

REJOINDER 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

REJOINDER OF THE REPUBLIC OF THE UNION OF MYANMAR

1 JULY 2011

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CHAPTER 1**INTRODUCTION**

1.1. This Rejoinder is filed by the Republic of the Union of Myanmar in accordance with the Order 2010/2 dated 17 March 2010 of the International Tribunal for the Law of the Sea (hereinafter “the Tribunal” or “ITLOS”).

1.2. The Tribunal will note the change in the name of the Respondent. This change resulted from the adoption of the new Constitution of the country, which entered into force on 31 January 2011. Together with the change of the name of the country, the Constitution provides for the appointment of the President and the Vice-President by a Parliament elected by the people (the *Pyidaungsu Hluttaw*), which is also called to approve the composition of the Government and the appointment of the Judiciary. The Constitution also contains important provisions on the protection of human rights, which were welcomed by the international community.

1.3. After summarizing Myanmar’s case (I) and discussing the important remaining points of disagreement between the Parties (II) this Introduction will proceed with a brief outline of this Rejoinder (III).

I. An Overview of Myanmar’s Case

1.4. In spite of Bangladesh’s efforts to caricature Myanmar’s case – while at the same time over-complicating its own – Myanmar’s case is straightforward: it is based on the application of the contemporary rules concerning maritime delimitation embodied in the 1982 United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or “the Convention”), as interpreted by the case law of international courts and tribunals and as implemented in the practice of States. These rules are aimed at achieving an equitable result by taking due account of the coastal geography of the parties without refashioning nature.

1.5. This holds true in the first place in respect to the delimitation of the territorial sea, which was the object of rather intensive but inconclusive negotiations between the Parties in the 1970s. In particular, the draft agreement on the delimitation of the territorial sea boundary

prepared by Bangladesh, and mentioned in the agreed minutes adopted at the end of the second round of negotiations in 1974, has never been concluded. It was communicated to the Burmese (Myanmar) delegation “for eliciting views from the Burmese Government” and the Head of the Myanmar delegation, who refused to sign, or even initial it. The draft treaty made clear that the delimitation of the territorial sea could only be part of a global package deal incorporating as well the delimitation of the exclusive economic zone/continental shelf.

1.6. Absent a treaty in force, the delimitation of the territorial sea between the Parties must be effected in accordance with the rules embodied in article 15 of UNCLOS. In other words, this means that, in the present case, in application of the equidistance/special circumstances rule of article 15 of UNCLOS, the boundary must first follow the median line between St. Martin’s Island and Myanmar’s mainland coast. However, since this island lies directly off Myanmar’s mainland, the prolongation of the median line in the south would have a strikingly distorting effect. The effect of the island would be to shift the median line closer to the mainland to the detriment of Myanmar. For this reason, St. Martin’s Island must be considered as a special circumstance and when the coasts of Myanmar and of St. Martin’s Island cease to be opposite, the line must turn toward the south-west, to the point where the 12-nautical-mile limit of St. Martin’s Island meets the provisional equidistance line constructed from both Parties’ mainland coast low-water lines, without taking the island into consideration.

1.7. Beyond this point the line is the single boundary between the exclusive economic zones and the continental shelf of the Parties. This line must be drawn in accordance with articles 74 and 83 of UNCLOS in order to achieve an equitable solution. To that end, it suffices to follow the now standard and well established three-stage equidistance/relevant circumstances method under the equitable principles/relevant circumstances rule which consists of drawing first a provisional equidistance line, then considering whether particular factors call for the adjustment of that line and finally checking whether the ensuing line does not lead to a marked inequity in view of the “non-disproportionality” test.

1.8. Applied to the present case, this equidistance/relevant circumstances method leads to adopting a provisional equidistance line starting at the endpoint of the land boundary (which is not in dispute between the Parties). In order to construct this provisional equidistance line,

appropriate base points must be selected on the coasts of the Parties “by reference to the physical geography of the relevant coasts”¹ and giving priority to the most prominent coastal points neighbouring the area to be delimited.

1.9. The line thus obtained in the present case needs only to be adjusted in order to take account of the delimitation of the territorial sea between Myanmar and Bangladesh². No relevant circumstance justifies any other shifting or adjustment of the equidistance line.

1.10. The boundary line thus drawn continues until it reaches the area where the rights of a third State – India – may be affected. Sketch-map No. R1.1 appearing on page 5 shows the course of the single maritime boundary resulting from Myanmar’s position.

1.11. Although the Tribunal cannot determine the tripoint where the boundary between Bangladesh and Myanmar ends, there can be no doubt that, given the direction of the equidistance line, Bangladesh has no right to any part of the continental shelf beyond that line. Therefore, the question persistently raised by the Applicant of its alleged “indisputable right” to a continental shelf beyond 200 nautical miles is moot and does not deserve discussion.

II. Main Points of Agreement and Disagreement

1.12. In the Introduction of its Reply, Bangladesh identifies what it calls four “points of agreement” between the Parties. However, the presentation it gives of these so-called “points of agreement” is in some respects biased and is silent on other points although they are significant (A). And, unfortunately, at the end of the written pleadings, the global picture is that the points of disagreement remain predominant (B).

A. Discussion on the “Points of Agreement” Identified by Bangladesh

1.13. According to Bangladesh, the Parties agree on the four following points:

¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 108, para. 137.

² See para. 1.6 above.

- the 1982 United Nations Convention on the Law of the Sea and other rules of international law not incompatible with it constitute the law applicable to the present case³;
- this Tribunal has jurisdiction to delimit the maritime boundary between the Parties up to 200 nautical miles⁴;
- the straight baselines established by the Parties are irrelevant⁵; and
- the Parties have no disagreement regarding the geological facts concerning both Bangladesh and Myanmar⁶.

Each of these points must be read with important *caveats* in mind.

1.14. Concerning the applicable law, Myanmar does not of course deny that UNCLOS, ratified by both Parties, applies as well as all other relevant customary or treaty law. But this is not the question. Uncertain and general as the provisions of the Convention on maritime delimitation are, they must be interpreted in light of the subsequent practice and case law. Unfortunately, Bangladesh endeavours to interpret these rules mainly (and, in reality, exclusively) in view of the case law prior to UNCLOS⁷.

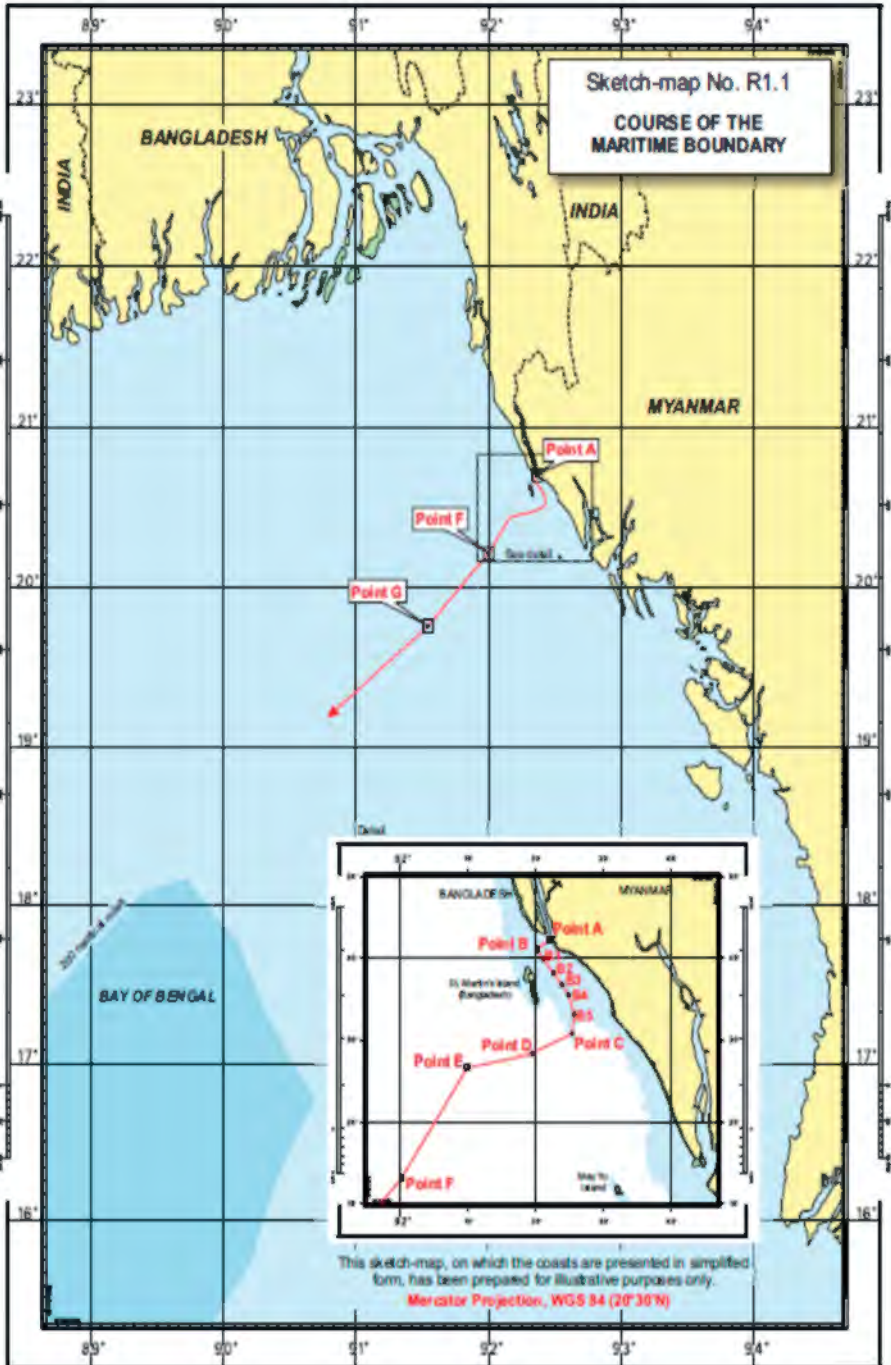
³ BR, para. 1.15.

⁴ BR, para. 1.16.

⁵ BR, para. 1.17.

⁶ BR, para. 1.20.

⁷ See BM, paras. 6.16-6.28; BR, paras. 3.24-3.28; and paras. 4.6-4.13 below.



1.15. Regarding the respective straight baselines of the Parties, Myanmar agrees that they are irrelevant in the present case since the maritime boundary between the Parties must be drawn according to base points selected among the most protuberant points on the relevant coasts of the Parties⁸. However, Myanmar formally maintains that, while its own straight baselines have been established in accordance with the applicable rules of international law, Bangladesh's straight baseline system is untenable and does not comply with the most basic rules and principles applicable⁹.

1.16. The jurisdiction of the Tribunal to decide a single delimitation line between the respective maritime areas of the Parties is neither disputable nor in dispute¹⁰. But this undisputable fact must not hide the important point that it does *not* have jurisdiction to decide on Myanmar's or Bangladesh's claims to an entitlement to a continental shelf beyond 200 nautical miles, which is the exclusive competence of the Commission on the Limits of the Continental Shelf (CLCS)¹¹.

1.17. And if it is true that the Counter-Memorial does not dispute Bangladesh's allegations concerning the geological facts commented in great length by the Applicant¹², this is not because Myanmar agrees, but because they are irrelevant for the present case since the boundary between both countries stops before reaching a distance of 200 nautical miles from Bangladesh's coasts¹³.

1.18. There are other points of agreement between the Parties that, significantly, Bangladesh carefully avoids mentioning in the Introduction to the Reply.

1.19. Thus it rightly asserts that "Bangladesh and Myanmar agree that the now-standard approach in the case law is first to draw a provisional equidistance line and then determine whether there are relevant circumstances that warrant a departure from it"¹⁴. Myanmar could

⁸ See BM, para. 3.9; BR, paras. 1.18-1.19; MCM, para. 5.93; and paras. 3.12-3.13 below.

⁹ See MCM, paras. 3.8 and 5.91; and MR, paras. 3.13-3.15.

¹⁰ See BM, para. 6.17; and MCM, para. 5.46.

¹¹ See MCM, paras. 1.17-1.23; and paras. A.9-A.20 of the Appendix to the present Rejoinder, below.

¹² BR, para. 1.21.

¹³ See MCM, paras. 5.155-5.162.

¹⁴ BR, para. 3.33.

not agree more. But it understands why the Applicant carefully avoids stressing this point of agreement: this methodological principle is so uncontroversial and well established that it could not avoid paying lip service to it; but the way Bangladesh applies it – or more exactly does not apply it – is so controversial and clearly unfounded that the Applicant apparently prefers not to stress it and omits to mention it as a point of agreement between the Parties.

1.20. Bangladesh keeps silence on other points of agreement. This is so in particular concerning:

- the starting point of the maritime boundary, which coincides with the endpoint of the boundary between the two countries in the Naaf River, as determined by the Supplementary Protocol concluded between the two States on 17 December 1980¹⁵; and
- the non-use of St. Martin's Island in the construction of the initial provisional line, which constitutes the first step of the delimitation process¹⁶.

1.21. These silences are significant: the Applicant avoids important points of agreement between the Parties, focusing on debatable or distorted points with the aim of trapping the Respondent in "agreements" that it has not given or which bear upon irrelevant elements.

B. Points of Disagreement between the Parties

1.22. This being said, unfortunately, the points of agreement between the Parties are globally of little significance in the present case – with the exception of the method to be followed to construct the line; but after expressing its agreement in principle to this elementary point, Bangladesh entirely neglects it and bases itself on a different method. Therefore there is hardly any point of agreement, while the points of disagreement are numerous and fundamental. They concern the delimitation of both the territorial sea and the exclusive economic zone/continental shelf area.

¹⁵ See BM, paras. 3.21 and 3.23; and MCM, para. 2.29.

¹⁶ See BM, paras. 6.68-6.73; and BR, paras. 3.140-3.161.

1.23. Concerning the *territorial sea*, Bangladesh maintains, against all reason, that “the Parties agreed to the course of their maritime boundary within 12 nautical miles (‘M’) in 1974, and that the boundary line has been settled since that date”¹⁷. This is erroneous on two accounts: first the proposition made by Bangladesh was not based on the 12-nautical-mile principle, but on that of equidistance¹⁸; second and more importantly, this proposition was never agreed by Myanmar¹⁹.

1.24. Therefore, the delimitation of the territorial sea has now to be drawn by the Tribunal in accordance with article 15 of UNCLOS. But the Parties have very different views concerning the method for reconnecting the initial median line between Myanmar’s mainland coast and St. Martin’s Island to the mainland-only delimitation line²⁰.

1.25. The points of disagreement between the Parties concerning the delimitation of their respective *continental shelf* and *exclusive economic zones* bear upon the very method to be used in order to apply the equitable principles/relevant circumstances rule. In spite of Bangladesh’s lip service to the equidistance/relevant circumstances method as the “now-standard approach in the case law”²¹, it then proceeds to ignore it and employ the “angle-bisector method” in place of drawing a provisional equidistance line²², notwithstanding that the latter is perfectly feasible²³.

1.26. The second main point of disagreement between the Parties in respect to the delimitation of the continental shelf and exclusive economic zones concerns the second stage of the delimitation process. While Bangladesh asserts that the concavity of its coasts is an important special circumstance which would justify a shift in its favour²⁴, Myanmar has shown that, once St. Martin’s Island has been given an appropriate effect in the delimitation

¹⁷ BR, para. 1.3.

¹⁸ See para. 2 of the 1974 agreed minutes. For the text of the agreed minutes, see MCM, para. 3.15 and BM, Vol. III, Annex 4.

¹⁹ See MCM, paras. 4.9-4.43; and Chapter 2 below.

²⁰ See BM, para. 6.73; BR, para. 3.161; MCM, para. 5.85; paras. 3.8-3.11 and 3.33-3.37 below.

²¹ See para. 1.19 above.

²² See BM, paras. 6.56-6.67; and BR, paras. 3.15-3.32.

²³ See paras. 5.2-5.42 below.

²⁴ See BM, paras. 6.30-6.42; and BR, paras. 3.36-3.83.

of the territorial seas of the Parties, no relevant circumstance calls for any departure from the provisional equidistance line²⁵.

1.27. Similarly, at the third stage of the delimitation process, Myanmar has shown that the result achieved by the equidistance line is an equitable solution²⁶; Bangladesh alleges that it is not so²⁷, but that its very peculiar application of the “angle-bisector method” would achieve such a result²⁸.

1.28. The last – but not least – point of disagreement between the Parties relates to Bangladesh’s self-serving allegation that it is entitled to a continental shelf beyond 200 nautical miles from its coasts – it insistently speaks of “its entitlement [or right] in the outer continental shelf”²⁹. In fact, it has no such automatic and postulated rights since its rights necessarily stop at the maritime boundary between the two States before the 200-nautical-mile limit is reached, as determined in application of articles 74 and 83 of UNCLOS and of the well established standard method of delimitation resulting from the international case law and practice³⁰. Consequently, the method of delimitation to be applied beyond 200 nautical miles has no practical application in this case³¹.

III. Outline of this Rejoinder

1.29. Following this Introduction, the present Rejoinder is divided into two Parts.

1.30. **Part I** deals with the delimitation of the territorial sea. In *Chapter 2*, Myanmar shows that contrary to Bangladesh’s repeated assertions no delimitation has yet been agreed by the

²⁵ See paras. 5.26-5.42 below.

²⁶ See MCM, paras. 5.145-5.153; and paras. 6.63-6.91 below.

²⁷ See BM, paras. 6.30-6.55; and BR, paras. 3.33-3.398.

²⁸ See BM, paras. 6.74-6.78; and BR, paras. 3.165-3.198.

²⁹ See, for example, BM, paras. 6.44 and 6.45; and BR, paras. 3.84 and 3.88.

³⁰ As Bangladesh itself recognizes, in Chapter 4 of its Reply, in the *Barbados/Trinidad and Tobago* Arbitration, “[h]aving determined the course of the boundary, the tribunal in that case concluded that the line did not extend beyond 200 M from the coast of Trinidad and Tobago. This was ... simply the equitable result that followed from the delimitation process in accordance with Articles 74 and 83.” (BR, para. 4.43) See also MCM, paras. 5.155-5.162.

³¹ See MCM, paras. 5.37-5.40.

Parties and, in particular, that the 1974 agreed minutes have never been accepted by Myanmar as an agreement on the delimitation of the territorial seas. Therefore, it is necessary for the Tribunal to proceed to the delimitation. This is the purpose of *Chapter 3*, which explains in particular that St. Martin's Island must be treated as a special circumstance for the purpose of the delimitation of territorial sea.

1.31. **Part II** is divided into three Chapters, all relating to the delimitation between the continental shelf and the respective exclusive economic zones of the Parties. *Chapter 4* briefly revisits the issue of the applicable law since Bangladesh still misreads it and sticks to a clearly outdated vision of it. *Chapter 5* explains again why the so-called "angle-bisector method" cannot be applied in the present case and is, anyway, misapplied by Bangladesh – assuming it could be used. In *Chapter 6*, Myanmar recalls that the only applicable method in this case is the firmly established equidistance/relevant circumstances method and that it achieves an equitable solution in the present case.

1.32. Finally, *Chapter 7* is a Summary of Myanmar's case and introduces Myanmar's *Submissions*.

PART I

THE TERRITORIAL SEA

I.1. The first Part of the present Rejoinder addresses the arguments in Chapter 2 of Bangladesh's Reply concerning the delimitation of the territorial sea.

I.2. *Chapter 2* considers, once again and in the light of the Reply, Bangladesh's far-fetched arguments to the effect that there is already a pre-existing agreement between the Parties on the delimitation of the territorial sea.

I.3. These arguments are contradicted by Bangladesh's own Notification and Statement of Claim, dated 8 October 2009, commencing these proceedings, in which Bangladesh itself said that there was no treaty or other international agreement ratified by Bangladesh and Myanmar delimiting any part of the maritime boundary in the Bay of Bengal.

I.4. Bangladesh's further attempts to show that the 1974 agreed minutes were a binding agreement establishing a maritime delimitation between the territorial seas of Myanmar and Bangladesh are discussed and rejected. The wording of the agreed minutes explicitly made agreement on the territorial sea delimitation conditional on reaching agreement, in the form of a treaty, on the whole of the delimitation line. Bangladesh's attempts to establish the existence of an agreed line on the basis of the practice of the two sides, including its production of affidavit "evidence", do not withstand scrutiny.

I.5. In *Chapter 3* Myanmar once more explains the basis for its proposed delimitation line between the territorial seas of Myanmar and Bangladesh. It explains in particular why the presence of Bangladesh's St. Martin's Island on the "wrong" side of the equidistance line, opposite the coastline of Myanmar, is a special circumstance that has to be taken into account when making the delimitation. The proposed delimitation is the same as that proposed in the Counter-Memorial, since none of the arguments put forward by Bangladesh in the Reply is such as to justify any other line.

CHAPTER 2

TERRITORIAL SEA: ABSENCE OF AGREED DELIMITATION

2.1. The present Chapter responds to the points made by Bangladesh in its Reply concerning the so-called “agreement” between Myanmar and Bangladesh on the territorial sea delimitation, said by Bangladesh to have been reflected in the 1974 agreed minutes. It will be shown that Bangladesh has failed to raise any sound arguments in support of its thesis that the 1974 agreed minutes constituted or reflected a maritime delimitation agreement or “an agreement ... to the contrary” within the meaning of article 15 of UNCLOS.

2.2. In this Chapter, Myanmar deals in turn with each of the arguments set out in the Reply, in which Bangladesh asserts variously that the 1974 agreed minutes are “a valid and binding agreement within the meaning of UNCLOS article 15”; that “[d]uly authorized representatives of the Myanmar government signed onto the agreement on no less than two occasions”; and that the “evidentiary record confirms Myanmar’s respect for the 1974 Agreement and its intent to be bound by these actions”³². Myanmar position as set out in Chapters 3 and 4 of the Counter-Memorial is maintained in full.

I. Notification and Statement of Claim

2.3. In its Notification and Statement of Claim, dated 8 October 2009, Bangladesh itself stated that “[t]here is no treaty or other international agreement ratified by Bangladesh and Myanmar delimiting any part of the maritime boundary in the Bay of Bengal”³³, and requested the Tribunal³⁴ “to delimit ... the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal, in the territorial sea ...”³⁵. That is a clear acknowledgment by Bangladesh, in the instrument instituting the present proceedings, that there is no legally

³² BR, para. 1.25.

³³ *Notification under Article 287 and Annex VII, article 1 of UNCLOS and the Statement of Claim and Grounds on Which it is Based*, 8 October 2009, para. 4.

³⁴ Originally the Annex VII Arbitral Tribunal, now ITLOS.

³⁵ *Notification under Article 287 and Annex VII, article 1 of UNCLOS and the Statement of Claim and Grounds on Which it is Based*, 8 October 2009, para. 24.

binding agreement between Myanmar and Bangladesh relating to the delimitation of the territorial sea.

2.4. Also in the Notification and Statement of Claim, Bangladesh, after acknowledging that the 1974 agreed minutes have “not been ratified”, claims that “both parties have consistently conducted themselves in accordance with the boundary in the territorial sea as described in that agreement”³⁶. Even if such conduct could be established, which – as shown below – is not the case, such conduct could not have transformed the minutes into a legally binding international agreement, or otherwise have established an agreed maritime boundary in the territorial sea.

II. The Negotiations

2.5. Myanmar described the negotiations that took place between 1974 and 1986, and then between 2008 and 2010, in Chapter 3 of the Counter-Memorial. Two points in particular emerge. First, Myanmar took a flexible approach throughout the negotiations and sought to achieve a reasonable agreed boundary based on applicable principles of international law. Bangladesh, for its part, showed no such flexibility while ignoring the applicable law. Second, it is clear from the course of the negotiations, as it is from the language employed, that the 1974 minutes were simply an *ad hoc* conditional understanding of what could eventually, subject to further negotiations and reflection, be included in an overall maritime delimitation agreement, an agreement which has never been achieved.

2.6. To conclude a non-binding *ad hoc* understanding, which may be reflected in agreed minutes of a meeting, as was done on this occasion, is entirely consistent with standard practice in negotiations, including maritime boundary negotiations. The parties to a negotiation frequently reach provisional “agreement” on one issue within a complex negotiation conditional on agreement on remaining issues, which they record more or less formally, and set on one side while they proceed to negotiate on the remaining issues. In such circumstances, it is well understood that “nothing is agreed until everything is agreed”. The negotiations aim at an overall deal (sometimes referred to as a “package deal”). A classic

³⁶ *Ibid.*, para. 5.

example is the negotiation of UNCLOS itself at the Third United Nations Conference on the Law of the Sea (1973-1982)³⁷. If the parties were too easily held to be bound by provisional “agreements” reached in the course of negotiating a “package deal” that valuable negotiating technique would no longer be possible. This happens frequently in the case of maritime delimitation negotiations, as has been well described by Judge Anderson:

“The area to be delimited often appears to be sub-divided into natural sections. These can best be taken in turn, rather than attempt to discuss all areas at the same time. If one section is agreed in principle, it may help the atmosphere to put aside for the time being, or ‘bank’, that section as being, for example, ‘agreed in principle, but always subject to the satisfactory resolution of the remaining issues,’ or some similar formula. It is then possible to concentrate on the remaining points of difference, possibly ‘banking’ further sections of line so as to build up the provisionally agreed mileage. In such circumstances, the negotiators may be encouraged to make greater efforts by the consideration that much had already been achieved, albeit provisionally. At the same time a failure to reach full agreement may still yield a partial agreement thereby reducing the scope of the remaining dispute.”³⁸

III. Status and Effect of the 1974 Agreed Minutes

2.7. The present section is to be read together with paragraphs 4.9 to 4.38 of the Counter-Memorial. At the outset, Myanmar recalls that, according to the case law of the International Court of Justice (ICJ), “[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed”³⁹. The 1974 agreed minutes have none of the hallmarks of an international maritime boundary agreement. Even a cursory

³⁷ See the Introduction to the United Nations publication containing the texts of UNCLOS and the 1994 Implementing Agreement (United Nations Publication, Sales No. E.97.V.10), pp. 1-6. As Ambassador Tommy Koh, of Singapore, the President of the Conference, explained, “the Conference took the wise decision that the package deal approach did not preclude it from allocating the 25 different subjects and issues to different negotiating forums, so long as the results were brought together to form an integrated whole” (“A Constitution for the Oceans”, M.H. Nordquist *et al.* (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. I, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. XXXV).

³⁸ 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, p. 427.

³⁹ *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; see also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 86, para. 68.

glance at the agreements collected in the six volumes of *International Maritime Boundaries* published thus far (2011) shows that virtually all of them are in standard treaty form (with, among other things, provision for ratification) and they contain, in addition to precision as regards the delimitation line, provisions on dispute settlement, cooperation between the parties, and navigation and resource rights where necessary⁴⁰.

2.8. Where the status of a text is in dispute between the parties, recourse may be made, by analogy, to the customary rules of treaty interpretation, as reflected in the Vienna Convention on the Law of Treaties⁴¹. The 1974 and 2008 minutes are to be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of their object and purpose⁴². The ICJ alluded to this methodology when it stated that, in order to decide whether an instrument is a binding agreement, one must look “above all to its actual terms and to the particular circumstances in which it was drawn up”⁴³.

A. Ordinary Meaning

2.9. Bangladesh begins its analysis of the 1974 agreed minutes by reference to their “ordinary language”⁴⁴. Yet in support of its claim that the minutes had established a boundary, its only recourse to their actual terms is when it points out that the text bore the title “Agreed Minutes” rather than just “Minutes”⁴⁵. Bangladesh then proceeds to ignore the actual text of the minutes, the words actually used, and quickly moves on to the subsequent negotiations and what it claims to be the subsequent practice of the Parties⁴⁶. Later in the

⁴⁰ See, for example, the Agreement between Myanmar and India of 23 December 1986 in *International Maritime Boundaries*, Report Number 6-3, Vol. II, p. 1338; Agreement between Myanmar and Thailand of 25 July 1980 in *International Maritime Boundaries*, Report Number 6-4, Vol. II, p. 1341.

⁴¹ Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, 1 February 2011, para. 57, citing further case law; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 429, para. 263.

⁴² See Vienna Convention on the Law of Treaties, art. 31.1.

⁴³ MCM, para. 4.24. In addition to the writings listed at MCM, footnote 210, see now Ph. Gautier, “Article 2”, in O. Corten and P. Klein, *The Vienna Conventions on the Law of Treaties. A Commentary*, Oxford University Press, Oxford, 2011, Vol. I, pp. 34-45.

⁴⁴ BR, para. 2.16.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, paras. 2.16 ff.

Reply, Bangladesh complains that Myanmar's approach prefers form over substance⁴⁷. Yet having regard, as Myanmar does, to the ordinary meaning of the actual terms of the 1974 and 2008 minutes is surely to have regard to substance rather than form. It is above all the language used within the 1974 agreed minutes that matters when determining their status and effect.

2.10. In international usage, the heading "agreed minutes" is normally used for the record of a meeting, or of the main points to emerge from a meeting, that has been agreed between the two sides. What is agreed is the terms of the document, that is, the account set forth therein of the meeting or its conclusions. By contrast, it is not particularly common for the designation "agreed minutes" to be given to a document that the participants intend to constitute a treaty.

2.11. The ordinary meaning of the terms of the 1974 and 2008 minutes was fully considered in the Counter-Memorial⁴⁸. In the present Rejoinder, Myanmar will respond to the arguments made by Bangladesh in its Reply, which are without merit.

2.12. As explained in the Counter-Memorial and indeed in Bangladesh's Reply⁴⁹, paragraph 4 of the 1974 minutes recorded the approval of the Bangladesh Government to Points 1 to 7 describing a territorial sea boundary, yet it was silent on any approval by the Government of Myanmar. Paragraph 5 of the 1974 minutes then recorded that a draft treaty was handed to the Myanmar delegation by the Bangladesh delegation "for eliciting the views of the Burmese Government". The draft agreement provided for ratification. As is well known, however, the Government of Myanmar never ratified the draft agreement; indeed, it neither signed nor even initialled the draft agreement⁵⁰. Moreover, as explained in Myanmar's Counter-Memorial, no international agreement could be concluded without the express confirmation of the Government of Myanmar, a point that was made clear to Bangladesh from the first round of negotiations⁵¹. Together with the explanation in the

⁴⁷ BR, paras. 2.42-2.43.

⁴⁸ MCM, paras. 4.11-4.15, 4.33-4.34.

⁴⁹ BR, para. 2.17; MCM, paras. 4.13-4.14.

⁵⁰ MCM, para. 4.15.

⁵¹ MCM, paras. 3.13-3.14, 4.16.

Counter-Memorial as to the correct interpretation of the actual terms of the 1974 minutes, these points confirm the conclusion that the minutes did not constitute a binding international agreement. In effect, Bangladesh is attempting to turn the non-ratified draft agreement into a binding document, though “uncompleted treaties ... do not create legal rights or obligations merely because they had been under consideration”⁵². Myanmar recalls in this connection the statement made by the ICJ in the *North Sea Continental Shelf* cases with respect to a State that has not expressed its consent to be bound by a treaty by ratifying it, yet was alleged to be bound by it by the other party to the dispute:

“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 do so, has nevertheless somehow become bound in another way”⁵³.

2.13. Bangladesh seeks to play down the fact that the 2008 minutes refer to the 1974 minutes as an “*ad hoc* understanding” by saying that this is merely a matter of form rather than substance⁵⁴. As already pointed out above, the ordinary meaning of a text should not be mistaken for form. The 2008 minutes refer to the 1974 minutes as an “ad-hoc understanding” no less than three times⁵⁵. The term was not used lightly. Rather, it accurately reflects the way both sides viewed the 1974 minutes.

2.14. Bangladesh has also put much weight on the fact that in the 2008 minutes “both sides agreed ad referendum that the word ‘unimpeded’ in ... the 1974 Agreed Minutes, be replaced with ‘Innocent passage through the territorial sea shall take place in conformity with the UNCLOS’”⁵⁶. In doing so, Bangladesh simply passes over in silence the words “ad referendum”, a term which clearly indicates that the two delegations intended to refer the matter back to their respective authorities. According to Bangladesh, this change “merely

⁵² *Guyana/Suriname*, Award of 17 September 2007, *International Legal Materials (ILM)*, Vol. 47, 2008, p. 208, para. 312 (also available on <http://www.pca-cpa.org/>); see also *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, *Judgment*, *I.C.J. Reports 1959*, p. 229.

⁵³ *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.

⁵⁴ BR, para. 2.43.

⁵⁵ 2008 agreed minutes, para. 2 and twice in para. 3, see MCM, para. 3.42.

⁵⁶ BR, paras. 2.19, 2.55.

served to modernize the language” used in 1974, and somehow, this proves that the 1974 minutes were indeed an “agreement”. This claim fails on two grounds.

2.15. First, the term “innocent passage” was already a standard term of art in 1974. It was in common use as early as the nineteenth century⁵⁷, and continued to be a common international law term through the twentieth century to the present, for example, in the 1958 Convention on the Territorial Sea and the Contiguous Zone⁵⁸. The use of the term “unimpeded passage” in the 1974 minutes does not reflect a pre-“innocent passage” era, as Bangladesh suggests. The two delegations in 1974 used the word “unimpeded” although they must have been fully aware of the term “innocent passage”. Secondly, and more importantly, this line of argumentation is a non-sequitur. Myanmar has already pointed out in its Counter-Memorial⁵⁹ that this adjustment could not change the status of the 1974 minutes, as was clear from paragraph 3 of the 2008 minutes.

2.16. Bangladesh also tries to read what is not there into the fact that it has supposedly granted Myanmar “unimpeded passage” around St. Martin’s Island. It maintains that Myanmar has conceded this point⁶⁰. Bangladesh further contends that Myanmar has not produced any evidence that its vessels were not granted “free and unimpeded passage” in the waters around St. Martin’s Island⁶¹. As for the latter point, Bangladesh cannot reverse the burden of proof: Bangladesh has put forward a factual claim, that vessels were granted the right of passage. It is Bangladesh, not Myanmar that carries the burden to establish the facts that support its contention. As for the former point, Myanmar has clearly not conceded in its Counter-Memorial that such passage was afforded, as this has not been proven by Bangladesh⁶². Myanmar simply made the point that *if any such practice existed*⁶³, its origin would have predated the 1974 minutes, a point Bangladesh itself admitted in the Reply (“[i]n

⁵⁷ D.P. O’Connell, *The International Law of the Sea*, I.A. Shearer (ed.), Clarendon Press, Oxford, 1982, pp. 263-270.

⁵⁸ See arts. 5 (2), and 14 to 23 of the 1958 Convention on the Territorial Sea and the Contiguous Zone. See also D.P. O’Connell, *loc. cit.*, pp. 268-269.

⁵⁹ MCM, paras. 3.43, 4.34.

⁶⁰ BR, para. 2.54.

⁶¹ BR, para. 2.54.

⁶² MCM, para. 4.37.

⁶³ MCM, para. 4.38.

reality, such unimpeded access has been provided since 1948⁶⁴ – that is, since the independence of Myanmar). If this is indeed the case, it is hard to see how Bangladesh can seriously claim that a practice predating the 1974 minutes by 26 years could somehow be dependent on a document produced in negotiations later in time.

B. Conditionality of the 1974 Minutes

2.17. Both Myanmar and Bangladesh agree that one of the conditions posed by Myanmar for the conclusion of a maritime delimitation agreement was that the whole of the boundary should be dealt with in one single document. It is undisputed that this condition was repeated time and time again by the Myanmar delegations to their counterparts during successive negotiating rounds⁶⁵.

2.18. The disagreement between the Parties revolves around the meaning and consequences of Myanmar's insistence on this condition, which was of course never fulfilled. Bangladesh simply ignores this basic fact, and argues that the two sides only disagreed on "whether there should be a treaty with respect to the territorial sea or an omnibus treaty that included the entire maritime area to be delimited"⁶⁶. Myanmar will not repeat the arguments in its Counter-Memorial. It suffices to recall that during the negotiations its delegations consistently pointed out that only a single, comprehensive agreement should be reached, and that it would not consent to any international agreement prior to the conclusion of the final treaty on delimitation⁶⁷.

2.19. Just as in the Memorial, Bangladesh in its Reply has failed to mention most of what occurred in the talks between 1975 and 1986⁶⁸. In particular, Bangladesh fails to recall that Myanmar clarified what was already known to Bangladesh: that an agreement between the Parties would only be concluded once there was a comprehensive settlement of the maritime

⁶⁴ BR, para. 2.54.

⁶⁵ BR, para. 2.20; BM, Vol. III, Annex 19; BR, paras. 2.29-2.30; MCM, paras. 3.13-3.14, 3.20, 3.34, 3.40.

⁶⁶ BR, para. 2.33.

⁶⁷ MCM, paras. 4.17-4.23.

⁶⁸ See BM, paras. 3.21-3.31 and 5.8-5.17.

boundary. A prominent example of such clarification is to be found in the speech made by the Myanmar Minister for Foreign Affairs during the sixth round of talks, on 19 November 1985:

“[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”⁶⁹.

In short, throughout the various rounds of negotiations, Myanmar was consistent in its position that the 1974 minutes were conditional on future agreement with respect to the whole length of the maritime boundary.

C. The Boundary Was Not “Settled”, as Is Now Maintained by Bangladesh

2.20. Another notable point in the Myanmar Foreign Minister’s statement of 19 November 1985 was his emphasis on the fact that the boundary was not “settled” at that point. This is of significance since, throughout the Reply, Bangladesh repeatedly asserts that the territorial sea boundary was “settled” in the 1974 minutes and therefore honoured by both sides, emphasizing the particular significance of the word “settled”. According to Bangladesh:

“The word ‘settled’ merits particular emphasis as it confirms that the issue had been resolved, in reflection of an agreement between the parties.”⁷⁰

2.21. The only basis for the repeated assertion by Bangladesh that the boundary was “settled” is its own “*Brief Report*” of the third round of the negotiations⁷¹. The Bangladesh official author of this report noted as follows:

“It might be recalled that both sides, during the second round of talks in Dacca from 19-25 November 1974, *settled* the boundary line on territorial waters and an agreed minute accompanying a map indicating the general alignment of the boundary line was signed by the Leaders of the respective delegations. At this session, the Burmese delegation repeated their earlier position ...”⁷².

⁶⁹ MCM, para. 3.34; Sixth Round, Speeches and statements (MCM, Annex 8).

⁷⁰ BR, para. 2.23.

⁷¹ BR, para. 2.23.

⁷² BM, Vol. III, Annex 15 (emphasis added).

2.22. Bangladesh would have the Tribunal believe that this unilateral “*Brief Report*” reflects the common understanding of both delegations of the status and effect of the 1974 minutes. Yet a careful reading of the “*Brief Report*” shows that the passage quoted in the preceding paragraph does not say what Bangladesh claims. The passage from the “*Brief Report*” quoted at paragraph 2.21 above does not even purport to reflect an actual discussion that took place during the third round of negotiations between the Parties. Quite the opposite: the passage merely reflects what the author of the “*Brief Report*” subjectively believed to have occurred during the previous *second* round of negotiations, and was probably included merely as background for the reader. It was only after the author asserted that the boundary was “settled”, that he or she moved on to report what was actually said during the session, as is evident by the phrase “In this session...”, following the account of the last round of talks. Furthermore, the text of the “*Brief Report*” does not say that this is the shared view of Myanmar or even the official view of Bangladesh at that time. Myanmar’s own (fuller) account of the third round of negotiations does not contain any mention of the fact that the boundary in the territorial sea was considered to be “settled” by both sides⁷³. The “*Brief Report*” provides no basis whatsoever for Bangladesh’s repeated claim that the boundary was “settled”, and nothing else is cited by Bangladesh to support this contention.

D. Commodore Hlaing’s Authority in Relation to the Negotiations

2.23. In paragraph 2.22 of the Reply, Bangladesh accuses Myanmar of failing to state that “Commodore Hlaing *did* in fact sign the Agreed Minutes”. In fact, Myanmar clearly stated in the Counter-Memorial that Commodore Hlaing, head of the Myanmar delegation to the negotiations, signed the agreed minutes⁷⁴. As was also clearly explained in the Counter-Memorial, and is reflected in Bangladesh’s own account of the negotiations, the Bangladesh delegation then handed their counterparts a draft agreement “for eliciting views from the Burmese Government”⁷⁵. The draft agreement was neither initialled nor signed by either Party. Moreover, it is not disputed that Commodore Hlaing refused to initial any document that would reflect a binding agreement between the Parties, a refusal that the Commodore maintained throughout the negotiations.

⁷³ MCM, Annex 4.

⁷⁴ MCM, paras. 3.15-3.16.

⁷⁵ BM, Vol. III, Annex 14, para. 7; MCM, para. 3.20.

2.24. This refusal was a consequence of two facts that Bangladesh consistently overlooks. The first, as explained in Subsection B above, was the clear and consistent view of Myanmar that any delimitation agreement reached between the Parties should settle the whole of the maritime boundary, and no agreement would come into effect between the Parties until there was agreement on the full line. The second was that Commodore Hlaing, Vice Chief of Staff in the Myanmar Defence Services (Navy), could not be considered as representing Myanmar for the purpose of expressing its consent to be bound by a treaty.

2.25. According to article 7 of the Vienna Convention on the Law of Treaties, the holders of certain high-ranking offices in the State are considered as representing their State for certain treaty purposes by virtue of their functions, that is, Heads of State, Heads of Government and Ministers for Foreign Affairs; and heads of diplomatic missions are so regarded for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited⁷⁶. Commodore Hlaing, a naval officer, was none of these.

2.26. In the alternative, a person may express the consent of the State to be bound if he or she produces full powers to that effect issued by the State concerned, or if it appears from the practice of the States concerned or from other circumstances that their intention was to consider the person concerned as representing the State for those purposes and to dispense with full powers⁷⁷. Neither of these circumstances applied in the case of Commodore Hlaing.

2.27. Bangladesh asserts in its Reply that Myanmar has not produced evidence to demonstrate that Commodore Hlaing “was not vested with the necessary powers to sign the agreement”⁷⁸. This argument stands in stark contradiction to the language of article 7 of the Vienna Convention and is yet another example of Bangladesh seeking to reverse the burden of proof. Since it is undisputable that Commodore Hlaing did not possess full powers by virtue of his functions, it is Bangladesh, not Myanmar, which must provide positive evidence to back an assertion that Commodore Hlaing possessed such powers in some other way.

⁷⁶ Vienna Convention on the Law of Treaties, art. 7.2.

⁷⁷ *Ibid.*, art. 7.1.

⁷⁸ BR, para. 2.33.

2.28. In any event, no such evidence exists. Commodore Hlaing was not provided by Myanmar with full powers to sign an international agreement, nor is there any Myanmar practice to provide such capacity to heads of delegations to negotiations. Furthermore, the Commodore's statements throughout the negotiations point to the contrary and clarify that he was not in such a position. As Bangladesh acknowledges it in its Reply, the Commodore stated several times that he would not sign a separate agreement on the territorial sea, or even initial such a text⁷⁹. To the contrary, in the first round of negotiations Commodore Hlaing made clear that the discussions between the delegations and their results were subject to the approval of the appropriate authorities of Myanmar:

“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”⁸⁰.

Consequently, even if Commodore Hlaing had signed a treaty on behalf of Myanmar, which obviously did not happen, his signature would lack any force under international law to bind the State.

E. Absence of Ratification of Any “Agreement” by Myanmar

2.29. Not only did Commodore Hlaing lack full powers to bind Myanmar to the understandings, but Bangladesh also wrongly implies that Myanmar has somehow ratified the minutes of 1974 by a Cabinet decision that it failed to mention. Contrary to what Bangladesh asserts in the Reply⁸¹, Myanmar did indeed mention the Cabinet decision in the Counter-Memorial, and pointed out its lack of significance⁸². This lack of significance flows both from the limited constitutional functions of the Cabinet (also known as the Council of Ministers), and the actual terms and timing of the Cabinet decision in question.

⁷⁹ BR, paras. 2.20, 2.31; see also MCM, paras. 3.19-3.21 quoting the minutes of the second round, Annexure C (MCM, Annex 3), first meeting para. 10 and second meeting, para. 4 and BM, Vol. III, Annex 14, para. 7.

⁸⁰ MCM, para. 3.13; MCM, Annex 2, Minutes of the first round, third meeting, para. 11.

⁸¹ BR, paras. 2.21, 2.30, 2.34.

⁸² MCM, para. 4.27.

2.30. The Constitution of the Socialist Republic of the Union of Burma of 3 January 1974, in force at the time in question, established a Council of State, a body that was quite distinct from the Cabinet (Council of Ministers), for the purpose of directing, supervising and co-ordinating public services and the actions of central and local organs of State power⁸³. The Council of State was comprised of the members of the legislative body (*Pyithu Hluttaw*) and the Prime Minister, and its chairman was the President of the Republic⁸⁴. Under article 73 of the Constitution, the Council of State was entrusted with responsibilities, regarding agreements of an international character, to

“(h) make decisions concerning the entering into, ratification or annulment of international treaties, or the withdrawal from such treaties with the approval of the *Pyithu Hluttaw*;

(i) make decisions concerning international agreements”⁸⁵.

On 12 November 1975, the Council of State issued Notification No. 4/75 of the *Pyithu Hluttaw* decision interpreting article 73 of the Constitution, which *inter alia* confirmed that article 73 (h) included treaties amending or specifying a boundary⁸⁶. A maritime delimitation agreement would fall within this category, and thus decisions concerning any such agreement would have to be made by the Council of State, not the Cabinet.

2.31. The Cabinet, on the other hand, was comprised of a list of people put forward by the Council of State, and its responsibilities were enumerated in the Constitution⁸⁷. These do not include responsibilities regarding international agreements.

2.32. As for the Cabinet decision in question, in its terms it did not purport to “ratify” the 1974 minutes, nor could it have done so: the Cabinet decision was adopted on 19 November 1974, *prior* to the second round of negotiations and the signing of the minutes⁸⁸. By the decision, the Cabinet merely decided (i) to send a technical delegation to

⁸³ The Constitution of the Socialist Republic of the Union of Burma of 3 January 1974, art. 33, Annex R1 to the present Rejoinder.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, art. 73, Annex R1.

⁸⁶ The Socialist Republic of the Union of Burma, Council of State, Notification No. 4/75, Annex R3.

⁸⁷ The Constitution of the Socialist Republic of the Union of Burma of 3 January 1974, Chapter VI.

⁸⁸ Decision of the 21st meeting of the Council of Ministers held on 19 November 1974, Annex R2.

the negotiations and (ii) that that delegation would support a median line principle during the negotiations⁸⁹. Contrary to what Bangladesh asserts, the Cabinet did not approve, ratify or even comment on any outcome of the negotiations: it could not have done so, since the decision was adopted before the second round of negotiations had even begun; nor was it empowered to do so. Nowhere in the Cabinet decision is there any suggestion of powers being given to Commodore Hlaing to sign an international agreement⁹⁰. In short, the Cabinet did not ratify the 1974 minutes, and Bangladesh's claims on this matter are groundless.

