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ITLOS/PV.11/14/Rev.1

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

2011

Public sitting

held on Thursday, 22 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
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		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

Bangladesh is represented by:

H.E. Mrs Dipu Moni, Minister of Foreign Affairs,

as Agent;

Rear Admiral (Ret'd) Md. Khurshed Alam, Additional Secretary, Ministry of Foreign Affairs,

as Deputy Agent;

and

H.E. Mr Mohamed Mijraul Quayes, Foreign Secretary, Ministry of Foreign Affairs,
H.E. Mr Mosud Mannan, Ambassador to the Federal Republic of Germany, Embassy of Bangladesh, Berlin, Germany,
Mr Payam Akhavan, Member of the Bar of New York, Professor of International Law, McGill University, Montreal, Canada,
Mr Alan Boyle, Member of the Bar of England and Wales, Professor of International Law, University of Edinburgh, Edinburgh, United Kingdom,
Mr James Crawford SC, FBA, Member of the Bar of England and Wales, Whewell Professor of International Law, University of Cambridge, Cambridge, United Kingdom,
Mr Lawrence H. Martin, Foley Hoag LLP, Member of the Bars of the United States Supreme Court, The Commonwealth of Massachusetts and the District of Columbia, United States of America,
Mr Lindsay Parson, Director, Maritime Zone Solutions Ltd., United Kingdom,
Mr Paul S. Reichler, Foley Hoag LLP, Member of the Bars of the United States Supreme Court and of the District of Columbia, United States of America,
Mr Philippe Sands QC, Member of the Bar of England and Wales, Professor of International Law, University College London, London, United Kingdom,

as Counsel and Advocates;

Mr Md. Gomal Sarwar, Director-General (South-East Asia), Ministry of Foreign Affairs,
Mr Jamal Uddin Ahmed, Assistant Secretary, Ministry of Foreign Affairs,
Ms Shahanara Monica, Assistant Secretary, Ministry of Foreign Affairs,
Lt. Cdr. M. R. I. Abedin, System Analyst, Ministry of Foreign Affairs,
Mr Robin Cleverly, Law of the Sea Consultant, The United Kingdom Hydrographic Office, Taunton, United Kingdom,
Mr Scott Edmonds, Cartographic Consultant, International Mapping, Ellicott City, Maryland, United States of America,
Mr Thomas Frogh, Senior Cartographer, International Mapping, Ellicott City, Maryland, United States of America,
Mr Robert W. Smith, Geographic Consultant, Oakland, Maryland, United States of America

as Advisors;

Mr Joseph R. Curray, Professor of Geology, Emeritus, Scripps Institution of Oceanography, University of California, San Diego, United States of America

Mr Hermann Kudrass, Former Director and Professor (Retired), German Federal Institute for Geosciences and Natural Resources (BGR), Hannover, Germany,

as Independent Experts;

and

Ms Solène Guggisberg, Doctoral Candidate, International Max Planck Research School for Maritime Affairs, Germany,

Mr Vivek Krishnamurthy, Foley Hoag LLP, Member of the Bars of New York and the District of Columbia, United States of America,

Mr Bjarni Már Magnússon, Doctoral Candidate, University of Edinburgh, United Kingdom,

Mr Yuri Parkhomenko, Foley Hoag, LLP, United States of America,

Mr Remi Reichhold, Research Assistant, Matrix Chambers, London, United Kingdom,

as Junior Counsel.

Myanmar is represented by:

H.E. Mr Tun Shin, Attorney General of the Union, Union Attorney General's Office,

as Agent;

Ms Hla Myo Nwe, Deputy Director General, Consular and Legal Affairs Department, Ministry of Foreign Affairs,

Mr Kyaw San, Deputy Director General, Union Attorney General's Office,

as Deputy Agents;

and

Mr Mathias Forteau, Professor at the University of Paris Ouest, Nanterre La Défense, France,

Mr Coalter Lathrop, Attorney-Adviser, Sovereign Geographic, Member of the North Carolina Bar, United States of America,

Mr Daniel Müller, Consultant in Public International Law, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre La Défense, France,

Mr Alain Pellet, Professor at the University of Paris Ouest, Nanterre La Défense, Member and former Chairman of the International Law Commission, Associate Member of the Institut de droit international, France,

Mr Benjamin Samson, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre La Défense, France,

Mr Eran Sthoeger, LL.M., New York University School of Law, New York, United States of America,

Sir Michael Wood, K.C.M.G., Member of the English Bar, Member of the International Law Commission, United Kingdom,

as Counsel and Advocates;

H.E. Mr U Tin Win, Ambassador Extraordinary and Plenipotentiary to the Federal Republic of Germany, Embassy of the Republic of the Union of Myanmar, Berlin, Germany,

Captain Min Thein Tint, Commanding Officer, Myanmar Naval Hydrographic Center, Yangon,

Mr Thura Oo, Pro-Rector, Meiktila University, Meiktila,

Mr Maung Maung Myint, Counselor, Embassy of the Republic of the Union of Myanmar, Berlin, Germany,

Mr Kyaw Htin Lin, First Secretary, Embassy of the Republic of the Union of Myanmar, Berlin, Germany,

Ms Khin Oo Hlaing, First Secretary, Embassy of the Republic of the Union of Myanmar, Brussels, Belgium,

Mr Mang Hau Thang, Assistant Director, International Law and Treaties Division, Consular and Legal Affairs Department, Ministry of Foreign Affairs,

Ms Tin Myo Nwe, Attaché, International Law and Treaties Division, Consular and Legal Affairs Department, Ministry of Foreign Affairs,

Mrs Héloise Bajer-Pellet, Lawyer, Member of the Paris Bar, France,

Mr Octavian Buzatu, Hydrographer, Romania,

Ms Tessa Barsac, Master, University of Paris Ouest, Nanterre La Défense, France,

Mr David Swanson, Cartography Consultant, United States of America,

Mr Bjørn Kunoy, Doctoral Candidate, Université Paris Ouest, Nanterre La Défense, France, currently Visiting Fellow, Lauterpacht Centre for International Law, University of Cambridge, United Kingdom,

Mr David P. Riesenberg, LL.M., Duke University School of Law, United States of America.

as Advisers.

THE PRESIDENT: Good afternoon. We continue the second round of hearings. I call on Professor Boyle to conclude his statement.

PROFESSOR BOYLE: When I concluded this morning, I observed that geology is an indivisible element of article 76 and of the concept of lateral prolongation. Myanmar, of course, relies on geomorphology to make its case for lateral prolongation from the outer continental shelf. Bangladesh relies on the absence of geological connection between Myanmar's land territory and the outer continental shelf.

There is, however, a second way to answer Myanmar's arguments on article 76. That involves taking you on another trip to New Zealand. If we examine this one example of the practice of the Commission on the Limits of the Continental Shelf, we can see how far removed from reality Myanmar's position has become. Why New Zealand, you may be asking? New Zealand is one of the small number of States that have received recommendations from the CLCS after examination of their submission. If you look at the screen, you will see near the top right hand corner a small teardrop-shaped area labelled the "South Fiji Basin". The neck of the teardrop, and you can see the arrow pointing quite close to it on the screen, is less than 60 miles across. The area enclosed within the teardrop is deep seabed, but New Zealand, nevertheless, drew a 60-mile line across the neck of the teardrop and included the whole area within its continental shelf submission, relying on article 76(7), which indicates the method of construction "…*straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by co-ordinates of latitude and longitude"*.

Without addressing the necessary element of natural prolongation from land territory, a literal implementation of the provisions in article 76(4) to 76(7), of the kind made by New Zealand, could easily enclose areas specifically excluded by the article, and that is exactly what happened in that example. The important point is that the CLCS did not accept New Zealand's attempt to enclose more than 60,000 square kilometres by lines that had been drawn ostensibly in strict accordance with article 76.[1] The only possible explanation for the decision of the CLCS is that the South Fiji basin represented deep ocean floor, beyond the continental margin, and therefore ineligible for definition as the continental shelf of New Zealand. It seems to us that this decision makes it clear that it is impossible slavishly to apply the wording of article 76(4), without taking into account the natural prolongation, both geological and geomorphological, of the features which extend beyond 200 M.

New Zealand's submission failed in the one area where there was no natural prolongation. Thus the ability to draw a line along the outer edge of the continental margin as defined in article 76(4) cannot be the only test of natural prolongation in article 76. Yet New Zealand had followed exactly the methodology recommended by Myanmar when it made its submission to the CLCS. It applied article 76(4), but it had enclosed a black hole and it was disallowed. In Bangladesh's view that is what should happen to Myanmar's reading of article 76(1) and to its attempt to subordinate natural prolongation within the formulae used in article 76(4).

