

Legislative Support in Enforcement – Maritime Infringement

Cdr BK Verma*

The oceans covering 140 million square miles, some 72 per cent of the earth's surface, have been subject to control by nations from time immemorial. The control, though, was through different perspective, including custom, tradition and law, defining the rights of the ships and mariners, who plied the waters as also of the States on the rim of the oceans.¹ In the 17th century, Grotius² recognized the existence of a nation's jurisdiction over the coastal waters that could be effectively controlled from the land which amounted to three NM of the territorial sea as the "cannon shot" rule. US, whilst addressing national security and law enforcement issues in coastal areas, were credited to have created the territorial sea and contiguous zone as early as the late 1700s. Assertion of fisheries and oil/gas exploration rights in the continental shelf saw further clamouring for control in the seas in 1950s. Nations continued to put varying claims and in the race the extent grew to about 200NM for exclusive control over all economic exploration and exploitation of the natural resources. By 1982, the custom of asserting a 12 nm territorial sea, 24 nm contiguous zone, and 200 nm EEZ was codified in the United Nations Convention on the Law of the Sea (UNCLOS).³

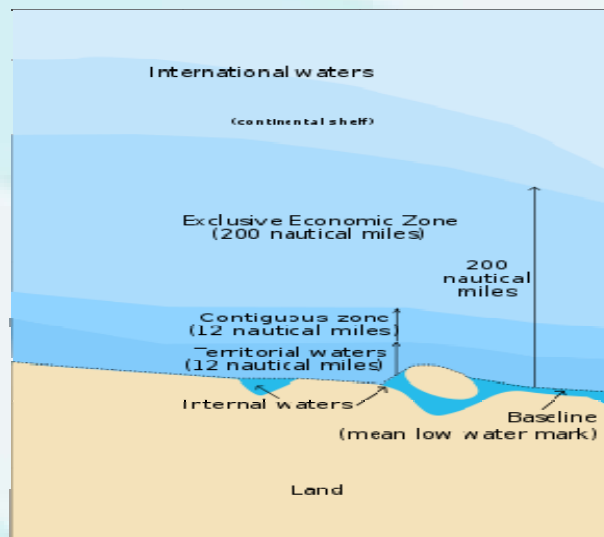


Figure 1 – Maritime Areas under UNCLOS⁴

The UNCLOS provided, for the first time, a universal legal framework for the rational management of marine resources and their conservation.⁵ Though the convention was largely accepted by world community, US strongly objected to the provisions of Part XI of the Convention. Terming it as not free-market friendly and unfavorable to its economy and security, the US refused to ratify the UNCLOS. However whilst considering many of the remaining provisions as binding as customary international law, it has enacted several legislations and measures to ensure the sanctity of its maritime zones and its interest.⁶ Shortly after 11 Sep 01, it enforced a Advance Notice of Arrival (ANOVA) requirements under which the USCG requires a 96 h notice of arrival for any vessel intending to enter a US port or place of destination.⁷ Failure to comply results in vessel being delayed and/or subjected to civil penalty proceedings. The programme, like various other enactments, has been successful as it has been ensured only with strict enforcement measures that required surveillance and coordination.

Indian Perspective

The Indian Ocean today is the primary energy source powering the economic-industrial sectors of major states which, therefore, becomes the principal strategic determinant. The Indian Ocean holds 65 per cent of strategic raw minerals and 31 per cent of gas comprises 30 per cent of the world population and is characterised by fast-growing economies and a large consumer market⁸. Geographic disposition bestows upon India inherent 'advantages' as well as 'inconveniences' that need to be understood and addressed holistically. The 7516 km long coastline, including the island groups, bestow upon our country a large ocean area. Though we may have been a country with rich maritime heritage, we have been somewhat subdued in addressing our rights. The largely continental mindset has been responsible in relegating the ocean affairs to the background. Even a country like Bangladesh, which gained independence much later and with comparative lesser maritime area, enacted its jurisdiction in 1972⁹. Prior to 1976 India did not have any comprehensive legislation on the Law of the Sea. The limits of the territorial waters and the continental shelf were governed by various proclamations issued by the President of India from time to time. In 1976, consequent upon the UNCLOS III, held at Geneva in which India participated, Article 297 of the Constitution of India was amended and all lands, mineral and other things of value, underlying the ocean, within the territorial waters or the continental shelf or the EEZ as well as all other resources of the EEZ were vested with the Union of India. The Article also provided that the limits of the Maritime Zones of India shall be as such, as may be specified from time to time by or under any Law made by the Parliament. In due course, the GoI put in place MZI Act 1976¹⁰ which was enacted in ratification of

the UNCLOS III provisions. Subsequently need arose to provide an enforcement structure for implementing one of the issues namely fisheries under the MZI Act 1976 and accordingly MZI Act 1981¹¹ was enacted.

