## SEPARATE OPINION OF JUDGE COT

*(Translation by the Registry)*

### 1. Introduction

For the most part, I am in agreement with the Judgment. The section on the delimitation of the continental shelf beyond 200 nautical miles is especially to be welcomed. The Tribunal has implemented the provisions of the United Nations Convention on the Law of the Sea productively, with a view to ensuring effective cooperation with the other organs responsible for applying the Convention, most notable among them the Commission on the Limits of the Continental Shelf.

I do have a serious reservation in respect of the delimitation of the exclusive economic zone and the continental shelf within 200 miles. The Tribunal claims to apply the equidistance/relevant circumstances method for this purpose. Yet it forsakes the equidistance line after some 30 miles in favour of an azimuth line. This, in my view, is plainly a perversion of the methodology and I am unable to concur with the Tribunal on this point.

I have however voted in favour of the operative part of the Judgment, for I believe that the line ultimately adopted satisfies the requirement laid down in articles 74 and 83 of the Convention that an equitable solution be achieved. That line is not very far removed from a properly adjusted provisional equidistance line.

### 2. Methodology

The Tribunal has opted to follow the methodology developed by international courts and tribunals over the past few decades and articulated most recently by the International Court of Justice in the case concerning *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* (*Judgment, I.C.J. Reports 2009*, p. 61, at pp. 101-103, paras. 115-122). I commend it for this, even though I would have preferred a clearer statement from it on the subject, one such as that in the joint declaration Judges Nelson and Chandrasekhara Rao and I have appended to the Judgment.

The process can be summarized in a few words. The judge must first define a delimitation method based on strict geographical and geological considerations. Priority must be given to the "equidistance" method, which cannot be ruled out unless reasons tied to the configuration of the coasts and the impossibility of identifying definite base points on them prevent it from being applied.

It is only where compelling reasons specific to the case in question preclude the drawing of a provisional equidistance line that courts and tribunals allow use of another method. The judge may then have recourse to a method such as that of the angle bisector, which, in particular, was followed by the International Court of Justice in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (*Judgment, I.C.J. Reports 2007*, p. 659).

At this stage in the process no heed is taken of considerations in respect of the equitableness of the result. The Court made this clear in denying Nicaragua's arguments in that case (*I.C.J. Reports 2007*, pp. 747-748).

The Tribunal is correct in rejecting Bangladesh's argument that the equidistance/relevant circumstances method is inherently inequitable in the present case. Bangladesh pleaded at length to the effect that the equidistance line produced an inequitable result on account of the double concavity of the Bay of Bengal. However, equitable considerations are not to be taken into account in drawing a provisional equidistance line. A provisional equidistance line has neither to be equitable or inequitable. It is a starting point in the reasoning of the judge, an abstract line the judge will then adjust in light of the relevant circumstances in the case in order to arrive at an equitable result.

There is nothing inequitable about the equidistance/relevant circumstances method in the present case. An unadjusted provisional equidistance line may produce an inequitable result; that is not a problem. What matters is that the adjusted equidistance line must be equitable and it is here.

### 3. Starting point and endpoint

I have no objection to the starting point chosen by the Tribunal in drawing the provisional equidistance line. Nor have I any in respect of the endpoint, that is to say the point where the line delimiting the exclusive economic zones and continental shelf of the two Parties intersects with the line marking the 200-nautical-mile limit measured from the baselines of the Parties' territorial seas. My problem lies between those two points.

The Parties were at odds over the starting point of the course of the line delimiting the exclusive economic zones and continental shelf.

Let us recall the geographical setting of the dispute. The line delimiting the respective territorial seas of Bangladesh and Myanmar begins at the Naaf River and then runs between Myanmar's mainland coast and Bangladesh's St. Martin's Island up to point 8 (sketch-map No. 2 in the Judgment), where it intersects with each Party's 12-mile limit. From point 8 the outer limit of Bangladesh's territorial waters off St. Martin's Island roughly arcs northwards until it intersects with the equidistance line drawn between the two mainland coasts from the midpoint of the Naaf River (paras. 168-169 of the Judgment).

The argument between the Parties is reminiscent of that between Ukraine and Romania in the case concerning *Maritime Delimitation in the Black Sea*. There, the International Court of Justice chose as the starting point for the provisional equidistance line the point situated midway between the first two base points used in drawing the line (*I.C.J. Reports 2009*, pp. 111-112, paras. 153 and 154).

