

PERMANENT COURT OF ARBITRATION

ARBITRATION UNDER ANNEX VII OF THE 1982 UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA

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In the Matter of Bay of Bengal Maritime Boundary
Arbitration Between:

THE PEOPLE'S REPUBLIC OF BANGLADESH

PCA Case No. 2010-16

and

PCA Reference BD-IN

THE REPUBLIC OF INDIA

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Volume 4

HEARING ON THE MERITS

Friday, December 13, 2013

The Permanent Court of Arbitration
PCA Administrative Council Chamber/
"Japanese Room"
Carnegieplein 2, 2517 KJ The Hague
The Netherlands

The hearing in the above-entitled matter convened at 10:00 a.m. before:

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JUDGE JEAN-PIERRE COT, Arbitrator

JUDGE THOMAS A. MENSAH, Arbitrator

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1 PROCEEDINGS

2 PRESIDENT WOLFRUM: Before we hear the first presentation and I read
3 out the program for this morning, which I received Sir Michael Wood on relevant coasts
4 and relevant areas for 25 minutes; he again on base point 65 minutes; thereafter, we will
5 have a break; and thereafter we will hear Alain Pellet for 60 minutes.

6 Let me deal with a procedural matter first. Bangladesh has raised yesterday
7 or this morning two questions with the PCA, namely: Was it in respect of the questions
8 raised by the Members of the Tribunal, new evidence may be brought in; and, secondly,
9 whether the other side--I formulate it for both sides--may respond to the answers the
10 Tribunal is is as follows:

11 Parties are encouraged to respond either orally within the Hearing or in
12 writing a little bit later; and, if you respond in writing, you'll see information, I should
13 rather call it, could come not in not later than 23rd of December. The other side has the
14 possibility to respond, and we will give that dates until when this response is due after
15 seeing what has come in. We will set a relatively short period that I'm also already sure
16 about.

17 Does that answer the question raised? Yes? Okay.

18 Professor Sands or Mr. Reichler.

19 PRESIDENT WOLFRUM: Why don't you take this microphone, please.

20 MR. REICHLER: First of all, good morning, Mr. President.
21

1 Good morning, everyone.

2 That certainly answers the question about timing. I wonder if you might
3 address the question of evidence. It was our understanding, or it would be our
4 understanding--and we hope--I'm sure you will correct us if we're wrong--that the evidence
5 that can be used to respond to the Tribunal's question is evidence that is in the record, and
6 that you're not inviting the Parties to go out and find new evidence.

7 PRESIDENT WOLFRUM: Mr. Reichler, if you use evidence which is on
8 the record, this is fine.

9 MR. REICHLER: Yes.

10 PRESIDENT WOLFRUM: But since the questions raised new issues, we
11 don't exclude that new evidence comes in. This is evidence, so it to speak, requested. But
12 to put it this way, we don't encourage heavy work for you. These were comparatively
13 simple questions, I believe, and you should try to answer them without digging into the files
14 of a hundred years.

15 MR. REICHLER: Thank you. That's very helpful and very welcome,
16 Mr. President. Thank you very much.

17 PRESIDENT WOLFRUM: Thank you, Mr. Reichler.

18 Now, Excellencies, ladies and gentlemen, let us start now with the Hearing,
19 and I call upon Sir Michael Wood.

20 Sir Michael, you have the floor.

21 MR. WOOD: Mr. President, Members of the Tribunal, first may we say that
22 we're grateful for those indications you have given about the responses to the questions, and

1 | we're happy with that.

1 **PERMANENT COURT OF ARBITRATION**

2
3 **ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS**
4 **CONVENTION ON THE LAW OF THE SEA**

5
6 **BAY OF BENGAL MARITIME BOUNDARY ARBITRATION BETWEEN THE**
7 **PEOPLE'S REPUBLIC OF BANGLADESH AND THE REPUBLIC OF INDIA**

8
9 **REPUBLIC OF INDIA**

10
11
12 **RELEVANT COASTS AND RELEVANT AREA**

13
14 **Sir Michael Wood**

15
16
17 **I. INTRODUCTORY**

18
19 1. Mr. President, it's a great pleasure, and an honour, to appear before you on behalf of the
20 Republic of India. My first task is to address the relevant coasts and the relevant area.
21 This will be followed by a separate presentation dealing with base points.

22
23 2. Before delimitation, a necessary preliminary step is to identify the relevant coasts of
24 the Parties and the relevant area within which the delimitation is to take place.

25
26 3. In *Black Sea*, the International Court explained that it was

27 "important to determine the coasts of Romania and of Ukraine which generate the
28 rights of these countries to the continental shelf and the exclusive economic zone, namely,
29 those coasts the projections of which overlap, because the task of delimitation consists in

1 resolving the overlapping claims by drawing a line of separation of the maritime areas
2 concerned.”¹

3
4 4. The ICJ confirmed the position as regards relevant coasts in its *Nicaragua v. Colombia*
5 Judgment of 19 November 2012. It there recalled that:

6
7 “It is well established that—and here it cited *Black Sea*--‘[t]he title of a State to
8 the continental shelf and to the exclusive economic zone is based on the principle that the
9 land dominates the sea through the projection of the coasts or the coastal fronts’ (*Maritime*
10 *Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 89,
11 para. 77).”²

12
13 The Court then reaffirmed that the relevant coasts are “those coasts the projections of
14 which overlap” and it went on:

15
16 “The Court will, therefore, begin by determining what are the relevant coasts of
17 the Parties, namely, those coasts the projections of which overlap, because the task of
18 delimitation consists in resolving the overlapping claims by drawing a line of separation
19 between the maritime areas concerned.”³

20
21 The Court went on to recall the “two different though closely related legal aspects” of the
22 role of relevant coasts,⁴ citing a passage from *Romania v. Ukraine*. That passage reads:

23
24 “The role of relevant coasts can have two different though closely related legal
25 aspects in relation to the delimitation of the continental shelf and the exclusive economic
26 zone. First, it is necessary to identify the relevant coasts in order to determine what
27 constitutes in the specific context of a case the overlapping claims to these zones. Second,
28 the relevant coasts need to be ascertained in order to check, in the third and final stage of
29 the delimitation process, whether any disproportionality exists in the ratios of the coastal
30 length of each State and the maritime areas falling either side of the delimitation line.”⁵

31
32 5. As the ITLOS emphasised in *Bangladesh/Myanmar*, only the relevant coasts, that is,
33 the coasts that “generate projections which overlap with those of the coast of another

¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 89, para. 77.

² *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, para. 140.

³ *Ibid*, para. 141.

⁴ *Ibid*, para. 141.

⁵ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 89, para. 78.

1 party”, have legal significance for maritime delimitation⁶. This is a fundamental point,
2 an obvious and simple point. One wonders therefore why Bangladesh repeatedly
3 refers to India’s extensive coasts and entitlements that lie well beyond the relevant
4 area, in the southern part of the Bay of Bengal, in the Arabian Sea etc. But Professor
5 Pellet said all that needs to be said about that yesterday.

- 6
- 7 6. Mr. President, Members of the Tribunal, you will recall that Bangladesh did not see fit
8 to address the relevant coasts or the relevant area in its Memorial. Instead it confused
9 the notion of relevant coast with the various lines it dreamt up - “coastal façades” - in
10 an effort to show the general direction of the coasts for the purpose of constructing a
11 convenient angle that could then be neatly bisected to deliver Bangladesh’s famous
12 180° degree line. Even in its Reply, and in these oral proceedings, Bangladesh has
13 relegated the matter to the end, as if it were something only relevant to the
14 non-disproportionality test.

15

16 II. RELEVANT COASTS

17

- 18 7. Mr. President, I turn now to the relevant coasts. First, the relevant coast of Bangladesh.
19 Here the Parties are in large agreement.⁷ Bangladesh’s relevant coast is essentially that
20 found by the ITLOS in *Bangladesh/Myanmar*.
- 21
- 22 8. You will recall that in *Bangladesh/Myanmar*, due to “the complexity and sinuosity of
23 the coast”,⁸ the ITLOS identified Bangladesh’s relevant coasts with two straight lines.
24 [SKETCH MAP ON SCREEN] In the present case, the Parties agree that
25 Bangladesh’s relevant coast is to be measured along these two lines, from the land
26 boundary terminus with India to a point on Kutubdia Island, and from that point to the
27 land boundary terminus with Myanmar in the middle of the Naaf River. These are on
28 the screen and at Tab 4.1. The total length, according to India, is 417 kilometres. The
29 slight difference in calculation with Bangladesh results from the different land

⁶ *Ibid*, para. 185.

⁷ Transcript, 9 December 2013, Martin, para. 13.

⁸ ITLOS, *Bangladesh/Myanmar*, Judgment, 14 February 2012, para. 201.

1 boundary terminus advocated by each side. In any event, for the purpose of
2 calculating the length of the relevant coast, the difference is immaterial.

3
4 9. Turning to the Indian relevant coast, in its written pleadings⁹, India identified its
5 relevant coast as consisting of three segments:

- 6
7 a. The first segment runs west from the land boundary terminus to a point in the vicinity
8 of Balasore;
9 b. the second segment runs from that point to Maipura Point;
10 c. the third segment running from Maipura Point until it reaches Devi Point.

11
12 Together, the three segments comprise India's relevant coast with a total length of 411
13 kilometres.

14
15 10. As I have said, Mr. President, Members of the Tribunal, it was only at the very end of
16 Bangladesh's first round oral pleadings that Mr. Martin addressed the relevant coasts
17 and the relevant area. International courts and tribunals deal with these matters at the
18 outset – as the *Black Sea* case teaches us – because they are fundamental to what
19 follows. They are not relevant just for the application of the essentially mathematical
20 non-disproportionality test, at the third stage of the standard methodology, as
21 Bangladesh seems to believe.

22
23 11. It is noteworthy that Mr. Martin dealt with the relevant coasts and relevant area
24 exclusively by reference to ITLOS's *Bangladesh/Myanmar* Judgment, indeed
25 exclusively by reference to Sketch-map No. 8 in that Judgment. You'll recall that
26 Sketch-map No. 8 is entitled "EEZ/CS. Tribunal's measurement of the relevant area".
27 That Sketch-map, as it appears in the Judgment, is now on the screen and at **Tab 4.2**.

28

⁹ CM, paras. 6.18-6.41; RJ, paras. 3.1-3.24.

1 12. In the course of his statement, Mr. Martin added various lines and annotations to the
2 ITLOS Sketch-map. So what you find at Bangladesh's tab 3.23 is not in fact
3 'Sketch-map No. 8 from the Bangladesh/Myanmar Judgment'. It is Bangladesh's
4 interpretation of Sketch-map No. 8.
5

6 13. Mr. Martin noted that, according to the ITLOS, "the relevant coast of Myanmar
7 extends well beyond 200 miles from Bangladesh"¹⁰, and he added that, "relatedly, the
8 relevant area includes areas that are more than 200 miles from Bangladesh but within
9 200 miles from Myanmar"¹¹. This may be the case. But why we know not, and Mr.
10 Martin was not able to enlighten us. Without a principled reason, it is impossible to
11 see why it might be applicable in the instant case.
12

13 14. It is useful to look at what the ITLOS did in two stages: first, the relevant coasts;
14 second, the relevant area.
15

16 15. The ITLOS dealt with the relevant coasts early in its consideration of delimitation, at
17 paragraphs 185 to 205 of the Judgment, and with a different Sketch-map, Sketch-map
18 No. 3. [SKETCH-MAP 3 FROM ITLOS JUDGMENT ON SCREEN] This is now on
19 the screen, and it is at **Tab 4.3**. The ITLOS explained that the relevant coast of
20 Myanmar stretched from the land boundary terminus in the Naaf River to Cape
21 Negrais, and not, as Bangladesh had argued, only to Bhiff Cape. (You can see Bhiff
22 Cape and Cape Negrais marked on the sketch-map.) The Tribunal's explanation was
23 contained in a single sentence, and I'll read it out:
24

¹⁰ Transcript, 9 December 2013, Martin, Para. 6, lines 21-22.

¹¹ Ibid., para. 7, lines 6-7.

1 “The Tribunal finds that the coast of Myanmar from the terminus of its land
2 boundary with Bangladesh to Cape Negrais does, contrary to Bangladesh’s contention,
3 indeed generate projections that overlap projections from Bangladesh’s coast.”¹²

4
5 16. That is all ITLOS said. Where the projections overlap is not stated, but it cannot have
6 been throughout the area within 200 nautical miles projected from the stretch of coast
7 beyond Bhih Cape to the south. One point of some significance may be that, as you
8 see from the Sketch-map, the stretch of Myanmar’s coast from Bhih Cape to Cape
9 Negrais faces in a generally northeasterly direction, back into the relevant area and
10 towards the coast of Bangladesh.

11
12 17. Mr. President, Members of the Tribunal, we have looked again at the
13 *Bangladesh/Myanmar* Judgment.¹³ And we have considered carefully what Mr. Martin
14 had to say on Tuesday. Having done so, we remain of the view that India’s relevant
15 coast cannot include the stretch of coast between Devi Point and Sandy Point. There is
16 no comparison between the southernmost stretch of Myanmar’s coast on the Bay of
17 Bengal, which – as I have just said - faces back into the relevant area, and the coast
18 between Devi Point and Sandy Point, which faces in a southeasterly direction, not back
19 into the head of the Bay. I would refer you to what Professor Pellet said yesterday about
20 the legal irrelevance of the Indian coast beyond Devi Point.

21
22 18. There is also no need to extend India’s coast beyond Devi Point to reflect any
23 entitlements beyond 200 nautical miles. If the Bangladesh coast that generates
24 overlapping projections with India within 200 nautical miles generates these
25 projections beyond 200 nautical miles, then India’s relevant coast up to Devi Point can
26 also generate overlapping maritime projections both within and beyond 200 nautical
27 miles. Thus, the extension of the length of India’s relevant coast is unnecessary, as well
28 as unjustified.

¹² ITLOS, *Bangladesh/Myanmar*, Judgment, 14 February 2012, para. 203.

¹³ *Ibid.*, paras. 185-205.

1
2 19. Indeed, since the coast up to Devi Point could be said to generate these overlapping
3 claims, Bangladesh's extension of India's relevant coast up to Sandy Point is entirely
4 arbitrary.¹⁴ India's coast to the south of Sandy Point also produces projections beyond
5 200 nautical miles. So why stop at Sandy Point? Why not continue and choose a point
6 even more remote from Bangladesh's coast and projections? There is no good reason
7 one way or another since Bangladesh's approach, we suggest, is based on achieving its
8 goals, not on sound legal reasoning.
9

10 **III. THE RELEVANT AREA**

11

12 20. Mr. President, Members of the Tribunal, I now turn to the relevant area. Bangladesh's
13 efforts to determine the relevant area raise other perhaps even more difficult issues.
14 Here again, Bangladesh clings to what it terms the 'guidepost'¹⁵ (perhaps they meant
15 'lamppost') of that Judgment. Mr. Martin said that "The key takeaway – sounds like a
16 hamburger – from that Judgment ... is that the relevant area must also include areas
17 beyond 200 miles".¹⁶
18

19 21. Two questions arise. First, does the relevant area for the purposes of delimitation
20 include areas within 200 nautical miles of State A that are more than 200 nautical miles
21 from State B? In concrete terms, how, in the *Bangladesh/Myanmar* case, could the
22 relevant area have included areas of Myanmar's territorial sea, exclusive economic
23 zone and continental shelf within 200 nautical miles of Myanmar but beyond 200
24 nautical miles of Bangladesh? Such areas, we say, cannot be the subject of
25 'overlapping' claims. There is unfortunately no explanation in the ITLOS Judgment
26 for Sketch-map No 8. Perhaps no explanation could be given. India would respectfully
27 urge the present Tribunal to consider this rather mysterious matter carefully, and not to

¹⁴ See also RJ, para. 3.21.

¹⁵ Transcript, 9 December 2013, Martin, para. 21, lines 2-4.

¹⁶ *Ibid.*, lines 4-5.

1 simply follow, as Bangladesh invites you to, what they claim was the basis for the
2 ITLOS Judgment. It was a technical point that perhaps did not affect the outcome in
3 *Bangladesh/Myanmar*. In any event, there is reason, we suggest, to be cautious about
4 viewing the 2012 Judgment as a precedent on this matter.

5
6 22. Mr. Martin, uncharacteristically I might say, shed no light. All he said was that, and I
7 quote,

8 “the ITLOS Judgment considered relevant portions of the Myanmar coast beyond
9 200 miles from Bangladesh, presumably because they so plainly fronted onto -- or
10 projected into -- the area to be delimited, including the area beyond 200 miles.”¹⁷

11
12 23. He may or may not be right in his basic presumption. But his reference to ‘the area to
13 be delimited, including the area beyond 200 miles’, is at best misleading. There is no
14 way that all of the area within 200 nautical miles projected from the southernmost
15 sector of Myanmar’s Rakhine Coast, between Bhiff Cape and Cape Negrais, could be
16 part of the area to be delimited. Bangladesh could have no claim whatsoever to such
17 areas that are more than 200 miles from its coast. The language in paragraph 491 of the
18 Judgment is not entirely easy to follow, and it is difficult to see how it can provide
19 support to Bangladesh’s excessive claim.

20
21 24. The second question that Bangladesh’s assertion gives rise to is how, if at all, areas of
22 continental shelf beyond 200 nautical miles are to be taken into account in applying the
23 non-disproportionality test. We are dealing in a sense with apples and oranges. On the
24 one hand, there are areas within 200 miles that are both exclusive economic zones and
25 continental shelf. On the other hand there are areas beyond 200 miles that are just
26 continental shelf. And, perhaps even more important, what to do about extravagant
27 claims to areas beyond 200 miles that are yet to be considered by the Commission on
28 the Limits of the Continental Shelf.

¹⁷ *Ibid.*, para. 11, lines 10-13.

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25. It was difficulties such as these that led us to the pragmatic approach of carrying out the non-disproportionality test in the areas within 200 nautical miles. It may not be necessary or feasible to do more.

26. I turn now to the precise area proposed by Bangladesh. It first says that the limit of the relevant area to the east should be the ITLOS delimitation line. That seems correct.

27. But it then claims that the limit to the south should be the furthest extent of its outer limit claim before the CLCS. That is highly speculative.

28. Finally, it turns to “the question of the limit of the relevant area in the southwest.” Here it makes the absurd claim that “the most natural and obvious way to close off the relevant area here is simply to connect Sandy Point, by means of a perpendicular line, to a point on Bangladesh’s outer limit that is closest to the Indian coast.”¹⁸ Mr. President, such a line would include a large area of India’s territorial sea and exclusive economic zone to which Bangladesh can have no conceivable claim. There is simply no overlapping claims here. It is not part of the relevant area.

29. Bangladesh offered two ‘observations’ in this respect. First it asserted that “Bangladesh’s approach is entirely consistent with the ITLOS Judgment. The relevant area does indeed include some areas that are within 200 miles of India, but beyond that distance from Bangladesh. But so too did the relevant area in *Bangladesh/Myanmar*. This is therefore not a principled basis on which to object.”¹⁹

¹⁸ *Ibid.*, para. 24.
¹⁹ *Ibid.*, para. 25, lines 5-11.

1 30. I'm not sure what Mr. Martin means by "a principled basis" – blind attachment to
2 Bangladesh's interpretation of the 2012 Judgment is hardly a principled argument.
3 Bangladesh's argument is unexplained and, in my respectful submission, inexplicable.
4

5 31. The second observation is this: Bangladesh asserts that "it seems to us that it would be
6 rather curious to exclude zones located immediately in front of India's relevant coast
7 from determination of the relevant area, as India seems to suggest."²⁰ I would say, in
8 reply, that it would be rather curious to include them, since they are not areas of
9 overlapping claims. To say that they should be included because they lie off the
10 relevant coast of India is a circular statement; it's question-begging. For what could
11 make the stretch of the coast between Devi Point and Sandy Point 'relevant'?
12 Certainly it is not relevant for areas within 200 nautical miles.
13

14 32. As can be seen on Figure R5.11, Bangladesh has included in what it claims is the
15 relevant area the maritime areas belonging to India lying off India's coast between
16 Devi Point and Sandy Point and within 200 nautical miles. India highlighted these
17 areas in Figure RJ 3.1B in its Rejoinder, now on the screen and at **Tab 4.4**. Does this
18 mean that India's territorial sea, exclusive economic zone and continental shelf within
19 200 nautical miles in the highlighted area are part of the overlapping areas? They
20 cannot be. They are not areas claimed by Bangladesh, and they bear no relationship to
21 Bangladesh's relevant coast or any possible projections stemming from them.²¹
22

23 As the ICJ stated when dealing with the issue of relevant coasts,

24 "there comes a point on the coast of each of the two Parties beyond which the
25 coast in question no longer has a relationship with the coast of the other Party relevant
26 for submarine delimitation. The sea-bed areas off the coast beyond that point cannot
27 therefore constitute an area of overlap of the extensions of the territories of the two
28 Parties, and are therefore not relevant to the delimitation."²²

²⁰ *Ibid.*, lines 11-13.

²¹ See also RJ, para. 3.21.

²² I.C.J., Judgment, 24 February 1982, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, I.C.J Reports 1982, pp. 61-62, para. 75.

1
2 That we say is the position here.
3

4 33. The addition of these areas results in an area of no less than 366,854 square
5 kilometres.²³ Bangladesh attempts to include these areas in the relevant area for no
6 good reason (but one can see why they do it when they seek to apply the
7 non-disproportionality test).
8

9 34. In conclusion to this speech, Mr. President, Members of the Tribunal, India maintains
10 its position, as presented in its Rejoinder,²⁴ that the relevant coast of Bangladesh is as I
11 have described it, and is 417 kilometres long; the relevant coast of India is as I have
12 described it, and is 411 kilometres long; and the relevant area measures 176,756 square
13 kilometres. The area is now on the screen and can also be found at **Tab 4.5**.
14

15 Mr. President, Members of the Tribunal, with your permission, I shall next turn to my
16 presentation on the subject of base points.
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²³ Figure R5.11; Transcript, 9 December 2013, Martin, para. 29, lines 13-15.

²⁴ As mentioned in the Rejoinder, para. 3.26, India has slightly modified its calculation of the relevant area in its Counter-Memorial.

1 PRESIDENT WOLFRUM: Just hold on. I just look around if there are any
2 questions from any of my colleagues.

3 No.

4 Then you may proceed on the base points. Thank you.

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13 December 2013

PERMANENT COURT OF ARBITRATION

BAY OF BENGAL MARITIME BOUNDARY ARBITRATION BETWEEN
BANGLADESH AND INDIA

THE REPUBLIC OF INDIA

13 December 2013

BASE POINTS

Sir Michael Wood

1. Thank you very much, Mr. President. As I said, my next task is to address the selection of base points. This may take a little longer. This is an exercise that the Tribunal must perform for the construction of the provisional equidistance line, the first stage of the standard three-stage maritime delimitation methodology. In doing so, I shall be responding to various points made by Professor Akhavan, Professor Boyle and Mr. Reichler.
2. Mr. President, the Tribunal's letter of 4 November included two points concerning base points that the Tribunal wished to see elaborated during the hearing. India responded in writing, following the Tribunal's invitation to do so. A copy of our letter of 2 December is at **Tab 5.1** [2 December letter and Annexed emails about visibility] in your folders. Bangladesh did not respond in writing, and has done so only during the present hearing.
3. In the letter of 4 November, you indicated that you "would welcome further arguments from the Parties concerning their selection of base points", and you drew attention to the recent jurisprudence of international courts and tribunals.

