

Restrictions on Foreign Military Activities in the Exclusive Economic Zone: Major Powers' 'Lawfare'

by MAJ Chuah Meng Soon

Abstract:

In this article, the author first defines and explains the concept of the Exclusive Economic Zone (EEZ) in the context of the United Nations Conference on the Law of the Sea (UNCLOS). He elaborates on the regional examples of restrictions declared and imposed by coastal states and also discusses the impact on traditional naval freedom of navigation due to these restrictions. The author concludes that the provisions in UNCLOS have been decisively clear that the EEZ was conceptualised to be exclusively for the coastal states in the realm of economic utilisation. He adds that disagreements will continue in the debate of UNCLOS between maritime powers and coastal states as long as fundamental interests are at play and that the seas remained important as a vital source of assets and a battle-ground for geopolitics.

Keywords: Exclusive Economic Zone; Military Activities; Lawfare; Financially Crippling; Rights

INTRODUCTION

The third United Nations Conference on the Law of the Sea (UNCLOS III) saw extensive debates between maritime powers and coastal states on the rights and freedom of use of the seas. Coastal states wanted full sovereignty and control of the immediate seas for all its resources while the maritime powers wanted the freedom of navigation in the 'global commons'. The concept of an Exclusive Economic Zone (EEZ) was created as part of the debates and negotiations between the countries with various interests. It was often stated that the EEZ was the grand compromise between the coastal states and the maritime powers.¹

Despite having the EEZ as the grand compromise in UNCLOS since 1982, the fundamental disagreements between the coastal states and the maritime powers still exist today. This is because the differences in

fundamental interests between the coastal states and maritime powers remain. Having said that, the positive impact of the compromise is that states now have a common reference founded by having a law of the sea, acting in concert with other existing international laws.

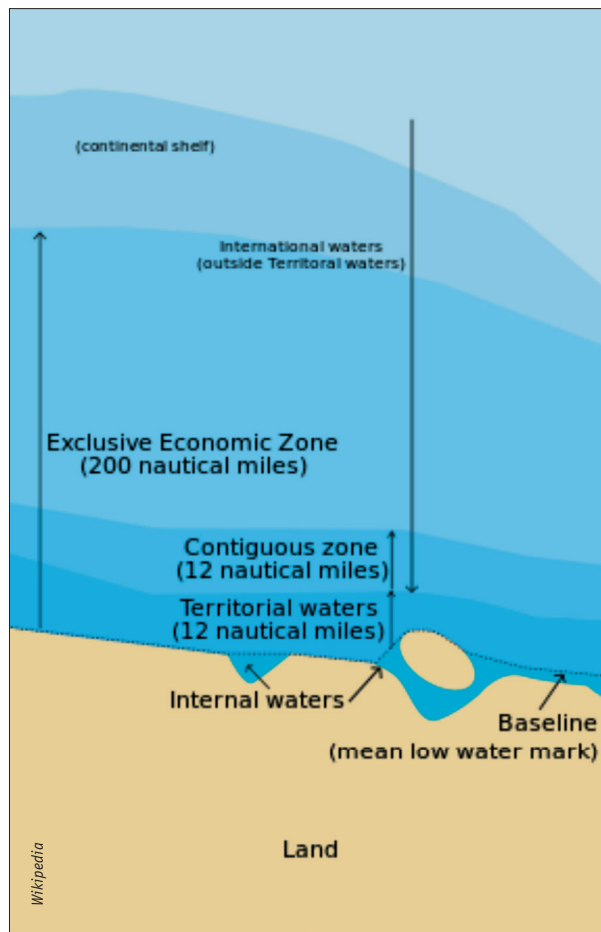
The recent debates are now focused on the legalities within the EEZ, particularly on whether military activities by foreign military powers should be restricted. As a result, the discussions on traditional freedoms of navigation against the provisions in the UNCLOS are revived.

