

REPLY OF BANGLADESH

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

REPLY OF BANGLADESH

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CHAPTER 1**INTRODUCTION**

1.1 These proceedings were instituted before the International Tribunal for the Law of the Sea (“ITLOS” or “the Tribunal”) pursuant to a special agreement dated 13 December 2009. In accordance with the Order of the Tribunal dated 20 January 2010, Bangladesh filed its Memorial on 1 July 2010 and Myanmar filed its Counter-Memorial on 1 December 2010. By Order dated 17 March 2010, ITLOS authorized the submission of a Reply by Bangladesh and a Rejoinder by Myanmar on 15 March 2011 and 1 July 2011, respectively. This Reply, together with accompanying figures and annexes, is submitted in accordance with that Order.

1.2 This Reply supplements the arguments of law and fact presented in the Memorial, all of which are maintained in full. In accordance with Article 62(3) of the ITLOS Rules, the parties are called on to focus on the issues that continue to divide them. Unfortunately, the initial exchange of pleadings has only served to underscore the extent of the differences between the Parties. Whether in regard to the delimitation of the territorial sea, the exclusive economic zone (“EEZ”) and continental shelf within 200 M, or the continental shelf beyond 200 M, they continue to be divided on many issues.

1.3 With respect to the territorial sea, the Bangladesh Memorial showed 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. The 1974 agreed boundary reflects an equidistance line drawn between Bangladesh’s St. Martin’s Island and Myanmar’s mainland coast, and is thus consistent with Article 15 of the later-adopted 1982 United Nations Convention on the Law of the Sea (“UNCLOS” or “the 1982 Convention”).

1.4 The Counter-Memorial disagrees. According to Myanmar, its agreement concerning the boundary in the territorial sea was provisional only and never became legally binding upon it. On that basis, Myanmar now argues for the first time that the territorial sea boundary should depart substantially from an equidistance line and instead follow an arc that cuts deeply into the 12 M territorial sea entitlement of St. Martin’s Island. This argument is contradicted by 34 years of continuous practise by Myanmar.

1.5 With respect to the EEZ and continental shelf within 200 M, the Memorial showed that the concave configuration of Bangladesh’s coast, combined with its location “sandwiched” between Myanmar and India, make the equidistance method incapable of yield-

ing an equitable solution in this case. Because of the effects of this concavity, an equidistance line with Myanmar runs together with an equidistance line with India and cuts off Bangladesh's maritime projection well before it reaches 200 M. Bangladesh showed that there is no justification for this result, particularly taking account of its indisputable entitlement in the continental shelf beyond 200 M. In place of equidistance, Bangladesh proposed that the delimitation with Myanmar be based on the other principal method relied upon in the jurisprudence – the angle-bisector method. Using that method in this case produces a result that is equitable to both Parties and thus satisfies the requirements of international law.

1.6 The Counter-Memorial does not dispute any of the pertinent geographical facts. It argues instead that they are unimportant. According to Myanmar: (1) modern jurisprudence renders the equidistance method legally obligatory; (2) the concavity of Bangladesh's coast is irrelevant; and (3) there is nothing inequitable about zone-locking Bangladesh well within 200 M and depriving it of an outer continental shelf. This is the correct approach, Myanmar claims, because "rights to maritime areas are governed by equidistance".¹ Myanmar therefore continues to insist on an equidistance-based delimitation despite its undeniable inequity to Bangladesh.

1.7 With respect to the issues concerning the continental shelf beyond 200 M, the Memorial showed that the seabed and subsoil of the Bay of Bengal constitute the "natural prolongation" of the Bangladesh landmass under Article 76(1) of UNCLOS. The sedimentary processes that have created and shaped most of Bangladesh's land territory are also those which have shaped the seafloor throughout the Bay of Bengal. Moreover, the sedimentary material that comprises the landmass of Bangladesh is precisely the same material that covers the seabed of the Bay in a blanket as much as 24 km thick. The landmass of Myanmar, in contrast, has no similar extension beyond 200 M. In fact, it is separated from the area beyond 200 M by a tectonic plate boundary defined by a trench and subduction zone corresponding to the most fundamental geological discontinuity known to science. As a result, Myanmar has no entitlement beyond 200 M.

1.8 The Counter-Memorial does not contest the geological facts. Rather, it argues only that Bangladesh has no rights in the continental shelf beyond 200 M because the equidistance method stops it from ever reaching that point. With respect to the issue of Myanmar's rights, it argues that it can be presumed to have a juridically manufactured (if not scientifically established) "natural prolongation" based not on Article 76(1) but on an erroneous reading of Article 76(4).

¹ Counter-Memorial of Myanmar (hereinafter "CMM") at para. 5.111.

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1.9 This Reply responds to all of the Counter-Memorial's arguments and shows how and why they do not withstand analysis. Whether in respect of the territorial sea, the EEZ and continental shelf within 200 M, or the continental shelf beyond 200 M, Myanmar's case is inconsistent with the provisions of UNCLOS as written, and as interpreted and applied in the jurisprudence. For the avoidance of doubt, Bangladesh maintains all the arguments raised in the Memorial.

1.10 The tension between Myanmar's arguments and the terms of the 1982 Convention is perhaps best exemplified by Myanmar's conspicuously contradictory attitude towards the equidistance method. Article 15 governing the delimitation of the territorial sea is the only provision of UNCLOS that gives equidistance an express role. Indeed, absent agreement or special circumstances, it makes the equidistance method obligatory. Yet, it is precisely in the territorial sea that Myanmar seeks to jettison equidistance in favour of a line that contradicts its own practise over 34 years and purports for the first time to deny St. Martin's Island – a major geographical feature directly adjacent to Bangladesh's coast – full effect even within 12 M.

1.11 Myanmar's arguments concerning the delimitation of the continental shelf and EEZ have the inverse problem. Unlike Article 15, Articles 74 and 83 of the 1982 Convention do not require that equidistance be given a mandatory or express role. Instead, they provide that the object of delimitation is to achieve an "equitable solution". Yet here, Myanmar insists that equidistance is obligatory. The Counter-Memorial seeks to elevate it from the ranks of a delimitation *method* to a rule of law of universal application, no matter the inequitable solution it may produce. Myanmar has, in a phrase, turned the law of delimitation on its head.

1.12 In contrast, Bangladesh's views are consistent with the terms of the 1982 Convention. Consistent with the wording of Article 15, Bangladesh considers that – in the absence of historic title or special circumstances – the boundary in the territorial sea should follow the equidistance line that was agreed and settled in 1974. Only if there was no agreement in 1974 might it be permissible to draw a new line but even here an equidistance line drawn on modern charts leads to a result that is almost identical to that agreed in 1974. And consistent with the text of Article 74 and 83, Bangladesh believes the boundary in the continental shelf and EEZ must achieve an equitable solution. Since equidistance is incapable of producing such a result in this case, a different approach is required. The most frequently used approach in such circumstances – and the one most suited to the present

circumstances – is the angle bisector. It demonstrably produces a solution that is equitable to both Parties.

1.13 The substance of all these points is explored fully in the chapters that follow.

I. Points of Agreement

1.14 Before proceeding, it is useful to note the few but important general points of agreement between the Parties. More specific points of agreement will be addressed in the relevant chapters that follow.

1.15 *First*, they agree on the applicable law. It is the 1982 Convention and the other rules of international law not incompatible with it.²

1.16 *Second*, the Parties agree that the Tribunal has jurisdiction to effect the delimitation between them, at least in the area within 200 M.³ Myanmar questions the Tribunal's jurisdiction to delimit in the continental shelf beyond 200 M.⁴ It does not, however, contend there is any reason ITLOS may not issue a judgment on the merits of this dispute.

1.17 *Third*, the Parties agree that their straight baseline systems should not be used in effecting this delimitation. The boundary between them should instead be drawn from their actual low-water lines.⁵

1.18 In its Memorial, Bangladesh discussed the history and pre-UNCLOS origins of its own straight baselines and acknowledged that they should not be used for purposes of this delimitation.⁶ It also analyzed Myanmar's straight baselines and showed that they do not meet the requirement of Article 7 of the 1982 Convention. There is no authentic "fringe of islands" along Myanmar's Rakhine coast; its straight baselines depart substantially from the general direction of the coast; and much of the sea area enclosed within Myanmar's baselines are not "closely linked to the land domain"⁷

1.19 The Counter-Memorial makes only a perfunctory attempt to rebut Bangladesh's arguments concerning Myanmar's straight baselines. It says only that Myanmar's straight

2 See, e.g., Memorial of Bangladesh (hereinafter "MB") at paras. 4.15-4.20; CMM at paras. 4.3-4.4, 5.5.

3 See MB at para. 4.40; CMM at para. 1.25.

4 CMM at paras. 1.12-1.24, 5.155-5.162.

5 See MB at paras. 3.9, 3.20; CMM at paras. 5.92-5.93.

6 MB at para. 3.9.

7 MB at para. 3.17.

baselines do in fact respect the general direction of the coast.⁸ Yet, it nowhere bothers to rebut the other two aspects of Bangladesh's critique. Myanmar thus effectively admits their force. Myanmar's admission is made manifest by the fact that it does not rely on its own straight baselines in drawing the delimitation lines it proposes either in the territorial sea or in the continental shelf and EEZ. All of Myanmar's proposed basepoints are located instead on the low-water lines of the Parties' coasts.⁹ The Tribunal therefore need not concern itself with any of the Parties' straight baselines.

1.20 A *fourth* – and arguably the most significant given the nature of this case – general subject of agreement between the Parties concerns the pertinent geological facts. In Chapter 2 of the Memorial, Bangladesh presented a detailed description of the geological history and current geological structure of the Bay of Bengal. Bangladesh's presentation was based on the peer-reviewed scientific literature and supported by the expert report of Dr. Joseph Curray, the world's foremost authority on the geology of the Bay. As described in the Memorial:

- the Bangladesh landmass sits on the Indian tectonic plate, straddling the boundary between continental and oceanic crust;¹⁰
- virtually the entirety of the Bay of Bengal seafloor is part of the same Indian tectonic plate;¹¹
- Myanmar lies on a different tectonic plate, known as the Burma plate, which extends no more than 50 M into the Bay where it is separated from the Indian plate by a subduction zone;¹²
- the Bengal Delta, which makes up more than half of Bangladesh's land territory, was formed by the accumulation of Himalayan sediments carried by the Ganges and Brahmaputra river systems and their precursors over millions of years;¹³
- those sediments that are not retained in the Delta are carried to the sea where they are deposited on the Bay of Bengal seafloor which they cover in layers up to 16.5 km thick;¹⁴

8 CMM at para. 3.6.

9 See CMM at paras. 4.68 and 5.100.

10 MB at para. 2.23.

11 MB at para. 2.30.

12 MB at para. 2.23.

13 MB at paras. 2.33-2.34.

14 MB at paras. 2.35-2.45.

- there is undisturbed physical continuity between the land territory of Bangladesh and seabed and subsoil of the Bay of Bengal;¹⁵
- Myanmar's mountainous Bay of Bengal coast, corresponding to the western margin of the Burma plate, consists of an accretionary prism formed by deformed seafloor sediments scraped off the Indian plate as it subducts under the Burma plate;¹⁶ and
- the subduction zone is marked by an oceanic trench that, although partially masked by the sedimentary processes described, remains visible in seismic imaging.¹⁷

1.21 The Counter-Memorial does not dispute any of these important facts. To the extent it says anything at all on the subject, it expressly agrees with Bangladesh. Concerning Bangladesh, for example, Myanmar states:

Most of Bangladesh's mainland is part of the Bengal delta, which has greatly influenced the special geography of the country. The Bengal delta was formed over the centuries, mainly, but not exclusively, by the accumulation of sediments carried by the Ganges and Brahmaputra Rivers and its predecessors from the Himalaya region. The Ganges and Brahmaputra, together with the Meghna, have created the largest fluvial delta in the world. Most of Bangladesh's landmass is formed by sediments deposited by this depositional system onto the oceanic crust of the Indian plate, i.e., beyond the shelf edge of the landmass of the tectonic plate. Active deposition of thick piles of sediments and the resulting progradation have formed, and are still forming, in the most eastern part of the delta, a very shallow plain hardly reaching more than ten metres above sea level.¹⁸

1.22 And concerning Myanmar, the Counter-Memorial states that the Indo-Burman Ranges that dominate its Bay of Bengal coast have been

formed by the accretionary prism along the subduction zone of the India tectonic plate and the Burma plate. They extend from Myanmar's northern border with India to the south and continue submerged along the subduction zone emerging from time to time forming, inter alia, Preparis and Coco Islands.¹⁹

15 MB at para. 2.32.

16 MB at paras. 2.29, 2.42.

17 MB at para. 2.45.

18 CMM at para. 2.12.

19 CMM at para. 2.5.

1.23 The Parties, of course, disagree on the legal conclusions to be drawn from these facts (a subject discussed at length in Chapter 4). But the crucial point is that the facts are agreed.

II. Structure of the Reply and Summary of Arguments

1.24 This Reply consists of three volumes. Volume I comprises the main text of the Reply, together with certain illustrative maps and figures. Volumes II and III contain supporting materials. Volume II contains a full set of maps and figures. Volume III contains documentary annexes arranged in the following order: government documents, expert reports, UN documents, other documents, and academic articles.

1.25 Volume I consists of four Chapters, followed by Bangladesh's Submissions. After this Introduction, **Chapter 2** sets out Bangladesh's response to the Counter-Memorial's arguments concerning the delimitation of the territorial sea. Bangladesh begins by refuting Myanmar's contention that the Parties' 1974 Agreement is not a valid and binding agreement within the meaning of UNCLOS Article 15. As will be shown, the facts confirm the validity of the agreement. Duly authorized representatives of the Myanmar government signed onto the agreement on no less than two occasions, once in 1974 and again 34 years later in 2008. The evidentiary record confirms Myanmar's respect for the 1974 Agreement and its intent to be bound by these actions. As the Tribunal will read, the jurisprudence has accorded binding effect to similar international legal instruments.

1.26 Chapter 2 then shows that even if Bangladesh is mistaken as to the existence of an agreed boundary, the result is essentially the same. Article 15 provides that the delimitation in the territorial sea should, absent agreement or special circumstances, be an equidistance line. The difference between the line agreed in 1974 and an equidistance line drawn on modern nautical charts are exceedingly modest.

1.27 Myanmar's argument for a substantial departure from the equidistance line is premised on the novel assertion that St. Martin's Island constitutes a "special circumstance". In Myanmar's view, the island should be given reduced effect in the territorial sea with the result that the delimitation slices deep into the island's 12 M entitlement. Bangladesh will show that Myanmar's suggestion is not only contrary to the terms of Article 15 but is also unsupported by any precedent to which Myanmar has been able to refer. None of the authorities Myanmar cites relate to the weight to be accorded an island in the territorial sea, let alone an island as significant as St. Martin's. A careful review of the jurisprudence confirms that St. Martin's Island may not be given less than full effect. As will be seen,

Myanmar's new line is also dramatically inconsistent with the views it espoused over a period of 36 years, a position it maintained until the filing of this case.

1.28 **Chapter 3** responds to the Counter-Memorial's arguments concerning the delimitation of the EEZ and continental shelf within 200 M. It begins by showing that Myanmar has greatly overstated its case concerning the alleged primacy of the equidistance method in this area. Myanmar's uncritical and erroneous embrace of equidistance is contrary to the terms of the 1982 Convention and inconsistent with the case law. Articles 74 and 83 of UNCLOS make the aim of the delimitation process an "equitable solution". And the International Court of Justice has stated that "equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed".²⁰ This does not mean that the Tribunal may decide this case *ex aequo et bono*. But it does mean that Article 74 and 83, both of which make equity the touchstone of the delimitation process, should be applied as written.

1.29 The equidistance method does not lead to an equitable solution in this case for a number of reasons, the foremost of which is the concavity of the Bangladesh coast combined with its location pinched between Myanmar and India. In this respect, Bangladesh is in substantially similar circumstances as Germany and Guinea in the *North Sea Continental Shelf* and the *Guinea/Guinea-Bissau* cases, respectively. Nothing in the Counter-Memorial undermines the significance of either case. Its arguments about the *North Sea* cases fail to meet the substance of the issue and it appears to be unable to find a basis to rebut the *Guinea* case, to the point that it says nothing about that case at all despite its evident pertinence. In addition to these closely analogous cases, Bangladesh's views concerning the inequity of equidistance in these circumstances are also strongly supported by State practise from around the world.

1.30 The problems with Myanmar's equidistance proposal are compounded by the fact that its proposed line, which Myanmar seeks to use to apportion entitlements extending nearly 400 M from the coast, is controlled by only four basepoints, only one of which is located on the Bangladesh coast. The dearth of basepoints is itself a function of the concavity of the Bangladesh coast and constitutes an additional reason why equidistance is ill-suited to the task of producing an equitable result in this case.

1.31 By contrast, the angle-bisector model that Bangladesh presented in the Memorial based on established jurisprudence does yield an equitable solution. Myanmar's argu-

20 *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, at para. 109.

ments to the contrary are without merit. In fact, as will be shown, significant elements of Myanmar's own case confirm the validity of Bangladesh's bisector approach, including the result it produces.

1.32 The angle-bisector line Bangladesh proposes – 215° – produces an equitable solution. It abates (although it does not eliminate) the inequities of equidistance without producing any distortions of its own. Indeed, it is telling that Myanmar's Counter-Memorial does not argue that the 215° line would be inequitable to it. It would not. Although the 215° line gives Bangladesh modest access to the 200 M limit, it scarcely affects Myanmar's maritime space at all.

1.33 **Chapter 4** begins by showing that, contrary to Myanmar's argument, the Tribunal has jurisdiction to delimit the continental shelf beyond 200 M. Myanmar's contention that the Commission on the Limits of the Continental Shelf ("the CLCS") must first delineate the outer limits of the shelf is not consistent with Article 76(10) or Part XV of UNCLOS. Accepting Myanmar's argument would lead to an absurd situation: the Tribunal would be prevented from delimiting until the CLCS has determined the outer limit and the CLCS would be prevented from determining the outer limit until ITLOS had delimited. The circularity of Myanmar's argument is self evident and would produce a result that is not one the drafters of UNCLOS could have intended or the plain meaning of UNCLOS allows.

1.34 Nor does a delimitation beyond 200 M prejudice the rights of third parties. The Tribunal could plainly exercise jurisdiction even if the rights of the international community to the international seabed were involved. The issue is irrelevant in this case in any event since both Parties agree that the area in dispute beyond 200 M does not extend to the international seabed. With respect to the area of shelf where the claims of Bangladesh and Myanmar overlap with those of India, the Tribunal need only determine which of the two Parties in the present proceeding has the better claim *vis-à-vis* each other. India's rights are amply protected by Article 33(2) of the ITLOS Statute which provides that decisions "shall have no binding force except between the parties in respect of that particular dispute."

1.35 Chapter 4 then demonstrates that Article 76(1) requires the coastal State to show that the seabed and subsoil constitute the "natural prolongation" of its land territory to establish an entitlement to a continental shelf beyond 200 M. Natural prolongation requires proof of geological *and* geomorphological continuity between the landmass and the areas of shelf claimed. Contrary to Myanmar's argument, mere geomorphic continuity is insufficient. Because it has no such natural prolongation, Myanmar has no entitlement beyond

200 M. Bangladesh, on the other hand, has an obvious and unchallengeable natural prolongation from its land territory into the Bay well beyond 200 M. It is therefore entitled to all of the disputed area of continental shelf beyond 200 M.

1.36 Assuming only for the sake of argument that Myanmar could somehow show a purely judicial natural prolongation beyond 200 M, an equitable delimitation in accordance with Article 83(1) would still have to take into account geology and geomorphology, and the fact that the physical continuities between the Bangladesh landmass and the seabed are orders of magnitude superior to those claimed by Myanmar. A delimitation leading to an equitable solution that is based on the relevant facts would still give Bangladesh sovereign rights over all of the disputed area of continental shelf beyond 200 M under these circumstances.

1.37 Volume I concludes by setting out Bangladesh's Submissions.

CHAPTER 2

DELIMITATION OF THE TERRITORIAL SEA

2.1 Building on Bangladesh's approach to the delimitation of the territorial sea as set out in Chapter 5 of the Memorial, this Chapter responds to the arguments made by Myanmar in Chapter 4 of its Counter-Memorial. There is nothing in those arguments to cause Bangladesh to revisit the approach taken in the Memorial: the Parties agreed on the delimitation of the territorial sea in November 1974, and that agreement was applied and affirmed until September 2008 when Myanmar abruptly changed its position.

2.2 The 1974 Agreement reflects the common recognition by both Parties of the agreed territorial sea boundary.¹ It also reflects a delimitation that accords with the requirements of Article 15 of the 1982 Convention. Bangladesh has consistently maintained that the line of delimitation set forth in the 1974 Agreement was intended to be – and is – valid, binding, and effective for both States. As described in the Memorial, it was signed on two occasions by duly authorized representatives of both States and to that extent constitutes an “agreement” within the meaning of Article 15 of the 1982 Convention.²

2.3 As set out in the Memorial, the 1974 agreed line begins from Point 1 at the mouth of the Naaf River and follows what is essentially an equidistance line drawn between points on Bangladesh's St. Martin's Island and Myanmar's mainland coast south of the Naaf River.³ It consists of seven points. The last, Point 7, is located where the 12 M arc drawn from the southern tip of St. Martin's Island intersects the 12 M arc drawn from the nearest point on Myanmar's mainland coast.

2.4 **Figure R2.1** following page 12 depicts the 1974 line together with an equidistance line as drawn on British Admiralty Chart 817, which Myanmar itself has used for plotting the boundary in the territorial sea. As the Tribunal can see, the two are for all practical purposes identical.

2.5 After some 34 years giving effect to the agreed delimitation depicted on the previous page, Myanmar now argues that the 1974 Agreement is not an “agreement” within the

1 Memorial of Bangladesh (hereinafter “MB”) at para. 5.1.

2 *Ibid.* at paras. 5.8-5.18.

3 *Ibid.* at para. 3.23 and Governments of Bangladesh and Myanmar, *Agreed Minutes of the Meeting Between the Bangladesh Delegation and the Burmese Delegation Regarding the Delimitation of the Maritime Boundary* (23 November 1974) (hereinafter “1974 Agreement”), at para. 2. MB, Vol. III, Annex 4.

meaning of Article 15. According to Myanmar, the “form and language of the 1974 agreed minutes, the fact that the understandings set out therein are conditional on an agreement on the delimitation of the entire maritime boundary line between Myanmar and Bangladesh, and the lack of any ratification, all demonstrate that there exists no ‘agreement ... to the contrary’ between Myanmar and Bangladesh within the meaning of article 15 of UNCLOS”⁴

2.6 In the absence of such an agreement, the Counter-Memorial proposes a delimitation in the territorial sea that departs substantially from the 1974 agreed line and more than three decades of subsequent practise (and thus also a modern equidistance line). Myanmar’s new line semi-enclaves St. Martin’s Island and deprives it of a full 12 M territorial sea. Myanmar’s construction of the maritime boundary in the vicinity of St. Martin’s Island is set out in Sketch map 4.1 in the Counter-Memorial (on page 81).

2.7 As will be shown below, the validity and binding nature of the 1974 Agreement relating to the territorial sea is not called into question by the efforts of both Parties to conclude a more comprehensive maritime delimitation agreement. Regardless, in the unlikely event the Tribunal adopts the argument of Myanmar on the effect of the 1974 Agreement, the practical consequences would be *de minimis*. The difference between the boundary as agreed in 1974 and an equidistance line drawn on modern nautical charts in conformity with Article 15 is minimal. Myanmar’s attempts to enclave St. Martin’s Island are wholly without precedent. The territorial sea boundary in this case should be the equidistance line either as agreed in 1974 or as drawn on modern charts.

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2.8 While the differences between the Parties will be dealt with below, it is noteworthy that there are important points of agreement between them. *First*, both Parties agree that the law applicable to the delimitation of the territorial sea is Article 15 of the 1982 Convention to which both States are parties.⁵ The main point of contention between them is whether the 1974 Agreement constitutes an “agreement ... to the contrary” within the meaning of that article.⁶ As set out below, the 1974 Agreement is valid and binding as between the Parties and falls within the meaning of an “agreement” in Article 15.

4 Counter-Memorial of Myanmar (hereinafter “CMM”) at para. 4.7.

5 MB at para. 5.6 and CMM at paras. 4.3-4.5.

6 CMM at paras. 4.6-4.8.

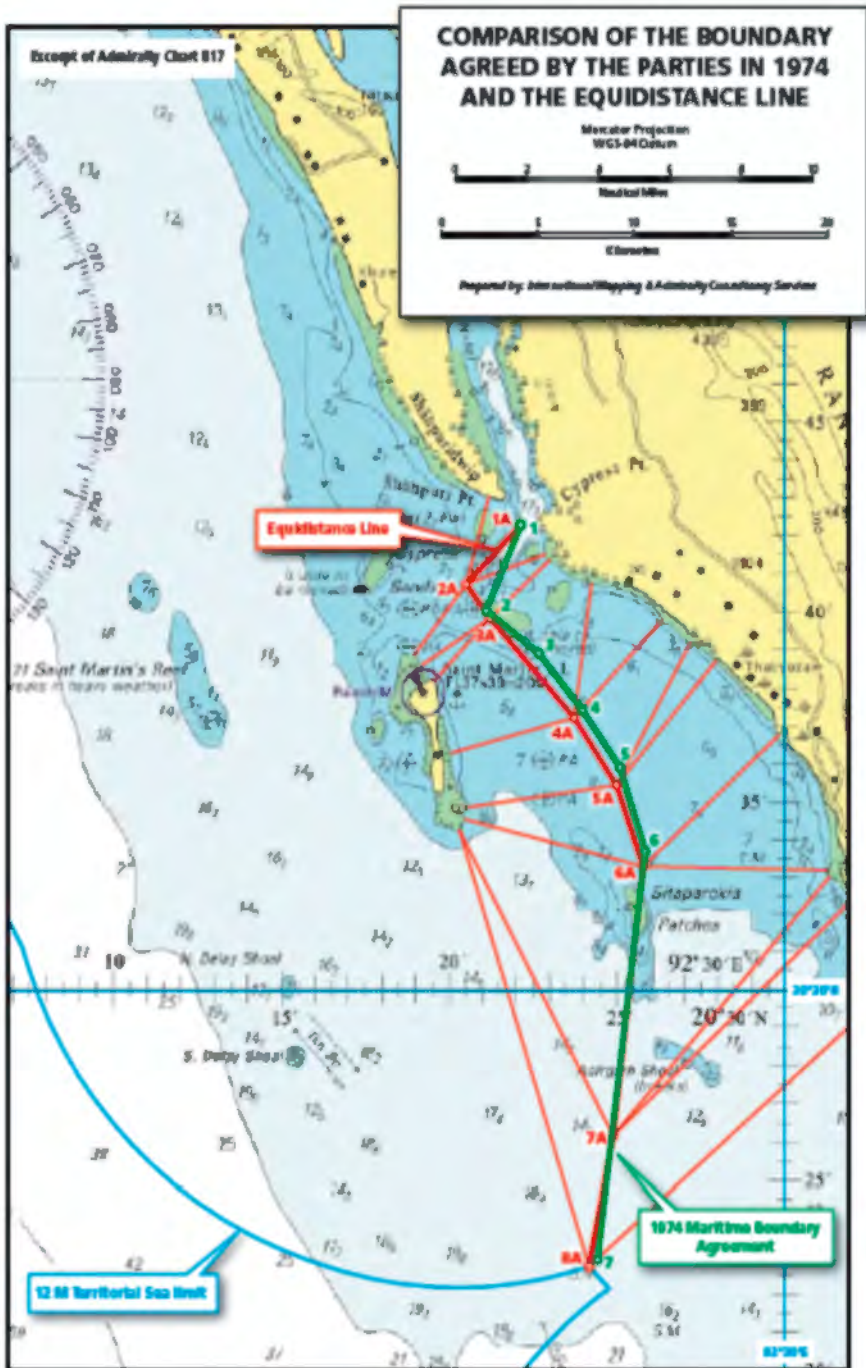


Figure A2.1

2.9 A *second* point of agreement concerns the location of the land boundary terminus. As set out in the Memorial, Pakistan and Myanmar agreed in 1966 that their land boundary terminus is the point where the centre of the main navigation channel of the Naaf River, which divides the two countries, meets the river's mouth.⁷ This was reflected in the 1974 Agreement and is not disputed by Myanmar, which confirms that the December 1980 Supplementary Protocol sets out the precise coordinates of the land boundary terminus: 20° 42' 15.8" N, 92° 22' 07.2" E.⁸ It is noteworthy that the coordinates of this point, which Myanmar has labeled 'Point A' in its chart at page 81 of the Counter-Memorial, correspond precisely with Point 1 as set out in the 1974 Agreement.

2.10 The *third* significant point of agreement is that no effect is to be given to Oyster Island.⁹ This confirms the approach taken by the 1974 Agreement.

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2.11 **Section I** of this Chapter shows that there is a valid and binding agreement between Bangladesh and Myanmar delimiting their respective territorial seas. This is reflected in the 1974 Agreement, an "agreement" within the meaning of Article 15 of the 1982 Convention. Contrary to Myanmar's claims, the form and language of the 1974 Agreement indicate that it created rights and obligations between the Parties, and was not conditional in the sense that Myanmar seeks to argue. **Section II** presents an alternative argument should the Tribunal nonetheless decide not to give effect to the 1974 Agreement. As shown, an equidistance line drawn on modern charts is not materially different from the 1974 agreed line. Bangladesh explains why Myanmar's proposed delimitation should not be followed: it is inaccurately plotted and is also wrong as a matter of law, not least because of the way in which it seeks to address St. Martin's Island (inconsistently with its own prior practise pursuant to which it recognized that St. Martin's was entitled to a full 12 M territorial sea of its own).

I. The 1974 Agreement

2.12 As set out in the Memorial, Bangladesh's and Myanmar's efforts to delimit their territorial sea boundary began in the mid 1970s, soon after Bangladesh attained inde-

7 MB at para. 3.21. See Pakistan-Burma Agreement on the Demarcation of a Fixed Boundary in the Naaf River (28 April 1966"), at Art. 2. MB, Vol. III, Annex 1; Protocol to Pakistan-Burma Agreement on the Demarcation of a Fixed Boundary in the Naaf River (28 April 1966"), at Art. III. MB, Vol. III, Annex 2.

8 CMM at paras. 2.27-2.29.

9 *Ibid.* at para. 5.79, together with 4.5-4.61. See also *Ibid.* at para. 5.98, where Myanmar accepts that Oyster Island can be excluded as a basepoint for the drawing of an equidistance line.

pendence from Pakistan. They reached agreement in November 1974 when the two delegations confirmed the terms of their agreement and gave it clear expression by jointly plotting the agreed line on Special Chart No. 114, which was then signed by the heads of both delegations.¹⁰ A copy of the signed chart is at Figure 3.2 of the Memorial (in Volume II only). As can be seen, the agreed delimitation is a line mid-way between points on St. Martin's Island and the Myanmar mainland coast.

2.13 Four days later, the Parties' agreement was reduced to writing in the form of the "Agreed Minutes Between the Bangladesh Delegation and the Burmese Delegation Regarding the Delimitation of the Maritime Boundary Between the Two Countries".¹¹ Special Chart No. 114, as previously signed by the heads of both delegations, was annexed to the Agreed Minutes.

2.14 Myanmar now seeks to argue that the 1974 Agreement was not an "agreement" within the meaning of Article 15. It attempts to underplay the significance of the Agreed Minutes by stating that they were "*merely an understanding* reached at a certain stage of the technical-level talks as part of the ongoing negotiations".¹² In the following sentence, however, Myanmar contradicts its own argument when it concedes that "[i]t was no doubt intended in due course that Points 1 to 7 would be included in an overall agreement on the delimitation of the entire line between the maritime areas appertaining to Myanmar and those appertaining to Bangladesh".¹³ Myanmar accepts, therefore, that Points 1 to 7 had been agreed upon. All that remained to be done was for that agreement to be incorporated into a comprehensive text that addressed the totality of the delimitation, including areas beyond the territorial sea. Myanmar adduces no evidence to indicate that it reserved the right to revisit the delimitation of the territorial sea or to abandon the agreement on Points 1 to 7.

2.15 Recognising the strength of Bangladesh's case that there was an agreement that had legal consequences, Myanmar argues that the agreement was conditional, was never ratified and was not registered with the UN (these arguments are addressed below). It relies on dicta in the *Romania v. Ukraine* case to argue that it is for the Tribunal to interpret the 1974 Agreement, and that in "carrying out that task, the Court must first focus its atten-

10 MB at para. 5.8 and Government of Bangladesh, *Brief Report on Bangladesh-Burma Negotiations on Maritime Boundary* (19-25 November 1974), at para. 3. MB, Vol. III, Annex 14.

11 MB at para. 5.9. See also the 1974 Agreement. MB, Vol. III, Annex 4.

12 CMM at para. 4.9 (emphasis added). Earlier, in CMM at para. 3.15, the 1974 Minutes are referred to as a "conditional understanding".

13 *Ibid.* at para. 4.9.

tion on the terms of those documents including the associated sketch-maps¹⁴ Bangladesh has no objection to that approach. If anything, it confirms the validity of the agreement in this case.

2.16 Myanmar argues that the ordinary language of the Agreed Minutes indicates that they were never intended to constitute a legally binding agreement.¹⁵ A careful textual analysis shows this to be wrong. Whilst the Agreed Minutes only dealt with the delimitation of the territorial sea, stating that they related to “the first sector of the maritime boundary”, this cannot of itself mean that the agreed minutes were “merely a record of a stage reached in the negotiations”, as Myanmar claims.¹⁶ Myanmar’s approach is not supported by the title of the text: “*Agreed Minutes Between the Bangladesh Delegation and the Burmese Delegation Regarding the Delimitation of the Maritime Boundary Between the Two Countries*”. Moreover, as stated, the Counter-Memorial itself acknowledges that it was, in fact, Myanmar’s intent to be bound when it states that “[i]t was no doubt intended in due course that Points 1 to 7 would be included in an overall agreement on the delimitation”.¹⁷

2.17 Myanmar argues that the agreement was no more than a conditional understanding at the level of the negotiators as to what might be included as part of an eventual maritime boundary agreement covering the whole of the maritime delimitation between them (territorial sea, exclusive economic zone, continental shelf).¹⁸ It argues that the conditionality on further developments is wholly inconsistent with the assertion that the Minutes were intended to reflect a binding agreement and contends that the so-called conditionality is two-fold. First, Myanmar states that paragraph 2 of the Agreed Minutes made the understanding between the delegations subject to “a guarantee that Burmese ships would have the right of free and unimpeded navigation through Bangladesh waters around St. Martin’s Island to and from the Burmese sector of the Naaf River”.¹⁹ Myanmar states that the second and “crucial condition” is found in paragraphs 4 and 5 of the Minutes. It argues:

According to paragraph 4, “[t]he Bangladesh delegation expressed the approval of their Government regarding the territorial waters boundary re-

14 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 86 (hereinafter “*Romania v. Ukraine*”), at para. 68. Cited by CMM at para. 4.10.

15 CMM at para. 4.11.

16 *Ibid.* at para. 4.11.

17 *Ibid.* at para. 4.9.

18 *Ibid.* at para. 3.10.

19 *Ibid.* at para. 4.12.

ferred to in para. 2". The paragraph, however, was silent with respect to approval of the Government of Myanmar to any such boundary. Paragraph 5 then stated that

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

Thus, in an attempt to obtain the agreement of the Government of Myanmar, which was lacking at the time of the drafting of the agreed minutes, Bangladesh prepared a draft treaty and presented it to Myanmar. The Government of Myanmar at no point expressed its consent to the content of the draft treaty or the agreed minutes.²⁰

The text of the Agreed Minutes and the subsequent negotiating history do not support Myanmar's conclusion.

2.18 With respect to the first alleged conditionality, Myanmar recognizes that the Bangladesh delegation took note of the Burmese Government's concern regarding the guarantee of free and unimpeded navigation by Burmese vessels.²¹ Its contentions that there is no record that Bangladesh accepted the condition or that this point was left open for further negotiation and settlement²² are totally unfounded. Bangladesh did subsequently afford "free and unimpeded navigation" in practise and Myanmar has failed to produce any evidence to the contrary.

2.19 The fact that Bangladesh accepted the condition regarding the guarantee of free and unimpeded navigation by Burmese naval vessels, and that it was reflected in decades of subsequent practise, is also confirmed by the fact that one of the two updates made in the Agreed Minutes of April 2008, wherein both Parties affirmed their continuing commitment to the 1974 Agreement, provided that the term "unimpeded access" used in the 1974 Agreed Minutes to describe the right that Bangladesh had granted to Myanmar's vessels would be replaced with a different form of words: "Innocent passage through the territorial sea shall take place in conformity with the UNCLOS 1982 and shall be based on reciprocity in each others' waters".²³ This textual change merely served to modernise the language and is inconsistent with Myanmar's claim that Bangladesh had not accepted the

²⁰ *Ibid.* at para. 4.13-4.14.

²¹ *Ibid.* at para. 3.16.

²² *Ibid.* at para. 4.12.

²³ Governments of Bangladesh and Myanmar, *Agreed Minutes of the Meeting Between the Bangladesh Delegation and the Myanmar Delegation Regarding the Delimitation of the Maritime Boundary* (1 April 2008) (hereinafter "*Agreed Minutes of Bangladesh-Myanmar Meeting Regard-*

condition or that it somehow remained open to negotiation. The issue was resolved in 1974 and the Parties acted accordingly.

2.20 In an attempt to demonstrate that the 1974 Agreement is “no more than a conditional understanding,”²⁴ Myanmar’s account of the negotiations between the Parties from 1974 to 2008 is selective and incomplete, and contains material omissions and misrepresentations. A detailed account of the negotiating history was set out in Chapters 3 (paras. 3.21 *et seq.*) and 5 (paras. 5.8-5.18) of Bangladesh’s Memorial. In that account, Bangladesh stated, *inter alia*, that it prepared and presented Myanmar with a draft treaty reflecting the agreed boundary line but Myanmar demurred.²⁵ While it stood by the line, Myanmar indicated that it preferred to formalise the agreement relating to the territorial sea within the context of a comprehensive maritime delimitation settlement rather than a stand-alone territorial sea treaty.²⁶ According to the contemporaneous Bangladesh account, Myanmar was

not inclined to conclude a separate treaty/agreement on the delimitation of territorial waters; they would like to conclude a single comprehensive treaty where the boundaries of territorial waters and continental shelf were incorporated.²⁷

2.21 Myanmar’s inconsistent position in relation to the 1974 Agreement is further highlighted by its admission that “in the second round of technical level talks in Dhaka in November 1974, *in accordance with the decision of its Cabinet*, Myanmar accepted median line from the mouth of Naaf River up to point number 7 subject to the completion of a treaty on delimiting EEZ/Continental Shelf.”²⁸

2.22 Myanmar argues that the fact that there was no agreement is clear from the refusal in November 1974 of Commodore Hlaing to initial any agreement.²⁹ Yet, Myanmar’s own records of the 1974 Negotiations indicate the reasons for Commodore Hlaing’s refusal to initial any agreement at the first meeting (on 20 November 1974). He stated that “signing a

ing Maritime Boundary Delimitation (1 April 2008”). MB, Vol. III, Annex 7. *See also* MB at paras. 3.27-3.28.

24 CMM at para. 3.10.

25 MB at para. 3.25.

26 *Ibid.* (citing *Brief Report on Bangladesh-Burma Negotiations on Maritime Boundary* (19-25 November 1974), at para. 7. MB, Vol. III, Annex 14).

27 *Ibid.*

28 Government of Bangladesh, *Report on Bangladesh-Myanmar Maritime Delimitation Technical Level Talks* (16-17 November 2008), at para. 17 (emphasis added). MB, Vol. III, Annex 19.

