

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



2011

Public sitting

held on Friday, 9 September 2011, at 10.00 a.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
		L. Dolliver M. Nelson
		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. The sitting is open. This morning we will
4 continue hearing the arguments of the People's Republic of Bangladesh. I give the
5 floor to Mr. Alan Boyle. Have the floor Sir.

6

7 **MR BOYLE:** Mr President, members of the Tribunal: It is a pleasure for me to
8 appear before you for the first time today, and an honour to do so on behalf of
9 Bangladesh. In the present sitting, Bangladesh will deal with the delimitation of the
10 territorial sea boundary. I will present Bangladesh's first argument, that there is an
11 agreement between the Parties which already delimits the territorial sea boundary.
12 My colleague Professor Sands will then address the Tribunal on Bangladesh's
13 second and alternative argument that, even if there is no such agreement, the
14 territorial sea boundary would nevertheless be an equidistance line drawn in
15 conformity with article 15 of the 1982 UN Convention on the Law of the Sea, and one
16 that gives full effect to a 12-mile limit.

17

18 Mr President, I have three submissions to make before you today: first, that in
19 accordance with article 15 of the 1982 Convention, the territorial sea boundary
20 between Bangladesh and Myanmar was settled definitively by agreement in 1974,
21 that agreement was subsequently re-confirmed and amended in minor detail in April
22 2008.

23

24 Secondly, the Agreed Minutes that constitute the 1974 agreement are an
25 "agreement" for the purposes of article 15, are binding in international law and
26 remain valid and in force between the Parties.

27

28 And thirdly, that the practice of both Parties shows that from 1974 until now, they
29 have fully respected the agreed boundary, entirely without incident or dispute, and
30 that both Parties treated the 1974 Agreed Minutes as reflecting a binding agreement
31 with respect to the delimitation of the territorial sea.

32

33 Let me begin by simply setting out the terms of article 15. You will find the text at tab
34 2.1 in the Judges' folder, but you will also see it on the screen. Both sides accept
35 that article 15 represents the applicable law on delimitation of the territorial sea.

1 Article 15 provides:

2
3 “Where the coasts of two States are opposite or adjacent to each other,
4 neither of the two States is entitled, *failing agreement between them to the*
5 *contrary*, to extend its territorial sea beyond the median line every point of
6 which is equidistant from the nearest points on the baselines from which
7 the breadth of the territorial seas of each of the two States is measured.
8 The above provision, [it goes on,] does not apply, however, where it is
9 necessary by reason of historic title or other special circumstances to
10 delimit the territorial seas of the two States in a way which is at variance
11 therewith.”
12

13 Save in one entirely immaterial respect, this article replicates article 12 of the 1958
14 Geneva Convention on the Territorial Sea.¹
15

16 The key point in article 15 is that it envisages the possibility of delimiting a territorial
17 sea boundary by “agreement”, and only in the absence of such an agreement is it
18 necessary to resort to the article’s other rules on delimitation. If the Tribunal
19 concludes that there is indeed an agreed territorial sea boundary between the
20 Parties then it need go no further on this element of the case.
21

22 The Parties disagree on two central points: whether they in fact concluded
23 a delimitation agreement in 1974 or subsequently, and whether as a matter of law
24 such an “agreement” must be a formally negotiated treaty in order to fall within the
25 terms of article 15 of the 1982 Convention. And it’s convenient to deal first with the
26 question whether there is an agreement before considering what kind of “agreement”
27 article 15 envisages.
28

29 Bangladesh has no doubt that there is an agreement on delimitation of the territorial
30 sea, that it was negotiated in 1974 and supported subsequently by the consistent
31 conduct of both Parties, and reiterated and confirmed in a further agreement
32 concluded in 2008. The original agreement takes the form of Agreed Minutes from
33 a meeting between the Parties on 23 November 1974. The Agreed Minutes were
34 subsequently signed by the heads of the both delegations, Ambassador Kaiser of
35 Bangladesh and Vice Chief of the Myanmar Naval Staff, Commodore Hlaing. The
36 agreed boundary line was set out on Chart No.114, also signed at the same time by
37 Ambassador Kaiser and Commodore Hlaing. And if we look at the map on the
38 screen, you will see the signatures down in the left-hand corner. It may also be
39 useful at this point to look at the agreed line as indicated on Chart 114. And that
40 should be coming up at any moment, I hope. And there it is and you can see to the
41 left of that line you can also see St Martin’s Island. And that was the line agreed in
42 1974, annexed to the Agreed Minutes, and signed by the heads of both delegations.
43

44 In deciding whether these Agreed Minutes and the annexed chart constitute an
45 agreement on delimitation of the territorial sea the court should of course focus on
46 the terms of the Minutes and the chart. Let me remind the Tribunal what the Agreed

¹ The second sentence reads as follows in article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone: “The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision”.

1 Minutes say with respect to the territorial sea. Paragraph 1 records that delegations
2 from both States, and I should perhaps say that you will find a copy of the Agreed
3 Minutes in your folder at tab 2.2., Paragraph 1 records that delegations of both
4 States held discussions on delimiting their maritime boundary in September and
5 November 1974.

6
7 Paragraph 2 indicates that with respect to the territorial sea boundary the two
8 delegations agreed as follows (and the text should be about to come up on screen
9 any moment and you will find it in your bundle at tab 2.3):

10
11 The relevant paragraph one says that:

12
13 "I. The boundary will be formed by a line extending seaward from
14 Boundary Point No.1 in the Naaf River to the point of intersection of arcs of
15 12 nautical miles from the southernmost tip of St Martin's Island and the
16 nearest point on the coast of the Burmese mainland, connecting the
17 intermediate points, which are mid-points between the nearest points on
18 the coast of St Martin's Island and the coast of the Burmese mainland.

19
20 It goes on to say that:

21
22 The general alignment of the boundary mentioned above is illustrated on
23 Special Chart No.114 annexed to these minutes."

24
25 And that is the chart we have already seen. And finally in Section II of paragraph 2
26 says:

27
28 "II. The final coordinates of the turning points for delimiting the
29 boundary of the territorial waters as agreed above will be fixed on the
30 basis of the data collected by a joint survey."

31
32 That is all that remained to be done.

33
34 Paragraph 3 provides:

35
36 "The Burmese delegation in the course of the discussions in Dacca stated
37 that their Government's agreement to delimit the territorial waters boundary
38 in the manner set forth in para.2 ... is subject to a guarantee that Burmese
39 ships would have the right of free and unimpeded navigation through
40 Bangladesh waters around St Martin's Island to and from the Burmese
41 sector of the Naaf River."

42
43 Bangladesh's agreement to that proviso is set out in paragraph 4 of the Minutes.

44
45 Finally, paragraph 5 indicates that copies of a draft treaty on the delimitation of the
46 territorial sea boundary were given to the Burmese delegation so that they could
47 elicit the views of their government. And paragraph 6 notes that discussions on an
48 exclusive economic zone and continental shelf boundary would continue.

49
50 That is all the Agreed Minutes say.

51

1 Do these two documents evidence the conclusion of an agreement delimiting the
2 territorial sea in 1974? Yes, for four reasons. First, the terms are clear and
3 unambiguous. Their ordinary meaning is that a boundary has been agreed. The text
4 clearly identifies a boundary located midway between St Martin's Island and the
5 coast of Myanmar, from points 1-7 as shown on Chart 114. Second, the object and
6 purpose of the agreement and the context in which it was negotiated could not be
7 clearer: to negotiate a maritime boundary. Third, the fact of agreement is evidenced
8 by the signature of the heads of both delegations and the terminology they used –
9 "Agreed Minutes". Fourth, they are unconditional apart from completing the
10 technicalities required to establish the final co-ordinates resulting from the joint
11 survey.

12
13 Myanmar alleges that the agreement on a territorial sea boundary was also
14 conditional on negotiating a more comprehensive maritime boundary² but paragraph
15 6 of the Agreed Minutes simply indicates that an EEZ/continental shelf boundary had
16 been discussed and that discussions on that issue would continue. Nowhere in the
17 Agreed Minutes is it suggested, as Myanmar alleges, that the territorial sea
18 agreement was conditional on negotiation of a larger package - nowhere.

19
20 If the conditionality point was repeated time and time again in the negotiations, as
21 Myanmar alleges,³ why do the Agreed Minutes not reflect this? Why indeed do
22 Myanmar's own records not reflect it? It is true, if you read them, that at their third
23 meeting on 23 November Myanmar records that "The Burmese side (and I'm
24 quoting) took the position that the agreed minutes should deal with the subject
25 matter *en toto* as one of delimiting the overall maritime boundary between the two
26 countries, and not be specific about a particular sector."⁴ That is what they record,
27 but that tells us only what Myanmar's preferred position was at that point in the
28 negotiations. By the end of the negotiations the Parties had been unable to
29 conclude the comprehensive agreement that Myanmar would have preferred, hence
30 their acceptance at that point of an *ad hoc* agreement limited to the territorial sea.

31
32 Bangladesh was well aware in 1974 and subsequently that Myanmar would have
33 liked to conclude a comprehensive maritime boundary treaty, but that does not mean
34 that Bangladesh understood Myanmar to say in 1974 that whatever was agreed on
35 the territorial sea would be merely provisional and conditional on broader agreement.
36 Bangladesh's own record of the negotiations shows only that Myanmar was not at
37 the outset inclined to conclude a separate treaty on delimitation of the territorial sea,
38 and would have preferred a comprehensive treaty.⁵ Myanmar's records show the
39 same.⁶ But by the end of the negotiations they had concluded the Agreed Minutes on
40 the territorial sea.

41
42 Now, even though Myanmar subsequently decided not to agree to the adoption of
43 the draft treaties that Bangladesh had earlier prepared, because it did want a

² Rejoinder of the Republic of the Union of Myanmar (hereinafter "MR"), paras. 2.17-2.19.

³ MR, para. 2.17.

⁴ Counter-Memorial of the Union of Myanmar (hereinafter "MCM"), Annex 3, 3rd Mtng, 23/11/74, p.3. See also 1st Mtng, 20/11/74, p. 5, para. 10.

⁵ *Brief Report on Negotiations on Maritime Boundary*, 19th-25th November 1974, Memorial of Bangladesh (hereinafter "BM"), Vol. III, Annex 14.

⁶ See Annexes 2-5 of MCM.

1 broader agreement, and even if it did reiterate the point in the negotiations, that does
2 not alter or diminish in any way the plain wording of the 1974 Agreed Minutes. The
3 Minutes may indeed be an *ad hoc* agreement – that is what you would expect, but so
4 what? The clear implication of the text is that – however reluctantly – both Parties in
5 the end concluded their broader negotiation by signing a boundary agreement limited
6 to the territorial sea. That agreement was on its face unconditional, save for
7 completing the technicalities. It made no reference to conditionality on any further
8 agreement. Myanmar’s version of events is simply not consistent with the text as
9 drafted or with its own record of the 1974 negotiations or with the practice of both
10 States for nearly four decades.

11
12 Over the next twelve years the Parties continued to try to negotiate an EEZ and
13 continental shelf boundary, unsuccessfully, as we know. Nevertheless, both Parties
14 accepted and respected the 1974 Agreed Minutes on the territorial sea until 2008,
15 when negotiations on a more comprehensive boundary agreement resumed. They
16 adopted further Agreed Minutes in 2008 and in those Minutes the parties record or
17 the minutes record that the Parties decided, *inter alia*, that "the agreed minutes of ...
18 1974 will remain the same" – will remain the same – subject to two very minor
19 alterations.⁷

20
21 *First*, and I quote, the Parties “plotted the coordinates as agreed in 1974 of the *ad*
22 *hoc* understanding on a more recent and internationally recognized chart, as you can
23 now see on the screen, namely Admiralty Chart No. 817”. Points 1 and 5 were
24 slightly adjusted on that chart,⁸ but points 2-4 and points 6-7 were unchanged, as a
25 comparison of the two charts will show. The specific coordinates of the revised
26 territorial sea delimitation you can see on the map. You will also find the map at tab
27 2.4 in your folder. That was the first minor change.

