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held on Thursday, 22 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

Uncorrected
Non-correcté
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Vice-President: Helmut Tuerk  
Judges ad hoc: Thomas A. Mensah, Bernard H. Oxman  
Registrar: Philippe Gautier
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and

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as Advisers.
CLERK OF THE TRIBUNAL: All rise.

THE PRESIDENT: Please be seated. Good morning. Today, Bangladesh will continue its second round of oral arguments in the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal. I call upon Mr Paul Reichler to make his presentation.

MR REICHLER: Mr President, Members of the Tribunal, good morning. It is an honour for me to appear before you again.

Myanmar’s counsel have struggled mightily during these proceedings - they have pulled out all stops - to persuade you to disregard St Martin’s Island in the delimitation of the boundary beyond the territorial sea. At least four different lawyers dedicated themselves to this objective.\(^1\) I admire their fortitude, and their imagination; but, with respect, they have produced an extremely complicated set of abstract arguments on this issue that are both misguided and impractical. They ignore the law and the established geographical facts. Their approach to the problem is ultimately unhelpful.

Their extraordinary and unorthodox efforts remind me of the four electricians who went to replace a burnt-out light bulb in the ceiling. The master electrician stood on a chair, holding the bulb directly above his head, while his three apprentices slowly turned the chair.

I have a vision of my old and dear friend, mon cher ami, mon frère, Professor Pellet standing on a chair, holding the bulb high over his head, while his three acolytes slowly turning the chair. “Angular displacement”, shouts Mr Lathrop, straining under the weight; “Wrong side of the line”, grunts Professor Forteau; “Dominant mainland coast”, says Mr Müller: and then, in unison, the final cri de coeur: “Mainland to mainland provisional equidistance line”.

Like the electricians, Myanmar’s counsel supply an overabundance of effort, and provide a much-too-complicated solution, to a not-so-difficult problem. But the worst of it is: when they finish the job, the room is still dark.

Mr President, the problem of how to treat St Martin’s Island is an important one, but it is not an especially difficult one to solve, and it takes not more than a single lawyer to do it, even one with talents as limited as mine.

There are really two ways to solve the problem. The first way – which is the one used by Bangladesh – is to delimit the boundary by means of an angle bisector. The bisector is drawn from the angle created by the intersection of the mainland coastal facades of the two States at their land boundary terminus. Then, to take account of St Martin’s, the bisector is transposed to the south so that it begins at the outward limit of the territorial sea boundary.

The transposition of the bisector is not as innovative as Myanmar would have you believe. In fact, it is not innovative at all. It is something that has already been done

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\(^1\) A. Pellet, M. Forteau, C. Lathrop, B. Samson. See e.g. ITLOS/PV.11/9, p. 15, lines 19-28 (Forteau).
three times in the case law: by the ICJ, by a Chamber of the Court, and by a
distinguished arbitral tribunal. Professor Crawford will discuss these cases with you.

In regard to the use of an angle bisector or other non-equidistance methodologies,
I am grateful to my friend, Mr Lathrop, for calling the attention of the Tribunal to the
excellent article by Sir Derek Bowett in Volume I of the International Maritime
Boundaries Series, concerning State practice in regard to delimitations involving
islands. The article entirely supports Bangladesh’s approach, as Professor Sands
pointed out yesterday. However, Professor Sands also called attention to the
strikingly incomplete manner in which Mr Lathrop quoted from that article. Here is
another example - Mr Lathrop cited Sir Derek for this proposition:

“that offshore islands have a greater potential for distortion of any
equidistant line in situations of adjacency than in situations of
oppositeness.”

Those were Sir Derek’s words, but they were only some of his words. The entire
sentence from which Mr Lathrop extracted them, reads as follows:

“The rejection of equidistance is therefore presumably connected with the
fact that offshore islands have a greater potential for distortion of any
equidistance line in situations of adjacency than in situations of
oppositeness.”

“The rejection of equidistance”: rather important words to leave out, would you not
say?

Also left out by Mr Lathrop, is the paragraph immediately preceding these words,
from which Sir Derek drew his conclusion, in regard to the “rejection of
equidistance”. He cites seven examples in State practice, where equidistance was
rejected on these grounds in delimitations involving islands. Three of them involved
the use of angle bisectors to delimit the boundary, two used parallels of latitude, one
used a straight line running along a constant azimuth, and the last used a series of
loxodromes. I will not take up the Tribunal's time elaborating on them, but the
paragraph from Sir Derek’s article that sets this out is at tab 7.1 of your Judges’
folder.

I said there are two ways to address St Martin’s Island. Bangladesh’s preferred way
is a transposed angle bisector. But if, contrary to Bangladesh’s view, equidistance is
not rejected, the legally correct application of equidistance methodology, reflected in
the case law, leads to an entirely different conclusion than the one advocated by
Myanmar. It leads to the conclusion that St Martin’s must be given full weight in any
solution based on an equidistance line, and that even this, is not enough to achieve
the equitable solution that is required by the 1982 Convention.

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2 D. Bowett, “Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations”, in
3 ITLOS/PV.11/8 p. 24, line 44 to p. 25, line 1 (Lathrop).
4 D. Bowett, “Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations”, in
5 Ibid.
Mr President, my presentation this morning will consist of three parts. First, I will discuss the opposing conclusions the Parties draw from their review of the case law regarding the effects given to islands in the delimitation of maritime boundaries. On the one hand, both Bangladesh and Myanmar rely on essentially the same cases. On the other, they draw opposite conclusions from these cases. Myanmar claims that they support exclusion of St Martin’s Island from the delimitation of the maritime boundary in the EEZ and continental shelf. Bangladesh disagrees. We say the case law demonstrates conclusively that St Martin’s must be given full effect in delimiting the area between 12 and 200 M. With your indulgence, Mr President, I will take you through these cases, and show you that Bangladesh is right, and Myanmar is wrong, in regard to the proper conclusions to be drawn from the rather considerable body of jurisprudence developed by the ICJ and arbitral tribunals.

In the second part of my submission, I will apply the legal principles derived from the case law to the delimitation between Bangladesh and Myanmar, and in particular to the treatment of St Martin’s Island. It will be very plain from this exercise that the law does not allow St Martin’s Island be ignored; to the contrary, it requires that St Martin’s be given full effect in the construction of a provisional equidistance line; and then it requires an adjustment of that line in Bangladesh’s favour, to abate the distorting effects of the only truly relevant circumstance in this case: the double concavity of Bangladesh’s coast. Only in this manner can the Tribunal fashion an equitable solution, as required by the 1982 Convention.

In the third and final part of my presentation, I will discuss, based on the case law, how an equitable delimitation of the EEZ and continental shelf might be achieved in this case.

With your permission, Mr President, I will turn to the Parties’ opposing interpretations of the case law, starting with that of Myanmar. There is more than a bit of contradiction in Myanmar’s position. Mr Lathrop calls St Martin’s “the epitome” of a special or relevant circumstance, while Professor Forteau insists that St Martin’s is anything but a relevant circumstance. However, they do agree with one another that it should be given no effect in the delimitation, because it purportedly satisfies three conditions: (1) St Martin’s is an island that is in a relationship of adjacency with the mainland of another State; (2) it lies in close proximity to the coast and land boundary terminus; and (3) there are no so-called “balancing islands” to offset its effects. Under Myanmar’s view, it is a rule of law, derived from the jurisprudence, that any island that satisfies these three conditions must, a fortiori, be disregarded in any delimitation beyond the 12 M territorial sea.

There are several fundamental problems with Myanmar’s view of the law. First, all of their three conditions are, to use Mr Lathrop’s own very apt description of them, entirely “abstract” concepts. Myanmar would apply them universally regardless of the geographical context in which the islands exist. We say it is only by examining an island in the overall geographical context of a particular case, taking all of the relevant coastal geography into account, that it is possible to determine whether the

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6 ITLOS/PV.11/8, p. 23, line 44 (Lathrop).
7 ITLOS/PV.11/10, p.12, line 44 to p. 13, line 3 (Forteau).
8 ITLOS/PV.11/8, p. 24, line 42 to p. 25, line 6 (Lathrop).
9 ITLOS/PV.11/8, p. 25, line 15 (Lathrop).
island’s effect is so distorting that it should be disregarded or given less than full weight. Second, and relatedly, no Court or arbitral tribunal has ever held that mere adjacency to another State’s mainland coast, by itself, requires an island to be disregarded. It all depends on the context. The distorting effect of the island on the provisional equidistance line must be demonstrated. Third, there is no case – none – in which islands have been disregarded either because of their proximity to the land boundary terminus, or because there are no so-called “balancing” islands to offset their effects. Myanmar’s three principles are, simply put, completely made up to fit this case. They are not supported by the case law.

If we examine the islands that were at issue in the principal cases relied on by both Parties, including, especially, the cases invoked by Professor Forteau Monday afternoon, we can see this very clearly. Even more, we can see from these cases that the ICJ and arbitral tribunals have, indeed, developed a clear and common approach to the determination of whether an island exerts such a distorting effect on the provisional equidistance line that it must be disregarded or given less than full weight in the delimitation; but what has emerged from all of these cases is nothing like the interpretation served up by Myanmar’s counsel.

The common approach, the de facto rule, which emerges from the case law is this: an island may be deemed to have a distorting effect if it pushes the provisional equidistance line across the coast of another State, cutting off the seaward projection of that State’s coastal front. Two elements are required for the island to be disregarded or given less than full weight: (1) the deflection of the equidistance line directly across another State’s coastal front; and (2) the cut-off of that State’s seaward access.

As we examine the cases, you will find that this is the unifying principle that explains and justifies all of the decisions cited and relied on by both Parties, including the cases mentioned by Professor Forteau on Monday. Mr President, this is Bangladesh’s interpretation of the law, and I am confident that by the time we finish you will agree that it is the correct one.

As you will recall, Professor Forteau told you that in all of the cases involving islands like St Martin’s, the ICJ and arbitral tribunals have disregarded them. The key words are “islands like St Martin’s”. Of course, it is much easier to say that the islands in these cases were like St Martin’s than to prove it, and Professor Forteau did no more than say it, and provide you with a list of cases and names of islands. But it could not have escaped your notice that he did not present maps showing these islands, or showing the delimitation lines that were adopted, or any of the reasons the islands were disregarded. It thus falls to me to do so.

As we go through the cases carefully and individually – and there is no other way to do it – you will see a common approach, a common principle, emerge from them. You will see that the case law does not support Myanmar’s argument: it does not support the exclusion of St Martin’s from the delimitation of the EEZ and continental...

