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Public sitting
held on Monday, 19 September 2011, at 3.00 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President José Luís Jesus presiding

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

(Bangladesh/Myanmar)

Verbatim Record

Present:	President	José Luís Jesus
	Vice-President	Helmut Tuerk
	Judges	Vicente Marotta Rangel
		Alexander Yankov
		P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tullio Treves
		Tafsir Malick Ndiaye
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Boualem Bouguetaia
		Vladimir Golitsyn
		Jin-Hyun Paik
	Judges *ad hoc*	Thomas A. Mensah
		Bernard H. Oxman
	Registrar	Philippe Gautier

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CLERK OF THE TRIBUNAL: All rise.

THE PRESIDENT: Please be seated.

We will continue the oral arguments in the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.

I call on Professor Forteau to continue his presentation.

MR FORTEAU (Interpretation)**:** Thank you, Mr President. This morning I began my presentation of the three fundamental criteria which limit today reliance on circumstances as relevant circumstances and I recalled, as the first of these criteria, that it is not possible, under the guise of a relevant circumstance, to refashion nature.

I will continue my presentation with a final comment on this first criterion. This comment takes the form, in reality, of a caveat.

Whilst a tribunal cannot refashion nature, it goes without saying of course that this is, on the other hand, within the remit of a political agreement but this is precisely the reason for which such agreements never have any probative value in front of a tribunal.

Last Monday, Mr Martin considered it useful to present to you four agreements to this effect, only four, which granted corridors to States suffering from a cut-off effect.[1] I note, by the way, that the reference to the alleged "corridor" of St Pierre and Miquelon has now disappeared. Bangladesh undoubtedly was convinced by the arguments in our Rejoinder on this point.[2]

According to Mr Martin, "these agreements evidence a broad recognition by States in Africa, in Europe, in the Americas and in the Caribbean that the equidistance method does not work in the case of States trapped in the middle of a concavity".[3] He talked about "broad recognition". States broadly recognise that to be the case. The term "broad recognition" is obviously an exaggeration.

Four agreements only and, if I'm counting properly, this represents an average of less than one agreement per continent. Although these are insignificant in number, they are lacking also in substantive relevance. In fact, they all have a certain eccentricity, which has escaped the wisdom of Mr Martin and which make them insignificant for our case. Each time, and I repeat *each time*, a State suffering from a cut-off effect, which has been granted a corridor by means of an agreement, is enclaved on both sides by a single State. Gambia is encircled to the north and the south by Senegal; Dominica to the north and the south by the French islands; Monaco to the west and the east by France; and Brunei to the west and the east by Malaysia. It is obviously not the case here. Myanmar is not India.

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[1] ITLOS/PV.11/4 (E), p. 21, lines 11-14 (Mr. Martin).
[2] Rejoinder of Myanmar, para. 6.29.
[3] *Ibid.*, p. 21, lines 11-14.

Incidentally, Mr President, we indicated in our Rejoinder[4] that the circumstances in which these few agreements granting a corridor had been concluded confirmed that in any case these were *political* concessions and their practical nature, in terms of the specific exercise of entitlements to the maritime zone, is scarcely evident.

The rapporteur in the French Parliament on the ratification of the Convention concluded with Monaco indicated, for example, that France had accepted a concession "that the rules of international law did not oblige it to accept".[5] You cannot be any more clear and Bangladesh has had no objection on this score.

This brings me to the second criterion which frames the invocation of relevant circumstances. This second criterion is as follows. The purpose of maritime delimitation is not the equitable division of the contested area. Bangladesh once again does not take this into account in its written submissions. According to Bangladesh,

> as adjacent coastal States with broadly comparable coasts facing onto the high seas, there is no reason in principle why Bangladesh and Myanmar should not have broadly comparable rights to extend their maritime jurisdiction as far seaward as international law permits.[6]

Again, according to Bangladesh, to deny it "an equitable apportionment of the waters of the Bay of Bengal" would be to deny its people "a fair share" of a resource on which they depend heavily.[7]

This, once again, is not the correct approach. International courts have repeatedly recalled that it is by no means a question of an equitable or proportionate division of the zone to be delimited. The sharing-out of the maritime areas is the consequence of the delimitation and not vice versa. As the International Court of Justice held in the *Libya v. Malta* case in 1985, there can be no question of engaging an exercise of "distributive justice".[8]

In the *Jan Mayen* case, the Court also said in 1993, and I quote:

> judicial treatment of maritime delimitation does not involve the sharing-out of something held in undivided shares . . the law does not require a delimitation based on an endeavour to share out an area of overlap on the basis of comparative figures for the length of coastal fronts" and, I underline, "the areas generated by them. The task of a tribunal is to define the boundary line between the areas under the maritime jurisdiction of two States. The sharing-out of the area is therefore the consequence of the delimitation and not vice versa.[9]

The third and final general criterion, which I have already raised and I can be very brief on this, is that the purpose of maritime delimitation is not to meet the "needs" of

[4] Paras. 6.21-6.33.
[5] Rejoinder of Myanmar, para. 6.28.
[6] Memorial of Bangladesh, para. 6.37.
[7] *Ibid.*, para. 6.39. See also Rejoinder of Myanmar, para. 6.1.
[8] *I.C.J. Reports 1985*, p. 40, para. 46 ; Counter-Memorial of Myanmar, para. 5.117.
[9] *I.C.J. Reports 1993,* pp. 66-67, para. 64.

States. Bangladesh claims, however, in this regard, that the “need” for it to have access to the outer continental shelf beyond 200 M (Bangladesh mentioned its “need for its access to its entitlement”) would constitute *per se* a relevant circumstance justifying an application of a method other than equidistance.[10]

Bangladesh has never explained, however, how in law this “need” should be relevant for the purposes of delimitation. It could not have done so. The object of a delimitation is to establish a limit depending on the coastal geography of the overlapping maritime areas, as the case law which I have already cited amply recalls.

If you take into account these three principles in the present case, there is no circumstance to justify adjusting the equidistance line. I will show you this afternoon. However, I would first like to remind of another obvious point when you consider the current case law concerning the methodology of delimitation. The second obvious point is this. A concavity producing a cut-off effect does not constitute a relevant circumstance, as Bangladesh believes.

The fact that a concavity producing a cut-off effect does not constitute *per se* a relevant circumstance was highlighted by the International Court of Justice in 2002 when it stated in the *Cameroon v. Nigeria* case that “the Court does not deny that the concavity of the coastline may be a circumstance relevant to delimitation”[11] – “may be”, the Court takes care to say – and it does not “inherently constitutes”.

I will come back to this. The delimitation which the Court standardised in its 2002 decision shows definitively that the concavity which Bangladesh is trying to apply to our case does not constitute a relevant circumstance.

Our opponents are again not very coherent on this point either.

- Sometimes they affirm that the concavity would be “inherently inequitable” and that equidistance would, “by definition”, lead to an inequitable result in the case of concavity between three States;[12]

- Sometimes they recognise, although it is difficult to do otherwise in view of modern jurisprudence, which I will return to in a moment, they recognise that concavity *per se* is not inequitable, claiming that a cut-off effect would be.[13]

But that claim is as incomplete as the preceding one: a cut-off effect is never inequitable as such. It is if it produces an inequitable result with regard to the coastal geography, which Bangladesh has failed to show specifically, and in particular failing to use the non-disproportionality test, which serves precisely this purpose.

[10] Memorial of Bangladesh, para. 6.43 ; see also para. 6.45.
[11] *ICJ Reports 2002*, p. 445, para. 297.
[12] ITLOS/PV.11/2/Rev.1 (E), p. 18, lines 43-45 (Reichler) ; ITLOS/PV.11/4 (E), p. 22, lines 16-17 (Martin).
[13] Reply of Bangladesh, para. 3.39.

In order to demonstrate this, Bangladesh invokes two dated cases, the *North Sea Continental Shelf case* and the arbitration in *Guinea/Guinea Bissau* and a series of abstract sketch maps on the effects of concavity.[14]

I would like to say a word, first of all, about these abstract sketch maps on the effects of concavity, which you will certainly remember, and which Mr Martin presented to us ten days ago.[15] Once again, the Applicant does not respect the coastal geography. These sketch maps are supposed to illustrate our case. They misrepresent it from three points of view.

- Equidistance grants to Bangladesh access to a limit of about 182 M. The sketch map that Mr Martin presented grants scarcely 100 to State B in the animation on which Professor Pellet commented last Thursday,

- The delimitation line does not start from the concavity in our case, but several hundreds of kilometres further to the south, from a place where the coasts of the Parties are adjacent, straight or even slightly convex. Nothing is said about this in Mr Martin's sketch maps;

- Lastly, the shrinkage effect which Mr Martin criticised is biased: from one sketch map to the other, the coast from State B, the one enclaved in the middle, retains the same length, whereas the coasts of States A and C lengthen. Mr Martin uses the sketch maps to compare situations which are not comparable, to create a false impression of disproportion.

As to the two precedents, the *North Sea* and *Guinea/Guinea Bissau* cases, on the other hand, my colleague Alain Pellet mentioned this morning that they do not reflect the applicable methodology. Furthermore, the International Court of Justice has never delimited Germany's maritime boundaries in the North Sea and it is highly speculative to imagine what it would have done in real terms.

Concerning the award in 1985 in the case of *Guinea/Guinea Bissau*, I would like to say simply that one of the members of the arbitral tribunal, later the President of the Court in The Hague, described the award in 1985 as a "*sui generis* case" ("*cas d'espèce*"), distancing himself officially, less than four years after its adoption, from the method that had been used in this case. I refer to the dissenting opinion of Arbitrator Bedjaoui in the case of the award to *Guinea/Guinea Bissau Senegal* of 1989[16], in particular in paragraph 104 of his dissenting opinion.

At the factual level then,

[14] ITLOS/PV.11/4 (E), p. 14, l. 4-41 (Martin).
[15] 12 September 2011, Tab. 3.7.
[16] Dissenting opinion of arbitrator Mr. Bedjaoui in the case concerning the *Delimitation of the maritime boundary between Guinea-Bissau and Senegal,* decision of 31 July 1989, *RIAA,* vol. XX, p. 194, para. 104 and note 109.

- the coastal geography has nothing comparable with the present case. In 1969 as in 1985, the three States affected by the delimitation had the same length of coastline.[17] That is not the case here,

- In these two cases the States placed at an advantage by the concavity benefited from convex coastlines which reinforced this advantage.[18] The opposite is the case here: the relevant coast of Myanmar is concave and not convex;

- Finally, in our case, the starting point of the maritime boundary does not begin at the concavity; it starts much further to the south, once again from a point where the relevant coasts of the Parties are directly adjacent and even convex, facing towards the south-west, which changes everything.

The decisions given in the past ten years by international courts are far more convincing, starting with the fact that they have been adopted respecting methodology which has now become firmly established. These decisions are doubly pertinent.

- First of all, they are pertinent in themselves by the solutions that they have adopted;

- but they are also pertinent retrospectively. These decisions have rejected the argument, when it was put forward to them, consisting of relying on the *North Sea Continental Shelf* case to try to avoid a cut-off effect caused by a concavity between three States.

With your permission, Mr President, I would like to have a brief look at three different cases of a recent nature.

In the case of *Cameroon v. Nigeria*, first of all - you will find the sketch map being shown in your Judges' folder under tab 3.2 - the International Court of Justice decided that there was no circumstance which could render it necessary to adjust the equidistance line. In particular, the Court rejected Cameroon's argument that the concavity of the coastline, which would give rise to enclaving to its detriment, should lead to a shift in the equidistance line to the west so as to allow it access to a more extensive maritime zone.

