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Thank you.





FOLEY  
HOAG LLP

# Presenting Your Case

*Written Pleadings & Oral Arguments*

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- I. Stages of the Proceeding
- II. Written Pleadings
- III. Oral Arguments

# I. Stages of the Proceeding

## Initiation

- Application initiating dispute

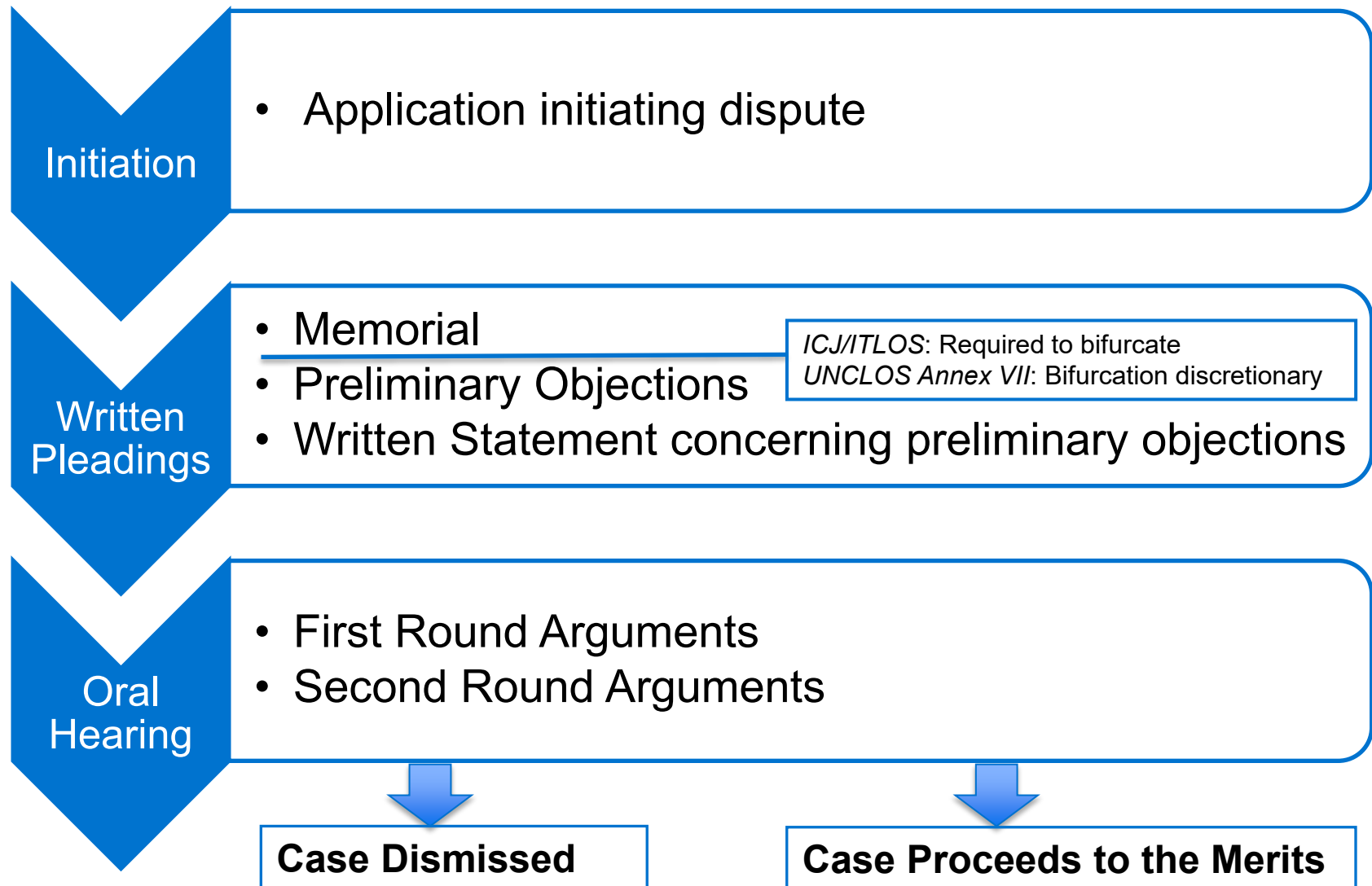
## Written Pleadings

- Memorial by Claimant
- Counter-Memorial by Respondent
- Reply by Claimant
- Rejoinder by Respondent