10 ITLOS/PV.11/10, p.13, lines 13-35 (Forteau).
11 ITLOS/PV.11/10, p. 13, lines 13-35 (Forteau).
shelf in this case. Quite the contrary: it supports not only including St Martin’s, but also giving it full effect in delimiting the boundary beyond 12 M.

Mr President, we begin with the Anglo-French Continental Shelf case, to which Professor Forteau, Professor Pellet and Mr Lathrop have referred many times to (tab 7.2). What you see on the screen is an equidistance line, as proposed by the United Kingdom, giving full weight to the Channel Islands - which lie directly in front of France’s coast and more than 60 and 75 M, respectively, from Britain - and giving full weight as well to the Scilly Isles. You will clearly observe these effects: the Channel Islands push the equidistance line closer to, and across, the French coast, blocking its seaward projection into the English Channel; and the Scilly Isles (which are in a relationship of adjacency to the French coast) push the equidistance line across France’s north-western coastal front, as shown by the thicker red arrow.

To relieve these blocking effects as best it could, the Court of Arbitration enclaved the Channel Islands, and gave half effect to the Scilly Isles, as is now shown. If you look at the delimitation line in the vicinity of the Scilly Isles, you will see that its direction was adjusted so it would more closely approximate that of, rather than cut across, the seaward projection of the French coastal front. As Professor Forteau very appropriately reminded us: “Delimitation depends” - and this is the first aspect of the principle “on the coastal configuration”, and “the land dominates the sea through the projection of the coasts or the coastal fronts”. We agree. You will soon see how this applies to the delimitation in this case, and fully supports Bangladesh’s position.

The next case cited by Professor Forteau on Monday was Eritrea v. Yemen. The approach followed by the arbitral tribunal in that case was similar to the one employed in the Anglo-French arbitration (tab 7.3). Here is the delimitation line adopted by the arbitral tribunal, which did not give weight to the Yemeni islands of al-Zubayr and Jabal al-Tayr. This is why: if these islands, which are located at a great distance from the mainland, had been given full effect, the equidistance line would have been pushed directly toward, and closer to, Eritrea’s coastal front. Of course, when States lie directly opposite one another - like Eritrea and Yemen across the Red Sea, or the UK and France across the English Channel - one State’s mid-sea islands will inevitably push the provisional equidistance line closer to the other State’s coastal front, generally cutting off or at least reducing its seaward projection in those areas.

This is not always the case when an island lies adjacent to the mainland coast of another State; but it does happen, and when it does, the same approach is followed. Take, for example, what the ICJ did in Qatar v. Bahrain, also cited by Professor Forteau. Those two States lie opposite one another for part of the boundary, and

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12 ITLOS/PV.11/7, p. 7, lines 37-40 (Pellet); ITLOS/PV.11/8, p. 15, lines 15-19; p. 16, line 37 et seq.; p. 18, lines 17-18 (Lathrop); p. 31, line 45 et seq. (Pellet); ITLOS/PV.11/9, p. 31, line 15 (Lathrop); ITLOS/PV/11/10, p. 13, line 15 (Forteau).
13 Delimitation of the Continental Shelf between France and the United Kingdom, Decision, 30 June 1977, reprinted in 18 RIAA 3 (hereinafter “Anglo-French Continental Shelf Case”), at paras. 199, 201-202, 244.
14 Anglo-French Continental Shelf Case, at paras. 199, 201-202, 248-249.
15 ITLOS/PV. 11/9, p.10, lines 33-39 (Lathrop).
16 Arbitration between Eritrea and Yemen, Award, Second Phase (Maritime Delimitation), 17 December 1999, reprinted in 22 RIAA 335 (hereinafter “Eritrea/Yemen II”), at paras.147-148.
then adjacent for another. In the area where they are adjacent, the boundary line
drawn by the Court gives no weight to Bahrain’s Qit’at Jaradah Island. Here is why:
giving full weight to this feature, which is actually an underwater reef with a tiny and
barely visible projection above sea level, would have pushed the equidistance line
into Qatar’s territorial sea, so that in the affected area Qatar would have enjoyed no
more than a 4.5-M territorial sea.

Professor Forteau helpfully brought up the Newfoundland/Nova Scotia arbitration,
where the same principle was employed (tab 7.5). Sable Island lies 88 M off the
coast of Nova Scotia. Here is the delimitation line adopted by the arbitral tribunal. If
Sable Island had been given weight in the construction of the equidistance line, it
would have deflected the line right across the seaward projection of Newfoundland’s
coast, producing a distinct cut-off effect as now shown. This was, in fact, one of the
principal bases for the arbitral tribunal’s award. Especially because of what it called
the “remote location” of this “small, unpopulated island”, the arbitral tribunal
expressed its “concern relat[ing] to the cut-off effect that the provisional line has on
the south-west coast of Newfoundland.”

It is noteworthy, as well, that if Sable Island had been allowed to influence the
equidistance line it would have pushed the line right across France’s continental
shelf emanating from St Pierre and Miquelon. The boundary line adopted by the
arbitral tribunal carefully avoided that. I can see why my French friends like the
result, but it does not support their argument on behalf of Myanmar: none of their
three so-called “conditions” for disregarding an island were even mentioned in the
award, let alone taken into account. The same can be said of all the other cases.

Professor Forteau gamely sought support from the ICJ’s Judgment in Tunisia v.
Libya, although here again it fails to support Myanmar’s argument (tab 7.6). Professor Forteau told you that the Court gave no effect to Tunisia’s Djerba Island. What he neglected to say was that the Court did not employ equidistance
methodology in the delimitation. In its first segment, the delimitation line was based
on a de facto agreement reflected in the Parties’ oil concessions, and their consistent
treatment of the clear line separating their respective concessions as the
international boundary for many years.

The second segment of the boundary, to the north-east, was a transposed angle
bisector. Here is what the delimitation line would have looked like if equidistance

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17 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain),
18 ITLOS/PV.11/10, p.13, lines 30-31 (Forteau).
19 Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia, Award,
20 Newfoundland/Nova Scotia Phase II, at paras. 5.13-5.15.
21 Newfoundland/Nova Scotia Phase II, at paras. 5.14-5.15.
22 Case concerning the delimitation of Maritime areas between Canada and the French Republic, 31
23 ITLOS/PV.11/10, p.13, line 18 (Forteau).
24 Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18 (herein-
after “Tunisia/Libya”), at para. 133(C)(2).
25 Tunisia/Libya, at para. 129.
methodology had been employed: a line cutting across Libya’s coastal front and blocking its seaward prolongation into the Mediterranean. Equidistance plainly would have been inequitable to Libya.

Last week I showed you that the same approach was also followed in the Dubai/Sharjah arbitration, where the island of Abu Musa was given no weight in the delimitation of the EEZ boundary (tab 7.7).26 This is another case invoked by Professor Forteau on Monday.27 Here again, the effect of Abu Musa was to push the equidistance line directly in front of, and across, Dubai’s coastline, and to cut off its seaward projection into the Persian Gulf.28 Let me briefly show you once more that giving Abu Musa weight in the EEZ delimitation would have created a functional concavity for Dubai – which explains why the cut-off effect was so severe in that case. Neither Professor Forteau nor any of his colleagues offered a response to this point in five sessions of oral pleadings.

Now let’s take a look at the final case on which Myanmar places heavy reliance, Romania v. Ukraine.29 This appears to be the favourite case of Myanmar’s counsel. We were told repeatedly that this case was decided unanimously, and that it represents the current state of maritime boundary delimitation law.30 We welcome Myanmar’s reliance on this case, because it follows exactly the same pattern as all the others. It employs precisely the same approach in seeking to avoid cut-off – as all of the other cases we have been discussing in regard to the effects of islands, and the geographic circumstances in which they may be disregarded when equidistance methodology is used (tab 7.8).

As we all know, Ukraine’s Serpents’ Island – 22 M off the coast and 1/50th the size of St Martin’s – was given no weight in the delimitation of the EEZ.31 Here is why: just as in all the other cases we have been analyzing, the effect of this island would have been to push the provisional equidistance line directly across, and in front, of Romania’s coast, significantly cutting off its access to the Black Sea.32 Why was the cut-off of Romania so pronounced in these circumstances? Because the inclusion of Serpents’ Island in the delimitation of the EEZ would have created a functional concavity for Romania. The ICJ did not make reference to the concavity of Romania’s coast, but it did fashion a solution that abated the cut-off effect produced by Serpents’ Island’s deflection of the equidistance line across Romania’s coastal front.33

Myanmar has spent a lot of time talking about adjacency and oppositeness, about proximity to the land boundary terminus, about being on the “wrong side” of an

27 ITLOS/PV.11/10, p. 13, line 22 (Forteau).
29 ITLOS/PV.11/9, p.26, lines 41-43 (Lathrop); ITLOS/PV. 11/10, p.15, lines 27-29 (Forteau); ITLOS/PV.11/7, p.6, line 46 to p.7, line 3 (Pellet).
30 ITLOS/PV.11/9, p.26, lines 41-43 (Lathrop); ITLOS/PV.11/7, p. 2, 7, lines 1-3 (Pellet).
32 Romania v. Ukraine, Sketch-map No.1 at p .9.
33 Romania v. Ukraine, at para. 201.
artificially constructed “mainland to mainland provisional equidistance line”, and
about so-called “balancing islands”, but the fundamental rule that emerges from the
case law, when properly reviewed, is none of the above. The central and unifying
principle common to all these cases is this: if equidistance methodology is used –
and we continue to say it should not be used in this case – an island must be given
full weight unless it has the effect of pushing the provisional equidistance line across,
and in front of, another State’s coastal front, resulting in a cut-off of that State’s
seaward projection. If the provisional equidistance line is distorted in this manner, the
island may be discounted, or given less than full weight in the delimitation.
Otherwise, it must be fully counted. This is what all the cases we have just reviewed,
including the cases expressly relied on by Professor Forteau and his colleagues, all
show.

Mr President, I come now to the second part of my submission: the treatment of
St Martin’s Island under the applicable case law. We will look at the actual effects of
St Martin’s Island on the provisional equidistance line, and see how they compare to
the effects produced by the islands in the cases we have just reviewed. On the
screen is Myanmar’s map depicting the seaward projection of its coastal front
adjacent to and south-east of St Martin’s Island. This map was presented by
Mr Lathrop last Friday.34 You can see from the thick arrow that the Myanmar coast
projects seaward directly toward the southwest. This is true, and it can be
appreciated even more clearly if we zoom out so we can see the entire Rakhine
coast of Myanmar. What we have just added to the picture is a properly drawn
provisional equidistance line, which takes St Martin’s Island fully into account. This is
at tab 7.9.

