

Retrieving Kachchatheevu for India: A Non-Starter?

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Introduction

The encroachment by Tamil Nadu fishermen in Sri Lankan waters in search of profitable catch and their detention by the Sri Lankan Navy have often caused friction in Indo-Sri Lankan ties. In order to maintain amiable bilateral relations, concurrent with India's "Neighbourhood First" policy, resolving this fishing dispute has assumed greater significance. During his March 2016 visit to Sri Lanka, Prime Minister Modi labeled the dispute a "livelihood and humanitarian concern" requiring a long-term solution.¹

The government of Tamil Nadu alleges that the Indo-Sri Lankan fishing dispute is a direct consequence of the "unlawful" ceding of Kachchatheevu to Sri Lanka. Kachchatheevu is a small barren island in the Palk bay contested by Indian Tamil and Sri Lankan Tamil fishermen from the northern provinces. The rich fisheries, now depleted on the Indian side, have been the traditional fishing grounds for fishermen from both countries. The island lies in Sri Lankan waters under the terms of a bilateral treaty signed in 1974.

This issue brief analyses the contentious issue of Kachchatheevu by examining the delineation of the maritime boundary with Sri Lanka and the contrasting claims of the Tamil Nadu and central government with regards to Kachchatheevu. It aims to examine to what extent the issue of Kachchatheevu plays a role in the fishery contention between the two countries.

Background

The negotiations between Sri Lanka and India on the settlement of their maritime boundaries, specifically in the Palk Bay, were propelled by the camaraderie enjoyed by then Indian PM Indira Gandhi and her Sri Lankan counterpart Mrs. Srimavo Bandaranaike.

In the 1970s, Mrs. Bandaranaike was at the receiving end of harsh criticism on the Tamil ethnic issue, higher cost of living and labour unrest. Seeking diplomatic means to silence her critics, she approached Mrs. Indira Gandhi and the matter pertaining to the delineation of historic waters and Kachchatheevu was settled between the two countries.² In Palk Bay, adjustments were made to the equidistant line, because of which, Kachchatheevu fell on the Sri Lankan side.³

Equidistant lines are often corrected for equitability. In establishing maritime boundaries, international norm governs that “delimitation is to be effected by the application of equitable criteria” in a manner “capable of ensuring an equitable result.”⁴ In the 1974 Indo-Sri Lanka agreement, India recognized Sri Lanka’s sovereignty over Kachchatheevu whilst gaining sovereignty over Wadge Bank in return.⁵ This decision was undertaken in order to cement friendly relations between the two countries and prevent ties from souring in the future over the relatively minor matter of the small uninhabited island. Furthermore, India was averse to approaching the International Court of Justice or involving a third party to settle the issue.⁶

Between India and Sri Lanka, three agreements were signed on the maritime boundary but only the 1974 and 1976 agreements are relevant to the fishing dispute. The 1974 treaty safeguarded the traditional rights of Indian Tamil pilgrims and fishermen to visit the island without travel documentation. Do visiting rights without travel documentation (Article 5) and traditional rights (Article 6) allow fishing in waters around Kachchatheevu which falls under Sri Lanka’s jurisdiction? The treaty fails to elaborate upon “such rights as they have traditionally enjoyed” leaving it open to often contrary interpretation.⁷ The subsequent agreement signed in 1976, on the other hand, restricted fishermen’s rights to fishing to only their home country’s waters.⁸ Does the 1976 agreement, on the settlement of maritime boundary in the Gulf of Mannar and Bay of Bengal, supersede the 1974 agreement? The ambiguity pertaining to the two treaties lies at the heart of the current dispute between India and Sri Lanka, and the Tamil Nadu and central governments.

