

THE LEGALITY OF FOREIGN PEACETIME MILITARY ACTIVITIES IN THE EXCLUSIVE ECONOMIC ZONE OF ANOTHER STATE

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Abstract

The author argues that in the absence of provisions explicitly regulating foreign peacetime military activities in the Exclusive Economic Zone (EEZ) of another states, disputes about this issue can be resolved only a case by case basis. This legal lacunae should be remedied. With that in mind, the author shall look at the negotiation process and the resulting provisions of the United Nations Convention on the Law of the Sea (UNCLOS) 1982. Subsequently, state practice related to the above activities shall be examined. By using both methods the author shall attempt to offer an interim solution to the problem at hand.

Keyword:

Peaceful Military Activitie; Exclusive Economic Zone; Law of the Sea; UNCLOS 1982.

Abstrak

Titik tolak penelitian ini adalah bahwa ketiadaan ketentuan internasional yang mengatur eksplisit kegiatan (militer) negara asing pada waktu damai di Zona Ekonomi Eksklusif (ZEE) negara lain telah menyebabkan penyelesaian sengketa tentang ini terpaksa dilakukan kasus demi kasus. Kekosongan hukum ini harus diperbaiki. Untuk itu, akan ditelusuri melalui pendekatan sejarah hukum (khususnya proses pembuatan Konvensi Hukum Laut PBB 1982), definisi kegiatan militer di waktu damai. Selain itu juga akan ditelusuri praktik hukum Negara dalam menafsirkan ketentuan-ketentuan Konvensi yang terkait. Penulis melalui kedua cara di atas akan mencoba memberikan solusi interim untuk mengisi kekosongan hukum yang diidentifikasi di atas.

Kata Kunci:

kegiatan militer di waktu damai; zona ekonomi eksklusif; hukum laut; UNCLOS 1982.

Introduction

Throughout the history, states have used the sea as an important media to pursue its interests.¹ The sea has been used as one of the avenue to project states'

¹ Donald R Rothwell and Tim Stephens, *The International Law of the Sea*, Hart Publishing, Melbourne, 2010, p. 259

military power to distant shore beyond its land territory.² In contrast, the sea has also been used the sea by states for peaceful purposes, e.g. for trade or as transportation-link that connected the states. The importance of the sea to the states had driven international community to push for the establishment of legal instruments to regulate the usage of the sea and the interaction of states in the sea either for peaceful as well as non-peaceful actions.³

The contemporary efforts of the international community to negotiate a comprehensive legal instrument that regulate the sea reaches its pinnacle on 10 December 1982⁴ when the Third United Nations Conference on the Law of the Sea in Montego Bay, Jamaica, successfully agreed the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982).⁵ The convention which often considered as the constitution of the sea⁶, is the most important culmination point after a long evolution process of the international law that specifically regulates the Sea. The convention 'provide a framework within which most uses of the seas are located'⁷ as well as serve as 'one of the most comprehensive' international legal instrument for the issue of law of the sea.⁸

The convention established several maritime zones, including the limit for each zone that may be claimed by States. One of those zones is the Exclusive Economic Zone (EEZ). The EEZ is a relatively novel legal regime, which evolves over the years and originally derived from the practice of states that claims an exclusive fisheries zone in addition to their territorial sea. ⁹ It is stipulated in the

² Id.

³ Id.

⁴ Id., p., 4.

⁵ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.

⁶ Jing Geng, The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS, 28/74 Utrecht Journal for International and European Law 22, 23, 2012.

⁷ R R Churchill and A V Lowe, The Law of Sea, Manchester University Press, Manchester, 1999, p. 24.

⁸ Donald R Rothwell and Tim Stephens, supra no. 1, p., 14.

⁹ Id, p. 83.

