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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
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		L. Dolliver M. Nelson
		P. Chandrasekhara Rao
		Joseph Akl
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CLERK OF THE TRIBUNAL: All rise.

THE PRESIDENT: Please be seated. Good morning. Today we will continue the hearing of the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal. I give the floor to Mr Sands.

MR SANDS: Mr President, Members of the Tribunal, my submission today will outline a number of general principles that Bangladesh submits should govern the approach that this Tribunal should take in this case, in relation to the delimitation of the exclusive economic zones and continental shelves of Bangladesh and Myanmar where those claims overlap. It builds on what Mr Reichler and Professor Crawford had to say last Thursday morning, during the first session, and I will be followed, Mr President, by Mr Martin, who will take us up to the coffee break, and then Mr Reichler will take over.

It is a particular privilege to be involved in the first case in which the Tribunal is called upon to adjudicate a delimitation dispute between two parties to the 1982 Convention. This may be your first case involving a boundary dispute; it will surely not be your last. As Professor Crawford intimated, it provides this Tribunal with an important opportunity to set out the approach that this Tribunal will take in interpreting and applying the applicable articles of the 1982 Convention, and not least its article 83 in the area that we have referred to as the outer continental shelf.

Mr President, in delimiting the continental shelf, both within and beyond 200 miles, where no international tribunal has gone before, the Tribunal will no doubt want to proceed in a balanced manner. This case, of course, allows the Tribunal to speak in its own voice, whilst taking account of what has come before, drawing in particular on the legacy of the *North Sea* cases, and contributing to a stable, predictable legal order that achieves equitable solutions. We are very mindful that the Tribunal finds itself in a unique and historic moment: a first international court or tribunal to delimit a continental shelf boundary between two States in areas beyond 200 miles.

Against this background, and before getting into details in the presentations that will follow, Bangladesh thought that it might be helpful to re-visit, on a broader canvas, the principles that we believe the Tribunal should adopt in dealing with delimitation beyond the territorial sea. As part of its judicial function, and having regard to its particular composition and representation of the global community as a whole, this Tribunal has of course already crafted a distinct and authoritative approach, and has often acted with a commendably unanimous voice. It is against this background that I make these submissions in the form of six propositions in two parts. First, I will pick up on references that Professor Crawford made to certain legal instruments that are relevant to maritime delimitation, primarily of course the 1982 Convention but also the 1958 Conventions. Second, I will set out six propositions that we say the Tribunal should follow, identifying points of commonality between the parties with respect to the applicable principles, as well as points on which there is disagreement. This will set the scene for the more detailed and fact-specific presentations that will be made by Mr Martin, Mr Reichler, Professor Crawford and Professor Boyle, as well as two other colleagues, who will address the application of these principles and rules to the facts of this case over the rest of today and tomorrow morning.

You will be aware, Mr President, that Bangladesh consistently has sought to give effect to the relevant rules of international law governing the delimitation of maritime spaces. Bangladesh was an active participant in the work of the Drafting Committee of UNCLOS III, and it played an active role in the negotiations leading to the adoption of the 1982 Convention. We pay tribute to the work of the delegation of Bangladesh, those individuals who contributed to the negotiation and adoption of this vital instrument. We note also the positive role played by Myanmar – or Burma as it then was – in those negotiations. It is also important to recognize that since attaining independence in 1971, Bangladesh has made consistent and sustained efforts to negotiate maritime boundary treaties with its neighbours, in accordance with international law.[1] 1974, early in its history, was an important year; that is when negotiations started with Burma, with Myanmar, and of course in that year 1974 Bangladesh enacted its Territorial Waters and Maritime Zones Act. The most recent meeting between Bangladesh and Myanmar, meetings which had continued right up until 2008, were then followed by further meetings that took place in 2010. The distinguished Foreign Minister who sits behind me explained the elements of success and failure, and how eventually Bangladesh saw no alternative but to institute legal proceedings with its neighbours, so as to definitively settle the boundary in the area beyond the territorial sea.

Let me just begin with the law. It is of course appropriate to interpret and apply the 1982 Convention in its historical context, as Professor Crawford did in his forensic detailed submissions of last Thursday. Of particular importance is the newly codified approach to the delimitation of continental shelf boundaries and to the exclusive economic zone (which of course was a concept new to the 1982 Convention), as compared with the approach taken by the Geneva Conventions of 1958. The 1982 Convention places an emphasis on achieving an equitable solution. This is reflected in articles 74 and 83. And Bangladesh very strongly supported this modern approach, as did Myanmar. You will see this in the record of negotiations. For example, on 26 August 1980, in calling for continental shelf delimitation "on the basis of the principle of equity", Mr Sultan of the Bangladesh delegation explicitly invoked what he called,

> "The peculiar geomorphological conditions and concave nature of the coast of Bangladesh [that] had created for his country an extraordinary situation which deserved serious consideration so that it might be protected from an unfair and untenable solution."[2]

Indeed, the representative of Burma, U Kyaw Min, as Burma then was, similarly recognized that the discarded elements of the 1958 Convention were disadvantageous – and inequitable – for many States with a unique coastal geography, noting that "equidistance boundaries were by definition arbitrary".[3] That was Burma's position in 1980.

Mr President, Members of the Tribunal, as you well know, until 1958 the rules of international law governing the use and delimitation of maritime areas was not

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[1] In 1974, Bangladesh also enacted the *Territorial Waters and Maritime Zones Act* (Act No. XXVI of 14 February 1974), MB, para. 3.2.
[2] A/CONF.62/SR.138, para. 61.
[3] A/CONF.62/C.2/SR.29l, para. 7.

codified. International law recognized the rights of coastal States over the waters immediately adjacent to their coasts – territorial sea – but did not recognize the sovereignty of states or the exercise of sovereign rights in maritime areas beyond the territorial sea. From the 1940s onwards, States increasingly asserted such claims, invoking rights over the continental shelf. And this of course catalyzed some of the major developments of the modern law of the sea.[4]

The process of codification followed seven years of work by the International Law Commission starting its activities in 1949.[5] The 1958 diplomatic conference transformed the ILC's work into four conventions,[6] one of which – the Convention on the Continental Shelf – is of particular contextual significance. That Convention was signed by Pakistan (of which Bangladesh was then a part) but it was never ratified, and it was never signed or ratified by Myanmar (Burma, as it then was).[7] That inaction on the part of Myanmar cannot be said to lend support to their newly-found warm embrace of equidistance in this case.

The 1958 Continental Shelf Convention marked a first codification of the rights of coastal States over their continental shelves, which it defined as follows:

> "The seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas" (article 1).

The 1958 Convention recognized that the coastal State's rights over the continental shelf were inherent – they were not dependent upon prior occupation or proclamation[8] – but that they fell short of sovereignty. As regards delimitation, the key provision for our purposes in 1958 was article 6(2), which provided as follows:

> "Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

It is important to recall these words, precisely because they have since been rejected, by courts, by arbitral tribunals and by the drafters of the 1982 Convention.

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[4] For example, in 1945, President Truman of the United States made a proclamation asserting rights over a continental shelf:

> "…the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."

Whiteman's Digest, Vol. IV, 756 (1963-1973).

[5] United Nations, *The Work of the International Law Commission*, Vol. I, 114-122 (6 ed., 2004).

[6] The Conference met from 24 February to 27 April 1958. For the *travaux prèparatoires* and the proceedings of the Conference, see *Official Records of the United Nations Conference on the Law of the Sea*, Vols. I to VII (1958).

[7] BM, para. 5.5.

[8] Convention on the Continental Shelf, 499 U.N.T.S. 311 (29 April 1958), entered into force 10 June 1964, article 2(3).

You will note in particular the emphasis that is given to the principle of equidistance – and I quote again, "shall be determined by application of the principle of equidistance" – subject to any special circumstances or agreement. This was a modest variation of the delimitation rule that was set out in article 12 of the 1958 Territorial Sea and Contiguous Zone Convention. The approach taken by article 6 was not acceptable to Bangladesh, or indeed to many States, and Bangladesh fought strongly for a new approach in what became article 83 of the 1982 Convention. In that legislative effort, Bangladesh's approach was strongly reinforced by the judgments in the 1969 *North Sea* cases, as anyone who was present in those negotiations between 1974 and 1982 will be able to attest.

The Preamble to the 1982 Convention indeed recognizes that "developments since [...] 1958 […] accentuated the need for a new and generally acceptable Convention on the law of the sea." For the exclusive economic zone and the continental shelf, "the new and generally acceptable rule" is reflected in, respectively, articles 74 and 83 of the 1982 Convention. Article 83(1) provides:

> "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

THE PRESIDENT: Mr Sands, I am sorry for interrupting you; the interpreters are experiencing some difficulties in following you. Could you slow down a bit, please? Thank you.

MR SANDS: I will be happy to slow down, sir.

Article 74(1), in respect of the EEZ, is in the same terms. Mr President, Members of the Tribunal, you will be well aware that unlike article 6(2) of the 1958 Convention, article 83(1) does not cite to equidistance at all. What it requires – what it requires pre-eminently – is the achievement of "an equitable solution".[9] This was recognized and emphasized by the ICJ in *Tunisia v. Libya*, where judgment was given just a few months before the 1982 Convention was adopted but after the text of article 83 had been agreed. And that Court put its view in the following terms:

> "In the new text [i.e. the official draft convention before the Conference the text of which has remained unchanged[10]], any indication of a specific criterion which could give guidance to the interested States in their effort

[9] *Eritrea/Yemen*, Award of the Arbitral Tribunal, Second Stage (Maritime Delimitation), at para. 116 (1999), *The Eritrea-Yemen Arbitration Awards of 1998 & 1999* online: http://www.pca-cpa.org. See also *Delimitation of Maritime Boundary between Guyana and Suriname*, Award, 17 September 2007, www.pca-cpa.org, (hereinafter "*Guyana/Suriname*"), at para. 332.

[10] Earlier, with regard to the delimitation of the continental shelf between States with opposite or adjacent coasts, article 83 (1) of the Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea (A/CONF.62/WP.lO/Rev.2) provided that:

> "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned."

See *Tunisia/Libya,* Judgment, I.C.J. Reports 1982, p. 18, at para. 49.

> to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved. The principles and rules applicable to the delimitation of the continental shelf areas are those which are appropriate to bring about an equitable result."[11]

In this way, as the International Court and a number of Annex VII arbitration tribunals have recognized, the 1982 Convention marked a clear departure from the 1958 Convention. In our written pleadings we explained the reason for the change: the negotiators of the 1982 Convention could not reach consensus, it being clear that there were too many situations in which equidistance plainly would yield a manifestly inequitable solution, or an "arbitrary", result, to take the words of the distinguished Delegate of Burma.[12] The coastal geography of Bangladesh – which had already been referred to in the pleadings in the 1969 *North Sea* cases, a point to which Mr Martin will return – was one such situation.[13] Since then, equidistance has not somehow re-emerged as the gold-standard for delimiting areas beyond 12 miles, as Myanmar now argues: there has not been a return to the situation that pertained in the 1958 Convention.[14]

Mr President, since 1982 there have been a great number of cases addressing the Convention and the approach that it has adopted. Professor Crawford dealt with this very fully, and there is no need for me to re-visit. He made it crystal clear, via the undiscovered writings of Sir Arthur Conan Doyle, directing you to the detective story of *The Strange Case of the Missing Concavity*, Chapter 1 of this collection of recently discovered writings. The second chapter might be called *The Curious Incident of the Convention that was Abandoned in the Night*. In its Counter-Memorial Myanmar asserts that Bangladesh has lost sight of developments since 1969:[15] with great respect, this is entirely wrong, as the pleadings of Bangladesh make clear. If anyone has lost sight of developments, it is surely Myanmar, harking back to those happy, carefree, teenage days of simple equidistance, reflected in the 1958 Convention, an instrument Myanmar seems to like quite a lot but, rather bizarrely perhaps, somehow failed to sign or ratify. Perhaps it is too much to suggest that Chapter 3 of the recently discovered writings might be entitled: *The Bizarre Episode of the Country that Invoked the Instrument it Forgot to Ratify*. Mr President, the 1958 Convention is long gone. The 1982 Convention and subsequent practice reflect a different approach. I can deal with them then in six propositions, in relation to delimitation in the areas beyond 12 miles.

