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Chapter 27

Limits to the Governability of Transboundary Fisheries: Implications for Small-Scale Fishers in Northern Sri Lanka and Beyond

Joeri Scholtens

Abstract Transboundary fisheries are a worldwide phenomenon that has considerable impact on small-scale fisheries. This chapter explores governability problems of transboundary fisheries in connection with small-scale fishers' marginality. Insights are derived by studying the practice of transboundary fishing in the Palk Bay, South Asia, where a sizable Indian trawler fleet impedes Sri Lankan small-scale fishers from carrying out their occupation. By analyzing the features of the fisheries systems and the fragmented governance practices, this chapter raises six issues that challenge the overall system's governability: (1) mismatch between the scale of governance and the scale of the problem; (2) high level of institutional fragmentation with limited cross-linkages; (3) actors' strategic framing of the nature, causes and solution to the problem; (4) power imbalances between Sri Lankan and Indian fishers; (5) deep politicization that has linked fisheries issues to higher level ethnic and geopolitical conflicts; and (6) path dependency of the trawl sector. I conclude that while co-governance is in theory crucial for transboundary governance to be more responsive to the situation at hand, governability analysis explains why constructive collaborative practices are difficult, if not impossible, to create in practice in this case.

Keywords Transboundary fisheries • Fisheries conflict • Governability • Sri Lanka • Politicization • Power asymmetry • Multi-level governance

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Introduction

Exploitation of natural resources across political boundaries, like transboundary fishing, is a worldwide phenomenon that raises concerns of ecological sustainability and social justice. Challenges pertain both to effectiveness in terms of environmental sustainability outcomes, as well as to the inclusiveness of the arrangements, particularly in terms of providing space for small-scale fisheries (Chuenpagdee et al. 2005). Various international and transnational institutions have been tasked with the governance of transboundary fisheries but their achievements have been notably poor (Cullis-Suzuki and Pauly 2010; White and Costello 2014). This gives rise to the question of why transboundary fisheries are such a tricky governance subject that demand understanding of the governability challenges involved, in particular as they pertain to small-scale fisheries.

This chapter derives its insights from a case study in the Palk Bay, where South Indian trawlers are fishing in large numbers in North Sri Lankan waters, obstructing the operations of thousands of small-scale fishers. These North Sri Lankan fishers are thus involved in a transboundary fishing conflict with technologically superior Indian trawlers. This marginal position is partly the result of the recent civil war (1983–2009) that crushed the livelihoods of North Sri Lankan fishers (Soosai and Stokke 2006) and partly due to the lack of power and political representation in post-war local and national politics. Such multidimensional marginality of small-scale fishers is by no means unique and in fact a common phenomenon of small-scale fishers (e.g. FAO 2014). While reallocating resources to small-scale fisheries and reinstating their rights may be goals worth striving for, the question is why these are so difficult to achieve in practice.

The problem of transboundary fishing in combination with small-scale fishers' marginality has many elements of a wicked problem (Rittel and Webber 1973). First, it does not lend itself to straightforward definitions of problem and solution. Stakeholders strategically frame the problem in accordance with their own images and interests, realizing that any future solution is shaped by the framing of the problem (Jentoft et al. 2010). Second, wicked problems are typically not contained— but rather embedded in and interconnected with issues at higher levels of scale, making it hard to solve them in isolation. According to Chuenpagdee and Jentoft (2013), such problems cannot be solved through techno-rational fixes, but rather require a governability analysis which deconstructs the governance challenges at hand. This chapter aims to derive lessons from the Palk Bay fisheries conflict regarding the governability limitations of transboundary fisheries, particularly as they pertain to livelihoods of small-scale fishers.

The remainder of the chapter is organized as follows. The next section provides an overview of global transboundary fisheries and their impact on small-scale fisheries. Section 3 zooms in on Palk Bay fisheries, mapping out key characteristics of the system-to-be-governed and the governing system. Section 4 analyses how governance functions in the Palk Bay by evaluating various modes of governance that

give rise to a range of governability problems. Section 5 reviews the Palk Bay's governability challenges, while Sect. 6 concludes by drawing out the wider implications of this study.

Transboundary Fishing and Impact on Small-Scale Fishers

Transboundary fishing is defined 'as the activities of fishers appropriating marine resources across boundaries, typically, but not limited to state borders' (Scholtens and Bavinck 2014, p10).¹ Such cross-border appropriation includes both fishers following transboundary target species (e.g. shared, straddling or highly migratory fish stocks) or simply by the lure of transboundary fishing grounds, which have come within operational reach (ibid). Transboundary fishing has a long history (e.g. Butcher 2005) and has more recently gained particular attention in connection with concerns over overexploitation of migratory stocks (White and Costello 2014). While that discussion focuses on areas outside Exclusive Economic Zones (EEZ), for small-scale fishers the fisher fleets appropriating marine life *inside* foreign EEZs, by legal or illegal means, is the primary concern. According to a recent study (Pauly et al. 2013) China's distant water fleet alone operates in 93 EEZs and is responsible for 5 % of global marine landings. The EU fleet derives 30 % of its catches from foreign EEZ (Swartz et al. 2010).

Transboundary fishing has been problematized either as a poorly managed and controlled fishing practice, or as a traditional practice being disrupted by state driven processes of territorialisation. In line with the former approach, White and Costello (2014, 1) argue that transboundary fisheries, on the high seas in particular, "pose perhaps the greatest global challenge to sustainable fisheries management". International law, voluntary guidelines and multi-lateral agreements have been developed over the past decades to manage transboundary fisheries, but with notably poor results (Cullis-Suzuki and Pauly 2010; Russell and Vanderzwaag 2010). In the second perspective, the concept of transboundary fishing is problematized as a state-biased construct that 'criminalizes' an age-old phenomenon of mobile resource exploitation (Gupta and Sharma 2008). For many fishers, mobility – including transnational migration – is a fact of life, much like the livelihood patterns practiced by pastoralists and nomads (Adhuri and Visser 2007).

