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Enhancing maritime security in the Bay of Bengal: Resolution of Grey Areas between India, Bangladesh, and Myanmar

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ABSTRACT

Bangladesh's initiation of arbitration proceedings separately against India and Myanmar, under the United Nations Convention on the Law of the Sea (UNCLOS), resulted in the creation of a "grey area", having overlapping continental shelf and exclusive economic zone rights, between India, Bangladesh, and Myanmar. There are several examples of cooperative frameworks for management of overlapping maritime claims areas around the world, but no such mechanism exists in South Asia. The resolution of the grey area remains an impediment towards ensuring collective maritime security and comprehensive development of the Bay of Bengal. Being the biggest nation in the region, and with its "Neighbourhood First" policy and its promotion of Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) to harness shared and accelerated growth through mutual cooperation, India needs to take the lead in seeking a resolution of the grey area.

KEYWORDS

UNCLOS; continental shift; exclusive economic zone; India; Bangladesh; Myanmar; maritime boundary delimitation; maritime boundary delineation; maritime dispute resolution

Introduction

India's maritime boundaries necessitate delimitation with seven states, namely, Pakistan, Maldives, Sri Lanka, Indonesia, Thailand, Myanmar, and Bangladesh. Given its vast maritime boundaries, it is creditable that India – having signed 11 maritime boundary agreements – has demarcated almost all of its maritime boundaries, barring those with Pakistan and Bangladesh.[1] What is noteworthy is all these 11 agreements were concluded by India much before the United Nations Convention on the Law of the Sea (UNCLOS) came into force.

The Bay of Bengal is the largest bay in the world.[2] It is bordered by Bangladesh to the north, Myanmar and Thailand to the east, Indonesia to the south, and India to the west. India's eastern mainland and the union territory of Andaman and Nicobar Islands are washed by its waters. Chittagong (Bangladesh), Yangon (Myanmar), Ranong (Thailand), and Chennai, Visakhapatnam, Kolkata, and Paradip (India) are some of the prominent ports in the region. Located at the heart of the Indo-Pacific, the Bay of Bengal is India's geostrategic gateway into the wider waters.[3] The area is rich in oil, natural gas, and other resources. About 31 per cent of world's fishermen live in the littorals around the Bay of

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Bengal. It accounts for 7 per cent of world's fishery produce as 6 million tonnes of fish is caught every year in the bay.[4] It is also an extremely disaster-prone region. Occupying just 0.6 per cent of the global ocean area, this bay is responsible for about four out of five cyclone-related deaths in the world.[5] The Bay of Bengal is also extremely vulnerable in terms of maritime security.

The 1982 UNCLOS, considered as "constitution of the oceans", is the result of an unprecedented, and so far never replicated, effort at codification of international law.[6] Containing more than 400 articles and nine annexes, it is the most extensive and detailed codification activity that states have ever attempted and successfully concluded under the aegis of the United Nations (UN). [7] The UNCLOS, which entered into force on November 16, 1994, is currently ratified by 168 state parties, including India.[8] Provisions of UNCLOS define the maritime zones and applicable sovereign rights and jurisdiction of a nation, including the territorial sea (TS), the exclusive economic zone (EEZ), and the continental shelf (CS).

According to UNCLOS, the EEZ of a coastal state extends up to 200 nautical miles (M) from the baselines,[9] where a nation has, inter alia, sovereign rights for exploring and exploiting, conserving and managing the natural resources.[10] Similarly, UNCLOS provides for a CS which comprises the seabed and subsoil of the submarine areas of a coastal state up to a distance of 200 M from the baselines.[11] In the CS, a state has sovereign rights for exploring it and exploiting its natural resources.[12] For claiming a CS beyond 200 M from the baselines, a coastal state is required to submit information to the Commission on the Limits of the Continental Shelf (CLCS),[13] which will then makes recommendations to the coastal state. The limits of the CS established by a coastal state on the basis of these recommendations is final and binding.[14]

On May 11, 2009, India made a partial submission for an extended continental shelf (ECS) beyond 200 M before the CLCS.[15] Bangladesh, protesting against this submission pertaining to India's eastern seaboard, asked the CLCS not to consider and qualify the Indian submission.[16] Similarly, Myanmar requested the CLCS that India's submission may be considered without prejudice to the entitlements of Myanmar.[17] As and when these observations are withdrawn, CLCS will consider India's submission. Thereafter, when the recommendations of CLCS are received, India's ECS will require to be delimited with the relevant neighbouring countries.

The article discusses the genesis of "grey area" between India–Bangladesh and Bangladesh–Myanmar. It examines the role and provisions of UNCLOS for dispute resolution in overlapping maritime claim areas. It also examines how unresolved maritime disputes hamper maritime security and hinder development and stability in the region. In addition, the article examines a few cooperative regimes in overlapping maritime claim areas around the world and recommends some essential elements and way ahead for a possible formal agreement between India, Bangladesh, and Myanmar for resolution of the grey area.

Grey area: Bangladesh – Initiation of arbitration against India and Myanmar

In 2009, Bangladesh initiated two separate arbitration proceedings against India and Myanmar, under UNCLOS, concerning the delimitation of the TS, EEZ, and the CS in the Bay of Bengal.

While Myanmar and Bangladesh agreed to transfer the dispute between them to the International Tribunal for the Law of the Sea (ITLOS), an arbitral tribunal (AT) considered the case between India and Bangladesh. The ITLOS delivered the judgment on March 14, 2012, while the AT rendered its award on July 7, 2014.

In the ITLOS judgement, the delimitation of the CS gave rise to an area located beyond 200 M from the coast of Bangladesh but within 200 M from the coast of Myanmar, yet on the Bangladesh side of the delimitation line.[18] This area, referred to as a grey area, resulted in an area of overlap wherein Myanmar's EEZ rights in the water column overlapped with Bangladesh's CS rights on the seabed (Figure 1). The ITLOS termed the grey

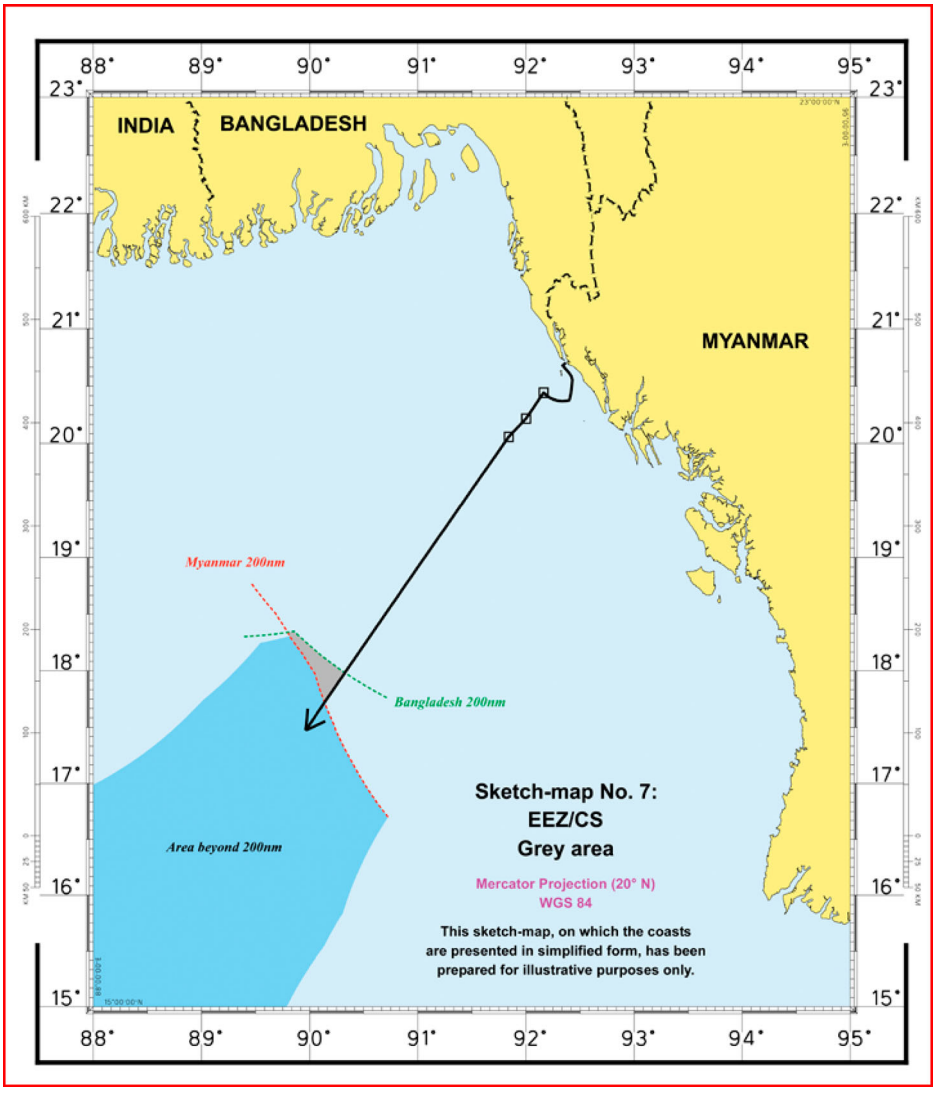

Figure 1. Bangladesh–Myanmar Grey Area. *Source*: ITLOS, "Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)", March 14, 2012, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16-J-14_mar_12.pdf (accessed March 28, 2022).

area arising as "a consequence of delimitation"[19] and stated that: "[t]here are many ways in which the Parties may ensure the discharge of their obligations in this respect, including the conclusion of specific agreements or the establishment of appropriate cooperative arrangements."[20]

