

**SEPARATE OPINION OF JUDGE TAFSIR M. NDIAYE**

*(Translation by the Registry)*

1. I have voted in favour of the Judgment as I am in agreement with all of the grounds set out by the Tribunal in respect of the main questions on the merits. Specifically, I concur in the conclusion articulated in paragraphs 329, 333 and 334 of the Judgment, providing:

329. The Tribunal decides that, in view of the geographic circumstances in the present case, the provisional equidistance line is to be deflected at the point where it begins to cut off the seaward projection of the Bangladesh coast. The direction of the adjustment is to be determined in the light of those circumstances.

333. The projection southward from the coast of Bangladesh continues throughout the delimitation area. There is thus a continuing need to avoid cut-off effects on this projection. In the geographic circumstances of this case it is not necessary to change the direction of the adjusted line as it moves away from the coasts of the Parties.

334. The Tribunal accordingly believes that there is reason to consider an adjustment of the provisional equidistance line by drawing a geodetic line starting at a particular azimuth. In the view of the Tribunal the direction of any plausible adjustment of the provisional equidistance line would not differ substantially from a geodetic line starting at an azimuth of  $215^{\circ}$ . A significant shift in the angle of that azimuth would result in cut-off effects on the projections from the coast of one Party or the other. A shift toward the north-west would produce a line that does not adequately remedy the cut-off effect of the provisional equidistance line on the southward projection of the coast of Bangladesh, while a shift in the opposite direction would produce a cut-off effect on the seaward projection of Myanmar's coast.

2. In my view, however, the Judgment goes further than necessary in two respects: on the question of jurisdiction (section I) and in the operative part (paragraph 6 of the operative part of the Judgment) in deciding the issue of the continental shelf beyond 200 nautical miles (section II).

In accordance with article 8, paragraph 6, of the Resolution on the Internal Judicial Practice of the Tribunal, this separate opinion will concern essentially these two points of difference with the Judgment.

## I. JURISDICTION

3. On 8 October 2009 Bangladesh addressed a written notification to Myanmar instituting arbitral proceedings under article 1 of Annex VII of the 1982 United Nations Convention on the Law of the Sea (hereinafter the “Convention”). The note verbale from the Ministry of Foreign Affairs of Bangladesh dated 8 October 2009 states:

Pursuant to Articles 286 and 287 of the 1982 *United Nations Convention on the Law of the Sea* (“UNCLOS”), and in accordance with the requirements of Article 1 of Annex VII thereto, Bangladesh hereby gives written notification to Myanmar that, having failed to reach a settlement after successive negotiations and exchanges of views as contemplated by Part XV of UNCLOS, it has elected to submit the dispute concerning the delimitation of its maritime boundary with Myanmar in the Bay of Bengal to the arbitral procedure provided for in Article VII of UNCLOS.

4. On 27 October 2009 Myanmar expressed “its total surprise” at the notification submitted to it “without . . . prior notice” (note verbale No. 44012/7 (432) of 27 October 2009, Counter-Memorial of Myanmar (“CMM”), vol. II, annex 19).

5. On 4 November 2009 Myanmar made a declaration under article 287 of the Convention, accepting “the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of [the] dispute between the Union of Myanmar and the People’s Republic of Bangladesh relating to the delimitation of [the] maritime boundary between the two countries in the Bay of Bengal” (Memorial of Bangladesh (“MB”), vol. III, annex 22).

6. One day later, on 5 November 2009, Myanmar gave Bangladesh notification of its decision to submit the dispute to the Tribunal in accordance with article 287 of the Convention (note verbale No. 44012/7 (459) of 5 November 2009, p. 1, CMM, vol. II, annex 20).

7. On 12 December 2009 Bangladesh accepted Myanmar's decision to submit the dispute to the Tribunal (note verbale No. MOFA/UNCLOS/320/2 of 12 December 2009, CMM, vol. II, annex 21).

8. Bangladesh confirmed its acceptance of the Tribunal's jurisdiction in a declaration dated the same day (MB, vol. III, annex 23).

9. On 13 December 2009 Bangladesh formally seised the Tribunal of the dispute by letter from the Minister of Foreign Affairs to the President of the Tribunal, stating:

5. Given Bangladesh's and Myanmar's mutual consent to the jurisdiction of ITLOS, and in accordance with the provisions of UNCLOS, article 287, para. 4, Bangladesh considers that your distinguished Tribunal is now the only forum for the resolution of the parties' dispute.

6. In light of the developments, Bangladesh respectfully invites ITLOS to exercise jurisdiction over the maritime boundary dispute between Bangladesh and Myanmar, which is the subject of Bangladesh's 8 October 2009 statement of claim. Bangladesh hereby notifies the Tribunal of its intention to select Professor Vaughan LOWE QC as Judge *ad hoc* in accordance with the Tribunal's Statute and article 19 of the Rules.

This letter is the actual instrument instituting proceedings, which indicates the mode of referral and names the judge *ad hoc*. The Agent of Bangladesh had already been appointed in the arbitral proceedings begun under Annex VII of the Convention.

10. This letter amounts to an application filed by one party to a dispute, because, by way of written declarations in accordance with article 287 of the Convention, the two Parties to the dispute accept the jurisdiction of the Tribunal as one of the means for settling disputes concerning the interpretation or application of the Convention.

**We find ourselves here in the domain of compulsory jurisdiction, in other words of compulsory procedures entailing binding decisions.**

11. The Tribunal has compulsory jurisdiction over any dispute concerning the interpretation or application of the Convention if, by declaration under article 287 of the Convention, the parties in conflict have chosen the Tribunal. If so, the dispute may be submitted to the Tribunal by means of a unilateral application by either of those parties.

12. This can be seen from the letter of 13 December 2009, which formally seises the Tribunal. **Thus, no special agreement is involved.** Had there been a *special agreement*, the Tribunal's task would have been defined very precisely. Questions such as the following would have been presented:

- a) Is the 1974 Agreement binding?
- b) Has there been a delimitation of the territorial sea?
- c) What is the course of the dividing line between the two Parties?
- d) Is the Tribunal competent to delimit the maritime boundary between the two States beyond 200 nautical miles?

13. At the same time, the referral entails the *transfer* to the Tribunal of the arbitral proceedings instituted by Bangladesh on 8 October 2009. It should be recalled that the Tribunal's experience includes two cases of transfers of proceedings, effected by means of special agreements. This is because the Parties can decide by agreement to bring before the Tribunal a dispute previously submitted to an arbitral tribunal formed in accordance with article 287, paragraph 3.

14. Thus, in the *M/V "SAIGA" (No. 2) Case*, Saint Vincent and the Grenadines instituted annex VII arbitral proceedings against Guinea. The two Parties subsequently notified to the Tribunal an agreement whereby they transferred the proceedings to the Tribunal (the "1998 Agreement") (see *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at pp. 14-17, para. 4).

15. The Parties in the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* between Chile and the European Community agreed to break off the Annex VII arbitral proceedings initiated by Chile and to submit the dispute to a special chamber of the Tribunal in accordance with article 15, paragraph 2, of the Statute of the Tribunal (see *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community), Order of 20 December 2000, ITLOS Reports 2000*, p. 148, at pp. 149-152, paras. 2 and 3).

16. In the present case the transfer was effected by the application instituting proceedings, namely the letter of 13 December 2009, which formally seised the Tribunal.

17. And, as stated in article 45 of the Rules of the Tribunal:

In every case submitted to the Tribunal, the President shall ascertain the views of the parties with regard to questions of procedure.

