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# India-Bangladesh Maritime Dispute: An International Law Perspective

Sunil Kumar Agarwal\*

*Maritime boundary, like territorial or land boundary, is a politically sensitive subject, because it affects a state's sovereign rights concerning the fisheries, hydrocarbons and other resources as well as uses of the sea. This sensitivity is manifest in the issue of delimitation of maritime boundaries between India and Bangladesh. Bangladesh, having failed to resolve the dispute diplomatically, has invoked Annex VII mandatory arbitration procedures, entailing binding decision, to seek judicial settlement of the dispute against India. Currently, arbitration proceedings are going on between India and Bangladesh at the Permanent Court of Arbitration, The Hague, for the delimitation of their maritime boundaries under the UNCLOS, 1982. This paper provides an overview and analysis of the legal aspects of the India-Bangladesh maritime boundary dispute. Bangladesh's 'nonflexible' approach in resolving the dispute is primarily driven by its desperation to benefit commercially by exploiting potential hydrocarbon resources in the Bay of Bengal, which ignores both facts as well as the applicable law. Therefore, arguments put forth by Bangladesh to buttress its maritime claim may boomerang in legal scrutiny and make it a loser in legal battle with India.*

## Introduction

Recently, Bangladesh has attracted worldwide attention, not as a state vulnerable to climate change, but for taking recourse to the judicial settlement under the United

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Nations Convention on the Law of the Sea (UNCLOS), 1982<sup>1</sup> to settle its maritime dispute with two neighbouring countries, India and Myanmar, to establish its sovereign rights for accessing hydrocarbon resources in the Bay of Bengal.<sup>2</sup> Hydrocarbons – oil and natural gas<sup>3</sup> – are important sources of energy and critical for the energy security of a country. Moreover, they are important economic resources for industrial growth, employment and revenue generation. The Bay of Bengal is thought to be rich in hydrocarbon resources and, thus, holds potential for future discoveries.<sup>4</sup> This has triggered a competition among the countries surrounding Bay of Bengal – India,<sup>5</sup> Bangladesh<sup>6</sup> and Myanmar<sup>7</sup> – to assert their claim over oil and gas resources. India and Myanmar delimited their maritime boundary in the Bay of Bengal on the basis of the principle of equidistance line through a bilateral agreement on December 23, 1986.<sup>8</sup> The agreement came into force on September 14, 1987. However, Bangladesh needs to resolve the maritime boundary issues with both India and Myanmar,<sup>9</sup> on the basis of international law, embodied under the UNCLOS, 1982.

Bangladesh's non-flexible approach, in diplomatic negotiations with India and Myanmar, did not allow it to reach any agreement with either of its neighbours to resolve the issues. However, recent developments within Bangladesh have forced it to urgently find a solution to the long-standing maritime disputes. In 2009, Bangladesh signed deals with international oil companies – ConocoPhillips of the United States (US) and Tullow of Ireland – to explore oil and gas in three offshore blocks in the Bay of Bengal. Soon, both India and Myanmar lodged strong protests over Bangladesh's move on the ground that the three blocks overlapped their territorial waters. Subsequently, both countries served notices on the oil companies not to go ahead with their operations. Oil companies need a legal certainty to commence their operations in the maritime areas licenced to them to gain anything commercially, otherwise their investment will result in huge commercial loss.

Legal certainty is only possible if there is a clear cut demarcation of Bangladesh's maritime boundary. This can result only through demarcation of maritime boundaries with India and Myanmar. Left with its failure to resolve the issue bilaterally through negotiations, Bangladesh seems to be compelled to seek judicial settlement in order to persuade oil companies not to head off from investing in the country. These circumstances explain Bangladesh's move in the wake of pressures from oil companies seeking a legal certainty to their investments. Hence, it has initiated an arbitral proceeding against India<sup>10</sup> and a judicial proceeding against Myanmar.<sup>11</sup>

This paper attempts to provide an overview and analysis of the India-Bangladesh maritime dispute from a legal perspective to discern the possible outcome of a judicial settlement of the India-Bangladesh dispute. In this regard, it analyses various aspects of a maritime dispute and the dispute settlement system under the UNCLOS, 1982.

## **An Overview of the Dispute**

### **Geography of Bay of Bengal**

The Bay of Bengal is the largest bay in the world<sup>12</sup> and is located in the northeastern part of the Indian Ocean (approximately 6° to 22°N and 80° to 94°E).<sup>13</sup> It is an embayment, resembling a triangle in shape and bound on the West by the East coast of India and Sri Lanka, on the North by India, Bangladesh and Myanmar and on the East by Andaman-Nicobar ridge. It is open towards Indian Ocean and encompasses 'Bengal Fan', the largest Fan in the world.<sup>14</sup> The region is influenced by monsoons and the outflow from several major river systems. To the North and East lies Bangladesh.<sup>15</sup> It occupies approximately 879,375 sq. nautical miles<sup>16</sup> area and has a mean depth of 2,586 m.<sup>17</sup> The continental slope terminates at less than 3,000 m depth.<sup>18</sup> The Bay of Bengal is rich not only in fish and seaweeds but also in mineral resources.<sup>19</sup>

### **Bone of Contention**

The bone of contention concerning Bangladesh's maritime dispute with India and Myanmar is overlapping sovereign right claims over the maritime zones in the Bay of Bengal to access oil and natural gas resources. While Bangladesh hibernated in offshore exploration for several years after taking the lead in 1974, India followed a consistent and steady policy in its oil and gas explorations and has discovered significant hydrocarbon resources in the Bay of Bengal under the New Exploration Licensing Policy (NELP). The Bay of Bengal has become a lucrative territory, especially after India's successive discoveries of 14 trillion cubic feet (TCF) of natural gas in 2002 and 20 TCF of natural gas reserves in 2005 in the Krishna-Godavari basin<sup>20</sup> and Myanmar's discovery of 7 TCF of gas in 2004.<sup>21</sup>

Under NELP-VI, in 2006, India licensed 55 blocks in the Bay of Bengal to oil companies, which are now under exploration phase. This led to contentions between India and Bangladesh over the oil and gas blocks. Bangladesh alleges that the blocks

in the Bay of Bengal, which India put for auction in NEPL-VI, are actually overlapping maritime claim. The region is alleged to be 'overlapping' between the exclusive economic zones (EEZs) of both countries. Bangladesh claims that blocks D-23 (8,706 sq. km) and D-22 (7,790 sq. km) overlap its block 21 declared in 1991, which is technically very hard to prove.