28
29 *Secondly*, the Parties agreed to replace the phrase "unimpeded access" in
30 paragraph 3 of the 1974 Agreement with the rather more up-to-date phrase which
31 reads: "Innocent passage through the territorial sea shall take place in conformity
32 with the UNCLOS 1982 and shall be based on reciprocity in each other's waters."
33 Yesterday you heard the Foreign Minister and Agent for Bangladesh reiterate that
34 commitment, which has proved entirely trouble-free. All of the other terms of the
35 1974 Agreed Minutes remained the same.

36
37 The 2008 Agreed Minutes cannot be read in any other way than as affirming and
38 updating the agreement reached in 1974 and followed thereafter. You will find the full
39 text of those Minutes set out at Annex VII in Vol. III of Bangladesh’s Memorial.

40
41 It was then some five months later, five months *after* the 2008 Agreed Minutes had
42 been adopted when Myanmar attempted first of all to annul the agreed boundary,
43 allegedly because the 1974 Minutes had been signed before adoption of the 1982

⁷ *Agreed Minutes of the meeting held between the Bangladesh Delegation and Myanmar Delegation regarding the delimitation of the Maritime Boundary between the two countries dated 1 April 2008*, BM, Vol. III, Annex VIII.

⁸ Point 1 was adjusted to reflect the co-ordinates agreed in 1980 and Point 5 was adjusted approximately 0.15 km south. See BM, para. 3.27.

1 UNCLOS.⁹ Myanmar quickly realized that was not a very sensible approach. They
2 withdrew its attempt to annul the whole agreement, and argued instead that the final
3 point, point 7, had not been agreed. This remains the position taken by Myanmar. It
4 is of course flatly contradicted by the terms of the Agreed Minutes of 1974 and the
5 Agreed Minutes of 2008 and the charts attached thereto. Point 7 is clearly indicated
6 on those charts. It is shown on the 1974 chart and again on the 2008 chart. And if
7 we look again at the 2008 chart you can see it there.¹⁰ There was no indication of
8 any uncertainty or dispute about point 7 when the 2008 Agreed Minutes and chart
9 were adopted or in the negotiations, and there is no uncertainty today. In contrast –
10 and I think this proves the point - there was initially a point 8 in Bangladesh's original
11 proposal in 1974, but Myanmar did object to that one, and it was eventually
12 dropped.¹¹ If you look at the charts, there is no point 8, so you can see that clearly
13 there was negotiation about at least one point and changes were made, but point 7
14 was agreed.

15

16 So summing up this part of the argument, a territorial sea boundary was agreed in
17 1974, with seven points, marked on Chart No. 114; it was reiterated and confirmed in
18 2008 with minor modifications to two points, also marked on an agreed chart. Only
19 since September 2008 has Myanmar contested the course of this previously agreed
20 boundary. In Bangladesh's submission, Myanmar cannot now change its mind and
21 unilaterally repudiate part of a boundary agreed definitively and put into effect 37
22 years ago, and respected thereafter.

23

24 Mr. President and members of the Court, let me now turn to the legal questions that
25 separate the Parties with respect to article 15 of the 1982 Convention. Article 15, as
26 we have seen, uses the term "agreement". We all know that a treaty between States
27 is necessarily an agreement binding in international law, whatever its particular
28 designation and article 1 of the 1969 Vienna Convention on the Law of Treaties so
29 provides,¹² but it does not follow that an "agreement" between States must
30 necessarily be in every sense a formally negotiated and binding treaty. Bangladesh
31 takes the view that the 1974 and 2008 Agreed Minutes are "agreements" delimiting
32 the territorial sea boundary in accordance with article 15. Myanmar disagrees and
33 claims that these agreements must be binding treaties,¹³ concluded by
34 representatives with full powers,¹⁴ and must be ratified.¹⁵ Myanmar in effect says that
35 the Agreed Minutes have no legal status because those who conducted the
36 negotiations did not possess full powers; and the Agreed Minutes were never
37 ratified, and they cannot therefore be binding. Myanmar's approach is not supported
38 by the text of article 15, for reasons I will explain.

39

⁹ *Report of the Visit of the Bangladesh Delegation to Myanmar regarding the delimitation of the maritime boundary*, Bagan, Myanmar, 4-5 September 2008, BM, Vol. III, Annex 18.

¹⁰ BM, Vol. II, Figure 3.3.

¹¹ 1974 1st Mtng, para. 7, MCM Annex 2; 1974 3rd Mtng, chapeau para., MCM Annex 3.

¹² Article 1(a), Vienna Convention on the Law of Treaties, 23 May 1969, 8 ILM 1969 (hereinafter "VCLT"); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p.112, para. 23 (hereinafter "Qatar v. Bahrain").

¹³ MR, paras. 2.35-2.36.

¹⁴ MR, paras. 2.23-2.38.

¹⁵ MR, paras. 2.29-2.34.

1 But let us suppose, purely for the sake of academic argument, that Myanmar is partly
2 right and let's suppose that the word "agreement" in article 15 does mean "binding
3 treaty". Would that be fatal to Bangladesh's case? Well no, it would not because
4 whether an agreement constitutes a binding treaty has to be determined objectively,
5 by reference to what the text says and the circumstances of its conclusion.¹⁶ The
6 question cannot be answered subjectively by reference to what the parties
7 subsequently say they intended, because they will of course disagree on exactly that
8 point, as they are in this case. In the *Qatar v. Bahrain*, a maritime delimitation case,
9 the International Court had to deal with exactly this article. In that case, the Court
10 held that agreed minutes of a negotiation constituted a binding agreement, a binding
11 treaty in other words, despite strong disagreement between the parties on whether
12 they had intended to conclude a treaty.

13
14 Quoting the *Aegean Sea Case*, the Court said in its judgment that I quote "[i]n order
15 to ascertain whether an agreement of that kind has been concluded, 'the Court must
16 have regard above all to its actual terms and to the particular circumstances in which
17 it was drawn up'."¹⁷ Having examined the agreed minutes, the Court went on in this
18 case to hold. I quote again:

19
20 ...the Minutes are not a simple record of a meeting...; they do not merely
21 give an account of discussions and summarize points of agreement and
22 disagreement. They enumerate the commitments to which the Parties
23 have consented. They thus create rights and obligations in international
24 law for the Parties. They constitute an international agreement.¹⁸

25
26 Exactly the same can be said in the present case about the 1974 and 2008 Agreed
27 Minutes. They are not a simple record of a meeting or a summary of points of
28 agreement and disagreement. They articulate a commitment to a clearly defined
29 maritime boundary in the territorial sea. Both Parties have consented to this agreed
30 boundary. The fact that Myanmar and Bangladesh felt obliged to amend the Agreed
31 Minutes in 2008 supports that conclusion. Why would they do so if the 1974 Agreed
32 Minutes did not constitute an agreed boundary? Why would Myanmar then seek to
33 annul the 2008 Agreed Minutes if they too did not constitute an agreed boundary? It
34 makes no sense to amend or annul something that allegedly has no legal
35 significance or effect.

36
37 Myanmar says that the "ordinary meaning of the text should not be mistaken for the
38 form".¹⁹ But as both the *Aegean Sea Case*²⁰ and the *Qatar v. Bahrain Case*²¹ make

¹⁶ *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Judgment of 19 December 1978, ICJ Reports 1978, p. 3, para. 96 (hereinafter "*Aegean Sea Case*"); *Qatar v. Bahrain* paras. 23-30; See A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge, 2007), pp. 49-52; S. Rosenne, "The *Qatar v. Bahrain Case*," (1995) *Leiden J.Int.L.* 161, 165; C. Chinkin, "A Mirage in the Sand? Distinguishing Binding and Non-binding Relations between States," (1997) *Leiden J.Int.L.* 223.

¹⁷ *Qatar v. Bahrain*, para. 23.

¹⁸ *Ibid.*, para. 25.

¹⁹ MR, para. 2.13.

²⁰ The Court stated:

Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form—a communiqué—in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué,

1 clear, the content and wording of the text is one of the best possible indicators of the
2 existence of an agreement – the other indicator being the circumstances in which it
3 is negotiated and adopted. There is really no need for me to labour this obvious
4 point again. The very fact that Myanmar makes the argument at all shows how they
5 do actually accept that the ordinary meaning of the 1974 Minutes indicates an
6 agreement between the parties.
7

8 Myanmar then attempts to evade these rather obvious points by saying that the 1974
9 Agreed Minutes are simply an “ad hoc conditional understanding” – that nothing is
10 agreed until everything is agreed.²² They are trying to turn it into the UNCLOS III
11 Conference, I think. They cite David Anderson, a very distinguished former judge of
12 this Tribunal, in an attempt to reinforce their very thin argument, but if you read the
13 quotation from Judge Anderson’s work in full, and they do set it out in the counter-
14 memorial, if you read it in full it becomes clear by the end that he actually supports
15 Bangladesh’s views. Having noted that some agreements of a negotiated boundary
16 can be “banked” provisionally – although I wonder whether references to banking in
17 the modern world are perhaps a little unwise – but the references to some
18 agreements that have been negotiated can be banked provisionally until a full
19 agreement is reached, he nevertheless concludes by saying, and I quote: “At the
20 same time a failure to reach full agreement may still yield a partial agreement
21 thereby reducing the scope of the remaining dispute.”²³ That is precisely the position
22 set out by Bangladesh with respect to the 1974 and 2008 Agreed Minutes. Both in
23 1974 and 2008 the parties sought to reduce the scope of the remaining dispute by
24 reaching an *ad hoc* agreement limited to the territorial sea – a very sensible way to
25 proceed, you may think, familiar to anyone in this room who has ever advised
26 governments on these delicate situations.
27

28 Myanmar also tries to buttress its argument by quoting from the *Qatar v. Bahrain*
29 case where the International Court notes that “agreement is not easily to be
30 presumed”. Well fortunately, the Tribunal in the present case has no need to
31 presume an agreement: it has two clearly worded unambiguous texts on which to
32 base its conclusions, supported by detailed charts. Myanmar says that it is “not
33 particularly common” for agreed minutes to constitute an agreement.²⁴ But even
34 Myanmar does not rule out the possibility that agreed minutes may constitute an
35 agreement, as they undoubtedly did in the *Qatar v. Bahrain* case. These are very
36 weak arguments put forward by Myanmar. They really are clutching at straws.
37

38 Then they go on to say, and this is their last point, that Commodore Hlaing had no
39 authority to sign an agreement²⁵ and that the agreement has not been ratified. But
40 that argument assumes that an article 15 agreement has to be a formally negotiated
41 treaty, attended by all the panoply of full powers, ratification and so on. Bangladesh
42 does not agree. In its view a less formally negotiated agreement is still fully within

the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.

Aegean Sea Case, para. 96.

²¹ *Qatar v. Bahrain*, paras. 2.3-2.5.

²² MR, para. 2.5.

²³ MR, para. 2.6.

²⁴ MR, para. 2.10.

²⁵ MR, paras. 2.23-2.28.

1 the terms of article 15, including, for example, if the agreement takes the form of
2 agreed minutes, a memorandum of understanding, or an agreement between
3 officials, then the full powers envisaged by article 7(1)(a) of the Vienna Convention
4 on Treaties or the ratification envisaged by article 14 are unnecessary.

