

PERMANENT COURT OF ARBITRATION

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

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

THE PEOPLE'S REPUBLIC OF BANGLADESH

PCA Case No. 2010-16

and

PCA Reference BD-IN

THE REPUBLIC OF INDIA

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Volume 3

HEARING ON THE MERITS

Thursday, December 12, 2013

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

The hearing in the above-entitled matter convened at 2:30 p.m. before:

JUDGE RÜDIGER WOLFRUM, Presiding Arbitrator

JUDGE JEAN-PIERRE COT, Arbitrator

JUDGE THOMAS A. MENSAH, Arbitrator

DR. PEMMARAJU SREENIVASA RAO, Arbitrator

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PERMANENT COURT OF ARBITRATION

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

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

ARBITRATOR’S FOLDER

REPUBLIC OF INDIA

GENERAL PRESENTATION OF THE CASE

DOCTOR NEERU CHADHA, AGENT OF INDIA

Thank you, Mr. President, and good afternoon everyone.

Mr. President, Members of the Tribunal, it is a great honour for me to appear before you today on behalf of my country, the Republic of India.

2. At the outset, allow me Mr. President to thank you and the members of the Tribunal for agreeing to be a part of this tribunal and for the steering of these proceedings. I also thank the staff and Registry of the Permanent Court of Arbitration for their ready and prompt assistance.

3. Let me also take this opportunity to thank the distinguished Agent of Bangladesh, Her Excellency Dr. Dipu Moni former Foreign Minister of Bangladesh, for her cooperation in these proceedings.

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Mr. President.

4. The Attorney General of India, in his introductory remarks on Monday, has highlighted the close bonds and friendly neighbourly relations between India and Bangladesh and our commitment to the principles of peaceful coexistence and peaceful settlement of disputes. He has also emphasised that the settlement of the present dispute can only strengthen these links. There can be no doubt about it; however, as Mr. Vahanvati also made very clear, the fact is that the negotiations between our two friendly countries on the maritime delimitation failed. And they failed because Bangladesh consistently refused to accept the legal – and I stress – “the legal” principles applicable to the delimitation of maritime areas.

5. We are confident, Mr. President, distinguished members of the Tribunal, that, as a court of law, your Tribunal will render an award strictly based on the *legal* principles it is bound to apply in accordance with Article 293, paragraph 1 of the UNCLOS, and not pronounce a kind of Solomonic judgment which, Bangladesh urges you to give, when it invokes your “margin of appreciation” and insistently invites you to use your “discretionary power”. Bangladesh talks of its flexibility – it’s very many alternatives for a so-called “equitable solution” which put into light its preference for equity over legal principles – if at all anything! India definitely has not accepted and does not accept an *ex aequo et bono* decision. The law as it stands is conceived so as to realize an equitable solution and we ask you, Members of the Tribunal, not to depart from this perspective and not to endanger the stability and certainty now obtained in the law of maritime delimitation.

Mr. President I will highlight India’s principal contentions briefly.

6. India’s first basic submission is that the applicable law is to be found in the provisions of UNCLOS, in particular those that govern maritime delimitation of different zones: that is Articles 15, 74 and 83.

1
2 7. The two main issues on which there is disagreement between the Parties are the
3 precise location of the starting point of the maritime boundary and the methodology to be
4 chosen for delimitation.

5
6 8. The starting point for the maritime delimitation is the land boundary terminus,
7 which – as both Parties agree – was defined by the Radcliffe Award. According to the
8 Award, the land boundary terminus is the point where the mid-stream of the main channel
9 of the Hariabhanga and Raimangal Rivers meets the Bay of Bengal.

10
11 9. The precise location of the land boundary terminus, is the point where the
12 north-south or vertical axis determined by the Radcliffe Award intersects the closing line
13 of the Bay of Bengal. All the relevant indicators, i.e., the text of the Radcliffe Award,
14 including its Annexure A and the map at Annexure B, the Bagge Award, principles of
15 international law with respect to boundary determination, hydrographic and bathymetric
16 data, satellite imagery and cartographic evidence..., *all* those indicators show that the land
17 boundary terminus is located at a point east of New Moore Island, [at 21°38'40.4" N,
18 89°10'13.8" E]. India has demonstrated during the Site visit that flow of the river is in the
19 south easterly direction which supports its contention as to the location of the land
20 boundary terminus and this is by no means is contradicted including by the British
21 Admiralty map of 1931.

22
23 Mr. President,
24

25 10. As regards the methodology for delimitation, the modern international law of
26 maritime delimitation is reflected in the three-stage equidistance/relevant circumstances
27 method set out systematically in the unanimous 2009 judgment of the ICJ in the *Black Sea*
28 case. In this judgment, which is the culmination of a long line of cases, the International
29 Court has brought a high degree of clarity and legal certainty to the law that reflects 40
30 years of jurisprudence since the *North Sea* cases. In the absence of any compelling reasons
31 that might make it unfeasible in the present case to identify appropriate base points and

1 | thus to draw the provisional equidistance line, there is no reason to abandon this well
2 | established method. This view is now also supported by the decision of the ITLOS in
3 | the *Bangladesh-Myanmar* case.

4 |
5 | 11. Bangladesh claims that the coastal instability and the concavity of its coast are
6 | special circumstances which make it necessary for the Tribunal to refrain from
7 | constructing a provisional equidistance line and that it should instead delimit the boundary
8 | by constructing a 180° angle-bisector on the basis of a contrived coastal construct.
9 | Bangladesh contends that the instability of the coastlines of Bangladesh and India makes
10 | the use of an equidistance line unfeasible as it is not possible to establish suitable base
11 | points. The facts do not support this contention,

12 |
13 | 12. Mr. President, it is perfectly feasible to apply the standard method in the present
14 | case. The ICJ in *Nicaragua v. Honduras* held that it is only when identifying reliable base
15 | points makes it impossible to apply the equidistance/relevant circumstances method, that a
16 | court or tribunal may look for alternative methods of delimitation.

17 |
18 | 13. Bangladesh's arguments on coastal instability are not relevant as coastal instability
19 | can only be a compelling circumstance if it renders selection of reliable base points
20 | impossible. In spite of its insistence on the instability of the coast – which will be discussed
21 | separately – Bangladesh has failed to show that appropriate base points cannot be
22 | identified or selected in the present case: it has itself selected some which have enabled it to
23 | draw a provisional equidistance line. The very base points which Prof. Akhavan urges you
24 | to reject and Prof. Boyle recommends you to use to construct a provisional equidistance
25 | line.

26 |
27 | 14. In the present case, in contrast to that in *Nicaragua v Honduras*, the geography of
28 | the Bay of Bengal provides for a large number of possible locations for base points along
29 | the relevant coastline. Appropriate base points are readily identifiable and, hence,
30 | exaggerated claims of instability should not come into play. The maps of the region right

1 from 1879 to the present date show that general configuration of the area remains the same
2 in the last 140 years. This should dispel the fears of imminent submergence of the region.
3

4 15. Many coastal States experience land erosion and accretion. To accept Bangladesh's
5 approach on the legal relevance of highly speculative futurist scenarios of ever greater
6 coastal instability would have far reaching consequences for the negotiations and stability
7 of maritime boundaries between many countries.
8

9 16. In this context, it is important to recall that the ITLOS judgment of 14 March 2012
10 rejected a number of Bangladesh's contentions identical to those it raises in the present
11 case, that is:

- 12 • the relevance of the alleged instability of the coasts of Bangladesh and the
13 impossibility of identifying relevant base points on these coasts;
- 14 • the claim for the application of the so-called "angle-bisector method"; or
- 15 • The need for a second adjustment of the line beyond 200 nautical miles.
16

17 And yet these rejections by the Hamburg Tribunal of some of its main arguments
18 did not dissuade Bangladesh to issue triumphant declarations to the effect - "It is a
19 great day for Bangladesh"... "we have achieved all our strategic objectives"—this is from
20 an official press release of Ministry of Foreign Affairs of Bangladesh. Elsewhere in
21 interviews with the press - "We got more than we wanted" and still elsewhere, "[i]t is not
22 only a victory, but a tremendous victory" - and I could add many more examples. But I
23 think it is enough to show that it is Bangladesh's legal strategy to claim much more than it
24 thinks it is entitled so that even if seemingly it gets a little less - as in the ITLOS case - it is
25 actually "more than it wanted. Therefore we do not understand the assertions that
26 Bangladesh only received a partial relief from ITLOS.
27

28 17. This said, Mr. President, Members of the Tribunal, I wish to make very clear, that,
29 contrary to Bangladesh's insistence, we firmly reject - the very idea that you would be
30 called "to complete the task that ITLOS partially fulfilled" or, to use an expression our
31 friends on the other side seem to have a special affection, that, Myanmar having "paid its

1 share”, Bangladesh can now present the bill to India in order to obtain another “payment”.
2 This case is different from the one Bangladesh had introduced against Myanmar, the two
3 tribunals are different, the issues at stake are different, the geography is different, the
4 circumstances (including the relevant – or irrelevant circumstances) are different.
5

6 18. Bangladesh claims that the concavity at the north-eastern corner of the Bay of
7 Bengal produces a severe cut-off of its coastal projection and using the equidistance line
8 would severely prejudice Bangladesh; this would represent a relevant circumstance and
9 any equidistance line delimiting the continental shelf and the exclusive economic zone
10 would require an adjustment of the line. In reality neither concavity nor cut-off effect are
11 *per se* relevant circumstances; whatever has been said at the beginning of the week, the
12 concavity is shared by both States – and that’s a fact -- and both suffer a similar cut-off; it is
13 thus not a relevant circumstance in this case.
14

15 19. The disproportionality test in relation to the equidistance line applied by India, far
16 from indicating disproportionality, actually confirms an almost equal division of the
17 relevant area.
18

19 20. India therefore sees no reason to depart from the equidistance/special or relevant
20 circumstances method. Nor does India see any such circumstances justifying adjustments
21 in the provisional equidistance line.
22
23
24

25 Mr. President and Members of the Tribunal,
26

27 21. In respect of the area beyond 200 nautical miles, Bangladesh proposes a second
28 deflection of its 180 degree equidistance line. It claims what it calls a line running parallel
29 to the maritime boundary between Bangladesh and Myanmar up to the outer limit of the
30 continental shelf claimed by Bangladesh. This line is not only disconnected from the
31 equidistance relevant/circumstances method, but also introduces a further deflection of its

1 so called “angle-bisector” line. It claims that this artificial line would allow it to enjoy
2 ‘reasonable entitlements’ in the area beyond 200 nautical miles “without creating any
3 meaningful countervailing cut-off effect on India”. These claims are without any legal
4 foundations. In terms of consequences Bangladesh’s claimed line beyond 200 nautical
5 miles produces an even more dramatic cut-off effect on India. It blocks the seaward
6 projection of both the south-facing and south-east-facing coasts of India.

7
8 22. In support of this surrealistic claim, Bangladesh once again invokes allegedly
9 dramatic cut-off effect produced by India’s proposed equidistance line where India
10 purportedly gives Bangladesh not more than a sliver of the cake in the outer continental
11 shelf as its entitlement and of which India takes away the biggest portion. Mr. President, it
12 is not India which gives Bangladesh this slice, it is a result of the application of the law to
13 the case- it is the geography as it stands. Bangladesh’s neighbours should not be
14 repeatedly expected to compensate for this as Bangladesh Counsel consistently seek you to
15 do. And neither should India be made to look apologetic or be expected to pay for its size
16 and entitlements elsewhere due to that, particularly, when those entitlements have no
17 connection whatsoever with the present delimitation. As stated earlier, India seeks a
18 decision based on law which results in an equitable solution for both the parties and not one
19 which reconstructs the geography of the region in search for a bigger slice for Bangladesh
20 than nature or law entitled it to.

21
22 23. India will address the above issues in detail in its oral arguments in which it will
23 respond to Bangladesh’s case law as argued at the beginning of the week. Mr. President,
24 India’s counsel will address the Tribunal in the following manner:

- 25
26 • Mr. R K P Shankardass will begin by tracing the historical aspects of the Case.
27
28 • Professor Alain Pellet will then present the geographical context of the case and
29 assess the outcome of the Site Visit.
30

1 • The question of the exact location of the starting point for the maritime delimitation
2 in the present case – which is the land boundary terminus – will be addressed by
3 Professor Michael Riesman.

4
5 • Before applying the three-stage methodology, a necessary preliminary step is to identify
6 the relevant coasts of the Parties and the relevant area within which the delimitation
7 is to take place. Sir Michael Wood on Friday will address the relevant coasts and
8 the relevant area, the two concepts that are crucial to any delimitation exercise.

9
10 • Thereafter Sir Michael Wood will identify India's base points and address the
11 arguments on the irrelevance of the alleged instability of the coasts in the
12 selection of base points.

13
14 • Professor Alain Pellet will discuss the special or relevant circumstances and
15 whether any such circumstance necessitates adjustment of the Equidistance Line.

16
17 • Thereafter Sir Michael Wood will address the delimitation line that India proposes
18 for the territorial sea. He will also deal with Bangladesh's proposed
19 angle-bisector.

20
21 • Professor Pellet will thereafter depict the delimitation of the EEZ and the
22 continental shelf.

23
24 • And, finally, the non-disproportionality test which constitutes the last step of the
25 three-stage method will be addressed by Prof Riesman.

26
27 I thank you, Mr. President, Members of the Tribunal, for your kind attention, and I would
28 request you, Mr. President, to invite Mr. Shankardass to the podium.

1 PRESIDENT WOLFRUM: Thank you for giving us the outline for the
2 sequence of speakers. Thank you very much, indeed.

3 I now call on Mr. Shankardass.

4 MR. SHANKARDASS: When you pronounce it once or twice, it will roll
5 off the tongue.

6 (Laughter.)

7 PRESIDENT WOLFRUM: It's complicated to me as mine is probably to
8 you, but Mr. Shankardass, there is one request I would ask. Draw the microphone a bit
9 closer to your mouth. Something has placed it at the edge, and this is not advantageous.
10 You see on the bench, me included, are somewhat elderly people.

11 You have the floor.

12 MR. SHANKARDASS: Being one of them, I quite understand what, Mr.
13 President, you're saying.

14

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12 December 2013

PERMANENT COURT OF ARBITRATION

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

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

REPUBLIC OF INDIA

HISTORICAL ASPECTS OF THE CASE

R.K.P SHANKARDASS

Mr. President, Distinguished Members of this Tribunal, it is indeed an honour and privilege to appear before you to represent my country, the Republic of India. My task today is to briefly place before you the historical aspects of this 40-year-old dispute in the hope that would allow it to come to an expedition and just conclusion.

1. The Tribunal will already be aware that upon the termination of British sovereignty on 15 August 1947 over India, as it was then comprised, the country was divided into two independent States of India and Pakistan by the Indian Independence Act of 1947 of the

1 United Kingdom Parliament; and that one result of this partition was that the great province
2 of Bengal was divided into East Bengal, which became part of Pakistan as East Pakistan,
3 and West Bengal which remained a part of India. As a result of the success of its citizens’
4 struggle for independence, in 1971, East Pakistan became the new state of Bangladesh.

5
6 2. The 1947 Act provisionally described the boundaries of the divided province which
7 were to constitute East Pakistan and West Bengal, but subject to the Award of a Bengal
8 Boundary Commission appointed by the Governor General of India in June 1947 with Sir
9 Cyril Radcliffe as the Chairman. His Award of 13 August 1947 generally known as the
10 “Radcliffe Award” which, as it is accepted by both parties to these proceedings, defines the
11 land boundary between India and Bangladesh.

12
13 3. Now, in efforts to demarcate this boundary between East Pakistan and West
14 Bengal, on the ground, and in some parts in rivers specified in the Award, certain disputes
15 arose on the interpretation of some of the terms of the Radcliffe Award. In an
16 Inter-Dominion Agreement of 14 December 1948, a Conference then held in New Delhi,
17 India and Pakistan agreed, among other decisions, to set up another tribunal known as “The
18 Indo-Pakistan Boundary Disputes Tribunal” with Justice Algot Bagge – so my friends
19 called him “Mr. Bagge” but I will, if I may, continue to call him “Justice Bagge” – of the
20 Supreme Court of Sweden as its Chairman, to decide the disputes on ‘the interpretation’ of
21 the Radcliffe Award. That Tribunal decided the disputed issues by its Award of 26

1 January 1950 (generally known as “the Bagge Award”)¹. On the issue of determining the
2 boundary where it was based on a river², the Tribunal evolved a principle to the effect that
3 the part of a boundary following the river Ganges, the midstream of the main channel, as on
4 the date of the demarcation, could be the boundary.

