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

2011

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

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

(Bangladesh/Myanmar)

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

THE PRESIDENT: Please be seated.

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

I call on Professor Forteau to continue his presentation.

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

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

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

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

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

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

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1 ITLOS/PV.11/4 (E), p. 21, lines 11-14 (Mr. Martin).
2 Rejoinder of Myanmar, para. 6.29.
3 Ibid., p. 21, lines 11-14.
Incidentally, Mr President, we indicated in our Rejoinder\(^4\) that the circumstances in which these few agreements granting a corridor had been concluded confirmed that in any case these were political concessions and their practical nature, in terms of the specific exercise of entitlements to the maritime zone, is scarcely evident.

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

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

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

Again, according to Bangladesh, to deny it “an equitable apportionment of the waters of the Bay of Bengal” would be to deny its people “a fair share” of a resource on which they depend heavily.\(^7\)

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

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

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

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

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\(^4\) Paras. 6.21-6.33.
\(^5\) Rejoinder of Myanmar, para. 6.28.
\(^6\) Memorial of Bangladesh, para. 6.37.
\(^7\) Ibid., para. 6.39. See also Rejoinder of Myanmar, para. 6.1.
\(^8\) I.C.J. Reports 1985, p. 40, para. 46 ; Counter-Memorial of Myanmar, para. 5.117.
\(^9\) I.C.J. Reports 1993, pp. 66-67, para. 64.
States. Bangladesh claims, however, in this regard, that the “need” for it to have access to the outer continental shelf beyond 200 M (Bangladesh mentioned its “need for its access to its entitlement”) would constitute *per se* a relevant circumstance justifying an application of a method other than equidistance.\(^{10}\)

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

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

The fact that a concavity producing a cut-off effect does not constitute *per se* a relevant circumstance was highlighted by the International Court of Justice in 2002 when it stated in the *Cameroon v. Nigeria* case that “the Court does not deny that the concavity of the coastline may be a circumstance relevant to delimitation”\(^{11}\) – “may be”, the Court takes care to say – and it does not “inherently constitutes”. I will come back to this. The delimitation which the Court standardised in its 2002 decision shows definitively that the concavity which Bangladesh is trying to apply to our case does not constitute a relevant circumstance.

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

- Sometimes they affirm that the concavity would be “inherently inequitable” and that equidistance would, “by definition”, lead to an inequitable result in the case of concavity between three States;\(^{12}\)
- Sometimes they recognise, although it is difficult to do otherwise in view of modern jurisprudence, which I will return to in a moment, they recognise that concavity *per se* is not inequitable, claiming that a cut-off effect would be.\(^{13}\)

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

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\(^{10}\) Memorial of Bangladesh, para. 6.43 ; see also para. 6.45.
\(^{12}\) ITLOS/PV.11/2/Rev.1 (E), p. 18, lines 43-45 (Reichler) ; ITLOS/PV.11/4 (E), p. 22, lines 16-17 (Martin).
\(^{13}\) Reply of Bangladesh, para. 3.39.
In order to demonstrate this, Bangladesh invokes two dated cases, the North Sea Continental Shelf case and the arbitration in Guinea/Guinea Bissau and a series of abstract sketch maps on the effects of concavity.\footnote{ITLOS/PV.11/4 (E), p. 14, l. 4-41 (Martin).}

I would like to say a word, first of all, about these abstract sketch maps on the effects of concavity, which you will certainly remember, and which Mr Martin presented to us ten days ago.\footnote{12 September 2011, Tab. 3.7.} Once again, the Applicant does not respect the coastal geography. These sketch maps are supposed to illustrate our case. They misrepresent it from three points of view.

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

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

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

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

Concerning the award in 1985 in the case of Guinea/Guinea Bissau, I would like to say simply that one of the members of the arbitral tribunal, later the President of the Court in The Hague, described the award in 1985 as a “sui generis case” (“cas d’espèce”), distancing himself officially, less than four years after its adoption, from the method that had been used in this case. I refer to the dissenting opinion of Arbitrator Bedjaoui in the case of the award to Guinea/Guinea Bissau Senegal of 1989\footnote{Dissenting opinion of arbitrator Mr. Bedjaoui in the case concerning the Delimitation of the maritime boundary between Guinea-Bissau and Senegal, decision of 31 July 1989, RIAA, vol. XX, p. 194, para. 104 and note 109.}, in particular in paragraph 104 of his dissenting opinion.

At the factual level then,
the coastal geography has nothing comparable with the present case. In 1969 as in 1985, the three States affected by the delimitation had the same length of coastline. The opposite is the case here: the relevant coast of Myanmar is concave and not convex; Finally, in our case, the starting point of the maritime boundary does not begin at the concavity; it starts much further to the south, once again from a point where the relevant coasts of the Parties are directly adjacent and even convex, facing towards the south-west, which changes everything.

The decisions given in the past ten years by international courts are far more convincing, starting with the fact that they have been adopted respecting methodology which has now become firmly established. These decisions are doubly pertinent. First of all, they are pertinent in themselves by the solutions that they have adopted; but they are also pertinent retrospectively. These decisions have rejected the argument, when it was put forward to them, consisting of relying on the North Sea Continental Shelf case to try to avoid a cut-off effect caused by a concavity between three States.

With your permission, Mr President, I would like to have a brief look at three different cases of a recent nature. In the case of Cameroon v. Nigeria, first of all - you will find the sketch map being shown in your Judges’ folder under tab 3.2 - the International Court of Justice decided that there was no circumstance which could render it necessary to adjust the equidistance line. In particular, the Court rejected Cameroon’s argument that the concavity of the coastline, which would give rise to enclaving to its detriment, should lead to a shift in the equidistance line to the west so as to allow it access to a more extensive maritime zone.

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

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I must point out here that the Court rightly highlights this final point, according to which the equidistance line represents an equitable result in “the area in respect of which it has jurisdiction to give a ruling”. In fact, a maritime limitation only concerns the States party to the dispute and consequently it must be “determined pursuant to the coastline and maritime features of the two Parties”, as the Court in The Hague once again pointed out on 4 May 201120 in the case of Nicaragua v. Colombia. This condemns in one blow the enclaving argument put forward by Bangladesh, according to which your Tribunal should take into consideration the effect of the delimitation to be made between India and Bangladesh in exercising the current delimitation. This is an argument which the International Court of Justice expressly rejected in the Cameroon v. Nigeria case. I quote:

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

Exactly the same is true in this case. The question of the effects of the presence of India on the projection of the maritime facade of Bangladesh seawards is raised between Bangladesh and India and not between Bangladesh and Myanmar. Therefore, it is not relevant for the purpose of the delimitation which concerns this Tribunal.

On 3 February 2009, the International Court of Justice once again adopted the equidistance as a maritime boundary line in the case of the Maritime delimitation in Black Sea (Romania v. Ukraine). According to the Court, none of the circumstances put forward by the Parties was relevant to the case in point and consequently the equidistance line was adjudged to be the line representing an equitable result.22 The Court rejected as non-relevant the six circumstances put forward by the Parties: that is, disproportion between the coastlines; the enclosed character of the Black Sea; the conduct of the Parties; considerations linked to security; the presence of Serpent’s Island in the delimitation zone, and lastly, the cut-off effect relied on by Ukraine. None of these circumstances was considered by the Court to be relevant.