In spite of this enclaving, the Court considered that "the [non-adjusted] equidistance line represents an equitable result for the delimitation of the area in respect of which it has jurisdiction to give a ruling".[19]

[17] ICJ *Judgment, 20 Febraury 1969, North Sea Continental Shelf Cases, Reports1969,* p. 50, para. 91 ; Decision of 14 Febraury 1985, *Delimitation of the maritime boundary between Guinea and Guinea-Bissau, RIAA,* vol. XIX, p. 185, para. 98 *in fine*.
[18] ICJ *Judgment, 20 Febraury 1969, North Sea Continental Shelf Cases, Reports 1969,* p. 17, para. 8 ; Decision of 14 Febraury 1985, *Delimitation of the maritime boundary between Guinea and Guinea-Bissau, RIAA,* vol. XIX, p. 187, para.103.
[19] Judgment of 10 October 2002, *ICJ Reports 2002*, p. 448, para. 306.

1 I must point out here that the Court rightly highlights this final point, according to
2 which the equidistance line represents an equitable result in “the area in respect of
3 which it has jurisdiction to give a ruling”. In fact, a maritime limitation only concerns
4 the States party to the dispute and consequently it must be “determined pursuant to
5 the coastline and maritime features of the two Parties”, as the Court in The Hague
6 once again pointed out on 4 May 2011[20] in the case of *Nicaragua v. Colombia*.
7
8 This condemns in one blow the enclaving argument put forward by Bangladesh,
9 according to which your Tribunal should take into consideration the effect of the
10 delimitation to be made between India and Bangladesh in exercising the current
11 delimitation. This is an argument which the International Court of Justice expressly
12 rejected in the *Cameroon v. Nigeria* case. I quote:
13

14 > In the present case, Bioko Island is subject to the sovereignty of
15 > Equatorial Guinea, a State which is not a party to the proceedings.
16 > Consequently the effect of Bioko Island on the seaward projection of the
17 > Cameroonian coastal front is an issue between Cameroon and Equatorial
18 > Guinea and not between Cameroon and Nigeria, and is not relevant to the
19 > issue of delimitation before the Court.[21]

20
21 Exactly the same is true in this case. The question of the effects of the presence of
22 India on the projection of the maritime facade of Bangladesh seawards is raised
23 between Bangladesh and India and not between Bangladesh and Myanmar.
24 Therefore, it is not relevant for the purpose of the delimitation which concerns this
25 Tribunal.
26
27 On 3 February 2009, the International Court of Justice once again adopted the
28 equidistance as a maritime boundary line in the case of the *Maritime delimitation in*
29 *Black Sea (Romania v. Ukraine)*. According to the Court, none of the circumstances
30 put forward by the Parties was relevant to the case in point and consequently the
31 equidistance line was adjudged to be the line representing an equitable result.[22] The
32 Court rejected as non-relevant the six circumstances put forward by the Parties: that
33 is, disproportion between the coastlines; the enclosed character of the Black Sea;
34 the conduct of the Parties; considerations linked to security; the presence of
35 Serpent’s Island in the delimitation zone, and lastly, the cut-off effect relied on by
36 Ukraine. None of these circumstances was considered by the Court to be relevant.
37
38 Finally, I would like to quote the arbitral award of 11 April 2006 given in the case of
39 *Maritime delimitation between Barbados and Trinidad and Tobago*. In that case, the
40 delimitation concerned once more concave coasts producing a cut-off effect. The
41 Tribunal rejected the view that the absence of access by Trinidad and Tobago to the
42 maritime zone situated beyond the 200-M limit constituted a relevant circumstance
43 implying an adjustment of the equidistance line. This claim of the absence of access
44 was rejected and the Tribunal considered, to the contrary, that the equidistance line
45 producing this enclaving effect represented the equitable result sought. Bangladesh

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[20] ICJ, Judgment of 4 May 2011, relating to the Application by Honduras for Permission to Intervene in the *Territorial and Maritime Dispute Nicaragua v. Colombia*, [www.icj-cij.org], para.73.
[21] *ICJ Reports 2002*, p. 446, para. 299.
[22] *ICJ Reports 2009*, pp. 112-128, paras. 155-204.

1 wholeheartedly agreed in its Reply, describing this line decided by the Tribunal in the
2 same way.[23]
3
4 It is true that in the same case the Tribunal, all the same, adjusted the final section of
5 the equidistance line to the benefit of Trinidad and Tobago.[24] The equidistance link is
6 dotted on the sketch map, and the Tribunal's line is the red line. Professor Crawford
7 described this adjustment as "one of the modest successes of [his] life"[25] before
8 going on to say that it was, nevertheless, "a real one" with regard to the claim by
9 Barbados. Mr President, Members of the Tribunal, you can see the success on the
10 screen right now. It is the small triangle at the eastern end of the line. You will see at
11 a glance just how much, comparatively speaking, the claim by Bangladesh in our
12 case is over the top.[26]
13
14 Professor Crawford committed a sin of omission by presenting what he described
15 himself as a modest success. He neglected the following important fact. If the
16 Tribunal made this limited adjustment, it was not due to the concavity and the
17 enclaving effect. The only reason was the disproportion of the length of the
18 coastlines of the two States, and the Tribunal considered this to be "sufficiently
19 great" to have to lead to the adjustment of the line to the benefit of Trinidad and
20 Tobago. In that case, the ratio was 8:1 in its favour. The coastline of Trinidad and
21 Tobago was eight times longer than that of Barbados.[27]
22
23 Mr President, Members of the Tribunal, if you will allow me to summarise,
24
25 - the adjustment made by the Tribunal is described as a "real success"
26 by Professor Crawford;
27
28 - This adjustment is "modest" because it still does not go beyond the
29 200-M limit,
30
31 - The Tribunal only granted this because the length of the coastline of
32 Trinidad and Tobago was eight times greater than the length of the coastline
33 of Barbados.
34
35 What about our case? The equidistance line gives Bangladesh access to about
36 182 M and the coast of Bangladesh is certainly not eight times longer than that of
37 Myanmar. On the contrary, it is the relevant coast of Myanmar which is twice as long
38 as that of Bangladesh. In brief, the equidistance line is equitable.
39
40 During the first round of pleadings, the counsel for Bangladesh were visibly
41 uncomfortable with these precedents.
42
43 Professor Boyle, first of all, relied last Tuesday on the case of *Barbados v. Trinidad*
44 *and Tobago* to protest against the cut-off effect suffered by Bangladesh.[28] The

[23] Reply of Bangladesh, para. 4.43.
[24] *RIAA* vol. XXVII, pp. 242 et seq, paras. 369 et seq.
[25] ITLOS/PV.11/2/Rev. 1 (E), p. 26, lines 42-44 (Crawford).
[26] See Jugdes' Folder, 12 September 2011, Tab. 4.12 (J. Crawford).
[27] *RIAA*, vol. XXVII, p. 239, para. 350 and para. 352.
[28] ITLOS/PV/11/6 (E), p. 27, lines 7-19 (Boyle).

1 approach is strange, to say the least. The award in that case was precisely the
2 opposite of the argument put forward by Bangladesh. According to the arbitral
3 tribunal, a line enclosing Trinidad and Tobago in its area of 200 M is the equitable
4 line and this enclaving is certainly not a relevant circumstance.
5
6 The comments made by Professor Crawford are just as surprising, with all due
7 respect. According to him, this case is not relevant because "[t]here was no concave
8 coastline, no State squeezed between two adjacent neighbours".[29] The concavity is,
9 however, there and the cut-off effect which it produces for the State squeezed
10 between the two – Trinidad and Tobago is squeezed between Barbados and
11 Venezuela.
12
13 Then there is a second reason, according to Professor Crawford, why this case is
14 still not relevant: (this is the black line on the sketch map which leaves the
15 equidistance line) by concluding the agreement with Venezuela in 1990, Trinidad
16 and Tobago was "auto cut-off". It was not up to the Tribunal in the case of *Trinidad*
17 *and Tobago v. Barbados* to compensate Trinidad and Tobago vis-à-vis Barbados
18 because Trinidad and Tobago had made concessions to Venezuela.[30] This
19 argument, I must say, has a certain spice.
20
21 We have been led to believe that Bangladesh's argument, like that of Trinidad and
22 Tobago and of Cameroon, is based entirely on the *North Sea Continental Shelf* case.
23 According to this argument, international law, and I underline that, would require the
24 cut-off effect produced by a concavity to be nullified by disenclaving the State that is
25 disadvantaged by nature.
26
27 In line with this argument, Mr Martin reminded us last Monday of the reason for
28 which Trinidad and Tobago agreed to adjust the equidistance line to the benefit of
29 Venezuela in the agreement of 1990. Mr Martin told us that this was done to accord
30 to Venezuela an outlet to the Atlantic, "with the result of the *North Sea* cases very
31 much in mind".[31]
32
33 In actual fact, Venezuela is enclosed by Guyana to the south and Trinidad and
34 Tobago to the north and this State, therefore, suffers a cut-off effect. If I understood
35 the demonstration by Mr Martin correctly, the agreement of 1990, that is the black
36 line, concluded by Venezuela and Trinidad and Tobago applied the precedent of the
37 *North Sea* and in doing this the agreement is said to support Bangladesh's
38 arguments. If this is the case, Members of the Tribunal, there can only be one
39 alternative:
40
41 - The first part of the alternative: disenclaving is necessary under
42 international law. In this case, the arbitral tribunal should have disenclaved
43 Trinidad and Tobago vis-à-vis Barbados. Mr Martin told us that it was
44 necessary in terms of international law for Trinidad and Tobago to disenclave
45 Venezuela. If this were true, it would then be difficult for Trinidad and Tobago,
46 in their relations with Barbados, to be punished by the Tribunal for this "auto
47 cut-off" in accordance with international law;

[29] ITLOS/PV/11/2/Rev. 1 (E), p. 27, lines 43-44 (Crawford).
[30] ITLOS/ PV/11/2/Rev. 1 (E), p. 27, lines 9-19 (Crawford).
[31] ITLOS/ PV/11/4 (E), p. 20, lines 20-24 (Martin).

- The second part of the alternative: disenclaving is not necessary under international law, which does not prevent it being granted as a political concession, for example, by offering a corridor. If this is the case, the Tribunal therefore had to take the view that the political concession made by Trinidad and Tobago to Venezuela, the black line, under a bilateral agreement which only concerned these two States, had no effect on the judicial delimitation with Barbados.

Mr President, Members of the Tribunal, it is the second solution which was adopted by the tribunal and it did this in a two-fold manner.

- First of all, it analysed the adjustment made by the Treaty of 1990 between Trinidad and Tobago and Venezuela not as the result of the application of the law but as a political concession made by Trinidad and Tobago to Venezuela. The terms of the award are very clear. "Political considerations" led Trinidad and Tobago to "give up" some of its maritime zones to Venezuela.[32] Professor Crawford himself spoke about the "concession" that was made to Venezuela;[33]

- Secondly, the arbitral tribunal refused to adjust the line with Barbados, on the sole ground that this line would enclave Trinidad and Tobago. I would remind us that if there were an adjustment, it is only due to the disproportion in the length of the coastlines; in other words, the tribunal did not agree to follow the approach taken in the agreement of 1990. As far as the tribunal was concerned, it is equidistance and only equidistance which governs delimitation, no matter what the enclaving effect is.

Our opponents are also not very comfortable with the case of *Cameroon v. Nigeria* but it is very crucial. It would be good to project here the sketch map that we saw earlier, which is still at tab 3.2 of the Judges' folder. This case is very crucial for several reasons.

- The part of the judgment which is of interest to us here was given unanimously by the 16 judges in the Court, including the two *ad hoc* judges;

- Here we have a State whose projection of the relevant coast is open towards the sea, as Bangladesh believes to be its case, in contrast with Germany in the *North Sea* case,[34]

- That State is affected by no less than three concavities: its general coastline is concave; its relevant coast vis-à-vis Nigeria is too; we have the island of Bioko, which exacerbates this and this adds a third very severe concavity which Professor Crawford, curiously, did not see,

- This coastal configuration encloses Cameroon in an area which is no larger than 30 M;

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[32] Decision of 11 April 2006, *RIAA,* vol. XXVII, pp. 238-239, paras. 346-347.
[33] ITLOS/ PV/11/2/Rev. 1 (E), p. 27, line 17 (Crawford).
[34] ITLOS/PV.11/4 (E), p. 17, lines 6-21 (Martin).

