INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

2011

Public sitting
held on Wednesday, 21 September 2011, at 3.00 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President José Luís Jesus presiding

DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY
BETWEEN BANGLADESH AND MYANMAR IN THE BAY OF BENGAL

(Bangladesh/Myanmar)

Verbatim Record
Present: President José Luís Jesus
Vice-President Helmut Tuerk
Judges Vicente Marotta Rangel
Alexander Yankov
P. Chandrasekhara Rao
Joseph Akl
Rüdiger Wolfrum
Tullio Treves
Tafsir Malick Ndiaye
Jean-Pierre Cot
Anthony Amos Lucky
Stanislaw Pawlak
Shunji Yanai
James L. Kateka
Albert J. Hoffmann
Zhiguo Gao
Boualem Bouguetaia
Vladimir Golitsyn
Jin-Hyun Paik
Judges ad hoc Thomas A. Mensah
Bernard H. Oxman
Registrar Philippe Gautier
Bangladesh is represented by:

H.E. The Honourable Dr. Dipu Moni, MP, Foreign Minister, Ministry of Foreign Affairs,

as Agent;

Rear Admiral (Ret'd) Md. Khurshed Alam, Additional Secretary, Ministry of Foreign Affairs,

as Deputy Agent;

and

H.E. Mr Mohamed Mijraul Quayes, Foreign Secretary, Ministry of Foreign Affairs,

H.E. Mr Mosud Mannan, Ambassador to the Federal Republic of Germany, Embassy of Bangladesh, Berlin, Germany,

Dr Payam Akhavan, Member of the Bar of New York, Professor of International Law, McGill University, Montreal, Canada,

Dr Alan Boyle, Member of the Bar of England and Wales, Professor of International Law, University of Edinburgh, Edinburgh, United Kingdom,

Dr James Crawford SC, FBA, Member of the Bar of England and Wales, Whewell Professor of International Law, University of Cambridge, Cambridge, United Kingdom,

Mr Lawrence H. Martin, Foley Hoag LLP, Member of the Bars of the United States Supreme Court, The Commonwealth of Massachusetts and the District of Columbia, United States of America,

Dr Lindsay Parson, Director, Maritime Zone Solutions Ltd., United Kingdom

Mr Paul S. Reichler, Foley Hoag LLP, Member of the Bars of the United States Supreme Court and of the District of Columbia, United States of America,

Mr Philippe Sands QC, Member of the Bar of England and Wales, Professor of International Law, University College London, London, United Kingdom,

as Counsel and Advocates;

Mr Md. Gomal Sarwar, Director-General (South-East Asia), Ministry of Foreign Affairs,

Mr Jamal Uddin Ahmed, Assistant Secretary, Ministry of Foreign Affairs,

Ms Shahanara Monica, Assistant Secretary, Ministry of Foreign Affairs,

Lt. Cdr. M. R. I. Abedin, System Analyst, Ministry of Foreign Affairs,

Dr Robin Cleverly, Law of the Sea Consultant, The United Kingdom Hydrographic Office, Taunton, United Kingdom,

Mr Scott Edmonds, Cartographic Consultant, International Mapping, Ellicott City, Maryland, United States of America,
Myanmar is represented by:

H.E. Dr Tun Shin (Mr), Attorney General of the Union, Union Attorney General’s Office,

as Agent;

Ms Hla Myo Nwe, Deputy Director General, Consular and Legal Affairs Department, Ministry of Foreign Affairs,
Mr Kyaw San, Deputy Director General, Union Attorney General’s Office,

as Deputy Agents;

and

Professor Mathias Forteau, Professor at the University of Paris Ouest, Nanterre La Défense, France,
Mr Coalter Lathrop, Attorney-Adviser, Sovereign Geographic, Member of the North Carolina Bar, United States of America,
Mr Daniel Müller, Consultant in Public International Law, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre la Défense, France,
Professor Alain Pellet, Professor at the University of Paris Ouest, Nanterre La Défense, Member and former Chairman of the International Law Commission, Associate Member of the Institut de droit international, France,
Mr Benjamin Samson, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre La Défense, France,
Mr Eran Sthoeger, LL.M., New York University School of Law, New York, United States of America,
Sir Michael Wood, K.C.M.G., Member of the English Bar, Member of the International Law Commission, United Kingdom,

as Counsel and Advocates;

H.E. U Tin Win, Ambassador Extraordinary and Plenipotentiary to the Federal Republic of Germany, Embassy of the Republic of the Union of Myanmar, Berlin, Germany,
Captain Min Thein Tint (Mr), Commanding Officer, Myanmar Naval Hydrographic Center, Yangon,
Dr Thura Oo (Mr), Pro-Rector, Meiktila University, Meiktila,
Mr Maung Maung Myint, Counselor, Embassy of the Republic of the Union of Myanmar, Berlin, Germany,
Mr Mang Hau Thang, Assistant Director, International Law and Treaties Division, Consular and Legal Affairs Department, Ministry of Foreign Affairs,
Ms Khin Oo Hlaing, First Secretary, Embassy of the Republic of the Union of Myanmar, Brussels, Belgium,
Mr Kyaw Htin Lin, First Secretary, Embassy of the Republic of the Union of Myanmar, Berlin, Germany,
Ms Tin Myo Nwe, Attaché, International Law and Treaties Division, Consular and Legal Affairs Department, Ministry of Foreign Affairs,
Mrs Héloïse Bajer-Pellet, Lawyer, Member of the Paris Bar, France,
Mr Octavian Buzatu, Hydrographer, Romania,
Ms Tessa Barsac, Master, University of Paris Ouest, Nanterre La Défense, France,
Mr David Swanson, Cartography Consultant, United States of America,

as Advisers.
THE PRESIDENT: Please be seated. Good afternoon. Today we start with the second round of oral arguments in the dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal. Bangladesh will commence its second round. I first call on Mr Lawrence Martin to make his presentation.

MR MARTIN: Mr President, distinguished Members of the Tribunal, good afternoon. It is once again a privilege to appear before you on behalf of Bangladesh, and to open this second round of Bangladesh's oral pleadings. This afternoon I will sketch the broad contours of the arguments that you will hear over the next two days. I will also outline the order of our presentations. Before I turn to the substance of my submissions, however, I begin with a point of order. As you know, Mr President, the schedule of hearings permitted the Parties as many as three full sessions in the second round. After listening to Myanmar's presentations in the first round, we decided that we did not need all that time. We are confident that we can respond to Myanmar's arguments within the equivalent of two sessions.

We plan to use our time as follows. Today, we expect to speak until right around the coffee break. Tomorrow morning, we will use the full two and a half hour session, and tomorrow afternoon we aim to finish by the 4.30 coffee break. I hope that our decision to forego some of the time allotted us will come as a relief to the very able people in the Registry and the translators, all of whom have worked very hard on our behalf these last two weeks. We thank them very much for their efforts.

We also opted for shorter presentations in the second round mindful of the fact that the Tribunal has already read and heard quite a lot from both Parties. You have two written submissions from each. Each has also already had five sessions of oral argument. There is no need to burden the Tribunal by belabouring points that have already been fully aired. Instead, we will use our time to reply to what Myanmar has said, focusing on what, in our view, are the key issues that can still benefit from further discussion. Points to which we do not respond in this round should under no circumstances be considered as having been conceded. They are not. Bangladesh maintains in full its submissions and arguments as previously set forth.

Mr President, Members of the Tribunal, we have listened attentively to the arguments that Myanmar presented in its first round. There is little – I dare say nothing – that surprised us. Indeed, Mr Reichler's observations from his initial presentation 13 days ago remain as true now as they were then. There are three key geographical and geological elements in this case: the concavity of Bangladesh's coast, St Martin's Island and the Bengal Depositional System. In its oral pleadings, Myanmar once again urged the Tribunal to ignore all three.

Because it fell to me to deal with the issue of concavity in the first round, I will deal with this subject somewhat more thoroughly here than the others. On the remaining subjects, I will do no more than outline the essential points that will be addressed in subsequent presentations.

On the issue of the concavity of Bangladesh's coast, we were initially quite pleasantly surprised. Myanmar at first seemed ready to engage with it in a clear and
direct manner. In his opening presentation last Thursday, Professor Pellet stated, and I quote: “[T]he coastlines of Bangladesh are universally concave; that is a fact.”¹ He also expressly admitted that Bangladesh’s geographic situation is comparable to the third in the series of four schematics that I presented the Tribunal last week, and which he helpfully displayed once again. He said: “[T]he case of severe concavity[;] I admit that this characterizes the coast of Bangladesh.”² To remind the Tribunal, the schematic to which Professor Pellet referred is the one now appearing on the screen.