UNCLOS 1982 that the EEZ to have a maximum breadth of 200 nautical miles (nm) from the baselines of the particular state.¹⁰

Furthermore, according to the provisions of UNCLOS 1982, each of those maritime zones is governed by the coastal states under a specific jurisdictional regime. The UNCLOS 1982 has determined that the Coastal State has sovereignty only for its territorial sea.¹¹ For the EEZ, including the contiguous zone and the Continental Shelf, the UNCLOS 1982 stipulates that it will be governed by coastal states under a sovereign right regime.¹²

The sovereign right jurisdiction of Coastal States in the EEZ will be mainly focussed for the exploration and exploitation, as well as the conservation and management of the natural resources in the EEZ, whether located in the water column or in the seabed.¹³ The UNCLOS 1982 retain and guaranteed the right of others State to freely navigate in the EEZ, subject to other provisions that specifically regulates the issue of the freedom of navigation.¹⁴

However, the aforementioned UNCLOS 1982 provisions are arguably left a gaping hole for the practice of the states. The explicit provisions on the issues that relate closely with the interest of the coastal states' regarding the military usage of EEZ is absent from the provision.¹⁵ This loophole had arguably created some contradictory interpretation of the UNCLOS 1982 provisions. Some of the States determined that the freedom of navigation established by the UNCLOS 1982 for navigation in the EZZ is exempted to include military vessels and airplanes of other States in particular when the military vessels and airplanes are conducting military exercises that use weapons and explosives.¹⁶ Other States have obviously

¹⁰ United Nations Convention on the Law of the Sea, *supra* no. 5, Article 57.

¹¹ *Id.*, Article 2.

¹² *Id.*, Article 56 (1)(a).

¹³ *Id.*

¹⁴ *Id.*, Article 58 and 87.

¹⁵ Francesco Francioni, *Peacetime use of Force, Military Activities, and the New Law of the Sea*, 18 *Cornell International Law*, 203, 203, 1985.

¹⁶ Those states that include Bangladesh, Brazil, Ecuador, India, Malaysia, Pakistan, Thailand and Uruguay had made declaration when ratifying or accessing the UNCLOS 1982 regarding this

perceived the provisions on the contrary and consider that the freedom of navigation in the EEZ is also granted towards military vessels and airplanes.¹⁷

This research is aimed to address the aforementioned ambiguity. The research will first analyse the general concept of international law of the sea regarding the peacetime military activities, with focus on the period prior to the incorporation of the EEZ principle in the UNCLOS 1982. Furthermore, to have a comprehensive understanding on the legal concept of EEZ, the research will then see the negotiation process for the EEZ provisions during the Third United Nations Conference on the Law of the Sea along with the negotiated provisions of the UNCLOS 1982 that agreed. In the end, the research will examine the interpretation and practices of several states in this matter, includes suggesting *interim* solutions to avoid direct conflict resulted from foreign military activities within the EEZ of another States.

Peacetime State's Military Activities

As mentioned on the previous part, the sea had been used by states to assert their 'naval power with the objective of controlling the oceans.'¹⁸ That action is commonly employed by the usage of naval force by states to do various forms of activities in the seas.

In its development, the activities of the states in the seas had come into a point that may potentially impede the freedom of navigation of other states in the sea. This lead for a Dutch scholar in the field of the law of the sea during the 16th century, Hugo Grotius,¹⁹ to suggested the principle of the freedom of the sea or *mare liberum* that argues that the sea should be open for all states without being

matter. UN, The Law of the Sea. Declarations and Statements with Respect to the United Nations Convention on the Law of the Sea, United Nations, New York, 1997, hlm 84.

¹⁷ Germany, Italy and the Netherlands had declared on their respective accession and ratification that the right of the coastal states does not include residual right to be notified for military activities in the coastal state's EEZ.

¹⁸ Donald R Rothwell and Tim Stephens, supra no. 1, p., 259.