2.33. That no ratification occurred is also clear from the lack of action taken by Myanmar following the signing of the 1974 minutes. Myanmar produced no publication or proclamation in its Official Gazette regarding the minutes, nor did it notify the local population of any so-called agreement that would affect their day-to-day life. By way of comparison, in the case of the maritime delimitation agreement between Myanmar and India, Myanmar's Council of State first issued a proclamation announcing its ratification of the agreement⁹¹, and later, when instruments of ratification were exchanged, this exchange was also published⁹². Moreover, practical arrangements were never made to give effect to the line described in the 1974 minutes, nor were any maps produced containing that line.

2.34. In fact, Bangladesh's whole argument about ratification in itself contradicts its own position. Bangladesh does not appear to question the fact that the minutes are not a treaty, while at the same time it seeks to conjure up a ratification procedure based on words mentioned in passing in its own account of a meeting held some 34 years later⁹³. No ratification took place, and the 1974 minutes were not in any event a treaty capable of and subject to ratification. The only relevant treaty text was the draft agreement mentioned in paragraph 5 of the 1974 minutes, which Myanmar did not initial, sign or ratify.

⁸⁹ *Ibid.*

⁹⁰ It should be noted that the authority to grant such powers would lie with the Council of State as it would be considered a decision concerning entering into an international treaty, see the Constitution of the Socialist Republic of the Union of Burma of 3 January 1974, art. 73, Annex R1.

⁹¹ Socialist Republic of the Union of Burma, Council of State, Proclamation 2/87, 16 March 1987, Annex R4.

⁹² "Instruments of Ratification of Agreement Exchanged", *Guardian*, 15 September 1987, Annex R5.

⁹³ BR, para. 2.34.

F. The 1974 Agreed Minutes Were Not a Treaty or Agreement
Within the Meaning of Article 15 of UNCLOS

2.35. Apparently in the alternative, Bangladesh asserts that the word “agreement” in article 15 of UNCLOS is distinguishable from a “treaty” or a “convention”, terms used elsewhere in UNCLOS⁹⁴. Myanmar submits that the word “agreement” in the expression “failing agreement between them to the contrary” in article 15 of UNCLOS should be given its ordinary meaning in its context and in the light of the object and purpose of UNCLOS⁹⁵. It will be recalled that the draft treaty handed over by Bangladesh in 1974 was itself entitled “Agreement”. A comparison with the use of other words in UNCLOS (“convention”, “treaty”, “agreement in force”), as suggested by Bangladesh⁹⁶, does not shed light on the meaning of “agreement” in article 15. Despite the best efforts of the Drafting Committee of the Conference⁹⁷, the various provisions of UNCLOS do not necessarily use such terms consistently, with clearly differentiated meanings. The use of different terms may be accounted for by the different origins of the provisions concerned. The drafters of UNCLOS clearly decided, in some instances, not to depart from existing language in earlier instruments, for the sake of a uniform usage. The wording of article 15 was taken directly from article 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone⁹⁸. In the *Romania v. Ukraine* case, where the ICJ had occasion to apply the words “agreement in force” in articles 74 (4) and 83 (4) of UNCLOS, the ICJ interpreted the word “agreement” to mean an agreement in force between the parties which establishes a sector of the maritime boundary which the ICJ had to determine (that is to say, a treaty)⁹⁹. It is submitted that a similar meaning attaches to the word “agreement” in article 15 of UNCLOS, which serves the same purpose: to preserve existing delimitation agreements.

⁹⁴ BR, para. 2.33.

⁹⁵ Vienna Convention on the Law of Treaties, art. 31.1.

⁹⁶ BR, para. 2.33.

⁹⁷ Introduction to the UN publication containing the texts of UNCLOS and the 1994 Implementing Agreement (United Nations Publication, Sales No. E.97.V.10), p. 5.

⁹⁸ Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, *UNTS*, Vol. 516, p. 205. Neither Bangladesh nor Myanmar became parties to the 1958 Convention, which was not of course in force between them when the agreed minutes were signed.

⁹⁹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 77, para. 40; see also *ibid.*, pp. 78-89, paras. 43-76.

2.36. The Vienna Convention on the Law of Treaties defines “treaty” as “an international agreement concluded between States in written form and governed by international law”¹⁰⁰. In the context of the present case, Bangladesh is essentially seeking to persuade the Tribunal to view the 1974 minutes as a written agreement governed by international law, albeit not denying it was not a treaty. In Bangladesh’s own contemporaneous record, there is no distinction between the terms “treaty” and “agreement”. Bangladesh recorded that 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”¹⁰¹.

As the author of this record rightly notes, Myanmar was not inclined to conclude any such treaty/agreement prior to agreement on the delimitation of the whole maritime boundary. No such delimitation agreement exists, as Bangladesh made clear in its Application instituting Proceedings (see Section I above).

G. Circumstances of the Signing of the 1974 Minutes

2.37. As noted above, Bangladesh has failed to describe most of the rounds of negotiations between the Parties between 1975 and 1986¹⁰². Despite the gaps in its own description of the negotiations, Bangladesh alleges in its Reply that Myanmar’s account of the negotiations is “selective and incomplete, and contains material omissions and misrepresentations”¹⁰³. Bangladesh fails to justify this generalized assertion with any specific point of criticism. It also fails to acknowledge that, by contrast with its own account of the negotiations, Myanmar’s account is detailed and comprehensive; it is moreover in several places based on Bangladesh’s own record of the negotiations¹⁰⁴.

¹⁰⁰ Vienna Convention on the Law of Treaties, art. 2.1 (a).

¹⁰¹ Cited at BR, para. 2.20; BM, Vol. III, Annex 19.

¹⁰² See BM, paras. 3.21-3.31, 5.8-5.17.

¹⁰³ BR, para. 2.20.

¹⁰⁴ For example, MCM, paras. 3.20, 3.25 and 3.46.

2.38. Undoubtedly, this omission is convenient for Bangladesh, which does not wish to view the 1974 minutes for what they were, and the circumstances under which they were signed. These circumstances undoubtedly confirm that they were no more than an *ad hoc* conditional understanding, reached at an initial stage of the negotiations, which never ripened into a binding agreement between the two negotiating Parties.

H. Subsequent Discussions Concerning “Point 7”

2.39. This *ad hoc* and conditional nature, and lack of finality, in the 1974 minutes is particularly clear in light of the disagreement that very quickly emerged in the talks with respect to points supposedly agreed upon in the 1974 minutes, in particular Point 7. As noted in Subsection C above, in the Reply Bangladesh repeatedly asserts that Points 1 to 7 were “settled” until Myanmar had a “change of heart” in September 2008. In reality, the exchanges that immediately followed the 1974 minutes tell a very different story.

2.40. In principle, the last point of the boundary in the territorial sea should serve as the starting point of the EEZ/continental shelf boundary. Nevertheless, even after signing the 1974 minutes, both sides continued to suggest alternatives to Point 7 as the starting point for the delimitation of the EEZ/continental shelf boundary¹⁰⁵. Bangladesh itself proposed an alternative to Point 7 during the negotiations, as attested by the records of both delegations¹⁰⁶. Even the 2008 minutes, the very same minutes that supposedly reinforce the “binding” nature of the 1974 minutes, contain in their paragraph 4 an alternative to Point 7¹⁰⁷. These and the other examples set out in Myanmar’s Counter-Memorial¹⁰⁸ demonstrate that Points 1 to 7, and especially Point 7 were tentative at best, conditional, and subject to change in future talks between the Parties.

¹⁰⁵ *Ibid.*, paras. 4.29-4.34.

¹⁰⁶ *Ibid.*, para. 4.30.

¹⁰⁷ *Ibid.*, para. 4.31.

¹⁰⁸ *Ibid.*, paras. 4.30-4.31.

I. Irrelevance of Case Law Cited by Bangladesh

I. Cameroon v. Nigeria

2.41. Bangladesh has sought to compare the status and legal effect of the 1974 minutes with that of the Maroua Declaration, which was before the ICJ in the *Cameroon v. Nigeria* case. As explained by Bangladesh, in that case the ICJ found that the Yaoundé II Declaration was called into question on a number of occasions, yet the line described therein was later confirmed by the Maroua Declaration, which constituted a binding treaty between the parties¹⁰⁹. The ICJ also gave weight in its analysis to the fact that the Maroua Declaration was corrected by both parties a month after its signing¹¹⁰.

2.42. Bangladesh's reliance on the ICJ's findings in *Cameroon v. Nigeria* fails on several grounds. The ICJ found that the Maroua Declaration

“constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties”¹¹¹.

Thus the ICJ reached its conclusions based on the fact that the elements of what constitutes a treaty were met, and in particular, the consent of both Nigeria and Cameroon to be bound by the Maroua Declaration. The ICJ reasoned that the signature of the Head of State of Nigeria was sufficient to express Nigeria's consent to be bound, as under the Vienna Convention States may express consent to be bound in various ways, including by signature¹¹². In the next paragraph the ICJ emphasized that

“Heads of State belong to the group of persons who, in accordance with Article 7, paragraph 2, of the Convention ‘[i]n virtue of their functions and without having to produce full powers’ are considered as representing their State”¹¹³.

¹⁰⁹ See BR, para. 2.25.

¹¹⁰ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Judgment, I.C.J. Reports 2002, p. 431, para. 267.

¹¹¹ *Ibid.*, p. 429, para. 263.

¹¹² *Ibid.*, pp. 429-430, para. 264. See also Vienna Convention on the Law of Treaties, arts. 11-15.

¹¹³ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Judgment, I.C.J. Reports 2002, p. 430, para. 265.

The ICJ then referred to the work of the International Law Commission to reiterate the fact that a Head of State is considered as representing his or her State for all acts related to the conclusion of a treaty¹¹⁴.

2.43. If anything, *Cameroon v. Nigeria* supports Myanmar's position. As has been explained in Subsection D above, not only do the language and context of the 1974 minutes make clear that these minutes were not an agreement between the Parties, but Commodore Hlaing cannot have been understood to have committed his State to a position by signing them. This was clear from his official position as a member of the Navy, and from what he said throughout the negotiations.

2.44. In addition, Bangladesh's attempt to draw an analogy between *Cameroon v. Nigeria* and the present case is flawed. In *Cameroon v. Nigeria*, the declaration later in time was found to constitute a treaty, thus eliminating the need of the ICJ to determine whether the earlier declaration had ever been binding on the parties. Applying this to the current dispute, it would have to be argued that the 1974 minutes and their content had become binding upon Myanmar and Bangladesh because the 2008 minutes were a treaty in force between them. This is not the case. Indeed, in the present case Bangladesh's arguments are essentially the reverse: it is trying to show that the earlier minutes were a binding agreement, and that the 2008 minutes strengthen that argument by partially reiterating the content of the 1974 minutes. Bangladesh has not made the separate claim that the 2008 minutes are binding as such, nor could it in light of their actual terms, which are perfectly clear.

2.45. Finally, it will be recalled that the Maroua Declaration was corrected by Nigeria and Cameroon just one month after its adoption. In the present case, the 1974 and 2008 minutes were 34 years apart; the updating effected in 2008 was not a correction, but reflected the passage of time and the usefulness for both sides, upon the resumption of negotiations after a long intermission, to recall issues discussed in past negotiations.

2.46. In sum, the ICJ's analysis in *Cameroon v. Nigeria*, far from supporting Bangladesh's case, support Myanmar's position, that the 1974 minutes were not a binding agreement.

¹¹⁴ *Ibid.*

2. Qatar v. Bahrain

2.47. Bangladesh also relies in its Reply on *Qatar v. Bahrain*¹¹⁵. It recalls that in that case the ICJ concluded that the minutes signed by the two Foreign Ministers were a text recording the commitments of their respective governments which was to be given immediate application¹¹⁶. It then rebukes Myanmar for

“[f]ailing to mention Bahrain’s other argument: that the subsequent conduct of the Parties showed that they never considered the 1990 Minutes to be a legally binding agreement ... Myanmar is silent on this point.”

2.48. Myanmar analysed *Qatar v. Bahrain* fully in the Counter-Memorial¹¹⁷. There is no need to repeat what is said there. It will however highlight three points. First, as it had in *Cameroon v. Nigeria*, the ICJ relied on the fact that the officials involved were those inherently invested with full powers to bind the State according to the law of treaties (in *Qatar v. Bahrain*, Foreign Ministers). The 1974 minutes did not involve a Myanmar official with such functions or an official who was vested with powers to conclude a binding agreement. Second, in *Qatar v. Bahrain*, the ICJ stressed that the commitments made by the Foreign Ministers were to have immediate effect. The 1974 minutes, on the other hand, were conditional and so quite different from the minutes in *Qatar v. Bahrain*.

2.49. Third, Myanmar did not, as asserted by Bangladesh, fail to mention Bahrain’s second argument. In fact, Myanmar’s Counter-Memorial reproduced and thoroughly examined the subsequent contacts between the two sides¹¹⁸, and pointed out that Bangladesh’s Memorial was not accompanied by any evidence to support its assertions concerning the conduct of the parties¹¹⁹.

¹¹⁵ BR, paras. 2.38-2.41.

¹¹⁶ BR, para. 2.39.

¹¹⁷ MCM, paras. 4.26-4.27.

¹¹⁸ MCM, Chapter 3 and paras. 4.29-4.34.

¹¹⁹ MCM, paras. 4.37-4.41, 4.49-4.50.

IV. The Subsequent Practice Cited by Bangladesh Does Not Support the Existence of an Agreed Delimitation Line

A. The Approach of International Courts and Tribunals to the Assessment of Affidavit Evidence

2.50. Before examining what Bangladesh now claims to be evidence of subsequent practice in application of the 1974 minutes, it is necessary to recall the approach of international courts and tribunals towards affidavit evidence. As Judge Wolfrum has pointed out,

“[t]he rules of the ICJ and of the ITLOS do not refer to the possibility of submitting affidavits ... as evidence. ... In recent cases, affidavits have been treated as admissible evidence. However, on the level of their evidentiary value, the ICJ has expressed scepticism ...”¹²⁰.

The case law shows that international courts and tribunals have generally attached little or no weight to such evidence, untested by cross-examination¹²¹. The following indicates the approach of the ICJ. That is appropriate since “the rules of the International Tribunal for the Law of the Sea closely resemble those of the ICJ”¹²². In any event, other courts and tribunals have adopted a similar stance¹²³.

2.51. In the *Nicaragua v. United States of America* case, the ICJ stated:

“The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence.

¹²⁰ R. Wolfrum, *International Courts and Tribunals, Evidence*, para. 31, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition).

¹²¹ C.F. Amerasinghe, *Evidence in International Litigation*, Nijhoff, Leiden, 2005, pp. 195-201; G. Niyungeko, *La Preuve devant les Juridictions Internationales*, Bruylant, Bruxelles, 2005, pp. 144-145, 362-367, 402-403; A. Riddell, B. Plant, *Evidence before the International Court of Justice*, British Institute of International and Comparative Law, London, 2009, pp. 279-283.

¹²² R. Wolfrum, *International Courts and Tribunals, Evidence*, para. 5, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition).

¹²³ See G. Niyungeko, *La Preuve devant les Juridictions Intenationales*, Bruylant, Bruxelles, 2005, pp. 402-403, citing the European Court of Human Rights (*Ireland v. United Kingdom*) and various arbitral tribunals (including *The Walfisch Bay Boundary* and *Rann of Kutch Arbitrations*); see also C.F. Amerasinghe, *Evidence in International Litigation*, Nijhoff, Leiden, 2005, pp. 195-197, citing several cases, including the *Mexico City Bombardments Claims* and the *Engleheart* cases.

An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight ...¹²⁴.

2.52. In *Qatar v. Bahrain*, Bahrain produced some affidavit evidence. In his Dissenting Opinion, Judge *ad hoc* Torres Bernárdez said:

“For example, regarding the affidavits, the Court considered them as a form of witness evidence, but one not tested by cross-examination. Its value as testimony is therefore minimal. In any case, the Court has not treated as evidence any part of a testimony which was not a statement of fact, but a mere expression of opinion as to the probability of the existence of such facts, not directly known to the witness, as stated in the 1986 Judgment of the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America, I.C.J. Reports 1986, p. 42, para. 68)*.”¹²⁵

2.53. In the *Democratic Republic of the Congo v. Uganda* case, the ICJ attached little weight to an affidavit given by the Ugandan Ambassador to the Democratic Republic of the Congo, because it had been prepared by a government official of a party to the case, and contained only indirect information that was unverified¹²⁶.

2.54. In the *Nicaragua v. Honduras* case, Honduras produced sworn statements by a number of fishermen attesting to their belief that the 15th parallel represents the maritime boundary between the two States¹²⁷. The ICJ summed up its case law as to the methodology of assessing affidavits in the following terms:

“The Court notes ... that witness statements produced in the form of affidavits should be treated with caution. In assessing such

¹²⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 42, para. 68.*

¹²⁵ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, dissenting opinion of Judge ad hoc Torres Bernárdez, I.C.J. Reports 2002, pp. 272-273, para. 38.*

¹²⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, pp. 49-50, para. 129.*

¹²⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p. 731, para. 243.*

affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred. In other circumstances, where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said. Thus, the Court will not find it inappropriate as such to receive affidavits produced for the purpose of a litigation if they attest to personal knowledge of facts by a particular individual. The Court will also take into account a witness's capacity to attest to certain facts, for example, a statement of a competent government official with regard to boundary lines may have greater weight than sworn statements of a private person.¹²⁸

Having examined the fishermen's affidavits produced in that case and attesting to their view of where the maritime boundary lay, the ICJ rejected the affidavits' evidentiary value¹²⁹.

2.55. In short, a court or tribunal should treat such affidavits with caution¹³⁰. Affidavits before international tribunals are prone to abuse, more so than before domestic courts¹³¹. In determining the value of the affidavits, the Tribunal should take into account their credibility and the interests of those providing the information concerned¹³². In particular, a Tribunal should be cautious in giving weight to *pro forma* affidavits, containing testimony with virtually identical language, produced wholesale and not in the language of the individual

¹²⁸ *Ibid.*, pp. 65-66, para. 244.

¹²⁹ *Ibid.*, p. 65, para. 245.

¹³⁰ *Ibid.*, pp. 65-66, para. 244.

¹³¹ D.V. Sandifer, *Evidence before International Tribunals*, rev. ed., University Press of Virginia, Charlottesville, 1975, p. 265.

¹³² *Ibid.*

providing the information, especially when the other party has not had the chance to cross-examine the information provider¹³³.

B. The Assessment of the Evidence in the Present Case

2.56. In its Reply, Bangladesh has produced various documents alleging that these confirm that both sides consistently abided by the 1974 minutes¹³⁴. None of these documents is sufficient to support Bangladesh's assertion of subsequent practice. These documents and further evidence show that, to the contrary, no clear boundary existed between Bangladesh and Myanmar, either on paper or in practice.

1. Affidavits of Fishermen and Naval Officers

2.57. The affidavits presented by Bangladesh in the present case (which it annexed to its Reply, not its Memorial) are similar to those produced by Nicaragua in the *Nicaragua v. Honduras* case, and it is submitted that the ICJ's approach to Nicaragua's affidavits¹³⁵ is equally applicable to Bangladesh's affidavits. An examination of the affidavits submitted by Bangladesh raises several questions as to their relevance and genuineness, and accordingly, the weight the Tribunal should give these, if any. The eight affidavits of the fishermen are all eerily similar in language, form and substance. All of the fishermen, in nearly identical language, "have always been aware of the location of the maritime boundary" between St. Martin's Island and Myanmar; that this boundary runs "approximately halfway between the east coast of St. Martin's Island and the mainland coast of Myanmar", and further to the south "approximately halfway between St. Martin's Island and Oyster Island"¹³⁶. The fishermen's affidavits appear to have been drawn up and signed in English; they are identical in wording or virtually so¹³⁷.

¹³³ *Ibid.*, pp. 262 and 266-267, referring to statements of the commissioner on the Turkish Indemnity to be paid under the American-Turkish Agreement of 25 October, 1934; see also C.F. Amerasinghe, *Evidence in International Litigation*, Nijhoff, Leiden, 2005, p. 200, on affidavits which were not "individual and spontaneous".

¹³⁴ BR, paras. 2.46 *et seq.*

¹³⁵ See paragraph 2.54 above.

¹³⁶ BR, Vol. III, Annex R16, Affidavits 1 to 8.

¹³⁷ See, for example, BR, Vol. III, Annex R16-2 and R16-3, points 7.a-c.

2.58. Applying the standards laid down by the ICJ in *Nicaragua v. Honduras*, the affidavits of naval officers and fishermen produced by Bangladesh cannot be considered as containing relevant evidence in this case. The naval officers, officials of Bangladesh, have a clear interest in supporting the position of Bangladesh on the location of the maritime boundary.

2.59. As in *Nicaragua v. Honduras*, the fishermen's affidavits cannot be viewed as real evidence as to the existence of an agreement setting the boundary in the territorial sea off St. Martin's Island. Even assuming their contents were true, they only attest to the subjective opinion of the fishermen on the existence of a boundary rather than a first-hand statement of a fact. Applying the approach of the ICJ in *Nicaragua v. United States of America*, it will be seen that none of the affidavits presented by Bangladesh claim that the fishermen ever saw the 1974 minutes, but rather the fishermen claim that they are subjectively "aware of the location of the maritime boundary between Bangladesh and Myanmar"¹³⁸. Yet the only source of such information provided for in the affidavits is "the Government officials and Bangladesh Naval Authorities"¹³⁹, the same source arguing that there is an agreement in force between the Parties before the Tribunal. The existence of an agreed boundary is not a matter "within the direct knowledge" of the fishermen; on the contrary, it could only be information known to the fishermen from hearsay, with the source of the alleged information being Bangladeshi officials.

2.60. In addition, all of the affidavits were produced specifically for the current case, and more particularly for the Reply, not even for the Memorial. None are contemporaneous accounts of the alleged practice in the area of St. Martin's Island.

2.61. Finally, as the language of these affidavits is strikingly similar, almost word for word, the Tribunal should view them for what they are, statements "influenced by those taking the deposition"¹⁴⁰, in the language of the ICJ, with no relevance to the present litigation. To summarize this point, the affidavits produced by Bangladesh in Annexes R16 and R17 are of no evidentiary value.

¹³⁸ BR, Vol. III, Annex R16-3, point 7.a.

¹³⁹ *Ibid.*, Annex R16-3, point 7.h.

¹⁴⁰ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, pp. 65-66, para. 244.

2. Naval Patrol Logs

2.62. The Bangladesh naval patrol logs produced in Annex R18 merely reflect Bangladesh's position and in no way demonstrate acquiescence on the part of Myanmar to the existence of an agreement on the territorial sea. In any case, Myanmar fails to understand how the information contained in the naval logs supports Bangladesh's claim. Rather, the few incidents mentioned in the logs correspond with Myanmar's and Bangladesh's current position that equidistance is the appropriate delimitation method in the areas between the opposite coasts of St. Martin's Island and Myanmar's mainland coast. That same information demonstrates with equal clarity that Myanmar's fishermen intercepted on Bangladesh's side of the supposed line were unaware of the existence of an agreed boundary. Therefore, these incidents, not reproduced on a map by Bangladesh, do not support the assertion by Bangladesh that there is an "agreement" on the territorial sea delimitation.

3. Coast Guard Logs

2.63. The Bangladesh Coast Guard logs at Annex R15 of the Reply are equally if not more unhelpful to Bangladesh. The Teknaf Police Station Arrest Records contain 34 incidents that do not prove any of Bangladesh's assertions on subsequent practice and, if anything, demonstrate that no such practice existed.

2.64. First, many of the incidents in the logs took place in the Naaf River¹⁴¹ or north of St. Martin's Island¹⁴² or perhaps even on land¹⁴³. Many of the records of the incidents do not mention an identifiable location. For example some simply refer to "St. Martin's Island" as the location of the incident, some refer simply to a location "close to St. Martin's Island"¹⁴⁴, and many other incidents are located well outside of St. Martin's Island territorial waters¹⁴⁵.

¹⁴¹ See, for example, BR, Vol. III, Annex R15 cases 10/81, 06/196, 25/212, 10/210.

¹⁴² See, for example, *ibid.*, cases 15/92, 03/18, 09/40.

¹⁴³ See, for example, *ibid.*, case 10/123 reporting an incident that occurred "near about 16 miles east" of St. Martin's Island.

¹⁴⁴ See, for example, *ibid.*, cases 06/06, 01/181, 97/186.

¹⁴⁵ See, for example, *ibid.*, cases 08/228 ("25 km south west of deep sea"), 11/163 ("39 NM in deep sea"), 07/34 (40 NM and 64 NM from St. Martin's Island).

2.65. Beyond the examples listed above that show how little relevance these incidents have to this case, one incident reported is worth mentioning. Case 14/51 is illuminating, as it records action taken by the Myanmar Frontier Forces (NASAKA) 4 kilometres (2.15 nautical miles) south-east of St. Martin's Island on 6 September 1999¹⁴⁶. Though the location given for this last incident is imprecise, it clearly places the NASAKA forces well inside the area that Bangladesh asserts was "agreed" to be within the territorial sea of Bangladesh by virtue of the 1974 minutes. Nothing in the log implies that the location of these incidents is irregular or that protests were made.

2.66. Not only are most of the incidents recorded in the Bangladesh Coast Guard logs entirely irrelevant to demonstrating any practice of respecting the 1974 minutes, the last aforementioned incident illustrates that the military forces of both Parties did not respect the so-called "agreed" boundary. Hence, both the Coast Guard and the naval logs fail to establish the existence of any agreement or practice, and are irrelevant to the current dispute and differences between the positions of the Parties regarding the delimitation line.

4. Note Verbale of 16 January 2008

2.67. Bangladesh also refers to a Myanmar Note Verbale of 16 January 2008 concerning a streamer¹⁴⁷. According to Bangladesh, "[i]n that note, which stated the position that Myanmar and Bangladesh had not yet *formally* delimited a maritime boundary, Myanmar nevertheless reiterated the consistent position it had taken for the prior 14 years: namely that *St. Martin's was entitled to a 12 M territorial sea*"¹⁴⁸. As the Tribunal will see, Bangladesh ignores the actual terms of the Note Verbale. The relevant passage reads:

"the Ministry wishes to stress that although Myanmar and Bangladesh have yet to delimit a maritime boundary, as States parties to the UNCLOS 1982 Myanmar and Bangladesh are both entitled to a 12 miles territorial sea *in principle*. It is in this neighbourly spirit that the Myanmar side has requested the kind cooperation of the Bangladesh side since the streamer/receiver of the said survey vessel is expected to enter the 12 mile territorial

¹⁴⁶ *Ibid.*, case 14/51.

¹⁴⁷ BR, para. 2.94; the Note Verbale is at BR, Vol. III, Annex R1.

¹⁴⁸ BR, para. 2.94 (emphasis added).

sea which Bangladesh's St. Martin Island enjoys *in principle* in accordance with UNCLOS, 1982"¹⁴⁹.

It is clear from the terms of the Note Verbale that in fact Myanmar underlined that there was no agreed delimitation and in that context was careful precisely not to say that St. Martin's Island was in fact entitled to a full 12-nautical-mile territorial sea. Contrary to Bangladesh's assertion, the Note Verbale is entirely consistent with Myanmar's position on these matters.

5. Summary as to Subsequent Practice

2.68. In short, Bangladesh has failed to produce any relevant evidence to support its argument that both Parties abided by the 1974 minutes in their practice. The documents it has produced to support its arguments are of little or no evidential value, and indeed irrelevant. The Bangladesh Coast Guard log suggests, if anything, that the military forces of both sides did not respect the agreed minutes in practice. Finally, like Myanmar¹⁵⁰, Bangladesh has not taken any action officially to announce the adoption of an agreement in the territorial sea – neither domestic legislation nor any publication in an official government publication. In fact, prior to 2008, some 34 years after the signing of the 1974 minutes, Bangladesh never claimed that an agreement in the territorial sea was reached and Myanmar was never made aware of any such assertion. Thus, there exists no subsequent practice to reinforce Bangladesh's assertion that the 1974 minutes constituted an agreement in force between the Parties.

V. Summary

2.69. Bangladesh's attempt to show that the 1974 agreed minutes were a binding agreement establishing a maritime delimitation between the territorial seas of Myanmar and Bangladesh fails on all counts. Neither the form nor the content of the minutes support Bangladesh's thesis. The wording of the agreed minutes is explicit in making the territorial sea delimitation conditional on reaching agreement, in the form of a treaty/agreement, on the whole of the delimitation line. The context in which the minutes were drawn up and signed reinforces this

¹⁴⁹ BR, Vol. III, Annex R1 (emphasis added).

¹⁵⁰ See para. 2.33 above.

conclusion. Nor has Bangladesh been any more successful in establishing the existence of such an agreed line on the basis of the subsequent practice of the two sides.

CHAPTER 3

DELIMITATION OF THE TERRITORIAL SEA

3.1. The present Chapter addresses the arguments in Bangladesh's Reply concerning the course of its proposed territorial sea boundary. The Chapter reaffirms the maritime delimitation line separating the territorial seas of Myanmar and Bangladesh, and the territorial sea of Bangladesh and the EEZ/continental shelf of Myanmar, described in Chapter 4 of Myanmar's Counter-Memorial.

I. Introduction

3.2. At its most basic, the delimitation in this case is between the mainland coasts of two adjacent States. Bangladesh's proposed delimitation line is derived from a bisector of the angle formed by its untenable coastal façades of the mainland coasts of the two States meeting at their agreed land boundary terminus in the mouth of the Naaf River¹⁵¹. The main course of Myanmar's delimitation is formed by an equidistance line constructed between the mainland coasts of the two States. For both States, islands play a limited role in this delimitation. Bangladesh does not include islands in its (mis)conception of coastal façades or in the construction of its angle bisector (notwithstanding the subsequent, unexplained, "slight" transposition of this bisector to an invented vertex as discussed in Chapter 5 below). Myanmar – notwithstanding an entire section in Bangladesh's Memorial arguing *against* the use of islands¹⁵² – does not include islands in the construction of its equidistance line¹⁵³.

3.3. The non-inclusion of islands in the conceptualization of the coasts and the non-use of islands in the construction of the basic delimitation line (whether equidistance or bisector) may be added to Bangladesh's three-point list of "important points of agreement" between

¹⁵¹ See BM, Figure 6.10 and accompanying text. As explained in Part II below, Myanmar disagrees that the angle bisector is the appropriate delimitation method in this case. Moreover, the Bangladesh interpretation of its façade is extremely distorted. Finally, the attempt to "transpose" the bisector from the actual land boundary terminus to a fictional offshore starting point is, at best, creative. Notwithstanding these fundamental problems with Bangladesh's approach, the Bangladesh line is, at its core, a line constructed using the mainland coasts of the Parties.

¹⁵² BM, Chapter 6, sec. 3.

¹⁵³ MCM, sketch-map 5.8.

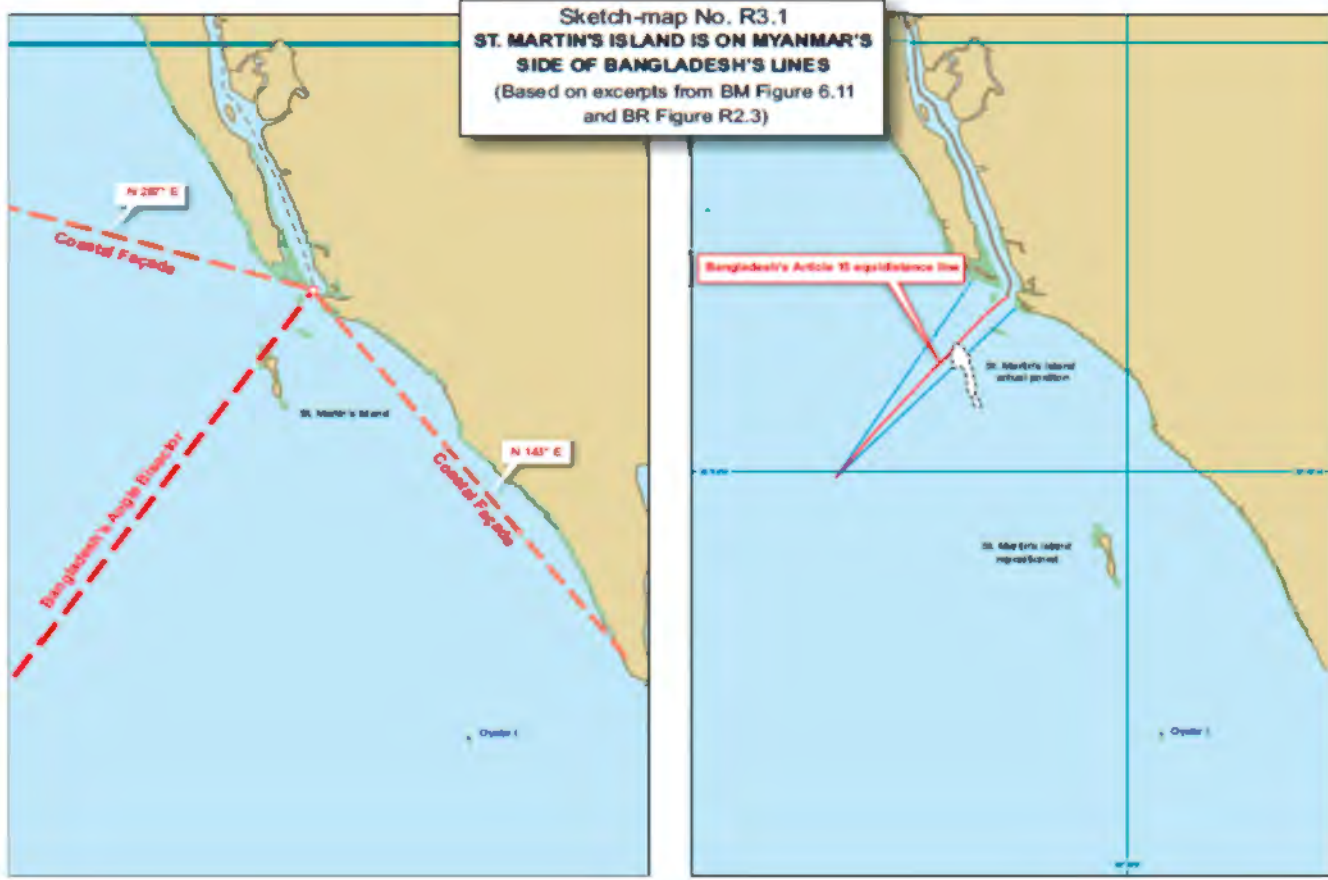
the Parties¹⁵⁴. In addition to these points of agreement related to the use of islands in the delimitation, the Parties share an “element of convergence” regarding St. Martin’s Island, in particular, which was not listed in Bangladesh’s Reply¹⁵⁵. Despite Bangladesh’s weak protestations regarding “the *alleged* location of St. Martin’s Island on the ‘wrong’ side of the equidistance line between the coasts of Myanmar and Bangladesh”¹⁵⁶, the Parties appear to agree that St. Martin’s Island is, in fact, situated on Myanmar’s side of any mainland-to-mainland delimitation line. This is so whether the equidistance or angle-bisector method is used. Bangladesh itself provides graphic proof of the location of St. Martin’s Island on Myanmar’s side of both versions of Bangladesh’s mainland-to-mainland delimitation lines: the first a bisector formed by the angle of what Bangladesh claims are coastal façades; the second an equidistance line drawn by Bangladesh from points on the mainland coasts of the Parties (see sketch-map No. R3.1 on the next page).

3.4. With these additional points of agreement – or “elements of convergence” – there are two remaining issues as regards delimitation in the territorial sea. First, what is the size and shape of the territorial sea enclave to be given to St. Martin’s Island? Second, by what method does the outer limit of that enclave reconnect to the mainland-to-mainland lines used to delimit areas of overlapping EEZ/continental shelf areas beyond the territorial seas of the Parties? In fact, Myanmar and Bangladesh take only slightly different approaches to the size and shape of the St. Martin’s Island enclave. The real difference lies in the method for reconnecting to the mainland-only delimitation line.

¹⁵⁴ BR, paras. 2.8-2.10. It should be noted that Bangladesh’s third “point of agreement” – that no effect is to be given to May Yu Island (Oyster Island) in the territorial sea – is less a point of agreement than an impossibility that both sides apparently recognize. May Yu Island (Oyster Island) lies more than 24 nautical miles from any Bangladesh territory. There is no possible overlap to be delimited between the territorial sea of May Yu Island (Oyster Island) and that of any Bangladesh territory.

¹⁵⁵ Bangladesh lists three other “elements of convergence” related to St. Martin’s Island at BR, para. 2.71.

¹⁵⁶ BR, para. 2.101 (emphasis added).



II. The Positions of the Parties

3.5. Myanmar's proposed delimitation line within 12 nautical miles of St. Martin's Island (Line A-B-B1-B2-B3-B4-B5-C-D-E) comprises five distinct sectors (see sketch-map No. R3.2 at page 53). From Point A to Point B, the line delimits the territorial sea between the adjacent mainland coastlines in the vicinity of the Naaf River. From Point B to Point B5, the line delimits the territorial sea in the narrow stretch of water lying between the opposite coasts of St. Martin's Island and Myanmar's mainland. From Point B5 to Point C the line delimits an area in which the coasts of the Parties transition from a relationship of oppositeness to one of adjacency. From Point C to Point D, the line delimits the stretch of territorial sea pertaining to the adjacent coasts of St. Martin's Island and Myanmar's mainland. The final sector, Point D to Point E, delimits the area in which St. Martin's Island's 12-nautical-mile entitlement overlaps with Myanmar's EEZ/continental shelf entitlement generated from Myanmar's mainland coast.

3.6. In its Reply, Bangladesh puts forward a line (line 1A-2A-3A-4A-5A-6A-7A-8A) which it describes as "a simplified strict equidistance line"¹⁵⁷. Like Myanmar's line A-B, Bangladesh's line 1A-2A is based on equidistance between adjacent mainland coasts. Like Myanmar's line B-B5, Bangladesh's line 2A-3A-4A-5A-6A is based on equidistance between the opposite coasts of Myanmar and St. Martin's Island. It should be noted that Myanmar's Point B5 and Bangladesh's Point 6A are in the approximate location of Point 6 as recorded in the 1974 agreed minutes. This is not mere coincidence; Point 6 was calculated as the midpoint between two points on the opposite coasts of the Parties.

3.7. Up to Point B5/6A the Parties apply the same delimitation method – equidistance between adjacent mainland coasts and between opposite mainland and island coasts – with similar but not identical results. Beyond Point B5/6A the opposite relationship of the coasts transitions to a relationship of adjacency. At this point the perspectives of the Parties on the delimitation begin to diverge. Ignoring this fundamental change in the geographic relationship of the coasts of the Parties, Bangladesh continues its "simplified strict" equidistance line to the intersection of the 12-nautical-mile arcs drawn from the low-water line of Myanmar's mainland and Bangladesh's St. Martin's Island (Point 8A). In contrast,

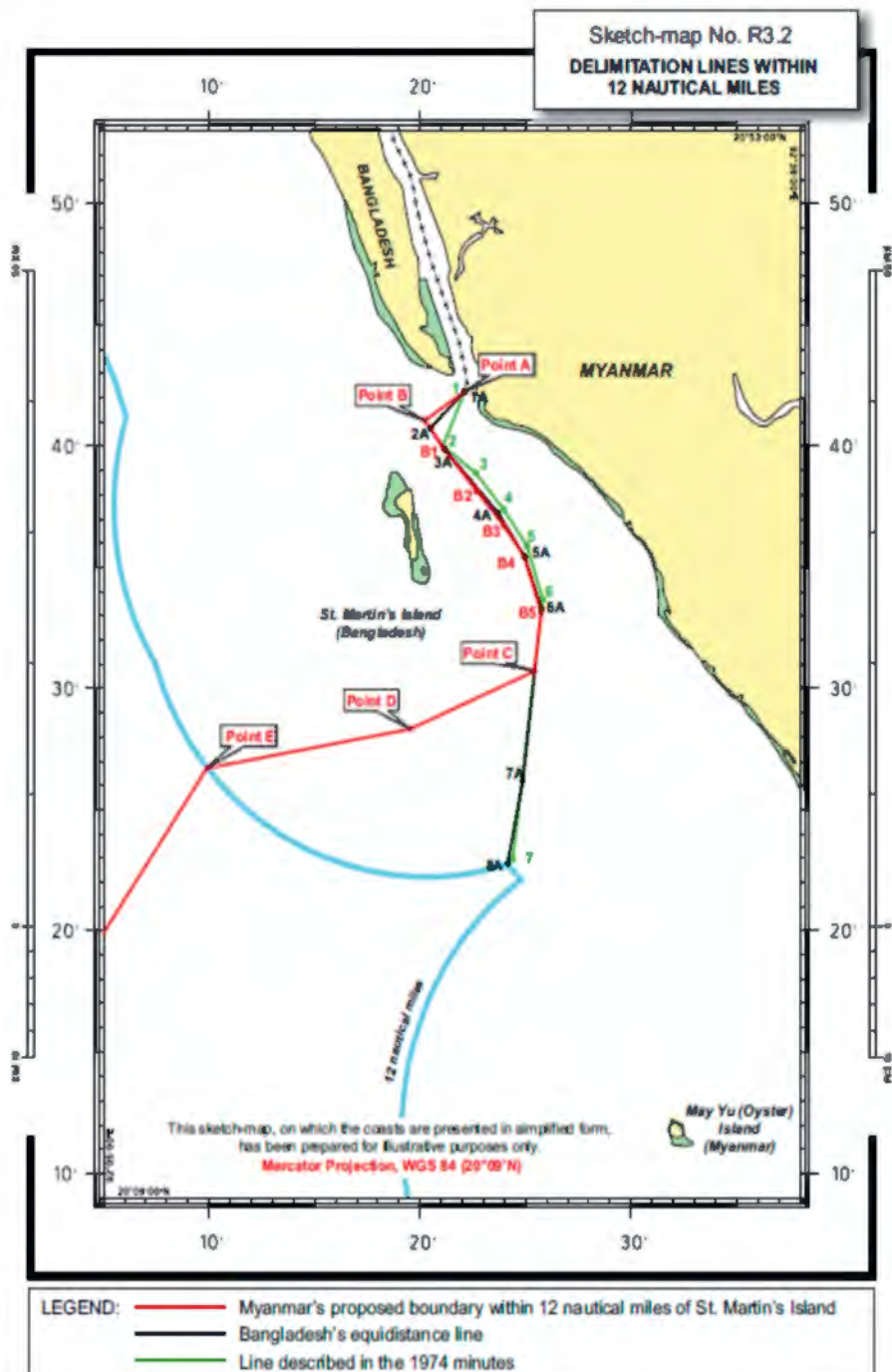
¹⁵⁷ BR, para. 2.106.

Myanmar acknowledges this shift, allowing St. Martin's Island to continue to affect the delimitation line out to 6 nautical miles before turning the line at Point C toward the west to account for the dominant effect of Myanmar's mainland coast over the coast of St. Martin's Island in this area. This approach is continued through Point D – a point on the outer limit of Myanmar's territorial sea – to Point E – the point of intersection between the outer limit of the territorial sea of St. Martin's Island and the continuation of the mainland-to-mainland equidistance line with which *both* Parties start their delimitations (segments A-B and 1A-2A respectively). This point, Point E, however it is reached, is the appropriate starting point of the delimitation between the respective areas of EEZ/continental shelf of the Parties. The delimitation beyond 12 nautical miles of both States is addressed in Part II below. The present Chapter addresses the delimitation between the agreed land boundary terminus and Point E.

III. Applicable Law

3.8. As described in Chapter 4 of the Counter-Memorial, the applicable law for the delimitation of the boundary between the territorial seas of Myanmar and Bangladesh (that is to say, from Point A to Point D of the line proposed by Myanmar) is article 15 of UNCLOS, which reads:

“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”



3.9. It will be noted that between Point D and Point E of the line proposed by Myanmar, the delimitation is not between the territorial seas of Myanmar and Bangladesh, but between Myanmar's EEZ/continental shelf and Bangladesh's territorial sea. Such delimitation is to be found in the practice of States¹⁵⁸, as well as in the case law¹⁵⁹, in particular with respect to islands on the "wrong" side of a mainland-only delimitation.

3.10. Delimitation between the territorial sea and the EEZ/continental shelf is not covered by article 15 of UNCLOS. Indeed, UNCLOS does not expressly lay down the rules applicable to such delimitation. In practice, in such cases international courts and tribunals have tended to have recourse to the law applicable to the delimitation of the EEZ/continental shelf (articles 74 and 83 of UNCLOS). For example, in the *Romania v. Ukraine* case, the ICJ dealt with the sector between Points 1 and 2 (on the 12-nautical-mile arc around Serpents' Island) as part of an EEZ/continental shelf delimitation¹⁶⁰. In any event, the equidistance/special circumstances rule in article 15 and the equidistance/relevant circumstances method applied by international courts and tribunals for all-purpose EEZ/continental shelf delimitations are very similar in practice¹⁶¹.

3.11. A key fact for present purposes is that Bangladesh's St. Martin's Island lies directly opposite the coast of Myanmar at only a very short distance from that coast (approximately

¹⁵⁸ See, for example, *Qatar/Abu Dhabi* (giving 3 nautical miles in the territorial sea around Daiyina) in *International Maritime Boundaries*, Report Number 7-9, Vol. II, p. 1541; *Iran/Saudi Arabia* (giving Arabi and Farsi 12 nautical miles in the territorial sea) in *International Maritime Boundaries*, Report Number 7-7, Vol. II, p. 1519; *Italy/Yugoslavia* (Pelagruz given 12 nautical miles in the territorial sea) in *International Maritime Boundaries*, Report Number 8-7 (1), Vol. II, p. 1627; but see *Italy/Tunisia* (Lampione given 12 nautical miles but others 13 nautical miles) in *International Maritime Boundaries*, Report Number 8-6, Vol. II, p. 1611.

¹⁵⁹ See, for example, the two most recent Judgments of the ICJ on maritime delimitation: *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 659 (in the area of the islands, the delimitation line fixed by the ICJ runs between the territorial sea and the EEZ/continental shelf); and *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 61 (see discussion at pp. 71-74, paras. 23-30. Between Point 1 and Point 2 the delimitation line fixed by the ICJ runs between Ukraine's territorial sea around Serpents' Island and Romania's EEZ/continental shelf.)

¹⁶⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, pp. 71-74, paras. 23-30.

¹⁶¹ Compare MCM, paras. 4.51-4.71 with paras. 5.76-5.153; see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, *I.C.J. Reports 2001*, p. 111, para. 231, quoted in BM, para. 6.18 and in MCM, para. 5.19, where the ICJ opined that the two are "closely interrelated".