1 4. You first recommended that the Parties discuss:
2

3 *(a) the appropriateness of the Parties' proposed base points situated on the current land coastline*
4 *of Bangladesh and India respectively, given their appreciation of the stability of those*
5 *coastlines: and*
6

7 *(b) the appropriateness of the Parties' proposed base points situated on low-tide elevations of*
8 *Bangladesh and India respectively, given their appreciation of the visibility and stability of*
9 *those features.*
10

11 5. And, second, you invited the Parties “to indicate any alternative base points to those already
12 submitted”, on the assumption (without deciding, as you put it) that stability and visibility may
13 be relevant factors in the selection of base points for the purpose of maritime delimitation.
14

15 6. I shall address these matters further in the course of the present statement. For the time being,
16 I would just recall that, in its response of 2 December, India explained that in its view, in the
17 present case, the applicable provisions are articles 5 and 13 of UNCLOS. Article 5 describes
18 the baseline as “the low-water line along the coast as marked on large-scale charts officially
19 recognized by the coastal State”. And Article 13 provides that the low-water line on a
20 low-tide elevation situated wholly or partly within the territorial sea of the mainland or an
21 island may be used as the baseline.
22

23 7. Mr. President, we suggested in our letter that two principal issues arise when considering base
24 points for the purposes of delimitation. First, whether the base points chosen by the Parties
25 are valid base points on the baselines established in accordance with the relevant provisions on
26 UNCLOS. Second, whether the base points chosen by the Parties are appropriate for
27 establishing a provisional equidistance line. We said that, in our submission, the main issue in
28 the present case was the second of these questions.
29

30 8. I would like to begin with three preliminary but important points. First, as the case law
31 demonstrates, it is only in wholly exceptional circumstances – in particular, when it is

1 impossible to identify base points – that a court or tribunal will set aside the selection of base
2 points (and therefore the equidistance/relevant circumstances method) for a different
3 methodology altogether. Such is not the case before the Tribunal as we have explained in detail
4 elsewhere, and Professor Pellet will come back to this shortly.
5

6 9. The second preliminary point is this. Mr. President, Members of the Tribunal, in your letter of
7 4 November you referred to the ‘visibility and stability’ of the low-tide elevations, and
8 Bangladesh picked up, indeed welcomed these words earlier this week. These, in our
9 submission, are two different matters.
10

11 10. To take visibility first. Professor Pellet explained yesterday the difficulties of actually seeing
12 the base points at the time of the site visit. In fact, what matters is not whether a low-tide
13 elevation is visible at a particular point in time, but whether a base point is on the low-water
14 line of the low tide elevation which is visible at only certain states of the tide. This might be
15 only at the lowest astronomical tide, or it might be more often. The general practice in
16 charting is to mark the low-water line as it appears at the lowest astronomical tide. The vertical
17 datum recommended by the International Hydrographic Organization for use on nautical
18 charts is the lowest astronomical tide, which is defined as “The lowest tide level which can be
19 predicted to occur under average meteorological conditions and under any combination of
20 astronomical conditions.” The actual low-water line using the lowest astronomical tide will
21 only be visible every 18.6 years provided the meteorological conditions are normal. But in
22 addition, as you know, the tide fluctuates in the course of the year, there are spring tides and
23 there are neap tides; and of course each day there are high tides and low tides.
24

25 11. The third preliminary point is this. Stability is relative. As we said in our letter of 2
26 December, “the general stability or instability of a coastline is not, in and of itself, relevant to
27 the choice of base points. What matters is whether appropriate base points can be selected at
28 points along the baseline.” There may be coastlines that are unstable in large sections (which is
29 not our case), but where appropriate base points can and will be located. Bangladesh
30 throughout seeks to confuse the coastline of the Bay of Bengal with the choice of appropriate
31 base points on that coastline. These are two different things. Bangladesh attempted to

1 demonstrate that the instability of the coastline in the Bay of Bengal was such that the search
2 for appropriate base points had to be abandoned. But it reached that conclusion, we say, by
3 misapplying the law and misrepresenting the facts. █
4

5 12. The reality is such that it is entirely feasible for appropriate base points to be selected in the
6 present case. And the reality is that, except for one extreme geographical setting in the
7 *Nicaragua v. Honduras* case, arguments based on instability such as that put forward by
8 Bangladesh have been rejected. They were, for example, rejected by the ITLOS when
9 Bangladesh made similar arguments, about the same coast, in its case with Myanmar.
10

11 13. In fact, both India and Bangladesh have offered the Tribunal a set of base points off their
12 coasts, which they consider appropriate for the delimitation. This in itself indicates that
13 selecting appropriate base points is far from unfeasible. Looking at the relevant area as a
14 whole, and making allowances for the different starting point put forward by each Party, the
15 differences between the two resulting equidistance lines are not all that great. This does not
16 suggest that in our case is coastal instability leads to vast disparities between equidistance lines
17 constructed from different base points. That in itself is telling of the value of Bangladesh's
18 assertions: Bangladesh cannot seriously claim that India's base points are inappropriate and do
19 not reflect the configuration of the coast due to its instability.
20

21 14. Bangladesh's approach in this case would subvert the application of the law governing
22 maritime delimitation, as it has been painstakingly developed over many years by international
23 courts and tribunals. I will show now, as India has demonstrated in its written pleadings, that
24 the Tribunal can and should select appropriate base points to construct the equidistance line.
25

26 15. To do so, I shall begin with a short summary of the methodology applied in the case law to
27 select appropriate base points. Based on a proper understanding of the law, I shall then place
28 Bangladesh's claims concerning instability in their proper context. I will show that such

1 arguments are only relevant in extraordinary circumstances, which do not exist in this case.
2 The question of instability is not, we say, in fact relevant in the present case. And finally, I shall
3 recall the base points proposed by India as those most appropriate in the present case; in doing
4 so, I shall respond to Bangladesh's claims and taking into account the recent visit.
5

6 **I. The methodology for the selection of appropriate base points**
7

8 16. Mr. President, in its written and oral pleadings Bangladesh seeks to convey the impression that
9 the coastline all along the Bengal Delta is highly unstable and that identifying appropriate base
10 points is therefore impossible. It does so even though Bangladesh itself succeeded in
11 identifying what it presumably considered to be appropriate base points, even if it now seeks to
12 renege on that and attack – albeit rather gently - its own proposals.
13

14 17. I start with summarising the straightforward process of selecting base points that courts and
15 tribunals have repeatedly used in delimitation cases, with reference to the jurisprudence
16 mentioned in your letter of 4 November.
17

18 18. The ICJ summarised its jurisprudence on the selection of base points in the *Black Sea* case. The
19 Court stated that
20

21 “Equidistance and median lines are to be constructed from the most appropriate points on
22 the coasts of the two States concerned, with particular attention being paid to those protuberant
23 coastal points situated nearest to the area to be delimited.”²⁵
24

25 The Court continued by saying that
26

²⁵ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, para. 117.

1 “the Court will identify the appropriate points on the Parties’ relevant coast or coasts which
2 mark a significant change in the direction of the coast, in such a way that the geometrical figure
3 formed by the line connecting all these points reflects the general direction of the coastlines.”²⁶
4 That, Mr. Chairman, is what we have done.

5
6 19. In addition, the Court recalled that the base points to be chosen to construct the equidistance
7 line are those found by the court or tribunal to be most appropriate. They are not necessarily
8 those put forward by Parties.²⁷

9
10 20. The ITLOS in *Bangladesh/Myanmar* quoted the ICJ on this matter, and the ITLOS observed
11 that

12
13 “while coastal States are entitled to determine their base points for the purpose of
14 delimitation, the Tribunal is not obliged, when called upon to delimit the maritime boundary
15 between the parties to a dispute, to accept base points indicated by either or both of them. The
16 Tribunal may establish its own base points, on the basis of the geographical facts of the case.”²⁸

17
18 21. The methodology for selecting base points was recently restated by the ICJ in *Nicaragua v.*
19 *Colombia*, where the Court referred to its previous jurisprudence and stated that it “will
20 accordingly proceed to construct its provisional median line by reference to the base points
21 which it considers appropriate.”²⁹

22
23 22. That courts are not bound by the selection of base points by the parties is a reflection of what
24 has been referred to as the “dual function” (*‘la double fonction’*) of base points.³⁰ As the ICJ
25 itself noted in the *Black Sea* case, base points are used both for determining the outer limits of
26 the maritime entitlements of the coastal State and to draw an equidistance line in delimiting the

²⁶ *Ibid.*, para. 127.

²⁷ *Ibid.*, para. 117, 137; see also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, *I.C.J. Reports 1985*, para. 48.

²⁸ ITLOS, *Bangladesh/Myanmar*, Judgment, 14 February 2012, para. 264.

²⁹ *Territorial and Maritime Dispute (Nicaragua/Colombia)*, Judgment., para. 191-200.

³⁰ *Black Sea*, Jean-Pierre Cot, “The Dual Function of Base Points”, *Liber Amicorum Rudiger Wolfrum*, Vol. I (Leiden, Boston 2012).

1 maritime areas of adjacent or opposite States.³¹ As such, while not putting into question the
2 baselines used by a coastal State to determine its own maritime jurisdiction, the Tribunal is to
3 choose the base points it itself views as appropriately reflecting the “physical geography of the
4 relevant coasts”.³² Thus, not necessarily those chosen by the Parties.
5

6 23. To sum up, according to the jurisprudence, the Tribunal is to choose appropriate base points
7 that reflect the physical geography and the general direction of the coastlines.
8

9 **II. I now turn to Bangladesh’s arguments concerning the instability of the coastline,**
10 **which, in our submission, are irrelevant.**
11

12 24. These arguments have to be seen in the light of the process regularly followed by courts and
13 tribunals for the selection of base points, which I have just outlined.
14

15 25. I shall first recall how coastal instability may relate to the process of identifying base points
16 and under what circumstances it may be legally relevant. As I will show, these circumstances
17 are wholly exceptional. Bangladesh’s arguments regarding instability are irrelevant to the
18 current proceedings and are, we submit, to be rejected. I will also survey the cases in which
19 claims of instability were raised in delimitation cases and were dismissed. Then, I will briefly
20 touch upon a point that India has already demonstrated in its written pleadings, that even if
21 there were merit in Bangladesh’s legal argument on the relevance of instability, which is not
22 the case, it is an argument that is not substantiated by the facts. On the contrary, Bangladesh
23 has distorted and misrepresented the relative stability of the relevant coasts.
24
25
26
27
28
29

³¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, para. 137; Cot, *supra*, pp. 807-808.

³² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, para. 137; see also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, *I.C.J. Reports 1985*, para. 48.

1 **a. Coastal instability in its proper legal context**

2
3 26. Mr. President, it is only in extraordinary circumstances that a Tribunal will find a compelling
4 reason to abandon the search for appropriate base points. Bangladesh wishes to expand these
5 circumstances, so as to have the Tribunal resort to its curious version of a bisector.

6
7 27. In its Reply, and then again earlier this week, we have seen Bangladesh's distorted version of
8 the facts and legal reasoning behind the ICJ's judgment in *Nicaragua v. Honduras*.³³ It tries to
9 compare the morpho-dynamism that the ICJ identified at the mouth of the River Coco to that of
10 the relevant coasts along the Bay of Bengal.³⁴ It claims that the ICJ in *Nicaragua v. Honduras*
11 opted for a methodology at variance with equidistance as it was "inappropriate" to do so.³⁵

12
13 28. First, the coastal geography in the Bay of Bengal is nothing like that of the River Coco.
14 Bangladesh is urging you greatly to lower the threshold for considering coastal instability as
15 relevant to delimitation.

16
17 29. The ICJ in *Nicaragua v. Honduras* was perfectly clear. It is only when it is impossible,
18 unfeasible to identify base points that the construction of an equidistance line is abandoned.³⁶
19 The Tribunal will recall that the Court stated in *Nicaragua v Honduras* that

20
21 "it is impossible for the Court to identify base points and construct a provisional
22 equidistance line for the single maritime boundary".³⁷

23
24 30. The Court confirmed the high threshold of impossibility or unfeasibility - I think they mean the
25 same thing, in its most recent delimitation judgment, *Nicaragua v. Colombia*. Professor
26 Boyle earlier this week drew your attention to a statement by the Court's in that case that the
27 "question is not whether the construction of such a line is feasible but whether it is appropriate

³³ BR, 3.63-3.64.

³⁴ Transcript, 10 December 2013, Boyle; Transcript, 9 December 2013, Akhavan, para. 120, lines 12-13.

³⁵ Transcript, 10 December 2013, Boyle, para. 26, lines 1-2.

³⁶ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, 8 October 2007, *I.C.J., Reports 2007 (II)*, pp. 743 and 745, paras. 280 and 283.

³⁷ *Ibid*, p. 743, para. 280.

1 as a starting-point for the delimitation.”³⁸ This statement, Mr. President, has to be read in the
2 context of the whole of paragraph 195 of the Judgment as well as the preceding paragraph. In
3 paragraph 194 the Court says, in the clearest of terms, that its task “will consist of the
4 construction of an equidistance line, ..., unless ... there are compelling reasons as a result of
5 which the establishment of such a line is not feasible.” In doing so, it referred to *Nicaragua v*
6 *Honduras*. Then paragraph 195 begins by stating that “Unlike [*Nicaragua v Honduras*], this is
7 not a case where the construction of such a line is not feasible.” It was in this context that the
8 Court made the statement quoted by Professor Boyle. The Court was merely stating that in the
9 case before it, the question was not whether the construction of the line was feasible – it plainly
10 was – the question was whether it was appropriate, given what the Court termed the ‘unusual
11 circumstance that a large part of the relevant area lies to the east of the principal Colombian
12 islands’.

13
14 31. Contrary to what Professor Akhavan asserted,³⁹ it is not India’s position that this impossibility
15 arises only in situations of “needle-like” protrusions. Though hard to imagine, there could be
16 other coastal configurations where only a couple of controlling base points are available and a
17 shift in their location is, therefore, critical. Nevertheless, the coastal configuration in
18 *Nicaragua v. Honduras* played a key role, without which the morpho-dynamism of the River
19 Coco would not have rendered it impossible to select appropriate base points. This was due to
20 an accumulation of facts: one, that the coastal configuration was such that there were only two
21 possible locations for appropriate base points – one on each bank of the river’s mouth; two,
22 that these happened to be both highly unstable; and three, that they were unusually close to
23 each other. In the Court’s own words, if it would have chosen these very specific locations as
24 base points, this

25
26 “might render any equidistance line so constructed today arbitrary and unreasonable in the
27 near future.”⁴⁰
28

³⁸ Transcript, 10 December 2013, Boyle, para. 29, lines 3-5; *Territorial and Maritime Dispute (Nicaragua/Colombia)*, Judgment, para. 195.

³⁹ Transcript, 9 December 2013, Akhavan, paras. 121-122.

⁴⁰ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, 8 October 2007, *I.C.J., Reports 2007 (II)*, p. 742, para. 277.

1 and that

2
3 “any variation or error situating them would become disproportionately magnified in the
4 resulting equidistance line”.⁴¹

5
6 In other words, in that case no other controlling points were available to the Court to construct an
7 equidistance line in the River mouth. So the reading of Bangladesh that the bisector method was
8 applied simply because of “the instability of base points”⁴² is oversimplistic and contrary to the
9 actual reasoning of the Court. It was having regard to all the circumstances of the case that the
10 instability of those specific base points made the task of the Court impossible.⁴³ In addition to
11 these physical elements, in *Nicaragua v. Honduras*, the selection of appropriate base points was
12 further complicated by the remaining differences on sovereignty over the islets formed near the
13 mouth of the River.⁴⁴

14
15 32. The extraordinary effect of all of these elements combined was brought to light by Nicaragua
16 during oral arguments before the ICJ. Nicaragua demonstrated to the Court that in the course of
17 27 years, from 1979 to 2006, the equidistance line constructed using the base points at the tip
18 of the River Coco shifted from an “almost vertical” equidistance line, to one nearly parallel.⁴⁵
19 The sketch on the screen and in Tab 5.2, which we have adapted from the Court’s judgment,
20 demonstrates the point made by Nicaragua with a range of equidistance lines constructed by
21 base points at the River mouth. Extending the two equidistance lines furthest to each other up
22 to 200 nautical miles would create a maritime area approximately 27,000 nautical square miles
23 in size. Indeed, in this geographical setting, one can readily see why the selection of
24 appropriate base points was impossible and the construction of a provisional equidistance line
25 was unfeasible.

26
27 33. In our case, by contrast, even if the Tribunal were to find one or more of the base points
28 selected by the Parties inappropriate, there are other prominent base points to choose from

⁴¹ *Ibid.*

⁴² Transcript, 9 December 2013, Akhavan, para. 78, para. 118, lines 14-15.

⁴³ Rejoinder, para. 4.18.

⁴⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, 8 October 2007, *I.C.J., Reports 2007 (II)*, p. 743, para. 279.

⁴⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, CR 2007/5 (translation), p. 8 (Pellet).

1 which reflect the general direction of the coastlines. Even if the coast were eroding as
2 Bangladesh would have it, this does not affect the general direction of the coasts of the parties
3 and the possibility of placing various base points along the coast.⁴⁶ Thus the task of the
4 Tribunal to select base points in this case is far from impossible.
5

6 34. For the sake of comparison, on the screen and at Tab 5.3 you have India's and Bangladesh's
7 equidistance lines based on their selection of base points. While there are some differences
8 between the two lines, they are not so different from each other and both reflect the physical
9 geography and the general direction of the coastlines.
10

11 35. Mr. President, this is not only a legal point, it is also one of simple logic. That the resort of the
12 Court in *Nicaragua v. Honduras* to the bisector is inapplicable here is a matter of common
13 sense and practicability. As my esteemed colleagues on the other side pointed out this week,
14 and as you just saw on your screens, in that case the bisector provided a fixed solution to an
15 otherwise greatly shifting and, consequently, arbitrary equidistance line, caused by the fact that
16 all of the two base points are located in virtually the same location, like a river mouth. A fixed
17 bisector made sense in that case, as the instability along the controlling coasts was localized to
18 the river mouth, while the general direction of the coast remained the same.
19

20 36. But here, Bangladesh's instability argument is importantly distinct. It is not localized but rather
21 appertains to the entire Bengal Delta. Here and at your Tab 5.4 you see the Figure Professor
22 Akhavan showed you on Tuesday allegedly depicting the disappearance of Bangladesh's coast
23 along the Delta "in the near future" – and by near future he seems to have meant 2070 – due to
24 rising sea levels.
25

26 37. I will address the value of this and other scientific evidence presented by Bangladesh in a
27 moment, but let us assume, just for a minute, that this depiction is accurate. How, then, does
28 the angle-bisector provide an equitable solution? If India's coast will recede, erode or
29 experience accretion, surely Bangladesh will be short-changed by a fixed bisector deemed

⁴⁶ Rejoinder, para. 4.19.

1 equitable in the current reality. Or, if Bangladesh's coast will recede, it is India that will be
2 deprived of its maritime entitlements prematurely by the Tribunal by a fixed angle-bisector.
3 Surely, if the physical geography of the coastline will change as dramatically as Bangladesh
4 argues, a fixed angle-bisector will be no less arbitrary than a fixed equidistance line. This is
5 hardly surprising. After all, Professor Boyle repeatedly reminded us that the angle-bisector is
6 "an approximation of the equidistance method".⁴⁷ In any scenario of a significant change in
7 the lengthy coast of the Bengal Delta, the bisector, fixed by a predetermined angle, would lose
8 its equitable nature: it would point in an irrelevant direction, it would be "arbitrary and
9 unreasonable".

10
11 38. Perhaps for this reason, other than the *Nicaragua v. Honduras* case and its unique
12 circumstances, instability has been raised only on a few occasions, and was found to be
13 irrelevant in each case.

14
15 39. In the case of *Guyana v. Suriname*, Suriname put before the Tribunal several arguments
16 against the application of the equidistance/relevant circumstances method. One such argument
17 rings very familiar. Suriname claimed that

18
19 "slight accretion relative to basepoints on one side, with erosion on the other side or even stability,
20 could result in substantial shifts in the provisional equidistance line from year to year, particularly
21 if the relative positions of these basepoints control the equidistance line over a long distance. Thus,
22 while it is possible to take a "snap shot" of the provisional equidistance line at any moment, its
23 acknowledged shifting characteristics, based on the changing position of its basepoints, weigh
24 heavily against use of the equidistance method..."⁴⁸

25
26 As you will see, these arguments are similar to the argument put forward by Bangladesh before
27 this Tribunal. Unsurprisingly, the Tribunal in that case did not accept these arguments among
28 others and applied the equidistance method.

29
30 40. On Tuesday we also heard again Bangladesh's attempt in this context to downplay the ITLOS
31 judgment in *Bangladesh/Myanmar*, noting that "B-2 had relatively little weight in the

⁴⁷ Transcript, 10 December 2013, Boyle, para. 21, line 10; Boyle, para. 30, line 16; Boyle para. 20, p. 169, lines 19-20, p. 170, lines 2-7; Boyle, para. 26, lines 1-2.

⁴⁸ *Guyana v. Suriname*, Suriname Counter-Memorial, para. 6.35.

1 Bangladesh v Myanmar Case” and only affected the equidistance line from point T-3.⁴⁹ This
2 of course acknowledges that it was indeed selected as an appropriate base point. It was an
3 appropriate base point then as it is now.
4

5 41. Furthermore, Bangladesh claims that the instability of point B-2 was not relevant to that case,
6 but that of course does not make any sense if we are to take the instability argument seriously.
7 An unstable piece of land is no more stable if the delimitation starts at the Naaf River as
8 opposed to the Estuary. Bangladesh conveniently overlooks the fact that it raised this same
9 instability argument in that case but to no avail; the ITLOS did not find these arguments
10 relevant and proceeded to select a base point off Bangladesh’s coast on Mandarbaria Island,
11 India’s point B-2 in this case.
12

13 42. Mr. President, the case law is unequivocal. Where instability was raised as a compelling reason
14 to abandon the equidistance method and sidestep the identification of appropriate base points,
15 it failed. This was the case in *Guyana v. Suriname* by the ad hoc tribunal, as well as by the
16 ITLOS in *Bangladesh/Myanmar*, a case that specifically dealt with the Bay of Bengal and even
17 employed one of the base points put forward by India in the present case.
18

19 **b. Bangladesh's factual misrepresentation of the stability of the Bay.**
20

21 43. I will turn now briefly to the factual misrepresentation of the factual issue of stability of the
22 Bay by Bangladesh. Mr. President, Bangladesh has advocated strongly that the Bay of Bengal
23 is highly unstable. As I have just shown, even taking these arguments at face value, which we
24 certainly do not, they do not lead to the conclusion that it is unfeasible to select base points to
25 construct a provisional equidistance line. It is not, in my view, necessary for you to reach a
26 view on the degree of instability of this particular coast, any more than it was necessary for the
27 ITLOS to do so. Nevertheless, given Bangladesh’s insistence on the matter, we do feel
28 obliged to address it briefly. Professor Pellet has, in fact, already done so. He has also
29 explained the limited significance of the site visit for the question of viewing the base points. I

⁴⁹ Transcript, 9 December 2013, Akhavan, para. 95, lines 7-10; see also BR, 3.61-3.62.

1 shall limit myself, therefore, to responding to what Counsel for Bangladesh said earlier this
2 week.

3
4 44. As you will have seen from the written pleadings, India rejects Bangladesh's misrepresentation
5 of the geographical reality of the coastlines. India rejects Bangladesh's accusation that it relies
6 on no evidence to reach this conclusion.⁵⁰ India attached ample scientific material to its
7 written pleadings⁵¹ and furthermore fleshed out the picture stemming from Bangladesh's own
8 Annexes.⁵² India has addressed all of these arguments thoroughly, including presenting to the
9 Tribunal the full scope of the studies of the Indian Geological Survey.⁵³

10
11 45. It is Bangladesh that chooses to present a highly speculative future as current reality. Future
12 erosion, future rising sea levels, future human activities and future natural storms. Bangladesh
13 has a penchant for worst-case scenarios. None of these are certainties, and all are open to
14 question. That only erosion will occur – as opposed to accretion and sediment deposition – is
15 contradicted by Bangladesh's own scientific material.⁵⁴

16
17 46. Mr. President, the Parties have both addressed the issue of instability at length in the written
18 pleadings. Professor Akhavan really said nothing new on Tuesday with respect to instability,
19 though he said it very elegantly. He highlighted several points which I will address briefly.
20 India does not ignore reality; it simply does not accept that Bangladesh has depicted it
21 accurately.

22
23 47. For example, Professor Akhavan showed the Tribunal an image from a letter to a scientific
24 journal, sent by among others, US World Wildlife Fund researchers, which I showed you
25 earlier as “an image of what the future might look like”, in his words.⁵⁵ Mr. President, it is not
26 that India has set out to challenge the phenomena of global warming or sea-level rises. It is that
27 it does not accept the legal assertions of Bangladesh presented as facts. The letter is about

⁵⁰ Transcript, 9 December 2013, Akhavan, para. 109, lines 16-19, 1-2.

⁵¹ CM, IN-20 to IN-31, IN-37, IN-38 ; RJ4-RJ10.

⁵² Rejoinder, paras. 4.25-4.46.

⁵³ Rejoinder, para. 4.41.

⁵⁴ Rejoinder, 4.32, Annexes BR9 and BR 13.

⁵⁵ Transcript, 9 December 2013, Akhavan, para. 111, lines 9-10.

1 Bengal tigers. It presents a model of sea-level rise to make a point, relating to tigers, not coastal
2 erosion, let alone delimitation. It has little or no relevance to our case. As the authors of the
3 letter put it:

4
5 “While there is wide variation in predictions of sea level rise, we structured our analysis to
6 focus on the height in which a rise in sea level would greatly reduce tiger persistence beyond 50
7 years, not the year in which it is likely to happen. The benefit of this approach is that our findings
8 can be revised if sea level rises faster or slower than predicted. Like any predictions of the future,
9 ours must be interpreted with caution.”⁵⁶

10
11 The authors go on to list many variables that they did not take into account, actions taken to reduce
12 threats and add:

13
14 “There is also some evidence to suggest that the Bangladesh coast, including the
15 Sundarbans, is currently growing in land mass through sediment accretion”.⁵⁷

16
17 48. If the Tribunal were to adopt Bangladesh’s approach, how many judgments and negotiated
18 agreements using base points would be viewed as “arbitrary and unreasonable”? Would any
19 maritime boundary withstand scrutiny? Surely this cannot be right. And it is not, since as
20 Bangladesh itself has highlighted, what at the end of the day the Tribunal must determine is, as
21 the International Court said in *Black Sea*, the reality “at the time of the delimitation”.⁵⁸ If the
22 Tribunal has to consider the fluctuation of coastlines due to possible sea level rises in the
23 future, a global phenomenon, then no boundary would ever be settled. No maritime boundary
24 would be final, whatever the delimitation method may be.