- In his Memorial in the *North Sea* case, as Mr Reichler recalled on the first day,[35] Germany presented several sketch maps to support its argument, including one of the Bay of Bengal, in order to illustrate the effect of equidistance. I would also like to remind us that Germany also showed a sketch map of the Gulf of Guinea which also showed the enclaving of Cameroon;[36]

- Cameroon cited the precedent of the *North Sea* case before the ICJ;[37]

- and it stated to the Court that:

> if a strict equidistance line were drawn, it would be entitled to practically no exclusive economic zone or continental shelf.[38]

- Having been duly informed of all these elements, in its judgment in 2002 the International Court of Justice adopted the equidistance line without considering that it needed to be adjusted and recalling that it was not called upon to refashion nature.

What will the counsel for Bangladesh answer? May I say, without being too impertinent, that I do not think they really know.

On the one had they are relying on this case to defend the idea that in any delimitation the entire coastal configuration must be taken into account. This is what Professor Crawford said, referring explicitly on this point in his pleadings on Monday, to the *Cameroon v. Nigeria* case.[39] It is also an argument which was invoked by Professor Sands.[40] It is the argument which was presented by Cameroon but the result is that none of the 16 judges of the Court found it convincing.

Professors Sands and Crawford have also not been able to convince ... Professor Crawford. In his first oral presentation, Professor Crawford told us that the Court did not actually take account of the entire coast of Cameroon but only Cameroon's coast to Cape Debundsha. Taking the entire coastal configuration into account would, as Mr Crawford said, have led the Court to reconfigure geography, which it was prevented from doing. Professor Crawford spoke in this respect of a "prohibition".[41]

We subscribe fully to this remark. The line adopted by the Court in *Cameroon v. Nigeria* speaks for itself. There was a serious cut-off effect; there was manifest enclaving due to a concavity; and the Court drew an equidistance line – a point, that is it. Despite these precedents, Bangladesh continues to affirm that circumstances justify setting aside the equidistance line. This claim does not correspond to the applicable method and law, which I will examine now in relation to implementation

[35] ITLOS/PV.11/2/Rev.1 (E), p. 15, lines 19-21 (Reichler).
[36] Memorial submitted by the FRG, [www.icj-cij.org], 14 May 1962, p. 43, Figure 7.
[37] See Rejoinder of Myanmar, para . 6.36.
[38] Judgment of 10 October 2002, *ICJ Reports 2002,* p. 433, para. 271.
[39] ITLOS/PV.11/5 (E), p. 4, lines 8-12 (Crawford) [the referemce contained in note 19 is, by the way, wrong].
[40] ITLOS/PV.11/4 (E), p. 10, lines 20-22 (Sands).
[41] ITLOS/PV.11/2/Rev.1 (E), p. 26, lines 1-2 (Crawford).

arrangements, showing that the circumstances invoked by Bangladesh cannot require any adjustment of the equidistance line in its favour. This applies to St Martin's Island and also to the cut-off effect.

Let us start with St Martin's Island. Last Monday Mr Reichler vehemently accused Myanmar of not respecting any method in terms of the role to be given to this island in delimitation beyond the territorial sea.[42] I would like to respond to Mr Reichler's concerns in a methodical way, breaking up my reasoning into three parts.

I will start by making a series of three points:

- The first point has to do with the unique position of St Martin's Island, which has three characteristic elements: it is close to the land boundary and therefore to the starting point of the equidistance line; it has the very exceptional feature of being on the wrong side of the equidistance line [and] also on the wrong side of the bisector claimed by Bangladesh; and, finally, the mainland coasts to be delimited are adjacent, not opposite. Those three elements together create a serious, very excessive distorting effect on delimitation, which was pointed to last Friday by Mr Lathrop;

- My secondly point: Bangladesh has never included St Martin's Island in its coastal façade or in the description of its relevant coast. In its Reply, Bangladesh writes that its relevant coast extends, from west to east, from the land boundary terminus with India to the land boundary terminus on the other side on the Naaf River.[43] There is no mention here of St Martin's Island. This makes even more curious the claim made by Mr Reichler that the island is "an integral part of the Bangladesh coast";[44]

- My third point: all the precedents cited by Professor Sands on Friday show that no effect beyond the territorial sea was accorded to islands in the delimitation of the mainland.[45] Where an island is located in the vicinity of the equidistance line for the delimitation of exclusive economic zones, the boundary of the territorial sea of the island will always meet the equidistance line which is drawn without taking the islands into account.

Allow me to give two illustrations, among others, one which I will borrow from Professor Sands, and the other from the case of *Romania v. Ukraine*:

- This is the treatment given to the island of Jazirat Diyina in the agreement of 1969 between Qatar and Abu Dhabi;

- and given to Serpents' Island in the case of *Romania v. Ukraine*.

Now I am coming to methodology. Mr Reichler reproaches Myanmar for confusing the first and second stages of the delimitation process. First of all, the equidistance

[42] ITLOS/PV.11/4 (E), p. 26, lines 19-25 (Reichler).
[43] Para. 3.166.
[44] ITLOS/PV.11/4 (E), p. 31, lines 18-19 (Reichler).
[45] ITLOS/PV.11/3 (E), p. 21, lines 13-30 (Sands). See also Counter-Memorial of Myanmar, paras. 4.51-4.61.

line must be drawn, including the island, and then it must be ascertained whether this is a relevant circumstance.[46] I am afraid that the criticism is not directed against us but against international courts. In the case of *Romania v. Ukraine*, which is cited by Mr Reichler, the Court clearly said that with the exception of a case where a series of "fringe islands" are along the coast, no base point can be used on an isolated island for the purpose of delimitation beyond the territorial sea. This is what the Court said:

> To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor the practice of maritime delimitation authorizes. The Court is thus of the view that Serpents' Island cannot be taken to form part of Ukraine's coastal configuration" (and the Court says: "cf. the islet of Filfla in the case concerning *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*).[47]

It is only in the second stage of the process that the island could – and I use the conditional deliberately – be taken into account, if need be, but under certain particular circumstances. Again, the judgment of the ICJ in *Romania v. Ukraine* is abundantly clear. I quote from the judgment:

> The Court recalls that it has already determined that Serpents' Island cannot serve as a base point for the construction of the provisional equidistance line between the coasts of the Parties, that it has drawn in the first stage of this delimitation process, since it does not form part of the general configuration of the coast (...). The Court must now, at the second stage of the delimitation ascertain whether the presence of Serpents' Island in the maritime delimitation area constitutes a relevant circumstance calling for an adjustment of the provisional equidistance line.[48]

The methodology thus outlined by the Court, as well as the precedents to which it refers, lead to two conclusions.

- The first conclusion is that, in principle, an island that does not belong to a series of "fringe islands" cannot be considered to be an integral part of the "general coastal configuration" and therefore will not be taken into account in the construction of an equidistance line;

- The second conclusion is that an island that exceptionally has been taken into account in the first stage of the process has to be excluded in the second stage because it produces a disproportionate effect.[49]

If you now look closely at how case law has applied this methodology, you will see that no island in the position of St Martin's Island has ever been considered, in the

[46] ITLOS/PV.11/4 (E), pp. 26-27, lines 39-47 then 1-3.
[47] *ICJ Reports 2009*, p. 110, para. 149. See also the Judgment of the ICJ in the case Tunisia/Lybia*,* 24 of Febraury 1982, *ICJ Reports 1982,* pp. 88-89, paras. 128-129 ; the arbitral decision of 17 December 1999 in the case *Eritrea/Yemen (Maritime Delimitation)*, *RIAA,* vol. XXII, p. 367, para. 139, and p. 369, paras. 149-151.
[48] *ICJ Reports 2009*, p. 122, para. 186.
[49] *Ibid.*, p. 122, para. 185.

first stage of the process, as an island that should have effect in drawing an equidistance line beyond the territorial sea, or in the second stage of the process as a relevant circumstance.

In almost all the cases that have been adjudged, the islands in question have been treated as follows:

- on the one hand, they have not been considered to be coastal islands;

- on the other hand, they were not given any effect on the construction of the equidistance line beyond the territorial sea.

This is the effect, or the lack of effect, that was given to the following islands:

- the Channel Islands in the case of *Delimitation of the continental shelf between France and the United Kingdom* in 1977;[50]

- the island of Djerba in the case of *Tunisia v. Libya* settled in 1982;[51]

- the island of Filfla in the case of *Libya v. Malta* settled in 1985;[52]

- the island of Abu Musa in the award between *Dubai and Sharjah* in 1981;[53]

- the Yemeni Islands in the arbitration between *Eritrea v. Yemen* in 1999;[54]

- the island of Qit at Jaradah in the case of *Qatar v. Bahrain* in 2001;[55]

- Sable Island in the arbitration of 2002 between the province of Newfoundland and Labrador;[56]

- Serpent's Island in the case of *Romania v. Ukraine* in 2009;[57]

- and the cays in the case of *Nicaragua v. Honduras* in 2007.[58]

The precedents apply to St Martin's Island in two respects.

First of all, St Martin's Island does not constitute an integral part of the coast of Bangladesh in the sense of the case law that I have just mentioned. It is not part of a system of fringe islands along the coast of Bangladesh. Moreover, it is opposite the coast of Myanmar and not Bangladesh. Under these conditions, considering St

[50] Counter-Memorial of Myanmar, para. 4.55:
[51] *ICJ Reports 1982*, p. 64, para. 79, and p. 85, para. 120.
[52] *ICJ Reports 1985,* p. 48, para. 64.
[53] *ILR,* vol. 91, pp. 676-677.
[54] *RIAA,* vol. XXII, paras. 117, 119 et 147.
[55] *ICJ Reports 2001*, pp. 104-109, para. 219.
[56] Rejoinder of Myanmar, para. 5.40.
[57] *ICJ Reports 2009*, p. 188, para. 123.
[58] Rejoinder of Myanmar, para. 3.25.

1 Martin's Island as an integral part of the coast Bangladesh would be to "refashion
2 geography".
3
4 In contrast with what Mr Reichler affirmed, St Martin's Island shares nothing in
5 common with the Scilly Islands or Ushant in the case of the *Delimitation of the*
6 *continental shelf between France and the United Kingdom*. Those islands were
7 "opposite" the coast of the State to which belonged and, as the Court of Arbitration
8 said in 1977, they were part, "both geographically and politically", of the territory of
9 the State opposite which they are located.[59]
10
11 In this case St Martin's Island, without any possible dispute, is "politically" part of the
12 State of Bangladesh, but from the point of view of its geographic location, on the
13 other hand, it is opposite the coast of Myanmar. Mr Lathrop reminded us of this on
14 Friday.[60] If you embrace the perspective of the law of the sea, and are on the
15 mainland coast that generates entitlements and look out to sea, the island is
16 opposite Myanmar; it is not opposite Bangladesh.
17
18 On the other hand, if, ignoring the above, one were to give effect to St Martin's Island
19 in the delimitation operation, this would produce a disproportionate result, which is
20 prohibited by the cases that I have just cited – *Dubai/Sharjah* in 1981,[61] *Libya/Malta*
21 in 1985,[62] *Qatar/Bahrain* in 1991[63] and *Romania/Ukraine* in 2009.[64]
22
23 This island, which is 5 km in length, would in itself produce at least 13,000 km^2 of
24 maritime area for Bangladesh in the framework of the delimitation between
25 continental masses:[65] and this is manifestly disproportionate. This view is not
26 subjective, whatever our opponents might say. The disproportion can't be missed.
27
28 Mr Reichler proffered the argument that it is not a question of knowing whether or not
29 an island is situated on the right side of the equidistance line. What counts, he told
30 us, is the possible disproportionate effect that it produces.[66] But this is the question
31 here. It is precisely the location of the island opposite the coast of Myanmar on the
32 wrong side of the equidistance line which is drawn between adjacent mainland
33 coasts that creates the distortion.
34
35 Let us now imagine, Mr President and Members of the Tribunal, the very rare cases
36 where islands have been given some effect in case law in continental delimitation.
37 You will see that they all have the same characteristics, none of which is possessed
38 by St Martin's Island:
39
40 - In the *Gulf of Maine* case, the effect produced by Seal Island was not
41 disproportionate. The Court itself stated that the "practical impact" on
42 delimitation of giving effect to the island is "limited"[67] and that that practical

[59] Decision of 30 June 1977, *RIAA*, vol. XVIII, p. 254, para. 248.
[60] ITLOS/PV.11/8 (E), p. 19, lines 31-35.
[61] *ILR*, vol. 91, para. 677.
[62] *ICJ Reports 1985*, p. 48, para.64.
[63] *ICJ Reports 2001*, p. 104, para.219.
[64] *ICJ Reports 2009*, p. 122, para. 185.
[65] Rejoinder of Myanmar, para. 5.35.
[66] ITLOS/PV/11/4 (E), p. 28, lines 36 et seq.
[67] *ICJ Reports 1984,* pp. 336-337, para. 222.