Our first proposition is this: in carrying out its judicial function a tribunal is bound to apply the rules of maritime delimitation set forth in the 1982 Convention to the facts that are established by the evidence – including expert evidence – that is before it in the record. These substantive rules are set forth in articles 74 and 83, as well as article 293 that directs the Tribunal to apply the rules set forth in the 1982 Convention and other rules of international law that are "not incompatible with" the

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[11] *Tunisia/Libya*, Judgment, I.C.J. Reports 1982, p. 18, at para. 50 [emphasis added].

[12] *Virginia Commentary* at p. 954 *et seq*. BM, Vol. III, Annex 32 cited in BM, para. 6.15.

[13] BM, para. 6.34. See also ITLOS/PV.11/Rev.1, pp. 7-19 (Reichler) and in particular pp. 12-13 (Reichler).

[14] MCM, para. 5.15.

[15] MCM, para. 5.16.

1982 Convention. The evidence on which you are entitled to rely is set forth in the pleadings of the parties.

Articles 74 and 83 deal with the delimitation of the EEZ and the continental shelf of States with opposite or adjacent States. The delimitation is to be effected by agreement to achieve an equitable solution. The Annex VII Tribunal in *Barbados v. Trinidad and Tobago* had this to say about the formulation:

> "This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules."[16]

There's nothing controversial there.

Bangladesh fully associates itself with the approach reflected in those words, and recognizes there is no disagreement in principle between the Parties with regard to the identification of the applicable, substantive law.[17] Where there is disagreement, however, is on the application of those rules to the facts. And in this regard, we are bound to note – with considerable surprise – that Myanmar has adopted a notably minimalist approach to matters of evidence. As I mentioned on Friday, Myanmar appears to have a tendency to make assertions that are not supported by any evidence; they are mere speculation. But Mr President, this Tribunal is required to decide facts on the basis of evidence, tendered in accordance with the rules of the Tribunal. And that is why it is so very striking that Myanmar has tendered no evidence – literally nothing – as regards geomorphological, geological or any other matters relating to the delimitation of the outer continental shelf, beyond 200 miles. Now, it is entirely a matter for Myanmar to litigate this case as it sees fit. However, the approach it has taken means that the Tribunal is confronted with a particular reality: having no expert evidence of its own to rely upon, Myanmar simply has no evidentiary basis of its own upon which to rely. It cannot challenge, on the basis of evidence, Bangladesh's approach. Indeed, Bangladesh's evidence stands unchallenged and unrebutted as a matter of evidence and this, frankly, is a rather novel situation, speaking personally, not one I have come across on many occasions, if any. Myanmar can make legal arguments as to the adequacy of Bangladesh's evidence, or its pertinence or relevance but it cannot seek to prevent the Tribunal from delimiting those areas on the grounds that it has, of its own accord, decided not to tender any evidence in this case in relation to that part of the dispute. The Tribunal has to decide the case on the basis of the evidence before it.

I would rather refer to another matter. Dealing with issues of fact without any evidence rather reminds me of the challenge that was faced by Dr Spock in a very early episode of *Star Trek* that went to air in 1967. When he was asked by a character (amazingly enough played by a very young Joan Collins), what exactly he

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[16] *Barbados v. Trinidad and Tobago,* Award of 11 April 2006, p. 68, para. 222, available at: http://www.pca-cpa.org/upload/files/Final%20Award.pdf

[17] MCM, paras. 4.3, 4.4, 5.5-5.7.

was doing and he offered the following reply: "I am endeavouring, madam, to construct a [computer] using stone knives and bearskins."[18] That seems to me to indicate the kind of challenge that Myanmar currently faces in relation to the outer continental shelf.

Which brings me to our second proposition: in accordance with international practice, the Tribunal is free to – and we say must – identify a single line to delimit the seabed and subsoil, and the superjacent water column, within 200 miles. Although the 1982 Convention contains distinct provisions relating to the delimitation of the EEZ and the continental shelf, over time the practice has generally been to draw a "single maritime boundary" to delimit both zones within 200 miles. In *Qatar v. Bahrain*, the International Court noted that this approach "finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various – partially coincident – zones of maritime jurisdiction appertaining to them."[19] As the Annex VII Tribunal in *Guyana v. Suriname* noted, a single maritime boundary serves "to avoid the difficult practical problems that could arise were one Party to have rights over the water column and the other rights over the seabed and subsoil below that water column".[20] The avoidance of practical difficulties inspired the approach taken by Bangladesh in its Memorial; Myanmar has expressed its agreement that the Tribunal should delimit a "single maritime boundary" up to 200 miles.[21] So there is no difference between the Parties, and no rule, principle or policy, we say, that ought to prevent the Tribunal from delimiting a "single maritime boundary", subject to a point that Professor Crawford will make later about grey zones.

I turn to our third proposition: the Parties also agree that the correct approach is for the Tribunal first to delimit the territorial sea up to a limit of 12 miles, in accordance with article 15, and then proceed to delimit the areas beyond 12 miles. As Myanmar put it in paragraph 2.40 of its Rejoinder, "In principle, the last point of the boundary in the territorial sea should serve as the starting point of the EEZ/continental shelf boundary." We say that principle applies in this case too. It is consistent with practice, and no departure is called for. One leading judgment that we submit is particularly apposite is that of the International Court in *Qatar v. Bahrain,* where the Court stated that:

> "[It] has to apply first and foremost the principles and rules of international customary law which refer to the delimitation of the territorial sea, while taking into account that its ultimate task is to draw a single maritime boundary that serves other purposes as well. […] Once it has delimited the territorial seas belonging to the Parties, the Court will determine the rules and principles… to be applied to the delimitation of the Parties' continental shelves and their exclusive economic zones or fishery zones."[22]

[18] Star Trek, City on the Edge of Forever, Season 1, Episode 28, first broadcast on 6 April 1967.

[19] *Qatar v. Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p. 40, at para. 173.

[20] *Delimitation of Maritime Boundary between Guyana and Suriname*, Award of 17 September 2007, at para. 334, available at: www.pca-cpa.org, (hereinafter "*Guyana/Suriname*"),

[21] MCM, paras. 5.1, 5.2 and 5.46.

[22] *Qatar v. Bahrain,* I.C.J. Reports 2001, p. 40, at paras. 174-176.

In our respectful submission, that is the correct approach to be followed in this case too. The approach recognizes that there is a distinction to be applied in delimiting different areas. We see no reason to depart from the approach reflected in existing and recent case-law.[23] That approach also supports the principle that the line of delimitation beyond the territorial sea should be transposed to the last point of the boundary in the territorial sea. Professor Crawford will return to this during the afternoon.

I turn now to a fourth proposition: in delimiting the areas beyond 12 miles, the 1982 Convention does not require any particular methodology to be applied. It does, however, impose upon the Tribunal an obligation to achieve an equitable solution, within the meaning of articles 74 and 83.

Bangladesh, Mr President, is not blind to the fact that in a great number of cases concerning the delimitation of the EEZ and continental shelf, the approach has been to follow two steps: first, to start by drawing a provisional equidistance line, and second, then to determine whether there are any relevant circumstances which require an adjustment to – or abandonment of – that line.[24] We do not challenge the propriety of that approach, but only for relevant cases. It is not the approach to be taken in all cases. And we therefore strongly disagree with Myanmar when it claims that "it is now scarcely arguable that any other approach can or should be adopted".[25] That is simply wrong. It reflects a partial, selective and self-serving reading of the international case law, an approach inspired no doubt by the desire to enhance the role of equidistance, putting a cart – and the wrong cart at that – before the horse. Myanmar is inviting you to return to 1958. That is the wrong approach.

Now, the Tribunal of course appreciates that articles 74 and 83 make it clear that the ultimate aim of the delimitation process is the achievement of an "equitable solution". That is the horse that should be leading this process of delimitation. Those two articles do not prescribe any method of delimitation, unlike the 1958 Convention. As we have explained, efforts to include any express role for equidistance were rejected outright during the negotiations leading up to the 1982 Convention. Myanmar may not be happy with that, but that is the reality with which it must live, and this Tribunal's role, as an institution established by the 1982 Convention, is to do justice to what the instrument's negotiators intended. That is one of the reasons why this case is of singular importance for this Tribunal: some three decades after the Convention was adopted, the full bench of the Tribunal has an opportunity to give its stamp of authority to the correct approach.

In this regard, it is noteworthy too that other legal fora, including the International Court, have recognized that "equidistance may be applied if it leads to an equitable solution", but "if not, other methods should be employed".[26] That is surely the right

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[23] *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40, para. 231. The following year, the Court again described the two methods as "very similar." See *Land and Maritime Boundary between Cameroon and Nigeria*, Merits, Judgment, I.C.J. Reports 2002, p. 303, para. 288.

[24] See BM, para. 6.18 and MCM, para. 5.30 – 5.31; see e.g. *Barbados v. Trinidad and Tobago* (Annex VII 2006), *Guyana v. Suriname* (Annex VII 2007) and *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*) (ICJ 2009).

[25] MCM, para. 5.32.

[26] *Tunisia/Libya*, Judgment, I.C.J. Reports 1982, p. 18, at para. 109.

approach: it does not imply any presumption in favour of equidistance, or indeed any requirement at all to make any use of equidistance. Equidistance may be a starting point in some cases – but not all – and even in those cases it may not end up providing the actual result. The Court made this very clear in a recent judgment in 2007, in the dispute between Honduras and Nicaragua, with which Myanmar seems notably reticent. The Court said that the equidistance method "does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate."[27] This approach is entirely consistent with other judgments and awards that make clear that equidistance is "not the only method applicable" and, to take it a step further, in the words of the Court, does "not even have the benefit of a presumption in its favour."[28]

The key point for this case is that the Tribunal's focus cannot be on any particular *a priori* methodology as to the mechanics of drawing a line; it has to focus on the end result, the achievement of an equitable solution. To adopt a different approach would be to undermine the 1982 Convention. The drafters of that Convention took into account what the ICJ had observed in 1969, that it would be "ignoring realities" if one failed to recognize that the blind use of a particular methodology – equidistance – will "under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable".[29] As has already been emphasized by Professor Crawford, and as Mr. Martin will in due course address in detail, these joined cases are of singular importance in guiding this Tribunal in its approach in resolving the present dispute. They confirm that the equidistance methodology urged upon you by Myanmar, in plain disregard of the geographic circumstances of this case, would undoubtedly result in a manifestly inequitable result. It would be arbitrary.

