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

2011

Public sitting
held on Thursday, 15 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
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as Deputy Agent;

and

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as Deputy Agents;

and

Mr 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,
Mr 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,
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as Advisers.
THE PRESIDENT: Good afternoon. Today Myanmar will begin its first round of oral arguments in the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal. Before giving the floor to the first speaker I would like to note that Judge Dooliver Nelson is prevented by illness from sitting on the Bench.

I now invite the Agent of the Republic of the Union of Myanmar, His Excellency Attorney General Dr Tun Shin, to take the floor.

MR SHIN: Mr President, Members of the Tribunal, it is a great honour for me to appear before you on behalf of my country, the Republic of the Union of Myanmar. This is the first time that Myanmar has taken part in proceedings before the International Tribunal for the Law of the Sea. Indeed, this is the first time that Myanmar has been a party to inter-State proceedings before any international court or tribunal.

Let me first thank the distinguished Agent of Bangladesh, Her Excellency the Honourable Dr Dipu Moni, Foreign Minister of Bangladesh, for her kind words addressed to the delegation of Myanmar last Thursday. As the Minister said, as close neighbours, our two States have long enjoyed strong ties.

Mr President, our decision, together with our friends from Bangladesh, to submit this case to the Tribunal, rather than to arbitration under Annex VII of the Law of the Sea Convention, is a measure of the confidence that we have in you, the Members of the Tribunal.

In its latest resolution on “Oceans and the Law of the Sea” the General Assembly of the United Nations:

“Note[d] with satisfaction the continued and significant contribution of the Tribunal to the settlement of disputes by peaceful means in accordance with Part XV of the Convention, and underlines the important role and authority of the Tribunal concerning the interpretation or application of the Convention and the Part XI Agreement.”¹

The General Assembly went on in the same resolution to refer to the present case. It noted, and I quote, “the recent referral to the Tribunal of a case concerning the delimitation of a maritime boundary”.²

Mr President, the General Assembly’s interest in the present case is a measure of its significance. This is, of course, the first maritime delimitation case to come before the Tribunal. The Court in The Hague, and ad hoc arbitral tribunals, including those under Annex VII, have dealt with, and are currently dealing with, a considerable number of such cases. States with maritime delimitation disputes, and there are

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¹ General Assembly resolution 65/37 of 7 December 2010, para. 37.
² Ibid., para. 41.
many of them, in all parts of the world, will be following the present proceedings with
great attention. The case is therefore a historic one, both for the Parties and for the
Tribunal.

Mr President, Members of the Tribunal, we in Myanmar have followed closely your
efforts to build up the Tribunal. The facilities here in Hamburg are of course first rate,
as is the Registry, and your caseload is now taking off. In addition to the present
proceedings, we saw in February of this year the important, and unanimous,
Advisory Opinion, of which the International Seabed Authority took note with
appreciation at its meeting in July. On your docket you have two other full-scale
cases raising central issues of the law of the sea.

As I have said, our decision to submit this case to the Tribunal is a measure of the
confidence that we have in the Tribunal. It is a function of our belief that, with your
collective wisdom and expertise, you will reach a decision firmly anchored in the
modern international law of the sea, a decision that is firmly anchored in the law on
maritime delimitation as it has developed in the case law of international courts and
tribunals, culminating in the unanimous judgment of the International Court in 2009 in
the case between Romania and Ukraine.¹

Mr President, Professor Alain Pellet will shortly give a brief overview of our case. All
I need do at this stage is to stress the importance of this case for Myanmar. Her
Excellency the Foreign Minister of Bangladesh described last Thursday the
importance of this case for her country. For Myanmar too, the sea and its resources
are a matter of vital concern. The Bay of Bengal is an essential part of the life of our
nation. Fortunately, Myanmar has succeeded in reaching delimitation agreements
with its other neighbours, India and Thailand.² Only with Bangladesh has such
agreement not proved possible. This is why we are here today.

Mr President, Members of the Tribunal, it remains for me to introduce those who will
address the Tribunal on behalf Myanmar in this first round of oral pleadings.

This afternoon, Professor Alain Pellet will begin by giving an overview of Myanmar’s
case. Then Mr Samson will introduce the geographical context.

Next, Sir Michael Wood will refer to the negotiations between the Parties,
negotiations that were aimed at agreeing a global delimitation of their respective
maritime spaces. He will show that the negotiations in question led to no agreement,
including in respect to the territorial sea. In particular, he will show that the 1974
Agreed Minutes were not a maritime delimitation agreement for the territorial sea.
Sir Michael will begin his speech this afternoon and continue tomorrow.

Mr Sthoeger will then show that there is nothing in the practice of the Parties that
leads to a different conclusion. It is therefore for the Tribunal to draw the boundary

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¹ International Seabed Authority, Decision of the Assembly of the International Seabed Authority
relating to the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the
Law of the Sea on matters relating to the responsibilities and obligations of States sponsoring persons
and entities with respect to activities in the Area, 25 July 2011, 17th session, ISBA/17/A/9.
line between the territorial waters of the Parties. Mr Lathrop will conclude our presentation tomorrow afternoon by describing the territorial sea delimitation line that we ask the Tribunal to adopt.

On Monday morning, Professor Pellet will address the law applicable to the delimitation of the continental shelf and the Exclusive Economic Zones of the Parties. Professor Forteau will stress the crucial role of equidistance in this case; and Mr Müller will describe the relevant coasts and the relevant areas.

Then, following the three-step method for the delimitation of maritime areas beyond the territorial sea, our counsel will describe the line proposed by Myanmar.

Mr Lathrop will describe the choice of the base points relevant for drawing a provisional equidistance line, and he will describe the equidistance line itself.

Then, Professor Forteau will discuss the “relevant” (and irrelevant) circumstances.

Sir Michael Wood will next show that our line in no way contravenes the disproportionality test.

Professor Pellet will conclude our presentation on Monday afternoon by demonstrating the inadequacy of the bisector line proposed by Bangladesh.

On Tuesday Mr Lathrop will show that the bisector line advocated by Bangladesh is wholly misconceived.

Professor Pellet will then deal with the question of the admissibility of that part of Bangladesh’s case that relates to the shelf beyond 200 M.

Mr Müller is our last speaker in the first round. He will show that Bangladesh’s argument concerning the continental shelf beyond 200 M is based on a wrong interpretation of article 76 of the United Nations Convention on the Law of the Sea.

Mr President, Members of the Tribunal, I thank you for your kind attention, and may I respectfully ask you, Mr President, to call upon Professor Pellet.

THE PRESIDENT: Thank you, Excellency. I now give the floor to Mr Alain Pellet.

MR PELLET: (interpretation from French) Mr President, Members of the Tribunal, it is a pleasure and an honour to appear for the first time before you in a case which itself also constitutes a first for Myanmar – as our Agent has just said – and for this esteemed Tribunal it is an occasion on which to assert fully its position as the Tribunal for the Law of the Sea in its entirety, discharging for the first time its functions in matters of maritime delimitation.

To take up an expression that you used yourself in one of your recent speeches, Mr President, it “confirms that this Tribunal is really the Tribunal for the Law of the Sea.”
Sea", and Myanmar is convinced that this important case will enable you, Members
of the Tribunal, to consolidate the international law of the sea – more precisely, that
of maritime delimitation – and that you will do so in conformity with your traditions
and with a mind to “avoiding fragmentation of international law and of overcoming
conflicts of jurisdiction”, to use the words of your predecessor.7

We are convinced that you will adopt this very wise approach, contrary to the
arguments put forward by Bangladesh attempting to convince you to set aside
several decades of consolidation of custom and clarification in case law of the
applicable law in the matter. I will return to this point, which will also constitute one of
the issues of general interest, at greater length in my further pleadings in this case.
For the moment, Mr President, I will limit myself to presenting the main outlines and
thrust of the arguments of Myanmar.

Let me address some points of clarification. First, we have taken good note of the
points that the Tribunal would like to have the parties examine in accordance with
article 76 of the Rules, and we will respond to these in the course of our pleadings.

Secondly, we have been struck by the way in which the counsel for Bangladesh
have employed flattery and tried to sow seeds. Often they have flattered the
Tribunal, but they also tried to give it lessons, to dictate its conduct, even under
scarcely veiled threats. We will do neither of these. We are confident that you will
perform your judicial functions to the best of your ability and that we have no need to
cajole or admonish you.

Thirdly, we have noted with a certain amused surprise that the Applicant, at least
during the hearing, added to the list of its counsel the name of two geology
professors, which is its right, calling them “independent experts”. The concept of
“independent experts” who are members of a legal team is very interesting.

Fourthly, on several occasions8 the counsel for Bangladesh have insisted heavily on
the fact that certain of the counsel for Myanmar were also counsel for India. That is
true. So what? Let me note that this is true for four of us, whereas, unless I am
mistaken, all the counsel for the opposing Party are advising it in its case with India;
and I will repeat my question – so what? This only creates “atmospheric” illusions,
and they are slightly unpleasant. Let me add that the deadline for lodging the
Counter-Memorial of India in the case with Bangladesh is 31 May 2012, and it was in
the written pleadings of Bangladesh that I found the delimitation line which my other

6 Keynote speech of Judge José Luís Jesus, President of the International Tribunal for the Law of the
Sea, about « The role of ITLOS in the settlement of law of the sea disputes » at the conference «
Globalization and the law of the sea » organized by KMI – COLP – NILOS, Washington D.C., 2 of
December 2010, available on the web site of the Tribunal:
10.pdf.
7 Statement given by H. E. Mr Rüdiger Wolfrum, President of the International Tribunal for the Law of the
Sea, at the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29
October 2007, available on the web site of the Tribunal:
7_eng.pdf.
8 ITLOS/PV.11/2/Rev.1 (E), p. 15, lines 11-13 (Mr. Paul Reichler) and ITLOS/PV.11/3 (E), p. 28, lines
37-39 (Mr. Philippe Sands), or ITLOS/PV.11/4 (E), p. 23, lines 4-12 (Mr Lawrence Martin).
client is trying to defend, in a case to be decided only after you have pronounced
your judgment. I also note that with staggering foresight Professor Crawford has
quoted the Counter-Memorial of India,\(^9\) whereas, as far as I know at least, this
document does not even exist.

Let me come back, Mr President, to more serious matters, which brings me to the
general presentation of Myanmar’s arguments. Contrary to those of the Applicant, by
which our friends on the other side have tried to obscure matters by encumbering
them with considerations of a quasi-scientific nature lacking relevance, our
arguments consist in five simple propositions, which I would like to develop seriatim.

The first is that there is no agreement in terms of maritime delimitation of any of the
maritime areas claimed by the Parties, including concerning the territorial sea. In
truth, Mr President, more than a proposition, this is an affirmation which is in fact an
evident truth, in spite of the relentless attempts of Bangladesh to let us believe that
the Agreed Minutes of 23 November 1974 constitute a legally binding agreement for
the Parties. This document, which is reproduced at tab 1 of the Judges’ folder, has
none of the characteristic features enabling it to be classified as an agreement within
the meaning of article 15 of the 1982 Convention.

