

Different Voices on Military Activities in the EEZ

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The purpose of this short paper is to address different voices on military activities in the EEZ responding to an article by Yao-Dong Yu and Wen-Jin Piao.¹ It seems that the article completely reflects China's position on the hot issue of military activities in the EEZ which is opposed to that of the United States and many other states. Therefore, it will be fair to introduce different or opposing viewpoints on military activities in the EEZ.

1. A sui generis legal regime of EEZ

The EEZ regime has not appeared until the 1982 UN Convention on the Law of the Sea (the Convention). Before the Convention the maritime space was mainly divided into the territorial sea and the high seas.² Coastal States had sovereignty over its territorial sea and all states enjoyed widespread freedom of the high seas including freedom of navigation and freedom of flight over the high seas.³

EEZ is "an area beyond and adjacent to the territorial sea", thus situated on between the territorial sea and the high seas.⁴ Article 55 of the Convention provides that EEZ is "subject to the specific legal regime established in this Part[EEZ], under which the rights and jurisdiction of the coastal State ... are governed by the relevant provisions of this Convention." And the Convention provides specifically the rights and jurisdiction of the coastal states in the EEZ. In the EEZ the coastal state has (a) "sovereign rights" for the economic purpose, (b) jurisdiction with regard to (i) the establishment and use of artificial islands, installations and structures, (ii) marine scientific research and (iii) the protection

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1 Yao-Dong Yu and Wen-Jin Piao, "Legal Study on Military Activities in the EEZ – with a focus on foreign Military Activities in the EEZ of P.R. China", *KMI International Journal* (to be published in December 2011).

2 Of course, there were contiguous zone for particular purpose such as customs, fiscal, immigration or sanitary and the continental shelf for the seabed and subsoil of submarine areas.

3 1958 Geneva Convention on the High Seas, Article 2.

4 1982 Convention, Article 55.

and preservation of the marine environment, and (c) other rights provided for in the UNCLOS.⁵

High Seas is defined in Article 86 of the Convention as “all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”⁶ In the high seas every state enjoys freedom of the high seas and Article 87 gives examples of the freedom such as freedom of navigation, freedom of overflight, freedom of lay submarine cables, freedom of fishing and freedom of scientific research. It is no doubt that warships and military planes enjoy these freedom of high seas. Even the Convention provides that “warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.”⁷

It is important to note that Article 58(1) of the Convention provides that in the EEZ all States enjoy the freedom of high seas provided in Article 87 subject to the relevant provisions of the Convention. As mentioned above, in the EEZ coastal states has sovereign rights on marine resources and jurisdiction with regard to some specified things such as establishment of artificial islands, marine scientific research and the protection and preservation of the marine environment. Therefore EEZ contains the nature of the territorial sea and the high seas. In this sense, EEZ is a *sui generis* zone newly appeared in the Convention.⁸

2. Military activities in the EEZ

Military activities in the EEZ include routine navigation, exercises and manoeuvres to weapons firing and testing, survey, reconnaissance and surveillance. These activities have been largely admitted in state practices as freedom of the high seas before the appearance of 1982 Convention. Pursuant to the Lotus principle,⁹ military activities in the EEZ will be permitted if there are no rules to prohibit them.

China argues that military activities such as surveillance and intelligence collection amount to “any threat or use of force against the territorial integrity or political independence” of China in violation of Article 301 of the Convention and Article 2(4) of the Charter of the UN. The same language of these articles

5 1982 Convention, Article 56.

6 1982 Convention, Article 86.

7 1982 Convention, Article 95.

8 Satya N. Nandan and Shabtai Rosenne, *United Convention on the Law of the Sea 1982. A Commentary Volume II* (Martinus Nijhoff Publishers, 1993), p.520.

9 *SS Lotus (France v. Turkey)*, 1927 PCIJ(Ser. A), No. 10, p.18. “Now the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State.”

can be found in Article 19(2)(a) which specifies some military activities violating the innocent passage in the territorial sea.¹⁰ However no such provisions are appeared in Part V of EEZ regime except on MSR. Also during the Third UN Conference on the Law of the Sea, China, Peru and Group of 77 made efforts but failed to include a security interest in the EEZ regime. When the convention was opened for signature on 10 December 1982, Brazil, Cape Verde and Uruguay made a declaration purporting to require coastal State consent to do military exercises in the EEZ. However, most of the delegations who participated in the Conference supported the view of the United States:¹¹

All States continue to enjoy in the [EEZ] traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone. This is the import of Article 58 of the Convention.(emphasis added)

Therefore it can be concluded that military activities in general except MSR are permitted in the EEZ. Security concern of coastal State is not enough reason to prohibit the activities.