Now that is not to say, as Myanmar wrongly asserts, that Bangladesh seeks a delimitation on the basis of an *ex aequo et bono* approach, or as apparently articulated, with characteristic elegance but ultimately unpersuasively, by Professor Pellet, the notion of an *équité créatice* (a "normative equity").[30] Bangladesh has never suggested that the delimitation should be achieved on the basis of an *ex aequo et bono* approach, or any other fancy name given to it.[31] A range of proper methodologies have been tried and tested, depending on the case in question, and they are also available in this case. The chart that Professor Crawford drew your attention to on Thursday made clear that there is no single methodology that has been dominant. The existing jurisprudence confirms that the angle-bisector methodology, for example, that is relied upon by Bangladesh has been used to achieve a solution that is equitable. And contrary to Myanmar's submission, this does not depart from the existing jurisprudence.[32] Quite the contrary, the bisector

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[27] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 159 , at para. 272.

[28] See *Qatar v. Bahrain,* 2001 I.C.J. 40, at para. 233 (citing *Libya v. Malta,* ICJ Reports 1985, p. 13, 47, para. 63).

[29] *North Sea Continental Shelf,* Cases, Judgment, ICJ Reports 1969, p. 3, para. 24.

[30] See *inter alia* MCM, paras. 5.6, 5.34, 5.36. 5.127, 5.134.

[31] BR, paras 3.10, 3.23 – 3.25.

[32] MCM, para. 5.139 (citing *Romania v. Ukraine* at para. 201).

method has been used in a number of recent judgments – such as that of the International Court in *Honduras v. Nicaragua* – and in arbitral tribunals' awards – such as that in *Guinea v. Guinea Bissau*. The Tribunal again will have noted Myanmar's plain discomfiture with this jurisprudence with these cases. Myanmar urges you not to follow this approach. It calls on you "not to depart," as it puts it, "from the modern rules clearly established in the recent law". It invites you not to undermine "consistency in international law and international judicial decisions."[33] Well Mr President, we simply do not see how, following these and other cases, it can possibly be said that reliance on the bisector methodology we invite you to apply can in any way be said to undermine an established consistency in the case law. To the contrary: as Professor Crawford will explain, a methodology that has been used in no less than four major judgments and awards, including as recently as 2007, enhances consistency. An angle bisector is, as the International Court put it in *Honduras v. Nicaragua*, a viable method where "equidistance is not possible or appropriate";[34] And I emphasize the words "not […] appropriate". In that case, the Court did not even draw an equidistance line; it went straight to the angle bisector. It seems that the Court was not willing to draw an equidistance line on the basis of a single base point plotted on each side of the constantly shifting mouth of the shared river that formed the boundary. Yet the Tribunal will have noted that in this case Myanmar has plotted just one single, lonely, sad base point on the coast of Bangladesh from which to draw the entire equidistance line. It is difficult to think, Mr. President, of any case in which equidistance would be less "appropriate" than this one.

This brings me to Bangladesh's fifth proposition: in delimiting this maritime boundary, as with any other, the Tribunal is permitted to take into account, and should take into account, the relevant regional context in which the delimitation is taking place. What this means is that the Tribunal must have regard to the situation of Bangladesh and Myanmar in the context of the relevant areas of the Bay of Bengal as a whole. The Tribunal must have regard to the implications of India's claim, and the impact that this has on Bangladesh's ability to exercise sovereign rights.

This approach is entirely well-established in seeking to achieve an equitable solution, and it is reflected in numerous judgments and awards. One clear example is the award of the Arbitral Tribunal in *Guinea v. Guinea Bissau*, which was presided over by the President of the International Court of Justice, Manfred Lachs, who will have been very well known to many of you sitting on the bench today. It cannot be said that Judge Lachs was without experience in or insight into these matters. The Arbitral Tribunal did not view its task solely from a bilateral perspective. It recognized that a broader, regional perspective was appropriate. It sought a solution that would take overall account of the shape of the entire West African coastline.[35] The Arbitral Tribunal referred to the need to produce a delimitation that would in its words:

> "be suitable for equitable integration into the existing delimitations of the West African region, as well as future delimitations which would be

[33] MCM, para. 1.28.

[34] *Nicaragua v. Honduras*, Judgment, ICJ Reports 2007, p. 659 ,746 at paras. 287 [emphasis added].

[35] *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau,* Award, 14 February 1985, reprinted in 25 I.L.M. 252, para. 108. BM, Vol. V.

> reasonable to imagine from a consideration of equitable principles and the most likely assumptions".[36]

These words are pertinent for this case. That Arbitral Tribunal rejected equidistance for the very same reasons that it is inappropriate in this case: the concave configuration of the West African coast in the vicinity of the Guinea-Guinea Bissau boundary made equidistance inequitable.

Existing and future delimitations in the Bay of Bengal provide compelling support for Bangladesh's approach. On your screens and at tab 3.4 you can see existing delimitations outlined in black, and now you can see in red future delimitations, based on the claims of Myanmar and India. We invite you to step back for a moment look at that plate, look at the region as a whole, and ask yourselves whether you can possibly conclude that the extensive existing rights and claims of our two neighbours can be said to allow Bangladesh a result that could in any terms be considered to be equitable. The existing case law confirms that in resolving this dispute you have to look at the region as a whole. And in this case, that necessarily also means taking into account the area beyond 200 miles: we invite the Tribunal to ask itself whether a delimitation that would allow Myanmar and India to exercise sovereign rights beyond 200 miles but did not permit Bangladesh to do so could be said to achieve an equitable solution. In our submission, the answer to that question is blindingly obvious.

Mr President, I turn now to our sixth and final general proposition, which concerns the relevant or special circumstances that are to be taken into account in achieving an equitable solution. It will be obvious that state practice demonstrates that each delimitation depends on its own particular set of geographical and historical circumstances. This was explained rather aptly by the Annex VII Tribunal in *Guyana v. Suriname*, which noted that "international courts and tribunals are not constrained by a finite list of special circumstances". The Tribunal emphasized that special circumstances giving rise to an equitable result are not a "defined or limited category of circumstances".[37] Bangladesh agrees with those words and invites the Tribunal to adopt the same approach. As that Arbitral Tribunal put it, in a unanimous award, "special circumstances that may affect a delimitation are to be assessed on a case-by-case basis, with reference to international jurisprudence and State practice."[38] Other cases support that approach.

Last Thursday Mr Reichler addressed two geographic aspects of this case that are to be treated as relevant circumstances with regards to the delimitation of the continental shelf. The first is obviously the pronounced concavity of Bangladesh's entire coastline and the double concavity within that overall concavity; the second is the extensive Bengal deposition system and the geological and geomorphological

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[36] *Ibid.* at para. 109 (In order to do so, "it is necessary to consider how all these delimitations fit in with the general configuration of the West African coastline, and what deductions should be drawn from this in relation to the precise area concerned in the present delimitation".) In the *Libya v. Malta* case, the ICJ similarly took a regional perspective, stating that it "has to look beyond the area concerned in the case, and consider the general geographical context in which the delimitation will have to be effected" (para. 69).

[37] *Guyana v. Suriname*, Award of the Arbitral Tribunal, PCA, 17 September 2007, para. 302.

[38] *Ibid.,* para. 303.

prolongation of Bangladesh's coastline.[39] Mr. Reichler also mentioned that St Martin's Island, which is located only 4.5 miles from the Bangladesh coastline, is a normal feature to be taken into account fully in delimiting the continental shelf. Now, this afternoon, Mr Martin and Mr Reichler will have more to say about these three elements, so I am just going to touch on one of them to which we say the Tribunal needs to pay particularly special attention. In 1969, in the *North Sea* cases, the International Court confirmed that it is "necessary to examine closely the geographical configuration of the coastline of the countries whose maritime areas are to be delimited."[40] And in 1977, the Court of Arbitration in the *Anglo-French Continental Shelf* case ruled that the appropriateness of any method for the purpose of effecting an equitable delimitation "is a function or reflection of the geographical and other relevant circumstances of each particular case."[41] That approach is surely correct: it is reflected in all the subsequent practice, and also reflected in the academic literature. And this case provides the Tribunal with an opportunity to give its own particular stamp of authority to that approach, recognizing the significance of coastal geology.

We have addressed in some detail the relevant features of the coastal geography of Bangladesh. One that is particularly significant, as I mentioned, is concavity, a feature that would tend, if equidistance were to be applied, to cut off Bangladesh's seaward projection. As early as 1969, the International Court articulated the principle of preventing, in such circumstances and as far as possible, a cut-off effect on the continental shelf delimitation, and the problem can be seen easily on your screen. As you can see, where a State like Bangladesh is situated in a concavity between two adjacent States – that's in the top right corner – the equidistance lines with its neighbours will converge in front of its coast. And this creates a "cut-off" effect. It deprives that State of a great deal of continental shelf – and EEZ – in which it would otherwise be entitled to exercise sovereign rights. In this case, in fact, it would completely prevent Bangladesh from having an extended continental shelf beyond 200 miles, a point to which Mr Martin will return. He will also have more to say about the *North Sea* cases, where the Court was careful to state that whilst it was not a question of "completely refashioning nature" – and I emphasize the word "completely" – it had to take account of thesituation in which the configuration of the coastline of one of the three States would, if the equidistance method was used, create an inequity. "What is unacceptable in this instance", said the International Court, "is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length."[42] These words, and the principles they reflect, are equally applicable in this case. And as Professor Crawford reminded you, the Court's judgment was then followed by a negotiated agreement, one that virtually doubled Germany's maritime spaces in the area, as compared with that which equidistance would have afforded.

[39] ITLOS/PV.11/Rev.1, pp. 18-19 (Reichler).

[40] *North Sea Cases,* 1969 ICJ Reports 3, at para. 96.

[41] *Anglo-French Continental Shelf Case,* ILR, Vol. 54, p. 66.

[42] *Ibid.* para. 91.

In adopting this approach, the Tribunal would be following and building on a settled and respected approach. The novelty of this case is that it raises, for the first time, the detailed applicability of the principle to the outer continental shelf. As a case of first impression, of course, I cannot refer you to any judicial or arbitral authority, but I can direct you to article 76 and urge you to lay down the analogous principles that will assist Bangladesh and Myanmar to resolve their dispute in a manner that can provide a useful contribution in affirming the need to assure an equitable solution in all areas of the continental shelf that are to be delimited. Professor Boyle will return to this tomorrow.

Mr President, Members of the Tribunal, this concludes this introductory overview, setting the scene for the more detailed submissions that will now follow. These are the broad principles that we say should inform the Tribunal as it adjudicates this first case. No doubt this case presents challenges and opportunities, but it is surely an important moment.

Mr President, on another planet, where Myanmar's legal arguments sometimes seem to be, I would be tempted to say "Beam me up, Scotty", as Captain Kirk or Dr Spock might have said once their mission was accomplished. Happily I do not need to be beamed up anywhere; I can just take my seat a couple of rows back. However, before doing that, I invite you to call Mr Martin to the Bar to address in more detail the application of these general propositions to the specific facts of this case. I thank you for your attention, Mr President.

THE PRESIDENT: Thank you. I now give the floor to Mr Martin.