Each year, a large number of Indian fishermen are apprehended by the Sri Lankan authorities. From 1983 to 2009, about 250 fishermen were killed by the Sri Lankan Navy and several hundreds injured, their equipment damaged and their catch pillaged.⁹ According to the Indian Ministry of External Affairs (MEA), in 2012, the Sri Lankan Navy nabbed 197 Indian fishermen, followed by 676 in 2013, 787 in 2015 and 235 in the first half of 2016. In recent years, the Sri Lankan authorities have taken to retaining trawlers, even after the release of the imprisoned fishermen has been secured by the Indian government. However, as is evident by

the increasing number of arrests, the steps taken by Sri Lanka have done little to deter Indian fishermen from crossing the IMBL.

Tamil Nadu versus Central Government

Tamil Nadu's Claims

Tamil Nadu asserts that Kachchatheevu is an integral part of India on historical, geographical and cultural grounds. Kachchatheevu fell under the Ramanthapuram Zamindari, ruled by the Sethupathis, as documented by the Ramanathapuram Registrar's Office. Furthermore, Tamil Nadu contends that in 1845, the Governor of Ceylon (as Sri Lanka was formerly known) had acknowledged Sethupathi Dynasty's territorial right over the islet in certain documents.¹⁰ On this basis, the then Chief Minister of Tamil Nadu, the Late Ms. Jayalalitha had filed a petition in 2008 in the Supreme Court challenging the constitutional legitimacy of the International Maritime Boundary Line (IMBL).¹¹ In 2013, a unanimous resolution seeking the retrieval of Kachchatheevu was passed in the Tamil Nadu Legislative Assembly. The petition is sub judice in the Supreme Court.

Central Government's Stance

Described by Indira Gandhi as a "sheer rock with no strategic significance", she could not have foreseen the animosity this uninhabited island would generate amongst Tamils from both sides of the border which continues to haunt India-Sri Lanka relations today.¹² Subsequent governments have held a similar view with regards to Kachchatheevu.

The central government perceives Kachchatheevu to be a settled issue. In response to a RTI application filed, the Ministry of External Affairs responded by stating that the two agreements (1974 and 1976) "did not involve either acquiring or ceding of territory belonging to India since the area in question had never been demarcated."¹³ In another instance the Centre had reiterated its stance by filing an affidavit in the Supreme Court stating "no territory belonging to India was ceded nor sovereignty relinquished since the area in question was in dispute and had never been demarcated."¹⁴ In the same affidavit, the Centre also dismissed Tamil Nadu's claim that the 1974 Agreement safeguarded the fishing rights of Indian Tamils, as outlined in Article 5 and 6 of the bilateral treaty. The Indian Coast Guard, in an affidavit to the Madras High Court in 2015, stated that Indian fishermen crossing into Sri Lankan waters

partook in illegal activities, namely peddling of contraband and banned trawling methods causing damage to Sri Lankan fishing equipment.¹⁵

Kachchatheevu as a ‘Band-Aid’

The Question of Livelihood

Fishermen from Tamil Nadu are predominantly employed as daily wage labourers on trawlers owned by big businessmen.¹⁶ These fishermen are compelled into fishing in waters with more profitable catch. According to one report, an estimated 40 percent of the total recorded catch in Tamil Nadu is poached from Sri Lankan waters.¹⁷ They risk arrest and alleged mistreatment by the Sri Lankan Navy so as to meet the demands of their employers. The alternative is to lose their jobs. The trawlers used by Indian Tamil fishermen generate employment for at least 25 people, which makes it highly unlikely that they will revert to traditional fishing.

An estimated 200,000 Sri Lankan Tamils from the northern provinces are dependent on the waters in Palk Bay to make ends meet.¹⁸ Following the end of the civil war in 2009, in an effort to resume their occupation, the fishermen set out to sea but were met with mechanized bottom trawlers operated by Indian Tamils who were encroaching in Sri Lankan waters. These bottom trawlers not only destroy the seabed and marine ecosystem but tear the fishing nets and destroy the traditional boats of the Sri Lankan Tamils.