5
6 In such cases the practice of States is to allow the appropriate officials to express
7 the State's consent without the full powers required for a treaty, and without the need
8 for formal ratification. Let me at this point, draw the Tribunal's attention to article
9 7(1)(b) of the Vienna Convention on Treaties. You will also see it on the screen and
10 the tab 2.5 in your folder. Article 7(1) says and I read it out:

- 11
12 1. A person is considered as representing a State for the purpose of
13 adopting or authenticating the text of a treaty or for the purpose of
14 expressing the consent of the State to be bound by a treaty if:
15
16 a. he produces appropriate full powers; or
17 b. it appears from the practice of the States concerned or
18 from other circumstances that their intention was to
19 consider that person as representing the State for such
20 purposes and to dispense with full powers.
21

22 Sir Ian Sinclair, in his book on the Vienna Convention, explains that "Subparagraph
23 (b) [of article 7(1)] is intended to preserve the modern practice of States to dispense
24 with full powers in the case of agreements in simplified form."²⁶
25

26 Well, that is exactly the situation in the present case. There can be no doubt – and
27 Myanmar does not deny – that Commodore Hlaing was the appropriate Burmese
28 official to negotiate with Bangladesh in 1974. He did not require full powers to
29 conclude an agreement in simplified form. In any case, if he did lack authority to
30 sign, he would only make the agreement voidable, not void.²⁷ It remains valid, in
31 accordance with article 8 of the Vienna Convention on Treaties, if it is afterwards
32 confirmed by the State concerned.²⁸ The Agreed Minutes were adopted in 1974, yet
33 the first occasion on which Myanmar has alleged that Commodore Hlaing lacked
34 authority to sign them was in the pleadings for this case. For 35 years Myanmar
35 respected the agreement and relied on its terms. They were confirmed and re-
36 adopted in 2008. The terminology used in article 8 is afterwards confirmed by that
37 State. They were confirmed in 2008. In these circumstances Myanmar cannot claim
38 a lack of authority on the part of the officials concerned. By confirming and re-
39 adopting the Agreed Minutes in 2008 and implementing them in practice, they have
40 waived any right to make such an argument, and are now estopped from changing
41 their position.²⁹ Frankly, it does not matter because Commodore Hlaing did not need
42 full powers to conclude an agreement in simplified form.

²⁶ I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn., Manchester, 1984), p. 31.

²⁷ VCLT, Article 8 provides: "An act relating to the conclusion of a treaty performed by a person who cannot be considered under Article 7 as authorized to represent a state for that purpose is without legal effect *unless afterwards confirmed by that State.*"

²⁸ *Ibid.*

²⁹ *Legal Status of Eastern Greenland* (Denmark v. Norway), Judgment of 5 April 1933, PCIJ Series A/B, 22 at pp. 70-71; *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, ICJ Reports 1962, p. 6 at 34; *Nuclear Tests (Australia v. France)*, Judgment of 20

1
2 The 1974 Agreed Minutes as amended in 2008 thus remain valid and binding
3 between the parties and Myanmar has done nothing to alter that position. They
4 constitute a binding treaty under international law, and the label “Agreed Minutes”
5 cannot alter that status.
6

7 But Myanmar would have you believe that the 1982 Convention uses the term
8 “agreement” in a much more limited sense. They would like you to exclude from
9 article 15 those less formally negotiated agreements that characterize much of
10 modern international relations in a globalised world, even if they are otherwise
11 binding in international law. Myanmar’s conception of the term “agreement” would
12 not have looked out of place at the Hague Conferences of 1899 and 1907, but it
13 looks very outdated today. Even the Vienna Convention on the Law of Treaties uses
14 the word “agreement” more loosely to include instruments that are not formal treaties
15 and are not necessarily even binding. If we take article 31(3) of the Vienna
16 Convention, it refers to “agreements relating to the treaty” and “subsequent
17 agreements” but in neither case is it necessary that these agreements of that kind
18 must themselves be formally negotiated treaties.
19

20 Tony Aust, a former foreign ministry legal adviser with great experience in this field,
21 has written in his book on treaties that “There is no need [in the circumstances of
22 article 31(3) of the Vienna Convention] there is no need for a further treaty, since the
23 paragraph refers to an ‘agreement’, not a treaty. Provided the purpose is clear, (he
24 goes on) the agreement can take various forms.”³⁰ He cites, *inter alia*, an agreed
25 minute, an exchange of letters, a decision of the parties, and agreed understandings
26 of some provision in a treaty.³¹
27

28 At least 37 articles – I have to be slightly cautious about the number there because
29 there is only so much of my energy can be devoted to counting articles in the 1982
30 Convention, but I tried, at least 37 articles of the 1982 Convention use the term
31 “agreement”: you will see the list on screen – I will not bore you by reading it out.
32 You can see the sorts of things they cover, a wide variety of activities and articles.
33

34 A handful of those articles does use the phrase “international agreement” [article 23
35 on nuclear powered ships, article 288 on jurisdiction, article 303 on archeological
36 objects and article 311 on relationship to other international agreements]. In those
37 four cases the agreements in question are very likely to be binding multilateral
38 treaties, probably adopted by IAEA, IMO, UNESCO or the UN, but article 15 does
39 not refer to an “international agreement”; it simply talks about “an agreement”. It
40 does not use any other qualifying form found elsewhere in the 1982 Convention.

December 1974, ICJ Reports 1974, p. 253 at 267-268; M.N. Shaw, *International Law* (5th edn. Cambridge, 2003), pp. 439-440. VCLT, Article 45 also provides:

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

³⁰ A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge, 2007), p. 239.

³¹ *Ibid.*, pp. 237, 239.

1 The correct interpretation of any of these UNCLOS provisions will of course depend
2 on the context, but there is no reason in principle why the term “agreement” should
3 always be synonymous with a binding treaty formally negotiated by representatives
4 with full powers to sign and ratify.

5
6 To take a random example – and it was random, but it is a good one – from Part III
7 on international straits, an agreement under article 43 to co-operate on navigational
8 aids or prevention of pollution. Agreements of that kind are far more likely to be in
9 the form of a memorandum of understanding or an action plan negotiated between
10 the relevant government agencies. Certainly it would be very odd to insist that only a
11 formally negotiated and ratified treaty could satisfy the terms of article 43. A great
12 deal of maritime co-operation is carried out under less formal bilateral or multilateral
13 agreements. Good examples can be found in UNEP’s Regional Seas Programme,
14 which is replete with agreements and action plans that are not registered at the UN
15 as treaties, or published in national treaty series, or ratified.³²

16
17 So, to hold that the word “agreement” is synonymous with a formally negotiated and
18 ratified treaty every time it appears in the 1982 Convention would neither be right nor
19 prudent nor would it reflect the real-world practice of states.

20
21 The only authority advanced by Myanmar to justify its contention that such
22 agreements must be formally negotiated treaties is the ICJ judgment in the *Maritime*
23 *Delimitation of the Black Sea Case*.³³ This case does not decide that only a formally
24 negotiated treaty can delimit a maritime boundary. On the contrary, the Court held
25 that a procès-verbal negotiated in 1949 had already delimited an agreed territorial
26 sea boundary. And if I quote from the judgment, they say that the procès-verbal
27 contains a complete description covering both land territory in the national border
28 area and the maritime territory up to Point 1439.³⁴ The Court held that that was an
29 agreed boundary of the territorial sea.

30
31 So the issue before the Court was not the status of the procès-verbal but whether it
32 also established a continental shelf/exclusive economic zone boundary for the
33 purposes of articles 74 and 83. They simply went on to find that the procès-verbal
34 as drafted in 1949, not surprisingly, had not delimited a boundary in the continental
35 shelf or the exclusive economic zone, but it nowhere suggested that the term
36 “agreement” referred to in articles 74 and 83 had to be a formally negotiated treaty
37 rather than a procès-verbal, nor did it say anything that supports Myanmar’s
38 assertions to this effect. It referred simply to “agreements” and carefully avoided any
39 suggestion that a formal treaty was required.³⁵

³²1981 Caribbean Action Plan; 1994 Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region; 1995 Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region; 1994 Action Plan for the Protection, Management and Development of the Marine and Coastal Environment of the Northwest Pacific Region; 1981 Action Plan for the protection and Development of the Marine Environment and Coastal Areas of the West and Central African Region; 2002 Plan of Action for the Protection and Sustainable Development of the Marine and Coastal Areas of the North-East Pacific; 1995 South Asian Seas Action Plan. See UNEP @ <http://www.unep.org/regionalseas/programmes/unpro/eastasian/instruments/default.asp>

³³ 2009 ICJ Reports p. 61 (hereinafter “*Black Sea Case*”).

³⁴ *Black Sea Case*, para. 57.

³⁵ *Ibid.*, para. 69.

1
2 The *Black Sea* case thus shows that an appropriately worded agreement or
3 procès-verbal between officials is sufficient for the purposes of article 15 and would
4 appear to be equally sufficient for the purposes of articles 74 and 83 even if it is not a
5 formally negotiated treaty.

6
7 It is interesting to note that in the *Qatar v. Bahrain* maritime delimitation case the
8 International Court also translated the term “procès-verbal” as “minutes”.³⁶ The 1974
9 Agreed Minutes which form the basis of the agreement on which Bangladesh relies
10 in this case are very similar or identical to the procès-verbal in the *Black Sea* case.
11 They both record an agreement negotiated by officials with power to conclude
12 agreements in simplified form in accordance with article 7(1)(b) of the Vienna
13 Convention, and Myanmar’s objections to the conclusion of an agreement by officials
14 who lack the full powers to conclude treaties are irrelevant, as are its arguments
15 about ratification. What matters is whether the Parties have agreed on a boundary,
16 even in simplified form, not whether their agreement is a formally negotiated treaty or
17 has been signed by representatives empowered to negotiate or ratify the treaty.

18
19 So the 1974 and 2008 Agreed Minutes are thus valid agreements within the terms of
20 article 15, and the annexed charts show exactly where that boundary is located.
21 There is no uncertainty or doubt on that matter.

22
23 Mr President, that brings me to my third and final argument, and on this I can be
24 mercifully brief. As I have indicated several times, the existence of an agreed
25 boundary is confirmed by the settled practice of the parties since 1974. Myanmar
26 tries to deny this rather obvious fact,³⁷ but there have been no conflicts over the
27 territorial sea during that long period of time. Fishermen have fished, ships have
28 sailed unimpeded, navies have patrolled their own side of the line, entirely without
29 incident. As the minister said yesterday, there have been no navigational problems
30 over unimpeded access to the Naaf River and Myanmar has not alleged any. This
31 would all be very remarkable indeed if there were no agreed boundary. It is merely
32 commonplace where there is an agreed boundary. All that Myanmar can manage to
33 say is that Bangladesh has not proved any of these things.³⁸ It is a bit difficult to
34 prove the absence of conflict, though I suppose we could try reading the newspapers
35 for the past 30 years! But, of course there is plenty of evidence to show that
36 Bangladesh has policed its side of the agreed boundary without challenge from
37 Myanmar. That is the point of the naval logs and affidavits from fishermen set out in
38 the annexes to its Reply.³⁹

39
40 The evidence adduced by Bangladesh shows that fishermen are arrested when they
41 fish illegally or carry illegal immigrants on the Bangladeshi side of the line, and the
42 fishermen appear well aware of the existence of a boundary in the territorial sea.⁴⁰
43 Again there is no evidence of any fishing disputes one would expect if the boundary
44 was not agreed; and one can think of many fishing disputes that occur in countries
45 where there is no agreed boundary.

³⁶1994 ICJ Reports 112.

³⁷ MR, para 2.68.

³⁸ MR, paras, 2.56-2.68.

³⁹ BR, Vol. III, Annexes R 15, R 16 and R 17.

⁴⁰ BR, Vol. III, Annex R 16.