18. Consultations were thus held on 25 and 26 January 2010 between the President of the Tribunal and the Parties. The minutes of the consultations were signed by the Parties and the President of the Tribunal; they state:

the parties concur that 14 December 2009 is to be considered the date of the institution of proceedings before the Tribunal;

and

Myanmar acquiesced to Bangladesh's decision to discontinue the arbitral proceedings which Bangladesh had instituted concerning the same dispute . . . by its notification and statement of claim dated 8 October 2009.

(Minutes of the consultations dated 26 January 2010 (CMM, annex 24)).

19. These minutes appear to be nothing more than an account of a meeting. They were signed by the two Parties' representatives and by the President of the Tribunal. They are confined to recounting discussions and summarizing points of agreement. They create neither rights nor obligations under international law for the Parties. Nor can they be regarded as a special agreement, i.e. an international agreement within the meaning of the Vienna Convention on the Law of Treaties. It suffices to quote paragraphs 12 and 14 of the minutes:

12. During the course of the consultations, the delegation of Myanmar informed the President of the intention of Myanmar to file preliminary objections in the case. In respect of this matter, a letter from the Agent of Myanmar dated 25 January 2010 was handed over to the Registrar.

14. Responding to a question raised by the delegation of Myanmar, the President clarified that the Tribunal will not consider the merits of the case until the judgment of the Tribunal on the preliminary objections is rendered and subject to the outcome of such judgment.

20. In the context of litigation, a special agreement is an international agreement by which States Parties agree to submit a legal dispute to the Tribunal. It establishes the extent of the powers granted to the Tribunal.

21. Accordingly, it is apparent that the case was referred to the Tribunal by way of Bangladesh's application in the letter of 13 December 2009.

22. While the notions of referral (seisin) and jurisdiction are closely linked, they are nevertheless quite different. Jurisdiction is the basis on which the Tribunal must take cognizance of the case and settle the dispute submitted to it; referral is the right of a claimant to be heard on the merits of the claim by bringing the case before the Tribunal.

23. The concepts of jurisdiction and referral are sometimes intertwined. That is the case where the mere act of submitting the case to the forum immediately gives rise to jurisdiction on the part of the forum. This occurs in four situations:

- 1) where a case is referred by special agreement, upon notification of the agreement to the Tribunal by the signatory parties;
- 2) where a case is referred to the Tribunal simultaneously by two applications (*Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 192, in which Nicaragua and Honduras made simultaneous referrals to the International Court of Justice);
- 3) where a case has been submitted by application and the respondent State's declaration accepting compulsory jurisdiction raises no obstacle to jurisdiction;
- 4) finally, as in the case before us, where there are two concordant declarations accepting the Tribunal's jurisdiction in accordance with article 287 of the Convention and they make the Tribunal the appropriate forum under paragraph 4.

24. I shall note that Myanmar withdrew its declaration. On 14 January 2010 the Government of Myanmar informed the Secretary-General of the United Nations that it had decided to withdraw the declaration made under article 287 of the Convention accepting the jurisdiction of the Tribunal to settle the dispute between Myanmar and Bangladesh over the delimitation of the maritime boundary between the two States in the Bay of Bengal.

25. The Tribunal still needed to determine the scope of its jurisdiction in the case. Myanmar asserted:

I must make perfectly clear that in principle the jurisdiction of the Tribunal is not a problem for us. Following the notification of arbitration by Bangladesh, the two Parties accepted the Tribunal's jurisdiction on the same terms, in accordance with the provisions of article 287 (1) of the Montego Bay Convention, "for the settlement of dispute . . . relating to the delimitation of maritime boundary between the two countries in the Bay of Bengal" [ . . . ]

The only problem that arises concerns the present *possibility* – the possibility – for the Tribunal now to exercise this jurisdiction and decide on the delimitation of the continental shelf beyond 200 [nautical miles]. I did say "possibility", Mr President, not jurisdiction in the abstract. Myanmar does not contest that *if* Bangladesh could advance claims to this part of the continental shelf in the Bay of Bengal, the Tribunal would have jurisdiction to proceed with delimitation (emphasis in the original) (ITLOS/PV.11/11, p. 8, lines 36-44 and p. 9, lines 1-4).

**All in all, the following can be accepted:**

26. The People's Republic of Bangladesh initiated the present proceedings against the Union of Myanmar on 8 October 2009 by notification of arbitral proceedings pursuant to article 287, paragraph 3, and Annex VII of the Convention, together with the statement of its claim and the grounds on which it was based.

27. In response, on 4 November 2009, Myanmar accepted the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of the dispute between Bangladesh and Myanmar "relating to the delimitation of [the] maritime boundary between the two countries in the Bay of Bengal".

28. Bangladesh made a declaration on 12 December 2009 stating that it "accepts the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of the dispute between the People's Republic of Bangladesh and the Union of Myanmar relating to the delimitation of their maritime boundary in the Bay of Bengal".

29. On the basis of these declarations, the Minister of Foreign Affairs of Bangladesh on 13 December 2009 formally referred the dispute to the Tribunal by means of a letter addressed to the President of the Tribunal, stating:

5. ... Given Bangladesh's and Myanmar's mutual consent to the jurisdiction of ITLOS, and in accordance with the provisions of UNCLOS Article 287(4), Bangladesh considers that your distinguished Tribunal is now the only forum for the resolution of the parties' dispute;

and

6. ... Bangladesh respectfully invites ITLOS to exercise jurisdiction over the maritime boundary dispute between Bangladesh and Myanmar, which is the subject of Bangladesh's 08 October 2009 statement of claim.

30. In the light of the Parties' respective declarations and Bangladesh's invitation to the Tribunal "to exercise jurisdiction", the International Tribunal for the Law of the Sea has jurisdiction to hear the dispute.

31. The Parties are in agreement that all required conditions for the Tribunal to have jurisdiction were satisfied at 13 December 2009, when Bangladesh submitted the Parties' respective declarations, and that the Tribunal is therefore empowered to hear the case. They disagree however on the exact scope of the jurisdiction thus conferred on the Tribunal.

32. Myanmar expressed doubt as to the Tribunal's jurisdiction and, should it in fact exist, as to the wisdom of exercising it to delimit the continental shelf beyond 200 nautical miles.

33. Myanmar does not dispute that, "as a matter of principle, the delimitation of the continental shelf, including the shelf beyond 200 nautical miles, could fall within the jurisdiction of the Tribunal" (CMM, para. 1.14).

34. Myanmar asserts in its Counter-Memorial that, as a general matter, the question of the Tribunal's jurisdiction to delimit the continental shelf beyond 200 nautical miles should not arise in this case, because the delimitation line should terminate well before reaching the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea is measured (CMM, para. 1.15).

35. Myanmar adds: “Even if the Tribunal were to decide that there could be a single maritime boundary beyond 200 nautical miles (*quod non*), the Tribunal would still not have jurisdiction to determine this line because any judicial pronouncement on these issues might prejudice the rights of third parties and also those relating to the international seabed area” (CMM, para. 1.16).

36. Myanmar argues: “As long as the outer limit of the continental shelf has not been established on the basis of the recommendations of the [Commission on the Limits of the Continental Shelf (hereinafter the “Commission” or the “CLCS”)], the Tribunal, as a court of law, cannot determine the line of delimitation on a hypothetical basis without knowing what the outer limits are” (CMM, para. 1.17). In this connection it maintains:

A review of a State’s submission and the making of recommendations by the Commission on this submission is a necessary prerequisite for any determination of the outer limits of the continental shelf of a coastal State “on the basis of these recommendations” under article 76 (8) of UNCLOS and the area of continental shelf beyond 200 nautical miles to which a State is potentially entitled; this, in turn, is a necessary precondition to any judicial determination of the division of areas of overlapping sovereign rights to the natural resources of the continental shelf beyond 200 nautical miles. . . . To reverse the process, . . . to adjudicate with respect to rights the extent of which is unknown, would not only put this Tribunal at odds with other treaty bodies, but with the entire structure of the Convention and the system of international ocean governance. (Rejoinder of Myanmar (“RM”), para. A.17).