## Oral Hearing

- First Round Arguments: Claimant & Respondent
- Second Round Arguments: Claimant & Respondent
- Tribunal's Questions

**PLUS:** Preliminary Objections, Provisional Measures, Counter-Claims and Interventions



## **First opportunity to present tribunal with your narrative and to create trust and credibility**

- Presentation of relevant facts is critical
- Presentation of law must be strongly grounded in cases
- Presentation of facts must be fully supported with evidence
  - Thoroughly review diplomatic negotiations and historic evidence
  - Do not try to ignore bad evidence. Build your strategy with challenging evidence in mind.
- If Claimant, whenever possible raise/address issues related to the merits BUT only to the extent they are relevant to jurisdiction

- May be brought at any point by either party once the application instituting the proceedings has been submitted
- Objective: to preserve the rights of the parties pending the final decision
  - “The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to *preserve the respective rights* of either party.” (ICJ Statute, Art. 41)
  - “...to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.” (UNCLOS, Art. 290)
- Pleadings are relatively short and fact intensive
- Timelines are also relatively short (within weeks – 2 months)
- So you must be prepared in advance:
  - Have evidence collected
  - Anticipate counter arguments



- First strategic decision in the case:  
If and when to bring provisional measures?
  - Do you have a strong case for the request? Is there an imminent risk of irreparable harm?
  - Will the request positively or negatively impact your narrative regarding the merits of your case?
  - Will the request positively or negatively the timing of the case?
  - What are the political/diplomatic consequences of the request?
  - Are you prepared to present the facts and evidence needed?
  - Are you open to any measures the tribunal may prefer?
  - What is the risk of a counter-request for provisional measures?
  - Potential leverage (or weakness) for settlement negotiations?

A counter-claim must:

- be made in the counter-memorial
- appear as part of the submissions of that party
- be directly connected with the subject-matter of the claim of the other party and
- come within the jurisdiction of a tribunal.

## ■ 2 Circumstances

### 1. Interest of a legal nature:

- “Should a state consider that it has an *interest of a legal nature which may be affected* by the decision in the case, it may submit a request to the Court to be permitted to intervene.” (ICJ Statute, Art. 62)
- High standard; rarely met

### 2. Multi-party Treaty Interpretation

- 63.1. “Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.”
- 63.2. “*Every state so notified has the right to intervene* in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.” (ICJ Statute, Art. 63)
- See also Arts. 31 & 32 of ITLOS Statute

## II. Written Pleadings

1. **Application:** commencing litigation/arbitration.
2. **Memorial and counter-memorial, reply and rejoinder:** presenting your case in chief and responding to the other party's case in chief.
3. **Incidental written pleadings:**
  - a) Provisional measures: preserving rights (or preventing serious harm to the maritime environment) pending litigation/arbitration.
  - b) Preliminary objections: challenging jurisdiction of a tribunal and admissibility of claims.
  - c) Counter-claims: raising grievances by respondent against claimant.
  - d) Intervention: protecting interests of a legal nature or treaty interpretation by a third party.
4. **Post-hearing briefs:** addressing issues left after oral pleadings

1. Rules of courts and tribunals governing their procedure.
2. Guidelines and practice directions concerning the preparation and presentation of cases before courts and tribunals.
3. Requirements include:
  - a) Language
  - b) Time
  - c) Content
  - d) Manner

## Memorial

- Statement of the relevant facts,
- Statement of law; and
- Submissions.

## Counter-Memorial

- Admission or denial of the facts stated in the memorial;
- Any additional facts, if necessary;
- Observations concerning the statement of law in the memorial;
- Statement of law in answer thereto; and
- Submissions.

## Reply & Rejoinder:

Highlight and address issues still in dispute

1. What strategic interests are involved?
2. What geographic area and/or features are in dispute?
3. What is the desired outcome? Are there acceptable alternative outcomes?