Bangladesh has an estimated 13.1 TCF of proven natural gas reserves.<sup>22</sup> While this high potential for gas reserves has increased the country's exploration desirability, it faces extraordinary challenges in accessing modern energy sources.<sup>23</sup> In fact, severe economic, technological, and institutional challenges have limited oil and gas exploration in Bangladesh,<sup>24</sup> which have been sporadic during the past 26 years. After a brief flurry of interest by foreign oil companies in 1973-74, the country was primarily on its own to pursue development of this sector. This caused lot of desperation in the country. In an attempt to "not to be left behind", Bangladesh divided its offshore area into 28 blocks at the beginning of 2008 and auctioned off these areas to international oil companies as part of its stepped-up move to end chronic gas shortages. It entered into deals with international oil companies, to explore oil and gas in three offshore blocks in the Bay of Bengal. Subsequent strong protests by India and Myanmar have frustrated Bangladesh's desperate attempt to access the potential offshore natural gas reserves, which it considers is a panacea to address all its domestic problems including energy security.

### **Bangladesh's Dilemma**

Bangladesh seems to be fascinated with the idea of solving all its domestic problems through revenue generated from the rich offshore oil and gas resources in the Bay of Bengal.<sup>25</sup> Its eagerness can be explained by the consequent employment generation for its increasing population and expansion of its industrial growth. This fascination has caused it to adopt a non-flexible approach in negotiations with both India and Myanmar. As a result it has failed to reach any agreement with either of its neighbours to resolve the issues of maritime boundary. The problem is compounded by the fact that limited financial, technological, and institutional resources have made Bangladesh dependent on foreign partners to benefit from its potential natural gas reserves,<sup>26</sup> but attracting foreign oil companies depends on the safety of the investment, which in turn depends on the legal certainty on the expected gains.

## Legal Aspects of India-Bangladesh Maritime Dispute

The legal basis of the present maritime dispute between India and Bangladesh lies in the fact that both countries are yet to delimit their maritime boundary in the Bay of Bengal in accordance with the UNCLOS, 1982, which regulates rights and obligations of states in the maritime space. This legal regime has caused maritime conflicts between neighbouring states due to the delimitation exercises which need to be undertaken by a coastal state with its neighbouring coastal state. The UNCLOS, 1982 has created a system of judicial settlement of disputes over application or interpretation of its various provisions to concrete cases, including delimitation of maritime boundary, with a view to its normative resolution by following the principle of peaceful settlement of dispute.

### International Dispute: Definition

An international 'dispute' is defined as "a specific disagreement relating to question of rights or interests".<sup>27</sup> According to J.G. Merrills:

*"A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another."*<sup>28</sup>

An international dispute involves considerable high stakes. Therefore, dispute settlement techniques under international law are employed to keep the disagreement from escalating to the point that the parties resort to violence.

### Obligation to Settlement of Dispute

Article 279 of UNCLOS, 1982 sets out the basic obligation of all state parties to settle their disputes concerning interpretation or application of the convention by peaceful means.<sup>29</sup> This general obligation is derived from Article 2(3) of the UN Charter. Article 279 also incorporates by reference the peaceful means of settlement of dispute as indicated in Article 33(1) of the UN Charter.<sup>30</sup> Article 33 of the UN Charter, in addition to listing the traditional means of settlement of disputes, arbitration and judicial settlement, also provides opportunity to states to seek the resolution of their dispute by resort to non-legal or diplomatic mechanisms such as negotiations, mediation,

inquiry, or conciliation.<sup>31</sup> As a consequence of this structure, any international dispute, including maritime dispute, will entail two initial choices to a state:<sup>32</sup>

- (a) Whether to settle a dispute at all?
- (b) What mechanism or combinations of mechanisms should be employed to bring about a resolution, if settlement, at all, is desirable?

### **Dispute between India and Bangladesh: The Hunt for Judicial Settlement**

The maritime dispute between India and Bangladesh concerning sovereign rights over maritime space in the Bay of Bengal requires determination of sovereignty over New Moore Island and delimitation of the maritime boundary. Both countries have considerable disagreement over legal rules, facts and application of law to those facts. Judicial resolution of this maritime dispute entails the application and interpretation of Articles 15, 74 and 83 of the UNCLOS, 1982. It is, thus, a legal dispute.

Before resorting to compulsory judicial procedures, entailing binding decisions, India and Bangladesh were required to take recourse to diplomatic means of dispute resolution, as stipulated in Section 1 of Part XV of the UNCLOS. The diplomatic means of dispute resolution are exchange of views, negotiations, conciliation, mediation or any other peaceful means of own choice.

India and Bangladesh have not been able to resolve the issue of delimitation of their maritime boundaries through negotiations over the past 35 years. It appears that after the 2008 Offshore Bidding Round, various developments within the country coupled with the pressures from international oil companies have driven Bangladesh to seek judicial settlement of its maritime dispute as a last resort.

The court or tribunal having jurisdiction over the matter has to resolve the dispute in accordance with the relevant provisions of UNCLOS, 1982. It may take into consideration the jurisprudence of delimitation of maritime boundaries. However, the principle of *stare decisis* is not applicable in the international dispute resolution system.<sup>33</sup>

### **Judicial Settlement Mechanisms Under the UNCLOS, 1982**

#### **UNCLOS, 1982**

The UNCLOS, 1982 is an international legal framework that provides the legal basis for states to exercise their rights and duties in the use of the ocean and in the exploitation

of its resources. It codifies and develops customary international law of the sea and creates new rules and institutions. It is a comprehensive treaty dealing with practically every aspect of the uses and resources of the seas and the oceans including dispute settlement pertaining to rights of states.<sup>34</sup> The major features of UNCLOS relate to the definition and regulation of the different maritime zones that coastal states are entitled to like, territorial sea, contiguous zone, archipelagic waters, EEZ and continental shelf. Other maritime zones like the high seas and international seabed area are also defined. The Convention sets the basis for the preservation of the marine environment, conduct of marine scientific research and development and transfer of marine technology.