1 impact was limited because this island, which is on the right side of the
2 equidistance line and close to the mainland, had an effect on the delimitation
3 between opposite coasts, not between adjacent ones. The Court also said
4 that the question of the effect to be given to Seal Island is just a minor aspect.
5 As the Court said, this island only leads to "a small transverse displacement of
6 that line, not an angular displacement";[68]
7
8 - In the case of the *Delimitation of the continental shelf between France*
9 *and the United Kingdom*, the Scilly Isles and Ushant were on the right side of
10 the equidistance line, they were highly populated and were competing with
11 one or more islands of the other State, which were on the right side of the
12 equidistance line;[69]
13
14 - In the *Tunisia v. Libya* case, the Kerkennah islands were on the right
15 side of the equidistance line, they were very big – 180 km^2 – they had over
16 15,000 inhabitants and were fringe islands.[70] The islands taken into account
17 in the arbitration between *Eritrea/Yemen* in 1999 were also fringe islands.[71]
18
19 St Martin's Island has none of these characteristics, for the reasons that I have just
20 indicated. In conclusion, the location of St Martin's Island and the effect that it
21 produces make it a special circumstance in the case of the delimitation of the
22 territorial sea, which explains the care taken by Myanmar to give it the effect that is
23 most appropriate to its unique location; and the same considerations lead to it not
24 being accorded more effect in the framework of the delimitation of the exclusive
25 economic zones.
26
27 In accordance with case law, of which the case of *Nicaragua v. Honduras* in 2007
28 and *Romania v. Ukraine* in 2009 are the most recent examples, the delimitation line
29 must, as a result, beyond the territorial sea, meet the equidistance line. This is, I
30 repeat, exactly the conclusion suggested by which the practice and case law
31 illustrated by Professor Sands ten days ago.[72]
32
33 Lastly, I am coming to the cut-off effect which, according to Bangladesh, constitutes
34 a relevant circumstance in its entirety. Please rest assured, Mr President, that we are
35 coming to the end of this long pleading.
36
37 The reach of the circumstance was defined very strictly by the Applicant in its Reply.
38 It is summed up its object in paragraph 3.39 of its second written pleading as follows:
39
40 Bangladesh does not argue that concavity *ipso facto* makes equidistance
41 inequitable. Bangladesh agrees that there are concave coastlines
42 including in the Bay of Bengal, that do not cause prejudice to the coastal
43 State. It is not a coastal concavity alone that causes inequity. The
44 inequity, in the form of a dramatic cut-off effect, is produced by a concave

[68] *Ibid.*
[69] Rejoinder of Myanmar, para. 5.31.
[70] Counter-Memorial of Myanmar, para. 4.58.
[71] Arbitral decision of 17 December 1999 in the case *Eritrea/Yemen (Maritime Delimitation)*, *RIAA,* vol. XXII, p. 367, para. 139, et p. 369, paras.149-151.
[72] See also Counter-Memorial of Myanmar, paras. 5.94-5.98 and Rejoinder of Myanmar, paras. 5.27-5.42.

1 coastline that is framed by land boundaries on both sides of and within the
2 concavity. That is the type of concavity in which Bangladesh, and no other
3 regional State, is situated. In fact, there is no more drastic concavity-
4 induced cut-off anywhere in the world.
5
6 This long quotation, which we find sums up the entire argument of Bangladesh, calls
7 for a certain number of comments and some corrections.
8
9 First of all, it is wrong to say that the land boundary between Bangladesh and
10 Myanmar, at the end of which the maritime delimitation should start, is "within a
11 concavity". As I said this morning, the starting point of the maritime boundary is
12 located more than 100 km from the concavity at a place where the relevant coast is
13 straight or even slightly convex.
14
15 Bangladesh also recognises in this passage that it is not the concavity as such in the
16 Bay of Bengal that constitutes a relevant circumstance but the enclaving that results
17 from it. Bangladesh admits that an equidistance line can produce an equitable result,
18 even if there is a concavity. In fact, that was the decision in the cases of *Cameroon*
19 *v. Nigeria* and *Barbados v. Trinidad and Tobago*, which I outlined earlier.
20
21 As far as the cut-off effect is concerned, it is not a very special circumstance at all.
22 According to the perfectly legitimate findings of the award of the Court of Arbitration
23 in 1977 in the case of the *Delimitation of Continental Shelf between France and the*
24 *United Kingdom*,
25
26 so far as delimitation is concerned ... this conclusion [according to which
27 there should not be a cut-off effect of the maritime space of another State]
28 states the problem rather than solves it. The problem of delimitation arises
29 precisely ... in such situations.[73]
30
31 In order to determine if the cut-off produced by an equidistance line to the detriment
32 of one of the Parties will lead to an equitable result, you have to have recourse to the
33 test of the absence of a significant disproportion, which is not a test of
34 proportionality, precisely because it is not a question of refashioning nature, but of
35 delimiting by reference to nature. What is particularly pertinent here is the remark
36 made by the ICJ in the *Libya/Malta* case: the fact that a coast is particularly irregular
37 or particularly concave or convex, the Court said, cannot be taken into account
38 unless it leads to a disproportionate result.[74] In the case – Sir Michael Wood will
39 come back to this in a moment – the test of the absence of disproportionality has
40 been satisfied, and if this is the case, it is above all because the coastline of
41 Bangladesh is not disproportionate in length in comparison with Myanmar.
42
43 Bangladesh has tried to replace statistical objectivity, envisaged by the third stage of
44 the method of delimitation, with artificial flights of lyrical fantasy and dramatic art, and
45 they have demonstrated remarkable verbal energy. Here is a non-exhaustive
46 anthology: Bangladesh would be deprived of an "overwhelming majority" of the
47 maritime areas to which it is entitled;[75] it would be confronted with inequity of the

[73] *RIAA*, vol. XVIII, p. 179, para. 79.
[74] *ICJ Reports 1985,* p. 48, para. 64.
[75] Memorial of Bangladesh, para. 6.30. see also para. 2.46 (i).

greatest order;[76] the cut-off effect would be dramatic,[77] "the most dramatic cut-off in the world";[78] equidistance in this case would produce results that are "arbitrary"[79] and even "irrational";[80] and it would only leave Bangladesh "just a small, wedge-shaped area of maritime space".[81]

Mr President, Members of the Tribunal, the drama shown by Bangladesh must not mislead the Tribunal. The so-called "relevant circumstances" it claims are based only on a verbal exaggeration of the effects of the equidistance line, inspired by an idea of equity of maritime delimitation as if the point of this was the egalitarian sharing of the maritime area.

For Bangladesh, according to Mr Reichler, there is not a generally accepted means of measuring and compensating for the distorting effect of a concave coastline on the construction of a line based on equidistance.[82] This is not true. There are concrete means of measuring the equitable character of the equidistance line, and I will make the following four concluding remarks along these lines.

First of all, I would like to recall that the cut-off effect suffered due to the concavity of the Bay of Bengal affects not only Bangladesh. We are not in a situation comparable with that in the *North Sea* case, in which one single State suffered the effects of a concave coast, whereas its neighbours benefited from convex coasts.[83] In this case, Myanmar also suffers from the effect of this concavity. The maritime delimitation adopted in 1986 by India and Myanmar points towards the northwest of the bay.[84] The effect caused by the presence of the Indian islands in the southeast of the bay is even more marked for Myanmar because Myanmar is totally enclaved by India and Thailand in the Gulf of Mottama.

Secondly, Bangladesh admits that the equidistance line gives it a maritime zone that extends 182 M from its coast. Such an extension does not correspond at all to "just a small, wedge-shaped area of maritime space".[85]

Thirdly, in the light of the delimitations that have been decided in judicial practice today – and I am, above all, thinking about the enclaving of Trinidad and Tobago in its 200-M limit decided unanimously by the members of the arbitral tribunal in 2006 and the enclaving of Cameroon at a distance of less than 30 M, again decided unanimously by the Judges of the ICJ in 2002 – it is undeniable that by comparison the equidistance line in our case fully leads to an equitable result. I would point out that Bangladesh has access to more than 180 M, and there is no significant disproportion between the length of its coast and that of Myanmar.

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[76] *Ibid.,* para. 6.45.
[77] Reply of Bangladesh, para. 3.39.
[78] *Ibid.,* para. 3.59.
[79] ITLOS/PV.11/4 (E), p. 9, l. 24 (Sands).
[80] Memorial of Bangladesh, para. 6.56.
[81] ITLOS/PV.11/2 (F), p. 6, line 43 (M[me] Moni).
[82] ITLOS/PV.11/2/Rev.1 (E), p. 16, lines 24-25 (Reichler) [ITLOS/PV.11/2 (F), p. 17, lines 18-19].
[83] Counter-Memorial of Myanmar, paras. 5.128-5.129.
[84] See Counter-Memorial of Myanmar, p. 29, sketch-map 2.3.
[85] See Rejoinder of Myanmar, paras. 6.70-6.72.

1 Fourthly and finally, the test of absence of disproportionality has been met, as Sir
2 Michael will explain to you in an instant. This last factor in itself confirms that the
3 equidistance line constitutes the equitable solution in the present case, as longs as
4 you apply the modern-day law of maritime delimitation as it is and not as Bangladesh
5 would dream that it should be.
6
7 Mr President, Members of the Tribunal, I would like to thank you for your patience,
8 for having listened to me for so long, and I would be very grateful if you could now
9 give the floor to Sir Michael, who will present the test of disproportionality to you.
10
11 **SIR MICHAEL WOOD:** Mr President, Members of the Tribunal, as Professor Forteau
12 has just said, we now come to the third stage of the equidistance/relevant
13 circumstances, the application of the disproportionality test. As the Annex VII Arbitral
14 Tribunal in *Barbados v Trinidad and Tobago* said,
15
16 proportionality [is] used as a final check upon the equity of a tentative
17 delimitation to ensure that the result is not tainted by some form of gross
18 disproportion.[86]
19
20 Professor Pellet described this morning how the law of maritime delimitation, that is
21 the international law referred to in articles 74 and 83 of the Law of the Sea
22 Convention, has, "in recent decades, been specified with precision" (these are the
23 words of the International Court[87]) into the three-stage method. There are three
24 'defined'[88] and 'separate'[89] stages (again, these are the words of the ICJ). They are
25 the establishment of a provisional equidistance line; the taking into account as
26 necessary of relevant circumstances, if any; and the application of the
27 disproportionality test. This three-stage process was described with great clarity by
28 the International Court of Justice in the 'Methodology' section of its judgment of 3
29 February 2009 in the *Black Sea* case[90].
30
31 This morning, Mr Lathrop explained the provisional equidistance line. Professor
32 Forteau has just taken you through the possible relevant circumstances. He has
33 explained that there are, in the present case, no such relevant circumstances
34 requiring any adjustment of our proposed line. Now, at this third stage, we have to
35 apply the disproportionality test to the line resulting from the first two stages. The aim
36 at this stage is to check that that line does not produce a "great disproportionality"[91]
37 between, on the one hand, the ratio of the areas appertaining to Myanmar and those
38 appertaining to Bangladesh, and, on the other hand, the ratio of their respective
39 coastal lengths – great disproportionality. Other terms also used in *Romania v*
40 *Ukraine* are "marked disproportion"[92] and "significant disproportionality"[93]. As we

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[86] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them,* Award of 11 April 2006, *UNRIAA,* Vol. XXVII, p. 214, para. 238.
[87] *Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 101, para. 116.
[88] *Ibid.,* at p. 101, para. 115
[89] *Ibid.,* at p. 101, para. 116.
[90] *Ibid.,* at pp. 101-103, paras. 115-122.
[91] *Ibid.,* at p. 103, para. 122.
[92] *Ibid.,* at p. 103, para. 122.
[93] *Ibid.,* at p. 129, para. 210.