The Tribunal adopted this analysis in the present case (para. 272). And there is logic to this. The continental shelf in the Bay of Bengal is the natural prolongation of the land mass of the mainland, not of an island like St. Martin's. The delimitation must therefore be defined from the mainland territory, not from a point chosen by reference to an island's territorial waters, in this case the point where Bangladesh's territorial sea off St. Martin's Island meets Myanmar's territorial sea.

For the endpoint of the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles the Tribunal has chosen a point lying at the intersection of the 215° azimuth, as drawn by the Tribunal, and the 200-nautical-mile limit measured from the baselines of the Parties' territorial seas ( Judgment, para. 340). This point is virtually equidistant from Cape Negrais in Myanmar and the land boundary between Bangladesh and India.

This endpoint lies between the final points of the respective lines advocated by the Parties in their submissions on the exclusive economic zone and continental shelf delimitation ( Judgment, sketch-map No. 4). The delimitation terminating at that endpoint falls within the perimeter defined by the Parties' submissions and is therefore not *ultra petita*.

I can accept this point or one nearby as the endpoint of the Parties' respective exclusive economic zones and continental shelf, subject to the outcome of the disproportionality test, by which the equitableness of a decided delimitation can be checked. Incidentally, no issue arises under the test of disproportionality in the present case.

**4. Relevant circumstances**

Two relevant circumstances potentially calling for adjustment of the provisional equidistance line obtain in the present case: the concavity of the Bay of Bengal and St. Martin's Island.

The problem was only addressed obliquely by the Parties, since neither of them, for reasons of their own, put forward any adjustment of the provisional equidistance line. Bangladesh did not draw an equidistance line, its view being that the delimitation should run along a bisector line following the 215° azimuth from a point south of St. Martin's Island. Myanmar argued that no relevant circumstances were present and therefore there was no need to adjust the provisional equidistance line drawn from the midpoint of the Naaf River.

The Tribunal has considered the concavity of the Bay of Bengal to be a relevant circumstance within the meaning of articles 74 and 83 of the Convention. It rightly points out the Bay's singular concavity, which is obvious at first glance and is immensely more pronounced than that in any of the examples so painstakingly analysed by Myanmar. The argument that it is only far to the north of the contemplated line of delimitation that the concavity of the coastline is so great rests on a micro-geographic view of the problem. Myanmar itself admits that account must be taken of the entire coasts of the two Parties in the reasoning concerning the determination of the relevant coasts. While it omits certain segments in its calculation, that is not on grounds that the Bay is not concave, but rather because those coasts do not project into the maritime area to be delimited. However, the relevance of the coasts used does not come into play only for the calculation of the lengths of the Parties' coasts. It also defines the general framework of the dispute.

The concavity of the Bay of Bengal is therefore a relevant circumstance liable to call for an adjustment of the provisional equidistance line.

In regard to the possibility of considering St. Martin's Island to be a relevant circumstance, the Tribunal states: "There is no general rule in this respect"

(para. 317). It adds: "Each case is unique . . ., the ultimate goal being to reach a solution that is equitable" (ibid.). While not disagreeing with this, I think that the statement could have been nuanced. True, there is no general rule, but that does not mean that the decision on an island's relevance in the delimitation process should be taken solely on the basis of the very vague "equitable solution" standard, where uncertainty of all kinds reigns.

The case law has identified a number of criteria for the determination; the Parties analyzed these at length in their pleadings. Some small islands, such as Jan Mayen, have been ascribed very significant effect. Others, larger ones like Djerba or Jersey and Guernsey, have been disregarded in the delimitation exercise. Account should be taken of this case law in resolving the issue.

It would appear that the main criterion to be applied is definitely not the social and economic importance of the island. Nor is it the island's geographical significance per se, its size or its geomorphology. The main criterion is first and foremost the location of the island.

Is it a fringing island? Does it fit into the general direction of the mainland coast? That is not the case here, because the island, while close to the Bangladesh mainland, lies opposite Myanmar's coast.

Does the island produce a disproportionate effect in the contemplated delimitation? The island, lying as it does in the immediate vicinity of the starting point of the provisional equidistance line, would have the effect of pulling the line – north- or south-wards – significantly and moving it outside the general outline defined by the Parties' submissions, whatever may be the effect (full, half or other) accorded the island, thereby leading the Tribunal to rule *ultra petita*.

Incidentally, an equitable solution can be achieved by adjusting the provisional equidistance line solely to take account of the concavity of the Bay of Bengal as a special circumstance. There is no need whatsoever to look any further.

