

This article was downloaded by: [Sunil Kumar Agarwal]

On: 08 July 2011, At: 20:44

Publisher: Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



## Maritime Affairs: Journal of the National Maritime Foundation of India

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/rnmf20>

### Legal Aspects of Marine Scientific Research in Exclusive Economic Zones: Implications of the Impeccable Incident

Commander K K Agnihotri<sup>a</sup> & Sunil Kumar Agarwal<sup>a</sup>

<sup>a</sup> National Maritime Foundation (NMF), New Delhi

Available online: 24 Jun 2011

To cite this article: Commander K K Agnihotri & Sunil Kumar Agarwal (2010): Legal Aspects of Marine Scientific Research in Exclusive Economic Zones: Implications of the Impeccable Incident, *Maritime Affairs: Journal of the National Maritime Foundation of India*, 5:2, 135-150

To link to this article: <http://dx.doi.org/10.1080/09733150903441887>

PLEASE SCROLL DOWN FOR ARTICLE

Full terms and conditions of use: <http://www.tandfonline.com/page/terms-and-conditions>

This article may be used for research, teaching and private study purposes. Any substantial or systematic reproduction, re-distribution, re-selling, loan, sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The accuracy of any instructions, formulae and drug doses should be independently verified with primary sources. The publisher shall not be liable for any loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.



# Legal Aspects of Marine Scientific Research in Exclusive Economic Zones: Implications of the *Impeccable* Incident

Commander KK Agnihotri\* and Sunil Kumar Agarwal

*The recent incident involving a United States ship (USS) Impeccable in the South China Sea has led to considerable debate over the jurisdiction of a coastal state to regulate marine scientific research (MSR) in its exclusive economic zone. This article examines the legal framework for MSR as embodied in the United Nations Convention on the Law of the Sea and interprets its provisions as applicable in the Impeccable 'incident' on the basis of the Vienna Convention on the Law of Treaties. This incident may set a wrong precedent for interpreting other international treaties on similar lines, the implications of which will be detrimental to international cooperation, as it can escalate tensions among the concerned countries. Hence, the matter may be taken up as an agenda item in the next Meeting of State Parties of UNCLOS (generally held in May-June every year) to clarify aspects related to maritime research and build a consensus on the issue.*

## I. Introduction

On March 8, 2009 the passage of the United States Navy (USN) surveillance ship *Impeccable*, which was conducting undersea passive sonar operations and acoustic data

---

\*Commander Kamlesh Kumar Agnihotri is an Indian Naval Officer and a Research Fellow in the China Cell at the National Maritime Foundation (NMF), New Delhi. The views expressed are solely those of the authors and do not reflect the official policy or position of the Indian Navy or NMF.

gathering in South China Sea, was impeded by some Chinese vessels. It has been alleged that Chinese trawlers manoeuvred close to the ship thereby impeding its movement. When *Impeccable* tried to move away, two Chinese trawlers stopped directly in front of the ship, forcing it to resort to an emergency stop to avoid a collision.<sup>1</sup>

This incident, which occurred about 75 miles South of Hainan Island,<sup>2</sup> was said to be the culmination of a string of incidents involving the *Impeccable* and Chinese vessels over the previous four days. Earlier, a Chinese frigate had crossed its bows and a Chinese Y-12 airborne early warning (AEW) aircraft had conducted 11 air passes over the ship.

This incident reveals the growing unease between China and the US in their bilateral maritime relations. Shrewdly, both countries tried to justify their actions in the garb of the United Nations Convention on the Law of the Sea (UNCLOS) provisions. Both the US and China have differing perspectives in respect of its provisions pertaining to marine scientific research (MSR) as embodied in the 1982 UNCLOS. Once again, the unilateral interpretation of the incident put forth by each party has brought to fore the contentious issue of rights of a coastal state to regulate MSR in its exclusive economic zone (EEZ). The issue of MSR remains contentious because of different interpretations on the rights of the maritime states vis-à-vis the coastal states in the maritime zones. Hence, the UNCLOS is a useful instrument to scrutinise the *Impeccable* 'incident' from an international law perspective.

In general terms, the expression MSR is most often used to describe activities to expand scientific knowledge of the marine environment and its processes, and includes, *inter alia*, oceanography, marine biology, marine chemistry, scientific ocean drilling and coring, and geological and geophysical surveying.<sup>3</sup> The legal basis for conducting MSR is UNCLOS 1982, which establishes a comprehensive legal order for the world's oceans and seas, setting forth the rights and duties of states in various ocean zones and covering all ocean-related activities, including MSR.<sup>4</sup> It also provides the legal basis for jurisdiction of coastal states over MSR.<sup>5</sup> However, a comprehensive regulatory framework for the operationalisation of the MSR regime is yet to be agreed to.

