

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



2011

Public sitting

held on Wednesday, 21 September 2011, at 3.00 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President José Luís Jesus presiding

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

(Bangladesh/Myanmar)

Verbatim Record

<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

Bangladesh is represented by:

H.E. Mrs Dipu Moni, Minister of Foreign Affairs,

as Agent;

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

as Deputy Agent;

and

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

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

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

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

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

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

Mr Scott Edmonds, Cartographic Consultant, International Mapping, Ellicott City, Maryland, United States of America,

Mr Thomas Frogh, Senior Cartographer, International Mapping, Ellicott City, Maryland, United States of America,

Mr Robert W. Smith, Geographic Consultant, Oakland, Maryland, United States of America

as Advisors;

Mr Joseph R. Curray, Professor of Geology, Emeritus, Scripps Institution of Oceanography, University of California, San Diego, United States of America
Mr Hermann Kudrass, Former Director and Professor (Retired), German Federal Institute for Geosciences and Natural Resources (BGR), Hannover, Germany,

as Independent Experts;

and

Ms Solène Guggisberg, Doctoral Candidate, International Max Planck Research School for Maritime Affairs, Germany,
Mr Vivek Krishnamurthy, Foley Hoag LLP, Member of the Bars of New York and the District of Columbia, United States of America,
Mr Bjarni Már Magnússon, Doctoral Candidate, University of Edinburgh, United Kingdom,
Mr Yuri Parkhomenko, Foley Hoag, LLP, United States of America,
Mr Remi Reichhold, Research Assistant, Matrix Chambers, London, United Kingdom,

as Junior Counsel.

Myanmar is represented by:

H.E. Mr Tun Shin, Attorney General of the Union, Union Attorney General's Office,

as Agent;

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

as Deputy Agents;

and

Mr Mathias Forteau, Professor at the University of Paris Ovest, Nanterre La Défense, France,
Mr Coalter Lathrop, Attorney-Adviser, Sovereign Geographic, Member of the North Carolina Bar, United States of America,
Mr Daniel Müller, Consultant in Public International Law, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ovest, Nanterre La Défense, France,
Mr Alain Pellet, Professor at the University of Paris Ovest, Nanterre La Défense, Member and former Chairman of the International Law Commission, Associate Member of the Institut de droit international, France,

Mr Benjamin Samson, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre La Défense, France,
Mr Eran Sthoeger, LL.M., New York University School of Law, New York, United States of America,
Sir Michael Wood, K.C.M.G., Member of the English Bar, Member of the International Law Commission, United Kingdom,

as Counsel and Advocates;

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

as Advisers.

1 **THE PRESIDENT:** Please be seated. Good afternoon. Today we start with the
2 second round of oral arguments in the dispute concerning the delimitation of the
3 maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.
4 Bangladesh will commence its second round. I first call on Mr Lawrence Martin to
5 make his presentation.
6

7 **MR MARTIN:** Mr President, distinguished Members of the Tribunal, good afternoon.
8 It is once again a privilege to appear before you on behalf of Bangladesh, and to
9 open this second round of Bangladesh's oral pleadings.
10

11 This afternoon I will sketch the broad contours of the arguments that you will hear
12 over the next two days. I will also outline the order of our presentations. Before I turn
13 to the substance of my submissions, however, I begin with a point of order. As you
14 know, Mr President, the schedule of hearings permitted the Parties as many as three
15 full sessions in the second round. After listening to Myanmar's presentations in the
16 first round, we decided that we did not need all that time. We are confident that we
17 can respond to Myanmar's arguments within the equivalent of two sessions.
18

19 We plan to use our time as follows. Today, we expect to speak until right around the
20 coffee break. Tomorrow morning, we will use the full two and a half hour session,
21 and tomorrow afternoon we aim to finish by the 4.30 coffee break. I hope that our
22 decision to forego some of the time allotted to us will come as some relief to the very
23 able people in the Registry and the translators, all of whom have worked very hard
24 on our behalf these last two weeks. We thank them very much for their efforts.
25

26 We also opted for shorter presentations in the second round mindful of the fact that
27 the Tribunal has already read and heard quite a lot from both Parties. You have two
28 written submissions from each. Each has also already had five sessions of oral
29 argument. There is no need to burden the Tribunal by belabouring points that have
30 already been fully aired. Instead, we will use our time to reply to what Myanmar has
31 said, focusing on what, in our view, are the key issues that can still benefit from
32 further discussion. Points to which we do not respond in this round should under no
33 circumstances be considered as having been conceded. They are not. Bangladesh
34 maintains in full its submissions and arguments as previously set forth.
35

36 Mr President, Members of the Tribunal, we have listened attentively to the
37 arguments that Myanmar presented in its first round. There is little – I dare say
38 nothing – that surprised us. Indeed, Mr Reichler's observations from his initial
39 presentation 13 days ago remain as true now as they were then. There are three key
40 geographical and geological elements in this case: the concavity of Bangladesh's
41 coast, St Martin's Island and the Bengal Depositional System. In its oral pleadings,
42 Myanmar once again urged the Tribunal to ignore all three.
43

44 Because it fell to me to deal with the issue of the concavity in the first round, I will
45 deal with this subject somewhat more thoroughly here than the others. On the
46 remaining subjects, I will do no more than outline the essential points that will be
47 addressed in the subsequent presentations.
48

49 On the issue of the concavity of Bangladesh's coast, we were initially quite
50 pleasantly surprised. Myanmar at first seemed ready to engage with it in a clear and

1 a direct manner. In his opening presentation last Thursday, Professor Pellet stated,
2 and I quote: “[T]he coastlines of Bangladesh are universally concave; that is a fact.”¹
3 He also expressly admitted that Bangladesh’s geographic situation is comparable to
4 the third in the series of four schematics that I presented the Tribunal last week, and
5 which he helpfully displayed once again. He said: “[T]he case of severe concavity[;]
6 I admit that this characterizes the coast of Bangladesh.”² To remind the Tribunal, the
7 schematic to which Professor Pellet referred is the one now appearing on the
8 screen.

9
10 But then other counsel seemed to backtrack and retreat to the more familiar – if less
11 accurate – view according to which there is no concavity, or at least not one with
12 which the Tribunal needs to concern itself. After Professor Pellet, a veritable parade
13 of other speakers referred to the Bangladesh coast as “straight”³ or even – and this
14 was a new one – as “convex”⁴.

15
16 They did this by inviting the Tribunal to focus only on the area in the immediate
17 vicinity of the Parties’ land boundary terminus. For example, on the screen now is
18 the map included at tab 3.4 of Myanmar’s Judges’ folder. You can see what
19 Myanmar has done. The geographical context has been eliminated; two essential
20 pieces are missing.

21
22 First, they have eliminated Bangladesh’s Bengal Delta coast to the north. If you
23 include that, as you must, the concavity within a concavity along the Bangladesh
24 coast immediately rematerializes. Second, they have also lopped off the coast of
25 India to the west of Bangladesh. If you include that, as again you must, the primary
26 concavity that is at the heart of this case comes back into focus. Context,
27 Mr President, is key; but it is exactly this context that Myanmar does not want you to
28 see. The image before you is included at tab 6.1 of today’s Judges’ folder.

29
30 This forced cartographic myopia is not a new twist adopted for the purposes of these
31 hearings. If you look carefully at Myanmar’s written pleadings, you will note that
32 aside from the first three sketch maps in Myanmar’s Counter-Memorial, none of the
33 others, including any in the Rejoinder, dares to show India’s coast on the west side
34 of the Bay of Bengal.

35
36 Mr President, Members of the Tribunal, depicted on the screen now is a coast that
37 shall remain momentarily nameless. Some of you may recognize it; others may not. I
38 ask you: is it obviously concave? Let us next see the whole coast in context. Now let
39 me ask: is there anyone here who would deny that this coast is concave? I suspect
40 not even Myanmar would.

41

¹ ITLOS/PV.11/7, p. 9, lines 20-21.

² ITLOS/PV.11/7, p. 9, lines 32-33.

³ See e.g. ITLOS/PV.11/8, p. 25, line 32 (Lathrop); ITLOS/PV.11/10, p. 4, line 35, p. 5, line 28, p. 18, line 12 (Forteau); “The Correct Application of the Bisector Method” (Lathrop – 20 September 2011) at para. 26.

⁴ See e.g. ITLOS/PV.11/7, p. 16, lines 6-7 (Samson); ITLOS/PV.11/8, p. 25, lines 32-33 (Lathrop); ITLOS/PV.11/9, p. 13, line 33, p. 16, line 34 (Forteau); ITLOS/PV.11/10, p. 4, line 36, p. 5, line 28, p. 18, line 13.

1 Aside from these sleights of hand, Myanmar also asks you to ignore the concavity by
2 telling you the recent jurisprudence does not consider concavity a circumstance
3 warranting a departure from equidistance. It cites *Cameroon v. Nigeria* and
4 *Barbados v. Trinidad & Tobago*. We already addressed these cases in our opening
5 round and Professor Crawford will have a bit more to say later. I will not burden the
6 Tribunal by saying anything more now.