1
2 Myanmar dismisses the note verbale of 16 January 2008⁴¹ concerning a Myanmar
3 survey vessel conducting research on both sides of the territorial sea boundary,⁴² but
4 the fact is that, however it may dress the matter up, Myanmar did notify Bangladesh
5 of its intention to carry out survey work on both sides of the boundary, and
6 Bangladesh raised no objection thereto.⁴³ Now, why would Myanmar seek
7 Bangladesh's consent if it regarded the whole area as falling within Myanmar's
8 territorial sea? Its conduct in 2008 clearly amounts to an acknowledgment of
9 Bangladesh's sovereignty over the territorial sea up to twelve miles from St. Martin's
10 Island up to the median line, and its own note verbale even made express reference
11 to the 1974 Agreed Minutes in that context.

12
13 So all of the circumstances therefore point to the existence of an agreed, trouble-free
14 boundary that has worked successfully since 1974 and continues to work even after
15 it was questioned by Myanmar in 2008.

16
17 Mr President, members of the Court, that brings me to my very brief conclusions.
18 The Agreed Minutes of 1974 delimit the territorial sea between Bangladesh and
19 Myanmar. That agreement, as re-confirmed and modified in 2008, is fully within the
20 terms of article 15 of the 1982 UN Convention on the Law of the Sea and it thus
21 constitutes a definitive boundary line within the territorial sea. That boundary is
22 indicated on Special Chart 114 and is subsequently modified on Admiralty Chart No.
23 817. Its existence is further confirmed by the subsequent practice of the Parties,
24 including the lack of objection and the absence of any disputes.

25
26 Mr President, members of the Tribunal, it has been a pleasure to appear before you
27 this morning. I thank you for your patience in listening to me and I now ask you to
28 give the floor to Professor Sands.

29
30 **THE PRESIDENT:** Thank you, Mr Boyle. I now give the floor to Mr Philippe Sands.

31
32 **MR SANDS:** Mr President, members of the Tribunal, it is a privilege for me to
33 appear before you in these proceedings on behalf of Bangladesh. I will address
34 Bangladesh's second argument, the delimitation of the territorial sea in the event that
35 the Tribunal concludes, contrary to our primary submission, that there is not already
36 an agreement between the Parties on this matter.

37
38 I will not finish, Mr. President, before the break. So, with your permission, I may
39 indicate a suitable moment in my submissions for the 30-minute break.

40
41 Bangladesh submits that there is compelling evidence to show that both Parties
42 proceeded to act, for more than three decades, on the basis of a binding, valid
43 effective agreement in force between them on the delimitation of the territorial sea,
44 as set out for you by my friend and colleague Professor Boyle. This boundary was
45 settled definitively by Bangladesh and Myanmar in 1974 and it was reaffirmed in
46 2008, both Parties have respected that agreement and they have abided by it
47 without apparent incident or protest over four decades. The submissions that I will

⁴¹ BR, Vol. III, Annex R 1.

⁴² MR, para 2.67.

⁴³ BR, para. 2.94.

1 put before you this morning are to be treated as an alternative. It is only if the
2 Tribunal declines to find an agreement on the delimitation of the territorial sea that
3 the other requirements of article 15 of the 1982 Convention come into play.

4
5 Yet even if the 1974 Agreement is put to one side, the result is virtually identical. On
6 your screens you can now see, in green, the 1974 line as agreed. Indeed, it very
7 largely reflects a delimitation that accords with the requirements of article 15 of the
8 1982 Convention. It is no coincidence that Bangladesh's proposed line is for all
9 practical purposes the same: the line agreed in 1974 is in essence an equidistance
10 line constructed by means of base points located on St Martin's Island and
11 Myanmar's mainland coast. It is, to take the language of article 15, a line that in the
12 view of the Parties in 1974 reflects and I quote: "the median line every point of which
13 is equidistant from the nearest points on the baselines from which the breadth of the
14 territorial seas of each of the two States is measured". On your screens you can
15 now see in addition, in red, the line that Bangladesh proposes in these proceedings
16 only in the absence of a pre-existing agreement. It is abundantly clear, blindingly
17 obvious, that the lines are not materially different, although some minor differences
18 do exist, and I will come back to those in due course.

19
20 By contrast to these two lines, Myanmar now proposes a radically different and
21 wholly new line, entirely at odds with what it has been perfectly happy to accept and
22 respect for nearly four decades. You can see that line in black. I pause for a
23 moment to allow the differences to sink in, so that you can see the full extent of the
24 changes that Myanmar now proposes between the black line to the north and the
25 more southern red or green lines. That is in the shaded area. That is the new area
26 claimed by Myanmar, initiated only in the course of these proceedings. Let's be very
27 clear about what is going on here. Assisted by its new legal team, Myanmar has
28 completely abandoned more than three decades of practice and it invites this
29 Tribunal to take an entirely new approach, departing from the 1974 agreed line and
30 appropriating as new territory of Myanmar approximately 240 square kilometres and,
31 most strikingly, newly creating what amounts to in effect a semi-enclave around
32 St Martin's Island. Myanmar, of course, is entirely free to develop its legal strategy
33 as it wishes, but let's be very clear about this: it is totally inconsistent with its own
34 practice, it is inconsistent with the international case law, it is inconsistent with the
35 requirements of article 15 and it is inconsistent with the geographic reality. That
36 inconsistency becomes most marked at a point to the south of St Martin's Island, at
37 points D and E on the chart that you can see on the screens. Myanmar has
38 proposed a new point D by giving to St Martin's a mere six-mile territorial sea – that
39 is how they do this – and Myanmar's proposed point E is pushed westward to the
40 point where it intersects with a wholly novel creature of international law, the so-
41 called mainland-to-mainland equidistance line invented by Myanmar for the purpose
42 of these proceedings. It might be said that this case is, to quote Sherlock Holmes,
43 the curious incident of the changing line. The novel approach has no precedence at
44 all and lacks all juridical merit. The effect is to deprive Bangladesh of a significant
45 part of the territorial sea over which it has exercised sovereignty for more than three
46 decades and to which it has a continuing entitlement. It further exacerbates
47 Bangladesh's evident geographical disadvantages. Could it be that Myanmar's newly
48 discovered approach is influenced in any way by a glance across the waters to the
49 impact of the agreed 1974 line – or the proper application of article 15 – to the
50 interests of its newfound Indian friends? Could it be that this is an invention of what

1 Hamlet referred to as a “robustious periwig-pated fellow”? It seems that Myanmar
2 has adopted this approach to support a line of demarcation beyond the territorial sea
3 precisely because it will stop Bangladesh from reaching a 200-mile limit. That is
4 what is going on here.

5
6 Mr President, against this introductory background, my submissions are in four parts.
7 First, I am going to address Myanmar’s erroneous assertion that St Martin’s
8 somehow lies , as it now puts it, on the “wrong” side of the equidistance line.
9 Second, I am going to address Myanmar’s equally erroneous claim that St Martin’s is
10 a “special circumstance” within the meaning of article 15 of the Convention.⁴⁴ Third,
11 I will explain why Myanmar’s proposed semi-enclave of St Martin’s Island is
12 inconsistent with the law of the sea and cannot be justified, given that St Martin’s is
13 entitled to a full 12-mile territorial sea in accordance with article 15, a fact that was
14 explicitly recognized by Myanmar in the 1974 agreement. The fourth and final part of
15 my submissions will address Myanmar’s proposal to shift the delimitation line around
16 St Martin’s to the west, to a point where it intersects with Myanmar’s curious
17 mainland-to-mainland equidistance line.

18
19 But before addressing these four sets of submissions, it is appropriate to recall that
20 there are at least six points that are important that are not in dispute between the
21 Parties. First, Bangladesh and Myanmar agree that the law applicable to the
22 delimitation of their territorial sea is article 15 of the 1982 Convention. In the
23 absence of agreement, the territorial sea is to be delimited by an equidistance line,
24 subject to any special circumstances or historic title. Neither Bangladesh nor
25 Myanmar claim historic title in the relevant area. Myanmar’s claim that St Martin’s is
26 a “special circumstance” is new.

27
28 A second point of agreement is that St Martin’s is an island within the meaning of
29 article 121 of the 1982 Convention. It is inhabited by a very large number of people
30 and it sustains extensive economic activity, including a vibrant and international
31 tourist area; it serves as an important base for operations of the Bangladesh Navy
32 and Coast Guard. It is not a rock and it is not a “clod”, as John Donne put it.
33 Relatedly, there is no dispute that Bangladesh has – and has always had –
34 sovereignty over St Martin’s, and Myanmar accepts that St Martin’s Island “can (and
35 I quote) generate maritime areas”.⁴⁵ A third point is that both Parties agree that St
36 Martin’s Island is properly to be taken into account in drawing the base-points that
37 are to be used in drawing an equidistance line in the territorial sea.

38
39 A fourth point of agreement is that the Parties have no difference as to the location of
40 the land boundary terminus. In fact, the location was agreed between Burma (as it
41 then was) and Pakistan as far back as 1966. It is located where the centre of the
42 main navigational channel of the Naaf River meets the sea. In 1980 the precise
43 co-ordinates were agreed and have been relied upon by both Parties ever since.⁴⁶

44
45 Fifth, the Parties agree that, despite the name that has been given to it, Oyster
46 Island is not an island and is not to be given any effect in the delimitation of the

⁴⁴ RB, para. 2.8; RM, para. 3.8.

⁴⁵ CMM, para. 4.53.

⁴⁶ CMM, paras 2.27-2.29, 4.68; RB, para. 2.9.

1 territorial sea.⁴⁷ It is a tiny, uninhabited rock within the meaning of article 121(3) of
2 the Convention, approximately 10.5 miles from Myanmar’s mainland and 26 miles
3 from Bangladesh. It sustains “no human habitation or economic life of its own” within
4 the meaning of article 121.

5
6 And finally, it is appropriate to mention that both Parties admit that Admiralty Chart
7 817 “is the most accurate chart for the area” and that it has been an agreed basis for
8 plotting the boundary in the territorial sea.⁴⁸ As Mr Reichler explained to you
9 yesterday, on the basis of Admiralty Chart 817 there is no material difference as to
10 the distance of St Martin’s from Bangladesh or Myanmar: it lies, on Chart 817,
11 4.547 miles from Bangladesh, 4.492 miles from Myanmar and - amazing coincidence
12 - exactly the same distance, 4.492 miles, to the land boundary terminus. The written
13 pleadings have made reference to other figures⁴⁹ based on other charts or satellite
14 images, but in no case can it be said that there is any material difference for the
15 purposes of the Parties’ respective claims as to proximity. With these points of
16 agreement, important points of agreement, one can see why the parties were, as far
17 back as 1974, easily able to reach agreement on the delimitation of the territorial
18 sea.

19
20 Mr President, against that background I now turn to our first submission, which
21 addresses Myanmar’s first argument against giving full effect to St Martin’s Island in
22 the territorial sea. For the purpose of supporting its claim that St Martin’s is a
23 “special circumstance” and as such not entitled to enjoy a full 12-mile territorial sea,
24 Myanmar has conjured up the argument that it somehow lies on the “wrong” side of
25 the equidistance line that is to be drawn in accordance with article 15. It makes this
26 point frequently, no less than ten times, in its written pleadings; so it would be
27 churlish to accuse Myanmar of subtlety.⁵⁰ Let us deal with the matter logically. First,
28 there is no legal authority for the proposition that the presence of an island on the
29 “wrong” side of an equidistance line – assuming that to have been established – is a
30 matter having any relevance to the weight to be accorded to the island in the
31 delimitation of the territorial sea. In the ICJ Case of *Nicaragua v. Honduras*, for
32 example, a recent example where the islands certainly were on the “wrong” side of
33 an equidistance line, to take Myanmar’s parlance: the ICJ ruled without any
34 hesitation that four Honduran islands situated on the Nicaraguan side of the bisector
35 line were to be accorded a full – a full – 12-mile territorial sea. Each was significantly
36 further from the mainland; each was much smaller, and they were scarcely
37 inhabited.⁵¹ So even if St Martin’s was on the “wrong” side – we say it is not - there
38 is no support in law for Myanmar’s claim that St Martin’s is entitled to anything other
39 than a full 12-mile territorial sea and it has to be fully taken into account, we say fully,
40 for the delimitation of maritime areas beyond the territorial sea.