MZI Act 1976

The Parliament in the year 1976 enacted the MZI Act, 1976 wherein it prescribed the limits of the extent of Territorial water, Continental Shelf, Exclusive Economic Zone and other Maritime Zones of India. In accordance with UNCLOS, India claims 2.01 million sq km of sea area for exclusive rights for exploration and exploitation of resources, both living and non-living under the 1976 MZI Act. The Act also provided a general legal framework specifying the nature, scope and extent of India's rights, jurisdiction and control in relation to the various maritime zones; the maritime boundaries between India and other littoral states whose coasts are adjacent to those of India; for the exploitation exploration, conservation, management of natural resources within the maritime zones. The Act also empowers the Central Government to extend with restriction and reservations any central enactments, for the time in force in India to the EEZ. It was also proposed to undertake separate legislation in future, as and when required, for dealing with the regulations for exploration and exploitation of particular resources or particular group of resources as well as with other matter in which the country has jurisdiction. The MZI Act, 1976 is, therefore, by nature an **Umbrella Legislation** on maritime matters.

The 1976 Act, under Section 11, provides for stringent punishment of imprisonment up to three years or unlimited fine or both for the offences committed under the Act. However, the Act necessitates the requirement of previous sanction of Central Government before instituting prosecution against any person prescribed under Section 14¹² of the said Act. Further, Section 15 of the MZI Act 1976 empowers the Central Government to make rules by notification to carry out the purposes of the Act in general and for delegating specific power for *inter-alia* regulation for conduct of any person in the territorial waters, the contiguous zone, the exclusive economic zone or any other maritime zone of India. However, so far no rules have been framed by the Central Government under the said Act.

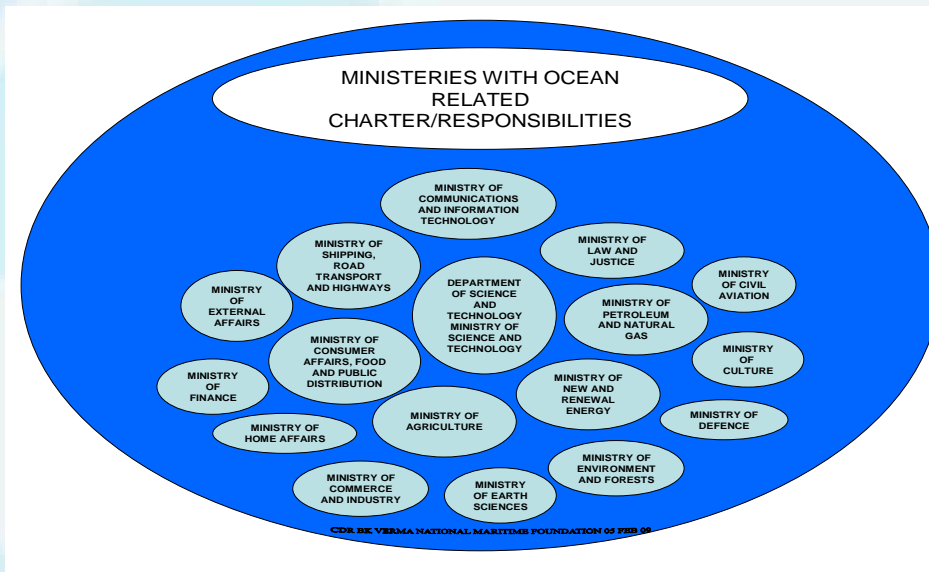
MZI Act 1981

With increase in poaching activities by foreign fishing vessels in the Indian EEZ, need was felt to frame a specific law to deal with the illegal fishing as also to protect the Indian fishermen and