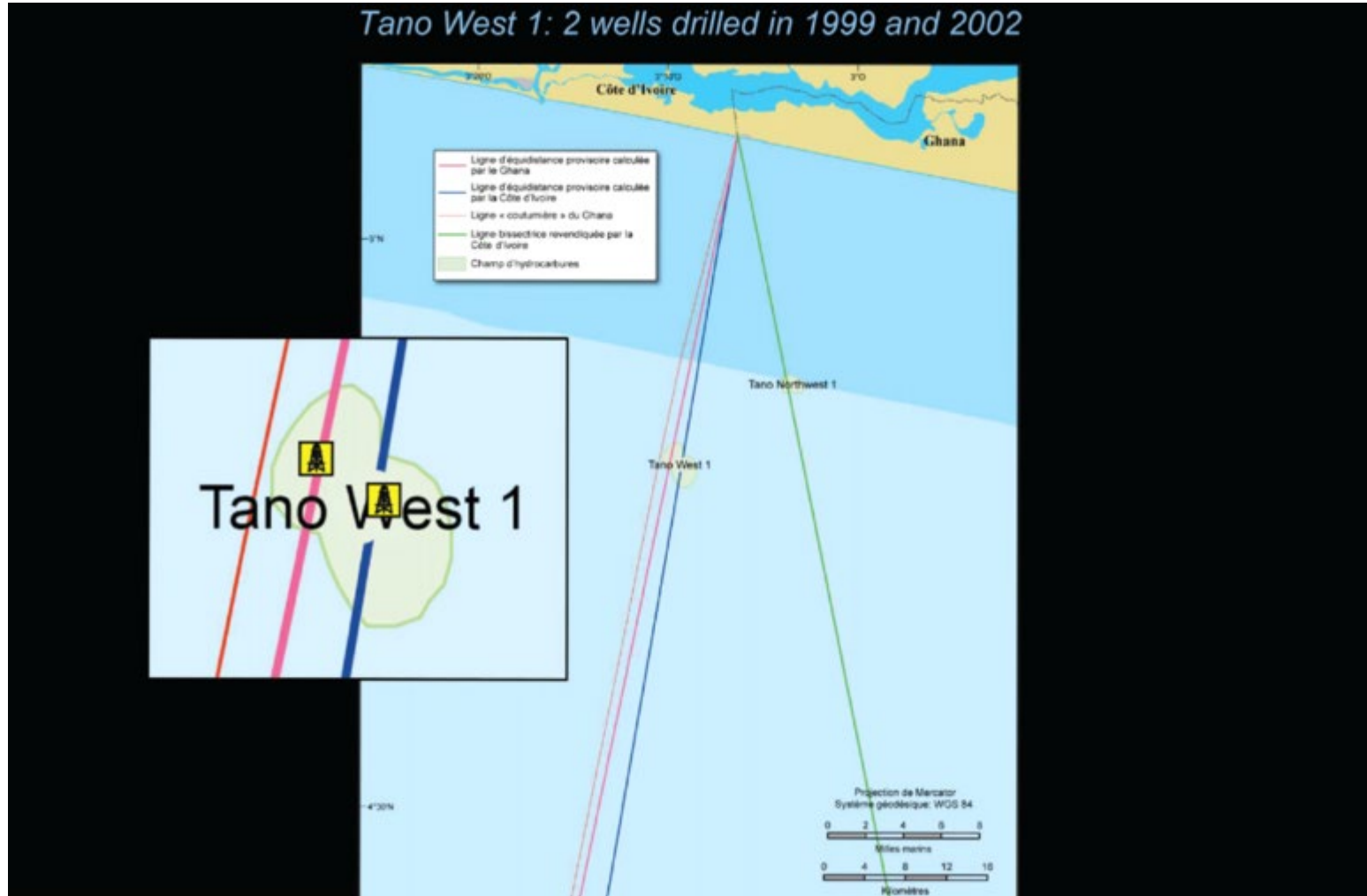
# 1. What strategic interests are involved?

## ➤ Access to oil, gas, fish and other natural resources



- Title to specific territory of high strategic, economic or historic value
- Strategic transit routes
- Etc.