29 CMM at para. 3.21 (citing “Minutes of the Second Round, first meeting (20 November 1974),” at para 11. CMM, Vol. II, Annex 3).

separate agreement on the territorial sea boundary would also be misconstrued and taken as implying that the two countries were only able to reach agreement on one issue and not on others”.³⁰ He went on to state that it would not be “effective” to do so.³¹ He conspicuously did *not* say that there was no agreement or that the terms of the agreement were not binding on both Parties. Even more importantly, Myanmar fails to state that just two days later, Commodore Hlaing *did* in fact sign the Agreed Minutes.³²

2.23 Since 1974, both States have consistently honoured the agreement reflected in the 1974 Agreed Minutes. At a meeting of the two States’ delegations in February 1975, the Parties recalled that three months earlier they had

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.³³

The word “settled” merits particular emphasis as it confirms that the issue had been resolved, in reflection of an agreement between the Parties. The Counter-Memorial does not address this point. On no occasion between then and 2008 did either Bangladesh or Myanmar ever re-open the “settled” issue of the boundary in the territorial sea. Myanmar has provided no evidence to the contrary. Indeed, Myanmar’s version of the negotiating history set out in its Counter-Memorial only confirms it.³⁴ Having resolved their territorial sea boundary, the Parties thereafter addressed only areas beyond the territorial sea.³⁵

30 “Minutes of the Second Round, first meeting (20 November 1974),” at para 10. CMM, Vol. II, Annex 3.

31 *Ibid.* at para. 11.

32 “Minutes of the Second Round, third meeting (20 November 1974),” Appendix II. CMM, Vol. II, Annex 3.

33 MB at para. 5.11 and Government of Bangladesh, *Brief Report on Bangladesh-Burma Maritime Boundary Talks* (14-19 February 1975), at para. 3 (emphasis added). MB, Vol. III, Annex 15.

34 See CMM at paras. 3.11 *et seq.*

35 At a meeting in 1985, a brief mention was made to the 1974 Minutes. Referring to its Annex 8, the CMM at para. 3.34 states:

The sixth round was held in Rangoon on 19 and 20 November 1985. The head of the Myanmar delegation, the Minister of Foreign Affairs, Mr. U Ye Goung, recalling the understanding of 1974, reiterated Myanmar’s position that “[what] is clearly implied in the text of Agreed Minutes, was that both the territorial sea sector and the continental shelf cum economic zone sector of the common maritime boundary should be settled together in a single instrument.

2.24 As noted above, subject to two updates, the 1974 Agreement was re-affirmed in April 2008.³⁶ Myanmar claims that although the 2008 minutes “did indeed revisit the 1974 minutes, they did not add anything to their legal effect, if any.”³⁷ A plain reading of the 2008 Minutes does not support that conclusion. The 2008 Minutes expressly state that the “other terms of the agreed minutes of the 1974 will remain the same.”³⁸ This makes clear that the 1974 Minutes were not to be changed, that the delimitation of the territorial sea continued to be “settled”, and that there continued to be an “agreement”. If the 1974 Minutes lacked any legal effect, as Myanmar claims, why was it necessary to declare that they remained the same and why were they updated by means of the more modern language to replace the original text? Moreover, if the matter had not been definitively settled and if there was no agreement, why would the Parties jointly re-plot the co-ordinates described in the 1974 Minutes on a more modern and internationally recognized chart?

2.25 Like Myanmar in this case, Nigeria in the *Cameroon v. Nigeria* case denied the existence of a delimitation agreement in the territorial sea and maintained that the whole maritime delimitation had to be undertaken *de novo*.³⁹ Cameroon, on the other hand, maintained that the two instruments at issue, the Yaoundé II Declaration and the Maroua Declaration, provided a binding definition of the boundary delimiting the respective maritime spaces of the two States. The Court noted that the Yaoundé II Declaration was called into question on a number of occasions by Nigeria. It stated, however, that it was unnecessary to determine the status of that declaration in isolation, since the line described in it was confirmed by the terms of the subsequent Maroua Declaration. The Court found that if the Maroua Declaration represented an international agreement binding on both parties, it necessarily followed that the line contained in the Yaoundé II Declaration, including the co-ordinates as agreed at a meeting of the joint boundary commission, was also binding on them.⁴⁰ The Court held that the Maroua Declaration constituted an international agreement in written form tracing a boundary and that it was thus governed by international law and constituted a treaty in the sense of the 1969 Vienna Convention on the Law of Treaties.⁴¹ The Court further observed that in July 1975 the two parties inserted a correction in the Maroua Declaration, that in so acting they treated the Declaration as

36 MB at paras. 3.27-3.28. See also “Agreed Minutes of Bangladesh-Myanmar Meeting Regarding Maritime Boundary Delimitation (1 April 2008)”, at paras. 2-3. MB, Vol. III, Annex 7.

37 CMM at para. 4.34.

38 “Agreed Minutes of Bangladesh-Myanmar Meeting Regarding Maritime Boundary Delimitation (1 April 2008)”, at paras. 2-3. MB, Vol. III, Annex 7.

39 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, at para. 254.

40 *Ibid.* at para. 262.

41 *Ibid.* at para. 263.

valid and applicable, and that Nigeria did not claim to have contested its validity or applicability prior to 1977.⁴² In these circumstances, both Declarations were considered as binding and as establishing a legal obligation on Nigeria.⁴³

2.26 Adopting the approach of the ICJ, the Tribunal has no need to determine the status of the 1974 Agreement in isolation since the line described in it was confirmed and updated by the subsequent Agreed Minutes of April 2008. By updating and modernizing the 1974 Agreement through the 2008 Agreed Minutes, Myanmar treated the 1974 Agreement as valid and applicable. In these circumstances, both sets of Agreed Minutes are to be considered binding and establishing a legal obligation on Myanmar.

2.27 As set out in the Memorial, it was only in September 2008, after 34 years of enduring commitment to the “settled” 1974 line, that Myanmar, for the first time and without any valid reason, suggested that a new final point for the line was needed to replace Point 7.⁴⁴ It did not, however, suggest any changes to Points 1 through 6. Bangladesh reminded Myanmar that, in fact, all seven points had twice been agreed, first in the Agreed Minutes of November 1974 and then again in the Agreed Minutes of April 2008.⁴⁵ On both occasions, representatives of the two States confirmed their agreement by plotting their territorial sea boundary on nautical charts – Special Chart No. 114 (in 1974) and Admiralty Chart 817 (in 2008).⁴⁶

2.28 According to the Report of the negotiations at Bagan in September 2008:

5. The Myanmar side took up a completely revisionist stance during the negotiation. At first they said that the point no. 7 which was mentioned in the 1974 agreement and also in the Dhaka Agreed Minutes, was not acceptable to them. Rather they wanted to make the mid point of the line joining the St. Martin’s Islands and Oyster Islands as the starting point of delimitation. From this point they would further proceed along the equidistance line for demarcation of territorial sea. When AFS [Assistant Foreign Secretary] mentioned that Myanmar had already agreed to all seven points in 1974 and in 2008 at Dhaka, the Myanmar side stated that signing the agreed minutes with the points did not mean that Myanmar agreed to the points. More exactly, they said, the points were mentioned merely for

42 *Ibid.* at para. 267.

43 *Ibid.* at para. 268.

44 MB at paras. 3.29, 5.16-5.17. See Government of Bangladesh, Report of the Visit by the Bangladesh Delegation to Myanmar Regarding the Delimitation of Maritime Boundary (4-5 September 2008) (hereinafter “Report of the Visit by the Bangladesh Delegation to Myanmar”), at para. 5, MB, Vol. III, Annex 18.

45 *Ibid.* at para. 6.

46 *Ibid.*

plotting on Chart 817 and Myanmar did not agree to these points especially the point no. 7. ... At one point they mentioned that the 1974 Agreement was done when UNCLOS 1982 was not there. So under new circumstances the 1974 Agreement should be annulled.⁴⁷

2.29 As stated in the Memorial, two months later in November 2008 Myanmar changed position yet again, abandoning its ‘annulment’ argument. The Report of the meeting states:

Myanmar delegation replied that they could not accept the 1974 agreement in piecemeal on [the territorial sea] only since that was a part of a comprehensive package. They said in the previous talks, it was *concluded* between the two states that points 1-6 form the international boundary between the two states and point 7 is the 12NM arc from Southern most tip of St. Martin’s Island and the nearest point in the Rakhaine coast. Myanmar left point-7 open since there is no satisfactory agreement between the two countries on EEZ.⁴⁸

2.30 Again Bangladesh pointed out that “base point 7 was accepted by Myanmar in 1974.”⁴⁹ Precisely on that point, Myanmar admitted “that in the second round of technical level talks in Dhaka in November 1974, *in accordance with the decision of its Cabinet*, Myanmar accepted median line from the mouth of the Naaf River up to point number 7 subject to the completion of a treaty on delimiting EEZ/Continental Shelf.”⁵⁰ Notably, in its Counter-Memorial, Myanmar makes no mention of this decision of its Cabinet. There was, therefore, no conditionality as to the agreement on Point 7; Myanmar was only stating that it did not wish to conclude a treaty on the territorial sea alone.

2.31 This is also clear from other contemporaneous documentary evidence.⁵¹ The minutes and records of negotiations do not state that the agreement reached on the delimitation of the territorial sea was conditional on any subsequent agreement on the rest of the maritime areas but merely that only one treaty would be signed once agreement was

47 *Ibid.* at para. 5 (emphasis added).

48 Government of Bangladesh, *Report on Bangladesh-Myanmar Maritime Delimitation Technical Level Talks* (16-17 November 2008), at para. 13. MB, Vol. III, Annex 19 (emphasis added).

49 *Ibid.* at para. 14.

50 *Ibid.* at para. 17 (emphasis added).

51 See *Brief Report on Bangladesh-Burma Negotiations on Maritime Boundary* (19-25 November 1974), at para. 7 (stating 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*” (emphasis added)). MB, Vol. III, Annex 14.

reached on all the contested areas. For example, as Myanmar points out, during the second round of negotiations, Commodore Hlaing stated that:

It was [not intended to sign a specific treaty on the territorial sea boundary.] The question of delimiting a sea boundary between Burma and Bangladesh would have to be dealt with in totality to cover the territorial sea, the continental shelf and economic zone.⁵²

2.32 Myanmar's argument that agreement on the delimitation of the territorial sea continued to be re-negotiated is misleading. The Parties had reached agreement as regards the delimitation of the territorial sea and on Points 1 to 7. Whilst no treaty was concluded and ratified, it is clear that an agreement was in place and not treated by either Party as being dependent for its application on the formality of incorporation into a treaty. That is clear from the Agreed Minutes, and from three and a half decades of consistent practise. For 34 years this boundary line was settled until Myanmar decided to seek to unsettle it by raising an issue as to Point 7.

2.33 Moreover, Article 15 of the 1982 Convention does not refer to a "treaty" on the delimitation of the territorial sea; it refers to an "agreement". UNCLOS refers to "agreement", "convention", and "treaty" in a manner that makes clear that the term "agreement" includes but is not limited to a "treaty" or "convention". Bangladesh's position is that the 1974 Agreed Minutes reflected an "agreement" within the meaning of Article 15 that remained to be formally memorialised in a treaty at a later date. The Parties disagreed only 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.

2.34 Myanmar seeks to argue that the identity of those signing the Agreed Minutes indicates an absence of agreement. This is entirely wrong. As noted in the Counter-Memorial,⁵³ the leaders of the respective delegations, Commodore Chit Hlaing, the Vice Chief of Staff of the Myanmar Defence Services (Navy), and H.E. Mr. Kwaja Mohammed Kaiser, the Bangladeshi Ambassador to Myanmar, signed the 1974 Agreement on 23 November 1974. Myanmar has provided no evidence to support a claim that Commodore Chit Hlaing was not vested with the necessary powers to sign the agreement. At no point in the following 34 years did Myanmar ever raise the concern it has now conjured up after more than three decades of settled practise. In any event, even if the Tribunal were to accept that Commodore Hlaing was not vested with the necessary powers to sign the agreement, the negotiating history establishes that "in accordance with the decision of its Cabinet", Myanmar ac-

⁵² See CMM at para. 3.19 (citing CMM, Vol. II, Annex 3 at paras. 4, 10).

⁵³ *Ibid.* at paras. 3.11 and 3.15.

cepted the median line from the mouth of the Naaf River up to point number 7.⁵⁴ In other words, Commodore Hlaing's signature was subsequently ratified by Myanmar's Cabinet.

2.35 The cases Myanmar invokes do not support its claim that there was no agreement in 1974. To the contrary, in the *Aegean Sea Continental Shelf* case, the ICJ was called upon to decide whether a communiqué – the Brussels Communiqué of 1975 – was an agreement under international law to refer a dispute to the Court.⁵⁵ The Court examined the form, text, and context of that document⁵⁶ before finding that it was not. However, the facts are clearly distinguishable from this case. Whilst Turkey was ready to consider a joint submission of the dispute to the Court by means of a special agreement, the provision made by the two Prime Ministers for a further meeting of experts to consider the issues to be referred was not reconcilable with an immediate and unqualified commitment to accept the submission of the dispute to the Court by means of a unilateral Application. Moreover, the Court found that the terms of the Communiqué were “wide and imprecise”, in sharp contrast to the specific and unambiguous agreement as to the points of the territorial sea boundary agreed and settled by Bangladesh and Myanmar.

2.36 The Court also looked to events immediately subsequent to the Communiqué (which included negotiations between experts and diplomatic exchanges) to confirm that the two Prime Ministers did not by their “decision” undertake an unconditional commitment to submit the dispute to the Court.⁵⁷ In the case of the territorial sea boundary settled by Myanmar and Bangladesh, there were no further negotiations in the period immediately after 1974 or at any point in the next three and a half decades.

54 Government of Bangladesh, *Report on Bangladesh-Myanmar Maritime Delimitation Technical Level Talks* (16-17 November 2008), at para. 17. MB, Vol. III, Annex 19.

55 *Aegean Sea Continental Shelf (Greece v. Turkey)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1978, p. 3, at paras. 94-107.

56 The Court stated as follows at para. 96 of its judgment in the *Aegean Sea Continental Shelf* case:

On the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. Arts. 2, 3 and 11 of the Vienna Convention on the Law of Treaties). Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form—a communiqué—in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.

57 *Ibid.* at para. 106.

2.37 Other facts indicate that the *Aegean Sea* case is clearly distinguishable from the present one. *First*, the Brussels Communiqué was not signed or initialed by the parties.⁵⁸ *Second*, the terms of the communiqué were vague; e.g., “existing situation”, “general lines on the basis which the forthcoming meetings ... would take place”. This is in contrast to the 1974 Agreement that was signed by both delegations and included plotting points on a map. *Third*, unlike the 1974 Agreement, in the Brussels Communiqué the parties did not undertake any concrete obligations. *Fourth*, in this case, the 1974 Agreed Minutes were agreed and affirmed by both Parties, reflecting that the matter was settled. And *fifth*, by contrast to the position adopted by Greece in the *Aegean Sea* case, from 1974 onwards Bangladesh considered that the Parties had settled the territorial sea boundary and, acting in reliance on that agreement, gave Myanmar unimpeded rights of access to agreed waters.

2.38 Myanmar derives no more support from its efforts to invoke the Judgment of the ICJ in *Qatar v. Bahrain*,⁵⁹ which actually supports Bangladesh’s argument as to the existence of an agreement. Myanmar’s position is akin to that adopted by Bahrain, which argued that its 1990 Agreed Minutes with Qatar did not constitute an agreement and therefore the Court lacked jurisdiction to deal with Qatar’s Application.⁶⁰ In finding that the 1990 Agreed Minutes *did* constitute an international agreement, the Court considered the nature of the texts upon which Qatar relied and then analyzed their terms. On the basis of Article 2(l)(a) of the 1969 Vienna Convention, the Court observed that international agreements may take a number of forms and be given a diversity of names. It concluded that in order to ascertain whether an agreement had been concluded, regard must be had above all to the actual terms and to the particular circumstances in which they were drawn up.⁶¹ The Court found, *inter alia*, that the 1990 Minutes referred to consultations between the Foreign Ministers of Bahrain and Qatar in the presence of the Foreign Minister of Saudi Arabia, and stated what had been “agreed” between the parties, and that they also included a reaffirmation of obligations previously entered into by them.⁶² Accordingly, and contrary to the contention of Bahrain (which are echoed by Myanmar in the present case), the Court found that:

the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely

⁵⁸ *Ibid.* at para. 95.

⁵⁹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112 (hereinafter “*Qatar v. Bahrain (Jurisdiction and Admissibility I)*”).

⁶⁰ *Ibid.* at para. 20.

⁶¹ *Ibid.* at paras. 21-23.

⁶² *Ibid.* at paras. 24-25.

give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.⁶³

2.39 The 1974 Agreement refers to a boundary line having been “agreed” (and in 1975 the Parties agreed the boundary was “settled”) and it identifies specific coordinates. In this way, the 1974 Agreement enumerates “the commitments to which the Parties have consented”. There are no points of disagreement on the location of the territorial sea boundary or on the precise coordinates. Just as the Court gave short shrift to Bahrain’s arguments that the signatories of the Minutes never intended to conclude an agreement, the Tribunal should reject Myanmar’s claim. The Court found that:

[t]he two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a ‘statement recording a political understanding’, and not to an international agreement.⁶⁴

These words apply equally to the 1974 Agreement, which was given immediate application and was applied continuously over the next 34 years.

2.40 Significantly, Myanmar fails 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.⁶⁵ For obvious reasons, Myanmar is silent on this point. Its own subsequent conduct confirms that from 1974 to 2008 it was in agreement with Bangladesh that the Parties had reached a legally binding agreement on the delimitation of the territorial sea.

2.41 In summary, *Qatar v. Bahrain* squarely supports Bangladesh. *First*, “agreed minutes” may constitute or reflect an international agreement that is legally binding.⁶⁶ *Second*, the 1974 Agreed Minutes are not “a simple record of a meeting” and “do not merely give an account of discussions and summarize points of agreement and disagreement”. They did more than encapsulate a stage reached in ongoing negotiations; they set out what had been “agreed” by the Parties. *Third*, they enumerated the commitments to which the Parties had

63 *Ibid.* at para. 25.

64 *Ibid.* at para. 27.

65 *Ibid.* at para. 28.

66 Myanmar accepts this. *See* CMM at para. 4.26.

consented, and thus created rights and obligations under international law. This included a commitment by Bangladesh to provide free and unimpeded passage to Myanmar ships in the area in question, and involved the plotting of specific and agreed points on a map signed by both Parties. Indeed, the joint plotting of the agreed seven points on two different occasions reflected the completeness of the agreement between the Parties. *Fourth*, the subsequent conduct of the Parties points decisively to the existence of an agreement between them under international law.

2.42 Myanmar takes refuge in a number of arguments of diminishing plausibility. It claims, for example, that its refusal to sign or ratify a draft treaty on the delimitation of the territorial sea confirms that there was no agreement between the Parties.⁶⁷ This is to confuse form and substance. Bangladesh has never claimed that an unsigned draft treaty could of itself be a legally binding agreement. Rather, Bangladesh's case is that an agreement settling the territorial sea boundary pre-existed the draft treaty, which would merely serve to reaffirm the existing agreement.

2.43 Myanmar then claims that the 2008 Agreed Minutes refer to the 1974 Agreed Minutes as an "ad hoc understanding".⁶⁸ Bangladesh is unable to see the force of this argument. For 34 years, the 1974 Agreed Minutes were treated as reflecting an agreement that settled the territorial sea boundary. Again, Myanmar prefers form over substance.

2.44 Myanmar further argues that neither Party considered the 1974 Agreed Minutes to be binding as they were not submitted for registration to the UN Secretariat nor were the co-ordinates submitted to the UN Secretary-General as provided in Article 16 (2) of UNCLOS.⁶⁹ Myanmar itself recognizes the weakness of this submission when it concedes that the absence of such submissions is not conclusive.⁷⁰ Once again Myanmar is clothing itself in the failed arguments of Bahrain. The ICJ easily rejected this argument, ruling that:

[n]on-registration or late registration, on the other hand, does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties.⁷¹

67 *Ibid.* at para. 4.28.

68 *Ibid.* at para. 4.33. It is submitted that both the 2008 Minutes and the 1974 Minutes were *Agreed Minutes*.

69 *Ibid.* at para. 4.35.

70 *Ibid.*

71 *Qatar v. Bahrain* (Jurisdiction and Admissibility I), at para. 29. The Court stated:

The Court therefore cannot infer from the fact that Qatar did not apply for registration of the 1990 minutes [...] that those Minutes did not constitute an international agreement. [...] Nor is there anything in the material before the Court which would justify deducing from

2.45 Finally, Myanmar argues that Bangladesh has not put forward any evidence of practise confirming the content of the 1974 Agreement. The fact is that both Parties treated the 1974 boundary as settled and their practise reflected that fact. As stated in the Memorial, Bangladesh and Myanmar both exercised peaceful and unchallenged administration and control over their agreed territorial seas, and, in reliance on the existing agreement, Bangladesh permitted Myanmar's vessels to navigate freely through its waters in the vicinity of St. Martin's Island to reach the Naaf River.⁷² Further, Bangladesh's coastal fishermen, including many of the 7,000 people who live on St. Martin's Island and depend on fishing for their livelihoods, have also relied on the 1974 line in the conduct of their fishing activities in the areas between St. Martin's Island and the Myanmar coast.⁷³

Fishing Activities

2.46 A number of fishermen residing on St. Martin's Island, or from the Teknaf peninsula, have testified to the fact that they believe there is an agreed boundary between the Parties in the territorial sea, and that this is located approximately midway between St. Martin's and the Myanmar mainland coast.⁷⁴ As a result, they have confined their fishing activities to the Bangladesh side of the boundary and carried the national flag of Bangladesh onboard.⁷⁵ Some of them have also testified to the fact that they have had their vessels intercepted by the Myanmar Navy when their boats accidentally strayed across the agreed line.⁷⁶ The dates of these interceptions by the Myanmar Navy and the Myanmar Frontier Forces ("NASAKA") range from 1979 to 2010.⁷⁷ Fishermen have also observed

any disregard by Qatar of its constitutional rules relating to the conclusion of treaties that it did not intend to conclude, and did not consider that it had concluded, an instrument of that kind; nor could any such intention, even if shown to exist, prevail over the actual terms of the instrument in question.

72 MB at para. 5.19.

73 See Sirajur Rahman Khan et al., "St. Martin's Island and its Environmental Issues", Geological Survey of Bangladesh (2002), at p. 2. MB, Vol. IV, Annex 49. See also Shakuntala Thilsted et al., "The Role of Small Indigenous Fish Species in Food and Nutrition Security in Bangladesh", *Naga, The ICLARM Quarterly Supplement* (July-December 1997), at pp. 82-83. MB, Vol. III, Annex 35.

74 See generally RB, Vol. III, Annex R16.

75 See, e.g., Affidavit of Md. Kabir Ahmed, RB, Vol. III, Annex R16-3.

76 See generally RB, Vol. III, Annex R16.

77 See, e.g., Affidavit of Md. Kabir Ahmed, RB, Vol. III, Annex R16-3, who states *inter alia* that his fishing vessel was intercepted by a Myanmar naval vessel in January 1979; Affidavit of Mohammed Mahmud Hossain, RB, Vol. III, Annex R16-5, who states *inter alia* that when boats cross the middle of the channel between St. Martin's and the Myanmar mainland, or cross into the area located south of the halfway point between St. Martin's and Oyster Island, they are routinely intercepted by patrol boats of the NASAKA (Myanmar Frontier Forces). He states that this happened to him on a number of occasions including incidents in December 1987 and February 1995; Affidavit of Mohammad Kabir, RB, Vol. III, Annex R16-7, who states *inter alia* that his

the Bangladesh Navy and Coast Guard patrolling the waters and intercepting Myanmar fishing vessels that have strayed over the boundary into Bangladesh waters.⁷⁸ One Bangladeshi fisherman also stated that in 2006 he met a fisherman from Myanmar who was also aware of the 1974 agreed boundary and had been instructed by the Myanmar authorities to comply with the same.⁷⁹

Naval and Aerial Patrols and Activities

2.47 Ever since the establishment of the Bangladesh Navy and Coast Guard, they have carried out a number of functions to the west of the agreed line in addition to maintaining Bangladesh's security. These activities and functions are attested to by Bangladesh naval officers and officers of the Coast Guard, and are detailed in Navy patrol logs and Navy ship tracks.

2.48 Both current and retired naval officers, ranging in rank from a Rear Admiral to a Lieutenant, have testified to their personal knowledge of the location of the agreed line between the Parties in the territorial sea; to the observance of the line by the Myanmar Navy; and to the interception of Myanmar vessels that have strayed across the agreed line by the Bangladesh Navy. For example, Rear Admiral B. Rahman of the Bangladesh Navy was stationed in Chittagong Naval Harbour between 1992 and 1995, and states that he was aware of the location of the maritime boundary agreed by Bangladesh and Myanmar in 1974, and navigational charts depicting the agreed maritime boundary were carried on board his vessels.⁸⁰ The Navy conducted regular patrols within Bangladesh's territorial waters in the vicinity of St. Martin's Island, during which the agreed boundary was respected.⁸¹ According to Rear Admiral Rahman, Myanmar's naval vessels based in Sittwe "scrupulously avoid[ed] crossing the agreed maritime boundary, except to use the navigational channel

fishing vessel was intercepted by a Myanmar naval vessel when he crossed the boundary in 1988 and 1999; Affidavit of Md. Jamal Uddin, RB, Vol. III, Annex R16-2, whose vessel was intercepted by the Myanmar Navy when he strayed across the boundary in 2002; Affidavit of Mohammad Hasan, RB, Vol. III, Annex R16-6, who states *inter alia* that his fishing vessel was intercepted by a Myanmar naval vessel on 5 December 2010 when he strayed across the middle of the channel between St. Martin's Island and the Myanmar mainland.

78 See, e.g., Affidavit of Md. Abul Bashar, RB, Vol. III, Annex R16-1, who states that he has seen the Bangladesh Navy operating in the area since independence and the Bangladesh Coast Guard since 1985. See also Affidavit of Mohammad Hasan, RB, Vol. III, Annex R16-6 at paras. 7(f)-7(g); Affidavit of Mohammed Mahmud Hossain, RB, Vol. III, Annex R16-8 at paras. 7(f)-7(g); Mohammed Kabir, RB, Vol. III, Annex R16-7 at para. 7(g); and Affidavit of Mohammad Amit Hossain, RB, Vol. III, Annex R16-5, at para. 7(f).

79 See Affidavit of Mohammad Hasan. RB, Vol. III, Annex R16-6.

80 See Affidavit of Rear Admiral (ret.) B Rahman. RB, Vol. III, Annex R17-9.

81 *Ibid.*

leading to and from the Naaf River”⁸² He states that fisherman from Myanmar knew about the area they were to operate within and also about the 1974 agreed line,⁸³ and Myanmar fishing and cargo vessels that strayed across the agreed boundary were “routinely intercepted” and “always instructed to remain eastside of the 1974 agreed boundary line.”⁸⁴

2.49 The Bangladesh Navy also provided the local fishermen on St. Martin’s Island regular briefings regarding the maritime boundary and the 1974 agreed boundary line.⁸⁵ Commodore Shamsul Kabir, commanding officer of BNS Abu Bakr stationed in Chittagong from 1991 to 1993, corroborates these facts.⁸⁶ This is also confirmed by serving naval officers.⁸⁷

2.50 Similarly, officers of Bangladesh’s Coast Guard regularly patrol the estuary of the Naaf River and north of St. Martin’s to monitor trafficking, protect against illegal fishing, and illegal entry of vessels in and around St. Martin’s, and conduct anti-piracy and anti-smuggling operations.⁸⁸ The Border Guards of Bangladesh, Teknaf base, hold regular meetings with the Myanmar Frontier Forces (NASAKA) to discuss operational issues relating to patrols in the maritime area between St. Martin’s and the mainland of Myanmar.⁸⁹

2.51 A number of Patrol logs summarizing the activities of Bangladesh naval vessels between 1990 and 2009 recount incidents in which Myanmar vessels were found on the Bangladesh side of the agreed line and instructed to head back into Myanmar waters.⁹⁰ Further, tracings from Admiralty Chart 817 showing standard patrol tracks taken by Bangladesh Navy vessels in the area around St. Martin’s Island demonstrate that Bangladesh

82 *Ibid.* at para. 4(f).

83 *Ibid.* at paras. 4(h) and 4(i).

84 *Ibid.*

85 *Ibid.* at para. 4(k).

86 See Affidavit of Commodore (retd.) Shamsul Kabir. RB, Vol. III, Annex R17-1.

87 See, e.g., Affidavit of Captain M. Nazmul Hasan, commanding officer of BNS Umar Farooq stationed at the Navy Fleet Harbour in Chittagong from January 2008 to January 2009. RB, Vol. III, Annex R17-4.

88 See, e.g., Affidavit of Lt. Commander M. Kibria Haq, Bangladesh Coast Guard. RB, Vol. III, Annex R17-3.

89 *Ibid.* at para. 4(i).

90 See Bangladesh Naval Patrol Logs, RB, Vol. III, Annex R18, which set out the details of the seizure of foreign vessels (especially Myanmar fishing vessels) in Bangladeshi waters illegally. See also Teknaf Police Station Ship Arrest Records, RB, Vol. III, Annex R15, which sets out, *inter alia*, details of a seizure of a fishing vessel in the Naaf River basin on 17 June 2004, details of a seizure of a fishing vessel on the North side of St. Martin’s Island on 27 May 2001, and details of the capture of a trawler with rice in the Naaf River basin on 10 November 2001.

routinely patrolled the area just seaward of the line segment connecting points 6 and 7 (as depicted on Figure R2.1).⁹¹

2.52 In addition to the activities of Bangladesh's Navy and Coast Guard, flight plans for routine Bangladesh Air Force surveillance of the area around St. Martin's Island show that Bangladesh aircraft routinely overfly areas landward of the claim line depicted in Myanmar's Counter-Memorial.⁹²

2.53 Based on this evidence of a long-established practise in the area, the existence of an agreement on the maritime frontier in the territorial sea is easily established. Such settled practise confirms the nature of the 1974 Agreement as reflecting a binding commitment within the meaning of Article 15 of the 1982 Convention, and it is also consistent with a tacit agreement.

2.54 By contrast, Myanmar has not produced any evidence to demonstrate that it has undertaken any regulatory or enforcement action in the area. Nor has it adduced any evidence to show that its vessels were *not* provided the right of free and unimpeded navigation in the waters around St. Martin's Island in accordance with the Agreed Minutes. In fact, Myanmar actually accepts that Bangladesh provided free and unimpeded navigation in the waters around St. Martin's Island when it acknowledges in the Counter-Memorial that this was "routine".⁹³ In reality, such unimpeded access has been provided since 1948. Even if Myanmar naval vessels routinely used the channel, Bangladesh would have been well within its rights to have put an end to this practise. Myanmar recognised Bangladesh's right to do so and that is why the provision regarding unimpeded access was incorporated into the 1974 Agreement. It is reaffirmed and updated in the 2008 Minutes and, by its own admission, Myanmar sought to incorporate this practise into a future boundary agreement.⁹⁴

2.55 Recognising the weakness of its argument, especially with regard to the fact that the 1974 Agreement was updated in the 2008 Agreed Minutes with the word "unimpeded" being replaced with "Innocent Passage through the territorial sea shall take place in conformity with the UNCLOS"⁹⁵, Myanmar states that the "effect of this substitution is not entirely clear, but it would seem that the intention was to retain the reference to 'free

91 See "Extracts from Chart No. 817". RB, Vol. III, Annex R19.

92 See "Reports on EEZ Surveillance by Air Craft". RB, Vol. III, Annex R20.

93 CMM at para. 4.38.

94 *Ibid.* at para. 4.39.

95 See MB at para. 3.28 and MB, Vol. III, Annex 7, at para. 2.

navigation”⁹⁶ The reason for the substitution is clear: the change was effected merely by way of a modernization of terms. In no way did it imply any change in the practise.

2.56 The fact that there has been conduct by both Parties showing their acceptance of a particular line of delimitation — even if not formally embodied in treaty form — is highly relevant and was affirmed by the ICJ in *Libya/Tunisia* in these terms:

This line of adjoining [oil] concessions, which was tacitly respected for a number of years, and which approximately corresponds furthermore to the line ... which had in the past been observed as a *de facto* maritime limit, does appear to constitute a circumstance of great relevance.⁹⁷

2.57 As stated in the Memorial, fundamental considerations of justice dictate that Myanmar is not entitled to claim that the 1974 Agreement is anything other than valid and that it produces the legal affects for which Bangladesh argues.⁹⁸ Myanmar characterizes Bangladesh’s argument as “far fetched”.⁹⁹ It is wrong to do so. Myanmar made repeated, unequivocal statements agreeing to and affirming the territorial sea delimitation first agreed in 1974; its statements and conduct were voluntary and unconditional.¹⁰⁰ Myanmar’s acceptance of the 1974 territorial sea boundary was clear, consistent and definite.¹⁰¹ While the Parties continued to negotiate with respect to further sectors of the maritime spaces, they had resolved the delimitation of the territorial sea. Bangladesh relied on the agreement and Myanmar’s subsequent affirmations in good faith to its own detriment. As noted above, this included allowing Myanmar vessels to have continued unimpeded passage, a benefit it obtained from the 1974 Agreement, which was reaffirmed in 2008.

2.58 For all these reasons, the Tribunal should find that the boundary in the territorial sea follows the line jointly plotted by the Parties in 1974 and again in 2008.

II. The Delimitation of the Territorial Sea in the Absence of Agreement

2.59 As set out above, the Parties agreed on the territorial sea boundary in 1974 and reaffirmed their agreement in 2008. It is only if the Tribunal declines to find an agreement

⁹⁶ CMM at para. 4.40.

⁹⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 (hereinafter “*Tunisia/Libya*”), at para. 96.

⁹⁸ MB at paras. 5.20-5.23.

⁹⁹ CMM at paras. 4.44-4.50.

¹⁰⁰ MB at para. 5.23.

¹⁰¹ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3, at paras. 28-30.

(or a tacit agreement) that it would have to address Myanmar's approach to the delimitation of the territorial sea. Accordingly, the argument that follows is presented only as an alternative to supplement Bangladesh's primary argument.

2.60 On the theory that there is no agreement (or tacit agreement) concerning the territorial sea boundary, Myanmar invites the Tribunal to delimit it by means of a different line from that settled by the Parties in 1974. The new line it proposes forms a semi-enclave around St. Martin's Island.¹⁰² In order to support this proposed line, Myanmar is forced to portray St. Martin's Island as a "special circumstance" under Article 15 that necessitates a "departure from the median line."¹⁰³ Myanmar denies that St. Martin's Island is a coastal island that is entitled to a full territorial sea. This argument is without merit and should be rejected. Myanmar's claim that St. Martin's represents a "special circumstance" is incorrect because of the coastal geography in the relevant area of the territorial sea. Since Myanmar does not claim that its approach is justified on the basis of any "historic title," it is bound to accept that if it fails in its claim that St. Martin's Island is a "special circumstance," then it must follow that this entire construct fails as well.

A. Myanmar's Proposed Delimitation Is Unjustified

2.61 The line for which Myanmar argues in the Counter-Memorial is, in its initial segments, remarkably similar to that which was agreed and settled by the Parties in 1974. **Figure R2.2** (in Volume II only) compares the 1974 agreed line and the new line proposed by Myanmar. Specifically, Myanmar accepts that it is "appropriate to follow the median line up to where the coasts of St. Martin's Island and Myanmar are opposite."¹⁰⁴ Myanmar argues, however, that "once [the coasts] are no longer opposite, a shift back to the equidistance line as it would be drawn in the absence of St. Martin's Island is called for."¹⁰⁵ In doing so, Myanmar has chosen to disregard Points 2 to 7 of the 1974 Agreement and now proposes different points. Myanmar's proposed line comprises an arc that cuts sharply in front of St. Martin's Island in disregard for the points agreed in 1974. Myanmar is, in effect, 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). The 1974 Agreement did not permit the Parties to subsequently adopt an *a la carte* approach to its terms. It settled the entire maritime boundary in the territorial sea.

102 CMM at paras. 4.51 *et seq.*

103 *Ibid.* at para. 4.52.

104 *Ibid.* at para. 4.62.

105 *Ibid.* at para. 4.62.

2.62 The Tribunal will note that the initial segment of Myanmar's "equidistance line" (between what it labels points A and B) is incorrectly drawn. As a result, its extension seaward would pass north of St. Martin's Island. This outcome conveniently bolsters Myanmar's claim that the island is located on the "wrong side" of a mainland-to-mainland equidistance line and thus opens the door to Myanmar's novel claim that St. Martin's Island should be enclaved (a claim that Myanmar had never made before these proceedings and that is inconsistent with its own practise in relation to its maritime delimitation with Thailand (discussed below)).

2.63 St. Martin's Island is just 6.5 M southwest of the land boundary terminus. Given the coastal geography in the relevant maritime area near the land boundary that separates Bangladesh and Myanmar, this is sufficiently close to the land boundary terminus to provide coastal control points that deflect the equidistance line between the mainland of Myanmar and the east facing coast of St. Martin's Island. From there, the equidistance line exits to the southeast and swings around to a more southerly orientation until it reaches the intersection of the 12 M limit measured from the southern tip of St. Martin's Island and the mainland of Myanmar. This can be seen on Figure 2.1 following page 12 which shows without ambiguity that the application of Article 15 places St. Martin's Island firmly on the *correct side* of the equidistance line.

2.64 In order to counter this difficulty for its case – and against the background of its own historical acceptance of this reality – Myanmar has now attempted to manufacture a "special circumstance" where none exists. In order to do this, Myanmar has resorted to the entirely artificial construction of a mainland-to-mainland equidistance line (depicted at Sketch Map No. 4.1 of the Counter-Memorial), which assumes that St. Martin's Island does not exist at all. Myanmar has ignored reality in order to provide itself with the desired result; namely, an equidistance line that it can claim runs to the north of St. Martin's Island. From this pseudo-geographic artifice, Myanmar draws the conclusion that St. Martin's Island is located in Myanmar's maritime area.

2.65 The approach faces numerous difficulties, not least the fact that it ignores the requirements of the first sentence of Article 15, which provides that in the absence of agreement the median line is to be based on points that are "equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured". This makes clear that the equidistance line in the territorial sea is not a hybrid line that is to be based on artificial coastal control points but rather on coastal points derived from the actual geographic situation. Given its location, there is no possible justification under the 1982 Convention for Myanmar to claim that St. Martin's Island is on

the “wrong side” of a mainland-to-mainland equidistance line since this line is not the equidistance line required by Article 15. Myanmar cites to no case-law that supports its approach.

2.66 Myanmar might have an argument if St. Martin’s Island were located at a greater distance from the land boundary terminus beyond any location at which its coasts could provide legitimate base points for the construction of the Article 15 equidistance line. In such circumstances, it might be arguable that a mainland-to-mainland equidistance line also represents a true Article 15 equidistance line out to the 12 M limit of the relevant coastal base lines. As shown in **Figure R2.3** (in Volume II only), if this were the geographic reality, then St. Martin’s Island might said to be on the wrong side of a properly drawn Article 15 equidistance boundary in the territorial sea. In such case, as the boundary would have headed out into the EEZ, it would have to loop back to pick up a more southerly St. Martin’s Island. If this were the case, there might arguably be a “special circumstance” within the meaning of Article 15, as St. Martin’s would have been on the wrong side of the initial territorial sea equidistance line and the looping back of the equidistance line would have blocked a far greater portion of Myanmar’s mainland coast from projecting seaward.

2.67 As is clear, however, this is an entirely hypothetical exercise that requires extensive cartographic manipulation. This is not something the Parties are entitled to do. Myanmar is stuck with the reality that St. Martin’s Island is located just 6.5 M from the land boundary terminus, a fact that renders its “special circumstance” claim entirely unarguable. The fact that it has itself for more than three decades recognised a different approach than the one it now argues for confirms that its argument is without legal merit.