But then other counsel seemed to backtrack and retreat to the more familiar – if less accurate – view according to which there is no concavity, or at least not one with which the Tribunal needs to concern itself. After Professor Pellet, a veritable parade of other speakers referred to the Bangladesh coast as “straight”³ or even – and this was a new one – “convex”⁴.

They did this by inviting the Tribunal to focus only on the area in the immediate vicinity of the Parties’ land boundary terminus. For example, on the screen now is the map included at tab 3.4 of Myanmar’s Judges’ folder. You can see what Myanmar has done. The geographical context has been eliminated; two essential pieces are missing.

First, they have eliminated Bangladesh’s Bengal Delta coast to the north. If you include that, as you must, the concavity within a concavity along the Bangladesh coast immediately rematerializes. Second, they have also lopped off the coast of India to the west of Bangladesh. If you include that, as again you must, the primary concavity that is at the heart of this case comes back into focus. Context, Mr President, is key; but it is exactly this context that Myanmar does not want you to see. The image before you is included at tab 6.1 of today’s Judges’ folder.

This forced cartographic myopia is not a new twist adopted for the purposes of these hearings. If you look carefully at Myanmar’s written pleadings, you will note that aside from the first three sketch maps in Myanmar’s Counter-Memorial, none of the others, including any in the Rejoinder, dares show India’s coast on the western side of the Bay of Bengal.

Mr President, Members of the Tribunal, depicted on the screen now is a coast that shall remain momentarily nameless. Some members of the Tribunal may recognize it; others may not. I ask you: is it obviously concave? Let us next see the whole coast in context. Now let me ask: is there anyone here who would deny that this coast is concave? I suspect that not even Myanmar would.

¹ ITLOS/PV.11/7, p. 9, lines 20-21.
² ITLOS/PV.11/7, p. 9, lines 32-33.
³ See e.g. ITLOS/PV.11/8, p. 25, line 32 (Lathrop); ITLOS/PV.11/10, p. 4, line 35, p. 5, line 28, p. 18, line 12 (Forteau); “The Correct Application of the Bisector Method” (Lathrop – 20 September 2011) at para. 26.
⁴ See e.g. ITLOS/PV.11/7, p. 16, lines 6-7 (Samson); ITLOS/PV.11/8, p. 25, lines 32-33 (Lathrop); ITLOS/PV.11/9, p. 13, line 33, p. 16, line 34 (Forteau); ITLOS/PV.11/10, p. 4, line 36, p. 5, line 28, p. 18, line 13.
Aside from these rather obvious sleights of hand, Myanmar also asks you to ignore the concavity by telling you that the recent jurisprudence does not consider concavity a circumstance warranting a departure from equidistance. It cites the cases of Cameroon v. Nigeria and Barbados v. Trinidad & Tobago. We already addressed these cases in our opening round and Professor Crawford will have a bit more to say about them later. I will not burden the Tribunal by saying anything more here.

I do, however, wish to say a word on the instances of State practice that I discussed during my first round presentation. These are the instances where the States concerned agreed to give a State that finds itself pinched in the middle of a concavity relief from the equidistance cut-off by according it an access zone out to its natural limits. On Monday afternoon Professor Forteau dismissed these as just four examples. Mr President, I am the last person to correct someone else’s maths, but in point of fact I actually cited five agreements, as the verbatim record will confirm.

There is also a sixth and a seventh that I did not mention, only because Professor Crawford already had. Those are the agreements among Germany, Denmark and the Netherlands in which Germany was accorded access to the mid-sea median line with the UK. The discussion of these agreements in international maritime boundaries makes clear that Germany “succeeded in its contention that its shelf extended to the centre of the North Sea in such a way as to meet that of the UK.”

This map is included at tab 6.2 of your Judges’ folder.

I might also have mentioned the arbitral award in the St Pierre et Miquelon case in which the Court of Arbitration gave the two small French islands that are otherwise completely surrounded by Canadian land and sea a 200-M access zone into the open Atlantic that is equal in breadth to the maritime front of the islands. At a certain point, Mr President, I do think that there is value in brevity.

What was more notable is what Myanmar did not say. In my initial presentation, I specifically invited Myanmar’s counsel to show us a contrary example from the State practice as they promised they could in their Rejoinder. I challenged it to show us an example where a State otherwise facing onto the open sea agreed to be cut off short of 200 M; but Myanmar had, and it has, nothing.

We say that the weight of the jurisprudence and the consistent State practice shows a clear international consensus: when a State sits in the middle of a concavity surrounded by neighbours on either side, equidistance cannot lead to an equitable solution.

In his presentation on Monday, Professor Forteau helpfully quoted a passage in Bangladesh’s Reply in which we stated that the cut-off that Myanmar’s proposed equidistance line would work on Bangladesh would be the worst anywhere in the

---

5 ITLOS/PV.11/10, p. 1, line 36 (Forteau).
6 ITLOS/PV.11/4, pp. 19-20 (Martin).
7 ITLOS/PV.11/2/Rev.1, p. 22, line 43-44.
9 ITLOS/PV.11/4, p. 21, line 34-35 (Martin).
10 Rejoinder of Myanmar (hereinafter “RM”) at para. 6.32.
There is no larger coastal State anywhere that faces onto the open seas yet faces the prospect of being cut off before 200 M. After reading these words, Professor Forteau then accused us of engaging in “dramatic arts” and “flights of fancy”. Mr President, I have been accused of many things in my life, but having a flair for the dramatic is distinctly not one of them! What we wrote about the cut-off effect is not hyperbole; it is not exaggeration. It is a fact – a fact, by the way, which Myanmar has never once even tried to deny. We say that the inequitableness of such a result speaks for itself.

Before leaving the subject of the concavity there is one final point that I would like to address quickly. You heard quite a bit from Myanmar’s counsel about base points. In particular, you heard that Bangladesh’s base point β₁ was located on “the most prominent feature in the area”, – Shahpuri Point. As a result, it supposedly takes three Myanmar base points to counteract it. Myanmar seems to think β₁ is like a fearsome neighbourhood bully. It is so strong that it can take on three little base points on Myanmar’s coast singlehandedly.

This is nonsense. There is one and only one reason that there is just a single base point on the whole of the Bangladesh coast – the concavity. Because the Bangladesh coast north of the land boundary terminus recedes into the concavity, there is nothing on the Bangladesh side to balance Myanmar’s coast. That is exactly why, as I showed last week, Myanmar’s proposed equidistance line cuts directly across the seaward projection of Bangladesh’s coast, blocking its access to the Bay of Bengal beyond a small triangular wedge.

Aside from the concavity, the second geographical fact that Myanmar would like the Tribunal to ignore is St Martin’s Island. Late last week and earlier this week Myanmar’s counsel persisted in arguing that it should be given reduced effect in the territorial sea, and no effect whatsoever in the EEZ and continental shelf within 200 M. It is appropriate to ignore St Martin’s in this way, they said, because it produces “a grossly distorting effect on the course of the delimitation.”

We have thought quite a lot about that statement over the last several days. In evaluating it, I wonder if it may be useful to step back for a moment. Viewed in the round, Myanmar’s case reduces to the following, rather remarkable, assertion: St Martin’s Island distorts an equidistance line but the double concavity of Bangladesh’s coast does not! Or, to put a more formal point on it, Myanmar would have the Tribunal rule that St Martin’s is “the epitome of a special circumstance”, but that the concavity of Bangladesh’s coast is not. The absurdity of the argument is self-evident.

As you will hear, there is no basis for diminishing the effect given St Martin’s Island, either in the territorial sea or in the EEZ. In the territorial sea, there is quite literally no

---

11 Reply of Bangladesh (hereinafter “RB”) at para. 3.59.
12 Reply of Bangladesh (hereinafter “RB”) at para. 3.59.
13 ITLOS/PV.11/10, p. 19, line 2 (Forteau) (“envolées lyriques et la dramaturgie”).
14 ITLOS/PV.11/9, p. 34, line 7 (Lathrop).
15 ITLOS/PV.11/4, p. 14, lines 33-44 (Martin).
16 ITLOS/PV.11/8, p. 26, line 8 (Lathrop).
17 ITLOS/PV.11/8, p. 23, line 44-45 (Lathrop).
precedent for giving an island with the characteristics of St Martin’s anything less
than a full 12 M. Indeed, at least since 1974 Myanmar itself has recognized this.
Only in 2010, when it submitted its Counter-Memorial did Myanmar articulate the
different view that it now purports to adopt. We say that the right view is the one that
Myanmar itself accepted, without qualification, for at least 36 years: St Martin’s
Island is entitled to a full 12-M territorial sea.

In the EEZ and continental shelf, there is likewise no basis for ignoring St Martin’s
Island. Even viewed in isolation, St Martin’s Island is a significant coastal island with
a large population and a vibrant economic life; it cannot be ignored. Moreover, it
cannot be viewed in isolation. Once again, context is key. Far from exerting a
distorting effect on an equidistance line, what St Martin’s actually does is offset – but
only partially – the far more pronounced effects of the double concavity of the
Bangladesh coast.