Myanmar says that the equidistance method requires the following steps: first, to
draw a provisional equidistance line taking all features, including islands, into
account; second, to consider whether any of these features has a distorting effect on
the provisional line, and if it does, disregard it and adjust the line accordingly. This
process is described by Mr Lathrop in an article he wrote in the American Journal of
International Law in 2008, to which he very helpfully referred us in footnote 8 to his
speech last Friday. He wrote:

“In applying the two-step equidistance process, the Court and other
boundary tribunals have given full effect to the base points on all features,
regardless of size, in the first step of the analysis: the construction of the
provisional equidistance line. In the second step of the analysis, the effect
of these features on the equidistance line has then been discounted,
either partially or fully, if necessary, to achieve an equitable result.”35

As I pointed out last week, this is what Myanmar’s counsel say, but then they do
something altogether different: Mr Lathrop himself draws what he calls a provisional
equidistance line that ignores St Martin’s completely. He and his colleagues attempt
to justify this by their a priori declaration that St Martin’s has a distorting effect on the
line. But how can they know this before they draw a provisional equidistance line that
includes St Martin’s, and assess its effects on the line? Professor Pellet said on

34 ITLOS/PV.11/8, tab 2.5 (Lathrop).
35 Coalter G. Lathrop, Territorial and Maritime Dispute between Nicaragua and Honduras in the
Monday that an equidistance line must be chosen not on the basis of the subjective
criteria of one of the parties, but on the basis of law.\textsuperscript{36} We agree. But Professor
Pellet and his colleagues fail to practice what they preach. What else but the
subjective criteria of one of the parties – Myanmar – justifies excluding St Martin’s
from the drawing of the provisional equidistance line, even before its actual effects
are measured?

Perhaps this is an illustration of what my friend and colleague, Professor Sands,
might call the fourth golden rule of advocacy. It is this: If you write an article about
the law, and then say exactly the opposite in court, do not be surprised when
opposing counsel calls attention to the fact that you have contradicted yourself. We
hope that, in Myanmar’s second round, Mr Lathrop will tell us whether he got the law
right in his article, or here in Hamburg. Yes, no, maybe, or none of the above.

In accordance with the standard practice of the ICJ and arbitral tribunals and, as set
forth in Mr Lathrop’s article, if not his pleadings before this Tribunal, we have drawn
a provisional equidistance line that includes St Martin’s Island. What we see from
this – and this is the critical point – is that it does not cut across, or in front of,
Myanmar’s south-west-facing coastal front in the area beyond 12 M. It does not cut
off Myanmar. It does not block Myanmar’s seaward projection. Except for the very
beginning of the line within the territorial sea, where Myanmar accepts full weight for
St Martin’s in the plotting of the equidistance line, it runs entirely in the same
direction as the seaward projection of Myanmar’s coast; it runs with the grain, so to
speak, not against it. Myanmar’s own arrow clearly shows this. This provisional
equidistance line, the legally correct one including St Martin’s Island, creates no
problem for Myanmar.

For Bangladesh, however, it is a different story. This is at tab 7.10. The provisional
equidistance line, which includes St Martin’s, does cut across somebody’s coastal
front, and does cause a significant cut-off effect – but the effect is not on Myanmar; it
is on Bangladesh. It is Bangladesh, not Myanmar, which needs an adjustment of the
provisional equidistance line, to achieve the equitable solution required by the 1982
Convention.

Professor Forteau points to this line, and he tells us: “The disproportion cannot be
missed”.\textsuperscript{37} Really? If this is true for Professor Forteau, what he has told us is that
disproportion, like beauty, is in the eye of the beholder. What this reveals about
Myanmar’s case is that disproportion is an entirely subjective concept. Professor
Forteau’s remark is a telling admission that there is no objectivity, no substance, no
justification, no legal basis, for Myanmar’s rejection of St Martin’s Island.

Does St Martin’s have an effect on the provisional equidistance line? Of course it
does. That is true for geographical features, insular and mainland, used in plotting
the provisional line: they contribute to its direction. If all features that merely
contributed to the direction of the line were disregarded, there would be no line. The
pertinent question is not whether a particular feature affects the provisional
equidistance line but whether it distorts the line. Does St Martin’s distort the

\textsuperscript{36} ITLOS/PV.11/9, p. 6, lines 2-5 (Pellet).
\textsuperscript{37} ITLOS/PV.11/10, p. 14, lines 25-26 (Forteau).
provisional equidistance line? The answer, the objective answer, based on the case law, is “No”! St Martin’s does not distort the line, because it does not cause the line to cross, or cut across, or cut off Myanmar’s coastal front or its seaward projection. The only State cut off by a properly drawn provisional equidistance line is Bangladesh; and it is that cut-off that requires an adjustment, in favour of Bangladesh, to avoid an inequitable solution.

However, instead of adjusting the line to reduce the cut-off of Bangladesh, Myanmar asks the Tribunal to adjust it in the opposite direction, against Bangladesh, thereby further exacerbating the cut-off. Myanmar’s line cannot be an equitable solution, but neither is the technically correct provisional equidistance line, even if it includes St Martin’s.

The reason these lines, or any other form of an equidistance line, are inequitable to Bangladesh is not difficult to discern: it is the double concavity in which Bangladesh sits. The concavity is the proverbial elephant in the room that Myanmar steadfastly tries to ignore, or to wish away as what Professor Forteau called an “irrelevant” circumstance. As we have seen in our review of the Dubai/Sharjah and Romania/Ukraine cases, the effect of a coastal concavity on an equidistance line is to distort it by pulling the line closer and closer to the coast, until its seaward projection is cut off. That was also true, of course, in the North Sea cases and in Guinea/Guinea Bissau arbitration, where equidistance methodology was rejected altogether, for this very reason.

In this case, the pull – the distorting effect – of Bangladesh’s double concavity is so strong that even St Martin’s Island can do no more than slightly reduce, but not even remotely eliminate, the distorting effects of Bangladesh’s double concavity. For these reasons, Bangladesh maintains that equidistance is the wrong methodology to apply in this case.

Myanmar appears to believe that two wrongs make a right. In the face of the distorting effects of Bangladesh’s double concavity, Myanmar would remove St Martin’s from the delimitation, thus depriving Bangladesh of the one feature that partially, and only partially, reduces the distorting effects of the concavity. This is piling injury on top of injury.

Myanmar must recognize that its treatment of St Martin’s – giving it no effect – is unsustainable as a matter of law. Their alternative argument is even worse, and even less sustainable. They suggest that if St Martin’s is given full effect, then full effect must also be given to their May Yu Island, also known as Oyster Island. This is, with respect, ridiculous. In their written pleadings, Myanmar all but disowned May Yu. They never sought any effect for it, and never drew a single line taking it into account. In their Rejoinder, May Yu is practically ignored, meriting a footnote, and an afterthought to paragraph 5.32, which states:

“St Martin’s Island stands alone in the vicinity of the delimitation line – except May Yu Island (Oyster Island) to which Myanmar agrees that no effect is to be given in the delimitation of the maritime areas as long as St Martin’s Island has no such effect either.”

38 RM, footnote 169 to para. 3.18.
Myanmar’s attempt to equate May Yu Island to St Martin’s is difficult to take seriously. This satellite photo at the same scale is located at tab 7.11. May Yu is 1/400th the size of St Martin’s. That is 0.25%, a quarter of one per cent. Next to May Yu, Serpents’ Island is a monster. This diagram compares the sizes of these islands. We start with May Yu in the lower right corner; using the same scale, we add Serpents’, which is eight times larger than May Yu; then we add St Martin’s which is 50 times bigger than Serpents’. This is at tab 7.12. Mr President, when it comes to islands: size matters. You already know about the location, population and economic life of St Martin’s. The facts are undisputed by Myanmar. The facts about May Yu are also undisputed: it has no permanent population, and no economic life of any kind, nor is it capable of sustaining either. Myanmar’s attempt to introduce alleged facts about May Yu for the first time at these oral hearings, which were not part of its written pleadings, and which are unsupported by any evidence before the Tribunal, is inadmissible as a matter of fundamental fairness. In any event, Mr Samson’s assertion that a permanent regiment of the Myanmar army is stationed there is not credible. A regiment consists of between 3,000 and 5,000 soldiers. The only way that many soldiers could fit on this miniscule feature is by stacking them one on top of another like folding chairs.

Mr Lathrop asserts that May Yu is an island under Article 121. But, unlike St Martin’s Island, which falls under Article 121(2), and has the same entitlements in the EEZ and continental shelf as a mainland, May Yu is governed by Article 121(3), which makes it a rock. In that regard May Yu is like Filfla, depicted here. Filfla is the Maltese rock that the ICJ gave no weight in the *Libya/Malta* delimitation.

On Monday, Mr Lathrop rather surprisingly tried to equate Filfla with St Martin’s Island. St Martin’s is more than 130 times larger than Filfla. Filfla is actually three times larger than May Yu at high tide; Filfla was probably even larger at one time, but the British navy used it for target practice during World War II. From the photo, it looks like they had good aim. I thank Mr Lathrop for calling Filfla to mind, and especially the ICJ’s decision to disregard it because: “the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effects of certain ‘islets, rocks and minor coastal projections’.”

To fully appreciate the mis-directedness of Myanmar’s argument in regard to May Yu, we need only look back at the map. This is at tab 7.13. Here is a provisional equidistance line giving full weight to both St Martin’s Island and May Yu. Here is one giving full weight to St Martin’s Island and half weight to May Yu, even though May Yu is only 0.25% as large. As you can clearly see, little May Yu, tiny and insignificant as it is, has a big effect on the provisional equidistance line because of

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39 RB, para. 3.124.
40 ITLOS/PV.11/7, p. 12, lines 18-19 and p. 14, lines 30-38 (Samson).
41 ITLOS/PV.11/8, p. 16, lines 24-26 (Lathrop).
43 ITLOS/PV.11/9, p. 29, lines 3-10 (Lathrop).
44 *Libya v. Malta*, at para. 64.
its seaward location: it pushes the line, even at half weight, more directly in front of
and across Bangladesh’s coastal front, and exacerbates even further the cut-off of
Bangladesh. It has no role to play in an equitable delimitation.

Mr President, please allow me now turn from lines that are clearly inequitable to
Bangladesh to one that is not. Let us try to find the equitable solution to this case.
The series of graphics will be found at tab 7.14. We start where we left off last week
in Bangladesh’s first round. On your screens is a display of how, and to what extent,
a properly drawn provisional equidistance line – one that includes St Martin’s Island
– helps to reduce the distorting effects of Bangladesh’s concave coast. For
illustration purposes, as we explained last week, and not to “reclaim land”, we have
eliminated the secondary concavity from the picture, so that we can determine its
effects on an equidistance line. The red line is what an equidistance line would look
like if there were no secondary concavity, and if St Martin’s were disregarded. The
purple line is the provisional equidistance line including St Martin’s. St Martin’s, you
will see and may recall, offsets much, but not all, of the effect of the secondary
concavity, the concavity within a concavity. The orange area is the maritime space
lost to Bangladesh by reason of the secondary concavity that is not recovered even
by giving St Martin’s the full weight to which it is entitled.