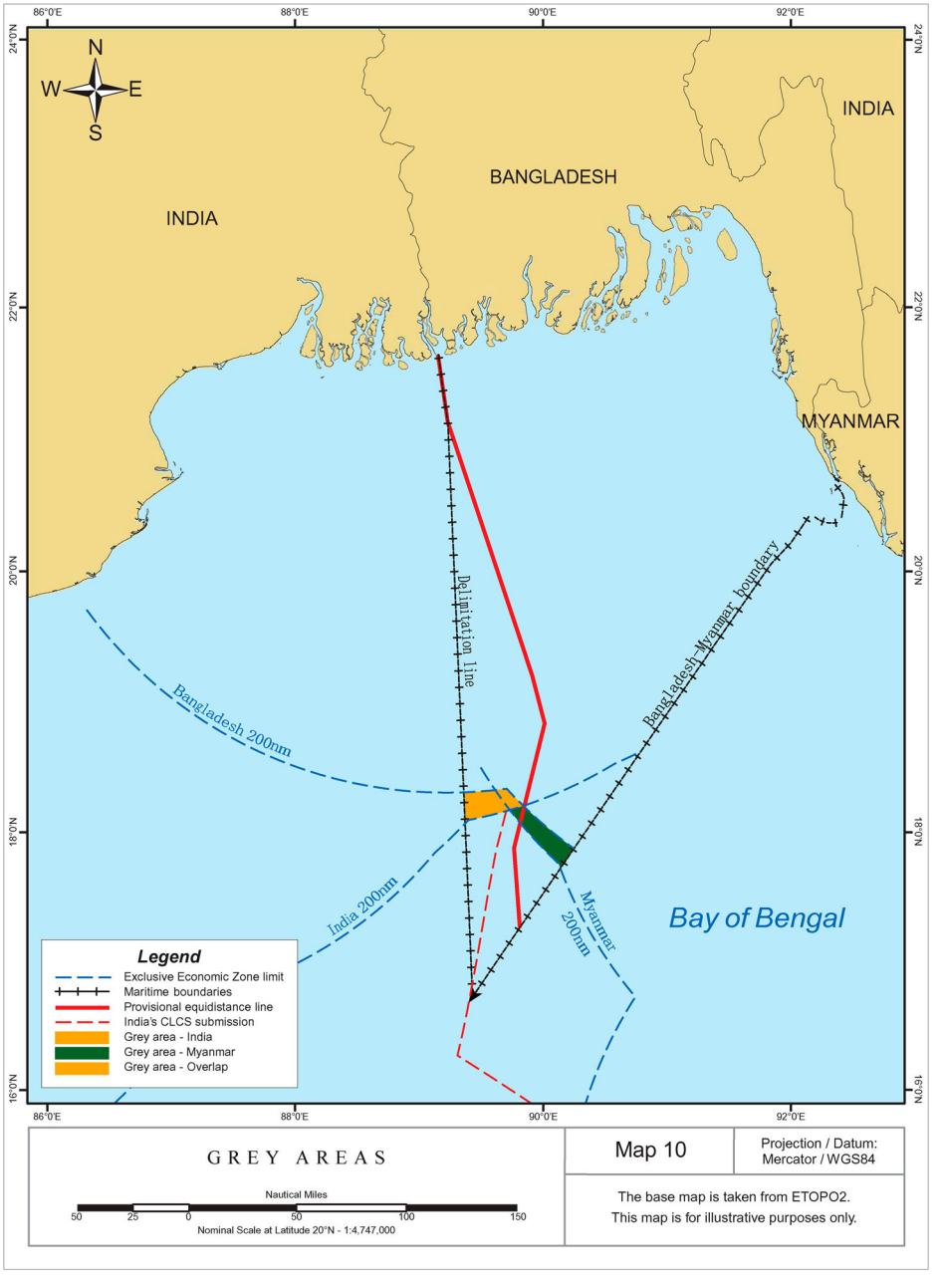

Figure 2. Bangladesh–India Grey Area. *Source*: The Arbitral Tribunal (AT), "In the Matter of the Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India", July 7, 2014, https://pcacases.com/web/sendAttach/383 (accessed March 30, 2022).

Similarly, a grey area arose in the AT award in *India vs Bangladesh*[21], wherein the tribunal's delimitation of EEZ and of the CS within and beyond 200 M gave rise to an area that lay beyond 200 M from the coast of Bangladesh and within 200 M from the coast of India, and yet lay on Bangladesh side of the delimitation line (Figure 2). The AT also

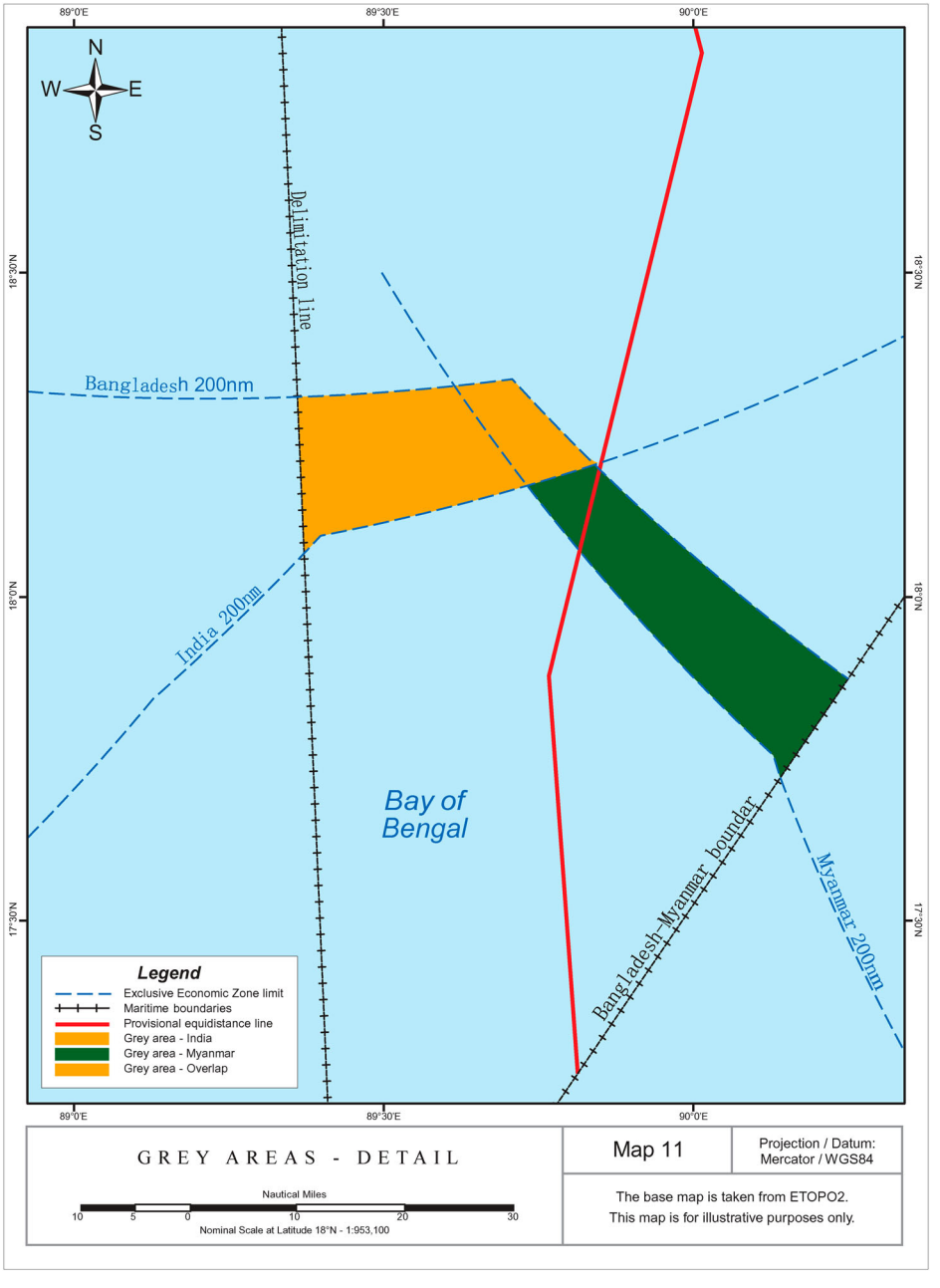

Figure 3. Grey Area Overlap: India and Myanmar. *Source*: The AT, "In the Matter of the Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India."

termed the resulting grey area, wherein India's EEZ rights in the water column overlapped with Bangladesh's CS rights on the seabed, as "a practical consequence of the delimitation process".[22]

Additionally, the grey area prescribed by the AT in the *India vs Bangladesh* award had overlaps in part with the grey area described in *Bangladesh vs Myanmar* ITLOS judgment. The AT stated that "the present delimitation does not prejudice