[1] See Summary of the Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in regard to the submission made by New Zealand on the 19 April 2006, especially paragraph 148 and Figure 2.

Professor Pellet and Mr Müller have offered you another surrealist vision of article 76. Like Don Giovanni at the Staatsoper, it will end by disappearing down a black hole. Relying on article 76(4) is not the right way to interpret natural prolongation.

Of course, you might say that the CLCS is not composed of lawyers. Its members are technical specialists in geology, geomorphology and hydrography[2] but they too have to interpret and apply article 76 as best they can. It is, however, for this court – not for the Commission – to give authoritative and definitive guidance on the interpretation of article 76, but it is nevertheless significant that the practice of the CLCS with respect to New Zealand's submission supports Bangladesh's reading of article 76 and the role of natural prolongation, and the importance of geology in establishing that prolongation.

Mr President, Members of the Tribunal, there is a larger point underlying this debate on the place of scientific evidence and terminology in the 1982 Convention. It is your responsibility to interpret and apply the Convention coherently, consistently and authoritatively. In doing so, your interpretations will give guidance to States, international organizations and the institutions established by the Convention, and that includes the Commission on the Limits of the Continental Shelf. It is true, as I am sure we would all recognize, that interpreting article 76 is not entirely straightforward, and its application may also require you to consider the relevant evidence in order to decide questions posed by the parties to this or subsequent disputes. It does not require me to tell you that there is nothing unusual about this. Despite what counsel on the other side might urge upon you, the application of science to law is what courts do all the time. Environmental cases, if I may pray in aid my other specialty, provide many good examples[3], including the *Pulp Mills* case and, for this Tribunal, the *Blue Fin Tuna* case. There are many counsel on both sides of this courtroom who understand very well the application of science in legal disputes. On the present topic, to come back to where I started and to reiterate one of my earliest points, the only evidential matter on which the parties disagree in this case is whether the tectonic plate lies under the Myanmar mainland or 50 M offshore. We showed you this morning our evidence, in summary, on the illustrations to demonstrate our view that it lies 50 M offshore, or thereabouts. Myanmar has tendered no evidence to address that issue. Its effort to challenge the evidence put in by Bangladesh have been unconvincing, in our view.

Mr President, Members of the Tribunal. This is an important case for a variety of reasons. The Tribunal now has the opportunity to contribute significantly to the articulation and crystallization of the law relating to the continental shelf beyond 200 M. However article 76(1) may be interpreted, it is self-evident that to give it an authoritative meaning will greatly assist the Parties to this case, the parties to the Convention, and the geologists and hydrographers who constitute the membership of the Commission on the Limits of the Continental Shelf. The same is true with regard to article 83(1). No international court has yet given judgment on the relevance of geology and geomorphology in fashioning an equitable solution in

[2] UNCLOS Annex II, article 2(1).

[3] See inter alia Pulp Mills on the River Uruguay (Argentina/Uruguay) (Judgment); Southern Bluefin Tuna Cases (Australia/Japan; New Zealand/Japan) (Award on Jurisdiction and Admissibility) 39 ILM (2000) 1359.

boundary delimitations beyond 200 M. Indeed, no international court has yet fashioned an equitable delimitation beyond 200 M. Until now, these have been, in the best sense, merely academic. It now falls to you to decide. Doing so will not merely help settle the present dispute but it will greatly facilitate future maritime boundary delimitations. Bangladesh has every confidence that you will rise to the occasion.

In conclusion, therefore, on the basis of the requirements of the 1982 Convention and the evidence we have put before the Tribunal, Bangladesh invites the Tribunal to rule as follows:

Firstly, we would maintain that in order to be able to exercise sovereign rights in any area beyond 200 M from its coast, article 76(1) of the 1982 Convention requires Myanmar to prove that there exists a natural prolongation from its land territory into the continental margin beyond 200 M.

Secondly, we would invite you to hold that the establishment of natural prolongation is dependent upon the presentation of geological evidence; establishing such a prolongation.

Thirdly, we would maintain that in the absence of any geological evidence establishing any natural prolongation from its land territory, Myanmar has no entitlement to extend its continental shelf beyond 200 M in any part of the bilateral or trilateral areas also claimed by Bangladesh.

Fourthly, and in contrast, Bangladesh has shown on the basis of the geological evidence that there exists a natural prolongation from its land territory that entitles it to extend its continental shelf beyond 200 M.

Accordingly, we would therefore maintain that Bangladesh is entitled to extend its continental shelf throughout the bilateral area also claimed by Myanmar and, without prejudice to the rights, if any, of India, also throughout the trilateral area also claimed by Myanmar and India.

Sixthly, to the extent that article 76 so requires, such determinations by the Tribunal are without prejudice to the delineation of the outer edge of the continental margin by the Commission on the Limits of the Continental Shelf.

Finally, further or alternatively, if the Tribunal were to rule that Myanmar has some entitlement to extend its continental shelf beyond 200 M, we would invite the Tribunal to achieve an equitable solution by delimiting the overlapping area in accordance with the line shown in Bangladesh's concluding submissions presented last Tuesday,14 September.

Mr President, Members of the Tribunal, it has been an honour and a privilege for me to have the opportunity of addressing you on these questions. I would ask you now to invite my colleague, Dr Akhavan, to the podium.

THE PRESIDENT: Thank you, Professor Boyle, for your presentation. I now call on Payam Akhavan to make his presentation.

MR AKHAVAN: Mr President, distinguished Members of the Tribunal, my task in this presentation is to respond to the arguments of Myanmar concerning the exercise by the Tribunal of its jurisdiction to delimit the outer continental shelf between Bangladesh and Myanmar. As Myanmar has only touched very lightly on these matters, I shall be brief.

Myanmar's principal contention throughout these proceedings has been that delineation of the outer limits of the continental shelf is a matter exclusively for the CLCS, in accordance with article 76(8) of the 1982 Convention. They say that such delineation is a pre-condition for this Tribunal to be able to delimit any area beyond 200 M of the land territory of either Party. Last Tuesday, Professor Pellet made the point as follows:

> [B]efore proceeding with lateral delimitation of the continental shelf beyond 200 nautical M between two coastal States, first of all we must ensure that these two States have a title to the continental shelf in question and this, according to the Convention, is within the competence of the Commission.[4]

This submission is the product of a fertile legal imagination, one that is designed to clip the wings of this Tribunal. Professor Pellet was unable to identify any provision of the 1982 Convention that imposed this particular sequence of events. He was unable to explain how his argument could be reconciled with the requirements of article 76(10) of the Convention, which provides that the provisions of article 76 are "without prejudice to the question of the delimitation of the continental shelf" between Bangladesh and Myanmar, a matter over which this Tribunal plainly has jurisdiction. Unable to rely on any legal provision, Professor Pellet argued instead that this "order of priority is based on common sense."[5] However, "common sense" as Voltaire said, "is not so common", not least as a means of salvaging legal arguments that are wholly without merit.

As set forth in our first-round arguments, Myanmar's contentions are plainly inconsistent with the Convention, and none of Professor Pellet's pleadings or appeals to "common sense" can justify so unreasonable and erroneous an interpretation of the Convention. He was unable to grapple with the distinction between, on the one hand, the delineation of the outer limit, which may be a matter for the Commission, and the delimitation of the continental shelf. Such a distinction is confirmed by article 76(10) and article 9 of Annex II of the Convention. It is plain to Bangladesh that the delineation of the outer limit is a different exercise from the delimitation of continental shelf boundary of Bangladesh and Myanmar. Each involves different parties, principles, and procedures.

Myanmar is seeking to conflate two different and distinct concepts. The function of the Commission, as clearly defined by article 76(8) and article 3(1) of Annex II, is to assist coastal States to establish their "outer limits". Nowhere does the Convention provide that Part XV procedures cannot apply to articles 76(1) and 83 to settle disputes between States in the outer shelf. Nowhere does the Convention state or

[4] ITLOS/PV11/11 (E/10) p. 10, lines 1-5 (Pellet).
[5] Ibid. p. 9, line 47-p. 10, line 10 (Pellet).

imply that this Tribunal, or an Annex VII arbitral tribunal or the International Court of Justice, is required to desist from exercising its judicial or arbitral function when it comes to delimiting the outer continental shelf. No doubt the exercise of such judicial or arbitral function cannot prejudice the question of the delineation of the outer limit and the exercise by the Commission of its role. As we have shown, however, the role of the Commission cannot trump that of this Tribunal, which must be the ultimate guardian of the rights and obligations of the Parties under the 1982 Convention. The rule of law is plainly a matter for this Tribunal, not the Commission.

