

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



2011

Public sitting

held on Thursday, 15 September 2011, at 3.00 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President José Luís Jesus presiding

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

(Bangladesh/Myanmar)

Verbatim Record

| | | |
|-----------------|----------------------|------------------------|
| <i>Present:</i> | President | José Lu3s Jesus |
| | Vice-President | Helmut Tuerk |
| | Judges | Vicente Marotta Rangel |
| | | Alexander Yankov |
| | | P. Chandrasekhara Rao |
| | | Joseph Akl |
| | | Rüdiger Wolfrum |
| | | Tullio Treves |
| | | Tafsir Malick Ndiaye |
| | | Jean-Pierre Cot |
| | | Anthony Amos Lucky |
| | | Stanislaw Pawlak |
| | | Shunji Yanai |
| | | James L. Kateka |
| | | Albert J. Hoffmann |
| | | Zhiguo Gao |
| | | Boualem Bouguetaia |
| | | Vladimir Golitsyn |
| | | Jin-Hyun Paik |
| | Judges <i>ad hoc</i> | Thomas A. Mensah |
| | | Bernard H. Oxman |
| | Registrar | Philippe Gautier |

Bangladesh is represented by:

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

as Agent;

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

as Deputy Agent;

and

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

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

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

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

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

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

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

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

as Advisors;

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

as Independent Experts;

and

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

as Junior Counsel.

Myanmar is represented by:

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

as Agent;

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

as Deputy Agents;

and

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

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

as Counsel and Advocates;

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

as Advisers.

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

2

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

4

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

10

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

13

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

20

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

25

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

30

31 In its latest resolution on "Oceans and the Law of the Sea" the General Assembly of
32 the United Nations:

33

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

39

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

43

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

¹ General Assembly resolution 65/37 of 7 December 2010, para. 37.

² *Ibid.*, para. 41.

1 many of them, in all parts of the world, will be following the present proceedings with
2 great attention. The case is therefore a historic one, both for the Parties and for the
3 Tribunal.

4
5 Mr President, Members of the Tribunal, we in Myanmar have followed closely your
6 efforts to build up the Tribunal. The facilities here in Hamburg are of course first rate,
7 as is the Registry, and your caseload is now taking off. In addition to the present
8 proceedings, we saw in February of this year the important, and unanimous,
9 Advisory Opinion, of which the International Seabed Authority took note with
10 appreciation at its meeting in July.³ On your docket you have two other full-scale
11 cases raising central issues of the law of the sea.

12
13 As I have said, our decision to submit this case to the Tribunal is a measure of the
14 confidence that we have in the Tribunal. It is a function of our belief that, with your
15 collective wisdom and expertise, you will reach a decision firmly anchored in the
16 modern international law of the sea, a decision that is firmly anchored in the law on
17 maritime delimitation as it has developed in the case law of international courts and
18 tribunals, culminating in the unanimous judgment of the International Court in 2009 in
19 the case between Romania and Ukraine.⁴

20
21 Mr President, Professor Alain Pellet will shortly give a brief overview of our case. All
22 I need do at this stage is to stress the importance of this case for Myanmar. Her
23 Excellency the Foreign Minister of Bangladesh described last Thursday the
24 importance of this case for her country. For Myanmar too, the sea and its resources
25 are a matter of vital concern. The Bay of Bengal is an essential part of the life of our
26 nation. Fortunately, Myanmar has succeeded in reaching delimitation agreements
27 with its other neighbours, India and Thailand.⁵ Only with Bangladesh has such
28 agreement not proved possible. This is why we are here today.

29
30 Mr President, Members of the Tribunal, it remains for me to introduce those who will
31 address the Tribunal on behalf Myanmar in this first round of oral pleadings.

32
33 This afternoon, Professor Alain Pellet will begin by giving an overview of Myanmar's
34 case. Then Mr Samson will introduce the geographical context.

35
36 Next, Sir Michael Wood will refer to the negotiations between the Parties,
37 negotiations that were aimed at agreeing a global delimitation of their respective
38 maritime spaces. He will show that the negotiations in question led to no agreement,
39 including in respect to the territorial sea. In particular, he will show that the 1974
40 Agreed Minutes were not a maritime delimitation agreement for the territorial sea.
41 Sir Michael will begin his speech this afternoon and continue tomorrow.

42
43 Mr Sthoeger will then show that there is nothing in the practice of the Parties that
44 leads to a different conclusion. It is therefore for the Tribunal to draw the boundary

³ International Seabed Authority, Decision of the Assembly of the International Seabed Authority relating to the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters relating to the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, 25 July 2011, 17th session, ISBA/17/A/9.

⁴ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 61.

⁵ See *International Maritime Boundaries*, Vol. II, Reports 6.3 and 6.4.

1 line between the territorial waters of the Parties. Mr Lathrop will conclude our
2 presentation tomorrow afternoon by describing the territorial sea delimitation line that
3 we ask the Tribunal to adopt.

4
5 On Monday morning, Professor Pellet will address the law applicable to the
6 delimitation of the continental shelf and the Exclusive Economic Zones of the
7 Parties. Professor Forteau will stress the crucial role of equidistance in this case; and
8 Mr Müller will describe the relevant coasts and the relevant areas.

9
10 Then, following the three-step method for the delimitation of maritime areas beyond
11 the territorial sea, our counsel will describe the line proposed by Myanmar.

12
13 Mr Lathrop will describe the choice of the base points relevant for drawing a
14 provisional equidistance line, and he will describe the equidistance line itself.

15
16 Then, Professor Forteau will discuss the “relevant” (and irrelevant) circumstances.

17
18 Sir Michael Wood will next show that our line in no way contravenes the
19 disproportionality test.

20
21 Professor Pellet will conclude our presentation on Monday afternoon by
22 demonstrating the inadequacy of the bisector line proposed by Bangladesh.

23
24 On Tuesday Mr Lathrop will show that the bisector line advocated by Bangladesh is
25 wholly misconceived.

26
27 Professor Pellet will then deal with the question of the admissibility of that part of
28 Bangladesh’s case that relates to the shelf beyond 200 M.

29
30 Mr Müller is our last speaker in the first round. He will show that Bangladesh’s
31 argument concerning the continental shelf beyond 200 M is based on a wrong
32 interpretation of article 76 of the United Nations Convention on the Law of the Sea.

33
34 Mr President, Members of the Tribunal, I thank you for your kind attention, and may
35 I respectfully ask you, Mr President, to call upon Professor Pellet.

36
37 **THE PRESIDENT:** Thank you, Excellency. I now give the floor to Mr Alain Pellet.

38
39 **MR PELLET:** (*interpretation from French*) Mr President, Members of the Tribunal,
40 it is a pleasure and an honour to appear for the first time before you in a case which
41 itself also constitutes a first for Myanmar – as our Agent has just said– and for this
42 esteemed Tribunal it is an occasion on which to assert fully its position as the
43 Tribunal for the Law of the Sea in its entirety, discharging for the first time its
44 functions in matters of maritime delimitation.

45
46 To take up an expression that you used yourself in one of your recent speeches, Mr
47 President, it “confirms that this Tribunal is really the Tribunal for the Law of the

1 Sea”,⁶ and Myanmar is convinced that this important case will enable you, Members
2 of the Tribunal, to consolidate the international law of the sea – more precisely, that
3 of maritime delimitation – and that you will do so in conformity with your traditions
4 and with a mind to “avoiding fragmentation of international law and of overcoming
5 conflicts of jurisdiction”, to use the words of your predecessor.⁷
6

7 We are convinced that you will adopt this very wise approach, contrary to the
8 arguments put forward by Bangladesh attempting to convince you to set aside
9 several decades of consolidation of custom and clarification in case law of the
10 applicable law in the matter. I will return to this point, which will also constitute one of
11 the issues of general interest, at greater length in my further pleadings in this case.
12 For the moment, Mr President, I will limit myself to presenting the main outlines and
13 thrust of the arguments of Myanmar.
14

15 Let me address some points of clarification. First, we have taken good note of the
16 points that the Tribunal would like to have the parties examine in accordance with
17 article 76 of the Rules, and we will respond to these in the course of our pleadings.
18

19 Secondly, we have been struck by the way in which the counsel for Bangladesh
20 have employed flattery and tried to sow seeds. Often they have flattered the
21 Tribunal, but they also tried to give it lessons, to dictate its conduct, even under
22 scarcely veiled threats. We will do neither of these. We are confident that you will
23 perform your judicial functions to the best of your ability and that we have no need to
24 cajole or admonish you.
25

26 Thirdly, we have noted with a certain amused surprise that the Applicant, at least
27 during the hearing, added to the list of its counsel the name of two geology
28 professors, which is its right, calling them “independent experts”. The concept of
29 “independent experts” who are members of a legal team is very interesting.
30

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

⁶ Keynote speech of Judge José Luís Jesus, President of the International Tribunal for the Law of the Sea, about « The role of ITLOS in the settlement of law of the sea disputes » at the conference « Globalization and the law of the sea » (organized by KMI – COLP – NILOS), Washington D.C., 2 of December 2010, available on the web site of the Tribunal:
http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/jesus_washington_021210.pdf.

⁷ Statement given by H. E. Mr Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, at the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, available on the web site of the Tribunal:
http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_291007_eng.pdf.

⁸ ITLOS/PV.11/2/Rev.1 (E), p. 15, lines 11-13 (Mr. Paul Reichler) and ITLOS/PV.11/3 (E), p. 28, lines 37-39 (Mr. Philippe Sands), or ITLOS/PV.11/4 (E), p. 23, lines 4-12 (Mr Lawrence Martin).

1 client is trying to defend, in a case to be decided only after you have pronounced
2 your judgment. I also note that with staggering foresight Professor Crawford has
3 quoted the Counter-Memorial of India,⁹ whereas, as far as I know at least, this
4 document does not even exist.

5
6 Let me come back, Mr President, to more serious matters, which brings me to the
7 general presentation of Myanmar's arguments. Contrary to those of the Applicant, by
8 which our friends on the other side have tried to obscure matters by encumbering
9 them with considerations of a quasi-scientific nature lacking relevance, our
10 arguments consist in five simple propositions, which I would like to develop *seriatim*.

11
12 The first is that there is no agreement in terms of maritime delimitation of any of the
13 maritime areas claimed by the Parties, including concerning the territorial sea. In
14 truth, Mr President, more than a proposition, this is an affirmation which is in fact an
15 evident truth, in spite of the relentless attempts of Bangladesh to let us believe that
16 the Agreed Minutes of 23 November 1974 constitute a legally binding agreement for
17 the Parties. This document, which is reproduced at tab 1 of the Judges' folder, has
18 none of the characteristic features enabling it to be classified as an agreement within
19 the meaning of article 15 of the 1982 Convention.

20
21 The Minutes plot the points on which the Parties were in agreement during the
22 second round of talks, but although it says that the Bangladesh delegation
23 expressed its agreement on the delimitation of the territorial sea described in this
24 way, it says nothing to this effect concerning the Burmese delegation. On the
25 contrary, it says that the draft treaty drawn up by Bangladesh was presented to the
26 Burmese delegation "for eliciting views from the Burmese Government". The head of
27 the Burmese delegation, who had no power to conclude a treaty, simply refused to
28 sign or even initial this draft. On several occasions he said that the understanding
29 between the Parties described in paragraph 2 of the Minutes was provisional and
30 would not take force until a comprehensive agreement on the entire maritime
31 boundary had been reached, and this has been repeated on several occasions by
32 the Myanmar authorities. Furthermore, the Minutes were never approved in
33 conformity with the constitutional provisions in force in either of the two countries, nor
34 were they published or registered with the Secretariat of the United Nations in
35 conformity with article 102 of the Charter. Our opponents, however, insist on calling
36 this document an "agreement". It is only one step in a comprehensive negotiation
37 and their terminology is based on wishful thinking. It cannot hide the fact that the
38 negotiations were unsuccessful and that there is no agreement on any part of the
39 maritime boundary of the Parties.

40
41 The further conduct of the Parties does not bear witness to any sense of legal
42 obligation stemming from the Minutes of 1974. The only contrary "evidence" to this
43 that Bangladesh claims to provide is either highly suspect (the series of similar
44 witness statements from the fishermen that are couched in particularly refined
45 English) or it proves nothing at all, as in the case of the list of incidents that allegedly
46 came about in the supposed delimited area, which gives witness to only one thing,
47 namely the constant uncertainty over the delimitation. The Parties agree that no
48 agreement has been reached between them on the subject of the delimitation of their

⁹ ITLOS/PV.11/5 (E), p. 12, lines 22-23.

1 continental shelf and the EEZ respectively. It is therefore up to this Tribunal to
2 establish the single maritime boundary between the Parties from their land boundary
3 terminus, and there is no disagreement on that. We are talking about the median
4 point of the mouth of the main navigable channel of the Naaf River. The precise co-
5 ordinates have been fixed by the Supplementary Protocol of 1980, and this boundary
6 should continue up to the area in which the rights of a third party (in this case India)
7 may be affected.

