

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



2011

Public sitting

held on Friday, 16 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

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

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as Advisers.

1 **CLERK OF THE TRIBUNAL:** All rise.

2

3 **THE PRESIDENT:** Please be seated.

4

5 Good afternoon. Today Myanmar will continue its oral arguments on the dispute
6 concerning the delimitation of the maritime boundary between Bangladesh and
7 Myanmar in the Bay of Bengal. I call on Sir Michael Wood to continue his
8 presentation.

9

10 **SIR MICHAEL WOOD:** Thank you, Mr President. Mr President, Members of the
11 Tribunal, yesterday I took you through the bilateral negotiations between Myanmar
12 and Bangladesh in so far as they shed light on the nature and meaning of the 1974
13 Agreed Minutes. I invited you to apply the test laid down by the International Court:
14 to consider the actual terms of the Agreed Minutes and the particular circumstances
15 of their conclusion. I ended yesterday evening by showing you Bangladesh's own
16 account, which states that the 1974 minutes briefly recorded the summary of their
17 discussions.

18

19 Mr President, the remainder of my speech in the next few minutes will cover some
20 miscellaneous points concerning the conclusion of the 1974 minutes. I shall briefly
21 address five matters: (i) the conditionality of the 1974 minutes; (ii) Bangladesh's
22 curious emphasis in its Reply on the fact that the boundary was "settled";
23 (iii) Commodore Hlaing's authority in relation to the conclusion of a treaty; (iv) the
24 absence of ratification of any "agreement" by the Myanmar authorities; and (v) the
25 subsequent discussions concerning "point 7".

26

27 Mr President, first, Myanmar and Bangladesh seem to agree that one of the
28 conditions put by Myanmar for the conclusion of a maritime delimitation agreement
29 was that the whole of the boundary should be settled in a single treaty. Bangladesh
30 itself states that the two sides disagreed on "whether there should be a treaty with
31 respect to the territorial sea or an omnibus treaty that included the entire maritime
32 area to be delimited"¹. This condition was repeatedly made clear by Myanmar
33 delegations to their counterparts during successive negotiating rounds². It was most
34 certainly clear at the second round in 1974, the round at which the minutes were
35 signed, as I explained yesterday, and I read out yesterday what the Foreign Minister
36 of Myanmar said on this subject at the sixth round.³

37

38 Bangladesh simply ignores the basic fact that no comprehensive agreement was
39 ever reached.

40

41 The second point is very brief. Bangladesh, throughout its Reply, and solely by
42 reference to one of its own reports, repeatedly asserts that the territorial sea
43 boundary was "settled" in the 1974 minutes⁴. Professor Boyle did not refer to this
44 argument last week, so I need not deal with it now. I would refer you to our
45 Rejoinder. I would however ask you to note that the only basis for this repeated

¹ BR, para. 2.33.

² BR, para. 2.20; BM, Vol. III, Annex 19; BR, paras. 2.29-2.30; MCM, paras. 3.13-3.14, 3.20, 3.34, 3.40.

³ MCM, para. 3.34; MCM, Vol. II, Sixth Round, Speeches and statements (Annex 8).

⁴ BR, para. 2.23.

1 assertion is paragraph 3 of Bangladesh's own "*Brief Report*" of the third round of the
2 negotiations⁵. When read carefully, this does not even purport to reflect an actual
3 discussion that took place during the third round of negotiations between the
4 Parties⁶.

5
6 I thirdly come to the question of the authority, or rather lack of authority, of the
7 members of the Myanmar delegation to the talks in November 1974 to commit their
8 Government to a legally-binding treaty. As we saw, the leader of the Myanmar
9 delegation was Commodore Hlaing. He was Vice Chief of Staff in the Myanmar
10 Defence Services (Navy). Commodore Hlaing, a naval officer, could not be
11 considered as representing Myanmar for the purpose of expressing its consent to be
12 bound by a treaty. He was not one of those holders of high-ranking offices in the
13 State referred to article 7, paragraph 2, of the Vienna Convention on the Law of
14 Treaties, who are considered as representing their State for certain specified treaty
15 purposes by virtue of their functions.

16
17 In the alternative, according to paragraph 1 of article 7, a person may express the
18 consent of the State to be bound if he or she produces full powers, or if it appears
19 that the intention of the States concerned was to dispense with full powers. Neither
20 of these circumstances applied in our case. Commodore Hlaing did not have full
21 powers issued by the Government of Myanmar and there were no circumstances to
22 suggest that it was the intention of Myanmar and Bangladesh to dispense with full
23 powers.

24
25 Quite the opposite: Commodore's Hlaing's statements throughout the negotiations
26 made it abundantly clear that he had no authority to commit his Government. As I
27 said yesterday, from the very first round, Commodore Hlaing made it clear that the
28 discussions between the delegations and their results were subject to the approval of
29 the appropriate authorities of Myanmar⁷.

30
31 There is one further point regarding the lack of authority of Commodore Hlaing to
32 bind his State. Professor Boyle argued that, even if the Commodore lacked "the
33 authority to sign [the 1974 minutes], he would only make the agreement voidable,
34 not void" and that the 2008 minutes confirmed the Commodore's signature⁸.
35 Professor Boyle also in this context referred to article 45 of the Vienna Convention
36 on the loss of the right to invoke a ground of invalidity of a treaty⁹. On that, it is clear
37 from the articles listed in the chapeau of article 45 that it does not apply in the
38 circumstances of this case. What the Commodore lacked was the power to express
39 Myanmar's consent to be bound, whether by signature or otherwise. The
40 Commodore could not have made that clearer to the Bangladesh delegation.

41
42 Professor Boyle's conclusion, we respectfully suggest, is based on a misreading of
43 article 8 of the Vienna Convention on the Law of Treaties. Article 8 provides that an
44 act by a person who cannot be considered as representing a state for the purposes

⁵ BR, para. 2.23; BM, Vol. III, Annex 15.

⁶ (emphasis added).

⁷ MCM, Vol. II, Minutes of the First Round, third meeting, para. 11, fourth meeting, para. 16 (Annex 2); see also MCM, Vol. II, Minutes of the Second Round, first meeting, para. 11 (Annex 3).

⁸ ITLOS/PV11/3(E), p. 9, line 1-2 (Boyle).

⁹ ITLOS/PV11/3(E), p. 9, Fn. 29 (Boyle).

1 of concluding a treaty is “without legal effect unless afterwards confirmed by that
2 State”. What has to be confirmed is the act of the unauthorised person. That act by
3 itself has no legal effect. It does not establish an agreement that is voidable¹⁰. This is
4 clear from the very fact that article 8 is placed in Part II of the Vienna Convention on
5 the conclusion and entry into force of treaties, and not in Part V¹¹.

6
7 This is perhaps a convenient moment to mention the two cases relied upon so
8 heavily by Bangladesh in its written pleadings: *Cameroon v. Nigeria* and *Qatar v.*
9 *Bahrain*. Since they have not relied upon them so much at this hearing, I can do so
10 very briefly.

11
12 Bangladesh’s reliance on the ICJ’s findings in *Cameroon v. Nigeria* fails on several
13 grounds. You will recall that the ICJ found that the Maroua Declaration constituted an
14 international agreement because the recognised elements of what constitutes a
15 treaty¹² were met, in particular, the consent of both Nigeria and Cameroon to be
16 bound by the Maroua Declaration. The signatures of the Heads of State of both
17 countries were clearly sufficient to express their consent to be bound. That is not our
18 case.

19
20 Commodore Hlaing cannot have been understood to have committed his State to a
21 legally-binding agreement by signing the 1974 minutes. This was clear from his
22 official position as a member of the Navy, and from what he himself stated
23 throughout the negotiations. There is no comparison between signature of the 1974
24 Agreed Minutes by the two heads of delegations, Commodore Hlaing and
25 Ambassador Kaiser, and signature of the Maroua Declaration by the Heads of State
26 of Cameroon and Nigeria.

27
28 Bangladesh has also sought to compare the 1974 Agreed Minutes with the 1990
29 Agreed Minutes in *Qatar v. Bahrain*. Bangladesh points to the fact that in *Qatar v.*
30 *Bahrain* the ICJ concluded that the minutes signed by the two Foreign Ministers were
31 a text recording the commitments of their respective governments which was to be
32 given immediate application¹³.

33
34 We have dealt with this case fully in our written pleadings, and I need not repeat
35 what we said there. I shall just make two points.

36
37 First, as it did in *Cameroon v. Nigeria*, in *Qatar v. Bahrain* the ICJ relied on the fact
38 that the officials involved were those inherently invested with full powers to bind the
39 State according to the law of treaties¹⁴. In *Qatar v. Bahrain* it was the Foreign
40 Ministers of both parties who were the signatories. Foreign Ministers are among
41 those holders of high office, the so-called *troika*, who, according to the Vienna
42 Convention, possess inherent full powers.

43

¹⁰ N. Angelet and T. Leidgens, “Article 8”, in O. Corten and P. Klein, *The Vienna Conventions on the Law of Treaties. A Commentary*, Oxford University Press, Oxford, 2011, Vol. I, p. 159.

¹¹ *Ibid.*, p. 156.

¹² Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331, art. 2.1(a).

¹³ BR, para. 2.39.

¹⁴ Vienna Convention on the Law of Treaties, 1969, art. 7(2)(a), *UNTS*, Vol. 1155, I-18232, p. 331.

1 The second point is this: the conditionality of the 1974 minutes distinguishes them
2 from those in *Qatar v. Bahrain*. In *Qatar v. Bahrain* the ICJ stressed that the
3 commitments made by the Foreign Ministers were to have immediate effect. The
4 1974 minutes, on the other hand, as we have seen, were conditional in a number of
5 important respects. The nature and content of the 1974 minutes were thus quite
6 different from that at issue in *Qatar v. Bahrain*.

7
8 Mr President, Members of the Tribunal, neither *Cameroon v. Nigeria* nor *Qatar v.*
9 *Bahrain* support the position of Bangladesh. On the contrary, the differences in
10 content and context, distinguishing the instruments in those cases from the minutes
11 in our case, shed light on the true nature and status of the 1974 minutes: the 1974
12 minutes were a conditional understanding, lacking any binding force.

13
14 I turn to the next point. In its written pleadings, but again not orally, Bangladesh
15 suggested that the Government of Myanmar had somehow ratified the 1974 minutes
16 by a Cabinet decision. Since Bangladesh seems to have abandoned this point, I
17 simply refer you to what we said in our Rejoinder¹⁵.

18
19 Fifthly and lastly, I will say a word about the subsequent discussions after the ad-hoc
20 Agreed Minutes concerning point 7.

21
22 The *ad hoc* and conditional nature of the 1974 minutes is apparent from the
23 disagreement that very quickly emerged in the talks with respect to points
24 supposedly agreed upon in the 1974 minutes, in particular point 7. As I have already
25 noted, Bangladesh repeatedly asserts that points 1 to 7 were “settled” until Myanmar
26 had a “change of heart”, as they put it, in September 2008. In fact, what followed in
27 the immediate aftermath of the signing of the 1974 minutes paints a very different
28 picture.

29
30 One would normally expect the last point of a territorial sea boundary to be the
31 starting point of an EEZ/continental shelf boundary but even after signing of the 1974
32 minutes, both sides continued to suggest alternatives to point 7 as the starting point
33 for the delimitation of the EEZ/continental shelf boundary¹⁶. Just three months after
34 the 1974 minutes were signed, during the third round of negotiations, Bangladesh
35 itself proposed an alternative to point 7¹⁷. Even the 2008 minutes, the very same
36 minutes that supposedly reinforce the “binding” nature of the 1974 minutes, contain
37 in paragraphs 4 and 5 alternatives to point 7¹⁸, alternatives proposed by both sides.
38 These and the other examples set out in our Counter-Memorial¹⁹ show that the
39 points described in the 1974 minutes, and especially point 7, were tentative at best,
40 conditional, and subject to change in further talks between the Parties.

41
42 Mr President, Members of the Tribunal, in summary, it is clear from the actual terms
43 of the Agreed Minutes of 1974 and from the particular circumstances of their
44 conclusion that they were not an agreement that is binding upon Myanmar and
45 Bangladesh under international law. It is, moreover, clear from their terms that they

¹⁵ MR, paras. 2.29-2.32.

¹⁶ MCM, paras. 4.29-4.34.

¹⁷ *Ibid.*, para. 4.30.

¹⁸ *Ibid.*, para. 4.31.

¹⁹ *Ibid.*, paras. 4.30-4.31.

1 did not effect a maritime delimitation between Myanmar and Bangladesh. The
2 minutes were simply a brief record of the discussions, which, among other things, set
3 out a conditional understanding as to what an eventual treaty establishing an overall
4 maritime delimitation line might contain.

5
6 Mr President, Members of the Tribunal, that concludes what I have to say on the
7 absence of agreement between the Parties on the delimitation of the territorial sea.
8 I thank you for your attention and I would now ask you to invite Mr Sthoeger to
9 address you on Bangladesh's arguments concerning practice in the territorial sea.

10
11 **THE PRESIDENT:** Thank you. I now give the floor to Mr Eran Sthoeger.

12
13 **MR STHOEGER:** Mr President, Members of the Tribunal, it is an honour to appear
14 before you on behalf of the Republic of the Union of Myanmar. I am grateful to the
15 Myanmar authorities for giving me this opportunity to address this distinguished
16 Tribunal.

17
18 Mr President, Sir Michael has explained that there is at present no agreement
19 between the Parties regarding the delimitation in the territorial sea. In the 1974
20 minutes the Parties reached no more than a conditional understanding as to what
21 could be included in an eventual treaty.