1 have just seen, the Tribunal in *Barbados/Trinidad and Tobago* spoke of "gross
2 disproportionality".
3
4 Mr President, we have dealt with the application of this test in both our Counter-
5 Memorial[94] and our Rejoinder[95] and I do not need to repeat what we said there.
6 Instead, I shall first recall the most relevant and recent case law. I shall then apply
7 the test to the line proposed by Myanmar. It will be clear that Myanmar's proposed
8 line results in no great disproportionality, and thus requires no adjustment at this
9 third stage.
10
11 Finally, in the last part of this speech, I shall describe briefly the line that Myanmar
12 proposes and explain in particular the treatment of the end-point, where the line
13 approaches the area where the rights of a third State may be affected.
14
15 First, a brief look at the case law on the disproportionality test. In its *Romania v*
16 *Ukraine* judgment, the International Court of Justice described this third stage,
17 concisely and precisely, at the end of a section entitled 'Delimitation Methodology'. It
18 did so in the following terms:
19

> 20 … at a third stage, the Court will verify that the line ... does not, as it
> 21 stands, lead to an inequitable result by reason of any marked
> 22 disproportion between the ratio of the respective coastal lengths and the
> 23 ratio between the relevant maritime area of each State by reference to the
> 24 delimitation line . . A final check for an equitable outcome entails a
> 25 confirmation that no great disproportionality of maritime areas is evident
> 26 by comparison to the ratio of coastal lengths.
> 27
> 28 This is not to suggest that these respective areas should be proportionate
> 29 to coastal lengths — as the Court has said "the sharing out of the area is
> 30 therefore the consequence of the delimitation, not vice versa (Maritime
> 31 Delimitation in the Area between Greenland and Jan Mayen (*Denmark v*
> 32 *Norway*), Judgment, I.C.J. Reports 1993, p. 67, para. 64).[96]

33
34 Mr President, the application of the disproportionality test is, in part, mathematical
35 (not particularly advanced mathematics, fortunately), but it is, above all, a matter for
36 the appreciation of the court or tribunal concerned in the light of all the
37 circumstances. When the ICJ came to apply the test in the *Black Sea* case, it was
38 clear as to what the test involved, and – just as important – what it did not involve.
39 The Court said:
40

> 41 The continental shelf and exclusive economic zone allocations are not to
> 42 be assigned in proportion to length of respective coastlines ..."
> 43
> 44 The Court cannot but observe that various tribunals, and the Court itself,
> 45 have drawn different conclusions over the years as to what disparity in
> 46 coastal lengths would constitute a significant disproportionality which

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[94] MCM, paras. 5.145-5.153.
[95] MR, paras. 6.63-6.92.
[96] *Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment of 3 February 2009, I.C.J.Reports 2009*, p. 103, para. 122. See also *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them,* Award of 11 April 2006, *UNRIAA,* Vol. XXVII, p. 214, para. 238.

1 suggested the delimitation line was inequitable and still required
2 adjustment. This remains in each case a matter for the Court's
3 appreciation, which it will exercise by reference to the overall geography
4 of the area.[97]
5
6 In that case, the *Black Sea* case, the Court went on to note that the ratio of the
7 coastal lengths for Romania and Ukraine was approximately 1:2.8 and the ratio of
8 the relevant area between Romania and Ukraine was approximately 1:2.1[98]. The
9 International Court concluded that this did not suggest that the line required any
10 alteration[99].
11
12 In other cases too, international courts and tribunals have considered that quite large
13 differences between the two ratios did not require the adjustment of the line. In
14 *Eritrea/Yemen*, the Tribunal stated that a ratio of 1:1.31 for the coastal lengths and
15 1:1.09 for the areas allocated to each Party did not justify any adjustment of the
16 equidistance line[100]. Similarly, in *Tunisia/Libya*, the ICJ found that the allocation to
17 Tunisia of 60% of the area, while 69% of the relevant coasts belong to it, met the
18 requirements of the proportionality test [101]. The ratio of the relevant coasts was
19 1:2.22, and the ratio of the areas allocated to each was 1:1.5.
20
21 Mr President, Members of the Tribunal, there are three cases in which international
22 courts and tribunals have decided that 'great disparity in the lengths of the relevant
23 coasts'[102] called for an adjustment to the line under the equidistance/relevant
24 circumstances method. In *Libya/Malta*, the International Court found that a disparity
25 between coastal lengths of 192 M (for Libya) and only 24 M (for Malta) was a
26 relevant circumstance which required a transposition of the median line northward[103].
27 In *Jan Mayen*, as Professor Forteau mentioned today, the disparity between the
28 relevant coasts was in the order of 9:1[104]. In *Barbados v Trinidad and Tobago*, also
29 mentioned by Professor Forteau, it was approximately 8:1[105]. In each of these three
30 cases the corresponding adjustment was in fact relatively minor. A great disparity
31 does not lead to a great adjustment. In any event, in our case, there is clearly no
32 such great disparity between the relevant coasts; and, as Daniel Müller has shown,
33 any disparity would favour Bangladesh, not Myanmar.
34
35 Mr President, Members of the Tribunal, it is hardly surprising that international courts
36 and tribunals have rarely found that an adjustment was called for at this, the third
37 stage of the equidistance/relevant circumstances method. It is not surprising,

[97] *Ibid.*, p. 129, paras. 211, 213.
[98] *Ibid.*, p. 130, para. 215-216.
[99] *Ibid.*
[100] S*econd stage of the proceedings between Eritrea and Yemen (Maritime Delimitation),* Decision of 17 December 1999, *UNRIAA*, Vol. XXII, p. 373, para. 168.
[101] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 91, para. 131.
[102] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 52, para. 73.
[103] *Ibid.,* pp. 48-49, paras. 66-73,
[104] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 65, para. 61.
[105] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them,* Award of 11 April 2006, *UNRIAA,* Vol. XXVII, p. 239, para. 352.

because any serious disproportion will most likely have been ironed out at the earlier stages, including at the second (relevant circumstances) stage. The International Court suggested as much in its conclusion on disproportionality in *Romania v Ukraine*. It said:

> The Court is not of the view that this suggests that the line as constructed, and checked carefully for any relevant circumstances that might have warranted adjustment, requires any alteration.[106]

I emphasize the words "and checked carefully for any relevant circumstances that might have warranted adjustment …"

Mr President, Members of the Tribunal, that is precisely what Myanmar has done in this case. We have checked carefully our line for any relevant circumstances that might have warranted adjustment. Professor Forteau has just shown that there were none, so it is not to be expected that the disproportionality test would require any adjustment of the line at this third stage.

Daniel Müller mentioned this morning the curious approach of Bangladesh in its written pleadings to the ascertainment of the relevant coasts and the relevant area. Bangladesh adopted, if anything, an even more curious approach to the disproportionality test[107]. In its Memorial, it ignored the actual coasts, and employed what it asserted were "coastal facades"'. It offered us what it referred to as two 'types of proportionality analysis'[108]. First, it worked out the ratio between what it termed variously 'coastal facades' or 'coastal front lines'[109]. And, second, and even more curiously, it tried to apply proportionality by reference to the extent of access to a 200-M line[110]. I think this is another example – an extreme example – of the Bangladesh's propensity, or at any rate the propensity of its lawyers, to ignore well-established legal principle and seek to persuade the Members of the Tribunal to sail off into uncharted waters.

Fortunately, the Tribunal does not need to grapple with these eccentricities, because on Monday Professor Crawford completely changed tack. He then sought to apply the third-stage disproportionality test to Bangladesh's bisector line, but he did so very cursorily (I think it came to four lines in the transcript, in fact)[111]. So perhaps at this late stage there is now some agreement between us at least on the test. But, the disproportionality test is part of the three-stage method. Professor Crawford, however, applied it to Bangladesh's angle-bisector line and found that 'the bisector splits the relevant area almost exactly in half', a ratio of 1.05:1 in favour of Bangladesh. This rather conveniently corresponds almost exactly to the ratio that Bangladesh had found between the relevant coasts, 1.1:1[112].

[106] *Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment of 3 February 2009, I.C.J.Reports 2009*, p. 61, at p. 230, para. 216.
[107] BM, paras. 6.28, 6.75-6.78; BR, paras. 3.165-3.199.
[108] BM, para.6.78.
[109] BM, para. 6.75-
[110] BM, para. 6.77.
[111] ITLOS/PV.11/5 (E), p. 12, lines 43-48 (Crawford).
[112] *Ibid.*

1 Mr President, that is almost too good to be true – and, of course, it is not true. As
2 Daniel Müller has shown earlier today, Bangladesh's calculation of the relevant
3 coasts, and its establishment of the relevant area, reflect neither geographical reality
4 nor applicable legal principle.
5
6 Mr President, this morning Mr Müller described the relevant coasts and the relevant
7 area. You will get the sketch-map on the screen with the relevant coasts and it is
8 also at tab 4.6 of the Judges' folders. I will just recall his conclusions. Myanmar's
9 relevant coast stretches from the terminus of the land boundary between Myanmar
10 and Bangladesh in the mouth of the Naaf River to Cape Negrais. The length of
11 Myanmar's relevant coast is approximately 740 km.
12
13 As Mr Müller demonstrated this morning, Bangladesh's argument seeking to limit
14 Myanmar's relevant coast to a northern sector between the mouth of the Naaf River
15 and Bhiff Cape is simply mistaken and wrong in law. It would remove at a stroke half
16 of Bangaladesh's relevant coast.
17
18 I now turn to the relevant parts or segments of Bangladesh's coast. Mr Müller has
19 described these. He explained that the relevant segments of Bangladesh's coasts
20 are, first, the segment that goes in a generally west-east direction from Bangladesh's
21 border with India to the western limit of the Meghna River estuary; and, second, the
22 segment between the eastern limit of the estuary and the border with Myanmar in the
23 mouth of the Naaf River, which goes in a roughly north-south direction. The relevant
24 coasts do not include the inner coasts of the estuary of the Meghna River, which
25 face each other and do not project in such a way as to overlap with projections from
26 Myanmar's coast. The total length of the relevant coasts of Bangladesh is
27 approximately 364 km.
28
29 It follows that the ratio between Bangladesh and Myanmar's relevant coasts is
30 approximately 1:2.03.
31
32 I now turn to the second factual element for the application of the disproportionality
33 test, the relevant area and its division by the delimitation line. The relevant area was
34 described this morning by Mr Müller, and is depicted on your screens and in the
35 sketch map found in tab 4.6. As Mr Müller showed, Bangladesh has sought, without
36 justification, to exclude a certain quite significant area from its own part of the
37 relevant area. If this area is restored, as we say they must be, the total relevant area
38 amounts to 214,300 km^2, of which 80,400 km^2 lie on Bangladesh's side of the
39 delimitation line proposed by Myanmar and 133,900 lying on Myanmar's side. The
40 ratio between part of the relevant area appertaining to Bangladesh and the part
41 appertaining to Myanmar is approximately 1:1.66.
42
43 Let us see, for the sake of argument, what would happen if we do what Bangladesh
44 has done, and remove from the relevant area the area between what is said to be
45 the Indian claim line and an equidistance line between Bangladesh and India. You
46 see what they have done on the sketch map on the screen. They have removed the
47 western part of the relevant area. (This would, I should point out, be an extraordinary
48 thing to do: Bangladesh would be assuming a worst case scenario for itself in the
49 arbitration with India. Of course, Myanmar cannot be required to compensate
50 Bangladesh for such a hypothetical, self-interested 'concession'.) In any event,