8
9 My second proposition, Mr President, is that to plot this single boundary line one has
10 to apply the standard delimitation method, that is the “equidistance/special or
11 relevant circumstances method” applicable in its principle to the territorial sea and to
12 the continental shelf and the EEZ.

13
14 This second proposition bears on a particularly sensitive area of the divergences in
15 approach between the two Parties. Both agree that article 15 of the United Nations
16 Convention on the Law of the Sea is applicable to delimitation of the territorial sea of
17 the two States. Therefore, to plot the maritime boundary one should determine the
18 median line, all the points of which are equidistant from the baselines, bearing in
19 mind special circumstances and the existence of historical title. The only historical
20 title in question is not spatial as such. This is the right of unimpeded passage of
21 Myanmar’s vessels in the waters surrounding St Martin's Island. Unfortunately, this is
22 where the agreement between the Parties stops. They do not agree on the
23 implementation of the provisions of article 15 in this case – I will come back to this
24 when I address my next proposition – or on the applicable method of delimitation
25 beyond the territorial sea.

26
27 In fact, on the pretext of the difference in the wording of articles 15 of the
28 Convention, on the one hand, and articles 74 and 83, devoted respectively to the
29 delimitation of the EEZ and the continental shelf, on the other hand, Bangladesh
30 denies the existence of any established method of delimitation beyond the territorial
31 sea and wants to rely only on the objective of an equitable solution within the
32 meaning of the first paragraph of the two latter provisions. In doing so, the Applicant
33 tries to convince you, Members of the Tribunal, to question the development of
34 custom which, in the course of a long period of case law development, has led
35 international courts and tribunals to re-inject into the laws of delimitation a modicum
36 of objectivity and foresight, which the mention of an equitable solution alone does not
37 ensure.¹⁰ It is in that spirit that, in their sometimes trial and error approach, the
38 international courts and tribunals have established the principle of equidistance or
39 special (or relevant) circumstances as a standard method applicable to all operations
40 of maritime delimitation. This method has today acquired the status of a customary
41 rule, under which we should proceed in three stages.

42
43 The first stage is to plot a provisional equidistance line between the coasts of the
44 Parties before going on to the second stage of ensuring that one or more special
45 circumstances do not lead to an adjustment or shift of this line and, finally and thirdly,
46 verifying the equitable character of the line thus plotted by applying the non-
47 disproportionality test between the maritime areas attributed to each State and the

¹⁰ See Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the *delimitation of the exclusive economic zone and the continental shelf between them*, decision of 11 April 2006, *R.I.A.A.* Vol. XXVII, p. 212, para. 230.

1 respective length of their coastlines. This standard three-stage method was applied
2 with particular clarity by the International Court of Justice in 2009 in the unanimous
3 judgment (without declarations or opinions) in the *Maritime Delimitation in the Black*
4 *Sea case (Romania v. Ukraine)*¹¹, which reflects the latest jurisprudence, in which
5 the Applicant displays a certain limited interest. However, one understands that in
6 that judgment the Court recalled that this method should be applied in each case
7 where there are no “compelling reasons”¹² not to.” Such reasons which would render
8 the plotting of the provisional equidistance line not feasible¹³ do not exist in this case;
9 and I will come back to that in a few moments.

10
11 To take matters *seriatim*, Mr President, I will first say a word on my third proposition,
12 which concerns the delimitation of the territorial sea – the only segment of the
13 maritime boundary between Bangladesh and Myanmar for which one cannot adopt
14 purely and simply the equidistance line. My third proposition concerning the territorial
15 sea, the implementation of the principle of equidistance, is complicated by the
16 presence opposite the Myanmar coast of St Martin's Island, which is under the
17 sovereignty of Bangladesh. As I said, contrary to what is the case for the remainder
18 of the maritime boundary, Bangladesh and Myanmar agree that the line separating
19 their respective territorial seas should be plotted by applying the rules of article 15 of
20 the 1982 Convention, the drawing of which is not impeded by any particular technical
21 obstacle. It is perfectly possible to fix the base points from which the equidistance
22 line may be drawn.

23
24 Furthermore, the Parties agree that from the beginning it should be from the base
25 points situated on their mainland coasts and that one should then proceed to draw a
26 line with reference to the points situated respectively on the coastline of Myanmar,
27 on the one hand, and St Martin's Island, on the other hand. However, a glance at the
28 chart will show you – and my colleague Coalter Lathrop will return to this – that one
29 cannot continue this line indefinitely towards the south because such a prolongation
30 would lead to a considerable distortion with respect to the general configuration of
31 the coastline, which constitutes the very definition of a special circumstance.¹⁴ This
32 circumstance is all the more special as St Martin's Island, under the sovereignty of
33 Bangladesh, is situated opposite the coastline of Myanmar, not Bangladesh.
34 Professor Sands boasts of having visited it, but if he thought that he saw the coast of
35 this country when he walked along the eastern coastline of the island, he is
36 mistaken. Only if he had to be at the extreme northern point of St Martin's Island
37 would he have been able to see the coast of Bangladesh without risking a stiff neck!

38
39 The case of St Martin's Island is similar to that of the Channel Islands in the 1977
40 arbitration on the *Delimitation of the continental shelf between the French Republic*
41 *and the United Kingdom*, in which the Court considered that “the presence of the
42 British Channel Islands close to the French coast must be considered *prima facie* as

¹¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment*, I.C.J. Reports 2009, p.61.

¹² *Ibid.*, p. 101, para. 116.

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

¹⁴ See i.e.: *Dubai-Sharjah Border Arbitration*, award of 19 October 1981,, *ILR*, Vol. 91, pp. 676-677; *Delimitation of the Boundary in the Gulf of Maine Area*, judgment, I.C.J. Reports 1984, pp. 336-337, para. 222; *Newfoundland and Labrador/Nova Scotia Arbitration*, Second phase, award of 26 March 2002, *ILR*, Vol. 128, para. 4.35.

1 constituting a 'special circumstance' justifying a delimitation other than the median
2 line proposed by the United Kingdom".¹⁵ The same applies to our case.

3
4 The presence of this very special circumstance obliges one to interrupt the plotting of
5 the equidistance line at point C to join a line the direction of which is more in
6 conformity with the general configuration of the coastlines of the Parties. It is for that
7 reason that, starting from point C situated 6 M from the southern point of St Martin's
8 Island, the line must bend to point E, which is the point of intersection of the limit of
9 the territorial sea of the island with the equidistance line between the coasts of the
10 Parties plotted from the mouth of the Naaf River.

11
12 Incidentally, if you accord partial half effect to the island, as we think should be done,
13 by giving it 12 M, where that is judicious, and this is what our line does at point E, in
14 any case we have to join the equidistance line plotted thus. This is the only
15 possibility, in the words of Court of Arbitration in its decision of 1997, of an
16 intermediate solution "that effects a more appropriate and a more equitable balance
17 between the respective claims and interests of the parties"¹⁶ and of avoiding "a
18 radical distortion of the boundary creative of inequity",¹⁷ which would result from the
19 prolongation of the line B/C beyond point C.

20
21 It is perhaps worth noting that our opponents do not contest the principle itself that
22 there be a necessary semi-enclaving of St Martin's Island; the entire jurisprudence,
23 without exception, on which Professor Sands relied in his pleadings last Friday¹⁸
24 points to this. I would add that we do not intend under any circumstances to "ignore"
25 St Martin's Island.¹⁹ Simply, the existence of St Martin's Island – a modest island,
26 although our opponents consider it a kind of Australia, or at least a Bioko – does not
27 justify this delimitation that you are asked to proceed with, Members of the Tribunal,
28 to the detriment of the general configuration of the coastline that constitutes the
29 primary factor to be taken into consideration and, apart for any exceptional situation,
30 the principle of equidistance would reflect best.

31
32 My fourth proposition, on the other hand, concerning the continental shelf and the
33 EEZs of the Parties, is that no relevant circumstance would lead to an adjustment of
34 the provisional line which should be plotted in the first phase of this method and
35 would indeed lead to an equitable solution. Beyond point E the equidistance line

¹⁵ Case concerning *the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision of 30 June 1977, R.I.A.A., Vol. XVIII, p. 229, para. 196.

¹⁶ *Ibid.*, p. 230, para. 198.

¹⁷ *Ibid.*, p. 230, para. 199.

¹⁸ ITLOS/PV.11/3 (E), p. 21, lines 13-30 (Mr. Philippe Sands) and Case concerning *the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decisions of 30 June 1977 and 14 March 1978, R.I.A.A., Vol. XVIII, p. 95-96, para. 203 ; ITLOS/PV.11/3 (E), p. 22, lines 1-5 (Mr. Philippe Sands) and *Dubai-Sharjah Border Arbitration*, award of 19 October 1981, *ILR*, Vol. 91, pp. 677-678 ; ITLOS/PV.11/3 (E), p. 22, lines 7-14 (Mr. Philippe Sands) and *Delimitation of the Boundary in the Gulf of Maine Area (Canada/United States of America)*, judgment, *I.C.J. Reports 1984*, p. 337, para. 222 ; ITLOS/PV.11/3 (E), p. 22, lines 16-29 (M. Philippe Sands) and *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, judgment, *I.C.J. Reports 2007*, p.752, para. 305 and p. 754, Sketch-map No. 5 ; /PV.11/3 (E), p. 22, lines 31-37 (Mr. Philippe Sands) and *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 130, para. 218.

¹⁹ V. ITLOS/PV.11/2/Rev.1 (E), p. 16, l. 43-45 (Mr. Paul Reichler).

1 plotted from the appropriate points of the mainland coastlines of the two Parties
2 would follow towards the southwest, turning at points F and G, as a result of the
3 general configuration of the coastline, which must dictate the delimitation. As nothing
4 would prevent drawing this equidistance line, there is no reason to depart from the
5 standard method in favour of the bisector line as Bangladesh claims insistently.
6

7 Let me add, however, that if we were to have recourse to this unusual bisector line
8 method, if properly applied, it would lead to a result that would clearly be more
9 favourable to Myanmar than that of equidistance. The line claimed by the Applicant
10 is based, for its part, on a fanciful view of the general direction of the coastlines of
11 the Parties, and in particular that of Bangladesh. However, once more, there is no
12 “compelling reason” to justify setting aside the equidistance or relevant circumstance
13 method. In this case it is feasible to draw an equidistance line.
14

15 St Martin's Island having been taken into account in terms of the territorial sea, the
16 question then is to consider whether any other relevant circumstances would lead to
17 an adjustment of the equidistance line in favour of Bangladesh.
18

19 They refer to two others – the concavity of the coastline and the Bengal Depositional
20 System. Mr President, the coastlines of Bangladesh taken as a whole are concave;
21 that is a fact. However, in spite of the lamentations of our Bangladeshi friends, the
22 resulting enclaving effect is not as dramatic as they claim. I refer to the interesting
23 animation that Mr Martin showed on Monday morning. In the first stage there is no
24 concavity. In principle, this is not the case here. I would point out, however, that for
25 about 100 km on each side of the Naaf River the coasts of the two States are more
26 or less straight or slightly convex, which could have a certain importance if one were
27 to have recourse to the bisector method.
28

29 The second stage is where there is a slight concavity. I recognize that Bangladesh's
30 concavity is generally more marked in this case, (but this is not so in respect of the
31 coast which would be relevant in drawing a bisector line if we were to have recourse
32 to this method, properly applied); and, thirdly, the case of severe concavity. I admit
33 that this characterizes the coast of Bangladesh, but the coast of Myanmar is also
34 concave, as the map to be shown by Mr Samson later will show you. What I am
35 saying is that Bangladesh is in this situation here, and not in the situation that you
36 see on the screen (fourth stage: concavity within a concavity), which illustrates rather
37 the situation of Germany in the *North Sea Continental Shelf* case, which would have
38 reduced Germany to a maritime zone extending to a maximum of 98 M from its coast
39 if the rule of equidistance had been applied. However, in the present case, the
40 equidistance line about which Bangladesh complains would give it a maritime area
41 almost double. Unless we completely refashion nature, which is not possible,²⁰ this

²⁰ See in particular *The land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria : Equatorial Guinea intervening, Judgement, I.C.J. Reports 2002*, p. 443-445, para. 295; see also *North Sea Continental Shelf Cases, I.C.J. Reports 1969*, p. 49, para. 91; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, R.I.A.A.*, Vol. XVIII, p. 58, para. 101; *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. 1985*, p. 45, para. 57; *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), judgment, I.C.J. Reports 2007*, p. 747, para. 289 ; *Guyana/Surinam*, decision of 17 September 2007, *ILM*, Vol. 47, 2008, p. 164, paras. 373-374 (available on the web site <http://www.pca-cpa.org/>).

1 concavity cannot be seen as a circumstance calling for a shift of the equidistance
2 line.