The potential conflict between entitlement to an outer shelf and its outer limits may be addressed in a straightforward manner. It does not admit of any particular difficulty. In these proceedings, this Tribunal has jurisdiction only with respect to the rights and obligations of Bangladesh and Myanmar. Its judgment cannot bind any third parties. It is without prejudice to their rights. This applies as much to India as it does to any third entities established under the Convention to address the area beyond national jurisdiction. For third States and third entities, any delimitation effected by this Tribunal pursuant to its exercise of jurisdiction is *res inter alios acta*.[6] This point was put clearly by the Arbitral Tribunal in the *Newfoundland-Nova Scotia* Arbitral Tribunal as follows:

> "There does not seem to be any difference in principle between the non-effect of a bilateral delimitation *vis-à-vis* a third state ... and its non-effect *vis-à-vis* the 'international community' or third states generally."[7]

As we have previously set forth, the definition of "natural prolongation" under article 76(1), as addressed earlier today by Professor Boyle, is plainly a matter that concerns "the interpretation or application" of the Convention within the meaning of article 288(1) of the Convention. Lest there be any doubt on that point, Mr Müller began his presentation with the following statement: "Article 76 is a rule in law and not a scientific proposition. This might be surprising to go into this, because it appears evident that article 76 is a legal rule."[8] To the extent that article 76 is, as he emphasizes, a legal rule and not a scientific proposition, any disagreement on its interpretation and application gives rise to a legal dispute. As such, it is properly a matter for determination by this Tribunal; it is not a matter for scientific or technical assessment by the CLCS. The Commission has no mandate to resolve disputes as to the interpretation or application of the Convention. It can make "recommendations", but they are not binding, and they certainly cannot trump any determinations by this Tribunal. When it comes to legal determinations, the hierarchical relationship between the Tribunal and the Commission is clear.

The contradictions of the position adopted by Myanmar were rather plain to see. We noted that Mr Müller spoke in less than charitable terms about Professors Kudrass and Curray, despite the fact that both are renowned experts in the world of geology

[6] *Delimitation of the Continental Shelf between France and the United Kingdom,* Decision, 30 June 1977, *reprinted in* 18 RIAA 3, para. 28. Reproduced in MB, Vol. V.
[7] Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of their Offshore Areas as defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act (Award of the Tribunal) (Second Phase) (2002), 128 ILR (2006) 504 at 538, fn. 90. Reproduced in MB, Vol. V.
[8] ITLOS/PV11/11 (E/10) p. 17, lines 6-7 (Müller).

and geomorphology. He sought to dismiss the views expressed in their expert evidence, despite the fact that Myanmar has taken no steps to challenge that evidence. It could have introduced its own evidence; it has not done so. It could have sought to cross-examine these two experts, it has not done so. All Mr Müller has done is assert that their expertise is irrelevant to the definition of "natural prolongation". Then, contradicting himself, he argues that it is for other experts – experts at the CLCS – to resolve what he recognized to be a legal dispute between the parties in this case as to entitlement to an outer shelf. He told us:

> I am confident and a little relieved that the battle is not playing in the field of science ... but in the field of law, and more particularly in article 76 of the Convention.[9]

He concluded that:

> It is only an application of these legal provisions which will determine entitlement of a coastal state to the continental shelf.[10]

How can the Commission resolve this legal dispute? The Commission can make scientific recommendations, no more and no less. It is for this Tribunal to interpret and apply article 76 as a matter of law. In performing that function, the Tribunal can, of course, rely on expert evidence. That is the role in this case of Professors Curray and Kudrass.

Mr President, distinguished Members of the Tribunal, there is no evidence before the Tribunal to support Myanmar's claim that it has any entitlement to an outer continental shelf, but even if the Tribunal were to find that Myanmar does have such an entitlement or were to conclude that the possibility of such an entitlement continues to exist, there is still no reason why the Tribunal could not exercise jurisdiction and act to delimit the outer continental shelf between the parties, in the proper exercise of its judicial function. All relevant parties – Bangladesh, Myanmar, and even India – agree that the outer limit of the continental shelf is nowhere near the area in dispute. But let us assume that Myanmar is correct. Let us consider hypothetically that there are serious doubts as to whether bilateral delimitation beyond 200 M could potentially encroach on areas beyond national jurisdiction. Let us assume, further, that the *res inter alios acta* principle is not sufficient to avoid prejudice to third parties. What would be the situation in such a scenario, as counsel for Myanmar seems so keen to argue?

The solution is straightforward and we need to look no further than Myanmar's own submissions to find it. In order to prevent any prejudice to the rights of India in the continental shelf within 200 M, Myanmar's Counter-Memorial invited the Tribunal to indicate the "general direction for the final part of the maritime boundary between Myanmar and Bangladesh", in accordance with the well-established practice of international courts and tribunals.[11] This directional line was depicted in Sir Michael Wood's presentation on Monday.[12] Now it is clear that we disagree strongly with the

[9] Ibid. p. 16, lines 18-22 (Müller).
[10] Ibid. lines 22-24 (Müller).
[11] Counter-Memorial of Myanmar (hereinafter "CMM"), para. 5.161.
[12] Tab 4.7. of Myanmar's Judges' Folder.

arbitrary and inequitable line drawn by Myanmar, but we agree that their line and method indicates that at the very least the Tribunal is free to indicate a directional line, one that could end before the potential location of the outer limits, one that could respect India's actual claims, and that a similar line could be indicated by the Annex VII Tribunal with respect to India.

Upon delineation of the outer limits by the CLCS sometime around 2035,[13] the extension of these two lines would intersect and fix the tripoint between the parties. The evidence on record indicates both India's actual claims and the potential location of the outer limits of the continental shelf. Neither the actual nor the potential claims of third parties are a bar to the Tribunal's jurisdiction. There is simply no reason why as a minimum the Tribunal cannot proceed on the basis of a directional line in the outer continental shelf. In that way, the rights of any third parties are fully protected.

In the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Application by Costa Rica for Permission to Intervene* judgment, the International Court of Justice ruled that, in exercising jurisdiction, the Court

> is not called upon to examine the exact geographical parameters of the maritime area in which Costa Rica considers it has an interest of a legal nature.[14]

It also held that

> a third State's interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play.[15]

The situation or principle is no different in this case in relation to the outer continental shelf, although we would submit that there is complete certainty as to the maximum claims of India and reasonable certainty as to the outer limits of the continental shelf.

In this regard, it is difficult to see any rhyme or reason in Myanmar's proposition that a directional line is permissible within 200 M but not beyond. It seems that for Myanmar the use of a directional line to avoid prejudice to third parties has a certain Dr Jekyll and Mr Hyde duality: it is a sane solution within 200 M and a monstrous method beyond. There is no authority supporting the proposition that a directional line cannot be used in the outer shelf in the same manner as the inner shelf.

In brief, exercising jurisdiction is hardly an "artificial inflation of your role" as claimed by Professor Pellet.[16] The only thing that is artificial is the attempt to transform unrelated procedures and third-party rights into an impenetrable obstacle against this Tribunal's exercise of jurisdiction.

It is in this light that I now turn to some of Professor Pellet's more entertaining arguments. These, of course, are more in the nature of variations on a theme, the

[13] See ITLOS/PV11/5 (E/4) p. 22, lines 13-15 (Akhavan).
[14] Para. 65.
[15] Para. 86.
[16] ITLOS/PV11/11 (F/10) p. 14, line 20-21 (Pellet).

theme being how to pay lip service to accept the Tribunal's jurisdiction *in abstracto* while preventing its actual exercise.

Just as Professor Pellet admonishes you to avoid an artificial inflation of your role he has no problems with artificially inflating the role of the CLCS to the exclusion of your jurisdiction. He does this by attempting to confer quasi-judicial powers to the Commission. He claimed, for instance, that:

> The recommendations of the Commission are legal rulings applicable to all and essential for the definitive establishment of the outer limits of the continental shelf of the coastal state beyond 200 M[17].

However, later he back-pedalled and admitted that States parties,

> can also refuse the recommendation, but if it stays at that point, the outer limits of its continental shelf will not be binding on third parties.[18]

This clarifies that the purpose of coastal State delineation based on CLCS recommendations is opposability against third States. As noted by an eminent authority during the negotiations of the Convention, where there is disagreement,

> the strength of the proposed [CLCS] procedure [is] that the limit eventually established by the coastal State in this case *will not be opposable to third States*.[19]

Nevertheless, Professor Pellet fails to explain how this function can either supplant the judicial role of this Tribunal or translate into a necessary pre-condition for this Tribunal's right to exercise its jurisdiction in this case. The opposability of the outer limits is not an issue in this case.