1 Mr President, as you can see, even if we were, hypothetically, to subtract this part of
2 the area, the ratio between the part of the relevant area allocated to Bangladesh and
3 the part allocated to Myanmar would be approximately 1:1.94. With a coastal ratio of
4 1:2.03, this would clearly not be in any way disproportionate.
5
6 Mr President, I will return from this fantasy land to the actual relevant area. To
7 summarize, the ratio of the relevant coasts between Bangladesh and Myanmar is
8 1:2.03. The ratio of the relevant area is 1:1.66. It is clear, to pick up the language of
9 the International Court in the *Black Sea* case, that this does not suggest that the
10 relevant line proposed by Myanmar requires any adjustment as a result of the
11 application of the disproportionality test. The difference is minor, and it is, moreover,
12 in Bangladesh's favour.
13
14 Mr President, Members of the Tribunal, that concludes my analysis of the application
15 of the disproportionality test. It also concludes our application of the three-stage
16 process for effecting a delimitation. In this case it remains only to recall our line, and
17 say a word about the end point.
18
19 Mr President, Members of the Tribunal, as explained by Counsel who have preceded
20 me, and as is set out in our written pleadings[113], Myanmar requests the Tribunal to
21 draw a single maritime boundary between Myanmar and Bangladesh that starts at
22 the agreed end point of the land boundary, point A. On your screen this line is shown
23 on sketch map, taken from our Rejoinder[114].
24
25 The line follows an equidistance or median line between point A and point C.
26 Between point A and point B the line is an equidistance line between the adjacent
27 coasts of Myanmar and Bangladesh. Between points B and C it is a simplified
28 median line between the opposite coasts of the Myanmar mainland and the eastern
29 side of Bangladesh's St Martin's Island. From point C, the line goes via point D to
30 point E. point E is where the continuation of the provisional equidistance line meets
31 the twelve-M arc drawn around St Martin's Island. From point E, the line continues a
32 south-west direction along the equidistance line as far as point G.
33
34 Just beyond point G, as you will see on the screen, there is an arrow indicating that
35 the line continues along the same azimuth until it reaches the area where the rights
36 of a third State (in this case, India) may be affected. Since the third State is not
37 before this Tribunal, it cannot be for this Tribunal to decide where that point is. By
38 placing an arrow, the Tribunal fulfils its mandate to delimit the line between Myanmar
39 and Bangladesh, while not prejudicing the rights of any third State.
40
41 Mr President, this is standard practice in maritime delimitation cases. The most
42 recent example is *Romania v Ukraine*. It did the same in *Nicaragua v Honduras*[115],
43 and in other cases[116].

[113] MCM, pp. 171-172, Submissions and sketch-map No. 5.11 at p. 169; MR, pp. 195-196, Submissions and sketch-map No. R1.1 at p. 5.
[114] *Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment, I.C.J. Reports 2009*, p. 61,
[115] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, *Judgment*, *I.C.J. Reports 2007*, p. 659, at p. 759, para. 320; and sketch-map 8 at p. 762.

1
2 The International Court explained its practice in this regard in the recent judgment
3 concerning Costa Rica's application to intervene in the Case between Nicaragua and
4 Colombia. The Court said:
5
6 In the present case, Costa Rica's interest of a legal nature may only be
7 affected if the maritime boundary that the Court has been asked to draw
8 between Nicaragua and Colombia were to be extended beyond a certain
9 latitude southwards. The Court, following its jurisprudence, when drawing
10 a line delimiting the maritime areas between the Parties to the main
11 proceedings, will, if necessary, end the line in question before it reaches
12 an area in which the interests of a legal nature of third States may be
13 involved.[117]
14
15 Mr President, Members of the Tribunal, that concludes my statement. And that
16 concludes what Myanmar has to say in the present round concerning the
17 construction of the delimitation line that we propose.
18
19 Professor Pellet, after the break, will address you on the inappropriateness of
20 Bangladesh's proposed angle bisector line.
21
22 I thank you Mr President.
23
24 **THE PRESIDENT:** I think at this point we will break off for 30 minutes and come
25 back at 5 p.m.
26
27 (Short adjournment)
28
29 **MR PELLET (Interpretation):** Mr President, Members of the Tribunal, claiming,
30 against all reason, that the application of equidistance is impossible on the grounds
31 of inequity, our friends from Bangladesh use an unusual method of delimitation,
32 which they call the "angle bisector" method. In doing so, they commit two errors,
33 each of which I will endeavour to show in turn:
34
35 - first, the very principle of using this method is erroneous, because in our case
36 nothing stands in the way of using the standard, principal method, known as that of
37 equidistance and special circumstances.
38
39 - second, even if it was conceded that this case lends itself to the application of the
40 bisector method, the Applicant's use of it is totally unacceptable.
41
42 Mr Lathrop will show tomorrow that the line which would result from the correct
43 application of the bisector method in this case – for which there is no justification in
44 law –would clearly be more favourable to Myanmar than the line drawn in
45 accordance with the usual three-stage method, which my colleagues Coalter

[116] *Territorial and Maritime Dispute (Nicaragua v Colombia) (Application by Honduras for Permission to Intervene)*, available at on http://www.icj-cij.org, para. 64.
[117] *Territorial and Maritime Dispute (Nicaragua v Colombia), Application by Costa Rica for permission to intervene, Judgment*, 4 May 2011, para. 89.

1 Lapthrop, Mathias Forteau and Sir Michael Wood described in their last three
2 statements.
3
4 Mr President, we had occasion to recall this morning that the use of equidistance first
5 is the norm. It is a legal norm, a legally binding norm. Article 15 of the 1982
6 Convention on the Law of the Sea explicitly makes equidistance the principle as
7 regards delimitation of the territorial sea and while Articles 74 and 83 do not mention
8 it explicitly, it is nevertheless the result of now extensive and widely accepted
9 jurisprudence. I quote from the 2009 case - that "the initial stage" is "the construction
10 of the provisional equidistance line".[118] In other words, to apply the rule laid down in
11 Articles 74 and 83 we must use the "equidistance/relevant circumstances" method,
12 which usually produces an equitable solution. The resulting line must then be tested
13 against the yardstick of manifest non-disproportionality during the third phase of the
14 implementation of the method. Equidistance therefore does indeed originally lie at
15 the centre of this process.
16
17 Having said that, if equidistance is the principle, it ceases to be applicable when –
18 and I quote the case of *Nicaragua v. Honduras* - a court or tribunal faces "special
19 circumstances in which it cannot apply the equidistance principle".[119] This is the
20 wording used by the ICJ in the most recent of the extremely rare cases in which
21 equidistance was set aside as a point of departure for effecting delimitation. The
22 quotation continues:
23
24 > For all of the above reasons, the Court finds itself within the exception
25 > provided for in Article 15 of the UNCLOS, namely facing special
26 > circumstances in which it cannot apply the equidistance principle. *At the*
27 > *same time equidistance remains the general rule*.[120]
28
29 Although the Court mentions Article 15 of the 1982 Convention, this general rule of a
30 customary nature also applies to the delimitation of the continental shelf and the
31 exclusive economic zone because, as I have already underlined, the applicable
32 method for delimiting these areas is similar to that set out in this provision.
33
34 On what grounds did the Court set aside this "general rule" in *Nicaragua v.*
35 *Honduras*? Not only – and I stress not only – for the delimitation of the territorial sea
36 but also of the continental shelf and the exclusive economic zones of the Parties.
37 There were four such grounds, which the Court applied concurrently, but none of
38 which is found in our case.
39
40 First, in the case that gave rise to the ICJ's 2007 Judgment "Neither Party has as its
41 main argument a call for a provisional equidistance line as the most suitable method
42 of delimitation,";[121] whereas in our case Myanmar is convinced that this is
43 indisputably the case and believes it has shown so. The fact is that the very special

[118] I.C.J., Judgment, 3 Febraury 2009 *Maritime Delimitation in the Black Sea (Romania v. Ukraine) I.C.J. Reports 2009*, p. 101, par. 118.
[119] .C.J. Judgment, 8 October 2007 *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 745, par. 281.
[120] *Ibid.* – emphasis added
[121] *Ibid.*, para. 275.

1 circumstances which, in the *Nicaragua v. Honduras* case, led the Parties and the
2 Court to set aside the equidistance method are nowhere to be found in our case.
3
4 Second - and probably one of the decisive grounds which led the Court to align itself
5 with the views shared by the Parties in *Nicaragua v. Honduras* the end-point of the
6 land border between Nicaragua and Honduras – here I am quoting the Court - "Is a
7 sharply convex territorial projection abutting a concave coastline on either side to the
8 north and south-west;
9
10 > [t]aking into account Article 15 of UNCLOS and given [this] geographic
11 > configuration … the pair of base points to be identified on either bank of
12 > the River Coco [the River Coco is the river which constitutes the boundary
13 > between Honduras and Nicaragua], at the tip of the Cape would assume a
14 > considerable dominance in constructing an equidistance line, especially
15 > as it travels out from the coast. Given the close proximity of these base
16 > points to each other, any variation or error in situating them would become
17 > disproportionately magnified in the resulting equidistance line.[122]
18
19 This very special circumstance is now being shown on the screen. The two points, V
20 and W, are the only base points that could be adopted. They are about 1,250 m
21 apart, which makes their use risky at the very least for the reasons given by the
22 Court. The equidistance line should have been constructed entirely on the basis of
23 these two points, V and W, which are the extreme points of the mouth of the river,
24 and at no time would another sector or another point on the Parties' coasts have
25 been relevant for this purpose because none is closer than V or W to the
26 equidistance line.[123]
27
28 Our case is completely different. As Mr Lathrop showed us this morning, it. is
29 perfectly possible to determine the base points on the basis of which one can,
30 without difficulty, draw the provisional equidistance line which may be adjusted if
31 need be. Of course, points β1 and μ1 situated on either side of the mouth of the Naaf
32 River are close to each other, (they are still just over 6.5 km away here, as against
33 1.250 km in the *Nicaragua v. Honduras* case, so much more than was the case in
34 *Nicaragua v. Honduras*.) However, as Myanmar showed in its Rejoinder,[124] distance
35 is not an essential problem. On the other hand, β1 and μ1 present three features that
36 distinguish them radically from points V and W at the mouth of the Coco River:
37
38 - On one hand – and this is the essential point – they are not, if I may put it like this,
39 "unique"; whereas in *Nicaragua v. Honduras* V and W exclusively governed the
40 course of the entire line, β1 and μ1 are just two out of five points. The equidistance
41 line is constructed on the basis of β1 and β2 on the Bangladesh side, and of μ1, μ2
42 and μ3 on the Myanmar side, which thereby limits the influence of β1 and μ1.
43
44 - On the other hand, (and this is connected), if for one reason or another β1 and μ1
45 would not do, other base points would be available in the immediate vicinity of those
46 adopted by Myanmar, and could be used to draw the provisional equidistance line.

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[122] *Ibid.*, para. 277.
[123] See the Memorial of Nicaragua in this case, available on the web site http://www.icj-cij.org/docket/files/120/
13719.pdf, particularly pp. 14-15, paras. 31-32 ; pp. 157-158, para. 23, and p. 159, para. 25.
[124] RM, pp. 95-101, paras. 5.10-5.13.