25
26 49. Professor Akhavan also quoted from an article written by Professor Mead Allison from 1998
27 suggesting that the Bay of Bengal has experienced erosion over the last couple of centuries.⁵⁹
28 That may be so, but in a later article co-authored by Professor Allison, in 2001, he puts this
29 process in context:

30

⁵⁶ BR12.

⁵⁷ *Ibid.*

⁵⁸ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, para. 131;
Transcript, 9 December 2013, Akhavan, para. 75, lines 3-4.

⁵⁹ Transcript, 9 December 2013, Akhavan, para. 104 lines. 6-7, referring to Annex B61.

1 “Lower Delta plain areas can be thought of as undergoing a natural cycle of growth,
2 followed by abandonment and subsidence-induced marine flooding and shoreline erosion, and
3 finally by eventual reoccupation and sediment supply from new river distributaries.”⁶⁰
4

5 His study then finds a process of sediment accretion in the Delta area, demonstrating this cycle that
6 essentially promises that the coastal configuration will remain the same.⁶¹ He explains the
7 contradiction with his previous article by the fact that “polders which are being constructed along
8 the lower delta plain shoreline in Bangladesh” have a negative effect on land elevation that would
9 naturally occur.⁶²
10

11 50. Mr. President, I now turn to the mangroves, on which we are all becoming experts in this room.

12 As both India and Bangladesh have observed in their written pleadings,⁶³ mangrove forests
13 significantly stabilize low-lying coasts and the Sundarbans are the world’s largest mangrove
14 forest, slowing down and decreasing coastal erosion caused by both long-term and short-term
15 natural occurrences considerably.
16

17 51. Mangroves not only slow down erosion, they stabilize the coastline to the extent that areas
18 once covered in water become stable and dry enough that mangroves can be replaced with
19 crops.⁶⁴ And where mangroves have been less successful this has to do less with nature and
20 more to do with human activities.⁶⁵
21

22 52. One needs look no further than Bangladesh’s afforestation programmes which have been
23 successful in stabilizing thousands of square kilometres of land since 1966.⁶⁶ Why else would
24 the articles quoted by Bangladesh recommend afforestation? Why else would Bangladesh
25 itself admit that erosion is “dominant” in places where “cultivated land has replaced forest”?
26

⁶⁰ BM, Annex B63.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ See Rejoinder, p. 81, paras. 4.35 referring to BR, p. 16, paras. 2.18.

⁶⁴ Rejoinder, para. 435 and footnote 197 therein.

⁶⁵ Rejoinder, para. 434-438 and footnotes therein.

⁶⁶ Annex IN-24, pp. 24-26; Annex IN-28, pp. 9 and 18; Rejoinder, para. 4.35.

1 53. The Tribunal was able to see with its own eyes the vast extent of the mangrove forests directly
2 on the coast of the Bay, providing coastal stability, now on the screen and at Tab 5.5. [ON
3 SCREEN ONE OF PHOTOS 421, 423, DAY 3 PART I] Bangladesh showed you different
4 images of mangroves along the coast, claiming that they clearly show the retreat of the coast.
5 [ON SCREEN Figure from Lawrence Martin of Mangroves day 3 part I image 227] How so?
6 I'm not sure. There was a clearly defined coast-line, there were some tree stumps but there
7 were many thick trees. And there was land where the tree stumps were. These images, in all
8 honesty, are of little significance to Bangladesh's arguments.
9

10 54. Of course, Professor Boyle questioned counsel for India's expertise in Mangrove forests,⁶⁷
11 and he did so in good spirit. But is it really Counsel for India that are advancing legal claims
12 based on their limited understanding of geology, geography, ecology etc.? It is in fact
13 Bangladesh that would have the Tribunal adopt a legal position based on partial and subjective
14 readings of articles written by scientists for scientists, for scientific, not legal, purposes.
15

16 55. Professor Akhavan also referred to a study that states that the Sundarbans "are highly prone to
17 massive erosion".⁶⁸ He referred to the erosion on Bhangaduni Island to demonstrate this
18 massive erosion and showed the Tribunal a figure from Bangladesh's Reply, comparing a
19 LandSat MSS satellite image from 1975 depicting the island in pink and comparing that to a
20 Google Earth image from 2010.
21

22 56. First, let me mention that this study that Professor Akhavan chose to put on a pedestal is less
23 than 4 pages along, and that includes the figures and tables. Not surprisingly, its main
24 conclusion is that further study is needed.
25

26 57. Second, India has serious doubts that Google Earth can demonstrate erosion, definitely not
27 with precision. It is designed for quick access to imagery and not for precise technical survey
28 work, let alone legal determinations. Google Earth, visually appealing as it may be, is not a
29 reliable source of information about the location of the low-water line.

⁶⁷ Transcript, 10 December 2013, Boyle, para. 12, lines 1-2.

⁶⁸ Annex BR8 ; Transcript, 9 December 2013, Akhavan, para. 106, lines 13-19.

1
2 58. At the end of the day, Bangladesh is attempting to mask natural and unsubstantial processes
3 that occur along coastlines all over the world, along with an assortment of speculations, as a
4 “compelling reason” to discard the equidistance method altogether. To view the universal and
5 regular fluctuation of coasts as such a compelling reason is a potentially dangerous position
6 that cannot be entertained. To loosen the test for departing from the equidistance/relevant
7 circumstances method, as Bangladesh urges, could have implications for delimitation in many
8 areas of the world, creating great uncertainties and seriously complicate both the negotiation of
9 maritime delimitation agreements and judicial decisions.

10
11 **III. The Selection of Base Points**
12

13 59. Members of the Tribunal, bearing in mind the legal framework that I surveyed at the beginning
14 of the statement, I now come the selection of the base points in the present case. India
15 maintains that the base points it has proposed in its Counter-Memorial, and restated in its
16 Rejoinder, are appropriate for the construction of the equidistance line.

17
18 *a. The use of LTE's as base points*
19

20 60. On Tuesday, as in its written pleadings,⁶⁹ Bangladesh tried to claim that low-tide elevations
21 have been disregarded in delimitation cases and, moreover, that courts and tribunals have
22 refrained from determining sovereignty over such features when disputed.
23

24 61. India and Bangladesh find some agreement here. Courts have indeed refrained from
25 sovereignty determinations pertaining to low-tide elevations when it was unclear to whom they
26 belonged, as they were located in overlapping territorial sea claims. But, in the present case,
27 the Parties also agree that once the starting point of the maritime boundary has been located,
28 there will be no dispute on this issue.⁷⁰
29

⁶⁹ BR, 3.75-3.76.

⁷⁰ BR, 3.72.

1 62. And that being agreed between the Parties, the situation is similar to that in *Malaysia v.*
2 *Singapore*, a case noticeably absent in Bangladesh’s oral arguments, not the *Qatar v. Bahrain*
3 or the *Gulf of Maine* cases,⁷¹ both addressed in India’s Rejoinder.⁷² In *Malaysia v. Singapore*,
4 the Court concluded that the low-tide elevation of South Ledge “belonged to the State in the
5 territorial waters of which it is located”.⁷³ That Bangladesh claims sovereignty over New
6 Moore does not create a dispute that produces uncertainty. Once the land boundary terminus is
7 determined this dispute will cease to exist. A finding that the starting point of the maritime
8 delimitation is east of New Moore, as can be seen on the screen and inat Tab 5.6, [IMAGE ON
9 SCREEN] will confirm India’s right to place base points on New Moore, a low-tide elevation
10 within Article 13 of UNCLOS.

11
12 63. Moreover, if there is a common thread in the case law, it is that features like small islands and
13 low-tide elevations are sometimes not taken into account not because of their nature, but
14 because in those cases the particular feature does not correctly reflect the general directions of
15 the coasts.⁷⁴ This is the case when the low-tide elevation lies “at a considerable distance from
16 terra firma”⁷⁵ and is “very distant from the Coast”.⁷⁶ Yet here, the low-tide elevations upon
17 which India has located base points are all clearly within 12 miles of the mainland or an island
18 and reflect the general direction of the coast. As such, they may be properly selected as base
19 points for the purposes of delimitation.

20
21 64. And finally, it should be noted that India has been careful to afford equal treatment to the
22 coasts of both Parties. India has selected base points located on low-tide elevations on
23 Bangladesh’s coast as well. In doing so India has selected base points that are south of possible
24 base points on the mainland or islands.

⁷¹ Transcript, 10 December 2013, Boyle, paras. 17-19; Transcript, 9 December 2013, Akhavan, para. 78.

⁷² Rejoinder, paras. 4.51-4.53.

⁷³ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, p. 12, pp. 101-102, paras. 297-300; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, I.C.J. Reports 2001, para. 204.

⁷⁴ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, I.C.J. Reports 1985, p. 64; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)*, I.C.J. Reports 1984, p. 329, paras 201, 210

⁷⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)*, I.C.J. Reports 1984, p.329, para. 201.

⁷⁶ *Ibid.*, para. 210.

1
2 **b. *Charts officially recognized by the Coastal State***
3

4 65. In the language of Article 5 of the UNCLOS, base points are to be located on the “low-water
5 line along the coast as marked on large-scale charts officially recognized by the coastal State”.
6 As Professor Pellet recalled yesterday, “it is not only common but universal practice to choose
7 base points not by going on the spot but in accordance with the usual maritime charts.” Mr.
8 President, there are obvious practical reasons why this is so. Bangladesh has taken issue with
9 India’s charts, arguing that they do not reflect the actual configuration of the coast, as do its
10 own charts. Yet, as India pointed out in its Rejoinder,⁷⁷ the minor discrepancies between
11 British Admiralty Charts 90 and 859 most likely have little to do with coastal instability, but
12 are rather due to different source data or difference in conversion methods into the Global
13 WGS-84 datum. In fact, such minor differences between charts depicting the same area are
14 common.⁷⁸ Interestingly enough, Bangladesh apparently sees no difficulty in using a different
15 chart altogether, British Admiralty Chart 817, to plot base point B-5, when its results are more
16 favourable to Bangladesh, as it moves B-5’s location due west in comparison with its location
17 on Chart 90.
18

19 66. By way of an example, some discrepancies between two charts of the same area relied upon by
20 Suriname were argued to be of significance in the case of *Guyana v. Suriname*, where Guyana
21 argued that the later chart should be discarded.⁷⁹ Guyana argued that in the earlier Dutch Chart
22 the base point Suriname placed on Visser’s Bank was “almost four km out to sea, and there is
23 no evidence of a feature there that is above water at low tide”⁸⁰.
24

25 67. The Tribunal found no reason to discard the later chart – “a chart recognised as official by
26 Suriname”, as inaccurate and went on to accept the base point placed by Suriname on Visser’s
27 Bank.⁸¹
28

⁷⁷ Reply, para. 4.63.

⁷⁸ See also India’s Letter of 2 December to the Tribunal, para. 7.

⁷⁹ *Guyana v. Suriname*, Guyana Reply, para. 3.19.

⁸⁰ *Ibid.*

⁸¹ *Guyana v. Suriname*, Award of 17 September 2007, para. 3.96.

1 *c. The appropriate base points*

2
3 68. Mr. President, Members of the Tribunal, I now come to India's selection of base points.

4
5 69. Point 1(b) in the Tribunal's letter of 2 December asked about the appropriateness of the
6 "proposed base points situated on low-tide elevations ..., given [the Parties'] appreciation of
7 the visibility and stability of these features." As we recalled in our written response,
8 UNCLOS expressly provides for baselines to be drawn on low-tide elevations. By definition,
9 low-tide elevations are not visible at certain states of the tide but are visible at low tide,
10 including at astronomical low tide, and are accordingly marked on large-scale charts.

11
12 70. I start with base points I-1 and I-2, on the Indian coast. These are located on the low-water
13 line of New Moore and are shown on your screen and at Tab 5.7. [Graphic of I-1 and I-2]

14
15 71. Professor Akhavan stated on Monday that "there is no evidence other than unreliable charts
16 that it is a low-tide elevation".⁸² He asserts that the charts do not offer certainty, and rejects
17 India's image from its Counter-Memorial from January 2012 showing the sand banks of New
18 Moore Island as breakers.⁸³ He then asserted that India had every opportunity to show
19 evidence that New Moore exists but has failed to do so.⁸⁴

20 [new pictures of New Moore running on screen]

21 72. Mr. President, following these statements, India requested to introduce pictures taken on and
22 around New Moore from April 2004, when India conducted its last survey in the area in
23 preparation of Chart IN351. We thank our colleagues from Bangladesh for not objecting to the
24 admission of these photos, and we particularly thank the Tribunal for agreeing that India may
25 present them today.

26

⁸² Transcript, 9 December 2013, Akhavan, para. 81, lines 8-9.

⁸³ *Ibid.*, lines 11-14.

⁸⁴ *Ibid.*, lines 1-18.

1 73. These pictures, I hope now appearing on your screen, they clearly show New Moore as a
2 low-tide elevation. Its sandy land mass is apparent, as is its geographical location just west off
3 the main channel thorough the Estuary. In addition, photos taken at high-tide show that it is
4 indeed a low-tide elevation rather than an island. The satellite image from 2012, which is now
5 on the screen and at Tab 5.8, shows the sandy-elliptical shape of New Moore Island above
6 water. (I might add, Mr. President, since we are taken to task sometimes for referring to this
7 feature as ‘New Moore Island’ that we do so simply because that is the name by which it is
8 known in India.)
9

10 74. In its letter on Wednesday Bangladesh accepted that New Moore exists as a low-tide
11 elevation, at least at the time when it conducted its own recent surveys up to 2010.⁸⁵ Given this
12 admission, and more recent charts reproduced by Bangladesh, India and the UK depicting New
13 Moore Island, India is left a little perplexed. How much more proof does Bangladesh require?
14 Apparently, photos, satellite images, even its own survey and charts are not enough to
15 convince Bangladesh. In our submission, in all the circumstances, and particularly when a
16 feature is shown on a chart, it is for Bangladesh – not India – to prove to this Tribunal that New
17 Moore does not exist, given the ample evidence that it does.
18

19 75. Bangladesh’s assertion that New Moore is highly unstable is unsupported. India showed in its
20 Rejoinder that New Moore was charted as a low-tide elevation as early as 1879, and continues
21 to be depicted as such on Bangladesh’s most recent charts.⁸⁶
22

23 76. The Members of the Tribunal saw waves repeatedly breaking over New Moore, which was just
24 below the water line at the time. These are at Tab 5.8 and now on the screen[ON SCREEN
25 IMAGE 417]. You will recall that the visit took place at a time that was not that of the
26 low-water on the day, and took place during a period of neap tides as Professor Pellet
27 explained yesterday. So it was to be expected that the presence of the low-tide elevation was
28 only visible by the waves and discoloration of the water (through sand particles) as India had
29 explained to the Tribunal in its communications to the Tribunal. A feature that has been present

⁸⁵ Bangladesh letter of 11 December.

⁸⁶ Figure RJ 4.1.

1 and stable for more than 130 years, if not longer, can hardly be claimed to be so unstable that it
2 is inappropriate for the location of a base point.

3
4 77. Mr. President, I now turn to base point I-3. This can be seen at Tab 5.10 and on the screen.
5 Base point I-3 is also located on a low-tide elevation that Bangladesh recognizes, though
6 begrudgingly, does in fact dry at low tide.⁸⁷ This is located south of Dalhousie and
7 Bhangaduni islands. The Members of the Tribunal will recall that they did not see base point
8 I-3 during the site visit, nor could the infrared camera show the feature due to weather
9 conditions, though they did see discoloration in the water showing the location of this low-tide
10 elevation. As India explained in its emails and letter of 2 December, and as Professor Pellet has
11 clarified, had the visit taken place at the right time, and had the weather been better during the
12 visit, the feature would have been visible. It may, however, be asked whether base point B-3
13 reflects the general direction of the coast. There are two points to make about this. First, the
14 low-tide elevation is at a distance of 9.1 miles from the mainland, well within the limit
15 specified in Article 13 of UNCLOS for the location of the ordinary baseline. Serpents' Island
16 in the *Black Sea* case, by contrast, was an isolated island some 20 miles from the mainland.
17 Second, it is important in this regard to recall that, unlike in the *Black Sea* case, where
18 Serpents' Island was a unique feature, and locating a base point on it may therefore be thought
19 to have unduly favoured one side, in the present case India has proposed the selection of
20 similarly placed low-tide elevations on the Bangladesh side. [general direction of the coast
21 figure TAB 5.11] The low-tide elevation upon which India's base point B-4 is located is itself
22 10.8 miles from the coast of Bangladesh. [show on screen]

23
24 78. I next turn to India's selected base point I-4. This is at Tab 5.12. It lies on Devi Point, a
25 prominent point that Bangladesh itself proposes to use for the construction of an equidistance
26 line.⁸⁸ The Tribunal will recall seeing this base point clearly from the Hercules. [PHOTO 280
27 of Day 4 SCREEN ALSO IN SAME TAB]

28

⁸⁷ BR, para. 4.58.

⁸⁸ BR, para. 4.57.

1 79. I now turn to the base points India has selected on the Bangladesh coast. First, your Tab 5.13
2 contains a chart extract with base points B-1 and B-2 located on Mandarbaria Island.
3 Bangladesh has argued that Mandarbaria Island is no place for an appropriate base point due to
4 its instability.⁸⁹ But as I have already noted, and as the Members of the Tribunal are aware,
5 Bangladesh accepted the Island as appropriate for selecting base points in its case against
6 Myanmar, as did the ITLOS itself.⁹⁰

7
8 80. Professor Akhavan said on Tuesday about B-1 and B-2 that while both parties attempted to
9 situate the base points on Mandarbaria Island, India's base points are out at sea, whereas
10 Bangladesh's are not.⁹¹ He claimed that the differences between the plotting of the two sets of
11 base points based on charts just several years apart are due to "massive erosion and coastal
12 instability."⁹² Mr. President, this is simply not the case. The minor differences are the result of
13 a combination of factors. They are a consequence of different source data, some 30 years apart
14 (in this particular area), and the difference in survey technology, which had of course
15 developed over time. In addition, there are errors as I referred to earlier inherent in the Datum
16 transformation parameters from the local Datum to the global WGS 84 Datum.

17
18 81. Mr. President, Professor Akhavan then showed the Tribunal photographs taken during the site
19 visit. He claims that these [no tab] are India's base points B-1 and B-2, and these [no tab] are
20 Bangladesh's base points.

21 [take off screen]

22 82. Indeed, the Tribunal did get quite a good view of the Island. But I am curious to know how
23 Professor Akhavan claims with confidence that the low-water line at the time of overhead
24 flight shows Bangladesh's base points and not India's B-1 and B-2? This is mere assertion and
25 speculation, like much of Bangladesh's scientific so-called "facts". The fact is that
26 Bangladesh, or anyone else for that matter, cannot know. After all, the distance between the
27 base points suggested by the Parties on the Island is minimal.

28

⁸⁹ Transcript, 9 December 2013, Akhavan, para. 93, lines 17-18.; BR, para. 3.80.

⁹⁰ ITLOS, *Bangladesh/Myanmar*, Judgment, 14 February 2012, para. 266.

⁹¹ Transcript, 9 December 2013, Akhavan, para. 92, lines 4-6.

⁹² Transcript, 9 December 2013, Akhavan, para. 93, lines 17-18.

1 83. And Bangladesh exposes its inability to make such determination when it touches upon other
2 base points it has suggested. At one stage Professor Akhavan says of Bangladesh's I-1 that it is
3 potentially valid.⁹³ At another stage he said that it may have already been submerged in
4 another.⁹⁴ Bangladesh's point I-2 on Bhangaduni Island, which I discussed earlier, is on the
5 one hand under water, according to Bangladesh,⁹⁵ but then it may still be on the low-water
6 line, also still according to Bangladesh.⁹⁶

7
8 84. Mr. President, you will recall flying close to the features on which Bangladesh placed its points
9 I-1 and I-2, here are the images Professor Akhavan showed you on Tuesday (ON SCREEN).
10 And yet, although he is able to tell you where points B-1 and B-2 are with pinpoint precision,
11 such knowledge eludes him with respect to Bangladesh's I-1 and I-2.

12
13 85. I can only conclude that India's base points B-1 and B-2, plotted on Chart IN351 (and
14 presumably Bangladesh's base points B-1 and B-2) are all on stable land, valid and
15 appropriate. It will be recalled that ITLOS had no difficulty plotting a base point on
16 Mandarbaria Island.

17
18 86. India's base points B-3 and B-4 are on the screen and at Tab 5.14. Bangladesh continues to
19 object to both points as they are located on low-tide elevations. I have already addressed that
20 argument. I will simply reiterate that India has correctly plotted its base points on the
21 low-water line in accordance with the provisions of the UNCLOS. These base points, as others
22 selected on low-tide elevations on the coasts of both Parties, do reflect the general direction of
23 the relevant coasts as can be seen in the Tab in front of you. This was also apparent from the
24 site visit, when the coastline was seen to be stable and all of the features discussed were true to
25 the rest of the coastline. When flying over B-3, the Tribunal saw clear discoloration in the
26 water, showing that if conditions had been conducive to viewing low-tide elevations, as
27 Professor Pellet explained, this feature would have emerged. As for B-4, to place a Bangladesh
28 naval boat on its location was a neat trick, but one is left to wonder why Bangladesh had us fly

⁹³ Transcript, 9 December 2013, para. 122, line 10.

⁹⁴ Transcript, 9 December 2013, para. 88, lines 17-21.

⁹⁵ Transcript, 9 December 2013, para. 89, lines 9-10.

⁹⁶ Transcript, 9 December 2013, para. 112, lines 16-17.

1 at a relatively long distance from the feature? What is it that we were not meant to see? In any
2 case, the image of the boat on the low-tide elevation is misleading. Those on the site visit can
3 all recall that adjacent to the boat's location were other features. It was not stranded out at sea
4 as Bangladesh tried to make it seem.
5

6 87. And, finally, Tab 5.15 shows base point B-5. Both Parties have selected this base point on
7 Shahpuri point, plotted on British Admiralty Chart 817. [ON SCREEN IMAGES 515-516
8 DAY 2 PART II]
9

10 88. As the Tribunal is aware, Bangladesh has selected its own set of base points on the coasts of
11 India and Bangladesh. These differ in part from those presented by India. I do not propose to
12 take you through them one by one, though I have referred to several of them during my
13 presentation. India's base points are in our submission more appropriate. As required by
14 Article 5 of UNCLOS, they are located on "the low-water line along the coast as marked on
15 large-scale charts officially recognized by the coastal State". They further take into account
16 low-tide elevations situated wholly or partly within the territorial sea of the mainland or an
17 island of the Parties, as stipulated in Article 13. Bangladesh, in contrast, prefers to select its
18 base points without reference low-tide elevations; its selection follows Article 5, yet ignores
19 Article 13. Professor Akhavan claimed this week that "Article 13 applies to measuring the
20 breadth of the territorial sea, and not delimitation".⁹⁷ But that, Mr. President, an assertion. The
21 same can be said for Article 5 but the Convention does not distinguish between the two
22 Articles: Both Articles 5 and 13 are to be used, we submit, to determine the baselines on the
23 low-water line and, consequently, the base points.
24

25 89. In any case, the important thing is that what Bangladesh's selection of base points does show is
26 that, despite its protestations, Bangladesh has found it perfectly possible to select base points
27 and to construct a provisional equidistance line, admitting that these – as charted on recent
28 charts – reflect the physical reality at present. Nevertheless, India would maintain that its
29 selected base points are more appropriate than those selected by Bangladesh. They are true to

⁹⁷ Transcript, 9 December 2013, para. 78 line 6.

1 the physical geography and the general direction of the relevant coasts, while Bangladesh's
2 selection of base points ignores key features.

3
4 **IV. Conclusions**

5
6 90. In short, Mr. President, India considers that its selection of base points is both valid and
7 appropriate. No doubt other base points could be selected. Bangladesh has, in part, done just
8 that.

9
10 91. In summary, there is no reason for the Tribunal to depart from the normal three-stage
11 methodology in the present case. Both India and Bangladesh have come up with credible sets
12 of base points. That shows it can be done. It is not infeasible or impossible to select such base
13 points in the present case. While we accept, of course, that at the end of the day the selection
14 of base points is a matter for the Tribunal, we commend to you the nine base points proposed
15 by India.

16
17 92. I thank you very much for your attention.

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1 PRESIDENT WOLFRUM: Thank you, Sir Michael.

2 We are now having a break. Let's say until 12:00 sharp. Thank you.

3 (Brief recess.)

4 PRESIDENT WOLFRUM: According to the schedule, I have received, it's now Professor
5 Pellet's turn.

6 You have the floor now, please.

7 PROFESSOR PELLET: The bad news is I will need more than one hour for this speech, the
8 good news is that we are much ahead from schedule this afternoon, so you can stop me whenever you like,
9 whenever you deem it necessary.

10 PRESIDENT WOLFRUM: Professor Pellet, I recommend that we stop around 1:00;
11 therefore, you take the convenient time not to break in the middle of a sentence or in the middle of the
12 argument. I leave it totally to you.