This fact renders Myanmar’s efforts to analogize to other cases wholly inapposite. At
most, St Martin’s abates the effects of the concavity within a concavity in the
Bangladesh coast, and even that it does not do fully. Still less does it do anything to
offset the effects of the primary concavity in the Bay of Bengal’s north coast.

Myanmar also asks the Tribunal to ignore the Bengal Depositional System and the
potential entitlement in the outer continental shelf that it generates for Bangladesh.
Myanmar’s counsel argued that “Bangladesh cannot claim any entitlement in the
continental shelf beyond 200 M”. This was so, we were told, because the
delimitation within 200 M would “inevitably stop” short of Bangladesh’s 200-M limit.

Mr President, Members of the Tribunal, whatever else might be said about this
argument, it is admirably self-justifying. You might even call it a tautology. If
Myanmar is wrong in its assertion that the delimitation stops short of the 200-M limit, then the conclusion that Bangladesh can claim no entitlement in the outer continental
shelf is equally wrong. That is exactly our view.

Even as it denies the existence of Bangladesh’s ability to “claim any entitlement in
the continental shelf beyond 200 M”, Myanmar nowhere – nowhere – denies the
facts proving that entitlement. Last Tuesday, during the last session of our first-round
presentations, you heard Dr Parson and Admiral Alam describe the basis on which
and the manner in which Bangladesh claims entitlement in the OCS. In none of
Myanmar’s Counter-Memorial, its Rejoinder or its first-round presentations did
Myanmar so much as suggest that Bangladesh is not entitled to apply article 76 in
the manner that we described. Myanmar’s only argument is that you can ignore
these facts on the basis of the entirely circular reasoning that I described.

Yet another thing Myanmar asks the Tribunal to ignore, both as a matter of fact and
a matter of law, is the issue of natural prolongation. In our first round, you heard all
the reasons that Bangladesh considers the seabed and subsoil of the Bay of Bengal
the natural prolongation, that is, the physical extension, of its land territory. Myanmar

18 ITLOS/PV.11/7, p. 11, line 1 (Pellet).
19 ITLOS/PV.11/8, p. 36, line 8 (Pellet).
had no reply. It said only that it did not think it “worthwhile to devote lengthy
discussion” to what it considered “irrelevant points”.20

In our first round, you also heard our interpretation of the phrase “natural
prolongation” in article 76(1) as a matter of law. In our view, it establishes an
independent criterion that must be met for a coastal State to establish entitlement in
the OCS. Both geological and geomorphological considerations are pertinent.

Myanmar’s response is to read the term out of article 76, to render it without any
independent legal significance. In Myanmar’s view, natural prolongation under article
76(1) is a mere conclusion that flows magically backwards from the application of
article 76(4). This is plainly inconsistent with the principle of effectiveness. Article 76
should not and cannot be read to deprive any piece of it of meaning.

In contrast to Myanmar, Bangladesh believes that an equitable solution cannot be
achieved by ignoring any one of the three most relevant geographical or geological
elements of this case, let alone all three of them.

Context is key. In the circumstances of this case, and giving proper weight to the
overall context, an equitable solution requires taking due account of the concavity of
Bangladesh’s coast, St Martin’s Island and the Bengal Depositional System.

Mr President, I will now briefly outline the presentations to follow today and
tomorrow. Following me to the podium this afternoon is Professor Boyle who will
respond to Myanmar’s arguments that there is no binding agreement concerning the
delimitation of the territorial sea.

After Professor Boyle, you will hear from Professor Sands who will address
Myanmar’s argument that in the absence of agreement, St Martin’s Island should be
given reduced weight in a territorial sea delimitation effected under article 15. As you
will hear, there is no authority to support Myanmar’s wholly novel proposition. In
accordance with article 15, the delimitation in the territorial sea must be an
equidistance line. There are no grounds for adjusting it within 12 M. The outer limit of
the territorial sea boundary and the starting point for the delimitation of the EEZ and
continental shelf is at point 8A.

When we return tomorrow morning, Mr Reichler will address the Tribunal on the
reasons Myanmar’s equidistance proposal does not result in an equitable solution in
the EEZ and continental shelf within 200 M. He will show that the jurisprudence,
including the jurisprudence relating to the effect to be given to islands,
overwhelmingly supports Bangladesh’s arguments: first, equidistance should be
rejected in favour of a different methodology; and second, if quod non, an
equidistance approach were adopted by the Tribunal, the provisional equidistance
line would have to be drawn giving full effect to St Martin’s Island, and then further
adjusted to more fully relieve Bangladesh of the distorting effects of its doubly
concave coast.

20 ITLOS/PV.11/7, p. 12, lines 35-37.
After that, Professor Crawford will respond to Myanmar’s arguments concerning Bangladesh’s alleged misapplication of the bisector method. As he will demonstrate, and in contrast to Myanmar’s equidistance proposal, Bangladesh’s proposed 215º bisector does yield an equitable result.

Professor Akhavan will conclude our presentations during tomorrow’s first session. He will refute Myanmar’s arguments relating to the Tribunal’s jurisdiction in the OCS. Professor Akhavan will demonstrate that Myanmar’s arguments are legally incorrect and, if adopted, would frustrate the very purpose of Part XV of the 1982 Convention.

Professor Boyle will be the first to the podium tomorrow afternoon and will return to the question of the outer continental shelf. Myanmar’s arguments concerning the interpretation of article 76 are singularly unpersuasive, and its refusal to address the issue of the delimitation in the area is notable.

Professor Crawford will be the last of Bangladesh’s counsel to speak. He will provide a summation of Bangladesh’s case and will show that the overall solution we propose is precisely the equitable result that the 1982 Convention requires.

When Professor Crawford is done, the Honourable Foreign Secretary of Bangladesh will provide some concluding remarks and present Bangladesh’s submissions.

Mr President, distinguished Members of the Tribunal, I thank you once more for your kind and patient attention. I ask that you invite Professor Boyle to the podium.

THE PRESIDENT: Thank you, Mr Martin. Professor Boyle, you have the floor.

PROFESSOR BOYLE: Mr President, Members of the Tribunal, my task this afternoon is to respond to Sir Michael Wood’s arguments on the existence of a territorial sea agreement. I have a very short speech. Let me begin with the easiest point. Both sides appear to accept that if the Agreed Minutes of 1974/2008 are binding agreements then they are sufficient for the purposes of article 15. The argument that divides the Parties is therefore not about form or legal effect but about whether the Agreed Minutes are indeed binding agreements at all. Let me reiterate Bangladesh’s position: the 1974 Agreed Minutes are not simply a record of a meeting as Sir Michael alleges. Viewed objectively, the Agreed Minutes of 1974 constitute an agreement on a territorial sea boundary that is binding on the Parties. That agreement was confirmed by the Foreign Minister of Myanmar in 1985 and it was confirmed by a further agreement in 2008, and remains in full force and effect today. Bangladesh does not accept Myanmar’s arguments to the contrary.

Nor does Bangladesh recognize or agree with Myanmar’s characterization of the negotiations that took place in 1974. Far from Bangladesh repeatedly pressurizing successive Burmese delegations with proposals, the record shows that both sides exchanged views and that each had its own agenda. In order to understand what was and was not agreed, it may be helpful to understand the context in which the 1974 negotiations took place. Bangladesh was interested in an agreement that

---

21 See Burma’s record of the 1974 talks in Counter-Memorial of Myanmar (hereinafter “MCM”), Annexes 2 and 3.
would facilitate oil exploration and drilling in waters and seabed adjacent to existing
Burmese oil fields.\textsuperscript{22} Another reason for negotiating was to deal with access to the
Naaf River.\textsuperscript{23} Burma was concerned that Bangladesh’s proposed territorial sea
boundary line – the one that was eventually agreed – would traverse the navigable
channel into the Naaf River.\textsuperscript{24} Bangladeshi law required foreign warships to obtain
prior permission for passage in the territorial sea, and this would be burdensome for
Myanmar.\textsuperscript{25} Myanmar had every reason to conclude an \textit{ad hoc} agreement on the
territorial sea in 1974 – it was in its interest to do so when broader negotiations failed
to make progress and general rules of international law on innocent passage were at
that point potentially open to renegotiation at UNCLOS III. This was not, however, a
matter that Bangladesh needed to press, but it was obviously important for
Myanmar.