47 RM, Chapter 3, footnote 169 (“the territorial sea of May Yu Island (Oyster Island) does not overlap with any Bangladesh territorial sea. Therefore May Yu Island (Oyster Island) does not influence the territorial sea boundary.”)

48 RM, para. 5.25; RB, para. 2.4; CMM, para. 3.43.

49 MB, para. 2.18; CMM, para. 2.8; RB, paras. 2.63, 2.67, 2.76, 3.110; RM, para. 3.11.

50 CMM, paras. 4.8; 4.52; 4.66; 4.71; 5.153; RM paras. 1.5; 3.3; 3.14; 3.26; 5.34.

51 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, para. 302.

1 Myanmar's "wrong" side argument is no stronger in fact than in law. Myanmar
2 asserts that St Martin's lies "in front of the Myanmar mainland coast",⁵² and that it is
3 situated "south of any delimitation line properly drawn from the coasts of the
4 Parties".⁵³ This is simply wrong. It is just wrong, and it is premised on Myanmar's
5 curious conception of frontage and its particular use of the words "properly drawn".
6 What are the geographic facts? On your screen you can see St Martin's, at tab 2.7
7 of the Judges' folder. Two points are immediately apparent: first, on Chart 817 you
8 can see that St Martin's is pretty much just as close to Bangladesh as it is to
9 Myanmar: in fact the difference, Mr President, is 88 metres, less than the distance
10 from where you are sitting from the front entrance of this Tribunal, something that
11 Usain Bolt could probably run in less than nine seconds. Second, St Martin's lies
12 well within the 12-mile limit drawn from Bangladesh's coast, shown here in darker
13 blue. St Martin's is as much "in front of" Bangladesh's coast – to use Myanmar's
14 bold expression – as it is "in front of" Myanmar's coast.

15
16 Bangladesh has not disputed that St Martin's Island lies south of an entirely
17 hypothetical so-called mainland-to-mainland delimitation line, but that is not the
18 proper approach: St Martin's does not lie south of a delimitation line "properly drawn"
19 in accordance with the requirements of article 15. Myanmar's so-called "wrong" side
20 argument simply ignores St Martin's Island; it is as though the island does not exist.
21 Myanmar would like the island to just go away, to be a non-island, to be an ex-island.
22 Well, it has been there for a long time and it has been there throughout the 37 years
23 in which they have respected the 1974 Agreement, which of course took account
24 fully of the geographic reality. Equally significantly, for the purposes of this case, the
25 approach also contradicts Myanmar's earlier statement that St Martin's Island is
26 entitled to "generate maritime areas".⁵⁴

27
28 Now, in its Rejoinder Myanmar recognises that "the delimitation of the territorial sea
29 between the Parties must be effected in accordance with the rules embodied in
30 article 15", and what this means for the present case, in application of the
31 equidistance/special circumstances rule of article 15 is that the boundary must first
32 follow the median line between St Martin's Island and the Myanmar's mainland
33 coast.⁵⁵ Bangladesh agrees with that in so far as it goes: a "properly drawn"
34 delimitation line in the territorial sea, drawn in accordance with the requirements of
35 article 15, is an equidistance line that is controlled by base points located on
36 Myanmar's mainland coast and on St Martin's Island.

37
38 But, Myanmar's "wrong side" argument depends in large measure on a cartographic
39 manipulation. For St Martin's to be on the "wrong side" of an equidistance line, it
40 would have to be located at a sufficient distance from the terminus of the agreed
41 land boundary so that it could not provide any legitimate base points in accordance
42 with the 1982 Convention. On your screen you can see the situation as it is now.
43 Let's see what happens when we start moving St Martin's Island, which you will see
44 in the animation. That is how they draw their line; they just disappear St Martin's.
45 They have to move it a distance of 11 miles south east in order to draw their entirely
46 artificial line. What are they doing? They are re-fashioning geography. Time after

⁵² RM, para. 3.18.

⁵³ RM, para. 3.14.

⁵⁴ CMM, para. 4.53.

⁵⁵ RM, para. 1.6.

1 time, the case law has told us that it is not something an international court or
2 tribunal is entitled to do. St Martin's does not have wheels, Mr President.

3
4 The first sentence of article 15 makes it clear that Myanmar's "wrong" side approach
5 is simply unarguable. It says: "Where the coasts of two States are opposite or
6 adjacent to each other, neither of the two States is entitled ... to extend its territorial
7 sea beyond the median line of every point which is equidistant from the nearest
8 points on the baselines from which the breadth of the territorial seas of *each* of the
9 two States- each of the two states - is measured." Myanmar has long accepted that
10 St Martin's coastline lies opposite its own mainland coast, and it continues to do so
11 in its written pleadings in this case. It has not disputed at all that St Martin's provides
12 legitimate base points for the construction of an article 15 equidistance line. And
13 from this concession it must follow that article 15 provides for an equidistance line
14 derived from the actual costal geography – not a hypothetical line based on
15 Myanmar's conception of moving islands. Myanmar cannot ignore the geographical
16 reality that St Martin's is where it is. Mr President, it is not anywhere else. There is
17 no basis under the 1982 Convention for Myanmar to claim that St Martin's is on the
18 "wrong" side of the equidistance line. We invite you to reject this argument and to do
19 so robustly.

20
21 I turn now to our second submission, on Myanmar's claim that St Martin's is not
22 entitled to have a full 12-mile territorial sea. Why? Well, Myanmar says, and I quote,
23 because its "presence ... in this geographical location is a classical example of
24 'special circumstance' within the meaning of Article 15's second sentence ...".⁵⁶
25 Well, just pause for a moment here, there is a certain inconsistency, it has to be said.
26 The extreme concavity of Bangladesh's entire coastline is not a "special
27 circumstance" but this moving island is! To support its claim, Myanmar invokes an
28 alleged "confluence" of three factors: (1) that Bangladesh and Myanmar's coastlines
29 are adjacent not opposite; (2) the location of St Martin's Island close to the terminus
30 of land boundary and "in front of the Myanmar mainland coast"; and (3) – another
31 new idea they have conjured up – the lack of any "balancing islands within 12
32 nautical miles".⁵⁷ And these three factors it is said that lead to the conclusion, as
33 night follows day, that St Martin's has to be treated as a "special circumstance".
34 Well, this, frankly, is a very striking argument. They are robust assertions, but that is
35 all they are – robust assertions - because Myanmar has not been able to find a
36 single legal authority in 21 decided cases to support its approach. It is entirely
37 unsupported by any judicial or arbitral authority. Mr President, it has been very clear
38 again what Myanmar is asking you to do. You are a court; you are not a legislature.
39 They are asking you to legislate a new rule of international law, and we say you
40 cannot do that.

41
42 Myanmar's inability to find a single case in which an island located close to the
43 coast, within the territorial sea, with a population, with economic and military activity
44 comparable to that of St Martin's, is really destructive of its argument. Faced with
45 this unfortunate reality, Myanmar has opted to invoke a series of cases in which
46 islands in no way comparable to St Martin's Island have been accorded less than full
47 effect. Mr President, this is pretty desperate stuff. Take, for example, the Court of

⁵⁶ RM, para. 3.11.

⁵⁷ RM, paras. 3.15-3.18.

1 Arbitration's findings on the Channel Islands in the *Anglo French Continental Shelf*
2 *Case*. This is a case on which Myanmar places heavy reliance.⁵⁸ Myanmar says
3 that "The Court of Arbitration decided that the Channel Islands could not generate
4 full maritime zones, but that, due to their position, they must be treated as a special
5 circumstance..."⁵⁹

6
7 Well, the first point to make is an obvious one. In that case the tribunal was
8 delimiting the continental shelf, not the territorial sea. Moreover, according to
9 Myanmar, it was the position of these islands that merited their designation as a
10 special circumstance by the Court of Arbitration. The point that Myanmar has
11 difficulty with, as many of you know, is that the Channel Islands are located more
12 than 60 miles from the United Kingdom mainland. You can see that on your
13 screens. It is very clear that the Channel Islands lie far outside the limits of the
14 United Kingdom's territorial sea, and immediately off the coast of France. The
15 Channel Islands, Mr President, are not 4.5 miles from the United Kingdom coastline.

16
17 Bangladesh fails to see how the Court of Arbitration's designation of Channel Islands
18 "situated not only on the French side of the median line drawn between two
19 mainlands, but also practically within the arms of a gulf on the French coast" can
20 provide any support for Myanmar's assertion that St Martin's is to be treated as a
21 "special circumstance". Indeed, the Court of Arbitration went so far as to explicitly
22 distinguish the Channel Islands from islands like St Martin's. It said that the case of
23 the Channel Islands is, and I quote "quite different from that of small islands on the
24 right side or close to the median line".⁶⁰ Let me emphasize those words: "quite
25 different from that of small islands on the right side or close to the median line".

26
27 Other cases in which international courts and tribunals have determined an island to
28 be a "special circumstance" are readily distinguishable from the present case. In
29 *Qatar v. Bahrain*, the island of Qit'at Jaradah was treated as a special circumstance,
30 but is totally different from St Martin's. The ICJ ruled that it "is a very small island,
31 uninhabited and without any vegetation. This tiny island ... is situated about midway
32 between the main island of Bahrain and the Qatar peninsula. Consequently, if its
33 low-water line were to be used for determining a base point in the construction of the
34 equidistance line, and this line taken as the delimitation line, a disproportionate effect
35 would be given to an insignificant maritime feature."⁶¹ No such words can be used in
36 relation to St Martin's, which is obviously not an "insignificant maritime feature", and
37 a comparison of the two islands makes this crystal clear, by reference to size,
38 population and activity. Now, on your screens you will see a satellite photograph,
39 and it is also at tab 2.10, which is a comparison of both islands. They are shown in
40 this image to exactly the same scale. The coastlines of both islands are shown in
41 bright red. Bright Red. Those cover the areas permanently above water. On the right
42 is Qit'at Jaradah, on the left is St Martin's. Mr President and the Tribunal, I wonder if

⁵⁸ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision of 30 June 1977, reprinted in 18 RIAA 3, reproduced at MB, Vol. V.

⁵⁹ CMM, para. 4.55.

⁶⁰ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision of 30 June 1977, para. 199, reprinted in 18 RIAA 3, reproduced at MB, Vol. V.

⁶¹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, I.C.J. Reports 2001, para. 219.

1 you can even see the red dot in relation to Qit'at Jaradah; it is uninhabited, it has no
2 vegetation, and it is entirely different from St Martin's.

3
4 But in that case of *Qatar v. Bahrain* there were islands that were relevant on which
5 Myanmar was conspicuously silent. At Tab 2.11 you will be able to see the Hawar
6 Islands that fall under Bahraini sovereignty and have a permanent population of less
7 than 4,000. Now, as you can see on the screen, they are located a greater distance
8 from Bahrain's coastline, that is about ten miles, but very close indeed to Qatar. One
9 would have expected in these circumstances, on Myanmar's approach, for the
10 Hawar Islands to be treated as a special circumstance but the ICJ said they were not
11 a special circumstance. We pointed this out in our Reply. What did Myanmar have
12 to say in its Rejoinder? Nothing.⁶² We look forward to hearing next week what they
13 have to say about Hawar, and why the International Court of Justice got the law
14 wrong. On the basis of the treatment accorded to the Hawar islands, it is very
15 difficult to see how Myanmar can argue with a straight face that St Martin's must be
16 treated as a special circumstance on the basis that it is just as close to Myanmar as
17 it is to Bangladesh and because it lies "in front" of both coasts.