2.68 The Counter-Memorial also attempts to buttress the argument for reducing the full 12 M territorial sea entitlement for St. Martin’s Island on the grounds of what it claims to be “important security interests in ensuring unimpeded passage and access from the mouth of the Naaf River to the open sea...”¹⁰⁶ In making this argument, Myanmar has provided no evidence whatsoever that the right of unimpeded passage to which it has always been entitled under the 1974 Agreement has been problematic in any way. In any event, the claim is unjustifiable by reference to a comparison of Myanmar’s proposed territorial sea boundary with an Article 15 equidistance line. If Myanmar’s claim to seek better access to the Naaf River was well-founded, a move of the boundary line from Point C to points D and E (as depicted on Figure R2.2) would not accomplish that objective. The area of maximum constriction leading into the Naaf River by reference to the 1974 agreed line is between Points 1 and 6, or Points B1 through B5 of Myanmar’s proposed new line, all

¹⁰⁶ *Ibid.* at para. 4.66.

of which are virtually identical to those of the 1974 Agreement. Myanmar's new proposal does nothing to widen the corridor that has existed since 1974 between Myanmar's mainland and the agreed boundary line in this area. Rather, its purported "access relief" comes well south of St. Martin's Island where the equidistance line already substantially widens Myanmar's access corridor as it heads out to the 12 M limit. This is shown at **Figure R2.4** (in Volume II only).

2.69 Although Myanmar's new proposal does nothing to improve its access to the Naaf River, it does provide Myanmar with three apparent benefits not available to it under the settled boundary that it has accepted for more than three decades. *First*, Myanmar would gain some 240 sq km of maritime space within the territorial sea area. *Second*, it would push the starting point of the continental shelf and EEZ boundary to a location well north and west of either Point 7 as agreed in 1974 or the terminal point of the modern equidistance line. And *third*, by so moving the starting point for the delimitation of the area beyond the territorial sea, it would give itself a sizable gain in maritime space in the adjacent EEZ (as depicted in **Figure R2.5** (in Volume II only)).

2.70 It will be readily apparent, therefore, that Myanmar's new argument is based on a distortion of reality that is motivated by a desire to create for itself a greater maritime space in the territorial sea and beyond. The argument is without merit for this reason alone. But it is also unsupported by case law and State practise (including its own).

B. St. Martin's Island Is Entitled to a Full Territorial Sea

2.71 As noted, there are elements of convergence between the Parties as regards St. Martin's Island. There is agreement that: (1) the island lies 6.5 M southwest of the land boundary terminus; (2) that Bangladesh has sovereignty over it; and (3) that it sustains a large and economically active population.

2.72 Myanmar's objection to the agreement that has been respected since 1974 is that the Island is "on the 'wrong' side of the equidistance line between the coasts of Myanmar and Bangladesh", and that this "is an important special circumstance which necessitates a departure from the median line".¹⁰⁷ This is a new argument and one that marks a sharp departure from Myanmar's long-standing acceptance that St. Martin's Island is entitled to a 12 M territorial sea.¹⁰⁸ Such acceptance on the part of Myanmar has long been given and

¹⁰⁷ *Ibid.*

¹⁰⁸ See RB at paras. 2.93-2.94.

recognised without any caveat, and clearly and directly contradicts the line that Myanmar now argues for in its Counter-Memorial.

2.73 Myanmar identifies a number of cases and instances of State practise in its Counter-Memorial to give less than full effect to St. Martin's Island in delimiting the territorial sea. However, these are not pertinent for the following reasons. *First*, they do not deal with the delimitation of the territorial seas; instead they concern the delimitation of the EEZ or the continental shelf. *Second*, most of the delimitation treaties Myanmar cites established maritime boundaries in areas that are geographically distinguishable from this case because those delimitations were carried out between States with opposite coastlines in narrow, semi-enclosed areas where islands were situated far offshore; in the middle of the delimitation area; or very close to the coastline of another State. Consequently, encaving them or giving them less than full effect reflected the reciprocal approach of the States to achieve an equitable result. *Third*, many treaties Myanmar invokes reflect political solutions reached in the context of resolving sovereignty issues; respecting prior oil concessions, and preserving the unity of oil and gas fields.

2.74 In the *Qatar/Bahrain* case, the Court considered the question of "special circumstances" which would require it to "adjust the equidistance line as provisionally drawn..."¹⁰⁹ In that case, the island in question – Qit'at Jaradah (under the sovereignty of Bahrain) – lay "midway between the main island of Bahrain and the Qatar peninsula",¹¹⁰ more than 10 miles from the respective coastlines. The Court was concerned that the use of that island's low-water line as a basepoint would result in a "disproportionate effect" being given to "an insignificant maritime feature".¹¹¹ But Myanmar ignores that Qit'at Jaradah is rather different from St. Martin's. As the Court noted, it is "a very small island, uninhabited and without any vegetation", it is "tiny",¹¹² it supports no economic activity, and is situated at a greater distance from either coast. The presence of an island situated 'on the wrong side of the equidistance line' has in itself no bearing on whether such an island is to be treated as a special circumstance. In fact, in the *Qatar/Bahrain* case, the Hawar Islands over which Bahrain was found to have sovereignty, were not treated by the Court as a special circumstance and accorded full effect, notwithstanding the fact that they have a population of less than 4000 and are situated roughly 10 M from the Bahrain coastline but just metres from

109 *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, Merits, Judgment of 16 March 2001, para. 217.

110 *Ibid.* at para. 219.

111 *Ibid.* at para. 220.

112 *Ibid.* at para. 219.

Qatar. Similarly, the island of Janan, 2.9 M from Qatar was also not treated as a special circumstance.

2.75 State practise relevant to maritime delimitation clearly indicates that an island adjacent to the coast may have an important bearing on the delimitation of a maritime boundary. Article 121(1) of UNCLOS defines an island as “a naturally formed area of land, surrounded by water, which is above water at high tide”. Once determined as such, islands are entitled to a 12 M territorial sea and in, principle, their own continental shelf and EEZ. A right of States to claim a territorial sea around islands is also a well-established principle of customary international law¹¹³ and is recognized by Myanmar.¹¹⁴ The burden is on Myanmar to persuade the Tribunal why St. Martin’s Island should be treated as a special circumstance and it has failed to meet that burden.

2.76 Why should St. Martin’s Island be treated as such? On its face, there are no persuasive reasons. St. Martin’s Island is located 6.5 M southwest of the land boundary terminus and an equivalent distance from the Bangladesh coast. It has a surface area of some 8 sq km and sustains a permanent population of about 7,000 people.¹¹⁵ It serves as an important base of operations for the Bangladesh Navy and Coast Guard. Fishing is a significant economic activity on the island, which also receives more than 360,000 tourists every year, it being a well-established holiday destination. The island is extensively cultivated and produces enough food to meet a significant proportion of the needs of its residents.¹¹⁶ The proximity of St. Martin’s Island to Bangladesh, its large permanent population and its important economic role are consistent with the conclusion that it is an integral part of the coastline of Bangladesh.

2.77 Notably, Myanmar’s approach in this case is inconsistent with its own practise in relation to other islands. The 1980 Myanmar-Thailand Agreement deals with a maritime delimitation that is remarkably similar to the present situation: a series of islands over which Myanmar has sovereignty, known as the Aladdin Islands, lie to the south west of the land boundary terminus opposite the coast of Thailand. Even though many are significantly smaller and more remote from the coastline of Myanmar than St. Martin’s is

113 See Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (2006), at p. 184. RB, Vol. III, Annex R28.

114 CMM at para. 4.53.

115 MB at para. 2.18. Myanmar recognizes this. See CMM at para. 2.19.

116 MB at para. 2.18. See also Sirajur Rahman Khan *et al.*, “St. Martin’s Island and its Environmental Issues”, Geological Survey of Bangladesh (2002). MB, Vol. IV, Annex 49. See also Mohammad Mahmudul Hasan, “Tourism and Conservation of Biodiversity: A Case Study of St. Martin’s Island, Bangladesh”, *Law, Social Justice & Global Development*, Vol. 1 (2009). MB, Vol. III, Annex 36.

from Bangladesh, they are not enclaved (or semi-enclaved) as Myanmar now proposes in respect of St. Martin's Island. Indeed, as is clear from **Figure R2.6** (in Volume II only), full effect is given to these and other small islands. Myanmar placed its base points on such islands as Haycock Islet, Western Rocky Islet, Christie Island, and South Twin Islet. Myanmar also recognizes the basepoint of Thailand on Pachumba Islet.

2.78 Having regard to its 1980 Agreement with Thailand, on what basis does Myanmar contend that St. Martin's is not a coastal island simply because it is situated less than 1 M closer to Myanmar's coastline than that of Bangladesh?¹¹⁷ Myanmar provides no support for this claim, which is flatly inconsistent with its approach to its own Aladdin Islands.

2.79 The 1980 Agreement with Thailand is not unusual. In the *Guinea/Guinea-Bissau* case the Arbitral Tribunal 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.¹¹⁸ In the *Yemen/Eritrea* arbitration, the Dahlak Islands were treated as coastal islands:

This tightly knit group of islands and islets, [or "carpet" of islands and islets as Eritrea preferred to call it] of which the larger islands have a considerable population, is a typical example of a group of islands that forms an integral part of the general coastal configuration. It seems in practise always to have been treated as such. It 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.¹¹⁹

2.80 The Dahlak Islands are no closer to the mainland than St. Martin's Island is to Bangladesh's coastline and the extremities of the Dahlaks lie more than 40 M off the Eritrean coast. The Tribunal described the population of these islands to be "considerable", where it numbered less than 3000.¹²⁰ Similar findings were made in relation to Yemeni offshore islands and reefs in the Red Sea. The relatively large Kamaran Island was held to form "an important bay and there can be no doubt that these features are integral to the coast of Yemen and part of it and should therefore control the median line".¹²¹ The islands north of Kamaran, the islet of Tiqfash, and the smaller islands of Kutama and Uqban were

117 CMM at para. 4.53.

118 *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 ILM 252 (hereinafter "Guinea/Guinea-Bissau"), at para. 95. Reproduced in MB, Vol. V.

119 *Arbitration between Eritrea and Yemen*, Award, Second Phase (Maritime Delimitation), 17 December 1999, reprinted in 22 RIAA 335, at para. 139.

120 *Ibid.*

121 *Ibid.* at para. 150.

also treated as coastal islands as they formed “part of an intricate system of islands, islets and reefs which guard this part of the coast”.¹²² All three of these islands lie further from Yemen’s coastline than St. Martin’s Island does from Bangladesh and none has any significant permanent population. The latter two are also relatively similar in size to St. Martin’s Island. Yet, all of these islands were given full effect in the delimitation of the maritime boundary between Yemen and Eritrea. The award in that case strongly supports Bangladesh’s case that St. Martin’s Island is a coastal island that should be given full effect for the delimitation of the territorial sea (and continental shelf and EEZ).

2.81 All of the cases cited by Myanmar in the Counter-Memorial are readily distinguishable and for precisely the same reason: none of them deals with the effect to be given an island in the territorial sea. All of them relate instead to the very different question of the effect to be given islands in the continental shelf and exclusive zone. They therefore do not support Myanmar’s argument. (The reasons St. Martin’s would be entitled to full effect in the continental shelf and EEZ are discussed in Chapter 3 of this Reply.)

2.82 The Counter-Memorial cites five cases to support its proposition that St. Martin’s should not receive its full entitlement in the territorial sea: the *Anglo-French Continental Shelf Case*, the *Dubai/Sharjah Border Arbitration*, the *Tunisia/Libya Continental Shelf case*, the *Gulf of Maine case* and the *Saint Pierre & Miquelon case*.¹²³ In none was reduced effect given to any of the islands Myanmar discusses in the territorial sea.

2.83 In the *Anglo-French Continental Shelf case*, for example, the issue was strictly the weight to be accorded the UK’s Channel Islands in the continental shelf delimitation between the parties. The issue of the boundary in the territorial sea was not even within the jurisdiction of the Court of Arbitration.¹²⁴

2.84 Similarly, in the *Dubai/Sharjah Arbitration*, the island of Abu Musa was given reduced effect in the continental shelf but *not* in the territorial sea. As Myanmar itself acknowledges in its description of the case, the island’s entitlement to a full 12 M territorial sea was expressly recognized.¹²⁵

122 *Ibid.* at para. 151.

123 CMM at paras. 4.55-4.59.

124 Delimitation of the Continental Shelf between France and the United Kingdom, Decision, 30 June 1977, reprinted in 18 RIAA 3 (hereinafter “Anglo-French Continental Shelf Case”), at para. 1. Reproduced in MB, Vol. V.

125 CMM at para. 4.57.

2.85 Likewise in the *Tunisia/Libya* case, the islands Myanmar mentions affected only the delimitation in the continental shelf.¹²⁶ Whatever weight they may have been given in that case therefore has no bearing on the issue now under consideration.

2.86 The *Gulf of Maine* case is irrelevant for the same reason. The relative weight to be accorded Canada's Seal Island only had bearing on the delimitation in the continental shelf, not the territorial sea.¹²⁷

2.87 And finally, the same is true for the *St. Pierre & Miquelon* case. The "limited extension of the enclave beyond the territorial sea"¹²⁸ in the form of a corridor to the 200 M limit was, as Myanmar's own description shows, "beyond the territorial sea"¹²⁹. Within the territorial sea, the French islands received full effect.¹³⁰

2.88 The truly relevant case law disproves Myanmar's argument. The ICJ's two most recent maritime delimitation cases, both of which do in fact relate to the question of the weight to be accorded islands in the territorial sea, confirm that St. Martin's Island must be given full effect.

2.89 In its 2007 decision in *Nicaragua v. Honduras*, the Court was tasked, *inter alia*, with delimiting the waters around and between opposite-facing cays north and south of the 15th parallel.¹³¹ Four cays north of the 15th parallel belonged to Honduras and one south of the parallel belonged to Nicaragua. Honduras argued that all the cays should be recognized as having a full 12 M territorial sea, except only where this would overlap with the territorial sea of the other party. Nicaragua argued instead that the small size and instability of the cays should act as "equitable criteria" justifying their being enclaved within only a 3 M territorial sea as a "full 12-mile territorial sea ... would result in giving a disproportionate amount of maritime areas in dispute to Honduras".¹³²

126 *Tunisia/Libya* at paras. 2, 4.

127 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 246, at para. 222.

128 CMM at para. 4.59.

129 *Ibid.* at para. 4.59.

130 *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon)*, Decision, 10 June 1992, reprinted in 31 ILM 1149, at paras. 66-74. Reproduced in MB, Vol. V.

131 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (hereinafter "*Nicaragua v. Honduras*"), at para. 299 *et seq.*

132 *Ibid.* at para. 300.

2.90 The Court rejected Nicaragua's argument, noting that by virtue of Article 3 of UNCLOS, Honduras had the right to establish the breadth of its territorial sea up to a limit of 12 M for both its mainland and for its cays, and found that, subject to any overlap between the territorial seas between the Honduran and Nicaraguan cays, they were entitled to a full territorial sea of 12 M.¹³³ It should be noted that all the cays in question were much smaller than St. Martin's Island, were mostly uninhabited, and lay considerably further off the mainland coast than does St. Martin's.

2.91 The Court came to a similar result in its 2009 Judgment in the *Black Sea* case between Ukraine and Romania. At issue in that case was Ukraine's Serpent's Island, a feature some 20 M off Ukraine's mainland coast measuring just 0.17 sq km (nearly 50 times smaller than St. Martin's) and sustaining only a marginal population. Although the Court ultimately decided against using Serpent's Island as a basepoint for purposes of delimiting the boundary between the parties in the continental shelf and EEZ, it nonetheless accorded it a full 12 M territorial sea. The first segment of the boundary adopted by the Court thus follows a 12 M arc around Serpent's Island to the point where the mainland-to-mainland equidistance line reaches a distance of more than 12 M from the island.¹³⁴ As with the cays at issue in *Nicaragua v. Honduras*, St. Martin's Island is a substantially more significant feature than Serpent's Island. If that smaller island, more distant than St. Martin's from the mainland coast, was accorded a full 12 M territorial sea, so too should St. Martin's.

2.92 Myanmar also invokes State practise that it asserts is supportive of its view that small or mid-size islands are usually "totally ignored" and the predominant tendency is to give no or little effect to such maritime formations.¹³⁵ Most of the State practise Myanmar invokes is irrelevant for exactly the same reason as the case law it cites: it concerns delimitations in the continental shelf and/or EEZ, not the territorial sea. Just two of the instances of State practise Myanmar cites (Australia-Papua New Guinea and Qatar-Abu Dhabi) relate to the effect of islands in the territorial sea and both arose in very different geographical circumstances. Even more significantly, these are examples of negotiated agreements in which the States involved negotiated arrangements based on a series of mutual concessions the details of which are not readily ascertainable from their texts. There 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. Accordingly, neither the jurisprudence nor the

¹³³ *Nicaragua v. Honduras* at para. 302.

¹³⁴ *Romania v. Ukraine* at para. 219.

¹³⁵ CMM at para. 4.60.

State practise supports the Counter-Memorial's claim for the radical departure from the equidistance line it seeks.

2.93 Myanmar's new argument marks a sharp break not only from the applicable precedents but also from its own long-standing acceptance of the fact that St. Martin's is entitled to full effect in territorial sea.¹³⁶ As discussed in the Bangladesh Memorial and reiterated above, as early as 1974, Myanmar agreed that St. Martin's Island was entitled to full effect and settled the boundary in the territorial sea on that basis. For the next 36 years, Myanmar continued to accept that St. Martin's Island was entitled to full effect. Even when Myanmar abruptly changed position in 2008 concerning the validity of the 1974 Agreement, it conspicuously did *not* argue that St. Martin's was entitled to anything less than full-effect in the territorial sea. What it argued instead was that the last point of the agreed line, Point 7, should be replaced by the mid-point between St. Martin's and Oyster (Mayu) Islands, a point located *more* than 12 M south-southeast of St. Martin's Island. That position, of course, is utterly inconsistent with the view Myanmar now purports to adopt in the Counter-Memorial that final segments of the boundary should carve deeply into St. Martin's 12 M territorial sea and be located essentially due west of the island.

2.94 The abruptness of Myanmar's change of views regarding the entitlement of St. Martin's Island to have a full 12 M territorial sea is also reflected in the diplomatic correspondence. As recently as January 2008, for example, in a note verbale to the Ministry of Foreign Affairs of Bangladesh, Myanmar requested the Bangladesh Ministry to extend its good offices to receive assurances for the safety of a streamer¹³⁷ which was expected to enter the 12 M territorial sea of St. Martin's Island.¹³⁸ In 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 34 years; namely, that St. Martin's was entitled to a 12 M territorial sea. This was offered and recognised without any caveat, and clearly and directly contradicts the line that Myanmar now argues for in its Counter-Memorial.

2.95 Myanmar's long-standing and unqualified acceptance of the need to give St. Martin's Island full weight by itself constitutes a compelling reason to do just that. Put simply, its consistent recognition of St. Martin's 12 M territorial sea entitlement constitutes com-

136 See RB at paras. 2.93-2.94.

137 A streamer is a length of cable towed by a survey vessel to which hydrophones and other scientific instruments are attached. Streamers can be several kilometres in length.

138 *Note Verbale* from the Myanmar Ministry of Foreign Affairs to the Bangladesh Ministry of Foreign Affairs, No. 44 10 2/7 (41) (16 January 2008). RB, Vol. III, Annex R1.

elling evidence of the fact that Myanmar considers that to be the correct result in this case.

2.96 Confronted with a similar issue in the *Tunisia/Libya* case, the ICJ adopted the eminently sensible view that “it is evident that the Court must take into account *whatever indicia are available of the lines or lines which the Parties themselves may have considered equitable* or acted upon as such...”¹³⁹ Essentially the same point was reiterated in *Libya v. Malta*, where the Court stated that it is appropriate to consider evidence of the Parties’ actions when it provides “a 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”.¹⁴⁰ And in the *Jan Mayen* case, too, the Court left open the possibility that sufficiently clear diplomatic exchanges might be enough to preclude the party from denying the acceptability of a median line.¹⁴¹

2.97 In this case, Myanmar accepted the 1974 agreed line, which is an equidistance line giving St. Martin’s full effect, on repeated occasions. In November 1974, its representatives signed Special Chart 114 on which the line was jointly plotted. Several days later, they signed the Agreed Minutes. In 1975, Myanmar acknowledged that the territorial sea boundary was “settled”. Thirty-three years later, it manifested its continuing acceptance of the line by jointly re-plotting it with Bangladesh and again endorsing another set of Agreed Minutes. At no moment prior to the filing of its Counter-Memorial did Myanmar ever suggest that St. Martin’s Island merited anything less than full effect in the territorial sea.

C. Myanmar’s New Equidistance Line Has Been Incorrectly Plotted

2.98 Beyond the error of having treated St. Martin’s Island as a “special circumstance”, Myanmar has also fallen into error in the manner in which it has plotted its proposed line. In particular, it has chosen incorrect basepoints for the calculation of the inshore median line.

2.99 **Figure R2.7** following page 46 shows the 1974 agreed line (in green), Myanmar’s proposed line (in black), and Bangladesh’s properly plotted equidistance line that gives full weight to St. Martin’s Island (in red). It will be apparent that the starting point for each line

139 *Tunisia/Libya* at para. 118 (emphasis added).

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

141 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 38, at paras. 37, 38.

(Myanmar's Point A, Point 1 on 1974 agreed line and Point 1A of the modern equidistance line) is the same.

2.100 Myanmar's first basepoint on the Bangladesh coast, β_1 , is not the right starting point within the territorial sea. In beginning from basepoint β_1 , Myanmar has ignored the nearest points on the Bangladesh low water line, which are located on the final spit on the northern shore of the Naaf River as charted on British Admiralty Chart 817. In so doing, it has produced an incorrect location for the turning point it labels Point B. The correct location is identified as Point 2A in the properly plotted modern equidistance line (shown in Figure R2.7). This point is equidistant from the two nearest points on either side of the Naaf River mouth and a third point on St. Martin's Island.

2.101 Beyond that, Myanmar's Points D and E have been plotted on the basis of not giving full effect to St. Martin's Island and they therefore do not reflect an equidistance line. They reflect Myanmar's hope that the Tribunal will accept its argument that Bangladesh's St. Martin's Island is not a coastal island ("if only because it lies in front of Myanmar's Coast, not that of Bangladesh")¹⁴² and the erroneous belief that the alleged location of St. Martin's Island on the "wrong" side of the equidistance line between the coasts of Myanmar and Bangladesh makes it a "special circumstance" that necessitates a departure from the median line.¹⁴³ For the reasons set out above, that claim is without merit.

2.102 As stated in the opening paragraphs of this Chapter, a true equidistance line properly plotted on modern charts is virtually identical to the boundary that was agreed in 1974 and that has been settled ever since. In the unlikely event that the Tribunal concludes that there is no agreement (or tacit agreement), the maritime boundary in the territorial sea should follow an equidistance line connecting Point 1A to Point 8A (as depicted in Figure R2.7) with geodetic lines. The line so plotted has the following co-ordinates:

¹⁴² CMM at para. 4.53.

¹⁴³ *Ibid.* at para. 4.52.

Point	Latitude	Longitude	Comment
1A	20° 42' 15.8"N	92° 22' 07.2"E	Agreed land boundary terminus = Point A in Myanmar's Counter-Memorial
2A	20° 40' 45.0"N	92° 20' 29.0"E	Tripoint equidistant between St. Martin's Island, and the Bangladesh and Myanmar banks of the mouth of the Naaf River
3A	20° 39' 51.0"N	92° 21' 11.5"E	Equidistant between St. Martin's and Myanmar mainland
4A	20° 37' 13.5"N	92° 23' 42.3"E	Ditto
5A	20° 35' 26.7"N	92° 24' 58.5"E	Ditto
6A	20° 33' 17.8"N	92° 25' 46.0"E	Ditto
7A	20° 26' 11.3"N	92° 24' 52.4"E	Ditto
8A	20° 22' 46.1"N	92° 24' 09.1"E	Intersection with 12 M limit drawn from St. Martin's and the low water line south of Sitaparokia on the Myanmar mainland

The coordinates are referred to WGS 84 datum.

From Point 8A, the boundary line would continue along the 215° bisector, the details of which are set out in the following Chapter.

2.103 The Tribunal will note that in this alternative, the starting point of the bisector (Point 8A) will be fractionally different from the starting point for the delimitation of the continental shelf and EEZ in relation to the line agreed in 1974 (Point 7). The distance between Point 7 of the 1974 agreed line and Point 8A of the modern equidistance line is about 500 metres, as shown in **Figure R2.8** (in Volume II only).

Conclusions

2.104 In summary, Bangladesh's claim is as follows:

- (1) In 1974 the Parties reached agreement on the maritime boundary of the territorial sea and subsequently confirmed that it had been "settled";
- (2) That agreement continues to be in full force and effect today;
- (3) Further or alternatively, in the absence of an agreement (or tacit agreement), the Tribunal should delimit the territorial sea by drawing an equidistance line that gives full effect to St. Martin's Island;

(4) There is no basis in law for enclaving or semi-enclaving St. Martin's Island in the territorial sea as Myanmar argues; and

(6) Myanmar's consistent conduct sustaining and reaffirming the 1974 agreed line constitutes compelling evidence of the fact that Myanmar considers a territorial sea boundary giving St. Martin's Island full effect to be the correct result in the circumstances of this case.

2.105 Accordingly, the territorial sea boundary between Bangladesh and Myanmar is depicted in Figure 5.1 of Volume II of the Memorial (and Figure 2.1 of this Reply), having an end point – Point 7 – that is located at $20^{\circ} 22' 56.6''$ N - $92^{\circ} 24' 24.2''$ E (WGS 84).

2.106 Alternatively, the maritime boundary in the territorial sea should follow a simplified strict equidistance line connecting Point 1A to 8A with geodetic lines and giving full effect to St. Martin's Island (as also depicted in Figure 2.1).

CHAPTER 3**DELIMITATION OF THE CONTINENTAL SHELF WITHIN 200 M AND THE EEZ**

3.1 In this Chapter, Bangladesh responds to the arguments presented in Chapter 5 of Myanmar's Counter-Memorial concerning the delimitation of the continental shelf and the exclusive economic zone.

3.2 Myanmar argues that this case calls for a delimitation of the maritime boundary between the two Parties *only* to a distance of 200 M and *not beyond*. It claims that there is no need for a delimitation beyond 200 M because (1) the boundary within 200 M should be an equidistance line, and (2) that line cuts off Bangladesh's maritime space well within 200 M of its coast. Myanmar further argues that, as a legal matter, the same delimitation rules and methodologies apply both within and beyond 200 M.

3.3 In this Chapter and the next, Bangladesh shows that Myanmar is wrong on all counts. This Chapter addresses the delimitation within 200 M and demonstrates that the equitable solution required by Articles 74 and 83 of the 1982 Convention is not achieved by the equidistance line Myanmar proffers, or by any other line that cuts off Bangladesh's maritime space less than 200 M from its coast. Contrary to the conclusions reached in the Counter-Memorial, Bangladesh's maritime space must extend up to 200 M (and beyond) pursuant to Articles 74 and 83, and the equitable principles applied by international courts and arbitral tribunals in prior maritime delimitation cases.

3.4 The next Chapter addresses the delimitation beyond 200 M and shows that the rules and methodologies applicable to delimitation within and beyond 200 M are different. To be sure, Article 83's call for an "equitable solution" in regard to delimitation of the continental shelf applies equally to areas within and beyond 200 M. However, in fashioning the required equitable solution beyond 200 M, Article 76 must also be taken into account. That Article provides that a coastal State's entitlement to a continental shelf beyond 200 M is not universal but depends on the existence of a "natural prolongation of its land territory" beyond that distance. Thus, beyond 200 M "natural prolongation" rather than distance from the coast is the basis of entitlement and determines whether and to what extent there are overlapping entitlements to be delimited. Accordingly, an equitable delimitation line within 200 M cannot simply be assumed to produce an equitable result in areas beyond 200 M. This is especially true in this case where the equidistance line Myanmar proposes does not even reach 200 M and thus completely ignores Bangladesh's

extensive natural prolongation. In Bangladesh's view, as elaborated in Chapter 4, recourse to different delimitation methodologies in the two areas is appropriate.

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3.5 Chapter 5 of Myanmar's Counter-Memorial has a single goal: to defend the equidistance method, both in general terms and as applied in this case. Indeed, Myanmar's embrace of equidistance is so complete and so completely uncritical it even claims that "*rights to maritime areas are governed by equidistance*"!¹ Myanmar cites no authority for this extraordinary proposition because there is none. In fact, Myanmar's position turns the law of the sea on its head. Neither the provisions of the 1982 Convention nor the jurisprudence applying them support Myanmar's argument.

3.6 In Myanmar's scheme of things, equidistance is elevated from a delimitation *method* into a rule of law of universal application. But Articles 74 and 83 of UNCLOS provide only that the goal of the delimitation process is an "equitable solution". The equidistance method is used, in appropriate circumstances, as a tool for achieving this ultimate aim. As the International Court of Justice has stated: "under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question."² "[I]f not, other methods should be employed"³

3.7 For the reasons articulated in Bangladesh's Memorial and underscored below, equidistance demonstrably does *not* lead to an equitable result in this case. Because of the conspicuous effects of the profound concavity in the northern Bay of Bengal, Bangladesh is inequitably cut off well before it reaches its 200 M limit. There is, quite literally, no more dramatic cut-off effect anywhere in the world. Not even Germany in the *North Sea Continental Shelf* cases was so badly cut off. The substantial inequity of this cut-off is exacerbated by the fact that Bangladesh is denied access to its unquestioned entitlement in the continental shelf beyond 200 M under Article 76.

3.8 None of the Counter-Memorial's arguments justify such a result. With respect to the effects of the concavity, Myanmar resorts to the truism that it is not for international courts and tribunals to "refashion nature"⁴ Among the many reasons this over-used ar-

1 Counter-Memorial of Myanmar (hereinafter "CMM") at para. 5.111.

2 *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, I.C.J. Reports 1985, p. 13 (hereinafter "*Libya v. Malta*"), at para. 63.

3 *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 (hereinafter "*Tunisia/Libya*"), at para. 109.

4 CMM at paras. 5.115-5.116, 5.121.

gument fails is the fact that the very authority Myanmar cites for it, the ICJ's decision in the *North Sea* cases, is a leading case in which equidistance was rejected as inequitable – precisely because of the concavity of the German coastline lying between Denmark and the Netherlands. Moreover, Myanmar's argument proves too much. If it were right, no departure from strict equidistance would ever be warranted because any departure necessarily involves giving different effects to different geographical features along a State's coastline. Doing so in appropriate circumstances does not, under the well-established jurisprudence, “refashion nature”.

3.9 With respect to the question of Bangladesh's entitlement in the outer continental shelf, Myanmar's only response is to say that it is not an issue because equidistance stops Bangladesh from reaching the outer continental shelf. In effect, Myanmar says the inequity Bangladesh protests does not exist as a result of the very factors that create the inequity in the first place. But, of course, this entirely circular argument assumes its own conclusion and is no stand-in for serious analysis.

3.10 For Bangladesh to say that equidistance does not lead to an equitable result does not mean, as Myanmar misleadingly asserts, that Bangladesh believes the delimitation should be decided *ex aequo et bono* or based on what Myanmar rather more disparagingly labels *équité créatrice* (“normative equity”). It is merely to state that the equidistance method does not satisfy the conditions laid down by the applicable law because it does not lead to the requisite “equitable solution” in the particular circumstances of this case.

3.11 The problem that remains for solution is what method does lead to the “equitable solution” that international law requires. The answer suggested by the existing jurisprudence is the angle-bisector method described and applied in Bangladesh's Memorial. Application of that methodology in this case provides a solution that is entirely equitable. Such an approach would not depart from the existing jurisprudence, let alone tear asunder the very fabric of the modern law of the sea, as Myanmar rather extravagantly portends.⁵ Indeed, application of the angle-bisector method in this case would be entirely consistent with the recent case law. It has been employed in at least four of the 16 international maritime boundary cases, including as recently as 2007.⁶

5 *Ibid.* at para. 1.28 (“And there can be no doubt that the Tribunal should take care not to depart from the modern rules clearly established in the recent case law”).

6 See *Tunisia/Libya; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment I.C.J. Reports 1984, p. 246 (hereinafter “*Gulf of Maine*”); *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 ILM 252 (hereinafter “*Guinea/Guinea-Bissau*”); and *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (hereinafter “*Nicaragua v. Honduras*”).

3.12 Myanmar's critique of the manner in which Bangladesh has employed the angle-bisector method is also unfounded. Indeed, as will be demonstrated, application of Myanmar's own reasoning leads to precisely the same result for which Bangladesh advocates; that is, a maritime boundary within 200 M following an azimuth of N215°E.

3.13 The 215° line leads to a result that, unlike the equidistance line Myanmar puts forward, is equitable to Bangladesh while at the same time is also equitable to Myanmar. Indeed, the difference between the 215° line and the equidistance line is significant for Bangladesh (because it affords it meaningful access to its 200 M limit as well as its entitlement in the outer continental shelf) but entirely *de minimis* for Myanmar (because it still retains the overwhelming majority of its maritime entitlement in the Bay of Bengal and elsewhere). In raw numbers, the 215° line advocated by Bangladesh increases its still-compressed maritime space by 25% as compared to Myanmar's equidistance line, while it leaves Myanmar with over 95% of the area it would have if its proposed solution were adopted.

3.14 Bangladesh submits that the 215° line constitutes the "equitable solution" international law requires.

I. Equidistance Is a Method Not a Rule of Law

3.15 Throughout the Counter-Memorial, Myanmar portrays itself as a defender of the modern law of the sea as reflected in the existing jurisprudence of the ICJ and international arbitral tribunals. Bangladesh, in contrast, is portrayed as a mutineer threatening to bring chaos to the well-settled legal order. The Tribunal is warned to "take care not to depart from the modern rules clearly established in the recent case law" lest it undermine the "consistency in international law and international judicial decisions".⁷

3.16 It is a clever narrative. But it is inaccurate. In fact, it is Myanmar that seeks to rewrite the 1982 Convention by picking equidistance out from the ranks of delimitation methodologies and promoting it to a rule of law from which virtually no derogation is possible. Neither UNCLOS nor the jurisprudence applying it supports Myanmar's attempt to give equidistance such an exalted status.

3.17 Myanmar itself recognizes, at least implicitly, that it goes too far in presenting equidistance as the alpha and omega of maritime delimitation. It expressly acknowledges each of the following general principles, with which Bangladesh fully agrees:

7 CMM at para. 1.28.

- “[T]he object of delimitation is to achieve a delimitation that is equitable”.⁸
- “[D]uring the negotiations of UNCLOS ‘[i]t was felt that the circumstances are too many and too varied in which equidistance does not yield an equitable result. Consequently, consensus was only possible around the broader ‘equitable solution’ provision” stated in Articles 74 and 83.⁹
- The standard approach adopted in the case law is first to draw a provisional equidistance line and then determine whether there are relevant circumstances warranting a departure from it (the so-called “equitable principles/relevant circumstances” method).¹⁰
- Nonetheless, “the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate”.¹¹
- In certain circumstances, the angle-bisector method has been used as an alternative to equidistance by the ICJ and an international arbitral tribunal.¹²
- Whatever the method, the final delimitation line must allow “the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way”.¹³

3.18 Ironically, notwithstanding its express agreement with the general principles just stated, Myanmar proceeds as if equidistance admits of no exceptions, other than where the circumstances of a given case make it “not technically feasible” to draw even a provisional equidistance line.¹⁴ Myanmar’s eagerness to enshrine equidistance as an immutable rule causes it to make the extraordinary claim that “rights to maritime areas are governed by equidistance”.¹⁵ Myanmar even goes so far as to rename what is properly known as the

8 *Ibid.* at para. 5.19 (citing *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009 (hereinafter “*Romania v. Ukraine*”), at para. 111).

9 *Ibid.* at para. 5.15 (citing Memorial of Bangladesh (hereinafter “MB”) at para. 6.15).

10 *Ibid.* at para. 1.26; MB at para. 6.18.

11 CMM at para. 5.20 (citing *Nicaragua v. Honduras* at para. 272).

12 *Ibid.* at para. 5.83.

13 *Ibid.* at para. 5.139 (citing *Romania v. Ukraine* at para. 201).

14 *Ibid.* at para. 5.26.

15 *Ibid.* at para. 5.111.

“*equitable principles/relevant circumstances*” method applicable to the delimitation of the continental shelf and EEZ as the “*equidistance/relevant circumstances*” approach.¹⁶

3.19 Myanmar has badly overstated its case. It is flatly incorrect that courts and tribunals have abandoned equidistance in favour of other methods only “when the drawing of an equidistance line proved not to be feasible.”¹⁷ In the first place, Myanmar studiously overlooks the *Guinea/Guinea-Bissau* case in which the distinguished arbitral tribunal rejected equidistance because of the inequitable effects of the concavity of Guinea’s coast.¹⁸ There was nothing about the configuration of the coasts at issue that rendered it difficult, much less impossible, to construct an equidistance line. The arbitral tribunal’s point was simply that equidistance did not yield an equitable result and was therefore an inappropriate tool for achieving the solution mandated by international law.¹⁹

3.20 The calculation of an equidistance line was also far from impossible in the *Gulf of Maine* case. Indeed, Canada’s primary argument was for an equidistance line (either taking account of all coastal features or ignoring the effect of Cape Cod in the United States).²⁰ The issue was simply that following the Canadian position would have resulted in “the adoption of a line all of whose basepoints would be located on a handful of isolated rocks, some very distant from the coast, or on a few low-tide elevations ...”²¹ To be sure, the United States and Canada had agreed on a starting point for the maritime boundary that did not correspond to any point along an equidistance line.²² But that problem could easily have been remedied other than by recourse to the angle bisector method. Point A, for instance, could simply have been connected to the equidistance line by means of a straight line segment in the same way the Court connected the angled territorial sea boundary in the *Cameroon v. Nigeria* case to the equidistance line in the areas beyond.²³

3.21 Even in *Nicaragua v. Honduras*, the case upon which Myanmar principally relies for its contention that it is only when equidistance is “impossible” that courts and tribunals have resorted to other methods, the fact is that Honduras actually presented an

16 *Ibid.* at paras. 1.29, 1.35, 5.4, 5.17, 5.26, 5.28, 5.37, 5.38, 5.39, 5.44, 5.104, 5.111, 5.127, 5.134, 5.145, 5.150, and 5.153.

17 *Ibid.* at para. 5.83.

18 *Guinea/Guinea-Bissau* at para. 104.

19 *Ibid.* at para. 103.

20 *Gulf of Maine* at paras. 71 and 77.

21 *Ibid.* at para. 210.

22 *Ibid.* at para. 211.

23 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Judgment, I.C.J. Reports 2002 (hereinafter “*Cameroon v. Nigeria*”), at para. 307.

equidistance line to the Court.²⁴ The ICJ nonetheless 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.²⁵ The Court was concerned that today's equidistance line might look very different from tomorrow's equidistance line.²⁶ It is thus untrue that it was "not technically feasible" to plot an equidistance line. Myanmar's argument is directly refuted by the language of the Court's judgment (quoted by Myanmar²⁷) that the use of a bisector "has proved to be a viable substitute method in certain circumstances where equidistance is not possible *or appropriate*".²⁸

3.22 These cases show that international courts and tribunals have readily employed a method other than equidistance, especially an angle bisector, when doing so achieved the equitable solution international law mandates.

3.23 Throughout the Counter-Memorial, Myanmar works painstakingly to cultivate the impression that by invoking the requirement stated in Articles 74 and 83 of the 1982 Convention that the delimitation lead to an "equitable solution", Bangladesh is somehow suggesting that the Tribunal should decide the case *ex aequo et bono* or that it can delimit in equity.²⁹ Bangladesh is doing no such thing. It readily accepts that "[e]quity is not a method of delimitation".³⁰ That said, if Myanmar is suggesting that equitable considerations are foreign to the delimitation process, it is mistaken. Articles 74 and 83 of the 1982 Convention by their express terms give equity an important role. In pointing this out, Bangladesh is doing no more than saying that UNCLOS must be interpreted and applied as it is written, not as Myanmar seeks to rewrite it.

3.24 Nor is Bangladesh suggesting that the equitable considerations encompassed by Articles 74 and 83 give license to do what Myanmar labels "*équité créatrice*".³¹ As the ICJ long ago stated:

it is not a question of applying equity simply as a matter of abstract justice, but applying a rule of law which itself requires the application of equitable

24 Rejoinder of Honduras (13 August 2003) at paras. 8.16-8.17 and Plate 48 (available from the ICJ website).

25 *Nicaragua v. Honduras* at paras. 32, 277.