The fact that Myanmar nevertheless refused to sign the draft treaty on the territorial
sea put forward by Bangladesh is explicable because Myanmar believed that doing
so might imply that it was impossible to reach further agreement on the Exclusive
Economic Zone or continental shelf.\textsuperscript{26} Moreover, the draft territorial sea treaty
proposed by Bangladesh also covered additional issues – dispute settlement and
transboundary oil deposits - that could more usefully be dealt with in a
comprehensive agreement covering also the EEZ and continental shelf. But refusal
to sign Bangladesh’s territorial sea draft treaty is not inconsistent with reaching an \textit{ad hoc} agreement on the boundary line in the territorial sea. The \textit{ad hoc} agreement
dealt with a far more limited agenda than Bangladesh would have wished to address
in a more comprehensive treaty, but it nonetheless represented a compromise
position for both States.

Sir Michael Wood said on Thursday\textsuperscript{27} that paragraph 4 of the Agreed Minutes
recorded only the approval of the Bangladesh delegation to points 1-7 of the
territorial sea boundary. But if you read paragraph 4, it does not mention points 1-7
at all. Instead it refers back to paragraph 2, and when you read paragraph 2 it
describes the course of the boundary in considerable detail and notes that it is
illustrated on Special Chart 114. Paragraph 2 goes on because it also records that
“With respect to the delimitation of the first sector of the maritime boundary” – which
is the territorial sea boundary “the two delegations agreed as follows.” I then sets out
the details of the boundary. So there you have it, Mr President. Both delegations
agreed points 1-7 in 1974, not just the Bangladeshi delegation. Both delegations
signed the minutes and the chart, not just the Bangladeshi delegation. Despite what
Sir Michael Wood also said about point 7, the final point in the agreed line, there is
no uncertainty about it in the text of the 2008 Agreed Minutes. The Minutes do refer
to several options for a variety of possible starting point of the EEZ delimitation, but
the agreed point 7 is specifically listed in paragraph 3 with full co-ordinates, like all
the others. Even the Counter Memorial notes:

\textsuperscript{22} Burma-Bangladesh Maritime Boundary Delimitation Talks, Minutes of the Second Round, 20-25
November 1974, Minutes of Second Meeting at para. 5. MCM, Annex 3.
\textsuperscript{23} \textit{Ibid.}, Minutes of First Meeting at paras. 4-7. MCM, Annex 3.
\textsuperscript{24} \textit{Ibid.}, para. 4.
\textsuperscript{25} \textit{Ibid.}, para. 4; Minutes of Third Meeting, paras. 2-4, MCM Annex 3; see also Bangladesh Territorial
Memorial of Bangladesh (hereinafter “MB”), Annex 10.
\textsuperscript{26} \textit{Ibid.}, Minutes of First Meeting, para. 10, MCM, Annex 3.
\textsuperscript{27} ITLOS/PV.11/7 (E/6), p. 33 lines. 4-7 (Wood).
it was no doubt intended in due course that points 1 to 7 would be included in an overall agreement on the delimitation of the entire line between the maritime pertaining to Myanmar and those appertaining to Bangladesh.\(^{28}\)

Now let me deal next with Sir Michael’s continuing insistence that the Agreed Minutes were only a conditional agreement. He refers to three alleged conditions. First, he says that negotiation of a future treaty on the whole maritime boundary was the objective of both sides. That is obviously true; it says so in all the records. But of course the fact that such a treaty was never agreed does not exclude the option of agreeing \textit{ad hoc} on a territorial sea boundary. An \textit{ad hoc} agreement is no less an ‘agreement’. There is nothing in the Minutes – in the terms of the agreement – that supports Sir Michael’s argument that nothing was agreed until everything was agreed. To remind the Court, what does the 1974 text say about this? It says only that negotiations would continue.\(^{29}\) That is all. How can that imply, still less express, the conditionality that Sir Michael claims? It is not obvious to me. After signing the ‘agreed minutes’ in 1974, there were several further rounds of talks were held between Bangladesh and Myanmar from 1974 to 1985,\(^{30}\) yet the issue of negotiating the territorial sea boundary was never raised again by Myanmar. Why not? Does this not show that Myanmar regarded the territorial sea boundary as settled or agreed in 1974? The fact that it was confirmed without controversy and with only minor changes in 2008 simply adds to the conclusion that the boundary had indeed been settled in 1974.

Secondly, Sir Michael argued that the Parties failed to conduct the joint survey provided for in para. 2. II of the Agreed Minutes. That is true; they did not but it overlooks the fact that they did agree co-ordinates through a joint inspection in 2008.\(^{31}\) Even if the final boundary co-ordinates were incomplete in 1974, they were definitively plotted and agreed on Admiralty Chart 817 in 2008.\(^{32}\)

The final alleged condition is our old friend unimpeded passage in the territorial sea. This is something of a red herring. On the one hand, Sir Michael argues that ‘free and unimpeded navigation’ was a precondition for the 1974 accord\(^{33}\) but on the other hand, he also said on Thursday that ships of Myanmar traditionally enjoyed the right of free and unimpeded navigation to and from the Naaf River since 1948.\(^{34}\) This is rather a contradictory position – apparently unimpeded passage had been exercised as a ‘historical right’, to quote Professor Pellet, since 1948,\(^{35}\) – but was then not exercised after 1974 because Myanmar did not want to put the issue to the

\(^{28}\) MCM, para 4.9.
\(^{29}\) Governments of Bangladesh and Myanmar, Agreed Minutes of the Meeting Between the Bangladesh Delegation and the Burmese Delegation Regarding the Delimitation of the Maritime Boundary (23 November 1974), para. 6, MB, Annex 4.
\(^{30}\) MB, para. 3.32; MCM, paras. 3.11-3.41.
\(^{31}\) Governments of Bangladesh and Myanmar, Agreed Minutes of the Meeting Between the Bangladesh Delegation and the Myanmar Delegation Regarding the Delimitation of the Maritime Boundary (1 April 2008), para. 3. MB, Annex 7.
\(^{32}\) Ibid.
\(^{33}\) ITLOS/PV.11/7 (E/6) p. 22, line 6-8; p. 31, lines 41-45 (Wood); MCM, para. 4.12.
\(^{34}\) Ibid PV.11/7 (E/6), p. 24, lines 15-17.
\(^{35}\) PV. 11/7 (E/6), p. 6, lines 12-23 (Pellet); Delimitation Talks, Third Round (February 1975), Minutes of First Meeting, para. 4. MCM, Annex 4; MCM, paras. 3.23 and 4.38.
test! Why did Myanmar not raise the question again in negotiations between 1974 and 2008 if Bangladesh’s position was as equivocal as Myanmar alleges? Self-restraint may explain a lack of conflict, but it cannot easily explain a lack of negotiation. There was ample opportunity to negotiate in 1980 when the Parties concluded a supplementary protocol to the 1966 Agreement on the Demarcation of a Fixed Boundary in the Naaf River – Unless of course Burma thought the matter had indeed been settled.

In 2008 the Parties recognized that access to Naaf River was no longer a problem, if it ever had been, because they agreed in that year unambiguously in the 2008 Agreed Minutes that navigation through the territorial sea was indeed governed by rules on innocent passage in the 1982 Convention. That had been the case since the Convention came into force. It is not credible to say that Myanmar is still waiting today for Bangladesh to agree on the rules for unimpeded passage. Nor has Bangladesh ever demanded that Myanmar naval vessels seek prior permission for passage into the Naaf River and Myanmar has not alleged any such practice. There is no basis for continuing to demand assurances about passage when the Parties have long since laid the issue to rest. In any event, Bangladesh has made unequivocally clear its acceptance of the right of unimpeded innocent passage for Myanmar vessels in accordance with the 1982 Convention as it had already agreed in 2008. It cannot meaningfully be said that it has not responded favourably to Myanmar’s desire for unimpeded passage into the Naaf River.

Sir Michael alleges that if we look carefully at the terms of the 1974 Minutes we will not find an agreement. So let us look at the terms. They say expressly that “the boundary will be formed by a line extending seaward from Boundary Point No 1… connecting … the mid-points between the nearest points on the coast of St Martin’s Island and the coast of the Burmese mainland.” What could be clearer and more precise? How else might the Parties be expected to express an agreement on the matter? Use of the future tense is appropriate when final co-ordinates are still to be plotted, but that does not make the agreed boundary any less clear or definitive. The text is considerably clearer and more precise than the communiqué in Qatar/Bahrain case. I make a mild diversion. You can see the text of that communiqué, or at least one version of the communiqué – there are two versions and I have compared the two of them – and there is no material difference for the purpose of the point I am about to make. Here we have the Qatar version. It merely reaffirms what was agreed previously, provides for continuation of the good offices of the Saudi king, and says that at the end of the agreed period “the Parties may submit the matter to the ICJ.” The Bahraini version says the two Parties may submit the matter to the ICJ but it makes no difference for this point. The ICJ nevertheless regarded this rather ambiguous diplomatic language as a binding agreement concluded by Foreign Ministers – despite the fact that the Parties could not even agree on how to interpret

---

36 Ibid., p. 24, lines. 32-35.  
and translate their communiqué.\textsuperscript{40} There is no comparable uncertainty or lack of clarity about the 1974 Agreed Minutes. On any reading they look much more like an agreement on the Qatar/Bahrain communiqué; they certainly look like an agreement on a boundary.