37. In support of its position, Myanmar cites the Arbitral Award in the *Case concerning the Delimitation of Maritime Areas between Canada and France* (St Pierre and Miquelon), which states: “It is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist” (*Decision of 10 June 1992, Reports of International Arbitral Awards, vol. XXI*, p. 265, at p. 293, para. 81 (in French); see also *International Legal Materials, vol. 31* (1992), p. 1145, at p. 1172, para. 81). In the view of the arbitral tribunal, any decision on delimiting the continental shelf beyond 200 nautical miles between France and Canada would have been based solely on hypothetical rights.

38. Myanmar also cites the International Court of Justice judgment in the *Nicaragua v. Honduras* case, asserting that the Court there declined to delimit the continental shelf beyond 200 nautical miles between Nicaragua and Honduras because the CLCS had not yet made recommendations to the two countries concerning their continental shelf beyond 200 nautical miles. The judgment cited by Myanmar to this effect states:

It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder. (*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. 319).

39. Myanmar elaborated on its position during the oral proceedings, stating, *inter alia*, that in principle it did not question the Tribunal's jurisdiction. The two Parties did indeed accept the jurisdiction of the Tribunal on the same terms, in accordance with the provisions of article 287, paragraph 1, of the Convention, for the "settlement of [the] dispute . . . relating to the delimitation of [the] maritime boundary between the two countries in the Bay of Bengal". According to Myanmar, the only problem concerned the possibility that the Tribunal might exercise such jurisdiction to decide on the delimitation of the continental shelf beyond 200 nautical miles.

40. Myanmar further contended that, if the Tribunal "nevertheless were to consider the Application admissible on this point – *quod non* –, it "could not but defer judgment on this aspect of the matter until the Parties, in accordance with Article 76 of the Convention, have taken a position on the recommendations of the Commission concerning the existence of entitlements of the two Parties to the continental shelf beyond 200 [nautical miles] and, if such entitlements exist, on their . . . extension" towards the outer limits of the continental shelf of the two countries (ITLOS/PV.11/11, p. 9, lines 18-23).

41. Bangladesh is of the view that the Convention expressly empowers the Tribunal to adjudicate disputes between States arising under articles 76 and 83, in regard to the delimitation of the continental shelf. As the Convention draws no distinction between jurisdiction over the inner part of the continental shelf, i.e., that part within 200 nautical miles, and the part further away, delimitation

of the entire continental shelf is, according to Bangladesh, covered by article 83, and the Tribunal plainly has jurisdiction to carry out delimitation beyond 200 nautical miles (MB, para. 4.23).

42. Responding to Myanmar's argument that "in any event, the question of delimiting the shelf beyond 200 [nautical miles] does not arise because the delimitation line terminates well before reaching the 200 [nautical mile] limit", Bangladesh states that "Myanmar's argument that Bangladesh has no continental shelf beyond 200 [nautical miles] is based instead on the proposition that once the area *within* 200 [nautical miles] is delimited, the terminus of Bangladesh's shelf falls short of the 200 [nautical mile] limit" (emphasis in the original) (RB, para. 4.39). Bangladesh contends:

This can only be a valid argument if the Tribunal first accepts Myanmar's arguments in favour of an equidistance line within 200 [nautical miles]. Such an outcome would require the Tribunal to disregard entirely the relevant circumstances relied upon by Bangladesh . . . (RB, para. 4.40).

43. With reference to Myanmar's argument regarding the rights of third parties, Bangladesh contends that a potential overlapping claim of a third State cannot deprive the Tribunal of jurisdiction to delimit the maritime boundary between two States that are subject to the jurisdiction of the Tribunal, because third States are not bound by the Tribunal's judgment and their rights are unaffected by it. Bangladesh points out that so far as third States are concerned, a delimitation judgment by the Tribunal is merely *res inter alios acta* and that this assurance is provided in article 33, paragraph 2, of the Statute of the Tribunal (MB, para. 4.35).

44. Bangladesh also observes that Myanmar's contention "with regard to the international seabed area disregards its own submission to the CLCS, which makes clear that the outer limits of the continental shelf *vis-à-vis* the international seabed are far removed from the maritime boundary with Bangladesh" (RB, para. 4.5).

45. Bangladesh notes a certain inconsistency in Myanmar's position on this subject, observing that Myanmar "accepts with respect to the potential areas of overlap with India that even if [the Tribunal] cannot fix a tripoint between three States, it can indicate the 'general direction for the final part of the maritime boundary between Myanmar and Bangladesh', and that doing so would be 'in

accordance with the well-established practise' of international courts and tribunals" (RB, para. 4.17).

46. Among Bangladesh's conclusions summarizing its position on the issue of third-party rights and the jurisdiction of the Tribunal are the following:

2. The delimitation by the Tribunal of a maritime boundary in the continental shelf beyond 200 [nautical miles] does not prejudice the rights of third parties. In the same way that international courts and tribunals have consistently exercised jurisdiction where the rights of third States are involved, ITLOS may exercise jurisdiction, even if the rights of the international community to the international seabed were involved, which in this case they are not.

3. With respect to the area of shelf where the claims of Bangladesh and Myanmar overlap with those of India, the Tribunal need only determine which of the two Parties in the present proceeding has the better claim, and effect a delimitation that is only binding on Bangladesh and Myanmar. Such a delimitation as between the two Parties to this proceeding would not be binding on India (RB, para. 4.91).

47. In respect of the role of the CLCS, Bangladesh states:

there is no conflict between the roles of ITLOS and the Commission in regard to the continental shelf. To the contrary, the roles are complementary. ITLOS has jurisdiction to delimit boundaries within the outer continental shelf; the Commission makes recommendations as to the delineation of the shelf's outer limits with the international seabed, provided there are no disputed claims between adjacent or opposite States. Indeed, the Commission may not make *any* recommendations on the outer limits until such dispute is resolved (by ITLOS or another judicial or arbitral body, or by agreement between the parties) – unless the parties give their consent that the Commission review their submissions.

In the present case, the Commission is precluded from acting due to the Parties' disputed claims in the outer continental shelf and the refusal by at least one of them (Bangladesh) to consent to the Commission's actions (MB, paras. 4.28 and 4.29).

## 48. Bangladesh contends:

if Myanmar's argument were accepted, ITLOS would have to wait for the CLCS to act and the CLCS would have to wait for ITLOS to act. The resulting catch-22 would mean that whenever parties are in dispute in regard to the continental shelf beyond 200 [nautical miles], the Compulsory Procedures Entailing Binding Decisions under Part XV, Section 2 of UNCLOS would have no practical application. In effect, the very object and purpose of the UNCLOS dispute settlement procedures would be negated. Myanmar's position opens a jurisdictional black hole into which all disputes concerning maritime boundaries in the outer continental shelf would forever disappear (RB, para. 4.7).

49. Summarizing its position, Bangladesh concludes in the Reply: "In portraying CLCS recommendations as a prerequisite to exercise of jurisdiction by this Tribunal, Myanmar sets forth a circular argument that would make the exercise of ITLOS jurisdiction with respect to the continental shelf beyond 200 [nautical miles] impossible. This is not consistent with Part XV of UNCLOS or with Article 76(10)" (RB, para. 4.91(1)).

