THE LAW AND PRACTICE RELATING TO MSR IN NE ASIA

2 December 2010
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On 23 January 1968, well before negotiations even began on the LOSC, the *Pueblo* incident happened

Rules of international law that govern MSR in NE Asia today

Legal issues arising out of the inherent lack of clarity within the LOSC concerning MSR and the possible approaches

Legal problems relating to MSR in the context of territorial/maritime boundary disputes in NE Asia and the possible solutions thereto
Introduction(2)

- Not intended to analyze the entire system of MSR under the LOSC
- Not to review each territorial/maritime boundary dispute in NE Asia
1. Rules of international law governing MSR in NE Asia

- As of 1 October 2010, 161 countries are parties to the LOSC
- All the relevant provisions of the LOSC apply to the relations between the four States (Japan, PRC, the ROK and Russia)
- If North Korea or non-parties to the LOSC are involved, customary international law still deserves attention
2.1. Legal Issues: Inherent lack of clarity within the LOSC(1)

- “survey activities” are primarily provided for in Arts. 19(2)(j), 40, and 54
- such activities do not fall under MSR regime in Part XIII of the LOSC
- Therefore, coastal State consent is required for MSR but not for survey activities in the EEZ.
2.1. Legal Issues: Inherent lack of clarity within the LOSC(2)

- It is not easy to distinguish between “research activities” and “survey activities”, in light of the types and potential uses of collectable marine data
- What the *Impeccable* was carrying out could be categorized as “MSR”
- Accordingly, China was within its rights to exercise its jurisdiction over such US activities
2.2. Possible Approaches: Law-of-treaties

- Subsequent practice is a major element in the interpretation of any treaty (e.g.: UN Charter, Art. 27(3))
- The question then is whether the *Impeccable* incident can be regarded as a “subsequent practice” under subparagraph 3(b) of Article 31, VCLT
  - beyond the scope of this paper
2.2. Possible Approaches: Customary International Law

- Churchill and Lowe argued:
  - Coastal State consent for MSR in the EEZ and on the CS is now part of customary international law.
  - However, many of the details of the LOSC are not now.
  - The ambiguity in the LOSC remains even in customary law.
- There can be customary international law concerning MSR existing alongside the LOSC.
2.3. Conclusion: Inherent lack of clarity within the LOSC

- Under Art. 297(2) of LOSC some MSR-related disputes are not to be brought before the compulsory procedures entailing binding decisions under Part XV, Section 2

- Therefore, one possible way to improve the current state of affairs would be to seek an advisory opinion from the ICJ or the ITLOS
3.1. Legal problems: territorial/maritime disputes in NE Asia

- Who is a “coastal State”?
- Therefore, at least some provisions of the LOSC may be of little use
- The best solution would be to resolve territorial/maritime boundary disputes
  - Bringing cases before an arbitral tribunal, the ICJ or the ITLOS.
  - Concluding maritime boundary agreements
  - But, Such disputes frequently take a long time to resolve
3.2. Solutions : territorial/maritime disputes in NE Asia(1)

- Art. 241 provides that MSR activities shall not constitute the legal basis for any claim to any part of the marine environment or its resources.

- Seeking a solution on an *ad hoc* basis.
  - State A intends to undertake MSR in waters, part of which both State A and State B consider as their respective EEZs or continental shelves.
  - Then, State A, when seeking the consent of State B, may add to its diplomatic note the following phrase:
  - “Nothing in the present note shall be construed as affecting the position of the Government of [State A] with respect to its maritime delimitation.”
3.2. Solutions: territorial/maritime disputes in NE Asia(2)

- Arts. 74(3) and 83(3) of LOSC requires interested states to seek a solution on a “more permanent” basis.

- In 2001, China and Japan agreed on a mutual prior notification system for MSR:
  - China is to give Japan at least two months’ notice when its research ships plan to enter waters “near Japan and in which Japan takes interest”
  - Japan is to inform China before its vessels enter waters “near” China
3.2. Solutions: territorial/maritime disputes in NE Asia

- The entire maritime area in NE Asia is “enclosed or semi-enclosed seas” in Art. 122 of the LOSC
- If C and D intend to undertake MSR in an area which they consider as their EEZs or continental shelves
- Joint MSR in any disputed area in accordance with Art. 123, without compromising their positions with respect to maritime delimitation
Whereas the LOSC is, to a large extent, applicable to MSR in NE Asia, customary international law could also be relevant.

There are conflicting legal interpretations of the LOSC in relation to MSR.

- a pressing need to somehow resolve this problem, e.g., by seeking an advisory opinion

Some part of LOSC may be of little use in the case of territorial/maritime boundary disputes.

- Seeking provisional solutions such as those found in Arts. 74(3) and 83(3), or Art. 123, of the LOSC
Thank you