7
8 I do, however, wish to say a word on the instances of State practice that I discussed
9 during my first round presentation. These are the instances where the States
10 concerned agreed to give a State that finds itself pinched in the middle of a concavity
11 relief from the equidistance cut-off by according it an access zone out to its natural
12 limits. On Monday afternoon Professor Forteau dismissed these as just four
13 examples.⁵ Mr President, I am the last person to correct someone else's math, but in
14 point of fact I actually cited five agreements, as the verbatim record will confirm.⁶

15
16 There is also a sixth and a seventh that I did not mention, only because Professor
17 Crawford already had.⁷ Those are the agreements among Germany, Denmark and
18 the Netherlands in which Germany was accorded access to the mid-sea median line
19 with the UK. The discussion of these agreements in *International Maritime*
20 *Boundaries* makes clear that Germany "succeeded in its contention that its shelf
21 extended to the centre of the North Sea in such a way as to meet that of the UK."⁸
22 This map is included at tab 6.2 of your Judges' folder.

23
24 I might also have mentioned the arbitral award in the *St Pierre et Miquelon* case in
25 which the Court of Arbitration gave the two small French islands which are otherwise
26 completely surrounded by Canadian land and sea a 200-M access zone into the
27 open Atlantic that is equal in breadth to the maritime front of the islands. At a certain
28 point, Mr President, I do think that there is value in brevity.

29
30 What was more notable is what Myanmar did *not* say. In my initial presentation, I
31 specifically invited Myanmar's counsel to show us a contrary example from the State
32 practice⁹ as they promised they could in their Rejoinder.¹⁰ I challenged it to show us
33 an example where a State otherwise facing onto the open sea agreed to be cut off
34 short of 200 M; but Myanmar had, and it has, nothing.

35
36 We say that the weight of the jurisprudence and the consistent State practice shows
37 a clear international consensus: when a State sits in the middle of a concavity
38 surrounded by neighbours on either side, equidistance cannot lead to an equitable
39 solution.

40
41 In his presentation on Monday, Professor Forteau helpfully quoted a passage in
42 Bangladesh's Reply in which we stated that the cut-off that Myanmar's proposed
43 equidistance line would work on Bangladesh would be the worst anywhere in the

⁵ ITLOS/PV.11/10, p. 1, line 36 (Forteau).

⁶ ITLOS/PV.11/4, pp. 19-20 (Martin).

⁷ ITLOS/PV.11/2/Rev.1, p. 22, line 43-44.

⁸ *International Maritime Boundaries*, Vol. II, p. 1805.

⁹ ITLOS/PV.11/4, p. 21, line 34-35 (Martin).

¹⁰ Rejoinder of Myanmar (hereinafter "RM") at para. 6.32.

1 world.¹¹ There is no larger coastal State anywhere that faces onto the open seas yet
2 faces the prospect of being cut off before 200 M.¹² After reading these words,
3 Professor Forteau then accused us of engaging in “dramatic arts” and “flights of
4 fancy”¹³. Mr President, I have been accused of many things in my life, but having a
5 flair for the dramatic is distinctly not one of them! What we wrote about the cut-off
6 effect is not hyperbole; it is not exaggeration. It is a fact – a fact, by the way, which
7 Myanmar has never once even tried to deny. We say that the inequitableness of
8 such a result speaks for itself.

9
10 Before leaving the subject of the concavity there is one final point that I would like to
11 address quickly. You heard quite a bit from Myanmar’s counsel about base points. In
12 particular, you heard that Bangladesh’s base point B1 was located on “the most
13 prominent feature in the area”,¹⁴ – Shahpuri Point. As a result, it supposedly takes
14 three Myanmar base points to counteract it. Myanmar seems to think B1 is like a
15 fearsome neighbourhood bully. It is so strong that it can take on three little base
16 points on Myanmar’s coast singlehandedly.

17
18 This is nonsense. There is one and only one reason that there is just a single base
19 point on the whole coast of Bangladesh– the concavity. Because the Bangladesh
20 coast north of the land boundary terminus recedes into the concavity, there is
21 nothing on the Bangladesh side to balance Myanmar’s coast. That is exactly why, as
22 I showed last week,¹⁵ Myanmar’s proposed equidistance line cuts directly across the
23 seaward projection of Bangladesh’s coast, blocking its access to the Bay of Bengal
24 beyond a small triangular wedge.

25
26 Aside from the concavity, the second geographical fact that Myanmar would like the
27 Tribunal to ignore is St Martin’s Island. Late last week and earlier this week
28 Myanmar’s counsel persisted in arguing that it should be given reduced effect in the
29 territorial sea, and no effect whatsoever in the EEZ and continental shelf within 200
30 M. It is appropriate to ignore St Martin’s in this way, they said, because it produces
31 “a grossly distorting effect on the course of the delimitation”.¹⁶

32
33 We have thought quite a lot about that statement over the last several days. In
34 evaluating it, I wonder if it may be useful to step back just for a moment. Viewed in
35 the round, Myanmar’s case reduces to the following, rather remarkable, assertion:
36 St Martin’s Island distorts an equidistance line, but the double concavity of
37 Bangladesh’s coast does not! Or, to put a more formal point on it, Myanmar would
38 have the Tribunal rule that St Martin’s is “the epitome of a special circumstance”¹⁷,
39 but the concavity of Bangladesh’s coast is not. The absurdity of the argument is self-
40 evident.

41
42 As you will hear, there is no basis for diminishing the effect given St Martin’s Island,
43 either in the territorial sea or in the EEZ. In the territorial sea, there is quite literally no

¹¹ Reply of Bangladesh (hereinafter “RB”) at para. 3.59.

¹² Reply of Bangladesh (hereinafter “RB”) at para. 3.59.

¹³ ITLOS/PV.11/10, p. 19, line 2 (Forteau) (“envolées lyriques et la dramaturgie”).

¹⁴ ITLOS/PV.11/9, p. 34, line 7 (Lathrop).

¹⁵ ITLOS/PV.11/4, p. 14, lines 33-44 (Martin).

¹⁶ ITLOS/PV.11/8, p. 26, line 8 (Lathrop).

¹⁷ ITLOS/PV.11/8, p. 23, line 44-45 (Lathrop).

1 precedent for giving an island with the characteristics of St Martin's anything less
2 than a full 12 M. Indeed, at least since 1974 Myanmar itself has recognized this.
3 Only in 2010, when it submitted its Counter-Memorial did Myanmar articulate the
4 different view that it now purports to adopt. We say that the right view is the one that
5 Myanmar itself accepted, without qualification, for at least 36 years: St Martin's
6 Island is entitled to a full 12 M territorial sea.

7
8 In the EEZ and continental shelf, there is likewise no basis for ignoring St Martin's
9 Island. Even viewed in isolation, St Martin's Island is a significant coastal feature with
10 a large population and a vibrant economic life; it cannot be ignored. Moreover, it
11 cannot be viewed in isolation. Once again, context is key. Far from exerting a
12 distorting effect on the equidistance line, what St Martin's actually does is offset – but
13 only partially – the far more pronounced effects of the double concavity of
14 Bangladesh's coast.

15
16 This fact renders Myanmar's efforts to analogize to other cases wholly inapposite. At
17 most, St Martin's abates the effects of the concavity within a concavity in the
18 Bangladesh coast, and even that it does not do fully. Still less does it do anything to
19 offset the effects of the primary concavity in the Bay of Bengal's north coast.

20
21 Myanmar also asks the Tribunal to ignore the Bengal Depositional System and the
22 potential entitlement in the outer continental shelf it generates for Bangladesh.
23 Myanmar's counsel argued that "Bangladesh cannot claim any entitlement in the
24 continental shelf beyond 200 M".¹⁸ This was so, we were told, because the
25 delimitation within 200 M would "inevitably stop" short of Bangladesh's 200-M limit.¹⁹

26
27 Mr President, Members of the Tribunal, whatever else might be said about this
28 argument, it is admirably self-justifying. You might even call it a tautology. If
29 Myanmar is wrong in its assertion that the delimitation stops short of the 200-M limit,
30 then the conclusion that Bangladesh can claim no entitlement in the outer continental
31 shelf is equally wrong. That is exactly our view.

32
33 Even as it denies the existence of Bangladesh's ability to "claim any entitlement in
34 the continental shelf beyond 200 M", Myanmar nowhere – nowhere – denies the
35 facts proving that entitlement. Last Tuesday, during the last session of our first-round
36 presentations, you heard Dr Parson and Admiral Alam describe the basis on which
37 and the manner in which Bangladesh claims entitlement in the OCS. In none of
38 Myanmar's Counter-Memorial, its Rejoinder or its first-round presentations did
39 Myanmar so much as suggest that Bangladesh is not entitled to apply article 76 in
40 the manner that we described. Myanmar's only argument is that you can ignore
41 these facts on the basis of the entirely circular reasoning I described.

42
43 Yet another thing Myanmar asks the Tribunal to ignore, both as a matter of fact and
44 a matter of law, is the issue of natural prolongation. In our first round, you heard all
45 the reasons that Bangladesh considers the seabed and the subsoil of the Bay of
46 Bengal the natural prolongation, that is, the physical extension, of its land territory.

¹⁸ ITLOS/PV.11/7, p. 11, line 1 (Pellet).

¹⁹ ITLOS/PV.11/8, p. 36, line 8 (Pellet).