We have now added, in green, the angle bisector, before its transposition to the
south of St Martin’s. As you can see, this green bisector is less favourable to
Bangladesh than a properly drawn provisional equidistance line, out to a distance of
approximately 140 M. The difference between the two lines out to this point is
shaded in red. However, as the green bisector extends seaward, beyond the point
where it intersects with, and crosses, the provisional equidistance line, it actually
recovers the orange area for Bangladesh. The highlighted line that you now see,
formed by the purple equidistance line that includes St Martin’s, in combination with
the green untransposed bisector, can thus be said to properly offset the distorting
effects of the secondary concavity in Bangladesh’s coast.

This highlighted line might appear, at first glance, to resemble an equitable solution,
but it is not. To be sure, it has the benefit of offsetting the distorting effects of the
secondary concavity. It also appears to give both sides something of what they have
argued for; for Myanmar, it is for 140 M an equidistance line, albeit a properly drawn
one that includes St Martin’s Island, as the law requires; and for Bangladesh it is for
60 M a bisector, albeit one that is not transposed. What makes this line still
inequitable to Bangladesh is that it does nothing to offset the distorting effect of the
primary concavity; it addresses only the problem caused by the secondary one.

Here is the only way, we believe, it is possible to address, and abate, the distorting
effects of both concavities. This is at tab 7.15. In fact, the distorting effects are still
evident, because even this line, the transposed bisector, leaves Bangladesh with
a tapering wedge of maritime space, the tell-tale sign of a major coastal concavity,
as my colleague Mr Martin has explained. Nevertheless, the transposed angle
bisector is the closest approximation to the equitable solution that this case requires.
It properly accounts for all of the features of coastal geography on which delimitation
within 200 M is based, including Bangladesh’s double concavity and St Martin’s
Island. It divides the relevant maritime area proportionately and equitably. Professor
Crawford will show this to you following my speech.
Contrary to Myanmar’s assertions, the ICJ did not speak of a “mainland-to-mainland equidistance line” in *Romania v. Ukraine*. It did not utter the phrase. However, it did break with custom and decide that Serpents’ Island was entitled to no weight in the delimitation of the EEZ without going through the first step of constructing a provisional equidistance line taking it into account. Mr Lathrop called this “unusual”, and it is. As he acknowledged, the general practice of the Court and arbitral tribunals, up to that point, had been to follow the two-step process he described in his article. To that extent, *Romania v. Ukraine* represents a departure from the common approach.

However, the deflection of the equidistance line across, and in front of, Romania’s coast, and the consequent cut-off effect caused by Serpents’ Island, were so blindingly obvious, as our earlier graphic demonstrated, that the Court found no need for the first step. St Martin’s Island has no similar effect, and certainly not against Myanmar.

How, then, are we to explain Mr Lathrop’s assertions that: “there are minor differences in geography between the two cases”; and that St Martin’s “must be eliminated from the construction of the provisional equidistance line, as a legal matter, for the same reasons Serpents’ Island, an otherwise legitimate source of relevant base points, was eliminated by the Court in the *Black Sea* case”? There is no explanation for Myanmar’s awkward attempt to conflate two very dissimilar geographic situations. Like the four electricians changing the light bulb at the beginning of my speech, Myanmar’s counsel are guilty of trying too hard. Their approach leaves us in the dark. On Friday, Mr Lathrop said that there were seven sources where the phrase “mainland-to-mainland equidistance line” can be found. None of them is a judicial or arbitral decision or award. The first source cited is Mr Lathrop himself. It is, I would suggest, a relevant circumstance, when counsel has to resort to citing himself to support his argument.

Professor Forteau provides no illumination either when he invokes *Romania/Ukraine* for the rather strange proposition that a small island that is one of a “fringe of islands” may be regarded as part of a State’s coastal configuration; but even islands as large, populated and significant as St Martin’s do not count as part of the coast – no matter how close they are to the State’s mainland – if they are not part of a so-called “fringe” group.

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49 ITLOS/PV.11/9, p. 3, lines 2-3.
50 ITLOS/PV.11/8, p. 15 lines 11-12 and footnote 57 to that text (Lathrop).
51 ITLOS/PV.11/8, p. 15 lines 11-12 and footnote 57 to that text (Lathrop).
52 ITLOS/PV.11/10, p. 12, lines 3-7, 35-38; p. 13, 14-18; p. 14, lines 19-22; p. 15, lines 19-22; p. 17, lines 1-6.
It is true that the ICJ said that Serpents’ Island could not be considered part of Ukraine’s coast because, among other reasons, it was not one of a “fringe of islands”, but that does not help Myanmar. What the Court was saying was that the only way an island like Serpents’, located beyond the territorial sea at 22 M from the coast, may be counted as part of the mainland coast, is if it belongs to a group of islands fringing the coast and straddling the 12 M limit.\textsuperscript{53} St Martin’s needs no such help from sister islands. It is within 5 M of the Bangladeshi mainland, well within its territorial sea, and therefore an integral part of its coastal geography.

It is worth noting that Sir Derek Bowett’s article, which addresses State practice, draws this conclusion, at tab 7.16: “There are numerous examples of islands being given separate entitlement and full weight as against mainland coasts”.\textsuperscript{54} This is reflected in the case law as well. For example, in the Anglo-French case, France’s Ushant Island, 10 M off the French coast, was given full weight and controlled the median line for a length of 190 M.\textsuperscript{55}

Full weight was also given to very small islands, much less significant than St Martin’s, in the Eritrea/Yemen case.\textsuperscript{56} Professor Sands told you yesterday that all of these islands were given 12-M territorial seas. What I want to emphasize is that they were all given full weight in the delimitation of the continental shelf, too. These include some of Eritrea’s Dahlaks Islands, and Yemen’s islands of Tiqfash, Kutama and Uqbar, all of which were treated as “coastal islands” even though they are farther from their respective coasts than St Martin’s Island is from Bangladesh.\textsuperscript{57}

Contrary to what you were told by Mr Lathrop, nowhere in this award – nowhere – did the arbitral tribunal indicate that its decision to give full weight to these islands in the continental shelf was based in any way on the presence of so-called “balancing” islands.\textsuperscript{58}

None of Myanmar’s counsel made any effort to explain how it could be equitable to give Myanmar’s Little Coco Island full effect in the delimitation of the equidistance boundary with India out to the 200-M EEZ limit, but not equitable to provide the same treatment to St Martin’s Island, which is the same size as Little Coco and much closer to the mainland coast. As you know, equidistance methodology was rejected in the Guinea/Guinea Bissau case. But it is interesting to note that the arbitral tribunal considered tiny Alcatraz Island to be significant enough to transpose the boundary line more than 12 M to the west in order to keep Alcatraz within Guinea’s waters. Alcatraz Island is much smaller than St Martin’s, much further from the mainland coast, and has no population, except for the rather extended family of seabirds you that see on your screens.

At 7.17 there is another of Sir Derek Bowett’s conclusions:

\textsuperscript{53} Romania v. Ukraine, at para. 149.
\textsuperscript{55} Anglo-French Continental Shelf, at para. 251.
\textsuperscript{56} Eritrea/Yemen II, at paras. 146,151.
\textsuperscript{57} Eritrea/Yemen II, at paras. 146.
\textsuperscript{58} ITLOS/PV.11/8, p. 25, lines 4-6; p. 25, lines 10-11 (Lathrop).
“the notion of ‘distortion’ is always linked to a perception of what the line would otherwise be, if the island did not exist. A variation caused by the island which appears inequitable, given the location and size of the island, will be regarded as a ‘distortion’.”

That is Bangladesh’s argument. One cannot judge an island’s effects to be distorting based on a set of abstract rules, let alone “rules” or “conditions” that have never been adopted or applied by any Court or arbitral tribunal. Nor is it wise, except in the most extreme cases, to exclude an island on the basis that it is distorting, without first plotting a provisional equidistance line that demonstrates such an effect. Distortion can be determined only by looking at the effects of an island on a particular provisional equidistant line, within a specific geographical context.

This is precisely what the ICJ and arbitral tribunals have done. The common thread of all of the decided cases – the unifying theme – is that islands are deemed to distort the equidistance line and produce an inequitable result when they push or deflect the line across and in front of another State’s coast and cut off its seaward projection. St Martin’s Island produces no such effect on Myanmar. It is not “extraneous” to this delimitation. It cannot be ignored; it cannot be disappeared. It is entitled to, and should be given, full weight in the event that an equidistance approach is favoured by the Tribunal.

However, even then, the resulting line will not be equitable to Bangladesh. To produce an equitable result in this case, a further adjustment must be made to mitigate the effects of Bangladesh’s concave coast, since St Martin’s by itself provides insufficient mitigation, or a more appropriate delimitation methodology should be employed. This is where I will pass the baton to Professor Crawford.

Before doing so, however, I feel that a response should be made to the conclusion that Mr Lathrop gave to his argument on Monday, which – not to single him out – may have reflected his colleagues’ attitude as well. Here is a graphic that he presented on Monday, and these are his words: “The fact that Myanmar, Bangladesh and India share a tripoint in the vicinity of point Z is a geographic fact. Bangladesh must learn to live with that fact”.60 The tone is as unfortunate as the statement is wrong. With respect, it is not for counsel – not even Bangladesh’s own counsel – to lecture a sovereign State on what it “must learn to live with”. This conveys a message that is inconsistent with the spirit of friendship and mutual respect that was underscored in the very commendable opening speeches of the Agents of both Parties.

Mr Lathrop’s statement about Myanmar’s point Z is not only unkind but untrue. Point Z is not a “geographic fact”. The concavity of Bangladesh’s coast is a geographic fact. It is apparent on every map and chart of the region, except those that Myanmar put in front of you, which have a cut-off effect of their own: they cut off almost all of Bangladesh; in fact, they cut it entirely out of the picture, except for the small slice of coast next to the land boundary terminus. One gets the impression that they not only

60 ITLOS/PV.11/9, p. 34, lines 30-32 (Lathrop).
want you to ignore the concavity and ignore St Martin’s Island but that they want you
to ignore Bangladesh!

Like the concavity, St Martin’s Island is also a geographic fact. You can go there,
and you can stand anywhere on its eastern shores and see the mainland coasts of
both Bangladesh and Myanmar.