The argument that determining "title to the continental shelf ... is within the competence of the Commission" is similarly flawed.[20] A proper reading of article 76(8) makes clear that it is not within the competence of the Commission to confer title to the continental shelf; that is a matter for the coastal State. To read once again the last sentence of article 76(8):

> The limits of the shelf *established by a coastal State* on the basis of these recommendations shall be final and binding.

It is the coastal State that establishes its sovereignty by making a claim justified under the Convention. The relevance of CLCS recommendations is opposability to third States. This principle was recognized long ago in the *Anglo-Norwegian Fisheries* case, in which the ICJ held that:

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[17] Ibid. p. 10, lines 32-34 (Pellet).
[18] Ibid. lines 43-45 (Pellet).
[19] Tullio Treves "La Nona Sessione della Conferenza sul Diritto del Mare" (1980) 63 *Rivista di Diritto Internazionale* 432-463 at 438; cited in Committee on "*Legal Issues of the Outer Limits of the Continental Shelf*" in International Law Association Report of the Seventy First Conference, (Berlin 2004) (International Law Association, London, 2004) (internet version) at p. 32, fn. 169 (emphasis added) [hereinafter 2004 ILA Report].
[20] ITLOS/PV11/11 (E/10) p. 10, lines 2-5 (Pellet).

> Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[21]

The situation is no different under article 76(8). The CLCS does not confer title, any more than it resolves disputes as to delimitation.

Another theme that Professor Pellet conjured up was the notion of procedural anarchy. Delimitation prior to delineation, he claimed,

> would not only be a breach of the procedure provided for by the Convention, but it would also entirely bypass the Commission ... which would be confronted with a *fait accompli* and would have nothing else to take a position on.[22]

I can reassure Professor Pellet that by proceeding as we suggest, in a manner that is without prejudice to the role of the CLCS, that body would not be left feeling futile and neglected. It would still have a role to play in delineating the outer limits, based on the Parties' submissions.

What is perhaps more significant is that Professor Pellet's procedural anarchy argument flies in the face of State practice. There are currently 14 bilateral maritime boundary agreements in which the continental shelf is delimited beyond 200 M. No fewer than eleven of these agreements were concluded before one or both Parties received a recommendation by the CLCS.[23] On Professor Pellet's approach, the States concerned have acted without lawful authority, and these agreements would have to be deprived of any legal effect. The procedural culprits include Mexico–USA in 2000, Australia–New Zealand in 2004, Iceland and Norway in 2006, Kenya–Tanzania in 2009, and Barbados–France in 2009. Surely Professor Pellet would

[21] ICJ Reports 1951, p. 116, at p. 132.
[22] ITLOS/PV 11/11 (E) p. 10, lines 6-10 (Pellet),
[23] All but one of these agreements can be found in ASIL's International Maritime Boundary series. The 1979 Agreement between the Gambia and the Republic of Senegal, Report No. 4-2, p. 849, read in conjunction with the Preliminary Information sent by both the parties to the CLCS; The 1978 Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters, Report no. 5-3, p. 929; The 1982 Agreement on Maritime Delimitation between Australia and France (New Caledonia), Report no. 5-1, p. 905; The 1988 Agreement Concerning the Delimitation of Areas of the Continental Shelf between the two Countries between Ireland and the United Kingdom no. 9-5, p. 1767; The 1988 Agreement between the Government of Solomon Islands and the Government of Australia Establishing Certain Sea and Sea-bed Boundaries, Report no. 5-4, p. 977; The 1990 Treaty on the Delimitation of Marine and Submarine Areas between Trinidad and Tobago and Venezuela, Report no. 2-13(3), p. 675; The 1990 Maritime Boundary Agreement between the United States of America and the Union of Soviet Socialist Republics, Report no. 1-6, p. 447; The 2000 Treaty on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical M, Report no. 1-5(2), p. 2621; The 2004 Treaty between the Government of Australia and the Government of New Zealand establishing certain Exclusive Economic Zone and Continental Shelf Boundaries, Report no. 5-26, p. 3759; The 2009 Agreement between the United Republic of Tanzania and the Republic of Kenya on the Delimitation of the Maritime Boundary of the Exclusive Economic Zone and the Continental Shelf see LOSB 70; The 2009 Agreement between the Government of the French Republic and the Government of Barbados on the delimitation of the maritime space between France and Barbados, Report no. 2-30, p. 4223.

agree that these States have not left the CLCS with "nothing else to take a position on."[24] This is extensive practice by significant States, on any view. It is practice that constitutes "objective evidence of the understanding of the parties as to the meaning of"[25] the procedure under article 76(8). If States can reach bilateral agreement on delimiting their outer continental shelves lawfully and without prejudice to the role of the CLCS, why cannot this Tribunal? Professor Pellet has provided no answer to that point. Such practice informs the interpretation of article 76 of the 1982 Convention, pursuant to article 31(3)(b) of the Vienna Convention on the Law of Treaties, which, as this Tribunal has recognized, "apply to the interpretation of provisions of the Convention."[26]

Mr President, from common sense, to inflated roles, to procedural anarchy, the next theme in Professor Pellet's presentation transported us from the outer limits of the continental shelf to the outer limits of legal reasoning. I refer in particular to his response to the insurmountable problems occasioned by the CLCS's projected date of 2035 for considering Bangladesh's submission. Professor Pellet complained at some length that whereas Myanmar is number 16 in the queue, Bangladesh is number 55. He asked, "Whose fault is that?" Now it is no secret that CLCS submissions are not like the Tour de France. There is no prize for being the first bicycle past the finish line. However, Professor Pellet goes to extraordinary lengths to attribute sinister motives to Bangladesh for being so far behind Myanmar in the queue. In responding to the fact that the CLCS recommendations may be 25 years away, he said:

> Mr President, whose fault is that? Myanmar presented its request on 16 December 2008 and today it is the first in the queue. ... Bangladesh, for its part, waited until 25 February 2011 to present its own request and I cannot help but think that this is not entirely lacking in any link to the case we are dealing with now, nor of tactical strategy ... Myanmar is number 16, Bangladesh is number 55. Whose fault is that, Mr President?[27]

If this were a horse race, with or without a cart, and we were galloping along the track, we would be devastated to know that Myanmar is number 16 and Bangladesh is number 55. But surely Professor Pellet is well aware that, according to article 4 of Annex II, States are only required to make their submissions "within 10 years of the entry into force of this Convention for that State." The Convention entered into force for Bangladesh in July 2001, which explains why it made its submission on 25 February 2011, actually six months prior to the deadline. The Convention came into force for Myanmar in May 1996, but primarily because the Commission was not yet functioning, the 10-year period was extended to run from 1999.[28] Mr President, there is no evil conspiracy here, no sinister motive, no delaying tactic as Myanmar

[24] ITLOS/PV11/11 (E) p. 10, line 10 (Pellet).
[25] ILC Yearbook 1966 (vol. II) 221.
[26] Advisory Opinion in the case of "Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area" 1 February 2011, para. 58. Available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf>.
[27] ITLOS/PV11/11 (E/10) p. 12, lines 4-10 (Pellet).
[28] See *Decision regarding the date of commencement of the ten-year period for making submissions to the Commission of the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea*, Eleventh Meeting, SPLOS/72, 29 May 2001; *Report of the eleventh Meeting of State Parties*, Doc. SPLOS/73 of 14 June 2001, at 13 para. 81.

imagines. Bangladesh has merely made its CLCS submission in accordance with the time limits stipulated in the Convention.

Professor Pellet does not stop there with this line of argument. Having accused Bangladesh of delaying tactics, he then proceeds to accuse it of "jumping the gun".[29] He warns the Tribunal of dire consequences if it exercises jurisdiction with respect to the outer shelf:

> All States not wanting to wait for the CLCS to examine their submission would bring to you their disputes, whether real or invented with their neighbours in order to bypass the Commission. This is called 'sneaking by'.[30]

With all this concern about orderly queues and "sneaking by", Professor Pellet would forgive me if I suggested that he sounds like an indignant Englishman. Perhaps he has in mind some barristers jumping the queue at the sandwich shop down the street, eager to have a quick lunch, as Englishmen do, so that they can hurry back to work on their pleadings. It is not fair to jump the queue, he says. However, it is difficult to understand how the exercise of jurisdiction by this Tribunal jumps the CLCS queue. Their functions are simply not the same. Bangladesh has not come to this Tribunal to delineate its outer limits. All that it asks for is a bilateral delimitation in the continental shelf within the outer limits. There is no "short-circuiting" of the Commission, of which Professor Pellet accuses us, no light bulbs that need to be changed, and the Convention's fuse-box is not in danger of exploding.