The Minutes plot the points on which the Parties were in agreement during the
second round of talks, but although it says that the Bangladesh delegation
expressed its agreement on the delimitation of the territorial sea described in this
way, it says nothing to this effect concerning the Burmese delegation. On the
contrary, it says that the draft treaty drawn up by Bangladesh was presented to the
Burmese delegation “for eliciting views from the Burmese Government”. The head of
the Burmese delegation, who had no power to conclude a treaty, simply refused to
sign or even initial this draft. On several occasions he said that the understanding
between the Parties described in paragraph 2 of the Minutes was provisional and
would not take force until a comprehensive agreement on the entire maritime
boundary had been reached, and this has been repeated on several occasions by
the Myanmar authorities. Furthermore, the Minutes were never approved in
conformity with the constitutional provisions in force in either of the two countries, nor
were they published or registered with the Secretariat of the United Nations in
conformity with article 102 of the Charter. Our opponents, however, insist on calling
this document an “agreement”. It is only one step in a comprehensive negotiation
and their terminology is based on wishful thinking. It cannot hide the fact that the
negotiations were unsuccessful and that there is no agreement on any part of the
maritime boundary of the Parties.

The further conduct of the Parties does not bear witness to any sense of legal
obligation stemming from the Minutes of 1974. The only contrary “evidence” to this
that Bangladesh claims to provide is either highly suspect (the series of similar
witness statements from the fishermen that are couched in particularly refined
English) or it proves nothing at all, as in the case of the list of incidents that allegedly
came about in the supposed delimited area, which gives witness to only one thing,
namely the constant uncertainty over the delimitation. The Parties agree that no
agreement has been reached between them on the subject of the delimitation of their

\(^9\) ITLOS/PV.11/5 (E), p. 12, lines 22-23.
continental shelf and the EEZ respectively. It is therefore up to this Tribunal to 
establish the single maritime boundary between the Parties from their land boundary 
terminus, and there is no disagreement on that. We are talking about the median 
point of the mouth of the main navigable channel of the Naaf River. The precise co-
ordinates have been fixed by the Supplementary Protocol of 1980, and this boundary 
should continue up to the area in which the rights of a third party (in this case India) 
may be affected.

My second proposition, Mr President, is that to plot this single boundary line one has 
to apply the standard delimitation method, that is the “equidistance/special or 
relevant circumstances method” applicable in its principle to the territorial sea and to 
the continental shelf and the EEZ.

This second proposition bears on a particularly sensitive area of the divergences in 
approach between the two Parties. Both agree that article 15 of the United Nations 
Convention on the Law of the Sea is applicable to delimitation of the territorial sea of 
the two States. Therefore, to plot the maritime boundary one should determine the 
median line, all the points of which are equidistant from the baselines, bearing in 
mind special circumstances and the existence of historical title. The only historical 
title in question is not spatial as such. This is the right of unimpeded passage of 
Myanmar’s vessels in the waters surrounding St Martin’s Island. Unfortunately, this is 
where the agreement between the Parties stops. They do not agree on the 
implementation of the provisions of article 15 in this case – I will come back to this 
when I address my next proposition – or on the applicable method of delimitation 
beyond the territorial sea.

In fact, on the pretext of the difference in the wording of articles 15 of the 
Convention, on the one hand, and articles 74 and 83, devoted respectively to the 
delimitation of the EEZ and the continental shelf, on the other hand, Bangladesh 
denies the existence of any established method of delimitation beyond the territorial 
sea and wants to rely only on the objective of an equitable solution within the 
meaning of the first paragraph of the two latter provisions. In doing so, the Applicant 
tries to convince you, Members of the Tribunal, to question the development of 
custom which, in the course of a long period of case law development, has led 
international courts and tribunals to re-inject into the laws of delimitation a modicum 
of objectivity and foresight, which the mention of an equitable solution alone does not 
ensure.10 It is in that spirit that, in their sometimes trial and error approach, the 
international courts and tribunals have established the principle of equidistance or 
special (or relevant) circumstances as a standard method applicable to all operations 
of maritime delimitation. This method has today acquired the status of a customary 
rule, under which we should proceed in three stages.

The first stage is to plot a provisional equidistance line between the coasts of the 
Parties before going on to the second stage of ensuring that one or more special 
circumstances do not lead to an adjustment or shift of this line and, finally and thirdly, 
verifying the equitable character of the line thus plotted by applying the non-
disproportionality test between the maritime areas attributed to each State and the

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10 See Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the 
delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006, R.I.A.A. Vol. XXVII, p. 212, para. 230.
respective length of their coastlines. This standard three-stage method was applied with particular clarity by the International Court of Justice in 2009 in the unanimous judgment (without declarations or opinions) in the Maritime Delimitation in the Black Sea case (Romania v. Ukraine)\(^{11}\), which reflects the latest jurisprudence, in which the Applicant displays a certain limited interest. However, one understands that in that judgment the Court recalled that this method should be applied in each case where there are no “compelling reasons”\(^{12}\) not to.” Such reasons which would render the plotting of the provisional equidistance line not feasible\(^{13}\) do not exist in this case; and I will come back to that in a few moments.

To take matters seriatim, Mr President, I will first say a word on my third proposition, which concerns the delimitation of the territorial sea – the only segment of the maritime boundary between Bangladesh and Myanmar for which one cannot adopt purely and simply the equidistance line. My third proposition concerning the territorial sea, the implementation of the principle of equidistance, is complicated by the presence opposite the Myanmar coast of St Martin’s Island, which is under the sovereignty of Bangladesh. As I said, contrary to what is the case for the remainder of the maritime boundary, Bangladesh and Myanmar agree that the line separating their respective territorial seas should be plotted by applying the rules of article 15 of the 1982 Convention, the drawing of which is not impeded by any particular technical obstacle. It is perfectly possible to fix the base points from which the equidistance line may be drawn.

Furthermore, the Parties agree that from the beginning it should be from the base points situated on their mainland coasts and that one should then proceed to draw a line with reference to the points situated respectively on the coastline of Myanmar, on the one hand, and St Martin’s Island, on the other hand. However, a glance at the chart will show you – and my colleague Coalter Lathrop will return to this – that one cannot continue this line indefinitely towards the south because such a prolongation would lead to a considerable distortion with respect to the general configuration of the coastline, which constitutes the very definition of a special circumstance.\(^{14}\) This circumstance is all the more special as St Martin’s Island, under the sovereignty of Bangladesh, is situated opposite the coastline of Myanmar, not Bangladesh. Professor Sands boasts of having visited it, but if he thought that he saw the coast of this country when he walked along the eastern coastline of the island, he is mistaken. Only if he had to be at the extreme northern point of St Martin’s Island would he have been able to see the coast of Bangladesh without risking a stiff neck!

The case of St Martin’s Island is similar to that of the Channel Islands in the 1977 arbitration on the Delimitation of the continental shelf between the French Republic and the United Kingdom, in which the Court considered that “the presence of the British Channel Islands close to the French coast must be considered prima facie as


\(^{12}\) Ibid., p. 101, para. 116.

\(^{13}\) Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), judgment, I.C.J. Reports 2007 (II), p. 745, para. 283.

constituting a ‘special circumstance’ justifying a delimitation other than the median line proposed by the United Kingdom”.\(^{15}\) The same applies to our case.

The presence of this very special circumstance obliges one to interrupt the plotting of the equidistance line at point C to join a line the direction of which is more in conformity with the general configuration of the coastlines of the Parties. It is for that reason that, starting from point C situated 6 M from the southern point of St Martin’s Island, the line must bend to point E, which is the point of intersection of the limit of the territorial sea of the island with the equidistance line between the coasts of the Parties plotted from the mouth of the Naaf River.

Incidentally, if you accord partial half effect to the island, as we think should be done, by giving it 12 M, where that is judicious, and this is what our line does at point E, in any case we have to join the equidistance line plotted thus. This is the only possibility, in the words of Court of Arbitration in its decision of 1997, of an intermediate solution “that effects a more appropriate and a more equitable balance between the respective claims and interests of the parties”\(^{16}\) and of avoiding “a radical distortion of the boundary creative of inequity”,\(^{17}\) which would result from the prolongation of the line B/C beyond point C.

It is perhaps worth noting that our opponents do not contest the principle itself that there be a necessary semi-enclaving of St Martin’s Island; the entire jurisprudence, without exception, on which Professor Sands relied in his pleadings last Friday\(^{18}\) points to this. I would add that we do not intend under any circumstances to “ignore” St Martin’s Island.\(^{19}\) Simply, the existence of St Martin’s Island – a modest island, although our opponents consider it a kind of Australia, or at least a Bioko – does not justify this delimitation that you are asked to proceed with, Members of the Tribunal, to the detriment of the general configuration of the coastline that constitutes the primary factor to be taken into consideration and, apart for any exceptional situation, the principle of equidistance would reflect best.

My fourth proposition, on the other hand, concerning the continental shelf and the EEZs of the Parties, is that no relevant circumstance would lead to an adjustment of the provisional line which should be plotted in the first phase of this method and would indeed lead to an equitable solution. Beyond point E the equidistance line


\(^{16}\) Ibid, p. 230, para. 198.

\(^{17}\) Ibid., p. 230, para. 199.


\(^{19}\) V. ITLOS/PV.11/2/Rev.1 (E), p. 16, l. 43-45 (Mr. Paul Reichler).
plotted from the appropriate points of the mainland coastlines of the two Parties would follow towards the southwest, turning at points F and G, as a result of the general configuration of the coastline, which must dictate the delimitation. As nothing would prevent drawing this equidistance line, there is no reason to depart from the standard method in favour of the bisector line as Bangladesh claims insistently.

Let me add, however, that if we were to have recourse to this unusual bisector line method, if properly applied, it would lead to a result that would clearly be more favourable to Myanmar than that of equidistance. The line claimed by the Applicant is based, for its part, on a fanciful view of the general direction of the coastlines of the Parties, and in particular that of Bangladesh. However, once more, there is no “compelling reason” to justify setting aside the equidistance or relevant circumstance method. In this case it is feasible to draw an equidistance line.

St Martin’s Island having been taken into account in terms of the territorial sea, the question then is to consider whether any other relevant circumstances would lead to an adjustment of the equidistance line in favour of Bangladesh.

They refer to two others – the concavity of the coastline and the Bengal Depositional System. Mr President, the coastlines of Bangladesh taken as a whole are concave; that is a fact. However, in spite of the lamentations of our Bangladeshi friends, the resulting enclaving effect is not as dramatic as they claim. I refer to the interesting animation that Mr Martin showed on Monday morning. In the first stage there is no concavity. In principle, this is not the case here. I would point out, however, that for about 100 km on each side of the Naaf River the coasts of the two States are more or less straight or slightly convex, which could have a certain importance if one were to have recourse to the bisector method.