In contrast, point Z exists only on paper. It cannot be found anywhere in the Bay of
Bengal. It is an imaginary point derived solely by the cartographic manipulation of
ignoring the real, physical geographic facts: the concave Bangladesh coast, and
St Martin’s Island. You cannot get there otherwise. In the words of the American, and
French, poet Gertrude Stein, who was not, but might have been, referring to point Z:
“There is no there, there”.

If point Z were ever to come into existence, it would not be by natural means. It
would be a man-made disaster and one which Bangladesh trusts that the Members
of this Tribunal, in their wisdom, mastery of the law, and commitment to achieve an
equitable solution, will not allow to occur.

Mr President, Members of the Tribunal, since this is the last time that I will address
you in these proceedings, please allow me once again to say what an honour and a
privilege it has been for me to plead before you in this history-making case. I am very
grateful and proud to be a part of it. I thank you again for your patience and your kind
and courteous attention. I ask that you now give the floor to Professor Crawford.

THE PRESIDENT: Thank you, Mr Reichler, for your statement. I now give the floor
to Mr James Crawford.

MR CRAWFORD: Mr President, Members of the Tribunal, in this presentation, I will
do two things. First, I will deal with Myanmar’s critique of the relevant coasts and
areas as presented in our first round; and, secondly, with its critique of the angle
bisector as a solution to the problem that Bangladesh finds itself in - shelf and zone-
locked in the vast open area of the Bay of Bengal.

I turn then to the first of these topics, the relevant coasts and relevant areas. There
are three aspects of the problem for which our argument was criticized: first, the
western segment of the line with India; second, the question whether a line should
be drawn across or within the Meghna Estuary and whether its coasts count as
relevant; and, third, the southern portion of Myanmar’s coast between Bhiff Cape
and Cape Negrais. Before I deal with these, I should note that Myanmar made no
answer to my criticism of the way in which their line measured their coastal
configuration in loving detail, while ours was given a broad-brush treatment.
I mentioned in that context the point about fractal geometry; there are many different
ways of measuring coasts and one must at least be consistent as between different
coasts.62

61 G. Stem, Everybody’s Autobiography (1937), at p. 289.
62 ITLOS/PV.11/5, p. 6, lines 24-26.
Turning first to the putative line separating Bangladesh from India, we told the story so far in our Reply. Counsel for Myanmar, with great independence of mind, complained that in no way could Myanmar be required to bear any burden or risk relating to the unknown claims of India. I am afraid that there is legitimate concern on Bangladesh’s part that it is the odd person out in a game of “pass the parcel” – or perhaps the game is “pass the counsel”. However, for the sake of argument, and only for the purposes of this exercise, let us accept Myanmar’s version of the western limit of the relevant area, shown on the screen.

Then at the other end of the coast we have the controversy pitting Cape Bhiff against Cape Negrais. You can see these two features on the screen now, with the distances from the land boundary terminus: this is tab 7.19 in your folders. Myanmar argues that all the coast down to Cape Negrais is relevant despite its great distance from the delimitation area, but this cannot possibly be right.

In Jan Mayen, the Court identified the relevant coasts as follows: You can see the graphics transposed from the Court’s decision.

“It is appropriate to treat as relevant the coasts between points E and F and between points G and H on sketch-map No. 1 in view of their role in generating the complete course of the median line provisionally drawn which is under examination.”

You can see these four points on the screen. The segments situated north of point H and south of point G were not considered as relevant for two reasons. First, the Greenland coast north of point H was not relevant because “Point H, in conjunction with point E on the northern tip of Jan Mayen, determined the equidistance line at its point of intersection with the Danish 200-mile limit (point A).”

Second, the Greenland coast south of point G was not relevant because “point G determined in conjunction with the southern tip of Jan Mayen (point F) the equidistance line at its point of intersection (point D) with the 200-mile line claimed by Iceland” – a third state – yet both points G and H were well within 200 M of the area of the delimitation, and coasts beyond both points G and H generated entitlements there.

To conclude, because Bhiff Cape is located 200 M from the land boundary terminus, any segment of the coastline further south to Cape Negrais becomes irrelevant, just like any segment northwest of point H on Greenland.

Finally, in the concavity of the Bay there is the closing line across the Meghna Estuary. You have heard the arguments about the Karkinits’ka Gulf in Romania v. Ukraine. The comparison is on the screen now, and they are obviously different.

63 MR, para 3.36; Annex R2.
64 Lathrop, ITLOS/PV.11/9 p.m., p. 25 lines 4-28; Wood
66 Jan Mayen at para. 20.
67 Jan Mayen at para. 20.
Myanmar’s characterization of the Meghna Estuary’s coastline as not relevant is unfounded, and the analogy between the Estuary and the Karkinits’ka Gulf is misconceived. As you can see, these waters of the Meghna Estuary are part of the area affected by the line, to the same extent as waters an equivalent distance to the south of the putative boundary. The coasts within the estuary look out towards the area of the delimitation.

In the interests of time, I will not read the long quotation from the Gulf of Maine case in relation to the Bay of Fundy.

I simply make the point that two segments of the Canadian coastline in the Bay of Fundy that face each other and measuring approximately 120 M were taken into account in the calculation of the length of the relevant coastlines because they too looked on to the area that was under delimitation.

Because the Meghna Estuary opens onto the Bay of Bengal and constitutes an integral part of it, the relevant coasts in that area as measured by Bangladesh should be taken into account in the delimitation. For the same reason, the Meghna Estuary cannot be analogized to Karkinits’ka Gulf in Romania v. Ukraine.

Mr President, Members of the Tribunal, I struggled in Romania v. Ukraine with the south-facing coasts of Ukraine and lost that argument. That having happened, I persist in thinking that the predominantly south-facing Bangladeshi coasts within the estuary are relevant coasts. If the stretch of coast that you can see here at 39 M just north of Cape Negrais is relevant – it is more than 500 km south of the land boundary terminus and does not generate any overlapping potential entitlement – then I fail to understand how the equivalent coasts within the estuary of 39 M, which are only 150 km north of the land boundary terminus and look straight out on to the area to be delimited, could possibly be irrelevant. How can the area in the south be relevant and the area in the north irrelevant?

Indeed, the relevance of the area in the north can be seen from Myanmar’s own graphic, which draws a line across the opening of the estuary and shows as relevant area everything up to that line; you can see it on the screen now. How can the area in the vicinity of that line be relevant, while the predominantly south-facing coasts a few miles further north are not relevant coasts? How can that be? It will be one of the mysteries of the world. People further on in eastern Bioko could go and see it. It does not make sense. These coasts generate overlapping potential entitlements.

For the reasons I have given, Bangladesh maintains its position as to the relevant coasts and areas in all respects.

THE PRESIDENT: I am sorry to interrupt. Perhaps a little slower.

MR CRAWFORD: I am sorry, Sir. Let us suppose, hypothetically, that Myanmar is correct on Cape Negrais and on the limit with India and only incorrect, as it must be, in relation to the estuary. Let us also suppose, as is consistent with principle, that all relevant coasts generate corresponding relevant areas. In the Meghna Estuary there are relevant coasts, shown as simplified straight lines in the graphic on the screen;
the area bounded by them must be part of the relevant area, so we have coloured that in. In the south, Myanmar cannot claim Cape Negrais without counting the areas offshore to the west out to 200 M, shown on the screen now. Making those three adjustments gives a relevant area of 252,500 km².

Now as to relevant coasts – you can see the relevant area in a delightful pink – again for the sake of argument, we take the entire Myanmar coast down to Cape Negrais and the entire Bangladesh coast across to the land boundary terminus with India, representing the complex coast of the estuary with a straight line and including all the waters of the sea bounded by them. We measure the two coasts in the same way, with the same level of detail, as you can see on the screen now. The total of the “relevant coasts” on this basis – a basis favourable to Myanmar – is as follows:

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<thead>
<tr>
<th></th>
<th>Bangladesh</th>
<th>Myanmar</th>
</tr>
</thead>
<tbody>
<tr>
<td>Length</td>
<td>510 km</td>
<td>600 km</td>
</tr>
<tr>
<td>Ratio (B:M)</td>
<td>1:1.17</td>
<td></td>
</tr>
</tbody>
</table>

Now as a preliminary, let us divide this area by the ratio of relevant coasts. I do this not because the ratio of relevant coasts is necessarily a criterion for delimitation, but simply to give you an idea of possible parameters. The result is a line much more favourable to Bangladesh than any line for which either party has argued. It would give Bangladesh a very significant frontage at 200M, with strong implications for delimitation of the outer continental shelf. This is another way of saying – or at least of illustrating – that Bangladesh is significantly disadvantaged by its position at the back of the Bay of Bengal.

Now I propose to divide the relevant area using lines for which the parties have argued. Let us start with Myanmar’s mainland equidistance line, as Professor Pellet’s peremptory norm of maritime delimitation would have us do. I shall have more to say about Pellet’s Law this afternoon. The result is shown on the screen:

<table>
<thead>
<tr>
<th></th>
<th>Bangladesh</th>
<th>Myanmar</th>
</tr>
</thead>
<tbody>
<tr>
<td>Area</td>
<td>84,100 km²</td>
<td>168,300 km²</td>
</tr>
<tr>
<td>Coastal ratio (B:M)</td>
<td>1:1.17</td>
<td></td>
</tr>
<tr>
<td>Area ratio (B:M)</td>
<td>1:2.00</td>
<td></td>
</tr>
</tbody>
</table>

Disproportionate? Pretty obviously. This is an indication of significant inequity. Myanmar gets much more than its coastal length would suggest or imply, twice as much.

Moreover you will see that this line falls short of the 200-M line from Bangladesh. The necessary implication is that Myanmar gets the entire bilateral area of shelf beyond 200 M and that it has only India to deal with in the trilateral area. Already within 200 M Myanmar is significantly favoured; beyond 200 M its cup runneth over. Bangladesh gets nothing.

Now let us use Bangladesh’s line, the angle bisector. This produces the following result:

<table>
<thead>
<tr>
<th></th>
<th>Bangladesh</th>
</tr>
</thead>
<tbody>
<tr>
<td>Area</td>
<td>107,100 km²</td>
</tr>
</tbody>
</table>
This line also gives Bangladesh access to the outer continental shelf. It is a much more equitable line. Whether it is open to the Tribunal to adopt it is a question to which I will return.

Now, in the interests of equality, let us use Myanmar’s version of the angle bisector, which Mr Lathrop showed you on Tuesday. This produces the following result:

Bangladesh: 69,800 km²  
Myanmar: 182,800 km²  
Coastal ratio (B:M): 1:1.17  
Area ratio (B:M): 1:2.62  

This line of course also denies Bangladesh access to the outer continental shelf. To be fair to him, Mr Lathrop did not actually advocate this line. One can see why.