Mr President, distinguished Members of the Tribunal, perhaps because Professor Pellet is an admirer of Pierre Corneille's *Le Cid*, he is attracted to dilemmas and wants to force this Tribunal to make "*un choix cornélien*". Just as Rodrigue had to choose between the honour of his father and his love for Chimène, we are told that this Tribunal has only two unpleasant choices: it must either wait 25 years to delimit the outer shelf or it will usurp the functions of the CLCS. Like Myanmar's arguments on jurisdiction, *Le Cid* is both a tragedy and a comedy. Fortunately, the Tribunal can avoid such an outcome by adopting an approach based on the Convention, common sense, and established judicial practice.

As set forth in our pleadings, the Annex VII Tribunal in *Barbados v. Trinidad* – the only Part XV procedure to consider the issue – found that it had jurisdiction to delimit beyond 200 M.[31] Having studiously ignored this precedent, Professor Pellet finally admitted on Tuesday that:

> In this award the arbitral tribunal considered that its competence to establish the maritime boundary between the continental shelf entitlements of the two countries extended to the part of the shelf situated beyond 200 M.[32]

[29] ITLOS/PV11/11 (E/10) p. 14, line 32 (Pellet).
[30] Ibid. p. 12, lines 33-36 (Pellet).
[31] *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago,* Award, 11 April 2006, *reprinted in* 27 RIAA 147, para. 217 (hereinafter "*Barbados/Trinidad & Tobago*"). Reproduced in MB, Vol. V.
[32] ITLOS/PV11/11 (E/10) p. 13, lines 4-7 (Pellet).

That is what Professor Pellet said, but he suggested that this precedent is consistent with Myanmar's position because Myanmar does not contest the Tribunal's jurisdiction *in abstracto*.[33] The Tribunal in that case, however, held that it had jurisdiction despite the argument advanced by Barbados – identical to Myanmar's argument in this case – that delimitation would "interfere with the core function" of the CLCS and "affect the rights of the international community", relying primarily on the *St Pierre et Miquelon* case.[34] That Award, rendered in 2006, a decade after the entry into force of the Convention and the establishment of the CLCS, is certainly the more persuasive authority, and it only reinforces our conclusion that the Tribunal may exercise jurisdiction in the present case.

Mr President, distinguished Members of the Tribunal, as this Tribunal lives up to its role in contributing to the delimitation of maritime boundaries in the outer continental shelf, as it asserts its rightful place as the guardian of the law of the sea, it must bear in mind that this will surely not be the last such dispute to come before it. The continental shelf beyond 200 M may be a last frontier of maritime delimitation beyond which lies the common heritage of mankind. With technological advances and the increasing demand for scarce resources, its importance will only grow in the coming years. It must be considered, as set forth in the ILA Report of 2004, that:

> There are but few of such areas which form the natural prolongation of only one coastal State. For instance, an inventory by Prescott from 1998 identifies 29 areas of outer continental shelf. Of these areas, 22 involve more than one State and only 7 just one State.[35]

There can be no doubt that many more States will need to resolve similar disputes in the future. Now is the time for the Tribunal to demonstrate that it can expeditiously and effectively delimit the outer shelf. Myanmar invites you to rule yourselves out of having any role in that process. That cannot be right. It must be a proper interpretation of the Convention that this Tribunal has the judicial role we say it has, contributing to the resolution of disputes in the outer continental shelf while respecting the role of the CLCS and giving full protection to the rights of third States. It is in this spirit that we invite the Tribunal to effect a full delimitation between the parties without prejudice to third parties so that, following its judgment and the award of the Annex VII Tribunal, Bangladesh's maritime borders in the Bay of Bengal with both Myanmar and India may be finally and completely settled. Future generations, we hope, will look back at this seminal judgment and see it as a groundbreaking contribution to international jurisprudence and an exemplary vindication of the Convention's dispute settlement procedures.

That brings to a conclusion my remarks. I thank you, Mr President and distinguished Members of the Tribunal, for your patience and kind consideration over the past several days. It has been a great privilege and honour to appear before you.

I now ask you, Mr President, to call Professor Crawford to the floor.

[33] Ibid. lines 13-15 (Pellet).
[34] Barbados/Trinidad & Tobago, para. 82.
[35] 2004 ILA Report, p. 26.

THE PRESIDENT: I thank you, Mr Akhavan. I now give the floor to Professor James Crawford.

MR CRAWFORD: Mr President, Members of the Tribunal, imagine Professor Pellet speaking not about non-derogable human rights or about the fundamental obligations of States on issues such as aggression. Imagine him speaking about the new-found diamantine law of maritime delimitation, the peremptory requirement of equidistance/special circumstances which we had previously thought of as a method. What Professor Pellet says sounds something like this - with apologies to W.H. Auden:

> Law, says [Professor Pellet] as he looks down his nose,
> Speaking clearly and most severely,
> Law is as I've told you before,
> Law is as you know I suppose,
> Law is but let me explain it once more,
> Law is the Law.[36]

It is true, there are exceptions: the law is sometimes not the law. There is even an exception in this case, St Martin's Island, whose maritime area is to be truncated and semi-enclaved in the interests of Myanmar; but with that self-interested, unprecedented and solitary exception, the law of maritime delimitation now proceeds in lock-step – first, equidistance; then special circumstances – but take care that they are really special – a ratio of relevant coasts of 8 or 9 to 1; then manifest disproportionality – a matter of appreciation, no doubt, but formulated in terms that the criterion for disproportionality will in normal circumstances never be met. "Law is the Law." The effect is – equidistance – and Bangladesh simply has to bear the consequences. Thus Professor Pellet:

> Unless we completely re-fashion nature, which is not possible, one cannot see this concavity as a circumstance involving a shift of the equidistance line.[37]

Mr President, Members of the Tribunal, in this final substantive presentation of our Reply, I will first address the core issue of principle that separates the Parties, which is whether this Tribunal, exercising jurisdiction under Part XV, has some flexibility in order to achieve an equitable solution or whether your hands are so tied by precedent that you have no choice. To put it in other terms, is there such a conventional and precedential emphasis on equidistance as *the* solution to delimitation between adjacent States that there is nothing to be done? Secondly, and on the basis that you do have a significant degree of flexibility, I will make some brief final remarks epitomizing Bangladesh's case. Third, I will comment on your role vis-à-vis third parties, specifically India. Finally, I will say something about Myanmar's approach to the two questions you have asked us.

Mr President, Members of the Tribunal, you have heard Myanmar's chorus of counsel solemnly intoning the Canticle of Equidistance as a fundamental norm,

[36] W.H. Auden, "Law, say the gardeners, is the sun" (1940) in *Another Time* (New edn., Faber & Faber, 2007), p. 5.
[37] ITLOS/PV.11/7, p. 9, line 41-42 (Pellet) (footnotes omitted).

subject to narrowly-defined special circumstances of which concavity is not – as such – one, but of which a coastal island is – provided it is associated with Bangladesh. By now you know both the words and the music of the Canticle of equidistance, and I will neither attempt to paraphrase nor to sing it. For the latter item of self-restraint the Tribunal should be grateful.

Instead I will ask what courts and tribunals say about their task, and how in fact they perform it. Because the *North Sea* decision is said to be an outlier, I will start with the others and only come back to it at the end.

In *Tunisia/Libya* the Court said:

> The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.[38]

In *Gulf of Maine* the Chamber said of the delimitation criteria including equidistance:

> … their equitableness or otherwise can only be assessed in relation to the circumstances of each case ... The essential fact to bear in mind is … that the criteria in question are not themselves rules of law and therefore mandatory in the different situations, but 'equitable', or even 'reasonable', criteria ...[39]

In *Guinea/Guinea-Bissau* the Tribunal said:

> The essential objective consists of finding an equitable solution with reference to the provisions of Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention … In each particular case, its application requires recourse to factors and the application of methods which the Tribunal is empowered to select.[40]

In *Libya/Malta*, a case to which Myanmar rightly attributes importance, the Court said:

> The application of equitable principles thus still leaves the Court with the task of appreciation of the weight to be accorded to the relevant circumstances in any particular case of delimitation…[41]

In *Jan Mayen* the Court said:

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[38] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18.
[39] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America),* Judgment, I.C.J. Reports 1984, p. 246, at para. 158.
[40] *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau,* Award, 14 February 1985, reprinted in 25 ILM 252, para. 88. Reproduced in MB, Vol. V.
[41] *Continental Shelf (Libyan Arab Jamahiriya v. Malta),* Judgment, I.C.J. Reports 1985, p. 13, at para. 48.