13 PROFESSOR PELLET: Yes, you will not mind if I stop before.

14 PRESIDENT WOLFRUM: It's totally up to you.

15 PROFESSOR PELLET: Okay, thank you.

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PERMANENT COURT OF ARBITRATION
ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA

BAY OF BENGAL MARITIME BOUNDARY ARBITRATION BETWEEN THE
PEOPLE’S REPUBLIC OF BANGLADESH AND THE REPUBLIC OF INDIA

REPUBLIC OF INDIA

SPECIAL OR RELEVANT CIRCUMSTANCES

Professor Alain PELLET

Mr. President, Members of the Tribunal,

1. Within the usually accepted framework of the three steps methodology now recognised as the “standard method”,⁹⁸ as recalled yesterday by my most respected colleague and friend Kumar Shankardass, the first phase consists of “positing of a provisional line of equidistance”.⁹⁹ This must be done “using the most appropriate base

⁹⁸ I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 199. See also *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, *U.N.R.I.A.A.*, Vol. XXVII, p. 214, para. 242 and ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 231.

⁹⁹ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, paras. 231 and 240. See also I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Reports 2009, p. 101, para. 116 and Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 191.

1 points”¹⁰⁰ which the Tribunal has to determine first. And Sir Michael has described the base
2 points proposed by India. Him and I will show this afternoon how the line is constructed “by
3 reference to the[se] base points”¹⁰¹ respectively in the territorial sea for Michael Wood and
4 in the EEZ and the continental shelf for myself.

5
6 2. As also stated in *Bangladesh/Myanmar*, after “having drawn the provisional
7 equidistance line, the Tribunal will now consider whether there are factors in the present
8 case that may be considered relevant circumstances, calling for an adjustment of that line
9 with a view to achieving an equitable solution”.¹⁰² It is my task this afternoon to show that
10 no such circumstance exists in the present case.

11
12 3. Before describing the concrete situation, with your permission, Mr. President, I
13 would like to make some general comments on the very nature of this concept of relevant or
14 special circumstances.

15 16 **I. Relevant Circumstances – Nature and Purpose**

17
18 4. Two general remarks are in order.

19
20 5. *First*, Article 15 of the UNCLOS, relating to the *Delimitation of the territorial sea*
21 *between States with opposite or adjacent coasts*, provides that the equidistance principle
22 “does not apply [...] where it is necessary by reason of historical title or other special
23 circumstances to delimit the territorial seas of the two States in a way which is at variance
24 therewith”. For their part, Articles 74 and 83 concerning delimitation respectively of the
25 exclusive economic zone and of the continental shelf between States still with opposite or

¹⁰⁰ I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 191.

¹⁰¹ *Ibid.*, para. 200.

¹⁰² ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, paras. 275. See also I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Reports 2009, p. 112, para. 155 and I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, paras. 192 and 205.

1 adjacent coasts” do not specify the method to be followed in order to achieve an equitable
2 solution. However, a now firmly established jurisprudence has remedied this shortcoming.
3

4 6. As noted by the ICJ twenty years ago, “it is in accord with precedents to begin with
5 the median line as a provisional line and then to ask whether ‘special circumstances’ require
6 any adjustment or shifting of that line.”¹⁰³ Since then, the case-law only strengthened and
7 reinforced. The *Guyana/Suriname* Arbitral Tribunal explained this very clearly:
8

9 “In the course of the last two decades [the Award was given in 2007] international
10 courts and tribunals dealing with disputes concerning the delimitation of the continental
11 shelf and the exclusive economic zone have come to embrace a clear role for
12 equidistance.”¹⁰⁴
13

14 And, as is well-known (but, with respect, not totally accepted by our friends on the other
15 side...), both the ICJ and the ITLOS have firmly consecrated this customary clarification of
16 Articles 74 and 83 as lying the fundamental principles applicable to the delimitation of
17 maritime areas. I quote from the Tribunal in *Bangladesh/Myanmar*, itself quoting from the
18 Court:
19

20 “In the *Black Sea* case, the ICJ built on the evolution of the jurisprudence on
21 maritime delimitation. In that case, the ICJ gave a description of the three-stage
22 methodology which it applied. At the first stage, it established a provisional equidistance
23 line, using methods that are geometrically objective and also appropriate for the geography
24 of the area to be delimited. ‘So far as delimitation between adjacent coasts is concerned, an
25 equidistance line will be drawn unless there are compelling reasons to make this unfeasible
26 in the particular case’^[105]. At the second stage, the ICJ ascertained whether ‘there are factors
27 calling for the adjustment or shifting of the provisional equidistance line in order to achieve
28 an equitable result’^[106]. At the third stage, it verified that the delimitation line did not lead to
29 ‘an inequitable result by reason of any marked disproportion between the ratio of the
30 respective coast lengths and the ratio between the relevant maritime area of each State by
31 reference to the delimitation line’^[107].”¹⁰⁸

¹⁰³ I.C.J., Judgment, 14 June 1993, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Reports 1993, p. 61, para. 51.

¹⁰⁴ *Guyana/Suriname*, Award of 17 September 2007, ILM, Vol. 47, 2008, p. 211, para. 335.

¹⁰⁵ “*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, at p. 101, para. 116”.

¹⁰⁶ “*ibid.*, at p. 101, para. 120”.

¹⁰⁷ “*ibid.*, at p. 103, para. 122”.

¹⁰⁸ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, para. 233.

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7. Therefore, nowadays, it is no more possible to ignore that, once a provisional equidistance line has been drawn, “[i]n the second stage”, it must be considered -- and I quote again from *Bangladesh/Myanmar*, it must be considered

“whether there are any relevant circumstances which may call for an adjustment or shifting of the provisional equidistance/median line so as to achieve an equitable result. If [the Tribunal] concludes that such circumstances are present, it establishes a different boundary which usually entails such adjustment or shifting of the equidistance/median line as is necessary to take account of those circumstances.”¹⁰⁹

8. Although the terminology slightly differs (“special” v. “relevant” circumstances) it is widely accepted that “there is inevitably a tendency towards assimilation between the special circumstances of Article 16 of the 1958 Convention [now referred to in Article 15 of the UNCLOS] and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result”¹¹⁰. And, as the ICJ recalled in several occasions, the “equitable principles/relevant circumstances method” and the “equidistance/special circumstances method applicable in delimitation of the territorial sea” are “very similar” and “may usefully be applied [...] when a line covering several zones of coincident jurisdictions is to be determined...”¹¹¹. Both imply that the circumstances to be taken into account step in at the second stage of the three-stage method, not at the first.

¹⁰⁹ Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 192 referring to: “*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 47, para. 63; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, pp. 102-103, paras. 119-121”; see also para. 205 and I.C.J., Judgment, 10 October 2002, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Reports 2002, p. 441, para. 288, or I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Reports 2009, p. 112, para. 155 and ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, paras. 275.

¹¹⁰ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 62, para. 56.

¹¹¹ I.C.J., Judgment, 8 October 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Reports 2007, p. 741, para. 271, quoting *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 441, para. 288. See also I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Reports 2009, pp. 101-103, para. 120.

1 9. *Second* and consequently, it is obvious that Bangladesh introduces serious confusion
2 when it invokes the special or the relevant circumstances in order, not to adjust or shift the
3 provisional equidistance line, but to allege that they constitute compelling reasons not to
4 draw the line itself.

5
6 10. To tell the truth, we are, at this late stage, still confused about Bangladesh's
7 interpretation and use of the notion of special or relevant circumstances:

8 - in its Memorial it squarely invoked it in order to circumvent the application of the
9 standard method by substituting a bisector for the provisional equidistance line. I quote the
10 Memorial:

11
12 "Bangladesh will show that in the context of the unusual geographic circumstances
13 prevailing in the Bay of Bengal, the equidistance method does not produce the equitable
14 solution required by the 1982 Convention. Accordingly, the relevant circumstances call for
15 an alternative delimitation methodology. In conformity with established jurisprudence,
16 Bangladesh submits that the angle-bisector method is the most appropriate alternative."¹¹²

17
18 - noting with some embarrassment that such an argument was irreconcilable with the
19 case-law as strongly reaffirmed by the ICJ in particular in its Judgment of 19 November
20 2012 in *Nicaragua v. Colombia* (I should probably specify: "*NICOL I...*"), Bangladesh
21 seemed to retreat in its Reply:

22
23 "...in particular in light of the decisions of ITLOS and the ICJ in *Bangladesh/Myanmar* and
24 *Nicaragua v. Colombia*, respectively, Bangladesh [...] accepts that the starting point for this
25 delimitation may be an equidistance line provisionally drawn."¹¹³

26
27 Mr. President, *seuls les imbéciles ne changent pas d'avis* – only fools do not change their
28 mind; and Bangladesh was right to change its mind!

29 - unfortunately, just after this prudent retreat, Bangladesh reiterated that, in view of
30 the particular circumstances of the case, "[r]ecourse to another delimitation method
31 'designed to achieve an equitable result' is therefore both appropriate and consistent with
32 the most recent case law."¹¹⁴; then – I just read from Bangladesh's Reply describing the
33 outline of Chapter 4, devoted to the Delimitation of the EEZ and Continental Shelf:

34

¹¹² BR, p. 81, para. 6.4.

¹¹³ BR, p. 77, para. 4.27.

¹¹⁴ BR, pp. 77-78, para. 4.29.

1 “Section II shows that even an appropriately constructed provisional equidistance
2 line is rendered unreliable by the instability of the coast and inequitable by the concavity of
3 the Bangladesh coast. Section III presents the angle-bisector method as a viable alternative
4 in the circumstances of this case...”¹¹⁵

5
6 In other words, Bangladesh maintains that two circumstances (the instability of the coast
7 and the concavity of the Bangladesh coast) should lead the Tribunal to rule out the
8 equidistance method for the benefit of the reaffirmed angle bisector method; and

9 - last Monday, unable to adopt a clear and consistent position on the methodology,
10 Bangladesh gave up trying. Professor Boyle undertook an interesting shilly-shallying: : Can
11 we draw an equidistance line? Yes we can! ... well... we could; but ... we won't – let's go
12 back to angle-bisector! Chased out the door, relevant (or special) circumstances slip in again
13 by the window, and still with the intention to hamper recourse to the drawing of the
14 provisional equidistance line as the first step of the delimitation process. This is an
15 untenable position.

16
17 11. Special/relevant circumstances must not be confused with the factors making the
18 construction of an equidistance line unfeasible. The “*compelling* reasons as a result of
19 which the establishment of such a line is *not feasible*”¹¹⁶ are purely objective: the drawing
20 of the line must not be *feasible* and the reasons for this must be *compelling*. Such reasons do
21 not lead to shifting a line but to drawing it by applying another method; they are related to
22 the choice of a method – not to the second stage of the standard methodology.

23
24 12. The difference appears with particular clarity when *Nicaragua v. Colombia* is
25 contrasted with *Nicaragua (still!) v. Honduras*. In the latter, as already recalled by Sir
26 Michael, four cumulative reasons led the Court to set aside the equidistance / relevant
27 circumstances method. None of them is found in our case, and I will recapitulate them, but
28 this time in contrast with *Nicaragua v. Colombia*:

¹¹⁵ BR, p. 78, para. 4.30.

¹¹⁶ I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 191, referring to *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 745, para. 281 – italics added; see also para. 195, and *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 101, para. 116 or ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, paras. 233.

1 1°- *First*, in the *Honduras* case, “[n]either Party has as its main argument a call for a
2 provisional equidistance line as the most suitable method of delimitation”¹¹⁷ whereas in the
3 *Colombia* case, Colombia – as India does in this case – argued that “the Court should adopt
4 the same methodology it has used for many years in cases regarding maritime delimitation,
5 starting with the construction of a provisional equidistance/median line”¹¹⁸

6 2°- *Second* – and probably the decisive reason – the terminus point of the land
7 boundary between Nicaragua and Honduras “is a sharply convex territorial projection
8 abutting a concave coastline on either side to the north and south-west”¹¹⁹. The equidistance
9 line would have been constructed entirely on the basis of only two very proximate base
10 points.¹²⁰ This situation is in sharp contrast with that of the *Colombia* case – as well as ours
11 – which both involve a long mainland coastline and a set of islands.

12 3°- *Third*, in the *Honduras* case, continued accretion is occurring at Cape Gracias a
13 Dios, where the end-point of the land boundary was located which directly affected the
14 viability of the only two potential base points.¹²¹ In the *Colombia* case – and in ours – no
15 such active morpho-dynamism precluded the Court from fixing appropriate base points.¹²²

16 4°- *Lastly*, in the *Honduras* case, the identification of reliable base points was further
17 complicated by the remaining differences “between the Parties as to the interpretation and
18 application of the King of Spain’s 1906 Arbitral Award in respect of sovereignty over the
19 islets formed near the mouth of the River Coco and the establishment of ‘[t]he extreme
20 common boundary point on the coast of the Atlantic’¹²³.”¹²⁴ Again, no similar difficulty
21 arose in the *Colombia* case. Consequently, as already noted by Sir Michael – and it is a
22 crucial point – the Court considered:

¹¹⁷ I.C.J., Judgment, 8 October 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Reports 2007 (II), p. 745, para. 275.

¹¹⁸ I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 187.

¹¹⁹ I.C.J., Judgment, 8 October 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Reports 2007 (II), p. 742, para. 277.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, p. 742, para. 277.

¹²² I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, paras. 200-204.

¹²³ *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, I.C.J. Reports 1960, p. 202

¹²⁴ I.C.J., Judgment, 8 October 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Reports 2007 (II), p. 743, para. 279.

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“Unlike the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, this is not a case in which the construction of such a line is not feasible.”¹²⁵

Accordingly, although it recognized the existence of an “unusual circumstance”¹²⁶, the Court proceeded in that case, in accordance with its standard method, in three stages, beginning with the construction of a provisional median line.

13. Now, Mr. President, last Tuesday, I have listened with the greatest attention to my learned friend Professor Boyle when he used some isolated expressions in the case-law with a view to prove that the “Court’s test” was “*inappropriateness* – not ‘impossibility’.”¹²⁷. It was a bright academic dissertation, Mr. President; but, in all frankness, quite unconvincing. I will not quibble on the details of the selected – and selective quotes nor even on the chronology (although it might have its importance). Let me just stress a more general point -- and this point is that, would this Tribunal follow such a subjective and unpredictable approach, it would put in question the difficult and long, but most fortunate, decisive trend towards more objectivity and more predictability of the law of maritime delimitation resulting from the case-law. While “impossibility” can be assessed with a reasonable degree of objectivity (even though it must, of course, be assessed by the Judges or the Arbitrators); “appropriateness” opens the door to full subjectivity. I am sure that it is tempting for judges or arbitrators to give in the sirens’ – admitting Professor Boyle can be compared with sirens – to give in the sirens’ call for “margin of appreciation” or “appropriateness”; but I am sure you will resist the temptation of a *gouvernement des juges*, (a “government of judges”) also advocated – and more abruptly (everyone has his own style...) by Professor Crawford when he suggested “India will no doubt protest, to say that a decision would be “unprecedented” or unsupported by law. This is very much a case of first impression, by definition unprecedented, and your making the law is as inevitable as your speaking prose – it not

¹²⁵ I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 195.
¹²⁶ *Ibid.*
¹²⁷ Transcript, 10 December 2013, Mr. Boyle, p. 173, para. 28, lines 14-15.

1 | being suggested you should fashion your award in blank verse hexameters.”¹²⁸ My
2 | opponent was right at least on one point, Mr. President: India does protest!

3 |

4 | 14. Anyway, in the present case, it is clear that no compelling reason – no reason at all...
5 | – makes the drawing of an equidistance line neither unfeasible nor “inappropriate” –
6 | admitting that these would be alternative criteria – *quod non*:

7 | - *first*, as just shown by Sir Michael, both Parties agree that base points can be
8 | determined – even though they partly disagree on their location;

9 | - *second*, the drawing of the provisional equidistance line by using these base points
10 | does not raise any particular problem; and

11 | - *third*, this, of course, does not exclude the possibility to adjust or shift this line
12 | during the second stage of the delimitation, were there exist relevant circumstances
13 | requiring such an adjustment or shift.

14 |

15 | 15. Although it does not overtly challenge these observations, Bangladesh definitely
16 | clings to its “angle-bisector methodology”:

17 | - it devotes a great deal of energy to plotting its own base points¹²⁹ – a superfluous
18 | exercise for drawing an angle-bisector;

19 | - then it pretends to construct a provisional equidistance line¹³⁰.

20 | But Bangladesh immediately auto-criticizes its own findings, whether in respect to the
21 | territorial sea or the EEZ and the continental shelf. And this one step forward, two steps
22 | backwards tactic, has been even more striking during the hearings at the beginning of this
23 | week. I quote from Professor Boyle’s at the opening of its statement:

24 |

25 | “Bangladesh reluctantly accepts that one way to approach this delimitation is to try
26 | to draw a provisional equidistance line. But, as you will no doubt have begun to understand,
27 | the instability and the concavity of the coastline will make it a difficult task to construct
28 | such an equidistance line that reflects the reality of the coastal area.”¹³¹ In this speech I
29 | will develop Bangladesh’s argument for adopting a more appropriate solution. The
30 | concavity of the coast inevitably makes any equidistance boundary inequitable to

¹²⁸ Transcript, 10 December 2013, Mr. Crawford, p. 219, para. 55; see also: pp. 221-222, para. 61.

¹²⁹ BR, pp. 78-85, paras. 4.31-4.57.

¹³⁰ BR, p. 85, para. 4.58 and Figure R4.12.

¹³¹ BR para 1.21.

1 Bangladesh, so even an equidistance line would have to be adjusted in order to ensure an
2 equitable solution, as it was adjusted in the *Bangladesh/Myanmar case*¹³².”¹³³

3

4 And this they apply to the territorial sea as well as to the continental shelf or the EEZ.

5

6 16. Territorial sea – and Professor Boyle again:

7

8 “In conclusion, Mr. President, members of the Tribunal, given the extreme coastal
9 instability of the Bengal Delta, equidistance is clearly not the appropriate solution for
10 delimitation of the territorial sea. India’s proposed base points are all submerged. None
11 of them is appropriate. Bangladesh’s base points are less inappropriate. But in view of
12 extreme coastal instability – characterized by Indian Government scientists as “massive
13 erosion” and “an abnormal rise in sea levels” – even the base points proposed by
14 Bangladesh will soon be submerged, rendering any equidistance line arbitrary and
15 unreasonable. Such active geomorphologic dynamism is a “special circumstance” under
16 Article 15 of the Convention”¹³⁴

17

18 17. Now, continental shelf and EEZ – and I quote from the Reply; but the pleadings at
19 the beginning of the week were in line with this:

20

21 “Since equidistance is rendered unreliable by the instability of the Bengal Delta coast and it
22 does not lead to an equitable solution in this case, the jurisprudence suggests that ‘other
23 methods should be employed.’ [...]”

24

25 As Bangladesh discussed in its Memorial, and India nowhere disputes, the alternative
26 methodology most commonly relied upon is the angle-bisector method which has been
27 utilized in more than one-fifth of the international maritime boundary cases decided to date
28 (4 of 19).”¹³⁵

29

30 18. Whatever Bangladesh’s wishful thinking allegations, India *has* disputed in great
31 details the soundness of resorting to the bisector both generally speaking and in relation to
32 the present case both in its Counter-Memorial and in its Rejoinder¹³⁶ – including the

¹³² *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012.*

¹³³ Transcript, 10 December 2013, Mr. Boyle, p. 161, para. 2.

¹³⁴ Transcript, 9 December 2013, Mr. Akhavan, pp. 118-119, para. 129; see also: BR, p. 65, para. 3.87.

¹³⁵ BR, p. 106, paras. 4.109-4.110 – footnotes omitted; see also: transcript, 10 December 2013, Mr. Boyle, p. 171, para. 24.

¹³⁶ ICM, pp. 84-92, paras. 5.9-5.26 and pp. 97-98, paras. 5.41-5.45; IR, pp. 149-160, paras. 6.8-6.21.

1 | relevance and scope of the very limited case-law invoked by Bangladesh.¹³⁷ I won't repeat
2 | it here anymore and I will confine myself to only two remarks:

3 | - *First*, the Bangladesh's argument totally ignores the time factor; in addition to
4 | being very limited (4 of 20 of the allegedly decided cases to date), the case law referred to
5 | by Bangladesh is noticeably outdated. As the ITLOS noted, "[t]he angle-bisector method
6 | was applied in cases preceding the *Libyan Arab Jamahiriya/Malta* judgment",¹³⁸ a
7 | judgment which was rendered almost thirty years ago. Since that judgment, the
8 | angle-bisector was only applied once (of the 13 cases decided subsequently): nobody in this
9 | room can ignore that it was in *Nicaragua v. Honduras* and for the very, very particular
10 | reasons I explained a few minutes ago. You will find a date list of maritime delimitations
11 | cases at TAB 6.1 of your folders; I recommend you have a look at it, distinguished Members
12 | of the Tribunal: it is very telling.

13 | - *Second*, it follows that, in accordance with the modern case law on maritime
14 | delimitation, absent any compelling reason, a provisional equidistance line must be drawn
15 | first, while special/relevant circumstances – if any – only come during the second phase of
16 | the three-stage methodology.

18 | **II. No Special / Relevant Circumstances in the Present Case**

19 |
20 | 19. With this in mind, I will confine myself to briefly recall that no factor calling for an
21 | adjustment of the provisional equidistance line can be invoked in the present case.

22 |
23 | 20. Just as a reminder, if I may, Mr. President, and I cite from *Nicaragua v. Colombia*:

24 |
25 | "Those factors are usually referred to in the jurisprudence of the Court as 'relevant
26 | circumstances' and, as the Court has explained, '[t]heir function is to verify that the
27 | provisional median line, drawn by the geometrical method from the determined base points

¹³⁷ IM, pp. 84-92, paras. 5.9-5.26.

¹³⁸ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, para. 234.

1 on the coasts of the Parties is not, in light of the particular circumstances of the case,
2 perceived as inequitable”¹³⁹

3
4 21. In the passages of its Reply I have just quoted, Bangladesh invokes two of these
5 factors – the instability of the relevant coast and the concavity of its own coast – not, I note
6 again, to adjust or shift the provisional equidistance line but to replace it by its so-called
7 “angle-bisector line”. For the reasons I have just explained, I will not follow my friends
8 representing Bangladesh on this ground. However, these two factors could also be
9 considered as special or relevant circumstances coming into play in order to adjust the
10 direction of the provisional line – and, not fearing inconsistency, Bangladesh also considers
11 them as such.¹⁴⁰

12
13 22. To that end, Bangladesh refers to two ‘trump arguments’, which it uses at one and
14 the same time as supposedly relevant circumstances *and* in order to prove – to try to prove –
15 that recourse cannot be had to the equidistance/relevant circumstances method: those two
16 factors are instability of the coasts and concavity (allegedly solely of Bangladesh’s coast).
17 However, if I have well understood their new tactic at the beginning of the week, it seems –
18 it seems -- that they now more or less allege that because the coast is instable, the drawing of
19 a provisional equidistance line is inappropriate; and because Bangladesh’s coast is concave
20 such a line should be adjusted – as well as their angle bisector it is true. But I might
21 excessively rationalize – even though Professor Crawford prides himself of being an
22 accomplished Cartesian:¹⁴¹ logic is not the first quality of our opponents...

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¹³⁹ I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 205, quoting from “*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 112, para. 155”.

¹⁴⁰ See BM, pp. 91-92, para. 6.30 and BR, p. 77, para. 4.28; transcript, 9 December 2013, Mr. Reichler, p. 112, para. 116.

¹⁴¹ Transcript, 10 December 2013, Mr. Crawford, p. 191, para. 3.

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1. Instability

23. I can be very brief on the first of these all purposes arguments: the claimed instability:

- Sir Michael has already dealt with the argument at length this morning, and I myself touched upon it in my “geographical” pleading;
- dramatic and generalized instability is far from proven; and
- most importantly (which does not mean that I hold Sir Michael’s pleadings as unimportant...), but even more importantly, the issue clearly is not whether or not the whole coast is stable, but only whether or not appropriate base points can be determined today: they can; both States have done so; and in the *Bangladesh/Myanmar* case, the ITLOS ignored Bangladesh’s concerns with respect to the “morpho-dynamism” of the portion of the coast on which one of Myanmar’s proposed base points was located and used that base point for constructing the provisional equidistance line.¹⁴²

2. Concavity

24. So much for the supposed instability of the coast which is neither a reason to abandon the equidistance/relevant circumstances method, nor a circumstance leading to shifting or adjusting the provisional equidistance line. The same holds true for the argument based on the concavity of Bangladesh’s coast – with however a difference: while the instability of the relevant coasts is certainly not as generalized as Bangladesh asserts, there is no doubt that the coast of Bangladesh is concave. But this does not mean that this circumstance is special or relevant within the meaning of the expression in the framework of the law applicable to maritime delimitation. As Bangladesh enjoys repeating, quoting the ITLOS: “concavity *per se* is not necessarily a relevant circumstance.”¹⁴³

¹⁴² See ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, e.g. paras. 244, 261-262 and 266.