3
4 This is also not the case for the very curious third special circumstance, which was
5 brought up late in Bangladesh's oral pleadings, in desperation, that is the Bengal
6 Depositional System,²¹ even though they admit that "within 200 M entitlement is by
7 operation of article 76(1) determined purely by reference to distance from the
8 coast".²²

9
10 Mr President, there does not exist any relevant circumstance that may lead to an
11 adjustment of the provisional equidistance line drawn as I indicated a moment ago.
12 In the same way, the test of proportionality – or, more precisely, the absence of
13 excessive disproportionality – confirms the equitable character of the solution
14 resulting from the provisional equidistance line. In other words, this line drawn in the
15 first stage of the standard method – there are three stages – meets the requirement
16 of an equitable solution imposed by articles 74 and 83 of the 1982 Convention.
17 Therefore, it is not necessary to modify or adjust it in the two other stages.

18
19 I turn to our fifth and final proposition. The question, put with insistence by
20 Bangladesh, of the definition of the delimitation of the continental shelf beyond 200
21 M is not raised because in any case the Applicant cannot have any claim to any part
22 of this maritime area. In the absence of India, the third coastal State in the northern
23 part of the Bay of Bengal, it would be impossible for the Tribunal to fix with any
24 precision the end point of the maritime boundary between Bangladesh and
25 Myanmar. That is the reason why it ends in an arrow on the graphic that you can
26 now see on the screen and in tab 3 of your Judges' folder. I would like to remark in
27 passing that the line presented with insistence by our opponents as representing
28 Myanmar's claim is wrong, and it does not correspond to that contained in our
29 submissions.

30
31 There remains the fact that, no matter what India's claim will be – and in the graphic
32 we see it represented hypothetically based on information given in the Reply of
33 Bangladesh on this point²³ – the final point of the maritime boundary between the
34 Parties, which would also be the tri-point with India, will inevitably be situated less
35 than 200 M from the coast of Bangladesh.

36
37 Under these conditions, the question of a delimitation of the continental shelf beyond
38 the 200-M limit does not arise.²⁴ This Tribunal would not be able to grant the
39 Applicant entitlements to a part of the continental shelf situated beyond the maritime
40 boundary, fully drawn, between the two States. There would simply be nothing left to
41 delimit. This is also the reason why, Mr President, Myanmar has refrained from
42 responding to the vehement, sometimes complex arguments made by the Applicant

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

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

²³ See Sketch-map R3.2 at p. 63 of the Reply.

²⁴ Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the *delimitation of the exclusive economic zone and the continental shelf between them*, decision of 11 April 2006, R.I.A.A. Vol. XXVII, p. 242, para. 368 (the award is reproduced in the MB, [Vol. V], p.329).

1 based exclusively on geological considerations. In fact, it does not matter whether
2 they are correct or false. First – and this is the most important thing – Bangladesh
3 cannot claim any entitlement to the continental shelf beyond 200 M. Second, and in
4 any case, if the problem was posed, these considerations would not be relevant.

5
6 The Applicant has made these arguments on the basis of an interpretation of article
7 76 of the 1982 Convention which is not tenable. The Party interprets the expression
8 “natural prolongation of its land territory” as though it took up the cautious definition
9 adopted by the ICJ in making the requested delimitation or rather in indicating the
10 principles applicable to the requested delimitation in its judgment of 1969 in the
11 *North Sea Continental Shelf* cases. In doing this, Bangladesh ignores both the
12 context of article 76(1), which must be interpreted in the light of the paragraphs that
13 follow it, and the evolution of case law that has taken place since that time. Neither
14 the one nor the other justifies the exclusively geological definition of the continental
15 shelf, even beyond 200 M, which would be based on an imaginary geographical
16 continuity test, to which Bangladesh is so attached.

17
18 I would like to add that in any case Bangladesh’s request in inviting the Tribunal to
19 decide that it has sovereign rights to a part of the continental shelf beyond the 200-M
20 limit, and that Myanmar does not have them, is inadmissible, and that you, the
21 Members of the Tribunal, cannot make a decision to that effect as long as the
22 Commission on the Limits of the Continental Shelf has not decided the possible
23 entitlements of the Parties in this area; and I will have occasion to come back to this.

24
25 Those, briefly explained, Mr President and Members of the Tribunal, are the main
26 outlines of Myanmar’s arguments in this first round. Contrary to the Respondent, we
27 are not attempting to drown the Tribunal in a flood of irrelevant arguments and
28 technical facts that will not help us to resolve this rather simple dispute.

29
30 I would like to thank you for your attention, honourable Judges, and I request you,
31 Mr President, to be so kind as to give the floor to Mr Benjamin Samson, who will give
32 a brief presentation on the geographic context of the case that we are discussing
33 here.

34
35 **THE PRESIDENT:** Thank you very much. I now give the floor to Mr Samson.

36
37 **MR SAMSON (*interpretation from French*):** Thank you very much. Mr President,
38 Members of the Tribunal, it is a huge honour for me to take the floor before you.
39 I would like to thank the authorities of the Republic of the Union of Myanmar for
40 having afforded me the opportunity to do so.

41
42 To continue this afternoon’s presentation, it is my task in the next few minutes to
43 introduce the geographic aspects of the case before you. Already, I would like to
44 assure our colleagues on the other side that we do not dispute in any way the
45 pertinence of geography in the present case. Myanmar is aware – and it has never
46 denied – that geography is the fact underpinning any delimitation exercise. In this
47 respect, we subscribe, without reserve, to the *dictum* of the International Court of
48 Justice – I am quoting the International Court of Justice in the *Cameroon v. Nigeria*
49 case:

1 “The geographical configuration of the maritime areas that the Court is
2 called upon to delimit is a given. It is not an element open to modification
3 by the Court, but a fact on the basis of which the Court must effect the
4 delimitation.”²⁵

5
6 Myanmar fully recognizes that your Tribunal may, where appropriate, take into
7 consideration particular geographic circumstances and possibly make adjustments
8 for their effects at the appropriate stage in the delimitation method, it being the case
9 however that even at that stage in the delimitation process, and I quote the arbitral
10 tribunal in the *Guyana-Suriname* case:

11
12 “International courts and tribunals dealing with maritime delimitations
13 should be mindful of not remaking or wholly refashioning nature, but
14 should in a sense respect nature.”²⁶

15
16 Bangladesh does not appear particularly concerned by this jurisprudence insofar as
17 its delimitation line and the “method” it does its best to apply amount to a
18 modification of the geography of the region. While Bangladesh has tried to take
19 advantage of the jurisprudence of the International Court of Justice to that effect,
20 specifically with a view to reducing the effect following from May Yu Island’s position
21 in front of Myanmar’s mainland coast²⁷, Bangladesh in its Reply makes a determined
22 effort to discredit the fundamental principle which it finds bothersome by dismissing it
23 as merely a “rather over-used argument”.²⁸

24
25 Geography is however what it is: a fact that must be taken into account and must be
26 respected in any delimitation process. I, for my part, would like to describe to you, as
27 neutrally as possible, the relevant geographical facts in the region before highlighting
28 the very skewed geographical approach taken by Bangladesh.

29
30 Before I start with a quick description of the Bay of Bengal region, Mr President,
31 allow me to say that we are not going to enter into the game that Bangladesh has
32 tried to draw us into by setting out in detail the geology of the Bay of Bengal. As
33 Professor Pellet has just reminded us, the question of delimiting the continental shelf
34 beyond 200 M simply does not arise in this present case. For this reason the geology
35 of the Bay cannot have any effect whatsoever on the delimitation you are entrusted
36 with now (nor could it even if you were actually called upon to delimit the continental
37 shelf beyond 200 M). We are not necessarily in agreement with all the information
38 presented by Bangladesh’s “independent” experts, but it does not seem worthwhile
39 to devote lengthy discussion to irrelevant points.

40
41 Mr President, Members of the Tribunal, the Bay of Bengal constitutes the north-east
42 part of the Indian Ocean, and is bordered by four States: Sri Lanka in the south-west,
43 India in the west, in the north and in the south-east by the Andaman and Nicobar
44 Islands, Bangladesh in the north and the east, and Myanmar in the east. To the east
45 and the south of Myanmar lie Thailand, Malaysia and Indonesia.

²⁵ *The land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening, Judgment, I.C.J. Reports 2002, p. 443 and 445, para. 295.*

²⁶ *Guyana/Suriname*, decision of 17 September 2007, *ILM*, vol. 47, 2008, p. 164, paras. 373-374 (also available on the web site of the P.C.A.: <http://www.pca-cpa.org/>).

²⁷ See MB, para. 6.51.

²⁸ RB, para. 3.60. See also *ibid.*, para. 3.8.

1
2 At the northern end of the Bay of Bengal the Bengal Delta extends from the Hooghly
3 River in India to the estuary of the Meghna River, which is part of Bangladesh. The
4 delta has been formed mainly, but not exclusively, by sediments carried by the
5 Ganges and Brahmaputra Rivers and their tributaries, which originate in the
6 Himalayas, that is to say outside of Bangladesh.
7

8 With a surface area of 2.2 million square kilometres, the Bay of Bengal is one of the
9 largest bodies of water in the world, but only a small part of this vast expanse is
10 relevant to the delimitation that the Parties have requested you to carry out. That part
11 is the area covering the coast of Bangladesh and Myanmar's Rakhine coast as far as
12 Cape Negrais, its southern end. Later on, Daniel Müller will return to the subject of
13 the characteristics of the relevant area for purposes of this case to address them
14 more from an exclusively legal perspective.
15

16 Bangladesh lies in the northernmost part of the Bay of Bengal. Its coast can be
17 divided into three coastal regions:
18

19 -- the western part of the coastline, which reaches from the land boundary
20 with India, which is formed by the Hariabhanga River, to the vicinity of the
21 Tetulia River. Most of this region is covered by the biggest mangrove forest in
22 the world, the Sundarbans;
23

24 -- the central region, extending from the Tetulia River to the town of Cox's
25 Bazar, and crossing the Meghna River estuary. The coastline in this area is
26 very irregular and features many islands. The western and central areas are
27 both a part of the Bengal Delta;
28

29 -- the eastern part of its coast runs from Sandwip Island to Point Shahpuri at
30 the mouth of the Naaf River.
31

32 The coastline of Bangladesh measures some 520 km. As Daniel Müller will also
33 show, not all of Bangladesh's coast is relevant for purposes of this delimitation.
34

35 The Naaf River flows between Bangladesh and Myanmar. It forms the land boundary
36 between the two Parties. It is common ground between the Parties that the land
37 boundary terminus should be considered the starting point of the delimitation you are
38 to effect.²⁹
39

40 St Martin's Island lies to the south-west of the mouth of the Naaf River. Last week
41 counsel for Bangladesh gave us a vibrant description of it³⁰ but neglected to mention
42 some important facts that are nevertheless set out in annexes to its Memorial.³¹ In
43 these documents we can see that: this island, which belongs to Bangladesh but lies
44 only 4.5 M from the Rakhine coast of Myanmar, is a feature standing alone in the
45 geography of Bangladesh; in fact, it is made up of three small islands; a narrow

²⁹ MB, vol. III, annex 6; see MB, paras. 3.21 and 3.23 and CMM, para. 2.29.

³⁰ ITLOS/PV.11/2/Rev.1 (E), p. 13, lines 5-11 and 27-29 and p. 19, lines 2-9 (Mr Paul Reichler);
ITLOS/PV.11/3 (E), p. 20, lines 9-17 (Professor Philippe Sands) and ITLOS/PV.11/4 (E), p. 31, lines
9-11 (Mr Paul Reichler).

³¹ Memorial of Bangladesh, vol. I, para. 2.18; vol. III, annex 36 ; vol. IV, annex 49.

1 channel two metres deep at all times separates the central island from the northern
2 one; certain parts of the island are submerged at high tide; and the shore of the
3 southern island is more irregular than that of the central island because of severe
4 wave erosion. Furthermore, you can walk around the island very quickly because it is
5 only 5 km at high tide and 8 km at low tide.³²

6
7 However, Mr President, the most important point is that this small island is directly
8 opposite the coast of *Myanmar* - I repeat: Myanmar - whether our colleagues on the
9 other side like it or not.³³ My eminent colleagues will come back to this question in
10 more detail.

11
12 Mr President, I would now like to turn to the geography of Myanmar (and to a few
13 related points that were left aside by Mr Reichler in his statement last week). The
14 biggest State in south-east Asia, with a territory of almost 700,000 km², Myanmar
15 has a very long coastline of nearly 2,400 km, which can be divided into three coastal
16 regions:

17
18 -- forming the eastern façade of the Bay of Bengal, the Rakhine coast runs
19 from the border with Bangladesh to Cape Negrais for a distance of some
20 740 km;

21
22 -- on the east of the Bay of Bengal the Irrawaddy coast and the Gulf of
23 Mottama form the northern limit of the Andaman Sea;

24
25 -- finally, the Tanintharyi coast borders the Andaman Sea to the east and runs
26 all the way to the boundary with Thailand.

27
28 For purposes of this delimitation, the only relevant coast is that of the first region, the
29 Rakhine coast.