other maritime interests of India. Accordingly, the Maritime Zones of India (Regulation of Fishing by Foreign Fishing Vessels) Act, 1981 (short title MZI Act, 1981) was enacted to regulate fishing activities by foreign fishing vessels and to provide for deterrent punishment by way of imprisonment, heavy fines and confiscation of the foreign fishing vessels convicted of offences of illegal fishing. This 1981 MZI Act complements the 1976 MZI Act where the rights in the EEZ were protected for exploitation of living resources by the citizens of India and the foreign vessels need to obtain license or permit in accordance to the conditions laid down in MZI Act 1981. The Act specifically authorised the CG under Article 9 Chapter III for enforcement of its provisions. Further, through an amendment, the Navy as well as the police was also subsequently authorised to implement and enforce the provisions of the said Act. With the passage of time, the MZI Act, 1981 came to be employed more frequently by the agencies of Union Government such as the Navy and the Coast Guard at Sea. Specific power of apprehension, arrest and seizure were vested with the State Police officials in the coastal states and “specified ports” were also notified in each coastal state where foreign fishing vessels could be taken for being handed over to police for prosecution. “Designation courts” at specific “places of trial” where Judicial Magistrates First Class were also empowered, in view of the heavy fines prescribed under the said Act for which the Magistrates were not originally empowered under the Cr PC. The MZI Act, 1981, unlike the umbrella legislation of MZI Act 1976, did not have any restriction of obtaining previous sanction of the Central Government before initiating prosecutions for the various offences, although the accused persons under the MZI Act, 1981 are all foreigners.

Enforcement Dilemmas

With a number of diverse players, with seemingly overlapping responsibilities and jurisdiction, in the maritime sector, the absence of a central coordinating mechanism or body has inadvertently ‘facilitated’ sufficient leeway for exploiting the provisions. Activities in maritime zones, in our context, are overseen/managed by a diverse number of government entities who may have differing rights, interests, mandates and responsibilities. A depiction of the Ministries with ocean role or responsibilities is placed at Figure 2.



Although Section 11 of the MZI Act 1976 provides stringent punishment of imprisonment up to three years or unlimited fine or both, the enforcement provisions are a bit of stumbling block. This lack of statistical data on the number of infringement in the MZI does not actually point to sanctity of our MZI or towards the effectiveness of the Act and its enforcement. It is arguable that this is more a case of lack of suitable provision pertaining to the power/authority to prosecute. This was mainly due to the requirement of obtaining previous sanction of Central Government before instituting prosecution against any person prescribed under Section 14 of the said Act. Reluctance to book offender under this act is probably due prolonged delay in obtaining the sanction of the MEA, the administrative ministry under this Act. Section 14 of MZI Act, 1976 states that¹³:-

‘No prosecution shall be instituted against any person in respect of any offence under this act or the rules made there under without the previous sanction of the Central Government or such officer or authority as may be authorised by that Government by order in writing in this behalf’.

With overlapping jurisdiction and interpretation of freedom of seas through UNCLOS, boarding a ship without authorization under law may lead the law enforcement agencies for a protracted legal engagement and payment of consequent damages for delay. Further, although Section 15 of the MZI Act 1976 empowers the Central Government to make rules by notification to carry out the purposes of the Act in general and for delegating specific power, **so far no rules have been framed by the Central Government under the said Act, unlike the MZI Rules, 1982 framed under the MZI Act, 1981.** As of now, only seven notifications have been issued under the MZI Act, 1976. Of them two important notifications issued in 1986 related to notifying “designated area” of

oil platforms etc, in the Western coast (ONGC oil platforms of Bombay High North and South near Mumbai) and notification for prohibition of entry of Merchant ships for other sea traffic (except the Indian Naval ships and Indian Coast Guard ships) within 500 meters of these restricted zones, named as “designated areas”. The co-ordinates of the oil platforms notified as designated areas were amended and more oil rigs were added vide the last notification issued by the Ministry of External Affairs in 1996. However, the absence of rules framed under the said Act or any notification authorizing the Naval Officers or ICG officers with the power of apprehension, arrest etc, the very purpose of imposition of such restrictions with is rendered superfluous. Moreover, there is also a clear absence of listing of offences in the MZI Act 76.