It is true, of course, that the 1974/2008 Agreed minutes were not agreed at Foreign Ministers, but that does not prevent the Parties from treating them as binding agreements in practice, as article 8 of Vienna Convention implies when it refers to subsequent confirmation. It is notable that at the sixth round of maritime boundary talks between the Parties in 1985, Myanmar’s Minister for Foreign Affairs and leader of its delegation to the talks, Mr U YE Goung, made the opening statement\textsuperscript{41} and when he made it, far from repudiating a supposedly unauthorized deal negotiated in 1974, he referred to the Minutes signed in Dhaka with approval. They were unquestionably confirmed again in 2008, subject only to minor modifications. This would be rather strange behaviour if indeed Commodore Hlaing had had no authority to sign the agreement or if the agreement he negotiated had been repudiated by his government immediately after the 1974 talks. Bangladesh reiterates its view that Myanmar is now estopped from denying the authority of Commodore Hlaing to conclude the 1974 Minutes. It notes that Myanmar does not deny the authority of those who concluded the 2008 Agreed Minutes.

What does Myanmar say about implementing this agreed boundary in practice? It says very little. It says that affidavits are unreliable evidence, to be treated cautiously, and that naval logs are of little help in proving the existence of a boundary.\textsuperscript{42} But Bangladesh is not using this evidence to prove the existence of an agreed boundary; it is simply using it to show how the boundary agreed in 1974 operated in practice – without problems, or disputes, or friction. Bangladesh has discharged whatever burden of proof it has in this respect and Myanmar has produced no evidence at all to the contrary. If there are problems, the burden is on Myanmar to prove them.\textsuperscript{43} Myanmar admits that the evidence does show that its fishermen have been arrested on Bangladesh’s side of the territorial sea.\textsuperscript{44} If there was in fact no agreed boundary, or no boundary in practice, why then did Myanmar not protest at these arrests? Myanmar says they were on Bangladesh’s side of the boundary.\textsuperscript{45} Precisely, Mr President.

I said this would be a short speech. The conclusion seems obvious. The 1974 Agreed Minutes in Bangladesh’s view did constitute an unconditional binding agreement settling the territorial sea boundary between the Parties, in accordance with article 15 of the 1982 Convention.\textsuperscript{46} Even if we assume that the 1974 Agreed

\textsuperscript{40} Ibid., paras. 19 and 30.
\textsuperscript{41} Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Speeches and Statements, 19-20 November 1985, p. 2. MCM, Annex 8.
\textsuperscript{42} ITLOS/PV.11/8 (E/7) p. 6, line 19; p. 11 line. 28 (Sthoeger); RM, paras. I.4 (p. 15) and 2.50-2.69.
\textsuperscript{44} ITLOS/PV.11/8 (E/7) p. 11, lines 34-35 (Sthoeger).
\textsuperscript{45} Ibid., lines 11-28.
\textsuperscript{46} ITLOS/PV.11/3 (E/2) p. 1, lines 23-25; p. 6, lines 7-9; p. 9, lines 16-19 (Boyle); MB, para. 5.18 ; RB, para. 2.8.
Minutes were not binding unless Myanmar’s conditions with respect to the fixing of boundary co-ordinates and unimpeded passage were fulfilled, by 2008 the coordinates had been plotted and the regime applicable to passage into the Naaf River had been agreed.\[^{47}\]

Acceptance of this boundary by the Parties is reflected in their wholly unproblematic practice with respect to navigation and law enforcement. The agreed boundary had been working effectively for 34 years in 2008 – and it continues to function effectively. Why? Not simply because it was agreed but because both Parties know it is equitable and because a properly drawn article 15 equidistance boundary would be almost identical – if anything it would be slightly more favourable to Bangladesh, as Professor Sands will shortly show you. Myanmar wants to unpick this agreement only because it is inconsistent with its grandiose and legally unsupportable arguments in the Exclusive Economic Zone and the continental shelf beyond the territorial sea.

Mr President, Members of the Tribunal, that concludes this part of my submission. Unless I can be of any further assistance, I would ask you to give the floor to Professor Sands.

THE PRESIDENT: I call on Professor Sands.

PROFESSOR SANDS: Mr President, Members of the Tribunal, it falls to me to respond to Myanmar’s arguments as to the delimitation of the territorial sea in the absence of the agreement to which Professor Boyle referred and it is off the back of Myanmar’s recent discovery that St Martin’s Island is, after all, a ‘special circumstance’ within article 15 of the 1982 Convention. As is, of course, an alternative argument. As is customary for a second round speech, I am going to limit myself to responding to the arguments of Myanmar, principally as presented by Mr Lathrop. I will not repeat what has been said in our written pleadings or in the first round of our oral arguments, and I will not seek to address the many inaccuracies or infelicities in Myanmar’s treatment of this subject.

The bottom line, Mr President, as anyone with even a passing knowledge of the law and practice of article 15 will know, is that Myanmar’s argument is thin, and that is a generous characterization. Article 15 establishes an equidistance rule for the territorial sea, and it draws no distinction between the entitlements that appertain to the mainland or to islands. Myanmar has found no authorities on which it can rely in support of its claim that St Martin’s Island is to be treated as a ‘special circumstance’ within the meaning of article 15. It is inviting you to make new law. In our submission, there is no basis for you to do so. Accordingly, I can be relatively brief.

Before getting to the only real issue – why St Martin’s Island is not now and has never been a ‘special circumstance’ – please allow me to make a small number of preliminary points.

First, it is necessary to say something about what Mr Lathrop had to say in its
totality, or, rather, what he did not say. One learns early in life, and in court,
Mr President, that on some occasions that which is not said is more significant than
that which is said. Mr Lathrop’s presentation was one such occasion, and a
particularly striking one. Many of those present in the courtroom when Mr Lathrop
addressed the delimitation of the territorial sea will have noted those matters on
which his silence was conspicuous.

He had nothing to say, for example, about access to the mouth of the Naaf River. He
had nothing to say about any difficulties of access through the territorial sea of
Bangladesh around St Martin’s Island. He had nothing to say about Myanmar’s
abrupt change of position after 2008: whether it be a legally binding agreement or
not, the fact is that starting in 1974, and for a period of at least 34 years, through the
negotiation, adoption, ratification of the 1982 Convention, and for more than a
decade after that ratification, Myanmar did not treat St Martin’s Island as a special
circumstance. In fact, Myanmar continuously recognized that St Martin’s Island was
entitled to a full 12-mile territorial sea. It said so very publicly, and at the highest
levels of government. In 1985, for example, the distinguished Foreign Minister of
Myanmar (or Burma, as it then was) said that his country recognized the "entitlement
of St Martin’s Island to a full 12 M territorial sea". I emphasize the word “full”. “Full”
is not “partial”, Mr President; nor is it “half-full”, nor is it three-quarters full. “Full”
means full. Nothing has changed in the law or in the facts since 1985 when the
Foreign Minister spoke. This Tribunal is entitled to an explanation from Myanmar as
to why it has recently and abruptly changed its position; it has had no explanation.

You have also been given no explanations as regards Myanmar’s own practice in
this field elsewhere, and the manifest inconsistency between that practice and what
it now says you should do in this case. It has provided no response to our questions
during these hearings as to why St Martin’s Island should be treated differently, for
example, than Myanmar’s Aladdin Islands; you will recall that those islands were
given a full 12 M territorial sea in Myanmar’s 1980 Agreement with Thailand. I
referred to that explicitly in the first round. What was Myanmar’s response? None.
There was no response. Nor have you been given any explanation in these hearings
as to why Myanmar’s Little Coco Island – to which I also referred – was given full
weight in the territorial sea in its 1986 agreement with India. What was Myanmar’s
response? None – again, silence. On all these matters, and on many others,
Mr Lathrop was silent. He was equally reticent on the case law that we cited in our
pleadings and that is so deeply harmful to the arguments of his client. I will return to
that in a moment.