5
6 4. I would like, if I may, to refer in this regard to an aspect which was addressed
7 before this Tribunal on Monday, Day 1, on behalf of Bangladesh. In an effort to support
8 and sustain Bangladesh’s submission that the India-Bangladesh boundary, as defined in the
9 Radcliffe Award, is a fixed invariable boundary, and not a ‘fluid’ boundary. Counsel for
10 Bangladesh, my good friend Prof Sands, cited certain observations of the Indian Judge on
11 the Bagge Tribunal, that Justice Chandrasekhara Aiyer made in his opinion³ which is
12 attached to the Bagge Award; and I would like, briefly, to refer to the correct position as it
13 emerged subsequent to that Opinion. Of course, it was entirely correct for Counsel to say
14 that Justice Aiyer strongly advocated a fixed (as against a ‘fluid’) boundary because the
15 overriding purpose of the division of the province of Bengal was that the two States should
16 be left ‘in no uncertainty about their boundary’. The following was cited from paragraph
17 31 of Justice Aiyer’s Opinion and I have it reproduced. It’s on your screen and it’s at Tab
18 1.1. I read it again because I can quite see why Professor Sands was tempted to use this
19 paragraph to support his contention, and if I may read it:

20
21 “The very Delhi agreement under which the Tribunal is constituted contemplates
22 elaborate demarcation operations in connection with the boundary line to be conducted by

¹ BM Annex B16.

² *Ibid*, p. 9.

³ BM, Vol. 3, Annex B16, Appendix I, p. 22.

1 experts of both the States. What is there to demarcate, if the boundary is a fluid one liable to
2 change or alteration at any moment? Is all the trouble to be taken only to ascertain what the
3 boundary is on a particular date, knowing full well that it may not be the boundary the next
4 day? Surveys of the river, cadastral or otherwise, will then be a futile endeavour; and
5 topographical maps prepared at elaborate expense and cost by means of aerial photographs
6 have to be thrown aside every time the river changes. It is very difficult to see the purpose
7 behind so much trouble or the

8
9 5. I now find it necessary to read out to you and draw your attention to the observation
10 by Justice Shahabuddin the judge on the Pakistan view on the subject which was presented
11 to the tribunal. And this is now on your screen and at **Tab 1.2 in the Tribunal's Folder.**
12 He said:

13
14 "Pakistan's case, on the other hand, is that the correct interpretation of the second
15 sentence in paragraph 5 of Annexure A is that the district boundaries *i.e.*, the midstream of
16 the river Ganges for the time being except across the Rampur-Boalia *char* –which was an
17 exception he made at the date of the award, shall be the boundary. This boundary was not
18 intended to be a fixed unalterable boundary. It is a river boundary subject to variations
19 resulting from changes in its course....."⁴

20
21 6. So there were therefore two strong view expressed by each country. Chairman
22 Bagge's Opinion, which formed the final Award because the other disagreed, accepted
23 Justice Aiyer's view of the fixed boundary but also introduced an exception which Prof

⁴ *Ibid*, Appendix II, p. 23.

1 Sands also cited, which was as follows and is now on your screen at **Tab 1.3** in the
2 Arbitrator's Folder and I read it:

3

4 "If the demarcation of this line is found to be impossible, the boundary between
5 India and Pakistan in this area shall then be a line consisting of the land portion of the
6 above mentioned boundary and of the boundary following the course of the midstream of
7 the main channel of the river Ganges as determined on the date of demarcation and not as it
8 was on the date of the Award....."⁵

9 Now, this was an idea that they developed and put it out.

10

11 7. Now, sometime after the Award was published, India officially took a decision
12 contrary to the view of Justice Aiyer preferring the Pakistan view. and both India and
13 Pakistan mutually agreed to alter the position of treating the Radcliffe boundary as a fixed
14 boundary for the southern-most portion between the district of Khulna (Bangladesh) and
15 24-Parganas (India) and agreed to treat it as a 'fluid' boundary. On your screen now are
16 the two diplomatic messages exchanged by the two Governments [and I will read them].
17 They are at **Tab 1.4** in the Arbitrator's Folder. [They are RJ 1 & RJ 2 reproduced in the
18 India's Rejoinder]. Pakistan wrote on the 7th of February. It's a bit difficult to read
19 because the actual representation which is presented, it's typed on one of the typewriters
20 presumably of the 1950s and almost unreadable. It's been deciphered and typed out again
21 and reads as follows:

22 "With reference to correspondence resting with telegram from the Government of
23 Pakistan, Ministry of Foreign Affairs and Commonwealth Relations,.....dated the 5th

⁵ *Ibid*, Award Dispute I, p. 12.

1 January 1951 – this message is the 7th of February -- I am directed to say that the
2 Government of Pakistan have very carefully considered the question of river boundary
3 between Khulna and 24 Paraganas and they are of the opinion that the boundary in this
4 section should be fluctuating. It is hoped that the Government of India will agree and issue
5 necessary instructions to the authorities concerned.”

6 India’s response of the 13th March 1951, which is also on your screen and in the
7 same judge’s folder reads as follows:

8 “Reference your letter of the 7th February 1951 regarding demarcation of
9 undisputed portions of West Bengal-East Bengal Boundary.

10 We agree that the boundary between Khulna and 24-Parganas running along the
11 midstream of the rivers should be a fluid one and are issuing necessary instructions to the
12 authorities concerned. Kindly issue instructions to East Bengal also.”

13 So here was the exception which was carved out by Justice Bagge in his final
14 Award, the same idea being adopted by both India and Pakistan by which you have an
15 agreement.

16 Mr. President, Members of this distinguished Tribunal:

17 8. Here then were two sovereign nations, who at first accepted the Radcliffe Award,
18 found it impracticable to apply in certain aspects and simply mutually agreed to change the
19 position from treating the boundary between Khulna and 24-Parganas as a fixed boundary
20 and treating it instead as a ‘fluid’ boundary. In such a situation where the two countries
21 agreed, I respectfully submit there could be no question of the application of the *uti*

1 | *possidetis* rule or any similar rule. This mutual decision, I would point out, was also
2 | consistent with the concept of ‘the main channel for the time being’ which, the Tribunal
3 | will recall, was incorporated in the boundary as defined (and as accepted by both parties as
4 | authoritative) in the Notification 964 of the Government of Province of Bengal of January
5 | 1925⁶, the last part of this, which is relevant for these proceedings, was as follows and is
6 | now on your screen at **Tab 1.5** in the Arbitrator’s Folders and I read it:

7 |
8 | “.... Till it [the river/boundary from the North] meets the midstream of the main
9 | channel of the River Ichhamati, then along the midstream of the main channel for the time
10 | being of the Rivers Ichhamati and Kalindi, Raimangal and Hariabhanga till it meets the
11 | Bay”.

12 | So therefore, Mr. President and Members of the Tribunal, here was this practice
13 | which they jointly agreed, or the rule they jointly agreed to follow, and have been
14 | following, if I may say so, ever since.

15 |
16 | 9. There can thus be no doubt that the river boundary between Khulna and
17 | 24-Parganas was regarded by both parties as a ‘fluid’ boundary (and not a fixed boundary
18 | as contended by Bangladesh as establishing a land boundary terminus⁷).

19 |
20 | 10. I leave this here as my distinguished college Professor Resiman will address you on
21 | various aspects of this conclusion. Now, I come to another aspect, and that was that in
22 | accordance with the agreement of December 1948 under which the Bagge Tribunal was

⁶ BM, Vol. 2, Annex B9.

⁷ BM, paras. 3.15-3.16.

1 constituted, also contemplated were (as noted by Justice Aiyer) elaborate demarcation
2 operations to be undertaken by experts of both States to demarcate the boundary line.⁸
3 Despite Justice Aiyer's disapproval of the idea, such demarcation operations by experts of
4 India and Pakistan were in fact undertaken and began soon after the Tribunal's Award.
5 They have continued ever since, including during the period following the independence of
6 Bangladesh in 1971, between experts of India and Bangladesh. As both parties are fully
7 aware, their experts (Land Officers, at first of East Pakistan and later of Bangladesh and
8 West Bengal) have been demarcating the inter-country boundary by affixing pillars on the
9 boundary at mutually agreed points.

10
11 11. Most of the land boundary including parts as rivers has now been demarcated
12 except for the small area being the southern-most boundary between the districts of Khulna
13 in Bangladesh and 24 Parganas in India (which as I have just shown, was agreed to be
14 treated as a "fluctuating" and "fluid" boundary) and which, in terms of paragraph 8 of the
15 Radcliffe Award, is the boundary "to the point when it meets the Bay of Bengal". This
16 therefore includes the point on the coast from where the maritime boundary is to be
17 delimited by this Tribunal.

18
19 12. Now, if I may go to another subject, by contrast, with this satisfactory progress on
20 the land boundary demarcation, serious and prolonged efforts, pursuant to a mutual
21 agreement between India and Bangladesh in May 1974, through negotiations to agree on a
22 maritime boundary between the two countries which took place between November 1974

⁸ *Ibid*, p.22, para. 31.

1 and January 2009 (and is elaborately described in the parties' pleadings and briefly referred
2 to hereafter) have failed to achieve that objective. Before I turn to that subject, may I first
3 describe a few important relevant facts.

4
5 13. Bangladesh enacted its Territorial Waters and Maritime Zones Act, 1974 on 14
6 February 1974⁹, and thereafter, on 13 April 1974, issued a notification contemplated in the
7 Act, claiming a 12 nautical miles territorial sea and an economic zone extending up to 200
8 nautical miles¹⁰. At the same time, it also declared a system of straight baselines consisting
9 of lines connecting eight base-points, all of which were located along the 10-fathom depth
10 contour in the submerged delta. Section 7(1)(a) of that Act further provided that the
11 continental shelf of Bangladesh comprises the seabed and subsoil of the submarine areas
12 adjacent to the coast of Bangladesh but beyond the limits of the territorial waters up to the
13 outer limits of the continental margin bordering on the ocean basin or abyssal floor.
14 Bangladesh contended during the negotiations with India that any agreed maritime
15 boundary must also comply with the provisions of this domestic legislation, predetermined
16 in other words.

17
18 14. The baselines were declared by Bangladesh eight years before the adoption of the
19 1982 Convention. The 10-fathom line that Bangladesh used to declare its baselines had no
20 basis even at the time of the declaration in the generally accepted principles of the law of
21 the sea. In fact Bangladesh's representative to the UN Convention of the Law of the Sea

⁹ ICM, Annex IN-5 and BM, Vol. III, Annex B5.

¹⁰ ICM, Annex IN-6.

1 announced the adoption of its baselines on depth criteria on 3 July 1974 at the Caracas
2 session of the Conference and thereafter made an unsuccessful attempt to win acceptance
3 of the criteria by the Conference¹¹. Bangladesh has now, of course, abandoned these
4 baselines¹².

5
6 15. Turning to India, India enacted its own “Territorial Waters, Continental Shelf,
7 Exclusive Economic Zone and Other Maritime Zones Act of 1976” (Act of 1976)¹³ which
8 took into account principles that were being discussed at the time at sessions of the Third
9 United Nations Conference on the Law of the Sea and on which there was broad consensus
10 which is now reflected in the 1982 Convention. A particularly relevant provision of the
11 Indian Act is Section 9 of the Act which prescribes that the maritime boundaries between
12 India and any State whose coast is opposite or adjacent to that of India shall be determined
13 by mutual agreement and pending such agreement, in the absence of other provisional
14 arrangements, the equidistance principle will be the basis of the boundary. India notified
15 its system of straight baselines on 11 May 2009. India is not, however, relying on these
16 straight baselines for the purpose of the present delimitation.

17
18 16. India has seven neighbouring countries. Except for Bangladesh and Pakistan, India
19 has delineated its maritime boundaries with all its other neighbouring countries by
20 agreement.¹⁴ It has signed twelve agreements with five of the seven neighbouring
21 countries: Myanmar, Thailand, Sri Lanka, Indonesia and Maldives. All these agreements

¹¹ ICM, Annexes IN-7, IN-8 and IN-19.

¹² BM, p. 47, para. 3.30 and p. 70, para. 5.20.

¹³ Act No. 80, 28 May 1976 (ICM, Annex IN-13)

¹⁴ List of Agreements concluded by India with neighbouring countries – ICM, Annex IN-39.

1 are based on the equidistance/median line principle. Despite the fact that in some cases, the
2 countries involved have concave coastlines (similar to the claim made by Bangladesh), the
3 equidistance line has been used by mutual agreement, in a sense, establishing a
4 sub-regional State practice.

5
6 17. I will turn now, if I may, Mr. President and Members of the Tribunal, to the difficult
7 India-Bangladesh negotiations to try and mutually agree on a maritime boundary. These,
8 as I mentioned, commenced in November 1974 and continued until January 1982 (i.e.
9 almost concurrent with the sessions of the Third Conference on the Law of the Sea and the
10 conclusion of the 1982 Convention).

11
12 18. During these meetings, Bangladesh representatives continued to explain and stress
13 the depth criteria for its baselines and argued that in settling a boundary between adjacent
14 States, the principle to be followed was to ensure that the boundary line be drawn on a basis
15 whereby it is equitable to both sides; and that it had to be settled taking into account the
16 particular conditions and circumstances of the two countries concerned. Bangladesh
17 rejected the equidistance/relevant circumstances method and contended throughout that
18 there was no general rule of international law governing maritime boundaries and that a
19 number of methods of equal validity can and have been used for drawing such boundaries.
20 Furthermore, that the adoption of the equidistance principle for – principle for the near
21 India-Bangladesh boundary would not be fair to Bangladesh because of the instability and
22 concavity of the coast, and its large land mass all of which would result in
23 disproportionately narrowing its continental shelf.

1

2 19. The Indian representatives, on the other hand, maintained that in the Bay of Bengal,
3 the shelf was the common natural prolongation of the land territory of India, Bangladesh
4 and others and therefore had to be divided in accordance with known and established
5 principles of law and precedents. The rule of equidistance had not only been included in
6 the 1958 Convention on the Continental Shelf to which more than 50 States are parties but
7 had also been followed in almost all cases of maritime delimitation whether among
8 opposite or adjacent countries. It was also pointed out that the equidistant line could be
9 adjusted, *if* it was established that there were special circumstances which warranted it,
10 however as a basic principle equidistance was universally recognised.¹⁵ _

11

12 20. It became evident as the discussions proceeded over the years till November 1982
13 that there was little chance of narrowing the differences between the two sides. After
14 1982, these negotiations, though resumed at a couple of technical meetings in 2008 and
15 January 2009,¹⁶ also did not lead to an agreement.

16

17 21. Bangladesh did not respond positively or make any proposal which signified the
18 slightest deviation from its basic position of rejecting the equidistance/special

¹⁵ See e.g. I.C.J., Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Reports 2009, pp. 101-103, paras. 115-122. See also, *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, *U.N.R.I.A.A.*, Vol. XXVII, pp. 210-215, paras. 223-242, *Guyana/Surinam*, Award of 17 September 2007, *ILM*, Vol. 47, 2008, p. 211, para. 335 and p. 213, para. 342, ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, para. 233 and I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, paras. 190-193.

¹⁶ ICM, p. 51, para. 3.51.

1 | circumstances formula. In fact, the proposal contained in the Bangladesh Memorial
2 | seeking a maritime boundary based on the angle-bisector method was *at no time* brought
3 | up in the course of the mutual discussions.
4 |

5 | 22. One negative aspect of these negotiations was that the Government of Bangladesh
6 | had taken unilateral action in fixing their baselines and base points and proclaimed a
7 | continental shelf prior to the first consultation agreed to in May 1974 and held in
8 | November 1974 between India and Bangladesh to mutually negotiate and agree the
9 | maritime boundary between the two countries. India considered this a manifestation of lack
10 | of good faith on Bangladesh's part. Furthermore, during periods of discussions,
11 | Bangladesh had, in fact, begun to invite offers and even entered into a third-party contract
12 | for preliminary exploration of maritime areas which India considered would fall on its side
13 | of an equidistance line. Following India's repeated protests over a long period, Bangladesh
14 | eventually decided not to issue concessions in regard to maritime areas claimed by both
15 | Bangladesh and India.
16 |

17 | 23. I indicated earlier also another such aspect, negative aspect, was the position taken
18 | by Bangladesh to accord priority to its own national law insisting that any formula should
19 | comply with its enacted law over well accepted principles/norms of international law.¹⁷
20 | These aspects effectively frustrated the negotiations to settle the maritime boundary by
21 | mutual agreement.
22 |

¹⁷ ICM, p. 47, para. 3.44.

1 24. Although Bangladesh had abandoned canvassing for its baselines on the depth
2 criteria by the time it came to file its Memorial in these proceedings, in that Memorial, it
3 now made a detailed submission contending that “nature had endowed Bangladesh with a
4 substantial entitlement in the continental shelf beyond 200 M”¹⁸ comprised of an extensive
5 “natural prolongation” in the sea-bed and sub-soil of the Bay of Bengal. This, it claims, is
6 constituted of millions of tons of sediment from erosion of the Himalayan Mountains
7 carried by a number of rivers flowing through Bangladesh, which then transports it into the
8 Bengal Delta, extending the Bengal Delta’s land territory, thus increasing Bangladesh’s
9 maritime entitlement. Bangladesh therefore rejected India’s proposal of delimitation based
10 on an equidistant line as inequitable, also on the ground that the line in combination with
11 Bangladesh’s concave coastline would severely cut off and reduce its access to this
12 extensive maritime entitlement including the area of what it claimed as its “natural
13 prolongation” which it claimed formed part of its continental shelf. Bangladesh has
14 continued to contend that because of this factor and because its coastline is highly unstable
15 and changes from year-to-year (sometimes even day-to-day),¹⁹ it is difficult, if not
16 impossible, to identify any normal base points for maritime delimitation purposes to draw
17 the boundary using the equidistance methodology. Bangladesh therefore claimed that in
18 situations where recourse to equidistance is unfeasible, international law permits, and it
19 therefore now proposes, the adoption of an angle-bisector methodology, which, it submits,
20 would be fully equitable to both Parties.²⁰

¹⁸ BM, Vol. III, Annex B25.