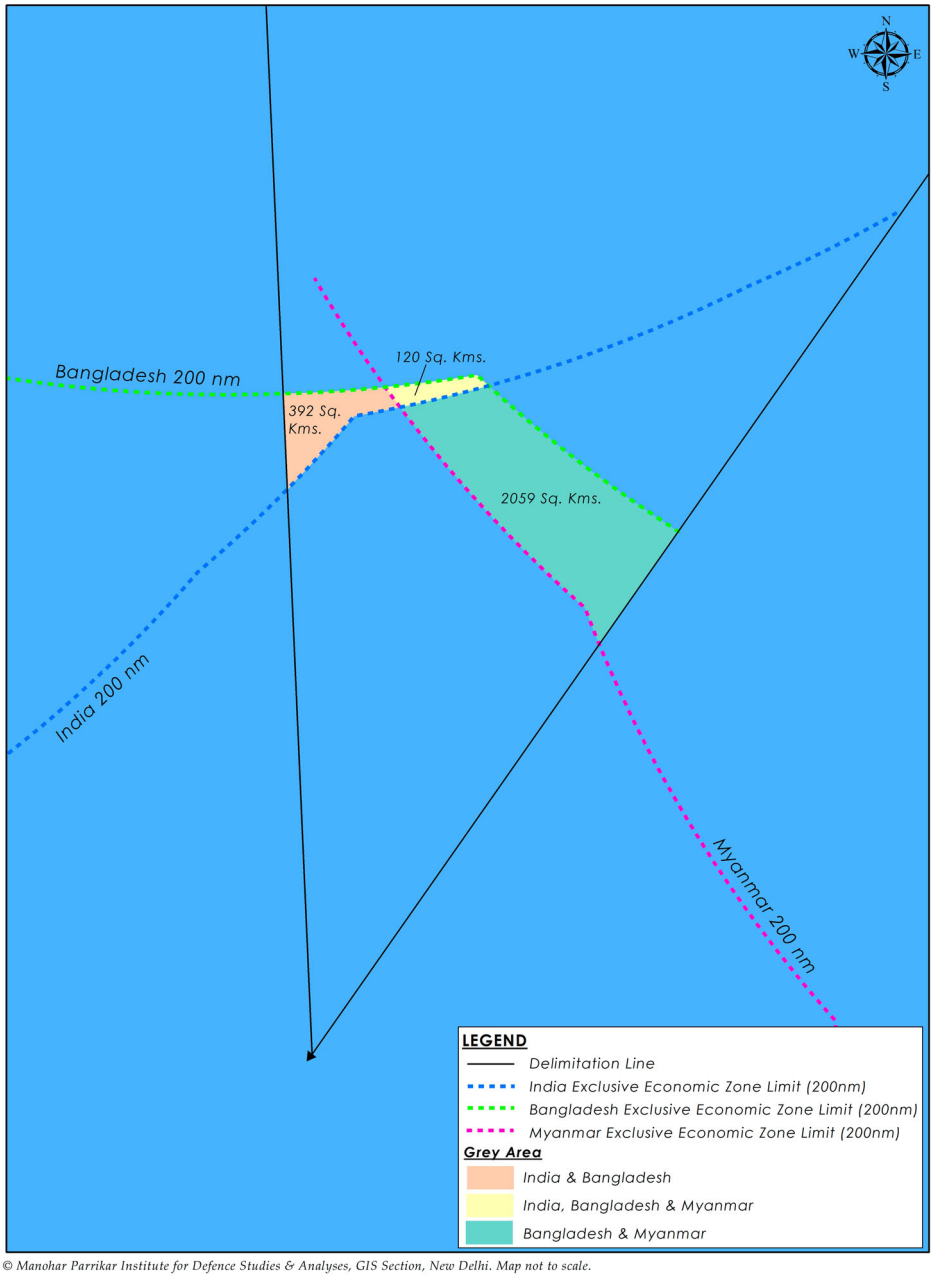

Figure 4. Extent of Grey Area: India and Myanmar. *Source*: Author.

the rights of India *vis-a-vis* Myanmar in respect of the water column in the area where the exclusive economic zone claims of India and Myanmar overlap"[23] (see Figure 3).

Extent of grey area

An exercise was undertaken in collaboration with the Geographic Information System (GIS) Lab at the Manohar Parrikar Institute for Defence Studies and Analyses, New Delhi to determine the extent of grey area. The coordinates used for calculation were the same as those used by the ITLOS and the AT in their respective judgment/award. Accordingly, the India–Bangladesh and Bangladesh–Myanmar grey areas were estimated to be 392 square kilometre (sq km) and 2059 sq km, respectively. The India–Myanmar grey area overlap was estimated to be 120 sq km (Figure 4).

Subsequent promulgation of basepoints by Bangladesh

On November 4, 2015, Bangladesh, by a notification, declared its baselines, TS, and EEZ.[24] In doing so, it declared a set of four basepoints which were different (southwards)

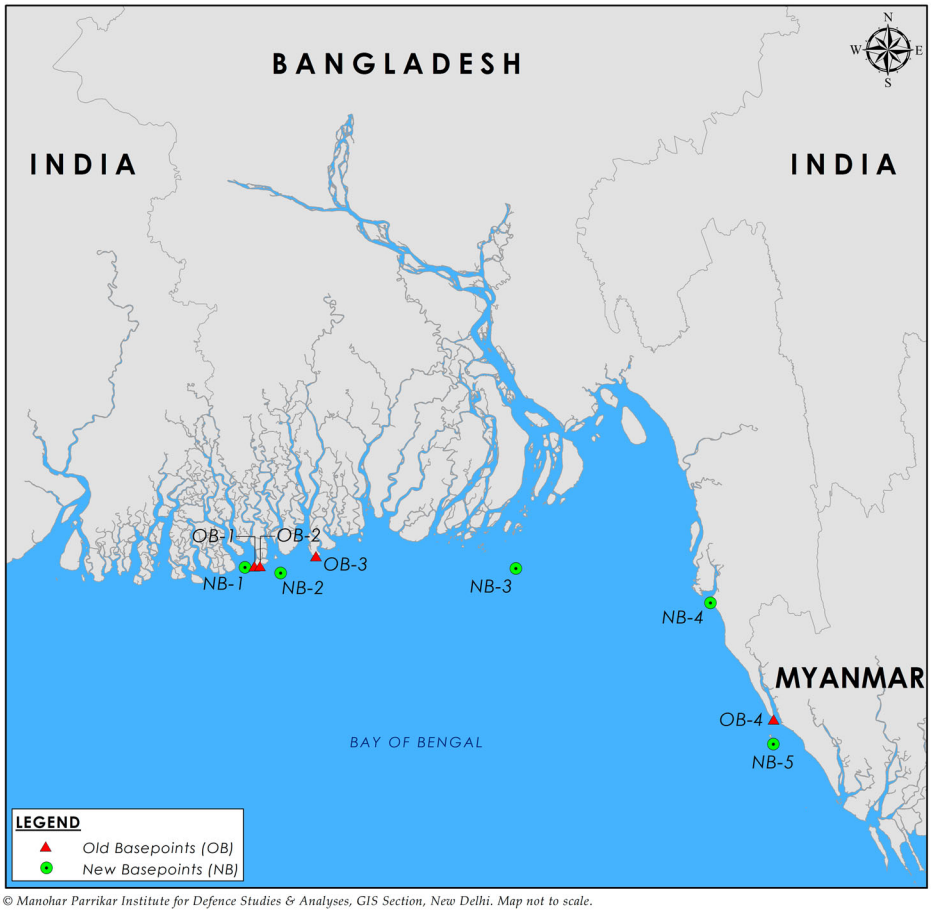

Figure 5. Promulgation of New Basepoints by Bangladesh. *Source*: Author.

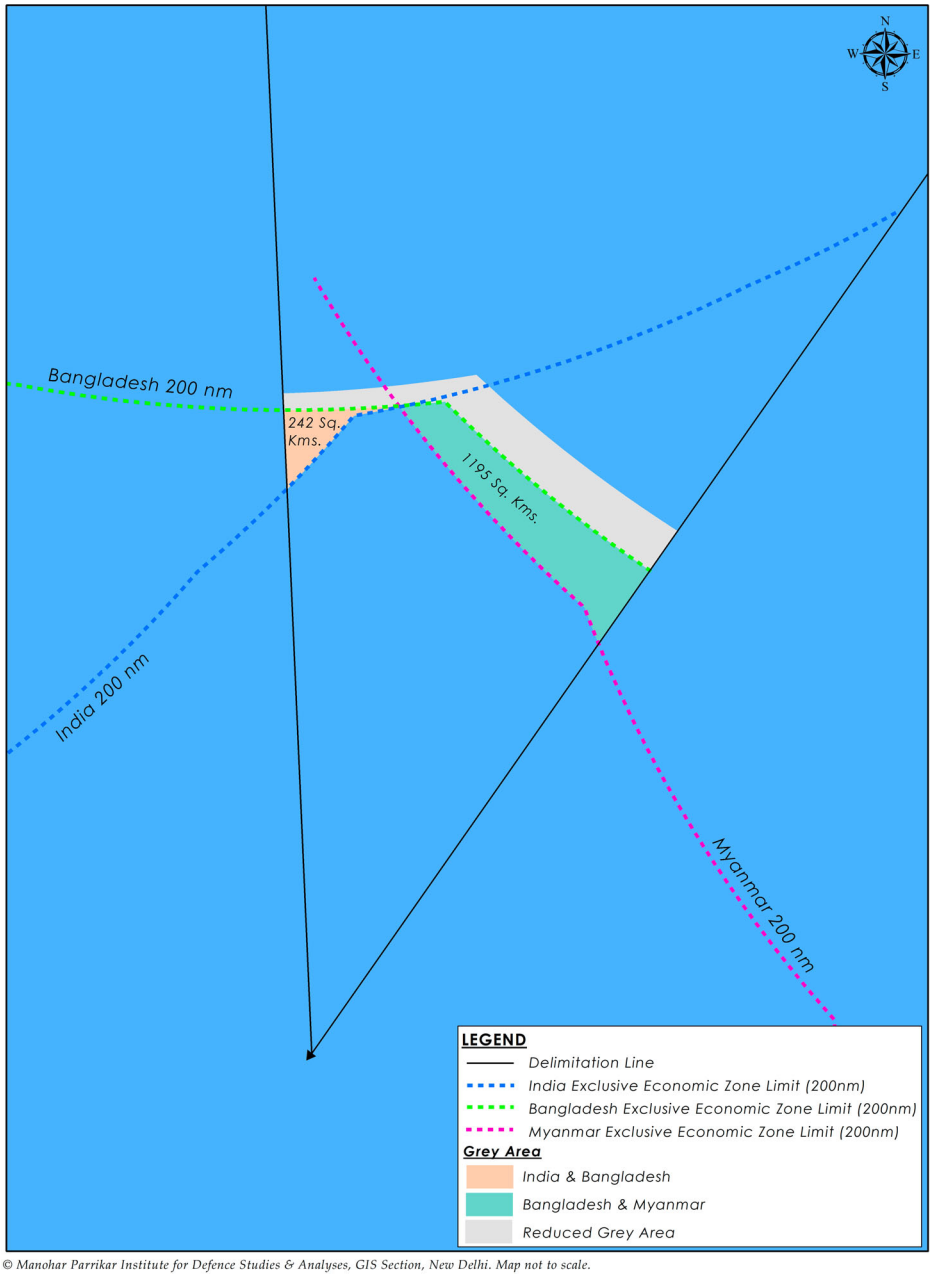

Figure 6. Reduced Grey Area of India and Myanmar**.** *Source*: Author.

Table 1. Grey Area Calculation (sq km).

	Original	Reduced by New Bangladesh Base points	Present
India	392	150	242
Myanmar	2059	864	1195
India–Myanmar Overlap	120	120	Nil

Source: Author.

from the basepoints used by the AT in the *India vs Bangladesh* award and *Bangladesh vs Myanmar* ITLOS judgment (Figure 5). Since the baseline is a line joining the basepoints and is the starting point from where the maritime entitlements, including TS, EEZ, and the CS, of a country are measured, the declaration by Bangladesh and shifting of baselines seawards (south) could be considered to have the effect of encroaching upon the grey area and EEZ entitlements of India as well as Myanmar. This was protested by India as well as Myanmar in 2017[25] and 2019,[26] respectively.

The resultant reduction in grey area (Figure 6) as a result of seaward shift of baselines by Bangladesh has been tabulated in Table 1.