So what did he talk about? Well, he had quite a lot to say about so-called “mainland-
to-mainland” equidistance lines. He sought to respond to our expression of surprise

---

48 ITLOS/PV.11/3, pp. 25-27 (Sands).
49 Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Rangoon, 19-20 November 1985, MCM, Annex 8, p. 2. Also, in a 2008 Note Verbale, Myanmar explicitly acknowledges the 12 M entitlement of St Martin’s Island: “It is in this neighbourly spirit that the Myanmar side has requested the kind cooperation of the Bangladesh side since the streamer/receiver of the said survey vessel is expected to enter the 12-mile territorial sea which Bangladesh’s St Martin’s Island enjoys in principle in accordance with UNCLOS, 1982” (BR, Vol. III, Annex R1).
50 ITLOS/PV.11/3, p. 24, line 12 et seq.
51 Ibid., p. 24, line 24 et seq.
as to the very recent adoption by Myanmar of the merits of such a line, no doubt as a
way of avoiding giving St Martin’s Island the full 12 M territorial sea to which its
Foreign Minister had previously professed such strong attachment. But,
Mr President, you will have noted that Mr Lathrop was not able to show you a single
decided case in which such an alleged line had been used in the manner now
proposed by Myanmar, a situation where a significant coastal island is located in
close proximity to the adjacent coastal State’s mainland and well within the
mainland’s 12 M territorial sea. He did refer you to four cases – the Anglo-French
Continental Shelf case, the Black Sea case, the case of Nicaragua v Honduras, and
the Eritrea v Yemen cases52 – but none of those cases is analogous, as we are sure
you will all be fully aware. In the first three cases, the islands were not coastal
islands; they were not located within 12 M of the mainland of the coastal State, and
each was given a full 12 M territorial sea – except where the full-weight median lines
truncate the territorial sea, as occurred for example in relation to some of the
Honduran cays.

The fourth case he referred to was Eritrea v Yemen. I say, Mr President, that we very
much regret to have to say that the treatment of that case was entirely misleading:
the tribunal in that case gave full weight and effect to four coastal islands, some of
which were located at a far greater distance from the mainland than is St Martin’s
Island, some even beyond 12 M. As you can see on your screens, these islands
included (highlighted in yellow at the top) the Dahls on the Eritrean side, and
Tiqfash, Kutama, Uqban and Kamaran on the Yemen side. These were coastal
islands, on which base points were located, and they were treated as an integral part
of the mainland in drawing an equidistance line. The implication that they were
ignored in drawing an equidistance line is wholly wrong. There is no analogy to be
drawn, and the award entirely supports the approach of Bangladesh that a coastal
island generates a full 12 M territorial sea, and full weight in the drawing of an
equidistance line.53

In that delimitation, which was of the continental shelf and not the territorial sea, the
islands that were ignored were located at great distances from the mainland.
Mr Reichler will return to say more about those islands tomorrow.

The fact that these examples are not on point is presumably one of the reasons why
Mr Lathrop did not show them to you on any charts. It is blindingly obvious,
Mr President, that if there are no islands to be found within 12 M of the coast then
article 15 could require you to draw a provisional equidistance line from base points
that are to be found on the two States’ mainlands. In these circumstances there are
good and obvious reasons why you might want to start with a so-called “mainland-to-
mainland” equidistance line – there are not any islands present. But if an island is
located within the 12 M coast, like St Martin’s Island, then there will be no
justification for drawing such a line because the 1982 Convention requires you –
requires you - to draw the equidistance line on the basis of base points located on
the island. That is clear and established law.

52 ITLOS/PV.11/8, p. 15, line 14 to p. 16, line 9 (Lathrop).
53 RB, para. 2.79-2.80.
Mr Lathrop derives no greater support from the writings of Professor Bowett, writings. I have to say that he filleted them in a manner that brought to mind the use of a hammer to remove the bones from a sardine. Derek Bowett was a great international advocate and international jurist, who chose his words very carefully, and it is a matter of great regret that he never had an opportunity to address this Tribunal. He was also my teacher and colleague, and I fear he would have raised a characteristic eyebrow if he had witnessed Mr Lathrop’s use of his writings to justify the unjustifiable.\(^{54}\) We have checked each and every one of the examples to which Mr Lathrop refers in the cited article. I can deal with them quickly. Mr Lathrop’s first example was as follows, and you can see the quote on your screen: “The island of Halul was ignored \(\ldots\) in constructing the mainland-to-mainland equidistant line”.\(^{55}\) That is what he said. You will note the dots and you will note the capital “T”. Here is what Professor Bowett actually wrote, including the words that Mr Lathrop left out:

Thus, in the Iran-Qatar agreement the island of Halul was ignored, apparently because of its disputed status, in constructing the mainland-to-mainland equidistant line.\(^{56}\)

If you then go to the footnote of that text, you will see that it refers to page 402 of Jayewardene’s book *The Regime of Islands in International Law*. If you then go and dig that up, you will see that it says the following:

The Qatari island of Halul which is an off-lying island and located over 60 M off the coast has been ignored as is indicated in the preceding analysis. The reason for disregarding Halul appears to have been its disputed status.

So when you fill in the dots and put the word “the” in lower case, you see clearly what Professor Bowett was addressing, and it is entirely distinguishable from this case.

The second example that Mr Lathrop gave you, drawing from Professor Bowett’s article, was the following quote: “Various small islands were ignored in drawing a mainland-to-mainland equidistant line.”\(^{57}\) What Mr Lathrop did not draw to your attention was that Professor Bowett was again referring to the same Iran-Qatar agreement. It was an agreement, Mr President, negotiated and adopted between two States. It can provide no support for the drawing of an equidistance line desired by Myanmar in this case.

The third quotation given by Mr Lathrop, we regret to say, was also partial and omitted significant elements. The quote he gave you was – and this is taken from the PV: “Several islands \(\ldots\) were ignored and a mainland-to-mainland equidistant boundary adopted.”\(^{58}\) Now let us look at the full quote:

So, too, in the Canada-Denmark agreement, where in the Kennedy Channel several islands on the Greenland side, and some small islands of

---

\(^{54}\) ITLOS/PV.11/8, p. 15, line 4 et seq.
\(^{55}\) ITLOS/PV.11/8, p. 15, line 7 (Lathrop).
\(^{57}\) ITLOS/PV.11/8, p. 15, line 8 (Lathrop).
\(^{58}\) *Ibid*. 
indeterminate sovereignty in the middle of the channel, were ignored and a mainland-to-mainland equidistant boundary adopted.  

I could make a lot of points, but I will just make a small number. It was an agreement, not a judicial or arbitral award, and the situation is entirely distinguishable from that of St Martin’s Island: (1) the islands lie in a narrow channel, less than 20 M wide; (2) it is a situation of two opposite mainland coasts; (3) none of them sustains a permanent population. Canada and Denmark agreed not to take into account the islands because of the narrowness of the body of water.

These three examples in no way assist Myanmar. The commentary of Professor Bowett may happen to use the same phrase that Myanmar likes, but they were very obviously referring to entirely different, extra-judicial cases, negotiated situations each of which turns on its own particular facts.

We regret having to point out these textual infidelities, but let me give one more example. After invoking Professor Bowett, Mr Lathrop referred you to a discussion at the International Law Commission in 1953, in support of his argument that there could be a departure from equidistance where “a small island opposite one State’s coast belonged to another”. If you take the trouble to check out what the 1953 discussion was about, as I am sure you will, you will see that the meeting at which that occurred at the International Law Commission was addressing a proposed text for what was to become article 6 of the 1958 Continental Shelf Convention. The reference invoked by Mr Lathrop had nothing to do with the delimitation of the territorial sea. The way they have been treated by counsel for Myanmar reminds one of golden rule no.3 of advocacy: if you are going to cite an authority that has footnotes, read the documents referred to in the footnotes.

It is against this background that we say it is entirely correct for us to argue that the invocation of a so-called “mainland-to-mainland” equidistance line in circumstances that wholly ignore an island located within 12 M is curious, to say the least, and appears to be novel and unprecedented in the case law. Let me be blunt: it is just plain wrong. We trust that this Tribunal will not be the first international court or tribunal to draw a so-called “mainland-to-mainland” equidistance line through an island or that ignores an island – and a most significant island at that – one that is located within 12 M of the coast.

We also trust that this Tribunal will not be seduced by Mr Lathrop’s occasional reference to what he called Myanmar’s “dominant mainland coast”. Let us not

---

60 H. Jayewardene, “The Regime of Islands in International Law”, (1990) at p. 431: “The boundary of the continental shelf between Canada and Greenland (Denmark) provides an example of how small islands lying the middle of a narrow body of water may be treated.”
61 ITLOS/PV.11/8, p. 26, lines 31-35 (Lathrop).
62 *Y.I.L.C.*, vol. I, *Summary records of the fifth session*, 204th Meeting, p. 128, para. 37: “There were cases, however, where a departure from the general rule was necessary in fixing boundaries across the continental shelf; for example, where a small island opposite one State’s coast belonged to another; the continental shelf surrounding that island must also belong to the second State. A general rule was necessary, but it was also necessary to provide for exceptions to it.” (Mr François) (emphasis added).
63 ITLOS/PV.11/8, p. 20, line 12; p. 23, line 27; p. 28, line 3 (Lathrop).
forget that Mr Lathrop was addressing the delimitation of the territorial sea. Let us recall also that article 121(2) of the 1982 Convention makes it clear that islands such as St Martin’s Island have exactly the same entitlements as “other land territory”. There is no basis – no basis - for the suggestion that any sort of adjustment is to be made to the limit of the territorial sea of St Martin’s Island on account of it being an island. St Martin’s Island is entitled to exactly the same treatment as Myanmar’s mainland coast - period. The concept of “dominance” simply does not arise. This is all the more so where St Martin’s Island is a coastal island and an integral part of Bangladesh’s coastline.