18
19 Mr President, Myanmar is seeking to manufacture a special circumstance where
20 there is none. We invite you to reject also this argument that it is to be treated as a
21 special circumstance, and to do so equally robustly.

22
23 Mr President, this brings me to a point in the speech that may be appropriate for a
24 30-minute break and I wonder whether with your permission I should stop here or
25 proceed.

26
27 **THE PRESIDENT:** If you so wish we will now take a break. We will resume at
28 twelve.

29
30 (Short adjournment)

31
32 **THE PRESIDENT:** We resume the hearing. I give the floor to Mr Sands.

33
34 **MR SANDS:** Mr President, members of the Tribunal, I just concluded just before the
35 break with my second submission inviting you to reject the argument that St Martin's
36 should be treated as a special circumstance.

37
38 So I turn now to our third submission on this issue of the delimitation of the territorial
39 sea and it is based on the evidently simple and correct proposition that St Martin's is
40 where it is and not where Myanmar would like it to be. There is no basis in law or in
41 fact, we submit, for it to be treated as a special circumstance. And against that
42 background, article 15 inevitably requires that St Martin's Island be given full effect
43 and accorded no less than a 12-mile territorial sea. And that is, of course, exactly
44 what was reflected in the 1974 agreement, as Professor Boyle described to you.

45
46 It is appropriate to highlight some of St Martin's more salient features. As you can
47 see from the four photographs on your screen, there is ample evidence of human
48 activity; you can see land cultivation, boats, large buildings and antennae. It is 8

⁶² RB, para. 2.74.

1 square kilometres in size; it supports a population of some 7,000 permanent
2 residents. It is extensively cultivated and produces enough food to meet the needs
3 of a large proportion of its residents. And as Mr Reichler said on Thursday, it does
4 also receive more than a quarter of a million tourists annually, and has an important
5 function as a naval and coastal base. In fact, I have been there and seen for myself
6 how vibrant a place it is. Myanmar does not dispute any of these facts.
7

8 I have already mentioned that on Admiralty Chart 817 St Martin's is located only 4.5
9 miles from the Bangladesh mainland, and Myanmar also of course does not dispute
10 that it is an island, a naturally formed area of land surrounded by water, which is
11 above water at high tide. So determined, an island is entitled to a full 12-mile
12 territorial sea, as well as its own continental shelf and Exclusive Economic Zone.
13 This is also a well-established principle of customary international law.⁶³ In disregard
14 of these undisputed facts, Myanmar is now inviting you to cast aside these well-
15 established rules of international law and make up a new approach, one that would
16 delimit by way of a line that cuts across the southern portion of the territorial sea over
17 which St Martin's has had sovereignty over the past four decades. We urge you to
18 reject this argument, based on the realities of the situation.
19

20 St Martin's is a coastal island and as such it forms an integral part of the coast of
21 Bangladesh. Myanmar argues that two cases in which an island or a group of
22 islands were designated as coastal islands are different from the present case. For
23 example, it distinguishes the award in *Guinea v. Guinea Bissau* on the basis that the
24 islands in that case "lay immediately off the mainland coast which was under the
25 same sovereignty as the islands themselves."⁶⁴ It makes the same argument in
26 relation to the findings of the Tribunal in *Yemen v. Eritrea*, arguing that the islands in
27 that case were "situated off the coast of the State to which they belonged."⁶⁵ With
28 respect, these cases really do not assist Myanmar's contention. You have seen the
29 charts. St Martin's is as immediately off the coast of Bangladesh as the islands in
30 those two other cases, or off the coast of the mainland State.
31

32 Myanmar's assertion that St Martin's Island should be given less than full effect in
33 the delimitation within 12 nautical miles⁶⁶ is, we say, entirely without merit. In fact, it
34 is undermined by Myanmar's own practice over more than three decades. None of
35 the cases cited by Myanmar, several cases, helps its cause. In no case was
36 reduced effect given to any island located in the territorial sea. The vast majority of
37 these cases invoked by Myanmar were concerned exclusively with the weight to be
38 accorded to islands on the continental shelf, in the EEZ, not in the territorial sea. Of
39 course, my colleagues will return to this next week. This was so, for example, in the
40 *Tunisia v. Libya Continental Shelf* case. The weight to be accorded to the islands
41 referred to by Myanmar, in that case the Kerkennah Islands and the Island of Jerba,
42 was only in relation to the delimitation of the continental shelf, not the territorial sea.⁶⁷
43 The same is true of the French Islands of St Pierre & Miquelon, which received full

⁶³ See Y. Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (2006), at p. 184.
RB, Vol. III, Annex R28.

⁶⁴ RM, para. 3.20.

⁶⁵ RM, para. 3.21.

⁶⁶ RM, para. 3.26.

⁶⁷ *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, paras.
2, 4.

1 effect within the territorial sea.⁶⁸ So these cases just do not support Myanmar's
2 attempt to usurp St Martin's territorial sea entitlement.

3
4 There are other cases cited by Myanmar but these two are, frankly, easily
5 distinguishable on the facts. In the *Anglo French Continental Shelf* case a number of
6 different islands were at issue.⁶⁹ Myanmar seeks support from the half-effect
7 accorded to the United Kingdom's Scilly Isles and makes much of the fact that these
8 isles "are located in front of the British coast, not the French coast",⁷⁰ but what they
9 prefer to forget is that the Scilly Isles are not 4.5 miles off the coast of the United
10 Kingdom; they are 21 miles from the mainland United Kingdom coast. That is
11 significantly further than St Martin's and, perhaps even more significantly, well
12 outside the limit of the territorial sea as drawn from the mainland. So, that example
13 really is not analogous to the present case.

14
15 It is interesting that Myanmar fails to address adequately the French island of
16 Ushant, which in many respects is more comparable to St Martin's and it was
17 accorded full effect. The Court of Arbitration determined that Ushant "not only forms
18 part, geologically, of the land mass of France but lies no more than 10 miles from the
19 French coast within the territorial sea of the French mainland".⁷¹ Ushant has
20 a population of less than 1,000 but it is located five miles further from the French
21 coast than St Martin's, but it was accorded full effect.

22
23 What does Myanmar have to say about this argument? It tries to distinguish the
24 case on the basis that the Court of Arbitration was in that case dealing with two sets
25 of arguments: one belonging to France located in front of its coast; the other
26 belonging to the United Kingdom located in front of its coast. By contrast, says
27 Myanmar, in the present case St Martin's Island stands alone.⁷² Well, with respect, it
28 is just not correct to claim that St Martin's stands alone, given its close proximity to
29 the coast of Bangladesh, closer to it than Ushant is to the coast of France.

30
31 Referring to the *Dubai v. Sharjah Arbitration*,⁷³ Myanmar also claims that St Martin's
32 is more like Abu Musa; it is an island of 12 square kilometres with just 500
33 inhabitants.⁷⁴ But as Myanmar itself acknowledges, the tribunal in that case
34 accorded Abu Musa a full 12-mile territorial sea. Where is it located? It is located
35 miles from the coast of Sharjah, in the middle of the Persian Gulf.⁷⁵

36

⁶⁸ *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon)*, Decision, 10 June 1992, reprinted in 31 ILM 1149, at paras. 66-74. Reproduced in MB, Vol. V.

⁶⁹ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision of 30 June 1977, reprinted in 18 RIAA 3, reproduced at MB, Vol. V.

⁷⁰ RM, para. 5.31.

⁷¹ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision of 30 June 1977, para. 248, reprinted in 18 RIAA 3, reproduced at MB, Vol. V.

⁷² RM, para. 5.31.

⁷³ *Dubai-Sharjah Border Arbitration*, Award of 19 October 1981, International Law Reports (I.L.R.), Vol. 91, 1981, p. 677.

⁷⁴ CMM, para. 5.97.

⁷⁵ CMM, para. 4.57.

1 Another case that Myanmar invokes is the decision of the International Court's
2 Chamber in the *Gulf of Maine* case, which accorded Seal Island only half effect.⁷⁶
3 Again, the facts are relevant and they are different. Seal Island is located some 15
4 miles from the coast of Nova Scotia, seaward of Canada's territorial sea, measured
5 from the mainland. Not only is it half the size of St Martin's and more than three
6 times further from the coast, but it also only sustains two small settlements of
7 fishermen and no year-round population.⁷⁷ We say the facts are very different in that
8 case.

9
10 In fact, all of the cases relied upon by Myanmar are distinguishable and none
11 supports the claim that St Martin's should be given anything less than full entitlement
12 to its maritime zones. The International Court's two most recent maritime
13 delimitation cases are also highly relevant to the issue of the weight to be accorded
14 to islands in the territorial sea. Both clearly support the position adopted by
15 Bangladesh, confirming the propriety of the approach taken by both States in
16 reaching their agreement in 1974, namely to give St Martin's a full, 12-mile territorial
17 sea. In *Nicaragua v. Honduras*, Nicaragua argued that a number of small cays, all
18 located more than 20 miles offshore, should be enclaved, and accorded a territorial
19 sea of only three miles.⁷⁸ You can see again in the same scale charts on your
20 screen and at tab 2.14 the comparison between on the left-hand side our case of St
21 Martin's and on the right-hand side the Honduran cays. The Court rejected
22 Nicaragua's argument. Every single one of these cays was given a full 12-mile
23 territorial sea.⁷⁹

24
25 And the same approach was taken in *Romania v. Ukraine*, which you can see on the
26 screen and which is also at tab 2.15. Serpent's Island, which was the island at issue
27 in that case, was accorded a full 12-mile territorial sea, despite the fact that it is
28 located some 20 miles offshore and is nearly 50 times smaller than St Martin's.⁸⁰ If
29 small islands like this at a far greater distance sustaining tiny populations or no
30 population at all are to be given a full, 12-mile territorial sea, it is really very difficult
31 to see on what basis St Martin's should be treated differently.

32
33 Myanmar accepts, as it is bound to do, that the two cases I have just mentioned are,
34 as it puts it, relevant, and it acknowledges that both cases dealt with a lateral
35 delimitation between adjacent mainland coasts in the vicinity of islands. It also
36 accepts, as obviously it has to do, that in both cases the ICJ did accord the islands in
37 question a full, 12-nautical-mile territorial sea.⁸¹ Frankly, it is hard pressed to find
38 ways to distinguish these cases but, ever inventive, it has done so, or sought to do
39 so, on two grounds. First, it asserts that both cases reflect what it calls "the practice
40 of the International Court of Justice of conceptualizing coasts in terms of the
41 predominant mainland relationship"; second, it asserts that the International Court's

⁷⁶ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984.

⁷⁷ RB, para. 3.121.

⁷⁸ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, para. 300.

⁷⁹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, para. 302.

⁸⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, para. 219.

⁸¹ RM, para. 3.24.

1 approach reflects what it calls “the practice of enclaving islands located in the vicinity
2 of, and especially on the ‘wrong’ side of, a mainland delimitation line”.⁸² Both
3 arguments are wrong. The ICJ has not developed any sort of “predominant
4 relationship” test. In neither *Nicaragua v. Honduras* nor in *Romania v. Ukraine* were
5 islands “in the vicinity of” the coast, since in both cases they were well beyond the 12
6 miles from the coast; they were well outside the mainland territorial sea. The
7 enclaving approach, to which I am going to return, occurs outside the territorial sea,
8 not within. That is a vital difference with this case. A key point is that Myanmar has
9 simply no answer to the fact that the ICJ gave a full, 12-mile territorial sea to the
10 islands in both cases.