1 Myanmar had no reply. It said only that it did not think it “worthwhile to devote
2 lengthy discussion” to what it considered “irrelevant points”.²⁰

3
4 In our first round, you also heard our interpretation of the phrase “natural
5 prolongation” in article 76(1) as a matter of law. In our view, it establishes an
6 independent criterion that must be met for a coastal State to establish entitlement in
7 the OCS. Both geological and geomorphological considerations are pertinent.

8
9 Myanmar’s response is to read the term out of article 76, to render it without any
10 independent legal significance. In Myanmar’s view, natural prolongation under article
11 76(1) is a mere conclusion that flows magically backwards from the application of
12 article 76(4). This is plainly inconsistent with the principle of effectiveness. Article 76
13 should not and cannot be read to deprive any piece of it of meaning.

14
15 In contrast to Myanmar, Bangladesh believes that an equitable solution cannot be
16 achieved by ignoring any one of the three most relevant geographical or geological
17 elements of this case, let alone all three of them.

18
19 Context is key. In the circumstances of this case, and giving proper weight to the
20 overall context, an equitable solution requires taking due account of the concavity of
21 Bangladesh’s coast, St Martin’s Island and the Bengal Depositional System.

22
23 Mr President, I will now briefly outline the presentations to follow today and
24 tomorrow. Following me to the podium this afternoon is Professor Boyle who will
25 respond to Myanmar’s arguments that there is no binding agreement concerning the
26 delimitation of the territorial sea.

27
28 After Professor Boyle, you will hear from Professor Sands who will address
29 Myanmar’s argument that in the absence of agreement, St Martin’s Island should be
30 given reduced weight in a territorial sea delimitation effected under article 15. As you
31 will hear, there is no authority to support Myanmar’s wholly novel proposition. In
32 accordance with article 15, the delimitation in the territorial sea must be an
33 equidistance line. There are no grounds for adjusting it within 12 M. The outer limit of
34 the territorial sea boundary and the starting point for the delimitation of the EEZ and
35 continental shelf is at point 8A.

36
37 When we return tomorrow morning, Mr Reichler will address the Tribunal on the
38 reasons Myanmar’s equidistance proposal does not result in an equitable solution in
39 the EEZ and continental shelf within 200 M. He will show that the jurisprudence,
40 including the jurisprudence relating to the effect to be given to islands,
41 overwhelmingly supports Bangladesh’s arguments: first, equidistance should be
42 rejected in favour of a different methodology; and second, if *quod non*, an
43 equidistance approach were adopted by the Tribunal, the provisional equidistance
44 line would have to be drawn giving full effect to St Martin’s Island, and then further
45 adjusted to more fully relieve Bangladesh of the distorting effects of its doubly
46 concave coast.

47

²⁰ ITLOS/PV.11/7, p. 12, lines 35-37.

1 After that, Professor Crawford will respond to Myanmar's arguments concerning
2 Bangladesh's alleged misapplication of the bisector method. As he will demonstrate,
3 and in contrast to Myanmar's equidistance proposal, Bangladesh's proposed 215°
4 bisector does yield an equitable result.

5
6 Professor Akhavan will conclude our presentations during tomorrow's first session.
7 He will refute Myanmar's arguments relating to the Tribunal's jurisdiction in the OCS.
8 Professor Akhavan will demonstrate that Myanmar's arguments are legally incorrect
9 and, if adopted, would frustrate the very purpose of Part XV of the 1982 Convention.

10
11 Professor Boyle will be the first to the podium tomorrow afternoon and will return to
12 the question of the outer continental shelf. Myanmar's arguments concerning the
13 interpretation of article 76 are singularly unpersuasive, and its refusal to address the
14 issue of the delimitation in the area is notable.

15
16 Professor Crawford will be the last of Bangladesh's counsel to speak. He will provide
17 a summation of Bangladesh's case and will show that the overall solution we
18 propose is precisely the equitable result that the 1982 Convention requires.

19
20 When Professor Crawford is done, the Honourable Foreign Secretary of Bangladesh
21 will provide some concluding remarks and present Bangladesh's submissions.

22
23 Mr President, distinguished Members of the Tribunal, I thank you once more for your
24 kind and patient attention. I ask that you invite Professor Boyle to the podium.

25
26 **THE PRESIDENT:** Thank you, Mr Martin. Professor Boyle, you have the floor.

27
28 **MR BOYLE:** Mr President, Members of the Tribunal, my task this afternoon is to
29 respond to Sir Michael Wood's arguments on the existence of a territorial sea
30 agreement. I have a very short speech. Let me begin with the easiest point. Both
31 sides appear to accept that if the Agreed Minutes of 1974/2008 are binding
32 agreements then they are sufficient for the purposes of article 15. The argument that
33 divides the Parties is therefore not about form or legal effect but about whether the
34 Agreed Minutes are indeed binding agreements at all. Let me reiterate Bangladesh's
35 position: the 1974 Agreed Minutes are not simply a record of a meeting as Sir
36 Michael alleges. Viewed objectively, the Agreed Minutes of 1974 constitute an
37 agreement on a territorial sea boundary that is binding on the Parties. That
38 agreement was confirmed by the Foreign Minister of Myanmar in 1985 and it was
39 confirmed by a further agreement in 2008, and it remains in full force and effect
40 today. Bangladesh does not accept Myanmar's arguments to the contrary.

41
42 Nor does Bangladesh recognize or agree with Myanmar's characterization of the
43 negotiations that took place in 1974. Far from Bangladesh repeatedly pressurizing
44 successive Burmese delegations with proposals, the record shows that both sides
45 exchanged views and that each had its own agenda.²¹ In order to understand what
46 was and was not agreed, it may be helpful to understand the context in which the
47 1974 negotiations took place. Bangladesh was interested in an agreement that

²¹ See Burma's record of the 1974 talks in Counter-Memorial of Myanmar (hereinafter "MCM"), Annexes 2 and 3.

1 would facilitate oil exploration and drilling in waters and seabed adjacent to the
2 existing Burmese oil fields.²² Another reason for negotiating was to deal with access
3 to the Naaf River.²³ Burma was concerned that Bangladesh's proposed territorial sea
4 boundary line – the one that was eventually agreed – would traverse the navigable
5 channel into the Naaf River.²⁴ Bangladeshi law required foreign warships to obtain
6 prior permission for passage in the territorial sea, and this would be burdensome for
7 Myanmar.²⁵ So Myanmar had every reason to conclude an *ad hoc* agreement on the
8 territorial sea in 1974 – it was in its interest to do so when broader negotiations failed
9 to make progress and when general rules of international law on innocent passage
10 were at that point potentially open to renegotiation at UNCLOS III. This was not,
11 however, a matter that Bangladesh needed to press, but it was obviously important
12 for Myanmar.

13
14 The fact that Myanmar nevertheless refused to sign the draft treaty on the territorial
15 sea put forward by Bangladesh is explicable because Myanmar believed that doing
16 so might imply that it was impossible to reach further agreement on the Exclusive
17 Economic Zone or continental shelf.²⁶ Moreover, the draft territorial sea treaty
18 proposed by Bangladesh also covered additional issues – dispute settlement and
19 transboundary oil deposits - that could more usefully be dealt with in a
20 comprehensive agreement covering also the EEZ and continental shelf. But refusal
21 to sign Bangladesh's territorial sea draft treaty is not inconsistent with reaching an *ad*
22 *hoc* agreement on the boundary line in the territorial sea. The *ad hoc* agreement
23 dealt with a far more limited agenda than Bangladesh would have wished to address
24 in a more comprehensive treaty, but it nonetheless represented a compromise
25 position for both States.

26
27 Mr President, Sir Michael Wood said on Thursday²⁷ that paragraph 4 of the Agreed
28 Minutes recorded only the approval of the Bangladesh delegation to points 1-7 of the
29 territorial sea boundary. But if you read paragraph 4, it does not mention points 1-7
30 at all. Instead it simply refers back to paragraph 2, and when you read paragraph 2 it
31 describes the course of the boundary in considerable detail and notes that it is
32 illustrated on Special Chart 114. Paragraph 2 goes on because it also records that
33 "With respect to the delimitation of the first sector of the maritime boundary" – which
34 is the territorial sea "the two delegations agreed as follows." It then sets out the
35 details of the boundary. So there you have it, Mr President. Both delegations agreed
36 points 1-7 in 1974, not just the Bangladeshi delegation. Both delegations signed the
37 minutes and the chart, not just the Bangladeshi delegation. And despite what Sir
38 Michael also said about point 7, the final point in the agreed line, there is no
39 uncertainty about it in the text of the 2008 Agreed Minutes. The Minutes do refer to
40 several options for a variety of possible starting point of the EEZ delimitation, but the
41 agreed point 7 is specifically listed in paragraph 3 with full co-ordinates, like all the
42 others. Even the Counter Memorial notes:

²² Burma-Bangladesh Maritime Boundary Delimitation Talks, Minutes of the Second Round, 20-25 November 1974, Minutes of Second Meeting at para. 5. MCM, Annex 3.

²³ *Ibid.*, Minutes of First Meeting at paras. 4-7. MCM, Annex 3.

²⁴ *Ibid.*, para. 4.

²⁵ *Ibid.*, para. 4; Minutes of Third Meeting, paras. 2-4, MCM Annex 3; see also Bangladesh Territorial Waters and Maritime Zones Act, 1974 (Act No. XXVI of 1974) (14 February 1974), Article 3(7). Memorial of Bangladesh (hereinafter "MB"), Annex 10.

