

The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS

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Keywords

Law of the Sea, UNCLOS, Exclusive Economic Zone, Foreign Military Activities, Freedom of Navigation, Military Uses of the Ocean, Peacetime Naval Operations, South China Sea

Abstract

During negotiations for the United Nations Convention on the Law of the Sea (UNCLOS), military activities in another state's Exclusive Economic Zone (EEZ) were a point of contention. Currently, the issue remains controversial in state practice. UNCLOS attempts to balance the differing interests of coastal and maritime states, but is silent or ambiguous on the legality of military operations in foreign EEZs. Coastal states seek to assert increasing control over their maritime zones while maritime states prioritize the freedom of navigation. This article examines the competing views on these issues in the context of the 2009 *Impeccable* incident between China and the United States that occurred in the South China Sea. The issue of military activities in the EEZ will continue to be a complex subject, without clear definitions in the nature and scope of permissible activity. As state practice evolves, the potential for hostilities is high, particularly in semi-enclosed sea areas such as the South China Sea. This article concludes that states should create dialogues and form agreements to help clarify the contours of military activity in the EEZ, focusing on mutual interests, interdependence, and coexistence rather than perceiving the ocean as a zero-sum resource.

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I. Introduction

A. *The 2009 Impeccable Incident*

In March 2009 in the South China Sea, five Chinese vessels surrounded the unarmed USNS *Impeccable*, a United States ('US') Navy ocean surveillance vessel, and ordered it to leave the area.¹ The *Impeccable* had been conducting routine seabed mapping and tracking submarines about seventy-five nautical miles (nm) south of China's Hainan Island.² Two of the Chinese vessels moved within eight meters of the US ship, forcing it to take collision-avoidance measures.³ The *Impeccable* withdrew from the area but returned the following day accompanied by a US guided missile destroyer for its protection.⁴ This incident raised tensions in Sino-American relations as both nations accused the other of violating international law.⁵ The Pentagon protested the aggressive 'harassment' of the Chinese vessels while Beijing accused the US ship of illegally operating in China's Exclusive Economic Zone (EEZ).⁶ This issue is unlikely to be resolved because the two sides fundamentally disagree on what military activities are permissible in another state's EEZ.⁷

The *Impeccable* confrontation is a good example of the uncertainty and controversy regarding the legality of military operations in the EEZ. Did the United States have the right to conduct activities in China's claimed EEZ? Was China out of line to require prior notification and permission? What does the United Nations Convention on the Law of the Sea (UNCLOS or the Convention) permit and prohibit in terms of military activities in the EEZ? Unfortunately, the issue of the military uses of the oceans in peacetime raises many contentious questions and very few answers.

B. *The Legal Question*

This article examines the legal question of whether States may conduct military activities in another State's EEZ under UNCLOS. When, if ever, are such operations permissible? The analysis is limited to the military uses of the oceans in peacetime.⁸ This article will consider the text of UNCLOS, as well as the varying state practice regarding the issue. Finally, the article addresses the real-world implications of these questions in the context of the continuing tensions in the South China Sea.

II. The Law

A. *UNCLOS – A Constitution for the Seas*

On December 10, 1982, in Montego Bay, Jamaica, UNCLOS was presented for signature. Over 115 countries signed that same day.⁹ UNCLOS came into force on November 16, 1994, and has been broadly accepted by the international community.¹⁰ To date, 161 States and the European Union have joined the convention.¹¹

UNCLOS is a comprehensive treaty that creates a legal regime governing the peaceful use of the ocean and its resources.¹² UNCLOS provides guidance on various maritime matters such as pollution, environmental protection, and resources rights.¹³ In many ways, UNCLOS has provided clarity and reliability in the maritime context,¹⁴ however, it is either silent

1 R Pedrozo, 'Close Encounters at Sea: The USNS *Impeccable* Incident' (2009) 62 Naval War Col Rev 101.

2 C Rahman and M Tsamenyi, 'A Strategic Perspective on Security and Naval Issues in the South China Sea' (2010) 41 Ocean Dev and Int'l L 315, 326.

