separated from

²⁶⁴ UNCLOS, art. 121 (2).

the remainder of United Kingdom continental shelf by a part of French continental shelf²⁶⁷. This was done, even though the Channel Islands possess

“a considerable population and a substantial agricultural and commercial economy, they are clearly territorial and political units which have their own separate existence, and which are of a certain importance in their own right separately from the United Kingdom”²⁶⁸.

4.56. In that same case, the Court of Arbitration had to deal with the Scilly Isles, a group of islands which lies roughly 21 nautical miles off the British mainland and have a significant population (more than 2,000 inhabitants)²⁶⁹. It also treated them as a “special circumstance” and gave them only half-effect in drawing the median line²⁷⁰.

4.57. In the *Dubai/Sharjah Border Arbitration*, after drawing the provisional equidistance line, the Court of Arbitration decided that the island of Abu Musa, which is a large maritime feature having a significant population (800 inhabitants) and economic importance, should only be entitled of a territorial sea of 12 nautical miles, with “no effect being accorded to the island of Abu Musa for the purpose of plotting median or equidistance shelf boundaries between it and neighbouring shelf areas”²⁷¹.

4.58. In the *Tunisia/Libya Continental Shelf* case, the International Court of Justice gave only half-effect to the Kerkennah Islands²⁷², despite their considerable size (180 square kilometres)²⁷³, while the presence of the large island of Jerba, located close to the mainland,

²⁶⁵ Decision of 30 June 1977, *UNRIAA*, Vol. XVIII, p. 93, para. 196.

²⁶⁶ *Ibid.*, pp. 94-95, para. 201.

²⁶⁷ *Ibid.*, p. 95, para. 202.

²⁶⁸ *Ibid.*, p. 88, para. 184.

²⁶⁹ *Ibid.*, p. 107, para. 227.

²⁷⁰ *Ibid.*, p. 117, para. 251.

²⁷¹ *Dubai-Sharjah Border Arbitration*, Award of 19 October 1981, *International Law Reports (I.L.R.)*, Vol. 91, 1981, p. 677.

²⁷² *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, pp. 88-89, paras. 128-129.

²⁷³ *Ibid.*, p. 89, para. 128.

was ignored even as a special circumstance given the other existing relevant circumstances²⁷⁴.

4.59. In the *Gulf of Maine* case, the Chamber considered appropriate that only half-effect should be given to Seal Island, although it is about 3 miles long, between 1 and 1½ miles wide and, as the Chamber underlined, is inhabited throughout the year²⁷⁵. And, in the *Saint-Pierre-et-Miquelon* case, the Tribunal awarded the French islands (of substantial size and with a long-standing resident population) only a limited extension of the enclave beyond the territorial sea, and then only in the form of a narrow corridor pointing in a direction which did not cut off the projection of any relevant Canadian (i.e., Newfoundland) coast²⁷⁶.

4.60. Regarding State practice, it may be noted that small or middle-size islands are usually totally ignored. The predominant tendency is to give no or little effect to such maritime formation. Various examples can be invoked in this respect:

- The Agreement between the Government of the Italian Republic and the Government of the Tunisian Republic Relating to the Delimitation of the Continental Shelf between the Two Countries of 1971²⁷⁷ disregarded the Italian islands Pantelleria, Linosa, Lampedusa, and Lampione for the purposes of drawing an equidistance median line. 12-nautical-mile territorial sea/contiguous zones were then given to each of the Italian islands, and an further one-nautical-mile zone of continental shelf outside those 12-nautical-mile arcs were given to Pantelleria (83 square kilometres, 7,500 inhabitants), Lionosa and Lampedusa (for both taken together: 16.6 square kilometres, 6,000 inhabitants).
- Less than full effect was also given to the Swedish islands of Götland (2,994 square kilometres) and Gotska Sandön (37 square kilometres), which have roughly 55,000

²⁷⁴ *Ibid.*, p. 64, para. 79 and p. 85, para. 120.

²⁷⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, *I.C.J. Reports 1984*, p. 337, para. 222.

²⁷⁶ *Delimitation of Maritime Areas between Canada and France (St.-Pierre-et-Miquelon)*, Decision of 10 June 1992, *ILM*, Vol. 31, 1992, p. 1145 (see also *UNRLAA*, Vol. XXI, p. 270).

²⁷⁷ Tunis, 20 August 1971; *UNTS*, Vol. 1129, I-17601, p. 255; see also United States Department of State, "Italy – Tunisia; Continental Shelf Boundary", *Limits in the Seas*, No. 89, 1980; and J.I. Charney and L.M. Alexander (eds.), *op. cit.* (fn. 63), pp. 1616-1617.

inhabitants, in the 1988 Agreement between Sweden and the USSR in relation to the continental shelf and exclusive economic zone/fishing boundary between the two States²⁷⁸.

- Half effect was given to islands in the case of the Agreement concerning the sovereignty over the islands of Al-'Arabiyah and Farsi and the delimitation of the boundary line separating the submarine areas between the Kingdom of Saudi Arabia and Iran (Kharg Island)²⁷⁹ (32 square kilometres).
- The large Australian islands of Boigu and Saibai (89.6 square kilometres), together with their associated islands Aubusi and Moimi, and Duan and Kaumang respectively, were awarded only 3-mile belts of territorial sea²⁸⁰.
- In the Agreement between Greece and Italy delimiting their respective continental shelf areas of 1977, various effects were given to Greek islands in the Channel of Otranto and the Strofades group, according to their size and their population²⁸¹.
- In the Agreement between Italy and Yugoslavia concerning the Delimitation of the Continental Shelf between the Two Countries of 1968²⁸², the Yugoslav islands of Jabuka, Pelagruz and Kajola (Galijula) were given zero effect, as was the small Italian island of Pianosa. The islands of Pelagruz and Kajola, lying almost exactly on the median line so drawn were given 12-nautical-mile enclaves.

²⁷⁸ Agreement between the Government of the Kingdom of Sweden and the Government of the Union of Soviet Socialist Republics on the Delimitation of the Continental Shelf and of the Swedish Fishing Zone and the Soviet Economic Zone in the Baltic Sea, Moscow, 18 April 1988; *UNTS*, Vol. 1557, I-27075, p. 283. See also J.I. Charney and L.M. Alexander (eds.), *op. cit.* (fn. 63), pp. 2061-2062.

²⁷⁹ Tehran, 24 October 1968, *UNTS*, Vol. 696, I-9976, p. 212. See also J.I. Charney and L.M. Alexander (eds.), *op. cit.* (fn. 63), p. 1521.

²⁸⁰ Treaty between Australia and Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters, Sydney, 18 December 1978, *UNTS*, Vol. 1429, I-24238, p. 208. See also J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. I, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 932.

²⁸¹ Agreement between the Hellenic Republic and the Italian Republic on the delimitation of the respective continental shelf areas of the two States, Athens, 24 May 1977, *UNTS*, Vol. 1275, I-21048, p. 427. See also J.I. Charney and L.M. Alexander (eds.), *op. cit.* (fn. 63), p. 1594.

²⁸² Rome, 8 January 1968; see United States Department of State, "Italy - Yugoslavia; Continental Shelf Boundary", *Limits in the Seas*, No. 9, 1970. See also J.I. Charney and L.M. Alexander (eds.), *op. cit.* (fn. 63), p. 1630.

- In the Agreement between Qatar and Abu Dhabi of 1969, the equidistant line between the two adjacent coasts is diverted around a 3-mile arc surrounding the island of Daiyina, which was otherwise given no effect at all²⁸³.
- In the Offshore Boundary Agreement between Iran and Dubai of 1974, only a slight deviation of the boundary otherwise drawn was provided for, on the basis of a 12-nautical-mile arc around the Iranian island of Sirri²⁸⁴.

4.61. In all the cases cited above, both from jurisprudence and State practice, maritime features equivalent to, or even much bigger than, St. Martin's Islands were in question. Many of these islands were considerably larger than St. Martin's Island, which has an area of approximately 8 square kilometres, according to Bangladesh²⁸⁵, and are permanently inhabited²⁸⁶. These characteristics have not prevented the interested States or international courts and tribunals to give them only a territorial sea of between 3 and 12 nautical miles.

B. The Delimitation Line Proposed by Myanmar

4.62. While it seems appropriate to follow the median line up to where the coasts of St. Martin's Island and Myanmar are opposite, once they are no longer opposite, a shift back to the equidistance line as it would be drawn in the absence of St. Martin's Island is called for (see sketch-map No. 4.1 at page 81). This is clear from the case law and practice described above.

4.63. In cases, when, for particular reasons, it was necessary to depart from the equidistance line for drawing the initial segment of an all-purpose maritime boundary, international courts and tribunals have mainly had recourse to two different techniques. Either, they have drawn a

²⁸³ Agreement concerning settlement of offshore boundaries and ownership of islands between Qatar and the United Arab Emirates (Abu Dhabi), Doha, 20 March 1969, *UNTS*, Vol. 2402, I-43372, p. 49; see also United States Department of State, "Qatar – United Arab Emirates (Abu Dhabi); Continental Shelf Boundary", *Limits in the Seas*, No. 18, 1970. See also J.I. Charney and L.M. Alexander (eds.), *op. cit.* (fn. 63), p. 1543.

²⁸⁴ Tehran, 31 August 1974; see United States Department of State, "Iran – United Arab Emirates (Dubai); Continental Shelf Boundary", *Limits in the Seas*, No. 63, 1975. See also J.I. Charney and L.M. Alexander (eds.), *op. cit.* (fn. 63), p. 1535.

²⁸⁵ BM, para. 2.18. See also para. 2.18 above.

²⁸⁶ According to Bangladesh, St. Martin's Island would support "a permanent population of 7,000 residents" (BM, para. 2.18). See also para. 2.19 above.

straight line joining the extreme point of the first segment of the boundary to the theoretical equidistance line by following a parallel or a meridian; or they have followed an arc of circle having its centre at a specific point.

4.64. The case of the *Land and Maritime Delimitation between Cameroon and Nigeria* gives an example of the first technique. Having considered that, in the “circumstances the Maroua Declaration, as well as the Yaoundé II Declaration, have to be considered as binding and as establishing a legal obligation on Nigeria” regarding the first segment of the boundary²⁸⁷, the International Court of Justice noted

“however, that point G, which was determined by the two Parties in the Maroua Declaration of 1 June 1975, does not lie on the equidistance line between Cameroon and Nigeria, but to the east of that line. Cameroon is therefore entitled to request that from point G the boundary of the Parties’ respective maritime areas should return to the equidistance line. ... The Court accordingly considers that from point G the delimitation line should directly join the equidistance line at a point ... which will be called X. The boundary between the respective maritime areas of Cameroon and Nigeria will therefore continue beyond point G in a westward direction until it reaches point X ... The boundary will turn at point X and continue southwards along the equidistance line.”²⁸⁸

Such a method, consisting in drawing a straight line from Point C to the point situated at a 12-nautical-mile limit from St. Martin’s Island on the equidistance line (Point E on sketch-map No. 4.1 at page 81) is not practicable in the present case, if only because it would deprive St. Martin’s Island of a great part of the territorial sea to which it is entitled.

4.65. In *Romania v. Ukraine*, where a 12-nautical-mile arc around Serpents’ Island²⁸⁹ was accepted as representing the seaward limit of maritime area appertaining to the Island, the Court decided that the maritime boundary between the Parties would follow that arc until the

²⁸⁷ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 431, para. 268.

²⁸⁸ *Ibid.*, p. 448, para. 307. See also *Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia, Second Phase*, Award of 26 March 2002, I.L.R., Vol. 128, pp. 571-572, para. 5.7.

²⁸⁹ That island – situated less than 24 nautical miles from the coasts of the mainland of the Parties – was much smaller than St. Martin’s Island. But this is not related to the issue which is dealt with here, which is only concerned with the method to be used to join a non-equidistant (or non-median) line with a provisional equidistant line.

point “where the arc intersects with the line equidistant from Romania’s and Ukraine’s adjacent coasts”²⁹⁰.

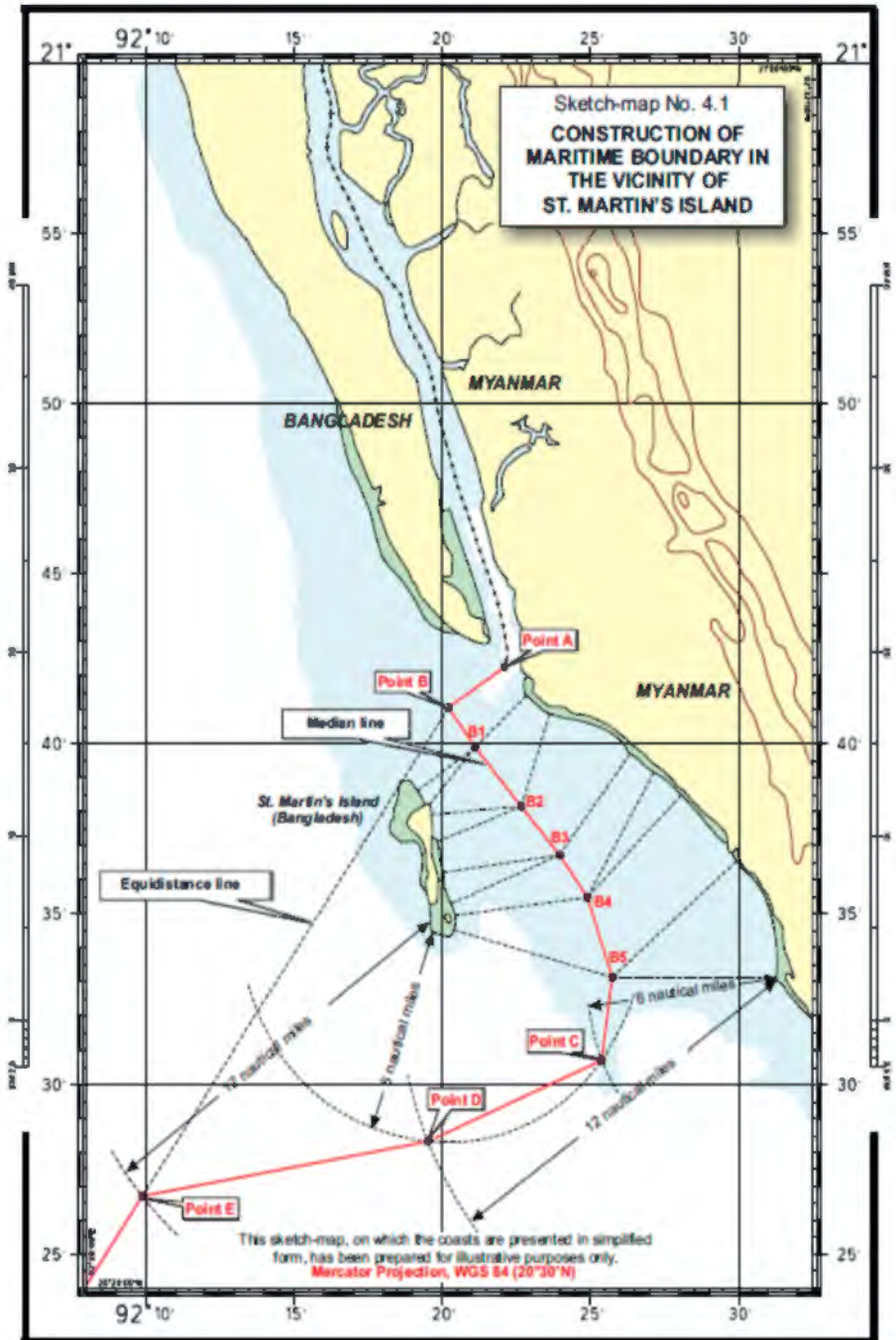
4.66. Having regard to the fact that St. Martin’s Island, lies wholly on the “wrong” side of the equidistance line based on the respective mainland coasts of Myanmar and Bangladesh, it is clear that this small island cannot enjoy a full 12-nautical-mile territorial sea. In addition, account has to be taken of Myanmar’s important security interests in ensuring unimpeded passage and access from the mouth of the Naaf River to the open sea for both State vessels and commerce.

4.67. Myanmar submits that, in application of the equidistance/special circumstances rule prescribed by article 15 of UNCLOS, a line should be constructed that gives St. Martin’s Island, to the east, a territorial sea up to the median line between the Island and Myanmar’s coastline, and to the south a territorial sea of between 6 and 12 nautical miles. The construction of this line is shown on sketch-map No. 4.1.

4.68. In the area around St. Martin’s Island, the following line is proposed as the delimitation line that derives from the applicable rules on maritime delimitation (see sketch-map No. 4.2 at page 85):

- (i) The boundary between the territorial seas of Myanmar and Bangladesh begins at Point A. Point A is the terminus of the land boundary agreed between Burma and Pakistan in 1966 and specified by co-ordinates in the Supplementary Protocol of 1980. The agreed co-ordinates (when converted to WGS 84) are 20° 42’ 15.8” N, 92° 22’ 07.2” E.
- (ii) From Point A, the line follows the equidistance line based on the mainland coastlines of Myanmar and Bangladesh (hereafter referred to as the “equidistance line”, for the construction of which see Chapter 5 below) until it reaches Point B, the point at which St. Martin’s Island (Bangladesh) begins to take effect.

²⁹⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 131, para. 219.



Point B is the point on the equidistance line that is equidistant between the coastline of Myanmar and the coastline of St. Martin's Island, as identified on Admiralty Chart No. 817²⁹¹. The co-ordinates of Point B are 20° 41' 03.4" N, 92° 20' 12.9" E.

- (iii) From Point B, the boundary is a median line between the coastline of Myanmar and St. Martin's Island (Bangladesh) until it reaches Point C. Point C is the point where the median line is 6 nautical miles from the Myanmar coastline and 6 nautical miles from the coast of St. Martin's Island. The co-ordinates of Point C are 20° 30' 42.8" N, 92° 25' 23.9" E.
- (iv) In order to simplify the median line between Point B and Point C, it is desirable (and in accordance with common practice both of States and of international courts and tribunals) to select a series of intermediate points, joined by straight lines (azimuths). The following are proposed:
- B1: 20° 39' 53.6" N, 92° 21' 07.1" E;
- B2: 20° 38' 09.5" N, 92° 22' 40.6" E;
- B3: 20° 36' 43.0" N, 92° 23' 58.0" E;
- B4: 20° 35' 28.4" N, 92° 24' 54.5" E;
- B5: 20° 33' 07.7" N, 92° 25' 44.8" E.
- (v) From Point C, the boundary follows a straight line (azimuth 276.74°) until it reaches Point D. Point D is a point 12 nautical miles from the mainland coast of Myanmar and 6 nautical miles from the coast of St. Martin's Island (Bangladesh). The co-ordinates of Point D are 20° 28' 20.0" N, 92° 19' 31.6" E.
- (vi) From Point D, the boundary follows a straight line to Point E, which is the point at which the equidistance line meets the 12-nautical-mile arc from the coastline of St. Martin's Island (Bangladesh). The co-ordinates of Point E are 20° 26' 42.4" N, 92° 09' 53.6" E.

²⁹¹ Elephant Point to Manaung (Cheduba Island) (INT 7430), 3rd ed., December 2009. See also para. 2 of the 2008 agreed minutes, at para. 3.42 above.

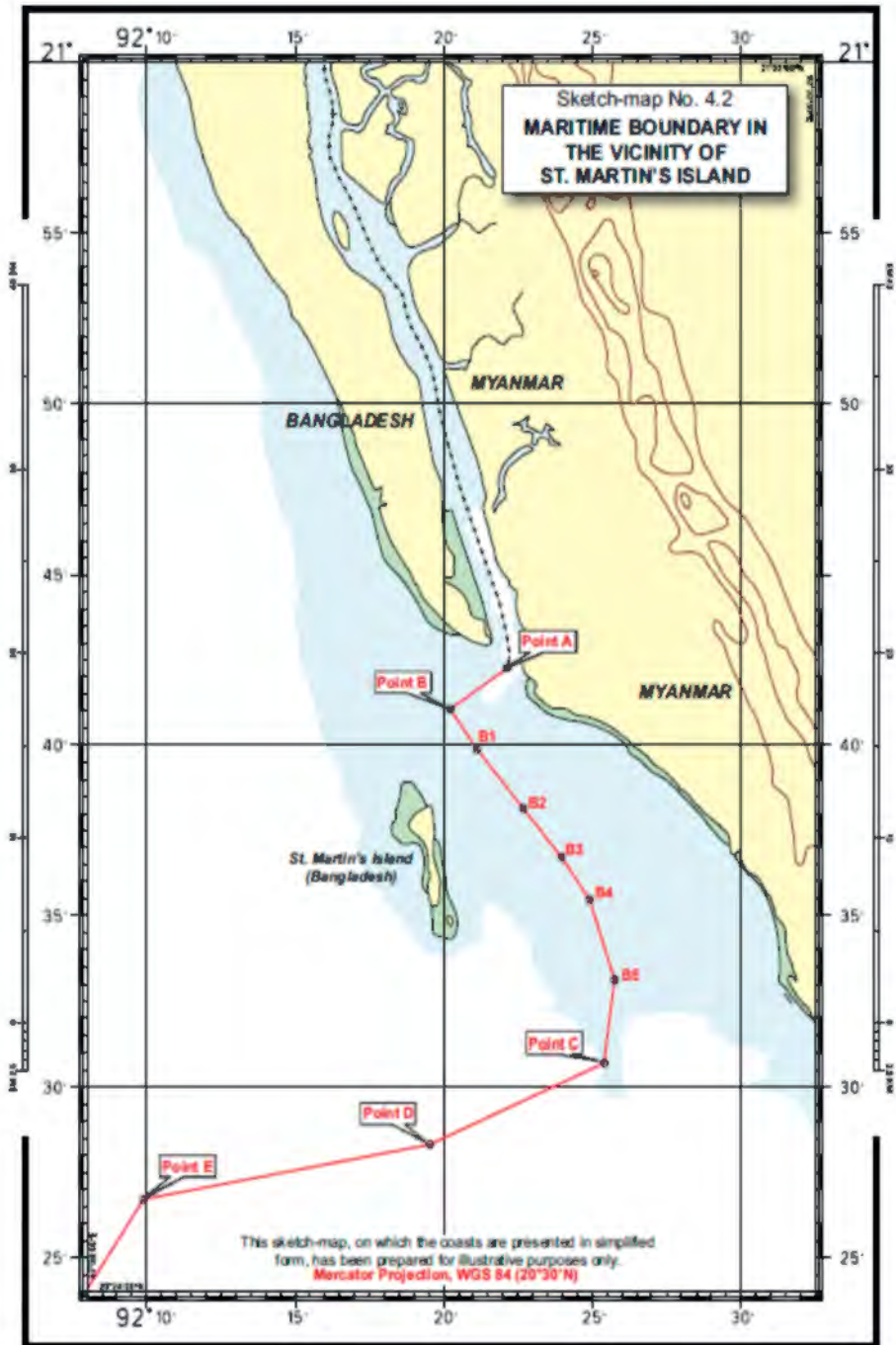
- (vii) From Point E, the line becomes a boundary between the exclusive economic zones/continental shelf of Myanmar and Bangladesh. It is described in Chapter 5.

Conclusions

4.69. There is no express or implicit agreement between the parties on an international maritime boundary. In particular, the 1974 minutes were only a conditional understanding on what, as regards the territorial sea, could be included in an eventual maritime boundary agreement covering the whole of the line between Myanmar and Bangladesh.

4.70. The boundary between the territorial seas of Myanmar and Bangladesh falls to be determined in accordance with the equidistance/special circumstances method set forth in article 15 of UNCLOS.

4.71. St. Martin's Island, lying directly opposite the coast of Myanmar on the "wrong" side of the median line, is such a special circumstance. Myanmar submits that, taking into account this special circumstance, in accordance with the applicable principles of international law, the delimitation line between the territorial seas of Myanmar and Bangladesh and between the territorial sea appertaining to St. Martin's Island (Bangladesh) and the exclusive economic zone/continental shelf of Myanmar is that described in paragraph 4.68 above and shown on sketch-map No. 4.2.



CHAPTER 5

**DELIMITATION OF THE CONTINENTAL SHELF
AND THE EXCLUSIVE ECONOMIC ZONE**

5.1. Invoking the *Qatar v. Bahrain* case²⁹², Bangladesh submits in its Memorial that:

“in accordance with the international judicial practice, ... the Tribunal should identify a single line to delimit the seabed and subsoil, and the superjacent water column. Although the 1982 Convention contains separate provisions relating to the delimitation of the EEZ and the continental shelf, international practice has largely converged around the drawing of a ‘single maritime boundary’ to delimit both zones within 200 M.”²⁹³

5.2. The Parties are in agreement on this point which, of course has important consequences. In particular, it means that there is and can be only one kind of relevant coast and one single relevant area covering at the same time overlapping claims to the exclusive economic zone and continental shelf. More generally, it is noticeable that articles 74 and 83 of UNCLOS provide for the same principles of delimitation for the exclusive economic zone on the one hand and the continental shelf on the other hand. As rightly noted by Bangladesh, “[u]nder the 1982 Convention, the principles governing the delimitation of the continental shelf and the EEZ are the same”²⁹⁴. In the words of the ICJ:

“As the 1982 Convention demonstrates the two institutions – continental shelf and exclusive economic zone – are linked together in modern law.”²⁹⁵

5.3. Moreover, as already mentioned in the Introduction to this Counter-Memorial²⁹⁶, this unity has another consequence concerning the delimitation of the continental shelf beyond

²⁹² *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 93, para. 173. See also, e.g., *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303, para. 286; *Guyana/Surinam*, Award of 17 September 2007, ILM, Vol. 47, 2008, p. 212, para. 334 (also available on <http://www.pca-cpa.org/>); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, pp. 739-740, paras. 265-266.

²⁹³ BM, para. 6.17.

²⁹⁴ BM, para. 6.13.

²⁹⁵ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 33, para. 33; see also *ibid.*, para. 34.

200 nautical miles from the baselines when the case arises – which, as will be shown in Section IV of this Chapter, is not the case here. However, it is worth noting the definition of the continental shelf in article 76 (1) of UNCLOS:

“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.”

It is clear that the text makes no difference based on the breadth of the continental shelf. It does not distinguish between an inner continental shelf, which would extend up to 200 nautical miles, and an outer continental shelf, which would extend beyond 200 nautical miles. There exists only one single continental shelf whatever the distance from baselines²⁹⁷. Therefore, very logically, the rules of delimitation applicable to *the* continental shelf are set out in a single provision of the Convention, namely article 83, which makes no distinction between the delimitation of the continental shelf within 200 nautical miles and beyond 200 nautical miles.

5.4. Notwithstanding this remark, this Chapter includes four Sections:

- **Section I** recalls briefly the sources and content of the law applicable to the delimitation of the continental shelf and the Parties' exclusive economic zone;
- **Section II** describes the relevant coasts of the Parties and the relevant area;
- on this basis, **Section III** follows the well-established three stages method in order to establish the maritime boundary between States with opposite or adjacent coasts, applying the universally recognized principle “equidistance/relevant circumstances” to the present case;

²⁹⁶ See paras. 1.25-1.29 above.

²⁹⁷ See *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, pp. 208-209, para. 213.

- finally, by way of conclusion, **Section IV** describes the boundary line thus established.

I. The Applicable Law

A. The Sources of the Relevant Rules

5.5. As noted above, principles of maritime delimitation as embodied in the United Nations Convention on the Law of the Sea are applicable in the present case²⁹⁸.

5.6. More generally, the applicable law is laid down in article 293 of the 1982 Convention. This article provides:

Applicable law

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

In the present case, no such agreement exists between Myanmar and Bangladesh. The Tribunal is therefore precluded from deciding *ex aequo et bono* and must only base itself on paragraph 1 of article 293 which sets forth the applicable law.

5.7. According to this provision the primary source of the applicable law is the Convention itself. However, the Tribunal is also entitled to apply other rules of international law in addition to the Convention, provided they are not incompatible with UNCLOS.

5.8. The only bilateral agreements of relevance in the present case are:

- the Agreement between Burma and Pakistan on the Demarcation of a Fixed Boundary between the two countries in the Naaf River signed at Rawalpindi on 9 May 1966²⁹⁹,

²⁹⁸ See paras. 4.3-4.4 above.

²⁹⁹ *UNTS*, Vol. 1014, I-14848, p. 4 (see also Annex 1).

which fixes the endpoint of the land boundary and, therefore, the starting-point of the maritime boundary³⁰⁰; and

- the 1980 Supplementary Protocol between Burma and Bangladesh³⁰¹.

5.9. The Tribunal may also have recourse to customary international law, when not incompatible with UNCLOS. However, in practice, as the International Court of Justice noted in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* with regard to the 1982 Convention:

“Many of the relevant elements of customary law are incorporated in the provisions of the Convention.”³⁰²

5.10. This is the case, in particular, of the rules concerning the delimitation of the maritime areas enunciated in the relevant articles of the Convention (articles 15³⁰³, 74 and 83), which reflect the existing rules of customary international law, as expressed by international courts and tribunals. Thus, according to the Chamber of the International Court of Justice in the *Gulf of Maine* case:

“these provisions [articles 74 (1) and 83 (1) of UNCLOS], even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question.”³⁰⁴

B. Bangladesh’s Distorted Approach of the Applicable Law

5.11. Bangladesh describes what it deems to be the “Applicable Law” to the delimitation of the continental shelf “within 200 M” and the exclusive economic zone in Section I of Chapter

³⁰⁰ See para. 4.68 above.

³⁰¹ Annex 7.

³⁰² *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 30, para. 27.

³⁰³ As to article 15, see para. 4.5 above.

³⁰⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 294, para. 94. See also *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, UNRIIA, Vol. XIX, p. 166, para. 43 and p. 181, para. 87; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 59, paras. 47-48.

6 of its Memorial³⁰⁵. Myanmar could agree on many – not all – of the principles set forth by the Applicant. Unfortunately, Bangladesh gives a distorted picture of the “applicable law”, not only because it wrongly assumes that it has a right to the continental shelf beyond 200 nautical miles from the baselines, and because its presentation of the applicable rules is often biased, but also, and more crucially, because it does not apply itself the most fundamental principles to which it pays lip service.