MR MARTIN: Mr President, distinguished Members of the Tribunal, good morning. It is a very special honour for me to appear before you today, and it is a privilege to do so on behalf of Bangladesh. My role today is to continue the discussion concerning the inappropriateness of using equidistance for delimiting the EEZ and continental shelf within 200 miles that Mr Reichler began last Thursday. Mr Reichler will follow me to the podium after the coffee break to complete our discussion of the issue. Last Thursday, Mr Reichler described the three most important geographical and geological features of this case. They are the concavity of the Bangladesh coast, St Martin's Island and the Bengal depositional system. I will be dealing with the first: the concavity of the coast. Mr Reichler will be dealing with the second and the third later this morning.

My submissions this morning will be divided into four parts. First, I will discuss the distorting effects that concave coasts have on the plotting of an equidistance line. Second, I will respond to Myanmar's arguments that the concavity of Bangladesh's coast is not an important element of this case. Third, I will discuss State practice that supports Bangladesh's position. Fourth, and finally, I will address certain other flaws with Myanmar's proposed equidistance line, most of which are also a function of the concavity of Bangladesh's coast.

In his opening presentation to the Tribunal on Thursday, Mr Reichler discussed the doubly concave nature of Bangladesh's coast. Not only is it pinched between Myanmar and India in the concavity formed by the Bay of Bengal's north coast,

Bangladesh's coast is itself defined by a secondary concavity. This, in our view, is the single most important geographic element, and fact, in this case.

In considering the relevance of this circumstance, I hope that it will be useful to step back just for a moment and see how equidistance works differently in the case of a concave coast. I will do so by reference to a series of schematics which are derived from a similar schematic included in the ICJ's judgment in the 1969 *North Sea Continental Shelf* cases.[43] All four schematics can be found at tab 3.7 of your Judges' folder.

We begin with an idealized straight-line coast along which lie three States: A, B, and C. (I assure you that it is pure coincidence that State B is the one in the middle!) In a situation like this, equidistance works well to divide the maritime areas equitably. As you see, the two notional equidistance lines are perpendicular to the coast and parallel to each other. All three States enjoy an access to their 200-mile limits that is equal in width to the length of their coasts.

On the next slide, we have a concave coast. The coasts of A and C bend upward and inward. You can see the difference immediately. Although States A and C continue to make out well, State B now has a substantially reduced maritime area. The equidistance lines on either side are pushed inward in the direction of State B's coast. The result is that the breadth of its maritime areas narrows noticeably further from shore. Although State B still reaches 200 miles, it does so to a more limited extent than in the prior schematic. We might call this narrowing of maritime space the most obvious footprint of a concavity.

Next up is a schematic of a more severe concavity. Here, the coasts of A and C bend upward and inward more sharply than in the prior image. Using equidistance, those two States again do just fine. State B, however, is much worse off. Not only is its maritime space reduced to a tapering wedge, it no longer even reaches the 200 mile limit. These, you might say, are the evil twin effects of a severe concavity.

Fourth and finally, we have a schematic showing what happens in the case of a concavity within a concavity. In this case, instead of having a straight line coast, as in the prior examples, State B's coast recedes from its land boundary termini on either side. This exerts a multiplier effect on the concavity. The equidistance lines on either side are pulled even further inward. The wedge of maritime space with which State B is left is now even smaller and reaches an even lesser distance from its coast.
Mr President, Members of the Tribunal, Bangladesh's location between Myanmar and India at the northern end of the Bay of Bengal is most like the final schematic we just looked at. The effect of the double concavity is to push the two equidistance lines between Bangladesh and its neighbours together. The effect is depicted on the map appearing in front of you, which you will recognize from Mr Reichler's Thursday presentation.

[43] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3, at p.16.

Both of the worst effects of a severe concavity are evident. Bangladesh is not only left with a wedge of maritime space that narrows dramatically to seaward but it is also stopped short of its 200-mile limit.

I come then to the second part of my presentation: our response to Myanmar's arguments that the concavity of Bangladesh's coast is irrelevant.

Myanmar, especially in its Rejoinder, seems reluctant to engage with the issue of the concavity. As Mr Reichler observed last week, they would prefer to ignore it. They want the Tribunal to ignore it too. In this respect, it is interesting that the Rejoinder does not get around to even talking about the concavity until deep into Chapter 6, the last substantive chapter. Considering that the concavity may be the single most important factual element of the case, Myanmar's approach evidences its discomfort with the issue.

When Myanmar does finally get around to addressing the issue of concavity, at around page 157 of the Rejoinder, Myanmar deploys two, not entirely consistent, arguments to deny its relevance. It argues first that there is no appreciable concavity and, second, that the concavity is legally irrelevant in any event. Both assertions are incorrect.

Turning to the first argument, at paragraph 5.15 of the Rejoinder, Myanmar argues that "the relevant sector of the coast – that is the part of the coast immediately adjacent to the land boundary terminus – does not exhibit particular concavity".[44] Mr President, with respect, it is just not credible for Myanmar to say that the coast of Bangladesh exhibits no particular concavity. The only way you can miss seeing the concavity – in fact, the double concavity – of Bangladesh's coast is by keeping your eyes closed.

It is very easy to illustrate this. Let us start right here in this courtroom by looking at the Tribunal's bench. I do not know whether this is providential or not, Mr President, but your bench is a close replica of Bangladesh's coast. Is there anyone here that would deny that your bench exhibits a pronounced concavity? Like Bangladesh's coast, it is entirely concave, from one end to the other.

Myanmar misses the point by asking the Tribunal to focus myopically on the coast in the immediate vicinity of the land boundary terminus. It would be like me suggesting to the Tribunal that the Judges' bench does not look particularly concave if you look only at the small bit right in front of you. The same is true in this case. One need do no more than look at a map of the Bay of Bengal to see the concavity of the Bangladesh coast.

Myanmar's argument that Bangladesh's coast is not concave also directly contradicts what it said in its own Counter-Memorial, which expressly acknowledged the doubly concave nature of Bangladesh's coast. I refer to paragraph 2.14 of the Counter-Memorial, which states: "Bangladesh's coast on the Bay of Bengal is

[44] RM, para. 5.15.

approximately 520 kilometres in length. Its coast is concave, like the entire northern part of the Bay of Bengal."[45]

Myanmar's other argument is that even if it is there, the concavity of the Bangladesh coast is legally irrelevant; concavity is *not* a circumstance warranting a departure from equidistance. According to Myanmar's Counter-Memorial, contemporary case law "invalidates" the assertion that concavity is "among the recognized circumstances where equidistance does not result in an equitable solution."[46]

The only ostensible jurisprudential basis for this claim is the ICJ's decision in *Cameroon v. Nigeria*. Their argument on "contemporary case law", therefore, succeeds or fails on the basis of this one decision. As Professor Crawford showed last Thursday, it fails badly.

According to Myanmar, the Court in that case held that "concavity did not represent a circumstance which would justify the adjustment of the equidistance line."[47] Professor Crawford already demonstrated the error of this argument in his opening comments. I could not possibly improve on them. I would add only one point. Far from stating - much less ruling - that concavity was not a circumstances rendering equidistance inequitable, the ICJ actually said exactly the opposite. In particular, the Court said:

> "The Court does not deny that the concavity of the coastline may be a circumstance relevant to the delimitation, as it was so held to be by the Court in the *North Sea Continental Shelf* cases and as was also so held by the Arbitral Tribunal in the case concerning the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* …."[48]

As Professor Crawford described earlier, the Court found the concavity about which Cameroon complained irrelevant to the area that was being delimited, due to the presence of Bioko Island so close offshore; and it found expressly that the portion of the coast relevant to the delimitation was not concave. *Cameroon v. Nigeria* thus offers no help to Myanmar.

In truth, there are only three decided cases that arose in circumstances similar to those here. The first two, of course, are the *North Sea* cases. Here again, Professor Crawford thoroughly addressed them last Thursday. I will confine myself to responding to one additional point that Myanmar raised in its Rejoinder. That is, Myanmar claimed that "there is nothing comparable between the *North Sea Continental Shelf* cases and this case" because the effect of Myanmar's and India's most recent claim lines is to truncate Bangladesh's maritime areas 182 miles from its coast.[49] In contrast, Myanmar says, the equidistance lines claimed by Germany's neighbours ran together just 98 miles from its coast.

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[45] CMM, para. 2.14.

[46] MCM, para. 5.121 (citing MB, para. 6.32).

[47] MCM, para. 5.122.

[48] *Land and Maritime Boundary between Cameroon and Nigeria,* Preliminary Objections, Judgment, I. C. J.
Reports 1998, p. 275, at para. 296.

[49] RM, para. 6.72.

This, I suppose, is something of a fall-back to Myanmar's fall-back argument. First, we are told there is no concavity. Second, we are told that even if there is, it is not legally relevant. And now, third, we are told that even if it is relevant, Bangladesh is actually better off than Germany so the Tribunal doesn't need to worry about it. But this third argument is as unpersuasive as the first two.
There are several elements that show the cut-off effect on Bangladesh is every bit as prejudicial as was the cut-off of Germany. Myanmar ignores all of them.

First, account must be taken of the fact that Bangladesh has a significantly larger coastal front than Germany. Measured point-to-point from one end of the concavity to the other, the coastal front of Bangladesh measures 350 kilometres, Germany's 200 kilometres. In other words, Bangladesh's coastal front is 70% larger than Germany's. The fact that it has a somewhat longer maritime reach is a direct function of this size difference.

Second, account should be taken of the fact that Bangladesh faces directly onto the open seas of the Bay of Bengal. Its maritime reach is thus limited only by the extent of its juridical continental shelf as provided in article 76. Germany, in contrast, faces across the North Sea at the opposite coast of the United Kingdom. Its maritime areas could therefore extend no further than the location of the mid-channel median line with the UK, approximately 175 miles from its coast.

Third, and relatedly, in contrast to Germany, Bangladesh has an indisputable – and, in fact, undisputed – entitlement in the outer continental shelf that reaches to as much as 390 miles from its coast. Limiting it to an area within 182 miles would thus stop it more than 200 miles short of its maximum reach. This is reflected on the graphic now appearing before you, which you can also find at tab 3.8 of your Judges' folder.

The reality is then that equidistance threatens Bangladesh with a more severe cut-off than Germany.

Aside from the *North Sea* cases, the other case that had similar circumstances is the *Guinea/Guinea-Bissau* arbitration decided by an arbitral tribunal composed of three sitting ICJ Judges and presided over by Judge Manfred Lachs. The effect of Guinea's concave coast on equidistance lines with its neighbours can be seen on the screen in front of you. The equidistance lines are depicted in blue. Depicted in red is the final delimitation line determined by the tribunal. As you can see, the relief the tribunal gave Guinea is considerable, certainly far greater than anything that Bangladesh is seeking in this case.

Later today, Professor Crawford will discuss the specific methodology – the angle bisector methodology – that the tribunal used to arrive at this result. The point I would invite you to focus on now is simply the fact that given the concave configuration of the coast, the tribunal discarded equidistance as an appropriate delimitation methodology. It stated:

> "When in fact - as is the case here, if Sierra Leone is taken into consideration - there are three adjacent States along a concave coastline,

> the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits."[50]

Myanmar's Rejoinder is oddly ambivalent about the *Guinea/Guinea-Bissau* decision. On the one hand, it says it is "so eccentric that it is difficult to refer to it".[51] It also says that it is "a very odd decision and calls for particular caution"[52]. We say these are strong and misplaced words to direct at such a distinguished tribunal.