The second stage is where there is a slight concavity. I recognize that Bangladesh’s concavity is generally more marked in this case, (but this is not so in respect of the coast which would be relevant in drawing a bisector line if we were to have recourse to this method, properly applied); and, thirdly, the case of severe concavity. I admit that this characterizes the coast of Bangladesh, but the coast of Myanmar is also concave, as the map to be shown by Mr Samson later will show you. What I am saying is that Bangladesh is in this situation here, and not in the situation that you see on the screen (fourth stage: concavity within a concavity), which illustrates rather the situation of Germany in the North Sea Continental Shelf case, which would have reduced Germany to a maritime zone extending to a maximum of 98 M from its coast if the rule of equidistance had been applied. However, in the present case, the equidistance line about which Bangladesh complains would give it a maritime area almost double. Unless we completely refashion nature, which is not possible, this

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concavity cannot be seen as a circumstance calling for a shift of the equidistance line. This is also not the case for the very curious third special circumstance, which was brought up late in Bangladesh’s oral pleadings, in desperation, that is the Bengal Depositional System,\(^{21}\) even though they admit that “within 200 M entitlement is by operation of article 76(1) determined purely by reference to distance from the coast”.\(^{22}\)

Mr President, there does not exist any relevant circumstance that may lead to an adjustment of the provisional equidistance line drawn as I indicated a moment ago. In the same way, the test of proportionality – or, more precisely, the absence of excessive disproportionality – confirms the equitable character of the solution resulting from the provisional equidistance line. In other words, this line drawn in the first stage of the standard method – there are three stages – meets the requirement of an equitable solution imposed by articles 74 and 83 of the 1982 Convention. Therefore, it is not necessary to modify or adjust it in the two other stages.

I turn to our fifth and final proposition. The question, put with insistence by Bangladesh, of the definition of the delimitation of the continental shelf beyond 200 M is not raised because in any case the Applicant cannot have any claim to any part of this maritime area. In the absence of India, the third coastal State in the northern part of the Bay of Bengal, it would be impossible for the Tribunal to fix with any precision the end point of the maritime boundary between Bangladesh and Myanmar. That is the reason why it ends in an arrow on the graphic that you can now see on the screen and in tab 3 of your Judges’ folder. I would like to remark in passing that the line presented with insistence by our opponents as representing Myanmar’s claim is wrong, and it does not correspond to that contained in our submissions.

There remains the fact that, no matter what India’s claim will be – and in the graphic we see it represented hypothetically based on information given in the Reply of Bangladesh on this point\(^{23}\) – the final point of the maritime boundary between the Parties, which would also be the tri-point with India, will inevitably be situated less than 200 M from the coast of Bangladesh.

Under these conditions, the question of a delimitation of the continental shelf beyond the 200-M limit does not arise.\(^{24}\) This Tribunal would not be able to grant the Applicant entitlements to a part of the continental shelf situated beyond the maritime boundary, fully drawn, between the two States. There would simply be nothing left to delimit. This is also the reason why, Mr President, Myanmar has refrained from responding to the vehement, sometimes complex arguments made by the Applicant.

\(^{21}\) ITLOS/PV.11/2/REV.1 (E), p. 18, lines 15-22 and p. 19, lines 11-21 (Mr. Paul Reichler); ITLOS/PV.11/4 (E), p. 11, lines 36-41 (Mr. Philippe Sands) et p. 32- lines 42-46 (Mr. Paul Reichler).

\(^{22}\) RB, para. 3.93; see also MB, para. 6.9, or ITLOS/PV.11/2/REV.1 (E), p. 33, lines 5-16 (Mr. James Crawford).

\(^{23}\) See Sketch-map R3.2 at p. 63 of the Reply.

\(^{24}\) Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006, R.I.A.A. Vol. XXVII, p. 242, para. 368 (the award is reproduced in the MB, [Vol. V], p.329).
based exclusively on geological considerations. In fact, it does not matter whether they are correct or false. First – and this is the most important thing – Bangladesh cannot claim any entitlement to the continental shelf beyond 200 M. Second, and in any case, if the problem was posed, these considerations would not be relevant.

The Applicant has made these arguments on the basis of an interpretation of article 76 of the 1982 Convention which is not tenable. The Party interprets the expression “natural prolongation of its land territory” as though it took up the cautious definition adopted by the ICJ in making the requested delimitation or rather in indicating the principles applicable to the requested delimitation in its judgment of 1969 in the North Sea Continental Shelf cases. In doing this, Bangladesh ignores both the context of article 76(1), which must be interpreted in the light of the paragraphs that follow it, and the evolution of case law that has taken place since that time. Neither the one nor the other justifies the exclusively geological definition of the continental shelf, even beyond 200 M, which would be based on an imaginary geographical continuity test, to which Bangladesh is so attached.

I would like to add that in any case Bangladesh’s request in inviting the Tribunal to decide that it has sovereign rights to a part of the continental shelf beyond the 200-M limit, and that Myanmar does not have them, is inadmissible, and that you, the Members of the Tribunal, cannot make a decision to that effect as long as the Commission on the Limits of the Continental Shelf has not decided the possible entitlements of the Parties in this area; and I will have occasion to come back to this.

Those, briefly explained, Mr President and Members of the Tribunal, are the main outlines of Myanmar’s arguments in this first round. Contrary to the Respondent, we are not attempting to drown the Tribunal in a flood of irrelevant arguments and technical facts that will not help us to resolve this rather simple dispute.

I would like to thank you for your attention, honourable Judges, and I request you, Mr President, to be so kind as to give the floor to Mr Benjamin Samson, who will give a brief presentation on the geographic context of the case that we are discussing here.

THE PRESIDENT: Thank you very much. I now give the floor to Mr Samson.

MR SAMSON (interpretation from French): Thank you very much. Mr President, Members of the Tribunal, it is a huge honour for me to take the floor before you. I would like to thank the authorities of the Republic of the Union of Myanmar for having afforded me the opportunity to do so.

To continue this afternoon’s presentation, it is my task in the next few minutes to introduce the geographic aspects of the case before you. Already, I would like to assure our colleagues on the other side that we do not dispute in any way the pertinence of geography in the present case. Myanmar is aware – and it has never denied – that geography is the fact underpinning any delimitation exercise. In this respect, we subscribe, without reserve, to the dictum of the International Court of Justice – I am quoting the International Court of Justice in the Cameroon v. Nigeria case:
“The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court, but a fact on the basis of which the Court must effect the delimitation.”

Myanmar fully recognizes that your Tribunal may, where appropriate, take into consideration particular geographic circumstances and possibly make adjustments for their effects at the appropriate stage in the delimitation method, it being the case however that even at that stage in the delimitation process, and I quote the arbitral tribunal in the *Guyana-Suriname* case:

> “International courts and tribunals dealing with maritime delimitations should be mindful of not remaking or wholly refashioning nature, but should in a sense respect nature.”

Bangladesh does not appear particularly concerned by this jurisprudence insofar as its delimitation line and the “method” it does its best to apply amount to a modification of the geography of the region. While Bangladesh has tried to take advantage of the jurisprudence of the International Court of Justice to that effect, specifically with a view to reducing the effect following from May Yu Island’s position in front of Myanmar’s mainland coast[27], Bangladesh in its Reply makes a determined effort to discredit the fundamental principle which it finds bothersome by dismissing it as merely a “rather over-used argument”.

Geography is however what it is: a fact that must be taken into account and must be respected in any delimitation process. I, for my part, would like to describe to you, as neutrally as possible, the relevant geographical facts in the region before highlighting the very skewed geographical approach taken by Bangladesh.

Before I start with a quick description of the Bay of Bengal region, Mr President, allow me to say that we are not going to enter into the game that Bangladesh has tried to draw us into by setting out in detail the geology of the Bay of Bengal. As Professor Pellet has just reminded us, the question of delimiting the continental shelf beyond 200 M simply does not arise in this present case. For this reason the geology of the Bay cannot have any effect whatsoever on the delimitation you are entrusted with now (nor could it even if you were actually called upon to delimit the continental shelf beyond 200 M). We are not necessarily in agreement with all the information presented by Bangladesh’s “independent” experts, but it does not seem worthwhile to devote lengthy discussion to irrelevant points.

Mr President, Members of the Tribunal, the Bay of Bengal constitutes the north-east part of the Indian Ocean, and is bordered by four States: Sri Lanka in the south-west, India in the west, in the north and in the south-east by the Andaman and Nicobar Islands, Bangladesh in the north and the east, and Myanmar in the east. To the east and the south of Myanmar lie Thailand, Malaysia and Indonesia.


27 See MB, para. 6.51.

28 *RB*, para. 3.60. See also *ibid.*, para. 3.8.
At the northern end of the Bay of Bengal the Bengal Delta extends from the Hooghly River in India to the estuary of the Meghna River, which is part of Bangladesh. The delta has been formed mainly, but not exclusively, by sediments carried by the Ganges and Brahmaputra Rivers and their tributaries, which originate in the Himalayas, that is to say outside of Bangladesh.

With a surface area of 2.2 million square kilometres, the Bay of Bengal is one of the largest bodies of water in the world, but only a small part of this vast expanse is relevant to the delimitation that the Parties have requested you to carry out. That part is the area covering the coast of Bangladesh and Myanmar’s Rakhine coast as far as Cape Negrais, its southern end. Later on, Daniel Müller will return to the subject of the characteristics of the relevant area for purposes of this case to address them more from an exclusively legal perspective.

Bangladesh lies in the northernmost part of the Bay of Bengal. Its coast can be divided into three coastal regions:

-- the western part of the coastline, which reaches from the land boundary with India, which is formed by the Hariabhanga River, to the vicinity of the Tetulia River. Most of this region is covered by the biggest mangrove forest in the world, the Sundarbans;

-- the central region, extending from the Tetulia River to the town of Cox’s Bazar, and crossing the Meghna River estuary. The coastline in this area is very irregular and features many islands. The western and central areas are both a part of the Bengal Delta;

-- the eastern part of its coast runs from Sandwip Island to Point Shahpuri at the mouth of the Naaf River.

The coastline of Bangladesh measures some 520 km. As Daniel Müller will also show, not all of Bangladesh’s coast is relevant for purposes of this delimitation.

The Naaf River flows between Bangladesh and Myanmar. It forms the land boundary between the two Parties. It is common ground between the Parties that the land boundary terminus should be considered the starting point of the delimitation you are to effect. St Martin’s Island lies to the south-west of the mouth of the Naaf River. Last week counsel for Bangladesh gave us a vibrant description of it but neglected to mention some important facts that are nevertheless set out in annexes to its Memorial. In these documents we can see that: this island, which belongs to Bangladesh but lies only 4.5 M from the Rakhine coast of Myanmar, is a feature standing alone in the geography of Bangladesh; in fact, it is made up of three small islands; a narrow

29 MB, vol. III, annex 6; see MB, paras. 3.21 and 3.23 and CMM, para. 2.29.
30 ITLOS/PV.11/2/Rev.1 (E), p. 13, lines 5-11 and 27-29 and p. 19, lines 2-9 (Mr Paul Reichler); ITLOS/PV.11/3 (E), p. 20, lines 9-17 (Professor Philippe Sands) and ITLOS/PV.11/4 (E), p. 31, lines 9-11 (Mr Paul Reichler).
31 Memorial of Bangladesh, vol. I, para. 2.18; vol. III, annex 36; vol. IV, annex 49.
channel two metres deep at all times separates the central island from the northern one; certain parts of the island are submerged at high tide; and the shore of the southern island is more irregular than that of the central island because of severe wave erosion. Furthermore, you can walk around the island very quickly because it is only 5 km at high tide and 8 km at low tide.\(^{32}\)

However, Mr President, the most important point is that this small island is directly opposite the coast of Myanmar - I repeat: Myanmar - whether our colleagues on the other side like it or not.\(^{33}\) My eminent colleagues will come back to this question in more detail.