5.12. A revealing feature of the Bangladesh Memorial in this respect is that it systematically attempts to cast doubt on the now indisputably well-established principles of delimitation of the two areas in which coastal States enjoy sovereign rights and jurisdiction – that is the exclusive economic zone and the continental shelf. And it is striking that the Applicant makes strenuous efforts to establish that the applicable law was frozen (in a state of uncertainty) in 1982 or, even better, in 1969, thus deliberately ignoring the developments which have occurred over the past 40 years³⁰⁶. Yet the Tribunal’s interpretation cannot remain unaffected by the subsequent development of law, through UNCLOS and by way of customary law resulting from the practice of States and the international jurisprudence³⁰⁷.

5.13. Bangladesh asserts, for example, that, “[u]nlike the territorial sea regime, which is well-established, the regime of the continental shelf is more recent ...”³⁰⁸, thus implying that the applicable rules have not yet stabilized. But this is not so. As the ICJ acknowledged:

“Despite its comparatively recent appearance among the concepts of international law, the concept of the continental shelf, which may be said to date from the Truman Proclamation of 28 September 1945, has become one of the most well-known and exhaustively studied, in view of the considerable economic importance of the exploitation activities effected under its aegis.”³⁰⁹

³⁰⁵ BM, paras. 6.4-6.28.

³⁰⁶ In this respect, see also paras. 27-28 above.

³⁰⁷ Cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, I.C.J. Reports 1971, p. 31, para. 53; see also *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, p. 32, para. 56.

³⁰⁸ BM, para. 6.7.

³⁰⁹ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment*, I.C.J. Reports 1982, p. 43, para. 36. See also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment*, I.C.J. Reports 1969, pp. 32-33, para. 47.

5.14. Similarly, Bangladesh alleges that “[t]he exclusive economic zone is of even more recent provenance than the continental shelf”³¹⁰. This might be true but is of little, if any, relevance – except from a purely academic point of view: here again, both the legal régime and the legal principles applicable to the delimitation of the exclusive economic zone are now well established and do not leave room to uncertainty. Thus, in *Libya/Malta* (1985), the International Court of Justice noted:

“It is in the Court’s view incontestable that, apart from those provisions, the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law.”³¹¹

5.15. Moreover, and concerning more specifically the delimitation of both the continental shelf and the exclusive economic zone, it is true that, during the negotiations of UNCLOS “[i]t was felt that the circumstances are too many and too varied in which equidistance does not yield an equitable result.”³¹² Consequently, consensus was only possible around the broader ‘equitable solution’ provision.³¹³ But the law has been considerably completed, developed and made more specific since the adoption of the 1982 Convention. This is accepted in principle by Bangladesh:

“Since the late 1960s, a body of international judicial and arbitral practice has developed concerning first, the delimitation of the continental shelf and later, the delimitation of the EEZ. This jurisprudence, and in particular that of the ICJ, has led to the development of a consistent and coherent set of principles applicable to the delimitation of the EEZ and continental shelf – at least within 200M.”³¹⁴

5.16. However, after having thus paid tribute to the key contribution of international courts and tribunals to “the development of a consistent and coherent set of principles applicable to

³¹⁰ BM, para. 6.10.

³¹¹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 33, para. 34. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, I.C.J. Reports 1982, p. 74, para. 100 (“While it may be that Tunisia’s historic rights and titles are more nearly related to the concept of the exclusive economic zone, which may be regarded as part of modern international law, Tunisia has not chosen to base its claims upon that concept.”)

³¹² See fn. 167 included in the original text (BM, para. 6.15): *Virginia Commentary* at pp. 957, 959, 964, 977. BM, Vol. III, Annex 32.

³¹³ BM, para. 6.15.

³¹⁴ BM, para. 6.16.

the delimitation of the exclusive economic zone and continental shelf”, Bangladesh loses sight of these developments. And the only thing it has to say in this respect is that “[t]o date, however, no international court or tribunal has delimited competing claims in the outer continental shelf. This Tribunal will likely be the first to do so”³¹⁵. Two remarks are in order in this respect:

- *first*, even if no international court or tribunal has pronounced on “competing claims in the outer continental shelf”, the present case would, in any event, not be an opportunity to do so since, as explained in the Introduction to this Counter-Memorial and demonstrated in the present Chapter³¹⁶, Bangladesh has no right to any part of the continental shelf beyond 200 nautical miles from its baselines;
- *second*, and in any case, notwithstanding the non-existence of such a right, it would not be for this Tribunal to delimit competing claims beyond the 200-nautical-mile distance. As the International Court of Justice explained in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*:

“[I]n no case may the line [decided as being the maritime boundary between the Parties] be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.”³¹⁷

5.17. More relevant – or irrelevant as it happens – are the various points Bangladesh makes after having paid lip service to the development of the principles of delimitation of maritime areas through the case law and, in particular that of the International Court of Justice, which it, then, endeavours to completely neutralize. In particular, after having made the point that “although the jurisprudence recognises a nominal distinction between the approaches for delimiting the territorial sea, on the one hand, and the EEZ/continental shelf within

³¹⁵ *Ibid.*

³¹⁶ See para. 1.15 above and paras. 5.155-5.162 below.

³¹⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 759, para. 319.

200 nautical miles, on the other, those approaches are, in fact, ‘closely interrelated’³¹⁸, Bangladesh stresses that in reality “it has been widely recognized that equidistance is more likely to achieve an equitable solution in the territorial sea than in the continental shelf/EEZ” – the sole basis invoked in favour of this “wide recognition” being the ICJ’s 1969 Judgment in the *North Sea Continental Shelf* cases³¹⁹. Since 1969, many aspects of the law of maritime delimitation have been clarified and it is hardly questionable that the initial suspicion towards equidistance has largely vanished – even though (and Myanmar does not challenge this) it is certainly true that the “equidistance/relevant circumstances” is not as such a rule of delimitation properly said, but a method, usually producing an equitable result³²⁰. As the ICJ stated in its most recent Judgment relating to maritime delimitation:

“The Court has also made clear that when the line to be drawn covers several zones of coincident jurisdictions, ‘the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result’ (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, para. 271).”³²¹

C. The Applicable Rules of Delimitation

5.18. Articles 74 and 83 of UNCLOS deal with the delimitation of the exclusive economic zone and the continental shelf. “Their texts are identical, the only difference being that article 74 refers to the exclusive economic zone and article 83 to the continental shelf.”³²² They read as follows:

*Delimitation of exclusive economic zone [continental shelf]
between States with opposite or adjacent coasts*

1. The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred

³¹⁸ BM, para. 6.18 quoting *Qatar v. Bahrain*, at para. 231.

³¹⁹ BM, para. 6.19.

³²⁰ See paras. 5.145-5.153 below.

³²¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 101, para. 120.

³²² *Ibid.*, p. 74, para. 31.

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

2. 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.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone [continental shelf] shall be determined in accordance with the provisions of that agreement.

5.19. There can be no doubt that, as the Court has recently recalled, “the object of delimitation is to achieve a delimitation that is equitable”³²³. But, while this is the aim to be achieved, the Convention is silent on the means to achieve this purpose. However, as noted by the ICJ:

“the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated”³²⁴.

5.20. It is certainly true that

“the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.”³²⁵

It remains that, as the ICJ noted in the immediately preceding sentence – to which Bangladesh fails to make any reference:

³²³ *Ibid.*, p. 100, para. 111.

³²⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 111, para. 231. See also fn. 318 above.

³²⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 741, para. 272 – quoted in BM, para. 6.20.

“The jurisprudence of the Court sets out the reasons why the equidistance method is widely used in the practice of maritime delimitation: it has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied.”³²⁶

5.21. In the words of the Tribunal which decided the case between *Barbados and Trinidad and Tobago*:

“[W]hile no method of delimitation can be considered of and by itself compulsory, and no court or tribunal has so held, the need to avoid subjective determinations requires that the method used start with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified.”³²⁷

5.22. From another point of view, Bangladesh misinterprets the ICJ Judgment in the *Nicaragua v. Honduras* case, which is so crucial for its case³²⁸. In particular it ignores the crucial facts that:

- “neither Party” to that case had made “as its main argument a call for a provisional equidistance line as the most suitable method of delimitation”³²⁹; and that,
- nevertheless, it is only after a lengthy discussion of the (im)possibility of drawing an equidistance line that, “[h]aving reached the conclusion that the construction of an equidistance line from the mainland *is not feasible*, the Court [considered] the applicability of the alternative methods put forward by the Parties”³³⁰.

5.23. In fact, in spite of the common views of Honduras and Nicaragua, that the drawing of a provisional equidistance line was not an appropriate method given the particular geographical situation in that case, the ICJ engaged in a lengthy discussion about the *possibility* (not the convenience or suitability) of drawing an equidistance line. It arrived at the provisional conclusion that:

³²⁶ *Ibid.*

³²⁷ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRILAA*, Vol. XXVII, p. 230, para. 306.

³²⁸ See, e.g., BM, paras. 6.20, 6.25, 6.57 and 6.62.

³²⁹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, pp. 743-744, para. 280.

³³⁰ *Ibid.*, p. 745, para. 283 (emphasis added).

“Given the set of circumstances in the current case it is impossible for the Court to identify base points and construct a provisional equidistance line for the single maritime boundary delimiting maritime areas off the Parties’ mainland coasts.”³³¹

However, even then, the Court asked itself whether it would, nonetheless,

“be possible to start the frontier line across the territorial seas as an equidistance line, as envisaged in Article 15 of UNCLOS”³³².

And it is only when it has established that this too proved impossible, that the Court considered

“whether in principle some form of bisector of the angle created by lines representing the relevant mainland coasts could be a basis for the delimitation”³³³.

5.24. It is only for the above reasons that the Court accepted to have recourse to the bisector method:

“The use of a bisector – the line formed by bisecting the angle created by the linear approximations of coastlines – has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate. The justification for the application of the bisector method in maritime delimitation lies in the configuration of and relationship between the relevant coastal fronts and the maritime areas to be delimited. In instances where, as in the present case, any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method.”³³⁴

5.25. In *Nicaragua v. Honduras* as well as in *Gulf of Maine*, for instance, the circumstances of the case rendered impossible the application of the equidistance method. Thus, the International Court of Justice stressed that:

“in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, the ‘main reason’ for the Chamber’s objections to using equidistance in the first segment of the delimitation was that the Special

³³¹ *Ibid.*, p. 746, para. 287.

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid.*

Agreement's choice of Point A as the beginning of the line deprived the Court of an equidistance point."³³⁵

Then, the Court came to the conclusion, quoted above³³⁶, according to which, in this very particular situation, identifying base points and constructing a provisional equidistance line was "impossible".

5.26. In other words, it is only if the use of the equidistance/relevant circumstances method proves to be not technically feasible that another method will be resorted to for drawing the initial provisional line.

5.27. In the present case, no circumstance renders unfeasible the use of the equidistance method. In particular, the argument raised by Bangladesh and based on the concavity of the region does not render it so. The question whether that situation is a relevant circumstance is an entirely different matter³³⁷.

5.28. In this respect, Bangladesh quotes the *Libya/Malta* case, in which the ICJ noted that the equidistance method could lead to a "disproportionate result where a coast is markedly irregular or markedly concave or convex"³³⁸. Having said that, if Bangladesh's reasoning were correct, the Court would have used the angle-bisector method in *Libya/Malta*. But it did not. On the contrary, it said that "an equitable result may be arrived at by drawing, as a first stage in the process, a median line every point of which is equidistant from the low-water mark of the relevant coast of Malta (excluding the islet of Filfla), and the low-water mark of the relevant coast of Libya, that initial line being then subject to adjustment in the light of the above-mentioned circumstances and factors"³³⁹. In other words, the Court applied the equidistance/relevant circumstances method.

³³⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, pp. 743-744, para. 280.

³³⁶ See para. 5.23 above.

³³⁷ See paras. 5.112-5.144 below.

³³⁸ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 43, para. 55.

³³⁹ *Ibid.*, p. 57, para. 79 (C).

5.29. This confirms that in all cases of maritime delimitation, “an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case”³⁴⁰. As will be shown below³⁴¹, in the present case, there exists no such “compelling reasons” to depart from this principle. Therefore the Tribunal should apply the now well-established method for drawing an all-purpose line for the delimitation of the maritime boundary between the Parties.

5.30. This well-established method consists of three stages which have been described with particular clarity in the ICJ unanimous 2009 Judgment in the case between Romania and Ukraine:

“These separate stages, broadly explained in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment, *I.C.J. Reports 1985*, p. 46, para. 60), have in recent decades been specified with precision.”³⁴²

5.31. In that 2009 Judgment, the Court described each of these three stages in more detail than it had done before (although the Judgment is but the last confirmation and the clear systematisation of a long evolution):

- “First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place”³⁴³ therefore, “the first stage of the Court’s approach is to establish the provisional equidistance line”³⁴⁴;
- “the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result”³⁴⁵;

³⁴⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 101, para. 116.

³⁴¹ See paras. 5.78-5.83 below.

³⁴² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 101, para. 116.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*, p. 101, para. 118.

³⁴⁵ *Ibid.*, pp. 101-103, para. 120.

- “[f]inally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line”³⁴⁶.

5.32. This constitutes yet further confirmation and consolidation – if any were needed – of the approach adopted by the Court (and arbitral tribunals) in previous cases involving questions of maritime delimitation³⁴⁷. It is now scarcely arguable that any other approach can or should be adopted.

5.33. Regarding the first stage of the delimitation, Bangladesh proposes “to set equidistance aside”³⁴⁸ and proposes the use of the so-called “angle-bisector” method³⁴⁹ which has been occasionally used by international courts and tribunals. To support its case, Bangladesh bases itself on a single argument: the alleged inequity of the equidistance line³⁵⁰. In so doing, Bangladesh attaches to equity a role that it does not have.

5.34. Equity is not a method of delimitation and it has no role to play in the first phase of the drawing of the line:

“[D]elimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court’s jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of

³⁴⁶ *Ibid.*, p. 103, para. 122.

³⁴⁷ See, e.g., *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 441, paras. 288-290; see also *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 60, para. 50; *Guyana/Surinam*, Award of 17 September 2007, ILM, Vol. 47, 2008, pp. 212-213, para. 335 (also available on <http://www.pca-cpa.org/>); *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 214, para. 242 and p. 243, para. 376; *Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia, Second Phase*, Award of 26 March 2002, I.L.R., Vol. 128, p. 537, para. 2.28.

³⁴⁸ BM, para. 6.55.

³⁴⁹ *Ibid.*, paras. 6.56-6.80.

³⁵⁰ *Ibid.*, paras. 6.30-6.55.

delimitation, but solely an aim that should be borne in mind in effecting the delimitation.”³⁵¹

5.35. As the Court observed in *Romania v. Ukraine*:

“[T]he object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 22, para. 18; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 67, para. 64).”³⁵²

And even more precisely:

“[T]he respective length of coasts can play no role in identifying the equidistance line which has been provisionally established. Delimitation is a function which is different from the apportionment of resources or areas (see *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 22, para. 18). There is no principle of proportionality as such which bears on the initial establishment of the provisional equidistance line.”³⁵³

5.36. Failing an authorization to decide *ex aequo et bono*³⁵⁴, international courts and tribunals have constantly adopted this position and have never given any role to equity in the first stage of the delimitation, including in cases quoted by Bangladesh in support of its claim. At most, the inequity of the result of the delimitation can call for an adjustment of the provisional equidistance line. However, in the present dispute, the circumstances do not call for such an adjustment, as will be shown below³⁵⁵.

³⁵¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 443, para. 294.

³⁵² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 100, para. 111.

³⁵³ *Ibid.*, para. 163.

³⁵⁴ See para. 5.6 above.

³⁵⁵ See paras. 5.102-5.144 and 5.163 below.

D. The Unity of the Method of Delimitation

5.37. It is also important to note that, nowadays, the consistently used equidistance/relevant circumstances method applies in all circumstances in the absence of compelling reasons: both for the delimitation of the continental shelf as for that of the exclusive economic zone³⁵⁶; and in the cases of adjacent as well as in cases of opposite coasts.

5.38. Thus, the equidistance/relevant circumstances method was applied by the ICJ to adjacent coasts in *Qatar v. Bahrain*³⁵⁷, and the Court recalled in *Nicaragua v. Honduras* that “equidistance remains the general rule”³⁵⁸. “No legal consequences flow from the use of the terms ‘median line’ and ‘equidistance line’ since the method of delimitation is the same for both.”³⁵⁹

5.39. Moreover, according to Bangladesh, the equidistance/relevant circumstances method – to which it claims to adhere while setting it aside – only applies within the 200-nautical-mile limit. Although it does not say so in so many words, the very structure of its Memorial implies that different principles apply to the delimitation of the continental shelf within or beyond 200 nautical miles since it deals with these areas in two separate Chapters. But this is not so: nothing either in UNCLOS or in customary international law hints at the slightest difference between the rule of delimitation applicable in the two areas.

5.40. Bangladesh is, however, conscious of this fact³⁶⁰ since, at the very end of the Chapter it devotes to the “Delimitation of the continental shelf beyond 200 nautical miles”, it submits

³⁵⁶ See para. 5.26 above.

³⁵⁷ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001*, in particular, p. 104, para. 217 and p. 111, paras. 229-230. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, paras. 288-290; or *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, p. 214, para. 242 and p. 230, para. 304 *et seq.*, in particular, p. 233, para. 317.

³⁵⁸ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 745, para. 281.

³⁵⁹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, paras. 115-116.

³⁶⁰ Bangladesh expressly accepts that “article 83(1) of UNCLOS applies with equal force to delimitation within and beyond 200 M” (BM, para. 7.3).

in the alternative that, “assuming *arguendo* that Myanmar could substantiate its claims over any part of the outer continental shelf areas, Bangladesh reserves the right to request a delimitation of the disputed area, taking into account the relevant circumstances (including the geology and the geomorphology of the seabed, the geography of the coastline, and the principles of non-encroachment and proportionality) in order to achieve an equitable solution in accordance with Article 83(1) of the 1982 Convention ...”³⁶¹. In reality, as shown below³⁶², Bangladesh has no right to any continental shelf beyond 200 nautical miles from its baselines since the terminal point of the boundary line between its continental shelf and that of Myanmar lies well within this limit.

II. The Relevant Coasts and the Relevant Area

5.41. In its Judgment of 3 February 2009 in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, the International Court of Justice stated that any process of maritime delimitation must begin by determining the relevant coasts and the relevant area. The Court then clarified the methodology which applies to these determinations, while summarizing its case law on the point:

“The title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts. As the Court stated in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, ‘the land is the legal source of the power which a State may exercise over territorial extensions to seaward’ (*Judgment, I.C.J. Reports 1969*, p. 51, para. 96). In the *Continental Shelf (Tunisia/Libya Arab Jamahiriya)* case, the Court observed that ‘the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it’ (*Judgment, I.C.J. Reports 1982*, p. 61, para. 73). It is therefore important to determine the coasts of [States concerned] which generate the rights of these countries to the continental shelf and the exclusive economic zone, namely, those coasts the projections of which overlap, because the task of delimitation consists in resolving the

³⁶¹ BM, para. 7.42.

³⁶² See paras. 5.155-5.162 below.

overlapping claims by drawing a line of separation of the maritime areas concerned.”³⁶³

5.42. The Court insisted on this methodology later in its Judgement:

“The Court, in considering the issue in dispute, would recall two principles underpinning its jurisprudence on this issue: first, that the ‘land dominates the sea’ in such a way that coastal projections in the seaward direction generate maritime claims (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, para. 96); second, that the coast, in order to be considered as relevant for the purpose of the delimitation, must generate projections which overlap with projections from the coast of the other party. Consequently ‘the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court’ (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 61, para. 75).”³⁶⁴

5.43. The Court added that:

“The role of relevant coasts can have two different though closely related legal aspects in relation to the delimitation of the continental shelf and the exclusive economic zone. First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones [this will be dealt with in the present sub-section]. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line.”³⁶⁵

³⁶³ *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77.

³⁶⁴ *Ibid.*, pp. 96-97, para. 99.

³⁶⁵ *Ibid.*, p. 89, para. 78.

5.44. This methodology is applicable whether the delimitation is based on the equidistance/relevant circumstances method, which is the applicable delimitation method in the present case, or on a bisector line, as Bangladesh (wrongly) asserts³⁶⁶.

5.45. Thus, to define the relevant coasts of Bangladesh and Myanmar – and consequently the relevant area to be delimited, it is necessary to determine Bangladesh's and Myanmar's coasts (adjacent or opposite) generating overlapping maritime projections.

A. Preliminary Remarks

5.46. At the outset, it should be noted that there is agreement between the Parties on the adoption of a single line of delimitation³⁶⁷. Therefore, only one set of relevant coasts and one relevant area cover the overlapping claims to the exclusive economic zone and the continental shelf.

5.47. In order to define the limits of the relevant area, two factors have to be taken into account.

5.48. First, it is no longer possible for Myanmar to claim areas appertaining to India by virtue of the agreement concluded by Myanmar and India in 1986 concerning delimitation of their maritime boundary in the Andaman Sea, in the Coco Channel and in the Bay of Bengal³⁶⁸. Therefore, the relevant area will necessarily lie north of the maritime boundary agreed in 1986³⁶⁹.

5.49. Second, Bangladesh states in its Memorial that “the maritime area to be apportioned is that situated in front of these coastal fronts ... except only that areas claimed by third States should not be included because they cannot fairly be considered as appertaining to either

³⁶⁶ See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 747, para. 289.

³⁶⁷ See para. 5.2 above.

³⁶⁸ In this sense, see *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, pp. 238-239, para. 347. For the 1986 Agreement, see UNTS, Vol. 1484, I-25390, p. 173 (also reproduced in Annex 11).

³⁶⁹ Concerning the maritime boundary agreed upon between India and Myanmar, see paras. 2.39-2.42 above.

Party³⁷⁰. It is indeed the case that the Tribunal does not have jurisdiction to fix the tripoint between India, Bangladesh and Myanmar's maritime entitlements in the western part of the area to be delimited. The Tribunal may only indicate the general direction of the maritime boundary between Myanmar and Bangladesh without fixing the precise point where it ends³⁷¹.

5.50. This approach conforms with the contemporary approach of international courts and tribunals. For instance, in the *Libya/Malta* case, the International Court of Justice "confine[d] itself to areas where no claims by a third State exist"³⁷². The Court followed the same approach in the *Cameroon v. Nigeria* case³⁷³. In the *Nicaragua v. Honduras* case, the Court once again stated that "it is usual in a judicial delimitation for the precise endpoint to be left undefined in order to refrain from prejudicing the rights of third States"³⁷⁴. In the *Romania v. Ukraine* case, the Court again followed this well-established judicial practice when it decided that "the delimitation line follows the equidistance line in a southerly direction until the point beyond which the interests of third States may be affected"³⁷⁵.

5.51. This does not mean, however, that for the purposes of defining the relevant area and applying the disproportionality test, areas where claims of a third State exist are to be excluded. This is all the more the case since in the present proceedings it is unclear where the maritime boundary between Bangladesh and India lies. Therefore, the area which is also claimed by India has to be included in the relevant area, for the reasons explained by the International Court of Justice in the *Romania v. Ukraine* case:

"The Court notes that in both these triangles the maritime entitlements of Romania and Ukraine overlap. The Court is also aware that in the south-western triangle, as well as in the small area in the western corner of the south-eastern triangle,

³⁷⁰ BM, para. 6.76.

³⁷¹ See paras. 5.152-5.162 below.

³⁷² *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 26, para. 22.

³⁷³ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 421, para. 238 and p. 443, para. 292.

³⁷⁴ See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 756, para. 312.

³⁷⁵ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 129, para. 209.

entitlements of third parties may come into play. However, where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area (and which in due course will play a part in the final stage testing for disproportionality), third party entitlements cannot be affected. Third party entitlements would only be relevant if the delimitation between Romania and Ukraine were to affect them. In light of these considerations, and without prejudice to the position of any third State regarding its entitlements in this area, the Court finds it appropriate in the circumstances of this case to include both the south-western and the south-eastern triangles in its calculation of the relevant area ...³⁷⁶.

The same applies in the present case.

5.52. Subject to these factors, Myanmar will define the relevant coasts of each Party (from the agreed land boundary terminus which constitutes the starting-point of the maritime boundary³⁷⁷) and define the relevant area. By doing so, Myanmar will show that Bangladesh's presentation of the relevant coasts and the relevant area is not in conformity with international law.

5.53. In its Memorial, Bangladesh failed to define accurately its relevant coast (B). Furthermore, it adopted a too narrow depiction of Myanmar's relevant coast (C). Consequently (and since "[t]he delimitation line to be drawn in a given area will depend upon the coastal configuration"³⁷⁸), Bangladesh bases its claim on an erroneous description of the area (D).

B. Bangladesh's Relevant Coast³⁷⁹

5.54. According to Bangladesh, "[i]ts entire coastline ... is concave in shape"³⁸⁰, its coastal front "faces predominantly south onto the Bay"³⁸¹ and the "majority of it runs east-west along

³⁷⁶ *Ibid.*, p. 100, para. 114.

³⁷⁷ On the precise location of this point, see para. 2.29 above.

³⁷⁸ *Delimitation of Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *Judgment*, *I.C.J. Reports 1984*, p. 330, para. 205.

³⁷⁹ For a geographical presentation of Bangladesh's coasts, see paras. 2.11-2.19 above.

³⁸⁰ BM, para. 2.7.

the coastal front of the Bengal Delta³⁸². Additionally, “[t]he middle third of it forms a second, even deeper concavity within this concave coastline”³⁸³. Bangladesh describes this “deeper concavity” located in the mouth of Bangladesh’s Meghna River elsewhere in its Memorial as a “concavity within a concavity”³⁸⁴. On the basis of that description, Bangladesh considers that its entire coast is relevant for the purpose of maritime delimitation with Myanmar³⁸⁵. It also notes that its entire coast “extends for approximately 421 km (as measured in its general direction)”³⁸⁶.

5.55. This description constitutes a self-serving assessment, which is not in accordance with the methodology used by international courts and tribunals. In fact, as Bangladesh admits in its Memorial, “the general direction of Bangladesh’s coast is more complicated to depict”³⁸⁷.

5.56. Bangladesh’s coast is actually made up of four segments, which are shown in sketch-map No. 5.1. The first segment proceeds in an easterly direction from the land border with India to the mouth of the Meghna River; the fourth segment goes in a south-southeast direction from the Lighthouse on Kutubdia Island to the land border with Myanmar. Between these two segments lies the mouth of the Meghna River – the “concavity within a concavity” referred to by Bangladesh. In this area, Bangladesh’s coasts (the second segment and the third segment) face each other and therefore cannot possibly overlap with Myanmar’s maritime projections.

5.57. Two conclusions must be drawn from the aforementioned geographical configuration of Bangladesh’s coasts:

5.58. First, one cannot consider the whole coast of Bangladesh as relevant in the present case. The second and the third segments of Bangladesh coastline are not relevant for the

³⁸¹ BM, para. 2.8.

³⁸² BM, para. 6.70.

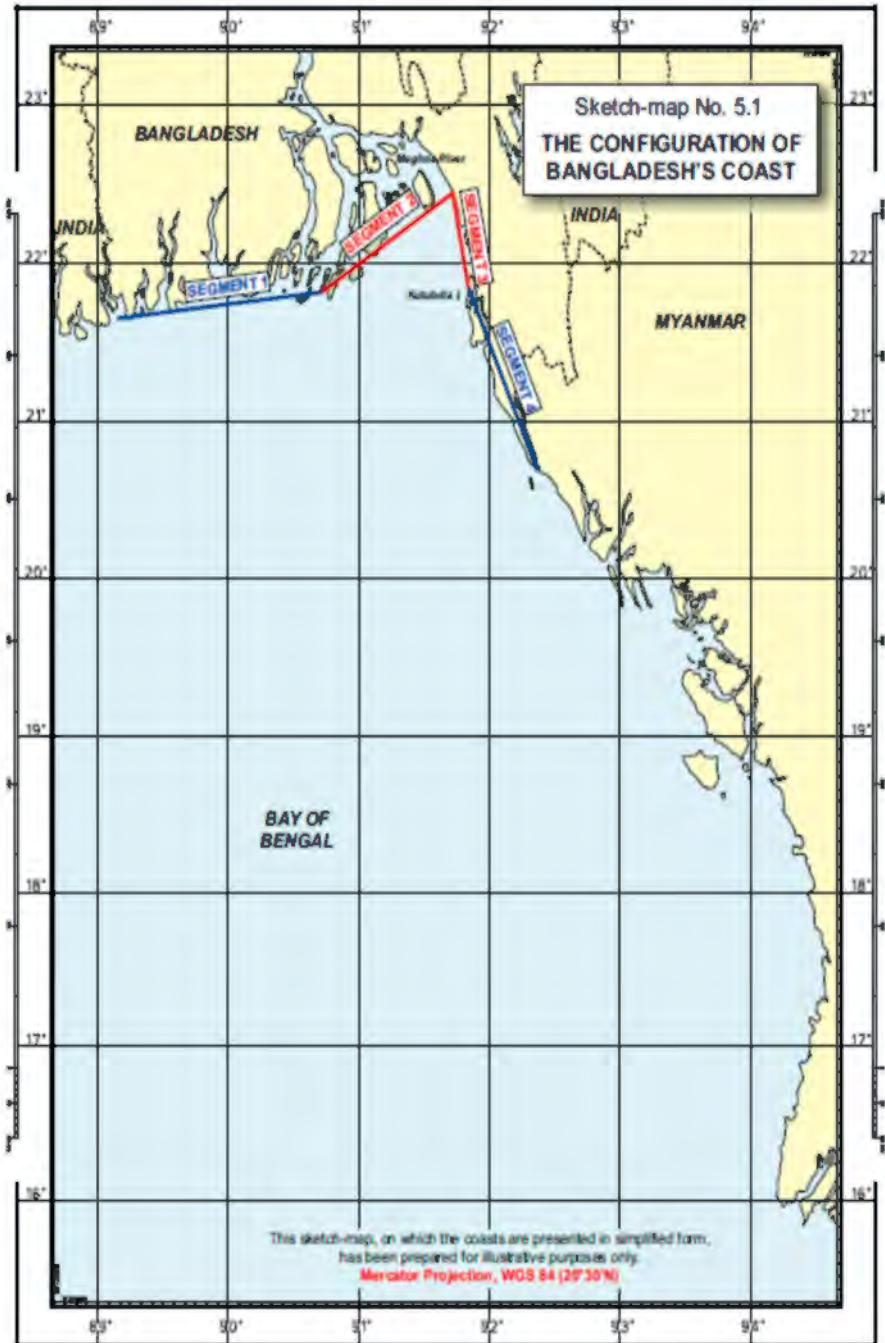
³⁸³ BM, para. 2.7.