The impact of transboundary fishing fleets on small-scale resident fisheries and their implications for governance has been poorly established in academic literature, albeit with some exceptions (Kaczynski and Fluharty 2002; Alder and Sumaila 2004; Swartz et al. 2010). These studies show that even when 'cash-for-access agreements' are carefully negotiated, benefits tend not to trickle down to the resident [small-scale] fishers (Kaczynski and Fluharty 2002). Small-scale fishers tend

¹Contrary to most literature on the issue, our focus lies on transboundary fishing rather than on transboundary resources, as fisheries tend to be governed through the steering of people rather than fish.

to bear the burden of declining fish stocks and foreign fishing fleets tend to have a negative impact on local (fish) food security (Alder and Sumaila 2004).

Factors that shape the capacity and quality of transboundary fisheries governance, i.e. their governability, cannot be a priori established. They emerge from a systematic journey through a particular system-to-be-governed, its governing system and the interactions between them. This journey is partly guided by the framework suggested by Chuenpagdee and Jentoft (2013).

Mapping Out the Palk Bay Fisheries Systems

This section draws out the basic features of the system-to-be-governed and the governing system for the transboundary Palk Bay fisheries. Although transboundary fisheries in the Palk Bay involves the Indian and Sri Lankan side of the Bay, this chapter focuses on the Sri Lankan side where I conducted 14 months of mixed method fieldwork during 2011 and 2012 among small-scale fishers, their leaders and various representative organizations. I will deal with the Indian side in passing, building on secondary literature, media coverage and earlier fieldwork in 2006 and 2007.

Natural System-to-Be-Governed

The Palk Bay and Palk Strait constitute a relatively confined sea area bounded by the Indian coastline to the west, Sri Lanka's coastline to the east, a bridge of shoals called the Adams Bridge that separates the Palk Bay from the Gulf of Mannar to the south, and the Bay of Bengal to the northeast. It is a shallow basin with an average depth of 9 m and is known for its lack of turbulence (Scholtens and Bavinck 2013). The bay is 137 km in length and 30–80 km in width.

The Palk Bay hosts a wide diversity of fish, sponges, molluscs, crustaceans and seaweeds. A survey of Indian catches revealed 56 different species (Stephen et al. 2013b) while a catch survey on the Sri Lanka side identified 63 different species. The quantity of fish catches and extent of biodiversity, however, seem to be declining (Vivekanandan and Kasim 2011). Commercially speaking, the area's prawn banks and sea cucumbers are the primary attraction. On the Indian side, a number of species have reportedly disappeared (including catfish, white sardine and sea turtles) and a range of species declined in number (including ray fish, silver bellies, anchovy, seer, lobster) (Vivekanandan and Kasim 2011). On the Sri Lankan side, fishers have observed declining catch for a given unit of effort, even though aggregate catches may have actually increased due to more purse seining. Fishers also observe that they rely on an increasingly limited number of (low value) species, most notably sardine which constituted over 50 % of catches. Vivekanandan and Kasim (2011, 23) conclude that "one can safely say that overfishing – both biological and economic – is definite in Tamil Nadu [even though] the extent of overfishing, the potential losses due to overfishing and the long term consequences of this are not known" (Fig. 27.1).

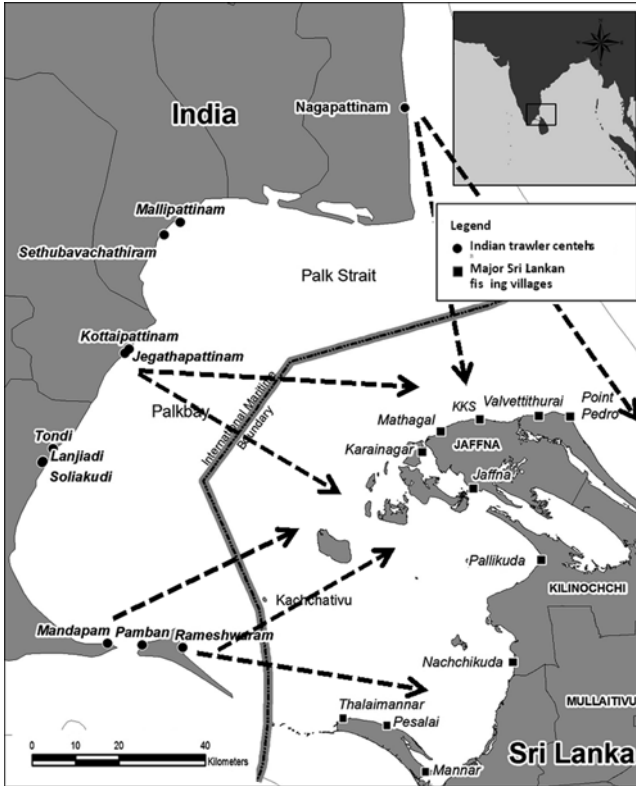


Fig. 27.1 Graphical representation of the system-to-be-governed. The *arrows* represent the origin and direction of Indian trawlers (There are no data available on the precise number of boats crossing into Sri Lankan waters. The *dotted arrows* also do not necessarily indicate a daily flow. The *arrows* are based on frequent anecdotal information from both Indian and Sri Lankan fishermen) Source: Adapted from University of Jaffna, Dept. of Geography

The Social System-to-Be-Governed

On the Indian side about 1,900 trawlers are berthed in 10 landing centres along the 294 km Palk Bay coastline (Stephen et al. 2013b). These trawlers of 30–50 ft in length are estimated to account for 70 % of total catches, the remainder being landed by the small-scale Indian fleet (Vivekanandan and Kasim 2011). They are owned by about 1,600 owners and operated by an average of four crewmembers per boat. In addition, about 2,000 merchants and 2,000 auxiliary workers derive their livelihood from the sector (Stephen et al. 2013b). Indian trawler owners and crew constitute a highly diverse community in terms of caste and religion, many of them originating from the agricultural sector, investing in trawling only in recent decades (Bavinck 2014). Regulations dictate that trawlers can operate maximum 3 days per week, beyond 5 km from the coast but not beyond the International Maritime Boundary Line (IMBL), which is located 15–46 km from their coastline. However, due to the large fleet in relation to very limited fishing grounds (Sathyapalan et al. 2008;

Sathyapalan et al. 2011) in practice trawlers operate deep into Sri Lankan waters, where Sri Lankan fishers report the ‘incoming city of trawlers’ with great anger and frustration.