¹⁴³ *Ibid.*, para. 292. See also BR, p. 54, para. 3.68, p. 86, para. 4.60, p. 91, para. 4.70; or transcript, 9 December 2013, Mr. Martin, p. 42, para. 43 and Mr. Reichler, pp. 123-124, para. 140 and p. 129, para. 149.

1 25. And, Mr. President, I wish to be very clear on another aspect of this self-evident
2 principle: it is undeniable that the ITLOS has accepted that the Bangladesh coast is
3 concave¹⁴⁴ – and, as I have said yesterday, it is indeed concave. But this is, if I may put it
4 that way, a purely “geographical” observation. To become a relevant circumstance it must
5 have as a consequence, in the relation between the two States concerned, to produce an
6 equitable result. But the 2012 ITLOS Judgment is *res inter alios acta* for India, which, by no
7 means can be considered as being accountable for “compensating” Bangladesh neither for
8 its intrinsic natural disadvantages, nor obtaining what it could not obtain from the Hamburg
9 Tribunal – I’ll come back to that in a few moments. And the objective geographic
10 relationship between the Parties is thoroughly different from that on which the ITLOS based
11 itself which it considered that the concave character of the Bangladesh coast was a relevant
12 circumstance justifying an adjustment of the provisional equidistance line.

13
14 **Projection n° 1: “Three Simple Schematics” – “Neutral Coast” (Bangladesh’ Folders,**
15 **Fig. 1-10 (1)**

16
17 26. Our case, Mr. President, is different both from the *North Sea* cases, and in several
18 respects, which I have already mentioned yesterday, from *Bangladesh/Myanmar*. However,
19 before coming to the concrete aspects of the present case, let me comment on the general
20 point made by Mr. Martin on Monday morning¹⁴⁵ – when he put on the screen a series of
21 what he called “three simple schematics”. All three imply that three States are concerned –
22 Myanmar is not concerned in the present case, where only two states are in front of you; but,
23 still, let’s go through the schemes. You can see the first one that they defined as a “Neutral
24 Coast” – flat; no angle; no concavity; evidently not our case.

25
26 **End of Projection 1 - Projection n° 2: “Three Simple Schematics” – “Concavity”**
27 **(Bangladesh’ Folders, Fig. 1-10 (2))**

28
29 This second scheme does not correspond to our situation: States A and B could, roughly
30 speaking, correspond to Myanmar and Bangladesh (but with a concavity more clearly

¹⁴⁴ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 291.

¹⁴⁵ See transcript, 9 December 2013, Mr. Martin, p. 42, para. 44.

1 marked to Bangladesh's disadvantage that for State B on this scheme); but it is simply not
2 possible to assimilate India to State C.

3

4 **End of Projection 2 - Projection n° 3: "Three Simple Schematics" – "Severe**
5 **Concavity" (Bangladesh' Folders, Fig. 1-10 (3))**

6

7 Clearly, Bangladesh sees itself as being poor State B, victim of nature's injustice, like
8 Germany was in 1969. Mr. President, I will not take a moral or political stance on this – but
9 the fact is that, here again, by no stretch of the imagination, can India be considered as State
10 C; even, having in mind the extremely simplified character of this graph, the direction of its
11 coast, of the coast of State C, has nothing to do – of India, the coast of India – has nothing to
12 with what appears on this graph.

13

14 **Fin de la projection 3 – Projection n°4 The Head of the Bay Shared (animation)**

15

16 Mr. President, if a scheme is needed, it is none of the three which Counsel for Bangladesh
17 showed on Monday morning, but a fourth one now on the screen: in a very schematic way, it
18 approximately reflects the current situation: both, State B and State C share the head of the
19 Bay. They can both have an equal access to their entitlements to maritime areas, which can
20 be equally shared if the length of their (relevant) coasts are equivalent. Now, of course, if a
21 third State is concerned **add A in the middle of the left coast of B and a dotted line**
22 **starting at the border point between A and B and fading somewhere before the middle**
23 **of the sea**, it can limit the effective area of sovereignty or sovereign rights of State B, but
24 even if it cannot be excluded that C can be affected in some way, it will certainly not be
25 affected as directly and in the same proportion as State B.

26

27 **End projection 4 – Projection 5: State C's come back: "Schematic of the Bay of Bengal**
28 **Region" (Bangladesh's Folder, Fig. 1-15)**

29

30 Now, purporting to reflect what he called a "schematic view of the region" Mr. Martin also
31 projected this fourth image. Of course, it has no connexion with the reality of the region, for
32 the very reasons I have just explained.

33

34

35

1 **End of projection 5 – Projection n° 6: A More Realistic Schematic of the Bay of Bengal**
2 **Region On projection 4 add a small circle (as in projection 5 above)**

3

4 The circle just added on my first scheme is supposed to represent the Andaman Islands. It
5 seems rather obvious that greedy State B (representing Bangladesh) can be, the newcomer
6 can interfere in the sharing of the neighbouring maritime areas between C (India) and A
7 (Myanmar) but that there is no chance for B to re-enter in the game.

8

9 **End of Projection 6 – Projection n° 7: Concavities**

10

11 27. And for a first and decisive reason: there is also not the slightest doubt that India's
12 coast too is concave. *Volens nolens*, Bangladesh has to acknowledge this, this factor. In
13 effect, it accepts the proposition that – and I quote from the Bangladesh Reply quoting from
14 the Indian Counter-Memorial:

15 - “*both* Parties (and not Bangladesh alone) are situated at the top of the Bay of
16 Bengal and have concave coasts”,¹⁴⁶ and

17 - “the coasts of *both* Parties (and not Bangladesh alone) have a ‘concavity within a
18 concavity’”.¹⁴⁷

19 Bangladesh also accepts that these propositions “may be accurate as a matter of descriptive
20 geography”, but, it writes, “they are entirely beside the point in the circumstances of this
21 case.”¹⁴⁸

22

23 28. This is a strange assertion, Mr. President. It seems to be based on the idea that a
24 concavity is a relevant circumstance only “when a State is pinched in the middle of a
25 concavity between two others.”¹⁴⁹ This can happen, but this is by no means *a*, or *a fortiori*,
26 *the* condition explaining why, in certain cases, concavity may be considered as a relevant
27 circumstance nor why it is not relevant in other cases. Thus, in *Cameroon v. Nigeria*, the
28 relevant coasts of Cameroon were pinched between Nigeria and Equatorial Guinea; the ICJ

¹⁴⁶ BR, quoting from ICM, p. 163, para. 6.60; see also: transcript, 9 December 2013, Mr. Martin, p. 33, para. 10.

¹⁴⁷ *Ibid.* quoting from the same passage in the ICM.

¹⁴⁸ *Ibid.*

¹⁴⁹ See transcript, 9 December 2013, Mr. Martin, p. 42, para. 43, pp. 43-44, para. 49 and pp. 44-45, para. 53 and of Mr. Reichler, pp. 122-123, para. 138. See also BR, pp. 91-92, para. 4.70.

1 has nonetheless drawn an equidistance line and refused to adjust it in consideration of this
2 patent concavity (and in spite of this quite apparent inequitable result).¹⁵⁰
3

4 29. Similarly, in *Barbados/Trinidad and Tobago*, Trinidad and Tobago was pinched
5 between Barbados and Venezuela and the land territories of these three states formed a
6 marked concavity. But Mr. Reichler has told you that this case is irrelevant because, he said,
7 “Trinidad and Tobago did not claim to be prejudiced by a coastal concavity [and that] [t]he
8 arbitral award d[id] not address the subject.”¹⁵¹ Well, this is true, Trinidad & Tobago did
9 not complain about concavity. It complained about a cut-off, and that makes – this is what
10 makes this case particularly relevant. Referring to the *North Sea* cases, Trinidad and Tobago
11 explained that the fact that “its coasts project eastward into the Atlantic leads [it] to
12 conclude that this constitutes a relevant circumstance strong enough to alter the direction of
13 the provisional equidistance line as from Point A, because an equidistance line would result
14 in the cut-off effects that the delimitation should avoid as far as possible.”¹⁵² However, this
15 is not the reason which led the Tribunal to slightly adjust the equidistance line; to do that, it
16 only based itself on “the disparity of the Parties’ coastal lengths resulting in the coastal
17 frontages abutting upon the area of overlapping claims”.¹⁵³
18

19 30. And there was no such “pinched” concavity in *Nicaragua v. Honduras* – which was
20 a purely bilateral case of extreme convexity.
21

22 31. The real explanation for dealing with concavity as a special circumstance lies in the
23 necessity [not] to treat grossly unequally States, which I quote from *North Sea Continental*
24 *Shelf*:

25
26 “have been given broadly equal treatment by nature except that the configuration of
27 one of the coastlines would, if the equidistance method is used, deny to one of these States
28 treatment equal or comparable to that given the other two. [...] What is unacceptable in this

¹⁵⁰ I.C.J., Judgment, 10 October 2002, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Reports 2002, pp. 445-446, para. 297 and p. 448, para. 306..

¹⁵¹ Transcript, 9 December 2013, Mr. Reichler, p. 136, para. 164.

¹⁵² *Ibid.*, p. 234, para. 322.

¹⁵³ *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, U.N.R.I.A.A., Vol. XXVII, p. 239, paras. 350 and 352.

1 instance is that a State should enjoy continental shelf rights *considerably* different from
2 those of its neighbours merely because *in the one case the coastline is roughly convex* –
3 convex, not concave – “*in form* and in the other it is markedly concave, although those
4 coastlines are comparable in length. It is therefore not a question of totally refashioning
5 geography whatever the facts of the situation but, given a geographical situation of
6 quasi-equality as between a number of States, of abating the effects of an incidental special
7 feature from which an unjustifiable difference of treatment could result.”¹⁵⁴

8
9 **End of Projection 7 – Projection n° 8: The “Danish Peninsula”**

10
11 32. In the present case, it must be noted that:

12 - contrary to what is the case in the North Sea, where both neighbours of Germany,
13 Denmark and the Netherlands, have convex coasts, in our case both Parties share a common
14 concave coast – as a reminder, I invite you, Members of the Tribunal, to have a new look at
15 one sketch map I put on the screen yesterday afternoon;

16 - India’s coastline as a whole is considerably longer than Bangladesh’s, but
17 considering the *relevant* coasts only, they are approximately equal – and when I say
18 “approximately”, Mr. President, it is, in fact equal by 1:1.015 or so¹⁵⁵ – a very small
19 difference in favour of Bangladesh; and the equidistance line proposed by India leads to a
20 final ratio of 1:0.90 in favour of India; this is certainly not a “disproportionate result”¹⁵⁶
21 calling for an adjustment of the provisional equidistance line proposed by India – let alone
22 for a renunciation to the standard method of delimitation. And let me note in passing that if
23 the whole length of the Indian coasts were taken into consideration, Bangladesh’s case
24 would be spectacularly affected when the non-disproportionality test is applied.

25
26
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28

¹⁵⁴ I.C.J., Judgment, 20 February 1969, *North Sea Continental Shelf, Reports 1969*, pp. 49-50, para. 91 –
italics added.

¹⁵⁵ IR, p. 189, para. 7.37.

¹⁵⁶ I.C.J., Judgment, 3 June 1985, *Continental Shelf (Libyan Arab Jamahiriya/Malta), Reports 1985*, p. 44,
para. 56.

1 PROFESSOR PELLET: I'm in the middle of some section, but maybe it's
2 nevertheless a good point to stop.

3 PRESIDENT WOLFRUM: Thank you very much, Professor Pellet, for your
4 presentation. As you suggest, we will break now, and we will reconvene at 2:00 sharp.
5 Thank you.

6 (Whereupon, at 1:00 p.m., the hearing was adjourned until 2:00 p.m., the same
7 day.)

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AFTERNOON SESSION

PRESIDENT WOLFRUM: Professor Pellet, you're going to finish your presentation, and then I have the following list, if you kindly confirm. After you, Sir Michael Wood, then you again, and--

PROFESSOR PELLETT: Unfortunately for you.

PRESIDENT WOLFRUM: I totally disagree, if I may. It's always a pleasure to listen to you.

And then Professor Reisman.

You have the floor, Professor Pellet.

PROFESSOR PELLETT: Thank you very much.

1 **End of Projection 8 - Projection n° 9 “Bangladesh is Cut off by India’s Claim Line”**
2 **(Bangladesh Folders, Fig. 1.1) (Animation)**

3
4 33. Mr. President, distinguished members of the Tribunal, the sketch map you now see on
5 the screen is the one that Mr. Reichler presented with a lyrical indignation – you probably
6 remember Gentlemen: “*This* is the point. *This* is the central element of the case. *This* is the
7 reason why we are here.”¹⁵⁷ Mr. President, I ask the question: what is wrong with this
8 sketch-map? what is wrong with this line?

9 - **flash the external triangle** Bangladesh gets an access to a part of the “extended
10 continental shelf” – a relatively limited part, but a part, while it, initially, thought – erroneously
11 – that it would be denied by India any access to the outer continental shelf;

12 - even though concave, the length of its coast – its whole coast – is small: only 417
13 kilometres **a green line following the general design of the Bangladesh’s coast** and the law
14 of maritime delimitation is based on two fundamental principles: first, “the land dominates the
15 sea”¹⁵⁸ and second, as I just quoted from the ICJ, there can be no question of “totally
16 refashioning geography”¹⁵⁹;

17 - the only exceptions are, if a relevant circumstance results in an anomalous cut-off –
18 this relates to the second stage of the standard methodology – or if, at the third stage, there is a
19 gross disproportion in the *ratio* between the relevant coasts **add (orange or purple) the**
20 **relevant coasts of India)** of both States and the area of continental shelf which it gets **join**
21 **Devi Point to the tripoint with a dotted line; no need of complex calculations to notice that**
22 **the equidistance line (in black)** does not create any kind of outrageous disproportion.

23
24 34. Let me pause however one minute on the alleged cut-off effect of the equidistance line
25 which is invoked with such a robust apparent conviction by our opponents.¹⁶⁰ Does, Mr.
26 President, a look at this sketch map justifies such indignation? Indeed not: Bangladesh is “cut

¹⁵⁷ Transcript, 9 December 2013, Mr. Reichler, p. 122, para. 136.

¹⁵⁸ I.C.J., Judgment, 20 February 1969, *North Sea Continental Shelf, Reports 1969*, p. 51, para. 96. See also ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Reports 2012*, para. 185, I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Reports 2009*, p. 89, para. 77 and Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 140. See also e.g. BM, p. 148, para. 7.72 and IR, p. 56, para. 3.7.

¹⁵⁹ I.C.J., Judgment, 20 February 1969, *North Sea Continental Shelf, Reports 1969*, p. 49, para. 91. See also I.C.J., Judgment, 10 October 2002, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Reports 2002*, p. 445, para. 295 and Judgment, 8 October 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Reports 2007*, p. 747, para. 289.

¹⁶⁰ See e.g. transcript, 9 December 2013, Mr. Martin, p. 43, para. 49 and Mr. Reichler, p. 48, para. 65, p. 124, para. 141.

1 off"? yes in that it does not get all the maritime areas it is potentially entitled to – but nor does
2 India. **take out the line along the Bangladesh’s coast and add two circles indicating the**
3 **concavities of both States** Why is that? because Bangladesh’s coast is concave? yes indeed –
4 but in the relevant area India’s coast is concave too.

5
6 35. Now, maybe Mr. President, you still have the impression of a small disadvantage for
7 Bangladesh – one should always be suspicious of impressions – and particularly so when you
8 are confronted with a map drawn by able cartographers, knowing what is the best interest of
9 their client. Now, let us lightly curve the orientation of the map on the right (say in a slightly
10 north-north-west direction to look learned!) so that the line has a general north-south direction.
11 Do you really see a dramatic cut-off here? Oh yes, there is the light inflexion at 150 nautical
12 miles; but can it be defined as “significantly curtailing the entitlement of [Bangladesh] to the
13 continental shelf and the exclusive economic zone”¹⁶¹ Indeed not – and particularly when one
14 keeps in mind one of the characters which any maritime boundary must have: “If it is to ‘be
15 faithful to the actual geographical situation’,^[162] the method of delimitation should seek a
16 solution by reference first to the States’ ‘relevant coasts’ “^[163].”¹⁶⁴ Is this really the map
17 through which the scandal comes? Is *this* the central element of the case? “Much ado about
18 nothing”, Mr. President. The provisional line drawn by India in full conformity with the
19 established rules of the law applicable to maritime delimitation with a view to achieving an
20 equitable solution is source of no scandal and reveals no relevant circumstance. You see it,
21 Members of the Tribunal; and you know that there is nothing obscene or inequitable in our line
22 – I’ll come back to this in my next speech with, I hope, your kind permission, Mr. President.

23
24 36. In the present case, as India has shown in its Counter-Memorial and in its Rejoinder,¹⁶⁵
25 what could be called the two concavities” (as well as the two “concavities within the
26 concavity”) “neutralize” each other if I may put it that way. Indeed Bangladesh is “cut-off”
27 compared with its maximum possible claim. Every maritime boundary delimitation between

¹⁶¹ I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Reports 2009, p. 127, para. 201.

¹⁶² “*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 45, para. 57”

¹⁶³ “see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, I.C.J. Reports 2001, p. 94 para. 178; see also the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, I.C.J. Report 2002, p. 442, para. 90).

¹⁶⁴ I.C.J., Judgment, 8 October 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Reports 2007, p. 747, para. 289.

¹⁶⁵ See BM, pp. 174-179, paras. 6.72-6.85 and ICM, and IR, pp. 119-128, paras. 5.14-5.25.

1 states “cuts off” one or the other or both; the question therefore is not “cut off” or “not cut off”,
2 but whether a cut off is inequitable which is not the case here.

3
4 37. Bangladesh had to face the fact. On Monday, quoting from the Rejoinder, Mr. Reichler
5 has told you: “India says: ‘The cut-off of India’s east-facing coast is similar, if not worse than
6 on Bangladesh’s west-facing coast.... In the present case, the cut-off produced by the
7 equidistance line is shared in a mutually balanced way.’ *Indeed, it is*, as shown here and at
8 Table 2.16.”¹⁶⁶ But Bangladesh insists and asks “what if, instead of looking east and west, we
9 look north and south? What about the cut-off on Bangladesh’s *south*-facing coast?”¹⁶⁷ Well,
10 the ITLOS has already answered these questions in its 2012 Judgment:

11
12 “The Tribunal is satisfied that such an adjustment, commencing at the starting point X
13 identified in paragraph 331, *remedies the cut-off effect on the southward projection of the coast*
14 *of Bangladesh* with respect to both the exclusive economic zone and the continental shelf”¹⁶⁸

15
16 38. When an equidistance line is drawn, it is apparent that Bangladesh does not enjoy
17 “continental shelf rights considerably different from those of [India].”¹⁶⁹ As Professor
18 Reisman will recall this afternoon, both Parties “enjoy reasonable entitlements in the areas into
19 which [their] coasts project”¹⁷⁰ since the equidistance line proposed by India produces an
20 almost equal division of the relevant area¹⁷¹. Moreover, contrary to what Bangladesh argued
21 first,¹⁷² the equidistance line claimed by India by no means deprives Bangladesh from its
22 alleged so-called right to an access to an area of the outer continental shelf beyond 200 nautical
23 miles: such an access is certainly not an absolute right, nor is it, of course, “a relevant
24 circumstance that, by itself, warrants a departure from equidistance” as Bangladesh claimed in

¹⁶⁶ Transcript, 9 december 2013, Mr. Reichler, p. 128, para. 147 – emphasis added.

¹⁶⁷ *Ibid.*

¹⁶⁸ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 335.

¹⁶⁹ I.C.J., Judgment, 20 February 1969, *North Sea Continental Shelf*, Reports 1969, pp. 49-50, para. 91.

¹⁷⁰ I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Reports 2009, p. 127, para. 201. See also ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 326 and I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 215.

¹⁷¹ See IR, p. 189, para. 7.37 and Figure RJ 7.3.

¹⁷² See BM, p. 107, paras. 6.71-6.73.

1 its Memorial.¹⁷³ This being said, in any case, India accepts that, in the circumstances,
2 Bangladesh has a – limited – entitlement to jurisdiction and sovereign rights on the continental
3 shelf lying beyond 200 nautical miles from its coasts – I’ll come back to this in my next speech.
4 In other words, we strongly doubt that the expression “maximum reach” is meaningful with all
5 due respect to the late Professor Charney¹⁷⁴ – Bangladesh is not deprived of it in the present
6 case in any case.

7
8 39. It is significant in this respect that Bangladesh made this indefensible argument (both in
9 law and in fact in the circumstances of the case) in its Memorial but abstained from invoking it
10 again in its Reply as well as during its pleadings at the beginning of the week. And I also note
11 that it does not insist any more on another related argument according to which the concavity of
12 its coast would prevent it to “have broadly comparable access to the 200 M limit in the area.”¹⁷⁵
13 As we have shown in our Counter-Memorial,¹⁷⁶ such a claim is in clear contradiction with the
14 case-law and with the principle that “[t]he object of delimitation is to achieve a delimitation
15 that is equitable, not an equal apportionment of maritime areas.”¹⁷⁷

16
17 40. Again, Mr. President, Members of the Tribunal, Bangladesh has abandoned these
18 arguments and you might wonder why I come back to them... I do – not only to take note of
19 this renunciation, but also to invite you to draw the consequences of it: *a contrario*, Bangladesh
20 cannot but accept that the concavity of its coast does not prevent the equidistance line proposed
21 by India from granting it an access to an area of the outer continental shelf beyond 200 nautical
22 miles – yet the supposed refusal of India to do so was the core argument of its initial “cut-off”
23 argument; the reason for this has disappeared – Bangladesh nevertheless maintains it. And yet,
24 the reason which excludes the alleged cut-off is crystal clear: Bangladesh’s coast concavity is
25 balanced by the comparable concavity of the Indian coast.

26

¹⁷³ See BM, p. 107, para. 6.72 or transcript, 10 December 2013, Mr. Boyle, p. 187, para. 54.

¹⁷⁴ See Jonathan I. Charney, “Progress in International Maritime Boundary Delimitation Law,” *American Journal of International Law*, Vol. 88, No. 227 (1994), pp. 247 et seq. (MB, Vol. III, Annex B43) quoted in B.

¹⁷⁵ BM, p. 99, para. 6.49.

¹⁷⁶ ICM, pp. 179-184, paras. 6.86-6.94; see also: IR, pp. 139-140, paras. 5.40-5.42.

¹⁷⁷ I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Reports 2009, p. 100, para. 111, citing “*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 22, para. 18; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 67, para. 64.

1 41. To put it in different words, some kind of “cut off” is simply unavoidable when
2 contiguous or adjacent States (here Bangladesh and India) both have competing and
3 overlapping claims.¹⁷⁸ When the concavity, or, as is the case here, the concavities of the coasts
4 of the Parties do not lead to “an unjustifiable difference of treatment”, it – or they, these
5 concavities – cannot be considered as circumstances relevant in order to shift or adjust the
6 provisional equidistance line. In alleging they are, Bangladesh simply requests the Tribunal to
7 ‘completely refashion nature’ if I dare cite again the celebrated formula used by the ICJ in the
8 *North Sea* cases.¹⁷⁹

9
10 42. On Monday afternoon, my opponent and good friend, Paul Reichler made an astute
11 presentation of an apparently impressive case-law showing, he said, that when a relevant
12 circumstance occurs, “the solution in the great majority of these cases involves the elimination
13 of the anomalous geographical feature from the construction of the final delimitation line, in
14 order to avoid or substantially abate the cut-off that the feature would have otherwise
15 produced.”¹⁸⁰ The demonstration was made with such vigour and apparent conviction that I
16 must admit, Mr. President, I was almost caught. Almost. But, after more careful analysis,
17 done with the always precious assistance of Benjamin Samson, I am relieved to be able to say
18 with confidence that this was only a lure – and I shall be brief:

19 - I have already dealt with the *North Sea* cases and *Bangladesh/Myanmar* at length;

20 - Seven of the eight remaining cases referred to by Mr. Reichler concern the distorting
21 effect of small islands on the drawing of the equidistance line. This is a first reason which, by
22 itself, renders these cases irrelevant to the present case. As the ICJ recalled in *Nicaragua v.*
23 *Colombia*, “those islands should not be treated as though they were a continuous mainland
24 coast stretching for over 100 nautical”¹⁸¹ miles.

25 - To these seven cases, we may add *Guinea/Guinea-Bissau* – a decision I have always
26 found absurd; but Counsel for Bangladesh are fond of it... They seek to convey the idea that the
27 Arbitral Tribunal based its decision to set aside equidistance only because of the concavity
28 formed by the coasts of the parties.¹⁸² This is simply untrue. In this case:

¹⁷⁸ See e.g.: IR, p. 128, para. 5.25 and the cited jurisprudence. See also *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre & Miquelon)*, Decision of 10 June 1992, ILM, Vol. 31, 1992, p. 1164, para. 45.

¹⁷⁹ Cf. I.C.J., Judgment, 20 February 1969, *North Sea Continental Shelf, Reports 1969*, pp. 49-50, para. 91.

¹⁸⁰ Transcript, 9 December 2013, Mr. Reichler, p. 139, para. 173.

¹⁸¹ I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 215.

¹⁸² Transcript, 9 December 2013, Mr. Reichler, p. 143, para. 180.