²⁶ *Ibid.*, Minutes of First Meeting, para. 10, MCM, Annex 3.

²⁷ ITLOS/PV.11/7 (E/6), p. 33 lines. 4-7 (Wood).

1
2 it was no doubt intended in due course that points 1 to 7 would be
3 included in an overall agreement on the delimitation of the entire line
4 between the maritime pertaining to Myanmar and those appertaining to
5 Bangladesh.²⁸
6

7 Now let me deal next with Sir Michael's continuing insistence that the Agreed
8 Minutes were only a conditional agreement. He refers to three alleged conditions.
9 First, he says that negotiation of a future treaty on the whole maritime boundary was
10 the objective of both sides. That is obviously true; it says so in all the records. But of
11 course the fact that such a treaty was never agreed does not exclude the option of
12 agreeing *ad hoc* on a territorial sea boundary. An *ad hoc* agreement is no less an
13 'agreement'. And there is nothing in the Minutes – in the terms of the agreement –
14 that supports Sir Michael's argument that nothing was agreed until everything was
15 agreed. To remind the Court, what does the 1974 text say about this? It says only
16 that negotiations would continue.²⁹ That is all. How can that imply, still less express,
17 the conditionality that Sir Michael claims? It is not obvious to me. After signing the
18 'agreed minutes' in 1974, there were several further rounds of talks held between
19 Bangladesh and Myanmar from 1974 to 1985,³⁰ yet the issue of negotiating the
20 territorial sea boundary was never raised again by Myanmar. Why not? Does this not
21 show that Myanmar regarded the territorial sea boundary as settled or agreed in
22 1974? The fact that it was confirmed without controversy and with only minor
23 changes in 2008 simply adds to the conclusion that the boundary had indeed been
24 settled in 1974.
25

26 Secondly, Sir Michael argued that the Parties failed to conduct the joint survey
27 provided for in para. 2. II of the Agreed Minutes. That is true: they didn't; but it
28 overlooks the fact that they did agree co-ordinates through a joint inspection in
29 2008.³¹ Even if the final boundary co-ordinates were incomplete in 1974, they were
30 definitively plotted and agreed on Admiralty Chart 817 in 2008.³²
31

32 The final alleged condition is our old friend unimpeded passage in the territorial sea.
33 Well this is something of a red herring. On the one hand, Sir Michael argues that
34 'free and unimpeded navigation' was a precondition of the 1974 accord,³³ but on the
35 other hand, he also said on Thursday that ships of Myanmar traditionally enjoyed the
36 right of free and unimpeded navigation to and from the Naaf River since 1948.³⁴ This
37 is a rather contradictory position – apparently unimpeded passage had been
38 exercised as a 'historical right', to quote Professor Pellet, since 1948,³⁵ – but was
39 then not exercised after 1974 because Myanmar did not want to put the issue to the

²⁸ MCM, para 4.9.

²⁹ Governments of Bangladesh and Myanmar, Agreed Minutes of the Meeting Between the Bangladesh Delegation and the Burmese Delegation Regarding the Delimitation of the Maritime Boundary (23 November 1974), para. 6, MB, Annex 4.

³⁰ MB, para. 3.32; MCM, paras. 3.11-3.41.

³¹ Governments of Bangladesh and Myanmar, Agreed Minutes of the Meeting Between the Bangladesh Delegation and the Myanmar Delegation Regarding the Delimitation of the Maritime Boundary (1 April 2008), para. 3. MB, Annex 7.

³² *Ibid.*

³³ ITLOS/PV.11/7 (E/6) p. 22, line 6-8; p. 31, lines 41-45 (Wood); MCM, para. 4.12.

³⁴ *Ibid* PV.11/7 (E/6), p. 24, lines 15-17.

³⁵ PV. 11/7 (E/6), p. 6, lines 12-23 (Pellet); Delimitation Talks, Third Round (February 1975), Minutes of First Meeting, para. 4. MCM, Annex 4; MCM, paras. 3.23 and 4.38.

1 test!³⁶ Why did Myanmar not raise the question again in negotiations between 1974
2 and 2008 if Bangladesh's position was as equivocal as Myanmar alleges? Self-
3 restraint may explain a lack of conflict, but it can't easily explain a lack of negotiation.
4 There was ample opportunity to negotiate in 1980 when the Parties concluded a
5 supplementary protocol to the 1966 Agreement on the Demarcation of a Fixed
6 Boundary in the Naaf River³⁷ – unless of course Burma thought the matter had
7 indeed been settled.

8
9 In 2008 the Parties recognized that access to the Naaf River was indeed no longer a
10 problem, if it ever had been, because they agreed in that year unambiguously in the
11 2008 Agreed Minutes that navigation through the territorial sea was indeed governed
12 by rules on innocent passage in the 1982 Convention. That had of course been the
13 case since the Convention came into force. It is not really credible to say that
14 Myanmar is still waiting today for Bangladesh to agree on the rules for unimpeded
15 passage. Nor has Bangladesh ever demanded that Myanmar naval vessels seek
16 prior permission for passage into the Naaf River and Myanmar has not alleged any
17 such practice. So there is no basis for continuing to demand assurances about
18 passage when the Parties have long since laid the issue to rest. In any event,
19 Bangladesh has made unequivocally clear its acceptance of the right of unimpeded
20 innocent passage for Myanmar vessels in accordance with the 1982 Convention as it
21 had already agreed in 2008. It cannot meaningfully be said that it has not responded
22 favourably to Myanmar's desire for unimpeded passage into the Naaf River.

23
24 Sir Michael alleges that if we look carefully at the terms of the 1974 Minutes we will
25 not find an agreement. So let us look at the terms. They say expressly that "the
26 boundary will be formed by a line extending seaward from Boundary Point No 1...
27 connecting ... the mid-points between the nearest points on the coast of St Martin's
28 Island and the coast of the Burmese mainland."³⁸ What could be clearer and more
29 precise? How else might the Parties be expected to express an agreement on the
30 matter? Use of the future tense is appropriate when final co-ordinates are still to be
31 plotted, but that does not make the agreed boundary any less clear or definitive. The
32 text is considerably clearer and more precise than the communiqué in *Qatar/Bahrain*
33 case. I make a mild diversion. You can see the text of that communiqué, or at least
34 one version of the communiqué – there are two versions and I have compared the
35 two of them – and there is no material difference for the purpose of the point I am
36 about to make. Here we have the Qatar version. It merely reaffirms what was
37 previously agreed previously, provides for continuation of the good offices of the
38 Saudi king, and says that at the end of the agreed period "the Parties may submit the
39 matter to the ICJ."³⁹ (Tab 6.5) The Bahraini version says the two Parties may submit
40 the matter to the ICJ but it makes no difference for this point. The ICJ nevertheless
41 regarded this rather ambiguous diplomatic language as a binding agreement
42 concluded by Foreign Ministers – despite the fact that the Parties could not even

³⁶ *Ibid.*, p. 24, lines. 32-35.

³⁷ Governments of Bangladesh and Myanmar, Supplementary Protocol to the 1966 Agreement between Pakistan and Burma on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River (1980). MB, Annex 6.

³⁸ Governments of Bangladesh and Myanmar, Agreed Minutes of the Meeting Between the Bangladesh Delegation and the Burmese Delegation Regarding the Delimitation of the Maritime Boundary (23 November 1974), para. 2. MB, Annex 4..

³⁹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112, para. 19.

1 agree on how to interpret and translate their communiqué.⁴⁰ There really is no
2 comparable uncertainty or lack of clarity about the 1974 Agreed Minutes. On any
3 reading they look much more like an agreement than the Qatar/Bahrain
4 communiqué; they certainly look like an agreement on a boundary.

5
6 It is true, of course, that the minutes agreed in 1974 and 2008 were not agreed at
7 Foreign Ministers, but that does not prevent the Parties from treating them as binding
8 agreements in practice, as article 8 of Vienna Convention implies when it refers to
9 subsequent confirmation. It is notable that at the sixth round of maritime boundary
10 talks between the Parties in 1985, Myanmar's Minister for Foreign Affairs and leader
11 of its delegation to the talks, Mr U YE Goung, made the opening statement⁴¹ and
12 when he made it, far from repudiating a supposedly unauthorized deal negotiated in
13 1974, he referred to the Minutes signed in Dhaka with approval. They were
14 unquestionably confirmed again in 2008, subject only to minor modifications. This
15 would be rather strange behaviour if Commodore Hlaing had had no authority to sign
16 the agreement or if the agreement he negotiated had been repudiated by his
17 government immediately after the 1974 talks. Bangladesh reiterates its view that
18 Myanmar is now estopped from denying the authority of Commodore Hlaing to
19 conclude the 1974 Minutes. It notes that Myanmar does not deny the authority of
20 those who concluded the 2008 Agreed Minutes.

21
22 What then does Myanmar say about implementing this agreed boundary in practice?
23 It says very little. It says that affidavits are unreliable evidence, to be treated
24 cautiously, and that naval logs are of little help in proving the existence of a
25 boundary.⁴² But Bangladesh is not using this evidence to prove the existence of an
26 agreed boundary; it is simply using it to show how the boundary agreed in 1974
27 operated in practice – without problems, or disputes, or friction. Bangladesh has
28 discharged whatever burden of proof it has in this respect and Myanmar has
29 produced no evidence at all to the contrary. If there are problems, the burden is on
30 Myanmar to prove them.⁴³ Myanmar admits that the evidence does show that its
31 fishermen have been arrested on Bangladesh's side of the territorial sea.⁴⁴ If there
32 was in fact no agreed boundary, or no boundary in practice, why then did Myanmar
33 not protest at these arrests? Myanmar says they were on Bangladesh's side of the
34 boundary.⁴⁵ Precisely, Mr President.

