

Resolving the Indo-Bangladesh Maritime Dispute

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EXECUTIVE SUMMARY

Indo-Bangladesh relations have been consistently hit by several contentious issues. One of these challenges is the longstanding maritime dispute over territorial waters and exclusive economic zones (EEZs) in the Bay of Bengal. This dispute was eventually taken to an international tribunal by Bangladesh in 2009 and the verdict is expected to be delivered in a few weeks. This discussion document investigates the nature of the dispute and presents policy options that the Indian government can use depending on the nature of the verdict.

While many states go to international tribunals and courts to resolve bilateral disputes, they ultimately conclude in bilateral negotiations. The Indian government can incentivise its neighbours to resolve outstanding issues bilaterally than through costly international adjudication.

India should concede no part whatsoever of the territorial waters because this area is essential for the livelihoods of its 300 million citizens living in States dependent on the Bay of Bengal. The international tribunal could adjudicate on the EEZ dispute by recommending either the equidistant or equitable principle to demarcate the EEZs. While the equidistant principle is in favour of India, the Indian government has a legitimate case for a favourable position even under the equitable principle. India can also propose joint development and exploration in the EEZ with Bangladesh.

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BACKGROUND

Indo-Bangladesh relations have been tumultuous since 1971. Even though India played a critical role in securing Bangladesh's Independence in 1971, bilateral relations between the two countries have been marred by several contentious issues like land border disagreements, terrorist activity emanating from Bangladeshi soil, river water sharing and illegal immigration.

Another issue, though of lower criticality is the maritime boundary dispute concerned with the delimitation of territorial waters and exclusive economic zones in the Bay of Bengal. Both countries have significant interests in fisheries, and more recently in oil and natural gas reserves in the contested region.

Setting the bilateral discussions aside, Bangladesh took this issue to the International Tribunal for Law of Sea (ITLOS) authorised under United Nations Convention on Law of Sea (UNCLOS) to seek a desirable solution. The verdict is expected in a few weeks, and some news reports say as early as July 2, 2014¹. How India reacts to this verdict will determine its stand on maritime disputes vis-a-vis other littoral neighbours in the future. Moreover, a quick resolution of this dispute can pave the way for resolving the other burning issues between India and Bangladesh.

DETAILS OF THE MARITIME DISPUTE

The Indo-Bangladesh maritime dispute can be broken down into three major points of contention as described in the table below.

The first of the three issues in the table is academic in nature since the island under contention completely disappeared in March 2010². The other two are still relevant; this paper will first explore these two issues and then recommend how these two can be addressed.

Issue	Indian Claim	Bangladeshi Claim	Precedent
Sovereignty over New Moore/ South Talpatti Islands	Island belongs to India according to Thalweg Doctrine as the mid flow of the river is on the island's eastern side	Island belongs to Bangladesh according to Thalweg Doctrine as the mid flow of the river is on the island's western side	None
Territorial Sea dispute	Demarcation be done according to the low-water baseline which closely follows the curve of the vertical coastline	Demarcation be done according to the straight water baseline due to uneven and variable coastline	Low Water Baseline system followed world over. General norm.
Exclusive Economic Zone dispute	Demarcation be done according to the Equidistant Principle	Demarcation be done according to the Equity Principle	For Equidistant-Cameroon/Nigeria Case For Equity-North Sea Continental Shelf Case, Libya/Tunisia and Gulf of Maine Case

THE TERRITORIAL WATERS DISPUTE

Territorial waters are important because these regions are extensively used for shipping and fishing. India contends that if Bangladesh were to follow the straight baseline system then firstly it will encroach on Indian territorial waters and secondly it would increase Bangladesh's Exclusive Economic Zone (EEZ) claim substantially.³

This will adversely impact the fishing communities in India. Bangladesh's proposed straight water baseline system is ambiguous as it is very difficult to determine whether a particular region is suffering from unstable coastlines and rising sea levels. Hence there may be difficulty in delimiting the maritime boundary if one country follows the normal low-water baseline systems and the other follows straight baseline system.⁴ India and Myanmar have reached a tacit understanding on settling their maritime disputes through bilateral negotiations.⁵