1 - the first relevant circumstance invoked by Guinea-Bissau was the presence of the
2 Bijagos Islands,¹⁸³ “the nearest of which is two nautical miles from the continent and the
3 furthest 37 miles;”¹⁸⁴

4 - and the first reason why the Arbitral Tribunal discarded equidistance is the presence of
5 these small islands and islets, and I quote the Award:

6 “Where equidistance is concerned, the Tribunal, which as we have seen is confronted
7 here with two lines of equidistance, is forced to accept that both would have serious drawbacks
8 in the present case. In the vicinity of the coast, they would give exaggerated importance to
9 certain insignificant features of the coastline, producing a cut-off effect which would satisfy no
10 equitable principle and which the Tribunal could not approve. In one case, this would be to the
11 detriment of Guinea-Bissau [with features such as Poilao Islet] and, in the other, to the
12 detriment of Guinea, with the island of Alcatraz being on the wrong side.”¹⁸⁵

13

14 - And there is something else – and I think more important: in each of these cases, the
15 anomalous geographical feature (if an island may be defined as “anomalous”) – the feature in
16 question belonged to the State which did not endure the severe cut-off. This is a big difference
17 with the present case. In our case, Bangladesh does not complain of the effect of a feature under
18 India’s sovereignty but of the effect of its own territory, of its own concavity. And I can assure
19 you, Members of the Tribunal, that, contrary to what Professor Crawford seemed to imply on
20 Tuesday, India has no “imperial” ambition on any part of Bangladesh’s territory.

21

22 43. In reality, Mr. President, Members of the Tribunal, Bangladesh asks you not to decide a
23 boundary achieving an equitable solution – the equidistance line, in itself, achieves this goal –,
24 but to adopt a delimitation *ex aequo et bono*, compensating it for its geographical disadvantage.
25 And, indeed, Bangladesh invoked in its Reply¹⁸⁶ and again on Monday its “right to be
26 compensated”.¹⁸⁷ According to Bangladesh, Myanmar and India have to “pay”¹⁸⁸ some
27 compensation for Bangladesh’s geographical situation. Still according to Bangladesh, the
28 ITLOS ensured that Myanmar paid its share and now your Tribunal is supposed to decide that
29 India pay it. In the same vein, on Tuesday, Bangladesh again argued that “[t]he broader

¹⁸³ *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *ILM*, Vol. 25, 1986, p. 294, para. 101.

¹⁸⁴ *Ibid.*, p. 291, para. 95.

¹⁸⁵ *Ibid.*, p. 295, para. 103.

¹⁸⁶ BR, pp. 93-100, paras. 4.75-4.76 and 4.84-4.88, pp. 129-130, paras. 5.5-5.6 and p. 158, para. 5.74.

¹⁸⁷ See the transcript, 9 December 2013, Mr. Martin, p. 46, para. 58 and Mr. Reichler, p. 126, para. 144 and p. 147, para. 188 and transcript, 10 December 2013, Mr. Boyle, p. 185, para. 52 and Mr. Crawford, p. 198, para. 14.

¹⁸⁸ BR, pp. 129-130, para. 5.5 and p. 135, para. 5.18. See the transcript, 9 December 2013, Mr. Martin, p. 46, para. 58 and Mr. Reichler, p. 126, para. 144 and p. 147, para. 188 and transcript, 10 December 2013, Mr. Boyle, p. 185, para. 52 and Mr. Crawford, p. 198, para. 14.

1 regional perspective which the tribunal adopted in that case is equally relevant in the Bay of
2 Bengal, since this tribunal must also take into account the maritime boundary drawn by the
3 Tribunal in the *Bangladesh/Myanmar* [case].”¹⁸⁹ In support of this extraordinary claim,
4 Bangladesh only offers an obscure and totally speculative reference to the “spirit” of the
5 ITLOS Judgment.¹⁹⁰

6
7 44. I also think, Mr. President, that Bangladesh should have looked more carefully into the
8 *Barbados/Trinidad and Tobago* case. In that case, the Tribunal expressly addressed a similar
9 argument made by Trinidad and Tobago,¹⁹¹ The Tribunal unequivocally rejected this claim¹⁹²;
10 it stated that:

11
12 “certainly Barbados cannot be required to ‘compensate’ Trinidad and Tobago for the
13 agreements it has made by shifting Barbados’ maritime boundary in favour of Trinidad and
14 Tobago. By its very terms, the treaty does not affect the rights of third parties. Article II(2) of
15 the treaty states in fact that ‘no provision of the present Treaty shall in any way prejudice or
16 limit . . . the rights of third parties’. The treaty is quite evidently *res inter alios acta* in respect of
17 Barbados and every other country.”¹⁹³

18
19 These findings are applicable *mutatis mutandis* to the present case. The ITLOS Judgment is
20 “quite evidently *res inter alios acta*” for India and “India cannot be required to ‘compensate’
21 [Bangladesh]” for this Judgment, however unsatisfactory it may now be in Bangladesh’s view.

22
23 45. Mr. President, with your permission I can summarize by way of conclusion:

24 (i) the drawing of a provisional equidistance line is by no means unfeasible – and
25 Bangladesh itself tries it and fully succeeds, basing itself on selected base points;

26 (ii) at best, the factors it invokes to substitute an angle bisector to the line drawn in
27 accordance with the normal three-stage method, could be considered as circumstances which
28 could incite the Tribunal to adjust the provisional line;

29 (iii) however, in the present case, those circumstances are not relevant to that effect:

¹⁸⁹ Transcript, 10 December 2013, Mr. Boyle, p. 181, para. 43.

¹⁹⁰ BR, p. 99, para. 4.84. See also transcript, 9 December 2013, Mr. Reichler, p. 126, para. 142 and 10
December 2013, Mr. Crawford, p. 218, para. 57

¹⁹¹ *Ibid.*, p. 233, para. 320.

¹⁹² *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the
exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIIAA, Vol. XXVII,
p. 237, paras. 340-341.

¹⁹³ *Ibid.*, p. 238, para. 346.

1 - the dramatic and generalized instability of the coast alleged by Bangladesh is not
2 averred (and, at least, has not prevented both Parties from identifying appropriate base points)
3 and, in any case, cannot constitute such a relevant circumstance, with “relevant” in inverted
4 commas; and,

5 - in the present case, the same holds true for the concavity of the Bangladesh’s coast;
6 we certainly do not deny that it is concave; but so is India’s; and these two concavities do not
7 produce a distortion of the limit drawn in accordance with the equidistance line which would
8 entail a grossly unequal treatment between both States – whose relevant coasts are broadly of
9 the same length.

10
11 46. Listening to Paul Reichler on Monday or, on Tuesday, to James Crawford, I was under
12 the impression that they were “bargaining” what Bangladesh considers an equitable solution. I
13 regret to say that, for India, this Tribunal is not a bazaar or a market place. Mr. President,
14 distinguished Members of the Tribunal, you are not supposed to act as amiable compositeur
15 and, in any case, no element of the present case can incite you to depart from the
16 equidistance/relevant circumstances method and no circumstance has any relevance in order to
17 shift, or adjust, let alone to set aside the provisional equidistance line. This line is equitable!

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1 PROFESSOR PELLET: I thank you very much for your patience – which must
2 be great for enduring me so long, for doing my “Pellet’s English” for such a long time – and
3 especially so after a night without sleep! If I can be of no further assistance, I would kindly ask
4 you to call again upon Sir Michael Wood. He will describe the line resulting from the applicable
5 method in the territorial sea

6 PRESIDENT WOLFRUM: Thank you, Professor people Pellet. I see my
7 colleague versus notice questions. Therefore, I call upon Sir Michael to give his presentation.

8 Thank you.

9 MR. WOOD: Thank you very much, Mr. President.

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PERMANENT COURT OF ARBITRATION
ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA

BAY OF BENGAL MARITIME BOUNDARY ARBITRATION BETWEEN THE
PEOPLE’S REPUBLIC OF BANGLADESH AND THE REPUBLIC OF INDIA

THE TERRITORIAL SEA AND BANGLADESH’S ANGLE BISECTOR

SIR MICHAEL WOOD

Mr. President, Members of the Tribunal,

IV. Before turning to the delimitation line that India proposes for the territorial sea, I shall first address Bangladesh’s proposed angle-bisector.

V. This short speech will thus be in two parts, though I cannot promise that it will be Cartesian. First, I shall look at Bangladesh’s proposed angle-bisector. Second, I shall look at India’s proposed line applying the three-stage method.

I. Bangladesh’s angle-bisector line

VI. Both in its Memorial¹⁹⁴, and its Reply¹⁹⁵, and again earlier this week, Bangladesh has proposed that instead of the standard three-stage methodology the Tribunal should adopt an angle-bisector. Professor Pellet and I have already explained why there is no reason in this case to depart from the three-stage method. The angle-bisector should only be employed

¹⁹⁴ MB, paras. 5.48-5.50 and 6.48-6.131.
¹⁹⁵

1 when for some compelling reason the equidistance/relevant circumstances method is not
2 feasible.

3
4 VII. Indeed, it is not clear how seriously Bangladesh maintains its proposal for an
5 angle-bisector. The Reply gave much less emphasis to it than did the Memorial. Yet. In its
6 oral presentation earlier this week Bangladesh did return to the angle-bisector – indeed,
7 Professor Boyle dealt with it at some length on Tuesday - but also indicated an openness to
8 applying the standard three-stage method. This ever-changing position of Bangladesh no
9 longer surprises us. Bangladesh seems not to concern itself with the application of the
10 law, which is what articles 15, 74 and 83 of the Convention prescribe. As Mr. Reichler put
11 it on Monday, Bangladesh “asks only that you exercise the ample margin of discretion that
12 the law gives to you, to produce an equitable solution as you see it”.¹⁹⁶ That sounds very
13 much like a decision *ex aequo et bono*, which of course is not something the parties have
14 agreed to (as they could have done, but did not, under article 293, paragraph 2 of
15 UNCLOS).

16
17 VIII. Nevertheless, Bangladesh’s latest formal submissions, in the Reply, maintain its
18 angle-bisector proposal. So it is necessary to stress that the angle-bisector actually
19 proposed by Bangladesh – the 180 degree line - is deeply flawed¹⁹⁷. It is an artificial
20 construction, contrived with one aim in mind, one aim alone, to achieve the result for which
21 Bangladesh strives, which indeed it demands you give it, a line that ignores the actual coast
22 and instead goes due south at 180 degrees, along a line of longitude, along a meridian.

23
24 IX. Members of the Tribunal, in our view, Bangladesh’s angle-bisector is extraordinary.
25 It’s so extraordinary indeed that, as you will recall, it felt the need to offer two alternative
26 ways of constructing it, each of which – as if by miracle – ended with its favoured 180
27 degree line. Judging by Professor Boyle’s presentation earlier this week, Bangladesh has
28 abandoned one of their two alternatives, the one that employed two so-called ‘coastal
29 facades’ that did not accurately reflect the coasts and did not even meet at a single point.
30 Just to remind you (as Bangladesh did not), that proposal, it is now on the screen and at Tab
31 7.1 in your folders. **[INDIA REJOINDER FIGURE RJ 6.1 ON SCREEN]**. You’ll recall it
32 involved a series of conjuring tricks. Moving the starting point of its own coastal façade

¹⁹⁶ BD-IN, 9 December 2013, para. 191 (Reichler),

¹⁹⁷ CMI, paras. 5.41-5.45; RI, paras.

1 some 12 miles kilometres north of the land boundary terminus, and the starting point of
2 India's 'coastal façade' some 8 kilometres south of it. About 20 kilometres apart altogether.
3 Demonstrating its lack of confidence in this alternative, it vanished on Tuesday.

4
5 X. As though - perhaps unsurprisingly – lacking confidence in its first alternative, Bangladesh
6 simultaneously proposed an angle based on a straight line going due east-west, which is
7 now on your screen and at Tab 7.2. A straight line, due east-west, unsurprisingly even to
8 me, produces a north-south 180 degrees 'angle-bisector'. It is plain from a glance at the
9 sketch that this east-west line represents yet another serious distortion of the general
10 direction of the actual coast. To the west, it cuts across India's land territory and to the east,
11 as regards Bangladesh, it lies well out to sea. [SKETCH ON SCREEN] Indeed, Professor
12 Boyle seemed to acknowledge as much on Tuesday when he tempted the Tribunal to draw
13 a 'modified' bisector.¹⁹⁸ India, for its part, does not believe that the directions of the
14 coastlines of the two States along the delta should be represented by a single coastal front
15 line, and in any case the due east-west one proposed by Bangladesh bears no resemblance
16 to the general direction of the coast.

17
18 XI. But Bangladesh's inventiveness does not end there. Bangladesh also distorts the direction
19 of the respective relevant coasts of Bangladesh and India, in this figure from its Reply
20 which was displayed on Tuesday.¹⁹⁹ [INDIA REJOINDER RJ6.2A] As you can see on the
21 screen, and at **Tab 7.34**, Bangladesh's own coast is presented as moving from the starting
22 point in a south easterly direction, while India's coast is presented as heading south west.
23 If you hollow out Bangladesh's thick red lines, it becomes obvious that the arrow depicting
24 Bangladesh's coast is again almost entirely on sea, while the arrow depicting India's coast
25 is for the most part on land. [AND 6.2B ON SCREEN] The only explanation, I would
26 suggest, can be that Bangladesh first constructed its favoured bisector, its 180 degree line,
27 and then constructed an angle to match. It may be, Mr. President, that as the ICJ said in
28 *Nicaragua v Honduras*, assessing the general direction of the coast "calls for the exercise of
29 judgment"²⁰⁰. But that is an exercise of judgment conducted in good faith, not a purely
30 self-serving exercise in defiance of geography.

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¹⁹⁸ Boyle, para. 56.

¹⁹⁹ Boyle-1, Figure 7.

²⁰⁰ *Nicaragua v. Honduras*, para. 289.

1 XII. Seeking to buttress its 180 degree line, and make it seem credible, Bangladesh repeats it
2 mantra about the extensive maritime zones to which India is entitled elsewhere, which is
3 peppered throughout its oral pleadings.²⁰¹ Bangladesh argues that if the Tribunal were to
4 accept the 180 degree line, the loss to India would be *de minimis*. This is simply not so.
5 India would lose a substantial portion of the relevant area. India's entitlements elsewhere,
6 outside the relevant area in the present case, are irrelevant. They have no bearing
7 whatsoever on the present case.

8
9 XIII. Bangladesh next seeks to justify its 180 degree line by asserting that it avoids the
10 cut-off effect that, according to Bangladesh, an equidistance line would produce. That is
11 simply not so. [INDIA REJOINER FIGURE RJ 6.3 ON SCREEN] On the contrary, the
12 180 degree line would produce a severe 'blocking effect' on India, as you can see from Tab
13 7.4. You only have to compare the blue arrows on the screen projecting from India and
14 Bangladesh's coasts respectively. But even if it were the case, the fact that a provisional
15 equidistance line produces a 'blocking [or cut-off] effect' is no reason to depart from the
16 standard methodology and shift to an angle-bisector. It might, if established (which it is
17 not) be a reason to adjust a provisional equidistance line.

18
19 XIV. In yet a further effort to support its 180 degree line Bangladesh states that the line was
20 in its 1974 Law and that its practice (what practice, it is not clear) since 1974 has been to
21 exercise jurisdiction up to this line. Such an argument, in our submission, can carry no
22 weight in international proceedings such as this. India has never accepted the 180 degree
23 line and had made that abundantly clear to Bangladesh throughout the years.

24
25 XV. The 1974 Law may be instructive in one respect, however. It does perhaps explain why
26 Bangladesh feels it has to propose such an extraordinarily exorbitant line in these
27 proceedings.

28
29 XVI. Mr. President, I should like to make a general point: The angle-bisector method is an
30 inherently crude and subjective way of determining a delimitation line, compared with the
31 discipline introduced by the standard three-stage method. Bangladesh would seek to

²⁰¹ BD-IN, 9 December 2013 (Akhavan).

1 persuade you that it is a better way to achieve the equitable solution that UNCLOS requires.
2 It is not. The angle depends entirely on the choice of lines showing the general direction of
3 the coast – the ‘coastal facades’. This is notoriously a highly subjective matter, for which
4 no technically robust methodology has been established. That is well demonstrated by
5 Bangladesh’s efforts in the present case. First decide what line of delimitation you want,
6 then construct so-called coastal facades to generate that line. That is Bangladesh’s
7 “method.”

8
9 XVII. Mr. President, Members of the Tribunal, Bangladesh’s second alternative
10 angle-bisector produces the same result as its first, a result highly favourable to
11 Bangladesh, and highly unfair to India. It is self-serving. It lacks any factual – let alone
12 legal – basis. It does not produce an equitable solution. We invite the Tribunal to reject
13 Bangladesh’s attempt to persuade you of the merits of an angle-bisector in the present case.

14
15 *II. The delimitation line in the territorial sea*

16
17 XVIII. Mr. President, I now turn to the delimitation line in the territorial sea. I note that
18 although Professor Akhavan’s presentation was to address the delimitation in the territorial
19 sea,²⁰² he did not actually get round to explaining Bangladesh’s line in the territorial sea.
20 He dealt mainly with the identification of base points and the effect of the alleged coastal
21 instability.

22
23 XIX. In any event, I can be quite brief. Professor Reisman has addressed the starting point
24 for the maritime delimitation line, that is, the land boundary terminus determined by the
25 Radcliffe Award. And I have explained the base points that India has identified. It
26 therefore only remains for me to plot the provisional equidistance line that is derived from
27 the starting point and the base points, and recall that there are no special circumstances that
28 would require any departure from that equidistance line.

29
30 XX. The construction of our line was set out in the Counter-Memorial²⁰³ and recalled in the
31 Rejoinder²⁰⁴. [SHOW ON SCREEN FIGURE RJ 6.5] The line we propose is appearing

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203 CMI, paras. 5.58-5.59.

204 RI, paras. 6.22-6.26.

1 on the screen now, and is also at **Tab 7.5**. It is an equidistance line, beginning at the starting
2 point to the east of New Moore Island. This is the point we have called Point L.

3
4 XXI. As Professor Pellet has just explained, there are no special circumstances that would
5 lead to a departure from the equidistance line. In particular, there is no concavity such as
6 to affect the line, and the supposed instability of the coastline is no reason to depart from
7 equidistance.

8
9 XXII. I only need to recall briefly, first, no concavity leads to such a cut-off effect as might
10 possibly justify a departure from equidistance anywhere along the delimitation line.
11 **[ADD LINE SHOWING DIRECTION OF THE COAST TO W FIGURE RJ 6.5]** Indeed,
12 as regards the territorial sea the relevant coasts are essentially linear, running west-south
13 westerly and east-north easterly, as indicated by the lines now appearing on screen.

14
15 XXIII. And as we have shown, both the reality and the legal significance of instability have
16 been greatly exaggerated by Bangladesh. Bangladesh has raised instability mainly in the
17 context of seeking to persuade you to depart from the equidistance/special or relevant
18 circumstances method altogether. Instability, claimed by Bangladesh to be a compelling
19 reason to abandon the three-stage method, is certainly no reason for an adjustment or
20 departure from equidistance once it has been decided to apply that method.

21
22 XXIV. As I explained earlier today, India has selected appropriate base points from which the
23 equidistance line has been constructed. It only remains for me to describe the line.

24
25 XXV. Starting from the land boundary terminus, the line is first controlled by base points I-1
26 and B-1, now appearing on the screen. It follows a geodetic azimuth of 149.3 degrees until
27 it reaches the point that we refer to as Point T1.

28
29 XXVI. From T1 the line is controlled by base points B-1 and I-2. It follows an azimuth of
30 129.4 degrees until it reaches T2.

31
32 XXVII. From T2 the line is controlled by base points I-2 and B-2. It follows an
33 azimuth of 144.2 degrees until it reaches T3.

1 XXVIII. After T3 the line is controlled by base points I-2 and B-3. It follows an
2 azimuth of 168.6 degrees up to - and beyond - the outer limit of the 12 mile territorial sea
3 marked as X – at which point Professor Pellet takes over.

4
5 XXIX. Mr. President, Members of the Tribunal, that concludes what I have to say about the
6 delimitation in the territorial sea. I thank you for your attention and now request that you
7 invite Professor Pellet, after his brief rest, to return to the podium. I thank you, Mr.
8 President.

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PRESIDENT WOLFRUM: Thank you, Sir Michael, for your presentation.

I call on Professor Pellet.

PROFESSOR PELLET: Thank you. Sorry to be so much present today.

If it is agreeable to you, it might be convenient that we take a break about the middle of it.

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PERMANENT COURT OF ARBITRATION
ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS
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BAY OF BENGAL MARITIME BOUNDARY ARBITRATION BETWEEN THE
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THE DELIMITATION LINE (EEZ AND CONTINENTAL SHELF)

Professor Alain PELLET (55’)

Mr. President, Members of the Tribunal,

47. There seems to be no dispute between the Parties that you are called upon to draw a single maritime boundary line between the exclusive economic zones and the continental shelf of the Parties.²⁰⁵ However, Bangladesh and India clearly disagree on the unity – or the diversity – of the rules applicable to the delimitation of the continental shelf within and beyond 200 nautical miles. As for us, I will further explain in the first part of my speech, that we maintain that the unity of the applicable rules, embodied in Article 83 of UNCLOS, matches the unity of the continental shelf itself and calls for a boundary line drawn beyond 200 nautical miles, extending the line adopted within this limit in following the same principles. In a second part (still our tribute to Descartes...), I will describe this single line. And I will contrast our proposed single line with the provisional line that Bangladesh, finally and reluctantly, agreed to envisage in order to immediately dismiss it in favour of its

²⁰⁵ See BM, p. 80, para. 5.50.

1 angle-bisector – but I won't deal with the latter: Sir Michael has just said what had to be
2 said.

3

4 **I. A Single Line Drawn According to Common Principles**

5

6 48. Then, with your permission, Mr. President, I will first answer Bangladesh's claims
7 concerning the delimitation of the continental shelf beyond 200 nautical miles. And it is not
8 an easy task – not because Bangladesh's arguments are difficult to answer; but because, as
9 in many other respects, its argumentation has changed radically since the beginning of these
10 proceedings, in particular with respect to what it alleges to be its entitlement to an area of the
11 continental shelf beyond 200 nautical miles.

12

13 **1. The Entitlement of the Parties to an Area of Continental Shelf Beyond 200 NM**

14

15 49. This said, I hasten to say, that contrary to Bangladesh's initial erroneous
16 assumption,²⁰⁶ India – and I've said it in my previous speech as well – India does not
17 dispute the fact that Bangladesh is entitled to claim such an area – as India itself, is. Nor is it
18 disputed that the entitlements of both States overlap – which necessitates drawing a line
19 between the respective areas on which each Party may exercise sovereign rights. But
20 Bangladesh's claim was initially based on radically erroneous grounds and unfortunately
21 the remnants of that flawed approach persist in its current argument.

22

23 50. Initially, Bangladesh asserted that its entitlement to a continental shelf beyond 200
24 nautical miles stemmed from the natural prolongation or continuation of its land territory
25 under the high seas²⁰⁷ since, it wrote, “the outer continental shelf in the Bay of Bengal is the
26 natural prolongation of the Bangladesh Landmass”²⁰⁸. We have shown that neither of these
27 assertions was well-founded:

28 - the law of the sea cannot be frozen in 1969 when the ICJ resorted – less exclusively
29 than Bangladesh alleged²⁰⁹ – to the idea of “natural prolongation”,²¹⁰ which must today be

²⁰⁶ BM, p. 3, para 1.14 or pp. 107-108, paras. 6.71-6.74.

²⁰⁷ BM, pp. 132-136, paras. 7.12-7.23.

²⁰⁸ BM, Section III, p. 136 – see pp. 136-138, paras. 7.24-7.30.

²⁰⁹ BM, pp. 105-106, para. 6.67.

1 | understood in light of the subsequent development of the law of the sea, through the
2 | case-law of the ICJ and international arbitral tribunals and by way of customary law as
3 | reflected in Article 76 of the UNCLOS²¹¹ – this was illuminated with particular clarity and
4 | authority by the ITLOS in its 2012 Judgment²¹²;

5 | - India also showed that Bangladesh’s claims to an exclusive or predominant
6 | “physical continuity” with the continental shelf of the Bay of Bengal were unfounded both
7 | in fact and in law and found no support in Article 76 of the UNCLOS.²¹³

8 |
9 | 51. Apparently, we convinced our friends from Bangladesh. In their Reply they have –
10 | very fortunately I must admit – radically changed their argument. And I indulge myself, Mr.
11 | President, to quote the relevant passage at some length; their admission greatly clarifies – or
12 | should clarify – this aspect of the case and important conclusions can be drawn from it:

13 |
14 | “5.10 Bangladesh accepts the Judgment of ITLOS as decisive in this respect. It
15 | therefore withdraws certain of the arguments previously advanced in its Memorial. In
16 | particular, it will no longer rely on scientific evidence of the greater geological or
17 | geomorphological continuity of its continental landmass beyond 200 M in relation to
18 | India’s. It will also no longer argue that it is entitled to a greater share of the shelf than India
19 | based on the greater degree of continuity between its continental landmass and the shelf
20 | beyond 200 M.