## 2. What geographic area and/or features are in dispute?



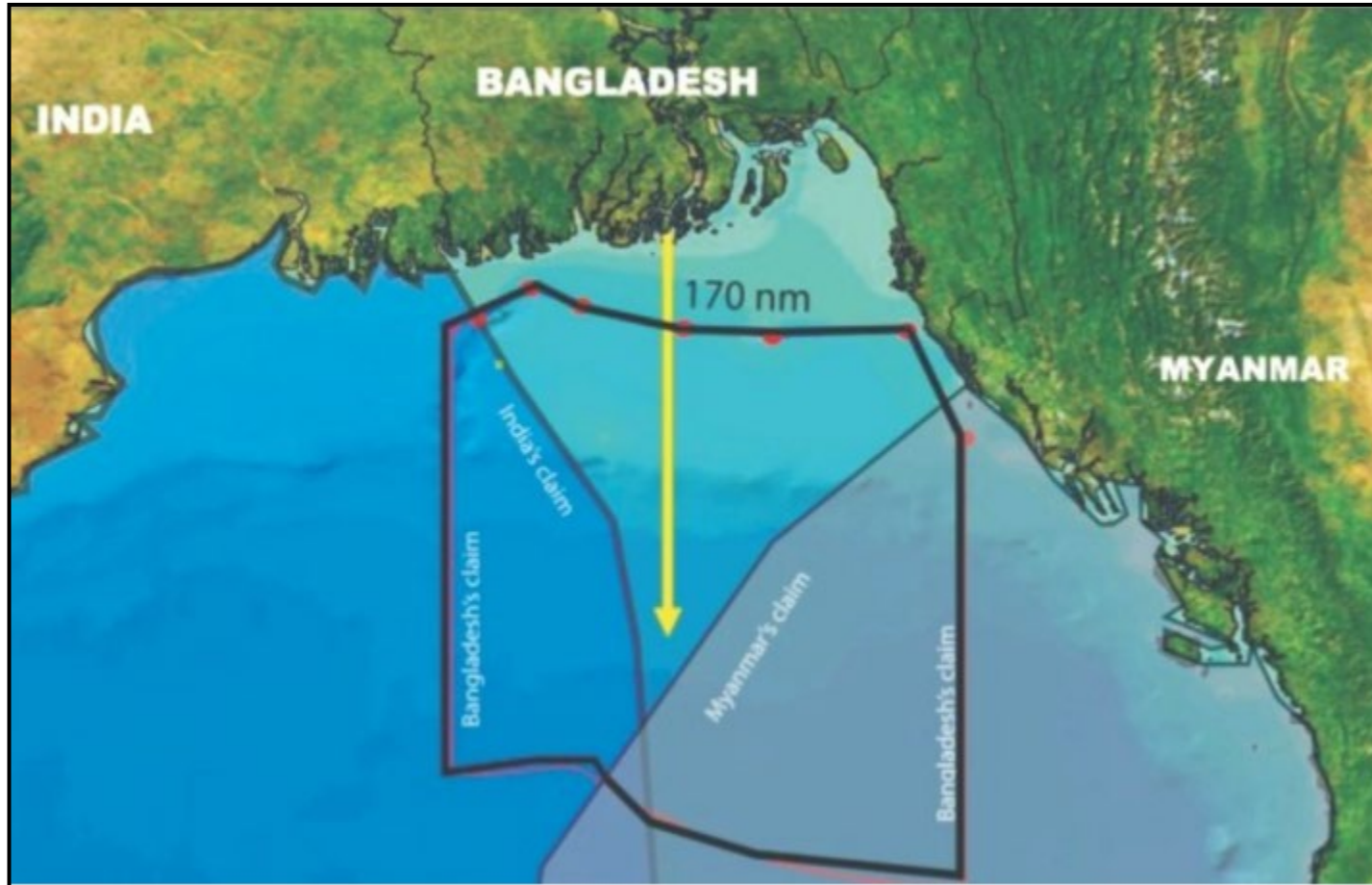
## Relationship between strategic objectives and the claim:

- The maritime areas and features a State should claim depends on the facts, law, and its strategic objectives.

## Relationship between the claim and credibility:

- A claim must be realistic. It should not be implausible or lacking in legal justification.
- A claim should never call into question the State's credibility before a court or tribunal.

# *Bangladesh/Myanmar (ITLOS):* Bangladesh's Historical Claim



# Bangladesh/Myanmar (ITLOS): Bangladesh's Litigation Claim



- The Pleading (100-400 pages)
- Supporting documents/evidence
  - Discussed later by Mr. Smith
- Fact Witness Statements (?)
  - Lower evidentiary value, but may be best evidence of certain facts
  - Local residents/users with activities related to the boundary
  - Pick wisely, as they may face cross-examination
- Expert Reports (?)
  - Geography/Geology experts
  - Ensure that report is user-friendly
  - Anticipate that there will be a counter-report
  - Distinguish role from internal team expert