> A court called upon to give a judgment declaratory of the delimitation of a maritime boundary … will therefore have to determine 'the relative weight to be accorded to different considerations' in each case; to this end, it will consult not only 'the circumstances of the case' but also previous decided cases and the practice of States.[42]

In *Romania v. Ukraine*, as Professor Pellet is fond of emphasizing, the Court did give priority to three separate stages as "broadly explained" in *Libya/Malta*, but it did so without disapproving the earlier jurisprudence including *Libya/Malta*, which allows for flexibility, and it referred to the need for methods "that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place".[43]

Finally, without descending to the form of legal realism which says that it all depends on what the judge had for breakfast,[44] it is material to observe what tribunals actually do in delimitation cases, sometimes without saying so.

First, they compromise. Even *Romania v. Ukraine*, the most overwhelming win in recent delimitation history, involved an element of compromise: the area of overlapping claims was shared (in a ratio of about 4:1) and it would have been much closer to 50:50 had not Ukraine ridiculously over-claimed.

Second, they take access to resources into account. It is well-known that this happened in *Gulf of Maine*. There was a story, no doubt apocryphal, that the President of the Chamber said to the Canadian agent: "I have got you your lobsters." The explicit reference to access to resources as a relevant factor in *Jan Mayen* – though it has attracted criticism – is a refreshing piece of intellectual honesty.

They emphasize the particular over the general. The Latin word "*unicum"* is used, for example, in the French texts of the *Gulf of Maine* judgment:

> (Interpretation): The practice ... is there to demonstrate that each specific case is, in the final analysis, different from all the others, that it is *monotypic ...*[45]

(Continued in English): The English translation of the authentic text is "monotypic", which is a bit of a pity: *"unicum"* could have been left in the Latin. It was used in the English text of *Guinea/Guinea Bissau*.

Tribunals sometimes make *a priori* decisions, not according to the formula they themselves lay down – for example, the *a priori* decision to ignore Serpents' Island in *Romania v. Ukraine*.

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[42] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 59, para. 58.
[43] *Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine),* Judgment of 3 February 2009, General List No. 132, para. 116.
[44] Attributed to Jerome Frank: see a Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 Loy. L. A. L. Rev. 993, 993 (1992-1993).
[45] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America),* Judgment, I.C.J. Reports 1984, p. 246, at p. 290 (para. 81).

In all these respects they are following the general approach in the *North Sea* cases, and not following Pellet's Peremptory Postulate - which brings me back, briefly, to that decision.

In the *North Sea* cases, the Court decided, definitively, that equidistance was a method of delimitation and not a rigid rule. It said:

> It has however been maintained that no one method of delimitation can prevent such results and that all can lead to relative injustices. This argument … can only strengthen the view that it is necessary to seek not one method of delimitation but one goal.[46] … The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.[47]

The fact is that the decision in the *North Sea Continental Shelf* cases is ineradicably, indelibly part of the jurisprudence. The jurisprudence has evolved but it is has not departed from the basic proposition that there is a level of flexibility in the process. The case is the single most cited authority in the jurisprudence of maritime delimitation.

Think how often counsel for Myanmar intoned that "the land dominates the sea". Where did that come from? Well, *North Sea Continental Shelf*.

Think how often they warned you against "completely refashioning nature". Where did that come from? *North Sea Continental Shelf*. It is worth noting, as I said this morning, that the Court was perfectly conscious that the negotiation of the continental shelf boundary in accordance with its judgment would involve substantial departure from equidistance, not merely trivial or minor. Hence the real significance of the word "completely" in that famous *dictum* – "completely refashioning nature". You saw how much refashioning was involved. Counsel for Myanmar tended to ignore that, thereby refashioning the *dictum* more or less completely.

To conclude, the jurisprudence, like the treaties, supports the view that there is no rigid rule or presumption of equidistance in international law. Articles 74(1) and 83(1) are different from article 15 of UNCLOS, and they are different from article 6 of the 1958 Continental Shelf Convention: the difference of language was deliberate and resulted from the 1969 judgment and the deliberate policy decision that judgment embodied. Maritime delimitation is a bilateral process between neighbours aiming at an equitable solution.

A similar position is taken, by and large, in the literature. Myanmar cited on several occasions a 1993 article by Professor Sir Derek Bowett. There is no-one more experienced than Sir Derek in this field or more capable of calling a spade a spade. His conclusion was, as usual, succinct and clear:

[46] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* Judgment, I.C.J. Reports 1969, para. 92.
[47] *Ibid.,* para. 93.

> The situations are so diverse that generalizations are hazardous, and to attempt to postulate 'rules' would be to fall into the error which the courts have persistently, and rightly, avoided.[48]

Many others have said the same, although not always with the same concision. Thus Dupuy and Vignes following the *North Sea* cases:

> "The goal became an 'equitable solution', taking account of all the 'relevant circumstances' which characterize a particular area, circumstances which might be geographical or geomorphological. Moreover, that solution could be obtained by drawing an adjusted median line, with due regard to the circumstances in question, even though this was by no means a rule …"[49]

I won't read the whole passage. Rothwell & Stephens:

> The ICJ in *Tunisia v. Libya …* gave initial guidance as to how this may be achieved, emphasizing the importance of taking into account the relevant circumstances of the case. This approach has been duplicated in subsequent decisions and is illustrated by the consideration given to a wide range of relevant geographic factors in order to ensure they are taken into account in the final delimitation lines.[50]

Malcolm Evans:

> I'm sufficiently dogmatic and unrepentant and still believe what I first wrote about the subject nearly 20 years ago. This is that the idea of delimitation in accordance with equitable principles is best understood as a process, rather than as a call for the identification of any particular means, methods, concepts or factors which, when framed as principles, are to be considered equitable.[51]

Prescott & Schofield:

> Thus there is ample scope for differing interpretations as to which factors are applicable to a particular case and therefore … there is much potential conflict in the stances of States as to the emphases to be afforded to the principles or rules that might be applicable to a particular delimitation.[52]

Churchill & Lowe:

> As regards the question of how particular relevant or special circumstances are to be weighted, it seems, especially from the *Libya/Malta* and *Greenland/Jan Mayen* cases, that a court has a broad discretion to determine the relative weight of any particular

[48] D. Bowett, in Charney & Alexander, *International Maritime Boundaries*, vol. 1 (1993) 131, 150.
[49] Dupuy and Vignes, A *Handbook on the New Law of the Sea*, Academie de droit international, 13.
[50] Rothwell & Stephens, *The International Law of the Sea* (2010), 401.
[51] Evans, in Freestone, Barnes & Ong (eds) *The Law of the Sea: Progress and Prospects* (2006) 137, 145. See also Evans, in Evans (ed) *International Law* (3rd edn 2010) 651, 679.
[52] Prescott &Schofield, *The Maritime Political Boundaries of the World,* (2nd edn, 2005), 223.

> circumstances, subject only to the need for some consistency with previous cases.[53]

These passages could be replicated *ad nauseam*, but they confirm Bowett's understanding. It follows that: (1) equidistance/special circumstances is one – but only one – a very important, but only one method of delimitation – it is normal but not invariable; (2) there is no presumption of equidistance – if it does not produce a satisfactory, i.e. equitable, outcome, it should be modified or abandoned; (3) there are other methods, including angle bisectors that may be appropriate, and they have been recently used.

Mr President, Members of the Tribunal, I move to look at the various issues of delimitation that you face and the circumstances of the present case. Following Professor Sands, there is nothing I need to say more about the territorial sea around St Martin's Island, except to stress the obvious contradiction between Myanmar's case on the territorial sea boundary and its case on the single maritime boundary within 200 M.

As to delimitation beyond 12 and within 200 M, I would make four points by way of wrapping up our case.

The first point concerns St Martin's Island as an EEZ base point. Of course if it is not even entitled to a full 12-M territorial sea, then a *fortiori* it is unlikely to be an EEZ base point. This perhaps explains why Mr Lathrop's opening presentation on the territorial sea was so inextricably confused with issues of EEZ delimitation. I would respectfully suggest that the Tribunal should not think that by giving St Martin's Island a 12-M territorial sea, it is doing Bangladesh some sort of favour. The real question for the Tribunal concerns delimitation beyond 12 M.

I have nothing more to say about coastal base points for an EEZ and continental shelf boundary over and above what has been said so eloquently by Mr Reichler today. No doubt there is much that could be said about article 121(3) but Myanmar has not said any of it. All I would say is that article 121 is part of the Convention and must be given its proper effect – which is not to be evaded by the choice of an article 121(3) feature as a base point.