Hence, it is imperative to examine the scope and extent of MSR under UNCLOS for addressing the concerns of maritime and coastal states over the conduct of military activities and the practice of MSR in EEZs. This article gives an overview and analysis of the legal aspects of MSR in order to contribute to the ongoing debate and to identify issues that need to be addressed in the operationalisation of the MSR regime.

This article has been structured into five parts. Part I introduces the issues arising out of the *Impeccable* incident. Part II examines the legal framework for MSR, which is necessary for analysing this incident. Part III provides different perspectives of the incident and the contentious interpretations of the ambiguous provisions of the UNCLOS. Part IV seeks to provide the legal interpretation of the incident in light of UNCLOS' provisions pertaining to MSR while Part V concludes the article.

## II. Legal Framework for MSR

### UNCLOS 1982

UNCLOS 1982 establishes a comprehensive legal order for the world's oceans and seas, setting forth the rights and duties of states in various ocean zones,<sup>6</sup> as well as the establishment of high seas (open to all states) and covering all ocean-related activities.<sup>7</sup>

### Ocean Zones

Under the convention, a coastal state is entitled to a territorial sea, contiguous zone, EEZ and continental shelf, over which it has specific rights and jurisdiction. The convention also specifies certain duties and obligations of the coastal state in each of these zones, subject to certain limited rights of other states. It is, therefore, obvious that the claims and exercise of rights by states pertaining to oceans and specified zones has to be in accordance with UNCLOS<sup>8</sup> and this should be reflected in their national legislation as well.

With certain exceptions related to navigation, a coastal state exercises sovereignty over its territorial sea, including its resources, both living and non-living. Coastal states can establish a contiguous zone not extending beyond 24 nautical miles (nm) from the baselines from which the territorial sea is measured.<sup>9</sup>

Beyond the territorial seas, states may establish an EEZ<sup>10</sup> extending not more than 200 nm from the baselines from which the breadth of the territorial sea is measured.<sup>11</sup> The EEZ is subject to a specific legal regime, according to which the coastal state has sovereign rights for the purpose of exploring and exploiting, as well as conserving and managing the natural resources (whether living or non-living) of the superjacent waters, as well as of the seabed and subsoil. In addition, a coastal state has the jurisdiction with regard to the establishment and use of artificial islands, installations and structures, MSR and protection and preservation of the marine environment.<sup>12</sup>

## MSR

UNCLOS 1982 also provides the legal basis for MSR, including jurisdiction of coastal states to regulate MSR in their EEZs. Part XIII of the UNCLOS contains provisions (Articles 238 to 265) pertaining to MSR and is designed with a view to promote international cooperation. The provisions represent a significant attempt to advance the gathering and interpretation of information for peaceful purposes. However, controversies in interpreting these provisions cause severe hindrance in universal acceptance of the law of the sea in relation to MSR. The *Impeccable* incident underscores the problems encountered in the implementation of the MSR regime established by the UNCLOS as well as the lack of consensus among states over it. In this context, this section examines the legal framework for MSR as embodied in the UNCLOS.

### The Definition of MSR

The concept of MSR, in its ordinary natural meaning, can be interpreted as any form of scientific investigation, fundamental or applied, concerned with the marine environment. However, the UNCLOS does not actually define the term 'marine scientific research'. Such a definition would seem necessarily to encompass marine resource exploration or exploitation undertaken for the purpose of preservation of the marine environment. The safe and economic use of oceans and the preservation of their stocks and resources are dependent on accurate, appropriate and sufficient scientific research. Knowledge gained from the oceans has implications for science and medicine as also for applied sciences and technology. The importance of MSR should not be underestimated. It is relied on primarily for exploration and control over stocks and mineral resources and so affects the economic development of states. However, it appears that in recent times, MSR is being used as a pretext to conduct military surveys in the EEZ of a coastal state. The *Impeccable* incident underscores the contentious claims of states concerning the ambit of the MSR. It is to be noted that both the US and China chose to justify their respective behaviour in the incident citing the provisions of UNCLOS.<sup>13</sup> The anomalies in their contentious claims reflect the scope for numerous interpretations of the provisions pertaining to MSR due to the lack of its definition. Hence, there is an acute necessity for a comprehensive mechanism to regulate the provisions of MSR to the satisfaction of all state parties.