Finally, I would like to quote the arbitral award of 11 April 2006 given in the case of Maritime delimitation between Barbados and Trinidad and Tobago. In that case, the delimitation concerned once more concave coasts producing a cut-off effect. The Tribunal rejected the view that the absence of access by Trinidad and Tobago to the maritime zone situated beyond the 200-M limit constituted a relevant circumstance implying an adjustment of the equidistance line. This claim of the absence of access was rejected and the Tribunal considered, to the contrary, that the equidistance line producing this enclaving effect represented the equitable result sought. Bangladesh

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20 ICJ, Judgment of 4 May 2011, relating to the Application by Honduras for Permission to Intervene in the Territorial and Maritime Dispute Nicaragua v. Colombia, [www.icj-cij.org], para.73.
22 ICJ Reports 2009, pp. 112-128, paras. 155-204.
wholeheartedly agreed in its Reply, describing this line decided by the Tribunal in the same way.\textsuperscript{23}

It is true that in the same case the Tribunal, all the same, adjusted the final section of the equidistance line to the benefit of Trinidad and Tobago.\textsuperscript{24} The equidistance link is dotted on the sketch map, and the Tribunal’s line is the red line. Professor Crawford described this adjustment as "one of the modest successes of [his] life"\textsuperscript{25} before going on to say that it was, nevertheless, "a real one" with regard to the claim by Barbados. Mr President, Members of the Tribunal, you can see the success on the screen right now. It is the small triangle at the eastern end of the line. You will see at a glance just how much, comparatively speaking, the claim by Bangladesh in our case is over the top.\textsuperscript{26}

Professor Crawford committed a sin of omission by presenting what he described himself as a modest success. He neglected the following important fact. If the Tribunal made this limited adjustment, it was not due to the concavity and the enclaving effect. The only reason was the disproportion of the length of the coastlines of the two States, and the Tribunal considered this to be "sufficiently great" to have to lead to the adjustment of the line to the benefit of Trinidad and Tobago. In that case, the ratio was 8:1 in its favour. The coastline of Trinidad and Tobago was eight times longer than that of Barbados.\textsuperscript{27}

Mr President, Members of the Tribunal, if you will allow me to summarise,

- the adjustment made by the Tribunal is described as a "real success" by Professor Crawford;
- This adjustment is "modest" because it still does not go beyond the 200-M limit,
- The Tribunal only granted this because the length of the coastline of Trinidad and Tobago was eight times greater than the length of the coastline of Barbados.

What about our case? The equidistance line gives Bangladesh access to about 182 M and the coast of Bangladesh is certainly not eight times longer than that of Myanmar. On the contrary, it is the relevant coast of Myanmar which is twice as long as that of Bangladesh. In brief, the equidistance line is equitable.

During the first round of pleadings, the counsel for Bangladesh were visibly uncomfortable with these precedents.

Professor Boyle, first of all, relied last Tuesday on the case of \textit{Barbados v. Trinidad and Tobago} to protest against the cut-off effect suffered by Bangladesh.\textsuperscript{28} The

\begin{itemize}
\item \textsuperscript{23} Reply of Bangladesh, para. 4.43.
\item \textsuperscript{24} \textit{RIAA} vol. XXVII, pp. 242 et seq, paras. 369 et seq.
\item \textsuperscript{25} ITLOS/PV.11/2/Rev. 1 (E), p. 26, lines 42-44 (Crawford).
\item \textsuperscript{26} See Judges' Folder, 12 September 2011, Tab. 4.12 (J. Crawford).
\item \textsuperscript{27} \textit{RIAA}, vol. XXVII, p. 239, para. 350 and para. 352.
\item \textsuperscript{28} ITLOS/PV/11/6 (E), p. 27, lines 7-19 (Boyle).
\end{itemize}
approach is strange, to say the least. The award in that case was precisely the
opposite of the argument put forward by Bangladesh. According to the arbitral
tribunal, a line enclosing Trinidad and Tobago in its area of 200 M is the equitable
line and this enclaving is certainly not a relevant circumstance.

The comments made by Professor Crawford are just as surprising, with all due
respect. According to him, this case is not relevant because "[t]here was no concave
coastline, no State squeezed between two adjacent neighbours". The concavity is,
however, there and the cut-off effect which it produces for the State squeezed
between the two – Trinidad and Tobago is squeezed between Barbados and
Venezuela.

Then there is a second reason, according to Professor Crawford, why this case is
still not relevant: (this is the black line on the sketch map which leaves the
equidistance line) by concluding the agreement with Venezuela in 1990, Trinidad
and Tobago was “auto cut-off”. It was not up to the Tribunal in the case of Trinidad
and Tobago v. Barbados to compensate Trinidad and Tobago vis-à-vis Barbados
because Trinidad and Tobago had made concessions to Venezuela. This
argument, I must say, has a certain spice.

We have been led to believe that Bangladesh’s argument, like that of Trinidad and
Tobago and of Cameroon, is based entirely on the North Sea Continental Shelf case.
According to this argument, international law, and I underline that, would require the
cut-off effect produced by a concavity to be nullified by disenclaving the State that is
disadvantaged by nature.

In line with this argument, Mr. Martin reminded us last Monday of the reason for
which Trinidad and Tobago agreed to adjust the equidistance line to the benefit of
Venezuela in the agreement of 1990. Mr. Martin told us that this was done to accord
to Venezuela an outlet to the Atlantic, “with the result of the North Sea cases very
much in mind”.

In actual fact, Venezuela is enclosed by Guyana to the south and Trinidad and
Tobago to the north and this State, therefore, suffers a cut-off effect. If I understood
the demonstration by Mr. Martin correctly, the agreement of 1990, that is the black
line, concluded by Venezuela and Trinidad and Tobago applied the precedent of the
North Sea and in doing this the agreement is said to support Bangladesh’s
arguments. If this is the case, Members of the Tribunal, there can only be one
alternative:

- The first part of the alternative: disenclaving is necessary under
international law. In this case, the arbitral tribunal should have disenclaved
Trinidad and Tobago vis-à-vis Barbados. Mr. Martin told us that it was
necessary in terms of international law for Trinidad and Tobago to disenclave
Venezuela. If this were true, it would then be difficult for Trinidad and Tobago,
in their relations with Barbados, to be punished by the Tribunal for this “auto
cut-off” in accordance with international law;

29 ITLOS/PV/11/2/Rev. 1 (E), p. 27, lines 43-44 (Crawford).
30 ITLOS/ PV/11/2/Rev. 1 (E), p. 27, lines 9-19 (Crawford).
- The second part of the alternative: disenclaving is not necessary under international law, which does not prevent it being granted as a political concession, for example, by offering a corridor. If this is the case, the Tribunal therefore had to take the view that the political concession made by Trinidad and Tobago to Venezuela, the black line, under a bilateral agreement which only concerned these two States, had no effect on the judicial delimitation with Barbados.

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

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

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

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

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

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

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

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

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33 ITLOS/PV/11/2/Rev. 1 (E), p. 27, line 17 (Crawford).
34 ITLOS/PV.11/4 (E), p. 17, lines 6-21 (Martin).
In his Memorial in the North Sea case, as Mr Reichler recalled on the first day, Germany presented several sketch maps to support its argument, including one of the Bay of Bengal, in order to illustrate the effect of equidistance. I would also like to remind us that Germany also showed a sketch map of the Gulf of Guinea which also showed the enclaving of Cameroon;

Cameroon cited the precedent of the North Sea case before the ICJ, and it stated to the Court that:

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

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

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

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

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

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

36 Memorial submitted by the FRG, [www.icj-cij.org], 14 May 1962, p. 43, Figure 7.
37 See Rejoinder of Myanmar, para. 6.36.
39 ITLOS/PV.11/5 (E), p. 4, lines 8-12 (Crawford) [the reference contained in note 19 is, by the way, wrong].
arrangements, showing that the circumstances invoked by Bangladesh cannot require any adjustment of the equidistance line in its favour. This applies to St Martin’s Island and also to the cut-off effect.

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

I will start by making a series of three points:

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

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

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

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

- This is the treatment given to the island of Jazirat Diyina in the agreement of 1969 between Qatar and Abu Dhabi;
- and given to Serpents’ Island in the case of *Romania v. Ukraine*.