### **Compulsory Dispute Settlement System**

The UNCLOS establishes a compulsory dispute settlement system and a permanent judicial settlement body, known as International Tribunal for Law of the Sea (ITLOS). It states that parties shall settle any dispute between them by peaceful means in accordance with Article 2 (3) of the UN Charter.<sup>35</sup> This may be done by utilising various means for dispute settlement as indicated in Article 33 (1) of the UN Charter:

*“negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.*

To facilitate the judicial settlement of disputes, the UNCLOS created a system of tribunals to hear disputes arising under its compulsory jurisdiction. Article 1 under Annex VI of the UNCLOS establishes the ITLOS as a permanent judicial body to hear all cases concerning the interpretation or implementation of UNCLOS. In addition to creating a judicial tribunal, the UNCLOS also provides for the formation of *ad hoc* arbitral tribunals to be called upon by parties that prefer a more informal arbitration to the formal ITLOS.<sup>36</sup> Recognising the delay that may occur with the formation of one of these arbitral tribunals, the UNCLOS empowered ITLOS to prescribe provisional measures to protect the rights of the parties and the health of the environment until such time as the arbitral tribunal could be constituted.<sup>37</sup>

### **Section 2, Part XV, UNCLOS, 1982**

Article 286 of the UNCLOS provides that a dispute can be submitted by any party

to the court or tribunal having jurisdiction under Section 2 of Part XV where no settlement has been reached by recourse to Section 1 of Part XV. This condition for invoking Section 2 of Para XV has been met in the maritime dispute between India and Bangladesh, which the latter has failed to resolve in the past 35 years through diplomatic means. Hence, the maritime dispute between them may be resolved through the judicial dispute settlement system as provided in Section 2 of Para XV, which deals with the judicial dispute settlement procedures related to the interpretation or applications of its provisions. This judicial dispute settlement system is uniquely characterised by two elements – compulsory binding procedures and flexibility to choose different procedures. The compulsory procedure entailing a binding decision, under Section 2 of Part XV, may be invoked by any party to the dispute for the resolution of the dispute, where no settlement has been reached with the other party to the dispute by recourse to Section 1 of Part XV.<sup>38</sup>

### *Choice of Procedure*

One of the important characteristics of the compulsory dispute settlement system under the UNCLOS is the freedom of state parties to choose a convenient dispute settlement body. Under Article 287(1), a state party has the flexibility to choose one or more of the following means for the settlement of disputes concerning the interpretation or application of the UNCLOS:

- (a) The ITLOS established in accordance with Annex VI;
- (b) The International Court of Justice (ICJ);
- (c) An arbitral tribunal constituted in accordance with Annex VII;
- (d) A special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Article 287(1) permits a state party, by way of a written declaration, to indicate its preferred choice of compulsory procedures at any time, which can be revoked or modified on three months' notice. If no declaration is made or if the parties to a dispute have made different choices, arbitration becomes the residual procedure, unless the parties otherwise agree.<sup>39</sup> A simpler way of describing this system is to say that arbitration is compulsory unless the parties to a dispute have consented in advance or *ad hoc* to have it settled in some other way.<sup>40</sup>

### *Consensual Jurisdiction of ITLOS*

Under Article 288 of the UNCLOS, ITLOS has jurisdiction over any dispute, referred to it in accordance with Part XV of the UNCLOS, over the interpretation and application of the provisions contained in the Convention, and any dispute which is referred to the Tribunal according to the international agreements that are relevant to the purpose of the UNCLOS, over the interpretation and application of the agreements concerned. The ITLOS is empowered to decide whether it has the jurisdiction over a dispute by a ruling. Article 21 of the Statute of the ITLOS also provides that:

*“the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”.*

It is important to note that state parties to the UNCLOS have freedom to choose ITLOS as one of judicial settlement body to be used when disputes occur related to the interpretation or application of the UNCLOS in accordance with Article 287(1). According to the choice of methods for dispute settlement provided in Article 287(1), if a state when signing, ratifying or acceding to this Convention chooses ITLOS to resolve disputes related to the interpretation or implementation of articles of the UNCLOS, then ITLOS has jurisdiction over the dispute. Therefore, the jurisdiction of the ITLOS is consensual, whether by a declaration by state parties or by an *ad hoc* special agreement of the parties to a dispute.

Both India and Bangladesh have neither made any written declaration concerning their preferred means of settlement of dispute in accordance with Article 287(1) of the UNCLOS, nor entered into any special agreement, unlike the case of Myanmar and Bangladesh, to grant jurisdiction to ITLOS to decide the present maritime boundary dispute between them. Hence, in this present situation, ITLOS does not have jurisdiction to decide the dispute between India and Bangladesh. But there is no bar in granting jurisdiction to ITLOS to decide the dispute through a special agreement in the future.

### *Deemed Jurisdiction of Annex VII Arbitral Tribunal*

Annex VII arbitral procedures under Section 2, Part XV of the UNCLOS are considered as residual procedures.<sup>41</sup> The state parties are obliged to have recourse to arbitration if

both have not accepted the same dispute settlement procedures under Article 287(5), unless they otherwise agree.<sup>42</sup> Under these circumstances, an arbitration procedure becomes compulsory for the parties to the maritime dispute. Further, a special agreement or *compromis* between the parties to the dispute is not required to invoke Annex VII arbitral procedures. These procedures can be invoked by any state to the dispute, if both the disputing states are parties to the UNCLOS. The procedures have been put in effect by precise rules concerning the structure, appointment and organisation of the tribunal. The rules have been designed to prevent deliberate frustration of the arbitral process.<sup>43</sup> In essence, there are three fundamental rules:

- (a) The arbitral tribunal shall consist of five members, of whom two will be the nationals of the disputing parties (one of each party) and three others will not be nationals (one among them will be President);
- (b) The list of potential arbitrators shall be drawn up and maintained by the UN Secretary-General, similar to the list used by Permanent Court of Arbitration;
- (c) The refusal or negligence of the other party in appointing its member of the arbitral tribunal, as well as any difficulty over the appointment of the other three members, can be overcome by the President of the ITLOS.

Annex VII arbitral tribunal procedures initiated by a party to the dispute in accordance with Article 287(5) have to be notified to the other party to the dispute. The other party is required to appoint one member of the arbitral tribunal of its nationality within 30 days of receipt of such notification. If the appointment is not made within that period, the party instituting the proceedings may, within two weeks of the expiration of that period, request that the appointment be made by the President of the ITLOS in accordance with Article 3(e) of the Annex VII arbitration rules.