In Northern Sri Lanka, apart from a few small trawl boats, all fishing activity can be safely termed small-scale. Fishing communities along the Palk Bay and Strait are spread over 120 villages along a 400 km coastline.² The majority of fishers are (Tamil) Catholic, but substantial groups of Hindu, Muslim and non-Roman Catholic fishers also fish. The large majority of fishers belong to traditional fishing castes, namely Karayars and Paravathars. There are about 6,000 18 ft Fiberglass Reinforced Plastic (FRP) boats with outboard engines of 8–25 hp. These FRP boats operate predominantly at night time, using gill and drift nets with mesh sizes varying from 1.5 in. (for sardines) to 18 in. (for ray fish). Nets are skillfully selected based on species targeted, location, seasonality, direction and strength of the wind, the position of the moon, as well as the demand of the market. Given the technological limitations, fishers often have to fish as far as 30 km from the coast. Based on a 1 year monitoring of fish catch and income, the monthly income of fishers in the village of Karainagar appeared to be on average \$190,³ about half of an average rural household income in Sri Lanka!

Table 27.1 reveals significant differences in technological capacity. Indian trawlers are equipped with engines up to 190 hp compared to 8–25 hp engines of North

Table 27.1 Comparison of fishing capacity and fishers operating on the Sri Lankan and Indian side of the Palk Bay

	Number of active fishers	Number of boats	Mechanized boats ^a	Motorized boats	Non-motorized boats
Sri Lankan fishery (1)	47,680	11,670	317	6,003	5,350
			Trawlers & gill netters 30 ft 30 hp IBM	FRP boats 18 ft 8 to 25 hp OBM	Kattumarams and wooden canoos 9–15 ft
Indian fishery ^b	61,162 (3)	9,912 (3)	1,907 (2)	4,141 (3) ^c	3,864 (3)
			Bottom & pelagic trawlers 30–50 ft 70–190 hp IBM.	Vallams & FRP boats 18–30 ft 5–30 hp	vattai's and Kattumarams 12–15 ft

Sources: Government of Sri Lanka 2013 (1); Stephen et al. 2013b (2); Government of India 2010 (3)

In grey the dominant subsectors are given

^aFor this categorization I follow Bavinck (2001)

^bThis include fishing villages from Rameshwaram to Thiruvapur. Nagapattinam district is excluded: even though they are regularly active at the North Eastern Sri Lankan waters, they rarely frequent the Palk Bay

^cThese motorized boats from Tamil Nadu, operating mostly monofilament nets banned in Sri Lanka, are also increasingly fishing in Sri Lankan waters since 2011, but this is beyond the scope of this chapter

²The coastal stretch between the villages Point Pedro and Talaimannar.

³An average boat in Karainagar earned \$8,502 from fish landings between April 2012 and March 2013. Subtracting \$1,845 for fuel costs and \$950 for depreciation costs means that a boat annually earns \$5,707. This amount is to be shared with two to three fishers. This estimate, moreover, is on the high side as interest payments and non-fuel operational costs are not accounted for.

Sri Lankan fishers. These differences result in significant inequalities in the capacity to access Palk Bay resources.

In 1974 and 1976 the maritime boundary line was settled in a bilateral agreement between the two countries. In Tamil Nadu, the settlement of this boundary is, until this day, perceived as a 'gifting away' of historical fishing grounds to Sri Lanka. The officially demarcated boundary, however, initially had little adverse impact on fishers, as their fleets were small and the boundary line poorly guarded. This changed with the onset of the civil war in Sri Lanka in 1983, when the Palk Bay became part of the battleground between government forces and the 'Sea Tigers', the navy wing of the Tamil Tiger guerrillas. While fishing in Northern Sri Lanka came to a virtual standstill, the rapidly developing trawler fleet in India fished the rich Sri Lankan fishing grounds, and were also involved in regular smuggling. Several hundred fishermen lost their lives, mostly killed by the Sri Lankan navy.

Fishermen from both sides are Tamils, sharing a language and ethnicity. Even though 'Sri Lankan Tamils' and 'Indian Tamils' constitute two different, and sometimes antagonistic, identities, both during and after the war Tamils from India have provided passionate support to the Sri Lankan Tamil plea for a separate *Eelam* (nation). Post war, the Sri Lankan government has taken a majoritarian approach embracing Sinhalese-Buddhist nationalist sentiments to the detriment of Tamil and Muslim minorities. The Chief Minister of the Northern Province argued that, paradoxically, the end of the war has actually deepened the ethnic conflict. A major development has been the process of militarization, in the sense of the military increasingly controlling public institutions to guard regime interests (Kadirgamar 2013) resulting in a state of 'oppressive stability' (Wickramasinghe 2014). These developments have received consistent and passionate responses from Tamil Nadu, which has consistently lobbied New Delhi to take a strong anti-Sri Lanka stand. These larger bilateral political dynamics provide the context within which transboundary fishing takes place.

Figure 27.2 reflects some of these historical patterns in terms of fish catch as well as the unequal catch capacities of both fleets. On the Sri Lankan side, it is noticeable that higher catches occurred during relatively calm periods of the war. Post-war, Sri Lankan fishing activity grew rapidly as a result of the step-by-step elimination of fishing restrictions, and the adoption of purse seining by several villages in Mannar.

Indian trawlers move deep into Sri Lankan waters because of their overcapacity and the fact that Sri Lankan fishing grounds are rich. It is estimated that about 2,000 Indian trawlers are fully or partially dependent on Sri Lankan waters so as to secure a profitable catch (Scholtens et al. 2012). Trawler intrusion obstructs Sri Lankan fishers from operating their gillnets which get damaged or destroyed completely when trawler gear is operated at the same time and place, especially at night. Thus, when trawlers operate, Sri Lankan fishers either stay at home, engage in some marginal fishing very close to the coast, or run the risk of substantial losses. In conclusion, trawler fishers from Tamil Nadu and small-scale fishers from Northern Sri Lanka are engaged in a transboundary fishing conflict defined by deep technological and political inequalities between the two groups of fishers (Scholtens et al. 2013).

