

“The Strife for Rules-Based Order in the Indo-Pacific”

*Amrit Singh
Faculty of Law,
University of Lucknow,
Lucknow, Uttar Pradesh*

ABSTRACT:

The phrase of Rules-Based order in the Indo-Pacific is one that has been in the news on a regular basis for the past few years but the strife for establishing such an order has been there for decades. This issue finds its roots in the ambiguity found in the various laws governing the relations between the countries of the world.

This paper makes an attempt to analyse various provisions of maritime laws and the ambiguities present in them which has given way to a tussle between various countries in the strategically important region of Indo- Pacific. The paper touches upon two issues to elucidate the fact one is the issue of China's extravagant claims in the South China sea and a recent event of Freedom of Navigation Operation conducted by U.S. Navy in the Exclusive Economic Zone of India which has brought the issue of ambiguities present in the maritime laws into the limelight.

By discussing various provisions that lead to such events the paper stresses on the need of more clarity being introduced in the concerned maritime laws.

KEYWORDS:

Rules-Based Order, Indo-Pacific, Freedom of Navigation Operations(FONOPs), Exclusive Economic Zones

INTRODUCTION:

Although the phrase of ‘rules- based order’ has come into prominence in the last decade and even more in the last four or five years but the concept of International law incorporating certain rules of conduct which both the states and other key players are required to adhere to is much older.

The rules of the current international order originate largely from the settlement at the end of the Second World War that brought into being the United Nations (UN) and the various so-called Bretton Woods institutions. These rules cover a wide range of issue areas and activities, in particular the incidence and conduct of war, international trade and economic development, the conduct of inter-state diplomacy, navigation and overflight, and the rights of individuals and communities.¹

However, from the very beginning the legitimacy of the post-world war rules- based order has been questioned and critics have argued that the makeup of the key organs such as the

¹ Stewart Patrick, ‘World Order: What, Exactly, are the Rules?’, *The Washington Quarterly* 39, no. 1 (2016), pp. 7-27

UNSC has been hugely tilted in the favour of the victors of the war. Moreover, regarding the permanent membership of the UNSC it is quite evident that it does not adequately represents the current demography of the world and hence its actions do not confirm to the ground level realities prevailing in the world. On December 2, 2004, United Nations secretary-general Kofi Annan circulated the report submitted to him by a sixteen-member high-level panel that he had appointed to address "threats, challenges and change" confronting the United Nations in the coming years.² A list of 101 recommendations are summarized in Annex I of the panel's report and deal with a wide range of problems facing the international community. Of them all, the recommendation concerning the enlargement of the Security Council has attracted the greatest attention internationally.³ As the report puts it, "those who contribute most to the Organization financially, militarily and diplomatically should participate more in Council decision-making The Security Council needs greater credibility, legitimacy and representation to do all that we demand of it"⁴ The report attempts to strike a balance in this regard between two major considerations that, in its view, should govern the composition of the Council: contribution to the Organization (financial, military, and diplomatic), on the one hand, and overall "representativeness,"⁵ This clearly shows that the rules based order that the world is after is not necessarily what the world demands but what the major powers of the world need for establishing a world order which promotes their national interests.

Over time, the rules-based order's scope and character has evolved with the creation of a plethora of new treaties and also the introduction by Western advocates a number of new, and politically contentious, norms of behaviour Change is most evident in three areas: the global economy, maritime rights, and human rights protections.⁶

SCOPE:

Although the debate of establishing a rules-based world order is going on in all the major domains of the International Law but the scope of this research paper is limited to the issues that have emerged in the domain of maritime rights.

OBJECTIVE:

The main objective of this paper is to understand the dynamics of various issues that have emerged in the domain of maritime rights pertaining to the claims being made by China in the South China Sea and the legalities involved in the recent Freedom of Navigation operation(FONOP) being carried out by the US Navy in the Exclusive Economic Zone of

² A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, at 8

³ Blum, Yehuda Z. "Proposals for UN Security Council Reform." *The American Journal of International Law*, vol. 99, no. 3, 2005, pp. 632–649. JSTOR, www.jstor.org/stable/1602295. Accessed 19 Apr. 2021

⁴ Panel Report, *supra* note 1, at 6

⁵ *Supra* note at 3

⁶ 'The Rules-Based Order in the Indo-Pacific: Opportunities and Challenges for Australia, India and Japan Policy Brief', Regional Outlook Paper No. 50, 2017

India near Lakshadweep. This paper makes an attempt to analyse the relevant provisions of United Nations Convention on Law of Seas(UNCLOS) and tries to find an answer the question as to what exactly would constitute a rules-based order in the much contested region of Indo-pacific Region.