Finally, in the interests of efficiency and full transparency, let us look at two other versions of an equidistance line. The first, if the Tribunal decides that some version of the equidistance line is called for, will require some study. This is what we may call the full effect line. It is the line which (entirely appropriately) gives full effect to St Martin’s Island and zero effect to Oyster Island. Mr Reichler has already referred to it. He stressed that it is only a starting point and that it requires adjustment to further abate the effects of Bangladesh’s concave coast. However, as it is, it produces the following result:

Bangladesh: 97,400 km²  
Myanmar: 155,100 km²  
Coastal ratio (B:M): 1:1.17  
Area ratio (B:M): 1:1.59  

This line gives Bangladesh a modest frontage at 200 M.

The second version of an equidistance line is one to which Myanmar has made no reference whatever. This is the line that gives full effect to both St Martin’s Island and Oyster Island. It produces the following result:

Bangladesh: 77,000 km²  
Myanmar: 175,500 km²  
Coastal ratio (B:M): 1:1.17  
Area ratio (B:M): 1:2.28  

This line gives Bangladesh no frontage at all at 200 M – a powerful effect for an article 121(3) rock, which is all that Oyster Island is! You will find these results tabulated in tab 7.24 of your bundles. I will return to them this afternoon.

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Mr President, Members of the Tribunal, before leaving the question of relevant coasts and relevant areas, let me deal with two minor points.

First, no doubt it will be said that the figures I have just given to you are new or revised figures, but that is no objection. The Tribunal will no doubt be in a position to check them carefully for itself, as we have done. I would note in that context that the figure cited by Mr Lathrop for the area that our coastal façade from the two terminal points of the land boundary “adds” to the land territory of Bangladesh is “over 23,000 sq km”.69 The figure in the Counter-Memorial is 19,519.70 Apparently Bangladesh has grown rather significantly in the course of the last year, perhaps due to plate tectonics. The better point, however, is that the Tribunal should now have the best figures available from the serried ranks of technicians assembled on either side.

Secondly, counsel opposite criticised Bangladesh for supposedly having agreed a different coastal length of Myanmar during the 2008 negotiations.71 What the record reflects is that Bangladesh and Myanmar exchanged various ideas about coastal lengths as part of their effort, ultimately unsuccessful, to justify their differing views on the boundary beyond 12 M. However, whatever may have been said on that occasion, it cannot possibly be relevant now. There is no basis for an estoppel. Where is the reliance? Moreover, if the doctrine of estoppel is to make its way into maritime boundary negotiations – negotiations in which, according to Myanmar, nothing was agreed until everything is agreed72 – then we will never hear an end of it. There is nothing in the point.

Mr President, that concludes my presentation on relevant coasts and relevant areas and I am now about to turn to the angle bisector, but I think that we should be fortified by caffeine for that experience.

THE PRESIDENT: Thank you very much. The Tribunal will now withdraw for a break of 30 minutes and we shall return at 12 noon.

(Short adjournment)

MR CRAWFORD: Mr President, Members of the Tribunal, I turn to the question of the angle bisector, vigorously assaulted by Professor Pellet and Mr Lathrop (at one point I felt like I had been mugged in the park!)

A preliminary point to be made, however, concerns the point of the bisector. It is not there to smooth out the odd promontory or to justify ignoring coastal islands. Mr Lathrop presented it as a matter of technique,73 but that ignores the reason for using it in the first place. It is a remedy for an inequitable result, which we know follows from strict equidistance when there is a coastal State with a comparable coastline caught in a concavity. If there are geographic circumstances to hand – for example, coastal islands – which allow adjustment of the equidistance line to achieve an equitable result, they may be used. Let me repeat that: if there are

69 ITLOS/PV.11/11, p. 4, line 29 (Lathrop).
70 Counter-Memorial of Myanmar (hereinafter “MCM”) at p 119, sketch-map 5.4.
71 ITLOS/PV.11/9, p. 20, lines 8-10 (Müller).
geographical circumstances to hand – for example, coastal islands – which enable adjustment of the equidistance line to achieve an equitable result, then well and good; they can be used in that way, even if they are unrelated to the cause of the inequality. But what if there are no such features? An angle bisector which simply
stuck to the existing south-west facing adjacent coasts of the two parties – such as Mr Lathrop showed you – will not solve the identified problem. You have seen that Myanmar’s bisector gives the worst result of all for Bangladesh – an area ratio of 1:2.62. Maritime delimitation, Mr President, Members of the Tribunal, is not a matter of rolling dice, but nor is it a matter of fiddling at the edges; it is a purposive activity with a clearly articulated rationale in articles 74(1) and 83(1) – achieving an equitable result.

Professor Pellet and Mr Lathrop both complained that our angle bisector cut the corner and was therefore inadmissible as a matter of law: they are fond of law doing all the work, avoiding the need for the best judgment of your Tribunal. If they protest so much in limine it is perhaps because they are concerned at what will transpire over the threshold.

Mr President, Members of the Tribunal, as to the substance, Myanmar criticises both the closing line across Bangladesh’s coastal front and the transposition of the bisector to the end of the territorial sea boundary. Let me deal with the transposition point first.

As to transposition, as Mr Reichler has said, this is by no means unprecedented. In Tunisia v. Libya, the ICJ transposed the angle bisector reflecting the average direction of Tunisia’s coastal façade, so that it would begin at the end of the first, landward, segment of the delimitation line. You can see the transposition on the screen.

In the Gulf of Maine case, the Chamber commenced the bisector at a point seaward of the Parties’ territorial seas, which were not delimited in the area adjacent to the land boundary terminus. This was the agreed point A. It is true that the bisector was not formally transposed to point A; Mr Lathrop complained that I said it was.\(^{74}\) What actually happened is that the same operation was performed at point A as would have been performed at the land boundary terminus, producing exactly the same angle of direction. It was as if Mr Lathrop told me that he took a pizza to a party on a boat when what he actually did was to take the ingredients and cook the pizza when he got to the boat. If it was the same pizza I would congratulate him on his versatility to replicate cooking his pizza while at sea – not accuse him of not telling the truth.

The arbitral tribunal in Guinea/Guinea Bissau used a bisector of the West African coastline to delimit the boundary, and commenced it at a seaward point 12 M to the west of Alcatraz Island, so that that small feature would remain on Guinea’s side of the boundary.

What these cases show is that, where equidistance is not considered an appropriate delimitation methodology, and a bisector is used instead, it is not uncommon to

\(^{74}\) ITLOS/PV.11/11, p. 5, lines 3, 21-25 (Lathrop).
transpose the bisector, or to commence it at an appropriate point seaward of the land boundary terminus. That is what Bangladesh has done here.

I turn to the larger question of the choice of the line to represent Bangladesh’s coastal frontage. As the Tribunal will know, we chose to draw a line joining the two land boundary termini. As I said in our first round, this reflects the average direction of a bidirectional coast: it is not a merely arbitrary line. It was directed at resolving, to some degree, the problem of the concavity. You saw from the figures I presented before the coffee break that it did so to some degree.

The angle bisector must be applied so as to alleviate the problem that warranted recourse to it in the first place. Thus, in the Guinea/Guinea-Bissau case, the arbitral tribunal employed it in such a way as to remedy the cut-off that equidistance would otherwise have imposed on Guinea. Any other approach would convert what is intended to be a solution into a perpetuation of the problem.

As the Tribunal is aware, the International Court was not called upon to effect a final delimitation in the North Sea cases. It was asked only to identify the applicable principles. Nonetheless, it is instructive to consider what would have been the result had the Court applied the bisector method in the manner we suggest here. Professor Forteau in effect implied that this was impossible. He said:

“The International Court of Justice has never delimited Germany’s maritime boundaries in the North Sea and it is highly speculative to imagine what it would have done in real terms.” 75

The Court knew that the parties were committed to apply its judgment, and it must have believed it was possible for them to do so. What is clear is that they could not have done so applying any version of equidistance, howsoever modified. Let us apply the angle bisector methodology to the West German concavity problem, and see what it looks like. As you will see, it would have actually produced a worse result for Germany than the one ultimately negotiated, though nonetheless a comparable result.

You can see a map of the pertinent coasts and the eventual maritime agreement made in 1971. We then draw straight line coastal façades for all three States. The coastal façade for Germany resembles the one we have drawn for Bangladesh. Visually, it appears to cut across open water from one end of the coast to the other. In fact, it merely represents the average direction of a bi-directional coast. In any event, if we were to bisect the angles of the coastal fronts so depicted, the result would be as shown on the screen now.

The fact that the result is not as favourable for Germany as the agreed boundaries of 1971 shows the modest nature of what Bangladesh seeks in this case. Far from seeking something radical, all we seek is a modest abatement of the concavity of the coast. No doubt our colleagues opposite would regard this as a form of “land reclamation”; but that is sour grapes: I hope the local vignerons of Hamburg (if such there be) will forgive the phrase “sour grapes”. The fact is that the Court envisaged

75 ITLOS/PV.11/10, p. 4, paras. 28-30 (Forteau).
a solution in accordance with international law, and in accordance with international law, the Parties found one. The angle bisector provides a possible analysis of a regular solution.

Mr President, Members of the Tribunal, to summarize, the bisector has been used as an alternative to equidistance in a number of different contexts for a number of different reasons, including to abate the prejudicial effects of a concave coast, exactly the reason Bangladesh says it should be used here.

For these reasons I reject the criticism of our opponents as to the choice of coastal lines or their transposition to the end of the territorial sea boundary. It would be wholly unreasonable to apply the bisector method in a way that made matters worse – even more inequitable. Its purpose is to produce an equitable result when equidistance cannot do so. It is to be employed with that objective firmly in mind.

Mr President, Members of the Tribunal, thank you again for your attention. I would ask you to call upon Professor Boyle.

THE PRESIDENT: Thank you, Mr Crawford. I now give the floor to Mr Alan Boyle.

MR BOYLE: Mr President, members of the Tribunal. On Tuesday you heard a very long and complicated speech by Daniel Müller expanding on Myanmar’s arguments regarding the continental shelf beyond 200 M and the interpretation of article 76. Müller is obviously very interested in the technicalities of delineating the outer limit of the continental shelf. It is an enthusiasm he no doubt hopes that we all share, although I wonder if, like me, you may have felt rather confused by his arguments. I have read and re-read his speech, and still find it hard to see how it can help this Tribunal decide issues that are relevant to this case. He talked a great deal about the views of “Earth scientists” on what constitutes a continental shelf and so on, but with the utmost respect to scientists, including Professor Curray, who is in the courtroom today, we are not here to conduct an academic seminar on the uses of scientific language. Whatever the terms used in article 76 may mean is a question for lawyers; it is not a question for scientists – and that much is obvious to a lawyer. Fortunately, most of what Mr Müller said was previewed last week by Professor Pellet, who was clearer, but no more convincing, and scarcely more relevant.