22
23 In its Memorial Bangladesh appeared to make two arguments based on practice: first
24 that the practice establishes a tacit agreement²⁰; and second, that the practice
25 confirms the existence of the 1974 agreement. In its Reply, and last Friday in its oral
26 presentation, Bangladesh did not pursue the tacit agreement argument. We have
27 dealt with this argument in our Counter-Memorial²¹, and see no need to elaborate
28 further today.

29
30 In its written submissions, Bangladesh further argued that the subsequent practice of
31 the Parties supports the assertion that the 1974 minutes were viewed as a binding
32 agreement by both Parties. In his very brief comments on practice last Friday,
33 Professor Boyle asserted that, and I quote, "of course there is plenty of evidence to
34 show that Bangladesh has policed its side of the boundary without challenge from
35 Myanmar"²². With respect, as I will show, this claim has no basis in fact. The
36 "evidence" produced by Bangladesh in its Reply is irrelevant at best. At times, it
37 undermines Bangladesh's own position. It demonstrates that the Parties were
38 oblivious to any so-called "agreement".

39
40 Professor Boyle has also highlighted the lack of conflict over navigational and fishing
41 rights over the years²³. I will not repeat comments made yesterday by Sir Michael on
42 the restraint shown by Myanmar regarding its right to free and unimpeded
43 navigation. What I will say is that such restraint and responsibility shown by the
44 Parties should be commended and not used to the detriment of Myanmar or
45 Bangladesh.

²⁰ BM, para. 5.19.

²¹ MCM, paras. 4.47-4.42.

²² ITLOS/PV11/3(E), p. 12, lines 7-8 (Boyle).

²³ ITLOS/PV11/3(E), p. 12, lines 1-3, 15-17 (Boyle).

1
2 Mr President, Members of the Tribunal, Sir Michael has quoted the words of the
3 International Court of Justice in the *Nicaragua v. Honduras* case that “[t]he
4 establishment of a permanent maritime boundary is a matter of grave importance
5 and agreement is not easily to be presumed”.²⁴ International courts and tribunals
6 have applied this approach repeatedly when dealing with claims of a tacit agreement
7 based on the practice of the Parties²⁵. As Sir Michael explained, it is established in
8 international law that the burden of proof lies on “the party asserting a fact”²⁶, and
9 Bangladesh has not met this burden.

10
11 Mr President, I shall deal in turn with the following matters: first, I shall recall the
12 approach of international courts and tribunals to the kind of “evidence” placed before
13 you by Bangladesh, particularly the affidavit evidence; second, I shall examine the
14 affidavits of the Bangladeshi fishermen and naval officers; third, I shall look briefly at
15 the Bangladeshi navy patrol logs. I shall then take you to the Bangladeshi
16 coastguard patrol logs and, finally, I shall turn to Myanmar’s *Note Verbale* of
17 16 January 2008.

18
19 Now, before examining what Bangladesh claims to be evidence of subsequent
20 practice in application of the 1974 minutes, it is helpful to recall the approach of
21 international courts and tribunals towards affidavit evidence. A full presentation of the
22 approach taken is given in Myanmar’s Rejoinder²⁷. At this stage, I shall just highlight
23 some key points necessary to correctly evaluate the alleged evidence that
24 Bangladesh has presented before the Tribunal.

25
26 The Rules of the Tribunal, like those of the ICJ, do not address the issue of
27 admissibility of affidavits. Yet, as an eminent author has written in the *Max Planck*
28 *Encyclopedia*, “In recent cases, affidavits have been treated as admissible evidence.
29 However, on the level of their evidentiary value, the ICJ has expressed
30 scepticism ...”²⁸

31
32 The case law shows that international courts and tribunals have generally attached
33 little or no weight to such evidence²⁹.

²⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at p. 735, para. 253; see also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 86, para. 68.

²⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at p. 735, para. 253; *Maritime Boundary between Cameroon and Nigeria*, Judgment, I.C.J. Reports 2002, p. 31, pp. 447-448, para. 304; *Gulf of Maine*, Judgment, I.C.J. Reports 1984, p. 246, at p. 310, para. 150; *Guyana/Suriname*, Award of 17 September 2007, ILM, Vol. 47, 2008, para. 371-391; *Newfoundland and Labrador and Nova Scotia*, Award Second Phase (2002), para. 3.5; *Barbados/Trinidad and Tobago*, ILM, Vol. 45, p. 798 (2006), para. 364.

²⁶ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, at p. 86, para. 68, with further references.

²⁷ MR, paras. 2.50-2.55.

²⁸ R. Wolfrum, *International Courts and Tribunals, Evidence*, para. 31, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition).

²⁹ C.F. Amerasinghe, *Evidence in International Litigation*, Nijhoff, Leiden, 2005, pp. 195-201; G. Niyungeko, *La Preuve devant les Juridictions Internationales*, Bruylant, Bruxelles, 2005, pp. 144-145,

1
2 As has been noted, in the context of evidence, “the rules of the International Tribunal
3 for the Law of the Sea closely resemble those of the ICJ”³⁰, so the practice of the ICJ
4 is of particular interest.

5
6 The ICJ summarized its position on the value of affidavit evidence in its 2007
7 judgment in *Nicaragua v. Honduras*. What the ICJ said is so relevant to the affidavits
8 presented by Bangladesh that I shall quote the relevant passage in full. You will find
9 the relevant passage from the judgment in tab 2.1 of your folders. The Court noted:

10
11 “Witness statements produced in the form of affidavits should
12 be treated with caution. In assessing such affidavits the Court
13 must take into account a number of factors. These would
14 include whether they were made by State officials or by private
15 persons not interested in the outcome of the proceedings and
16 whether a particular affidavit attests to the existence of facts or
17 represents only an opinion as regards certain events. The
18 Court notes that in some cases evidence which is
19 contemporaneous with the period concerned may be of special
20 value. Affidavits sworn later by a State official for purposes of
21 litigation as to earlier facts will carry less weight than affidavits
22 sworn at the time when the relevant facts occurred. In other
23 circumstances, where there would have been no reason for
24 private persons to offer testimony earlier, affidavits prepared
25 even for the purposes of litigation will be scrutinized by the
26 Court both to see whether what has been testified to has been
27 influenced by those taking the deposition and for the utility of
28 what is said. Thus, the Court will not find it inappropriate as
29 such to receive affidavits produced for the purpose of a
30 litigation if they attest to personal knowledge of facts by a
31 particular individual. The Court will also take into account a
32 witness’s capacity to attest to certain facts, for example, a
33 statement of a competent government official with regard to
34 boundary lines may have greater weight than sworn
35 statements of a private person.”³¹

36
37 Having examined the fishermen’s affidavits produced in that case, attesting to their
38 view of where the maritime boundary lay, the ICJ rejected the affidavits’ evidentiary
39 value³².

40
41 I would like to stress the first few words of the ICJ in that passage that “witness
42 statements produced in the form of affidavits should be treated with caution”³³. In
43 particular, Mr President, the Tribunal should be cautious in giving weight to *pro forma*

362-367, 402-403; A. Riddell, B. Plant, *Evidence before the International Court of Justice*, British
Institute of International and Comparative Law, London, 2009, pp. 279-283.

³⁰ R. Wolfrum, *International Courts and Tribunals, Evidence*, para. 5, in: R. Wolfrum (ed.), *Max Planck
Encyclopedia of Public International Law* (online edition).

³¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea
(Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 659, at pp. 731-732, para. 244.

³² *Ibid.*, p. 65, para. 245.

³³ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea
(Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 659, at pp. 731-732, para. 244.

1 affidavits containing testimony with virtually identical language, produced wholesale
2 and not in the language of the individual providing the information³⁴.

3
4 Moreover, when determining the value of admissible affidavits, the Tribunal should
5 take into account their credibility and the interests of those providing the information
6 concerned³⁵.

7
8 To recap, among the relevant questions to ask when assessing the affidavits are the
9 following: Are they in identical language and form? Do they go to the existence of
10 facts as opposed to personal opinion? What are the interests of those who made the
11 affidavits? Are they contemporaneous accounts? And, lastly, were the statements
12 “influenced by those taking the deposition”?

13
14 I now turn to the four sets of materials that Bangladesh has presented as
15 subsequent practice supposedly confirming the status of the 1974 minutes as a
16 binding international agreement: first, the affidavits of fishermen and naval officers;
17 second, the Bangladeshi naval logs; third, the coastguard logs; and fourth, the *Note*
18 *Verbale*.

19
20 I shall begin by addressing the affidavits of Bangladeshi fishermen and naval
21 officers, found respectively in Annex R16 and Annex R17 to Bangladesh’s Reply. An
22 examination of the affidavits submitted by Bangladesh raises several questions as to
23 their relevance and genuineness, and accordingly the weight that the Tribunal should
24 give to the affidavits, if any.

25
26 Mr President, it will be seen that the affidavits presented by Bangladesh in the
27 present case are remarkably similar to those produced by Honduras in the
28 *Nicaragua v. Honduras* case. It is our submission that the ICJ’s approach to
29 Honduras’s affidavits in that case is equally applicable to those of Bangladesh before
30 this Tribunal.

31
32 The eight affidavits of the fishermen are all eerily similar in language, form and
33 substance.³⁶ You will recall that Professor Boyle claimed last Friday that these
34 affidavits attest to the knowledge of Bangladeshi fishermen concerning the alleged
35 “boundary” in the territorial sea. Let us examine these affidavits closely³⁷.

36 Mr President, Members of the Tribunal, by way of example, I refer you to tab 2.2
37 which places side by side two of the affidavits found in Annex R16 to Bangladesh’s
38 Reply. The affidavits can also be seen on the screens in front of you. On the left, you
39 will find affidavit R16-2 and on the right affidavit R16-3. These two affidavits illustrate
40 the striking similarities to which we draw your attention. First, just from looking at the
41 affidavits one cannot help but notice the similarity in their content. As you can see,
42 they are very difficult to tell apart from one another.

³⁴ D.V Sandifer, *Evidence before International Tribunals*, rev. ed., University Press of Virginia, Charlottesville, 1975, pp. 262 and 266-267, referring to statements of the commissioner on the Turkish Indemnity to be paid under the American-Turkish Agreement of 25 October, 1934; see also C.F. Amerasinghe, *Evidence in International Litigation*, Nijhoff, Leiden, 2005, p. 200, on affidavits which were not “individual and spontaneous”.

³⁵ *Ibid.*

³⁶ BR, Vol. III, Annex R16, Affidavits 1 to 8.

³⁷ ITLOS/PV11/3(E), p. 12, lines 13-14 (Boyle).

1
2 Let us look closer at some of the statements contained in these two affidavits. In
3 particular, I will go through point 7. I will begin with point 7a of both affidavits, now on
4 your screens. These two fishermen, as the other six fishermen, were supposedly
5 sworn to “have always been aware of the location of the maritime boundary”
6 between St Martin’s Island and Myanmar. This quote appears in both affidavits, and
7 in virtually identical language in all other affidavits.

8
9 Moving on to point 7b, the text magnified on the screen before you now can be found
10 in point 7b of both affidavits. The two fishermen were, again in very similar terms,
11 aware that this boundary runs “approximately halfway between the east coast of
12 St Martin’s Island and the mainland coast of Myanmar”.

13
14 In point 7c of both affidavits, now on your screens, the two fishermen were similarly
15 aware that further to the south the boundary continues “approximately halfway
16 between St Martin’s Island and Oyster Island”. You will have noticed the striking
17 similarity with which both fishermen describe this boundary; and these are just
18 examples of the virtual identical language in all the affidavits in Annexes R16 and
19 R17 to Bangladesh’s Reply.

20
21 Members of the Tribunal, you will have also noticed that the fishermen’s and the
22 naval officers’ affidavits appear to have been drawn up and signed in English, not
23 Bengali, the native language of those sworn in the affidavits. If the affidavits were in
24 fact taken in Bengali, Bangladesh has failed to submit to the Tribunal the original
25 affidavits. Absent the original affidavits, the affidavits produced in English are of even
26 lesser value.

27
28 I now turn to the issue of facts, as opposed to expressions of personal opinion. As in
29 *Nicaragua v. Honduras* before the ICJ, the fishermen’s affidavits cannot be viewed
30 as real evidence as to the existence of an agreement setting the boundary in the
31 territorial sea. Even if one were to assume that their contents are true, the affidavits
32 of the fishermen only attest to the fishermen’s subjective opinion on the existence of
33 a boundary, rather than a first-hand statement of a fact.

34
35 In *Nicaragua v. United States of America*, the ICJ addressed these kinds of
36 affidavits, and I quote from that judgment:

37
38 “The Court has not treated as evidence any part of the
39 testimony given which was not a statement of fact, but a mere
40 expression of opinion as to the probability or otherwise of the
41 existence of such facts, not directly known to the witness.
42 Testimony of this kind, which may be highly subjective, cannot
43 take the place of evidence... Nor is testimony of matters not
44 within the direct knowledge of the witness, but known to him
45 only from hearsay, of much weight”³⁸

46
47 Myanmar fully subscribes to this approach, Mr President. None of the affidavits
48 presented by Bangladesh claims that the fishermen ever saw the actual text of the

³⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 42, para. 68.

1 1974 minutes. Rather, the fishermen claim that they are subjectively “aware of the
2 location of the maritime boundary between Bangladesh and Myanmar”³⁹. Yet the
3 only source of such information provided for in the fishermen’s affidavits is “the
4 Government officials and Bangladesh Naval Authorities”⁴⁰, unsurprisingly, as this is
5 the exact same source arguing that there is an agreement in force between the
6 Parties before the Tribunal. Faced with this issue, the ICJ in *Nicaragua v. Honduras*
7 concluded that,

8
9 “Occasional references in the affidavits to the boundary
10 running along the 15th parallel is of the nature of a personal
11 opinion rather than the knowledge of a fact.”⁴¹

12
13 It follows that the existence of an alleged agreed boundary is not a matter “within the
14 direct knowledge” of the fishermen. On the contrary, it could only be information
15 known to the fishermen from hearsay, with the source of the alleged information
16 being Bangladeshi officials.