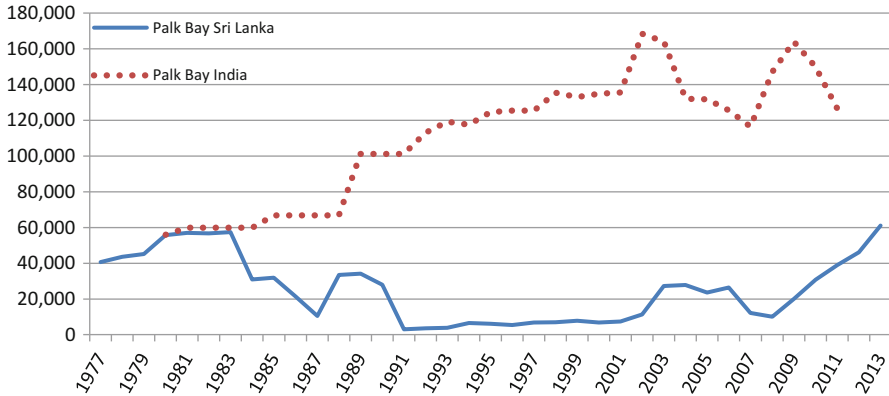


Fig. 27.2 Comparison of fish catch volume from the Palk Bay between Indian and Sri Lankan fleets (Sources: Sri Lankan data: Government of Sri Lanka (2013). Indian data: 1980–1996 Vivekanandan (2001). 1997–2007 and 2011 Government of Tamil Nadu (2012), 2008–2010 Government of India (2010))

The Governing System

The problematic transboundary fishing grounds of the Palk Bay are governed by a plethora of state and non-state institutions at multiple levels at both sides of the boundary. Figure 27.3 provides an overview of this complex multi-layered governance architecture. This section maps out the various authorities. The actual functioning of these authorities in relation to the system-to-be-governed is the subject of Sect. 4.

At the international level, guidance for the regulation of transboundary fisheries is provided by various treaties and soft law agreements (Russell and Vanderzwaag 2010) which also apply to the Palk Bay. **UNCLOS** (United Nations 1982) provides Coastal States with sole exploitation rights of natural resources in their exclusive economic zones (Art. 56.1) and dictates that “nationals of other States fishing in the EEZ shall comply with ... laws and regulations of the coastal State” (Art. 62.4; see also Art 73). The **FAO** has drawn up the voluntary Code of Conduct for Responsible Fisheries (1995), and various tools have been developed to address ‘Illegal, Unreported and Unregistered’ fishing, and more recently the Voluntary Guidelines for Securing Sustainable Small-scale Fisheries (FAO 2014). These regulations place obligations on both the Indian and Sri Lankan government but are in practice only rarely called upon (Scholtens and Bavinck 2014).

At the national level, various ministries are involved in both India and Sri Lanka. In **India**, the Ministry of External Affairs in terms of being in charge of Indo-Sri Lankan relations, the Ministry of Defence, with Indian Coast Guard and Navy having significant presence in the Palk Bay, and the Ministry of Agriculture, which deals with fisheries, are the ministries that play an important role Fisheries

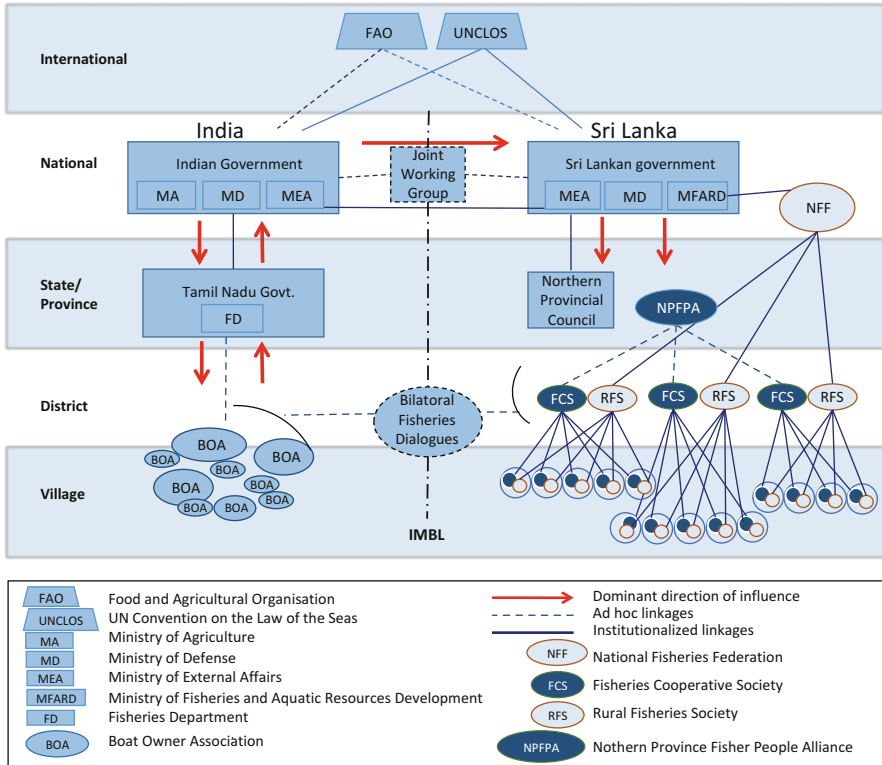


Fig. 27.3 Graphical representation of the multi-level Governing System (Scholtens and Bavinc 2014)

management itself is a state level subject. Fisheries on the Indian side of the Palk Bay is governed by the 1983 **Tamil Nadu** Marine Resources Act as well as a range of regulations specific to the Palk Bay region, collectively placing restrictions on trawlers in terms of gear, time, and location (Scholtens and Bavinc 2013). Despite repeated High Court rulings that Indian fishers have no fishing rights beyond the IMBL,⁴ the Tamil Nadu Government continues to claim ‘historical rights’ for Tamil fishers beyond the IMBL.⁵

In **Sri Lanka**, fisheries come under the Ministry of Fisheries and Aquatic Resources Development (MFARD). The Palk Bay, which is considered part of Sri Lanka’s internal waters,⁶ is regulated by the Maritime Zones Act of 1976 and the Fisheries and Aquatic Resources Act No. 2 of 1996. Significantly, an amendment adopted in August 2010 prohibits bottom trawling in Sri Lankan waters. Post-war security concerns have also resulted in significant authority over fishing affairs

⁴The New Indian Express newspaper 23 January 2014. Accessed on May 30 2014.