11
12 Now, Myanmar then invokes alleged State practice to support its argument that
13 St Martin’s should not be accorded full effect in the territorial sea, but again we say
14 the approach is flawed; it is deeply flawed for the same reason. Almost all of the
15 practice it invokes concerns the delimitation in the continental shelf or EEZ and it
16 deals with islands that are geographically very different from St Martin’s. Of all the
17 examples given,⁸³ only two are concerned with a delimitation within 12 miles of a
18 mainland coast. The first is the 1969 agreement between Qatar and Abu Dhabi.
19 Myanmar seeks support from the two States’ decision to accord Daiyina Island a
20 three-mile territorial sea, but the treatment of Daiyina Island in the 1969 agreement is
21 not pertinent to this case. First, the 1969 agreement did not purport to give effect to
22 an emerging 12-mile rule. By contrast, as you will recall from the first plate I showed
23 you, the 1974 agreement, signed just five years later, or agreed just five years later,
24 did reflect a full, 12-mile territorial sea, in terms, for St Martin’s Island up to point 7.
25 Second, there are geographic factors that also explain why so little effect was given
26 to Daiyina. It is a remote, uninhabited maritime feature; it is 2.5 kilometres long and
27 less than 1.5 kilometres wide, and it is located more than 35 miles from the coast of
28 Qatar. If full effect had been given to this island, a substantial inequity might have
29 resulted for Qatar. But, most important and not addressed by Myanmar and
30 especially relevant to this case, is the motivation for the 1969 agreement. It was
31 largely intended by both parties to equitably allocate valuable oil deposits in the
32 vicinity of Daiyina Island.⁸⁴ That is what that agreement was about.

33
34 The second agreement cited by Myanmar on the weight accorded to islands in the
35 territorial sea is the 1978 Treaty between Australia and Papua New Guinea. You
36 can see this on your screen and it is at tab 2.17. The Australian islands of Saibai,
37 Boigu and Dauan, just south of Papua New Guinea, are located two, three and five
38 miles respectively from the coastline but more than 75 miles from the Australian
39 mainland. It is plain, you just have to look at the plate, to see that this is completely
40 different from the geographic realities faced by Myanmar in the present case.

41
42 There is another problem with Myanmar’s invocation of practice. Whilst it is happy to
43 reach out to the practice of third States, it would rather not talk to you about its own
44 practice, and why is that? It is because Myanmar’s practice directly contradicts the
45 approach that it has taken in these proceedings. As Professor Boyle explained, part
46 of that practice was the 1974 agreement, which gave St Martin’s full effect and was
47 respected fully until 2008, but it is not the only bit of Myanmar practice that is

⁸² RM, para. 3.24.

⁸³ CMM, para. 4.60.

⁸⁴ J. I. Charney & L. M. Alexander, *International Maritime Boundaries*, (1996), Vol. II, at p. 1543.

1 relevant. There is other practice which also supports this approach. For example,
2 there is the 1980 Myanmar-Thailand agreement. You can see this now or ought to
3 be able to see it shortly on your screens; if you can't it is at tab 2.18. You will see in
4 the middle of the page Myanmar's Aladdin Islands, which lie south-west of the land
5 boundary terminus. They are significantly smaller than St Martin's Island and they
6 are much further offshore than St Martin's. But what does the 1980 agreement do?
7 Well, surprise, surprise, like the 1974 agreement, it gives full effect to the Aladdin
8 Islands. It does not adopt a hypothetical "mainland equidistance" line. You can see
9 that line in black. If Myanmar had followed the approach it urges upon you in these
10 proceedings, that is the line that it would have drawn and it did not do so.

11
12 And it is not the only agreement reflecting Myanmar's practice. Six years after that
13 agreement, it entered into another agreement, this time with India and in relation to
14 the delightfully named Little Coco Island. You can see that on your screens. Little
15 Coco is about the same size as St Martin's but it sustains no known population. It is
16 located some 130 miles from Myanmar's coast. That is a very significant distance.
17 But it is only 21 miles from India's Andaman Islands. In the 1986 agreement, Little
18 Coco Island (over which Myanmar has sovereignty) was the sole controlling point for
19 the delimitation up to a distance of 235 miles. You can see that on your screen. It
20 was given full effect within 12 miles and beyond 12 miles. Now against that
21 background, on what basis can Myanmar reasonably sustain the argument it is
22 encouraging you to adopt in these proceedings?

23
24 With great respect, Myanmar may wish to disown this practice, but that practice is
25 devastating for its case before this Tribunal, because here we have two relatively
26 recent examples in which islands are given full effect, a full 12-mile territorial sea.
27 Therefore, on what basis does Myanmar seek to disown its own practice that is
28 inconsistent with the argument in this case? Well what it says is: "[t]here may be
29 many reasons of policy why a particular negotiated maritime boundary is agreed
30 between two States; the fact that State A has reached a particular solution in its
31 negotiations with State B is of no significance when it comes to a third-party decision
32 on the maritime boundary between State A and State C."⁸⁵ Well of course, we must
33 not forget that just a little earlier Myanmar invoked the 1969 Agreement between
34 Qatar and Abu Dhabi, so it has to be consistent. It either likes agreements involving
35 third States or it doesn't, it cannot have it both ways. The inconsistencies, the
36 contradictions, in its approach are self-evident and, with respect, no amount of
37 creative periwigged-thinking can justify a State's wholesale abandonment of its own
38 practice.

39
40 Myanmar seeks to distinguish the 1980 Agreement with Thailand on three grounds.⁸⁶
41 First, it argues that the starting point of the delimitation, point 1, is located 47 miles
42 from the terminus of the land boundary. That may well be the case, but it fails to
43 deal with the fact that the 1980 Agreement does not endorse the use of the kind of
44 hypothetical mainland-to-mainland line that Myanmar urges upon you. In 1980
45 Myanmar did not agree to cut into the territorial sea of the Aladdin Islands to deprive
46 them of a full 12-mile territorial sea. Myanmar's second argument is that a first part of
47 the delimitation – that near the mouth of the Pakchan River – was agreed as far back

⁸⁵ RM, para. 3.28.

⁸⁶ RM, para. 3.28.

1 as 1868 by Great Britain and Siam (as it was then known) and hence allows the
2 example to be distinguished. But why should that make any difference? Why should
3 that be the case? In this case, the land terminus between the Parties was agreed by
4 Pakistan and Myanmar in 1966, nearly 50 years ago, and ratified and then taken
5 forward by Bangladesh and Myanmar in 1974, so we do not see that's a reason to
6 distinguish. Third, Myanmar tries to distinguish the 1980 Agreement by pointing to
7 other offshore islands which it alleges have the effect of offsetting the effect of
8 Aladdin Islands. However, it provides no evidence to show that the Parties adopted
9 this approach, and it has not explained why, in the absence of these balancing
10 islands, the agreed delimitation would have been any different.

11
12 Myanmar also tries to distinguish the 1986 Agreement with India on the basis of its
13 alleged practice in relation to islands which are less significant and further from its
14 coast than is St Martin's. Myanmar says that Little Coco is different from St Martin's
15 because the 1986 Agreement dealt with the delimitation of opposite coasts. Well we
16 ask why as a matter of principle, having regard to the text of article 15, should a
17 difference of approach automatically follow. We say that it does not.

18
19 There is another basis upon which Myanmar tries to distinguish Little Coco. It says
20 that it is part of what it calls "a string of islands"⁸⁷ and therefore carries more weight
21 in the delimitation. The only word that I can think of for that argument, Mr President,
22 is hopeless. The nearest island to Little Coco is 8 miles away. The next closest
23 island is then 50 miles away. This is not a string of islands any more than a
24 necklace comprising three pearls at a great distance from each other can be called a
25 string of pearls. By contrast to all of this, St Martin's is only 4.5 miles off the
26 Bangladesh mainland coast.

27
28 Finally, Myanmar concocts another novel argument to justify its claim that full effect
29 should not be given to St Martin's. It says that to do so would undermine what it
30 calls "security interests" and the right of "unimpeded passage and access from the
31 mouth of the Naaf River to the open sea..."⁸⁸ Mr President, we very much
32 appreciated the question that was put to us by the Tribunal at the meeting earlier this
33 week on Wednesday afternoon, inviting both Parties to clarify their positions with
34 regard to right of passage of ships of Myanmar through the long existing 12-mile
35 territorial sea around St Martin's, but the situation is crystal clear: since 1974 these
36 ships have had an unimpeded right of passage, and there is no evidence to the
37 contrary.

38
39 Now, the argument might perhaps have legs if Myanmar could adduce any evidence
40 to show that since 1974 its security interests have somehow been undermined, or
41 that there were any problems with passage to and from the Naaf River. However,
42 not once in the 30 years after the Parties agreed to the boundary in 1974 has
43 Myanmar claimed that St Martin's should not be entitled to a full territorial sea on the
44 basis of alleged security or right of passage interests. In fact, it was only when the
45 Counter-Memorial was filed in December 2010 that Myanmar for the first time raised
46 this argument in the way it did, and it did so, so powerful was the argument, by
47 devoting just one line to it at paragraph 4.66 of its Counter-Memorial. So we

⁸⁷ RM, para. 5.32, citing RB, para. 3.123.

⁸⁸ CMM, para. 4.66.

1 responded at paragraph 2.68 of our Reply. We made two points: first we said, that
2 Myanmar has advanced no evidence as to any problem since 1974 regarding
3 passage; and, our second point was, that a move of the boundary line from point C
4 (more or less where it was agreed in 1974) to points D and E would not accomplish
5 that putative objective. Now, one would have expected the Reply having been filed,
6 for Myanmar to respond in its Rejoinder with a welter of evidence about all of the
7 problems that exist in relation to this matter. Yet they have provided not a shred of
8 evidence. Nothing, nada, rien on this issue. They have not identified a single
9 occasion on which the existing agreed line has created any difficulty in terms of
10 rights of passage, and we pointed this out in the Reply.⁸⁹ Myanmar, in its Rejoinder,
11 says: “Bangladesh accuses Myanmar of providing no evidence that the right of
12 unimpeded passage has been problematic in any way.”⁹⁰ I read that and thought,
13 “OK, here it comes, we are going to have 47 witness statements, annexes of
14 diplomatic notes of protest and all the other things that many of us are so used to in
15 so many of these cases”, but there was nothing. Instead, they say – and you will see
16 it underlined there – “Future tensions cannot be excluded”. Mr President, it is not the
17 function of an international court or tribunal to engage in speculation, and in
18 particular speculation that has no connection with reality and is unsupported by any
19 evidence. This is a court of law and evidence, not a court of speculation. It is a well-
20 established general principle of international law that “it is the litigant seeking to
21 establish a fact who bears the burden of proving it”,⁹¹ and Myanmar has patently
22 failed to meet this test. The extent of its response had been to cite two cases in
23 which mention was made of security interests being taken into account in a
24 delimitation. And no doubt that may be right where there is evidence of a genuine
25 issue, but in this case there is no such evidence. Myanmar has not demonstrated
26 that at any point in the past 37 years has the question of passage through the
27 territorial sea of St Martin’s ever been an issue.

28

29 Mr President, the “access relief” argument is wholly unsustainable. Having failed to
30 produce any evidence as to a problem, nevertheless Myanmar continues to propose
31 a new point D on the line of delimitation, which cuts across St Martin’s existing
32 territorial sea – you can see it there on the screen – but you will see straightaway
33 from just looking at the chart that it does nothing to improve Myanmar’s access to the
34 mouth of the Naaf River. The point at which access to the Naaf River is most
35 constricted is not around points C, D and E, where Myanmar’s proposed line
36 diverges from the 1974 Agreement and article 15, it is at Myanmar’s points B to B5
37 at the mouth of the river, which you can see on the screen. Therefore, the question
38 for Myanmar is this: if it is so concerned about unimpeded passage to the mouth of
39 the Naaf River, why has it proposed cutting off St Martin’s to the south and proposed
40 nothing to allegedly improve access near the mouth of the Naaf River?

