India and the Law of the Seas

Introduction

In India, overlapping responsibilities and jurisdiction in the maritime sector, coupled with the absence of a central coordinating body have inadvertently led to the exploitation of the provisions governing the law of the sea. Activities in the maritime zones of India are managed by various governmental ministries, such as the Ministry of Shipping, Road Transport and Highways, External Affairs, Defence, Earth Sciences, Law and Justice, etc., with differing rights, interests, mandates and responsibilities. This has led the drafting and enactment of very general worded statutes in the maritime sector, which has subsequently led to frail enforcement provisions which are a bit of a stumbling block.

This bulletin provides an overview on the statutes defining the rights and responsibilities of India while using the surrounding oceans for their natural resources, with special emphasis on the lacunae in the respective statutory provisions towards protecting the maritime zones of India.

1. Legislative enactments: an overview

1.1 The Territorial Waters, Continental Shelf, Exclusive Economic Zones and Maritime Zones Act, 1976 ("the Act"): For years India’s territorial waters\(^1\) and continental shelf\(^2\) were governed by proclamations issued by the President of India. In 1976, consequent upon the Third United Nations Convention on the Law of the Sea ("UNCLOS"), held at Geneva, the Act was enacted in India. Hereunder, land, minerals and other resources, underlying the ocean, within the territorial waters, the continental shelf or the Exclusive Economic Zone\(^3\) ("EEZ") are vested with the Union of India. The Act categorically prescribes the limits of the territorial waters,\(^4\) continental shelf,\(^5\) EEZ\(^6\) and other maritime zones of India.\(^7\) It also provides the legal framework specifying the nature, scope and extent of India’s rights, jurisdiction and control of various maritime zones; the maritime boundaries between India and its neighboring countries; and the exploitation, exploration, conservation and management of natural resources within the maritime zones. Further, the Act proposed to undertake separate legislation in future, as and when required, to deal with the regulations

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\(^1\) That portion of sea, which is adjacent to the shores of a country

\(^2\) The stretch of the seabed adjacent to the shores of a particular country to which it belongs

\(^3\) The sea zone over which a country has special rights with respect to exploration and use of marine resources. EEZ may not necessarily be equivalent to the continental shelf

\(^4\) The territorial waters of India extend up to 12 nautical miles from the baseline on the coast of India and include any gulf, harbor, creek or tidal river

\(^5\) At present, India’s continental shelf extends to 200 nautical miles from the baseline. However, an application by India before the UN Commission on the Limits of the Continental Shelf under Article 76 of the UNCLOS to extend the continental shelf to 350 nautical miles is pending

\(^6\) India’s EEZ extends to 200 nautical miles from the baseline

\(^7\) Sections 3, 5, 6 and 7 of the Act
for exploration and exploitation of particular resources in which India has jurisdiction. Thus, the Act by its very nature is an umbrella legislation on maritime issues.

A close scrutiny of the Act, also reveals that the offences mentioned therein are generalized under section 11 of the Act, which states that “whoever contravenes any provisions of this Act or of any notification there under shall (without prejudice to other action which may be taken against such person under any other provision of this or of any other enactment) be punishable with imprisonment which may extend to three years or with fine, or with both.” Acting as a deterrent is the punishment awarded to persons found guilty of contravening the provisions of the Act, which is imprisonment up to three years or unlimited fine or both. However, the Act necessitates the requirement of previous sanction of Central Government (“Government”) before instituting prosecution against such persons without providing a time-line within which the approval is granted or rejected, which has led the maritime enforcement agencies and the police to book the apprehended vessels under various provisions of the Indian Penal Code, the Arms Act, Customs Act, etc.

Further, section 15 of the Act empowers the Government to make rules by notification to carry out the purposes of the Act in general and for delegating specific power for inter-alia regulating the conduct of a person in the territorial waters, contiguous zone, EEZ or any other maritime zone of India. It is pertinent to note that till date no rules have been framed by the Government under the Act.

Accordingly, following are the suggestions towards addressing the enforcement lacunae in the Act: (i) Amend section 14 so as to provide the Indian navy and Indian coast guard the necessary legislative support by way of authorization to stop, board, search and seize vessels and bring them before a competent court for detention and prosecution of offenders; (ii) Extend these powers to the coastal police force for enforcing the Act to have effective coastal surveillance in the near shore waters; and (iii) Provide more clarity and understanding of the types of offences that affect the security of India, especially with respect to the use of territorial waters by foreign ships and the EEZ. Carrying out these and further changes shall form the backbone to effective implementation of maritime security in India. Points (i) and (ii) above, will also help curb terrorism in the country as the Indian navy and coast guard, along with the coastal police force will then have the power to search and seize vessels, without prior approval of the Government. The Mumbai terror attack on November 26, 2008, wherein the terrorists made their way transiting through the coastal route, is just an indicator of the enormity of threats that needs to be dealt with.

1.2 The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (“the MZI Act”): Subsequent to the enactment of the Act, the MZI Act was enacted to curb poaching activities by foreign fishing vessels in the Indian EEZ. Under the MZI Act, the EEZ was protected from exploitation of living resources by Indians and/or foreign nationals aboard a foreign vessel, which did not hold a valid license/permit issued under the MZI Act. Further, the MZI Act awarded imprisonment, heavy fines and confiscation of the foreign fishing vessels convicted of offences of illegal fishing. Thus, in many ways the MZI Act complements the Act. Furthermore, the MZI Act specifically empowered authorized

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8 Section 14 of the Act
Government officials, navy and police to implement and enforce the provisions of the MZI Act and the specific power of apprehension, arrest and seizure are vested with the local police officials in the coastal states. Moreover, unlike the Act, the MZI Act does not require prior sanction of the Government to initiate prosecutions for the various offences. As opposed to the Act, the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Rules, 1982 were framed by the Government under section 25 of the MZI Act. Thus, the regulatory framework is in place.

While offences related to poaching are dealt with the MZI Act and smuggling under the Customs Act, there are offences such as, unauthorized research activity, acts aimed at collecting information to the prejudice of the security of India, unauthorized operation of a vessel in the offshore development area, etc., which have not been covered under any statute. Also, the operation of deep sea fishing vessels with foreign crew have made our coasts vulnerable to nefarious activities, which further emphasizes the need to make the MZI Act stronger.

**Conclusion**

The relevance and effectiveness of any statute is dependent on how effectively it can be implemented and enforced. Whilst UNCLOS provides ships the freedom of navigation at high seas\(^9\) and the right of innocent passage in territorial waters,\(^{10}\) one needs to examine these issues in some perspective. What comprises an innocent passage and when does a passage no longer remains innocent? How long does it take for an innocent passage of a foreign ship to transform into a non-innocent one? Maritime lawyers and experts would agree that this is impossible to calculate. However, one needs to bear in mind that even though the UNCLOS agreements were put together after serious and prolonged deliberations in a number of contentious issues, yet, ambiguity and scope for interpretation is always wide in such treatise to acquire acceptance of all member countries. Moreover, national security comes ahead of the international treatise and one should be willing to put in stricter norms, balancing them with the international convention, to safeguard ones interests. Furthermore, India needs to start the deliberative process towards putting in place a legal framework to safeguard its continental shelf once it is extended since there is an increasing competition for the ocean’s resources.

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\(^9\) Articles 17-19 of UNCLOS
\(^{10}\) Article 58 of UNCLOS