30
31 The northernmost part of the Rakhine coast, from Cypress Point, marking the mouth
32 of the Naaf River, to the mouth of the May Yu River, is not distinguished by any
33 particular feature. May Yu Island should however be noted, lying south-west of the
34 mouth of the latter river. This island, and it is undeniably one, is characterised by the
35 facts that it has a lighthouse and that a regiment of the armed forces of Myanmar is
36 permanently stationed there.

37
38 From the south of the May Yu River through to Cape Negrais, the coastal strip has
39 two distinctive features:

40
41 -- many significant islands, such as Myingun, Yanbye and Manaung;

42
43 -- and many rivers, such as the Lay Myo and the Kaladan, at whose mouth
44 Sittwe, the capital of Rakhine State and the biggest port on the Rakhine coast,
45 is situated. These rivers originate in the Rakhine-Chin-Naga Ranges. These
46 mountains, which were formed by the accretionary prism, run from north to
47 south along the Rakhine coast. The accretionary prism and the mountains

³² *Ibid.*, vol. III, annex 36, para. 2.

³³ RB, para. 3.110.

1 produced by it continue under the sea beyond the land mass of Myanmar,
2 emerging from time to time to form, inter alia, the Preparis and Coco Islands,
3 south of Cape Negrais.
4

5 Members of the Tribunal, to round off this presentation of the general geographic
6 context of our case, I now need to say a few words about delimitation agreements in
7 the region. As the present dispute is strictly a bilateral one, I will be brief on this
8 subject.
9

10 Nevertheless, two points should be made. First, it is only the northern zone of the
11 Bay of Bengal that remains to be delimited. Two delimitations still need to be made.
12 It is for your Tribunal to delimit the maritime boundary between Bangladesh and
13 Myanmar. The second one, between India and Bangladesh, is currently pending
14 before an arbitral tribunal constituted under Annex VII of the 1982 United Nations
15 Convention on the Law of the Sea. In the rest of the region, from the Maldives in the
16 west to Indonesia and Thailand in the east, the States have delimited all their
17 maritime areas up to 200 M by agreement, in accordance with the Convention.
18

19 In all these delimitation agreements, without any exception, the parties have decided
20 to apply the “equidistance/relevant circumstances” method, even in areas marked by
21 a strong concavity, such as the Gulf of Mottama. It is in vain that Bangladesh seeks
22 to deny this.³⁴ In these agreements the Parties have systematically adopted a strict
23 or adjusted equidistance line.³⁵
24

25 Allow me now, Mr President, to come to my second point: the random and biased
26 geographic approach taken by Bangladesh.
27

28 Bangladesh is very imprecise in describing the geographic aspects of our case. This
29 is crucial because, as my eminent colleagues will show you in the course of this
30 week, it is mainly on this geographic imprecision that the choice of delimitation
31 “method” and line advocated by Bangladesh rest. I will make three remarks on this
32 subject.
33

34 The first approximation: Bangladesh simply asserts that its entire coast is concave.³⁶
35 From the point of view of macro-geography, it is true that Bangladesh’s coast is
36 generally concave,³⁷ as is the entire northern part of the Bay of Bengal, from
37 Batticaloa in Sri Lanka to the Preparis and Coco Islands in Myanmar.
38

39 But, if you move closer to the coastline of Bangladesh you see that the facts are
40 more nuanced, and that it is more complicated to depict the coastline than it would
41 seem, as, by the way, the Applicant occasionally admits.³⁸ Thus, the western part of

³⁴ RB, para. 3.69.

³⁵ See Agreement India-Maldives of 1976, J.I. Charney and L.M. Alexander (ed.), *International Maritime Boundaries*, Vol. II, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 1394; Agreements India-Sri Lanka of 1974 and 1976, *ibid.*, p. 1409 and 1423; Agreements India-Indonesia of 1974 and 1977, *ibid.*, p. 1363 and 1373; Agreement India-Indonesia-Thailand of 1978, *ibid.*, pp. 1382-1383; Agreement India-Thailand of 1978, *ibid.*, p. 1436; and Agreement India-Myanmar of 1986, *UNTS*, Vol. 1484, I-25390, p. 173 (also reproduced in annex 11 of Myanmar’s Counter-Memorial).

³⁶ MB, para. 2.7.

³⁷ CMM, para. 2.14.

³⁸ MB, para. 6.70.

1 Bangladesh's coastline follows a generally west/east direction without showing any
2 change of direction. In continuing towards the east, Bangladesh's coastline follows
3 the shores of the Meghna estuary through to the vicinity of Sandwip Island and the
4 town of Chittagong. It then changes direction radically to run north-west/south-east to
5 Sonadia Island. From Sonadia Island onwards the eastern part of the coast of
6 Bangladesh curves slightly in order to go in a south/south-east direction to the
7 boundary with Myanmar. As you will see from the image on the screen now, this part
8 of the coast of Bangladesh is convex – I repeat, convex.

9
10 The imprecision of the Applicant does not stop here – and this is my second remark.
11 Our opponents have described in detail the deltaic nature of the north-eastern shore
12 of the Bay of Bengal, from the Hooghly River in India to the Meghna River in
13 Bangladesh. According to them, the natural forces interacting in this area have made
14 this coastline one of the most unstable in the world.³⁹ Once again, this is very much
15 an over-generalization. It is plausible that the central part of the coast of Bangladesh
16 around the estuary of the Meghna River is indeed very unstable; but on the other
17 hand the western part of its coastline, which is covered by the Sundarbans Forest, is
18 stable. The work of several researchers in Bangladesh, with scientifically recognised
19 authority, shows that the Sundarbans Forest provides stability to the coastline of
20 Bangladesh.⁴⁰ Some of this work was presented by Bangladesh during the
21 negotiations between the two countries. We can make it available to the Tribunal if
22 you so wish.

23
24 This does not prevent Bangladesh from asserting, without precision or evidence, that
25 its eastern coast is subject to such erosion and accretion that it is impossible to
26 identify a stable base point. However, this portion of the Bangladesh coastline is
27 smooth and protected by a foreshore of submerged silt and sand.

28
29 The third imprecision, Mr President, is seen in the very short geographic description
30 of Myanmar that was given by Bangladesh. Bangladesh declares that the Rakhine
31 coast “runs in a relatively straightforward north-west to south-east direction”.⁴¹ The
32 map now on the screen shows that this is wrong. Contrary to what the Applicant has
33 said, the Rakhine coast shows a very definite concavity. Running in a north-
34 west/south-east direction, from the mouth of the Naaf River to the vicinity of the Bay
35 of Gwa, the Rakhine coast curves gradually towards Cape Negrais in a north-
36 east/south-west direction. This concavity is even more pronounced if you follow the
37 coast to the Preparis and Coco Islands.

38
39 Mr President, these are the “raw data of nature”⁴² in our case; they are what they are
40 and nothing other than what they are, and no “human extrapolation”⁴³ can result in
41 any modification of them.

42

³⁹ MB, para. 2.16. See also ITLOS/PV.11/2/Rev.1 (E), p. 9, lines 35-37 and p. 10 lines 1-2 (Mr Paul Reichler).

⁴⁰ Hoque M. N., “Legal and Scientific Assessment of Bangladesh's Baseline in the Context of Article 76 of the United Nations Convention on the Law of the Sea”, *United Nations*, 2006, p. 46.

⁴¹ MB, para. 2.7.

⁴² Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal, decision of 31 July 1989. Dissenting opinion of Mr. Mohamed Bedjaoui, RIAA, Vol. XX, p 193, para. 101.

⁴³ *Ibid.*

1 Mr President, Members of the Tribunal, this concludes my presentation. I would like
2 to thank you very much for your patience and for your kind attention. Mr President,
3 with your permission Sir Michael Wood will present the historical context of this
4 dispute after the customary coffee break, unless you would like to hear him now.

5
6 **THE PRESIDENT:** Thank you. I understand that your intention is to call on Sir
7 Michael Wood to speak after the coffee break. Would you prefer him to take the floor
8 now?

9
10 **MR SAMSON:** Now.

11
12 **THE PRESIDENT:** Sir Michael, you have the floor.

13
14 **SIR MICHAEL WOOD:** Mr President, Members of the Tribunal, I hope it is not
15 inconvenient if I speak a little bit before the coffee break – I have quite a lot to get
16 through, and it would be helpful.

17
18 Mr President, it is an honour to appear before you, and it is an especial honour to do
19 so on behalf of Myanmar. I expect to be speaking for the rest of the afternoon, and I
20 apologise for that. I may have to continue for a short time tomorrow afternoon – we
21 will see.

22
23 I can assure you that I shall not be quoting any English poets. There will be no
24 Shakespeare, no Pope, no Blake; there will not even be Rabindranath Tagore. There
25 will be no Sherlock Holmes and there will certainly be no Star Trek.

26
27 Indeed, the main subject of my speech will be the absence of any agreement
28 between the parties on the delimitation of the territorial sea.

29
30 First I shall cover the negotiations between Myanmar and Bangladesh, which took
31 place between 1974 and 2010. In these negotiations, the Parties sought to reach
32 agreement on a comprehensive maritime delimitation. Regrettably, the negotiations
33 were unsuccessful. No agreement was reached.

34
35 In the second section of my speech, I shall explain that, contrary to the repeated
36 assertions of Bangladesh - repeated yet again by Professor Boyle last Friday - there
37 is no agreement between the Parties concerning maritime delimitation in the
38 territorial sea. In particular, the Agreed Minutes of 1974 are not such an agreement.

39
40 Mr Eran Sthoeger will then complete the picture. He will explain that none of the so-
41 called 'practice' cited by Bangladesh to prop up its claim to the existence of such an
42 agreement in fact does so. On the contrary, Bangladesh's efforts to rely on such
43 practice only serve to emphasise the weakness of its case based on the Agreed
44 Minutes themselves.

45
46 Mr Sthoeger and I will therefore have shown that Bangladesh has failed to establish
47 the existence of any agreement between Myanmar and Bangladesh on maritime
48 delimitation. This will hardly come as a surprise since in its application instituting
49 these proceedings Bangladesh said as much. It said, in terms, and I quote "[t]here is

1 no treaty or other international agreement ratified by Bangladesh and Myanmar
2 delimiting any part of the maritime boundary in the Bay of Bengal".⁴⁴

3
4 It will then be for Mr Coalter Lathrop to describe and explain the territorial sea
5 delimitation line which Myanmar requests the Tribunal to draw.

6
7 Mr President, by way of introduction let me recall that Myanmar participated actively
8 in the three United Nations Conferences on the Law of the Sea, in 1958, in 1960 and
9 from 1973 to 1982. While it did not become a party to the 1958 Geneva Conventions,
10 its maritime legislation followed the provisions of those Conventions closely. Then in
11 1977, like many other States at that time, Myanmar enacted a Territorial Sea and
12 Maritime Zones Law.⁴⁵ This provides for the various zones recognized in the modern
13 law of the sea, as that law was evolving at the Third United Nations Conference.

14
15 Myanmar signed the 1982 Convention on 10 December 1982. Myanmar ratified the
16 Convention in May 1996, not long after its entry into force. It did so without making
17 any interpretative declarations.

18
19 Bangladesh ratified the Convention some five years later, in 2001 in fact. It did so
20 with a considerable number of declarations. One of the declarations may be relevant
21 to these proceedings. Bangladesh stated, upon ratification, that

22
23 "Ratification of the Convention by Bangladesh does not *ipso facto* imply
24 recognition or acceptance of any territorial claim made by a State party to
25 the Convention, nor automatic recognition of any land or sea border."

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

34
35 Mr President, Members of the Tribunal, I now turn to the negotiations between
36 Myanmar and Bangladesh on a comprehensive maritime delimitation agreement.
37 These negotiations form an important part of the background to the present case,
38 and in particular to the 1974 Minutes. They are, in the words of the International
39 Court of Justice, the "particular circumstances in which [the Minutes] were drawn
40 up"⁴⁶. Bangladesh has been strangely reticent about the negotiations. Professor
41 Boyle scarcely mentioned them last week.

42

⁴⁴ Notification under article 287 and Annex VII, article 1 of UNCLOS and the Statement of Claim and Grounds on Which it is Based, 8 October 2009, para. 4.

⁴⁵ Pyithu Hluttaw Law No. 3 of 9 April 1977 (BM, Vol. III, Annex 12).

⁴⁶ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1978, p. 3, at p. 39, para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1994, p. 112, at p. 121, para. 23; Ph. Gautier, "Article 2", in O. Corten and P. Klein, *The Vienna Conventions on the Law of Treaties. A Commentary*, Oxford University Press, Oxford, 2011, Vol. I, pp. 34-45.

1 As you are aware, Members of the Tribunal, maritime delimitation negotiations
2 between the Parties stretched over a period of some 36 years, though there was an
3 extended gap between 1986 and 2008. Eight rounds of negotiations took place
4 between 1974 and 1986. Six more rounds (which we refer to as the “resumed
5 rounds”) took place between 2008 and 2010.