Be that as it may, the most interesting comment Myanmar makes about the case is this: After levelling very strong criticism at the tribunal, the Rejoinder changes tack and admits that the tribunal's approach "led to an equitable solution in the singular circumstances of this case"![53] Mr. President, you heard that right. Myanmar admits that the approach taken by the arbitral tribunal in *Guinea/Guinea Bissau* – that is the rejection of the equidistance method in favour of an angle bisector – "led to an equitable solution in the singular circumstances of this case". I refer to paragraph 5.58 of the Rejoinder.

We say this is a critical admission. By acknowledging that the tribunal's decision to give Guinea relief from the concavity of its coast "led to an equitable solution", Myanmar undermines its own arguments against giving Bangladesh comparable relief in this case. How can relief from a concavity be equitable in the case of Guinea but not in the case of Bangladesh? How can it be equitable to reject equidistance because of the concavity of the coast in *Guinea/Guinea Bissau* but not here?

Indeed, the approach taken in *Guinea/Guinea Bissau* is all the more appropriate here because the cut-off Bangladesh suffers is much more pronounced than Guinea. The equidistance lines between Guinea and its two neighbours did not fully cut Guinea off within 200 miles. Even with equidistance, it had an outlet to 200 miles. Yet, Bangladesh does not get so far even though it is a significantly larger coastal State. Moreover, as I mentioned, Bangladesh has an entitlement in the outer continental shelf that extends out to some 390 miles from its coast. Although Guinea too appears to have an entitlement in the OCS, that entitlement reaches no more than approximately 250 miles from its coast.[54]

As I mentioned, the effect of the arbitral tribunal's delimitation on Guinea and its maritime rights was considerable. Equidistance would have given it only a modest outlet to 200 miles. In its award, the tribunal accorded it a much larger outlet measuring some 140 miles across; that is, about 260 kilometres. This is nearly the size of Guinea's 284 kilometres coastal front as measured between its two land boundary termini. The map on your screen is included at tab 3.9 of your Judges'

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[50] *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 ILM 252, para. 104.

[51] RM, para. 4.27.

[52] RM, para. 5.58.

[53] RM, para. 5.58.

[54] Guinea, *Preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles of 11 May 2009* available at <http://www.un.org/depts/los/clcs_new/commission_preliminary.htm>

folder. The Tribunal was evidently motivated to permit Guinea to extend its maritime territory to 200 miles across a broad area.

Mr President, that brings me to the third part of my presentation this morning: the pertinent State practice.

Although the *Guinea/Guinea Bissau* case is the only adjudicated delimitation arising in circumstances like those prevailing in the Bay of Bengal, there are a number of instructive examples from the State practice. These examples involve instances where a State is pinched in the middle of a concavity and would have been cut-off, had the equidistance method been used. The maritime boundaries that were ultimately agreed discarded equidistance in order to give the middle State access to its 200-mile limit.

I will show the Tribunal the principal examples of State practice to which I am referring in just a moment. Before doing so, I want to anticipate Myanmar's counter-argument because our answer is best understood by looking at the maps. Bangladesh presented many – but not all – of these examples of State practice in our Reply. In its Rejoinder, Myanmar tried to undermine their relevance by arguing that the agreements in question "generally created only very narrow corridors which are not comparable at all" to what Bangladesh seeks here.[55]

Mr President, as you are about to see, if it is true that the corridors in question were indeed narrow, that is only because the relevant States had relatively small coasts. In fact, the access zones granted them were generally equal in size to the full breadth of their coastal fronts. The fact that relatively small States were accorded such broad access to their natural limits is actually an argument that supports Bangladesh. If comparatively smaller coastal States were accorded full access zones, denying comparable treatment to a large coastal State like Bangladesh would be inequitable.

The first example is the 1975 agreed delimitation between Senegal and The Gambia on the coast of West Africa. As you can see on the screen, due to the concavity of the coast in the area, equidistance would have cut The Gambia off short of its 200-mile limit. In their agreement, the parties avoided this result by agreeing to give The Gambia a 200-mile zone of access identical in width to the full breadth of its 61-kilometre coastal front. This map can also be found at tab 3.10 of your Judges' folder.

This next map shows you the situation at issue in the 1987 agreed boundaries in the Atlantic between Dominica and the French islands of Guadeloupe and Martinique. Because both Guadeloupe and Martinique lie east of it, Dominica sits in what is functionally a concavity facing onto the open Atlantic. The equidistance lines converge shortly in front of its coasts. To remedy this cut-off, the parties agreed to accord Dominica the 200-mile access zone you see depicted on the screen. This map is at tab 3.11 of your Judges' folder. Again, the extent of access is virtually identical in width to the breadth of Dominica's coastal front. Although it tapers very

[55] RM, para. 6.22.

slightly, it is still almost as wide at the end – 31 kilometres – as Dominica's coast is broad – 49 kilometres.

Next is the 1984 agreement between France and Monaco. Once more, as you can see, the effect of equidistance would have been to cut Monaco off a short distance from its coast. In their agreement, the Parties agreed to accord Monaco a 48-mile long access zone that is again virtually identical to the breadth of Monaco's coast. You can find this map at tab 3.12 of your Judges' folder.

You will notice that unlike the prior two agreements, the corridor does not extend out to 200 miles. This is because the French Island of Corsica is directly opposite Monaco. The access zones thus extend to the full extent of Monaco's natural limit at the location of the median line with Corsica.

To these agreements, which we presented in Bangladesh's Reply, at least two more should be added. The first is the 2009 memorandum of understanding between Malaysia and Brunei. According to published accounts, Malaysia agreed that Brunei has jurisdiction over the areas formerly encompassed within Malaysia's oil blocks L & M.[56] The location of those blocks, combined with the effect of equidistance on Brunei's maritime areas, can be seen on the image in front of you. It is also at tab 3.13 of your Judges' folder. (The red lines are the colonial maritime boundaries dating to 1958 established by the United Kingdom.) Here once more, we see that the potentially cut-off State, Brunei, has been accorded an access zone equal in breadth to its coastal front.

A final example is the 1990 agreement between Venezuela and Trinidad and Tobago. Much like the other examples we have been looking at, Venezuela is located in a functional concavity between Trinidad and Tobago to the north and Guyana to the south. The effect of equidistance lines on its maritime areas is shown on the map in front of you. You can see the unmistakable footprints of a concavity; Venezuela's maritime space tapers and ends well short of 200 miles.

To take account of this fact, the parties to the 1990 agreement departed from equidistance in Venezuela's favour, as depicted on the map on the screen. This combined map is at tab 3.14 of your Judges' folder. The negotiating history shows that this was done precisely to accord Venezuela a *salida al Atlántico* - an outlet to the Atlantic - with the result of the *North Sea* cases very much in mind.[57]

Now, there are a couple of points that make this agreement different from the others that we have discussed.

First, Venezuela's maritime space was not limited to the Atlantic areas delimited by this agreement. It also has a sizable maritime area in the Caribbean as well. In contrast, Bangladesh does not have other maritime areas beyond those at issue in this case. Myanmar, however, has extensive coasts fronting on areas other than the Bay of Bengal, for example in the Andaman Sea.

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[56] N. Najib and S. Ali Bernama, "Oil Blocks 'Giveaway' to Brunei", *The Malay Mail* 30 April 2010 available at <http://www.mmail.com.my/content/35121-oil-blocks-giveaway-brunei>

[57] J. Charney and L. Alexander (eds.) *International Maritime Boundaries* (1996), Vol. I, at p. 681-682.

Second, the bilateral agreement between Venezuela and Trinidad and Tobago was incapable by itself of giving Venezuela the outlet to the Atlantic that it sought. Venezuela still requires corresponding relief on the other side with Guyana. The completion of that delimitation has yet to occur.

Third, unlike any of the other cases we have been looking at, and unlike the situation in the Bay of Bengal, you will see that there are actually competing cut-offs in this area of the Atlantic. In particular, equidistance cuts off both Venezuela *and* Trinidad and Tobago short of their 200-mile limits. By accommodating Venezuela's demand for an outlet to the Atlantic, Trinidad and Tobago was thus exacerbating its own cut-off, by Barbados. As Professor Crawford described on Thursday, this good deed did not go unpunished.

In any event, there are no similar competing cut-offs to worry about in the Bay of Bengal. Neither Myanmar nor India faces the prospect of being cut off should the effects of the concavity of Bangladesh's coast be abated. Bangladesh's claims leave both neighbours with the extent of their access to the 200-mile limit virtually undiminished.

In its Rejoinder, Myanmar attempts to minimize the significance of these instances of State practice by arguing that, as political compromises, these agreements have no direct applicability to the questions of law now before the Tribunal. We disagree. It is impossible *not* to draw the conclusion that these agreements, collectively or individually, 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. All of these States recognized that an equitable solution required abating the effects of equidistance, and according the middle State access to the natural limits of its maritime jurisdiction. In his writings, Jonathan Charney has referred to this as the principle of "maximum reach".[58]

I should note too that the other thing these cases show is the extent of State reliance on the holding of the *North Sea* cases. I invite the Tribunal to review the description of these agreements in the relevant volumes of the American Society of International Law's multi-volume set International Maritime Boundaries. When you do, you will see numerous references to the relevant States' reliance on the ICJ's Judgment in the *North Sea* cases.[59] That fact is a powerful demonstration of just how settled the international community's understanding of the law has become.

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

[59] See e.g., Press Statement by the Honourable Minister of External Affairs and International Trade, Port of Spain, 16 July 1990, at para. 29 (cited in J. Charney and L. Alexander (eds.) *International Maritime Boundaries* (1996), Vol. I, at p. 678).

Myanmar tries to enlist alleged countervailing State practice to argue that there are "many other cases where no corridor has been granted by way of an agreement between the States concerned, although equidistance has led to some cut-off effect".[60] This is at paragraph 6.31 of the Rejoinder. The Tribunal may wish to examine that statement closely. When it does, it will see that there is no footnote; it is an assertion without a citation. Not a single agreement is cited. This is not an oversight. Myanmar cites nothing because there is nothing. If Myanmar disagrees with us, we invite it to show us, and the Tribunal, later this week.

In the next paragraph of the Rejoinder, paragraph 6.32, Myanmar offers what it calls "the practice in the region" as support for the supposed fact that cut-offs within 200 miles are common.[61] The examples Myanmar cites are: (1) the agreements among India, Indonesia and Thailand in the Andaman Sea of 1978; (2) the agreement among Indonesia, Malaysia and Thailand in the Northern Part of the Strait of Malacca of 1971; and (3) the agreement among Myanmar, India and Thailand in the Andaman Sea

Mr President, these agreements do not support Myanmar's proposition. As you can see from the map in front of you, which is also at tab 3.15 of your Judges' Folder, all of these cases relate to situations where the States in question sat *opposite* each other at distances of less than 300 miles. It was thus impossible for *any* State to reach even 150 miles, much less 200 miles. This, of course, is not the situation here. Bangladesh faces directly onto the open sea. The only landmass opposite it is Antarctica, 5,200 miles away!

For all these reasons, we say the weight of the State practice supports Bangladesh's position concerning the inadequacy of the equidistance method in this case. When a State is located on a concave coast sandwiched between two neighbours, equidistance by definition cannot lead to the equitable solution the law requires.