3. Military Flights above EEZ

China takes an aggressive position against US surveillance and reconnaissance flights above the EEZ. A good example is the EP-3 incident between US and China. On 1 April 2001 two Chinese F-8 fighters intercepted a US EP-3 conducting a routine reconnaissance flight about 70 miles away from Hainan Island. As a result of close approaching to EP-3, one of the F-8 fighters lost control and collided with the EP-3.¹² China criticized that the US violated the Convention. However china's

10 1982 Convention, Article 19 (2) (b) "any exercise or practice with weapons of any kind"; (c) "any act aimed at collecting information to the prejudice of the defence or security of the coastal State"; (d) "any act of propaganda aimed at affecting the defence or security of the coastal State"; (e) "the launching, landing or taking on board of any aircraft"; (f) "the launching, landing or taking on board of any military device"; (j) "the carrying out of research or survey activities".

11 Official Records of the Third UN Conference on the Law of the Sea, Vol. 17, Plenary Meetings, Doc. A/CONF.62/WS/37 and ADD.1 and 2 (New York: United Nations, n.d.), 243(Recited at Raul Pedrozo, "Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone", in 9 *Chinese Journal of International Law* 9 (2010), p.10).

argument to require coastal State consent on military activities above the EEZ is misplaced. There is no article in the Convention which prohibits those activities above the EEZ. Articles 2 and 49 of the Convention provides that the airspace above the territorial sea and archipelagic waters is subject to coastal State or archipelagic State sovereignty. On the other hand, Article 56 of the Convention limits sovereign rights of coastal States in the EEZ to the seabed, subsoil and the waters superjacent to the seabed for the economic purpose only. In accordance with Article 58 of the Convention all States enjoy the freedoms of navigation and overflight which includes routine military activities over the EEZ. Thus coastal States do not have sovereign rights over airspace above the EEZ. They can not control military flight of other State if it does not affect on the EEZ use of coastal States.

In fact, military flights for surveillance and intelligence collection were common place during the Cold War and continue today without the consent of the coastal States concerned. From May 2007 to May 2008, for instance, in many times, Russian TU-95 Bear bombers conducted military flights just outside the territorial sea limit off Alaska and Canada. Each time US and Canadian fighters took off to monitor the Russian bombers but allowed the bombers to continue on their way.¹³ To sum up, to regulate military activities in the airspace above the EEZ has no legal basis in the Convention.¹⁴

4. MSR and military survey

The convention distinguishes between marine scientific research(MSR) activities and data collecting activities such as hydrographic survey. For instance, Article 19(2)(j) of the Convention provides that “carrying out of research or survey activities” is not innocent passage in the territorial sea of coastal States. And Article 40 of the Convention provides that foreign ships “including marine scientific research and hydrographic survey ships may not carry out any research or survey activities without the prior authorization of the States bordering straits.” Article 40 also applies to archipelagic waters pursuant to Article 54 of the Convention. On the other hand, Article 56 grants specifically coastal States jurisdiction only over MSR in the EEZ and Part 12 of the Convention regulates only on MSR.

Although MSR and survey are legally different from each other, however, problems

12 Raul Pedrozo, “Military Activities In and Over the Exclusive Economic Zone”, in Myron H. Nordquist, Tommy T.B. Koh and John Nroton Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff Publishers, 2009), p.239.

13 For more instance, see Raul Pedrozo(2010), p.15;

14 Raul Pedrozo(2010), p.12.

arise from the fact that it is very difficult to draw a sharp distinction between them in practice.¹⁵ As an author clearly points out this, “many of the technologies now used for hydrographic surveying and MSR are relatively recent innovations. Both MSR vessels and dedicated hydrographic surveying vessels use precise navigation systems, multibeam sonars, current meters, seabed sampling devices, etc.”¹⁶ Indeed, some states including Australia and Canada seek to permission of the coastal States before conducting hydrographic surveys in the EEZ of other States. According to a survey carried out in the 1980s by UN, legislations of most States do not distinguish between MSR and hydrographic surveys.¹⁷ With regard to military survey in the EEZ, the gap between law and practice is a source of conflicts. However, it is also clear that other routine military activities such as reconnaissance and surveillance in the EEZ are not required to authorization of coastal State.

5. Conclusions

Since 1945 in which US President Truman proclaimed US authority over the resources of the continental shelf contiguous to the lands of US, many coastal States tried to extend their sovereignty beyond the territorial sea. EEZ is the result of compromise to keep a balance between the interest of coastal States and the freedom of high seas. Coastal States enjoy exclusive economic rights in the EEZ specifically provided in the Convention. It is clear that the power to control military activities in the EEZ does not belong to coastal States. Therefore all States maintain the rights of military activities in the EEZ of coastal States as a traditional freedom of high seas right. However, with regard to military survey, question is that it is difficult to distinguish between MSR and military survey in practice.

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15 Zhang Haiwen, “Is IT Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? - Comments on Raul (Pete) Pedroz’s Article on Military Activities in the EEZ”, 9 *Chinese Journal of International Law* 31 (2010), p.42.

16 Sam Bateman, “Scholars’ Community Response to Agora: Military Activities in the EEZ - A Response to Pedrozo: The Wider Utility of Hydrographic Surveys”, 10 *Chinese Journal of International Law* 177 (2011), p.181.

17 UN, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National Jurisdiction* (UN, 1989), pp.143-154 (Recited at Sam Bateman(2011), p.182).