This essay argues that the provisions in UNCLOS are clear that restrictions of military activities in EEZ are not justified. The current debates around what activities are permissible in EEZ are merely the result of 'lawfare' launched against maritime powers as part of a greater play of geopolitics and jostle for supremacy.

The approach of this essay is to first define and explain the concept of EEZ in the context of the UNCLOS. It then highlights the legal aspects, i.e. the text within the convention that had been the source of the debates. The essay will also look at regional examples of restrictions declared and imposed by coastal states. The impact on traditional naval freedom of navigation due to these restrictions will also be discussed. This essay will also examine the United States Naval Ship (USNS) *Impeccable* incident in 2009 to unravel the motivations behind the disputes beyond the legal cover.

THE CONCEPT OF EEZ

The EEZ was conceptualised as a new *suis generis* zone, i.e. unique in its characteristics and specificities, which is governed by the ‘specific legal regime’ in



Sea areas in international rights.

UNCLOS (Part V).² As the name suggests, EEZ is exclusive only in the economic-related domains. Article 56 defined the “rights, jurisdiction, and duties of the coastal states in the EEZ,” while Article 58 spelt the “rights and duties of other states in the EEZ.”³

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“RIGHTS, JURISDICTION, AND DUTIES IN EEZ”

Article 56 is clear that coastal states enjoy ‘sovereign rights’ and not ‘sovereignty’ over the EEZ. This term had been carefully chosen to distinguish territorial waters and EEZs.⁴ In Article 56(a), there is little doubt that ‘economic exploitation’ was the only rationale in the crafting of this provision. In Article 56(b), the only areas that coastal states have jurisdiction within the EEZ are stated. Reading in conjunction with Article 56(a), Article 56(b) supports the economic exploitation within the EEZ through the jurisdiction over: (1) “the establishment and use of artificial islands, installations and structures” to confer power in the extraction of resources such as oil and fishery; (2) ‘marine scientific research’ to provide exclusivity in the exploration of resources such as oil and fishery; and (3) “the protection and preservation of the marine environment” to define authority to protect marine life sustainability specifically in fisheries which is an important source of economic livelihood for many coastal states.⁵ Hence, it is clear that the text in the convention with regard to coastal states rights and jurisdiction are only framed with the rationale of giving these coastal states sufficient legal power in economic gains within the EEZ.

In Article 58(1), it is expressively stated that “in the EEZ... all states... enjoy the freedoms referred to in article 87 of navigation and overflight... and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships... compatible with the other provisions of this Convention.”⁶ Furthermore, Article 58(2) stated that “Articles 88 to 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with this Part.”⁷ This article again clearly explains that other states are free to use the EEZs but they are not allowed to contravene and disrupt the economic exploitation within the EEZs by the coastal states in the conduct of their activities.⁸

The UNCLOS was meant to be a comprehensive package deal. Thus, there are no exclusions, no exceptions, and no reservations.

TERRITORIALISING THE EEZ – RESTRICTION OF MILITARY ACTIVITIES

Despite the clarities in the regime of EEZ, why did coastal states continue to debate and argue about military activities in the EEZ? The short answer is that such activities were not explicitly written and permitted within the EEZ. This prompted a comment by Tommy Koh, President of the Conference in the third UNCLOS, on the debate:

“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 EEZ 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[...].”⁹

This statement has essentially explained the background and robustness of the negotiations that had gone into the crafting of the UNCLOS texts allowing foreign military activities within the EEZ.

Had the provisions within UNCLOS been meant to restrict and regulate military activities, it would have been made explicit and included in the provisions much like the various articles involving ‘Innocent Passage in the Territorial Sea.’¹⁰ Furthermore, the stated activities in Article 87(1) should not be seen as exhaustive and ‘*inter alia*’ was deliberately included.¹¹ The fact is, again, that EEZ is not the Territorial Sea and hence it does not have any provisions against any conduct of military activities within the EEZ. States that impose restrictions on military activities in their EEZs are in fact trying to ‘territorialise’ the EEZs.