21 |
22 | 5.11 Bangladesh accepts that its entitlement beyond 200 M, as well as India’s, are
23 | determined by application of Article 76(4) of the 1982 Convention, and that, in the area
24 | where the Parties’ entitlements overlap, neither may claim that its entitlement is superior
25 | based on geological or geomorphological factors.”²¹⁴

26 |
27 | Professor Crawford confirmed the abandonment of this argument.²¹⁵

28 |

²¹⁰ I.C.J., Judgment, 20 February 1969, *North Sea Continental Shelf*, Reports 1969, p. 22, para. 19.

²¹¹ I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 114 and 118.

²¹² See e.g. ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 447, see also paras. 437-438. See ICM, pp. 207-220, paras. 7.3-7.24.

²¹³ See ICM, pp. 220-228, paras. 7.25-7.42.

²¹⁴ BCM, p. 133, paras. 5.10-5.11.

²¹⁵ Transcript, 10 December 2013, Mr. Crawford, p. 202, lignes 7-8.

1 52. This, Mr. President, is a judicious volte-face. And I do not criticize Bangladesh for
2 it: “*errare humanum est...*” But, here again, Bangladesh fails to draw all the consequences
3 which necessarily flow from its belatedly correct view of coastal States’ entitlement to an
4 area of continental shelf beyond 200 nautical miles. For, although *perseverare diabolicum*
5 *est*, instead of rallying to the law, it immediately retreats to its mantra: equity. Thus it writes
6 in the very paragraph of its Reply that I have just quoted at length and I quote again:

7 53. “...the area of overlap must be delimited on the basis of equitable
8 considerations...”²¹⁶; and in the next paragraph: “Accordingly, in this Reply, the maritime
9 boundary Bangladesh claims beyond 200M is based *strictly* on equitable
10 considerations...”²¹⁷. Similarly, on Monday earlier this week, Mr. Reichler stated upfront:
11 “methodology is less important to Bangladesh than achievement of an equitable result”.²¹⁸
12 For once, my friend Paul Reichler gives to understatement: it is not that “methodology is
13 *less important*” to Bangladesh; to put it mildly: they simply do not care *at all* about
14 methodology. In any case, this opposition between the methodology and the equitable result
15 is disingenuous and disregards the significance of the evolution of the law applicable to the
16 delimitation of maritime areas. The fundamental principle of this law consists to insuring
17 an equitable result *through and by* a reliable, objective and stable methodology. In so doing,
18 Bangladesh misinterprets the evolution of the law as it results from more than forty years of
19 international jurisprudence.

20
21 54. The position of Bangladesh is indeed in clear contradistinction with the applicable
22 law, stemming from the UNCLOS and applied by international courts and tribunals, in
23 particular by the ITLOS in the other *Bay of Bengal* case. At best, it is a very partial and
24 incorrectly simplified view of the applicable principles. As the ITLOS made clear in its
25 2012 Judgment “the question of the Parties’ entitlement to a continental shelf beyond 200
26 nm raises issues that are predominantly legal in nature...”²¹⁹ predominantly legal in
27 nature.

28
29
30

²¹⁶ *Ibid.*, para. 5.11.

²¹⁷ *Ibid.*, para. 5.12 – italics added.

²¹⁸ Transcript, 9 December 2013, Mr. Reichler, p. 122, para. 132.

²¹⁹ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 413.

1 **2. The Law Applicable to the Delimitation of the Continental Shelf Beyond 200 NM**

2

3 55. Mr. President, this statement also applies to the delimitation of this part of the
4 continental shelf. Indeed the aim is “to achieve an equitable solution” – as provided for in
5 Article 83, paragraph 1, of the UNCLOS, but as the ITLOS has stated,²²⁰ as the ICJ has
6 stressed in many occasions,²²¹ as arbitral tribunals have recalled²²² as India has repeated
7 again and again,²²³ (and I have myself noted a few minutes ago on behalf of India²²⁴), the
8 applicable law has not been frozen in 1969, nor even in 1982 and the developments in the
9 legal principles applicable to the delimitation of the continental shelf apply beyond as well
10 as within 200 nautical miles.

11

12 56. What I mean here, Mr. President, is that it is not enough for Bangladesh to concede,
13 as it does in paragraph 5.13 of its Reply, that the overlapping continental shelves of the
14 Parties “must be delimited in accordance with Article 83 of the Convention.”²²⁵ It is not
15 enough for Professor Crawford to state – rather mysteriously: the principle – emphasize --
16 “...the *principle* of delimitation is the same (Article 83), but the incidence of delimitation
17 may be different”²²⁶. Article 83 must be interpreted and applied concomitantly with the
18 standard methodology accepted by the case-law, and which has become an integral part of
19 the legal principles applicable. What has been called an “*acquis judiciaire*”²²⁷ equally
20 applies to the delimitation of the continental shelf within *and beyond* 200 nautical miles.

²²⁰ *Ibid.*, paras. 226-233.

²²¹ I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Reports 2009, p. 101, paras. 115-118. See also Judgment, 14 June 1993, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Reports 1993, p. 61, para. 51, Judgment, 16 mars 2001, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Reports 2001, pp. 110-111, para. 227 and Judgment, 10 October 2002, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Reports 2002, pp. 441-442, paras. 288-289.

²²² *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, U.N.R.I.A.A., Vol. XXVII, pp. 210-211, para. 223 and *Guyana/Surinam*, Award of 17 September 2007, ILM, Vol. 47, 2008, pp. 213-213, paras. 373-374 paras. 335-342.

²²³ ICM, pp. 114-119, paras. 6.4-6.12, p. 164, para. 6.65. See also IR, p. 115, para. 5.2.

²²⁴ See above, para. 50.

²²⁵ BR, p. 134.

²²⁶ Transcript, 10 December 2013, Mr. Crawford, p. 212, para. 39.

²²⁷ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Declaration of Judge Wolfrum, p. 3; see also: Declaration of Judge Treves, para. 2, Joint Declaration of Judges Nelson, Chandrasekhara and Cot, p. 1, Joint Declaration of Judges *ad hoc* Mensah and Oxman, para. 4, and Separate Opinion of Judge Cot, pp. 1-2.

1

2 57. This has been explained with the greatest clarity by the ITLOS:
3

4 “Article 76 of the Convention embodies the concept of a single continental shelf. In
5 accordance with article 77, paragraphs 1 and 2, of the Convention, the coastal State
6 exercises exclusive sovereign rights over the continental shelf in its entirety without any
7 distinction being made between the shelf within 200 nm and the shelf beyond that limit.
8 Article 83 of the Convention, concerning the delimitation of the continental shelf between
9 States with opposite or adjacent coasts, likewise does not make any such distinction.”²²⁸

10

11 58. However, here again, Mr. President, I’m afraid that there is a profound disagreement
12 between the Parties, which is obscured by Bangladesh’s now familiar tactic. In a first step, it
13 *pretends* that it agrees with the law as applied by the ITLOS and as it *must* be applied – in
14 the present case, with the unity of the applicable law. In paragraph 5.27 of its Reply, it
15 concedes:

16

17 “Bangladesh certainly agrees that the core principles of maritime boundary
18 delimitation law are applicable ‘irrespective of the nature of maritime zones to be delimited
19 or the method applied to the delimitation’.”²²⁹

20

21 And in the next paragraph it writes:

22

23 “Bangladesh also agrees that there is in law only one continental shelf, not two.”²³⁰

24

25 James Crawford conceded even less last Tuesday: “...there is only one continental
26 shelf in the sense that each state has a single continental shelf.” But he added immediately:
27 “This cannot hide the reality that there is a different *regime* beyond 200 miles (where
28 geomorphology dominates) as compared within 200 miles (where geomorphology is
29 irrelevant).”²³¹ Maybe this is a way of preparing a new *volte-face* and a return to the
30 original “geomorphologic” claim of Bangladesh? And, regarding delimitation, he warned,
31 Mr. Crawford warned: “the *principle* of delimitation is the same (Article 83), the incidence

²²⁸ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 361.

²²⁹ BR, p. 139, para. 5.27, referring to ICM, “at para. 7.49 (citing *Bangladesh/Myanmar* at para. 455)”.

²³⁰ BR, p. 139, para. 5.28.

²³¹ Transcript, 10 December 2013, Mr. Crawford, p. 21, para. 38, lines 2-4.

1 of delimitation may be different”.²³² Here we are speaking only of delimitation as far as I
2 know.

3

4 59. What is sure is that, like Bangladesh did in its Reply, Professor Crawford
5 immediately conditions and tempers its reluctant agreement by reducing the applicable law
6 to equity. Our opponents criticize us for “worship[ing] at the altar”²³³ of equidistance – we
7 accept that we believe that equidistance must be the first step of the delimitation process
8 whenever it is feasible; but our faith is less simplistic than caricatured by Mr. Reichler: in
9 *law* we trust – with all its implications and nuances; in the circumstances, equidistance is a
10 necessary point of departure; then it can be – when necessary – tempered by the
11 consideration of special circumstances (no need here); then again it is submitted to the
12 non-disproportionality test in order to check that the result is equitable – as a matter of
13 definition the standard method leads to such a result. For their part, our friends on the other
14 side have a much more simple belief: in equity they trust – full stop; equity *contra* more than
15 merely *praeter legem*, and even less, *infra legem*, but, indeed, equity only – and very
16 subjectively conceived. The same “false deity”²³⁴ as they said, they had idolized in
17 Hamburg last year – which is their right, after all, Mr. President; contrary to them²³⁵ we do
18 not complain that the same Legal Team has represented Bangladesh in both cases... Indeed
19 as the ITLOS noted:

20

21 “in accordance with Article 83, the Arbitral Tribunal’s task is to achieve a solution
22 that is equitable both within 200 M and beyond 200 M.

23 [...]

24 [T]hat does not mean that the line adopted in one area of the shelf must necessarily
25 be extended unchanged through another area of the shelf. At first blush, there may be an
26 appealing simplicity in extending the boundary adopted within 200 M through the shelf
27 beyond 200 M. Yet, it remains fundamental to this and every other maritime boundary
28 delimitation that an equitable solution will depend on the particular circumstances of each
29 case.”²³⁶

30

²³² *Ibid.*, para. 39(3), lines 17-18.

²³³ Transcript, 9 December 2013, Mr. Reichler, p. 131, para. 151.

²³⁴ *Ibid.*

²³⁵ Transcript, 9 December 2013, Mr. Reichler, p. 135, para. 161.

²³⁶ BR, p. 139, paras. 5.27 and 5.28.

1 60. The “particular circumstances” of the case, Mr. President, indeed! And this implies,
2 first, that, while the ITLOS has considered that, *in that case*, -- I speak of
3 Bangladesh/Myanmar -- one special circumstance, the “unilateral” concavity of
4 Bangladesh’s coast “requir[ed] an adjustment of the provisional equidistance line”,²³⁷ the
5 same circumstance by no means is relevant equally in our case. Of course, the concavity is a
6 fact but, as I have explained this morning – or start of the afternoon -- it is not relevant in the
7 “*particular circumstances*” of the *present* case. Definitely, the ITLOS had it right:
8 *relevance* – within the meaning I have tried to explain in my previous pleading --
9 relevance is the condition. It is, of course, the case that a particular ‘relevant circumstance’ –
10 a small island, for example – may affect the line through only part of its length, but that has
11 nothing to do with a distinction between the shelf within or beyond 200 nm. It would be a
12 remarkable coincidence indeed if a “relevant circumstance” came into play at precisely the
13 point where the line crosses 200 nm. In the present case, Bangladesh can avail itself of no
14 such circumstance within 200 nautical miles limit and I wonder what kind of circumstances,
15 not relevant within 200 nautical miles, could become relevant beyond it? After two rounds
16 of written pleadings and one round of hearings, we have yet to be presented with any
17 relevant circumstance which could be specific to the area lying beyond that limit.

19 3. The Absence of Any Particular Relevant Circumstance Beyond 200 NM

21 And, in fact, Mr. President, Bangladesh does not take the trouble to establish that any
22 such relevant circumstance, specifically applicable to the delimitation beyond 200
23 nautical miles, exists at all. What it does is completely different: it tries to show that the
24 circumstances it invokes within have an impact beyond... This, Mr. President, I can easily
25 accept: *if* circumstances relevant for shifting or adjusting the provisional equidistance
26 line within 200 nautical miles exist, they *might* also have an impact on the line beyond
27 that distance. I have shown that such circumstances do not exist within; they do not exist
28 beyond either. This is, I think, as simple as that.

30 61. Now, let us, however, look a little more closely at the Bangladesh argument.

²³⁷ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 324.

1 62. It first asserts:
2

3 “that in *Bangladesh/Myanmar* ITLOS employed two different methods to delimit
4 the area beyond the territorial sea: (a) equidistance from the point 12 M beyond St. Martin’s
5 Island (Point 9) to a point approximately 48 M – an important number – from the coast
6 (Point 11); and (b) an azimuth matching the direction of the angle bisector proposed by
7 Bangladesh.”²³⁸

8

9 Yes, the Hamburg Tribunal did so²³⁹, without giving much explanation²⁴⁰ but still
10 without questioning its rejection of the angle-bisector method.²⁴¹ However, this shifting of
11 the equidistance line did not occur 200 nautical miles from the coast but 48 miles. If it can
12 confirm anything, it is that the drawing of *the whole line* is governed by *the same principles*
13 and that *the same circumstances* are relevant within and beyond 200 nautical miles. Indeed
14 the ITLOS unambiguously stated:

15

16 “In the view of the Tribunal, the delimitation method to be employed in the present case for
17 the continental shelf beyond 200 nautical miles should not differ from that within 200 nm.
18 Accordingly, the equidistance/relevant circumstances method continues to apply for the
19 delimitation of the continental shelf beyond 200 nm. This method is rooted in the
20 recognition that sovereignty over the land territory is the basis for the sovereign rights and
21 jurisdiction of the coastal State with respect to both the exclusive economic zone and the
22 continental shelf.”²⁴²

23

24 63. Then, Bangladesh, astoundingly, invokes the ICJ’s Judgment in *Nicaragua v.*
25 *Colombia*.²⁴³ It is astounding precisely because, in this case, the Court categorically
26 affirmed the generalized application of the three-stage method and explicitly specified that
27 “[f]ollowing this approach does not preclude very substantial adjustment to, or shifting of,
28 the provisional line in an appropriate case, nor does it preclude the use of enclaving in those

²³⁸ BR, p. 140, para. 5.29.

²³⁹ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 334.

²⁴⁰ See ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Separate Opinion of Judge Cot, p. 1 and pp. 7-8 and Separate Opinion of Judge Gao, para. 39.

²⁴¹ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, paras. 238-240.

²⁴² ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 455.

²⁴³ BR, pp. 140-141, paras. 5.30-5.31; transcript, 9 December 2013, Mr. Reichler, p. 143, para. 178 or 10 December 2013, Mr. Crawford, pp. 203-204, paras. 22-23.

1 areas where the use of such a technique is needed to achieve an equitable result.”²⁴⁴
2 Contrary to Bangladesh’s assertion, the Court did not resort to “different methodologies”:
3 the shifting of the provisional equidistance line and the enclaving of certain islands
4 intervened at the second stage of the standard method as a consequence of certain relevant
5 circumstances.

6

7 64. It is also to be noted that, in that same Judgment, the ICJ expressly rejected the
8 argument made by Nicaragua²⁴⁵ -- by me, I’m afraid -- based on the 1977 decision of the
9 Court of Arbitration in the *Anglo-French Continental Shelf* case:

10

11 “198. The Court – the ICJ -- does not consider that the award of the Court of
12 Arbitration in the *Anglo-French Continental Shelf* case calls for the Court to abandon its
13 usual methodology. That award, which was rendered in 1977 and thus some time before the
14 Court established the methodology which it now employs in cases of maritime delimitation,
15 [...] began with the construction of a provisional equidistance/median line between the two
16 mainland coasts and then enclaved the Channel Islands because they were located on the
17 ‘wrong’ side of that line²⁴⁶. For present purposes, however, what is important is that the
18 Court of Arbitration did not employ enclaving as an alternative methodology to the
19 construction of a provisional equidistance/median line, but rather used it in conjunction with
20 such a line.”

21

22 Having no genuine arguments, Bangladesh clings to the one which the ICJ clearly rejected.
23 (I have mainly quoted from the Reply – which is more explicit – but Professor Crawford
24 repeated these arguments although more shortly.²⁴⁷)

25

26 65. It must also be noted that, in the *Bangladesh/Myanmar* case, the ITLOS examined –
27 and rejected – Bangladesh’s claim according to which “the relevant circumstances in the
28 delimitation of the continental shelf beyond 200 nm include the geology and
29 geomorphology of the seabed and subsoil”.²⁴⁸ Bangladesh made that same argument in its
30 Memorial in our case.²⁴⁹ Since it has, rightly, renounced its claim based on the “natural

²⁴⁴ I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 197.

²⁴⁵ CR/2012/10, pp. 11-16, paras. 25-36 (A. Pellet).

²⁴⁶ *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (1977)*, RIAA, Vol. XVIII, p. 88, para. 183; *ILR*, Vol. 54, p. 96.

²⁴⁷ See e.g.: transcript, 10 December 2013, Mr. Crawford, pp. 203-205, paras. 22-24.

²⁴⁸ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 457.

²⁴⁹ BM, pp. 134-136, para. 7.18-7.23 and pp. 144-145, paras. 7.57-7.58.

1 | prolongation” theory, Bangladesh is, by the same token, deprived from making the geology
2 | and geomorphology argument and is left with the sole hope that your Tribunal find that any
3 | circumstance it may have found to be relevant within 200 nautical miles “has a continuing
4 | effect beyond 200 nm.”²⁵⁰ Again, since no relevant circumstance can reasonably be
5 | invoked within 200 nautical miles, none can be beyond – and this is the end of the matter.
6 |

7 | 66. Or it should be, Mr. President. Yet, notwithstanding this inescapable conclusion,
8 | Bangladesh starts over with its preferred argument: equity. This is the alpha and omega of
9 | its entire case and it uses it again specifically in support of its eccentric contentions
10 | concerning the delimitation of the continental shelf beyond 200 nautical miles, which I will
11 | now compare with the legal, reasonable and, I would say, “classical” Indian claim.
12 |

13 | **II. The Boundary Line in the EEZ and the Continental Shelf**

14 |
15 | 67. Mr. President, Members of the Tribunal, the Indian claim is simple: the maritime
16 | boundary beyond 200 nautical miles is the prolongation of the boundary within 200 nautical
17 | miles and must be drawn in accordance with the standard equidistance/relevant
18 | circumstances method – with, of course, the difference that “within”, the boundary line
19 | divides the respective EEZs of the Parties while that is not the case “beyond”. The
20 | Bangladesh argument is more tortuous and now results in an unbelievable claim to an
21 | entirely artificial and bizarre corridor extending up to 390 nautical miles off its coast
22 | according to Bangladesh²⁵¹ (but in reality 420 nautical miles according to our
23 | hydrographers).²⁵² With your permission, Mr. President, I will start by – rather briefly –
24 | explaining why this is simply surrealistic.
25 |

26 | **Projection n° 1: Bangladesh’s Claimed Line**

27 | **1. Bangladesh’s Claim**

²⁵⁰ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 461.

²⁵¹ BR, pp. 143-144, para. 5.41.

²⁵² IR, p. 179, Figure RJ 7.2.

1 68. Having arbitrarily ruled out the standard method, Bangladesh’s point of departure is
2 the place where its angle-bisector line reaches two-hundred nautical miles from its coast.
3 But, rather than continuing this – in itself unacceptable – limit Bangladesh adds, with an
4 apparent straight face:

5
6 “A result [of prolonging the 180° bisector] that would allot to Bangladesh only 20% of its
7 potential entitlement beyond 200 M (while allotting India 98% of its entitlement) plainly
8 does not represent a reasonable and mutually balanced sharing of the relevant area.
9 Accordingly, the only way to ensure a truly equitable solution is by bending the 180° line at
10 the point where it reaches the international 200 M limit so as to allow Bangladesh to ‘enjoy
11 reasonable entitlements’ in the area beyond 200 M.”²⁵³

12
13 **End of projection 1 – Projection n° 2: Bangladesh’s Boundary Claim in regard to**
14 **India**

15
16 The sketch map you now see on the screen was the initial Bangladesh claim as illustrated in
17 its Memorial. No comment – simply absurd and outrageous!

18
19 69. Our friends on the other side realized this and, as a consequence of the ITLOS
20 Judgment and of the abandonment of their claim based on the “natural prolongation” of
21 their territory, they radically modified it. Magnanimously, they write in their Reply:

22
23 **End of Projection 2 – Projection n° 1^{bis}: The Bangladesh Claimed Line**

24
25 “... Bangladesh no longer claims the entire area of overlap. As discussed above, it
26 recognises the force and effect of the *Bangladesh/Myanmar* Judgment insofar as it relates to
27 the interpretation of Article 76. Bangladesh has therefore modified its claim to take account
28 of the ITLOS Judgment, and the delimitation principles stated therein. To be specific,
29 Bangladesh submits that upon reaching the international 200 M limit, the 180° line should
30 bend and run along an azimuth of 214° parallel to the Bangladesh-Myanmar delimitation up
31 to the outer limit of Bangladesh’s continental shelf.”²⁵⁴

32

²⁵³ BR, p. 143, para. 5.38.

²⁵⁴ BR, pp. 143-144, para. 5.41.

1 70. In a futile attempt to defend this indefensible claim, Bangladesh put forward
2 “three compelling and inter-related reasons why this constitutes the equitable solution that
3 Article 83 of the 1982 Convention requires”.²⁵⁵

4 - “*First*, it more equitably abates the cut-off effect caused by the concavity of the
5 Bangladesh coast”.²⁵⁶

6 - “*Second*, the proposed solution would be consistent with the overall geographic
7 circumstances prevailing in the Bay of Bengal, and with the *Bangladesh/Myanmar*
8 *Judgment*”.²⁵⁷

9 - “*Third*, deflecting the line in the manner Bangladesh proposes would comfort with
10 the State practice discussed in Bangladesh’s Memorial and revisited in” its Reply.²⁵⁸

11

12 71. Mr. President, we have commented at length on these three so-called “reasons” in
13 our Rejoinder²⁵⁹ and I will not repeat our argument in detail, even if my preferred opponent
14 – well say one of my preferred opponents not to make other jealous! -, James Crawford
15 briefly reaffirmed them in his pleading on Tuesday – but, with all due respect, without
16 adding much nor taking pain at replying to our own answers, which I, therefore, recommend
17 to the attention of the Tribunal.

18

19 72. And Bangladesh also puts forward what can be seen as a fourth reason, which is,
20 once again, only based on what Bangladesh presents as equity. It asserts that your Tribunal
21 can without concern shift again the delimitation line beyond 200 nautical miles because
22 “there is very little danger of creating a significant cut-off of India [...since it] would still
23 retain the continental shelf beyond 200 M in the area to the south of the outer limit of
24 Bangladesh’s claim.”²⁶⁰ Besides the fact that just a glance at the map evidently shows that
25 India, in such an hypothesis, would be severely cut off from its entitlement to the “outer
26 continental shelf”, this new inflexion finds no ground in the applicable law. It implies a kind
27 of stranglehold of Bangladesh on areas which it is not concerned with at all, and which it
28 pretends to “exchange” with an extended area in its favour.

²⁵⁵ BR, p. 144, para. 5.42.

²⁵⁶ *Ibid.* – see also transcript, 10 December 2013, Mr. Crawford, pp. 220-221, paras. 58-59.

²⁵⁷ *Ibid.*, para. 5.44. See also transcript, 10 December 2013, Mr. Boyle, p. 187, para. 54 and Mr. Crawford, pp. 219-220, para. 57.

²⁵⁸ BR, pp. 147-148, para. 5.47 – see also transcript, 10 December 2013, Mr. Crawford, p. 217, paras. 53-54.

²⁵⁹ BR, pp. 144-150, paras. 5.42-5.54.

²⁶⁰ BR, p. 143, para. 5.40 and p. 147, para. 5.46.