4.5 nautical miles). As explained in the Counter-Memorial¹⁶², the presence of St. Martin's Island in this geographical location is a classic example of a "special circumstance" within the meaning of the second sentence of article 15 or a "relevant circumstance" for continental shelf/EEZ purposes. As Churchill and Lowe note (in the context of delimitation of the territorial sea) "[i]n all cases, it is possible that special circumstances, such as the presence of offshore islands ... will demand the adoption of some other boundary line ..."¹⁶³.

IV. Baselines

3.12. In Chapter 1 of the Reply, Bangladesh asserts that Myanmar, by not rebutting Bangladesh's critique of its straight baseline system, "thus effectively admits their force"¹⁶⁴. Myanmar has made no such admission. Indeed, as was abundantly clear in the Counter-Memorial, Myanmar is confident that it has drawn its straight baselines in full conformity with UNCLOS. Myanmar responded to Bangladesh's assertions concerning its straight baselines along the Rakhine (Arakan) coast. In doing so, Myanmar pointed out that they were "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"¹⁶⁵. And Myanmar underlined that "during the period of more than 40 years since they were first promulgated ... 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 proceedings"¹⁶⁶.

3.13. In any event, as Bangladesh itself states, "[t]he Tribunal need not concern itself with any of the Parties' straight baselines"¹⁶⁷. In the present case, neither Party relies upon its straight baselines in relation to this delimitation. Myanmar did not go into the matter of straight baselines in detail, nor will it here, since the validity of those baselines is immaterial

¹⁶² MCM, paras. 4.51-4.61.

¹⁶³ R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, Manchester, 1999, p. 183.

¹⁶⁴ BR, para. 1.19.

¹⁶⁵ MCM, para.3.6.

¹⁶⁶ *Ibid.*

¹⁶⁷ BR, para. 1.19.

in the present case. However, it maintains, as a matter of principle, that Bangladesh's baselines are not drawn in accordance with the applicable rules.

V. Assertion that Myanmar's Claim Is Inconsistent with Case Law and Practice

3.14. In its Reply, Bangladesh argues that "Myanmar's claim that St. Martin's represents a 'special circumstance' is incorrect because of the coastal geography"¹⁶⁸. Bangladesh disputes Myanmar's claim that St. Martin's Island lies off the coast of Myanmar and on the "wrong" side of the equidistance line. Yet, as noted at paragraph 3.3 above, it only takes a quick glance at the map to see that Myanmar is correct. Without shifting St. Martin's Island, without engaging in what Bangladesh sees fit to call "cartographic manipulation", St. Martin's Island clearly, and for the whole of its length, lies opposite and just off Myanmar's coast and to the south of any delimitation line properly drawn from the coasts of the Parties. So while St. Martin's Island may be a coastal island in generic terms, and is Bangladesh territory, it is neither a coastal island offshore Bangladesh nor an island that may be regarded as an integral part of the Bangladesh coastline. St. Martin's Island must therefore be given less than full effect in the delimitation within 12 nautical miles and zero effect beyond 12 nautical miles. Contrary to Bangladesh's assertion, it is exactly because of the coastal geography that St. Martin's Island must be considered a special circumstance.

3.15. There are several factors that determine whether an island constitutes a special circumstance requiring a delimitation of the territorial seas of the two States in a way which is at variance with equidistance, strict, simplified or otherwise. The *first* factor is the predominant relationship – opposite or adjacent – of the mainland coasts of the parties. When mainland coasts are in a relationship of oppositeness, islands lying close to the mainland of the State under whose sovereignty they lie tend not to have distorting effects. However, when mainland coasts are in a relationship of adjacency, islands, even those lying close to the mainland of the State under whose sovereignty they lie, have the potential to distort the boundary throughout its entire length.

¹⁶⁸ BR, paras. 2.60, 2.63-2.67.

3.16. The *second* factor is the position of the island in question relative to those mainland coasts and, in the case of adjacent coasts, relative to the land boundary terminus or starting point of the maritime delimitation. In situations of oppositeness, the further the island is from the mainland coast of the State to which it belongs, the more distorting its effect on an equidistance line. This is not necessarily true of islands situated in the context of adjacent mainland coasts. Instead, in situations of adjacency, the closer the island is to the starting point of the maritime boundary the greater is its distorting effect on an equidistance line. This effect is, of course, even greater when the island is not simply near the starting point of the maritime boundary, but beyond the starting point so that it sits just off territory that is under a different sovereignty.

3.17. The *third* factor is the presence or absence of balancing islands that would mitigate or offset the distorting effect of the island in question. When such balancing islands are present – in mainland coastal relationships of both oppositeness and adjacency – the islands in question often do not constitute a special circumstance and equidistance can be used without modification.

3.18. In the present case, the predominant mainland coastal relationship is one of adjacency. Bangladesh's St. Martin's Island is not simply close to the land boundary terminus, but is located beyond it in front of the Myanmar mainland coast. And there is no balancing island within 12 nautical miles to offset the distorting effect of St. Martin's Island¹⁶⁹. This confluence of factors dictates that St. Martin's Island must be considered a special circumstance within the meaning of article 15 for the purposes of delimiting within 12 nautical miles. This position is supported by the case law and practice cited by Myanmar in its Counter-Memorial¹⁷⁰.

3.19. Bangladesh seeks to downplay the significance of the case law and practice referred to by Myanmar concerning the effect of islands such as St. Martin's Island, either on the

¹⁶⁹ As noted in footnote 154 above, the territorial sea of May Yu Island (Oyster Island) does not overlap with any Bangladesh territorial sea. Therefore May Yu Island (Oyster Island) does not influence the territorial sea boundary. Furthermore, Myanmar has not constructed a delimitation line beyond 12 nautical miles that gives effect to either St. Martin's Island or May Yu Island (Oyster Island). May Yu Island (Oyster Island) is, however, a legitimate source of base points for measuring the breadth of its territorial sea and exclusive economic zone and should be given full effect in any delimitation in which islands are given effect.

¹⁷⁰ MCM, paras. 4.51-4.61.

ground that it relates to the continental shelf and/or EEZ or on the ground that it concerns different geographical circumstances (such as cases where the States are opposite rather than adjacent)¹⁷¹. Yet these matters in no way diminish the significance of the materials cited. Indeed, as mentioned at paragraph 3.10 above, the rules applicable to continental shelf/EEZ delimitations are very similar to those applied to territorial sea-continental shelf/EEZ delimitations. There is relatively little case law concerning the delimitation of overlapping territorial seas between adjacent states in the vicinity of distorting features, but solutions reached in the context of the exclusive economic zone and continental shelf may be useful in reaching solutions for the territorial sea.

3.20. Bangladesh cites the *Guinea/Guinea-Bissau* case, asserting that the Arbitration Tribunal there “ruled that coastal islands that were separated from the mainland only by narrow sea channels or watercourses were to be regarded as an integral part of the general coastline”¹⁷². This is a distorted and partial account of the Tribunal’s reasoning and it cannot be applied to the geography in the present case. In the first place, the Tribunal used this distinction among various types of islands when considering what constituted the relevant coast, and in particular the length of that coast¹⁷³. It was not making a general pronouncement about coastal islands. Second, the islands concerned lay immediately off a mainland coast which was under the same sovereignty as the islands themselves. And third, the Tribunal referred to the fact that the islands in question were “often joined to [the continent] at low tide”. The full citation from paragraph 95 (a) of the Award is as follows:

“The coastal islands, which are separated from the continent by narrow sea channels or narrow watercourses and are often joined to it at low tide, must be considered as forming an integral part of the continent.”¹⁷⁴

In the original French text, this paragraph of the Award reads:

¹⁷¹ BR, paras. 2.73, 2.81-2.87.

¹⁷² BR, para. 2.79, citing *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *United Nations Reports of International Arbitral Awards (UNRIAA)*, Vol. XIX, pp. 183-184, para. 95.

¹⁷³ *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, referring to the measurement of coastal lengths the Tribunal wrote: “account should be taken of the coastal islands and the Bijagos Archipelago ...” (*UNRIAA*, Vol. XIX, pp. 184-185, para. 97).

¹⁷⁴ *Ibid.*, pp. 183-184, para. 95 (a).

« Les îles côtières, qui ne sont séparées de la terre ferme que par des bras de mer ou cours d'eau de faible largeur et qui lui sont souvent reliées à marée basse, doivent être considérées comme partie intégrante du continent. »¹⁷⁵

Finally, and perhaps most importantly for the immediate case, the islands referred to at paragraph 95 (a) of the Award (and the Bijagos Islands referred to at paragraph 95 (b)), both of which were “to be taken into account” for the purpose of measuring coastal lengths¹⁷⁶, were given no effect whatsoever in the delimitation. In short, the islands at issue in *Guinea/Guinea-Bissau*, the ones that Bangladesh would like to equate with St. Martin’s Island, were given no effect on the delimitation within or beyond 12 nautical miles.

3.21. Bangladesh next cites the *Eritrea/Yemen* Award of 17 December 1999¹⁷⁷, in which the Tribunal considered a number of Eritrean and Yemeni islands (see sketch-map No. R3.3 on the next page). The geographical situation was completely different from that in the present case. The coasts of Eritrea and Yemen lay opposite one another. Each of the islands concerned was situated off the coast of the State to which it belonged. And in each case the islands that were given effect beyond their own territorial seas were either very close to the mainland coast of the State to which they belonged, or faced balancing islands, or both. The Tribunal’s findings in this case between predominantly opposite coasts with balancing islands are not relevant to the position of Bangladesh’s St. Martin’s Island, which lies off the coast of Myanmar – not Bangladesh.

3.22. The Tribunal found that Eritrea’s Dahlak Islands, which lie off the coast of Eritrea, not Yemen, formed “an integral part of the general coastal configuration” and continued:

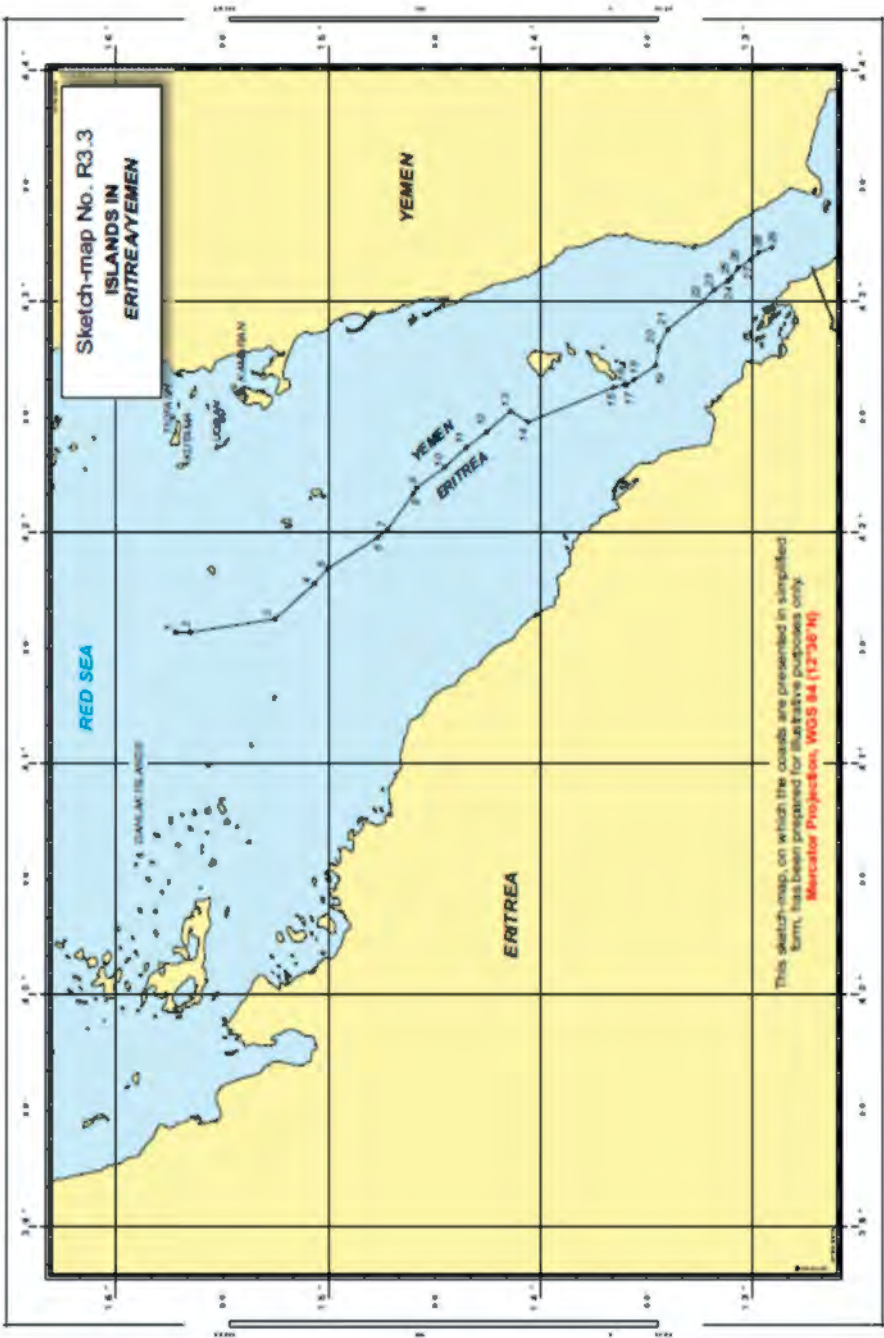
“[i]t follows that the waters inside the island system will be internal or national waters and that the baseline of the territorial sea will be found somewhere at the external fringe of the island system”¹⁷⁸.

¹⁷⁵ The *Guinea/Guinea-Bissau* Award was done in French and Portuguese, with the French text being the only one valid in law. The original French text is at *UNRIAA*, Vol. XIX, p. 149.

¹⁷⁶ *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *UNRIAA*, Vol. XIX, pp. 184-185, para. 97.

¹⁷⁷ *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, *UNRIAA*, Vol. XXII, p. 335.

¹⁷⁸ *Ibid.*, p. 367, para. 139.



The Tribunal next considered Yemen's Kamaran Island, which it described as a relatively large, inhabited and important island

“off this part of the Yemen coast. This island, together with the large promontory of the mainland to the south of it, forms an important bay ...”¹⁷⁹.

Bangladesh goes on to mention Tiqfash, Kutama and Uqban, which – in the words of Bangladesh – the Tribunal “also treated as coastal islands”¹⁸⁰. It is important to see why. The Tribunal said:

“The relatively large islet of Tiqfash, and the smaller islands of Kutama and Uqban further west, all appear to be part of an intricate system of islands, islets and reefs which guard this part of the coast. This is indeed, in the view of the Tribunal, a ‘fringe system’ of the kind contemplated in article 7 of the Convention ...”¹⁸¹.

Yet as mentioned above, in the case in hand Bangladesh's St. Martin's Island lies off the coast of Myanmar, not Bangladesh.

3.23. Another element distinguishing the treatment of islands in *Eritrea/Yemen* from the appropriate treatment of St. Martin's Island in this case is that the delimitation in *Eritrea/Yemen* was between opposite coasts. Here, with the exception of the short section of an opposite boundary between Points B and B5 of the line proposed by Myanmar, the delimitation is of a lateral boundary between adjacent coasts where the distorting effect of features, such as islands, can create disproportionate results.

3.24. Bangladesh cites what it terms the “truly relevant case law” – *Nicaragua v. Honduras* and *Romania v. Ukraine* – as disproving Myanmar's argument¹⁸². These two cases, each of which dealt with lateral delimitations between adjacent mainland coasts in the vicinity of islands, are indeed relevant. They are especially relevant concerning, *first*, the practice of the

¹⁷⁹ *Ibid.*, p. 369, para. 150.

¹⁸⁰ BR, para. 2.80.

¹⁸¹ *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, *UNRIAA*, Vol. XXII, p. 335, at p. 369, para. 151.

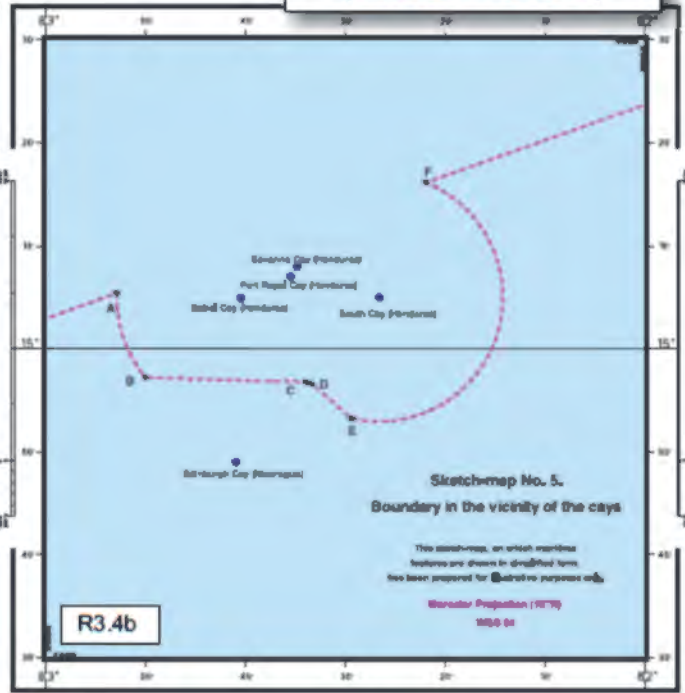
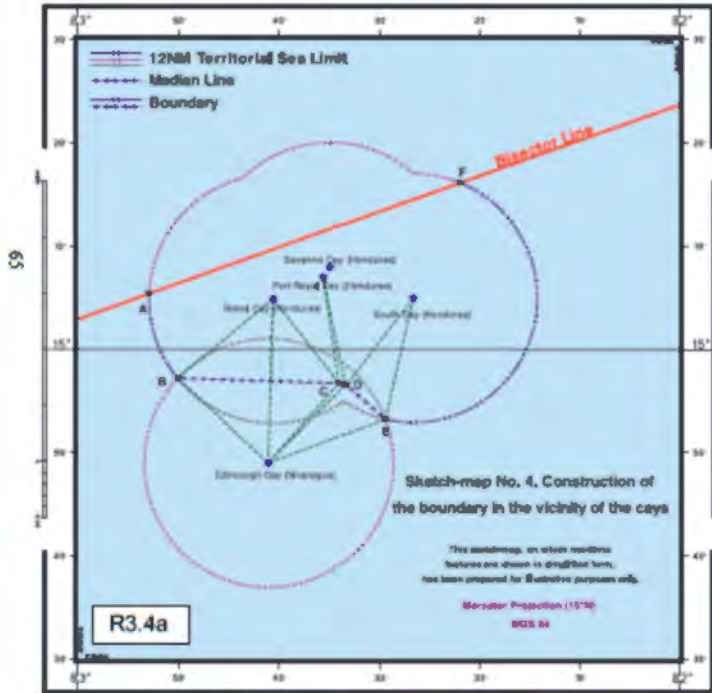
¹⁸² BR, paras. 2.88-2.91.

ICJ of conceptualizing coasts in terms of the predominant mainland relationship; *second*, the practice of enclaving islands located in the vicinity of, and especially those on the “wrong” side of, a mainland delimitation line; and *third*, the practice of giving no effect to islands in the delimitation beyond the territorial sea. Furthermore, in these two cases, the ICJ delimited boundaries separating, in part, the territorial sea of an island (or islands) from the EEZ/continental shelf entitlements generated by the mainland coasts of the parties.

3.25. It will be noted that in both cases the ICJ did accord the islands in question a full 12-nautical-mile territorial sea. The ICJ then followed the outer limit of the territorial sea back to the mainland delimitation which constituted the remainder of the delimitation. In other words, these islands, although not considered special circumstances in the context of a territorial sea/territorial sea delimitation, were disregarded for the EEZ/continental shelf delimitation. Giving these islands a full 12-nautical-mile territorial sea, but no more, was appropriate for the following reasons. In *Nicaragua v. Honduras*, a Nicaraguan island (Edinburgh Cay) was situated opposite and within 24 nautical miles of the enclaved Honduran islands. This was illustrated clearly in sketch-maps Nos. 4 and 5 of the Judgment (see sketch-maps Nos. R3.4a and R3.4b reproducing the ICJ’s maps on the next page). To give the Honduran islands less than 12 nautical miles, while the similarly situated Nicaraguan island received a full 12-nautical-mile territorial sea, would have been inequitable. In *Romania v. Ukraine*, the 12-nautical-mile arc drawn around Serpents’ Island, corresponded almost exactly with the mainland delimitation line as illustrated in sketch-map No. 8 of the Judgment (see sketch-map No. R3.5 reproducing the ICJ’s map at page 67). Serpents’ Island was not on the “wrong” side of the delimitation line, nor was virtually all of its 12-nautical-mile territorial sea entitlement.

3.26. In the present case, which is remarkable for a combination of factors, St. Martin’s Island is on Myanmar’s side of the mainland-only delimitation line, the delimitation beyond Point C of the line proposed by Myanmar is between purely adjacent coasts (St. Martin’s Island and the dominant Myanmar mainland), and there is no opposite Myanmar island within 24 nautical miles of St. Martin’s Island that offsets the distorting effect of St. Martin’s Island or that would enjoy a full 12-nautical-mile territorial sea at the expense of St. Martin’s Island. For these reasons, St. Martin’s Island should be treated as a special circumstance and should be given less than full effect on the delimitation within 12 nautical miles.

Sketch-maps Nos. R3.4a and R3.4b
 THE PROPER CONSTRUCTION OF A
 BOUNDARY WHEN ISLANDS ARE
 LOCATED ON THE "WRONG" SIDE
 OF A BISECTOR LINE
 (NICARAGUA v. HONDURAS)



Source: *Nicaragua v. Honduras*, sketch-map no. 4 at p.753 and sketch-map no. 5 at p. 754.

Sketch-map No. R3.5
 THE PROPER CONSTRUCTION OF A BOUNDARY WHEN AN ISLAND
 IS LOCATED IN THE VICINITY OF THE EQUIDISTANCE LINE
 (ROMANIA v. UKRAINE)



Source: Romania v. Ukraine, sketch-map no. 8 at p. 132.

VI. Assertion that Myanmar's Claim Is Inconsistent with its Own Practice

3.27. Bangladesh asserts that Myanmar's line is "inconsistent with its own practice in relation to its maritime delimitation with Thailand"¹⁸³. The reference is to the Agreement between Myanmar and Thailand on the Delimitation of the Maritime Boundary between the two Countries in the Andaman Sea¹⁸⁴. Bangladesh asserts that this Agreement "deals with a maritime delimitation that is remarkably similar to the present situation"¹⁸⁵. This is not so. There may be many reasons of policy why a particular negotiated maritime boundary is agreed between two States; the fact that State A has reached a particular solution in its negotiations with State B is of no significance when it comes to a third-party decision on the maritime boundary between State A and State C. And in any event, Myanmar's past practice is in no way inconsistent with its position in the present case.

3.28. There are at least three important differences. First, the delimitation effected by the 1980 Agreement between Myanmar and Thailand starts from a Point 1 which is some 47 nautical miles from the terminus of the land boundary in the mouth of the Pakchan River. Second, the area between the mouth of the Pakchan River and Point 1 was the subject of a 1868 Agreement between Great Britain and Siam, which allocated islands and may also have come to be regarded as fixing a maritime line¹⁸⁶. And, third, as with the island-to-island boundary in *Nicaragua v. Honduras*, equidistance was appropriate in the Myanmar-Thailand Agreement since "[i]t was necessary to draw a lateral boundary between their offshore islands which were of similar size, were equally distant from the coast, and had a common alignment"¹⁸⁷. Or, as Sir Derek Bowett wrote of equidistance in the context of these particular balancing islands, "[t]his was a boundary between adjacent states that did use equidistance, but both parties had offshore islands offsetting each other so that the equidistance line was not distorted"¹⁸⁸.

¹⁸³ BR, paras. 2.62, 2.77-2.78.

¹⁸⁴ *International Maritime Boundaries*, Report Number 6-4, Vol. II, p. 1341.

¹⁸⁵ BR, para. 2.77.

¹⁸⁶ *International Maritime Boundaries*, Report Number 6-4, Vol. II, pp. 1349-1350.

¹⁸⁷ *Ibid.*, p. 1342.

¹⁸⁸ D. Bowett in *International Maritime Boundaries*, Vol. I, p. 135, note 3.

3.29. Bangladesh's reference to the Agreement between Myanmar and India in the Andaman Sea is also misleading¹⁸⁹. In its Reply, Bangladesh described this Agreement as a "departure" and "relief" from equidistance¹⁹⁰. Yet in fact, this delimitation line is a prime example of avoiding the distorting effect of small islands: the so-called "departure" from equidistance was agreed by the parties in order to give limited effect to India's Narcondam and Barren Islands in the Andaman Sea¹⁹¹.

VII. Security Interests/Non-Encroachment

3.30. Bangladesh accuses Myanmar of providing no evidence that the right of unimpeded passage has been problematic in any way. This is to misunderstand Myanmar's argument based on its security interests. As the Tribunal said in the *Guinea/Guinea Bissau* Award:

« Son objectif premier a été d'éviter que, pour une raison ou pour une autre, une des Parties voit s'exercer en face de ses côtes et dans leur voisinage immédiat des droits qui pourraient porter atteinte à son droit au développement ou compromettre sa sécurité. »

"Its prime objective has been to avoid that either Party, for one reason or another, should see rights exercised opposite its coast or in the immediate vicinity thereof, which could prevent the exercise of its own right to development or compromise its security."¹⁹²

3.31. The Tribunal in *Guyana/Suriname* also considered this issue. In delimiting the territorial sea boundary between the parties, the Tribunal constructed a line that "avoids a sudden crossing of the area of access to the Corentyne River, and interposes a gradual

¹⁸⁹ BR, para. 3.68.

¹⁹⁰ BR, para. 3.5.

¹⁹¹ This agreement is discussed below in Chapter 6. An extract of the map of the delimitation produced by Bangladesh in BR, Vol. II, Figure R3.5, also may be found in Chapter 6.

¹⁹² *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, UNRIAA, Vol. XIX, p. 194, para. 124. The *Guinea/Guinea-Bissau* Award was done in French and Portuguese, with the French text being the only one valid in law. The English translation is from *ILM*, Vol. 25, 1986, p. 302. This passage was cited with approval (albeit with a somewhat less accurate English translation) in *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, UNRIAA, Vol. XXII, p. 370, para. 157.

transition from the 3 nm to the 12 nm point. It also ensures that the line is convenient for navigational purposes.”¹⁹³

3.32. Myanmar finds itself in a similar position. If St. Martin’s Island were to have a full 12-nautical-mile territorial sea to the south, the maritime area within which Myanmar ships, sailing to and from the mouth of the Naaf River, would only be entitled to the right of innocent passage under UNCLOS would be significantly enlarged. It should be recalled that under the innocent passage regime, the coastal State has considerable powers in relation to foreign ships. In particular, and crucially, the coastal State

“may suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises.”¹⁹⁴

Since future tensions cannot be excluded, notwithstanding the current good relations between the Parties, this is a matter of a serious concern.

VIII. The Appropriate Junction between the Territorial Sea and EEZ/Continental Shelf Delimitation Lines

3.33. As noted at the beginning of this Chapter, the Parties take very different approaches to the method to be used to connect the territorial sea boundary between the opposite coasts of St. Martin’s Island and Myanmar’s mainland with the EEZ/continental shelf boundary between their adjacent mainland coasts. This transition begins at Point B5/6A. As described, from Point B5/6A Myanmar brings the delimitation around St. Martin’s Island to reconnect with the equidistance boundary drawn between the mainland coasts of the Parties at Point E. In stark contrast, Bangladesh continues its equidistance delimitation from Point B5/6A into areas of increasing adjacency between St. Martin’s Island and the Myanmar coast until it reaches the intersection of the outer limits of both States’ territorial seas at Point 8A/Point 7.

3.34. Bangladesh’s approach does not take account of St. Martin’s Island as a special circumstance in contravention of article 15 of UNCLOS. More importantly, however, is the

¹⁹³ *Guyana/Suriname*, Award of 17 September 2007, *ILM*, Vol. 47, 2008, para. 324.

¹⁹⁴ UNCLOS, art. 25 (3).

manner in which Bangladesh connects its territorial sea endpoint to its mainland-only angle bisector. It does not, as might be expected, follow the outer limit of the territorial sea around to the intersection with its mainland-only angle bisector, despite clear guidance on this point in the two most recent international maritime delimitation decisions, *Nicaragua v. Honduras* and *Romania v. Ukraine*. Instead, Bangladesh reverses the process. It plucks up its mainland-only angle bisector, moves it nearly 12 nautical miles to the south-east and attaches it to Point 8A/Point 7. This, apparently, is the “slight” transposition referred to in passing in the Memorial and Reply¹⁹⁵. This “slight” transposition – the effect of which is not at all slight, adding an additional 8,000 square kilometres to the area already taken in by the original, ill-conceived, angle bisector – defies the logic of the angle-bisector method so vigorously advocated by Bangladesh. The effect of this approach is felt throughout the entire EEZ/continental shelf delimitation, an issue that will be addressed more fully in Part II below.

3.35. Here the important issue is Bangladesh’s reliance on Point 7 as both an endpoint for the territorial sea boundary *and* a starting point for the EEZ/continental shelf boundary. As discussed in Chapter 2 above¹⁹⁶, and in the Counter-Memorial¹⁹⁷, Point 7 was never agreed as a terminus point of the territorial sea boundary and certainly not as a starting point of the EEZ/continental shelf boundary¹⁹⁸. Myanmar has already drawn attention to the special considerations applicable to the final point, Point 7, of the allegedly agreed territorial sea boundary¹⁹⁹. No agreement was reached in 1974 on the starting point of the EEZ/continental shelf boundary. This remains the position today.

3.36. From the very beginning, a distinction was drawn between Points 1 to 6 in the 1974 agreed minutes, on the one hand, and Point 7, on the other. For example, in the draft treaty prepared by Bangladesh and handed to the Myanmar delegation on 20 November 1974 (as is recorded in the 1974 agreed minutes), Points 1 to 6 were dealt with in article II while Point 7 was dealt with in article III. According to its terms, Article II of the draft treaty dealt with

¹⁹⁵ BM, para. 6.73, BR para. 3.133.

¹⁹⁶ Paras. 2.39-2.40 above.

¹⁹⁷ MCM, paras. 4.30-4.32.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*, and paras. 2.39-2.40 above.

“the delimitation of the territorial waters between St. Martin Island of Bangladesh and the Burmese mainland coast lines”. The boundary was said to be “not a median line based on the configuration of the coast line but a line between selected landmarks on both Bangladesh (St. Martin Island) and Burmese territory”²⁰⁰. Point 7, dealt with in a separate provision, was described as being “located at the intersection of arcs of 12 nautical miles from Points (I) and (J) located on the coasts of St. Martin Island and Burma respectively”.

3.37. While, in the subsequent negotiations, neither side raised issues concerning Points 1 to 6, both sides proposed alternatives for Point 7 on various occasions. As early as the third round, in February 1975, just three months after the 1974 agreed minutes, both sides proposed points other than Point 7 for the start of the EEZ/continental shelf boundary²⁰¹. Such proposals continued, for example at the first round of resumed talks in March/April 2008²⁰² and at the second round of resumed talks in September 2008²⁰³. Bangladesh’s assertion that Myanmar only questioned Point 7 at a late stage is wrong.

IX. Bangladesh’s Assertion of Myanmar’s “long-standing acceptance that St. Martin’s Island is entitled to a 12 M territorial sea”

3.38. In its Reply, Bangladesh asserts that what it terms “Myanmar’s new argument” “marks a sharp departure from Myanmar’s long-standing acceptance that St. Martin’s Island is entitled to a 12 M territorial sea”²⁰⁴.

3.39. Even if this were true, that would not invalidate Myanmar’s position in these proceedings before ITLOS. A party to proceedings before an international court or tribunal is not bound by positions adopted in the course of negotiations. Any other approach would be a significant impediment to the meaningful conduct of negotiations, which requires the parties

²⁰⁰ Article II, paragraph 1, of the draft Agreement reproduced in BM, Vol. III, Annex 3.

²⁰¹ MCM, paras. 3.26, 4.30.

²⁰² See the 2008 agreed minutes, paras. 4 and 5 reproduced in BM, Vol. III, Annex 7.

²⁰³ MCM, paras. 3.45, 3.46.

²⁰⁴ BR, paras. 2.72, 2.93-2.97.

to be able to put forward proposals and compromises without the fear that they may be prejudicing their legal position if the matter ever came before a court or tribunal²⁰⁵.

3.40. In any event it is simply not the case that “as early as 1974 Myanmar agreed that St. Martin’s Island was entitled to full effect”²⁰⁶. As explained in the Counter-Memorial and in Chapter 2 above, the agreed minutes were merely an *ad hoc* conditional understanding reached at a certain point in negotiations that never reached a conclusion.

3.41. In this connection, Bangladesh first cites the streamer incident²⁰⁷, which Myanmar has already shown to be irrelevant²⁰⁸. Bangladesh next cites passages from the *Tunisia/Libya*, *Libya v. Malta*, and *Jan Mayen* cases. Yet none of these was in any way similar to the present case. In *Jan Mayen*, the ICJ simply pointed out that Denmark’s opposition to a median line could not have been prejudiced because it had consistently rejected the median line in diplomatic correspondence²⁰⁹. It does not in any way support Bangladesh’s position. As for the other two cases referred to, as shown in Chapter 2, in the present case neither Bangladesh let alone Myanmar has acted in a way to suggest that they regarded the 1974 agreed minutes as binding. The present case is similar to *Libya v. Malta*, where the ICJ found that

“[i]t is however unable to discern any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court. Its decision must accordingly be based upon the application to the submissions made before it of principles and rules of international law.”²¹⁰

²⁰⁵ MCM, para. 5.79, quoting *Factory at Chorzów, Merits, Judgment, 1928, P.C.I.J., Series A, No. 17*, p. 51.

²⁰⁶ BR, para. 2.93.

²⁰⁷ BR, para. 2.94.

²⁰⁸ Para. 2.67 above.

²⁰⁹ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 38, para. 38.

²¹⁰ *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment, I.C.J. Reports 1985*, p. 13, para. 25.

X. Base Point Issues

3.42. Bangladesh accuses Myanmar of “picking and choosing those agreed points that it wants to use (i.e., Point 1) and disregarding those that are now seen to be inconvenient (i.e., Points 2 to 7)”. It suggests this is “an *à la carte* approach” to the terms of the agreed minutes²¹¹. This is not so. Myanmar does not propose Point 1 because it features in the agreed minutes, but because it is the last point of the land boundary agreed by treaty between the Parties²¹². It is an elementary proposition in maritime boundary making that the maritime boundary should commence at the terminus of the land boundary when, as here, the location of that terminus is clear.

3.43. Bangladesh further complains that “the initial segment of Myanmar’s ‘equidistance line’ (between what it labels points A and B) is incorrectly drawn”²¹³, and that Myanmar’s choice of base point $\beta 1$ “ignored the nearest points on the Bangladesh low water line” which, if used to calculate the short lateral equidistance line segment from the mouth of the Naaf River to the first turning point influenced by St. Martin’s Island, would push that segment slightly to the south (from Myanmar’s point B to Bangladesh’s point 2A)²¹⁴.

3.44. In fact, both Myanmar and Bangladesh have chosen a single base point on each coast to define this short, initial segment²¹⁵. The result is both a simplification of the true coastal configuration in the mouth of the Naaf River and a simplification of the first segment of the equidistance line. There are, in fact, many base points on both coasts that are nearer to some part of this segment than the two base points selected by the Parties, but neither Party has chosen to use more than two, one on each coast, to calculate this first segment of the equidistance line. This may explain Bangladesh’s description of its line as a “simplified strict equidistance line”. The important point here is that both Parties agree that equidistance is the appropriate methodology in the first section between the adjacent mainland coasts (A-B or

²¹¹ BR, para. 2.61.

²¹² MCM, paras. 2.27-2.29 and 4.68 (i).

²¹³ BR, para. 2.62.

²¹⁴ BR, para. 2.100.

²¹⁵ Base point issues are discussed further in Chapter 5.

1A-2A) and the second section between the opposite coasts of St. Martin's Island and Myanmar's mainland (B-B5 or 2A-6A)²¹⁶.

XI. Summary

3.45. For the reasons given in the Counter-Memorial and in the present Chapter, Myanmar submits that, in the area around St. Martin's Island, the delimitation between the maritime areas appertaining to Myanmar and those appertaining to Bangladesh should follow the line described at paragraph 4.68 of the Counter-Memorial. That line starts at Point A and ends at Point E, and is shown on sketch-map No. 4.1 of the Counter-Memorial at page 81 and sketch-map No. R1.1 of this Rejoinder at page 5. It has the following co-ordinates (referenced to WSG84):

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

²¹⁶ BR, para. 3.31.

PART II

THE DELIMITATION OF THE EEZ AND THE CONTINENTAL SHELF

II.1. As already explained²¹⁷, Myanmar maintains that there is no ground whatsoever which could justify a discussion of a maritime boundary between the Parties beyond 200 nautical miles: Bangladesh has no right whatsoever to a continental shelf beyond 200 nautical miles. Therefore the present Part describes the maritime boundary between Bangladesh and Myanmar up to the tripoint where it meets the continental shelf and exclusive economic zone of India – a point which cannot be precisely determined by the Tribunal in the absence of that country in the present proceedings.

II.2. In the present Part, Myanmar answers Chapter 3 of the Applicant's Reply and establishes successively:

- that Bangladesh's conception of the equitable principles/relevant circumstances *rule* is erroneous (*Chapter 4*);
- that Bangladesh's use of the angle-bisector method is erroneous (*Chapter 5*); and
- that the line claimed by Myanmar leads to an equitable result (*Chapter 6*).

²¹⁷ See paras. 1.11 and 1.28 above. See also MCM, paras. 5.155-5.162.

CHAPTER 4

**BANGLADESH'S ERRONEOUS CONCEPTION OF THE
EQUITABLE PRINCIPLES/RELEVANT CIRCUMSTANCES RULE**

4.1. Bangladesh asserts that Myanmar has taken “a completely uncritical” approach of the role of equidistance in the law of maritime delimitation²¹⁸. This is not so: Myanmar acknowledges the role of equitable principles to mitigate the effects of equidistance when need be (I). However there can be no doubt that, while equidistance has always played a role in maritime delimitation, its function is now inescapable in the first stage of the standard three-stage method for applying the equitable principles/relevant circumstances rule (II).

I. Equidistance and Equitable Principles

4.2. Bangladesh seeks proof of the extreme position it attributes to Myanmar in an incomplete quote by which the Applicant attributes – four times! – to the Respondent the belief that “rights to maritime areas are governed by equidistance”²¹⁹. In all those cases, Bangladesh omits to put this phrase in its context²²⁰:

- *first*, it ends with the important precision “not vice versa” which is borrowed from the 1993 Judgment of the ICJ in the case concerning *Jan Mayen*, quoted correctly in the Applicant’s Memorial, according to which “the sharing-out of the area is ... the consequence of the delimitation, not vice-versa”²²¹ and quoted again by Myanmar in its Counter-Memorial²²²;
- *second*, the phrase is used in a specific background: it is intended to show that the function of the delimitation is to decide between overlapping claims and that States cannot maintain claims beyond a maritime boundary determined in accordance with

²¹⁸ BR, para. 3.5.

²¹⁹ MCM, para. 5.111, quoted in BR, paras. 3.5 and 3.18.

²²⁰ A complete quotation appears at BR, para. 3.25.

²²¹ BM, para. 6.28 (quoting para. 64 of the 1993 ICJ Judgment, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 66, para. 64).

²²² MCM, para. 5.108.

the applicable principles; in this respect, equidistance plays a predominant – although not exclusive – role.

4.3. In this respect, it must be clearly stated again that Myanmar does not claim that the boundary line finally decided by the Tribunal does not need to lead to an equitable result. This is expressly demanded by articles 74 (1) and 83 (1) of UNCLOS and this is the reason why, as Myanmar made clear in its Counter-Memorial²²³, equitable considerations play an important role at two different stages of the delimitation. First, *after* the drawing of a provisional *equidistance* line, the Tribunal must, in a 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”²²⁴ – this is the second phase of the three-stage method of delimitation described by the ICJ in its unanimous 2009 Judgment in *Romania v. Ukraine*. Second, at the third stage, the Tribunal will have to “verify that the line ... does not, as it stands, lead to an inequitable result ...”²²⁵.

4.4. However, two elements, which Bangladesh persists in making as obscure and confused as possible, must be clarified.

4.5. In the first place, the Applicant persists in confusing the *method* of delimitation beyond the territorial sea with the *principle* of delimitation. In fact – and contrary to Bangladesh’s allegations²²⁶ – the now firmly established method of implementing the “equitable principles/relevant circumstances *rule*”²²⁷ is the “equidistance/relevant circumstances”²²⁸ three-stage *method*.

²²³ See, for example, MCM, paras. 5.31, 5.36, 5.102, and 5.145-5.146.

²²⁴ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 101, para. 120.

²²⁵ *Ibid.*, p. 103, para. 122. Both paragraphs of the Judgment are quoted in full in MCM, para. 5.31.

²²⁶ See BR, paras. 3.16-3.28.

²²⁷ See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 111, para. 231 and *Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 62, para. 56.

²²⁸ 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. 214-215, para. 242 and particularly p. 230, para. 304.

4.6. In the second place – and this explains the first point – Bangladesh’s failure to take into account the development in the case law over time leads it to give a totally distorted and outdated picture of the applicable law as if we were still in the late 1960s while the law of maritime delimitation has considerably developed and matured since the ICJ Judgment in the *North Sea Continental Shelf* cases – which seems to constitute the legal horizon of the Applicant.

II. The Progressive Strengthening of the Role of Equidistance in Maritime Delimitation

4.7. It is however, quite telling that Bangladesh itself agrees “that the now-standard approach in the case law is first to draw a provisional equidistance line and then determine whether there are relevant circumstances that warrant a departure from it”²²⁹. In writing this, it acknowledges that the law has crystallized or, at least, became more precise and certain in this matter during the last forty years, in great part thanks to the case law of the ICJ and of various arbitral tribunals and reflected in the practice of States. Therefore, while there is no doubt that the 1969 ICJ Judgment had played a role on the establishment of the modern law of the sea (A), this law has been completed and consolidated since then and it has now become undisputable that it is necessary to start the delimitation process by drawing a provisional equidistance line (B).

A. The 1969 ICJ Judgment and its Influence on the Establishment of the Modern Law of the Sea

4.8. What characterizes the 1969 Judgment is first of all its indeterminacy. In the most relevant passage of the Judgment in this respect, the ICJ declared:

“The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.”²³⁰

²²⁹ BR, para. 3.33.

²³⁰ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 49, para. 90.

No “imperative rule”, “various principles or methods”, “equitable principles”, “reasonable result”... This kind of “guidelines” offers only limited guidance for concrete delimitations which can only be done on a case-by-case basis, as the Chamber of the ICJ noted fifteen years later in the *Gulf of Maine* case²³¹. But since 1969 those uncertainties have been largely cleared up.

4.9. Nevertheless, there is no doubt that the ICJ’s 1969 Judgment played a role in the adoption of the rule finally embodied in articles 74 (1) and 83 (1) of the 1982 Convention. However, while it is true that the ICJ’s Judgment in the *North Sea Continental Shelf* cases had been mentioned at various occasions during the Third United Nations Conference on the Law of the Sea, it had not the weight that Bangladesh seeks to give it²³².

4.10. In fact, regarding the formula for delimiting maritime boundaries in the case of States opposite or adjacent to each other with overlapping exclusive economic zone or continental shelf areas, the 1969 ICJ’s Judgment was one source of inspiration among others, like article 6 of the 1958 Geneva Convention on the Continental Shelf or State practice²³³. In fact, several delegations nuanced the relevance of these cases and put forward other working bases. For example the delegation of El Salvador stated that:

“The 1969 judgment of the International Court of Justice on the North Sea Continental Shelf cases had been exploited excessively. A distinction should be drawn in that judgment between that which constituted a dictum of general application and that which applied solely to the particular circumstances of the case *sub judice*. [El Salvador] favoured provisions similar to those contained in article 6 of the 1958 Geneva Convention on the Continental Shelf on the understanding that the principle of equidistance, with exceptions in special circumstances, would not

²³¹ See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 290, para. 81.

²³² BR, paras. 3.46-3.47.

²³³ See, for example, the statement of the Cypriot delegation at the 40th plenary meeting, 12 July 1974, A/CONF.62/ SR.40, *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. I, p. 175, para. 41. See also the statement of the Greek delegation at the 18th meeting of the Second Committee, 29 July 1974, A/CONF.62/C.2/SR.18, in *ibid.*, Vol. II, p. 152, para. 50.

merely serve as a method of delimitation but would become a rule of delimitation.”²³⁴

Similarly, even the explanatory note of the Irish draft article on delimitation of areas of continental shelf between neighbouring States underlined that “[r]egard has also been had to the frequent use of the equidistance criterion as a starting-point in negotiations between States”²³⁵. This is remarkable since Bangladesh exclusively invokes the position of Ireland in support of its allegation that “[t]he ICJ’s judgment in the *North Sea* cases featured prominently in the negotiations leading to the adoption of the 1982 Convention”²³⁶.

4.11. The different sources of inspiration for article 83 especially are reflected in the Main Trends Working Paper of the Second Committee²³⁷. Most notably, Provision 82 Formula A repeated article 6 of the 1958 Convention on the Continental Shelf. Formulas B, C and D incorporated language similar to proposals made at the second session by States supporting delimitation on the basis of an equidistance line and by States favouring delimitation in accordance with equitable principles.

4.12. In any case, while it is true that the 1969 ICJ Judgment had been mentioned by some States arguing that emphasis should be placed on equitable principles, the formula used by the ICJ was not simply reproduced in articles 74 and 83. In fact, they only refer to the result of the delimitation, not to the method to be used. They are recognised as a “neutral formula”²³⁸ and represent “a balance resulting from arduous negotiations”²³⁹ between the

²³⁴ 18th meeting of the Second Committee, 29 July 1974, A/CONF.62/C.2/SR.18, in *ibid.*, Vol. II, p. 149-150, para. 14. See also the statements of the delegations of Cyprus and Malta at the 20th meeting of the Second Committee, 30 July 1974, A/CONF.62/C.2/SR.20, in *ibid.*, Vol. II, paras. 43 and 105.

²³⁵ Ireland: draft article on delimitation of areas of continental shelf between neighbouring States, A/CONF.62/C.2/L.43, in *ibid.*, Vol. III, p. 221.

²³⁶ BR, para. 3.46; see also para. 3.47.

²³⁷ Statement of activities of the Conference during its first and second sessions, 1974, U.N. Doc. A/CONF.62/L. 8/Rev.1, in *ibid.*, Vol. III, pp. 119-120.

²³⁸ Statement by the delegation of Colombia dated 1 April 1982, A/CONF.62/WS/18, in *ibid.*, Vol. XVI, p. 257.