EXAMPLES OF RESTRICTIONS IMPOSED ON MILITARY ACTIVITIES BY REGIONAL COASTAL STATES

The UNCLOS was meant to be a comprehensive package deal. Thus, there are no exclusions, no exceptions, and no reservations.¹² However, regional coastal states still unilaterally went ahead to institute laws to control military activities in their Territorial Seas and EEZs. *Table 1* describes the types of rights asserted by the regional coastal states.

These regional examples of restrictions involving 13 states give a flavour of the type of control and restrictions imposed. These ranged from registering a concern, to requirements of notifications, to establishing ambiguous security zones through to requirements of prior approval before military activities can be conducted.

In reality, there had been observers that stated that of the 18 countries in the world that enact such laws, only three of these states, i.e. China, North Korea and Peru, had directly interfered with foreign military activities within their EEZs.¹³ What this means is that although regional coastal states had instituted such

STATE	TYPE OF RIGHTS ASSERTED
Bangladesh	Warships require prior authorisation; Control Zone (CZ) 18 nmh.
Cambodia	All foreign activities on the continental shelf are under control, regardless of their purpose; CZ 24nm.
China	Requires prior notice for transports of waste in TS and EEZ; warships require prior authorisation; CZ 24nm Security interests.
India	Warships are to announce their passage in advance; Prior consent to military exercises and manoeuvres in the EEZ and on the continental shelf; CZ 24 nm.
Indonesia	Warships and all vessels other than merchantmen must announce their passage in advance; 100 nm ships are not allowed to stop, anchor or cruise 'without legitimate cause'.
Malaysia	Prior consent to military exercises and manoeuvres in the EEZ and on the continental shelf.
Myanmar	Warships require prior authorisation; Claims the right to restrict the freedom of navigation and overflight in its exclusive economic zone; CZ 24nm.
North Korea ¹⁴	"62 nm Military zone 50 nm seaward of the territorial sea. All ships and aircraft require prior approval."
Pakistan	Warships require prior authorisation; supertankers, nuclear-powered ships and ships carrying nuclear materials are required to announce their passage in advance; Claims authority to regulate transit through parts of the EEZ and enact and enforce all regulations required for controlling activities in the EEZ; CZ 24nm.
Philippines	Expressed concern at UNCLOS III with respect to military activities in the EEZ
South Korea	Warships and government ships have to announce their passage three days in advance before exercising Innocent Passage.
Sri Lanka	Warships require prior authorisation; CZ 24nm
Vietnam	Warships require authorisation to be applied for at least 30 days prior to passage; passage restricted to 3 warships at a time; CZ 24nm. Submarines are required to navigate on the surface and to show their flag; aircraft are not allowed to land on board ships or be launched from them; on-board weapons have to be set in 'non-operational' mode prior to the entry into the zone.

Table 1: The Types Of Rights Asserted By The Regional Coastal States.¹⁵

laws, they have not actively enforced these laws with the exception of China and North Korea.¹⁶ Hence, these so-called restrictions had not really impeded traditional naval freedoms of navigation. The actions of China and the impact to naval freedoms of navigation shall be discussed later in the USNS *Impeccable* example.

LAWFARE – THE NEW WARFARE

Now given that the case is so clear as demonstrated in the explanations of the relevant articles in UNCLOS, The UNCLOS was meant to be a comprehensive package deal. Thus, there are no exclusions, no exceptions, and no reservations. why are there still debates over the

legitimacy of military activities within the EEZs? This can be attributed to a new strategy. China uses legal warfare or otherwise known as 'lawfare' to challenge the maritime powers, namely the United States (US) in the disputes over the military activities in the EEZs. 'Lawfare' aims to win the strategic narrative through deliberation misinterpretation of existing laws.

The Points For Legal Contention

The key to 'lawfare' is to find gaps and ambiguities in the law in order to attack and turn these points to one's advantage. The examples of these points in relation to military activities are: (1) it 'must be exercised with due regard to the rights and duties of the coastal state', (2) it 'must comply with laws and regulations of the coastal state adopted in accordance with the provisions of the Convention', (3) it 'must not be exercised in such a manner that it would constitute an abuse of rights', and (4) it 'must be for peaceful purposes'.¹⁷ These points can be examined.