Although Article 3(e) makes it mandatory for the President to make an appointment of the arbitrator upon the request of the initiating party to the dispute, it is not a strict rule and, thus, the President may extend the time period for the appointment of a national arbitrator by the other party in default, provided both the parties agree to it. This may be done with a view to facilitate the dispute settlement by peaceful means among the disputing states if both parties to the dispute are willing to try to settle their dispute peacefully through judicial means. This flexibility can certainly result in enhancing the faith and trust in judicial dispute settlement under the UNCLOS.

## Legal Analysis of the Dispute

### Mixed Maritime Boundary Delimitation Dispute

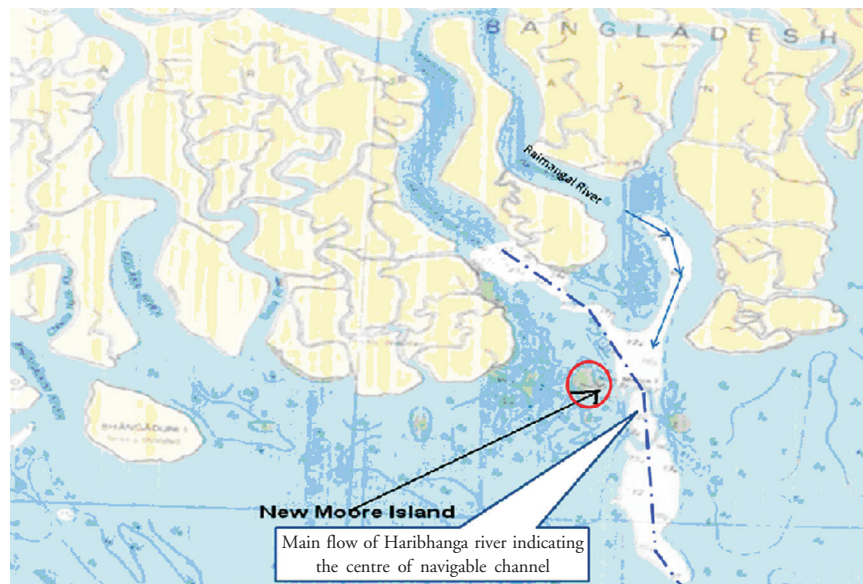
There are situations in which the delimitation of a maritime boundary may necessarily require a decision concerning disputed sovereignty over land, for example, where an island is used as a base-point for an EEZ or continental shelf claim. This kind of a dispute is characterised as a mixed maritime boundary dispute. The maritime boundary dispute between India and Bangladesh has two components – determination of the sovereign rights over New Moore/South Talpatty Island and delimitation of maritime boundaries. Hence, it may be characterised as a mixed maritime boundary dispute.

Bangladesh intends to construct its baseline from New Moore (South Talpatty) Island in order to broaden its claim for a larger territorial sea, EEZ and continental shelf. In addition, Bangladesh argues that the course of the natural prolongation of continental shelf is from North to South, which is contested by India stating that it is from East to West.<sup>44</sup> In sum, resolution of a maritime boundary dispute entails addressing two contentious issues; the baselines to demarcate maritime boundaries and delimitation of maritime boundaries including the outer limit of the overlapping extended continental shelf. Addressing these contentious issues requires determination on the basis of established principles of maritime boundary delimitations under the international law, as reflected in UNCLOS.

### *Sovereignty Over New Moore (or South Talpatty) Island*<sup>45</sup>

Maritime disputes between Bangladesh and India involve the formation of a small uninhabited offshore island in the Bay of Bengal in the aftermath of the *Bhola* cyclone in 1970.<sup>47</sup> It is known as New Moore/Purbasha Island in India and South Talpatty Island in Bangladesh.<sup>46</sup> The island was discovered by a US satellite in 1974 and lies at the mouth of the Hariabhanga River, which separates the two countries. It has been pointed out by some commentators that the ownership of New Moore Island is directly related to the direction of flow of the Hariabhanga River. Bangladesh insists that the island is formed from the combined currents of Hariabhanga, Raimongal and Jamuna Rivers and lies straight South of the Hariabhanga. Although these rivers have slopes on the East, the main current flows on the West of the island. Hence, sovereignty over South Talpatty Island must take into account the combined currents of the three

ivers. The gist of Bangladesh's argument is to support its ownership claim over South Talpatty Island on the ground that the Hariabhanga River flows along the West of this Island. India's position is that the current of the Hariabhanga flows along the East of the island and also that the point which Bangladesh considers as the starting point to demarcate its maritime boundary, actually lies within India's territorial sea (Fig. 1).



**Fig. 1.** Navigational map of area surrounding New Moore Island (source: Chart 351 (2002 Edn.), National Hydrographic Organisation, Dehradun, India). The lines passing through the deepest path of the navigable channel have been drawn by the author.

Sovereignty over this island is one of the issues plaguing maritime delimitation between India and Bangladesh since 1979. The uninhabited island has gained importance as both countries claim that it lies in their respective maritime zones. South Talpatty Island is considered very important by Bangladesh as the starting point to demarcate its maritime boundary and to map its EEZ as well as continental shelf by constructing its baselines from the island. It is preparing its documents with facts and figures to claiming the EEZ by basing this point of the Hariabhanga river as the starting point. Bangladesh's insistence over its claims can be attributed to its desire to claim as much as maritime space as possible to benefit from the future exploitation of natural resources in the Bay of Bengal. In short, resolution of the maritime boundary dispute between

India and Bangladesh essentially depends on the determination of sovereignty over the South Talpatty Island since Bangladesh's claim is based on the baseline to be drawn from this island to widen its claim over the maritime zone under the UNCLOS.

### *Delimitation of Maritime Boundary*

The absence of an agreed maritime boundary between India and Bangladesh has resulted in overlapping maritime zones. The UNLOS, 1982 defines maritime zones, rights of states and their delineation process. There are mainly four maritime zones – Territorial Sea (up to 12 nautical miles), Contiguous Zone (up to 24 nautical miles), EEZ (up to 200 nautical miles), and Continental Shelf (up to 200 nautical miles, but extendable up to 350 nautical miles under particular conditions). The maximum extent of the respective zones is usually measured from baselines delineated by states on the basis of their declared base-points. The baselines delineated may be normal or straight depending on the geography of the coast of states in accordance with Articles 5 or 7, respectively.