3 Rahman and Tsamenyi (n 2).

4 Pedrozo (n 1) 101.

5 V England, 'Who's right in South China Sea spat?' *BBC News* (London, 13 March 2009) <<http://news.bbc.co.uk/2/hi/asia-pacific/7941425.stm>> accessed 30 January 2012.

6 *ibid.*

7 *ibid.*

8 For a discussion on naval warfare, see generally L Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995). For example, hostile forces may conduct activities in all the waters of belligerent states, including internal waters, the continental shelf, and the high seas.

9 JA Duff, 'The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification' (2005) 11 Ocean and Coastal LJ 1, 6.

10 United Nations Convention on the Law of the Sea – Current Status <http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm> accessed 30 January 2012.

11 United Nations Convention on the Law of the Sea – Current Status (n 10).

12 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397 Overview and full text <http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm> accessed 30 January 2012.

13 DG Stephens, 'The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations' (1998) 29 Cal W Int'l LJ 283.

14 *ibid.*

or ambiguous about issues concerning military operations and the use of force in the oceans.¹⁵ The Convention does not explicitly regulate military activities in the EEZ or the high seas, though Article 88 requires that ‘the high seas shall be reserved for peaceful purposes.’¹⁶

B. *Development of the EEZ*

In some ways, the law of the sea has always had a tension between states supporting the doctrine of an open sea (*mare liberum*) and states that seek control over a more closed sea (*mare clausum*).¹⁷ This struggle has been continuous throughout the evolution of the law of the sea and many UNCLOS provisions reflect this balance between coastal state and maritime state interests.¹⁸

UNCLOS provides for different maritime zones with varying substantive regimes. For instance, the coastal state has sovereignty over the territorial sea,¹⁹ which extends up to 12 nm from the baseline.²⁰ Foreign warships must follow the conditions of Article 19 for ‘innocent passage’ if they are to navigate through the territorial seas of a coastal state.²¹ Article 25 permits the coastal state to protect itself and ‘take the necessary steps in its territorial sea to prevent passage which is not innocent.’²² On the other hand, all states equally enjoy the freedom of navigation and overflight in the high seas,²³ an area beyond national jurisdiction.²⁴ Situated between these two substantive regimes is the EEZ, which is arguably the most complicated of the maritime zones in terms of regulation and enforcement.²⁵

The concept of an EEZ developed early in the course of negotiations during the third United Nations Conference on the Law of the Sea (UNCLOS III).²⁶ Asian and African states adopted the 1972 Addis Ababa Declaration recognizing the right of a coastal state to establish an EEZ up to 200 nm in which ‘the coastal state would exercise permanent sovereignty over all resources without unduly hampering other legitimate uses of the sea, including freedom of navigation, of overflight and laying cables and pipelines.’²⁷ During UNCLOS III, there was considerable debate regarding the EEZ’s legal status.²⁸ Maritime powers maintained that the EEZ should have the traditional freedoms of the high seas,²⁹ while coastal states argued for more rights and control over the zone.³⁰ The result is an EEZ that is a compromise between the varying positions.³¹

UNCLOS Article 56 establishes the substantive regime of the EEZ. This maritime zone begins where the territorial sea ends and is to extend no more than 200 nm from the baseline.³² The coastal state has the sovereign rights for the economic exploitation and exploration of all resources in the EEZ, including, for instance, energy production.³³ The coastal state also has jurisdiction over artificial islands and installations, marine scientific research, and the protection and preservation of the marine environment.³⁴ In its regulation of the EEZ, the coastal state is obliged to give ‘due regard’ to the rights and duties of other states and must act in a ‘manner compatible’ with the Convention.³⁵ It is important to note that ‘sovereign rights’

15 *ibid.*

16 M Lehto, ‘Restrictions on Military Activities in the Baltic Sea – A Basis for a Regional Regime?’ (1991) 2 Finnish YB Int’l L 38, 45; see also art 88 United Nations Convention on the Law of the Sea (UNCLOS) 10 December 1982, 1833 UNTS 397.

17 CE Pirrle, ‘Military Uses of Ocean Space and the Law of the Sea in the New Millennium’ (2000) 31 Ocean Dev and Int’l L 7, 11.

18 *ibid.*

19 Subject to the right of innocent passage and transit passage of foreign vessels. See UNCLOS, Arts 17 and 38 respectively.