Mr President, I would now like to turn to the geography of Myanmar (and to a few related points that were left aside by Mr Reichler in his statement last week). The biggest State in south-east Asia, with a territory of almost 700,000 km\(^2\), Myanmar has a very long coastline of nearly 2,400 km, which can be divided into three coastal regions:

-- forming the eastern façade of the Bay of Bengal, the Rakhine coast runs from the border with Bangladesh to Cape Negrais for a distance of some 740 km;

-- on the east of the Bay of Bengal the Irrawaddy coast and the Gulf of Mottama form the northern limit of the Andaman Sea;

-- finally, the Tanintharyi coast borders the Andaman Sea to the east and runs all the way to the boundary with Thailand.

For purposes of this delimitation, the only relevant coast is that of the first region, the Rakhine coast.

The northernmost part of the Rakhine coast, from Cypress Point, marking the mouth of the Naaf River, to the mouth of the May Yu River, is not distinguished by any particular feature. May Yu Island should however be noted, lying south-west of the mouth of the latter river. This island, and it is undeniably one, is characterised by the facts that it has a lighthouse and that a regiment of the armed forces of Myanmar is permanently stationed there.

From the south of the May Yu River through to Cape Negrais, the coastal strip has two distinctive features:

-- many significant islands, such as Myingun, Yanbye and Manaung;

-- and many rivers, such as the Lay Myo and the Kaladan, at whose mouth Sittwe, the capital of Rakhine State and the biggest port on the Rakhine coast, is situated. These rivers originate in the Rakhine-Chin-Naga Ranges. These mountains, which were formed by the accretionary prism, run from north to south along the Rakhine coast. The accretionary prism and the mountains

\(^{33}\) *RB*, para. 3.110.
produced by it continue under the sea beyond the land mass of Myanmar, emerging from time to time to form, inter alia, the Preparis and Coco Islands, south of Cape Negrais.

Members of the Tribunal, to round off this presentation of the general geographic context of our case, I now need to say a few words about delimitation agreements in the region. As the present dispute is strictly a bilateral one, I will be brief on this subject.

Nevertheless, two points should be made. First, it is only the northern zone of the Bay of Bengal that remains to be delimited. Two delimitations still need to be made. It is for your Tribunal to delimit the maritime boundary between Bangladesh and Myanmar. The second one, between India and Bangladesh, is currently pending before an arbitral tribunal constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea. In the rest of the region, from the Maldives in the west to Indonesia and Thailand in the east, the States have delimited all their maritime areas up to 200 M by agreement, in accordance with the Convention.

In all these delimitation agreements, without any exception, the parties have decided to apply the “equidistance/relevant circumstances” method, even in areas marked by a strong concavity, such as the Gulf of Mottama. It is in vain that Bangladesh seeks to deny this. In these agreements the Parties have systematically adopted a strict or adjusted equidistance line.

Allow me now, Mr President, to come to my second point: the random and biased geographic approach taken by Bangladesh.

Bangladesh is very imprecise in describing the geographic aspects of our case. This is crucial because, as my eminent colleagues will show you in the course of this week, it is mainly on this geographic imprecision that the choice of delimitation “method” and line advocated by Bangladesh rest. I will make three remarks on this subject.

The first approximation: Bangladesh simply asserts that its entire coast is concave. From the point of view of macro-geography, it is true that Bangladesh’s coast is generally concave, as is the entire northern part of the Bay of Bengal, from Batticaloa in Sri Lanka to the Preparis and Coco Islands in Myanmar.

But, if you move closer to the coastline of Bangladesh you see that the facts are more nuanced, and that it is more complicated to depict the coastline than it would seem, as, by the way, the Applicant occasionally admits. Thus, the western part of

34 RB, para. 3.69.
36 MB, para. 2.7.
37 CMM, para. 2.14.
38 MB, para. 6.70.
Bangladesh’s coastline follows a generally west/east direction without showing any change of direction. In continuing towards the east, Bangladesh’s coastline follows the shores of the Meghna estuary through to the vicinity of Sandwip Island and the town of Chittagong. It then changes direction radically to run north-west/south-east to Sonadia Island. From Sonadia Island onwards the eastern part of the coast of Bangladesh curves slightly in order to go in a south/south-east direction to the boundary with Myanmar. As you will see from the image on the screen now, this part of the coast of Bangladesh is convex – I repeat, convex.

The imprecision of the Applicant does not stop here – and this is my second remark. Our opponents have described in detail the deltaic nature of the north-eastern shore of the Bay of Bengal, from the Hooghly River in India to the Meghna River in Bangladesh. According to them, the natural forces interacting in this area have made this coastline one of the most unstable in the world. Once again, this is very much an over-generalization. It is plausible that the central part of the coast of Bangladesh around the estuary of the Meghna River is indeed very unstable; but on the other hand the western part of its coastline, which is covered by the Sundarbans Forest, is stable. The work of several researchers in Bangladesh, with scientifically recognised authority, shows that the Sundarbans Forest provides stability to the coastline of Bangladesh. Some of this work was presented by Bangladesh during the negotiations between the two countries. We can make it available to the Tribunal if you so wish.

This does not prevent Bangladesh from asserting, without precision or evidence, that its eastern coast is subject to such erosion and accretion that it is impossible to identify a stable base point. However, this portion of the Bangladesh coastline is smooth and protected by a foreshore of submerged silt and sand.

The third imprecision, Mr President, is seen in the very short geographic description of Myanmar that was given by Bangladesh. Bangladesh declares that the Rakhine coast “runs in a relatively straightforward north-west to south-east direction”. The map now on the screen shows that this is wrong. Contrary to what the Applicant has said, the Rakhine coast shows a very definite concavity. Running in a north-west/south-east direction, from the mouth of the Naaf River to the vicinity of the Bay of Gwa, the Rakhine coast curves gradually towards Cape Negrais in a north-east/south-west direction. This concavity is even more pronounced if you follow the coast to the Preparis and Coco Islands.

Mr President, these are the “raw data of nature” in our case; they are what they are and nothing other than what they are, and no “human extrapolation” can result in any modification of them.

39 MB, para. 2.16. See also ITLOS/PV.11/2/Rev.1 (E), p. 9, lines 35-37 and p. 10 lines 1-2 (Mr Paul Reichler).
41 MB, para. 2.7.
43 Ibid.
Mr President, Members of the Tribunal, this concludes my presentation. I would like to thank you very much for your patience and for your kind attention. Mr President, with your permission Sir Michael Wood will present the historical context of this dispute after the customary coffee break, unless you would like to hear him now.

THE PRESIDENT: Thank you. I understand that your intention is to call on Sir Michael Wood to speak after the coffee break. Would you prefer him to take the floor now?

MR SAMSON: Now.

THE PRESIDENT: Sir Michael, you have the floor.

SIR MICHAEL WOOD: Mr President, Members of the Tribunal, I hope it is not inconvenient if I speak a little bit before the coffee break – I have quite a lot to get through, and it would be helpful.

Mr President, it is an honour to appear before you, and it is an especial honour to do so on behalf of Myanmar. I expect to be speaking for the rest of the afternoon, and I apologise for that. I may have to continue for a short time tomorrow afternoon – we will see.

I can assure you that I shall not be quoting any English poets. There will be no Shakespeare, no Pope, no Blake; there will not even be Rabindranath Tagore. There will be no Sherlock Holmes and there will certainly be no Star Trek.

Indeed, the main subject of my speech will be the absence of any agreement between the parties on the delimitation of the territorial sea.

First I shall cover the negotiations between Myanmar and Bangladesh, which took place between 1974 and 2010. In these negotiations, the Parties sought to reach agreement on a comprehensive maritime delimitation. Regrettably, the negotiations were unsuccessful. No agreement was reached.

In the second section of my speech, I shall explain that, contrary to the repeated assertions of Bangladesh - repeated yet again by Professor Boyle last Friday - there is no agreement between the Parties concerning maritime delimitation in the territorial sea. In particular, the Agreed Minutes of 1974 are not such an agreement.

Mr Eran Sthoeger will then complete the picture. He will explain that none of the so-called ‘practice’ cited by Bangladesh to prop up its claim to the existence of such an agreement in fact does so. On the contrary, Bangladesh’s efforts to rely on such practice only serve to emphasise the weakness of its case based on the Agreed Minutes themselves.

Mr Sthoeger and I will therefore have shown that Bangladesh has failed to establish the existence of any agreement between Myanmar and Bangladesh on maritime delimitation. This will hardly come as a surprise since in its application instituting these proceedings Bangladesh said as much. It said, in terms, and I quote: “[t]here is
no treaty or other international agreement ratified by Bangladesh and Myanmar delimiting any part of the maritime boundary in the Bay of Bengal”.

It will then be for Mr Coalter Lathrop to describe and explain the territorial sea delimitation line which Myanmar requests the Tribunal to draw.

Mr President, by way of introduction let me recall that Myanmar participated actively in the three United Nations Conferences on the Law of the Sea, in 1958, in 1960 and from 1973 to 1982. While it did not become a party to the 1958 Geneva Conventions, its maritime legislation followed the provisions of those Conventions closely. Then in 1977, like many other States at that time, Myanmar enacted a Territorial Sea and Maritime Zones Law. This provides for the various zones recognized in the modern law of the sea, as that law was evolving at the Third United Nations Conference.


Bangladesh ratified the Convention some five years later, in 2001 in fact. It did so with a considerable number of declarations. One of the declarations may be relevant to these proceedings. Bangladesh stated, upon ratification, that

"Ratification of the Convention by Bangladesh does not ipso facto imply recognition or acceptance of any territorial claim made by a State party to the Convention, nor automatic recognition of any land or sea border."

While I cannot say I fully understand this declaration, it hardly seems consistent with Bangladesh’s attempt now to rely on an alleged agreement on a territorial sea border, dating from 1974, some 26 years before the declaration. Indeed, this and other declarations made by Bangladesh seem to cast doubt on Bangladesh’s full commitment to the Convention – though they cannot of course qualify its obligations under the Convention. It might be helpful if Bangladesh could explain what was intended.

Mr President, Members of the Tribunal, I now turn to the negotiations between Myanmar and Bangladesh on a comprehensive maritime delimitation agreement. These negotiations form an important part of the background to the present case, and in particular to the 1974 Minutes. They are, in the words of the International Court of Justice, the “particular circumstances in which [the Minutes] were drawn up”.

Bangladesh has been strangely reticent about the negotiations. Professor Boyle scarcely mentioned them last week.

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44 Notification under article 287 and Annex VII, article 1 of UNCLOS and the Statement of Claim and Grounds on Which it is Based, 8 October 2009, para. 4.
As you are aware, Members of the Tribunal, maritime delimitation negotiations between the Parties stretched over a period of some 36 years, though there was an extended gap between 1986 and 2008. Eight rounds of negotiations took place between 1974 and 1986. Six more rounds (which we refer to as the “resumed rounds”) took place between 2008 and 2010.

We have set out briefly, in Chapter 3 of our Counter-Memorial, what happened at each round. You have our minutes of the meetings, and you have some of those prepared by Bangladesh. (I should like to emphasize that what we say about the negotiations, both in our written pleadings and here in oral argument, takes account of Bangladesh’s records as well as our own.) I do not intend to repeat what we said in the Counter-Memorial. Instead I shall begin by highlighting two general points and I shall then take you through, in a little more detail, what transpired during the negotiations in so far as it is relevant to an understanding of the Agreed Minutes of 1974.