Both India and Bangladesh have enacted domestic legislations to declare their marine zones. Ever since enactment of its 1974 Territorial Waters and Maritime Zones Act,<sup>48</sup> Bangladesh has had serious delimitation disputes with India about overlapping maritime boundaries.<sup>49</sup> On the twin elements of the issue – base-point method for delineating baseline and natural prolongation of the continental shelf – India has argued that the natural prolongation of the continental shelf is from East to West. This is contested by Bangladesh as being from North to South. Contentious claims, thus, have led to disputes over the overlapping territorial sea, EEZ and continental shelf.

### *Base-points for Delineating the Baseline*

Baselines have a direct bearing on the outer limits of maritime zones, when they are to be determined with reference to distance therefrom. They are delineated on the basis of the base-points. India has used the straight line method to construct its baselines, whereas Bangladesh has used the depth method, that is, it has delineated baselines according to the depth of waters in view of the geomorphologic and geographical peculiarities of its coastline and the concave nature of its coast, resulting from the special nature of the offshore areas of the Ganges River delta.

In 1974, Bangladesh declared a straight baseline with a length of 222 nautical miles at 10 fathoms contour line under Section 3 (1) of the Territorial Waters and Maritime

Zones Act, 1974. This straight baseline has been constructed by successively linking eight base-points, all of which are located in the sea.<sup>50</sup> In order to legitimise its uniquely delineated baselines, Bangladesh attempted to propose an amendment to Article 4 of the Territorial Sea Convention to delineate baselines using the depth method for establishing baselines, instead of the “normal baselines” or “straight baselines” standards used in the law of the sea.<sup>51</sup> The amendment was not accepted, but Article 7(2) of the UNCLOS, 1982 attempted to meet the situation.<sup>52</sup>

### *Overlapping Maritime Boundaries*

The term “maritime boundaries” has two main implications. It refers to seaward outer limit of maritime zones of a coastal state, such as the territorial sea, and also refers to the limits of the maritime zones of a coastal state with opposite or adjacent coasts, in order to avoid an overlap. The latter is popularly called “delimitation of maritime boundary”.<sup>53</sup> Delimitation of maritime boundaries has become an important issue for states in the practice of the modern law of the sea. Disputes between coastal countries centre on the delimitations of the territorial sea, the EEZ and the continental shelf. Where the distance between two opposite or adjacent littoral states is less than 24 nautical miles, then each state cannot claim its full entitlement to 12 nautical miles of territorial sea. Similarly, where two opposite states are less than 400 nautical miles apart, an issue arises as to their respective entitlement to the continental shelf. How to reconcile such differences and delimit the maritime zones between contending opposite or adjacent states is an issue that has generated considerable controversy and also received significant judicial attention.

The UNCLOS, 1982 deals with maritime boundary delimitation problems of territorial seas (Article 15), EEZs (Article 74), and the continental shelf (Article 83) between states with opposite or adjacent coasts. Article 121 relating to the regime of islands is also relevant in connection with the delimitation problem. The judicial decisions rendered either by the Court or by an arbitral tribunal, having the jurisdiction, also set standards for resolving maritime boundary-delimitation issues.

The dispute between India and Bangladesh has arisen primarily due to the different approaches adopted by them to demarcate their maritime boundaries. Bangladesh considers that geographical considerations play a critical role in adopting the principle to be followed in delimitation of the EEZ and the continental shelf. It insists that the equidistance principle is only applicable between opposite countries and not in the case

of adjacent countries like India in respect of delimitation of the EEZ and the continental shelf. The argument put forth by Bangladesh is that maritime boundary demarcated on the basis of equidistance principle disregards the physical features of the coastal areas and, thus, cannot achieve “an equitable solution”.

### *Claim for Extended Continental Shelf*

The extended continental shelf refers to maritime areas that extend beyond 200 nautical miles from the baselines of a coastal state. A coastal state is entitled to a continental shelf of 200 nautical miles, but right to the outer continental shelf beyond 200 nautical miles the continental shelf is based upon the physical characteristics of the seabed and subsoil. The rules that define the limits of a coastal state's entitlement are found in Article 76 of the UNCLOS, which creates two alternative means for determining the outer limit of the continental shelf if it extends beyond 200 nautical miles from the coast (Article 76(4)), provides for some limitations on the application of these formulae (Article 76(5)), and sets forth some exceptions to these limitations (Article 76(6)).<sup>54</sup>

The UNCLOS provides that a claim for an extended continental shelf has to be submitted to the UN Commission on the Limits of the Continental Shelf (UNCLCS) in accordance with Article 76 and Annex II. A coastal state has to submit relevant scientific and technical proof to support its claim within 10 years of the ratification of the UNCLCS by that state.<sup>55</sup> The UNCLCS is required to make recommendations after examining the submission of state parties to the UNCLOS. Further, outer limit of the extended continental shelf established by a coastal state on the basis of these recommendations shall be final and binding under Article 76(8) of the UNCLOS.

While India made partial submissions for an extended continental shelf to the UNCLCS in 2009, Bangladesh has time till 2011 to make its submission.

## **Ongoing Dispute Resolution Process**

### **Diplomatic Negotiations: A Failure?**

A series of diplomatic negotiations between India and Bangladesh over the last 35 years have not succeeded in arriving at an amicable solution. The bilateral negotiations at the official level started in 1974 to resolve the maritime boundary dispute. Thereafter,

several meetings have taken place at the Foreign Secretary level. Subsequently, negotiations were elevated to the Foreign Minister level in 1975 and the ministers from both sides considerably narrowed down the disputes. In 1978, another session took place, but it did not result in any move forward to resolve the issue. In 1982, yet another session took place, but remained inconclusive and ended without any consensus. In September and November 2008, meetings were held at the technical level.<sup>56</sup> However, the matter regarding the maritime boundary could not be settled.

It is quite clear that all kinds of diplomatic negotiations between India and Bangladesh have remained inconclusive till date due to the different approaches followed by both countries to resolve their maritime dispute. At present, a judicial settlement of the dispute has been sought by Bangladesh.