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

\(^{43}\) Para. 3.166.
\(^{44}\) ITLOS/PV.11/4 (E), p. 31, lines 18-19 (Reichler).
\(^{45}\) ITLOS/PV.11/3 (E), p. 21, lines 13-30 (Sands); See also Counter-Memorial of Myanmar, paras. 4.51-4.61.
line must be drawn, including the island, and then it must be ascertained whether this is a relevant circumstance.\textsuperscript{46} I am afraid that the criticism is not directed against us but against international courts. In the case of Romania \textit{v. Ukraine}, which is cited by Mr Reichler, the Court clearly said that with the exception of a case where a series of “fringe islands” are along the coast, no base point can be used on an isolated island for the purpose of delimitation beyond the territorial sea. This is what the Court said:

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

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

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

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

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

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

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

\textsuperscript{46} ITLOS/PV.11/4 (E), pp. 26-27, lines 39-47 then 1-3.  
\textsuperscript{47} \textit{ICJ Reports} 2009, p. 110, para. 149. See also the Judgment of the ICJ in the case Tunisia/Lybia, 24 of February 1982, \textit{ICJ Reports} 1982, pp. 88-89, paras. 128-129; the arbitral decision of 17 December 1999 in the case Eritrea/Yemen (Maritime Delimitation), \textit{RIAA}, vol. XXII, p. 367, para. 139, and p. 369, paras. 149-151.  
\textsuperscript{48} \textit{ICJ Reports} 2009, p. 122, para. 186.  
\textsuperscript{49} \textit{Ibid.}, p. 122, para. 185.
first stage of the process, as an island that should have effect in drawing an
equidistance line beyond the territorial sea, or in the second stage of the process as
a relevant circumstance.

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

- on the one hand, they have not been considered to be coastal islands;
- on the other hand, they were not given any effect on the construction of
the equidistance line beyond the territorial sea.

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

- the Channel Islands in the case of Delimitation of the continental shelf
  between France and the United Kingdom in 1977;\(^50\)
- the island of Djerba in the case of Tunisia v. Libya settled in 1982;\(^51\)
- the island of Filfla in the case of Libya v. Malta settled in 1985;\(^52\)
- the island of Abu Musa in the award between Dubai and Sharjah in
  1981;\(^53\)
- the Yemeni Islands in the arbitration between Eritrea v. Yemen in
  1999;\(^54\)
- the island of Qit at Jaradah in the case of Qatar v. Bahrain in 2001;\(^55\)
- Sable Island in the arbitration of 2002 between the province of
  Newfoundland and Labrador;\(^56\)
- Serpent’s Island in the case of Romania v. Ukraine in 2009;\(^57\)
- and the cays in the case of Nicaragua v. Honduras in 2007.\(^58\)

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

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

\(^{50}\) Counter-Memorial of Myanmar, para. 4.55:
\(^{51}\) ICJ Reports 1982, p. 64, para. 79, and p. 85, para. 120.
\(^{52}\) ICJ Reports 1985, p. 48, para. 64.
\(^{53}\) ILR, vol. 91, pp. 676-677.
\(^{54}\) RIAA, vol. XXII, paras. 117, 119 et 147.
\(^{56}\) Rejoinder of Myanmar, para. 5.40.
\(^{57}\) ICJ Reports 2009, p. 188, para. 123.
\(^{58}\) Rejoinder of Myanmar, para. 3.25.
Martin’s Island as an integral part of the coast Bangladesh would be to “refashion geography”.

In contrast with what Mr Reichler affirmed, St Martin’s Island shares nothing in common with the Scilly Islands or Ushant in the case of the *Delimitation of the continental shelf between France and the United Kingdom*. Those islands were “opposite” the coast of the State to which belonged and, as the Court of Arbitration said in 1977, they were part, “both geographically and politically”, of the territory of the State opposite which they are located.\(^{59}\)

In this case St Martin’s Island, without any possible dispute, is “politically” part of the State of Bangladesh, but from the point of view of its geographic location, on the other hand, it is opposite the coast of Myanmar. Mr Lathrop reminded us of this on Friday.\(^{60}\) If you embrace the perspective of the law of the sea, and are on the mainland coast that generates entitlements and look out to sea, the island is opposite Myanmar; it is not opposite Bangladesh.

On the other hand, if, ignoring the above, one were to give effect to St Martin’s Island in the delimitation operation, this would produce a disproportionate result, which is prohibited by the cases that I have just cited – *Dubai/Sharjah* in 1981,\(^{61}\) *Libya/Malta* in 1985,\(^{62}\) *Qatar/Bahrain* in 1991\(^{63}\) and *Romania/Ukraine* in 2009.\(^{64}\)

This island, which is 5 km in length, would in itself produce at least 13,000 km\(^2\) of maritime area for Bangladesh in the framework of the delimitation between continental masses,\(^{65}\) and this is manifestly disproportionate. This view is not subjective, whatever our opponents might say. The disproportion can’t be missed.

Mr Reichler proffered the argument that it is not a question of knowing whether or not an island is situated on the right side of the equidistance line. What counts, he told us, is the possible disproportionate effect that it produces.\(^{66}\) But this is the question here. It is precisely the location of the island opposite the coast of Myanmar on the wrong side of the equidistance line which is drawn between adjacent mainland coasts that creates the distortion.

Let us now imagine, Mr President and Members of the Tribunal, the very rare cases where islands have been given some effect in case law in continental delimitation. You will see that they all have the same characteristics, none of which is possessed by St Martin’s Island:

- In the *Gulf of Maine* case, the effect produced by Seal Island was not disproportionate. The Court itself stated that the “practical impact” on delimitation of giving effect to the island is “limited”\(^{67}\) and that that practical

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\(^{60}\) ITLOS/PV.11/8 (E), p. 19, lines 31-35.

\(^{61}\) *ILR*, vol. 91, para. 677.

\(^{62}\) *ICJ Reports* 1985, p. 48, para.64.


\(^{64}\) *ICJ Reports* 2009, p. 122, para. 185.

\(^{65}\) Rejoinder of Myanmar, para. 5.35.

\(^{66}\) ITLOS/PV/11/4 (E), p. 28, lines 36 et seq.

\(^{67}\) *ICJ Reports* 1984, pp. 336-337, para. 222.
impact was limited because this island, which is on the right side of the
equidistance line and close to the mainland, had an effect on the delimitation
between opposite coasts, not between adjacent ones. The Court also said
that the question of the effect to be given to Seal Island is just a minor aspect.
As the Court said, this island only leads to “a small transverse displacement of
that line, not an angular displacement”.68

- In the case of the Delimitation of the continental shelf between France
and the United Kingdom, the Scilly Isles and Ushant were on the right side of
the equidistance line, they were highly populated and were competing with
one or more islands of the other State, which were on the right side of the
equidistance line;69

- In the Tunisia v. Libya case, the Kerkennah islands were on the right
side of the equidistance line, they were very big – 180 km² – they had over
15,000 inhabitants and were fringe islands.70 The islands taken into account
in the arbitration between Eritrea/Yemen in 1999 were also fringe islands.71

St Martin’s Island has none of these characteristics, for the reasons that I have just
indicated. In conclusion, the location of St Martin’s Island and the effect that it
produces make it a special circumstance in the case of the delimitation of the
territorial sea, which explains the care taken by Myanmar to give it the effect that is
most appropriate to its unique location; and the same considerations lead to it not
being accorded more effect in the framework of the delimitation of the exclusive
economic zones.

In accordance with case law, of which the case of Nicaragua v. Honduras in 2007
and Romania v. Ukraine in 2009 are the most recent examples, the delimitation line
must, as a result, beyond the territorial sea, meet the equidistance line. This is, I
repeat, exactly the conclusion suggested by which the practice and case law
illustrated by Professor Sands ten days ago.72

Lastly, I am coming to the cut-off effect which, according to Bangladesh, constitutes
a relevant circumstance in its entirety. Please rest assured, Mr President, that we are
coming to the end of this long pleading.