³⁸⁴ BM, para. 6.72.

³⁸⁵ BM, para. 6.75 and Figure 6.11.

³⁸⁶ BM, para. 2.7.

³⁸⁷ BM, para. 6.70.



reasons indicated by the ICJ in the *Romania v. Ukraine* case, with respect to the coasts of Karkinit'ska Gulf. As the Court ruled,

“The coasts of this gulf face each other and their submarine extension cannot overlap with the extensions of Romania's coast. The coasts of Karkinit'ska Gulf do not project in the area to be delimited. Therefore, these coasts are excluded from further consideration by the Court. The coastline of Yavorlyts'ka Gulf and Dnieper Firth is to be excluded for the same reason.”³⁸⁸

Accordingly, Bangladesh's relevant coast are limited to two segments: the first segment running from the land border with India to the mouth of the Meghna River, about 5 nautical miles east from KukuriMukuri Char's southern coast, and the fourth segment going from the land border with Myanmar up to the Lighthouse on Kutubdia Island. These two segments measure (applying the methodology previously indicated³⁸⁹) 203 kilometres and 161 kilometres respectively. Thus, the length of Bangladesh's relevant coast is 364 kilometres.

5.59. Second, Bangladesh's coast is not oriented in a single direction. While the first segment goes eastward, the fourth runs in a south-southeast direction. Moreover, contrary to what Bangladesh asserts in its Memorial, this last segment which “runs south-southeast from the east bank of the Meghna River to the land boundary terminus with Myanmar in the Naaf River” does not constitute a “small portion of its coasts”³⁹⁰.

C. Myanmar's Relevant Coast³⁹¹

5.60. Myanmar's coast stretches approximately 2,400 kilometres. It is composed of three different segments: the Rakhine (Arakan) coastal region (740 kilometres); the Ayeyarwaddy and Gulf of Mottama (Gulf of Martaban) region (560 kilometres) and the Tanintharyi coastal region (1,100 kilometres)³⁹².

³⁸⁸ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 97, para. 100.

³⁸⁹ See fn. 43 above.

³⁹⁰ BM, para. 6.70.

³⁹¹ For a geographical presentation of Myanmar's coast, see paras. 2.4-2.10 above.

³⁹² See also para. 2.1 above.

5.61. Myanmar's coast starts at the mouth of the Naaf River. From here, the coast gradually curves along the Rakhine (Arakan) coast south-eastward and then south-westward to Cape Negrais. From there, the coast turns sharply eastward and goes straight along the Gulf of Mottama (Gulf of Martaban). Then, from the eastern bank of the Gulf of Mottama (Gulf of Martaban) the coast goes southward along the Tanintharyi coast until it reaches the border with Thailand.

5.62. Regarding the determination of Myanmar's relevant coast, Bangladesh states in its Memorial that

“[t]he portion of Myanmar's coastline that fronts the Bay of Bengal extends for approximately 595 km although, as explained in Chapter VI, not all of that coastline is relevant to the delimitation of the maritime boundary with Bangladesh”³⁹³.

5.63. Bangladesh bases this assertion on two arguments:

- (i) the coasts located south of the Rakhine (Arakan) coast “lie outside the Bay of Bengal and are thus well beyond the scope of this case”³⁹⁴;
- (ii) beyond a point near Bhiff Cape (located approximately at 18° N, 94,5° E), Myanmar's coast “is more than 200 M from the land boundary terminus with Bangladesh and therefore ceases to have any plausible significance in this delimitation”³⁹⁵. As a result of this amputation of a large part of Myanmar's coast, Bangladesh concludes in its Memorial that the two States' respective coastlines (in fact coastal-front lines) are almost of same lengths (Bangladesh's relevant coastal front measuring 349 kilometres and Myanmar's 369 kilometres)³⁹⁶.

5.64. This approach is in sharp contrast with the methodology established by international courts and tribunals, including the International Court of Justice.

³⁹³ BM, para. 2.7.

³⁹⁴ BM, fn. 69.

³⁹⁵ BM, para. 6.69, and Vol. II, Figure 6.10.

³⁹⁶ See BM, paras. 6.75-6.76, and Vol. II, Figure 6.12.

5.65. First, whether part of Myanmar's coast formally belongs or not to the "Bay of Bengal", as Bangladesh suggests³⁹⁷, is not a relevant factor. In order to determine the relevant coasts, one has to establish whether the maritime projections generated by one Party's coast overlap with the maritime projections generated by the other Party's coast. This is the only applicable criterion.

5.66. Second, the legal ground on which the relevant coasts are defined is not the fact that they are more or less "than 200 M from *the land boundary terminus*" with the other Party, as Bangladesh claims. Rather, the key factor is that the *maritime projections* of each State's coasts overlap³⁹⁸.

5.67. Applying the correct methodology, Myanmar's relevant coast does not stop near Bhiff Cape. In fact, Myanmar's coast are relevant all along the Rakhine (Arakan) coast, from the Naaf River to Cape Negrais, the last point on Myanmar's coast generating maritime projections overlapping with Bangladesh's coastal projections.

5.68. This configuration is precisely what Bangladesh considered and admitted during the third Round of Maritime Delimitation Technical Level Talks held in Dhaka on 16 and 17 November 2008. According to the Bangladeshi Delegation, "[a]s enunciated in the TALOS guidelines^[399], the relevant coastlines for Myanmar in the Bay of Bengal is up to Cape Negrais"⁴⁰⁰.

5.69. Consequently, the relevant coast of Myanmar, for the purpose of maritime delimitation with Bangladesh, is the entire Rakhine (Arakan) coast which begins at the mouth of the Naaf River and ends at Cape Negrais. This coastline measures 740 kilometres.

³⁹⁷ BM, paras. 2.4-2.7.

³⁹⁸ See *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 97, para. 101 ("Ukraine's south-facing coast generates projections which overlap with the maritime projections of the Romanian coast. Therefore, the Court considers these sectors of Ukraine's coast as relevant coasts.") See also *ibid.*, p. 96, para. 99 ("the coast, in order to be considered as relevant for the purpose of the delimitation, must generate projections which overlap with projections from the coast of the other party").

³⁹⁹ *Manual on Technical Aspects of the Law of the Sea – 1982* published by the International Hydrographic Bureau, 4th ed., March 2006.

⁴⁰⁰ BM, Vol. III, Annex 19, para. 21.

5.70. The relevant coasts of Bangladesh and Myanmar in the present case are shown on sketch-map No. 5.2.

D. The Relevant Area

5.71. As explained above, the relevant area consists of the maritime area generated by the projections of Bangladesh's relevant coasts and Myanmar's relevant coast.

5.72. Having regard to the elements presented below, the relevant area to be delimited in the present case includes maritime areas lying directly off (i) the first and the fourth segments of Bangladesh's coastline and (ii) Myanmar's Rakhine (Arakan) coast.

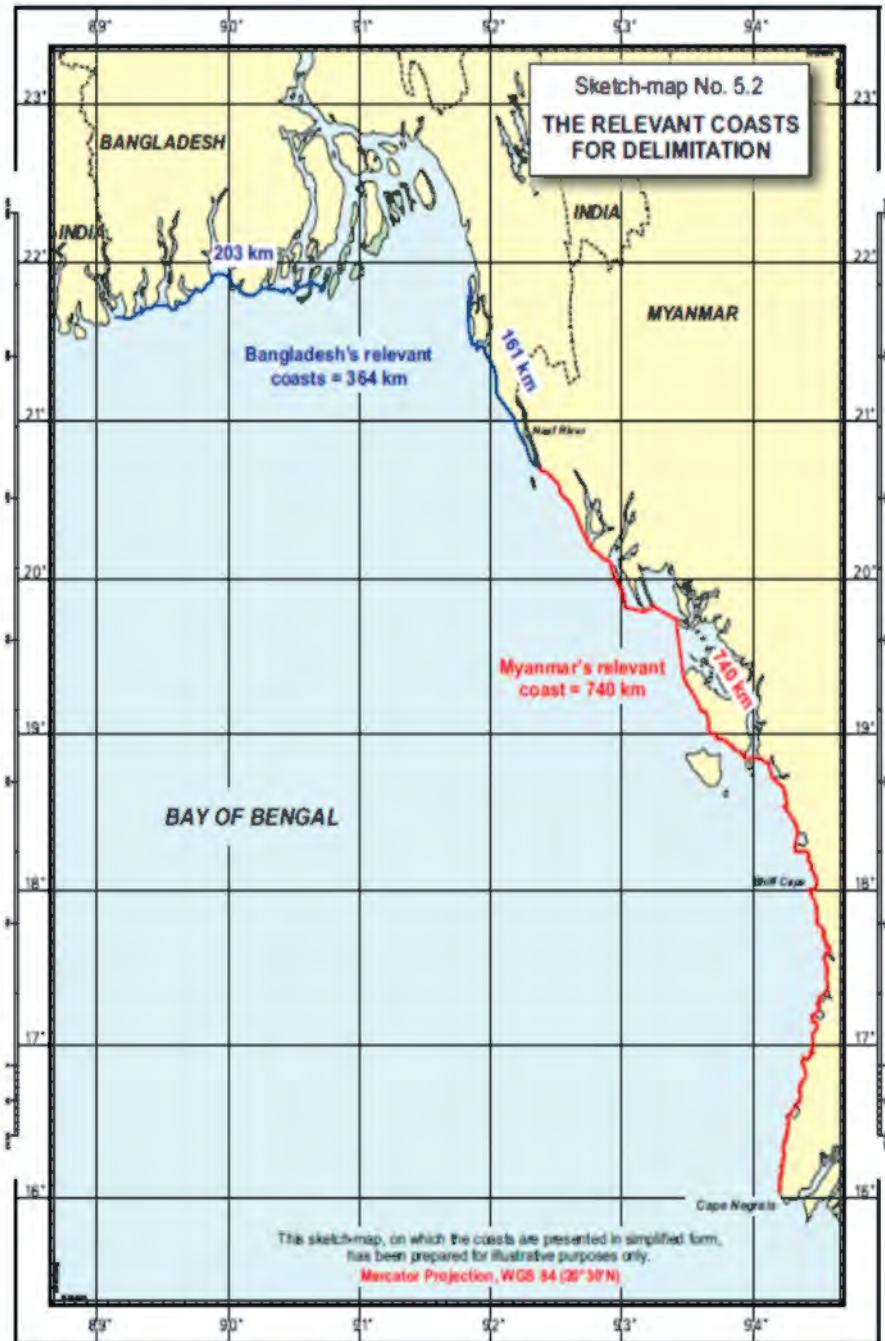
5.73. The relevant area is described on sketch-map No. 5.3 (at page 117):

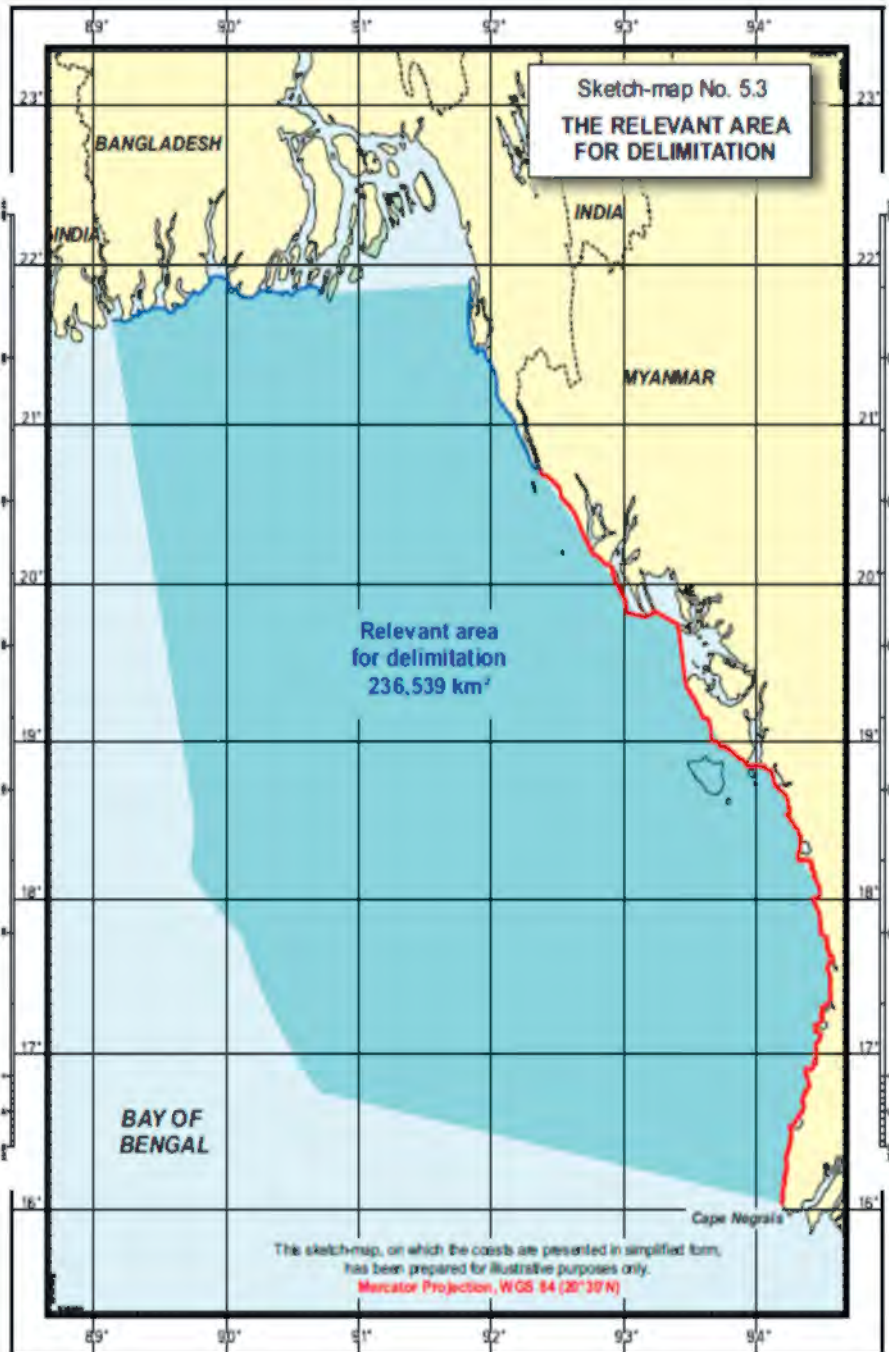
- (i) to the north and to the east, it includes all maritime projections from Bangladesh's relevant coasts, except the area where Bangladesh coasts face each other (the triangle between the second and the third segments);
- (ii) to the east and to the south, it includes all maritime projections from Myanmar's Rakhine (Arakan) coast, as far as these projections overlap with Bangladesh's;
- (iii) to the west, it extends these maritime projections up to the point they overlap.

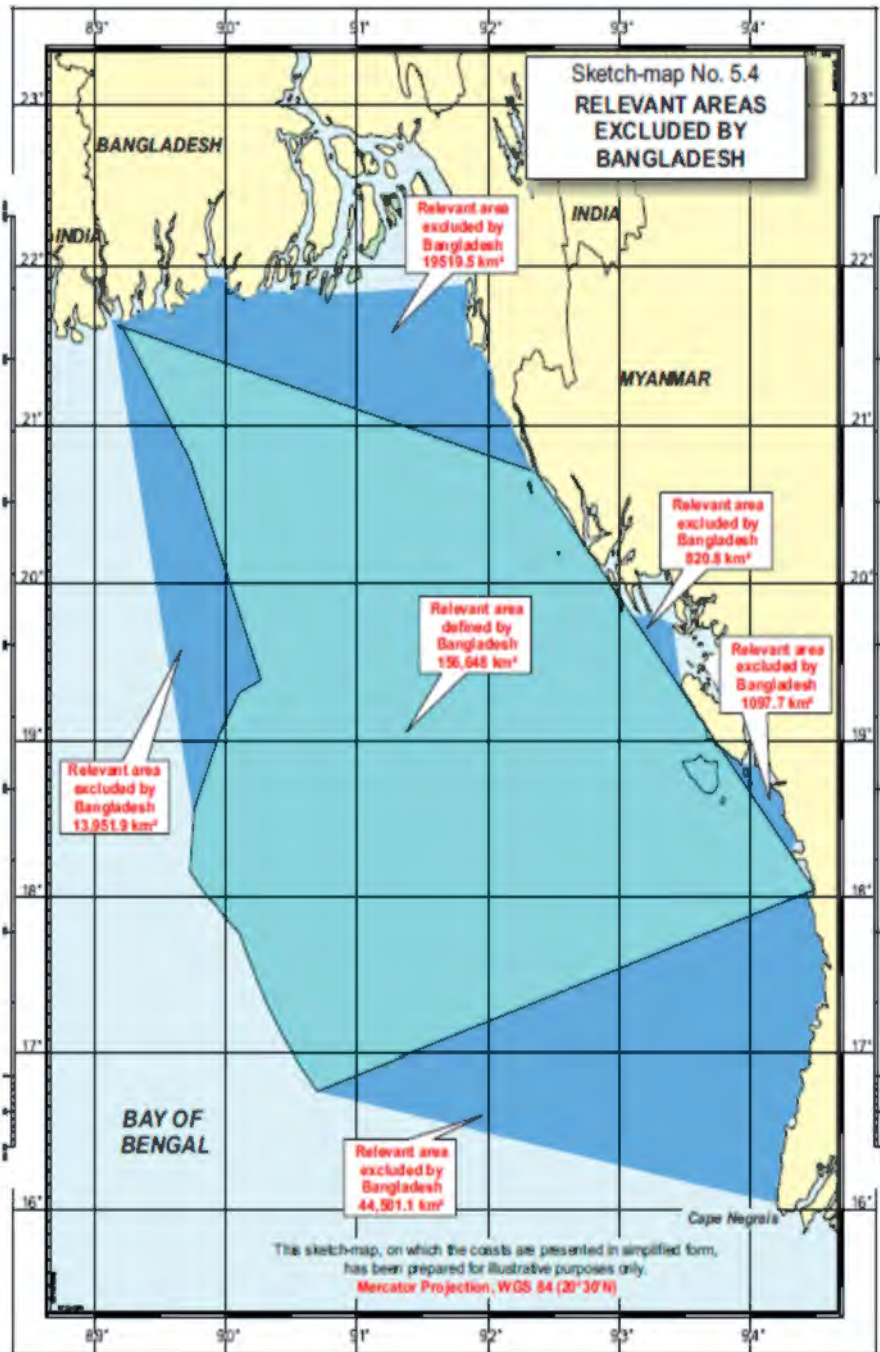
5.74. The relevant area has a total surface area of 236,539 square kilometres.

5.75. Figure 6.12 of Bangladesh's Memorial, which purports to represent the relevant area, does not describe it accurately. It does not apply the well-established method in four respects, as it can be seen on sketch-map No. 5.4 (at page 119):

- (i) to the north, it wrongly excludes maritime areas lying off Bangladesh's coasts, although they form part of Bangladesh's maritime projections overlapping with Myanmar's;







- (ii) to the northwest, it does not extend maritime projections up to the point they overlap, contrary to case law⁴⁰¹;
- (iii) to the east, it wrongly excludes maritime areas lying off Myanmar's coast, although they form part of Myanmar's maritime projections overlapping with Bangladesh's;
- (iv) to the south, it does not include maritime projections generated by the southern part of the Rakhine (Arakan) coast (up to Cap Negrais), although maritime projections from this part of Myanmar's coast overlap to some extent with Bangladesh's maritime projections⁴⁰².

III. The Three Stages of the Delimitation Process

5.76. As explained above⁴⁰³, the first stage of the delimitation process is the construction of the equidistance line, which is a purely technical operation, only necessitating the choice of appropriate base points from which the line is drawn (A). At the second stage, the line thus provisionally drawn may be adjusted if relevant circumstances so require (B). Then, and finally, the line thus obtained is checked against the "non-disproportionality" test (C).

A. Stage 1 – The Provisional Equidistance Line

5.77. In Chapter 4 above, Myanmar has shown that, absent an agreement to the contrary, the appropriate maritime boundary between the territorial seas of the Parties must be drawn according to the "equidistance/special (relevant) circumstances" method. From the terminus point of the land-boundary at the mouth of the Naaf River, the maritime delimitation line first follows the equidistance line before bending in a south-south-east direction in order to skirt St. Martin's Island through first a simplified median line between Points B and C and then two segments joining that Point C to Point E situated 12 nautical miles from St. Martin's Island⁴⁰⁴. From Point E – which marks the limit of St. Martin's Island's territorial sea – a

⁴⁰¹ See paras. 5.41-5.45 above.

⁴⁰² See paras. 5.67-5.69 above.

⁴⁰³ See para. 5.31 above.

⁴⁰⁴ See sketch-map No. 4.2.

provisional equidistance line must be drawn between the respective maritime areas of the Parties (1), which implies to determine appropriate base points (2).

1. The Provisional Equidistance Line beyond Point E

5.78. While recognizing that “[i]n accordance with the jurisprudence, the first step is provisionally to identify an equidistance line”⁴⁰⁵, Bangladesh vehemently rejects such a method on the pretext of the “inequity of the equidistance line” which would produce a “cut-off effect”⁴⁰⁶, “prevent Bangladesh from exercising sovereign rights in the continental shelf beyond 200 NM”⁴⁰⁷ and give an excessive weight to May Yu Island (Oyster Island), “a single, insignificant feature”⁴⁰⁸. Several remarks are in order in respect to these allegations.

5.79. *First*, it is *not* Myanmar’s case that May Yu Island (Oyster Island) should govern the whole drawing of the equidistance line. It is true that, in some phases of the negotiations between the Parties, Myanmar had given emphasis to that maritime feature. However:

- it is accepted that the positions taken by the Parties during diplomatic negotiations do not bind them when an international court or tribunal is called to settle their dispute⁴⁰⁹ – and for good reasons: in the negotiations, the Parties try to find a global *quid pro quo* acceptable as a package⁴¹⁰; as explained in the often quoted passage from the PCIJ Judgment in the *Chorzów* case:

“The Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement.”⁴¹¹

⁴⁰⁵ BM, para. 6.29.

⁴⁰⁶ BM, paras. 6.30-6.42.

⁴⁰⁷ BM, paras. 6.43-6.46.

⁴⁰⁸ BM, paras. 6.47-6.55.

⁴⁰⁹ *Factory at Chorzów, Merits, Judgment, 1928, P.C.I.J., Series A, No. 17*, p. 51; see also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1993*, pp. 405-406, para. 73; *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 1986*, p. 632, para. 147; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 476, para. 57.

⁴¹⁰ See paras. 4.15-4.20 above.

⁴¹¹ *Factory at Chorzów, Merits, Judgment, 1928, P.C.I.J., Series A, No. 17*, p. 51.

- this is precisely so in the present case: Myanmar could have been inclined to give more weight than it legally deserves⁴¹² to St. Martin's Island "in exchange", so to speak, for Bangladesh's acceptance of taking into account a base point on May Yu Island (Oyster Island) in order to adjust the equidistance line in a more acceptable direction, less incompatible with the general orientation of the coasts of the Parties⁴¹³;
- since Bangladesh has refused this global package and no agreement could be reached on such a compromise, it is not Myanmar's case before this Tribunal either that Point 7 envisaged in the 1974 "agreed minutes" is acceptable as the last point of the limit between the territorial seas of the Parties, or that May Yu Island (Oyster Island) should be retained as a base point for drawing the maritime boundary beyond that point.

5.80. *Second*, the two other Bangladesh allegations are highly questionable:

- the argument that "it is inequitable to prevent Bangladesh from exercising sovereign rights in the continental shelf beyond 200 M"⁴¹⁴ is self-serving and begs the question; as will be shown in Section IV below, Bangladesh has no such rights; and,
- as for the so-called "cut-off effect", it mainly consists of invoking the concavity of Bangladesh's coast and, as will be shown below⁴¹⁵, is ill-founded. Bangladesh overestimates the effect of such concavity on the maritime delimitation with Myanmar and on the application of equidistance, and it gives it a legal effect it does not have in the present case or according to the case law.

5.81. *Third* and in any case, equity can play no role in identifying the provisional equidistance line⁴¹⁶. This operation is of a purely technical character⁴¹⁷; if equitable

⁴¹² See paras. 4.51-4.61 above.

⁴¹³ Among the reasons of convenience which drew Myanmar to show flexibility on this point, it can be noted that (i) May Yu Island (Oyster Island) is the first base point retained by Myanmar for the fixing of its straight baselines (see Pyithu Hluttaw Law No. 3 of 9 April 1977, BM, Vol. III, Annex 12); (ii) taking May Yu Island (Oyster Island) as a base point would have enabled to draw a strict equidistance line while obtaining a result which could be seen as equitable (even though rather advantageous for Bangladesh).

⁴¹⁴ BM, p. 83, 2.

⁴¹⁵ See paras. 5.103 and 5.112-5.144 below.

⁴¹⁶ See, e.g., paras. 5.34-5.36 above.

considerations are to be taken into account, it is only, to some extent, during the second phase when relevant circumstances may lead to adjust the equidistance line⁴¹⁸, and, mainly, during the third stage of the delimitation process, when the equitable character of the line is tested⁴¹⁹.

5.82. None of the reasons invoked by Bangladesh to set aside the usual method of drawing the maritime boundary between States has any basis in modern international law of the sea, the first step of which is to identify the provisional equidistance line.

5.83. It is certainly true that, in some exceptional cases, the ICJ and one arbitral tribunal, have resorted to the “angle-bisector method”⁴²⁰, but as shown above⁴²¹ this occurred only as a *substitute* for the equidistance method and when the drawing of an equidistance line proved not to be feasible. No such reason exists in the present case and Bangladesh invokes none. Therefore, it is not only appropriate but legally required first to draw an equidistance line beyond Point E as determined above⁴²².

5.84. It is therefore only in the alternative and for the sake of completeness that Myanmar notes that the application of the “angle-bisector method” by Bangladesh in the present case is, by any means, clearly unacceptable.

5.85. In effect, it is obvious that Bangladesh misapplies the angle-bisector method since it very abusively cuts down Myanmar’s relevant coasts in order to shift the delimitation line southward to its (undue) advantage. Figure 6.10 in Volume II of the Memorial of Bangladesh – which is reproduced on the next page (sketch-map No. 5.5) – is revealing in this respect: there is absolutely no reason why the respective relevant “coastal façades” of the two States would be those proposed by Bangladesh. Not only, as shown in Section II above⁴²³, are the relevant coasts of the Parties misrepresented on this sketch-map, but also, and more

⁴¹⁷ See in particular paras. 5.31 and 5.76 above.

⁴¹⁸ See paras. 5.31 and 5.36 above and paras. 5.102-5.144 below.

⁴¹⁹ See paras. 5.31 and 5.36 above and paras. 5.145-5.153 below.

⁴²⁰ See BM, paras. 6.56-6.67.

⁴²¹ See paras. 5.22-5.26 above.

⁴²² See para. 4.68 above.

⁴²³ See paras. 5.54-5.69 above.





fundamentally, for the purpose of establishing the bisector line, only the general direction of the respective fragments of the coasts in the immediate proximity of the starting-point of the maritime boundary would be relevant.

5.86. The coastal front of the Rakhine (Arakan) coast follows an azimuth of 145° , while the relevant segment for the purpose of this delimitation on the Bangladesh coast, runs from the land boundary terminus in the Naaf River to south of the Sonadia Island and it follows an azimuth of 329° . According to a less untenable application of bisector method which would take into account the two Parties' coasts on an equal basis, the bisector should follow an azimuth of 237° . The delimitation line so derived, commencing at the land boundary terminus in the Naaf River (Point A), is portrayed in sketch-map No. 5.6 (at page 127).

5.87. However, Myanmar wishes firmly to reiterate that no reason whatsoever justifies recourse to the "angle-bisector method" in the present case and that, in accordance with the usual principles a provisional equidistance line must first be drawn.

2. *The Appropriate Base Points*

5.88. This being the case, the provisional equidistance line must be drawn from base points selected on the mainland of both parties (disregarding St. Martin's Island, which is a special circumstance that has already been given its due weight in the delimitation of the territorial seas).

5.89. As the International Court of Justice recalled in the *Romania v. Ukraine* case:

"Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to the [*sic* – be] delimited"⁴²⁴.