50. It must be recalled that the jurisdiction of the Tribunal depends in all instances on the prior consent of the parties and that no sovereign State can be party to a case before an international court unless it has consented thereto. It is this consent to bring a dispute before the Tribunal that determines the Tribunal's jurisdiction over the dispute.

However, the dispute and the applications [in French, *demandes*] should not be confused. Article 21 of the Statute of the Tribunal provides:

The jurisdiction of the Tribunal comprises all disputes and all applications [*demandes*] submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

51. The ICJ has defined a submission to be the "precise and direct statement of a claim [*demande*]" (*Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 126). According to the Court, submissions may not be presented in interrogative form (*Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 71). And the Court considers that it has jurisdiction to interpret them, which allows it, where it deems necessary, to refrain from responding to them (*Monetary Gold Removed from Rome in*

1943, *Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19, at p. 28). The Court wrote:

The Italian Government contends that the Court has no jurisdiction to adjudicate upon these Submissions of the United Kingdom. The Court cannot consider itself as lacking jurisdiction to adjudicate upon the validity, withdrawal or cancellation of an application which has been submitted to it: to adjudicate upon such questions with a view to deciding upon the effect to be given to the Application falls within the purview of its judicial task.

52. This means that the Tribunal, in performing its judicial task, may choose the terms under which it will respond to the Parties' submissions. The Tribunal is therefore free to consider and decide the question of delimiting the continental shelf beyond 200 nautical miles separately. Myanmar's jurisdictional objection in respect of the delimitation of the continental shelf beyond 200 nautical miles is justified by the fact that Myanmar *as Respondent* accepted the jurisdiction of the Tribunal. Indeed, paragraph 12 of the minutes of the consultations with the President of the Tribunal clearly states:

During the course of the consultations, the delegation of Myanmar informed the President of the intention of Myanmar to file preliminary objections in the case. In respect of this matter, a letter from the Agent of Myanmar dated 25 January 2010 was handed over to the Registrar.

Those preliminary objections concern the delimitation of the continental shelf beyond 200 nautical miles between the two Parties.

## II. DELIMITATION OF THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES BETWEEN THE PARTIES

53. This is the only issue still dividing the Parties. Delimitation is determined by agreement or by adjudication by a court or tribunal. The outer limits of the continental shelf are established by the coastal State on the basis of recommendations by the Commission and are "final and binding". The recommendations of the Commission are submitted in writing to the coastal State which made the submission and to the Secretary-General of the United Nations (Annex II, article 6, paragraph 3, of the Convention).

54. For this reason, article 7 of Annex II provides:

Coastal States shall establish the outer limits of the continental shelf in conformity with the provisions of article 76, paragraph 8, and in accordance with the appropriate national procedures.

55. The thrust of these rules is to establish by implication that any delimitation of the continental shelf, or any delineation of its outer limits beyond 200 nautical miles, effected unilaterally by one State regardless of the views of the other State or States concerned, or established otherwise than under article 76, paragraph 8, is in international law not opposable to those States (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 292, para. 87). “The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. 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” (*Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 132).

56. Under the circumstances of the case can the Tribunal delimit the continental shelf beyond 200 nautical miles between Bangladesh and Myanmar? Specifically, can it do so even before the Parties' claims to the continental shelf have been confirmed on the basis of the recommendations by the Commission on the Limits of the Continental Shelf referred to in article 76, paragraph 8? Each Party disputes the other's entitlement to continental shelf area beyond 200 nautical miles.

The circumstances:

a) *treaty obligations* (article 76 and Annex II of the Convention)

57. Paragraph 1 of article 76 of the Convention defines the continental shelf and establishes two criteria. The first is the distance criterion for those States whose continental margin does not extend more than 200 nautical miles from the baselines. In this case, the outer limit of the juridical continental shelf merges with the outer limit of the exclusive economic zone. The second criterion is a geomorphological one for those States whose continental margin extends more than 200 miles from the baselines. In this case, the coastal State must show the Commission on the Limits of the Continental Shelf that the natural prolongation of its land mass extends more than 200 nautical miles. For purposes of this determination, there apply (i) two formulae determining the outer edge of the continental margin; and (ii) constraints limiting the expansion of States. The outer limit of the juridical continental shelf can be established by the combined application, in accordance with precise rules, of the lines resulting from the

formulae and constraints. Scientific data must be gathered at sea to produce the information needed to apply the formulae.

58. The coastal State establishes the outer limits of the continental shelf on the basis of the recommendations made by the Commission on the Limits of the Continental Shelf (article 76, para. 8, of the Convention and Annex II of the Convention). The Secretary-General of the United Nations gives due publicity to these limits.

59. Article 3, paragraph 1, of Annex II to the Convention describes the Commission's functions as follows:

1. The functions of the Commission shall be:

(a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;

(b) to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).

60. This means that the authority to examine lies with the Commission if the information furnished to it proves that the conditions laid down in article 76 for purposes of establishing the outer limits of the continental shelf are satisfied by the coastal State. Under the terms of the Convention, the power to assess the scientific and technical data submitted by the coastal State is vested exclusively in the Commission.

61. The Tribunal complicated its task by delimiting the continental shelf beyond 200 nautical miles even though the Commission has not pronounced upon the outer limits of each Party's continental shelf.

62. b) *Objection to jurisdiction* raised by the Respondent (Myanmar) concerning the possibility for the Tribunal now to decide on the delimitation of the continental shelf beyond 200 nautical miles, accompanied by an objection to the admissibility of the Application.

63. Myanmar contends that, even on the assumption that the Tribunal decided “that there could be a single maritime boundary beyond 200 nautical miles (*quod non*), the Tribunal would still not have jurisdiction to determine this line because any judicial pronouncement on these issues might prejudice the rights of third parties and also those relating to the international seabed area” (CMM, para. 1.16).

64. Myanmar adds: “As long as the outer limit of the continental shelf has not been established on the basis of the recommendations” of the Commission on the Limits of the Continental Shelf, “the Tribunal, as a court of law, cannot determine the line of delimitation on a hypothetical basis without knowing what the outer limits are” (CMM, para 1.17). It maintains:

A review of a State’s submission and the making of recommendations by the Commission on this submission is a necessary prerequisite for any determination of the outer limits of the continental shelf of a coastal State “on the basis of these recommendations” under article 76 (8) of UNCLOS and the area of continental shelf beyond 200 nautical miles to which a State is potentially entitled; this, in turn, is a necessary precondition to any judicial determination of the division of areas of overlapping sovereign rights to the natural resources of the continental shelf beyond 200 nautical miles. . . . To reverse the process, . . . to adjudicate with respect to rights the extent of which is unknown, would not only put this Tribunal at odds with other treaty bodies, but with the entire structure of the Convention and the system of international ocean governance (RM, para. A.17).

65. c) *Suspension by the Commission on the Limits of the Continental Shelf of consideration of Myanmar’s and Bangladesh’s submissions* (SPLOS/31, para. 44; Annex II, article 5, of the Convention). “In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute” (Annex I, para. 5(a), of the Rules of Procedure of the Commission). In accordance with this, the Commission stated on the subject of the submission made by Myanmar pursuant to article 76 on 16 December 2008:

noting that there had been no developments to indicate that consent existed on the part of all States concerned allowing the consideration of the submission notwithstanding the existence of a dispute in the region, the Commission decided to further defer the establishment of a subcommission for the consideration of the submission made by Myanmar. It was also decided that, since the submission remained next in line for consideration as queued in the order in which it was received, the Commission would revisit the situation at the time of establishment of its next subcommission.

The Commission reiterated this decision at its twenty-seventh session (7 March – 21 April 2011).