The reach of the circumstance was defined very strictly by the Applicant in its Reply.
It is summed up its object in paragraph 3.39 of its second written pleading as follows:

Bangladesh does not argue that concavity ipso facto makes equidistance
inequitable. Bangladesh agrees that there are concave coastlines
including in the Bay of Bengal, that do not cause prejudice to the coastal
State. It is not a coastal concavity alone that causes inequity. The
inequity, in the form of a dramatic cut-off effect, is produced by a concave

68 Ibid.
69 Rejoinder of Myanmar, para. 5.31.
70 Counter-Memorial of Myanmar, para. 4.58.
71 Arbitral decision of 17 December 1999 in the case Eritrea/Yemen (Maritime Delimitation), RIAA,
vol. XXII, p. 367, para. 139, et p. 369, paras.149-151.
72 See also Counter-Memorial of Myanmar, paras. 5.94-5.98 and Rejoinder of Myanmar, paras. 5.27-
5.42.
coastline that is framed by land boundaries on both sides of and within the concavity. That is the type of concavity in which Bangladesh, and no other regional State, is situated. In fact, there is no more drastic concavity-induced cut-off anywhere in the world.

This long quotation, which we find sums up the entire argument of Bangladesh, calls for a certain number of comments and some corrections.

First of all, it is wrong to say that the land boundary between Bangladesh and Myanmar, at the end of which the maritime delimitation should start, is “within a concavity”. As I said this morning, the starting point of the maritime boundary is located more than 100 km from the concavity at a place where the relevant coast is straight or even slightly convex.

Bangladesh also recognises in this passage that it is not the concavity as such in the Bay of Bengal that constitutes a relevant circumstance but the enclaving that results from it. Bangladesh admits that an equidistance line can produce an equitable result, even if there is a concavity. In fact, that was the decision in the cases of Cameroon v. Nigeria and Barbados v. Trinidad and Tobago, which I outlined earlier.

As far as the cut-off effect is concerned, it is not a very special circumstance at all. According to the perfectly legitimate findings of the award of the Court of Arbitration in 1977 in the case of the Delimitation of Continental Shelf between France and the United Kingdom,

so far as delimitation is concerned ... this conclusion [according to which there should not be a cut-off effect of the maritime space of another State] states the problem rather than solves it. The problem of delimitation arises precisely ... in such situations.73

In order to determine if the cut-off produced by an equidistance line to the detriment of one of the Parties will lead to an equitable result, you have to have recourse to the test of the absence of a significant disproportion, which is not a test of proportionality, precisely because it is not a question of refashioning nature, but of delimiting by reference to nature. What is particularly pertinent here is the remark made by the ICJ in the Libya/Malta case: the fact that a coast is particularly irregular or particularly concave or convex, the Court said, cannot be taken into account unless it leads to a disproportionate result.74 In the case – Sir Michael Wood will come back to this in a moment – the test of the absence of disproportionality has been satisfied, and if this is the case, it is above all because the coastline of Bangladesh is not disproportionate in length in comparison with Myanmar.

Bangladesh has tried to replace statistical objectivity, envisaged by the third stage of the method of delimitation, with artificial flights of lyrical fantasy and dramatic art, and they have demonstrated remarkable verbal energy. Here is a non-exhaustive anthology: Bangladesh would be deprived of an “overwhelming majority” of the maritime areas to which it is entitled;75 it would be confronted with inequity of the

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73 RIAA, vol. XVIII, p. 179, para. 79.
74 ICJ Reports 1985, p. 48, para. 64.
75 Memorial of Bangladesh, para. 6.30. see also para. 2.46 (i).
greatest order;\textsuperscript{76} the cut-off effect would be dramatic,\textsuperscript{77} “the most dramatic cut-off in the world”;\textsuperscript{78} equidistance in this case would produce results that are “arbitrary”;\textsuperscript{79} and even “irrational”;\textsuperscript{80} and it would only leave Bangladesh “just a small, wedge-shaped area of maritime space”.\textsuperscript{81}

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

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

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

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

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

\textsuperscript{76} Ibid., para. 6.45.
\textsuperscript{77} Reply of Bangladesh, para. 3.39.
\textsuperscript{78} Ibid., para. 3.59.
\textsuperscript{79} ITLOS/PV.11/4 (E), p. 9, l. 24 (Sands).
\textsuperscript{80} Memorial of Bangladesh, para. 6.56.
\textsuperscript{81} ITLOS/PV.11/2 (F), p. 6, line 43 (Mme Moni).
\textsuperscript{82} ITLOS/PV.11/2/Rev.1 (E), p. 16, lines 24-25 (Reichler) [ITLOS/PV.11/2 (F), p. 17, lines 18-19].
\textsuperscript{83} Counter-Memorial of Myanmar, paras. 5.128-5.129.
\textsuperscript{84} See Counter-Memorial of Myanmar, p. 29, sketch-map 2.3.
\textsuperscript{85} See Rejoinder of Myanmar, paras. 6.70-6.72.
Fourthly and finally, the test of absence of disproportionality has been met, as Sir Michael will explain to you in an instant. This last factor in itself confirms that the equidistance line constitutes the equitable solution in the present case, as longs as you apply the modern-day law of maritime delimitation as it is and not as Bangladesh would dream that it should be.

Mr President, Members of the Tribunal, I would like to thank you for your patience, for having listened to me for so long, and I would be very grateful if you could now give the floor to Sir Michael, who will present the test of disproportionality to you.

**SIR MICHAEL WOOD:** Mr President, Members of the Tribunal, as Professor Forteau has just said, we now come to the third stage of the equidistance/relevant circumstances, the application of the disproportionality test. As the Annex VII Arbitral Tribunal in *Barbados v Trinidad and Tobago* said,

> proportionality [is] used as a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion.86

Professor Pellet described this morning how the law of maritime delimitation, that is the international law referred to in articles 74 and 83 of the Law of the Sea Convention, has, “in recent decades, been specified with precision” (these are the words of the International Court87) into the three-stage method. There are three ‘defined’88 and ‘separate’89 stages (again, these are the words of the ICJ). They are the establishment of a provisional equidistance line; the taking into account as necessary of relevant circumstances, if any; and the application of the disproportionality test. This three-stage process was described with great clarity by the International Court of Justice in the ‘Methodology’ section of its judgment of 3 February 2009 in the *Black Sea* case90.

This morning, Mr Lathrop explained the provisional equidistance line. Professor Forteau has just taken you through the possible relevant circumstances. He has explained that there are, in the present case, no such relevant circumstances requiring any adjustment of our proposed line. Now, at this third stage, we have to apply the disproportionality test to the line resulting from the first two stages. The aim at this stage is to check that that line does not produce a “great disproportionality”91 between, on the one hand, the ratio of the areas appertaining to Myanmar and those appertaining to Bangladesh, and, on the other hand, the ratio of their respective coastal lengths – great disproportionality. Other terms also used in *Romania v Ukraine* are “marked disproportion”92 and “significant disproportionality”93. As we

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86 *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 214, para. 238.
have just seen, the Tribunal in Barbados/Trinidad and Tobago spoke of “gross disproportionality”.

Mr President, we have dealt with the application of this test in both our Counter-Memorial and our Rejoinder and I do not need to repeat what we said there. Instead, I shall first recall the most relevant and recent case law. I shall then apply the test to the line proposed by Myanmar. It will be clear that Myanmar’s proposed line results in no great disproportionality, and thus requires no adjustment at this third stage.

Finally, in the last part of this speech, I shall describe briefly the line that Myanmar proposes and explain in particular the treatment of the end-point, where the line approaches the area where the rights of a third State may be affected.

First, a brief look at the case law on the disproportionality test. In its Romania v Ukraine judgment, the International Court of Justice described this third stage, concisely and precisely, at the end of a section entitled ‘Delimitation Methodology’. It did so in the following terms:

… at a third stage, the Court will verify that the line … does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line … A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

This is not to suggest that these respective areas should be proportionate to coastal lengths — as the Court has said “the sharing out of the area is therefore the consequence of the delimitation, not vice versa (Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway), Judgment, I.C.J. Reports 1993, p. 67, para. 64).”