¹⁹ Hugo Grotius arguments were based on his book, *Mare Liberum* (Freedom of the Sea).

hampered by states' possession over a particular maritime zone.²⁰ In contrast, other scholars, particularly English Scholars, including Scot Welwood and John Selden²¹, were suggesting for the principle of *mare clausum* that argue that states should be able to control over a particular maritime zone of the seas as extension of state's land territory.²²

The contradiction between both views continues until fairly recent history as it becomes the clashing point in the *Corfu Channel Case*²³ when United Kingdom brought Albania to the *International Court of Justice* over the dispute on the damages suffered by *HMS Saumarez* and *HMS Volage*, two destroyers of the Royal Navy, when they struck naval mines in the Corfu Channel that located within the Albanian territorial waters.²⁴

Additionally, to further discuss the action of states in asserting its interest in the seas, the activities of the states should be differentiated between the action of the states which conducted during wartime and the military activities during peacetime since both activities are governed under separate legal regime and will subsequently resulted in difference legal consequences.²⁵

Traditionally, the wartime activities of states are governed under the specific international law of armed conflicts which 'pre-requisite' a formal declaration of war.²⁶ The wartime military activities should adhere various provisions of customary international laws including the provisions of the international humanitarian laws e.g. the 1899 and 1907 *Hague Conventions*, the

²⁰ Clive Schofield, Parting the Waves: Claims to Maritime Jurisdiction and the Division of Ocean Space, 1 Penn State Journal of Law and International Affairs. 40, 41, 2012.

²¹ Scot Welwood arguments were published in his book Abridgment of All Sea Lawes. John Selden's argument was written in his book Mare Clausum seu Domino Maris (Of the Dominion or Ownership of the Sea). Id.

²² Brown, E D, The International Law of the Sea Volume I Introductory Manual, Dartmouth Publishing, Dartmouth, 1994, p., 6-7.

²³ Corfu Channel (United Kingdom v Albania) [1949] ICJ Rep 4.

²⁴ Donald R Rothwell and Tim Stephens, supra no. 1, p., 267.

²⁵ Id., p. 258.

²⁶ R R Churchill and A V Lowe, supra no. 7, p.,422.

four 1949 Geneva Conventions and the two 1977 Additional Protocols to the Geneva Convention.²⁷

Currently, the aforementioned category of the state's activities had been become very limited in its implementation under the prevailing international law. There were several legal provisions, which had denounced the practice of using of force in relations with other states, which also includes to ban arms conflict; including the 1928 *Kellogg-Briand Pact*²⁸ and most importantly Article 2(4) of the *United Nations Charter*, with the exception of UN sanctioned military actions and self-defence as stipulated under Chapter VII of the UN Charter.²⁹ Any further discussions on these matters will fall outside the scope of this research.

There are several important elements that need to be taken into account when analysing state's peacetime military activities that conducted at sea, especially with regards to the nature of the activities as well as the technical elements of the activities.³⁰ An absolute definition, which may comprehensively describe peacetime (and arguably should also be lawful) military activity, is yet to be available.³¹ However, it generally defines as military activity which not directly related to arms conflict which includes *inter alia* military exercise, military manoeuvres and military intelligence gathering as well as marine data collection, which involving naval vessel and military airplane.³²

Furthermore, state's military activities should supposedly have the intention to achieve peaceful purpose as stipulated in various provisions of the UNCLOS 1982, most prominently Article 88 and Article 301.³³ Article 88 UNCLOS 1982 stressed that the high seas and the EEZ, in accordance with Article 58(2) UNCLOS 1982, should be 'reserved' for activities of the states which has a peaceful

²⁷ Donald R Rothwell and Tim Stephens, *supra* no. 1, 260-261.

²⁸ *Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy*, 27 August 1928, 94 LNTS 57.

²⁹ *Charter of the United Nations, Article 2(4) & Chapter VII*, 24 October 1945, 1 UNTS XVI.

³⁰ Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 *Marine Policy*. 123, 128, 2005.