¹⁹ BM, para. 3.22.

²⁰ BM, para. 1.31.

1 25. A short period after India made a Submission on 11 May 2009 to the Commission
2 on the Limits of the Continental Shelf in accordance with Article 76, paragraph 8 of 1982
3 Convention on the limits of the continental shelf beyond 200 nautical miles, and notified its
4 baselines, Bangladesh filed the present arbitration proceedings seeking various reliefs set
5 out in the Statement of Claim²¹ and then in its Memorial.

6
7 26. As the Tribunal is aware, Bangladesh simultaneously commenced proceedings
8 with Myanmar which came to be heard and decided by the ITLOS²². In fact, Bangladesh
9 issued a Notification of arbitration to Myanmar on the same date as to India, i.e., 8 October
10 2009. As India's Agent pointed out, in that case also, the main issue was the refusal of
11 Bangladesh to accept the application of the standard equidistance/relevant circumstances
12 method for the delimitation of the exclusive economic zone and the continental shelf.
13 Bangladesh's contentions included, again, a claim of concavity, the extension of its
14 "natural prolongation" as well as the instability of the Bangladesh deltaic coastline which,
15 so it argued, made it unfeasible to identify the base points necessary for delimitation based
16 on the equidistance/relevant circumstances method.²³

17
18 27. The ITLOS judgment of 14 March 2012 in the *Bangladesh/Myanmar* case rejected
19 a number of Bangladesh's contentions identical to those raised in the present case. Thus the
20 ITLOS judgment held that "the most natural prolongation" argument made by Bangladesh

²¹ BM, Vol. III, Annex B26.

²² BM, para.1.25.

²³ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, paras. 213, 244, 276, 279 and 424.

1 had no relevance to that case, a ruling, equally applicable in the present case. The Tribunal
2 held that natural prolongation was not an independent basis for entitlement and the
3 reference thereto in article 76 should be interpreted in the context of the subsequent
4 provisions of article 76, in particular paragraph 76(4). The Judgment did not accept
5 Bangladesh’s submissions on the instability of the Bangladesh-Myanmar coast and, rejecting
6 its proposal to draw an angle-bisector, applied the equidistant/relevant circumstances
7 methodology for determining the maritime boundary between the two countries.²⁴

8
9 28. In its Reply in the present case, Bangladesh therefore abandons its claims of
10 extension of its “natural prolongation” based on the prolonged deposits of Himalayan
11 sediment. It however continues to claim that the concavity which led to the adjustment of
12 the equidistance line in the *Bangladesh/Myanmar* case decided by ITLOS would have the
13 same effect in the present case on any equidistance line between India and Bangladesh.
14 However, it ignores the fact that India has a concavity in its own coastline which has a
15 similar or more severe effect. Although Bangladesh still maintains its submissions on the
16 instability of the India-Bangladesh coastline and the impossibility of location of stable base
17 points for the equidistant line; it in fact proceeds to identify base points and offers a
18 provisional equidistant line of its own not very dissimilar to the one offered by India.

19
20 29. Mr. President and distinguished Members of this Tribunal, may I now turn to - and
21 very briefly -- to the historical development of the principles of the applicable law which
22 Bangladesh seeks to cite in support of its submissions which have formed in the recent

²⁴ *Ibid.* paras. 237-239.

1 past, which my other colleagues will, of course, analyse in relation to the different issues,
2 but I propose to be very brief on this.

3
4 30. In its Memorial, Bangladesh contends that the geographical circumstances in this
5 case are similar to those in the *North Sea Continental Shelf cases*²⁵ before the International
6 Court of Justice of in 1969, where, in view of a concavity, the ICJ found that equidistance
7 would not yield an equitable result.

8
9 31. Bangladesh also seeks some support from the ITLOS judgment but ignores the fact
10 that notwithstanding the *North Sea Continental Shelf cases*, international law has since
11 recognized that the standard methodology, as carefully clarified by the ICJ, in the *Black*
12 *Sea case*,²⁶ was followed by the ITLOS in *Bangladesh/Myanmar*, where the three-stage
13 method was expressly endorsed both in principle, and, in particular, it is important to note,
14 in its application to the Bay of Bengal²⁷. This method cannot be squared with the approach
15 Bangladesh has urged this Tribunal to adopt.

16
17 32. May I respectfully draw your attention to the view expressed in a Joint Declaration
18 in the *Bangladesh/Myanmar* case to the effect that the equidistance method now takes
19 “priority” in any delimitation; this is because “[r]sort to equidistance as a first step leads to

²⁵ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 3.*

²⁶ *ICJ, Reports 2009, p. 61.*

²⁷ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, paras. 233, 238-240.

1 a delimitation that is simple and precise. However complicated the coastline involved is,
2 there is always one and only one equidistance line, whose construction results from
3 geometry and can be produced through graphic and analytical methods. A provisional
4 equidistance line is to be drawn, calculated by reference to adequate base points chosen
5 along the continental coasts of both parties”.²⁸

6
7 33. In its Reply, Bangladesh has also cited the recent and relevant judgment delivered
8 since the Parties filed their Memorial and Counter-Memorial, i.e., the decision of the
9 International Court of Justice in the *Nicaragua v. Columbia*).²⁹ Bangladesh claims both
10 the ITLOS and the ICJ decisions substantially strengthen the Bangladesh case³⁰ again
11 failing to recognize that the ITLOS rejected Bangladesh’s submissions to draw an
12 angle-bisector and that both the above decisions have confirmed and employed the
13 equidistance/relevant circumstances method as the standard methodology for
14 determination of maritime boundaries in the absence of reasons that make its application
15 unfeasible.

16
17 34. In summary, therefore, Mr. President and Members of this Tribunal, most of the
18 Bangladesh’s principal contentions which it sought to apply to the delimitation of its
19 maritime boundaries over the years have not found universal favour or have been rejected.
20 Thus Bangladesh’s contention for fixing base lines on the depth criteria did not find favour
21 at UN Convention of the Law of the Sea and have since been abandoned by Bangladesh
22 itself. Its contention that its geographical circumstances and the instability of its coastline

²⁸ See Joint Declaration of Judges Nelson, Chandrasekhara Rao and Cot in *Bangladesh/Myanmar*, pp. 1-2.

²⁹ On 19 November 2012.

³⁰ BR, para 1.12.

1 in the Bay of Bengal are such that it is impossible to fix base points was not accepted by
2 ITLOS. Its novel contention that the natural prolongation of the land mass increased
3 extensively as a result of accretion of sediment deposits over many years from a number of
4 rivers crossing (not originating from) its territory was also not found by ITLOS as falling
5 within the scope of Article 76 of UNCLOS.

6
7 35. Although its argument that its specific natural concavity in its coastline in relation
8 to the Myanmar coastline be taken into account in drawing its maritime boundary with
9 Myanmar was accepted in its particular geographical circumstances of the area, ITLOS
10 clearly also clarified – not very well put – but clearly clarified the principle that concavity
11 is not a relevant circumstance *per se*.³¹

12
13 36. The ITLOS also did not accept Bangladesh's contentions that the
14 equidistance/relevant circumstances method was unfeasible on any of the grounds pleaded
15 by it for drawing its boundary with Myanmar or that only the angle-bisector proposed by it
16 could achieve an equidistant result. The Tribunal therefore proceeded to determine the
17 maritime boundary by applying the well-established rule of drawing a provisional
18 equidistance line and making it subject to an adjustment on account of the pleaded
19 concavity. It is important to note however that the geographical and other relevant
20 circumstances in the present case are very different and clearly distinguishable. The whole
21 of the northern coast of the Bay of Bengal is concave and the concavity runs from the
22 northernmost part of the peninsular coast of India along the coasts of India and Bangladesh,

³¹ ITLOS Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 292.

1 to the western coast of Myanmar. Unlike the situation in the *Bangladesh/Myanmar* case,
2 the coasts of both India and Bangladesh are located in the broad concavity of the Bay of
3 Bengal and each country has an additional or secondary concavity (within the broad
4 concavity), which require entirely different and balanced assessment and treatment.

5

6 Mr. President, that concludes my presentation today. I thank you and each
7 Member of this distinguished Tribunal, for the patience and attention with which I have
8 been heard and request you to invite my distinguished colleague, Professor Alain Pellet to
9 the podium to address the geographical context of the case. Thank you.

10

11

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1 PRESIDENT WOLFRUM: Thank you, Mr. Shankardass.

2 I now give the floor to Alain Pellet.

3 PROFESSOR PELLET: Thank you very much, Mr. President.

4 PRESIDENT WOLFRUM: Professor Pellet, before you commence, I
5 assume you're speaking for 60 minutes. We will have a break in between. Could you
6 kindly choose a time which is appropriate.

7 PROFESSOR PELLET: Yes, I will tell you I suppose within 20 or 25
8 minutes.

9 PRESIDENT WOLFRUM: I leave that to you.

10 PROFESSOR PELLET: Thank you very much.

11 PRESIDENT WOLFRUM: Thank you, Mr. Shankardass.

12 I notice now give the floor to Alan Pellet.

13 PROFESSOR PELLET: Thank you very much, Mr. President.

14 PRESIDENT WOLFRUM: Professor Pellet, before you commence, I
15 assume you're speaking for 60 minutes. We will have a break in between. Could you
16 kindly choose a time which is appropriate.

17 PROFESSOR PELLET: Yes, I will tell you I suppose within 20 or 25
18 minutes.

19 PRESIDENT WOLFRUM: I leave that to you.

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

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

REPUBLIC OF INDIA

GEOGRAPHICAL CONTEXT AND LESSONS FROM THE SITE VISIT

PROFESSOR ALAIN PELLET

Mr. President, Members of the Tribunal,

1. My task this afternoon is two-fold:

- it is first to set the relevant geographical context of this case; and
- second, to make some remarks on the site visit and highlight its most important lessons. However, I leave it to my colleagues to discuss these conclusions in greater detail in their respective presentations.

1 **I. THE MAIN GEOGRAPHICAL ASPECTS OF THE CASE**

2

3 2. Mr. President, Members of the Tribunal, you have already heard a lot about
4 the geography of the region. You have received two rounds of written pleadings and you
5 have been on-site. I will not therefore come back in detail on the geography of the Parties³²
6 and will confine myself to the most “relevant” aspects of the geographical context of the
7 present case, with particular emphasis on the Bay of Bengal. I hasten to say that I put the
8 word “relevant” between inverted commas because, as the ICJ emphasized in the
9 *Tunisia/Libya* case, “the only purpose of the description which follows is to outline the
10 background, and not to define legally the area of delimitation nor to say how [India] views
11 the various geographical features for the purposes of their impact on the legal situation.”³³
12 My esteemed colleague and friend, Sir Michael Wood, will deal later with the relevant
13 coasts and the relevant area in the legal meaning of the term.

14

15 3. And there is another preliminary point which needs to be made. As the ICJ
16 recalled in *Cameroon v. Nigeria*:

17

18 “The geographical configuration of the maritime areas that the Court is called upon to
19 delimit is a given – a given. It is not an element open to modification by the Court but a fact
20 on the basis of which the Court must effect the delimitation.”³⁴

21

22 This is true of geography in general, whether it bears upon the sea or the land
23 including the rivers.

24

³² As for the geography of Bangladesh, see BM, pp. 14-20, paras. 2.7-2.24 and ICM, pp. 22-23, paras. 2.18-2.24. As for the geography of India, see BM, p. 21, paras. 2.25-2.30 and ICM, pp. 14-22, paras. 2.5-2.17.

³³ I.C.J., Judgment, 24 February 1982, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Reports 1982, p. 34, para. 18. See also I.C.J., Judgment, 3 June 1985, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Reports 1985, p. 20, para. 14.

³⁴ I.C.J., Judgment, 10 October 2002, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Reports 2002, pp. 443-445, para. 295.

1 4. With this is mind, I will first describe the Bay of Bengal, before making a
2 few remarks on some geographical similarities and differences with those prevailing in the
3 *Bangladesh/Myanmar* case

4
5 **Projection 1: The Bay of Bengal (1)**

6
7 **1. The Bay of Bengal**

8
9 5. Mr. President, Bangladesh is eager to have the Tribunal think that *its* coast
10 is concave³⁵ and it insists that inside the general concavity, the Brahmaputra delta forms a
11 “concavity within the concavity”.³⁶ Well, Mr. President, indeed, as a matter of definition, a
12 bay is concave; as accepted in Article 10, paragraph 2, of the UNCLOS, the first sentence
13 of which gives a general definition of a bay, which I read:

14
15 “...a bay is a well-marked indentation whose penetration is in such proportion to
16 the width of its mouth as to contain land-locked waters and constitute more than a mere
17 curvature of the coast.”

18
19 And the *Encyclopaedia Britannica* expressly defines a bay as a

20
21 “*concavity* of a coastline or reentrant of the sea, formed by the movements of either
22 the sea or a lake.”³⁷

23

³⁵ See e.g. BM, p. 3, para. 1.13, p. 13, para. 2.2, p. 14, para. 2.6 and p. 17, para. 2.11 and BR, p. 2, para. 1.6, p. 3, para. 1.9, p. 6, para. 1.18, p. 8, para. 1.22, pp. 8-9, para. 1.24, p. 11, paras. 2.1-2.2 and pp. 12-14, paras. 2.6-2.14. See also e.g. transcript, 9 December 2013, Mr. Martin, p. 33, paras. 10, 11 and pp. 43-44, 48 and 49 and Mr. Reichler, pp. 123-124, paras. 139-140 and p. 129, para. 149.

³⁶ See e.g. BM, p. 17, para. 2.10, p. 18, para. 2.14 and p. 38, para. 2.72 and BR, pp. 8-9, para. 1.24, pp. 12-13, para. 2.8, p. 25, para. 2.37 and p. 65, para. 3.88.

³⁷ <http://global.britannica.com/EBchecked/topic/56637/bay> - italics added.

1 There is, therefore, no doubt that the coast of Bangladesh, which occupies half of
2 the head of the Bay of Bengal, is concave **draw a half circle and stop it at the land**
3 **terminus**. Nor do we challenge that the delta of the rivers Brahmaputra and Meghna can be
4 described as a “concavity within” the larger concavity formed by the Bay of Bengal itself.³⁸
5 **Add on the map the corresponding semi-circle.**

6
7 6. But – and it is quite a big “but”, Mr. President –, contrary to Bangladesh’s
8 allegations, these two aspects characterize the Indian coast as well.

9
10 7. In the first place, India shares the head of the Bay of Bengal with
11 Bangladesh, and it is squarely absurd to deny that its coast in the relevant area is concave
12 (for this moment, I merely define the relevant area as the area which can be seen as relevant
13 prima facie without entering into any legal detail – just common sense, not law) **add a**
14 **semi-circle from the land terminus to Devi Point**; I’m not sure they are otherwise
15 incompatible. It is and, indeed, Bangladesh acknowledges that it is concave.³⁹
16

17 8. For its part, Bangladesh does not – and it is a quote –“Bangladesh does not
18 dispute that India’s coast changes direction between the Bengal Delta and peninsular
19 India.”⁴⁰ It asserts however that “[t]here are [...] two critical facts that make this change in
20 direction unlike the concavity of the Bangladesh coast: (a) in contrast to Bangladesh, India
21 has only one land boundary terminus located in the concavity described by the Bay of
22 Bengal’s north coast (namely, that with Bangladesh); and (b) the broader geographic
23 reality that defines the Indian coast as a whole is that it is manifestly convex, not
24 concave.”⁴¹ Neither of these assertions is pertinent or sustainable:
25

³⁸ See e.g.: ICM, p. 163, para. 6.60.

³⁹ See BR, p. 91, para. 4.69. See also BM, p. 10, para. 1.30 and BR, p. 14, para. 2.11.

⁴⁰ BR, p. 14, para. 2.11.

⁴¹ *Ibid.*

1 (a) The first objection is irrelevant; what matters is the “physical geography of the
2 relevant coast”,⁴²

3
4 **End of Projection 1 - Projection n° 2: The effect of third-state entitlements on the**
5 **definition of relevant coasts” (Myanmar’s Rejoinder in *Bangladesh/Myanmar* Figs.**
6 **R6.5a and R6.5b (<http://www.itlos.org/index.php?id=108&L=0>))**

7
8 “It is clear from the map that there comes a point on the coast of each of the two
9 Parties beyond which the coast in question no longer has a relationship with the coast of the
10 other Party relevant for submarine delimitation. The sea-bed areas off the coast beyond that
11 point cannot therefore constitute an area of overlap of the extensions of the territories of the
12 two Parties, and are therefore not relevant to the delimitation.”⁴³

13
14 In other words, when the coast of one Party suddenly changes of direction and
15 ceases to have a relationship with the coast of the other Party, the part of the coast located
16 beyond the breaking point cannot be considered relevant for the purpose of the maritime
17 delimitation. This was the case in Tunisia/Libia for the Tunisian coast beyond Ras
18 Kadbouadia; “on the Libyan coast it is Ras Tajoura. The Court cannot, therefore, take into
19 consideration such parts of the sea-bed of the Pelagian Block as lie beyond those points”.⁴⁴

20
21 **End of Projection 2 – Projection n° 3: Devi Point as a Change of Direction**

22
23 In the present case, the breaking point is Devi Point, beyond which another less
24 marked, concavity occurs; the similarity with Ras Tajoura is obvious.