(Short adjournment)

Mr. President, I have arrived at the last portion of my comments this morning. Largely as a result of the effects of the concavity of Bangladesh's coast, Myanmar's proposed equidistance line suffers from still other defects than the ones I have already discussed.

In the first instance, Myanmar does not seem to know exactly where its own line goes. The Tribunal will have no doubt noted that the line described in Myanmar's Submissions is not the same as the line described in the body of its Pleadings. In both the Counter-Memorial and the Rejoinder, Myanmar's Submissions describe the final segment of its proposed delimitation as follows:

> "From Point G, the boundary line continues along the equidistance line in a south-west direction following a geodetic azimuth of 231° 37' 50.9" until it reaches the area where the rights of a third State may be affected."[62]

[60] RM, para. 6.31.
[61] RM, para. 6.32.
[62] MR, para. 6.93.

This suggests that the proposed delimitation continues along a 232° line throughout its course, no matter where the rights of a third State may be determined to come into play, but that is not an accurate description of the line Myanmar purports to be drawing.

As the Tribunal well knows, Myanmar's proposed equidistance line gives St Martin's Island no effect. If drawn all the way out to 200 miles, this nil-effect line actually bends to the southwest in its final 10 miles or so. It does so at the point Myanmar labels Point Z in Sketch map No. 5.8 of the Counter-Memorial, where Bangladesh's base point β2 begins to affect the course of the equidistance line. That Sketch map is displayed before you now. You can also find it at tab 3.16 of your Judges' Folder. Curiously, Myanmar never bothers to show the effect of base point β2 on its proposed delimitation. Here is what it would look like had Myanmar bothered to show it. It is the black line on the map you see in front of you.

Interestingly, Myanmar's proposed Point Z coincides almost precisely with the location at which Myanmar's proposed equidistance line intersects with India's most recent claim line. The relationship between the two is portrayed on the large-scale map now appearing before you. It's also at tab 3.17 of your Judges' Folder. India's claim line not-so-coincidentally passes about 900 metres to the east of Point Z. By limiting its description of its proposed line to the area east of Point Z, it is as if Myanmar knew exactly what India's claim was going to be. This has always struck us as a bit odd because Bangladesh itself did not know about India's new claim line until much later in the life history of this case.

Myanmar's proposed equidistance line is also problematic because it is drawn on the basis of just four coastal base points, three on Myanmar's coast and only one – base point β1 – on the Bangladesh coast, which Myanmar places very near the land boundary terminus with Bangladesh and Myanmar in the Naaf River. Myanmar takes pains to make it appear as though it actually uses two Bangladesh base points in the plotting of the equidistance line, but that is not true. As we saw, Myanmar never bothers to show the effect of alleged base point β2 on its proposed delimitation line, because it has none. Base point β2 never actually comes into play in Myanmar's proposed delimitation.

We say it would be quite remarkable to base a delimitation that apportions rights out to 200 miles – not to mention amputates Bangladesh's entitlements extending out to 390 miles – on the basis of a single coastal base point. Indeed, after a review of the jurisprudence and State practice, we have been unable to find even one example where a delimitation extending so far from the coast is based on just one base point. Moreover, in the *Nicaragua v. Honduras* case, the ICJ drew a bisector precisely to avoid such a situation.

The paucity of base points is yet another reason that calls into question the viability of equidistance as a delimitation methodology in this case. In its Rejoinder, Myanmar quotes the *Black Sea* case for the proposition that base points will generally "have an effect on the provisional equidistance line that takes due account of the

geography".[63] This may be true as a broad proposition, but I would submit that an equidistance line that reaches out to 180 miles from the coast yet is based on a single coastal base point could not possibly "take due account of the geography".

The dearth of base points on the Bangladesh coast is a function of the concavity of Bangladesh's coast. After base point β1, Bangladesh's coast recedes into the mouth of the Meghna estuary. There is thus nothing to counteract the effect of Myanmar's coast south of the land boundary terminus.

Myanmar's Rejoinder again cites the *Black Sea* case for the proposition that:

> "Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protruberant coastal points situated nearest to the area to be delimited."[64]

The trouble here is that due to the concavity of Bangladesh's coast, there are no "protruberant coastal base points".

The consequence can be seen in what happens to Myanmar's equidistance line as it moves further and further from shore. As it does so, it becomes increasingly prejudicial to Bangladesh, and increasingly inequitable. This is shown on the annotated copy of Sketch map No. 5.8 from the Counter-Memorial appearing before you now, which you can also find at tab 3.18 of your Judges' Folder. The first segment of Myanmar's line between the land boundary terminus and Point F, as you see on the map, which is controlled by base points β1 and μ1, follows an azimuth of 214°, that's all but identical to Bangladesh's proposed bisector of 215°, as Professor Crawford will be discussing later. The second segment between Point F and Point G, where Myanmar's base point μ2 takes effect, is pushed inward towards Bangladesh at an azimuth of 223.5°, a difference of about 9°. And then in the third segment between Points G and Z where Myanmar's base point μ3 is controlling, the line arcs even further inwards at an angle of about 232°.

Myanmar's Rejoinder again cites the *Black Sea* case for the proposition that an equidistance line will be "heavily dependent on the physical geography."[65] Here the "physical geography" is a concave coast, the effect of which is to cause Myanmar's equidistance line to swing progressively inward to Bangladesh, and to its detriment. It is precisely this same sort of physical geography where equidistance was rejected as the applicable delimitation methodology in the *North Sea* cases and in the *Guinea/Guinea-Bissau* decision.

Mr President, Members of the Tribunal, that concludes my presentation this morning. I thank you for your kind attention and I ask that you callMr Reichler to the podium.

THE PRESIDENT: Thank you, Mr Martin. I now give the floor to Mr Reichler.

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[63] MR, para. 5.45 (citing *Black Sea* case, para. 117).
[64] MR, para. 4.25 (citing *Black Sea* case, para. 117).
[65] MR, para. 4.25 (citing *Black Sea* case, para. 117)

MR REICHLER: Mr President, Members of the Tribunal, I am very pleased to appear before you again. It falls to me today to give you the second part of the two-part presentation by Mr Martin and myself on why equidistance cannot lead to an equitable maritime boundary between Bangladesh and Myanmar in the areas beyond the territorial sea.

As we have emphasized from the outset of these hearings, Myanmar has chosen to present a boundary proposal that intentionally ignores what we believe to be the three most dominant geographical and geological features that characterize and define the area to be delimited. They are all highly relevant to this case. They are, as you are by now quite familiar, the double concavity of Bangladesh's coast, the existence of St Martin's Island, and the natural, uninterrupted, geological and geomorphological prolongation of Bangladesh's landmass into the Bay of Bengal far beyond 200 miles. We say that it is impossible to delimit an equitable boundary in this case without duly taking into account all three of these natural features.

My colleague, Mr Martin, in the first part of this presentation, focused on Myanmar's failure to take into account the double concavity of Bangladesh's coast, and the inequity of any boundary line, including Myanmar's equidistance line, which fails to do so. I will address the failures of Myanmar and its proposed delimitation methodology to account for St Martin's Island, and for the natural prolongation of Bangladesh's landmass beyond 200 miles.

Mr President, as I said last Thursday, Myanmar deliberately ignores St Martin's Island, giving it no effect, in their construction of an equidistance line in the EEZ and continental shelf. In their own words, they plot their equidistance line "from both Parties' mainland low water lines, without taking the island into consideration."[66] We think they are wrong to begin with an equidistance line at all but, having done so, they are wrong also to have eliminated St Martin's from the line they have drawn: given the geography of this case, its removal cannot lead to an equitable solution, for the reasons I introduced last Thursday, and as I will further explain today.

Myanmar tries to justify its exclusion of St Martin's from the pertinent geography of this case by telling you that Bangladesh agrees to it. They say, in their written pleadings, that "an important point of agreement"[67] between the parties is on "the non-use of St Martin's in the construction of the initial provisional line, which constitutes the first step in the delimitation process."[68]

Mr President, it is bad enough that they fall into the error of ignoring one of the most significant geographical features that characterizes this case; it is even worse that they try to use us to break their fall.

Why would Bangladesh agree that its own highly important coastal feature, St Martin's Island, should be ignored in the delimitation of the boundary? It makes no sense. What is true is that Bangladesh takes the position – indeed, it has always taken the position, including the consistent position in 37 years of negotiations with

[66] RM, para. 1.6.
[67] RM, para. 3.3.
[68] RM, para. 1.20.

Myanmar – that equidistance is not an acceptable basis for delimiting the boundary beyond the territorial sea, and that no form of an equidistance line, however modified or adjusted, is capable of leading to an equitable solution in these circumstances. Consistent with this approach, Bangladesh did not present to the Tribunal, in either of its written submissions, a version of its provisional equidistance line in the EEZ and continental shelf. To say, as Myanmar does, that Bangladesh has not placed any base points on St Martin's is true, but only in a very limited and misleading sense. It is true in the same sense that we have not placed any base points anywhere along Bangladesh's coast, or on Myanmar's coast. We have not placed any base points there because we have not constructed a provisional equidistance line; hence, there is no need for us to put base points on St Martin's Island or anywhere else.

What makes Myanmar's statement even more strange is that in the delimitation line that we have submitted to the Tribunal we have taken St Martin's fully into account and given it the proper effect which it merits under article 121. As Professor Crawford will explain this afternoon, instead of an equidistance line, Bangladesh believes an angle bisector is the appropriate method for delimiting the boundary in the EEZ and continental shelf within 200 miles in this case. Our bisector of 215° is initially drawn from the point where the coastal façades of Bangladesh and Myanmar intersect, and is then transposed to the south so that it commences at the outer limit of the territorial sea boundary. In this manner, our proposed delimitation line gives full effect to St Martin's, both in the territorial sea and in the EEZ and continental shelf to 200 miles. As you will hear from Professor Crawford, this is entirely consistent with the established case law, and produces an equitable result as between Bangladesh and Myanmar.

In short, Mr President, Myanmar is not entitled to claim any support from us in regard to their highly unorthodox decision to exclude St Martin's Island from the case. They are entirely on their own on that one.

But worse than being confused about our position on St Martin's, Myanmar seem to be especially confused about their own. They repeat at several places what they regard as the methodology that, according to their reading of the case law, must be applied in the delimitation of a maritime boundary.[69] Then they go and do something completely different and contradictory when it comes to St Martin's. This divergence between what they say and what they do is almost as wide as the tectonic plate boundary in the Bay of Bengal.

Myanmar says repeatedly that there is a conventional approach that international courts and tribunals commonly use, in cases where equidistance is appropriate, to implement the "equitable principles/relevant circumstances" rule articulated in the *North Sea* cases and subsequent ICJ judgments. First, a provisional equidistance line is drawn. Second, consideration is given to whether there are any relevant circumstances warranting a departure from the line. Myanmar is quite devoted to this approach, at least on paper. It insists on it repeatedly throughout its written pleadings.[70] Yet, it fails to follow its own advice. By proffering a so-called mainland-

[69] RM, paras. 4.14-4.23.

[70] MCM, paras. 5.76-5.81; RM, paras. 4.14-4.23.

to-mainland equidistance line as its "provisional equidistance line", Myanmar makes the prior assumption that St Martin's should have no effect. In so doing, it confuses the second step of its equidistance methodology with the first.