35
36 The conclusion – I said this would be a short speech – seems obvious. The 1974
37 Agreed Minutes in Bangladesh's view did constitute an unconditional binding
38 agreement settling the territorial sea boundary between the Parties, in accordance
39 with article 15 of the 1982 Convention.⁴⁶ But even if we assume that the 1974

⁴⁰ *Ibid.*, paras. 19 and 30.

⁴¹ Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Speeches and Statements, 19-20 November 1985, p. 2. MCM, Annex 8.

⁴² ITLOS/PV.11/8 (E/7) p. 6, line 19; p. 11 line. 28 (Stoeger); RM, paras. 1.4 (p. 15) and 2.50-2.69.

⁴³ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 43, para. 204; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility)*, I.C.J. Reports 1984, p. 392, para. 101.

⁴⁴ ITLOS/PV.11/8 (E/7) p. 11, lines 34-35 (Stoeger).

⁴⁵ *Ibid.*, lines 11-28.

⁴⁶ ITLOS/PV.11/3 (E/2) p. 1, lines 23-25; p. 6, lines 7-9; p. 9, lines 16-19 (Boyle); MB, para. 5.18 ; RB, para. 2.8.

1 Agreed Minutes were not binding unless Myanmar's conditions with respect to the
2 fixing of boundary co-ordinates and unimpeded passage were fulfilled, by 2008 the
3 coordinates had been plotted and the regime applicable to passage into the Naaf
4 River had been agreed.⁴⁷

5
6 Acceptance of this boundary by the Parties is reflected in their wholly unproblematic
7 practice with respect to navigation and law enforcement. The agreed boundary had
8 been working effectively for 34 years in 2008 – and it continues to function
9 effectively. Why? Not simply because it was agreed but because both Parties know it
10 is equitable and because a properly drawn article 15 equidistance boundary would
11 be almost identical – if anything it would be slightly more favourable to Bangladesh,
12 as Professor Sands will shortly show you. Myanmar wants to unpick this agreement
13 only because it is inconsistent with its grandiose and legally unsupportable
14 arguments in the Exclusive Economic Zone and the continental shelf beyond the
15 territorial sea.

16
17 Mr President, Members of the Tribunal, that concludes this part of my submission.
18 Unless I can be of any further assistance, I would ask you to give the floor to
19 Professor Sands.

20
21 **THE PRESIDENT:** I call on Professor Sands.

22
23 **MR SANDS:** Mr President, Members of the Tribunal, it falls to me to respond to
24 Myanmar's arguments as to the delimitation of the territorial sea in the absence of
25 the agreement to which Professor Boyle referred and it is off the back of Myanmar's
26 recent discovery that St Martin's Island is, after all, a 'special circumstance' within
27 article 15 of the 1982 Convention. This is, of course, an alternative argument. As is
28 customary for a second round speech, I am going to limit myself to responding to the
29 arguments of Myanmar, principally as presented by
30 Mr Lathrop. I will not repeat what has been said in our written pleadings or in the first
31 round of our oral arguments, and I will not seek to address the many inaccuracies or
32 infelicities in Myanmar's treatment of this subject.

33
34 The bottom line, Mr President, as anyone with even a passing knowledge of the law
35 and practice of article 15 will know, is that Myanmar's argument is thin, and that is a
36 generous characterization. Article 15 establishes an equidistance rule for the
37 territorial sea, and it draws no distinction – no distinction -- between the entitlements
38 that appertain to the mainland or to islands. Myanmar has found no authorities on
39 which it can rely in support of its claim that St Martin's Island is to be treated as a
40 'special circumstance' within the meaning of article 15. It is inviting you to make new
41 law. In our submission, there is no basis for you to do so. Accordingly, I can be
42 relatively brief.

43
44 Before getting to the only real issue – why St Martin's Island is not now and has
45 never been a 'special circumstance' – please allow me to make a small number of
46 preliminary points.

47

⁴⁷ See Agreed Minutes of Bangladesh-Myanmar Meeting Regarding Maritime Boundary Delimitation (1 April 2008), para. 2-3. MB, Annex 7.

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

8
9 He had nothing to say, for example, about access to the mouth of the Naaf River. He
10 had nothing to say about any difficulties of access through the territorial sea of
11 Bangladesh around St Martin's Island.⁴⁸ He had nothing to say about Myanmar's
12 abrupt change of position after 2008: whether it be a legally binding agreement or
13 not, the fact is that starting in 1974, and for a period of at least 34 years afterwards,
14 through the negotiation, adoption, ratification of the 1982 Convention, and for more
15 than a decade after that ratification, Myanmar did not treat St Martin's Island as a
16 special circumstance. In fact, Myanmar continuously recognized that St Martin's
17 Island was entitled to a full 12-mile territorial sea. It said so very publicly, and it said
18 so at the highest levels of government. In 1985, for example, the distinguished
19 Foreign Minister of Myanmar (or Burma, as it then was) said that his country
20 recognized the "entitlement of St Martin's Island to a full 12 M territorial sea".⁴⁹ I
21 emphasize the word "full". "Full" is not "partial", Mr President; nor is it "half-full", nor is
22 it three-quarters full. "Full" means full. Nothing has changed in the law or in the facts
23 since 1985 when the Foreign Minister spoke. This Tribunal is entitled to an
24 explanation from Myanmar as to why it has so recently and so abruptly changed its
25 position; it has had no explanation.

26
27 You have also been given no explanations as regards Myanmar's own practice in
28 this field elsewhere, and the manifest inconsistency between that practice and what
29 it now says you should do in this case. It has provided no response to our questions
30 during these hearings as to why St Martin's Island should be treated differently, for
31 example, than Myanmar's Aladdin Islands; you will recall that those islands were
32 given a full 12 M territorial sea in Myanmar's 1980 Agreement with Thailand. I
33 referred to that explicitly in the first round.⁵⁰ What was Myanmar's response? None.
34 There was no response. Nor have you been given any explanation in these hearings
35 as to why Myanmar's Little Coco Island – to which I also referred – was given full
36 weight in the territorial sea in its 1986 agreement with India.⁵¹ What was Myanmar's
37 response? None – again, silence. On all these matters, and on many others,
38 Mr Lathrop was silent. He was equally reticent on the case law that we cited in our
39 pleadings and that is so deeply harmful to the arguments of his client. I will return to
40 that in a moment.

48 ITLOS/PV.11/3, pp. 25-27 (Sands).

49 Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Rangoon, 19-20 November 1985, MCM, Annex 8, p. 2. Also, in a 2008 *Note Verbale*, Myanmar explicitly acknowledges the 12 M entitlement of St Martin's Island: "It is in this neighbourly spirit that the Myanmar side has requested the kind cooperation of the Bangladesh side since the steamer/receiver of the said survey vessel is expected to enter the 12-mile territorial sea which Bangladesh's St Martin's Island enjoys in principle in accordance with UNCLOS, 1982" (BR, Vol. III, Annex R1).

50 ITLOS/PV.11/3, p. 24, line 12 *et seq.*

51 *Ibid.*, p. 24, line 24 *et seq.*

1 So what did he talk about? Well, he had quite a lot to say about so-called “mainland-
2 to-mainland” equidistance lines. He sought to respond to our expression of surprise
3 as to the very recent adoption by Myanmar of the merits of such a line, no doubt as a
4 way of avoiding giving St Martin’s Island the full 12 M territorial sea to which its
5 Foreign Minister had previously professed such strong attachment. But,
6 Mr President, you will have noted that Mr Lathrop was not able to show you a single
7 decided case in which such an alleged line had been used in the manner now
8 proposed by Myanmar, a situation where a significant coastal island is located in
9 close proximity to the adjacent coastal State’s mainland and well within the
10 mainland’s 12 M territorial sea. Now, he did refer you to four cases – the *Anglo-
11 French Continental Shelf* case, the *Black Sea* case, the case of *Nicaragua v
12 Honduras*, and the *Eritrea v Yemen* cases⁵² – but none of these cases is analogous,
13 as we are sure you will all be fully aware. In the first three cases, the islands were
14 not coastal islands; they were not located within 12 M of the mainland of the coastal
15 State, and each was given a full 12 M territorial sea – except where the full-weight
16 median lines truncate the territorial sea, as occurred for example in relation to some
17 of the Honduran cays.

18
19 The fourth case he referred to was *Eritrea v Yemen*. I say, Mr President, we very
20 much regret to have to say that the treatment of that case was entirely misleading:
21 the tribunal in that case gave full weight and effect to four coastal islands, some of
22 which were located at a far greater distance from the mainland than is St Martin’s
23 Island, some even beyond 12 M. As you can see on your screens, these islands
24 included (highlighted in yellow at the top) the Dahlaks on the Eritrean side, and
25 Tiqfash, Kutama, Uqban and Kamaran on the Yemen side. These were coastal
26 islands, on which base points were located, and they were treated as an integral part
27 of the mainland in drawing an equidistance line. The implication that they were
28 ignored in drawing an equidistance line is wholly wrong. There is no analogy to be
29 drawn, and the award entirely supports the approach of Bangladesh that a coastal
30 island generates a full 12 M territorial sea, and full weight in the drawing of an
31 equidistance line.⁵³

32
33 In that delimitation, which concerned the continental shelf and not the territorial sea,
34 the islands that were ignored were located at great distances from the mainland.
35 Mr Reichler will return to say more about those islands tomorrow.