25
26 (b) It is therefore irrelevant whether after this change of direction a coast which is
27 no longer related to the area to be delimited is convex or forms another concavity; whatever

⁴² *Ibid.*, p. 108, para. 137. See also ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 264.

⁴³ I.C.J., Judgment, 24 February 1982, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Reports 1982, pp. 61-62, para. 75.

⁴⁴ *Ibid.*, p. 62, para. 75.

1 its direction, it cannot be taken into account: “for the purpose of shelf delimitation between
2 the Parties, it is not the whole of the coast of each Party which can be taken into account.”⁴⁵

3
4 **End of Projection 3 – Projection 4: The “Danish Peninsula”**

5
6 and the fact that Bangladesh describes India as “a massive peninsula”⁴⁶ has no
7 consequence in our case, exactly as, in the *North Sea Continental Shelf* cases, the eastern
8 coast of Denmark, which also is peninsular, are completely irrelevant. May I say, Mr.
9 President that it is sometimes embarrassing to answer meaningless arguments: you are
10 forced simply to state the obvious...

11
12 **End of Projection 4 – get back to Projection 1(bis): The Bay of Bengal (1)**

13
14 9. To borrow the language of the ITLOS in *Bangladesh/Myanmar*, there is no
15 doubt “that the [relevant] coast of [India], seen as a whole, is manifestly concave”⁴⁷.
16 Moreover, just like Bangladesh’s coast, India’s relevant coast includes a double concavity
17 **add the semi-circle in the Bay of Balasore**. Bangladesh, has prudently ignored this
18 geographical fact – it has mentioned the Bay of Balasore only once in its written pleadings
19 and at no point of its first round of oral pleadings, no point. The Bay of Balasore is ... a
20 bay! as a matter of definition it is concave and India could avail itself of this “double
21 concavity” as Bangladesh tries to do for itself. I note however that, in its 2012 Judgment,
22 the ITLOS has mentioned the similar argument made by Bangladesh⁴⁸ but has drawn no
23 consequence from it.

24
25 **End of Projection 1^{bis}**

26

⁴⁵ *Ibid.*, p. 61, para. 75.

⁴⁶ BR, p. 14, para. 2.13. See also transcript, 9 December 2013, Mr. Martin, p. 44, para. 54, and Bangladesh’s Folder, Tab 2.18 India’s Convex Coastline Compared to Bangladesh’s Concave Coastline.

⁴⁷ Cf. ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 291.

⁴⁸ *Ibid.*, para. 276.

1 10. Mr. President, before turning to the second part of my presentation, I would
2 like to mention another relentless aspect of Bangladesh's case: the alleged instability of the
3 Parties' coast. In its Reply, Bangladesh has devoted almost fifteen pages to that topic;⁴⁹
4 and, during Bangladesh first round on Monday, several of its speakers have addressed this
5 topic – and at great length.⁵⁰ However, in addition to being irrelevant as Sir Michael Wood
6 will explain, its claim is not supported by the materials they themselves have produced:

7 - The alleged instability is clearly not as dramatic as Bangladesh claims: it is true
8 that a few parts of the coasts of the Parties are subject to some erosion but, if Bangladesh's
9 data were to be taken at face-value, the delta would have regressed much more
10 dramatically than it has; and many vast islands which appear on the charts since they exist
11 for the region (the first British Admiralty Chart was published in 1879) so these vast
12 islands should have disappeared years ago; they have not! Just to give an example:
13 according to Professor Akhavan,⁵¹ “[g]iven the massive erosion” in this area Bhangaduni
14 Island has shrunk by nearly one nautical mile (1.8 km) in the last 35 years. This might seem
15 to be an impressive figure, Mr. President – perhaps because it is most exaggerated. A closer
16 look at the 1931 chart (based on the 1879 data) shows that Bhangaduni Island was 4.7
17 nautical miles in length and 5.7 nautical miles in breadth. If the rate of erosion is to be taken
18 as a given, Bhangaduni Island would have vanished quite a long time ago by now; its area
19 today is 3 nautical miles in length and 3.9 nautical miles in breadth (still 30 square
20 kilometres).

21 - Generally speaking, Bangladesh's prophesies must be treated with skepticism: the
22 studies annexed by Bangladesh to its written pleadings offer many scenarios in terms of
23 sea-level rising without expressing a preference for one view over the other; significantly,
24 the sea-level rise rate attached to the Bay of Bengal coincides with the global average.⁵²
25 Similarly, contrary to our opponents' allegations,⁵³ the instability of the deltas of the
26 Ganges and Brahmaputhra, is just comparable to the instability of all the major deltas in the

⁴⁹ BR, pp. 14-26.

⁵⁰ See transcript, 9 December 2013, H.E. Mahmood Ali, pp. 13-14, para. 5, Mr. Martin, pp. 37-40, paras. 28-39, of Pr. Akhavan, in particular pp. 105-111, paras. 98-113 and of Pr. Boyle, pp. 14-16, paras. 9-13.

⁵¹ Transcript, 9 December 2013, Pr. Akhavan, pp. 101-102, para. 89.

⁵² C. Loucks *et al.*, “Sea level rise and tigers: predicted impacts to Bangladesh's Sundarbans Annex BR12 mangroves”, *Climate Change*, Vol. 98, No. 1 (2010), Annex BR12, Vol. III, p. 152.

⁵³ See e.g.: transcript, 9 December 2013, Mr. Akhavan, p. 96, para. 74 and p. 111, para. 112.

1 World; thus, an analysis of satellite images of fourteen of the world's major deltas in the
2 word indicated a total loss of 15,845 km² of deltaic wetlands over the past 14 years; every
3 delta showed land loss, but at varying rates, and human development activities accounted
4 for half of the losses,⁵⁴ and up to 60% in the case of the Ganges-Brahmaputra delta – you
5 will find these data in Tab 2.5 of your Folder.⁵⁵

6 - Moreover, the Sundarbans Forest – the world's largest mangrove forest – has,
7 contrary to Professor Akhavan's allegations,⁵⁶ a well-documented⁵⁷ stabilizing effect, a
8 fact that Bangladesh implicitly acknowledged in its Reply.⁵⁸

9 - Lastly, the materials provided by Bangladesh confirm that erosion is also caused
10 and largely caused by human activities such as the building of dams, agriculture, mining,

⁵⁴ Coleman, J.M., O.K. Huh, D.H. Braud, Jr. and H.H. Roberts, 2005: Major World Delta Variability and Wetland Loss. *Gulf Coast Association of Geological Societies (GCAGS) Transactions*, 55, 102-131 (cited in) Nicholls, R.J., P.P. Wong, V.R. Burkett, J.O. Codignotto, J.E. Hay, R.F. McLean, S. Ragoonaden and C.D. Woodroffe, 2007: Coastal systems and low-lying areas. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, pp. 326.

⁵⁵ Coleman, J. M., Huh, O. K., and DeWitt Braud Jr., 2008, Wetland Loss in World Deltas, *Journal of Coastal Research*, Vol. 24, p. 3, Table 1.

⁵⁶ Transcript, 9 December 2013, Mr. Akhavan, p. 109, para. 106, p. 111, para. 112 and 10 December 2013, Mr. Boyle, p. 14, para. 10.

⁵⁷ See P. Saenger and N. A. Siddiqi, "Land from the Sea: The Mangrove Afforestation Program of Bangladesh", *Ocean and Coastal Management*, Vol. 20, 1993, pp. 23-39, ICM Annex IN-24, Vol. II, p. 219; G. Prasetya, "The Role of Coastal Forests and Trees in Protecting against Coastal Erosion", in S. Braatz, S. Fortuna, J. Broadhead and R. Leslie (eds.), *Coastal Protection in the Aftermath of the Indian Ocean Tsunami: What Role for Forests and Trees?*, *Proceedings of the Regional Technical Workshop, Khao Lak, Thailand, 28-31 August 2006*, FAO, 2007, pp. 103-130, ICM Annex IN-31, Vol. II, p. 284 and M. M. Rahman and S. K. Biswas, "Feasible Solution of Protection and Adaptation Strategy for Coastal Zone of Bangladesh", *Pakistan Journal of Meteorology*, Vol. 8, 2011, pp. 9-19, ICM Annex IN-38, Vol. II, p. 391 and S. Bandyopadhyay, "Natural Environmental Hazards and their Management: A Case Study Annex BR7 of Sagar Island, India", *Singapore Journal of Tropical Geography*, Vol. 18, No. 1 (1997), Annex BR7, Vol. III, p. 73; 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, Vol. III, p. 109; 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, Vol. III, p. 131 and 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, Vol. III, p. 169.

⁵⁸ See IR, p. 81, paras. 4.35 referring to BR, p. 16, paras. 2.18.

1 sediment extraction in the Bay, flooding engineering and mangrove deforestation.⁵⁹ On
2 that particular point, Professor Boyle asked on Tuesday: “does it matter why the erosion
3 occurs?”⁶⁰ The answer is “yes, it does” – and for at least two reasons:

4 - first, when it has human origin, it can be avoided;
5 - second, when it has natural origin, it can be cured ... by strengthening the
6 “mangrove effect”, as has long been recognized by scientists: because “mangrove areas in
7 India and Bangladesh, especially at the mouth of the Ganges were able to *heal* cyclonic
8 wounds and maintain the extent of their total area through natural succession *without*
9 *human interference*.”⁶¹

10
11 11. And, Mr. President, if I may, a last point on this “instability fuss” made by
12 Bangladesh: it is related to the impression we could have during the aerial part of the

⁵⁹ See IR, p. 81, para. 4.34, fn. 177 referring to 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), p. 21, Annex BR7, Vol. III, p. 76; 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), pp. 92 and 94, Annex BR9, Vol. III, pp. 112 and 114; G. Gopinath, “Critical Coastal Issues of Sagar Island, east coast of India”, *Environmental Monitoring and Assessment*, Vol. 160 (2010), pp. 3123 and 3127, Annex BR13, Vol. III, pp. 173 and 177 and 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), pp. 555 and 558-559, Annex BR14, Vol. III, pp. 161 and 164-165 and G. Prasetya, “The Role of Coastal Forests and Trees in Protecting against Coastal Erosion”, in S. Braatz, S. Fortuna, J. Broadhead and R. Leslie (eds.), *Coastal Protection in the Aftermath of the Indian Ocean Tsunami: What Role for Forests and Trees?*, Proceedings of the Regional Technical Workshop, KhaoLak, Thailand, 28–31 August 2006, FAO, 2007, pp. 107-108, ICM Annex IN-31, Vol. II, pp. 289-290. See also F. Blasco, E. Janodet and M.F. Bellan, “Natural Hazards and Mangroves in the Bay of Bengal”, *Journal of Coastal Research Special Issue No. 12: Coastal Hazards*, 1994, pp. 277-288, Annex RJ-4, Vol. III, pp. 67-78; K. Furukawa, E. Wolanski, “Sedimentation in Mangrove Forests”, *Mangroves and Salt Marshes*, Vol. 1, 1996, pp. 3-10, Annex RJ-5, Vol. III, pp. 80-88; Y. Mazda, M. Magi, M. Kogo, P.N. Hong, “Mangrove as Coastal Protection from Waves in the Tong King Delta, Vietnam”, *Mangroves and Salt Marshes*, Vol. 1, 1997, pp. 127-135, Annex RJ-6, Vol. III, pp. 91-100 and J.M. Smoak, S.R. Patchneelam, “Sediment Mixing and Accumulation in a Mangrove Ecosystem: Evidence from 210Pb, 234Th and 7Be”, *Mangroves and Salt Marshes*, Vol. 3, 1999, pp. 17-27, Annex RJ-7, Vol. III, pp. 103-114.

⁶⁰ Transcript, 10 December 2013, Mr. Boyle, pp. 14-15, para. 11.

⁶¹ F. Blasco, E. Janodet and M.F. Bellan, “Natural Hazards and Mangroves in the Bay of Bengal”, *Journal of Coastal Research Special Issue No. 12: Coastal Hazards*, 1994, pp. 280 and 284 (Vol. II, Annex RJ-4, pp. 70 and 74) – emphasis added.

1 site-visit on 23 and 25 October. Indeed, in the Sunderbans region, there were small areas
2 where erosion was evident, which is natural in a delta; but this impression was also
3 probably partly misleading since it is mainly given by the mangrove, which, precisely has a
4 stabilizing effect; and, in any case, the existence of eroding sectors (and of areas of
5 accretion) does not qualify for the sweeping statement emphatically made by Bangladesh
6 that its entire deltaic coast is ‘unstable’.

7
8 **Projection 5: “Aerial Photograph of the Bengal Delta Taken During the Site Visit”**
9 **(Tab 1.4 of Bangladesh’s Folders)**

10
11 12. Counsel for Bangladesh has aggravated this misleading impression when
12 (and this is only an example – but so telling, Mr. President!) when he put on the screen the
13 photo you can watch again. Mr. Martin did project this image in support of his portraying
14 of the apocalyptic situation of the allegedly highly unstable delta. Indeed as he rightly
15 commented, the land on the photo “partakes very much of water.”⁶² But this photo, Mr.
16 President, whose coordinates have not been given by Mr. Martin, does not show the coast
17 but aquaculture fields located around 70 kilometres inland. The coordinates are, according
18 to our hydrographers: 22°19’56”N; 89°13’10”E. Proving too much, proves little...

19
20 13. This said, from our helicopters or from the plane, we have noted that the
21 great majority of the coasts of Bangladesh as well as the Indian coasts looked to be highly
22 stable. Extensive development could be seen all along the coastal belt. The southern part of
23 the coast of Bangladesh consists of hills and had a hard and firm coastline. And, in the
24 deltaic region itself, including in the Sunderbans, we saw houses, industries, ports, roads,
25 resorts and hotels.

26
27

⁶² Transcript, 9 December 2013, Mr. Martin, p. 38, para. 29.

1 PROFESSOR PELLET: Now would be a good moment to have a break or
2 go on. I'm in your hands.

3 PRESIDENT WOLFRUM: I thank you very much, Professor Pellet. I
4 believe it is an appropriate moment for breaking and, therefore, let's break for tea/coffee for
5 20 minutes. Thank you.

6 (Brief recess.)

7 PRESIDENT WOLFRUM: Professor Pellet, you may continue, please.

8 PROFESSOR PELLET: Thank you, Mr. President, Mr. President.

9

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1 **2. Geographical Similarities and Differences with the *Bangladesh/Myanmar* Case**

2
3 14. Throughout its pleadings, Bangladesh has sought to artificially assimilate
4 this case to the one decided in 2012 by the ITLOS, both as a matter of law – which we
5 accept in principle – and as a matter of geography – which we do not fully accept, far from
6 it. The geographical context is different in several important respects, and these differences
7 require adjustments in the application of the law; Bangladesh seems to accept this⁶³ but,
8 regrettably (if unsurprisingly...), they get the differences wrong.

9
10 15. I will now deal with the geographical aspects of Bangladesh’s argument.
11 Later on, my colleagues and I will dwell on the legal consequences of both these
12 similarities and differences.

13
14 16. There are indeed similarities in the geographical context of the two cases –
15 if only because Bangladesh is a Party in both cases. They can be summarized as follows:

- 16 - in both cases, it is admitted that the entire Bangladesh coast is relevant;
- 17 - the Bangladesh coast as a whole is concave;
- 18 - it includes a concavity within this global concavity; however, as I have just said,
19 this aspect was not considered as being relevant by the ITLOS in its Judgment last year;
- 20 - in the present case, the Parties agree on the relevance of two of the base points
21 used by the ITLOS: the one located on Mandarbaria/Clump Island – situated at the entry of
22 the estuary of the Hariabhanga/Raimangal, on the one hand, and the one located on
23 Shahpuri Point, on the other hand;⁶⁴
- 24 - by the same token, they admit that the coasts, on which these points have been
25 identified, are such that base points may be located there.

⁶³ See e.g. transcripts, 9 December 2013, Mr. Martin, p. 27, para. 6 and pp. 31-32, paras. 6-7 and 10 December 2013, Mr. Boyle, p. 163, para. 7.

⁶⁴ ITLOS, Judgment, 14 March 2012, Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Reports 2012, para. 202.

1
2 17. It can also be noted that the ITLOS drew the first line it adopted in order “to
3 avoid difficulties caused by the complexity and sinuosity” of Bangladesh’s coast⁶⁵ “from a
4 point on Bangladesh’s coast on Mandarbaria Island *near the land boundary terminus with*
5 *India*”⁶⁶. By doing so, it carefully avoided to pronounce itself on the correct location of that
6 terminus, but, implicitly, it seemed to have accepted that it was situated where India claims
7 it to be: this would explain the difference in the length of the Bangladesh coast as indicated
8 by the Tribunal (413 kilometres)⁶⁷ and that claimed by Bangladesh during the present
9 proceedings (424 kilometres).⁶⁸ Similarly it did not follow up on an argument made by
10 Myanmar in respect to New Moore Island (South Talpatty).⁶⁹

11
12 18. This being said, India is not Myanmar and at least three important
13 differences between the two geographical contexts can (and must) be noted.