With your permission, I propose first to deal briefly with the comments of Professor Pellet and Mr Müller on natural prolongation, before responding to what they had to say about article 76. I will do my best to end by one o’clock, but I cannot promise that I will succeed.

Before doing so, however, let us recall what the Tribunal has to decide with respect to the continental shelf beyond 200 M, because on this subject Myanmar has sought to confuse the issues and to mislead the Tribunal into thinking the case is far more complex than it really is. First, there is the question whether Myanmar has any entitlement under article 76 to exercise sovereign rights in the continental shelf beyond 200 M. Bangladesh, of course, argues that it does not. This requires the

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76 ITLOS/PV.11/11 (E/10) p. 15, line 31 et seq. (Müller).
77 ITLOS/PV.11/8 (E/5) p. 14, lines 27-29 (Boyle); Memorial of Bangladesh (hereinafter “MB”) paras. 7.27-7.36.
Tribunal to decide (a) whether article 76(1) requires geological and geomorphological continuity between the land territory of Myanmar and the continental margin beyond 200 M. It also requires the Tribunal to decide whether geological and geomorphological continuity actually exists between Myanmar’s land territory and the areas of continental shelf beyond 200 M, the ones that are also claimed by Bangladesh. If geological and geomorphological continuity is necessary, pursuant to article 76(1), and if the evidence does not show that it exists, then Myanmar can have no entitlement to an outer continental shelf beyond the 200-M limit.

Mr President, if I might observe, the text from which I am reading is not quite the text that you have. I have been making a number of additions to it.

Secondly, only if the Tribunal decides that Myanmar does have an entitlement beyond 200 M, do you then have to achieve an equitable delimitation in the outer continental shelf, as between Myanmar and Bangladesh. That would require the Tribunal to decide what circumstances are most relevant to an equitable delimitation in that area. In particular, the Tribunal will have to decide whether, as Bangladesh argues, the encroachment by Myanmar on the natural prolongation of Bangladesh that results from the unusual concave coastal geography is relevant beyond 200 M. You will also have to decide whether the geology and geomorphology of the seabed and subsoil are circumstances to be taken into account and relevant to the delimitation beyond the 200-M limit. Bangladesh has already made known its views on all of these questions. Myanmar said nothing about equitable delimitation beyond 200 M in the first round – in its view the second question that the Tribunal posed to the parties simply does not arise. We regret this refusal to address the Tribunal’s second question, even hypothetically, because it deprives us of the opportunity to respond and it leaves the Tribunal in some difficulty. Accordingly, in this round I have nothing more to add on equitable delimitation beyond 200 M, since there is nothing to respond to, and I will simply reiterate that the position outlined by Bangladesh in its submissions last week on equitable delimitation beyond 200 M has not changed.

Mr President, Members of the Tribunal, those are the only relevant questions for the Tribunal in respect of delimitation beyond 200 M. That is probably a large enough menu for any court to decide in one case. Everything else in Professor Pellet’s speech and Mr Müller’s is a diversion. Despite what Mr Müller seemed to suggest, there is no need to understand or apply the Hedberg or Gardiner formulae on the outer edge of the continental margin. That very technical question can safely be left to States’ Parties and to the CLCS in accordance with article 76(8). It is their task, not yours, to delineate the outer limit of the continental shelf of either Party.

Nor, as the case now stands, do you need to decide whether Bangladesh has any entitlement to a continental shelf beyond 200 M – not for the reasons given by Myanmar, but simply because Myanmar has not challenged Bangladesh’s evidence, whether in the written pleadings or in these proceedings. As Mr Martin reiterated

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78 Ibid PV lines. 30-32; MB para. 7.42; Reply of Bangladesh (hereinafter “RB”), paras. 4.75-4.89.  
79 Ibid.
yesterday, the point is not in issue between the Parties, and it is now too late for Myanmar to make an issue of it.

I turn then to natural prolongation, which is at the heart of this case, at least in so far as it concerns boundary delimitation beyond 200 M. The point of departure in all maritime delimitations is the entitlement of a State to a given maritime area.\textsuperscript{80} Beyond 200 M, natural prolongation - not distance from the coast - is the basis of entitlement to an extended continental shelf. The ICJ tells us in \textit{Tunisia v. Libya}:\textsuperscript{81}

\begin{quote}
"[i]t is only the legal basis of the title to continental shelf rights [...] which can be taken into account as possibly having consequences for the claims of the Parties."\textsuperscript{82}
\end{quote}

Natural prolongation is therefore fundamental to any claim beyond 200 M. Without it, Myanmar has no continental shelf beyond that limit.

Professor Pellet does not deny that the continental shelf beyond 200 M can only be constituted by natural prolongation. What he objects to is the proposition that natural prolongation is to any extent a geological phenomenon, although even here we note that he only says "not necessarily so".\textsuperscript{82} He agrees that in the \textit{North Sea Case} the ICJ wisely accepted that geology "appears to have to be taken into account",\textsuperscript{83} but he immediately goes on to dismiss the statement as outdated, like the Court's references to concavity and equidistance.\textsuperscript{84} My colleagues have explained why the \textit{North Sea} case is still very relevant, and I do not think there is any need for me to repeat what they have said. The North Sea is somewhat distant from Paris and obviously not well understood there, but I am sure that will not be a problem in Hamburg – or The Hague.

Professor Pellet seems more comfortable in the Mediterranean. He agrees that in the \textit{Libya v. Malta Case} the ICJ

\begin{quote}
"recognized the relevance of geophysical characteristics of the area of delimitation if they assist in identifying a line of separation between the continental shelves of the parties." \textsuperscript{85}
\end{quote}

So he accepts the principle – that geology is relevant to identifying a boundary between two separate continental shelves – and that is precisely the point that Bangladesh has repeatedly made. Geology can be relevant in this way if it marks the limit of the natural prolongation of one state, where "a marked disruption or discontinuance of the sea-bed" serves as "an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations". I am of

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\textsuperscript{80} \textit{Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago}, Award, 11 April 2006, reprinted in 27 RIAA 147 para. 224. Reproduced in MB, Vol. V.

\textsuperscript{81} \textit{Continental Shelf (Tunisia/Libyan Arab Jamahiriya)}, Judgment, I.C.J. Reports 1982, p. 18 at para. 48 (hereinafter "Tunisia/Libya").

\textsuperscript{82} ITLOS/PV.	extsuperscript{11/8} (E/7) p. 30, lines 4 (Pellet).

\textsuperscript{83} Ibid p. 30, lines. 12-14.

\textsuperscript{84} Ibid lines. 18-19.

\textsuperscript{85} \textit{Continental Shelf (Libyan Arab Jamahiriya/Malta)}, Judgment, I.C.J. Reports 1985, p. 13, para. 40 (hereinafter "Libya/Malta").
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\end{flushleft}
course quoting once more from the language of the ICJ in *Tunisia v. Libya*.

It is the undisputed, unchallenged evidence before the Tribunal showing the complete absence of geological prolongation from Myanmar beyond 200 M which makes the 200-M line the limit of Myanmar’s continental shelf in the present case.

To this argument Professor Pellet has a simple answer. He says: “This hardly corresponds … to the circumstances of the facts of our case…” But, unlike Libya, Tunisia, or Malta, Bangladesh can point to a major geological discontinuity – the most significant discontinuity of all – a tectonic plate boundary running all the way along the Myanmar coast, barely 50 M offshore. In the Mediterranean the evidence of the Parties before the International Court was, in the Court’s view, inconclusive and contested. But in the Bay of Bengal the uncontested evidence shows that there is indeed a major geological discontinuity. So Professor Pellet cannot say that “this hardly corresponds … to the circumstances of the facts of our case…” He is firmly impaled on the horns of Myanmar’s failure to plead any evidence or to call any experts to contradict what Bangladesh has argued. Having chosen that route, Myanmar is not now in a position to challenge our clear, compelling evidence.

The best that Myanmar can do is to argue that the tectonic plate boundary is not where Bangladesh says it is, but much further inland. This was Daniel Müller’s closing argument on Tuesday. Unfortunately, Mr Müller is mistaken. He failed to understand the evidence. Professor Curray’s figure, the one you can see on the right, the one that was shown by Myanmar on Tuesday afternoon, indicates correctly (as a red line) the northward continuation of the axis of the subduction zone between the India and Burma Plate, buried as it is under the accretionary prism. If you look on the left you can see that we have shown you there the same red line, and if you look to the left of that you can see the outer edge, the western edge, of the accretionary prism, and you can also see that it is well out to sea because that is what Mr Müller failed to understand.

In his report, Professor Curray traces the eastern margin of the Bengal Depositional System, which is what he shows in his chart, and the locus of the tectonic plate boundary, along that rather prominent dashed black line that you can see in the same figure. It is that black line that you can see in both figures that corresponds to the western edge of the accretionary prism and the outermost limit of Myanmar’s geological prolongation. The key point when you look at both charts is that it is the same line, on the left, and it is offshore by some 50 km. Indeed, we can show you that on the next figure, which is simply a schematic representation of the seabed. You can see there the large serrated black line going underground; that is the black line that you could see on the previous chart, and it is quite obviously offshore.

Professor Curray’s red line is not just a line on the map, I might say; it is the same subduction zone that caused the devastating tsunami off Sumatra in December.

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86 *Tunisia/ Libya* at para. 66.
87 ITLOS/PV.11/8 (E/7) p. 32, lines 41-43 (Pellet).
88 Ibid; *Libya v. Malta* at para. 41.
89 Ibid. (Pellet).
90 ITLOS/PV.11/11 (E/10) p. 28, line 8.
2004. That subduction zone is still active today. I think that emphasizes the
importance of this really rather major geological discontinuity between Myanmar and
the seabed and subsoil of the rest of the Bay of Bengal.

Late in his speech on Tuesday Mr Müller also referred to a scientific article by Mr C.
Nielsen and others. He told the court that, according to Nielsen:

“The morphology of the continental margin of Myanmar does not present
any discontinuity in spite of the existence of a subduction zone.”

Mr President, we spent some time last night scouring this article, looking for
a statement to this effect, but we could not find any in the text. The article does say,
however:

“The structures observed along a 700-km long portion of the West Burma
Scarp typically depict a dextral shear zone with wrenched accretionary
wedge.”

If I can translate that into plain English, I think they are saying that it fully confirms
the illustrations I have just shown you. It provides no support for what Mr Müller said
on Tuesday.