Protests by India and Myanmar

It is assessed that India and Myanmar's protest against Bangladesh's promulgation of new basepoints and the subsequent reduction in their respective grey areas may be an overreaction. First, Bangladesh has not announced any alteration of the grey area resulting from the promulgation of its new basepoints. Second, both India and Myanmar have not taken account of the final and binding nature of decision rendered by a court or tribunal that is required to be complied with the parties to the dispute under UNCLOS.[27] While the promulgation of the new basepoints by Bangladesh may result in shifting of its maritime entitlements southwards, the grey area and the EEZ entitlement of both India and Myanmar ought to remain unchanged since they were pronounced by the AT/ITLOS. Third, Bangladesh has stated its intention to abide by the ITLOS judgment and the AT award with respect to Myanmar and India, respectively. Bangladesh's amended ECS submission (October 22, 2020) to CLCS, which completely supersedes its earlier 2011 submission, is to harmonise and "give effect to binding maritime boundary delimitations established in the Bangladesh/Myanmar Judgement and the Bangladesh/Myanmar Award."[28]

Therefore, it is recommended that India and Myanmar ought to exercise jurisdiction in their respective grey area EEZs, in accordance with the original judgment/award. However, this is not the focus of the article and could be part of a separate analysis.

Despite the passage of time, the issue of grey area remains to be resolved between India and Bangladesh as well as Bangladesh and Myanmar. The three countries have also lodged a protest against each other on their respective ECS submissions.

Practical consequences of grey area[29]

In the India versus Bangladesh scenario, where India has EEZ while Bangladesh has CS rights in the grey area, the complications are as follows:

(1) *India's EEZ rights*: In the grey area, India has sovereign rights for "exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil", as well as "for the economic exploitation and exploration, such as the production of energy from the water, currents and winds." India also has jurisdiction regarding the establishment and use of artificial islands, installations, and structures; marine scientific research; and the protection and preservation of the marine environment.[30]

(2) *Bangladesh's CS rights*: The CS entitlement of Bangladesh in the grey area exists on seabed and subsoil[31] wherein it exercises sovereign rights for exploring it and exploiting its natural resources, which consist of mineral and other non-living resources of the seabed and subsoil, together with living organisms belonging to sedentary species.[32] The CS rights of Bangladesh in the grey area are exclusive and do not depend on occupation, effective or notional, or on any express proclamation.[33]

In the grey area, therefore, India can exercise full control by virtue of its EEZ rights (Article 56), except sovereign rights to explore the CS and to exploit the "mineral and other non-living resources of the seabed and subsoil … " (Article 77). Bangladesh, in turn, can only utilise limited resources from the seabed and the subsoil (Article 77). Further, for Bangladesh to utilise its rights as permitted by UNCLOS, it would need India's concurrence to deploy its extraction paraphernalia in India's EEZ.[34]

However, since Bangladesh's CS rights are exclusive, even if it does not wish to explore the resources of the CS in the grey area, it does not give India the right to exploit those resources (Article 77(2)). Similarly, if India wishes to undertake drilling in the grey area for scientific purposes, it would require agreement/permissions from Bangladesh (Article 81).

If India undertakes to install an artificial installation/structure in the grey area, within its EEZ, it would create a conflict with Bangladesh as it is entitled to erect a similar structure in its continental shelf (Article 60 versus Article 80, UNCLOS). This was acknowledged by the AT wherein it noted that, in the grey area, the EEZ rights of India include rights to the seabed and subsoil (Article 56(1), UNCLOS) that also fall within the regime for the CS rights of Bangladesh. However, it explained that the UNCLOS distinguishes between the rights that arise under multiple regimes (Article 56(3) and Article 68).

In the Myanmar versus Bangladesh scenario, it is exactly the same situation as above where India can be replaced by Myanmar. Further, there is an additional area wherein the EEZ rights of India overlap with those of Myanmar. This is without precedent. While overlapping claims on EEZ or CS may exist between two states due to differing perceptions of their respective maritime entitlements, in this case overlapping EEZ rights have arisen as a result of a judicial process.

In both cases of the resulting grey area, the onus has been put on India, Bangladesh, and Myanmar to resolve their differences and arrive at a solution. The AT observed that:

> It is for the Parties to determine the measures they consider appropriate in this respect, including through the conclusion of further agreements or the creation of a cooperative arrangement. The Tribunal is confident that the Parties will act, both jointly and individually, to ensure that each is able to exercise its rights and perform its duties within this area.[35]

Similarly, in *Bangladesh vs Myanmar*, the judgment observed that:

> there are many ways in which the Parties may ensure the discharge of their obligations in this respect, including the conclusion of specific agreements or the establishment of appropriate cooperative arrangements. It is for the Parties to determine the measures that they consider appropriate for this purpose.[36]

UNCLOS and dispute resolution in overlapping maritime claim areas

Articles 15, 74, and 83, UNCLOS, deal with the delimitation of the TS, EEZ, and CS, respectively, between states with opposite or adjacent coasts. However, mechanism for

the resolution of the grey area, wherein EEZ rights of India and Myanmar overlap with CS rights of Bangladesh, is not provided for in the UNCLOS. Further, while there have been numerous instances of International Court of Justice (ICJ), ITLOS, and the Permanent Court of Arbitration (PCA) arbitrating/adjudicating between states with overlapping maritime claims, the grey area is the first such instance arising out of a judgment/award of the ITLOS/tribunal.

The UNCLOS does, however, provide the manner in which India, Bangladesh, and Myanmar can approach the resolution of the grey area. In both cases, in respect of delimitation of EEZ as well as CS, UNCLOS prescribes: "the States concerned, in a spirit of understanding and cooperation, *shall make every effort to enter into provisional arrangements of a practical nature* and, during this transitional period, *not to jeopardize or hamper the reaching of the final agreement*."[37] It is plain that UNCLOS places the burden of conduct on the claimant states on both counts.

All nations are duty-bound to shall settle their international disputes by peaceful means in such a manner that international peace, security, and justice are not endangered.[38] This obligation would apply to littoral states with overlapping maritime claims as well.

Part XV of the UNCLOS, dealing with settlement of disputes, not only reinforces Article 33 of UN Charter but also allows flexibility for the state parties to settle maritime disputes between them by peaceful means.[39] The UNCLOS further grants flexibility to states to settle a dispute between them by any peaceful means of their choice.[40]

Further, UNCLOS places the obligation between disputant state parties to "expeditiously" exchange views, at all stages of the dispute, that is, at the commencement, termination, or implementation of the settlement so arrived.[41] Finally, Section I of Part XV of UNCLOS provides the non-binding option of conciliation to the state parties either based on the procedure specified in Annex V of the UNCLOS or on any other procedure.[42]

In the event where no settlement has been reached by the state parties, UNCLOS prescribes compulsory proceedings entailing binding decisions[43] and provides one or more of the four options, available to the states, to be exercised while signing, ratifying, or acceding to UNCLOS, or any time thereafter,[44] for dispute resolution.

Bangladesh has already availed the option of compulsory proceedings entailing binding decisions against India and Myanmar, and both countries have adhered to the decisions in letter and spirit. The resolution of the resultant grey area arising out of the decisions remains the only impediment in the unlocking of the tremendous potential of maritime and economic cooperation that exists in the Bay of Bengal, between the three countries.

While legal options under the ambit of UNCLOS still exist for the resolution of the grey area, bilateral/trilateral/multilateral discussions remain the preferred option worldwide. Less than 1 per cent of settled international maritime boundaries have been achieved through judicial decisions.[45]

Overlapping maritime claims and maritime security

Maritime areas subject to competing claims serve to undermine good ocean governance and compromise maritime security, allowing illegal activities at sea to flourish.[46]

Sometimes negotiations can drag on for decades, limiting access to valuable resources and hydrocarbons in the claim area. A case in point is the Russia–Norway maritime boundary agreement (2010) in the Barents Sea in Arctic Ocean, which took four decades of negotiations before being signed.[47]

At the extreme end of the spectrum, these overlapping claims can produce skirmishes and conflicts, such as those witnessed in the South and East China Seas. They also stand in the way of optimal exploitation of resources and the development of blue economy in the claim area.

Resolution of boundaries and maritime zones allows for: clarity in designation and regulation of respective fishing areas; undertaking resource exploration and exploitation; and carrying out research and development in the respective zones. It also lends itself to enhanced investor confidence and facilitates investment in the dispute-free maritime zone of the respective countries. Finally, it leads to greater regional cooperation, resulting in the much-needed overall development in the region, such as in the Bay of Bengal.

Until recently, the Bay of Bengal region was in the backwaters as far as maritime cooperation is concerned. However, with improved bilateral relationship between India–Bangladesh and India–Myanmar, emergence of decisive leaderships with a desire to enhance maritime connectivity and cooperation, and a greater role for Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), there is a conducive environment for greater sub-regional cooperation.