20 UNCLOS, Art 3.

21 UNCLOS, Art 19.

22 UNCLOS, Art 25.

23 UNCLOS, Art 87.

24 UNCLOS, Art 89.

25 See *eg.* DR Rothwell and T Stephens, *The International Law of the Sea* (Hart Publishing, Portland 2010) 428.

26 S Mahmoudi, ‘Foreign Military Activities in the Swedish Economic Zone’ (1996) 11 Int’l J Marine and Coastal L 365, 366.

27 *ibid.* 367.

28 *ibid.* 366.

‘Since the advent of the EEZ in 1971 there has been contrast in the views of different states about the legal status of the zone, the balance of rights and duties, and particularly about the exercise of the so-called residual rights *i.e.* the rights which are not expressly attributed in the convention either to the coastal state or the flag state. It is not surprising, therefore, that the relevant provisions in the 1982 LOS Convention are not interpreted uniformly.’

29 GV Galdoresi and AG Kaufman, ‘Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict’ (2001) 32 Cal W Int’l LJ 253, 254, ‘It is not a part of the high seas, although high-seas-like freedom exists there with respect to navigation. EEZ claims extract approximately 30 to 36 per cent of the world’s oceans from waters traditionally considered high seas.’

30 Commander JC Meyer, USN, ‘The Impact of the Exclusive Economic Zone on Naval Operations’ (1992) 40 Navak L Rev 241.

31 *ibid.* 241.

32 UNCLOS, Art 57.

33 UNCLOS, Art 56.

34 UNCLOS, Art 56.

35 UNCLOS, Art 56.

does not mean sovereignty.³⁶ Other states enjoy freedoms in the EEZ similar to those of the high seas, such as navigation and overflight.³⁷ Article 58 outlines the rights and duties of other states in the EEZ and mandates a similar obligation upon maritime states to have ‘due regard’ to the rights and duties of the coastal state.³⁸ Thus, articles 56 and 58 strike a balance between the interests of the coastal states, and the right to the freedom of navigation of all other states. The cross-reference to Articles 88 to 115 in Article 58 applies certain high seas provisions to the EEZ, so long as they are compatible with this regime.³⁹ Therefore, Article 58(2) envisions that other states may need to engage in certain non-economic, high-seas activities in the EEZ, such as hot pursuit, counter-piracy efforts, assistance and rescue missions, and the suppression of drug trafficking.⁴⁰

C. *Varying State Interpretations*

Since the conclusion of UNCLOS in 1982, the general concept of an EEZ and the right for a coastal state to exercise sovereign rights over economic activity and resources have become customary international law.⁴¹ However, as a relatively new concept in international law, the specific scope of rights and responsibilities in the EEZ is dynamic and ever-evolving.⁴² UNCLOS does not clarify the specific issue of military activities in the EEZ and a major source of contention continues to be whether maritime states may unilaterally conduct certain military operations in the EEZ of the coastal state without permission.⁴³ Some maritime powers support unfettered military activity in the EEZ by emphasizing the freedom of navigation.⁴⁴ Conversely, some coastal states object to military activity in their EEZ by expressing concern for their national security and their resource sovereignty.⁴⁵ This divergence in perspective regarding the legality of foreign military activities in the EEZ is partly due to varying interpretations of Article 58, which permits maritime states to engage in ‘other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.’⁴⁶ Thus, nations such as the United States perceive this provision to permit naval operations in the EEZ as an activity ‘associated with the operation of ships’ and more generally, as protected within the scope of the freedom of navigation.⁴⁷

Since UNCLOS is meant to be a comprehensive ‘package deal’, states may not make reservations or exceptions to the Convention.⁴⁸ Otherwise, parties to the treaty could effectively opt out of their convention obligations.⁴⁹ Under Article 310, States retain the right to make declarations, though such statements are illegitimate if they ‘purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.’⁵⁰ Some states have exercised their Article 310 right by making declarations on the issue of military activities in the EEZ.⁵¹ For instance, Brazil, Bangladesh, Cape Verde, Malaysia, India, and Pakistan have all expressed concern over the ability of foreign military vessels to engage in certain activities within the EEZ.⁵² In their declarations, these states require consent before a foreign ship may conduct military activities.⁵³ To illustrate, Brazil declared in 1988:

36 Pirtle (n 17) 30.

37 Lehto (n 16) 48.

38 UNCLOS, Art 58.

39 UNCLOS, Art 58(2).

40 JM Van Dyke, ‘Military ships and planes operating in the exclusive economic zone of another country’ (2004) 28 *Marine Policy* 29, 36.