## ■ The Pleading

### I. Introduction

a) Summary of position

b) Structure of Memorial

### II. Geographic Circumstances

### III. History of the Dispute

### IV. Jurisdiction

### V. Applicable Law & Arguments relating to claimed boundary

### VI. Submission

### VII. List of Figures

### VIII. List of Annexes

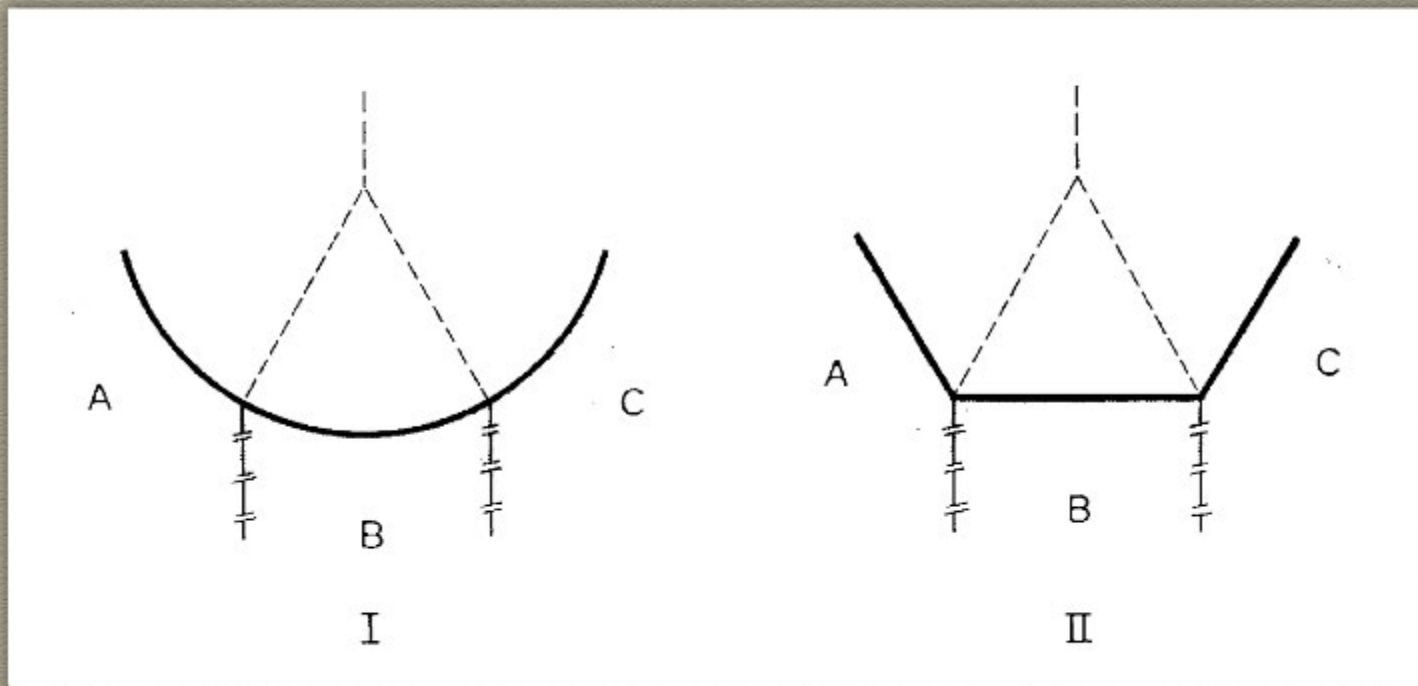
1. Collecting evidence.
2. Identifying, documenting, and articulating all relevant circumstances.
3. Dealing with case law, commentaries, and State practice.
4. Enlisting science.
5. Preparing illustrative maps.
6. Anticipating (and preempting) counter-arguments.



- Government statements to the press or in documents
- Diplomatic notes
- Laws & regulations
- Treaties and agreement (even third state treaties recognizing rights)
- News reports
- Materials in all languages
- Maps and charts
- Archival documents, preferably from multiple archives