66. d) *The question of entitlements*: the delimitation requires knowledge of the two Parties' entitlements in the area concerned. Thus, the first question which the Tribunal should have addressed in the present case is whether the Parties hold concurrent entitlements to the continental shelf beyond 200 nautical miles. If not, the Tribunal would be dealing with a hypothetical question with no real point.

67. The Parties have asserted overlapping claims to the continental shelf beyond 200 nautical miles. Part of this area is also claimed by India. Each Party denies the other's entitlement to the continental shelf beyond 200 nautical miles. Further, Myanmar contends that the Tribunal cannot address the question of either Bangladesh's or Myanmar's entitlement to a continental shelf beyond 200 nautical miles, as this issue lies solely within the competence of the Commission, not the Tribunal (RM, para. A.5).

68. Considering the positions of the Parties as described above, the Tribunal will first address the main point in dispute, namely whether or not they have any entitlement to the continental shelf beyond 200 nautical miles. In this regard, the Tribunal will first examine the Parties' positions in regard to their respective entitlements; it will analyze the meaning of "natural prolongation" and its interrelation with that of continental margin. The Tribunal will then ascertain whether it has jurisdiction in the present case to determine the entitlements of the Parties to the continental shelf beyond 200 nautical miles. Finally, the Tribunal will determine whether there is overlap between any entitlements the Parties may have to the continental shelf beyond 200 nautical miles. On the basis of these determinations, the Tribunal will take a decision on the delimitation of the continental shelf of the Parties beyond 200 nautical miles (para. 401 of the Judgment).

69. While both Parties make claims to the continental shelf beyond 200 nautical miles, each disputes the other's claim. Thus, according to them, there are no overlapping claims over the continental shelf beyond 200 nautical miles. It follows either that the question of delimitation does not arise or that the delimitation between the Parties must be effected so as to leave the entire continental shelf area beyond 200 nautical miles to one Party alone.

70. Bangladesh submits that pursuant to article 76 of the Convention, it has an entitlement to the continental shelf beyond 200 nautical miles. It further submits that Myanmar enjoys no such entitlement because its land territory has no natural prolongation into the Bay of Bengal beyond 200 nautical miles. Therefore, according to Bangladesh, there is no overlapping continental shelf beyond 200 nautical miles between the Parties, and it alone is entitled to the continental shelf claimed by both of them. Bangladesh thus submits that any boundary in this area must lie no further seaward from Myanmar's coast than the 200 nautical mile "juridical shelf" provided for in article 76 (MB, para. 7.37).

71. In respect of its own entitlement to the continental shelf beyond 200 nautical miles, Bangladesh asserts that "the outer continental shelf claimed by Bangladesh is the natural prolongation of Bangladesh's land territory by virtue of the uninterrupted seabed geology and geomorphology, including specifically the extensive sedimentary rock deposited by the Ganges-Brahmaputra river system" (MB, para. 7.43). To prove this, Bangladesh provided the Tribunal with scientific evidence to show that there is a geological and geomorphological continuity between the Bangladesh land mass and the Bay of Bengal. In addition, Bangladesh submits that its entitlement to the outer continental shelf, the limits of which have been established by the so-called Gardiner formula based on sediment thickness, extends well beyond 200 nautical miles.

72. In respect of Myanmar's entitlement, Bangladesh claims that Myanmar is not entitled to a continental shelf beyond 200 nautical miles because it cannot meet the physical test of natural prolongation in article 76, paragraph 1, which requires evidence of a geological character connecting the seabed and subsoil directly to the land territory. According to Bangladesh, there is overwhelming and unchallenged evidence of a "fundamental discontinuity" between the landmass of Myanmar and the seabed beyond 200 nautical miles (RB, para. 4.62). Bangladesh contends that the tectonic plate boundary between the Indian and Burma Plates is manifestly "a marked disruption or discontinuance of the sea-

bed” that serves as “an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations” (RB, para. 4.62).

73. In its note verbale of 23 July 2009 to the Secretary-General of the United Nations, Bangladesh stated that the areas claimed by Myanmar in its submission to the Commission as part of its putative continental shelf were in fact the natural prolongation of Bangladesh and hence Myanmar’s claim was disputed by Bangladesh (MB, vol. III, Annex 21). In its submission of 25 February 2011 to the Commission, Bangladesh reiterated this position, stating that it “disputes the claim by Myanmar to areas of outer continental shelf” because those claimed areas “form part of the natural prolongation of Bangladesh” (Executive Summary, appearing in RB, vol. III, Annex R3, para. 5.9).

74. In summing up, Bangladesh states in its Memorial:

- That by reason of the significant geological discontinuity which divides the Burma plate from the Indian plate, Myanmar is not entitled to a continental shelf in any of the areas beyond 200 [nautical miles].
- That Bangladesh is entitled to claim sovereign rights over all of the bilateral shelf area beyond 200 [nautical miles] claimed by Bangladesh and Myanmar . . .
- That, vis-à-vis Myanmar only, Bangladesh is entitled to claim sovereign rights over the trilateral shelf area claimed by Bangladesh, Myanmar and India . . . (MB, paragraph 7.43).

75. Myanmar rejects Bangladesh’s contention that Myanmar has no entitlement to a continental shelf beyond 200 nautical miles. While Myanmar does not contradict Bangladesh’s evidence from a scientific point of view, it emphasizes that the existence of a geological discontinuity in front of the coast of Myanmar is simply irrelevant to the case. According to Myanmar, the entitlement of a coastal State to a continental shelf beyond 200 nautical miles is not dependent on any “test of natural geological prolongation”. What determines such entitlement is the physical extent of the continental margin, that is to say its outer edge, to be identified in accordance with article 76, paragraph 4, of the Convention (ITLOS/PV.11/11, p. 20, line 28).

76. Myanmar asserts that it identified the outer edge of its continental margin by reference to the Gardiner formula, which is embodied in article 76, paragraph 4(a)(i). The Gardiner line thus identified is well beyond 200 nautical miles, and, consequently, so is the outer edge of Myanmar's continental margin. Therefore Myanmar is entitled to a continental shelf beyond 200 nautical miles in the present case. It has accordingly submitted the particulars of the outer limits of its continental shelf to the Commission pursuant to article 76, paragraph 8, of the Convention (CMM, para. A.2).

77. In a note verbale dated 31 March 2011 to the Secretary-General of the United Nations, Myanmar stated: "Bangladesh has no continental shelf extending beyond 200 [nautical miles] measured from base lines established in accordance with the international law of the sea" and "Bangladesh's right over a continental shelf does not extend either to the limit of 200 [nautical miles] measured from lawfully established base lines, or, *a fortiori*, beyond this limit" (RM, Appendix, p. 198).

78. Myanmar argues that Bangladesh has no continental shelf beyond 200 nautical miles because the delimitation of the continental shelf between Bangladesh and Myanmar stops well before reaching the 200-nautical-mile limit measured from the baselines of both States (CMM, para. 5.160). In these circumstances, the question of the delimitation of the continental shelf beyond this limit is moot and does not need to be considered further by the Tribunal (CMM, para. 5.160, p. 165).

79. Determining the entitlements of the two States to the continental shelf beyond 200 nautical miles and their respective extent is a prerequisite for any delimitation.

80. This consists of "draw[ing] the exact line or lines where the extension in space of the sovereign powers and rights of [one State concerned] meets those of [the other]" (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 35, para. 85). The intimate link between States' entitlement to a maritime area and the delimitation of a maritime area between neighbouring States is "self-evident" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 30, para. 27). It is apparent that "*le titre commande la délimitation, la délimitation est fille du titre*" ("entitlement determines delimitation, delimitation issues from entitlement" [translation by the Registry]) (P. Weil, "*Vers une conception territorialiste de la délimitation maritime*", *Mélanges Michel Virally, Le droit international au service de la paix de la justice et du développement*, Paris, Pedone 1991, pp. 501-511, spec. p. 511).