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

The continental shelf and exclusive economic zone allocations are not to be assigned in proportion to length of respective coastlines …”

The Court cannot but observe that various tribunals, and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would constitute a significant disproportionality which

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94 MCM, paras. 5.145-5.153.
95 MR, paras. 6.63-6.92.
96 Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009, p. 103, para. 122. See also Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 214, para. 238.
suggested the delimitation line was inequitable and still required adjustment. This remains in each case a matter for the Court’s appreciation, which it will exercise by reference to the overall geography of the area.\textsuperscript{97}

In that case, the \textit{Black Sea} case, the Court went on to note that the ratio of the coastal lengths for Romania and Ukraine was approximately 1:2.8 and the ratio of the relevant area between Romania and Ukraine was approximately 1:2.1\textsuperscript{98}. The International Court concluded that this did not suggest that the line required any alteration\textsuperscript{99}.

In other cases too, international courts and tribunals have considered that quite large differences between the two ratios did not require the adjustment of the line. In \textit{Eritrea/Yemen}, the Tribunal stated that a ratio of 1:1.31 for the coastal lengths and 1:1.09 for the areas allocated to each Party did not justify any adjustment of the equidistance line\textsuperscript{100}. Similarly, in \textit{Tunisia/Libya}, the ICJ found that the allocation to Tunisia of 60\% of the area, while 69\% of the relevant coasts belong to it, met the requirements of the proportionality test\textsuperscript{101}. The ratio of the relevant coasts was 1:2.22, and the ratio of the areas allocated to each was 1:1.5.

Mr President, Members of the Tribunal, there are three cases in which international courts and tribunals have decided that ‘great disparity in the lengths of the relevant coasts’\textsuperscript{102} called for an adjustment to the line under the equidistance/relevant circumstances method. In \textit{Libya/Malta}, the International Court found that a disparity between coastal lengths of 192 M (for Libya) and only 24 M (for Malta) was a relevant circumstance which required a transposition of the median line northward\textsuperscript{103}. In \textit{Jan Mayen}, as Professor Forteau mentioned today, the disparity between the relevant coasts was in the order of 9:1\textsuperscript{104}. In \textit{Barbados v Trinidad and Tobago}, also mentioned by Professor Forteau, it was approximately 8:1\textsuperscript{105}. In each of these three cases the corresponding adjustment was in fact relatively minor. A great disparity does not lead to a great adjustment. In any event, in our case, there is clearly no such great disparity between the relevant coasts; and, as Daniel Müller has shown, any disparity would favour Bangladesh, not Myanmar.

Mr President, Members of the Tribunal, it is hardly surprising that international courts and tribunals have rarely found that an adjustment was called for at this, the third stage of the equidistance/relevant circumstances method. It is not surprising,\textsuperscript{\textsuperscript{97} Ibid., p. 129, paras. 211, 213. \textsuperscript{98} Ibid., p. 130, para. 215-216. \textsuperscript{99} Ibid. \textsuperscript{100} Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, UNRIAA, Vol. XXII, p. 373, para. 168. \textsuperscript{101} Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18, at p. 91, para. 131. \textsuperscript{102} Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13, at p. 52, para. 73. \textsuperscript{103} Ibid., pp. 48-49, paras. 66-73, \textsuperscript{104} Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway), Judgment, I.C.J. Reports 1993, p. 38, at p. 65, para. 61. \textsuperscript{105} Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 239, para. 352.}
because any serious disproportion will most likely have been ironed out at the earlier
stages, including at the second (relevant circumstances) stage. The International
Court suggested as much in its conclusion on disproportionality in *Romania v
Ukraine*. It said:

> The Court is not of the view that this suggests that the line as constructed,
and checked carefully for any relevant circumstances that might have
warranted adjustment, requires any alteration.\(^{106}\)

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

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

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

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

\(^{106}\) *Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment of 3 February 2009,

\(^{107}\) BM, paras. 6.28, 6.75-6.78; BR, paras. 3.165-3.199.

\(^{108}\) BM, para.6.78.

\(^{109}\) BM, para. 6.75-

\(^{110}\) BM, para. 6.77.

\(^{111}\) ITLOS/PV.11/5 (E), p. 12, lines 43-48 (Crawford).

\(^{112}\) *Ibid.*
Mr President, that is almost too good to be true – and, of course, it is not true. As Daniel Müller has shown earlier today, Bangladesh’s calculation of the relevant coasts, and its establishment of the relevant area, reflect neither geographical reality nor applicable legal principle.

Mr President, this morning Mr Müller described the relevant coasts and the relevant area. You will get the sketch-map on the screen with the relevant coasts and it is also at tab 4.6 of the Judges’ folders. I will just recall his conclusions. Myanmar’s relevant coast stretches from the terminus of the land boundary between Myanmar and Bangladesh in the mouth of the Naaf River to Cape Negrais. The length of Myanmar’s relevant coast is approximately 740 km.

As Mr Müller demonstrated this morning, Bangladesh’s argument seeking to limit Myanmar’s relevant coast to a northern sector between the mouth of the Naaf River and Bhiff Cape is simply mistaken and wrong in law. It would remove at a stroke half of Bangladesh’s relevant coast.

I now turn to the relevant parts or segments of Bangladesh’s coast. Mr Müller has described these. He explained that the relevant segments of Bangladesh’s coasts are, first, the segment that goes in a generally west-east direction from Bangladesh’s border with India to the western limit of the Meghna River estuary; and, second, the segment between the eastern limit of the estuary and the border with Myanmar in the mouth of the Naaf River, which goes in a roughly north-south direction. The relevant coasts do not include the inner coasts of the estuary of the Meghna River, which face each other and do not project in such a way as to overlap with projections from Myanmar’s coast. The total length of the relevant coasts of Bangladesh is approximately 364 km.

It follows that the ratio between Bangladesh and Myanmar’s relevant coasts is approximately 1:2.03.

I now turn to the second factual element for the application of the disproportionality test, the relevant area and its division by the delimitation line. The relevant area was described this morning by Mr Müller, and is depicted on your screens and in the sketch map found in tab 4.6. As Mr Müller showed, Bangladesh has sought, without justification, to exclude a certain quite significant area from its own part of the relevant area. If this area is restored, as we say they must be, the total relevant area amounts to 214,300 km², of which 80,400 km² lie on Bangladesh’s side of the delimitation line proposed by Myanmar and 133,900 lying on Myanmar’s side. The ratio between part of the relevant area appertaining to Bangladesh and the part appertaining to Myanmar is approximately 1:1.66.

Let us see, for the sake of argument, what would happen if we do what Bangladesh has done, and remove from the relevant area the area between what is said to be the Indian claim line and an equidistance line between Bangladesh and India. You see what they have done on the sketch map on the screen. They have removed the western part of the relevant area. (This would, I should point out, be an extraordinary thing to do: Bangladesh would be assuming a worst case scenario for itself in the arbitration with India. Of course, Myanmar cannot be required to compensate Bangladesh for such a hypothetical, self-interested ‘concession’.) In any event,
Mr President, as you can see, even if we were, hypothetically, to subtract this part of the area, the ratio between the part of the relevant area allocated to Bangladesh and the part allocated to Myanmar would be approximately 1:1.94. With a coastal ratio of 1:2.03, this would clearly not be in any way disproportionate.

Mr President, I will return from this fantasy land to the actual relevant area. To summarize, the ratio of the relevant coasts between Bangladesh and Myanmar is 1:2.03. The ratio of the relevant area is 1:1.66. It is clear, to pick up the language of the International Court in the Black Sea case, that this does not suggest that the relevant line proposed by Myanmar requires any adjustment as a result of the application of the disproportionality test. The difference is minor, and it is, moreover, in Bangladesh’s favour.

Mr President, Members of the Tribunal, that concludes my analysis of the application of the disproportionality test. It also concludes our application of the three-stage process for effecting a delimitation. In this case it remains only to recall our line, and say a word about the end point.

Mr President, Members of the Tribunal, as explained by Counsel who have preceded me, and as is set out in our written pleadings, Myanmar requests the Tribunal to draw a single maritime boundary between Myanmar and Bangladesh that starts at the agreed end point of the land boundary, point A. On your screen this line is shown on sketch map, taken from our Rejoinder.