The first general point is this. As you will have noticed, the negotiations began just as the Third United Nations Conference on the Law of the Sea was getting underway. In fact, the first round took place in September 1974, less than a week after the end of the Caracas Session. The first five rounds of negotiations took place in parallel with the very polarized negotiations on delimitation that were taking place at the Conference.

Despite this difficult and uncertain background, Myanmar was conscious, throughout the bilateral negotiations, of the obligation upon States to settle their differences by peaceful means, including negotiation, in accordance with the Charter of the United Nations and the Law of the Sea Convention.

To this end, Myanmar adopted, throughout the negotiations, a responsible and flexible approach, and sought to achieve a reasonable agreed boundary on the basis of international law, as referred to in the ICJ Statute, in order to achieve an equitable solution.

Bangladesh, on the other hand, approached the negotiations in a rigid manner, ignoring the applicable principles of international law, and even at times making proposals that took the Parties further apart. Considerations of the applicable principles of international law seem to have played little, if any, part in Bangladesh’s approach to the negotiations. While, early on, Bangladesh did propose an equidistance line, thereafter it insisted throughout the negotiations on what it termed an “ad hoc” or “friendship” line.

The second point concerning the negotiations goes to procedure. Bangladesh’s disregard for the substantive norms of international law seems to have gone hand-in-hand with disregard for the normal processes of international negotiation. As we have shown in our written pleadings, and as I shall once again explain, it is clear,

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47 MCM, Vol. II, Annexes 2-6, 8-10, 14-15, 18, 23 and 25.
49 North Sea Continental Shelf cases, I.C.J. Reports 1969, p. 3, at p. 47, para. 85(a); now reflected in UNCLOS art. 74, para. 1 and art. 83, para. 1; see also UNCLOS Part XV.
50 MCM, Vol. II, Minutes of the second round, third meeting, para. 17 (Annex 3).
both from the course of the negotiations and from the words used, that the 1974
Minutes were no more than a conditional understanding of what could, eventually,
and subject to further negotiations and reflection, be included in an overall maritime
delimitation agreement, if and when such agreement was reached. Unfortunately, no
such agreement was reached, so, to put it colloquially, “all bets were off”.
Bangladesh’s refusal to acknowledge this simple fact shows a wilful disregard of
standard negotiating practice.

To conclude a non-binding understanding, which may be reflected in agreed minutes
of a meeting, as was done on this occasion, is entirely consistent with the practice of
negotiating States, including in maritime boundary negotiations. The parties to a
negotiation frequently reach provisional “agreement” on one issue within a complex
negotiation conditional on agreement on the remaining issues. They record that
provisional or conditional agreement more or less formally, and move on to negotiate
the remaining issues. In such circumstances, it is well understood that “nothing is
agreed until everything is agreed”. Negotiations on a complex matter, where
everything is interlinked, may sometimes proceed stage-by-stage, with partial or
interim agreements, but this is rare. Where issues are interlinked, the aim is normally
to reach at an overall “package deal”. The negotiation of UNCLOS itself is an
obvious case in point. States are unwilling definitively to agree to one part of the
package without seeing how the overall outcome will meet their interests. They may
cannot be prepared to make concessions in one area in return for concessions, not yet
negotiated, elsewhere. If the parties to a negotiation were too easily held to be
bound by provisional “agreements” reached in the course of negotiating a “package
deal”, that valuable negotiating technique would no longer be possible.

Of course, Mr President, even in the negotiation of extended maritime boundaries,
States may sometimes be prepared to agree a boundary step-by-step but then this is
done through formal agreement, not through what is effectively a record of a
meeting. That is all that Judge Anderson was saying at the end of the passage cited
by Professor Boyle last Friday. I shall give one example. As Members of the
Tribunal will be well aware, Norway and the Russian Federation held negotiations
over their boundary in the Barents Sea for many years. They finally reached
agreement in 2010. But before that, in 2007, they reached agreement on a small part
of the line in the Varangerfjord area, stretching just short of 40 nautical miles. The
important point to note is that, although it was reached in the course of the wider
negotiations on the whole line, the agreement of 2007 was entered into with all due
formality, being signed in due and proper form and entering into force upon
exchange of instruments of ratification. It contains detailed provision for the
exploitation of joint deposits, and is explicitly without prejudice to the remainder of
the negotiation. The contrast with the “Agreed Minutes” invoked by Bangladesh in
the present case could not be more stark.

It is obviously important that Parties to negotiations are not bound by positions they
take during the negotiation, otherwise negotiation would become impossible.

51 ITLOS/PV11/3, p. 7, lines 27-35 (Boyle).
52 Agreement between the Russian Federation and the Kingdom of Norway on the Maritime
Delimitation in the Varangerfjord area, 11 July 2007: International Maritime Boundaries (IMB) Vol. VI,
Sometimes they may address this issue directly\textsuperscript{53} but even when they do not, the basic principle is clear: a party to a negotiation cannot be held to offers or concessions made in the course of the negotiations. When they reach a provisional or conditional understanding, as they did in our case – one only has to look at the words used; it is clearly conditional – it is just that. It no longer has significance if the negotiations do not succeed.

Mr President, Members of the Tribunal, I shall now take you to what happened during the negotiations in so far as it is relevant to the status and meaning of the Agreed Minutes of 1974. It will be seen that what Bangladesh persists in calling an “agreement on the territorial sea” was no more than (i) a conditional understanding, (ii) at the level of the negotiators, (iii) as to what might be included as part of an eventual maritime boundary agreement covering the whole of the maritime delimitation between them (territorial sea, exclusive economic zone, continental shelf).

As will be seen, it seems to have been a characteristic of the talks that the Bangladesh side constantly sought to press successive Myanmar delegations to agree, on the spot, to proposals which Bangladesh alone had drafted. The Myanmar side equally consistently resisted such pressure. The Myanmar delegations were clear throughout that they did not have authority to conclude an agreement, and that they had to refer all proposals back to higher authority.

This pattern was established at the very first round of negotiations, and continued through to the most recent rounds. The first round, it will be recalled, was held in Rangoon (now referred to by its Myanmar-language version, Yangon) on 4, 5 and 6 September 1974. The Myanmar delegation was led by Commodore Chit Hlaing, who was Vice Chief of Staff, Defence Services (Navy). The leader of the Bangladesh delegation was Ambassador Kaiser. During the first round, Bangladesh suggested an equidistance line to be drawn along the midpoints between St Martin’s Island and the Myanmar main coast\textsuperscript{54}, and it suggested terminating the territorial sea boundary at the median point between St Martin’s Island and May Yu Island (Oyster Island)\textsuperscript{55}. The Bangladesh side produced a map. What happened was that in response, Commodore Hlaing stated that:

\begin{quote}
"he would submit the map \ldots to higher authorities and inform them that it was the Bangladesh proposal drawn on the basis of the median line. Whether they would agree or not was another matter"\textsuperscript{56}.
\end{quote}

At the end of the first round, Commodore Hlaing again stressed that he would have first to submit the position to senior authorities\textsuperscript{57}.

\begin{footnotes}
\item[54] MCM, Vol. II, Minutes of the First Round, second meeting, para. 10 (Annex 2).
\item[55] \textit{Ibid.}, third meeting, para. 10.
\item[56] \textit{Ibid.}, third meeting, para. 11.
\item[57] \textit{Ibid.}, fourth meeting, para. 16.
\end{footnotes}
The second round of negotiations was held in Dhaka from 20 to 25 November 1974. It was at this round that the Agreed Minutes were signed. The delegations were headed by the same officials. In the course of the ongoing discussions of the delimitation in the Bay of Bengal, the delegations reached a provisional understanding with respect to the delimitation of the first sector of the line, the line between their respective territorial seas. This understanding was clearly conditional on reaching agreement on the whole of the delimitation line, and on resolution of the free and unimpeded access issue. The understanding, and these conditions, were reflected in “Agreed Minutes”, about which you have heard much, and will hear much, I fear, signed by the two heads of delegation.

You have already been shown the Agreed Minutes by Professor Pellet. They are at tab 1.1 in your Judges’ folders. It will be necessary to look at them in some detail shortly. For the time being, I would just ask you to note paragraph 5 of the Minutes. Paragraph 5 records that, during the second round, the Bangladesh delegation handed the Myanmar delegation “a draft treaty on the delimitation of the territorial waters boundary”. Paragraph 5, now appearing on your screens, reads:

“Copies of a draft Treaty on the delimitation of the territorial waters boundary were given to the Burmese delegation by the Bangladesh delegation on 20 November 1974 for eliciting views from the Burmese Government.”

It will be seen that at the same meeting that these Agreed Minutes were signed, Bangladesh itself was putting forward a draft treaty to embody the territorial sea boundary in that form.

Bangladesh’s draft of a treaty, referred to at paragraph 5, was entitled “Agreement Between the Government of the People’s Republic of Bangladesh and the Government of the Socialist Republic of the Union of Burma Relating to the Delimitation of the Boundaries of the Territorial Waters Between the Two Countries”. There is a copy of the draft treaty at tab 1.7 in your folders. I just want to contrast for a moment the clarity with which that draft treaty states its aim. The aim of the Bangladesh side was to have a treaty delimiting the territorial sea boundary at the very same meeting that these Agreed Minutes were being signed.

Mr President, I think that would be a convenient moment to stop.

MR PRESIDENT: Thank you. The Tribunal will withdraw for a period of 30 minutes.

(Short adjournment)

SIR MICHAEL WOOD: Mr President, Members of the Tribunal, before the short break I was taking you through the bilateral negotiations in so far as they may be relevant to understanding the 1974 Agreed Minutes. I thank you for your patience. We were in the middle of the negotiations at the second round, the all-important second round, and I was just referring you to the draft treaty that was prepared by Bangladesh and handed to Myanmar at that round.

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I want to emphasize that the draft treaty was entirely a Bangladesh initiative. It was presented to Myanmar on the first day of the second negotiating round, and had obviously been prepared in advance. This Bangladesh draft, if agreed (which it was not), would have put into legal language the conditional understanding reflected in the minutes. The draft treaty, prepared, as I said, by Bangladesh, provided for ratification and entry into force. Article VII stated, “[t]his Agreement shall be ratified in accordance with the legal requirements of the two countries”\textsuperscript{60}. Article VIII provided that “[t]his Agreement shall enter into force on the date of the exchange of the Instruments of Ratification”\textsuperscript{61}. In fact, neither party signed the draft treaty, then or ever.

When the draft treaty was handed over, on 20 November 1974, the leader of the Myanmar delegation, Commodore Hlaing responded immediately, and in the clearest terms. He said:

“It was not intended to sign a specific treaty on the territorial sea boundary. The question of delimiting a sea boundary between Burma and Bangladesh would have to be dealt with in totality to cover the territorial sea, the continental shelf and economic zone.”\textsuperscript{62}

Asked later in the same meeting whether he would be willing to initial any agreement, Commodore Hlaing replied with a clear and simple “no”\textsuperscript{63}. This was the consistent position of the Myanmar delegation.