81. On the subject of determining the Parties' entitlements, the Tribunal explains (para. 439 of the Judgment) that not every coast generates entitlement to a continental shelf extending beyond 200 nautical miles. The Commission in some instances has based its recommendations on its view that an entire area or part of an area included in a coastal State's submission comprises part of the deep ocean floor. Myanmar does not deny that the continental shelf of Bangladesh, if not affected by the delimitation within 200 nautical miles, would extend beyond that distance. Bangladesh does not deny that there is a continental margin off Myanmar's coast but argues from its interpretation of article 76 of the Convention that this margin has no natural prolongation beyond 50 nautical miles off that coast. The Tribunal says that the problem lies in the Parties' disagreement as to what constitutes the continental margin (para. 442 of the Judgment). It notes that the Bay of Bengal presents a unique situation and that its sea floor is covered by a thick layer of sediments 14 to 22 kilometres deep. The Tribunal states that, given the presence of these sedimentary rocks, both Parties included in their submissions to the Commission data indicating that their entitlement to the continental margin extending beyond 200 nautical miles was based to a great extent on article 76, paragraph 4(a)(i), of the Convention (para. 445 of the Judgment).

82. The entitlement to be ascertained cannot but be tied to the definition itself of the continental shelf. An exercise in maritime delimitation consists of applying the natural sciences to ascertain the extent of the natural prolongation under the sea of each of the two States and of making a finding on – not awarding – the extent of the submarine basement nature has placed before each of the two States.

83. In past decades it was the concept of natural prolongation of a State's land territory that made it possible to determine how far seaward the State's rights to the seabed extended. Today, it is the criterion of distance that performs this function for the continental shelf, the exclusive economic zone and the territorial sea. Let us recall that every coastal State has the right to a continental shelf, which is the natural prolongation of its territory. This right can be limited in five different ways: (1) to 200 nautical miles where the outer edge of the continental margin lies within that distance; (2) by the outer edge of the continental margin; (3) to a distance of 350 nautical miles where the outer edge of the continental margin lies at a greater distance than that; (4) by the rights and entitlements of third States; and (5) by the rights and entitlements of the international community represented by the International Seabed Authority. It would have been good to have specific data on the continental shelf of Bangladesh and of Myanmar beyond 200 nautical miles. The distance criterion is linked to the law relating to a State's legal entitlement to the continental shelf. As the International Court of Justice has said (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment,

*I.C.J. Reports 1985*, p. 13, at p. 46, para. 61), the law applicable to the dispute, that is, to claims relating to continental shelves located less than 200 miles from the coasts of the States in question, is based not on geological or geomorphological criteria, but on a criterion of distance from the coast or, to use the traditional term, on the principle of adjacency as measured by distance. The problem here lies in the fact that this criterion does not apply to the continental shelf beyond 200 miles. The consequences of the development of continental shelf law can be seen with regard to both verification of entitlement and delimitation as between rival claims. On the basis of the law now applicable, namely the distance criterion, has it been proved that Bangladesh and Myanmar hold valid entitlements to the seabed areas they claim? What is the impact of considerations of distance on the delimiting itself, which must both fix limits on the States' maritime projections seaward and delimit these various areas between the two States? It has to be kept in mind in making this assessment that the delimitation must achieve an equitable result by applying equitable principles to the relevant circumstances. The adjudicator must decide "on the basis of law" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 278, para. 59). To this end, the International Court of Justice has established the status of equitable principles. It explains that the judicial decisions are at one in holding that the delimitation of a continental shelf boundary must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an equitable result. This approach "is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 59, para. 70). It is however the goal – the equitable result – and not the means used to achieve it, that must be the primary element in this duality of characterization. "Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it" (*ibid.*, p. 60, para. 71). A distinction must however be made between applying equitable principles and giving a decision *ex aequo et bono*, because "it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 47, para. 85).

84. Thus the justice of which equity is an emanation is not abstract justice but justice according to the rule of law, which is to say that its application should display consistency and a degree of predictability. Even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13, at p. 39, para. 45). Equitable principles therefore take on a normative character.

85. The great weakness in the present Judgment is that it does not succeed in determining Bangladesh's and Myanmar's precise entitlements to the continental shelf beyond 200 nautical miles. Nor does it succeed in establishing the extent of those entitlements. On the issue of its jurisdiction to decide the Parties' entitlements, the Tribunal points out the need to make a distinction between the notion of entitlement to the continental shelf beyond 200 nautical miles and that of the outer limits of the continental shelf. It notes that "article 83 of the Convention addresses the delimitation of the continental shelf between States with opposite or adjacent coasts without any limitation as to area. It contains no reference to the limits set forth in article 76, paragraph 1, of the Convention. Article 83 applies equally to the delimitation of the continental shelf both within and beyond 200 nm". The Tribunal explains that a coastal State's entitlement to the continental shelf exists by the sole fact that the basis for it is present; it does not require the establishment of outer limits. Article 77 of the Convention is cited in this connection (paragraph 361 of the Judgment).

86. This illustrates a fundamental difference to be observed between land delimitation – which upholds vestiges of the colonial era – and maritime delimitation. Unlike the former, the latter does not involve identifying the better title, hence the legally dispositive one; it involves resolving the difficulties created by the coexistence of two entitlements of equal legal value. "*Tandis que la délimitation terrestre a pour objectif de suum cuique tribuere, la délimitation maritime est condamnée à amputer le titre de chacun. L'une est faite de reconnaissance, de consécration; l'autre de réduction, de sacrifice, d'amputation. On s'explique ainsi le rôle différent que joue l'effectivité dans les délimitations terrestres et les délimitations maritimes. L'occupation, l'exercice effectif des souverainetés étatiques, les actes de souveraineté : autant d'éléments qui contribueront à établir le titre le meilleur, donc le seul juridiquement à retenir, dans les problèmes de délimitation terrestre, mais qui sont sans pertinence dans la délimitation maritime.*" ["While *suum cuique tribuere* is the objective in land delimitation, maritime delimitation is destined to cut back the entitlement of each. One involves recognition, enshrinement; the other reduction, sacrifice, cutting back. This explains the difference in the role played by *effectivité* in land and maritime delimitations. Occupation, effective exercise of State sovereignty, acts of sovereignty: all elements which help to establish the better, hence legally prevailing, title in land delimitation

cases but which have no relevance in maritime delimitation" (Translation by the Registry). (P. Weil, "Délimitation maritime et délimitation terrestre", *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht, Martinus Nijhoff Publishers, 1989, pp. 1021-1026, spec. p. 1024).