17
18 This brings me to the next factor mentioned in *Nicargua v. Honduras*, that of the
19 interests of those sworn in the affidavits, particularly the naval officers of
20 Bangladesh. The naval officers, officials of Bangladesh and organs of the state, have
21 a clear interest in supporting the position of Bangladesh on the location of the
22 maritime boundary. As the ICJ has noted on more than one occasion, a state official
23 “will probably tend to identify himself with the interests of his country”⁴². This being
24 the case, the affidavits in Annex R17 (those of the naval officers) are of little value to
25 these proceedings⁴³.

26
27 I also note the fact that all of the affidavits were produced specifically for the current
28 case, and more particularly for the Reply, not even for the Memorial. All of the
29 affidavits, without exception, in Annexes R16 and R17 were taken in February of this
30 year. None are contemporaneous accounts of the alleged practice in the area of
31 St Martin’s Island.

32
33 Finally, as the language of these affidavits is strikingly similar, almost word for word,
34 the Tribunal should view them for what they are, that is statements “influenced by
35 those taking the deposition”, to adopt the language of the ICJ in *Nicaragua v.*
36 *Honduras*. As such, in our submission, they are of no probative value whatsoever.

37
38 In short, the affidavits produced by Bangladesh in Annexes R16 and R17 are of no
39 evidentiary value.

40
41 Mr President, Members of the Tribunal, I now turn to the Bangladeshi naval patrol
42 logs, produced by Bangladesh at Annex R18 of its Reply. We fail to understand how

³⁹ BR, Vol. III, Annex R16-3, at point 7.a, and similarly in point 7.a of all of the affidavits therein

⁴⁰ *Ibid.*, Annex R16-3, point 7.h.

⁴¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*
(*Nicaragua v. Honduras*), *Judgment*, I.C.J. Reports 2007, p. 659, at p. 732, para. 245.

⁴² See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v.*
Uganda), *Judgment*, I.C.J. Reports 2005, p. 168, at p. 203, para. 63; *Military and Paramilitary*
Activities in and against Nicaragua (Nicaragua v. United States of America), *Merits, Judgment*, I.C.J.
Reports 1986, p. 14, at pp. 42-43, paras. 69-70.

⁴³ *Ibid.*

1 these contribute in any way to Bangladesh's position. The incidents supposedly
2 recorded therein do not and cannot demonstrate acceptance on the part of Myanmar
3 to the existence of an agreement on the delimitation of the territorial sea.
4

5 If anything, they are merely a reiteration of Bangladesh's position stated before the
6 Tribunal and nothing more. Even assuming the content of the naval patrols is true, it
7 is unfortunate that Bangladesh has not cared to share its position on what it persists
8 in referring to as the "1974 agreement" with the Myanmar authorities but rather opted
9 to keep its position known only to its own naval officers.
10

11 In any case, Myanmar is at a loss as to how the information contained in the naval
12 logs supports Bangladesh's claim. Mr President, Members of the Tribunal, these
13 incidents have not been reproduced on a map by Bangladesh. Their location and
14 relevance is hard to discern. In an attempt to make sense of the content of these
15 logs, Myanmar has worked out that, with the exception of two incidents, all of these
16 naval incidents took place in the vicinity of St Martin's Island, in an area that the
17 current delimitation lines put forward by both countries allocate to Bangladesh.
18 Hence, these incidents do not give support to Bangladesh's position over that of
19 Myanmar's on the delimitation of the territorial sea.
20

21 Finally, Mr President, regarding the naval logs, I wish to point out that Bangladesh's
22 so-called "practice" regarding the 1974 minutes is a mirror image of the lack of
23 corresponding practice of Myanmar and its fishermen. In fact, this same information
24 could be used to demonstrate, with equal clarity, that Myanmar's fishermen,
25 intercepted on Bangladesh's side of the supposed line, were unaware of the
26 existence of an agreed boundary. The "practice" allegedly recorded in the naval logs
27 tends to undermine Bangladesh's own position that both sides respected the 1974
28 minutes and treated them as an agreement binding on the Parties.
29

30 Mr President, Members of the Tribunal, I now turn to the third element of so-called
31 evidence. This is the coastguard logs of Bangladesh found in Annex R15 of the
32 Reply. These are equally, if not more, unhelpful to Bangladesh.
33

34 The Bangladeshi Teknaf police station arrest records contain 34 incidents that do not
35 prove any of Bangladesh's assertions on subsequent practice. If anything, they
36 demonstrate that no such practice existed. The vast majority of the incidents in the
37 logs are completely irrelevant. They have no connection with the dispute between
38 the Parties. I will explain this by referring, again by way of example, to the first page
39 of Annex R15 in Bangladesh's Reply, found in tab 2.3 of the Judges' folders.
40

41 Going through the incidents contained in Annex R15, some are listed as taking place
42 in the Naaf River. For example, case 10/81, at the top of the page in tab 2.3, places
43 the fishing boat at the "Naaf River Basin". At the bottom of the same page, case
44 06/196 places two fishing boats encountered at the "Naaf River Basin" as well. This
45 location is irrelevant to this dispute.
46

47 Other incidents are reported as taking place in areas completely unrelated to the
48 dispute as well. Looking still at the page you have before you at tab 2.3, in between
49 the two cases that took place in the Naaf River, case 15/92 locates an "illegal fishing
50 trawler" on the "north side of St Martin's Island" – *north side* - an area not in dispute

1 between the Parties. This incident, as others recorded in the Bangladesh coastguard
2 log, are entirely unconnected to the present proceedings.

3
4 Moreover, several items listed in the log presented in Annex R15 are poorly located
5 and impossible to pinpoint. Case 10/123, for example, recalls an incident that
6 occurred off St Martin's Island "near about 16 miles east", most likely placing this
7 incident somewhere on land. For a more detailed analysis of the irrelevance of the
8 content of this log I refer to Myanmar's Rejoinder, paragraphs 2.63 and 2.64.

9
10 To summarize on this point, most of the incidents recorded in the Bangladesh
11 coastguard logs are entirely irrelevant to demonstrating any practice of respecting
12 the line described in the 1974 minutes. Hence, both the coastguard logs and the
13 naval logs fail to establish the existence of any agreement or practice, and are totally
14 irrelevant to the current dispute.

15
16 Finally, Mr President, I turn to the *Note Verbale* of 16 January 2008⁴⁴, to which
17 Bangladesh attaches such importance. In fact this was the only element of practice
18 to which Bangladesh devoted any time during its oral presentation⁴⁵ on Friday. For
19 that reason, it seems appropriate to look closer at the *Note Verbale* and appreciate it
20 for its true value. According to Bangladesh, and I quote, "[i]n that note, which stated
21 the position that Myanmar and Bangladesh had not yet formally delimited a maritime
22 boundary, Myanmar nevertheless reiterated the consistent position it had taken for
23 the prior 14 years: namely that St Martin's was entitled to a 12 M territorial sea"⁴⁶.

24
25 As the Tribunal will see, Bangladesh ignores the actual terms of the *Note Verbale*.
26 Mr President, Members of the Tribunal, you will find a copy of Myanmar's *Note* at
27 tab 2.4 in your folders, and now also on the screen before you. The relevant passage
28 reads:

29
30 "The Ministry wishes to stress that although Myanmar and
31 Bangladesh have yet to delimit a maritime boundary, as States
32 Parties to the UNCLOS 1982 Myanmar and Bangladesh are
33 both entitled to a 12 miles territorial sea in principle. It is in this
34 neighbourly spirit that the Myanmar side has requested the
35 kind cooperation of the Bangladesh side since the
36 streamer/receiver of the said survey vessel is expected to
37 enter the 12-mile territorial sea which Bangladesh's St Martin's
38 Island enjoys in principle in accordance with UNCLOS,
39 1982"⁴⁷.

40
41 On this note Myanmar was careful precisely not to say that St Martin's Island was in
42 fact entitled to a full 12-M territorial sea. It twice included the words "in principle", and
43 referred to the relevant body of law that both Parties agree governs the matter,
44 article 15 with its equidistance/special circumstances rule. It emphasized that the
45 request for cooperation was made in a "neighbourly spirit" and not because of any
46 legal obligation. It was explicitly a request for cooperation, not for consent as might

⁴⁴ BR, Vol. III, Annex R1.

⁴⁵ ITLOS/PV11/3(E), p. 12, lines 19-27 (Boyle).

⁴⁶ BR, para. 2.94 (emphasis added).

⁴⁷ BR, Vol. III, Annex R1 (emphasis added).

1 have been required under the 1982 Convention for such activity within the territorial
2 sea.

3
4 Not only does the *Note Verbale* refer to entitlement in principle rather than
5 entitlement in practice, but, very significantly, it refrains from relying upon the agreed
6 boundary. If such a boundary based on the 1974 minutes had existed, in practice if
7 not formally, why not refer to that agreement and the boundary established thereby,
8 rather than to a principle found in an international treaty? The reliance on article 15
9 of UNCLOS rather than on a maritime agreement supposedly in existence between
10 the Parties – as Bangladesh would have it – speaks for itself: Myanmar had never
11 viewed the 1974 minutes as carrying any legal significance.

12
13 Mr President, Members of the Tribunal, It is true that the *Note Verbale* mentions the
14 1974 minutes in its penultimate paragraph, now enlarged on the screen in front of
15 you. Yet the *Note Verbale* refers to the 1974 minutes as containing a “conditional
16 line” which was “conditionally agreed”.⁴⁸ Furthermore, the context in which the 1974
17 minutes were referred to is of the essence. It is only after the reliance placed on
18 article 15 that the *Note Verbale* refers to the 1974 minutes in this paragraph. In this
19 paragraph, after a short explanation of the content of the minutes, the drafter
20 concludes at the end of the paragraph, and I quote, that “the current survey area lies
21 well within Myanmar’s waters”⁴⁹. And so it happens that Myanmar sent this *Note*
22 *Verbale* informing Bangladesh of the survey, despite the fact that the drafter of the
23 *Note Verbale* understood the area in question to be on Myanmar’s side of the line
24 described in the conditional understanding which is the 1974 minutes. Contrary to
25 Bangladesh’s assertion, the *Note Verbale* is entirely consistent with Myanmar’s
26 position in the present case, and it is entirely consistent with Myanmar’s concern to
27 avoid difficulties and to proceed in a cooperative and good neighbourly spirit
28 pending – *pending* - the establishment of a boundary.

29
30 Mr President, Members of the Tribunal, I have explained why Bangladesh’s assertion
31 that there is subsequent practice to support the binding force of the 1974 minutes is
32 without merit. The evidence put forward by Bangladesh is of no irrelevance both in
33 form and content, and at times even counterproductive to Bangladesh’s case. The
34 same goes for all of Bangladesh’s assertions regarding the 1974 minutes, as
35 Sir Michael explained yesterday and today. Neither the form nor the content of the
36 minutes support Bangladesh’s thesis that the 1974 minutes established a maritime
37 boundary between the Parties. These, along with the context in which the minutes
38 were signed, make clear that the line described therein was subject to certain
39 conditions, in particular the guarantee of free and unimpeded passage and on
40 reaching agreement in the form of a treaty, on the whole of the delimitation line.

41
42 Mr President, Members of the Tribunal, this concludes my presentation. I thank you
43 very much for your attention. May I request that you now call on Mr Coalter Lathrop.

44
45 **THE PRESIDENT:** Thank you. I now give the floor to Mr Coalter Lathrop.

46

⁴⁸ BR, Annex R1.

⁴⁹ *Ibid.*

1 **MR LATHROP:** Mr President, distinguished Members of the Tribunal, it is a
2 pleasure to appear before you for the first time today, and an honour to do so on
3 behalf of Myanmar.

4
5 Mr President, I will not be able to complete my presentation before the break. With
6 your permission I would propose to speak until approximately 4:30, and resume
7 again after the break.

8
9 Mr President, as Myanmar has demonstrated throughout the written and oral
10 pleadings, there is no agreed boundary separating the territorial sea of Myanmar
11 from that of Bangladesh. Nothing that Bangladesh presented in the first round of
12 these hearings changes this fact, and in the absence of any such agreement, it falls
13 to this Tribunal to delimit the boundary separating the maritime zones of the Parties,
14 including their territorial seas.

15
16 My task today is to present Myanmar's position on the proper delimitation of the
17 maritime zones lying within 12 M of the coasts. It should be noted at the outset that,
18 in this area the delimitation between the Parties is primarily a delimitation of their
19 territorial seas, but there is also a part of the delimitation that will divide the territorial
20 sea of Bangladesh from the exclusive economic zone and continental shelf of
21 Myanmar. During this presentation I will focus on the territorial sea delimitation. My
22 colleagues and I will present the delimitation beyond 12 M in subsequent
23 presentations.

24
25 I will begin my presentation by blowing away some of the smoke left over from
26 Bangladesh's territorial sea presentation. Once we can all see clearly again, I will
27 follow with a brief review of the law applicable to territorial sea delimitations.
28 Because delimitation is a function of coastal geography, I will then review the
29 geography in this part of the delimitation area before describing the Parties'
30 proposed delimitation lines. That description of the lines will reveal that there is only
31 one material disagreement - whether St Martin's Island constitutes a special
32 circumstance in this delimitation within the meaning of article 15 of the Law of the
33 Sea Convention. As I will demonstrate, St Martin's Island is indeed a special
34 circumstance. Accordingly, I will conclude my presentation by describing how its
35 presence should be treated in this delimitation.