And the Court went on to specify that:

"In this stage of the delimitation exercise, the Court will identify the appropriate points on the Parties' relevant coast or coasts which mark a significant change in the direction of the coast, in

⁴²⁴ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 101, para. 117.

such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines. The points thus selected on each coast will have an effect on the provisional equidistance line that takes due account of the geography.”⁴²⁵

5.90. States have the right to fix the baselines from which the breadth of their territorial sea is measured in accordance with the relevant provisions of UNCLOS. Articles 57 and 76 of UNCLOS provide respectively that the breadth of the exclusive economic zone and the continental shelf shall be measured “from the baselines from which the breadth of the territorial sea is measured”. However, “the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the exclusive economic zone and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the exclusive economic zone between adjacent/opposite States are two different issues”⁴²⁶. As the International Court of Justice observed in this regard – still in *Romania v. Ukraine*:

“In the first case, the coastal State, in conformity with the provisions of UNCLOS (Articles 7, 9, 10, 12 and 15), may determine the relevant base points. It is nevertheless an exercise which has always an international aspect (see *Fisheries (United Kingdom v. Norway)*, *Judgment*, *I.C.J. Reports 1951*, p. 132). In the second case, the delimitation of the maritime areas involving two or more States, the Court should not base itself solely on the choice of base points made by one of those parties. The Court must, when delimiting the continental shelf and exclusive economic zones, select base points by reference to the physical geography of the relevant coasts.”⁴²⁷

5.91. Therefore, it is clear that the Tribunal may, when appropriate, rely on base points established by the Parties, but it has no obligation to do so. However, if it decides that it is appropriate to do so, the Tribunal could only rely on base points determined by the Parties in accordance with UNCLOS. But, in the present case, the baselines established by Bangladesh in the Act No. XXVI of the Bangladesh Parliament to Provide for the Declaration of the

⁴²⁵ *Ibid.*, p. 105, para. 127.

⁴²⁶ *Ibid.*, p. 108, para. 137. See paras. 3.5-3.6 above.

⁴²⁷ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, p. 108, para. 137; see also *ibid.*, p. 101, para. 117 *in fine*.

Territorial Waters and Maritimes Zones dated 14 February 1974⁴²⁸, are not consistent with the Convention. In its Memorial, Bangladesh itself clearly recognizes “that because its 1974 baselines were drawn along the 10 fathom line, they do not conform to the terms of the later-adopted 1982 Convention”⁴²⁹ and therefore it “does not rely on them for purposes of this maritime delimitation with Myanmar”⁴³⁰.

5.92. In addition, Bangladesh criticizes Myanmar’s straight baselines⁴³¹. In spite of Bangladesh protests, Myanmar maintains that these baselines are in full conformity with the requirements of article 7 of UNCLOS; a glance at figure 3.1 in Volume II of Bangladesh’s Memorial shows that they certainly do not “depart from any appreciable extent from the general direction of the coastline.”

5.93. However, for the present case, there is no need for a lengthy discussion on this point since it is in any case for the Tribunal to determine the base points from which it will draw the provisional equidistance line.

5.94. It is, however, excluded that a base point could be selected on St. Martin’s Island. In effect, this island, which is situated in front of the coast of Myanmar, cannot be considered as a part of Bangladesh coast.

5.95. In *Romania v. Ukraine*, the ICJ disregarded Serpents’ Island when constructing the delimitation line between the two countries. The Court observed that:

“Serpents’ Island calls for specific attention in the determination of the provisional equidistance line. In connection with the selection of base points, the Court observes that there have been instances when coastal islands have been considered part of a State’s coast, in particular when a coast is made up of a cluster of fringe islands. Thus in one maritime delimitation arbitration, an international tribunal placed base points lying on the low water line of certain fringe islands considered to constitute part of the very coastline of one of the parties (*Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and*

⁴²⁸ BM, Vol. III, Annex 10.

⁴²⁹ BM, para. 3.9.

⁴³⁰ *Ibid.*; see also paras. 3.7-3.8 above.

⁴³¹ BM, paras. 3.10-3.20.

Yemen (Maritime Delimitation), 17 December 1999, *RIAA*, Vol. XXII (2001), pp. 367-368, paras. 139-146). However, Serpents' Island, lying alone and some 20 nautical miles away from the mainland, is not one of a cluster of fringe islands constituting 'the coast' of Ukraine.

To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes. The Court is thus of the view that Serpents' Island cannot be taken to form part of Ukraine's coastal configuration (cf. the islet of Filfla in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment, I.C.J. Reports 1985*, p. 13).

For this reason, the Court considers it inappropriate to select any base points on Serpents' Island for the construction of a provisional equidistance line between the coasts of Romania and Ukraine."⁴³²

5.96. Similarly, in the case concerning the *Delimitation of the Continental Shelf between France and the United-Kingdom*, the Court of Arbitration noted that:

"The existence of the Channel Islands close to the French coast, if permitted to divert the course of that mid-Channel median line, effects a radical distortion of the boundary creative of inequity ..."

"In the actual circumstances of the Channel Islands region, where the extent of the continental shelf is comparatively modest and the scope for adjusting the equities correspondingly small, the Court considers that the situation demands a twofold solution. First, in order to maintain the appropriate balance between the two States in relation to the continental shelf as riparian States of the Channel with approximately equal coastlines, the Court decides that the primary boundary between them shall be a median line, linking Point D of the agreed eastern segment to Point E of the western agreed segment. In the light of the Court's previous decisions regarding the course of the boundary in the English Channel, this means that throughout the whole length of the Channel comprised within the arbitration area the primary boundary of the continental shelf will be a mid-Channel median line. In delimiting its course in the Channel Islands region, that is between Points D and E, the Channel Islands themselves are to be disregarded, since their

⁴³² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment, I.C.J. Reports 2009*, p. 109, para. 149.

continental shelf must be the subject of a second and separate delimitation.”⁴³³

Although not identical to the Channel Islands – St. Martin’s Island is much less populated and lies only a few miles off the coast of Myanmar, the present case is similar in that St. Martin’s Island must be taken into consideration in order to draw the first part of the maritime boundary between Myanmar and Bangladesh, but must be disregarded in respect to the rest of the delimitation (beyond Point E). And the Channel Islands covered approximately 200 square-kilometres, and had at the time approximately 160,000 inhabitants – to be compared with respectively about 8 square-kilometres and 7,000 inhabitants for St. Martin’s Island.

5.97. St. Martin’s Island is more like Abu Musa (12 square-kilometres, 500 inhabitants) an island to which the Arbitral Tribunal which settled the *Boundary Dispute between Dubai and Sharjah* gave no effect and denied any relevance for fixing the base points:

“The application of equitable principles here, so as to achieve a delimitation that is a function or reflection of the geographical and other relevant circumstances of the area, must lead to no effect being accorded to the island of Abu Musa for the purpose of plotting median or equidistance shelf boundaries between it and neighbouring shelf areas.”⁴³⁴

5.98. Both May Yu Island (Oyster Island) and St. Martin’s Island⁴³⁵ being excluded as possible relevant base points, these points must be fixed on the mainland coasts of each of the Parties.

5.99. The following points, which refer “to the physical geography of the relevant coasts”, correspond to the guidelines given by the ICJ⁴³⁶ and constitute appropriate base points for the

⁴³³ Decision of 30 June 1977, *UNRIAA*, Vol. XVIII, p. 94, para. 199 and pp. 94-95, para. 201.

⁴³⁴ *Dubai-Sharjah Border Arbitration*, Award of 19 October 1981, *ILLR*, Vol. 91, 1981, p. 677, para. 263.

⁴³⁵ See paras. 5.78-5.79 and 5.94-5.97 above.

⁴³⁶ See para. 5.89 above.

construction of the provisional equidistance line (as identified on the basis of the British Admiralty Charts Nos. 817⁴³⁷ and 859⁴³⁸).

- Three base points may be considered on Myanmar coasts:

(μ 1) at the mouth of the Naaf River, the closest point of the starting-point of the maritime boundary (Point A) located on the low water line of Myanmar's coast, base point μ 1 (co-ordinates 20° 41' 28.2" N, 92° 22' 47.8" E) on sketch-map No. 5.7;

(μ 2) Kyaukpandu (Satoparokia) Point, located on the landward/low water line most seaward near Kyaukpandu Village, base point μ 2 (co-ordinates 20° 33' 02.5" N, 92° 31' 17.6" E) on sketch-map No. 5.7;

(μ 3) at the mouth of the May Yu River (close to May Yu Point), base point μ 3 (co-ordinates 20° 14' 31.0" N, 92° 43' 27.8" E) on sketch-map No. 5.7.

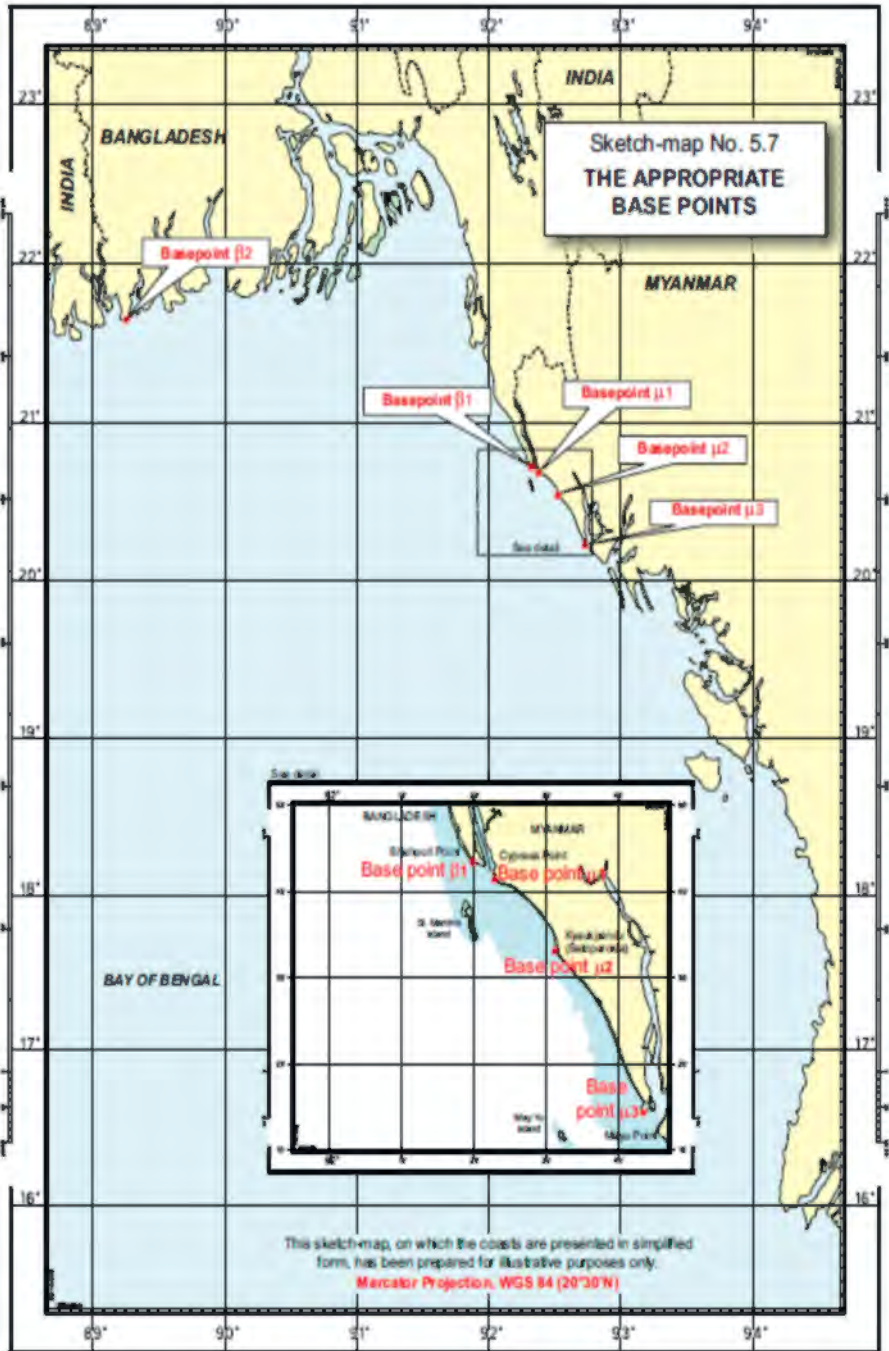
- Two base points representing the most advanced part of the land (low water line) into the sea, seem to stand out on Bangladesh coasts:

(β 1) the closest point to the starting-point of the maritime boundary (Point A) located on the low water line of Bangladesh's coast, base point β 1 (co-ordinates 20°43'28.1"N, 92°19'40.1"E) on sketch-map 5.7; and

(β 2) the more stable point located on Bangladesh coast nearest to the land boundary with India, base point β 2 (co-ordinates 21° 38' 57.4" N, 89° 14' 47.6" E) on sketch-map No. 5.7.

⁴³⁷ Elephant Point to Manaung (Cheduba Island) (INT 7430), 3rd ed., December 2009. See also para. 2 of the 2008 Agreed Minutes, at para. 3.42 above.

⁴³⁸ Raimangal River to Elephant Point (small corrections, 2007)..



5.100. Consequently, the provisional equidistance line between the continental shelf and exclusive economic zones of the Parties is constructed as follows:

- from Point E (the point at which the equidistance line meets the 12-nautical-mile arc from the coastline of St. Martin's Island⁴³⁹) with co-ordinates 20° 26' 42.4" N, 92° 09' 53.6" E, it continues (following a geodetic azimuth of 214° 08' 17.5") until it reaches Point F with co-ordinates 20° 13' 06.3" N, 92° 00' 07.6" E, where it becomes affected by the base points β_1 , μ_1 and μ_2 ;
- from Point F the equidistance line continues in a south-westerly direction (geodetic azimuth 223° 28' 03.5") to Point G, with co-ordinates 19° 45' 36.7" N, 91° 32' 38.1" E, where the line becomes affected by the base point μ_3 ;
- from Point G, the equidistance line continues in direction of Point Z, with co-ordinates 18° 31' 12.5" N, 89° 53' 44.9" E, which is controlled by base points μ_3 , β_2 , and β_1 .

5.101. This line is reproduced on sketch-map No. 5.8 (at page 139) of this Counter-Memorial.

B. Stage 2 – (Ir)relevant Circumstances

5.102. In accordance with the usual method for delimiting maritime areas between two States the coasts of which are opposite or adjacent, once the provisional equidistance line is drawn, account must be taken of the relevant circumstances – if any⁴⁴⁰.

5.103. Bangladesh does not overtly invoke any relevant circumstance which would require shifting the provisional line in its favour since its bisector line is not presented as provisional⁴⁴¹. It puts forward the "cut-effect" of the equidistance line and the concavity of its coasts. But it does so not as a second step for drawing the delimitation line, but in an effort to

⁴³⁹ See para. 4.68 above.

⁴⁴⁰ See paras. 5.31 and 5.76 above.

⁴⁴¹ Bangladesh takes however account of St. Martin's Island in order to connect its bisector line with Point 7 (see BM, para. 6.73).

show that the Tribunal should not start with a provisional equidistance line⁴⁴² or that its own claimed bisector line is equitable⁴⁴³. As for the first point, Myanmar has shown that these alleged “circumstances” were not of such nature as to justify the substitution of a bisector line for an equidistance line⁴⁴⁴. Concerning the second recourse to these circumstances in relation with the equitableness of the line, Myanmar will show below that the line it proposes, which takes account of the special circumstance constituted by St. Martin’s Island and, for the rest, maintains the equidistance principle, fully meets the test of equitableness⁴⁴⁵.

5.104. Indeed no relevant circumstance exists which would lead to an adjustment of the provisional equidistance line beyond Point E. And, in particular, it is the case neither of Bangladesh alleged “need for access to its entitlement in the outer continental shelf” (a rather embarrassed circumvolution...) nor of the claimed “cut-off effect” of the line resulting from the application of the equidistance/relevant circumstances method. While both arguments overlap in many respects, Myanmar will deal with them successively.

1. The Bangladesh Argument Based on its Alleged “Need for Access to its Entitlement in the Outer Continental Shelf”

5.105. Bangladesh claims in its Memorial that its “need for access to its entitlement in the outer continental shelf [would] constitute an independent ‘relevant circumstance’ that warrants application of a methodology other than equidistance.”⁴⁴⁶ Application of equidistance, in so far as it would deny Bangladesh any access to the continental shelf beyond 200 nautical miles, “would constitute an inequity of the highest order.”⁴⁴⁷ These are untenable assertions.

5.106. To begin with, Bangladesh does not rely on any relevant case law to support its claim. It limits itself to invoking considerations stemming from “equity” that have no basis in

⁴⁴² BM, paras. 6.30-6.55.

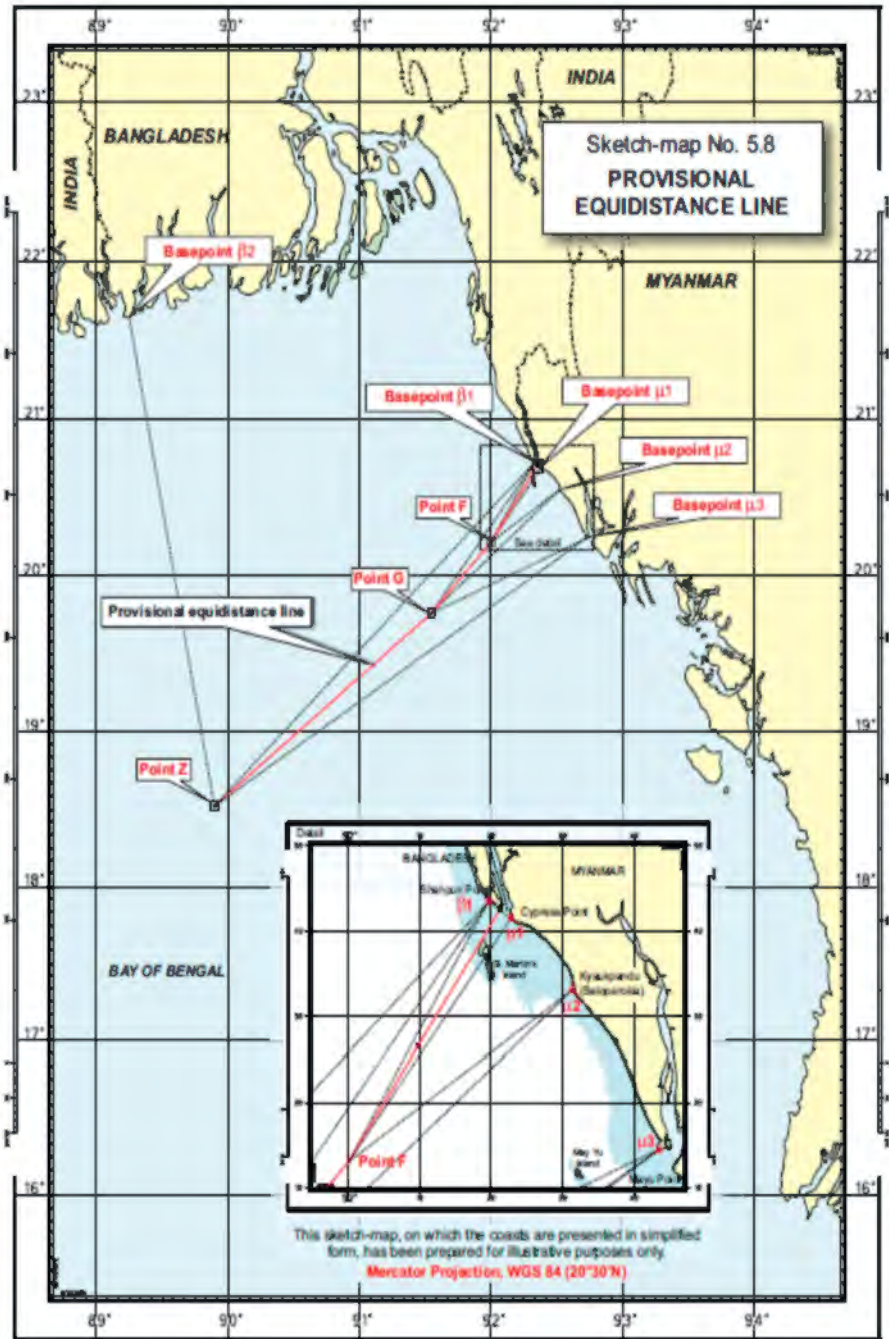
⁴⁴³ BM, paras. 6.74-6.78.

⁴⁴⁴ See paras. 5.78-5.83 above.

⁴⁴⁵ See paras. 5.102-5.144 and 5.145-5.153 below.

⁴⁴⁶ BM, paras. 6.43-6.46. See also BM, paras. 1.11-1.12.

⁴⁴⁷ BM, para. 6.45.



international law⁴⁴⁸. It does not show that an alleged “need for access” to the continental shelf beyond 200 nautical miles could constitute under international law a relevant circumstance of such a nature as to impose, an adjustment of the equidistance line, still less recourse to another methodology⁴⁴⁹.

5.107. Moreover, Bangladesh’s argument based on an alleged “need for access to its entitlement” to some area of continental shelf beyond 200 nautical miles is circular and cannot form the legal basis of any maritime delimitation claim. As the Court of Arbitration said in the *Anglo-French Continental Shelf* case, any argument based on some “non-encroachment principle” is of no assistance: “[s]o far as delimitation is concerned, ... this [principle] states the problem rather than solves it. The problem of delimitation arises precisely because” there exist overlapping claims⁴⁵⁰.

5.108. In fact, in a case where *both* Parties would have overlapping entitlements (a matter over which, as regards the continental shelf beyond 200 nautical miles, the Tribunal does not have jurisdiction in the present case⁴⁵¹), the allocation of sovereign rights in the continental shelf would depend on the delimitation, not vice-versa⁴⁵². Bangladesh rightly quotes the ICJ’s case law in that regard when it recalls in its Memorial that the Court stated in the *Jan Mayen* case that “the sharing-out of the area is ... the consequence of the delimitation, not vice-versa”⁴⁵³.

5.109. A close look to the case law shows clearly that Bangladesh’s claim is misconceived. In the *North Sea Continental Shelf* cases, the International Court of Justice stated that “the appurtenance of a given area, considered as an entity, in no way governs the precise

⁴⁴⁸ See paras. 5.33-5.36 above.

⁴⁴⁹ BM, para. 6.45.

⁴⁵⁰ *Delimitation of the Continental Shelf between France and the United-Kingdom*, Decision of 30 June 1977, UNRIAA, Vol. XVIII, p. 49, para. 79. See also N. Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation. Legal and Technical Aspects of a Political Process*, Martinus Nijhoff Publishers, Leiden/Boston, 2003, pp. 128-129.

⁴⁵¹ See paras. 1.12-1.24 above.

⁴⁵² See also paras. 5.157-5.159 below.

⁴⁵³ BM, para. 6.28 (quoting para. 64 of the 1993 ICJ Judgment). See also paras. 5.157-5.159 below.

delimitation of its boundaries”⁴⁵⁴. The Court confirmed its position in the *Tunisia/Libya Continental Shelf* case by underlining that the entitlement of the coastal State is not relevant “in itself to determine the precise extent of the rights of one State *in relation to those of a neighbouring State*”⁴⁵⁵. In that regard, Bangladesh’s argument is totally flawed. If a “need for access to its entitlement” were a valid argument, it would have to be applied to any maritime claim, that is to say to the exclusive economic zone in its entirety (up to 200 nautical miles) and to the continental shelf within and beyond 200 nautical miles since Bangladesh claims all of these areas. But then articles 74 (1) and 83 (1) of UNCLOS would be meaningless since both States would have in such a situation overlapping *rights* – and not claims. Again, such a purported “need for access to its entitlement” “states the problem rather than it solves it”⁴⁵⁶.

5.110. The purpose of any maritime delimitation is to determine in which areas each State has exclusive sovereign rights. In this respect, there is no room to introduce some difference of treatment between the continental shelf within and beyond 200 nautical miles⁴⁵⁷. Rights over maritime areas (be it exclusive economic zone or continental shelf within or beyond 200 nautical miles) which are *claimed* by two or more States will depend on the location of the maritime boundary, not vice versa. This is exactly the reason why the Arbitral Tribunal rejected the claim Trinidad and Tobago put forward in the *Barbados/Trinidad and Tobago* Arbitration. Trinidad and Tobago claimed “the adjustment of the equidistance line on the ground of an entitlement to a continental shelf out to the continental margin defined in accordance with UNCLOS article 76(4)-(6)” and asserted “that its rights to the continental shelf cannot be trumped by Barbados’ EEZ”. The Tribunal rejected that claim on the ground that “the single maritime boundary which the Tribunal has determined is such that, between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm”⁴⁵⁸. Thus, Trinidad and Tobago had no right on the continental shelf beyond 200 nautical miles as

⁴⁵⁴ *I.C.J. Reports 1969*, p. 32, para. 46.

⁴⁵⁵ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 46, para. 43 (emphasis added). See also *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *UNRIAA*, Vol. XIX, p. 184, para. 96.

⁴⁵⁶ See para. 5.107 above.

⁴⁵⁷ See also para. 5.3 above.

⁴⁵⁸ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, p. 242, paras. 367-368.

a result of the delimitation. The situation is exactly the same in the present case and therefore, there is no reason to depart from this solution⁴⁵⁹.

5.111. In view of the above, it will be apparent that an alleged “need for access to its entitlement” to some area of continental shelf beyond 200 nautical miles cannot constitute a valid argument either to set aside equidistance or to adjust the provisional equidistance line. As Bangladesh acknowledges in its Memorial, “Article 83(1) [of UNCLOS] applies with equal force to delimitation within and beyond 200 M”⁴⁶⁰. As Myanmar has already underlined, “equidistance/relevant circumstances” constitutes the basic method for contemporary maritime delimitation, including of the continental shelf, within as well as beyond 200 nautical miles, provided that Bangladesh has any entitlement on the latter (a point on which the Tribunal does not have jurisdiction); rights to maritime areas are governed by equidistance, not vice versa. Therefore the “need for access” argument cannot override the recourse to equidistance as Bangladesh claimed and does not constitute a relevant circumstance requiring the adjustment of the provisional equidistance line.

2. The Bangladesh Argument Based on the Alleged “Cut-Off Effect”

5.112. Bangladesh complains that, because it

“is tucked between Myanmar and India in the concavity described by the Bay of Bengal’s north coast, Myanmar’s proposed equidistance line converges a short distance in front of the Bangladesh coast with the equidistance line India has claimed as its maritime boundary with Bangladesh. Together, the two lines create a ‘cut-off’ effect that deprives Bangladesh of the overwhelming majority of its maritime entitlement.”⁴⁶¹

The argument is used by Bangladesh in order to rule out the equidistance line. As noted above⁴⁶², it is without legal basis. In addition, the alleged “cut-off effect” cannot be invoked as a relevant circumstance which could lead to adjusting the equidistance line.

⁴⁵⁹ See paras. 5.155-5.162 below.

⁴⁶⁰ BM, para. 7.3.

⁴⁶¹ BM, para. 6.30.

⁴⁶² See paras. 5.80-5.82 above.

5.113. According to Bangladesh's Memorial:

“Because of its concave coastline, Bangladesh [would be] severely prejudiced by the equidistance lines claimed by Myanmar and India from their respective land boundary termini with Bangladesh, which intersect well within 200 M of the Bangladesh coast, cutting off its access to a full 200 M EEZ and continental shelf, and blocking it entirely from access to the outer continental shelf. Because of its unique and disadvantageous coastal geography, Bangladesh [would be] ‘EEZ and shelf-locked’ by equidistance lines.”⁴⁶³

As a result of such a “cut-off effect”, Bangladesh argues that it would be deprived of the “*overwhelming majority*” of the maritime area it claims⁴⁶⁴.

5.114. It is clear that the crux of Bangladesh's claim is a geographical one: as it is stated in its Memorial, “[t]he fundamental geographic reality of this case [would be] that Bangladesh sits in a broad and deep concavity at the northern limit of the Bay of Bengal, with Myanmar to its east and India to its west”⁴⁶⁵; adding later that “the core geographic fact of this case [would be] the concave configuration of the Bay of Bengal's north coast”⁴⁶⁶; and, again, that “the concavity (...) [would be] so central to this case” because it would produce an “anomaly” from which inequity would result⁴⁶⁷.

5.115. It is a fact that the general configuration of the coasts facing the Bay of Bengal is concave. But Bangladesh overstates the importance of this concavity on the maritime delimitation with Myanmar. It gives this factor a legal effect not based on the reality of the present case and, more largely, on the case law. This is so at least in three respects:

- International courts and tribunals cannot refashion nature;
- Concavity does not as such result in an inequitable application of equidistance; and

⁴⁶³ BM, para. 2.2.

⁴⁶⁴ BM, para. 6.30 (emphasis added). According to Bangladesh, “[t]he two lines quickly meet and truncate Bangladesh's maritime entitlement at a distance of just 137 M from the Bangladesh coast, leaving it with a narrow wedge of maritime space” (BM, para. 6.31).

⁴⁶⁵ BM, para. 1.8.

⁴⁶⁶ BM, para. 1.20.

⁴⁶⁷ BM, para. 6.38.

- There is no right to “have broadly comparable rights to extend its maritime jurisdiction as far seawards as international law permits”.

a. International Courts and Tribunals cannot Refashion Nature

5.116. It must first be recalled that, as a geographical feature, concavity cannot be refashioned by international courts and tribunals:

“whether the one State or the other is favoured by nature, or the reverse, as regards its coastline [is] an argument which the Court does not consider to be relevant since, even accepting the idea of natural advantages or disadvantages, ‘it is not such natural inequalities as these that equity could remedy’ (*I.C.J. Reports 1969*, p. 50, para. 91)”⁴⁶⁸.

5.117. As the International Court of Justice said in the *Libya/Malta* case, the purpose is not “to make equal what nature has made unequal” and “there can be no question of distributive justice”⁴⁶⁹. Therefore, even if concavity could be considered as an “anomaly” (a claim which would assume that there is some kind of “geographical normality”), such an “anomaly” could not be remedied by an international tribunal. To do so would be to open Pandora’s Box, since any geographical configuration can be considered unique.

5.118. In 2002, the International Court of Justice again underlined in the *Cameroon v. Nigeria* case that:

“delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court’s jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation.”⁴⁷⁰

The Court noted:

“The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open

⁴⁶⁸ *Continental Shelf (Tunisia/Libya)*, Judgment, *I.C.J. Reports 1982*, pp. 63-64, para. 79.

⁴⁶⁹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 40, para. 46.