## 5. Peculiar application of the equidistance/relevant circumstances method

It is not enough simply to proclaim allegiance to a delimitation method. That method has to be applied judiciously and in a manner true to both its letter and spirit. This is where I part company with the majority of the Tribunal. In my view, the delimitation has not been effected on the basis of the provisional equidistance line, but on the basis of the 215°-azimuth line advocated by Bangladesh; that line determines the delimitation over four fifths of its course.

The Parties did not make the Tribunal's task any easier. Bangladesh argued in favour of the 215°-azimuth line drawn from the endpoint of the line delimiting the Parties' territorial seas. Consequently, it saw no need to draw a provisional equidistance line. Curiously, Myanmar did not draw a provisional equidistance line either. After identifying base points, it drew the initial segment of a provisional equidistance line up to the point where it might meet any claim by India, but Myanmar refrained from drawing the subsequent segments on the ground that there was no need for any adjustment to the equidistance line.

Nor has the Tribunal made the effort of drawing a complete provisional equidistance line. It has confined itself to the first segment plotted by Myanmar, which it then cut off after a few dozen nautical miles and replaced with a line with an azimuth of 215°. The correspondence between the azimuth chosen by the Tribunal and the azimuthal bisector line argued for by Bangladesh is disturbing.

The Tribunal seeks to explain how its 215° azimuthal line bears no relation whatsoever to the bisector put forward by Bangladesh: the length of the relevant coasts used is not the same as the length calculated by Bangladesh; the line starts at a different point. Granted, but the explanation is more contrived than convincing.

In other words, confusion reigns. The re-introduction of the azimuth method deriving from the angle-bisector theory results in mixing disparate concepts and reinforces the elements of subjectivity and unpredictability that the equidistance/relevant circumstances method is aimed at reducing.

## 6. Unity of the delimitation of the continental shelf

There is a conceptual difficulty here. First, the Parties argued for a single delimitation line for the exclusive economic zone and continental shelf. The requested delimitation therefore extends more than 200 nautical miles from the Parties' coasts. This is clear in what is known as the grey zone, i.e., the band of territory lying beyond one party's exclusive zone as a result of a delimitation which does not follow a strict equidistance line, i.e., an unadjusted line (Judgment, paras. 471-475). But this is equally true of the entire continental shelf beyond 200 nautical miles.

Further, the Tribunal rightly considers there to be a single continental shelf. There is only one continental shelf, which lies both within and beyond 200 nautical miles. The Tribunal draws the ensuing inference from this in considering that the delimitation within the 200-mile limit must be extended beyond, without any new relevant circumstances, such as natural prolongation or the impact of the depositional system, to be taken into account (para. 460). It confirms this analysis in calculating the relevant area and applying the proportionality test in regard to the outer continental shelf, and not the area within the 200-nautical-mile limit (paras. 488 *et seq.*).

Under these circumstances it is even more difficult to see why the Tribunal refrains from drawing a provisional equidistance line along its entire length, up to the point where the Parties' claims end in recognition of third parties' rights.

In all logic, if there is a single continental shelf, both within and beyond the 200-nautical-mile limit, there is a single delimitation line, governed by the same rules and principles. In order to define this line, a provisional equidistance line should therefore be drawn in its entire length, including that part over the continental shelf beyond 200 nautical miles. In refusing to draw this line in its entire length, the Tribunal admits as much: the provisional equidistance line is not being adjusted, but replaced by an azimuth line.

## 7. The concept of adjustment

In the Judgment the Tribunal relies on the notion of "adjustment" to take account of the relevant circumstance consisting of the singular concavity of the Bay of Bengal and its consequence: the cut-off effect to the detriment of Bangladesh. There can be no question that this concavity must be characterized as a relevant circumstance. But the manner in which this relevant circumstance is given

effect perverts the application of the method relied on and does so for no good reason.

The concept of adjustment cannot be stretched without limit. Recourse to the standard dictionaries provides some help in defining its bounds. The *Dictionnaire de l'Académie française* (Dictionary of the French Academy) offers the following definition:

> *AJUSTER. v. tr. Accommoder une chose, en sorte qu'elle s'adapte à une autre.* Ajuster un châssis à une fenêtre, un couvercle à une boîte. Ajuster une vis à un écrou, une clef à une serrure. [ADJUST, to. tr. v. To adapt something so that it fits with something else. *To adjust a frame to a window, a lid to a box. To adjust a screw to a nut, a key to a lock* [translation by the Registry].]