During the third negotiating round, held in Rangoon three months later, in February 1975, Commodore Hlaing recalled that the understanding in the 1974 Minutes was conditioned on the right of “unimpeded passage” to Myanmar ships around St Martin’s Island\textsuperscript{64}. He further recalled that this “unimpeded passage” – and I quote – “was a routine followed for many years by Burmese naval vessels to use the channel …” He added that, in asking for unimpeded navigation, the Burmese side was only asking for existing rights which it had been exercising since 1948\textsuperscript{65}, that is to say, since independence. In response, and according to Bangladesh’s own account, the Bangladesh delegation said that this concern could be addressed in the treaty that would eventually be concluded between the parties:

“Bangladesh delegation stated that they did not see any difficulty in accommodating the Burmese position in the future treaty.”\textsuperscript{66}

Once again it was clear, even at this very early stage, that an essential condition for any agreement by Myanmar to the line in the Minutes had not been met. Bangladesh’s own negotiators said the condition could be met “in the future treaty”.

\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid., Minutes of the Second Round, first meeting, para. 10; see also, second meeting, para. 4. This exchange is also recorded in the “Brief Report” prepared by Bangladesh following the second round of negotiations: BM, Vol. III, Annex 14, para. 7.
\textsuperscript{63} Ibid., Minutes of the Second Round, first meeting, para. 11 (Annex 3).
\textsuperscript{64} Ibid., Minutes of the Third Round, first meeting, para. 4 (Annex 4).
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid.
Mr President, this is a convenient point to respond to the second of the two questions which the Tribunal put to both Parties in advance of the hearing. That question reads as follows:

“Given the history of the discussions between them on the issue, would the parties clarify their position regarding the right of passage of ships of Myanmar through the territorial sea of Bangladesh around St Martin’s Island?”

Mr President, the first thing I would say by way of response is that we have taken careful note of what the distinguished Agent of Bangladesh said last Thursday\(^\text{67}\), together with what counsel for Bangladesh said last Friday\(^\text{68}\).

Myanmar’s position is as follows. Ships of Myanmar traditionally enjoyed the right of free and unimpeded navigation through Bangladesh waters around St Martin’s Island to and from the Myanmar section of the Naaf River. They did so since 1948.

As I have already made clear, when the maritime delimitation negotiations started in 1974 it was considered crucially important for Myanmar that this historic right be guaranteed. That is what is recorded in paragraph 3 of the Agreed Minutes of 23 November 1974 but, as is recorded in paragraph 4 of those Minutes, the Bangladesh delegation to the talks merely took note of Myanmar’s position.

When pressed on the point during the third round of negotiations, the Bangladesh delegation, as we have seen, said that this was a matter that could be dealt with in an eventual delimitation treaty. As Members of the Tribunal are well aware, there has never been such a treaty. Bangladesh has never given the guarantee that Myanmar sought.

It is no answer to say, as Bangladesh now does, that there have never been problems with access. That is easily explained. In the absence of any guarantee in 1974, or later, Myanmar has not sought to put to the test its right of free and unimpeded navigation, for reasons of discretion which are entirely understandable. They wanted to avoid any possible conflict.

The position on the right of passage of ships of Myanmar through the territorial sea of Bangladesh around St Martin’s Island continues to be less than satisfactory. (That is a British way of putting it: “less than satisfactory”.) As I have said, we listened very carefully to the various statements made on this subject by the representatives of Bangladesh last week. None of those statements was entirely clear. What is, unfortunately, clear, and what is relevant for an understanding of the status and effect of the 1974 Minutes, is that an essential condition for Myanmar’s agreement to incorporating the line described in the Minutes in an eventual overall maritime boundary treaty was not, and has not, been met.

I hope I have answered the Tribunal’s question.

\(^{68}\) ITLOS/PV11/3 (E), p. 25, lines 43-45, p. 26, lines 15-17 (Sands).
I now return, if I may, to my account of the negotiations. Also during the third round, the two delegations proposed starting points for the delimitation of the continental shelf and exclusive economic zone, in terms that make it rather clear that the line described in the Agreed Minutes was open to further negotiation. Myanmar referred to the 235° line and its joining with the median line drawn between the Myanmar main coast and St Martin’s Island. Bangladesh, in response, proposed that the delimitation continue from point 7, the southernmost median point between the territorial sea of Myanmar’s main coast and St Martin’s Island. In the alternative, Bangladesh suggested that the point of origin be the median point between St Martin’s Island and May Yu Island (Oyster Island). Both proposals were rejected by Myanmar. The fourth and fifth rounds were held in 1976 and 1979, and concentrated on the EEZ and continental shelf.

A sixth round was held in Rangoon in November 1985. This time, the leader of the Myanmar delegation was its Minister for Foreign Affairs. The Foreign Minister recalled the Minutes of 1974, and reiterated Myanmar’s position that: “[what] is clearly implied in the text of Agreed Minutes, was that both the territorial sea sector and the continental shelf cum economic zone sector of the common maritime boundary should be settled together in a single instrument.”

The seventh and eighth rounds took place in Dhaka in February and June/July 1986. Again, they focused on the EEZ and continental shelf. However, at the eighth round the Myanmar delegation once again restated Myanmar’s position that it was only prepared to reach agreement on an overall agreement, not a partial one. The leader of the Myanmar delegation reminded his opposite number, first, that his delegation did not have authority to conclude a treaty; and, second, that a treaty between the Parties could only be concluded when the final delimitation of all the areas in dispute was agreed upon.

After a suspension for over 20 years, the first round of the resumed talks between the Parties was held in March and April 2008. During this round, the two delegation leaders signed Agreed Minutes. These are referred to as the “2008 Agreed Minutes.” Members of the Tribunal will find the text of the 2008 Minutes at tab 1.8.

I shall return to these Minutes later. For the time being, I would just like to draw attention to paragraph 3, where the word “unimpeded” in the 1974 Minutes was to be replaced by a whole sentence:

69 MCM, Vol. II, Minutes of the Third Round, second meeting, para. 3; third meeting, para. 3 (Annex 4).
70 BM, Vol. III, Annex 15, para. 5; MCM, Vol. II, Minutes of the Third Round, second meeting, paras. 5 and 7; third meeting, para. 8 (Annex 4).
71 BM, Vol. III, Annex 15, para. 5; MCM, Vol. II. Minutes of the Third Round, second meeting, paras. 5 and 7; third meeting, para. 8 (Annex 4).
73 Ibid., Sixth Round, Speeches and statements (Annex 8) (emphasis added).
“Innocent Passage through the territorial sea shall take place in conformity with UNCLOS, 1982 and shall be based on reciprocity in each other’s waters.”

Paragraph 3 of the 1974 Minutes, even if amended, continued in terms to be no more than a statement of the Myanmar delegation’s position. (I would note in passing that it is not clear how the original sentence would have read with the change. You cannot simply replace the word “unimpeded” by the whole sentence which I just read out.) Be that as it may, this change was expressly said to be “ad-referendum”; in other words the signatories of the 2008 Minutes – once again a senior diplomat on the Bangladesh side and a Commodore on the Myanmar side – were not committing their respective Governments even to making this textual change.

In addition, in paragraph 3 of the 2008 Minutes the parties updated – “to a more recent and internationally recognized chart” – the points plotted in the 1974 Minutes.

Professor Boyle suggested last Friday that these changes support the conclusion that the Minutes “articulate a commitment to a clearly defined maritime boundary in the territorial sea.” That is simply not the case.

What is particularly noteworthy in the 2008 Minutes is that in three places the Minutes of 1974 are referred to as an “ad-hoc understanding”. Paragraph 2 begins: “Both sides discussed the ad-hoc understanding …” Paragraph 3 refers to the chart “referred to in the ad-hoc understanding …” and again, later in the same sentence there is another reference to the “ad-hoc understanding”.

During the second round of resumed talks, held in Bagan in early September 2008, Myanmar noted that the 2008 Minutes signed at the first resumed round were merely a reiteration of the Agreed Minutes of 1974, and not in any way their ratification.

Nothing relevant to the status of the 1974 Minutes occurred during the third, fourth or fifth rounds of the resumed negotiations, nor indeed was there any breakthrough in the negotiations.

Mr President, Members of the Tribunal, I have just taken you through the negotiations in so far as they are relevant to the existence or otherwise of an agreement between the Parties on the delimitation of the territorial sea. I now turn to the second part of my statement. I shall show that, contrary to the claim of Bangladesh, repeated last week by Professor Boyle, there is no agreement between the Parties on the delimitation of the territorial sea. In particular, the Agreed Minutes of 1974 are not such an agreement.

Members of the Tribunal may wonder whether this matters. It matters, first, because it raises an important issue of principle: maritime delimitation agreements are not

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76 ITLOS/PV11/3(E), p. 7, lines 6-7 (Boyle).
easily to be presumed\textsuperscript{78}. It matters, above all, because it may affect the delimitation
of the line as a whole.

Of course, between the opposite coasts of St Martin’s Island and the Myanmar
mainland, the median line proposed by Myanmar and the line described in the 1974
Minutes are not so different but beyond point 6 the two lines diverge significantly.
This divergence is nothing new. The Parties have always differed as to the proper
location of the transition point between the territorial sea boundary and the exclusive
economic zone boundary. As Mr Lathrop will explain, the proper delimitation in the
territorial sea needs to take account of the special circumstance that is St Martin’s
Island.

Bangladesh’s principal contention is that the Agreed Minutes of November 1974
constitute a legally-binding agreement establishing a maritime boundary between the
territorial sea of Myanmar and the territorial sea of Bangladesh. In our written
pleadings, we have set out in detail why this is not the case\textsuperscript{79}. We propose to
highlight the main lines of our argument, responding to Bangladesh’s arguments in
so far as we can discern them.

We shall concentrate on three basic propositions.

First, the Agreed Minutes of November 1974 were not, contrary to Bangladesh’s
assertion, a legally-binding agreement; second, in any event, according to their
terms, the Minutes did not purport to establish a maritime boundary; they merely
recorded the understanding of the Parties at a particular stage of the negotiations as
to what could become part of an overall maritime boundary agreed in a future treaty.
They were conditional in other respects as well; third, again contrary to the
unfounded assertions of Bangladesh, nothing in the practice of the Parties confirms
their agreement to a territorial sea delimitation line.

Mr President, the first two of these propositions are best considered together. They
each turn on the application of the law of treaties. The third proposition, on which
Mr Sthoeger will address you tomorrow, is chiefly a matter of evidence – or, rather,
lack of evidence.

Mr President, I shall deal first with two preliminary matters.

One important issue underlying each of these propositions, and particularly the third
one, concerns the burden of proof. It is Bangladesh that asserts the existence of an
agreement between the Parties effecting a delimitation of the territorial sea. The
burden of proof therefore lies on Bangladesh. As the International Court has said, on
a number of occasions, and as Professor Sands reminded us last week\textsuperscript{80}, “the party
asserting a fact as a basis of its claim must establish it”\textsuperscript{81}. The burden of proof in this
case is a heavy one. It is our submission that Bangladesh has not begun to

\textsuperscript{78} Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea
(Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p. 735, para. 253; see also Maritime
\textsuperscript{79} BCM, paras. 4.09-4.38; BR, paras. 2.7-2.55.
\textsuperscript{80} ITLOS/PV11/3 (E), p. 26, lines 28-29 (Sands).
\textsuperscript{81} Romania v. Ukraine, I.C.J. Reports 2009, p. 61, at p. 86, para. 68 (with further references).
discharge that burden. Let me recall the words of the International Court in the
Nicaragua v. Honduras case, “[t]he establishment of a permanent maritime boundary
is a matter of grave importance and agreement is not easily to be presumed.”