Bay of Bengal – Regional initiatives and maritime security

Maritime security in the Bay of Bengal

The Bay of Bengal remains highly vulnerable in the domain of maritime security. In 2018, almost a third of all reported incidents of piracy and armed robbery at sea in the Indo-Pacific occurred in the Bay of Bengal (28 per cent).[48] Similarly, in illicitly traded[49] items, ranging from counterfeit goods, to gold, to an array of illegal narcotic substances and wildlife products, traffickers operating in the Bay of Bengal readily employ the maritime space to transport their wares.[50]

Because of its geographic location between Africa, Europe, Southeast Asia, and the drug-producing regions known as the Golden Triangle and the Golden Crescent, a variety of drugs are trafficked through the Bay of Bengal using the countries of the region as transit points.[51]

In a 2015 assessment, the total value of illegal fishing catches in the Bay of Bengal was estimated between $3.35 billion and $10.40 billion annually, and unreported fishing could be valued between $2.7 billion and $1.35 billion annually.[52]

BIMSTEC

The BIMSTEC is a regional organisation that was established on June 6, 1997.[53] Initially known as BIST-EC (Bangladesh–India–Sri Lanka–Thailand Economic Cooperation), the organisation now comprises seven member states with the subsequent admission of Myanmar, Bhutan, and Nepal.[54] The BIMSTEC comprises 21.7 per cent of the world population and combined gross domestic product (GDP) of US$ 3.8 trillion.[55] Some of the notable purposes of BIMSTEC include: creation of an enabling environment for rapid

economic development; acceleration of economic growth and social progress in the Bay of Bengal; promotion of collaboration on matters of common interest in the economic, social, technical, and scientific fields; maintenance of peace and stability in the Bay of Bengal region; eradication of poverty; establishment of multidimensional connectivity for shared prosperity; and promotion of trade and investment.[56]

Apart from being a founding member, India is actively participating in all cooperation programmes and activities of BIMSTEC.[57] "Neighbourhood First" and "Act East" – both of which are relevant for BIMSTEC – are the cornerstones of India's foreign policy.[58]

The member states are also making progress on finalising the BIMSTEC Coastal Shipping Agreement for enhanced connectivity in the region.[59] India has vital stakes in the India–Myanmar–Thailand Trilateral Highway and the Kaladan Multi-Modal Transit Transport Project, both of which are part of the finalised BIMSTEC Master Plan for Transport Connectivity, for the development of its north-eastern region.[60]

Cooperation in the security domain is considered of special salience under the BIMSTEC. This is reflected in the meetings of BIMSTEC national security chiefs. They have met three times – in 2017 in New Delhi, 2018 in Dhaka, and 2019 in Bangkok – and each time, they have underscored the importance of recognising the Bay of Bengal as a common security space. In addition, they have agreed to collectively work to deal with challenges, including maritime security cooperation.[61]

To further enhance coastal security and connectivity in the Bay of Bengal, India has taken the lead by organising the first BIMSTEC Ports Conclave at Visakhapatnam, on November 7–8, 2019,[62] as well as the first Coastal Security Workshop for BIMSTEC Countries at the Information Fusion Centre-Indian Ocean Region (IFC-IOR), Gurugram, on November 20–22, 2019.[63]

Onus on India for enhancing maritime security in Bay of Bengal

As India is the region's predominant economic and security power, it has the responsibility to ensure the all-round development of the region. This is also in sync with India's maritime vision of Security and Growth for all in the Region (SAGAR), including Act East and Neighbourhood First policies.

Further, the region's maritime law enforcement agencies share a common interest in countering maritime threats, such as piracy, illegal, unreported and unregulated (IUU) fishing, and illicit smuggling, in addition to protecting maritime sovereignty. Increased maritime domain awareness (MDA) and counter-trafficking efforts in the region could benefit from the expansion and formalisation of existing information sharing taking place between regional maritime law enforcement entities.

Regional maritime cooperation efforts would, therefore, benefit from India's continued leadership. Continuing bilateral maritime capacity building with Bay of Bengal neighbours will help address regional gaps in enforcement capacity and strengthen collective maritime security. By investing political capital in ensuring the resolution of overlapping maritime claims, India can help remove the impediments to make the Bay of Bengal a stable, peaceful, and prosperous region.

Therefore, it is incumbent upon India to take the lead towards achieving the resolution of the grey area for ensuring collective maritime security, governance, and prosperity in the region.

Cooperative regimes in overlapping claim areas

It is important to reiterate here that in an overlapping maritime claims scenario, the UNCLOS places the onus on the states to enter into provisional arrangements of a practical nature and, pending final delimitation, not to jeopardise or hamper the reaching of final agreement. For instance, in the *Guyana vs Suriname* maritime boundary delimitation case argued before the PCA in 2004, the constituted tribunal found both parties to be in breach of their obligations under UNCLOS and asked them to make provisional arrangements of a practical nature pending delimitation.[64] It found that Suriname had breached its obligation to negotiate in good faith and Guyana had failed to inform Suriname about its exploration activity in the disputed area.[65]

This section examines some of the provisional agreements and cooperative regimes in overlapping maritime claim areas. Provisional agreements can take many forms. They can incorporate a well-defined provisional maritime boundary, without prejudice to final delimitation, joint development zones, and incorporate clauses not to undertake activities that could prejudice final delimitation. Political will in the leadership of the states with overlapping maritime claims undoubtedly ranks as the foremost prerequisite towards entering into a provisional agreement of a temporary nature.

Joint development is defined as "the cooperation between States with regard to exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims."[66] Another definition views joint development as "an inter-governmental arrangement of a provisional nature, designed for functional purposes of joint exploration for and/or exploitation of hydrocarbon resources of the seabed beyond the territorial sea."[67] Joint development agreements are usually undertaken in overlapping maritime claim areas when there is a discovery of hydrocarbon or mineral deposits.

Some cooperative agreements on joint development/sharing of entitlements are examined next.

India and Indonesia

Though not a cooperative agreement, the 1974 India–Indonesia CS boundary agreement (Figure 7) is being referred here to highlight that even before the UNCLOS, boundary negotiators of both countries had a vision to cooperate in the event of discovery of transboundary resources and incorporated a mechanism to cater to such an eventuality. The agreement contains a clause for consultations regarding transboundary "petroleum or natural gas structure or field, or other mineral deposit of whatever character", wherein the "two Governments shall communicate to each other … and shall seek to reach agreement as to the manner in which the structure, field or deposit will be most effectively exploited and the benefits arising from such exploitation will be equitably shared."[68]

Qatar and Abu Dhabi (United Arab Emirates)

The agreement between the two countries on settlement of maritime boundaries and ownership of islands (1969)[69] divides the ownership of Al-Bunduq oilfield equally

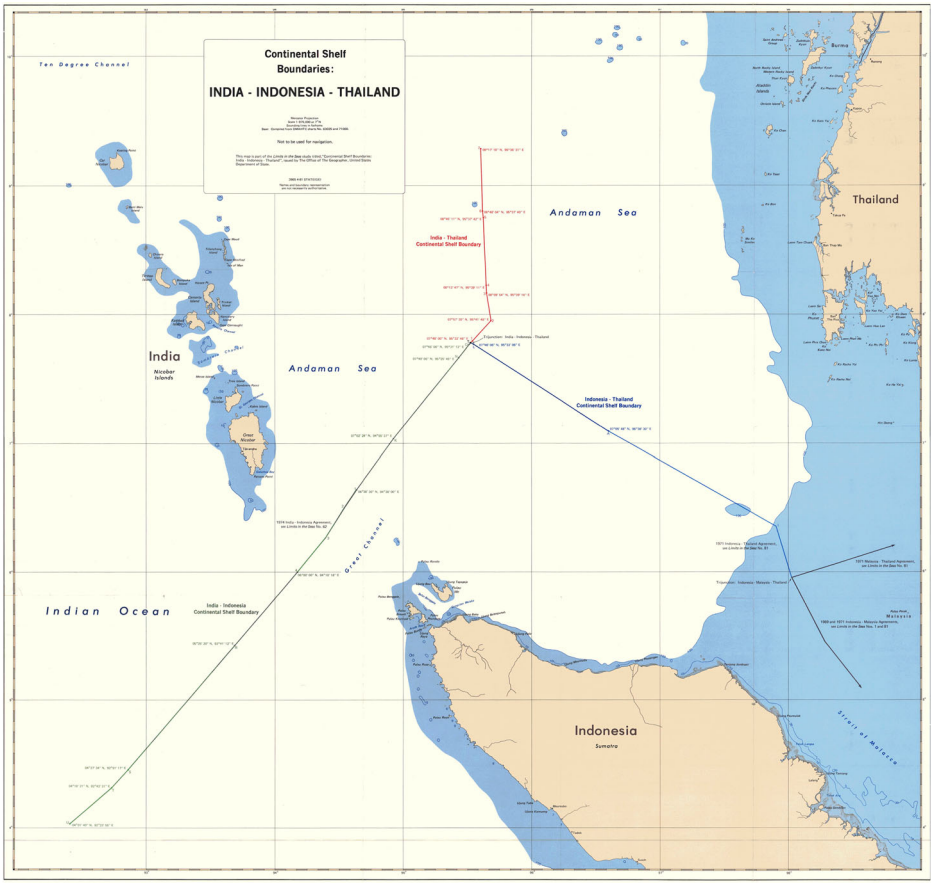

Figure 7. India–Indonesia Continental Shelf Agreement. *Source*: "Continental Shelf Boundaries: India–Indonesia–Thailand", Limits in the Seas (LIS) no. 93, August 17, 1981, https://www.state.gov/wp-content/uploads/2019/12/LIS-93.pdf (accessed March 23, 2022).

between the two with periodic consultation on all matters. The oilfield is to be operated by an Abu Dhabi company and all the revenue and profits are to be shared in accordance with the agreement.[70]

Sudan and Saudi Arabia

In 1974 agreement between Sudan and Saudi Arabia relates to joint exploitation of natural resources of the seabed and subsoil of the Red Sea in the "Common Zone",[71] defined as an area of water of depth greater than 1,000 metres (m) lying between the two countries.[72] The two countries have not only renounced their respective rights in the Common Zone but also mutually agreed to equal sovereign rights in all the natural resources of the Common Zone.[73] They have also agreed to establish a joint commission to ensure efficient exploitation of the natural resources of the Common Zone. The charter of this commission includes, inter alia: (i) surveying, delimiting, and demarcating the boundaries of the Common Zone; (ii) undertaking studies for exploration and exploitation of natural resources; (iii) encouraging specialised bodies to undertake

operations for the exploration of natural resources; (iv) considering and deciding applications for licences and concessions concerning exploration and exploitation; (v) facilitating exploitation of natural resources of the seabed; and (vi) organising supervision of the exploitation at the production stage.[74]

France and Spain

In the agreement on the delimitation of the CS in the Bay of Biscay between France and Spain (1974),[75] the exploitation of the zone is based on equal distribution of its resources. In addition, the companies of the two nations participate in exploration on the basis of equal partnership and proportional financing of operations.[76]

Australia and Papua New Guinea

The two countries have signed a treaty concerning sovereignty and maritime boundary in the Torres Strait (1978),[77] which provides for a "Protected Zone" (Figure 8). This treaty acknowledges and protects the way of life and livelihood of the traditional inhabitants, including their fishing and free movement.[78] It also caters for sharing of the catch of the Protected Zone "commercial fisheries" and prescribes a "Torres Strait Joint Advisory Council" whose charter is to "seek solutions to problems arising at the local level."[79]