26 *Ibid.* at para. 277.

27 CMM at para. 5.24.

28 *Nicaragua v. Honduras* at para. 287 (emphasis added).

29 See CMM at paras. 5.6, 5.36.

30 *Ibid.* at para. 5.34.

31 See *ibid.* at paras. 5.127, 5.134.

principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field.³²

This is precisely what Bangladesh has done in its Memorial, and no more. It has applied the equitable principles which unmistakably underlie the “development of the legal régime of the continental shelf” and EEZ.

3.25 If either Party is misconstruing the 1982 Convention, it is Myanmar. Its argument that “rights to maritime areas are governed by equidistance” flies in the face of the express language of Articles 74 and 83. It makes the object of delimitation (an equitable solution) captive to the method (equidistance). But the nature of the relationship must be the reverse: the method must serve the object. If it does not, if the result to which a method leads is inequitable, it must be rejected. In the words of the ICJ, “equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed”.³³

3.26 Myanmar accuses Bangladesh of assuming that “the applicable law was frozen (in a state of uncertainty) in 1982 or, even better, in 1969”, and of “deliberately ignoring the developments which have occurred over the past 40 years”.³⁴ That is not true. It is nothing more than a rhetorical device to make Bangladesh’s case appear unappealing by portraying it as something it is not. As evidenced by the Parties’ agreement concerning the general principles that govern maritime delimitation,³⁵ Bangladesh not only accepts, it embraces the developments of the last 40 years. The difference between the Parties is over how the agreed general principles apply in the context of this particular case. Myanmar interprets recent developments to mean that the Tribunal is compelled to delimit based on equidistance. Bangladesh, to the contrary, believes that acceptance of everything that has come before means recognizing that Articles 74 and 83 do not make equidistance mandatory – especially in a case like this where it produces a plainly inequitable result. Under the law today, as before, the Tribunal retains a significant margin of appreciation to fashion an equitable solution in light of the particulars of the case before it.

3.27 If either of the Parties is trapped in the past, it is Myanmar. Article 6 of the 1958 Convention on the Continental Shelf³⁶ gave equidistance a role more akin to the one My-

32 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3 (hereinafter “*North Sea Cases*”), at para. 85.

33 *Tunisia/Libya* at para. 109.

34 CMM at para. 5.12.

35 RB at para. 3.17.

36 Convention on the Continental Shelf, 499 UNTS 311 (29 April 1958), entered into force 10 June 1964.

anmar seeks to ascribe to it under Articles 74 and 83 of the 1982 Convention. But as Bangladesh previously pointed out³⁷ – and Myanmar has expressly agreed³⁸ – the idea of giving equidistance such a central role was specifically rejected in the negotiations leading to the adoption of UNCLOS.

3.28 Myanmar’s misinterpretation of the actual state of the law is typified by its citation to the ICJ’s Judgment in *Nicaragua v. Honduras* for the ostensible proposition that “equidistance remains the general rule”.³⁹ Although the language quoted does indeed appear in the Court’s Judgment, it does *not* concern the delimitation of the continental shelf/EEZ, as Myanmar mistakenly suggests. Rather, the Court’s statement relates to the delimitation of the territorial sea, a matter governed by Article 15 of the 1982 Convention. And of course, unlike Article 74 and 83, Article 15 expressly incorporates equidistance, making it the general rule absent special circumstances. Myanmar attempts to read into Articles 74 and 83 the language of Article 15, which is simply not there.

3.29 To be sure, the equidistance method has, even in the continental shelf/EEZ, attained a certain prominence because it is a geometrical construct that can be “employed in almost all circumstances” by any competent cartographer.⁴⁰ Myanmar calls it “a purely technical operation” of “a purely technical character”.⁴¹ Supposedly, this gives it the advantage of being “objective”.⁴²

3.30 There is certainly something enticing about a methodology that can be described as objective. But, depending on the circumstances, the objectivity of equidistance can be more apparent than real. In fact, the equidistance method offers considerable opportunity for subjective manipulation. Since an equidistance line is by definition controlled by basepoints, litigating States have an obvious incentive to choose basepoints that best advance their case.⁴³ Myanmar itself effectively admits this when it concedes that what it labels a “purely technical operation” nonetheless “necessitat[es] *the choice* of appropriate basepoints”.⁴⁴

37 MB at para. 6.15.

38 CMM at para. 5.15.

39 *Ibid.* at para. 5.38 (quoting *Nicaragua v. Honduras* at para. 281).

40 *North Sea Cases* at para. 22.

41 CMM at paras. 5.76 and 5.81.

42 *Ibid.* at para. 5.153.

43 RB at para 2.98-2.100.

44 CMM at para. 5.76 (emphasis added).

3.31 The equidistance line Myanmar offers for delimitating the EEZ and continental shelf within 200 M is an example of such basepoint manipulation. Myanmar's equidistance line in this area discards Bangladesh's basepoints on St. Martin's Island that Myanmar historically recognized in prior negotiations with Bangladesh, and fixes in their place a new one along Bangladesh's continental coast never previously identified. By this subjective and self-serving denial and attribution of basepoints for Bangladesh, Myanmar secures for itself an equidistance line that ignores St. Martin's Island altogether – despite the fact that it is a significant coastal island with a substantial population and economic life – in order to deprive this major geographical feature of any influence over the course of the proffered delimitation line. To be sure, once the basepoints are selected, the drawing of an equidistance line may be reduced to a geometrical exercise. But Myanmar itself has demonstrated the subjectivity and arbitrariness underlying the methodology and corrupting the result.

3.32 Thus, equidistance is neither the mandatory rule of law nor the purely objective construct Myanmar makes it out to be. To be applied in a given case, equidistance must be shown to lead to an equitable solution. If it does not, recourse to another delimitation method is necessary. Here, equidistance does not lead to an equitable solution. This is further discussed in the next section.

II. The Equidistance Method Does Not Lead to an Equitable Result in This Case

3.33 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.⁴⁵ The Counter-Memorial argues that Bangladesh did not do this.⁴⁶ It is wrong. At paragraph 6.29 of its Memorial, “in accordance with the jurisprudence”⁴⁷, Bangladesh presented the equidistance line giving equal weight to all features (which generally follows an azimuth of approximately 243°) that Myanmar had historically claimed in negotiations between the two Parties. Bangladesh then showed the existence of relevant circumstances making that equidistance line inequitable.⁴⁸

3.34 The Counter-Memorial abandons Myanmar's historical equidistance line and claims instead an equidistance line drawn giving no effect to Bangladesh's St. Martin's Island. This new equidistance line generally follows an azimuth of some 230°. Although Myanmar's new line is marginally less disadvantageous to Bangladesh than the old line

⁴⁵ *Ibid.* at paras. 5.30-5.31; MB at para. 6.18.

⁴⁶ *Ibid.* at para. 1.25.

⁴⁷ MB at para. 6.29.

⁴⁸ *Ibid.* at paras. 6.30-6.55.

in the areas farthest from shore, it is materially *less* favourable to Bangladesh in the areas closest to its coast. Unlike the equidistance line Myanmar had historically claimed, its new line does not start from Point 7 of the territorial sea boundary 12 M south-southeast of St. Martin's Island as agreed in 1974 but rather from a point significantly to the northwest, directly in front of St. Martin's Island. As compared to Myanmar's historical equidistance line, it slices off a significant area of maritime space that Myanmar had at all previous times acknowledged as appertaining to Bangladesh. This is portrayed in **Figure R3.1** (in Volume II only).

3.35 For this reason, and the others discussed below, Myanmar's new equidistance line is every bit as inequitable as the old one. It therefore does not constitute an equitable solution.

A. The Concavity in the Bay of Bengal

3.36 Myanmar's current version of an equidistance line is depicted together with India's most recently claimed equidistance line⁴⁹ on **Figure R3.2** (following page 62). Due to the effect of the coastal concavity in which Bangladesh sits, the two lines run together and form a rapidly tapering wedge that truncates Bangladesh's maritime entitlement well before it reaches its 200 M limit. Bangladesh remains, in a word, cut off – and badly so. The central problem at the heart of this case remains unabated.

3.37 The Counter-Memorial does not deny that Bangladesh is cut off or that the cut-off it suffers is a function of its location at the apex of the Bay of Bengal concavity. Instead, Myanmar deploys an array of legal and factual arguments to argue that it does not matter because this cut-off is not inequitable. None of Myanmar's arguments fairly meet the substance of the issue.

49 While conducting routine patrols in the Bay of Bengal in September 2010, a number of Bangladesh naval vessels, including the survey ship BNS Anushandhan – were contacted by Maritime Patrol Aircraft of the Indian Navy. The Indian aircraft warned the Bangladesh naval vessels to steer clear along the following coordinates:

Lat 21 Deg 38 Min N - Long 089 Deg 10 Min E;
 Lat 20 Deg 00 Min N - Long 089 Deg 55 Min E;
 Lat 19 Deg 00 Min N - Long 090 Deg 04 Min E; and
 Lat 17 Deg 37 Min N - Long 089 Deg 36 Min E.

Bangladesh protested these actions by issuing an aide memoire dated 10 October 2010. To date it has received no response from India. See *Aide Memoire* from the Government of Bangladesh to the Government of India (10 October 2010). RB, Vol. III, Annex R2.

3.38 Myanmar contends, for instance, that “concavity does not as such result in an inequitable application of equidistance.”⁵⁰ Myanmar appears to be saying, in other words, that just because a State’s coast may be concave, that does not mean equidistance-based maritime boundaries will necessarily be prejudicial to it. Part of this argument is Myanmar’s contention that not only Bangladesh’s coast is concave but India’s and Myanmar’s are too. For example, the Counter-Memorial states:

[I]t is not only the Applicant’s coast in the north of the Bay which is concave in character. The entire western and northern part of the Bay is marked by an important concavity (see sketch-map No. 2.2 at page 19). In the west, India’s coast is concave: it starts in the south near Point Calimere and continues in a south-north direction up to the delta of the Krishna River; it then turns and continues in a southwest-northeast direction and finally ends in a west-east direction joining the Bengal delta. The concave character of the Indian coast is further marked by the island of Sri Lanka in the southern part of the Bay of Bengal. Myanmar’s coast is also concave.⁵¹

3.39 Myanmar’s observations may be true as a general matter but they are entirely beside the point here. Bangladesh’s position is not the one Myanmar depicts. Bangladesh does *not* argue that concavity *ipso facto* makes equidistance inequitable. Bangladesh agrees that there are concave coastlines, including in the Bay of Bengal, that do not cause prejudice to the coastal State. It is not a coastal concavity *alone* that causes inequity. The inequity, in the form of a dramatic cut-off effect, is produced by a concave coastline that is framed by land boundaries *on both sides of and within the concavity*. That is the type of concavity in which Bangladesh, but no other regional State, is situated. In fact, there is no more drastic concavity-induced cut-off anywhere in the world.

3.40 In the Bay of Bengal, India, for example, would be hard pressed to claim that the concavity in its coast in the area of Nizampatnam Bay renders equidistance inequitable to it. The location of that concavity has no effect on any of its maritime boundaries. Bangladesh’s situation is completely different. It is not only located at the apex of the concavity formed by the Bay of Bengal’s northern coast, it is “sandwiched” between Myanmar and India with which it shares land boundaries on either side and within the same concavity. It is the combined effect of these geographical facts that is the source of the inequity in this case.

3.41 The arbitral tribunal in the *Guinea/Guinea-Bissau* case noted exactly this problem with equidistance in its Award. It observed that when:

50 CMM at p. 146 (argument heading preceding para. 5.121 – initial caps modified).

51 *Ibid.* at para. 2.3.



Figure R3.2

there are three adjacent States along a concave coastline, the equidistance method has the other drawback of resulting in *the middle country being enveloped* by the other two and thus prevented from extending its maritime territory as far seaward as international law permits.⁵²

3.42 The Federal Republic of Germany and the Republic of Guinea were in precisely the same predicament as Bangladesh in the *North Sea* and *Guinea/Guinea-Bissau* cases, respectively. And in both cases, equidistance was rejected as a method of delimitation. In the *North Sea Cases* – which it must be remembered were decided against the backdrop of the 1958 Continental Shelf Convention which expressly gave equidistance a predominant role – the ICJ decided “equity excludes the use of the equidistance method in the present instance”.⁵³ Similarly, in *Guinea/Guinea-Bissau*, the arbitral tribunal rejected equidistance in favour of the angle-bisector method because it did “not have the drawbacks of the line of equidistance”.⁵⁴

3.43 Confronted with this clear authority, Myanmar attempts to argue that the *North Sea Cases* “are not at all – and certainly not any more – the leading authority for the settlement of maritime delimitation disputes”.⁵⁵ With respect to the *Guinea/Guinea-Bissau* case, it maintains a deliberate, if glaring, silence (about which Bangladesh will say more shortly).

3.44 Myanmar is plainly wrong in claiming that the Judgment in the *North Sea Cases* is no longer good law. The case remains a landmark in the maritime boundary delimitation jurisprudence. If proof is needed, it can be found in the fact that the 1969 Judgment has been cited in literally every single maritime boundary decision since – a total of 15 – including the ICJ’s most recent decision in 2009 in the *Romania v. Ukraine* case.⁵⁶ In fact, no other case has been cited nearly as often in the jurisprudence. A detailed review shows that the *North Sea* cases have been cited a total of 128 times in the case law, an average of 8.5 times per case.

3.45 Moreover, the now-dominant “equitable principles/relevant circumstances” approach followed in the modern jurisprudence is drawn directly from the *dispositif* of the Court’s 1969 judgment, paragraph (C)(1) of which provides that “delimitation is to be ef-

52 *Guinea/Guinea-Bissau* at para. 104 (emphasis added).

53 *North Sea Cases* at para. 90.

54 *Guinea/Guinea-Bissau* at para. 107.

55 CMM at para. 5.126.

56 *Romania v. Ukraine* at paras. 77, 99, 111, 155, and 163.

fectured by agreement in accordance with equitable principles, and taking account of all the relevant circumstances⁵⁷

3.46 The ICJ's judgment in the *North Sea* cases featured prominently in the negotiations leading to the adoption of the 1982 Convention. The *travaux* confirm that the Court's Judgment was a major inspiration for Articles 74 and 83.⁵⁸ For example, at the very first session of the Second Committee, which was responsible, *inter alia*, for drafting Parts V and VI of the 1982 Convention, Ireland proposed a draft article on the delimitation of the continental shelf that enshrined equitable principles as the relevant rule of law. An explanatory note attached to the Irish proposal referred to the *North Sea Cases* in the following manner:

In formulating the draft, special regard has been had to the principles laid down in the *North Sea Continental Shelf* case where the International Court of Justice held that the rights of a coastal State over the continental shelf arose by virtue of its sovereignty over the land and that the primary rule of international law was that delimitation should be effected by agreement in accordance with equitable principles.⁵⁹

3.47 Other States invoked the principles set forth in the case in a similar manner.⁶⁰ Commenting on the final versions of Articles 74 and 83 at the Signing Session for the 1982 Convention, Ireland observed that:

Finally... the vast majority of the interested delegations... endorsed the provision which now appears in the Convention. This provides that the delimitation shall be effected in the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice. We are satisfied that the *relevant principles of international law thus referred to are as identified by the International Court of Justice in its decision on the North Sea Cases in 1969* and as confirmed by subsequent judicial and arbitral decisions.⁶¹

57 *North Sea Cases* at para. 101.

58 See, e.g., Myron H. Nordquist *et al.*, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II. (2003) (hereinafter "*Virginia Commentary*"), at pp. 953 *et seq.* RB, Vol. III, Annex R27.

59 *Ibid.* at pp. 958-959.

60 See Third United Nations Conference on the Law of the Sea, *Summary records of plenary meetings, 36th meeting*, U.N. Doc. A/CONF.62/SR.36 (10 July 1974), at para. 2. RB, Vol. III, Annex R6. See also Third United Nations Conference on the Law of the Sea, *Summary records of plenary meetings, 37th meeting*, U.N. Doc. A/CONF.62/SR.37 (11 July 1974), at para. 18. RB, Vol. III, Annex R7.

61 Third United Nations Conference on the Law of the Sea, *Verbatim records of plenary meetings, 186th meeting*, U.N. Doc. A/CONF.62/PV.186 (6 December 1982), at paras. 9-10. RB, Vol. III, Annex R14.

3.48 Myanmar attempts to support its argument about the ostensibly outdated nature of the *North Sea Cases* by citing to the ICJ's decision in *Cameroon v. Nigeria*. According to the Counter-Memorial, the Court in that case "rather expeditiously" came to the conclusion that "concavity did not represent a circumstance which would justify the adjustment of the equidistance line".⁶² Myanmar is mistaken. The Court's decision not only does not support Myanmar's argument, it refutes it.

3.49 Cameroon argued – as Myanmar says – that "the concavity in the Gulf of Guinea in general, and of Cameroon's coastline in particular, creates a virtual enclavement of Cameroon, which constitutes a special circumstance to be taken into account in the delimitation process".⁶³ The Court did indeed reject this argument but not, as Myanmar says, because "concavity did not represent a circumstance" warranting a departure from equidistance. Rather, the Court rejected the argument because the concavity Cameroon invoked did not lie within the area to be delimited in that case.⁶⁴ Due to the presence of Bioko Island (a possession of Equatorial Guinea, a non-party third-State) less than 20 M in front of Cameroon's coast, the Court considered itself constrained to effect the bilateral delimitation between Cameroon and Nigeria only along a tiny segment of the boundary. Within this small area, "the sectors of coastline relevant to the present delimitation exhibit no particular concavity".⁶⁵

3.50 Contrary to Myanmar's mistaken representations, the ICJ actually affirmed the potential relevance of coastal concavities in *Cameroon v. Nigeria*. It stated:

The Court does not deny that the concavity of the coastline may be a circumstance relevant to delimitation, as it was held to be by the Court in the *North Sea Continental Shelf* cases and as was also so held by the Arbitral Tribunal in the case concerning the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, decisions on which Cameroon relies. Nevertheless the Court stresses that this can only be the case when such concavity lies within the area to be delimited.⁶⁶

3.51 In the present case, there is no question that the Bay of Bengal concavity in which Bangladesh is situated "lies within the area to be delimited". It is therefore very much a circumstance relevant to the delimitation. The most pertinent cases in the jurisprudence are and remain the *North Sea* and *Guinea/Guinea-Bissau* cases. Indeed, the Court in *Cam-*

62 CMM at para. 5.122.

63 *Cameroon v. Nigeria*. at para. 296 (cited in CMM at para. 5.122).

64 *Ibid.* at para. 297.

65 *Ibid.* at para. 297.

66 *Ibid.* at para. 297.

eroon v. Nigeria cited both cases approvingly in the portion of its Judgment quoted directly above.

3.52 Among the more remarkable omissions in Myanmar's otherwise ample Counter-Memorial is its failure to mention, let alone discuss, the *Guinea/Guinea-Bissau* case and its implications for these proceedings.⁶⁷ Such conspicuous silence can only have been the result of a conscious choice. By saying nothing, Myanmar can only be understood to admit that there is nothing it can say to diminish the relevance of that case. This is understandable. The ICJ recently affirmed the enduring vitality of the case in its 2007 decision in *Nicaragua v. Honduras*, in which it cited *Guinea/Guinea-Bissau* at several key passages of its decision.⁶⁸ The case was also cited favourably in the Court's most recent maritime delimitation judgment rendered in 2009 in *Romania v. Ukraine*.⁶⁹

3.53 The Tribunal will recall that the arbitral tribunal rejected equidistance as a methodology because of the cut-off of Guinea's maritime entitlement resulting from the concave configuration of the West African coast in the region. The arbitral tribunal stated:

When in fact – as is the case here, if Sierra Leone is taken into consideration – there are three adjacent States along a concave coastline, the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits. In the present case, this is what would happen to Guinea, which is situated between Guinea-Bissau and Sierra Leone. Both equidistance lines envisioned 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.⁷⁰

3.54 The *Guinea/Guinea-Bissau* case stands in stark contradiction of the contentions central to Myanmar's argument. *First*, it disproves Myanmar's assertion that "concavity [does] not represent a circumstance which would justify the adjustment of the equidistance line".⁷¹ *Second*, it belies Myanmar's statement that it is only when equidistance is "not

67 Reference to the case can be found only in a direct quotation (at para. 5.146) of the ICJ's judgment in *Romania v. Ukraine* (at paras. 210-211) and in two footnotes (nos. 304 and 455, appearing on pp. 90 and 142, respectively).

68 See *Nicaragua v. Honduras* at paras. 280, 288, and 311.

69 *Romania v. Ukraine* at para. 211.

70 *Guinea/Guinea-Bissau* at para. 104.

71 CMM at para. 5.122.

technically feasible that another method will be resorted to.”⁷² *Third*, it refutes Myanmar’s contention that equity has no role in the selection of delimitation methods.⁷³

3.55 Rather than take aim at the *Guinea/Guinea-Bissau* case, Myanmar chooses to concentrate its fire on the *North Sea Cases*. In addition to its meritless argument about the Judgment no longer representing good law,⁷⁴ the Counter-Memorial argues that it is irrelevant in any event because Bangladesh “is not in the same situation as Germany in 1969.”⁷⁵ As grounds for this statement, Myanmar invokes the alleged fact that its own relevant coast is supposedly twice as long as that of Bangladesh’s and therefore, unlike Germany vis-à-vis Denmark and the Netherlands, Bangladesh has not been given “broadly equal treatment by nature.”⁷⁶ This attempt to distinguish the *North Sea* cases fails for several reasons.

3.56 *First*, it is incorrect. As discussed in detail in Section V below, the relevant coasts of Bangladesh and Myanmar are in fact closely comparable. The two States have thus been given “broadly equal treatment by nature” in all material respects.

3.57 *Second*, even accepting Myanmar’s erroneous characterization of the coastal geography, the alleged disparity in relevant coastal length it cites would still not render the severe cut-off of Bangladesh’s maritime projection equitable. In suggesting that such a dramatic truncation of Bangladesh’s maritime space is acceptable, the Counter-Memorial states: “Relevant legal consequences must be drawn from that decisive geographical difference.”⁷⁷ In other words, because of its ostensibly shorter relevant coast, Bangladesh deserves the sour fate to which equidistance would consign it. That cannot be right. Even accepting the fiction that it exists (*quod non*), a 2:1 disparity in relevant coastal length would hardly constitute an excuse for preventing Bangladesh from reaching any part of its 200 M limit. Even if Myanmar were correct (which it is not), the lengths of the two coasts would still be well within the same order of magnitude. A solution that would permit such an extreme disparity whereby the larger State enjoyed unfettered access to its 200 M limit at the same time that the smaller State was “prevented from extending its maritime territory as far seaward as international law permits”⁷⁸ would self-evidently not be equitable.

72 *Ibid.* at para. 5.26.

73 *Ibid.* at para. 5.34.

74 See RB at paras. 3.43-3.44.

75 CMM at para. 5.127.

76 *Ibid.* at para. 5.129 (citing *North Sea Cases* at para. 91).

77 *Ibid.* at para. 5.133.

78 *Guinea/Guinea-Bissau* at para. 104.

3.58 The Counter-Memorial attempts to enlist Judge Tanaka's dissenting opinion in the *North Sea Cases* to support an argument that "situations where equidistance produces ... 'cut-off effects' are not rare and are not considered as preventing the achievement of an equitable result".⁷⁹ But, of course, the fact that he was in dissent undermines the force of whatever Judge Tanaka may have written. Moreover, Judge Tanaka's words that Myanmar cites go to a very different point. Judge Tanaka was simply stating that sometimes States with very large landmasses have very small coastlines.⁸⁰ The Democratic Republic of Congo (cited by Judge Tanaka) is a paradigmatic example. Bangladesh, of course, accepts that the total size of its (and Myanmar's) landmass is irrelevant for maritime delimitation purposes.⁸¹ That is not the point. The point is that whatever the comparison with Myanmar may be, Bangladesh is a significant coastal State that is equitably entitled to significant maritime rights.

3.59 Bangladesh's maritime frontage on the Bay of Bengal (measured point-to-point between land boundary termini) is more than 70% larger than Germany's frontage on the North Sea (350 km vs. 200 km). In fact, there is *no* State anywhere in the world with a longer coast facing on to the high seas that equidistance would prevent from reaching any portion of its 200 M limit. The cut-off that Myanmar seeks to impose on Bangladesh is, in a phrase, the most dramatic cut-off in the world. In Bangladesh's view, the inequity of that situation speaks for itself.

3.60 As mentioned earlier, Myanmar seeks to downplay this inequity by turning to the rather over-used argument that "international courts and tribunals cannot refashion nature."⁸² According to Myanmar, concavity "is 'a given' from a geographical point of view";⁸³ it is therefore not for the Tribunal to "correct" it by departing from equidistance. More than a little ironically, the leading authority invoked by Myanmar for this proposition is the *North Sea Cases*⁸⁴, in which the ICJ specifically rejected the equidistance method because of the concave nature of the Germany's coast. The Court made clear what it meant by "completely refashioning nature". It stated, for example:

79 CMM at para. 5.135.

80 *North Sea Cases* at p. 189 (Tanaka J., dissenting).

81 As the ICJ observed in *Libya v. Malta*, "[t]he capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect" (at para. 49).

82 CMM at p. 145 (argument heading preceding para. 5.116 – initial caps modified).

83 *Ibid.* at para. 5.120.

84 *Ibid.* at para. 5.116 (citing *Tunisia/Libya* at para. 79 (citing, in turn, *North Sea Cases* at para. 91).

equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline.⁸⁵

By the same token, it also made clear that equitable considerations *do* require “abat-ing the effects of an incidental special feature from which an unjustifiable difference of treatment could result”.⁸⁶ On this basis, it ruled that equity required an abatement of the cut-off resulting from Germany’s concave coastline. Quite obviously, the Court did not consider such a result as “refashioning nature”.

3.61 If Myanmar’s argument were accepted, it would mean that no court or tribunal could ever depart from strict equidistance because any such departure necessarily involves adjusting the weight to be given different geographical features, all of which are “a given” in precisely the sense Myanmar says. Delimitation would be turned from a mindful exercise aimed at an equitable solution to a rote application of equidistance. That is not how Articles 74 or 83 were intended to work. They make the aim of the delimitation process an “equitable solution”. A significant margin for appreciation is stitched into the fabric of UNCLOS. Perhaps the easiest demonstration of this truth is the fact that of 16 international maritime boundary delimitation cases to date, only two (*Guyana v. Suriname* and *Cameroon v. Nigeria*) have resulted in strict equidistance lines in the continental shelf and EEZ,⁸⁷ and in the latter case the delimitation was limited to an area within 17 M of the parties’ coasts. Neither involved geographical circumstances even remotely comparable to this case. In the only two cases with geographical circumstances similar to this case,⁸⁸ equidistance was specifically rejected as the applicable delimitation methodology.

3.62 Myanmar argues that Bangladesh is asking the Tribunal to refashion nature in order to make equal what nature has made unequal.⁸⁹ That is not the case. *First*, as discussed above, nature has not made Myanmar and Bangladesh unequal. *Second*, it is not equality of treatment that Bangladesh seeks. In accordance with the jurisprudence, it merely seeks the abatement of “the effects of an incidental special feature from which an unjustifiable difference of treatment could result”.⁹⁰ The result for which Bangladesh advocates – the 215° line – does not lead to a result that is “equal” in any meaningful sense. It gives Ban-

85 *North Sea Cases* at para. 91.

86 *Ibid.* at para. 91.

87 MB at para. 6.27.

88 Namely, *Gulf of Maine* and *Guinea/Guinea-Bissau*.

89 CMM at paras. 5.132, 5.134.

90 *North Sea Cases* at para. 91.

gladesh only a very modest outlet to its 200 M limit that is several times smaller than its 190 M coastal frontage (as measured point-to-point between land boundary termini). It would still be left with a tapering wedge of maritime space that reflects the enduring effects of the Bay of Bengal concavity. Myanmar would retain the overwhelming majority both of its access to its own 200 M limit and its maritime space.

3.63 The modest nature of Bangladesh's claim can be shown graphically. **Figure R3.3A** (following this page) is a regional map of South Asia showing the maritime space appurtenant to Myanmar (in red), India (in blue), Sri Lanka (in violet) and Bangladesh (in green). Bangladesh's maritime space reflects the combined effects of Myanmar's equidistance line with India's claim line. **Figure R3.3B** is identical in all respects except only that Bangladesh's maritime space has been adjusted to reflect Bangladesh's proposed 215° degree line.

3.64 The difference is scarcely noticeable at this scale. Bangladesh's maritime area continues to narrow dramatically from north to south as a result of the effects of the concavity; Myanmar's is barely diminished. There is therefore no question of "completely refashioning nature"⁹¹ That said, the difference, although *de minimis* to Myanmar, is material to Bangladesh. It is no longer zone-locked. It now has access not only to its 200 M limit but also to its entitlement in the outer continental shelf (about which see Section II(B) below).

3.65 Among the virtues of this map is the object lesson it provides on the differing effects of concave vs. convex coasts. In contrast to the Bangladesh coast, the coastline of Sri Lanka facing east and south in the area of the Bay of Bengal is convex in shape. Measured by means of straight-line segments, Sri Lanka's coastal front measures 485 km, just 15% longer than Bangladesh's 421 km coastal front as measured in the same way.⁹² Yet, as a result of "the effects of an incidental special feature", "an unjustifiable difference of treatment could result"⁹³. Because of its convex characteristics, Sri Lanka's 485 km coast opens to five times the maritime space (all within 200 M) as Bangladesh's 421 km coast using Myanmar's equidistance line.⁹⁴ The differences are depicted graphically on **Figure R3.4** (in Volume II only). Even using Bangladesh's proposed 215° line, the difference between Bangladesh's and Sri Lanka's maritime spaces is still huge: 3.75 times.⁹⁵

91 *Ibid.* at para. 91.

92 MB at paras. 2.7, 6.30.

93 See *North Sea Cases* at para. 91.

94 344,302 sq km for Sri Lanka and 69,112 sq km for Bangladesh.

95 344,302 sq km for Sri Lanka and 91,870 sq km for Bangladesh.

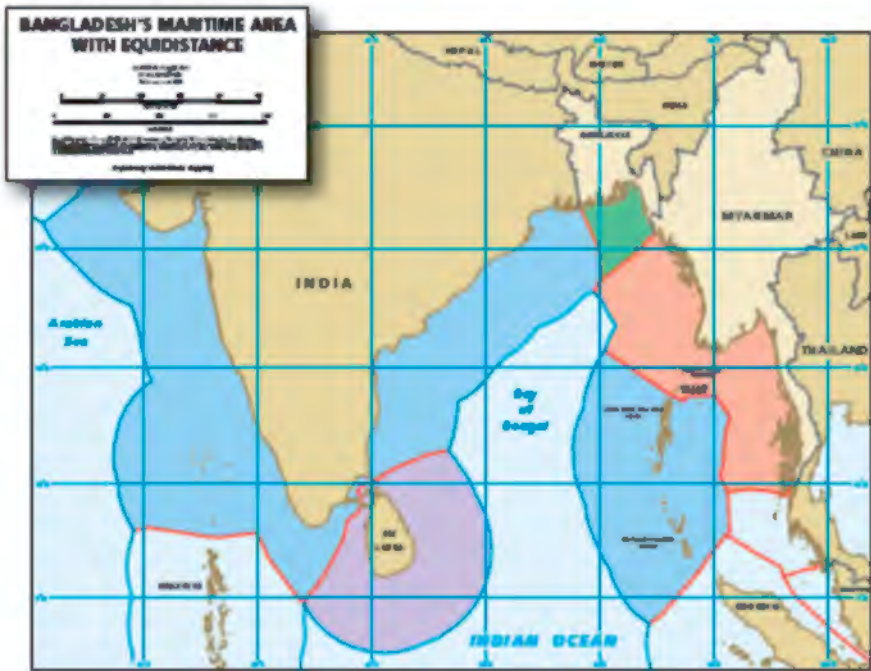


Figure R3.3A

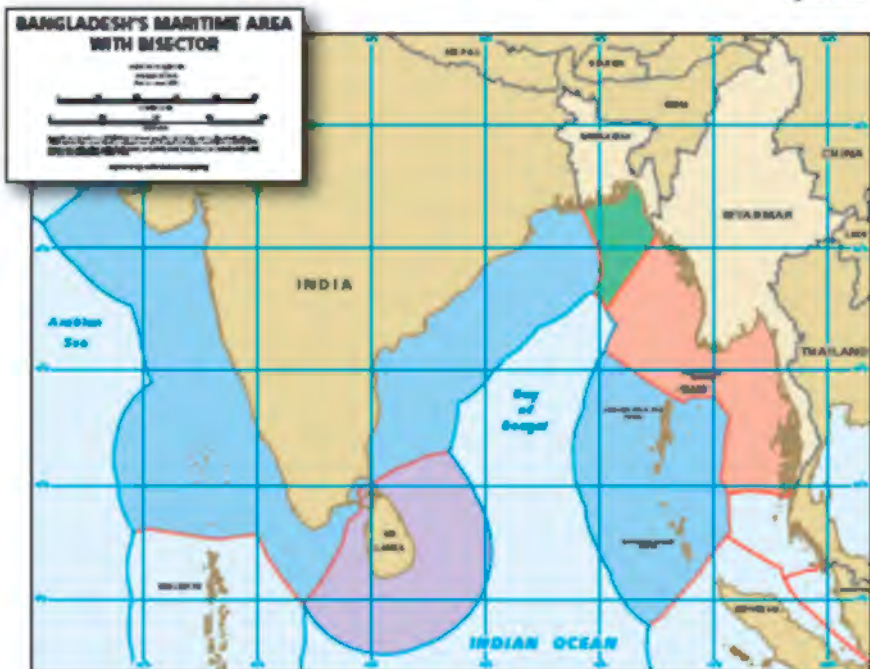


Figure R3.3B

3.66 Bangladesh thus does not seek to “refashion” or “ignore” nature, as Myanmar contends.⁹⁶ Rather, in accordance with the jurisprudence, it seeks only an abatement of the distorting effects of the concavity in which it sits.

3.67 Myanmar invokes State practise in the area. But this, if anything, supports Bangladesh. According to the Counter-Memorial: “Existing maritime boundary agreements in the immediate vicinity of the Bay of Bengal or in the Bay itself also show that equidistance is resorted to even if the States’ relevant coasts are concave”.⁹⁷ However, this invocation of State practise fails to meet the substance of the problem. In fact, the State practise Myanmar cites actually contradicts its premise.

3.68 None of the delimitation treaties Myanmar invokes relates to a situation that is even remotely comparable to this case. Of the nine agreements Myanmar cites,⁹⁸ none involves a State located entirely within a concavity and surrounded by neighbouring States on both sides. In fact, only one of Myanmar’s examples (Myanmar-India) relates even in part to a coast that can justly be described as concave: Myanmar’s Gulf of Martaban. And most significantly, the Myanmar-India delimitation line in precisely that area where Myanmar says there is a concavity bears no similarity whatsoever to an equidistance line. Indeed, it represents a sizable departure from equidistance. The contrast between the agreed line and an equidistance line is depicted on **Figure R3.5** (in Volume II only). The difference between the two lines – which represents a departure from equidistance in favour of Myanmar – is sizable; it measures 25,155 sq km. (By way of comparison, the area lying between Myanmar’s proposed equidistance line and Bangladesh’s 215° line is smaller: 22,875 sq km.)

3.69 Myanmar’s attempt to invoke regional State practise thus adds nothing to its case.

3.70 Myanmar also argues that it is equitable to prevent Bangladesh’s considerable maritime frontage from reaching the 200 M limit because there is no right for States “to have broadly comparable rights to extend their maritime jurisdiction as far seaward as international law permits”.⁹⁹ But as just discussed, Bangladesh is not seeking a right to extend its maritime jurisdiction seaward in a manner that is “broadly comparable” with Myanmar. Indeed, it is not seeking to extend its maritime territory seaward in a manner that is even remotely comparable to Myanmar. Bangladesh’s proposed 215° line does not come close to

96 CMM at para. 5.134.

97 *Ibid.* at para. 5.123.

98 *Ibid.* at paras. 2.36-2.37.

99 *Ibid.* at para. 5.137.

equalizing the situation but instead gives it only a modest outlet to the 200 M limit that is significantly smaller than its coastal frontage.

3.71 Bangladesh 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. Moreover, the jurisprudence and State practise support Bangladesh’s views.

3.72 In his writings, Charney has observed that international courts and tribunals have sought “to delimit maritime boundaries so that all disputants are allotted some access to the areas approaching the maximum distance from the coast permitted for each one”.¹⁰⁰ Perhaps the most obvious example is the *Guinea/Guinea-Bissau* case. There, the tribunal rejected equidistance precisely because it “prevented [Guinea] from extending its maritime territory as far seaward as international law permits”.¹⁰¹ The boundary adopted by the arbitral tribunal remedied this problem and is depicted in **Figure R3.6** (in Volume II only).

3.73 Similarly, in *St. Pierre & Miquelon*, the Court of Arbitration gave the two small French islands which are otherwise completely surrounded by Canadian land and maritime territory a 200 M corridor into the Atlantic Ocean equal in width to the maritime front of the islands. The boundary adopted by the Court of Arbitration is depicted on **Figure R3.7** (in Volume II only).

3.74 Charney’s principle of ‘maximum reach’ has also been recognized in State practise from Africa, Europe, and the Caribbean. The 1975 delimitation agreement between the West African States of Senegal and The Gambia is a prime example. The Gambia’s relatively narrow, 61 km (32 M) coastal front is situated within a mild concavity in which it is completely surrounded by Senegal. As described in *International Maritime Boundaries*: “If the equidistant line were used, the coastal configuration of the two adjacent states would have dictated a delimitation that was bound to cut off the maritime area of The Gambia

100 Jonathan I. Charney, “Progress in International Maritime Boundary Delimitation Law,” *American Journal of International Law*, Vol. 88, No. 227 (1994) (hereinafter “Charney (1994)”), at pp. 247 et seq. RB, Vol. III, Annex R22. In support of this view, Charney cites the following cases: *North Sea Cases* at para. 81; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Judgment, I.C.J. Reports 1993, p. 351 (hereinafter “*Gulf of Fonseca*”), at paras. 415-420; and *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon)*, Decision, 10 June 1992, reprinted in 31 ILM 1149 (hereinafter “*St. Pierre & Miquelon*”), at paras. 66-74.

101 *Guinea/Guinea-Bissau* at para. 104 (emphasis added).

close to shore”¹⁰². In fact, the two equidistance lines ran together approximately 130 M in front of The Gambia’s coast. To avoid this result, “[t]he parties deliberately chose to use [an alternative] delimitation method instead of the equidistance method”¹⁰³. In particular, they agreed to accord The Gambia a 32 M wide maritime corridor extending a full 200 M into the Atlantic. The agreed boundaries between Senegal and The Gambia are depicted on **Figure R3.8** (in Volume II only).

3.75 In light of Myanmar’s argument that “[r]elevant legal consequences must be drawn from that decisive geographical difference”¹⁰⁴ (*i.e.*, that because of Myanmar’s allegedly longer relevant coast, it is equitable to cut off Bangladesh), the agreement between Senegal and The Gambia bears special emphasis. As noted, The Gambia’s coastal façade measures just 61 km (32 M). Senegal’s total coast, in contrast, measures some 424 km, seven times greater. Even limiting the Senegal coast to those portions directly facing onto the delimitation, its coast still measures 230 km, nearly four times longer than The Gambia’s. Nevertheless, the parties agreed that equity required according The Gambia a corridor to its 200 M limit virtually equal in width to the breadth of its coastal front.

3.76 France and the Caribbean island of Dominica came to a similar result in their 1987 agreement delimiting the maritime boundaries between the French insular territories of Guadalupe and Martinique, on the one hand, and Dominica, on the other. Because Guadalupe and Martinique are located slightly east of it, Dominica sits in what is for all practical purposes a concavity facing onto the open Atlantic. The consequence is predictable. According to *International Maritime Boundaries*:

The equidistant line would enclose Dominica’s economic zone within a triangle whose seaward extension would lie less than 55 n.m. east of the island. In the *North Sea Continental Shelf* cases, this result was found to have been inequitable...