41 Galdoresi and Kaufman (n 29) 285.

42 *ibid* 254.

43 Rothwell and Stephens (n 25) 284.

44 See *eg*, the United States Navy’s Freedom of Navigation Program as described in WJ Aceves, ‘The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics’ (1995) 19 *Hastings Int’l & Comp L Rev* 259.

45 M Valencia, ‘Intelligence Gathering, the South China Sea, and the Law of the Sea’ (Nautilus Institute, 30 August 2011) <http://www.nautilus.org/publications/essays/napsnet/forum/Valencia_SCS> accessed 30 January 2012. See also MJ Valencia and Y Amae, ‘Regime Building in the East China Sea’ (2003) 34 *Ocean Dev and Int’l L* 189.

46 UNCLOS, Art 58(1).

47 Y Song, ‘The PRC’s Peacetime Military Activities in Taiwan’s EEZ: A Question of Legality’ (2001) 16 *Int’l J Marine and Coastal L* 625, 635, ‘Specifically, the U.S. interprets UNCLOS Art 58(1) to permit “military activities such as task force maneuvering, flight operations, military exercises, naval survey, information gathering, and weapons testing and firing.”’ *ibid* 636.

48 UNCLOS, Art 309.

49 Van Dyke (n 40) 30.

50 UNCLOS, Art 310.

51 UNCLOS, Art 310 for ‘Declarations and statements’, ‘Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

52 See generally United Nations Convention on the Law of the Sea: Declarations and Statements <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm> accessed 30 January 2012.

53 UNCLOS Declarations and Statements (n 52).

The Brazilian Government understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives, in the exclusive economic zone without the consent of the coastal State.⁵⁴

States such as Italy, Germany, the Netherlands and the United Kingdom have protested these interpretations as unduly restrictive on navigational freedoms and as inconsistent with Article 310 and UNCLOS.⁵⁵ For example, the Netherlands declared in 1996:

The Convention does not authorize the coastal State to prohibit military exercises in its exclusive economic zone. The rights of the coastal State in its exclusive economic zone are listed in article 56 of the Convention, and no such authority is given to the coastal State. In the exclusive economic zone all States enjoy the freedoms of navigation and overflight, subject to the relevant provisions of the Convention.⁵⁶

These declarations demonstrate the sharp disagreement and variance in interpretation regarding the legality of conducting military activities in the EEZ of another country.⁵⁷

Despite the ambiguity in the language of UNCLOS and the divergence in interpretation of the text, there is some evidence that the Convention did not intend to broadly exclude peacetime military operations in the EEZ.⁵⁸ For instance, the 1949 International Court of Justice (ICJ) *Corfu Channel* decision refers to the freedom of navigation of warships in peacetime as a 'general and well-recognized principle.'⁵⁹ The ICJ's findings in the *Corfu Channel* case were influential in the development of the law of the sea in the UNCLOS conferences.⁶⁰ This finding is crucial since the freedom of navigation is the foundation for military operations at sea.⁶¹ However, the Court's decision did not specify the scope of the rights included in the freedom of navigation of warships. During UNCLOS III, the President of the Conference, Tommy T.B. Koh, commented on the question of military activities in the EEZ by stating in 1984:

The solution in the Convention text is very complicated. Nowhere is it clearly stated whether a third state may or may not conduct military activities in the exclusive economic zone of a coastal state. But, it was the general understanding that the text we negotiated and agreed upon would permit such activities to be conducted. I therefore would disagree with the statement made in Montego Bay by Brazil, in December 1982, that a third state may not conduct military activities in Brazil's exclusive economic zone[...].⁶²

Unfortunately, the issue of military activities in the EEZ remains ambiguous and unsettled.

