

# Client Alert

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## Bangladesh and Myanmar Submit the First Maritime Delimitation Case to be Heard by the International Tribunal for the Law of the Sea

A maritime delimitation case has been submitted to the International Tribunal for the Law of the Sea (ITLOS) for the first time. The dispute concerns the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.

The mechanism for determining most maritime delimitation disputes is set out in the United Nations Convention on the Law of the Sea (UNCLOS).<sup>1</sup>

Under Part XV of UNCLOS, States can agree upon one of three mechanisms for the determination of maritime delimitation disputes that cannot be settled through negotiation. Namely, they may choose to submit a dispute to (1) ITLOS; (2) the International Court of Justice (ICJ); or (3) arbitration under Annex VII of UNCLOS.<sup>2</sup> Historically, States favoured the ICJ. However, in recent years, States have also utilised arbitration under Annex VII (for example, Annex VII arbitral tribunals determined the disputed Barbados-Trinidad and Tobago and the Guyana-Suriname maritime boundaries).

In October 2009, Bangladesh notified Myanmar that it sought to submit their maritime delimitation dispute to an Annex VII arbitral tribunal. However, in November 2009 Myanmar issued a declaration accepting the jurisdiction of ITLOS in relation to the

dispute with Bangladesh. Bangladesh reciprocated with its own declaration accepting ITLOS' jurisdiction and then, referring to the mutual consent of the parties, requested ITLOS to exercise jurisdiction over the dispute. In recent days there have been reports that Bangladesh and Myanmar have reached a negotiated settlement, though the parties have not yet withdrawn the case from ITLOS.

Bangladesh is also seeking to resolve its contested boundary with India. As well as having made a declaration accepting ITLOS jurisdiction over its dispute with Myanmar, Bangladesh has also made a declaration accepting ITLOS jurisdiction over its dispute with India. It will be interesting to see whether India is willing to submit the dispute to ITLOS.

ITLOS is an independent judicial body, based in Hamburg, established pursuant to Annex VI of UNCLOS as a specialised Tribunal to deal with disputes arising out of the interpretation and application of UNCLOS. This is the 16th case submitted to ITLOS (although one case between Chile and the European Union has very recently been discontinued). However, it is the first maritime delimitation case submitted to ITLOS. Previous cases have dealt with, *inter alia*, the prompt

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release of vessels and crews, freedom of navigation, the marine environment, and the conservation of fish stocks.

The procedural conduct of a case brought before ITLOS is governed by ITLOS' Statute and its comprehensive Rules of the Tribunal.

Unlike an Annex VII arbitration, but in common with an ICJ case, ITLOS has a standing body of 21 members to hear the case. Crucially, therefore, the parties will not have the opportunity to select an arbitral tribunal. However, because there is no currently serving member from either Bangladesh or Myanmar, each State would be entitled to choose a person to participate as an *ad hoc* Judge for the purpose of hearing this case.

In general, a case brought before ITLOS will be heard by all 21 members, who may excuse themselves if necessary. However, as provided for by UNCLOS, ITLOS has set up a specialised Chamber for Maritime Delimitation Disputes, with 10 members. The dispute may be heard by this more select Chamber, if agreed to by both parties. It is not clear whether this case would be heard by the full ITLOS or the dedicated Chamber.

Also in common with the ICJ, but distinct from an Annex VII arbitration, the parties will not be required to pay the costs associated with hearing the case. Rather, these costs will be covered by the ITLOS budget which comes from all of the State Parties to UNCLOS.

The submission of this case to ITLOS represents an important and interesting development in the resolution of maritime boundary delimitation disputes, whether or not it is eventually heard by ITLOS. If the dispute is resolved by ITLOS, the efficacy of ITLOS and the outcome will be closely monitored by other States currently contesting maritime boundaries. Should ITLOS perform well it is likely that other States may follow in Bangladesh and Myanmar's footsteps to Hamburg. However, even if the parties reach a negotiated settlement, the mere submission of the dispute to ITLOS will have raised the profile of ITLOS as a potential forum for the resolution of maritime delimitation cases.

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Latham & Watkins' Public International Law group has one of the world's most experienced maritime boundary delimitation practices.

**Endnotes**

<sup>1</sup> 160 States are party to UNCLOS, with the USA being a notable exception. By default, the UNCLOS dispute resolution mechanisms apply to the State Parties to UNCLOS. However, a States may specifically declare that, for certain categories of disputes (including maritime delimitation disputes), it does not accept the UNCLOS dispute resolution mechanisms. Neither Bangladesh nor Myanmar has made such a declaration.

<sup>2</sup> Part may also be resolved by means of arbitration under Annex VIII of UNCLOS. However, the procedure set out in Annex VIII does not apply to delimitation disputes.

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