⁵India Today online news; September 7th 2013. Accessed on May 30 2014.

⁶Govt of Sri Lanka 1976 – Maritime Zones Act 22, Article 7ii.

being given to the Navy and the Army, while the Ministry of External Affairs is in charge of fisheries negotiations with India. The recently elected **Northern Provincial Council** has its own Minister of Fisheries, but his authority is restricted to inland waters. Being strongly dependent on political support from India, the provincial government has kept an unholly silence about the intrusion of Indian trawlers.

The Indian and Sri Lankan governments signed bilateral agreements in 1974 and 1976 to demarcate the international maritime boundary line. While the implications of this agreement on fishing rights of Indian fishers were initially ambiguous (Suryanarayan 2004), later letter exchanges by the Ministers of External Affairs in 1976 clarified that Indian fishers have no fishing rights in Sri Lanka.⁷ In 2005 a bilateral **Joint Working Group** of Fisheries was set up to deal with transboundary fishing issues.

In terms of non-state institutions, on the Indian side the trawl owners are organized in associations that develop their own forms of fisheries management. These **Boat Owner Associations** have significant political agency (Scholtens et al. 2013) and lobby with the State and Central government for a firm stand vis-a-vis Sri Lanka, noting that trawler fishers should not be harassed by the Sri Lankan navy, and (often implicitly) claiming that the Palk Bay is part of their traditional waters.

On the Sri Lankan side, Fisheries Cooperatives play a significant role at the village and district levels in defining indigenous territorial rights. In 2011, MFARD created parallel representative bodies named **Rural Fisheries Organizations** with the '**National Fisheries Federation**' as their national apex body. Finally the '**Northern Province Fisher People Alliance**' is a loosely organized fisher body at the provincial level. The autonomy of all of these organizations is limited due to strict strong surveillance by State authorities (Scholtens and Bavinck 2014).

Five dialogues were held between fisher representatives of both countries. Initially, they were facilitated by local NGO's (2004 and 2010), while later they were taken over by the States (2012 and 2014). These dialogues led to concrete results (Stephen et al. 2013a), including the commitment of Indian trawler fishers in 2010 to stop trawling after a year's time, implementation of these agreements have proven extremely problematic, partly because of the lack of endorsement by the State governments (Scholtens and Bavinck).

A few things are worth noting based on this brief review of existing institutions and rules governing fishing in the Palk Bay. First, the Palk Bay is characterized by significant legal pluralism, with multiple rule systems applying to fishing in the Bay. Secondly, governance is mediated at multiple (spatial) scale levels, including small fishers' organizations as well as government authorities in both countries. Thirdly, even though occasional horizontal bilateral interaction has occurred in the form of state-to-state and fisher-to-fisher dialogues, there is no institution with authority over the full Palk Bay. Section 5 will discuss the implications of these features for Palk Bay's governability.

⁷"[...] no fishing vessels and fishers of India shall not engage in fishing in the historic waters, the territorial sea and the exclusive economic zone of Sri Lanka nor shall the fishing vessels and fishers of Sri Lanka engage in fishing in the historic waters, territorial sea and the exclusive economic zone of India, without the express permission of Sri Lanka or India, as the case may be [...]" (quoted in Suryanarayan 2004: 167).

Governance Interactions in the Palk Bay

While the previous section provided a baseline of who is governing and what is being governed, this section analyses *how* governance takes place. According to interactive governance theory, governance takes place through interactions between the governing system and the system that is being governed through various modes of governance: hierarchical governance, co-governance and self-governance (Kooiman et al. 2008). These are essentially heuristic categories that emphasize different types of governance interactions, defined as “the institutions and processes through which the system-to-be-governed and the governing system relate to one another” (Chuenpagdee and Jentoft 2013, 344). The governability of a fishery “depends to a large extent on the ways in which the three governance modes are developed and attuned to each other” (Kooiman and Chuenpagdee 2005, 346), and whether the combination of the three can be responsive to the situation at hand. These different governance modes are thus used as analytical tools to shed light on various types of interactions between the governing system and the system-to-be-governed.

Hierarchical Governance: The Realm of Governments

Sri Lanka is one of the most fisheries dependent countries in the world, especially in terms of employment and food security (Barange et al. 2014). The small-scale (inshore) sector contributed 62 % of total marine fish landings in 2012 (Government of Sri Lanka 2013) and is recognized by the state as vital for the country’s food security. The official ban on bottom trawling in 2010 (a rarity in Asia) is an example of a pro-small-scale fisheries policy, even though implementation has proved to be troublesome. The state’s involvement in fisheries has focused historically on increasing production through fleet modernization. Whereas in India modernization programs resulted in the promotion of a trawler fleet that interfered with small-scale fishers (Bavinck 2001), in Sri Lanka the focus was on developing off-shore long liners that rarely interrupted the practices of the sizable small-scale fleet (Amarasinghe 2005).

As a result of the recent violent history in the Palk Bay region and the continued political sensitivity of Palk Bay matters, both governments have dealt with Palk Bay fisheries first and foremost from a security perspective, illustrated by the deployment of numerous Navy and Coast Guard vessels on both sides of the boundary. In Sri Lanka, while fisheries department officials are officially tasked with implementing the State’s fisheries regulations and provisions, in the North especially the Sri Lankan Navy dictates matters at sea. Most fishing villages have one or multiple ‘navy points’, where uniformed armed men maintain a surveillance system, which is justified in the name of providing security. Even though since 2012 the actual restrictions imposed by the Navy are limited, their very presence fuels a continuous sense of powerlessness amongst fishers.