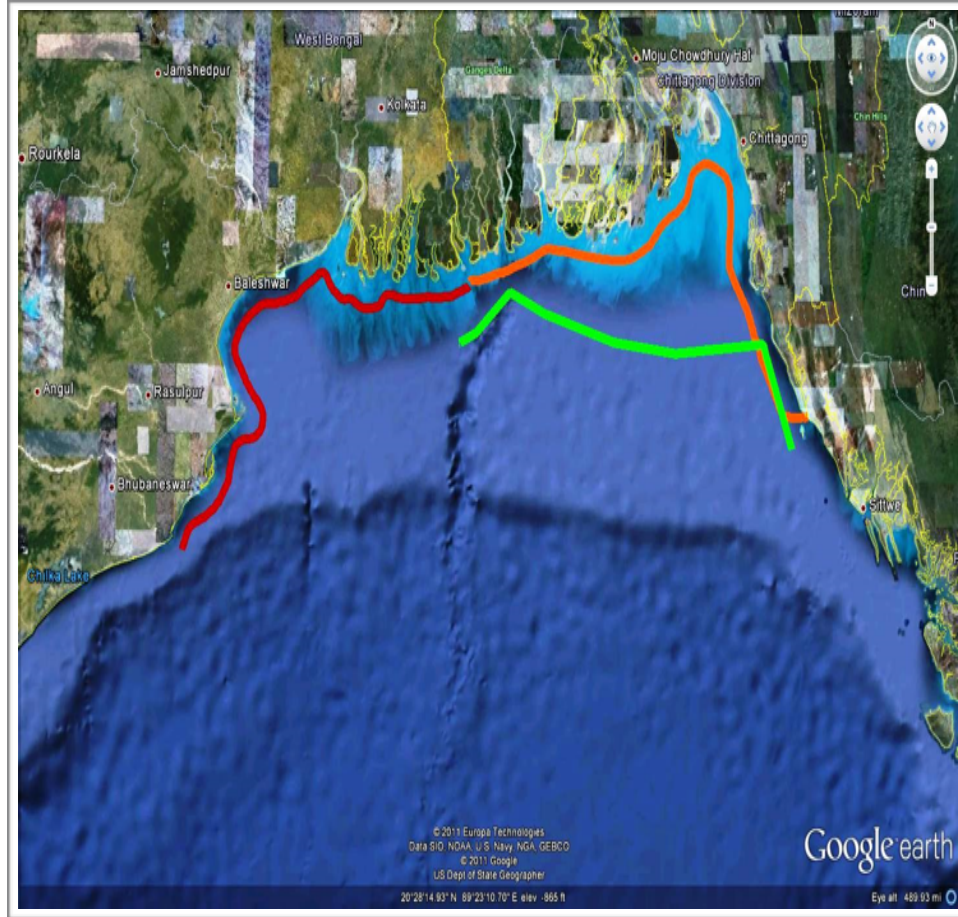


Figure 1: Red shows India's territorial waters extent according to Low-water Baselines, orange shows Bangladesh's territorial water extent according to Low-water Baselines and Green shows Bangladesh's territorial waters according to straight baselines principle.⁶

EEZ dispute

The dispute over demarcation of the EEZ is based on which principle to apply – equidistance or equitability. The 1958 Territorial Sea Convention and Article 15 of UNCLOS, 1982,⁷ define equidistance as “the line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each of the two States is measured”.⁸ The use of equidistance methods depends on the baselines along the coasts of the respective States whose offshore areas are to be separated by the boundary. According to the 1958 Conventions, the use of the equidistance method was obligatory in the absence of an agreement, historical titles or special circumstances.

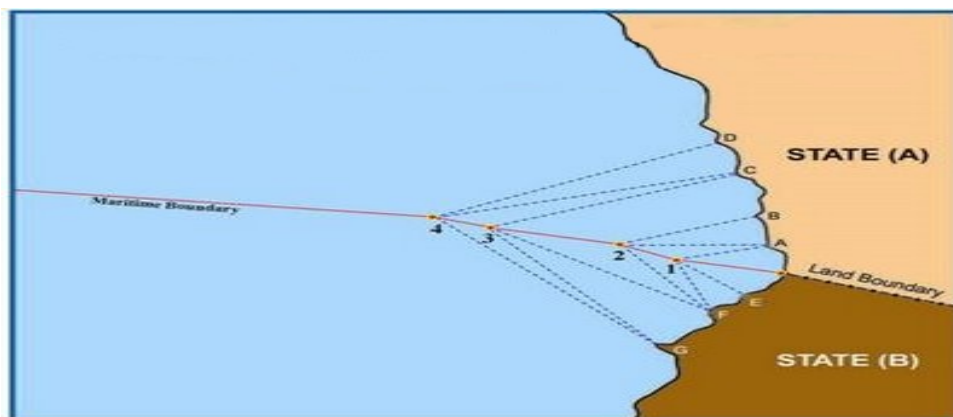


Figure 2: A simple illustration explaining the equidistant principle.⁹

Bangladesh uses the particular phrase “special circumstances” to invoke the principle of equitability instead. This principle, while dictating that the boundary be drawn in a manner that avoids an inequitable result, does not provide any precise criteria for what manner of result is to be considered equitable. The 1982 UNCLOS sets only a goal which must be achieved and stipulates nothing on how to achieve the result; the precise contours of equitability are decided on a case-to-case basis and through negotiations between the states in question.