1) Due Regard

UNCLOS did not state what is due regard. In law, this simply means to give a fair consideration. The opponents supporting restriction of military activities often cite weapons firing. It was claimed that weapon exercises would breach this provision as it can harm resources owned by the coastal state and deny or disrupt access to known fishing areas posing hazards to commercial fishing.¹⁸

This restriction sounds perfectly logical. However, this is exactly what 'due regard' is stated for. Maritime states ought not to prejudice or interfere with that activity in undertaking their right i.e. the right to conduct military activities.¹⁹ The converse is also true that other states exercising due diligence in their right, ought not to be interfered by other users. The truth is till date, maritime states have been conducting a range of military activities from

navigation through to weapons firing and testing but there had not been any serious protests by coastal states as these military activities had been conducted with 'due regard'.

2) Laws and Regulations of Coastal State

As discussed earlier in this essay, the laws and regulations by many coastal states are non-starters as they have not been adopted in accordance with UNCLOS. These laws and regulations are deemed illegal in UNCLOS. Despite this, many argued the validity of these laws through the concerns of environmental damage particularly by nuclear powered military ships. Djibouti, Egypt, Estonia, Haiti, Iran and Oman are among these coastal states that regulate these nuclear-powered vessels in and just outside their territorial seas. When referencing against the 'protection of marine environment', this argument sounds legitimate.²⁰

The key to 'lawfare' is to find gaps and ambiguities in the law in order to attack and turn these points to one's advantage.

However, it should be noted that Article 23 had expressively stated that "foreign nuclear-powered ships ... shall, when exercising the right of innocent passage through the territorial sea,... observe special precautionary measures established for such ships by international agreements."²¹ It is clear that nuclear-powered ships enjoy the right of innocent passage in territorial seas, hence such freedoms are undoubtedly extended in the EEZ. Of note, there had been muted response to the US nuclear submarines plying all over the world. Nightmare scenarios cannot be taken as a planning norm in the application of UNCLOS. Thus, states asserting excessive restrictions in the EEZ under the pretext of environment protection should

not be looked upon as championing a cause but as a group of wilful actors acting contrary to international environmental law. These actors are over-reacting and hence may dilute genuine efforts made in marine environmental protection.²²

3) Abuse of Rights

The oft cited example by analysts to claim that military activities can constitute an abuse of rights is the congregating of naval ships within the EEZ of another state.²³ This is far-fetched and in any case these actions would inadvertently violate the United Nations (UN) Charter and breach other international laws as worded in the convention. The truth is the abuse of rights had not been committed by foreign militaries using the EEZs; it is the coastal states that had been abusing their rights to illegally and at times forcefully enforcing such unfounded restrictions in the EEZs.

4) Peaceful Purposes

Peaceful purposes is the most quoted point by many lawfare specialists. Again, peaceful purposes are left undefined in the convention. Peace simply means no war and (armed) conflicts. Military activities should not be seen as war-like. It should be noted that military manoeuvres and exercises have long been considered acceptable in the high seas.²⁴ In fact, the military have always been considered the vanguards of peace. Think about the counter-piracy efforts in the Gulf of Aden along with other peace-keeping missions undertaken by the military. It is evident that military activities do not equate to non-peaceful purposes.

UNCLOS is not the only international maritime law; high seas freedom is also subjected to 'other rules of international law'.²⁵ The crafting of this text makes it clear that other international laws must be considered for legitimate uses in EEZs and

high seas. Take for example *The San Remo Manual on Armed Conflicts at Sea* that laid down the rules of sea combat; it also requires belligerents to avoid or minimise damage to neutral states in the EEZs.²⁶ It should also be noted that had peaceful purposes meant no military activities, the US and the Soviet Union would not have agreed to UNCLOS as it was negotiated during the Cold War. It must be reminded that Article 95 did provide immunity from jurisdiction on warships.