Related to this, Mr Lathrop invoked the concept of what he called a “simplified equidistance line”. That was to respond, as you will recall, to our objection to Myanmar’s use of incorrect base points for the calculation of the median line, in particular the location of Myanmar’s point B, which had ignored the nearest points on Bangladesh’s low water line, located on the final spit of the northern shore of the Naaf River on British Admiralty Chart 817.64

The response given by Myanmar to this was to say that it had engaged in what it called a “simplification process” with respect to the equidistance line.65 With great respect, Mr Lathrop has mis-stated the concept of a “simplified equidistance line”. It is certainly correct that where a strict equidistance line has many turning points, all of which extend the line in the same direction, those plotting the line will often delete many of the turning points without altering the course of the line, or at least they will give each side an equal allocation of area by way of compensation. The process of simplification is done fairly such that neither party is disadvantaged, and the net effect is neutral. That is not what happened here: Myanmar’s segment makes a distinct change of direction, and Myanmar’s so-called “simplified equidistance line” would, if applied by the Tribunal, give Myanmar an added area at the expense of Bangladesh without any compensatory allocation to Bangladesh. It should not be applied by the Tribunal: it is incorrectly calculated and it wrongly allocates an area to Myanmar. The simple point is that Myanmar made a mistake in calculating the equidistance line, and has now recognized that Bangladesh’s line is the correct one. Mr Lathrop in effect admitted this. He conceded during his oral arguments that, “From a technical perspective, there is nothing objectionable about Bangladesh’s proposed territorial sea line.”66 We invite you to read that very carefully because it is a major concession, and we hope that the Tribunal will take note of it. In the unlikely event that the Tribunal does not find that an agreed boundary in the territorial sea has been in place since 1974, Bangladesh submits that the Tribunal should delimit the maritime boundary in the territorial sea as plotted by Bangladesh, from points 1A to 8A. You can see that line on the screen now: The only point of difference that remains between the Parties, is what to do beyond Myanmar’s point C, or our point 6A, and it is to that which I now turn.

Having accepted that there is “nothing objectionable about Bangladesh’s proposed territorial sea line”, the burden is on Myanmar to prove that there is no justification in law for delimiting the boundary along to point 7 (of the 1974 agreement), or to the

---

64 RB, paras. 2.98 and 2.100; ITLOS/PV.11/3, lines 38-44, p. 27 (Sands).
65 ITLOS/PV.11/8, p. 22, line 27 (Lathrop).
66 ITLOS/PV.11/8, p. 21, line 4 (Lathrop).
end point (point 8A) of the territorial sea boundary drawn on the red equidistance line (in accordance with article 15). Mr Lathrop set out his stall in the following way:

The problem with Bangladesh’s proposed delimitation of the territorial sea”, he said, “is not a technical one but a legal one. Bangladesh fails to take into consideration the second half of the equidistance/special circumstances rule as it applies to St Martin’s Island.67

Putting aside the matter that it took Myanmar more than 34 years to notice that St Martin’s Island was somehow a special circumstance, and that even its own Foreign Minister had missed this point in 1985, the challenge for Myanmar is to persuade you that St Martin’s Island is indeed a special circumstance.

Mr Lathrop told you that the problem with Bangladesh’s line is a “legal one”. With great respect, he faces an insurmountable difficulty, as his limited use of authorities makes clear: he has no legal support whatsoever for his claim.

Just before we get to that issue, it is worth noting that as regards the characteristics of St Martin’s Island there appears to be a large measure of agreement between the Parties. On the basis of what Mr Lathrop did and did not say, it seems there is general agreement between the Parties as to the facts pertaining to St Martin’s Island. It is agreed that it is an island. It is agreed that it is located at an equal distance from the mainland coasts of Bangladesh and Myanmar, namely 4.5 M. There seems to be no dispute that so located it is a coastal island, that it has a significant population, extensive economic activity, and an important role as a base for Bangladesh’s navy and coast guard. It is also common ground between the parties that during the period of 34 years over which Myanmar unequivocally recognized Myanmar’s entitlement to have a full 12 M territorial sea, no problems ever arose, particularly regarding navigational passage issues. There is one point of minor difference perhaps, in relation to the significance of St Martin’s Island as a geological feature, which Mr Lathrop on one occasion sought to play down – but I have to say he was somewhat contradictory. Early in his presentation he noted that if you were to stand on the Myanmar coast at any point between Cypress Point and the town of Kyaukpandu – a considerable distance by any standard – you would look toward the east-facing coast of St Martin’s Island. That seems to suggest it is rather significant.68 But then, just a few minutes later, he backpedalled rather furiously, denying that St Martin’s Island is a “major geographic feature”.69 So you can see it along large parts of Myanmar’s coast, but it is not significant.

This also allows me to correct a minor error into which Professor Pellet fell, when he said that you could only see the mainland coast of Bangladesh from the northernmost tip of St Martin’s Island.70 I am afraid that is not correct: a part of the mainland of Bangladesh can be seen from any point on the east coast of St Martin’s Island.

67 ITLOS/PV.11/8, p. 21, lines 21-24 (Lathrop).
68 ITLOS/PV.11/8, p. 19, line 31 (Lathrop).
69 ITLOS/PV.11/8, p. 25, line 41 (Lathrop).
70 ITLOS/PV.11/7, p. 7, lines 34-35 (Pellet).
Let us turn to the “legal problems” that Mr Lathrop identified with our line. The first point to make is that in making that assertion Mr Lathrop ignored any of the cases to which I directed you.\(^{71}\) I am not now, this afternoon, going to repeat all of them, but let us just take one. You will recall that I drew your attention to the Hawar Islands, which are located very close to Bahrain but were not treated by the ICJ as a special circumstance in delimiting the territorial sea. We said that we looked forward to hearing from Myanmar what it had to say about the Hawar Islands, and why the ICJ had got its law wrong.\(^{72}\) What did Mr Lathrop have to say? Yet again, nothing; he made no mention of this island. This is a characteristic feature of Myanmar’s approach not just to my part of the case that I am addressing now, but to its treatment generally; it ignores unhelpful authorities and hopes that somehow they will just go away.

Mr President, the function of counsel is to assist the Tribunal and to confront the difficulties in its own arguments.

Having failed to engage with the difficulties posed by its own treaty practice, and by this and other unhelpful authorities, what he did instead was to reach out to a different class of cases. Now I have to say, this had us really puzzled. He homed in on two cases in particular, in support of his proposition that St Martin’s Island was indeed a special circumstance within the meaning of article 15, one that should cause a normal equidistance line in the territorial sea to be adjusted or rejected.

Last Friday, in his submissions, Mr Lathrop directed you to the award of *Guinea v Guinea-Bissau*. You can see it on the screen. He described it as “the most directly relevant case when it comes to the treatment of islands in the delimitation of the territorial sea.”\(^{73}\) That being the case, one might ask oneself what Myanmar had to say about the most directly relevant case in its Counter-Memorial. Let us have a look at what Myanmar had to say. It is not a technical hitch Mr President: of the “most directly relevant case”, they said … nothing. What did they say about it in the Rejoinder? We have already mentioned to you that they thought – you can see it on your screen now - the award was “so eccentric that it is difficult to refer to it”\(^{74}\), but that is not all they had to say in their Rejoinder. Eccentric perhaps, but nevertheless somehow they overcame the monumental difficulty of referring to it, and this is what they said: “The award cannot be applied to the geography in the present case.”\(^{75}\) So what is it, Mr Lathrop? Have you actually read the pleadings? What is your case? Is *Guinea v Guinea-Bissau* inapplicable to the geography of this case, or is it the most directly relevant authority? I have to say that as I listened to this the episode reminded me of a particularly splendid answer given by a witness during a cross-examination in another case a few years ago. When asked whether she had ever seen previously seen a document, the witness initially declined to answer. She was pushed by the distinguished presiding arbitrator, and eventually she gave the following memorable response to the question: “Have you ever seen this document before?” “Yes”, she said, first [pause]; “No”, she said a moment later [pause] – “Maybe”, she said a moment after that. Is this the way in which Myanmar invokes

\(^{71}\) ITLOS/PV.11/3, pp. 17-23 (Sands).
\(^{72}\) ITLOS/PV.11/3, p. 19, line 21 (Sands).
\(^{73}\) ITLOS/PV.11/8, p. 27, lines 25-26 (Lathrop).
\(^{74}\) RM, para. 4.27.
\(^{75}\) RM, para. 3.20.
Guinea v Guinea-Bissau? We look very much forward to hearing on Saturday whether it is “yes” or “no”, or “maybe”, or perhaps some combination of the three.