²³⁹ *United Nations Yearbook*, 1982, p. 197.

proponents of the two groups who were evenly divided. Finally, as Ireland itself admitted, “the efforts to express the relevant law substantively” were abandoned²⁴⁰.

4.13. Articles 74 and 83 of UNCLOS have not put an end to the indeterminacy of the principles enunciated in the 1969 Judgment, as was also noted by the ICJ Chamber in *Gulf of Maine*. But, as it also rightly stated, the identical wording of these provisions limits itself

“to expressing the need for settlement of the problem by agreement and recalling the obligation to achieve an equitable solution. Although the text is singularly concise it serves to open the door to continuation of the development effected in this field by international case law.”²⁴¹

B. The Progressive Affirmation of the Necessity to Start by Drawing a Provisional Equidistance Line

4.14. More than a quarter of century later, this development has largely occurred and has resulted in a clear and uniform method for achieving the equitable result imposed by articles 74 (1) and 83 (1) of UNCLOS. The indeterminate and confused “all-equitable approach” still used during the 1980s has been definitely set aside and replaced by the three-stage approach so clearly expressed by the ICJ in the unanimous 2009 Judgment in *Romania v. Ukraine*. The main stages of this evolution are well known. It suffices to recall them briefly:

4.15. Already in 1977, the Anglo-French Court of Arbitration observed that:

“it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation.”²⁴²

4.16. This passage was quoted with approval by the ICJ in its 1993 Judgment concerning *Jan Mayen* in which the Court found that

²⁴⁰ 186th plenary meeting, 6 December 1982, A/CONF.62/SR.186, *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. XVII, p. 24, para. 9.

²⁴¹ *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. 95.

²⁴² *Delimitation of the Continental Shelf between France and the United-Kingdom*, Decision of 30 June 1977, *UNRIIAA*, Vol. XVIII, p. 116, para. 249.

“in respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases^[243], it is in accord with precedents to begin with the median line as a provisional line and then to ask whether ‘special circumstances’ require any adjustment or shifting of that line.”²⁴⁴

4.17. Some nine years later, in *Cameroon v. Nigeria*, the ICJ recalled that, on several occasions, it had

“made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’.”²⁴⁵

4.18. Or, as very clearly noted by the Arbitral Tribunal in *Guyana/Suriname*:

“In the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace a clear role for equidistance”²⁴⁶;

and the Tribunal went on to explain that:

“Articles 74 and 83 of the Convention require that the Tribunal achieve an ‘equitable’ solution. The case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in

²⁴³ Besides the 1977 Award, the ICJ had mentioned the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*I.C.J. Reports 1982*, p. 79, para. 110); the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (*I.C.J. Reports 1984*, p. 297, para. 107); and the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*I.C.J. Reports 1985*, p. 37, para. 43).

²⁴⁴ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, *Judgment*, *I.C.J. Reports 1993*, pp. 60-61, para. 51. See also, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1994*, pp. 110-111, paras. 227-230.

²⁴⁵ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Judgment*, *I.C.J. Reports 2002*, p. 441, para. 288.

²⁴⁶ *Guyana/Surinam*, Award of 17 September 2007, *ILM*, Vol. 47, 2008, pp. 212-213, para. 335 (also available on <http://www.pca-cpa.org/>).

appropriate cases, begin by positing a provisional equidistance line which may be adjusted in the light of relevant circumstances in order to achieve an equitable solution. The Tribunal will follow this method in the present case.²⁴⁷

4.19. The unanimous Judgment of the ICJ in *Romania v. Ukraine* is the culmination of this development. The ICJ recalls that:

“115. When called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages.

116. 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^[248]), have in recent decades been specified with precision. 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. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment, I.C.J. Reports 2007 (II)*, p. 745, para. 281).²⁴⁹

4.20. Three different aspects deserve to be noted.

4.21. First, the ICJ introduces the time factor by stressing that the three-stage method has been specified with precision “*in recent decades*”. This clearly shows that it is untenable to deny the existence of a development in the law since 1969, contrary to Bangladesh’s thesis²⁵⁰.

4.22. Second, the content of the clarification which has taken place “in recent decades” is described with the greatest clarity by the ICJ: it consists in three stages which are clearly defined and the first of which is the drawing of an equidistance line. This is *the* method which

²⁴⁷ *Ibid.*, p. 213, para. 342.

²⁴⁸ See also p. 47, para. 63 where the ICJ notes that “[i]t is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result”.

²⁴⁹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment, I.C.J. Reports 2009*, p. 101, paras. 115-116.

²⁵⁰ See in particular BR, paras. 3.15-3.16, see also paras. 1.12, 3.6, 3.8, 3.26 *in fine*.

has to be followed in principle in all maritime delimitation cases. That is not to say that the aim of reaching an equitable solution has disappeared; but “[a]t this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data”²⁵¹.

4.23. Third, still in principle, these “geometrical criteria” are used to draw an equidistance line to the exclusion of any other method. It is only if “there are *compelling* reasons that make this *unfeasible* in the particular case”²⁵² that it is possible to have recourse to other “objective” methods – including that of the “bisector”. In this respect, it must be noted that Bangladesh repeatedly criticized Myanmar for considering that a departure from the method of the provisional equidistance line is acceptable only when it is not technically feasible to draw such a line²⁵³; however, this is precisely the principle that the ICJ set out in *Romania v. Ukraine* and implemented in *Nicaragua v. Honduras*²⁵⁴. As Myanmar will show in Chapter 5 below, the drawing of an equidistance line is perfectly feasible in the present case.

4.24. According to Bangladesh, “equidistance is [not] the purely objective construct Myanmar makes it out to be”²⁵⁵ because the construction of the equidistance line requires the determination of the appropriate base points that control this line. It is certainly true that any method of delimitation implies some element of subjectivity. However, the equidistance method is much less subjective than others. Besides, contrary to what Bangladesh alleges, the construction of the equidistance line, and more specifically the determination of the appropriate base points, is not a subjective operation and is not subject to the parties’ arbitrary assessment.

4.25. This was the position of the ICJ in *Romania v. Ukraine*:

²⁵¹ *Ibid.*, p. 101, para. 118.

²⁵² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 101, para. 116 (emphasis added).

²⁵³ See, for example, BR, paras. 3.18-3.19, 3.21, 3.54, 3.138 and 3.162.

²⁵⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 745, para. 283: “Having reached the conclusion that the construction of an equidistance line from the mainland is *not feasible*, the Court must consider the applicability of the alternative methods put forward by the Parties.” (emphasis added).

²⁵⁵ BR, para. 3.32.

“In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court’s approach is to establish the provisional equidistance line. At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and *the line is plotted on strictly geometrical criteria on the basis of objective data.*”²⁵⁶

And the ICJ specified in the immediate following paragraph that:

“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 be delimited. ... When construction of a provisional equidistance line between adjacent States is called for, the Court will have in mind considerations relating to both Parties’ coastlines when choosing its own base points for this purpose. *The line thus adopted is heavily dependent on the physical geography* and the most seaward points of the two coasts.”²⁵⁷

4.26. For its part and by contrast, the application of the “angle-bisector method” “offers considerable opportunity for subjective manipulation”²⁵⁸. This explains why the ICJ deemed it necessary to recall, in *Nicaragua v. Honduras*, one of the rare cases when it used it, that “where the bisector method is to be applied, particular care must be taken to avoid ‘completely refashioning nature’ (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 49, para. 91)”²⁵⁹. As demonstrated in Section 2 of Chapter 5 below, Bangladesh’s application of the angle-bisector method in the present case perfectly illustrates the wide possibilities of manipulation.

4.27. It must also be noted that among the four examples invoked by Bangladesh as applying the “angle-bisector method”²⁶⁰, one (*Tunisia/Libya*) does not really use it, another

²⁵⁶ *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, para. 116 (emphasis added). See also *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. 212, para. 231.

²⁵⁷ *Ibid.*, p. 101, para. 117 (emphasis added).

²⁵⁸ BR, para. 3.30.

²⁵⁹ *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.

²⁶⁰ See paras. 5.55-5.59 below.

(*Guinea/Guinea Bissau*) is so eccentric that it is difficult to refer to it, and *Gulf of Maine* is now considered to be superseded by the subsequent practice. The latter shows, without the shadow of a doubt, that drawing a provisional *equidistance* line is the only acceptable method as long as it is feasible and that there exists no compelling reasons not to do so. This is precisely what proved to be the case in *Nicaragua v. Honduras*²⁶¹, which is the *only* case in the modern case law which resorted to the bisector.

²⁶¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 745, para. 283.

CHAPTER 5**BANGLADESH'S ERRONEOUS USE OF THE "ANGLE-BISECTOR METHOD"**

5.1. Repudiating what it recognizes as "the now-standard approach in the case law" – that is "to draw a provisional equidistance line and then determine whether there are relevant circumstances that warrant a departure from it"²⁶², Bangladesh seizes upon the "angle-bisector method" in order to draw the single delimitation line between the EEZ and the continental shelf of the Parties. As will be shown again in the present Chapter, there is no reason to depart from the equidistance/relevant circumstances method in the present case (I). Moreover, even accepting for the sole sake of the discussion that the so-called "angle-bisector method" could be applied in the present case, Bangladesh errs in its way of applying it (II).

I. There Is No Justification to Depart from the Equidistance Method

5.2. Bangladesh complains of Myanmar's application of the equidistance method. Bangladesh asserts in the Reply that "[e]ven beyond this cut-off effect, Myanmar's proposed equidistance line is infected with still other problems" and "far too many debilitating flaws to provide an acceptable result"²⁶³: the equidistance line would be "based on inappropriately small slices of micro-geography"²⁶⁴ (A) and would "inappropriately ignor[e] St. Martin's Island"²⁶⁵ (B). Before explaining why these arguments are wrong, Myanmar notes that they are in any case aimed against the way the equidistance method has been applied by Myanmar in this particular case, not against the use of the equidistance method itself. And indeed, these ill-founded criticisms do not justify the abandonment of the equidistance method in favour of the "angle-bisector method".

²⁶² BR, para. 3.33.

²⁶³ BR, para. 3.125.

²⁶⁴ BR, pp. 84 *ff.*, A.

²⁶⁵ BR, pp. 86 *ff.*, B.

A. The Base Points Determined by Myanmar Are Appropriate

5.3. One of the main arguments used by the Claimant to substitute the “angle-bisector method” to the application of the usual equidistance/relevant circumstances method is that the base points used by Myanmar to draw the equidistance line would be inappropriate²⁶⁶. Bangladesh’s grievance in this regard is twofold. Both reproaches fail.

1. The Choice of Five Base Points

5.4. Bangladesh first asserts that the direction of the equidistance line is controlled by five base points on both Parties’ coasts and that it would be “remarkable” to base a maritime boundary line “on such a small sampling of points”²⁶⁷, the location of which, according to the Reply, would be problematic as far as they would disadvantage Bangladesh²⁶⁸.

5.5. Once again, Bangladesh totally fails to base its claim on the international law of the sea as it stands today (none of its arguments are even supported by any case law) and especially on the well established methodology applicable for selecting base points so clearly expounded by the ICJ in *Romania v. Ukraine* (as explained in Myanmar’s Counter-Memorial²⁶⁹).

5.6. Two points are particularly important in that regard:

- i. to select appropriate base points, “particular attention” has to be “paid to those protuberant coastal points situated nearest to the area to [be] delimited”;
- ii. and the selection “is heavily dependent on the physical geography”²⁷⁰.

5.7. The TALOS guidelines²⁷¹ indicate for their part that

²⁶⁶ See MCM, paras. 5.88-5.101.

²⁶⁷ BR, para. 3.99.

²⁶⁸ BR, paras. 3.100-3.101, 3.103 and 3.105-3.108. Bangladesh alleges (twice) that “[b]ecause of the absence of additional Bangladesh base points north of β_1 , there is nothing to counteract the effects of Myanmar’s coast between base points μ_1 , μ_2 and μ_3 ” (BR, para. 3.105, and see also para. 3.101).

²⁶⁹ MCM, paras. 5.88 *ff.*

²⁷⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, para. 117.

“[o]nly *portions* of a State’s baseline will affect an equidistance line. By definition, the equidistance line will be constructed by using only the salient (seaward-most) basepoints. The number actually chosen will depend on the interplay of the relevant segments of baseline of both States, on the configuration of the coastline, and on the distance of the median line from the nearest basepoints. The greater the distance, the fewer the basepoints that are likely to affect it, and the greater the distance that may be selected between points along a smooth coast.”²⁷²

5.8. The application of this methodology can perfectly well lead to the selection of only a few base points, if those points are the salient points reasonably controlling the equidistance line.

5.9. Bangladesh wrongly declares in that regard that it would be “untenable” to use only five base points as Myanmar did. But in the *Romania v. Ukraine* case, it is exactly what the ICJ did. It used two base points on the Romanian coast and three base points on the Ukrainian coast²⁷³ and decided that the equidistance line controlled by these five base points achieved an equitable result. Moreover, only three of these five base points influenced the lateral portion of the boundary between the adjacent coasts of the parties (see sketch-map No. R5.1, reproducing the ICJ’s map No. 7, at page 97). In *Cameroon v. Nigeria*, the ICJ similarly decided that the strict equidistance line has to be based on two base points and that it achieved an equitable result²⁷⁴ (see sketch-map No. R5.2, reproducing the ICJ’s map No. 12, at page 99).

5.10. For Bangladesh to argue that base points β_1 , μ_1 , μ_2 and μ_3 would not be appropriate or “defensible” since they are located near the land boundary²⁷⁵ is also misconceived. It should be noted that the distance between β_1 and μ_1 is 6.56 kilometres (3.54 nautical miles) while the distance between landward Sulina Dyke and Tsyganka Island, which were accepted

²⁷¹ *Manual on Technical Aspects of the Law of the Sea – 1982* published by the International Hydrographic Bureau, 4th ed., March 2006.

²⁷² Point 6.2.2. “Selecting Basepoints” (emphasis added).

²⁷³ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 108, para. 141, p. 109, para. 148, and p. 111, para. 153.

²⁷⁴ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 443, para. 292.

²⁷⁵ BR, para. 3.105. In the Reply, Bangladesh complains that “basepoint β_1 is problematic due to its location just 2.5 M from the land boundary terminus” (BR, para. 3.102).

as base points by the ICJ in *Romania v. Ukraine*²⁷⁶, is 7.19 kilometres (3.88 nautical miles). As in the case between Romania and Ukraine, in the present case, *the fact is* that the most prominent base points on the coasts of the adjacent States are found in the vicinity of their land boundary terminus in the mouth of the Naaf River. From there the coasts of *both* States recede slightly. Bangladesh tries to characterize this situation as a “concavity within a concavity”²⁷⁷ but this is a one-sided assessment, and, in any event, is not a reference to the adjacent coast of Bangladesh which is quite straight if not slightly convex.

5.11. A delimitation line responds to coastal configuration. The line is “pushed” and “pulled” by the coast, not the other way round. The location of a base point on Bangladesh’s prominent Shahpuri point ($\beta 1$) is not open for debate, it is a fact of the coastal configuration. The location of points $\mu 1$, $\mu 2$ and $\mu 3$ is not open to debate either. They are, like $\beta 1$ for Bangladesh’s coast, a function of the natural geographic configuration of the mainland coasts of Myanmar. They are “a given”, “not an element open to modification by the [Tribunal] but a fact on the basis of which [it] must effect the delimitation”²⁷⁸.

5.12. However Bangladesh complains of this geography, asserting that the base points selected on Myanmar’s coast create an “increasingly prejudicial effect” on the equidistance line as it moves offshore²⁷⁹ and that “[b]ecause of the absence of additional Bangladesh base points north of $\beta 1$, there is nothing to counteract the effects of Myanmar’s coast between base points $\mu 1$, $\mu 2$ and $\mu 3$ ”²⁸⁰. Bangladesh is legally and factually wrong. It forgets that maritime delimitation depends on coastal geography, not vice versa.

²⁷⁶ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, pp. 106-108, paras. 133-141, (Sulina Dyke) and p. 109, para. 143 (Tsyganka).

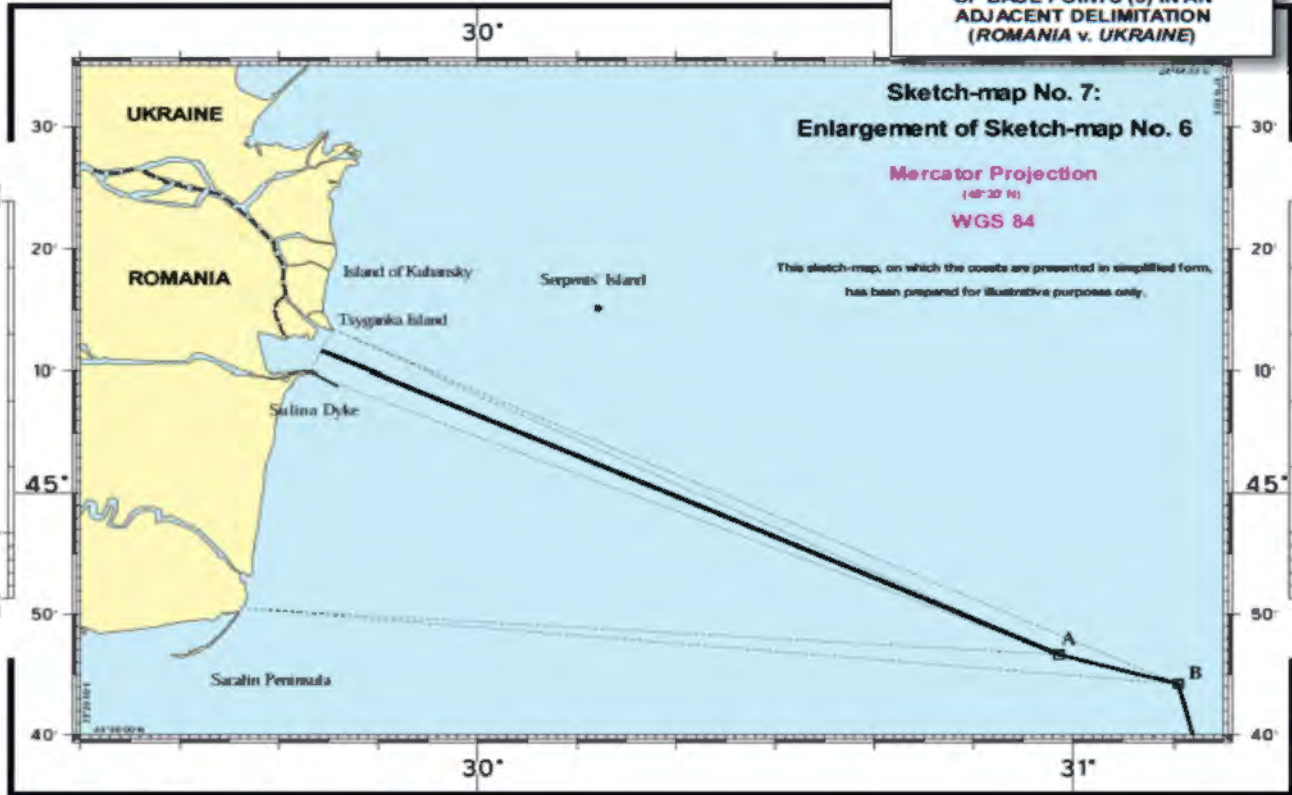
²⁷⁷ BR, para. 3.100.

²⁷⁸ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, pp. 443-445, para. 295.

²⁷⁹ BR, para. 3.107.

²⁸⁰ BR, para. 3.105.

Sketch-map No. R5.1
 THE USE OF A LIMITED NUMBER
 OF BASE POINTS (3) IN AN
 ADJACENT DELIMITATION
 (ROMANIA v. UKRAINE)



Source: *Romania v. Ukraine*, sketch-map no. 7 at p. 115.



5.13. Moreover, it has the relationship backwards. Bangladesh's base point β_1 , not Myanmar's base points, is the most prominent of the base points on either side of the land boundary terminus²⁸¹. As the equidistance line moves offshore, each successive base point of Myanmar pushes against this single Bangladesh's point in order to overcome its influence on the direction of the equidistance line. Myanmar only notes that the effect of β_1 is a function of the geography in which it finds itself. To argue that the Tribunal should change the only possible choice of the relevant base points because the particular geography prejudices Myanmar would be a direct request to refashion geography, an approach that has been rejected repeatedly by courts and tribunals faced with such requests.

5.14. As regards base point β_2 , Bangladesh complains that "it does not really affect the course of the maritime boundary line at all"²⁸². Bangladesh admits however that β_2 exerts an effect "in the last 10 M of Myanmar's equidistance line"²⁸³. That its effect does not extend any further is the result not of Myanmar's claim, but of the possible claim of India, a third State to the present proceedings.

5.15. In any case, this is again a function of geography. If base point β_1 is mainly controlling the equidistance line, it is because in the relevant area, adjacency, as a geographical fact, is more controlling than oppositeness. As in *Cameroon v. Nigeria*, the relevant sector of coast – that is the part of the coast immediately adjacent to the land boundary terminus – does not exhibit particular concavity²⁸⁴. The fact that base point β_2 does not come into effect until near the likely tripoint with India shows indeed that most of the length of the delimitation is fundamentally a relationship between adjacent coasts.

²⁸¹ Bangladesh is wrong to characterize β_1 as "the one Myanmar has conveniently placed near the land boundary terminus" (BR, para. 3.103 *in fine*). In fact there are dozens of base points in the immediate vicinity of the mouth of the Naaf River that have some influence on the equidistance line close to the coast, but as far as the equidistance line beyond the territorial sea of St. Martin's Island is concerned, the most prominent point on the Bangladesh's mainland coast is β_1 . This is a function of geography, not a "subjective manipulation" as Bangladesh alleges in the Reply (at paras. 3.30-3.31).

²⁸² BR, para. 3.103.

²⁸³ *Ibid.*

²⁸⁴ See para. 6.41 below.

2. *The Alleged Instability of Base Points $\beta 1$ and $\beta 2$*

5.16. Bangladesh continues to attempt to undermine the equidistance method by attacking the quality of the base points used to calculate the provisional equidistance line. It alleges that base point $\beta 2$ – a point which has little effect on the equidistance line except in the area of the notional tripoint with India – is inappropriate because it is located on coast that is “among the most unstable anywhere in the world”²⁸⁵. Bangladesh goes on, in an obvious reference to the judgment in *Nicaragua v. Honduras*, to describe the coast near $\beta 2$ as “characterized by a ‘very active morpho-dynamism’”²⁸⁶. Regarding base point $\beta 1$ Bangladesh does not go so far, but only alleges that it is located “on a low-lying coast that is subject to erosion and accretion”²⁸⁷. The consequence of this alleged instability would, according to Bangladesh, radically “undermin[e] the viability of the equidistance *method* in this case”²⁸⁸. This reasoning is totally flawed.

5.17. First, Bangladesh confuses the alleged inappropriateness of the base points selected by Myanmar and the purported impossibility of using the equidistance method. As long as base points *can* be selected, equidistance remains fully relevant.

5.18. Second, the base points selected by Myanmar on Bangladesh’s coast are not subject to a “very active morpho-dynamism” as Bangladesh contends²⁸⁹. Bangladesh does not even try to justify the reality of this statement. With respect to $\beta 1$, Bangladesh’s assertion contradicts its own depiction of its eastern coast beginning at Cox’s Bazar, which it did not characterise in its Memorial as being affected by accretion or erosion²⁹⁰. Bangladesh would clearly like to equate the allegedly unstable coasts in this case with those in *Nicaragua v. Honduras* stating

²⁸⁵ BR, para. 3.104

²⁸⁶ *Ibid.* quoting *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, (*Nicaragua v. Honduras*), Judgment, I.C.J. Reports 2007, p. 742, para. 277.

²⁸⁷ BR, para. 3.102.

²⁸⁸ BR, paras. 3.102 and 3.104 (emphasis added).

²⁸⁹ BR, para. 3.104.

²⁹⁰ See BM, paras. 2.18-2.19. See also MCM, para. 2.17.

that the ICJ “rejected equidistance not because of any impossibility of drawing the line but due to the unstable nature of the coast near the parties’ land boundary terminus”²⁹¹.

5.19. In fact, both points $\beta 1$ and $\beta 2$ are situated on stable coastal features in stark contrast to the main feature of concern in *Nicaragua v. Honduras*, Cape Gracias a Dios. Cape Gracias a Dios consists of the delta formed at the mouth of the boundary river in that case, the River Coco. The ICJ’s description of Cape Gracias a Dios and the surrounding areas is worth repeating. The ICJ wrote of the sedimentation process in the River Coco: “The most notable effect is the rapid accretion and inevitable advance of the coastal front due to the constant deposition of terrigenous sediments carried by the rivers to the sea”²⁹². The ICJ continued: “[t]he River Coco has been progressively projecting Cape Gracias a Dios towards the sea carrying with it huge quantities of alluvium. ... In sum, both the delta of the River Coco and even the coastline north and south of it show a very active morpho-dynamism. The result is that the river mouth is constantly changing its shape, and unstable islands and shoals form in the mouth where the river deposits much of its sediment”²⁹³. This morpho-dynamism was, in fact, so active that the point fixed as the land boundary terminus at the mouth of the River Coco in 1962 was located as far as a 1 mile inland from the mouth of the river by the time of the pleadings less than 40 years later²⁹⁴. Here, the point fixed on 17 December 1980²⁹⁵ – over thirty years ago – is *still* located at the mouth of the Naaf River (see sketch-map No. R5.3 at page 105). Clearly, the instability of coastal features in *Nicaragua v. Honduras* was of a different order of magnitude than anything found along the adjacent coasts of the Parties in the present case.

5.20. Not only was the instability of Cape Gracias a Dios a problematic factor but it was compounded by cumulative difficulties related to the coastal geographic configuration and unresolved issues of disputed island sovereignty at the mouth of the river:

²⁹¹ BR, para. 3.21 referencing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, (*Nicaragua v. Honduras*), *Judgment*, I.C.J. Reports 2007, p. 673, para. 32 and p. 742, para. 277.

²⁹² *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, (*Nicaragua v. Honduras*), *Judgment*, I.C.J. Reports 2007, pp. 672-673, para. 31.

²⁹³ *Ibid.*, p. 673, para. 32.

²⁹⁴ *Ibid.*, p. 692, para. 99 and p. 693, para. 101.

²⁹⁵ See MCM, Annex 7.

“Cape Gracias a Dios, where the Nicaragua-Honduras land boundary ends, is a sharply convex territorial projection abutting a concave coastline on either side to the north and south-west. ... The Parties agree, moreover, that the sediment carried to and deposited at sea by the River Coco have caused its delta, as well as the coastline to the north and south of the Cape, to exhibit a very active morpho-dynamism.”

...

“These geographical and geological difficulties are further exacerbated by the absence of viable base points claimed or accepted by the Parties themselves at Cape Gracias a Dios.”

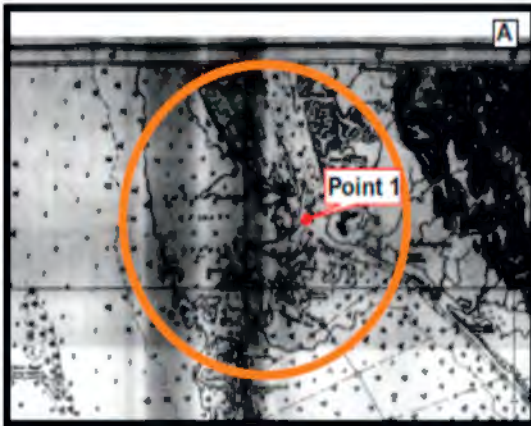
...

“This difficulty in identifying reliable base points is compounded by the differences, addressed more fully, *infra*, that apparently still remain between the Parties as to the interpretation and application of the King of Spain’s 1906 Arbitral Award in respect of sovereignty over the islets formed near the mouth of the River Coco and the establishment of ‘[t]he extreme common boundary point on the coast of the Atlantic’.”²⁹⁶

5.21. In the present case, there is nothing approaching the coastal instability faced by the ICJ and the parties in *Nicaragua v. Honduras*. The Tribunal does not face either a similar geographic configuration. The coast near the land boundary terminus is not “a sharply convex territorial projection abutting concave coastline on either side”²⁹⁷. Instead, the only convex territorial projection is the slight bulge of Bangladesh’s Shahpuri Point on which $\beta 1$ is located. The coasts to either side recede slightly but are essentially straight. Finally, unlike the ICJ which did not know the sovereignty of several critical features at the extreme point of Cape Gracias a Dios, there is no outstanding territorial sovereignty dispute in this case.

²⁹⁶ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, pp. 742-743, paras. 277-279.*

²⁹⁷ *Ibid.*, p. 742, para. 277.



Sketch-map No. R5.3
**STABILITY IN THE AREA OF
 THE LAND BOUNDARY
 TERMINUS AND β 1**

- A. Excerpt of BM, vol. II, Figure 3.2 representing Special Chart 114, first edition, 1974
- B. Excerpt from UKHO 817 Chart, Elephant Point to Manaung (Cheduba) Island - 1999
- C. Excerpt from BR Figure R2.2, prepared by "... & Admiralty Consultancy Service" in 2011 from Admiralty Chart 817



5.22. The ICJ faced one last problem of a technical nature that is not present in this case:

“These geographical and geological difficulties are further exacerbated by the absence of viable base points claimed or accepted by the Parties themselves at Cape Gracias a Dios. In accordance with Article 16 of UNCLOS, Honduras has deposited with the Secretary-General of the United Nations a list of geographical co-ordinates for its baselines for measuring the breadth of its territorial sea (see Honduran Executive Decree No. PCM 007-2000 of 21 March 2000 (published in the *Law of the Sea Bulletin*, No. 43; also available at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE43.pdf)). The Honduran Executive Decree identifies one of the points used for its territorial sea baselines, ‘Point 17’, as having co-ordinates 14° 59.8’N and 83° 08.9’W. These are the exact co-ordinates the Mixed Commission identified in 1962 as being the thalweg of the River Coco at the mouth of its main branch. *This point, even if it can be said to appertain to Honduras, is no longer in the mouth of the River Coco and cannot be properly used as a base point (see UNCLOS, Art. 5.)*”²⁹⁸

This last parenthetical is, of course, a reference to the normal baseline provision of the Convention.

5.23. In the present case, the Parties agree that the appropriate baselines for the construction of a delimitation line are not their own claimed straight baselines, but instead are the normal baselines along their coasts. In its Memorial, 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 the 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.*”²⁹⁹

5.24. Myanmar has taken the same position with respect to the relevance of its straight baselines for the construction of the delimitation line. Like Bangladesh, Myanmar does not rely on its straight baselines, but instead on the normal baselines in conformity with UNCLOS, that is, the low-water line along the coast of the Bay of Bengal.

²⁹⁸ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p. 743, para. 278 (emphasis added).*

²⁹⁹ BM, para. 3.9 (emphasis added).

5.25. If this agreement were not enough, it should be noted that both Parties rely on the same chart, Admiralty chart number No 817. This chart has been recognized by both Parties as the most accurate chart available for the area³⁰⁰.

5.26. In sum, the Tribunal in this case faces none of the obstacles – geologic, geographic, legal, or technical – with respect to the selection of appropriate base points that the ICJ confronted in *Nicaragua v. Honduras*.

B. St. Martin's Island Has Been Given an Appropriate Effect

5.27. Bangladesh does not hesitate in the Reply to accuse Myanmar of drawing the equidistance line “ignoring” and “reducing St. Martin's Island to the same status as Oyster Island”³⁰¹. This argument, like those concerning the choice of base points, is addressed to the way the equidistance line is drawn, and does not put in question the method itself, nor does it justify the abandonment of the equidistance/relevant circumstances method for the “angle-bisector method”. Moreover, the Claimant's grievance is simply wrong.

1. St. Martin's Island as a Special Circumstance

5.28. Bangladesh misread the Counter-Memorial, which explains that St. Martin's Island is “an important special circumstance which necessitates a departure from the median line”³⁰². To this end, Myanmar considers it equitable that it be given, not “zero effect” as alleged by Bangladesh, but, given the particular location of the island, a territorial sea up to the median line between the island and Myanmar's mainland coast to the east, and to the south and west a territorial sea between 6 and 12 nautical miles³⁰³.

5.29. On the other hand, it is quite obvious that there is no case for selecting base points on St. Martin's Island in order to draw the equidistance line beyond the territorial sea given the islands' location directly in front of the coast of Myanmar and the disproportionate effect this feature would thus have on the entire course of this line.

³⁰⁰ See MCM, para. 3.43.

³⁰¹ BR, paras. 3.109 and 3.124.

³⁰² MCM, para. 4.52.

³⁰³ See MCM, para. 4.67 and above, Chapter 3, paras. 3.14-3.26.

5.30. Bangladesh contests this on the ground that St. Martin's Island is a significant geographic feature. Its criticism is not consistent with its own case. Bangladesh indeed does not include St. Martin's Island in its coast for the purpose of drawing its claimed line: a bisector of the angle formed by the mainland coasts only³⁰⁴. When the Memorial comes to the test of disproportionality, it equally measures the length of its relevant coasts by locating their endpoint at "the land boundary terminus with Myanmar in the Naaf River", without including St. Martin's Island³⁰⁵. In the Reply, Bangladesh again claims that for the purpose of the delimitation and the test of disproportionality, its relevant coasts extend "from land boundary terminus to land boundary terminus"³⁰⁶. Bangladesh also alleges incorrectly that St. Martin's Island "can equally be characterized as being in front of the Bangladesh coast"³⁰⁷. But St. Martin's Island's east coast is totally opposite to Myanmar's coast and this is precisely the reason why between Point B and Point C the territorial sea boundary runs exclusively between St. Martin's Island's east coast and Myanmar mainland coast³⁰⁸.

5.31. In that regard, the case of St. Martin's Island cannot be compared, as Bangladesh wrongly does, with the French Island of Ushant (Ouessant), which was afforded full effect in the *Anglo-French Continental Shelf* case³⁰⁹:

- i. the French Island of Ushant is located in front of the French coast, not in front of the British coast, while the Bangladeshi St. Martin's Island is located in front of Myanmar's coast;
- ii. the same is true as regards the United Kingdom's Scilly Isles, which are located in front of the British coast, not the French coast;
- iii. in that case, there were two sets of islands, one belonging to France located in front of its coast, the other belonging to the United Kingdom located in front of its coast; by

³⁰⁴ See BM, para. 6.70.

³⁰⁵ See BM, para. 6.75.

³⁰⁶ BR, para. 3.166.

³⁰⁷ BR, para. 3.111.

³⁰⁸ See MCM, sketch-map 4.2, p. 85. See also Chapter 3, paras. 3.5-3.7 above.

³⁰⁹ BR, paras. 3.115, 3.118-3.120.

contrast, in the present case, St. Martin's Island stands alone and it is located in front of Myanmar's coast while belonging to Bangladesh;

- iv. since the Scilly Isles are located more westerly than Ushant, the Court of Arbitration decided that it was necessary to "find a method of remedying in an appropriate measure the distorting effect on the course of the boundary of the more westerly position of the Scillies and the disproportion which it produced in the areas of continental shelf accruing to the French Republic and the United Kingdom"³¹⁰. Thus the effect to be given to the islands depended on their *reciprocal* effects on the maritime delimitation and the Court of Arbitration finally decided to give Ushant full effect and the Scillies only half-effect;
- v. there is therefore no room for an *a fortiori* argument according to which St. Martin's Island would deserve the same treatment as Ushant or as the Scilly Isles. The situations are different;
- vi. in any case, as Myanmar underscored in the Counter-Memorial, the Scilly Isles were given only half-effect even though they have a significant population (more than 2,000 inhabitants) and the Channel Islands, which have a population of approximately 160,000 but which do lie off the French coast, were given no effect beyond their own tightly circumscribed enclave³¹¹.

5.32. For the very same reason, Bangladesh is wrong in referring to the treatment reserved to Little Coco Island in the negotiated maritime delimitation agreement concluded in 1986 by Myanmar and India³¹². First, as Bangladesh acknowledges, Little Coco Island "is part of a string of islands comprising the Coco and Preparis Chain"³¹³ while St. Martin's Island stands alone. Second, the agreed boundary concerns, in the relevant sector, opposite coasts, not adjacent coasts. Third, it is mainly determined by islands, not by mainland coasts³¹⁴, and

³¹⁰ *Delimitation of the Continental Shelf between France and the United-Kingdom*, Decision of 30 June 1977, *UNRIAA*, Vol. XVIII, p. 115, para. 248.

³¹¹ See MCM, paras. 4.55-4.56.

³¹² BR, paras. 3.122-3.123.

³¹³ BR, para. 3.123.

³¹⁴ See J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. II, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 1333: "With the possible exception of Point 9 all of the

allocates the islands on both sides of the line. Hence Article V of the 1986 Agreement states that “[e]ach Party has sovereignty over the existing islands and any islands that may emerge, falling on its side of the maritime boundary”³¹⁵. By contrast, St. Martin’s Island stands alone in the vicinity of the delimitation line – except May Yu Island (Oyster Island) to which Myanmar agrees that no effect is to be given in the delimitation of the maritime areas as long as St. Martin’s Island has no such effect either³¹⁶.

5.33. The same reason makes the *Romania v. Ukraine* Judgment relevant in the present case. The ICJ decided in 2009 not to count Serpents’ Island as a relevant part of the Ukrainian coast for the delimitation of the EEZ/continental shelf and, consequently, not to select any base points on it³¹⁷. Bangladesh argues that St. Martin’s Island is not comparable to Serpents’ Island, which is smaller, sustains a negligible population and lies more than three times further from the Ukrainian coast than St. Martin’s Island from the mainland coast³¹⁸. But Serpents’ Island shares many other features with St. Martin’s Island: in particular, it lies “alone” and “is not one of a cluster of fringe islands constituting ‘the coast’ of Ukraine”³¹⁹.

5.34. Besides, just as in *Romania v. Ukraine*, there is no case for selecting base points on St. Martin’s Island without producing inequitable effects. The assertion that the selection of base points on St. Martin’s Island “does not threaten any kind of distortion of the boundary, let alone a radical distortion of it”³²⁰, does not hold up under scrutiny. An island lying close to the starting point of the maritime boundary in a lateral delimitation between adjacent coasts generally produces a disproportionate effect³²¹. This effect increases the closer the

points are related either directly to equidistance lines drawn between islands or to discounted equidistance lines involving islands”.

³¹⁵ MCM, Annex 11.

³¹⁶ MCM, para. 5.79.

³¹⁷ See MCM, para. 5.95.

³¹⁸ BR, para. 3.114.

³¹⁹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 109, para. 149.

³²⁰ BR, para. 3.116.

³²¹ See V. Prescott and G. Triggs, “Islands and Rocks and their Role in Maritime Delimitation”, *International Maritime Boundaries*, 2005, Vol. 5, p. 3249: “In the case of adjacent states an island that lies close to the projection of the land boundary can influence the direction of an equidistance line out to the 200 n.m. limit. In such circumstances the state that possesses the island would derive a major advantage if the boundary was a median line.” See also paras. 3.14-3.26 above.

feature is to the starting point of the maritime boundary and is multiplied even further when the feature is located on the “wrong” side of the boundary. In the present case, the effect of St. Martin’s Island is clearly disproportionate due to its location not only near the starting point of the maritime boundary, but directly in front of Myanmar’s coast.

5.35. If base points on St. Martin’s Island were used to generate an equidistance line to delimit the EEZ/continental shelf – which, in fact, neither Party has argued for – it would produce a disproportionate effect on that line throughout its entire length. This effect would be mitigated, only in part, by the countervailing influence of base points on Myanmar’s May Yu Island (Oyster Island). When compared with the proper application of the equidistance method to the mainland coasts of the Parties, the additional area controlled by St. Martin’s Island is approximately 13,000 square kilometres (see sketch-map No. R5.4 on the next page). An 8 square kilometres island generating approximately 13,000 square kilometres of maritime entitlement is the very definition of disproportion. To use the words of the *Dubai/Sharjah* Arbitral Tribunal, the existence of St. Martin’s Island “produce[s] a distortion of [the] equidistance line or an exaggerated effect which [is] inequitable”³²². Aside from the inequitably disproportionate effect of this incidental feature on the division of maritime areas, its use in the construction of an equidistance line would drive that line southward in front of Myanmar’s coast.

5.36. There can be no question that the use of St. Martin’s Island to generate an equidistance line would result in an inequitable delimitation of the EEZ/continental shelf. Bangladesh takes this obvious inequity and compounds it further by taking its ill-conceived angle bisector up to a point giving full effect to St. Martin’s Island.

³²² *Dubai/Sharjah Border Arbitration*, Award of 19 October 1981, *ILR*, Vol. 91, p. 676.



2. *The Weight to Be Given to St. Martin's Island*

5.37. Bangladesh's covert use of St. Martin's Island in the construction of its proposed EEZ/continental shelf delimitation stands in stark contrast to the treatment of islands in the case law. In the *Gulf of Maine* case, on which Bangladesh relies to claim that St. Martin's Island should be accorded full weight, Seal Island was given half-effect³²³. As the chamber of the ICJ underlined in its 1984 Judgment, the existence of Seal Island (which occupied "a commanding position in the entry to the Gulf") was a "minor" aspect since "the result of the effect to be given to the island is a small transverse displacement of that line, not an angular displacement; and its practical impact therefore is limited"³²⁴. By contrast, the use of islands in adjacent coastal configurations is almost always a problem as it generates such an angular displacement. This would be true in particular if St. Martin's Island were given full effect, which would result in a significant angular displacement of the delimitation line.

5.38. The *Dubai/Sharjah* and *Tunisia/Libya* cases show conclusively that there is no case for selecting base points on islands such as St. Martin's Island for the purpose of the delimitation of a single maritime boundary. In the *Dubai/Sharjah* case, although Abu Musa was located in mid-Gulf, 35 nautical miles offshore, and was considered as entitled, as a matter of principle, to a continental shelf, the Court of Arbitration decided to give it no entitlement to any maritime area beyond its territorial sea³²⁵. The Court considered that

"[t]o give no effect to the continental shelf entitlement of the island of Abu Musa would preserve the equities of the geographical situation and would be consistent, for example, with comparable regional practice as applied to the islands of Al-'Arabiyah and Farsi in the Saudi Arabian-Iranian agreement of January 1969, and Dayinah in the Abu Dhabi-Qatar agreement of March 1969, where the continental shelf rights of islands were limited to coincide with their respective territorial waters, but not used as base points for the purpose of constructing median or

³²³ BR, para. 3.121.

³²⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, pp. 336-337, para. 222. A "transverse displacement" occurs in situations of opposite coasts. An "angular displacement" occurs in situations of adjacent coasts.

³²⁵ *Dubai/Sharjah Border Arbitration*, Award of 19 October 1981, IJR, Vol. 91, p. 677. Contrary to what Bangladesh suggests (BR, para. 3.117), non-geographical features are not integrated in the motives on which the Court decided the effect to be given to Abu Musa.

equidistance boundaries in respect of the continental shelves between opposite or adjacent States.”³²⁶

5.39. In *Tunisia/Libya*, the ICJ similarly decided that only half-effect would be given to the Kerkennah Islands although they were “surrounded by islets and low-tide elevations”, of a considerable size (180 square kilometres, compared to the 8 square kilometres of St. Martin’s Island) and lying “some 11 miles east of the town of Sfax”, therefore in front of the Tunisian coast (on the right side of the delimitation line). The ICJ also disregarded entirely, even as a special circumstance, the large Island of Djerba, located close to the mainland³²⁷.

5.40. Similarly, no effect was given to Sable Island in the *Newfoundland and Labrador and Nova Scotia* case, the Tribunal underlining that “in the context of a delimitation between adjacent coasts and a line proceeding out to the open sea, a relatively minor feature such as Sable Island is capable of having major effects”³²⁸. Sable Island was located relatively far offshore and at a significant distance from the starting point of this delimitation. Had it been located closer to the starting point, the “major” effects would have been much greater.

5.41. Bangladesh’s only answer is that “the islands Myanmar mentions affected only the delimitation in the continental shelf”³²⁹. If the argument were relevant, then Bangladesh would not rely so insistently on the *North Sea Continental Shelf* cases which also only dealt with the continental shelf... The truth is that Bangladesh could not find any plausible argument to refute these clear precedents confirming that there is no case for selecting base points on St. Martin’s Island for the purpose of delimiting the EEZ and the continental shelf.

5.42. As shown in this Section, it is perfectly possible to determine base points for the drawing of a provisional equidistance line and those used by Myanmar are in conformity with the applicable rules. Therefore, there is no reason to have recourse in the present case to the “angle-bisector method” which is only an alternative to the equidistance/relevant

³²⁶ *Ibid.*

³²⁷ See MCM, para. 4.58.

³²⁸ *Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia, Second Phase*, Award of 26 March 2002, *ILR*, Vol. 128, para. 4.35; see also paras. 4.32-4.36 and paras. 5.13-5.15.

³²⁹ BR, para. 2.85.

circumstances method, when the drawing of an equidistance line proves unfeasible. And anyway, there is no case for selecting a base point on St. Martin's Island.

II. Bangladesh's Erroneous Application of the "Angle-Bisector Method"

5.43. As is made clear in the previous Section, nothing precludes the drawing of a provisional equidistance line – and in no way is the construction of such a line “unfeasible”³³⁰. It is therefore only in the alternative and in order not to let the Applicant's argument go unanswered – weak and untenable as it is – that Myanmar will show in the present Section that Bangladesh's application of the “angle-bisector method” is biased (A) and that its use by Bangladesh in this case leads to a clearly inequitable solution (B). The argument can be made briefly: it is the inescapable consequence of the argument in favour of the equidistance line, of which it constitutes the other side of the coin.

A. The Flaws in Bangladesh's Application of the “Angle-Bisector Method”

1. Bangladesh's Odd Argument of Connecting Base Points

5.44. In the first place, the Reply puts forward the curious argument that the Tribunal should validate the line proposed by Bangladesh because it would allegedly be confirmed by different elements picked up here and there in the Myanmar's Counter-Memorial. The general idea is that if one connects the base points selected by Myanmar, “the two lines of general direction are all but identical to the coastal façades Bangladesh presented in the Memorial”³³¹.

5.45. The function of base points is not to depict the general direction of the coast but to allow the court or the tribunal to draw an equidistant line between the coasts of both parties:

“Once the base points have been established in accordance with the above-mentioned principles laid down by the Court in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, it will be possible

³³⁰ See paras. 5.2-5.26 above.

³³¹ BR, para. 3.131.

to determine the equidistance line between the relevant coastlines of the two States.”³³²

To that effect, when choosing the appropriate base points the court or the tribunal will select points that “will have an effect on the provisional equidistance line that takes due account of the geography”³³³. And this is indeed what the ICJ did in *Romania v. Ukraine*:

“When construction of a provisional equidistance line between adjacent States is called for, the Court will have in mind considerations relating to both Parties’ coastlines when choosing its own base points for this purpose. The line thus adopted is heavily dependent on the physical geography and the most seaward points of the two coasts.”³³⁴

As was also recalled in *Nicaragua v. Honduras*, the purpose of such an operation is to draw a provisional equidistance line that approximates “the relationship between two parties’ relevant coasts by taking account of the relationship between designated pairs of base points”³³⁵.