36
37 The fact that these examples are not on point is presumably one of the reasons why
38 Mr Lathrop did not show them to you on any charts. It is blindingly obvious,
39 Mr President, with respect to these examples, that if there are no islands to be found
40 within 12 M of the coast then article 15 could require you to draw a provisional
41 equidistance line from base points that are to be found on the two States’ mainlands.
42 In these circumstances there are good and obvious reasons why you might want to
43 start with a so-called “mainland-to-mainland” equidistance line – there are not any
44 islands present. But if an island is located within the 12 M coast, like St Martin’s
45 Island, then there will be no justification for drawing such a line because the 1982
46 Convention requires you – *requires you* - to draw the equidistance line on the basis
47 of base points located on the island. That is clear and established law.

⁵² ITLOS/PV.11/8, p. 15, line 14 to p. 16, line 9 (Lathrop).

⁵³ RB, para. 2.79-2.80.

1
2 Mr Lathrop derives no greater support from the writings of Professor Bowett.
3 Writings, I have to say that he filleted them in a manner that brought to mind the use
4 of a hammer to remove the bones from a sardine. Derek Bowett was a great
5 international advocate and international jurist, who chose his words very carefully,
6 and it is a matter of great regret that he never had an opportunity to address this
7 Tribunal. He was also my teacher and colleague, and I fear he would have raised a
8 characteristic eyebrow if he had witnessed Mr Lathrop's use of his writings to justify
9 the unjustifiable.⁵⁴ We have checked each and every one of the examples to which
10 Mr Lathrop refers in the cited article. I can deal with them quickly. Mr Lathrop's first
11 example was as follows, and you can see the quote on your screen: "The island of
12 Halul was ignored ... in constructing the mainland-to-mainland equidistant[ce] line".⁵⁵
13 That is what he said. You will note the dots and you will note the capital "T". Here is
14 what Professor Bowett actually wrote, including the words that Mr Lathrop left out:

15
16 Thus, in the Iran-Qatar agreement the island of Halul was ignored,
17 apparently because of its disputed status, in constructing the mainland-to-
18 mainland equidistant line.⁵⁶

19
20 If you then go to the footnote of that text, you will see that it refers to page 402 of
21 Jayewardene's book *The Regime of Islands in International Law*. If you then go and
22 dig that up, you will see that it says the following:

23
24 The Qatari island of Halul which is an off-lying island and located over 60
25 M off the coast has been ignored as is indicated in the preceding analysis.
26 The reason for disregarding Halul appears to have been its disputed
27 status.

28
29 So when you fill in the dots and put the word "the" in lower case, you see clearly
30 what Professor Bowett was addressing, and it is entirely distinguishable from this
31 case.

32
33 The second example that Mr Lathrop gave you, drawing from Professor Bowett's
34 article, was the following quote: "Various small islands were ignored in drawing a
35 mainland-to-mainland equidistant line."⁵⁷ What Mr Lathrop did not draw to your
36 attention was that Professor Bowett was again referring to the same Iran-Qatar
37 agreement. It was an agreement, Mr President, negotiated and adopted between two
38 States. It can provide no support for the drawing of an equidistance line desired by
39 Myanmar in this case.

40
41 The third quotation given by Mr Lathrop, we regret to say, was also partial and
42 omitted significant elements. The quote he gave you was – and this is taken from the
43 PV: "Several islands . . . were ignored and a mainland-to-mainland equidistant
44 boundary adopted."⁵⁸ Now let us look at the full quote:

⁵⁴ ITLOS/PV.11/8, p. 15, line 4 *et seq.*

⁵⁵ ITLOS/PV.11/8, p. 15, line 7 (Lathrop).

⁵⁶ D. Bowett, *International Maritime Boundaries*, Vol. 1, at p. 136.

⁵⁷ ITLOS/PV.11/8, p. 15, line 8 (Lathrop).

⁵⁸ *Ibid.*

1 So, too, in the Canada-Denmark agreement, where in the Kennedy
2 Channel several islands on the Greenland side, and some small islands of
3 indeterminate sovereignty in the middle of the channel, were ignored and
4 a mainland-to-mainland equidistant boundary adopted.⁵⁹

5
6 I could make a lot of points, but I will just make a small number. It was an
7 agreement, not a judicial or arbitral award,⁶⁰ and the situation is entirely
8 distinguishable from that of St Martin's Island: first, the islands lie in a narrow
9 channel, less than 20 M wide; secondly it is a situation of two opposite mainland
10 coasts; and third, none of them sustains a permanent population. Canada and
11 Denmark agreed not to take into account the islands because of the narrowness of
12 the body of water.

13
14 So these three examples in no way assist Myanmar. The commentary of Professor
15 Bowett may happen to use the same phrase that Myanmar likes, but they were very
16 obviously referring to entirely different, extra-judicial cases, negotiated situations
17 each of which turns on its own particular facts.

18
19 We deeply regret having to point out these textual infidelities, but let me give one
20 more example. After invoking Professor Bowett, Mr Lathrop referred you to a
21 discussion at the International Law Commission in 1953, in support of his argument
22 that there could be a departure from equidistance where "a small island opposite one
23 State's coast belonged to another".⁶¹ If you take the trouble to check out what the
24 1953 discussion was about, as I am sure you will, you will see that the meeting at
25 which that occurred at the International Law Commission was addressing a
26 proposed text for what was to become article 6 of the 1958 Continental Shelf
27 Convention.⁶² The reference invoked by Mr Lathrop had nothing to do with the
28 delimitation of the territorial sea. The way they have been treated by counsel for
29 Myanmar reminds one of golden rule no. 3 of advocacy: if you are going to cite an
30 authority that has footnotes, read the documents referred to in the footnotes.

31
32 It is against this background that we say it is entirely correct for us to argue that the
33 invocation of a so-called "mainland-to-mainland" equidistance line in circumstances
34 that wholly ignore an island located within 12 M is curious, to say the least, and
35 appears to be novel and unprecedented in the case law. Let me be blunt: it is just
36 plain wrong. We trust that this Tribunal will not be the first international court or
37 tribunal to draw a so-called "mainland-to-mainland" equidistance line through an
38 island or that ignores an island – and a most significant island at that – one that is
39 located within 12 M of the coast.

40

⁵⁹ D. Bowett, *International Maritime Boundaries*, Vol. 1, at p. 136.

⁶⁰ H. Jayewardene, "The Regime of Islands in International Law", (1990) at p. 431: "The boundary of the continental shelf between Canada and Greenland (Denmark) provides an example of how small islands lying the middle of a narrow body of water may be treated."

⁶¹ ITLOS/PV.11/8, p. 26, lines 31-35 (Lathrop).

⁶² *Y.I.L.C.*, vol. I, *Summary records of the fifth session*, 204th Meeting, p. 128, para. 37: "There were cases, however, where a departure from the general rule was necessary in fixing boundaries *across the continental shelf*; for example, where a small island opposite one State's coast belonged to another; the continental shelf surrounding that island must also belong to the second State. A general rule was necessary, but it was also necessary to provide for exceptions to it." (Mr François) (emphasis added).

1 We also trust that this Tribunal will not be seduced by Mr Lathrop's occasional
2 reference to what he called Myanmar's "dominant mainland coast".⁶³ Let us not
3 forget that Mr Lathrop was addressing the delimitation of the territorial sea. Let us
4 recall also that article 121(2) of the 1982 Convention makes it clear that islands such
5 as St Martin's Island have got exactly the same entitlements as "other land territory".
6 There is no basis – no basis - for the suggestion that any sort of adjustment is to be
7 made to the limit of the territorial sea of St Martin's Island on account of it being an
8 island. St Martin's Island is entitled to exactly the same treatment as Myanmar's
9 mainland coast - period. The concept of "dominance" simply does not arise. This is
10 all the more so where St Martin's Island is a coastal island and an integral part of
11 Bangladesh's coastline.