14
15 *(i) The Concavities Within the Concavities*

16
17 19. *First*, the most striking of these differences is the indisputable concave
18 character of India’s relevant coast. I note in this respect that the ITLOS has taken no
19 position as to the argument based on the concavity of its coast made by Myanmar, but, in
20 any case, a glance at a map suffices to be convinced that it was not able to balance the
21 marked concavity of Bangladesh’s coast. Our case is different: *both coasts* are concave.
22 Moreover, even if it might well be without any consequences, contrary to Myanmar, India,
23 as I have also just said, can avail itself of a “double concavity” as Bangladesh does.

⁶⁵ *Ibid.*, para. 201.

⁶⁶ *Ibid.*, para. 202 – italics added.

⁶⁷ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 202.

⁶⁸ See BR, pp. 153-154, para. 5.62 and transcript, 10 December 2013, Mr. Boyle, pp. 230-231, para. 13.

⁶⁹ ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 247.

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End of Projection 6 – Projection n° 7: Comparison of Cut-off Effect (Bangladesh’s Folder, Tab 1-11)

20. And I note that it is also a difference between the present case and the *North Sea* cases in which the relevant coasts of Denmark and the Netherlands were convex and exhibit no concavity, let alone a concavity within a concavity. It is plainly visible on the figure available at TAB 1.11 of Bangladesh’s folder on which we have added lines showing the convexity of Denmark’s and the Netherlands coasts on both sides of the “German concavity”.

(ii) India’s Entitlements

21. *Second difference*, the geography in our case is much more complicated than it was in Myanmar’s if only because of the presence of India both in the west and the east of the Bay of Bengal with the Andaman Islands – which also has an entitlement within and beyond 200 nautical miles.

End of Projection 7

(iii) The River Systems

22. And, last but not least, it must also be noted that the River system is different, more complex and more central in our case, than it was in *Bangladesh/Myanmar*. In that case, the only relevant river was the Naaf River where the starting point of the

1 maritime boundary was situated,⁷⁰ whose precise coordinates had formally been agreed
2 by a treaty between the Parties.⁷¹ In our case, the issue of the starting point is complicated
3 by Bangladesh's obdurate refusal to accept that the main channel of the Hariabhanga River
4 flows *east* of New Moore Island. As it has been amply demonstrated in India's written
5 pleadings⁷² and during the site visit, the starting point of the sea delimitation is located
6 where this channel meets the Bay of Bengal. Professor Reisman will come back to that in a
7 few moments.

8
9 23. Bangladesh agrees that the river system in the present case is to be
10 distinguished from that of the *Bangladesh/Myanmar* case but not for the same reasons. Mr.
11 Martin explained on Monday that "[o]f these three rivers that feed the estuary, two and a
12 half of them belong to Bangladesh."⁷³ This is simply irrelevant!

13
14 24. Mr. President, as the ICJ recalled in *Libya/Malta*, "[t]he delimitation of the
15 continental shelf must start from the geographical facts in *each particular case*."⁷⁴ And,
16 like the Chamber of the ICJ in the *Gulf of Maine* case, I "must recall that the facts of
17 geography are not the product of human action amenable to positive or negative judgment,
18 but the result of natural phenomena, so they can only be taken as they are";⁷⁵ as they are.
19 And, I would add, as they are "today".⁷⁶ The site visit you made from 22 to 26 October was
20 the occasion to see with your own eyes the situation on the ground.

21

⁷⁰ See ITLOS, Judgment, 14 March 2012, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Reports 2012, para. 272.

⁷¹ See *ibid.*, para. 157.

⁷² ICM, pp. 53-77, paras. 4.1-4.36 and IR, pp. 13-53, paras. 2.1-2.72.

⁷³ Transcript, 9 December 2013, Mr. Martin, p. 36, para. 22.

⁷⁴ I.C.J., Judgment, 3 June 1985, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Reports 1985, p. 37, para. 42 – emphasis added.

⁷⁵ I.C.J., Judgment, 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Reports 1984, p. 217, para. 37.

⁷⁶ I.C.J., Judgment, 24 February 1982, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Reports 1982, pp. 53-54, para. 61.

1 **II. SOME REMARKS ON THE SITE VISIT**

2
3 25. This brings me to say a few words on the site-visit and the lessons which
4 can be drawn from it – although they will be, the lessons – although they will be more
5 completely developed by my learned colleagues Michael Reisman and Michael Wood in
6 their pleadings devoted respectively to the starting point of the maritime delimitation and
7 to the appropriate base points to be used for constructing the provisional equidistance line.
8

9 26. However, Mr. President, I would ask you your permission to start this brief
10 review of the site-visit with a personal note of gratitude for the two Governments which
11 have, both, so efficiently and beautifully, organised this event; I also highly appreciated the
12 globally friendly atmosphere which marked the relations between the participants. And
13 although I have still my doubts on the “quality-price ratio” of this exercise, I must admit
14 that it has been more fruitful than I had expected – and this in spite of the unfortunately
15 very bad weather conditions.
16

17 **1. Procedure**

18
19 27. This said, first some words on the procedure followed.
20

21 28. Two main things must be stressed straightaway:
22 - *first*, although it could not be formally agreed, each Party was clearly responsible
23 for the programme and organisation of its half visit as finally set up by the Tribunal after
24 ample consultation with the Parties;⁷⁷

⁷⁷ See Procedural Order No. 1 (Concerning the Site Visit of October 2013), 28 August 2013, para. 1.2; see also *e.g.*: letters from Bangladesh to the Tribunal dated 3 May and 30 June 2013 and letters from India to the Tribunal dated 8 and 26 July 2013.

1 - *second*, in accordance with Paragraph 5 of Procedural Order n° 1 of August 28,
2 revised on October 11, 2013:

3
4 “Any presentations made during the site visit shall be limited to objective, technical
5 presentations made by experts in situ (whether by members of the official delegations or by
6 other experts). Legal issues or arguments may not be discussed at any point during such
7 presentations. Presentations must be succinct and remain neutral in tone.”

8
9 29. This, I think, worked well and was faithfully respected by the Parties – in
10 spite of an unfortunate incident created by Bangladesh during the inspection of the main
11 channel of River Hariabhanga conducted under the responsibility of India, during the
12 afternoon of the 24 October. But the Tribunal’s decision conveyed to the Parties by the
13 Registrar’s letter of 2 December 2013 has settled the matter, and, for our part, we consider
14 that this incident is over: no material relating to the site visit is excluded from these
15 proceedings on the basis of Bangladesh’s objection formulated in its letter of 14 November
16 2013. But, of course, it goes without saying that, as made clear by the registered letter I
17 have just mentioned, “that pursuant to Article 12(1) of the Rules of Procedure, it remains
18 for the Tribunal to determine the relevance, materiality, and weight of all evidence in these
19 proceedings.”⁷⁸

20
21 **2. The base-points**

22
23 30. It remains that the dates of the visit were rather unfortunate in view of its
24 object – or to be precise, its object as adroitly imposed by Bangladesh. Originally, as
25 defined by the letter of the Registrar, on behalf of the Tribunal, dated 11 February 2013
26 -well, the object as defined by the Tribunal in this letter was “to better establish the facts of
27 the case”, in particular “to observe the mouth of the Hariabanga river *in situ*”. However,

⁷⁸ Letter to the Parties, 2 December 2013 (BD-IN 108505).

1 progressively, Bangladesh succeeded in putting the viewing of the base points at the centre
2 of the attention:

3 - it mentioned the base points as a “specific site to be visited” in an e-mail sent by
4 its Deputy Agent on 13 May 2013;⁷⁹

5 - in her answer of 28 May, our Agent drew Bangladesh’s attention to the fact that,
6 due to the timing of the site visit, any attempt to visually identify base points would be a
7 costly and pointless exercise.

8 - in his reply, the Deputy Agent of Bangladesh inflexibly insisted;⁸⁰

9 - on 21st June , the Agent of India expressed again her reluctance.

10 “Efficient use of time, in our view, does not mean that [the] Tribunal be subjected
11 to unnecessary long tours when the same result can be achieved in shorter and more
12 focused visits.

13

14 As regards the aerial survey, we are not sure that an extended aerial survey of the
15 entire relevant coast covering around 400 kms would help in appreciation of base points
16 though it can give an idea on the general configuration of the coast.”⁸¹

17

18 - But Bangladesh continued to insist

19 “Whatever India’s reasons may be, Bangladesh considers it essential that the
20 proposed basepoints be included among the features inspected.”⁸²

21

22 - finally, for the sake of reaching an agreement and of transparency, the Agent of
23 India gave her accord while warning against excessive expectations:

24 “Bangladesh alleges that India has expressed reluctance about including the
25 locations of the Parties proposed base points among the features to be inspected on days 1
26 and 3. In the latest proposal, India agreed on this point and included inspection on the base
27 points proposed by the Parties on the 23rd and first half of 24th October, though we had
28 and have reservations about the utility of such inspection. But Bangladesh has failed to

⁷⁹ E-mail from the Deputy Agent of Bangladesh to the Agent of India dated 13 May 2013.

⁸⁰ E-mail from the Deputy Agent of Bangladesh to the Agent of India dated 7 June 2013.

⁸¹ E-mail from the Agent of India to the Deputy Agent of Bangladesh dated 21 June 2013.

⁸² Letter from the Deputy Agent of Bangladesh to the Registrar dated 30 June 2013, p. 3.

1 bring this to the attention of the Tribunal, apparently with view to trying to prejudice the
2 Tribunal.”⁸³ Which is from an e-mail of the – letter of the Agent of India to the Registrar of
3 8 July 2013.

4
5 31. Mr. President, taking an easy ironic tone, Counsel for Bangladesh have,
6 during their first round, heaped scorn on the result of this inspection of the base-points –
7 showing with a hardly hidden delight, photos taken at the location of the base points and
8 showing mainly breakers and water discolouration.⁸⁴ Keeping in mind that breakers and
9 brown water are clearly signs of shallow waters, nothing much better could be expected
10 and India had insistently warned against other expectations. The Agent of India had
11 repeatedly written in this sense in her correspondence with the Co-Agent of Bangladesh or
12 with the Tribunal. Thus in an e-mail to the Registrar of 3 July 2013, Dr. Chadha wrote:

13
14 “India could agree to the dates proposed earlier, i.e. October 22-26. However, the Tribunal
15 may wish to be aware that during these dates the possibility of sighting low-tide elevations
16 is quite uncertain since the days in question coincide with neap tides.”⁸⁵

17
18 32. It is a fact that three combined factors have contributed to this rather limited
19 result.

20
21 33. *First* the period retained was, as stressed by the Agent of India, one of neap
22 tides – that is where low tides and high tides are near their minimum. The graph and tables
23 that you can find in your Folder at Tab 2.9 and 2.10 show the high and low-water levels at
24 Jefford Point (which is located about 43 km northeast of New Moore) and at site during the
25 site visit. One key thing the graph illustrates – the graphs illustrate is that even if we had
26 gone to New Moore at low-water, the water would have been at least one metre and a half
27 above the Lowest Astronomical Tide. So, as long as New Moore is less than a metre and a

⁸³ Letter from the Agent of India to the Registrar dated 8 July 2013, para. 7.

⁸⁴ Transcript, 9 December 2013, Mr. Akhavan, pp. 94-95, paras. 71-72 and pp. 96-103, paras. 75-92, see TABs 2.1-2.8 of Monday’s folder.

⁸⁵ E-mail from the Agent of India to Mr. A. Llamzon dated 3 July 2013. See also Letter from the Agent of the India to the Registrar dated 8 July 2013, para. 7.

1 half above water, in this circumstance, on 24 October, it would have only been possible to
2 have at best a glimpse of the patches – and this only if we had been able to get there when
3 the tide was at its lowest. I note in passing that Bangladesh’s own large-scale chart 3529
4 shows New Moore drying to half a metre or less except at one point where it dries to 1.1
5 metre. If one bases himself on that chart, *a fortiori*, it explains that almost all New Moore
6 would have been under water for almost the entirety of 24 October. I add that had the tidal
7 range been higher, the base points located on low-tide elevations may still not have been
8 visible as land features but the tell-tale signs such as the breakers and water discolouration
9 would have been more distinct.

10
11 34. Now, this also points at the second reason why we could not see new Moore
12 emerging – New Moore, an indisputably an existing low tide-elevation. As I have just said,
13 that day, the lowest tides – the only ones when small parts of New Moore emerged –
14 occurred at 6.30am or 6.40pm. We awoke early that day, but I am not sure, Mr. President, it
15 would have been possible or “feasible” (a word our friends do not like much...) to be on
16 the spot at -- on time this morning. And I would not think we would have enjoyed a night
17 sailing for moving up the main channel and having a second night at Jessore Air Force base
18 – or the Raimangal channel and having a second night at Jessore Air Force base – in spite
19 of their excellent welcome... This being said, without wanting to anticipate too much on
20 what Sir Michael will have to say, I note *en passant* that (a) all old and current charts
21 describe New Moore as a low-tide elevation and (b) that it is not only common, but
22 universal practice, to choose base points not by going on the spot, but in accordance with
23 the usual maritime charts.

1 **Projection 8: Tides at Site – 24 October 2013**

2

3 35. The third reason why this part of our visit was not very fruitful, that is with
4 respect to the base points, is of course the bad weather – and things would have been much
5 worse had we gone on the spot in August as Bangladesh had first proposed.⁸⁶ This said, I
6 concede that the Bangladesh authorities cannot be blamed for everything: they are not
7 responsible for the bad weather! It remains that the poor meteorological conditions were
8 extremely prejudicial concerning the determination of the submerged base points most of
9 which could be perceived – but with difficulty and only owing to, as I have already
10 recalled, breakers, foam or changes in the colours of the sea; or they could be seen but only
11 owing to the infra-red camera fixed under our impressive Hercules plane. For its part point
12 I3 could not be detected – but I hasten to add that this certainly does not mean that the – that
13 this certainly does mean that the low-tide elevation on which it is situated does not exist –
14 as, again, is shown by all the existing charts; moreover, the tide was around 2 meters when
15 the aircraft was over Indian base point I-3. The only conclusion which can be drawn from
16 what I have said is that, under the prevailing conditions, marked by heavy rains and the
17 consecutive lowering of sea surface temperature, I-3 could not be seen by the participants
18 to the site-visit.

19

20 **End of Projection 8**

21

22 **3. The main channel of the Hariabhanga**

23

24 36. If not for the pleasure of the visit, the bad weather conditions were much
25 less prejudicial in respect to the determination of the main channel of the Hariabhanga.
26 Like Mr. Larry Martin, I have been struck by the hugeness of the spaces where the rivers

⁸⁶ See e.g. the Letter from the Agent of India to the Registrar dated 24 January 2013.

1 and the sea meet⁸⁷ – whether you see it from the air or from the sea. But this does not affect
2 the only relevant question: where is the main channel situated?
3

4 37. Let us see what conclusions can be inferred from the site visit in this
5 respect. Professor Reisman will shortly – but not briefly – revert to this, probably
6 tomorrow morning, I can be relatively brief – but this is important enough to be underlined.
7

8 38. This determination of the main channel of the Hariabhanga was the most
9 important, if not sole, purpose of the site inspections conducted respectively by
10 Bangladesh on the morning of 24 October and by India on the afternoon of that same day.
11

12 39. To please my friend James Crawford, let's be Cartesian, Mr. President: the
13 morning first. Bangladesh conducted their onsite sea inspection in two Patrol Crafts. The
14 visit set off from Mandarbaria Island and the craft was navigated south through the River
15 Raimangal to the centre of the River Hariabhanga from where the inspection commenced.
16 Being on the other craft, I could not have the benefit of Rear Admiral Alam's
17 demonstration when he lectured the members of the Tribunal about the location of the main
18 channel.⁸⁸ But I'm afraid that his demonstration was contradicted by the very route
19 followed by the craft. Let's have a look at it.
20

21 **Projection n° 9: Onsite Sea Inspection Route - Bangladesh**

22

23 40. It is interesting to note that the Bangladesh craft merely navigated to the
24 land terminus point as proposed by Bangladesh through the select parts of a minor opening
25 which lays West of New Moore. They did not attempt to demonstrate the drift or flow of
26 the main channel of the River Hariabhanga. Further, and this is a most important point,
27 which, I am sure, will not have escaped the attention of the Tribunal, the craft did not go

⁸⁷ Transcript, 9 December 2013, Mr. Martin, p. 36, para. 21.

⁸⁸ BD Sea Inspection-Patrol Boat (PCA), 24 October 2013 – am (Day 3), 1:39 to 1:43.

1 beyond the point proposed by Bangladesh. And for good reasons: this so called main
2 channel of River Hariabhanga (West of New Moore) as claimed by Bangladesh is not a
3 continuous one and its navigability is effectively blocked.⁸⁹ Just have a look at the shallow
4 soundings as it descends southward, which can be discerned on the Chart **Flash the**
5 **shallow relevant parts** – which, I have to specify, is the Bangladesh chart 3529 of 2012.
6 On this basis, the course of the River Hariabhanga would appear to be more realistic and
7 closer to what is on ground if a 9-meter contour is drawn, instead of the 10 meter contour
8 which is depicted on the chart. The chart with a 9-meter contour is available at tab 2.12 of
9 your Folders.

