

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 5

HEARING ON THE MERITS

Monday, December 16, 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 2:00 p.m. before:

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JUDGE JEAN-PIERRE COT, Arbitrator

JUDGE THOMAS A. MENSAH, Arbitrator

DR. PEMMARAJU SREENIVASA RAO, Arbitrator

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PRESIDENT WOLFRUM: Before we hear Bangladesh, let me make one announcement.

We have discussed within the Tribunal whether we wanted the final submissions in writing or not. We would prefer to have them in writing, but since this is taken Bangladesh a bit by surprise, we will give Bangladesh at the end of the day to submit them in writing. But could you kindly at the end of today read them out so that we have them in the transcript as well as edged of the day in writing.

MR. REICHLER: Yes, we shall, Mr. President. We will do both.

PRESIDENT WOLFRUM: Very good.

Anything else?

No?

Then you may start. I have a feeling it's Professor Sands who will be starting.

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PERMANENT COURT OF ARBITRATION

*Bay of Bengal Maritime Boundary
Arbitration between Bangladesh and India*

Philippe Sands

The Location of the Land Boundary Terminus

16 December 2013

11 1. Thank you very much, Mr. President, the Members of the Tribunal, good morning.
12 My task this morning is to respond to India's arguments in relation to the location of the
13 land boundary at terminus (or "LBT").

14 2. You will have with you two new sets of tabs, one for each half of this mornings'
15 presentations. The differences between the Parties could not be more stark.
16 Bangladesh has adopted a position that is consistent and clear. It argues as follows:

17 **[FIGURE 1A, SEQUENTIALLY]** [LBT]

18 (1) the land boundary terminus is located at the point where the "midstream of the main
19 channel" of the Hariabhanga River met the Bay of Bengal on the 15th of August 1947;

20 (2) the land boundary terminus has remained fixed at that location ever since;

21 (3) the Hariabhanga River (and its "main channel"), and the estuary and the coast, have
22 changed significantly in the intervening seven decades; and

1 (4) the location of the LBT is to be determined by reference to the principle of *uti possidetis*
2 and a “photograph of the territory”¹ at the critical date in August 1947, by reference to the
3 charts available at that date.

4 3. By contrast, India has presented the Tribunal with arguments that are inconsistent,
5 unclear and contradictory. On the basis of the various positions argued by India, so far as
6 we are able to ascertain, it appears that India's argument is as follows: [FIGURE 1B,
7 SEQUENTIALLY]:

8 (1) the land boundary terminus is located at the point where the “midstream of the main
9 channel” of the conjoined Hariabhanga **and Raimangal Rivers** meet at the Bay of Bengal
10 as **at today’s date**;

11 (2) the LBT has been and is **fluid and fluctuating**;

12 (3) the Hariabhanga River (and its “main channel”), and the estuary and the coast **have not**
13 **changed** in the intervening seven decades; and

14 (4) the location of the LBT **can ignore** the principle of *uti possidetis*, **does not** require a
15 “photograph of the territory” at the critical date, and is to be determined by reference to a
16 **chart prepared by India after these proceedings began.**

¹ *Case Concerning the Frontier Dispute (Benin/Niger)*, Judgment, I.C.J. Reports 2005, p. 109, at para, 26.

1 4. Mr. President, Members of the Tribunal, the two Parties before you are divided: one has
2 taken account of the geographic realities and applied the law, the other had ignored
3 both geography and law. India is constantly changing arguments reflect a state of
4 complete disarray. Against this general background, I will set out six propositions
5 that we suggest The Tribunal might wish to consider as it resolves the dispute
6 between the Parties.

7 5. Proposition One: **the law matters**. The location of the land boundary terminus is to be
8 determined by reference to the applicable law, including in particular the terms of
9 the Radcliffe Award. This may seem obvious, but in circumstances in which India
10 has made but a single reference to the principle of *uti possidetis* – erroneously
11 claiming (without reference to a single legal authority) that it does not apply
12 because the parties have agreed otherwise² – the proposition I've just made needs
13 to be stated clearly. We were very surprised that India chose to say nothing about
14 the principle or the clear case-law to which we drew your attention in the first
15 round.³ Of course if they address it in the second round we will not have an
16 opportunity to respond to what they say. That would be unfortunate and unfair.

17 6. As regards the Radcliffe Award, it is at the heart of the “rule[s] of international law not
18 incompatible with [the 1982] Convention” that the Tribunal is mandated to apply
19 by virtue of Article 293 of the Convention. Arbitrator Rao raised a question

² Transcript, Day 3, page 266.

³ Transcript, Day 1, pp. 74-76.

1 relevant to this at the end of the session last Thursday. You enquired, Sir, whether
2 there was any material available, “that can help us to understand the location of the
3 point with respect to the equitable nature of the enjoyment of the common points”.⁴
4 The question implied, if we understood it correctly, the possibility that “equitable”
5 considerations might assist the Tribunal to determine the location of the land
6 boundary terminus. In our submission, and with great respect, “equitable”
7 considerations can have no role in determining the location of the land boundary or
8 its terminus. There is no question of taking into account social or economic
9 considerations, or any other factors of that kind, in locating the land boundary. Nor
10 can there be any question of splitting the difference between the Parties, of
11 somehow locating the terminus somewhere between the two points identified by
12 the Parties.

13 7. Why? Because this is a Tribunal of Law, and it must apply the applicable law, and the
14 applicable law says nothing about equitable considerations in respect to this part of
15 the dispute. The applicable law requires the Tribunal, as its initial task, to locate the
16 point where the “midstream of the main channel” of the Hariabhanga River met the
17 Bay of Bengal, on the 15th of August 1947, if that is possible. India accept that
18 proposition: it has told you that you can only seek to identify that point by reference

⁴ Transcript, Day 3, page 341.

1 to the conditions that pertain today if it is “impossible” to identify the point as it
2 was in 1947.⁵

3 8. In this regard, both Parties referred you to the Bagge Award, [FIGURE 2] and in
4 particular the passage that provided that the date of demarcation becomes relevant
5 “If the demarcation of this line is found to be impossible”.⁶ I am going to return in
6 due course to the significance of this passage, which is accepted by India.
7 [SCREEN OFF]

8 9. So I turn to Proposition Two, which is in two parts: **(A) the location of the boundary**
9 **and the land boundary terminus were fixed in 1947, and (B) that location has**
10 **not been supplanted by any agreement on a fluid boundary or land boundary**
11 **terminus.** Mr. President, the Radcliffe Award set a fixed boundary along the
12 midstream of the main channel of the Hariabhanga River, with effect from the 15th
13 of August 1947. It follows that the land boundary terminus was also fixed at that
14 date. That was the position accepted by India in its Counter-Memorial⁷ and you
15 heard no explanation from Professor Reisman as to the reasons for India’s
16 subsequent change of position. Instead, he and Mr. Shankardass offered the
17 Tribunal an argument to the effect that in 1951, four years after the Radcliffe

⁵ Transcript, Day 3, page 325.

⁶ *Bagge Award*, BM vol. III, Annex 16, p. 13.

⁷ CM, para. 5.31 (“The land boundary terminus, which is the starting point for the maritime delimitation, was determined at the time of the independence of India and Pakistan in August 1947, and has not subsequently changed.”)

1 Award, India and Pakistan entered into an “agreement” to change a fixed boundary
2 for one that was fluid.⁸ The only evidence offered in support of such an agreement
3 was an exchange of letters between two civil servants, one of whom is identified,
4 the other (the Indian) is not.⁹

5 10. Now, we can understand that this argument was presented by Mr. Shankardass and
6 Professor Reisman, and not by Sir Michael Wood, given the rather different
7 arguments, as you will remember, Mr. President, he presented when he was
8 wearing another hat out of Myanmar in the parallel case. “The burden of proof . . . is
9 a heavy one”, he told ITLOS,¹⁰ on behalf of Myanmar back then. And Sir
10 Michael reminded the International Tribunal for the Law of the Sea as to the words
11 of the International Court of Justice in the *Nicaragua v Honduras* case, and I quote:
12 “[t]he establishment of a permanent maritime boundary is a matter of grave
13 importance and agreement is not easily to be presumed”.¹¹ And he reminded the
14 Tribunal that States in that care are “careful” in authorizing persons to engage in
15 such matters.¹² Now India seeks to persuade you that an anonymous, unknown
16 Indian civil servant could somehow have bound India to an agreement on its land
17 and maritime boundary, by means of a single three-sentence letter.

⁸ Transcript, Day 3, p. 263, para. 7; p. 323, para. 46.

⁹ IR, Annex RJ-1 & RJ-2.

¹⁰ ITLOS PV ITLOS/PV.11/7/Rev.1, 15 September 2011, p. 26, line 43 et seq., citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 735, para. 253.

¹¹ *Ibid.*

¹² ITLOS PV ITLOS/PV.11/7/Rev.1, 15 September 2011, p. 28, line 28.

1 11. In its Counter-Memorial, India made no mention of any such agreement. It is a
2 Johnny-come-late. The “agreement” was never published (or otherwise) made
3 public. It was not registered with the United Nations. Mr. President, International
4 Tribunal for the Law Of the Sea made clear its views in its judgment in the
5 *Myanmar* case, on a matter it characterized as “sensitive”.¹³ Applying the standard
6 adopted by ITLOS to the facts before you, it is plain that there was no such
7 agreement, whether by treaty or other means. The requirements of the Radcliffe
8 Award have not been set aside in the improbable manner argued for by Mr.
9 Shankardass or by Professor Reisman.

10 12. Proposition Three: **the location of the “main channel” of the Hariabhanga River**
11 **is what matters.** India argues that you look for the “main channel” of the conjoined
12 Hariabhanga and Raimangal Rivers (I might say we might throw in the Jamuna
13 River too, for good measure, although the distinguished Agent for India omitted to
14 do so in her introductory words).¹⁴ This is based on a very curious reading of
15 Notification 964, which, as you recall, refers, to “the midstream of the main
16 channel for the time being of the rivers Ichhamati and Kalindi, Raimangal and
17 Hari[a]bhanga till it meets the Bay”.¹⁵

¹³ *Bangladesh v. Myanmar* Judgment, 2012, paras. 95-99.

¹⁴ Transcript, Day 3, page 252 (“main channel of the Hariabangha and Raimangal meets the Bay”).

¹⁵ Government of Bengal, Notification 964 Jur. (24 January 1925), reprinted in *The Calcutta Gazette* (29 January 1925) (hereinafter “Notification 964 Jur (1925)”) at p. 178 (emphasis added). MB, Vol. III, Annex B9.

1 13. Last Monday, when I was before you, I indicated that India's proposition was very
2 easily tested: if the reference to the rivers "Raimangal and Hari[a]bhanga" implied
3 the existence of a conjoined "main channel", as India argues, then so must the
4 reference to the "Ichhamati and Kalindi" rivers.¹⁶ Was there such a conjoined
5 "main channel" of the "Ichhamati and Kalindi" Rivers in 1947? There was not.
6 [FIGURE 3] On your screens you can see Chart 859 from 1931. Let us begin by
7 highlighting the top, the Ichhamati River, [TRANSITION]. You can see it there in
8 blue. Now let's zoom in and see the point where it connects with the Kalindi River
9 [TRANSITION]. You can see that very, very clearly. And now let us carry on
10 down the Kalindi River, to the point where it connects with the Raimangal River.
11 The rest you are familiar with. [TRANSITION] So we issued an invitation to
12 Professor Reisman: please show us on Wednesday where the "main channel" of
13 the conjoined Ichhamati and Kalindi Rivers is located.¹⁷ We'll be amazed if you are
14 able to do so. If you can't, we would welcome an explanation as to the purpose of
15 the word "and" that separates the words "Ichhamati" and "Kalindi" in the phrase
16 "Ichhamati and Kalindi", if it is not the one for which Bangladesh has argued. The
17 "struggle", we say, is for Professor Reisman's side, not ours.¹⁸ [SCREEN OFF]
18 The Radcliffe Award was concerned, in the area with which we are focused, with
19 the "main channel" of the Hariabangha River, not the "main channel" of the

¹⁶ Transcript, Day 1, p. 84, line 20 *et seq.*

¹⁷ ICM, para. 4.17.

¹⁸ Transcript, Day 3, p. 316, line 9.

1 Hariabhanga and Raimangal rivers, and not the “main channel” in the Raimangal
2 estuary, not the "main channel" in the Raimangal estuary. In its
3 Counter-Memorial, India explicitly recognized that “the boundary follows the
4 *midstream of the main channel* of the Hariabhanga ...”.¹⁹ That statement
5 contradicts the argument it now makes.

6 14. In support of India’s revised position, Professor Reisman relied on the *Kasikili/Sedudu*
7 case.²⁰ He was very wrong to do so, and I'm sure he knows that he was wrong. That
8 case concerned two channels of the same river, as split by the Kasikili/Sedudu Islands.
9 This case concerns two different rivers, each with its own distinct and separate main
10 channel.

11 15. Which brings me to Proposition Four: **the “main channel” of the Hariabhanga River**
12 **as it was in August 1947 is easily identifiable.** This is the only channel that
13 concerns the Tribunal.

14 16. On Thursday Professor Reisman showed you Bangladesh’s Chart 7501 on which
15 India’s cartographers had rather imaginatively added a 9-meter contour line in red.
16 You can see it now on your screen [FIGURE 4]. This was the charted that
17 purported to show “the Hariabhanga and Raimangal Rivers joining before India’s

¹⁹ CM, para. 4.8 (emphasis in the original).

²⁰ Transcript Day 3, page 317 (para. 23).

1 proposed point, whereupon the conjoined rivers descend into the Bay of Bengal.”²¹
2 Those are his words. Well, perhaps Professor Reisman might explain the basis
3 upon which he was able to find a 9-meter line, because the Chart does not depict a
4 9-meter line. India’s choice of a 9-meter line is arbitrary, strategic and
5 manipulative. Why not show [TRANSITION] the actual contour lines drawn on
6 the chart, namely the 10-meter contour line? Because Mr. President, as you can see,
7 when you take the 10-meter contour chart, Professor Reisman’s purportedly
8 “conjoined rivers”²² disappear. [SCREEN OFF]

9 17. Professor Reisman proceeded to argue “the part of the Hariabhanga flowing to the west
10 of New Moore Island encounters shoals or lesser depths between 2 and 5 meters
11 and, thus, cannot be the main channel.”²³ Those are his words. We assume that by
12 this he means the “main channel” of the estuary, that is to say the deepest of several
13 channels in the estuary, and it indicates that he has fallen into serious error. Of
14 course BA Chart 859 of 1931 shows no New Moore Island or South Talpatty
15 Island, so his words cannot apply to that time. [FIGURE 6] India’s modern-day
16 chart 351, on your screens, shows that India’s preferred eastern channel – the
17 channel of the Raimangal River – is equally shallow beyond the estuary, at depths
18 of between 2.4 and 5.5 meters. You can see that dotted around in the red circles.
19 But it is not blocked. It is still navigable by the few short draft vessels that sail these

²¹ Transcript Day 3, page 314, (para. 18).

²² *Ibid.*

²³ Reisman, para. 56.

1 waters. Just as the eastern channel is navigable, so the Hariabhanga River western
2 channel is navigable. [TRANSITION] By way of comparison, on the same chart,
3 let's look at the entrances to the Hooghly River, leading to the great city of Kolkata,
4 which we visited. As you can see, it's just as shallow as the western and eastern
5 channels formed by either the Hariabhanga or Raimangal Rivers today [SCREEN
6 OFF].

7 18. Which brings me to Proposition Five: **it is not “impossible” to identify the point**
8 **where the “midstream of the main channel” of the Hariabhanga River met the**
9 **Bay of Bengal on the 15th of August 1947.** This is a task that could have been
10 carried out in 1947, and it can be carried out just as easily today by reference to the
11 situation that prevailed back then. Your task is simply to determine the location of
12 the land boundary terminus as Sir Cyril Radcliffe and his team would have done in
13 1947. There is no impediment to your doing that, as we explained in our written
14 pleadings and in our first round of these hearings. Armed with the Radcliffe Award,
15 and the 1931 edition of BA 859, you can identify the location of the “midstream of
16 the main channel” of the Hariabangha River, and the closing line that separates the
17 Raimangal Estuary from the Bay of Bengal, as at the critical date.

18 19. [FIGURE 7] On your screen you can see the relevant area on Chart BA 859 of 1931.
19 [TRANSITION] In blue we can trace the “main channel” of the Hariabangha River.
20 There is no difficulty in showing you that “main channel”. We can easily identify

1 the midstream where the “midstream of the main channel” of the Hariabangha
2 River intersects with the closing line. [TRANSITION]. We applied the same
3 methodology to determine the location of the closing line across the estuary, which
4 is depicted on your screens now [TRANSITION]. The east-west closing line is
5 simply drawn from headland to headland across the estuary. I should note that the
6 coordinates provided on the chart are the correct ones, as I accidentally recited the
7 wrong numbers in last Monday’s presentation. As Bangladesh has already
8 explained – the difference between the Parties’ is simply due to India’s misguided
9 reliance on its 2011 sketch map, prepared after the litigation began. In any event, as
10 regards the situation in 1947, the question is: Where is the impossibility? As
11 regards the transposition to modern charts, in response to the Tribunal’s question
12 last Tuesday, Dr. Cleverly explained how this was done. [SCREEN OFF]

13 20. Professor Reisman told you that the 1931 edition of BA 859 shows that the “main
14 channel” swings to the east of New Moore Island/South Talpatty. If he was
15 referring to the “main channel” of the Hariabangha River – he is wrong. The 1931
16 chart does not show any South Talpatty or New Moore Island, as I have already
17 mentioned, and, indeed, as India well knows, Commander Kennedy makes no
18 reference to it in his 1957 Study.

19 21. Other contemporaneous sources also make it clear that the “main channel” of the
20 Hariabhangha River lies on the western side of the estuary. The 1953 edition of BA

1 859 confirms the location,²⁴ and so does the 1959 edition of BA 829 that we
2 referred to in our Reply.²⁵ Most importantly, India's own evidence--India's own
3 evidence--in the form of Commander Kennedy's work provides still further
4 confirmation; in fact, it deals a rather major blow to India's case. I have to
5 recognize that Professor Reisman did refer you to Commander Kennedy's study,²⁶
6 but only a bit of it, and not the most relevant bit. [FIGURE 8] This is the line he
7 referred you to, where Commander Kennedy states that the Hariabhanga and
8 Raimangal rivers "meet in a common estuary".²⁷ Well, that is obviously true. But
9 Commander Kennedy was a man who chose his words carefully. He refers to a
10 meeting of the "rivers", not a meeting of the "channels". He did not say that the
11 "channels" of these two rivers meet in the estuary. And I referred you last week to
12 what Commander Kennedy said about that,²⁸ [TRANSITION], namely that each
13 river channel lay "towards the side of the estuary, leaving a shallow bank between
14 and south of the island separating the rivers".²⁹ Commander Kennedy also stated
15 that "Seaward of the entrance, the channels unite to form a single approach over a
16 distance of about 15 miles from the coastal banks."³⁰ [FIGURE 9] Commander

²⁴ BR, Figure R3.7.

²⁵ BR, Figure R3.8.

²⁶ Transcript, Day 3, p. 311, line 12.

²⁷ Commander R.H. Kennedy, "A Brief Geographical and Hydro Graphical Study of Bays and Estuaries the Coasts of which Belong to Different States," Document A/Conf.13/15, 13 November 1957. Indian Rejoinder Volume India, Annex RJ3.

²⁸ Transcript, Day 1, p. 86, line 9 *et seq.*

²⁹ ICM, ¶ 2.16.

³⁰ Commander R.H. Kennedy, "A Brief Geographical and Hydro Graphical Study of Bays and Estuaries the Coasts of which Belong to Different States", Document A/CONF.13/15, 13 November 1957, IR Annex RJ-3.

1 Kennedy knew the difference between "channels" and "rivers". His sketch map
2 also shows clearly that as at 1958 the channels of the two rivers did not unite or
3 connect or conjoin in the estuary. It is clear from Commander Kennedy's words
4 and the drawing that he prepared, that ten years after August 1947, there were still
5 two distinct channels in that estuary, that of the Hariabangha River (on the western
6 side), and that of the Raimangal River (on the eastern side). Professor Reisman had
7 no answer to this. Once again, as with the law and with the cases, so with the
8 evidence--a silence. [SCREEN OFF]

9 22. The point is confirmed by another source. [FIGURE 10] On your screens you can see
10 an extract from the 1881 edition of *The Imperial Gazetteer of India*, Annex B37 to
11 the Bangladesh Memorial. It's the entry for "Raimangal", and it's worth reading
12 carefully. The entry describes an "Estuary in the Sundarbans, Bengal". It then
13 states, [HIGHLIGHT] "about 6 miles from the sea it receives the united streams of
14 three rivers – the Hariabangha being the westernmost, the Raimangal proper the
15 next, and the Jamuna the easternmost". I would ask you to take careful note of use
16 of the word [HIGHLIGHT] "streams", not "channels": what conjoins in the estuary
17 is only the water carried by the rivers, not their channels. The entry proceeds to
18 describe the western channel – the channel of the Hariabangha River – which lies
19 alongside, "the point of land on the west side of the entrance" to the estuary, where
20 the channel has a depth of, [HIGHLIGHT] "5 or 6 fathoms", which increases to

1 “10 to 12 fathoms inside the Hariabangha river” and “decreases gradually to 4
2 fathoms in the western channel” as you head “seaward”. It is plain from this text
3 that there are two distinct channels throughout the estuary, the [HIGHLIGHT]
4 “western channel” separated by a “sandbank” from the “eastern channel” that leads
5 “directly to the entrance of the Raimangal and" the forgotten "Jamuna rivers”. It is
6 plain that there were two distinct channels throughout the estuary, in 1881, in 1931,
7 and in 1957 when Commander Kennedy wrote his report. [SCREEN OFF] It's
8 plain, too, that the Radcliffe Report refers to the “main channel” of the Hariabhanga
9 River, not to any “main channel” of two rivers, or to any “main channel” in the
10 estuary, as India and Professor Reisman would have you believe.

11 23. All of this material confirms that it is easily possible to demarcate the line identifying
12 the “midstream of the main channel” of the Hariabangha River as at 1947, as the
13 Bagge Award indicates you should do. Neither Professor Reisman nor Mr.
14 Shankardass, or any other counsel on behalf of India, has argued otherwise as to
15 impossibility. Neither addressed the challenge of proving “impossibility”, a burden
16 that falls on India and which is a high one, according to Sir Michael Wood. The
17 Radcliffe Award, the principle of *uti possidetis*, the Bagge Award, and the case-law
18 of the International Court of Justice all indicate that the boundary follows the

1 course of the midstream of the main channel of the River “*as it was at the time of*
2 *the award given by Sir Cyril Radcliffe in his Report of August the 12th, 1947*”.³¹

3 24. Which brings me to my sixth, and final, proposition: **the geographic situation in the**
4 **Estuary, including the “main channel” of the Hariabhanga River, has**
5 **changed.** This is a very important proposition. Why? Because India told you,
6 through Professor Reisman, [FIGURE 11] the “use of subsequent data would be
7 reasonable and permissible in terms of the case law only if the geographical
8 situation in the Estuary has not changed”³². This a major concession by India. It
9 means that the Tribunal must form a view as to whether there has been a change in
10 the physical and geographic situation, as Bangladesh says plainly there has.
11 [SCREEN OFF]

12 25. To justify the use of its “more recent evidence”, Professor Reisman expended a great
13 deal of effort in telling you that nothing has changed since 1947, or indeed since
14 1879. [FIGURE 12; SEQUENTIALLY] “[T]he evidence confirms that the profile
15 of the Estuary” has not changed, he said,³³ adding for good measure that “the
16 location of the critical rivers has not changed”.³⁴ [TRANSITION] And then he
17 said: “the essential profile of the Estuary [is] essentially unchanged over time”.³⁵

³¹ *Indo-Pakistan Award*, p. 13 (emphasis added).

³² Transcript, Day 3, p. 316, line 4.

³³ *Ibid.*, p. 318, line 13.

³⁴ *Ibid.*

³⁵ *Ibid.*, p. 316, line 8.

1 [TRANSITION] And then: “the Estuary has not changed”, and I note that the word
2 “essentially” has somehow been dropped.³⁶ [TRANSITION] And then he says:
3 “neither the essential profile of the Estuary nor the location within the Estuary of
4 the main channel has changed”.³⁷ And these are striking words. Why? He does
5 not specify whether he means, in each case, the “main channel” of the Hariabangha
6 River, or of the supposed Hariabangha/Raimangal “twinned” or “conjoined”
7 channel, or the “main channel” in the estuary in the sense of the deepest channel in
8 the estuary. And there is a word for this: It's obfuscation. It is notable that
9 Professor Reisman never said to you that the “main channel of the Hariabangha
10 River” – which is the only one that matters in this part of the case – has not
11 changed. He never said that, and he hasn't said because he knows that he cannot say
12 it: the location of the “main channel of the Hariabangha River” has changed over
13 time. [SCREEN OFF]

14 266. Let us look at the charts, to see what has happened to the “main channel of the
15 Hariabangha River” and its midstream, starting with the very same charts Professor
16 Reisman showed you. [FIGURE 13] Of this he said: “Please note the continuity
17 through time of the profile of the Estuary.”³⁸ This is the chart he put up on the
18 screen. But, Mr. President, this Tribunal is not concerned with the “profile of the
19 Estuary”. That's not an issue. The Radcliffe Award and Notification 964 make

³⁶ *Ibid.*, p. 332, line 7.

³⁷ *Ibid.*, p. 329, line 3.

³⁸ *Ibid.*, p. 316, line 11.

1 no reference to the Estuary, or to its profile. The Tribunal, like Cyril Radcliffe, is
2 concerned with the “main channel of the Hariabangha River”, and the images that
3 Professor Reisman showed confirm there has been a significant change in the
4 “main channel” of the Hariabangha River in that intervening period.
5 [TRANSITION] On your screen now is again BA Chart 859 of 1931. By
6 highlighting the relevant contours [TRANSITION] and then overlaying the 1931
7 map with India’s 1996 map relied on by Professor Reisman [TRANSITION], you
8 can see the change quite clearly. In case India has any lingering doubts, we can
9 carry out the same exercise with India’s Naval Chart 351 from 2011
10 [TRANSITION]. You can see that one now on your screens, which it has used to
11 identify its modern-day location of the land boundary terminus. Again, one can see
12 the two river channels are in different locations. And I invite you, in your own
13 time, to look very, very carefully at this overlay: It's Tab 4.13. There is simply no
14 escaping the fact the change has occurred. Whilst we're on the subject of these
15 India's charts, they're interesting for another reason. This one clearly depicts a
16 fixed river boundary--not the fluid boundary that India now advocates. You can see
17 on the screen, that boundary line slices through an area of shallow water that is just
18 1.8 meters deep and, therefore, is not the "midstream of the mainchannel."
19 [SCREEN OFF] That is an Indian chart.

1 27. Mr. President, this is perhaps the right moment to say something about the map
2 appended to the Radcliffe Award. That's the one that is or was in this courtroom,
3 which was offered with India's Rejoinder, and one to which India now seems to be
4 most attached.³⁹ Let us not forget, however, as India wishes us to do, that in its
5 Counter-Memorial it offered a different map [FIGURE 14]. You can see it now on
6 your screens, and it described as "a reproduced certified copy".⁴⁰ We have heard
7 rather less about that map because of this week. [TRANSITION] Now you can now
8 see both of India's Radcliffe maps next to each other, [TRANSITION] and you will
9 note that both are purportedly signed by Sir Cyril. India considers one to be more
10 authoritative than the other. In our submission, however, you need express no view
11 on the authority or authenticity of either of these maps. [SCREEN OFF] Why?
12 Because neither map assists you in locating the "midstream of the main channel" of
13 the Hariabhanga River.

14 28. On this issue too, as on so many, India was gloriously, wonderfully contradictory, and
15 this time not only as between its own counsel. Professor Reisman managed in short
16 order to contradict himself. [FIGURE 15] First he told you that "[t]he Radcliffe
17 Map ... clearly marks the location of the main channel".⁴¹ It took him about a
18 minute to disagree with himself, because the very next thing that he told you
19 [TRANSITION] and you can see it on the screen: "the Radcliffe Award does not

³⁹ IR, Vol. III.

⁴⁰ ICM, para. 4.4.

⁴¹ Transcript, Day 3, p. 325, line 5.

1 assist for while it can identify the river, it cannot in the nature of things, identify the
2 location of the main channel”.⁴² Well, that is the second quote, precisely
3 Bangladesh’s position, and it's that point in this part of the case, and we agree with
4 it, the second proposition. But we're bound to ask: which of Professor Reisman’s
5 two statements will he agree with on Wednesday and which one will he let go of?
6 For Bangladesh the answer is in any event very clear: a map that has no bathymetric
7 data and which is on a scale of 1 inch to 8 miles – it is about 1:500,000 exactly as I
8 said – cannot offer the Tribunal any real assistance in locating the “midstream of
9 the main channel of the Hariabangha River”. India has never used either of its
10 Radcliffe maps to identify the location of the land boundary terminus, nor can you.

11 [SCREEN OFF]

12 29. The “main channel” of the Hariabhanga River and the environs in which it is located
13 have changed, and they have changed very significantly. Sir Michael Wood was
14 rather more circumspect. He acknowledged the fact of change and that there were
15 “minor discrepancies”, as he put it, between the British charts over time.⁴³ He then
16 asserted – without the benefit of any supporting evidence – that this, “most likely”,
17 had, “little to do with coastal instability”, pure assertion by counsel. He said it was
18 due to, “different source data or differences in conversion methods into WGS-84

⁴² *Ibid.*, p. 326, line 7.

⁴³ Transcript, Day 4, p. 381, line 10.

1 datum”⁴⁴, no authorities whatsoever provided in support of those assertions.
2 Professor Pellet, with characteristic Gallic flourish, told you that any suggestion of
3 change was, “most exaggerated”, and offered an example of exaggeration.⁴⁵ Well,
4 Professor Payam Akhavan will in due course show you quite how disconnected
5 from reality, geographic reality, Professor Pellet is. And I must confess that when
6 he told us that, “in the Sundarbans, we saw houses, industries, ports, roads, resorts
7 and hotels”--hotels, I really began to wonder whether the man who claimed to be
8 Professor Pellet on the journey we took together around the Sundarbans was the
9 same Professor Pellet who was in the courtroom last week. Could it have been that
10 we traveled with his French-speaking twin?

11 30. Mr. President, Members of the Tribunal, it is blindingly obvious that the area has
12 changed and that is has no hotels. The estuary has changed and it has no casinos,
13 and the two river channels in the estuary have changed, and there is no mining or
14 other such activity in the area we visited. For the Tribunal to find otherwise, and to
15 so state, would surely expose it to the risk of manifest ridicule. If you are minded to
16 adopt that path, however, and are willing to take a few more hits on the chin, why
17 not go the extra mile and conclude that you have identified the present location of
18 the “main channel” of the Hariabangha River by use of a carefully conducted
19 scientific experiment. One might call “the floating hovercraft test”. Mr. President,

⁴⁴ *Ibid.*, p. 381, line 11.

⁴⁵ Transcript, Day 3, p. 286, line 15 *et seq.*

1 this is the courtroom of an international tribunal. We are not in a school
2 playground.

3 **CONCLUSIONS**

4 31. I can conclude quickly. The land boundary terminus was fixed in August 1947. It
5 has not moved since. The applicable law requires you to locate it as it was then.
6 As I've explained, you can do so without difficulty. There is a very simple
7 flaw--legal, logical--in India's position. Professor Reisman first tells you that
8 nothing has changed in the geography since 1947 or earlier. But if that is the case,
9 why can't cannot use the charts that date to back then? What impediment is there
10 to your using the 1931 edition of BA 859, if nothing has changed. Professor
11 Reisman also tells you, as I explained, that if somehow there has been a change,
12 then the law does not permit you to use any later charts. On that basis too, you are
13 bound to use, then, the 1931 edition of BA 859. On either of his approaches, you
14 end up where Bangladesh says you must end up, which is at the point where the
15 western channel – the midstream point of the main channel of the Hariabhanga –
16 meets the Bay of Bengal. Confirming that the point is there located will have no
17 effect whatsoever on the usage of the river, because it is navigable in that location,
18 and because, as the total lack of evidence to the contrary makes clear, there is very
19 little human presence there, and such minimal navigation as there might be will not
20 be interfered with in any way whatsoever. By contrast, a constantly fluid and

1 fluctuating land boundary terminus, in an area subject to great and rapid physical
2 change, will merely extend the uncertainty and the risks of continued conflict,
3 exactly as Justice Aiyea in Bagge Tribunal wisely recognised.

4 32. Mr. President, Members of the Tribunal, that concludes my submissions this morning.

5 It remains simply for me to thank Clara Brillembourg and Remi Reichold for their
6 tremendous assistance to me in preparing these submissions. And I ask you now to invite
7 Professor Payam Akhavan to the podium. Thank you very much.

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1 PRESIDENT WOLFRUM: Thank you very much, Professor Sands,
2 for your presentation.

3 Professor Akhavan issue you have the floor.

4 Thank you.

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PERMANENT COURT OF ARBITRATION

*Bay of Bengal Maritime Boundary
Arbitration between Bangladesh and India*

Professor Payam Akhavan

Delimitation of the Territorial Sea

16 December 2013

- 12 1. Mr. President, members of the Tribunal. I will briefly address India's arguments on
13 coastal instability, selection of base points, and why equidistance is not an appropriate
14 delimitation method in the territorial sea.
- 15 2. Bangladesh's scientific evidence of extreme coastal instability remains unrebutted. On
16 the first day of India's pleadings, Professor Pellet invoked a 2005 study to argue that
17 the Bengal Delta's instability "is just comparable to the instability of all the major
18 deltas in the World".⁴⁶ This is nothing new. We already know from *Nicaragua v.*
19 *Honduras* that "all deltas are by definition geographical accidents of an unstable
20 nature...."⁴⁷ But Professor Pellet's study is about the loss of wetlands throughout the
21 Delta. It is not about instability on the Sundarbans coastline.⁴⁸ And where the study

⁴⁶ Transcript (12 December 2013), Vol. 3, Professor Pellet, p. 286, line 25 top. 287, line 5 and tab 1.5 (reproducing James Coleman et al., "Wetland Loss in World Deltas", *Journal of Coastal Research*, Vol. 24, No. 1A (2008), p. 3, table 1 (hereinafter Coleman (2008))).

⁴⁷ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (hereinafter "Nicaragua v. Colombia"), para. 32.

⁴⁸ See generally Coleman (2008).

1 does mention instability in general, it singles out the Bengal Delta as “extremely
2 unstable” compared to the fourteen major deltas in the world.⁴⁹

3 3. Counsel for India still accuses Bangladesh of exaggerating coastal instability. But
4 they have completely ignored the Indian Geological Survey’s alarming conclusion of
5 “massive erosion” and “an abnormal rise in sea level”.⁵⁰ Instead, their diversionary
6 tactic is to observe that sea level rise is “a global phenomenon”.⁵¹ This is an obvious
7 fact. But the Geological Survey refers to an “abnormal” rise in sea level. The
8 Sundarbans are just barely above sea level. They are exceptionally vulnerable to even
9 a modest rise in water heights, let alone an abnormal rise. This was clearly visible
10 during the site visit.

11 4. **[slide]** You may recall these striking images of the Sundarbans Tiger Reserve from the
12 scientific study prepared for the World Wildlife Fund. This reflects a mere twenty
13 centimetre rise in sea level. **[off]** The most Sir Michael had to say was that this study
14 related to tigers and not delimitation. I concede, of course, that tigers have little
15 respect for boundaries. A possible exception is Kipling’s Sheer Khan, who claimed
16 sovereign rights over the jungle! But, Mr. President, the imminent disappearance of
17 this area is not in dispute, even based on “conservative” projections of sea level rise by

⁴⁹ Coleman (2008), p. 4.

⁵⁰ Geological Survey of India, “Endangered Sundarbans” (available at <http://www.portal.gsi.gov.in/portal/page?_pageid=127,723790&_dad=portal&_schema=PORTAL&linkId=1216>). RB, Vol. III, Annex BR15.

⁵¹ Transcript (13 December 2013), Vol. 4, Sir Michael Wood, p. 376, line 23.

1 the International Panel on Climate Change.⁵² This fact is directly relevant to coastal
2 instability in the Sundarbans.

3 5. This brings us to base points, and Professor Pellet’s reference to the site visit as “a
4 costly and pointless exercise”.⁵³ He showed this tide chart [slide] and complained that
5 on October 24, when the Tribunal was on the Bangladesh navy ship, the conditions
6 were not ideal for viewing South Talpatty. This is not correct. [off] India’s chart 351
7 shows a drying height of up to 1.6 metres. At eight in the morning, [slide] when this
8 photograph was taken, the tidal height was just 1.4 metres. According to India’s chart
9 351, [slide] South Talpatty should have been 20 centimetres above water. It should
10 have been visible. So Professor Pellet is almost correct in saying that this was a
11 “pointless exercise”; it was in reality a “base pointless” exercise. We had to strain to
12 see just a few lonely breakers. There was simply nothing there. [off] These images are
13 in your folders at tabs 3.16 and 3.17.

14 6. Sir Michael suggested that we should wait 18.6 years for the lowest astronomical tide.
15 Perhaps we can schedule a second site visit then. In the meanwhile, we can ponder
16 why India has failed to produce a single authority supporting the use of low-tide
17 elevations as base points. In *Bangladesh/Myanmar*, [slide] there were many low-tide
18 elevations near the land boundary terminus. [slide] ITLOS drew a delimitation line that

⁵² C. Loucks et al., “Sea level rise and tigers: predicted impacts to Bangladesh’s Sundarbans mangroves”, *Climate Change*, Vol. 98, No. 1 (2010) at p. 295. RB, Vol. III, Annex BR12.

⁵³ Transcript (12 December 2013), Vol. 3, Professor Pellet, p. 287, lines 6-7.

1 sliced right through them. They were wholly irrelevant. **[off]** This figure is at tab 3.18
2 of your folders.

3 7. Counsel for India repeated once again that South Talpatty has exhibited a degree of
4 stability because breakers were charted there in the nineteenth century.⁵⁴ **[slide]** Mr.
5 President, following Professor Reisman's presentation, you requested a clarification of
6 changes in this feature since 1947. First, it is not disputed between the parties that
7 South Talpatty only emerged as an island in 1970 after a devastating cyclone. Second,
8 this chart indicates **[slide]** that the location of the breakers, based on data from 1879, is
9 3.5 miles from where this island actually emerged in 1970. In fact, in 1879, the location
10 where the island emerged eventually in 1970 was under ten metres of water. If this
11 were truly a stable feature for the past 150 years, it would no doubt today be home to
12 the many "resorts and hotels" Professor Pellet claims to have seen in the Sundarbans.⁵⁵
13 **[off]** These figures are at tab 3.19 in your folders.

14 8. Mr. President, members of the Tribunal, in summary, there is simply no basis, either in
15 fact or in law, for plotting an equidistance line based on India's submerged base points.

16 9. Bangladesh maintains that even its own base points, situated on land features on its
17 latest charts, are inherently unstable. An equidistance line thus constructed would

⁵⁴ Transcript (13 December 2013), Vol. 4, Sir Michael Wood, p. 383, line 19-21.

⁵⁵ Transcript (12 December 2013), Vol. 3, Professor Pellet, p. 289, lines 23-25.

1 become “arbitrary and unreasonable in the near future” in the words of *Nicaragua v*
2 *Honduras*.⁵⁶ Sir Michael portrayed the angle-bisector as the four horsemen of the
3 apocalypse, a Judgment Day for all maritime boundaries. He warned that if this
4 abomination were adopted, “how many judgments and negotiated agreements using
5 base points would be viewed as ‘arbitrary and unreasonable’?”⁵⁷

6 10. Mr. President, all that Bangladesh asks is that because of extreme coastal instability, an
7 angle-bisector is more immune, less vulnerable to geographical fluctuations, than an
8 equidistance line. A simplified methodology is clearly consistent with the
9 jurisprudence. It is also consistent with the express recognition of the Bengal Delta’s
10 high instability by the drafters of the 1982 Convention. Bangladesh notes that counsel
11 for India did not even attempt to address Article 7(2) in their oral pleadings.

12 11. It did not go unnoticed however, that while ostensibly defending an equidistance line,
13 Sir Michael repeatedly referred to the stability of the “general direction” or “general
14 configuration” of the Bengal coast.⁵⁸ That is exactly the logic of an angle-bisector; a
15 simplified methodology based on the general direction of the coast rather than
16 particular base points that are inherently unstable.

⁵⁶ *Nicaragua v. Honduras*, para. 277.

⁵⁷ Transcript (13 December 2013), Vol. 4, Sir Michael Wood, p. 376, lines 17-19.

⁵⁸ Transcript (13 December 2013), Vol. 4, Sir Michael Wood, p. 371, line 27 top .372, line 4.

1 12. You may recall Professor Pellet’s skepticism on erosion rates. He argued that if they
2 were true, “Bhangaduni Island would have vanished quite a long time ago by now.”⁵⁹
3 There is a simple explanation for this. As pointed out in my earlier pleadings, the
4 coast has been eroding at an average rate of 21 metres a year from 1840 to 1984.⁶⁰ But
5 during the period from 1975 to 2010, the erosion rate for Bhangaduni doubled to at
6 least 42 metres, [slide] as depicted on this image that you may recall, which is also at
7 tab 3.20 in your folders. And this is where [slide] Bangladesh’s base point I2 is situated
8 today, although it is on the low-water line on the latest available chart. If the same
9 erosion rate of 42 metres continues over the next thirty-five years, [slide] here is a
10 rough illustration of how the island would look. But the erosion rate is dramatically
11 accelerating, because of an abnormal rise in sea levels. The island is thus likely to
12 vanish sometime in the near future. This, after all, has been the fate of even larger,
13 inhabited islands in the delta.⁶¹ In other words, [slide] if Bangladesh’s base point I2 is
14 adopted by the Tribunal, this is where it will probably end up, far at sea, several miles
15 from the nearest point on land. [off]

⁵⁹ Transcript (12 December 2013), Vol. 3, Professor Pellet, p. 286, line 17 to 20.

⁶⁰ Mead A. Allison, “Historical Changes in the Ganges-Brahmaputra Delta Front”, *Journal of Coastal Research*, Vol. 14, No. 4 (1998), p. 3122. MB, Vol. IV, Annex B61.

⁶¹ MB at para. 2.20. See also G. Lean, “Disappearing world: Global warming claims tropical island”, *The Independent*, 24 December 2006 (available at <http://www.independent.co.uk/environment/climate-change/disappearing-world-global-warming-claims-tropical-island-429764.html>). MB, Vol. III, Annex B49.

1 13. Mr. President, Bhangaduni Island is a prominent base point with significant effect on
2 an equidistance line. Its disappearance would render any such line arbitrary and
3 unreasonable in the near future.

4 14. India has accused Bangladesh of speculation, fortune-telling, and all manner of
5 witchcraft. But let us consider a study by the Institute of International Law at the
6 University of Kiel in Germany.⁶² [slide] This study analyzes the impact of sea level
7 rise on maritime boundary delimitation, including in the Bay of Bengal. This is how an
8 equidistance line could shift in the coming years. [off]

9 15. The Tribunal must consider the reality at the time of delimitation. But in determining
10 both the appropriate methodology and an equitable delimitation, it should not disregard
11 the reality of massive erosion and the shifting direction of the coastline in the near
12 future. We know with near certainty that the coastline will change dramatically, and we
13 thus know with near certainty, that any equidistance line drawn today will become
14 arbitrary and unreasonable in the near future.

15 16. Mr. President, members of the Tribunal. That concludes my brief submission. I wish
16 to thank Vivek Krishnamurthy for his assistance, and I take this opportunity to thank
17 you, the Secretariat of the Permanent Court of Arbitration, and our friends and

⁶² Katherine J. Houghton et al., "Maritime boundaries in a rising sea", *Nature Geoscience*, Vol. 3, No. 12 (2010) at p. 815. MB, Vol. IV, Annex B79.

1 | colleagues from the Indian team, for their kindness and courtesy. If you have no
2 | questions, I would ask that you give the podium to Professor Boyle.

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1 PRESIDENT WOLFRUM: Thank you, Professor Akhavan.

2 Since there are no questions, I give the floor to Professor Boyle.

3 PROFESSOR BOYLE: Thank you, Mr. President. My task is to reinforce the
4 submissions of my colleagues.

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PERMANENT COURT OF ARBITRATION

***Bay of Bengal Maritime Boundary
Arbitration between Bangladesh and India***

Professor Alan Boyle

The Angle Bisector Method of Delimitation [2]

16 December 2013

1. Mr. President, members of the tribunal. Listening on Friday to my good friends Professor Pellet and Sir Michael Wood, I felt that I was momentarily transported back to my university tutorials forty years ago, debating – no doubt a little too earnestly – the merits of the *North Sea Continental Shelf cases*, and the role of courts in deciding them. India’s oral argument exhibited the same obsession with equidistance methodology as did the pre-UNCLOS advocates of Article 6 of the Continental Shelf Convention. Echoing the great Prosper Weil, Alain Pellet urged you to resist becoming “un gouvernement des juges”. Use no discretion, he would say. Decide nothing new. On his view, the role of equity in maritime boundary cases has entirely fossilised into one rule – equidistance, now, forever, everywhere, in all circumstances - or almost all. Your job, it seems, is merely to apply that rule to this case.
2. Sir Michael Wood sang the same song, though perhaps a little less appassionato. To him, our advocacy of the angle bisector method sounded “very much like a decision

1 *ex aequo et bono*”, to which India had not agreed.⁶³ Bangladesh, he said, “seems not
2 to concern itself with the application of the law.....which is what Articles 15, 74 and
3 83 prescribe.”⁶⁴

4 3. India’s counsel claimed that Bangladesh relied on out-date cases – but they made the
5 same argument for the *Myanmar case*. It's true, the *North Sea Case* may be old – but
6 that did not stop ITLOS from applying it to the Bay of Bengal in its 2011 judgment.
7 In reality, India’s argument is outdated – the constant refrain that equidistance is an
8 obligatory rule reflects an old debate that we all thought had died at UNCLOS III. But
9 no, it is alive and well and living in New Delhi. The angle bisector cases are not
10 nearly as old, but even if they were, that should not stop you from following them if
11 they indicate the most appropriate method by which to reach an equitable solution to
12 the present dispute.

13
14 4. For that, Mr. President and members of the Tribunal, is the nub of this case, and the
15 heart of Bangladesh’s submissions. Whatever solution you adopt must be equitable.
16 That is what Articles 15, 74 and 83 of the Convention require. India wants you to
17 ignore that fundamental rule of the Convention and of customary law. It says that you
18 must follow “a now firmly established jurisprudence”⁶⁵ which compels you to start
19 with a provisional equidistance line, as if it were a new *grundnorm* of international

⁶³ Transcript (13 December 2013), Vol.4, Sir M. Wood, p. 422, lines 13-15.

⁶⁴ Transcript (13 December 2013), Vol.4, Sir M. Wood, p. 422, lines 9-10.

⁶⁵ Transcript (13 December 2013), Vol.4, Sir M. Wood, p. 392, line 2.

1 law. But Mr.President, that is not the law. The law does not say that only through
2 equidistance methodology may you reach an equitable solution. The law says you
3 have a choice, if you think it appropriate to start somewhere else, or even to finish
4 somewhere else. But the result of that choice must be equitable.

5
6 5. My colleague Mr.Reichler will say more about equidistance lines and about the
7 *Nicaragua/Colombia case*, but let me remind you that that case employs no less than
8 three distinct methods of delimitation, none of them based on equidistance. It no more
9 supports India's adherence to equidistance methodology than the
10 *Nicaragua/Honduras case*.

11
12 6. [GRAPHIC 1] Now let me now draw your attention to two graphics from
13 *Nicaragua/Honduras*. The first is the provisional equidistance line proposed by
14 Nicaragua – TAB1 I your folder. And the second [GRAPHIC 2] is the equidistance
15 line proposed by Honduras - TAB2 in your folder. Now, remember:
16 *Nicaragua/Honduras* is the one case where even India agrees that the angle bisector
17 method was appropriate. And yes, both parties did show a provisional equidistance
18 line to the Court, even if neither of them argued for it. So even in that case it was not
19 impossible to start with a provisional equidistance line. But quite rightly the parties
20 and the court concluded that in the circumstances it would be arbitrary and
21 unreasonable to do so, and they opted for an angle bisector instead.

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7. Now, in our view, it would be arbitrary and unreasonable in the present case to start with an equidistance line, but it would be far more arbitrary and unreasonable to finish with one. Placing base points on a shifting and unstable coastline lacks any of the inherent objectivity which India attributes to the equidistance method. Professor Akhavan has made that very clear in his presentation. Drawing an angle bisector perpendicular to the general direction of the coast is a more objective way to address the circumstances of this case. As the case law indicates, it approximates to the equidistance method but applies it to the macro level of the coastline as a whole, and this enables the tribunal to move beyond the submerged or muddy features of an irregular and unstable coast, while at the same time achieving a solution that minimizes the effects of the concavity and is fully equitable to both parties.

8. Now, Sir Michael Wood characterises Bangladesh’s arguments on base points and the angle bisector as “misleading and incorrect.” He claims that they would “subvert the application of the law governing maritime delimitation, as it has been painstakingly developed over many years.”⁶⁶ Citing the *Black Sea Case*, he says you must start by identifying appropriate base points as a preliminary to drawing a provisional equidistance line.⁶⁷ But he misses the point about the angle bisector method – the

⁶⁶ Transcript (13 December 2013), Vol.4, Sir M. Wood, p. 365, lines 24-26.
⁶⁷ Transcript (13 December 2013), Vol.4, Sir M. Wood, p. 366, line 21.

1 question is not whether the base points are appropriately drawn, the question is
2 whether it is appropriate to rely upon a provisional equidistance line drawn from base
3 points at all.

4
5 9. And these are two quite different questions. Drawing a provisional equidistance line
6 requires selection of appropriate base points and leads next to consideration of
7 circumstances which may call for adjustment of that line – as in the *Myanmar Case*.
8 But adopting an angle bisector – whether or not you start with a provisional
9 equidistance line - avoids altogether the need to select appropriate base points and
10 leads to the drawing of a boundary appropriate to the general direction of the coast.
11 Two totally different processes.

12
13 10. But whether we adjust an equidistance line, or draw a bisector, the result must be an
14 equitable solution. The Court really has no choice about that outcome. But you must
15 decide for yourselves how to get there. And quite frankly it's no more a decision *ex*
16 *aequo et bono* than any other decision of an international court. It calls for an
17 appreciation of all the geographical circumstances relevant to the case, informed by
18 the evidence, and guided no doubt by previous precedents, applied in such a way as to
19 ensure a solution equitable to both parties. However you arrive at the solution, we say
20 the 180⁰ line will be equitable.

1 11. Now, Sir Michael Wood repeated the erroneous assertion that it's only in
2 "extraordinary circumstances" that a court or tribunal may abandon the search for
3 appropriate base points.⁶⁸ But again, that is not at all what the cases say. The cases
4 say that the angle bisector method can be used when it's not appropriate to draw a
5 provisional equidistance line. It will never be literally "impossible" to draw such a
6 line. If you have a chart, you can draw one. As I demonstrated a few moments
7 ago, even in the *Nicaragua-Honduras* that was done. It was possible.

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9 12. So, we continue to say that the cases show that the angle bisector method is
10 appropriate here: in particular the *Guinea/Guinea Bissau case*, about which India has
11 said very little. Quite apart from concavity, *Guinea/Guinea Bissau* has other obvious
12 similarities to the geography of this case: there were mangrove swamps, there were
13 river deltas, there were many coastal islands which join together at low tide, and a
14 continental shelf "which bears the traces of successive coast lines".⁶⁹

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16 13. India says that *Guyana/Suriname* does not support our use of the angle bisector. But
17 here is what the arbitral tribunal said in *Guyana/Suriname*: "The Tribunal is bound to
18 note that the coastlines at issue [in Gulf of Maine, Tunisia/Libya, St. Pierre et
19 Miquelon] cannot be compared to the configuration of the relevant coastlines of

⁶⁸ Transcript (13 December 2013), Vol.4, Sir M. Wood, p. 369, line 4.

⁶⁹ *Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau*, Decision of 14 February 1985, ILR, Vol. 77, p. 635, at para. 19.

1 Guyana and Suriname.” It went to say that the general configuration of the maritime
2 area to be delimited “does not present the type of geographical peculiarities” found in
3 the angle bisector cases. It accepted that “Such peculiarities may, however, be taken
4 into account as relevant circumstances, for the purpose of adjusting or shifting the
5 provisional delimitation line.”⁷⁰ That was an easy case: there was plainly no reason
6 not to start with an equidistance line, there was not reason even to adjust it in the EEZ
7 and continental shelf. But our case, of course, is not like that at all.

8
9 14. Basing the *India/Bangladesh* boundary on a bisector which follows the general
10 direction of the coast – a general direction which even Sir Michael Wood admits has
11 not changed over many years - is bound to be more objective than attempting to
12 locate an equidistance line on shifting sands and submerged or semi-submerged
13 features. Sir Michael agrees that the tribunal does not have to accept the base points
14 proposed by either party – but on what more “objective” basis can the tribunal then
15 select its own base points? There is necessarily a subjective judgment even here.
16 Applying the equidistance method is not a mechanical process. And the freedom of
17 the tribunal to select base points merely illustrates the larger point that I made a few
18 moments ago: the tribunal is also free to select the methodology it considers most
19 appropriate to an equitable solution of the case.

20

⁷⁰ *Guyana v. Suriname*, para. 372.

1 15. So this tribunal cannot abandon the agony of choice. That is its role. Why else do we
2 litigate maritime boundary disputes? Disputes which almost by definition are likely to
3 be the ones that cannot be negotiated on equidistance lines. India says it has
4 negotiated boundaries on an equidistance basis with its other neighbours. But that
5 tells us nothing beyond pointing to the quite different geographical context – these
6 were all agreements with opposite states. The point of an equitable solution is that it
7 requires a tribunal to take into account differences in geographical circumstances and
8 avoid rigidly inflexible outcomes. The angle-bisector method serves that fundamental
9 purpose in cases where its use is appropriate. But there may be other cases where
10 there are other ways of reaching an equitable solution is neither here nor there in the
11 grand scheme of things. Starting with a provisional equidistance line may often be the
12 right thing to do, but that cannot lead to the conclusion that's always the right thing to
13 do, as India would have you believe. And if you do choose to start with equidistance,
14 it would definitely not be the right place to stop in the circumstances of this case.

15
16 16. India complains that the east-west line that we have drawn across the Bay of Bengal
17 as the basis of our angle bisector runs out to sea on the Bangladeshi side and over
18 land on India's side. That is only partly true, and it is not at all decisive. The line we
19 have drawn is no different to the lines drawn in other cases. [GRAPHIC 3] You can
20 now see on the screen the angle bisector between the mainland and the islands in the
21 *Tunisia/Libya* case, and then again [GRAPHIC 4] the line used in

1 *Guinea/Guinea-Bissau case*. And finally [GRAPHIC 5] you can see the angle
2 bisector used in *Nicaragua/Honduras case*. All of those lines are in part over land
3 and in part out to sea.

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5 17. [GRAPHIC 6] The Bay of Bengal, Mr. President and members of the tribunal, has
6 long been a special case, and we can see that in Article 7(2) of the 1982 Convention,
7 and in Annex II on the outer edge of the continental margin. For all the reasons I have
8 set out, the geography also makes this case a classic angle-bisector case, more than
9 any previous precedent. I will, therefore, conclude by showing you once again
10 Bangladesh's 180° angle bisector.

11

12 18. Mr.President, members of the tribunal: may I thank you all for listening patiently and
13 courteously throughout these proceeding, and I would now ask you to call Mr.Martin
14 to the podium.

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1 PRESIDENT WOLFRUM: Thank you, Professor Boyle, for your
2 presentation.

3 I see no questions.

4 Mr. Martin, you have the floor.

5 MR. MARTIN: Mr. President, Members of the Tribunal, good morning.
6 Mr. President, I will be precisely 20 minutes. I warrant if I should just press on to the
7 coffee break, with your permission?

8 PRESIDENT WOLFRUM: Yes.

9 MR. MARTIN: Very good.

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PERMANENT COURT OF ARBITRATION

*Bay of Bengal Maritime Boundary
Arbitration between Bangladesh and India*

Lawrence H. Martin

Concavity and Disproportionality

16 December 2013

13 **I. Introduction**

14 1. I will address three topics today. Number (1), I will respond to some of India's
15 remarks on the question of concavity, in order to correct its persistent
16 misunderstanding of the issue. Number (2), I will attempt to inject some clarity into
17 India's confused treatment of the subject of disproportionality. And number (3), I will
18 discuss the issue of the relevant coasts and the relevant area, and show why Bangladesh
19 is right and India wrong.

20 **II. The Concavity of the Bay of Bengal**

21 2. My first point is India's failure to come to terms with the issue of concavity and its
22 relevance to this delimitation. I will deal with the issue insofar as it relates to
23 Bangladesh's location sandwiched between India and Myanmar. Mr. Reichler will
24 deal with the issue insofar as it relates to the specific characteristics of India's claim
25 line in this case.

26 3. As we anticipated, India persists in arguing that it also has a concave coast. This is the
27 "me too" argument. According to Professor Pellet, "what could be called the two

1 concavities” (as well as the two ‘concavities within the concavity’) ‘neutralize’ each
2 other.”⁷¹ Professor Pellet showed you this sketch to support his assertion. Mr.
3 President, I invite you to consider it carefully. In our view, all it does is underscore
4 precisely the point that Bangladesh has been making since day one: due to the
5 concavity of its coast, its maritime entitlements are inequitably pinched off even after
6 the ITLOS Judgment; India’s are not.

7 4. To create the contrary impression, India has drawn the imaginary orange dashed line
8 that you see to the southwest, the basis of which it does not explain. We have no idea
9 what this line is supposed to represent; it doesn't even correspond to India's own
10 depiction of the relevant area which, as I will discuss, is deeply flawed in any event.
11 To borrow one of counsel for India’s favourite words, this line is totally ‘arbitrary.’ If
12 it conveys the impression of cut-off, it is only because India has committed the
13 maritime equivalent of * set a coup; it is an auto-cutoff, and a fake one no less.
14 Without that line, one readily sees that there is no real cut-off.

15 5. India seems still to have missed the point, maybe because it is their strategy to do so.
16 As we have explained, the paradigmatic case in which a concavity exerts a prejudicial
17 effect on the delimitation is when one State is surrounded by two others inside a
18 concavity. That was the situation in the *North Sea* cases, *Guinea/Guinea-Bissau* and
19 *Bangladesh/Myanmar*. And that is the situation of Bangladesh here. India is
20 different.

⁷¹ Transcript, Day 4, p. 411, para. 36, line 25.

1 6. In order for India to be similarly pinched off by any concavity in the Bay of Balasore,
2 there would have to be another State on its other side. To see this, imagine that our
3 British friends had decided to keep most of India, letting only pieces become
4 independent. Imagine a smaller India tucked next to Bangladesh at the northern end
5 of the Bay. To its southwest, the peninsular landmass of what is still British India. In
6 that, if I may say, distasteful scenario, which you see now, India might indeed bear the
7 inequitable effects of a concavity resulting from the use of equidistance. But that is
8 not this case.

9 7. Mr. President, you will recall that last Monday, I showed several schematics
10 demonstrating the effect coastal concavities can have on maritime delimitation, the last
11 one of which is on your screen again now. I said it was drawn from the ICJ Judgment
12 in the *North Sea* cases. Really, I should have said it was directly taken from that
13 Judgment. These are two of the Court's actual schematics. Like all schematics, they
14 are not intended to be a precise depiction of anything; but they do capture an idea.
15 And that idea could scarcely be clearer: State B, the middle State, is cut-off.

16 8. Nevertheless, on Friday, Professor Pellet presented an alternative schematic of his own
17 creation that he said more accurately reflected the geographic reality of the Bay. This
18 is it. Frankly, it is unclear what idea this diagram is meant to convey. Its purpose
19 seems to be to suggest that this Tribunal has very little margin for flexibility because
20 Bangladesh is literally "boxed in".

21 9. But this contrived sketch bears absolutely no relation to geographic reality. To see
22 this, all we have to do is compare the schematic I presented, and the alternative

1 Professor Pellet proposed, to an actual map of the Bay. This is our schematic -- and
2 here is the coast of the Bay. In contrast, this is Professor Pellet's -- and here again is
3 the coast of the Bay. Here is ours again once more, and the Bay. As you can see, the
4 reality is that the Bay opens widely to the southwest (that's up in this map). There is
5 therefore ample margin for flexibility for the Tribunal to abate the cutoff on
6 Bangladesh and still fashion a solution that is equitable to India.

7 **III. The Three-Step Method and the Issue(s) of Proportionality**

8 10. Mr. President, that brings me to the second of my three points: India's confusion about
9 the three-step approach to which it professes such attachments. The three steps are
10 easily stated: (1) draw a provisional equidistance line; (2) consider whether there are
11 relevant circumstances that warrant adjustments to -- or the outright abandonment of --
12 that line to produce an equitable result; and (3) test the final delimitation arrived at
13 following the first two steps for any form of gross disproportion. Professors Akhavan
14 and Boyle have already spoken about step one. I will focus on the relation between
15 the second and the third steps.

16 11. I do this because, as much as it professes adherence to the three step method, India --
17 sometimes subtly, sometimes not so -- asks you to conflate step two with step three, if
18 not avoid step two altogether. That is, India tempts you to draw a provisional
19 equidistance line, evaluate it by reference to the disproportionality test and end the job
20 there. To take just one example, India states at paragraph 6.46 of its
21 Counter-Memorial that "equitable considerations are only to be taken into account ...

1 | mainly, during the third stage of the delimitation process, when the disproportionality
2 | is tested.”⁷²

3 | 12. Professor Reisman seemed to be suggesting the same thing when he said on Friday that
4 | “India submits that no adjustment of the delimitation line” -- by which it means, of
5 | course, the equidistance line -- “no adjustment of the delimitation line is required by the
6 | application of the non-disproportionality test.”⁷³

7 | 13. With great respect, this is flat-out wrong. But it does serve India’s purpose in
8 | diverting attention from step two: the relevant circumstances inquiry. The search for
9 | relevant circumstances at step two has nothing whatsoever to do with the
10 | disproportionality test at step three. Step two involves examining the particular
11 | geographic circumstances of the case to determine whether or not there are reasons that
12 | render inequitable the provisional line drawn in step one. In this case we say that there
13 | are two such circumstances: the concavity and the instability of the coast.

14 | 14. The critical point is that the relevant circumstances are to be weighed and taken into
15 | account by a tribunal based on its overall evaluation of the geographic situation. The
16 | relevant circumstances inquiry is performed on the basis of human judgment involving
17 | equitable considerations; equity *infra legem*.

⁷² See also ICM, para. 6.71 (stating “the fact that a coast is markedly irregular or concave or convex could be taken into account only when it leads to a disproportionate result. As will be seen in Sub-Section C below, the delimitation line proposed by India easily meets the non-disproportionality test.”)

⁷³ Transcript, Day 4, p. 453, para. 11, line 18.

1 15. Step 2 relevant circumstances have nothing to do with the mathematical comparison of
2 coastal length ratios with the relevant area ratio done at step three. The
3 disproportionality test is, by design, a very blunt instrument. It is not meant to be an
4 all-purpose test of equity. To the contrary, it is done only, as the ICJ said, “to ensure
5 that there is not a disproportion so gross as to taint the result and render it
6 inequitable.”⁷⁴ Notably, no line in the case law has ever flunked the
7 disproportionality test.

8 16. To summarise, Mr. President -- and I hope this is not controversial -- step two must
9 come before step three.

10 **IV. The Relevant Coasts and the Relevant Area**

11 17. On then to my third and final step, Mr. President: the issue of the relevant coasts and
12 the relevant area, and why Bangladesh is right and India is wrong. I start with the
13 overall picture. This, of course, is the Bay of Bengal. And these are the relevant
14 coasts and the relevant areas as determined by ITLOS in the Myanmar case. Here we
15 are dealing with the other side of the same coin. Let us then flip the coin.

16 18. You can see the parallels immediately. Note that Sandy Point, the relevance of which
17 India so vehemently protests, is due west of Myanmar’s Bhiff Cape, and well north of
18 the southern limit of the relevant coast according to ITLOS. That being the case, it’s
19 hard to understand why India is so troubled by the inclusion of this segment of its coast
20 in its relevant coast.

⁷⁴ *Nicaragua v. Colombia*, para. 242.

1 19. Of course, the two sides of the Bay are not exact mirror images. Nature does not work
2 that way. Now on your screens is the relevant area as Bangladesh sees it in this case
3 compared to the relevant area as determined by ITLOS in that case. The differences
4 are immaterial. The relevant coast of India does not extend quite as far southward,
5 and the relevant area extends to the outer limit of Bangladesh's claim in the OCS. But
6 these differences, viewed in context, are not conceptual; they result from the natural
7 variations in the pertinent geography. I should say, Mr. President, this is at tab 5.3 of
8 today's folders.

9 20. It is precisely for this reason that Sir Michael Wood spent as much of his time on Friday
10 suggesting the ITLOS got it wrong, as he did saying Bangladesh got it wrong. He
11 conspicuously never once suggested that we had been unfaithful to the lessons of that
12 Judgment. Indeed, when India accuses Bangladesh of changing its position after its
13 Memorial, all it succeeds in proving is that Bangladesh actually read the ITLOS
14 Judgment and took account of it. It is less clear to us that India did so.

15 21. In any event, there are really only two issues in dispute: (1) the length of India's
16 relevant coast; and (2) the size of the relevant area. I will deal with each in turn.

17 22. With respect to the length of India's relevant coast, India offered several purported
18 justifications for stopping at Devi Point. First, on Thursday, Professor Pellet
19 displayed the following diagram, and cited *Tunisia/Libya* for the proposition that when
20 a coast changes direction, it ceases to be relevant. Let's look at *Tunisia/Libya*. Here
21 is the area in which that delimitation took place. According to Professor Pellet, there

1 was a change in direction in “the Tunisian coast beyond Ras Kaboudia.”⁷⁵ That
2 location is highlighted on your screens. As the Tribunal can see, it is quite reminiscent
3 of Myanmar’s Cape Negrais, in that beyond that point the Tunisian coast turns at
4 virtually a 90° angle away from the area to be delimited. This image is at tab 5.4 of
5 your folders. The breaking point is obvious. Devi Point is different.

6 23. Professor Pellet’s image is designed to show that the direction of India’s coast changes
7 suddenly at Devi Point. But as with so many of India’s images, they are giving you a
8 very tiny slice of reality, like the frog in Chinese proverb who, sitting at the bottom of
9 the well, can see only a small circle of the sky. Here is Devi Point in larger
10 perspective. As you can see, the direction of India’s coast does not change
11 appreciably, let alone suddenly, at Devi Point. To the contrary, the peninsular coast of
12 India is relatively straight throughout this area. And this image is at tab 5.5 of your
13 folders.

14 24. Sir Michael on Friday had a different approach. He said the coast of India between
15 Devi Point and Sandy Point was unlike the coast of Myanmar between Bhiff Cape and
16 Cape Negrais because it does not face onto the relevant area. He said the coast
17 between Devi and Sandy Points “faces in a southeasterly direction, not back into the
18 head of the Bay.”⁷⁶ But whether or not it faces “into the head of the Bay” is not the
19 question. The question is whether it faces onto the area to be delimited, and India’s
20 coast here plainly does.

⁷⁵ Transcript, Day 3, p. 284, para. 8, line 17.

⁷⁶ Transcript, Day 4, p. 355, para. 17, line 18.

1 25. The relevant area must, as it did in the Myanmar case, include areas of overlapping
2 claims beyond 200 nm. As the ICJ said in *Tunisia-Libya*, the relevant coasts are those
3 the “submarine extension[s]” of which overlap.⁷⁷ Those areas beyond 200 nm are on
4 the screens now. The Indian coast facing onto these areas evidently extends to Sandy
5 Point. This is at tab 5.6 of your folders. Thus, in response to Sir Michael’s question
6 Friday “why stop at Sandy Point?”⁷⁸, the answer is really quite simple. Beyond that
7 point, India’s peninsular coast faces onto areas that are not claimed by Bangladesh.

8 26. With respect to the size of the relevant area, India takes issue with Bangladesh’s
9 depiction in two respects: (A) the limit in the south; and (B) the limit in the southwest.
10 According to Sir Michael, the limit in the south is inappropriate because -- well, it’s
11 actually not entirely clear. He merely posed the wholly rhetorical question “what to
12 do about extravagant claims to areas beyond 200 miles that are yet to be considered by
13 the [CLCS]”⁷⁹ and he dismissed Bangladesh’s outer limit line as “highly
14 speculative.”⁸⁰ He then said: “It was difficulties such as these that led us to the
15 pragmatic approach of carrying out the non-disproportionality test in the areas within
16 200 nautical miles.”⁸¹

17 27. With great respect, these are words without substance. India’s approach is not
18 ‘pragmatic’; it is expedient. The truth is that India has never -- never -- disputed either
19 the existence or the extent of Bangladesh’s potential entitlement in the OCS. Sir

⁷⁷ *Tunisia/Libya*, para. 75.

⁷⁸ Transcript, Day 4, p. 356, line 5.

⁷⁹ *Ibid.*, p. 357, para. 24, line 26.

⁸⁰ *Ibid.*, p. 358, para. 27, line 11.

⁸¹ *Ibid.*, p. 358, para. 25, line 2.

1 Michael distinctly did not say otherwise. The outer limit of Bangladesh's claim is
2 drawn in accordance with Article 76(4)(a)(i) -- the 1% sediment thickness line -- as
3 constrained by Article 76(5) -- the 2500 metre isobath plus 100 nm. Although the
4 precise location of the outer limit has yet to be ratified by the CLCS, the location of the
5 2500 metre isobath in the Bay of Bengal is not exactly a matter of great debate; the
6 ultimate result can vary by no more than a few tens of metres, at most.

7 28. Neither does Bangladesh dispute India's potential entitlement. That being the case,
8 the relevant area must include the area of overlapping potential entitlements beyond
9 200 nm. India itself refers to the relevant area as areas of "overlapping claims."⁸²
10 There can therefore be no justification for excluding areas of overlapping claims just
11 because they lie beyond 200 nm.

12 29. In his presentation on Friday, Professor Pellet offered this sketch -- it would be
13 generous to call it a map -- to illustrate what he called "overlapping claims beyond 200
14 nm."⁸³ Honestly, Mr. President, we are not even sure what to say about it, except
15 perhaps that it reminds us of Matisse's L'Escargot. It is not explained how the various
16 green projections -- if that's what they are -- were drawn. Why this far and no more?
17 Why this direction and not another? Whatever the case, the limits of Bangladesh's
18 claim are, as I said, clear, and they are legally and scientifically unchallenged. The
19 area of overlapping claims really does define itself. This drawing is of no help.

⁸² See e.g., Transcript, Day 4, p. 351, para. 4, line 19 *et seq.*; p. 450, line 19 *et seq.*

⁸³ Arbitrator's Folder, Day 4, Pellet, Tab 8.6.

1 30. Turning to the limit of the relevant area in the southwest, as I explained last Tuesday,
2 we have simply connected the end of Bangladesh's OCS claim to the closest point on
3 the Indian coast by means of a perpendicular line. India objects vociferously because
4 it includes areas that are within 200 nm of India but beyond that distance from
5 Bangladesh. According to Sir Michael, this is both "unexplained" and
6 "inexplicable."⁸⁴

7 31. There really is no mystery, Mr. President. As I have said, we are simply following the
8 lead of ITLOS in the Myanmar case. Contrary to India, we proceed on the basis that
9 ITLOS knew what it was doing. The issue India identifies is a result of the fact that
10 this case relates both to the delimitation within 200 nm, and beyond. It has therefore
11 arisen only once in the case law, in *Bangladesh/Myanmar*. That case is the only one to
12 delimit beyond 200 nm. Consistent with what we consider sound judgment, ITLOS
13 came up with a pragmatic solution to a practical problem. To do otherwise, would
14 mean excluding from the relevant area zones of maritime space that lie directly in front
15 of a State's relevant coast. For obvious reasons, that cannot be right.

16 32. Bangladesh maintains that the approach presented in its Reply and again last week is
17 right. That model is on your screens again now. It's also at tab 5.7 of your folders.
18 Professor Crawford will have more to say after the break.

19 33. Thank you, Mr. President, members of the Tribunal. I very much appreciate your
20 attention and your patience.

⁸⁴ Transcript, Day 4, p. 358, para. 30, line 3.

1 PRESIDENT WOLFRUM: Thank you very much, Mr. Martin, for your
2 presentation.

3 We break now for 20 minutes. That means we resume at 10 minutes to 12.
4 Thank you.

5 (Brief recess.)

6 PRESIDENT WOLFRUM: Mr. Reichler, you have the floor.

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PERMANENT COURT OF ARBITRATION

***Bay of Bengal Maritime Boundary
Arbitration between Bangladesh and India***

Mr. Paul S. Reichler

Delimitation of the EEZ and Continental Shelf (Round 2)

16 December 2013

Mr. President, Members of the Court, Good Morning.

1. Professor Pellet is right about one thing. I am his friend. We are, in fact, very good friends. More often than not, we are teammates as well. And our collaboration goes back all the way back to 1984, in *Nicaragua v. United States*. We still represent Nicaragua together, almost thirty years later. And he always amazes me with his advocacy. He is a true artist, a master, perhaps even THE master, especially after Professor Crawford ascends to more sublime surroundings. I refer, of course, to the ICJ. But artist, master that he is, Professor Pellet is not an alchemist. Not even he can make diamonds of dust. Not even he can make something out of India's rigid

1 insistence on a strict, unadjusted equidistance line. It is a dead weight that India
2 obligates him to bear.

3 2. Behind all the eloquence – in English no less – behind all the hyperbole; behind the
4 attempt to cast ridicule on Bangladesh’s reasoned arguments as “absurd”,
5 “arbitrary”, “bizarre”; behind the deliberate attribution to Bangladesh of bad
6 arguments that it does not make, and never made, for the sole purpose of knocking
7 them down; behind all the “volte faces” they attribute to us; behind all these
8 diversionary tactics, is this inescapable fact: India’s proposal, a strict equidistance
9 line without any adjustment whatsoever, is manifestly inequitable to Bangladesh,
10 and contrary to the law.

11 3. They accuse us, most unfairly, of avoiding the law, and of “ask[ing] you to adopt a
12 delimitation ex aequo et bono.”⁸⁵ They tell you that Bangladesh “trusts in equity –
13 full stop; equity contra legem.”⁸⁶ By contrast, they say, India’s creed is “in law we
14 trust.”⁸⁷

15 4. Really? If India wants to challenge us on whose approach to delimitation
16 methodology, and whose proposed solution are more consistent with and justified
17 by the 1982 Convention and the case law, we say: Bring it on!

⁸⁵ Transcript (13 December 2013), Vol.4, Professor Pellet, p. 415, para. 43, lines 25-28

⁸⁶ Transcript (13 December 2013), Vol.4, Professor Pellet, p. 433, para. 59, lines 18-21.

⁸⁷ Transcript (13 December 2013), Vol.4, Professor Pellet, p. 433, para. 59, line 14.

1 5. Let's start with the approach to delimitation methodology, about which we are
2 accused of not caring at all.⁸⁸ Apparently, their best response to our first round
3 arguments is to mischaracterize them. Yes, I said that Bangladesh places more
4 emphasis on the achievement of an equitable solution than it does on which of two
5 established methodologies – angle bisector or equidistance/relevant circumstances
6 – is used to get there. That's because Articles 74 and 83 – which India agrees
7 constitute the applicable law – mandate an equitable solution, and do not specify
8 any particular delimitation methodology.

9 6. In fact, however, I spent much of my speech (some 19 paragraphs) precisely on
10 methodology, demonstrating how the equidistance/relevant circumstances method,
11 properly applied – that is, applied in a manner that is consistent with the case law –
12 produces an equitable solution within 200M very similar to the 180 degree line that
13 Bangladesh derives from its angle bisector methodology. Bangladesh is very much
14 interested in methodology. Its point is: that under either of the accepted
15 methodologies, the 180 degree line is an equitable solution.

16 7. As Mr. Martin pointed out, if anyone is confused about methodology, it's India.
17 They repeatedly invoke the three-step equidistance/relevant circumstances method,
18 and then they apply it wrongly and self-servingly. They like steps one and three:
19 drawing a provisional equidistance line, and then immediately checking it for
20 disproportionality. But, as my colleague pointed out, they skip right over step two –
21 checking for relevant circumstances and adjusting or shifting the provisional line to

⁸⁸ Transcript (13 December 2013), Vol.4, Professor Pellet, p. 430, para.53, lines 14-16.

1 prevent inequity. They pay no more than lip service to the second step, jumping
2 past it to get to step three, so they can rush to the judgment that their equidistance
3 line is not inequitable under the very liberal standards of the disproportionality test.
4 But just as two always comes after one and before 3, after (1) drawing the
5 provisional equidistance line, you have to (2) check for, and adjust for, relevant
6 circumstances *before* you (3) check for disproportionality.

7 8. This was reaffirmed in the most recent delimitation case, Nicaragua/Colombia.
8 **(F1)** After India’s muddying of the waters, the Court’s explanation and application
9 of the three-step process are worth another look: “The construction of a provisional
10 median line **(A)**... is *nothing more* than a first step and *in no way prejudices the*
11 *ultimate solution, which must be designed to achieve an equitable*
12 *result....Following this approach does not preclude very substantial adjustment*
13 *to--very substantial adjustment to--or shifting of, the provisional line* in an
14 appropriate case.” In that case the Court found that there were two relevant
15 circumstances: **(B)** the substantial disparity in coastal lengths, and the cutoff effect
16 the provisional equidistance line had on Nicaragua.

17 9. The solution adopted by the Court consisted of three different delimitation
18 methodologies – none of which was equidistance – and all of which were applied
19 within the same maritime zone: the EEZ and continental shelf within 200 M. First,
20 **(C)** in the area between Nicaragua’s mainland and Colombia’s islands, the Court
21 employed what is referred to in the literature as the *equiratio* method. But, the Court
22 found: “to extend that line into the parts of the relevant area north of point 1 or

1 south of point 5 would not lead to an equitable result.” For that reason, the Court
2 turned to a second and then a third methodology. **(D)** The second one consisted of
3 enclaving Colombia’s smaller islands, in the south and in the north, within a 12 M
4 territorial sea. Third, **(E)** in regard to Colombia’s larger islands, the Court created a
5 corridor along parallels of latitude extending from west to east.

6 10. The Court’s use of three different methodologies, even after first drawing a
7 provisional equidistance line, recalls the dictum in the *North Sea* cases that “it is
8 necessary to seek not one *method of delimitation* but one *goal*.” That goal, of
9 course, is an equitable solution. Nicaragua/Colombia refutes India’s argument,
10 which it bases on the earlier *Black Sea* case, that relevant circumstances may call
11 for an adjustment or shift of a provisional equidistance line, but never its
12 abandonment. Bangladesh, relying on Nicaragua/Colombia, as well as the 2012
13 ITLOS judgment, disagrees. Where, as here, the provisional equidistance line is so
14 manifestly inequitable to Bangladesh, resort to a different methodology is more
15 likely to lead to an equitable solution within 200 M.

16 11. But that is not to say that an equitable solution cannot be reached by adjustment, in
17 this case “a very substantial adjustment”⁸⁹ to the provisional equidistance line, to
18 reflect the relevant circumstances, chief among them: the cutoff produced by the
19 concavity of Bangladesh’s coast. To get there, we need only apply the three-step
20 process properly, consistent with Nicaragua/Colombia and the ITLOS judgment.

⁸⁹ *Nicaragua v. Colombia*, para. 197.

1 12. Mr. President, Members of the Tribunal, it might surprise you that, despite all of
2 Professor Pellet's huffing and puffing, Bangladesh and India are in agreement on at
3 least five key points in regard to relevant circumstances, and to concavity as a
4 relevant circumstance in particular.

5 13. **(F2)** First, Professor Pellet agrees that Bangladesh's entire coast is concave.⁹⁰ **(A)**
6 What you see on the screen is also reproduced at Tab 8 of today's folder. Second,
7 he agrees that Bangladesh's coast has a concavity within a concavity.⁹¹ **(B)** Third,
8 he concedes that a coastal concavity can be a relevant circumstance, where the
9 State with a concave coast is pinched between two other States, or otherwise where
10 the concavity causes a cutoff effect.⁹² **(C)** Fourth, he acknowledges that ITLOS
11 determined that Bangladesh's coastal concavity was a relevant circumstance
12 justifying a departure from equidistance;⁹³ **(D)** and fifth, he recognizes that this
13 concavity, even after the ITLOS judgment, cuts off Bangladesh from its maritime
14 entitlements.⁹⁴ That is a very large part of our submission that is now agreed.

15 14. Nevertheless, Professor Pellet denies that Bangladesh's concavity is a relevant
16 circumstance in this case, and this is where the Parties still disagree. Mr. President,
17 all this idle talk about Bangladesh wanting to refashion nature, to exalt equity over
18 law, or to obtain a delimitation *ex aequo et bono* is just that: idle talk, hyperbole, the
19 artistry of a skilled advocate deliberately mischaracterizing his adversary's

⁹⁰ Transcript (12 December 2013), Vol.3, Professor Pellet, p.293, para. 16, line 17.

⁹¹ Transcript (12 December 2013), Vol.3, Professor Pellet, p.293, para. 16, lines 18-19.

⁹² Transcript (13 December 2013), Vol.4, Professor Pellet, p.401, para. 21, lines 8-11.

⁹³ Transcript (13 December 2013), Vol.4, Professor Pellet, p.403, para. 25, lines 9-12.

⁹⁴ Transcript (13 December 2013), Vol.4, Professor Pellet, pp.410-411, para. 34 (lines 26, 1-4) and pp. 411-412, para. 36 (lines 27, 1-3)

1 argument in order to make it appear weak. But putting rhetoric aside, this
2 delimitation is quintessentially a legal dispute. Actually, two of them. First, are
3 there relevant circumstances, within the meaning of the case law, including
4 Bangladesh/Myanmar and Nicaragua/Colombia, that justify a departure from
5 equidistance in favor of an angle bisector? Professor Boyle has very ably presented
6 Bangladesh's position on this. Second, if the Tribunal considers it inappropriate to
7 depart entirely from equidistance, are there relevant circumstances that justify a
8 substantial adjustment to the provisionally drawn line? That, too, is a legal
9 question, and it is the one that I have been addressing. To characterize
10 Bangladesh's position as "absurd" or "bizarre", is just another tactic.

11 15. So let's look at what the real arguments are. You know what Bangladesh's is: the
12 concavity of its coast is a relevant circumstance, justifying resort to the angle
13 bisector method, or in the alternative, to a substantial adjustment of the provisional
14 equidistance line, because that line, due to the concavity, severely cuts off
15 Bangladesh from its entitlements, both within and beyond 200 M. India opposes
16 this. It argues that it too has a concave coast, which neutralizes or balances the
17 cutoff on Bangladesh, rendering an adjustment unnecessary. That is *the* only
18 argument they put forward for denying the relevance of Bangladesh's concavity. It
19 is a contrived and geographically untenable argument, but that is their argument, as
20 expostulated by Professor Pellet, and he deserves a response.

21 16. (F3) Here is the figure Professor Pellet used to demonstrate the existence of the two
22 concavities, Bangladesh's in the Meghna Estuary, and India's in the Bay of

1 Balasore.⁹⁵ This is at Tab 9 of our folder today. It is India's sketch map, and we
2 don't vouch for it, but we can use it for present purposes. Yes, Professor Pellet is
3 right, India's coast, like Bangladesh's, has a concavity. Bangladesh has never said
4 otherwise, in its written pleadings or last week. But, no, India's concavity, unlike
5 Bangladesh's does not produce a cutoff effect, and for this reason it does *not*, to use
6 Professor Pellet's words, neutralize or balance Bangladesh's concavity. Mr. Martin
7 already gave you one reason why there is no such neutralization or balancing. India
8 has only one land boundary terminus in the concavity of the northern Bay of
9 Bengal. Unlike Bangladesh, its entire coast, from one LBT to another, is not
10 pinched or sandwiched inside that concavity, between two States. India is,
11 therefore, unlike Germany, Guinea, or Bangladesh.

12 17. But there is a second, and equally compelling, reason why India's concavity does
13 not produce a cutoff and does not neutralize or balance Bangladesh's. India's
14 concavity in the Bay of Balasore, is offset – compensated for – by the presence of
15 protruding Indian base points at offshore Bangadhuni Island **(A)** (I-2) and the
16 coastal projection at False Point **(B)** (I-3). As I am confident your expert Dr. Gray
17 will confirm, because of the locations of these protruding base points at either end
18 of India's concavity, its effects are neutralized, and it causes no cutoff of India's
19 coastal projection. That, by contrast, is not the case on the Bangladesh side. **(C)**
20 There the concavity is much wider, extending across 349 km (as compared to a
21 width of only 232 km from Bangadhuni across the Bay of Balasore), and
22 Bangladesh has no base points to offset this considerably larger and deeper

⁹⁵ Transcript (12 December 2013), Vol.3, Professor Pellet, p.287, para. 9, lines 14-23.

1 concavity until you get all the way to its land boundary terminus at Shahpuri Point
2 **(D)** (B-5), which only begins to assert a very mild effect on the equidistance line
3 shortly before the 200 M limit. **(E)** This is why, even though each Party has a
4 concavity, India's equidistance line veers across Bangladesh's coastal projection,
5 and leaves Bangladesh's south-facing coast, behind its concavity, cut off. Simply
6 put, if the two concavities truly neutralized one another in these circumstances, the
7 equidistance line would not favor or prejudice either Party's southward projection;
8 it would be much straighter, not unlike an angle bisector.

9 18. In the south, only Bangladesh is cut off by the equidistance line. India agrees that,
10 looking east and west, India's east-facing and Bangladesh's opposite, west-facing
11 coast, separated by less than 400 M, produce a cutoff that is mutual and balanced.
12 As Professor Pellet confirmed, "Indeed, it is" mutual and balanced".⁹⁶ **(F4)** If we
13 look east and west, neither an equidistance line nor a 180 degree line can properly
14 be described as inequitable to either Party, as I showed you last week.

15 19. But what if, instead of looking east and west, we look north and south? **(F5)** The
16 Court will recall that I asked this question and displayed the same figure last week.
17 After hearing Professor Pellet's response, it now should be even clearer why India
18 is wrong, that is, why India's concavity in the Bay of Balasore does not, indeed it
19 cannot, neutralize or balance Bangladesh's concavity in the Meghna Estuary. This
20 is because Bangladesh's concavity is south-and south-west facing. And for that
21 reason, it projects into a confined space, a tapering wedge, a triangle with its apex

⁹⁶ Transcript (13 December 2013), Vol.4, Professor Pellet, p.412, para. 37, lines 8-9.

1 to seaward, created by the combination of India’s provisional equidistance line and
2 the boundary fixed by ITLOS. By contrast, there is absolutely nothing to limit the
3 projection southward of India’s south-facing coast. Bangladesh is cut off. India is
4 not. There is no mutuality, no balance. The cutoff is therefore inequitable to
5 Bangladesh, it does constitute a relevant circumstance under the three-step method,
6 and it requires an adjustment to the equidistance line, if not substitution of a
7 different method, like angle bisector, to achieve an equitable solution.

8 20. And what does my friend, Professor Pellet, have to say about this? Not much. He is
9 very skilled at remaining silent, when there is nothing to say. But to be fair, he did
10 say this: “Bangladesh asks: what about the cut-off on Bangladesh’s *south*-facing
11 coast? Well, the ITLOS has already answered these questions in its 2012
12 Judgment.”⁹⁷ That’s it. That’s all. Not a word more about this cutoff. ITLOS’s
13 Judgment “remedies the cut-off effect on the southward projection of the coast of
14 Bangladesh,” and nothing further is required.

15 21. Mr. President, Members of the Tribunal, you can’t say we didn’t warn you. We told
16 you last week that India considers the ITLOS Judgment to have resolved both the
17 Bangladesh/Myanmar case and this one. By adjusting the equidistance line
18 between Bangladesh and Myanmar, India says, ITLOS completely relieved
19 Bangladesh of the cutoff of its south-facing coast, and no further relief is required,
20 certainly not by way of an adjustment to the Bangladesh/India equidistance line.
21 Last week we referred to this as India’s “thank you Myanmar” defense. But at this

⁹⁷ Transcript (13 December 2013), Vol.4, Professor Pellet, p.412, para. 37, lines 9-11.

1 stage of the proceedings, it's not funny. This is what the case that is now in your
2 trusted hands reduces to: For India, the ITLOS Judgment gave Bangladesh all the
3 relief it needs to avoid the cutoff resulting from its coastal concavity. For
4 Bangladesh, it did not. Indeed, it could not have. ITLOS equitably settled the
5 boundary between Bangladesh and Myanmar, nothing more. It adjusted the
6 equidistance line in Bangladesh's favor, but only so far as not to be prejudicial to
7 Myanmar. It said so specifically. It plainly left the delimitation between
8 Bangladesh and India for another day, for another case, this one of which it was
9 well aware. We addressed the subject of ITLOS' intentions last week. We leave it
10 to the Tribunal to determine if Bangladesh is still inequitably prejudiced by its
11 coastal concavity, such that a substantial adjustment of that line is required.

12 22. We say, and I attempted to show last week that the solution within 200M proposed
13 by Bangladesh, a 180 degree line, whether achieved by an angle bisector or an
14 adjustment to equidistance, is justified by the case law. I am compelled to say, with
15 the greatest respect, that Professor Pellet's treatment of the jurisprudence, very
16 uncharacteristically, was not up to his usually impeccable standards of scholarship.
17 To begin with, he accused Bangladesh of totally ignoring the "time factor" and
18 relying on cases that are "noticeably outdated".⁹⁸ Mr. President, as we made clear
19 last week, and in our Reply, we place our reliance on Bangladesh/Myanmar and
20 Nicaragua/Colombia, the two most recently-decided cases. If those cases are
21 "outdated", then the only way we could satisfy Professor Pellet is clairvoyantly --
22 by citing cases that have not yet been decided, or even initiated. It may be worth

⁹⁸ Transcript (13 December 2013), Vol.4, Professor Pellet, p. 400, para. 18, line 5.

1 reminding him that in three of the last four judgments, dating back to
2 Nicaragua/Honduras, equidistance was either abandoned, in whole or in most of the
3 delimitation area, or substantially adjusted. Only in Romania/Ukraine did the Court
4 adopt what *it* called an unadjusted equidistance line, but that is because it decided,
5 for whatever reason, to eliminate Serpents' Island before, rather than after, drawing
6 the line. If it had strictly followed the three-step process, it would have drawn the
7 provisional line reflecting all geographical features, including Serpents' Island, and
8 then eliminated it as a relevant circumstance because of its cutoff effect on
9 Romania. The Judgment has attracted some criticism on that basis.

10 23. Professor Pellet provided a list of 20 cases, which he included in India's folder at
11 Tab 6.1. He said: "It is very telling."⁹⁹ We agree. But what exactly does his list tell
12 us? **(F6)** This is what you see at Tab 10. What you see displayed is Professor
13 Pellet's list, with an additional column on the right, supplied by us. Professor Pellet
14 says that the equidistance/relevant circumstances approach was employed in most
15 of these cases. Perhaps. But some clarifications are required. Of those cases, only
16 three involved coastal concavities, and in all three cases equidistance was rejected
17 in favor of a different methodology, including an angle bisector, in either the entire
18 area to be delimited or the part affected by the concavity, as in
19 Bangladesh/Myanmar. Three for three, as I said last week.

20 24. Also, my friend's characterization of the cases is, at least in regard to some of them,
21 debatable. Take his description of the *North Sea* cases. **(A)** He says: "*Sui Generis*

⁹⁹ Transcript (13 December 2013), Vol.4, Professor Pellet, p. 400, para. 18, line 12.

1 (no precise method)". From this you would never know, which of course you do,
2 that the Court regarded equidistance as inequitable due to the cutoff effect
3 produced by Germany's coastal concavity. **(B)** Or take his description of
4 Nicaragua/Colombia: "Equidistance/relevant circumstances." Come on. We
5 argued this one together, on the winning side! Yes, the Court employed the
6 three-step process. But, as we know, it found the cutoff effect on Nicaragua so
7 prejudicial that it abandoned equidistance in favor of three different methodologies,
8 in different parts of the area delimited, in order to achieve an equitable solution.
9 Professor Pellet's list of cases is not the product of disinterested scholarly study. It
10 is India's advocate's attempt to persuade you that the case law supports his client's
11 position. My friend cannot be faulted for this. That is his job.

12 25. While he was doing it, he used the same epithet for the Guinea/Guinea Bissau
13 award as he uses for Bangladesh's arguments: "absurd".¹⁰⁰ But that, of course,
14 does not make it so. In any event, the award was cited and quoted approvingly by
15 the ICJ in Nicaragua/Honduras¹⁰¹ and by ITLOS¹⁰², for the very proposition that:
16 equidistance may produce an inequitable cutoff on a State with a concave coast,
17 pinched between two other States. Professor Pellet tries to distinguish
18 Guinea/Guinea Bissau because one of the reasons equidistance was rejected was
19 the presence of small islands near the line that distorted its direction.¹⁰³ True
20 enough, but that only reinforces Bangladesh's argument. There were two grounds
21 for the rejection of equidistance, the prejudicial effects of these small islands, and

¹⁰⁰ Transcript (13 December 2013), Vol.4, Professor Pellet, p.414, para. 42, line 29.

¹⁰¹ *Nicaragua v. Honduras*, paras. 287-288.

¹⁰² *Bangladesh/Myanmar*, para. 296.

¹⁰³ Transcript (13 December 2013), Vol.4, Professor Pellet, p.415, para. 42, lines 3-5.

1 of Guinea's coastal concavity, both of which served to cut off Guinea's access to its
2 maritime entitlements, and require an angle bisector.

3 26. The case underscores the principle that was consistently applied in the ten cases I
4 reviewed with you last week. For each of those cases I provided a figure illustrating
5 the delimitation, and how it resulted from the determination that either small
6 islands (in seven cases) or coastal concavities (in the three others) inequitably cut
7 off coastal projections, such that, to achieve an equitable solution, these anomalous
8 features had to be eliminated from the construction of the final delimitation line.
9 That is, indeed, what the jurisprudence shows. Professor Pellet told you he found
10 my discussion of the case law so effective that he was almost "lured" by it, until he
11 was rescued at the last moment by his young junior counsel.¹⁰⁴ I know Professor
12 Pellet's assistant, and he is indeed excellent. If the best even he could do to
13 distinguish the cases were to say that some of them involved islands rather than
14 coastal concavities – truly a distinction without a difference – then my analysis of
15 them is confirmed. Yes, islands are different from coastal concavities, but the point
16 is that their treatment in the jurisprudence is the same. The issue is whether they
17 cause cutoffs, and whether those cutoffs are inequitable. Where they are, the feature
18 is disregarded or eliminated in the final delimitation exercise, whether it is an island
19 or a concavity. That is true in all of the cases we reviewed last week.

20 27. And that brings us back to the heart of the matter. (F7) THIS is STILL the heart of
21 the matter. THIS is still a cutoff. Bangladesh submits that it still remains

¹⁰⁴ Transcript (13 December 2013), Vol.4, Professor Pellet, p.415, para. 42.

1 inequitably cut off, even after ITLOS' Judgment. In Bangladesh's view, the
2 inequity is manifest, and no objective observer could fail to see it. In
3 Nicaragua/Colombia, the Court said that the purpose of the second step of the
4 three-step process "is to verify that the provisional median line...is not, in light of
5 the particular circumstances of the case, perceived as inequitable."¹⁰⁵ Not
6 *perceived* as inequitable. And Mr. President it is your perception, and the
7 perception of your distinguished colleagues on the Tribunal, that matters. Professor
8 Pellet, reflecting India's position, looks at this and predictably asks: "What is
9 wrong with this line?"¹⁰⁶ What is wrong with it is that the south-facing coast of
10 Bangladesh remains severely cut off, while the adjacent south – facing coast of
11 India reaches its maximum entitlement unhindered. Professor Pellet brushes this
12 off as "much ado about nothing."¹⁰⁷ We trust, Mr. President, that neither you nor
13 your fellow arbitrators will perceive this gross inequity to Bangladesh as nothing.

14 28. I turn now to how to remedy it. Our proposed solution, as you know, is a 180 degree
15 line, achieved either by an angle bisector or an adjustment to equidistance. This is
16 at Tab 11. (A) Significantly, Professor Pellet did not show you how the 180 degree
17 line would be inequitable to India. In fact, he made no attempt to do so. Perhaps he
18 is waiting to do this in the second round, when we will have no opportunity to point
19 out any flaws in his analysis. We would therefore urge you to react cautiously to an
20 attempt, if there is one, to exploit the advantage of going last by deliberately
21 holding back a demonstration of our line's purported inequity, to immunize it from

¹⁰⁵ *Nicaragua v. Colombia*, para. 205; *Romania v. Ukraine*, para. 155.

¹⁰⁶ Transcript (13 December 2013), Vol.4, Professor Pellet, p. 410, para. 33, line 8.

¹⁰⁷ Transcript (13 December 2013), Vol.4, Professor Pellet, p.411, para. 35, line 18.

1 the scrutiny of the adversarial process. Mr. Martin has already showed you that our
2 proposal is equitable to both Parties, and satisfies the disproportionality test, the
3 final step in the three step process.

4 29. (F8) Mr. President, we have shown you that a line of 180 degrees is equivalent to an
5 equidistance line, drawn after the relevant circumstance of Bangladesh's concavity
6 is eliminated from the picture, in conformity with the methodology reflected in the
7 case law. And we have shown you that the 180 degree line partially relieves the
8 cutoff of Bangladesh's south-facing coast, without cutting off India's south-facing
9 coast in any manner. Here is India's response. (F9) This is the way India actually
10 displayed it, at Tab 6.10 of their folder. Tilted to one side. I wonder if Professor
11 Pellet appreciates the apparently unintended irony of his own remark: "Now
12 maybe, Mr. President, you still have the impression of a small disadvantage for
13 Bangladesh – one should always be suspicious of impressions – and particularly so
14 when you are confronted with a map drawn by able cartographers, knowing what is
15 in the best interest of their client. Now let us lightly curve the orientation of the map
16 on the right...so that the line has a general direction north-south."¹⁰⁸ He could not
17 have done a better job of discrediting his own map. Of course, by "curving the
18 orientation of the map" in this manner, that is by distorting it, the cutoff of
19 Bangladesh's south-facing coast is made to appear less severe, if not to disappear
20 altogether. Why else would they reorient or tilt the map? Why do they draw an
21 entirely artificial orange-dashed line, that is neither an adjudicated nor an agreed

¹⁰⁸ Transcript (13 December 2013), Vol.4, Professor Pellet, p.411, para. 35, lines 6-11.

1 boundary line, to make it appear as though they are cut off in the south, when that is
2 so plainly not the case?

3 30. (F8) Let us return to a properly oriented map, where north is up and south is down.
4 You can see again the equidistance line that results from elimination of
5 Bangladesh's concavity. It is very close to our 180 degree line. What I expected
6 India to say in response to this is, if Bangladesh wanted to be fair, it would have
7 eliminated the effects of both concavities, not just its own. We think this depiction
8 *is* fair, because only Bangladesh's south-facing concavity produces an inequitable
9 cutoff. India's concavity in the Bay of Balasore produces no such cutoff, because
10 its effect is almost entirely eliminated by India's protruding base points I-1 and I-2.
11 But we don't want to be seen as unfair to India. (C) Here, we show the equidistance
12 line that would result if both concavities were eliminated. The effect of completely
13 eliminating India's concavity is minimal because the effect of that concavity is
14 minimal. Perhaps this is why India chose not to show this, or challenge us to do so.
15 This line, too, demonstrates that Bangladesh's proposed 180 degree line is not
16 inequitable to India. This is at our Tab 12.

17 31. Mr. President, India accuses us of "bargaining" with the Tribunal. Professor Pellet
18 lectures us: "this is not a bazaar or a market."¹⁰⁹ Mr. President, this charge, too, is
19 false. Within 200M we have proposed a 180 degree line, period. That is our
20 position. We believe, and believe we have shown, that it is an equitable solution
21 that can be achieved by either an angle bisector or adjusted equidistance. At the

¹⁰⁹ Transcript (13 December 2013), Vol.4, Professor Pellet, p.417, para. 46, line17.

1 same time, we recognize – and this is another point of difference with India – that
2 more than one specific solution may be perceived as equitable. If 180 degrees is
3 equitable, it would be difficult to argue that 181 degrees, or 179 degrees, is not. We
4 recognize, as India does not, that there is no magic formula, and that you are vested
5 by the Convention with the power, within a margin of appreciation, to fashion an
6 equitable solution within a range of possibilities consistent with the case law. That
7 is what the law says. Professor Pellet warns you not to be seduced by what he called
8 “the siren’s song” of margin of appreciation.¹¹⁰ The "siren's song" of margin of
9 appreciation. Mr. President, the language about the absence of a magic formula,
10 and the discretion afforded arbitrators under Articles 74 and 83, comes from the
11 Barbados/Trinidad and Tobago tribunal. I must confess, I have great difficulty
12 imagining the president of that tribunal, Judge Stephen Schwebel, as a siren, let
13 alone a singing one.

14 32. It appears that India’s concept of not bargaining is this: stubbornly refuse to
15 consider any alternative to strict equidistance, without even the possibility of
16 adjustment. They offer no guidance to the Tribunal as to how you might adjust the
17 equidistance line, or by how much, should you find that you are not required by law
18 to adopt an unadjusted equidistance line, and only an unadjusted equidistance line,
19 in this case. Their only concession, which they have clearly signaled, is their
20 willingness to accept Bangladesh’s provisional equidistance line in place of their
21 own. But that is only because, as they themselves have underscored, there is no
22 significant difference between the two. Otherwise, India has not changed its

¹¹⁰ Transcript (13 December 2013), Vol.4, Professor Pellet, p.397, para. 13, lines 22-23.

1 position, at all, since this case began in 2009. In fact, India has not changed its
2 position, at all, since the Parties first sat down to negotiate the boundary, in 1974.
3 No change. Equidistance or nothing. Take it or leave it. Mr. President, India
4 counsels us: *Errare humanum est, perseverare diabolicum est*. It's very good
5 advice. India might wish to follow it.

6 33. Mr. President, Members of the Tribunal, this concludes my presentation. I wish to
7 thank Mr. Yuri Parkhomenko for his outstanding assistance. It has been an honor
8 appearing before you in these proceedings, and I thank you for your kind and
9 courteous attention. I ask you to call Professor Crawford to the podium.

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1 PRESIDENT WOLFRUM: Thank you very much for your presentation,
2 Mr. Reichler. We will take your advice to tie ourselves to the masts of ships. That's the
3 measure being taken by Ulysses, as far as I remember, but I now give the floor to Professor
4 Crawford. You have the floor.

5 PROFESSOR CRAWFORD: Thank you, sir.

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PERMANENT COURT OF ARBITRATION

*Bay of Bengal Maritime Boundary
Arbitration between Bangladesh and India*

James Crawford AC SC

The Outer Continental Shelf

16 December 2013

13 Mr. President, Members of the Tribunal:

14 **Introduction**

- 15 1. It is my task in this last presentation to deal with the arguments relating to the
16 delimitation of the outer continental shelf, largely in response to Professor Pellet's
17 rhetorical *tour de force* of last Friday. Listening to him, it occurred to me that the
18 rule of delimitation he was applying was equidistance plus special expostulations.
- 19 2. It is a without seeking to identify the terms of opprobrium that Professor Pellet did
20 **not** use in relation to our outer continental shelf claim, let me take on the easier task
21 of listing some of the points of substance he did **not** mention, the points we made
22 on the outer continental shelf he did **not** contradict. They include:
- 23 (1) He ironized about my two numerical tables of last Tuesday, but he did not question
24 the numbers themselves -- merely the need for numbers. Look Tribunal, no
25 numbers! Apparently maritime delimitation is purely qualitative -- though not of
26 course subjective!

- 1 (2) In particular, he did not contradict my estimate that under India's proposal
2 Bangladesh receives but 1.35% of its potential outer continental shelf entitlement.
- 3 (3) Nor did he contradict my estimate that the quadrilateral never previously claimed
4 by India is nearly three times (actually 2.69%, or 2.69 times) the size of the tiny
5 outer continental shelf slice allocated by India to Bangladesh.
- 6 (4) Apart from a sideways kick at Jonathan Charney, he did not engage with the
7 presumption of maximum reach.
- 8 (5) He did not deny that the whole of the Bay of Bengal qualifies as outer continental
9 shelf of one or the other of the three coastal States.
- 10 (6) He did not deny what I said last Tuesday about the different regime of the
11 continental shelf beyond 200M.
- 12 (7) He seemed to agree that the dictum of ITLOS which I analysed last Tuesday did not
13 actually require the continuation beyond 200M of a line drawn within -- though he
14 was notably unclear on that point.

15

16 **Bangladesh's case summarized**

17 Mr. President, Members of the Tribunal:

- 18 3. For the sake of clarity, let me summarise Bangladesh's claim to the outer
19 continental shelf, which consists of the following 11 propositions:
- 20 (1) The whole area of the Bay of Bengal beyond 200M is geomorphologically outer
21 continental shelf attributable to one coastal state or another under the formulas
22 incorporated in Article 76.
- 23 (2) Bangladesh's maximum outer continental shelf claim – its maximum potential
24 entitlement – is to be calculated in accordance with article 76 of the Convention. In
25 fact that claim is public, having been made to the CLCS on the basis of proper
26 advice. Mr. Martin has already dealt with that.

- 1 (3) Outer continental shelf entitlements are not dependent on a recommendation of the
2 CLCS, they are established through implementation of Article 76, and in
3 appropriate cases (such as overlap) they are a matter for judicial determination in
4 the course of delimitation.
- 5 (4) Bangladesh has a frontage on the outer continental shelf, the width of which will
6 depend on your delimitation within 200 M.
- 7 (5) ITLOS has already determined the full extent of Bangladesh's entitlement to outer
8 continental shelf vis-à-vis Myanmar, taking into account the full coastal frontage of
9 both States.
- 10 (6) There is no fourth State whose rights or interests need to be taken into account in
11 this case: either the relevant area pertains to India, to Bangladesh or to Myanmar.
12 As between the last two it's decided.
- 13 (7) Bangladesh's outer continental shelf claim is delimited to the east by the ITLOS
14 judgment; to the south by the requirements – justiciable before you – of article 76;
15 and to the west by the delimitation line you will decide upon between mainland
16 India and Bangladesh. The fact that areas to the east of the ITLOS line remain
17 undetermined as between Myanmar and the Andaman Islands does not affect your
18 jurisdiction or competence to decide this case.
- 19 (8) Bangladesh has an existing *ipso jure* entitlement to outer continental shelf, which
20 falls to be delimited by you such that the overall delimitation--I stress the overall
21 limitation between India and Bangladesh is equitable in accordance with article 83.
- 22 (9) Given a frontage out to the outer continental shelf (which even India concedes)
23 Bangladesh's claim should be determined in accordance with three criteria which
24 together contribute to an equitable solution. These are:
- 25 (a) the principle that the adjustment of an inequitable solution due to concavity
26 should take into account both states contributing to the inequity and not only
27 one of them -- here both India and Myanmar.

1 (b) the principle of maximum reach according to which in the absence of special
2 circumstances a state with a frontage on a particular zone or area should not be
3 locked in and excluded from the reach of that zone.

4 (c) the principle of not unduly cutting off the seaward projection of the coasts of
5 the other party (both sides are agreed that cut-off is inevitable).

6 (10) The appropriate way, Mr. President and Members of the Tribunal, to give effect to
7 these principles or criteria is to delimit a corridor to the west of the ITLOS line to
8 the edge of Bangladesh's outer continental shelf entitlement under article 76.

9 (11) The resulting delimitation is equitable. It remedies the cut off caused by
10 Bangladesh's concave coast. It does not disproportionately cut off India's east and
11 southeast-facing coast. It passes both the second stage and the third stage tests
12 under Professor Pellet's famous methodology.

13 4. These propositions are clear and, I suggest, reasonable and fair. They take into
14 account the exigencies of delimitation beyond 200M in a way that India's rigid
15 adherence to equidistance does not. Professor Pellet accused us of advocating
16 'government by judiciary'.¹¹¹ But what we ask you to do is simply what you are
17 mandated to do: to delimit outer continental shelf entitlements which are in
18 competition. That's a boundary question which no government can unilaterally
19 determine and which the two governments together have been unable to resolve.
20 Once you have determined it, each will be free to regulate its own area in
21 accordance with international law. Nothing could be further from 'government by
22 judiciary'.

23 **Specific Issues raised by India**

¹¹¹ Transcript (13 December 2013), Vol.4, Professor Pellet, p. 397, lines 21 to 27.

1 Mr. President, members of the tribunal:

2 5. Having, I hope, clarified Bangladesh's case, I turn to consider a number of specific
3 issues raised by India. There are five of them. The first is the extent of relevant
4 coasts having special regard to the outer continental shelf claims of the parties.

5 **[GRAPHIC -- INDIA'S RELEVANT COAST AS INDIA SHOWS IT]**

6

7 6. The first point concerns the relevant coasts and the relevant area for the purpose of
8 outer continental shelf delimitation. It's the point of great significance. The
9 Tribunal has been treated to the spectacle, unusual in my experience, of a coastal
10 state arguing that its relevant coast is actually shorter rather than longer. Normally
11 claimant states are concerned to emphasise how big theirs is, not how small. But
12 India's counsel are unexpectedly, and I would say unusually, modest: they insist
13 that small is beautiful and the relevant coasts extend only to Devi Point. In doing
14 so, they make a cardinal error, invert the normal process of identification of
15 relevant coasts, and end in self-contradiction.

16 **[END GRAPHIC]**

17

18 7. The cardinal error is to identify as relevant coast only the coastline which is
19 necessary to sustain a state's position. In fact the relevant coast is not limited to the
20 coast where the base points are located which determine the line. Otherwise a state
21 with two promontories close together on a long coast would have a short coastal
22 frontage because only the promontories would provide delimitation base points.

23 **[GRAPHIC --- ROMANIA UKRAINE]** The position as explained by the Court in

1 *Romania v Ukraine* and applied by ITLOS in *Bangladesh-Myanmar* is that the
2 whole coastline which fronts on the area to be delimited is relevant coast
3 irrespective of whether particular stretches of coast provide delimitation base
4 points or not.¹¹² You can see this by looking at the relevant area in
5 *Romania-Ukraine*. You can also see it from the ITLOS decision to extend
6 Myanmar's relevant coast down to Cape Negrais, a decision which Sir Michael
7 Wood found it necessary to criticize very politely¹¹³ (though he seemed happier
8 with it in his former capacity as counsel for Myanmar). I suppose it is a case of
9 *autres pays, autres affaires, autres côtes pertinentes*.

10 [END GRAPHIC]

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12 8. The inversion of the normal processes of identification, India's second error, can be
13 seen from the fact that plainly enough India starts with determining what the
14 delimitation should be (an unadjusted equidistance line) and works backwards from
15 that determination to decide on the extent of the relevant coast. But that is quite
16 improper: as Sir Michael Wood said, one determines relevant coasts upfront, prior
17 to considering the delimitation.¹¹⁴ Moreover, one determines relevant coasts by
18 reference to the overlapping potential entitlements of both parties and not only of
19 one's own. Bangladesh has a claim, defensible in terms of article 76 out to the outer
20 reach of its continental shelf. To the extent that the coasts of either party front on to
21 that area of the claim, they are relevant coasts.

¹¹² *Romania v. Ukraine* at paras. 99-100, *Bangladesh/Myanmar* at paras. 198-205.

¹¹³ Transcript (13 December 2013), Vol. 4, Sir Michael Wood, p. 353, line 16 to p. 354, line 10.

¹¹⁴ Transcript Day 4, page 350 (para. 2, lines 23-24).

1 [GRAPHIC 7]
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3 9. And the contradiction to which this obstinate insistence on a small coast commits
4 India is that it seeks to show subsequently a cut off of coasts below Devi Point by
5 our claim, which coasts it nonetheless asserts are irrelevant. The definition of a
6 relevant coast might even be that it is a coast capable of being affected by a
7 delimitation. So India contradicts itself: the coasts in question are by definition
8 relevant to outer continental shelf delimitation in such circumstances.

9 [END GRAPHIC]
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- 11 • **The second point to discuss, the principle of maximum reach and its application**
12 **in practice.**

13 [NSCS GRAPHIC]
14

15 10. Professor Pellet had almost nothing to say about the principle of maximum reach,
16 except for an *en passant* comment about its principal academic protagonist, the late
17 lamented Professor Jonathan Charney.¹¹⁵ The presumption of maximum reach is
18 not just an academic fable, it is an accurate description of what courts and tribunals
19 generally do. For example, the *North Sea Continental Shelf* cases themselves
20 allowed Germany access to the median line with the opposite State as a result of
21 negotiations.¹¹⁶ Listening to Professor Pellet the other day I could just imagine him

¹¹⁵ J.I. Charney, "Progress in International Maritime Boundary Delimitation Law," *American Journal of International Law*, Vol. 88, No. 227 (1994) at pp. 247 et seq. MB, Vol. III, Annex B43. ("According to the principle of 'maximum reach' international courts and tribunals have sought "to delimit maritime boundaries so that all disputants are allotted some access to the areas approaching the maximum distance from the coast permitted for each zone.")

¹¹⁶ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/*

1 as counsel for Denmark, pouring scorn on Germany's claims and thanking the stars
2 that in accordance with his advice Denmark and the Netherlands had fought the
3 cases separately and had not allowed them to be joined. He would have said what
4 he said verbatim, except for the name of the States. The principle of maximum
5 reach was also clearly articulated in *Guinea/Guinea-Bissau*, another reason
6 Professor Pellet does not like the decision.¹¹⁷

7 [END GRAPHIC]

8 [GRAPHIC - ST P & M]

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10 11. Nor did Professor Pellet mention *Saint Pierre and Miquelon*, a notable example of
11 the presumption of maximum reach at least out to 200M.¹¹⁸

12 [END GRAPHIC]

13 [GRAPHIC -- NIC/COL]

14

15 12. Of at least even greater and recent significance is *Nicaragua v. Colombia*, where
16 the presumption of maximum reach was applied to both parties' eastwards-facing
17 coasts. On the one hand Nicaragua got projections to the north and (apparently)
18 the south of the Colombian islands, at least out to 200M and, as I am sure Professor
19 Pellet will assure you on Wednesday, arguably beyond that as well. On the other

Netherlands), Judgment, I.C.J. Reports 1969, p. 3.

¹¹⁷ *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 ILM 252 at para. 104. Reproduced in MB, Vol. V (The arbitral tribunal expressly noted that the critical problem posed by a coastal concavity is that "the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits.")

¹¹⁸ *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon)*, Decision, 10 June 1992, reprinted in 31 ILM 1149. Reproduced in MB, Vol. V.

1 hand the Court did the same for the Colombian islands, articulating the principle as
2 follows:

3 “[A]ny adjustment or shifting of the provisional median
4 line must not have the effect of cutting off Colombia from the entitlements
5 generated by its islands in the area to the east of those islands. Otherwise,
6 the effect would be to remedy one instance of cut-off by creating another.
7 An equitable solution requires that each State enjoy” -- and here are the
8 crucial words -- “reasonable entitlements in the areas into which its coasts
9 project.”¹¹⁹

10 [END GRAPHIC]

11 [ANGLO-FRENCH GRAPHIC]

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13 13. There are only two cases in the pantheon where the presumption of maximum reach
14 was not applied to substantial continental coasts as distinct from tiny islands. The
15 first is the *Anglo-French* case of 1976, (a prehistoric decision, Professor Pellet will
16 no doubt tell you, though one he might still want to rely on). There the Channel
17 Islands were enclaved. Doubts were expressed at the time and have been expressed
18 since as to the decision to leave to France a small section of Channel waters to the
19 north-west of the Islands. But however that may be, the fact is that the Islands were
20 very close indeed to the French coast (of which they were historically and
21 geographically part), were relatively small, and they had a disproportionate effect
22 on French entitlements.¹²⁰ But comparing the case to *Saint Pierre and Miquelon*, it

¹¹⁹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, para. 216.

¹²⁰ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, reprinted in 18 RIAA 3. Reproduced in MB, Vol. V.

1 is not unfair to remark that, from the French point of view, the presumption of
2 maximum reach seems to work better on the other side of the Atlantic!

3 [END GRAPHIC]

4 [B/T&T GRAPHIC]

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6 14. The other case, of which Professor Pellet made a very great deal, is from the other
7 side of the Atlantic: it is *Barbados v Trinidad and Tobago*.¹²¹ There the Tribunal
8 made only a modest deflection of the line which, taken together with the Trinidad
9 and Tobago/Venezuela delimitation line, cut off Trinidad and Tobago from the
10 outer continental shelf. To be more precise, Trinidad and Tobago was represented
11 on the 200M line exclusively by a point, from which it may be assumed that no
12 further extension was possible. Angels can dance on the head of a pin, but I'm not
13 sure the outer continental shelf can be generated by a point (though I note that
14 Trinidad and Tobago has nonetheless made an outer continental shelf submission).
15 But there are three things to note about the decision. First, it was not a case about
16 concavity. Even if the east-facing coasts of Trinidad and Tobago could be
17 represented by a somewhat concave line, it wouldn't be very concave. There was
18 no delimitation between those two islands. They're part of the same state.
19 Trinidad, Tobago and Barbados lie in more or less in a straight line running from
20 south-south-west to north-north-east with a very considerable distance between
21 Tobago and Barbados. The problem of cut off was not caused by concavity but by
22 two other factors. First and most important, Barbados is a long way to the east of
23 Trinidad and Tobago, with consequent effects on the 200M line and the

¹²¹ *Barbados/Trinidad and Tobago*, reproduced in MB, Vol. V.

1 equidistance line. Secondly, the pre-existing Venezuela Agreement conceded to
2 Venezuela a significant strip of maritime area that would otherwise have
3 appertained to Trinidad and Tobago. That was a political deal, if ever there was
4 one, and the Tribunal rightly held that Trinidad and Tobago had to live with the
5 consequences of that deal in terms of cut off, without any contribution being able to
6 be exacted from Barbados. Thirdly, the Tribunal did in fact deflect the line in a way
7 which, as you can see now from the graphic, should have given Trinidad and
8 Tobago access to the outer continental shelf, had the line with Venezuela been
9 otherwise. It may be said that the deflection in that line was somewhat minor: I
10 was counsel for Trinidad and Tobago, I thought it was a bit mean. But that is a
11 matter of appreciation. But properly understood the decision did allow especially
12 the small northerly island of Tobago a reflection on the 200M line. For the reasons
13 I have explained, it was a pointillist reflection.

14 [END GRAPHIC]

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16 15. For these reasons, the presumption of maximum reach remains valid and should be
17 applied here.

18 **3. The third point to discuss is the process of delimitation beyond 200M**

19 [GRAPHIC--DELIMITATION BEYOND 200M]

20
21 16. I have already drawn attention to the new domain of outer continental shelf
22 delimitation, with its vast areas, the reintroduction of geomorphology as a factor,
23 and the need for an equitable solution beyond as well as within 200M. Professor

1 Pellet treated what I said last week as an invitation to you to legislate -- but I was
2 simply drawing attention to the inevitability of your making the law however you
3 may decide -- or of unmaking it if you reinstate equidistance as the dominant factor
4 the further away from the coast one gets -- a proposal which would seem to me
5 paradoxical.

6 17. Professor Pellet asked why bend the line at 200M rather than say 46M? I don't
7 think he was actually advocating a bend at 46M, but I would respond with three
8 observations.

9 (a) First, within 200M there is the constraint of EEZ delimitation, and the
10 desirability (even if the Parties do not expressly agree on a single maritime
11 boundary) of EEZ and continental shelf boundaries coinciding -- by
12 definition that's irrelevant beyond 200M.

13 (b) Secondly, there is the fact that a significant proportion of the world's
14 maritime boundaries stop at 200M, leaving delimitation beyond still to be
15 effected.

16 (c) And thirdly there is the point made by the Court in 1969 that concavity has
17 even more serious effects as one proceeds seawards. At 200M< if not
18 before, it is time to take stock.

19 18. In the present case we have submitted that an equitable solution to delimitation
20 cannot be achieved by a single continuous line, that it needs to be adjusted at the
21 200M limit. Professor Pellet said there was no reason to do it at 200M, but there
22 are several: the grey area should be reduced to a minimum, whereas if the
23 delimitation beyond 200M continues unchanged, the allocation of outer continental
24 shelf (and the delimitation as a whole) is patently inequitable.

1 [END GRAPHIC]

2 [ANDAMANS GRAPHIC]

3
4 19. Mr. President and members of the Tribunal, it is true that there are outer continental
5 shelf issues as between India in right of the Andaman Islands and Myanmar. But
6 these issues cannot affect Bangladesh's rights vis-à-vis India. If India in right of the
7 Andaman Islands has claims to areas now being claimed by Bangladesh, it has had
8 every opportunity to substantiate them in these proceedings. In fact, the Andaman
9 Islands have a coastal frontage of about some 300km but they are about 280M away
10 from the ITLOS delimitation line. India cannot in the last stage of an arduously
11 pleaded case, when Bangladesh no longer has the opportunity to respond, oppose
12 the position of the Andaman Islands to obstruct Bangladesh's south-westerly
13 projection in the outer continental shelf.

14 [END GRAPHIC]

15 **4. The fourth question is the question of cut-off.**

16 [CUT-OFF GRAPHIC]

17
18 20. There is little more to say here after what Mr. Reichler has said. Cut-off is a
19 question of degree, not a generic prohibition, and certainly not as far out as 200M.
20 The earlier discussions of cut-off actually concerned cases of cut-off immediately
21 in front of the coasts of the States concerned-- I recall Cameroon's absurd initial
22 claim to that effect in *Cameroon/Nigeria*. This was Professor Pellet in his
23 non-equidistance mode. But in the present case, outer delimitation does not
24 unduly cut off India's south-east facing coast, as Mr. Reichler has shown you.

1 Moreover there are ways of mitigating cut-off, for example by tapering the corridor
2 to some extent.

3 **5. Proportionality as it applies to the total claims of the parties.**

4 21. Beyond the subjective assertion that their line in the outer continental shelf is
5 equitable -- that is, India's 104%, Bangladesh's 1.35% -- Professor Pellet has not
6 even told you the respective extent of continental shelf allocation of the Parties.
7 This is because he focused almost exclusively on the continental shelf within
8 200M, with a *douceur* to Bangladesh in the form of a tiny little bit of the cake.

9 22. But if Article 83 applies equally within and beyond 200M, as the Court has said and
10 as we agree, and the methodology is unchanged (as India insists) the overall equity
11 of the line must be assessed and not just as equity within 200M. I did that last
12 Tuesday, and Professor Pellet did not question my calculations, which were
13 cleverly performed.

14 [END GRAPHIC]

15 [GRAPHIC -- INDIA'S AREA PROPORTIONALITY CALCULATION]

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17 23. Let us, however, assume that India is right on relevant coasts, and that the relevant
18 coast of India extends only to Devi Point, and the relevant area within 200M
19 includes only areas that are within 200M from both States. Those areas -- the
20 overlapping potential entitlements within 200M -- are now depicted. We have
21 drawn them by mean of overlapping envelopes of arcs of 200M. You can see that

1 there is a bulge southwest of Devi Point because these are the areas that are within
2 200M from Bangladesh.

3 24. Now, this cannot be enough. Even on India's own theory, this cannot be the limit
4 of the relevant area. India has itself acknowledged that the relevant area must
5 include the area of overlapping claims -- and that means *all* overlapping claims.
6 Adding the areas of overlapping potential entitlements in the OCS yields the
7 relevant area depicted on your screens now.

8 25. Using Bangladesh's proposed boundary to divide this area results in the following
9 allocation of the area so described: 145,000 sq km to Bangladesh rounded up
10 slightly, and 105,000 sq km for India. The ratio is **{+1.38:1}** in favour of
11 Bangladesh, with a coastal length ratio of **{+1.03:1}** in favour of Bangladesh.
12 Properly applied, that boundary is not at all disproportionate, let alone grossly so in
13 terms of the third-stage methodology.

14 26. By contrast, using India's proposed boundary results in the following allocation:
15 83,200 sq km for Bangladesh and 166,800 sq km for India. The ratio is almost
16 exactly **{+2:1.02}** the coastal ratio of **{+1.02:1}**, close enough, but that's plainly
17 not an equitable solution.

18 **[END GRAPHIC]**

19

20 **Conclusion**

21 Mr. President, Members of the Tribunal:

1 27. To conclude, far from a bizarre exercise of bargaining with the Tribunal,
2 Bangladesh's claim is moderate, supported by precedent and fully consistent with
3 Article 83 and with the three-step method of maritime delimitation. It has been
4 presented consistently, and clearly. I commend it to the Tribunal.

5 Thank you, Mr. President, Members of the Tribunal, for your patient attention. Mr.
6 President, I would ask you to call on the Deputy Agent of Bangladesh to read the
7 submissions of the country he has served so devotedly. Thank you, Mr. President.

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1 PRESIDENT WOLFRUM: Thank you, Professor Crawford, for your
2 presentation.

3 I now call upon the Deputy Agent for Bangladesh to read us the submission,
4 which we will receive in writing this evening. Thank you.

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PERMANENT COURT OF ARBITRATION

*Bay of Bengal Maritime Boundary
Arbitration between Bangladesh and India*

Closing Remarks of Bangladesh's Agent

16 December 2013

- 12 1. Mr. President, distinguished Members of the Tribunal, it has been a sincere honor and
13 privilege for me to represent my country in these proceedings. As the Deputy Agent
14 of the People's Republic of Bangladesh, it is with great pride that I conclude the oral
15 presentations so diligently prepared and presented by our exceptional legal team and
16 technical advisors.
- 17 2. Please allow me at the outset to express on behalf of the Agent of Bangladesh, the
18 Honourable Foreign Minister, myself, and the people of Bangladesh, our profound
19 appreciation to you, Mr. President, and to each esteemed Member of the Tribunal. We
20 also thank the staff of the Permanent Court of Arbitration, the stenographers, and the
21 entire team that has made these hearings run so smoothly.
- 22 3. I also wish to commend the Agent and Co-Agents of the Government of India, as well
23 as the entire Indian delegation, for the gracious manner in which they have conducted
24 themselves during these hearings. Bangladesh brought this arbitration with the
25 expectation that the Award will end our long-standing differences on maritime rights,

1 thereby strengthening our already deep and inextricable ties. After these hearings, we
2 are even more confident now that this will indeed be the case.

3 4. Bangladesh's presentations in these proceedings come to a close today on a very
4 significant date in Bangladesh's history. Today is our Victory Day. It marks the
5 anniversary of the moment when Bangladesh succeeded in its struggle to gain its
6 independence at great cost and sacrifice, including the loss of more than 3 million lives.
7 On this date in 1971, Bangladesh secured its rights over its land. But its maritime
8 entitlements have remained elusive. Since achieving independence, Bangladesh has
9 been blocked from realizing its potential entitlements and exploiting the resources in
10 the Bay of Bengal. These resources are critical not only for the advancement of
11 Bangladesh as a whole, but also for the millions of fishermen who depend on these
12 waters for their very survival. The Bay stretches out before our coast, yet remains
13 beyond our reach because of the legal uncertainty over the boundary. Bangladesh
14 trusts this esteemed and wise tribunal to bring about a just resolution to this
15 long-standing impasse. The aspirations of all Bangladeshis now rest with you.

16 5. Mr. President and distinguished Members of the Tribunal, I shall now read the final
17 submissions of the Government of the People's Republic of Bangladesh. Based on the
18 facts and law set forth in our written pleadings and during these oral proceedings,
19 Bangladesh requests the Tribunal to adjudge and declare that:

20 (1) The maritime boundary between Bangladesh and India follows a line with a
21 geodesic azimuth of 180° from the location of the land boundary terminus at 21° 38' 14" N
22 – 89° 06' 39" E to the point located at 17° 49' 36" N – 89° 06' 39" E;

1 (2) from the latter point, the maritime boundary between Bangladesh and India
2 follows a line with a geodesic azimuth of 214° until it meets the outer limits of the
3 continental shelf of Bangladesh as established on the basis of the recommendations of the
4 Commission on the Limits of the Continental Shelf (“CLCS”);

5 (3) from the point located at 16° 40’ 57”N – 89° 24’ 05”E, which marks the
6 intersection of the geodesic line as adjudged by the International Tribunal for the Law of
7 the Sea in the *Dispute Concerning Delimitation of the Maritime Boundary between*
8 *Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* with the limits of
9 the claim submitted by India to the Commission on the Limits of the Continental Shelf on
10 11 May 2009, the maritime boundary between Bangladesh and India follows the same
11 geodesic line until it meets the outer limits of the continental shelf of Bangladesh as
12 established on the basis of the recommendations of the CLCS; and

13 (4) from the points specified in Submissions (2) and (3), and along the outer
14 limits of the continental shelf of Bangladesh as established on the basis of the
15 recommendations of the CLCS.

16 (All points referenced are referred to WGS84)

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1 DEPUTY AGENT ALAM: I thank you, Mr. President and the Members of
2 the Tribunal and everyone represented here. Thank you, and good afternoon.

3 PRESIDENT WOLFRUM: I thank the Deputy Agent for Bangladesh for his
4 last concluding remarks, and for the submission, and this closes this part on the Bangladesh
5 side. We adjourn and meet again on Wednesday, the 9th of December, at 2:00 for the
6 Hearing on the Indian side. The meeting is adjourned. Thank you.

7 (Whereupon, at 1:07 p.m., the hearing was adjourned until 2:00 p.m.,
8 Wednesday, December 18, 2013.)

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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