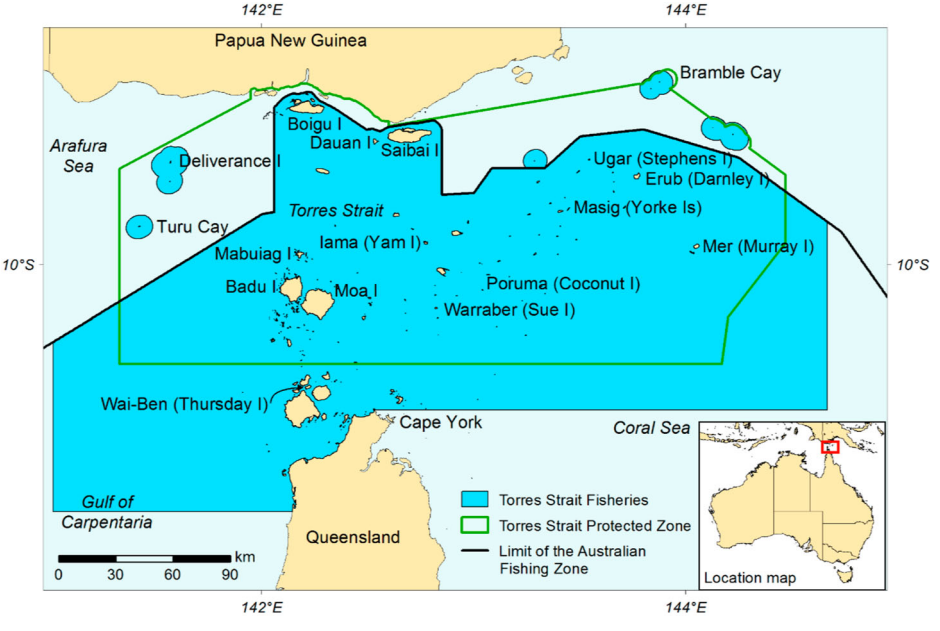

Figure 8. Torres Strait Protected Zone. *Source*: Auditor General Report No. 41 of 2018–19, "Coordination Arrangements of Australian Government Entities Operating in Torres Strait", Australian National Audit Office, 29 May 2019, https://www.anao.gov.au/work/performance-audit/coordination-arrangements-australian-government-entities-operating-torres-strait (accessed March 9, 2022).

Norway and Russia

The 2010 maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean treaty between Norway and Russia[80] is particularly relevant. The two nations had been in negotiations to resolve a dispute over a 175,000 sq km area in the Barents Sea for 40 years.[81] Norway claimed the boundary on the median line principle, while Russia sought a "sector"-based boundary.[82] An agreement was finally signed in September 2010, resulting in a "Special Area" to the east of the boundary which lies within 200 M of the Norwegian mainland but more than 200 M from Russian territory.[83] It entitled Russia to exercise sovereign rights and jurisdiction derived from EEZ jurisdiction that Norway would otherwise be entitled to exercise under international law.[84] The agreement also included provisions for cooperative exploitation and management of transboundary hydrocarbon deposits.[85]

Before signing this agreement, in 1978, Norway and Russia had also agreed on a provisional fishing arrangement for regulating foreign fishing activities and had established a "Grey Zone Agreement", which was initially limited to one year but was renewed on a yearly basis. It applied to an area of 67,500 sq km in the Barents Sea, of which 23,000 sq km were in undisputed Norwegian waters and 3,000 sq km were in undisputed Russian waters.[86] This agreement was terminated after the signing of 2010 agreement.[87]

United States (US) and Soviet Union

The US and the Soviet Union concluded a boundary agreement in the Arctic in June 1990.[88] It contains an "Eastern Special Area" which lies more than 200 M from the

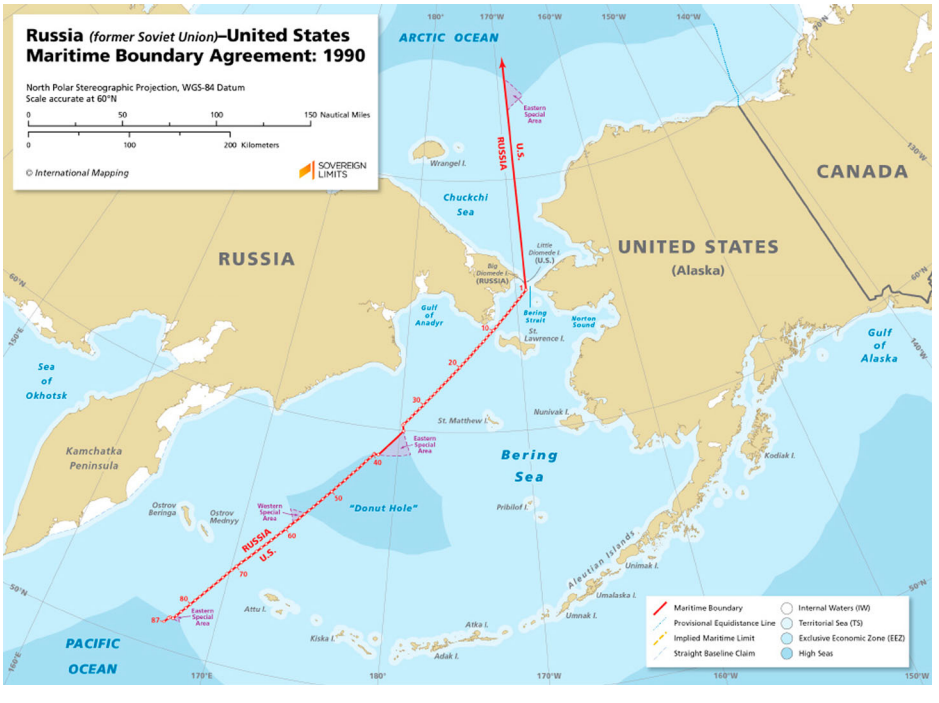

Figure 9. US–Soviet Union Boundary Agreement. *Source*: "RUS_USA.Jpg (1000×732)", https://sovereignlimits.com/wp-content/uploads/sites/2/2018/07/RUS_USA.jpg (accessed March 23, 2022).

baseline of the US but less than 200 M from the baseline of Russia (Figure 9). Under the agreement, the Soviet Union has agreed that the US should exercise EEZ jurisdiction within this area.[89] Even though the agreement is yet to be ratified by the Russian Parliament, its provisions have been applied since 1990.[90]

Denmark and the United Kingdom (UK)

The 1999 maritime delimitation agreement between the two countries relating to the area between the Faroe Islands and the UK designates an overlapping "Special Area" in which each state "is entitled to exercise its jurisdiction and rights" (Figure 10).[91] These include: cooperative exercise of fisheries jurisdiction (Article 5); joint responsibility towards prevention and elimination of pollution (Article 6); and timely notification and non-interference (Article 7).[92] The agreement also mentions that it is "without prejudice to any claim of either Party outside the Area" (Article 10),[93] thereby providing for further negotiations as also cooperative management of the area during the currency of negotiations.

Japan and South Korea

Japan and South Korea reached an agreement in 1974 for joint development of the southern part of the CS adjacent to the two countries (Figure 11).[94] It provides for

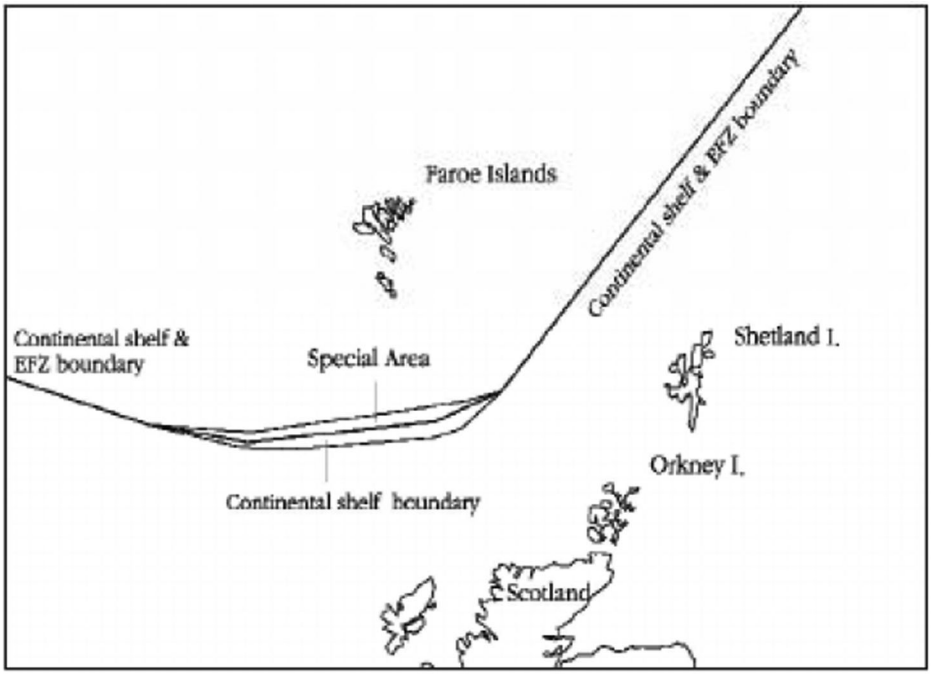

Figure 10. Maritime Delimitation Agreement between Denmark and the UK. *Source*: International Institute for Law of the Sea Studies (IILSS), "Denmark (Faroe Islands)–United Kingdom Maritime Boundary and Special Area", September 7, 2021, http://iilss.net/denmarkfaroe-islands-united-kingdom-maritime-boundary-and-special-area/ (accessed March 7, 2022).