The Dominica-France Agreement avoided such an inequitable result by directing the Atlantic sector of each boundary line northeastwards in a quasi-parallel formation seaward to points 8 and 9, in order to allow each party to have a full 200-mile jurisdiction in the ocean.¹⁰⁵

The boundary as agreed is depicted on **Figure R3.9** (in Volume II only).

102 J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. I (1996), at p. 850. RB, Vol. III, Annex R23.

103 *Ibid.* at p. 849.

104 CMM at para. 5.133.

105 J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. I (1996), at p. 709. RB, Vol. III, Annex R23.

3.77 Significantly, the France-Dominica treaty expressly invokes the rules and principles embodied in the 1982 Convention.¹⁰⁶ Again according to *International Maritime Boundaries*: “Equity predominated as the basis for the drawing of the line.... In the Atlantic sector, the line had to be guided in such a way as to avoid having Dominica suffer from the same enclosure effect which led the Federal Republic of Germany to the ICJ in the late 1960s.”¹⁰⁷

3.78 Two additional examples can be found in State practise from Europe. The 1984 maritime delimitation agreement between Monaco and France creates a maritime corridor for Monaco that extends 48 M into the Mediterranean to the location of the median line between the European mainland and Corsica. *International Maritime Boundaries* explains:

The very short Monegasque coastline is located in a concavity enclosed by the coasts of France and, to a minor extent, of Italy. After the territorial seas of the parties were enlarged from 3 to 12 n.m., 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 seek the negotiation of the convention [with France] in order to avoid a situation that was regarded also by France as ‘uncomfortable’.¹⁰⁸

The boundary agreed between France and Monaco is depicted on **Figure R3.10** (in Volume II only).

3.79 Unlike the agreements between Senegal and The Gambia, and France and Dominica, this agreement does not accord Monaco access to the 200 M limit. There are two reasons. *First*, in the enclosed setting of the Mediterranean no State anywhere reaches the 200 M limit. *Second*, the large island of Corsica sits opposite Monaco and thus the median line between the two represents the ‘natural’ limit of Monaco’s maritime jurisdiction. In this sense, the France-Monaco agreement, like the others, permits Monaco to extend its maritime jurisdiction as far seaward as international law permits.

3.80 The France-Monaco case represents something of a real-world *reductio ad absurdum*. Monaco’s Mediterranean coast measures barely over three km in length. France’s coast in the immediate vicinity of the delimitation measures approximately 145 km, more

¹⁰⁶ *Ibid.* at p. 707.

¹⁰⁷ *Ibid.* at pp. 711-712.

¹⁰⁸ J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. II (1996), at p. 1584. RB, Vol. III, Annex R24.

than 48 times longer. Nonetheless, the agreement permits Monaco to extend its maritime territory out to the location of the Monaco-Corsica median line.

3.81 Another example from State practise is found in the 1971 agreements between Germany and the Netherlands, and Germany and Denmark, concerning their maritime boundary in the North Sea. Following the ICJ's 1969 Judgment in the *North Sea* cases, the parties proceeded to delimit their continental shelf boundaries by agreement. Those agreements gave Germany access to the mid-sea median line with the United Kingdom. In its comments about the agreements, *International Maritime Boundaries* specifically notes that Germany "succeeded in its contention that its shelf extended to the centre of the North Sea in such a way as to meet that of the UK..."¹⁰⁹ The agreed boundaries are depicted on **Figure R3.11** (in Volume II only).¹¹⁰

3.82 Denmark's agreement to accord Germany access to the median line with the UK is particularly notable because it represented a significant sacrifice for Denmark. Because of the configuration of the eastern littoral of the North Sea, the maritime entitlements of *four* States – Germany, Denmark, and the Netherlands plus Norway – come together in very close proximity near the mid-line with the UK. In 1965, Denmark had already agreed with Norway to delimit their continental shelf boundary by means of an equidistance line to the middle of the North Sea. Due to the location of that line, and the fact that it severely limited Denmark's own access to the mid-sea median line, there was very little room to accommodate Germany's demand for access to the centre of the North Sea. Nonetheless, in the end, Denmark accepted the force of the German argument and agreed to cede to Germany a full one-third of its access to the median line.

3.83 In this case, Myanmar faces no competing concerns. Whatever line is ultimately adopted, it will retain the overwhelming majority of its access to the 200 M limit in the Bay of Bengal. Equitable principles recognized in the jurisprudence, the State practise and the doctrine require that Bangladesh be given access to its own 200 M limit.

B. Bangladesh's Entitlement in the Outer Continental Shelf

3.84 The inequity of the cut-off of Bangladesh from its maritime entitlement that the equidistance method would produce is plain. That inequity is exacerbated by the fact that

109 *Ibid.* at. p. 1805.

110 The inward bend of the Germany-Denmark line was a result of the need "to leave some Danish licensees undisturbed on the Danish side of the line". *Ibid.*, at. p. 1803.

Bangladesh would be denied any access to its undisputable entitlement in the continental shelf beyond 200 M.

3.85 As discussed in Bangladesh's Memorial¹¹¹ and further elaborated in Chapter 4 of this Reply, the seabed and subsoil throughout the Bay of Bengal constitutes a literal extension of the continental landmass of Bangladesh. The same sedimentary processes that have given rise to much of the land territory of Bangladesh have, over geologic time, also blanketed the seabed and subsoil in the Bay in layers of sediment as much as 24 km thick.¹¹² As a result, the material that makes up most of Bangladesh's land territory is precisely the same material that comprises the sea floor from the coast of Bangladesh all the way to a point well south of Sri Lanka.¹¹³ The seabed and subsoil of the Bay of Bengal are, without question, the natural prolongation of Bangladesh.

3.86 Especially considering the fact that the sedimentary processes just described are what enable *any* of the Bay of Bengal's littoral States to claim a continental shelf beyond 200 M, it would constitute an inequity of the most obvious sort to deny Bangladesh – the State that shares the most obvious physical connection to the sea floor – any access to the outer continental shelf.

3.87 The Counter-Memorial's response is dismissive, disingenuous, and inconsistent with other elements of its own argument. Labelling Bangladesh's argument "untenable,"¹¹⁴ Myanmar begins its assault with the assertion that:

Bangladesh does not rely on any relevant case law to support its claim. It limits itself to invoking considerations stemming from "equity" that have no basis in international law.¹¹⁵

Both aspects of this argument are flawed. *First*, the Counter-Memorial's statement that Bangladesh does not cite any case law 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 200M.¹¹⁶ This Tribunal will be the first to do so.

111 MB at para. 2.32 *et seq.*

112 *Ibid.* at para. 2.10.

113 *Ibid.* at para. 2.32.

114 CMM at para. 5.105.

115 *Ibid.* at para. 5.106.

116 MB at para. 6.16.

3.88 The absence of jurisprudence is no impediment to Bangladesh's claim, however. As stated in the Memorial (and not challenged in the Counter-Memorial), there is no fixed, pre-established set of "relevant circumstances" that warrant a departure from equidistance.¹¹⁷ Each case must be judged according to its own circumstances.¹¹⁸ Here, for the reasons articulated, Bangladesh submits that its indisputable entitlement in the continental shelf beyond 200 M constitutes a relevant circumstance not only justifying but necessitating the rejection of Myanmar's equidistance line.

3.89 *Second*, as Bangladesh will show in Chapter 4, the authority for its argument comes directly from the text of UNCLOS. The wording and structure of Article 76 strongly support Bangladesh's claim.

3.90 *Third*, Myanmar's argument fails because it once again suggests that equitable considerations are foreign to the 1982 Convention. They are not. As discussed, equitable considerations lie at the heart of Articles 74 and 83. Of course, equity in this sense cannot be assimilated to generalized conceptions of fairness but is limited to principles that are related to "the ideas which have always underlain the development of the legal régime of the continental shelf in this field."¹¹⁹ In Bangladesh's view, the existence of its natural prolongation throughout the Bay of Bengal and its entitlement to an equitable share of the outer continental shelf could scarcely be more paradigmatic ideas underlying the development of the legal régime of this maritime area.

3.91 Ultimately, Myanmar's main response to Bangladesh's argument on this score is that since equidistance cuts Bangladesh off short of its 200 M limit, there is no need to worry about its entitlement in the continental shelf beyond 200 M. Myanmar asserts:

"equidistance/relevant circumstances" [sic: equitable principles/relevant circumstances] constitutes the basic method for contemporary maritime delimitation, including the continental shelf, within as well as beyond 200 nautical miles, provided that Bangladesh has any entitlement on the latter (a point on which the Tribunal does not have jurisdiction); rights to maritime areas are governed by equidistance, not vice versa.¹²⁰

3.92 These assertions cannot survive even minimal scrutiny. In the first instance, the Counter-Memorial is incorrect when it suggests that there is a settled method for the delimitation of the continental shelf beyond 200 M (that not so coincidentally just happens

117 *Ibid.* at para. 6.26.

118 *Ibid.* at para. 6.26.

119 *North Sea Cases* at para. 85.

120 CMM at para. 5.111.

to be the one Myanmar prefers). No court or tribunal has yet had occasion to delimit a maritime boundary in the outer continental shelf. Myanmar's assertions are thus without foundation.

3.93 Underlying Myanmar's position is its view that "there is no room to introduce some difference of treatment between the continental shelf within and beyond 200 nautical miles".¹²¹ But this too is a statement without foundation. Notably, the only support the Counter-Memorial cites for it is itself.¹²² It is also incorrect. As discussed in the next Chapter of this Reply, there is every reason to view the delimitation of the continental shelf beyond 200 M differently from delimitation within 200 M. Article 76 of the 1982 Convention makes a clear distinction between the two areas. Most fundamentally, the basis of entitlement within and beyond 200 M is different. Within 200 M, entitlement is, by operation of Article 76, paragraph 1, determined purely by reference to distance from the coast. Beyond 200 M, coastal geography is irrelevant to entitlement. In that outer area, a State's entitlement is based on "the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin..." The outer limits of a State's entitlement are determined by the geological and geomorphological factors stated in Article 76, paragraphs 4, 5, 6 and 7. That being the case, it would be wholly inappropriate to rely on a delimitation method that depends solely on features of coastal geography and distance from the coast.

3.94 In addition to its many other failings, Myanmar's argument that rights in the outer continental shelf should be "governed by equidistance" is directly at odds with its own view of how Article 76 works as presented in the Appendix to the Counter-Memorial. In the Appendix, Myanmar argues that, contrary to what Bangladesh showed in the Memorial, Myanmar does have rights in the continental shelf beyond 200 M because it has a "natural prolongation" into the middle of the Bay of Bengal. The reasons Myanmar is mistaken, and in fact has no natural prolongation beyond 200 M into the Bay of Bengal, are presented in Chapter 4 of this Reply. Here, the point is that in arguing that Myanmar has an entitlement in the outer continental shelf based on an alleged natural prolongation beyond 200 M, the Appendix contradicts Myanmar's assertions in Chapter 5 of the Counter-Memorial that rights in the outer continental shelf are governed by equidistance.

3.95 Specifically, in the Appendix, Myanmar argues that the question of "natural prolongation", and thus rights in the outer continental shelf, is governed only by the two formula lines defined in Article 76(4) (*i.e.*, the Hedberg and Gardiner formulae). In Myanmar's

121 *Ibid.* at para. 5.110.

122 *Ibid.* at para. 5.110 (citing CMM at para. 5.3).

view, if a coastal State can show that application of either formula gives it a continental shelf beyond 200 M, it has an outer shelf. The Counter-Memorial states:

The entitlement to a continental shelf beyond 200 nautical miles, i.e., the existence of a prolongation of the coastal State's land territory to the outer edge of the continental margin, must consequently be determined by application of article 76(4), i.e., by the determination of the outer limit of the continental margin through the implementation of the Hedberg [sic] and Gardiner formulae.¹²³

3.96 Assuming that were true (*quod non*¹²⁴), it would necessarily mean that, contrary to Myanmar's basic argument, Bangladesh too has rights in the continental shelf beyond 200 M. There is and can be no dispute that Bangladesh satisfies the test Myanmar sets out. As described in Bangladesh's Memorial and discussed further in Chapter 4, applying the Gardiner 1% sediment thickness formula (limited by the 2,500 metre isobath plus 100 M constraint line), Bangladesh's outer continental shelf extends some 390 M from its coast. Nowhere does Myanmar make any effort to deny these facts. Accordingly, Myanmar's (erroneous) argument in the Appendix that interests in the continental shelf beyond 200 M are determined solely by application of the Article 76(4) formulae defeats its argument in Chapter 5 that Bangladesh's rights in the outer continental shelf are determined – and defeated – by equidistance.

3.97 Interestingly, in connection with stating the truism that “any maritime delimitation has a ‘cut-off effect’ in the sense that it deprives the States concerned of some parts of their claims”,¹²⁵ Myanmar acknowledges that the final delimitation line must allow “the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way”.¹²⁶ Under no conceivable view of the facts, however, does Myanmar's equidistance line produce a “reasonable and mutually balanced” effect on the parties' maritime entitlements. Focusing only on the areas within 200 M, Myanmar's equidistance line truncates Bangladesh's maritime entitlement well short of its natural limit while simultaneously permitting Myanmar to extend its maritime reach out to a full 200 M across a substantial area. The effects are even more egregious in the areas beyond 200 M. Bangladesh receives *no portion whatsoever* of its 99,700 sq km entitlement in the outer continental shelf. In contrast, Myanmar receives all of its purported 144,000

123 *Ibid.* at para. A.21.

124 See RB, Chapter 4, Section IV.

125 CMM at para. 5.140.

126 *Ibid.* at para. 5.139 (citing *Romania v. Ukraine* at para. 201).

sq km entitlement beyond 200 M (subject only to the competing claims of India in a portion of that area).

3.98 Confining Bangladesh to a narrow wedge of maritime space, none of it in the outer continental shelf, is not reasonable, is not balanced, and is not an equitable solution.

III. Other Problems with Myanmar's Equidistance Line

A. The Equidistance Line Is Based On Inappropriately Small Slices of Micro-Geography

3.99 There are still other problems with Myanmar's equidistance line that render it an untenable solution in this case. Among them is the fact that its direction is controlled by a total of just five basepoints on both Parties' coasts, three on Myanmar's side (μ_1 , μ_2 , and μ_3) and only two in Bangladesh (β_1 and β_2),¹²⁷ although Myanmar stops its line before basepoint β_2 actually comes into play. It would be remarkable to base a maritime boundary line, particularly one that in Myanmar's view apports entitlements that reach well beyond 350 M from the coast, on such a small sampling of points.

3.100 The small number of basepoints on both sides is a function of the "concavity within a concavity" that characterizes the Bangladesh coast. As discussed in the Memorial, the essential truth of this case is not only that Bangladesh sits pinched between Myanmar and India at the apex of the concavity formed by the Bay of Bengal's north coast, it is also that Bangladesh's coastline itself is significantly concave.¹²⁸ The vast mouth of the Meghna River cuts deeply into the central portion of the Bangladesh coast.¹²⁹ In Myanmar's own words: "Bangladesh's coast is fashioned by a deep indentation to the north, the mouth of the Meghna River".¹³⁰ The fundamental geographic facts are these: Bangladesh's entire coast is concave and much of that coast forms a secondary concavity within the overall concave coast. Put simply, Bangladesh would be doubly prejudiced by its concavity if its maritime rights were determined by equidistance.

3.101 North of what Myanmar labels basepoint β_1 near the mouth of the Naaf River, Bangladesh's concave coast recedes quickly to the north-northwest and then to the west. Because of this, there is no coast to counteract the effect of Myanmar's basepoints μ_1 , μ_2 , and μ_3 , and thus abate the cut-off from which Bangladesh suffers. Only when Myanmar's equidistance line is 190 M from the mainland coasts of both States would basepoint β_2 be-

127 *Ibid.* at para. 5.99.

128 MB at para. 2.2.

129 *Ibid.* at para. 2.7.

130 CMM at para. 2.16.

gin to deflect Myanmar's equidistance line slightly to the south (an effect which Myanmar does not even bother to show).¹³¹

3.102 Moreover, basepoint β_1 is problematic due to its location just 2.5 M from the land boundary terminus on a low-lying coast that is subject to erosion and accretion. The proximity of basepoint β_1 to the start of Myanmar's proposed line means that small changes in its position would be magnified farther from shore. If, for example, it were moved just 0.5 M to the northwest, the effect would be to move the segment of Myanmar's equidistance line between what it label Points F and G (*see* Sketch Map No. 5.8 on page 139) a full 4 M to the north; that is, *eight times* as much. This "leveraging effect" is less pronounced for Myanmar's basepoints μ_2 and μ_3 because they are considerably further from the land boundary terminus.

3.103 Basepoint β_2 is also problematic for reasons of its own. *First*, it is located at a very considerable distance from basepoint β_1 : approximately 330 km. *Second*, under Myanmar's scenario, it does not really affect the course of the maritime boundary line at all. According to Myanmar, the Tribunal must stop its delimitation short of the area where the interests of India come into play.¹³² Yet, because it is only in the last 10 M of Myanmar's equidistance line that basepoint β_2 exerts its effects, Myanmar's approach would require the Tribunal to stop the delimitation before the influence of that basepoint is felt. This can be seen most obviously in Figure R3.2 (following page 62) where basepoint β_2 not so coincidentally deflects Myanmar's equidistance line to the south at precisely the point it meets India's claim line. In reality then, Myanmar's equidistance proposal is based on just a single basepoint (β_1) along the entirety of the Bangladesh coastline, the one Myanmar has conveniently placed near the land boundary terminus.¹³³

3.104 If all that were not enough, the utility of β_2 as a basepoint is questionable because it is located on Bangladesh's Bengal Delta coast. As discussed in Bangladesh's Memorial, the Bengal Delta coast is among the most unstable anywhere in the world.¹³⁴ The forces of accretion and erosion resulting from massive sediment flows, large storms and, increasingly, climate change-induced sea level rise constantly reshape the low-lying Delta. The location of basepoint β_2 this year might be very different from its location next year. To have one of just two equidistance basepoints located on a coast characterized by a "very

131 *Ibid.* at Sketch-map No. 5.8 (p. 139).

132 *Ibid.* at para. 5.161 and Sketch-map No. 5.11 (p. 169).

133 RB at para. 3.31.

134 MB at para. 2.16.

active morpho-dynamism¹³⁵ further undermines the viability of the equidistance method in this case.

3.105 The situation on the Myanmar side is scarcely more defensible. All three of Myanmar's basepoints are located within just 64 km of the Bangladesh-Myanmar land boundary terminus. As with Bangladesh, the paucity of basepoints on Myanmar's coast is a consequence of the double concavity of Bangladesh's coast. Because of the absence of additional Bangladesh basepoints north of β_1 , there is nothing to counteract the effects of Myanmar's coast between basepoints μ_1 , μ_2 , and μ_3 .

3.106 One consequence of this is that the direction of Myanmar's proposed equidistance line becomes progressively more prejudicial to Bangladesh as it moves further off shore. The first segment of the line is, of course, controlled by basepoints β_1 and μ_1 , and it follows an azimuth of approximately 214° , virtually identical to the direction of Bangladesh's proposed angle bisector (215°). Seaward of Myanmar's Point F where basepoint μ_2 begins to exert its affects, however, the line shifts almost 10° to the northwest to an angle of 223.5° . And then seaward of Myanmar's Point G where basepoint μ_3 comes into play, the line cuts even more sharply across Bangladesh's coastal front at an angle of about 232° .

3.107 This increasingly prejudicial effect can be seen graphically on Myanmar's Sketch-map no. 5.8 on page 139 of the Counter-Memorial (an annotated copy of which is reproduced as **Figure R3.12** (in Volume II only)) where one can see that Myanmar's proposed line bends ever more inward to the detriment of Bangladesh.

3.108 The fact that there are just four basepoints that control the entire course of Myanmar's proposed equidistance line, only one of which is on the Bangladesh coast, underscores the inappropriateness of employing the equidistance method in this case. In Bangladesh's view, there is no serious argument that a maritime boundary delimitation can equitably be based on such tiny bits of microgeography.

B. Myanmar's Equidistance Line Inappropriately Ignores St. Martin's Island

3.109 Myanmar's equidistance line has still other fatal flaws, including the fact that it is drawn so as to ignore Bangladesh's St. Martin's Island (which is distinctly not justified). By airbrushing this significant coastal island off the map, Myanmar has distorted the geographic realities of this case and thus disproved its own contentions about the supposedly "objective" character of the equidistance method.

135 *Nicaragua v. Honduras* at para. 277.

3.110 St. Martin's Island is home to approximately 7,000 people on its 8 sq km, lying just 6.5 M off of Bangladesh's coast. There is a vibrant economy based on tourism, fishing, and agriculture, and there is also a major naval and coast guard base.¹³⁶ Myanmar's argument for ignoring St. Martin's Island in drawing its equidistance line in the continental shelf and EEZ is conspicuously muted. Aside from inapposite references to the case law (discussed below), it limits itself to the assertion that "this island, which is situated in front of the coast of Myanmar, cannot be considered as part of [the] Bangladesh coast".¹³⁷ This contention is both factually incorrect and legally insufficient to warrant ignoring such a significant geographic feature.

3.111 *First*, as a matter of fact, St. Martin's Island is virtually as close to the mainland coast of Bangladesh (6.5 M) as it is to Myanmar (5 M) and lies well within the 12 M limit of the territorial sea as drawn from the Bangladesh mainland. If it can be characterized as "in front of" Myanmar's coast, it can equally be characterized as being in front of the Bangladesh coast. This is not a situation where an island belonging to State A is located far from that State's mainland territory and close to the coast of State B.¹³⁸ As discussed in Chapter 2 concerning the delimitation of the territorial sea, Myanmar cannot even argue seriously that St. Martin's is on the 'wrong side' of the equidistance line.¹³⁹ As discussed below, the case law supports treating such proximate islands as an integral part of the coastal State's coast.¹⁴⁰

3.112 *Second*, in addition to being factually incorrect, Myanmar's assertion about St. Martin's location *vis-à-vis* the Myanmar coast is also legally insufficient to justify ignoring the island. The manner in which one might choose to characterize an island's location is not the issue. The operative inquiry is whether using the island as a basepoint would produce "an inequitable distortion of the equidistance line producing disproportionate effects

¹³⁶ Bangladesh recognizes, of course, that population as such is not strictly relevant to the issue of the weight to be accorded islands. Article 121(3) on the 1982 Convention does, however, distinguish between 'true' islands and mere "[r]ocks which cannot sustain human habitation or economic life of their own". Bangladesh considers that present population is probative evidence of an island's ability to sustain human habitation.

¹³⁷ CMM at para. 5.94 ("It is, however, excluded that a base point could be selected on St. Martin's Island. In effect, this island, which is situated in front of the coast of Myanmar, cannot be considered as a part of Bangladesh coast").

¹³⁸ Examples of such islands include: the Greek island of Kastelorizo (located 1M off the coast of Turkey, but more than 60 M from the next closest Greek island, Rhodes); the Australian islands of Boigu, Dauan, Saibai, and Kaumag in the Torres Strait (located between 3M and 6M from Papua New Guinea, but more than 75 M from mainland Australia) and the Channel Islands of Jersey and Sark (located 12 M and 19 M from France, but 76 M and 64 M from the British mainland).

¹³⁹ RB at paras. 2.65-2.66.

¹⁴⁰ *Ibid.* at paras. 2.79 *et seq.*

on the areas of shelf accruing to the two States”¹⁴¹ That is a showing Myanmar does not even attempt to make. Nowhere in the Counter-Memorial does it argue that according St. Martin’s Island full weight would lead to an inequitable distortion producing disproportionate effects. Instead, it limits itself to the wholly erroneous assertion about its location refuted just above. Myanmar’s argument thus fails even to engage with, much less meet, the relevant legal test.

3.113 Myanmar purports to find support for its argument in the jurisprudence but none of the cases it invokes help it. In fact, a serious review of the jurisprudence, including Myanmar’s own cases, show that if an equidistance line is to be drawn, it can only be drawn so as to give St. Martin’s Island full weight.

3.114 The Counter-Memorial first cites language from the ICJ’s judgment in the *Romania v. Ukraine* case concerning the treatment to be accorded Ukraine’s tiny Serpents’ Island.¹⁴² Although Myanmar quotes the Court’s judgment at considerable length, it never ventures to argue explicitly that St. Martin’s and Serpents’ islands are comparable. Its restraint is well justified; it would be absurd to compare the two. Serpents’ Island is nearly 50 times smaller than St. Martin’s (0.17 sq km vs. 8 sq km), sustains only a negligible population, and lies more than three times further from the Ukraine coast than St. Martin’s does from the rest of Bangladesh (20 M vs. 6 M).

3.115 Myanmar also claims to find support in the treatment given the Channel Islands in the *Anglo-French Continental Shelf Case*. Again, the two cases are not at all analogous. Indeed, the Court of Arbitration itself specifically anticipated the important distinction with this case. It emphasized that “[t]he case [of the Channel Islands] is quite different from that of small islands on the right side of or close to the median line”.¹⁴³ What made the case of the Channel Islands so different was the combination of two factors, neither of which is present in this case. *First*, the location of the Channel Islands is truly remarkable. Not only are they “practically within the arms of a gulf on the French coast”¹⁴⁴ they are also

141 *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, reprinted in 18 RIAA 3 (hereinafter “*Anglo-French Continental Shelf Case*”), at para. 246. Reproduced in MB, Vol. V. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 40 (hereinafter “*Qatar v. Bahrain*”), at para. 245 (stating with respect to Fasht al Jarim: “The only noticeable element is Fasht al Jarim as a remote projection of Bahrain’s coastline in the Gulf area, which, if given full effect, would “distort the boundary and have disproportionate effects”) (citing *Anglo-French Continental Shelf Case* at para. 244) (emphasis added).

142 CMM at para. 5.95.

143 *Anglo-French Continental Shelf Case* at para. 199.

144 *Ibid.* at para. 183.

“wholly detached geographically from the United Kingdom”,¹⁴⁵ lying in some cases more than 75 M from the British mainland. *Second*, the extent of the continental shelf in the area of the Channel Islands was “comparatively modest and the scope for adjusting the equities correspondingly small”.¹⁴⁶ As a result, the Court of Arbitration was faced with what was essentially a binary choice: either give the islands full weight or enclave them. Given the unusual geographic realities of the case, it chose the enclaving solution so as to avoid “a radical distortion of the boundary”.¹⁴⁷

3.116 None of this can be said about St. Martin’s Island. It lies very close to the rest of the Bangladesh coast of which it forms a part. And it does not threaten any kind of distortion of the boundary, let alone a radical distortion of it.

3.117 The Counter-Memorial also argues that St. Martin’s Island “is more like” the remote offshore island of Abu Musa which was given no weight in the *Dubai-Sharjah Border Arbitration*.¹⁴⁸ Once more, Myanmar’s analogy is ill-founded. Unlike St. Martin’s Island, Abu Musa is some 34 M from the coast of Sharjah (nearly five times further) very near to the median line between the United Arab Emirates and Iran in the middle of the Persian Gulf. At that distance, Abu Musa and Dubai stand in a relationship of oppositeness. If given weight, Abu Musa would have had the effect of deflecting the equidistance line across Dubai’s coastal front and thus preventing it from reaching its ‘natural’ outlet at the mid-gulf median line. In its judgment, the Court of Arbitration decided to give Abu Musa no weight because it “would have produced a *disproportionate and exaggerated entitlement to maritime space* as between the Parties to the... dispute”.¹⁴⁹ Myanmar does not even try to argue that St. Martin’s would produce a similar result in this case.¹⁵⁰

145 *Ibid.* at para. 199. According to the Court, the presence of the islands “in that particular situation disturbs the balance of the geographical circumstances which would otherwise exist between the Parties in the region as a result of the broad equality of the coastlines of their mainlands”. *Ibid.* at para. 183.

146 *Ibid.* at para. 201. The Court found that giving the Channel Islands “full effect in delimiting the continental shelf, will manifestly result in a substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic”. *Ibid.* at para. 196 (emphasis added).

147 *Ibid.* at paras. 199, 201.

148 CMM at para. 5.97.

149 *Dubai/Sharjah Border Arbitration*, Award, 19 October 1981, reprinted in 91 ILR 543 (hereinafter “*Dubai/Sharjah*”), at p. 677.

150 It bears mention too that there were also important non-geographical features that militated against giving Abu Musa full weight in that case. In particular, part of a key oil field operated under the authority of the Government of Dubai would have fallen under the jurisdiction of Sharjah if strict equidistance had been used. See *Ibid.* at pp. 668-669.

3.118 The jurisprudence supports giving St. Martin's Island nothing less than full effect. The *Anglo-French Continental Shelf Case* invoked by Myanmar provides a truly apt example. In the western, or Atlantic, sector of the France-UK continental shelf boundary, the Court of Arbitration gave full effect to the French island of Ushant (Ouessant). Covering an area of 16 sq km with a population of less than 1000, Ushant lies 10 M off France's Brittany coast. Although it is 40% further from the French coast than St. Martin's is from the Bangladesh mainland, the Court of Arbitration nevertheless determined that it forms part of the coast of France and "cannot be disregarded in delimiting the continental shelf boundary without 'refashioning geography'"¹⁵¹ Notably, as the western-most point in France, the island controlled the direction of the delimitation line over its final 210 M. The decision to accord Ushant full effect thus had a considerable effect on the final boundary.

3.119 Because it is considerably closer to Bangladesh, approximately the same size and sustains a significantly larger population, St. Martin's *a fortiori* deserves the same treatment as Ushant. If the latter warranted full effect, so too does the former.

3.120 The relevance of St. Martin's close proximity to the rest of Bangladesh is underscored by yet another group of islands at issue in the *Anglo-French Continental Shelf Case*. In addition to the questions concerning the treatment to be accorded the Channel Islands and Ushant, the Court of Arbitration was also confronted with arguments from France that the UK's Isles of Scilly should be ignored altogether. Although collectively the Isles are almost precisely the same size as Ushant (16.2 sq km), they are more than twice as far from the mainland British coast than Ushant is from the French mainland (21 M vs. 10 M) and thus outside the limits of the territorial sea as drawn from the UK mainland. As a result of their distance from Britain, they generated projections seawards into the Atlantic that substantially outstripped those of Ushant. The Court of Arbitration took the view that this circumstance constituted "an element of distortion ... material enough to justify the delimitation of a boundary other than the strict median line"¹⁵² It therefore decided to accord the Isles half-effect. Again, if the Isles of Scilly merited half effect despite being three times further from the British mainland than St. Martin's Island is from Bangladesh, the latter must *a fortiori* be given full effect.

3.121 Similar reasoning applies to the ICJ Chamber's treatment of Canada's Seal Island in the *Gulf of Maine* case. There, the Chamber gave half effect to Seal Island, which is situated 15 M off the coast of Nova Scotia, covers an area of about four sq km, and at the time sustained only two small settlements of fishermen (although it no longer sustains any

151 *Anglo-French Continental Shelf Case* at para. 248.

152 *Ibid.* at para. 244.

year-round population). Since St. Martin's Island is located more than twice as close to the Bangladesh mainland, is twice the size, and sustains an exponentially larger permanent population, logic requires that it be accorded full weight.

3.122 Perhaps the most persuasive argument against giving St. Martin's Island anything less than full effect comes from Myanmar's own treaty practise. In its 1986 delimitation agreement with India, the two States agreed to delimit their boundary in the Coco Channel and Bay of Bengal by means of an equidistance line. On the Myanmar side, they agreed that the course of the line covering a distance of more than 235 M, would be controlled by a single feature, Little Coco Island, which was given full effect. This part of the agreement merits special attention here because of the physical similarities between Little Coco Island and St. Martin's Island. Recent satellite pictures of the two islands viewed at the same scale are presented in **Figure R3.13** (in Volume II only). As the Tribunal can see, the two islands are virtually identical in size. The similarities end there, however. In other respects they are very different but those differences only underscore the significance of the agreement to give the Little Coco Island full effect. *First*, although public information about Myanmar's insular possessions is hard to come by, it appears that Little Coco Island sustains no known population. *Second*, and more importantly, unlike St. Martin's Island, Little Coco Island is located very far – nearly 130 M – from Myanmar's mainland coast. In contrast, it is just 21 M from India's Andaman Islands. Nevertheless, Myanmar and India agreed to give the island full effect in their delimitation.

3.123 It is true that Little Coco Island is part of a string of islands comprising the Coco and Preparis chain, and Little Coco Island has Great Coco Island and Preparis Island to 'back it up'. But it is equally true that St. Martin's Island has the entire landmass of the Bangladesh mainland to back it up. Moreover, St. Martin's is considerably closer to the rest of Bangladesh than Little Coco is to the other Myanmar islands in its vicinity. Great Coco Island is more than 8 M away and the next closest island, Preparis Island, is more than 50 M away (which in turn is 70 M from the Myanmar mainland). Here again, if Little Coco Island merits full effect, it follows, *a fortiori*, that so too must St. Martin's Island.

3.124 Instead, Myanmar treats St. Martin's Island as if it were like Myanmar's own Oyster (or "May Yu") Island and gives it zero effect. This is patently unsustainable. As described in Bangladesh's Memorial, Myanmar's Oyster Island is a sandy outcrop approximately 10.5 M off the mainland that covers roughly 0.02 sq km (400 times *smaller* than St. Martin's), on which is located a lighthouse. Oyster Island has no permanent population and none could be sustained. Nor is it capable of sustaining an economic life of its own.¹⁵³ The Counter-

¹⁵³ MB at para. 2.21; see also MB at para. 6.49.

Memorial makes no effort to contest these facts or to argue that Oyster Island should be accorded any weight. A satellite photo of the island visually confirming its insignificance was included among the figures annexed to the Memorial.¹⁵⁴ Recent satellite photos of the two islands at the same scale are reproduced side-by-side in **Figure R3.14** (in Volume II only). The difference between the two could scarcely be more plain. In reducing St. Martin's Island to the same status as Oyster Island, Myanmar ignores geographic reality.

3.125 Accordingly, the equidistance line advocated by Myanmar is neither the objective nor the equitable solution Myanmar pretends it to be. It is the product of a deliberate manipulation of basepoints and the deletion of a major geographic feature – St. Martin's Island – intended to produce a solution entirely favourable to Myanmar and prejudicial to Bangladesh. The use of equidistance is infected with far too many debilitating flaws to provide an acceptable result in this case. It is incapable of yielding the equitable solution international law requires.

IV. The Angle-Bisector Leads to an Equitable Solution in this Case

3.126 Since equidistance does not and cannot lead to an equitable solution in this case, the jurisprudence dictates that "other methods should be employed".¹⁵⁵ As Bangladesh discussed in its Memorial, the alternative methodology most commonly relied upon is the angle-bisector approach which has been utilized in one-fourth of the international maritime boundary cases decided to date (four of 16).¹⁵⁶

3.127 It bears emphasis that the angle-bisector method is in reality less an alternative to equidistance than it is a simplified variant of it. Whereas 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 representations of the general direction of those same coasts. As the ICJ stated in *Nicaragua v. Honduras*:

The equidistance method approximates the relationship between two parties' relevant coasts by taking account of the relationship between designated pairs of base points. The bisector method comparably seeks to approximate the relevant coastal relationships, but does so on the basis of the

154 *Ibid.* at Vol. II, Figure 6.6.

155 *Tunisia/Libya* at para. 109.

156 The four cases are: *Tunisia/Libya*; *Gulf of Maine*; *Guinea/Guinea-Bissau*; and *Nicaragua v. Honduras*.

macro-geography of a coastline as represented by a line drawn between two points on the coasts.¹⁵⁷

3.128 As discussed and presented in Bangladesh's Memorial, employing the angle-bisector method in this case leads to a maritime boundary following an azimuth of 215° from Point 7 on the agreed territorial sea boundary to the 200 M limit.

A. The Counter-Memorial Confirms the Appropriateness of Bangladesh's 215° Bisector

3.129 Myanmar's Counter-Memorial launches a full-scale assault on the angle-bisector method, both in general and as Bangladesh has applied it. Myanmar deploys an array of arguments in an effort to defeat the 215° line. None succeed. Indeed, given the ferocity of Myanmar's attack, it is more than a little ironic that key elements of the Counter-Memorial actually validate the 215° line and the coastal fronts on which it is based.

3.130 As discussed, Myanmar identifies five basepoints controlling the direction of the equidistance line it proposes: β_1 and β_2 for Bangladesh, and μ_1 , μ_2 , and μ_3 for Myanmar. In the process of identifying these as what it calls "the appropriate base points"¹⁵⁸, Myanmar is careful to make their significance clear. In particular, it quotes the judgment of the ICJ in *Romania v. Ukraine* for the proposition that in choosing base points, one must

identify the appropriate points on the Parties' relevant coast or coasts which mark a significant change in direction of the coast, in such a way that *the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines*.¹⁵⁹

3.131 If one does as exactly Myanmar directs and connects the dots of its basepoints to depict "the general direction of the coastlines" on either side, the result is compelling. The two lines of general direction are all but identical to the coastal façades Bangladesh presented in the Memorial. Equally compelling is the direction of the bisector of these two lines: 214.7° – again virtually identical to Bangladesh's proposed delimitation line of 215°.

3.132 This result is depicted on **Figure R3.15** appearing following page 94. The base figure is Sketch-map No. 5.7 from Myanmar's Counter-Memorial. The only changes Bangladesh has made are: (1) to follow Myanmar's instructions and connect the basepoints to

¹⁵⁷ *Nicaragua v. Honduras* at para. 289.

¹⁵⁸ CMM at p. 129 (argument heading preceding para. 5.88 – initial caps modified).

¹⁵⁹ *Ibid.* at para. 5.89 (quoting *Romania v. Ukraine* at para. 127) (emphasis added).

ascertain the “general direction of the coastlines”, and (2) bisect those two lines of general direction.

3.133 The Tribunal will immediately note the similarity of this map to Figure 6.11 of Bangladesh’s Memorial, which portrays the manner in which Bangladesh constructed its 215° angle bisector. The differences are exceedingly minor. Bangladesh’s coastal façade is rotated slightly to the north and Myanmar’s is rotated slightly to the east but the angle of the bisector is virtually unchanged. The only meaningful difference is that to constitute the maritime boundary, the 214.7° bisector would have to be transposed slightly to the south-east to meet Point 7 at the end of the territorial sea boundary as agreed in 1974.

3.134 Interestingly, constructing Myanmar’s line of general direction in the manner the Counter-Memorial directs results in a relevant coastal front for Myanmar that is just 64 km long. Even if one extends the line south-southeast along the same azimuth to the point where it intersects that Myanmar mainland, it is still measures just 335 km, approximately 35 km less than the length of Myanmar’s relevant coast as Bangladesh measured it in the Memorial (369 km).¹⁶⁰

3.135 Myanmar would be hard-pressed to argue that depicting its coast in this way distorts either the direction or the length of its coast. At paragraph 5.99 of the Counter-Memorial, Myanmar quite clearly states that the basepoints it identifies “refer to the physical geography of the relevant coasts”.¹⁶¹ This, of course, is entirely consistent with its observation that “the line connecting all these [base] points reflects the general direction of the coastlines”.¹⁶²

3.136 The near perfect match between Bangladesh’s 215° bisector line and the 214.7° bisector of Myanmar’s lines of “general direction of the coastlines” is not merely a coincidence. There is a good reason they are virtually identical. As discussed above, the first segment of Myanmar’s proposed equidistance line follows an azimuth of 214°; for all intents and purposes that is identical to both Bangladesh’s 215° bisector and Myanmar’s 214.7° bisector. This reflects the comparative balance between Bangladesh’s basepoint β_1 and Myanmar’s basepoint μ_1 . Due to the distorting effect of the “concavity within a concavity” at the mouth of the Meghna River, however, the equidistance line slants progressively inward until it reaches the point approximately 190 M from the coast where basepoint β_2 finally begins to deflect it slightly back to the south. In simplifying the general direction of the

160 Compare CMM Sketch Map No. 5 with MB Figure 6.11.

161 CMM at para. 5.99 (emphasis added, internal quotation marks omitted).

162 *Ibid.* at para. 5.89 (quoting *Romania v. Ukraine* at para. 127) (emphasis added).