D. 'For Peaceful Purposes'

UNCLOS repeatedly emphasizes that various maritime activities should be conducted 'for peaceful purposes.'⁶³ Both the Preamble and Article 301, for instance, reinforce the peaceful uses of the oceans.⁶⁴ Article 301 for 'Peaceful uses of the seas' echoes Article 2(4) of the United Nations Charter by stating:

54 Brazil (1988), UNCLOS Declarations and Statements (n 52).

55 UNCLOS Declarations and Statements (n 52).

56 The Netherlands (1996), UNCLOS Declarations and Statements (n 52).

57 Van Dyke (n 40) 29.

58 Van Dyke (n 40) 31.

59 *Case concerning Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4.

60 Rothwell and Stephens (n 25) 267-68: 'The ICJ's finding that the freedom of navigation was enjoyed by warships in peacetime was subsequently reflected in deliberations at UNCLOS I and III and in both the Geneva Conventions and the LOSC [...]. That it was considered a general principle further elevates its significance and needs to be taken into account when interpreting the international law of the sea concerning navigation by warships.'

61 *ibid* 267.

62 Van Dyke (n 40) 31.

63 Rothwell and Stephens (n 25) 266: 'This is reflected not only in Article 301, but is restated in numerous provisions throughout the convention including that the high seas are reserved for peaceful purposes (LOSC, Art 88), that the use of the Area is exclusively for peaceful purposes (LOSC, Art 141), and that marine scientific research is to be carried out exclusively for peaceful purposes (LOSC, Art 240). Consistent with these articles and the Preamble, the convention also emphasizes that passage in the territorial sea which is 'prejudicial to the peace' is inconsistent with the LOSC and coastal states may respond accordingly (LOSC, Art 19).'

64 UNCLOS (n 16) Preamble: 'Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.'

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.⁶⁵

Although some states have interpreted Article 301 to prohibit foreign military activities in the EEZ,⁶⁶ it does not follow that military activities are inherently non-peaceful. While Article 88, for example, reserves the high seas for peaceful purposes,⁶⁷ military maneuvers and exercises have traditionally been considered compatible with the freedom of the high seas.⁶⁸

E. *'Due Regard' for Rights and Duties*

In tandem, Articles 56 and 58 mandate that coastal and maritime states shall mutually respect each other's rights and duties in the EEZ.⁶⁹ These articles are meant to balance the interests of various states in the EEZ. However, 'due regard' is not defined in the Convention and is open to interpretation.⁷⁰ For instance, proponents of the legality of military activities in the EEZ argue that such actions do not interfere with the economic activity of a nation and thus cannot be regulated by the coastal state.⁷¹ What regard is due will inevitably depend on the circumstances, for instance, a military vessel conducting weapons tests may need to take measures to ensure the safety of maritime navigation in the vicinity.⁷² In cases where the extent of a state's legal rights in the EEZ is uncertain, Article 59 provides that the conflict in interests 'should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.'⁷³ Thus, circumstances matter and the implication is that there are many variables in determining whether certain military activities are permissible in the EEZ of a state, such as the scope and nature of the activity, the proximity of the vessel to the coastal state, and the impact on the marine environment.

III. In Practice

A. *The Impeccable Incident Revisited*

Now that we have reviewed the relevant law, it is time to return to the *Impeccable* incident and examine the law in practice. China has ratified UNCLOS but the US has only signed it.⁷⁴ As a non-party to the Convention, the US argues that the provisions are considered customary international law.⁷⁵ After the confrontation between the US navy ship and the five Chinese vessels, the Pentagon protested by stating:

We believe firmly that what that naval ship was doing in those international waters is not only fully consistent with international law, it is common practice. And we hope that the Chinese would behave in a similar way, that is, according to international law.⁷⁶

A spokesman from the Chinese Foreign Ministry responded:

65 UNCLOS (n 16) Art 301. See also Art 2(4) United Nations, Charter of the United Nations (24 October 1945) 1 UNTS XVI.

66 UNCLOS Declaration and Statements (n 52).

67 UNCLOS (n 16) art 88.

68 Valencia (n 45). See also Francesco Francioni, 'Peacetime Use of Force, Military Activities, and the New Law of the Sea' (1985) 18 Cornell Int'l LJ 203, 222: 'The term 'peaceful purposes' did not, of course, preclude military activities generally. The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement.'