2. Bangladesh’s Erroneous Determination of the Coasts Relevant for Drawing the Bisector Line

5.46. More importantly, Bangladesh presents a coastal façade which can simply not be described as depicting the general direction of the coasts.

5.47. As the ICJ stated in *Nicaragua v. Honduras*, “[i]dentifying the relevant coastal geography calls for the exercise of judgment in assessing the coastal geography”³³⁶. In that case, as the ICJ prepared to apply the bisector method to the coasts of Nicaragua and Honduras, and having described the coastal fronts – or façades – proposed by the parties, it assessed the “various possibilities for the other coastal fronts that could be used to define

³³² *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 443, para. 292.

³³³ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 105, para. 127.

³³⁴ *Ibid.*, p. 101; para. 117.

³³⁵ *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.

³³⁶ *Ibid.*

these linear approximations of the relevant geography³³⁷. In so doing the ICJ rejected two options that cut across Honduran territory because, if used to form the angle to be bisected, they “would deprive significant Honduran land mass lying between the sea and the line of any effect on the delimitation”³³⁸. Those lines were not “linear approximations of the relevant geography” because they effectively erased large portions of that geography from the delimitation (see sketch-map No. R5.5 at page 121).

5.48. Here, the Bangladesh version of its coastal façade is equally out of line with the relevant geography, but instead of erasing the relevant geography as occurred with the lines cutting across the Honduran territory, the Bangladesh façade creates new geography giving the area of sea between the land and its façade full effect on the delimitation. A glance at the map suffices to show how far from an approximation of the relevant geography Bangladesh’s claimed coastal façades are, in particular when it comes to describing the coasts of Bangladesh. Bangladesh’s coastal façade by no means follows the general direction of the coasts of that country. The Bangladesh “land reclamation project” between the actual coasts of Bangladesh and its coastal façade takes refashioning nature to a new extreme (see sketch-map No. R5.6 at page 123).

5.49. The considerations above point to another general remark which is compelling: it is simply unsustainable to allege that, in the present case “[t]o depict [the] relevant coast by means of a single straight line reflecting its general direction is therefore a straightforward operation of connecting the two land boundary termini”³³⁹. This approach was flatly rejected in the *Nicaragua v. Honduras* case; however, it is on this obviously unsound allegation that the whole of Bangladesh’s case is based.

5.50. Determining the general direction of the coast for the specific purpose of drawing the bisector line is not an arbitrary operation and does not boil down to simply joining the extreme points of the coasts of the two concerned States. Limited as it is, the case law is telling in this respect. It shows without ambiguity that, when applying the angle-bisector

³³⁷ *Ibid.*, para. 295.

³³⁸ *Ibid.*, para. 297.

³³⁹ BR, para. 3.149.

method, international courts and tribunals have always taken care to depict *faithfully* the general direction of the coast, with the constant concern not to refashion nature³⁴⁰.

5.51. The segments constituting the angle (used to draw the bisector line) must necessarily represent the general direction of the relevant coast. This is an obvious consequence of Bangladesh's correct statement according to which: "the angle-bisector method is in reality less an alternative to equidistance than it is a simplified variant of it"³⁴¹. As a consequence, the lines representing the two sides of the angle must be an approximate representation of the general direction of the *relevant* coasts and, must be related to the point of departure of the delimitation.

5.52. However, contrary to what Bangladesh seems to imply³⁴², the identification of the relevant coasts for the delimitation in general and the depiction of the general direction of the coast when applying the angle-bisector method are two different operations intervening at two different stages of the delimitation process.

5.53. In its unanimous Judgment of 3 February 2009 in the *Romania v. Ukraine* case, the ICJ clarified the role of the relevant coasts in any process of maritime delimitation. The ICJ pointed out that the identification of the relevant coasts is necessary "in order to determine what constitutes in the specific context of a case the overlapping claims zones"³⁴³. In this regard, it has two different purposes:

- *first*, it is necessary in order to determine the area to be delimited, i.e., the segments of the coast "which generate the rights of these countries to the continental shelf and the exclusive economic zone, namely, those coasts the projections of which overlap because the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned"³⁴⁴;

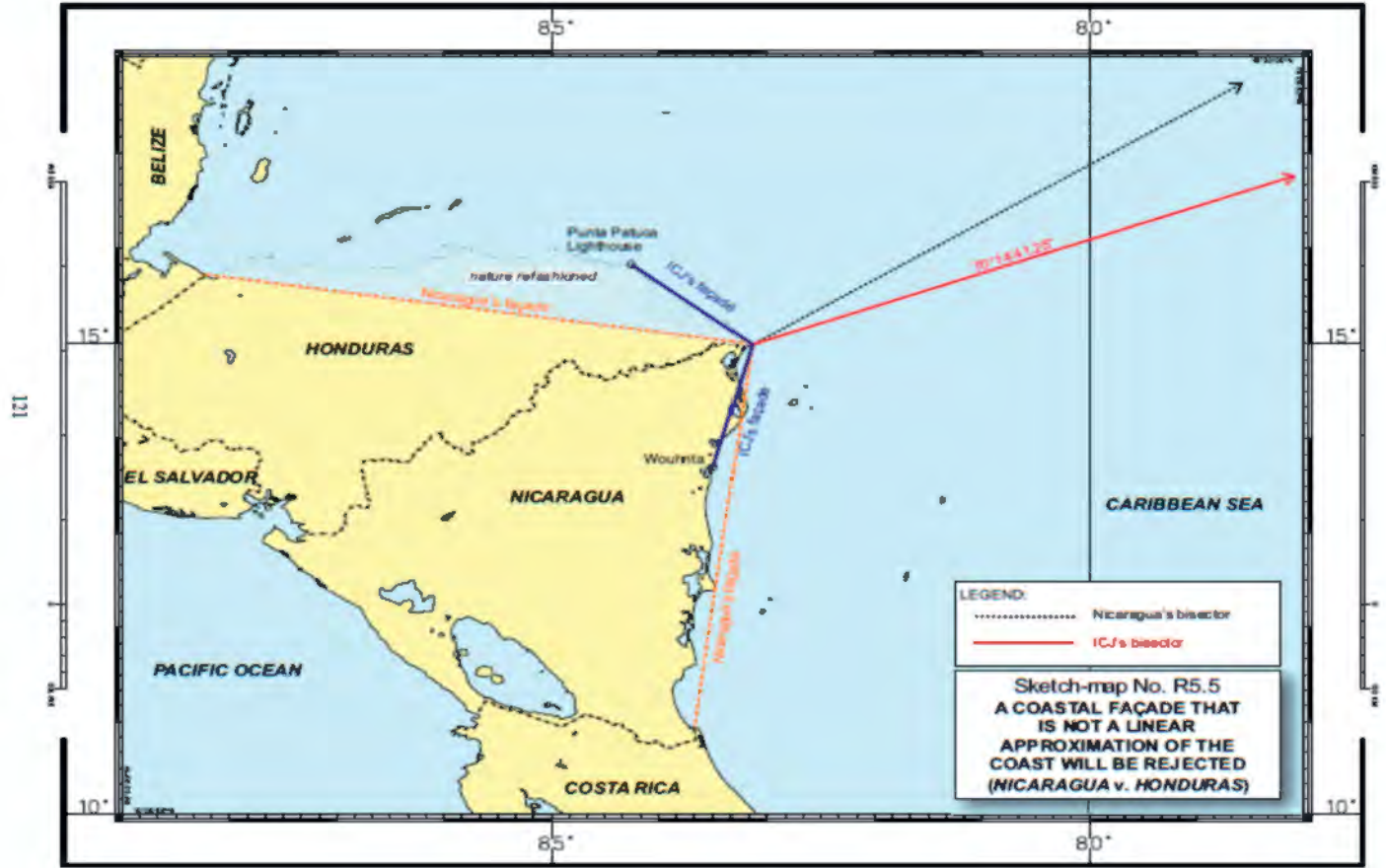
³⁴⁰ See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 747, para. 289.

³⁴¹ BR, para. 3.127.

³⁴² BR, paras. 3.150-3.155.

³⁴³ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 89, para. 78.

³⁴⁴ *Ibid.*, para. 77.





- *second*, it brings to light possible reasons that render unfeasible the use of the equidistance method or possible relevant circumstances that could lead to shift the provisional equidistance line in the second stage of the delimitation process.

5.54. The depiction of the general direction of the coast with a view to drawing a bisector line when an equidistance line is not feasible has a very different role. It seeks to override the compelling reasons that led to depart from the equidistance method. In order not to refashion nature, the coastal front used must faithfully represent the general direction of the coast. In cases where the coastline follows the same general direction for hundreds of kilometres, as it is the case for Myanmar's Rakhine (Arakan) coast, this whole line will be taken into consideration to determine the angle used to draw the bisector line³⁴⁵. However, this line will stop where the direction of the coast changes. Whether this turning point is inside or outside the relevant area does not matter; the general direction of the coast, without regard to length, is the only relevant criterion when constructing an angle bisector.

5.55. In the more recent *Nicaragua v. Honduras* case, Nicaragua, like Bangladesh in the present case, advocated general direction lines constructed by connecting the land boundary terminus of the parties with those of the parties' neighbours, Guatemala and Costa Rica. But, contrary to Bangladesh's insistence that determining the general direction of the coast is "a straightforward operation of connecting the two land boundary termini"³⁴⁶, the ICJ rejected Nicaragua's proposal to connect land boundary termini. Instead the ICJ looked at the actual shape of the coasts of Honduras and Nicaragua and found "linear approximations" of those coasts with which to construct its bisector. When constructing the coastal direction line for Honduras, the ICJ noted in particular "how quickly to the northwest the Honduran coast turns away from the area to be delimited after Cape Falso, as it continues past Punta Patuca and up to Cape Camerón"³⁴⁷. The ICJ chose Punta Patuca, a notable turning point on the Honduran coast, as an endpoint for its coastal direction line. This approach is made apparent in the ICJ's

³⁴⁵ This is why Myanmar agrees with Bangladesh on the general direction of Myanmar's coast even though both Parties differ on the methodology.

³⁴⁶ BR, para. 3.149.

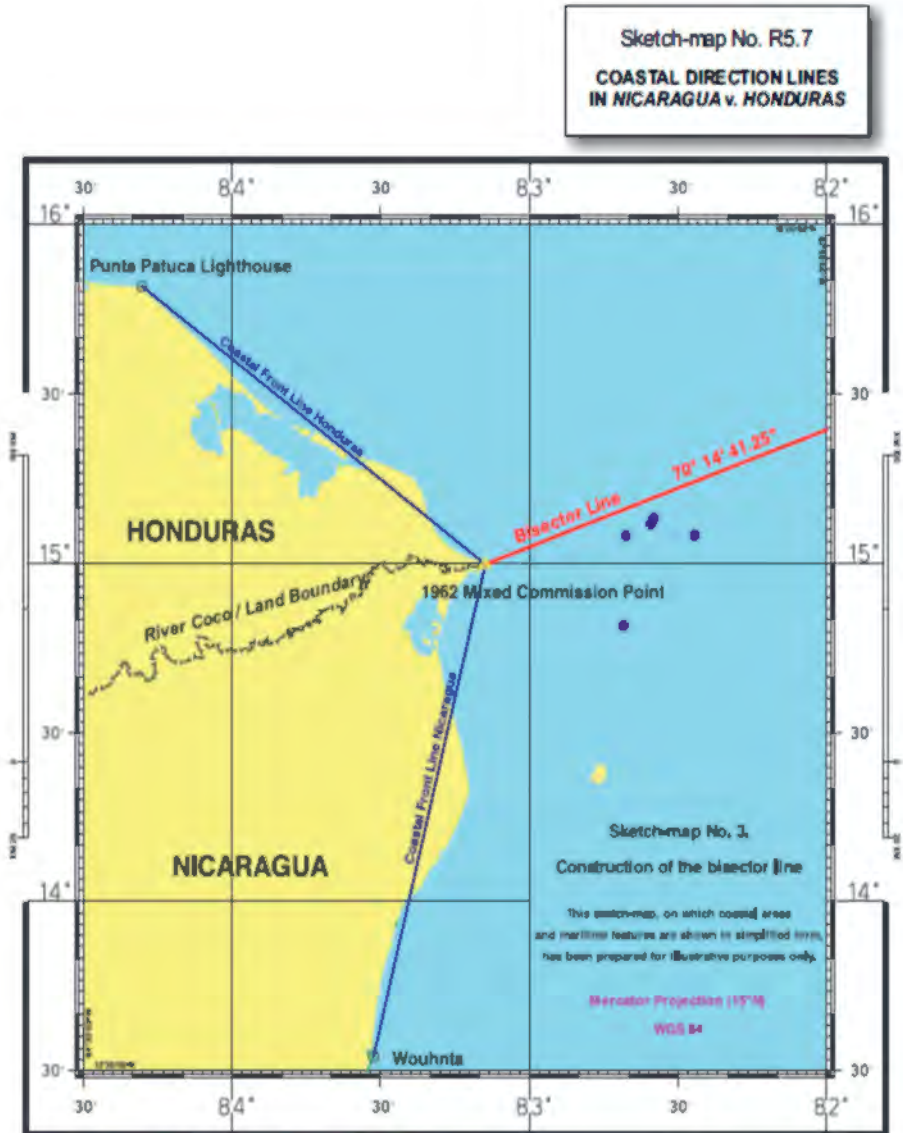
³⁴⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, (*Nicaragua v. Honduras*), *Judgment*, I.C.J. Reports 2007, p. 749, para. 296.

illustrative map No 3 (Construction of the Bisector Line) appearing at p. 750 of the Judgment (see sketch-map No. R5.7 reproducing the ICJ's map on the next page).

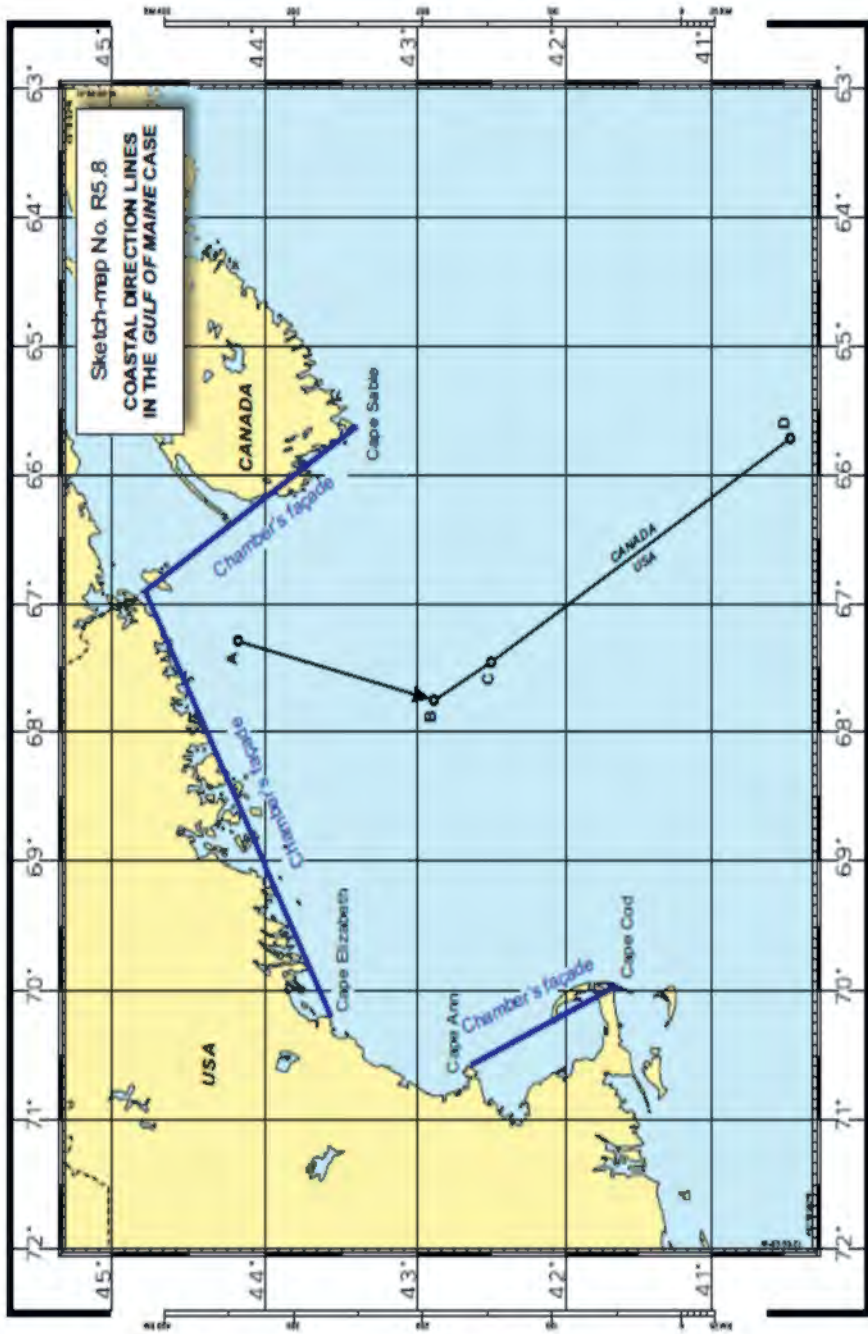
5.56. Bangladesh invokes two other cases to support its use of the angle-bisector method: *Tunisia/Libya* and *Guinea/Guinea Bissau*. While both of these cases employed geometric methods to simplify coastal configurations and to arrive at an equitable solution, they are not "angle-bisector" cases in that they do not apply the method in the way it was applied in the *Gulf of Maine* case (see sketch-map No. R5.8 at page 129) or in the *Nicaragua v. Honduras* case, or in the way Bangladesh asks the Tribunal to apply the method here. Thus, any consideration of the simplified coastal direction lines and geometric methods used in *Tunisia/Libya* and *Guinea/Guinea Bissau* should be undertaken with caution.

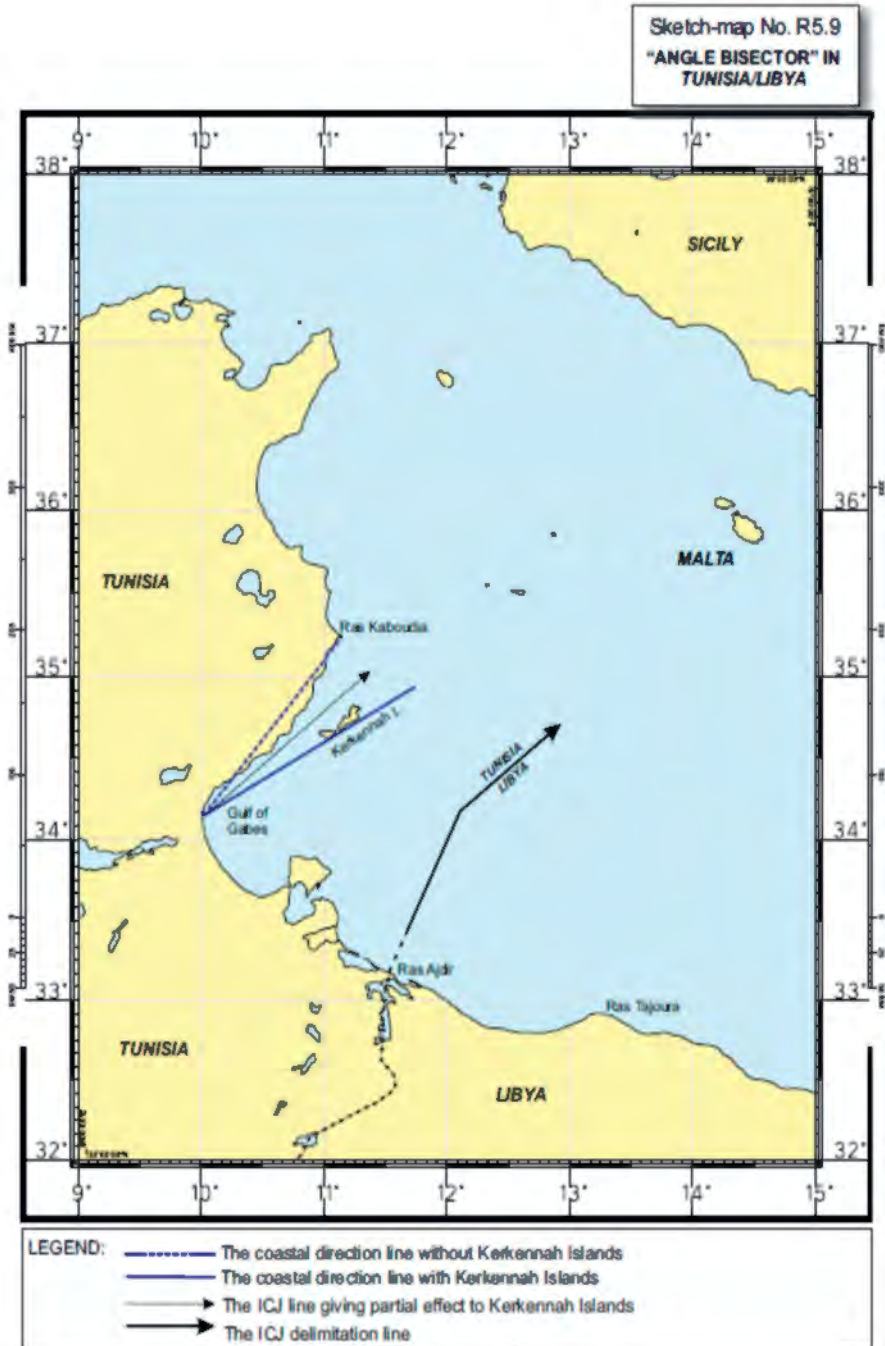
5.57. As Bangladesh notes in the Reply, and Myanmar agrees, "[w]hereas a conventional equidistance line is drawn so that it is always equally distant from designated basepoints on the low-water lines of the two States' coasts, the angle bisector is always exactly half-way between the straight-line representation of the general direction of those same coasts"³⁴⁸. The angle-bisector method as applied in *Nicaragua v. Honduras* bisected an angle formed by linear approximations of the coasts of the parties meeting at their shared land boundary terminus. This same approach was taken in the *Gulf of Maine* case. While it is true that in *Tunisia/Libya* the ICJ bisected an angle, it did so for the limited purpose of giving partial effect to Tunisia's Kerkennah Islands. Libya's coast was not considered at all in the construction of the Kerkennah Islands partial effect bisector (see sketch-map No. R5.9 reproducing the ICJ's map at page 131).

³⁴⁸ BR, para. 3.127.



Source: *Nicaragua v. Honduras*, sketch-map no. 3 at p. 750.





5.58. *Guinea/Guinea-Bissau*, on which Bangladesh places so much emphasis, is even less an “angle-bisector” case than is *Tunisia/Libya*. Moreover, the delimitation method used in it has never been applied by any other court or tribunal before or since. It is a very odd decision and calls for particular caution³⁴⁹. In that case, the Arbitral Tribunal showed special consideration for a rarely expressed concern to ensure the “integration [of the delimitation between the Parties] into the existing delimitations of the West African region, as well as into future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions”³⁵⁰. In accordance with this unique approach, the Tribunal drew a line from Almadies Point (Senegal) to Cap Shilling (Sierra Leone) “tak[ing] overall account of the shape of [the West African] coastline”³⁵¹ and spanning the territory of five different coastal States in the process. This 800 kilometres long coastal direction line did not reflect – and was not intended to reflect – the general direction of the coasts of the two States parties to the dispute as contemplated in the application of the angle-bisector methodology. Any “bisector” of the straight-line representation of “the overall configuration of the West African coastline”³⁵², while it may have led to an equitable solution in the singular circumstances of this case, is far removed from the angle-bisector methodology used in the *Gulf of Maine* case and *Nicaragua v. Honduras* (see sketch-map No. R5.10 at page 135).

5.59. The angle-bisector case law, although limited, is straight forward and clearly shows three important elements:

- *first* the segments used in order to determine the angle for drawing the bisector line must reflect the general directions of the coasts of the two parties;
- *second*, the sides of the angle are determined from the point of departure of the line up to the point where the direction of the coast changes significantly, wherever this change occurs;

³⁴⁹ See also para. 6.40 below.

³⁵⁰ *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *ILM*, Vol. 25, 1986, p. 297, para. 109; see also para. 6.40 below.

³⁵¹ *Ibid.*, para. 108.

³⁵² *Ibid.*, pp. 297-98, para. 110.

- *third*, the part of the coast for which a linear approximation is created for the purpose of finding a general direction and applying the angle-bisector method need not correspond with the part of the coast that is relevant for the purpose of measuring coastal length.

5.60. Indeed, as the ICJ stated in *Nicaragua v. Honduras*, “[i]dentifying the relevant coastal geography calls for the exercise of judgment in assessing the coastal geography”³⁵³. Unfortunately, Bangladesh, which quotes this passage in its Reply³⁵⁴ completely ignores this wise *caveat*.

5.61. In the present case, if it were necessary to draw a bisector line – *quod non* – it should be considered that:

- the coastal front of Bangladesh runs from Point A, the starting point of the boundary, and follows an azimuth of 329°;
- the coastal front of Myanmar runs from Point A, passes through the southerly point of Myingun Island (Boronga Island) and follows an azimuth of 145°³⁵⁵;
- the correctly conceived coastal façade has an obvious impact on the construction of the angle bisector when the properly constructed angle bisector is compared with Bangladesh’s incorrect construction (see sketch-map No. R5.11 at page 137).

³⁵³ *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.*

³⁵⁴ BR, para. 3.140.

³⁵⁵ See MCM, sketch-map 5.6.

Sketch-map No. R5.10
"ANGLE BISECTOR" IN
GUINEA/GUINEA-BISSAU





B. The Inequitable Result of Bangladesh's Bisector Line

5.62. Bangladesh makes a big point about the fact that “[n]owhere in 207 pages of text does Myanmar argue that the 215° line would be inequitable to it”³⁵⁶. And it develops it on not less than four paragraphs³⁵⁷. In reality, there is a clear and straightforward explanation for this “striking” and “telling” omission³⁵⁸ or “this hole in Myanmar’s case” – which it is certainly not Myanmar’s intention to “belatedly attempt to fill ... with a jerry-built argument”³⁵⁹: since Myanmar’s equidistance line, in itself, achieves an equitable solution³⁶⁰, it cannot be the case that the entirely different solution arrived at by the bisector method as applied by Bangladesh also achieves such a solution.

5.63. In any case, the inequitable character of the Bangladesh’s bisector line is so obvious that it does not need a long discussion.

5.64. As shown in the previous Subsection, Bangladesh’s flawed interpretation of the actual direction of the coasts – Bangladesh’s coast in particular – leads to the construction of a bisector with an incorrect direction: 215° instead of 237°. Bangladesh’s erroneous application of the bisector methodology is then exaggerated through its “slight” transposition of the bisector from the actual vertex of the angle formed at the land boundary terminus to an invented starting point for the exclusive economic zone/continental shelf delimitation – a starting point that was created using equidistance and giving full effect to base points on St. Martin’s Island³⁶¹!

5.65. This approach does not take account of St. Martin’s Island as a special circumstance in contravention of article 15 of UNCLOS. More importantly, however, is the manner in which Bangladesh connects its territorial sea endpoint to its mainland-only bisector. It does not, as might be expected, follow the outer limit of the territorial sea around to the intersection with its mainland-only angle bisector despite clear guidance on this point in the

³⁵⁶ BR, para. 3.162.

³⁵⁷ BR, paras. 3.162-3.164, 3.187.

³⁵⁸ BR, para. 3.163.

³⁵⁹ BR, p. 103, para. 3.164.

³⁶⁰ See paras. 6.63-6.91 below.

³⁶¹ See sketch-map No. R5.4 at page 113 above. See also BM, para. 6.73 and BM, Figure 6.11 at page 92.

two most recent international maritime delimitation decisions, *Nicaragua v. Honduras* and *Romania v. Ukraine*. Instead, Bangladesh reverses the process. It plucks up its mainland-only bisector, moves it nearly 12 nautical miles to the south-east and attaches it to Point 8A/Point 7! This, apparently, is the “slight” transposition referred to in passing in the Memorial and Reply³⁶². This “slight” transposition – the effect of which is not at all slight, adding an additional 8,000 square kilometres to the area already taken in by the original, ill-conceived, angle bisector – defies the logic of the angle-bisector method so vigorously advocated by Bangladesh. The effect of this approach, of course, is not only felt within 12 nautical miles, but, and much more, beyond 12 nautical miles, through the entire EEZ/continental shelf delimitation to the 200-nautical-mile outer limit, an issue that will be addressed more fully in the following Chapter.

5.66. In contrast, it is apparent that a correct application of the bisector method would in fact be more favourable to Myanmar than Myanmar’s own line constructed by applying the equidistance/relevant circumstances method to the coast of the Parties (see sketch-map No. R5.12 at page 143). However, Myanmar agrees that an equitable solution is not a lottery and that the Tribunal should prefer the latter for the reasons exposed above³⁶³: there are no grounds to resort to the “angle-bisector method” when, as in the present case, base points can be used in order to draw a provisional equidistance line. The “loss” thus endured by Myanmar by not using the angle-bisector method also pleads in favour of adopting the provisional equidistance line as the final maritime boundary between the Parties and, therefore, not shifting it when applying the two next stages of the delimitation process.

5.67. As shown in the present Chapter:

- i. recourse may be had to the so-called “angle-bisector method” only if the standard method (that is the equidistance/relevant circumstances method) is unfeasible for compelling reasons;
- ii. base points selected by Myanmar are dictated by the coastal geography and in conformity with the applicable rules;

³⁶² BM para. 6.73; BR para. 3.133.

³⁶³ See MCM, paras. 5.22-5.26. See also paras. 4.24 and 5.15-5.22 above.

- iii. in the present case, it is in no way unfeasible to draw the provisional equidistance line using the base points selected by Myanmar;
- iv. there is no case for selecting base points on St. Martin's Island since this would give this feature a totally disproportionate effect;
- v. an equidistance line being fully feasible, a discussion on an alternative bisector line is purely academic; however,
- vi. while Bangladesh's bisector line is artificial, being based on an untenable identification of the relevant coasts,
- vii. a bisector line, drawn in compliance with the general principles reflected in the rare cases when the "angle-bisector method" could be seen as having been applied, would in fact be more favourable to Myanmar than an equidistance line.

CHAPTER 6

THE EQUIDISTANCE LINE CLAIMED BY MYANMAR
LEADS TO AN EQUITABLE RESULT

6.1. Even though Bangladesh acknowledges in the Reply that it does not “believ[e] the delimitation should be decided *ex aequo et bono*”³⁶⁴ and that “proportionality is *not* a method of delimitation”³⁶⁵, it is clear that Bangladesh’s basic claim is that the relevant area must be shared proportionally between the two States. As it did throughout the negotiations, Bangladesh asserts that it has an “entitlement to an equitable share of the outer continental shelf”³⁶⁶ and it tries to convince the Tribunal of the alleged inequitableness of the equidistance line as compared to what it calls “a truly proportional delimitation”³⁶⁷.

6.2. Furthermore, contrary to the well established principle according to which “the sharing-out of the area is ... the consequence of the delimitation, not vice-versa”³⁶⁸ – in other words, before the maritime delimitation is agreed, “the maritime boundaries had not been determined, and consequently neither of the two States could assert that a particular portion of the maritime area was ‘its own’”³⁶⁹, Bangladesh repeatedly affirms that it has already acquired rights which must be protected by and reflected in the maritime delimitation between Myanmar and Bangladesh. If Bangladesh is to be “a significant coastal State that is equitably entitled to significant maritime rights”³⁷⁰, as it describes itself, the maritime

³⁶⁴ BR, para. 3.10.

³⁶⁵ BR, para. 3.197.

³⁶⁶ BR, para. 3.90.

³⁶⁷ BR, para. 3.197.

³⁶⁸ See MCM, para. 5.108. See also para. 4.2 above.

³⁶⁹ *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Award of 31 July 1989, para. 39 (translation by the Registry of the ICJ, Annex to the Application instituting proceedings of the Government of the Republic of Guinea-Bissau in the case *Arbitral Award of 31 July 1989* (available on <http://www.icj-cij.org>); authoritative French text in *UNRIIAA*, Vol. XX, p. 134, para. 39: « les limites maritimes n[e] s[on]t pas fixées et par conséquent, aucun des deux Etats ne p[eu]t affirmer qu’une fraction déterminée de la zone maritime [es]t ‘sienne’ »).

³⁷⁰ BR, para. 3.58 *in fine*.

delimitation would have to be fixed in a manner which preserves “its 200 M limit”³⁷¹ and its “undisputable entitlement in the continental shelf beyond 200 M”³⁷².

6.3. This is obviously not the correct approach³⁷³. In these circumstances, it is hardly surprising that nowhere in Chapter 3 of the Reply dedicated to the delimitation of the EEZ and the continental shelf does Bangladesh quote, as regards methodology, the unanimous and most recent maritime boundary Judgment of the ICJ in the *Romania v. Ukraine* case. Clearly the three-stage process reaffirmed by the ICJ in its 2009 Judgment – to which the Reply only very cursorily alludes³⁷⁴ – causes difficulties for Bangladesh, which at no point tries to propose some adjustment to the equidistance line but rather simply asserts that equidistance must be set aside. According to Bangladesh, *any* equidistance line would be inequitable and therefore the line claimed by Myanmar in its Counter-Memorial would be “every bit as inequitable as the old one”, that is to say the line Myanmar proposed during the negotiations³⁷⁵.

6.4. In the Reply, Bangladesh claims that “the equidistance method does not lead to an equitable result in this case”³⁷⁶ on the basis of two arguments:

³⁷¹ See, for example, BR, paras. 3.7 or 3.13 or 3.57.

³⁷² See, for example, BR, para. 3.84.

³⁷³ See Chapter 4 above.

³⁷⁴ See BR, para. 3.33.

³⁷⁵ BR, para. 3.35. Bangladesh relies on proposals made during the negotiations to support its claim, arguing that the line proposed by Myanmar in its Counter-Memorial would be somehow less favourable to Bangladesh in the areas closest to its coasts (but, as Bangladesh admits, “marginally less disadvantageous [to it] ... in the areas farthest from shore”) “than the old line” (see BR, para. 3.34). Myanmar recalled in its Counter-Memorial that positions taken during negotiations do not bind the parties when an international court or tribunal is called to settle their dispute (see MCM, para. 5.79). In any event, Bangladesh, not Myanmar, radically changed its *legal* position in the present case. Myanmar always based its claim on equidistance. On the other hand, if Bangladesh excludes equidistance in its Memorial and Reply, it is worth mentioning that at the beginning of the negotiations, just five years after the Judgment in the *North Sea Continental Shelf* cases was delivered, the Chief Legal Adviser of the Ministry of Foreign Affairs of Bangladesh indicated that Bangladesh’s intention “was to apply the same principle as for the territorial sea, and to measure 200 miles from the respective baselines. This would mean the application of the median line principle with equidistance points from the Bangladesh baselines”; “[i]n deference to all practical international law his government wished to apply the equidistance line. This median line was the practical and an accepted principle in international law” (see Minutes of the First Meeting, Friday 6 September 1974, 10h00-11h15, para. 17 – MCM, Annex 2, and Minutes of the First Meeting, Friday 6 September 1974, 15h30-17h00, para. 13 – MCM, Annex 2). Bangladesh’s reversal could not have been more extreme.

³⁷⁶ BR, pp. 60 *ff.*, II.

- the line claimed by Myanmar would be inequitable in so far as it would affect the maritime rights of Bangladesh (I);
- and the test of disproportionality would not be satisfied (II).

6.5. These arguments are not convincing, nor legally relevant, for the reasons set out below. Before refuting them in turn, it is to be noted that in the Reply Bangladesh has abandoned the argument based on economic considerations, which was clearly irrelevant as Myanmar explained in its Counter-Memorial³⁷⁷.

I. Bangladesh Does Not Possess Any Pre-existing Rights Which Would Pre-empt the Maritime Delimitation

6.6. Bangladesh's case is expressed as follows in the Reply: the equidistance line is inequitable since, together with India's claimed equidistance line, it "truncates Bangladesh's maritime entitlement well-before it reaches its 200 M limit"³⁷⁸; this cut-off effect is "the most dramatic ... in the world"³⁷⁹ and "is exacerbated by the fact that Bangladesh would be denied any access to its undisputable entitlement in the continental shelf beyond 200 M"³⁸⁰.

6.7. These are strong assertions, aimed at impressing the members of the Tribunal by dramatising the effects of a maritime delimitation which, actually, does not at all result in dramatic consequences, as will be explained below (see particularly Section II).

6.8. Bangladesh's reasoning is in fact fundamentally misconceived. Bangladesh asserts that it already has maritime rights – in particular in areas also claimed by other States – and deduces from these alleged rights that an equitable maritime delimitation would have to respect them. However, contrary to this assertion, international law does not grant to a coastal State pre-existing or absolute rights to "its 200 M limit", nor to some alleged "undisputable entitlement in the continental shelf beyond 200 M". Bangladesh forgets that "the sharing-out

³⁷⁷ See MCM, para. 5.143.

³⁷⁸ BR, para. 3.36.

³⁷⁹ BR, para. 3.59.

³⁸⁰ BR, para. 3.84.

of the area is ... the consequence of the delimitation, not vice-versa³⁸¹. A maritime delimitation could perfectly well lead to an equitable result without giving to one State a full 200-nautical-mile EEZ or any continental shelf beyond 200 nautical miles.

6.9. Bangladesh admits this conclusion elsewhere in the Reply when it considers, rightly, that the decision of the Tribunal in the *Barbados/Trinidad and Tobago* Arbitration was “*simply the equitable result* that followed from the delimitation process in accordance with Articles 74 and 83³⁸². Yet the Tribunal decided, against the will of Trinidad and Tobago whose claim was substantially the same as Bangladesh’s, that “the line did not extend beyond 200 M from the coast of Trinidad and Tobago”. The same solution prevails in the present case where the equidistance line leads to an equitable result although it does not allocate to Bangladesh all the maritime areas it claims.

6.10. In the Reply Bangladesh mainly relies on two rather old cases to support its claim to access to “its” alleged “200 M limit” and its “undisputable entitlement in the continental shelf beyond 200 M”: the *North Sea Continental Shelf* and *Guinea/Guinea-Bissau* cases. But the *North Sea Continental Shelf* cases have in important respects been superseded by later case law while the *Guinea/Guinea-Bissau* case is a very odd decision which calls for particular caution³⁸³.

6.11. To begin with, these cases no longer reflect the methodology applicable to maritime delimitation, as was recalled above³⁸⁴. Hence they are irrelevant as far as methodology is concerned.

³⁸¹ See MCM, para. 5.108. In fact, Bangladesh is conscious of the weakness of its reasoning on this point since it concedes in another part of the Reply, at para. 3.71, that it “does not contend that there is a ‘right’ as such to extend one’s maritime jurisdiction as far seaward as international law permits. It does, however, consider it inequitable to prevent a State with hundreds of kilometres of coastline that otherwise faces onto international waters from reaching any part of its 200 M limit”. If Bangladesh’s point is that maritime delimitation has to take into account the length of the coasts, this point is only relevant to the test of disproportionality. In the present case, Myanmar’s equidistance line fully satisfies the test (see Section II below).

³⁸² BR, para. 4.43 (emphasis added).

³⁸³ See Chapter 5, para. 5.56 above.

³⁸⁴ See paras. 4.14-4.27 above. See also the statement of the former President of the ICJ, Judge Guillaume, before the Sixth Committee of the United Nations General Assembly on 31 October 2001: “At this stage, case law and treaty law had become so unpredictable that there was extensive debate within doctrine on

6.12. Moreover, contrary to Bangladesh's assertion³⁸⁵, these two cases cannot be decisive since the facts were different from those of the present case. Myanmar already explained in its Counter-Memorial how grossly artificial is the allegation according to which "[t]he Federal Republic of Germany and the Republic of Guinea were in precisely the same predicament as Bangladesh" in these two cases. The relevant coasts of Bangladesh and Myanmar are not "in fact closely comparable" and the two States have not "been given 'broadly equal treatment by nature in all material respects'"³⁸⁶; in the *North Sea Continental Shelf* cases³⁸⁷ as in *Guinea/Guinea-Bissau*³⁸⁸, the relevant coasts of the parties were equal in length, which is not true in the present case.

6.13. But the flaw of Bangladesh's claim is even more serious than that. According to Bangladesh, even if Myanmar and Bangladesh had not been given broadly equal treatment by nature, the *North Sea Continental Shelf* and *Guinea/Guinea-Bissau* cases would in any event establish that Myanmar's equidistance line is not equitable because the maritime delimitation would deny Bangladesh access to "its 200 M limit" and to the continental shelf beyond that limit³⁸⁹.

6.14. Bangladesh omits to say however that "its 200 M limit" is completely surrounded by the 200-nautical-mile limit of Myanmar and by the 200-nautical-mile limit of India.

6.15. Moreover, the foundation of the argument is unclear. Bangladesh seems to consider that the absence of access to "its 200 M limit" and to its "undisputable entitlement in the

whether there still existed a law of delimitation or whether, in the name of equity, we were not ending up with arbitrary solutions. Sensitive to these criticisms, in subsequent years, the Court proceeded to develop its case law in the direction of greater certainty" (Speech by H. E. Judge Gilbert Guillaume, President of the ICJ, to the Sixth Committee of the General Assembly of the United Nations, 31 October 2001 (available at <http://www.icj-cij.org/court/index.php?p1=1&p2=3&p3=1&pt=3&y=2001>); see also MCM, para. 1.27).

³⁸⁵ BR, para. 3.42.

³⁸⁶ BR, para. 3.56. See MCM, paras. 5.68, 5.64 and 5.132; and Subsection II, A below.

³⁸⁷ See on that point MCM, paras. 5.129-5.134.

³⁸⁸ See *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *ILM*, Vol. 25, 1986, pp. 291-292, para. 97.

³⁸⁹ BR, para. 3.57.

continental shelf beyond 200 M” would be a factor which *alone* would render equidistance inequitable, whatever the factual and geographical configuration³⁹⁰.

6.16. This assertion is legally misconceived since the equitableness of a maritime delimitation is not to be assessed *in abstracto*, as if there were some abstract rights to protect like an “access to ‘its’ 200 M limit”. It is to be assessed *in concreto*. This is true at least in three respects:

- i. international courts and tribunals cannot refashion nature and consequently, each case has to be settled on the basis of its own geographical features³⁹¹;
- ii. maritime delimitation is not the result of the automatic enforcement of absolute, inherent, pre-existing, unilateral rights belonging to one State, it is a *delimitation* between two States whose geographical relationship is unique;
- iii. the equitableness of the maritime delimitation is checked through the test of non-disproportionality, not in a vacuum or on the basis of very general assertions.

6.17. In that regard, Bangladesh deliberately by-passes and even distorts the nature of maritime delimitation when it compares itself to Sri Lanka to try to convince the Tribunal that it is necessary to give it larger maritime areas than those allocated on the basis of equidistance. The Reply states that Sri Lanka’s coastal front is just 15% longer than Bangladesh’s but that “the difference between Bangladesh’s and Sri Lanka’s maritime spaces is still huge: 3.75 times”. That would constitute “an unjustifiable difference of treatment” which would need to be corrected³⁹².

6.18. Bangladesh’s reasoning is quite extraordinary:

- i. Bangladesh applies its reasoning not only to equidistance *but also* to its own line: “[e]ven using Bangladesh’s proposed 215° line, the difference between Bangladesh’s

³⁹⁰ See BR, para. 3.71. Bangladesh “does ... consider it inequitable to prevent a State with hundreds of kilometres of coastline that otherwise faces onto international waters from reaching any part of its 200 M limit”.

³⁹¹ See MCM, paras. 5.116-5.120.

³⁹² BR, para. 3.65 and BR, Vol. III, Figure R3.4.

and Sri Lanka's maritime spaces is still huge"³⁹³. To be coherent with its argument, Bangladesh would therefore have to claim a line going much more to the south than its 215° line and claim in fact *all* the relevant area, leaving nothing to Myanmar. The relevant area to be delimited in the present case measures approximately 236,000 square kilometres while the maritime area allocated to Sri Lanka measures 344,302 square kilometres according to Bangladesh; if the latter were entitled to claim the same area as the area allocated to Sri Lanka to correct the "difference of treatment" to which it refers, it would have to be allocated (at least!) all the relevant area in the present case and the ratio between Bangladesh and Myanmar would be infinite: Myanmar: 0; Bangladesh: 236,000!

- ii. If such an absurd reasoning were valid, any coastal State could claim large maritime areas by invoking equality of treatment and the fact that small isolated islands in the middle of the ocean possess a full EEZ all around them. This kind of reasoning entirely misses the point for two reasons: first, maritime delimitation consists of a *delimitation* between *two* States with overlapping claims, not of an allocation to one State of areas it claims unilaterally; second, as the Arbitral Tribunal correctly stated in the *Guinea/Guinea-Bissau* case,

"[a] State with a fairly small land area may well be justified in claiming a much more extensive maritime territory than a larger country. *Everything depends on their respective maritime facades and their formations*"³⁹⁴.

6.19. The relevant point indeed is to determine whether the maritime delimitation results in an equitable solution *between Myanmar and Bangladesh in the relevant area*; it is not to assess the equitableness of the maritime areas allocated to each State in the abstract as if unlimited resources were allocated on the basis of individual and absolute rights³⁹⁵.

³⁹³ BR, para. 3.65.

³⁹⁴ *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *ILM*, Vol. 25, 1986, p. 301, para. 119 (emphasis added). See also *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre & Miquelon)*, Decision of 10 June 1992, para. 45: "The extent of the seaward projections will depend, in every case, on the geographical circumstances; for example, a particular coast, however short, may have a seaward projection as far as 200 miles, if there are no competing coasts that could require a curtailed reach".

³⁹⁵ See, for example, BR, para. 3.13, where Bangladesh compares the areas allocated to it with the maritime areas of Myanmar not only in the relevant area, but "in the Bay of Bengal and elsewhere".

6.20. As Bangladesh rightly underscores in the Reply, “there are concave coastlines ... that do not cause prejudice to the coastal State”³⁹⁶. The equitableness of equidistance *cannot be* then a matter of general assertions. It is a matter of concrete appreciation. State practice and modern case law confirm this conclusion.

A. State Practice

6.21. State practice, Bangladesh argues, would support its views through the recognition of an alleged “principle of ‘maximum reach’” which would make it mandatory to give Bangladesh “access to its own 200 M limit”³⁹⁷. The Reply relies to this effect on a few maritime boundary agreements³⁹⁸ which do not help Bangladesh’s case in any way.