### *Peaceful Purposes*

The concept of peaceful purposes is the cornerstone of UNCLOS 1982, in general and MSR, in particular. Nonetheless, this key principle has never been comprehensively defined. It is found in Articles 240 and 246(3), but a comprehensive formula was never settled upon due to the reluctance of the maritime countries. The concept was introduced in relation to MSR to bargain with the coastal states and is aimed at controlling military manoeuvres in EEZs. Its scope was, however, never determined due to the view of various maritime countries, which insisted that peaceful military activities were not prohibited under international law. The interpretation of 'any peaceful purposes' in UNCLOS has led to inconsistencies in its interpretation. Further, the ambit of military activities has generated considerable debate due to the interpretation of Article 58 and the differing views pertaining to the development of state practice with respect to residual rights in EEZs. Activities, such as military surveys and military exercises, have proved particularly contentious. Some argue that coastal states have no jurisdiction to restrict any military activity that does not amount to a 'threat or use of force' in accordance with the UN Charter under Article 2(4).

Having gained a legal perspective with regard to the scope and limitations of MSR provisions as embodied in UNCLOS, the following section provides an overview of the *Impeccable* incident and various interpretations that highlighted the ambiguities inherent in these provisions.

## III. Differing Perspectives of the *Impeccable* Incident

### Chinese Perspective

#### Chinese Interpretation of the UNCLOS

China's position on the MSR regime under the UNCLOS is that the use of its EEZ for non-peaceful purposes without its consent is illegal. This includes foreign military and electronic intelligence gathering activities as well as MSR for non-peaceful purposes. China maintains that the obligation of 'due regard' by a foreign state for a coastal state's rights is superior to that of the coastal state for the rights of a foreign state. The same principle also applies when there are situational encounters between foreign and domestic aircraft and vessels in the EEZ. However, China does recognise that there are no uniform regulations for such interactions. Though the issue does not have any

simplistic or ready solutions, due to differences in interpretation of international law and other complexities, a uniform rule for governing the EEZ needs to be established so as to avoid situations that may lead to a conflict.

### **Chinese Law**

China sought to interpret the UNCLOS and its provisions to stretch its maritime control area by adopting in 1992 its own Law on the Territorial Seas and Contiguous Zones. This law was formulated to provide a legal basis for China to exercise sovereignty over its territorial seas and jurisdiction over adjacent zones and safeguard its marine rights and interests.<sup>14</sup> It further enacted the Exclusive Economic Zone and Continental Shelf Act 1998, with the objective of safeguarding its sovereign rights and jurisdiction over the EEZ and continental shelf, and to protect its maritime rights and interests.<sup>15</sup>

### **Chinese Aspirations**

China aspires to grow into a dominant player in the maritime domain in furtherance of its aim to become a global superpower. It, therefore, seeks to vehemently extend its maritime control domain as far away from its shores as possible as a first step. As a part of this strategy, China has tried to lay maritime claims over a large area along its maritime periphery, quoting historical antecedents. To buttress its claims, China has sought to quote the voyages of Admiral Zheng He (Ming Dynasty 1405-1433), who plied the South China Sea and the Indian Ocean.<sup>16</sup> China has also occasionally resorted to force in furtherance of its aim. It forcibly wrested control of Paracel Islands from Vietnam in 1974 and has been claiming all the Spratly Islands as its sovereign territory. The Chinese claims to these islands have been accorded legal sanction by promulgation of the Law of the People's Republic of China on the Territorial Seas and Contiguous Zones, 1992.<sup>17</sup>

### **Chinese Policy: Leapfrogging**

During the past few decades, China has been engaged in the process of leapfrogging transformation of its national strength in order to carve out a new place for itself in the international system, as it perceives that it will eventually seek international superpower status. Considerable doctrinal changes have also come about in the stance of Chinese maritime mindset, consequent to their newly found strength and capabilities

in all spheres, including their defence forces. The People's Liberation Army (PLA) Navy, on its part, has expanded its scope of operations. Military Operations Other Than War are now an important form of applying military force for PLA Navy.<sup>18</sup> The increased confidence level of the PLA Navy while interacting with US warships at sea in the Pacific Ocean, as also the stronger stand taken by them vis-à-vis passage and operation of the US and other countries' warships in South and East China seas, is clearly indicative of their changed mindset.<sup>19</sup> The *Impeccable* incident underscores this growing strength of the Chinese Comprehensive National Power, duly backed by its military power, in general and naval capabilities, in particular.