36
37 Allow me first to touch on several preliminary matters, beginning with the concept of
38 mainland-to-mainland delimitation. Bangladesh's team repeatedly attacked the
39 notion of a mainland-to-mainland delimitation during its first round of pleadings,
40 calling it "curious"⁵⁰, "the fruit of fertile and creative legal imaginations"⁵¹, and "a
41 wholly novel creature of international law"⁵². Mr Reichler even declared: "This is a
42 new concept, as far as we can tell, developed by Myanmar for the purposes of this
43 case."⁵³ But, as I will demonstrate, the mainland-to-mainland equidistant line has a
44 respectable pedigree. Neither the phrase nor the concept is original to Myanmar or
45 to this litigation. Perhaps counsel for Bangladesh has been watching too much Star

⁵⁰ ITLOS/PV11/3 (E), p. 14, line 34–35 (Sands).

⁵¹ ITLOS/PV11/2 (E), p. 16, line 43 (Reichler).

⁵² ITLOS/PV11/3 (E), p. 14, line 8–9 (Sands).

⁵³ ITLOS/PV11/2 (E), p. 16, line 39–40 (Reichler).

1 Trek or reading too much Sherlock Holmes - who, I might add, was not an authority
2 on maritime boundary delimitation.

3
4 By contrast, the late Sir Derek Bowett was, and the phrase, “mainland-to-mainland
5 equidistant line” was both known to him and used by him. In Volume I of *International*
6 *Maritime Boundaries*, Sir Derek used the phrase to describe several negotiated
7 boundaries. In one instance, Sir Derek wrote: “The island of Halul was ignored . . . in
8 constructing the mainland-to-mainland equidistant line”⁵⁴. In another: “Various small
9 islands were ignored in drawing a mainland-to-mainland equidistant line.”⁵⁵ In yet a
10 third: “Several islands . . . were ignored and a mainland-to-mainland equidistant
11 boundary adopted.”⁵⁶ Apart from Sir Derek, at least seven other authors have used
12 this phrase since 1985.⁵⁷

13
14 Just as the phrase, “mainland-to-mainland” is not a “novel creature”, neither is the
15 concept. State practice is full of examples, and so too are the cases. In the
16 *Anglo-French Continental Shelf* case, the Court of Arbitration considered the position
17 of the Channel Islands relative to “a median line drawn between the two
18 mainlands”⁵⁸, ultimately adopting the mainland-to-mainland line and fully enclaving
19 those islands. The tribunal in *Eritrea/Yemen* held that the boundary, after diverting to
20 accommodate the territorial seas of several small islands, should subsequently
21 “rejoin the mainland coast median line” and “[t]hence . . . resume[] as a median line
22 controlled by the two mainland coasts”⁵⁹. Most recently, in the *Black Sea* case, a
23 similar mainland-to-mainland line was proposed by Romania,⁶⁰ and ultimately
24 adopted by the Court.⁶¹ It was described as a “provisional equidistance line . . .
25 drawn between the relevant mainland coasts of the Parties”⁶².

⁵⁴ Derek Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations*, in J.I. Charney & L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. 1, p. 131 (2005), at p. 136.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Coalter G. Lathrop, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, in *American Journal of International Law*, Vol. 102, p. 113 (2008), at p. 119; J.I. Charney & L.M. Alexander (eds.), *Australia-New Zealand Boundary Report*, in *International Maritime Boundaries*, Vol. 5, p. 3759 (2005), at p. 3763; Steven Wei Su, *The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan*, in *Chinese Journal of International Law*, Vol. 3, p. 385 (2004), at p. 412; Zou Keyuan, *Maritime Boundary Delimitation in the Gulf of Tonkin*, in *Ocean Development & International Law*, Vol. 30, p. 235 (1999), at p. 246; Hiran Wasantha Jayewardene, *The Regime of Islands in International Law* (1990), at p. 429; L.A. Willis, *From Precedent to Precedent: The Triumph of Pragmatism in International Maritime Boundaries*, *Canadian Yearbook of International Law*, Vol. 24 p. 3 (1986), at p. 28; Jan Schneider, *The Gulf of Maine Case: The Nature of an Equitable Result*, 79 *American Journal of International Law* p. 539 (1985), at p. 557, fn. 79.

⁵⁸ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, R.I.A.A., Vol. 18 (hereinafter “*Anglo-French Continental Shelf*”), p. 88, para. 183.

⁵⁹ *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, R.I.A.A., Vol. 22 (hereinafter “*Eritrea/Yemen*”), p. 371–372, para. 163.

⁶⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009 (hereinafter “*Black Sea*”), p. 55, para.182.

⁶¹ *Ibid.*, para. 187.

⁶² *Ibid.*, para. 182.

1 Finally, in *Nicaragua/Honduras*, because it was, to quote the Court, “impossible for
2 the Court to identify base points and construct a provisional equidistance line . . .
3 delimiting maritime areas off the Parties’ mainland coasts”⁶³ the Court turned to a
4 different delimitation methodology and bisected “the angle created by lines
5 representing the relevant mainland coasts”⁶⁴. Unlike equidistance, which may take
6 account of insular features, the angle bisector method is inherently a mainland-to-
7 mainland delimitation method. For this reason alone, the mainland-to-mainland
8 delimitation concept should be familiar to Bangladesh - the Party that purportedly
9 advocates for an angle bisector delimitation.

10
11 Moving on from mainland-to-mainland delimitation, let me turn to a second
12 preliminary matter—May Yu (or Oyster) Island. To be very clear, May Yu Island does
13 not factor into the delimitation of the territorial sea, because the 12-M territorial sea
14 of May Yu does not overlap any possible territorial sea entitlement of Bangladesh.⁶⁵
15 Why then does Mr Sands even mention May Yu in a speech on the delimitation of
16 the territorial sea? He does so to confound three separate issues: first, the effect of
17 May Yu Island on the delimitation within 12 M – none; second, the effect of May Yu
18 Island on the delimitation beyond 12 M, and third, the status of May Yu Island under
19 article 121, a non-delimitation provision of the Law of the Sea Convention. The first
20 of these issues I have just addressed, but to be very clear on the second issue,
21 May Yu Island would be given full effect in any *island-to-island* delimitation beyond
22 12 M.

23
24 As for the third issue, May Yu Island is an island not only in name but also in law,
25 with entitlements to an exclusive economic zone and continental shelf pursuant to
26 article 121(2). This distinction between the use of a maritime feature in the
27 delimitation of overlapping maritime areas and the potential entitlement of that
28 feature to certain maritime zones in the absence of competing claims is one that
29 Bangladesh muddles throughout its written and oral pleadings, not only with respect
30 to May Yu Island but also with respect to St Martin’s Island.⁶⁶

31
32 The third preliminary matter is the notion that coastal oppositeness may transition
33 into coastal adjacency. Mr Sands had some difficulty with this concept last week,
34 accusing Myanmar of “rather bizarre reasoning”⁶⁷. Because this is a fundamental
35 concept of maritime boundary delimitation and because I refer to it throughout my
36 presentation, it may be worth taking a few moments to focus on it. Addressing this
37 issue, the Court of Arbitration in the *Anglo-French Continental Shelf* case wrote

38
39 “The appreciation of the effect of individual geographical
40 features on the course of an equidistance line has necessarily

⁶³ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*), *Judgment*, I.C.J. Reports 2007 (hereinafter “*Nicaragua/Honduras*”), p. 76, para. 280.

⁶⁴ *Ibid.*, para. 287.

⁶⁵ Rejoinder of Myanmar (hereinafter “MR”), para. 3.3, n. 154; ITLOS/PV11/3 (E), p. 15, line 18 (Sands).

⁶⁶ See Reply of Bangladesh (hereinafter “BR”), paras. 2.75–2.76; ITLOS/PV11/3 (E), p. 14, lines 47–48, and p. 15, lines 1–3 (Sands); ITLOS/PV11/2 (E), p. 35, line 18 (Crawford).

⁶⁷ ITLOS/PV11/3 (E), p. 28, lines 41–45 (Sands).

1 to be made by reference . . . to the actual relation of the two
2 coasts to th[e] particular area [to be delimited].”⁶⁸

3
4 A Chamber of the International Court later wrote in the *Gulf of Maine* case,

5
6 “It is also obvious . . . that . . . the coasts of two States may be
7 adjacent at certain places and opposite at others.”⁶⁹

8
9 What these statements mean is that the same features can have both opposite
10 coasts and adjacent coasts simultaneously. These characterizations are dependent
11 on the relationship of the coasts not only to each other but also to the area to be
12 delimited. If Mr Sands is still confused by this in the second round, I will be happy to
13 come back to it then.

14
15 The final preliminary matter is the question of cartographic manipulation. Last week,
16 even as he moved St Martin’s Island 11 M across the screen, Mr Sands accused
17 Myanmar of “refashioning geography”⁷⁰. Mr Reichler drew the newfound Bangladesh
18 coastal façade: he added 23,000 square kilometres of non-existent Bangladeshi
19 territory, and he proceeded to draw an equidistance line between this recently
20 discovered “coast” and Myanmar’s actual mainland coast.⁷¹ In fact, he did this twice
21 in a single speech⁷². Finally, Professor Crawford created “Eastern Bioko”, brought it
22 to the Bay of Bengal, and invited the people of Equatorial Guinea to visit on a
23 holiday.⁷³

24
25 Mr President, Members of the Tribunal, I simply wish to observe that these are
26 cartographic manipulations. I urge you to remain vigilant, to be aware of them, and to
27 reject these attempts by Bangladesh to confuse the geographic facts in this case.

28
29 Mr President, I will now turn to issues that are more directly related to the topic at
30 hand: the delimitation of the territorial sea.

31
32 The applicable law for this part of the delimitation is found in article 15 of the 1982
33 Law of the Sea Convention. There is no dispute between the Parties on this point⁷⁴.
34 Instead, the dispute arises from the application of this provision to the geographic
35 facts and other circumstances in this case.

36
37 Although the Members of the Tribunal are, of course, familiar with article 15, I would
38 like to take a moment to review the text of this two-part provision, which was taken
39 nearly verbatim from article 12 of the 1958 Convention on the Territorial Sea and
40 Contiguous Zone.⁷⁵

68 *Anglo-French Continental Shelf, R.I.A.A.*, Vol. 18, p. 112, para. 240.

69 See *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984* (hereinafter “*Gulf of Maine*”), p. 324, para 187.

70 ITLOS/PV11/3 (E), p. 17, lines 11–18 (Sands).

71 ITLOS/PV11/2 (E), p. 16, lines 9–14 (Reichler) (describing Exhibit 1.13 in the Judges’ folders).

72 *Ibid.*, p. 17, lines 46–48 (describing Exhibit 1.15 in the Judges’ folders).

73 ITLOS/PV11/2 (E), p. 26, line 29–30 (Crawford).

74 See Memorial of Bangladesh (hereinafter “BM”), para. 5.6; Counter-Memorial of Myanmar (hereinafter “MCM”), para. 4.5; ITLOS/PV11/3 (E), p. 14, line 39–40 (Sands).

75 Convention on the Territorial Sea and Contiguous Zone, 1958, art. 12, U.N.T.S., Vol. 516, p. 205.

1 The first sentence of article 15 sets out the general rule that States are not entitled to
2 extend their territorial seas beyond the equidistance line. Bangladesh would,
3 apparently, like article 15 to end there but it does not. The general rule of
4 equidistance has two exceptions, which the second sentence of article 15 sets out:

5
6 “The above provision does not apply, however, where it is
7 necessary by reason of historic title or other special
8 circumstances to delimit the territorial seas of the two States in
9 a way which is at variance therewith.”⁷⁶

10
11 This is the equidistance/special circumstances rule of article 15. As a formal matter,
12 this rule arises from a different source than the equidistance/special circumstances
13 rule of article 6 of the 1958 Continental Shelf Convention and the
14 equidistance/relevant circumstances method as applied to the delimitation of
15 maritime zones beyond the territorial sea. Although the sources of these rules are
16 different, the approaches to delimitation of these different zones are, in practice,
17 nearly identical⁷⁷. As the Court of Arbitration noted in the *Anglo-French* case, they
18 “reflect differences of approach and terminology rather than of substance.”⁷⁸ The
19 primary concern of both approaches is coastal geography and, in particular, the
20 distorting effect of specific coastal features on the course of an equidistance line.
21 The treatment of small distorting features that have a disproportionate effect on the
22 boundary is, for all practical purposes, the same under both approaches.
23 Nonetheless, because these approaches pertain formally to the delimitation of
24 different maritime zones, they will be treated separately in these pleadings. I will
25 focus here on the equidistance/special circumstances rule as it should be applied to
26 the delimitation of the territorial seas. The delimitation beyond 12 M will be
27 addressed in subsequent presentations.

28
29 Mr President, before I turn to a presentation of the coastal geography, allow me to
30 summarize this part of the delimitation case as it stands today. First, there is no
31 delimitation agreement between the Parties. Second, neither Party claims, for the
32 purpose of delimitation, historic title to areas beyond the median line. Third, both
33 Parties agree that equidistance is the appropriate starting point for the delimitation of
34 zones within 12 M. Fourth, both parties start the equidistance line from their land
35 boundary terminus, agreed in 1966 and delimited with precise coordinates in 1980⁷⁹.
36 In the territorial sea, the only outstanding disagreement between Myanmar and
37 Bangladesh is whether there are any special circumstances that affect the territorial

⁷⁶ United Nations Convention on the Law of the Sea, 1982, art. 15, U.N.T.S., Vol. 1833, p. 397 (emphasis added).

⁷⁷ See BM, para. 6.18 (“[A]lthough the jurisprudence recognizes a nominal distinction between the approaches for delimiting the territorial sea, on the one hand, and the EEZ/continental shelf within 200 M, on the other, those approaches are, in fact, ‘closely interrelated’.”). See, e.g., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001* (hereinafter “*Qatar v. Bahrain*”), p. 111, para. 231; *Land and Maritime Boundary between Cameroon and Nigeria (Equatorial Guinea Intervening), Merits, Judgment, I.C.J. Reports 2002* (hereinafter “*Cameroon v. Nigeria*”), p. 441, para. 288.