### **Conflicting Approach**

India seeks to resolve the issue on the basis of the principle of 'equidistance', whereas Bangladesh seeks to base any resolution on the basis of 'equity'. The same difference in arguments also rendered the Bangladesh-Myanmar talks inconclusive. Importantly, in the meanwhile, India and Myanmar have delimited their maritime boundaries on the basis of the equidistance principle.<sup>57</sup> According to Bangladesh, India's proposed line is contrary to international law as decided by the ICJ in the *North Sea Continental Shelf Case* (1969)<sup>58</sup> and ignores the special circumstances related to the indented nature of Bangladesh's coastal belt and concavity of its coasts. Bangladesh also maintains that the boundary proposed by India will make it a "sea-locked" country.<sup>59</sup>

Bangladesh's approach does not seem to take into account the later developments in the jurisprudence of maritime boundary disputes, which is quite consistent in terms of application of equidistance line/relevant circumstances method for delimitation of maritime boundaries. In post-North Sea Continental Shelf cases, the court has clarified its methodology for delimiting the EEZ/continental shelf, following a three-stage process.<sup>60</sup> In the first stage, it requires drawing a provisional equidistance line between the most appropriate base-points on the coasts of two states. In the second stage, the court may consider the required adjustment of this line, taking into account the relevant circumstances, if any. In the third and final stage, the court verifies that the line does not lead to an inequitable result.

### **UNCLOS and Principle of Equity**

During the UNCLOS negotiations the issue of delimitation of maritime boundary was subject to lengthy debates, primarily concerned with the principle to be followed for the delimitation process. One group favoured the equidistance principle while another group favoured the equity principle. Finally, a compromise was reached among states to end the stalemate on the issue. The compromise text of Articles 74 and 83 refers to “equitable solution” as the objective of delimitation of maritime boundaries and not to ‘equitable’ principle as the basis of delimitation.<sup>61</sup> Interestingly, Bangladesh was one of the prominent countries which favoured the principle of equity as the method for delimiting maritime boundaries during UNCLOS negotiations.<sup>62</sup>

### **Arbitration as a Default Mechanism**

India is a signatory to the UNCLOS and one of the first countries to ratify it on June 29, 1995. Bangladesh is also a signatory to the UNCLOS and ratified it on July 27, 2001. Thus, India and Bangladesh are entitled to avail the Part XV procedures of dispute settlement. However, both the countries have not made any written declaration pursuant to Article 287(1) for their preferred means of settlement of dispute. Further, there is no special agreement between them for conferring jurisdiction to a particular dispute settlement body to decide their maritime dispute.

Therefore, both countries are deemed – by operation of Article 287(3) – to have accepted arbitration in accordance with Annex VII as the means of settling disputes between them concerning delimitation of maritime boundary. Hence, an arbitral tribunal constituted pursuant to Annex VII read with Article 287(3) has jurisdiction over their maritime dispute in accordance with Article 288(1) of UNCLOS.

### **The Way Ahead**

Bangladesh has invoked Article 287(3) of the UNCLOS, read with Article 287(1), as the basis of jurisdiction of the Annex VII arbitral tribunal to seek the judicial settlement of its maritime dispute with India. Currently, the Annex VII arbitral tribunal has been constituted with the Permanent Court of Arbitration serving as registry. The arbitral tribunal is seized of the matter to delimit the maritime boundary between India and Bangladesh, in accordance with the Articles 15, 74, 83 of the 1982 UNCLOS. The tribunal, while deciding on the matter, will take into consideration the applicable

principles of maritime boundary delimitation and the jurisprudence on the subject. The arbitral award shall be final and without appeal.<sup>63</sup>

It may, however, be noted that India and Bangladesh can “any time”, agree to use “any peaceful means of their own choice”. They retain this option even if Annex VII arbitral procedure has begun and can discontinue it by resorting to some other procedures.<sup>64</sup>

## **Conclusion**

It is well-known that oceans are the most important resource on our planet. Every state in the world has economic, political, strategic, and social interests in the oceans that are manifest in a variety of maritime activities, including fishing, shipping of goods, hydrocarbon and mineral extraction, naval missions and scientific research. Therefore maritime boundaries, like territorial/land boundaries, are a politically sensitive subject, because they affect a coastal state’s jurisdiction concerning the fisheries, hydrocarbons and other resources as well as other uses of the sea. This sensitivity is manifest in the issue of delimitation of maritime boundaries between India and Bangladesh which has remained a persistent source of conflict between the two countries since 1974.

In this regard, Bangladesh’s move to make use of Annex VII arbitral tribunal under the UNCLOS, 1982 to resolve its maritime dispute with India is no exception. However, it seems that the main driver behind Bangladesh seeking a judicial settlement is its desperation to benefit commercially from the potential rich hydrocarbon resources in the Bay of Bengal. This desperation can be gauged from its approach for delimitation of maritime boundary and, as a result, Bangladesh seems to be behaving imprudently in its endeavour to benefit commercially from exploitation of oil and natural gas in the Bay of Bengal. In fact, it is trying to put forth all sorts of convenient arguments to buttress its maritime claims, ignoring both facts and law.

A decision *ex aequo et bono* (on the basis of equity) may be sought especially when the law governing the dispute is *non liquet* (unclear). The arguments simply on the basis of equity could be risky in the current dispute as its judicial resolution shall be determined in accordance with the UNCLOS, 1982. The final outcome may not be as desired by Bangladesh, which needs to understand that “equitable solution”, to be applied for the delimitation of maritime boundary process under UNCLOS is not the same as application of “principle of equity”. Further, extraneous arguments to garner

sympathy, like “least developing country”, “resource-deficit country”, “poor economy”, “victim of climate change” etc., may provide certain advantages in international politics and diplomacy, but they do not hold much water under the international law on delimitation of maritime boundaries as embodied in the UNCLOS. Ironically, Bangladesh has chosen judicial mechanisms to get political and economic concessions. Therefore, arguments put forth by Bangladesh to buttress its maritime claim may boomerang in legal scrutiny and make it lose the legal battle with India.