China's security-related policies towards the US, whose domination it will have to challenge eventually, have been characterised as a two-sided effort focussing on 'co-option' on the one hand and 'prevention' on the other. The efforts towards co-option focus essentially on developing and maintaining cordial relations with the US while the efforts at prevention seek to hinder any US initiatives that may be directed towards frustrating the expansion of Chinese capability, status and influence.<sup>20</sup> An assertive China is, thus, being viewed with growing concern by the US. This has forced the US to look towards formulating a policy to contain China in order to ensure its global superiority. Sino-US relations have, thus, become tenuous, though both countries have been trying their best to maintain a façade of normalcy.

### **Chinese Claims in the South China Sea: Recent Events**

The long outstanding South China Sea disputes continue to keep the maritime security situation in that region quite fragile. All countries bordering directly on this sea, i.e. China, Philippines, Taiwan, Vietnam, Malaysia and Brunei, have claimed some or all of the tiny Spratly islets and some or all of the maritime space and its resources. Some also lay their claims on the Paracel Islands. China is a major power and a key player in the area. Thus, it seeks to arrive at a solution on terms that are most favourable to its own interests.

The Philippines Congress passed a bill, the 2009 Baseline Bill, just a few days before the *Impeccable* incident, extending the archipelago's territory to include Huangyan Island and part of Nansha (Spratly group) Islands in the South China Sea, saying these were part of its EEZ. The Chinese Foreign Ministry immediately lodged a stern protest denouncing the Philippines' claim as 'illegal and invalid'. In order to reinforce its sovereign claim, one of China's largest fisheries patrol ships, *Yuzheng 311* was dispatched

to patrol around the disputed Paracel Islands in April 2009. China also imposed a general fishing ban in the South China Sea with effect from May 16, 2009 with the stated aim of protecting the sustainability of marine life in that area and sent eight patrol ships to monitor about 128,000 sq. km of the sea.<sup>21</sup> The obvious connotation was to reinforce its indisputable sovereignty over the South China Sea islands, including Xisha (Paracel) and Nansha (Spratly) islands, and their adjacent waters as its own territorial waters.<sup>22</sup>

On May 7, 2009, in a bid to publicise the issue internationally, the Chinese government officially reiterated its indisputable sovereignty over the islands in the South China Sea and the adjacent waters in a communication to the UN Secretary-General.<sup>23</sup> The communication stated that China “enjoyed sovereign rights and jurisdiction over the islands in the South China Sea and the adjacent waters, as well as the sea bed and subsoil thereof”. The Chinese government also attached a map<sup>24</sup> to substantiate its claim, an unaltered copy of which is shown in Fig. 1.

It is in the backdrop of underlying tensions resulting from ongoing tussles in the recent past over conflicting claims of maritime jurisdiction in the South China Sea that the *Impeccable* incident took place, culminating into a ‘face-off’ of sorts between China and the US, at a location approximately half way between China’s Hainan Island and the Paracels.

### The US Perspective

The *Impeccable* incident has resulted in a more contentious interpretation of the issue by researchers and legal scholars. Some reviews of this incident have tried to justify the US action while undermining the Chinese contention. It has been argued that the significance of Chinese actions lies in its claim that international law precludes the kind of peaceful, stabilising military activities that the USS *Impeccable* was pursuing. They, therefore, place at stake the premise whether international law is interpreted in such a way so as to promote the peaceful military uses of the seas or, by contrast, whether law becomes a means to promote the kind of anti-access, national-security focussed interpretation that China was attempting to impose.<sup>25</sup>

The US viewpoint avers that intelligence gathering and other military activities are clearly lawful under the current international law, as UNCLOS specifies that the jurisdictional authorities of coastal states include MSR, but limits this jurisdiction, since it does not define the terms ‘marine scientific research’ and ‘hydrographic surveys’.