Bottom-trawling by Indian fishermen has contributed to the destruction of their primary source of livelihood by depleting the fisheries in Indian waters. They wish to replicate the same in Sri Lankan waters but under the protection of legal and historic rights. This is unlikely to secure the long-term future of these fishermen.

Bilateral Ties

It is important for India and Sri Lanka to maintain good relations for various reasons including for the sake of their citizens’ livelihood.

In February 2015, the European Union (EU) imposed a ban on fish imports from Sri Lanka, for failing to sufficiently address illegal, unreported and unregulated (IUU) fishing. In April 2016, 15 months after the ban was imposed, the EU delisted Sri Lanka in light of the

satisfactory reforms undertaken by the government to combat IUU.¹⁹ Sri Lanka's revenue against fish export from the EU was an estimated \$108 million prior to the ban.²⁰ India, viewed as a "friendly neighbour" was not at the receiving end of a similar ban as Sri Lanka did not lodge a complaint to the EU against Indian fishermen poaching in Sri Lankan waters.²¹

Sri Lanka's attempts to maintain good relations has also meant that Indian fishermen have been remanded under the less stringent Immigrants and Emigrants Act, 1948 for crossing the maritime boundary rather than the more pertinent Fisheries Act, 1979 for poaching. In response to unrelenting domestic criticism for failing to curb illegal poaching, the Sri Lankan government has decided to amend the Fisheries (Regulation of Foreign Fishing Boats) Act, 1979. The amendment will lead to intensified patrol and surveillance by the Sri Lankan Navy and Coast Guard, imposition of higher penalties on foreign vessels found poaching in Lankan waters and the permanent seizure of captured trawlers. The government has restated its intent to continue releasing Indian fishermen on humanitarian grounds.²² But a restive northern province with a mainly impoverished population is unlikely to maintain its patience for long. The island nation continues to rebuild after the conclusion of its decades long civil war. If the livelihood of its Tamil population is not secured and their fears continue to be neglected, instability may resume in the province—a risk Sri Lanka cannot afford to take.

International Obligations

The 1974 Indo-Sri Lankan Agreement is binding under the Vienna Convention on the Law of Treaties, 1969 (VCLT).

The bilateral treaty with Sri Lanka does not have provisions for either withdrawal or termination. Under Article 56 of the VCLT, it stands then that India cannot unilaterally rescind the treaty. In order to withdraw from the treaty, India is required to notify Sri Lanka and acquire the latter's consent to the same under Article 65 (1). If Sri Lanka's consent is not forthcoming, the two countries will have to seek recourse under Article 33 of the UN Charter.²³ In such a situation a peaceful settlement may be sought through resorting to arbitration or involving a third party.²⁴ However, Sri Lanka has opposed any disruption to the status quo with regards to the maritime boundary with India. Therefore, third-party intervention may threaten Indo-Sri Lankan relations and runs contrary to India's current "Neighbourhood First" policy. The abrogation of the bilateral treaty by India, as Tamil Nadu demands, will ensure the country loses face in the realm of international politics at a time when it is staking its claim as a rising power.

Conclusion

The reinstatement of the “traditional rights” of Tamil fishermen which Tamil Nadu continues to call for is short-sighted. It only serves as political rhetoric helping political parties curry favour amongst a one million strong vote base. As a responsible power, India has an obligation to abide by international law. The bilateral relation with Sri Lanka should take precedence over the small matter of an uninhabited island which fails to provide a feasible solution to the fishing dispute. Over the years, relations with Sri Lanka have been amicable at best. Colombo’s growing closeness to China means New Delhi has to tread with caution. The need of the hour is to incentivize fishermen towards a sustainable alternative to bottom-trawling which will safeguard the future of both the Indian and Sri Lankan fishermen without compromising Indo-Sri Lankan ties. The willful and inadvertent transgressions into Sri Lankan waters by Indian fishermen need to be curtailed, but this will only be feasible when the livelihoods of these fishermen are secured—the duty and obligation of which rests with the Tamil Nadu and Central governments.

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