The line follows an equidistance or median line between point A and point C. Between point A and point B the line is an equidistance line between the adjacent coasts of Myanmar and Bangladesh. Between points B and C it is a simplified median line between the opposite coasts of the Myanmar mainland and the eastern side of Bangladesh’s St Martin’s Island. From point C, the line goes via point D to point E. point E is where the continuation of the provisional equidistance line meets the twelve-M arc drawn around St Martin’s Island. From point E, the line continues a south-west direction along the equidistance line as far as point G.

Just beyond point G, as you will see on the screen, there is an arrow indicating that the line continues along the same azimuth until it reaches the area where the rights of a third State (in this case, India) may be affected. Since the third State is not before this Tribunal, it cannot be for this Tribunal to decide where that point is. By placing an arrow, the Tribunal fulfils its mandate to delimit the line between Myanmar and Bangladesh, while not prejudicing the rights of any third State.

Mr President, this is standard practice in maritime delimitation cases. The most recent example is Romania v Ukraine. It did the same in Nicaragua v Honduras, and in other cases.

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113 MCM, pp. 171-172, Submissions and sketch-map No. 5.11 at p. 169; MR, pp. 195-196, Submissions and sketch-map No. R1.1 at p. 5.
115 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras), Judgment, I.C.J. Reports 2007, p. 659, at p. 759, para. 320; and sketch-map 8 at p. 762.
The International Court explained its practice in this regard in the recent judgment concerning Costa Rica’s application to intervene in the Case between Nicaragua and Colombia. The Court said:

In the present case, Costa Rica’s interest of a legal nature may only be affected if the maritime boundary that the Court has been asked to draw between Nicaragua and Colombia were to be extended beyond a certain latitude southwards. The Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved.\footnote{Territorial and Maritime Dispute (Nicaragua v Colombia), Application by Honduras for Permission to Intervene, Judgment, 4 May 2011, para. 64.}

Mr President, Members of the Tribunal, that concludes my statement. And that concludes what Myanmar has to say in the present round concerning the construction of the delimitation line that we propose.

Professor Pellet, after the break, will address you on the inappropriateness of Bangladesh’s proposed angle bisector line.

I thank you Mr President.

THE PRESIDENT: I think at this point we will break off for 30 minutes and come back at 5 p.m.

(Short adjournment)

MR PELLET (Interpretation): Mr President, Members of the Tribunal, claiming, against all reason, that the application of equidistance is impossible on the grounds of inequity, our friends from Bangladesh use an unusual method of delimitation, which they call the “angle bisector” method. In doing so, they commit two errors, each of which I will endeavour to show in turn:

- first, the very principle of using this method is erroneous, because in our case nothing stands in the way of using the standard, principal method, known as that of equidistance and special circumstances.

- second, even if it was conceded that this case lends itself to the application of the bisector method, the Applicant’s use of it is totally unacceptable.

Mr Lathrop will show tomorrow that the line which would result from the correct application of the bisector method in this case – for which there is no justification in law – would clearly be more favourable to Myanmar than the line drawn in accordance with the usual three-stage method, which my colleagues Coalter
Lapthrop, Mathias Forteau and Sir Michael Wood described in their last three statements.

Mr President, we had occasion to recall this morning that the use of equidistance first is the norm. It is a legal norm, a legally binding norm. Article 15 of the 1982 Convention on the Law of the Sea explicitly makes equidistance the principle as regards delimitation of the territorial sea and while Articles 74 and 83 do not mention it explicitly, it is nevertheless the result of now extensive and widely accepted jurisprudence. I quote from the 2009 case - that “the initial stage” is “the construction of the provisional equidistance line”. In other words, to apply the rule laid down in Articles 74 and 83 we must use the “equidistance/relevant circumstances” method, which usually produces an equitable solution. The resulting line must then be tested against the yardstick of manifest non-disproportionality during the third phase of the implementation of the method. Equidistance therefore does indeed originally lie at the centre of this process.

Having said that, if equidistance is the principle, it ceases to be applicable when – and I quote the case of Nicaragua v. Honduras – a court or tribunal faces “special circumstances in which it cannot apply the equidistance principle”. This is the wording used by the ICJ in the most recent of the extremely rare cases in which equidistance was set aside as a point of departure for effecting delimitation. The quotation continues:

For all of the above reasons, the Court finds itself within the exception provided for in Article 15 of the UNCLOS, namely facing special circumstances in which it cannot apply the equidistance principle. At the same time equidistance remains the general rule.

Although the Court mentions Article 15 of the 1982 Convention, this general rule of a customary nature also applies to the delimitation of the continental shelf and the exclusive economic zone because, as I have already underlined, the applicable method for delimiting these areas is similar to that set out in this provision.

On what grounds did the Court set aside this “general rule” in Nicaragua v. Honduras? Not only – and I stress not only – for the delimitation of the territorial sea but also of the continental shelf and the exclusive economic zones of the Parties. There were four such grounds, which the Court applied concurrently, but none of which is found in our case.

First, in the case that gave rise to the ICJ’s 2007 Judgment “Neither Party has as its main argument a call for a provisional equidistance line as the most suitable method of delimitation,” whereas in our case Myanmar is convinced that this is indisputably the case and believes it has shown so. The fact is that the very special

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120 Ibid. – emphasis added
121 Ibid., para. 275.
circumstances which, in the *Nicaragua v. Honduras* case, led the Parties and the Court to set aside the equidistance method are nowhere to be found in our case.

Second - and probably one of the decisive grounds which led the Court to align itself with the views shared by the Parties in *Nicaragua v. Honduras* the end-point of the land border between Nicaragua and Honduras – here I am quoting the Court - “Is a sharply convex territorial projection abutting a concave coastline on either side to the north and south-west;

[taking into account Article 15 of UNCLOS and given [this] geographic configuration … the pair of base points to be identified on either bank of the River Coco [the River Coco is the river which constitutes the boundary between Honduras and Nicaragua], at the tip of the Cape would assume a considerable dominance in constructing an equidistance line, especially as it travels out from the coast. Given the close proximity of these base points to each other, any variation or error in situating them would become disproportionately magnified in the resulting equidistance line."

This very special circumstance is now being shown on the screen. The two points, V and W, are the only base points that could be adopted. They are about 1,250 m apart, which makes their use risky at the very least for the reasons given by the Court. The equidistance line should have been constructed entirely on the basis of these two points, V and W, which are the extreme points of the mouth of the river, and at no time would another sector or another point on the Parties’ coasts have been relevant for this purpose because none is closer than V or W to the equidistance line.

Our case is completely different. As Mr Lathrop showed us this morning, it is perfectly possible to determine the base points on the basis of which one can, without difficulty, draw the provisional equidistance line which may be adjusted if need be. Of course, points β1 and μ1 situated on either side of the mouth of the Naaf River are close to each other, (they are still just over 6.5 km away here, as against 1.250 km in the *Nicaragua v. Honduras* case, so much more than was the case in *Nicaragua v. Honduras*. ) However, as Myanmar showed in its Rejoinder, distance is not an essential problem. On the other hand, β1 and μ1 present three features that distinguish them radically from points V and W at the mouth of the Coco River:

- On one hand – and this is the essential point – they are not, if I may put it like this, “unique”; whereas in *Nicaragua v. Honduras* V and W exclusively governed the course of the entire line, β1 and μ1 are just two out of five points. The equidistance line is constructed on the basis of β1 and β2 on the Bangladesh side, and of μ1, μ2 and μ3 on the Myanmar side, which thereby limits the influence of β1 and μ1.

- On the other hand, (and this is connected), if for one reason or another β1 and μ1 would not do, other base points would be available in the immediate vicinity of those adopted by Myanmar, and could be used to draw the provisional equidistance line.

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122 ibid., para. 277.
124 RM, pp. 95-101, paras. 5.10-5.13.
However, it did not work like this in Nicaragua v. Honduras, where the extreme convexity of the mouth of the Coco River excluded any alternative, and

- Lastly, these two points, β1 and μ1, are situated on banks which, contrary to the banks of the Coco River, are extremely stable.