I turn again - this is my second point - to the *Cameroon v. Nigeria* case which Professor Forteau described as *particulièrement déterminante*.[54] It is for your purposes for the present case not determinant at all, for reasons I gave in the first round. The crucial point is of course Bioko, located in precisely such a place as to block any south-eastern extension of a limited Cameroon-relevant coast. Incidentally, it was not I who came up with the bright idea of an Eastern Bioko, as counsel suggested.[55] It was their suggestion, but we are grateful for it, since locating eastern Bioko in the Bay of Bengal only emphasized the enormous open space of that Bay, over which Bangladesh's coastal frontage looks unimpeded, towards Antarctica. But I do confess that it was my idea that Eastern Bioko should be a holiday destination!

[53] Churchill & Lowe, *The Law of the Sea,* (3rd edn, 1999), 188 (footnotes omitted).
[54] ITLOS/PV.11/10 F/9, p. 10, line 22 (Forteau).
[55] ITLOS/PV.11/8, p. 17, lines 20-23 (Larthrop).

Professor Forteau, who also sees concavity everywhere except where it is actually to be found in the corner of the Bay of Bengal, noted that the Court said that the Cameroon coast west of Cape Debunscha established "no particular concavity" and that is true.[56] Here there was nothing more than an irregular coastline with an estuary and a major opposite island with little or no sea space. None of these factors apply to our situation in the Bay of Bengal.

Thirdly, a final word about *Barbados v. Trinidad & Tobago*, on which our friends opposite had so much to say: the case was essentially about two different issues. First there were two small islands opposite each other, not to be distinguished – Tobago and Barbados. Barbados claimed about 80% of the relevant area between those two islands, essentially on grounds of historic fishing title, and it failed utterly. There was no case for anything more as between those two opposite coasts for anything more than equidistance. That is what Trinidad and Tobago asked for and it is what it got. Secondly, however, there was a question whether the east-facing coast of the island of Trinidad was entitled to get out to 200 M – that it was entitled to a corridor, or only to equidistance. The Tribunal's answer was – in effect – "yes, a modest tapering corridor" – but, the Tribunal said, "you have already given that away to Venezuela" – so they got a point instead, a point rather than a goal, you might say.. As I said in the first round, a tribunal which believed in Professor Pellet's peremptory norm would not have given even that.

Fourthly, I refer to the grey area issue that I discussed in the first round. Professor Pellet said almost nothing about it – he simply asserted that it created a legal impossibility – he is very fond of impossibilities. He added that my failure to deal with State practice was embarrassing.[57] But I referred to the practice of his own client – that is to say Myanmar – which claims priority of EEZ over territorial sea in the area of cut-off of St Martin's Island. He completely failed to deal with that. In fact there is not much practice and what there is, is equivocal. I would simply note two points. First, much of the focus has been on the special case where rights in different zones overlap and are exercised by different States concurrently – as with the Australia-Papua New Guinea Agreement. But the Parties here agree that the boundary is a single maritime boundary, which effects a delimitation *inter se* of all rights by a single line. It excludes as well as allocating rights, whatever they may be. So there was no legal impossibility. There would be territorial sea rights to the south of the line between Nicaragua and Honduras because the lines around the cays are drawn from a single point, and the cays have outlying reefs and so on, which in other circumstances could have provided a basis for territorial sea jurisdiction. That jurisdiction is excluded vis-à-vis EEZ rights by the line that the Court drew. That is simply one example of potentially many. Of course it is possible for there to be an express agreement closing off the EEZ and continental shelf jurisdiction of a State at 200 M, in effect enclaving a corridor. There are only two judicial decisions – which reach opposite conclusions – but the logic of the position is as I have stated it, and it has only been challenged by Professor Pellet in a single conclusory sentence.

[56] ITLOS/PV.11/9, p. 12, lines 15-16 (Forteau).
[57] ITLOS/PV.11/11 F/10, p. 9, lines 37-39 (Pellet).

Mr President, Members of the Tribunal, on the subject of delimitation of the continental shelf beyond 200 M, there is also nothing to add to what has just been said by Professors Boyle and Akhavan. I would only add one point. Presentations by Bangladesh have confirmed the importance placed on natural prolongation in the delimitation of the continental shelf. The importance is demonstrated by the *North Sea* cases, which noted that different levels or degrees of prolongation should be taken into account. The Tribunal has learnt the extent to which Bangladesh sustains a robust and continuous natural prolongation into the Bay of Bengal. It has been informed of the limited nature of the prolongation of Myanmar into the Bay – which is one of mere adjacency, and not of continuity. That fact must be relevant to your task.

An equitable solution: Mr President, Members of the Tribunal, Myanmar presents maritime delimitation as a form of manifest destiny, with Bangladesh excluded. Notably it is excluded from the 200-M line by Myanmar's claim line, which divides the area I showed you this morning – including the area down to Cape Negrais, in a ratio of 1:2 in favour of Myanmar; and this despite a coastal ratio – on the assumptions I set out this morning of 1:1.17. In truth, since Cape Negrais is too far from the area of the delimitation to exert any influence over it in terms of overlapping potential entitlement, the ratio of relevant coasts is much closer to 1:1. That makes a 2:1 division of the area of overlapping claims within 200 M obviously inequitable. This is the more so in that Myanmar's claim line excludes Bangladesh entirely from the outer continental shelf, despite the fact that it has more than 30% of the coastline in the northern part of the Bay of Bengal. The overall result taken together is grossly inequitable. To allow one State to have some access to the outer continental shelf and the other to have none – none at all – is grossly inequitable. It is far from being required by international law, as Myanmar claims.

I should say something about the position of India and the Annex VII Tribunal *vis-à-vis* your Tribunal. I would first note that Myanmar has said nothing in response to my comments in the first round about the systematic character of Part XV of the Convention, and the need for tribunals under Part XV to act in aid of each other. Sir Michael makes much of the possibility that any attempt to remedy the cut-off effect by adjusting the boundary in this case will make Myanmar "compensate" Bangladesh for India's claims. One can safely predict that he will make the converse argument before the Annex VII Tribunal on behalf of India. The two parties have, it might seem, joined forces to try to prevent either Tribunal from addressing the cut-off effect in favour of Bangladesh.

Here there are four points to be made. First, you can only decide this case as between the two Parties. That is common ground. Secondly – and at least out to 200 M this also seems to be common ground – you can decide this case on the basis of equitable principles as between Myanmar and Bangladesh. Thirdly, Bangladesh's entire coastal frontage stands in opposition to Myanmar's and must be fully taken into account. Bangladesh's coast is not divided *a priori* between competing neighbours. India has the normal protections of a third party in bilateral delimitation proceedings: it could have intervened to clarify its position but it chose not to do so. That means it is unequivocally a third party. But, and this is my fourth point, the Tribunal is entitled to know and to take into account the factual situation. It is currently as shown on the screen. You are entitled to know and to take into

account the fact that the two claim lines of Bangladesh's neighbours result in a cut-off which is more serious by reason of their combination. This enhances – it certainly does not diminish – Bangladesh's claim to an equitable result in the delimitation with Myanmar.

Further, the Tribunal cannot assume that the Annex VII Tribunal alone can remedy the cut-off. I suggest that you cannot avoid the issue by allowing each side to play the other side against Bangladesh – the game of pass the parcel to which I referred earlier. I suggest, with all respect, that your Tribunal cannot avoid adjusting the line as between these two Parties in view of the obvious inequity to Bangladesh. If each Tribunal acts in accordance with article 74(1) and 83(1), the overall result will be equitable as between all three States.

Mr President, Members of the Tribunal, finally certain remarks are called for concerning Myanmar's answers to the two questions put by the Tribunal, through you, Mr President, at the preliminary meeting on 7 September, and subsequently communicated in writing.

The practice whereby the Tribunal asks for certain matters to be dealt with by the parties in oral argument is now well established. It is a feature of Hamburg rather than The Hague – it would be good if it was a feature of The Hague. I remember the significant questions asked by the Tribunal in the *Southern Bluefin Tuna* and *Land Reclamation* cases, and Professor Sands has reminded me of those put in the *Saiga* case. Both parties in those cases took the questions seriously. Indeed, in this case we welcomed the questions and we did our best to address them. How did Myanmar answer these questions? Well, it did not, as you will have noticed.

The first question concerned Myanmar's right of access by ship to the Naaf River through the waters around St Martin's Island. There is no evidence that this has caused any difficulty in practice these last 30 years – certainly Myanmar produces none. Yet on Friday you heard a long presentation, ostensibly on the territorial sea, by Mr Lathrop in which the question of maritime access was not mentioned once. Not merely did Mr Lathrop not answer the question, he did not even say he was not answering the question. This was silence upon silence.