6
7 We have set out briefly, in Chapter 3 of our Counter-Memorial, what happened at
8 each round. You have our minutes of the meetings,⁴⁷ and you have some of those
9 prepared by Bangladesh⁴⁸. (I should like to emphasize that what we say about the
10 negotiations, both in our written pleadings and here in oral argument, takes account
11 of Bangladesh’s records as well as our own.) I do not intend to repeat what we said
12 in the Counter-Memorial. Instead I shall begin by highlighting two general points and
13 I shall then take you through, in a little more detail, what transpired during the
14 negotiations in so far as it is relevant to an understanding of the Agreed Minutes of
15 1974.

16
17 The first general point is this. As you will have noticed, the negotiations began just as
18 the Third United Nations Conference on the Law of the Sea was getting underway. In
19 fact, the first round took place in September 1974, less than a week after the end of
20 the Caracas Session. The first five rounds of negotiations took place in parallel with
21 the very polarized negotiations on delimitation that were taking place at the
22 Conference.

23
24 Despite this difficult and uncertain background, Myanmar was conscious, throughout
25 the bilateral negotiations, of the obligation upon States to settle their differences by
26 peaceful means, including negotiation, in accordance with the Charter of the United
27 Nations and the Law of the Sea Convention.⁴⁹

28
29 To this end, Myanmar adopted, throughout the negotiations, a responsible and
30 flexible approach, and sought to achieve a reasonable agreed boundary on the basis
31 of international law, as referred to in the ICJ Statute, in order to achieve an equitable
32 solution.

33
34 Bangladesh, on the other hand, approached the negotiations in a rigid manner,
35 ignoring the applicable principles of international law, and even at times making
36 proposals that took the Parties further apart. Considerations of the applicable
37 principles of international law seem to have played little, if any, part in Bangladesh’s
38 approach to the negotiations. While, early on, Bangladesh did propose an
39 equidistance line⁵⁰, thereafter it insisted throughout the negotiations on what it
40 termed an “*ad hoc*” or “friendship” line.

41
42 The second point concerning the negotiations goes to procedure. Bangladesh’s
43 disregard for the substantive norms of international law seems to have gone hand-in-
44 hand with disregard for the normal processes of international negotiation. As we
45 have shown in our written pleadings, and as I shall once again explain, it is clear,

⁴⁷ MCM, Vol. II, Annexes 2-6, 8-10, 14-15, 18, 23 and 25.

⁴⁸ BM, Vol. III, Annexes 14-16, 18-21.

⁴⁹ *North Sea Continental Shelf cases*, I.C.J. Reports 1969, p. 3, at p. 47, para. 85(a); now reflected in UNCLOS art. 74, para. 1 and art. 83, para. 1; see also UNCLOS Part XV

⁵⁰ MCM, Vol. II, Minutes of the second round, third meeting, para. 17 (Annex 3).

1 both from the course of the negotiations and from the words used, that the 1974
2 Minutes were no more than a conditional understanding of what could, eventually,
3 and subject to further negotiations and reflection, be included in an overall maritime
4 delimitation agreement, if and when such agreement was reached. Unfortunately, no
5 such agreement was reached, so, to put it colloquially, “all bets were off”.
6 Bangladesh’s refusal to acknowledge this simple fact shows a wilful disregard of
7 standard negotiating practice.

8
9 To conclude a non-binding understanding, which may be reflected in agreed minutes
10 of a meeting, as was done on this occasion, is entirely consistent with the practice of
11 negotiating States, including in maritime boundary negotiations. The parties to a
12 negotiation frequently reach provisional “agreement” on one issue within a complex
13 negotiation conditional on agreement on the remaining issues. They record that
14 provisional or conditional agreement more or less formally, and move on to negotiate
15 the remaining issues. In such circumstances, it is well understood that “nothing is
16 agreed until everything is agreed”. Negotiations on a complex matter, where
17 everything is interlinked, may sometimes proceed stage-by-stage, with partial or
18 interim agreements, but this is rare. Where issues are interlinked, the aim is normally
19 to reach at an overall “package deal”. The negotiation of UNCLOS itself is an
20 obvious case in point. States are unwilling definitively to agree to one part of the
21 package without seeing how the overall outcome will meet their interests. They may
22 be prepared to make concessions in one area in return for concessions, not yet
23 negotiated, elsewhere. If the parties to a negotiation were too easily held to be
24 bound by provisional “agreements” reached in the course of negotiating a “package
25 deal”, that valuable negotiating technique would no longer be possible.

26
27 Of course, Mr President, even in the negotiation of extended maritime boundaries,
28 States may sometimes be prepared to agree a boundary step-by-step but then this is
29 done through formal agreement, not through what is effectively a record of a
30 meeting. That is all that Judge Anderson was saying at the end of the passage cited
31 by Professor Boyle last Friday⁵¹. I shall give one example. As Members of the
32 Tribunal will be well aware, Norway and the Russian Federation held negotiations
33 over their boundary in the Barents Sea for many years. They finally reached
34 agreement in 2010. But before that, in 2007, they reached agreement on a small part
35 of the line in the Varangerfjord area, stretching just short of 40 nautical miles⁵². The
36 important point to note is that, although it was reached in the course of the wider
37 negotiations on the whole line, the agreement of 2007 was entered into with all due
38 formality, being signed in due and proper form and entering into force upon
39 exchange of instruments of ratification. It contains detailed provision for the
40 exploitation of joint deposits, and is explicitly without prejudice to the remainder of
41 the negotiation. The contrast with the “Agreed Minutes” invoked by Bangladesh in
42 the present case could not be more stark.

43
44 It is obviously important that Parties to negotiations are not bound by positions they
45 take during the negotiation, otherwise negotiation would become impossible.

⁵¹ ITLOS/PV11/3, p. 7, lines 27-35 (Boyle).

⁵² Agreement between the Russian Federation and the Kingdom of Norway on the Maritime Delimitation in the Varangerfjord area, 11 July 2007: *International Maritime Boundaries (IMB)* Vol. VI, pp. 4479-4487, Report no. 9-6(2). See also *IMB*, Vol. I, pp. Report no. 9-6(1).

1 Sometimes they may address this issue directly⁵³ but even when they do not, the
2 basic principle is clear: a party to a negotiation cannot be held to offers or
3 concessions made in the course of the negotiations. When they reach a provisional
4 or conditional understanding, as they did in our case – one only has to look at the
5 words used; it is clearly conditional – it is just that. It no longer has significance if the
6 negotiations do not succeed.

7
8 Mr President, Members of the Tribunal, I shall now take you to what happened
9 during the negotiations in so far as it is relevant to the status and meaning of the
10 Agreed Minutes of 1974. It will be seen that what Bangladesh persists in calling an
11 “agreement on the territorial sea” was no more than (i) a conditional understanding,
12 (ii) at the level of the negotiators, (iii) as to what might be included as part of an
13 eventual maritime boundary agreement covering the whole of the maritime
14 delimitation between them (territorial sea, exclusive economic zone, continental
15 shelf).

16
17 As will be seen, it seems to have been a characteristic of the talks that the
18 Bangladesh side constantly sought to press successive Myanmar delegations to
19 agree, on the spot, to proposals which Bangladesh alone had drafted. The Myanmar
20 side equally consistently resisted such pressure. The Myanmar delegations were
21 clear throughout that they did not have authority to conclude an agreement, and that
22 they had to refer all proposals back to higher authority.

23
24 This pattern was established at the very first round of negotiations, and continued
25 through to the most recent rounds. The first round, it will be recalled, was held in
26 Rangoon (now referred to by its Myanmar-language version, Yangon) on 4, 5 and
27 6 September 1974. The Myanmar delegation was led by Commodore Chit Hlaing,
28 who was Vice Chief of Staff, Defence Services (Navy). The leader of the Bangladesh
29 delegation was Ambassador Kaiser. During the first round, Bangladesh suggested
30 an equidistance line to be drawn along the midpoints between St Martin’s Island and
31 the Myanmar main coast⁵⁴, and it suggested terminating the territorial sea boundary
32 at the median point between St Martin’s Island and May Yu Island (Oyster Island)⁵⁵.
33 The Bangladesh side produced a map. What happened was that in response,
34 Commodore Hlaing stated that:

35
36 “he would submit the map ... to higher authorities and inform them that it
37 was the Bangladesh proposal drawn on the basis of the median line.
38 Whether they would agree or not was another matter”⁵⁶.

39
40 At the end of the first round, Commodore Hlaing again stressed that he would have
41 first to submit the position to senior authorities⁵⁷.

53 D. Anderson, “Negotiating Maritime Boundary Agreements”, in R. Lagoni and D. Vignes (eds.),
Maritime Delimitation, Nijhoff, Leiden, 2006, pp. 121-141, reproduced and slightly updated in D.
Anderson, *Modern Law of the Sea: Selected Essays*, Nijhoff, Leiden, 2008, p. 424.

54 MCM, Vol. II, Minutes of the First Round, second meeting, para. 10 (Annex 2).

55 *Ibid.*, third meeting, para. 10.

56 *Ibid.*, third meeting, para. 11.

57 *Ibid.*, fourth meeting, para. 16.

1 The second round of negotiations was held in Dhaka from 20 to 25 November 1974.
2 It was at this round that the Agreed Minutes were signed. The delegations were
3 headed by the same officials. In the course of the ongoing discussions of the
4 delimitation in the Bay of Bengal, the delegations reached a provisional
5 understanding with respect to the delimitation of the first sector of the line, the line
6 between their respective territorial seas. This understanding was clearly conditional
7 on reaching agreement on the whole of the delimitation line, and on resolution of the
8 free and unimpeded access issue. The understanding, and these conditions, were
9 reflected in “Agreed Minutes”, about which you have heard much, and will hear
10 much, I fear, signed by the two heads of delegation⁵⁸.

11
12 You have already been shown the Agreed Minutes by Professor Pellet. They are at
13 tab 1.1 in your Judges’ folders. It will be necessary to look at them in some detail
14 shortly. For the time being, I would just ask you to note paragraph 5 of the Minutes.
15 Paragraph 5 records that, during the second round, the Bangladesh delegation
16 handed the Myanmar delegation “a draft treaty on the delimitation of the territorial
17 waters boundary”. Paragraph 5, now appearing on your screens, reads:

18
19 “Copies of a draft Treaty on the delimitation of the territorial waters
20 boundary were given to the Burmese delegation by the Bangladesh
21 delegation on 20 November 1974 for eliciting views from the Burmese
22 Government.”

23
24 It will be seen that at the same meeting that these Agreed Minutes were signed,
25 Bangladesh itself was putting forward a draft treaty to embody the territorial sea
26 boundary in that form.

27
28 Bangladesh’s draft of a treaty, referred to at paragraph 5, was entitled “Agreement
29 Between the Government of the People’s Republic of Bangladesh and the
30 Government of the Socialist Republic of the Union of Burma Relating to the
31 Delimitation of the Boundaries of the Territorial Waters Between the Two
32 Countries”⁵⁹. There is a copy of the draft treaty at tab 1.7 in your folders. I just want
33 to contrast for a moment the clarity with which that draft treaty states its aim. The aim
34 of the Bangladesh side was to have a treaty delimiting the territorial sea boundary at
35 the very same meeting that these Agreed Minutes were being signed.

36
37 Mr President, I think that would be a convenient moment to stop.

38
39 **MR PRESIDENT:** Thank you. The Tribunal will withdraw for a period of 30 minutes.

40
41 (Short adjournment)

42
43 **SIR MICHAEL WOOD:** Mr President, Members of the Tribunal, before the short
44 break I was taking you through the bilateral negotiations in so far as they may be
45 relevant to understanding the 1974 Agreed Minutes. I thank you for your patience.
46 We were in the middle of the negotiations at the second round, the all-important
47 second round, and I was just referring you to the draft treaty that was prepared by
48 Bangladesh and handed to Myanmar at that round.

⁵⁸ BM, Vol. III, Annex 4.

⁵⁹ MCM, Vol. II, Minutes of the Second Round, Annexure C (Annex 3).

1
2 I want to emphasize that the draft treaty was entirely a Bangladesh initiative. It was
3 presented to Myanmar on the first day of the second negotiating round, and had
4 obviously been prepared in advance. This Bangladesh draft, if agreed (which it was
5 not), would have put into legal language the conditional understanding reflected in
6 the minutes. The draft treaty, prepared, as I said, by Bangladesh, provided for
7 ratification and entry into force. Article VII stated, “[t]his Agreement shall be ratified in
8 accordance with the legal requirements of the two countries”⁶⁰. Article VIII provided
9 that “[t]his Agreement shall enter into force on the date of the exchange of the
10 Instruments of Ratification”⁶¹. In fact, neither party signed the draft treaty, then or
11 ever.

12
13 When the draft treaty was handed over, on 20 November 1974, the leader of the
14 Myanmar delegation, Commodore Hlaing responded immediately, and in the clearest
15 terms. He said:

16
17 “It was not intended to sign a specific treaty on the territorial sea
18 boundary. The question of delimiting a sea boundary between Burma and
19 Bangladesh would have to be dealt with in totality to cover the territorial
20 sea, the continental shelf and economic zone.”⁶²

21
22 Asked later in the same meeting whether he would be willing to initial any
23 agreement, Commodore Hlaing replied with a clear and simple “no”⁶³. This was the
24 consistent position of the Myanmar delegation.