The third point, as the ICJ also noted, is that Nicaragua and Honduras agreed moreover that:

The sediments carried to and deposited at sea by the River Coco have caused its delta, as well as the coastline to the north and south of the Cape, to exhibit a very active ... morpho-dynamism. Thus continued accretion at the Cape might render any equidistance line so constructed today arbitrary and unreasonable in the near future.125

I am well aware, Mr President, that Bangladesh would have us believe that the same phenomenon is present here. Hence, in paragraph 3.104 of its Reply, the Applicant reasserts that the coastline of the Bengal Delta is among the most unstable anywhere in the world.126 But this assertion is deceptive.

The question is not to establish to what extent the coasts of the Bay of Bengal in general are stable or not, but whether their alleged instability precludes fixing the appropriate base points.

As Mr Lapthrop also showed, it is certainly possible to establish base points that escape this partly postulated instability.127 Although I need not go over this again, this is the case of the five points on which Myanmar relies in order to draw the provisional equidistance line. And it is especially the case of points β1 and μ1, whose similarity to points V and W, situated on the banks of the River Coco – is an illusion. As shown in the series of satellite photographs now on the screen and found at tab 4.10 in your file, the deposits of the Coco are particularly impressive, extending by more than 3.5 km each century. 3.5 km each century!

There is nothing comparable in the Naaf estuary. As Myanmar has shown in its Rejoinder;128 this part of the coast of the Bay of Bengal is, by contrast, remarkably stable. A comparison of the nautical charts of the region from 1974 to 2011 – relevant extracts of which you can see on your screens, and which are also found at tab 4.11 in the Judges’ file - confirm this stability. Points β1 and μ1 are situated at locations which have remained unchanged since at least 1974.

Last but not least, and this is the fourth ground which led the ICJ to set aside equidistance as a method of delimitation in Nicaragua v. Honduras, the Court found that, in this case:

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126 See also: MB, paras. 2.16 et 2.46.
127 See the pleading of Mr Samson (ITLOS/PV.11/7 (F), p. 18, lines 11-29).
128 RM, paras. 5.18-5.19 and Sketch-map No. R.5.3.
The difficulty in identifying reliable base points is compounded by the [remaining] differences between the Parties as to the interpretation and application of the King of Spain’s 1906 Arbitral Award in respect of sovereignty over the islets formed near the mouth of the River Coco and the establishment of ‘[t]he extreme common boundary point on the coast of the Atlantic [129]. {130}

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

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

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

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129 Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras V. Nicaragua), Judgment, I.C.J Reports 1960, p. 202.
131 MB, vol. III, annex 6; see MB, paras. 3.21 and 3.23 and CMM, p. 26, para. 2.29.
The 2007 decision is important for another reason. In it, the ICJ analyzes the handful of other precedents which Bangladesh also relies on in support of its favoured method. These are the cases of *Tunisia v. Libya* and *Gulf of Maine*, also adjudicated by the Court, and the Arbitral Award of 1985 in the *Guinea v. Guinea Bissau* case. (I note again in passing that, in his presentation of the applicable law last Thursday, Professor Crawford placed *Tunisia v. Libya* and *Guinea v. Guinea Bissau* among the decisions based not on the principle of the angle bisector but on a *sui generis* method.) The Court's analyses in the 2007 Judgment will serve as a framework for my brief comments on these three cases, which I shall examine in reverse chronological order, it being noted that all three of them go back to the years 1982 to 1985; over 30 years have passed since then.

The 1985 Award is perhaps the one that serves Bangladesh's interests the least badly. But let me say quite clearly that despite my deep and genuine respect for the members of the Tribunal that delivered it, it is somewhat eccentric as regards the adopted method of delimitation and (fortunately, I believe), has remained one of a kind. It was also challenged shortly afterwards by one of the members of the Tribunal, President Bedjaoui, as Mathias Forteau mentioned this morning. Also, while the ICJ mentioned it three times in the 2007 Judgment, it was wary of relying on the Tribunal's reasoning when delivering its own decision. One might even think that the *caveat* accompanying its prudent use of the bisector method was inspired, precisely, by this somewhat baffling "precedent". In the Court's own words:

[Thus] ... warns the Court in referring to its judgement of 1969 in the North Sea Continental Shelf Cases where the bisector method is to be applied, care must be taken to avoid 'completely refashioning nature'.

This is of course true in every case, but it is particularly so when using the bisector method which, if one is not careful, can go overboard, as Bangladesh's claim illustrates in just as extreme a form as the 1985 Award so dear to it.

I would point out that, in any event, this atypical Award, which, again, in his table of maritime delimitation cases, Professor Crawford placed among the *sui generis* cases, is not based on the application of the bisector method as such but on another one, which is similar to the method of the line perpendicular to the general direction of the coast, (and in this case to the coast of an entire continent ...). Again, as the ICJ recalled in its 1982 Judgment in *Tunisia v. Libya*, this method, as we know, "becomes, generally speaking, the less suitable as a line of delimitation the further it extends from the coast".

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135 See the document produced in Tab 1.18 of the Judge's folders of Thursday 8 September (Outcome of Decided Cases).
In respect of the same case of *Tunisia v Libya* the Court at The Hague observed – and I refer again to *Nicaragua v Honduras*:

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

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

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

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

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

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Here again, this is not true in our case. As I have said, the Parties are in agreement that the end point of the land boundary, which coincides with the starting point of the maritime boundary, is the point having the coordinates indicated in article IV of the 1980 Protocol.

Nor does the second reason which led the Chamber in Gulf of Maine to reject equidistance in favour of a bisector in its 1984 judgment apply in the present case. In the words of the 2007 judgment:

The Chamber of the Court in the Gulf of Maine case also used a bisector of the Gulf-facing mainland because it deemed the small islands in the Gulf unsuitable for use as base points.146

Professor Crawford added that in that case:

The Chamber decided that the extraordinary irregularity of the coast, particularly on the United States side, made the use of equidistance problematic.147

My eminent opponent could not have admitted more clearly (and more honestly) that this was a special case, one in which use of equidistance was ruled out (and that was 17 years ago).

To recapitulate, Mr President:

(1) cases in which an international court or tribunal has had recourse to the bisector method are extremely rare. There is only one in which it was fully applied for the totality of the delimitation requested by the Parties, and that was the Nicaragua v Honduras case. The peculiar arbitration of 1985 in Guinea/Guinea Bissau employs a perpendicular to the general direction of the coasts of five States – apart from the parties, Sierra Leone, Senegal and the Gambia – a solution which obviously cannot be transposed to the current case. In the Tunisia v Libya and Gulf of Maine cases, the ICJ rejected equidistance for the determination of only a portion of the maritime boundary between the parties, emphasizing the very special aspects of the circumstances in each of these cases. These circumstances do not occur at all in our case, which, I would add, is clearly distinguishable from the only real convincing case in which a bisector was drawn because equidistance was not practicable (and once again I refer to Nicaragua v Honduras). Furthermore, as I have said, Tunisia/Libya is also not a convincing illustration of the "bisector method" as such;

(2) in contrast to what was the case in the judgment of 2007, it is in no way impossible in our case to determine base points that would allow the construction of a provisional equidistance line, and I would like to refer you to what Mr Lathrop said this morning;

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147 ITLOS/PV.11/5 (E), p. 2, lines 31-33 (Mr. Crawford).
(3) even if certain parts of the coastline of the Bay of Bengal are unstable, that is not true of the locations used to fix the base points advocated by Myanmar;

(4) there is absolutely no disagreement between Bangladesh and Myanmar on the starting point of the maritime delimitation and its coinciding with the land boundary terminus;

(5) finally, in contrast to the situation in Nicaragua v Honduras (and Tunisia v Libya as well, by the way), Members of the Tribunal, in no way have the Parties to the case before you agreed to ask you to reject the equidistance/relevant circumstances method. Myanmar is fundamentally opposed to setting aside this method, which will make it possible, perfectly and without any complication, to arrive at a solution that is as equitable as it can be in the sense given by law to this word, while taking full account of the coastal geography of the Parties. Mr President, this Tribunal is not called upon and was not called upon to rule ex aequo et bono.