1 However, it did not work like this in *Nicaragua v. Honduras,* where the extreme
2 convexity of the mouth of the Coco River excluded any alternative, and
3
4 - Lastly, these two points, β1 and μ1, are situated on banks which, contrary to the
5 banks of the Coco River, are extremely stable.
6
7 The third point, as the ICJ also noted, is that Nicaragua and Honduras agreed
8 moreover that:
9
10 > The sediments carried to and deposited at sea by the River Coco have
11 > caused its delta, as well as the coastline to the north and south of the
12 > Cape, to exhibit a very active … morpho-dynamism. Thus continued
13 > accretion at the Cape might render any equidistance line so constructed
14 > today arbitrary and unreasonable in the near future.[125]
15
16 I am well aware, Mr President, that Bangladesh would have us believe that the same
17 phenomenon is present here. Hence, in paragraph 3.104 of its Reply, the Applicant
18 reasserts that the coastline of the Bengal Delta is among the most unstable
19 anywhere in the world.[126] But this assertion is deceptive.
20
21 The question is not to establish to what extent the coasts of the Bay of Bengal in
22 general are stable or not, but whether their alleged instability precludes fixing the
23 appropriate base points.
24
25 As Mr Lapthrop also showed, it is certainly possible to establish base points that
26 escape this partly postulated instability.[127] Although I need not go over this again,
27 this is the case of the five points on which Myanmar relies in order to draw the
28 provisional equidistance line. And it is especially the case of points β1 and μ1, whose
29 similarity to points V and W, situated on the banks of the River Coco – is an illusion.
30 As shown in the series of satellite photographs now on the screen and found at tab
31 4.10 in your file, the deposits of the Coco are particularly impressive, extending by
32 more than 3.5 km each century. 3.5 km each century!
33
34 There is nothing comparable in the Naaf estuary. As Myanmar has shown in its
35 Rejoinder;[128] this part of the coast of the Bay of Bengal is, by contrast, remarkably
36 stable. A comparison of the nautical charts of the region from 1974 to 2011 –
37 relevant extracts of which you can see on your screens, and which are also found at
38 tab 4.11 in the Judges' file - confirm this stability. Points β1 and μ1 are situated at
39 locations which have remained unchanged since at least 1974.
40
41 Last but not least, and this is the fourth ground which led the ICJ to set aside
42 equidistance as a method of delimitation in *Nicaragua v. Honduras,* the Court found
43 that, in this case:
44

[125] I.C.J. Judgment, 8 October 2007, *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 742, para. 277.
[126] See also: MB, paras. 2.16 et 2.46.
[127] See the pleading of Mr Samson (ITLOS/PV.11/7 (F), p. 18, lines 11-29).
[128] RM, paras. 5.18-5.19 and Sketch-map No. R.5.3.

> The difficulty in identifying reliable base points is compounded by the [remaining] differences between the Parties as to the interpretation and application of the King of Spain's 1906 Arbitral Award in respect of sovereignty over the islets formed near the mouth of the River Coco and the establishment of '[t]he extreme common boundary point on the coast of the Atlantic [[129]].[130]

Mutatis mutandis the same was true in the *Gulf of Maine* case, but, once again, nothing of the kind in our case, where both Parties accept that the starting point of the delimitation which this Tribunal has been requested to effect coincides with the end- point of the land boundary. Bangladesh and Myanmar agree that this is fixed by Article 4 of the Additional Protocol of 17 December 1980 on the demarcation of the boundary between the two countries in the Naaf River.[131]

Mr President, I have dwelt at some length on the differences – the gulf – between this case that has brought us together and the case which, a few years ago, I had the honour of pleading on behalf of Nicaragua in the Hague Court, because it is the most recent in the brief series of "precedents" – in quotation marks – which Bangladesh relies on in support of the bisector method. The comparison is instructive. It shows that here there is no trace of *any* of the grounds which led the ICJ, exceptionally, to adopt this alternative method in the Judgment concerning *The Land and Maritime Dispute between Nicaragua and Honduras*. All the same, after finding that, in this case, it faced "special circumstances in which it [could] not apply the equidistance principle", the Court was careful to note that "equidistance remains the general rule".[132] Here, there is no reason to waive this in favour of the replacement method of the bisector, "unless there are compelling reasons that make this unfeasible in the particular case",[133] as the ICJ emphasized in *Romania v. Ukraine*. There are no such "compelling reason" in our case.

Let me add that in *Nicaragua v. Honduras* the Court considered that it was impossible to draw "an equidistance line from the mainland".[134] That is, for all the maritime areas of the Parties: the exclusive economic zone and the continental shelf, *but also – and above all in reality – as regards the territorial sea*. In our case, Bangladesh has never disputed that it is possible to draw an equidistance line for the delimitation of the territorial sea from the mouth of the Naaf River. We do not see why what was possible for the territorial sea could not also be possible for the subsequent maritime zones.

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[129] *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras V. Nicaragua), Judgment, I.C.J Reports 1960*, p. 202.

[130] I.C.J. Judgment, 8 October 2007 *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 743, para. 279.

[131] MB, vol. III, annex 6; see MB, paras. 3.21and 3.23 and CMM, p. 26, para. 2.29.

[132] I.C.J. Judgment, 8 October 2007, *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 745, para. 281.

[133] I.C.J., Judgment, 3 Febraury 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine) I.C.J. Reports 2009*, p. 101, para. 116.

[134] I.C.J. Judgment, 8 October 2007, *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 745, para. 283.

1 The 2007 decision is important for another reason. In it, the ICJ analyzes the handful
2 of other precedents which Bangladesh also relies on in support of its favoured
3 method. These are the cases of *Tunisia v. Libya* and *Gulf of Maine*, also adjudicated
4 by the Court, and the Arbitral Award of 1985 in the *Guinea v. Guinea Bissau* case. (I
5 note again in passing that, in his presentation of the applicable law last Thursday,
6 Professor Crawford placed *Tunisia v. Libya* and *Guinea v. Guinea Bissau* among the
7 decisions based not on the principle of the angle bisector but on a *sui generis*
8 method.)[135] The Court's analyses in the 2007 Judgment will serve as a framework for
9 my brief comments on these three cases, which I shall examine in reverse
10 chronological order, it being noted that all three of them go back to the years 1982 to
11 1985; over 30 years have passed since then.
12
13 The 1985 Award is perhaps the one that serves Bangladesh's interests the least
14 badly. But let me say quite clearly that despite my deep and genuine respect for the
15 members of the Tribunal that delivered it, it is somewhat eccentric as regards the
16 adopted method of delimitation and (fortunately, I believe), has remained one of a
17 kind. It was also challenged shortly afterwards by one of the members of the
18 Tribunal, President Bedjaoui,[136] as Mathias Forteau mentioned this morning. Also,
19 while the ICJ mentioned it three times in the 2007 Judgment,[137] it was wary of relying
20 on the Tribunal's reasoning when delivering its own decision. One might even think
21 that the *caveat* accompanying its prudent use of the bisector method was inspired,
22 precisely, by this somewhat baffling "precedent". In the Court's own words:
23
24 > [Thus] … warns the Court in referring to its judgement of 1969 in the
25 > North Sea Continental Shelf Cases [138] where the bisector method is to be
26 > applied, care must be taken to avoid 'completely refashioning nature'.[139]
27
28 This is of course true in every case, but it is particularly so when using the bisector
29 method which, if one is not careful, can go overboard, as Bangladesh's claim
30 illustrates in just as extreme a form as the 1985 Award so dear to it.
31
32 I would point out that, in any event, this atypical Award, which, again, in his table of
33 maritime delimitation cases, Professor Crawford placed among the *sui generis*
34 cases, is not based on the application of the bisector method as such but on another
35 one, which is similar to the method of the line perpendicular to the general direction
36 of the coast, (and in this case to the coast of an entire continent …). Again, as the
37 ICJ recalled in its 1982 Judgment in *Tunisia v. Libya,* this method, as we know,
38 "becomes, generally speaking, the less suitable as a line of delimitation the further it
39 extends from the coast".[140]

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[135] See the document produced in Tab 1.18 of the Judge's folders of Thursday 8 September (*Outcome of Decided Cases*).
[136] Dissenting opinion of arbitrator Mr. Bedjaoui in the case concerning the *Delimitation of the maritime boundary between Guinea-Bissau and Senegal,* decision of 31 July 1989*, RIAA*, vol. XX, p. 194, para. 104 and note 109.
[137] *Ibid.*, p. 745, para.280 ; p. 747, para. 288 ; p. 756, para.311 (but in a totally different subject).
[138] (I.C.J., Judgment, 20 February 1969, *I.C.J. Reports 1969*, p. 49, para. 91).
[139] I.C.J. Judgment, 8 October 2007, *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 747, para. 289.
[140] I.C.J., Judgment, 24 of February 1982, *Case concerning the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) I.C.J. Reports 1982*, pp. 87-88, para. 125.

In respect of the same case of *Tunisia v Libya* the Court at The Hague observed – and I refer again to *Nicaragua v Honduras*:

> Equidistance could not be used for the second segment of the delimitation because the segment was to begin at a point not on any possible equidistance line.

This is why "the Court there used a bisector to approximate the northerly change in direction of the Tunisian coast beginning in the Gulf of Gabes".[141] As emphasized in the 2007 judgment, the Court applied this method in *Tunisia v Libya* for "very particular reasons", because it "worked backwards from a line of convergence of the concessions granted by each Party and reflected this in a line drawn from a defined point offshore to the endpoint of the land frontier".[142] Moreover, this use of a bisector plotted in an angle formed by the coast of one, not both, of the two litigating parties – in this case Tunisia – is far removed from the "bisector method" which Bangladesh seeks to apply in this case.

Furthermore, in *Tunisia v Libya* the ICJ thought that it should take into account the "firmly expressed view of the Parties", *both* of which considered that using equidistance in that case would not give a satisfactory result.[143]

In respect of the *Gulf of Maine* case, the ICJ in its 2007 judgment – in which it examines all of these alleged precedents – recalls that the "main reason" for which the Chamber which decided *Gulf of Maine* rejected the equidistance method in favour of that of the bisector was the disagreement between the parties as to whose territory contained the base points which would have made possible use of this method. I quote from the 2007 judgment:

> The Court notes that in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), the 'main reason' for the Chamber's objections to using equidistance in the first segment of the delimitation was that the Special Agreement's choice of Point A as the beginning of the line deprived the Court of an equidistance point, 'derived from two base points of which one is in the unchallenged possession of the United States and the other in that of Canada'[[144]].[145]

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[141] I.C.J. Judgment, 8 October 2007, *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 746, para. 288, referring to I.C.J., Judgment, 24 February 1982, *Tunisia/Libya, I.C.J. Reports 1982*, p. 94, para. 133, point C 3).

[142] I.C.J. Judgment, 8 October 2007, *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 745, para. 280, making reference to I.C.J., Judgment, 24 February 1982, *Case concerning the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) I.C.J. Reports 1982*, p. 85, para. 121.

[143] I.C.J., Judgment, 24 February 1982, *Case concerning the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) I.C.J. Reports 1982,* p. 79, para. 110.

[144] *Judgment, I.C.J. Reports 1984*, p. 332, para. 211.

[145] I.C.J. Judgment, 8 October 2007, *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 743, para. 279.

1 Here again, this is not true in our case. As I have said, the Parties are in agreement
2 that the end point of the land boundary, which coincides with the starting point of the
3 maritime boundary, is the point having the coordinates indicated in article IV of the
4 1980 Protocol.
5
6 Nor does the second reason which led the Chamber in *Gulf of Maine* to reject
7 equidistance in favour of a bisector in its 1984 judgment apply in the present case. In
8 the words of the 2007 judgment:
9
10 > The Chamber of the Court in the *Gulf of Maine* case also used a bisector
11 > of the Gulf-facing mainland because it deemed the small islands in the
12 > Gulf unsuitable for use as base points.[146]
13
14 Professor Crawford added that in that case:
15
16 > The Chamber decided that the extraordinary irregularity of the coast,
17 > particularly on the United States side, made the use of equidistance
18 > problematic.[147]
19
20 My eminent opponent could not have admitted more clearly (and more honestly) that
21 this was a special case, one in which use of equidistance was ruled out (and that
22 was 17 years ago).
23
24 To recapitulate, Mr President:
25
26 (1) cases in which an international court or tribunal has had recourse to the bisector
27 method are extremely rare. There is only one in which it was fully applied for the
28 totality of the delimitation requested by the Parties, and that was the *Nicaragua v*
29 *Honduras* case. The peculiar arbitration of 1985 in *Guinea/Guinea Bissau* employs a
30 perpendicular to the general direction of the coasts of *five* States – apart from the
31 parties, Sierra Leone, Senegal and the Gambia – a solution which obviously cannot
32 be transposed to the current case. In the *Tunisia v Libya* and *Gulf of Maine* cases,
33 the ICJ rejected equidistance for the determination of only a portion of the maritime
34 boundary between the parties, emphasizing the very special aspects of the
35 circumstances in each of these cases. These circumstances do not occur at all in our
36 case, which, I would add, is clearly distinguishable from the only real convincing
37 case in which a bisector was drawn because equidistance was not practicable (and
38 once again I refer to *Nicaragua v Honduras*). Furthermore, as I have said,
39 *Tunisia/Libya* is also not a convincing illustration of the “bisector method” as such;
40
41 (2) in contrast to what was the case in the judgment of 2007, it is in no way
42 impossible in our case to determine base points that would allow the construction of
43 a provisional equidistance line, and I would like to refer you to what Mr Lathrop said
44 this morning;
45

[146] *Ibid.*, pp. 746-747, para. 288 ; see I.C.J., Judgment, 12 October 1984, *Delimitation of the Boundary in the Gulf of Maine Area, judgment, I.C.J. Reports 1984*, p. 332, para. 210 ; see also in particular, p. 330, para. 202 and I.C.J., Judgment, 12 October 1984, *Delimitation of the Boundary in the Gulf of Maine Area, judgment, I.C.J. Reports 1984*, p. 332, para. 211.
[147] ITLOS/PV.11/5 (E), p. 2, lines 31-33 (Mr. Crawford).