25
26 During the third negotiating round, held in Rangoon three months later, in
27 February 1975, Commodore Hlaing recalled that the understanding in the
28 1974 Minutes was conditioned on the right of “unimpeded passage” to Myanmar
29 ships around St Martin’s Island⁶⁴. He further recalled that this “unimpeded passage”
30 – and I quote – “was a routine followed for many years by Burmese naval vessels to
31 use the channel ...” He added that, in asking for unimpeded navigation, the Burmese
32 side was only asking for existing rights which it had been exercising since 1948⁶⁵,
33 that is to say, since independence. In response, and according to Bangladesh’s own
34 account, the Bangladesh delegation said that this concern could be addressed in the
35 treaty that would eventually be concluded between the parties:

36
37 “Bangladesh delegation stated that they did not see any difficulty in
38 accommodating the Burmese position in the future treaty.”⁶⁶

39
40 Once again it was clear, even at this very early stage, that an essential condition for
41 any agreement by Myanmar to the line in the Minutes had not been met.
42 Bangladesh’s own negotiators said the condition could be met “in the future treaty”.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*, Minutes of the Second Round, first meeting, para. 10; see also, second meeting, para. 4. This exchange is also recorded in the “Brief Report” prepared by Bangladesh following the second round of negotiations: BM, Vol. III, Annex 14, para. 7.

⁶³ *Ibid.*, Minutes of the Second Round, first meeting, para. 11 (Annex 3).

⁶⁴ *Ibid.*, Minutes of the Third Round, first meeting, para. 4 (Annex 4).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

1
2 Mr President, this is a convenient point to respond to the second of the two
3 questions which the Tribunal put to both Parties in advance of the hearing. That
4 question reads as follows:

5
6 "Given the history of the discussions between them on the issue, would
7 the parties clarify their position regarding the right of passage of ships of
8 Myanmar through the territorial sea of Bangladesh around St Martin's
9 Island?"

10
11 Mr President, the first thing I would say by way of response is that we have taken
12 careful note of what the distinguished Agent of Bangladesh said last Thursday⁶⁷,
13 together with what counsel for Bangladesh said last Friday⁶⁸.

14
15 Myanmar's position is as follows. Ships of Myanmar traditionally enjoyed the right of
16 free and unimpeded navigation through Bangladesh waters around St Martin's Island
17 to and from the Myanmar section of the Naaf River. They did so since 1948.

18
19 As I have already made clear, when the maritime delimitation negotiations started in
20 1974 it was considered crucially important for Myanmar that this historic right be
21 guaranteed. That is what is recorded in paragraph 3 of the Agreed Minutes of
22 23 November 1974 but, as is recorded in paragraph 4 of those Minutes, the
23 Bangladesh delegation to the talks merely took note of Myanmar's position.

24
25 When pressed on the point during the third round of negotiations, the Bangladesh
26 delegation, as we have seen, said that this was a matter that could be dealt with in
27 an eventual delimitation treaty. As Members of the Tribunal are well aware, there has
28 never been such a treaty. Bangladesh has never given the guarantee that Myanmar
29 sought.

30
31 It is no answer to say, as Bangladesh now does, that there have never been
32 problems with access. That is easily explained. In the absence of any guarantee in
33 1974, or later, Myanmar has not sought to put to the test its right of free and
34 unimpeded navigation, for reasons of discretion which are entirely understandable.
35 They wanted to avoid any possible conflict.

36
37 The position on the right of passage of ships of Myanmar through the territorial sea
38 of Bangladesh around St Martin's Island continues to be less than satisfactory. (That
39 is a British way of putting it: "less than satisfactory".) As I have said, we listened very
40 carefully to the various statements made on this subject by the representatives of
41 Bangladesh last week. None of those statements was entirely clear. What is,
42 unfortunately, clear, and what is relevant for an understanding of the status and
43 effect of the 1974 Minutes, is that an essential condition for Myanmar's agreement to
44 incorporating the line described in the Minutes in an eventual overall maritime
45 boundary treaty was not, and has not, been met.

46
47 I hope I have answered the Tribunal's question.
48

⁶⁷ ITLOS/PV11/2/Rev1 (E), p. 5, lines 23-29 (Moni).

⁶⁸ ITLOS/PV11/3 (E), p. 25, lines 43-45, p. 26, lines 15-17 (Sands).

1 I now return, if I may, to my account of the negotiations. Also during the third round,
2 the two delegations proposed starting points for the delimitation of the continental
3 shelf and exclusive economic zone, in terms that make it rather clear that the line
4 described in the Agreed Minutes was open to further negotiation. Myanmar referred
5 to the 235° line and its joining with the median line drawn between the Myanmar
6 main coast and St Martin's Island⁶⁹. Bangladesh, in response, proposed that the
7 delimitation continue from point 7, the southernmost median point between the
8 territorial sea of Myanmar's main coast and St Martin's Island⁷⁰. In the alternative,
9 Bangladesh suggested that the point of origin be the median point between St
10 Martin's Island and May Yu Island (Oyster Island)⁷¹. Both proposals were rejected by
11 Myanmar⁷². The fourth and fifth rounds were held in 1976 and 1979, and
12 concentrated on the EEZ and continental shelf.

13
14 A sixth round was held in Rangoon in November 1985. This time, the leader of the
15 Myanmar delegation was its Minister for Foreign Affairs. The Foreign Minister
16 recalled the Minutes of 1974, and reiterated Myanmar's position that:

17
18 " [what] is clearly implied in the text of Agreed Minutes, was that both the
19 territorial sea sector and the continental shelf *cum* economic zone sector
20 of the common maritime boundary should be settled together in a single
21 instrument."⁷³

22
23 The seventh and eighth rounds took place in Dhaka in February and June/July 1986.
24 Again, they focused on the EEZ and continental shelf. However, at the eighth round
25 the Myanmar delegation once again restated Myanmar's position that it was only
26 prepared to reach agreement on an overall agreement, not a partial one. The leader
27 of the Myanmar delegation reminded his opposite number, first, that his delegation
28 did not have authority to conclude a treaty; and, second, that a treaty between the
29 Parties could only be concluded when the final delimitation of all the areas in dispute
30 was agreed upon⁷⁴.

31
32 After a suspension for over 20 years, the first round of the resumed talks between
33 the Parties was held in March and April 2008. During this round, the two delegation
34 leaders signed Agreed Minutes. These are referred to as the "2008 Agreed
35 Minutes".⁷⁵ Members of the Tribunal will find the text of the 2008 Minutes at tab 1.8.

36
37 I shall return to these Minutes later. For the time being, I would just like to draw
38 attention to paragraph 3, where the word "unimpeded" in the 1974 Minutes was to be
39 replaced by a whole sentence:

40

⁶⁹ MCM, Vol. II, Minutes of the Third Round, second meeting, para. 3; third meeting, para. 3 (Annex 4).

⁷⁰ BM, Vol. III, Annex 15, para. 5; MCM, Vol. II, Minutes of the Third Round, second meeting, paras. 5 and 7; third meeting, para. 8 (Annex 4).

⁷¹ BM, Vol. III, Annex 15, para. 5; MCM, Vol. II, Minutes of the Third Round, second meeting, paras. 5 and 7; third meeting, para. 8 (Annex 4).

⁷² MCM, Vol. II, Minutes of the Third Round, third meeting, para. 12 (Annex 4).

⁷³ *Ibid.*, Sixth Round, Speeches and statements (Annex 8) (emphasis added).

⁷⁴ MCM, Vol. II, Eighth Round, Report of Myanmar Delegation, para. 11 (Annex 10).

⁷⁵ BM, Vol. III, Annex 7.

1 "Innocent Passage through the territorial sea shall take place in
2 conformity with UNCLOS, 1982 and shall be based on reciprocity in each
3 other's waters."
4

5 Paragraph 3 of the 1974 Minutes, even if amended, continued in terms to be no
6 more than a statement of the Myanmar delegation's position. (I would note in
7 passing that it is not clear how the original sentence would have read with the
8 change. You cannot simply replace the word "unimpeded" by the whole sentence
9 which I just read out.) Be that as it may, this change was expressly said to be "ad-
10 referendum"; in other words the signatories of the 2008 Minutes – once again a
11 senior diplomat on the Bangladesh side and a Commodore on the Myanmar side –
12 were not committing their respective Governments even to making this textual
13 change.
14

15 In addition, in paragraph 3 of the 2008 Minutes the parties updated – "to a more
16 recent and internationally recognized chart" – the points plotted in the 1974 Minutes.
17

18 Professor Boyle suggested last Friday that these changes support the conclusion
19 that the Minutes "articulate a commitment to a clearly defined maritime boundary in
20 the territorial sea".⁷⁶ That is simply not the case.
21

22 What is particularly noteworthy in the 2008 Minutes is that in three places the
23 Minutes of 1974 are referred to as an "ad-hoc understanding". Paragraph 2 begins:
24 "Both sides discussed the ad-hoc understanding ..." Paragraph 3 refers to the chart
25 "referred to in the ad-hoc understanding ..." and again, later in the same sentence
26 there is another reference to the "ad-hoc understanding".
27

28 During the second round of resumed talks, held in Bagan in early September 2008,
29 Myanmar noted that the 2008 Minutes signed at the first resumed round were merely
30 a reiteration of the Agreed Minutes of 1974, and not in any way their ratification⁷⁷.
31

32 Nothing relevant to the status of the 1974 Minutes occurred during the third, fourth or
33 fifth rounds of the resumed negotiations, nor indeed was there any breakthrough in
34 the negotiations.
35

36 Mr President, Members of the Tribunal, I have just taken you through the
37 negotiations in so far as they are relevant to the existence or otherwise of an
38 agreement between the Parties on the delimitation of the territorial sea. I now turn to
39 the second part of my statement. I shall show that, contrary to the claim of
40 Bangladesh, repeated last week by Professor Boyle, there is no agreement between
41 the Parties on the delimitation of the territorial sea. In particular, the Agreed Minutes
42 of 1974 are not such an agreement.
43

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

⁷⁶ ITLOS/PV11/3(E), p. 7, lines 6-7 (Boyle).

⁷⁷ BM, Vol. III, Annex 18, para. 5; MCM, Vol. II, Second Round of Resumed Talks, Report of Myanmar Delegation, para. 4 (Annex 14).

1 easily to be presumed⁷⁸. It matters, above all, because it may affect the delimitation
2 of the line as a whole.

3
4 Of course, between the opposite coasts of St Martin's Island and the Myanmar
5 mainland, the median line proposed by Myanmar and the line described in the 1974
6 Minutes are not so different but beyond point 6 the two lines diverge significantly.
7 This divergence is nothing new. The Parties have always differed as to the proper
8 location of the transition point between the territorial sea boundary and the exclusive
9 economic zone boundary. As Mr Lathrop will explain, the proper delimitation in the
10 territorial sea needs to take account of the special circumstance that is St Martin's
11 Island.

12
13 Bangladesh's principal contention is that the Agreed Minutes of November 1974
14 constitute a legally-binding agreement establishing a maritime boundary between the
15 territorial sea of Myanmar and the territorial sea of Bangladesh. In our written
16 pleadings, we have set out in detail why this is not the case⁷⁹. We propose to
17 highlight the main lines of our argument, responding to Bangladesh's arguments in
18 so far as we can discern them.

19
20 We shall concentrate on three basic propositions.

21
22 First, the Agreed Minutes of November 1974 were not, contrary to Bangladesh's
23 assertion, a legally-binding agreement; second, in any event, according to their
24 terms, the Minutes did not purport to establish a maritime boundary; they merely
25 recorded the understanding of the Parties at a particular stage of the negotiations as
26 to what could become part of an overall maritime boundary agreed in a future treaty.
27 They were conditional in other respects as well; third, again contrary to the
28 unfounded assertions of Bangladesh, nothing in the practice of the Parties confirms
29 their agreement to a territorial sea delimitation line.

30
31 Mr President, the first two of these propositions are best considered together. They
32 each turn on the application of the law of treaties. The third proposition, on which
33 Mr Sthoeger will address you tomorrow, is chiefly a matter of evidence – or, rather,
34 lack of evidence.

35
36 Mr President, I shall deal first with two preliminary matters.

37
38 One important issue underlying each of these propositions, and particularly the third
39 one, concerns the burden of proof. It is Bangladesh that asserts the existence of an
40 agreement between the Parties effecting a delimitation of the territorial sea. The
41 burden of proof therefore lies on Bangladesh. As the International Court has said, on
42 a number of occasions, and as Professor Sands reminded us last week⁸⁰, "the party
43 asserting a fact as a basis of its claim must establish it"⁸¹. The burden of proof in this
44 case is a heavy one. It is our submission that Bangladesh has not begun to

⁷⁸ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 735, para. 253; see also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 86, para. 68.