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### Notes

1. See United Nations Convention on the Law of the Sea (hereinafter UNCLOS), United Nations Document *A/CONF.62/122* (1982), 1833 *UNTS* 396, reprinted in 21 *International Legal Materials* (ILM) 1261 (1982) (opened for signature December 10, 1982 and entered into force November 16, 1994).
2. For an overview, see R.C. Sharma, “South Asia Maritime Issues”, *Ocean and Shoreline Management*, 15(4) (1991): 325-336; M.H. Rahman, “Delimitation of Maritime Boundaries: A Survey of Problems in the Bangladesh Case”, *Asian Survey*, Vol. 24(12) (1984): 1302-1317; M.K. Alam, “Maritime Security of Bangladesh: Traditional Issues Impinging on Maritime Boundary Delimitation”, Seminar on Maritime Security of Bangladesh, Bangladesh Institute of International and Strategic Studies (BISS), Dhaka, February 12, 2009.
3. Natural gas has emerged as the most preferred fuel due to its inherent environmentally benign nature, greater efficiency and cost effectiveness. It can replace existing fuels in various sectors both for feedstock and for energy purposes. See Integrated Energy Policy:

- Report of the Expert Committee, Planning Commission, Government of India, New Delhi, 2006, available at [http://planningcommission.nic.in/reports/genrep/rep\\_intengy.pdf](http://planningcommission.nic.in/reports/genrep/rep_intengy.pdf), p. 26.
4. *FACTS*: “India’s Long-Term Gas Supply Outlook is Bright”, *Oil and Gas Journal*, 101(47) (2003): 30; “Operators Discover More Gas in Bay of Bengal off India”, *Oil and Gas Journal*, July 18, 2005, 103(27): 34; “Reliance-Niko Combine Scores More Gas off North-Eastern India”, *Oil and Gas Journal*, September 27, 2004, 102(36): 37.
  5. “India Seeks Bids in Eighth NELP Licensing Round”, *Oil and Gas Journal*, 107(16) (2009): 40.
  6. Petrobangla: “Petroleum Exploration Opportunities in Bangladesh”, Government of the People’s Republic of Bangladesh and Bangladesh Oil, Gas and Minerals Corporation (Petrobangla), Dhaka, Bangladesh, February 2000; “Tectonics and Petroleum Prospects in Bangladesh”, *Oil and Gas Journal*, 93(28) (1995): 66.
  7. Alan Petzet, “Daewoo International Makes Giant Gas Discovery in Rakhine Basin off Northwestern Myanmar”, *Oil and Gas Journal*, 102(4) (2004): 52.
  8. See *Agreement between the Socialist Republic of the Union of Burma and the Republic of India on the Delimitation of the Maritime Boundary in the Andaman Sea, in the Coco Channel and in the Bay of Bengal*, December 23, 1986. Through this agreement the maritime boundary between India and Myanmar (formerly, Burma) was delimited in the Andaman Sea, the Coco Island and the Bay of Bengal that extends 200 nautical miles to the sea. India and Myanmar have agreed to discuss bilaterally to further extend the maritime boundary beyond Point 16. Text of the agreement may be accessed at [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/MMR-IND1986MB.PDF](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/MMR-IND1986MB.PDF)
  9. ANN, “Bangladesh, Burma in Maritime Dispute”, *Asia News Network*, November 3, 2008, available at [www.asianewsnet.net/news.php?sec=1&id=2417](http://www.asianewsnet.net/news.php?sec=1&id=2417)
  10. See DOALOS, Note by Bangladesh to the Secretary General of the United Nations in response to India’s Submission to DOALOS, *No. PMBNY-UNCLOS/2009*, October 29, 2009. Available at [www.un.org/Depts/los/clcs\\_new/submissions\\_files/ind48\\_09/bgd\\_re\\_ind\\_clcs48\\_2009e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/ind48_09/bgd_re_ind_clcs48_2009e.pdf)
  11. See ITLOS Press Release, “Proceedings Instituted in the Dispute Concerning the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal”, *ITLOS/Press 140*, December 16, 2009, available at [www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html)
  12. The Bay of Bengal is not a Bay for the purposes of Article 10 of the UNCLOS. See Mohammad Mohiuddin, *Settlement of a Maritime Delimitation Dispute in the Context of UNCLOS: The Case of the Bay of Bengal and the South Talpatty Island*, ITLOS Intern Research Paper, July-September 2009.
  13. V.P. Rao and P.M. Kessarkar, “Geomorphology and Geology of Bay of Bengal and the Andaman Sea”, In: *The Indian Ocean: A Perspective*. eds. R.S. Gupta and Ehrlich DESA, Vols. 1 and 2, 2<sup>nd</sup> Edn. (New Delhi: Calcutta: Oxford and IBH Publishing Co. Pvt. Ltd., 2001), Chapter 21, p. 817.

14. *Ibid.*
15. M. Habibur Rahman, *Delimitation of Maritime Boundaries* (Rajshahi University, 1991), p. 273.
16. R.W. Fairbridge, ed., *The Encyclopedia of Oceanography 1* (New York: Van Nostrand Reinhold Company, 1966), pp. 110-118.
17. R.W. Fairbridge, ed., *The Encyclopedia of Oceanography 3* (New York: Van Nostrand Reinhold Company, 1966).
18. *Ibid.*
19. See M. Habibur Rahman, *Supra* note [15], pp. 98-144.
20. "Operators Discover More Gas in Bay of Bengal Off India", *Oil and Gas Journal*, July 18, 2005.
21. Alan Petzet, "Daewoo International Makes Giant Gas Discovery in Rakhine Basin off Northwestern Myanmar", *Oil and Gas Journal*, 102(4) (2004): 52.
22. See British Petroleum, *BP Statistical Review of World Energy*, 2009, p. 22.
23. "Comprehensive Bangladesh Gas Strategy Needed Ahead of Export Decision", *Oil and Gas Journal*, 98(34) (August 21, 2000): 18.
24. *Ibid.*
25. Bangladesh's proven natural gas reserves are 13.1 TCM. See British Petroleum, *BP Statistical Review of World Energy*, 2009, p. 22; Brown, T.A., Shamsuddin, A.H.M. and Rickard, M., "Hydrocarbon Resource Base of Bangladesh", *Proc. 13<sup>th</sup> Southeast Asia Petroleum Exploration Society*, Singapore, 2001; Government of the People's Republic of Bangladesh, Ministry of Power, Energy and Mineral Resources, Energy and Mineral Resource Division, Hydrocarbon Unit, "Bangladesh Petroleum Potential and Resource Assessment 2001", 2002.
26. "Bangladesh Seeks Foreign Petroleum Investment", *Oil and Gas Journal*, 91(44) (November 1, 1993): 31.
27. See the *Mavrommatis Palestine Concessions Case* (Greece vs. UK), *PCIJ*, Series A, No. 2, 1924, p. 11.
28. J.G. Merrills, *International Dispute Settlement*, 3<sup>rd</sup> Edn. (Cambridge: Cambridge University Press, 2000), p. 1.
29. The principle of peaceful settlement of disputes is the cornerstone of international law. It is also one of the pillars of contemporary world order under the UN as reflected in the UN Charter. Article 2(3) of the UN Charter obliges states to settle their disputes in a peaceful manner and Article 33 sets out the mechanisms by which the peaceful settlement of disputes can be effected. It may be pointed out that UN Charter does not require states to choose a particular means of settlement of dispute, but is only concerned that means employed are peaceful. See D.W. Bowett, "Developments in Settlement of Disputes", 180 *Recueil des cours* 173, 177(1987).
30. See Myron Norquist, ed., *United Nations Convention on Law of the Sea 1982: A Commentary*, Vol. V (Dordrecht: Martinus Nijhoff Publications, 1985), p. 18.