There is no legal basis for an *a priori* assumption that St Martin's Island should be ignored in the drawing of Myanmar's provisional equidistance line. As Professor Sands described yesterday, it is a significant coastal feature that indisputably generates entitlement in the continental shelf and EEZ. There are thus no grounds, other than Myanmar's self-interest, for excluding it in the plotting of a provisional equidistance line, where, in the first instance, all coastal features are to be included. In the equidistance method, it is only after the provisional equidistance line has been plotted that it is analyzed to determine whether it should be adjusted in light of relevant circumstances. In Myanmar's words, citing the ICJ's judgment in *Romania v. Ukraine*: "At this initial stage of construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data."[71]

If St Martin's is the relevant circumstance that Myanmar paints it to be – which Bangladesh disputes, along with any use of the equidistance method in these circumstances – then it is up to Myanmar, in the first instance, to draw a provisional equidistance line "on strictly geometrical criteria on the basis of objective data". Then, and only then, it is for Myanmar to demonstrate how and why the provisional equidistance line so drawn is inequitable, and that the putative inequity is attributable to a disproportionate effect exerted by St Martin's. But Myanmar doesn't do this. They shouldn't be drawing a provisional equidistance line at all, in our view, but if they insist on going down that route, they should at least do it in accordance with the approach taken in those cases where it is justifiable. They don't even attempt that. Myanmar conveniently skips over what they themselves insist is the first essential step. Their provisional equidistance line excludes St Martin's. How can they, the champions of equidistance, the truest of the true believers, ignore what they have said many times is the appropriate way to apply equidistance methodology? Here is all they offer by way of explanation: "[I]t is quite obvious that there is no case for selecting base points on St Martin's in order to draw the equidistance line beyond the territorial sea given the island's location directly in front of the coast of Myanmar and the disproportionate effect this feature would have on the entire course of the line."[72] In other words, they assume their own conclusion. So much for "strictly geometrical criteria" and "objective data". What is "obvious" to Myanmar, in its subjective and not unbiased judgment, is not to Bangladesh; and if the disproportionate effect of St Martin's on a provisional equidistance line is so "obvious", why don't they plot the line using St Martin's first, and then show how and why St Martin's makes it inequitable, so that it may be treated as a relevant circumstance according to the methodology that they repeatedly pay lip service?

One of Myanmar's principal arguments in favour of an equidistance line is its alleged objectivity. According to Myanmar, "the equidistance method is much less subjective than others."[73] But Myanmar itself proves the opposite – that equidistance is just as

[71] RM, para. 4.22.
[72] RM, para. 5.29.
[73] RM, para. 4.24.

susceptible to subjectivity as any other delimitation method. Myanmar's *a priori* decision to ignore St Martin's Island on the self-serving grounds of "obviousness" is an example.

Further, under the so-called conventional approach, as Myanmar describes it, the second stage of the delimitation process requires an examination of relevant circumstances to see whether there are disproportionate effects caused by a particular feature and, if so, how large an adjustment to the provisional equidistance line is warranted. The determination of whether any given mainland or insular feature, like St Martin's, constitutes a relevant circumstance requires a judgment that, at least in part, is subjective; so does the determination as to how large an adjustment of the line is warranted. Geometric criteria and objective data will rarely answer these questions. For a party to a case to declare that a particular feature has disproportionate effects and then exclude it from the delimitation analysis on the grounds that this is "obvious" emphasizes the subjective nature of the exercise. If more evidence of Myanmar's subjective application of equidistance is required, it need only be pointed out that Myanmar treats St Martin's Island as a relevant circumstance, but not the double concavity in which Bangladesh's entire coast is located.

Mr President, as you know, Bangladesh eschews equidistance methodology as not appropriate for this case. This is a good illustration. Even if we could all agree that the double concavity of Bangladesh's coast is a relevant circumstance, as the ICJ found in similar circumstances in the *North Sea* cases,[74] and the arbitral tribunal found in *Guinea/Guinea Bissau,*[75] how would we measure the distorting effects on a provisional equidistance line, and how would we calculate how much of an adjustment to equidistance to make? In this context, an equidistance approach turns out to be even more subjective.

Myanmar offers three alleged principles for determining whether an island is what they call a "special circumstance". First, they say that an island is more likely to be a "special circumstance" when it is adjacent to, as distinguished from opposite, the coast of the neighbouring State.[76] Second, they say an island closer to the mainland is more likely to be a special circumstance than one lying farther offshore.[77] And third, the island is more likely to be a special circumstance, according to Myanmar, if there are no so-called "balancing islands" of the neighbouring State.[78] These propositions are all stated in successive paragraphs at pages 57–58 of the Rejoinder. What is common to all of them is that there are no citations to any judicial or arbitral decisions or any other legal authorities – not a single one. This is mere assertion, not legal argument.

[74] North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 3, at para. 91.
[75] Delimitation of Maritime Boundary between Guinea and Guinea-Bissau, Award, 14 February 1985, reprinted in 25 ILM 252, at paras. 107-110.
[76] RM, para. 3.15.
[77] RM, para. 3.16.
[78] RM, para. 3.17.

Myanmar here invents its own rules. The first two of them are closely related. In essence, they claim that St Martin's is a special or relevant circumstance because it lies directly in front of Myanmar's mainland, necessitating that the equidistance line be drawn around it, rather than through it. On Friday, Professor Sands addressed Myanmar's insistence that St Martin's Island is located in front of its coast. I will therefore not dwell on this matter, but I would like to make these observations.

First, and most important, whether or not an island can be characterized as being "in front of" one coast or another does not in itself determine whether it is a special or relevant circumstance. Instead, as explained by the Court of Arbitration in the *Anglo-French Continental Shelf* case, the pertinent question is whether it would produce "an inequitable distortion of the equidistance line producing disproportionate effects on the areas of shelf accruing to the two States."[79] In other words, what counts is the effect an island produces in the context of a particular delimitation. Labelling St Martin's as being "in front of" Myanmar's coast will, of itself, establish nothing.

Second, St Martin's Island is as much in front of the Bangladesh coast as it is in front of Myanmar's coast. As Professor Sands explained, in order for it to be true that St Martin's Island lies entirely in front of the Myanmar coast, St Martin's would have to be shifted significantly southwards by at least 11 miles.

Third, the case law supports the view that St Martin's Island lies in front of the mainland of Bangladesh as well as of Myanmar. At paragraph 5.31 of its Rejoinder, Myanmar describes the French island of Ushant as being "located in front of the French coast".[80] This is interesting because Ushant lies 10 miles off France's Brittany coast, further than St Martin's is from Bangladesh. Similarly, the Rejoinder describes the UK's Scilly Islands as being "located in front of the British coast."[81] The Scilly Islands are 21 miles off the UK coast. *A fortiori*, St Martin's is in front of the Bangladesh coast. Moreover, Myanmar's proposition that a finding of special or relevant circumstance is more likely when an island lies closer to the mainland is wrong. In fact, it is when islands lie *outside* a State's 12-mile territorial sea that they have been treated as relevant circumstances and given less than full effect in the EEZ and continental shelf delimitations.[82] Here, Myanmar has it backwards.

What really matters is a contextualized assessment of an island's effect in the particular circumstances of a given case. Only in a particular geographical setting can the effect of an island be judged proportionate or disproportionate. Here again, Myanmar has very little to say. What they do say is this, and only this: "An 8 square kilometres island generating approximately 13,000 square kilometres of maritime entitlement is the very definition of disproportion."[83]

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[79] Delimitation of the Continental Shelf between France and the United Kingdom, Decision, 30 June 1977, reprinted in 18 RIAA 3, at para. 246.

[80] RM, para. 5.31(i).

[81] RM, para. 5.31(ii).

[82] See, e.g. the Scilly islands in *Delimitation of the Continental Shelf between France and the United Kingdom,* Decision, 30 June 1977, *reprinted in* 18 RIAA 3; the Abu Musa island in *Dubai/Sharjah Border Arbitration,* Award, 19 October 1981, *reprinted in* 91 ILR 543; the Seal Island in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 246.

[83] RM, para. 5.35.

No authority is cited. Again, Myanmar pleads by way of assertion, not legal authority. It simply assumes, once again, that what it says is "obvious", but there is nothing obvious about it. Merely measuring the amount of maritime space that an island generates cannot be dispositive on the question of disproportionate effects. A mid-sea island with no neighbouring States, for example, controls a maritime area 400 miles in diameter, an area of approximately 430,000 km^2. Is that the "very definition of inequitable"? Of course not. By definition, equity can only be judged in context. Whether or not an 8 km^2 island, like St Martin's, controlling a certain amount of maritime space is inequitable cannot be decided in the abstract; it depends on the circumstances of the case. Here, the circumstances not only show no inequity, they show the opposite: they show that ignoring St Martin's only exacerbates the inequity of Myanmar's proposed equidistance boundary.

Mr President, with your indulgence, I will return very briefly – in fact, for one paragraph – to a chart that I displayed last Thursday. This can be found at tab 1.15 of your Judges' folders. We start with Myanmar's version of an equidistance line and India's claim line. Here, just for illustration purposes, you will recall that we removed the secondary concavity of Bangladesh's coast – the concavity within a concavity – but not the primary concavity, and we then plotted another version of an equidistance line which, like Myanmar's, completely ignores St Martin's. The area in red is a rough approximation of the area that Bangladesh loses to Myanmar by virtue of the secondary concavity in the Bangladesh coast. Now, again, in purple, as shown on Thursday, is a third version of an equidistance line, which is like Myanmar's except that it takes St Martin's and its four base points into account. As you can see, the effect of adding St Martin's to the picture is to offset, but only partially, the effect of Bangladesh's secondary concavity. There is still an area, in orange, which St Martin's fails to recapture for Bangladesh; and St Martin's does nothing to offset the even greater prejudice to Bangladesh caused by the primary concavity.

What this confirms is that we can only ascertain the effects of a particular feature – in this case St Martin's – in context. To merely say that it generates 13,000 km^2 of maritime space – full stop – is to say nothing that is dispositive. It tells us zero about whether the effects are disproportionate. In context, we can see that the effects of St Martin's plainly are not. To the contrary, it is the elimination of St Martin's that disproportionately affects Myanmar's delimitation exercise, and renders it even more inequitable than it already is.

Myanmar's invocation of prior court decisions and arbitral awards involving islands does not alter this conclusion. Take, for example, the decision in the *Dubai/Sharjah* case cited by Myanmar.[84] The geographical circumstances at issue there were completely different from those here. The island of Abu Musa was located 34 miles off the coast of Sharjah - five times further than St Martin's is from Bangladesh and not far from the location of the median line in the middle of the Persian Gulf between Dubai and Iran. At that distance, Abu Musa and Dubai stand in a relationship of oppositeness. If it was given weight beyond the 12-mile territorial sea, Abu Musa would have had the effect of deflecting the equidistance line between Dubai and Sharjah across Dubai's coastal front, cutting it off and preventing it from reaching its

[84] *Dubai/Sharjah Border Arbitration,* Award, 19 October 1981, reprinted in 91 ILR 543.

natural outlet at the location of the mid-Gulf median line. You can see this on the screen in front of you, and at tab 3.19 of your Judge's folder.