Bangladesh contends that if the equidistant principle is followed it will lose out on a huge chunk of marine resources such as fisheries, oil and natural gas reserves recently discovered. And since the application of the equidistant principle creates ‘inequitable results’ this case should be settled by applying the principle of equitability. The case was also made that since Myanmar also follows the equidistant principle of delimiting its maritime boundary, Bangladesh will get “zone-Locked”¹⁰. Bangladesh had followed the same reasoning in a parallel case against Myanmar. The ITLOS verdict¹¹, in that case that divided the territorial sea between Bangladesh and Myanmar based on the equidistant principle while the EEZ was divided on the equitable principle. Bangladesh will no longer be zone-locked irrespective of the judgment in the Indo-Bangladesh dispute.

Articles 74¹² and 83¹³ of the 1982 LOS Convention concerning the delimitation of the EEZ and the CS provide for effecting the delimitation by agreement, in accordance with international law and in order to achieve an equitable result. In all the precedent cases where the court favoured settlement of disputes in accordance with equity principle, it failed to provide a framework to reach the same, and left it to the states to bilaterally sort them out in order to achieve such a result.

Having discussed the two principles, the current status of the dispute in question can be explored further. The dispute is pending before the International Tribunal for Law of Sea (ITLOS) after the Bangladesh government filed claims in 2009 alleging India was encroaching upon its maritime zones and exploiting the oil blocks in the contested areas for its own use.

India asked the Bangladesh government to not pursue this case and requested them to solve the issue bilaterally, which Bangladesh rejected. Both the sides have made their pleadings to the court recently; the judgment is anticipated to be pronounced in July 2014. Bangladesh cited, *inter alia*, the United Nations Framework Convention on Climate Change (UNFCCC) for the needs and special circumstances of countries vulnerable to climate change. India has emphasized the equidistant principle, and Indian conformity with UNCLOS to delimit its maritime boundary. India also contends that Bangladesh alone is not suffering from climate change and that Bangladesh's proposal to settle this dispute in accordance with equitable principle is vague and lacks uniformity.

RECOMMENDATIONS

In light of the dispute and the upcoming verdict of the ITLOS court, there is a distinct possibility of another round of negotiations to arrive at an 'equitable' solution to the problem. The following are options for India to best safeguard its national interests.

1. India's approach to the dispute over international waters

Do not compromise the livelihoods of Indian nationals dependent on these waters.

India's position should rest on the rationale that '*maritime territory of a nation-state is not as important as upholding the interests of the State's citizens*'. Thus, with regards to the dispute in the territorial waters where the livelihoods of Indian fishermen are at stake, India must not relent to a solution that is unfavourable in any way. Since the low-water baseline has been the almost unanimously favoured standard elsewhere in the world as well, India's withstands legal scrutiny as well. Hence, interests in the territorial waters should be explicitly made non-negotiable.

2. India's approach to the dispute over the EEZ

Emphasise on India's long-term interests within the ambit of the tribunal's decision.

Regarding the EEZ dispute, if the court rules in accordance with the equidistant principle, all of India's demands will be met and India should enforce the verdict without any further concessions for Bangladeshi opposition. If, on the other hand, the tribunal rules in favour of principle of equitability, two possible scenarios are likely to emerge. The implications of each of these scenarios is discussed below:

2.1. Equitable resource sharing verdict

Demand a greater share of resources based on legitimate demand and demographics

Under this scenario, the tribunal is likely to recommend an EEZ border which leads to an equitable sharing of resources found in the contested region. The equity in resources can further be determined on the basis of resource demand or demographics of the two countries. Quite clearly, this method of splitting up of resources found in Bay of Bengal according to equitable principle is very vague.

Moreover, much of the oil and natural gas resources here is in exploratory state, and hence it is very difficult to estimate the amounts involved that must be equitably divided. Only recently¹⁴ India discovered 100 trillion cubic feet of hydrocarbon and oil deposit in Bay of Bengal followed by Myanmar discovering 7-8 trillion cubic feet of hydrocarbon and oil deposits.

