

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER**



2011

Public sitting

held on Monday, 19 September 2011, at 10.00 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President José Luís Jesus presiding

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

(Bangladesh/Myanmar)

Verbatim Record

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

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as Advisers.

1 **CLERK OF THE TRIBUNAL:** All rise.

2
3 **THE PRESIDENT:** Please be seated. Today Myanmar will continue its oral
4 arguments in the dispute concerning the delimitation of the maritime boundary
5 between Bangladesh and Myanmar in the Bay of Bengal. I call on Mr Alain Pellet to
6 make his presentation.

7
8 **MR PELLET (*Interpretation from French*):** I hope that you have all had a good
9 weekend. It was one in which we studied and were unable to go out and enjoy the
10 funfair.

11
12 With your permission, Mr President, I will continue my presentation on applicable law
13 which I started on Friday.

14
15 Mr President, like a player who is ready to place his fortune on two numbers only,
16 Bangladesh is founding its argument on two slogans – “natural prolongation”, about
17 which I spoke on Friday, and “equitable solution”. These words can mean anything
18 and can be made to say almost anything, if you do not relate it to clear rules to
19 implement it, and I will spend the first part of this brief presentation dealing with this
20 before saying a few words about the respective roles of equidistance and equity in
21 the task of delimitation.

22
23 There is no doubt, Mr President, that in making the delimitation that the Tribunal is
24 called on to proceed with, the Tribunal must arrive at an equitable solution in line
25 with the first paragraphs of articles 74 and 83 of the 1982 Convention, which must be
26 fully applied. In a moment I will come back to the role that equity is called on to play
27 in our case.

28
29 Right now I will spend time speaking about what is *not* stated in these provisions.
30 With regard to the interpretation of these very general wordings, the decision taken
31 by the ICJ in the *North Sea Continental Shelf* cases constitutes, it seems, the
32 horizon beyond which the Applicant is unable to go. I do not want to contest the fact
33 that the judgment of 1969 is a “leading case”;¹ it is a leading case, in so far as it is
34 relevant to us, because it is the reason for the formula used in articles 74 and 83 of
35 the Convention of 1982, which requires us to “achieve an equitable solution” on the
36 basis of law. However, as Bangladesh said in its Reply, (in English) “articles 74 and
37 83 of UNCLOS provide only that the goal of the delimitation process is an ‘equitable
38 solution’.”² (Interpretation continued) Due to disagreements between the participants
39 at the Third United Nations Conference on the Law of the Sea, these two provisions
40 do not give any indication on the method to be pursued in order to arrive at this
41 result. However, in the meantime this lacuna has basically been filled.

42
43 To quote the very sensible and wise words of the Arbitral Tribunal in the case of the
44 delimitation of the maritime boundary between Barbados and Trinidad and Tobago:

45
46 (In English) “Equitable considerations *per se* are an imprecise concept in
47 the light of the need for stability and certainty in the outcome of the legal
48 process ... The search for predictable, objectively determined criteria for

¹ RB, p. 53, para. 3.8.

² RB, p. 52, para. 3.6; see also MB, p. 72, para. 6.18.

1 delimitation, as opposed to subjective findings lacking precise legal or
2 methodological bases, emphasized that the role of equity lies within and
3 not beyond the law (*Libya/Malta* ICJ Reports 1985, p. 13).”³
4

5 This is a quotation from *Barbados v. Trinidad and Tobago*.

6
7 As this very Tribunal said, in its apparent simplicity, the formula used in articles 74
8 and 83 of the 1982 Convention is not very precise and
9

10 (in English) “allows in fact for a broad consideration of the legal rules
11 embodied in treaties and customary law as pertinent to the delimitation
12 between the parties, and allows as well for the consideration of general
13 principles of international law and the contributions that the decisions of
14 international courts and tribunals and learned writers have made to the
15 understanding and interpretation of this body of legal rules.”⁴
16

17 Article 293(1) of the Convention of 1982, as well as the first paragraphs of articles 74
18 and 83, both of which refer to “international law, as referred to in article 38 of the
19 Statute of the International Court of Justice”, allows and even requires recourse to be
20 had to this rich case law, but here again Bangladesh’s watch has stopped in 1982, or
21 even in 1969, and they ignore the evolution and precision and clarification that the
22 law has undergone since then, thanks to international practice and case law.
23

24 However, between 1969 or 1982 and today many different things have happened.
25 The equidistance/special circumstances method contained in article 15 of the
26 Convention on the delimitation of the territorial sea has been transposed to the
27 continental shelf and the EEZ. The circumstances in question were described in this
28 case as “relevant” rather than “special”, but without this terminological nuance having
29 had an effect on the application of the method in question. The general application of
30 the standard method has been affirmed, whether the coasts of the States concerned
31 are adjacent or opposite, as is clear from the very title of articles 74 and 83. The
32 modalities of its implementation have been the subject of increasing clarification,
33 which happily precludes any arbitrary determination and constitutes valuable
34 guidelines for the States concerned as well as the courts and tribunals that deal with
35 the construction of a maritime boundary, and all this is supremely ignored by our
36 opponents.
37

38 Without a doubt, they seemed to have accepted, and I quote from their Memorial,
39 that:
40

41 (In English) “In both cases, the standard approach is now to begin by
42 provisionally drawing an equidistance line and then to consider whether
43 there are ‘special’ or ‘relevant’ circumstances which require an
44 adjustment to – or abandonment of [a possibility which, from our point of

³ Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the *delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 April 2006, *R.I.A.A.*, Vol. XXVII, p. 212, para. 230.

⁴ Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the *delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 April 2006, *R.I.A.A.*, Vol. XXVII, p. 210, para. 222; see also *Guyana/Surinam*, Decision of 17 September 2007, *ILM*, Vol. 47, 2008, p. 212, para. 333.

1 view simply does not exist] – that line. Virtually all of the most recent
2 cases, whether before the ICJ or international arbitral tribunals, have
3 adopted this approach ...”⁵
4

5 However, I spoke in the past by saying that they “seemed to have accepted”, Mr
6 President, because whilst the Applicant “seemed to have accepted” it, it did this in its
7 Memorial and has reversed this realistic position in its Reply and during the hearings.
8 For example, in paragraph 3.28 of its Reply the Applicant criticizes Myanmar for
9 having applied to the continental shelf and the exclusive economic zones the method
10 of delimitation included in article 15 of the Convention,⁶ which it expressly accepted
11 a few months earlier when it wrote in its Memorial, “The two rules, however, are
12 substantially the same.”⁷
13

14 On the more precise question of the applicability of the method of equidistance and
15 relevant circumstances to delimitation of maritime areas of States whose coasts are
16 adjacent, Bangladesh retained the dubious position of the ICJ in its 1969 judgment
17 and has continued to affirm that it is more suited to the delimitation of the continental
18 shelf between States with opposite coasts than those with adjacent coasts.⁸ This
19 strange position has been abandoned for a long time. The tribunal that dealt with the
20 *Trinidad and Tobago v. Barbados* case stated, (in English) “the distinction between
21 opposite and adjacent coasts, while relevant in limited geographical circumstances,
22 has no weight where the delimitation is concerned with vast ocean areas”;⁹ and,
23 apart from that, an international court has never refused to apply the standard
24 method, saying that the coasts of the Parties are adjacent, and in footnote 357 of its
25 Counter-Memorial Myanmar quoted many cases in which international courts have
26 applied this to States with adjacent coasts.
27

28 In a more general perspective, it is somewhat excruciating to note that for
29 Bangladesh, (in English) “[t]he most pertinent cases in the jurisprudence are and
30 remain the *North Sea* and *Guinea/Guinea Bissau* cases.”¹⁰ The arbitral decision in
31 this case in 1985 adopts a rather preposterous method of delimitation which is not
32 that of a bisector, as the Applicant says,¹¹ but rather resembles a perpendicular to
33 the very general direction of the mainland coasts. In the table listing the ‘Outcome of
34 decided cases’ which he included under tab 1.18 of the Judges’ folder on Thursday 8
35 September, Professor Crawford placed this decision among those based on a *sui*
36 *generis* method. He back-pedalled on Monday afternoon,¹² but on Thursday he was
37 right! In fact, this decision has remained completely isolated in this respect. As far as
38 the judgment of the ICJ is concerned, which goes back more than 40 years, I do not
39 deny that it was fundamental in its time, but the case law of the Court itself has made

⁵ MB, p. 72, para. 6.18 – footnotes omitted

⁶ RB, p. 59, para. 3.28; see also i.e.: ITLOS/PV.11/2/Rev.1 (E), p. 34, lines 20-23 (Mr Crawford).

⁷ MB, p. 72, para. 6.18.

⁸ MB, p. 73, para. 6.19.

⁹ Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the *delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 April 2006, *R.I.A.A.*, Vol. XXVII, pp. 232-233, para. 316; see also *Guyana/Surinam*, Decision of 17 September 2007, *ILM*, Vol. 47, 2008, p. 213, para. 338.

¹⁰ RB, para. 3.51; see also ITLOS/PV.11/2/Rev.1 (E), p. 15, lines 38-41 (Mr Paul Reichler).

¹¹ ITLOS/PV.11/2/Rev.1 (E), p. 16, lines 1-4 (Mr Paul Reichler).

¹² ITLOS/PV.11/5 (E), p. 3, lines 17-19 and 22-23 (Mr. Crawford).

1 it largely obsolete, as the table that you will find under tab 1 of your folder this
2 morning demonstrates.

3
4 We drew up this table on the basis of that of James Crawford, which I have just
5 mentioned, but we have made some corrections that we felt fitted in better with what
6 was decided in certain cases. It speaks for itself and does not need lengthy comment
7 – only three remarks.

8
9 First, the method of equidistance and relevant circumstances is very largely
10 predominant. It was already in the Crawford table – 12 cases out of the 21 which he
11 claimed to list but which in reality are only 19. Secondly, it becomes exclusive from
12 the judgment of the ICJ in 1993 in the *Jan Mayen* case, which in fact is 20 years ago.
13 Thirdly, the only exception is in the judgment of 2007 in *Nicaragua v. Honduras*,
14 which can be explained by very special reasons, which we will have occasion to
15 come back to and which have nothing to do with our case. However, it is wrong that
16 “the bisector method has been used in a number of recent judgments”.¹³ One is
17 really a very, very small number.

18
19 Actually, Mr President, far from being the culmination of the applicable rules, the
20 judgment in 1969 was the point of departure, the starting point of a long evolution
21 that has put into perspective its pertinence, above all as regards the uncertainty over
22 the method to be used in order to achieve an equitable solution, which is still the
23 objective to be achieved – but not any equity nor by any means.

24
25 Mr President, Members of the Tribunal, the Applicant State is trying to present to you
26 the case that has brought us together as a fight between equity and equidistance. It
27 is a bit of a simplistic vision, or rather wrongly simplistic of the position of Myanmar,
28 because as far as the position of Bangladesh is concerned it has only one
29 obsession, to which it sometimes confesses, around one sentence. It is asking you
30 “to set equidistance aside”.¹⁴

31
32 Our argument is more balanced and I would like to repeat it. For Myanmar it is not a
33 case of relying on a political, moral concept of equity, as our opponent is doing, nor
34 of setting aside equity in favour of equidistance which is applied mechanically. The
35 objective is to arrive at an equitable solution following the proven three-stage method
36 which nearly all the decisions that have taken place in maritime delimitation in the
37 past two decades have used. One must say that today this method has acquired a
38 customary value. Seeking an equitable solution, this method – and do we need to
39 repeat this? – says that one must first of all start with a provisional equidistance line
40 that is corrected afterwards, if necessary, to prevent special relevant circumstances
41 resulting in gross, measurable inequities.

42
43 Mr President, allow me to take up two points that we could call respectively – “equity
44 without equidistance” according to Bangladesh and “equity by equidistance”
45 according to Myanmar.

46

¹³ ITLOS/PV.11/4 (E), p. 9, lines 38-39 (Mr. Sands); see also ITLOS/PV.11/5 (E), p. 1, lines 43-48 (Mr Crawford).

¹⁴ MB, p. 86, para. 6.55.

1 The opposition between equity and equidistance, to which the Applicant is trying to
2 reduce this case, might also symbolize that between great bad Myanmar and poor
3 little Bangladesh, Myanmar with its long coasts, and Bangladesh, which
4 unfortunately has been disadvantaged by cruel nature because it has concave,
5 unstable coasts that are menaced and threatened by the elements and the
6 negligence of man and many other factors such as the food situation of the
7 Bangladeshi people,¹⁵ and climate change,¹⁶ which should lead this Tribunal to
8 make compensation to the Applicant.¹⁷ Perhaps unfortunately – and I have never
9 denied being a proponent of the third world, although, after all, Myanmar is also a
10 poor country and its coasts are largely concave – in spite of the lamentations and
11 appeals of Bangladesh to good spirit,¹⁸ neither compensatory equity nor distributive
12 justice¹⁹ has a place in the law of maritime delimitation. It cannot be a question of
13 “completely refashioning nature” – an expression that has the same effect on our
14 friends on the other side as a red cloth does to a bull;²⁰ but, whether they like it or
15 not, it is one of the key elements of the law of maritime delimitation²¹ and it cannot
16 be a question of dividing out an area where there are overlapping claims on a
17 subjectively equitable basis, contrary to the insistent requests of Bangladesh.²² As
18 the ICJ firmly recalled in its unanimous judgment in the case of *Romania v. Ukraine*
19 *in 2009*:

20
21 “The purpose of delimitation is not to apportion equal shares of the area
22 nor indeed proportional shares ... The object of delimitation is to achieve
23 a delimitation that is equitable, not an equal apportionment of maritime
24 areas.”²³

25
26 This result must be understood as a function of the general configuration of the
27 coasts²⁴ and not subjective claims by the Parties.

¹⁵ MB, para. 6.39; ITLOS/PV.11/2/Rev.1(E), p. 5, lines 8-10 (Ms Moni).