6.22. First, these agreements generally created only very narrow corridors which are not comparable at all with the “modest outlet to the 200 M limit”³⁹⁹ claimed by Bangladesh, which is in fact approximately 50 nautical miles wide when it reaches the 200-nautical-mile limit (assuming an equidistance boundary between Bangladesh and India). For example, the Agreement between Dominica and France⁴⁰⁰ afforded to Dominica a corridor 17 nautical miles wide (this recourse to pure equity being moreover only applied, for political reasons, in the Atlantic sector where no third State had to be taken into account while in the Caribbean sector simplified equidistance was preferred); similarly the agreements between Germany and Denmark⁴⁰¹ and Germany and The Netherlands⁴⁰² left to Germany a corridor less than 10

³⁹⁶ BR, para. 3.39.

³⁹⁷ BR, paras. 3.72, 3.83.

³⁹⁸ BR, paras. 3.74-3.82.

³⁹⁹ BR, para. 3.70.

⁴⁰⁰ Agreement on Maritime Delimitation (with map) between the Government of French Republic and the Government of Dominica, 7 September 1987, published in *UNTS*, Vol. 1546, I-26854, p. 308.

⁴⁰¹ Treaty between the Kingdom of Denmark and the Federal Republic of Germany concerning the delimitation of the continental shelf under the North Sea (with annexes and exchange of letters), 28 January 1971, in *UNTS*, Vol. 857, I-12295, p. 109.

⁴⁰² Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the delimitation of the continental shelf under the North Sea (with annexes and exchange of letters), 28 January 1971, in *UNTS*, Vol. 857, I-12296, p. 131.

nautical miles wide; and the Convention concluded by France and Monaco⁴⁰³ granted to Monaco a corridor less than 2 nautical miles wide.

6.23. Moreover, these corridors do not go beyond 200 nautical miles and some of them do not reach the 200-nautical-mile limit. The Monegasque corridor stops for instance before reaching 50 nautical miles, and the corridor afforded to Dominica by France is encircled beyond 200 nautical miles by the French maritime area. The same can be said as regards Germany since the area allocated to it does not reach 100 nautical miles.

6.24. This scant practice is not legally probative in any case since, to use Bangladesh's own words,

“[t]here is a world of difference between a negotiated agreement, which may or may not reflect what the rules of international law require, and a delimitation effected by a judicial body or arbitral tribunal in application of the relevant rules of law”⁴⁰⁴.

6.25. The few agreements quoted by Bangladesh well illustrate this caveat. They reflect agreed solutions dictated by political considerations. As such, they are not probative before an international tribunal required to apply international law, not to decide the case *ex aequo et bono*⁴⁰⁵.

6.26. As regards the Agreement between The Gambia and Senegal, which is a very special case since Gambia is completely surrounded by Senegal, Bangladesh considers that “the parties *agreed that equity* required according The Gambia a corridor to its 200 nautical miles limit...”⁴⁰⁶. Commenting on Denmark's Agreement with Germany, Bangladesh likewise states that the access to the median line (between opposite coasts in the North Sea) which Denmark agreed “to accord Germany” represented “a significant sacrifice for Denmark” and

⁴⁰³ Convention on Maritime Delimitation (with maps) between the Government of the French Republic and the Government of His Serene Highness the Prince of Monaco, 16 February 1984, in *UNTS*, Vol. 1411, I-23631.

⁴⁰⁴ BR, para. 2.92.

⁴⁰⁵ It is not without interest to note in this regard that the agreements referred to by Bangladesh to support its claim were all concluded before UNCLOS entered into force, that is to say, according to Bangladesh, before the “clear break” from the 1958 Convention under UNCLOS, which “gave the equidistance method an express role” (BM, para. 6.14).

⁴⁰⁶ BR, para. 3.75 (emphasis added).

that, nonetheless, “in the end, Denmark accepted the force of the German argument and *agreed to cede* to Germany a full one-third to its access to the median line”⁴⁰⁷.

6.27. As regards the Agreement concluded between France and Dominica,

“[i]t is quite probable that certain political perceptions favoured that account be taken of the legitimate rights and interests of the islands’ populations (Dominica’s population of 80,000 is quite low compared to the 360,000 persons in each French department), France’s prestige as a solid member of the EEC, and its conciliatory position in relations with the Third World (particularly within the framework of the Lomé Convention)”⁴⁰⁸;

“some economic considerations might have helped to influence the choices between equity and equidistance. If there was an extrajudicial or extra-technical factor that influenced the drawing of the line, such a factor would have been closely linked to the economic zone concept. ... This is a case where the boundary between political considerations and economic considerations becomes difficult to detect”⁴⁰⁹;

France had later to “compensate Guadeloupe for this compromise”⁴¹⁰;

“[e]quity predominated as the basis for the drawing of the line”⁴¹¹.

6.28. The same remarks apply to the Agreement between France and Monaco:

“As stated by Mr Paul Robert, rapporteur for the convention before the French Senate, ‘because of the tight and exceptional nature of the French-Monegasque relations, France has accepted provisions *that the rules of international law did not oblige it to accept.*’”⁴¹²;

“... an equidistant boundary would have resulted in converging boundary lines that intersect less than 12 n.m. from Monaco. This would have meant cutting off the Monegasque territorial sea from the high seas. Such a disadvantaged situation, *which however is not explicitly prohibited by international law*, prompted Monaco to

⁴⁰⁷ BR, para. 3.82 (emphasis added).

⁴⁰⁸ *International Maritime Boundaries*, Report Number 2-15, Vol. I, p. 707, reproduced in BR, Vol. III, Annex R23.

⁴⁰⁹ *Ibid.*, pp. 707-708.

⁴¹⁰ *Ibid.*, p. 709.

⁴¹¹ *Ibid.*, p. 711.

⁴¹² *International Maritime Boundaries*, Report Number 8-3, Vol. II, p. 1582, reproduced in BR, Vol. III, Annex R23 (emphasis added).

seek the negotiation of the convention in order to avoid a situation that was regarded also by France as ‘uncomfortable’⁴¹³.

6.29. Such political considerations were admittedly not guiding in the *St. Pierre & Miquelon* case which was settled by arbitration and left to France a “corridor” which is less than 11 nautical miles wide⁴¹⁴. But this case was the opposite of the present one. The corridor that, according to Bangladesh, the Court of Arbitration allegedly “gave” to the French islands was not aimed at remedying a claim similar to that of Bangladesh⁴¹⁵. In the *St. Pierre & Miquelon* case, the State to which a “corridor” has allegedly been given was the State claiming the application of equidistance. On the contrary, in the present case, Bangladesh wants equidistance to be set aside. In *St. Pierre & Miquelon* indeed, France, not Canada, claimed the application of equidistance. For its part, Canada, not France, was considering that it risked some cut-off effect – this was the reason why Canada denied any French entitlement beyond 12 nautical miles⁴¹⁶.

6.30. The Court of Arbitration recalled in its Award that France had an entitlement extending up to 200 nautical miles like Canada and that consequently delimitation had to be operated between the two States in the area located within 200 nautical miles⁴¹⁷. The Court decided that France, as a result of the delimitation (that France wanted to be based on equidistance), would be allocated “a full seaward projection to 200 miles of the unobstructed south coast of the French islands” and found the result equitable because the disproportionality test was satisfied⁴¹⁸. The Court thus delimited the relevant area within

⁴¹³ *Ibid.*, p. 1584 (emphasis added).

⁴¹⁴ See BR, Vol. II, Figure R3.7. Charney underlines that this “very narrow corridor” constituted for France “a consolation” and a “symbolic victory” which “may make fisheries and resource management in the area difficult without agreements between France and Canada” (BR, Vol. III, Annex R22, pp. 247-248). See also E. Zoller, « La sentence franco-canadienne concernant St Pierre et Miquelon », *AFDI*, 1992, pp. 482-484.

⁴¹⁵ BR, para. 3.73.

⁴¹⁶ See *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre & Miquelon)*, Decision of 10 June 1992, *UNRIAA*, Vol. XXI, pp. 338-339 (and *ILM*, Vol. 31, 1992, pp. 18-19).

⁴¹⁷ *Ibid.*, para. 70.

⁴¹⁸ *Ibid.*, paras. 74 and 93.

200 nautical miles⁴¹⁹ contrary to the wish of Canada which was claiming that the French EEZ would cut-off its maritime spaces.

6.31. The existence of many other cases where no corridor has been granted by way of agreement between the States concerned, although equidistance has led to some cut-off effect, confirms that the very small number of agreements quoted by Bangladesh are neither significant nor legally relevant. The latter cannot substantiate its claims that an equidistance line depriving one of the parties of full access to 200 nautical miles and/or to the potential continental shelf entitlements beyond 200 nautical miles would be inequitable *as such*.

6.32. This is particularly true with regard to the practice in the region. As Figure R3.3A of the Reply shows conclusively⁴²⁰, out of fewer than ten maritime delimitations agreed in the region, seven entail cut-off effects within 200 nautical miles – at the tripoints between India (Nicobar Islands), Indonesia and Thailand⁴²¹; between Indonesia, Malaysia and Thailand⁴²²; and between Myanmar, India and Thailand⁴²³. These cut-off effects have not prevented those States from agreeing on maritime boundaries⁴²⁴.

6.33. As regards the 1986 India-Myanmar Agreement in the Gulf of Martaban⁴²⁵, Bangladesh agrees that it “relates even in part to a coast that can justly be described as

⁴¹⁹ See the map reproduced in *Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia, Second Phase*, Award of 26 March 2002, *ILR*, Vol. 128, following para. 2.32.

⁴²⁰ BR, Vol. I, following p. 72, and Vol. II.

⁴²¹ 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.

⁴²² Agreement between the Government of the Republic of Indonesia, The Government of Malaysia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Strait of Malacca, 21 December 1971 (reproduced in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. II, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 1452).

⁴²³ 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.

⁴²⁴ See also MCM, paras. 2.31-2.44 and 5.136.

⁴²⁵ Sketch-map No. 2.3 of Myanmar’s Counter-Memorial (at page 29) incorrectly depicted (for illustrative purposes only) the line agreed in 1986. The official Chart, forming an integral part of the 1986 Agreement, was reproduced in Annex 11 to the Counter-Memorial.

concave”⁴²⁶. But it goes on to argue that the delimitation line “bears no similarity whatsoever to an equidistance line” since “it represents a sizable departure from equidistance”⁴²⁷. Bangladesh fails to take into account however the presence of Narcondam and Barren Islands, to which the parties decided to give less than full effect. This is the reason why the delimitation line has been adjusted (see sketch-map No. R6.1 at page 159). On the other hand, the concavity of the Gulf of Martaban played no role at all in the delimitation process and has not been invoked as a special circumstance.

B. Modern Case Law

6.34. Recent cases decided by international courts and tribunals confirm that Bangladesh’s claim is not justified and that a maritime delimitation based on equidistance could well lead – as in the present case – to an equitable result even when concave coasts produce cut-off effects. Two cases are especially relevant in so far as claims very similar to that of Bangladesh were raised *and rejected* respectively by the ICJ and an arbitral tribunal.

6.35. The first case is *Cameroon v. Nigeria*. The Judgment of the ICJ is particularly relevant when it deals with Cameroon’s claim that “the concavity in the Gulf of Guinea in general and of Cameroon’s coastline in particular, creates a virtual enclavement of Cameroon” which makes it necessary to adjust (not to set aside) the provisional equidistance line⁴²⁸. This is exactly Bangladesh’s claim, which is in substance a copy and paste of Cameroon’s Memorial.

6.36. In its Memorial Cameroon claimed that

“a glance at the map shows that the geographic situation constituted by the Bay of Biafra combines certain of the worst geographical anomalies examined in the maritime delimitation

⁴²⁶ BR, para. 3.68.

⁴²⁷ *Ibid.*

⁴²⁸ See MCM, para. 5.122, quoting the 2002 ICJ Judgment, and see BR, para. 3.49. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 419, para. 234: Cameroon “is asking [the Court] to take into account the entire geographic situation in the region, and in particular the disadvantage suffered by Cameroon as a result of its position in the centre of a highly concave coastline, which results in the claims of the adjoining States having a ‘pincer’ effect upon its own claims. It is simply asking the Court ‘to move, as it were, the Nigerian part of the pincers in a way which reflects the geography’”.

cases that the Court has had to deal with. Cameroon is confronted with the same problem of a very concave coast as the Federal Republic of Germany in 1969. To this effect, it is instructive to study map No. 3 reproduced on page 15 of the 1969 Judgment in the *North Sea Continental Shelf* cases; the map is turned so that North is found at the left, thus making appear, in the area situated between points A, B, E, D and C, a surprising resemblance with the present situation⁴²⁹.

6.37. In its Memorial in the present case, Bangladesh likewise asserts that

“[t]his case presents geographic circumstances substantially 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)”⁴³⁰.

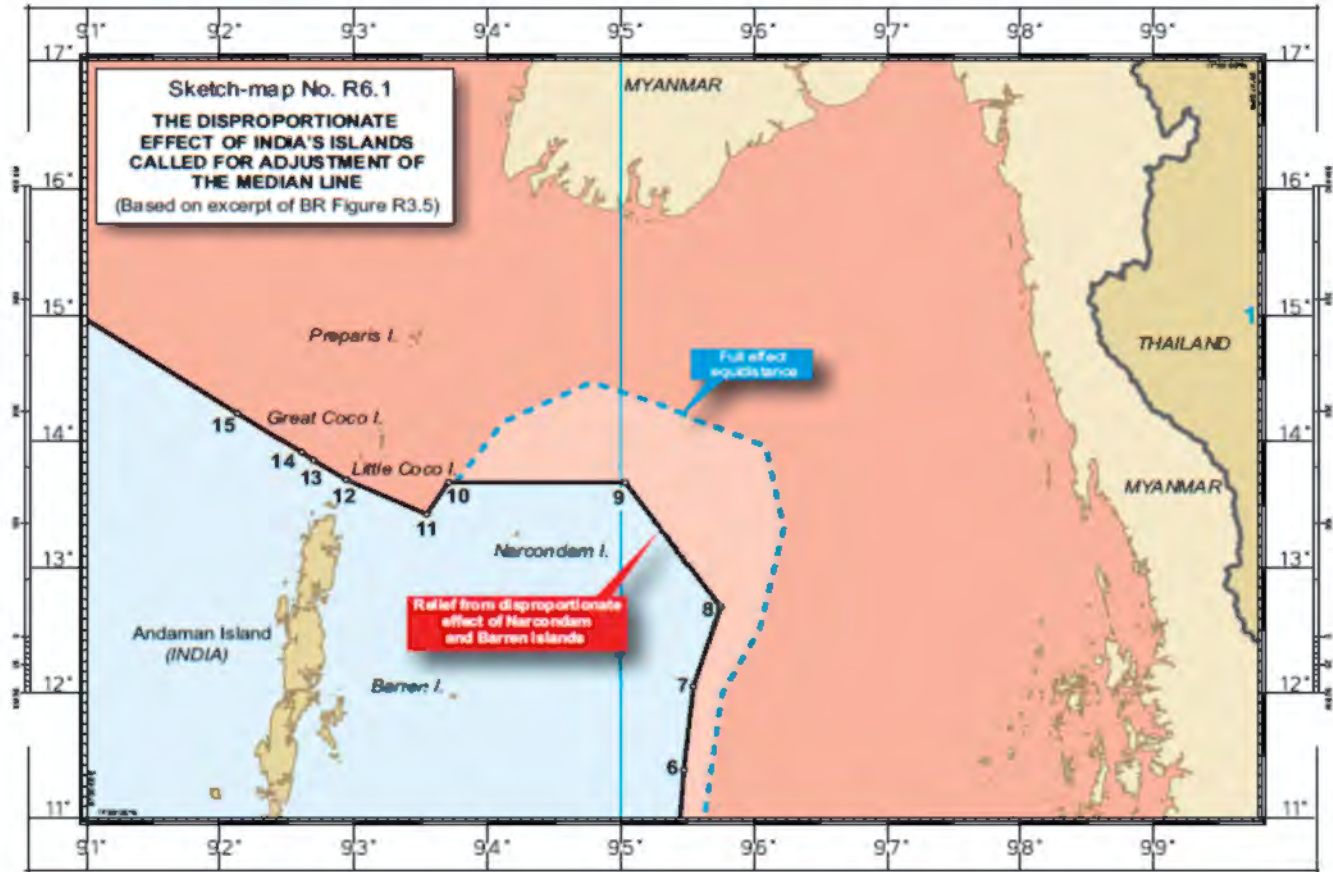
6.38. The solution adopted in the 2002 Judgment of the ICJ in *Cameroon v. Nigeria* is therefore compelling in the present case.

6.39. First, despite the obvious concavity of the Gulf of Guinea and particularly of the Bay of Biafra and of Cameroon’s coast, which is not very different from that of Bangladesh, the ICJ decided that the configuration of the coast does not represent “a circumstance that would justify shifting [or *a fortiori* setting aside] the equidistance line”⁴³¹.

⁴²⁹ Our Translation (French original: « Un coup d’œil sur la carte montre que la situation géographique constituée par la Baie de Biafra combine certaines des pires anomalies géographiques examinées dans les affaires de délimitation maritime dont la Cour a eu à connaître. Le Cameroun se voit confronté au même problème de côte fortement concave que la République Fédérale d’Allemagne en 1969. A cet effet, il est instructif d’étudier la carte n° 3 reproduite à la page 15 de l’arrêt de 1969 rendu dans l’affaire du *Plateau continental de la Mer du Nord*; la carte est tournée de telle sorte que le nord se trouve à gauche, faisant ainsi ressortir, dans la zone située entre les points A, B, E, D, et C, une ressemblance surprenante avec la présente situation ... »), Cameroon’s Memorial, 16 March 1995, Vol. I, pp. 538-539, para. 5.90 (available on <http://www.icj-cij.org/>); see also Cameroon’s Reply, 4 April 2000, pp. 403 *et seq.*, paras. 9.54 *et seq.* (available on <http://www.icj-cij.org/>).

⁴³⁰ BM, para. 1.9. Reciprocally, Germany had submitted in its Memorial to the ICJ in the *North Sea Continental Shelf* cases eight figures to support its claim that the concavity of the coast would impose to set aside equidistance. Figures 7 and 11 concerned two pairs of States (*Cameroon v. Nigeria* and *Romania v. Ukraine*) which maritime dispute has been settled by the ICJ in 2002 and 2009 by adopting an equidistance line on the basis of what is now considered the established methodology.

⁴³¹ *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, pp. 445-446, para. 297.



6.40. Second, the ICJ did not apply a regional approach to coastal configuration but only considered the relevant coasts of the parties in its Judgment. This is especially at odds with the approach followed by the Arbitration Tribunal in *Guinea/Guinea-Bissau*, where the Tribunal used a method consisting “of looking at the whole of West Africa and of seeking a solution which would take overall account of the shape of its coastline”. In other words, the Tribunal decided no longer to restrict “considerations to a *short coastline* but to a *long coastline*”⁴³². As a result, the Arbitration Tribunal chose a single, unidirectional coastal façade extending from Senegal right down to Sierra Leone – thus jumping across the territories of no fewer than five different States⁴³³ – to draw the delimitation line⁴³⁴. Even Bangladesh in the present case does not use such an over-simplified method (the Tribunal selected “a straight line joining two coastal points *on the continent*”⁴³⁵). In fact, in 1985 the Arbitration Tribunal confused the equitable result that any delimitation between two States must concretely result in with an exercise it called the “equitable integration [of the delimitation between Guinea and Guinea-Bissau] into the existing delimitations of the West African region, as well as into future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions”⁴³⁶.

⁴³² *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, reproduced in *ILM*, Vol. 25, 1986, p. 297, paras. 108 ff. (see also *UNRIIAA*, Vol. XIX, p. 189) (emphasis added).

⁴³³ Senegal (twice), The Gambia, Guinea-Bissau, Guinea and Sierra Leone, see BR, Vol. III, Figure R3.6.

⁴³⁴ *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, reproduced in *ILM*, Vol. 25, 1986, pp. 297-298, paras. 110-111 (see also *UNRIIAA*, Vol. XIX, pp. 189-190).

⁴³⁵ *Ibid.* (emphasis added).

⁴³⁶ *Ibid.*, para. 109. It has also to be noted that the Tribunal contradicted itself in its reasoning: on the one hand, the Tribunal considered that it “could not take into consideration a delimitation [the delimitation between Guinea and Sierra Leone, which produced a cut-off effect detrimental to Guinea] which did not result from negotiations or an equivalent act in accordance with international law” (the said delimitation was unilaterally fixed by *Guinea* and the Tribunal noted that “Sierra Leone has apparently not recognized this delimitation” and “[t]here is nothing to say whether, in the event of a formal agreement finally being achieved, the line adopted would follow the same direction or a direction more or less favorable [*sic*] to Guinea”) (para. 94); on the other hand, it rejected equidistance because the equidistance line would “arrive too soon at the parallel of latitude drawn from the land boundary between Guinea and Sierra Leone which Guinea has unilaterally taken as its maritime boundary” (para. 104). In sharp contrast, the Arbitral Tribunal in *Barbados/Trinidad and Tobago* more coherently decided in 2006 that it was “not concerned with the political considerations that might have led the Parties to conclude the 1990 Trinidad-Venezuela Agreement, and certainly Barbados cannot be required to ‘compensate’ Trinidad and Tobago for the agreements it has made by shifting Barbados’ maritime boundary in favour of Trinidad and Tobago” (para. 346).

6.41. By contrast, the ICJ in *Cameroon v. Nigeria* resorted to an objective approach considering that the concavity of the coast was not a relevant circumstance since “the sectors of coastline relevant to the present delimitation exhibit no particular concavity”⁴³⁷ (see sketch-map No. R6.2 at page 165). In other words,

- i. in accordance with modern case law, the ICJ restricted the delimitation to the relevant area and adopted a spatially constrained approach which it recently confirmed by stating in the *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Application by Honduras for Permission to Intervene)* that “[b]etween Colombia and Nicaragua, the maritime boundary will be determined pursuant to the coastline and maritime features of the two Parties” only⁴³⁸;
- ii. the ICJ introduced a difference between the general concavity of the coasts and the particular concavity of the relevant coasts, which is interesting since Bangladesh claims in the Reply that the course of the equidistance line is exclusively controlled by the adjacent coasts of the Parties, not by the concave sector of its coasts⁴³⁹;
- iii. the ICJ did not take into account the general concavity of Cameroon’s coasts, and *a fortiori* the concavity of the Gulf of Guinea, restricting itself to the concavity of the relevant sector which was very narrow compared to the overall extent of Cameroon’s coasts;
- iv. the ICJ stated that “the concavity of the coastline may be a circumstance relevant to delimitation”⁴⁴⁰ but it did not take into account *at all* the cut-off effect that equidistance would produce to the disadvantage of Cameroon. Yet Bangladesh “does not argue that concavity *ipso facto* makes equidistance inequitable” but only that the

⁴³⁷ *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 445, para. 297.

⁴³⁸ Judgment of 4 May 2011, para. 73, available on <http://www.icj-cij.org/> (emphasis added).

⁴³⁹ See BR, para. 3.103. The Reply criticizes the construction of the equidistance line on the ground that it is based on Bangladesh’s side on a single base point, located near the land boundary terminus. This shows that the adjacent coast of Bangladesh essentially controls the equidistance line (see Chapter 5, para. 5.14 above).

⁴⁴⁰ *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 445, para. 29.

cut-off effect which equidistance might create would be inequitable⁴⁴¹. This is precisely what the ICJ did not accept as a relevant circumstance in 2002. As Bangladesh itself underlines in the Reply, the ICJ adopted a “strict equidistance” line in *Cameroon v. Nigeria* which is, in several respects, a case very comparable to the present one⁴⁴².

6.42. Finally, the ICJ decided that there was no particular concavity in the relevant sector – although the Gulf of Guinea *is* concave and Cameroon is located “at the apex” of the Gulf⁴⁴³ – because the relevant coasts of Cameroon in this case did not extend to the east beyond Debundsha Point⁴⁴⁴. This is again decisive:

- i. Cameroon’s coast *up to* Debundsha Point was not considered by the ICJ as non-concave. It is indeed concave. The ICJ said rather that this relevant sector of the coast (up to Debundsha Point) exhibited “no particular” concavity. This shows that: first, a concavity that is not “particular” is not a relevant factor; and second, that concave coasts such as Cameroon’s coast up to Debundsha Point are not considered by the ICJ as exhibiting “particular concavity”;
- ii. the “cut-off effect” argument of Cameroon was stronger than that of Bangladesh in the present case, since Cameroon’s case was twofold: (1) Cameroon contended that its coasts were markedly concave; (2) *and* that the presence of Bioko Island constituted a relevant circumstance which should be taken into account, because it “substantially reduces the seaward projection of Cameroon’s coastline”⁴⁴⁵. The ICJ also rejected this claim on the ground that, Bioko Island being subject to the sovereignty of a third State, its effect “on the seaward projection of the Cameroon coastal front is ... not relevant to the issue of delimitation before the Court”⁴⁴⁶;

⁴⁴¹ BR, para. 3.39 (emphasis added).

⁴⁴² BR, para. 3.61.

⁴⁴³ BR, para. 3.37, Bangladesh argues that it is located “at the apex of Bengal concavity”.

⁴⁴⁴ *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, pp. 442-443, para. 291.

⁴⁴⁵ *Ibid.*, p. 446, para. 298.

⁴⁴⁶ *Ibid.*, p. 446, para. 299.

- iii. therefore, the ICJ decided that the cut-off effect was not a special circumstance requiring the adjustment of the equidistance line *even if* there was an additional element which exacerbated this effect (Bioko Island in this case). In other words, if there were an island belonging to a third State located just in front of the east coast of Bangladesh (which would produce an effect much more detrimental to Bangladesh than the mere presence of India in the relevant area), the application of the 2002 Judgment would lead to strict equidistance between the adjacent coasts of Bangladesh and Myanmar even though the cut-off effect would be more marked for Bangladesh than it is in the actual geography of this case. In these circumstances, the *Cameroon v. Nigeria* case clearly supports Myanmar's position.

6.43. The same conclusion follows from the Award unanimously delivered in 2006 by the Arbitral Tribunal in the *Barbados/Trinidad and Tobago* case⁴⁴⁷. This Award radically contradicts Bangladesh's claim according to which the alleged "inequity" of equidistance "is exacerbated by the fact that Bangladesh would be denied any access to its undisputable entitlement in the continental shelf beyond 200 M"⁴⁴⁸.

6.44. The Reply asserts, when dealing with Myanmar's objection that Bangladesh does not rely on any relevant case law to support its claim, that the objection

"can most charitably be described as disingenuous. Myanmar knows well why Bangladesh does not cite relevant case law – because there is none! As Bangladesh stated in its Memorial, no court or tribunal has yet had any occasion to decide a case involving analogous issues in the continental shelf beyond 200 M"⁴⁴⁹;

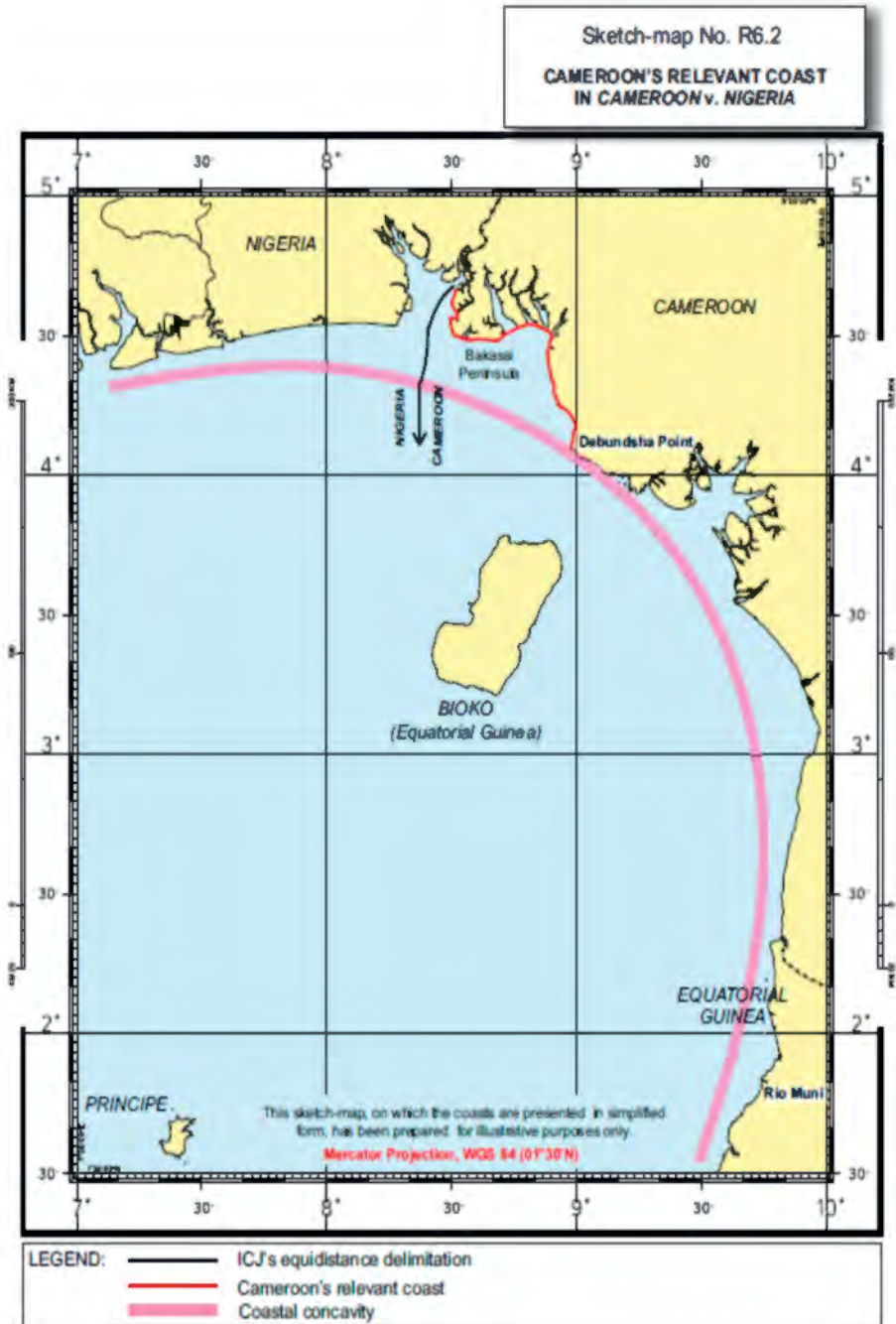
"[n]o court or tribunal has yet had occasion to delimit a maritime boundary in the outer continental shelf"⁴⁵⁰.

⁴⁴⁷ The Arbitral Tribunal consisted of Judge Stephen Schwebel (President), Sir Ian Brownlie, Prof. Vaughan Lowe, Prof. Francisco Orrego Vicuña and Sir Arthur Watts.

⁴⁴⁸ BR, paras. 3.84 *ff.*

⁴⁴⁹ BR, para. 3.87.

⁴⁵⁰ BR, para. 3.92.



6.45. These assertions are hardly understandable since Bangladesh quotes in the Memorial and in the Reply the *Barbados/Trinidad and Tobago* case, which dealt with a claim very similar to the claim put forward by Bangladesh before ITLOS. Bangladesh appears to overlook that in the Memorial it wrote that:

“In the *Barbados/Trinidad and Tobago Maritime Boundary Arbitration Award* of 11 April 2006, an UNCLOS Annex VII arbitral tribunal held that delimitation of the outer shelf formed part of the claim and that it had jurisdiction to delimit the maritime boundary extending beyond 200 M”⁴⁵¹.

6.46. Bangladesh annexed the Award to its Memorial⁴⁵², which seems appropriate since Trinidad and Tobago’s claim was the same as that of Bangladesh:

“Adoption of the equidistance line in the Atlantic sector, as claimed by Barbados, would, Trinidad and Tobago maintains, prevent Trinidad and Tobago from reaching the limit of its EEZ entitlement, and allow Barbados to claim 100% of the outer continental shelf in the area of overlapping entitlements, a result which Trinidad and Tobago argues is inequitable and in violation of the principle of non-encroachment.

Trinidad and Tobago argues further that where there are competing claims, the Tribunal should draw the delimitation ‘as far as possible so as to avoid ‘cutting off’ any State due to the convergence of the maritime zones of other States”⁴⁵³.

6.47. Barbados opposed this claim saying that it was wrongly based on the assumption that Trinidad and Tobago possessed an “inherent right” or an “absolute entitlement” to the maritime areas it claimed, something which was absurd. Maritime delimitation “is the ultimate refutation of a claim of absolute entitlement”. Its effect could only be to leave to each party its putative entitlements “as much as possible” as international courts and tribunals have recalled, including in the *North Sea Continental Shelf* and *Guinea/Guinea-Bissau* cases so heavily relied upon by Bangladesh⁴⁵⁴.

⁴⁵¹ BM, para. 4.24.

⁴⁵² BM, Vol. V, p. 329.

⁴⁵³ Award of 11 April 2006, paras. 152-153.

⁴⁵⁴ See Reply of Barbados, 9 June 2005, (available on <http://www.pca-cpa.org/>), paras. 233-234 and 235, and largely paras. 233-241 and 273-274.

6.48. In its Reply, Bangladesh also argues that the delimitation of the continental shelf beyond 200 nautical miles would not be governed by equidistance⁴⁵⁵. But Bangladesh confuses the delineation of the outer limit of the continental shelf beyond 200 nautical miles and the delimitation of the continental shelf between States⁴⁵⁶. As regards delimitation, the Arbitral Tribunal in *Barbados/Trinidad and Tobago* adopted the method of equidistance even in the face of competing claims to the continental shelf beyond 200 nautical miles.

6.49. In Chapter 4 of the Reply, Bangladesh recognizes that in the *Barbados/Trinidad and Tobago* Arbitration,

“[h]aving determined the course of the boundary, the tribunal in that case concluded that the line did not extend beyond 200 M from the coast of Trinidad and Tobago. This was ... simply the equitable result that followed from the delimitation process in accordance with Articles 74 and 83”⁴⁵⁷.

6.50. Bangladesh thus admits that the delimitation decided by the Tribunal leads to an “equitable result ... in accordance with Articles 74 and 83”. This admission is wholly contrary to Bangladesh’s basic argument in the present case.

6.51. Facing Trinidad and Tobago’s claim to the adjustment (and not the setting aside) of the equidistance line on the ground of an entitlement to a continental shelf beyond 200 nautical miles, the Tribunal decided *not* to adjust the equidistance line on that ground because “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”⁴⁵⁸ (see sketch-map No. R6.3 at page 171). It did not mean of course that either Trinidad and Tobago *or* Barbados was deprived of any access to the continental shelf beyond 200 nautical

⁴⁵⁵ BR, paras. 3.93-3.97.

⁴⁵⁶ On the jurisdictional problems raised by the determination of the entitlement on the continental shelf beyond 200 M, see Appendix paras. A.9-A.20 below. The fact that entitlements on the continental shelf beyond 200 nautical miles have not been yet decided by the CLCS (which can perfectly reject on the merits any claim submitted to it) makes totally hypothetical and artificial the calculations made by Bangladesh at para. 3.97 of the Reply. Besides, these calculations contradict Bangladesh’s claim that Myanmar has no entitlement on the continental shelf beyond 200 nautical miles.

⁴⁵⁷ BR, para. 4.43.

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, UNRIIA, Vol. XXVII, p. 242, para. 368.

miles. In the circumstances of the case, it simply meant that Trinidad and Tobago had no access to the continental beyond 200 nautical miles *as a result* of the delimitation process which, according to the Tribunal and Bangladesh, leads to an “equitable result”.

6.52. The decision of the Tribunal is without any ambiguity:

“The Tribunal has concluded above that it has jurisdiction to decide upon the delimitation of a maritime boundary in relation to that part of the continental shelf extending beyond 200 nm. 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”⁴⁵⁹;

“[t]he delimitation line is ... drawn ... in a straight line in the direction of its *terminal* point, which is located at the point of intersection of Trinidad and Tobago’s southern maritime boundary with its 200 nm EEZ limit. This point, described in the Tribunal’s delimitation line as ‘11’, has an approximate geographic coordinate of 10° 58.59’N, 57° 07.05’W. The *terminal* point is where the delimitation line intersects the Trinidad and Tobago-Venezuela agreed maritime boundary^[460], which as noted establishes the southernmost limit of the area claimed by Trinidad and Tobago. This terminal point marks *the end of the single maritime boundary* between Barbados and Trinidad and Tobago *and of the overlapping maritime areas between the Parties*”⁴⁶¹.

The assertion that “the overlapping maritime areas between the Parties” ends on the terminal point of the single maritime boundary between them, which is the junction point of the 200-nautical-mile limit of Trinidad and Tobago with the Trinidad and Tobago-Venezuela agreed maritime boundary, necessarily entails that the maritime areas allocated to Trinidad and Tobago end at this point while those allocated to Barbados continue beyond it⁴⁶². Actually, the Tribunal did not specify that the maritime delimitation continues until it reaches the area where the rights of third States may be affected (as international courts and tribunals always do when they cannot fix the endpoint of the maritime boundary and as the Tribunal

⁴⁵⁹ *Ibid.*

⁴⁶⁰ As the Tribunal recalled in its Award, Trinidad and Tobago concluded in 1990 an agreement with Venezuela delimiting their maritime boundary using an all purpose line (Award, paras. 346-347).

⁴⁶¹ *Ibid.*, para. 374 (emphasis added).

⁴⁶² According to the Tribunal, the endpoint of the maritime boundary is “point #11 [which] is the junction of Trinidad and Tobago’s southern maritime boundary with its 200 nm EEZ limit” (*ibid.*, para. 382, 1.).

actually did at the western end of the line⁴⁶³). It decided that the maritime boundary between the two States “continues along that geodetic line *to the point of intersection*” of *Trinidad and Tobago*’s southern maritime boundary⁴⁶⁴.

6.53. Similarities between the *Barbados/Trinidad and Tobago* Arbitration and the present case do not end here. An additional element shows that in any event, even if Bangladesh had (*quod non*) a pre-existing right to reach the 200-nautical-mile limit, it could not be allocated any access to the continental shelf beyond 200 nautical miles.

6.54. Any allocation of area to Bangladesh extending beyond 200 nautical miles off Bangladesh’s coast, would trump Myanmar’s rights to EEZ and continental shelf within 200 nautical miles. As Bangladesh admitted in its Memorial, the area located immediately beyond Bangladesh’s 200-nautical-mile limit is located *within* Myanmar’s 200-nautical-mile limit⁴⁶⁵. Therefore, the extension of the delimitation beyond 200 nautical miles would inevitably infringe on Myanmar’s undisputable rights. This would then preclude any right of Bangladesh to the continental shelf beyond 200 nautical miles.

6.55. Bangladesh alleges that “[t]his matter cannot be resolved by giving priority to the EEZ over the continental shelf⁴⁶⁶ but, on the contrary, by giving priority to the continental shelf over the EEZ. Bangladesh submits that the single maritime boundary has

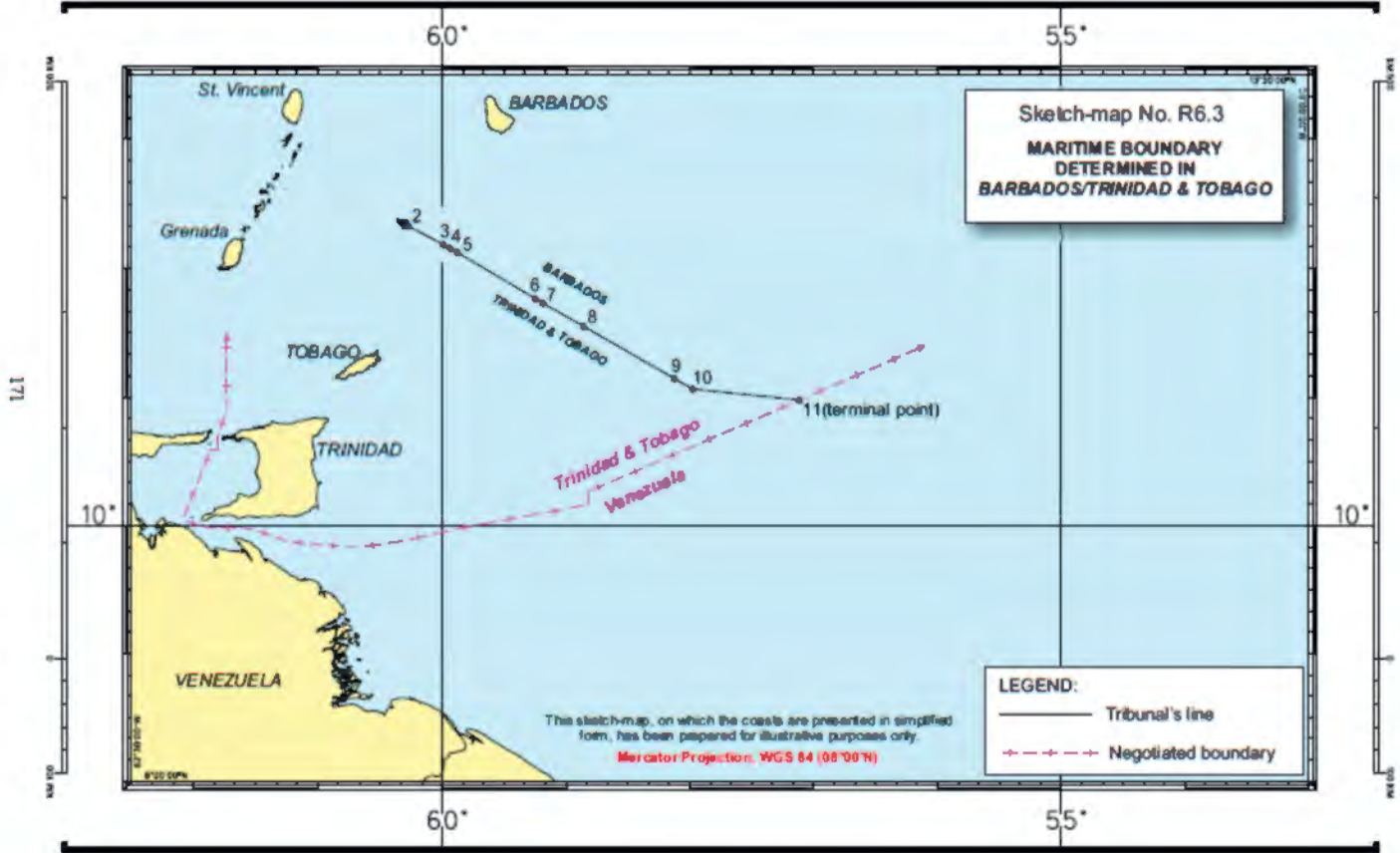
- i. to continue beyond Bangladesh’s 200-nautical-mile limit,
- ii. to cross Myanmar’s area located within Myanmar’s 200 nautical-mile-limit,

⁴⁶³ *Ibid.*, para. 382 (2): “The delimitation line extends from Point #2 listed above ... until it meets the junction with the maritime zone of a third State ...”.

⁴⁶⁴ *Ibid.*, para. 381 (emphasis added). For the geographic co-ordinate of that point, see *ibid.*, para. 382 (1).

⁴⁶⁵ See BM, para. 7.38 and Figure 7.5 following p. 108.

⁴⁶⁶ BM, para. 7.39.



- iii. and to deprive Myanmar of its rights in this area since, according to Bangladesh, there is “no textual basis in UNCLOS” for allocating water column rights to Myanmar and continental shelf rights to Bangladesh in such a situation, and that differential attribution of the EEZ and the continental shelf “has hardly ever been adopted in State practice”⁴⁶⁷.

6.56. This, again, was exactly Trinidad and Tobago’s claim. In the Reply, Barbados rightly protested against this infringement of its rights within 200 nautical miles:

“In claiming sovereign rights over the sea-bed beyond 200 nautical miles from its coast, within an area of Barbados’ undisputed EEZ, Trinidad and Tobago is effectively asking the Tribunal to allow its theoretical (and highly speculative) rights to sovereignty over an ECS [“extended” continental shelf] to trump the undisputed sovereign rights of Barbados over its EEZ. Such an outcome would be incompatible with UNCLOS and State practice and would be utterly artificial”⁴⁶⁸.

6.57. Bangladesh asserts that the Arbitral Tribunal “sought at all costs to avoid the problem”⁴⁶⁹. That is not true. The Tribunal settled the problem by drawing a maritime boundary ending on the 200-nautical-mile limit of Trinidad and Tobago and therefore making clear that Trinidad and Tobago had no access to the continental shelf beyond 200 nautical miles. If such access had existed, then the Tribunal would have had to draw a delimitation line between the two Parties beyond 200 nautical miles, which it did not do. In fact, the Tribunal did not decide, as Trinidad and Tobago wanted it to do, that priority had to be given to the continental shelf over the EEZ, but instead rejected Trinidad and Tobago’s claim, which was worded in the same way as Bangladesh’s claim. In the words of the Tribunal, the terminal point of the maritime boundary, located on the 200-nautical-mile limit of Trinidad and Tobago, marks “the *end* of the single maritime boundary between Barbados and Trinidad and Tobago and of the overlapping maritime areas between the Parties”⁴⁷⁰.

⁴⁶⁷ BM, paras. 7.40-7.41.

⁴⁶⁸ Reply of Barbados, Vol. 1, 9 June 2005, (available on <http://www.pca-cpa.org/>), para. 152 as well as paras. 146-173.

⁴⁶⁹ BM, para. 7.40.

⁴⁷⁰ See para. 6.52 above (emphasis added).

6.58. State practice confirms that there is *no right* to maritime areas beyond 200 nautical miles when that would trump undisputable rights within 200 nautical miles.

6.59. For instance, Article 3 of the Maritime Boundary Agreement between the United States of America and the Union of the Soviet Socialist Republics, concluded on 1 June 1990, reads as follows:

“1. In any area east of the maritime boundary that lies within 200 nautical miles of the baselines from which the breadth of the territorial sea of the Soviet Union is measured but beyond 200 nautical miles of the baselines from which the breadth of the territorial sea of the United States is measured (‘eastern special area’), the Soviet Union *agrees* that henceforth the United States may exercise the sovereign rights and jurisdiction derived from exclusive economic zone jurisdiction *that the Soviet Union would otherwise be entitled to exercise under international law in the absence of the agreement of the Parties on the maritime boundary.*

2. In any area west of the maritime boundary that lies within 200 nautical miles of the baselines from which the breadth of the territorial sea of the United States is measured but beyond 200 nautical miles of the baselines from which the breadth of the territorial sea of the Soviet Union is measured (‘western special area’), the United States *agrees* that henceforth the Soviet Union may exercise the sovereign rights and jurisdiction derived from exclusive economic zone jurisdiction *that the United States would otherwise be entitled to exercise under international law in the absence of the agreement of the Parties on the maritime boundary.*

3. To the extent that either Party exercises the sovereign rights or jurisdiction in the special area or areas on its side of the maritime boundary as provided for in this article, *such exercise of sovereign rights or jurisdiction derives from the agreement of the Parties and does not constitute an extension of its exclusive economic zone.* To this end, each Party shall take the necessary steps to ensure that any exercise on its part of such rights or jurisdiction in the special area or areas on its side of the maritime boundary shall be so characterized in its relevant laws, regulations, and charts⁴⁷¹.