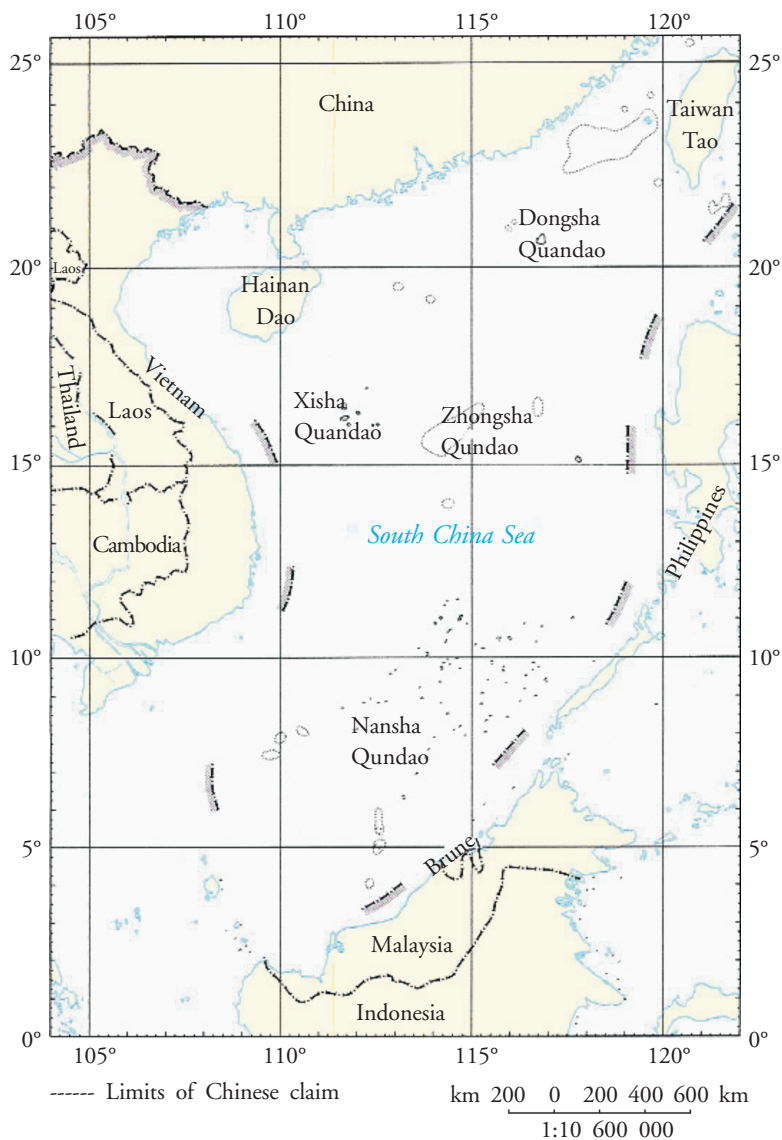


Fig. 1. Map given by the Chinese government to the UN on May 7, 2009.

The US claims that international law fundamentally works by negation. Hence, as long as an international law authority does not specifically prohibit an act, then it is allowed.<sup>26</sup>

The US contends that surveys are one of the traditional high seas freedoms and allows vessels to study the maritime environment. As the convention protects the right

of all states to undertake other high seas freedoms that have not been specifically allocated to the coastal state, hydrographic surveys may not be regulated by laws of a coastal state. Further, intelligence gathering in the EEZ of another state is one of the pre-existing high seas freedoms.<sup>27</sup>

The argument that intelligence gathering violates the 'peaceful purposes' clause of the UNCLOS is refuted by the counter-argument that this clause was never intended to impose higher requirements for state behaviour other than that laid down in the UN Charter.

It seems the hidden agenda behind the US approach towards MSR is its desire to ensure creation of conditions under which its maritime forces can operate freely at sea within their areas of interest without being impeded from freedom of manoeuvre and access. Towards this end, the US strategy envisages development of capabilities for exercising effective sea control, either unilaterally or jointly with other friendly countries.<sup>28</sup> The essence of the US approach towards the UNCLOS is underpinned by its 'maritime strategic concept', which seeks to continuously posture credible combat power in the Western Pacific with a view to deter and dissuade potential adversaries and peer competitors.<sup>29</sup> It does not require a great sense of imagination to guess that the US refers to China as an adversary and peer competitor.

Another viewpoint also focusses on the incorrect stand taken by China vis-à-vis the UNCLOS, stating that "UNCLOS only authorises economic sovereign rights instead of sovereignty to the coastal state". Thus, a coastal state cannot interfere with non-economic activities of other nations' ships, since according to UNCLOS, an EEZ is to be considered as high sea for all ships indulging in non-economic activities. Therefore, the emphasis by China on the UNCLOS in accusing the US ship was not an appropriate way to give legitimacy to the blocking activities of its ships, regardless of the provisions laid down in domestic Chinese regulations.<sup>30</sup>

Yet another interpretation of the *Impeccable* incident tries to support US actions by insinuating that the difference in perception about the rights and duties of various parties in an EEZ is the root cause, as an EEZ is a relatively new concept, the UNCLOS having been adopted only in 1982. Another argument advanced in support of the US is that it was a part of the 'high seas' freedoms of navigation specifically extended to an EEZ and the activity was not to be considered as MSR under the UNCLOS.<sup>31</sup>

However, these arguments amount to highly overreaching interpretations of the UNCLOS. Further, they intend to mould the legal language of the UNCLOS to suit

a particular view, but fail to qualify as a considered interpretation. It is pertinent to mention that provisions of international agreements do not lose their validity simply on the grounds of being part of a new convention. Moreover, international agreements are adopted after years of negotiations between sovereign states and draw their validity from the principle of *pacta sunt servanda*.<sup>32</sup>