12
13 Related to this, Mr Lathrop invoked the concept of what he called a "simplified
14 equidistance line". That was to respond, as you will recall, to our objection to
15 Myanmar's use of incorrect base points for the calculation of the median line, in
16 particular the location of Myanmar's point B, which had ignored the nearest points on
17 Bangladesh's low water line, located on the final spit of the northern shore of the
18 Naaf River on British Admiralty Chart 817.⁶⁴

19
20 The response given by Myanmar to this was to say that it had engaged in what it
21 called a "simplification process" with respect to the equidistance line.⁶⁵ With great
22 respect, Mr Lathrop has mis-stated the concept of a "simplified equidistance line". It
23 is certainly correct that where a strict equidistance line has many turning points, all of
24 which extend the line in the same direction, those plotting the line will often delete
25 many of the turning points without altering the course of the line, or at least they will
26 give each side an equal allocation of area by way of compensation. The process of
27 simplification is done fairly such that neither party is disadvantaged, and the net
28 effect is neutral. That is not what happened here: Myanmar's segment makes a
29 distinct change of direction, and Myanmar's so-called "simplified equidistance line"
30 would, if applied by the Tribunal, give Myanmar an added area at the expense of
31 Bangladesh without any compensatory allocation to Bangladesh. It should not be
32 applied by the Tribunal: it is incorrectly calculated and it wrongly allocates an area to
33 Myanmar. The simple point is that Myanmar made a mistake in calculating the
34 equidistance line, and it has now recognized that Bangladesh's line is the correct
35 one. Mr Lathrop in effect admitted this. He conceded during his oral arguments that,
36 "From a technical perspective, there is nothing objectionable about Bangladesh's
37 proposed territorial sea line."⁶⁶ We invite you to read that very carefully because it is
38 a major concession, and we hope that the Tribunal will take note of it. In the unlikely
39 event that the Tribunal does not find that an agreed boundary in the territorial sea
40 has been in place since 1974, Bangladesh submits that the Tribunal should delimit
41 the maritime boundary in the territorial sea as plotted by Bangladesh, from points 1A
42 to 8A. You can see that line on the screen now: The only point of difference that
43 remains between the Parties, is what to do beyond Myanmar's point C, or our point
44 6A, and it is to that which I now turn.

45

⁶³ ITLOS/PV.11/8, p. 20, line 12; p. 23, line 27; p. 28, line 3 (Lathrop).

⁶⁴ RB, paras. 2.98 and 2.100; ITLOS/PV.11/3, lines 38-44, p. 27 (Sands).

⁶⁵ ITLOS/PV.11/8, p. 22, line 27 (Lathrop).

⁶⁶ ITLOS/PV.11/8, p. 21, line 4 (Lathrop).

1 Having accepted that there is “nothing objectionable about Bangladesh’s proposed
2 territorial sea line”, the burden is on Myanmar to prove there is no justification in law
3 for delimiting the boundary along to point 7 (of the 1974 agreement), or to the end
4 point (point 8A) of the territorial sea boundary drawn on the red equidistance line in
5 accordance with article 15. Mr Lathrop set out his stall in the following way:

6
7 The problem with Bangladesh’s proposed delimitation of the territorial
8 sea”, he said, “is not a technical one but a legal one. Bangladesh fails to
9 take into consideration the second half of the equidistance/special
10 circumstances rule as it applies to St Martin’s Island.⁶⁷

11
12 Putting aside the matter that it took Myanmar more than 34 years to notice that
13 St Martin’s Island was somehow a special circumstance, and that even its own
14 Foreign Minister had missed this point in 1985, the challenge for Myanmar before
15 this Tribunal is to persuade you that St Martin’s Island is indeed a special
16 circumstance.

17
18 Mr Lathrop told you that the problem with Bangladesh’s line is a “legal one”. With
19 great respect, he faces an insurmountable difficulty, as his limited use of authorities
20 makes clear: he has no legal support whatsoever for his claim.

21
22 Just before we get to that issue, it is worth noting that as regards the characteristics
23 of St Martin’s Island there appears to be a large measure of agreement between the
24 Parties. On the basis of what Mr Lathrop did and did not say, it seems there is
25 general agreement between the Parties as to the facts pertaining to St Martin’s
26 Island. It is agreed that it is an island. It is agreed that it is located at an equal
27 distance from the mainland coasts of Bangladesh and Myanmar, namely 4.5 M.
28 There seems to be no dispute that so located it is a coastal island, that it has a
29 significant population, extensive economic activity, and an important role as a base
30 for Bangladesh’s navy and coast guard. It is also common ground between the
31 parties that during the period of 34 or more years over which Myanmar unequivocally
32 recognized St. Martin’s Island’s entitlement to have a full 12 M territorial sea, no
33 problems ever arose, particularly regarding navigational passage issues. There is
34 one point of minor difference perhaps, in relation to the significance of St Martin’s
35 Island as a geographical feature, which Mr Lathrop on one occasion sought to play
36 down – but I have to say he was somewhat contradictory. Early in his presentation
37 he noted that if you were to stand on the Myanmar coast at any point between
38 Cypress Point and the town of Kyaukpandu – a considerable distance by any
39 standard – you would look toward the east-facing coast of St Martin’s Island. That
40 seems to suggest it is rather significant.⁶⁸ But then, just a few minutes later, he
41 backpedalled rather furiously, denying that St Martin’s Island is a “major geographic
42 feature”.⁶⁹ So you can see it along large parts of Myanmar’s coast, but it is not
43 significant.

44
45 This also allows me to correct a minor error into which Professor Pellet fell, when he
46 said that you could only see the mainland coast of Bangladesh from the

⁶⁷ ITLOS/PV.11/8, p. 21, lines 21-24 (Lathrop).

⁶⁸ ITLOS/PV.11/8, p. 19, line 31 (Lathrop).

⁶⁹ ITLOS/PV.11/8, p. 25, line 41 (Lathrop).

1 northernmost tip of St Martin's Island.⁷⁰ I am afraid that is not correct: a part of the
2 mainland of Bangladesh can be seen from any point on the east coast of St Martin's
3 Island.

4
5 So let's turn to the "legal problems" that Mr Lathrop identified with our line. The first
6 point to make is that in making that assertion Mr Lathrop ignored the any of the
7 cases to which I directed you.⁷¹ I am not now, this afternoon, going to repeat all of
8 them, but let us just take one. You will recall that I drew your attention to the Hawar
9 Islands, which are located very close to Bahrain but were not treated by the ICJ as a
10 special circumstance in delimiting the territorial sea. We said that we looked forward
11 to hearing from Myanmar what it had to say about the Hawar Islands, and why the
12 ICJ had got its law wrong.⁷² What did Mr Lathrop have to say? Yet again, nothing; he
13 made no mention of this island. This is a characteristic feature of Myanmar's
14 approach not just to my part of the case that I am addressing now, but to its
15 treatment generally; it ignores unhelpful authorities and hopes that somehow they
16 will just go away.

17
18 Mr President, the function of counsel is to assist the Tribunal and to confront the
19 difficulties in its own arguments.

20
21 Having failed to engage with the difficulties posed by its own treaty practice, and by
22 this and other unhelpful authorities, what he did instead was to reach out to a
23 different class of cases. Now I have to say, this had us really puzzled. He homed in
24 on two cases in particular, in support of his proposition that St Martin's was indeed a
25 special circumstance within the meaning of article 15, one that should cause a
26 normal equidistance line in the territorial sea to be adjusted or rejected.

27
28 Last Friday, in his submissions, Mr Lathrop directed you to the award of *Guinea v*
29 *Guinea-Bissau*. He described it – you can see it on the screen -- as "the most directly
30 relevant case when it comes to the treatment of islands in the delimitation of the
31 territorial sea."⁷³ That being the case, one might ask oneself what did Myanmar have
32 to say about the most directly relevant case in its Counter-Memorial. Well let us have
33 a look at what Myanmar had to say. It is not a technical hitch Mr President: of the
34 "most directly relevant case", they said ... nothing. What did they say about it in the
35 Rejoinder? We have already mentioned to you that they thought – you can see it on
36 your screen now - the award was "so eccentric that it is difficult to refer to it";⁷⁴ but
37 that is not all they had to say in their Rejoinder. Eccentric perhaps, but nevertheless
38 somehow they overcame the monumental difficulty of referring to it, and this is what
39 they said: "The award cannot be applied to the geography in the present case."⁷⁵ So
40 what is it, Mr Lathrop? Have you actually read the pleadings? What is Myanmar's
41 case? Is *Guinea v Guinea-Bissau* inapplicable to the geography of this case, or is it
42 the most directly relevant authority? I have to say that as I listened to this the
43 episode reminded me of a particularly splendid answer given by a witness during a
44 cross-examination in another case a few years ago. When asked whether she had

⁷⁰ ITLOS/PV.11/7, p. 7, lines 34-35 (Pellet).

⁷¹ ITLOS/PV.11/3, pp. 17-23 (Sands).

⁷² ITLOS/PV.11/3, p. 19, line 21 (Sands).

⁷³ ITLOS/PV.11/8, p. 27, lines 25-26 (Lathrop).

⁷⁴ RM, para. 4.27.

⁷⁵ RM, para. 3.20.

1 ever seen previously seen a document, the witness initially declined to answer. She
2 was pushed by the distinguished presiding arbitrator, and eventually she gave the
3 following memorable response to the question: “Have you ever seen this document
4 before?” “Yes”, she said, first [pause]; “No”, she said a moment later [pause] –
5 “Maybe”, she said a moment after that. Is this the way in which Myanmar invokes
6 *Guinea v Guinea-Bissau*? We look very much forward to hearing on Saturday
7 whether it is “yes” or “no”, or “maybe”, or perhaps some combination of the three.

8
9 Let’s try to help you on this case. As you can see on your screens, there were some
10 islands off the coast of Guinea and Guinea-Bissau, and some were within 12 M of
11 the coast. The arbitral tribunal did not effect the delimitation by means of an
12 equidistance line: it effected it in three stages. The line A to B reflects the agreement
13 set forth in the 1886 Convention between Portugal and France; the segment B to C
14 reflects the limit of Guinea’s claim in that area, and it will be noted that Guinea did
15 not claim a 12 M territorial sea for these islands; and the segment beyond C is
16 effected by using a bisector, as you can see in red on your screen; and it was drawn
17 to ensure that Alcatraz Island remained squarely within the area claimed by Guinea.
18 That is why the islands were not given a full 12 M. The issue of equidistance simply
19 never came into play. Mr President, the award provides no support for the
20 proposition that St Martin’s Island is not entitled to a full 12 M territorial sea.