⁴⁷¹ See J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. I, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 456 (emphasis added)

6.60. A similar provision was included by Norway and the Russian Federation twenty years later in the Treaty concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, done on 15 September 2010⁴⁷².

6.61. This is very similar to what Bangladesh unilaterally claims. But without the agreement of Myanmar, it is legally not possible to deprive it of its undisputable rights within its 200-nautical-mile limit.

6.62. Be that as it may, even if such an infringement were possible, for the reasons set out below, the question of the delimitation of the continental shelf beyond 200 nautical miles is moot since the (equitable) maritime boundary between Bangladesh and Myanmar ends before reaching the 200-nautical-mile limit of Bangladesh.

II. The Test of Non-Disproportionality Is Satisfied in the Present Case

6.63. Bangladesh's argument that equidistance between Myanmar and Bangladesh would not achieve an equitable solution could only succeed if *the result* were not equitable as required by international law. Contrary to Bangladesh's assertions, delimitation is not inequitable because, in the abstract, it does not allocate access to some mythical 200-nautical-mile limit or does not remedy a cut-off effect⁴⁷³. It does not achieve an equitable result if there is, according to the now well established standard, a "significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means and the lengths of their respective coasts"⁴⁷⁴.

6.64. The test of "significant disproportionality", which Bangladesh embraces in the Reply⁴⁷⁵, is fully consistent with the specific nature of maritime delimitation:

⁴⁷² Available at http://www.regjeringen.no/upload/ud/vedlegg/folkerett/avtale_engelsk.pdf.

⁴⁷³ See Section I above.

⁴⁷⁴ See *Romania v. Ukraine* as quoted in MCM, para. 5.147. See also MCM, para. 5.124, quoting *Libya v. Malta*: the fact that "a coast is markedly irregular or markedly concave or convex" could be taken into account *when* it leads to a "disproportional result".

⁴⁷⁵ See BR, paras. 3.165 and 3.197.

- i. its purpose is not to refashion nature, but to check that the delimitation line does not significantly misrepresent it;
- ii. it is not applied in the abstract or at a macro-geographical level but to the relevant area to be delimited – precisely because *a delimitation* is at stake.

6.65. Bangladesh distorts the test of disproportionality in the Reply, firstly, by comparing it to “a truly proportional delimitation”⁴⁷⁶ – that is to say, an apportionment of the area precisely proportional to the ratio of coastal lengths, which is however strongly rejected by international courts and tribunals⁴⁷⁷, secondly, by using a macro-geographical approach⁴⁷⁸ which is totally irrelevant. Maritime delimitation is a process between two States in a relevant area and the test of disproportionality applies only to such delimitation.

6.66. Myanmar showed in the Counter-Memorial that, in the present case, its equidistance line unquestionably satisfies the test of non-disproportionality. As it explained, the two ratios are nearly the same and the slight difference between them favours Bangladesh⁴⁷⁹.

6.67. Surprisingly however, Bangladesh asserts forcefully that the equidistance line would “produce irrational results”⁴⁸⁰, deprive it “of the overwhelming majority of its maritime entitlement”⁴⁸¹ and produce the most dramatic cut-off effect “anywhere in the world”⁴⁸².

6.68. Paradoxically, although the inequitable result would be according to Bangladesh dramatic calling for a radical remedy, Bangladesh professes that it claims only a “very

⁴⁷⁶ BR, paras. 3.197-3.198.

⁴⁷⁷ See, for example, *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre & Miquelon)*, Decision, 10 June 1992, para. 101. See also MCM, para. 5.35.

⁴⁷⁸ See BR, paras. 3.63-3.65, and Figure R3.3. in BR, Vol. I, following p. 72, and Vol. II.

⁴⁷⁹ MCM, paras. 5.151-5.152.

⁴⁸⁰ BM, para. 6.30.

⁴⁸¹ BM, para. 6.31.

⁴⁸² BR, paras. 3.7 and 3.39.

modest outlet to its 200 M limit⁴⁸³ which would be “scarcely noticeable” *when observed at the scale of the regional map of South Asia*⁴⁸⁴.

6.69. But considered at the relevant scale, Bangladesh’s claim *is* excessive and refashions nature⁴⁸⁵. There is in particular nothing comparable at all between the alleged “modest outlet” Bangladesh claims and the narrow corridors a few States have been granted by political agreements⁴⁸⁶ – and it must be noted that it is Bangladesh which has deliberately chosen to short-circuit the diplomatic means of delimitation to seize the Tribunal.

6.70. Bangladesh argues however that “[n]ot even Germany in the *North Sea Continental Shelf* cases was so badly cut off” by equidistance compared to Bangladesh⁴⁸⁷. This is not true. While the equidistance lines envisaged in the *North Sea Continental Shelf* cases met at a relatively “short distance” from the coast⁴⁸⁸ – approximately 90 nautical miles, Myanmar’s line allocates to Bangladesh a very considerable EEZ and continental shelf.

6.71. In the Memorial, Bangladesh admitted that the maritime areas allocated to it by equidistance extended to 137 nautical miles⁴⁸⁹, which were then 50 per cent farther from the coast than those allocated to Germany.

6.72. The actual distance is greater. First, in the Memorial, Bangladesh misrepresented Myanmar’s maritime boundary claim, which is much more favourable to Bangladesh than the line depicted in the Memorial which gave full effect to St. Martin’s Island and May Yu Island (Oyster Island). Second, Bangladesh indicates in the Reply that “India has staked [a] new claim” which “superseded” the line depicted in the Memorial and which “results in a *net increase in the size of the relevant area depicted in the Memorial*”⁴⁹⁰. As can be seen on

⁴⁸³ BR, para. 3.62.

⁴⁸⁴ BR, para. 3.63.

⁴⁸⁵ On the inequitableness of Bangladesh’s bisector line, see Chapter 5 above.

⁴⁸⁶ See Subsection I, A above.

⁴⁸⁷ BR, para. 3.7.

⁴⁸⁸ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 17, para. 8.

⁴⁸⁹ BM, para. 1.8.

⁴⁹⁰ BR, para. 3.186 (emphasis added).

Figure R3.2 of the Reply, the equidistance line allocates now to Bangladesh maritime areas extending up to 182 nautical miles from the nearest point on Bangladesh's coast. There is therefore nothing comparable between the *North Sea Continental Shelf* cases and this case, as is clearly illustrated in sketch-map No. R6.4 on the next page.

6.73. The equitableness of Myanmar's claimed line is corroborated by the test of disproportionality. This is the reason why Bangladesh desperately attempts in the Reply to by-pass it by modifying the parameters of the test.

A. Relevant Coasts and Area

6.74. Bangladesh asserts that

“the relevant coasts are (1) in the case of Bangladesh, the entire coast extending from land boundary terminus to land boundary terminus, and (2) in the case of Myanmar, the coast extending from the Naaf River to the area of Bhiff Cape”⁴⁹¹.

6.75. Myanmar considers, for the reasons set out in the Counter-Memorial, that this is not an accurate depiction of the relevant coasts. Bangladesh's relevant coasts do not include the sector between the mouth of the Meghna River and the Lighthouse on Kutubdia Island because in that sector Bangladesh's coasts face each other⁴⁹². On the other hand, Myanmar's coast extends from the mouth of the Naaf River to Cape Negrais⁴⁹³.

6.76. Bangladesh alleges that Myanmar “has artificially lengthened its own relevant coast and simultaneously shortened Bangladesh's in a manner that misrepresents reality”⁴⁹⁴. This is wishful thinking.

⁴⁹¹ BR, para. 3.166.

⁴⁹² MCM, paras. 5.56-5.58.

⁴⁹³ MCM, paras. 5.60-5.69.

⁴⁹⁴ BR, para. 3.169.



Sketch-map No. R6.4
THERE IS NO COMPARISON BETWEEN
BANGLADESH'S PURPORTED "CUT-OFF EFFECT"
AND THE NORTH SEA CONTINENTAL SHELF CASES
(Based on excerpts of BR Figure R3.2 and BM Figure 6.5)



6.77. As regards Myanmar coast, Bangladesh considers that the portion between Bhiif Cape and Cape Negrais is not relevant because it cannot or does not “affect either of the proposed delimitation lines within 200 M”⁴⁹⁵, “is simply too far from the delimitation to be considered relevant in this case”⁴⁹⁶, “lies beyond 200 M from any delimitation line”⁴⁹⁷ or “is far too removed from any possible delimitation – whether Myanmar’s or Bangladesh’s – which instead are both controlled by more proximate portions of Myanmar’s coast”⁴⁹⁸.

6.78. The argument is misconceived. The criteria for selecting relevant coasts, as Myanmar recalled in the Counter-Memorial, is not the distance from the land boundary, as Bangladesh asserted in the Memorial⁴⁹⁹, nor the distance from the delimitation line, as it asserts now in the Reply. The coasts of one party are relevant if their maritime projections overlap with maritime projections of the coasts of the other party⁵⁰⁰. As the ICJ put it in *Romania v. Ukraine*, “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”⁵⁰¹. In the present case, it is undisputable that the maritime projections of Myanmar’s coast located between Bhiif Cape and Cape Negrais overlap with the maritime projections of Bangladesh’s coasts⁵⁰².

6.79. Bangladesh apparently overlooks the fact that controlling coasts for the purpose of selecting base points and drawing the delimitation line are not necessarily the same as relevant coasts for the purpose of the test of disproportionality⁵⁰³. Actually, if Bangladesh were right that only *controlling* coasts were relevant in the present case for the purpose of the

⁴⁹⁵ BR, paras. 3.152 *ff.*

⁴⁹⁶ BR, para. 3.169.

⁴⁹⁷ BR, para. 3.156.

⁴⁹⁸ BR, para. 3.159.

⁴⁹⁹ BM, para. 6.69.

⁵⁰⁰ See MCM, para. 5.66.

⁵⁰¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, pp. 96-97, para. 99, and MCM, para. 5.42.

⁵⁰² See MCM, paras. 5.60-5.69.

⁵⁰³ See *Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia, Second Phase*, Award of 26 March 2002, *ILR*, Vol. 128, para. 4.22. In the Reply Bangladesh defines Myanmar’s relevant coasts for the purpose of the test of disproportionality by referring to its subsection devoted to the construction of the bisector line (see BR, para. 3.169, fn. 192).

test of disproportionality, then Myanmar's relevant coasts would end at point μ_3 , i.e., would measure about 90 kilometres. Such an absurd conclusion is not even claimed by Bangladesh.

6.80. Bangladesh relies on the *Tunisia/Libya* and *Nicaragua v. Honduras* cases to restrict Myanmar's relevant coasts but it quotes them incompletely⁵⁰⁴. In its quotation from *Nicaragua v. Honduras*, the ICJ opted for a shortened Honduran coastal front (against the will of Nicaragua, not Honduras) not for the purpose of the test of disproportionality (if it were so, one imagines Nicaragua would not have objected) but "for purposes of drawing the bisector"⁵⁰⁵.

6.81. Similarly, in *Tunisia/Libya*, the ICJ stated when selecting the relevant coasts for the purpose of the drawing of the line: "[a]s for the boundaries to seaward of the area relevant for the delimitation, these are not at present material and will be considered only in relation to the criterion of proportionality, for the purposes of which such boundaries will have to be defined"⁵⁰⁶. The ICJ then adopted the same relevant coasts for the purpose of the test of disproportionality, but it did so because of the existence of third-party entitlements in the region. In particular the 1971 Italo-Tunisian delimitation line prevented Tunisia from claiming continental shelf overlapping with the Libyan shelf beyond Ras Kaboudia, as clearly depicted on map No. 1 published at *I.C.J. Reports 1982*, at p. 36⁵⁰⁷, which is reproduced at sketch-map No. R6.5a on the next page. The inclusion on the map of the 1971 line, which Bangladesh omitted to reproduce on Figure R3.16 of the Reply, changes of course the picture and reveals the fallacy of Bangladesh's argument (see sketch-map No. R6.5b on the next page).

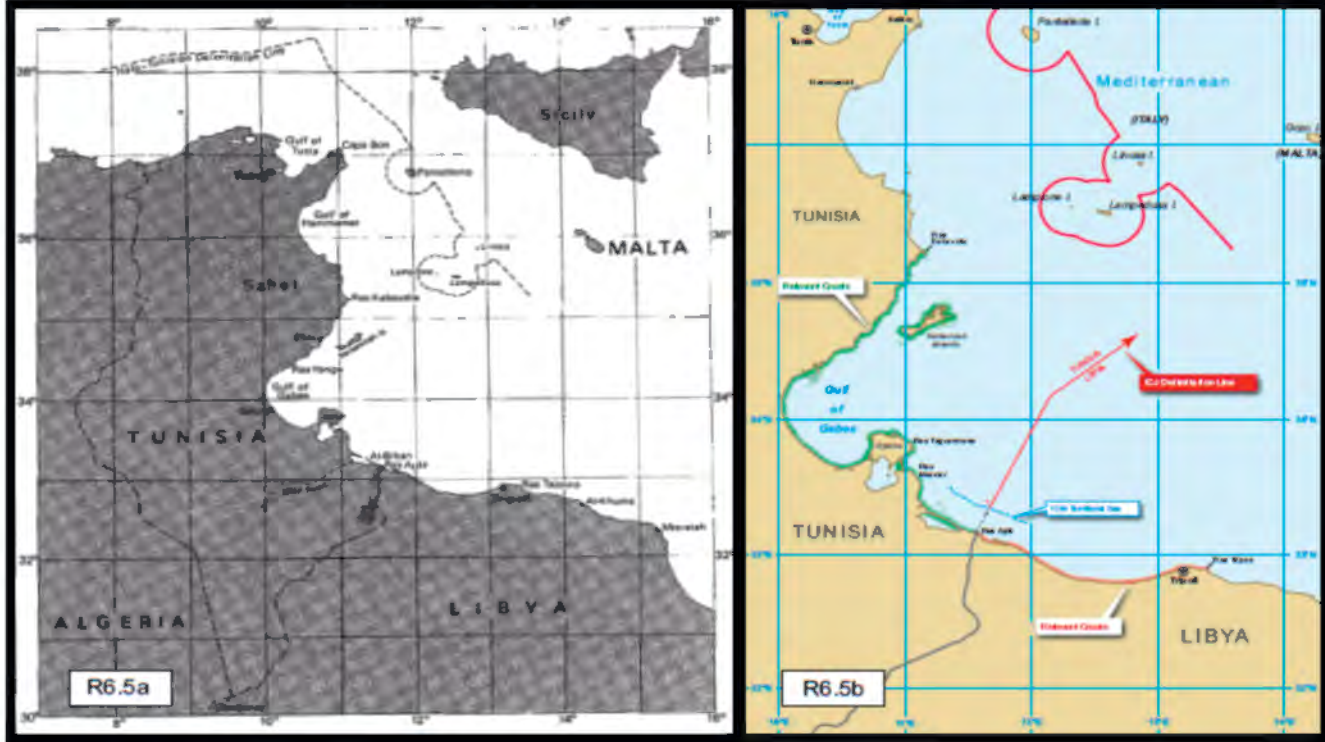
⁵⁰⁴ BR, paras. 3.152-3.159.

⁵⁰⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 749, para. 298.

⁵⁰⁶ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 62, para. 75.

⁵⁰⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 91, paras. 130-131.

Sketch-maps Nos. R6.5a and R6.5b
THE EFFECT OF THIRD STATE ENTITLEMENTS
ON THE DEFINITION OF RELEVANT COASTS
(Based on BR Figure R3.16)



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Source: Tunisia/Libya, sketch-map no. 1 at p. 36.

6.82. On the other hand, Bangladesh says nothing in the Reply in response to paragraph 5.68 of the Counter-Memorial, which reads as follows:

“[the extension of Myanmar’s relevant coast up to Cape Negrais] 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, the relevant coastlines for Myanmar in the Bay of Bengal is up to Cape Negrais’”.⁵⁰⁸

6.83. Myanmar has nothing to add to this description of its relevant coasts.

6.84. As regards Bangladesh’s relevant coasts, the Reply surprisingly alleges that the Parties “are in broad agreement that the entirety of the Bangladesh coast” is relevant⁵⁰⁹. Elsewhere it however recalls that according to Myanmar, the coast of Bangladesh has to be divided into four segments, segments 2 and 3 being irrelevant since they face each other⁵¹⁰ and that the Parties “are distinctly not in agreement” on that point⁵¹¹.

6.85. According to the Reply, the exclusion of segments 2 and 3 from Bangladesh’s relevant coasts would “punish Bangladesh twice for the configuration of its coast”⁵¹². But in fact:

- i. this exclusion mirrors the geographical configuration of the coasts which, once again, is “a given”, “not an element open to modification by the [Tribunal] but a fact on the basis of which [it] must effect the delimitation”⁵¹³;
- ii. it is based, not on the subjective will of Myanmar to “seek to extract still additional advantage from the fact of concavity”, as Bangladesh asserts⁵¹⁴, but on the well-

⁵⁰⁸ MCM, para. 5.68, fn. omitted.

⁵⁰⁹ BR, para. 3.149.

⁵¹⁰ BR, para. 3.168.

⁵¹¹ BR, para. 3.170.

⁵¹² BR, para. 3.171.

⁵¹³ *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, pp. 443-445, para. 295.

⁵¹⁴ BR, para. 3.171.

established methodology which the ICJ expounded in *Romania v. Ukraine* and applied to the Karkinitits'ka Gulf⁵¹⁵.

6.86. Bangladesh objects that the mouth of the Meghna River (segments 2 and 3 of Bangladesh's coasts) "is not comparable to Ukraine's Karkinitits'ka Gulf"⁵¹⁶. First, according to the Reply the two coasts of the Gulf "are nearly parallel and 'face each other' much more obviously and directly than the Bangladesh coast at the mouth of the Meghna River"⁵¹⁷. This is not true, as shown on sketch-map No. R6.6 on the next page. Second, contrary to the mouth of the Meghna River, "the opening of Karkinitits'ka Gulf itself actually faces back onto other portions of the Ukraine coast and not the delimitation"⁵¹⁸. Again, this is not true. Moreover, in *Romania v. Ukraine*, the ICJ did not consider the direction in which the mouth of the Gulf faced. It was the direction in which the coasts of the Gulf faced that was relevant according to the ICJ.

6.87. Bangladesh also relies on the *Gulf of Maine case*⁵¹⁹ but this case is irrelevant because the situation in the *Gulf of Maine case* is not comparable to the present one. One of the coasts of the Bay of Fundy was *immediately adjacent* to the American coast and therefore had to be taken into account. The opposite coast of the Bay was also to some extent *immediately opposite* to the American coast. By contrast, segments 2 and 3 of Bangladesh's coast are neither immediately adjacent to Myanmar's coast, nor immediately opposite to it. The methodology set forth by the ICJ in *Romania v. Ukraine* then fully applies.

6.88. Finally, as regards the relevant area, Bangladesh maintains its view that "areas on the 'Indian side' of India's claim are not relevant in this case"⁵²⁰. Myanmar still considers that since the maritime delimitation between India and Bangladesh has not yet been agreed or decided, the area which is also claimed by India has to be included in the area applying the methodology defined by the ICJ in *Romania v. Ukraine*:

⁵¹⁵ See MCM, paras. 5.56-5.58.

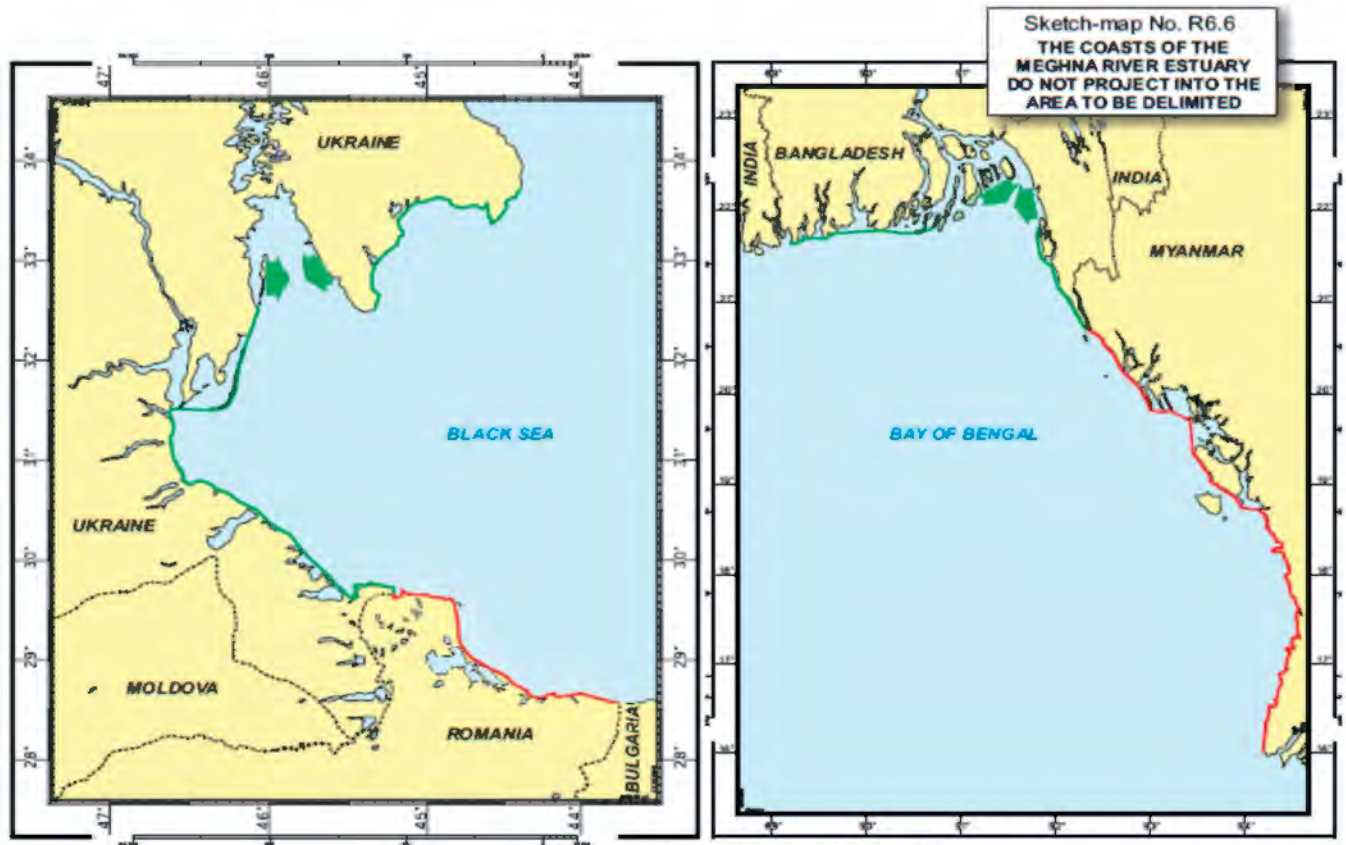
⁵¹⁶ BR, para. 3.172.

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.*

⁵¹⁹ BR, para. 3.173.

⁵²⁰ BR, paras. 3.184 and 3.193.



This sketch-map, on which the coasts are presented in simplified form, has been prepared for illustrative purposes only.

“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 [areas claimed by third States] in its calculation of the relevant area ...”⁵²¹

B. The Application of the Test

6.89. Bangladesh states that the test of disproportionality is based on “approximate measurements”⁵²². However it then launches into many scenarios based on very detailed calculations (as in paragraph 3.195 of the Reply⁵²³) to substantiate the alleged inequitableness of the equidistance line. But it does so in vain.

6.90. Myanmar wishes to recall that, in the present case, the test of disproportionality applied to Myanmar’s delimitation line does not lead to a “significant disproportionality”. The two ratios (coastal lengths and maritime areas) are nearly the same (1:2.03 and 1:1.94) and the slight difference between them is in favour of Bangladesh (Myanmar is allocated 66 per cent of the area while its coast are in proportion of 67 per cent of the relevant coasts)⁵²⁴. On this point, Bangladesh does not comment at all on the case law quoted at paragraph 5.152 of the Counter-Memorial, which strengthens the equitableness of Myanmar’s claimed line.

⁵²¹ See MCM, para. 5.51 and *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 100, para. 114. Bangladesh adjusts in the Reply the line claimed by India (BR, para. 3.186). This is rather strange. Unless Bangladesh agreed with the line claimed by India, the Indian claim is just a claim, not a delimitation line. Hence it is not possible for ITLOS to decide where Bangladesh’s maritime projections end as far as they overlap with Myanmar’s and India’s. This is the reason why the area claimed by the three States has to be included in the relevant area, as the ICJ did in *Romania v. Ukraine*.

⁵²² BR, para. 3.165.

⁵²³ “This corrected version of Myanmar’s relevant area measures a total of 242,465 sq km (236,559 – 11,451 + 17,377) ...”.

⁵²⁴ MCM, paras. 5.151-5.152.

6.91. Actually, *even* if the “corrected versions” of Myanmar’s definitions of relevant coasts and relevant area which Bangladesh put forward in the Reply were well-founded (*quod non*), the test would *still* be satisfied:

- i. if segments 2 and 3 were included in Bangladesh’s relevant coasts⁵²⁵, then the ratios would be 1:1.27 and 1:1.94, Myanmar would be allocated 66 per cent of the area while its coasts would be in a proportion of 56 per cent of the relevant coasts; this is very far from a “significant disproportionality”;
- ii. Bangladesh contends that Myanmar did not measure the coasts in the same manner on both sides of the land boundary; if it were true (*quod non* – see sketch-map No. 5.2. of the Counter-Memorial), the disparity between the two relevant coasts would be, Bangladesh argues, “significantly reduced”⁵²⁶. But in this case the ratios would be: 1:1.83/1:1.94. Myanmar does not see where there is any “significant disproportionality”;
- iii. even if the first two scenarios were combined⁵²⁷, the same conclusion would prevail: the ratio would become 1:1.2/1:1.94. Myanmar would then be allocated 66 per cent of the area while its coasts would be in a proportion of 55 per cent of the relevant coasts. It is again very far from a “significant disproportionality”;
- iv. it remains true even if *additionally*, as Bangladesh claims, all the maritime areas lying off the Rakhine (Arakan) coast (and not only the maritime projections of the coast *overlapping with* the maritime projections of Bangladesh’s coasts, as international law requires) are included in the relevant area *and* if, contrary to the established methodology, the area claimed by Bangladesh, Myanmar and India is excluded⁵²⁸. *In this maximalist approach of Bangladesh’s claim*, the ratios would again *not be* significantly disproportional: Myanmar would be allocated 71 per cent of the relevant area while its coasts would be in a proportion of 55 per cent of the relevant coasts;

⁵²⁵ See BR, paras. 3.174-3.175.

⁵²⁶ BR, para. 3.177.

⁵²⁷ BR, para. 3.178.

⁵²⁸ See para. 6.88 above; BR, paras. 3.194-3.195 and Vol. II, Figure R3.19.

- v. finally, if, as Bangladesh asserts, Myanmar's relevant coasts could not be extended beyond Bhiff Cape, "it would be incongruous to consider as relevant the maritime spaces adjacent to an irrelevant coast"⁵²⁹; thus only maritime projections from the coast of Myanmar up to Bhiff Cape would be relevant. The relevant area would consequently be significantly reduced (44,501 square kilometres⁵³⁰) *exclusively on Myanmar's side*. Therefore, the area allocated to it would be significantly reduced to the advantage of Bangladesh. Myanmar would be allocated 58 per cent of the relevant area. Even admitting then, as wrongly alleged by Bangladesh, that "the relevant coasts of the two States are closely comparable" (Bangladesh acknowledging in any event that Myanmar's relevant coast is larger than Bangladesh's)⁵³¹, the result would be again very far from a "significant disproportionality". Bangladesh is totally silent on this automatic consequence of *its* own definition of relevant coasts.

III. Summary

6.92. To conclude, the equidistance line proposed by Myanmar, as described in the Counter-Memorial⁵³², achieves an equitable result in the present case:

- i. it is based on the applicable method (equidistance/relevant circumstances) from which it is not necessary to depart since the drawing of a provisional equidistance line is in no way "unfeasible" in the present case;
- ii. the equidistance line proposed by Myanmar is controlled by the appropriate base points;
- iii. these base points have to be selected exclusively on the mainland low-water line of both Parties since selecting one of them on St. Martin's Island would have a disproportionate effect;
- iv. there exists no relevant circumstance requiring the adjustment of the equidistance line;

⁵²⁹ BR, para. 3.185.

⁵³⁰ See MCM, p. 119.

⁵³¹ BR, para. 3.179.

⁵³² See MCM, paras. 4.62-4.68.

- v. in particular, the fact that the equidistance line (which potentially reaches up to 182 nautical miles to the tripoint with India) does not allocate to Bangladesh all maritime areas it claims does not constitute a relevant circumstance requiring the adjustment of the line;
- vi. as confirmed by the non-disproportionality test (whatever the scenario), the equidistance line indisputably achieves an equitable result in accordance with articles 74 and 83 of UNCLOS.

6.93. Myanmar thus respectfully requests the Tribunal to decide that the maritime boundary between the continental shelf and the exclusive economic zones of Myanmar and Bangladesh is as follows (this boundary is reproduced on sketch-map No. R1.1 at page 5 of this Rejoinder):

- from Point E (the point at which the equidistance line meets the 12-nautical-mile arc from the coastline of St. Martin's Island) 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-west direction⁵³³ following a geodetic azimuth of 231° 37' 50.9" until it reaches the area where the rights of a third State may be affected⁵³⁴.

⁵³³ In the Submissions of the Counter-Memorial, Myanmar erroneously wrote "south-east" instead of "south-west" when depicting the direction of the last segment of the line. Myanmar apologises to the Tribunal and Bangladesh for this typographical error.

⁵³⁴ In its Judgment of 4 May 2011, *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (*Application by Costa Rica for Permission to Intervene*), available on <http://www.icj-cij.org>, the ICJ recalled that "[t]he Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved (see *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 100, para. 112)" (para. 89). See also the Judgment of the ICJ on the same day, *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (*Application by Honduras for Permission to Intervene*), available at on <http://www.icj-cij.org>, para. 64.

CHAPTER 7**SUMMARY**

7.1. The present Chapter summarizes Myanmar's position as set out in the Counter-Memorial and in this Reply. It is followed by Myanmar's formal submissions at the end of the written proceedings.

I. The Territorial Sea

7.2. Myanmar rejects as wholly unfounded Bangladesh's claim that there is already an agreement in force between Myanmar and Bangladesh delimiting their respective territorial seas. The 1974 agreed minutes were merely an *ad hoc* understanding between the Parties, reached at a particular stage in the negotiating process, as to what might form part of an eventual comprehensive maritime boundary agreement. Myanmar's position was entirely consistent throughout the negotiations: it was not prepared to enter into any agreement covering only part of the maritime delimitation line between the two States. Nor was any agreement established by the practice of the two States. Nor did Myanmar acquiesce in any delimitation in the territorial sea.

7.3. Given the geographical circumstances, and in particular the location of Bangladesh's St. Martin's Island lying immediately off Myanmar's coastline, on Myanmar's side of the mainland equidistance line, the island constitutes a classic 'special circumstance' within the meaning of article 15 of UNCLOS. A proper application of the equidistance/special circumstances rule in article 15 of UNCLOS results in a territorial sea delimitation based, primarily, on equidistance, taking into account the relationship between Myanmar's dominant mainland coast and St. Martin's Island. Equidistance is the appropriate delimitation method from the agreed land boundary terminus in the mouth of the Naaf River (Point A) until the point at which the Myanmar mainland and St. Martin's Island are no longer purely opposite (Point C). Beyond Point C it becomes necessary to delimit using a method other than equidistance to account for St. Martin's Island. From Point C the delimitation line turns in a south-westerly direction and follows a straight line until it reaches Point D, which is 12 nautical miles from the mainland coast of Myanmar and 6 nautical miles from the coast of

St. Martin's Island. It then continues until it reaches the 12-nautical-mile limit of St. Martin's Island and reconnects to the mainland equidistance line at Point E: the starting point for the EEZ/continental shelf boundary.

II. EEZ and Continental Shelf

7.4. After reaching the 12-nautical-mile territorial sea limit south-west of St. Martin's Island at Point E, the delimitation line proposed by Myanmar continues in a south-westerly direction until it reaches the area where the rights of a third State may be affected. Myanmar's proposed line results from the proper application of the well established "equidistance/relevant circumstances" three-stage method.

7.5. In order to delimit the EEZ and continental shelf between the Parties in accordance with the equitable principles/relevant circumstances rule of articles 74 and 83 of UNCLOS, one must apply the well established "equidistance/relevant circumstances" three-stage method. The provisional equidistance line described in the Counter-Memorial achieves an equitable result in the present case. The drawing of the provisional equidistance line is in no way "unfeasible" and, therefore, the resort to a bi-sector line is excluded. In any case, Bangladesh's application of the bi-sector method is incorrect.

7.6. The equidistance line proposed by Myanmar, on the other hand, is controlled by appropriate base points selected on the low-water line of the mainland coasts of both Parties. Furthermore, no relevant circumstances require its adjustment. Finally, the non-disproportionality test confirms that the equidistance line achieves an equitable result in accordance with articles 74 and 83 of UNCLOS.

III. The Tribunal Is Not Called upon to Delimit Any Area beyond 200 Nautical Miles

7.7. Since the delimitation line between the EEZ/continental shelf of Myanmar and Bangladesh's reaches the area where the rights of a third State may be affected short of the 200-nautical-mile limit the Tribunal is not called upon to delimit any area of continental shelf lying beyond that limit. The question of its jurisdiction to do so therefore does not arise.

SUBMISSIONS

Having regard to the facts and law set out in the Counter-Memorial and this Rejoinder, the Republic of 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:

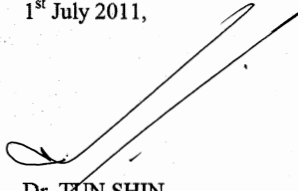
Point	Latitude	Longitude
A	20° 42' 15.8" N	92° 22' 07.2" E
B	20° 41' 03.4" N	92° 20' 12.9" E
B1	20° 39' 53.6" N	92° 21' 07.1" E
B2	20° 38' 09.5" N	92° 22' 40.6" E
B3	20° 36' 43.0" N	92° 23' 58.0" E
B4	20° 35' 28.4" N	92° 24' 54.5" E
B5	20° 33' 07.7" N	92° 25' 44.8" E
C	20° 30' 42.8" N	92° 25' 23.9" E
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-west 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 Republic of the Union of Myanmar reserves its right to supplement or to amend these submissions in the course of the present proceedings.

1st July 2011,

A handwritten signature in black ink, consisting of a series of loops and a long, sweeping stroke that extends upwards and to the right.

Dr. FUN SHIN

Attorney General of the Union

Agent for the Republic of the Union of Myanmar

APPENDIX**THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES**

A.1. In the Reply, Bangladesh raises four issues related to the continental shelf beyond 200 nautical miles in the Bay of Bengal. First, Bangladesh argues that the Tribunal has jurisdiction to delimit as between the Parties areas of continental shelf beyond 200 nautical miles. Second, Bangladesh submits that it is entitled to areas of continental shelf beyond 200 nautical miles pursuant to the provisions of article 76 of UNCLOS. Third, Bangladesh argues, on the basis of an erroneous interpretation of article 76, that Myanmar is not entitled to areas of continental shelf beyond 200 nautical miles. Fourth, Bangladesh urges the Tribunal to adopt a particular perspective on the principles of delimitation that apply to areas beyond 200 nautical miles¹.

A.2. None of these four issues arises in the present proceedings for the simple reason that the line delimiting the continental shelf between Myanmar and Bangladesh stops before reaching the 200-nautical-mile limit. Therefore, there is no call for the Tribunal to deal with any of these issues.

A.3. Nonetheless, in the interest of completeness, Myanmar reiterates that, in any case, the Tribunal does not have jurisdiction to delimit the hypothetical entitlements of the Parties to continental shelf beyond 200 nautical miles, contrary to Bangladesh's assertions in the Reply² (II). Furthermore, given Myanmar's legitimate claim to an area beyond 200 nautical miles – a claim that is pending before the Commission on the Limits of the Continental Shelf (CLCS), which Bangladesh has nevertheless sought to attack throughout these pleadings – Myanmar wishes to comment on Bangladesh's assertions concerning Myanmar's entitlement to a continental shelf extending beyond 200 nautical miles (III). First, however, Myanmar wishes to make certain comments with regard to Bangladesh's submission to the CLCS concerning the outer limit of Bangladesh's claimed continental shelf beyond 200 nautical miles (I).

¹ This fourth issue has been dealt with in the Counter-Memorial. See MCM, paras. 1.26, 5.3, 5.12, and 5.39-5.40. See also para. 6.48 above.

² BR, paras. 4.4-4.23.

I. The Bangladesh Submission to the CLCS

A.4. On 25 February 2011, under article 76 (8) of UNCLOS Bangladesh submitted to the CLCS information on its purported entitlement to, and the limits of, the continental shelf beyond 200 nautical miles. The Executive Summary of Bangladesh's submission has been made available at the CLCS website³, and has also been annexed to Bangladesh's Reply⁴. An electronic copy of the full submission has been made available, by Bangladesh, pursuant to article 63 (2) of the Rules of the Tribunal, with the "understanding that the submission should be treated as a confidential document"⁵. This assertion of confidentiality does not preclude Myanmar from commenting on Bangladesh's submission, which is now part of the file before the Tribunal and has been made available to Myanmar by the Registry in electronic copy.

A.5. However, Myanmar does not consider it necessary to present, before the Tribunal, a full assessment of Bangladesh's CLCS submission. The Tribunal has no need to and cannot deal with the issue of the entitlement of Bangladesh or of Myanmar to a continental shelf extending beyond 200 nautical miles. In this regard, the fact that Bangladesh has now chosen to make its submission available to the Tribunal does not further its case, either before the Tribunal or before the CLCS. It is for the CLCS to consider the information submitted and to make the appropriate recommendations, not for the Tribunal⁶.

A.6. By a Note Verbale dated 31 March 2011, Myanmar informed the United Nations Secretary-General of its view according to which "Bangladesh has no continental shelf extending beyond 200 nautical miles measured from baselines established in accordance with the international law of the sea. Indeed, Bangladesh's right over a continental shelf does not extend either to the limit of 200 nautical miles measured from lawfully established baselines, or, *a fortiori*, beyond this limit."⁷ Beyond this general objection, it is for the CLCS to

³ Available at http://www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/Executive_summary_final.pdf.

⁴ BR, Vol. III, Annex R3.

⁵ Letter of the Registrar of the Tribunal to the Agent of Myanmar, 16 March 2011.

⁶ See also para. A.15 below.

⁷ Note Verbale of the Permanent Mission of the Union of Myanmar to the United Nations to the Secretary-General of the United Nations, 31 March 2011, Annex R6 (also available on the CLCS website:

determine whether the Bangladesh submission meets the requirements of article 76 of UNCLOS, just as it is for the CLCS to assess Myanmar's submission made on 16 December 2008⁸.

A.7. However, it should be noted that even if the CLCS were to accept the information submitted by Bangladesh and to make recommendations upon which Bangladesh could establish the outer limits of its virtual entitlement to a continental shelf beyond 200 nautical miles, such a recommendation would not be determinative of Bangladesh's rights in these areas. Regardless of the question whether Bangladesh is entitled to areas of continental shelf beyond 200 nautical miles, it is precluded from making good its claim to these areas because the line delimiting the continental shelf between Myanmar and Bangladesh stops before Bangladesh's 200-nautical-mile limit. Indeed, as Bangladesh itself has noted in the Executive Summary of its submission to the CLCS, and as has been underlined by Myanmar in its Note Verbale of 31 March 2011⁹:

"Bangladesh wishes to assure the Commission that the present Submission is made without prejudice to the delimitation of the relevant maritime boundaries with the coastal States concerned, including with respect to the matters that are presently the subject of third-party adjudication."¹⁰

And Bangladesh again stated that

"the consideration of [its] Submission will not prejudice the consideration of the matters in dispute outlined above, or prejudice the delimitation of boundaries between Bangladesh and any other State(s)"¹¹.

http://www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/mmw_nv_un_001_08_04_2011_11-00509.pdf.

⁸ For the Executive Summary of the submission made by Myanmar, see MCM, Annex 16 (also available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf).

⁹ Note Verbale of the Permanent Mission of the Union of Myanmar to the United Nations to the Secretary-General of the United Nations, 31 March 2011, Annex R6 (also available on the CLCS website: http://www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/mmw_nv_un_001_08_04_2011_11-00509.pdf).

¹⁰ BR, Vol. III, Annex R3, paras. 5-13.

¹¹ *Ibid.*, paras. 5-14.

A.8. Myanmar agrees, but reserves its right to comment and to refer to Bangladesh's Submission as far as it is appropriate. Silence on any points and claims made in the Submission does not imply Myanmar's acceptance.

II. Jurisdiction of the Tribunal to Delimit Continental Shelf Areas beyond 200 Nautical Miles

A.9. The Parties disagree over the jurisdiction of this Tribunal in relation to Bangladesh's claim to a continental shelf beyond 200 nautical miles. Bangladesh has requested the Tribunal to delimit the boundary between Myanmar and Bangladesh throughout the entirety of the continental shelf, "including the portion of the continental shelf pertaining to Bangladesh that lies more than 200M from the baselines from which its territorial sea is measured"¹². In principle, the Tribunal has jurisdiction to delimit maritime boundaries in areas beyond 200 nautical miles¹³. However, in the circumstances of this case (1) there is no possibility for the Tribunal to exercise such jurisdiction in areas beyond 200 nautical miles, (2) the exercise of such jurisdiction would prejudice third State interests and the interests of the international community in the area beyond 200 nautical miles, and (3), in any event, Bangladesh's request for delimitation in areas beyond 200 nautical miles is inadmissible because the CLCS has not reviewed the submissions made by Myanmar and Bangladesh respectively and has not yet made recommendations related to the outer limits of Myanmar's or Bangladesh's continental shelf pursuant to the agreed procedures under UNCLOS, including article 76 and Annex II.

A.10. Delimitation beyond 200 nautical miles does not arise in this case because the maritime area in which Bangladesh enjoys sovereign rights with respect to the natural resources of the continental shelf does not extend up to 200 nautical miles and therefore, *a fortiori*, does not extend beyond 200 nautical miles from its coast. For this reason, in the specific circumstances of this case, the Tribunal is not called upon to exercise its jurisdiction to delimit maritime boundaries beyond 200 nautical miles.

¹² Government of Bangladesh, Statement of Claim and Notification under UNCLOS Article 287 and Annex VII, Article 1, 8 October 2009, para. 24.

¹³ See MCM, para. 1.14.

A.11. As Myanmar noted in the Counter-Memorial “[e]ven 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 this issue might prejudice the rights of third parties and also those relating to the international seabed area (the area beyond the limits of national jurisdiction)”¹⁴. Bangladesh offers a short, partial, and wholly unconvincing response.

A.12. *First*, with respect to the issue of international interests in the area beyond 200 nautical miles, Bangladesh asserts that “the outer limits of the continental shelf *vis-à-vis* the international seabed are far removed from the delimitation of the maritime boundary [between Myanmar and] Bangladesh”¹⁵. Bangladesh assumes, unjustifiably, that the CLCS will recommend outer limits of the continental shelf that correspond to those submitted by the four submitting States in this area. This is purely hypothetical¹⁶. As discussed below, it cannot be excluded that the CLCS will not endorse all of the submissions of the States in the Gulf of Bengal region and that, according to the CLCS recommendations, there will be an “area beyond the limits of national jurisdiction” in the Bay of Bengal. Any delimitation that extends into such a potential area would enter upon and affect international interests in the seabed.

A.13. *Second*, with respect to the issue of third State interests, India has clear interests in the delimitation area *within* 200 nautical miles. Bangladesh itself has made the Tribunal aware of the apparent geographic limit of India’s interests within 200 nautical miles¹⁷. The Tribunal will have to delimit the maritime boundary between Bangladesh and Myanmar in such a way as to avoid prejudicing India’s interests¹⁸. Myanmar has not suggested and does not believe that the mere presence of a third State *near* the delimitation area would strip the Tribunal of its jurisdiction to delimit in areas that are *not* subject to third State claims.

¹⁴ MCM, para. 1.16 (footnotes omitted).

¹⁵ BR, para. 4.5.

¹⁶ See also para. A.53 below.

¹⁷ BR, para. 3.36, fn. 49.

¹⁸ See MCM, paras. 5.161-5.162.

A.14. However, the Tribunal is faced with a different situation in areas beyond 200 nautical miles. Four States have made submissions to the CLCS, or at least partial submissions, which encompass part of the continental shelf area beyond 200 nautical miles in the Bay of Bengal: Myanmar¹⁹, Bangladesh²⁰, India²¹, and Sri Lanka²². Bangladesh is clearly aware of the submissions made by other States, since it has written to the United Nations Secretary-General with concerns about all of them²³, and has invoked the non-consent provision of the CLCS Rules of Procedure, Annex I, paragraph 5 (a) with respect to two of them (Myanmar's submission and India's submission). Moreover, India and Sri Lanka have made only partial submissions to the CLCS and have formally reserved their right to make submissions with respect to other areas²⁴, which could potentially overlap entirely with the areas of continental shelf extending beyond 200 nautical miles claimed by the Parties to the present proceedings.

A.15. Unlike the area within 200 nautical miles, much of which may be delimited without prejudicing the interests of third States, the Tribunal cannot delimit any area beyond 200 nautical miles from the lawfully established baselines of the Parties because that area – all of it – is actually claimed or can potentially be claimed by one or two third States in the region. Bangladesh ignored these potential claims, which cannot be excluded under article 76 of UNCLOS and the Statement of Understanding at Annex II to the Final Act of the Third United Nations Conference on the Law of the Sea, when it commented on Figure R4.1 of the

¹⁹ 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), MCM, Annex 16. See also MCM, Appendix, paras. A.44-A.46.

²⁰ People's Republic of Bangladesh, Submission to the Commission on the Limits of the Continental Shelf, submitted to the Tribunal in electronic copy. See also paras. A.4-A.8 above.

²¹ 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). See also MCM, Appendix, paras. A.50-A.53.

²² 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). See also MCM, Appendix, paras. A.48-A.49.

²³ See MCM, Appendix, paras. A.46 and A.52. For Bangladesh's comments on Sri Lanka's Submission, see Note verbale from the Permanent Mission of Bangladesh to the United Nations to the United Nations Secretary-General, 20 October 2010 (available at: http://www.un.org/Depts/los/clcs_new/submissions_files/lka43_09/clcs_43_2009_los_bgd.pdf).