69 UNCLOS (n 17) Arts 56 and 58.

70 Galdoresi and Kaufman, (n 29) 273: 'As agreed upon, however, with residual rights unassigned and the issue left in the balance, and with each side required to exercise its rights in the EEZ with due regard for the rights of the other, the regime appeared ambiguous. These provisions left any undefined rights unassigned, and gave no hint as to how to weigh the balance in settling any dispute over such assignment. Moreover, these provisions, while requiring 'due regard,' did not define just what regard is due, leaving that difficult and dangerous question on the table, with the answer very much dependent upon the eye of the beholder.'

71 Meyer (n 30) 246: '[A]rticle 58's stipulation that states "shall comply with the laws and regulations adopted by the coastal State" in its EEZ, relates to activities for which the coastal state exercises sovereign rights and jurisdiction under the provisions of part V of the 1982 Convention relative to the EEZ. Those activities are economic in nature and are not applicable to the conduct of warships in the coastal state's EEZ.'

72 Rothwell and Stephens (n 25) 280.

73 UNCLOS (n 16) Art 59.

74 United Nations Convention on the Law of the Sea – Current Status (n 10).

75 Valencia (n 45).

76 JR Crook (ed), 'United States Protests Chinese Interference with US Naval Vessel, Vows Continued Operations' in *Contemporary Practice of the United States Relating to International Law* (2009) 103 Am J Int'l L 325, 351. See also US Department of Defense, 'DoD News Briefing with Geoff Morrell from the Pentagon' (11 March 2009) <<http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4369>> accessed 31 January 2012.

[T]he USNS *Impeccable* conducted activities in China's special economic zone in the South China Sea without China's permission [...]. We demand that the United States put an immediate stop to related activities and take effective measures to prevent similar acts from happening.⁷⁷

Officials from both sides rejected each other's legal arguments.⁷⁸ China argues that the military activities of the *Impeccable* are an 'abuse of rights' under Article 300⁷⁹ and that they constituted a non-peaceful threat of the use of force prohibited under Article 301.⁸⁰ The 'abuse of rights' argument is meant to protest the United States' allegedly arbitrary use of China's EEZ.⁸¹ On the other hand, the United States continues to assert a 'complete right to unilateral, unlimited naval operations in foreign EEZs.'⁸² What is legally permissible in the EEZ is most likely somewhere between these extremes.

It is difficult to comment on the legality of the *Impeccable* in China's claimed EEZ without knowing the exact circumstances of what the vessel was doing there. According to the US Navy's Military Sealift Command website, the *Impeccable* is an ocean surveillance ship that 'directly support[s] the Navy by using both passive and active low frequency sonar arrays to detect and track undersea threats.'⁸³ Much to China's irritation, the United States will most likely continue to assert the freedom of navigation and point to military activities in the EEZ as legitimate, non-resource related, and posing no direct threat to the coastal state.⁸⁴ Meanwhile, China relies on Article 301 and demands that the United States respect its legal interests and security concerns.⁸⁵ Ultimately it appears that the two nations remain markedly divergent in their interpretation of whether peacetime military activities such as what the *Impeccable* was engaged in are a threat to the territorial integrity or political independence of the coastal state.

B. *The Difficulty in Discerning State Practice*

In light of the ambiguity of treaty obligations under UNCLOS regarding military operations in the EEZ, it is useful to consult customary international law. However, state practice regarding such activity is as diverse as states themselves.⁸⁶ Although all states possess sovereign equality under the UN Charter, states have differing, and at times conflicting, interests and various factors influence their perspective regarding military operations in the EEZ. For instance, a fledgling coastal state without a strong navy may not prioritize the freedom of navigation as much as a state with an advanced military would. In fact,

The struggle to define the EEZ is a political tug-of-war involving a large number of states with dissimilar history, unequal resources, and different maritime interests. This diversity engenders an acute sensitivity about relative rights and privileges, and negotiations tend to end up being viewed through the lens of a zero-sum perspective.⁸⁷

According to some commentators, there is no reason why economic and military activities cannot coexist in a maritime zone.⁸⁸ Nevertheless, as military technology continues to advance,⁸⁹ less developed states continue to make greater claims

77 Crook (n 76). See also 'China Says US Naval Ship Breaks Int'l, Chinese Law' Xinhua News Agency (10 March 2009) at <http://news.xinhuanet.com/english/2009-03/10/content_10983647.htm> accessed 31 January 2012.