In this scenario, India can assert a maximal claim, demanding a greater share over the resources because of its higher demand for energy, seafood etc., given a far larger population. India's concessional claim could be to offer joint scientific exploration in and development of these areas for mutual benefits. India has the necessary know-how to ensure more scientific exploration and management of these areas. Bangladesh, on the other hand, depends on foreign funding and technical expertise even to carry out surveys and mapping of the region, having spent a sum total of 10-12 million USD since 1990 on such efforts.¹⁵

2.2. Equitable area sharing verdict

Demand a greater area based on the dependent population

Under this scenario, the tribunal is likely to recommend an EEZ border which leads to an equitable sharing of the EEZ area on the basis of the population dependent on the Bay of Bengal in the two countries. Bangladesh's negotiating point in this case would be that its high population density warrants a greater share of the resources. It will also contend that it is a resource scarce country and has to depend on energy imports to meet its growing energy demands. Moreover, almost half of its population depends on marine resources for its livelihood.

If the verdict ends up in this scenario, India can assert a maximal claim based on its absolute population, arguing that the entire country makes use of marine resources from the Bay of Bengal. Since India's population is eight times the population of Bangladesh, its "equitable" share of territory would accordingly be much greater. India's concessional claim could be to consider the population of only certain states, e.g. those bordering the Bay of Bengal. India should highlight that a substantial population of these states will suffer and their economic growth will get hampered if the equitable solution disregards the absolute population. Both the scenarios above depict that India has legitimate reasons to show that it has a greater stake over the EEZ even when equitable distribution principle is adhered to. India however clearly needs to map out the energy resources and energy potential of the region so as to see how much of the estimates are true.

3. A lesson for settling maritime and other bilateral disputes in the future

Incentivise and ensure that such issues are resolved bilaterally.

India needs to highlight that because the equitable principle is so ambiguous, using it to demarcate boundaries will eventually land the two countries in bilateral negotiations in any case. Hence, resolving such issues bilaterally is a better way to approach the dispute, as both nation-states can then come to a mutually acceptable solution. While approaching the tribunal eventually leads to the same route, the legal standoff makes the positions of the nation-states inflexible and hence a mutually acceptable solution becomes difficult. India can best illustrate this point, and dissuade other neighbours from opting for the tribunal route in future cases, by prosecuting its maximal claims in this dispute.

CONCLUSION

India has two options regarding the resolution of the Indo-Bangladesh maritime dispute. It can legitimately press for its maximal claims in the dispute to secure a favourable outcome. That will also act as a deterrent for other states to avoid taking such cases to the tribunals. On the other hand, since the maritime dispute is not among issues that are critical to Indo-Bangladesh relations, India can settle for a more relaxed claim, in lieu of concessions from Bangladesh in more substantial outstanding issues.

In summary, maritime disputes are better solved bilaterally and India must welcome and incentivise all neighbours to choose bilateral means over international and multilateral options. Many countries in India's immediate neighbourhood are endowed with limited number of resources. Being a regional leader, India should go out of the way to address their concerns on a case to case basis, subject to securing the well-being of Indian citizens. Where the interests of its citizens are at stake, the Indian government should not be afraid to hold on to any sound and justified stance that can be asserted in such a dispute.

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⁴ Lewis M. Alexander. The delimitation of maritime boundaries. Political geography quarterly, Vol 5.

⁵ <http://news.priyo.com/story/2010/oct/25/9975-india-myanmar-settle-maritime-boundary-disputes-bangladesh>

⁶ Indo-Bangladesh Maritime Border Dispute Conflicts over a disappeared island Kisei Tanaka ICE Case Studies Number 270, December, 2011.

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

⁸ 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Article 12.

⁹ Indo-Bangladesh Maritime Border Dispute Conflicts over a disappeared island Kisei Tanaka ICE Case Studies Number 270, December, 2011.

¹⁰ Rahman, M.H., Delimitation of Maritime Boundaries – A Survey of Problems in the Bangladesh Case. Asian Survey, 1984. 24(12): p. 1302-1317.

¹¹ Dispute concerning delimitation of maritime boundary between Bangladesh and Myanmar in the Bay of Bengal, 14 March 2012, ITLOS case no. 16

¹² The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

¹³ The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

¹⁴ Devare, S. and Institute of Southeast Asian Studies., A new energy frontier : the Bay of Bengal region. ISEAS series on energy. 2008, Singapore: Institute of Southeast Asian Studies. xix, 205 p.

¹⁵ India-Bangladesh Maritime dispute in Bay of Bengal, The New Horizon, <http://horizonspeaks.wordpress.com/2008/12/26/the-maritime-dispute-with-bangladesh/>

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