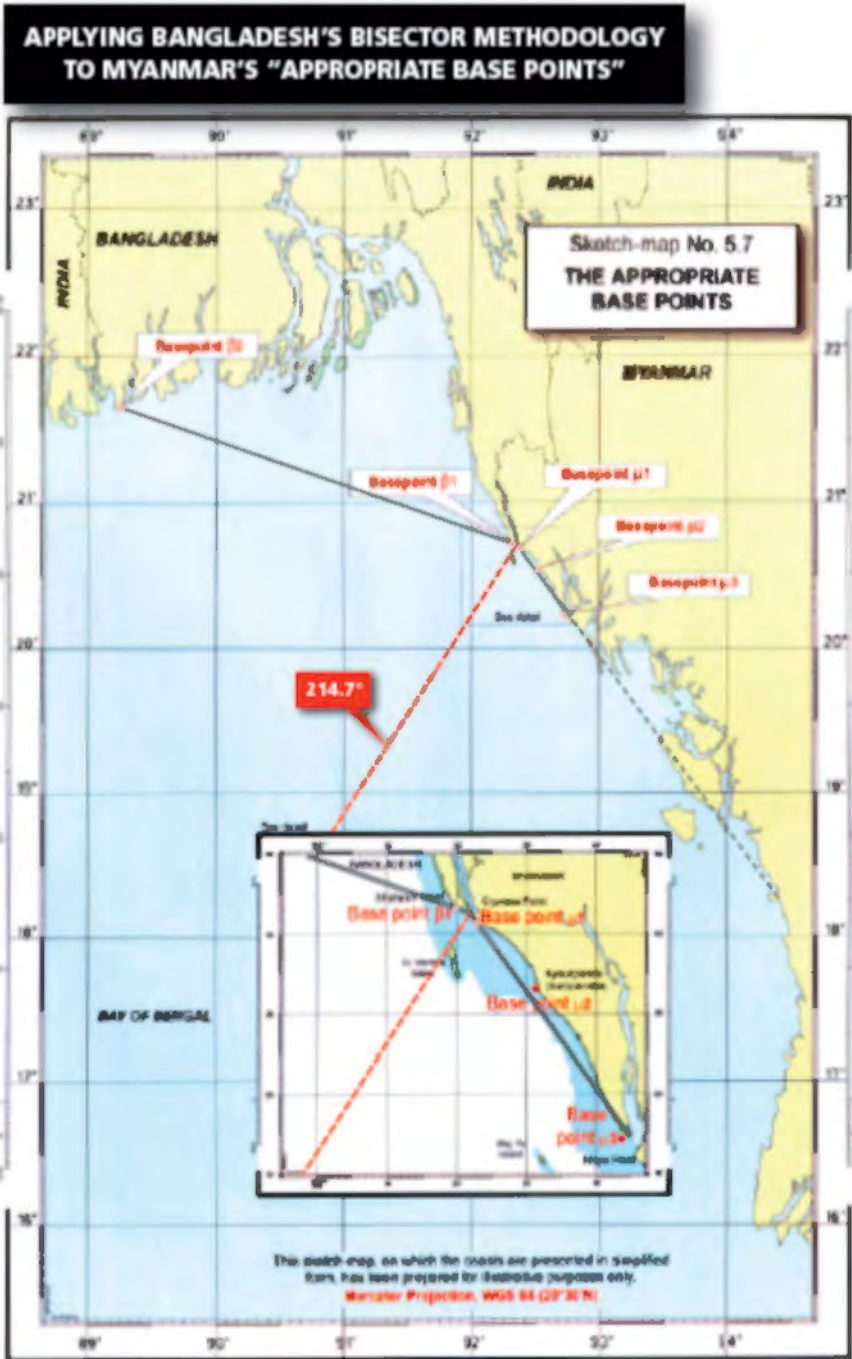


Figure B3.15

Bangladesh coast by means of a straight line connecting basepoints β_1 and β_2 , the effect of the Meghna concavity is minimized and the delimitation line is able to remain essentially on its original course until it reaches the 200 M limit.

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3.137 Even setting aside the fact that key portions of Myanmar's own argument support Bangladesh's proposed 215° angle-bisector line, none of Myanmar's attacks on the bisector diminish the validity of Bangladesh's approach.

3.138 Myanmar's primary argument against the angle-bisector method – that it has only been utilized when it was “not technically feasible” to draw an equidistance line – has already been addressed and refuted above.¹⁶³ As discussed, Myanmar's assertion is contradicted by the case law. In no case in which the angle-bisector method was used was it impossible to draw a provisional equidistance line. In only one case (*Nicaragua v. Honduras*) was it even difficult to do so. In the others (*Tunisia/Libya*, *Gulf of Maine*, and *Guinea/Guinea-Bissau*), there was no reason why an equidistance line could not be plotted. The ICJ (in the cases of *Tunisia/Libya* and *Gulf of Maine*) and the arbitral tribunal (in the case of *Guinea/Guinea-Bissau*) simply decided that there were other factors in the particular circumstances of those cases that warranted reliance on angle-bisectors.

3.139 Myanmar's other argument against the use of the angle-bisector method – that equitable considerations have no role in the selection of the delimitation method – has also already been addressed and refuted above.¹⁶⁴ The ICJ itself has made clear that “equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed”.¹⁶⁵ Moreover, in the *Guinea/Guinea-Bissau* case, the arbitral tribunal eschewed equidistance in favour of an angle-bisector for no other reason than the fact that equidistance did not yield an equitable result given the concavity of Guinea's coast. As the ICJ has observed about that case: “The Tribunal considered [the angle-bisector] approach, rather than equidistance, necessary in order to effect an equitable delimitation that had to be ‘integrated into the present or future delimitations of the region as a whole’”.¹⁶⁶ Equidistance, or any delimitation method, is no more than a means for achieving the end envisioned by the 1982 Convention; *i.e.*, an equitable result. Maritime delimitation is one facet of life where it cannot be denied that the ends *do* justify the means. If the means do not produce

163 RB at paras. 3.21, 3.54.

164 *Ibid.* at paras. 3.23 *et seq.*

165 *Tunisia/Libya* at para. 109.

166 *Nicaragua v. Honduras* at para. 288.

the desired end (an equitable solution), they can and should be set aside in favour of means that do so.

B. Bangladesh Applies the Angle-Bisector Method Correctly

3.140 In *Nicaragua v. Honduras*, the ICJ made clear that, like any delimitation method, the angle-bisector approach “should seek a solution by reference first to the States’ ‘relevant coasts’”.¹⁶⁷ It also made clear, however, that “[i]dentifying the relevant coastal geography calls for the exercise of judgment in assessing the coastal geography”.¹⁶⁸

3.141 In the Memorial, Bangladesh identified its own relevant coast as including the entirety of its Bay of Bengal coastline from the land boundary terminus with India in the west to the land boundary terminus with Myanmar in the east. The straight line connecting these two points follows an azimuth of N287°E. As noted, this portrayal of Bangladesh’s relevant coast corresponds almost precisely with the depiction of the “the physical geography of the relevant coasts”¹⁶⁹ achieved by connecting the two basepoints (β_1 and β_2) Myanmar uses in the construction of its proposed equidistance line.

3.142 The Memorial identified Myanmar’s relevant coast as extending from the Parties’ land boundary terminus in the Naaf River to a point 200 M (369 km) southeast near Bhiff Cape. The straight line representing the general direction of this coast follows an azimuth of N143°E. Again, this portrayal of Myanmar’s relevant coast is a very close match with the result one gets by connecting the three basepoints on the Myanmar coast (μ_1 , μ_2 and μ_3) used to plot Myanmar’s proposed equidistance line, and then extending that line south-southeast to the point where it intersects the Myanmar mainland.

3.143 Notwithstanding the near perfect coincidence of Bangladesh’s conception of the Parties’ relevant coasts with Myanmar’s own construct, the Counter-Memorial attacks Bangladesh’s model because:

there is absolutely no reason why the respective relevant “coastal façades” of the two States would be those proposed by Bangladesh.... [M]ore fundamentally, for purposes of establishing the bisector line, only the general direction of the respective fragments of the coasts in the immediate proximity of the starting-point of the maritime boundary would be relevant.¹⁷⁰

167 *Ibid.* at para. 289.

168 *Ibid.* at para. 289.

169 CMM at para. 5.99.

170 *Ibid.* at para. 5.85.

3.144 Both aspects of Myanmar's argument are mistaken. *First*, as well demonstrated by the harmony between the Parties' coastal façades as portrayed by Bangladesh and the lines of general direction formed by connecting Myanmar's basepoints, there is in fact good reason why the façades of the two States would be exactly those proposed by Bangladesh. Additional reasons why these are the right façades are presented below.

3.145 *Second*, Myanmar's assertion that only the "fragments of the coasts in the immediate proximity of the starting-point" are relevant for establishing the bisector is just that: a bare assertion. The Tribunal will note that Myanmar cites no authority whatsoever to support it. Considering that the Counter-Memorial describes the point as "fundamental", one might justifiably expect a citation to an external source. But there is none, and for good reason. It is directly contrary to the case law.

3.146 In the *Gulf of Maine* case, for instance, the ICJ Chamber depicted the general direction of the parties' coasts by means of straight lines extending considerable distances from the starting point of the maritime boundary. The coastal front of the United States relevant to the delimitation of the first segment of the maritime boundary reached almost 300 km from the land border with Canada to Cape Elizabeth.¹⁷¹ The relevant coastal front of Canada was also quite extensive, reaching nearly 180 km from the land boundary terminus to the southern tip of Nova Scotia in the area of Cape Sable Island.¹⁷²

3.147 The *Guinea/Guinea-Bissau* case refutes Myanmar's assertion even more directly. There, the arbitral tribunal drew a single straight line to represent the general direction, not of the "fragments of the coasts in the immediate proximity of the starting-point", but rather of the whole of the West Africa coast from Senegal to Sierra Leone.¹⁷³ This single straight line (which the tribunal then proceeded to bisect by means of a perpendicular) measured over 800 km in length.

3.148 Consistent with the ICJ's observation that one of the merits of the angle-bisector method is that it approximates the relevant coastal relationships "on the basis of the macro-geography of a coastline",¹⁷⁴ proper use of that method thus requires taking account of more than the fragment of the coasts near the land boundary terminus.

171 *Gulf of Maine* at para 213 and Technical Report para. 3; see also MB at Figure 6.7.

172 *Gulf of Maine* at para 213 and Technical Report para. 3; see also MB at Figure 6.7.

173 *Guinea/Guinea-Bissau* at paras. 108, 110; see also MB at Figure 6.9.

174 *Nicaragua v. Honduras* at para. 289.

3.149 Aside from its erroneous assertion about only the near-most fragments of the coasts being relevant in the drawing of the angle-bisector, the Counter-Memorial has little to say about the Bangladesh coastal façade depicted in the Memorial. As will be discussed at greater length in Section V below, the Parties are in broad agreement that the entirety of the Bangladesh coast from the land boundary terminus with India to the land boundary terminus with Myanmar is relevant to this delimitation. To depict this 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. The result is the 287° line identified in Bangladesh's Memorial.

3.150 The Counter-Memorial is more vocal about the coastal façade for Myanmar Bangladesh presents in the Memorial. According to Myanmar, Bangladesh "very abusively cuts down Myanmar's relevant coasts"¹⁷⁵ by stopping it in the area of Bhiff Cape. In Myanmar's view, its relevant coast actually extends all the way down to Cape Negrais,¹⁷⁶ nearly 300 M¹⁷⁷ south-southeast of the Parties' land boundary terminus in the Naaf River. The difference between the Parties on this score is material to the bisector analysis because a coastal façade that reaches Cape Negrais follows a different direction than the coastal façade extending to Bhiff Cape. The general direction of the former is N159°E; the general direction of the latter is N143°E. The 16° difference between the two would have a significant effect on the direction of the bisector.

3.151 Although the Counter-Memorial objects to the manner in which Bangladesh portrays Myanmar's relevant coast, it is conspicuously understated on the question of exactly why Myanmar's entire coastline as far as Cape Negrais, much of it quite distant, is relevant to the delimitation with Bangladesh. It says only that "Cape Negrais [is] the last point on Myanmar's coast generating maritime projections overlapping with Bangladesh's coastal projections".¹⁷⁸ Tellingly, however, Myanmar never bothers to describe how these "coastal projections" should be drawn, much less show exactly where they overlap. In fact, since the entire length of Myanmar's coast below Bhiff Cape is more than 200 M from Bangladesh (*i.e.*, beyond any possible projection the Bangladesh coast might generate), the projection of Myanmar's coast between Bhiff Cape and Cape Negrais could not possibly overlap with that of Bangladesh. Put simply, Myanmar's coast south of Bhiff Cape is just too far from the delimitation to be considered relevant.

175 CMM at para. 5.85.

176 *Ibid.* at para. 5.67.

177 As measured in a single straight line.

178 CMM at para. 5.67.

3.152 This is not a case like some others where Myanmar's coast beyond Bhiff Cape doubles back on the delimitation area and thus continues to influence the maritime boundary. The *Tunisia/Libya* case provides a useful counterpoint. In that case, the Tunisian coast west of the Gulf of Gabes turned sharply north, bending back towards the delimitation and thus continuing to affect it.¹⁷⁹ The relevant coasts as determined by the ICJ in that case are depicted in **Figure R3.16** (in Volume II only). Myanmar's coast beyond Bhiff Cape is not like that. In fact, *every* point on Myanmar's coast south of Bhiff Cape is further from either of the Parties' proposed delimitation lines than *any* point north of Bhiff Cape. Accordingly, no portion of Myanmar coast between Bhiff Cape and Cape Negrais can or does affect either of the proposed delimitation lines within 200 M.

3.153 Looking first at Myanmar's equidistance proposal, Bhiff Cape is, at its closest, more than 190 M from the delimitation line Myanmar proffers. Each and every point on the Myanmar coast south of Bhiff Cape is even further from Myanmar's proposed line, most of it well more than 200 M from any point on the line.

3.154 Much the same can be said about Bangladesh's proposed 215° bisector. At its closest, Bhiff Cape is nearly 180 M from the 215° line. Every point on the coast beyond Bhiff Cape is even further away, again most of it more than 200 M.

3.155 The *Tunisia/Libya* case again provides a useful comparison that confirms the irrelevancy of Myanmar's coast between Bhiff Cape and Cape Negrais. There, the Court determined that Tunisia's relevant coast included those portions lying between the land boundary with Libya and Ras Kaboudia but did not include any portions further west or north. The length of Tunisia's coast between Hammamet and Kelibia (*see* Figure R3.16) was not considered relevant, even though it faces directly onto the delimitation area and lies well within 200 M of the maritime boundary adopted by the Court. Since the delimitation line was controlled by other, nearer portions of the coast, it was simply too distant to be relevant.

3.156 It is much the same with Myanmar's coast between Bhiff Cape and Cape Negrais, except that unlike Tunisia's coast between Hammamet and Kelibia, the portion of Myanmar's coast in question does not directly face the delimitation and most of it lies beyond 200 M from any delimitation line.

3.157 An even more analogous example comes from *Nicaragua v. Honduras*, the case in which the ICJ most recently relied on the angle-bisector method. In the process of

179 *Tunisia/Libya* at paras. 75, 122.

“consider[ing] the various possibilities for the other coastal fronts that could be used to define these linear approximations of the relevant geography”,¹⁸⁰ the Court rejected Nicaragua’s proposal to use a coastal front for Honduras that ran from the boundary with Nicaragua to the boundary with Guatemala, a distance of 549 km (measured point-to-point). The Court found the proposed front too long, saying it “would give significant weight to Honduran territory that is far removed from the area to be delimited”¹⁸¹. It opted instead for a shorter coastal front measuring just 153 km.

3.158 Significantly, the length of Nicaragua’s proposed Honduran front – 549 km – is almost exactly the same as the distance from the mouth of the Naaf River to Myanmar’s Cape Negrais – 552 km. It thus follows that much of Myanmar’s Rakhine coast is equally too “far removed from the area to be delimited” to be considered relevant. In this respect, Bangladesh notes that the coastal front it has proposed for Myanmar is more than three times as long as the coastal front the ICJ ultimately adopted for Honduras (369 km vs. 153 km). Myanmar has no valid argument that it is too short.

3.159 As the ICJ stated in *Nicaragua v. Honduras*, “[i]dentifying the relevant coastal geography calls for the exercise of judgment”.¹⁸² Exercising judgment in this case dictates that Myanmar’s coast beyond Bhiff Cape be deemed irrelevant. It is too far removed from any possible delimitation – whether Myanmar’s or Bangladesh’s – which instead are both controlled by more proximate portions of Myanmar’s coast.

3.160 For all these reasons, Myanmar’s relevant coast is exactly as Bangladesh portrayed in the Memorial. It follows a general direction of 143°.

* * *

3.161 With the two relevant coasts thus identified and rendered as straight-line coastal facades, it is a simple matter to bisect them. The result is the 215° line beginning from Point 7 of the 1974 territorial sea agreement presented in Bangladesh’s Memorial.¹⁸³

3.162 Considering all the criticism the Counter-Memorial so liberally heaps on Bangladesh’s proposed bisector, one critical point is rather notably absent. Nowhere in 207 pages of text does Myanmar argue that the 215° line would be inequitable to it. Myanmar argues (wrongly) that equidistance is mandatory; it argues (wrongly) that bisectors are only used

180 *Nicaragua v. Honduras* at para. 295.

181 *Ibid.* at para. 295.

182 *Ibid.* at para. 289.

183 MB at para. 6.73.

when equidistance is not technically feasible; it argues (wrongly) that its proposed equidistance line is equitable. But it never argues that Bangladesh's 215° proposal would be inequitable.

3.163 The omission is as telling as it is striking. Surely, if Myanmar had a serious argument that the 215° degree line was inequitable, it would have made it. But it did not. And the fact that it did not must be viewed as tantamount to an admission that the line is equitable to both Parties. The reason is clear. As discussed above, the difference between Myanmar's proposed equidistance line and Bangladesh 215° bisector is significant for Bangladesh but *de minimis* for Myanmar, whose maritime space would scarcely be diminished.

3.164 Bangladesh assumes that, especially now that this hole in Myanmar's case has been exposed, the Rejoinder will belatedly attempt to fill it with a jerry-built argument as to why the 215° line is not equitable. Bangladesh suggests that the Tribunal may wish to take any such claim for what it is: a *post hoc* effort to manufacture an argument where none existed in the first place. The silence of Myanmar's Counter-Memorial on this critical point speaks for itself: the 215° line is not inequitable to Myanmar.

V. The Disproportionality Test

3.165 The Parties are agreed that the final step in the delimitation process is to check that the delimitation line "does not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue".¹⁸⁴ It is therefore necessary to have at least approximate measurements for the relevant coasts and the relevant area, although precision is not required. As the ICJ has noted "[t]hese measurements are necessarily approximate given that the purpose of this final stage is to make sure there is no significant disproportionality".¹⁸⁵

A. The Relevant Coastal Lengths

3.166 As discussed in the previous section, Bangladesh considers 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. Measured as straight-line coastal façades, the lengths of these two coasts are 349 km and 369 km, respectively. The ratio is 1.06:1 in favour of Myanmar.

¹⁸⁴ CMM at para. 5.146 (quoting *Romania v. Ukraine* at para. 210).

¹⁸⁵ *Romania v. Ukraine* at para. 214.

3.167 The Counter-Memorial, of course, presents a different view. As stated, Myanmar considers all of its coast from the Parties' land boundary terminus in the Naaf River to Cape Negrais near the mouths of the Irawaddy relevant.¹⁸⁶ The Counter-Memorial measures the length of this coast as 740 km.¹⁸⁷

3.168 Myanmar slices the Bangladesh coast up into four segments and then purports to find only two of these segments relevant.¹⁸⁸ According to the Counter-Memorial, Segment 1 of the Bangladesh coast runs from the border with India to a point on western side of the mouth of the Meghna River; Segment 2 skirts the edges of several islands inside the mouth of the Meghna; Section 3 generally corresponds to the Meghna's eastern banks; and Segment 4 runs from Kutubdia Island to the border with Myanmar.¹⁸⁹ The Counter-Memorial argues that only Segments 1 and 4, which together measure 364 km, are relevant.¹⁹⁰ On this basis, Myanmar purports to find a disparity in relevant coastal length of 2.03:1 in its favour.¹⁹¹

3.169 The ostensible 2:1 disparity is a fiction. Myanmar has artificially lengthened its own relevant coast and simultaneously shortened Bangladesh's in a manner that misrepresents reality. The reasons Myanmar is wrong about the length of its own relevant coast have been discussed already in the previous Section. As stated, much of Myanmar's Rakhine coast (the segment south of Bhiff Cape) is simply too far from the delimitation to be considered relevant in this case.¹⁹² In reality, its relevant coast is significantly shorter than Myanmar claims.

3.170 With respect to the Bangladesh coast, the Parties are in agreement that both ends on the side abutting India (Myanmar's Segment 1) and on the side abutting Myanmar (Segment 4) are relevant.¹⁹³ But they are distinctly not in agreement to the extent that Myanmar tries to sever the central portions of the Bangladesh coast (Segments 2 and 3) corresponding to the concavity within a concavity at the mouth of the Meghna River.

186 CMM at para. 5.67.

187 *Ibid.* at para. 5.69.

188 *Ibid.* at para. 5.56 and Sketch-map No. 5.1.

189 *Ibid.*

190 *Ibid.* at para. 5.58.

191 *Ibid.* at para. 5.15 and Sketch-map No. 5.9.

192 See RB at paras. 3.150-3.160.

193 Compare MB at para. 6.70 with CMM at para. 5.58.

3.171 Myanmar attempts to justify ignoring these two segments on the ostensible grounds that they “face each other” and thus do not project into the area to be delimited.¹⁹⁴ Aside from being incompatible with the most pertinent case law (see below), Myanmar’s effort to cut the heart out of the Bangladesh coast would, if permitted to succeed, effectively punish Bangladesh twice for the configuration of its coast. The central problem in this case is the combined effect of both the general concavity formed by the Bay of Bengal’s northern coast and the concavity within a concavity at the mouth of the Meghna River. By pretending the central portion of the Bangladesh coast does not exist precisely because it is concave, Myanmar seeks to extract still additional advantage from the fact of concavity.

3.172 Myanmar purports to find support for pretending the middle two segments of the Bangladesh coast do not exist in the ICJ’s treatment of Karkinit’ska Gulf in *Romania v. Ukraine*. There, the Court decided that since the “coasts of this gulf face each other”¹⁹⁵, the lengths of coast within the gulf should not be considered part of Ukraine’s relevant coast. The mouth of the Meghna, however, is not comparable to Ukraine’s Karkinit’ska Gulf. *First*, the two coasts of Karkinit’ska Gulf are nearly parallel and ‘face each other’ much more obviously and directly than the Bangladesh coast at the mouth of the Meghna River. *Second*, in the enclosed setting of the Black Sea, the opening of Karkinit’ska Gulf itself actually faces back onto other portions of the Ukraine coast and not the delimitation.¹⁹⁶ This phenomenon is depicted graphically on **Figure R3.17A** (in Volume II only). The opening at the mouth of the Meghna, in contrast, faces directly onto the open sea and the delimitation at issue in this case (as depicted on **Figure R3.17C**).

3.173 An apt comparison from the jurisprudence is to the ICJ Chamber’s treatment of the mouth of the Bay of Fundy in the *Gulf of Maine* case. There, although the coasts of the Bay are generally parallel and therefore ‘face each other’, the opening at the mouth of the Bay faces directly onto the initial segment of the maritime boundary. The Chamber therefore deemed relevant both segments of Canada’s parallel coasts within the Bay as well as the line drawn straight across the Bay inside its mouth.¹⁹⁷ Canada’s relevant coast as identified by the Chamber is depicted at **Figure R3.17B**. As the Tribunal can see, the mouth of Bangladesh’s Meghna River is substantially more like the Bay of Fundy than Karkinit’ska Gulf. There are therefore no grounds for ignoring the middle of Bangladesh’s coast as Myanmar might like.

194 CMM at para. 5.56 and 5.58.

195 *Romania v. Ukraine* at para. 100.

196 *Ibid.* at para. 100 and Sketch-map No. 5.

197 *Gulf of Maine* at paras. 31, 221.

3.174 As stated, Myanmar measures what it labels Bangladesh's relevant coast (comprised of Segments 1 and 4)¹⁹⁸ as 364 km. Adding Segments 2 and 3 adds 220 km to this figure, making the total length of Bangladesh coast as Myanmar conceives it 584 km.

3.175 Five hundred and eighty-four km is just 156 km less than the 740 km relevant coast extending all the way down to Cape Negrais that Myanmar gives itself. What the Counter-Memorial calls a 2:1 disparity in coastal length¹⁹⁹ is, even accepting Myanmar's excessively generous depiction of its own relevant coast, therefore really just a 1.27:1 difference.

3.176 Even that number overstates the extent of the difference under Myanmar's model. The Counter-Memorial measures the coasts it says are relevant in a way that is designed to slant the numbers in Myanmar's favour. In particular, the Counter-Memorial measures the Myanmar coast carefully tracing its sinuosities, which are particularly noticeable in the areas to the south of Cheduba Island.²⁰⁰ On the Bangladesh side, however, the even more pronounced sinuosities have very obviously been minimized.²⁰¹

3.177 If these same segments of coast were measured in the same manner on both sides (by means of straight-lines ignoring all sinuosities), Myanmar's coast would measure just 595 km (nearly 150 km less) while Bangladesh's would still measure 325 km (only 40 km less). The disparity between the two would therefore be significantly reduced.

3.178 The figures become even more comparable when one includes the two central segments of the Bangladesh coast that Myanmar has inappropriately sought to exclude from Bangladesh's relevant coast.²⁰² Including these two segments increases the total length of Bangladesh's coast to 490 km. The ratio of coastal lengths becomes just 1.2:1 in favour of Myanmar.²⁰³ Far from the "radical geographical difference"²⁰⁴ that Myanmar describes in the Counter-Memorial, there is, even under Myanmar's own model, scarcely a difference at all.

3.179 Moreover, the difference between the Parties' two models of the relevant coasts is, numerically speaking also small. Whether one adopts Bangladesh's approach (1.06:1 in favour of Myanmar) or Myanmar's as adjusted above (1.2:1 in favour of Myanmar), the

¹⁹⁸ See CMM at Sketch-map No. 5.9 (p. 159).

¹⁹⁹ *Ibid.* at para. 5.151.

²⁰⁰ *Ibid.* at Sketch-map No. 5.2 (p. 115).

²⁰¹ *Ibid.* at Sketch-map No. 5.2 (p. 115).

²⁰² *Ibid.* at para. 5.58 and Sketch-map No. 5.1 (p. 109).

²⁰³ 595:490.

²⁰⁴ CMM at para. 5.134.

relevant coasts of the two States are closely comparable. Either way, they have plainly been given, in the words of the *North Sea* cases, “broadly equal treatment by nature”.²⁰⁵

B. The Relevant Area

1. *The Relevant Area According to Bangladesh*

3.180 In its Memorial, Bangladesh portrayed the relevant area as including the waters situated in front of the two Parties’ coastal fronts and extending out to the 200 M limit, except only that areas claimed by third States were excluded.²⁰⁶ It then showed that the 215° line it proposes does not produce any significant disproportionality. That line allocates the relevant area in a ratio of 1.25:1 in favour of Myanmar, a number that is actually *less* advantageous to Bangladesh than the 1.06:1 (or even the 1.2:1) ratio of coastal lengths.²⁰⁷

3.181 In response, Myanmar argues that Bangladesh has incorrectly depicted the relevant area,²⁰⁸ and that its proposed equidistance line equitably apportions what the Counter-Memorial claims is the relevant area.²⁰⁹ It is wrong on both counts.

3.182 With respect to the assertion that Bangladesh has incorrectly portrayed the relevant area, Bangladesh stands by the model presented in the Memorial. Myanmar criticizes it on three grounds: (1) it does not include maritime spaces landward of the Parties’ coastal façades; (2) it does not include areas claimed by India; and (3) it does not include areas off Myanmar’s coast south of Bhiff Cape. None of these critiques is valid.

3.183 *First*, in the Memorial, Bangladesh acknowledged that its model of the relevant area did not include maritime spaces landward of the Parties’ coastal façades but expressly noted that even if those areas were included they did not make a material difference to the proportionality calculation.²¹⁰ Whether or not they are included, the result remains measurably more favourable for Myanmar than for Bangladesh.²¹¹

3.184 *Second*, nothing in the Counter-Memorial causes Bangladesh to change its view that areas on the “Indian side” of India’s claim line are not relevant in this case. It cannot be

205 *North Sea Cases* at para. 91.

206 MB at para. 6.76.

207 *Ibid.* at para. 6.76.

208 CMM at para. 5.75.

209 *Ibid.* at para. 5.153.

210 See MB at para. 6.76 and fn. 231.

211 *Ibid.*

right to credit Bangladesh for maritime spaces that are subject to an active claim by a third State; they cannot fairly be considered as appertaining to Bangladesh in any meaningful sense. To include those areas in the proportionality calculations would have a dramatic effect on the numbers that distorts reality.

3.185 *Third*, it is not appropriate to treat as relevant the maritime areas lying off Myanmar's coast between Bhiff Cape and Cape Negrais. That section of Myanmar's coast is irrelevant for the reasons discussed above.²¹² It would be incongruous to consider as relevant the maritime spaces adjacent to an irrelevant coast.

3.186 That said, one adjustment to the relevant area as presented in the Memorial is necessary. As noted, in the interval since Bangladesh submitted its Memorial, India has staked new claim.²¹³ The line depicted in the Memorial has therefore been superseded. India's new line is slightly less extreme and results in a net increase in the size of the relevant area depicted in the Memorial of 2,630 sq km. The adjusted relevant area is depicted on **Figure R3.18** (in Volume II).

3.187 Using Bangladesh's proposed 215° line to apportion this area results in an allocation of maritime space having a ratio of 1.2:1 in favour of Myanmar.²¹⁴ Even including the maritime space landward of the Parties' coastal façades, the ratio is broadly comparable: approximately 1.1:1.²¹⁵ Considering the minimal disparity in the lengths of the Parties' relevant coastal fronts, Myanmar has no argument that the 215° delimitation line resulting from the angle bisector methodology is inequitable – and indeed it makes none.

2. *The Relevant Area According to Myanmar*

3.188 With respect to Myanmar's assertion that its proposed equidistance line equitably apportions the area that it claims is relevant, the fact is that it does not. Myanmar's own model, erroneous though it may be, actually underscores the inequitable character of its proposed equidistance line.

3.189 According to Myanmar, the relevant area "includes maritime areas lying directly off (i) the first and fourth segments of Bangladesh's coastline and (ii) Myanmar's Rakhine

212 See RB at paras. 3.150-3.160.

213 *Ibid.* at para. 3.36 fn. 49.

214 86,931 sq km to Myanmar and 72,347 sq km to Bangladesh.

215 92,431 sq km to Myanmar and 87,247 sq km to Bangladesh.

(Arakan) coast²¹⁶ It measures a total of 236,539 sq km.²¹⁷ Myanmar's equidistance proposal would allocate this maritime space in a ratio of 1.94:1 in favour of Myanmar.²¹⁸ This result is fully 60% larger than the 1.2:1 ratio of relevant coastal lengths (using Myanmar's model). There is no justification for such a disproportionate result.

3.190 The inequity of this evident disproportion is exacerbated by the fact that not only is Bangladesh's maritime space inequitably diminished in absolute terms, it also stops well short of the 200 M limit. This aspect of the inequitableness of Myanmar's proposed equidistance line has already been addressed above. Bangladesh will not repeat itself here except to note that a solution that denies one State any access to the 200 M limit whatsoever yet permits the other to enjoy unimpeded access to the entirety of its own 200 M limit self-evidently does not share out the cut-off effect "in a reasonable and mutually balanced way";²¹⁹ as Myanmar itself acknowledges the law requires.²²⁰

3.191 Using Bangladesh's proposed 215° bisector line to divide what Myanmar contends is the relevant area would yield a result that is markedly more balanced, although still more favourable to Myanmar than to Bangladesh. The 215° line yields an allocation having a ratio of 1.3:1 in favour of Myanmar.²²¹ In other words, the maritime boundary Bangladesh proposes still gives Myanmar significantly more of the area Myanmar itself says is relevant than it gives to Bangladesh.

3.192 The disproportionality of Myanmar's equidistance line is actually worse than the numbers just cited suggest. Even assuming it is broadly correct (which it is not), the particular manner in which Myanmar has portrayed the relevant area badly skews the numbers and makes the disproportionality of its proposed delimitation look less severe than it actually is. Myanmar misportrays what it says is the relevant area in two significant respects.

3.193 *First*, Myanmar has inappropriately allocated an artificially large amount of maritime space to Bangladesh by including as 'relevant' maritime zones that are claimed by India. The maritime boundary India claims cuts substantially further east than the limit of the relevant area as portrayed on Myanmar's Sketch-map No. 5.3 (on page 117 of the Counter-Memorial). The area between India's claim line and the western limit of what

216 CMM at para. 5.72.

217 *Ibid.* at para. 5.72.

218 *Ibid.* at para. 5.151 (156,133 sq km to Myanmar and 80,406 sq km to Bangladesh).

219 *Ibid.* at para. 5.139 (citing the *Black Sea* case, para. 201).

220 RB at para. 3.97.

221 133,258 sq km to Myanmar and 103,281 sq km to Bangladesh.

Myanmar says is the relevant area measures 11,451 sq km. For the reasons discussed above, this area must be deducted from the Bangladesh side of the ledger.

3.194 *Second*, Myanmar has inappropriately allocated itself an artificially small amount of maritime space by excluding a sizable area that should be included. As noted, Myanmar states that the relevant area includes maritime areas “lying directly off” its Rakhine coast.²²² Yet, the picture of the relevant area presented in Sketch-map No. 5.3 (on page 117 of the Counter-Memorial) does not match this description. In particular, the southern limit of the area currently shown in the vicinity of Cape Negrais is described by an angled line drawn west-northwest from the Myanmar coast.²²³ To faithfully include all the maritime space “lying directly off” Cape Negrais, however, the southern limit of the area should extend horizontally seaward along approximately the 16th parallel of north latitude, not along an arbitrarily angled line. Including this additional space adds approximately 17,377 sq km to Myanmar’s account.

3.195 This corrected version of Myanmar’s relevant area measures a total of 242,465 sq km (236,539 – 11,451 + 17,377) and is depicted on **Figure R3.19** (in Volume II only). Using Myanmar’s proposed equidistance line to apportion this corrected area results in an allocation with a ratio of 2.5:1 in favour of Myanmar.²²⁴ That is more than double the disparity in the lengths of what Myanmar says are the Parties’ relevant coasts (1.2:1).

3.196 Using Bangladesh’s proposed 215° line to delimit this area would only be modestly less favourable to Myanmar. It would allocate the maritime space in a ratio of 1.6:1 in favour of Myanmar,²²⁵ still 60% more for Myanmar than for Bangladesh. Again, Myanmar has no argument that the 215° line is inequitable.

3.197 Both Parties are agreed that proportionality is *not* a method of delimitation.²²⁶ Instead, as they both recognize, the proportionality test is used only as a final check of a proposed delimitation in order to ensure that it does not produce significantly disproportionate results. Nonetheless, it is instructive to consider what a truly proportional delimitation might look like, if only for the purpose of putting the equitableness of the 215° solution Bangladesh proposes into relief.

222 CMM at para. 5.72.

223 *Ibid.* at Sketch-map No. 5.2 (p. 117).

224 173,510 sq km for Myanmar and 68,995 sq km for Bangladesh.

225 150,635 sq km to Myanmar and 91,870 sq km to Bangladesh.

226 MB at para. 6.28, CMM at para. 5.147 (citing *Romania v. Ukraine* at para. 110).

3.198 Myanmar's relevant area (as corrected) measures a total of 242,465 sq km. Dividing this area up in a manner equal to the ratio of the lengths of what Myanmar says are the Parties' relevant coasts (1.2:1) would give Myanmar 132,254 sq km and Bangladesh 110,211 sq km. In order to achieve this result, the delimitation line would have to follow an azimuth of 205°. That line, a full 10° southeast of Bangladesh's proposed boundary, is depicted in **Figure R3.20** (following page 112). As the Tribunal can see, a truly proportional maritime boundary would, even using Myanmar's own model, be significantly more advantageous for Bangladesh than the one it actually seeks.

Conclusions

3.199 In summary, Bangladesh sets forth the following conclusions concerning the delimitation of the continental shelf within 200 M and the exclusive economic zone:

(1) The equidistance method is not the mandatory rule of law Myanmar seeks to make it. Articles 74 and 83 of the 1982 Convention expressly make the objective of the delimitation process "an equitable solution". The equidistance method may be used if, but only if, it produces an equitable result in the particular circumstances of a given case. If it does not, other methods should be used. The angle-bisector approach is the principal other method relied upon in the jurisprudence when equidistance fails.

(2) The equidistance method does not and cannot lead to an equitable solution in this case. Due to the effects of the double concavity in which Bangladesh is located, equidistance boundaries cut off Bangladesh's maritime space well before reaching the 200 M limit. Such a result would be especially inequitable given Bangladesh's indisputable entitlement in the continental shelf beyond 200 M. Even beyond this cut-off effect, Myanmar's proposed equidistance line is infected with still other problems that render it an untenable solution, including the fact that it is based on an inappropriately small sampling of just five basepoints on the entirety of both Parties' coasts.

(3) In contrast to equidistance, the angle-bisector method as Bangladesh has applied it can and does lead to an equitable solution in this case. The 215° line Bangladesh proposes alleviates – but does not eliminate – the effects of the concavity in which Bangladesh sits. Although it leaves Bangladesh with what is still a tapering wedge of maritime space, it does at least

give it a modest outlet to the 200 M limit. At the same time, the 215° line scarcely reduces Myanmar's maritime space at all.

(4) For all these reasons as more fully elaborated above, the maritime boundary between the Parties in the continental shelf within 200 M and EEZ should follow an azimuth of N215°E from the end of the territorial sea boundary as agreed in 1974 (Point 7).

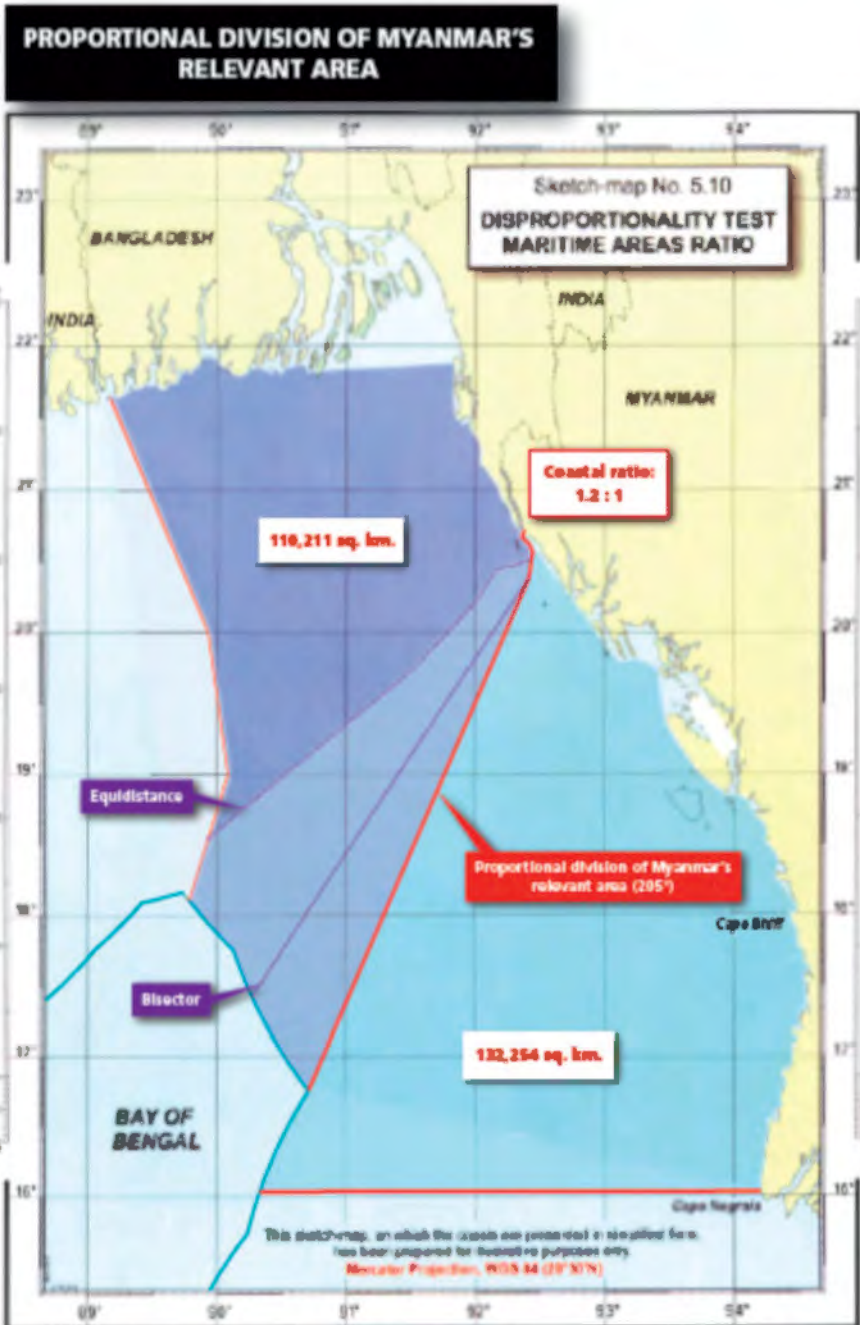


Figure B3.20

CHAPTER 4

THE DELIMITATION OF THE CONTINENTAL SHELF BEYOND 200 M

4.1 In its Memorial, Bangladesh showed that pursuant to Article 76 of the 1982 Convention, it has an entitlement to a continental shelf beyond 200 M. Bangladesh further showed that Myanmar enjoys no such entitlement because, as a matter of fact and law, its land territory has no natural prolongation into the Bay of Bengal beyond 200 M. Accordingly, the Tribunal must necessarily delimit the maritime boundary between Bangladesh and Myanmar by allocating to Bangladesh all of the disputed areas of continental shelf beyond 200 M.