1 (3) even if certain parts of the coastline of the Bay of Bengal are unstable, that is not
2 true of the locations used to fix the base points advocated by Myanmar;
3
4 (4) there is absolutely no disagreement between Bangladesh and Myanmar on the
5 starting point of the maritime delimitation and its coinciding with the land boundary
6 terminus;
7
8 (5) finally, in contrast to the situation in *Nicaragua v Honduras* (and *Tunisia v Libya*
9 as well, by the way), Members of the Tribunal, in no way have the Parties to the case
10 before you agreed to ask you to reject the equidistance/relevant circumstances
11 method. Myanmar is fundamentally opposed to setting aside this method, which will
12 make it possible, perfectly and without any complication, to arrive at a solution that is
13 as equitable as it can be in the sense given by law to this word, while taking full
14 account of the coastal geography of the Parties. Mr President, this Tribunal is not
15 called upon and was not called upon to rule *ex aequo et bono*.
16
17 Since, in the words of the ICJ in the *Romania v Ukraine* case, in our case there are
18 no "compelling reasons" that would preclude the drawing of an equidistance line[148]
19 and since, in contrast to the Court in *Nicaragua v Honduras*, the Tribunal is not
20 "facing special circumstances in which it cannot apply the equidistance principle",[149]
21 there is no reason to reject it in favour of the dubious bisector method.
22
23 Accordingly, it is solely *ex abundante cautela*, Members of the Tribunal, that I will
24 now endeavour to show, more concisely, that in any event Bangladesh is greatly
25 mistaken in the way it applies the bisector method.
26
27 Purporting to respect the guidelines laid down by the ICJ, according to which, in
28 order to apply the bisector method, it is necessary first of all to "seek a solution by
29 reference first to the States' 'relevant coasts'",[150] Bangladesh adopts a very robust
30 position. According to it, its entire coast is relevant for purposes of determining the
31 bisector line,[151] whereas Myanmar's only relevant coast is that between the mouth of
32 the Naaf River and Bhiff Cape.
33
34 I am not sure that any more is needed than just a quick look at the sketch map on
35 the screen to realize how incongruous these assertions are. The coast of
36 Bangladesh shows a number of sudden changes in direction:
37
38 -- the first segment, which runs north-west, starts at the Naaf River (point a) and
39 ends at the lighthouse on Kutubdia Island (point b) on the map;
40 -- from point b, the coast changes direction to run more towards the north, up to
41 point c, which is the northernmost point of the Bay of Bengal;
42 -- it then changes direction radically, going southwest to point d,

[148] I.C.J., Judgment, 3 Febraury 2009 *Maritime Delimitation in the Black Sea (Romania v. Ukraine) I.C.J. Reports 2009*, p. 101, para. 116.
[149] I.C.J. Judgment, 8 October 2007 *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 745, para. 281.
[150] *Ibid.*, p. 747, para. 289.
[151] MB, para. 6.70 and RB, para. 3.141 and para. 3.149.

1 -- from which it takes on an almost east-west direction to end at point e,
2 between Bangladesh and India.
3
4 In spite of this zigzagging, Bangladesh has no qualms in declaring its entire coast
5 relevant – after the bold simplification consisting in drawing a straight line between
6 points a and e -- between the border point with Myanmar and the border point with
7 India. The problem this operation gives rise to is that the line thus drawn has no
8 connection – none at all – with "the actual geographical situation",[152] and it is difficult,
9 to put it mildly, to see this as the result of "the exercise of judgment in assessing the
10 actual coastal geography",[153] to quote the ICJ in the *Nicaragua v. Honduras* case.
11 Without my wishing to upset my learned opponents, this is simply nonsense!
12
13 The error is less on Myanmar's side, because the general direction of the coast
14 being used by Bangladesh is less exaggeratedly arbitrary. However, you will note,
15 Members of the Tribunal, the blatant inconsistency between the way in which the
16 Applicant treats Myanmar and the way in which it treats itself – all of its coast, but
17 only a small part of Myanmar's – whereas it is hard to see why at the very least the
18 portion from Bhiff Cape to Cape Negrais should be excluded, since it projects
19 towards Bangladesh, to which it in part stands opposite. If Bangladesh wants to
20 refashion nature in its favour, it should accept that at the very least this applies to
21 Myanmar as well, especially since this would be much less arbitrary, and there is no
22 reason why the portion of the coast between Bhiff Cape and Cape Negrais should be
23 eliminated from the picture that Bangladesh has painted (granted, it is probably more
24 of the surrealist, or even dadaist, school than the realist). Frankly, this is hardly very
25 serious and, as Mr Lathrop will show tomorrow morning, constructing a bisector line
26 worthy of the name and by the book leads to very different results. For now I would
27 like to invite you, Members of the Tribunal, just to have a quick look at the sketch
28 which includes the bisector invented by Bangladesh, the bisector that should be
29 drawn according to the rules if this method were to be used – with in the background
30 the line resulting from the "normal" method, that is, equidistance/special or relevant
31 circumstances. However, I have three short general remarks on our opponents'
32 method – or would that be lack of method?
33
34 First of all, I am only going to mention in passing the rather odd argument that they
35 have made based on the supposed similarity between the depiction of the general
36 direction of the coasts which they put forward and that which would result from
37 connecting the base points proposed by Myanmar. Our opponents were so delighted
38 at having discovered this that they devoted two full pages and seven paragraphs of
39 their Reply to it.[154] It does not take that much to refute this. Suffice it to say that they
40 have it all mixed up. Base points are not used to represent the general direction of
41 the coast; their only use is in constructing equidistance lines;[155] and if there were any
42 concurrence, it would be purely by chance. This being so, Bangladesh's counsel did
43 not revisit this during their first round of argument – point noted.

[152] (I.C.J. Judgment, 3 June 1985, *Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 45, para. 57).
[153] I.C.J. Judgment, 8 October 2007 *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007*, p. 747, para. 289.
[154] RB, paras. 5.129-5.136; see also RB, para. 3.143 and para. 3.144.
[155] See RM, paras. 5.44-5.45.

1
2 Secondly, it is important to note that the notion of "relevant coasts", so important in
3 maritime delimitation, means different things depending on the method employed
4 and the stage in its application, that is, the stage of application that we are at now. In
5 its statement this morning, Daniel Müller described the relevant coasts for purposes
6 of drawing the equidistance line. The same coasts are also relevant, as Sir Michael
7 has shown, for the application of the test of non-disproportionality. However, things
8 are quite different when it comes to deciding which coasts should be taken into
9 consideration in drawing a bisector.[156] Here, it is not the length that matters but the
10 direction (and this must be a single direction in order to determine the two sides of
11 the angle whose bisector will form the maritime boundary between the two
12 countries), whereas the relevant coasts for purposes of drawing the equidistance line
13 as well as applying the non-disproportionality test can consist of segments oriented
14 in different directions as long as the segments are adjacent to the coast of the other
15 State or are opposite it. Bangladesh does not make this differentiation. It rejects in
16 one fell swoop the validity of the coasts used by Myanmar on the one hand to
17 construct the equidistance line,[157] of which it wants no part, and, on the other hand,
18 to establish the angle of the bisector; and it uses the same lines (giving a general
19 depiction of the coasts) for purposes of drawing a bisector line as well as applying
20 the test of non-disproportionality.[158] Once again, Mr President, this is really mixing up
21 everything.
22
23 Our opponents, who in the end realized that their notion of relevant coasts was wildly
24 out of kilter, fell back on a slightly more reasonable idea of matters, as Daniel Müller
25 showed this morning, and as illustrated in the sketch maps at tab 3.5 of the Judges'
26 folders today. But this leaves fully intact the question of determining the relevant
27 coasts, not in view of the non-disproportionality test or the equidistance line but for
28 purposes of constructing the bisector. Equidistance reflects the coastal geography of
29 the Parties in its totality. All the coasts defined as relevant must be taken into
30 consideration. The bisector cuts an angle the sides of which must be defined using
31 just a little bit of common sense – "using our heads", if I may put it in those terms.
32 Professor Crawford[159] may well have cited the call for an "exercise of judgment"
33 issued by the ICJ in *Nicaragua v Honduras*, yet he was unable to resist the demons
34 tormenting our opponents and learned friends so relentlessly, inciting them time and
35 again to refashion nature. If one wanted to construct a bisector according to the
36 rules, then the a-b segments on the Bangladesh side, on the one hand, and those
37 leading from the mouth of the Naaf River to the southernmost point of Myingun
38 Island on Myanmar's side, on the other hand, would have to be taken into
39 consideration.
40
41 Thirdly, I cannot help but point out the extraordinary contradiction in which
42 Bangladesh has become entangled.
43
44 On the one hand, they criticize as "a bare assertion" Myanmar's argument that the
45 relevant coasts for determining the angle on the basis of which the bisector should

[156] See RM, paras. 5.52-554.
[157] ITLOS/PV.11/5 (E), pp. 4-7 (Mr Crawford) ; see also : RB, paras. 3.141-3.143 and paras. 3.149-3.156.
[158] See RB, para.3.166.
[159] ITLOS/PV.11/5 (E), p. 9, line 24 (Mr Crawford).

1 be drawn are those found in immediate proximity to the delimitation starting point[160]
2 (this seems self-evident to me if an “exercise of judgment” in assessing the relevant
3 coasts is to be attempted).
4
5 However, on the other hand, Bangladesh asserts just as vehemently that the
6 Myanmar coast south of Bhiff Cape (in English) “is just too far from the delimitation to
7 be considered relevant.”[161] (Interpretation continued)
8
9 This latter remark takes on a special pungency, emanating as it does from a State
10 that is particularly partial to the arbitral award of 1985 between Guinea and Guinea
11 Bissau in which the tribunal had no problem representing the relevant coast by a line
12 drawn along the coasts of no fewer than five States and extending a length of 870
13 km.
14
15 Mr President, in my view there is hardly any need to conclude by saying:
16
17 - there is no reason to resort to a bisector line when nothing militates against
18 equidistance;
19
20 - the bisector line invented by Bangladesh is nothing but a figment of the
21 imagination.
22
23 With your leave, Mr President, tomorrow morning Mr Lathrop will complement this
24 general presentation with some more technical considerations and will show what a
25 properly drawn bisector line might look like: and it would not be to Bangladesh’s
26 benefit. That concludes our presentation this afternoon. Members of the Tribunal, I
27 would like to thank you indeed for your very kind attention.
28
29 **THE PRESIDENT:** We have come to the end of today’s sitting. The hearing will be
30 resumed tomorrow at 10 a.m. The sitting is now closed.
31
32 (The sitting closed at 5.48 p.m.)

[160] RB, para.3.145.
[161] RB, para. 3.151.