Table 27.2 Arrests of Indian fishers in Sri Lankan waters

Year	No. of arrests ^a	No. of arrested fishers ^b	Average duration in custody (days)	Total man-days in custody
2009	12	175	9.8	1,708
2010	10	56	7.1	396
2011	6	182	3.0	540
2012	10	205	3.5	712
2013	27	730	29.0	21,194
Total	65	1,348		24,530

Source: The Hindu and Daily Mirror digital newspaper records

^aExcluding remands for alleged drug smuggling (8 fishers)

^bA single fisher may have been arrested more than one time

Illustrative of the security focus maintained by both governments, is the continuous arrest of fishers. During 2013 the Sri Lanka navy arrested 730 Indian fishers and impounded approximately 200 boats (see Table 27.2). Even though the number of arrests is a small relative to the alleged number of incursions (the Sri Lankan navy spotted Indian trawlers 45,167 times crossing the boundary in 2013),⁸ these arrests result in outrage in Tamil Nadu. Sri Lankan fishers have asked for heavier state involvement, by repeatedly requesting the Navy to take action against trawlers. But as a navy commander said in 2013: “it’s like having our hands tied behind our back; whenever we arrest fishers it becomes a bilateral political issue”.⁹

In 2005, the two governments set up the Joint Working Group (JWG) of Fisheries, consisting of delegates from the relevant Ministries of both countries, as a mechanism to deal amicably with the transboundary fisheries issue. Four such working group meetings have been held since the inception of the JWG. These meetings resulted in diplomatic joint statements; however, sensitive issues remained largely unaddressed. The last meeting was held in January 2012, after which meetings were suspended due to political obstacles and negotiations on a Memorandum of Understanding failed. What was also noticeable in these meetings was the lack of representation from the fishing community, even though on occasion they have been consulted in advance.

Self-Governance – The Realm of Fishers’ Rule

Self-governance is when “fishers govern themselves, without external interference or support, outside the purview of government” (Kooiman and Chuenpagdee 2005, 334). Self-governance does not so much denote

⁸Personal communication Navy Commander, January 2014.

⁹Sunday Times, 3 March 2013. <http://www.sundaytimes.lk/130303/news/navy-has-a-tough-job-with-indian-fishermen-35225.html>. Accessed 20 July 2014.

individualized governance, but is rather a specific expression of community based collective action (e.g. Ostrom 1990).

In India, Boat Owner Associations manage day-to-day trawler activity, in addition to (often successful) lobbying the political establishment. In Sri Lanka, fishers in the Northern Province have cooperative societies that have survived decades of civil war. Whilst being closely monitored and controlled by the cooperative department, fisheries department, and the intelligence and security forces, these organizations have considerable control over those issues that are beyond the state's interest. This includes fish marketing, solving internal conflicts, managing insurance schemes, contributing to social development and regulating appropriate timing of gear use. In the aftermath of the war, however, these organizations have been significantly weakened for a couple of reasons. First, in 2011 the Ministry of Fisheries founded a new fisheries representative body, appointing leaders loyal to the government, which created a politicized parallel institution to the cooperatives; this also marked the end of financial contributions of the Fisheries Ministry to fisheries cooperatives. Even though these parallel institutions suffer from a lack of local legitimacy, state support and patronage gives these organizations significant power. Secondly, there was political interference in cooperative elections in 2011 and 2012, resulting in autonomy being lost. Both these developments have strengthened a patronage-based system where fisher leaders are tied to the interests of particular politicians, compromising their ability to represent actual fisher concerns and fueling strong sense of skepticism among fishers.

Sri Lankan fishers' self-governance is also limited, given their inability to shield themselves from the intrusion of outsiders (i.e. Indian trawlers), which is a vital pre-condition for self-governance (Ostrom 1990). Self-governance is adversely impacted by and interlinked with processes at higher scale levels. In 2011, fishers from two villages in Jaffna district took the law into their own hands and hijacked 36 Indian trawlers (Scholtens et al. 2012). This characterized a strong act of village level collective action, even though the authorities may have provided silent support.

More constructive forms of self-governance include the dialogues between fisher representatives from both countries held in 2004, 2010, 2012 and 2014. In 2010, fisher representatives from both countries had lengthy negotiations and reached a concrete agreement, even though it was subsequently dismissed by the Sri Lankan government and not adhered to by Indian fishers (Stephen et al. 2013a). Both governments have at time endorsed these dialogues through official Joint Statements, but have been equally quick to dismiss them. The Tamil Nadu establishment, in particular, has repeatedly employed delaying tactics due to fear that these meetings may expose frictions in pan-Tamil political identity (SathyaMoorthy 2013).

Self-governance thus has clear limitations in this multi-scalar, transboundary and politically charged environment and many fisher leaders have lost both confidence in self governance as it exists and a sense of agency. As one leader responded to my repeated questions as to why fishers remained silent about trawler transgressions: "Joeri, this is not something for fishers to solve. Don't you see that politics have crept in, what can we do?"

Co-governance: The Realm of Collaboration

The third mode, co-governance, suggests a form of collaboration between different stakeholders, including the state. Co-governance has been widely propagated as a means to draw on the capacities of both fisher communities and the government, while compensating for the inherent limitations of both.

Neither in Sri Lanka nor in Tamil Nadu is there a co-management system in place, in the sense of an institutionalized form of power-sharing and rule-making between state and fisher groups. In both countries, interaction between fisheries department officials, security forces and fisher representatives tend to take place on an ad hoc basis (Scholtens and Bavinck 2013), although recent initiatives in both countries are promising.¹⁰ Various authorities each operate on the basis of an internal logic and distinct norms, which, depending on the circumstances, accommodate, ignore, support or compete with the norms of others (Bavinck et al. 2013). As a notable exception in Sri Lanka, the Assistant Director of Fisheries participates regularly in the Jaffna district Fisheries Cooperative Union's Federation meetings.

Whereas at the institutional – technical level differences between India and Sri Lanka are insignificant, at the political level the nature of fisher-government collaboration differs significantly between the two countries. North Sri Lankan fishers, being part of an entrenched and long-term ethnic conflict, have a deeply distrustful relationship with the state, obstructing any constructive forms of interaction. In fact, many fishers believe that the Sri Lankan government has a hidden interest in allowing Indian encroachment to prevail, as it would undermine the Tamil economy in the North and create a welcome breach between the Tamils of both countries (Scholtens et al. 2013, 4). While these conspiracy framings are not necessarily in line with the demonstrated commitment of the Sri Lankan Fisheries Ministry and Navy to stop transboundary fishing, Sri Lankan politicians have few incentives to attend to North Sri Lankan fishers' concerns, not least because they do not form an electoral constituency for the dominant parties. The irony is that although in principles Lankan Tamil fishers' interests are aligned with the Sri Lankan government as far as the Palk Bay is concerned, the hegemonic Tamil versus Sinhala discourse blocks effective collaboration.