⁴⁷⁰ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 443, para. 294.

to modification by the Court but a fact on the basis of which the Court must effect the delimitation. As the Court had occasion to state in the *North Sea Continental Shelf* cases, '[e]quity does not necessarily imply equality' and in a delimitation exercise '[t]here can never be any question of completely refashioning nature' (*I.C.J. Reports 1969*, p. 49, para. 91).⁴⁷¹

5.119. Quoting those paragraphs from *Cameroon v. Nigeria*, in 2007 the Arbitral Tribunal in the *Guyana/Surinam* Arbitration made the following comment:

"In short, international courts and tribunals dealing with maritime delimitations should be mindful of not remaking or wholly refashioning nature, but should in a sense respect nature."⁴⁷²

5.120. All these findings apply to concavity which is "a given" from a geographical point of view.

b. Concavity Does Not as such Result in an Inequitable Application of Equidistance

5.121. According to Bangladesh, concavity is "among the recognized circumstances where equidistance does not result in an equitable solution"⁴⁷³. Contemporary case law does not confirm but rather invalidates Bangladesh's assertion. Bangladesh presents this factor as an exception to the principle according to which international courts and tribunals cannot refashion nature. It must be considered with great caution.

5.122. In the *Cameroon v. Nigeria* case, Cameroon insisted on the concavity of its coast with a view, not to set aside equidistance, as Bangladesh claims in the present case, but to adjust the provisional equidistance line. Cameroon contended that "the concavity of the Gulf of Guinea in general, and of Cameroon's coastline in particular [which is at least as marked as the concavity of the north-eastern part of the Bay of Bengal], creates a virtual enclavement of Cameroon, which constitutes a special circumstance to be taken into account in the delimitation process"⁴⁷⁴. This is exactly Bangladesh's argument – except that Bangladesh's

⁴⁷¹ *Ibid.*, pp. 443-445, para. 295.

⁴⁷² *Guyana/Surinam*, Award of 17 September 2007, *ILM*, Vol. 47, 2008, p. 164, paras. 373-374 (also available on <http://www.pca-cpa.org/>).

⁴⁷³ *BM*, para. 6.32.

⁴⁷⁴ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 445, para. 296.

assertion is much more radical than the adjustment of the provisional equidistance line, since it claims that equidistance would have to be set aside at the outset. But the International Court of Justice rejected rather expeditiously this claim on the grounds that concavity did not represent a circumstance which would justify the adjustment of the equidistance line⁴⁷⁵.

5.123. Existing maritime boundary agreements in the immediate vicinity of the Bay of Bengal or in the Bay itself also show that equidistance is resorted to even if the States' relevant coasts are concave. As previously recalled, Myanmar, Thailand and India decided to resort to equidistance in the Gulf of Mottama (Gulf of Martaban) although Myanmar's coast is roughly concave in this Gulf⁴⁷⁶. Similarly, in their 1986 Agreement, India and Myanmar adopted an equidistance line to delimit the exclusive economic zones and the continental shelf up to 200 nautical miles in the Bay of Bengal although Myanmar coast is concave in that area⁴⁷⁷.

5.124. This shows conclusively that concavity is not sufficient, *as such*, to produce an inequitable result. All will depend on the actual circumstances of each case. To that end, the disproportionality test (third phase of the delimitation process⁴⁷⁸) will be decisive. In the *Libya/Malta* case, the International Court of Justice indicated that the fact that "a coast is markedly irregular or markedly concave or convex" could be taken into account *when* it leads to a "disproportionate result"⁴⁷⁹. Thus, if the test of non-disproportionality is satisfied, there is no reason to give any specific effect to concavity since there is no manifest inequity to correct. This is the case with respect to the present maritime boundary proposed by Myanmar⁴⁸⁰.

5.125. In reality, Bangladesh bases its whole argument concerning the cut-off effect on the *North Sea Continental Shelf* cases, claiming that their reasoning is "equally applicable to Bangladesh today". According to Bangladesh's Memorial:

⁴⁷⁵ *Ibid.*, pp. 445-446, para. 297.

⁴⁷⁶ See para. 2.37 above.

⁴⁷⁷ See paras. 2.39-2.42 above.

⁴⁷⁸ See paras. 5.145-5.153 below.

⁴⁷⁹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment*, *I.C.J. Reports 1985*, p. 48, para. 64.

⁴⁸⁰ See paras. 5.145-5.153 below.

“This case presents geographic circumstances similar to those in the *North Sea Cases* decided by the International Court of Justice (‘ICJ’) in 1969. Bangladesh’s geographic situation is equivalent to that of the Federal Republic of Germany, which is located in a similar concavity formed by the North Sea coast between Germany’s borders with Denmark (to the north) and the Netherlands (to the west). Like Bangladesh, equidistance lines drawn between Germany and its two neighbours cut off its maritime projection very near the coast. Germany’s central contention before the ICJ was that, given the geographic circumstances, equidistance did not yield an equitable result. The Court agreed, and its judgment in the *North Sea Cases* remains a landmark in the history of maritime delimitation jurisprudence”⁴⁸¹.

5.126. However, contrary to Bangladesh’s claim, the *North Sea Continental Shelf* cases are not at all – and certainly not any more – the leading authority for the settlement of maritime delimitation disputes⁴⁸².

5.127. Moreover, even if (*quod non*) we were living in the unpredictable world of *équité créatrice* (‘normative equity’), as Bangladesh appears to wish, although it acknowledges that the Tribunal has to take into account “the existing body of jurisprudence from both the ICJ and international tribunals developed over the course of the last four decades”⁴⁸³ (that is to say the equidistance/relevant circumstances method), Bangladesh could not rely on the *North Sea Continental Shelf* cases because it is not in the same situation as Germany in 1969.

5.128. To begin with, in 1969 the Court based its decision on the fact that “what is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave ...”⁴⁸⁴. In our case, Myanmar relevant coast is not (roughly) convex but is itself concave⁴⁸⁵.

⁴⁸¹ BM, para. 1.9 (footnotes omitted).

⁴⁸² See para. 1.27 above.

⁴⁸³ BM, para. 1.17.

⁴⁸⁴ *I.C.J. Reports 1969*, p. 50, para. 91 (emphasis added).

⁴⁸⁵ See para. 2.8 above.

5.129. Additionally, the Court decided in 1969 to override equidistance *only because* the three States involved were on an equal footing as regards the length of their coasts. The Court underlined no less than four times in a single paragraph that:

“in the present case there are three States whose North Sea coastlines are in fact *comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two*. Here indeed is a case where, *in a theoretical situation of equality within the same order*, an inequity is created ... It is therefore not a question of totally refashioning geography whatever the facts of the situation but *given a geographical situation of quasi-equality* between a number of States, of abating the effects of an incidental special feature from which an unjustifiable *difference of treatment* could result.”⁴⁸⁶

5.130. This is exactly the perception in the *Handbook on the Delimitation of Maritime Boundaries* quoted by Bangladesh in its Memorial. According to Bangladesh’s own comment, the relevant situations depicted in the *Handbook* are those where “State B has a coastline roughly equal in size to the coastlines of States A and C”⁴⁸⁷.

5.131. According to its own Report on the third Round of Technical Level Talks held in 2008, Bangladesh again underlined that “originally ICJ accepted the principle of proportionality under three geographical conditions: a) the relevant coast must be adjusted; b) there must be a particular configuration of the coast such as concavity or convexity, and c) *the relevant coast must [be] of quasi equal length*”⁴⁸⁸.

5.132. In the present case, it is indisputable that India, Bangladesh and Myanmar have *not* “been given broadly equal treatment by nature” and are *not* in a “geographical situation of quasi-equality”. An indisputable natural difference exists between the length of the Bay of Bengal coastlines of India and Myanmar, on the one hand, and of Bangladesh, on the other.

⁴⁸⁶ *I.C.J. Reports 1969*, p. 50, para. 91 (emphasis added). Indeed, this was exactly Germany’s case: Germany claimed that the use of equidistance “would be inequitable because it would unduly curtail what the Republic believed should be its proper share of continental shelf area, *on the basis of proportionality to the length of its North Sea coastline*” (*ibid.*, p. 17, para. 7).

⁴⁸⁷ BM, para. 6.32.

⁴⁸⁸ BM, Vol. III, Annex 19, para. 22 (emphasis added).

From a purely geographical point of view, Bangladesh, on the one hand, and Myanmar and India, on the other, do not belong to the same category of coastal States. If one looks at Figure 2.1 of Bangladesh's Memorial⁴⁸⁹, one may appreciate the great difference between the restricted length of Bangladesh's coastline, lying on the extreme northeast of the Bay of Bengal, and the extensive coastlines of India and Myanmar. As regards especially the relevant coasts in the present case, Myanmar's relevant coast is twice as long as Bangladesh's⁴⁹⁰.

5.133. In this situation, it is clear that concavity cannot be considered as "an *incidental* special feature from which an unjustifiable difference of treatment could result."⁴⁹¹ This difference of treatment *pre-exists* concavity – and it is a *geographical* difference of treatment – while in the *North Sea Continental Shelf* cases, the situation was one of a "theoretical situation of equality" as far as the length of States concerned coastlines was concerned. Relevant legal consequences must be duly drawn from that decisive geographical difference. As the Court stated in 1969⁴⁹² and as the Tribunal in the *Barbados/Trinidad and Tobago* Arbitration reaffirmed in 2006⁴⁹³, it is not possible to "rende[r] the situation of a State with an extensive coastline similar to that of a State with a restricted coastline". In other words, maritime delimitation "is not a question of apportioning [maritime] areas in order to compensate for the irregularities of the nature"⁴⁹⁴.

5.134. This radical geographical difference is one of the weakest points of Bangladesh's case (even assuming that *équité créatrice* were applicable, *quod non*). Bangladesh has tried to hide this weakness by a very questionable formula which, in fact, refashions nature and even negates it. Bangladesh asserts that "Bangladesh and Myanmar have ... 'been given broadly

⁴⁸⁹ BM, Vol. I, facing p. 12; Vol. II, Figure 2.1.

⁴⁹⁰ See paras. 5.58 and 5.64 above.

⁴⁹¹ See the quotation in para. 5.129 above.

⁴⁹² *I.C.J. Reports 1969*, pp. 49-50, para. 91.

⁴⁹³ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, p. 213, para. 237.

⁴⁹⁴ S.C. Vasciannie, *Land-Locked and Geographically Disadvantaged States in the International Law of the Sea*, Clarendon Press, Oxford, 1990, p. 102; see also pp. 32-33.

equal treatment by nature”⁴⁹⁵; that Bangladesh and Myanmar are “adjacent coastal States with broadly comparable coasts facing onto the high seas”; and that “the geographical circumstances in which Bangladesh finds itself are broadly similar to that of Germany in 1969”⁴⁹⁶. Bangladesh also adopted a wrong definition of relevant coasts with a view artificially to render similar what is not geographically similar⁴⁹⁷. But contrary to what Bangladesh asserts, the coastlines of Bangladesh, India and Myanmar and their relevant coasts are manifestly *not* “generally comparable”⁴⁹⁸. Therefore, even *équité créatrice*, if it were applicable (*quod non*), could not be applied in the present case. By contrast, this conclusion strengthens the equitable nature of the equidistance/relevant circumstances method under the more objective regime of *équité correctrice*.

5.135. Maritime boundaries agreements concluded over the years confirm that situations where equidistance produces, given the geographical configuration of the coasts of the parties, “cut-off effects” are not rare and are not considered as preventing the achievement of an equitable result. As Judge Tanaka explained in the *North Sea Continental Shelf* cases:

“Examples are not lacking of a large State, because of being given too small a window on the open sea as a result of a special geographic configuration, getting a very small portion of the continental shelf quite disproportionate to its large land territory (for instance Syria, Congo, Guatemala, Romania).”⁴⁹⁹

This statement still fully reflects the current state of law on maritime delimitation.

5.136. As a matter of fact, recent State practice amply confirms that equidistance is viewed as equitable even in case of cut-off effects. This is true regarding several agreements concluded between the States in the region around the Bay of Bengal. Thus, it is apparent that the delimitation agreements leading to the equidistant tripoint adopted by India, Maldives and Sri Lanka produces a cut-off effect detrimental to India⁵⁰⁰; the same remark can be made in

⁴⁹⁵ BM, para. 6.36.

⁴⁹⁶ BM, para. 6.40.

⁴⁹⁷ See paras. 5.54-5.70 above.

⁴⁹⁸ BM, para. 6.76.

⁴⁹⁹ Judge Tanaka, Dissenting Opinion, *I.C.J. Reports 1969*, p. 189; see also Judge Sørensen, Dissenting Opinion, *ibid.*, pp. 255-256.

⁵⁰⁰ See para. 2.37 above.

respect to the maritime delimitations agreed between Myanmar, India and Thailand⁵⁰¹, or about the recourse to equidistance by Malaysia and Thailand in the Gulf of Thailand⁵⁰².

c. There is No Right to “Have Broadly Comparable Rights to Extend its Maritime Jurisdiction as Far Seawards as International Law Permits”

5.137. Contrary to Bangladesh’s assertions, there is no right for “adjacent coastal States with broadly comparable coasts facing onto the high seas” to “have broadly comparable rights to extend their maritime jurisdiction as far seaward as international law permits”⁵⁰³. Besides the fact that it is simply not true that Bangladesh and Myanmar have “comparable coasts facing onto the high seas”⁵⁰⁴, this assertion has no basis in international law.

5.138. As the International Court of Justice said it in the *Romania v. Ukraine* case:

“The purpose of delimitation is not to apportion equal shares of the area ... The object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 18; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 67, para. 64).”⁵⁰⁵

5.139. Therefore, the argument raised by Bangladesh on the basis of an “amputative effect” is without foundation. In the *Romania v. Ukraine* case, the International Court of Justice considered that in order to check whether equidistance achieves an equitable result one has to verify if the delimitation line, *which by its very nature amputates maritime entitlements*⁵⁰⁶,

⁵⁰¹ See para. 2.38 above.

⁵⁰² *Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand*, 24 October 1979, *UNTS*, Vol. 1291, I-21271, p. 251.

⁵⁰³ BM, para. 6.37.

⁵⁰⁴ See paras. 2.1 and 2.14 above.

⁵⁰⁵ *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, pp. 99-100, paras. 110-111.

⁵⁰⁶ See N. Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation. Legal and Technical Aspects of a Political Process*, Martinus Nijhoff Publishers, Leiden/Boston, 2003, p. 139 (“This is the paramount conceptual axiom of maritime delimitation: politically, what lies at its very heart is an ‘amputation’ of maritime entitlements – not apportionment of areas”; emphasis in the original), and p. 140 (“Maritime delimitation has one key tenet. Insofar as it presupposes the existence of an overlapping of entitlements, it entails the ‘amputation’ of the potential entitlement of at least one of the States involved.”)

“allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way”⁵⁰⁷.

5.140. It is a fact that, in case of overlapping maritime claims, any maritime delimitation has a “cut-off effect” in the sense that it deprives the States concerned of some parts of their claims⁵⁰⁸. In such a case, none of the concerned States can be given a full access to the areas it could claim if there was no State with adjacent or opposite coasts producing maritime projections overlapping with its own maritime projections: this is *per se* impossible precisely because there exist overlapping claims. As the ICJ underlined in the *Jan Mayen* case,

“maritime boundary claims have the particular feature that there is an area of overlapping entitlements, in the sense of overlap between the areas which *each State* would have been able to claim *had it not been* for the presence of the other State; *this was the basis of the principle of non-encroachment enunciated in the North Sea Continental Shelf cases*”⁵⁰⁹.

5.141. In the present situation, equidistance deprives Bangladesh *as well as* Myanmar of potential rights to some portions of their entitlement to a full exclusive economic zone and continental shelf. Therefore, contrary to what Bangladesh suggests, equidistance does not “deny to [it] treatment equal or comparable to that given to [Myanmar]”⁵¹⁰. Myanmar as well as Bangladesh will at the end of the process obtain less than their putative respective full entitlement.

5.142. According to Bangladesh, the alleged inequitableness resulting from equidistance is moreover

⁵⁰⁷ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 127, para. 201.

⁵⁰⁸ Answering for instance to Canada’s claim based on the “*principe de non-empiètement*”, the Court of Arbitration made the following observations in the case concerning the *Delimitation of Maritime Areas between Canada and France (St.-Pierre-et-Miquelon)*: “Both Parties, however recognize that ‘some degree of cut off may be inherent in any delimitation’ ... (C.M. para. 392 ...); it has also been stated that any solution ‘amputera ... inéluctablement une partie de leurs droits. Tel est l’esprit de toute opération de délimitation.’ (CMF para. 370).” (Decision of 10 June 1992, *ILM*, Vol. 31, 1992, p. 1169, para. 67 (see also *UNRIAA*, Vol. XXI, p. 289)).

⁵⁰⁹ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *I.C.J. Reports 1993*, p. 64, para. 59 (emphasis added).

⁵¹⁰ BM, para. 6.36.

“exacerbated by the fact that fish from the Bay of Bengal are a key component of the national diet ... Fishing is also a major source of employment ... To deny Bangladesh an equitable apportionment of the waters of the Bay of Bengal would therefore be to deny its people a fair share of a resource on which they depend heavily.”⁵¹¹

5.143. The economic considerations put forward by Bangladesh in relation to fishing activities cannot change the picture:

- (i) as Bangladesh admits, equidistance will give it a substantial exclusive economic zone where its people can fish (“an area within 137 M from its coast” according to Bangladesh’s assessment⁵¹² and even bigger if one takes into account the delimitation line proposed by Myanmar). Whether the extent of this area is not disproportionate is a different question, which will be dealt with below⁵¹³;
- (ii) in any case, according to the consistent case law⁵¹⁴, the resource-related criterion does not constitute a ground for setting aside equidistance and, even if it could be treated as a relevant circumstance requiring an adjustment of the equidistance line, it would be only in the very exceptional case where well-documented and duly proved catastrophic results would ensue from the adoption of the provisional equidistance line⁵¹⁵. This is clearly not Bangladesh’s claim.

5.144. In the light of the above, it is clear that Bangladesh does not raise in its Memorial any convincing and legally well-founded argument against the equitableness of the provisional equidistance line.

⁵¹¹ BM, para. 6.39.

⁵¹² BM, para. 6.45. Contrary to what Bangladesh asserts “its case against equidistance is [not] even stronger than were Germany’s in the *North Sea Cases*” (BM, paras. 6.40-6.42). Actually, if equidistance had been applied, Germany would have been allocated an exclusive economic zone extending 90 nautical miles into the North Sea only (see BM, Vol. II, Figure 6.5). In the present case and *although* (contrary to Germany) its coastlines’ length is not comparable at all to its neighbours’, Bangladesh considers that its maritime area would extend up to 137 nautical miles.

⁵¹³ See paras. 5.145-5.153 below.

⁵¹⁴ See para. 4.42 above.

⁵¹⁵ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 214, para. 241, and pp. 221-223, paras. 266-270.

C. Stage 3 – The Test of Disproportionality

5.145. The equitableness of the delimitation line proposed by Myanmar on the basis of the equidistance/relevant circumstances method is corroborated by the test of disproportionality – “a test of the equitableness of [the] delimitation”⁵¹⁶ which, once satisfied, confirms that equidistance/relevant circumstances method achieves an equitable result in a given case.

5.146. The third stage of the maritime delimitation process has recently been described as follows by the International Court of Justice:

“The Court now turns to check that the result thus far arrived at, so far as the envisaged delimitation line is concerned, does not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue. This Court agrees with the observation that

‘it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor... there can never be a question of completely refashioning nature... it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features’ (*Anglo-French Continental Shelf Case*, *RIAA*, Vol. XVIII, p. 58, para. 101).

The continental shelf and exclusive economic zone allocations are not to be assigned in proportion to length of respective coastlines. Rather, the Court will check, *ex post facto*, on the equitableness of the delimitation line it has constructed (*Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, *RIAA*, Vol. XIX, paras. 94-95).⁵¹⁷

5.147. The Court also observed that

“the relevant area is pertinent to checking disproportionality ... The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or

⁵¹⁶ *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, Decision of 17 December 1999, *UNRIAA*, Vol. XXII, p. 372, para. 165.

⁵¹⁷ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, p. 129, paras. 210-211.

other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.

.....

A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths. This is not to suggest that these respective areas should be proportionate to coastal lengths – as the Court has said “the sharing out of the area is therefore the consequence of the delimitation, not vice versa” (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 67, para. 64).⁵¹⁸

5.148. In other words, and as Bangladesh itself recognizes⁵¹⁹, the test is of a negative nature. Its aim is not to check if the two ratios are in any given arithmetical proportion to each other; it is “used as a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion”⁵²⁰, “significant disproportionality” or “great disproportionality”⁵²¹. Similarly, “[t]he pertinent general principle, to the application of which the proportionality factor may be relevant, is that there can be no question of ‘completely refashioning nature’; the method chosen and its results must be faithful to the actual geographical situation”⁵²².

5.149. In the present case, Bangladesh asserts that equidistance would “produc[e] irrational results”⁵²³; that it would deprive Bangladesh “of the overwhelming majority of its maritime entitlement”⁵²⁴, while “leaving it with a narrow wedge of maritime space”⁵²⁵.

⁵¹⁸ *Ibid.*, p. 99, para. 110 and p. 103, para. 122.

⁵¹⁹ BM, pp. 76-77, para. 6.28.

⁵²⁰ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 214, para. 238.

⁵²¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, pp. 129-130, para. 214 and p. 103, para. 122.

⁵²² *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 45, para. 57.

⁵²³ BM, para. 6.56.

⁵²⁴ BM, para. 6.30.

⁵²⁵ BM, para. 6.31.

5.150. Yet Bangladesh does not base these assertions on the disproportionality test as defined by international courts and tribunals, which it completely ignores in its Memorial. Instead, it introduces an unknown test by which it seeks to allocate to the States involved a percentage of the area of the concavity and relates it to the 200-nautical-mile limit, without indicating the ratio existing between these percentages and the maritime areas allocated to each State by virtue of the equidistance/relevant circumstances line⁵²⁶. Moreover, Bangladesh uses a false depiction of relevant coasts (according to which Bangladesh, Myanmar and India would occupy the same percentage of the Bay of Bengal concavity, which is obviously far from the reality).

5.151. The reluctance of Bangladesh to apply the normal disproportionality test as it stands is understandable. In the present case, it is manifest that there is no disproportion at all between the coastal lengths and the maritime areas allocated to each State on the basis of equidistance, let alone the kind of disproportionality that would justify an adjustment of the line. The relevant ratios are as follows (see sketch-maps Nos. 5.9 and 5.10 at pages 159 and 161):

Coastal lengths

Bangladesh		Myanmar
364 km		740 km
1	:	2.03

Maritime areas

Bangladesh		Myanmar
80,406 km ²		156,133 km ²
1	:	1.94

It is obvious that such ratios cannot be considered as disproportionate. To the contrary, they are nearly the same and if there is some difference between them, it is in favour of Bangladesh, not Myanmar. Therefore, according to the case law, the disproportionality test is fully satisfied.

⁵²⁶ See BM, para. 6.38 (“Bangladesh occupies fully 34% of the concavity, yet it does not reach any portion of the 200 M limit. Conversely, Myanmar, the coast of which comprises 32% of the concavity, and India, which takes up 34%, have access to 38% and 62% of the 200 M limit, respectively.”)

5.152. In the *Romania v. Ukraine* case, the ICJ decided:

“It suffices for this third stage for the Court to note that the ratio of the respective coastal lengths for Romania and Ukraine, measured as described above, is approximately 1:2.8 and the ratio of the relevant area between Romania and Ukraine is approximately 1:2.1. The Court is not of the view that this suggests that the line as constructed, and checked carefully for any relevant circumstances that might have warranted adjustment, requires any alteration.”⁵²⁷

In fact, it would have been very surprising to decide otherwise since international courts and tribunals have considered that bigger differences between the two ratios do not require the adjustment of the line. In the *Eritrea/Yemen* Arbitration for instance, the Tribunal stated that the two ratios of 1 : 1.31 and 1 : 1.09 did not justify any adjustment of the equidistance line⁵²⁸. Similarly, the ICJ decided in the *Tunisia/Libya* case that the allocation to Tunisia of 60 per cent of the area, while 69 per cent of the relevant coasts belong to it, was not disproportionate⁵²⁹. In the present case, Myanmar is allocated 66 per cent of the area while its coasts are in a proportion of 67 per cent of the relevant coasts. There is therefore no disproportionality at all requiring any adjustment of the equidistance line.

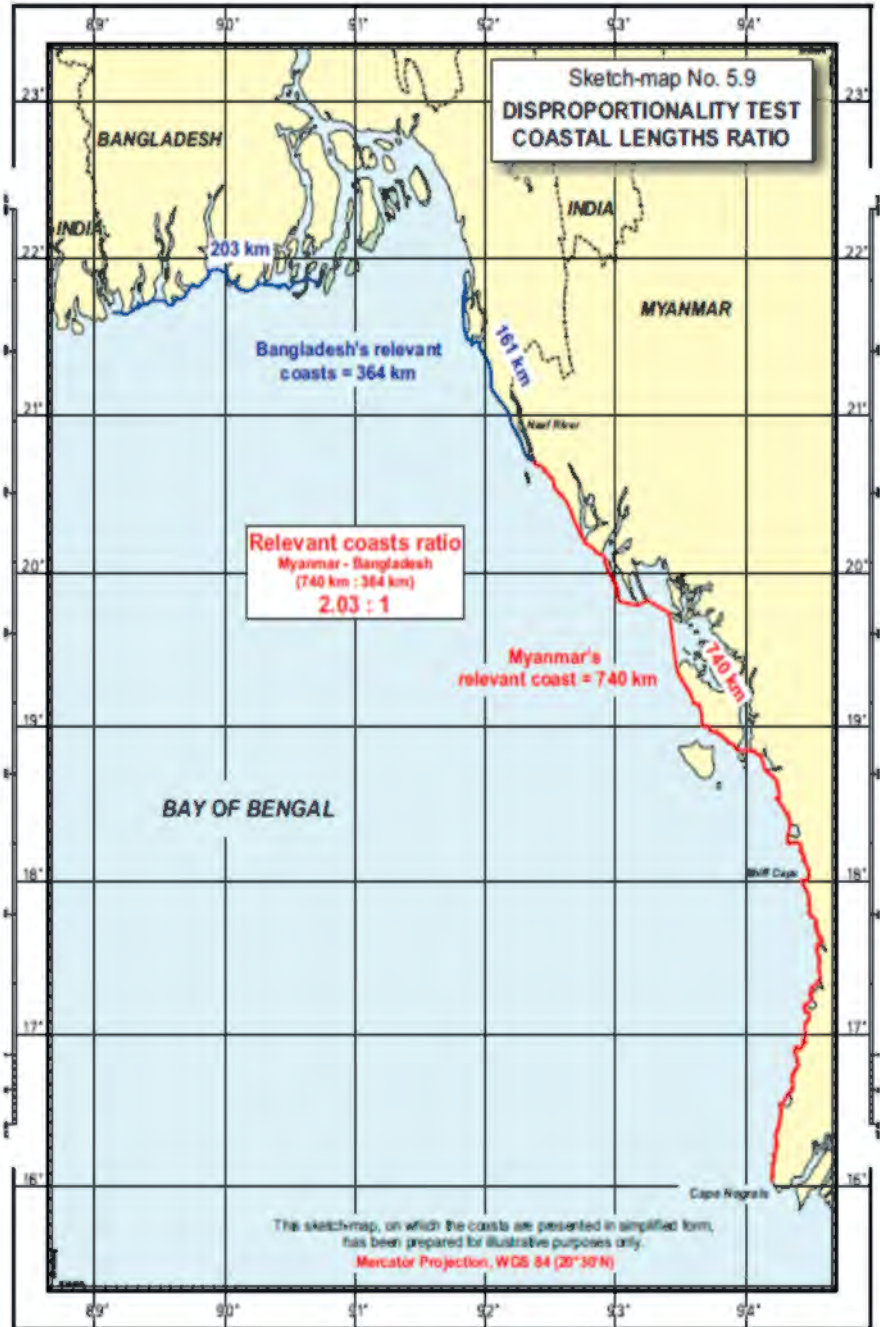
5.153. For the above reasons, Myanmar’s claimed line leads to an equitable solution under articles 74 (1) and 83 (1) of UNCLOS:

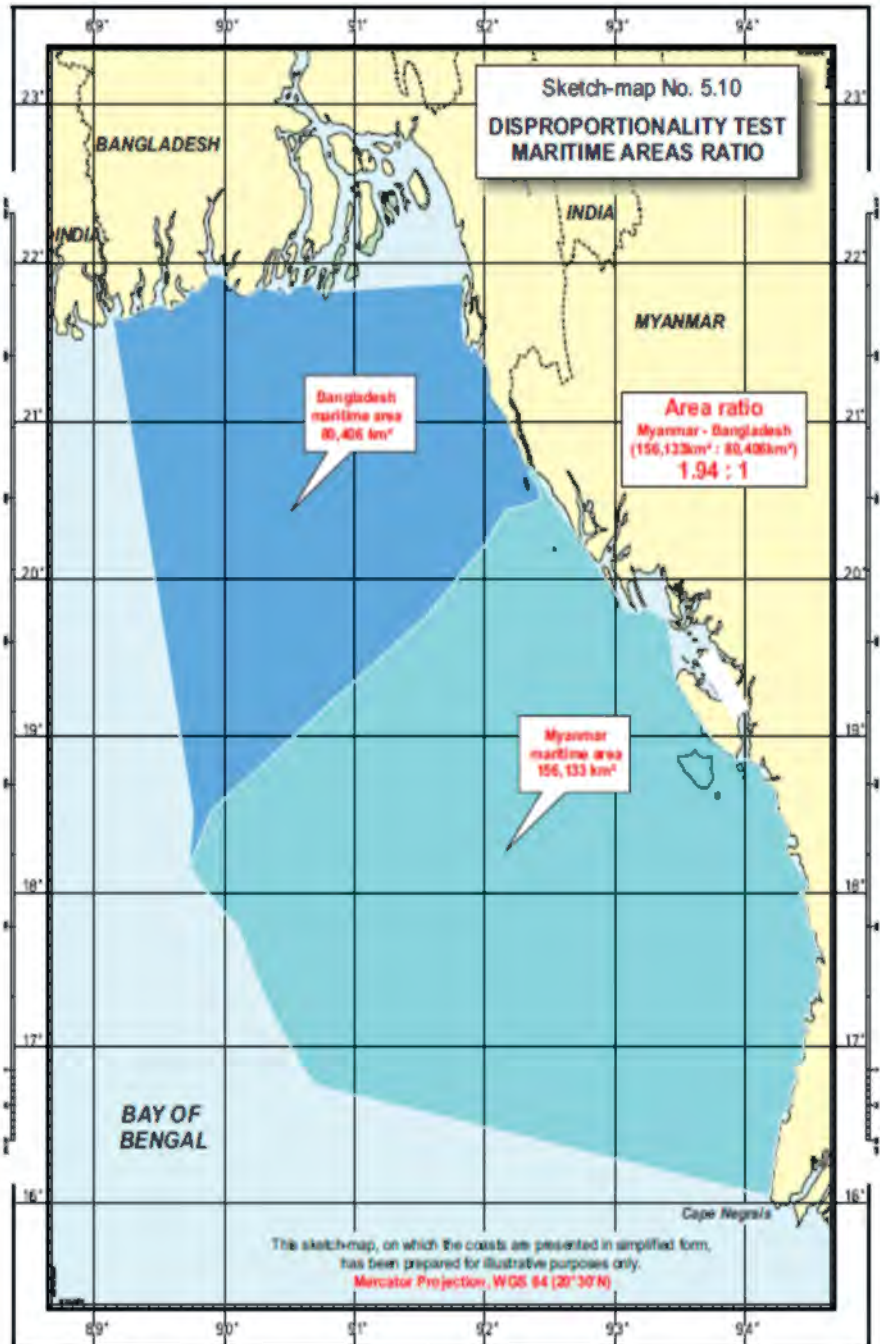
- (i) Myanmar’s claimed line is objectively based on the equidistance/relevant circumstances method recognized in the case law of international courts and tribunals, and is well-founded in law;
- (ii) Myanmar’s line does not refashion nature; to the contrary it mirrors it faithfully;
- (iii) it takes into due consideration the anomalous presence of St. Martin’s Island (Bangladesh) on the “wrong” side of the equidistance line directly off the mainland coast of Myanmar;

⁵²⁷ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 130, paras. 215-216.