The second preliminary matter concerns the word “agreement” in article 15 of
UNCLOS. It is clear from the wording and context of article 15 that what is
contemplated is an agreement that is binding in international law. In Romania v.
Ukraine the ICJ had to consider the words “agreement in force” in article 74,
paragraph 4, and article 83, paragraph 4, of UNCLOS. In that context, it interpreted
the word “agreement” to mean an agreement in force between the parties which
establishes a sector of the maritime boundary which the ICJ had to determine (that is
to say, a treaty). It is submitted that a similar meaning attaches to “agreement” in
article 15, which serves the same purpose: to preserve existing delimitation
agreements.

In his speech last Friday, Professor Boyle seemed to acknowledge that article 15
contemplated a legally binding agreement. The point he sought to make was a
different one. He repeatedly suggested that Myanmar did not accept that a treaty in
simplified form - un accord en forme simplifiée - could be an agreement within the
meaning of article 15.

That is not our position. That is not at all what we have said. Of course, we do not
dispute that an agreement in simplified form may be a binding treaty under
international law. Of course, form is not decisive (though it may well be indicative). A
treaty in simplified form is just as binding in international law as the most solemn of
treaties, for example, one expressed to be made between Heads of State. The
commitment is legally just as serious. That is why, Mr President, Members of the
Tribunal, States are careful in authorizing persons to represent them in relation to the
conclusion of a treaty, whatever form that treaty may take.

Having misrepresented our position, Professor Boyle compounds the error by
asserting that “[t]he only authority advanced by Myanmar to justify its contention that
such agreements must be formally negotiated treaties” is the Black Sea judgment.
Professor Boyle made much last Friday of the 1949 General Procès-Verbal that
was at issue in the Black Sea case. He went so far as to assert that the 1974 Agreed
Minutes in the present case “are very similar or identical to the procès-verbal in the
Black Sea case.” That is simply not the case. I shall briefly mention three essential
differences.

First, the actual terms of the 1949 Procès-Verbal in the Black Sea case are in no
way comparable with those of the 1974 Minutes. One striking difference is that the
final provision of the Procès-Verbal expressly stated that it was to enter into force

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82 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea
83 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61,
at p. 77; para. 40; see also ibid., pp. 78-89, paras. 43-76.
84 ITLOS/PV11/3 (E), p. 6, lines 11-14; p.9, lines 21-24; p. 11, lines 36-38 (Boyle).
85 ITLOS/PV11/3 (E), p. 9, lines 21-24 (Boyle). See also ibid., p. 2, lines 9-11; p. 6, lines 9-11 (Boyle);
p. 10, lines 34-35 (Boyle); p. 10, line 39 (Boyle).
86 ITLOS/PV11/3(E), p. 10 line 38-p. 11 line 34 (Boyle).
87 Ibid., p. 11, lines 26-27.
immediately after its signature. Another important difference is that the Procès-
Verbal was a typical demarcation document comprising three large volumes, with six
volumes of annexed Procès-Verbaux of individual demarcation points. It was not a
delimitation agreement. It was drawn up by a Mixed Soviet-Romanian Commission
on the Demarcation of the State Border, whose task was to demarcate the State
border. This it did, and the result was incorporated by reference into a State Border
Treaty signed just two months later.

Second, the context in which the 1949 Procès-Verbaux were concluded was entirely
different. As the International Court explains in its 2009 judgment, the Procès-
Verbaux resulted from the work of the Soviet-Romanian Border Commission, as I
have said, which was implementing an agreement signed on Moscow in 1948, which
itself modified the 1947 Paris Treaty between the Allied and Associated Powers and
Romania. The 1949 Procès-Verbal was an integral part of a treaty-based delimitation
and demarcation process that reached its conclusion in a treaty.

The third difference is that in the Black Sea case the Parties were in agreement that
the Procès-Verbal was a legally binding international agreement. As Professor
Boyle conceded, “[t]he issue before the Court [in the Black Sea case] was not the
status of the procès-verbal but whether it ... established a continental shelf/Exclusive
Economic Zone boundary ...” The International Court itself therefore did not need
to address its status.

It is, Mr President, perhaps somewhat misleading to say, as Professor Boyle did, that
“[t]he Black Sea case thus shows that an appropriately worded agreement or procès-
verbal between officials is sufficient for the purposes of article 15 ...” Whether a
text is an agreement within the meaning of article 15 does indeed depend on the
actual terms of the document – upon whether it is, to use Professor Boyle’s phrase,
“appropriately worded” – as well as the particular circumstances in which it was
drawn up. The 1974 Minutes, by contrast with the Procès-Verbal in the Black Sea
case, are not worded appropriately to establish an article 15 agreement.

After these two preliminary matters, I shall now return to examine the Agreed
Minutes in a little more detail. The central questions are: are the Agreed Minutes an
agreement binding under international law, that is to say, a treaty, and did they, by
their terms, establish a maritime delimitation?

Professor Boyle, last Friday, gave four reasons why the Agreed Minutes “evidence
the conclusion of an agreement delimiting the territorial sea in 1974.” With all due
respect, these reasons are unconvincing. First, Professor Boyle says, “the terms are
clear and unambiguous”. This is not much of an argument. In our view too the terms

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88 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Ukraine Counter-Memorial, p. 81, para. 5.41.
89 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Ukraine Counter-Memorial, pp. 80-81, para. 5.41; p. 94, para. 5.78; CR 2008/24 (8 September 2008), pp. 42-43, para. 29 (Wood).
91 Ibid., p. 75, para. 32; p. 81, para. 52.
92 ITLOS/PV11/3(E), p. 11, lines 9-10 (Boyle).
93 ITLOS/PV11/3(E), p. 11, lines 19-20 (Boyle) (emphasis added).
are clear and unambiguous, but not in the sense that Professor Boyle gives to them.
Second, he says the object and purpose of the agreement and the context in which it
was negotiated was "to negotiate a maritime boundary". "To negotiate" is a rather
strange object and purpose for an agreement, especially an agreement that is
alleged to have effected a maritime delimitation. No doubt a successful conclusion is
the aim of every negotiation, but that sheds no light on the object and purpose of the
Agreed Minutes. Third, Professor Boyle says that "the fact that an agreement is
evidenced by the signature of the heads of both delegations and the terminology
used, ‘Agreed Minutes’" is relevant. This seems to be two separate arguments. Mere
signature is no indication of the legal status of a document, nor is the title "Agreed
Minutes". Fourth, according to Professor Boyle, the Agreed Minutes are
"unconditional apart from completing the technicalities." Even if this were correct,
which it plainly is not – there were other important conditions – the condition of
determining precise coordinates is hardly a negligible aspect of a boundary
agreement.

In approaching these questions, Bangladesh seems to overlook one rather
elementary point. In the words of the International Court of Justice when considering
the legal nature of the Brussels Communiqué in the Aegean Sea case, in order to
ascertain whether an international agreement has been reached, "the Court must
have regard above all to its actual terms and to the particular circumstances in which
it was concluded." That language was also employed by the International Court in
Qatar v. Bahrain, when it was considering the status of the 1990 Minutes.

So, in order to determine the nature of the 1974 Agreed Minutes, we must "have
regard above all to [their] actual terms and to the particular circumstances in which
[they were] concluded." I shall begin with the actual terms. The actual terms used
are the starting point for determining the effect of any document. Even Bangladesh
seems to accept this, since in its Reply it begins its analysis of the Minutes by
referring to their "ordinary language", but then its only reference to the actual terms
of the Minutes is when it points out that the title of the document is "Agreed Minutes"
rather than just "Minutes". From then on, Bangladesh proceeds to ignore the actual
terms of the Minutes, the text, the words used, and quickly moves on to what it
claims to be the subsequent practice of the Parties.

Mr President, the title "Agreed Minutes" is often employed in bilateral international
relations, as in domestic contexts, for the record of a meeting, or of the main points
to emerge from a meeting, agreed between the various participants. What is agreed
is the terms of the document recording what happened at the meeting, that is, the
account set forth therein of the meeting or its conclusions. By contrast, it is not a
common designation for a document that the participants intend to constitute a treaty
or a contract, though it is not of course unknown.

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95 Aegean Sea Continental Shelf (Greece v. Turkey), Jurisdiction of the Court, Judgment, I.C.J.
96 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain),
97 Aegean Sea Continental Shelf (Greece v. Turkey), Jurisdiction of the Court, Judgment, I.C.J.
98 BR, para. 2.16.
99 Ibid.
100 Ibid., paras. 2.16 ff.
Mr President, Members of the Tribunal, could I please ask you to turn once again to the text of the 1974 Agreed Minutes, which can be found at tab 1.1 in the Judges’ folder.

Mr President, we would agree with our friends from Bangladesh that the first thing to note about the Minutes is indeed the title. As I have said, the term “Agreed Minutes” is a perfectly normal term for an agreed record of a meeting. The term “minutes” is one that is well known to those involved in the running of any organization, be it a government or a private entity. The dictionary definition is “an official note of the proceedings of a meeting, conference, convention etc.”101 The term is very often used in English to refer to the record of a meeting. “Cabinet minutes”, for example, are the record of meetings of the Cabinet drawn up by the Cabinet Secretary. They record the discussions and conclusions, if any. Such conclusions may be important, but they are not legally binding. If the minutes of a meeting are approved, as is frequently done, they may be referred to as “approved” or “Agreed Minutes”. That does not detract from their status as records of meetings.

Mr President, Members of the Tribunal, you will note that the full title of the 1974 Agreed Minutes reads: Agreed Minutes between the Bangladesh Delegation and the Burmese Delegation regarding the Delimitation of the Maritime Boundary between the Two Countries. I repeat, “between the Bangladesh Delegation and the Burmese Delegation”. A legally binding treaty between two sovereign States would hardly be expressed, in its title, to be between delegations. Similarly, the Minutes are expressed to be signed by the two delegation leaders, not on behalf of their respective governments, but simply as leaders of the two delegations to the talks. Likewise, paragraph 1 of the Minutes opens with the words: “The delegations of Bangladesh and Burma held discussions”. Again, the emphasis is on delegations, not governments, not States, and these opening words are clearly the language of a record of a meeting, not of a legally binding agreement.

Paragraph 2 of the Minutes records that with respect to the first sector, that is the territorial sea, the two delegations agreed that the boundary “will be formed” [note the future tense, “will”, not “is” or “shall be”] – “will be formed” by a line, the “general alignment” of which was illustrated on an annexed chart. Also in paragraph 2 they further agreed that “[t]he final coordinates of the turning points for delimiting the boundary of the territorial waters … will be fixed on the basis of the data collected by a joint survey.” That joint survey, Mr President, has never been conducted, so that element of the Agreed Minutes was never implemented.

As we have already seen, paragraph 3 expressed Myanmar’s position that the understanding was subject to the guarantee that Myanmar’s vessels “would have the right of free and unimpeded navigation through Bangladesh waters around St Martin’s Island to and from the Burmese sector of the Naaf River” – again, a condition that was never met.