4.2 Myanmar's Counter-Memorial argues in response that: (1) a determination by the CLCS of the outer limits of the continental shelf beyond 200 M is a prerequisite for any delimitation of that area;¹ (2) the Tribunal has no jurisdiction to delimit the shelf beyond 200 M because such a delimitation might prejudice third parties or the international seabed area;² and (3) in any event, the question of delimiting the shelf beyond 200 M does not arise because the delimitation line terminates well before reaching the 200 M limit.³ In its Appendix, the Counter-Memorial goes on to argue that: (4) based on the geomorphology (rather than the geology) of the seabed, Myanmar's continental shelf entitlement extends beyond 200 M;⁴ and (5) delimitation beyond 200 M is based on the same principles as delimitation within 200 M.⁵

4.3 Bangladesh's response to point 1 – the wholly spurious contention that a determination of the outer limits of the continental shelf by the CLCS is required before the Tribunal can delimit beyond 200 M – is dealt with in **Section I** below. So is Bangladesh's response to point 2 – the claim that the Tribunal has no jurisdiction to delimit the shelf beyond 200 M because of alleged prejudice to third parties. The remainder of this Chapter responds to Myanmar's points 3 through 5. In **Section II**, Bangladesh highlights what are now the uncontested geographical and geological facts pertinent to this case. In **Section III**, it sets out Bangladesh's natural prolongation deep into the Bay of Bengal and its consequent entitlement, based on the undisputed scientific facts, to an outer continental shelf beyond 200 M. In **Section IV**, it refutes Myanmar's erroneous interpretation of Article

1 Counter-Memorial of Myanmar (hereinafter "CMM") at para. 1.17.

2 *Ibid.* at para. 1.16.

3 *Ibid.* at para. 1.15.

4 *Ibid.* at paras. A.28-A.40.

5 *Ibid.* at paras. 5.3, 5.110.

76 and its resulting misapplication of the concept of natural prolongation beyond 200 M. Finally, in **Section V**, it demonstrates the fallacy of Myanmar's theory of delimitation of the outer continental shelf and sets out Bangladesh's conclusions on equitable delimitation of this area.

I. Jurisdiction to Delimit the Continental Shelf Beyond 200 M

4.4 Myanmar's principal jurisdictional objection is that "the Tribunal cannot exercise jurisdiction to delimit hypothetical areas of continental shelf beyond 200 nautical miles from the baselines from which the territorial sea is measured".⁶ The Counter-Memorial does not dispute that "as a matter of principle, the delimitation of the continental shelf, including the shelf beyond 200 nautical miles, *could* fall within the jurisdiction of the Tribunal".⁷ But it argues that the CLCS must issue its recommendations pursuant to Article 76(8) of the 1982 Convention *before* the Tribunal can delimit the boundary.⁸ Myanmar conspicuously omits to mention, however, that unless the Tribunal delimits the boundary first, the CLCS's own rules prohibit it from issuing any recommendations. In portraying CLCS recommendations as a prerequisite to the exercise of jurisdiction by this Tribunal, Myanmar thus sets up a neatly circular argument that would make delimitation of disputed areas beyond 200 M impossible.

4.5 Myanmar's second jurisdictional objection is that ITLOS has no jurisdiction to delimit the continental shelf beyond 200 M because of potential prejudice to "the rights of third parties" (namely India) "and also those relating to the international seabed area".⁹ Myanmar's contention with regard to the international seabed area disregards its own submission to the CLCS, which makes clear that the outer limits of the continental shelf *vis-à-vis* the international seabed are far removed from the delimitation of the maritime boundary with Bangladesh.¹⁰ And Myanmar disregards the *res inter alios acta* principle recognized in the jurisprudence and enshrined in Article 33 of the ITLOS Statute, which applies equally to India's potential rights and to the international seabed area. The delimitation of a maritime boundary in the outer continental shelf by the Tribunal would not prejudice the rights of third parties in any way.

6 *Ibid.* at para. 1.12.

7 *Ibid.* at para. 1.14.

8 *Ibid.* at para. 1.17.

9 *Ibid.* at para. 1.16.

10 Government of Myanmar, *Continental Shelf Submission of the Union of Myanmar: Executive Summary* (December 2008) (hereinafter "*Myanmar CLCS Submission*"), at pp. 5-6.

A. Delineation by the CLCS Is Not a Prerequisite to Delimitation by ITLOS

4.6 Myanmar's principal contention is that the Tribunal cannot delimit the continental shelf beyond 200 M until the CLCS has first delineated its outer limits. The Counter-Memorial states:

the determination of the entitlements of both States to a continental shelf beyond 200 nautical miles and their respective extent is a prerequisite for any delimitation.... Only the determination of the outer limit in accordance to the relevant provisions of article 76, including the filing of a submission to the CLCS and the determination of the outer limit "on the basis" of the CLCS' recommendations, can remove this uncertainty.¹¹

4.7 Myanmar fails to mention, however, that the CLCS *cannot* delineate the outer limits if there is a pending delimitation dispute. Annex I, paragraph 5(a) of the CLCS Rules of Procedure expressly states: "In cases where a land or maritime dispute exists, the Commission *shall not* examine and qualify a submission made by any of the States concerned in the dispute."¹² Thus, if Myanmar's argument were accepted, ITLOS would have to wait for the CLCS to act and the CLCS would have to wait for ITLOS to act. The resulting catch-22 would mean that whenever parties are in dispute in regard to the continental shelf beyond 200 M, the Compulsory Procedures Entailing Binding Decisions under Part XV, Section 2 of UNCLOS would have no practical application. In effect, the very object and purpose of the UNCLOS dispute settlement procedures would be negated. Myanmar's position opens a jurisdictional black hole into which all disputes concerning maritime boundaries in the outer continental shelf would forever disappear.

4.8 The absurdity of Myanmar's assertion is exacerbated by the uncontested fact that the outer limits of the continental shelf *vis-à-vis* the international seabed area are wholly irrelevant to the dispute between Bangladesh and Myanmar. Myanmar's own submission to the CLCS concedes that the outer limits of the continental shelf are not even remotely close to the area in dispute with Bangladesh.¹³ Bangladesh agrees, as its own recent submission to the CLCS confirms. Myanmar's argument thus reduces to the nonsensical assertion that even if both States agree that the ultimate outer limits of the continental shelf are irrelevant to the resolution of their dispute, ITLOS still cannot exercise jurisdiction to delimit a maritime boundary.

¹¹ CMM at para. 1.17.

¹² Commission on the Limits of the Continental Shelf, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, U.N. Doc. No CLCS/40/Rev.1 (17 April 2008).

¹³ *Myanmar CLCS Submission* at pp. 5-6.

4.9 The statement in the Counter-Memorial that “Bangladesh accept[ed] that a final delimitation can only be determined once the CLCS has considered Myanmar’s and Bangladesh’s submissions”¹⁴ in a Note Verbale to the United Nations Secretary-General dated 23 July 2009 is false. In fact, Bangladesh’s Note Verbale to the Secretary-General says the opposite. It states very clearly that because there is a dispute between Bangladesh and Myanmar over the area in question, the CLCS may *not* – under its own rules – consider the Parties’ submissions until the dispute is resolved.¹⁵ Myanmar does not get any mileage by citing Bangladesh’s expressed willingness “to reach a practical arrangement with Myanmar” within the scope of Article 83(3) of UNCLOS pending “final delimitation” of the maritime boundary, since this is no more than a restatement of both Parties’ obligations under the Convention.¹⁶ It is not clear how Myanmar leaps from that to the conclusion it seeks to draw.

4.10 The provisions of UNCLOS make clear that the advisory mandate of the CLCS to assess scientific and technical data is not in conflict with the jurisdiction of ITLOS to adjudicate the present legal dispute. Article 76(8) provides that “[i]nformation on the limits of the continental shelf beyond 200 nautical miles ... shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf”; that “[t]he Commission shall make *recommendations* to coastal States on matters related to the establishment of the outer limits of their continental shelf”; and that “[t]he limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding”.¹⁷

4.11 Recognizing the exclusively scientific and technical role of the CLCS, the 2004 report of the International Law Association’s Outer Continental Shelf Committee – which Myanmar mistakenly cites in *support* of its argument¹⁸ – observes:

If article 76 were to be completely excluded from the procedures of Part XV, the absence of legal expertise in the Commission would seem to be

14 CMM at para. 1.23.

15 *Note Verbale* from the Permanent Mission of Bangladesh to the Secretary-General of the United Nations, No. PMBNY-UNCLOS/2009-3135 (6 July 2009), at paras 2-3, 8. Memorial of Bangladesh (hereinafter “MB”), Vol. III, Annex 20.

16 Article 83(3) of the 1982 Convention states:

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

17 (Emphasis added.)

18 CMM at para. 1.17, fn. 25.

problematic, as there then would be hardly any possibility to submit questions of interpretation raised by a submission to legal scrutiny.¹⁹

Because disputes under Article 76 plainly *do* fall within the dispute resolution provisions of Part XV, the ILA Report goes on to state that a court or tribunal under Part XV may even “find that a recommendation of the CLCS is invalid”²⁰ There can thus be no doubt that the legal interpretation of UNCLOS provisions on the outer continental shelf in this case is solely within the jurisdiction of ITLOS.

4.12 This understanding of the Part XV compulsory dispute settlement procedures is consistent with the decision of the Annex VII Tribunal in *Barbados v. Trinidad*. The arbitral tribunal in that case found that its jurisdiction “includes the delimitation of the maritime boundary in relation to that part of the continental shelf extending beyond 200 nm” notwithstanding any recommendations the CLCS may issue at some point in the future.²¹ The Counter-Memorial rather conspicuously ignores this precedent.

4.13 While disregarding this obvious authority, it is curious that on two separate occasions, Myanmar invokes the following dictum from *Nicaragua v. Honduras* to support its argument concerning the alleged primacy of the CLCS over ITLOS:

in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.²²

4.14 The ICJ’s statement is wholly inapposite in this case. *First*, neither of the parties in that case made any claim to an outer continental shelf.²³ *Second*, the Court was merely stating the obvious fact that *if* such claims had been made by the parties, they would have to satisfy the requirements of Article 76. The passing reference to the “review” function of

19 International Law Association, Outer Continental Shelf Committee, *Berlin Conference (2004): Legal Issues of the Outer Continental Shelf* (hereinafter “ILA Report”), at p. 4.

20 *Ibid.* at p. 12.

21 Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago, Award, 11 April 2006, reprinted in 27 RIAA 147 (hereinafter “Barbados/Trinidad & Tobago”), at para. 217. Reproduced in MB, Vol. V.

22 See CMM at paras. 1.22 and 5.162, citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (hereinafter “Nicaragua v. Honduras”), at para. 319.

23 See generally Memorial of Nicaragua (21 March 2001); Counter-Memorial of Honduras (21 March 2002); Reply of Nicaragua (13 January 2003); and Rejoinder of Honduras (13 August 2003) (all available on the ICJ website).

the CLCS does not in any way suggest that the ICJ deemed this to be a pre-requisite to the exercise of jurisdiction. It is nothing more than recognition – by way of *obiter dicta* – of the CLCS’s scientific and technical role in reviewing such claims and making recommendations to States concerning the outer limits of their continental shelves.

4.15 With respect to the decision of the Court of Arbitration in the *St. Pierre & Miquelon* case, it is noteworthy that beyond an erroneous understanding of the mandate of the yet-to-be established CLCS, the decision of the arbitrators not to exercise jurisdiction over the delimitation in the outer continental shelf was motivated in part by the failure of the parties to submit any scientific evidence:

The disagreement between the Parties concerning the factual situation, namely, whether at the relevant location the geological and geomorphological data make Article 76(4) applicable or not, was not elucidated during the oral proceedings. *This deficiency strengthens the Court’s decision to abstain from pronouncing on the substance of the matter.* It is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist.²⁴

4.16 Unlike *St. Pierre & Miquelon*, Bangladesh has submitted extensive evidence concerning the natural prolongation of its land territory in the continental shelf beyond 200 M²⁵, thus enabling the Tribunal to reach a decision based on well-established facts.

B. Delimitation Does Not Prejudice the Rights of Third Parties

4.17 Myanmar’s second jurisdictional objection is that the Tribunal has no jurisdiction to delimit the outer continental shelf “because any judicial pronouncement on these issues might prejudice the rights of third parties and also those relating to the international seabed area (the area beyond the limits of national jurisdiction)”.²⁶ It appears, however, that Myanmar is not convinced by its own argument. In Chapter 5, the Counter-Memorial accepts with respect to the potential areas of overlap with India that even if ITLOS cannot fix a tripoint between three States, it can indicate the “general direction for the final part of

²⁴ *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon)*, Decision, 10 June 1992, reprinted in 31 ILM 1149 (hereinafter “*St. Pierre & Miquelon*”), at para. 81. Reproduced in MB, Vol. V. Cited at CMM, para. 1.18.

²⁵ Bangladesh presented its Submission to the CLCS on 25 February 2011. The Executive Summary is reproduced in Vol. III of this Reply as Annex R3. An electronic copy of the full text of the Submission has been deposited with the ITLOS Registry.

²⁶ CMM at para. 1.16.

the maritime boundary between Myanmar and Bangladesh”,²⁷ and that doing so would be “in accordance with the well-established practise” of international courts and tribunals.²⁸

4.18 Having conceded that the potential rights of India are not a bar to the Tribunal’s jurisdiction, Myanmar completely disregards the fact – as stated by the *Newfoundland-Nova Scotia* arbitral tribunal – that “there does not seem to be any difference in principle between the non-effect of a bilateral delimitation vis-à-vis a third state... and its non-effect vis-à-vis the ‘international community’ or third states generally”.²⁹ Thus, in the same way that international courts and tribunals have consistently exercised jurisdiction where the rights of third States are claimed, ITLOS may also exercise jurisdiction when the rights of the international community to the international seabed are raised. In any event, the issue concerning the interests of the international community in the international seabed is purely an abstract concern in this case. As stated, the Parties here agree that the international seabed area is wholly outside and irrelevant to the delimitation of the areas in dispute between Bangladesh and Myanmar.³⁰

4.19 With respect to the interests of India, Myanmar concedes that, at the very least, the Tribunal “is not prevented from finally settling the present dispute, by fixing not a point but a general direction for the final part of the maritime boundary between Myanmar and Bangladesh”.³¹ Whether ITLOS elects to effect a complete delimitation of the maritime boundary between the Parties (as Bangladesh has suggested³²) or opts instead in favour of a directional line (as Myanmar suggests) is irrelevant to the core jurisdictional issue. Irrespective of the method the Tribunal adopts, it is competent over the dispute.

4.20 As set forth in the Memorial,³³ the Court of Arbitration in the *Anglo-French Continental Shelf Case* was confronted with a similar trilateral overlap issue. The area of delimitation between the United Kingdom and France overlapped with an area claimed by Ireland. In effecting a complete delimitation between the parties rather than opting simply or a directional line, the Court of Arbitration observed that its Award “will be binding only as between the Parties to the present arbitration and will neither be binding upon

27 *Ibid.* at para. 5.161.

28 *Ibid.* at para. 5.162.

29 *Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia*, Award, Second Phase, 26 March 2002, available at [http://lawlibrary.unbf.ca/boundaryarbitration/pdfs/Awards%20&%20Maps/PhaseII_Award_English\[1\]_opt.pdf](http://lawlibrary.unbf.ca/boundaryarbitration/pdfs/Awards%20&%20Maps/PhaseII_Award_English[1]_opt.pdf) (hereinafter “*Newfoundland/Nova Scotia Phase II*”), at para. 2.31, fn. 90. Reproduced in MB, Vol. V.

30 See RB at para. 1.34.

31 CMM at para. 5.161.

32 MB at paras. 4.34-4.38.

33 *Ibid.* at paras 4.36-4.37.

nor create any rights or obligations for any third State, and in particular for the Republic of Ireland, for which the Decision will be *res inter alios acta*.³⁴ The fact that there would be two “successive delimitations”, even with potential “overlapping of the zones”, posed no obstacle.³⁵

4.21 It bears reiteration that the delimitation of the continental shelf beyond 200 M between Bangladesh and Myanmar has both a bilateral and a trilateral aspect. As set forth in **Figure R4.1** (in Volume II only), the first portion of the outer continental shelf is claimed only by Bangladesh and Myanmar; the rights of India are in no way implicated.³⁶ With respect to the second portion, where the claims of Bangladesh and Myanmar do partially overlap with those of India, the Tribunal can nonetheless effect a complete delimitation as between the Parties to this proceeding, just as did the Court of Arbitration in the *Anglo-French Continental Shelf Case*. ITLOS need only determine which of the two Parties to this case has the better claim *vis-à-vis* the other, without prejudice to the claims of India. Any such action would not be binding on India by application of the *res inter alios acta* principle both generally and as specifically reflected in Article 33(2) of the ITLOS Statute, which provides: “The decision shall have no binding force except between the parties in respect of that particular dispute.” The Tribunal could also include a specific statement to that effect in its *Dispositif* in this case to eliminate any possible doubt on the matter.

4.22 Proceeding in this manner would also be of material assistance in assuring a final and complete settlement among all three States concerning their respective entitlements beyond 200 M in the Bay of Bengal. As the Tribunal knows, the dispute between Bangladesh and India concerning their maritime boundary, including in the continental shelf beyond 200 M, is currently pending before a five-member arbitral tribunal convened pursuant to UNCLOS Annex VII. That arbitral tribunal will render its award as between Bangladesh and India subsequent to the Judgment of ITLOS in this case, at which time the rights of Bangladesh and Myanmar *vis-à-vis* each other will have been resolved. If the Tribunal proceeds in the manner Bangladesh suggests, the cumulative effect of these parallel, but consecutive, proceedings will ensure a full and final settlement of the issues in dispute

34 Delimitation of the Continental Shelf between France and the United Kingdom, Decision, 30 June 1977, reprinted in 18 RIAA 3 (hereinafter “Anglo-French Continental Shelf Case”), at para. 28. Reproduced in MB, Vol. V.

35 *Ibid.* at para. 28; see also *Frontier Dispute (Burkina Faso/Mali)*, Judgment, I.C.J. Reports 1986, p. 554, at para. 50; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6, at para. 63.

36 The outer limit of Bangladesh’s claim in the continental shelf beyond 200 M as depicted in Figure R4.1 varies slightly from those depicted in the figures presented in Bangladesh Memorial, which were provisional only. The outer limit as depicted in Figure R4.1 reflects the final coordinates of Bangladesh’s claim as submitted to the CLCS on 25 February 2011.

without prejudicing the rights of any party, and without leaving significant portions of the disputed areas trapped in perpetual limbo.

4.23 Accordingly, there is no bar to the Tribunal's exercise of jurisdiction to delimit the area of the continental shelf beyond 200 M that is in dispute between the Parties to this case. Nor has the Counter-Memorial proffered any basis for the Tribunal to decline to exercise its jurisdiction. To the contrary, Part XV of the 1982 Convention and the orderly administration of justice require the Tribunal to decide this matter. The alternative is to leave the area in perpetual dispute without any near or even long-term prospect of resolution. The Parties have already spent 30 years unsuccessfully attempting to resolve this dispute diplomatically and the differences between them have grown larger. They should not be condemned to another 30 years, or more, of conflict. They came to ITLOS, by mutual agreement, to avoid this.

II. The Geology and Geomorphology of the Bay of Bengal

4.24 Before turning to the legal dimensions of delimiting the continental shelf beyond 200 M, it is helpful to review the scientific evidence as presented in Chapter 2 of the Bangladesh Memorial. Those facts are, in Bangladesh's view, the key determinant of the issues before the Tribunal in regard to the outer shelf area.

4.25 There is general agreement among scientific experts as to the geology of the Bay of Bengal, and in particular the disposition of the tectonic plates that underlie it. As Bangladesh showed in its Memorial, supported by the expert evidence of Professor Joseph Curray,³⁷ Bangladesh and Myanmar rest on two separate, and juxtaposed, tectonic plates. Virtually all of the land territory of Bangladesh sits on the Indian Plate, while Myanmar sits on the Burma Plate.

4.26 The geology of these two regions is fundamentally different. The Indian Plate consists of continental and oceanic crust overlaid by thick blankets of sediment derived from the Bengal Depositional System, which has formed the landmass of Bangladesh, the phys-

37 Joseph R. Curray, "The Bengal Depositional System: The Bengal Basin and the Bay of Bengal" (23 June 2010) (hereinafter "Curray Expert Report (2010)"). MB, Vol. IV, Annex 37. *See also* Joseph R. Curray, "Comments on the Myanmar Counter-Memorial, 1 December 2010" (8 March 2011) (hereinafter "Curray Supplemental Report (2011)"). RB, Vol. III, Annex R4; *and* Hermann Kudrass, "Elements of Geological Continuity and Discontinuity in the Bay of Bengal: From the Coast to the Deep Sea" (8 March 2011) (hereinafter "Kudrass Expert Report (2011)"). RB, Vol. III, Annex R5.

ical shelf and slope in the Bay of Bengal, and the deep-sea Bengal Fan.³⁸ The Burma Plate, in contrast, consists of a continental core with its western edge comprised of deformed sediment scraped off the subducting (down-going) Indian Plate to form an extensive accretionary prism.³⁹ While the Indian Plate underlies almost the entirety of the shelf and seabed beneath the Bay of Bengal, the edge of the Burma Plate extends at most 50 M west of Myanmar's coast.⁴⁰

4.27 The junction between these two geological regions marks the locus of a collision between the two tectonic plates, and is a textbook example of the most fundamental geological discontinuity found anywhere on the earth. The Counter-Memorial does not dispute these facts or the existence of this major discontinuity.

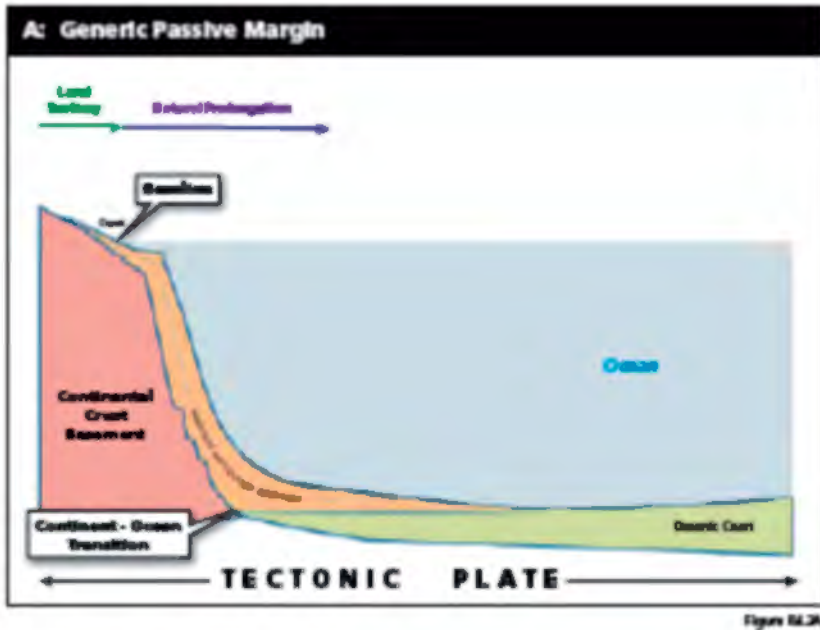
4.28 As discussed in Chapter 2 of the Memorial, the continental margins in the Bay of Bengal are of two main types: (1) the east-facing coast of peninsular India and the south-facing coast of Bangladesh are both "passive margins" (although, as discussed below, of very different sorts); and (2) Myanmar's Rakhine coast, together with the west-facing coast of Bangladesh's Chittagong division, are part of a single "active margin" that extends southwards through India's Andaman Islands. It is instructive to examine schematic cross-sections that illustrate the differences among these various margins.

4.29 **Figure R4.2A** on the next page shows the usual characteristics of a passive margin like that of peninsular India. The outer edge of the continental crust is formed by the rifting and breakup of the precursor continent, and is attached to oceanic crust, which in turn is formed by the process of seafloor spreading after break-up. The continental crust thins and merges with the oceanic crust such that there is not a sharp boundary but rather a transition zone. One of the main distinguishing features of such a simple passive margin, as compared with an active margin, is that there is comparatively little volcanic or earthquake activity. Sediment derived from erosion of the continental interior forms a thin layer overlying the continental crust and the physical continental shelf and slope. It also forms a sedimentary rise at the base of the slope. This style of passive margin is common, and is typical of the east and west coasts of India and Africa, the east coast of South America, and others.

38 Curray Expert Report (2010), at p. 4. MB, Vol. IV, Annex 37; Kudrass Expert Report (2011), at pp. 1-2. RB, Vol. III, Annex R5.

39 *Ibid.* at pp. 4, 6. MB, Vol. IV, Annex 37; Kudrass Expert Report (2011), at pp. 3-4. RB, Vol. III, Annex R5.

40 See discussion in MB at paras. 2.22 and 2.41.



4.30 Bangladesh's south-facing coast is also part of a passive margin but, while having underlying similarities to a typical margin as depicted in Figure R4.2A, has a very different origin. As discussed in the Memorial,⁴³ sedimentation derived from the rivers flowing from the Himalaya Mountains initiated and perpetuated the Bengal Depositional System.

4.31 The Bengal margin is therefore unusual in that massive sediment layers have built up over the edge of the continental crust and onto the oceanic crust, as depicted in Figure R4.2B on the next page. These sedimentary layers comprise the delta, submerged delta, and deep-sea fan, and have buried the edge of the continental crust so that the continent-ocean boundary is now hundreds of miles inland. These sedimentary deposits now form much of the landmass of Bangladesh and extend continuously from the Bangladesh mainland through the continental shelf, slope, and rise in the Bay of Bengal. In this case, the continental rise, which is typically just 60-100 M in width, extends southwards over 1000 M throughout the whole length of the Bay of Bengal (and beyond). The natural prolongation of Bangladesh's landmass into the sea, therefore, is one of the longest continuous prolongations in the world.

⁴³ *Ibid.* paras. 2.26 and 2.30. See also Curray Expert Report (2001), at pp. 2-3, MB, Vol. IV, Annex 37; Endram Expert Report (2001), at p. 3, RB, Vol. III, Annex B5.

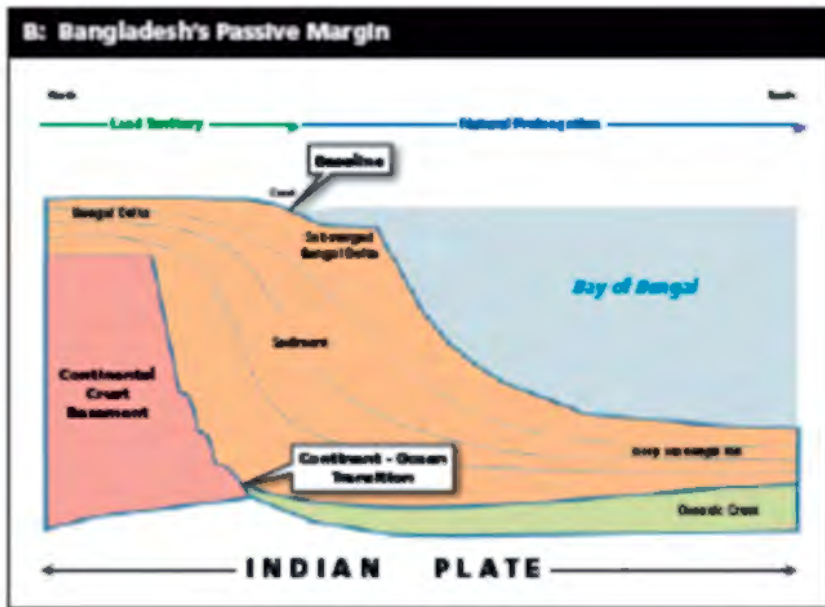


Figure R4.2B

4.32 In this respect, it is worth noting that when Article 76 speaks of “natural prolongation” it is neutral on the composition of the crust and applies equally to continental or oceanic crust, as long as there is no geological or geomorphological discontinuity.⁴³ Myanmar is therefore mistaken when it maintains that “The Applicant itself is deprived of a natural prolongation extending offshore, given the fact that a major part of its landmass is lying on oceanic crust as a result of the sedimentation process”.⁴⁴

4.33 In contrast to Bangladesh’s continental margin, Myanmar’s is an active (convergent) margin. (See Figure R4.2C on the next page) That is to say, the margin is defined by a subduction zone where part of the Indian Plate underlying the Bay of Bengal impinges upon and is forced beneath the Burma Plate to the east.⁴⁵ This movement generates a large number of earthquakes along the whole margin as well as sporadic volcanic activity. This “active” type of margin is in sharp contrast to the fixed type of passive margin possessed

43 Commission on the Limits of the Continental Shelf, *Summary of Recommendations in regard to the Submission made by the United Kingdom in respect of Ascension Island*, (9 May 2008), available at <http://www.un.org/Depts/los/clcs_new/submissions_files/ukbr08/ukbr_08_01_rec_summ.pdf> (hereinafter “CLCS Ascension Island Recommendations”), at para. 22.

44 CHM at para A.12.

45 Curry Supplemental Report (2011), at p. 3, R.B. Vol. III, Annex R4.

by Bangladesh where the continent-ocean boundary is stable, continuous, and virtually devoid of earthquake or volcanic activity.⁴⁵

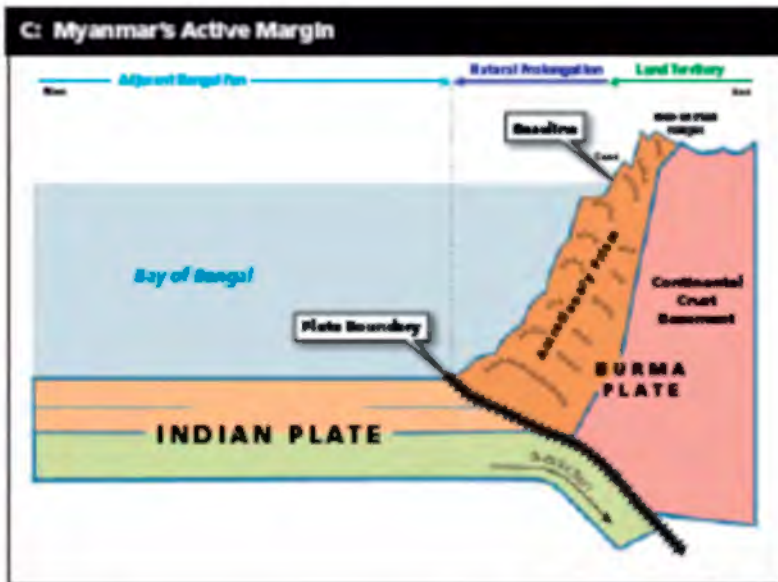


Figure M.2C

4.34 At the convergence of the two tectonic plates, the Indian Plate is loaded with the sediment derived from the Bengal Depositional System. As it is forced beneath the Burma Plate, this sediment is scraped off the down-riding Indian Plate to form an accretionary wedge butting against the continental blocks of central Myanmar. The accretionary wedge can be seen today in the coastal ranges of western Myanmar.⁴⁶

4.35 Western Myanmar therefore consists geologically of a central core of older material with a strip of highly deformed sedimentary material – the accretionary wedge – pushed up along its western side⁴⁷ (as depicted in Figure 2.5 of the Memorial (in Volume II only)). The extension of Myanmar's landmass, therefore, includes the accretionary wedge – but not the undeformed sediment seaward of the plate boundary. This point is confirmed by paragraph 6.3.6 of the *CLCS Scientific and Technical Guidelines* ("*CLCS Guidelines*"), which states that "the seaward extent of convergent continental margins is defined [] by

45 Three-dimensional computer-generated visualizations of each of the margins described in the preceding paragraphs are included as an annex to this Reply RB, Vol. III, Annex E.21.

46 The accretionary wedge is also visible as the Chittagong Hills in Bangladesh. See MB at para. 2.20.

47 Krishna Expert Report (2011), at pp. 3-4. RB, Vol. III, Annex E5.

the seaward edge of the accretionary wedge...".⁴⁸ In Myanmar's case, "the seaward edge of the accretionary wedge" lies no farther than 50 M from its Bay of Bengal coastline. It falls substantially short of the 200 M line where the outer continental shelf begins.

4.36 To summarise, it is clear from a geoscientific perspective that there is an overwhelming physical continuity extending far more than 200 M from the Bangladesh land territory into the Bay of Bengal by virtue of (1) a continuous basement of oceanic crust, and (2) an overlying unbroken sedimentary accumulation which now comprises the shelf, slope, and rise.⁴⁹ In contrast, the physical extension of the land territory of Myanmar extends only through a narrow zone of attached, deformed sediments scraped off the Indian Plate and overlying the leading (western) edge of the Burma Plate that does not reach more than 50 M from Myanmar's coastline.⁵⁰

III. Bangladesh's Entitlement Beyond 200 M

4.37 In accordance with Article 76(1) of the 1982 Convention, entitlement to a continental shelf beyond 200 M requires evidence of "natural prolongation" from the coastal State's land territory. Natural prolongation beyond 200 M is, at root, a physical concept not purely an abstract legal one. It must be established by both geological and geomorphological evidence. It cannot be based on the geomorphology of the ocean floor alone but must have an appropriate geological foundation. Mere "appurtenance" to the nearest landmass does not create an entitlement to a continental shelf beyond 200 M.

4.38 Myanmar cannot meet the physical test of natural prolongation Article 76(1) establishes for the reasons discussed above. As a result, it is not entitled to an outer continental shelf. Because its claim does not meet the requirements of Article 76(1), the question of whether the conditions set out in Article 76(4) (the Hedberg and Gardiner formulae) are met does not arise. In any event, Myanmar has misunderstood and misapplied Article 76. As discussed below, neither the *CLCS Guidelines* nor its practise conform to the erroneous reading of Article 76 presented by Myanmar.

48 Commission on the Limits of the Continental Shelf, *Scientific and Technical Guidelines*, U.N. Doc. No. CLCS/11 (13 May 1999) (hereinafter "*CLCS Guidelines*"), at para. 6.3.6. See also Figure 6.1A to the same.

49 See generally Kudrass Expert Report (2011), RB, Vol. III, Annex R5; see also Curray Supplemental Report (2011), at pp. 1, 4, RB, Vol. III, Annex R4.

50 Kudrass Expert Report (2011), at p. 3, RB, Vol. III, Annex R5.

4.39 Myanmar disputes Bangladesh's claim to a continental shelf beyond 200 M.⁵¹ But it does *not* dispute that Bangladesh's land territory has a natural prolongation beyond 200 M as required by Article 76(1). Nor does it say that Bangladesh does not satisfy the conditions set out in Article 76(4). To that extent, both Parties agree that there is a continental shelf extending beyond 200 M that is both a geological and geomorphological extension of Bangladesh's landmass. As discussed in the previous Chapter, Myanmar's argument that Bangladesh has no continental shelf beyond 200 M is based instead on the proposition that once the area *within* 200 M is delimited, the terminus of Bangladesh's shelf falls short of the 200 M limit.

4.40 This can only be a valid argument if the Tribunal first accepts Myanmar's arguments in favour of an equidistance line within 200 M. Such an outcome would require the Tribunal to disregard entirely the relevant circumstances relied upon by Bangladesh and discussed in the previous Chapter, including the cut-off effect resulting from the concavity of its coast.⁵² As explained in Chapter 3 of this Reply, the already substantial inequity of this cut-off is exacerbated by the fact that Bangladesh would be denied access to its unquestioned entitlement in the continental shelf beyond 200 M.⁵³ The resulting inequity would be compounded still further if the areas of continental shelf beyond 200 M at issue are attributed to Myanmar, notwithstanding its lack of a natural prolongation into the area. In these circumstances, a delimitation that denies Bangladesh any entitlement to a continental shelf beyond 200 M is necessarily inequitable.

4.41 Myanmar argues that if Bangladesh is cut off from areas beyond 200 M, that is just something it has to live with and that it cannot claim this is a relevant circumstance. To support this argument, Myanmar draws attention to the ICJ's 1993 Judgment in the *Jan Mayen* case, in which the Court noted that "the sharing out of the area is... the consequence of the delimitation, not vice versa".⁵⁴ Myanmar claims that Bangladesh "bases itself on a claimed entitlement in order to allocate to itself sovereign rights over that part of the continental shelf".⁵⁵ But this reasoning confuses two quite different situations: entitlement and delimitation. In *Jan Mayen*, there was no doubt that both parties were in principle entitled to a continental shelf. Since their entitlements overlapped, it was for the Court to delimit an equitable boundary. In that context, it is clear and Bangladesh does not dispute

51 CMM at paras. 5.155-5.162.

52 RB at paras. 3.36-3.37, 3.39-3.40.

53 *Ibid.* at para 3.84.

54 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 38 (hereinafter "*Jan Mayen*"), at para. 64.

55 CMM at para. 5.157.

that “the task of a tribunal is to define the boundary line between the areas under the maritime jurisdiction of two States...”⁵⁶ That is exactly what Bangladesh seeks in the present case: a boundary between two areas under the jurisdiction of the parties. The same point is made in the *Anglo-French Continental Shelf Case*: “delimitation is essentially a process of ‘drawing a boundary line between areas which already appertain to one or other of the States affected’”⁵⁷

4.42 The problem with Myanmar’s approach is that it starts from the wholly erroneous assumption that Bangladesh has no entitlement to a continental shelf beyond 200 M because the delimitation line will necessarily cut off Bangladesh short of 200 M. But that, of course, is exactly what the Tribunal has to determine. It cannot do so equitably if it ignores all the relevant circumstances, including the uncontested natural prolongation of Bangladesh’s landmass beyond 200 M and the cut-off effect generated by its concave coastline.

4.43 The award of the arbitral tribunal in the *Barbados/Trinidad & Tobago* arbitration⁵⁸ does not contradict Bangladesh’s position in this respect. Having 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 not an *a priori* assumption, as Myanmar appears to think, but simply the equitable result that followed from the delimitation process in accordance with Articles 74 and 83.

4.44 Taking into account the jurisprudence on natural prolongation considered in the Memorial,⁵⁹ and applying it to “the physical circumstances as they are today,”⁶⁰ leaves no doubt that the continental shelf that runs southwards from Bangladesh into the Bay of Bengal is a natural prolongation of its landmass, as required by Article 76(1). It is then for the Tribunal to delimit an equitable boundary with Myanmar throughout the area in dispute, both within and beyond 200 M, taking into account all the relevant circumstances. These include the absence of any natural prolongation from Myanmar’s land territory as

56 *Jan Mayen* at para. 122.