¹⁶ See RB, para.3.104.

¹⁷ See i.e. ITLOS/PV.11/2/Rev.1 E, p. 15, line 37 or p. 17, line 47 (Mr Reichler); ITLOS/PV.11/6 E, p. 28, line 47 (Mr Boyle).

¹⁸ See, among many examples: MB, para. 6.30 or RB, para. 3.39; para. 3.100 or para. 3.105 RB, para. 3.57; para. 3.59; see also ITLOS/PV.11/2 (E), p. 15, lines 18-35 (Mr Reichler), ITLOS/PV.11/4 (E), p. 14, lines 39-41 (Mr Martin) and ITLOS/PV.11/5 (E), p. 10, lines 26-27 (Mr Crawford).

¹⁹ I.C.J., Judgment, 3 June 1985 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Reports 1985, p. 40, para. 46.

²⁰ See in particular RB, para. 3.8, para. 3.60 and para. 3.62; see also: ITLOS/PV.11/5 E, p. 8, lines 27-32 (Mr. Crawford).

²¹ I.C.J., Judgment, 10 October 2002 *The land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Reports 2002, pp. 443-445, para. 295; see also I.C.J., Judgment, 20 February 1969, *North Sea Continental Shelf Cases*, Reports 1969, p. 49, para. 91; *The delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision of 10 June 1977, R.I.A.A, Vol. XVIII, p. 58, para. 101; I.C.J., Judgment, 3 June 1985 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Reports 1985, p. 45, para. 57; I.C.J. Judgment, 8 October 2007 *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Reports 2007, p. 747, para. 289; Guyana/Surinam, Decision of 17 September 2007, *ILM*, Vol. 47, 2008, p. 164, paras. 373-374 (available on the web site <http://www.pca-cpa.org/>).

²² See ITLOS/PV.11/2/Rev.1 (E), p. 21, lines 38-41 (Mr. Crawford); see also MB, para. 6.37 and para. 6.39.

²³ See *I.C.J. Reports 2009*, pp. 99-100, paras. 110-111 of the Judgment.

²⁴ See in particular I.C.J., Judgment, 3 February 2009 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* Reports 2009, p. 89, para. 77; or, Judgment, 10 October 2002 *The land and*

1
2 Although they refute this, the entire strategy of Bangladesh is aimed at reintroducing
3 into the applicable law on maritime delimitation the excessive subjectivity which 40
4 years of evolution of case law has progressively allowed us to cast off. Ignoring
5 these case law evolutions, as is its habit, the Applicant did not hesitate to write in its
6 Reply:

7
8 (In English) “Under the law today, as before, the Tribunal retains a
9 significant margin of appreciation to fashion an equitable solution in light
10 of the particulars of the case before it.”²⁵

11
12 “Under the law today, as before, ...” - nothing has changed, therefore, in the law of
13 maritime delimitation. The uncertainty of 1969, and to a great extent 1982, remains
14 the rule, and this of course comes down to asking the court to give preference to a
15 subjective concept of equity, based on good feeling and resentment against nature
16 that is unjust, over the strictly legal concept which prevails today in all international
17 competent tribunals so far as maritime delimitation is concerned, including the author
18 of the judgment of 1969, the International Court of Justice.

19
20 Members of the Tribunal, I do not see how this appeal to a subjective fabrication of
21 an equitable solution is different from an incitation for you to pronounce *ex aequo et*
22 *bono*, which the Applicant rejects in the same way for the Respondent.²⁶ An *ex*
23 *aequo et bono* decision is also the aim of that other strange position taken by
24 Bangladesh, where it appears to take the view that base points for the drawing of the
25 provisional equidistance line can be chosen freely. They must be chosen – or
26 “determined” is maybe a more appropriate word – but not at random or depending on
27 the subjective interests of one Party. They have to be determined only on the basis
28 of legal criteria that have been made progressively more precise by case law which
29 is more and more rigorous, and Mr Lathrop will proceed with this later.

30
31 Let me add that among the number of successes of which Professor Crawford can
32 boast and he describes too modestly as ‘modest’,²⁷ there was one obtained at my
33 expense in the case of *Cameroon v. Nigeria*, in which my opponent and learned
34 friend put forward more or less the same line of argument that I have just
35 advanced.²⁸ I pleaded the contrary on behalf of Cameroon but, unfortunately for me
36 and for Cameroon, the Court decided in favour of Nigeria, strictly applying the
37 method of equidistance in spite of the situation of Cameroon which was at a far
38 greater disadvantage than that which the counsel of Bangladesh bemoans;
39 Cameroon was indeed a “stranger in a crowded room”.²⁹ I really do not know why Mr
40 Crawford wanted to sing this here,³⁰ but I am looking forward to his singing his next
41 pleadings. Nevertheless, to come back to the more serious subject that we are

maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Reports 2002, pp. 443-445, para. 295.

²⁵ RB, para.3.26.

²⁶ See ITLOS/PV.11/2/Rev.1 (E), p. 21, lines 27-30 (Mr Crawford); ITLOS/PV/11/4 (E), p. 9, lines 18-24 (Mr Sands); see also: CMM, para. 5.6 or para. 5.36, RB, para. 3.10, or para. 3.23.

²⁷ See ITLOS/PV.11/2/Rev.1 (E), p. 26, lines 40-42 (Mr Crawford).

²⁸ CR 2002/13, p. 55, paras. 13-14, p. 56, paras. 15-17, pp. 56-57, paras. 19, p. 57, para. 20, pp. 58-59, para. 29 and p. 59, para. 30.

²⁹ ITLOS/PV.11/2/Rev.1 (E), p. 25, lines 32-33 (Mr Crawford).

³⁰ *Ibid.*

1 dealing with, the case of the Applicant is, as I have said before, less dramatic than its
2 Counsel would like us to believe – much less indeed than that of Germany in the
3 cases of 1969. Against that background, it is worth noting that at the Third
4 Conference Bangladesh was not even part of the group of land-locked and
5 geographically disadvantaged States,³¹ nor is it part of this group today within the
6 Authority.³² Mr President, this is a very telling indicator.

7
8 Concentrating exclusively on the equitable nature of the solution to be adopted and
9 flouting the best established rules to reach this solution, the Applicant State is
10 reversing the entire logic of the rules of delimitation patiently consolidated by the
11 jurisprudence of the Court in The Hague and the arbitral tribunals. The object of an
12 equitable solution becomes a method of delimitation and is the alpha and omega in
13 all its line of argumentation.

14
15 Incidentally, Mr President, equity has its role to play. No one, and certainly not
16 Myanmar, denies it, but it cannot be at the same time the starting point, the method
17 and the finishing point of any operation of delimitation. In the three-stage method to
18 which Bangladesh pays lip service as the “standard approach”³³ today, although it
19 went back on this point last week when Mr Reichler talked about a “so-called
20 standard approach”,³⁴ equity takes two thrusts: in the second phase, when we ask
21 whether relevant circumstances should not mean a shift of the provisional
22 equidistance line drawn up during the first phase; and again during the third and last
23 phase, which consists in ensuring that there is not a marked disproportion between
24 the ratio of the lengths of the coasts of each State and that of the maritime areas
25 situated on both sides of the line of delimitation.

26
27 I indeed have certain scruples, Mr President, in recalling these rather elementary
28 facts of maritime delimitation law which result from a long period of customary
29 development and which are attested to unanimously by the “judicial decisions and
30 the teachings of the most highly qualified publicists of the various nations” which are
31 “a subsidiary means for the determination of rules of [international] law”. This is
32 stated in Article 38 of the Statute of the ICJ, to which articles 74 and 83 of the
33 Montego Bay Convention refer, and the Applicant seems to ignore this.

34
35 This quasi-unanimity of legal doctrine and jurisprudence and the references of a
36 precise nature to this three-stage method in the written pleadings of Myanmar³⁵
37 mean I do not have to dwell on this, save to mention one point, which concerns the
38 first phase, in which equity has nothing to say.

39
40 For some time now jurisprudence has been uncertain on the priority nature of
41 recourse to equidistance in plotting the initial line of delimitation. Bangladesh has
42 been constant in its remarkable indifference to chronology here and plays on past
43 uncertainties to affirm that there is no presumption in favour of equidistance. This
44 may have been true in 1969 but it certainly it is not in 2011. Furthermore, as the ICJ

³¹ See M. Nordquist *et al.*, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, 1985, Vol. II, pp. 72-73.

³² <http://www.isa.org.jm/files/documents/EN/16Sess/Assembly/ISBA-16A-CRP2.pdf>.

³³ MB, para. 6.18 and RB, para. 3.17 and para. 3.33; ITLOS/PV.11/4 (E), p. 9, lines 28-30 (Mr Sands).

³⁴ ITLOS/PV.11/4 (E), p. 27, line 39.

³⁵ CMM, paras. 5.30-5.32, para. 5.76 and RM, para. 4.3.

1 noted in a passage from its judgment in 1985 in the *Libya v. Malta* case, curiously
2 cited by Professor Crawford last week:

3
4 “The Convention sets a goal to be achieved, but is silent as to the method
5 to be followed to achieve it. It restricts itself to setting a standard, and it is
6 left to States themselves, or to the courts, to endow this standard with
7 specific content.”³⁶

8
9 This is what has happened. The judges gave a precise idea of the method, in the
10 words of the Arbitral Tribunal in the case of *Guyana v. Suriname*:

11
12 (in English) “... international courts and tribunals dealing with disputes
13 concerning the delimitation of the continental shelf and the exclusive
14 economic zone have come to embrace a clear role for equidistance. The
15 process of the delimitation is divided into two stages. First the court or
16 tribunal posits a provisional equidistance line which may then be adjusted
17 to reflect special or relevant circumstances.”³⁷

18
19 (Interpretation continued) The Tribunal in this case said that there was a
20 “presumption in favour of equidistance”;³⁸ the expression is there.

21
22 This presumption, of course, is not carved in stone, and there may be some cases in
23 which recourse to equidistance is not feasible, and one is obliged to come back to
24 other alternative methods. This is what happened in the case of the maritime
25 delimitation between Nicaragua and Honduras in the Caribbean Sea, in which the
26 ICJ found itself “facing special circumstances in which it cannot apply the
27 equidistance principle”. In its judgment of 2007 the Court in The Hague, whilst
28 recalling that “equidistance remains the general rule”, held that:

29
30 “having reached the conclusion that the construction of an equidistance
31 line from the mainland is not feasible, the Court must consider the
32 applicability of the alternative methods put forward by the Parties.”³⁹

33
34 On the other hand, as the ICJ clearly said in its judgment of 2009 in
35 *Romania v. Ukraine*, in the absence of “compelling reasons” (doing this, the Court
36 referred to the *Nicaragua v. Honduras* case), in the absence of compelling reasons,
37 it is an equidistance line that has to be plotted in the first stage:

38
39 “So far as delimitation between adjacent coasts is concerned, an
40 equidistance line will be drawn unless there are compelling reasons that
41 make this unfeasible in the particular case.”⁴⁰

36 I.C.J., Judgment, 3 June 1985 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Reports 1985, pp. 30-31, para. 28; quoted in ITLOS/PV.11/2/Rev.1, p. 30, lines 27-30 (Mr Crawford).

37 *Guyana/Surinam*, Decision of 17 September 2007, ILM, Vol. 47, 2008, pp. 212-213, para. 335.

38 Judgment, 8 October 2007 *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Reports 2007 (II), p. 745, para. 281.

39 *Ibid.*, para. 283.

40 I.C.J., Judgement, 3 February 2009 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* Reports 2009, p. 101, para. 116.

1 But it is self-evident that the possible inequity of an equidistance line does not
2 constitute such a “compelling reason”, because it is precisely to correct this, if the
3 case arises, that the relevant circumstances intervene in the second phase and the
4 test of non-disproportionality in the third phase.

5
6 The method of delimitation in maritime spaces between States with adjacent or
7 opposite coasts is solidly established but at the same time complex. It comprises
8 several phases in which equity and equidistance each play their role, a
9 complementary role that guarantees that neither will be engulfed by the other.

10
11 Mr President, in a speech that you gave before the Legal Advisers meeting at the
12 United Nations last October, which I was privileged to attend, you declared:

13
14 “The Tribunal has, on occasions, resorted to the case law of the PCIJ and
15 ICJ as a source for the identification of customary law and general
16 principles of law in situations where the Convention did not provide
17 sufficient guidance. This shows an unequivocal reliance on the
18 jurisprudence of other international courts on certain issues and provides
19 clear evidence that, at least in the Tribunal's case, the concerns about
20 possible fragmentation of the jurisprudence of international courts and
21 tribunals are unwarranted.”⁴¹

22
23 Mr President, Members of the Tribunal, we do not have these concerns. We are
24 convinced that your decision will not constitute the retrograde step which
25 Bangladesh is requesting. Far from questioning the additions and developments that
26 have taken place in state and case law practice in the past 40 years, which they
27 have added to the wavering law outlined by the ICJ judgment of 1969 and the 1982
28 Convention, in conformity with your settled practice,⁴² you will apply the standards
29 that have now become customary, reflecting these developments, and again I refer
30 to your speech of last year in my closing remarks:

31
32 “The application of the norms of customary law and of general principles
33 of law becomes relevant, as evidenced in the Tribunal's jurisprudence, in
34 situations where, to use the terminology of a working group of the
35 International Law Commission, the provisions of the Convention are
36 ‘unclear or open textured’; where ‘the terms or concepts used in the
37 [Convention] have an established meaning in customary law or under
38 general principles of law’; or where the Convention does not provide
39 sufficient guidance.”⁴³

40
41 This is, in part, the case when we are talking about the rules applicable to maritime
42 delimitation, and in particular beyond the territorial sea.

43

⁴¹ Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 25 of October 2010; available on the following address: http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/legal_advisors_251010_eng.pdf.

⁴² See in particular Advisory opinion, 1 February 2011, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, p. 57, p. 22.