10
11 41. Prudently – and fortunately both for the ships and for their passengers...–
12 the crafts stopped well short of the shallow area. This most welcomed prudence, and this
13 failure to navigate where it would have been expected if the main channel been located
14 west of New Moore Island, speak volumes: this western channel is *not* the main channel.
15 And the Bangladesh conducted inspection tells another lesson: during its passage in the
16 Raimangal River the craft navigated *very* carefully – very carefully -- keeping *very* close to
17 Mandarbaria Island along the main channel of River Raimangal to avoid the shoals which
18 lay due west. This clearly indicates that the main flow of the Raimangal River is in a
19 south-south westerly direction hugging the west coast of Mandarbaria Island.

20
21 **End Projection 9 – Projection n° 10: Onsite Inspection – India’s Drifting Experience**

22
23 42. Some words now on the inspection conducted by India on the afternoon of
24 24 October. I will not come back at length on the demonstration we have made concerning
25 the location of the main channel – Michael Reisman will. Let me just recall the
26 methodology, and then directly turn to the factual and geographical conclusion which can
27 be drawn from it. Twice – and it could have been repeated as many times as the Bangladesh
28 representatives, or the Tribunal would have wanted (save for the nightfall) – twice the

⁸⁹ See ICM, paras. 4.18 and 4.29 and IR, paras. 2.41-2.42 and the comparison of the relevant charts *ibid.*, pp. 34-37.

1 engine of the hovercraft was stopped; then the craft was left adrift – unavoidably it went,
2 slowly but surely, downstream following the direction of the main channel as depicted by
3 India. The conclusions seems quite obvious:

4 - *First*, the main channel of the Hariabhanga flows in a south easterly direction well
5 past New Moore where it conjoins the Raimangal River and enters the Bay at a point where
6 we have proposed our starting point for the sea delimitation by this Tribunal;

7 - *Second*, from that point onwards, the main channel of the conjoined rivers in the
8 common Estuary moves in a southerly direction forming the main channel out to the sea
9 which is East of New Moore.

10
11 **End of Projection n° 10.**

12
13 43. Mr. President, I can certainly not be seen as an impartial witness – and I do
14 not pretend I am. This said, I must say quite frankly that this afternoon of 24 October has
15 been, for me, the culmination of our visit and the experience led by India the most telling
16 part of the site visit. This is certainly why our friends on the other side have been so keen to
17 try to obtain its elimination from the admissible evidence. This is also why, as I said,
18 Professor Reisman will come back to it in his speech, if it pleases you, Mr. President, to
19 yield him the floor – although his presentation will, more generally, bear upon the starting
20 point of the sea delimitation and will be continued tomorrow. Thank you very much, Mr.
21 President, Members of the Tribunal, for your kind attention.

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PRESIDENT WOLFRUM: Thank you, Professor Pellet, for your presentation. And I believe it's now the turn for Professor Reisman to continue for today.

PROFESSOR REISMAN: Thank you, Mr. President.

12 December 13

PERMANENT COURT OF ARBITRATION

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

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

ARBITRATOR'S FOLDER

REPUBLIC OF INDIA

LAND BOUNDARY TERMINUS

PROFESSOR W. MICHAEL REISMAN

I. INTRODUCTORY REMARKS

1. Mr. President, Members of the Tribunal: It is an honor to appear before you on behalf of the Government of India. As Professor Pellet my colleague has just explained, my task is to review India's position with respect to the location of the land boundary terminus and the starting point of the maritime boundary and to comment on

1 Bangladesh's position. I shall be presenting some charts and maps as well as PowerPoints
2 of key documents; you will also find them in your folders.

3 2. The land boundary terminus is the point where the closing line between the
4 two headlands of the Estuary intersects the mid-stream of the main channel of the rivers
5 Raimangal and Hariabhanga. Until this Monday, it *seemed* that the parties may have
6 agreed on the location of the closing line because, while India had provided precise
7 coordinates on each headland, as you can see, [Tab 3.1.] Bangladesh had only provided a
8 sketch which seemed to follow the Indian coordinates. [Tab 3.2.]

9 3. On Monday, Professor Sands introduced "precise coordinates" one of
10 which is 1.6 kilometers inland⁹⁰; the other is identical to the first. So India is still in the dark
11 as to how the Bangladesh delegation plots its closing line. Mr. Cleverly's answer to
12 Professor Shearer's question did not contain sufficient information to enable our
13 cartographers to verify the coordinates when they tried to plot it, so we were all the more
14 bemused when Professor Sands blamed India for the discrepancy. After explaining that
15 "This difference quite simply results from the use of different charts,"⁹¹ Professor Sands
16 said ". . . despite India's incorrect identification of the closing line, the outcome is not very
17 different from Bangladesh's line."⁹² We still only have Bangladesh's sketch. But since it
18 seems to approximate India's closing line and Professor Sands says "the outcome is not
19 very different", India rests its case on its closing line at the coordinates which were in the
20 Counter-Memorial and the Rejoinder. You can see them on the screen. [Tab 3.3.]

⁹⁰ Sands transcript paragraph 74, p. 92, line 3 and 4.

⁹¹ Sands, ¶ 72.

⁹² *Id.*, at ¶ 75.

1 4. Mr. President, if we are willing to accommodate Bangladesh on that point,
2 we must take issue with figures which present water areas in the Estuary as if they were dry
3 land. Bangladesh Figure 16, for example, shows the closing line crossing land. [Tab 3.4.]

4 5. The critical point of this disagreement is the location of the main channel
5 descending from the north to the Bay. [Tab 3.5.] Happily, the Parties do agree on the
6 identity of the key legal provision for resolving this difference. [Tab 3.6.] The highlighted
7 words on the screen are in Notification No. 964 of 1925 of which you'll now be quite
8 familiar; the Parties agree that that Notification is what the Radcliffe Award referred to
9 when it said "the boundary between the Districts of Khulna and 24 Parganas, to the point
10 where that boundary meets the Bay of Bengal." [Tab 3.7] But the Parties disagree on the
11 legal interpretation of that provision, on the legal material relevant to the interpretation
12 and, factually, on features of the "midstream of the main channel."

13 6. So, if it please the Tribunal, I will turn to the interpretation of the provisions
14 which are the centerpiece of the applicable law and, then, to the facts to which the law must
15 be applied.

16 **II. THE APPLICABLE LAW**

17 7. As to the applicable law, three instruments are dispositive:
18 (i) the Radcliffe Award of 12 August 1947 including the Map in Annexure B;
19 (ii) Notification No. 964 Jur. of January 1925; and
20 (iii) the Bagge Award of 26 January 1950. **[Proj.]**

21 Professor Sands treated these instruments on Monday, but as India does not agree with a
22 number of his statements, let me recall each instrument briefly.

1 | **A. The Radcliffe Award**

2 |
3 | 8. The Radcliffe Award set out the entire boundary in its Annexure A.⁹³ As
4 | you can see, paragraph 2 of Annexure A provides that:

5 | A line shall then be drawn from the point where the boundary between the Thanas
6 | of Haripur and Raiganj in the district of Dinajpur meets the border of the province
7 | of Bihar to the point where the boundary between the districts of 24 Parganas and
8 | Khulna meets the Bay of Bengal. This line shall follow the course indicated in the
9 | following paragraphs⁹⁴ [Tab 3.8.]

10 | The relevant description is in Annexure A's concluding paragraph 8:

11 | The line shall then run southwards along the boundary between the Districts
12 | of Khulna and 24 Parganas, to the point where that boundary meets the Bay of
13 | Bengal.⁹⁵ [Tab 3.9.]

14 | As you can see, Mr. President, the territories of the districts of Khulna and 24
15 | Parganas, to which paragraph 8 refers, reach the Bay of Bengal.

16 | 9. In your letter of November 4, 2013, you posed three questions about the
17 | Radcliffe Award and I shall be providing India's responses to them as I proceed. But allow
18 | me to say straight out that India agrees with Bangladesh that the Radcliffe Award (I am

⁹³ Case concerning the boundary disputes between India and Pakistan relating to the interpretation of the report of the Bengal Boundary Commission 12 and 13 August 1947, XXI Reports of International Arbitral Awards 1 (1950); Bangladesh Memorial, Vol III, 4.

⁹⁴ *Id.*, at 6.

⁹⁵ *Id.*, at 7.

1 quoting Bangladesh) “established the entirety of the land boundary between India and East
2 Pakistan, including the terminus of the boundary where it meets the Bay of Bengal.”⁹⁶

3 10. I intend to address other aspects of the Tribunal’s questions in a moment.
4 But first let me complete the review of the applicable law.
5

6 **B. Notification No. 964 Jur.**
7

8 11. You will recall that paragraph 8 of Annexure A of the Radcliffe Award
9 decided that “The line shall then run southwards along the boundary between the Districts
10 of Khulna and 24 Parganas, to the point where that boundary meets the Bay of Bengal.”⁹⁷

11 **[Tab 3.10.][Tab 3.11.]**

12 12. Inasmuch as the Radcliffe Award thus confirmed that the pre-1947 district
13 boundary would henceforth be the international boundary, the Parties agree that the
14 definition of the district to which the Award referred is in the Government of Bengal’s
15 1925 Notification, Notification 964 JUR. The Notification declared that the last sector of
16 the district boundary is formed by – and these are the critical words – “the midstream of the
17 main channel for the time being of the rivers Ichhamati and Kalindi, Raimangal and
18 Haribhanga until it meets the Bay.”⁹⁸ **[Tab 3.13.]**

19 13. Here, we encounter several critical points of disagreement. First, the Parties
20 disagree as to which river *or rivers*’ main channel the Notification refers. Second, the

⁹⁶ MB, ¶ 5.4.

⁹⁷ *Id.*, at 7.

⁹⁸ Government of Bengal, Notification 964 Jur. (24 January 1925), reprinted in *The Calcutta Gazette* (29 January 1925). III Bangladesh Memorial at Tab B9.

1 Parties disagree as to which is the **main** channel. Third, for determining the answers to
2 these questions – which rivers and the location of the main channel-- they disagree as to
3 whether the map in Annexure B of the Radcliffe Award, the Radcliffe Map, is a full part of
4 the Award and, if so, what it shows. Fourth, the Parties disagree on which other map
5 evidence may be relevant and the weight it should have in relation to the Radcliffe Map.
6 This is a particularly critical issue for Bangladesh, because, while India finds that the
7 Radcliffe Map is clear on this point and so informative as to be dispositive of the location
8 of the rivers in question, Bangladesh dismisses the Radcliffe Map as a rough sketch map,
9 so lacking in precision that one must resort to a “contemporaneous chart”.⁹⁹ And, fifth,
10 insofar as contemporary data is necessary (for Bangladesh) or supplementary (for India),
11 the Parties disagree on what constitutes “contemporaneous” data on the rivers and main
12 channels in the Estuary. Professor Sands puts “the probative value of contemporaneous
13 evidence” ... at the heart of the dispute.”¹⁰⁰

14 14. There are, thus, quite a few points of disagreement. I will work through
15 them as methodically as I can.

16 15. Bangladesh reads the Notification as referring only to the midstream of the
17 main channel of the Hariabhanga River. This, it argues, would put the boundary between
18 the two states along a line, as Bangladesh puts it, “hugging the Indian coast.”¹⁰¹

19 16. Bangladesh’s reading of the Notification is incorrect on its face; the
20 Notification presents the rivers together and not, as Bangladesh argues, as “sequential”.
21 The Notification says “the midstream of the main channel of the rivers Ichhamati and
22 Kalindi, Raimangal and Haribhanga till it meets the Bay.” [Tab 3.14.]

⁹⁹ BR, ¶ 3.12.

¹⁰⁰ Sands, at ¶ 24.

¹⁰¹ MB, ¶ 5.8.

1 17. The Notification’s description of the “Raimangal and Hariabhanga” as
2 joined at the point of meeting the Bay, far from being an anomaly, is an accurate
3 description of the actual joinder of the two rivers before they meet the Bay of Bengal. Only
4 look at the Radcliffe Map which clearly shows the joinder of the Hariabhanga and
5 Raimangal Rivers *before* the conjoined rivers descend to the Bay of Bengal. [Tab 3.15.]

6 18. Even Bangladesh’s data confirm it. I am now displaying Bangladesh’s
7 Chart 7501. The nine meter contour map, on which the proposed land boundary terminus
8 of each Party has been superimposed, shows the Hariabhanga and Raimangal Rivers
9 joining before India's proposed point, whereupon the conjoined rivers descend into the Bay
10 of Bengal. [Tab 3.16.] [Tab 3.16.] This is, as I said, Mr. President, Bangladesh’s
11 Chart.

12 19. Nor has any neutral scientific observer said otherwise. Indeed, the boundary
13 as the midstream of the joinder of the Hariabhanga and Raimangal rivers was confirmed by
14 none less than Commander R. H. Kennedy. In a study of bays and estuaries whose coasts
15 belong to different states, which he prepared in 1957 for the First United Nations’
16 Conference on the Law of the Sea, Commander Kennedy described the boundary between
17 India and what was then East Pakistan– as “reach[ing] the sea in the vicinity of the mouths
18 of the Hariabhanga and Raimangal rivers, two of the rivers forming part of the delta of the
19 River Ganges. These two rivers meet in a common estuary.”¹⁰² [Tab 3.17.]

20 20. Bangladesh ignores the language of Notification No. 964 Jur. and
21 repeatedly states that the text only refers to the Hariabhanga. That is incorrect. Bangladesh
22 cites no evidence that might justify departing from the text of the Notification, from the

¹⁰² Commander R.H. Kennedy, “A Brief Geographical and Hydro Graphical Study of Bays and Estuaries the Coasts of which Belong to Different States,” Document A/Conf.13/15, 13 November 1957. Indian Rejoinder Volume India, Annex RJ3.

1 Radcliffe Map and from Commander Kennedy’s study. To be fair, Professor Sands tries
2 but his effort requires him to abbreviate the provision. Here is what he said to you on
3 Monday: [Tab 3.18.]

4 “The placement of the word “and” between the “Raimangal and
5 Hariabhanga” simply ends a series of more than three objects – there is nothing
6 more to it than that.”¹⁰³

7 But he immediately acknowledges “It might be said, I suppose, that the odd choice is the
8 use of the “and” between “Ichhamati and Kalinidi.””¹⁰⁴ After some further struggles, he
9 concludes “It is difficult to see, however, that it can be anything other than a stylistic
10 choice.”¹⁰⁵ “A stylistic choice?” The bureaucrats and cartographers who prepared the 1925
11 Notification were not writing scanning poetry. They were writing a regulation. Mr.
12 President, members of the Tribunal: There is no mystery here. The Radcliffe Map,
13 Commander Kennedy, and a sequence of charts over 50 years indicate that “the two rivers
14 meet in a common estuary”, to quote Commander Kennedy again, and that is the land
15 terminus point.

16 21. But, Mr. Chairman, this disagreement between the Parties may be a
17 difference without legal consequence for the resolution of the case. One of the great ironies
18 of Bangladesh's argument here is that its distortion of the text of the Notification ultimately
19 fails to assist it, for, as is clear from Bangladesh’s own Map 7501, the one with the
20 nine-meter contour imposed, even if one treats the rivers upstream as sequential, the main
21 channel of the Hariabhanga River itself swings eastward in any event, descending to the

¹⁰³ Sands, ¶ 57.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

1 Bay to the east of New Moore Island. [Tab 3.19.] And, again, the Radcliffe Map clearly
2 indicates the end of the land boundary at the same place. Incidentally, though I have
3 displayed a recent Bangladesh chart, one of the charts which Bangladesh used for you,
4 during its visit to the Estuary, I will show you in a few moments, that data from 1879,
5 which was the basis of British Admiralty 859 of 1931, show the main channel of the
6 Hariabhanga swinging eastward and descending to the Bay to the east of New Moore.

7 22. The point is that the determination of the first question – which rivers – is
8 clearly resolved by the Radcliffe Award and the Notification. It is where the Raimangal
9 and Hariabhanga meet. And even if one chooses to look only to the Hariabhanga, its main
10 channel reaches the same point. But this brings us to the second question which calls for
11 the identification of the “main channel” and its “midstream” and, that, in turn, brings us to
12 the issue of what Professor Sands repeatedly referred to as “contemporaneous evidence.”

13 [Tab 3.20.]