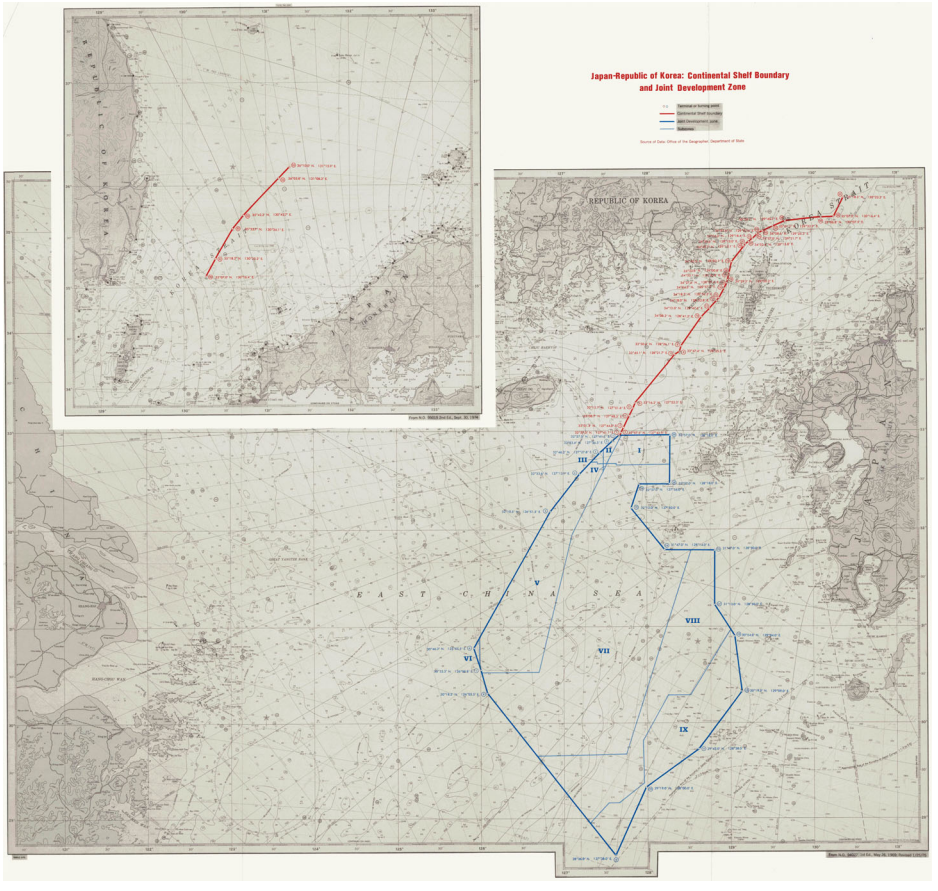

Figure 11. Japan–South Korea Agreement. *Source*: "Continent Shelf Boundary and Joint Development Zone: Japan–Republic of Korea", LIS no. 75, September 2, 1977, https://www.state.gov/wp-content/uploads/2019/11/LIS-75.pdf (accessed March 23, 2022).

"concessionaires of both Parties" to enter into an operating agreement to carry out jointly exploration and exploitation of natural resources in the Joint Development Zone.[95] It also provides, inter alia, for: (i) details relating to the sharing of natural resources and expenses; (ii) adjustment of fisheries interests; and (iii) settlement of disputes.[96]

Gulf of Thailand – Cooperative arrangements

The Gulf of Thailand is surrounded by four countries, namely, Cambodia, Malaysia, Thailand, and Vietnam, and encompasses approximately 301,000 sq km of area.

Thailand and Malaysia

In 1979, the two countries concluded a memorandum of understanding (MoU) on the delimitation of the CS boundary between the two countries in the Gulf of Thailand.[97] The MoU provided for continuation of negotiations to complete the delimitation,[98] and also catered for exchange of information and negotiations in the event of future discovery

of transboundary geological petroleum or natural gas field, or any mineral deposit.[99] The area spans 5,439 sq km and the MoU recognises the overlapping claim of the two states. It caters for establishing a joint authority for the exploration and exploitation of the non-living resources of the seabed and subsoil in the overlapping area.[100] The MoU also provides for rights of either party in matters of fishing, navigation, hydrographic and oceanographic surveys, the prevention and control of marine pollution, and contains clauses regarding the criminal jurisdiction of each country in the overlapping area.[101]

Vietnam and Cambodia

In 1982, the two countries signed an agreement to resolve an overlapping area of over 8,000 sq km in the Gulf of Thailand. Under the agreement, the two countries agreed to divide the area by the use of Brévie Line, used earlier in 1939 as the dividing line of sovereignty over islands between the two countries, and place it under the status of historic internal waters.[102] It was also agreed that the two countries would determine their maritime overlapping area at a suitable time.[103] Joint patrolling and surveillance of the historical waters was agreed to between the two countries. Further, it was agreed that the local population would continue to conduct their fishing and get other sea resources as usual.[104] Regarding the exploitation of natural resources in this zone, the two parties decided to resolve it by agreement.[105]

Vietnam and Malaysia

Vietnam and Malaysia undertook negotiations on settling an overlap of 2800 sq km in the Gulf of Thailand created by the claims of South Vietnam in 1971 and Malaysia in 1979 (Figure 12).[106] Based on their leaders' agreement, the two countries agreed to apply a joint development model in a partial area.[107] They signed an MoU in 1992 on the establishment of a "Joint Authority" for the exploitation of resources of the seabed in a "Defined Area" of the CS of the two countries in the Gulf of Thailand.[108] The MoU agreed on the existence of an overlapping area and agreed to continue to resolve the problem of the delimitation of the boundary by negotiations. The two countries agreed, pending final delimitation of their CS boundaries pertaining to the Defined Area, to explore and exploit petroleum and arrive at mutually acceptable terms for its exploitation after discovery.[109]

China and Vietnam in the Gulf of Tonkin

The Gulf of Tonkin is a shared water area between China and Vietnam covering more than 126,000 sq km.[110] In 2000, China and Vietnam concluded a maritime boundary agreement in the Gulf of Tonkin after three rounds of negotiations spanning 26 years (Figure 13).[111] It was the first maritime boundary that China agreed upon with its neighbouring countries.[112] In the event of discovery of transborder petroleum, natural gas field, or mineral deposits, the agreement provides for reaching agreement after mutual consultations and equitable sharing from the exploitation.[113] It also caters for consultations on sustainable development of the living resources, as well as on cooperative activities relating to the conservation, management, and use of the living resources in the EEZ of the two countries in the Gulf.[114]

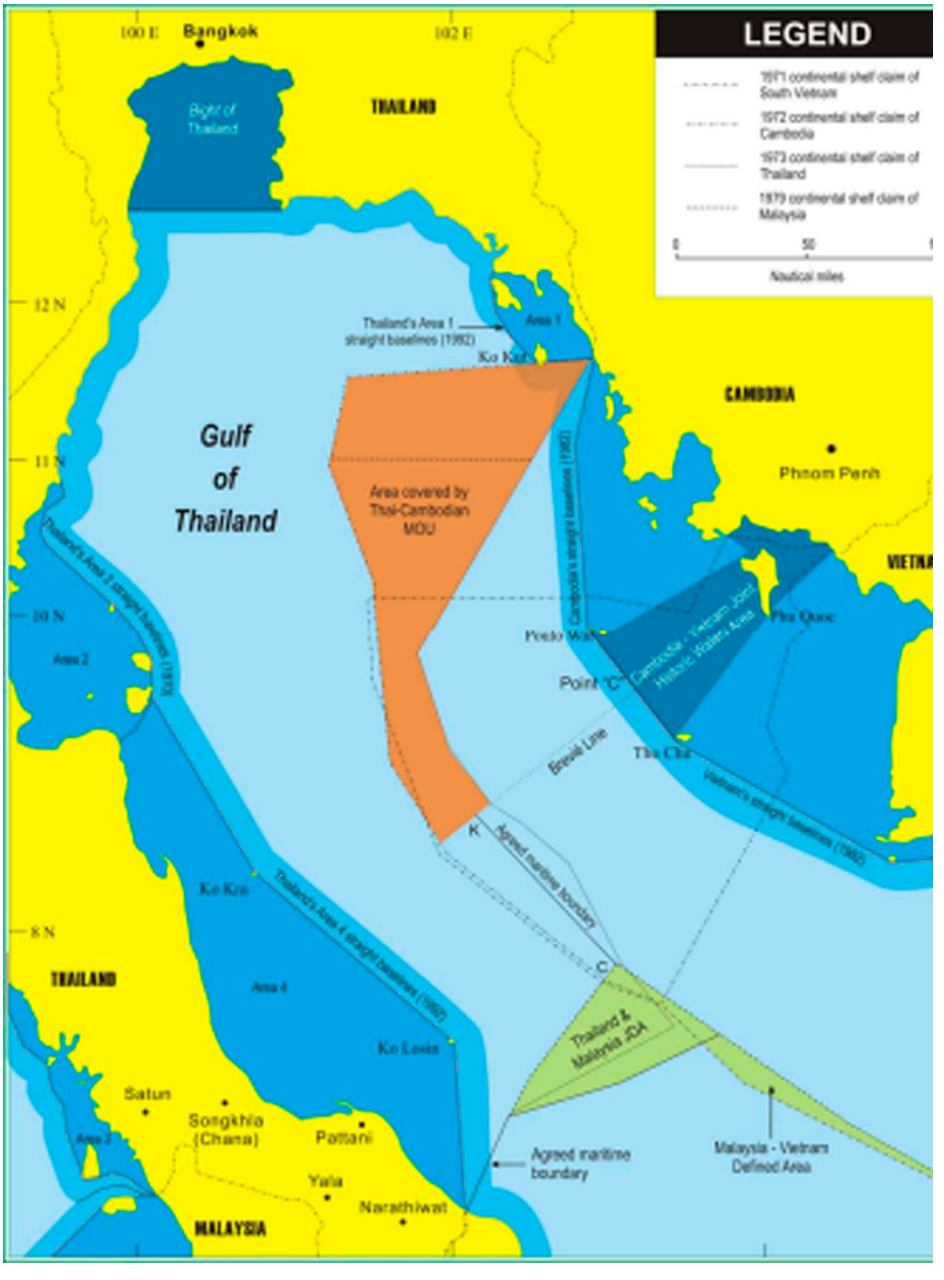

Figure 12. Cooperative Arrangements in the Gulf of Thailand.
Source: Tran Truong Thuy. "Cooperation of States Bordering Enclosed or Semi-Enclosed Seas: The Cases of South China Sea and Gulf of Thailand." https://aseanregionalforum.asean.org/wp-content/uploads/2019/10/Annex-16-Cooperation-of-States-Bordering-Enclosed-or-Semi-Enclosed-Seas-The-Cases-of-the-South-China-Sea-and-Gulf-of-Thailand.pdf (accessed July 17, 2022).

The boundary delimitation was linked to a fishery arrangement on Chinese insistence,[115] which establishes a "Common Fishery Zone" of about 30,000 sq km[116] in the Gulf of Tonkin.