³¹ *Id.*

³² *Id.*

³³ *Id.*, p., 124.

intention. Article 301 UNCLOS 1982 underlined the obligation for the States to 'refrain from using any threat or use of force against the territorial integrity or political independence of any State' in accordance with the provisions of Article 2(4) UN Charter.³⁴ An exception for these provisions is for a use of force action that mandated by the UN under Chapter VII of the UN Charter or an act of self defence under Article 51 UN Charter.³⁵

In practice, there are several examples of methods where a state would employ its naval power to assert its interest in peacetime. The first method is related to the 'law enforcement' function of naval force with focus to impose the 'fisheries, customs and immigration laws' of the Coastal State in its maritime zones.³⁶ States also commonly use its navy for 'manoeuvres and weapon test' in the high seas, as a method prepare for any further escalation of action needed.³⁷

The last potential method of employment of the navy during peacetime by a particular state is to assert of the interest of the state to another State to support its diplomatic efforts and to project its "national power and influence".³⁸ The example of the application of this method could be seen during the Corfu Channel incident when Royal Navy vessels sailed through the Corfu Channel, claimed as Albanian Territorial Waters to asserts its passage rights in the maritime zone claimed by Albania³⁹ and when the United States Navy flotilla navigate in to the Lombok and Malacca Strait⁴⁰ subsequent to the Juanda Declaration⁴¹ of the Indonesian Archipelagic water claim in 1957.

To avoid conflict with the coastal states, the aforementioned peacetime military activities of states are supposedly conducted in the high seas beyond

³⁴ Id.

³⁵ Id., p., 125.

³⁶ R R Churchill and A V Lowe, *supra* no. 7, p., 426.

³⁷ Id.

³⁸ Id.

³⁹ Corfu Channel, *supra* 22.

⁴⁰ R R Churchill and A V Lowe, *supra* no. 7, hlm., 426.

⁴¹ John G. Butcher, 'Becoming an Archipelagic State: The Juanda Declaration of 1957 and the 'Struggle' to Gain International Recognition of the Archipelagic Principle' in Robert Cribb and Michele Ford (eds), *Indonesia Beyond the Water's Edge*, Institute of South East Asia Studies, Singapore, 2009, p., 33-40

coastal states jurisdiction.⁴² However, there were cases, where a state, whether intentionally or not, conducting its activities in the maritime zone of coastal state, where the coastal states retain some sort of jurisdiction in the form of sovereign right over the maritime zone, specifically the EEZ.

From the aforementioned facts, it may be concluded that the military activities of the states in the Sea would have several elements that need to be closely analysed, *vis a vis* to the provisions of the UNCLOS 1982 which regulate the EEZ and the activities in the EEZ, for comprehensively understand the legality of military activities especially activities that were conducted in the EEZ of another state. Those elements are the intention of the State conducting the military activities as well as the method of the military activities of the State, which may include maritime navigation, overfly, collecting intelligent information, placement of navigation tools and conventional weapons, and anti-submarine weapons.⁴³

The Negotiation Process and The Provisions of UNCLOS 1982

The Negotiation Process For The EEZ Provisions

In analysing state's peacetime military activities in the EEZ of another state, a study on the original meaning of the provisions of the UNCLOS 1982, specifically on the provisions concerning the EEZ and the provisions on the peaceful used of the seas by states, is essentially needed to gain comprehensive understanding of the matter.

The contemporary efforts to establish an internationally agreed legal instrument to serve as the basic legislation for regulate the seas started by the convening of the 1930 League of Nations the Hague Codification Conference for codifying certain internationally recognized customary laws, including customary

⁴² R R Churchill and A V Lowe, *supra* no. 7, p., 426.

⁴³ Boleslaw Adam Boczek, *Peacetime military activities in the exclusive economic zone of third countries*, 19 *Ocean Development & International Law*. 445, 448, 1988.

laws in the sea,⁴⁴ by the Committee of Experts that previously appointed by the League of Nations in 1924.⁴⁵ However it was not until 1958 when the First United Nations Conference on the Law of the Sea held in Geneva agreed four conventions which regulate several aspects of the law of the seas⁴⁶ which include the territorial sea and the contiguous zone,⁴⁷ the high seas,⁴⁸ the continental shelf⁴⁹ as well as fisheries and the conservation of living resources issues.⁵⁰