The *Petit Robert* gives the following definition:

> *Ajuster. Mettre aux dimensions convenables, rendre conforme à un étalon. Mettre en état d'être joint à (par adaptation, par ajustage).* [Adjust, to. To make something the suitable size; to put something in conformity with a standard. To make something suitable for being connected to (by adaptation, by adjustment) [translation by the Registry].]

The Concise Oxford Dictionary states:

> Adjust. Alter (something) slightly in order to achieve a correct or desired result.

There are no doubt other, looser, definitions of the verb "to adjust". But the jurisprudence, as I understand it, adheres to a strict definition.

In the present case, the Tribunal satisfies itself with the construction of an initial equidistance line for a few dozen miles before replacing it with an azimuthal line for the best part of its full course. The figures speak for themselves: some 30 nautical miles from point E, the starting point of the delimitation of the two exclusive economic zones and the continental shelf, to the endpoint decided for the equidistance line, whence the line follows the 215° azimuth; more than 160 nautical miles from this endpoint along the 215° azimuth until the point where the delimitation line intersects with the line lying 200 nautical miles off the Parties' coasts.

To be sure, it is all relative. But I do not think that abandoning a provisional equidistance line before it has covered one fifth of the length to be delimited

and replacing it with an azimuthal line can be considered an "adjustment", whatever the language used. A decision to adjust is not a licence for caprice.

**8. No provisional equidistance line in the Judgment**

What is more, as we have noted, the Tribunal has not deemed it necessary to construct a complete provisional equidistance line. The first stage in any delimitation under the equidistance/relevant circumstances method is however to construct the provisional equidistance line.

In the case concerning *Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*), the Court stated:

> So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case. (*I.C.J. Reports 2009*, p. 101, para. 116)

But that is not done in the Judgment. The Tribunal confines itself to defining the two base points on Myanmar's coast by which the equidistance line can be constructed. In fact, only the first three base points are used to draw an embryonic equidistance line before it is deflected to follow the 215° azimuth. The Judgment provides no depiction of the complete provisional equidistance line, let alone any specification of its co-ordinates. It is therefore impossible from the Judgment to compare the provisional equidistance line with the delimitation as decided and to justify why the Tribunal rejected that line. The Tribunal considered no possibilities for adjusting the line other than abandoning it after some 30 nautical miles in favour of the 215° azimuth.

The failure to construct a provisional equidistance line severely undermines the reasoning of the Tribunal. Had the Tribunal examined the provisional equidistance line in its entirety, it could have considered the various possibilities for adjustment which presented themselves. It could have compared their outcomes from the perspective of the cut-off effect caused by the concavity of the Bay of Bengal and could have explained why it preferred to forsake the equidistance method after some 30 nautical miles and replace it with an azimuthal line. In refusing to engage in this exercise, the Tribunal accentuates the arbitrariness of its choice and undercuts the force of its decision.

## 9. Analysis of the provisional equidistance line

No particular problem arises in constructing the provisional equidistance line. The Tribunal has decided to rely on the base points suggested by Myanmar, namely, points μ1, μ2 and μ3 on Myanmar's coast and points β1 and β2 on Bangladesh's. Bangladesh did not put forward any base points because it chose the angle-bisector method. I agree with the Tribunal on this point but am that much sorrier at its decision in drawing the delimitation line to limit itself to only the first two base points chosen on the coast of Myanmar, it being the case that points μ3 and μ4, shown on sketch-map No. 5, do not come into play until after the provisional equidistance line has been forsaken.

A provisional equidistance line is not a delimitation but an obligatory station along the way to the construction of the delimitation line proper. It is defined purely in terms of mathematics and topology. Thus, in the plotting of the provisional line, no account is to be taken of the criteria of legal delimitation which determine the ultimate delimitation, such as the existence or not of legal title, distance from the coast and respect for third States' rights. These considerations come into play in the second stage, that of the adjustment of the provisional line.

Oddly enough, the Tribunal stops the provisional equidistance line when it reaches the 200-nautical-mile limit (para. 274). The Tribunal thereby precludes the possibility of analyzing the provisional equidistance line along its entire length, of examining the various potential adjustments of the line in the light of the relevant circumstances and of comparing these possible adjustments. It confines itself to noting that various adjustments could be made but does not specify even one of them (para. 327). The Tribunal would indeed find it difficult to offer any examples for its assertion, since it has not provided itself with the means to do so.