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Paragraph 4 recorded indeed that “the Bangladesh delegation expressed the approval of their Government regarding the territorial waters boundary referred to in paragraph 2”. Again as we have already seen, paragraph 4 went on merely to record that the “Bangladesh delegation” had “taken note” of the Myanmar Government’s position regarding the guarantee of free and unimpeded navigation. It will be seen that this last sentence refers to the Bangladesh delegation, not the Government, and that the delegation merely “took note” of Myanmar’s position. In diplomatic parlance “taking note” is far removed from “agreement”, despite Professor Boyle’s curious interpretation of the term. So the Minutes clearly did not meet Myanmar’s concerns on this point.

I have already taken you to paragraph 5, which concerns the draft treaty presented by Bangladesh. I will come back to that shortly. The last paragraph of the Minutes, paragraph 6, notes the ongoing discussions concerning the second sector of maritime border, in other words the EEZ and the continental shelf – a reminder that the Minutes are not concerned only with the boundary in the territorial sea.

I pause at this point to note that the 1974 Minutes have none of the hallmarks of an international maritime boundary agreement. Given the “grave importance” of “[t]he establishment of a permanent maritime boundary”, it is unsurprising that virtually all such agreements are solemn treaties (traités en forme solennelle), with, among other things, provision for ratification, and they often contain, in addition to precision as regards the delimitation line, provisions on dispute settlement, cooperation between the parties, and navigation and resource rights where necessary. They are, of course, published and registered with the United Nations under article 102 of the Charter, and they usually find their way into International Maritime Boundaries (a publication that does have reports on Myanmar’s maritime boundary agreements with other States). None of this happened in our case and for one obvious reason: the Agreed Minutes were not an “agreement” within the meaning of article 15 of the Convention. This is in stark contrast to Myanmar’s practice in its maritime delimitation agreements with India, with Thailand, and on the tripoint.

An interesting example of practice concerning these two Parties is the land boundary between Myanmar and Bangladesh in the Naaf River, which was fixed by international treaty: an Agreement of 9 May 1966, and a Supplementary Protocol of December 1980. This treaty you will hear about later; it is relevant to the end point of the land boundary, the starting point of the maritime boundary. That 1966 Boundary Agreement was signed by the two Heads of State. It consists of an Agreement and an annexed Protocol. The Protocol describes the line of delimitation

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102 ITLOS/PV11/3(E), p. 3, line 16 (Boyle).
104 See the agreements collected in the six volumes of International Maritime Boundaries published thus far (2011).
105 See MR, paras. 3.27-3.29.
in detail, and it was signed some days before the Agreement itself by persons
described as “plenipotentiaries”; even so, it had no legal effect of its own. It had
effect only as from the date of the coming into force of the Agreement of which it
formed an integral part.

Mr President, to return to the 1974 Minutes. The key point is what the text actually
says about their substance. As I have said, paragraph 4 recorded the approval of the
Bangladesh Government to points 1 to 7 describing a territorial sea boundary, but it
was silent on any approval by the Government of Myanmar. There was no such
approval.

Paragraph 5 is of particular importance: it records that a draft treaty was handed to
the Myanmar delegation by the Bangladesh delegation “for eliciting the views of the
Burmese Government”. I described that when I was describing the course of the
negotiations. What, Members of the Tribunal, would have been the purpose of
preparing a draft agreement, if the Agreed Minutes themselves were already a
legally-binding maritime delimitation agreement?

The draft agreement provided for ratification. In fact, of course, the Government of
Myanmar never ratified the draft agreement. Indeed, it neither signed nor even
initialled it,\(^{108}\) nor did the Government of Bangladesh. Moreover, as I have described,
no international agreement could be concluded without the express confirmation of
the Government of Myanmar, a point that was made clear to Bangladesh from the
first round of negotiations\(^{109}\). In effect, Bangladesh is attempting to turn the draft of
an agreement, which it presented, and which was not even initialled, into a binding
document, though – as the arbitral tribunal said in Guyana/Suriname, “uncompleted
treaties … do not create legal rights or obligations merely because they had been
under consideration”\(^{110}\).

Finally, it should further be noted that the Minutes were not published, and indeed
were not referred to in public on any of the many occasions when the Parties met to
discuss their bilateral relations. This is remarkable if, as Bangladesh now says, for
the purposes of these proceedings, they constitute a legally binding maritime
delimitation agreement.

Mr President, I will now turn to the 2008 Minutes. Bangladesh seeks to bolster its
claim that the 1974 Minutes constitute a delimitation agreement by reference to the
2008 Minutes. Again, it is also necessary to look first at their “actual terms”\(^{111}\),
something Bangladesh studiously avoids. If I could invite Members of the Tribunal to
turn to the text of the 2008 Minutes, which will be found at tab 1.8 in the folders,
there are a number of points to be made about the text.

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\(^{108}\) MCM, para. 4.15.

\(^{109}\) MCM, paras. 3.13-314, 4.16.


\(^{111}\) Aegean Sea Continental Shelf (Greece v. Turkey), Jurisdiction of the Court, Judgment, I.C.J. Reports 1978, p. 3, at p. 39, para. 96; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 121, para. 23.
As with the 1974 Minutes, the first thing to note about the 2008 Minutes is the title. It reads: “Agreed Minutes of the meeting held between the Bangladesh Delegation and the Myanmar Delegation regarding the delimitation of the Maritime Boundaries between the two countries.” So even the title makes it clear that these are minutes of a meeting, no more and no less. Once again the reference is to the two delegations, not to governments or States. Once again the text begins with the words: “The Delegations of Bangladesh and Myanmar held discussions ...” Once again the language it that of a record of discussions, not of treaty commitments. This is clear in each and every paragraph.

Second, Bangladesh seeks to play down the fact that the 2008 Minutes refer to the 1974 Minutes as an “ad hoc understanding” by saying that this is merely a matter of form rather than substance. As I have already pointed out, the 2008 Minutes refer to the 1974 Minutes as an “ad-hoc understanding” no less than three times. This can hardly have been an oversight. Rather, the term accurately reflects the way both sides viewed the 1974 Minutes. (I would note in passing that the French translation of the 2008 Agreed Minutes prepared by the Registry is perhaps a little misleading in that it translates “understanding” by “accord”; “entente” might have been more accurate – or perhaps even that very good French word – understanding – tout simplement.) An “understanding”, a term generally reserved in diplomatic usage for a non-binding document, is a good description of what the 1974 Minutes were: they were a conditional understanding reached at the level of the negotiators as to what could be included in an eventual overall maritime delimitation agreement.

Third, as we have already seen, our friends from Bangladesh appear to attach great significance to the fact that in paragraph 2 of the 2008 Minutes both sides agreed ad referendum that the word “unimpeded” be replaced by a whole sentence, which I read out earlier. In doing so, Bangladesh simply passed over in silence the words “ad referendum”, a term which clearly indicates that the two delegations intended to refer the matter back to their respective governments. According to Bangladesh, this change “merely served to modernize the language” used in 1974, and somehow – it is not explained how – this proves that the 1974 Minutes were indeed an “agreement”.

Mr President, Members of the Tribunal, I have taken you to the actual terms of the 1974 Minutes (as well as those of the 2008 Minutes), and it is now necessary to turn to “the particular circumstances in which [they] were concluded”. There are many ways in which the circumstances of the conclusion of the 1974 Minutes confirm that they were never intended to be a legally-binding instrument. On the contrary, they were, to use the language of the earlier cases, “a simple record of a meeting”. As I said, Bangladesh has said very little about the course of the negotiations. In particular, Bangladesh has told you very little about the circumstances under which

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112 BR, para. 2.43.
113 2008 Agreed Minutes, BM, Vol. III, Annex 7, para. 2; para. 3 (twice). See MCM, para. 3.42.
the Agreed Minutes came to be signed and what the negotiators said about them. This is hardly surprising, as these circumstances confirm that the Minutes were no more than an ad hoc conditional understanding, reached at an initial stage of the negotiations, which never ripened into a binding agreement between the two negotiating sides.

I would urge you, Mr President and Members of the Tribunal, to read carefully the records of the November 1974 round of negotiations that each side has annexed to its written pleadings. These are contemporaneous accounts of what actually happened during the second round. They refer to three documents: the draft minutes produced by the Bangladeshi delegation; the 1974 Minutes themselves as signed; and the draft treaty produced by Bangladesh. You will see the following points that emerge from these records of the meeting:

First, Commodore Hlaing, the head of the Myanmar delegation, for his part, was explicit that navigational passage should be embodied in a treaty. The head of the Bangladeshi delegation, Ambassador Kaiser, also suggested a treaty to this effect, and merely stated that Myanmar’s concerns on passage would be kept “in advisement.”

Second, at the commencement of the third meeting of the second round, Bangladesh introduced draft minutes entitled “Agreed Minutes between the Bangladesh and Burmese Delegations regarding the Delimitation of the Boundaries of Territorial Waters between the two Countries.” It was at this point that the Myanmar delegation took the position that “the agreed minutes should deal with the subject matter en toto”, a statement quoted by Professor Boyle last Friday. Bangladesh’s own account recalls the negative reaction of the Myanmar delegation “to conclude a separate treaty/agreement on the delimitation of the territorial waters.” (You will find the full text of the Bangladesh record of the second round of negotiations at tab 1.9 in your folders). Professor Boyle disregarded this position as inconsequential, yet obviously it was considered seriously, as the signed minutes’ title was changed to refer not only to territorial waters but to “the Delimitation of the Maritime Boundary”.

Paragraph 6 of the initial draft minutes, the draft prepared by Bangladesh, stated that the Myanmar delegation indicated its government’s agreement to the plotted points in the territorial sea. This passage was removed from the minutes as signed.

The next point is that Bangladesh’s own records of the second round also make clear that the Bangladesh delegation had “taken note” of Myanmar’s position on navigational passage, and no more.

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117 MCM, Vol. II, Minutes of the Second Round, first meeting, para. 6 (Annex 3).
118 Ibid., para. 5.
119 MCM, Vol. II, Minutes of the Second Round, third meeting, and Appendix I (Annex 3)
120 ITLOS/PV11/3(E), p. 4, lines 1-2 (Boyle).
Similarly, Bangladesh “took note” of Myanmar’s concern on point 8 of its straight base lines, located on St Martin’s Island\textsuperscript{124}. To this day, point 8 has not been altered.

Finally, Mr President, Members of the Tribunal, if you look at paragraph 10 in tab 1.9 of Bangladesh’s own account, you will see that it records that:

\begin{quote}
“An Agreed minutes was signed at Dacca by the Leaders of the respective delegations on 23rd November 1974 \textit{which briefly recorded the summary of their discussions}\textsuperscript{125}.”
\end{quote}

Myanmar could not agree more with Bangladesh’s account and statement of the true status, object and purpose of the 1974 Minutes.

Mr President, it is a little early, but that would be a convenient place for me to break and then I would have about twenty minutes more to finish tomorrow, if that is convenient to the Tribunal.

\textbf{THE PRESIDENT:} Your proposal is acceptable. Therefore, we shall now break and conclude your statement tomorrow.

This brings us to the end of today’s sitting. The hearing will be resumed on Friday, 16 September 2011 at 3 p.m. The sitting is now closed.

\begin{quote}
(The sitting closed at 5.54 p.m.)
\end{quote}

\textsuperscript{124} \textit{Ibid.}, para. 6.
\textsuperscript{125} BM, Vol. III, Annex 14, para. 10 [emphasis added].