⁴³ *Ibid.*; see also ITLOS/PV.11/2/Rev.1(E), p. 21, lines 32-46 (Mr Crawford).

1 Thank you, Members of the Tribunal, for your attention. With your permission,
2 Mr President, I ask you to give the floor to Professor Mathias Forteau, who will go
3 into more detail on the role played by equidistance in the current case.
4

5 **THE PRESIDENT:** Thank you. I give the floor to Professor Mathias Forteau.
6

7 **MR FORTEAU (*Interpretation from French*):** Mr President, Members of the
8 Tribunal, it is a great honour for me and also a remarkable privilege and an immense
9 pleasure to appear before your esteemed Tribunal for the first time.
10

11 Mr President, Professor Pellet recalled that the method applicable to the delimitation
12 of the EEZ and continental shelf is that of the relevant circumstances and
13 equidistance which, I now no longer need to remind you, falls into three stages: that,
14 is, establishing the provisional line of equidistance,⁴⁴ ascertaining whether there are
15 any relevant circumstances, and lastly, the test of disproportionality.
16

17 In the following submissions, counsel of Myanmar, scrupulously following this
18 method, will set out the reasons why the equidistance line in this case produces the
19 equitable solution provided for in Articles 74 and 83 of the Convention on the Law of
20 the Sea.
21

22 However, before expounding these reasons, it is important, as a preliminary, to recall
23 the fundamental points which govern the application of the method of equidistance
24 and relevant circumstances in our particular case. This is what I shall seek to do in
25 the next 20 minutes relating these fundamental points to two main themes.
26

27 I will start by presenting the relevant geographic elements which determine the
28 delimitation; secondly, I will indicate the reasons why, in our case, the equidistance
29 line equitably reflects the coastal geography.
30

31 The geographic elements are clearly fundamental. Everyone knows that in any
32 delimitation the starting point must be the undisputed principle according to which
33 “the land dominates the sea”. This fundamental consideration has a twofold effect on
34 the delimitation, first a positive effect, second a negative effect.
35

36 To begin with, delimitation depends, and this is the first aspect of the principle, on
37 the coastal configuration, for it is this which dictates the line. The International Court
38 of Justice had occasion to recall this in the *Romania v Ukraine* case:
39

40 “The title of a State to the continental shelf and the exclusive economic
41 zone is based on the principle that the land dominates the sea through
42 the projection of the coasts or the coastal fronts”.
43

44 The court also recalled in this connection that:
45

⁴⁴ ICJ, Judgment of 10 October 2002 in the case *Cameroon v. Nigeria*, *ICJ Reports 2002*, p. 441, para. 288; Decision of 11 April 2006 in the case *Barbados v. the Republic of Trinidad and Tobago*, *R.I.A.A.*, vol. XXVII, p. 230 para. 304 (referring to the ICJ, case *Qatar v. Bahrain*, *ICJ Reports 2001*, p. 94, para. 176); ICJ, case *Romania c. Ukraine*, Judgment of 3 February 2009, *ICJ Reports 2009*, para. 120.

1 “in the continental shelf (*Tunisia v Libyan Arab Jamahiriya*) case the court
2 observed that ‘the coast of the territory of the State is a decisive factor for
3 titles to submarine areas adjacent to it’ (Judgment, I.C.J Reports 1982,
4 p. 61, para.73)”.⁴⁵
5

6 Ergo, and this is the negative aspect of the role played by coastal configuration,
7 delimitation cannot lead to reshaping nature as international courts once again have
8 reminded us very many times. The geographic elements are a factor which an
9 international court has to take into account as it actually is and not as it ought to be
10 in an ideal world. The terms used by the International Court of Justice in its
11 Judgment of 10 October 2002 in *Cameroun v. Nigeria*, which you know as well as I
12 do, clearly explain this:

13
14 “the geographical configuration of the maritime areas that the Court is
15 called upon to delimit is a given; it is not an element open to modification
16 by the Court but a fact on the basis of which the Court must effect the
17 delimitation”.⁴⁶
18

19 It is therefore clear that delimitation must reflect coastal geography and its job is not
20 to redraw it. The constituent aspect of the principle according to which the land
21 dominates the sea must never be separated from its limitative aspect. They are two
22 sides of the same coin. The coast creates the title but its configuration dictates the
23 limits.

24
25 Members of the Tribunal, what are the relevant geographic elements in our case?
26 First of all, we have never had any disagreement on this point with our opponents.
27 The Bay of Bengal is by nature indisputably concave. It is concave but that in itself
28 does not dispense with the question. First of all, it must be stressed that Bangladesh
29 is not the only State to be affected by the concavity of the Bay of Bengal. As shown
30 on this sketch map, India in its relation to Sri Lanka to the west or Myanmar in its
31 relationship to India to the east are also to differing degrees affected by the concavity
32 of the Bay. However, this has never led the States in the region to reject
33 equidistance.

34
35 Conversely, it is noteworthy that the delimitation agreements hitherto concluded by
36 the States bordering on the Bay of Bengal have not used any other method but
37 equidistance.⁴⁷ Furthermore, these agreements have made recourse to this even
38 when it might create a cut-off effect, which is the case for example of the delimitation
39 in the south-west of the Bay between the Maldives, India and Sri Lanka.
40

41 In more general terms, this sketch of the delimitation in the region shows that these
42 delimitations reflect the coastal geography, including natural inequalities which it may
43 bring about, in particular due to the presence in the south-east of the Gulf of the
44 Indian islands. But the delimitation is not there to compensate for these natural
45 inequalities. We do not dispute that the hand of equity, had it had this power, could
46 have redistributed all these delimitations differently. But equity is not the equitable

⁴⁵ Judgment of 3 February 2009, *ICJ Reports 2009*, p. 89, para. 77.

⁴⁶ Judgment of 10 October 2002, *ICJ Reports 2002*, pp. 443-445, para. 295.

⁴⁷ See Counter-Memorial of Myanmar, paras. 2.31-2.44.

1 result imposed by the law of the Convention of which your Tribunal is the organ.
2 Unlike equity, the equitable result is geographically determined.

3
4 Turning more specifically now to the relevant area to be delimited, it must first be
5 emphasized that the coast of Myanmar in this relevant area is also concave by
6 nature. This is its general shape from the starting point of the land boundary with
7 Bangladesh to Cape Negrais, the last point on Myanmar's relevant coast.

8
9 Secondly, the general concavity of the Bay of Bengal does not constitute an
10 intrinsically relevant element for the purposes of our delimitation between the two
11 States parties to this case. What is decisive is the geographic configuration of the
12 coasts controlling the delimitation. Let me remind you that the coast creates the title;
13 its configuration dictates the limits. It is thus the geographical configuration of the
14 coasts of the two parties to the case which must be our primary concern.

15
16 The International Court of Justice underlined this with particular clarity in the
17 *Cameroun v Nigeria* case. In that case, the Court rejected the argument of concavity
18 put forward by Cameroun "for the reasons that the sectors of the coastline relevant
19 to the present delimitation exhibit no particular concavity".

20
21 I would note here that the Court in 2002 does not say what Professor Crawford said
22 it did, according to which the Court allegedly determined that the coasts "were not
23 concave at all".⁴⁸ The Court said that the sectors of the relevant coasts d[id] not
24 exhibit any "particular" concavity.

25
26 Again according to the Court, in its 2002 Judgment, the concavity of Cameroun's
27 coastline is apparent primarily – and I stress that the Court did not say exclusively
28 but primarily – in the sector where it faces Bioko".⁴⁹

29
30 We have shown this on a sketch map in order to underscore the significance of the
31 Court's decision which Professor Crawford presented in an incomplete fashion
32 during his first pleading on Thursday.⁵⁰ You will find this sketch at Tab 3 in this
33 morning's hearing.

34
35 First of all, you see that the general coastal configuration in this area and curiously
36 the Cameroun coast is indisputably concave. The ICJ nevertheless considered that
37 the concavity of the Cameroun coast located east of the Island of Bioko, which is
38 under the sovereignty of a third State, was not part of the area to be delimited.

39
40 According to the Court, the relevant coasts of Cameroun – underlined in dark blue on
41 the sketch map – end with respect to Nigeria at Cape Debuncha. From this, the
42 Court concluded that there was no need to allow for the concavity further east. This
43 means, and this is a first important lesson from this Judgment, that the Court
44 excluded any regional approach to the configuration of the coast and its delimitation
45 and concentrated solely on the coastal configuration of the two parties to the dispute
46 and on them alone.

47

⁴⁸ ITLOS/PV.11/2/Rev.1, p. 24, lines 29-30.

⁴⁹ Judgment of 15 October 2002, *ICJ Reports 2002*, p. 445, para. 297.

⁵⁰ ITLOS/PV.11/2/Rev.1 (E), pp. 24-26.

1 Professor Crawford said a word about this 10 days ago⁵¹ yet failed to add that the
2 Court also did not feel obliged to take account of two other concavities which were
3 nevertheless present in the sector for delimitation.

4
5 On the one hand, the relevant coast of Cameroun, which, according to the Court,
6 stops at Cape Debuncha, is also concave; it is, first of all, adjacent and in a straight
7 line with Nigeria's coast before undergoing a second concavity and afterwards then
8 running south-eastwards almost at a right angle to Cape Debuncha. According to the
9 Court, let me remind you, there is no "particular" concavity here. On the other hand,
10 the west coast of the island of Bioko results in a drastic enclaving effect for
11 Cameroun.

12
13 Nigeria underscored in its pleadings in this case that "the northern and western
14 coasts of Bioko constitute the third relevant coast for this area".⁵² Of course, it was
15 not a relevant coast strictly speaking since the island of Bioko belonged to a third
16 State but this assertion quite rightly explained the effect which was produced by the
17 north and west coast of the island of Bioko on the delimitation line to be effected
18 between Cameroun and Nigeria.

19
20 This concavity between the three States had a manifest enclaving effect. The Court
21 nevertheless judged that this manifest concavity was not relevant. According to the
22 Court, there was no reason to adjust the strict equidistance line in favour of
23 Cameroun, in spite of the cut-off effect that this meant for it. In other words, the Court
24 adhered to the adjacent character of the coast of these two States on either side of
25 their point of intersection with the land boundary without concerning itself with the
26 configuration of the coasts in the region, or with concavity and the cut-off effect
27 suffered by Cameroon owing to the presence of the island of Bioko, which was under
28 the sovereignty of a third State.⁵³

29
30 This solution applies, *a fortiori*, in the current case. Again, we are dealing with a
31 coastal configuration which, as regards the Gulf as a whole, is completely concave,
32 but the coasts of Bangladesh and Myanmar themselves, which determine this
33 delimitation line, are "essentially" directly adjacent or even slightly convex, as you
34 can see from the sketch map on the screen now.

35
36 In no way does the starting point of the maritime delimitation lie in the concavity. You
37 will find this sketch map at tab 3.4 in this morning's file. So as you see, the starting
38 point of the maritime delimitation does not lie in the concavity. The starting point of
39 our maritime delimitation lies much further south at the point where the coasts of the
40 two parties are directly adjacent, facing south-west.

41
42 Mr Martin glossed over this decisive point, in his abstract sketch maps on
43 concavity.⁵⁴ The land boundary between Myanmar and Bangladesh does not end in
44 concavity. The point of intersection with the land boundary lies far beyond this
45 concavity and not to take it into account is to refashion geography.

46

⁵¹ *Ibid.*

⁵² CR 2002/13, public hearing of 7 March 2002 (morning), p. 38, para. 47 *in fine* [www.icj-cij.org].

⁵³ See also Rejoinder of Myanmar, para. 6.41.

⁵⁴ Session of 12 September 2011, Tab. 3.7.

1 In contrast to what Mr Martin said last Monday,⁵⁵ this direct adjacency relationship is
2 significant because it continues for over 100 kilometres on both sides of the land
3 boundary (let us be clear, for over 100 kilometres on both sides of the land boundary
4 and therefore from the starting point of the maritime delimitation).

5
6 And precisely as a result of the fact that the coasts of the two States are mainly
7 adjacent, most of the equidistance line is not influenced by the northern part of the
8 coast of Bangladesh. The northern part of the coast of Bangladesh only starts to
9 influence the equidistance line at the end of this line, when the claims of the parties
10 to this case may well come up against the claims of India, the third State in this
11 dispute. Mr Lathrop will come back to this in greater detail in a moment.⁵⁶

12
13 To borrow the terms used by the Hague Court in 2002, the concavity of the coast of
14 Bangladesh therefore “essentially” has no effect in the area for delimitation. This in
15 fact is a situation much more adjacent, if I may put it like that, than in the case of
16 *Cameroun v Nigeria*. It is a decisive geographical fact.

17
18 This direct adjacency in the area for delimitation is accompanied by another
19 important geographic factor. Bangladesh has unceasingly protested against the fact
20 that one single base point on its coast controls the equidistance line over most of its
21 course. This is point β1 lying close to the land boundary, which Mr Lathrop will go
22 into with you shortly.

23
24 Bangladesh’s complaint is very unusual as this base point is very favourable to
25 Bangladesh extending as it does further west than the base points on the coast of
26 Myanmar. To this extent it favours Bangladesh, which it ill becomes to complain
27 about it.

28
29 I would add that if this base point has this effect favouring Bangladesh, it is precisely
30 also because, in the relevant area, the adjacent character of the coasts is the
31 predominant one. Lastly, if the configuration of the coasts is decisive, their length
32 also comes into play as regards verifying the absence of disproportionality. On the
33 scale of the Gulf, in which Bangladesh wrongly places itself, there is nothing
34 comparable between the length of the coasts of Bangladesh on the one hand and
35 the length of the coasts of India and Myanmar on the other. Contrary to the
36 Applicant’s repeated assertion, we are certainly not in a situation of three States in
37 a situation of virtual geographic equality. The respective lengths of their respective
38 coasts are simply not comparable. This also applies if the situation is viewed from
39 the angle, the only relevant one in law, of the area to be delimited. As Mr Müller will
40 explain in a moment, the relevant coasts of the two parties in this delimitation case
41 are in a ratio of one to two in favour of Myanmar.