However, the maximum breadth of the territorial sea, which the coastal states may retain sovereignty was left unsettled.⁵¹ The absent of this essential provision in the aforementioned four conventions had made the international community to convened another conference for the issue, the United Nations Conference on the Law of the Sea in 1960 to ventured in solving the problem.⁵² Nonetheless, the second conference was also failed to reach any agreement on the issue. Additionally, the second conference was also failed to establish the limit of 'demarcation of fisheries zone', which claimed by several states in the years following the first conference.⁵³

The failure of both conference to settled the essential issues as well as on the issue of the *de facto* excessive claims of maritime zones by states for the purpose of exploitation of the living or non-living natural resources, had made the international community to strive for convening the Third United Nations Conference on the Law of the Sea, which started its negotiation in 1973.⁵⁴ In the end, the conference would agreed the UNCLOS 1982 that signed on 10 December

⁴⁴ René-Jean Dupuy and Daniel Vignes (ed), A Handbook on the Law of the Sea, Martinus Nijhoff, Dordrecht, 1991, p., 67

⁴⁵ R R Churchill and A V Lowe, supra no. 7, p. 15.

⁴⁶ René-Jean Dupuy and Daniel Vignes (ed), supra no. 44, p. 72.

⁴⁷ Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 UNTS 205.

⁴⁸ Convention on the High Seas, 29 April 1958, 450 UNTS 11.

⁴⁹ Convention on the Continental Shelf, 29 April 1958, 499 UNTS 311.

⁵⁰ Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 599 UNTS 285.

⁵¹ R R Churchill and A V Lowe, supra no. 7, p. 15.

⁵² René-Jean Dupuy and Daniel Vignes (ed), supra no. 44, p., 76.

⁵³ Id.

⁵⁴ R R Churchill and A V Lowe, supra no. 7, p.16-17.

1982 in Montego Bay, Jamaica.⁵⁵ This conference was aimed to establish a comprehensive convention that may serve as a single unified legal basis for the law of the sea, which combined the provisions of the previous four conventions as well as other provisions, which developed as practice of states.⁵⁶ Among those practices of the states that finally incorporated into the provisions of UNCLOS 1982 was the EEZ.

Initially, the concept of EEZ was proposed by Kenya in the 1971 Asian-African Legal Consultative Committee.⁵⁷ The concept was originally derived from the practices of States to claim the continental shelf area adjacent to its land territory as first done by the United States of America by the *Truman Declaration*.⁵⁸ It also traced its idea from states claimed over exclusive fisheries area adjacent to its territorial sea, which mainly claimed by the Latin America states as declare by the Montevideo Declaration and the Lima Convention.⁵⁹ The EEZ may also base its conception on the excessive claim of territorial sea made by several states to a distance of 200 nm from its baselines.⁶⁰

The EEZ combined all of the claims by states for the exploration and exploitation, as well as in the conservation and management of the 'natural resources, whether living or non-living' in the water column and the seabed in the area to a distance of maximum 200 nm from the baselines or 188 nm from the outer limit of the territorial sea.⁶¹ The distance of 200 nm originated from the Second World War Security and Neutrality Zone of the American Continent, which eventually adopted as the maximum distance for the EEZ.⁶²

⁵⁵ United Nations Convention on the Law of the Sea, supra no. 5.

⁵⁶ Id.

⁵⁷ Id, p. 160.

⁵⁸ George V Galdorisi and Alan G Kaufman, Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, 32 California Western International Law Journal. 253, 259, 2002.

⁵⁹ Id, p. 260-261.

⁶⁰ Id.

⁶¹ United Nations Convention on the Law of the Sea, supra no. 5, Art. 56(1).

⁶² Satya N Nandan, The Exclusive Economic Zone: A historical perspective, in *The Law and The Sea: Essays in Memory of Jean Carroz*, UN Food and Agriculture Organization, Rome, 1987, p. 171.