87. Unable to determine the Parties' exact entitlements to the continental shelf beyond 200 nautical miles, or to establish their extent so as to ascertain whether those entitlements are concurrent, overlapping or intertwined, the Tribunal takes another tack. It states: "The scientific data and analyses presented in this case, which have not been contested, do not establish that Myanmar's continental shelf is limited to 200 nm under article 76 of the Convention, and instead indicate the opposite" (para. 448 of the Judgment); and "[t]he Tribunal accordingly concludes that both Bangladesh and Myanmar have entitlements to a continental shelf extending beyond 200 nm. The submissions of Bangladesh and Myanmar to the Commission clearly indicate that their entitlements overlap in the area in dispute in this case" (para. 449 of the Judgment). In respect of the Area, the Tribunal adds its observation that, as is evident from the Parties' submissions to the Commission, the continental shelf beyond 200 nautical miles that is the subject of delimitation here is situated far from the Area (para. 368 of the Judgment). It is indeed true that the Commission has neither confirmed nor invalidated the scientific information in the submissions made to it, since it has suspended its consideration of them on account of the dispute that is the object of the present case (on the subject of the decision to defer consideration of the respective submissions of Myanmar and Bangladesh, see the Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, CLCS/64, 1 October 2009, p. 10, para. 40, and the Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, CLCS/72, 16 September 2011, p. 7, para. 22). The Parties dispute each other's claims to the continental shelf. While each makes a claim to continental shelf area beyond 200 nautical miles, each challenges the other's claim. Accordingly, there are no overlapping claims to the continental shelf beyond 200 nautical miles. Instead, each claim is exclusive of the other. From the Parties' point of view, the question of delimitation does not arise and it may be that the delimitation should be effected so as to leave the entire continental shelf area beyond 200 miles to one Party or the other. As a result, we are reduced to conjecture. And, by drawing the line it envisages, is the Tribunal not prejudicing the rights of the international community? Beyond doubt, the right process was to have recourse first to the Commission.

88. It must be kept in mind that judges find entitlements; under no circumstances may they grant them. Owing to the nature of the judicial function and the nature of entitlements, it is all the more imperative that courts rely on existing law, however uncertain may be the principles or rules deriving from the requirement of an equitable solution. The Tribunal pretends to base its decision on principles of law, but, for lack of sufficiently precise substantive rules founded on general international law, it is reduced to ruling by the exercise of discretion.

89. This approach rebounds on the Tribunal's chosen method of delimitation – equidistance/relevant circumstances – insofar as the elements of the delimitation exercise become inoperative, that is to say inapplicable, for three reasons:

90. First, it is by juxtaposing titles which are concurrent, overlapping or intertwined throughout their full extent that an idea of the relevant area can be derived, and this in turn makes it possible to ensure that there is no disproportion. This process plays an important role in the delimitation operation by assessing the relationship between the length of the coasts of the States concerned and the extent of maritime area accruing to them. This means that it is difficult to produce from rough guesses the explicit result expected of delimitation, which must achieve an equitable result. Indeed, it has by now become unclear whether this is a dispute concerning attribution of one territory or a dispute concerning delimitation of two territories, since the relevant area is nonexistent because indeterminate.

91. "In the view of the Tribunal, the delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 nm. Accordingly, the equidistance/relevant circumstances method continues to apply for the delimitation of the continental shelf beyond 200 nm. This method is rooted in the recognition that sovereignty over the land territory is the basis for the sovereign rights and jurisdiction of the coastal State with respect to both the exclusive economic zone and the continental shelf. This should be distinguished from the question of the object and extent of those rights, be it the nature of the areas to which those rights apply or the maximum seaward limits specified in articles 57 and 76 of the Convention. The Tribunal notes in this respect that this method can, and does in this case, permit resolution also beyond 200 nm of the problem of the cut-off effect that can be created by an equidistance line where the coast of one party is markedly concave" (para. 455 of the Judgment).

92. This method involves three well-defined stages. The first consists of plotting the provisional equidistance line. At this stage, the judge pays no heed to any relevant circumstances and the line is drawn in accordance with strictly geometric criteria on the basis of objective data. The course of the final line must produce an equitable solution (articles 74 and 83 of the Convention). This is why in the second stage the judge considers whether there are any factors calling for an adjustment or displacement of the provisional equidistance line to achieve an equitable result. Finally, in the third stage the judge must verify that the line does not 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 areas of the two States by reference to the delimitation line.

93. Next, under these conditions identifying the relevant circumstances becomes a tricky exercise characterized by uncertainty in respect of the continental shelf beyond 200 nautical miles. The role of proportionality, the conduct of the Parties, socio-economic elements, the general geographical setting, and the geology and geomorphology could furnish factual information for the adjudicator to take into consideration in drawing an equitable line. The approach changed somewhat and an attempt was made to re-establish order by assessing the weight to be accorded to relevant circumstances in any particular delimitation. According to the International Court of Justice: "In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 50, para. 93). But it is not so where a judicial or arbitral body applies equitable procedures. For such a body, although there is assuredly no exhaustive list of considerations, it is evident that only "those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 40, para. 48). In the case at hand can a convincing link be established between the relevant circumstances cited by just one Party and the adversarial continental

shelf claims asserted by Bangladesh and Myanmar? Specifically, does the equidistance line duly take account of the relevant circumstances, i.e., the cut-off effect it produces, the concavity of the Bangladesh coast and the Bengal depositional system? Do these factors call for an adjustment or shifting of the equidistance line beyond 200 nautical miles in order to arrive at an equitable result? Did the Tribunal ensure that the decided delimitation line did not lead to an inequitable result by reason of a marked disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas? What are the relevant maritime areas attributed by the delimitation line to Bangladesh and Myanmar beyond 200 nautical miles?

94. Bangladesh contends that the relevant circumstances in the delimitation of the continental shelf beyond 200 nautical miles include the geology and geomorphology of the seabed and subsoil, because entitlement beyond 200 nautical miles depends entirely on natural prolongation while within 200 nautical miles it is based on distance from the coast (ITLOS/PV.11/6, p. 24, line 34). According to Bangladesh, its entitlement to the continental shelf beyond 200 nautical miles “rests firmly” on the geological and geomorphological continuity between its land territory and the entire seabed of the Bay of Bengal. Bangladesh states that Myanmar “at best enjoys only geomorphological continuity between its own landmass and the outer continental shelf” (ITLOS/PV.11/6, p. 26, lines 2-3). In Bangladesh’s view, therefore, “an equitable delimitation consistent with article 83 must necessarily take full account of the fact that Bangladesh has the most natural prolongation into the Bay of Bengal, and that Myanmar has little or no natural prolongation beyond 200” nautical miles (ITLOS/PV.11/6, p. 26, lines 16-19).

95. Another relevant circumstance cited by Bangladesh is “the continuing effect of Bangladesh’s concave coast and the cut-off effect generated by Myanmar’s equidistance line, or by any other version of an equidistance line”. According to Bangladesh, “[t]he farther an equidistance or even a modified equidistance line extends from a concave coast, the more it cuts across that coast, continually narrowing the wedge of sea in front of it” (ITLOS/PV.11/6, p. 26, lines 35-37).

96. Given its position that Bangladesh’s continental shelf does not extend beyond 200 nautical miles, Myanmar did not present arguments regarding the existence of relevant circumstances relating to the delimitation of the continental shelf beyond 200 nautical miles. In this connection the Tribunal observes that Myanmar stated that there are no relevant circumstances requiring a deflection of the provisional equidistance line in the context of the delimitation of the continental shelf within 200 nautical miles.

97. Finally, a question may be raised on the nature of the line dividing the continental shelf beyond 200 nautical miles. The Tribunal has decided that the maritime boundary more than 200 nautical miles from Bangladesh continues along the geodetic line starting from point 11 at an azimuth of  $215^{\circ}$  as identified in operative paragraph 5, until it reaches the area where the rights of third States may be affected (para. 6 of the operative part of the Judgment). The Tribunal has decided that, in view of the geographic circumstances in the present case (concavity and cut-off effect, St Martin's Island), the delimitation line must be deflected at the point where it begins to cut off the seaward projection of the Bangladesh coast and that the direction of the adjustment is to be determined in the light of this circumstance. In this regard, we must confess to great surprise at paragraphs 235, 236 and 237 of the Judgment, since the Tribunal has opted to follow the equidistance/relevant circumstances method. It is only when the equidistance method leads to an inequitable and unreasonable result that recourse to other methods is justified. Thus, it is an inherent contradiction, a logical paradox, to change approach.