78 Crook (n 76).

79 UNCLOS (n 16) Art 300.

80 Valencia (n 45). See also UNCLOS (n 16) Art 301.

81 Valencia (n 45): 'China argues that the activities of the EP-3 and the *Impeccable* are an "abuse of rights" prohibited by UNCLOS Article 300, ie the unnecessary or arbitrary exercise of rights, or interference with the exercise of rights by another state. This in turn goes back to exactly what these platforms were doing and to the issue of "due regard to the rights and duties" of *each* other. Although such due regard in the EEZ is required by the Convention, it is undefined.'

82 Galdoresi and Kaufman (n 29) 289.

83 United States Navy Military Sealift Command Website <<http://www.msc.navy.mil/pm2/>> accessed 30 January 2012.

84 Rothwell and Stephens (n 25) 276. See also Rahman and Tsamenyi (n 2) 328; R Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9 Chinese J Int'l L 9, 29; R Pedrozo, 'Responding to Ms. Zhang's Talking Points on the EEZ' (2011) 10 Chinese J Int'l L 207, 213.

85 Rahman and Tsamenyi (n 2) 326.

86 Rothwell and Stephens (n 25) 280: 'In light of this diversity in state practice, Churchill observed in 2005 that "there is no agreed interpretation of the Convention nor a rule of customary international law" on whether there is an unfettered right to conduct these military operations in the EEZ.'

87 Commander SA Rose, USN, 'Naval Activity in the EEZ – Troubled Waters Ahead?' (1990) 39 Naval L Rev 67, 78.

88 Rose (n 87) 78.

89 See eg, Valencia (n 45): 'Drones are generally considered relatively cheap weapons and highly effective reconnaissance tools. In a world of increasing use of spy planes including UAVs (unmanned aerial vehicles) such as the ever improving Global Hawk, and spy ships including unmanned surface vessels (USVs) and now unmanned underwater vessels UUVs, their missions are rapidly outstripping relevant laws and regulations. For example remote sensing from satellites and high-flying surveillance aircraft have for decades undertaken maritime scientific research and surveys in others EEZs without the permission – or even the advance knowledge – required by the 1982 UNCLOS.'

in the EEZ.⁹⁰ As state practice regarding military operations in the EEZ continues to evolve in a dynamic system, national practice is inconsistent and remains in dispute.⁹¹ In many ways, the legal status of the EEZ will continue to develop through the interaction of competing interests and ‘claim and counterclaim.’⁹²

C. *The Way Forward*

With such limited guidance from the text of UNCLOS and from state practice, what is the way forward for determining the scope of permissible military activity in the EEZ? Furthermore, what can be done to prevent hostilities and other incidents at sea? Seeking clarity from tribunals will be difficult since Article 298 has an opt-out clause where many states may exclude disputes regarding military activities from compulsory dispute resolution.⁹³ In fact, many states have taken advantage of this option.⁹⁴ It will be difficult to look for an authoritative legal interpretation regarding military activities in the EEZ if such a dispute is not presented before the ICJ or the International Tribunal for the Law of the Sea.⁹⁵ Thus, the question of whether naval operations are permissible within the EEZ of a coastal state remains unclear.