The close scrutiny of the MZI Act 76, also reveals that the offences mentioned therein are generalized in Section 11, 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*”. While offences related to poaching are dealt with MZI Act 1981, smuggling under Customs Act 1962, offences such as unauthorized research activity, unauthorized operation of any vessel in the Offshore Development Area (ODA), acts aimed a collecting information to the prejudice of the defence or security of India, any activity not having a direct bearing on passage have not been covered under any other Act. In many instances, cases resembling violations of provisions of MZI Act 76 have been booked under other acts like IPC 1860, Arms Act, and Passport Act etc and did not yield the desired results.

It is indeed remarkable that no credible statistics are available on the public domain with respect to violations in compliance of MZI Act 1976. It would be nigh unimaginable that in the wide expanse of our EEZ, no violations occur. It may be more likely that the violations occur but are not detected, due surveillance constraints, or that enforcements are not actually enforcement in view of inherent lacunae. However in the few cases that were reported and analyzed, it was amply clear that the maritime enforcement agencies have observed vessels clearly contravening the provisions of MZI Act 76 of their conduct in territorial waters. The vessels were apprehended and handed over to the police who were booked under various sections of IPC 1860, Arms Act, Customs Act etc except under MZI Act 76 as it required obtaining of sanction from the Central Government with necessary justification. Few cases have been taken up with the MEA in the nineties for booking offences against small vessels like Dhows involved in smuggling of contraband goods under Section 14 of the

MZI Act. These Dhow owners were not known and the crew was left to fend for themselves. The standing of the case and its disposal are not known.

In the recent past there has been a large increase in the presence of support vessels in the Offshore Development Area, increased movement of coastal vessels and the simultaneous presence of foreign vessels exercising passage in the sea lanes adjoining the coast. Whilst the 'Cabotage Rule' is clearly mandated through the Merchant Shipping Act 1958, through Articles 405 to 414¹⁴, to safeguard Indian interest in coastal shipping and activities, it does permit foreign vessel operating through 'licensing' by adhering to stipulated norms. The operation of Deep Sea Fishing Vessels with foreign crew, though with limited permission, have made our coast vulnerable to nefarious activities and there is a strong need to make a robust MZI Act to take necessary action by the maritime law enforcement agencies in India. It is not common to hear variously that catch, by the licensed foreign vessels, are being delivered to mother ship for transshipment illegally. There are no legal means of validating such siphoning off through shore based monitoring. The Mumbai terror attack on 26 Nov 08, wherein the terrorist made their way transiting through the coastal route, is just an indicator of the enormity of threats that we are dealing with. Whilst addressing the issue of surveillance, one needs to understand to be fully grounded with the enormity of the task of checking. It is also not feasible to seal off the maritime domain in the similar manner wherein the road blocks and checks would suffice. The enormity of the task for protecting the entire coastline would only be assessed by imagining that one would have to resort to placing a guard every 2- kilometer or so, in order to be in the visible range, to prevent any landing. It would require legislative support, with enforceable provisions, along with other means to address issue of sanctioning power for the sanctity of our MZI. Towards addressing the enforcement lacunae in our Umbrella act of MZI 1976 Act, the following could be resorted to expeditiously:-

- (a) Suitable amendment of Section 14 to ensure that the Officers of the Indian Navy and Indian Coast Guard are provided 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. The amendment if brought into force will form the backbone to effectively implement the maritime security initiatives. This authorization can be subsequently extended to the officers of the Coastal Police force in the Coastal States for enforcing the 1976 MZI Act to have effective coastal surveillance in the near shore waters.

(c) To provide more clarity and understanding of the types of offences that affects the peace, good order and security of India affecting subsection (1) of Section 4 (use of territorial waters by foreign ships) and subsection 7 (b) of Section 7 (Exclusive Economic Zone), which were earlier not elucidated, can also be specified.

The 2.01 million square km of the Indian MZI is all set to increase to about 3 million sq km¹⁵ with the delineation of Continental Shelf in near future. One would also need to start the deliberative process towards putting in place a legal framework so that we are prepared adequately when the Continental Shelf issue is ratified and put in place. One also needs to scan the horizon to keep abreast of the developments and initiative by nations in strengthening their maritime jurisdiction. Whilst we are still gripping to address our local issues, we need to start putting our acts together wrt to new legislations to address the extended continental shelf as also the ocean areas in Arctic. Russia's recent planting of its flag on the bottom of the Arctic Ocean has been the latest attempt to 'mark one claim' on the virgin territory of Earth that seems to hold bountiful resources. There is increasing competition for the ocean's resources and the need for law to govern how these resources are divided up and the environment protected cannot to be overemphasized.