RESEARCH METHODOLOGY:

A combined and integrated descriptive-analytic approach is taken to find various issues related to establishing a rules-based order in the Indo-Pacific region. In general, various approaches are combined to make this article extensively useful such as:

- Analytical study
- Descriptive approach
- Critical analysis

CHINA'S CLAIMS AND INTEREST IN THE SOUTH CHINA SEA:

In recent years, no international maritime dispute has garnered more attention than the contest over the islands, reefs and waters of the South China Sea. The dispute involves the overlapping claims of six governments to territorial sovereignty and maritime rights, encompasses the main sea lines of communication that connect Southeast Asia with Northeast Asia, covers large fishing grounds and may contain vast reserves of oil and natural gas. In the South China Sea dispute, no state attracts more attention than the People's Republic of China (PRC) because of its expansive claims past uses of force over islands in these waters and its growing naval capabilities.⁷

Since the mid-1990s, China has pursued a strategy of delaying the resolution of the dispute. The goal of this strategy is to consolidate China's claims, especially to maritime rights or jurisdiction over these waters, and to deter other states from strengthening their own claims at China's expense, including resource development projects that exclude China. Since the mid-2000s, the pace of China's efforts to consolidate its claim and deter others has increased through diplomatic, administrative and military means. Although China's strategy seeks to consolidate its own claims, it threatens weaker states in the dispute and is inherently destabilizing. As a result, the delaying strategy includes efforts to prevent the escalation of tensions among the claimants.⁸

In the South China Sea, Beijing claims territorial sovereignty over two groups of islands and maritime rights over related waters. The contemporary basis for China's territorial claims is a statement that Chinese premier Zhou Enlai issued in August 1951 during the Allied peace treaty negotiations with Japan. In the statement, Zhou declared China's sovereignty over the Paracel and Spratly Islands.¹ In September 1958, China reaffirmed its claim to these islands

⁷ FRAVEL, M. TAYLOR. "China's Strategy in the South China Sea." *Contemporary Southeast Asia*, vol. 33, no. 3, 2011, pp. 292–319. JSTOR, www.jstor.org/stable/41446232. Accessed 19 Apr. 2021

⁸ ibid

when it asserted rights to territorial waters during the Jinmen crisis. The 1958 declaration marked the first time that China linked its claims to territorial sovereignty with the assertion of maritime rights, in this case, rights to territorial waters. From the mid1970s to the present, official government statements have used roughly the same language to describe China's sovereignty claim. The claim is usually phrased as: "China has indisputable sovereignty over the Spratly Islands (or South China Sea Islands) and adjacent waters."⁹

As the international maritime legal regime evolved, China began to codify its claims to maritime rights through the passage of domestic legislation. These laws harmonized China's legal system with the requirements of the UN Convention on the Law of the Sea (UNCLOS). In 1992, the National People's Congress (NPC) passed a Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China, which reaffirmed the content of the 1958 declaration but contained more specific language. Following this law, China issued baselines for its territorial waters in 1996. In 1998, the NPC passed a Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China, in which it claimed additional maritime rights beyond those contained in the 1992 law. The EEZ law did not refer to the Paracels or the Spratlys, but, when combined with the 1992 law on territorial seas, it provides a basis for claiming maritime rights in the South China Sea. In April 2011, China affirmed this interpretation in a note verbale to the UN Commission on the Limits of the Continental Shelf (the Commission or CLCS) by stating that the Spratly Islands were "fully entitled" to territorial waters, an EEZ and a continental shelf.¹⁰

The scope of China's claims to maritime rights or jurisdiction, however, remains ambiguous. **First**, many of the land features that China claims in the South China Sea would not qualify as islands under Article 121(3) of UNCLOS and thus could not serve as the basis for a claim to an EEZ. China could probably claim a large portion of the South China Sea as an EEZ from the five largest of the Spratly Islands as well as Woody Island in the Paracels and Pratas Island (currently controlled by Taiwan). Such claims, however, would only represent a maximal position, as UNCLOS requires that states resolve disputes when EEZ claims overlap. A **second source of ambiguity** concerns the question of historic rights that China might claim in the South China Sea. Article 14 of the 1998 EEZ law states that it "shall not affect the historic rights that the PRC enjoys". Although some Chinese policy analysts have suggested that the South China Sea are historic waters, the 1998 law did not define the content or spatial scope of these historic rights. Moreover, no other Chinese law has described what these rights might encompass.¹¹

The "nine-dashed line" that appears on official Chinese maps of the region creates a **third source of ambiguity**. The line was initially drawn in the 1930s, first appeared on an official Republic of China (ROC) map in 1947, and has appeared on PRC maps since 1949. Neither the ROC nor the PRC has ever defined what type of international legal claim the line

⁹ Supra note at 7

¹⁰ ibid

¹¹ Supra note at 7

depicted. To this day, the line remains undefined. For example, although China included a map with the nine-dashed line in a note verbale to the CLCS in May 2009, it never defined the line or claimed historic rights that some scholars argue that the line indicates.¹²

The most dramatic turn of events took place when on 22 January 2013, the Republic of the Philippines instituted arbitral proceedings against the People's Republic of China under Annex VII to the United Nations Convention on the Law of the Sea (the "Convention"). The arbitration concerned the role of historic rights and the source of maritime entitlements in the South China Sea, the status of certain maritime features in the South China Sea, and the lawfulness of certain actions by China in the South China Sea that the Philippines alleged to be in violation of the Convention. China adopted a position of non-acceptance and non-participation in the proceedings.