21
22 Digging deep, very deep in fact, Mr Lathrop found another novel argument to justify
23 an adjustment of the equidistance line in the territorial sea. He raised the spectre of
24 the alleged disparity in the distance between the base points used on the coasts of
25 St Martin’s Island and of Myanmar to draw the equidistance line. Mr Lathrop said that
26 these had “a highly disproportionate ratio of approximately 1:20”.⁷⁶ In support of that
27 argument he invoked a single case, the ICJ judgment in the *Jan Mayen* case, citing
28 its conclusion that a coastal disparity of 1:9 as between the relevant coast of
29 Greenland (Denmark) and the island of Jan Mayen was “a special circumstance that
30 called for an adjustment of the equidistance line”.⁷⁷ This was even more curious than
31 his new-found love for *Guinea v Guinea Bissau*: in that case (Jan Mayen) the line
32 that was being delimited was not of the territorial sea, but of fishing zones and
33 continental shelf. As you can see now on your screens, the island of Jan Mayen is
34 located some 245 M from the coast of Greenland, and it has a full 12 M territorial
35 sea. It is simply irrelevant to the delimitation of the territorial sea.

36
37 There was a theme running through Mr Lathrop’s presentation: he sort of forgot that
38 he was dealing with the delimitation of the territorial sea. Time and again, he took
39 you to cases that relate to the area beyond 12 M, and then he invited you to apply
40 their findings to the delimitation within the 12 M limit. That is not something this
41 Tribunal can or should do, and certainly cannot do safely, Mr President, without
42 doing considerable damage to the well-established case law, all of which recognizes
43 that islands located within 12 M are entitled to a full 12 M territorial sea. Let us not
44 forget that Mr Lathrop’s presentation was entitled: “The Delimitation within 12
45 Nautical Miles”. It seems that in reality he was setting up the case for the delimitation
46 beyond 12 M. This strategy was as plain to us as his pleading was confused, and he

⁷⁶ ITLOS/PV.11/8, p. 20, line 45 (Lathrop).

⁷⁷ ITLOS/PV.11/8, p. 21, lines 1-2 (Lathrop).

1 was just as wrong about truncating St Martin's beyond 12 M, a point to which Mr
2 Reichler will return tomorrow.

3
4 Mr President, Myanmar has given every impression that it recognizes that it cannot
5 win this part of the case. It knows that its own practice, the text of the 1982
6 Convention and the jurisprudence point decisively to a judgment from this Tribunal
7 that gives St Martin's Island a full 12 M territorial sea.

8
9 What this necessarily means, as the 1974 Agreement and subsequent practice have
10 confirmed, is that the end point of the territorial sea delimitation is where Bangladesh
11 says it is: either at point 7 of the 1974 agreement, or at point 8A on Bangladesh's
12 modern equidistance line plotted strictly in accordance with the requirements of
13 article 15. Which brings me by way of wrap-up to another final curiosity of Myanmar's
14 presentation of its case in oral argument: despite the clarity of what we thought we
15 had said in the first week of hearings, it seems that we were not clear enough. Let
16 me give you one example. Last Thursday we heard Professor Pellet say that it was
17 "worth noting that our opponents do not contest the principle itself that there be a
18 necessary semi-enclaving of St Martin's Island".⁷⁸ Those were his words. In fact, it
19 repeated a point made at paragraph 3.4 of their Rejoinder.

20
21 I have to say that I was pretty surprised when I heard him say that, as we thought we
22 had taken the trouble to say very clearly that his claim, in paragraph 3.4 of their
23 Rejoinder, was "totally wrong" – those were my words -- and that we did and do
24 contest that principle. The words "totally wrong" seemed to us to admit of no
25 ambiguity, but in order to avoid any possible doubt, I also said the following, as the
26 transcript will show. I said: "We have never accepted that there is any sort of enclave
27 to be established around St Martin's, and until 2010 Myanmar made no such claim
28 either".⁷⁹ How, then, could Professor Pellet say what he did? Perhaps he had not
29 heard me. I continued to wonder why, in the face of our clear denial, he still believed
30 that we were supportive of an enclave around St Martin's Island. Then, thankfully, on
31 Monday he gave us a clue. He made a reference to modern art. He referred to the
32 work of the Dadaists and the surrealists.⁸⁰ Professor Pellet had entered the world of
33 the surrealists, the world of surprises, the world of unexpected juxtapositions and
34 *non sequiturs*. Perhaps therein lies the explanation for his odd statement, and
35 suddenly, magically, I understood. One of the most well-known surrealists is the
36 Belgian artist Rene Magritte, and one of his most famous paintings, dating to 1928,
37 is titled 'La trahison des images'. You can see that on your screens; it's his painting.
38 Some of you, I am sure will be familiar with it. It shows an image of what appears
39 indisputably to be a pipe, and then underneath it the words 'Ceci n'est pas une pipe'.
40 Magritte's point was that what we are looking at is not a pipe; it is an image of a pipe.

41
42 With that in surrealist clue in mind, we think that we can perhaps understand
43 Myanmar's approach to the delimitation of the territorial sea, which you will be able
44 to see on the screens. It plainly shows the island of St Martin's Island within a partial
45 enclave. So I can add the surrealist words, 'Ceci n'est pas une enclave'. Taking this
46 surrealist approach, I suppose that that description of this image could be right. It is
47 not an enclave, it is only an image of an enclave, and that would surely have been

⁷⁸ ITLOS/PV.11/7, p. 8, lines 21-22 (Pellet).

⁷⁹ ITLOS/PV.11/3, p. 28, lines 27-29 (Sands).

⁸⁰ ITLOS/PV.11/10, (19 September 2011, p.m. session) (Pellet).

1 Rene Magritte's point if we had retained his services instead of those of our
2 marvellous cartographers. Adopting that surrealist approach, let us try to be a little
3 more precise, in the hope that we can once and for all impress upon Myanmar's
4 counsel what our position is. Let us take a clear image that shows our line of
5 delimitation of the territorial sea. You can see it in red and you see St Martin's Island.
6 We can now graphically represent our belief that our line of delimitation does not
7 depict an image of an enclave, and we can add the words, to be clear, 'Ceci n'est
8 pas l'image d'une enclave'. Mr President, for the avoidance of all doubt, we remain
9 totally opposed to any enclaving of St Martin's. There is no justification for it in art or
10 in law.

11
12 The point is actually a serious one. Counsel for Myanmar keep coming back to the
13 enclave point, presumably as a means of helping to push the line of the territorial sea
14 delimitation back to their point E. As you can see on the screen, point E is where
15 Myanmar would like the territorial sea boundary to reconnect to their putative,
16 imaginative, erroneous, novel and legally indefensible mainland-to-mainland
17 equidistance line. They are as keen on point E as they are on an enclave,
18 Mr President – so keen, in fact, that you too will no doubt have noted the concession
19 that Professor Pellet made last Thursday afternoon, picking up on a hint made at
20 paragraph 3.7 of their Rejoinder. "In any case", he told you, "we have to join the
21 equidistance line plotted thus",⁸¹ implying that they could live with a full 12 M
22 territorial sea for St Martin's Island, so long as a line connecting the end point of a
23 full 12 M territorial sea is then drawn to Myanmar's proposed point E. On your
24 screens, in red, you can see what it would look like. That is what Myanmar is playing
25 for. As you can see for yourselves, it is a manifestly unsupportable suggestion,
26 deprived of any legal authority, and we invite you to robustly reject the suggestion.
27 Point E is not, and has never been, a reasonable starting point for the delimitation of
28 the continental shelf. It assumes the conclusion that St Martin's Island is not to be
29 given any weight beyond the territorial sea. That is the point of their argument.
30 Tomorrow, Mr Reichler will explain why there is no justification for refusing to give
31 St Martin's Island anything less than full effect from the territorial sea boundary
32 throughout the EEZ and continental shelf up to the 200 M limit. The correct starting
33 point, the one you can see on your screens, is point 7 of the 1974 agreement,
34 alternatively point 8A of the modern equidistance line.

35
36 Mr President, that concludes my presentation and, as we indicated yesterday
37 afternoon, the presentations of Bangladesh are now concluded for today. The
38 boundary in the territorial sea must be an equidistance line as required by article 15.
39 St Martin's Island is not a special circumstance; it is entitled to a full 12 M territorial
40 sea. We look forward to resuming tomorrow afternoon, assisted by a plentiful supply
41 of graphics and charts that are intended to assist the Tribunal with its work, when Mr
42 Reichler will pick up from my submissions and address the arguments of Myanmar
43 on the delimitation of the EEZ and continental shelf. Ceci est une promesse, M. le
44 President. I thank you for your kind attention.

45
46 **THE PRESIDENT:** I thank you, Mr Sands. That concludes our sitting today. The
47 hearing will resume tomorrow morning at 10 a.m. The sitting is now closed.
48

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

(The sitting closed at 4.34 p.m.)