### **A Similar Episode in India's EEZ**

An episode similar to the *Impeccable* incident was also reported to have occurred in India's EEZ in 2002-03, wherein a US naval survey ship, USS *Bowditch* was involved in a military survey in the Bay of Bengal, off the Visakhapatnam coast, consistently for many months. It was alleged to be carrying out ocean floor and seabed mapping, gathering data on underwater topography and acoustic signal range limitations, assessing temperature, salinity and sound velocity profiles inside the Indian EEZ.<sup>33</sup>

The report purportedly quoted an Indian Navy official note,<sup>34</sup> which stated that “the US ship clearly violated Indian and International law in having exceeded its rights in Indian EEZ, as laid down in the UNCLOS”, and sought to include ‘military survey and research’ activities conducted by the US ship within the purview of MSR under Section 7(4) (C) of Maritime Zones of India Act, 1976 thereby needing consent from India. The note also asserted the rights of the coastal state (India, in this case) to not allow any research activity to commence and continue without its express consent as laid out in Article 264 of the UNCLOS, pending settlement of dispute under Sections 2 and 3 of Part XV of the UNCLOS. The note also recommended that “if the issue was not resolved through diplomatic discussions/channels, the matter could be taken up at the appropriate forum in accordance with Article 2, paragraph 3 of the Charter of the UN and the Government of India should seek a permanent solution by invoking the provisions indicated in Article 33, paragraph 1 of the UN Charter”.

The above report stirred a political debate and a question titled ‘Spying by USS *Bowditch* Inside India's EEZ’ was raised by the law makers on August 25, 2004 in the *Rajya Sabha* (Upper House) of the Indian Parliament.<sup>35</sup> However, the Indian government denied the occurrence of any such incident in reply to the question.

Notwithstanding the official denial, it is an established fact that US military research vessels often carry out these activities in the EEZs of various coastal states. In fact, USS *Bowditch* had been escorted out of Chinese EEZ in March 2001, when it was found to be engaging in underwater survey activities in the South China Sea.

## IV. Interpreting the *Impeccable* Incident

### Settled Principle of Interpretation

Under Part XIII of the UNCLOS, all states have the right to conduct MSR, subject to rights and duties of other states.<sup>36</sup> It is a settled principle of interpretation of statutes that a statute must be read as a whole.<sup>37</sup> Therefore, the provisions pertaining to MSR as embodied in UNCLOS 1982 must be read as a whole and applied in their entirety. States should not be encouraged to pick and choose areas and parts which they find convenient to justify their contentious claims in the maritime domain.

Disputes concerning interpretation of the UNCLOS are to be settled by peaceful means under the procedures entailing non-binding decisions<sup>38</sup> and third-party settlement procedures entailing binding decisions.<sup>39</sup>

### Uniqueness of the *Impeccable* Incident

The uniqueness underlying the *Impeccable* incident is that China is a party to the UNCLOS, whereas the US is not. This implies that the dispute between China and the US concerning the interpretation of the scope of MSR cannot be resolved under the dispute-settlement mechanism as provided in UNCLOS 1982. This undermines the very *locus standi* of the UNCLOS as a legal regime to comprehensively deal with the infringement of MSR stipulations between the US, on one hand and the other coastal states that are signatories to the UNCLOS, on the other.

### Need for a *Sui Generis* MSR Regime

It is apparent from the divergent views about the scope of the MSR regime as embodied in the UNCLOS that the bone of contention is the 'definition' of MSR. The definition of a contentious issue is the firm starting point for initiating a debate on its scope. The UNCLOS does not elaborate on the definition of MSR. This situation, in turn, provides ample opportunity to disputant states, i.e. China and the US, in the instant case, to put forth their own perspective on the rights and obligations of state parties to the UNCLOS, underpinned with their own interests. Further, it also tends to transform a legal matter into a political issue between disputant states. This may set a trend and become precedence for other nation-states to undermine the authority of the UNCLOS as a comprehensive regime to deal with all issues pertaining to ocean

governance. The *Impeccable* incident, thus, underscores the need to negotiate a *sui generis* MSR regime in consonance with the spirit of the UNCLOS for regulating scientific research in the EEZ of a coastal state.