The relevance and effectiveness of an Act or provision is dependent on how effectively it can be implemented and enforced practically. Whilst deliberating on the enforcement of jurisdiction over Maritime Zones, it needs to be borne in mind that the maritime scenario is very fluid and flexible which changes rapidly. Whilst UNCLOS¹⁶ provides ships the freedom of navigation at high seas (Articles 17 to 19, UNCLOS) and the right of innocent passage in territorial waters (Articles 58, UNCLOS), one needs to examine these issues in some perspective. What comprises an innocent passage and when does an innocent passage no longer remains that? How long does it take for an innocent passage of a foreign flagged ship along the coast to transform into a non-innocent one? Mariners would agree that this would be very hard, if not impossible to predict. The area of transit along the coast remains close to the demarcation of the territorial waters and EEZ which provide for different rights. Boarding of a ship in EEZ would go against the fiber of freedom of navigation and gathering firm evidence will remain a non-starter. The UNCLOS agreements were put in place after some very serious and prolonged deliberations in a number of contentious issues. Ambiguity and scope for interpretation is always wide in such treatise that require acceptance by a large group of member countries. Under similar conditions but some differing interpretations, US remained a non-signatory to the UNCLOS. Further, the maritime environment was markedly different during the period when UNCLOS was being deliberated and framed. The ambiguity of piracy jurisdiction is just

a moot indicator. However, it needs to be borne in mind that 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.

*Cdr BK Verma is a Research Fellow at the National Maritime Foundation, New Delhi. He has been involved with issues of Ocean Management for the last three years and is currently working on Issues in Coastal Security. He has also completed an EEZ Protection Officers Course at Fareham, UK. The views expressed are those of the author and do not reflect the official policy or position of the National Maritime Foundation or the Indian Navy. The author may be reached at bkverma@maritimeindia.org

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³ History Of The Maritime Zones Under International Law - From The Cannon Shot Rule To UNCLOS, http://www.nauticalcharts.noaa.gov/staff/law_of_sea.html (accessed on 11 Feb 09)

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⁵ **Oceans and the international community** http://www.un.org/Depts/los/consultative_process/consultative_process_background.htm (accessed on 11 Feb 09)

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⁷ USCG National Vessel Monitor Centre, <http://www.nvmc.uscg.gov/nvmc> (accessed 14Jan 09)

⁸ Kohli, K.K., Maritime Power in Peace and War: An Indian View. African Security Review. 1996, **5** (2).

⁹ Bangladesh MZ Act, Territorial Waters and Maritime Zones Act 1974, Act No. XXVI of 1974 http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/BGD_1974_Act.pdf (accessed 23Jan 09)

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¹¹ The Maritime Zones Of India (Regulation Of Fishing By Foreign Vessels) ACT, 1981 (No.42 of 1981)http://www.icsf.net/icsf2006/uploads/resources/legalIndia/pdf/english/central/1112181327796***Maritime_Zones_of_India_Act,_1981.PDF (accessed 14 Mar, 2009)

¹² Sec 14 Previous sanction of the Central Government for Prosecution No prosecution shall be instituted against any person in respect of any offence under this act or the rules made there under without the previous sanction of the Central Government or such officer or authority as may be authorized by that Government by order in writing in this behalf".

¹³ The Territorial Waters, Continental Shelf, Exclusive Economic Zone And Other Maritime Zones Act, 1976 25 August, 1976, <http://meaindia.nic.in/actsadm/30aa13.pdf> (accessed 14 Mar, 2009)

¹⁴ Control Of Indian Ships And Ships Engaged In Coasting Trade, Art 405 to 414, PART XIV, Merchant Shipping Act 1958, <http://shipping.gov.in/writereaddata/linkimages/the%20merchant%20shipping%20act%2019583199054969.htm>

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¹⁶ UNCLOS, www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm(accessed 14 Mar, 2009)

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