⁵²⁸ See *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, Decision of 17 December 1999, *UNRIAA*, Vol. XXII, p. 373, para. 168.

⁵²⁹ *I.C.J. Reports 1982*, p. 91, para. 131.





- (iv) the equitable character of the line is corroborated by the application of the test of disproportionality.

IV. The Delimitation Line

5.154. Before recapitulating, by way of conclusion to this Chapter, the description of the maritime boundary between Bangladesh and Myanmar (B), it is appropriate to discuss not the actual end-point of the boundary – since the Tribunal cannot fix it in the absence of third State concerned – but at least the general question of the final direction of the boundary (A).

A. The Final Direction of the Boundary Line

5.155. Bangladesh devotes a whole Chapter of its Memorial⁵³⁰ to the “Delimitation of the Continental Shelf Beyond 200 Nautical Miles”, where it professes to demonstrate that “it is only Bangladesh that is entitled to the outer continental shelf beyond 200 M because only Bangladesh has an entitlement under the 1982 Convention; that is, only the landmass of Bangladesh has a natural prolongation extending to these areas of the outer shelf. Myanmar enjoys no entitlement in these areas because, as a matter of fact and law, its land territory has no natural prolongation into the Bay of Bengal beyond 200 M from its coastline.”⁵³¹

5.156. These assertions are based on two grossly fallacious assumptions:

- *first*, that the Tribunal has jurisdiction to deal with this issue; and
- *second*, even more wrongly, that the only criterion for an entitlement to a continental shelf beyond 200 nautical miles from the baselines would be the concept of “natural prolongation” very oddly assimilated to a purely sedimentary phenomenon.

5.157. It is not the intention of Myanmar to discuss these assertions in the present Chapter: it has already shown that the Tribunal has no jurisdiction to decide on the respective claims of the Parties to areas of continental shelf beyond 200 nautical miles – at least in the present

⁵³⁰ BM, Chapter 7, pp. 95-111.

⁵³¹ BM, para. 7.5.

circumstances⁵³². Bangladesh's position on the "sedimentary prolongation" is so evidently misconceived that it is only so as not to let any argument go unanswered that it will answer it in an Appendix to this Memorial. But there is another and more fundamental reason why Bangladesh's claim to a continental shelf beyond 200 nautical miles does not deserve a discussion in the body of this Counter-Memorial: in making that claim, Bangladesh, so to speak, puts the cart before the horse; it bases itself on a claimed *entitlement* in order to allocate to itself sovereign *rights* over that part of the continental shelf. But it is not an acceptable reasoning; as explained by the ICJ in an already quoted passage of its 1993 Judgment in *Jan Mayen*: "the sharing-out of the area is ... the consequence of the delimitation, not vice-versa"⁵³³.

5.158. The relevant passage of that Judgment deserves to be quoted in full:

"When, as in the present case, delimitation is required between opposite coasts which are insufficiently far apart for both to enjoy the full 200-mile extension of continental shelf and other rights over maritime spaces recognized by international law, the median line will be equidistant also from the two 200-mile limits, and may prima facie be regarded as effecting an equitable division of the overlapping area. However, as the Court observed, in relation to the continental shelf, in 1969, judicial treatment of maritime delimitation does not involve the sharing-out of something held in undivided shares:

'Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.' (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 22, para. 18.)

Thus the law does not require a delimitation based upon an endeavour to share out an area of overlap on the basis of comparative figures for the length of the coastal fronts and the areas generated by them. The task of a tribunal is to define the boundary line between the areas under the maritime jurisdiction of

⁵³² See paras. 1.12-1.24 above.

⁵³³ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 67, para. 64.

two States; the sharing-out of the area is therefore the consequence of the delimitation, not vice versa.”⁵³⁴

5.159. This was also the view of the Court of Arbitration in the *Anglo-French Continental Shelf* case in its 1977 Award:

“The first of these conclusions was that delimitation of the continental shelf is not a question of apportionment, that is of awarding ‘just and equitable’ shares to each State in a common, as yet undelimited, area of shelf. On the contrary, delimitation is essentially a process of ‘drawing a boundary line between areas which already appertain to one or other of the States affected’ (*I.C.J. Reports 1969*, paragraph 20). Accordingly, although the delimitation in the present case must be equitable, it cannot have as its object simply the awarding of an equitable ‘share’ in the continental shelf to each Party. The delimitation, when made, will in practice divide the continental shelf in the arbitration area between the French Republic and the United Kingdom in what may then be said to be shares; but this will be only the incidental result of fixing their boundary in the marginal areas where their respective continental shelves converge.”⁵³⁵

5.160. The delimitation of the continental shelf between Myanmar and Bangladesh stops well before reaching the 200-nautical-mile limit measured from the baselines of both States. In these circumstances, the question of the delimitation of the continental shelf beyond this limit is moot and does not need to be considered further by the Tribunal. In this regard, the present case calls for the same findings as those of the Arbitral Tribunal in the *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*:

“As will become apparent, however, the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm. The problems posed by the relationship in that maritime area of [continental shelf] and EEZ rights are accordingly problems with which the Tribunal has no need to deal. The Tribunal therefore takes no position on the substance of the

⁵³⁴ *Ibid.*; see also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 103, para. 122 *in fine*.

⁵³⁵ *Delimitation of the Continental Shelf between France and the United-Kingdom*, Decision of 30 June 1977, *UNRIIA*, Vol. XVIII, pp. 48-49, para. 78.

problem posed by the argument advanced by Trinidad and Tobago.”⁵³⁶

The same can be said word for word (*mutatis mutandis*) in the present case.

5.161. As a consequence, the Tribunal is only left with the question of where the delimitation which it is called to decide should end. The answer to this question can only be given by taking into account the fact that, as acknowledged by Bangladesh, its “claim overlaps not only with Myanmar’s claim, but also with that of India”⁵³⁷. India being absent from the present proceedings, it is quite obvious that the Tribunal will have to preserve the rights of that State and is therefore unable to fix a tripoint between the three States. However, it is not prevented from finally settling the present dispute, by fixing not a point but a general direction for the final part of the maritime boundary between Myanmar and Bangladesh.

5.162. Such a decision will be in accordance with the well-established practice whereby one or several third States’ rights may be affected by a decision concerning a maritime delimitation, international courts and tribunals avoid fixing any point as the terminus of the line they decide, but simply indicate a direction at which the terminal part of the line points, until the jurisdiction of a third State is reached⁵³⁸. It has to be recalled that:

“in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of

⁵³⁶ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, p. 242, para. 368.

⁵³⁷ BM, para. 7.4.

⁵³⁸ See, e.g., among a very abundant case law *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, pp. 26-27, paras. 21-22; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 421, para. 238; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, pp. 244-245, paras. 381-382; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, pp. 755-759, paras. 312-318; or *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 130, para. 218.

UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder⁵³⁹.

B. Description of the Maritime Boundary between Myanmar and Bangladesh

5.163. Since no special circumstance, nor any equitable consideration based on the test of (non-)disproportionality, leads to an adjustment of the equidistance line delimiting the respective continental shelves and exclusive economic zones of the Parties, this line, in addition to the territorial sea limit described in the previous Chapter of this Counter-Memorial, will constitute the single maritime boundary between Bangladesh and Myanmar.

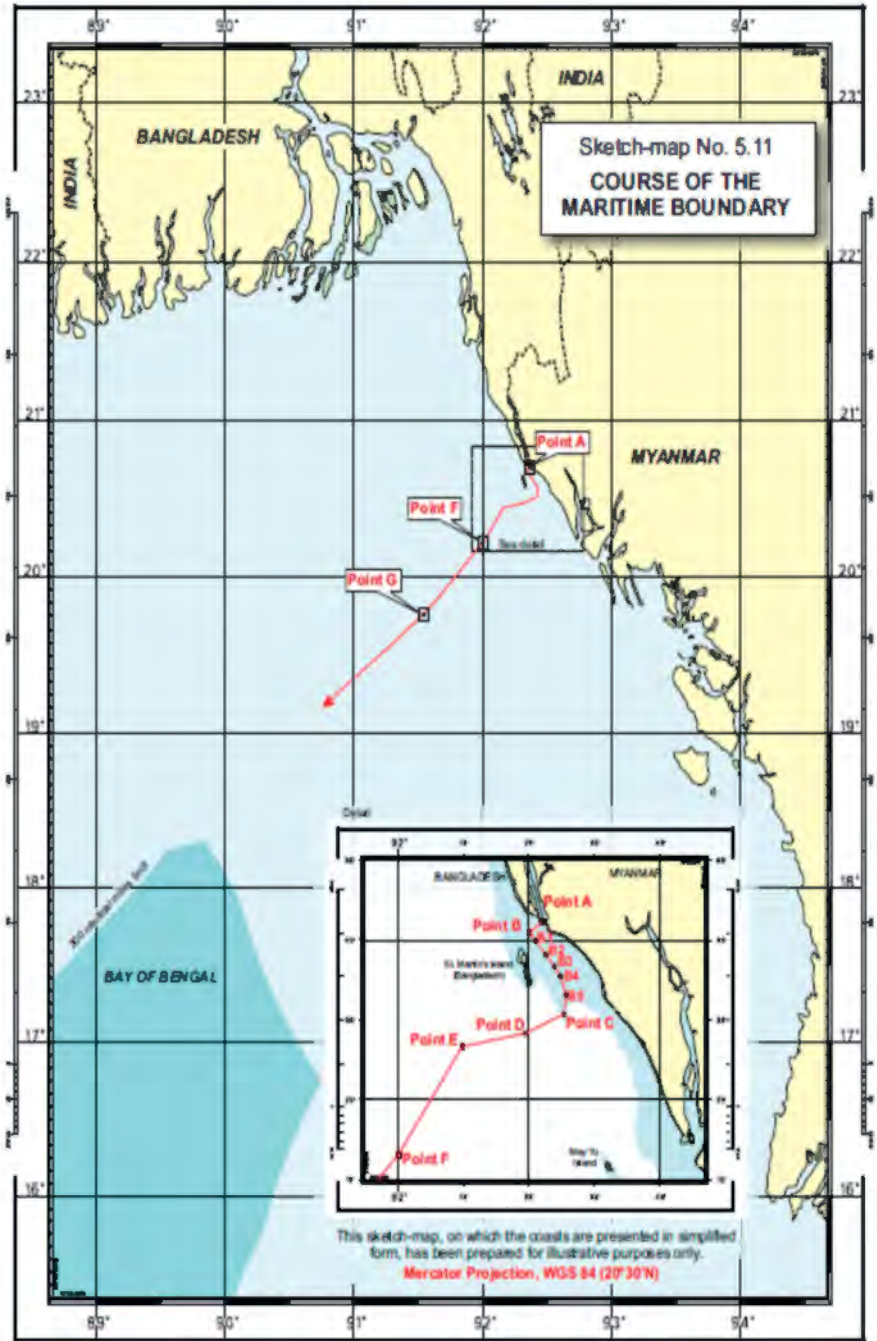
5.164. As a consequence, the maritime boundary between the continental shelf and the exclusive economic zones of Myanmar and Bangladesh is as follows:

- from Point E (the point at which the equidistance line meets the 12-nautical-mile arc from the coastline of St. Martin's Island⁵⁴⁰) with co-ordinates 20° 26' 42.4" N, 92° 09' 53.6" E, the boundary line continues along the equidistance line until it reaches Point F, with co-ordinates 20° 13' 06.3" N, 92° 00' 07.6" E;
- from Point F, the boundary line follows the equidistance line in a south-westerly direction to Point G, with co-ordinates 19° 45' 36.7 "N, 91° 32' 38.1" E; and
- from Point G, the boundary line continues along the equidistance line in a south-east direction following a geodetic azimuth of 231° 37' 50.9" until it reaches the area where the rights of a third State may be affected.

This boundary is reproduced on sketch-map No. 5.11 (at page 169), on the next page of this Counter-Memorial.

⁵³⁹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 759, para. 318.

⁵⁴⁰ See para. 4.68 above.



SUBMISSIONS

Having regard to the facts and law set out in this Counter-Memorial, the Union of Myanmar requests the Tribunal to adjudge and declare that:

1. The single maritime boundary between Myanmar and Bangladesh runs from Point A to Point G as follows:

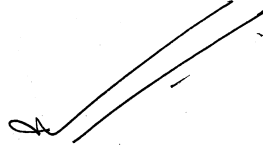
Point	Latitude	Longitude
A	20° 42' 15.8" N	92° 22' 07.2" E
B	20° 41' 03.4" N	92° 20' 12.9" E
B1	20° 39' 53.6" N	92° 21' 07.1" E
B2	20° 38' 09.5" N	92° 22' 40.6" E
B3	20° 36' 43.0" N	92° 23' 58.0" E
B4	20° 35' 28.4" N	92° 24' 54.5" E
B5	20° 33' 07.7" N	92° 25' 44.8" E
C	20° 30' 42.8" N	92° 25' 23.9" E
D	20° 28' 20.0" N	92° 19' 31.6" E
E	20° 26' 42.4" N	92° 09' 53.6" E
F	20° 13' 06.3" N	92° 00' 07.6" E
G	19° 45' 36.7" N	91° 32' 38.1" E

(The co-ordinates are referred to WGS 84 datum)

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

The Union of Myanmar reserves its right to supplement or to amend these submissions in the course of the present proceedings.

1st December 2010,

A handwritten signature in black ink, consisting of a small loop followed by two long, sweeping diagonal strokes.

Dr. TUN SHIN

Deputy Attorney General

Agent for the Union of Myanmar

APPENDIX

MYANMAR'S ENTITLEMENT TO A CONTINENTAL SHELF
BEYOND 200 NAUTICAL MILES

A.1. As has been explained in Chapter 5 above, the delimitation of the continental shelf between Myanmar and Bangladesh stops at a distance well before reaching the 200-nautical-mile limit measured from the baselines of both States¹. In these circumstances, the question of the delimitation of the continental shelf beyond this limit is moot and does not need to be considered further by the Tribunal. However, in order to respond to the groundless allegations made by Bangladesh in its Memorial, Myanmar wishes to comment on some issues relating to its entitlement to a continental shelf extending beyond 200 nautical miles in the present Appendix.

A.2. In Chapter 7 of the Memorial which is said to address “the delimitation of the continental shelf beyond 200 M”², but which, in fact, contains only arguments concerning the entitlement of Bangladesh and Myanmar to a continental shelf beyond 200 nautical miles, Bangladesh concludes that, “as between Bangladesh and Myanmar, it is only Bangladesh that is entitled to the outer continental shelf beyond 200 M because only Bangladesh has an entitlement under the 1982 Convention”³. This conclusion is based on an erroneous and selective interpretation of the legal notion of “natural prolongation” contained in article 76 of UNCLOS (**Section I**). A correct application of the provisions of the Convention leads to the conclusion that Myanmar is entitled to a continental shelf extending beyond 200 nautical miles and, consequently, to delineate the outer limit of the continental shelf according to the provisions of article 76 of UNCLOS (**Section II**). Accordingly, in accordance with article 76 (8) of the Convention, Myanmar has submitted the particulars of the outer limit of its continental shelf to the Commission on the Limits of the Continental Shelf (CLCS) (**Section III**).

¹ See paras. 5.155-5.162 above.

² BM, para. 7.1.

³ *Ibid.*, para. 7.5. See also *ibid.*, paras. 2.3 and 7.37.

I. Bangladesh's Erroneous Interpretation of Article 76 of UNCLOS

A.3. In its Memorial, Bangladesh adopts an exclusively scientific, geological, interpretation of the concept of “natural prolongation”, embodied in article 76 (1) of UNCLOS, in order to demonstrate that it, and not Myanmar, is entitled to a continental shelf beyond 200 nautical miles. However, the International Court of Justice, which has indeed added much to the establishment of the notion in the modern law of the sea, confirmed in 1985 that the notion of natural prolongation “in spite of its physical origins has throughout its history become more and more a complex and juridical concept”⁴. Bangladesh is interpreting the concept of “natural prolongation” in isolation from its immediate context (A) and ignores the drafting history of article 76 of the Convention (B). Both these elements confirm that the concept of “natural prolongation” has a special legal meaning for the purposes of the Convention⁵. This is furthermore confirmed by the relevant practice of the CLCS (C).

A. The Context

A.4. The notion of “natural prolongation”, which has been incorporated into paragraph 1 of article 76 of UNCLOS, cannot be understood if it is taken in an isolated manner or in the particular context of the Judgment of the International Court of Justice in the *North Sea Continental Shelf* cases⁶ – as Bangladesh suggests⁷. It is an integral part of article 76 of the Convention in its entirety and must be interpreted in this particular context.

⁴ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34.

⁵ Vienna Convention on the Law of Treaties, 1969, Article 31 (4), *UNTS*, Vol. 1155, p. 331 (I-18232). Neither Bangladesh nor Myanmar are parties to the 1969 Vienna Convention. However, article 31 of the Convention is part of customary international law, as has been recognized by the International Court of Justice in numerous judgments (see, e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, paras. 64-65 (available on <http://www.icj-cij.org>)).

⁶ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3.

⁷ BM, paras. 7.10-7.13.

A.5. Article 76 of UNCLOS provides as follows:

Article 76

Definition of the continental shelf

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 isobath, 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.

A.6. The text of paragraph 1 of article 76 of UNCLOS directly shows that the concept of “natural prolongation” cannot be understood, for the purposes of the Convention, as a term of science. It is an integral part of the definition of the “legal” continental shelf the extent of which is to be determined with reference to the geomorphologic notion of continental margin⁸. However, under the régime of article 76 of UNCLOS, the “legal” continental shelf, i.e., the natural prolongation of the coastal State’s territory, does not necessarily coincide with the geomorphologic continental margin. Indeed, in the case where the outer edge of the continental margin of a coastal State does not extend to a distance of 200 nautical miles, the

⁸ United Nations, Office of Legal Affairs, *The Law of the Sea: Training Manual for Delineation of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles and for Preparation of Submissions to the Commission on the Limits of the Continental Shelf*, New York, 2006, p. I-18.

legal continental shelf, i.e., the natural prolongation of the territory, extends nevertheless up to this distance (see Figure No. A.1)⁹.

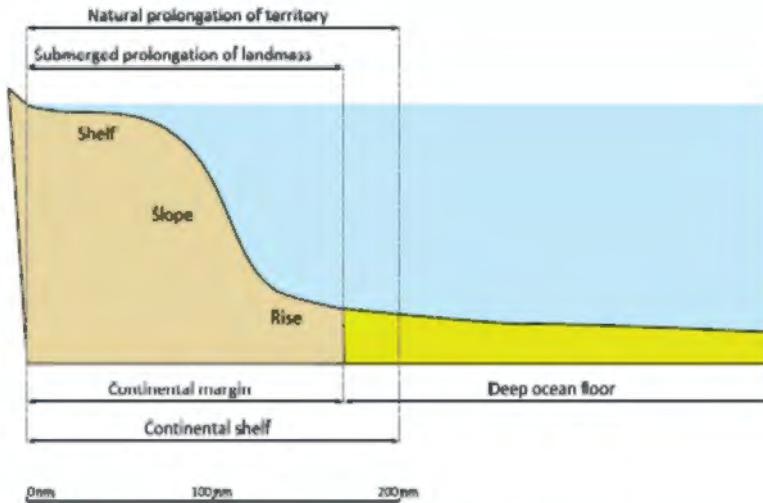


Figure No. A.1. Continental margin extending less than 200 nautical miles.

A.7. Even in the case where the continental margin extends beyond 200 nautical miles measured from the baseline of the coastal State, article 76 of the Convention is far from equating the legal continental shelf to a scientific geological concept of "natural prolongation". It refers to the notion of the "outer edge of the continental margin" which is further defined in the following paragraphs of article 76 of UNCLOS. Thus, paragraph 3 explains that the "continental margin" is "the submerged prolongation of the land mass of the coastal State", composed of the seabed and subsoil of the continental shelf, the continental slope and the continental rise, and excluding any adjacent feature, i.e., the deep ocean floor with its oceanic ridges. Paragraph 4 continues to describe how, for the purposes of the Convention, a coastal State has to determine the "outer edge of the continental margin". Under the Convention, the outer edge does not necessarily coincide with the physical edge

⁹ *Ibid.*, pp. I-18 and I-19. See *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34 ("This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil.")

of the geologic or geomorphologic continental margin, but is determined by the application of the formulae provided under paragraph 4 (a) (i) (sediment thickness formula or "Gardiner formula") and paragraph 4 (a) (ii) (distance formula or "Hedberg formula"). Only these formulae determine the possible extent of the "continental margin" referred to in article 76 of UNCLOS, and only the application of the formulae can demonstrate the existence of a "natural prolongation" in the sense of paragraph 1 of this provision, i.e., an edge of the continental margin situated at a distance of more than 200 nautical miles from the baseline.

A.8. Paragraph 5 limits the extent of the legal continental shelf further by the so-called constraint lines: the legal continental shelf can in no case extend further than 350 nautical miles measured from the coastal State's baseline, or further than 100 nautical miles measured from the 2,500 metre isobath, as the case may be. The limits imposed by the constraint lines have no connection to the scientific natural prolongation of the coastal State's landmass. They are artificially imposed and are an integral part of the legal concept of the continental shelf defined under article 76 (1) of UNCLOS.

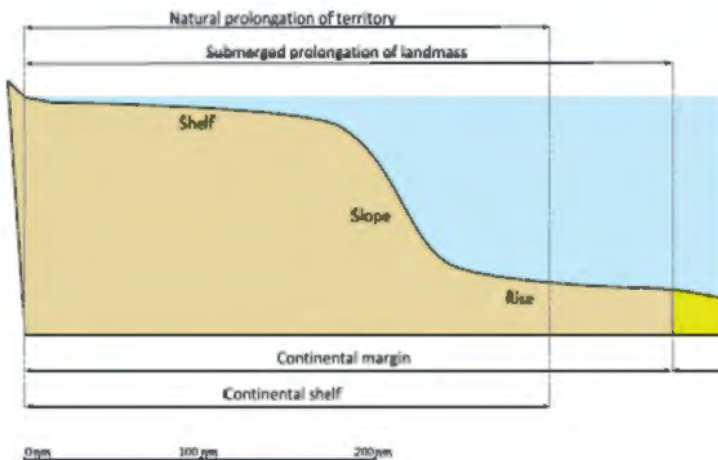


Figure No. A.2. Continental margin extending beyond 200 nautical miles.

The outer limit of the legal continental shelf, the “natural prolongation” of the coastal State’s land territory, does thus not coincide with the scientific outer limit of the continental margin (see Figure No. A.2)¹⁰.

A.9. Under article 76 of UNCLOS, “natural prolongation” refers to a legal concept which takes some account of scientific notions. It is not at all designed to describe necessary natural and scientific characteristics of the continental shelf, but refers only to a legal concept which assesses the legal title of a State to the continental shelf. The International Court of Justice has indeed noted in its 1969 Judgment:

“What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, – in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.”¹¹

A.10. Only the application of article 76 of UNCLOS in its entirety can determine the existence and the outer limit of the legal continental shelf extending beyond 200 nautical miles. Bangladesh admits this point; indeed, it notes that “[t]he conclusion *which flows from the application of Article 76* to the geology and geomorphology of the Bay of Bengal is that Bangladesh is entitled to claim sovereign rights in accordance with the 1982 Convention over the ‘natural prolongation’ of its landmass seawards from the 200 M limit *as far as the outer limit of the shelf delineated in accordance with Article 76(4), 76(5) and 76(7)*”¹². “Natural prolongation” is not the criterion; it is the (legal) outcome.

¹⁰ M.H. Nordquist *et al.* (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. II, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 873, para. 76.18 (a); R.J. Dupuy and D. Vignes, *Traité du Nouveau Droit de la Mer*, Economica, Paris, 1985, p. 276; R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 1999, p. 148. See also S.V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment*, Springer, Berlin, 2008, p. 241; International Law Association, Berlin Conference (2004), *Report on the Legal Issues of the Outer Continental Shelf*, point 6.1 (available at <http://www.ila-hq.org/download.cfm/docid/B5A51216-8125-4A4B-ABA5D2CAD1CF4E98>).

¹¹ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J. Reports 1969*, p. 31, para. 43. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 48, para. 48.

¹² BM, para. 7.26 (emphasis added).

A.11. In this regard, it is not relevant whether there is a “marked disruption or discontinuance of the sea-bed”¹³ or not, as Bangladesh is arguing in its Memorial¹⁴. Neither the legal concept of “natural prolongation”, nor the more scientific concept of “continental margin” incorporated into the Convention make any reference to such disruption, or to the geological distinction of continental and oceanic crust¹⁵. Article 76 of UNCLOS retains an essentially geomorphic definition of the margin, by enumerating its components, i.e., the shelf, the slope and the rise (see Figure No. A.3a)¹⁶. Under the Convention, the actual boundary between continental crust and oceanic crust – which constitutes the geological limit of the natural prolongation of the land mass (see Figure No. A.3b)¹⁷ – does not play any role. Only the location of the foot of the continental slope and the implementation of the formula lines are relevant for the determination of the entitlement of a coastal State to a continental shelf extending beyond 200 nautical miles, and of the corresponding limits.

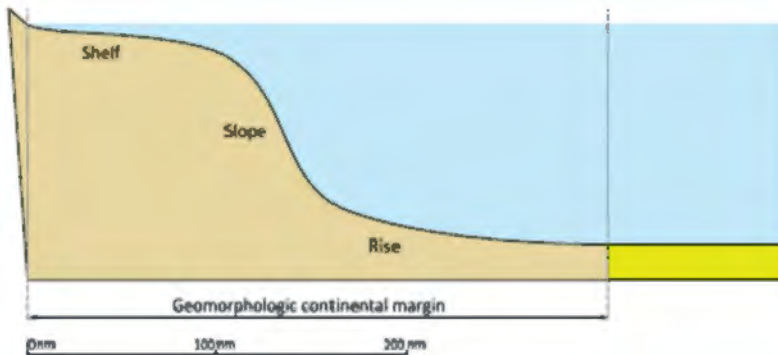


Figure No. A.3a. Geomorphologic continental margin.

¹³ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 57, para. 66.

¹⁴ BM, paras. 7.13 and 7.28.

¹⁵ United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: Training Manual for Delineation of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles and for Preparation of Submissions to the Commission on the Limits of the Continental Shelf*, New York, 2006, p. I-17.

¹⁶ R.J. Dupuy and D. Vignes, *op. cit.* (fn. 10), p. 300 (“On doit noter enfin que l’article 76 de la Convention donne primauté à la géomorphologie sur la géologie en ce qui concerne la définition de la marge continentale, ainsi qu’on le verra ci-après. Le concept de prolongement naturel doit être ainsi entendu dans un sens géomorphologique plus que géologique.”) See also Ph.A. Symonds *et al.*, “Characteristics of Continental Margins”, in P.J. Cook and Ch.M. Carleton (eds.), *Continental Shelf Limits: The Scientific and Legal Interface*, Oxford University Press, 2000, pp. 27-29.

¹⁷ See, e.g., Ph.A. Symonds *et al.*, “Characteristics of Continental Margins”, in P.J. Cook and Ch.M. Carleton (eds.), *op. cit.* (fn. 16), p. 27 and p. 55.

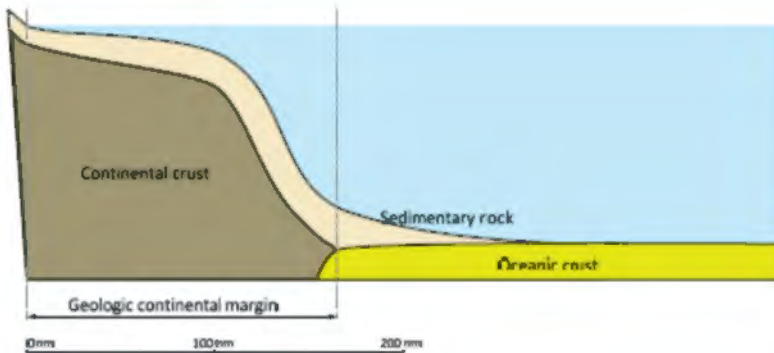


Figure No. A.3b. Geologic continental margin.