⁷⁸ *Anglo-French Continental Shelf, R.I.A.A.*, Vol. 18, p. 75, para. 148.

⁷⁹ *Agreement between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River*, 1966, U.N.T.S., Vol. 1014, I-14848, p. 4 (BM, Annex 1); *Supplementary Protocol between Burma and Bangladesh to the Protocol between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River*, 1980 (BM, Annex 7).

1 sea delimitation within the meaning of article 15. In particular, the Parties dispute
2 whether the presence of Bangladesh's St Martin's Island immediately opposite and
3 in close proximity to Myanmar's mainland coast constitutes a special circumstance.
4 Ultimately, this is a question of coastal geography.

5
6 The map now on the screen and at tab 2.5 of your Judges' folders shows the
7 geography of the area of the delimitation within 12 M. It includes the configuration of
8 the charted low and high-water lines, the position of Bangladesh's St Martin's Island
9 and Myanmar's May Yu Island, and of low-tide elevations in the area. I should point
10 out that on our maps and the maps presented by Bangladesh, territory that is above
11 water at high tide is shown in yellow, while areas that dry at low tide, but that are
12 covered at high tide are shown in green. The low tide elevations in the area include
13 both Cypress Sands and Sitaparokia Patches. As noted, May Yu Island is located
14 more than 24 M from St Martin's Island and therefore can have no effect on the
15 territorial sea delimitation. In addition to these coastal features, the map shows the
16 location of the land boundary, the land boundary terminus, and the boundary river,
17 the Naaf River. It also shows the arcs forming the outer limits of the undisputed parts
18 of the Parties' territorial seas. The map on the screen shows only undisputed
19 geographic facts. The existence of and the absolute locations of the features shown
20 on this map are not in dispute. Nonetheless, there remains a question about the
21 position of St Martin's Island relative to the coasts of the Parties. Does it sit opposite
22 the coast of Bangladesh or the coast of Myanmar?

23
24 Bangladesh argued in the Reply that if St Martin's Island "can be characterized as 'in
25 front of' Myanmar's coast, it can equally be characterized as being in front of the
26 Bangladesh coast"⁸⁰. Mr Sands said again on Friday that, "St Martin's is as much 'in
27 front of' Bangladesh's coast . . . as it is 'in front of' Myanmar's coast"⁸¹ but the map
28 before you very clearly contradicts this characterization. For its entire length, St
29 Martin's Island lies just offshore and immediately opposite the mainland coast of
30 Myanmar. No sleight-of-hand mapping or "pseudo-geographic artifice"⁸² is required
31 to demonstrate this basic point. If one were to stand on the shore in any place along
32 Myanmar's coast from Cypress Point to the small headland near the town of
33 Kyaukpandu and look seaward – not up the coast or down the coast, but seaward –
34 one would be looking toward the east-facing coast of St Martin's Island. The same
35 cannot be said of the seaward view from Bangladesh's mainland coast.

36
37 Because of the spatial relationship among Bangladesh's mainland coast, Myanmar's
38 mainland coast and St Martin's Island, Bangladesh's island sits on Myanmar's side
39 of any delimitation line constructed between mainland coasts. In other words, St
40 Martin's Island is on the wrong side of the line. Bangladesh has repeatedly denied
41 this truth, while at the same time providing incontrovertible proof of it. Myanmar
42 showed in the Rejoinder that Bangladesh's own mainland equidistance line and
43 angle bisector run north of St Martin's Island.⁸³ However, Bangladesh is still in
44 denial⁸⁴, and Myanmar must again point out the error. On Friday, Mr Sands showed
45 us that St Martin's Island is within 12 M of Bangladesh's mainland. Of course, St

⁸⁰ See BR, para. 3.111.

⁸¹ ITLOS/PV11/3 (E), p. 16, lines 27–28 (Sands).

⁸² See BR, para. 2.64.

⁸³ See sketch-map No. R3.1.

⁸⁴ ITLOS/PV11/3 (E), p. 16, lines 27–28 (Sands).

1 Martin's Island is also within 12 M of Myanmar, as shown on the screen and at tab
2 2.7. The two States' territorial seas overlap, as shown here in the darkest blue.
3 When this area of overlap is divided from the land boundary terminus to the
4 intersection of the outer limits, St Martin's Island is once again on Myanmar's side of
5 the line. Once again, the actual geographic facts contradict Bangladesh's strained
6 characterizations.⁸⁵

7
8 Mr President, I would like to emphasize that the location of St Martin's Island on the
9 wrong side of the line does not mean that St Martin's Island lacks a territorial sea.
10 Quite the contrary; St Martin's Island is surrounded on all sides by Bangladesh's
11 territorial sea but, because the territorial sea around St Martin's is overlapped by the
12 territorial sea generated by Myanmar's dominant mainland coast, the maritime zone
13 around St Martin's Island will be semi-enclaved. In other words, it will in turn be
14 surrounded on three sides by the maritime zones generated by Myanmar's mainland
15 coast.

16
17 Mr President, we have revisited the location of St Martin's Island relative to the
18 Parties' coasts. I can turn to a description of the Parties' proposed delimitation lines,
19 beginning with Bangladesh's preferred line.

20
21 Bangladesh, acknowledging that the Tribunal may find that there is no territorial sea
22 agreement between the Parties, has developed an equidistance line for delimiting
23 the territorial sea⁸⁶. The Bangladesh line begins at the agreed land boundary
24 terminus at a point designated 1A. The first section of Bangladesh's line from 1A to
25 2A is an equidistance line drawn between the adjacent mainland coasts of Myanmar
26 and Bangladesh, specifically from single base points located on the headlands of the
27 Naaf River at Shahpuri Point and Cypress Point. At point 2A, base points on St
28 Martin's Island begin to affect the line. The adjacent coastal relationship switches
29 abruptly to an opposite coastal relationship between St Martin's Island and
30 Myanmar's mainland coast. This opposite relationship is maintained from point 2A
31 through several segments to point 6A. Point 6A is the last point on Bangladesh's line
32 formed by base points on purely opposite coasts, specifically a base point on
33 Myanmar's mainland near Kyaukpandu and a base point on the southern tip of St
34 Martin's Island. Beyond point 6A, the line is constructed from increasingly adjacent
35 coasts until it reaches Bangladesh's point 8A at the intersection of 12 M arcs drawn
36 from St Martin's Island and Myanmar's mainland.

37
38 It should be noted while this map is on the screen that Bangladesh's entire line
39 beyond point 6A is driven by two base points on the charted low water line south of
40 St Martin's Island within a few hundred metres of each other. In contrast, base points
41 along five or six kilometres of Myanmar's mainland coast push against the distorting
42 effect of this attenuated promontory. So, while the lengths of the coasts that
43 determine the course of the line between point 2A and point 6A are approximately
44 equivalent, the coasts that determine the course of Bangladesh's line between point
45 6A and point 8A stand in a highly disproportionate ratio of approximately 1:20. It
46 should be noted here that, in the *Jan Mayen* case, the International Court held a

⁸⁵ *Ibid.*

⁸⁶ See BR, para. 2.102.

1 smaller coastal disparity of 1:9 to be a special circumstance that called for an
2 adjustment of the equidistance line.⁸⁷

3
4 From a technical perspective, there is nothing objectionable about Bangladesh's
5 proposed territorial sea line. It is a straightforward exercise, once the relevant coastal
6 features have been determined, to calculate an equidistance line from the nearest
7 points on the baselines of the two States. Bangladesh has undertaken this exercise
8 to construct what it calls a "simplified strict equidistance line"⁸⁸. Myanmar
9 understands this phrase to mean that, as its first step, Bangladesh has constructed a
10 strict equidistance line by blindly using all possible base points irrespective of their
11 legal validity. Then, in a second step, Bangladesh has eliminated many of the
12 resulting turning points on the line in order to reduce the complexity of that strict
13 equidistance line. The result is that some 100 turning points, and their associated
14 base points, are reduced to Bangladesh's eight. This, we assume, is the meaning of
15 the phrase "simplified strict".

16
17 This method of simplification is, in principle, entirely acceptable and it accords with
18 the general practice and with Myanmar's approach. On the screen, we have now
19 added the construction lines generated by a strict equidistance calculation in this
20 area. As you can see, there are many. For obvious reasons, some simplification is
21 necessary and desirable. The problem with Bangladesh's proposed delimitation of
22 the territorial sea is not a technical one but a legal one. Bangladesh fails to take into
23 consideration the second half of the equidistance/special circumstances rule as it
24 applies to St Martin's Island.

25
26 Mr President, Bangladesh asks, "Why should St Martin's Island be treated as [a
27 special circumstance]?"⁸⁹ After all, according to Bangladesh, "[f]ishing is a
28 significant economic activity on the island," it is a tourist destination, and it "produces
29 enough food to meet a significant proportion of the needs of its residents"⁹⁰. We are
30 told St Martin's has a permanent population and is host to both economic and
31 military activities⁹¹. In sum, Bangladesh has forcefully argued that St Martin's Island
32 can sustain both human habitation and an economic life of its own.

33
34 However, this is a *non sequitur*. Indeed, Bangladesh completely confuses the
35 question of whether St Martin's Island is an article 15 special circumstance with the
36 question of whether it is an article 121 island⁹².

37
38 But the distinction between the effect of a maritime feature in a territorial sea
39 delimitation (which is an article 15 question) and the zones to which a maritime
40 feature might be entitled in the absence of competing claims (which is an article 121
41 question) is very important and should not be blurred. The status of St Martin's
42 Island under article 121 has no bearing whatsoever on whether St Martin's Island

⁸⁷ See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993 (hereinafter "*Jan Mayen*"), pp. 65 and 68, paras. 61 and 68.

⁸⁸ BR, para. 2.106.

⁸⁹ *Ibid.*, para. 2.76.

⁹⁰ *Ibid.*

⁹¹ ITLOS/PV11/3 (E), p. 18, lines 10–11 (Sands).

⁹² See BR, paras. 2.74–2.75; ITLOS/PV11/3 (E), p. 14, lines 47–48 (Sands); ITLOS/PV11/2 (E), p. 35, line 18 (Crawford).

1 constitutes a special circumstance for the purpose of delimiting the territorial sea. A
2 maritime feature can certainly be both an island and a special circumstance, and in
3 fact many of them are. Bangladesh simply ignores this truth when it draws its
4 territorial sea delimitation and gives full effect and more to St Martin's Island under
5 the guise of article 121.

6
7 In contrast, Myanmar carries the application of article 15 to its necessary conclusion.
8 Like Bangladesh's line, Myanmar's line starts at the land boundary terminus at a
9 point designated point A. Like Bangladesh's line, Myanmar's line extends seaward
10 from point A to point B as an equidistance line drawn between the adjacent mainland
11 coasts of Myanmar and Bangladesh. Like Bangladesh's line, Myanmar's line turns
12 abruptly at point B as the dominant coastal relationship is interrupted by St Martin's
13 Island. This point, point B, is where the second sentence of article 15 must first be
14 considered.

15
16 However, before I turn to the second sentence of article 15, and while this image is
17 on the screen, it may be useful to address a complaint raised by Bangladesh in the
18 Reply and again on Friday⁹³. The Tribunal will recall that Bangladesh took issue with
19 the location of Myanmar's point B and the direction of line segment A-B, arguing that
20 Myanmar chose "incorrect base points for the calculation of the inshore median
21 line"⁹⁴. Bangladesh continued, asserting that "Myanmar has ignored the nearest
22 points on the Bangladesh low water line, which are located on the final spit on the
23 northern shore of the Naaf River as charted on British Admiralty Chart 817"⁹⁵. Of
24 course, Bangladesh is aware from the simplification of its own strict equidistance line
25 that if Myanmar used every possible base point on the headlands of the Naaf River,
26 the resulting line would have tens if not hundreds of turning points. Here, Myanmar
27 engaged in the same simplification process with only slightly different results.

28
29 Yet Bangladesh turns an unimportant technicality into an accusation that Myanmar
30 deliberately chose an incorrect base point and drew segment A-B so that "its
31 extension seaward would pass north of St Martin's Island." Bangladesh
32 characterizes this as another attempt by Myanmar to "bolster" the claim that "the
33 island is located on the 'wrong side' of a mainland-to-mainland equidistance line"⁹⁶.
34 The technical variation in the Parties' results is minor and requires no additional
35 response, but the other part of this accusation – that Myanmar acted in bad faith to
36 deceive the Tribunal as to the location of St Martin's Island relative to the
37 equidistance line – merits further investigation. The hypothetical seaward extension
38 of segment A-B, to which Bangladesh referred, has been added to the map. It does
39 run north of St Martin's Island, but what will be clear to the Tribunal is that the
40 seaward extension of Bangladesh's *own* first segment – segment 1A-2A – *also*
41 passes north of St Martin's Island. One look at Bangladesh's own first segment
42 reveals its accusations to be as unfounded as they are nonsensical. Bangladesh's
43 own line provides yet more proof that St Martin's Island is indeed on Myanmar's side
44 of any delimitation line drawn between the mainland coasts of the Parties. Myanmar
45 did not rig the location of its base points in order to create this result, nor would that

⁹³ BR, para. 2.98; ITLOS/PV11/3 (E), p. 27, lines 28–36 (Sands).

⁹⁴ BR, para. 2.98.

⁹⁵ *Ibid.*, para. 2.100.

⁹⁶ *Ibid.*, para. 2.62.

1 have been necessary. Bangladesh's own "properly plotted modern equidistance
2 line"⁹⁷ is sufficient for the task.