## V. Conclusion

The present analysis of the *Impeccable* incident highlights the extent of US-China conflict of interests in the South China Sea due to the ambiguities inherent in UNCLOS 1982. The UNCLOS establishes a comprehensive legal order for the world's oceans and seas, embodying the rights and duties of states in various ocean zones and covers all ocean-related activities, including MSR. It exemplifies the codification of the maritime practices of the states. The essence of this legal order is that all rights claimed by states must be subject to the fulfilment of their concomitant obligations as provided in the UNCLOS. It embodies the rights and obligations of states over the maritime domain.

The UNCLOS, *inter alia*, establishes jurisdiction, rights and obligations of states with respect to MSR. It is apparent that the MSR regime as embodied in the UNCLOS is susceptible to various interpretations by states to suit their interests and concerns. The ambiguities in certain key areas, viz. the definition and scope of MSR in the EEZ of a coastal state, provide ample latitude to states to indulge in infringement and brinkmanship, as was evidenced in the *Impeccable* incident.

The *Impeccable* incident has the potential to disturb the delicate balance of rights and obligations of coastal states and maritime states as embedded in the UNCLOS. Moreover, it has far-reaching implications for inter-state cooperation for addressing various international concerns in other areas as well, including MSR. It is, thus, apparent that there is a need to review the MSR regime in light of the new developments. The advent and use of high technology in MSR, which was not foreseen when the UNCLOS came into effect, presents a challenge in designing a comprehensive regulatory regime, which may be relevant and acceptable in the current day and age. While science and technology evolve very quickly, legal regimes tend to lag behind due to the complexities inherent in inter-governmental negotiation processes, which require building a consensus. This gap is particularly evident in case of MSR in the EEZ of a coastal state.

Finally, it may be concluded that the *Impeccable* incident underscores the problems encountered in the implementation of the MSR regime established by the UNCLOS as well as the lack of consensus among states over the MSR regime in practice. Indeed, it creates an opportunity for growth of a new irritant in international relations in the

maritime domain. Therefore, there is a need to clarify the ambiguities in the legal regime for MSR with the aim of avoiding situations like the *Impeccable* incident. Hence, it is suggested that the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) should clarify the contentious issues related to MSR. It is also suggested that matter may be taken up by the Meeting of State Parties to the UNCLOS for building a consensus on a comprehensive regulatory regime for the MSR.

## Notes

1. For an overview of the *Impeccable* incident, see Kamlesh Kumar Agnihotri, "Chinese Snort in "The Year of the Ox: Is US Worried?""', April 23, 2009, pp. 1, 6. [www.maritimeindia.org/pdfs/Commentry23Apr09.pdf](http://www.maritimeindia.org/pdfs/Commentry23Apr09.pdf)
2. There is considerable ambiguity about the exact position of the incident, as the coordinates of the ship could not be ascertained despite best efforts. But it was definitely not in the high seas, being only 75 nm from the recognised Chinese territory of Hainan.
3. See J.A. Roach, "Marine Scientific Research and the New Law of the Sea", *Ocean Development and International Law*, 27 (1996), pp. 59-72.
4. See UN, United Nations Convention on the Law of the Sea, United Nations Treaty Series (UNTS), 1833, p. 3; adopted in Montego Bay, December 10, 1982; Entry into force: November 16, 1994; Status: 158 state parties.
5. Since the Convention does not offer solutions to all traditional and future problems of the seas and oceans, it established the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) to support this process.
6. These zones have to be measured from baselines, which are normally the tidal low water mark along the coast (normal baselines) or archipelagic baselines defined by reference to lists of geographical coordinates of points. Waters on the landward side of the baseline are internal waters of the State or, in the case of archipelagic baselines, archipelagic waters.
7. See notes [4], [5].
8. The UNCLOS, however, confers rights and obligations on the states which are parties to the Convention. Under international law, a state becomes a party to the Convention on its ratification. See UN Convention on Law of the Sea.
9. The rights of a coastal state over the contiguous zone extend to (a) prevention of infringement of customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and (b) punishment of infringement of the above laws and regulations committed within its territory or territorial sea. See Article 33 of the Convention.