To be fair, Sir Michael Wood mentioned maritime access, in the course of his long refutation of a proposition for which we have not argued – that is, that there is a signed treaty delimiting the territorial sea. In the course of his speech he briefly mentioned the issue of naval access, on which he said there was likewise no agreement. He said Bangladesh's position was not clear.[58]

Well, you have heard what the Foreign Minister and Agent had to say on Day 1.[59] I thought she was clear. What the Foreign Minister and Agent says in response to a direct question from an international tribunal commits the State. That is the lesson of the *Nuclear Tests* cases,[60] so there is your answer.

[58] ITLOS/PV.11/7, p. 24, lines 2-47 (Wood).
[59] ITLOS/PV.11/2/Rev.1, p. 5, lines 23-29 (H.E. Dr Dipu Moni).
[60] *Nuclear Tests (New Zealand v. France),* Judgment, I.C.J. Reports 1974, p. 457, at pp. 472-475.

Unlike Mr Lathrop, Professor Pellet was explicit in failing to answer the second question, about methods of delimitation beyond 200 M. It did not arise, he said. Evidently your Tribunal thought it might arise, which is why you asked it, but from Professor Pellet, answer came there none. He said only that the criteria for delimitation do not change at 200 M.[61] Beyond that – in his best hard-boiled manner – he said, in effect, it is no business of yours. This was the self-judging advocate: what I tell you is off-limits, must be irrelevant. I do not suggest it was contempt of the Tribunal but it sounded like deliberate neglect. By contrast, Professor Boyle and I have tried to address the issue in a way we hope might assist in a useful, practical manner.

This leads me to my second final concluding point. This case has now been pleaded extensively, in writing and orally. On key issues Myanmar has adopted a strategy of silence. It has expressly declined to discuss delimitation beyond 200 M from the nearest coast. It takes refuge in an implausible admissibility argument to preclude you from dealing with an issue as to which the Annex II Commission self-evidently lacks jurisdiction to determine. We will listen with care to what they have to say on Saturday, but in respect to the silences I have mentioned, and the many others, I suggest, with respect, it should not be allowed to fill the cavities in its case by introducing new material or argument to which we have no chance to respond.

Mr President, Members of the Tribunal, I thank you again on behalf of counsel for your patient attention. I would ask you now to call the Deputy Agent to deal with the question of our submissions.

THE PRESIDENT: Thank you for your statement. I now call on the Deputy Agent, Mr Mohammed Khurshed Alam, to read his Party's final submissions.

REAR ADMIRAL ALAM: Mr President, Members of the Tribunal, may I request that HE Mohamed Mijarul Quayes, the Foreign Secretary of the Government of Bangladesh, comes to the podium for the submission.

THE PRESIDENT: Thank you. I invite His Excellency Mr Mohamed Mijarul Quayes, the Foreign Secretary of Bangladesh, to take the floor to present the submissions of Bangladesh on behalf of the Agent of Bangladesh.

H.E. MOHAMED MIJARUL QUAYES: Mr President, distinguished Members of the Tribunal, it is a distinct privilege and honour for me, as the principal diplomatic officer of my Government, to appear before you to conclude the oral presentation so meticulously prepared and presented by our distinguished legal team. The Honourable Foreign Minister, in her capacity as the Agent for Bangladesh, asked me to speak on behalf of Bangladesh at the closing of this presentation and to read our formal submissions into the record.

Allow me at the outset to convey, on behalf of the Honourable Foreign Minister, myself, the Deputy Agent, the entire Bangladesh legal team and, most importantly, the people of Bangladesh, our sincerest thanks and appreciation to you,

[61] ITLOS/PV.11/8, p. 35, lines 39-47 (Pellet).

Mr President and to all your fellow Judges, including of course Judges Caminos and Nelson who are not able to be here today. We thank also the Registrar and everyone working at the Registry, the interpreters and translators, the stenographers, and the entire team that has made our work here over the past three weeks run as smoothly as it has. You have our deepest gratitude.

We are grateful also for everything that you have done to facilitate these proceedings, beginning as early as December 2009 when the Parties agreed to bring these proceedings before this Tribunal. The efficiency and fairness with which this case has been conducted have been exemplary. Everything that we have experienced over the last 21 months has only enhanced our confidence in the wisdom of our mutual decision to bring this case to the International Tribunal for the Law of the Sea.

I commend the Agent of Myanmar, the Honourable Attorney General Mr Tun Shin, for the foresight and courage that his Government has shown. I shall be remiss if I do not also thank the counsel for Myanmar and all the members of the team, for the courtesies and civility with which they have conducted themselves during the hearings, and the demonstration of their friendship.

In her opening remarks on 8 September, the Honourable Foreign Minister traced the many steps over the last very many years that brought us to your door. At this late stage, there is of course, no point in looking backwards. For 34 years, the Parties were unable to agree on the course of their maritime boundaries, except only in the territorial sea. Earnest efforts in good faith were made on both sides but ultimately to no avail. Thanks to the wisdom and foresight of the drafters of the 1982 Convention, the dispute resolution provisions of Part XV offered us another way to resolve this dispute once and for all.

For Bangladesh, this Tribunal's Judgment will be the first of two very important steps. As you know well, Bangladesh has parallel proceedings *vis-à-vis* its other neighbour, India, pending before a distinguished arbitral tribunal convened pursuant to the provisions of Annex VII of the 1982 Convention. Although India has not acceded to our request to bring our proceedings to this Tribunal, it is evident that the two cases are very much related. Our three States – Bangladesh, India and Myanmar – are geographically united by the concavity in the Bay of Bengal's north coast. The comprehensive resolution that Bangladesh seeks, and the full equitable solution that the 1982 Convention promises, will come once the Annex VII Tribunal also has issued its award.

Mr President, Members of the Tribunal, Bangladesh confidently places itself in your hands. I stand before you at this Areopagus of the Law of the Sea, not to argue a point of law, but to reiterate, *a fortiori,* the arguments and conclusions presented by our legal team. I stand here for the 160 million people of Bangladesh who have full faith in their capacity to define their destiny and to embellish their lives and livelihood with resourcefulness and enterprise, and the resources that they rightfully own on land and in their seas. I stand before you to convey their conviction that here justice will be done, with fairness, so as to achieve an equitable solution. We have never wavered, and will never waiver, in our trust in, and respect for, your judgment. You

have heard the arguments presented by our counsel; they fully set forth the views of Bangladesh. There is nothing more for me to add.

Mr President, Myanmar is one of the only two States contiguous to Bangladesh. Naturally, there are issues characteristic of relations between the two countries that are born of contiguity. These, we would like to speak of as issues of intimacy rather than irritants or long-standing problems. Delimitation of the maritime boundary is one such issue of intimacy. Looking forward, Bangladesh very much believes that these proceedings will deepen, not detract from, the friendship between the peoples of Bangladesh and Myanmar. With the benefit of the Tribunal's Judgment, our two countries will be able to move forward, where the maritime boundary shall constitute a celebration of our friendship – not a wall that separates, but a frontier for cooperation, our way smoothed by the legal certainty that we seek.

Pursuant to article 75 of the Rules of the Tribunal, I shall now read the final submissions of the Government of the People's Republic of Bangladesh. They are unchanged from those set out in our Reply. Instead of reading out the many coordinates that are included there, we have provided a copy in the Judges' folders at Tab 8.10. The coordinates can also be seen on the screens.

Mr President, distinguished Members of the Tribunal, on the basis of the facts and arguments set out in our Reply and during these oral proceedings, Bangladesh requests the Tribunal to adjudge and declare that:

(1) The maritime boundary between Bangladesh and Myanmar in the territorial sea shall be that line first agreed between them in 1974 and reaffirmed in 2008. The coordinates for each of the seven points comprising the delimitation are those set forth in our written Submissions in the Memorial and Reply;

(2) From Point 7, the maritime boundary between Bangladesh and Myanmar follows a line with a geodesic azimuth of 215° to the point located at the coordinates set forth in paragraph 2 of the Submissions as set out in the Reply; and

(3) From that point, the maritime boundary between Bangladesh and Myanmar follows the contours of the 200-M limit drawn from Myanmar's normal baselines to the point located at the coordinates set forth in paragraph 3 of the Submissions as set out in the Reply.

Mr President, Members of the Tribunal, I thank you very much for your kind indulgence and patient attention. This brings us to the close of the Bangladesh's oral pleadings.

I thank you, Mr President.

THE PRESIDENT: I thank you, your Excellency, for your presentation. This completes the second round of the oral arguments of Bangladesh. The hearing will be resumed on Saturday, 24 September, at 10 a.m. The sitting is now closed.

(The sitting closed at 4.35 p.m.)