14 23. Notification No. 964 Jur. speaks of “the **midstream** of the main channel”.
15 The terms “midstream” and “main channel” indicate that a criterion for the selection of the
16 boundary was navigability, a maritime feature of special importance in international fluvial
17 delimitation: that type of boundary ensures that each riparian has the opportunity to enjoy
18 the use of the navigational utility of the waters concerned and, not the least, access to its
19 respective interior. This means that insofar as there may be more than one channel in the
20 designated rivers, the boundary is the midstream of the “**main** channel”; and it is the **main**
21 channel by virtue of its superior navigability. One may note in this regard, the Notification

1 No. 964 JUR. is consistent with international law, as confirmed by the International Court
2 in *Kasikili-Sedudu*.¹⁰⁶

3 24. There is no evidence, of which we are aware, that Sir Cyril Radcliffe (or
4 Mountbatten who was not a member of the Commission but to whom Professor Sands
5 refers) were busily poring over maritime charts when they adopted Notification No. 964
6 JUR. For the last and southernmost segment of the Bengal boundary. Certainly, Radcliffe
7 appreciated that the boundaries he was drawing were to become international and he was
8 concerned, among other things, that communications, in a henceforth divided territory, be
9 maintained insofar as possible. But if Notification No. 964 Jur. or the Radcliffe Award
10 were unclear (and we insist they are not), but if they were, it would be appropriate to
11 inquire as to what “contemporaneous evidence” could further illuminate the matter. What
12 would be the most contemporaneous evidence? Bangladesh’s answer is BA Chart 859, the
13 1931 edition, as Bangladesh believes it is closest in time to the Commission. By the same
14 token, Bangladesh seeks to disqualify all of the subsequent charts and images which India
15 adduced on the ground that they are not contemporaneous. Well, I correct myself -- almost
16 all. Mr. Cleverly, in answering Professor Shearer’s question, briefly revived the 1953
17 edition of BA 859 because the Estuary had not changed!¹⁰⁷

18 25. Mr. President, Members of the Tribunal, you will have observed the point
19 that my colleague Professor Pellet has just presented. Professor Sands spent almost no
20 time in his presentation reviewing the site visit to the Estuary. The fact that the Tribunal

¹⁰⁶ *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Reports 1999.

¹⁰⁷ R. Cleverly, “As regards the movement of the latitude/longitude grid between the 1931 and 6 1953 editions of BA859, there is a shift westwards of about 0.5M. This movement 7 was the result of updates to the chart, although no changes to charted data were 8 made in the area of the Raimangal estuary. Bangladesh places no reliance on the 9 1953 edition, except to illustrate Commander Kennedy’s report.” Day 2, Tuesday 10 December 2013, p. 237, ¶ 2.

1 ordered it indicated that it recognized that the geographical, hydrological and bathymetric
2 situation there could be relevant to the Tribunal’s discharge of its mandate to determine the
3 land terminus point; that is a decision that will be enormously consequential for land-based
4 activities in both States; as Professor Pellet has just recalled, observing “the mouth of the
5 Hariabhanga in situ” was the first purpose, especially emphasized by the Tribunal when it
6 decided on a site visit. Bangladesh's emphasis on “contemporaneous evidence”, which, as I
7 will explain, means maritime source data gathered in 1879 and published in that year, can
8 best be described as one more part of its evading the Tribunal’s direction to encounter the
9 actual conditions in the Estuary.

10 26. Professor Sands reviewed case law on the role of contemporaneous
11 evidence at length. Although we do not agree with all of his interpretations, I do not intend
12 to review them, for three reasons: first, BA 859 is not the most contemporaneous chart;
13 second, the evidence confirms that the profile of the Estuary and the location of the critical
14 rivers has not changed so that more recent evidence is entirely appropriate; and, third and
15 most important, the map evidence from BA 859 and its subsequent editions – and indeed
16 from its first edition in 1879 – show that the main channel of the Hariabhanga River swings
17 to the east of New Moore and intersects **India’s** land terminus point.

18 27. Let me elaborate each of these points. First, the data on which BA 859 is
19 based were gathered no later than 1879. None of the data on the Estuary was updated in the
20 subsequent editions of the charts through 1931 and even beyond. That is hardly
21 contemporaneous with a decision taken in 1947. [Tab 3.21.] [Tab 3.22.] [Tab 3.23.] Mr.
22 Reichler developed some fascinating parallels between the Myanmar judgment’s numbers
23 and those in the instant case. If we adapt that interest-intriguing numerical technique, data

1 | within a 66-year span going forward – and backward – should qualify as
2 | “contemporaneous” in Bangladesh's use of the term. That takes us back to 1879 to be sure
3 | and forward to 2013!

4 | 28. But use of subsequent data would be reasonable and permissible in terms of
5 | the case law only if the geographical situation in the Estuary has not changed. Mr.
6 | President, Bangladesh has repeatedly invoked coastal instability, and my colleague
7 | Professor Pellet has commented on its exaggeration. I would simply note that India's charts
8 | and all of the charts which Bangladesh has submitted show the essential profile of the
9 | Estuary essentially unchanged over time. **[Tab 3.24.]**

10 | Displayed are British Admiralty Chart 859 of 1880, one year after 1879 at the top, based on
11 | the data of 1879, and BA 813 of 1996. Please note the continuity through time of the profile
12 | of the Estuary.

13 | 29. Even if there is instability in certain coastal areas of Bangladesh and India,
14 | that instability is largely a consequence of factors emanating from the marine environment.
15 | By contrast, the forces operating on the Rivers Hariabhanga and Raimangal emanate from
16 | the land. The successive charts do not show the rivers in different locations. Hence
17 | evidence about them should be admissible.

18 | 30. Third, and most important, BA 859, as I explained earlier, clearly shows the
19 | flow of the Hariabhanga descending southeasterly and to the east of New Moore. Rejoinder
20 | Figures, R 2.5, a, b, c, and d, show this clearly over time. **[Tab 3.25.] [Tab 3.26.] [Tab**
21 | **3.27.]**

22 | 31. Thus, Mr. President, Members of the Tribunal, India submits that
23 | cartographic and satellite evidence after 1947 is admissible and probative. Moreover, it is a

1 matter of common sense: where the area has not changed but better data is available, as
2 compared to the rudimentary hydrographic, bathymetric and cartological methods in use
3 134 years ago, surely one will turn to the better data, *a fortiori* when mariners' lives are at
4 stake.

5 32. Before I turn to the factual data showing the midstream of the main channel
6 to the east of New Moore Island and the comparative navigability of the eastern and
7 western channels, I must complete the survey of the components of the texts that comprise
8 the applicable law for the determination of the land boundary terminus: I refer to the
9 Radcliffe Map and the Bagge Award. In your letter to the Parties of 4 November 2013, you
10 indicated that the Tribunal "would welcome clarification of the Parties' respective
11 positions regarding the relevance of the "Radcliffe Map" to this arbitration." This is an
12 opportune moment for India to respond to that question.

13
14 **C. The Radcliffe Map as an Integral Part of the Award [Tab 3.28.]**

15 33. Mr. President, Article 31 of the Convention on the Law of Treaties says
16 famously that the terms of a treaty are to be defined in their "context" which it defines as
17 including the treaty's "preamble and annexes." The Radcliffe Map in Annexure B is an
18 annex of the Radcliffe Award. The Parties agree that the Map is part of the Award and, as
19 has been stated, that the Award determined the land boundary terminus. A reproduction of
20 the entire map is annexed in Volume III and is now available here in the courtroom. [**Tab**
21 **3.28.**]

1 34. A word about nomenclature, Mr. President, Members of the Tribunal: The
2 “Radcliffe Map”, while a convenient abbreviation for Annexure B of the Award, is
3 something of a misnomer, for it is not a sketch map which Sir Cyril Radcliffe dashed off,
4 whether hurriedly or carefully. It is a professionally prepared government map, compiled
5 in 1944 by the Bengal Drawing Office, which was part of the Government of India. [Tab
6 **3.28.**] It is entitled “Map of Bengal” and it indicates, *in its original printing*, the boundaries
7 of all of the districts of what then comprised the whole of Bengal. And it is a large map, as
8 you can see, measuring 3 feet, 11 inches by 4 feet, 10 inches and, if I may correct a
9 misstatement on Monday, its scale is clearly marked as one inch to 8 miles. [Tab **3.28.**]
10 Indeed, it is what the Bagge Award called “a congregated map of the district maps used at
11 the time of the latest notifications”.¹⁰⁸ As such, it is comprised of four separate sheets
12 which are carefully put together but with discernible seams. It was clearly prepared for
13 official purposes, as its legend’s references are to province, district and sub-division
14 boundaries, police stations, railways and different types of roads. [Tab **3.28.**]

15 35. It is also clear that the map was current as of July 1947, for, below the
16 printed legend – let’s see if I can draw it to your attention – it’s probably clear up on the
17 screen. Below the printed legend, you will see in the upper right quadrant, a handwritten
18 inscription that says “Prepared by the Bengal Drawing Office in July 1947.” I trust the
19 Members of the Tribunal’s eyesight is better than mine.[Tab **3.28.**]

20 36. The certification by Sir Cyril Radcliffe of the authenticity of the map says,
21 in Radcliffe’s hand, “Certified as Annexure B of my Report dated 12th August 1947, Cyril
22 Radcliffe, Chairman – Bengal Boundary Commission”. A stamp along with writing above

¹⁰⁸ Bagge Award, *UNRIAA*, Vol. XXI, p. 28; MB, Vol. III, Annex B16.

1 the legend of the map indicates that this particular map was also submitted in the Bagge
2 arbitration, on which I will comment, I expect, tomorrow.

3 37. As a map of Bengal, the Bengal Drawing Office marked all the district
4 boundaries by a black line which is highlighted by a thicker green line. The legend
5 indicates that the black and green highlighted lines mark the various provincial boundaries.
6 The boundaries are plainly drawn with care, including those boundaries which run in
7 rivers. Some of the river boundaries are on one or the other of the banks, sometimes the
8 river boundaries follow the approximate center of the rivers. The attention with which the
9 black lines are drawn is particularly striking in marking the boundaries in the many inlets
10 which dot the Bengali coast. Sometimes the district boundary line veers sharply to one
11 bank or the other.

12 38. A clearly distinguished red line marks the Radcliffe Commission's
13 boundary line. But this is very important: that Radcliffe, or whoever he authorized to
14 prepare the map for his signature, did not draw a "new line". There is no Radcliff line in
15 that sense in the section of the boundary that interests us; the Award's line simply traces the
16 specific, pre-existing district boundary between Khulna and 24 Parganas which was
17 already inscribed on the 1944 map.

18 39. Professor Sands dismisses the Radcliffe Map as a small scale map,¹⁰⁹ a
19 "roughly drawn map".¹¹⁰ Bangladesh tried to diminish the probative value by referring to
20 it as the "the rough-drawn map attached to the Radcliffe award"¹¹¹ and "the rough

¹⁰⁹ Sands, ¶ 15.

¹¹⁰ Sands, ¶ 22.

¹¹¹ BR, ¶ 3.3.

1 Radcliffe sketch-map.”¹¹² Mr. President, if it’s a “rough-drawn map”, then the entire
2 professionally prepared map is “rough-drawn”, for Radcliffe simply confirmed the
3 already-existing district boundary line, by marking it in red. But the Bengal Drawing
4 Office’s Map is not, as you can see, “rough-drawn” by any measure and, I submit,
5 consequently, neither is the Radcliffe line.

6 40. Bangladesh finally does concede that the Radcliffe Map “is important and
7 instructive, but”, it adds, “plainly not intended to be authoritative.”¹¹³ Bangladesh does
8 not, however, explain why the signed map was not intended to be authoritative. Annexure
9 B is as much a part of the Award as Annexure A and the Award expressly assigns the map
10 a value whose evidentiary weight is negated only if the description of the boundary on the
11 map diverges from the boundary as described in Annexure A. Paragraph 10 of the
12 Radcliffe Award states: **[36.]**

13 The demarcation of the boundary line is described in detail in the schedule which
14 forms Annexure A to this award, and in the map attached thereto, Annexure B. The
15 map is annexed for purposes of illustration, and if there should be any divergence
16 between the boundary as described in Annexure A and as delineated on the map in
17 Annexure B, the description in Annexure A is to prevail.

18 What does that mean? If the boundary line which Radcliffe drew on the map does not
19 diverge from the boundary as described in Annexure A of the Award, the map should be –
20 and is -- conclusive as to the meaning of the Award.

¹¹² BR, ¶ 3.27.

¹¹³ *Ibid.*

1 41. Bangladesh has also tried to deny the Map its proper legal effect; but
2 international law is clear: the Chamber in the Burkina/Mali *Frontier Dispute* held that
3 maps may acquire legal force when “annexed to an official text of which they form an
4 integral part.”¹¹⁴ The Radcliffe Map is just such a map.

5 42. Bangladesh has also tried to depreciate the probative value of the Map,
6 stating that “the map is not intended to be anything more than generally illustrative.”¹¹⁵
7 But Bangladesh selectively quotes only one phrase in the Award’s paragraph 10 (which I
8 just read) and thus inverts its meaning. The Radcliffe Award clearly indicated how the map
9 in Annexure B was to be used in relation to the verbal description in Annexure A: [**Tab**
10 **3.29.**] As you can see, paragraph 10 of the Award does not confine the map to a “generally
11 illustrative” function. If the boundary line in Annexure B does not diverge from the verbal
12 description in Annexure A, then the Map is probative.

13 43. As a last defense, Bangladesh argues that the Map lacks “sufficient scale
14 and level of detail necessary to determine the exact location of the boundary along the
15 midstream of the main channel of the Haribhanga River.”¹¹⁶ Overlooking the fact that the
16 text is the “Raimangal *and* Hariabhanga”, Bangladesh's argument mistakes the evidentiary
17 relevance of the Radcliffe Map in this case. The function of the Map was not to show “the
18 exact location of the boundary along the midstream of the main channel”; it could only
19 identify the *main channel*, which it clearly does. As for the location of the midstream of
20 that channel, it was fluid, an interpretation which was confirmed in the *Bagge Award*, and,
21 more importantly, by subsequent agreement, as my colleague Mr. Shankardass explained

¹¹⁴ Frontier Dispute (Urkina Faso’ Mali) Judgment ICJ Reports 1986, p. 582, ¶ 54.

¹¹⁵ BR, 3.27.

¹¹⁶ BR, 3.29.

1 earlier this afternoon, and that is the last component of the applicable law for this matter, to
2 which I will turn in a moment.

3 44. Your November 4 letter asked if “the Parties agree that the copy of the
4 “Radcliffe Map” is either authentic or at least an exact reproduction of the original map?”
5 Mr. President, Members of the Tribunal: Speaking for India, the Map in Volume III of the
6 Rejoinder is an exact reproduction of the original. The original, authenticated by Sir Cyril
7 Radcliffe’s signature, is in this court room.

8 Mr. President, if it please the Court, this could be a.....

9
10 **D. The Bagge Award**

11
12 45. Mr. President, Members of the Tribunal: My colleague, Mr. Shankardass,
13 has already discussed the events surrounding the Bagge Award, so I can be very brief.
14 When disputes arose over the interpretation of the Radcliffe Award, India and Pakistan
15 agreed in 1948 to submit some of them to another mixed tribunal, composed of Indian and
16 Pakistani arbitrators and chaired by Algot Bagge of Sweden of the Swedish Supreme Court
17 – formerly of the Swedish Supreme Court. In 1950, Justice Bagge interpreted the
18 Radcliffe Award with respect to one of its fluvial boundaries to the north of the segment
19 fixing the land boundary terminus to the north. After confirming the midstream of the main
20 channel as the boundary of the Ganges, Justice Bagge held: **[Tab 3.30.]**

21 If the demarcation of this line is found to be impossible, the boundary between
22 India and Pakistan in this area shall then be a line consisting of . . . the boundary

1 following the course of the midstream of the main channel of the river Ganges as
2 determined on the date of demarcation and not as it was on the date of the award.¹¹⁷

3 You will note that I am quoting the presiding arbitrator and not the separate
4 opinions of the two respectively dissenting and concurring Awards.

5 46. The Bagge Award cannot be read, however, without its sequel, and I think
6 this is critical, and if you'll indulge me, I'll repeat something that Mr. Shankardass said.
7 The sequel was that: the practice of India and Pakistan in their implementation of the
8 Radcliffe Award with respect to the segment between Khulna and 24 Parganas was agreed
9 in 1951. In a diplomatic note to India on 7 February 1951, shortly after the Bagge Award,
10 Pakistan stated: **[Tab 3.31.]**

11 “the Government of Pakistan have very carefully considered the question of
12 river boundary between Khulna and 24 Parganas. That's the segment that goes to
13 the land terminus, and they are of the opinion that the boundary in this section
14 should be fluctuating. It is hoped that the Government of India will agree”.¹¹⁸
15 **[Tab 3.32.]**

16 India did agree; on 13 March 1951, it said: **[Tab 3.33.]**

¹¹⁷ Bagge Award, UNRIIA, Volume 21, 28, 29.

¹¹⁸ No. 1(1).3/10/50, 7 February 1951 (Vol. II, Annex RJ-1). [footnote 76 in the Rejoinder of the Republic of India, Volume 1, 31 July 2013.]

1 “we agree that the boundary between Khulna and 24 Parganas running
2 along the midstream of the rivers should be a fluid one and are issuing necessary
3 instructions to the authorities concerned”.¹¹⁹

4 Professor Sands says only that the Pakistani correspondent, A.A. Shah, was “purportedly
5 writing for the Secretary of the Government of Pakistan”.¹²⁰ India has no reason to doubt
6 this Pakistani governmental communication, has no evidence that it has not been honored
7 and rests on its submission.

8 47. So, Mr. President, Members of the Tribunal, the last element of the
9 applicable law holds that the land terminus of the boundary is the fluctuating midstream of
10 the main channel of the Raimangal and Hariabhanga Rivers. The critical question is, then,
11 the location of the main channel.

12 48. For that determination, I ask your indulgence to turn to the factual data, first
13 to Map Evidence.

¹¹⁹ Copy of Express Letter from Foreign, New Delhi to Foreign, Karachi, No. F. 20/50-Pak.III, 13 March 1951 (Vol. II, Annex RJ-2). [footnote 77 in the Rejoinder of the Republic of India, Volume 1, 31 July 2013.]