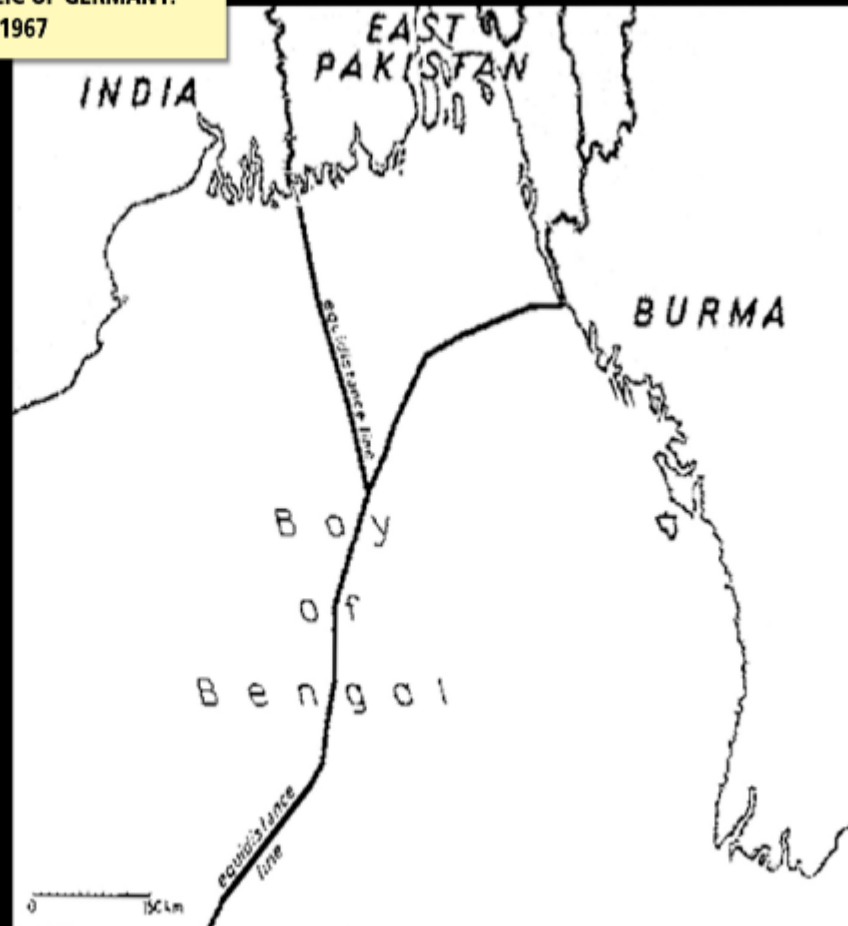
## *The North Sea Continental Shelf Cases Judgment,*