3
4 Let me return to point B. Point B is where St Martin's Island first comes into play and
5 is therefore the point where the second sentence of article 15 enters this delimitation.
6 In the absence of St Martin's Island, the delimitation line would continue from point B
7 on a course to point E and beyond. From point B to point E and out to point F, the
8 line would be an equal distance from the nearest base points, β_1 and μ_1 on Shahpuri
9 Point and Cypress Point. In the absence of St Martin's Island, this would be the
10 boundary between the Parties. However, St Martin's Island *does* exist and must be
11 accommodated. Accordingly, Myanmar fully accepts that St Martin's Island must be
12 allowed to drive the delimitation for the short distance that it runs between the
13 opposite coasts of the parties. Subsequently, the delimitation should rejoin the
14 equidistance line where the coastal relationship returns to one of adjacency.

15
16 Like Bangladesh's line, Myanmar's line runs from point B to point B5 as an
17 equidistance line between the opposite coasts of Myanmar's mainland and
18 St Martin's Island. In this section, both Parties have applied the equidistance
19 method, but for very different reasons. Bangladesh uses this method in a blind
20 application of only half of the equidistance/special circumstances rule. Myanmar
21 applies the same method in this section because to do so allows the special
22 circumstance to be taken into account. These apparent similarities mask the major
23 difference in the legal justifications underlying the two lines. Beyond point B and in
24 particular at point C, the diverging lines express the Parties' different perspectives on
25 the role of St Martin's Island in this coastal geography. Bangladesh gives St Martin's
26 Island full effect throughout the territorial sea delimitation despite the significant
27 distortion that this relatively small feature creates as against the dominant Myanmar
28 mainland coast. Myanmar takes account of these factors as the coastal relationship
29 transitions from pure oppositeness to pure adjacency.

30
31 Mr President, if it is convenient for you, this would be a good time for me to stop and
32 I shall be happy to resume my presentation after the break.

33
34 **THE PRESIDENT:** I thank you. We will now withdraw for a break of 30 minutes. We
35 shall continue the hearing at 5 p.m.

36
37 (Short adjournment)

38
39 **THE PRESIDENT:** Mr Lathrop, you may now wish to conclude your statement.

40
41 **MR LATHROP:** Thank you, Mr President. Before the break I had finished discussing
42 the Parties' lines and I will now turn to St Martin's Island as a special circumstance.

43
44 Mr President, St Martin's Island is indeed the epitome of a special circumstance. As
45 Myanmar noted in the Rejoinder, there are three practical factors that together
46 determine whether an island creates such an exaggerated distortion in an
47 equidistance line that the island must be considered a special circumstance⁹⁸. The

⁹⁷ *Ibid.*, para. 2.100.

⁹⁸ See MR, paras. 3.15–3.17.

1 first factor is the predominant coastal relationship between the States, that is,
2 whether the States' coasts are opposite or adjacent.

3
4 As a general matter, islands create more exaggerated distortions when the dominant
5 coastal relationship is an adjacent relationship. In opposite coastal relationships, by
6 contrast, distortions are much less extreme. As the International Court noted in
7 *Libya/Malta*:

8
9 "In the ... situation [of adjacent coasts], any distorting effect of
10 a salient feature might well extend and increase through the
11 entire course of the boundary whilst in the ... situation [of
12 opposite coasts], the influence of one feature is normally
13 quickly succeeded and corrected by the influence of another,
14 as the course of the line proceeds between more or less
15 parallel coasts."⁹⁹

16
17 The reason for the difference is simple geometry. Where mainland coasts are
18 predominantly opposite one another, an island will create a transverse displacement.
19 Where mainland coasts are predominantly adjacent, an island will create an angular
20 displacement. Of the two, an angular displacement usually creates the more
21 exaggerated distortion. This difference between angular and transverse
22 displacements was identified by the Chamber in the *Gulf of Maine* case¹⁰⁰. In that
23 case, the Chamber wrote that the "practical impact" of a transverse displacement
24 was relatively "limited", as compared with that of an angular displacement.¹⁰¹ That
25 was the first factor.

26
27 This first factor is closely related to the second factor, which is the proximity of the
28 island to the land boundary terminus. In the case of opposite coastal configurations,
29 the relevant measurement is the distance between the island and its mainland coast:
30 the farther from the coast the larger the distortion. Proximity to the coast matters less
31 in adjacent configurations. As long as the island is not near the boundary, its
32 distance from the coast is not in issue. In the case of adjacent coastal configurations,
33 the primary concern is the proximity of the island to the boundary and in particular to
34 the land boundary terminus. Where mainland coasts are adjacent, the closer the
35 island is to the land boundary terminus, the greater the angular displacement will be
36 on the equidistance line. The distorting effect is strongest when an island is located
37 (as it is in this case) not just near but beyond the land boundary terminus hard
38 against the coast of another State. This is because the angular displacement of the
39 line starts at, or very near, the land boundary terminus and grows larger as the line
40 moves away from the coast.

41
42 Finally, the third practical factor is the presence or absence of balancing islands. In
43 Volume I of *International Maritime Boundaries*, Sir Derek Bowett describes a
44 principle that we have already discussed, our first practical factor: "that offshore
45 islands have a greater potential for distortion of any equidistant line in situations of

⁹⁹ *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, I.C.J. Reports 1985, p. 13 (hereinafter "*Libya/Malta*"), p. 51, para. 70.

¹⁰⁰ *Gulf of Maine*, I.C.J. Reports 1984, p. 337, para. 222.

¹⁰¹ *Ibid.*

1 adjacency than in situations of oppositeness”¹⁰². But then Sir Derek goes on to
2 identify an exceptional case – the 1980 Myanmar-Thailand agreement – where the
3 two adjacent States had offshore islands that offset each other and eliminated the
4 distortion that would otherwise have occurred.¹⁰³ As Sir Derek recognized, a
5 balancing island can neutralize the effect of an island that would otherwise have
6 constituted a special circumstance.

7
8 To summarize, the three practical factors that determine the level of geometric
9 distortion caused by an island are as follows: the predominant coastal relationship,
10 the relative location of the island, and the presence or absence of balancing
11 features. When a confluence of these factors produces a substantial distortion of the
12 equidistance line, the island creating the distortion constitutes a special circumstance
13 under article 15.

14
15 Let us now leave the abstract discussion of these three factors and turn to the case
16 before the Tribunal. Before directly applying our three-factor analysis to St Martin’s
17 Island, I want to speak a bit about its surroundings.

18
19 Myanmar and Bangladesh have a predominant coastal relationship of adjacency and
20 an agreed land boundary terminus in the mouth of the Naaf River. From the mouth of
21 the Naaf River, Myanmar’s coast stretches, generally, toward the southeast and
22 Bangladesh’s, generally, toward the northwest. To either side of the land boundary
23 terminus, both States’ mainland coasts are accompanied by several coastal islands.
24 For example, Myanmar’s Myingun Island and Bangladesh’s Sonadia Island would be
25 considered coastal islands as that term is used in the case law¹⁰⁴. These islands are
26 in line with the general direction of the coast, they form an integral part of the general
27 coastal configuration¹⁰⁵, they are not “scattered islands”¹⁰⁶, and most importantly,
28 they are under the same sovereignty as the proximate mainland territory¹⁰⁷. As such,
29 they can be considered to form integral parts of the predominant coastal geography
30 of these two coastal States.

31
32 Side by side, the relatively straight, slightly convex but largely unremarkable coasts
33 of the Parties face toward the southwest. As we have seen, any delimitation between
34 these coasts would run, as a general matter, in a south-westerly direction. In
35 particular, the properly constructed bisector, which is constructed on the basis of the
36 general direction of these coasts, runs in this direction. This line represents a
37 simplified lateral delimitation line between the adjacent mainland coasts of Myanmar
38 and Bangladesh.

39
40 Into this straightforward coastal relationship comes St Martin’s Island. St Martin’s
41 Island is, in this geography, the exception. St Martin’s Island is hardly a “major

¹⁰² Derek Bowett, *International Maritime Boundaries*, Vol. 1, at p. 135.

¹⁰³ *Ibid.*, p. 135, fn. 31.

¹⁰⁴ See, e.g., *Anglo-French Continental Shelf, R.I.A.A.*, Vol. 18, p. 79, para. 159; *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *R.I.A.A.*, Vol. 19 (hereinafter “*Guinea/Guinea-Bissau*”), pp. 183–185, paras. 95(a), 97; *Black Sea, I.C.J. Reports 2009*, p. 45, para. 149.

¹⁰⁵ *Eritrea/Yemen, R.I.A.A.*, Vol. 22, p. 367, para. 139.

¹⁰⁶ *Guinea/Guinea-Bissau, R.I.A.A.*, Vol. 19, p. 184–185, para. 97.

¹⁰⁷ *Anglo-French Continental Shelf, R.I.A.A.*, Vol. 18, p. 79, para. 159.

1 geographic feature” as Mr Reichler claims¹⁰⁸, but it certainly is an exceptional
2 geographic feature. This feature, St Martin’s Island, sits opposite the mainland
3 territory of a different sovereign, Myanmar, lying to the south of every version of a
4 lateral delimitation, even the most ill-conceived. In the context of this overall
5 configuration, it is an extraneous element. In a word, St Martin’s Island is “special”.

6
7 Moreover, because of the three practical factors described previously, St Martin’s
8 Island has a grossly distorting effect on the course of the delimitation. Because the
9 mainland coasts of the Parties are adjacent, St Martin’s Island creates an angular
10 displacement of the equidistance line. Because St Martin’s Island is on the wrong
11 side of the land boundary terminus, this angular displacement is quite considerable.
12 Finally, because of the distance of May Yu Island from St Martin’s Island, there are
13 no balancing islands to counteract this substantial angular distortion within the
14 territorial sea. In this context, St Martin’s Island is a very special circumstance.

15
16 Mr President, none of this analysis is revolutionary or innovative. Recent
17 commentary confirms its correctness, as do older authorities. Writing in *International*
18 *Maritime Boundaries*, Professors Victor Prescott and Gillian Triggs (not Sir Derek)
19 note that, “[a] *prima facie* circumstance leading to possible inequity in a delimitation
20 arises where an island off the coast of one State is subject to the sovereignty of
21 another”¹⁰⁹. They go on to list the ways in which distortions are caused by islands,
22 writing that a “distortion might be caused when the detached islands of one country
23 lie very close to the coast of an opposite or adjacent neighbor”.¹¹⁰ After a thorough
24 review of delimitation case law and state practice, Professors Prescott and Triggs
25 also identify the solution to this distortion. They say:

26
27 “[T]he most common method of making a distorted median line
28 more equitable involves discounting the effect of the island or
29 islands that cause the distortion.”¹¹¹

30
31 Moreover, in the 1953 session of the International Law Commission, the same
32 example was raised and the same solution was proposed. Even then, five years
33 before the conclusion of the 1958 Conventions, special circumstances where “a
34 small island opposite one State’s coast belonged to another” were recognized to
35 necessitate a departure from the “general rule” of equidistance.¹¹²

36
37 Bangladesh argues that the geography here is distinguishable from the geography in
38 the case law and examples of state practice. Indeed, there are very few situations in
39 the world that share this extreme confluence of distorting factors: coastal adjacency
40 with a small feature lying on the wrong side of the delimitation line without any
41 balancing feature. Sir Derek Bowett wrote:

108 ITLOS/PV11/2 (E), p. 13, line 5 (Reichler).

109 Victor Prescott and Gillian Triggs, *Island Rocks and their Role in Maritime Delimitation*, in J.I. Charney & L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. 5, p. 3245 (2005), at p. 3274.

110 *Ibid.*, p. 3275.

111 *Ibid.*

112 *I.L.C. Yearbook*, 1953, Vol. 1, 204th meeting, 29 June 1953, p. 128, para. 37.

1 “Occasionally an island will lie on or near a lateral boundary
2 between adjacent coasts. In either case the potential for
3 distortion is considerable.”¹¹³
4

5 I submit that the distortion is that much more “considerable” when the island lies
6 beyond the lateral boundary, as in the exceptional case of St Martin’s Island.
7 Like the state practice, the maritime delimitation case law contains few examples of
8 territorial sea delimitations that are directly on point. Of the delimitation cases
9 decided by international courts and tribunals the majority either contained no island
10 issues or did not concern a territorial sea delimitation. In other words, most of the
11 cases are distinguishable on the basis of coastal geography or jurisdictional scope.
12

13 Nonetheless, there are cases that are directly relevant to this delimitation. As
14 indicated by Bangladesh, *Nicaragua/Honduras* and the *Black Sea* cases are both
15 highly relevant¹¹⁴. Not only are they the two most recent international maritime
16 delimitation cases, they both delimit between adjacent States in the vicinity of islands
17 that are near or on the wrong side of the delimitation line. But, contrary to
18 Bangladesh’s assertion, neither of these cases “relate to the question of the weight
19 to be accorded islands in the territorial sea”¹¹⁵. Instead they both relate to the
20 question of the weight to be accorded islands *beyond* the territorial sea. The answer,
21 as we all know, is none; no weight. But the treatment of islands in delimitations
22 beyond the territorial sea is for my colleague Professor Forteau to address next
23 week.
24

25 In fact, the most directly relevant case when it comes to the treatment of islands in
26 the delimitation of the territorial sea is *Guinea/Guinea-Bissau*. Although the
27 expansive macro-geographic considerations underlying the delimitation in the
28 offshore area were bizarre and have never been followed, in the near-shore area this
29 case demonstrates that islands that distort the equidistance line should be treated as
30 special circumstances and given less than full effect in the delimitation. In
31 *Guinea/Guinea Bissau* the “scattered islands” - in the words of the tribunal¹¹⁶ -
32 located in front of the land boundary terminus were given no effect on the
33 delimitation of the territorial sea.¹¹⁷
34

35 Mr President, the location of St Martin’s Island requires a delimitation that accounts
36 for this special circumstance. Bangladesh ignores this and delimits on the basis of its
37 so-called “strict simplified” equidistance line out to point 8A. In contrast, Myanmar
38 acknowledges the legal requirements of article 15 and proposes a delimitation that
39 responds to the geographic facts of this case.
40

41 From point B5, the last point between the purely opposite coasts of the Parties, the
42 delimitation extends to point E, the first equidistance point on the boundary
43 separating the exclusive economic zones and continental shelves of the Parties.
44 Myanmar’s line from point B5 to point C continues to give effect to St Martin’s Island
45 to account for its presence in the delimitation area. Beginning at point C, a point 6 M

¹¹³ Derek Bowett, *International Maritime Boundaries*, Vol. 1, at p. 141.