In India, on the contrary, fishers enjoy significant political agency vis-à-vis the Tamil Nadu political establishment (Scholtens et al. 2013). Not only are fishers well represented in major political parties, the fishing issue provides perfect fuel for the State Government and fishers to jointly rally against the Central Government to demand more attention to the plight of fishers. Fishers' plight also feeds well into strong anti-Sri Lankan sentiments in Tamil Nadu making fisheries a popular subject for politicians to rally behind (ibid). These differences in trust and collaboration between the two countries imply a highly uneven playing field from where fishers can stake their claims.

¹⁰ See for example the Lagoon Fisheries Management Authorities in Sri Lanka, and the FIMSUL project in Tamil Nadu.

What further stands out is the limited role of civil society groups. Whereas in India civil society actors occasionally act as intermediaries, or on behalf of various fisher groups, the Sri Lankan government has ruled out any NGO involvement in Palk Bay issues. NGOs who have tried to mediate have been threatened and accused of conspiring with Tamil Nadu, ‘the West’ or both.

Discussion: Limitations to Palk Bay Fisheries’ Governability

Governability challenges are embedded in the system-to-be-governed, the governing system as well as in their interactions (Chuenpagdee and Jentoft 2013). Based on the journey through these various systems made in the previous sections, I identify six crucial factors limiting the governability of the Palk Bay. Each of these issues has an element of wickedness, in the sense of disagreement between stakeholders about what the problem actual is, where the problem starts and ends, or how it is embedded in wider issues.

Boundaries and Scalar Mismatch

Inherent in the governance of transboundary fisheries is a mismatch “between the geographic scale of ecosystem functioning and the spatial extent of the institutional arrangements managing such a system” (Duraiappah et al. 2014). The Palk Bay provides an exemplary case of the problem of mismatch between institutional, ecosystem and fishers’ operational scales. While the ecosystem and the spatial extent of fishing operations generally coincide with the expanse of the Palk Bay, these do not correspond with the spatial scope of any of the multiple legal systems (Scholtens and Bavinck 2013). According to Berkes (2010, 236) this “gross misfit of ... scales is one of the fundamental reasons why management often fails”. However, he also argues that seeking an exact fit may often not be very realistic given the highly dynamic and mobile nature of both fish stocks and fishers. Rather, mismatches need to be addressed by having appropriate interactions, both horizontally (at a single level) and vertically (between levels) as only then various overlapping jurisdictions can coordinate efforts (Fanning et al. 2007). In order to enhance the ‘institutional fit’, bridging organizations can be valuable in providing linkages that allow crossing scales and boundaries, and enable the grassroots to influence national level authorities (Nayak 2011).

The bilateral Joint Working Group and fisheries dialogues between the two groups of fishers provide in principle valuable transnational linkages. However, not only have the number of actual transnational meetings been minimal,¹¹ but such

¹¹In the period of 2004 to 2014, 6 meetings between fisher groups and 4 by the Joint Working Group have materialized.

meetings have also been regularly co-opted by the respective State governments. While fishers from Tamil Nadu are able to assert their interests' vis-à-vis their political establishments, North Sri Lankan fishers' relationship with their government is one of distrust, avoidance and fear (Scholtens et al. 2013). These mismatches of scale and the lack of functioning bridging organizations have a limiting effect on the Palk Bay's governability.

Institutional Fragmentation

In a transboundary fishery, multiple state and non-state actors are involved, generating an array of legal arrangements vis-à-vis fishing. These arrangements include international law, bilateral agreements, state law and community institutions, none of which enjoy exclusive authority over the fishing grounds. These legal systems are both fragmented in terms of the scale at which they operate, and the qualitative differences in terms of substance as well as process (Scholtens and Bavinck 2015).

High levels of legal pluralism in the Palk Bay result in fragmented governance. For both India and Sri Lanka, the Palk Bay is primarily a space requiring attention in terms of security and sovereignty, reflected by the deployment of significant navy and coast guard fleets on either side. Fishing communities, however, have their own notions of legitimacy in terms of who can fish, where fishers can fish and when and how they can fish. The repeated arrests of Indian fishers by the Sri Lankan Navy, as well as protests against arrests by fishers, are illustrative of the lack of congruence between the numerous legal systems.

Conflicting Problem Images

Directly related to institutional fragmentation is the absence of a shared discursive image of the problem among stakeholders. Images are mental models of how the world functions or should function and which inform policy (Mahon et al. 2005). The conflicting stakeholders in the Palk Bay strategically pursue different framings of the problem that reflect their particular interests. Indian fishers and the Tamil Nadu Government frame the problem as an over-assertive (Sinhala) Sri Lankan navy that is keen to harass Tamil trawler fishers while they fish in their traditional fishing grounds. Sri Lankan small-scale fishers emphasize the destructive trawler gear and their status as victims post-war. The Sri Lankan government frames the problem as a violation of boundaries and sovereignty and emphasizes the big brother attitude of India and the hypocrisy of the Tamil Nadu government. The Indian government has generally taken a soft stand, recognizing the IMBL as it is, but nevertheless condemning the Sri Lankan Navy.

The news media have an important role in (re)producing or nuancing these entrenched frames of reference. While media on both sides mostly echo the dominant discourses of their audiences, since late 2012 some Indian newspapers have occasionally questioned the actions of Indian trawlers. These conflicting images and entrenched frames thus represent worldviews connected to vested interests, contributing both to the wickedness of the problem (unclear problem definition) and constituting a governability problem by itself.

Power Imbalances

Governance interactions are mediated by power, which has both an enabling and restricting role (Jentoft 2007). Chuenpagdee and Jentoft (2013) suggest that power imbalances can constitute an important governability problem and even bring the entire governing process to a halt. According to Araral (2014), productive cooperation in the regional commons in the presence of asymmetric power relations is extremely difficult.