A.12. If one would apply the purely geologic understanding of “natural prolongation”, Bangladesh would nonetheless be deprived of an entitlement to a continental shelf beyond 200 nautical miles. Indeed, Bangladesh admits¹⁸ and the scientific studies attached to Bangladesh’s Memorial reveal¹⁹ that the eastern limit of the Indian plate continental crust is situated approximately along the so-called hinge zone which divides Bangladesh’s land territory in a north-western part and a south-eastern part. The entire south-eastern part is located on oceanic crust, i.e., beyond the geologic boundary between the continent and the oceans. In a purely geological point of view, which Bangladesh wants to apply in regard to

¹⁸ BM, para. 2.31. See also BM, Vol. II, Figure 2.5.

¹⁹ See in particular M. Alam *et al.*, “An Overview of the Sedimentary Geology of the Bengal Basin in Relation to the Regional Tectonic Framework and Basin-fill History”, *Sedimentary Geology*, Vol. 155, 2003, pp. 179-208, *passim* (BM, Vol. IV, Annex 50). See also J.R. Curran, “Sediment Volume and Mass beneath the Bay of Bengal”, *Earth and Planetary Science Letters*, Vol. 125, 1994, p. 381 (BM, Vol. IV, Annex 38); M.A. Allison, “Geologic Framework and Environmental Status of the Ganges-Brahmaputra Delta”, *Journal of Coastal Research*, Vol. 14, 1998, p. 829 (BM, Vol. IV, Annex 45); A. Uddin and N. Lundberg, “Miocene Sedimentation and Subsidence During Continent-Continent Collision, Bengal Basin, Bangladesh”, *Sedimentary Geology*, Vol. 164, 2004, pp. 133-135 and 144 (BM, Vol. IV, Annex 51); S. Kuehl *et al.*, “The Ganges-Brahmaputra Delta”, in L. Giosan and J.P. Bhattacharya (eds.), *River Deltas: Concepts, Models, and Examples*, Society for Sedimentary Geology (SEPM), 2005, p. 414 (BM, Vol. IV, Annex 53); K. Zahid and A. Uddin, “Influence of Overpressure on Formation Velocity Evaluation of Neogene Strata from the Eastern Bengal Basin, Bangladesh”, *Journal of Asian Earth Sciences*, Vol. 25, 2005, p. 420 (BM, Vol. IV, Annex 54); M.S. Steckler *et al.*, “Collision of the Ganges-Brahmaputra Delta with the Burma Arc: Implications for Earthquake Hazard”, *Earth and Planetary Science Letters*, Vol. 273, 2008, p. 369 (BM, Vol. IV, Annex 56); A. Mukherjee *et al.*, “Geologic, Geomorphic and Hydrologic Framework and Evolution of the Bengal Basin, India and Bangladesh”, *Journal of Asian Earth Sciences*, Vol. 34, 2009, pp. 229 and 231 (BM, Vol. IV, Annex 58). See also A.M. Sikder and M.M. Alam, “2-D Modelling of the Anticlinal Structures and Structural Development of the Eastern Fold Belt of the Bengal Basin, Bangladesh”, *Sedimentary Geology*, Vol. 155, 2003, p. 210; M.R. Gani and M.M. Alam, “Sedimentation and Basin-fill History of the Neogene Clastic Succession Exposed in the Southeastern Fold Belt of the Bengal Basin, Bangladesh: a High-resolution Sequence Stratigraphic Approach”, *ibid.*, p. 229.

Myanmar's continental shelf entitlement, the Applicant itself is deprived of a natural prolongation extending offshore, given the fact that a major part of its landmass is lying on oceanic crust as a result of the sedimentation process²⁰.

B. The *travaux préparatoires* of Article 76 of UNCLOS

A.13. The negotiating history of article 76 of UNCLOS must be understood in light of a search for a more precise determination of the extent of the (legal) continental shelf than by the exploitability criteria retained in the 1958 Geneva Convention on the Continental Shelf²¹. The later was largely criticized due to its imprecise nature and its unsuitability for legal purposes²². In 1956, the International Law Commission justified its non-scientific approach by noting:

“The sense in which the term ‘continental shelf’ is used departs to some extent from the geological concept of the term. The varied use of the term by scientists is in itself an obstacle to the adoption of the geological concept as a basis for legal regulation of this problem.”²³

²⁰ See also J.R. Curray, “The Bengal Depositional System: The Bengal Basin and the Bay of Bengal” (23 June 2010), p. 4 and Figure 11 (BM, Vol. IV, Annex 37); M.S. Steckler *et al.*, “Collision of the Ganges-Brahmaputra Delta ...”, *op. cit.* (fn. 19), p. 369; Y. Najman *et al.*, “The Paleogene Record of Himalayan Erosion: Bengal Basin, Bangladesh”, *Earth and Planetary Science Letters*, Vol. 273, 2008, p. 5.

²¹ *UNTS*, Vol. 499, p. 312 (I-7302). Article 1 of the 1958 Convention defined the continental shelf in the following way:

“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.”

²² See in particular the critics expressed by the French representative to the 1958 Geneva Conference, United Nations Conference on the Law of the Sea, *Official Records of the United Nations Conference on the Law of the Sea*, Vol. VI (Fourth Committee (Continental Shelf)), 3rd meeting, 3 March 1958, p. 2, para. 11 (“the French delegation was unable to accept as a criterion valid in law a concept lacking in constancy, uniformity and certainty”); see also the assessment made by the Secretariat of the UNESCO, Scientific Considerations relating to the Continental Shelf, Memorandum, A/CONF.13/2 and Add.1, para. 26, in *ibid.*, Vol. I (Preparatory Documents), p. 42. See also United Nations, General Assembly, resolution 2574 A (XXIV), 15 December 1969 (“Considering that the definition of the continental shelf contained in the Convention on the Continental Shelf of 29 April 1958 does not define with sufficient precision the limits of the area over which a coastal State exercises sovereign rights for the purpose of exploration and exploitation of natural resources, and that customary international law on the subject is inconclusive”).

²³ *ILC Yearbook*, 1956, Vol. II, p. 297, para. (5) of the commentary on draft article 67.

A.14. At the Third United Nations Conference on the Law of the Sea, the issue of the exact extent of the continental shelf in which the coastal State was entitled to exercise sovereign rights became essential in order to implement effectively the agreement that the seabed and its subsoil beyond the limits of national jurisdiction (the Area) were the common heritage of mankind²⁴. The discussion was largely influenced by the Judgment of the International Court of Justice in the *North Sea Continental Shelf* cases²⁵, which referred several times to the concept of “natural prolongation” in order to assess the legal basis of the State’s sovereign rights on the continental shelf. The statement of the Bangladesh representative to the Conference, Mr. Chowdhury, is in this regard enlightening and contradicts largely the purely scientific interpretation put forward by the Applicant in the present proceedings:

“In 1969, in paragraph 19 of its judgment on the North Sea continental shelf, the International Court of Justice had held that the continental shelf was the natural prolongation of a State’s territory and that the rights of the coastal State with regard to that area existed *ipso facto* and *ab initio* by virtue of its sovereignty over the land. Although those rights were embodied in the 1958 Geneva Convention, they existed independently of the Convention by virtue of their foundation in customary law. The International Court had in effect underscored the importance of the geological factor, which must be taken into account in any definition of the continental shelf.

The definition of the continental shelf in article 1 of the 1958 Convention lacked precision. The criterion of exploitability was open to various interpretations; by stressing the geological and the geographical factors, the International Court had not supported that criterion. The definition must be made more precise; the legal notion of the continental shelf must be different from the geological notion. In his delegation’s view, the definition should be expressed in terms of depth, and the continental shelf should include the continental slope and rise. That view was supported by the judgment of the International Court that the coastal State’s jurisdiction over submerged areas extended not only over the continental shelf but also over the slope and rise, on the grounds

²⁴ United Nations, General Assembly, resolution 2749 (XXV), *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction*, 17 December 1970, para. 1 (“The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.”)

²⁵ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J. Reports 1969*, p. 3.

that they were a natural prolongation of the coastal State's territory."²⁶

A.15. It became quickly apparent that the new definition of the continental shelf should indeed be based on "natural prolongation", but that a scientific concept alone would not be sufficiently clear in order to provide a legally useful definition of the legal continental shelf and its extent – an important concern of the Conference. One of the early proposals submitted by Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway defined the continental shelf with reference to a 200-nautical-mile distance criterion and as the "natural prolongation of [the coastal State's] land territory where such natural prolongation extends beyond 200 miles"²⁷. The representative of Canada confirmed that the proposed "article 19 was intended as a basis of discussion to replace the elastic and open-ended exploitability criterion", and that the proposal was "drawn on the language of the 1969 decision of the International Court of Justice (ICJ) in the North Sea Continental Shelf Case"²⁸. It is noteworthy that the sole reference to "natural prolongation" was not considered to be a sufficient criterion in order to determine the continental shelf; a note attached to the proposed provision underlined that "[f]urther provisions will be required on the subject of article 19 including provisions to cover the precise demarcation of the limits of the continental margin beyond 200 miles"²⁹.

A.16. Quickly the notion of "natural prolongation" was joined by the concept of "continental margin"³⁰, which, as such, did not completely eliminate uncertainties concerning the outer limit of the legal continental shelf. The representative of Kenya noted:

"One of the major weaknesses of the concept of the margin as the outer edge of the area of national jurisdiction was that neither the scientists nor its proponents were in a position to state with any degree of certainty where the margin ended. It would be a tragedy if States were allowed to determine for themselves how far the

²⁶ *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. II, Second Committee, 16th meeting, 26 July 1974, p. 144, para. 13.

²⁷ A/CONF.62/L.4, article 19 (2), in *ibid.*, Vol. III, p. 83.

²⁸ *Ibid.*, Vol. I, Plenary, 46th meeting, 29 July 1974, p. 203, para. 63.

²⁹ See fn. 27 above. See also the draft articles submitted by the United States of America, and in particular articles 22 (2) and 23, A/CONF.62/C.2/L.47, in *ibid.*, Vol. III, p. 224.

³⁰ *Ibid.*, Vol. I, Plenary, 32nd meeting, 8 July 1974, p. 132, para. 67 (Bahamas); 39th meeting, 12 July 1974, p. 169, para. 36 (Turkey).

natural prolongation of their land territory extended, because they would then be tempted to claim areas in which there were valuable deposits, particularly hydrocarbons, and the International Sea-Bed Authority would be deprived of all but the sea-bed minerals.”³¹

A.17. While “natural prolongation” and “continental margin” were accepted very early in the negotiating texts³², they were always considered to be too vague concepts and in need of further precision³³. In his memorandum introducing the Informal Composite Negotiating Text, prepared in 1977, the President of the Conference noted that “there was widespread agreement that the definition of the continental shelf as appearing in article 76 of the composite text [which is identical to article 76 (1) of UNCLOS] constituted one of the essential elements of the package deal. On this assumption and in accordance with the terms of that article a *need has been recognized for a more precise definition of the outer edge of the continental margin.*”³⁴

A.18. It is in this particular context that the complex provisions of article 76 of UNCLOS have been elaborated, essentially on the basis of the proposals of the Irish and the Soviet delegations³⁵, by the Chairman of the Second Committee³⁶. Paragraphs 2, 3, 4, 5 and 6 are

³¹ *Ibid.*, Vol. II, Second Committee, 20th meeting, 30 July 1974, p. 161, para. 17. The representative of Malta proposed to keep only a distance criterion because “[t]he advantages of that limit would be its precision, universality, uniformity and equity—qualities which were not implicit in the criteria of exploitability and of so-called natural prolongation” (*ibid.*, p. 168, para. 104). See also *ibid.*, 22nd meeting, 31 July 1974, p. 176, para. 75 (Zaire); *ibid.*, Vol. I, Plenary, 32nd meeting, 8 July 1974, p. 132, para. 68 (Bahamas).

³² See, e.g., provision 68 of the Main trends working paper of the Second Committee, A/CONF.62/L.8/REV.1, Appendix I, in *ibid.*, Vol. III, pp. 117-118. See also article 62 of the Informal Single Negotiating Text (1975), Part II, A/CONF.62/WP.8/PartII, in *ibid.*, Vol. IV, p. 162; article 64 of the Revised Single Negotiating Text (1976), Part II, A/CONF.62/WP.8/Rev.1/PartII, in *ibid.*, Vol. V, p. 164; article 76 of the Informal Composite Negotiating Text (1977), A/CONF.62/WP.10, in *ibid.*, Vol. VIII, p. 16.

³³ See variant C to provision 68 of the Main trends working paper of the Second Committee: “The continental shelf of a coastal State extends beyond its territorial sea to a distance of 200 miles from the applicable baselines and throughout the natural prolongation of its land territory where such natural prolongation extends beyond 200 miles to the outer limit of its continental margin, as precisely defined and delimited in accordance with article ...” (A/CONF.62/L.8/REV.1, Appendix I, *ibid.*, Vol. III, p. 117). See also provision 81 of the same text concerning the outer limit of the continental shelf (*ibid.*, p. 119).

³⁴ A/CONF.62/WP.10/Add.1, in *ibid.*, Vol. VIII, p. 68 (emphasis added). See also A/CONF.62/WP.8/Rev.1/PartII, in *ibid.*, Vol. V, p. 153, para. 13.

³⁵ Reproduced in Study of the implications of preparing large-scale maps for the Third United Nations Conference on the Law of the Sea, A/CONF.62/C.2/L.99, Annexes II and III, in *ibid.*, Vol. XI, pp. 123-124. There was also an alternative proposal made by a group of Arab States which clearly established the understanding that also a legal continental shelf defined solely on a distance criterion is to be considered to be the “natural prolongation” of the coastal State’s territory (Annex I, *ibid.*, p. 123). See also Report to the Plenary by the Chairman of the Second Committee, A/CONF.62/RCNG.1, in *ibid.*,

indeed an essential element of the definition of the continental shelf contained in paragraph 1³⁷, which, as itself, was considered to be not sufficiently precise.

A.19. The *travaux préparatoires* of article 76 of UNCLOS demonstrate conclusively that “natural prolongation” does not correspond to a scientific concept. It is only part of the general legal definition which is contained in this provision taken as a whole.

C. The Relevant Practice

A.20. The CLCS has also noted that the definition of the continental shelf in article 76 (1) of the Convention needs to be understood not purely scientifically. Indeed, in its Guidelines, the Commission underlined:

“Both the basis for entitlement to delineate the outer limits of an extended continental shelf and the methods to be applied in this delineation are embedded in article 76. However, it is clear that the positive proof of the former precedes the implementation of the latter, as stated in article 76, paragraph 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 ...’³⁸

A.21. The entitlement to a continental shelf beyond 200 nautical miles, i.e., the existence of a prolongation of the coastal State’s land territory to the outer edge of the continental margin, must consequently be determined by the application of article 76 (4), i.e., by the determination of the outer limit of the continental margin through the implementation of the Hedberg and Gardiner formulae. The sole reference to “natural prolongation” is not sufficient to establish the entitlement of a State to a continental shelf extending beyond 200 nautical miles. Indeed, “the Commission finds that the proof of entitlement over the continental shelf and the method of delineation of the outer limits of the continental shelf are

Vol. X, p. 83, paras. 6-7; and A/CONF.62/RCNG.2, in *ibid.*, Vol. X, p. 164, para. 6. See also para. A.6 above.

³⁶ Compromise suggestions by the Chairman of Negotiating Group 6, A/CONF.62/L.37, in *ibid.*, Vol. XI, pp. 100-101.

³⁷ Report of the Chairman of the Second Committee (1979), A/CONF.62/L.38, in *ibid.*, pp. 101-102, para. 9.

³⁸ CLCS Guidelines, 13 May 1999, CLCS/11, point 2.2.1.

two distinct but complementary questions. The basis for delineation cannot be other than pertinent to that of entitlement itself.”³⁹

A.22. The “test of appurtenance”, i.e., the process by means of which the application of article 76 of the Convention is examined by the CLCS, does not make any further reference to “natural prolongation”. In order to satisfy the test of appurtenance and, consequently, to be entitled to a continental shelf extending beyond 200 nautical miles, a coastal State has to demonstrate that the implementation of the formulae described in article 76 (4) (a) of UNCLOS results in a line or lines extending beyond 200 nautical miles. The CLCS described this test of appurtenance in the following terms:

“If either the line delineated at a distance of 60 nautical miles from the foot of the continental slope, or the line delineated at a distance where the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the slope, or both, extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, then a coastal State is entitled to delineate the outer limits of the continental shelf as prescribed by the provisions contained in article 76, paragraphs 4 to 10.”⁴⁰

A.23. The legal concept of “natural prolongation” must be understood by reference to the formulae of article 76 (4) (a) of UNCLOS and their starting-point, i.e., the foot of the continental slope, determined in accordance with article 76 (4) (b) of the Convention as the point of maximum change in the gradient at the base of the slope. Even if the definition of the legal continental shelf makes reference to scientific concepts, like continental margin, slope, rise, foot of the slope and edge of the margin, all these terms must be understood in their specific legal context and are further refined within article 76 of UNCLOS. The CLCS has acknowledged that

“Clarification is required in particular because the Convention makes use of scientific terms in a legal context *which at times departs significantly from accepted scientific definitions and terminology.*”⁴¹

³⁹ *Ibid.*, point 2.2.5.

⁴⁰ *Ibid.*, point 2.2.8.

⁴¹ *Ibid.*, point 1.3 (emphasis added). See also *ibid.*, point 6.1.5.

A.24. The CLCS confirmed this interpretation of the concept of “natural prolongation” in its recommendations. In its recommendation concerning Australia’s submission, the CLCS noted:

“The outer edge of the continental margin, as generated from the foot of the continental slope of the Argo Region by applying the provisions of article 76, paragraph 4, extends beyond the 200 M limits of Australia. On this basis, the Commission recognizes the legal entitlement of Australia to establish continental shelf beyond its 200 M limits in this Region.”⁴²

This formula has also been used in the recommendations concerning New Zealand’s submission⁴³, concerning the joint submission made by France, Ireland, Spain and the United Kingdom⁴⁴, and those concerning Norway’s⁴⁵ and Mexico’s submission⁴⁶.

A.25. Interestingly, in its submission concerning Ascension Island the United Kingdom argued that

“Article 76 provides that the first consideration to be addressed is the extent of the natural prolongation of the coastal State’s land territory, which, in accordance with Article 76 (1) extends to the outer edge of the continental margin. It is only then that it is possible to identify in what region the formulae in Article 76 (4) must be applied. The United Kingdom does not consider that natural prolongation, an inherent property of any landmass, can be defined by applying Article 76 (4). Whether there is any natural

⁴² Summary of the Recommendations of the CLCS in regard to the Submission made by Australia on 15 November 2004, 9 April 2008, para. 10 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/aus_summary_of_recommendations.pdf). See also *ibid.*, paras. 21, 38, 58, 71, 80, 94-95, 108, and 121.

⁴³ Summary of the Recommendations of the CLCS in regard to the Submission made by New Zealand on 19 April 2006, 22 August 2008, paras. 134, 150, 169, and 180 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/nzl06/nzl_summary_of_recommendations.pdf).

⁴⁴ Summary of the Recommendations of the CLCS in regard to the Joint Submission made by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland in respect of the Area of the Celtic Sea and the Bay of Biscay on 19 May 2006, 24 March 2009, para. 10 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/frgbires06/fisu_clcs_recommendations_summary_2009.pdf).

⁴⁵ Summary of the Recommendations of the CLCS in regard to the Submission made by Norway in respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006, 27 March 2009, paras. 14, 26, and 44 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf).

⁴⁶ Summary of the Recommendations of the CLCS in regard to the Submission made by Mexico in respect of the Western Polygon in the Gulf of Mexico on 13 December 2007, 31 March 2009, para. 9 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/mex07/summary_recommendations_2009.pdf).

prolongation of the submerged component of a land territory can only be established by an assessment of all of the available geoscientific data as a whole.”⁴⁷

The Commission replied that

“(i) The ‘natural prolongation of [the] land territory’ is based on the physical extent of the continental margin to its ‘outer edge’ (article 76, paragraph 1) i.e. ‘the submerged prolongation of the land mass...’ (article 76, paragraph 3);

(ii) The outer edge of the continental margin in the sense of article 76, paragraph 3, is established by applying the provisions of article 76, paragraph 4, through measurements from the [foot of the continental slope];

(iii) The FOS determined for this purpose is always associated with an identifiable base of continental slope, pursuant to article 76, paragraph 4 (b) (see also paragraphs 5.4.5 and 6.2.3 of the Guidelines);

(iv) The principle of crustal neutrality applies: i.e. article 76 is neutral regarding the crustal nature of the land mass of a coastal State ...”⁴⁸

In addition, the Commission confirmed that “for the purposes of the Convention, any kind of land mass (irrespective of crustal type, size etc.) of a coastal State has a continental margin that can be delineated in accordance with article 76, paragraph 4 of the Convention”⁴⁹. This entails that article 76 (4) is applicable independently of the question whether the continental margin is or is not the scientific natural prolongation of the land mass. It is the application of this provision which determines if a coastal State is entitled to a continental shelf extending beyond 200 nautical miles.

A.26. This does not mean that geologic or geomorphologic data are entirely irrelevant for the implementation of article 76 of UNCLOS. To the contrary, this provision is largely based on such technical and scientific elements. Under certain circumstances⁵⁰, geologic data can be

⁴⁷ Summary of Recommendations of the CLCS in regard to the Submission made by the United Kingdom of Great Britain and Northern Ireland in respect of Ascension Island on 9 May 2008, 15 April 2010, para. 20 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/gbr08/gbr_asc_isl_rec_summ.pdf).

⁴⁸ *Ibid.*, para. 22.

⁴⁹ *Ibid.*, para. 23 (ii).

⁵⁰ The CLCS noted that “the determination of the foot of the continental slope when evidence to the contrary to the general rule is invoked, as a provision with the character of an exception to the rule. This provision

referred to in order to determine the foot of the continental slope, i.e., the starting-point for the application of the formulae in article 76 (4) of UNCLOS⁵¹.

*

A.27. In conclusion, Bangladesh's interpretation of the concept of "natural prolongation" does not correspond to its true meaning in the framework of UNCLOS, in general, and article 76 of UNCLOS, in particular. The continental shelf, i.e., the natural prolongation of the territory, is a legal concept defined by legal rules contained in article 76 of UNCLOS and representing nature to a certain extent.

II. Myanmar's Entitlement to a Continental Shelf beyond 200 Nautical Miles in Accordance with Article 76 of UNCLOS

A.28. Contrary to Bangladesh's groundless allegations, the application of article 76 of UNCLOS entitles Myanmar to a continental shelf in the Bay of Bengal extending beyond 200 nautical miles. Myanmar's continental margin satisfies the appurtenance test of article 76 (4) of UNCLOS, i.e., the edge of Myanmar's continental margin established in accordance with the Convention is situated beyond 200 nautical miles measured from its baseline. Consequently, Myanmar is entitled to delineate the outer limit of its continental shelf in conformity with article 76 (8) of UNCLOS⁵².

A. The Foot of the Continental Slope Points

A.29. In order to implement article 76 (4) of UNCLOS, it is necessary to determine the foot of the continental slope. The Gardiner formula and the Hedberg formula are applied with reference to the foot of the continental slope as the starting-point. UNCLOS defines the foot of the continental slope in article 76 (4) (b):

not only does not oppose, but in fact complements, the general rule established by the determination of the foot of the continental slope as the point of maximum change in the gradient at its base." (CLCS Guidelines, 13 May 1999, CLCS/11, point 6.1.2).

⁵¹ *Ibid.*, point 6.3.1.

⁵² See paras. A.44-A.45 below.

“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.”

A.30. The CLCS has noted:

“As a general rule, whenever the base of the continental slope can be clearly determined on the basis of morphological and bathymetric evidence, the Commission recommends the application of that evidence. Geological and geophysical data can also be submitted by coastal States to supplement proof that the base of the continental slope is found at that location.”⁵³

A.31. Myanmar has determined six foot of the continental slope points by bathymetric and morphological evidence, i.e., on the basis of sea-bed profiles. The base of the continental slope can be determined on such profiles at the point where the steeper slope merges into the continental rise which usually has a smaller gradient. For the purpose of the appurtenance test, only three of them are relevant. These points and the relevant bathymetric profiles are shown in sketch-map No. A.4 (at page 193).

A.32. In addition, the bathymetric profiles show that, there is no visible marked disruption of the continental margin, contrary to Bangladesh’s assertion. Despite the fact that the Rakhine continental margin is situated on the subduction zone (the Indian tectonic plate subducting under the Burma tectonic plate), the bathymetric profiles do not show a marked trench (see also Figure No. A.5 at page 195)⁵⁴. There is no visible interruption of the prolongation of Myanmar’s landmass seawards. In fact, the Rakhine margin shows a more classical shelf-slope-rise configuration. This is explained by the sedimentary processes which, over time, have filled up the trench from the north to the south. The abundance of sediments makes it almost impossible to determine with accuracy the plate boundaries and the trench in the region⁵⁵. These difficulties have been rendered even greater by the fact that

⁵³ CLCS Guidelines, 13 May 1999, CLCS/11, point 5.4.6.

⁵⁴ C. Nielsen *et al.*, “From Partial to Full Strain Partitioning Along the Indo-Burmese Hyper-oblique Subduction”, *Marine Geology*, Vol. 209, 2004, p. 307 (BM, Vol. IV, Annex 52) (“A set of bathymetric sections across the West Burma Scarp ... clearly shows that the morphology is not typical of a trench.”)

⁵⁵ M. Alam *et al.*, “An Overview of the Sedimentary Geology of the Bengal Basin ...”, *op. cit.* (fn. 19), p. 184 (“Thick sediment cover in the Bengal Basin conceals the basement configuration and makes the reconstruction or exact location of plate boundaries and sutures more difficult.”) See also C. Nielsen *et al.*, “From Partial to Full Strain Partitioning ...”, *op. cit.* (fn. 54), p. 312 (“A large deep sea fan outlines the very unstable tectonic front, but no clear fault geometry can be observed there. Absence of significant

the Rakhine continental margin is built up with an accretionary complex, comprising an accretionary prism and an accretionary wedge, which thrust upon the thick sedimentary sequence of the subducted plate and is, through the tectonic and sedimentary processes, advancing seawards, increasingly covering the plate boundary and the subduction zone.

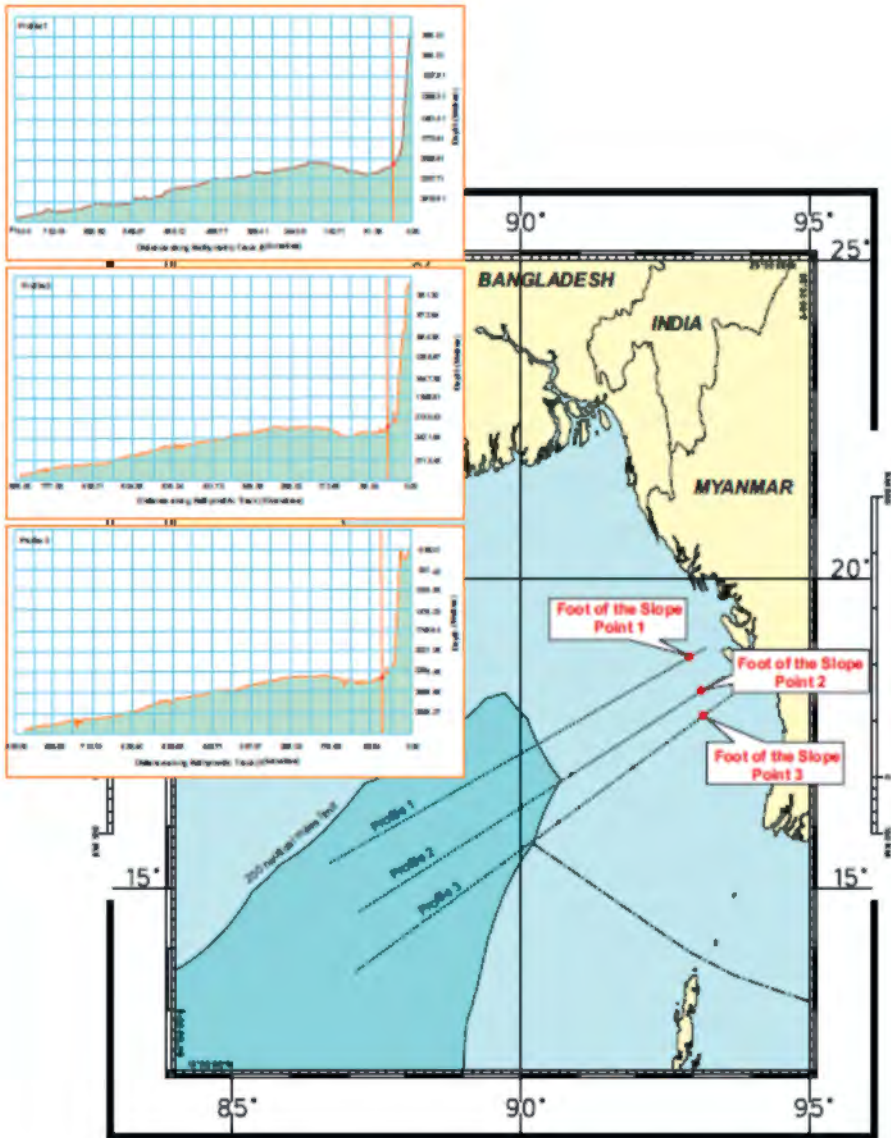
A.33. The irrelevance of the existence of the subduction zone off the Rakhine (Arakan) coast is also confirmed by Bangladesh's own assessment of the outer limit of its entitlement of a continental shelf extending beyond 200 nautical miles. Indeed, at least two of the foot of the slope points determined by Bangladesh and shown on Figures 7.3 and 7.4 of the Memorial are situated immediately off the Rakhine (Arakan) coast, which, according to its own arguments is deprived of a "natural prolongation" because of the subduction zone situated in this area.