42
43 Aware of this difficulty, Bangladesh, in its first round of pleadings, ended up asserting
44 that the relevant coasts of Bangladesh were actually longer than those of
45 Myanmar.⁵⁷ We leave it to you to judge the credibility of such a claim. Even in its
46 reply, Bangladesh did not make so bold as to defend such an idea. In less than six
47 months between the filing of the Reply and the opening of the oral hearings, the

⁵⁵ ITLOS/PV.11/4 (E), p. 15, l. 13-32 (Martin).

⁵⁶ See also Rejoinder of Myanmar, para. 5.15

⁵⁷ ITLOS/PV.11/5 (E), p. 7, lines 30-31 (Crawford).

1 coast of Bangladesh has grown by 72 kilometres; the coast of Myanmar by one
2 measly kilometre ...⁵⁸ At this rate, Members of the Tribunal, the coast of Bangladesh
3 will soon reach Cape Negrais.

4
5 Mr President, I now come to my second point, in which I will more briefly set out the
6 reasons why the equidistance line equitably reflects the coastal geography in this
7 case. To do so, I must start by recalling that the two Parties to the dispute seem
8 agreed on considering that the purpose of the single delimitation line, which they are
9 asking you to draw, is to separate maritime areas which are a projection of the
10 mainland of the two States. In other words, fundamentally, this is a case of a
11 mainland-to-mainland delimitation.

12
13 Counsel of Bangladesh were offended in their first round of pleadings by the use of
14 this expression, which, as Mr Lathrop recalled last Friday, is in no way a new
15 coinage, quite the contrary.⁵⁹ However, this in no way detracts from the fact that this
16 expression corresponds perfectly to what is, in this case, the delimitation which you
17 are called upon to make.

18
19 Myanmar considers that no effect can be given to this title to St Martin's Island
20 beyond the territorial sea, since it is a geographical singularity and lies on the wrong
21 side of the equidistance line which Professor Sands expressly acknowledged last
22 week when he said that Bangladesh "has not disputed that St Martin's Island lies
23 south" of the "mainland to mainland" delimitation line.⁶⁰

24
25 Under modern jurisprudence, an island in the special geographic situation of
26 St Martin cannot be incorporated into the coast of Bangladesh and cannot therefore
27 serve as a point of reference for drawing the delimitation line beyond the territorial
28 sea. I will revert to that this afternoon.

29
30 Bangladesh has protested against this but, if the truth be told, its protestation is
31 widely at odds with own positions.

32
33 - Bangladesh has not included St Martin Island in the definition of its relevant coasts.
34 All the sketch maps shown by Professor Crawford last Monday are perfectly clear
35 and unequivocal:⁶¹ none of them includes this island in the relevant coasts of
36 Bangladesh.

37
38 - Nor has the Applicant taken them fully into account in the definition of the coastal
39 fronts for the purposes of the delimitation line it claims, whereas it seeks to give full
40 effect to Saint Martin Island.⁶²

41

⁵⁸ See Memorial of Bangladesh, para. 6.75 (and Reply of Bangladesh, para. 3.166): "Point-to-Point, Bangladesh's coastal front measures 349 km; Myanmar's measures 369 km"; ITLOS/PV.11/5 (E), p. 7, lines 30-31 (Crawford): "The relevant coastal lengths are therefore 421 kilometres for Bangladesh and 370 kilometres for Myanmar".

⁵⁹ ITLOS/PV.11/2/Rev.1 (E), p. 16, lines 36-43 (Reichler); ITLOS/PV.11/3 (E), p. 14, lines 8 et seq. (Sands).

⁶⁰ ITLOS/PV.11/3 (E), p. 16, lines 30-31 (Sands).

⁶¹ ITLOS/PV.11/5 (E), pp. 5 et seq. (Crawford).

⁶² See Rejoinder of Myanmar, para. 5.30.

1 This exclusion is wholly justified. St Martin Island is not an island that could be
2 incorporated into the coast of Bangladesh without refashioning the coastal
3 geography. Under these circumstances and in line with the jurisprudence presented
4 by Professor Sands, which I will comment upon in my second statement,⁶³ it is not
5 possible to give St Martin Island more effect than it is entitled to under the
6 delimitation of the territorial sea.

7
8 Also, the written pleadings of Bangladesh did not dispute the fact that the application
9 of the test of the absence of disproportion in this case entails recognizing that the
10 equidistance line meets this test, which again confirms that the equidistance line
11 equitably reflects the coastal geography.

12
13 Of course this then deprives of all basis Bangladesh's claim that the equidistance
14 line would produce an inequitable result. In fact, the circumstances which
15 Bangladesh relies upon in order to oppose this line are not such as to make it
16 inequitable.

17
18 First of all, the concavity of the Gulf is in no way a circumstance necessarily leading
19 to an adjustment of the equidistance line, as witnessed by international
20 jurisprudence, particularly in the last ten years, in the solutions adopted in the
21 *Cameroun v Nigeria* and *Barbados v Trinidad and Tobago* cases.

22
23 Secondly, and also pursuant to contemporary jurisprudence, the fact that a State
24 does not have access to all the maritime areas it claims, especially those lying
25 beyond 200 nautical miles, also in no way constitutes a circumstance entailing the
26 adjustment of the equidistance line, all the more so when this claim is completely
27 hypothetical.

28
29 Mr President, I would like very briefly to summarize all this. In this case, the
30 equidistance line equitably reflects the geographic coast and for the following main
31 reasons.

32
33 - In the relevant area, the delimitation is essentially dictated by the coasts in a
34 relationship of direct adjacency and even slight convexity;

35
36 - On the Bangladesh side, the delimitation line is largely controlled by a base point in
37 its favour.

38
39 - The equidistance line therefore gives Bangladesh access extending to some 182
40 nautical miles;

41
42 - the equitable nature of this result in every respect complies with the solutions
43 adopted in contemporary jurisprudence, as I shall show this afternoon;

44
45 - lastly, the equidistance line satisfies the test of the absence of disproportionality.

46
47 With your permission, Mr President, we will demonstrate all this afternoon, Daniel
48 Müller having first defined the relevant coasts and maritime areas.

⁶³ ITLOS/PV.11/3 (E), p. 21, lines 13-30 (Sands).

1
2 Mr President, Members of the Tribunal, this presentation of the statements to follow
3 brings my own to a close. I thank you for listening so attentively and would ask you
4 to call to the Bar Mr Daniel Müller to present the coasts and the relevant areas.

5
6 **MR MÜLLER (*Interpretation from French*):** Mr President, Members of the Tribunal,
7 it is an honour to be here today before you and to find myself for the first time before
8 this Tribunal.

9
10 During his presentation last Monday Professor Crawford presented the coasts that
11 Bangladesh considers relevant to the delimitation exercise which you have been
12 referred by the parties. We listened with very particular interest because in spite of
13 two rounds of written pleadings, the Applicant State has never really proceeded to
14 this important and very preliminary stage of any maritime delimitation.⁶⁴ The
15 identification of the relevant coasts and the resulting relevant area is not a simple
16 superfluous or purely technical exercise that has an implication only in the final stage
17 of the process, that is examining the absence of any disproportionality; these coasts
18 are not a simple unit of measure; they are the very basis of the delimitation operation
19 as Professor Forteau reminded us a few moments ago. The situation of the mainland
20 geography, of the coasts, constitutes the starting point for determining the
21 entitlements of a State to maritime areas and consequently the zones where these
22 entitlements overlap with those of another State. "The land dominates the sea".⁶⁵

23
24 Last Monday the position of Bangladesh developed considerably. During his oral
25 pleadings, which in part were dedicated to this preliminary aspect of delimitation,
26 Professor Crawford carefully avoided projecting sketch map 6.12, which is in
27 Volume II of the Applicant's Memorial, which you now have on your screens. You
28 can see on the sketch map and in the text of the Applicant's Memorial⁶⁶ that
29 Bangladesh did not use the length of its coast or that of the coast of Myanmar to
30 conduct the non-disproportionality test. In its Memorial⁶⁷ and also in its Reply⁶⁸, only
31 the length of the coastal facades used, in an indefensible way, to construct the
32 bisector line to which our learned friends on the other side attach a great deal of
33 importance was taken into account in examining the disproportionality test.

34
35 However, it is not the maritime facades of a coastal State that determine its relevant
36 coasts, as it is not the base points that are chosen for the construction of the
37 provisional equidistance line which identify, one way or another, the relevant coasts.
38 We have to think the other way round. First, you have to establish the relevant

⁶⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2009, p. 659, p. 747. par. 289; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment*, I.C.J. Reports 2001, p. 40, p. 94, par. 178; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I. C. J. Reports 2002, p. 303, p. 442, par. 290.

⁶⁵ *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, p. 3, p. 51, par. 96; *Aegean Sea Continental Shelf, Judgment*, I.C.J. Reports 1978, p. 3, p. 97, par. 185; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment*, I. C. J. Reports 2001, p. 40, p. 97, par.185).

⁶⁶ MB, par. 6.75.

⁶⁷ *Ibid.*

⁶⁸ RB, par. 3.166.

1 coasts, then draw the necessary conclusions in order to apply the method of
2 delimitation, that is to identify the appropriate base points.

3
4 However, it is useless to argue at length on this methodological error by Bangladesh.
5 The wisdom of Professor Crawford put the Applicant on the right path, or the legal
6 path rather, by departing very clearly from the position defended in the written phase.
7 The method and obviously the figures have changed. The operation was of benefit to
8 Bangladesh, which gains 72 km, whilst the benefit for Myanmar is much more
9 modest – we only have one little kilometre more; we have reproduced these two
10 positions of Bangladesh at tab 3.5 in your folders.

11
12 In effect, instead of purely and simply using the coastal facades as relevant coasts,
13 Professor Crawford went to lengths to determine the relevant *coasts* – and I
14 emphasize coasts, and not coastal facades, although these coasts are very much
15 simplified by straight lines.

16
17 Myanmar can only welcome this change in method. Nevertheless, the identification
18 by Bangladesh of the respective relevant coasts of the Parties and the relevant area
19 for delimitation still suffers from considerable approximations, so I will come back
20 briefly to these one by one.

21
22 The Parties are now in agreement that the identification of the relevant coasts is not
23 a simple geographic operation, but it is a legal exercise that follows its own rules.
24 The jurisprudence has clearly established when and why part of the coast is
25 relevant, and Professor Crawford rightly referred to the unanimous judgment of the
26 ICJ in the *Maritime delimitation in the Black Sea* case between Romania and
27 Ukraine.⁶⁹ In its judgment the Court not only defined the legal notion of relevant
28 coast; it also explained the test that renders a geographical coast relevant in the
29 legal sense of the term. It underlined – and allow me to quote:

30
31 The coast in order to be considered as relevant for the purpose of
32 delimitation must generate projections which overlap with projections from
33 the coast of the other Party. Consequently,

34
35 the Court continues, citing its judgment in the *Continental Shelf between Tunisia*
36 *and Libya case*,

37
38 the submarine extension of any part of the coast of one Party which,
39 because of its geographic situation, cannot overlap with the extension of
40 the coast of the other, is to be excluded from further consideration by the
41 Court.⁷⁰

42
43 To determine whether a part of the coast is relevant for the delimitation or not, we
44 have to verify if it generates entitlements to maritime areas, projections into the sea
45 that overlap on those generated by the coast of the other State in question. It is
46 neither the direction nor the distance of the coast in relation to the starting point for
47 delimitation that is important, but only the relationship of the projections of this coast
48 to the projections of the coast of the other Party.

⁶⁹ ITLOS/PV.11/5 (E), p. 4, lines 27-34 (Crawford).

⁷⁰ *I.C.J. Reports 2009*, p. 97, par. 99.

1
2 Mr President, I think we can say that the Parties at this stage in the proceedings
3 agree on several portions of the relevant coasts, the projections of which overlap.
4 First, Bangladesh accepts that the coast of Rakhine, from the mouth of the Naaf
5 River, the starting point for the maritime delimitation line up to a point 200 M from
6 this starting point near Bhiif Cape, is relevant for the delimitation.

7
8 Then, concerning the coast of Bangladesh, the agreement between the Parties
9 includes the coast stretching from the mouth of the Naaf River up to the eastern
10 entry of the estuary of the Meghna River on the one hand, and the coast to the west,
11 from the estuary to the land boundary terminus of the Applicant state and India on
12 the other.

13
14 These parts of relevant coast, the respective projections of which overlap, as the
15 Parties agree, can be seen now on the screen. Myanmar has represented the coasts
16 of the two Parties not by straight lines connecting their end points, but more closely
17 to the coastal geography. This does not imply, as Bangladesh insinuates,⁷¹ that the
18 Myanmar cartographers have applied a double standard in measuring the lengths of
19 the coasts of Myanmar on the one hand and Bangladesh on the other. As we
20 explained in our Counter-Memorial, we followed the recommendations contained in
21 the Manual on Technical Aspects of the United Nations Convention on the Law of
22 the Sea.⁷² As a result, in order to measure the length of the coasts, Myanmar
23 calculated the sum of the length of the straight lines linking a number of points
24 representing the coast. As the ICJ did in *Romania v. Ukraine*, the coasts “alongside
25 waters lying behind gulfs or deep inlets have not been included for this purpose”.⁷³

26
27 In the application of this method, Myanmar has not made any distinction between the
28 Bangladesh coast and its own. Of course, we agree with the ICJ that “these
29 measurements are necessarily approximate”.⁷⁴ However, it is not a case of
30 producing a precise mathematical relationship, either at this stage or at the stage
31 when we speak about the test for the absence of disproportion, which is restricted to
32 a test of serious disproportion.

33
34 Furthermore, I would like to state that Mr Crawford did not include in his definition of
35 the relevant coast the coast of Bangladesh’s St Martin’s Island, and Myanmar did not
36 do this either.