Since, in the words of the ICJ in the Romania v Ukraine case, in our case there are no “compelling reasons” that would preclude the drawing of an equidistance line and since, in contrast to the Court in Nicaragua v Honduras, the Tribunal is not “facing special circumstances in which it cannot apply the equidistance principle”, there is no reason to reject it in favour of the dubious bisector method.

Accordingly, it is solely ex abundante cautela, Members of the Tribunal, that I will now endeavour to show, more concisely, that in any event Bangladesh is greatly mistaken in the way it applies the bisector method.

Purporting to respect the guidelines laid down by the ICJ, according to which, in order to apply the bisector method, it is necessary first of all to “seek a solution by reference first to the States’ ‘relevant coasts’”, Bangladesh adopts a very robust position. According to it, its entire coast is relevant for purposes of determining the bisector line, whereas Myanmar’s only relevant coast is that between the mouth of the Naaf River and Bhiff Cape.

I am not sure that any more is needed than just a quick look at the sketch map on the screen to realize how incongruous these assertions are. The coast of Bangladesh shows a number of sudden changes in direction:

-- the first segment, which runs north-west, starts at the Naaf River (point a) and ends at the lighthouse on Kutubdia Island (point b) on the map;
-- from point b, the coast changes direction to run more towards the north, up to point c, which is the northernmost point of the Bay of Bengal;
-- it then changes direction radically, going southwest to point d,

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150 Ibid., p. 747, para. 289.
151 MB, para. 6.70 and RB, para. 3.141 and para. 3.149.
from which it takes on an almost east-west direction to end at point e, between Bangladesh and India.

In spite of this zigzagging, Bangladesh has no qualms in declaring its entire coast relevant – after the bold simplification consisting in drawing a straight line between points a and e – between the border point with Myanmar and the border point with India. The problem this operation gives rise to is that the line thus drawn has no connection – none at all – with "the actual geographical situation", and it is difficult, to put it mildly, to see this as the result of "the exercise of judgment in assessing the actual coastal geography", to quote the ICJ in the Nicaragua v. Honduras case. Without my wishing to upset my learned opponents, this is simply nonsense!

The error is less on Myanmar’s side, because the general direction of the coast being used by Bangladesh is less exaggeratedly arbitrary. However, you will note, Members of the Tribunal, the blatant inconsistency between the way in which the Applicant treats Myanmar and the way in which it treats itself – all of its coast, but only a small part of Myanmar’s – whereas it is hard to see why at the very least the portion from Bhiff Cape to Cape Negrais should be excluded, since it projects towards Bangladesh, to which it in part stands opposite. If Bangladesh wants to refashion nature in its favour, it should accept that at the very least this applies to Myanmar as well, especially since this would be much less arbitrary, and there is no reason why the portion of the coast between Bhiff Cape and Cape Negrais should be eliminated from the picture that Bangladesh has painted (granted, it is probably more of the surrealist, or even dadaist, school than the realist). Frankly, this is hardly very serious and, as Mr Lathrop will show tomorrow morning, constructing a bisector line worthy of the name and by the book leads to very different results. For now I would like to invite you, Members of the Tribunal, just to have a quick look at the sketch which includes the bisector invented by Bangladesh, the bisector that should be drawn according to the rules if this method were to be used – with in the background the line resulting from the “normal” method, that is, equidistance/special or relevant circumstances. However, I have three short general remarks on our opponents’ method – or would that be lack of method?

First of all, I am only going to mention in passing the rather odd argument that they have made based on the supposed similarity between the depiction of the general direction of the coasts which they put forward and that which would result from connecting the base points proposed by Myanmar. Our opponents were so delighted at having discovered this that they devoted two full pages and seven paragraphs of their Reply to it. It does not take that much to refute this. Suffice it to say that they have it all mixed up. Base points are not used to represent the general direction of the coast; their only use is in constructing equidistance lines, and if there were any concurrence, it would be purely by chance. This being so, Bangladesh’s counsel did not revisit this during their first round of argument – point noted.

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154 RB, paras. 5.129-5.136; see also RB, para. 3.143 and para. 3.144.
155 See RM, paras. 5.44-5.45.
Secondly, it is important to note that the notion of “relevant coasts”, so important in maritime delimitation, means different things depending on the method employed and the stage in its application, that is, the stage of application that we are at now. In its statement this morning, Daniel Müller described the relevant coasts for purposes of drawing the equidistance line. The same coasts are also relevant, as Sir Michael has shown, for the application of the test of non-disproportionality. However, things are quite different when it comes to deciding which coasts should be taken into consideration in drawing a bisector. Here, it is not the length that matters but the direction (and this must be a single direction in order to determine the two sides of the angle whose bisector will form the maritime boundary between the two countries), whereas the relevant coasts for purposes of drawing the equidistance line as well as applying the non-disproportionality test can consist of segments oriented in different directions as long as the segments are adjacent to the coast of the other State or are opposite it. Bangladesh does not make this differentiation. It rejects in one fell swoop the validity of the coasts used by Myanmar on the one hand to construct the equidistance line, of which it wants no part, and, on the other hand, to establish the angle of the bisector; and it uses the same lines (giving a general depiction of the coasts) for purposes of drawing a bisector line as well as applying the test of non-disproportionality. Once again, Mr President, this is really mixing up everything.

Our opponents, who in the end realized that their notion of relevant coasts was wildly out of kilter, fell back on a slightly more reasonable idea of matters, as Daniel Müller showed this morning, and as illustrated in the sketch maps at tab 3.5 of the Judges’ folders today. But this leaves fully intact the question of determining the relevant coasts, not in view of the non-disproportionality test or the equidistance line but for purposes of constructing the bisector. Equidistance reflects the coastal geography of the Parties in its totality. All the coasts defined as relevant must be taken into consideration. The bisector cuts an angle the sides of which must be defined using just a little bit of common sense – “using our heads”, if I may put it in those terms. Professor Crawford may well have cited the call for an “exercise of judgment” issued by the ICJ in Nicaragua v Honduras, yet he was unable to resist the demons tormenting our opponents and learned friends so relentlessly, inciting them time and again to refashion nature. If one wanted to construct a bisector according to the rules, then the a-b segments on the Bangladesh side, on the one hand, and those leading from the mouth of the Naaf River to the southernmost point of Myingun Island on Myanmar’s side, on the other hand, would have to be taken into consideration.

Thirdly, I cannot help but point out the extraordinary contradiction in which Bangladesh has become entangled.

On the one hand, they criticize as “a bare assertion” Myanmar’s argument that the relevant coasts for determining the angle on the basis of which the bisector should...
be drawn are those found in immediate proximity to the delimitation starting point\textsuperscript{160} (this seems self-evident to me if an "exercise of judgment" in assessing the relevant coasts is to be attempted).

However, on the other hand, Bangladesh asserts just as vehemently that the Myanmar coast south of Bhiff Cape (in English) “is just too far from the delimitation to be considered relevant.”\textsuperscript{161} (Interpretation continued)

This latter remark takes on a special pungency, emanating as it does from a State that is particularly partial to the arbitral award of 1985 between Guinea and Guinea Bissau in which the tribunal had no problem representing the relevant coast by a line drawn along the coasts of no fewer than five States and extending a length of 870 km.

Mr President, in my view there is hardly any need to conclude by saying:

- there is no reason to resort to a bisector line when nothing militates against equidistance;
- the bisector line invented by Bangladesh is nothing but a figment of the imagination.

With your leave, Mr President, tomorrow morning Mr Lathrop will complement this general presentation with some more technical considerations and will show what a properly drawn bisector line might look like: and it would not be to Bangladesh’s benefit. That concludes our presentation this afternoon. Members of the Tribunal, I would like to thank you indeed for your very kind attention.

\textbf{THE PRESIDENT:} We have come to the end of today’s sitting. The hearing will be resumed tomorrow at 10 a.m. The sitting is now closed.

\textit{(The sitting closed at 5.48 p.m.)}

\textsuperscript{160} RB, para.3.145.
\textsuperscript{161} RB, para. 3.151.