A.34. The CLCS has expressly considered the case of convergent, active continental margins, i.e., the margin located on the edge of a subduction zone and consisting of a wide wedge of accreted sediments which were scraped off from the downgoing plate. It has found that in such cases the foot of the continental slope point can be determined, under the "proof to the contrary" provision of article 76 (4) (b) of UNCLOS, on the seaward edge of the accretionary wedge which, scientifically speaking, is supposed to represent the edge of the continental margin⁵⁶. The CLCS has thus confirmed that the existence of a subduction zone does not in itself deprive the coastal State of a continental shelf extending beyond 200 nautical miles. Quite to the contrary, with regard to the submission of New Zealand and Barbados, the Commission accepted in its recommendations that foot of the slope points can be determined within a trench in a subduction zone⁵⁷. In addition, India has also determined

deformation at the toe of the scarp is illustrated along seismic line Andaman 50 (Fig. 11). The trench does not appear either in the morphology. The Bengal fan sediments actually lap gently the base of the WBS [West Burma Scarp].")

⁵⁶ CLCS Guidelines, 13 May 1999, CLCS/11, point 6.3.6.

⁵⁷ Summary of the Recommendations of the CLCS (New Zealand), *op. cit.* (fn. 43), paras. 136; Summary of Recommendations of the CLCS in regard to the Submission made by Barbados on 8 May 2008, 15 April 2010, paras. 11–14 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/brb08/brb08_summary_recommendations.pdf).



**Sketch-map No. A.4
FOOT OF THE SLOPE
POINTS**

This sketch-map, on which the coasts are presented in simplified form, has been prepared for illustrative purposes only.
Mercator Projection, WGS 84 (18° 30' N)

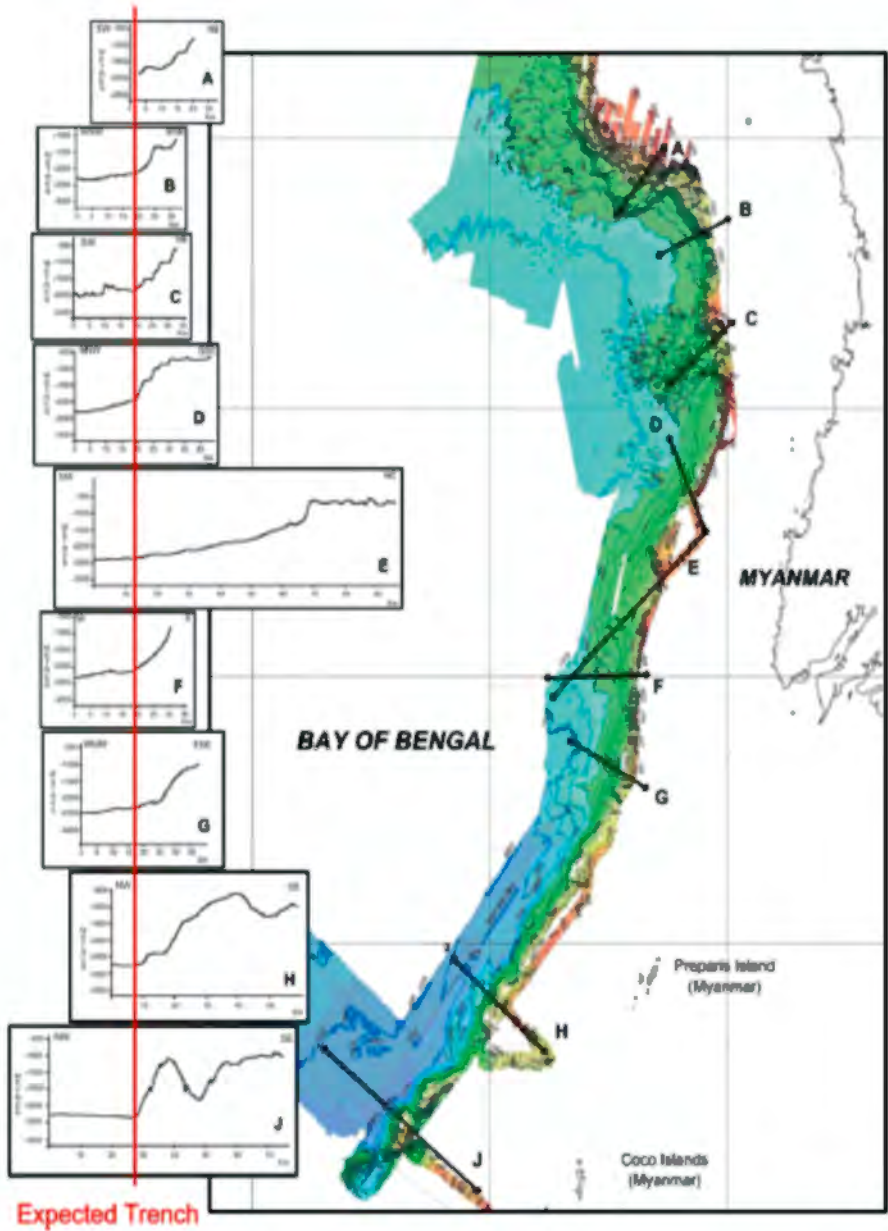


Figure No. A.5. Bathymetric profiles of Myanmar's western coast (based on C. Nielsen et al., "From Partial to Full Strain Partitioning Along the Indo-Burmese Hyper-oblique Subduction", *Marine Geology*, Vol. 209, 2004, p. 306 (BM, Vol. IV, Annex 52))

the foot of the continental slope in the Western Andamans sector on the edge of the accretionary wedge created along the India-Burma plate subduction zone⁵⁸.

A.35. While in these later cases, the edge of the accretionary wedge is easily identifiable, this is not the case concerning the wedge building up the Rakhine continental margin which is covered by thick layers of sediment softening the usually marked edge into a more classical slope/rise boundary. In this case, as has been confirmed by the CLCS in its recommendation concerning Barbados' submission⁵⁹, it is neither necessary nor appropriate to establish the foot of the continental slope by a method different from the general rule, i.e., the maximum change in the gradient. It can be clearly determined on the basis of morphological and bathymetric evidence only.

B. The Implementation of the Article 76 (4) (a) Formulae

A.36. The next step for the implementation of article 76 (4) of UNCLOS is the determination of the so-called formula lines. According to article 76 (4) (a) of the Convention:

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.

A.37. Both formulae, the Gardiner formula (article 76 (4) (a) (i) of UNCLOS) and the Hedberg formula (article 76 (4) (a) (ii) of UNCLOS) have been established in order to provide a useful and accurate tool to determine, for the purposes of the Convention, the edge of the continental margin, i.e., the limit of the continental shelf entitlement of a State under

⁵⁸ See para. A.51 below.

⁵⁹ Summary of Recommendations (Barbados), *op. cit.* (fn. 57), para. 14.

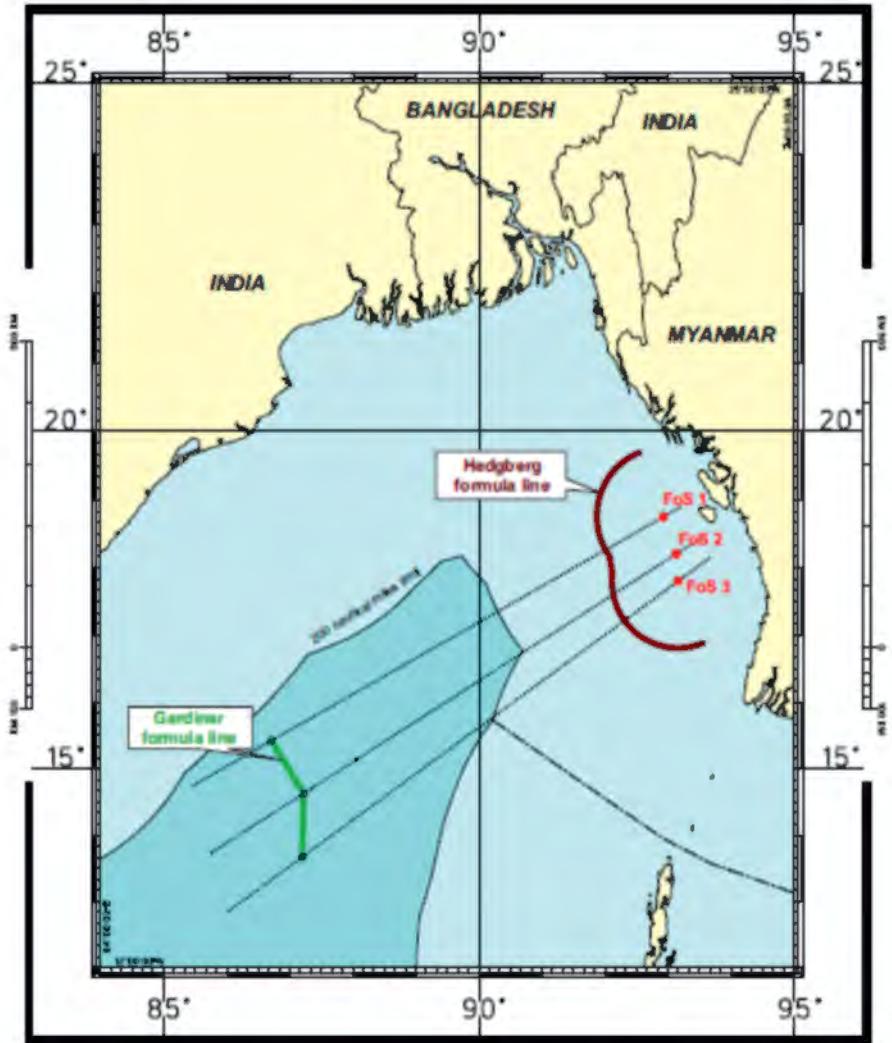
article 76 of UNCLOS. Indeed, in practice, it would be quite impossible to determine with sufficient precision – a necessary requirement for the application of the legal rules embodied in the Convention – the exact position of the physical outer edge of the continental margin (the last grain of sand of the continental rise on the deep ocean floor). Both formulae are therefore based on the fiction that the edge of the continental margin is located either on the point where the sediment thickness represents at least one per cent of the shortest distance from the foot of the continental slope, or on a distance of 60 nautical miles from the foot of the continental slope. The combination of these formulae determines the edge of the continental margin for the purpose of UNCLOS.

A.38. As can be seen on sketch-map No. A.6, the line resulting from the implementation of the Hedberg formula is everywhere less than 200 nautical miles from Myanmar's baseline.

A.39. The Gardiner formula is based on the assumption that the sediments constituting the continental rise gradually decrease in the seaward direction. Under article 76 (4) (a) (i) of UNCLOS the outer limit of the continental margin is to be found at any point where the thickness of the sediments on the basement represents at least one per cent of the distance of the point from the foot of the continental slope. The thickness of sediments is defined by the CLCS as the "vertical distance of from the sea floor to the top of the basement at the base of the sediments regardless of the slope of the sea floor or the slope of the top basement surface"⁶⁰. It can be determined by seismic reflection data. Contrary to Bangladesh's assertions, the mere origin of the sediments is not decisive⁶¹. Indeed, as Bangladesh itself and its expert note, the sediments deposited, even if they have been transported through the Bengal delta into the Bay of Bengal, do not *originate* from Bangladesh, but from the Himalaya region, i.e., Nepal, India, China, and Bhutan. No one would reasonably conclude that, therefore, the Bay of Bengal constitutes the "natural prolongation" of all of these States. In addition, sedimentation within the Bay of Bengal is not originating through the Bengal delta only, but also from the Rakhine-Chin-Naga Ranges (also known as Indo-Burman

⁶⁰ CLCS Guidelines, 13 May 1999, CLCS/11, point 8.1.8.

⁶¹ *Ibid.*, point 8.2.16.



Sketch-map No. A.6
**HEDBERG AND GARDINER
FORMULAE LINES**

This sketch-map, on which the coasts are presented in simplified form, has been prepared for illustrative purposes only.
Mercator Projection, WGS 84 (18°30'N)

Ranges)⁶². In any event, it is entirely sufficient that the sediment layer between Myanmar's foot of the continental slope is undisrupted up to the one per cent thickness points. This is indeed the case, as the entire Bay of Bengal is covered with sediments⁶³.

A.40. The implementation of the Gardiner formula results in a line depicted in sketch-map No. A-6 (at page 199). The one per cent sediment thickness line is situated at a distance beyond 200 nautical miles from Myanmar's baseline.

Conclusion

A.41. Given the fact that the one per cent sediment thickness line established in accordance with article 76 (4) of UNCLOS is situated beyond 200 nautical miles from Myanmar's baseline, Myanmar has satisfied the appurtenance test. Indeed:

“If either the line delineated at a distance of 60 nautical miles from the foot of the continental slope, or the line delineated at a distance where the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the slope, or both, extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, then a coastal State is entitled to delineate the outer limits of the continental shelf as prescribed by the provisions contained in article 76, paragraphs 4 to 10.”⁶⁴

This is the case. In accordance with article 76 of UNCLOS, Myanmar is consequently entitled to a continental shelf extending beyond 200 nautical miles.

⁶² See C. Nielsen *et al.*, “From Partial to Full Strain Partitioning ...”, *op. cit.* (fn. 54), *passim*; Y. Najman, “The Detrital Record of Orogenesis: A review of Approaches and Techniques Used in the Himalayan Sedimentary Basins”, *Earth-Science Reviews*, Vol. 74, 2006, p. 11; C. Colin *et al.*, “Erosional History of the Himalayan and Burman Ranges During the Last Two Glacial-interglacial Cycles”, *Earth and Planetary Science Letters*, Vol. 171, 1999, pp. 647-660.

⁶³ See, e.g., BM, paras. 1.11. and 2.37.

⁶⁴ CLCS Guidelines, 13 May 1999, CLCS/11, point 2.2.8.

III. The Submissions to the Commission on the Limits of the Continental Shelf

A.42. According to article 76 (8) of UNCLOS and article 4 of Annex II to the Convention, Myanmar has submitted the particulars of the outer limit of its continental shelf beyond 200 nautical miles to the consideration of the CLCS (A). Within the Bay of Bengal region, Sri Lanka and India (B) have made such submissions as well.

A.43. Bangladesh has not yet submitted the required information to the CLCS. As provided for under article 4 of Annex II, it has to do so “within 10 years of the entry into force of [UNCLOS]” for Bangladesh, i.e., not later than 25 August 2011⁶⁵.

A. The Submission made by Myanmar

A.44. Myanmar submitted the information required under article 76 (8) of UNCLOS and article 4 of Annex II on 16 December 2008⁶⁶. The submission was presented to the CLCS on 24 August 2009⁶⁷.

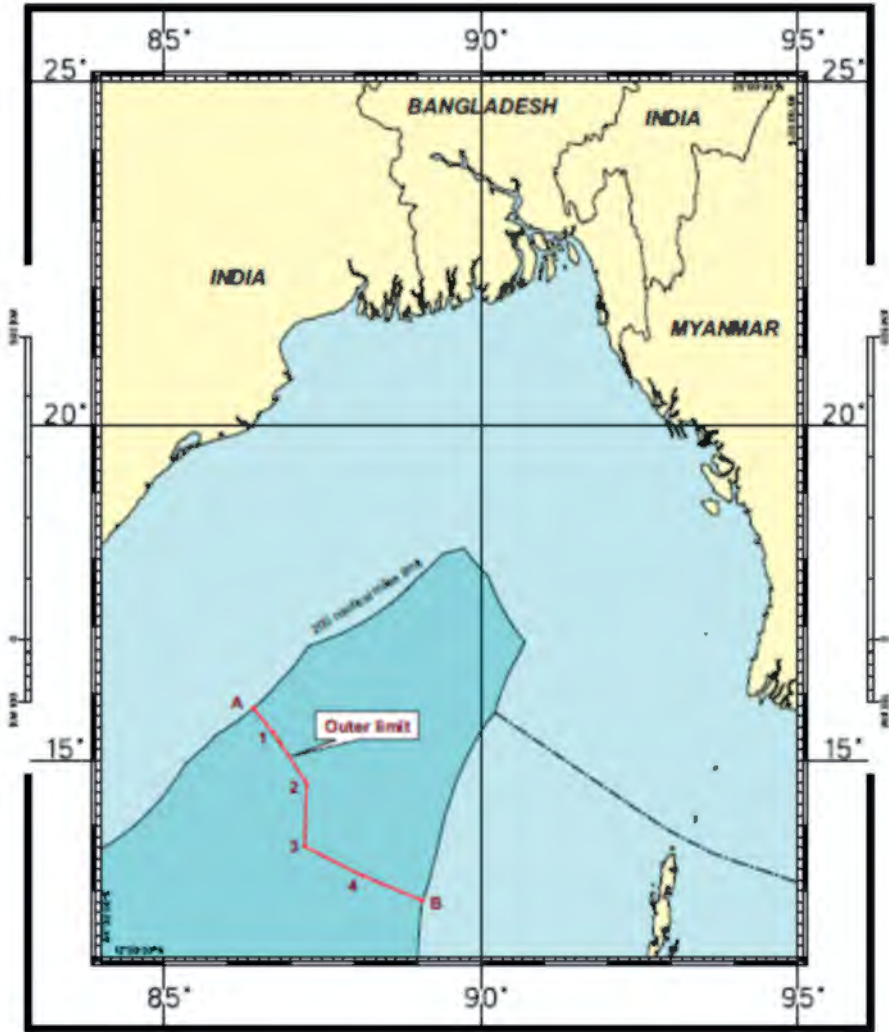
A.45. In its submission, Myanmar establishes the extension of its continental shelf in the Bay of Bengal, off the Rakhine (Arakan) coast, beyond 200 nautical miles. The outer limit of Myanmar’s continental shelf is constituted by three fixed points established in accordance with article 76 (5) of UNCLOS on the 350-nautical-mile constraint line and the 2,500-metre isobath plus 100-nautical-mile constraint line, and one point established in accordance with the Statement of Understanding contained in Annex II of the Final Act of UNCLOS. The co-ordinates of these points have been established in Myanmar’s submission⁶⁸. The area and the outer limit of Myanmar’s entitlement are illustrated in sketch-map No. A.7.

⁶⁵ Under these circumstances, Bangladesh is required to submit the information necessary to the consideration of its entitlement to a continental shelf beyond 200 nautical miles only after the deadline for Myanmar’s Rejoinder, which is due on 1 July 2011 (*Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Order of 17 March 2010).

⁶⁶ Continental Shelf Submission of Union of Myanmar, Executive Summary, 16 December 2008 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf) (Annex 16).

⁶⁷ CLCS, Twenty-fourth session, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission, CLCS/64, 1 October 2009, para. 35 (emphasis added) (also reproduced in BM, Vol. III, Annex 29).

⁶⁸ Continental Shelf Submission of Union of Myanmar, Executive Summary, 16 December 2008, p. 5.



Sketch-map No. A.7
**OUTER LIMIT OF THE RAKHINE
CONTINENTAL SHELF**

This sketch-map, on which the coasts are presented in simplified form, has been prepared for illustrative purposes only.
Mercator Projection, WGS 84 (18°30'N)

A.46. Sri Lanka⁶⁹, India⁷⁰, Kenya⁷¹, and Bangladesh⁷² have submitted reactions to Myanmar's submission to the CLCS.

A.47. In 2009, the Commission decided "to defer further consideration of the submission and the notes verbales until such time as the submission is next in line for consideration as queued in the order in which it was received"⁷³.

B. The Submissions made by Sri Lanka and India

A.48. Sri Lanka filed a submission on the outer limits of its continental shelf beyond 200 nautical miles to the CLCS on 8 May 2009, "in respect to the area of the Bengal Fan pursuant to Annex II of the Final Act of the Third United Nations Conference on the Law of the Sea"⁷⁴.

A.49. In its submission, Sri Lanka explains that its continental margin displays the special characteristics described in the Statement of Understanding contained in Annex II of the Final Act of UNCLOS, i.e., a very narrow shelf, a very steep slope and an extensive rise⁷⁵. Accordingly, all points submitted by Sri Lanka for the determination of the outer limit of its continental shelf beyond 200 nautical miles have been established with reference to the Statement of Understanding. A list of the co-ordinates of the 60 fixed points determined is

⁶⁹ Note Verbale from the Ministry of Foreign Affairs of the Democratic Socialist Republic of Sri Lanka to the United Nations Secretary-General, 2 March 2009 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/clcs16_2008_mmr_lka_e.pdf).

⁷⁰ Note Verbale No. NY/PM/443/2/2009 from the Permanent Mission of India to the United Nations to the Secretary-General of the United Nations, 26 March 2009 (Annex 17) (also available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/clcs16_2008_ind_e.pdf).

⁷¹ Note Verbale from the Ministry of Foreign Affairs of the Republic of Kenya to the United Nations Secretary-General, 30 April 2009 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/clcs16_2008_mmr_ken_e.pdf).

⁷² Note Verbale from the Permanent Mission of the People's Republic of Bangladesh to the United Nations Secretary-General, 23 July 2009 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/clcs16_2008_mmr_bgd_e.pdf). BM, Vol. III, Annex 21.

⁷³ CLCS, Twenty-fourth session, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission, CLCS/64, 1 October 2009, para. 40 (also reproduced in BM, Vol. III, Annex 29).

⁷⁴ Continental Shelf Submission of Sri Lanka, Part I, Executive Summary, p. 4, para. 1.3 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/lka43_09/lka2009executivesummary.pdf).

⁷⁵ *Ibid.*, p. 6, para. 2.3.

contained in the Executive Summary of Sri Lanka's submission to the CLCS⁷⁶. Sri Lanka further reserved its right to make submissions in respect of other areas⁷⁷.

A.50. India filed a partial submission on the outer limits of its continental shelf beyond 200 nautical miles to the CLCS on 11 May 2009.

A.51. The Executive Summary of India's submission⁷⁸ indicates that it is aimed at submitting particulars of the outer limit of India's continental shelf in the western offshore region of India in the Arabian Sea (which is not relevant in the present proceedings), and in the Bay of Bengal comprising the eastern offshore region from mainland India (the "Bay of Bengal sector"), on the one hand, and the western offshore region of the Andaman Islands (the "Western Andamans sector"), belonging to India, on the other hand. India's submitted entitlements in the Bay of Bengal sector and the Western Andamans sector are partially overlapping⁷⁹. The resulting combined area and the outer limit claimed by India are fixed by co-ordinates of fixed points reproduced in the Executive Summary of India's submission⁸⁰.

A.52. Myanmar and Bangladesh submitted comments and observations on India's partial submission with regard to the Bay of Bengal sector and the Western Andamans sector, on 4 August 2009⁸¹ and 29 October 2009⁸², respectively.

A.53. In the Executive Summary of its submission India indicates that it reserves the right to make a further partial submission to the Commission with regard to information and data

⁷⁶ *Ibid.*, pp. 10-11.

⁷⁷ *Ibid.*, p. 9, para. 4.3.

⁷⁸ The Indian Continental Shelf, Partial Submission to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Part I, Executive Summary, IND-ES, 11 May 2009 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/ind2009executive_summary.pdf).

⁷⁹ *Ibid.*, p. 7, para. VI.6.

⁸⁰ *Ibid.*, Appendix 1 (Bay of Bengal sector) and Appendix 2 (Western Andamans sector).

⁸¹ Note Verbale from the Permanent Mission of the Union of Myanmar to the United Nations to the United Nations Secretary-General, 4 August 2009 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/clcs_48_2009_los_mmr.pdf).

⁸² Note Verbale from the Permanent Mission of the People's Republic of Bangladesh to the United Nations Secretary-General, 29 October 2009 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/bgd_re_ind_clcs48_2009e.pdf).

concerning the application of Annex II of the Final Act of UNCLOS “notwithstanding the provisions regarding the ten-years period”⁸³.

⁸³ The Indian Continental Shelf, Partial Submission to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Part I, Executive Summary, IND-ES, 11 May 2009, p. 2, para. I.6 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/ind2009executive_summary.pdf).

TABLE OF SKETCH-MAPS AND FIGURES

Sketch-Map No. 2.1	The Bay of Bengal	17
Sketch-Map No. 2.2	Concavity of the Bay of Bengal.....	19
Sketch-Map No. 2.3	Maritime delimitations agreed in the region.....	29
Sketch-Map No. 4.1	Construction of maritime boundary in the vicinity of St. Martin’s Island.....	81
Sketch-Map No. 4.2	Maritime boundary in the vicinity of St. Martin’s Island.....	85
Sketch-Map No. 5.1	The configuration of Bangladesh’s coast	109
Sketch-Map No. 5.2	The relevant coasts for delimitation	115
Sketch-Map No. 5.3	The relevant area for delimitation.....	117
Sketch-Map No. 5.4	Relevant areas excluded by Bangladesh.....	119
Sketch-Map No. 5.5	Application of the “Angle-Bisector Method” by Bangladesh	125
Sketch-Map No. 5.6	The correct application of the Bisector Method	127
Sketch-Map No. 5.7	The appropriate base points	135
Sketch-Map No. 5.8	Provisional equidistance line	139
Sketch-Map No. 5.9	Disproportionality test: Coastal lengths ratio	159
Sketch-Map No. 5.10	Disproportionality test: Maritime areas ratio.....	161
Sketch-Map No. 5.11	Course of the maritime boundary	169
Figure No. A.1	Continental margin extending less than 200 nautical miles	177
Figure No. A.2	Continental margin extending beyond 200 nautical miles	178
Figure No. A.3a	Geomorphic continental margin	180
Figure No. A.3b	Geologic continental margin.....	181
Sketch-Map No. A.4	Foot of the slope points.....	193
Figure No. A.5	Bathymetric profiles of Myanmar’s western coast.....	195
Sketch-Map No. A.6	Hedberg and Gardiner Formulae Lines	199
Sketch-Map No. A.7	Outer Limit of the Rakhine continental shelf	203

LIST OF ANNEXES
(VOLUME II)

- Annex 1** *Agreement between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River, 9 May 1966*
- Annex 2** Burma-Bangladesh Maritime Boundary Delimitation Talks, Minutes of the First Round, 4-6 September 1974
- Annex 3** Burma-Bangladesh Maritime Boundary Delimitation Talks, Minutes of the Second Round, 20-25 November 1974
- Annex 4** Burma-Bangladesh Maritime Boundary Delimitation Talks, Minutes of the Third Round, 14-20 February 1975
- Annex 5** Burma-Bangladesh Maritime Boundary Delimitation Talks, Minutes of the Fourth Round, 29 February - 7 March 1976
- Annex 6** Burma-Bangladesh Maritime Boundary Delimitation Talks, Fifth Round, Report of Myanmar Delegation (Unofficial Translation), 8-9 June 1979
- Annex 7** *Supplementary Protocol between Burma and Bangladesh to the Protocol between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River, 17 December 1980*
- Annex 8** Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Speeches and Statements, 19-20 November 1985
- Annex 9** Burma-Bangladesh Maritime Boundary Delimitation Talks, Seventh Round, Report of Myanmar Delegation (Unofficial Translation), 11-12 February 1986
- Annex 10** Burma-Bangladesh Maritime Boundary Delimitation Talks, Eighth Round, Report of Myanmar Delegation, 30 June - 5 July 1986
- Annex 11** *Agreement between the Socialist Republic of the Union of Burma and the Republic of India on the Delimitation of the Maritime Boundary in the Andaman Sea, in the Coco Channel and in the Bay of Bengal, 23 December 1986*
- Annex 12** Note Verbale from the Ministry of Foreign Affairs of Bangladesh to the Embassy of Burma and Note Verbale from the Ministry of Foreign Affairs of Bangladesh to the High Commission of India, 6 June 1987

- Annex 13** Note Verbale from the Ministry of Foreign Affairs of Burma to the Embassy of Bangladesh, 28 July 1987
- Annex 14** Myanmar-Bangladesh Maritime Boundary Delimitation Talks, Second Round of Resumed Talks, Report of Myanmar Delegation, 4-5 September 2008
- Annex 15** Myanmar-Bangladesh Maritime Boundary Delimitation Talks, Third Round of Resumed Talks, Summary of Discussions, 16-17 November 2008
- Annex 16** Continental Shelf Submission of Union of Myanmar, Executive Summary, 16 December 2008
- Annex 17** Note Verbale No. NY/PM/443/2/2009 from the Permanent Mission of India to the United Nations to the Secretary-General of the United Nations, 26 March 2009
- Annex 18** Myanmar-Bangladesh Maritime Boundary Delimitation Talks, Fourth Round of Technical Level Talks, Summary of Discussions, 30-31 July 2009
- Annex 19** Note Verbale No. 44 01 2/7 (432) from the Ministry of Foreign Affairs of Myanmar to the Embassy of Bangladesh, 27 October 2009
- Annex 20** Note Verbale No. 44 01 2/7 (459) from the Ministry of Foreign Affairs of Myanmar to the Embassy of Bangladesh, 5 November 2009
- Annex 21** Note Verbale No. MOFA/UNCLOS/320/2 from the Ministry of Foreign Affairs of Bangladesh to the Embassy of Myanmar, 12 December 2009
- Annex 22** Letter from the Minister for Foreign Affairs of Bangladesh to the President of the ITLOS, 13 December 2009
- Annex 23** Myanmar-Bangladesh Maritime Boundary Delimitation Talks, Fifth Round of Technical Level Talks, Summary of Discussions, 8-9 January 2010
- Annex 24** Minutes of the President's Consultation with the Representatives of the Parties in the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, 26 January 2010
- Annex 25** Myanmar-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round of Technical Level Talks, Opening statement by the Deputy Minister for Foreign Affairs, 17-18 March 2010