37
38 There is, however, a difference in regard to the southern part of the coast of
39 Rakhine, which Professor Crawford excluded from the relevant coast of Myanmar,
40 and the shores, or the closing line, should I say after hearing the oral pleadings last
41 Monday,⁷⁵ of the estuary of the Meghna River, which Bangladesh includes in its own
42 relevant coast. It is therefore necessary to return to the non-relevance of this ghost-
43 line – because it is a purely artificial line which does not correspond in any way to the

⁷¹ RB, par. 3.176-3.177. See also ITLOS/PV.11/5, p. 6, lines 22-32 (Crawford).

⁷² *Manual on Technical Aspects of the United Nations Convention on the Law of the Sea*, special publication n° 51, 4^e ed., The International Hydrographic Bureau, Monaco, 2006 (ch. 6.3.2).

⁷³ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, p. 129-130, par. 214.

⁷⁴ *Ibid.*

⁷⁵ ITLOS/PV.11/5, p. 5, lines 14-19 (Crawford).

1 Bangladesh coast, and the relevance of the southern part of the Myanmar's Rakhine
2 coast to Cape Negrais, and I would like to start with this latter point.

3
4 Mr President, it is incorrect that Bangladesh wants to deprive Myanmar of this
5 segment of its coast, which measures 275 km. This cutting-off of the relevant coast
6 of Myanmar only appears with the very imaginative application of the bisector
7 method in the Memorial of our opponents. During the negotiations in November 2008
8 between the two States, Bangladesh, according to its own minutes, recognised "the
9 relevant coastline for Myanmar and the Bay of Bengal is up to Cape Negrais".⁷⁶ You
10 cannot be more explicit than that. However, one and a half years later this position
11 seems to be upturned and the Bangladesh Memorial, and Professor Crawford, are
12 trying to find arguments to justify why in 2008 the representatives of Bangladesh
13 made a mistake. But it is in vain: Myanmar has already shown this in its Rejoinder.⁷⁷

14
15 The main argument that our opponents are using now against the relevance of the
16 southern part of the Rakhine coast consists in claiming – and I am quoting the
17 Memorial -- that it "is more than 200 M from the land boundary terminus with
18 Bangladesh and therefore ceases to have any plausible significance in this
19 delimitation."⁷⁸

20
21 In its Reply the argument changed slightly in order to use more appropriate terms
22 based on international case law. Bangladesh therefore noted

23
24 *(In English)* since the entire length of Myanmar's coast below Bhih Cape
25 is more than 200 M from Bangladesh (i.e., beyond any possible projection
26 the Bangladesh coast might generate), the projection of Myanmar's coast
27 between Bhih Cape and Cape Negrais could not possibly overlap with
28 that of Bangladesh.⁷⁹

29
30 *(Interpretation continued)* Professor Crawford used this argument last Monday in his
31 pleadings,⁸⁰ but I regret to have to say that this has not made it more credible.
32 Politely said, it is not correct in law, and above all in mathematics.

33
34 Whilst it was established that *projections* of 200 M of the relevant coasts must
35 overlap, coasts that are at a distance of less than 400 M are highly likely to produce
36 such overlaps; 200 plus 200 equals 400, not 200. Since Cape Negrais is at a
37 distance of less than 300 M from the first point on the coast of Bangladesh, this
38 overlapping is certainly not excluded. It is the projections that must overlap one
39 another, and not the projection of one coast with the other coast.

40
41 On this point the arguments of Bangladesh and the presentation by Professor
42 Crawford last Monday are quite simply wrong. It is not the relevant area that
43 determines the relevant coast, it is the relevant coast that circumscribes the area to
44 be delimited. It is only the projections of the coasts that are relevant in this regard. If
45 you establish, as Professor Crawford did, arcs along the southern coast of Rakhine -

⁷⁶ MB, vol. III, Annex 19, par. 21. See also CMM, par. 5.68 and RM, par. 6.82 and 6.83.

⁷⁷ RM, par. 6.76-6.81.

⁷⁸ MB, par. 6.69.

⁷⁹ RM, par. 3.151.

⁸⁰ ITLOS/PV.11/5, p. 7, lines 23-27 (Crawford).

1 a very simple cartographic exercise - there can be no doubt that this part of the coast
2 is relevant. Its projection overlaps with the projection of the coast of Bangladesh and
3 this is all that you need to prove.

4
5 Confronted with this evidence, however, Bangladesh doubts the relevance of this
6 part of the coast because, and I quote once again from the Reply:

7
8 (In English) *Every* point on Myanmar's coast south of Bhiif Cape is further
9 from either of the Parties' proposed delimitation lines than *any* point north
10 of Bhiif Cape. Accordingly, no portion of Myanmar's coast between Bhiif
11 Cape and Cape Negrais can or does affect either of the proposed
12 delimitation lines within 200 M.⁸¹

13
14 As if repetition could make this proposition more plausible – and on this point our
15 distinguished friends on the other side come under the criticism that Mr Reichler has
16 addressed towards us⁸² – Bangladesh argues many times that this part of the coast
17 “is simply too far from the delimitation to be considered relevant in this case”⁸³ – “lies
18 beyond 200 M from any delimitation line”⁸⁴ or even “is too far removed from any
19 possible delimitation - whether Myanmar's or Bangladesh's - which instead are both
20 controlled by more proximate portions of Myanmar's coast”⁸⁵.

21
22 In spite of this, the relevant coasts cannot depend, or be determined by reference to
23 the delimitation line. They logically precede it, and it is the delimitation line that must
24 be determined by reference to the relevant coasts and the projections that these
25 generate. Bangladesh has put the cart before the horse.

26
27 In this respect we only need to rapidly consider a similar argument by Romania in
28 the *Maritime delimitation of the Black Sea* case. Romania said that a large part of the
29 northern coast of Ukraine between point S, close to the Dniester estuary, and Cape
30 Tarkhankut was not relevant. According to Romania the northern part of the coast of
31 Ukraine was not only far removed from the relevant area, but furthermore it was
32 “eclipsed” by other Ukrainian coasts that were closer. As a result, this northern part
33 did not affect the delimitation line.

34
35 Counsel for Romania invoked the same judgments of the Court⁸⁶ as our colleagues
36 on the other side. However, the Court did not feel that Romania was justified but
37 included this part of the coast of Ukraine in the relevant coast. The graphic shows
38 this. We can see that the Court noted in the relevant part of its judgment:

39
40 The north-western part of the Black Sea (where the delimitation is to be
41 carried out) in its widest part measures slightly more than 200 M and its
42 extent from north to south does not exceed 200 M. As a result of this
43 geographical configuration, Ukraine's south-facing coast generates
44 projections which overlap with the maritime projections of the Romanian

⁸¹ RB, par. 3.152 (italics in the text).

⁸² ITLOS/PV.11/2/Rev.1 (E), p. 17, lines 22-23 (Reichler).

⁸³ RB, par. 3.169.

⁸⁴ RB, par. 3.156.

⁸⁵ RB, par. 3.159.

⁸⁶ See, for example, CR 2008/18, 2 September 2008, p. 64-67, par. 15-17, and p. 69-70, par. 26 and 27 (1) (Crawford) et CR 2008/19, 3 September 2008. P. 16, par. 22 (Crawford).

1 coast. Therefore, the Court considers these sectors of Ukraine's coast as
2 relevant coasts.⁸⁷

3
4 There is no reason why the southern part of the coast of Myanmar adjacent to the
5 Bay of Bengal should be any different – it generates projections that overlap
6 projections from the Bangladesh coast. This is the only determining criterion.

7
8 As a result, Mr President, it is the whole of the coast of Myanmar from the estuary of
9 the Naaf River to Cape Negrais that is relevant for delimitation.

10
11 This leads me to the part of the coast of Bangladesh which, according to us, should
12 not be included in the Applicant's relevant coast for the simple reason that the coasts
13 concerned do not generate extensions that overlap those of Myanmar's coast. We
14 are talking about the estuary of the Meghna River and its shores. In Bangladesh's
15 view, the exclusion of these two segments of the Bangladesh coast "would punish
16 Bangladesh twice for the configuration of its coast".⁸⁸ Might I point out that nature
17 does not "punish" anyone; it just is, quite simply. However, in the first day, in these
18 oral pleadings Mr Reichler completely neglected this part of the coast of Bangladesh
19 in his description of the coastal geography.⁸⁹ And with good reason! What Professor
20 Crawford wants to include in the relevant coast of Bangladesh is not even a coast,
21 but rather a line in the sea without any relevant coast behind it. Admittedly, as
22 William Blake and Professor Crawford suggest,⁹⁰ you can see the world in a grain of
23 sand; but here we have nothing but water – no sand and no coast!

24
25 The shores of the estuary, the real geographic coast, generate no projection
26 overlapping that of any coast of Myanmar. The eastern shore of the estuary is clearly
27 west-facing and only projects towards the other shore. Similarly, the western shore
28 of the estuary does not generate, even potentially, any projection capable of
29 overlapping with projections of Myanmar's coast. Its projections aim at either the
30 other bank of the estuary or the Bangladesh coast.

31
32 In this regard the situation is wholly comparable to that of the coasts in the Gulf of
33 Karkinit'ska in the case concerning *Maritime Delimitation in the Black Sea*, in which
34 the ICJ disregarded the coasts of this gulf, saying – and I quote the International
35 Court of Justice:

36
37 The coasts of this gulf face each other and their submarine extension
38 cannot overlap with the extensions of Romania's coast. The coasts of
39 Karkinit'ska Gulf do not project in the area to be delimited. Therefore,
40 these coasts are excluded from further consideration by the Court.⁹¹

41
42 The coasts – and I emphasize the "coasts" – of the Karkinit'ska Gulf do not project
43 into the zone to be delimited, just as the coasts of the estuary of the Meghna River
44 do not project into the zone to be delimited, but towards other Bangladesh coasts. In

⁸⁷ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, p. 97, par. 101.

⁸⁸ BR, par. 3.171.

⁸⁹ ITLOS/PV.11/2/Rev.1 (E), pp. 9-10 (Reichler).

⁹⁰ ITLOS/PV.11/5, p. 6, line 27.

⁹¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, p. 97, par. 100.

1 this respect, they are wholly comparable to the coasts of the Ukrainian gulf and must
2 therefore be excluded from the relevant coasts.

3
4 True, the Karkinit's'ka Gulf opens towards other parts of the Ukrainian coast and not
5 towards the area to be delimited, whereas the opening of the Meghna River estuary
6 is opposite the area to be delimited. The Court however underlined clearly in 2009
7 that a closing line, such as the one Professor Crawford would like to see added to
8 the relevant coast of Bangladesh, I am quoting here, "does not generate any
9 entitlement";⁹² coasts alone can generate maritime spaces, not phantom, imaginary
10 lines.⁹³ It is decidedly the land which dominates the sea.

11
12 In no case can Bangladesh enjoy treatment similar to that of Canada in the case
13 concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, and
14 more particularly the Chamber's treatment of the coasts in the Bay of Fundy.
15 Granted, the Court included certain parts of the northern and southern coasts of the
16 Bay of Fundy in the relevant coast, although they are opposite each other and
17 appertain entirely to Canada;⁹⁴ but that was not because the opening of this bay was
18 opposite the area of delimitation. The decisive point was the specific location of the
19 end point of the land boundary between the United States and Canada exactly at the
20 opening of the Bay of Fundy. The situation in respect of the estuary of the Meghna
21 River is completely different. If, by way of a strictly geopolitical hypothesis, the land
22 boundary between Bangladesh and Myanmar had been placed somewhere around
23 the Island of Kutubdia, which you will see on the screen, the coasts on either side of
24 the estuary would undoubtedly have been relevant, but that is not where the
25 boundary is; it is much further to the south.

26
27 So there is no reason to include the shores of the Meghna River estuary in the
28 relevant coasts of the Parties, and absolutely no reason to include a purely
29 hypothetical line that cannot generate any maritime entitlement.

30
31 To summarise, Mr President, Members of the Tribunal, the relevant coasts for the
32 delimitation between Myanmar and Bangladesh are as follows:

33
34 - on Myanmar's side, the relevant coast extends from the mouth of the Naaf
35 River to Cape Negrais.

36
37 - on Bangladesh's side, the relevant coast extends from the mouth of the Naaf
38 River to the eastern limit of the estuary of the Meghna River and from the western
39 entry into the estuary up to the endpoint of the land boundary with India.

40
41 The relevant coast of Myanmar has, consequently, an overall length of around
42 740 km. The two parts of the Bangladeshi coast that are relevant to the delimitation
43 measure 161 km and 203 km respectively. The length of the relevant coast of
44 Bangladesh is therefore 364 km. We have included this sketch map in tab 3.6 in your
45 folders.

⁹² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, p. 97, par. 100.

⁹³ See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246, p. 270, par. 31.

⁹⁴ *Ibid.*, p. 336, par. 221.

1
2 Mr President, I need another few minutes for the subject of the relevant maritime
3 area.

4
5 Mr President, it will be about ten minutes, perhaps we could stop now for coffee.
6

7 **THE PRESIDENT:** Since you are going to start a new section, I was going to
8 suggest that we take a 30-minute coffee break and return at noon, unless you would
9 wish to continue your statement.

10
11 **MR MÜLLER (*Interpretation from French*):** I suggest that I stop here and continue
12 after the break.

13
14 *(The sitting was adjourned at 11.30 a.m. and resumed at noon.)*

15
16 **THE PRESIDENT:** We shall continue now. Mr Müller, you have the floor.
17

18 **MR MÜLLER (*Interpretation from French*):** Mr President, Members of the Tribunal,
19 before the break I explained the relevant coasts in law for the delimitation between
20 Bangladesh and Myanmar.