10. Briefly, under the UNCLOS, all coastal states are given an EEZ of 200 nm from baselines along the shore, except where a zone of that width would infringe on the EEZ of another State. Article 76 outlines:
  - how a coastal state may stake claim beyond the EEZ;
  - puts upper limits on how far a claim can extend;
  - establishes the Commission on the Limits of the Continental Shelf (CLCS) to review claims prepared by a coastal state.
11. Article 56 of the Convention.
12. *Ibid.*
13. Though China has ratified the UNCLOS, 1982, the US is not a party to it. Notwithstanding this, the US President issued an ‘Oceans Policy Statement’ declaring that “the US will recognise the rights of other states in waters off their coasts, as reflected in the Convention” and that “the US will exercise and assert its navigation and overflight rights and freedoms on a world-wide basis in a manner that is consistent with the balance of interest reflected in the Convention”. See *Weekly Compilation of Presidential Documents*, 19(10), pp. 383-385, March 4, 1983; Rene-Jean Dupuy and Daniel Vignes (Eds.), *Handbook on the New Law of the Sea* (Dordrecht: Martinus Nijhoff Publishers, 1991), p. 244.
14. Law on Territorial Sea, the Preamble.
15. EEZ Act, Article 1.
16. However, this entire episode was exceedingly brief and, thus, cannot in any way provide the basis for Chinese maritime claims. See Michael D. Swaine and Ashley J. Tellis, *Interpreting China’s Grand Strategy: Past, Present, and Future* (Washington, D.C., RAND, 2000), p. 53.
17. Valencia, Mark J. et al., “Analyzing the South China Sea Claims under International Law,” *Sharing the Resources of the South China Sea* (The Hague: Kluwer Law International, 1997), Chapter III, pp. 17-75.
18. White Paper on ‘China’s National Defense in 2008’, [http://www.china.org.cn/government/central\\_government/2009-01/20/content\\_17155577\\_4.htm](http://www.china.org.cn/government/central_government/2009-01/20/content_17155577_4.htm) (accessed May 21, 2009).
19. See Kamlesh Kumar Agnihotri, note [1].
20. Michael D. Swaine and Ashley J. Tellis, *Interpreting China’s Grand Strategy: Past, Present, and Future* (Washington, D.C., RAND, 2000), p. 114.
21. See “South China Sea Fishing Ban ‘Indisputable’.” *China Daily*, June 9, 2009, [http://www.chinadaily.com.cn/china/2009-06/09/content\\_8263930.htm](http://www.chinadaily.com.cn/china/2009-06/09/content_8263930.htm) (accessed July 3, 2009).
22. *Ibid.*
23. The Chinese communication (CML/18/2009 of May 7, 2009) was in response to Vietnamese submission dated May 7, 2009 to the UN Commission on the Limits of the Continental Shelf, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf) (accessed June 19, 2009).

24. *Ibid.*
25. Peter Dutton and John Garofano, "China Undermines Maritime Laws", *Far Eastern Economic Review*, 172(3) (April 2009): 44-47.
26. *Ibid.*
27. *Ibid.*
28. US Navy, *A Cooperative Strategy for 21<sup>st</sup> Century Seapower*, 2007, p. 11, para. 3.
29. *Ibid.*, pp. 6-10.
30. Chengkun Ma, *PLA News Analysis*, No. 17, March 2009.
31. Sam Bateman, "Clashes at Sea: When Chinese Vessels Harass US Ships," *RSIS Commentaries*, No. 27, March 13, 2009.
32. It implies that international agreements are to be followed in good faith. See Vienna Convention on the Law of Treaties, United Nations Treaty Series (UNTS), Vol. 1155, 1969, p. 331. Adopted on May 23, 1969; Entry into force: January 27, 1980; Status: 109 state parties.
33. "Port Hole: An American Warship is 'Caught' Spying in the Indian Waters under the Pretext of Research," *Outlook India*, June 7, 2004, <http://www.outlookindia.com/fullprint.asp?choice=1andfodname=20040607andfname=Navy+%28F%29andsid=1> (accessed June 23, 2009).
34. See [http://www.outlookindia.com/images/navy\\_letter\\_20040607.jpg](http://www.outlookindia.com/images/navy_letter_20040607.jpg) (accessed June 23, 2009).
35. The text of the question was: "Whether Naval Headquarters have sent a detailed note to the Ministry of Defence raising serious objections about an American warship USS *Bowditch* spying consistently for several months in 2002-03 and carrying out unauthorised exercises off the Visakhapatnam coast well inside India's EEZ", to which the Indian Defence Minister replied in the negative. See Rajya Sabha, "Spying by USS *Bowditch* inside India's EEZ," List of Questions for Written Answers, Question no. 2245, p. 500, <http://rajyasabha.gov.in/dailyques/202/uq25082004.PDF> (accessed June 23, 2009).
36. The UNCLOS, Article 238.
37. UN, "Vienna Convention on the Law of Treaties," *United Nations Treaty Series*, Vol. 1155, 1969, p. 331 (adopted May 23, 1969; entry into force January 27, 1980), Article 31, General rule of interpretation.
38. The UNCLOS, Part XV, Annex. V.
39. The UNCLOS, Part XV, Annex. VI, VII, VIII.