Mr Müller’s last illustration was taken from the Bangladesh submission to the
Commission on the Limits of the Continental Shelf, and he showed the positions of
the foot-of-slope points used by Bangladesh to apply the Hedberg and Gardiner
formulae in paragraph 4 of Article 76. He seemed to think there was something
significant here, notably the location of the last point, No. 9; but all of these points,
including point 9, lie within the natural prolongation of the land territory of
Bangladesh. Again, the helpful citation from Nielsen et al (2004) shows that even the
most easterly of the points, including No. 9, lies west of the West Burma Scarp, in
other words west of the accretionary wedge, described in the Nielsen reference. I
think that that shows it is beyond the natural prolongation of Myanmar.

Turning back to Professor Pellet, his final act of surrealism is to transport Algeria to
Brazil in response to an argument that Bangladesh has never made about the origin
of sediments. The Bengal Fan is largely the natural prolongation of Bangladesh. We
have argued that, and that is what the scientists say, but it is the natural prolongation
of Bangladesh not because it has been transported there via Bangladesh - that fact
is immaterial. Most of the Bay of Bengal is the natural prolongation of Bangladesh
because of the continuous, unbroken, subsea structure of the Bengal Delta and the
Bengal Fan, extending from well inside the land territory of Bangladesh to the outer
edge of the continental margin far to the south. Our point is that Myanmar simply has
no comparable natural prolongation because its geological shelf ends approximately
50 M offshore at the western boundary of two tectonic plates, marking again – to use

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92 C. Nielsen et al., “From Partial to Full Strain Partitioning Along the Indo-Burmese Hyper-oblique
93 ITLOS/PV.11/11 (E/10) p. 32, lines 26-28 (Müller).
95 ITLOS/PV.11/11 (E/10) p. 32, lines 34 et seq. (Müller).
the ICJ’s phraseology — “the juncture of two separate natural prolongations”. That, Mr President, Members of the Tribunal, is the fundamental difference at the heart of this case.

That is the reason why Bangladesh is inviting this Tribunal to rule, in accordance with the evidence, that Myanmar has no continental shelf extending beyond 200 M, as provided for in article 76(1) of the 1982 Convention.

Mr President, Members of the Tribunal, Myanmar then attempts to reinterpret article 76 in order to avoid this inevitable conclusion. We can now turn to that part of our argument. Myanmar’s arguments on article 76 are indeed very complicated, and Bangladesh does not accept them. Daniel Müller boldly told the court on Tuesday that “Article 76 is not an approximation of a scientific truth. In law, it is the legal truth.” I suppose like a medieval pope or Donald Rumsfeld, he was not interested in evidence or facts, whether scientific or otherwise. Salvation, it seems, comes through law, and only law. But of course even Mr Müller cannot eliminate all science from article 76. He cannot do so because of the text of article 76. Even if we ignore article 76(1), there are still many elements of the article that require scientific evidence. The thickness of sedimentary rocks must be measured to apply article 76(4)(a)(i). Only scientists can tell us where the foot of the continental slope is located for the purposes of article 76(4)(a)(ii). Lawyers should probably not try to draw the 2,500-metre isobath in article 76(5). We need a geologist to identify the submarine ridges, plateaux, rises, caps, banks and spurs mentioned in article 76(6). A cartographer would be very useful to draw the lines referred to in article 76(7). All this different expertise is carefully reflected in Annex II, article 2, paragraph 1 of the 1982 Convention, which identifies potential members of the Commission on the Limits of the Continental Shelf and calls for “experts in the field of geology, geophysics or hydrography”.

So, Mr President and Members of the Tribunal, there is really no doubt that the application of article 76 requires a great deal of scientific and technical expertise before lawyers can make effective use of it. That is why the submissions to the CLCS require significant amounts of scientific research and data collection and take years to assemble. It is why this Tribunal has to proceed on the basis of evidence before it, not on the basis of mere assertion or speculation of the kind proffered by Mr Müller. It is also why the CLCS Commissioners are not lawyers, and it explains why we have geologists, hydrographers, and cartographers on our legal team. Their expertise is indispensable, even to lawyers. The idea that article 76 is simply law and only law is untenable and unworkable. Indeed, it is absurd.

What is true for the rest of article 76 is equally true for article 76(1). That provision, as you know, redefined what constitutes a continental shelf. I do not really need to read out that provision. It also sets out the legal basis of entitlement to a continental shelf, partly in terms of distance, up to 200 M, but also in terms of natural prolongation of the land territory beyond 200 M. “Natural prolongation” and “continental margin” are legal terms because they are in a treaty, and they have to be defined and applied as treaty terms. We have to look, in accordance with the

96 ITLOS/PV.11/6 (E/5) p. 7, lines 7-10 (Parson); BM paras. 2.22 and 2.41; BR para. 4.26.
97 ITLOS/PV.11/11 (F/10) p. 19, lines 44-45 (Müller).
Vienna Convention, article 31, for the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty. The rules on treaty interpretation are no different here.

Mr Müller in effect says that “natural prolongation” as a concept has no ordinary meaning. He subsumes the concept entirely within the context of the rest of the article, and especially of article 76(4), as I explained last week. He ignores the object and purpose of the 1982 Convention, or at least he accords it no relevance, although one obvious object and purpose of article 76 is to give the definition and extent of the continental shelf greater certainty, a goal which his definition noticeably fails to reach. Finally, both he and Professor Pellet largely eliminate geology from their reading of natural prolongation. Of course that is what they want to achieve.

Professor Pellet says that article 76:

“merely relies on morphology to recognize the existence of natural prolongation, and only turns to geology... secondarily as additional or optional evidence.” According to him “geology may by way of exception be relevant [but] ...it is not at all necessary...”

Professor Pellet has given you a characteristically elegant and artful argument, but it is a diversion from the evidential basis of natural prolongation that underpins article 76. Moreover, his views are contradicted by the only scientific source that Myanmar cites in its Counter-Memorial for the proposition that “article 76 retains an essentially geomorphic definition of the margin, including the shelf, the slope and the rise.” The article that he relies upon is by Dr Philip Symonds and his co-authors and that article recognizes that the words “shelf, slope and rise” are “geomorphological” but they go on, two pages later, to observe the following:

“Although continental rise is a geomorphic term, it is really used to describe a depositional feature caused by the accumulation of sediment largely derived from the continent and transported both down and along the slope. Therefore, the definition of a rise should not be based simply on the smooth surface and low gradient towards the abyssal plain, but also on its geological characteristic of being a sediment apron at the base of the slope.”

Summarizing that, it is about geomorphology and geology. That is the key point.

Throughout their pleadings, Myanmar repeatedly tries to convince the Tribunal to decouple article 76 from geology, to decouple natural prolongation from geology, and – in their own expression – to “keep it in a black box,” until it is briefly opened and when we turn to article 76(4)(a)(1), and then they close the lid again.

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99 ITLOS/PV.11/8 (E/7) p. 34, lines 38-40 (Pellet).
100 Ibid lines 40-41.
102 Ibid. p. 31.
103 ITLOS/PV.11/11 (E/10) p. 28, lines 10-11 (Müller).
There are two answers to this view of article 76. First, it is wrong. The continental shelf is not just the seabed – according to article 76(1) it is the seabed and the subsoil, and subsoil is nothing if it is not geology. The thickness of sedimentary rocks in 76(4)(a) is also a geological question. Bangladesh entirely accepts that geomorphology is relevant to the application of 76, but in conjunction with geology, not in splendid isolation from it.

The Tribunal needs to look at all of the relevant evidence – geomorphological and geological. You do not have to rely on Bangladesh for that view. Many of you will be familiar with the Scientific and Technical Guidelines published by the CLCS. If I may look briefly at what they say about geology and article 76. In particular, they say:

“Article 76 contains a complex combination of four rules, two formulae and two constraints, based on concepts of geodesy, geology, geophysics and hydrography.”

In the implementation of article 76, they say, they “will be guided by bathymetric, geomorphologic, geologic and geophysical sources of evidence”. They go on to say much the same with regard to evidence to the contrary under article 76(4)(b). That is interpreted by the CLCS in a whole chapter of their Guidelines to mean geological and geophysical evidence. The Guidelines also refer to the outer limit of the shelf having both geological and geomorphological characteristics.

There are many other references to geology in the CLCS Guidelines. Indeed, the Commission almost goes so far as to suggest that geological considerations are more important than geomorphology in determining the outer edge of the continental margin. You will see on the screen two paragraphs that are particularly helpful here. I will not read them out in the interests of time. You will see there that at the end of paragraph 6.1.9 they refer to consideration of tectonics, sedimentology and other aspects of geology.

You can see in 6.3.12 that they talk about geological (plate tectonic) considerations and they say that these are very important for coastal States in the determination of the various additional aspects they refer to there.

Mr President, a moment ago I quoted Dr Philip Symonds and his co-authors. Dr Symonds is one of the original members of the CLCS. He is a well-known geologist. He adds that it is possible to give a geomorphological interpretation to article 76 but he then adds, and I think this is an important point:

However, an alternative view would be that the natural prolongation being referred to is defined by the geological continental margin (Figure 4.1b), and embraces both the geomorphic and sub-surface characteristics of the margin.

He goes on then to refer to that view, building on the North Sea case, the subsequent interpretation of the significance by O’Connell, and he says that it gains

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105 CLCS Guidelines at para 6.1.7. “Although article 76 refers to the continental shelf as a juridical term, it defines its outer limit with a reference to the outer edge of the continental margin with its natural components such as the shelf, the slope and the rise as geological and geomorphological features.”
support within article 76 from the use of the terms “seabed and subsoil”. He concludes by saying it suggests that the continental margin comprises the submerged prolongation in article 76(3), implying prolongation in the geological sense.106

Mr President, members of the Tribunal, I could go on, but I will spare you the ordeal. Like me, you are lawyers, not geologists. I have probably sorely tested your patience and I would not wish to push it too far simply for the purposes of demolishing my opponent’s rather desperate arguments. I hope I have said enough to demonstrate why article 76 of the 1982 Convention cannot be interpreted and applied in clinical isolation from the natural world. Geology is an indivisible element of article 76 and of the concept of natural prolongation. That is the simple, sensible point I have been trying to make, possibly at excessive length.

There is a second way to answer Myanmar’s arguments but, Mr President, my sense is that, since I am not going to finish by 1 o’clock, this might be the moment to take a lunch break and to resume this afternoon.

THE PRESIDENT: Thank you. This brings us to the end of this morning’s sitting. The hearing will be resumed at 3 p.m. In this context, may I remind the parties that article 75, paragraph 2, of the Rules of the Tribunal provides the following:

At the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read that party’s final submissions. A copy of the written text of these, signed by the agent, shall be communicated to the Tribunal and transmitted to the other party.

The sitting is now closed.

(Luncheon adjournment)

106 Ibid.