98. If this delimitation operation is justifiable for the continental shelf within 200 nautical miles and the exclusive economic zone, it is wholly inappropriate for the continental shelf beyond 200 nautical miles because the Parties' entitlements remain *undefined*: unless there are overlapping, equal entitlements to a given area, there is hardly any call for maritime delimitation. Good sense required terminating the delimitation line at the 200-nautical-mile limit, not beyond.

99. Under the circumstances of the present case, the Tribunal should have sought a preliminary ruling in order to settle this last part of the dispute. It should have made an Order of referral to that end. There has been no recourse to the referral-for-preliminary-ruling mechanism in international law. It is a concept of European Union law applicable in the courts of the European Union Member States.

100. The preliminary-ruling procedure affords national courts the possibility of seeking the views of the Court of Justice of the European Union on the interpretation or validity of Community law in the context of litigation before them. The procedure aims at ensuring legal certainty through the uniform application of Community law throughout the European Union. The procedure is now provided for in articles 256 and 267 of the Treaty on the Functioning of the European Union (TFEU).

101. The Tribunal alone can do this. It is necessary to recall here the different views expressed by international courts and tribunals on the subject of delimitation beyond 200 nautical miles. In the *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*, the Arbitral Tribunal said:

As will become apparent, however, the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm. The problems posed by the relationship in that maritime area of CS and EEZ rights are accordingly problems with which the Tribunal has no need to deal. The Tribunal therefore takes no position on the substance of the problem posed by the argument advanced by Trinidad and Tobago. (*Decision of 11 April 2006, Reports of International Arbitral Awards, vol. XXVII*, p. 147, at p. 242, para. 368).

102. In the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, the International Court of Justice said:

The Court may accordingly, without specifying a precise endpoint, delimit the maritime boundary and state that it extends beyond the 82nd meridian without affecting third-State rights. It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder (*Judgment, I.C.J. Reports 2007*, p. 659, at p. 759, para. 319).

103. Further, the arbitral award in the case concerning *Delimitation of Maritime Areas between Canada and France (St Pierre and Miquelon)* reads:

It is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist (*Decision of 10 June 1992, International Legal Materials, vol. 31 (1992)*, p. 1145, at p. 1172, para. 81 (English translation); see also *Reports of International Arbitral Awards, vol. XXI*, p. 265, at p. 293, para. 81 (French version)).

International courts and tribunals in these various cases have endeavoured to apply positive law without seeking to create precedent.

104. The International Tribunal for the Law of the Sea, the Commission on the Limits of the Continental Shelf, the International Seabed Authority and the Meeting of States Parties to the Convention are organs set up by the Convention. And each must assume a given role assigned to it under the Convention, that of guardian and authoritative interpreter being for the Tribunal.

105. This creates a limitation – an important one for the Tribunal – on the exercise of its jurisdiction, for not only does the Convention specifically assign to the Commission the task of:

consider[ing] the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and...mak[ing] recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea,

but also the Commission must:

provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a) (article 3(1)(a) and (b) of Annex II of the Convention).

106. In this regard the Commission enjoys the exclusive, discretionary authority to carry out the tasks entrusted to it and the Tribunal must take account of this in the exercise of its jurisdiction in the present case.

107. For this reason, the Tribunal should have referred the matter to the Commission at this stage in the proceedings, without there being any need for one of the Parties to request it to do so, since the Tribunal should have considered itself unable to dispense justice in the circumstances of the case. It is for the Tribunal to judge whether to make the referral.

108. If the dispute could be settled solely on the basis of international law, if the question were substantively identical to one already resolved by the international jurisprudence, or if applying the delimitation rules and principles could lead to an equitable result and be in accordance with article 76 of the Convention, a referral would have been pointless. However, in the three cases in which the question has arisen – *Delimitation of Maritime Areas between Canada and France (St Pierre and Miquelon)* (Decision of 10 June 1992, Reports of International Arbitral Awards, vol. XXI, paras. 78 and 79 (in French), see also *International Legal Materials*, vol. 31 (1992), paras. 78 and 79 (in English)); *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of*

*the exclusive economic zone and the continental shelf between them (Decision of 11 April 2006, Reports of International Arbitral Awards, vol. XXVII, para. 213); and Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) (Judgment, I.C.J. Reports 2007, para. 319) – the judicial and arbitral bodies exercised caution and confined themselves to recalling the law in force.*

109. There was a real need to request a preliminary ruling by the Commission so that the validity of the entitlements claimed by the Parties to the dispute before the Tribunal could be assessed. This would have enabled us to dispense justice to Bangladesh and Myanmar and to settle this dispute once and for all. This would also have paved the way for other international fora (International Court of Justice and arbitral tribunals) to deal with this difficult issue: this was the judicious course.

110. For this purpose, the Tribunal should have immediately notified the President of the Meeting of States Parties and the Chairman of the Commission with a view to lifting the suspension, dating from 11 May 2011, of consideration of Myanmar's submission. It should be kept in mind that Myanmar is first in the queue and the examination of its submission would have sufficed for the Tribunal in the exercise of its jurisdiction because the data and information furnished by Bangladesh are uncontested.

111. The Tribunal should have empowered the President and the two judges *ad hoc* to act so as to ensure equality of the Parties in the process. A memorandum of understanding with the Commission and a specific timetable could then have been agreed to. The Order of referral and the memorandum of understanding could have been annexed to the Judgment delivered by the Tribunal on 14 March 2012.

112. The Commission could have been requested to make its recommendations within one year: this would have initiated the second phase of this case. As the Tribunal is at liberty in the performance of its judicial role to define the manner in which it chooses to respond to the parties' submissions, it was perfectly free to consider and decide the question of the delimitation of the continental shelf beyond 200 nautical miles separately.

113. Disputes of this kind may well proliferate in a world in which territorial concerns play a leading role. This was an opportune occasion to establish a procedural precedent that could prove very useful to international courts and tribunals called upon to exercise jurisdiction in these areas.

114. The system put in place under the Convention corresponds to the notion that some subject matters call for a lighter procedure, one with recourse to experts not lawyers and one in which factual determinations undoubtedly play a more important role than “legal” considerations in the strict sense; this is because scientific questions are answered by science, not law.

115. Thus, Annex II of the Convention establishes the Commission on the Limits of the Continental Shelf, which is tasked with making recommendations to coastal States on matters related to establishing the outer limits of their continental shelf when it extends more than 200 nautical miles from the baselines.

116. By laying down precise criteria for the determination of the limits of the continental shelf, article 76 dispels the uncertainties having arisen under the 1958 Convention, which, among other things, based the definition of the continental shelf on exploitability, thereby paving the way to runaway extensions.

117. Application of the scientific criteria set out in article 76 could not be left solely to the discretion of the coastal State, which remains empowered to determine the course of its boundaries since it establishes the outer edge of the continental margin and delineates the outer limits of its continental shelf (paras. 4 and 7 of article 76).

118. The Commission was established to provide an independent, objective analysis of the elements of a State’s claim in respect of the outer limits of its continental shelf. The Commission has to contribute to determining the definitive course of the outer limits of the continental shelf. It must also act as ethical safeguard by preventing overblown claims.

119. Maritime delimitation is founded on the notion that the coastal projections of two neighbouring States, each measuring a certain distance from the coast, overlap or are superimposed. Where there are not equal, concurrent entitlements to a given area, there is no call for maritime delimitation. The problem in the present case is that the claimed entitlements are founded more on presumptions than proof, hence the need for recourse to the Commission.

120. The Tribunal is the guardian and authoritative interpreter of the Convention and is duty-bound to be painstaking in protecting and preserving it.

*(signed)* Tafsir M. Ndiaye