21
22 Now I should say a few words on the relevant area because the Parties still disagree
23 as to the extent of this area. Although Professor Crawford's statement rendered
24 Bangladesh's position more legally correct, it is still far removed from the objectivity
25 that the speaker promised.⁹⁵

26
27 The relevant maritime area is dependent on the relevant coasts, on the one hand,
28 and on the projections of these coasts, insofar as they overlap, on the other. We also
29 heard this last Monday.⁹⁶

30
31 You will see on the screen the relevant zone as defined by Bangladesh up to the end
32 of the written proceedings. It is not dependent on the relevant coasts, but on the
33 coastal facades as determined by our opponents. The relevant zone that
34 Bangladesh has been claiming since last Monday is different. As you can see on the
35 sketch map on your screens, which merely repeats the relevant zone projected last
36 Monday, including this time the maritime areas that are directly in front of the
37 geographic coast. Myanmar criticised the Applicant's position on this point.⁹⁷ The
38 Applicant's new argument recognises the merit of our criticism.

39
40 But there are still two points on which the Parties are not in agreement. These
41 differences concern, on the one hand, in the more southerly area, the consequences
42 of the relevance of the southern part of the coast of Rakhine in respect of the extent
43 of the relevant zone; and, on the other hand, to the north-west the exact extent of the
44 relevant area.
45

⁹⁵ ITLOS/PV.11/5, p. 11, lines 36-37 (Crawford).

⁹⁶ ITLOS/PV.11/5, p. 12, lines 1-10 (Crawford).

⁹⁷ CMM, par. 5.75.

1 As explained in its written pleadings and on last Monday,⁹⁸ Bangladesh did not
2 include in the relevant zone maritime areas which, according to Bangladesh, are the
3 subject of claims on the part of India. It therefore extended the relevant zone only up
4 to the line claimed by this third State – while changing it in its Reply to take into
5 account new information it claimed to have received concerning the claims of India,
6 which is not a party to these proceedings.⁹⁹ In these calculations not only is
7 Bangladesh excluding a maritime area of more than 11,000 km² but they also make
8 the delimitation between Bangladesh and Myanmar depend on the claims of a third
9 State, claims which it says are changing and are in no way established in law or in
10 fact. But we do not see why we should not include these maritime areas over which
11 Bangladesh may potentially claim sovereign rights, once the delimitation with India
12 has been settled. I find it difficult to believe that Bangladesh has finally renounced
13 any claim to these areas and does not lay any claim to them in the framework of the
14 pending arbitration with India. It is for this reason that this area should be re-included
15 in the relevant area up to the equidistance line between the coasts of the two States
16 in question, that is to say India and Bangladesh. This way of proceeding is in
17 conformity with the jurisprudence of the International Court of Justice. In the case of
18 the delimitation between Romania and Ukraine the Court re-incorporated in the
19 maritime zone a part of the maritime area claimed by Bulgaria against Romania.¹⁰⁰

20
21 The sketch map, which is also at tab 4.19 of Bangladesh's folder, confirms moreover
22 that Bangladesh is potentially seeking an area much larger than that. The line of
23 delimitation sought by India is, at the end of the day, only a pretext to reduce the
24 relevant area, and used for the purpose of dramatizing the Applicant's geographic
25 and legal position.

26
27 Finally, the relevant area of Bangladesh does not take account either of the relevant
28 south coast of Myanmar, which extends all the way to Cape Negrais. As I have just
29 shown, this is a relevant coast, the extension of which overlaps with that of the coast
30 of Bangladesh. Thus, the maritime areas opposite this relevant coast should be
31 included in the relevant area. In the case concerning the delimitation between
32 Romania and Ukraine the Court did the same for the northernmost coast of Ukraine,
33 which I referred to a short while ago. This coast was considered part of the relevant
34 coast, in spite of its distance from the delimitation zone, and the Court noted:

35
36 The section of the Ukrainian coast situated to the north of the line running
37 from Point S to Cape Tarkhankut is a relevant coast for the purpose of the
38 delimitation exercise. Accordingly, the area lying immediately south of this
39 coast ...¹⁰¹

40
41 The relevant area defined thus, Mr President, is slightly smaller than that which the
42 Respondent has referred to in its written pleadings. According to the explanation
43 given by Professor Crawford last Monday, Bangladesh considers that we cannot
44 include certain maritime areas in the south-west region because the projections of
45 the coast of Bangladesh do not overlap those of Myanmar in this region. We take

⁹⁸ ITLOS/PV.11/5, p. 12, lines 22-25 (Crawford).

⁹⁹ RB, par. 3.36 (note 49) et par. 3.186.

¹⁰⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, p. 100, par. 114).

¹⁰¹ *Ibid.*, p. 100, par. 113.

1 note of the Applicant's position on this point. I shall make only one comment on the
2 subject. If Bangladesh is right, the only consequence which can derive from this is
3 that the portion of the maritime areas awarded to Myanmar in the delimitation is
4 reduced, which increases the ratio in its favour. Sir Michael is going to come back to
5 this this afternoon.

6
7 For the moment we need only note that the relevant zone, as defined by Bangladesh
8 and corrected by Myanmar – the zone therefore in which the entitlements of
9 Bangladesh and those of Myanmar actually overlap – does not include the grey area.
10 In fact, the relevant zone does not extend up to the limit of 200 M measured from the
11 base lines of Myanmar, the limit to which Bangladesh is seeking access.

12
13 But, Mr President, these spaces are either part of the relevant area or they are not.
14 Just as there are not two sets of relevant coast, there is only one relevant zone.

15
16 To conclude rapidly on this point, Mr President, Myanmar considers that the relevant
17 maritime zone for the delimitation, as defined in accordance with the rules identified
18 in the international jurisprudence on the subject, is that which you see on the screen.
19 This maritime zone, the zone in which delimitation must be effected, covers an area
20 of approximately 214,300 km². There again you will find the sketch map now on the
21 screen in your folders at tab 3.7.

22
23 Mr President, Members of the Tribunal, I would like to thank you for your kind
24 attention. Mr President, I would ask you now to give the floor to Mr Coalter Lathrop
25 so that he can continue with the presentation of Myanmar.

26
27 **THE PRESIDENT:** I now give the floor to Mr Coalter Lathrop.

28
29 **MR LATHROP:** Mr President, Members of the Tribunal, this morning Professor
30 Pellet set forth the law applicable to maritime delimitations beyond 12 M. In that
31 presentation he discussed the role of the equitable principles/relevant circumstances
32 rule and the three-stage equidistance/relevant circumstances method.

33
34 My task today is to present the first of the three stages – the construction of the
35 provisional equidistance line. My colleagues, Professor Forteau and Sir Michael
36 Wood, will present the second and third stages of the equidistance/relevant
37 circumstances method in subsequent presentations. In my presentation, I will first
38 review the case law on the determination of base points. In that review, I will focus
39 on the *Black Sea* case for two reasons. First, it is the most recent in a long line of
40 cases that have applied the same approach to this first stage. Second, the coastal
41 geography of that case shares much in common with the case before you today. I
42 will then turn to the determination of base points in the case between Myanmar and
43 Bangladesh and conclude with a description of the resulting provisional equidistance
44 line.

45
46 Although the case between Romania and Ukraine in the Black Sea is the most
47 recent international maritime boundary decision from any international court or
48 tribunal, it is not particularly special¹⁰². Indeed, it is one in a long line of cases in

¹⁰² *Maritime Delimitation in the Black Sea, Judgment, I.C.J. Reports 2009* (hereinafter "*Black Sea*"), p.

1 which the Court and other tribunals have taken the same approach to delimitation.
2 The outcome in the *Black Sea* case was not surprising, nor was the method used to
3 achieve it.

4
5 As in most previous cases, the Court applied the three-stage equidistance/relevant
6 circumstances method in order to delimit an equitable equidistance boundary
7 between the mainland coasts. The Court gave no effect to a prominent Ukrainian
8 island in the area, Serpents' Island, beyond its own territorial sea. The map on the
9 screen is from the Court's judgment in the *Black Sea* case. It shows the coastal
10 geography in the area and the lateral boundary extending from the adjacent coasts.
11 Like the geography in the present case, the predominant coastal relationship
12 between the Parties was one of adjacency, with an incongruous island situated in the
13 vicinity of the delimitation. There are minor differences between the geography in the
14 two cases. For example, the Ukrainian island in question was not situated in front of
15 the other state's coast. Nonetheless, the geography is similar enough that strong
16 parallels can be drawn. The line delimited by the Court in those geographic
17 circumstances is similar to the outcome that Myanmar argues for here –
18 equidistance from adjacent mainland coasts with no effect given to St Martin's
19 Island.

20
21 Other than the unanimity of the Court, what set the *Black Sea* decision apart from
22 previous delimitation decisions was the clarity with which the Court explained the
23 standard delimitation methodology, including the first stage of that method – the
24 determination of the base points and the construction of the provisional equidistance
25 line therefrom.

26
27 Before I explain the Court's first-stage analysis in the *Black Sea* case, I would like to
28 clarify some concepts and terminology. It should be understood that, as a technical
29 matter, the construction of an equidistance line is a purely objective exercise
30 involving trigonometric calculations on the surface of an ellipsoid. That may sound
31 complicated, and as a matter of mathematics it is certainly beyond my abilities, but
32 as a matter of process it is really quite straightforward. The inputs are the coasts (or
33 base lines) of both States, represented by a series of points, or "base points", along
34 the charted low-water line. The output is an equidistance line – a line that is an
35 equal distance from the nearest points on the coasts of both States. Once the
36 coasts, or base lines, have been determined, it is only a matter of plugging them into
37 computer software to perform the calculation. What comes out is a line, every point
38 of which is an equal distance from the nearest points on the chosen baselines of
39 each State. These "nearest points" are most accurately called not simply base
40 points, but *relevant base points*, that is, base points that are relevant for the
41 calculation of the equidistance line. There may be many base points on the base
42 lines that are farther from the equidistance line than the "nearest points". Those are
43 still base points but those base points are not mathematically relevant base points.

44
45 The principle here is that once the coastal inputs, or base lines, are determined,
46 there are no further decisions to be made about the relevant base points. The choice
47 of relevant base points is entirely a matter of objective measurements.
48

67, para. 219.

1 By contrast, determination of the baselines is a matter of international law. To
2 identify the appropriate coastal inputs, a court or tribunal must consider each coastal
3 feature in turn and assess whether the feature should or should not influence the
4 course of the provisional equidistance line on the basis of previous judicial decisions
5 and state practice. Once the tribunal has done so, the base points used in the
6 equidistance calculation are simply the remaining relevant points – that is, the
7 nearest points – located on the base lines of the legally controlling coastal features.

8
9 To illustrate the distinctions between coastal features, base lines, and base points,
10 allow me to read a quote regarding Ukraine’s contentions with respect to base points
11 on Serpents’ Island. The Court wrote:

12
13 “Ukraine maintains that because Serpents’ Island has a coast, it follows
14 that it has a baseline. As a result, it states that there are base points on
15 that baseline that can be used for plotting the provisional equidistance
16 line”¹⁰³.

17
18 To paraphrase or rephrase that quotation: the coastal feature – Serpents’ Island –
19 has a base line along which lie innumerable base points, some of which could be
20 relevant in the construction of the provisional equidistance line. But when it came
21 time for the Court to consider the role of Serpents’ Island in the delimitation, it was
22 not concerned about whether base points on Serpents’ Island might be *relevant* as a
23 matter of computation. Instead, the Court was concerned about whether that coastal
24 feature itself should be allowed to influence the delimitation, as a matter of law.

25
26 The Court decided that Serpents’ Island should not. The Court wrote:

27
28 To count Serpents’ Island as a relevant part of the coast would amount to
29 grafting an extraneous element onto Ukraine’s coastline; the
30 consequence would be a judicial refashioning of geography, which neither
31 the law nor practice of maritime delimitation authorizes. The Court is thus
32 of the view that Serpents’ Island cannot be taken to form part of Ukraine’s
33 coastal configuration.

34
35 For this reason, the Court considers it inappropriate to select any base
36 points on Serpents’ Island for the construction of the provisional
37 equidistance line between the coasts of Romania and Ukraine.¹⁰⁴

38
39 Twenty-four years earlier, the International Court made the same determination
40 about a similar feature when constructing the first-stage provisional equidistance
41 line. The Court wrote, in *Libya/Malta*:

42
43 An immediate qualification of the median line which the Court considers
44 must be made concerns the base points from which it is to be
45 constructed... In this case, the equitableness of an equidistance line
46 depends on whether the precaution is taken of eliminating the
47 disproportionate effect of certain ‘islets, rocks and minor coastal
48 projections’. The Court thus finds it equitable not to take account of Filfla

¹⁰³ *Ibid.*, para. 126.

¹⁰⁴ *Ibid.*, para. 149. See also Memorial of Bangladesh (hereinafter “BM”), para. 6.51.

1 in the calculation of the provisional median line between Malta and
2 Libya.¹⁰⁵
3

4 The Tribunal will recall from Bangladesh's Memorial that Filfla was a Maltese island
5 located less than 3 M from Malta's main island¹⁰⁶. Clearly, mere proximity to the
6 coast is not the sole determinant of whether or not to include a feature in the
7 calculation of the line.

8
9 In *Eritrea/Yemen*, the tribunal went through a similar process of identifying the
10 appropriate coastal features before plugging their base lines into the equidistance
11 line calculation. As that tribunal noted,

12
13 [t]here do arise some questions about what is to be regarded as the
14 'coast' for these purposes, especially where islands are involved; and
15 these questions ... require decisions by the Tribunal¹⁰⁷.

16
17 In the process of making those decisions, the tribunal eliminated several coastal
18 features from the calculation on the grounds that they were either not above water at
19 low tide¹⁰⁸ or not part of the mainland coast¹⁰⁹.

20
21 The International Court in *Qatar v Bahrain* went through the same process, devoting
22 over twenty-five paragraphs of its judgment to an analysis of which features should
23 and should not be used to construct the provisional equidistance line¹¹⁰. After the
24 construction of the provisional line, the Court eliminated additional features, but this
25 was in the second-stage consideration of relevant circumstances¹¹¹, which is a topic
26 that Professor Forteau will address.