The tribunal ruled almost categorically in favour of the Philippines, which had challenged some of China's territorial claims. It also said China had broken international law by endangering Philippine ships and damaging the marine environment. Maybe most important, the tribunal largely rejected the nine-dash line that China has used to indicate its South China Sea claims. This could open the way for other Asian states to challenge China's claims.¹³

So the letter of international law seems to say that China could be compelled to abandon many of its South China Sea claims.

But while the ruling is considered binding, there is no enforcement mechanism. China boycotted the proceedings, saying that the tribunal had no jurisdiction and that it would ignore any decision a position it reiterated after the ruling came out.¹⁴

Still, China is facing international pressure. Whether China chooses to defy or comply with that pressure, though, could help to shape its place in the international community and will have a massive impact on the future of maritime issues that prevail.

LEGAL ASPECTS AND IMPLICATIONS OF THE FREEDOM OF NAVIGATION OPERATIONS BEING CARRIED OUT BY THE US NAVY:

U.S. Navy through USS John Paul conducted Freedom of Navigation operation 130 Nautical miles west of Lakshadweep Island. This paved the way for plethora of legal issues between India and USA which mainly revolved around the issue whether such an exercise was consistent with the provisions of International Law or not.

In the aftermath of this incident, the U.S. Pentagon defended the military operation off India's waters and claimed it to be "consistent with international law". FONOPs by the US Navy are a way of showing that the maritime claims of certain states are incompatible with

¹² ibid

¹³ Max Fisher. "The South China Sea: Explaining the Dispute." New York Times, 14 July 2016, <https://www.nytimes.com/2016/07/15/world/asia/south-china-sea-dispute-arbitration-explained.html>. Accessed 19 April 2021

¹⁴ ibid

international law. India has a requirement of prior consent for the passage of foreign warships through Indian EEZs of India, U.S. officials believe that this is a clear violation of the United Nations Convention on the Law of the Sea (UNCLOS). U.S. claims that article 56 and 58, Part V of the Law of Seas gives freedom of high seas to the U.S. Maritime ships in the EEZ of India.

India interprets the maritime convention differently. Indian experts note that the UNCLOS does not explicitly permit the passage of military vessels in another state's EEZ. When it ratified the convention in 1995, New Delhi stated, "India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State." This position is consistent with India's domestic law — the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones of India Act of 1976 — and remains unchanged.¹⁵

On a conjoint reading of Articles 58, 87 and 310, it can be argued that freedom of navigation cannot be read in an absolute and isolated manner. Given the nature of EEZ and the activities that a coastal state conducts in its EEZ, non-consensual military activities that hinder the lawful enjoyment of such rights need not be permissible. Also, a coastal state is naturally concerned about military exercises and manoeuvres posing a risk to its coastal communities, its installations or artificial islands, as well as the marine environment. Thus, any state which wishes to conduct such exercises must do so only in consultation with the coastal state since the coastal state is the best judge of its EEZ.¹⁶

While India ratified UNCLOS in 1995, the U.S. has failed to do it so far so the FONOP carried by the U.S. Navy cannot be justified according to Indian officials. Although a lot of experts believe that it was more of a signal that U.S.A. wanted to convey to China that they are committed to the idea of rules-based order in the Indo-Pacific.

CONCLUSION:

The strife for a rule based order has been mainly around the issue of extravagant claims that China has made in the South China Sea and the recent FONOP carried out by the U.S. Navy at the backdrop of the Quad meeting held between U.S.A., Australia, Japan and India has brought to the forefront the need of proper definition of what exactly constitutes a rules-based order when it comes to the much contended and strategically important Indo-Pacific region.

Both India and the U.S. should negotiate concerns regarding their differences regarding their varying interpretation of the laws concerned with the maritime issues for the maintenance of international peace and security. Riding roughshod over international obligations premised

¹⁵ Abhijit Singh. "Not on the same page at sea." The Hindu, 13 April.2021, <https://www.thehindu.com/opinion/op-ed/not-on-the-same-page-at-sea/article34304977.ece> Accessed 19 April 2021

¹⁶ Anmolam and Farheen Ahmad. "Navigation with permission". The Hindu, 15 April.2021, <https://www.thehindu.com/opinion/op-ed/navigation-with-permission/article34320149.ece> Accessed 19 April 2021

either in an erroneous interpretation of the law or the scope of its application will not only threaten friendly relations but also undermine the progress made towards codification and development of international law in an area such as the law of the sea, which is particularly complex and one that has become even important given the dynamics of geopolitical interest of various stakeholders involved in the Indo-Pacific which has given way to a lot of tussle in this region.

It is quite clear that the maritime laws have a lot of lacunae in them which leads to lot of uncertainties and as a result in claims of countries that are inconsistent with each other so in order to put an end to strife in the Indo-Pacific a lot of clarity is required in the relevant maritime laws.

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