31. A.N. Clark, "Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law", *Georgetown International Environmental Law Review*, 10 (1997-98): 551.
32. *Ibid.*
33. See Article 59 of the ICJ Statute: "The Decision of the Court has no Binding Force Except Between the Parties and in Respect of that Particular Case".
34. T.B. Koh, "A Constitution for the Oceans", In: *United Nations Convention on Law of the Sea 1982: A Commentary*, Vol. I, ed. Myron Norquist (Dordrecht: Martinus Nijhoff Publications, 1985), adopted from statement by President Koh on December 6 and 11, 1982 at the final session of the conference at Montego Bay.
35. See Article 279 of UNCLOS.
36. See Article 287 of UNCLOS.
37. See Article 290(1) of UNCLOS.
38. Article 286 permits these compulsory procedures of consultations and negotiations to be invoked by any party to the dispute before submitting the dispute to a court or tribunal having jurisdiction under Section 2, which concerns compulsory judicial settlement of disputes under the UNCLOS, 1982.
39. For details see Adede, *The System for Settlement of Disputes under the UN Convention on the Law of the Sea* (Dordrecht: Martinus Nijhoff, 1987), p. 53; L. Sohn, "Settlement of Law of the Sea Disputes", *International Journal of Marine and Coastal Law*, 10 (1995).
40. A.E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", *International and Comparative Law Quarterly*, 46: 40.
41. See Myron Nordquist, *Supra* note [30], p. 422.
42. *Ibid.*, p. 422.
43. *Ibid.*, p. 422.
44. See Moinuddin, *Supra* note [15].
45. Some people argue that New Moore is no longer an issue in the delimitation of maritime boundary between India and Bangladesh as this island is now submerged in the Bay of Bengal. The author is of the opinion that despite New Moore losing its legal status as an Article 121 island, it is still considered as a low-tide elevation (LTE) under Article 13(1) of the UNCLOS. Hence, New Moore is still relevant in deciding the dispute.
46. R.P. Anand, "South Asia and the Law of the Sea: Problems and Prospects", *Studies in International Law and History: An Asian Perspective* (Brill Academic Publishers, Martinus Nijhoff Publishers, Leiden, the Netherlands, 2004); D.W. Wadegaonkar, "Changing Concept of the Determination of Maritime Frontiers and the Delimitation of Maritime Boundaries", in S.K. Agrawala, T.S. Rama Rao, and J.N. Saxena (Eds.), *New Horizons of International Law and Developing Countries* (International Law Association, N.M. Tripathi Private Ltd., India, 1983).

47. See “Storms and Depression”, Annual Summary, *India Weather Review*, 1970, Part C, p. C8.
48. See *Bangladesh Gazette*, Extra, Part V, February 14, 1974, pp. 2234-2237.
49. D.A. Desierto, “Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia”, *International Journal of Legal Information*, 36 (2008): 387.
50. See Ministry of Foreign Affairs Declaration No. LT/II/3-74, April 13, 1974.
51. See D.A. Desierto, *Supra* note [48].
52. Article 7(2): “Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal state in accordance with this Convention”.
53. S.P. Jagota, *Maritime Boundary* (Dordrecht: Martinus Nijhoff Publishers, 1985), Chapter 1, p. 3.
54. D.A. Colson, “The Delimitation of the Outer Continental Shelf Between Neighboring States”, *American Journal of International Law*, 91 (2003): 97.
55. See UNCLOS, Annex II, Article 4.
56. Mir Mostafizur Rahman, “Technical Level Talks to Settle Sea Boundary Stepped Up”, *The Independent*, available at <http://theindependent-bd.com/details.php?nid=137036> (accessed on August 19, 2009).
57. India-Myanmar Agreement.
58. North Sea Continental Shelf Cases, Federal Republic of Germany, Denmark, The Netherlands, 1969 ICJ Reports.
59. Harun ur Rashid, “Demarcating Maritime Zones in the Bay of Bengal”, *The Daily Star*, September 25, 2007, available at [www.thedailystar.net/pf\\_story.php?nid=5298](http://www.thedailystar.net/pf_story.php?nid=5298) (accessed on August 13, 2009).
60. See Greenland/Jan Mayen Case, ICJ Report, 1993; Qatar/Bahrain Case, 2001 ICJ Reports, Cameroon/Nigeria Case, 2002 ICJ Reports, para 230; 2006 Barbados/Trinidad and Tobago Award, PCA Award Series, Vol. V (2007), para 242; 2007 Guyana/Surinam Award, PCA Award Series, Vol. V (2007); 2009 Romania/Ukraine Case, 2009 ICJ Reports.
61. Hungdah Chiu, “Some Problems Concerning the Application of the Delimitation of Maritime Boundary Provisions of the 1982 United Nations Convention on the Law of the Sea”, *Chinese (Taiwan) Yearbook of International Law and Affairs*, 4 (1984): 66.
62. United Nations Press Release, SEA/425 (March 4, 1981), p. 24.
63. The parties may, however, agree in advance to appellate procedures, see Article 11, Annex VII of UNCLOS.
64. See Myron Nordquist, *Supra* note [30], p. 21.