⁷⁹ BCM, paras. 4.09-4.38; BR, paras. 2.7-2.55.

⁸⁰ ITLOS/PV11/3 (E), p. 26, lines 28-29 (Sands).

⁸¹ *Romania v. Ukraine*, I.C.J. Reports 2009, p. 61, at p. 86, para. 68 (with further references).

1 discharge that burden. Let me recall the words of the International Court in the
2 *Nicaragua v. Honduras* case, “[t]he establishment of a permanent maritime boundary
3 is a matter of grave importance and agreement is not easily to be presumed”⁸².
4

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

16 In his speech last Friday, Professor Boyle seemed to acknowledge that article 15
17 contemplated a legally binding agreement⁸⁴. The point he sought to make was a
18 different one. He repeatedly suggested that Myanmar did not accept that a treaty in
19 simplified form - *un accord en forme simplifiée* - could be an agreement within the
20 meaning of article 15⁸⁵.
21

22 That is not our position. That is not at all what we have said. Of course, we do not
23 dispute that an agreement in simplified form may be a binding treaty under
24 international law. Of course, form is not decisive (though it may well be indicative). A
25 treaty in simplified form is just as binding in international law as the most solemn of
26 treaties, for example, one expressed to be made between Heads of State. The
27 commitment is legally just as serious. That is why, Mr President, Members of the
28 Tribunal, States are careful in authorizing persons to represent them in relation to the
29 conclusion of a treaty, whatever form that treaty may take.
30

31 Having misrepresented our position, Professor Boyle compounds the error by
32 asserting that “[t]he only authority advanced by Myanmar to justify its contention that
33 such agreements must be formally negotiated treaties” is the *Black Sea* judgment.
34 Professor Boyle made much last Friday⁸⁶ of the 1949 General Procès-Verbal that
35 was at issue in the *Black Sea* case. He went so far as to assert that the 1974 Agreed
36 Minutes in the present case “are very similar or identical to the procès-verbal in the
37 *Black Sea* case”⁸⁷. That is simply not the case. I shall briefly mention three essential
38 differences.
39

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

⁸² *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*
(*Nicaragua v. Honduras*), Judgment, I.C.J. Reports 2007, p. 735, para. 253.

⁸³ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61,
at p. 77, para. 40; see also *ibid.*, pp. 78-89, paras. 43-76.

⁸⁴ ITLOS/PV11/3 (E), p. 6, lines 11-14; p. 9, lines 21-24; p. 11, lines 36-38 (Boyle).

⁸⁵ ITLOS/PV11/3 (E), p. 9, lines 21-24 (Boyle). See also *ibid.*, p. 2, lines 9-11; p. 6, lines 9-11 (Boyle);
p. 10, lines 34-35 (Boyle); p. 10, line 39 (Boyle).

⁸⁶ ITLOS/PV11/3(E), p. 10 line 38-p. 11 line 34 (Boyle).

⁸⁷ *Ibid.*, p. 11, lines 26-27.

1 immediately after its signature⁸⁸. Another important difference is that the Procès-
2 Verbal was a typical demarcation document comprising three large volumes, with six
3 volumes of annexed Procès-Verbaux of individual demarcation points. It was not a
4 delimitation agreement. It was drawn up by a Mixed Soviet-Romanian Commission
5 on the Demarcation of the State Border, whose task was to demarcate the State
6 border. This it did, and the result was incorporated by reference into a State Border
7 Treaty signed just two months later⁸⁹.

8
9 Second, the context in which the 1949 Procès-Verbaux were concluded was entirely
10 different. As the International Court explains in its 2009 judgment, the Procès-
11 Verbaux resulted from the work of the Soviet-Romanian Border Commission, as I
12 have said, which was implementing an agreement signed on Moscow in 1948, which
13 itself modified the 1947 Paris Treaty between the Allied and Associated Powers and
14 Romania. The 1949 Procès-Verbal was an integral part of a treaty-based delimitation
15 and demarcation process that reached its conclusion in a treaty⁹⁰.

16
17 The third difference is that in the *Black Sea* case the Parties were in agreement that
18 the Procès-Verbal was a legally binding international agreement⁹¹. As Professor
19 Boyle conceded, “[t]he issue before the Court [in the *Black Sea* case] was not the
20 status of the procès-verbal but whether it ... established a continental shelf/Exclusive
21 Economic Zone boundary ...”⁹². The International Court itself therefore did not need
22 to address its status.

23
24 It is, Mr President, perhaps somewhat misleading to say, as Professor Boyle did, that
25 “[t]he *Black Sea* case thus shows that an appropriately worded agreement or procès-
26 verbal between officials is sufficient for the purposes of article 15 ...”⁹³. Whether a
27 text is an agreement within the meaning of article 15 does indeed depend on the
28 actual terms of the document – upon whether it is, to use Professor Boyle’s phrase,
29 “appropriately worded” – as well as the particular circumstances in which it was
30 drawn up. The 1974 Minutes, by contrast with the Procès-Verbal in the *Black Sea*
31 case, are not worded appropriately to establish an article 15 agreement.

32
33 After these two preliminary matters, I shall now return to examine the Agreed
34 Minutes in a little more detail. The central questions are: are the Agreed Minutes an
35 agreement binding under international law, that is to say, a treaty, and did they, by
36 their terms, establish a maritime delimitation?

37
38 Professor Boyle, last Friday, gave four reasons why the Agreed Minutes “evidence
39 the conclusion of an agreement delimiting the territorial sea in 1974.”⁹⁴ With all due
40 respect, these reasons are unconvincing. First, Professor Boyle says, “the terms are
41 clear and unambiguous”. This is not much of an argument. In our view too the terms

⁸⁸ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Ukraine Counter-Memorial, p. 81, para. 5.41.

⁸⁹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Ukraine Counter-Memorial, pp. 80-81, para. 5.41; p. 94, para. 5.78; CR 2008/24 (8 September 2008), pp. 42-43, para. 29 (Wood).

⁹⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 61, at p. 82, para. 55; CR 2008/24 (8 September 2008), pp. 42-44. paras. 27-33 (Wood).

⁹¹ *Ibid.*, p. 75, para. 32; p. 81, para. 52.

⁹² ITLOS/PV11/3(E), p. 11, lines 9-10 (Boyle).

⁹³ ITLOS/PV11/3(E), p. 11, lines 19-20 (Boyle) (emphasis added).

⁹⁴ ITLOS/PV11/3 (E), p. 3, lines 25-35. (Boyle).

1 are clear and unambiguous, but not in the sense that Professor Boyle gives to them.
2 Second, he says the object and purpose of the agreement and the context in which it
3 was negotiated was “to negotiate a maritime boundary”. “To negotiate” is a rather
4 strange object and purpose for an agreement, especially an agreement that is
5 alleged to have effected a maritime delimitation. No doubt a successful conclusion is
6 the aim of every negotiation, but that sheds no light on the object and purpose of the
7 Agreed Minutes. Third, Professor Boyle says that “the fact that an agreement is
8 evidenced by the signature of the heads of both delegations and the terminology
9 used, ‘Agreed Minutes’” is relevant. This seems to be two separate arguments. Mere
10 signature is no indication of the legal status of a document, nor is the title “Agreed
11 Minutes”. Fourth, according to Professor Boyle, the Agreed Minutes are
12 “unconditional apart from completing the technicalities.” Even if this were correct,
13 which it plainly is not – there were other important conditions – the condition of
14 determining precise coordinates is hardly a negligible aspect of a boundary
15 agreement.

16

17 In approaching these questions, Bangladesh seems to overlook one rather
18 elementary point. In the words of the International Court of Justice when considering
19 the legal nature of the Brussels *Communiqué* in the *Aegean Sea* case, in order to
20 ascertain whether an international agreement has been reached, “the Court must
21 have regard above all to its actual terms and to the particular circumstances in which
22 it was concluded.”⁹⁵ That language was also employed by the International Court in
23 *Qatar v. Bahrain*, when it was considering the status of the 1990 Minutes.⁹⁶

24

25 So, in order to determine the nature of the 1974 Agreed Minutes, we must “have
26 regard above all to [their] actual terms and to the particular circumstances in which
27 [they were] concluded.”⁹⁷ I shall begin with the actual terms. The actual terms used
28 are the starting point for determining the effect of any document. Even Bangladesh
29 seems to accept this, since in its Reply it begins its analysis of the Minutes by
30 referring to their “ordinary language”⁹⁸; but then its only reference to the actual terms
31 of the Minutes is when it points out that the title of the document is “Agreed Minutes”
32 rather than just “Minutes”.⁹⁹ From then on, Bangladesh proceeds to ignore the actual
33 terms of the Minutes, the text, the words used, and quickly moves on to what it
34 claims to be the subsequent practice of the Parties.¹⁰⁰

35

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

⁹⁵ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1978, p. 39, para. 96.

⁹⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1994, p. 112 at p. 121, para. 23.

⁹⁷ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1978, p. 39, para. 96.

⁹⁸ BR, para. 2.16.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, paras. 2.16 ff.

1
2 Mr President, Members of the Tribunal, could I please ask you to turn once again to
3 the text of the 1974 Agreed Minutes, which can be found at tab 1.1 in the Judges'
4 folder.

5
6 Mr President, we would agree with our friends from Bangladesh that the first thing to
7 note about the Minutes is indeed the title. As I have said, the term "Agreed Minutes"
8 is a perfectly normal term for an agreed record of a meeting. The term "minutes" is
9 one that is well known to those involved in the running of any organization, be it a
10 government or a private entity. The dictionary definition is "an official note of the
11 proceedings of a meeting, conference, convention etc"¹⁰¹. The term is very often
12 used in English to refer to the record of a meeting. "Cabinet minutes", for example,
13 are the record of meetings of the Cabinet drawn up by the Cabinet Secretary. They
14 record the discussions and conclusions, if any. Such conclusions may be important,
15 but they are not legally binding. If the minutes of a meeting are approved, as is
16 frequently done, they may be referred to as "approved" or "Agreed Minutes". That
17 does not detract from their status as records of meetings.

18
19 Mr President, Members of the Tribunal, you will note that the full title of the 1974
20 Agreed Minutes reads: *Agreed Minutes between the Bangladesh Delegation and the*
21 *Burmese Delegation regarding the Delimitation of the Maritime Boundary between*
22 *the Two Countries*. I repeat, "between the Bangladesh Delegation and the Burmese
23 Delegation". A legally binding treaty between two sovereign States would hardly be
24 expressed, in its title, to be between delegations. Similarly, the Minutes are
25 expressed to be signed by the two delegation leaders, not on behalf of their
26 respective governments, but simply as leaders of the two delegations to the talks.

27
28 Likewise, paragraph 1 of the Minutes opens with the words: "The delegations of
29 Bangladesh and Burma held discussions". Again, the emphasis is on delegations,
30 not governments, not States, and these opening words are clearly the language of a
31 record of a meeting, not of a legally binding agreement.

32
33 Paragraph 2 of the Minutes records that with respect to the first sector, that is the
34 territorial sea, the two delegations agreed that the boundary "will be formed" [note
35 the future tense, "will", not "is" or "shall be"] – "will be formed" by a line, the "general
36 alignment" of which was illustrated on an annexed chart. Also in paragraph 2 they
37 further agreed that "[t]he final coordinates of the turning points for delimiting the
38 boundary of the territorial waters ... will be fixed on the basis of the data collected by
39 a joint survey." That joint survey, Mr President, has never been conducted, so that
40 element of the Agreed Minutes was never implemented.

41
42 As we have already seen, paragraph 3 expressed Myanmar's position that the
43 understanding was subject to the guarantee that Myanmar's vessels "would have the
44 right of free and unimpeded navigation through Bangladesh waters around St
45 Martin's Island to and from the Burmese sector of the Naaf River" – again, a
46 condition that was never met.

47

¹⁰¹ *Collins English Dictionary* (2007).

1 Paragraph 4 recorded indeed that “the Bangladesh delegation expressed the
2 approval of their Government regarding the territorial waters boundary referred to in
3 paragraph 2”. Again as we have already seen, paragraph 4 went on merely to record
4 that the “Bangladesh delegation” had “taken note” of the Myanmar Government’s
5 position regarding the guarantee of free and unimpeded navigation. It will be seen
6 that this last sentence refers to the Bangladesh delegation, not the Government, and
7 that the delegation merely “took note” of Myanmar’s position. In diplomatic parlance
8 “taking note” is far removed from “agreement”, despite Professor Boyle’s curious
9 interpretation of the term¹⁰². So the Minutes clearly did not meet Myanmar’s
10 concerns on this point.

11
12 I have already taken you to paragraph 5, which concerns the draft treaty presented
13 by Bangladesh. I will come back to that shortly. The last paragraph of the Minutes,
14 paragraph 6, notes the ongoing discussions concerning the second sector of
15 maritime border, in other words the EEZ and the continental shelf – a reminder that
16 the Minutes are not concerned only with the boundary in the territorial sea.