27
28 Although courts and tribunals write about determining or identifying *base points*, this
29 is simply shorthand for the process of assessing whether the *base line* of a particular
30 coastal feature, such as an island, is an appropriate source of base points as a
31 matter of law. If the answer is "yes, the feature is an appropriate source of base
32 points", then the relevant base points (if any) on that feature are identified through a
33 mathematical calculation. If the answer is "no, the feature is not an appropriate
34 source of base points", then the base points on that feature are not used in the
35 calculation of the provisional equidistance line.

36
37 Of course, the reverse situation does arise. Even if a given coastal feature is an
38 appropriate source of base points from a legal perspective, it is often the case that
39 the coastal feature provides no relevant base points from a technical perspective
40 because no point along the baseline of that feature is "nearest" to the provisional

¹⁰⁵ *Continental Shelf (Libyan Arab Jamahiriya v Malta)*, Judgment, I.C.J. Reports 1985, p. 48, para. 64.

¹⁰⁶ See BM, para. 6.54.

¹⁰⁷ *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, R.I.A.A., Vol. 22, p. 366, para. 133.

¹⁰⁸ *Ibid.*, paras. 143-145 (eliminating Negileh Rock from consideration as part of the relevant coast).

¹⁰⁹ *Ibid.*, paras. 147-148 (eliminating the island of al-Tayr and the island group of al-Zubayr from consideration as part of the relevant coast).

¹¹⁰ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment*, I.C.J. Reports 2001 (hereinafter "*Qatar v Bahrain*"), pp. 97-103, paras. 184-209.

¹¹¹ See *ibid.*, paras. 217-223 and 245-249.

1 equidistance line. This possibility is illustrated by another example from the *Black*
2 *Sea* case. On the Ukrainian coast, just north of the land boundary terminus, the
3 Court identified two features – the islands of Tsyganka and Kubansky – both of
4 which the Court found to be legally appropriate sources of base points¹¹²; but only
5 the base point at the southeastern tip of Tsyganka was mathematically relevant. The
6 Court noted that the nearest base point on Kubansky did

7
8 not produce any effect on the equidistance line plotted by reference to
9 [nearer base points on the coasts of both states]... This base point is
10 therefore to be regarded as irrelevant for the purposes of the present
11 delimitation¹¹³.

12
13 The same was true of base points north of Kubansky as well.

14
15 Continuing this iterative process in the *Black Sea* case, the Court found several
16 more coastal features that were both legally appropriate sources of base points and
17 prominent (or seaward) enough to provide mathematically relevant base points. On
18 the Romanian coast, those features were Sacalin Peninsula and the landward end of
19 Sulina Dyke. On the Ukrainian coast, those features were Tsyganka Island, Cape
20 Tarkhankut, and Cape Kherones. Altogether, the Court designated five base points
21 for the construction of the provisional equidistance line in this case. The map on the
22 screen illustrates those five base points, the provisional equidistance line, and the
23 construction lines connecting the equidistance turning points with the relevant base
24 points. (Those equidistance turning points are designated A, B and C on this map.)
25 The Tribunal will undoubtedly note that from Tsyganka Island to Cape Tarkhankut
26 there are no mathematically relevant *base points*, even though much of this coast
27 was deemed to be relevant coast. It should also be noted that from the land
28 boundary terminus to point B, the provisional equidistance line is constructed
29 between adjacent coasts. Then, at point B, this relationship changes. Through point
30 C and to the south, this becomes a boundary between opposite coasts. A somewhat
31 similar geographic configuration is present in the case now before this Tribunal—a
32 point to which I will turn in a moment. For now, what can also be seen on this map is
33 that base points on Serpents' Island were not used to construct the provisional
34 equidistance line despite their relative proximity to that line. Serpents' Island and its
35 base points were not used because, as the Court wrote, their use would have been
36 “a judicial refashioning of geography, which neither the law nor practice of maritime
37 delimitation authorizes”.¹¹⁴

38
39 In the Bay of Bengal Myanmar followed this standard approach, constructing the
40 provisional equidistance line using the nearest points on appropriate features. In the
41 process, Myanmar identified five base points that were both mathematically relevant
42 to the construction of the provisional equidistance line and located on features that,
43 as a legal matter, were appropriate sources of base points.

44
45 Before I describe those base points in further detail, let me respond to an argument
46 Bangladesh raised in the written pleadings and again during the first round of these

¹¹² *Black Sea*, I.C.J. Reports 2009, p. 44, paras. 143-144.

¹¹³ *Ibid.*, para. 144.

¹¹⁴ *Ibid.*, para. 149.

1 hearings¹¹⁵. Bangladesh opposes, as a general matter, the use of an equidistance
2 line for this boundary delimitation, but also has a specific problem with “the fact that
3 its direction is controlled by a total of just five base points on both Parties’ coasts,
4 three on Myanmar’s side ... and only two on Bangladesh ...”¹¹⁶. Bangladesh goes on
5 to tell us that “[i]t would be remarkable to base a maritime boundary line ... on such a
6 small sampling of points”¹¹⁷.

7
8 But would it really be remarkable to use just five base points to construct the
9 provisional equidistance line in this case? As just demonstrated, five base points
10 were sufficient to delimit a boundary in the Black Sea stretching well over 100 M
11 from start to finish. In other delimitations, especially those between adjacent coasts,
12 even fewer base points have been used. Just three base points were used for the
13 170 nautical mile western section of the boundary in the *Anglo-French case*,¹¹⁸ and
14 just two base points were used to construct the provisional equidistance line in
15 *Cameroon v Nigeria*¹¹⁹. Clearly, five base points are more than enough in the
16 geography of this case. Not only are they enough, the five base points presented by
17 Myanmar are the only base points that influence the course of the equidistance line.
18 In other words, these five are the only mathematically and legally relevant base
19 points.

20
21 On the Bangladesh coast, there are two relevant base points: we have designated
22 them $\beta 1$ on Bangladesh’s mainland coast at Shahpuri Point just north of the land
23 boundary terminus, and $\beta 2$ on the southern tip of Mandabaria Island near the land
24 border with India. On Myanmar’s coast, there are three relevant base points, all on
25 Myanmar’s mainland coast. The first, $\mu 1$, is on the coast just south of the land
26 boundary terminus at Cypress Point. The second, $\mu 2$, is on the small promontory
27 near Kyaukpandu. The third, $\mu 3$, is located on the northern headland of the May Yu
28 River.

29
30 Of course, as was the case with potential base points on Ukraine’s coast between
31 Tsyganka Island and Cape Tarkhankut, here there are an infinite number of base
32 points located on baselines that, because of their distance from the provisional
33 equidistance line, are not relevant to the construction of that line. For example, north
34 of the land boundary terminus, many base points on Bangladesh’s mainland coast
35 and coastal islands could be considered legally appropriate base points, but because
36 $\beta 1$ is nearer to the provisional equidistance line, then those other potential base
37 points are not relevant. On Myanmar’s side, the same is true of base points on the
38 coastal features south of base point $\mu 3$. These potential base points on both coasts
39 were eliminated on the objective basis of a distance measurement. They are not
40 nearest.

41

¹¹⁵ See Reply of Bangladesh (hereinafter “BR”), para. 3.99; ITLOS/PV11/2(E), p. 14, lines 42-44, and p. 17, lines 32-34, 37-40 (Reichler); ITLOS/PV11/4(E), p. 23, lines 14-17 (Martin).

¹¹⁶ BR, para. 3.99.

¹¹⁷ *Ibid.*

¹¹⁸ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, *R.I.A.A.*, Vol. 18, Annex, Technical Report to the Court, pp. 128-129.

¹¹⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Equatorial Guinea Intervening)*, *Merits, Judgment*, *I.C.J. Reports 2002*, p. 443, para. 292.

1 Several other base points were eliminated for legal reasons, leaving us with the five
2 final base points used to construct the equidistance line. Allow me to briefly explain
3 the basis for eliminating those other base points.

4
5 First, South Talpatty - which is present in the upper image on the screen - is a
6 potential source of relevant base points because of its relatively seaward location.
7 Yet, as a legal matter, South Talpatty cannot be a source of base points for two
8 reasons. First, the sovereignty of this feature is disputed between Bangladesh and
9 India. Second, as the Tribunal can see on the images provided by Bangladesh in its
10 Memorial and now shown on the screen, it is not clear whether the coastal feature-
11 which may have existed in 1973 - still exists. The next nearest base point on an
12 appropriate coastal feature is found at $\beta 2$ on the southern coast of Mandabaria
13 Island, which is also shown on the screen.

14
15 While we are here, the Tribunal will recall that $\beta 2$ is the base point that Bangladesh
16 claims is "located on a coast characterized by a 'very active morpho-dynamism'"¹²⁰.
17 Bangladesh expresses concern that "the location of base point $\beta 2$ this year might be
18 very different from its location next year"¹²¹. Based on the images on the screen from
19 Bangladesh's memorial, it is difficult to detect any change in the location of $\beta 2$ in the
20 sixteen years from 1973 to 1989. I mention this only in passing, because nautical
21 charts not satellite images are used to determine the location of baselines. In any
22 event, these images, contrary to Bangladesh's concerns, indicate that the area of $\beta 2$
23 is quite stable.

24
25 Here is a second example of a set of coastal features that are potential sources of
26 relevant base points, but that were nonetheless excluded from the calculation of the
27 equidistance line. I refer to the low-tide elevations around the mouth of the Naaf
28 River, the Cypress Sands, and Sitaparokia Patches, off Myanmar's coast, all shown
29 in green on the map now on the screen. Neither Party used base points on those
30 low-tide elevations, despite the fact that they are legitimate sources of base points
31 for measuring the breadth of the territorial sea and are nearer to the territorial sea
32 equidistance line than the base points on the mainland coasts. These low-tide
33 elevations are also nearer the provisional equidistance line than either base point $\beta 1$
34 or $\mu 1$. Why, then, did neither Party make use of the technically relevant base points
35 on these prominent features to construct their lines? The reason is that they cannot
36 be used, as a legal matter, for that purpose. The International Court in *Qatar v*
37 *Bahrain* noted that "low-tide elevation[s] ... situated in the overlapping area of the
38 territorial sea of two States"¹²² "must be disregarded" for the purpose of drawing the
39 equidistance line¹²³.

40
41 Finally, two other coastal features must be eliminated as sources of base points:
42 Myanmar's May Yu Island and Bangladesh's St Martin's Island. Both of these
43 features are legitimate sources of normal baselines for measuring the breadth of the
44 territorial sea, and both would otherwise have provided the nearest base points –
45 that is, the relevant base points – for the construction of the provisional equidistance
46 line. However, the technical qualities of these features cannot overcome their legal

¹²⁰ BR, para. 3.104.

¹²¹ *Ibid.*

¹²² *Qatar v Bahrain, I.C.J. Reports 2001*, p. 101, para. 202.

¹²³ *Ibid.*, para. 209.

1 deficiencies. These features must be eliminated from the construction of the
2 provisional equidistance line, as a legal matter, for the same reasons that Serpents'
3 Island, an otherwise legitimate source of relevant base points, was disregarded by
4 the Court in the *Black Sea* case. These two outlying features are extraneous
5 elements relative to the predominant coastal geography of the Parties. They cannot
6 be grafted onto those coasts and cannot be taken to form part of the coastal
7 configuration of the Parties without refashioning geography¹²⁴.

8
9 The use of these anomalous features in the construction of the provisional
10 equidistance line would create a line that would be, to borrow a phrase from
11 Bangladesh, "wholly inconsistent with the dominant geographic realities in the
12 area"¹²⁵. Myanmar could not agree more. Bangladesh is correct in arguing that, if
13 these islands were used in the construction of the provisional equidistance line, the
14 entire course of that line would be determined by these two features alone¹²⁶. It
15 would be as if the mainland coasts of the Parties did not exist. From this observation,
16 with which Myanmar agrees, Bangladesh then leaps to the conclusion that the only
17 remedy for this situation is the application of a method other than equidistance¹²⁷.
18 This is, to say the least, a wild overreaction.

19
20 Even when faced with extraneous maritime features, international courts and
21 tribunals have consistently applied the three-stage equidistance/relevant
22 circumstances method and eliminated those features in question. Myanmar
23 advocates the same approach here, while Bangladesh takes the opposite view.

24
25 Mr President, as I noted earlier in this presentation, once the coastal inputs have
26 been decided, the rest is left to trigonometric calculations. The correct coastal inputs
27 consist of points along the low-water lines of all coastal features of both Parties
28 except those features that were eliminated for the legal reasons as described above.
29 Here, the location of the low-water line was determined using the most up-to-date
30 British Admiralty charts. The output of the trigonometric calculations is the
31 provisional equidistance line generated from the nearest base points on the
32 baselines of both states. The map on the screen shows the result of this calculation.
33 From the agreed land boundary terminus, Point A, the line extends through point E
34 to point F: a point equidistant from β_1 , μ_1 and μ_2 , thence to point G: a point
35 equidistant from β_1 , μ_2 and μ_3 , and, finally, to point Z: a point equidistant from β_1 ,
36 μ_3 and β_2 .

37
38 Before I conclude my presentation and while this map is still on the screen, I would
39 like to make two final points. First, Bangladesh notes an inequality in the number of
40 base points along the Parties' adjacent coasts and casts itself as disadvantaged.
41 Bangladesh writes,

42
43 because of the absence of additional Bangladesh base points north of β_1 ,
44 there is nothing to counteract the effects of Myanmar's coast between
45 base points μ_1 , μ_2 , and μ_3 ¹²⁸.

¹²⁴ *Black Sea*, I.C.J. Reports 2009, p. 44, paras. 149.

¹²⁵ BM, para. 6.47.

¹²⁶ See *ibid.*, paras. 6.47-6.55.

¹²⁷ *Ibid.*, para. 6.55.