¹²⁰ Sands, at ¶ 33.

1 III. THE LOCATION OF THE MAIN CHANNEL OF THE RAIMANGAL AND
2 HARIABHANGA RIVERS

3 A. Map Evidence
4

5 49. The Radcliffe Map clearly marks the location of the main channel and,
6 inasmuch as it is consistent with the verbal description in Annexure A, it is an authoritative
7 illustration. If I may draw your attention again to the detail of the Map, you will see that the
8 draftsman overlaid all boundaries, which were marked by black ink, with a green overlay;
9 the heavy black lines indicate provincial boundaries, the dotted black line indicate district
10 boundaries and the dashed line indicates sub-districts. If you look at the Estuary, you can
11 see the district boundary clearly running to the point where the Hariabhanga and
12 Raimangal meet at the end of the Estuary and the beginning of the Bay of Bengal. You may
13 wish to compare the clarity of that line, for example, with the line considerably to the north
14 between Raj Shahi and Malda, which was also drawn in this case departing from the
15 district boundaries and it is considerably less clear. [Tab 3.35.]

16 50. As against this map, none of the maps which Bangladesh adduced are
17 probative. The so-called British Foreign Office map, a tiny sketch, which was prepared by
18 someone in London a year after the Award and after independence, was for a collection of
19 diplomatic papers and its line, unlike the boundary line marked on the Radcliffe map, is on
20 the Indian coast. [Tab 3.36.]

21 51. The map from the Pakistan Gazette, misleadingly entitled “Annexure B” in
22 Bangladesh's Reply, is not the map in the Radcliffe Award's Annexure B. Its provenance is

1 unknown and its line departs from the Radcliffe Map. So of all the maps that are
2 submitted, the Radcliffe map, India submits, is the most probative. [Tab 3.37.]

3
4 **B. Bathymetric Data**

5 52. But if there is, indeed, more than one channel in the estuary, the *main*
6 channel is perforce the channel which is the most navigable. This is a point on which the
7 Radcliffe Award does not assist, for while it can identify the river, it cannot in the nature of
8 the thing, identify the location of the main channel. Here the Tribunal has been afforded
9 bathymetric data as well as the opportunity it provided for itself to conduct its own on-site
10 observations.

11 53. Bangladesh's own bathymetric data confirms that what it calls the western
12 channel, which it proposes as the main channel, is not a continuously navigable channel, as
13 compared with the channel that descends east of New Moore Island. I repeat: this is based
14 on Bangladesh's data! The four navigational charts which Bangladesh has produced are
15 BN 40001 [Tab 3.38.], BN 35001, [Tab 3.39.] BN 7501 [Tab 3.40.] and BN 3529 [Tab
16 3.41.]. As you can see, in each, the main channel flows to the east of New Moore Island and
17 the soundings on those maps indicate its navigability.

18 54. I should like to draw your attention in particular to Chart 3529 [Tab 3.41.]
19 which was edited by Bangladesh on 13 November 2012 and submitted to the PCA
20 Registrar on 4 March 2013. The data on which it is based was collected according to the
21 chart's legend between 2007 and 2010. Like the three other Bangladesh charts, it shows the
22 main channel flowing to the east of New Moore Island. [Tab 3.41.] The Tribunal will
23 recognize Chart 3529, as it was one of the maps which Bangladesh used on board ship

1 during the site visit to explain the positions. I think there could hardly be a clearer
2 admission of its authority.

3 55. Given Bangladesh’s reliance on Chart 3529 for its demonstration of its
4 proposed channel, it may be useful to stay with it for another moment. The location of the
5 main channel can be made more manifest by using the data on Chart 3529 to generate a
6 digital terrain model or DTM of the relevant area. [Tab 3.42.] The DTM indicates various
7 depths by different colors:

8 dark blue for depths greater than 10 meters;

9 light blue for depths between 5 and 10 meters;

10 light brown for depths between 2 and 5 meters; and

11 dark brown for depths from 2 meters to shoals.

12 56. As can be seen on the screen, the DTM of Bangladesh’s chart shows that the
13 deepest part of the Hariabhanga River is where it joins the Raimangal River to the east of
14 New Moore Island. By contrast, the part of Hariabhanga flowing to the west of New Moore
15 Island encounters shoals or lesser depth between 2 and 5 meters, as Professor Pellet
16 observed, and, thus, cannot be the main channel. No surprise then that Bangladesh
17 carefully avoided taking its vessel south of its proposed land terminus point. Bangladesh
18 has sought to divert attention from these facts by stating that its proposed channel has “a
19 depth of **up to** 8.6 and 9.6 meters.” Of course, the question for the mariner is not “up to”

1 but rather “depth down to” and that is where Bangladesh's proposed channel hits the rocks
2 so drastically that we can all be thankful that its pilot did not even try to navigate it on 24
3 October.

4 57. I would like to recall your attention to Bangladesh's chart 7501, which I
5 displayed a moment ago, this time with the nine-meter contour indicated. [Tab 3.43.] The
6 east channel conjoining the Raimangal is manifestly the main channel; the channel to the
7 west which Bangladesh has proposed is not the main channel.

8 58. Nor, Mr. President, Members of the Tribunal, is any of this a recent
9 development. As I mentioned, the depth information on all of the subsequent iterations of
10 British Admiralty Chart 859, which was originally prepared in 1931, is consistent with the
11 more contemporary soundings. [Tab 3.44.] [Tab 3.45.]

12 59. Mr. President, in your letter to the parties of 4 November 2013, you ask
13 “whether or not the historic geographical situation in the estuary has an influence on the
14 determination of where “... the midstream of the main channel for the time being of the
15 rivers Ichhamati and Kalindi, Raimangal and Hariabhanga till it meets the Bay” lies.””
16 Bangladesh, in its Reply, stated that the “the location of the land boundary terminus has
17 remained unchanged since the time of the Radcliffe Award.”¹²¹ In its Rejoinder, India
18 affirmed its agreement with that statement.¹²² But in his speech on December 9, Professor
19 Sands insisted that what was meant was that the boundary on August 15 was fixed, which
20 meant that its location can only be determined by cartographic data which existed at that
21 time. The application of Notification 964J presents two questions; where is the main
22 channel, for the time being, and where is its midstream?

¹²¹ BR, ¶ 3.2.

¹²² Rejoinder, ¶ 2.47.

1 60. Mr. President, all the evidence in the record confirms this joint position.
2 Successive cartographic evidence indicates that, while New Moore Island has evolved and
3 changed over time, neither the essential profile of the Estuary nor the location within the
4 estuary of the main channel has changed. One need only compare the successive iterations
5 of BA 859 of 1931 with the more recent Bangladesh charts to confirm this. Because of this
6 fact, more recent and better quality evidence, such as the satellite imagery which India has
7 tendered, is relevant and, India submits, should be borne in mind and is decisive.

8 61. Paradoxically, Bangladesh, while stating that the situation is unchanged,
9 has objected to this later evidence. In point of fact, Indian satellite imagery of 4 February
10 2013 [Tab 3.46.] shows in the most dramatic fashion that the main channel is to the east of
11 New Moore Island, precisely where the bathymetric soundings of all the charts, including
12 Bangladesh's own charts, place it. And it is consistent with the bathymetric data of the
13 other charts which are before you.

14
15 **C. The Site Inspection**
16

17 62. A word about the site inspection. Conducted on October 23-25, it afforded
18 the Tribunal an opportunity to confirm the documentary and cartographic evidence. As
19 your recollections of this are recent and my colleague, Professor Pellet, has already
20 addressed the subject, I will revert only to the main points that relate to the estuary.

21 63. On 24 October, as you will recall, the Tribunal embarked on a hovercraft
22 which proceeded to navigate to the center of the Hariabhanga north of New Moore Island,

1 whereupon the motors were cut so that the craft could drift. [Tab 3.47.] The progressive
2 position of the craft was displayed and continuously recorded and an echo sounder was
3 also operating and was recorded. At the same time, Indian naval vessels were anchored at
4 India's and Bangladesh's respective proposed land termination points; this provided visual
5 references for the Tribunal on board the hovercraft. A third Indian vessel was anchored
6 further south in the main channel, that is the channel east of New Moore, to provide a
7 visual locator as well as a demonstration of the channel's navigability; obviously, the ship
8 could not have reached that point if the channel were not navigable.

9 64. With its engines idled in neutral position, the Indian hovercraft drifted in a
10 southeasterly direction at a speed of approximately 0.8 knots against head winds of
11 approximately 10 knots and a northwesterly sea swell with wave height of approximately
12 0.5 meters. The initial drift was on an easterly bearing of 095-100 shifting south to a
13 bearing of 120-125. [Tab 3.47.] Then, at Bangladesh's request, the hovercraft shifted its
14 course west to the 10-meter contour and was again allowed to drift, this time with its
15 engines cut. This time the drift was southeasterly on a bearing of 130-135 at approximately
16 1.2 knots against head winds, again, of approximately 10 knots. [Tab 3.47.]

17 65. The hovercraft then moved south to a position due east of New Moore
18 Island but still north of India's proposed land terminus point; motors were initially
19 disengaged and then entirely cut and the craft was allowed to drift. [59.] Drift was
20 southeasterly on a bearing of 130-140 at an approximate speed of 2 knots; headwinds were
21 approximately 10 knots. As the craft drifted south and came under the influence of both the
22 Hariabhanga and the Raimangal Rivers, the drift changed to a bearing of 130-150. [Tab
23 3.47.]

1 66. Mr. President, you will recall India offered to allow the vessel to drift at any
2 other location, but the Tribunal did not ask for it. The drift observations are set out in the
3 sketch map now displayed. [Tab 3.47.]

4 67. Thus, the site evidence showed the southeasterly flow of the Hariabhanga to
5 the north and east of New Moore Island.

6 68. By contrast, Bangladesh's presentation was confined to the western channel
7 and only as far south as the proposed land terminus. The Tribunal will recall, however, that
8 as the vessel approached the proposed land boundary terminus, it slowed considerably,
9 illustrating the difficulties the navigators faced even at the northern end of the western
10 channel. Thus Bangladesh elected not to challenge the shoals south of its proposed land
11 terminus point which obstruct navigation. No evidence of the flow of the Hariabhanga's
12 so-called eastern channel was presented.

13 69. Thus, Mr. President, Members of the Tribunal, both the applicable law and
14 the facts about the fluvial movements in the Estuary – whether those facts are derived from
15 the cartographic material, from satellite imagery or from the data gathered in the site visit–
16 all confirm that the land terminus point, “the midstream of the main channel for the time
17 being of the rivers Ichhamati and Kalindi, Raimangal and Hariabhanga until it meets the
18 Bay,” follows the joinder of the Raimangal and Hariabhanga as it descends to the east of
19 New Moore and continues in a more southerly direction until it meets the Bay. [Tab 3.48.]
20 The midstream of that main channel is located in the Estuary; it is a fluid and fluctuating
21 element by definition and is found at 21° 38' 40.0" N, 89° 10' 13.8" E.

1 **IV. CONCLUSION**

2 70. In conclusion, Mr. President, I'd like to return to Questions 3, 4 and 5 of
3 your letter of 4 November as they invite a comment on the possibility that the Radcliffe
4 Award may not be relevant because of changes in the Estuary since 1947 (that's question 3)
5 or the possibility of uncertainties about the relevance of the Radcliffe Map (questions 4 and
6 5). I should say that although I address this, I'm going to emphasize that India maintains
7 that neither of these theoretical possibilities arises and India submits that the Estuary has
8 not changed, that the Award is still dispositive and that the Radcliffe Map's identification
9 of the location of the main channel is clear. But if the Tribunal's speculative possibilities
10 were to arise and the Tribunal were minded to look at the question of the location of the
11 land terminus point de novo, necessary for maritime boundary exercise, the Tribunal may
12 wish to take account of the social and economic consequences which each of the proposed
13 land terminus points would engender. Bangladesh's point produces a boundary line which
14 Bangladesh itself accurately described as "hugging the Indian coast." The social and
15 economic consequences of the Bangladesh line would be that India and its coastal and
16 inland population would be effectively and permanently excluded from participating in the
17 multiple uses of this common waterway, even for the minimal use of navigation from the
18 north for access to the Bay.

19 71. Bear in mind that the waters north of the land boundary terminus are
20 internal and, as such, are not subject to international law's right of innocent passage. In
21 contrast to Bangladesh's proposal, India's line, which is the Radcliffe line, assures the
22 peoples of both India and Bangladesh in that sector full access and opportunity to
23 participate in the uses of this common resource. International law, seeking to optimize

1 the use of common resources and especially to ensure both riparian states' access to
2 navigable waterways, is fully served by the Indian line.

3 72. Thank you, Mr. President, Members of the Tribunal. And I thank you, in
4 particular, for your indulgence in letting me run over the deadline today.

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1 PROFESSOR REISMAN: Thank you, Mr. President, Members of the
2 Tribunal. And I thank you in particular for this indulgence in letting me run over the
3 deadline today.

4 PRESIDENT WOLFRUM: Thank you, Professor Reisman.

5 Before we adjourn, let me inquire with my colleagues whether they have any
6 questions.

7 I see Professor Shearer.

8 ARBITRATOR SHEARER: Thank you, Mr. Chairman.

9 Yes, professor Reisman, I'm wondering if we've got any data at all, especially
10 for the period around 1947 or it may be 1950, about the use of the rivers for navigation. To
11 what extent was it used as a means of entry to and exit from the rivers by vessels of some
12 degree of draft that would have to respect the middle of the main channel for fear of going
13 aground? Is that a relevant consideration, or is there any evidence before us as to the
14 actual extent?

15 From my visual observations of the site, it seemed that there was little
16 navigation apart from coastal fishing and shallow draft vessels, but I'm just wondering if
17 there was a change in the use of the rivers for navigation of any size.

18 Thank you.

19 PRESIDENT WOLFRUM: Before you answer, Professor Reisman, you
20 don't have to answer the question right away. Perhaps it's wiser to consult and look into
21 the maps. May I support that question and indicate that in one of the maps you showed
22 there was a sign for an anchoring ground, which gives an indication that there was some

1 kind of delimitation.

2 Here there was a question, you said, Professor Reisman, and I quote verbally,
3 New Moore Island has changed over time. And then you later said the estuary has not
4 changed. Could you perhaps give us--this is not a contradiction--I know what you mean,
5 but could you give us first a clarification about the change of New Moore Island since, let's
6 say, 1947. Somewhere in the Counter-Memorial and Memorial I read that New Moore
7 Island was actually a full island after a heavy typhoon or cyclone or whatever development
8 after 1947, but I'm not sure what is correct.

9 There is another question from Professor Cot.

10 ARBITRATOR COT: Yes, I would like to pick up the question put by Ivan
11 Shearer, but address it also to Bangladesh, if Bangladesh could also give an answer perhaps
12 next week. I mean, it's not an immediate question, but I think it would be interesting to
13 have the data from both sides on the issue of possible navigation and the importance of
14 navigation issues in 1947.

15 PRESIDENT WOLFRUM: Thank you.

16 And since you, Professor Reisman, refer to also social considerations, both
17 sides again might give us, if they have the data available, possibly also after the Hearing an
18 indication of the density of the population of the Hariabhanga and the Raimangal Rivers,
19 which would depend on perhaps navigation. That would be an additional information
20 which might be useful.

21 Dr. Rao.

22 ARBITRATOR RAO: Following the same trend of thinking on this side,

1 most of the time, when we went to the site visit also, the estuary that we were considering to
2 see where the channel is--I mean, of course, the rivers came down and both sides were met
3 at a particular point or not, whether they met in the estuary or not, will further be considered
4 in the light of arguments made by both sides, but the estuary we are considering for the
5 point of terminus, how will that impact upon the social and economic conditions as opposed
6 to the river main channels upwards? In other words, in the estuary, I think the area is a
7 different type of socioeconomic value as opposed to the river channels and upwards the
8 river. If there is a particular clarification or data or certain amount of material that can help
9 us to understand the location of the point with respect to the equitable nature of the
10 enjoyment of the common points.

11 Thank you.

12 PRESIDENT WOLFRUM: Thank you very much, Dr. Rao.

13 May I emphasize that all these questions raised are raised for both Parties.

14 That is well-understood, they have not been formulated that way, but they are addressing
15 both Parties, and I believe it would be appropriate if we give you some time for answering
16 them. We don't expect an answer tomorrow or day after tomorrow.

17 PROFESSOR REISMAN: Fools rush in where angels fear to tread.

18 PRESIDENT WOLFRUM: Thank you, Professor Reisman, for an
19 interesting presentation, and I thank the Indian delegation for today's presentation. You
20 have seen from the intensive questioning that the Tribunal was listening intensively. We
21 will consider what you have been saying. Thank you very much.

22 We meet tomorrow at 10:00. Please, we continue with India. And as far as

1 I have written it down, it will be Sir Michael Wood on base points and Professor Pellet on
2 special circumstances, and then again Sir Michael Wood on the delimitation methodology.

3 Is that correct?

4 MR. WOOD: No.

5 PRESIDENT WOLFRUM: No? But we will see you tomorrow.

6 (Whereupon, at 5:17 p.m., the hearing was adjourned until 10:00 a.m. the
7 following day.)

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CERTIFICATE OF REPORTER

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

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

DAVID A. KASDAN