17
18 I pause at this point to note that the 1974 Minutes have none of the hallmarks of an
19 international maritime boundary agreement. Given the “grave importance” of “[t]he
20 establishment of a permanent maritime boundary”¹⁰³, it is unsurprising that virtually
21 all such agreements are solemn treaties (*traités en forme solennelle*), with, among
22 other things, provision for ratification, and they often contain, in addition to precision
23 as regards the delimitation line, provisions on dispute settlement, cooperation
24 between the parties, and navigation and resource rights where necessary.¹⁰⁴ They
25 are, of course, published and registered with the United Nations under article 102 of
26 the Charter, and they usually find their way into *International Maritime Boundaries* (a
27 publication that does have reports on Myanmar’s maritime boundary agreements
28 with other States). None of this happened in our case and for one obvious reason:
29 the Agreed Minutes were not an “agreement” within the meaning of article 15 of the
30 Convention. This is in stark contrast to Myanmar’s practice in its maritime
31 delimitation agreements with India, with Thailand, and on the tripoint.¹⁰⁵

32
33 An interesting example of practice concerning these two Parties is the land boundary
34 between Myanmar and Bangladesh in the Naaf River, which was fixed by
35 international treaty: an Agreement of 9 May 1966¹⁰⁶, and a Supplementary Protocol
36 of December 1980¹⁰⁷. This treaty you will hear about later; it is relevant to the end
37 point of the land boundary, the starting point of the maritime boundary. That 1966
38 Boundary Agreement was signed by the two Heads of State. It consists of an
39 Agreement and an annexed Protocol. The Protocol describes the line of delimitation

¹⁰² ITLOS/PV11/3(E), p. 3, line 16 (Boyle).

¹⁰³ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p. 659, at p. 735, para. 253.

¹⁰⁴ See the agreements collected in the six volumes of *International Maritime Boundaries* published thus far (2011).

¹⁰⁵ See MR, paras. 3.27-3.29.

¹⁰⁶ *Agreement between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River*, 9 May 1966, United Nations, *Treaty Series (UNTS)*, Vol. 1014, I-14848, p. 4 (MCM, Vol. II, Annex 1).

¹⁰⁷ *Supplementary Protocol between Burma and Bangladesh to the Protocol between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River*, 17 December 1980 (MCM, Vol. I, Annex 7).

1 in detail, and it was signed some days before the Agreement itself by persons
2 described as “plenipotentiaries”; even so, it had no legal effect of its own. It had
3 effect only as from the date of the coming into force of the Agreement of which it
4 formed an integral part.

5
6 Mr President, to return to the 1974 Minutes. The key point is what the text actually
7 says about their substance. As I have said, paragraph 4 recorded the approval of the
8 Bangladesh Government to points 1 to 7 describing a territorial sea boundary, but it
9 was silent on any approval by the Government of Myanmar. There was no such
10 approval.

11
12 Paragraph 5 is of particular importance: it records that a draft treaty was handed to
13 the Myanmar delegation by the Bangladesh delegation “for eliciting the views of the
14 Burmese Government”. I described that when I was describing the course of the
15 negotiations. What, Members of the Tribunal, would have been the purpose of
16 preparing a draft agreement, if the Agreed Minutes themselves were already a
17 legally-binding maritime delimitation agreement?

18
19 The draft agreement provided for ratification. In fact, of course, the Government of
20 Myanmar never ratified the draft agreement. Indeed, it neither signed nor even
21 initialled it,¹⁰⁸ nor did the Government of Bangladesh. Moreover, as I have described,
22 no international agreement could be concluded without the express confirmation of
23 the Government of Myanmar, a point that was made clear to Bangladesh from the
24 first round of negotiations¹⁰⁹. In effect, Bangladesh is attempting to turn the draft of
25 an agreement, which it presented, and which was not even initialled, into a binding
26 document, though – as the arbitral tribunal said in *Guyana/Suriname*, “uncompleted
27 treaties ... do not create legal rights or obligations merely because they had been
28 under consideration”¹¹⁰.

29
30 Finally, it should further be noted that the Minutes were not published, and indeed
31 were not referred to in public on any of the many occasions when the Parties met to
32 discuss their bilateral relations. This is remarkable if, as Bangladesh now says, for
33 the purposes of these proceedings, they constitute a legally binding maritime
34 delimitation agreement.

35
36 Mr President, I will now turn to the 2008 Minutes. Bangladesh seeks to bolster its
37 claim that the 1974 Minutes constitute a delimitation agreement by reference to the
38 2008 Minutes. Again, it is also necessary to look first at their “actual terms”¹¹¹,
39 something Bangladesh studiously avoids. If I could invite Members of the Tribunal to
40 turn to the text of the 2008 Minutes, which will be found at tab 1.8 in the folders,
41 there are a number of points to be made about the text.

42

¹⁰⁸ MCM, para. 4.15.

¹⁰⁹ MCM, paras. 3.13-314, 4.16.

¹¹⁰ *Guyana/Suriname*, Award of 17 September 2007, *International Legal Materials (ILM)*, Vol. 47, 2008, p. 208, para. 312 (also available on <http://www.pca-cpa.org/>); see also *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, Judgment, *I.C.J. Reports* 1959, p. 229.

¹¹¹ *Aegean Sea Continental Shelf (Greece v. Turkey)*, Jurisdiction of the Court, Judgment, *I.C.J. Reports* 1978, p. 3, at p. 39, para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports* 1994, p. 121, para. 23.

1 As with the 1974 Minutes, the first thing to note about the 2008 Minutes is the title. It
2 reads: “Agreed Minutes of the meeting held between the Bangladesh Delegation and
3 the Myanmar Delegation regarding the delimitation of the Maritime Boundaries
4 between the two countries.” So even the title makes it clear that these are minutes of
5 a meeting, no more and no less. Once again the reference is to the two delegations,
6 not to governments or States. Once again the text begins with the words: “The
7 Delegations of Bangladesh and Myanmar held discussions ...” Once again the
8 language is that of a record of discussions, not of treaty commitments. This is clear in
9 each and every paragraph.

10
11 Second, Bangladesh seeks to play down the fact that the 2008 Minutes refer to the
12 1974 Minutes as an “*ad hoc* understanding” by saying that this is merely a matter of
13 form rather than substance.¹¹² As I have already pointed out, the 2008 Minutes refer
14 to the 1974 Minutes as an “*ad-hoc* understanding” no less than three times¹¹³. This
15 can hardly have been an oversight. Rather, the term accurately reflects the way both
16 sides viewed the 1974 Minutes. (I would note in passing that the French translation
17 of the 2008 Agreed Minutes prepared by the Registry is perhaps a little misleading in
18 that it translates “understanding” by “*accord*”; “*entente*” might have been more
19 accurate – or perhaps even that very good French word – understanding – *tout*
20 *simplement*.) An “understanding”, a term generally reserved in diplomatic usage for a
21 non-binding document, is a good description of what the 1974 Minutes were: they
22 were a conditional understanding reached at the level of the negotiators as to what
23 could be included in an eventual overall maritime delimitation agreement.

24
25 Third, as we have already seen, our friends from Bangladesh appear to attach great
26 significance to the fact that in paragraph 2 of the 2008 Minutes both sides agreed *ad*
27 *referendum* that the word “unimpeded” be replaced by a whole sentence, which I
28 read out earlier. In doing so, Bangladesh simply passed over in silence the words
29 “*ad referendum*”, a term which clearly indicates that the two delegations intended to
30 refer the matter back to their respective governments. According to Bangladesh, this
31 change “merely served to modernize the language” used in 1974, and somehow – it
32 is not explained how – this proves that the 1974 Minutes were indeed an
33 “agreement”.

34
35 Mr President, Members of the Tribunal, I have taken you to the actual terms of the
36 1974 Minutes (as well as those of the 2008 Minutes), and it is now necessary to turn
37 to “the particular circumstances in which [they] were concluded”¹¹⁴. There are many
38 ways in which the circumstances of the conclusion of the 1974 Minutes confirm that
39 they were never intended to be a legally-binding instrument. On the contrary, they
40 were, to use the language of the earlier cases, “a simple record of a meeting”¹¹⁵. As I
41 said, Bangladesh has said very little about the course of the negotiations. In
42 particular, Bangladesh has told you very little about the circumstances under which

¹¹² BR, para. 2.43.

¹¹³ 2008 Agreed Minutes, BM, Vol. III, Annex 7, para. 2; para. 3 (twice). See MCM, para. 3.42.

¹¹⁴ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1978, p. 3, at p. 39, para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1994, p. 112, at p. 121, para. 23.

¹¹⁵ *Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1994, p. 112, at p. 121, para. 25.

1 the Agreed Minutes came to be signed and what the negotiators said about them.
2 This is hardly surprising, as these circumstances confirm that the Minutes were no
3 more than an *ad hoc* conditional understanding, reached at an initial stage of the
4 negotiations, which never ripened into a binding agreement between the two
5 negotiating sides.

6
7 I would urge you, Mr President and Members of the Tribunal, to read carefully the
8 records of the November 1974 round of negotiations that each side has annexed to
9 its written pleadings¹¹⁶. These are contemporaneous accounts of what actually
10 happened during the second round. They refer to three documents: the draft minutes
11 produced by the Bangladeshi delegation; the 1974 Minutes themselves as signed;
12 and the draft treaty produced by Bangladesh. You will see the following points that
13 emerge from these records of the meeting:

14
15 First, Commodore Hlaing, the head of the Myanmar delegation, for his part, was
16 explicit that navigational passage should be embodied in a treaty.¹¹⁷ The head of the
17 Bangladeshi delegation, Ambassador Kaiser, also suggested a treaty to this effect,
18 and merely stated that Myanmar's concerns on passage would be kept "in
19 advisement"¹¹⁸.

20
21 Second, at the commencement of the third meeting of the second round,
22 Bangladesh introduced draft minutes entitled "Agreed Minutes between the
23 Bangladesh and Burmese Delegations regarding the Delimitation of the Boundaries
24 of Territorial Waters between the two Countries"¹¹⁹. It was at this point that the
25 Myanmar delegation took the position that "the agreed minutes should deal with the
26 subject matter *en toto*", a statement quoted by Professor Boyle last Friday¹²⁰.
27 Bangladesh's own account recalls the negative reaction of the Myanmar delegation
28 "to conclude a separate treaty/agreement on the delimitation of the territorial
29 waters"¹²¹. (You will find the full text of the Bangladesh record of the second round of
30 negotiations at tab 1.9 in your folders). Professor Boyle disregarded this position as
31 inconsequential, yet obviously it was considered seriously, as the signed minutes'
32 title was changed to refer not only to territorial waters but to "the Delimitation of the
33 Maritime Boundary".

34
35 Paragraph 6 of the initial draft minutes, the draft prepared by Bangladesh, stated that
36 the Myanmar delegation indicated its government's agreement to the plotted points
37 in the territorial sea¹²². This passage was removed from the minutes as signed.

38
39 The next point is that Bangladesh's own records of the second round also make
40 clear that the Bangladesh delegation had "taken note" of Myanmar's position on
41 navigational passage, and no more¹²³.

42

¹¹⁶ MCM, Vol. II, Minutes of the Second Round (Annex 3) and BM, Vol. III, Annex 14.

¹¹⁷ MCM, Vol. II, Minutes of the Second Round, first meeting, para. 6 (Annex 3).

¹¹⁸ *Ibid.*, para. 5.

¹¹⁹ MCM, Vol. II, Minutes of the Second Round, third meeting, and Appendix I (Annex 3)

¹²⁰ ITLOS/PV11/3(E), p. 4, lines 1-2 (Boyle).

¹²¹ BM, Vol. III, Annex 14, para. 7.

¹²² MCM, Vol. II, Minutes of the Second Round, Appendix I (Annex 3)

¹²³ BM, Vol. III, Annex 14, para. 4.

1 Similarly, Bangladesh “took note” of Myanmar’s concern on point 8 of its straight
2 base lines, located on St Martin’s Island¹²⁴. To this day, point 8 has not been altered.

3
4 Finally, Mr President, Members of the Tribunal, if you look at paragraph 10 in tab 1.9
5 of Bangladesh’s own account, you will see that it records that:

6
7 “An Agreed minutes was signed at Dacca by the Leaders of the
8 respective delegations on 23rd November 1974 **which briefly recorded**
9 **the summary of their discussions**”¹²⁵.

10
11 Myanmar could not agree more with Bangladesh’s account and statement of the true
12 status, object and purpose of the 1974 Minutes.

13
14 Mr President, it is a little early, but that would be a convenient place for me to break
15 and then I would have about twenty minutes more to finish tomorrow, if that is
16 convenient to the Tribunal.

17
18 **THE PRESIDENT:** Your proposal is acceptable. Therefore, we shall now break and
19 conclude your statement tomorrow.

20
21 This brings us to the end of today’s sitting. The hearing will be resumed on Friday,
22 16 September 2011 at 3 p.m. The sitting is now closed.

23
24 (The sitting closed at 5.54 p.m.)

¹²⁴ *Ibid.*, para. 6.

¹²⁵ BM, Vol. III, Annex 14, para. 10 [emphasis added].