*20 February 1969, pg. 16.*

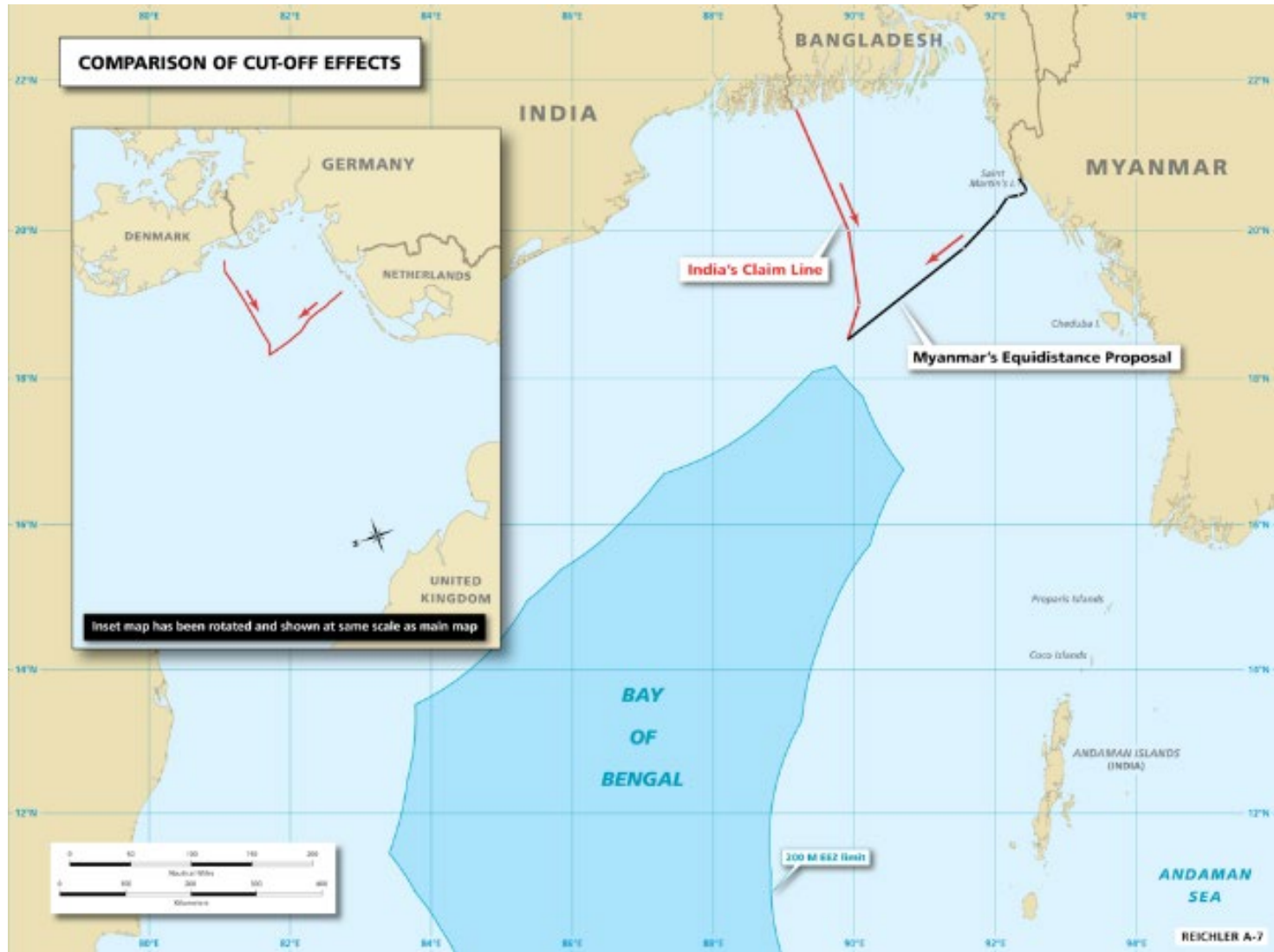


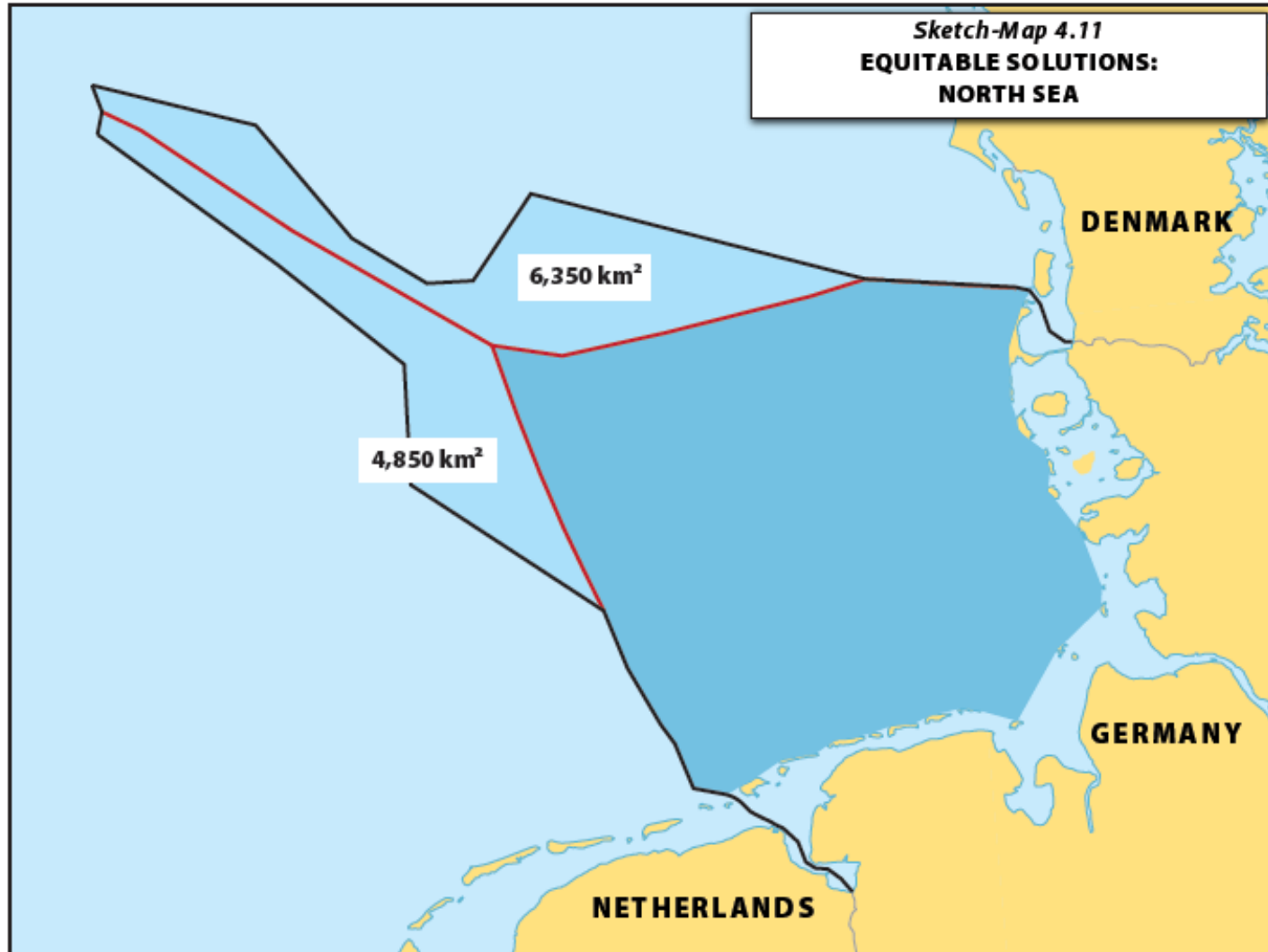
(MARTIN-3) Figure 2

FIGURE NO. 9 FROM THE MEMORIAL SUBMITTED  
BY THE FEDERAL REPUBLIC OF GERMANY:  
21 AUGUST 1967



(REICHLER-1) Figure 8







- Avoid ostrich technique: do not ignore “bad” evidence
- Use simple, clear language and short sentences
- Anticipate and preempt counter-arguments
- Keep some powder dry for the second round
- Do not blindly adopt opposing parties framework/arguments: Keep true to your framework
- Clear and convincing visuals are key
- Ensure consistency across chapters
- Integrate evidence/facts with the law
- Never misrepresent a fact or a quote
- Do not get lost in details



EDIT,  
EDIT,  
EDIT,  
THEN EDIT AGAIN!



# III. Oral Arguments

## ■ First Round

- Claimant's opening arguments
  - Statement by Agent
  - Arguments by Counsel
- Respondent's opening arguments
  - Statement by Agent
  - Arguments by Counsel

## ■ Second Round

- Claimants closing arguments
  - Responsive arguments by Counsel
  - Request for determinations by Agent / Final Submissions
- Respondent's closing arguments
  - Responsive arguments by Counsel
  - Request for determinations by Agent / Final Submissions

## ■ Questions from the tribunal?



- Must be fully written in advance and read at hearing, due to translation
- Present slowly, with relevant points of emphasis (shown by change in tone, speed, emotion)
- Be sure to not simply focus on your primary arguments, but the primary issues that the judges are likely to be considering
  - Are you speaking to yourself, your counter-part or the judges?