41

42 Mr President, Members of the Tribunal, I hope this clarifies the response to your
43 question. Myanmar has simply no answer to that question; it is stuck with its
44 bilateral, peaceful, untroubled practice with Bangladesh over nearly four decades,
45 with its own practice with Thailand and India and with all the established international
46 case law. Denying St Martin’s its full 12-mile territorial sea to the south – in the

⁸⁹ RB, para. 2.68-2.69.

⁹⁰ RM, para. 3.30.

⁹¹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 392, at para. 101.

1 triangle that is created by points C, E and 7 – does nothing, absolutely nothing to
2 improve passage to the Naaf River. In fact, the presence of shoals to the south of
3 point C reveals that in any case vessels navigating to and from the mouth of the
4 Naaf River would be required to adopt a course far south of point C to avoid shallow
5 waters. The solution that Myanmar asks of this Tribunal is aimed not at improving
6 access but rather at appropriating a larger share of maritime area in the territorial
7 sea. Of course, this really is not an issue because Bangladesh has always
8 respected the unrestricted passage by Myanmar vessels and will continue to do so,
9 as the distinguished Foreign Minister made clear in this Court Room. The findings of
10 the Tribunal in *Guyana v. Suriname*, on which Myanmar relies, to the effect that a
11 delimitation line ought to “avoid [...] a sudden crossing of the area of access to the
12 Corentyne River”,⁹² which some members of this Bench will remember well, does
13 not provide any support at all to Myanmar. As I noted at the outset, the first eight
14 points of the line that it has proposed nearest to the mouth of the Naaf River are
15 virtually identical to the first six points agreed by the Parties in 1974 and followed
16 ever since. St Martin’s is entitled to a full 12-mile territorial sea, and we invite you to
17 so declare.

18
19 Mr President, I will conclude with the fourth part of our submissions. You will have
20 noted that parts of Myanmar’s proposed line are very similar to that put forward by
21 Bangladesh and that to which the two States agreed in 1974. However, in our
22 submission the initial segment of Myanmar’s line (between points A and B) which
23 you can see on your screens and at tab 2.22, has been incorrectly plotted by
24 Myanmar. The first segment of Myanmar’s equidistance line, that’s the line from
25 points A to point B, adopts a direction that would (if extended) pass north of St
26 Martin’s Island, and that conveniently bolsters the misguided argument that
27 St Martin’s lies on the “wrong” side of the equidistance line. And this, we think, is
28 what apparently aims at opening the door to Myanmar’s special circumstances
29 argument, which is intended to provide support for the new claim that the island
30 should be enclaved.

31
32 Mr. President, we think that Myanmar has incorrectly plotted its point B. It has done
33 so because it has ignored the closest points on the Bangladesh coast at the mouth
34 of the Naaf River, which points you can see highlighted on the screen. It has taken a
35 more distant base point on the Bangladesh coast – that is point beta 1 – which you
36 can see there on the screen. If Myanmar had used the correct base points, which
37 you will see further down the coast, its point B would have been located in a more
38 southerly place, as you can now see on the screen and at point 2A.

39
40 Now on the screen is Bangladesh’s proposed line, in red, and Myanmar’s proposed
41 line, in black. As you can see on the screen – this is also at tab 2.23 – the middle
42 segment of Myanmar’s proposed line, that is points B1 to B5, is virtually identical to
43 the Bangladesh line. In this segment, the equidistance line is governed by base
44 points on the low watermark of St Martin’s and on Myanmar’s mainland coast, so this
45 part is not in dispute.

46
47 Beyond that to the south, Myanmar’s lines, from points C to E, severely cut off St
48 Martin’s Island, depriving it of a full 12-mile territorial sea. Now this attempt to

⁹² RM, para. 3.31.

1 enclave St Martin's is novel and it is of course, as I have already said, contradicted
2 by the practice between the Parties and by the case law. We have explained
3 already why St Martin's is entitled to a full 12-mile territorial sea. It therefore follows,
4 in our submission, that a properly constructed line in the territorial sea in accordance
5 with the requirements of article 15, taking account of the base points, must continue
6 along a more southerly direction (the red line), reflecting a 12-mile territorial sea, until
7 it reaches the intersection of the 12-mile limit as measured from the southern tip of
8 St Martin's and Myanmar's coastline. You can see this red line on the screens. That
9 is where we say the outer limit of the territorial sea is located.

10
11 Following article 15, there really is no basis for any enclaving of St Martin's, and we
12 think that Myanmar has fallen into error in seeking to characterize the dispute
13 between the parties. In its Rejoinder, it asserts that there are two issues as regards
14 delimitation in the territorial sea. It does this by way of rhetorical questions. First, it
15 asks: "What is the size and shape of the territorial sea enclave to be given to
16 St Martin's Island?" Second, "By what method does the outer limit of that enclave
17 reconnect to the mainland-to-mainland lines used to delimit area of overlapping
18 EEZ/continental shelf areas beyond the territorial seas of the Parties?"⁹³ Those are
19 the two questions that they ask. And curiously, they then go on to say that Myanmar
20 and Bangladesh and I am quoting here "take only slightly different approaches to the
21 size and shape of the St Martin's Island enclave."⁹⁴ That is at paragraph 3.4 of their
22 Rejoinder. That is totally wrong. We have never accepted that there is any sort of
23 enclave to be established around St Martin's, and until 2010 Myanmar made no such
24 claim either.

25
26 It is a new claim and it is not an agreed basis on which to proceed. It is in fact,
27 a desperate effort to refashion the geographic reality and to refashion the law. We
28 assume that it has been done to support a line of delimitation beyond the territorial
29 sea that would contribute to preventing Bangladesh from reaching any sort of
30 entitlement to exercise sovereign rights beyond 200 miles. So, it is, in this way, an
31 entirely artificial and strategic construct, put together with an eye to the line that will
32 eventually be delimited between Bangladesh and India. The approach dates to
33 2010, at a time when Myanmar was advised by the same lawyers who represent
34 India. This may, of course, be entirely coincidental.

35
36 In any event, Myanmar's last two points – points D and E – are plotted on the basis
37 of what it describes as a "transition from a relationship of oppositeness to one of
38 adjacency."⁹⁵ Now this really is rather bizarre reading. They cannot seem to make
39 up their mind as to whether the delimitation here is between opposite States or
40 adjacent States. We refer you in this regard, to the text of article 15 of the
41 Convention, which does not in terms provide for any distinction. In both cases the
42 method of delimitation is an equidistance line. A properly constructed equidistance
43 line, plotted in accordance with the requirements of article 15, is controlled by base
44 points on St Martin's and on Myanmar's mainland coast. There is no dispute
45 between the Parties as to that. There is therefore no basis in law or fact to accord St
46 Martin's anything less than full weight in the equidistance calculation. Myanmar's
47 point D is located just six miles from the southern tip of St Martin's and it is plotted in

⁹³ RM, para. 3.4.

⁹⁴ RM, para. 3.4.

⁹⁵ RM, para. 3.5.

1 manifest disregard of practice and legal authorities and in manifest disregard of the
2 geography.

3
4 In relation to point E, there is simply no merit in Myanmar's attempts to shift the line
5 of delimitation back to a hypothetical mainland-to-mainland equidistance line that
6 ignores the existence and location of St Martin's. Now, at this point Myanmar makes
7 an accusation against Bangladesh; it criticises us for what it says is plucking up its
8 mainland-only angle bisector, moving it nearly 12 nautical miles to the south-east
9 and attaching it to points 8A and 7.⁹⁶ But Myanmar cannot simply ignore St Martin's
10 altogether, as I have already explained and illustrated with that animated plate, by
11 drawing a mainland-to-mainland delimitation line which moves St Martin's into a
12 different place.

13
14 There are two points to be made in relation to Bangladesh's point 8A, which you can
15 see on the screen and which is at tab 2.24. First, it is beyond question, in our
16 submission, that point 8A is, on the proper construction and application of article 15,
17 the appropriate end point of the territorial sea delimitation. It is situated at the
18 intersection of the 12-mile limit as measured from the southernmost point of St
19 Martin's and Myanmar's mainland coast. This is the line to be drawn in accordance
20 with international judicial and arbitral practice. There is no basis for moving the end
21 point on the basis of some hypothetical mainland-to-mainland line.

22
23 Secondly, the transposition of the starting point of a delimitation line beyond the
24 terminus of the land boundary is a practice that finds support in the relevant case
25 law. The angle bisector method, which is the most appropriate in this case, and will
26 be dealt with in some detail by Mr Martin and Professor Crawford, only produces a
27 direction of the line. There is no implicit location of that line. In the *Gulf of Maine*
28 *Case* the Chamber began its delimitation from point A, which is located 39 miles
29 from the land boundary terminus.⁹⁷ The Chamber then drew lines from the land
30 boundary terminus representing the general direction of the coast and then it drew
31 perpendiculars – as you see in the dotted blue line. It then moved the bisector line
32 such that it started at point A.

33
34 Mr President, Members of the Tribunal, this concludes my presentation of our
35 submissions this morning and for this week. On this matter, Bangladesh invites the
36 Tribunal to rule that in 1974 the Parties did reach agreement on the delimitation of
37 the territorial sea boundary, for the reasons explained in our written pleadings and by
38 Professor Boyle this morning. If for some reason the Tribunal concludes that there
39 has been no such agreement, despite the constant practice, we then invite you to
40 delimit by reference to the standard required by article 15. That leads to the line that
41 is shown on your screens. It is remarkably similar to the line agreed in 1974. That
42 line you will find at tab 2.24. We ask you to reject all of Myanmar's newly invented
43 argument and all of its newly constructed lines of delimitation. We invite you to take
44 account of the geographic reality. We invite you to take full account of Myanmar's
45 own practice both in relation to Bangladesh and with third States, and invite you to
46 give effect to the rules of the 1982 Convention as they are drafted. In particular, we
47 urge you to conclude that St Martin's is not a "special circumstance" and that it is

⁹⁶ RM, para. 3.34.

⁹⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984, p. 246, paras. 20, 23.

1 entitled to a full 12-mile territorial sea. We would welcome, as I think many would, a
2 very firm decision that rejects the effort by Myanmar to cause you to make entirely
3 new law by enclaving an island that lies within 12 miles of the coast of Bangladesh,
4 an island the sovereignty of which has never been in dispute between the Parties,
5 which is large, and which sustains a significant and economically active population.
6 We think that any other approach threatens very great mischief to the system
7 established by the Law of the Sea Convention.

8
9 Mr President, in his presentation, if I heard him correctly, Professor Crawford alluded
10 to the rather famous opening sequence in *Star Trek* that is very familiar to many of
11 us. He invited you, I think in relation to the outer continental shelf to “boldly go
12 where no man has gone before” and delimit the outer continental shelf.

13
14 In respect of the territorial sea delimitation there is no need for you to go boldly
15 where none have been before, and we think it would be deeply damaging for you to
16 do so.

17
18 Mr President, it remains for me simply to wish all Members of the Tribunal on behalf
19 of our delegation a very fine weekend. That concludes my presentation this morning
20 and it concludes our presentation for this week. We very much look forward to
21 seeing you on Monday morning. Thank you very much for your attention.

22
23 **THE PRESIDENT:** Thank you, Mr Sands. This brings us to the end of today’s
24 sitting. The hearing will be resumed on Monday 12 September 2011 at 10 a.m. The
25 sitting is now closed.

26
27 (The sitting closed at 12.45 p.m.)