¹¹⁴ BR, paras. 2.88–2.91; ITLOS/PV11/3 (E), p. 23, lines 1–3 (Sands).

¹¹⁵ BR, para. 2.88.

¹¹⁶ *Guinea/Guinea-Bissau*, R.I.A.A., Vol. 19, p. 184, paras. 95(c) and 97.

¹¹⁷ *Ibid.*, para. 111(a).

1 from both St Martin's Island and the Myanmar mainland coast, the effect of St
2 Martin's Island (now in an increasingly adjacent relationship with the dominant
3 Myanmar coast) is reduced incrementally while still allowing St Martin's Island to
4 enjoy a full territorial sea to the south-west. Between point C and point D the effect of
5 St Martin's Island is reduced from full effect to half effect. It should be noted that, in
6 contrast to the 12-M arcs drawn around Serpents' Island and the Honduran Cays
7 (which created boundaries between the territorial sea and exclusive economic zone),
8 segment C-D divides the territorial sea of St Martin's Island from the territorial sea of
9 Myanmar's mainland coast. Beyond point D, St Martin's influence on the direction of
10 the line is further reduced while at the same time giving the feature a full 12 M
11 territorial sea at point E.

12
13 This line reflects the law of maritime boundary delimitation as applied to the coastal
14 geography of this case. The use of straight lines to reattach to the mainland
15 equidistance line is not uncommon and has been used by a variety of international
16 courts and tribunals, including the International Court in *Cameroon v. Nigeria*, an
17 Annex VII tribunal in *Guyana/Suriname*, and an *ad hoc* tribunal in *Eritrea/Yemen*. In
18 *Cameroon v. Nigeria*, the Court drew a straight line to re-attach an agreed non-
19 equidistance line to the mainland equidistance line¹¹⁸. In *Guyana/Suriname*, the
20 tribunal drew a straight line to connect from the end of a non-equidistance, special
21 circumstance line to the first point on the mainland equidistance line between the
22 Parties¹¹⁹. In *Eritrea/Yemen*, the straight-line connectors between points 13, 14, and
23 15 of that delimitation cut across a Yemeni island's territorial sea in order to reattach
24 to the mainland equidistance line, thus giving that island less than 12 M as against
25 Eritrea's exclusive economic zone¹²⁰.

26
27 Although straight lines have been used on many occasions, arcs may also be
28 employed to achieve the same goals of mitigating the distorting effect of a special
29 circumstance while reconnecting to the equidistance line. For example, from point C,
30 the boundary could follow the 6 M arc drawn from base points on St Martin's Island
31 until it reconnected with the equidistance line.

32
33 It will be noted that segment D-E represents a boundary between the territorial sea
34 of St Martin's Island and Myanmar's exclusive economic zone. In a formal sense, the
35 applicable law in these circumstances is the law pertaining to the delimitation of
36 areas beyond 12 M, an issue that Professor Pellet will take up momentarily. As
37 mentioned earlier, the treatment of distorting features is the same under both rules
38 and so the distinction is, for all practical purposes, without difference. The more
39 important point is that point E - an equidistance point measured from the nearest
40 points on the mainland coasts of the Parties - is the appropriate starting point for the
41 delimitation of areas beyond 12 M.

42
43 Mr President, Members of the Tribunal, this concludes my presentation on the
44 delimitation of zones within 12 M. I will leave you at point E, the start of the exclusive
45 economic zone and continental shelf boundary. I thank you for your patience and
46 kind attention and ask you to please call on Professor Pellet.

¹¹⁸ *Cameroon v. Nigeria*, I.C.J. Reports 2002, p. 431, para. 268.

¹¹⁹ *Delimitation of Maritime Boundary between Guyana and Suriname*, Award, 139 I.L.R. 566, 17 September 2007, paras. 323, 325.

¹²⁰ *Eritrea/Yemen*, R.I.A.A., Vol. 22, p. 371, para. 160–162.

1
2 **THE PRESIDENT:** Thank you. I now call on Professor Pellet.

3
4 **MR PELLET: (*Interpretation from French*)** Mr President, Members of the Tribunal,
5 it may seem strange at this late stage in the case that it is necessary to return to the
6 question of applicable law. It is necessary, however, because whilst the Parties
7 seem to be more or less in agreement concerning the rules relative to delimitation of
8 the territorial sea, they have remained profoundly divided on the subject of the rules
9 that apply to the continental shelf and the EEZ.

10
11 Indeed, there are a certain number of points of agreement between them concerning
12 the principles to be applied; but this understanding dissipates as soon as you move
13 from the principles to implementation; so much so that, perhaps apart from the idea
14 that the Tribunal is called upon to plot a single delimitation line,¹²¹ I do not see really
15 what they actually do agree upon in terms of applicable law.

16
17 They are in profound disagreement on the very sources of these rules, which
18 Bangladesh would like to confine solely to certain provisions of the United Nations
19 Convention on the Law of the Sea and which it interprets mainly, if not exclusively, in
20 the flickering light of the judgment delivered by the ICJ in 1969 in the *North Sea*
21 *Continental Shelf* cases without attaching the least importance to details of custom
22 and case law that have been added subsequently.

23
24 They are also in fundamental disagreement on the respective roles that equidistance
25 and equity should play.

26
27 Mr President, Members of the Tribunal, there is no doubt that UNCLOS 1982, in
28 particular article 74 (for the EEZ) and article 83 (for the continental shelf) are
29 applicable to the delimitation upon which you have been asked to proceed. The
30 Parties agree on that.¹²² However, whilst Myanmar is inviting you to apply and
31 interpret the text of these articles in the light of the developments that have been
32 brought about by subsequent practice and jurisprudence, Bangladesh sticks to the
33 letter of certain provisions of the Convention, which it reads selectively and in a
34 retrograde manner, based almost exclusively on the judgment delivered by the ICJ
35 more than forty years ago in the *North Sea Continental Shelf* cases.

36
37 The entire argument of Bangladesh can be summarized in four words: “equitable
38 solution”; and “natural prolongation”.

39
40 I will turn to the first of these expressions on Monday, that is “equitable solution”. I
41 would now like to address the expression “natural prolongation of its land territory”
42 on which the Applicant focuses. This expression appears in article 76(1) of the
43 Convention, but our friends on the other side make little of the context of this
44 provision, which they interpret as if time had stood still in 1969 with this very
45 judgment.

46

¹²¹ See. MB, para. 6.17 and CMM, , para. 1.2, and paras. 5.1-5.2.

¹²² See in particular MB, paras. 6.4-6.6, and pp. 69-70 ; CMM, paras. 4.3-4.4 ; paras. 5.5-5.7, paras. 5.9-5.10, and para. 5.18.

1 Mr President, the entire argument put forward on Tuesday by Professor Boyle is
2 based on the idea, which is bold if not to say foolhardy, that the continental shelf of
3 one State is constituted and can only be constituted by its “natural geological
4 prolongation”¹²³: Natural, yes, but geological, no; in any case not necessarily so.

5
6 Article 76 of the Convention of 1982, which by no means concerns lateral
7 delimitation between States, most certainly does not require anything of the like.

8
9 Our opponents and learned friends care little about that. They produce a sort of
10 master trump or joker, always the same, out of their sleeves, like a talisman, a
11 panacea to overcome all the weaknesses of their arguments and saying in chorus:
12 “There is the judgment of 1969!”¹²⁴ It is true that the ICJ mentioned in this decision,
13 wisely of course, that geology was one of the aspects that “appear to have to be
14 taken into account”.¹²⁵

15
16 Mr President, this is the only source that gives a semblance of plausibility to the
17 geological concept of the continental shelf, which is defended tooth and nail by
18 Bangladesh.¹²⁶ Now this source, Mr President, is not only fragile but also outdated. It
19 is fragile for the following reasons. First, whilst it is true that the judgment of 1969
20 mentions the geological factor, it is only one element among others that the ICJ cited
21 for the purposes of delimitation, “so far as known or readily ascertainable”.¹²⁷ It
22 referred to this without making it an element of the definition of the continental shelf.
23 Just as Chimène has eyes for Rodrigue in *Le Cid* by Corneille¹²⁸, Bangladesh has
24 only eyes for that. Professor Crawford has become the Chimène of the Applicant,
25 declaring his passion for an ICJ artificially petrified in its *dicta* of 1969, of which he
26 attempts to vaunt the relevance or “continuing validity”¹²⁹; whereas the Court has
27 distanced itself from these positions, which became obsolete in many respects.

28
29 My second point: while not excluding consideration of geological factors, in its
30 judgment of 1969 the ICJ also put forward geographical and geomorphological
31 considerations; but, let me repeat, all of this not for the purpose of defining the
32 continental shelf but for the purpose of its delimitation. It is no more relevant from
33 this perspective either.

34
35 I would also submit to you that the only example of a break in the natural
36 prolongation that it gives is that of the Norwegian Trough, which constitutes,
37 obviously, a break of a morphological nature and not of a geological nature.

38
39 I quote from the Court:
40

¹²³ See in particular. ITLOS/PV.11/6 (E), p. 16, lines 18-25 [the French translation omitted the word “natural” - see p. 18, line 16] and p. 17, lines 4-23 (Mr. Alan Boyle).

¹²⁴ See ITLOS/PV.11/6 (E), p. 21, lines 7-8 and p. 17, line 23 (Mr. Alan Boyle).

¹²⁵ *I.C.J., North Sea Continental Shelf Cases, I.C.J. Reports 1969, Judgment of 20 February* p. 50, para. 94 – emphasis added

¹²⁶ See in particular ITLOS/PV.11/2 (E), p. 8, lines 43-45 et p. 14, lines 9-12 (Mr. Reichler); ITLOS/PV.11/4 E, p. 6, lines 25-28 (Mr. Sands) ; or ITLOS/PV.11/6 (E), p. 21, lines 12-18 (Mr. Alan Boyle)

¹²⁷ *North Sea Continental Shelf Cases, Reports 1969*, p. 54, par. 101.D.2); see also p. 51, para. 94.

¹²⁸ See Pierre Corneille, *Le Cid*.

¹²⁹ ITLOS/PV.11/2/Rev.1 (E), p. 19, line 46 (Mr. Crawford).

1 Without attempting to pronounce on the status of that feature,
2 the Court notes that the shelf areas in the North Sea separated
3 from the Norwegian coast by the 80-100 km of the Trough
4 cannot in any physical sense be said to be adjacent to it, nor to
5 be its natural prolongation.¹³⁰
6

7 My third point: the zone affected by this delimitation did not extend beyond 98 M,
8 much less than 200 M, and the strict application of the equidistance line would have
9 led to a court awarding Germany 16,500 square kilometres¹³¹ whereas it enables
10 Bangladesh to receive a continental shelf more than four times larger for a coastline
11 longer by less than 30 per cent – 262 km for the relevant German coast on the North
12 Sea, 364 for the coast of Bangladesh.
13

14 In any case, the problem does not arise in any of these terms today in relation to
15 sovereign rights of coastal states up to this distance (*in English*):
16

17 To be sure, natural prolongation as such is no longer relevant
18 to a coastal State's title over the continental shelf within 200 M.
19 UNCLOS article 76(1) makes clear that coastal States enjoy a
20 presumptive entitlement to a continental shelf of 200 M
21 regardless of whether or not they can establish the physical
22 continuation of their land territory out to that distance.
23

24 (*Interpretation continued*) It is not I who am saying this, Mr President; it is the
25 Applicant.¹³² This renders dangerous any deduction which one could make based on
26 the concept of the continental shelf as conveyed by the judgment of 1969, which the
27 Convention of 1982 seriously called into question.
28

29 My fourth point: furthermore, the Court itself had warned in advance against the
30 general application of positions which it took in the *North Sea Continental Shelf*
31 cases, which again, I will quote:
32

33 It would not [...] be in harmony with this history to over-
34 systemize a pragmatic construct the developments of which
35 have occurred within a relatively short space of time.¹³³
36

37 This in fact was premonitory. Not only does article 76 of the Montego Bay
38 Convention, to which I would like to come back in a moment, only refer in part to the
39 text of the judgment of 1969 but also subsequent jurisprudence distanced itself, if not
40 from the very notion of natural prolongation of territory, at least from its geological
41 definition, and largely excluded considerations of a geological nature. Thus the
42 jurisprudence of 1969, if you can talk about jurisprudence in the case of a judgment
43 which has remained, on this point at least, in isolation, is outdated.
44

45 From 1977, in the Anglo-French case concerning the delimitation of the continental
46 shelf, the Court of Arbitration refused to consider that the Hurd Deep and the Hurd

¹³⁰ *Ibid.*, p. 32, para. 45 – emphasis added.

¹³¹ See ITLOS/PV.11/2/Rev.1 (E), p. 22, line 43 (Mr. Crawford).