Aside from dispute settlement, states could gain clarity regarding military activity in the EEZ from bilateral or regional arrangements. Such dialogue could promote clarity and potentially help preempt conflict.⁹⁶ For instance, the former Soviet Union and the United States adopted a ‘Joint Statement’ providing for uniform interpretation of the right of innocent passage in the territorial sea.⁹⁷ In the East China Sea, China and Japan have developed bilateral regimes for ‘conflict avoidance’ regarding fisheries and marine scientific research.⁹⁸ These agreements may not resolve every issue, but they do certainly offer more clarity and could provide mechanisms to deal with situations where the law is uncertain. Another option would be to form regional agreements. In the 1990s, Indonesia used Association of Southeast Asian Nations as a venue for hosting informal talks aimed at conflict resolution and management in the South China Sea.⁹⁹ Thus, individual states as well as regional organizations may have a role in clarifying the legality of military operations in the EEZ. There is the risk of regional diversification in state practice and interpretation; nevertheless, such arrangements could contribute to increased certainty regarding military uses of the oceans. These multi-state dialogues are particularly crucial at the moment as tensions continue to escalate in the South China Sea region.¹⁰⁰

IV. Conclusion

Military activities in the EEZ were a point of contention during UNCLOS III negotiations, and remain controversial in state practice. UNCLOS attempts to balance the differing interests of coastal and maritime states, but is silent or ambiguous on the legality of military operations in foreign EEZs. Coastal states seek to assert increasing control over their maritime zones while maritime states prioritize the freedom of navigation. Military activity that is permissible will depend on many variables and the circumstances. Maritime states cannot engage in naval activities without constraint, and coastal states should not unilaterally revoke certain high-seas freedoms. Both the coastal state and the maritime state should have mutual respect and ‘due regard’ for one another.¹⁰¹

90 Galdoresi and Kaufman (n 29) 288: ‘It is often the less developed countries that make the strongest claims, seeking to use the law to achieve the exclusion and control they cannot yet ensure with weapons and technology.’ See also Meyer (n 30) 250: ‘The number of extended claims of jurisdiction is growing as developing countries claim greater rights to the exploitation of the ocean and demand a larger say in ocean affairs. The US historical approach to navigation and overflight has little meaning to this community of nations whose independence from colonial rule has been gained only within the past twenty years. From their perspective, repeated incursions into their waters by US naval forces, demonstrating freedom of navigation rights, could be seen as superpower “bullying.”’

91 Galdoresi and Kaufman (n 29) 285-86: ‘National practice and legislation is varied and inconsistent in the implementation of the detailed EEZ mechanisms, and so does not provide a rule for naval operations [...]. State declaratory practice reflects a continuing effort by coastal States to retain control of coastal waters by legal exclusion—whether by claims of sovereignty, or extensive regulatory jurisdiction, or some combination amounting to quasi-sovereignty.’

92 Aceves (n 44) 262.

93 UNCLOS (n 16) Art 298.

94 UNCLOS Declarations and Statements (n 52).

95 Song (n 47) 637.

96 Galdoresi and Kaufman (n 29) 296.

97 Galdoresi and Kaufman (n 29) 295.

98 Valencia and Amae (n 45).

99 JP Burgess, ‘The Politics of the South China Sea: Territoriality and International Law’ (2003) 34 Security Dialogue 7, 10 <<http://community.middlebury.edu/~scs/docs/Burgess,%20Politics%20of%20the%20South%20China%20Sea-Territoriality%20and%20.pdf>> accessed 30 January 2012.

100 See eg, O Saleem, ‘The Spratly Islands Dispute: China Defines the New Millennium’ (1999) 15 Am U Int’l L Rev 527.

101 Galdoresi and Kaufman (n 29) 301: ‘A sufficiently dense network of such arrangements and understandings, followed by consistent practice, will ensure the vitality of customary norms. In the end, it is our view that this is an approach that will ensure the best balance among an ongoing network of lawful naval and military activities, stable international law, freedom of navigation for ocean-going commerce, and is an approach that will protect interests common to all in an internationally interdependent world.’

The issue of military activities in the EEZ will continue to be a complex subject, without clear definitions in the nature and scope of permissible activity. As state practice evolves, the potential for hostilities is high, particularly in semi-enclosed sea areas such as the South China Sea. States should create dialogues and form agreements to help clarify the contours of military activity in the EEZ. They should focus on mutual interests, interdependence, and coexistence rather than perceiving the ocean as a zero-sum resource.¹⁰² ■

102 Galdoresi and Kaufman (n 29) 300: 'A stable system of international law is good for trade, and a strong Navy, able to evenhandedly defend legal entitlements by its presence at sea, is good for a stable system of international law. The cooperative approach is the preferable approach.'