In the tribunal's words, giving Abu Musa effect beyond 12 miles "would have produced a disproportionate and exaggerated entitlement to maritime space as between the Parties."[85] The reference to the effect of an island "as between the Parties" is important. Disproportion is not determined in the abstract by reference to a particular number of square kilometres. Instead it depends on the island's impact on the delimitation viewed in its overall context. The tribunal's decision to give Abu Musa no effect beyond the territorial sea supports Bangladesh's case, not Myanmar's. The tribunal's delimitation line is depicted in red on the screen before you, together with the equidistance line that the tribunal rejected. The effect of Abu Musa's location was to place Dubai in a functional concavity between Sharjah/Abu Musa on the one side and Abu Dhabi on the other. What the arbitral tribunal did was to give Dubai relief from the cut-off that equidistance would have imposed upon it by virtue of this concavity.

Moving from the Persian Gulf to the Black Sea does not assist Myanmar. It gets no benefit from its effort to compare St Martin's Island to Ukraine's Serpents' Island, which was given no effect beyond the territorial sea in the *Romania/Ukraine* case.[86] There is really no comparison. Serpents' Island is one-fiftieth - 2% - the size of St Martin's.[87] It has no permanent population, just a few lighthouse-keepers, as compared to the 7,000 permanent inhabitants and hundreds of thousands of tourists on St Martin's, and it lies more than three times further from the Ukraine coast than St Martin's does from the rest of Bangladesh.[88] Even Myanmar admits these major differences.[89] Nonetheless it attempts to find commonality between the two islands by arguing that St Martin's, like Serpents', lies "alone" and not in "a cluster of fringe islands constituting the coast of Ukraine."[90] Even if that were a significant detail, it would not be true, because unlike Serpents' Island, which does lie alone 20 miles off the Ukraine coast, St Martin's is a coastal island in close proximity to the mainland land mass of Bangladesh, and functions as an integral part of the Bangladesh coast.

Myanmar also fails to find support for its treatment of St Martin's Island in the *Anglo-French Continental Shelf* case.[91] The treatment accorded Ushant Island in fact supports Bangladesh's case. There, the Court of Arbitration gave full effect to Ushant, with a population of less than 1000, and lying 10 miles off France's Brittany coast. That is twice as far from the French coast as St Martin's is from the Bangladesh mainland, and only one-seventh as populated as St Martin's. The Court of Arbitration nevertheless determined that Ushant forms part of the coast of France and "cannot be disregarded in delimiting the continental shelf boundary without 're-

[85] *Dubai/Sharjah*, p. 677.
[86] *Maritime Delimitation in the Black Sea (Romania v. Ukraine),* Judgment, I.C.J. Reports 2009, p. 86 (hereinafter "*the Black Sea Case*"), at para. 149.
[87] RB, para. 2.91.
[88] RB, para. 2.91.
[89] RM, para. 5.33.
[90] RM, para. 5.33.
[91] *Delimitation of the Continental Shelf between France and the United Kingdom,* Decision, 30 June 1977, *reprinted in* 18 RIAA 3 (hereinafter "*Anglo-French Continental Shelf Case"*).

fashioning geography'".[92] Notably, as the western-most point in France, the island controlled the direction of the delimitation line over its final 210 miles.

Myanmar's own practice also undermines its argument that St Martin's Island should be ignored, or given anything less than full effect, in the delimitation of the boundary in this case. In 1986, Myanmar and India agreed to delimit the boundary between Myanmar's Coco and Preparis Islands and India's Andaman Islands in the Andaman Sea and the Bay of Bengal.[93] Professor Sands spoke about this agreement in relation to the territorial sea on Friday. I will only add to his comments insofar as the argument bears on the delimitation of the EEZ and continental shelf.

The agreed line in the Bay of Bengal is depicted on the screen. This is also at tab 3.20 of your Judge's folder. What is interesting about this line is that it is entirely controlled on the Myanmar side by Little Coco Island, which was given full effect by the Parties. Little Coco and St Martin's are virtually identical in size. A side-by-side view of the two at the same scale shows just how similar they are. This is at tab 3.21. If Little Coco Island was taken fully into account by Myanmar and India in delimiting the EEZ, why should St Martin's be treated less favourably?

Finally, to summarize Mr President, Myanmar has offered no valid reason for ignoring St Martin's island in the delimitation of the EEZ and continental shelf as between Bangladesh and Myanmar, or for giving it anything less than full effect. St Martin's is one of the important geographical features in this case. Any line of delimitation that would ignore it, as Myanmar's proposed boundary does, is inherently and necessarily inequitable. But even including St Martin's in the delimitation exercise, and giving it the full effect to which it is entitled under the Convention and the applicable case law does not – it cannot – make up for the severe prejudice caused to Bangladesh by an equidistance line – any equidistance line – in the presence of Bangladesh's doubly concave coast. That is why, as Professor Crawford will explain this afternoon, the only way to achieve an equitable solution in this case is to begin with a wholly different methodology, as supported by the relevant jurisprudence, to recognize that equidistance is inappropriate in these circumstances, and to employ the angle bisector methodology in its place.

Mr President, I turn now to the third major feature of this case that Myanmar ignores, the Bengal depositional system and the undisputed prolongation of the Bangladesh land mass far beyond 200 miles from its territorial sea baselines. As we have said since our opening speeches last week, Myanmar's proposed boundary is inequitable to Bangladesh because, in addition to the other reasons that we have discussed, it completely cuts off Bangladesh from any access to the outer continental shelf.

I introduced this subject on Thursday, and it was touched on by Professor Sands this morning. Tomorrow, our entire session will be devoted to delimitation of the outer continental shelf. The undisputed facts regarding the geology and geomorphology of the Bay of Bengal, and the Bangladesh and Myanmar landmasses, will be laid out by

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[92] *Anglo-French Continental Shelf Case,* at para. 248.

[93] Agreement between the Socialist Republic of the Union of Burma (Myanmar) and the Republic of India on the Delimitation of the Maritime Boundary in the Andaman Sea, in the Coco Chanel and in the Bay of Bengal of 23 December 1986 (J. Charney and L. Alexander, *International Maritime Boundaries* (1996), at pp. 1330-1340).

Dr Lindsay Parson and Admiral Mohamed Khurshed Alam; and Admiral Alam will explain and support Bangladesh's claim in the outer continental shelf, which both Bangladesh and Myanmar recognize lies well within the outer limit of the continental margin in the Bay of Bengal. I will not, therefore, address the pertinent facts, or the merits of the specific claims of Bangladesh, today.

My point this morning is simply that the physical, geological and geomorphological connection between the Bangladesh land mass and the Bay of Bengal sea floor is so clear, so direct and so pertinent, that adopting a boundary in the area within 200 miles that would cut off Bangladesh and deny it access to, and rights in, the area beyond would constitute a grievous inequity.

This has been our argument since the beginning of this case. To date, Myanmar has offered no serious response. In its written pleadings Myanmar argued that Bangladesh was putting the cart before the horse by supposedly assuming that it has rights in the outer continental shelf that the Tribunal is required to recognize.[94] That assumption, Myanmar said, was incorrect since equidistance prevents Bangladesh from ever getting to the area beyond 200 miles.

This argument suffers from at least two flaws. First, Bangladesh makes no assumptions as to its rights. It claims that it is entitled to a part of the outer continental shelf under article 76 of the Convention; it recognizes that it is for this Tribunal to determine whether in fact it has those rights. Myanmar's equidistance boundary would automatically and completely eviscerate Bangladesh's claims, even if they are justified under the applicable provisions of the Convention.

Myanmar nowhere – nowhere – challenges any of the facts or legal principles on which Bangladesh's claims in the outer continental shelf are based, and it acknowledges this.[95] At paragraph A.43 of the Rejoinder's Appendix, Myanmar states: "If the outer edge [of the continental shelf] is situated at a distance greater than 200 nautical miles from lawfully established baselines, the coastal State is entitled to exercise its sovereign rights up to this edge"[96] Since there is no dispute about the fact that the outer edge of the continental shelf of Bangladesh lies beyond 200 miles, by Myanmar's own reasoning Bangladesh "is entitled to exercise its sovereign rights up to this edge" - absent the cut-off imposed by Myanmar's equidistance boundary.

The other flaw in Myanmar's argument is that it assumes its own conclusion. By telling the Tribunal that it does not need to concern itself with Bangladesh's claim in the outer continental shelf because equidistance stops it from getting there, Myanmar gets stuck in a logical roundabout. Myanmar says, in effect, that the problem takes care of the problem. Because of its insistence on equidistance, which is the central problem, Myanmar creates – it does not resolve – the problem of Bangladesh's inability to access the part of the outer continental shelf in which it, otherwise, would have undisputed rights.

[94] MCM, paras. 5.157.
[95] RM, para. 1.7.
[96] RM, para. A.43.

Mr President, Members of the Tribunal, as you know from reading the written pleadings, there is an important point on which the Parties are in agreement: that is, that any delimitation will work some cut-off on both Parties' maritime entitlements. That being true, the goal must be, as the ICJ observed in the *Black Sea* case: to "allow […] the coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way" and in a manner that achieves an equitable solution.[97] This is a point with which Myanmar has expressly agreed. I refer in particular to page 153 of the Counter-Memorial where this very passage is cited with approval.

Given its agreement with this statement of principle, I ask how could Myanmar possibly believe its proposed delimitation line satisfies it? The effect of Myanmar's reliance on an equidistance boundary is to cut Bangladesh off entirely from any ability to exercise sovereign rights over an area of some 100,000 km^2 that is part of its natural prolongation. In contrast, it would allow Myanmar to exercise sovereign rights over some 140,000 km^2 in the area beyond 200 miles, and that is assuming that Myanmar has any natural prolongation in the area, which it does not. Bangladesh will return to this issue tomorrow.

In any event, Myanmar's proposed delimitation line contradicts the very principle Myanmar purports to embrace. A delimitation that prevents Bangladesh from exercising sovereign rights beyond 200 miles while at the same time permitting Myanmar to do so over a huge area is not reasonable, is not balanced and cannot be an equitable solution.

Mr President, in final summary of Mr Martin's presentation and my own, Myanmar has chosen to submit a proposed boundary line based on equidistance methodology that deliberately ignores the most important geographic and geologic features pertinent to this case – the double concavity of Bangladesh's coast, the existence of St Martin's Island, and the fact that the Bay of Bengal sea floor is the natural prolongation of Bangladesh but not of Myanmar. In Bangladesh's view, it is impossible to delimit the maritime boundary between the two Parties equitably without taking all three of these critical features into due account. The boundary proposed by Myanmar is therefore not equitable. But the point is larger than this. In Bangladesh's view there is no version of an equidistance line that could suitably and equitably take account of all of these features, especially the double concavity of Bangladesh's coast. As Professor Sands recalled for you this morning, Myanmar's (then Burma's) position during the negotiations leading to the 1982 Convention was that: "equidistance boundaries were by definition arbitrary."[98] That is certainly true in this case.

For these reasons, a different methodology must be employed. Professor Crawford will discuss it with you when we return for the afternoon session.

Mr President, Members of the Tribunal, I thank you once again for your patience and courteous attention. Bangladesh's presentation this morning is now concluded. We look forward to seeing you at 3 p.m.

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[97] *Black Sea Case,* para. 201.

[98] A/CONF.62/C.2/SR.291, para. 7.

(Luncheon adjournment)