Current governance in the Palk Bay produces outcomes that consistently marginalize North Sri Lankan small-scale fishers. Fishermen are the weaker party both in an ethnically grounded conflict with Sri Lankan authorities, and in a livelihood-grounded conflict with Indian fishermen. They are technologically marginalized by Indian trawlers and they are ethnically marginalized by an increasingly repressive government. Added to this, the Sri Lankan Tamil political party (TNA) that is supposed to represent Tamil interests maintains an unholy silence over the fisher issue, unwilling to confront Tamil Nadu. The result is that Northern fishers have no powerful ally to turn to in order to form a potentially useful coalition. These asymmetrical power relations lead to a lack of representation of small-scale fishers' interests, hampering the system's capacity and quality of governance.

Issue Linkage

The Palk Bay fisheries conflict is deeply embedded in national and regional politics and has been consistently immersed in the politics of ethnicity. In Tamil Nadu, the fishing conflict is linked to the aggressiveness of the Sinhala Navy. In Sri Lanka, the government highlights the hypocrisy of Tamil Nadu and the TNA. These 'ethnic' framings undermine the fact that the conflict is one of technological mismatch between two sets of fishers.

The recent decision of the Sri Lankan President to release all arrested Indian fishers in Sri Lankan custody, immediately after India abstained from backing a resolution against Sri Lanka at the UN Human Rights Council (Times of India, March 29,

2014) once again highlights how the fisher issue is intertwined in wider geopolitics. The Indian Foreign Secretary confirmed this act of horse-trading by stating that “India’s stand [regarding the UNCHR resolution] would help resolve the problems of fishers from Tamil Nadu...” (The Hindu, March 30, 2014). The fisheries conflict is thus a pawn in larger geopolitical relations between Indian and Sri Lanka. Sri Lankan Northern fishers pay the price for this.

Although politicizing an issue can bring attention to it, connecting the fisheries conflict to highly charged ethnic tensions makes the fishing problem practically unsolvable. In addition, politicization also leads to fragmentation, with its tendency to emphasize difference and connect it to unrelated, but popular issues.

Path Dependency of Indian Trawlers

Fisheries policies tend to have a strong element of path dependency (e.g. Hersoug et al. 2000). The industrialization of Indian fisheries (Bavinck 2001) has a strong degree of irreversibility that contributes to the problem’s wickedness (Chuenpagdee and Jentoft 2013). While at one level, a possible solution is to reduce the size of the trawler fleet, such a decommissioning scheme is difficult to implement for a few reasons. First, past and ongoing capital investments have created an entrenched sector. Second, boat owners are enrolled in complex systems of loans and advances with traders and crewmembers, which provide incentives to continue fishing. Third, alternative livelihood options are poor. Finally, the diesel subsidy provides a subtle incentive to stay in trawling, a sector which enjoys strong political support. Trawler owners have argued consistently that the government is responsible for them trawling and now they are simply not in the position to stop overnight, even though virtually everyone agrees that the sector is overcapitalized. This entrenched nature of the Indian trawler economy provides an additional governability challenge with no easy fix.

Conclusions

This chapter has aimed to understand how a fleet of almost 2,000 trawlers continues to fish in Sri Lankan waters though it violates international law, Tamil Nadu fisheries law, Sri Lankan fisheries law and Indo-Sri Lankan bilateral agreements and despite the presence of naval forces and angry affected Sri Lankan fishers and significant media attention.

The Palk Bay is characterized by an asymmetrical fisheries conflict, with North Sri Lankan fishers struggling to carry out their work in the face of Indian trawlers who encroach deep into Sri Lankan waters appropriating most of the fish resources. The governing system is characterized by its intense fragmentation, with a large variety of actors at different scale levels, each with high stakes, and each embedded

in different legal systems that are conflictual. This has resulted in the problematic functioning of self- and hierarchical modes of governance, and the virtual absence of co-governance. The involvement of state boundaries and state sovereignty in transboundary fisheries provides obvious limitations to self-governance. Governments too have not been successful in dealing with transboundary fishing. While co-governance is in theory crucial for transboundary governance to be more responsive to the situation at hand, building constructive interactions is hampered by a range of factors embedded in the governing system, the system-to-be-governed and their interactions.

The governability analysis has identified six factors that limit the capacity for and quality of transboundary fisheries governance: scalar mismatch, institutional fragmentation, politicization of processes, power imbalances, conflicting problem images and path dependency of trawling. All of these collectively result in the governance process 'getting stuck' and the interests of North Sri Lankan small-scale fishers being undermined.

In order to make sense of marginalization through a governability assessment, I argue that we need to be careful about only looking at system's features like diversity, complexity, dynamics and scale as it makes us blind to *relational* processes of marginalization. This chapter demonstrates that marginality of small-scale fishers is not a given feature of a system, but is continuously (re)produced through interactions between actors. I believe that this has been a neglected issue in interactive governance theory.

I contend that even though this chapter does not provide clear-cut policy proposals, its utility is twofold: (1) it provides an understanding of why fisheries are so difficult to govern in the first place and highlights where governance 'gets stuck'; and (2) it helps in doing a 'reality check' on potential interventions, to assess their feasibility and potential effects. Take, for example a prominent policy proposal that suggests a partial decommissioning scheme for trawlers. The governability challenges would indeed support the relevance of this idea, but a more relational approach would highlight the political sensitivity of doing so. Moreover, solving the trawler problem will not necessarily address Sri Lankan fisher problems given their poor political representation. The practice of doing a careful governability assessment –one that reveals the limitations and opportunities for governance interventions – thus may eventually contribute to improving a system's governability.

This chapter has demonstrated the governability challenges of a transboundary fishery and its impact on a small-scale fishing community. The question is to what extent these insights have larger validity and wider implications beyond this particular context. While there are unique features to this region and fishery, scalar mismatch, power imbalances and (geopolitical) subject linking, and processes of small-scale fishers' marginalization are issues that affect the governability of many transboundary fisheries around the world. In terms of future research, it would be fascinating to see how the governability problems described in this chapter apply to the European and Chinese fleets fishing (with or without permits) in foreign EEZs and, no doubt affecting domestic (small-scale) fisheries.

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