¹³² MB, para. 6.9 – italics in the text; see also, para. 1.15, para. 7.7 or RB, para. 3.93 ; see also, ITLOS/PV.11/2/Rev.1 (E), p. 31, lines 25-34 ; or p. 33, lines 5-15 or p. 34, lines 16-18. (Mr. Crawford).

¹³³ *North Sea Continental Shelf Cases, I.C.J. Reports 1969* p. 53, para. 100.

1 Deep Fault Zone have any influence on the course of the maritime boundary
2 between the Parties, and let me quote from this decision:

3
4 but the axis of the Hurd Deep Fault Zone is placed where it is
5 simply as a fact of nature and there is no intrinsic reason why a
6 boundary along that axis should be the boundary which is
7 justified by the special circumstance...¹³⁴
8

9 The arbitral award of 11 April 2006 concerning the maritime delimitation between
10 Barbados and Trinidad and Tobago describes precisely and clearly the situation in
11 this regard, and I will quote this in the original language (*in English*):
12

13 At the time when the continental shelf was the principal
14 national maritime area beyond the territorial sea, such
15 entitlement found its basis in the concept of natural
16 prolongation (North Sea Continental Shelf Cases, I.C.J.
17 Reports 1969, p. 4). However, the subsequent emergence and
18 consolidation of the EEZ meant that a new approach was
19 introduced, based upon distance from the coast.
20

21 (*Interpretation continued*) I repeat: based upon distance from the coast-

22
23 (*in English*) In fact, the concept of distance as the basis of
24 entitlement became increasingly intertwined with that of natural
25 prolongation. Such a close interconnection was paramount in
26 the definition of the continental shelf under UNCLOS
27 Article 76, where the two concepts were assigned
28 complementary roles.¹³⁵
29

30 (*Interpretation continued*) I will come back to those complementary roles in a
31 moment.
32

33 In the *Libya v. Malta* case, the only one which Bangladesh cites, not only in writing
34 but also in its oral pleadings¹³⁶, to substantiate the alleged reliance of jurisprudence
35 on the geological notion of the continental shelf, the Court in the Hague confined
36 itself to noting that certain previous judgments had (*in English*):
37

38 recognized the relevance of geophysical characteristics of the
39 area of delimitation if they assist in identifying a line of
40 separation between the continental shelves of the Parties.¹³⁷
41

42 I repeat: “geophysical characteristics if they assist in identifying a line of separation
43 between the continental shelves of the Parties”. (*Interpretation continued*) This
44 hardly corresponds, by the way, to the circumstances of the facts of our case but,

¹³⁴ Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decisions of 30 June 1977, R.I.A.A., vol. XVIII, p. 192, para. 108.

¹³⁵ 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. 211, paras. 224-225.

¹³⁶ See MB, paras. 7.11 and 7.12 or ITLOS/PV.11/6 (E), p. 21, lines 12-30 (Mr. Alan Boyle).

¹³⁷ Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment I.C.J. 1985, p. 35, para. 40.

1 having noted that this situation was not likely to play any role in the disputed area,
2 the distance between the coasts of the Parties being less than 400 M, the ICJ takes
3 no position whatsoever on the relevance of these criteria beyond 200 M.
4

5 It is also interesting to note that Bangladesh, which does not quote any further case
6 to support its statements, affirms *expressis verbis* that (*in English*):
7

8 No court or tribunal has yet had any occasion to decide a case
9 involving analogous issues in the continental shelf beyond
10 200 M.¹³⁸
11

12 (*Interpretation continued*) It is recognizing that it cannot invoke any precedent in
13 case law to support its original or rather backward-looking theory about the “natural
14 geological prolongation of the land territory”.
15

16 This notion has no support in article 76 of the United Nations Convention on the Law
17 of the Sea, of which Professor Boyle rendered a rather bold interpretation last
18 Tuesday. You know this provision by heart, Members of the Tribunal, but for your
19 convenience it is reproduced in tab 2.14 of your folders. Undoubtedly, paragraph 1 of
20 article 76 describes the continental shelf as “the natural prolongation of [the] land
21 territory” but, contrary to the statements of Bangladesh (*in English*):
22

23 Article 76 of UNCLOS [does not provide] that entitlement is
24 determined by the geological and geomorphological factors
25 that inform the juridical concept of “natural prolongation”.¹³⁹
26

27 (*Interpretation continued*) This provision makes absolutely no reference to these
28 factors, that is geological and geomorphological factors, and does not refer in any
29 way to any test of geological natural prolongation.
30

31 Mr President, we all know the egg of Columbus and now we have the egg of
32 Boyle¹⁴⁰, a “Boyled” egg? But an egg is an egg whether it is raw, hard-boiled, soft-
33 boiled, or even simply an empty, sucked egg, and I am sure, Members of the
34 Tribunal, that you cannot know whether this egg I am showing you contains a yolk or
35 a white, or both, or none at all, whether it is boiled or not, but it is still an egg. In the
36 same way, the Convention does not define the egg – continental shelf – in terms of
37 its contents. The shell, including its thickness, suffices, exactly as it was sufficient for
38 me to show you my eggshell so that you would know that it was one. Article 76 of the
39 Convention merely relies on morphology to recognize the existence of a natural
40 prolongation and only turns to geology, or the yolk or the white of the egg,
41 secondarily as additional and optional evidence.
42

43 Paragraph 1 of article 76 of the Convention does describe the continental shelf as
44 “the natural prolongation of its land territory to the outer edge of the continental
45 margin” but it does not talk about geology and it cannot be read in clinical isolation.
46 Its meaning can only be understood in the light of the provisions which follow.

¹³⁸ RB, para. 3.87; see also MB, para. 6.16.

¹³⁹ MB, para. 1.15, para. 7.9 ; see also RB, para. 3.93 ; or ITLOS/PV.11/6 E, p. 17, lines 17-23 ; p. 25, lines 39-45 and footnote 67 ; p. 29, lines 8-12 (Mr. Boyle).

¹⁴⁰ ITLOS/PV.11/6 (E), p. 18, lines 33-42.

1 Paragraph 1 designates the extension of the continental shelf but only defines
2 partially what we should understand by the expression “natural prolongation”. All we
3 know, reading this provision, is that when the distance between the baselines and
4 the outer edge of the continental margin is greater than 200 M, this “natural
5 prolongation” extends up to this outer edge, but that is all. The outer edge is not
6 defined in paragraph 1. Paragraph 3 describes both positively and negatively the
7 morphological component elements of the continental margin, again without making
8 the slightest allusion to an imaginary geological continuity, and we have to wait for
9 paragraphs 4-6 to gain a more precise idea of the notion of outer edge, used to
10 define the extent of the continental shelf to which the coastal State may lay claim,
11 the only question arising before us today.¹⁴¹
12

13 Paragraph 4 is not a particularly engaging or poetic provision, I admit. In spite of the
14 warnings of Sir Michael Wood, I prefer Corneille, Rabindranath Tagore, or even
15 Conan Doyle, although I would not put him in the same category, but it is the sad lot
16 of lawyers to put up with this type of legal-speak, which is perhaps approximately
17 scientific, but which makes up the law.
18

19 Here we have alternative formulas, Hedberg and Gardiner. The first, Hedberg, which
20 corresponds to letter (ii), is based on distance alone, whereas the Gardiner formula
21 from sub-paragraph (a)(i) includes a geophysical element because it mentions the
22 thickness of sedimentary rocks, but it stops there. In no way does it include the origin
23 or the nature of the sediments.
24

25 I know, Mr President, that sub-paragraph (b) of paragraph (4) of article 76, which
26 lays down the principle of a coincidence of “the foot of the continental slope [with] the
27 point of maximum change in the gradient at its base” allows “evidence to the
28 contrary” and that, depending on the case, this may be based on geological
29 factors.¹⁴² In any case, within the terms of point 5.4.6 of the Scientific and Technical
30 Guidelines of the CLCS (*in English*):
31

32 as a general rule, whenever the base of the continental slope
33 can be clearly determined on the basis of morphological and
34 bathymetric evidence, the Commission recommends the
35 application of that evidence.
36

37 (*Interpretation continued*) The geological and geophysical data can only provide
38 supplementary evidence, which may be used by the coastal States without being
39 bound by it in any way. Thus, as Professor Boyle points out, this formula enables us
40 to use geological evidence¹⁴³, but – and it is a big “but” – it is not, for all that, in any
41 way an obligation. Geology may by way of exception be relevant. It is not at all
42 necessary, contrary to what my opponent, and nonetheless learned friend, has
43 said.¹⁴⁴
44

¹⁴¹ See point 2.2.6 of the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, adopted by the CLCS on 13 May 1999 at its fifth session, doc. CLCS/11. (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/171/08/IMG/N9917108.pdf?OpenElement>).

¹⁴² *Ibid.*, Chapter 6.

¹⁴³ ITLOS/PV.11/6 (E), p. 19, lines 35-40 and p. 20, lines 1-3 (Mr. Boyle).

¹⁴⁴ *Ibid.*, p. 20, lines 5-11.

1 In any case – and this is even more important – once the foot of the continental
2 slope has been defined in conformity with the rule in paragraph 4(b) of article 76, we
3 apply the formulas of sub-paragraph (a) and, as I have said, these certainly give no
4 place to the origin of the sediments or their nature. Mr President, this is how the
5 continental shelf is defined today, and it is thus that we should understand the notion
6 of “natural prolongation”. In this conception, the principle of geological discontinuity
7 has not the slightest place, and this is only fair.

8
9 If we were to grant it, the States through which pass the Ganges and the
10 Brahmaputra would have to be accorded part of the continental shelf Bangladesh is
11 claiming. China, Nepal and Bhutan would be pleased to hear that, I am sure, not to
12 mention India, but India does not need this because it is one of the bordering States;
13 it is to those States that the sediments carried by the great rivers and their tributaries
14 are dragged; but I think that this rather unorthodox argument of Bangladesh would
15 lull these States into a false sense of hope. Furthermore, Mr President, do we define
16 the land territory of these States by geology? Certainly not. Otherwise we would
17 have some rather surprising consequences.

18
19 Let me give you an example. In Brazil a couple of years ago I visited one of the most
20 beautiful natural wonders of the world – the Lençóis Maranhenses. This is a dune
21 formation made from sand transported by winds from the Sahara. Brazil and Algeria
22 are countries that I love for very different reasons, but I must say that if Algeria, or
23 another Saharan state, claimed the Lençóis, I would tend towards the defence of
24 Brazil rather than the claim of Algeria. Now the argument of Bangladesh is hardly
25 less eccentric than that.

26
27 Before concluding today, Mr President, I would like to give you Myanmar’s response
28 to the first question put to the Parties by the Tribunal. The question is: “Without
29 prejudice to the question whether the Tribunal has jurisdiction to delimit the
30 continental shelf beyond 200 nautical miles, would the parties expand on their views
31 with respect to the delimitation of the continental shelf beyond 200 nautical miles?”
32 Members of the Tribunal, I understand that you are perplexed because Bangladesh
33 has successively affirmed, and with as much apparent conviction, on the one hand –
34 I quote from its Memorial to start – that (*in English*) “article 83(1) [of the 1982
35 Convention] applies with equal force to delimitation within and beyond 200 M.”¹⁴⁵ On
36 the other hand – and now I quote from its Reply – it says that “recourse to different
37 delimitation methodologies in the two areas is appropriate.”¹⁴⁶

38
39 (*Interpretation continued*) For our part, we endorse the first of these two positions.
40 There is only one single continental shelf. Article 76, which defines it, establishes
41 different rules to establish its outer limits – its “delineation”, as we might say in
42 Franglais – depending on whether or not the continental margin extends beyond
43 200 M from the baselines. But concerning lateral delimitation between States with
44 adjacent or opposite coasts, article 83 does not make the slightest differentiation
45 between the two situations, which Professor Boyle admitted in his presentation on
46 Tuesday.¹⁴⁷ The same rules must therefore be applied, and neither geology nor
47 geomorphology has anything to do with this case.

¹⁴⁵ MB, para. 7.3 and RB, para. 4.77.

¹⁴⁶ RB, para. 3.4.

¹⁴⁷ ITLOS/PV.11/6 (E), p. 23, lines 46-47 (Mr. Alan Boyle).

1
2 With all due respect to the Tribunal, I would like to state in the strongest terms the
3 position of Myanmar, which Daniel Müller – who is well versed in these matters,
4 although his great knowledge is not really useful in this case – and I will go into in
5 further detail next week. The problem does not arise in this case. It is not up to the
6 Tribunal to delimit the continental shelf between the Parties beyond 200 M since the
7 line that it will plot, by applying articles 74 and 83 of the United Nations Convention
8 on the Law of the Sea, would inevitably stop before this 200-M limit. It is for that
9 ample reason that you do not have to make a decision on the erroneous
10 interpretation by Bangladesh of the rules applicable to the establishment of the outer
11 limits – or delineation, if you like – of the continental shelf beyond 200 M. In any
12 case, you cannot exercise your jurisdiction in this respect pending the
13 recommendations of the CLCS, but here again, and for the same insurmountable
14 reason, the problem does not arise.

15
16 Mr President, with your permission, I will continue on Monday morning with our
17 presentation on rules applicable to the delimitation of the continental shelf and the
18 exclusive economic zone, discussing the second joker that Bangladesh is trying to
19 play – the search, albeit unnecessary, for an “equitable solution”. I am sure,
20 Members of the Tribunal, that this relative cliff-hanger will not spoil your weekend,
21 and I wish you and our friends from Bangladesh an excellent weekend. Thank you
22 for your kind attention.

23
24 **THE PRESIDENT:** That brings us to the end of today’s sitting. The hearing will be
25 resumed on Monday, 19 September 2011 at 10 a.m. I wish you all a good weekend.
26 The sitting is now closed.

27
28 *(The sitting closed at 5.55 p.m.)*