¹²⁸ BR, para. 3.105.

1
2 Three against one: Bangladesh, apparently, feels unfairly outnumbered. But in fact
3 the reason that $\beta 1$ is the only relevant base point along this part of the Bangladesh
4 coast is that it is situated on the most prominent feature in the area - Shahpuri Point.
5 No other features along the Bangladesh coast are more prominent than Shahpuri
6 Point. Indeed, no features along the Myanmar coast are as prominent. It takes three
7 successive features along the Myanmar coast to counteract the overwhelming effect
8 of the single base point on Shahpuri Point on the direction of the provisional
9 equidistance line.

10
11 My second point concerns the coastal geography that affects the line at point Z and
12 beyond. Mr President, I promised earlier that I would return to address the transition
13 from coastal adjacency to oppositeness in this case. You will recall that we saw this
14 transition occur at point B in the *Black Sea* case where the opposite Crimean coast
15 of Ukraine begins to affect the delimitation, turning the line toward the south. We
16 have a similar coastal configuration here. The provisional equidistance line is
17 governed by the purely adjacent coasts of the Parties from the land boundary
18 terminus, through points F and G and out to point Z. It is at point Z that the purely
19 adjacent relationship begins to take on an element of oppositeness as Bangladesh's
20 $\beta 2$ influences the course of the line. Bangladesh complains that this transition occurs
21 "not so coincidentally ... at precisely the point it meets India's claim line"¹²⁹. In fact, at
22 or near point Z, the relationship between the adjacent coasts of Myanmar and
23 Bangladesh ceases and the relationship between the opposite coasts of Myanmar
24 and India begins. As Bangladesh implies, this is not a coincidence. Instead, it is a
25 function of the actual coastal geography of the Bay of Bengal. Bangladesh has very
26 little coastline west of $\beta 2$ and, it goes without saying, it has no coastline west of its
27 land border with India. The fact that Myanmar, Bangladesh, and India share a tripoint
28 in the vicinity of point Z is a geographic fact. Bangladesh must learn to live with that
29 fact, as have many other similarly situated coastal states around the world.

30
31 Mr President, Members of the Tribunal, this concludes my presentation on the
32 construction of the provisional equidistance line. I thank you for your kind attention
33 and, with your permission, I am quite sure that Professor Forteau, will be happy to
34 begin now in the remaining time to present the second stage of the
35 equidistance/relevant circumstances method.

36
37 **THE PRESIDENT:** Thank you. I call on Professor Forteau to take the floor.

38
39 **MR FORTEAU (*Interpretation from French*):** Thank you, Mr President. I am most
40 grateful to you for giving me the floor again.

41
42 Mr President, Members of the Tribunal, in accordance with the method firmly
43 established in jurisprudence, I will now examine the second stage of delimitation. I
44 will do so during the 15 minutes remaining between now and lunch, and I will
45 continue for about 50 minutes this afternoon.

46
47 Once the provisional equidistance line has been drawn it is for the international court
48 in this second stage of the process to see "whether there are factors calling for the

¹²⁹ *Ibid.*, para. 3.103.

1 adjustment or shifting [not the setting aside] of that line in order to achieve an
2 'equitable result'. I am quoting here the terms used in 2009 by the ICJ in *Romania v.*
3 *Ukraine*.¹³⁰

4
5 There is no dispute between the parties concerning the necessity to proceed to the
6 search for relevant circumstances in this second stage of the process. There is,
7 however, deep disagreement between them about the type of circumstances that
8 can be validly relied on in this respect.

9
10 The upshot of this disagreement is that the Parties also disagree on the equitable
11 nature of the equidistance line. Myanmar feels that there are no circumstances
12 requiring a shift in this line, resulting as it does in the present case in an equitable
13 solution. Bangladesh meanwhile rejects this conclusion, taking umbrage at the, in its
14 view, "dramatic" and "arbitrary" nature of delimitation based on equidistance.
15 According to Bangladesh, the equidistance line is not equitable in that it would leave
16 it "just a small, wedge-shaped area of maritime space".¹³¹

17
18 Mr President, Members of the Tribunal, I will focus my statement on these two
19 factors at issue between the two Parties. Having recalled the applicable principles as
20 regards relevant circumstances, I will indicate how they apply to this case, and I will
21 show that, in both respects, the Applicant State is systematically confusing, and
22 asking you to confuse, a fair solution and an equitable solution. What Bangladesh is
23 claiming is a proportional division of the area for delimitation, and this is certainly not
24 a delimitation leading to an equitable result within the meaning of contemporary
25 jurisprudence.

26
27 In response to Bangladesh's arguments on the first point, the nature of
28 circumstances that can validly be relied on, I will put forward two proposals.

29
30 First, I would point out that not all circumstances can be relied upon in support of the
31 adjustment of a provisional equidistance line; in other words, not every circumstance
32 is necessarily a "relevant" circumstance;

33
34 I will then emphasize the fact that an equidistance line can certainly produce an
35 equitable result as laid down by UNCLOS, including, let me stress, when it creates a
36 cut-off effect.

37
38 Let us start with the first point, which should take us through to the lunch break.

39
40 In its Memorial¹³² and Oral Pleadings¹³³, Bangladesh has asserted that there was no
41 pre-defined list of circumstances that could be characterized as relevant
42 circumstances. Indeed, this is what the Arbitral Tribunal found in 2007 in the *Guyana*
43 *v. Suriname* case, which Bangladesh refers to in its Written Pleadings.

44
45 But it is not because the list of relevant circumstances supposedly remains open that
46 every circumstance can therefore become a relevant circumstance. Modern

¹³⁰ *I.C.J. Reports*, p. 112, para. 155.

¹³¹ ITLOS/PV.11/2 (E), p. 6, line 3/4 (Ms Moni).

¹³² Memorial of Bangladesh, para. 6.26.

¹³³ ITLOS/PV.11/4 (E), p. 11, lines 22-34 (Sands).

1 jurisprudence, which is well developed, has outlined what can be potentially
2 achieved in this respect,

3
4 Moreover, Bangladesh has implicitly admitted that not every circumstance is a
5 relevant circumstance, referring in its Memorial to an economic circumstance that,
6 significantly, has vanished from its Reply, and has not re-appeared during the oral
7 pleadings, the only conclusion being that Bangladesh now admits that it was not
8 actually a relevant circumstance.

9
10 In its Memorial the Applicant claimed that the economic needs of its population
11 constituted a relevant circumstance for delimitation. Bangladesh considered that
12 depriving it of as broad an access to the maritime areas as it was claiming was a
13 source of “inequity” because the fish in the Bay of Bengal are a key component of
14 the national diet.¹³⁴

15
16 However, the documents which Bangladesh annexed to its Memorial in support of
17 this show that as a matter of fact the population mainly consumes river-dwelling fish
18 and products of aquaculture, and that if more fish were to be consumed in
19 Bangladesh, stress would need to be placed specifically on fish from flood plains and
20 developing aquaculture.¹³⁵ It goes without saying that the inhabitants of Myanmar,
21 whose diet includes more ocean-dwelling fish and seafood, are in just as much need
22 of access to fisheries resources.

23
24 No matter what these needs may be, these considerations are all beside the point.
25 Economic needs such as these are extraneous to an exercise in maritime
26 delimitation. The case law has rejected the notion that economic considerations can
27 constitute a relevant circumstance. Myanmar recalled this in its Counter-Memorial,¹³⁶
28 and it can only note with satisfaction that the Applicant has given up this argument in
29 the meantime.

30
31 I shall add that these last remarks apply equally to access to the resources of the
32 continental shelf. That Bangladesh may wish to have access to these is one thing,
33 but that wish is not thereby turned into an entitlement of Bangladesh that absolutely
34 has to be recognised. Rightly or wrongly, delimitation depends on the coastal
35 configuration and on it alone.

36
37 The example of economic needs that I have just mentioned is merely one illustration,
38 amongst others, of the fact that not each and every circumstance necessarily
39 constitutes a relevant circumstance. The notion is a legal notion, and as such is
40 bound within legal limits, as made very clear by the arbitral tribunal in *Barbados v.*
41 *Trinidad and Tobago*, when it said that the factors which can be relied upon are

42
43 constrained by legal principle, *in particular in respect of the factors that may*
44 *be taken into account.* It is furthermore necessary that the delimitation be
45 consistent with legal principle as established in decided cases.¹³⁷
46

¹³⁴ Memorial of Bangladesh, para. 6.39.

¹³⁵ Memorial of Bangladesh, vol. III, annex 35.

¹³⁶ Counter-Memorial of Myanmar, para. 5.143.

¹³⁷ RIAA, vol. XXVII, p. 215, para. 243.

1 In other words, the decided cases are controlling on this point.

2
3 Specifically, three fundamental criteria in this respect make it possible to identify the
4 outlines of the circumstances that can be considered relevant. As I shall show,
5 Bangladesh has consistently disregarded these three criteria in this case,
6 notwithstanding the absolutely clear directives found in the contemporary case law.
7

8 The first criterion I am obliged to recall is that maritime delimitation cannot lead to a
9 refashioning of nature. It follows from this fundamental constraint that a circumstance
10 which if taken into account would lead to a refashioning of nature cannot be
11 regarded as a relevant circumstance. In my first statement I said that in 2002 in
12 *Cameroon v. Nigeria* the International Court of Justice stated:

13
14 The geographical configuration of the maritime areas that the Court is
15 called upon to delimit is a given. It is not an element open to modification
16 by the Court but a fact on the basis of which the Court must effect the
17 delimitation.
18

19 Bangladesh's argument is diametrically opposed to this fundamental principle.
20 Bangladesh, in its first round of oral argument, repeated time and again that the
21 critical geographical element in our case was the concavity of the Bay of Bengal; but
22 Bangladesh draws the wrong conclusion from this. Bangladesh considers that the
23 effects of geographical configuration must be compensated for. The International
24 Court of Justice, for its part, reaffirmed that "the geographical configuration of the
25 maritime areas [to be] delimit[ed] is a given ...[,] not an element open to modification
26 by the Court".

27
28 Bangladesh sees this principle, which is nevertheless well established, as a "truism",
29 which would prove "too much". According to the Reply of Bangladesh, if this truism
30 were correct, that is that you cannot refashion nature, "no departure from strict
31 equidistance would ever be warranted".¹³⁸
32

33 However, Bangladesh is confusing two things here that are very different. The
34 adjustment of the equidistance line can stem from different weights being attributed
35 to distinct elements of coastal geography. It is clear that a coastal configuration
36 leading to a result that is significantly disproportionate to the length of the coastline
37 of the two Parties may require an adjustment of the line in favour of the State the
38 length of whose coastline cannot be compared with that of its neighbour.
39

40 However, it is only in this case, where there is flagrant disproportion, that an
41 adjustment is called for. In the *Jan Mayen* case the ICJ made such an adjustment on
42 the ground that the ratio between the coast of Jan Mayen and that of Greenland was
43 "so disproportionate"¹³⁹ that there was reason to adjust it. In that case the ratio
44 between the coasts was 1:9.¹⁴⁰ One of the States had a coast that was nine times
45 longer than the other.
46

¹³⁸ Reply of Bangladesh, para. 3.8.

¹³⁹ *I.C.J. Reports 1993*, p. 67, para. 65.

¹⁴⁰ *I.C.J. Reports 1993*, p. 65, para. 61.

1 In this type of situation the adjustment does not refashion coastal geography; it is
2 aimed solely at reflecting it without a significant disproportion. The Court in The
3 Hague clearly underlined this in the same case on the basis of the following
4 reasoning:

5
6 The question for the Court is thus the following. The difference in the
7 length of relevant coasts is striking. Regard being had to the effects
8 generated by it, does this disparity constitute ... a 'relevant circumstance'
9 for the purposes of the rules of customary law requiring an adjustment or
10 shifting of the median line? A delimitation by the median line would, in the
11 view of the Court, involve disregard of the geography of the coastal fronts
12 of eastern Greenland and Jan Mayen.¹⁴¹

13
14 In other words, from beginning to end you can see that it is the coastal configuration
15 that dictates the delimitation, including any adjustment of the equidistance line. At no
16 point does the court refashion nature, and this is the reason why the non-
17 proportionality test balances geographic elements.

18
19 This way of proceeding is by no means comparable with an approach in which the
20 detrimental effect of nature would be corrected by reason of considerations this time
21 of an extra-geographic nature - *a fortiori* by reason of the simple fact that one of the
22 two States claims to be *disadvantaged* by nature. Do not forget, by the way, that if a
23 coastal State is disadvantaged by nature, it is still better off than a State that has no
24 access to the sea at all. This is precisely what Bangladesh is claiming. It bemoans, in
25 its Memorial, that it is "disadvantaged by its unique coastal geography";¹⁴² in other
26 words, it is its coastal configuration itself which Bangladesh is contesting now. It
27 cannot invoke a natural disadvantage here without at the same time breaching the
28 rule according to which delimitation cannot refashion nature. The directives
29 established in jurisprudence are clear in this, and I will close on this point this
30 morning. In its judgment of 2002 in *Cameroon v. Nigeria* the Court said that the
31 objective of maritime delimitation is "to seek to draw a delimitation line and not to
32 provide equitable compensation for a natural inequality".¹⁴³

33
34 Mr President, with your permission I would like to stop for the morning at this point
35 and would like to wish you and the delegation from Bangladesh *bon appétit*.
36 Mr President, Members of the Tribunal, thank you very much for your attention.

37
38 **THE PRESIDENT:** You will continue your statement this afternoon? Thank you very
39 much. This brings us to the end of this morning's sitting. The hearing will be resumed
40 this afternoon at three o'clock. The sitting is now closed.

41
42 *(Luncheon adjournment)*

¹⁴¹ *I.C.J. Reports* 1993, p. 68, paras. 67-68.

¹⁴² Memorial of Bangladesh, para. 2.46 (i).

¹⁴³ *I.C.J. Reports* 2002, p. 446, para. 299.