Let us try to help you on this case. As you can see on your screens, there were some islands off the coast of Guinea and Guinea-Bissau, and some were within 12 M of the coast. The arbitral tribunal did not effect the delimitation by means of an equidistance line: it effected it in three stages. The line A to B reflects the agreement set forth in the 1886 Convention between Portugal and France; the segment B to C reflects the limit of Guinea’s claim in that area, and it will be noted that it did not claim a 12 M territorial sea for these islands; and the segment beyond C is effected by using a bisector, as you can see in red on your screen; and it was drawn to ensure that Alcatraz Island remained squarely within the area claimed by Guinea. That is why islands were not given a full 12 M. The issue of equidistance simply never came into play. Mr President, the award provides no support for the proposition that St Martin’s Island is not entitled to a full 12 M territorial sea.

Digging deep, very deep in fact, Mr Lathrop found another novel argument to justify an adjustment of the equidistance line in the territorial sea. He raised the spectre of the alleged disparity in the distance between the base points used on the coasts of St Martin’s Island and of Myanmar to draw the equidistance line. Mr Lathrop said that these had “a highly disproportionate ratio of approximately 1:20”. In support of that argument he invoked a single case, the ICJ judgment in the Jan Mayen case, citing its conclusion that a coastal disparity of 1:9 as between the relevant coast of Greenland (Denmark) and the island of Jan Mayen (Denmark) was “a special circumstance that called for an adjustment of the equidistance line”. This was even more curious than his new-found love for Guinea v Guinea Bissau: in that case the line that was being delimited was not of the territorial sea, but of fishing zones and continental shelf. As you can see now on your screens, the island of Jan Mayen is located some 245 M from the coast of Greenland, and it has a full 12 M territorial sea. It is simply irrelevant to the delimitation of the territorial sea.

There was a theme running through Mr Lathrop’s presentation: he sort of forget that he was dealing with the delimitation of the territorial sea. Time and again, he took you cases that relate to the area beyond 12 M, and then invited you to apply their findings to the delimitation within the 12 M limit. That is not something this Tribunal can or should do, and certainly cannot do safely, Mr President, without doing considerable damage to the well-established case law, all of which recognizes that islands located within 12 M are entitled to a full 12 M territorial sea. Let us not forget that Mr Lathrop’s presentation was entitled: “The Delimitation within 12 M”. It seems that in reality he was setting up the case for the delimitation beyond 12 M. This strategy was as plain to us as his pleading was confused, and he was just as wrong about truncating St Martin’s beyond 12 M, a point to which Mr Reichler will return tomorrow.

Mr President, Myanmar has given every impression that it recognizes that it cannot win this part of the case. It knows that its own practice, the text of the 1982

---

76 ITLOS/PV.11/8, p. 20, line 45 (Lathrop).
77 ITLOS/PV.11/8, p. 21, lines 1-2 (Lathrop).
Convention and the jurisprudence point decisively to a judgment from this Tribunal that gives St Martin’s Island a full 12 M territorial sea.

What this necessarily means, as the 1974 Agreement and subsequent practice have confirmed, is that the end point of the territorial sea delimitation is where Bangladesh says it is: either at point 7 of the 1974 agreement, or at point 8A on Bangladesh’s modern equidistance line plotted strictly in accordance with the requirements of article 15. That brings me by way of wrap-up to another final curiosity of Myanmar’s presentation of its case in oral argument: despite the clarity of what we thought we had said in the first week of hearings, it seems that we were not clear enough. Let me give you one example. Last Thursday we heard Professor Pellet say that it was “worth noting that our opponents do not contest the principle itself that there be a necessary semi-enclaving of St Martin’s Island”. Those were his words. In fact, it repeated a point made at paragraph 3.4 of their Rejoinder.

I have to say that I was pretty surprised when I heard him say that, as I thought I had taken the trouble to say very clearly that his claim was “totally wrong”, and that we did and do contest that principle. The words “totally wrong” seemed to us to admit of no ambiguity, but in order to avoid any possible doubt, I said, as the transcript will show: “We have never accepted that there is any sort of enclave to be established around St Martin’s, and until 2010 Myanmar made no such claim either”. How, then, could Professor Pellet say what he did? Perhaps he had not heard me. I continued to wonder why, in the face of our clear denial, he still believed we were supportive of an enclave around St Martin’s Island. Then, thankfully, on Monday he gave us a clue. He made a reference to modern art. He referred to the work of the Dada-ists and the surrealists. Professor Pellet had entered the world of the surrealists, the world of surprises, unexpected juxtapositions and non sequiturs. Perhaps therein lies the explanation for his odd statement, and suddenly, magically, I understood. One of the most well-known surrealists is the Belgian artist Rene Magritte, and one of his most famous paintings, dating to 1928, is titled ‘La trahison des images’. You can see his painting on your screens now. Some of you, I am sure will be familiar with it. It shows an image of what appears indisputably to be a pipe, and then underneath it the words ‘Ceci n’est pas une pipe’. Magritte’s point was that what we are looking at is not a pipe; it is an image of a pipe.

With that in surrealist clue in mind, we think that we can perhaps understand Myanmar’s approach to the delimitation of the territorial sea, which you will be able to see on the screens. It plainly shows the island of St Martin’s Island within a partial enclave. So I can add the surrealist words, ‘Ceci n’est pas une enclave’. Taking this surrealist approach, I suppose that that description of this image could be right. It is not an enclave, it is only an image of an enclave, and that would surely have been Magritte’s point if we had retained his services instead of those of our marvellous cartographers. Adopting that surrealist approach, let us try to be a little more precise, in the hope that we can once and for all impression on Myanmar’s counsel what our position is. Let us take a clear image that shows our line of delimitation of the territorial sea. You can see it in red and you see St Martin’s Island. We can now graphically represent our belief that our line of delimitation does not depict an image

78 ITLOS/PV.11/7, p. 8, lines 21-22 (Pellet).
79 ITLOS/PV.11/3, p. 28, lines 27-29 (Sands).
80 ITLOS/PV.11/10, (19 September 2011, p.m. session) (Pellet).
of an enclave, and we can add the words, to be clear, ‘Ceci n’est pas l’image d’une enclave’. Mr President, for the avoidance of all doubt, we remain totally opposed to any enclaving of St Martin’s Island. There is no justification for it in art or in law.

The point is actually a serious one. Counsel for Myanmar keep coming back to the enclave point, presumably as a means of helping to push the line of territorial sea delimitation back to their point E. As you can see on the screen, point E is where Myanmar would like the territorial sea boundary to reconnect to their putative, imaginative, erroneous, novel and legally indefensible mainland-to-mainland equidistance line. They are as keen on point E as they are on an enclave, Mr President – so keen, in fact, that you too will no doubt have noted the concession that Professor Pellet made last Thursday afternoon, picking up on a hint made at paragraph 3.7 of their Rejoinder, “In any case”, he told you, “we have to join the equidistance line plotted thus”, implying that they could live with a full 12 M territorial sea for St Martin’s Island, so long as a line connecting the end point of a full 12 M territorial sea is then drawn to Myanmar’s proposed point E. On your screens, in red, you can see what it would look like. That is what Myanmar is playing for. As you can see for yourselves, it is a manifestly unsupportable suggestion, deprived of any legal authority, and we invite you to robustly reject the suggestion. Point E is not, and has never been, a reasonable starting point for the delimitation of the continental shelf. It assumes the conclusion that St Martin’s Island is not to be given any weight beyond the territorial sea. That is the point of their argument. Tomorrow, Mr Reichler will explain why there is no justification for refusing to give St Martin’s Island anything less than full effect from the territorial sea boundary throughout the EEZ and continental shelf up to the 200 M limit. The correct starting point, which you can see on your screens, is point 7 of the 1974 agreement, alternatively point 8A of the modern equidistance line.

Mr President, that concludes my presentation and, as we indicated yesterday afternoon, the presentations of Bangladesh are now concluded for today. The boundary in the territorial sea must be an equidistance line as required by article 15. St Martin’s Island is not a special circumstance and it is entitled to a full 12 M territorial sea. We look forward to resuming tomorrow afternoon, assisted by a plentiful supply of graphics and charts that are intended to assist the Tribunal with its work, when Mr Reichler will pick up from my submissions and address the arguments of Myanmar on the delimitation of the EEZ and continental shelf. Ceci est une promesse, M. le President. I thank you for your kind attention.

THE PRESIDENT: I thank you, Mr Sands. That concludes our sitting today. The hearing will resume tomorrow morning at 10 a.m. The sitting is now closed.

(The sitting closed at 4.34 p.m.)

---

81 ITLOS/PV.11/7, p. 8, lines 13-14 (Pellet).