In the present case drawing the provisional equidistance line over its entire length raises no particular problem once the Tribunal has identified the requisite base points: a pure provisional equidistance line, constructed from the first two base points lying on either side of the land boundary terminus in the Naaf River, between the two adjacent coasts and bending southwards as the additional base points decided on by the Tribunal begin to take effect by the operation of mathematics. Still, the complete line needed to be drawn.

**10. Adjustment of the provisional equidistance line**

We are confronted here with a difficulty arising from the absence of any case law precedent directly on point. Until now, courts and tribunals have not needed to adjust an equidistance line between coasts that were unqualifiedly adjacent. Neither the arbitral tribunal in the Guyana-Suriname case nor the International Court of Justice in the case concerning *Maritime Delimitation in the Black Sea* found any relevant circumstances and therefore had no need to adjust the provisional equidistance line. Where courts and tribunals have adjusted equidistance lines, it was in cases involving opposite coasts or mixed configurations complicated by the presence of islands or low-tide elevations. There is however one implicit guiding principle, necessary to reduce subjectivity in the exercise: respect for the initial projection of the provisional equidistance line, which is transposed without a change in its course, unless required for a special reason.

It is instructive to observe how the median line has been adjusted in instances of opposite coasts. To take account of the circumstance calling for an adjustment, that being, in the cases involved, the disparity in coastal lengths, courts and tribunals have faithfully transposed the line resulting from the projection of the mainland coasts being used. Thus, in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the International Court of Justice explained its thinking as follows:

> By "transposing" is meant the operation whereby to every point on the median line there will correspond a point on the line of delimitation, lying on the same meridian of longitude but 18' further to the north. Since the median line intersects the meridian 15" 10' E at 34" 12' N approximately, the delimitation line will intersect that meridian at 34" 30' N approximately . . . (*Judgment, I.C.J. Reports 1985*, p. 52, para. 73).

The Court proceeded likewise in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*, but there it changed the direction of the median line as thus adjusted in the southern zone to take account of the additional relevant circumstance represented by the fishing area.

In each case the Court was careful to transpose the median line faithfully, with all its twists and turns, to reflect the line without changing its characteristics, and the Court did so in order to reduce the role of subjectivity as much as possible in the operation.

Transposing the provisional equidistance line obviously makes no sense in the context of adjacent coasts. But the reasoning is the same. I shall note incidentally that the jurisprudence uses the English terms "shift" or "shifting", which refer equally to the transposition, change in direction, or rotation of a line. When the reasoning is transferred to a situation involving delimitation between adjacent coasts, I think that the solution most faithful to the initial projection of the coasts and least susceptible to subsequent manipulation is to shift the entire provisional equidistance line, beginning at its starting point, southwards at an acute angle calculated to achieve an equitable result.

The adjustment must remain true to the configuration of the coast. The point is to modify the course dictated by the coastal geography as little as possible, so as to eliminate subjective factors from the operation.

**11. Comparison of the possible lines of delimitation**

Had the Tribunal undertaken a more painstaking comparison of the two lines, it would have been able, had the need arisen, to justify its decision to set aside the provisional equidistance line and to adopt the 215° azimuth line, thereby forsaking the established method involving the adjustment of the provisional equidistance line in favour of another method better suited to achieving the desired result, for example the method combining equidistance and azimuth.

The two lines in question – the Tribunal's and the one I propose – are fairly close to each other. The two lie within the Parties' respective claims in the disputed area. They do not therefore constitute the basis of a decision *ultra petita*. If we look at roughly the same point of intersection of the line lying 200 nautical miles off the Parties' coasts and the straight line drawn between the furthest points on the relevant coasts, the difference is not glaring. Once shifted, the equidistance line attributes to Myanmar a bit more maritime area within the 200-nautical-mile exclusive economic zone and to Bangladesh a bit more of the continental shelf beyond 200 nautical miles.

Let it be added that the two lines easily pass the disproportionality test. In terms of equity, I see no persuasive argument in support of one line or the other.

Under these circumstances, was it really necessary to flout a now settled methodology and, by drawing a line in reliance on a mix of different methods, to sow doubt as to whether the Tribunal's adherence to the jurisprudence of other courts and tribunals is anything more than half-hearted?

**12. The delimitation of the continental shelf beyond 200 nautical miles**

Both lines appear to me to be equitable under the criterion laid down in articles 74 and 83 of the Convention. I therefore see no problem in extending the delimitation decided by the Tribunal under article 83 of the Convention to the continental shelf beyond 200 nautical miles and accordingly in voting in favour of that latter delimitation.

*(signed)* Jean-Pierre Cot