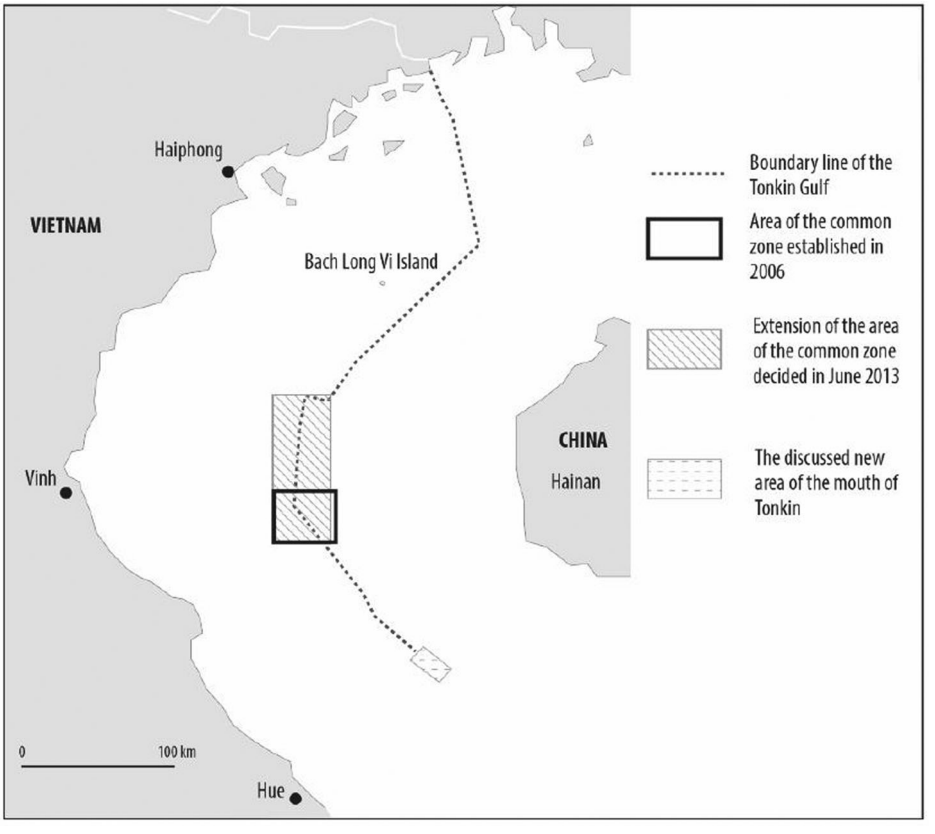

Figure 13. China–Vietnam Maritime Boundary Agreement in the Gulf of Tonkin. *Source*: "Img-2.Jpg (826×734)", https://journals.openedition.org/chinaperspectives/docannexe/image/7030/img-2.jpg (accessed March 23, 2022).

China and the Philippines – South China Sea

The South China Sea (SCS), linking the Pacific and Indian Oceans, is frequently in the news for all the wrong reasons. Witness to several territorial disputes, SCS is the centre-piece of influence wielding by the US and China, and is regarded as one of the hotbeds of potential conflicts in the Indo-Pacific. The littoral states include, apart from China itself, Taiwan, the Philippines, Malaysia, Brunei, Indonesia, and Vietnam. In 2016, the *South China Sea Arbitration* between the Philippines and China concerned an application by the Philippines wherein it sought a ruling towards ascertaining the two countries' rights and obligations in the SCS.[117] Despite China's refusal to participate, the AT rendered its award, which largely went in the favour of the Philippines.[118] However, China refused to honour the award and rejected the verdict.

Despite China's refusal to accept the award and the Philippines inability to enforce the same, in November 2018, the two countries signed a "Memorandum of Understanding on Cooperation on Oil and Gas Development" to facilitate exploration and exploitation in relevant maritime areas.[119] The MoU provided for the establishment of an "Inter-Governmental Joint Steering Committee" that would be responsible for

negotiating and agreeing the cooperation arrangements and the maritime areas to which they would apply. In addition, the two government would attempt to reach an agreement on the cooperation arrangements within 12 months. Further, it was stated that the MoU would be without prejudice to the respective legal positions of both governments and did not create rights or obligations for either signatory under international or domestic law.[120]

Elements of a cooperative framework in the grey area

Having examined the cooperative regimes in various overlapping maritime claim areas, it would be worthwhile to distil some common elements that could form part of a cooperative regime in the grey area between India, Bangladesh, and Myanmar.

(1) *Political will*: There ought to be political will in the leadership of the three countries to resolve the issue of grey area to enhance maritime security in the Bay of Bengal and unlock the potential for development in the region.
(2) *Spirit of cooperation*: Apart from political will, the resolution will be possible only if there is a spirit of cooperation, among the three states, towards drawing a framework for resolution.
(3) *Clearly defined area*: The grey area needs to be clearly defined with mutually agreed coordinates.
(4) *Sovereignty and jurisdiction*: The issue of sovereignty and jurisdiction in the grey area would also need to be addressed. An agreement could be based on shared sovereignty and common jurisdiction. Applicability of laws, regulations, and jurisdiction in the event of a dispute would also need to be articulated.
(5) *Formal agreement*: There ought to be a formal agreement. This could either be in the form of a provisional agreement or an MoU on joint/cooperative development of resources in the grey area.
(6) *Joint commission*: The agreement could provide for the formation of a joint commission/working group whose charter may include, inter alia: (i) survey and demarcation of the grey area; (ii) decide on respective country's exercise of rights and jurisdiction in the grey area; (iii) lay down permissible activities in the grey area and guidelines for undertaking them; (iv) formulate rules for exploration, exploitation, and sharing of natural resources as and when discovered; and (v) act as a dispute resolution body.
(7) *Consultations*: The agreement may provide for consultations in the event of discovery of resources by any party in the grey area.
(8) *Pollution and environment*: The agreement may lay down responsibility and mechanism to ensure prevention of pollution and protection of environment in the grey area.
(9) *Security*: Joint patrolling and surveillance to ensure maritime security could be undertaken in the grey area. Alternately, it could be undertaken on a timeshare basis.
(10) *Sharing of resources*: The agreement could lay down guidelines on sharing of resources, including transboundary development, sharing of investments, exploitation of resources, and sharing of revenues.
(11) *Without prejudice clauses*: If joint/shared sovereignty is not agreeable, the provisional agreement may contain a clause that it would be without prejudice to the

respective legal positions of the three countries and that it does not create rights or obligations for any of the three signatories under international or domestic law.

(12) *Fishing and trawling*: The agreement may lay down guidelines, and if required quota, for each country for fishing and trawling. These may include mechanisms for licensing, verification, and monitoring.

(13) *Settlement of disputes*: The agreement must include a clearly defined mechanism for redressal of grievances of individual states and actors, as well as a dispute resolution mechanism for speedy settlement of differences.

Recommendations

Miniscule disputed area

The original India–Bangladesh grey area of 392 sq km represents a mere 0.00017th part of India's 2.3 million sq km of EEZ, which is not sovereign territory but provides for cretain sovereign rights. This also has to be seen in the context of *India vs Bangladesh* AT award wherein out of a disputed area of 25,602 sq km, 19,467 sq km (>75 per cent) was awarded to Bangladesh and the remaining 6,135 sq km to India. Similarly, the India–Myanmar overlapped grey area is a mere 120 sq km. It is, again, not sovereign territory but provides only for sovreign rights.

While India–Bangladesh grey area is compartively smaller and lends to an easy resolution, the Bangladesh–Myanmar grey area of approximately 2,059 sq km could prove difficult to resolve. One possible way ahead could be for India–Bangladesh and India–Myanmar to resolve their grey area and overlap respectively, in the first instance. A successful template could thereafter be employed in the Bangladesh–Myanmar grey area.

Excellent bilateral relations

India and Bangladesh have successfully negotiated and resolved many complex and outstanding issues between them. In one instance, in 2015, as per the Land Boundary Agreement (LBA), 1974 and Protocol of 2011, 51 erstwhile Bangladeshi enclaves in India and 111 erstwhile Indian enclaves in Bangladesh were physically transferred to the other country.[121] The area of 111 enclaves transferred from India to Bangladesh added up to 17,160.63 acres, while India received 7110.02 acres of 51 Bangladeshi enclaves.[122]

Similarly, with Myanmar – with whom, along with maritime boundary, there is also a land border of over 1,600 km – India has excellent relations. The present leadership of the three countries and the prevailing state of bilateral relations provide for a most conducive environment to resolve the grey area between them. It is recommended that leaders of three countries, at an opportune moment, make a pledge towards resolution of the grey area between the three countries.

Initial mechanism

Between India and Myanmar, there is a Joint Boundary Working Group led by Joint Secretary (Bangladesh and Myanmar), Ministry of External Affairs (MEA).[123] On expression

of political will, the bilateral working group could be expanded to include Bangladesh as well, and may include relevant experts from the three countries. Alternately, a new MEA-led joint working group on resolution of grey area may be constituted by the three countries.

Conclusion

The resolution of the grey area between India, Bangladesh, and Myanmar is imperative to unlock the potential of development in the Bay of Bengal and enhance maritime security in the region. India also stands to benefit greatly as the resolution will pave the way for India's eventual notification of ECS on the eastern seaboard, opening up an area of approximately 600,000 sq km for lawful exploration and exploitation. India has taken the lead by promoting BIMSTEC and heading certain priority areas of cooperation in the forum, namely, transportation and communication, tourism, environment and disaster management, and counter-terrorism and transnational crime.[124] All these areas are likely to be benefited by the resolution of the grey area.

There are several cooperative agreements in respect of overlapping maritime claim areas around the world. Many of them are far more complex, involving protracted negotiations spanning decades. However, they have been resolved, leading to better utilisation of resources and enhanced peace and stability in the concerned region. In the case of India, Bangladesh, and Myanmar, the ITLOS judgment/AT award has placed the onus for resolution of the grey area on the respective countries for conclusion of specific agreements or establishment of appropriate cooperative arrangements. The areas involved in question, at least from India's perspective, both with respect to Bangladesh as well as Myanmar, are miniscule. The waters are not sovereign territory but provide sovereign rights. The potential rewards from resolution far outweigh any loss/perceived losses/risks that any country may anticipate. No political fallout is anticipated and it is a tailor-made case for a win-win situation for the three countries. The resolution provides a golden opportunity for India, Bangladesh, and Myanmar to cooperate and write a new chapter in the development and economic prosperity of the Bay of Bengal.

Notes

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