- You are there to help inform the judges and lead them to the best and most just outcome
- Agent's Speech: Presents context (reality, politics, humanity) -- Why should we care?
- Ensure all speakers have read each other's presentations
- Have clear, strategic understanding of how/when visuals will be used
- Avoid anger and hyperbole
- Break presentations into multiple speakers to sustain judges' attention
- Provide clear structure and lay out your primary points in advance

- Format
  - Opening introduction by counsel and/or witness
  - Cross-examination by opposing counsel
  - Re-examination by counsel
  - Questions from the tribunal
- Scope: Based on the evidence and statements in their witness declaration or expert report
- Your questions may be aggressive; but never your attitude
- Review their evidence in miniscule detail
  - Be prepared to cite to evidence contradicting/supporting statements
- Do not give opposing experts a platform to orate on their expertise
- Prepare, prepare, prepare

- Less time to prepare
- Take good notes of arguments made in prior rounds
  - Statements you can use against them
  - Statements that require a response
  - Evidence that requires investigation
- Respond to the arguments raised in the first round, BUT based on your presentation or organization of the case
- Address all “weak points” – if you ignore them, they will not go away
- Present final submissions
- Be prepared to present post-hearing submissions
- Do not underestimate the importance of a good support team



Thank you very much for your participation

Questions?

Please feel free to contact me with further questions:

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