57 Delimitation of the Continental Shelf between France and the United Kingdom, Decision, 30 June 1977, reprinted in 18 RIAA 3 (hereinafter “Anglo-French Continental Shelf Case”), at para. 78 (quoting *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3 (hereinafter “North Sea Cases”) at para. 20).

58 Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago, Award, 11 April 2006, reprinted in 27 RIAA 147 (hereinafter “Barbados/Trinidad & Tobago”), at para. 368. Reproduced in MB, Vol. V.

59 MB at paras. 7.10-7.13.

60 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 (hereinafter “*Tunisia/Libya*”), at para. 60.

required by Article 76, the geology and geomorphology of the seabed, and the cut-off effect of Bangladesh's concave coastline sandwiched between India and Myanmar.

IV. Article 76 and Natural Prolongation

4.45 Myanmar's view of natural prolongation rests on a fundamentally flawed reading of Article 76. Put simply, Myanmar argues that where the outer edge of a continental margin appurtenant to the coastal State can be delineated in accordance with either the Hedberg or Gardiner formulae stated in Article 76(4), a wholly judicial "natural prolongation" within the meaning of Article 76(1) can be presumed.⁶¹ In the words of the Counter-Memorial: "Natural prolongation" is not the criterion; it is the (legal) outcome⁶² On this reading, Article 76(1) and its reference to natural prolongation play no role in determining entitlement in the outer continental shelf; only the location of the foot of the slope line and the Article 76(4) formula lines are relevant.⁶³ By reading Article 76 backwards, and using paragraph 4 to control paragraph 1, Myanmar thus seeks to give the concept of natural prolongation a purely geomorphological character, while ignoring geology altogether.

4.46 Myanmar's reliance on Article 76(4) rather than Article 76(1) is not surprising since, as explained earlier, it has no geological extension beyond 200 M (or indeed beyond 50 M).⁶⁴ By reading Article 76(1) out of UNCLOS, Myanmar thus hopes to avoid the question of whether there is any geological continuity between the seabed beyond 200 M and the adjacent landmass. It prefers to ignore the existence of intervening tectonic plate boundaries, seabed trenches, or any other major geological discontinuity. But, as discussed below, there is no authority for taking such a narrow view of entitlement in the outer continental shelf.⁶⁵

4.47 Bangladesh takes the view that Article 76 cannot be interpreted in such a truncated form; Article 76(1) cannot be ignored. Article 76 as whole is a carefully structured package that proceeds logically from the definition of the "continental shelf" in Article 76(1), which expressly includes natural prolongation, to the rules and procedures for establishing the outer edge of the "continental margin" in Article 76(4). The plain meaning of the term, the *travaux* to the 1982 Convention, and the jurisprudence all make clear that the establishment of an Article 76(1) "natural prolongation" requires evidence of a geologi-

61 CMM at paras. A.21-A.22.

62 *Ibid.* at para. A.10.

63 *Ibid.* at paras. A.11.

64 See RB, Chapter 4, Section II.

65 CMM at para. A.9, quoting *North Sea Cases* at para. 43 (emphasis added).

cal character connecting the seabed directly to the landmass.⁶⁶ Both geology and geomorphology are relevant and necessary to satisfy the test of natural prolongation.

4.48 The ICJ's Judgment in the *North Sea Cases*, which the Counter-Memorial is understandably at pains to disparage and discredit, is instructive in this regard. Myanmar itself cites the following passage:

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*.⁶⁷

4.49 Myanmar claims that this passage supports its claim that natural prolongation is not the criterion of title but rather “the (legal) outcome”.⁶⁸ It says that Article 76 “refers to a legal concept which takes some account of scientific notions. It is not all designed to describe necessary natural and scientific characteristics of the continental shelf, but refers only to a legal concept which assesses the legal title of a State to the continental shelf”.⁶⁹ With all due respect, this gives a very tortured reading to some very plain English. Moreover, when reading what the ICJ actually said about the subject, it is clear that the Court did indeed have in mind a physical prolongation or continuation of the land territory of the coastal State and that this physical continuation is what bestowed title over the shelf.

4.50 This view is reiterated by the Court elsewhere in its 1969 Judgment, most notably in a passage cited by Bangladesh in the Memorial.⁷⁰ This passage merits emphasis because it very clearly sets out the view that natural prolongation entails physical continuity as opposed to mere appurtenance:

More fundamental than the notion of proximity appears to be the principle – constantly relied upon by all the Parties – of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and *it is this idea of extension*

66 MB at paras. 7.10-7.13.

67 *North Sea Cases* at para. 43.

68 CMM at para. A.10.

69 *Ibid.* at para. A.9.

70 MB at para. 7.10.

which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because – or not only because – they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. 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.* From this it would follow that *whenever a given submarine area does not constitute a natural – or the most natural – extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; – or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.*⁷¹

4.51 Since the disputed areas of outer continental shelf in this case are not a “natural – or the most natural – extension of its landmass”, Myanmar strives to persuade the Tribunal that these references to “natural prolongation” in the *North Sea Cases* do not mean what they say.⁷² But if they *do* mean what they say, then Myanmar’s Article 76 argument falls apart. What the Court says in the language quoted above is wholly inconsistent with Myanmar’s reliance on appurtenance as the test of entitlement.⁷³ The Court clearly holds that the shelf does not appertain to a coastal state on the basis of proximity or adjacency (“*even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State*”) but on the basis of natural prolongation (“*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... an extension of it under the sea*”). In the present case, there is no doubt that the “submarine area concerned is to be regarded as a natural extension” of the landmass of Bangladesh. In contrast, the evidence amply demonstrates that the Bengal Depositional System and its associated fan are not the natural extension – still less “the most natural” extension – of the Myanmar landmass.⁷⁴

71 *North Sea Cases* at para. 43 (emphases added).

72 CMM at paras. A.9, A.11.

73 *Ibid.* at paras. A.21-A.22.

74 RB at paras. 4.33-4.36.

4.52 If the ICJ's views concerning the continental shelf are reflected in Article 76 (which, as discussed below, they are), then natural prolongation – the submerged extension of the land territory – must be an essential element of title to the shelf beyond 200 M, and the continental shelf beyond 200 M defined by Article 76 must be essentially a physical one informed by both geological and geomorphological phenomena. Only the definition of the outer limit of the margin in Article 76(4) is a purely legal construct. Myanmar is thus wrong to claim that the “legal concept of ‘natural prolongation’ must be understood by reference to the formulae of article 76(4)(a) of UNCLOS and their starting point, i.e., the foot of the continental slope...”⁷⁵ This is reading the law backwards. Article 76(1) refers to “natural prolongation of its land territory to the outer edge of the continental margin...” It does *not* say “natural prolongation from the foot of the slope to the land territory...”

A. The Meaning of “Natural Prolongation” in the *Travaux Préparatoires*

4.53 The term “natural prolongation” is not further defined in the 1982 Convention but there is no doubt that it comes directly from the Judgment in the *North Sea Cases*. This is clear from the repeated use of the term in the Official Records of the Third United Nations Conference on the Law of the Sea (“UNCLOS III”) and earlier. It first appears in a Working Paper submitted by China to the UN General Assembly’s Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.⁷⁶ Working papers and draft texts submitted at UNCLOS III also use the term – see in particular those of Canada and eight other States;⁷⁷ the USA;⁷⁸ and Ireland.⁷⁹ There are also references to

75 CMM at para. A.23.

76 M. Nordquist et al., eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II (2003) (hereinafter “Virginia Commentary”), at p. 843. RB, Vol. III, Annex R27.

77 Draft Article 19(2) of this working paper defines the continental shelf in the following terms: “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”. See Third United Nations Conference on the Law of the Sea, *Canada, Chile, Iceland, Indonesia, Mauritius, Mexico, New Zealand and Norway: working paper*, U.N. Doc. No. A/CONF.62/L.4 (26 July 1974). RB, Vol. III, Annex R8.

78 Draft Article 22(2) submitted by the United States provided as follows: “The continental shelf is the sea-bed and subsoil of the submarine areas adjacent to and beyond the territorial sea to the limit of the economic zone or, beyond that limit, throughout the submerged natural prolongation of the land territory of the coastal State to the outer limit of its continental margin, as precisely defined and delimited in accordance with article 23”. See Third United Nations Conference on the Law of the Sea, *United States of America: draft articles for a chapter on the economic zone and the continental shelf*, U.N. Doc. No. A/CONF.62/C.2/L.47 (8 August 1974). RB, Vol. III, Annex R10.

79 Ireland proposed the following definition of “continental margin” in an informal text submitted to the Second Committee: “The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor nor the subsoil thereof”. See Third United

the concept in committee debates.⁸⁰ From these uncontroversial beginnings, the terminology found its way into Article 62 of the 1975 Informal Single Negotiating Text⁸¹ and Article 64 of the 1976 Revised Single Negotiating Text.⁸² These draft articles are identical to Article 76(1) of the 1982 Convention.

4.54 At UNCLOS III, the delegations were well aware of the significance of natural prolongation and of the references to it in the *North Sea Cases*.⁸³ The delegate from Burma made the following intervention during the 1974 session of the Conference. He leaves no doubt that Burma (as it then was) accepted natural prolongation as a physical and geological concept:

89. U KYAW MIN (Burma) said that his delegation saw the continental shelf régime as an autonomous régime within the broader frame of the future régime of the exclusive economic zone or patrimonial sea. The continental shelf and the water space should be viewed as forming a whole.

90. His delegation believed that the doctrine of the natural prolongation of the land territory into and under the sea had now attained the status of a basic principle of international maritime law, conferring on coastal States certain legal rights and powers which were original, natural and exclusive.

91. On the central issue of limits, his delegation considered it essential that *the paramountcy of the natural prolongation principle should be upheld in formulating the draft articles on the geographic limits of a coastal State's jurisdiction over the sea-bed, both seawards and vis-à-vis another State*. The definition of the continental shelf as embodied in the 1958 Geneva Convention, notwithstanding the exploitability clause, had done only partial justice to the natural prolongation principle, which was expressed in the Convention in terms of the natural continental shelf, namely, the 200-metre isobath line. *But in geological terms the submerged parts of continents ended not at the edge of the natural continental shelf, but at the edge of the continental margin*. The new definition of the continental shelf to be elaborated by the Conference must express "natural prolongation" in terms of the continental margin. His delegation could not agree to the proposal to

Nations Conference on the Law of the Sea, *Preliminary Study Illustrating Various Formulae for the Definition of the Continental Shelf*, U.N. Doc. A/CONF.62/C.2/L.98 (18 April 1978), at p. 189, n. 11. RB, Vol. III, Annex R13.

80 See RB at paras. 4.54-4-56.

81 Third United Nations Conference on the Law of the Sea, *Informal Single Negotiating Text* (Part II), U.N. Doc. A/CONF.62/WP.8/PART II (7 May 1975). RB, Vol. III, Annex R11.

82 Third United Nations Conference on the Law of the Sea, *Revised Single Negotiating Text* (Part II), U.N. Doc. A/CONF.62/WP.8/REV.1/PART II (6 May 1976), RB, Vol. III, Annex R12.

83 See in particular Third United Nations Conference on the Law of the Sea, *Summary records of meetings of the second committee: 18th meeting*, U.N. Doc. A/CONF.62/C.2/SR.18 (29 July 1974). RB, Vol. III, Annex R9.

establish a uniform distance criterion for determining the outer limits of the continental shelf, for that would divest many coastal States of their primordial rights over a portion of the submerged part of their continental land mass, which rights were recognized under the existing law.⁸⁴

4.55 This is how Burma viewed what is now Article 76 at the time it was negotiated. Indeed, there is more in the same delegate's speech:

92. Since the continental margin in the Bay of Bengal, whose waters washed the entire sea coast of Burma, was very wide, the principles and modalities of delimiting the continental shelf between States were of particular interest to his delegation. The most glaring omission in article 6 of the 1958 Convention on the Continental Shelf was the absence of any reference to the natural prolongation principle. That should be corrected in the new convention. Since that principle was the source of the continental shelf rights of coastal States, *it should also form the basis for the establishment of continental shelf boundaries between States, wherever applicable*. His delegation would return to that matter when the Committee discussed item 6 of its agenda⁸⁵

4.56 The most notable feature of this statement by the Myanmar delegate is the recognition that the natural prolongation principle is "the source of the continental shelf rights of coastal States". He confirms exactly the view that Bangladesh has consistently taken: that each coastal State must establish the physical fact of natural prolongation from its own landmass into the outer continental shelf.

B. The Ordinary Meaning of "Natural Prolongation"

4.57 How then should Article 76 of the 1982 Convention be interpreted? First and foremost, in accordance with Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, the Tribunal must look to "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".⁸⁶ Pursuant to Article 32, recourse may be made to preparatory or supplementary material or to the circumstances in which the treaty was concluded only if the terms of the treaty are ambiguous or obscure, or if the ordinary meaning leads to a result which is "manifestly absurd or unreasonable".

4.58 In Bangladesh's view the ordinary meaning of the words "natural prolongation" in their context is clear: both geomorphological and geological continuity must exist be-

84 *Ibid.* at paras. 89-91 (emphases added).

85 *Ibid.* at para. 92 (emphasis added).

86 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969), entered into force 27 January 1980.

tween the coastal State's landmass and the seabed beyond 200 M. The words "natural" and "prolongation" applied to a continental shelf cannot mean anything else. In these circumstances the Tribunal "can only confine itself to the actual terms" of Article 76.⁸⁷ But in any event, the *travaux préparatoires* referred to above confirm Bangladesh's interpretation of Article 76.

4.59 So does the jurisprudence. In the *Tunisia/Libya Case*, the ICJ echoed the words of the *North Sea Cases*, referring to "the physical factor constituting the natural prolongation".⁸⁸ It also made clear that "a marked disruption or discontinuance of the sea-bed" may constitute "an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations".⁸⁹ The Court's understanding of natural prolongation is not diminished by the fact that, on the evidence presented to it by the parties, it was unable to conclude that such a discontinuity existed in that case.⁹⁰

4.60 In the *Libya v. Malta* case, the ICJ again held that a discontinuity in the seabed could be "so scientifically 'fundamental', that it must also be a discontinuity of a natural prolongation in the legal sense".⁹¹ Once again, however, the evidence was insufficient to demonstrate that such a discontinuity existed in the seabed underlying that part of the Mediterranean Sea:

Having carefully studied that evidence, the Court is not satisfied that it would be able to draw any sufficiently cogent conclusions from it as to the existence or not of the "fundamental discontinuity" on which the Libyan argument relies. Doubtless the region has many geological or geomorphological features which may properly be described in scientific terms as "discontinuities". 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.⁹²

87 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112 (hereinafter "*Qatar v. Bahrain* (Jurisdiction and Admissibility)"), at para. 41

88 *Tunisia/Libya* at para. 68.

89 *Ibid.* at para. 66.

90 *Ibid.* at para. 66.

91 *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, I.C.J. Reports 1985, p. 13 (hereinafter "*Libya v. Malta*"), at para. 41.

92 *Ibid.* at para. 41.

4.61 As the Court indicated, a fundamental discontinuity signifying the end of a State's natural prolongation into the seabed could be indicated by either "a tectonic plate boundary" or at least by "a very marked geomorphological feature". Libya claimed the existence of such a "tectonic plate boundary" but according to the Court, "the no less distinguished scientists called by Malta testified that this supposed 'secondary' tectonic plate boundary was only an hypothesis, and that the data at present available were quite insufficient to prove, or indeed to disprove, its existence".⁹³ The Court concluded on the specific facts of that case that it was unable "to draw any sufficiently cogent conclusions... as to the existence or not of the 'fundamental discontinuity'".⁹⁴

4.62 The facts of this case are very different. In the present dispute, there is overwhelming evidence of a "fundamental discontinuity" between the landmass of Myanmar and the seabed beyond 200 M, including but not limited to the tectonic plate boundary between the Indian and Burma plates. This manifestly is "a marked disruption or discontinuance of the sea-bed" that serves as "an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations".⁹⁵ In contrast, the physical continuity between Bangladesh and the seabed beyond 200 M is complete.

4.63 Crucially, Myanmar does not contradict – or even question – any of the scientific facts. It admits them in both its Counter-Memorial⁹⁶ and its submission to the CLCS.⁹⁷ Its only argument is that the geological facts are irrelevant for purposes of this case.⁹⁸

4.64 Myanmar vainly invokes the *Guidelines* and practise of the CLCS to support its argument.⁹⁹ Neither does. The question before the Tribunal in this case is quite different from any question that has so far been considered by the CLCS. The Tribunal must answer this question before it can delimit the shelf: does either Party have an entitlement to a continental shelf beyond 200 M? For this purpose, it has to interpret and apply Article 76(1) and decide whether there is natural prolongation from the land territory of Myanmar, and whether there is one from Bangladesh. In most of the eleven submissions the CLCS has so far considered it has not had to address questions of natural prolongation of a particular State's coastal landmass. As a practical matter, the only question it has had to answer is

93 *Ibid.* at para. 41.

94 *Ibid.* at para. 41.

95 *Tunisia/Libya* at para. 66.

96 *See, e.g., CCM* at paras. 2.5, 2.12, A.12, A.32-A.35.

97 *Myanmar CLCS Submission* at p. 2.

98 CMM at paras. A.32-A.33.

99 *Ibid.* at paras. A.20-A.26 and A.34-A.35.

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.¹⁰⁰ 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.

4.65 The CLCS submissions to which Myanmar draws particular attention are those made by the United Kingdom (in respect of Ascension Island) and by Barbados. Ascension is a mid-Atlantic island pinnacle located on a mid-oceanic ridge. The UK submitted that Ascension had a continental margin which extended beyond 200 M.¹⁰¹ The CLCS concluded otherwise. In its view, there was insufficient evidence of a continental margin beyond the foot of the slope around the island. The Commission considered that the island was surrounded by deep ocean floor and thus had no continental shelf beyond 200 M.¹⁰² For this purpose, it did not matter whether the island rested on oceanic or continental crust;¹⁰³ the continental margin stopped well within 200M. That conclusion is not relevant to the situation of Myanmar or Bangladesh. The problem for the UK was not a fundamental discontinuity in the seabed but rather the fact that there was limited continental margin as defined by Article 76(3).

4.66 In one crucial respect, however, the CLCS recommendation fully supports Bangladesh's view of natural prolongation. The obvious conclusion from the Commission's action on Ascension Island is that the existence of a continental margin is a physical fact, not a legal one. In the view of the Commission, there was no submerged extension of the landmass – no natural prolongation – from Ascension Island beyond 200 M. That is exactly Bangladesh's point with respect to Myanmar.

4.67 A declaration of principles of interpretation of Article 76 was made by the Sub-commission during the examination of the UK's Ascension submission and is referred to by Myanmar in its Counter-Memorial.¹⁰⁴ It contains the following very pertinent paragraphs:

100 These include the recommendations referred to by Myanmar in para. A.24 of its Counter-Memorial.

101 United Kingdom Government, *Submission to the CLCS in respect of Ascension Island – Part I: Executive Summary* (9 May 2008), available at <http://www.un.org/Depts/los/clcs_new/submissions_files/gbro8/ascension_executive_summary.pdf>.

102 *CLCS Ascension Island Recommendations* at paras. 42-44.

103 *Ibid.* at para. 22.

104 *Ibid.* at para. 22. Cited by CMM at para. A.25.

(i) The “natural prolongation of [the] land territory” is based on the *physical extent* of the continental margin to its “outer edge” (article 76, paragraph 1) i.e. “the submerged prolongation of the land mass...” (article 76, paragraph 3);

(ii) The outer edge of the continental margin in the sense of article 76, paragraph 3, is established by applying the provisions of article 76, paragraph 4, through measurements from the FOS.¹⁰⁵

4.68 The important points to observe here are the confirmation that the “natural prolongation of land territory” for the purpose of Article 76(1) refers to the “physical extent” of the continental margin and the “submerged prolongation of the landmass”; and that Article 76(4) defines only the “outer edge” of the margin for legal purposes. Myanmar attempts to suggest otherwise¹⁰⁶ but this is a misreading of what the Commission says.

4.69 With respect to Barbados, the circumstances are also very different from the present case. The Commission considered that “[f]rom a morphological point of view... the ‘Accretionary Front’... can be considered a[] natural prolongation[] of the Barbados landmass”.¹⁰⁷ Applying the provisions of Article 76(4)(a)(i), it decided that the outer edge of the continental margin extended beyond 200 M and therefore entitled Barbados “to delineate continental shelf beyond its 200 M limits”.¹⁰⁸ The natural prolongation, nonetheless, clearly stopped at the outer edge of the accretionary front (or wedge), which is exactly the point Bangladesh makes for the Myanmar margin. Myanmar’s problem is that the outer edge of its accretionary front is located approximately 50 M offshore.¹⁰⁹

4.70 None of this helps Myanmar establish a continental shelf beyond 200 M. On the contrary, it points, as Bangladesh has argued, to the need for a physical extension of the landmass beyond 200 M. It does not show, as Myanmar argues, that “article 76(4) is applicable independently of the question whether the continental margin is or is not the scientific natural prolongation of the land mass”.¹¹⁰ Article 76(4) does not define “natural

105 *Ibid.* at para. 22 (emphasis added).

106 See, e.g., CMM at paras. A.3, A.7-A.8, A.19.

107 Commission on the Limits of the Continental Shelf, *Summary of Recommendations in regard to the Submission made by Barbados* (15 April 2010), available at < http://www.un.org/Depts/los/clcs_new/submissions_files/brbo8/brbo8_summary_recommendations.pdf > (hereinafter “CLCS Barbados Recommendations”), at para. 11.

108 *Ibid.* at para. 12.

109 RB, Chapter 4, Section II. See also Curray Expert Report (2010), at pp. 4, 6. MB, Vol. IV, Annex 37; Curray Supplemental Report (2011), at p. 4. RB, Vol. III, Annex R4; and Kudrass Expert Report (2011), at p. 4.

110 CMM at para. A.25.

prolongation”. It merely defines the outer edge of the continental margin in cases where there already exists the necessary natural prolongation from the land territory as defined by Article 76(1).

4.71 The *CLCS Guidelines* tell the same story. In paragraph 2.1.1, the Commission acknowledges that Article 76(1) establishes the right of States to determine the outer limit of the continental shelf by means of natural prolongation. Paragraph 6.1.9 discusses natural prolongation in reference to Articles 76(1) and 76(3). The Commission’s text provides a *geological* definition of natural prolongation. Paragraph 6.1.9 reads:

These paragraphs [i.e., 76(1) and 76(3)] are valuable to the Commission on several grounds. They help clarify concepts such as natural prolongation of the land territory to the outer edge of the continental margin *in the geological sense of these terms, which require the consideration of tectonics, sedimentology and other aspects of geology.*¹¹¹

4.72 In paragraph 6.3.11 of the Guidelines, the Commission also discusses natural prolongation where mixtures of rock types are juxtaposed. The conclusion (based on a wholly geological viewpoint) is that the extent of the “rifted volcanic continental margin” dictates the extent of the natural prolongation.¹¹² It is clear from this example and the paragraphs quoted above that geology is a very material element of natural prolongation under Article 76 and cannot be ignored, as Myanmar would have it. Rather grudgingly, Myanmar accepts that geologic data are not “entirely irrelevant” for the implementation of Article 76 but only, it seems, in order to determine the foot of the slope.¹¹³ This is not a sustainable position. It cannot be squared with the ordinary meaning of Article 76, the *travaux*, the ICJ precedents starting with the *North Sea* cases, or the Guidelines or recommendations of the CLCS. Myanmar stands alone with its strained interpretation of Article 76. It is entirely without support.

4.73 Bangladesh therefore stands by its interpretation of Article 76 and invites the Court to hold that “natural prolongation of its land territory” in Article 76(1) refers to the need

¹¹¹ Emphasis added.

¹¹² Paragraph 6.3.11 of the *CLCS Guidelines* reads, in relevant part:

Rifted volcanic continental margins are characterized by a thick low-crustal lens with high seismic velocities in the range of 7.0-7.6 km/s and a thick sequence of seaward-dipping reflectors (SDRS) beneath the basement surface. The SDRS merge seaward without a sharp boundary into oceanic crust created at a pre-existing oceanic ridge. Since the feather edge of the SDRS overlies rifted continental crust, a major part of the rifted volcanic continental margin can be considered as “the natural prolongation of the land territory” (article 76, paras. 1 and 3).

¹¹³ CMM at para. A.26.

for geological as well as geomorphological continuity between the land mass of the coastal State and the seabed beyond 200 M. Where, as in the case of Myanmar, such continuity is absent, there cannot be entitlement beyond 200 M. In these circumstances, an equitable delimitation of the outer shelf areas claimed by Myanmar and Bangladesh must recognize that only Bangladesh has entitlement in those areas, and there are no overlapping entitlements to be divided between the two Parties.

4.74 *Vis-à-vis* Myanmar, and without prejudice to the claims of India, Bangladesh is therefore entitled to a continental shelf beyond 200 M adjacent to Myanmar's 200 M limit, as shown in **Figure R4.3** (in Volume II only).

V. Equitable Delimitation Beyond 200 M

4.75 The delimitation proposed by Bangladesh in the outer continental shelf satisfies the requirement of Article 83 for an "equitable solution". It is undeniably the case that by virtue of its geological as well as geomorphological continuity with the outer continental shelf, Bangladesh enjoys "the most natural extension"¹¹⁴ in comparison with Myanmar. And it is equally true that this solution would leave Myanmar with very extensive shelf areas within 200 M in areas not claimed by Bangladesh and not in dispute in these proceedings.

A. The Presence or Absence of Geological and Geomorphological Continuity

4.76 As shown in Section IV above, Myanmar at best enjoys only geomorphological continuity between its own landmass and the outer continental shelf. This "continuity" is based simply on oceanic sediments scraped off the Indian Plate as it subducts under the Burma Plate, filling the deep trench that marks the divergence of the two plates. Unlike Myanmar, the vast majority of Bangladesh sits on the same tectonic plate as virtually the entire Bay of Bengal. Bangladesh can thus show not only geomorphological continuity but also geological continuity. The Bay of Bengal seabed and subsoil truly are the natural prolongation of the landmass of Bangladesh. This cannot be said of Myanmar. In Bangladesh's view, an equitable delimitation consistent with Article 83 must necessarily take full account of the fact that Bangladesh has "the most natural" prolongation in the Bay of Bengal and on this basis attribute the whole of the disputed shelf beyond 200 M to Bangladesh.

4.77 Article 83 of the 1982 Convention does not distinguish between delimitation of the continental shelf beyond 200 M and delimitation of the shelf within 200 M. Its terms are equally the applicable law for delimitation of the continental shelf beyond 200 M. The

¹¹⁴ *North Sea Cases* at para. 43.

objective of delimitation in both cases is thus “to achieve an equitable solution” (Article 83(1)). Because the goal of the delimitation process is an “equitable solution”, the merits of any method of delimitation can only be judged on a case-by-case basis.

4.78 Beyond 200 M, however, some of the circumstances most relevant to achieving an equitable solution are necessarily different from those which may be significant closer to the coast. Since the outer continental shelf is the product of natural prolongation, geology and geomorphology will inevitably have direct relevance to an equitable delimitation. There are precedents for this conclusion. In the *Tunisia/Libya* case, after rejecting the argument that the evidence showed a “marked discontinuity in the seabed”, the ICJ went on to hold that “[i]n such a situation, however, the physical factor constituting the natural prolongation is not taken as a legal title, but as one of several circumstances considered to be the elements of an equitable solution”.¹¹⁵ The same conclusion is supported by scholars. Colson argues that “geological and geomorphological factors will re-emerge in the law of maritime delimitation of the outer continental shelf.... Presumably, they will work together with the other factors in the case, perhaps prominently or perhaps not, depending of the circumstances, to achieve an equitable solution”.¹¹⁶ Hightet goes further and predicts that, in delimitation of the continental shelf beyond 200 M, “it is clear that geological and geomorphological factors will not merely be important; they will be of the essence”.¹¹⁷

4.79 As indicated, Myanmar has no natural prolongation beyond 200 M. However, for the purposes of an equitable delimitation, Bangladesh need not prove that Myanmar has no prolongation at all in order to establish a superior claim to the disputed areas of continental shelf beyond 200 M. Instead, Bangladesh needs only to show that, *vis-à-vis* Myanmar, it has “the most natural” prolongation. The ICJ so indicated in the *North Sea* cases, where the Court found that:

whenever a given submarine area does not constitute a natural – or the most natural – extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; – or at least it cannot be so regarded in the face of a competing claim by a State of whose land terri-

¹¹⁵ *Tunisia/Libya* at para. 68.

¹¹⁶ David A. Colson, “The Delimitation of the Outer Continental Shelf between Neighboring States,” *American Journal of International Law*, Vol. 97, No. 91 (2003) (hereinafter “Colson (2003)”), at p. 107, RB, Vol. III, Annex R26.

¹¹⁷ Keith Hightet, “The Use of Geophysical Factors in the Delimitation of Maritime Boundaries”, in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. 1 (1996), at p. 196, RB, Vol. III, Annex R25.

tory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.¹¹⁸

4.80 For all the reasons set out in Section II above, any prolongation of the landmass of Myanmar into the Bay of Bengal is not comparable in character to that of Bangladesh. Even if, *quod non*, Myanmar were right in asserting an entitlement to the outer shelf beyond 200 M, Bangladesh nevertheless maintains that the geological characteristics of the seabed are relevant to and decisive of an equitable continental shelf boundary delimitation between the two Parties to this dispute.

4.81 In the present case, Myanmar can at best point only to geomorphological continuity based on sedimentation and accretion caused by subduction of the Indian tectonic plate. In contrast, Bangladesh's claim to the continental shelf beyond 200 M rests firmly on the underlying Bengal Depositional System, comprising the land territory of Bangladesh, the physical shelf and slope in the Bay of Bengal, and the deep-sea Bengal Fan.¹¹⁹ Geologically as well as geomorphologically, the outer shelf is a natural prolongation of Bangladesh – there is no discontinuity between the land territory of Bangladesh and the entire seabed of the Bay of Bengal. From either perspective, the seabed is “the *most natural* extension of the land territory” of Bangladesh.

B. Myanmar's Misplaced Reliance on Equidistance To Delimit in the Outer Continental Shelf

4.82 In Chapter 3 of this Reply, Bangladesh demonstrated that equidistance is not an appropriate methodology for delimiting the maritime boundary between the two Parties in the continental shelf within 200 M and EEZ. That discussion will not be repeated here. It suffices to say that if the equidistance fails to achieve an equitable solution within 200 M, then *a fortiori* it does not achieve one beyond 200 M. As Bangladesh has shown, equidistance cuts off Bangladesh's maritime space well within 200 M. The consequence of this is that Bangladesh is “shelf-locked”; that is, cut off entirely from the outer continental shelf beyond 200 M. Equidistance does not *divide* this area between Bangladesh and Myanmar but leaves it all to Myanmar. As explained above, this is an especially inequitable result where, as here, Bangladesh has an entitlement to an outer continental shelf under Article 76(1), while Myanmar has none.

¹¹⁸ *North Sea Cases* at para. 43 (emphasis added).

¹¹⁹ See MB at paras. 7.17-7.18.

4.83 In *Barbados/Trinidad & Tobago*, the Arbitral Tribunal referred to “[t]he principle that delimitation should avoid the encroachment by one party on the natural prolongation of the other or its equivalent in respect of the EEZ (*North Sea Continental Shelf Cases*, ICJ Reports 1969, p. 4; *Gulf of Maine*, ICJ Reports 1984, p.246; *Libya/Malta*, ICJ Reports 1985, p.13)”¹²⁰ The problem for Myanmar is that its continental shelf claim represents more than an encroachment on the natural prolongation of Bangladesh: it represents the complete cut-off of Bangladesh’s prolongation into the outer continental shelf.

4.84 Scholars have also argued that the principle of non-encroachment will likely “remain a key feature of outer continental shelf cases”¹²¹ Colson addresses the problem in the following way:

The principle of nonencroachment concerns how close the boundary line lies to each neighboring coast, and whether in the circumstances of the case, that seems to be an equitable result. It has both a positive and a negative aspect. Each state is entitled to the projection of its coastal front, but the boundary must not “cut off” the projection of the neighbor’s coastal front. Accordingly, the principle of nonencroachment works hand in hand with special circumstances. It is really the nonencroachment perspective that comes into play in deciding that an equidistant line will cut off the extension of the coastal front of the neighboring country. Identifying the special circumstance that causes the equidistant line to do that, and adjusting for it, leads to a satisfactory sharing of the “cutoff” of projections of neighboring coastal fronts and thereby satisfies the principle of nonencroachment.¹²²

4.85 As noted in the previous Chapter, Charney argues that decisions of international adjudicators have sought “to delimit maritime boundaries so that all disputants are allotted some access to the areas approaching the maximum distance from the coast permitted for each one”¹²³ Thus, in *St. Pierre & Miquelon*, the Court of Arbitration awarded France a narrow corridor which it constructed seaward from the coastline to the 200 M limit. This is what Charney called the idea of maximum reach, an idea equally relevant in areas where

120 *Barbados/Trinidad & Tobago* at para. 232.

121 Colson (2003) at p. 107. RB, Vol. III, Annex R26.

122 *Ibid.* at p. 102 fn. 62.

123 Jonathan I. Charney, “Progress in International Maritime Boundary Delimitation Law,” *American Journal of International Law*, Vol. 88, No. 227 (1994) (hereinafter “Charney (1994)”), at pp. 247 *et seq.*, RB, Vol. III, Annex R22. In support of this view, Charney cites the following cases: *North Sea Cases* at para. 81; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Judgment, I.C.J. Reports 1993, p. 351 (hereinafter “*Gulf of Fonseca*”), at paras. 415-420; and *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon)*, Decision, 10 June 1992, *reprinted in* 31 ILM 1149 (hereinafter “*St. Pierre & Miquelon*”), at paras. 66-74.

the continental shelf extends beyond 200 M. In *St. Pierre & Miquelon* the Court of Arbitration did not extend the delimitation beyond 200 M but for erroneous jurisdictional reasons discussed earlier in this Chapter.¹²⁴

4.86 In the Appendix to the Counter-Memorial, Myanmar argues that the rules and methodologies for maritime delimitation beyond 200 M are identical to those within 200 M. In this way, Myanmar claims that just as equidistance is the guiding principle within 200 M, so it must be in the area beyond. This analysis ignores the most fundamental difference between delimitation within and beyond 200 M. Pursuant to Article 76(1), entitlement to the continental shelf within 200 M is based on distance from the coast; natural prolongation of the continental landmass is irrelevant within 200 M. By contrast, entitlement beyond 200 M depends entirely on natural prolongation. Thus, beyond 200 M, distance – including equidistance – assumes a *de minimis* role. While coastal geography still may be relevant to the delimitation – especially if it brings about an exaggerated encroachment or cut-off effect (as in the case of Bangladesh’s pronounced coastal concavity) – the most important factor in delimitation of the outer continental shelf is, by virtue of Article 76(1), natural prolongation.

4.87 It is not difficult to understand why Myanmar ignores the fundamental difference between delimitation within and beyond 200 M, and the primacy of natural prolongation in delimitation beyond that distance: it has no natural prolongation beyond 200 M. Only Bangladesh has one. But Myanmar cannot compensate for this by its insistence that the same methodology for delimiting the continental shelf within 200 M must be used for delimiting it beyond 200 M or its insistence that the methodology can only be equidistance. As Bangladesh has shown, in the circumstances of this case the equidistance method is inappropriate within 200 M and has no application in the area beyond.

4.88 It is worth recalling the common sense view taken in *Tunisia/Libya* that “[t]he equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result”.¹²⁵ The delimitation line set out in **Figure R4.3** would allow the Tribunal to give effect to an equitable delimitation for both Parties. It requires no departure from existing case law or the terms of Article 83 of the 1982 Convention but is “consistent with legal principle as established in decided cases”.¹²⁶ It reflects the geology and geomorphology of the seabed and Bangladesh’s stronger claim to natural prolongation from its land territory. It would recognise Bangladesh’s entitlement to an outer con-

124 RB at para. 4.15.

125 *Tunisia/Libya* at para. 70.

126 *Barbados/Trinidad & Tobago* at para. 243.

tinental shelf, while leaving Myanmar a very extensive shelf area within 200 M. It would ensure the equitable solution required by Article 83(1) of the 1982 Convention.

4.89 For all these reasons, Bangladesh's view is that an equitable delimitation between the parties would not extend Myanmar's continental shelf beyond 200M in any of those areas which are the subject of this dispute.

Conclusions

4.90 In summary, Bangladesh's conclusions concerning the continental shelf beyond 200 M are set forth below.

4.91 With respect to jurisdiction:

(1) In portraying CLCS recommendations as a prerequisite to exercise of jurisdiction by this Tribunal, Myanmar sets forth a circular argument that would make the exercise of ITLOS jurisdiction with respect to the continental shelf beyond 200 M impossible. This is not consistent with Part XV of UNCLOS or with Article 76(10).

(2) The delimitation by the Tribunal of a maritime boundary in the continental shelf beyond 200 M does not prejudice the rights of third parties. In the same way that international courts and tribunals have consistently exercised jurisdiction where the rights of third States are involved, ITLOS may exercise jurisdiction, even if the rights of the international community to the international seabed were involved, which in this case they are not.

(3) With respect to the area of shelf where the claims of Bangladesh and Myanmar overlap with those of India, the Tribunal need only determine which of the two Parties in the present proceeding has the better claim, and effect a delimitation that is only binding on Bangladesh and Myanmar. Such a delimitation as between the two Parties to this proceeding would not be binding on India

With respect to entitlement and delimitation:

(1) If Myanmar has no entitlement to a continental shelf beyond 200M in accordance with Article 76(1) of the 1982 Convention, then it necessarily follows that Myanmar's claims to areas of continental shelf also claimed by Bangladesh are invalid insofar as these areas lie beyond 200 M from either Party to this dispute.

(2) Because Bangladesh, by contrast, *can* demonstrate a legal and scientific basis for natural prolongation from its land territory, it must be entitled to a continental shelf beyond 200 M in accordance with the Convention.

(3) Any boundary between that shelf and Myanmar's must lie no further seawards from Myanmar's coast than the 200 M juridical shelf provided for in Article 76(1). There is no overlapping shelf beyond 200 M from Myanmar and, vis-à-vis Myanmar, Bangladesh is therefore entitled to extend its continental shelf beyond Myanmar's 200 M limit as shown in Figure R4.3.

SUBMISSIONS

On the basis of the facts and law sets forth in this Memorial, Bangladesh requests ITLOS to adjudge and declare that:

(1) The maritime boundary between Bangladesh and Myanmar in the territorial sea shall be that line first agreed between them in 1974 and reaffirmed in 2008. The coordinates for each of the seven points comprising the delimitation are:

No.	Latitude	Longitude
1.	20° 42' 15.8" N	92° 22' 07.2" E
2.	20° 40' 00.5" N	92° 21' 5.2" E
3.	20° 38' 53.5" N	92° 22' 39.2" E
4.	20° 37' 23.5" N	92° 23' 57.2" E
5.	20° 35' 53.5" N	92° 25' 04.2" E
6.	20° 33' 40.5" N	92° 25' 49.2" E
7.	20° 22' 56.6" N	92° 24' 24.2" E

(2) From Point 7, the maritime boundary between Bangladesh and Myanmar follows a line with a geodesic azimuth of 215° to the point located at 17° 25' 50.7" N - 90° 15' 49.0" E; and

(3) From that point, the maritime boundary between Bangladesh and Myanmar follows the contours of the 200 M limit drawn from Myanmar's normal baselines to the point located at 15° 42' 54.1" N - 90° 13' 50.1" E.

(All points referenced are referred to WGS84.)

15 March 2011



Rear Admiral (Retd.) Md. Khurshed Alam

Deputy Agent of the People's Republic of Bangladesh

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- Annex R6 Third United Nations Conference on the Law of the Sea, *Summary records of plenary meetings, 36th meeting*, U.N. Doc. A/CONF.62/SR.36 (10 July 1974)
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