USNS IMPECCABLE – LEGAL OR NOT IN THE EEZ?

In March 2009, USNS *Impeccable*, a US ocean surveillance ship was harassed by five Chinese vessels and was ordered to leave. This happened about 75nm south of China's Hainan Island.²⁷ The USNS *Impeccable* left the area but returned a day later under the escort of a US destroyer. The US protested against the aggressive stance by the Chinese while China claimed that the US presence was illegal in its EEZ.²⁸ This incident brought the spotlight back on the long drawn disagreement between a maritime power and a coastal state.

China engaged the tools of 'lawfare' in presenting its case in this incident. Beijing argued that the activities undertaken by the USNS *Impeccable* constitutes an 'abuse of rights'.²⁹ The Chinese also claimed that the surveillance ship's activities amounted to non-peaceful purposes prejudicial to Article 301. Key to the 'lawfare' tactics employed was the debate about 'Marine Scientific Research' (MSR). China claimed that what the USNS *Impeccable* was doing was in fact MSR and that it was in China's jurisdiction since the US ship operated in her EEZ.

MSR was unsurprisingly left undefined as well in UNCLOS. A clever dissection of the term can be made to mean any form of study that enhances the knowledge of the marine environment. Article



Figure 1: Incidents between US Ships and Aircraft in China EEZ (2001 – 2009)³¹

240 also stated that “marine scientific research is exclusively for peaceful purposes.”³⁰ In this sense, China may have a case where firstly MSR was under her jurisdiction and secondly, a military surveillance ship activities within her EEZ was prejudicial to her security and sovereignty.

A retired Chinese general gave this remark after the incident. “If a military surveillance ship conducts military intelligence-gathering activities in another state’s EEZ, it is hard to explain this as friendly behaviour that is 'harmless' and undertaken in 'good

faith’.”³² This remark is not surprising as the USNS *Impeccable* incident was a culmination of other similar incidents between the US and China as seen in *Figure 1*.

The US thinking on this issue is completely divergent from the Chinese interpretation. The US argued that she has the complete legitimacy and rights in conducting military activities that has no bearing on a state's resource exploitation and that the activities were benign. This is evident in the US statement:

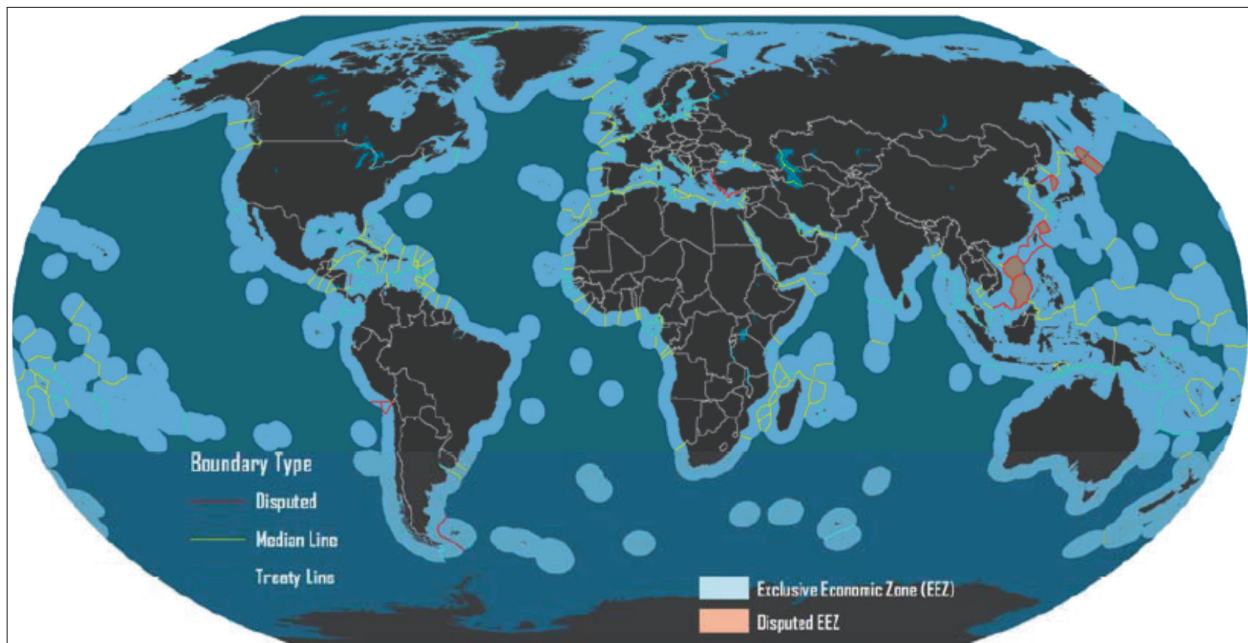


Figure 2: World EEZ Claims.³⁴

*“... the position of the United States... that the navigational rights and freedoms applicable within the EEZ are qualitatively and quantitatively the same as... applicable on the high seas...”*³³

Washington also argued that there had been instances of Chinese military activities in other EEZ. For example, in July 2004, a Chinese naval survey vessel was spotted within Japan's EEZ. When called to explain her actions, the officials replied that the “ship was engaged in military activities, thus obviating the need for [prior] notification” to the Japanese government.³⁵

As elaborated earlier, MSR was framed for resource-related contexts. China on the other hand also engaged in surveillance activities in foreign EEZs citing support from UNCLOS. It is plain to see from this example that UNCLOS did not justify the restriction of military activities in the EEZ as supported by the various articles.

UNCLOS – JUST ANOTHER DEBATE

The debates and disputes in the USNS *Impeccable* Incident was ultimately not about the law. A search through the related literary works will point to the fact that these disputes were essentially only between the US and China, the EEZ debate is just one of the many other disputes in nearly all domains. One may argue that if Sino-American relations were good, there will not be any debates on military activities and EEZ.

Despite its consistent argument that UNCLOS was not about security concerns, the US constant pitch for Freedom Of Navigation (FON) is unmistakably central to her security concern. The US being a maritime power requires her naval ships to be able to sail unimpeded in the global commons to protect her vital overseas territories and interests. A look at the World EEZ map (see *Figure 2*) will reveal that if China wins her case, the US Navy might not even be

able to sail into the South China Sea. China, shaped by her historical experiences, may have believed that keeping foreign military activities out of her shoals and EEZ will provide the security she desires. The debate was really about the clash of the strategies, i.e., US Maritime Power Projection versus China's Anti-Access Area Denial.

CONCLUSION

The provisions in UNCLOS have been decisively clear that the EEZ was conceptualised to be exclusively for the coastal states in the realm of economic exploitation. However, lawfare will continue in the debate of UNCLOS between maritime powers and coastal states as long as fundamental interests are at play and that the seas remained important as a vital source of assets and a battle-ground for geopolitics. Incidents will also continue as evident in the 2013 USNS *Impeccable* incident.

The threat of impediment to the FON is an over-play of the actual situation. As it stands, 'FON had not been seriously threatened as the global interdependence and military cooperation far outweigh any rhetorics.

Singapore and the Singapore Armed Forces (SAF) should, however, pay close attention to the developments of the debates. Singapore should also monitor or, if possible, provide inputs to the debates as it has bearing on whether international law continues to be respected.

It should be perceived that the spirit of UNCLOS was to resolve the conflicts over the resources of the sea through the codification of the negotiations in the law. This was aimed at UNCLOS being able to contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and to promote the economic and social advancement of all peoples of the world.³⁶

The freedom of the global commons must not be undermined and states should not act without considering the positions of others. Mutual respect and understanding is a vital key to circumscribe these pitfalls of tensions. Hence, states should explore various platforms to iron out their differences. Ultimately, the seas are vast and the aims are interconnected. It is never just a zero-sum game. 🌐

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