1

2 73. In support of this last call to equity, Bangladesh went as far as to refer to the
3 potential entitlement of India in the southern part of the Bay of Bengal and in the Arabian
4 Sea.²⁶¹ As India explained in its Rejoinder, such references are completely irrelevant:

5 - the Tribunal has not been called to delimit the whole of the Bay of Bengal, let alone
6 the Arabian Sea, but only “that part of the maritime space in which the potential
7 entitlements of the parties overlap”;²⁶²

8 - as the Tribunal in *Barbados/Trinidad and Tobago* explained, “the Tribunal’s
9 discretion must be exercised within the limits set out by the applicable law”;²⁶³ and, as the
10 ICJ recalled in the *Black Sea* case, “the legal concept of the ‘relevant area’ has to be taken
11 into account as part of the methodology of maritime delimitation”;²⁶⁴

12 - it follows that “the submarine extension of any part of the coast of one Party which,
13 because of its geographic situation, cannot overlap with the extension of the coast of the
14 other, is to be excluded -- is to be excluded -- from further consideration by the
15 [Tribunal].”²⁶⁵

16

17 74. Bangladesh does not confine itself to suggesting a stunning boundary line extending
18 as far as 420 nautical miles from its coast, it also asks the Tribunal to grant it a huge corridor
19 extending from the 200 nautical miles limit to a postulated “Outer Limit of the Bangladesh’s
20 Continental Shelf”, covering no less than 12,256 square nautical miles (that is more than
21 42,000 square kilometres). Without offering any further explanation,

22

23 ‘Bangladesh observes that in *Bangladesh/Myanmar*, ITLOS ruled that the 215°
24 boundary adopted in that case extended ‘until it reaches the area where the rights of third
25 States may be affected.’ Should the Arbitral Tribunal agree with Bangladesh that the
26 boundary with India beyond 200 M should be deflected so as to accord Bangladesh a
27 corridor out to the limits of its continental shelf, the ITLOS boundary would by necessity
28 reach the area where Bangladesh, India and Myanmar all maintain claims. In that event,

²⁶¹ See e.g. BR, pp. 114, paras. 4.139-4.140, p. 130, para. 5.6, pp. 134-135, paras. 5.16-5.17, p. 142, paras. 5.35-5.36, 5.38 and p. 158, para. 5.74. See also e.g. transcript, 10 December 2013, Mr. Crawford, pp. 194-198, paras. 6-13.

²⁶² Cf. I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 159.

²⁶³ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIIA, Vol. XXVII, p. 243, para. 373.

²⁶⁴ I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Reports 2009, p. 99, para. 110.

²⁶⁵ I.C.J., Judgment, 24 February 1982, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Reports 1982, pp. 60-61, para. 75.

1 Bangladesh submits that the 215° line should continue to mark the limits of its maritime
2 jurisdiction...”²⁶⁶

3

4 75. This huge claim raises many difficulties – to put it politely:

5 - *First*, as India explained in its Rejoinder, “the ITLOS 215° line constitutes the
6 maritime boundary between Bangladesh and *Myanmar*. As Bangladesh successfully argued
7 before the ITLOS ‘third States are not bound by the Tribunal’s judgment and their rights are
8 unaffected by it’ since ‘delimitation judgment by the Tribunal is merely *res inter alios*
9 *acta*.’²⁶⁷ For this reason, Bangladesh cannot claim maritime areas *east* of the 215° line on
10 the basis of the ITLOS Judgment...”²⁶⁸

11 - *Second*, and “reciprocally” in some respects, Bangladesh simply disposes of
12 Myanmar’s rights and interests – in particular if one keeps in mind that the maritime
13 boundary between India’s Andaman Islands and Myanmar in the continental shelf beyond
14 200 nautical miles also remains to be delimited. And

15 - *third*, in any case, all the reasons already explained which exclude the inflexion of
16 the boundary line, apply *a fortiori* to this last-minute artificial and absurd claim.

17 It may be the case that Bangladesh finally realized the incongruity of its claim; its
18 Submissions at the end of its Reply are mute as to this proposed extension of the ITLOS
19 Judgment, which they do not even mention. Bangladesh’s tactic is familiar: Bangladesh has
20 accustomed us to unjustified changes of argument and one more volte face next Monday
21 cannot be excluded. Let’s be prepared for new surprises...

22

23 76. The reasons I have just exposed are more than sufficient, Mr. President, to rule out
24 Bangladesh’s unreasonable claim to a disproportionate part of the continental shelf lying
25 beyond 200 nautical miles from its coast. However, Mr. President, before reviewing the
26 much less extravagant India’s claim, I would like to add a few words on another of the most
27 curious and cavalier aspects of Professor Crawford’s presentation last Tuesday. It
28 concerns cut-off and overlapping.

29

30

31

²⁶⁶ BR, pp. 149-159, para. 5.54.

²⁶⁷ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 352.

²⁶⁸ IR, pp. 182-183, paras. 7.23-7.24.

1 **End of Projection 1^{bis} – Projection n° 3: “Figure RJ 7.2 from India’s Rejoinder” as**
2 **reviewed by Bangladesh (Tab 3-22 in Bangladesh’s Folder)**

3
4 77. My distinguished opponent put on the screen the alleged Figure RJ 7.2 from India’s
5 Rejoinder – in fact it has been reviewed – but, in some respect improved by Bangladesh’s
6 cartographers – all right! You can see it again. I do not think it deserves long comments: it is
7 a perfect illustration of a totally arbitrary cut-off. The only comment made by my learned
8 friend was: this graphic “shows an impoverished subcontinent cowering before the mighty,
9 long extension of Bangladesh’s southeast-facing coast.”²⁶⁹ This is anything but a legal
10 argument – and the cut-off doubly imposed on India’s entitlements is obvious.

11
12 **End Projection 3 – Projection n° 4: Figure RJ 7.2 from India’s Rejoinder (Tab 3-22 in**
13 **Bangladesh’s Folder)**

14
15 78. Now, on the screen the “real” or “original” figure RJ 7.2 as included in the
16 Rejoinder. It too shows the cut-off (although only of continental India – and I’ll say a few
17 words on this in thirty seconds). But it adds something which has been forgotten by the
18 cartographers working for Bangladesh: the distances; the most proximate distance from
19 Bangladesh’s coast to the extremity of its outer continental shelf claim is, I repeat, 420
20 nautical miles; for its part, India’s crashes into the Bangladesh’s line at a maximum distance
21 of 251 nautical miles. This has nothing to do with a rather unpleasantly declared
22 “mightiness”; it is just an obvious and indefensible cut-off.

23
24 **End of Projection 3 - Projection n° 4: Overlapping Claims Beyond 200 NM**

25
26 79. Indefensible, Mr. President, because it is unfair, unjust and inequitable. But
27 indefensible also because it occurs far away from the relevant area, the one where the claims
28 (the legitimate claims, those which are based on legally justifiable entitlements) overlap.
29 This area is illustrated on the graph now on the screen. The relevant simplified) coasts are
30 those which have been drawn by Bangladesh itself on the map entitled “The Relevant
31 Coasts” which Mr. Martin showed last Tuesday and which was reproduced in Tab 3-24 of

²⁶⁹ Transcript, 10 December 2013, Mr. Crawford, p. 221, par. 63, lines 19-21.

1 its Folder and again we have put in Tab 8-5 of today's Folder (of course Bangladesh
2 prolonged the so-called “relevant coast” down to Sandi Point while I will stop it at the real
3 turning point – that is Devi Point; but it changes nothing for my demonstration or could only
4 be worse for Bangladesh. In blue the Indian coast; in green the Bangladesh coast; in red the
5 ITLOS line; and in orange (as far as I can see), the Indian claim line; still following the
6 projections of maritime entitlements followed by Bangladesh, the Indian entitlement can be
7 represented like that – in blue; and the Bangladesh’s entitlement like that – in green; the
8 overlapping resulting legitimate claims are now shown in red and brown. This area, Mr.
9 President, and this area only is at stake in our case as far as the continental shelf beyond 200
10 nautical miles is concerned. Bangladesh may ask you to delimit the whole Indian Ocean as
11 well as the Arabian Sea; it would not be less – nor more – absurd than its actual claim.
12

13 **End of Projection 4 – Projection n° 5: The Arbitrariness of Bangladesh’s Claim**
14

15 80. Mr. President, in his Tuesday’s pleading, Professor Crawford, in support to the
16 claim in equity made by Bangladesh, did not hesitate to bravely develop an incredible
17 hotchpotch of percentages, *quid pro quos*, ratios – not to forget various niceties *vis-à-vis*
18 India compared with a child and, simultaneously, accused of “self-proclaimed
19 domination”²⁷⁰ or of taking an “imperious, if not imperial” position.²⁷¹ I am not sure these
20 “arguments” add much to the debates, nor do I think that this novel invention of an
21 haphazardly new test of all-catching “proportionality” must – nor can – be seriously
22 rebutted, Mr. President: you take a length, then an area; you make a ratio... All right: but
23 which coast? which area? nobody knows – and nobody can know, since you are expressly
24 called to legislate on this new legal *terra incognita*²⁷².
25

26 81. Discussing the issue of adjustment of the equidistance line, the Tribunal in
27 *Barbados/Trinidad and Tobago* cautioned against “artificial construction”.
28

29 “The Tribunal concludes on this question not only that the ‘relevant circumstances’
30 provide no justification for the use of Point A as a turning point, but also that the vector
31 approach itself is untenable as a matter of law and method. In fact, such an approach entails
32 projecting straight out the whole coastline, while at the same time moving the projection

²⁷⁰ See e.g., transcript, 10 December 2013, Mr. Crawford, p. 196, paras. 10-11.

²⁷¹ *Ibid.*, p. 198, para. 14, line 3.

²⁷² See transcript, 10 December 2013, Mr. Crawford, pp. 217-218, paras. 55.

1 northwards, without regard to the geographical circumstances the Tribunal considers
2 relevant, and then using the northern limit of that projection as the delimitation line with
3 Barbados. *Equidistance and relevant circumstances are simply discarded so as to favour a*
4 *wholly artificial construction.*”²⁷³

5 Definitely, Mr. President, our opponents should read this Award with
6 attention.

7 82. This warning fully applies to Bangladesh’s wholly artificial construction.

9 **2. The Indian Claim**

10 **End of Projection 5 – Projection 6: The Maritime Boundary in the Exclusive** 11 **Economic Zone and the Continental Shelf**

12
13 83. Mr. President, Members of the Tribunal, I will now turn to the description of the
14 delimitation line in the exclusive economic zone and the continental shelf. This morning, Sir
15 Michael has shown you that the base points identified by India are unquestionably feasible;
16 they are valid; they are appropriate. Six of these base points control the equidistance line
17 proposed by India beyond the territorial sea. There are three on each side.

18
19 84. On India’s coast, the relevant base points are:

- 20 - I-2, based on New Moore Island;
- 21 - I-3, located on a low-tide elevation south of Dalhousie Island; and
- 22 - I-4, which lies on Devi Point;

23
24 85. On Bangladesh’s coast, the relevant base points are:

- 25 - B-3, located on a low-tide elevation which lies on the southeast of Putney Island;
- 26 - B-4, which lies on a low-tide elevation southeast of Andar Chal Island; and
- 27 - B-5, located on Shahpuri point near the boundary between Bangladesh and Myanmar.

28

²⁷³ *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, U.N.R.I.A.A., Vol. XXVII, p. 240, para. 360 – italics added.

1 86. On the basis of these six base points, the provisional equidistance line in the
2 exclusive economic zone and the continental shelf is constructed as follows:

3 - from Point X, the end point of the maritime boundary in the territorial sea, the
4 equidistance line extends to Point T4, which is equidistant from base points I-2, I-3 and B-3;

5 - then the line continues through to Point T5, which is equidistant from base points
6 I-3, B-3 and B-4;

7 - and Point T6, which is equidistant from base points I-3, B-4 and B-5, until it
8 reaches the limit of 200 nautical miles of Bangladesh at Point Y;

9 - from point Y, the maritime boundary becomes a pure continental shelf boundary and
10 passes through point T7, which is equidistant from base points I-3, I-4 and B-5, before
11 meeting the maritime boundary between Bangladesh and Myanmar at Point Z.

12

13 87. Since no relevant circumstance requires any adjustment of this provisional line, this
14 line constitutes the single maritime boundary between the Parties – subject to the non-gross
15 disproportionality test which forms the third step of the three-stage standard method –
16 which Professor Reisman will now discuss if you could kindly give him the floor, Mr.
17 President.

18

19 Thank you very much.

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PRESIDENT WOLFRUM: Thank you, Professor Pellet.

No questions.

Then I give the floor to Professor Reisman, please.

PROFESSOR REISMAN: Thank you, Mr. President.

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3 **PERMANENT COURT OF ARBITRATION**

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5 ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS
6 CONVENTION ON THE LAW OF THE SEA

7
8 BAY OF BENGAL MARITIME BOUNDARY ARBITRATION BETWEEN THE
9 PEOPLE'S REPUBLIC OF BANGLADESH AND THE REPUBLIC OF

10
11 **THE NON-DISPROPORTIONALITY TEST**

12 **PROFESSOR W. MICHAEL REISMAN**

13
14 1. Thank you, Mr. President, Members of the Tribunal. I am honored to return on
15 behalf of India to address you—and I promise very briefly -- on the third stage of the
16 maritime delimitation process, the application of the non-disproportionality test. The law on
17 this matter is straightforward, and the application of the law to the facts should be equally
18 straightforward. It is mathematical in the sense that values are expressed numerically, but
19 it is a soft mathematics. That soft and approximate character would seem to make
20 accommodation easy but in the present case, it is a contentious issue. As Sir Michael has
21 explained, the Parties disagree on the two key facts to which the law is to be applied: the
22 relevant coastal lengths and, in consequence, the relevant area. I will briefly consider the
23 law just on the focus of non-disproportionality and, finally, explain India's proposed
24 application.

25 The Law

26 2. The non-disproportionality test is conducted to ensure that the
27 delimitation line which has emerged from the application of the two preceding

1 stages – I’m quoting the language of the Black Sea -- “does not lead to any
2 significant disproportionality by reference to the respective coastal lengths and the
3 apportionment of areas that ensue.”²⁷⁴ “The respective coastal lengths” in maritime
4 boundary delimitation are not discretionary creations of each party, as Sir Michael
5 explained this morning. They are objectively determined because the relevant coasts
6 are only those coasts which generate overlapping claims as Professor Pellet has just
7 explained dramatically. The ITLOS held in the *Myanmar* case at paragraph 489 that
8 [Tab 9.1]

9 “the relevant maritime area for the purpose of the delimitation of the
10 exclusive economic zone and the continental shelf between Bangladesh and
11 Myanmar is that resulting from the projections of the relevant coasts of the Parties”.

12 And at paragraph 493, [Tab 9.2]

13 “for the purpose of determining any disproportionality in respect of areas
14 allocated to the Parties, the relevant area should include maritime areas subject to
15 overlapping entitlements of the Parties to the present case.”

16 3. Mr. President, it is important to emphasize, even again, that the criterion is
17 not proportionality. It is “significant disproportionality” or “gross disproportion.”²⁷⁵
18 The International Court in *Nicaragua v Colombia* explained that a tribunal’s task “is
19 not to attempt to achieve even an approximate correlation between the ratio of the
20 lengths of the Parties’ relevant coasts and the ratio of their respective shares of the
21 relevant area.”²⁷⁶ – not to attempt to achieve an approximation, an approximate

²⁷⁴ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, ICJ Reports 2009, p. 129, paras. 210-211; see also p. 99, para. 110 and p. 103, para. 122; see also *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, para. 240.

²⁷⁵ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, UNRIIA, Vol. XXVII, p. 214, para. 238 (emphasis added).

²⁷⁶ Paragraph 242.

1 correlation. It is, rather, “to check for a significant disproportionality.”²⁷⁷ With
2 respect to the method to be deployed, as the ITLOS put it in *Bangladesh/Myanmar*,
3 “mathematical precision is not required in the calculation of either the relevant
4 coasts or the relevant area”.²⁷⁸ Here I would read that as presumptively meaning
5 mathematical precision in the relevant or relevant area in the sense of not fighting
6 over each kilometer or 100 meters as is wanted in interstate conflicts, but simply to
7 have a rough approximation of the relevant coast of the relevant area. Rather, I
8 would suggest, the purpose is to ensure that the result of the execution of the two
9 prior stages of the delimitation procedure, as the *Barbados v. Trinidad and Tobago*
10 Tribunal put it, “is not tainted by some form of **gross** disproportion.”²⁷⁹

11 4. Although Bangladesh has recited many of the same authorities, it actually
12 tries to turn the gross disproportionality test into a “most proportionate” or “more
13 proportionate test”. In its Reply, Bangladesh asserts that “India's claim line and the
14 provisional equidistance line ... are significantly less proportionate...”²⁸⁰ than the
15 180° line which it proposes.” And it volunteers that its 180° line gives Bangladesh
16 “marginally more maritime space than it would get by drawing a strictly
17 proportionate boundary [and thus] – I’m interposing – “easily passes the
18 disproportionality test,”²⁸¹ as the authorities I quoted to you hold. But the function
19 of the non-disproportionality test is not to secure an equal allocation of the relevant
20 area; it is only to avoid gross disproportionality.

²⁷⁷ Id. at paragraph 240.

²⁷⁸ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, para. 477.

²⁷⁹ Ibid.

²⁸⁰ BR 5.72.

²⁸¹ BR 5.71.

1 5. In its Reply, Bangladesh also tries to take the non-disproportionality test,
2 which in reality only comes into play at the third stage of delimitation, and to
3 transform it into some new *proportionality* test based on what Bangladesh calls a
4 “margin of appreciation”; it would then retroject this novel proportionality test into
5 the second stage.²⁸² Bangladesh purports to base itself on selected dicta from
6 *Nicaragua v. Colombia* in which the Court dealt with the unique geographical
7 circumstances in that case. Mr. President, that geographical configuration bears no
8 resemblance whatsoever to the case before you. India does not accept Bangladesh's
9 invention of a new second stage proportionality test. I note it at this juncture, while I
10 focus on the third, only to ensure that it does not infect the discussion of the third
11 stage, which international law has now clearly established as the place for a
12 non-disproportionality test.

13 The Relevant Coastlines and the Relevant Area

14 6. The first thing to determine when applying the non-disproportionality test
15 is the ratio of the Parties’ respective coastal lengths which generate overlapping
16 claims to the EEZ and continental shelf, overlapping claims. The relevant coasts
17 determine the relevant area. The International Court explained in *Black Sea* that

18 [Tab 9.3]

19 “It is therefore important to determine the coasts . . . which generate the
20 rights of [the Parties] to the continental shelf and the exclusive economic zone,
21 namely, those coasts the projections of which overlap. . . .”²⁸³

²⁸² BR 4.156-157; see also *id.* at 153-154.

²⁸³ At paragraph 77.

1 My colleagues have already drawn your attention to the fact that, in its Memorial,
2 Bangladesh failed to define the relevant coasts for the purposes of the
3 non-disproportionality test. Instead, it presented you with two arbitrary straight
4 lines, with scant correlation with the actual direction of the coast. This was
5 ostensibly to serve as the basis for its angle-bisector.

6 **[Tab 9.4 Power Point of Counter-Memorial 6.1 and 6.2]**

7 7. Besides failing to provide the lengths of coastlines, this lapse by
8 Bangladesh also failed, as a consequence, to indicate the overlapping claims and, as
9 result of that, to indicate the relevant area. Nor was Bangladesh's argument in the
10 alternative a more satisfactory discharge of this requirement.

11 **[Tab 9.5 Power Point, Counter-Memorial Sketch Map 6.3]**

12 8. In its Reply, Bangladesh, as my colleagues have pointed out, reversed
13 course. It accepted India's endorsement of Bangladesh's coast as determined by
14 ITLOS in *Myanmar* but, ignoring the reasoning on which the ITLOS determination
15 was based, it sought to add a fourth segment to India's description of its own relevant
16 coast. As Sir Michael explained this morning, rather than stopping at Devi Point,
17 where the overlapping claims generated by each State's coasts end, Bangladesh has
18 proposed to extend India's relevant coast from Devi Point south further down the
19 Indian coast to Sandy Point. This would add an additional 304 kms to India's coast.
20 Bangladesh did this, even though the new segment from Devi Point to Sandy Point
21 has no opposing Bangladeshi coastal length and thus violates the ground rules which

1 ITLOS and the ICJ in its judgments prescribed for this operation and which I cited to
2 a moment earlier.

3 9. International courts have held that only marked differences between the
4 two ratios require the adjustment of the line. I'd like to talk briefly about the scope of
5 those ratios and the extent to which they influence this particular case. In the case
6 of *Jan Mayen*, the ratio between the coast of the island of Jan Mayen and that of
7 Greenland was 1 to 9.2 or 1 to 9.1, according to two different methods of
8 calculation²⁸⁴; that disparity led the Court to consider that “the median line should be
9 adjusted or shifted in such a way as to effect a delimitation closer to the coast of Jan
10 Mayen.”²⁸⁵ In *Barbados v. Trinidad and Tobago*, the Tribunal decided that “[t]he
11 disparity of the Parties’ coastal lengths resulting in the coastal frontages abutting
12 upon the area of overlapping claims is sufficiently great to justify” a limited
13 adjustment of the line²⁸⁶; in that case, the ratio between the length of the respective
14 coasts of the Parties was 8.2:1 in favor of Trinidad and Tobago²⁸⁷. These figures are
15 obviously out of all proportion with those in the present case²⁸⁸.

16 10. In the *Black Sea* case, the ICJ stated: [Tab 9.6]

²⁸⁴ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 65, para. 61.

²⁸⁵ *Ibid.*, p. 68, para. 69.

²⁸⁶ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, p. 239, para. 350.

²⁸⁷ *Ibid.*, p. 234, para. 326.

²⁸⁸ In *Tunisia/Libya*, the International Court of Justice found that the proportions of approximately 34:66 in favour of Tunisia in respect to the lengths of the coastlines and coastal fronts and a proportion 40:60 in respect to the areas of continental shelf “meet the requirements of the test of proportionality . . .” (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 91, para. 131). In the *St. Pierre & Miquelon* case, the Court of Arbitration decided that a ratio between the coastlines of 15.3:1 and a ratio of the maritime spaces appertaining to the Parties of 16.4:1 was not disproportionate (*Delimitation of Maritime Areas between Canada and France*, Decision of 10 June 1992, *UNRIAA*, Vol. XXI, p. 296, para. 93).

1 “It suffices for this third stage for the Court to note that the ratio of the
2 respective coastal lengths for Romania and Ukraine, measured as described above,
3 is approximately 1:2.8 and the ratio of the relevant area between Romania and
4 Ukraine is approximately 1:2.1. The Court is not of the view that this suggests that
5 the line as constructed, and checked carefully for any relevant circumstances that
6 might have warranted adjustment, requires any alteration.”²⁸⁹

7 Mr. President, we submit, the same holds true in the present case.

8 Conclusion

9 11. As Sir Michael has explained, the length of India’s relevant coast is 411
10 km and the length of Bangladesh’s relevant coast is 417 km. The ratio of the lengths
11 of the relevant coasts of the two countries is thus 1:1.015. The relevant area
12 generated by the overlapping claims of these coastlines is 176,756 square
13 kilometres, which when delimited by the line proposed by India results in 93,235
14 square kilometres for India and 83,521 square kilometres for Bangladesh. The ratio
15 of their respective shares of the relevant area is thus 1:0.90 – as shown on the
16 sketch-map which is displayed. The ratios of the relevant coasts are 1:1.015. There
17 is therefore hardly any difference at all, certainly no ‘significant’ or ‘gross’
18 disproportionality. As a consequence, Mr. President, India submits that no
19 adjustment of the delimitation line is required by the application of the
20 non-disproportionality text.

21 [Tab 9.7 Power Point of final submission Figure RJ7.3 at p. 191]

²⁸⁹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 130, paras. 215-216.*

1 12. Mr. President, Members of the Tribunal, that concludes my statement. And that
2 concludes India's first round of pleadings. I and my colleagues thank you for your patience
3 and your attention.

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1 PRESIDENT WOLFRUM: Professor Reisman, could you wait for a
2 moment. Professor Shearer has a question.

3 ARBITRATOR SHEARER: Professor Reisman, I'm just wondering if you
4 can remind us whether in any of the precedent cases the adjective "gross" is used in stating
5 the proportionality test. You have spoken several times of "gross disproportionality." Are
6 there degrees of proportionality, and would it be enough for a court or tribunal to find
7 disproportionality in any line requiring adjustment, or must it be "gross"?

8 Thank you.

9 PROFESSOR REISMAN: Thank you for your question, Professor Shearer.
10 I restrained myself from answering you yesterday when you kindly posed the question to
11 me, but I will address this question today, with the President's permission.

12 PRESIDENT WOLFRUM: Sure. If you wish to respond, go ahead.

13 PROFESSOR REISMAN: The word "gross disproportion" comes from the
14 Arbitral Tribunal of Barbados/Trinidad and Tobago at Page 376. As to the variation in the
15 use of the adjectives, I'm not sure exactly where the line, if I may use that term, is drawn, but
16 if we infer from the case law that the disparity of 1:8 or 1:9 certainly tips the scales in that
17 direction, and we can also determine that a disparity of 1:2 presumably does not. So, the
18 gray area between those two, at what point a serious disparity becomes a gross disparity
19 between two and eight or two and nine, I can't address. Happily, for the Tribunal in the
20 present case, we are in the small figures when it's not plainly gross or even excessive
21 disparity.

22 ARBITRATOR SHEARER: Yes, I can understand that you could use the
23 word "gross" to describe the actual situation in a particular case, but as a test--as the rule, if
24 you would like--that is what I was considering, and thank you anyway for your clarification.

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PROFESSOR REISMAN: Thank you for your question, sir.

PRESIDENT WOLFRUM: Thank you.

Any further questions? No?

Thank you, Professor Reisman.

Let me then conclude. This ends today, and ends also the first day or the first round for India. We will meet again on Monday starting at 10:00 with Bangladesh's second round, Number 1 and 2, in the morning.

And it remains to me to wish you a pleasant weekend, perhaps a bit of recovery after the sleepless night. Thank you.

(Whereupon, at 4:51 p.m., the hearing was adjourned until 10:00 a.m., Monday, December 16, 2013.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN