PERMANENT COURT OF ARBITRATION

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

- -x

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

- -x Volume 1

HEARING ON THE MERITS

Monday, December 9, 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 9:30 a.m. before:

JUDGE RÜDIGER WOLFRUM, Presiding Arbitrator

JUDGE JEAN-PIERRE COT, Arbitrator

JUDGE THOMAS A. MENSAH, Arbitrator

DR. PEMMARAJU SREENIVASA RAO, Arbitrator

PROFESSOR IVAN SHEARER, Arbitrator

Permanent Court of Arbitration:

MR. BROOKS W. DALY
Registrar and PCA Deputy Secretary-General
DR. ALOYSIUS P. LLAMZON
PCA Legal Counsel
MR. GARTH L. SCHOFIELD
PCA Legal Counsel
MS. YANYING LI
PCA Assistant Legal Counsel
MR. KEVIN LEE
PCA Assistant Legal Counsel
MR. BENJAMIN CRADDOCK
PCA Case Manager
MS. SUMAYA BOUSSAA
PCA Assistant Case Manager

Expert Hydrographer to the Tribunal:

MR. DAVID H. GRAY

Court Reporters:

MR. DAVID A. KASDAN, RDR-CRR
MS. DAWN K. LARSON, RDR-CRR
Registered Diplomate Reporter
Certified Realtime Reporter
Worldwide Reporting, LLP
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903
info@wwreporting.com

APPEARANCES:

On behalf of the People's Republic of Bangladesh:

H.E. DR. DIPU MONI, MP
Agent of Bangladesh and Former Foreign Minister,
Government of the People's Republic of Bangladesh

REAR ADMIRAL (RETD) MOHAMMAD KHURSHED ALAM MPHIL, ndc, psc, Deputy Agent of Bangladesh & Secretary (Maritime Affairs Unit), Ministry of Foreign Affairs, Dhaka

Counsel and Advocates:

H.E. The Honourable A.H. Mahmood Ali, MP,
Foreign Minister, Government of the People's Republic of Bangladesh

MR. MOHAMMAD SHAHIDUL HAQUE
Secretary, Legislative & Parliamentary Affairs Division, Ministry of Law, Justice and Parliamentary Affairs, Dhaka

PROFESSOR PAYAM AKHAVAN
McGill University

PROFESSOR ALAN BOYLE
University of Edinburgh

PROFESSOR JAMES CRAWFORD South Carolina, FBA
Cambridge University

MR. LAWRENCE H. MARTIN
Foley Hoag LLP

MR. PAUL S. REICHLER
Foley Hoag LLP

PROFESSOR PHILIPPE SANDS QC
University College London

APPEARANCES: (Continued)

On behalf of the People's Republic of Bangladesh:

Advisors:

MR. SHIEKH MOHAMMED BELAL
Director General, Ministry of Foreign Affairs and
Bangladesh Ambassador-designate to the Netherlands

MS. ISHRAT JAHAN
Counsellor & CDA, ad. i, Embassy of Bangladesh,
The Hague

MR. MOHAMMAD SHAHEEN IQBAL
Bangladesh Navy

M.R.I. ABEDIN
System Analyst, Ministry of Foreign Affairs

MR. MOHAMMAD HAZRAT ALI KHAN
Director, Ministry of Foreign Affairs

MD. ABDULLAH AL MAMUN
Bangladesh Army

MD. ABU RAYHAN
Bangladesh Air Force

MD. ABDUL MOKTADER
Private Secretary to the Foreign Minister, Ministry
of Foreign Affairs

MR. SYED SHAH SAAD ANDALIB
Assistant Secretary, Ministry of Foreign Affairs

MR. HARIPADA CHANDRA NAG
Assistant Secretary, Ministry of Foreign Affairs

DR. ROBIN CLEVERLY
Law of the Sea Consultant, The United Kingdom
Hydrographic Office

MR. SCOTT EDMONDS
Cartographic Consultant, International Mapping

APPEARANCES: (Continued)

On behalf of the People's Republic of Bangladesh:

MR. THOMAS FROGH
Senior Cartographer, International Mapping

DR. LINDSAY PARSON
Director, Maritime Zone Solutions Ltd.

MR. ROBERT W. SMITH
Geographic Consultant

Junior Counsel:

MRS. CLARA BRILLEMBOURG
MR. VIVEK KRISHNAMURTHY
MR. YURI PARKHOMENKO
Foley Hoag LLP

MR. REMI REICHHOLD
Matrix Chambers

Legal Assistants:

MR. DARA IN
University College London

MS. NANCY LOPEZ

MR. RODRIGO TRANAMIL
Foley Hoag LLP

APPEARANCES: (Continued)

On behalf of the Republic of India:

G. E. VAHANAVTI
Attorney General of India

MR. DEVADATT KAMATH
Assistant Counsel to the Attorney General

DR. NEERU CHADHA
Agent, Joint Secretary & the Legal Adviser,
Ministry of External Affairs, Government of India

MR. HARSH VARDHAN SHRINGLA
Co-Agent, Joint Secretary (BSM), Ministry of
External Affairs, Government of India

MR. PUNEET AGRAWAL
Deputy Agent, Director (BSM), Ministry of External
Affairs

H.E. MR. R.N. PRASAD
Ambassador of India to the Netherlands

MR. R.K. SINGH
Deputy Chief of Mission

Counsel:

PROFESSOR ALAIN PELLET
University of Paris Ouest

SIR MICHAEL WOOD, K.C.M.G.

MR. R.K.P. SHANKARDASS
Senior Advocate

PROFESSOR W. MICHAEL REISMAN
Yale University

MR. BENJAMIN SAMSON
Junior Counsel, University of Paris Oueste

APPEARANCES: (Continued)

On behalf of the Republic of India:

MR. ERAN STHOEGER
Junior Counsel, New York University

Scientific and Technical Experts:

VICE ADMIRAL S. K. JHA, Chief Hydrographer
to the Government of India

REAR ADMIRAL K. M. NAIR
Joint Chief Hydrographer, National Hydrographic
Office (NHO)

PROFESSOR MARTIN PRATT
Expert Cartographer

COMMODORE ADHIR ARORA
Principal Director of Hydrography, NHO

CAPT. PEUSH PAWSEY
Director of Hydrography (Ops), NHO

DR. DHANANJAY PANDEY
Scientist, National Centre for Antarctic and Ocean
Research (NCAOR)

MR. R.C. SAMOTA
Cartographic Assistant, NHO

Research Associates:

MR. K. S. MOHAMMED HUSSAIN
Legal Officer, Ministry of External Affairs

MS. HELOISE PELLET

Additional Attendee:

MS. NAFISA VAHANAVTI

C O N T E N T S

P R O C E E D I N G S

PRESIDENT WOLFRUM: Good morning to everybody, Your Excellencies. The Arbitral Tribunal in the case on Bangladesh versus India is now starting its hearing.

I would like to welcome you very much, and particularly the Minister of Foreign Affairs from Bangladesh as well as the Attorney General of India who we had not the pleasure here to meet. The others we had met frequently during our site visit.

I hope, and I'm absolutely sure, that we are going to have a very fruitful and very productive meeting, and I hope, also, that the meeting will continue, like the site visit was, in a very good and amicable atmosphere.

I do not intend to introduce the Members of the Tribunal in great length. We have met over the three days in Bangladesh and India quite well, but you see from my left side Judge Jean-Pierre Cot, Judge Mensah, Dr. Sreenivasa Rao, and Judge Ivan Shearer. PCA is well known to you; therefore, there is no need for introduction.

Now, I would like to take this opportunity to really thank the representatives of Bangladesh and India very much again for the organization--preparation and organization of the site visit, particularly also for the hospitality extended to us. It was a great experience, at least for us, and I hope for you too. And I believe we have learned quite a great deal, and it was worth very much the effort.

Let me say a very few words about the Hearing and the procedure. I would like to draw your attention to the schedule as provided in Procedural Order Number 2. We have rather fixed time limits, and I would very much appreciate if you could really

stick to the time limits. I would hate to interrupt anybody.

There is a small change, which I would like to mention. This afternoon, Bangladesh has asked--Paul Reichler, actually--to have only 60 minutes for the first speech and thereafter the break, and thereafter Paul Reichler would continue. I don't know whether you're going to continue for a hundred minutes--you have the right to do so--but if you wish to do so, please bear with me that we would insert a 10 minutes' break so as not to sit in this room for 100 minutes straight.

Is that agreeable?

MR. REICHLER: Thank you very much, Mr. President. I promise that I will not speak for 100 minutes. It will be closer to 80. But if you would prefer me to break for 10 minutes anywhere along the way, I'm happy to accommodate.

PRESIDENT WOLFRUM: We will see how it works out, and we can play it by ear. We can be flexible on that. If the total time allotted to you is not exhausted, that's even better.

Okay. Let me mention a second aspect: The Tribunal has formulated several questions, and we would very much, indeed looking forward to hear your responses, and I will not exclude that there are further questions to come from the Tribunal, but I also would like to inform you that each individual member of the Arbitral Tribunal may in due course ask questions. We are a small group; therefore, this is more convenient for asking questions than the larger body such as ITLOS or the ICJ, although the ICJ in a recent session, there were many questions which have been asked.

These are my remarks for the beginning and for the introduction, and I

would again wish us a very fruitful and cooperative undertaking, and now I give the floor to the introductory remarks of the two Parties. According to the schedule, it is for Bangladesh to start.

PERMANENT COURT OF ARBITRATION

Bay of Bengal Maritime Boundary

Arbitration between Bangladesh and India

H.E. The Honourable A.H. Mahmood Ali, MP, Foreign Minister

9 December 2013

1. Mr. President, distinguished members of the Tribunal, good morning, it is a great honour and privilege for me to appear before you today on behalf of the government of the People's Republic of Bangladesh.

2. Please allow me to begin by expressing my gratitude to the Tribunal and to the Permanent Court of Arbitration. Bangladesh is extremely indebted to you Mr President, to the entire Tribunal and to the staff of the PCA, for the transparency, integrity and efficiency that have characterized every stage of these proceedings. Bangladesh is also thankful for all the work that you have done, and the PCA has done, to make these hearings possible. We would also like to express our appreciation for the effort and level of care taken in preparing for and participating in the Tribunal's visit to India and Bangladesh, which allowed you to observe first-hand the areas that you are asked to delimit.

3. Mr President, as I hope you witnessed during your recent visit, nature and history have endowed Bangladesh with an abundance of human and natural resources. Because of this abundance, Bangladesh is, in many respects, a country of extremes unlike any other. Perhaps most notably, it is the most densely populated country in the world that is not a city-State. More than 163 million people live and work in just over 143 thousand square kilometers of land. It is for our people that Bangladesh initiated these proceedings.

4. As you saw, the land we call home is also quite remarkable. The coast of Bangladesh is unique in many respects. You know already that the coast forms part of the world's largest river delta. You may be more surprised to learn that, on the eastern side, the Bangladesh coast also includes the longest beach on Earth.

5. This remarkable landscape has been formed, and is continually reformed, by exceptional climatic conditions. Natural disasters, such as tropical cyclones, floods, tornadoes and tidal bores occur almost every year in Bangladesh. Only five years ago, Bangladesh experienced the most severe flooding in modern world history. The force of these waters left a full two-thirds of the country underwater. Indeed, the impact that water will have on our land will only increase in the coming years. Bangladesh is widely recognized to be one of the countries most vulnerable to climate change. The natural hazards that come from increased rainfall, rising sea levels and tropical cyclones are expected to increase as the world's climate changes. Studies estimate that in the coming decades sea level rise by itself will

create more than 20 million climate refugees in Bangladesh. That is a population larger than the 16 million inhabitants of the Netherlands.

6. The great benefits and difficulties resulting from this natural abundance have formed the character of our nation. Our citizens are resilient and enterprising; and our land is rich and full of potential. Bangladesh has already made great strides in its human and economic development. Poverty levels have declined considerably since independence. Per-capita income has doubled since 1975. Bangladesh is determined to continue this success.

7. To meet its full potential, Bangladesh must unleash the industriousness of its people by improving access to its energy resources. Although Bangladesh is endowed with a large supply of clean-burning natural gas, much of this supply is located offshore. The absence of a defined maritime boundary with India has undermined our ability to exploit this much-needed resource. The equitable resolution of this case will enable both Bangladesh and India to take full advantage of their resources in the Bay of Bengal.

8. These resources also include the rich fish populations in the Bay's waters. Fishing is an integral part of the culture and heritage of Bangladesh. The people of Bangladesh are born of the Bay's waters. This is reflected by the country's very name, which means "Country of Bengal" in Bengali. Still today, a significant portion of our economy is built on our fisheries. In fact, Bangladesh is among the largest fish exporters in the world. The certainty and stability that the resolution of this case promises will allow us to more rationally exploit this resource so as to

maximize the current benefit while at the same time ensuring long-term sustainability, a goal to which we are strongly committed.

9. Mr President, Bangladesh initiated this dispute resolution process in order to unlock the potential these resources offer. These hearings represent the culmination of Bangladesh's pursuit of a just delimitation of its maritime boundaries in the Bay of Bengal. We are fully confident that the equitable solution that could not be attained through decades of diplomatic initiatives will finally be reached in these proceedings.

10. With the Judgment reached by ITLOS in the Myanmar case, Bangladesh was able to settle, peacefully and in accordance with international law, its maritime boundary with Myanmar. It gives me great pleasure to say that both Bangladesh and Myanmar expressed their satisfaction with the result, and their commitment to accept and implement it. We are grateful to ITLOS for its painstaking efforts to achieve an equitable solution in conformity with the 1982 United Nations Convention on the Law of the Sea.

11. We are here before you, in this proceeding, to complete the delimitation of the boundaries between Bangladesh and its neighbours in the Bay of Bengal. We are confident that, with your legal expertise, wisdom, objectivity and hard work, the final result will be a fair and equitable boundary between Bangladesh and India that will bring finality to this longstanding dispute, as well as clarity, stability and, we hope, greater prosperity to both States and to our region.

12. In pursuing these aims, Bangladesh has benefited from the remarkable efforts by the members of its delegation. The full list of members has been provided to the Tribunal. This morning, I would like to express my gratitude especially, and introduce formally, our distinguished Agent and Deputy Agent, and the Advocates who will be addressing you on behalf of Bangladesh in these hearings.

13. Our Agent is The Honourable Dr. Dipu Moni, Former Foreign Minister of the Government of the People's Republic of Bangladesh. Our Deputy Agent is Rear Admiral M. Khurshed Alam, Secretary of the Maritime Affairs Unit of the Ministry of Foreign Affairs.

14. Our esteemed Advocates are Mr. Paul Reichler and Mr. Lawrence Martin of the law firm Foley Hoag; Professor James Crawford of Cambridge University; Professor Philippe Sands of University College London; Professor Alan Boyle of the University of Edinburgh; and Professor Payam Akhavan of McGill University.

15. Mr President, distinguished Members of the Tribunal, on behalf of myself and the entire delegation of the Government of Bangladesh, I thank you for your time and courteous attention this morning and throughout these proceedings. We gratefully put ourselves in your eminently capable hands.

PRESIDENT WOLFRUM: I thank His Excellency, as the acting Foreign Minister of Bangladesh, for his statement, and I now give the floor to His Excellency, the Attorney General of India.

PERMANENT COURT OF ARBITRATION

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

PEOPLE'S REPUBLIC OF BANGLADESH v. REPUBLIC OF INDIA

INTRODUCTORY STATEMENT BY
MR. GOOLAM E. VAHANVATI
ATTORNEY GENERAL FOR INDIA

Mr. President, Members of the Tribunal, it is a great privilege and honour to appear before you, on behalf of the Republic of India. At the outset, let me on behalf of my Team and on my personal behalf, express my deep appreciation and gratitude to the President and Members of the Tribunal for agreeing to undertake this arbitration. My thanks also go to the Registrar and Staff of the Tribunal for their tireless efforts in these proceedings. We were particularly pleased to welcome the Members of the Tribunal for the Site Visit which was undertaken in October this year.

2. I convey my greetings to our distinguished friends from Bangladesh and their learned team.

3. I also have the pleasant task of introducing India's team to the Tribunal.

Our Agent is Dr. Neeru Chadha, Joint Secretary & the Legal Adviser, Ministry of External Affairs; and Mr. Puneet Agrawal, Director (BSM) also from Ministry of External Affairs is the Deputy Agent.

Our distinguished Counsel are Professor Alain Pellet, University of Paris; Professor W. Michael Reisman, McDougal Professor of Law, Yale University; Mr. R.K.P. Shankardass**,** Senior Advocate, Supreme Court of India; Sir Michael Wood, Member of the English Bar; and Mr Devadatt Kamat, Advocate, Supreme Court of India. Mr. Benjamin Samson and Mr. Eran Sthoeger are our Junior Counsel.

India's Scientific and Technical Experts are Vice Admiral S. K. Jha, who is Chief Hydrographer to the Government of India; Rear Admiral K. M. Nair, Joint Chief Hydrographer; Professor. Martin Pratt, Director of Research International Boundaries Research Unit, Durham University, UK; Commodore. Adhir Arora; Capt. Peush Pawsey; and Dr. Dhananjai Pandey, Scientist, National Centre for Antarctic and Ocean Research (NCAOR)

In addition, we have Mr. K. S. Mohammed Hussain, Legal Officer; and Ms. Héloïse Bajer Pellet, Member of the Paris Bar, France, **as our Research Associates; and** Mr. R.C. Samota, Cartographic Assistant.

Mr. President, Members of the Tribunal;

4. India is a developing country with a population of over 1.2 billion. India has achieved considerable progress and development over the last two decades. Providing for a population as large as India's remains a major challenge for India.

5. India continues to be very dependent on the sea for trade, transport, fisheries and other related activities. India's population includes a large number of marine fishermen – more than 860,000 households according to our 2010 Marine Census. Nearly 61% of the marine fishermen families in the country were Below Poverty Line (BPL). Among the marine fishermen households more than 91% were traditional fishermen families, a large number of whom are dependent for fishing on the Exclusive Economic Zone (EEZ) of India in the Bay of Bengal.

6. Most of this dependent population comprises traditional artisanal fishermen who have been historically fishing in the area over many generations. Also, a large number of women derive their living from the sector, especially in post-harvest activities. Fisher folk from West Bengal and Odisha are dependent for their livelihood on fishing in the area under dispute.

Mr. President,

7. India's cultural, social and economic links with Bangladesh are long and deep. The uniting features include linguistic and cultural ties, passion for music, literature and arts.

8. India supported Bangladesh's struggle for freedom and liberation, which has led to enduring feelings of fraternal and familial ties with Bangladesh. Our two countries have achieved unprecedented progress in the last few years in taking forward our mutually beneficial cooperation in areas such as infrastructure development, connectivity, border management and boundary issues. I had occasion to interact closely with my counterparts in Bangladesh during the proceedings in the Supreme Court relating to the environmental issues arising out of the supply of limestone to Bangladesh.

9 In the last few years we have made progress on issues that have eluded solution for decades. We have broken fresh ground in areas such as trade, power, people to people exchanges, security cooperation, telecom connectivity, New and Renewable Energy, Civil Nuclear Cooperation and Sub-Regional cooperation.

10. After eight years of efforts to resolve the maritime boundary issue from 1974 to 1982 no negotiations took place until 2008. Technical talks were resumed and meetings were held in September 2008 and March 2009. Finally Mr. President, Bangladesh on 8 October 2009 elected to submit the dispute concerning the delimitation of the maritime

boundary with India to the arbitral procedure provided for in Annex VII of the United Nations Convention on the Law of the Sea ('UNCLOS').

11. These proceedings reflect our country's commitment to the principles of peaceful coexistence and peaceful settlement of disputes between our two nations. We are confident that the resolution of these issues will be an important and enduring chapter in the history of relations between our countries.

Mr. President,

12. India's Constitution is based on the firm commitment to the Rule of Law and as such India is a strong supporter of United Nations Convention on the Law of the Sea. India stands for maritime delimitation in accordance with objective rules which have been developed by international courts and tribunals to achieve an equitable solution

13. The International Tribunal for the Law of the Sea in Bangladesh/Myanmar has reiterated the need to reduce subjectivity and uncertainty in the determination of maritime boundaries. It has confirmed – and significantly contributed to the progress which international law had achieved in the area of maritime delimitation: And here I quote from the judgment

"[i]nternational courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end."[1]

14. The body of case law that the ITLOS referred to here culminated in the ICJ's judgment in the Black Sea case in which the ICJ unanimously and with great clarity set out the three-stage method for delimiting maritime rights.

[1]Ref. *Bangladesh/Myanmar,* Judgment dated 14 March 2012, para 226.

15. This standard methodology, as carefully elaborated by the ICJ, in the Black Sea case, was followed by the ITLOS in Bangladesh/Myanmar, in which the three stages method was endorsed both in principle and in application to the Bay of Bengal.

16. India's case is straightforward. The starting point for the maritime delimitation is the Land Boundary Terminus, which was defined by the Radcliffe Award.

17. Thereafter the first step is to draw a provisional equidistance line. The drawing of an equidistance line on the basis of appropriate base points is by no means unfeasible. In Bangladesh/Myanmar case, which also concerned the Bay of Bengal, ITLOS had no difficulty in identifying suitable base points.

18. Indeed, the equidistance lines to determine the entire maritime boundary constructed by both India and Bangladesh are remarkably similar - except that Bangladesh's proposed line lies due west of the Indian line because of the difference as to the land boundary terminus.

19. Accordingly, resort to an angle-bisector is unnecessary.

20. The next step is to consider whether there are special or relevant circumstances that call for adjustment of the provisional equidistance line. India disputes the relevance of Bangladesh's claim that the concavity of its coasts constitutes a special or relevant circumstance. Moreover, the Indian coast is also concave.

21. Every maritime delimitation case involves some degree of cut off effect for both Parties. The cut-off produced by the equidistance line proposed by India is shared in a mutually balanced way by India and Bangladesh and both enjoy reasonable entitlements in the areas into which their coasts project. The equidistance line proposed by India produces an almost equal division of the relevant area.

22. The delimitation line with a second deflection beyond 200 nautical miles proposed by Bangladesh lacks any legal basis.

23. India's proposed equidistance line for the maritime boundary in the continental shelf and EEZ achieves an equitable solution. It does not result in any gross disproportionality.

24. In conclusion, India submits that a purely intuitive supposedly equitable approach based on subjective and speculative assessments involving an enquiry into the fairness of a party's treatment by nature would comport neither with international law nor with real equity. I would therefore submit that the approach commended by India is the best means to reach an equitable solution.

I thank you, Mr. President.

PRESIDENT WOLFRUM: I thank His Honor, the Attorney General of India, for his introductory remarks. We are now starting to go into the first part of the Hearing. It's the turn of Bangladesh, the Agent of Bangladesh, please.

PERMANENT COURT OF ARBITRATION

Bay of Bengal Maritime Boundary

Arbitration between Bangladesh and India

H.E. Honourable Dipu Moni, MP

9 December 2013

1. Mr President, distinguished members of the Tribunal, it is a great honour and a privilege for me to appear before you today as the Agent of the Government of the People's Republic of Bangladesh.

2. Like the Honourable Foreign Minister before me, I must start by reiterating the gratitude of all Bangladeshis towards the members of this august Tribunal as well as the staff of the PCA. Bangladesh also wishes to extend its thanks, and its respects, to the Agent of India and her delegation for their professionalism in pursuing a lasting and peaceful resolution to this dispute. Since long before the formation of our two great nations, our destinies have been closely intertwined. Bangladesh brought this arbitration with the intention and expectation that the Award will end our long-standing differences on maritime rights, thereby strengthening our already deep and inextricable ties.

3. Mr President, just over four years ago, in October 2009, Bangladesh filed its Notifications and Statements of Claim with the Governments of both India and Myanmar "in order to secure the full and satisfactory delimitation of Bangladesh's maritime boundaries in the territorial sea, the exclusive economic zone and the continental shelf in accordance with international law." As the Tribunal well knows, Bangladesh's maritime boundaries have now been defined in part by the March 2012 Judgment of ITLOS in the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal. As a result, the uncertainty surrounding Bangladesh's access to its resources in the Bay of Bengal has been partially resolved. With the ITLOS Judgment, Bangladesh finally achieved some measure of certainty, some definite measure of access, to the maritime areas in front our coast. What remains uncertain pending your Award is just how much access it will have to its potential entitlements in these areas, including especially the areas beyond 200 nm.

4. When Bangladesh presented its case to ITLOS, its central complaint was that the boundary proposals of Myanmar and India, taken together, sharply cut off Bangladesh from its maritime entitlements. In Bangladesh's view, this cutoff was arbitrary and inequitable, and out of keeping with its extensive coastline along the Bay of Bengal. ITLOS agreed with Bangladesh, and gave us a boundary with Myanmar that partially relieved us from the effects of the cutoff. But ITLOS could not fashion a completely satisfactory solution, because India was not a party to that case. As Bangladesh's written pleadings in this case demonstrate, and as its counsel will further elaborate in these hearings, Bangladesh remains sharply cutoff from its maritime entitlements, even after ITLOS' Judgment of March 2012. The existing situation , as of today, is still highly

prejudicial to Bangladesh. We are still cut off. That is why it is here before this honourable Tribunal to ask you, in the exercise of your sound and unbiased judgment, to complete the task that ITLOS partially fulfilled – to relieve Bangladesh from the inequitable effects of the cutoff that still plagues it, while at the same time rendering an Award that is equitable to India, as well.

5. As in the case with our neighbor Myanmar, the objective of the present arbitration is to obtain an equitable delimitation of the Parties' entitlements in the Bay of Bengal, and thereby to bring a lasting and peaceful settlement to a long-standing dispute, the origins of which date back to the day in August 1947 when India and Pakistan were born as independent nations. That year, Sir Cyril Radcliffe was given the fateful task of establishing a definitive and final boundary through the former colonial province of Bengal. A key purpose was to help put an end to the instability that had come with the struggle for independence. In retrospect, it is telling that Sir Cyril's boundary line was drawn in red. As you know, the implementation of this boundary was painful and bloody; millions of people migrated from one side of the border to the other. Bangladesh's greatest desire is to protect the sanctity of these hard-won borders and ensure the long-term stability that the drawing of this boundary line sought to make possible.

6. Mr President, this brings me to the organization of Bangladesh's first-round of presentations. Following me this morning, Mr. Lawrence Martin of the law firm Foley Hoag will describe the geographic circumstances relevant to this case, with a particular emphasis on what makes this case different from the prior case with Myanmar. He will be followed by Professor Philippe Sands of University College London, who will address the

issues concerning the location of the land boundary terminus, the starting point of the maritime boundary.

7. After the lunch break, Professor Payam Akhavan of the McGill University will focus on the delimitation of the maritime boundary in the territorial sea. Bangladesh's first day of presentations will then conclude with Mr. Paul Reichler of Foley Hoag. Mr. Reichler will address the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf within 200 M.

8. On Tuesday morning, we will continue with Professor Alan Boyle of the University of Edinburgh. Professor Boyle will demonstrate that the geographic circumstances of this case call for the application of an angle bisector line, rather than an equidistance line, in order to achieve the equitable solution required by the UN Convention on the Law of the Sea. He will be followed by Professor James Crawford of the University of Cambridge, who will discuss the equitable delimitation of the outer-continental shelf, beyond 200 M. Mr. Martin will then return to the podium to conclude Bangladesh's first round, with a presentation on the issue of proportionality.

9. Mr. President, members of the Tribunal, that brings me to the end of my comments this morning. Bangladesh respectfully invites you to end the uncertainty that has clouded this issue for far too long by devising, in conformity with the 1982 Convention, an equitable solution based on the unique geographic circumstances that our counsel will describe presently. Thank you for your time and courteous attention. I ask that you now invite Mr. Martin to the podium.

PRESIDENT WOLFRUM: I thank the Agent of Bangladesh for her introduction, and I call upon Lawrence Martin, to continue.

PERMANENT COURT OF ARBITRATION

Bay of Bengal Maritime Boundary

Arbitration between Bangladesh and India

Lawrence H. Martin

The Geographical Context of the Present Case

9 December 2013

I. Introduction

1. Mr President, distinguished Members of the Tribunal, good morning. It is a real honour for me to appear before you, and a pleasure to do so on behalf of Bangladesh. My task this morning is to set forth the geographical context in which the delimitation you have been asked to effect will take place.

2. Before I turn to that task, as the first of Bangladesh's counsel to speak, there is a clerical point I should address. That is, the hard cover binders that you have before you now. These Arbitrators' Folders include selected slides from those that will be presented during this morning's sessions. Before this afternoon's sessions, and before tomorrow's presentations, we will also be providing the Tribunal with similar exhibits. The exhibits for the different sessions will be distributed with different colour file dividers to distinguish them from those presented this morning.

3. Today's exhibits are preceded by a red divider, marked with the number 1 to indicate that these tabs correspond to the first morning of Bangladesh's presentations. The tabs themselves are numbered consecutively in the order in which they will be presented. As you will soon see, when I speak about the first exhibit in the Arbitrator's Folder, it is marked as Tab 1.1, indicating it was presented during the first morning as the first exhibit. This will be followed by Tab 1.2, and so on. Counsel who follow me today will simply pick up where I leave off. This afternoon's supplement will be preceded by a orange divider, with the number 2, and the exhibits will be numbered 2.1, 2.2, etc.

4. I trust that is clear; I promise in comparison it is all downhill running from here!

5. One more thing: should you, Mr President or any member of the Tribunal have any questions, whether they concern matters of form or substance, please do not hesitate to stop me or any of Bangladesh's other counsel at any time to ask us.

II. The Geographical Context of This Case

6. Mr. President, it is customary in maritime delimitation cases to begin by setting out the geographical context in which the delimitation is to take place, and that is what I will now do. Bangladesh is mindful of the fact that all five arbitrators went on the site visit, and that three of the distinguished members of this Tribunal also participated in the parallel delimitation case with Myanmar. After a very brief general overview of the pertinent geography, I will therefore focus my comments this morning on the geographical elements that make this case different from that case.

7. In the view of Bangladesh, there are three important geographical differences between the two cases. These relate to the questions of (1) the location of the land boundary terminus in the Raimangal Estuary; (2) the unique physical characteristics of the Bengal Delta, which play a central role is this delimitation; and (3) the manner in which the concavity -- or perhaps I should say concavities -- in the Bay of Bengal bear on this delimitation.

A. General Overview

8. I turn then to the general overview. The Bay of Bengal is depicted on the screens in front of you, and at **Tab 1.1** in your Arbitrator's Folders. It is a massive body of water, measuring 1,800 km across, from west to east at its widest point, and extending to the south for 1,500 km beginning at its northernmost extremity along Bangladesh's coast. It covers more than two million sq km. According to the International Hydrographic Organization, the Bay is bounded in the north by the Bangladesh and Indian coasts; in the west by the coasts of peninsular India and Sri Lanka; in the east by the coast of Myanmar extending down to Cape Negrais, and from there along the Andaman and Nicobar Islands of India; and in the south, the Bay begins its transition into the rest of the Indian Ocean at approximately six degrees north latitude.

9. By virtue of its peninsular coast in the west, and the Andaman and Nicobar Islands in the east, India is, as you can see, located on both sides of the inverted "U"-shaped Bay, which tilts slightly in a south-westerly direction.

10. The area to be delimited in this case is located in the northern half of the Bay, adjacent to the coasts of Bangladesh and India. The northern coast of the Bay is concave. As highlighted on the screen, the concavity in the northern reaches of the Bay extends, east to west, from the coast of Myanmar, along all of the Bangladesh coast, to the coast of peninsular India. Bangladesh's entire coast lies within this general concavity.

11. At the northeastern end of the Bay, within Bangladesh itself, there is a secondary concavity – a concavity within the overall concavity of the Bay's north coast – that extends from one land boundary terminus to another. This image is included at **Tab 1.2** of your Arbitrator's Folders. The issue of these concavities is a topic to which I will return in greater length shortly.

12. From the Meghna Estuary, in the centre of the Bangladesh coast, to the west all the way to the border with India, Bangladesh's coast is completely deltaic. This is the Bengal Delta, formed by the Ganges and Brahmaputra Rivers and their many distributaries, which empty into the Bay along this section of the coast. The coast of the Bengal Delta is one of the most changeable coastlines on the planet. Accretion and erosion are constant. Small islands and low-tide elevations appear and disappear suddenly. They are, sometimes quite literally, here today and gone tomorrow. This too is an issue to which I will return shortly.

13. East of the Meghna Estuary, the Bangladesh coast extends south-easterly to the land boundary terminus with Myanmar, at the Naaf River. As the Tribunal will recall from the October site visit, this section of the coast is characterised by long sandy beaches

and is unlike the deltaic coast to the west. The southern-most point of Bangladesh is on St. Martin's Island-- no relation, I assure you.

14. India's coast extending west from the Raimangal Estuary and to the western bank of the Hooghly River is entirely deltaic. The coast of India's West Bengal State forms the western third of the delta. That said, there are important differences in the make-up of the two sides of the Bengal Delta, which I will detail presently.

15. To the west of India's deltaic coast is the regular, sandy coast of peninsular India. The Tribunal will remember from our rainy fly-over of this portion of India's coast on 24 October that there are no significant islands of note, and little to distinguish it from other coastlines of this kind seen around the world.

16. This, then, is the general geographic context in which the present delimitation is to be carried out. Within this overall setting, I will now focus on the three aspect of the relevant geography that, we say, distinguish this case from the prior case with Myanmar.

B. The Geography of the Raimangal Estuary

17. The first important geographical difference between this case and the Myanmar case relates to the land boundary terminus in the Raimangal Estuary. Before I go any further, let me be absolutely clear: I will be talking only about the geographical aspects of the issue this morning. The historical, hydrological and legal issues are matters that

Professor Sands will be dealing with when I am done. The geographical points I will be making should not be controversial.

18. Having spent a good part of two days flying over the estuary and another day navigating upon it, the Tribunal is acquainted with the essential geographic situation. You will have been struck, in particular, by the sheer size of the area, and the vast expanses of water. Familiar as you are, however, there are important aspects of the estuary's geogrpahy that are perhaps too easy to overlook; aspects that are critical to appreciating the truth of the situation. This is especially true in light of India's repeated insistence that the land boundary terminus Bangladesh has proposed somehow lies inappropriately close to the Indian coast.[2] In Bangladesh's view, this assertion has to be evaluated against the geographic realities that you saw for yourselves.

19. On the screen now is a large-scale image of the estuary from approximately the area where it meets the Bay in the south to the confluence of the Raimangal and Hariabhanga Rivers in the north. The points on which I would like to focus the Tribunal's attention are these:

20. First, the Raimangal Estuary is fed by three different rivers. From east to west, they are: the Jamuna, the Raimangal and the Hariabhanga. The Jamuna and the Raimangal meet in the northern reaches of the Estuary, approximately five nautical miles north of the area where the Hariabhanga joins them.

[2] IR, paras. 2.1, 2.71.

21. On a map, even at this large scale, it is easy to forget the vastness of the distances involved here. All of us who participated in the site visit will remember the enormity of these spaces. Even the Jamuna, the smallest of these three rivers is, by Western standards at least, a significant water-course. It is nearly two nm across where it meets the Raimangal, approximately seven times the breadth of the Elbe in Hamburg across from ITLOS. For its part, the mouth of the Raimangal is more than 2.5 nm across, itself more than eight times the width of the Mississippi as it passes through New Orleans.

22. Of these three rivers that feed the estuary, two and a half of them belong to Bangladesh. Both the Jamuna and Raimangal are wholly Bangladesh national rivers; about that there is no dispute. And as to the third -- the Hariabhanga -- it is a binational river over half of which Bangladesh is also sovereign. By contrast, India is sovereign only over half of one of these three rivers; namely, the western half of the Hariabhanga.

23. Second, the estuary is virtually surrounded by Bangladesh land territory. The eastern jaw of the estuary is comprised of Bangladesh's Mandarbari Island, which you will also sometimes see labelled as "Clump" Island. To the northeast and north are several additional unnamed islands that also belong to Bangladesh. And to the northwest is North Talpatty Island, also undisputed Bangladesh territory.

24. Only the western jaw of the estuary at Baghmarah Island is Indian land territory. If one were to envision the estuary as a semi-circle, fully three-quarters -- or some 135 degrees -- of it would be surrounded by Bangladesh. This final image on the screen now is included at **Tab 1.3** in your Arbitrator's Folders.

25. Geographically speaking, it is therefore natural that the land boundary terminus between the Parties should be closer to the coast of India's Baghmarah Island than to Bangladesh's Mandarbari Island.

C. The Bengal Delta

26. That brings me, Mr President, to the second point of distinction between this case and Bangladesh/Myanmar; namely, the relevance of the Bengal Delta. Although the history, composition and geography of the Delta were the object of some attention during the proceedings before ITLOS, the real focus in that case was, due to the parties' arguments about their entitlements in the outer continental shelf, off-shore on the geomorphological characteristics of the seabed and the subsoil. In view of the 2012 ITLOS Judgment, Bangladesh recognizes that those issues are no longer germane to this case.

27. Moreover, because the land boundary terminus between Bangladesh and Myanmar was located along the far more regular Chittagong coast of Bangladesh, not within the Bengal Delta, the delta's unusual characteristics played a less significant role in that Judgment.

28. The circumstances of this case are very different. The provisional equidistance lines drawn by both Bangladesh and India -- and indeed any delimitation line -- must inevitably be affected by the deltaic coasts of the two Parties. That is, after all, where the maritime boundary starts. It is therefore useful to focus more sharply on the

unique characteristics of this remarkable natural feature, which so strongly affects the delimitation process.

29. Of course, the truth is that Tribunal doesn't really need me to talk about it. You have seen it with your own eyes. No one flying over the Delta could have been anything but impressed by the remarkable merger of land and water. Throughout the delta, the land partakes very much of water, and the water very much of land. Images like this of muddy land barely rising out of the water, and languid, brown sediment-laden water speak better for themselves than I ever could. This photo is included at **Tab 1.4**.

30. The result is a coastline that is covered with islands, deeply indented, and greatly unstable. Throughout the Delta, muddy, jointed fingers of land extend into the sea where they are met by muddy tentacles of water reaching back into the land. This publicly available satellite photo on the screens is at **Tab 1.5**. As Professor Akhavan will discuss this afternoon, the truly unique instability of the Bengal Delta is specifically recognized in the text of Article 7 of UNCLOS.

31. In order to appreciate the extraordinary instability that characterizes the Delta's coast, it is important to understand the natural processes that have built it up.

32. The Bengal Delta is the world's largest delta -- and by far. It covers more than 110,000 sq km. Indeed, it's larger than the deltas of the Nile and Mississippi Rivers combined. In total, the delta stretches some 350 km along the northern coast of the Bay of Bengal from the eastern jaw of the Meghna Estuary to the mouth of the Hooghly River in India.

33. The Bengal Delta has formed -- and is continuing to form -- through the accumulation of sediments washed down from the high Himalayas to the north. The erosion of the Himalayas is sped by the annual monsoons that inundate the Asian subcontinent. Every year, more than a thousand million tons of sediment flow down through the Delta towards the Bay. That equates to some three million tons every single day. This is far and away the largest sediment discharge of any river system in the world. This image is at **Tab 1.6** of your Folders.

34. Much of the sediment load carried through the delta ends up being deposited on the seafloor of the Bay, where it has formed an extensive shelf, slope and rise that extend beyond the Equator, more than 1500 nm away. Some sediment is, however, deposited in the Bengal Delta, primarily by the floods that accompany the summer monsoons.

35. Today, the main flows of the Ganges and Brahmaputra Rivers converge in central Bangladesh first as the Padma and then as the Meghna River, which empties into the sea through the estuary of the same name. This sketch-map is at **Tab 1.7**. Within historic memory, the two rivers used to push their way to the sea separately. The Ganges used to find its way to the sea through the myriad distributaries that crisscross the western delta. Its main mouth was in the vicinity of the Hooghly River. By the time the ancestors of our British friends arrived in Bengal, however, the Ganges had changed course and carved a path through what is now central Bangladesh to meet the Brahmaputra.

36. This same basic process, albeit on a much smaller scale, was described well by the International Court of Justice referring to the delta of the River Coco in *Nicaragua v.*

Honduras. The Court observed: "The sediments deposited by the River Coco are dispersed by a network of diverging and shifting river channels, a process which gives rise to a deltaic plain. The hierarchy of the river channels changes rapidly: the main channels may quickly become secondary channels and vice versa."[3]

37. Now that the Ganges merges with the Brahmaputra and exits through the Meghna, the western two-thirds of the Delta is deprived of the sediments that are required to keep the forces of erosion at bay. Consequently, the coast of the Bengal Delta from the Hooghly River in India to the Harianghata River in Bangladesh, is now eroding, at least on a net basis. Meanwhile, in the eastern third of the delta, accretion prevails over erosion. This is in the Meghna Estuary where most of the sediment-rich waters of the Ganges-Brahmaputra river system now make their way into the Bay.

38. This is not to say that no new land is being formed in the western two-thirds of the Delta, or that no land is being lost in the eastern third. To the contrary, on a localized basis, new islands, mudflats and shoals appear and disappear throughout the entire delta in response to natural seasonal or climatic variations. The case of the feature known in Bangladesh as 'South Talpatty' and in India as 'New Moore' is a perfect example. Professor Akhavan will have more to say on this subject shortly.

39. India has not challenged these facts in broad strokes, although it does dispute the significance of the delta's instability. This is not a fray into which I intend to step. My purpose this morning has been simply to introduce the general picture. Professor Akhavan will return to the issue shortly and show why India's arguments do not

[3] *Nicaragua v. Colombia*, para. 32.

withstand scrutiny. In any event, the bottom line is simple and self-evident: the coast of the Bengal Delta is profoundly unstable.

D. The Concavities in the Bay of Bengal

40. With that, Mr President, I come to the third and final geographic element that we say distinguishes this case from *Bangladesh/Myanmar*. That is, the ways in which the concavities in the Bay of Bengal relate to the delimitation at issue. Here, I must beg for a bit of patience. This is a subject on which I will spend somewhat more time than the others. I trust that when I am done you will understand why. In Bangladesh's view, these issues are of singular importance.

41. With your permission, Mr President, I will begin with a brief recapitulation of the essential issue; namely, the role coastal concavities can play in the delimitation process. I will do this quickly; I am aware that some of it is familiar. Nevertheless, we think it useful to provide a common starting point for the presentations that will follow today and tomorrow.

42. The prejudicial effect coastal concavities can have on delimitation was, of course, first recognised in the *North Sea Continental Shelf* cases between Germany, on the one hand, and Denmark and the Netherlands, on the other. The holding of those cases -- about which Mr Reichler will have more to say this afternoon -- has now passed into the realm of received wisdom. It is no longer really even debatable, much less is it controversial. The point is so well-settled that it has even entered the Handbook on the Delimitation of Maritime Boundaries, published in 2000 by the United Nations

Office of Legal Affairs. The Handbook states: "The relevance of convexity or concavity of the relevant coastline was highlighted by the International Court of Justice in the 1969 North Sea Continental Shelf cases. The distorting effects of the equidistance method in the presence of a concave or convex coastline is shown in the following illustration."[4] This is at **Tab 1.8** of your Folders.

43. A further general point is critical: not all concavities are relevant for delimitation purposes. In the words of one case "concavity per se is not necessarily a relevant circumstance."[5] It is only when the concavity exerts an inequitable effect on a proposed delimitation that it will be considered relevant. And that happens when one State is pinched between two others in the middle of the concavity.

44. Three simple schematics will illustrate the point. These schematics are derived from a similar schematic included in the ICJ's 1969 Judgment in the *North Sea* cases. All three can be found at **Tab 1.9** of your Folders.

45. We begin with an idealized straight-line coast along which lie three States: State A, State B in the middle and State C. In this situation, equidistance works well to apportion the maritime areas equitably. As you see, the two notional equidistance lines are perpendicular to the coast, and parallel to each other. All three States enjoy an access to their 200 nm limits that is equal in width to the length of their coasts.

[4] United Nations. Division for Ocean Affairs and the Law of the Sea, *Handbook on the Delimitation of Maritime Boundaries* (2000), at p. 30, para. 143. Figure 6.2.

[5] *Bangladesh/Myanmar*, para. 292.

46. On the next image, we have a concave coast. The coasts of States A and C bend upward and inward. You can see the difference immediately. Although States A and C continue to make out well, State B now has a substantially reduced maritime area. The equidistance lines on either side are pushed inward and in front of State B's coast. The result is that the breadth of its maritime areas narrows noticeably further from shore. Although State B still reaches 200 nm, it does so to a more limited extent than in the prior schematic. We might call this tapering of maritime space the most obvious footprint of a concavity.

47. Finally, is a schematic of a more severe concavity. Here, the coasts of States A and C bend upward and inward more sharply than in the prior image. Using equidistance, those two States again do just fine. State B, however, is much worse off. Not only is its maritime space reduced to a rapidly tapering wedge, it no longer even reaches its 200 nm limit.

48. In the context of the northern Bay of Bengal, only Bangladesh finds itself in the position of State B in the preceding schematics. Only Bangladesh stands with both feet – that is, both of its land boundary termini – planted firmly inside the general concavity that constitutes the northern coast of the Bay of Bengal.

49. Because the entirety of Bangladesh's coast lies within a concavity sandwiched between India and Myanmar, unadjusted equidistance lines inevitably produce a very pronounced cut-off effect, as shown on the screens and at **Tab 1.10**. The result is not unlike the one faced by Germany in the *North Sea* cases. Here are the two cases side-by-side. The maps are drawn to the same scale; the only change has been to

rotate the North Sea coast so that it faces in the same direction as the northern coast of the Bay of Bengal. The similarity could scarcely be clearer.

50. I very much appreciate your kind indulgence through that reprise, Mr President. I come now to what is different about this case than the case with Myanmar. Given the centrality of the concavity issue in *Bangladesh/Myanmar*, it may perhaps surprise you to hear Bangladesh considers the issue different here. But it does. Although the general question of concavity remains critical, the manner in which the issue presents itself is materially different. This is true in three respects.

51. First, although Myanmar hinted at the argument in the earlier case, India seriously and sustainedly contends that it, like Bangladesh, has a concave coast. Indeed, India goes so far as to argue that it, like Bangladesh, has a concavity within a concavity along its north coast. Presumably, the purpose of this argument is to suggest that, geographically speaking, Bangladesh is no worse off than India; that equidistance is no more inequitable to Bangladesh than to India. "Me too!" says India.

52. The Indian Rejoinder offers the following sketch to support its argument. With great respect -- and with apologies to Mickey Mouse whose ears appear to have turned up in the Bay of Bengal -- this is entirely beside the point.

53. Whether or not this or that portion of the Indian coast can be characterised as "concave" is simply not relevant. The only pertinent question is whether or not the concavity threatens to exert an inequitable effect on the delimitation. And as I just explained, that happens when a State is pinched in the middle of the concavity between two others.

54. That is the precisely the circumstance with which Bangladesh is confronted. And it is distinctly not the circumstance in which India finds itself. To the contrary, there is no other State on the other side of India for some 1,700 km to the southwest; that is, until one reaches Sri Lanka.

55. Second, the manner in which the concavity arises in this case is different from the Myanmar case precisely because of the ITLOS Judgment. Prior to the 2012 Judgment, Bangladesh was faced with equidistance solutions proposed by Myanmar, on the one side, and India, on the other, that would have cut it off well short of its 200 nm limit, and given it no access to its undisputed entitlement in the outer continental shelf. The 2012 Judgment altered the equation somewhat, at least on one side. ITLOS accorded Bangladesh a measure of relief from the cut-off by adjusting the provisional equidistance line to the south so as to open a slightly larger wedge of sea to Bangladesh. The extent of the adjustment is depicted on the image on the screen now.

56. So, how does this change things? Well, in the view of Bangladesh, not that much. Bangladesh still left with a rapdily tapering wedge of maritime space that reaches a bit further than before, but not really all that far, and not nearly to the limit of its unquestioned entitlement in the continental shelf beyond 200 nm. This final image can be found at **Tab 1.11**.

57. India takes a very different view. As India would have it, the fact that ITLOS afforded Bangladesh some relief from the equidistance cut-off on the Myanmar side means that this Tribunal has no need to make any further adjustments on the India side. This is perhaps the single most persistent theme running through the Indian Rejoinder. India

states, for example, "In *Bangladesh/Myanmar*, the ITLOS adopted a line avoiding the excessive resulting cut-off for Bangladesh; this precludes Bangladesh" -- this precludes Bangladesh -- "from raising the same alleged disadvantage again, now that it is no longer cut off."[6]

58. In effect, India seems to be suggesting that when it rendered its Judgment in 2012, ITLOS was actually deciding both cases -- and in so doing, deciding that Myanmar would pay the whole price associated with alleviating the cut-off equidistance works on Bangladesh. In our Reply, we called this India's "thank Myanmar" theory of the case. Among other things, it completely fails to take adequate account of the fact that, as I just showed, Bangladesh is still severely cut off.

59. Lastly, India's "thank Myanmar" argument makes a mockery of the larger-scale geographic realities in the Bay of Bengal. Those larger-scale geographic realities are precisely the third and final respect in which the concavity-related issues are different in this case than in the case with Myanmar.

60. As I discussed at the outset of my presentation this morning, India is, by virtue of its peninsular coast in the west, and the Andaman and Nicobar Islands in the east, located on both sides of the inverted "U"-shaped Bay of Bengal. Bangladesh sits alone in the bottom curvature of this inverted "U". But right next to it, and bounded by India's Andaman and Nicobar Islands to the south, is Myanmar.

[6] IR, para. 7.18.

61. It may be easiest to explain the significance of this fact by reference to the schematics I presented earlier. To make the schematic more faithful to the reality of the Bay of Bengal, one has to first invert it and then add State C to both sides of the concavity, as you see on the screen now. That having been done, the problem is immediately obvious. In order to alleviate the inequity to State B, the equidistance line between it and State A has to be adjusted to the south. Yet, as you adjust the line more to the south, you create a real risk of inequitably cutting off State A as well. This is precisely because State A's maritime space is bounded on the other side by the ubiquitous State C. To put it in the plainest possible terms, as between States A and B, there is very little margin for adjustment due to the presence of State C on the other side. The more you give to State B, the greater the risk of cutting off State A. This schematic is included at **Tab 1.12** of your Folders.

62. We can see precisely this effect by reference to one of the maps presented in the Bangladesh Reply. On the screen now is Bangladesh Reply Figure R4.26A. It is included also at **Tab 1.13** of your Folders. Bangladesh's maritime space within 200 nm is depicted in green, and for this purpose is based on the ITLOS Judgment line with Myanmar and the provisional equidistance line with India. India's maritime space is portrayed in blue; Myanmar's in red. With this image, one can appreciate just how little flexibility ITLOS had. Any greater adjustment to equidistance than the one it adopted would have created a very real cut-off on Myanmar, particularly in the area beyond 200 nm. Even a change of five degrees would have left Myanmar with a very limited outlet to its entitlement in the outer continental shelf. ITLOS made this point explicit. At paragraph 334 of its Judgment, it said about the 215° line it adopted:

"A shift toward the north-west would produce a line that does not adequately remedy the cut-off effect of the provisional equidistance line on the southward projection of the coast of Bangladesh, while a shift in the opposite direction would produce a cut-off effect on the seaward projection of Myanmar's coast."

You can find this language at **Tab 1.14**.

63. India -- State C in our schematic -- faces no similar risk. There is, in short, plenty of flexibility to fashion an equitable solution for Bangladesh that is equally equitable for India. India is not at all in the same position as Myanmar; there is no meaningful risk of creating an inequitable cut-off of India.

64. In considering this issue, it is useful to step all the way back. As I have already discussed, India asks this Tribunal to determine that it too has a concave coast, just like Bangladesh. Mr. President, the fact -- the unavoidable and undeniable fact -- is that India surely has one of the most classically convex coasts in the world. Indeed, it has two of them! Not only is the coast of the Indian subcontinent self-evidently convex, so too are the coasts of the Andaman and Nicobar Islands which, due to their geographic orientation, open an enormous amount of additional maritime space to India.

65. Bangladesh can thus perhaps be forgiven if it does not fully sympathise with India's attempt to portray itself too as bearing the inequities of a concave coast, or suffering the cut-off of its maritime entitlements.

III. Conclusions

66. Mr President, I have come to my conclusions in regard to the geographical facts. There are three:

First, Bangladesh dominates the geography of the Raimangal Estuary. Of the three rivers that feed into it, two and a half are the sovereign rivers of Bangladesh. Only half of one is Indian. Moreover, the projections of Bangladesh's land territory dominate the estuary.

Second, the forces that have created -- and continue to create -- the Bengal Delta render it one of the most unstable coastlines in the world.

Third, Bangladesh continues to be inequitably cut-off by the multiple concavities of its coast. There is, in comparison to the situation with Myanmar, substantially more room for flexibility on the Indian side of the concavity to alleviate this cut-off.

67. Mr President, I thank you and all of the Members of the Tribunal for your courteous and patient attention. Bangladesh's next speaker is Professor Philippe Sands. I ask that you call him to the podium.

PRESIDENT WOLFRUM: I thank you for your statement, and leading us through the geographical features of Bay of Bengal, and I will now call upon Professor Philippe Sands to continue, please.

PERMANENT COURT OF ARBITRATION

Bay of Bengal Maritime Boundary

Arbitration between Bangladesh and India

Professor Philippe Sands

The Location of the Land Boundary Terminus

9 December 2013

1. Mr. President, Members of the Tribunal, it is an honour for me to appear before you this morning in these important proceedings on behalf of the People's Republic of Bangladesh.

2. This morning my task is to address you on the location of the land boundary terminus. Professor Payam Akhavan will then deal with the delimitation of the territorial sea from and around that point. I should say that the tabs that I will be taking you to, although you don't need to call them up, are Tabs 1.15 to 1.42. I will speak, with your permission, Mr. President, for about 30 minutes and then suggest perhaps, with your permission, that we take a break and then continue thereafter. But you will be pleased to know you'll get an early lunch today and we won't go until ten past one, to use a cricketing parlance, which unite both sides, I think.

3. This is an area with which you are now reasonably familiar. You will recall that on Wednesday October the 23rd, just a few weeks ago, you saw for yourselves the area in which the disputed land boundary terminus is located. You saw it first from the window of a helicopter on which we flew, after passing St. Martin's Island and turning back up the coast and seeing, for a second time, the remarkable site of the graveyard of the great ships, near Chittagong. The following morning, after the delightful evening that we all spent at Jessore Air Force base, we boarded a Bangladesh naval vessel at Mandabari Island, and we made our way across the Raimangal Estuary to the Hariabangha River. And, like me, I am sure you will have been struck by the great expanse of these rivers, on a scale that cannot easily be captured on a map alone. There is, certainly for me, a considerable benefit to having been there, and seeing the reality of the area for oneself.

4. On your screens you can see the route that we followed on that Thursday morning. It's the route in purple on the right-hand side, starting at Mandabari Island. [FIGURE 1]. We made our way across the estuary to the land boundary terminus on a boat, and later that afternoon, we boarded two Indian hovercraft, and returned once again to the two rivers (and you can see that on the chart in green). The following day, on Friday the 25th October, we returned for a third time to visit the site, this time onboard a C-130 Hercules aircraft. You will recall that we spent several hours sitting in front of a grey screen, looking for South Talpatty Island (which has previously been referred to by India as New Moore Island, but was described to us during the visit, certainly as I was sitting on the hovercraft, as "New Moore Elevation" – it may be that that was at long last a concession to reality!). Standing in front of that screen on one occasion I blocked it, and I recall the sight of Sir Michael Wood waving me out of the way, lest we might actually

see South Talpatty, during that long flight as we circled the area. We didn't find South Talpatty Island or elevation. We didn't see it. It was rather like the hunting of the snark. It was not there.

5. The site visit did illuminate the parties' two rounds of written pleadings, and it certainly highlighted points of agreement and those matters on which differences remain. The parties indeed agree on several points of principle governing the determination of the land boundary terminus, but they disagree on the application of those principles to the facts of this case. And in particular, they disagree on a rather fundamental issue, namely the critical date for the determination of the location of the land boundary terminus and the drawing of the boundary. That fundamental disagreement in turn feeds another point of contention: which charts, Mr. President, are to be used to identify the location of the land boundary terminus as established by the Award prepared by Sir Cyril Radcliffe, in August 1947? And we note and appreciate that the Tribunal has recognised the significance of this aspect. We noted in particular that in your letter of the 4th of November 2013 you have invited the parties, "to discuss whether or not the historical geographical situation [in 1947] in the estuary has an influence on the determination" of the land-boundary terminus.[7] Mr President, members of the Tribunal, we say that it does have an influence, and we say that it is the critical issue in relation to this part of the case. In our submission, what the Tribunal must do is take itself back to the situation as it was in that summer of 1947 and seek to decide where the land boundary terminus is located by reference to the boundary as it was established by Lord Mountbatten and Cyril

[7] Letter dated 4 November from the Tribunal to the Parties.

Radcliffe on the 15th of August of that year. And we say that you can only do that by referring to the charts to which they had or could have had access.

6. So against this background, let me begin with some matters on which the parties agree.

7. First, India agrees with Bangladesh that the land boundary terminus was authoritatively determined by the Radcliffe Award in August 1947, and that it was based on pre-partition boundaries.[8] As the Tribunal is well aware, upon India's independence, its territory was divided between India and the newly formed State of Pakistan. India claimed the province of West Bengal, while Pakistan was ceded East Bengal (which of course became Bangladesh in 1971). The Indian Independence Act of 1947 charged the Bengal Boundary Commission with the task of determining the boundary between East and West Bengal. The Commission was chaired by Sir Cyril Radcliffe. It's task was obviously politically contentious and resulted, as we know and mention has already been made of this, of a very great migration, of a terrible upheaval, and much loss of blood. Cyril Radcliffe's Award established that the final portion of the boundary between India and East Bengal leading up to the terminus of the land boundary is, as you can see now on your screens. The Award provided that: [FIGURE 2.1]

"The line shall then run southwards along the boundary between the Districts of Khulna and 24 Parganas, to the point where the boundary meets the Bay of Bengal."[9]

Those are the critical words.

[8] BR ¶ 3.2.

[9] Bengal Boundary Commission, Report to His Excellency the Governor General of British India (12 August 1947) (hereinafter "Radcliffe Award") at Annexure A, p. 3 (emphasis added). MB, Vol. III, Annex B12.

8. Now there is a second matter on which the Parties agree and it is this: The boundary between these two districts – the district of Khulna and the district of 24 Parganas, referred to in the Radcliffe Award – was defined pre-partition by Notification No. 964 Jur. of 1925, and it is still so defined today. That Notification – which you can see on the screen, it's at Tab 1.17 [FIGURE 2.2] – established the following district boundary:

> "[T]he Western boundary of district Khulna passes along the south-western boundary of Chandanpur … till it meets the midstream of the main channel of the river Ichhamati, then along the midstream of the main channel for the time being of the rivers Ichhamati and Kalindi, Raimangal and Hari[a]bhanga till it meets the Bay."[10]

9. The Parties agree on this. There is no dispute between the parties as to the law that is to be applied to determine the location of the land boundary terminus. And they agree too that the applicable law places the land boundary terminus at the point where the midstream of the main channel of the Hariabhanga river meets the Bay of Bengal.[11]

10. There is another matter on which the Parties agree: they agree that that the river boundary meets the Bay of Bengal at the *intra fauces* closing line across the mouth of the Raimangal Estuary. Indeed, the parties even largely agree on the location of that closing line: such disagreement as exists between the Parties is only due to the fact that India has drawn its line on the basis of an Indian chart that was plotted in 2011, three quarters of a century after Cyril Radcliffe drew his boundary, and well after these proceedings were initiated. That is the difference between the Parties on that closing line.

[10] 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.
[11] BR ¶ 3.8; ICM ¶, 4.5.

11. And finally, and helpfully, both Parties agree on another matter: they recognise that the Radcliffe Award alone – along with the illustrative map that is appended as Annexure "B" of the Award – is not sufficient to determine the precise location of the boundary as established by the Award. Additional data is needed.[12] That is a point of agreement between the Parties. What they disagree about is where you, the Tribunal, should go to find that additional data. We, on the Bangladesh side, say that you, the Tribunal, must look to the data that was available in 1947. India, for its part, invites you to ignore all of that material and to rely on modern data that it has prepared after this case was initiated. That is the central point of difference between the two sides.

12. Now, as things stand after two rounds of written pleadings, these are important points of agreement with regard to the location of the land boundary terminus. There is, also, one more important point on which the Parties were in agreement in their first round of written pleadings, until, that is, India filed its Rejoinder, when it suddenly and markedly changed its mind. In the Counter-Memorial, at paragraph 5.31, which you can see on the screen, the Indian position was that, [FIGURE 3] "the land boundary terminus ... was determined at the time of the independence of India and Pakistan in August 1947, and has not subsequently changed". "...and has not subsequently changed". Bangladesh agrees entirely with that sentence. It is correct: the land boundary and its terminus were fixed by the Radcliffe Award on the 15th of August 1947, and they were permanently fixed at that date. The location of the land boundary terminus is in exactly the same place today as it was on 15th of August 1947. The land boundary terminus is another one of Midnight's Children, like Saleem Sinai, the narrator of Salman Rushdie's fine novel, born at the

[12] IR ¶ 2.5.

exact moment when India and Pakistan obtained their independence. The land boundary terminus did not move at any point thereafter. It is not a wandering land boundary terminus. It did not change location with every accretion or erosion, with every ebb and flow, with every change in the river or the coast, with every change over the passage of time. And so the task of the Tribunal is to identify the location as it was at midnight on the 15th of August 1947. To do that, we say you have to examine the charts that were in existence at that time, and which were available to Sir Cyril Radcliffe and his team.

13. That was the position as at the filing of the Counter-Memorial. But between the filing of the Counter-Memorial and the Rejoinder, something changed for India. It continued to agree that, "the location of the land boundary terminus has remained unchanged since the time of the Radcliffe Award", but it then argued – and we have to say it's an improbable argument – that the location was not fixed by what India calls the, "historic geographical situation" that pertained as at 1947, as the Tribunal has put it, but by reference to the geographical situation that pertains today. That is India's position. It is unchanged and it is also not unchanged, it might be said. It now appears to be India's position that the present-day circumstances in the estuary – and this is how they justify the contortions – the present-day circumstances in the estuary are exactly the same as those that existed at the time of the Radcliffe Award, 66 years, four months, and 24 days ago. Nothing has changed. At paragraphs 2.47 to 2.51 of its Rejoinder, India proceeds on the basis that later charts, including that produced in 2011, can be used because, "the location has not changed over time", by which it appears to mean there are no changes in the coast or the islands, or the size or direction of the river, or any aspect of the

hydrographic situation.[13] That is, we say, an improbable claim. And on this improbable basis – which is utterly contradicted by every single one of the charts that you have before you – India invites the Tribunal to ignore all of the evidence contemporaneous with the preparation of the Radcliffe Award, and to rely exclusively on the hydrographic circumstances which pertain and are shown in India's present-day surveys of the estuary. The improbability of that argument became readily apparent on the afternoon of Thursday, October the 24th , 2013, confirmed on the afternoon of Friday, 25th of October 2013, as members of the Tribunal and all those on the site visit will recall the unsuccessful attempt, over several hours, to be able to see South Talpatty Island for ourselves. We saw for ourselves what is – and is not – in and around the Hariabangha River today. We could see for ourselves the obvious changes that have occurred since 1947, by reference to a comparison between the charts that existed back then, the charts that exist today, and what we saw for ourselves, looking out of those windows and onto those grey screens.

14. Mr. President, this is by way of introduction. Let me turn now to my submissions, which are in two parts. First, I am going to address the fundamental dispute that affects what India calls the "north-south axis", formed by the boundary established in the Radcliffe Award along the midstream of the main channel of the Hariabhanga River. And in so doing, I will address India's reliance on the map at Annexure "B" of the Radcliffe Award (the Radcliffe map, we might call it) – and this was a point raised by your question number five, Mr. President, in your

[13] See India *Rejoinder*, para. 2.48 ("If the location has not changed over time, then subsequently prepared and better charts must not only be admissible, but, indeed, preferable and accorded more weight, precisely because they provide the best evidence of the facts in contention.")

letter of 4th of November last[14] – and then I will deal with the probative value of the contemporaneous evidence that existed back then in 1947. In the second part of my presentation, which can be very brief, I will address the east-west axis, formed by the closing line across the estuary. It is the intersection of these two lines, the north-south axis along the midstream of the Hariabhanga River and the east-west axis along the *intra fauces* closing line that the terminus of the land boundary is located.

A. The Boundary Established by the Radcliffe Award on the Midstream of the Main Channel of the Hariabhanga River

i. The Radcliffe Map

15. So I turn to the first submission. India places very great reliance on the Radcliffe map at Annexure "B" of the 1947 Award. It is a matter of note, and I've already mentioned it, that in so doing, India has chosen to make no use of any authoritative contemporaneous chart that accurately reflects the north-south axis, as it was fixed by the Radcliffe Award on the 15th of August 1947. India proceeds as though Sir Cyril and his team went blindly to their task, blissfully unaware of the various charts that existed, and upon which they might have relied. India adopts a different approach, and it relies on two sources of evidence: first, it relies on the illustrative and roughly-drawn map attached to the Radcliffe Award, and second, it relies on present-day charts that were, of course, not available to Sir Cyril and his team, and which have been prepared on the basis of surveys conducted by India including after the commencement of this arbitration. On the basis of this limited material, India asserts that the "bathymetric data of the estuary [measured some 65 years later] confirm the location of the main channel consistent with

[14] Letter dated 4 November from the Tribunal to the Parties: "Do the Parties agree that the copy of the "Radcliffe Map" provided in India's *Rejoinder* is either authentic or at least an exact reproduction of the original map?"

pre-partition government documents."[15] How India feels able to reach this surprising conclusion is unclear, unexplained and unknowable. It is pure assertion. Proceeding in this way, we say that India has fallen into very serious error in plotting its north-south axis exclusively on the basis of modern day charts.

16. Both Parties acknowledge that the map appended to the Radcliffe Award is instructive. But, both also agree that, in and of itself, the various maps produced by India lack the information that is necessary to determine with any degree of precision or accuracy the location of the boundary in the midstream of the main channel of the Hariabhanga River. India, acknowledges this in its Rejoinder, when its states that [FIGURE 4]

"[i]n resolving the difference as to the location of the vertical axis, a number of different lines of inquiry must be pursued: textual analysis of the Award (including the Radcliffe Map) and cartographic analyses for all of the other charts and maps that have been adduced."[16]

On this point, it would appear that Bangladesh agrees with India, but that's not quite accurate, because India seems to say that all other charts, as they use in the phrase there, does not include all the other charts that were in existence as at 1947. The Radcliffe Award, however, is plainly not sufficient along with its accompanying map for the purposes of locating the land boundary terminus.

17. Now, more than one "true" copy of the Radcliffe map has surfaced during these proceedings. India originally argued that the Tribunal should rely on the "true" copy of

[15] *Ibid.* at para. 4.7 (emphasis added).
[16] IR, ¶ 2.5.

the map that it presented as an annexure to its Counter-Memorial.[17] Bangladesh raised a number of questions about the characterization of the map, including the fact that the Award from the Indo-Pakistan Boundary Disputes Tribunal explicitly described the boundary line on the map as drawn in red ink – red ink – and not the black line with the red dots that appeared in that map produced by India.[18] During its search for a true copy of the original map, Bangladesh did locate two maps that purport to depict the boundary established by the Radcliffe Award. The first was a map entitled "Annexure B", which was published in the Gazette of Pakistan on the 17th of August 1947 – the very same day that India published the Radcliffe Award in its own official gazette, although without an accompanying map.[19] Bangladesh has also located a second map showing "the boundaries as finally demarcated by the Boundary Commission" which was published by the British Foreign Office in September 1948.[20]

I should mention that the footnotes to this set of submissions provide you with the annex numbers and where you can find all of those maps.

18. In presenting its Rejoinder, however, India has now identified a new (and what it calls) a "true" copy, replacing its prior Radcliffe map, although it provides no explanation for what was apparently a mistake with regard to the earlier "true" copy.[21] Bangladesh is not in a position to confirm the authenticity of this latest map, or to challenge it. Nor is Bangladesh able to express any view on whether it is, as the Tribunal asks, "an authentic

[17] ICM, Annex IN-2.
[18] BR ¶ 3.28.
[19] "Report by the Chairman of the Bengal Boundary Commission", reprinted in *The Gazette of Pakistan* (extraordinary) (17 August 1947). MB, Vol. III, Annex B13.
[20] BM, para. 5.7; Vol. II, Figures 5.1 & 5.2.
[21] IR ¶ 2.61.

reproduction of the original map". We just don't know. To be able to express a view on authenticity would require expert evidence on the original copy, and the Tribunal has no evidence before it. What is curious is that India didn't produce this new second "true" copy earlier in the proceedings: on its account, it was to be found at the Ministry of Home Affairs up until May 2010, and then it spent three years apparently orphaned in the National Archives of India.[22]

19. But in any event, you don't have to express a definitive view on the matter of authenticity, because, Mr. President, members of the Tribunal, even if the map is authentic or not authentic, there are at least four reasons why it (and the other purported "true" map) are not sufficient to allow the Tribunal to determine with any degree of precision the location of the north-south axis along the midstream of the channel of Hariabhanga River. First, whichever of these maps may be an authentic copy of the original Radcliffe map, or even the original Radcliffe map itself, none purports to provide the precise location of the north-south boundary leading to the land boundary terminus. None purports to provide the precise location. Due to the scale of the map on which the line is drawn, the line depicted in India's original "true" copy of the map, filed with the Counter-Memorial, was more than one mile wide and covered 20 percent of the estuary's opening.[23] The width of the line in the second "true" copy is 0.6 miles. For this reason alone, we say India cannot rely on these maps to accurately determine the location of the land boundary terminus.

[22] IR Annex RJ-11.
[23] BR ¶ 3.29.

20. Second, it is the text of the Radcliffe Award that is authoritative, not the map, which is merely illustrative. The Award states this explicitly and unambiguously that the map was "annexed [as Annexure B] for purposes of illustration". And the Award further states that if there should be any divergence between the boundary described in the Award and the boundary illustrated in Annexure B, the description in Annexure A is to prevail.

21. Third, the value of India's Radcliffe maps for pinpointing the location of the midstream of the main channel of the Hariabhanga River is called into some question by the fact that no Hariabhanga River is actually shown by name on either map. [FIGURE 5] On both maps the Hariabhanga River has been incorrectly identified as the Haringhata River – it does not exactly inspire a huge amount of confidence. And indeed, as I will discuss shortly, when the Indo-Pakistan Boundary Disputes Tribunal was faced with a problem in identifying the Mathabanga River (which may have been of nomenclature, or simply the placement of a river in the wrong place), the Tribunal declined to give precedence to the map (as India had urged), and instead it relied on the Award's description, combined with contemporaneous evidence of the geographical circumstances of the river boundary in 1948. And this is, of course, exactly what Bangladesh asks the Tribunal to do in this case.

22. Fourth, and most importantly, the very nature of the map makes it ill-suited and inappropriate for identifying the location of the land boundary terminus. [FIGURE 6] You can see this on the screen. This is Tab 1.21. It is a very small-scale map (showing a large geographic area with a minimum of detail). In fact, we think it's drawn to a proportion of approximately 1 to 500,000 (we can't be more precise, as the map has no scale written on it). It is nothing more than a general reference map prepared by the

Bengal Drawing Office in 1944; it shows political subdivisions, but it shows no hydrographic or bathymetric information. The Bengal Drawing Office apparently drew the line described in the Radcliffe's Award on its 1944 map to illustrate the division of the territory. It is a line of attribution – showing roughly which State got what territory – not a line of delimitation. To delimit the boundary in the estuary Sir Cyril Radcliffe and the Bengal Drawing Office would have needed a larger scale nautical chart, not a small-scale general reference map.

23. India acknowledges that it cannot rely on this map as the sole piece of contemporaneous evidence. In its Rejoinder, it explains that "in as much as all the district boundaries, including the boundary in the Estuary, were inserted in 1944 in clear black lines, the map is also an authentic interpretation of Notification No. 964 Jur."[24] Yet, India then acknowledges that "because Notification No. 964 Jur. employs terms such as 'main channel', comparative hydrographic and bathymetric data are also necessary for the determination [of the vertical axis]."[25] We say that is an important concession, because the 1944 map of Bengal provides no such hydrographic or bathymetric data. So one is bound to ask: how can that map possibly represent an "authentic interpretation of [Notification 964]"?

24. The question answers itself, and we note that India has not attempted to use this map to identify the location of the midstream of the main channel of the river. Like Bangladesh, it has relied exclusively on large-scale nautical charts. [FIGURE 7] The difference between the parties is that Bangladesh – whose line is shown on the chart on

[24] IR ¶ 2.22.
[25] IR, ¶ 2.5.

the left of the screen – relies on what would have been available to the Radcliffe team, namely the 1931 edition of British Admiralty Chart 859. That is the one on the left and which we say you ought to use. India, on the other hand, whose line is shown on the right side of the screens, has turned to a 2011 Indian Chart, prepared after this arbitration was underway. Mr. President, Members of the Tribunal, the only one of those charts that could have been available to Sir Cyril Radcliffe and his team, sufficient to carry out his task, was the 1931 chart: the small-scale 1944 Bengal map was inadequate. The 2011 Indian chart did not exist. This is the best we have to ascertain what the situation was on the 15th of August 1947, and we say that it is why you ought to rely on that version of that chart.

PROFESSOR SANDS: Mr. President, this may be an appropriate moment to break for coffee.

PRESIDENT WOLFRUM: Thank you, Professor Sands.

We now adjourn for 20 minutes and in 20 minutes, meet again.

(Brief recess.)

PRESIDENT WOLFRUM: Professor Sands, before you start again, Professor Shearer would like to ask a question.

Professor Shearer.

ARBITRATOR SHEARER: Yes, Mr. Sands. Just going back to your argument about the 1927 description of the main channel for the time being, how do you interpret the words "for the time being"? Does it mean as at 1927 and then 1947 they chose that as the main channel? Because the thalweg or main channel can notoriously change over time, can it not? You're saying that the main channel as at August 1947 fixes the points, is it, where it meets the Bay, not that it might from time to time alter with accretion over time? It's a question of the interpretation of the words "for the time being." Does it mean now, or does it mean as it might be for the future?

Thank you.

PROFESSOR SANDS: Well, thank you, Judge Shearer.

The answer that I would give to that question is that the position in the Notification says what it says and, for the time being, led us up to a situation as at the 15th of August 1947 at which point Sir Cyril Radcliffe and his team were to determine at that moment, as your question implies, where the main navigation channel was, and it was at that moment that it was fixed in time. And I'm coming now to address precisely that point, but your question is a very important one, and one cannot exclude the possibility that the language on one interpretation envisaged a difference of channel. But as of August 1947, as I will explain, that is the crucial moment. So,

whatever change occurred subsequently could not alter the location of the boundary as then determined and the land boundary terminus as then determined.

25. PROFESSOR SANDS: This brings me to the second part of my first submission on the probative value of contemporaneous evidence. This, of course, is at the heart of the dispute between the parties. According to India's Rejoinder, the Tribunal should begin with the contemporaneous evidence, but only in the form of the small-scale illustrative Radcliffe map. On India's approach, as I've mentioned, all other contemporaneous evidence is to be ignored or set aside. If the Radcliffe Award, including its map, cannot provide the Tribunal with the precise location of the land boundary terminus, then India says the Tribunal must jump more than sixty years to the present-day circumstance of the river boundary as shown on the 2011 Indian chart representing nautical surveys and bathymetric data as at that date.

26. We say the approach is very obviously flawed. The 1947 Award, in combination with the map at Annexure "B" and notification 964, merely describes the course of the land boundary; and it offers no coordinates. It tells us how to find the terminus, but it does not tell us where it is. To locate it with precision, one must turn to other contemporaneous charts and material that would have been available at that time.

27. One might ask why does India ignore the contemporaneous charts in favour of those it has prepared more recently? One assumes that it is because the current surveys are more favourable to India's position. India acknowledges that the implementation of Notification 964 requires reference to hydrographic and bathymetric data, we don't see how this can be done otherwise than by reference to the data that is in British Admiralty Chart 859 of 1931.

28. It is not Bangladesh's position that the waters, or perhaps even the main navigational channel, have remained somehow frozen in time, but that upon the establishment of the boundary in the Radcliffe Award the location of the land boundary terminus has remained fixed. As the International Court of Justice put it in the Benin/Niger case of 2005, the task is to create a "photograph of the territory' at the critical date".[26] It's a very helpful image to keep in one's mind. This can only be done by recourse to the charts in existence at the time of the Radcliffe Award. Subsequent changes to the geography, or in this case, hydrography, are not to be – and should not be – taken into account.

29. Bangladesh's approach respects the binding, permanent and immutable nature of the boundary established in the Radcliffe Award. The purpose of the Radcliffe Award was to create a fixed, permanent border between the newly independent States of Pakistan and India. As the International Court of Justice observed in its 1962 judgment in the Case concerning the Temple of Preah Vihear, "one of the primary objects" of a boundary settlement "is to achieve stability and finality."[27] The recent judgment on the Request for the Interpretation of that 1962 judgment confirmed the singular importance of that point.[28]

30. As Bangladesh noted in its written pleadings, what is true of boundary settlements generally is all the more pertinent in respect of the division of India and Pakistan. The consequences of Partition are too well known: nearly 14 million people (nearly the entire

[26] *Benin/Niger,* ¶ 26.
[27] *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, I.C.J. Reports 1962 (hereinafter "*Temple Case*") at p. 34.
[28] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand)* (Cambodia *v.* Thailand), I.C.J. Reports 2013, at para. 22.

population of The Netherlands) abandoned their homes to move across the border,[29] and an estimated one million people suffered violent death in the process.[30] What the Award sought to do against the background of that situation was to create a definitive solution that would avoid further conflict and bloodshed over the location of the boundaries. Uncertainty, and a shifting boundary, would not have assisted in that task. What the Award did was to give effect to the well-established principle of uti possidetis juris, which, as this Tribunal appreciates very well, respects and perpetuates pre-colonial boundaries as the international border, following the critical date when the new State is formed.[31]

31. The International Court made clear in the case of Burkina Faso/Mali, that uti possidetis juris is a "firmly established principle of international law where decolonisation is concerned."[32] Like the Radcliffe Award, the Court went on, its "obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers…".[33] And the court went on, the effect is to "freeze the territorial title" at the critical date,[34] taking a "'photograph' of the

[29] A. Read & D. Fischer, *The Proudest Day: India's Long Road to Independence* (1998) at p. 497. RB, Vol. III, Annex BR3.

[30] *See Ibid.*, at pp. 497-499. RB, Vol. III, Annex BR3; *See also* A. Von Tunzelmann, *Indian Summer: The Secret History of the End of an Empire* (2007) at pp. 273-275. RB, Vol. III, Annex BR4.

[31] *See* R. Jennings and A. Watts (eds.), *Oppenheim's International Law,* Vol. I (9th ed. 1996) at p. 669. RB, Vol. III, Annex BR2; *Frontier Dispute (Burkina Faso/Mali),* Judgment, I.CJ. Reports 1986 (hereinafter "*Burkina Faso/Mali*"), at para. 23 ("The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.").

[32] *Ibid.* at para. 20 ("…firmly established principle of international law where decolonisation is concerned … It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs."); *Ibid.* at para. 23.

[33] *Ibid.* at para. 20.

[34] *Case Concerning the Frontier Dispute (Benin/Niger)*, Judgment, I.C.J. Reports 2005, p. 109 (hereinafter "*Benin/Niger*") at para. 26; *See also Burkina Faso/Mali* at para. 30.

territorial situation then existing."[35] In the present case, the critical date is 15 August 1947.[36] That is the date on which the photograph was taken.

32. India wishes to ignore the contemporaneous chart and data material, and ignore the principle of uti possidetis juris and its application to this case. What it says instead is that "when there is disagreement regarding the location of the land boundary terminus … then it is the situation prevailing at the moment of decision of this Tribunal that is decisive."[37] In support of that remarkable position, it purports to rely on decisions of the International Court of Justice, and the Award of the Indo-Pakistan Boundary Disputes Tribunal—which I'm going to come back to--which it refers to as the Bagge Award. Yet these authorities directly contradict India's approach to the principle of uti possidetis juris, and they confirm the determinative role of contemporaneous data and the position adopted by Bangladesh.

33. India refers to two letters exchanged between the Governments of India and Pakistan in 1951 to support its contention that the land boundary terminus was not fixed in 1947 even though it doesn't argue for a generally fluid boundary. In the first of these letters, on the 7th of February 1951, A.A. Shah, purportedly writing for the Secretary of the Government of Pakistan proposed that the river boundary in question should be considered "fluctuating". The Official added that "It is hoped that the Government of India will agree and issue necessary instructions to the authorities."[38] An entity referring to itself as "Foreign, New Delhi" – which is presumably the Indian Ministry of Foreign Affairs –

[35] *Ibid.*
[36] The Radcliffe Award was completed on 13 August 1947. Pakistan achieved Independence on 14 August 1947 and India achieved Independence on 15 August 1947. *See* MB at para. 3.6.
[37] IR ¶ 2.7.
[38] IR, Annex RJ-1.

responded on the 13 March 1951 in the affirmative. That letter stated that "We agree that the boundary between Khulna and 24-Parganas running along the midstream of the rivers should be a fluid one and are issuing necessary instructions to the authorities concerned. Kindly issue instruction to East Bengal also."[39] However, India has not been able to produce any evidence to show that any actions were actually taken by India or by Pakistan, or by Bangladesh in reliance on that momentary and fleeting proposition, which flies in the face of the practice of the International Court of Justice and the Indo-Pakistan Tribunal. Such practice plainly confirms the need to rely on contemporaneous evidence to determine river boundaries on the critical date when the boundary was set.

34. So let's begin with the practice of the International Court of Justice in determining the location of analogous river boundaries. The Court has consistently determined the location of international river boundaries by using evidence that is contemporaneous to the critical date on which that boundary was established – and specifically contemporaneous charts – unless the course of the river was identical in the present-day, in which case modern evidence might be used to determine the location of the river boundary as of the date of independence.

35. In the Frontier Dispute between Benin and Niger, the ICJ Chamber established the boundary along the course of the Mekrou and Niger Rivers by determining the colonial boundary as at the date of independence. In reviewing the evidence before it, the Chamber sought to determine the physical situation pertaining to the course of the river at the time of independence.[40] Applying the uti possidetis juris principle to the evidence

[39] IR, Annex RJ-2.
[40] *Benin/Niger* at para. 26.

before it, the Chamber determined the precise location of the boundary line in the "channel of the River Niger as it existed at the dates of independence."[41]

36. India had misconstrued the Chamber's approach by contending that the Chamber looked to "present day physical realities" to determine the boundary. It did not. In addition to determining the river boundary, the Parties had also requested the Chamber to determine the sovereignty over certain islands within the river. The Court took account of evidence of the present-day situation where islands were said to have appeared only after the date of independence, the critical date, in circumstances in which it had to determine sovereignty over islands.[42] That is not the case here.

37. What is significant in that case is that the Chamber relied on contemporaneous evidence to determine the location of the river's main channel in 1960. The Chamber explained: "Given that the Chamber has to determine the course of the boundary at the time of independence, the NEDECO report of 1970 provides the most useful information on the situation at the critical date."[43] The Chamber determined that the evidence leading up to and surrounding the time of independence was "the most pertinent."[44] Later evidence showed the circumstances of the river boundary following independence was considered to be irrelevant unless it served as proof of the parties' agreement: "the examination of documents posterior to independence cannot lead to any modification of the 'photograph of the territory' at the critical date unless, of course, such documents clearly express the

[41] *Ibid.* at paras. 103-104

[42] The Chamber explained that present-day evidence was relevant only when determining the sovereignty over islands, given that some islands appeared after independence. The Chamber noted that no islands had appeared or disappeared between 1960 (independence) and the NEDECO report (1970), so the NEDECO report determined those issues. But one island had appeared since the NEDECO report. The Chamber decided on the sovereignty of that island based on more recent evidence. (¶ 116)

[43] *Ibid*. at ¶ 109.

[44] *Ibid.*, ¶ 107.

Parties' agreement to such a change."[45] In the present case, there is no evidence of any clear agreement between Pakistan and India as to the existence of a fluid boundary and we note too the recent views of International Tribunal for the Law of the Sea, the Bangladesh/Myanmar case expressing the view that "the delimitation of maritime areas is a sensitive issue" and "agreement is not easily to be presumed".[46]

38. In the case of Kasikili/Sedudu, the Court adopted the same approach with regard to the Chobe river. It ruled that the location of the boundary should be identified as it existed at the date of independence. Here again, apparently eager to find support for the use of its 2011 charts, India has fallen into unfortunate confusion with regard to the Court's reference to modern evidence. In that case, the Court relied on modern evidence only because both Parties agreed that the channels "had remained relatively stable through that period of time."[47] "In short" the Court went on, "the present hydrological situation of the Chobe around Kasikili/Sedudu Island may be presumed to be essentially the same as that which existed when the 1890 Treaty was concluded."[48] The same cannot be said of the estuary in this case. Throughout the written pleadings, and as you heard again this morning, Bangladesh has demonstrated the patent instability of the coastline in this area.[49] You saw it for yourselves less than two months ago, when you visited the area. [FIGURE 8] The photograph on your screen, taken during the site visit, shows the

[45] *Ibid.* ¶ 26.

[46] *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, para. 95 (concurring with ICJ in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgment, ICJ Reports 2007, p. 659 at p. 753, para. 253).

[47] *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1065 (hereinafter "*Botswana/Namibia*") at para. 31.

[48] *Ibid.*, ¶ 31.

[49] BM ¶ 2.17, 5.40; BR ¶ 2.15-2.36.

mangrove stumps -- we remember them well -- that are characteristic of erosion and retreat. In this case, modern evidence cannot serve as a snapshot of the course of the river channel as it was on August 15 1947. Recourse must be had to authoritative nautical charts contemporaneous to the Radcliffe Award, considered to be authoritative at the time. Those recent charts confirm that the situation has changed since 1947.

39. In a third case, that of the Gulf of Fonseca, the International Court determined the final section of the international boundary on the Goascorán River once again by seeking to identify the location of the river at the time of independence in 1821.[50] To reach its final determination, the Court looked to the contemporaneous evidence of the river's course at that time and it held that "[s]ince what is important is the course of the river in 1821, more significance must be attached to evidence nearer to that date."[51]

40. And so the Court relied on a contemporaneous chart from 1796 depicting the location of the river's mouth to determine the boundary as it was some 30 years later in 1821. In relying on this contemporaneous evidence, the Court sought to clear up any potential misunderstanding that may have resulted from a reference to the value of maps in the earlier Frontier Dispute case – another misunderstanding that India has fallen foul of in its pleadings.[52] The Court specifically affirmed that charts contemporaneous to the period during which the boundaries were established are the most probative evidence for determining the location and character of river boundaries. The Court found that "the 1796 map is … a visual representation of what was recorded in the contemporary

[50] "The Chamber will therefore now consider the evidence made available to it concerning the course of the river Goascorán in 1821." *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Judgment, I.C.J. Reports 1993 (hereinafter "*Gulf of Fonseca case*") at para. 313.
[51] *Ibid.*
[52] IR, ¶ 2.27.

report."[53] And the Court pointed out that the Chamber in the Frontier Dispute was concerned with maps presented 'as evidence of a frontier'", [54] whereas in the Gulf of Fonseca case – as in this case with which we are concerned – "the fact to be proved is otherwise a concrete, geographical fact."[55] The Court, therefore, relied on the 1796 expedition report and map of the area in question to determine the location of the river boundary as established in 1821.[56]

41. I can summarize easily, when the Court was given the same task as the one that is presented to this Tribunal, namely the determination of the location of a river boundary set on the date of independence, the Court relied on evidence contemporaneous to the critical date to identify that boundary.

42. Now, most significantly, the very same approach was adopted by the Indo-Pakistan Boundary Disputes Tribunal, when it determined the location of other river boundaries established by the very same Radcliffe Award. That tribunal's approach was controlled by the location of the river as it was in 1947, and as confirmed by contemporaneous evidence. Allow me to elaborate.

43. The Indo-Pakistan Tribunal was a three-member tribunal appointed in 1949 to resolve issues arising from the implementation of the Radcliffe Award. India and Pakistan each appointed one national judge and Algot Bagge, a former member of the Supreme Court of Sweden, was appointed as Presiding Chairman. The arbitration concerned four areas in dispute. Like the case before you now, the first two disputes before the Indo-Pakistan

[53] Gulf of Fonseca Case, ¶ 316.
[54] Gulf of Fonseca Case, ¶ 316.
[55] Gulf of Fonseca Case, ¶ 316.
[56] Gulf of Fonseca Case, ¶ 314.

tribunal were concerned with the location of river boundaries between East and West Bengal.

44. The first dispute concerned the location of a district boundary located on the midstream of the main channel on the River Ganges. In that case the Tribunal identified the boundary as fixed by the Radcliffe Award in August 1947. Pakistan argued that this midstream boundary should shift as the Ganges River shifted its course over time; India argued that the boundary was fixed at the time of the establishment of the Radcliffe Award. The Indo-Pakistan Tribunal agreed with India. [FIGURE 9] It ruled that "the boundary as determined by the district boundaries is to be rigid and not a flexible line,"[57] and it went on – you can read the second quotation below --

"the boundary following the course of the midstream of the main channel of the river Ganges as it was at the time of the award given by Sir Cyril Radcliffe in his Report of August 12th, 1947, is the boundary between India and Pakistan to be demarcated on the site."[58] That is bang on point.

45. To reach the decision, Chairman Bagge considered the differing opinions of his co-arbitrators: Justice Aiyar largely agreed with India's position, and Justice Shahabuddin adopted Pakistan's position. Ultimately, the Chairman of the Tribunal agreed with Justice Aiyar,[59] who explained that the "overriding purpose" of the Radcliffe Award was to create a definite and final boundary. And it is worth reproducing Justice Aiyar's words in full: [FIGURE 10.1]

[57] *Case concerning boundary disputes between India and Pakistan relating to the interpretation of the report of the Bengal Boundary Commission, 12 and 13 August 1947,* Decision, 26 January 1950 (hereinafter *Indo-Pakistan Award*) BM Annex 16, p. 29.

[58] *Indo-Pakistan Award*, p. 13 (emphasis added).

[59] *Indo-Pakistan Award*, p. 12.

"The overriding purpose or object of the division must be borne in mind in construing the award. The idea was to bring into existence two independent Sovereign States which would have nothing more to do with each other except as the result of treaty or agreement or adjustment. The interpretation of the boundary on the basis of a fluid line would definitely frustrate this idea if the river changes its course. Pakistan territory might become Indian territory and vice versa; and pockets might be created in each State of what must be regarded as foreign territory. … Surely, a person of the eminence and experience of Sir Cyril Radcliffe must have envisaged all these difficulties and made up his mind to provide for definite and inflexible boundaries."[60]

46. To proceed otherwise than by "definite and inflexible boundaries', Justice Aiyar continued, would frustrate the fundamental purpose of the Tribunal: [FIGURE 10.2]

"The very Delhi agreement under which the Tribunal is constituted contemplates elaborate demarcation operations in connection with the boundary line to be conducted by experts of both the States. What is there to demarcate, if the boundary is a fluid one liable to change or alteration at any moment? Is all the trouble to be taken only to ascertain what the boundary is on a particular date, knowing full well that it may not be a boundary the next day? Surveys of the river, cadastral or otherwise, will then be a futile endeavour; and topographical maps prepared at elaborate expense and cost by means of aerial photographs have to be thrown aside every time the river changes. It is very difficult to see the purpose behind so much trouble or the usefulness of such undertakings, if Sir Cyril intended a fluid boundary."[61]

47. That is directly on point, we say, and we adopt that reasoning. India has cited this decision as an authoritative one for the Tribunal's approach in the present dispute.[62] In

[60] *Indo-Pakistan Award*, p. 21, ¶ 23.

[61] *Indo-Pakistan Award*, p. 22, ¶ 31.

[62] IR ¶ 2.53.

its Rejoinder, India quotes a passage from Bagge Award: "the boundary following the course of the midstream of the main channel of the river Ganges as it was at the time of the award given by Sir Cyril Radcliffe in his Report of August 12th, 1947, is the boundary between India and Pakistan to be demarcated on the site." The Tribunal's Award then continues and this is the bit that India relies on: "If demarcation of this line is found to be impossible, the boundary between India and Pakistan in this area shall then be …the boundary following the course of the midstream of the main channel of the river Ganges as determined on the date of demarcation."[63]

48. India has misunderstood the Bagge Award. It interprets it as meaning that if it is not possible to determine the boundary only by reference to the map appended to the Radcliffe Award, then the Tribunal should jump forward 66 years in time and determine the boundary based on the circumstances that prevail today. That is not what the Tribunal decided back then. Nor is it the approach adopted by the International Court of Justice in the three cases which I have just described. And it is not the approach that should be taken by this Tribunal.

49. Like the International Court of Justice, the Indo-Pakistan Tribunal looked to the existing contemporaneous evidence – evidence which was not limited to the Radcliffe map – to determine the river boundary as at August 1947. The Indo-Pakistan Tribunal made clear that it was only if the determination of the line was impossible on the basis of the contemporaneous evidence, including but not limited to the Radcliffe Map, then the solution would have to be found in the present-day evidence (which at that time, of course was a mere three years after the Award had been pronounced). As Justice Aiyar

[63] *Indo-Pakistan Award*, p. 13.

put it in relation to dispute number 2, that they were determining, as you can see on the screen with [FIGURE 10.3]: "The demarcation will have to be made accordingly with reference to the conditions prevalent on the date of the [Radcliffe] report."[64] He made the very same point in relation to dispute number 1, with which they were concerned with explaining [FIGURE 10.4]: "We must presume or assume that Sir Cyril Radcliffe was in full possession of all the materials to enable him to pronounce the report. In fact, he says so. Therefore, we must take it that he had before him the several notifications and also maps relied on by either side giving the thana as district boundaries of various localities."[65] We say that the approach was right then, and it is right today and that you should make the same presumption and assumption. What that means for this case is that the Tribunal should be relying on the maps that would have been used or would have been available to, Sir Cyril Radcliffe.

50. The second Indo-Pakistan Tribunal decision on river boundaries between East and West Bengal concerned the Mathabhanga River. And here again, the Tribunal relied on contemporaneous evidence to locate the boundary that they did it not once, but twice. The dispute concerned a part of the Radcliffe Award that established that the boundary would run from "the point of the River Ganges where the channel of the river Mathabhanga takes off."[66] However, both parties agreed that the Mathabanga River was not located in the place where Radcliffe appeared to have placed the boundary on his map. India argued that the Tribunal should defer to the incorrectly drawn boundary line found on the Radcliffe map, while Pakistan contended that the boundary should be as

[64] *Indo-Pakistan Award*, p. 33, ¶ 15.

[65] *Ibid.*, p. 19, ¶ 12.

[66] *Ibid.*, p. 9.

described in the Award – the location where the Mathabanga took off from the Ganges River as of the moment when the Award set the boundary. Chairman Bagge set out the relative value of the Radcliffe Award and Map for identifying the location of the river boundary: [FIGURE 11]

"I am of the opinion that it must be held that the Award makes a difference between the description in Annexure A and the delineation on the map Annexure B. So far as it is possible to get a solution from the description in Annexure A the delineation on the map is only an illustration of that solution."[67]

51. In that case, as in this one, the Tribunal found the solution in contemporaneous evidence dating back to the time of the Award: it relied on aerial photographic maps of the intersection of the Ganges and Mathabhanga Rivers in 1939 and 1948, which showed the river taking off from a loop of the river Ganges, not far from the point indicated on the Annexure B map.[68] The Tribunal relied entirely on evidence of the location of the river boundaries from the period of the Radcliffe Award.

52. India therefore gains no support from these proceedings or from authorities it cites. To the contrary, these prior authorities "prescribe" determining the location of the river boundary as it was set by the Radcliffe Award in August 1947 based on the charts and other material existing at that time.

b. The Contemporaneous Evidence Confirms the Location of the Land Boundary Terminus

53. Having established the key role to be played by evidence in the form of charts available at the time of the Radcliffe Award, I now turn to that evidence, and what it shows as to

[67] *Indo-Pakistan Award*, p. 37.
[68] *Indo-Pakistan Award*, p. 37.

the location of Sir Cyril Radcliffe's intended boundary along the midstream of the main channel of the Hariabhanga River.

54. Bangladesh has adopted a completely consistent position: the 1931 edition of British Admiralty Chart 859 is the most authoritative chart to determine the location of the land boundary terminus.[69] We say it is the one you should use. This edition of Chart 859 was available and current at the time of the Radcliffe Award in August 1947. This chart, together with other contemporaneous evidence and material, shows the flaws in India's argument.

55. Mr President, Members of the Tribunal, as you will recall, [FIGURE 12] Notification 964 describes the boundary as running along the "midstream of the main channel of the river Ichhamati, then along the midstream of the main channel for the time being of the river Ichhamati and Kalindi, Raimangal and Hari[a]bhanga till it meets the Bay." [FIGURE 13] Based on this language, India argues that "Bangladesh has ignored what it calls the 'twinning' of each set of rivers and has simply assumed that the relevant river is the last in the series."[70] [FIGURE 13a] India's argument is that the word "and" between "Raimangal and Hariabhanga" and also between "Ichhamati and Kalindi" refers to a conjoined main channel formed by the two sets of "twin" rivers. Based on this hypothesis, it then argues that the land boundary terminus is not located at a point along the main channel of the Hariabhanga River but instead at a point along a conjoined channel where the Hariabhanga meets the channel formed by the Raimangal and Jamuna

[69] BR, ¶ 3.31.
[70] IR ¶ 2.15.

Rivers. Let us take a closer look at what Bangladesh is accused of "assuming" and "ignoring."

56. India accuses Bangladesh of assuming that Notification 964 refers to the boundary flowing from one river into another down a series of rivers until the last river meets the Bay of Bengal. Chart 859 of 1931 shows – as would any chart – that the district boundary line adopted by Cyril Radcliffe followed a sequence of river channels, each in turn, from inland out to the sea. The relevant boundary line begins at the midstream of the main channel of the river Ichhamati. That is the large chart you can see on the map. [FIGURE 14] Under the title "Matla River to Elephant Point", you can see the Ichhamati River, in blue at the top of the screen, the main channel of the Ichhamati then meets the Kalindi River. At this point, the boundary continues down the Kalindi River until it meets the Raimangal River. And here again, the boundary continues down the main channel of the Raimangal River until it reaches the Hariabhanga River. As you can see, following the blue line southwards, the boundary line then leaves the Raimangal and runs down the Hariabhanga River until it meets the Bay of Bengal. It really is as simple as that, just as Notification 964 plainly prescribes: the boundary line flows sequentially down the Ichhamati River through the Kalindi River through the Raimangal River through the Hariabhanga down to the Bay. It is very difficult for us to understand how India can contest this obvious reality, yet it does.[71]

57. Which brings me to the claim by India that Bangladesh has somehow "ignored" the text of the Raimangal [sic] Award. [FIGURE 15] The placement of the word "and" between the "Raimangal and Hariabhanga" simply ends a series of more than three objects – there

[71] ICM, ¶ 2.15.

is nothing more to it, we say, than that. It might be said, I suppose, that the odd choice is the use of the word "and" between "Ichhamati and Kalindi". This might be nothing more than a reference to the situation when the first river branches into the second: the Ichamati branches between the Ichamati and the Kalindi, and the boundary follows the latter; the Raimangal branches between the Raimangal and the Hariabhanga, and here too the boundary follows the latter. It is difficult to see, however, that the choice of the word "and" can be anything other than a mere stylistic choice. There is no evidence before you, no principle to show that it is meant to convey a special normative meaning, and it certainly does not mean, or imply, the "twinning" of the rivers in the way urged by India. The claim is easily tested: if you drop the "and" and replace it with a comma, you can see that there is no change in the meaning of the language, or in the location of the boundary.

58. The flaw in India's "twinning" argument is also apparent by looking at the rivers themselves. If, as India contends, the "and" between "Raimangal and Hariabhanga" refers to a conjoined channel of those rivers, the "and" between "Ichhamati and Kalindi" must also refer to a conjoined channel of those two rivers. But, there is no such conjoined channel between the Ichhamati and the Kalindi Rivers, as you will be able to see on the map. Equally, there is no conjoined Raimangal and Hariabhanga channels at the point we are concerned with.

59. Even if we were willing to join India on this somewhat imaginative and unlikely journey, the unavoidable fact remains that it was impossible for the Radcliffe Award to have referenced to a conjoined main channel of the Hariabhanga and Raimangal Rivers where it meets the Bay. There was no such channel in 1947! [FIGURE 16] You can see that on Figure 16. It's tab 1.34 in your books.

60. As you can see, the 1931 Chart clearly shows two distinct channels in the Raimangal Estuary: Plainly there are two distinct channels: the channel of the Hariabhanga River (on the western side of the estuary, that is on the left in blue), and the channel formed by the Raimangal and Jamuna Rivers (that is on the eastern side of the estuary, on the right of the chart). This chart was available in 1947. It is entirely clear that within the Raimangal Estuary north of the closing line these two channels were independent of each other.

61. India's own evidence also provides the same description of the separate and distinct river channels within the estuary. We were extremely grateful to our friends on the Indian delegation when they made available once more, during the site visit, the 1958 Study prepared by Commander Kennedy for the United Nations Conference on the Law of the Sea. [FIGURE 17] He prepared a report which described the distinct channels flowing from the mouth of the Hariabhanga and Raimangal Rivers as at 1958 – just eleven years after Partition – and noting that each lay "towards the side of the estuary, leaving a shallow bank between and south of the island separating the rivers" as you saw on the 1931 chart.[72] Helpfully, Commander Kennedy's 1958 Study also included a little map, and this too shows the Raimangal River on the right and Hariabangha Rivers on the left as two distinct channels. [FIGURE 18] Mr President, members of the Tribunal, the channels were distinct on the 1931 Chart, they are distinct on Commander Kennedy's 1958 chart, there is nothing before you to show that they were not distinct as of midnight on August 15th 1947. The burden is on India to prove otherwise, and it has not met that burden.

[72] ICM, ¶ 2.16.

62. The 1931 Chart makes clear that these separate channels did not meet until they were about half a mile south of where the river boundary met the Bay of Bengal. [FIGURE 19] British Admiralty Chart 859 of 1953 and 1931, and Chart 829 of 1959 confirm the same fact. [FIGURE 20] All of the evidence before this Tribunal points to the very same conclusion.

63. In the face of this incontrovertible evidence, this situation as at 1931, 1953, 1958, 1959, India nevertheless argues that there is a single channel made up of the conjoined Hariabhanga, Raimangal and Jamuna rivers in the estuary, to the north of the intra fauces closing line. Yet India has introduced no expert evidence to support this claim. Its own contemporaneous evidence contradicts the position, a point which is of cardinal significance and undermines the case it seeks to present. India argued in its Rejoinder that "the conjoined main channels of the Hariabhanga and Raimangal coincide at the point on which they reach the Bay of Bengal." It told us that this point was "clearly made" by the 1958 study prepared by Commander Kennedy.[73] Indeed, a point is clearly made by Commander Kennedy study. But it is Bangladesh's point. Commander Kennedy's study, like all of those contemporaneous charts, confirms that the Hariabhanga River channel did not meet the channel formed by the Raimangal and Jamuna rivers until some distance south of the closing line separating the estuary from the Bay. [FIGURE 21] As Commander Kennedy notes in his study, he states that "Seaward of the entrance [to the estuary], - seaward being the crucial word – the channels unite to form a single approach over a distance of about 15 miles between the coastal banks."[74] This is also clearly

[73] IR, ¶ 2.16.

[74] 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.

illustrated on his sketch map appended to the description. Commander Kennedy directly contradicts India's contention, and makes it unquestionably clear that in 1958 still the channels did not conjoin until seaward of the point where Cyril Radcliffe's boundary met the Bay.

64. Thus, in the face of clear evidence to the contrary, India is asking that this Tribunal should ignore all of this material and determine that the boundary should jump from the channel on the Hariabhanga River to the "deepest channel hugging the eastern and not the western coast",[75] running within the Raimangal and Jamuna Rivers until that channel meets the Bay.

65. In 1947 there was no single channel formed by the Raimangal and Hariabhanga rivers in the area in question, and so no such channel could have formed the basis for any international boundary between Bangladesh and India. India is inviting this Tribunal to decide that Sir Cyril Radcliffe was making reference to a channel that did not exist when he drew his line and we say that is not something this Tribunal can do.

66. Moreover, the entirely separate and distinct channel on the eastern side of the estuary is, as you've already seen this morning, the confluence of two national rivers – the Raimangal and the Jamuna – which lie entirely within the territory of Bangladesh. These national rivers cannot form the basis for the international boundary established by the Radcliffe Award, particularly when the Jamuna River is not even mentioned in the Award, nor the Notification forming the district boundary on which the Award is based. As the Bagge Award makes clear, international law does not apply to internal rivers, nor

[75] ICM ¶2.69.

can these internal rivers form part of an international boundary. In its decision concerning the River Ganges, the Indo-Pakistan Award determined that where that river did not flow between two States "there is no scope for the application of any international law or for any theory about the main stream of a flowing river being a boundary."[76]

67. India itself recognizes, in its Counter-Memorial, that the "main channel" identified in Notification 964 must be located within the international boundary river. It explains that Notification 964 "established that where the boundary between the two districts runs along a river, the boundary is the 'midstream of the main channel' of the boundary river."[77] As I have already explained, the Notification sets out that the boundary runs along four rivers in turn – sequentially – first the Ichhamati, then the Kalindi, then the Riamangal and finally the Hariabhanga. Much as India would like it to, the Notification does not say that the boundary follows the Raimangal, then the Hariabhanga, and then Raimangal again. Beyond the point where the Hariabhanga and Raimangal diverge, 22 miles upstream from the estuary, the boundary follows the Hariabhanga, through the estuary, until that river meets the bay. The Raimangal River is an internal river and it does not form the international river boundary at this point – and its channel through the estuary is not where the terminus of the land boundary is to be found.

68. I am bound to make one final comment on the north-south axis before turning briefly to the east-west closing line that determines the location of the terminus. At the end of India's discussion of the land boundary in its Rejoinder (and perhaps recognizing the weakness of its primary arguments), it attempts to draw on extraneous social and

[76] Bagge Award, p. 20, ¶ 21.
[77] ICM ¶ 4.16.

economic considerations to advocate against locating the land boundary terminus in the place it was plainly intended to be located by the Radcliffe Award in August 1947. India argues that placing the land boundary terminus at the point intended by Radcliffe would hamper India from "participating in multiple uses of the Bay of Bengal."[78] It offers no explanation as to what these multiple uses are or how they would be affected and it offers no evidence in support of the submission. You saw for yourselves, as I did during three days spent at the location, that navigation and any other activities in that area can hardly be described as intensive! We did not see streams of vessels queuing to make their way up the Hariabhanga or Raimangal Rivers. There is no evidence in support of that claim. You saw for yourselves what the true situation is.

69. India's inability to describe these uses of the Bay result from the fact that there is simply no one there to use it. This is patently clear from the recent site visit. The area surrounding the Bay is an entirely unpopulated mangrove forest known as the Sundarbans, most of which is slowly becoming covered in water. [FIGURE 22] The few who navigate in this area have multiple points of access as you can see on the screens in front of you and they can access the Bay using the neighbouring rivers to the west of the Hariabhanga River.

B. The Intra Fauces Closing Line

70. Against that self-evident, obvious set of arguments, Mr. President, I turn now to my second submission on which I can be very brief. As I noted earlier, Bangladesh and India agree that the point where the land boundary established by the Radcliffe Award "meets

[78] IR, ¶ 2.71.

the Bay of Bengal" is the location where that boundary crosses the closing line across the entrance of the Raimangal Estuary.[79]

71. It is not in dispute that the channel of the Hariabhanga River runs into the Raimangal Estuary, which is considered internal waters under the intra fauces terrae doctrine.[80] In accordance with established practice at that time, as at 1947 the line dividing British India's internal waters from the sea was the closing line across the mouth of the Raimangal Estuary.

72. Much like the north-south axis, while the Parties agree on the governing principles, each has placed the closing line at a slightly different location and angle. This difference simply results from the use of different charts. There is nothing more complicated to it than that. Bangladesh has plotted its closing line as it must on the basis of British Admiralty Chart 859 of 1931, and India has plotted its line on the basis of its own 2011 chart.

73. At paragraph 2.2 of its Rejoinder, India wrongly concludes that "Bangladesh accepts India's co-ordinates for the horizontal axis or closing line." This is not correct. He is wrong. Bangladesh does not accept India's horizontal closing line. This is because of the inappropriate chart India has used to plot that line, which as I have made very clear, is plainly not relevant to this case.

74. As seems to be a familiar pattern in these proceedings, India's actual practice, its application, contradicts the governing principle. As it explained in its Counter-Memorial,

[79] BM, ¶ 5.10; ICM ¶ 4.23.
[80] BM, ¶ 5.10; ICM ¶ 4.23.

"A correct application of contemporaneous British law on [the closing line] requires this Tribunal to complete the enquiry into the land boundary terminus by drawing a closing line between the two headlands of the estuary, in accordance with British practice at the time of the partition."[81] This is exactly what Bangladesh has done, and it has done so using the most authoritative contemporaneous Chart available, namely British Admiralty Chart 859, which, to adopt the words of the International Court of Justice, "provides the most useful information on the situation at the critical date".[82] The Chart is quite simply "the most pertinent"[83] evidence available to this Tribunal. It is this Chart that Bangladesh has used to identify the closing line between the headlands, exactly in accordance with the practice at the time of partition, as it would have been applied on the authoritative chart from the time of partition – as shown on the figure you can see on the screen. [FIGURE 23] On the basis of the "most pertinent" evidence, Bangladesh invites the Tribunal to adopt the horizontal closing line depicted in Figure 5.4A of its Memorial. In response to a point made by India, we would like to inform the Tribunal that the coordinates – the precise coordinates – for points where the horizontal line hits the headlands in the graphic are in the west 21° 38' 19"N 89°05'4"E and on the eastern 21° 38' 19"N 89°05'4"E (and these are the coordinates based on to the original chart of 1931).

75. Mr. President, Members of the Tribunal, it is worth noting that contrary to the situation with regard the horizontal north-south axis, despite India's incorrect identification of the closing line, the outcome is not very different from Bangladesh's line. [ADD PURPLE

[81] ICM ¶ 4.21.
[82] *Benin/Niger*. at ¶ 109.
[83] *Ibid.*, ¶ 107.

LINE TO FIGURE 23] In fact, India's closing line and Bangladesh's closing line neatly intersect precisely where Bangladesh's land boundary terminus is located. As you can see on this depiction of both lines on the chart available in 1947, the "X" marks the spot.

CONCLUSION

76. Which brings me to my conclusion. [FIGURE 24] In summary, the point where the midstream of the main channel of the Hariabhanga River intersects with the closing line across the mouth of the Raimangal Estuary, identified as of the time when that boundary was established by the Radcliffe Award in August 1947, on British Admiralty Chart 859 as it was in 1931, is the land boundary terminus presented in Bangladesh's pleadings and shown in the figure before you now. The coordinates are 21° 38' 14" N – 89° 06' 39" E as converted to WGS84. You can see those on the left side of the screen.

77. Those coordinates on the right side are then taken and placed on modern charts. And on the right side of the screen, you can see the land boundary terminus, as proposed by Bangladesh, as transposed to a modern chart.

PERMANENT COURT OF ARBITRATION

Bay of Bengal Maritime Boundary

Arbitration between Bangladesh and India

Professor Payam Akhavan

Delimitation of the Territorial Sea

9 December 2013

IV. Introduction

68. Mr. President, distinguished members of the Tribunal. I am honoured to appear before you today on behalf of Bangladesh. I will be addressing the delimitation of the territorial sea. I will focus in particular on the selection of base points, both on the land coastline and the supposed low-tide elevations of the Bengal Delta, in view of their visibility and stability. In so doing I will respond to the questions posed by the Tribunal in its November 4th letter to the parties.

69. Earlier this morning, my colleague Mr. Martin described the "concavity within a concavity" and the high instability characterizing the relevant coasts of Bangladesh and India. Following my pleadings, Mr. Reichler and tomorrow, Professor Boyle, will explain why given this geographical context, an angle-bisector with an azimuth of 180 degrees

constitutes an "equitable solution" under Articles 74 and 83 of the Convention, in the EEZ and continental shelf within 200 miles. It falls on me to explain why, in the territorial sea, a delimitation based on equidistance is also not an appropriate solution.

70. The International Court of Justice recognized in *Nicaragua v Honduras* that coastal instability constitutes a "special circumstance" under Article 15 of the Convention. It recognized that where base points are unstable – in a delta exhibiting "a very active morpho-dynamism" – any delimitation based on equidistance would become "arbitrary and unreasonable in the near future".[84] The situation is analogous here. The Bengal Delta is the largest delta in the world, exhibiting very active morphological dynamism. It is *the* paradigm of extreme coastal instability, characterized by massive erosion and an abnormal rise in sea levels. The plotting of stable base points on this coast is simply not feasible.

71. These are images of India's proposed base points. These are base points I1 and I2, [**Slide**] and this is I3. [**Slide**] On the Bangladesh coast, this is B1 and B2, [**Slide**] this is B3, [**Slide**] and this is B4 [**Slide**]. It is plainly visible that all of these base points are out at sea. Five of these seven points situated on supposed low-tide elevations are not only submerged, but they are also several miles from the nearest mainland coastline. Even India's B1 and B2, which it attempts to locate on Bangladesh's Mandarbari Island, are now underwater. Not a single one of India's base points in the Bengal Delta is valid. As such, the entire length of its equidistance line is invalid.

[84] *Territorial and Maritime between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (hereinafter *"Nicaragua v. Honduras"*), para. 277.

72. Bangladesh does not doubt that India's Chart 351 depicts the physical reality as it existed at the time the area was surveyed. India cannot be blamed for the disappearance of its base points. Its December 2nd letter to the Tribunal, which is noticeably defensive, explains that it used "the latest hydrographic charts available" to it. Its territorial base sea points are based primarily on surveys carried out between 1998 and 2004. Elsewhere, it relies on British Admiralty charts published between 1996 and 2011. These data are recent by charting standards. But the reality is that during the site visit, after many hours of flying and floating and straining to see something, anything, resembling an elevation, the best that India could offer were a few breakers and a great deal of muddy water. It is clear that the chart no longer represents physical reality. This is powerful testimony to the coastal instability of the Bengal Delta. There can be no better example of why a base point selected on land today is likely to be under water in the near future.

73. In its Reply, Bangladesh used the most recent hydrographic charts available to it to show that India's base points are now out at sea. To be clear, Bangladesh firmly maintains that equidistance methodology is inappropriate because of coastal instability. It selected base points for the sole purpose of demonstrating that even if this was a stable coast, which it is not, India's base points would be wholly inappropriate. Bangladesh relied primarily on its Chart 40001 as well as British Admiralty Chart 90, both of which depict the Raimangal Estuary and adjacent Bangladesh coast based on hydrographic surveys from 2007 and 2008. As the more recent chart, it allows for more accurate plotting of base points than India's Chart 351. Bangladesh has also made every effort to select base points connected to more stable features above high tide, rather than transient low-tide elevations. Despite these efforts, the site visit demonstrated that by now, some of these points may also be

submerged. The Bengal Delta's ever-changing physical reality differs even from a five-year old coastal survey. Of course, physical reality and its cartographic representation may not be perfectly congruent. But the differences here are not minor technical discrepancies. They are conspicuous and significant, and increasing over time.

74. My presentation today will be divided in three parts. First, I will demonstrate that all of India's base points are inappropriate, and that while Bangladesh's points are less inappropriate, they too are unstable and unreliable. Although I will focus on base points relevant to the territorial sea, I will also address the instability of other base points located in the Bengal Delta. Second, I will address the evidence demonstrating that the Bengal Delta is among the most highly unstable coasts in the world. This scientific evidence is unrefuted by India. Third, I will demonstrate why coastal instability constitutes a "special circumstance" under Article 15 of the Convention, rendering equidistance methodology inappropriate, even on a provisional basis. Since coastal concavity also cuts off Bangladesh in the territorial sea, here there is a combination of two "special circumstances" rendering equidistance inappropriate. As requested by the Tribunal in its first question to the parties, I shall address the appropriate methodology in light of the *Romania v. Ukraine* and *Nicaragua v. Honduras* cases.

V. The invisibility and instability of base points

75. I will now turn to India's liquid base points. It is not clear how their selection on India's chart can be reconciled with what the members of the Tribunal saw for themselves during the visit. The jurisprudence clearly indicates that, in the selection of base points, what matters is the "physical reality" of the coast at the time of delimitation. As stated by the

Court in *Romania v. Ukraine*, "the geometrical nature of the first stage of the delimitation exercise leads it to use as base points those which the geography of the coast identifies as a *physical reality* at the time of the delimitation."[85]

76. If the "physical reality" at the time of delimitation varies from what appears in charts, international courts and tribunals opt for the "reality", and not the charts. Thus, in *Nicaragua v. Honduras*, the Court rejected the base point on the official charts of Honduras because the point "was no longer in the mouth of the River Coco." As a result of coastal change, the Court concluded that it "cannot be properly used as a base point" with specific reference to Article 5 of the Convention.[86]

77. Presumably, it is in part because of its concern with "physical reality" that this Tribunal decided to conduct the first site visit of any international tribunal hearing a maritime delimitation case. It is also why Bangladesh welcomes the reference in the Tribunal's first question to the "visibility and stability" of low-tide elevations. These two elements are closely related. The invisibility of such putative features during a site visit calls into question their very existence, especially in light of a highly unstable coast. India's Chart 351 [**Slide**] concedes this point in unmistakable terms. It contains a warning to mariners that [**Slides 9 and 10**] "the changes in depths and direction of the channels are in some places very rapid." If depths and channels are liable to very rapid change, then so too are incidental features like low-tide elevations.

[85] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009 (hereinafter "*Romania v. Ukraine*"), para. 131.
[86] *Nicaragua v. Honduras*, para. 278.

78. In this regard, it cannot be disregarded that South Talpatty on which India's I1 and I2 are plotted has a significant impact on the direction of the equidistance line in the territorial sea. I shall shortly address whether in light of the site visit, this is a low-tide elevation or not. But even if it is not submerged – and no one saw it at any point during the site visit, as India concedes – it cannot be used as a base point in the context of delimitation. Article 13 applies to measuring the breadth of the territorial sea, and not delimitation. Low-tide elevations cannot be used if they are situated in an area of overlapping claims. As the Court put it clearly in *Qatar v Bahrain*: "... there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevations which are situated in the zone of overlapping claims, or for recognizing Qatar as having such a right."[87] (para. 209) For this reason alone, India's base points I1 and I2 are simply not valid, even if they constitute low-tide elevations, which the site visit casts into serious doubt.

79. This is how India's base points I1 and I2 appear on India's Chart 351 **[Slide]**, on Bangladesh's Chart 40001 [**Slide]**, and here is the physical reality as observed during the site visit. [**Slide**] **These images appear at tab 2.1 of your folders.** As you can see, there is a great deal of water, but nothing resembling an elevation. The site was visited on numerous occasions. Each time there was nothing to be seen, beyond a few breakers, suggesting shallow waters. There was no island, no elevation.

80. In its December 2nd letter to the Tribunal, India asserts that "the timings of the site visit were unfortunately not conductive to viewing the low-tide elevations." Considering the

[87] *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain),* Merits, Judgment, I.C.J. Reports 2001 (hereinafter "*Qatar v. Bahrain*"), para. 209.

multiple viewings of that location over several hours on two separate days using four different modes of transportation, it is difficult to believe that if there was any significant physical feature, it would not have been observed by the Tribunal. India emphasizes that it was still possible to "very clearly see the breakers on New Moore Island". But breakers are not low-tide elevations. Breakers merely indicate the presence of shallow waters. For example, India's Chart 351 shows vast areas of breakers in the Bay of Bengal. India has not suggested that these are all low-tide elevations.

81. Bangladesh does not dispute that there is an area of shallow water in that location. But there is no evidence other than unreliable charts that it is a low-tide elevation. Given the coastal instability at play, the charts of India and Bangladesh, neither of the charts, offer any certainty as to the physical reality of South Talpatty. In this regard, Bangladesh notes that the grainy January 2012 satellite image presented by India in its Counter-Memorial allegedly depicting what India describes as "visible sand banks" is more likely just breakers near South Talpatty. (Figure 2.3) This image bears little resemblance to the depiction of that feature in the most recent charts of both parties. It is also noted that the satellite image of 4 February 2013 in India's Rejoinder shows nothing but water in the estuary. (Figure RJ 2.6). India has had every opportunity over four years to demonstrate the physical reality of this and other low-tide elevations, and it has clearly failed.

82. Equally remarkable is India's persistence in referring nostalgically to South Talpatty as "New Moore *Island*". It is rather imaginative to suggest that it is a more or less "stable" feature. New Moore is no more. It has not enjoyed the elevated status of an island since

at least 1990, twenty-three years ago. That happens to be the last time it was spotted above water at high tide.

83. This is the first known satellite image of South Talpatty, taken three years after the island was first spotted following a cyclone in 1970. [**Slide]** India maintains that this feature has demonstrated "a degree of stability" because it claims that the British charts contemporaneous with Partition depict the area as "breakers". [**Slide]** But the island actually emerged at a spot where 10 metres (or 5.5 fathoms) of water once flowed. [**Slide**]

84. In 1973, South Talpatty had an area of 1.3 sq km. [**Slide**] Over the next three years, it migrated towards the north and more than doubled in size to 3.1 sq km. [**Slide**] By 1980, the island had moved further north and shrunk to 1.2 sq km, such that the areas that were above water in 1973 were now submerged. [**Slide**] The island then began to erode precipitously, shrinking to 0.5 sq km in 1985 [**Slide]** before vanishing completely off the satellite imagery in 1990. [**Slide**] It has not been seen ever since.

85. Now, Mr. President, it is said that lonely sailors at sea for too long imagine sea mammals to be mermaids, and perhaps a lonely international lawyer at sea for too long may also imagine low-tide elevations, but I doubt that it would qualify as a physical reality for delimitation purposes. I will now leave South Talpatty aside.

86. India's other base points are not much better. Let us look at I3, relevant to the delimitation of the EEZ and continental shelf. Here is how this base point appears on India's Chart 351 [**Slide**], and here is what the Tribunal saw during the site visit [**Slide**]. Nothing but water. No land anywhere in sight. India's December 2nd letter now complains that "Due to bad

weather and the timing of the visit, I3 could not be depicted on the infrared camera which would have clearly shown the existence of the feature." Now, no infrared camera is required to confirm that there was, in fact, nothing there. Nonetheless, Bangladesh notes that the following infrared image of I3 was, in fact, captured by India. [**Slide**] Here is the image, showing nothing there. The equipment was in good working order. The only thing that malfunctioned was the alleged low-tide elevation that failed to elevate. **These images of India's I3 are available at tab 2.2 in your folders.**

87. In brief, Mr. President, members of the Tribunal, none of the base points India has attributed to its own coast for delimitation of the territorial sea are valid. Their stability and continued existence cannot be assumed along this most changeable of coasts when India has failed to adduce any contemporary evidence of their existence.

88. By contrast, Bangladesh has endeavored to select base points on the Indian coastline as identified on the most recent charts available to it. These base points are less unstable than those of India. But they are still inherently unstable because of massive erosion in the Bengal Delta. As depicted in the current version of British Admiralty Chart 814, Bangladesh's base point I1 is located on the low-water line of India's Baghmara Island. [**Slide**] Here is the image from the site visit. [**Slide**] Unlike India's points, it is located on the low-water line of a charted high-tide feature. Even so, it is not clear whether because of erosion, this point is still on land or out at sea.

89. It is also useful to consider Bangladesh's base point I2 although it is not relevant to delimitation of the territorial sea. It is located along the low-water line of Bhangaduni Island as depicted by the same chart. [**Slide**] Here is an image of this base point from the

site visit. [**Slide**.] It is out at sea. This should come as no surprise. As Bangladesh noted in its Reply, there are good reasons to doubt whether either of these base points is still above water. The following figure shows the effects of massive erosion on Bhangaduni Island since 1975. [**Slide**] Despite being uncovered by untouched mangrove forests, the southern coastline of the island has retreated by at least 1.8 km. This is where Bangladesh's base point I2 is situated on this figure. [**Slide**] Given the massive erosion of Bhangaduni Island, it seems that base point I2 is already underwater. **The figures depicting Bangladesh's I1 and I2 are available at tab 2.3 of your folder.**

90. I will now turn to the base points proposed by India for the Bangladesh coast. I will return to B1 and B2 shortly, but briefly, this is B3 on India's Chart, [**Slide**] and Bangladesh's Chart 40001 [**Slide**], and as it appeared from the air [**Slide**]. Again, you saw nothing but water. **All of these figures are at tab 2.4 in your folders.** In its letter of December 2nd, India persisted in describing B3 as located on a low-tide elevation. It maintains that the more recent Bangladesh chart only shows "marginal changes" in its position. This is a generous interpretation of "marginal" change, as the latest Bangladesh chart shows the point to be one mile from the nearest low-tide elevation, and three miles from the nearest land on the coastline.

91. India's base point B4 is even worse. Here it is on India's chart, [**Slide**] here it is on Bangladesh's chart, [**Slide**] and this is how it appeared from the air [**Slide**]. Yes, that is a Bangladesh navy ship, on the exact location of the imaginary low-tide elevation. There is nothing there but deep water. Not even breakers. **These figures are at tab 2.5 of your folders.**

92. Now turning to B1 and B2, there is some similarity between the base points proposed by India and Bangladesh. Both parties attempt to situate the base points on Mandarbari Island. But India's base points are out at sea, whereas Bangladesh's are not – at least not yet. Here are India's B1 and B2 on India's chart, [**Slide**] here they are on the chart used by Bangladesh [**Slide**], and as they appeared during the site visit [**Slide**]. To provide further context, here are the base points plotted on Figure R2.3 from the Bangladesh Reply, which depicts erosion on Mandarbari Island between 1975 and 2010. [**Slide**] India's base points are clearly in the water. **These figures are at tab 2.6 of your folders.**

93. This may be contrasted with Bangladesh's B1 and B2. Plotting them on India's chart shows these points to be well inland, [**Slide**] but plotting them on the more recent Bangladesh chart shows them to be right on the low-water line. [**Slide]** The difference is the result of erosion between the differing times India and Bangladesh gathered their respective data. These surveys were carried out less than a decade apart. This rapid change reflects massive erosion and coastal instability. Here is how these base points appeared during the Tribunal's site visit. [**Slide] These images are at tab 2.7 of your folders.**

94. India's base point B2, of course, coincides with the base point of the same designation used by ITLOS in constructing a provisional equidistance line in *Bangladesh v. Myanmar*. In this regard, the British Admiralty Chart 859 used by ITLOS appears to be based on the same hydrographic survey as India's Chart 351. This does not change the fact however, that Bangladesh's more recent chart shows that this point is now at sea. It also does not change the physical reality that it is now submerged as observed during the site visit. So

what is the significance of this discrepancy, and how should it be reconciled by the Tribunal?

95. B2 had relatively little weight in the *Bangladesh v Myanmar* Case. As this map from the Judgment clearly shows, [**Slide**] base point B2 came into effect only at point T3 on ITLOS's provisional equidistance line, at a distance of more than 190 miles from both the Bangladesh-Myanmar land boundary terminus and from base point B2 itself. Contrary to India's Rejoinder, ITLOS never rejected either the existence or significance of coastal instability in the Bengal Delta. Unlike the present case, it was simply not a relevant issue. The Bengal Delta was not the location of the Bangladesh-Myanmar land boundary terminus. Rather, base point B2 only came into play in the outermost reaches of the ITLOS provisional equidistance line. As illustrated by this map, [**Slide**] there is no comparison to the significance of this base point in the present case. Here, even a slight difference in the location of base points would make a significant difference in the course of a provisional equidistance line in the territorial sea and beyond.

96. The reality is that ITLOS relied on a base point that we now know was out at sea at the time of the delimitation. Fortunately, the base point was of minor significance in that case and was further diminished because ITLOS ultimately adjusted the provisional equidistance line and avoided giving base point B2 any real effect.

97. In this case the Tribunal can choose to use India's B2, to be consistent with ITLOS B2, but it would be selecting a point that is clearly out at sea. Or, the Tribunal can choose Bangladesh's B2, which is inconsistent with ITLOS B2, but at least it's not out at sea, not yet. Bangladesh submits that the best way to reconcile this discrepancy is to recognize that

any base point on this rapidly eroding coastline is inherently unstable. The best approach therefore, is to choose a methodology that, unlike equidistance, does not rely on stable base points.

VI. Scientific Evidence of Coastal Instability

98. I now turn to the scientific evidence of coastal instability; evidence that puts the invisibility and instability of the proposed base points in context. These images from the Bengal coastline will be familiar to the Tribunal. This is an image of the southern coast of Mandarbari Island, where both parties have placed base points B1 and B2. [**Slide**] The image shows a broad area of dead mangrove roots and significant erosion on the coastline. And here is an image of the southern coast of Bhangaduni Island, on the Indian side, where Bangladesh's base point I2 is situated. [**Slide**] It is taken from a higher altitude from the Indian Hercules. But it shows the same signs of significant erosion as the seaward side of Mandarbari Island. Such erosion is caused by a combination of dying mangroves, unrelenting waves, tropical cyclones, monsoon rains, and now, the catastrophe effect of rising sea levels. In simple terms, the coast in this area is literally collapsing into the sea. **These figures are available at Tab 2.8 in your folders.**

99. These forces explain why the low-tide base points on India's Chart have vanished. They also explain why even Bangladesh's base points on the land coastline are unstable and likely to be submerged in the near future.

100. Although these images of collapsing mangrove forests that I just showed only capture "a particular moment in time", as India complains in its December 2nd letter, they demonstrate natural conditions on the sea coast that have resulted in massive erosion over a relatively short time. Here again is the image showing the not so gradual disappearance of Mandarbari Island [**Slide**] and Bhangaduni Island [**Slide**]. These are by no means the only islands disintegrating into the sea. For example, during just a three-year period between 1996 and 1999, India's Sagar Island lost 10% of its surface area to erosion.[88] Another notable example is India's Lohachara Island, once home to more than 10,000 people, which has now completely disappeared.[89]

101. None of this should come as a surprise. The scientific evidence that Bangladesh has submitted to the Tribunal – and which appears at Chapters 2 of both its Memorial and Reply – confirms that the Bengal Delta coast is highly unstable because of "massive erosion" and "an abnormal rise in the sea level".

102. Remarkably, India claims that the Bengal Delta coast is "stable." India's Rejoinder cites to its own Counter-Memorial as proof for the proposition that "of the three sub-areas of the [Bengal] Delta … only the Meghna Estuary ... is affected by any kind of significant instability." [90] India's Rejoinder disparages Bangladesh's claims of erosion as "unfounded and speculative."[91] It describes the several significant scientific studies that

[88] G. Gopinath, "Critical Coastal Issues of Sagar Island, east coast of India", *Environmental Monitoring and Assessment,* Vol. 160 (2010) at pp.557-558. RB, Vol. III, Annex BR13.
[89] G. Lean, "Disappearing world: Global warming claims tropical island", The Independent, 24 December 2006 (available at <http://www.independent.co.uk/envi- ronment/climate-change/ disappearing-world-global-warming-claims-tropical-island-429764. html>). MB, Vol. III, Annex B49.
[90] Rejoinder of India (hereinafter "RI"), para. 4.42.
[91] RI, para. 4.67.

we've submitted as "pseudo-science".[92] Ironically, India's arguments resemble those of climate change skeptics and naysayers who stubbornly deny the reality of rising sea levels. Even more ironically, some of the best scientific evidence that India disparages is from its own leading scientists, including those working for Indian Government agencies.

103. These numerous studies are available to the Tribunal in the annexes to Bangladesh's written pleadings.[93] I will draw your attention only to some of the more significant recent studies that point to the accelerating rate of erosion in the Sundarbans coastline adjacent to the land boundary terminus. This may help better connect the non-existent or unstable base points that you observed during the site visit with the scientific evidence of active

[92] RI, para. 4.32.

[93] See, e.g., S. Kuehl et al., "Subaqueous Delta of the Ganges-Brahmaputra River System", *Marine Geology,* Vol. 144, No. 1 (1997) (Annex B57); Mead A. Allison, "Geologic Framework and Environmental Status of the Ganges-Brahmaputra Delta", *Journal of Coastal Research,* Vol. 14, No. 3 (1998) (Annex B60); Mead A. Allison, "Historical Changes in the Ganges-Brahmaputra Delta Front", *Journal of Coastal Research,* Vol. 14, No. 4 (1998) (Annex B61); S. Kuehl and S.L. Goodbred, "Holocene and modern sediment budgets for the Ganges-Brahmaputra River: Evidence for highstand dispersal to flood-plain, shelf, and deep-sea depocenters", *Geology,* Vol. 27, No. 6 (1999) (Annex B62); M. A. Allison & E.B. Kepple, "Modern Sediment Supply to the Lower Delta Plain of the Ganges-Brahmaputra River in Bangladesh", *Geo-Marine Letters,* Vol. 21 (2001) (Annex B63); S. Kuehl et al., "The Ganges-Brahmaputra Delta", in *River Deltas-- Concepts, Models, and Examples* (L. Giosan & J. Bhattachar eds., 2005) (Annex B71); Rodman E. Snead, "Bangladesh", in *Encyclopedia of the World's Coastal Landforms* (Eric C.F. Bird ed., 2010) (Annex B77); S. Bandyopadhyay, "Natural Environmental Hazards and their Management: A Case Study of Sagar Island, India", *Singapore Journal of Tropical Geography,* Vol. 18, No. 1 (1997) (Annex BR7); D. Ganguly et al., "Geomorphological Study of Sundarban Deltaic Estuary", *Journal of the Indian Society of Remote Sensing,* Vol. 34, No. 4 (2006) (Annex BR8); Chandra Giri, "Monitoring Mangrove Forest Dynamics of the Sundarbans in Bangladesh and India using Multi-Temporal Satellite Data from 1973 to 2000", *Estuarine, Coastal and Shelf Science,* Vol. 73, No. 1 (2007) (Annex BR9); K. Kathiresan, "Threats to Mangroves: Degradation and Destruction of Mangroves", United Nations University Institute for Water, Environment and Health, Training Course on Mangroves and Biodiversity - Module 5.1 (2008) (available at <http://ocw.unu.edu/international-network-on-water-environment-and-health/unu-inweh-course-1-mangroves/Degradation-and-destruction-of-mangroves.pdf>) (Annex BR10); A. Z. Md. Zahedul Islam, "Study of the Morphology of the South Talpatti Landmass, Mandarbaria Island and Bhangaduni Island in the Northern Bay of Bengal using Remote Sensing and GIS Techniques", Bangladesh Space Research and Remote Sensing Organization (SPARRSO), (April 2008) (Annex BR11); C. Loucks et al., "Sea level rise and tigers: predicted impacts to Bangladesh's Sundarbans mangroves", *Climate Change,* Vol. 98, No. 1 (2010) (Annex BR12); G. Gopinath, "Critical Coastal Issues of Sagar Island, east coast of India", *Environmental Monitoring and Assessment*, Vol. 160 (2010) (Annex BR13); Abdullah F. Rahman et al., "Response of the Sundarbans Coastline to Sea Level Rise and Decreased Sediment Flow: A Remote Sensing Assessment", *Remote Sensing of Environment,* Vol. 115, No. 12 (2011) (Annex BR14); 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>) (Annex BR15)

geomorphologic dynamism in the Delta. Indeed, as I will explain, the accelerating coastal erosion is massive and the abnormal rises in sea level alarming.

104. One study which provides historical context is by Professor Mead Allison of Texas A&M University published in the *Journal of Coastal Research* in 1998.[94] It compares British colonial charts with satellite imagery collected in 1984 and concludes that: "The shoreline and shallow offshore areas of the western delta front are in a net erosional state. Seaward-facing shoreline areas have retreated as much as 3-4 km since 1792."[95] This study shows that there was already significant erosion before its dramatic acceleration in recent years, primarily because of rising sea levels.

105. A more recent study published in 2011 is by Professor Rahman and colleagues at Indiana University in the United States.[96] It appears in the journal *Remote Sensing of Environment*, and uses LANDSAT satellite imagery from between 1973 and 2010 to detect changes in the Sundarbans coastline. Its results are presented in the following figure, in which areas of accretion are depicted in green, and areas of erosion in red. [**Slide**] The study concludes that just along the seacoast of the Sundarbans, in just 37 years, 170 sq km of land has disappeared.[97]

106. And now I turn to what is perhaps the most illuminating recent study on coastal erosion. It comes from a prominent source that should be well familiar for India. It was published in

[94] Mead A. Allison, "Historical Changes in the Ganges-Brahmaputra Delta Front", *Journal of Coastal Research,* Vol. 14, No. 4 (1998), at p. 1270. MB, Vol. IV, Annex B61.
[95] Ibid., p. 1274.
[96] Abdullah F. Rahman et al., "Response of the Sundarbans Coastline to Sea Level Rise and Decreased Sediment Flow: A Remote Sensing Assessment", *Remote Sensing of Environment,* Vol. 115, No. 12 (2011). RB, Vol. III, Annex BR14.
[97] Ibid., p. 3127.

2006 by Professor Ganguly of the University of Kolkata and three co-authors who work for the Indian Government's Institute of Remote Sensing.[98] **[Slide]** This study compares imagery captured by NASA satellites in 1989 with imagery captured by Indian satellite in 2004 to "study accretion and erosion in [the] coastal zone" on the Indian side of the Bengal Delta.[99] This area is directly relevant to Bangladesh base points I1 and I2, and India's base points I1, I2, and I3.[100] The study contains the following figure, where areas of accretion are illustrated in green, and erosion in red. **[Slide]** The far-reaching significance of this physical reality is best captured by the conclusion of the authors. This is what they say. **[Slide]** "… a huge amount of land area of coastal Sundarbans is prone to erosion. Especially the southern portions of many islands (namely Sagar, Mankhana, Jambu, Lothian, Dalhousie, Bhangaduani, etc.) are highly prone to massive erosion."[101] I repeat, "massive erosion", according to India's own scientists, and in the exact area where base points are situated, including Bhangaduni Island where Bangladesh's I2 is placed based on the most recent charts, but is now out at sea. Although the study only considers the Indian side of the Delta, its findings are equally relevant to the southern portion of Mandarbari Island where both parties' base points B1 and B2 are situated.

107. What is even more inconvenient to India's coastal instability denial is the position of yet another highly authoritative source; namely, India's own Geological Survey, a

[98] D. Ganguly et al., "Geomorphological Study of Sundarban Deltaic Estuary", *Journal of the Indian Society of Remote Sensing,* Vol. 34, No. 4 (2006) RB, Vol. III, Annex BR8.
[99] Ibid., p. 432.
[100] Ibid.
[101] Ibid.

Government agency that, according to its website, provides "objective, impartial and up-to-date geological expertise."[102]

108. Now, the Indian Geological Survey is evidently alarmed at what it calls "an abnormal rise in the sea level" and "massive erosion" in the Bengal Delta. Here's what its website says: "Nearly half of the 102 Sundarban islands in India spreading over 9.5 sq km area are uninhabited due to *an abnormal rise in the sea level and massive erosion.*"[103] **[Slide]** It notes further the disturbing fact that: "About a fifth of the southern part of the delta complex, the heart of the Tiger Reserve, is already submerged."[104] **[Slide]** Yet India asks the Tribunal to select base points and plot an equidistance line exactly in this area that its own scientists say is subject to "massive erosion" and "an abnormal rise in the sea level."

109. India's response to this authoritative body of scientific evidence is striking. Its December 2nd letter persists in arguing that Bangladesh has "grossly exaggerated the instability of the coasts in question". This is pure assertion. It is completely unsupported by evidence. And India's own scientists would disagree with that assertion as well.

110. This brings us back to the far-reaching implications of sea-level rise. The Indian Geological Survey describes a looming disaster that will make past erosion pale in comparison. The distinguished scientists of India's own Geological Survey predict that "at

[102] Website of the Geological Survey of India, <http://www.portal.gsi.gov.in/portal/ page?_pageid=127,529213 &_dad=portal&_schema=PORTAL&linkId=1000>

[103] 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.

[104] Ibid.

the current rate of erosion, a loss of 15% of farmlands and [more than] 250 sq km, 250 sq km, of the National Park in the next two decades is expected."[105]

111. How will this hyper-active geomorphologic dynamism re-shape the coastline of the Bengal Delta? This map, produced by scientists for a World Wildlife Fund study, provides an image of what the future may look like. [**Slide**] It shows the catastrophic effect of rising sea levels and the disappearance of the mangrove forests in the relatively near future.

112. The Bengal Delta is without doubt one of the most highly unstable coastlines in the world. If the recent past is any guide, much of what the Tribunal saw of the Sundarbans – which in Bengali means the "beautiful forest", a UNESCO World Heritage Site – much of this forest will disappear within our lifetimes. Even Bangladesh's base points B1, B2, I1, I2 – assuming they are not already submerged – have a very short life expectancy.

113. Mr. President, members of the Tribunal, simply put, if the Bengal Delta is not a case of extreme coastal instability, then nothing is.

VII. The Applicable Law

114. I will now turn to the applicable law for the last part of my presentation. I refer in particular to the Tribunal's letter of November 4th, inviting the parties to make further arguments on the selection of base points, in light of "the recent jurisprudence of international courts and

105

tribunals, in particular the judgments of the International Court of Justice in *Romania v Ukraine* and *Nicaragua v Honduras*.

115. The question for the Tribunal is whether the clear, convincing, and unrebutted evidence of extreme coastal instability that I've just described constitutes a "special circumstance" within the meaning of Article 15 of the Convention. If so, the consequent question is whether this "special circumstance" requires delimitation "at variance" with the equidistance method.

116. Of course, the problem of concavity and the resulting cut-off effect on the Bangladesh coast is also a "special circumstance" in this delimitation. This is depicted in figure 4.16 of our Reply. My colleagues Mr. Reichler and Professor Boyle will speak to the need for equitable delimitation based on a single angle-bisector throughout the territorial sea, EEZ, and the continental shelf within 200M. For present purposes, I will focus on why solely because of coastal instability, delimitation based on equidistance methodology, even on a provisional basis, is clearly not the appropriate solution.

117. India seems to be fixated on the statement in *Romania v. Ukraine* that says as follows "[s]o far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case."[106] They conclude from this statement that unless it is technically impossible to draw an equidistance line, the Tribunal must necessarily adopt that methodology for delimitation. But that is not what the case-law says.

[106] *Romania v. Ukraine,* para. 116.

118. In *Nicaragua v Honduras*, the Court first clarified that "the equidistance method does not automatically have priority over other methods of delimitation" and noted that in particular circumstances, "there may be factors which make the application of the equidistant method inappropriate."[107] Second, it held that "[n]othing in the wording of Article 15 suggests that geomorphological problems are *per se* precluded from being 'special circumstances' within the meaning of [Article 15] of the Convention," nor that they "may only be used as a corrective element to a line already drawn."[108] Third, the Court found that because the delta of the River Coco exhibited "a very active morpho-dynamism" it "might render any equidistance line so constructed today *arbitrary and unreasonable* in the near future."[109] "Arbitrary and unreasonable", why, because of the instability of base points. The Judgment repeatedly refers to the "difficulty in identifying reliable base points"[110] (para. 279), and the "unstable nature" of relevant coasts that would make "base points … uncertain within a short period of time". (para. 280) Those are the words of the court.

119. This is why the Judgment held that it was "impossible for the Court to identify base points and construct a provisional equidistance line". [111] (para 280) It confirms that geomorphologic conditions are a "special circumstance" under Article 15 because they render the identification of stable base points unfeasible.[112] That is the clear import of *Nicaragua v Honduras*, as affirmed in *Romania v Ukraine*, and just last year in *Nicaragua v Colombia*. In this regard, there can be little doubt, little doubt, in light of the clear, convincing, and unrebutted evidence of extreme coastal instability in the Bengal Delta that

[107] *Nicaragua v. Honduras,* para. 272.
[108] Ibid., para. 280.
[109] Ibid., para. 277.
[110] Ibid., para. 279.
[111] Ibid., para. 280.
[112] Ibid.

qualifies as a "special circumstance". There can be little doubt that base points on that coastline are "unstable" and that they would become "uncertain within a short period of time" (if they are not already uncertain). This is why any equidistance line would become "arbitrary and unreasonable in the near future" in the present case.

120. Indeed, the Bengal Delta is *the* paradigm of coastal instability. It is certainly no less stable than the Coco River delta. As set forth in Bangladesh's Reply, the erosion rate on Bangladesh's Mandarbari Island in the 30-year period between 1975 and 2005 is almost exactly the same as the accretion rate on the Coco River mouth in the 40-year period between 1962 and 2002. It is 42 metres in contrast with 40 metres per year.

121. Now, India offers a different interpretation of what *Nicaragua v Honduras* stands for. It argues that it is a unique geographical precedent that does not apply to the Bengal Delta because in the Coco River delta, the equidistance line was "controlled by a pair of base points at the river mouth, at the tip of the 'needle'", referring to a protrusion of sedimentation at the estuary.[113] India submits that it was not feasible to draw an equidistance line in that case solely because "the only possible controlling base points were highly unstable".[114]

122. India's view that absent a "needle-like projection", *Nicaragua v Honduras* is inapplicable is a rather exacting view of judicial precedent. It would require finding an identical needle in a haystack of jurisprudence before any precedent could ever apply. But even if India's standard is applied to the territorial sea, it is evident that just one or two base points on each

[113] RI, para. 4.15.
[114] RI, para. 4.16.

coast control the entire equidistance line, and that all these points are unstable. In fact, India's base points are submerged and thus invalid. The only potentially valid base points – Bangladesh's I1, B1 and B2; just one on India's coast already submerged and two on Bangladesh's coast – are situated on a coastline that will almost certainly be submerged in the near future.

123. India's misplaced "needle-point" theory is also apparent in its letter of December 2nd. India maintains that "the general stability or instability of a coastline is not, in and of itself, relevant to the identification of base points. What matters is whether appropriate base points can be identified at points along the baseline." It emphasizes that "it is perfectly possible to select base points notwithstanding any instability of the coast." This assertion completely misunderstands *Nicaragua v Honduras*, where one of the parties did propose and plot an equidistance line. The Court however, rejected this proposal because unstable base points will result in an "arbitrary or unreasonable" line in the near future. That is what is meant by "impossible" or "unfeasible".

124. Of course, the *dictum* in *Nicaragua v Honduras* is not limited to "needle-points". Should there be any doubt about the general application of that case to the highly unstable Bengal Delta, the Judgment specifically held that "all deltas", all deltas – the words of the Court – "are by definition geographical accidents of an unstable nature and suffer changes in size and form in relatively short periods of time."[115] **[Slide]** Surely, the principle on coastal instability that applies to the Coco River delta, applies equally to the Bengal Delta.

[115] *Nicaragua v. Honduras,* para. 32.

125. The Tribunal of course has a margin of appreciation in deciding whether a fact precedent applies by analogy or not. No two sets of facts are identical. But what if, hypothetically, there was a norm of international law that specifically recognized the Bengal Delta as a "highly unstable" coastline? Better yet, what if hypothetically there was a tailor-made treaty provision that deemed it to be the paradigmatic case of coastal instability? How could that guide the Tribunal in deciding whether coastal instability in the present case qualifies as a "special circumstance"? Well, this hypothetical proposition isn't really hypothetical. We need look no further than Article 7(2) of the Convention itself. It provides in relevant part as follows:

> "Where because of the presence of a delta and other natural conditions *the coastline is highly unstable*, the appropriate points may be selected along the furthest seaward extent of the low-water line… [on straight baselines]..."

126. Article 7(2) is consistent with *Nicaragua v Honduras*. It expressly recognizes that "the presence of a delta" renders the coastline "highly unstable" and thus requires a simplified methodology. This translates into straight baselines for measuring the breadth of the territorial sea. But by the same logic, it could translate into an angle-bisector for delimitation. What is particularly significant, though, about Article 7(2) is that it was tailor-made for the Bengal Delta coast. In other words, this delta was considered by the drafters of the Convention as the paradigmatic case of a highly unstable coast requiring a method at variance with ordinary baselines.

127. In 1974, at the Caracas session of the Third United Nations Conference on the Law of the Sea, the representative of Bangladesh explained that:

> ... as a result of the continuous process of alluvium siltation and sedimentation, the submarine areas off the coast are being built up. Mud-banks and low-tide elevations appear and disappear over relatively short periods of time. The coastline is, therefore, constantly fluctuating.[116]

The Bangladesh delegate speaking in 1974 could have scarcely imagined how this coastal instability would accelerate in the years that followed. But it was understood even then, even then, that the Bengal Delta was an exceptional, if not unique, coastline that required a specific provision in the Convention.

128. The Virginia Commentary also confirms that "in light of the interest taken in this provision by Bangladesh, the provisions in [Article 7(2)] were drafted with the specific case of the Ganges/Brahmaputra River delta in mind."[117] The provision was unanimously adopted by the Conference. In other words, State parties specifically agreed that the Bengal Delta is a "highly unstable" coastline and consequently that straight baselines are the appropriate method of delineation. This leads logically to the conclusion that for delimitation purposes, an angle-bisector based on straight-line coastal facades is equally the appropriate methodology.

129. In conclusion, Mr. President, members of the Tribunal, given the extreme coastal instability of the Bengal Delta, equidistance is clearly not the appropriate solution for delimitation of the territorial sea. India's proposed base points are all submerged. None of them is appropriate. Bangladesh's base points are less inappropriate. But in view of extreme coastal instability – characterized by Indian Government scientists as "massive erosion" and "an abnormal rise in the sea level" – even the base points proposed by

[116] *Bangladesh Position on the Question of Baselines, Second Committee Informal Proposals* (Caracas Session, 1974), *reprinted in* 4. R. PLATZÖDER, THIRD UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: DOCUMENTS 180-181 (1983).

[117] M. Nordquist et al., eds., *United Nations Convention on the Law of the Sea 1982: A Commentary,* Vol. II (1993) (hereinafter "Virginia Commentary, Vol. II (1993)"), at p. 101.

Bangladesh will soon be submerged, if they are not already submerged, rendering any equidistance line arbitrary and unreasonable. Such active geomorphologic dynamism is clearly a "special circumstance" under Article 15 of the Convention. It necessitates a simplified methodology such as the angle-bisector, which my colleagues will discuss.

130. Mr. President, members of the Tribunal. That concludes my pleadings for today. I thank you for your patience and indulgence. If the Tribunal has no questions, this might be an appropriate time to take the break, after which I would request that you call my colleague, Mr. Reichler, to the podium.

PRESIDENT WOLFRUM: Mr. Reichler, before you start, may I please make an announcement. We have been distributing a question raised by the Tribunal which should not be answered orally but in writing when it suits you, and I read it out for the record: "Because the latitude/longitude grid on British Admiralty Chart 859 has significantly moved between the 1931 and the 1953 editions (shown in the Bangladesh written pleadings)--it's been referred to--the Tribunal's Expert would appreciate knowing how the WGS84 coordinates of the land boundary terminus claimed by Bangladesh were computed."

Thank you, as I said, it should be done in writing.

Now, the turn is for you, Mr. Paul Reichler, but after you finish here, please don't rush away. We are meant to have a photo taken, since the group is a little bit on the large side, we can't do it here behind us. It's normally been done, and we will walk down to the big staircase where we will be properly positioned and then the photo is going to be taken. It will take an additional 10 minutes, but if you bear with me, it's necessary for the record, for you, and you can show it to your grandchildren later.

Thank you.

Paul Reichler, please.

PERMANENT COURT OF ARBITRATION

Bay of Bengal Maritime Boundary

Arbitration between Bangladesh and India

Paul S. Reichler

Delimitation of the EEZ and Continental Shelf

9 December 2013

131. Mr. President, Members of the Tribunal, good afternoon. It is a great honor for me to address such a preeminent group of international jurists, and it is a privilege for me to be doing so on behalf of Bangladesh. Mr. President and Members of the Tribunal, we appreciate the question that has been addressed to Bangladesh, and we will provide the answer tomorrow morning.

132. I will speak with you this afternoon about the delimitation of the exclusive economic zone and the continental shelf out to 200 M. The Parties have presented their proposals in their written pleadings. India proposes an equidistance line without adjustment. India says that equidistance methodology is mandatory here, and that there are no relevant circumstances that require any adjustment of the line whatsoever. For Bangladesh, India's equidistance line, apart from being improperly drawn, is manifestly inequitable. Bangladesh proposes, instead, a line of delimitation that follows an azimuth of 180 degrees, extending seaward

from the land boundary terminus. Bangladesh arrives at this line by the angle bisector method, which it considers more appropriate to the geographical circumstances of this case than equidistance. But methodology is less important to Bangladesh than achievement of an equitable result. That is what Articles 74 and 83 of the 1982 Convention require. They do not mandate reliance on any particular delimitation methodology to achieve that result.

133. Mr. President, my presentation today will be divided into two parts. In the first part, I will show why India's proposal fails to meet the requirements of the Convention. It fails because, in the particular circumstances of this case, it does not constitute an equitable solution. It is manifestly inequitable to Bangladesh. Nor is India's methodology supportable. Equidistance is not mandatory, and it is not appropriate here because it does not lead to an equitable outcome.

134. In the second part of my presentation, I will discuss how an equitable solution within 200 M might be achieved. One way international courts and tribunals have done this in the past, in analogous geographical circumstances, is by rejecting equidistance methodology in favor of an angle bisector. Another way is by starting with a provisionally drawn equidistance line, and adjusting it sufficiently until it produces an equitable delimitation – usually by discounting or eliminating unusual or anomalous geographical features that would otherwise distort the line.

135. This was the approach followed by ITLOS in the *Bangladesh/Myanmar* case. It worked well there, in the sense of creating an equitable result. But whenever a tribunal decides to adjust the provisional equidistance line, questions are raised. How should the line be adjusted, and by how much? This, of course, is not an exact science. As ITLOS itself said,

"there are no magic formulas".[118] How does a tribunal determine what specific changes are required to make equitable a provisional equidistance line that is not? Is equity, like beauty, in the eye of the beholder? Or are there more objective methods of achieving it? The second part of my presentation will be devoted to these questions, and to casting light on some concepts that, I hope, will prove helpful to the Tribunal in its effort to find an equitable solution.

136. Mr. President, your time is precious, so I will get right to the point. *This* is the point. *This* is the central element of the case. *This* is the reason why we are here. It is at Tab 2.9 of your Folders. The red line is Bangladesh's maritime boundary with Myanmar, as established by ITLOS in March 2012. The black line is the equidistance line proposed by India. The product of the two lines is a cutoff. The cutoff is severe, and manifestly inequitable to Bangladesh.

137. Mr. President, a prominent United States Supreme Court Justice once said about obscenity that he had difficulty defining it, but he knew it when he saw it. The same could be said of manifest inequity, or at least *this* manifest inequity. In the context of maritime delimitation, this result is truly x-rated. The inequity to Bangladesh is just as obscene when it is depicted from a macrogeographic perspective. This is also at Tab 2.10 of the Folders.

138. For Bangladesh, *this* cannot be an acceptable solution. It is inconsistent with Articles 74 and 83 of UNCLOS. And it is also inconsistent with the case law, commencing with the *North Sea* cases, holding that equidistance is ill-suited to producing an equitable

[118] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar),* Case No. 16, ITLOS Judgment 2012 (hereinafter "*Bangladesh/Myanmar*), para. 327.

delimitation where one coastal State, sandwiched between two others, has a coast that is entirely concave, and where, in the words of the ICJ: "the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity," so as "to take the form approximately of a triangle with its apex to seaward…'cutting off' the coastal State from the further areas of the continental shelf outside of and beyond this triangle."[119]

139. The ICJ might just as well have been referring to Bangladesh, because that is precisely its situation. As shown here, and at Tab 2.11 of the Folders, the Bay of Bengal's north coast is markedly concave. Exacerbating the effects of this primary concavity is the concavity within that concavity described by the coast of Bangladesh itself. The combined effect of these concavities is to pull the equidistance line sharply inward, in the direction of the concavities, forming the paradigmatic "triangle with its apex to seaward" described by the ICJ, or the rapidly "tapering wedge", as my colleague Mr. Martin called it, either of which spells cutoff. As you can see here, and at Tab 2.12, the distance between Bangladesh's land boundary termini, by the shortest route, from point to point, is 188 M. At just 75 M from shore, the distance is reduced by 40%, to 117 M. At 150 M from shore, the distance is only 45 M, less than 25% of the original length. And at 200 M, the wedge is narrowed to just 26 M, or one-sixth of its original length.

140. Mr. President, it is not just Bangladesh that finds these circumstances inequitable. This was what ITLOS found in the *Bangladesh/Myanmar* case. "The Tribunal observes that the coast of Bangladesh, seen as a whole, is manifestly concave…. The Tribunal notes that in

[119] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 (hereinafter "*North Sea Continental Shelf*"), at p. 17, para. 8.

the delimitation of the exclusive economic zone and the continental shelf, concavity *per se* is not necessarily a relevant circumstance. However, when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result. The Tribunal further notes that, on account of the concavity of the coast in question, the provisional equidistance line it constructed in the present case *does* produce a cut-off effect on the maritime projection of Bangladesh and that the line if *not* adjusted would *not* result in achieving an equitable solution, as required by Articles 74 and 83 of the Convention."[120]

141. India disagrees. India looks at these circumstances and replies: *What* cutoff? To India, there *is* no cutoff. Why not? Because ITLOS has already eliminated its prejudicial effects, and Bangladesh has no need for further relief. This is at paragraph 7.18 of India's Rejoinder: "In *Bangladesh/Myanmar,* the ITLOS adopted a line avoiding the excessive resulting cutoff for Bangladesh; this *precludes* Bangladesh from raising the same alleged disadvantage again, now that it is no longer cut-off." "Now that it is no longer cut-off." So, for India, *this* is inequitable, but *this* is not.[121] The Indian *Rejoinder* says Bangladesh is no longer "*dramatically* cut-off".[122] In other words: cutting off a neighbor's arm at the elbow is not as dramatic as cutting it off at the shoulder. That may be true, but it doesn't mean the mutilated neighbor hasn't got something to complain about. Of course, the cutoff produced by the two equidistance lines was even more severe than the one Bangladesh now faces. By adjusting the provisional equidistance line between Bangladesh and Myanmar,

[120] *Bangladesh/Myanmar,* paras. 291-293.
[121] See Tab 2.13 in your arbitrator's folder.
[122] India's Rejoinder, para. 5.15.

ITLOS gave Bangladesh a measure of relief from the combined effect of both lines. But it did not resolve the entire problem for Bangladesh. It did not constitute the entire solution to Bangladesh's cutoff. Nor do we believe it was so intended by ITLOS. We do not believe that ITLOS purported to decide both the Bangladesh/Myanmar case and the Bangladesh/India case at the same time, in the same Judgment, simply by adjusting the equidistance line between Bangladesh and Myanmar.

142. Mr. President, you and two of your esteemed colleagues on the Tribunal were privy to ITLOS' internal deliberations. We were not. We can only surmise what the Tribunal intended. We do know, however, that ITLOS was fully aware of the arbitration between Bangladesh and India at the time it issued its Judgment, and it knew that India, like Myanmar, was insisting on a boundary with Bangladesh based strictly on equidistance, without any adjustment. India's claim line was shown and discussed in both the written and oral pleadings before ITLOS. Three of the judges had already been appointed as arbitrators in this case, and had received Bangladesh's *Memorial*. All 23 judges knew that, following the delimitation in that case, there would be another one here. Bangladesh believes that, in those circumstances, if ITLOS had intended to decide both cases at once, with the delimitation produced in that case serving as the solution for this one as well, it would have said so in the Judgment.

143. Much more likely, in our view, is that ITLOS understood from the charts it had studied, that abatement of the inequity caused by the cutoff would have to come from both sides, not only from the Myanmar side; that the "burden" (if you will) of abating the cutoff and relieving the inequity to Bangladesh would ultimately be *shared* by Myanmar and India,

and not borne by Myanmar alone; or, put differently, the Judgment decided only what Myanmar's share would be, leaving it to this Tribunal to determine India's.

144. Again, India disagrees. India argues that ITLOS' adjustment of the Bangladesh/Myanmar equidistance line in Bangladesh's favor is enough to eliminate the inequity caused by the cutoff, and avoid the need to adjust the Bangladesh/India equidistance line. This is what Mr. Martin referred to as India's "thank you Myanmar" defense. Myanmar has already paid the entire bill. There is no balance due. Therefore, no additional contribution is required from India. A simple look at the map refutes this argument. Bangladesh is still severely cut off. The ITLOS Judgment has improved Bangladesh's situation, but only partially. An equitable solution requires further abatement.

145. India can only deny the obvious for so long. So, in the end, it resorts to the argument that even if Bangladesh is, in fact, substantially cut off, so too is India. This is what we refer to as India's "me too" defense. India goes so far as to argue that even its own proposal would cut it off *more* than Bangladesh. According to the Indian *Rejoinder,* even with an unadjusted equidistance line: "The cut-off on India's east-facing coast is similar but more radical than on Bangladesh's west-facing coast."[123] Mr. President, it's difficult for me to find the right words to characterize this argument, or at least words that I might use here. So let's look at some pictures instead. First, from this perspective: here, side by side, and at Tab 2.14, are the solutions proposed by India and Bangladesh, respectively: an unadjusted equidistance line and a 180 degree angle bisector. The cutoff of Bangladesh's entire coast, especially its predominant south-facing coast, is apparent in both circumstances. Where is India cut off?

[123] India's Rejoinder, para. 5.23.

146. Let's take a closer look. This is India's Figure RJ 6.3, from its *Rejoinder*. India says at paragraph 6.20 that this figure demonstrates how India would be "severely" cut off by Bangladesh's proposed solution. India does not complain of a cutoff of its south-facing coast along and adjacent to the Bengal Delta. It says the figure shows that its *east-facing* coast would be cut off short of its full 200 M projection. But what does this figure really show? As you can see here, and at Tab 2.15 of today's Folders, an unadjusted equidistance line, which India considers an equitable solution, also cuts off its coastal projection short of 200 M, at 136 M. In fact, at this point, Bangladesh's proposal would reduce India's eastward reach by only 19 M, compared to India's equidistance line, and would extend Bangladesh's reach by a modest 12 M, while cutting off the projections of both coasts at less than 200 M. India's southeast-facing reach would be 185 M, only 15 M short of its 200 M entitlement. Quite obviously, Bangladesh's proposal would have only a minor impact on India, in comparison with India's own proposal; but the difference would be significant to Bangladesh, in terms of widening its tapering wedge and allowing it to have a longer presence along its 200 M limit to the south; instead of 26 M across, the width at 200 M would be 73 M.

147. As can readily be seen, both proposals produce cutoff effects on both States. There is nothing remarkable about this. To the contrary, it is inevitable, whenever two States are adjacent to one another, or they have opposite coasts separated by less than 400 M, as here. As ITLOS recognized, not every cutoff is a relevant circumstance. Not every cutoff is inequitable. Rather, equity is achieved if the cutoff is shared in a mutually balanced way.[124]

[124] *Territorial and Maritime Dispute (Nicaragua v. Colombia),* ICJ Judgment 2012, (hereinafter "*Nicaragua v. Colombia"*), para. 215; *Maritime Delimitation in the Black Sea (Romania v. Ukraine),* Judgment, I.C.J. Reports 2009, p. 86 (hereinafter "*Romania v. Ukraine"*), para. 201; *Bangladesh/Myanmar,* paras. 325-326.

India's proposed equidistance line does not do this. Again, all it takes is a simple look at the map, to show that it does not. It is only Bangladesh that is left with a narrow, tapering wedge of maritime space forming a triangle with its apex to the south. India tries to obscure this by diversionary tactics. India asks the Tribunal to look east and west, where the cut-off is, indeed, mutual and balanced under both Parties' proposals, but not north and south, where it is not. India says: "The cut-off on India's east-facing coast is similar, if not worse than on Bangladesh's west-facing coast…. In the present case, the cut-off produced by the equidistance line is shared in a mutually balanced way."[125] Indeed, it is, as shown here and at Tab 2.16. But what if, instead of looking east and west, we look north and south? What about the cut-off on Bangladesh's *south*-facing coast; and the fact that there is *no* corresponding cut-off on *India's* south-facing coast? About this, India's *Rejoinder* is notably silent. It *avoids* showing you the cutoff of Bangladesh's projection to the south. This figure is at Tab 2.16 of your Folders.

148. Plainly, India's proposal does not share the cut-off in the south in a mutually balanced way. It very magnanimously gives the entire cut-off to Bangladesh. In fact, even Bangladesh's proposed solution does not apportion the cutoff in a mutually balanced way. As shown here, and at Tab 2.17, even Bangladesh's own proposal, 180 degree angle bisector, leaves Bangladesh to suffer the brunt of the cutoff. Bangladesh does not ask India to share the cutoff on an equal basis. It would impose only a modest adjustment on India, approximate to the adjustment ITLOS made to the equidistance line between Bangladesh and Myanmar. Bangladesh has felt constrained not to ask for a boundary line more favorable than the 180 degree angle bisector, even though equity arguably would entitle it to more, because, since

[125] India's Rejoinder, para. 8.6.

1974 Bangladesh law has established this line as its boundary with India. This is reflected in its Territorial Waters and Maritime Zones Act.[126]

149. Of course, the reason the cutoff prejudices Bangladesh under either of these scenarios is the concave nature of the Bay of Bengal's coast, combined with the concavity within that concavity formed by the coast of Bangladesh. India tries to minimize its significance by arguing that it, too, has a concave coast; and it, too, has a concavity within a concavity.[127] Mr. Martin has already exposed the Mickey Mouse nature of this argument. But it is worth emphasizing, again, that it is not every concavity that is a relevant circumstance. Concavity *per se*, is not *necessarily* a relevant circumstance, as ITLOS itself has stated.[128] It is relevant only when it causes the provisional equidistance line to inequitably cut off a State's maritime entitlement, as it does in the case of Bangladesh, but not India.[129] This is because only Bangladesh, and not India, has two land boundary termini situated within the concavity. There may be concave stretches along India's lengthy coastline. But they are not relevant because, as we have seen, they produce no cutoff. Unlike Bangladesh, India's entire coast is not concave; in fact, as Mr. Martin showed this morning, taken as a whole, India's coast, depicted here and at Tab 2.18, is one of the most emphatically convex in the world.

150. What India's case boils down to is this. Equidistance today. Equidistance tomorrow. Equidistance forever. It is as if a new god has been added to the legal Pantheon: the god of equidistance. At paragraph 5.13 of its *Rejoinder*, India accuses Bangladesh of seeking "to

[126] Bangladesh Territorial Waters and Maritime Zones Act, 1974 (Act No. XXVI of 1974) (14 February 1974), MB, Vol. III, Annex B5.
[127] India's Rejoinder, para. 5.24.
[128] *Bangladesh/Myanmar,* para. 292.
[129] *Bangladesh/Myanmar,* paras. 292-297.

evade the *mandatory* application of the equidistance line in this case," as if Bangladesh were guilty of some kind of religious apostasy. Bangladesh is branded a heretic for even mentioning relevant circumstances. India insists: "relevant circumstances must not be confused with 'compelling reasons' which, in very exceptional cases can lead an international court to depart from the equidistance/relevant circumstances method for an alternate form of delimitation."[130] And to leave no doubt: "There are no special or relevant circumstances…that require adjustment of the equidistance line."[131]

151. Mr. President, Myanmar, like India, worshipped at the altar of the same false deity. You will recall that it, too, insisted on a strict equidistance line, without any adjustment for relevant circumstances. It, too, argued that the concavity of Bangladesh's coast and the resulting cut off of its maritime entitlements were irrelevant, and insufficient to prevent the mandatory application of an unadjusted equidistance line. India falls into the same error.

152. There have been three cases, prior to this one, where one of the parties had a concave coast and equidistance sharply cut it off from its maritime entitlements. In *none* of these cases was equidistance deemed to be divinely ordained.

153. In the *North Sea* cases, Germany used this figure of the Bay of Bengal, located at Tab 2.19, to support its own argument that equidistance does not produce an equitable result for a State with a concave coast. The ICJ, agreeing with Germany, said: "it has been seen in the case of concave [] coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable"--"the more unreasonable"--are the results produced. So great an

[130] India's Rejoinder, para. 5.27.
[131] India's Rejoinder, para. 8.6.

exaggeration of the consequences of a natural geographic feature must be remedied or compensated for as far as possible, being of itself creative of inequity."[132] On that basis, the Court concluded that equidistance should not be used in fixing Germany's maritime boundaries with Denmark and the Netherlands. Because the geographical situations of Germany and Bangladesh are so similar, the Court's reasoning applies with equal force here.

154. India is at great pains to distinguish the *North Sea* cases. But its effort to do so is painful. According to India, "an actual reading of the 1969 Judgment demonstrates that it does not help Bangladesh's case"[133] Why not? You might want to listen particularly closely to this one, Mr. President. According to India, "The situation is quite different in the present case where two separate disputes have been brought before two different Tribunals, and when the legal arguments in the two cases are quite different."[134] That single sentence is quite a mouthful, and it is difficult to digest. What India appears to be feeding us is that you can't compare the *North Sea* cases with this one because the ICJ considered both of Germany's boundaries together, and this case only deals with one of Bangladesh's boundaries, the other having been addressed already by ITLOS. But how does this render the *North Sea* cases unhelpful to Bangladesh?

155. The ICJ itself rejected the thesis that India advances here, that dealing with two boundaries in the same case is somehow materially different from dealing with them in separate cases. To quote the Court: "Although the proceedings have been joined, the cases themselves remain separate, at least in the sense that they relate to different areas of the North Sea

[132] *North Sea Continental Shelf,* p. 49, para. 89.
[133] India's Rejoinder, para. 5.51.
[134] India's Rejoinder, para. 5.52.

continental shelf, and that there is no *a priori* reason why the Court must reach identical conclusions in regard to them.… [I]t must be noted that although two separate delimitations are in question, they involve – indeed they actually give rise to – *a single situation*. The fact that the question of either of these delimitations might have arisen and called for settlement separately in point of time, does not alter the character of the problem with which the Court is actually faced…"[135]

156. Here, too, there are two separate delimitations – between Bangladesh and Myanmar, and between Bangladesh and India – that give rise to a *single* situation. The geographical circumstances are very similar, and the ICJ's findings on the distorting effects of coastal concavity on an equidistance line, the inequity of the resulting cutoff, and the requirement that this be "remedied or compensated for as far as possible" are perfectly applicable here.

157. What truly differentiates the *North Sea* cases from our case is that the ICJ was not called upon to determine how the inequity to Germany should be "remedied or compensated for"; the Court was not asked to draw a boundary. It was asked by the parties only to determine whether equidistance produced an equitable solution. Here, as in *Bangladesh/Myanmar*, the Tribunal must go further. It must furnish the equitable solution that UNCLOS requires.

158. That was the task undertaken by the arbitral tribunal in the *Guinea/Guinea Bissau* case, about which India, in its *Rejoinder*, has conspicuously little to say. That was the second case, after the *North Sea* cases, involving a State with a concave coast, squeezed in between two neighboring States. The cutoff of Guinea produced by an equidistance line is shown here, and at Tab 2.20. The tribunal determined that, in such circumstances,

[135] *North Sea Continental Shelf,* p. 3, p.19, para. 11.

equidistance necessarily produces an inequitable result, and rejected it in favor of an angle bisector. In the portion of the Award quoted by ITLOS in its March 2012 Judgment, the Tribunal explained: "When in fact…there are three adjacent States along a concave coastline, 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."[136]

159. So that makes it two-for-two: two cases involving concave coastlines; two cases in which equidistance was rejected altogether as the delimitation methodology because of its cutoff effect on the middle State's maritime entitlements. The third and last case, before this one, involving similar geographical circumstances was *Bangladesh/Myanmar*. ITLOS did not reject equidistance methodology. But it rejected Myanmar's argument – the same one India makes here – that strict equidistance must dictate the solution, and that the delimitation line should be an unadjusted equidistance line. ITLOS rejected Myanmar's approach precisely on the same grounds as the ICJ in the *North Sea* cases, and the arbitral tribunal in the *Guinea/Guinea Bissau* case, refused to use equidistance to delimit the boundary: because a delimitation based on strict equidistance would have been inequitable: "The Tribunal finds that the concavity of the coast of Bangladesh is a relevant circumstance in the present case, because the provisional equidistance line as drawn produces a cut-off effect on that coast requiring the adjustment of that line."[137]

160. So that makes it three-for-three. Three cases involving concave coasts. Three cases in which the solution India proposes here was rejected. In my country, we say three strikes

[136] *Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau,* Decision of 14 February 1985, ILR, Vol. 77, p. 635, at p. 682, para. 104.
[137] *Bangladesh/Myanmar,* para. 297.

and you're out. But Bangladesh and India play cricket, not baseball. So India gets to come to bat here, one more time, but with a very sticky wicket. India swings and misses when it argues: "Ignoring the development of the jurisprudence, Bangladesh omits the *Cameroon v. Nigeria* case and the *Barbados/Trinidad and Tobago* case."[138] In fact, it is India that ignores Bangladesh's written pleadings, which fully addressed *Cameroon/Nigeria* at paragraphs 4.62 through 4.68 of the *Reply.* In regard to *Barbados/Trinidad and Tobago*, Bangladesh can hardly be faulted for not responding previously to an argument that India made for the first time in its *Rejoinder.*

161. More to the point, these cases do nothing to support India's argument that equidistance is a mandatory methodology, or that it should be applied without adjustment in this case. It says a lot that these are the only cases India can come up with. They were invoked by Myanmar to the same ends, and ITLOS, as you know, did not accept an unadjusted equidistance line. India's legal arguments, in fact, bear a striking resemblance to Myanmar's. That is hardly surprising, Mr. President, when you consider that India's counsel also bear a striking resemblance to Myanmar's.

162. India and Myanmar both cited *Cameroon v. Nigeria*, because the ICJ adopted an unadjusted equidistance line for the abbreviated portion of the maritime boundary that it delimited. India, like Myanmar, points to the fact that Cameroon had argued against equidistance because of a concavity along its coast. According to the Indian *Rejoinder*: the ICJ "did not take into account the cut-off effect that equidistance would produce to the disadvantage of Cameroon at all."[139] But, as shown here and at Tab 2.22, the case does not

[138] India's Rejoinder, para. 5.43.
[139] India's Rejoinder, para. 5.20.

support India's argument. Due to the presence of Equatorial Guinea's Bioko Island less than 20 M in front of Cameroon's coast, the ICJ considered itself constrained to delimit the Cameroon/Nigeria boundary only in the small area of maritime space unaffected by Bioko. It therefore used only one base point for each party. Cameroon's was placed at East Point on the Bakassi Peninsula, where the coast was *not* concave. For that reason, the Court found that the equidistance line in the area to be delimited was not affected by a concavity. Within this confined area "the sectors of coastline relevant to the present delimitation exhibit no particular concavity."[140] Put simply, the concavity of Cameroon's coast never came into play. It did *not* produce *any* effects, let alone a cutoff of Cameroon's maritime entitlements, in the abbreviated area that the Court decided to delimit.

163. India mistakenly suggests that the Judgment rejected concavity *per se* as a relevant circumstance. But that is *not* what the ICJ did, as it was careful to explain: "The Court does not deny that the concavity of the coastline may be a circumstance relevant to delimitation, as it was held to be by the Court in the *North Sea* [] cases, and as was also so held by the Arbitral Tribunal in the case…between *Guinea and Guinea-Bissau*…. Nevertheless the Court stresses that this can only be the case when such concavity lies within the area to be delimited."[141] In *Cameroon v. Nigeria,* the concavity was plainly *not* within the area to be delimited. In *Bangladesh/Myanmar,* it *was*, as it undeniably *is* here.

164. *Barbados/Trinidad and Tobago* does not support India's argument either. Trinidad and Tobago did not claim to be prejudiced by a coastal concavity. The arbitral award does not address the subject. It is odd, therefore, that India states in its *Rejoinder* that "Trinidad and

[140] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Merits, Judgment, I.C.J. Reports 2002 (hereinafter "*Cameroon v. Nigeria*"), para. 297.
[141] *Cameroon v. Nigeria,* para. 297.

Tobago's claim was virtually the same as that of Bangladesh in the present case."[142] How can this be so, when the central issue in this case is Bangladesh's coastal concavity and the distorting effect it has on the equidistance line, and no such issue appears in *Barbados/Trinidad and Tobago*? Why does India strain so hard to fit the present case into the *Barbados/Trinidad and Tobago* mold?

165. This may have more to do with delimitation beyond 200 M than within, a subject that Professor Crawford will address tomorrow. To be sure, Bangladesh's argument that equidistance inequitably cuts it off from its maritime entitlements beyond 200 M is, superficially similar to Trinidad and Tobago's complaint that the equidistance line in that case prevented it from reaching beyond 200 M. But there are fundamental differences between the two arguments. In Bangladesh's case, it is a naturally-occurring, geographical feature – the deep concavity of its coast -- that causes the equidistance line to produce a dramatic cutoff of its maritime entitlements both within and beyond 200 M. As shown here and at Tab 2.23, within 200 M, the arbitral tribunal adjusted the equidistance line in Trinidad and Tobago's favor, between points 10 and 11, to produce what it considered an equitable solution.[143] The cutoff at 200 M resulted from the overly generous concessions to Venezuela that Trinidad and Tobago had previously made in a bilateral agreement with that State. What Trinidad and Tobago sought in the arbitration was, in effect, relief beyond 200 M from the consequences of its unfavorable agreement with Venezuela, at Barbados' expense.

[142] India's Rejoinder, para. 5.46.

[143] *Delimitation of Maritime Boundary between Barbados and Trinidad & Tobago,* Award, 11 April 2006, *reprinted in* 27 RIAA 147 (hereinafter "*Barbados/Trinidad and Tobago*") at para. 373.

166. This, in the arbitral tribunal's view, did not justify an adjustment to the delimitation line: "The Tribunal is not concerned with the political considerations that might have led the Parties to conclude the 1990 Trinidad-Venezuela Agreement, and certainly Barbados cannot be required to 'compensate' Trinidad and Tobago for the agreements it made by shifting Barbados' maritime boundary in favour of Trinidad and Tobago."[144] The case is completely distinguishable from ours on this basis. Bangladesh is not asking India to compensate it for an unfavorable agreement it negotiated with Myanmar, by which Bangladesh ended up cutting off itself.

167. What Bangladesh seeks is relief from the cutoff resulting from its concave coast on the *Indian* side that is comparable to the relief it obtained from ITLOS on the *Myanmar* side, because the 2012 ITLOS Judgment, without more, still leaves it inequitably shelf-locked by India's strict equidistance proposal.

168. Mr. President, Bangladesh submits that, if, as we have seen, strict application of equidistance methodology is *not* justified by the case law, it is even *less* appropriate in the particular geographical circumstances present here. This case presents a perfect storm of factors militating against an equidistance line. First, we have Bangladesh's concave coast. Second, as Professor Akhavan showed, the coasts of both Parties in the vicinity of the land boundary terminus are deltaic, and among the most unstable anywhere in the world. Three of the four base points India gives itself, and four of the five it gives to Bangladesh are located in this unstable area; worse, all of those Indian points and two of those attributed to Bangladesh are placed on what India itself considers low tide elevations, all of which are especially unstable. Only India's base point I-4 and Bangladesh's B-5 are arguably located

[144] *Barbados/Trinidad and Tobago,* para. 346.

on dry land, in morphologically more stable areas far removed from the delta. But I-4 has no effect on the equidistance line before it reaches 200 M, and B-5 only exerts an effect after 173 M. Thus, India's unadjusted equidistance line is completely unsupportable. It simply doesn't float.

169. In fact, it sinks right to the bottom. These are the photographic images of India's base points I-1, 2 and 3, which control the equidistance line out to 200 M, as displayed earlier by Professor Akhavan. These, again, are India's proposed base points B-1 through B-4. They are reproduced at Tab 2.24 in your folders. One might refer to all of them as "Australian" base points, because they come from "down under": deep down, under the water. With all due respect to the eminent Dr. Gray, it would seem that the Tribunal brought along the wrong expert on the site visit. To find India's proposed base points you needed Jacques Cousteau. Even if these points could be found on low tide elevations as India contends, they would still be invalid, because the case law makes clear that, for delimitation purposes, base points may not be placed on such incidental features.[145]

170. In spite of all this, India stubbornly insists on an equidistance line – *its* equidistance line – without any adjustment whatsoever. There is no "give" in India's position. Despite the case law, despite the unstable, deltaic coast and underwater base points, India is inflexible. In one way, India derives an advantage from taking such an extremely dogmatic position. By refusing to even consider anything other than strict, unadjusted equidistance, India avoids the need to address, or propose, how the Tribunal might determine whether, and to what degree, an alternative to equidistance might be employed, or even the manner and extent to

[145] *Continental Shelf (Libya/Malta),* Judgment, I.C.J. Reports 1985, p.13, para. 64; *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, (hereinafter "*Qatar v. Bahrain*"), para. 219; *Romania v. Ukraine,* para. 149.

which a properly drawn equidistance line might be adjusted to achieve an equitable solution. India chooses not to cast light on any alternative to an unadjusted equidistance line. Instead, India clings hard to a strict equidistance line in the same way a drunken man hangs onto a lamppost: to prop himself up, not to illuminate the surroundings.

171. If the Tribunal is seeking some illumination from the Parties on whether an alternative to equidistance might be employed, how, or to what extent, the equidistance line might be adjusted or shifted to produce an equitable result, India offers no help. Bangladesh does not take the same "all or nothing" approach. In the remainder of my presentation, therefore, I will review what other international courts and tribunals have decided in regard to how best to abate the cutoff of a coastal State's maritime entitlements; and I will then offer some illustrations, based on these precedents, of how that might best be accomplished in the present case.

172. There are, in fact, quite a number of maritime delimitation cases in which the ICJ and arbitral tribunals have had to ameliorate the effects of cutoff in order to achieve an equitable solution; and there are useful principles to be derived from these cases. The cutoff cases fall into two categories: cutoffs produced by small islands that block the seaward projections of other States; and cutoffs produced by coastal concavities.

173. As we go through the solutions reached in these cases, Mr. President, I believe a common theme will emerge. In particular, you will see that the solution in the great majority of these cases involves the elimination of the anomalous geographical feature from the construction of the final delimitation line, in order to avoid or substantially abate the cutoff that the feature would have otherwise produced. I will go through these cases rapidly, to save

time. But the figures that I project on the screen, which are all provided in your Folders today, can be studied at your convenience. Let us begin with the earliest case of cutoff produced by blocking islands, the *Anglo-French Continental Shelf* case. What you see on the screen, and at Tab 2.25, is an equidistance line, as proposed by the United Kingdom, taking into account all features, including the Channel Islands – which lie directly in front of the French coast and more than 60 M from Britain – and the Scilly Isles, off Britain's southwest coast. The Channel Islands cause the equidistance line to severely cut off the French coast opposite Britain, and the Scilly Isles push the line across the seaward projection of France's northwestern coast. To relieve these cutoffs, the Court of Arbitration enclaved the Channel Islands – and thereby eliminated them as a factor in construction of the median line where the British and French coasts were opposite one another – and it gave only half effect to the Scilly Isles, so that the delimitation line in that sector abated the cutoff of the French coast.

174. In *Qatar/Bahrain,* the ICJ addressed the cutoff effect of Bahrain's Qit at Jaradah. As shown here and at Tab 2.26, because this small insular feature caused the equidistance line to veer close to Qatar's coast and cut off its seaward projection, the Court decided to give it no weight, that is, to eliminate it, in the construction of the line, so that "no disproportionate effect would be given to an insignificant maritime feature."[146] The same treatment – elimination from the construction of the equidistance line – was given to Sable Island in the *Newfoundland/Nova Scotia* arbitration. Because, as shown here and at Tab 2.27, Sable Island would have caused the equidistance line to veer across and block Newfoundland's maritime entitlements, it was eliminated from consideration. The arbitral

[146] *Qatar v. Bahrain*, para. 219

tribunal made clear that this was required because of "the cut-off effect that the provisional line has on the southwest coast of Newfoundland."[147]

175. And, again, the same principle was applied in the *Dubai/Sharjah* arbitration. If Abu Musa, an island claimed by Sharjah, had been taken into account, Dubai would have been completely cut off from its maritime entitlements a short distance from its coast. The solution, shown here and at Tab 2.28, was to eliminate Abu Musa from the picture, leaving it only a 12 M territorial sea, and giving it no weight in the construction of the equidistance line that the arbitral tribunal adopted as the boundary, in order to: "preserve the equities of the geographical situation."[148]

176. The ICJ was again confronted with a blocking island that cut off another State from its maritime entitlements in *Romania/Ukraine.* There, the Court determined that no base points could be placed on Ukraine's Serpents Island, thereby eliminating it as a factor in constructing the delimitation line beyond 12 M. As the Court observed, the delimitation proposed by Ukraine using Serpents' Island as a base point "significantly curtail[s] the entitlement of [Romania] to the continental shelf and the exclusive economic zone. … By contrast, the…line drawn by the Court, still quoting, "avoids such a drawback as it allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way."[149] This figure is located at Tab 2.29.

177. The next case to consider how to treat a cutoff created by a blocking island was *Bangladesh/Myanmar.* In that case, as the members of this Tribunal are well aware, ITLOS

[147] *Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia, Second Phase*, Award of 26 March 2002, ILR, Vol. 128, paras. 5.14-5.15.
[148] *Dubai/Sharjah Border Arbitration*, Award, 19 October 1981, *reprinted* in 91 ILR 543, p. 677, para. 265.
[149] *Romania v. Ukraine,* para. 201.

determined that Bangladesh's St. Martin's Island, situated directly in front of Myanmar's coast, produced a cutoff effect. For that reason, it gave the feature no base points in the construction of the equidistance line, eliminating it as a factor in the delimitation beyond the 12 M zone in which it was enclaved. As the Tribunal stated: "because of its location, giving effect to St. Martin's Island in the delimitation of the exclusive economic zone and the continental shelf would *result in a line blocking the seaward projection* from Myanmar's coast in a manner that would cause an unwarranted distortion of the delimitation line."[150] This figure is at Tab 2.30.

178. Finally, and most recently, the ICJ addressed a cutoff caused by a series of small, blocking islands in *Nicaragua v. Colombia.* These Colombian islands, when taken into account in constructing an equidistance line, collectively cut off the seaward projection of Nicaragua's long Caribbean coast within 70 M. As the Court stated: "The effect of the provisional median line is to cut Nicaragua off from some three quarters of the area into which its coast projects. Moreover, that cut-off effect is produced by a few small islands which are many nautical miles apart. … The Court therefore concludes that the cut-off effect is a relevant consideration which requires adjustment or shifting of the provisional median line in order to produce an equitable result."[151] To abate the cutoff, the Court enclaved the Alburquerque Cays, the East-Southeast Cays, Quitasueno and Serrana. And, in regard to the larger islands of San Andres and Providencia, it applied an equiratio formula giving three times as much weight to Nicaragua's base points as to Colombia's, effectively enclaving them on the side facing Nicaragua, and then created a corridor limiting the breadth of their reach to the east. This allowed Nicaragua to realize its

[150] *Bangladesh/Myanmar,* para. 318.
[151] *Nicaragua v. Colombia,* para. 215.

maritime entitlements out to 200 M. The cutoff was thereby abated as far as possible. This figure is at Tab 2.31.

179. Mr. President, the common element – the common theme – in all seven of these cases is this: where an anomalous geographical feature exerts an excessive influence on a delimitation line in such manner as to produce an inequitable cutoff of a State's maritime entitlements, the feature is *eliminated* from consideration in the construction of the final delimitation line, even where that line is based on equidistance. The elimination of the anomalous feature avoids, or at least substantially abates, the resulting inequity. In these cases, the blocking islands were eliminated, either by enclavement, semi-enclavement, or simply giving them no effect, or very little effect, in the construction of the final delimitation line.

180. We can see the same theme in the cutoff cases involving coastal concavities, although the jurisprudence is not as plentiful. In two of the three coastal concavity cases, equidistance was rejected altogether as a delimitation methodology, precisely because the concavities caused the equidistance lines to produce inequitable cutoffs. I refer to the *North Sea* cases and the *Guinea/Guinea Bissau* arbitration. By using an angle bisector instead of an equidistance line, as shown here and at Tab 2.21, the arbitral tribunal in *Guinea/Guinea Bissau* rendered the relevant coasts in the form of a straight line, thus *eliminating* the anomalous and troublesome feature, Guinea's coastal concavity, from consideration. In this way, the award is consistent with the cutoff cases involving blocking islands: the feature causing the cutoff was treated as though it did not exist in the drawing of the final boundary line.

181. Which brings us back to *Bangladesh/Myanmar.* By enclaving St. Martin's Island within 12 M, ITLOS adopted an adjusted equidistance line to a point 49 M from the land boundary terminus. At that point, ITLOS found: "the equidistance line begins to cut off the southward projection of the coast of Bangladesh," as a result of Bangladesh's coastal concavity.[152] To abate the cutoff, from that point on, out to 200 M and beyond, ITLOS abandoned equidistance in favor of a straight line following an azimuth of 215 degrees. The Judgment does not provide much explanation as to how ITLOS arrived at 215 degrees, as opposed to a different azimuth. For that reason, it has attracted some criticism, both from Judges filing separate opinions and academic commentators, although, conspicuously not from the parties – Bangladesh and Myanmar – both of which regarded the delimitation as equitable. In fact, even the critics of the Judgment regard it as equitable. They would have preferred, however, more explanation of how ITLOS got where it did. It may be that some of the members of this Tribunal feel the same way, and would like to be able to justify the means they use in this case to produce an equitable solution.

182. Perhaps this will be helpful. This is a figure that Bangladesh displayed in the oral hearings before ITLOS, and which is reproduced at Tab 2.32 of today's folder. In this figure, Bangladesh portrayed the cutoff effect of the secondary concavity along its coast, that is, the concavity within a concavity. By drawing a straight line between its two land boundary termini, and treating everything behind the line as land, or internal waters, Bangladesh did not eliminate the primary concavity that characterizes the Bay of Bengal's north coast. But the concavity of Bangladesh's coast within that concavity was eliminated. Here, as Bangladesh depicted in the prior case, is an equidistance line drawn from this adjusted

[152] *Bangladesh v. Myanmar,* para. 331.

coast, from which the concavity within the concavity, the anomalous feature, has been eliminated. And here is the boundary adopted by ITLOS. As you can see, the two are virtually indistinguishable.

183. Mr. President, the point here is not to attempt to divine what ITLOS consciously or unconsciously did to arrive at its 215 degree azimuth. Rather, it is to show that, consistent with all these of these other cases involving cutoff, by eliminating at least the concavity within a concavity – that is, by eliminating the anomalous feature that causes the cutoff, just as the ICJ and other arbitral tribunals have consistently done in cases involving cutoffs – the equidistance line can be made to approximate an equitable result.

184. Here is what happens if we do the same thing in this case. Here is an equidistance line between Bangladesh and India, drawn on the same basis, that is, where the anomaly of the concavity within a concavity is eliminated. When this equidistance line is mathematically averaged into a straight line, it follows an azimuth of 178.5 degrees. As you can see, this line very closely approximates the 180 degree line derived by Bangladesh from its application of angle bisector methodology. This figure is also at Tab 2.32.

185. Here is another illustration that you, Mr. President, and the Members of the Tribunal, might find helpful. Here, and at Tab 2.33, are the provisional equidistance line and the final boundary line, both as drawn by ITLOS in the *Bangladesh/Myanmar* case. You will note that rotation of the provisional equidistance line by 8.5 degrees produces a line that is very close to the boundary that was adopted. In his separate opinion in that case, Judge Cot suggested that, although he agreed with the result, it might have been better if ITLOS had achieved it by rotating the provisional equidistance line as far as necessary to achieve

equity. In that case, equity was achieved, in the view of ITLOS and the two parties, by a rotation of 8.5 degrees.

186. Let us see what the result would be if a provisional equidistance line between Bangladesh and India were rotated by the same amount, 8.5 degrees. In this figure, the provisional equidistance line has been drawn from base points that are unstable but, at least not presently, under water. The locations and precise coordinates are provided in Bangladesh's *Reply*, and in your Folders at Tab 2.33. As you can see, both here and at Tab 2.33, when this provisional equidistance line is rotated 8.5 degrees it comes close to the 180 degree line proposed by Bangladesh. In fact, it connects with the line drawn 200 M from the land boundary terminus at almost exactly the same point as the 180 degree line. In this exercise, the concavity within the concavity of Bangladesh's coast has not been eliminated. The provisional equidistance line is still influenced by it. Instead of *eliminating* the anomalous feature, as done in the prior cases, in this exercise we have *compensated* for it to the same degree – perhaps I would say "to the same 8.5 degrees" – as it was compensated for by ITLOS in the *Bangladesh/Myanmar* case.

187. If the provisional equidistance line were rotated a bit more, it would almost match the 180 degree line. As Mr. Martin recalled this morning, ITLOS felt constrained not to go beyond 215 degrees in fixing the boundary in *Bangladesh/Myanmar*, because it found that anything beyond that would have produced an unacceptable cutoff of Myanmar. But since the 180 degree line, as shown, does not cut off India, there is room for a greater rotation of the provisional equidistance line on this side, of more than 8.5 degrees, to produce a result that is equitable to both Parties.

188. Mr. President, what these exercises show is the equitableness of Bangladesh's proposal. They show that a boundary following a 180 degree azimuth between the land boundary terminus and the 200 M line would be an equitable solution, and very similar to the solution reached by ITLOS in *Bangladesh/Myanmar*. The adjustments to the two provisional lines would be similar in both cases. Bangladesh does not ask India to "pay" more than Myanmar. It asks only that India only contribute its fair share, as Myanmar has already done, to abate the cutoff.

189. Here is one more way to conceptualize a solution. Starting with an equidistance line that is fully influenced by Bangladesh's coastal concavities, what would happen if, as the ICJ did in *Nicaragua/Colombia*, the Tribunal were to give extra weight to Bangladesh's base points in comparison with India's, to compensate for the cutoff produced by equidistance? The ICJ gave Nicaragua's base points three times as much weight as Colombia's. Let us be much more modest, and instead of using a 3:1 weighting of base points, let us use only a 1.1:1 weighting. Here, and at Tab 2.34, is the adjusted equidistance line according to that approach. This line, too, reinforces the conclusion that the 180 degree boundary line proposed by Bangladesh as a result of its angle bisector methodology constitutes an equitable solution. Professor Boyle will demonstrate tomorrow morning why an angle bisector is preferable to an adjusted equidistance line in the geographical circumstances that are present here, and under the applicable case law. But my message today is that, under either methodology, properly applied, the most equitable solution within 200 M is a line following an azimuth of 180 degrees.

190. Mr. President, as the arbitral tribunal in *Barbados/Trinidad and Tobago* observed, in applying what it called "the mandate of UNCLOS Articles 74 and 83 to achieve an

equitable result"[153]: "[T]here are no magic formulas for making such a determination and it is here that the Tribunal's discretion must be exercised within the limits set out by the applicable law."[154] ITLOS agreed. Noting that there are "various adjustments that could be made within the relevant legal constraints to produce an equitable result," it too observed, in its March 2012 Judgment, that "there are no magic formulas."[155]

191. It is just as well, Mr. President, because it is unlikely that you have been endowed by the President of ITLOS with magical powers. But the earthly powers that you and other Members of the Tribunal possess are more than sufficient to accomplish your mission. As experienced judges and arbitrators, appointed in conformity with Annex VII, the Convention empowers you with the discretion to interpret and apply its provisions, including the mandate of Articles 74 and 83 to fashion what you consider an equitable solution in the delimitation of the exclusive economic zone and the continental shelf. India's approach would deprive you of this discretion, and require you to woodenly apply a formulaic methodology that has been proven, time and again, to fail to produce an equitable solution in geographical circumstances similar to those present here. This is not what the Convention, or the case law, requires. Bangladesh asks only that you exercise the ample margin of discretion that the law gives to you, to produce an equitable solution as you see it. We say that that solution, within 200 M, is a straight line following an azimuth of 180 degrees.

192. Mr. President, Members of the Tribunal, this brings us to the conclusion of Bangladesh's presentation for today. I thank you for your kind and courteous attention.

[153] *Barbados/Trinidad and Tobago,* para. 372.
[154] *Barbados/Trinidad and Tobago,* para. 373.
[155] *Bangladesh/Myanmar,* para. 327.

PRESIDENT WOLFRUM: Thank you, Mr. Reichler, for your presentation.

As I said before we started, I don't dismiss everybody. We now go to the staircase to have the photograph taken, and thereafter you're dismissed. Thank you very much again.

(Whereupon, at 5:10 p.m., the hearing was adjourned until 10: 00 a.m. the following day.)

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