

**JOINT DECLARATION
OF JUDGES *AD HOC* MENSAH AND OXMAN**

1. We support the Judgment of the Tribunal. We wish to add some brief observations on a number of issues addressed therein.

Navigation and right of access

2. An important objective of maritime delimitation is to promote stability in the relations between neighbouring States regarding activities in their waters. This objective is also furthered by accommodating specific concerns regarding navigation and access rights. We consider that the statement of Bangladesh in response to the Tribunal's question is very helpful in this regard, and we support the decision of the Tribunal to take note of the commitment by Bangladesh. With regard to the references to the agreement reached in 1974 in the statements set forth in paragraphs 173 and 174 of the Judgment, we observe that although the Tribunal's delimitation of the territorial sea is not founded on the existence of an agreement between the Parties as argued by Bangladesh, the maritime boundary established by the Tribunal in the territorial sea is based on the equidistance line proposed by Bangladesh in these proceedings, and is essentially the same as that contemplated by the Agreed Minutes of 23 November 1974.

Entitlement to a continental shelf beyond 200 nautical miles

3. We agree with the Tribunal's conclusion that there is no need in this case for the Tribunal to decline to delimit the continental shelf beyond 200 miles until such time as the Commission on the Limits of the Continental Shelf has made its recommendations and each Party has had the opportunity to consider its reaction. In this connection, we note that the Tribunal's determination that each Party is entitled to a continental shelf beyond 200 miles, and that their entitlements overlap, does not entail an interpretation or application of article 76 of the Convention that is incompatible with the submission that either Party has made to the Commission regarding the outer limits of its continental shelf, as described in the respective executive summaries. Accordingly, the Judgment does not prejudice the right of each Party under paragraph 8 of article 76 to establish final and binding outer limits of its continental shelf on the basis of the recommendations of the Commission through the process prescribed by the Convention. This process is neither adjudicative nor adversarial.

Delimitation of the Exclusive Economic Zone and the Continental Shelf

4. The law applicable to delimitation of the exclusive economic zone and the continental shelf, as articulated and applied by international courts and tribunals, entails neither an unyielding insistence on mathematical certainty nor an unbounded quest for an equitable solution. The equidistance/relevant circumstances method of delimitation seeks to balance the need for objectivity and predictability with the need for sufficient flexibility to respond to circumstances relevant to a particular delimitation. Maintaining that balance requires that equidistance be qualified by relevant circumstances and that the scope of relevant circumstances be circumscribed.

5. Both Parties argued that a line that is equidistant from the nearest points on their respective coasts would not be appropriate in the geographic circumstances of this case. While Myanmar drew its proposed boundary on the basis of equidistance, it demonstrated that, given the size and position of St. Martin's Island directly in front of Myanmar's coast near the terminus of the land frontier, measuring an equidistance line from base points on that island would have a distorting effect that would block the seaward projection of Myanmar's coast. Bangladesh, in turn, demonstrated that, because of the marked concavity of its coast, the equidistance line advocated by Myanmar, and even an equidistance line measured from St. Martin's Island, would have the unwarranted effect of cutting off the seaward projection of the south-facing coast of Bangladesh.

6. This does not mean that resort to the angle-bisector method of delimitation is necessary. There is no difficulty in drawing a provisional equidistance line in this case. While the angle-bisector method can be viewed as a variant of equidistance, it lacks the precision of equidistance. As noted in the Judgment, the angle can change significantly depending on how it is constructed. In this regard the Tribunal observed that Bangladesh constructed its 215° bisector with reference to Bhiff Cape, which Bangladesh contended was the limit of Myanmar's relevant coast. The Tribunal did not accept this contention, and determined that Myanmar's relevant coast extends to Cape Negrais, which would produce a significantly different bisector.

7. In this case, the 215° azimuth, properly employed, can indeed provide an equitable solution to the problem of the cut-off effect produced by an equidistance line. But the reason lies not in the methodology used by Bangladesh to generate the azimuth, but rather in its effect as an adjustment to the provisional equidistance line.

8. It is the relevant circumstance, namely the cut-off effect, and the need to give the coasts of both Parties their effects in a reasonable and balanced way, that dictate both the location and the direction of an adjustment to the provisional equidistance line. While no adjustment for relevant circumstances is immune to the risks of subjectivity, the focus on addressing the precise problem posed by the provisional equidistance line, and on the relationship of any adjustment to the relevant coasts of both Parties as they are, helps to discipline the process and to direct attention to the right questions.

9. Neither Party expressly addressed the issue of how an adjustment to the equidistance line should be made that would give appropriate effect to the seaward projection of the south-facing coast of Bangladesh. However, independently of its boundary proposal of a transposed angle bisector, Bangladesh also adverted to the 215° azimuth to illustrate inequities in various hypothetical lines. The Parties had the opportunity, albeit in a different context, to comment on the advantages and disadvantages of using that azimuth, and each of them availed itself of that opportunity at length in its written and oral pleadings. While we do not think that this fact in and of itself obliges the Tribunal to consider or use this azimuth in its adjustment of the provisional equidistance line, the Parties' discussion of the azimuth undoubtedly facilitated evaluation of its suitability for that purpose.

10. In this case the circumstances deemed relevant to adjustment of the provisional equidistance line are those that arise from the configuration of the coasts of the Parties in relation to each other. With rare exceptions, other types of circumstances have either been rejected or treated with great circumspection by international courts and tribunals. Thus, as evidenced by the Tribunal's decision in this case, even if otherwise relevant, circumstances relating only to the seabed and subsoil might rarely if ever be regarded as relevant to a single maritime boundary that delimits both the continental shelf and the superjacent waters of the exclusive economic zone.

11. No question of delimitation of the superjacent waters arises with respect to the continental shelf beyond 200 miles. With regard to that area, Bangladesh invited the Tribunal to undertake an evaluation of the relative strengths of the natural prolongations of the Parties, based on geological and related factors. Acceptance of this idea would, in our view, introduce a new element of difficulty and uncertainty into the process of maritime delimitation in this case. We are concerned that it could have an unsettling effect on the efforts of States to agree on delimitation of the continental shelf beyond 200 miles. Further we think that such an exercise conflates the determination of the extent of entitlement under article 76 of the Convention with the delimitation of overlapping entitlements under article 83. The Tribunal rightly declined to do so.

12. The decision of the Tribunal to draw the provisional equidistance line without reference to base points on St. Martin's Island, and to use the 215° azimuth to adjust that line in the area south of the northern coast of Bangladesh, allows the coasts of both Parties to produce their effects in a reasonable and mutually balanced way in terms of entitlements to the exclusive economic zone and to the continental shelf. The Tribunal thus achieves a solution that is equitable in the circumstances of this case.

(signed) Thomas A. Mensah

(signed) Bernard H. Oxman