²⁴ *Ibid.*, paras. A.49 (Sri Lanka) and A.53 (India).

Reply, saying that “the first [green] portion of the outer continental shelf is claimed only by Bangladesh and Myanmar”²⁵. Indeed, the green area on Figure R4.1 can potentially also be claimed by Sri Lanka and India. Any delimitation between the Parties in this area would prejudice the interests of these States.

A.16. Faced with this difficult situation, Bangladesh falls back on article 33 (2) of the Statute of the Tribunal²⁶. But, while that provision may state a truism with respect to the limited reach of the *res judicata* principle in the international legal system, it does not shield non-parties from delimitation decisions that relate to areas in which they maintain a claim. The Tribunal may not delimit beyond 200 nautical miles without prejudicing non-party third State interests. Article 33 (2) does not change this²⁷.

A.17. Finally, Bangladesh’s request that the Tribunal delimit its boundary with Myanmar in areas beyond 200 nautical miles is inadmissible because neither Bangladesh nor Myanmar has completed the process by which States Parties to UNCLOS have agreed to establish the outer limits of their continental shelf areas – should they extend beyond 200 nautical miles – as provided in article 76 (8) and Annex II of the Convention. A review of a State’s submission and the making of recommendations by the Commission on this submission is a necessary prerequisite for any determination of the outer limits of the continental shelf of a coastal State “on the basis of these recommendations” under article 76 (8) of UNCLOS and the area of continental shelf beyond 200 nautical miles to which a State is potentially entitled; this, in turn, is a necessary precondition to any judicial determination of the division of areas of overlapping sovereign rights to the natural resources of the continental shelf beyond 200 nautical miles²⁸. This process is dictated by the logic of the system of supervised unilateralism established under the Convention for the purpose of establishing the outer limits of coastal States’ continental shelf entitlement beyond 200 nautical miles. This system enhances the inherent right of coastal States to the continental shelf. In fact it is a system

²⁵ BR, para. 4.21.

²⁶ BR, paras. 1.34, 4.5, and 4.21.

²⁷ See also *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, Judgment, para. 85 and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 421, para. 238.

²⁸ See also MCM, paras. 1.17-1.18.

designed to ensure a degree of control with respect to otherwise purely unilateral and potentially abusive claims to vast areas of continental shelf. To reverse the process, as Bangladesh urges the Tribunal to do, to adjudicate with respect to rights the extent of which is unknown, would not only put this Tribunal at odds with other treaty bodies, but with the entire structure of the Convention and the system of international ocean governance.

A.18. Nonetheless, Bangladesh complains that to respect this step-by-step process would entrap Bangladesh in “a neatly circular argument” or a “catch-22” “that would make delimitation of disputed areas beyond 200M impossible”²⁹. The fallacy underlying this complaint exposes Bangladesh’s fundamental distortion of the system for determining the extent of a State’s entitlement to continental shelf. It is true that the Tribunal may not delimit a boundary between areas to which the Parties may not, in fact, be entitled under the agreed rules of international law. It is not true, however, “that unless the Tribunal delimits the boundary first, the CLCS’s own rules prohibit it from issuing any recommendations”³⁰. The Convention could not be clearer on the point that submissions under article 76 and the Commission’s subsequent work, including the making of recommendations, are all “without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts”³¹. This allows the work of the Commission to go forward in the face of overlapping claims to maritime area. It is only in the rare event when a coastal State invokes the blocking provisions of paragraph 5 (a) of Annex I of the CLCS’s Rules of Procedure that the Commission may not move forward. The full text of that provision reads:

“In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. *However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.*”³²

²⁹ BR, paras. 4.4, 4.7.

³⁰ BR, para. 4.4.

³¹ UNCLOS, art. 76 (10). See also Rule 46 (2) of the Rules of Procedure of the Commission on the Limits of the Continental Shelf (CLCS/40/Rev.1, 17 April 2008).

³² Rules of Procedure of the Commission on the Limits of the Continental Shelf, CLCS/40/Rev.1, 17 April 2008, Annex I (Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes), point 5 (a) (emphasis added).

The Chairperson of the CLCS has made clear, in the last statements on the progress of work in the Commission, that in the event of the existence of a dispute, the CLCS is not barred from considering a submission except in the absence of consent by all States concerned³³. There is no inherent impossibility for the Commission to continue its work in such cases, contrary to Bangladesh's assertion.

A.19. It is Bangladesh itself which has invoked the blocking provision of paragraph 5 (a) of Annex I to the CLCS's Rules of Procedure in order to prevent the Commission's consideration of Myanmar's submission. In contrast, Myanmar, acknowledging the "without prejudice" language of the Convention, has chosen not to block the Commission's consideration of Bangladesh's submission. It is only Bangladesh's refusal to consent to the consideration of Myanmar's submission before the CLCS which has forced the Commission so far to defer the establishment of a sub-commission to consider the submission³⁴. Until Bangladesh gives its consent, the Commission may not move forward on Myanmar's submission and any delimitation of areas beyond 200 nautical miles would not be possible. To the extent that Bangladesh is caught in a "catch-22", it is entirely of its own making.

A.20. For all of these reasons, and in the exercise of judicial propriety, the Tribunal should, in any event, decline to consider the request of Bangladesh to attribute or delimit areas of continental shelf beyond 200 nautical miles.

III. Myanmar's Entitlement to Continental Shelf beyond 200 Nautical Miles

A.21. Myanmar has explained in its Counter-Memorial that, according to the relevant provisions of UNCLOS, it is entitled to a continental shelf beyond 200 nautical miles³⁵. It has

³³ Statement by the Chairperson of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, Twenty-sixth session, New York, 2 August-3 September 2010, CLCS/68, 17 September 2010, para. 51; *ibid.*, Twenty-seventh session, New York, 7 March-21 April 2011, CLCS/70, 11 May 2011, para. 42. See also Letter dated 21 April 2011 from the Chairperson of the Commission on the Limits of the Continental Shelf addressed to the President of the twenty-first Meeting of States Parties, SPLOS/225, 5 May 2011, para. 9.

³⁴ *Ibid.*

³⁵ MCM, Appendix, paras. A.28-A.41.

submitted the relevant information to the CLCS³⁶, in accordance with article 76 (8) of UNCLOS and article 4 of Annex II to UNCLOS. Once the Commission makes its recommendations, Myanmar may establish the outer limits of its continental shelf “on the basis of these recommendations” in accordance with article 76 (8) of UNCLOS. The limits thus established “shall be final and binding”³⁷. There is no reason for Myanmar to resubmit that information in the present proceedings.

A.22. Bangladesh does not agree that Myanmar is entitled to any area of continental shelf beyond 200 nautical miles³⁸, and submits, not without hesitation³⁹ and contrary to previous statements⁴⁰, that Bangladesh alone is entitled to a continental shelf extending beyond 200 nautical miles in the Bay of Bengal. According to Bangladesh’s argument the Tribunal must, therefore, allocate “to Bangladesh *all* of the disputed areas of continental shelf beyond 200 M”⁴¹.

A.23. This conclusion is based on a misreading of article 76 of UNCLOS and, in particular, on a misunderstanding of the place and meaning of the term “natural prolongation” in the context of article 76 (1) of UNCLOS. Article 76, like all the provisions of UNCLOS, has to be interpreted in accordance with rules of customary international law on treaty interpretation, as reflected in articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties⁴², starting with the general rule of article 31. Accordingly, article 76, as Bangladesh admits⁴³, has to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

³⁶ MCM, Appendix, paras. A.44-A.47. See also Continental Shelf Submission of the Union of Myanmar, Executive Summary, 16 December 2008, MCM, Annex 16 (also available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf).

³⁷ UNCLOS, art. 76 (8).

³⁸ BR, paras. 1.7, 1.35, 4.1, 4.38, 4.73, 4.82, and 4.91 (1).

³⁹ See BR, para. 3.86 (“the sedimentary processes [in the Bay of Bengal] are what enable *any* of the Bay of Bengal’s littoral States to claim a continental shelf beyond 200 M”; emphasis added).

⁴⁰ See MCM, para. 3.39.

⁴¹ BR, para. 4.1 (emphasis added). See also, *ibid.*, paras. 1.35 and 4.91 (3), and BM, para. 7.37.

⁴² Seabed Dispute Chamber, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, para. 57.

⁴³ BR, para. 4.57.

A.24. It is important, at the outset, to note the context in which the term “natural prolongation” occurs in article 76. “Natural prolongation” is not a stand-alone term, but is used in article 76 (1) in the phrase “throughout the natural prolongation of its land territory to the outer edge of the continental margin”⁴⁴. Bangladesh, however, takes the term in isolation and then invents a scientific definition for the legal term “natural prolongation” which serves its purposes, and creates a novel criterion, or “test”⁴⁵, that must be satisfied before a coastal State may claim an entitlement to areas of continental shelf beyond 200 nautical miles. According to Bangladesh, before a coastal State, or the CLCS – or, presumably, in its view, the Tribunal – may establish the outer edge of the continental margin – which is to be done pursuant to article 76 (4) and (5) of UNCLOS – it must first inquire “whether there is any *geological* continuity between the seabed beyond 200 M and the adjacent landmass”⁴⁶. This “test of natural prolongation”, according to Bangladesh, is a prerequisite step in the process of determining entitlement to areas of continental shelf beyond 200 nautical miles. The required geological continuity, according to this novel theory, would not exist in the presence, for example, of “intervening tectonic plate boundaries, seabed trenches, or any other major geological discontinuity”⁴⁷.

A.25. Bangladesh posits that “the *most fundamental geological discontinuity* there is”⁴⁸ is found in the subduction zone between the Burma Plate and the Indian Plate⁴⁹. Therefore, it concludes that Myanmar’s “natural prolongation” is interrupted by the subduction zone, and that Myanmar fails the elemental first obstacle of Bangladesh’s version of article 76.

A.26. Although it is irrelevant to the delimitation decision requested in the present case, Myanmar feels compelled to respond briefly to Bangladesh’s misinterpretation of article 76 of UNCLOS. The Bangladesh interpretation of article 76, in particular paragraph 1 and the term “natural prolongation”, is simply wrong. It is contradicted by the negotiating history, the text and the context of UNCLOS (A), and by the application of that provision by the CLCS –

⁴⁴ See also para. A.34 below.

⁴⁵ BR, para. 4.47 (“to satisfy the *test* of natural prolongation”; emphasis added).

⁴⁶ BR, para. 4.46 (emphasis added).

⁴⁷ *Ibid.*

⁴⁸ BM, para. 7.28 (emphasis added).

⁴⁹ *Ibid.*

the institution tasked by the States Parties to UNCLOS with “mak[ing] recommendations in accordance with article 76”⁵⁰ (B).

A. “Natural Prolongation” in Article 76 of UNCLOS

A.27. In its Reply, Bangladesh asserts that Myanmar is “reading the law backwards”⁵¹ ignoring altogether article 76 (1), the reference to “natural prolongation” therein, and the “test of natural prolongation” to be satisfied by geological and geomorphological continuity⁵². In Bangladesh’s point of view, the reference to “natural prolongation” is necessary and sufficient to determine the area over which a coastal State enjoys a certain number of sovereign rights enumerated in article 77 of UNCLOS. This understanding of article 76 of UNCLOS is wrong.

A.28. Bangladesh states that the ordinary meaning of the term “natural prolongation” cannot be but a reference to science and the scientific concept as used in geomorphology *and* geology. However, “natural prolongation” in article 76 (1) of UNCLOS is not equivalent to or defined by a pre-existing scientific concept – be it geological, geomorphological, or other – but instead is a term of art with a specific legal meaning in its specific context, i.e., the law of the sea and, in particular, the legal concept of continental shelf. As Bangladesh’s own expert geologist concedes, “[t]he term ‘natural prolongation’ is not in common usage among earth scientists”⁵³. Bangladesh’s expert notes that the term, when it is used by earth scientists, “carries strong connotations of geological continuity”⁵⁴. However, here, the term is not used by “earth scientists” but found in an international treaty – a legal, not a scientific, instrument. When “natural prolongation” is used in this legal context, it carries no such scientific connotation.

⁵⁰ Article 3 (1) of Annex II of UNCLOS provides: “The functions of the Commission shall be: (a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea ...”.

⁵¹ BR, paras. 4.52 and 4.45.

⁵² BR, para. 4.52.

⁵³ BR, Vol. III, Annex R4, p. 1.

⁵⁴ *Ibid.*

A.29. Bangladesh's flawed use of scientific definitions for legal terms becomes even more obvious when considering another central term in article 76 (1), i.e., "continental shelf". Bangladesh's scientific expert writes with more conviction that "[e]arth scientists agree that the continental shelf is the submerged margin of a continent or island extending from the shoreline to the prominent break in a slope or increase in gradient at a world-wide depth average of about 120 meters"⁵⁵. Even if this might be the correct understanding of the term in the earth sciences, it clearly does not correspond to the concept of continental shelf in international law: under UNCLOS, the term "continental shelf" refers to an area extending to the "outer edge of the continental margin", which in turn includes the shelf, the slope and the rise and can extend to distances up to and in some cases exceeding 350 nautical miles from baselines and to depths well in excess of 2,500 metres. Alternatively, the term "continental shelf" refers to the seabed within a distance of 200 nautical miles from the baselines, irrespective of depth or any other geological or geomorphological characteristics. "Outer edge of the continental margin" is another term in article 76 (1) that might confound an earth scientist if asked to provide the legal definition. A scientist might say the outer edge of the continental margin is located where the rise meets the abyssal plain. Under UNCLOS, one would refer to the formulae of article 76 (4) (a) of UNCLOS which emerged out of a decade of negotiations. These definitions – the scientific definition and the legal definition painstakingly crafted by international lawyers and diplomats – are not the same in form and the things they define are not the same in substance.

A.30. Bangladesh wrongly turns to earth sciences in order to define legal terms within article 76, ignoring the object and purpose, as well as the negotiating history of this provision. Through a series of contortions, Bangladesh transforms "natural prolongation" into a scientific criterion that must be satisfied, asserting (without any support whatsoever) that "[b]oth geology and geomorphology are relevant and necessary to satisfy the test of natural prolongation"⁵⁶.

A.31. "Natural prolongation", "continental shelf" and "outer edge of the continental margin", all found in article 76 (1), are surely some of the terms the CLCS had in mind when

⁵⁵ *Ibid.*, p. 3.

⁵⁶ BR, para. 4.47.

it wrote that “the Convention makes use of scientific terms in a legal context which at times departs significantly from accepted scientific definitions and terminology”⁵⁷. The Commission went on to note that

“[t]he trend for the creation of separate interpretations of terms can be traced back to the work carried out for the first United Nations Conference on the Law of the Sea by the International Law Commission. Article 76, paragraph 1, which defines the legal concept of the continental shelf by means of a reference to the outer edge of the continental margin, provides a measure of the current gap between the juridical and the scientific use of terms.”⁵⁸

A.32. The gap between the juridical and scientific use of terms is large. It is intentional and necessary in order to serve the specific purpose of article 76 of UNCLOS as a whole, i.e., on the one hand, to define the legal continental shelf satisfying the aspirations of wide-margin States, and, on the other hand, to provide for exact limits to those aspirations⁵⁹ in order to precisely define the Area, which, together with its resources, is the “common heritage of mankind”⁶⁰. The important issue was not the scientific characteristics of the shelf; the important issue was and is to define the shelf with reference to criteria permitting the determination of a precise limit of an area submitted to a specific legal regime⁶¹, necessary and essential for the orderly exploitation of seabed resources.

⁵⁷ CLCS Guidelines, 13 May 1999, CLCS/11, point 1.3. See also MCM, Appendix, para. A.23.

⁵⁸ *Ibid.*, point 6.1.5 (reference omitted).

⁵⁹ See also article 76 (2) of UNCLOS which “serves as a reassurance to States concerned about the extension of coastal State jurisdiction over the continental shelf that there are limits to that jurisdiction” (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. 874, para. 76.18(c)).

⁶⁰ UNCLOS, art. 136.

⁶¹ 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). The author refers to the commentary of the ILC to draft article 67 of its Articles concerning the Law of the Sea, which states, *inter alia*: “While adopting, to a certain extent, the geographical test for the ‘continental shelf’ as the basis of the juridical definition of the term, the Commission therefore in no way holds that the existence of a continental shelf, in the geographical sense as generally understood, is essential for the exercise of the rights of the coastal State as defined in these articles” (*ILC Yearbook*, 1956, Vol. II, p. 297, para. (7) of the commentary). See also the very clear explanation given by Mr. François, Special Rapporteur of the ILC, of one of its earlier proposals retaining only a 200-metre-depth criterion: “the main feature of his definition was that it entirely disregarded the geographical and geological concept of the continental shelf. It was well-known that geographers and geologists were not at all agreed as to the meaning to be attached to the notion of the continental shelf. In his opinion the only way to get results was to adhere to the strictly legal concept of the continental shelf. ... No positive and concrete result could therefore be achieved except by

A.33. A brief review of the *travaux préparatoires* of the 1982 Convention confirms this point. Very early in the negotiations, it became clear that “natural prolongation” constituted a poor criterion for the determination of the spatial extent and the limits of the continental shelf, one of the key objectives of the new definition. Indeed, as stated by the sponsors of a proposal essentially based on “natural prolongation”⁶², “[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”⁶³. The United States of America, whose 1974 proposal was based on natural prolongation, agreed: “Provisions are needed for locating and defining the precise limit of the continental margin, and to provide a precise and permanent boundary between coastal State jurisdiction and the international sea-bed area.”⁶⁴ Natural prolongation alone did not serve that function. The next half decade of negotiations, which Bangladesh does not mention in its written pleadings, were dedicated to identifying and agreeing the criteria – primarily geomorphological⁶⁵ – that would be used to define that spatial extent. Article 76 of the Convention is the result.

A.34. In this context, “natural prolongation” as referred to in article 76 (1) of UNCLOS cannot be and cannot create a new and independent condition or test for the entitlement to a continental shelf. Any such additional condition would jeopardize the entire structure and functioning of article 76. Indeed, Bangladesh offers no explanation why, if “natural prolongation” is the criterion for establishing the spatial extent of the continental shelf, article 76 (1) adds “to the outer edge of the continental margin”. This addition would have been entirely unnecessary given that natural prolongation – as a scientific concept – would have had its own identifiable limit, i.e., the point where the allegedly necessary geological

adopting a strictly legal definition.” (*ILC Yearbook*, 1951, Vol. I, 113th meeting, 28 June 1951, p. 270, para. 54).

⁶² Article 19 (2) of the Working Paper jointly submitted in 1974 by Canada, Chile, Iceland, Indonesia, Mauritius, Mexico, New Zealand and Norway provided: “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.” (A/CONF.62/L.4, in *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. III, Documents of the Conference, p. 83)

⁶³ *Ibid.*

⁶⁴ A/CONF.62/C.2/L.47, article 23, *ibid.*, p. 224.

⁶⁵ See also paras. A.45-A.46 below.

and geomorphological continuity with the land territory ceases to exist; this solution was indeed advocated during the Conference⁶⁶, but was not incorporated into article 76.

A.35. Assuming, *arguendo*, that “natural prolongation” does define the extent of the continental shelf of a State, where would the actual limit of the continental shelf under article 76 be located? The problem arises with particular sharpness in a case where the edge of the continental margin as defined by the formulae in article 76 (4) lies seawards of a geological discontinuity, for example, a subduction zone⁶⁷. According to Bangladesh’s point of view, a coastal State would be entitled only to a continental shelf up to this discontinuity⁶⁸. However, article 76 does not contain any principles or rules in order to determine the outer limit of the continental shelf in such a case – a situation which is inconceivable with regard to the object and purpose of the provision, i.e., to fix precise limits for the Area⁶⁹. It would be even more surprising if, in these circumstances, a State would be entitled to fix the outer limit of its continental shelf with reference to the “outer edge of the continental margin” as defined under article 76 (4) because it would then be allowed to include into its continental shelf areas which do not satisfy the “test of natural prolongation”. This, it is submitted, is a result which is manifestly absurd or unreasonable.

A.36. In fact natural prolongation is not a criterion or test of title, but is rather the *basis* of title. In article 76 (1) of UNCLOS, natural prolongation is not an “if” (if natural prolongation, then continental shelf entitlement), it is a “because” that answers the question “why?” (why

⁶⁶ Informal Suggestion by the Union of the Soviet Socialist Republics, C.2/Informal Meeting/14, 27 April 1978, 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, in *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. XI, Documents of the Conference, p. 124 (Annex III) (“In cases where the edge of the continental margin extends less than 100 miles beyond the outer limit of the 200-mile economic zone, the continental shelf of the coastal State will be determined on the basis of scientifically sound geological and geomorphological data.”) See also the proposal made by China: “By virtue of the principle that the continental shelf is the natural prolongation of the continental territory, a coastal State may reasonably define, according to its specific geographical conditions, the limits of the continental shelf under its exclusive jurisdiction beyond its territorial sea or economic zone. The maximum limits of such continental shelf may be determined among States through consultations.” (A/AC.138/SC.II/L.34; see also 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. 843, para. 76.4).

⁶⁷ This is the case of Barbados and, in part, of New Zealand. See paras. A.54-A.57 below.

⁶⁸ See also BR, para. 4.69; and para. A.55 below.

⁶⁹ See para. A.32 above.

continental shelf entitlement? because natural prolongation). It is not an obstacle to, or criterion for entitlement; it is the foundational reason for the existence of the entitlement in the international legal system of sovereignty and sovereign rights. It has no relationship whatsoever to geological continuity. Natural prolongation is a juridical concept, as Bangladesh readily admits⁷⁰. As the ICJ said in 1985:

“[W]here 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”⁷¹.

A.37. Bangladesh seeks to rely on selected extracts from the 1969 judgment of the ICJ in the *North Sea Continental Shelf* cases in order to prove otherwise⁷². This reliance is however misplaced. First of all, even if it is undisputed that the 1969 judgment has influenced the work of the Third United Nations Conference, it has now been largely overtaken by the outcome of the conference, i.e., UNCLOS. Moreover, in the judgment the ICJ made extensive reference to “natural prolongation” but never called into question the then established legal understanding concerning the extent of the continental shelf. Instead it found that the 1958 Geneva Convention provided the “received or at least emergent rules of customary international law relative to the continental shelf, amongst them *the question of the seaward extent of the shelf*”⁷³.

A.38. The ICJ did not change, in 1969, the criteria for determining what portion of the seabed and subsoil is to be considered the legal continental shelf. There is no hint in the 1969

⁷⁰ BM, para. 1.15.

⁷¹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 33, para. 34 (emphasis added).

⁷² Bangladesh attempts to bolster its argument regarding the outer limit of the continental shelf with additional jurisprudence from another *delimitation* case (see BR, paras. 4.60-4.61). Not only is the subject matter of the case unrelated to the question here, the case does not support Bangladesh’s argument. The relevant passage referred to by Bangladesh says: “The endeavour, however, *in the terms of the Libyan argument*, was to convince the Court of a discontinuity so scientifically ‘fundamental’, that it must also be a discontinuity of a natural prolongation in the legal sense; and such a fundamental discontinuity was said to be constituted by a tectonic plate boundary which the distinguished scientists called by Libya detected in the rift zone, or at least by the presence there of a very marked geomorphological feature.” (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 36, para. 41).

⁷³ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 39, para. 63 (emphasis added).

judgment – contrary to what Bangladesh implies⁷⁴ – that natural prolongation refers to prerequisite geological and geomorphological characteristics of the continental shelf that must be established by conclusive scientific proof before a coastal State may claim title. Indeed, it was not the spatial extent of a State’s entitlement over the continental shelf which was at issue in this part of the judgment, but the principles underlying the very existence of, or providing the explanation for, the then still rather recently established notion of the juridical continental shelf. The ICJ, in addressing natural prolongation was explaining the reason why a coastal State could, under the modern international law, exercise sovereign rights over the natural resources of the shelf. It is in this context that paragraph 43 of the Judgment, which has now been extensively quoted by both parties, should be understood:

“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.”⁷⁵

A.39. A coastal State could exercise sovereign rights over the continental shelf because it was *deemed to be* a prolongation of its land territory and therefore of the corresponding title. Natural prolongation was not at that time, and has not become by the *North Sea Continental Shelf* judgment, still less under UNCLOS, a criterion for defining the extent of the continental shelf. Instead, natural prolongation is, and has always been, the underlying juridical concept that explains why a State could exercise some specific rights in the area the spatial extent of which was defined, at that time, in article 1 of the 1958 Geneva Convention on the Continental Shelf. The criteria for defining the spatial extent of the juridical continental shelf have changed with UNCLOS, but the basis of title, i.e., natural prolongation, is still the same.

A.40. Even if article 76 (1) of UNCLOS responds to the question of the legal basis of the title of a State to a continental shelf, it does not, taken in isolation, define the extent of the entitlement. Only article 76 in its entirety can provide an answer which satisfies the purpose

⁷⁴ BR, paras. 4.48, 4.51 and 4.52.

⁷⁵ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 31, para. 43 (emphasis added).

of legal certainty, essential for orderly resource exploitation⁷⁶, through the application of legal criteria painstakingly negotiated during the Third United Nations Conference on the Law of the Sea.

A.41. Indeed, under article 76 (1) of UNCLOS, the relevant question is not if there is a “natural prolongation” or not. The first issue to address is whether the “outer edge of the continental margin” extends up to a distance of 200 nautical miles from the baselines. Only the location of the outer edge of the continental margin relative to the 200-nautical-mile limit is controlling.

A.42. The outer edge of the continental margin, as the controlling element, is not left undefined. Article 76 takes care not to refer simply to a scientific concept which would not produce a limit satisfying the purpose of legal certainty. Even if paragraph 3 defines the “continental margin” by reference to its geomorphological elements, i.e., the shelf, the slope and the rise, and by excluding other geomorphological features, i.e., the deep ocean floor with its oceanic ridges, such a definition of the margin does not permit with the necessary degree of certainty (especially necessary where resource exploitation is involved) a determination of where the margin ends: the seaward end of the continental rise, as well as the landward end of the deep ocean floor, even if they exist on the ground, are not easily identifiable. Therefore, this very general definition of the continental margin is complemented by the legal artifact establishing the outer edge, for the purposes of the Convention, by reference to the foot of the slope and the two formulae (paragraph 4) which have already been described in the Appendix to Myanmar’s Counter-Memorial⁷⁷.

A.43. Consequently, article 76 (4) of UNCLOS controls to a large extent the application of article 76 as a whole and is the key to the provision. For the application of article 76 (1), it is of the utmost importance to determine the “outer edge of the continental margin” as a first step. If the outer edge is situated at a distance of less than 200 nautical miles from the relevant baselines, then the coastal State is entitled to a continental shelf extending up to this

⁷⁶ See also para. A.32 above.

⁷⁷ See MCM, Appendix, paras. A.28-A.40.

200-nautical-mile limit⁷⁸, subject to the effect of delimitation with any opposite or adjacent State. If the outer edge is situated at a distance greater than 200 nautical miles from lawfully established baselines, the coastal State is entitled to exercise its sovereign rights extending up to this edge and needs to proceed to the delineation of its continental shelf according to the relevant provisions of article 76, and in particular its paragraphs 2, 4 to 6, and 7 to 9, and, in the event it is necessary, to the delimitation of this area with any opposite or adjacent State.

A.44. This is not reading the law backwards⁷⁹. It is reading the law taking due account of the relevant definitions and criteria provided. The outer edge of the continental margin is the relevant criterion within paragraph 1. It is given a specific meaning only in paragraph 4. It is only logical and necessary, in this context, to apply paragraph 4 in the implementation of paragraph 1.

A.45. None of the above is to suggest that geoscience does not play any role under article 76 of UNCLOS. However, the earth sciences do not have the role Bangladesh wants them to play. The Conference picked up what it considered to be the most accessible scientific definition of the continental margin and transformed this into legal criteria. These criteria are decidedly more complex than the depth criteria of the 1958 Convention, but they are far more certain. They do not involve geological continuity, but are based primarily on concerns of horizontal distance and the shape (or geomorphology) of the seabed. The formula line of article 76 (4) (a) (i) is determined by measuring the distance from the surface of the seabed to the bottom of the sedimentary layer and the distance from the foot of the continental slope. The formula line of article 76 (4) (a) (ii) is determined by measuring distance from the foot of the continental slope. Likewise, both constraint lines of article 76 (5) are determined wholly or in part by distance measurements, one from baselines and one from the 2,500 metre isobaths. Geomorphology also plays a role. The three features from which distances are measured – the baselines, the foot of the continental slope⁸⁰, and the 2,500 metre isobaths – are all geomorphological features. They are functions of the shape of the seabed. One

⁷⁸ See also CLCS Guidelines, 3 September 1999, CLCS/11/Add.1, Annex II: Flowcharts and Illustrations Summarizing the Procedure for Establishing the Outer Limits of the Continental Shelf.

⁷⁹ See BR, paras. 4.45 and 4.52. See also para. A.27 above.

⁸⁰ The foot of the continental slope is “the point of maximum change in the gradient at its base” (art. 76 (4) (b) of UNCLOS). This is a function of the shape of the surface of the continental slope.

common characteristic of these distance and geomorphological criteria is that they are entirely arbitrary – a function of diplomatic compromise. More importantly, they have nothing to do with geology.

A.46. While criteria related to distance and shape dominate the process of determining the outer edge of the continental margin, geology is not entirely excluded, but plays only a minor role. Pursuant to article 76 (4) (b), the general rule for identification of the foot of the slope is the geomorphological one related to the gradient of the slope⁸¹. However, this paragraph also allows for the submission of “evidence to the contrary” in support of a different location of the foot of the continental slope – a provision deemed to have “the character of an exception to the rule”⁸². In addition to the geomorphological evidence required to demonstrate the location of the foot of the slope under the general rule, States may submit as “evidence to the contrary” geological and geophysical evidence. This is the one place in article 76 where geological considerations *may* be taken into account.

A.47. The relevance of science and scientific criteria within article 76 has been well described by David Colson:

“What Article 76 brings to the table is not so much the reminder that geology and geomorphology were relevant to a delimitation beyond 200 nautical miles ... What Article 76 provides that is new are *agreed categories of geological and geomorphological facts* that are legally relevant for the purpose of determining title to the outer continental shelf, and it establishes a commission to confirm those facts.”⁸³

A.48. All the criteria determined by article 76 of UNCLOS, taken as a whole, describe what should be understood as the continental margin for the purpose of the Convention and, when correctly applied, they translate into law a certain idea and understanding of continuity between the land mass and the continental margin.

⁸¹ CLCS Guidelines, 13 May 1999, CLCS/11, point 6.1.1.

⁸² *Ibid.*, point 6.1.2.

⁸³ D.A. Colson, “The Delimitation of the Outer Continental Shelf between Neighboring States”, *American Journal of International Law*, Vol. 97, 2003, p. 102 (emphasis added). See also St. Th. Gudlaugsson, “Natural Prolongation and the Concept of the Continental Margin for the Purposes of Article 76”, in M.H. Nordquist, J.N. Moore and T.H. Heidar (eds.), *Legal and Scientific Aspects of Continental Shelf Limits*, Nijhoff, Leiden, 2004, p. 87.

A.49. The Convention does not contemplate the kind of in-depth scientific investigation that Bangladesh advocates. One need not test the origin of sediment on the seabed or in the subsoil. One need not ask whether that sediment is deformed or undisturbed. One need not determine the basement structure or tectonics underlying the seven continents in order to apply the terms of the Convention. These scientific facts are not relevant for determining the outermost limit of entitlement to the continental shelf under article 76. These are not among the “agreed categories of geological and geomorphological facts” arrived at in the course of negotiating the legal provisions of UNCLOS⁸⁴.

B. The Practice of the CLCS Confirms Myanmar’s Approach

A.50. In its Reply, Bangladesh tries to downplay the practice of the CLCS, which confirms Myanmar’s understanding of article 76 of UNCLOS. It alleges that the Commission “has not had to address questions of natural prolongation of a particular State’s landmass”. Bangladesh continues:

“[a]s a practical matter, the only question [the CLCS] has had to answer is whether there is a continental margin beyond 200 M and if so whether the outer limits have been correctly defined by the State submitting data. This entails the interpretation and application of Articles 76(4)-(7). It is thus not surprising that the CLCS has paid little attention to Article 76(1). In the majority of submissions, the question of natural prolongation does not arise or is moot by the time the CLCS is ready to make recommendations on delineation of the outer limits.”⁸⁵

A.51. This argument implies that the CLCS is, somehow, unaware of an elemental first step in the process of analyzing claims of wide margin States under article 76 of UNCLOS. The better explanation of the Commission’s lack of “attention” to “the question of natural prolongation” is the one given in Subsection A: natural prolongation is not relevant to the task of defining the spatial extent of a coastal State’s juridical continental shelf under the terms of article 76 of UNCLOS. Natural prolongation is not the criterion for defining the outer edge of the continental margin. Moreover, natural prolongation does not refer to or

⁸⁴ D.A. Colson, *loc. cit.*

⁸⁵ BR, para. 4.64.

imply other criteria, such as geological continuity, that must be satisfied in order to find the location of the outer edge of the continental margin⁸⁶.

A.52. Bangladesh's argument that geological continuity is a determinative factor in the definition of the outer edge of the continental margin is clearly contradicted by the recommendations issued by the CLCS. In its consideration of submissions, the Commission has applied a step-by-step analysis focused primarily on the application of the criteria of article 76 (4) and (5)⁸⁷. That process has not involved, as a first step or anywhere else, an assessment of geological continuity between the submitting State's land territory and areas of continental shelf encompassed by the claimed outer edge of the continental margin.

A.53. With regard to the CLCS recommendations related to Ascension Island, contrary to what Bangladesh argues in the Reply on the basis of an isolated and partial reading of the recommendations⁸⁸, the CLCS did not approach the "natural prolongation" issue as a question of physical extent⁸⁹. A full reading of the recommendations reveals that the CLCS came to its conclusion that Ascension Island is not entitled to a continental shelf extending beyond 200 nautical miles by a strict application of the criteria in article 76 (4). The Commission states that "[w]hether such islands are entitled to establish outer limits to their continental shelves beyond 200 M depends on the location of the base and the FOS [foot of the continental slope] within the submerged prolongation of those islands. Therefore, the FOS must be situated more than 140 M from the territorial sea baselines in order to establish an outer edge of continental margin beyond 200 M using the 60 M distance formula."⁹⁰ This, in

⁸⁶ That is why the CLCS has underlined, with respect to the use of the two formulae contained in paragraph 4 (a) of article 76 of UNCLOS for the purpose of the "test of apurtenance", i.e., the test of entitlement, that "[t]he application of any other criteria would be inconsistent with the provisions contained in the Convention for the delineation of the outer limit of the continental shelf" (CLCS Guidelines, 13 May 1999, CLCS/11, point 2.2.7).

⁸⁷ See also CLCS Guidelines, 3 September 1999, CLCS/11/Add.1, Annex II: Flowcharts and Illustrations Summarizing the Procedure for Establishing the Outer Limits of the Continental Shelf.

⁸⁸ BR, para. 4.67-4.68.

⁸⁹ See also the note from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland addressed to the Secretary-General of the United Nations, 11 January 2011, Annex, para. 22 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/gbr08/gbr_nv_11jan2011.pdf).

⁹⁰ 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. 44 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/gbr08/gbr_asc_isl_rec_summ.pdf).

the opinion of the Commission, was not the case of Ascension Island and *therefore* it was not entitled to a continental shelf extending beyond 200 nautical miles⁹¹.

A.54. With regard to the Barbados submission to the Commission and the recommendations adopted in 2010⁹², Myanmar cannot accept Bangladesh's assertion that this case is different from the present one. Indeed, as already explained in the Counter-Memorial⁹³, Barbados's situation is comparable to that of Myanmar. First, it must be recalled that, as in the case of *Barbados/Trinidad and Tobago*, the delimitation line between Bangladesh and Myanmar does not extend beyond 200 nautical miles from the coast of Bangladesh, i.e., it stops before reaching that limit. Bangladesh admits in its Reply that, in the decision of the Arbitral Tribunal, "[t]his was not an *a priori* assumption ... but simply the equitable result that followed from the delimitation process in accordance with Articles 74 and 83"⁹⁴. This is not different in the present case as Myanmar has shown in its Counter-Memorial and the present Rejoinder.

A.55. The cases of Myanmar and of Barbados are also comparable with regard to the geological structure of the relevant continental margins. Indeed, between the land territory of Barbados and the outer limit of the continental shelf as recommended by the Commission is a convergent, active subduction zone where the Atlantic Plate is subducting under the Caribbean Plate. The seaward limit of the accretionary prism formed by this subduction process does not extend beyond 200 nautical miles from Barbados' baselines, but is situated well within this limit⁹⁵, as is also the case for Myanmar. Despite this fundamental geological discontinuity, the CLCS made recommendations for an outer limit well beyond 200 nautical miles on the basis of natural prolongation (see sketch-map No. RA.1 at page 223).

⁹¹ *Ibid.*, para. 50.

⁹² Summary of Recommendations of the CLCS in regard to the Submission made by Barbados on 8 May 2008, 15 April 2010 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/brb08/brb08_summary_recommendations.pdf).

⁹³ MCM, Appendix, para. A.34.

⁹⁴ BR, para. 4.43. See also paras. 6.9 and 6.49-6.50 above.

⁹⁵ See also para. A.57 below.

Bangladesh's assertion that the "natural prolongation" of Barbados "clearly stopped at the outer edge of the accretionary front (or wedge)"⁹⁶ is simply wrong.

A.56. The recommendations to New Zealand were made under similar circumstances and with a similar result: the territory of the submitting coastal State is separated partly from the outer edge of the continental margin as recommended by the CLCS by a subduction zone formed by the meeting of two different tectonic plates (see sketch-map No. RA.2 at page 225)⁹⁷.

A.57. The recommendations to Barbados and New Zealand demonstrate that Bangladesh has completely misunderstood how article 76 of UNCLOS works. Geological discontinuities in the basement structure are not as such the limit of, and even less an obstacle to an entitlement to areas of continental shelf beyond 200 nautical miles. Only the application of the defined criteria of article 76 of UNCLOS determine if and to what extent a coastal State is entitled to such areas of continental shelf.

*

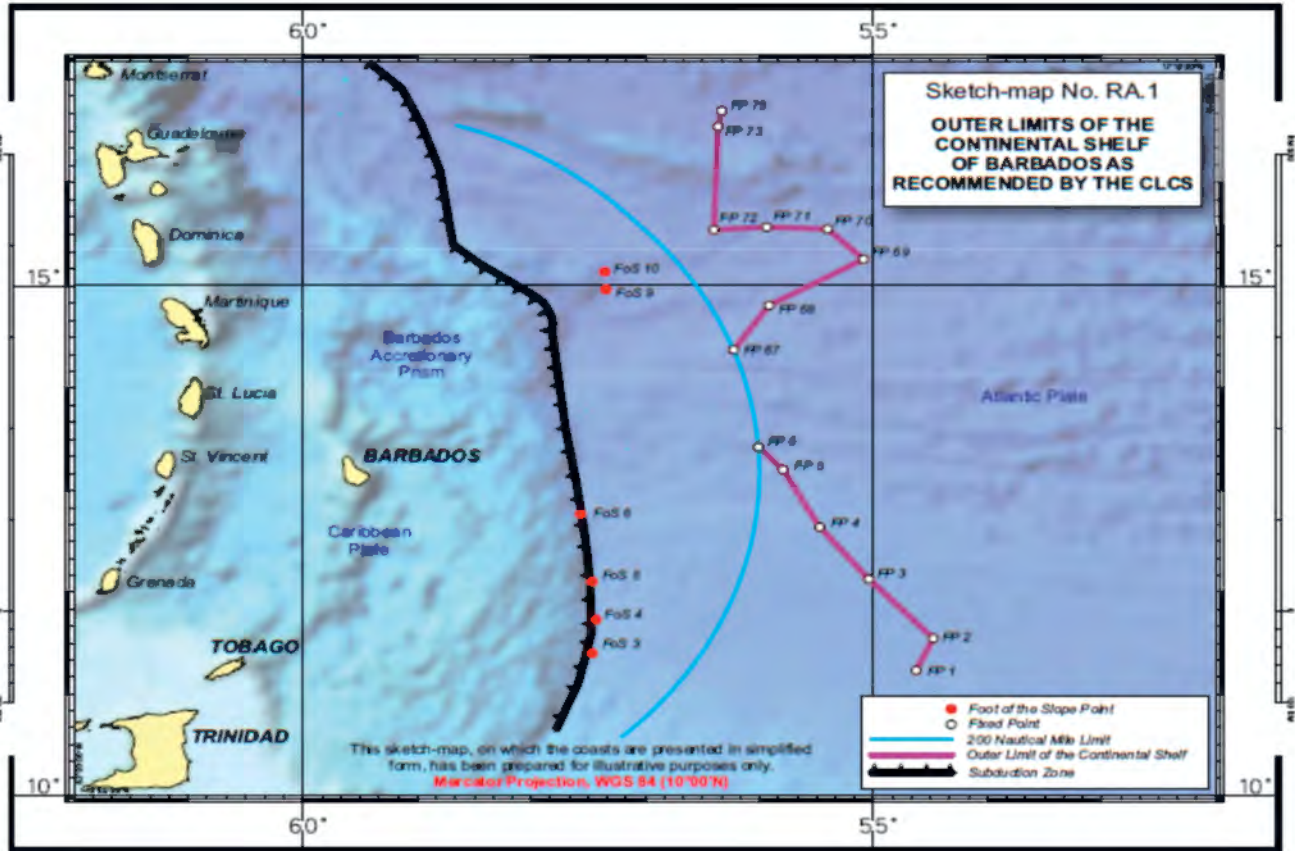
A.58. Natural prolongation, as referred to in article 76 (1) of UNCLOS, is not, and cannot be made to be, a new and independent criterion or test of entitlement to continental shelf which is defined under article 76 of UNCLOS, and in particular by the criteria determined by article 76 (4). Only these criteria, which have their specific scientific background, are controlling. Article 76 is not a mere approximation of science; it translates a specific scientific understanding of the continental shelf, including the particular criteria chosen by the drafters of UNCLOS, into law. So it stands and must be applied in accordance with its terms.

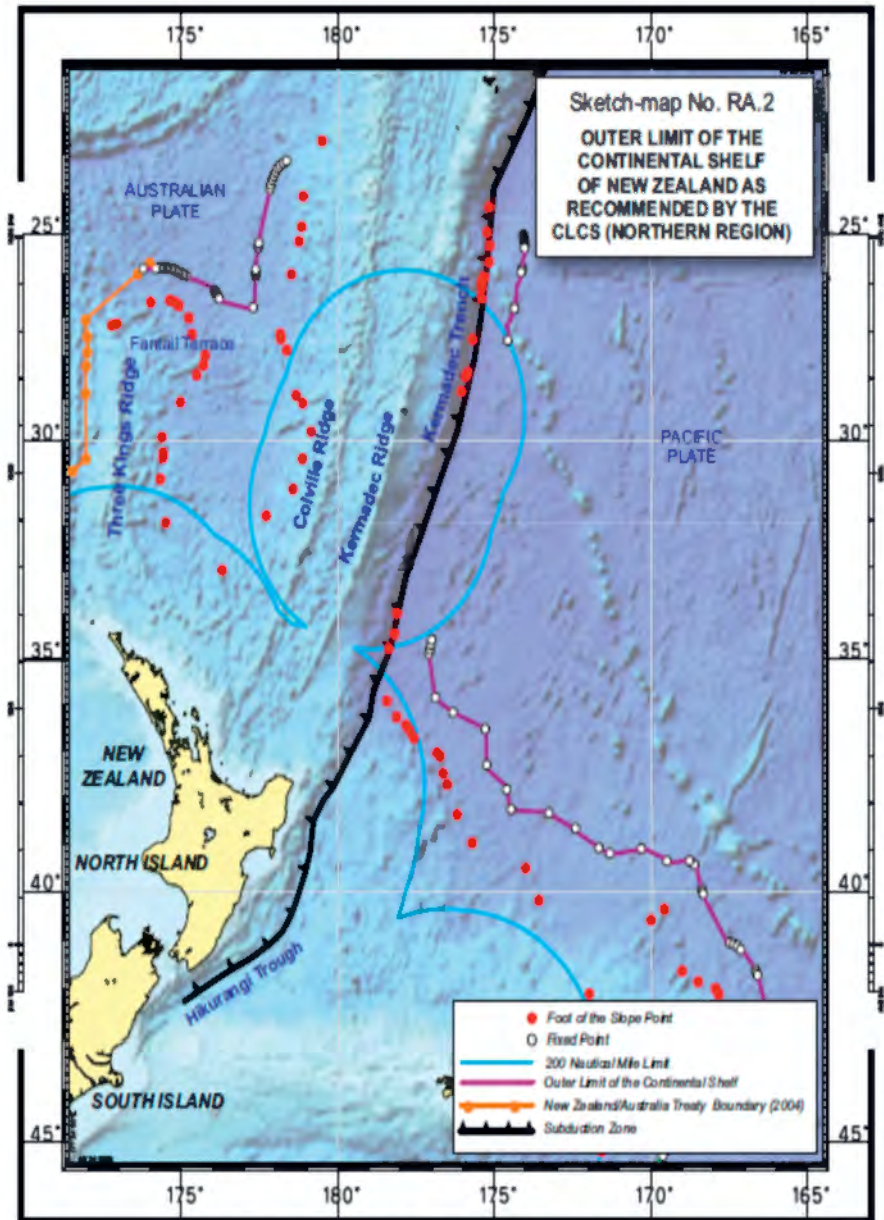
A.59. Myanmar has an entitlement to continental shelf extending beyond 200 nautical miles given the fact that the outer edge of its continental margin, as defined under article 76 (4) of UNCLOS is situated beyond 200 nautical miles from its baselines. The final and binding

⁹⁶ BR, para. 4.69.

⁹⁷ Summary of the Recommendations of the CLCS in regard to the Submission made by New Zealand on 19 April 2006, 22 August 2008, paras. 133-148, and in particular para. 136 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/nzl06/nzl_summary_of_recommendations.pdf).

outer limit of the continental shelf of Myanmar will be determined in due course, on the basis of the recommendations to be made by the CLCS, in accordance with article 76 (8) of UNCLOS.





This sketch-map, on which the coasts are presented in simplified form, has been prepared for illustrative purposes only.
 Mercator Projection, WGS 84 (45°24'S)

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- Annex R2** Decision of the 21st Meeting of the Council of Ministers held on 19 November 1974
- Annex R3** Socialist Republic of the Union of Burma, Council of State, Notification No. 4/75, 12 November 1975
- Annex R4** Socialist Republic of the Union of Burma, Council of State, Proclamation 2/87, 16 March 1987
- Annex R5** *Guardian*, "Instruments of Ratification of Agreement Exchanged", 15 September 1987
- Annex R6** Note Verbale from the Permanent Mission of the Union of Myanmar to the United Nations to the Secretary-General of the United Nations, 31 March 2011