The concept of the EEZ serve as a compromise that accommodate the need of the developing countries, for the exploitation of the potential economic resources in the area to a distance of 200 nm and the need of major maritime states, the developed countries, to retain some sorts freedom of navigation regime in the area.⁶³ In 1974 during the session of the conference in Caracas, Venezuela, the majority of the participants of the conference, 100 out of 118, had supported the EEZ concept.⁶⁴

However the views of states towards the concept were consequently divided into two large groups of opinions, which respectively reflected their own specific division of the interest within each of the larger groups of the view.⁶⁵ The first view of the groups, which supported by the developing countries group, the Group of 77 (G-77) comprise of African, Asian, Latin American and Caribbean States, consider that the EEZ should be place under a certain 'jurisdiction' of the coastal states with the focus on the exploitation and management of the economic resources of the area.⁶⁶

The second group was comprised of the developed countries group, including the United States, Western European States and Japan, which argued for the freedom of navigation principle to be retained in the EEZ and consider that the EEZ as a 'part of the high seas.'⁶⁷ The states viewed that the negotiated convention should be aimed solely for the purpose of exploitation and management of the natural resources in the maritime zone, as governed under by the coastal state using limited right, which later would be define as sovereign right.⁶⁸ Any 'residual rights' that explicitly absent from the provisions of the convention should be retain by other states, as well as the territorial disadvantages states and land-locked

⁶³ Boleslaw Adam Boczek, *supra* no. 43, p. 448.

⁶⁴ George V Galdorisi and Alan G Kaufman, *supra* no. 58, p. 266.

⁶⁵ Boleslaw Adam Boczek, *supra* no. 43, p. 448.

⁶⁶ *Id.*

⁶⁷ Edited Transcript of Question and Answer Session Panel III: Military Activity in the EEZ, in Myron H Nordquist, Tommy T B Koh and John Norton Moore (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Martinus Nijhoff, Dordrecht, 2008, p. 301.

⁶⁸ *Id.*

states.⁶⁹ The states in this group predominantly owned 'blue water navy' that have the capability, which enabled them to operate, deploy and project their naval force far beyond their own coastal area.⁷⁰

Another essential factor, which differentiates the opinions of both groups, was on the definition of the right of other states in the maritime zone that would be defined as the EEZ. The first group viewed that the rights of others States in the EEZ should be limitedly defined as the right for 'freedoms of navigation, over-flight, and laying submarine cables and pipelines and 'other internationally lawful uses of the sea related to navigation and communication.'⁷¹

In contrast, the second group proposed a wider definition of such right with the suggestion of the term 'and other lawful uses of the sea' to replace the last section of the definition that being suggested by the preceded group that limited the definition only to be related to navigation and communication purposes.⁷² It was suggested that the right to conduct military activities in the EEZ was the motive behind both views and the second group views was based on the argument to prevent the employment or the threat the employment of military force against 'the sovereignty, the territorial integrity or political independence of the coastal state.'⁷³ The states which suggesting this alternative term had considered that state's military activities that conducted in the EEZ of another states could be construed as a lawful uses of the sea as on a principle the EEZ is included to be high sea.⁷⁴

The 1975 Informal Single Negotiating Text (ISNT) of the negotiated Convention, prepared by Mr. Galindo Pohl, Chairman of the Second Committee of the Conference as well as the informal "*Evensen Paper*" and a proposal from the

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id., p., 448-449.

⁷² Id., p., 449.

⁷³ Id.

⁷⁴ Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge University Press, Cambridge, 2012, p., 369.

Group of 77 also supported the position of the first group which was in the clear contrast to position of the second group.⁷⁵

States/Groups	Basic Support	Active States	Interests
Archipelagic States	Oceanic / Island States	Fiji, Indonesia, Mauritius, The Philippines	Archipelagic waters by strait baselines and 200 nm EEZ
Group of 77	Afro- Asian and Latin American		International regime for seabed mining; common heritage; production limit and price control of seabed mining
Japan	N/A	N/A	Opposed expanded claims on territorial sea and fishery zone; Access to deep seabed mining
Landlocked / Geographically Disadvantages	A mixed group of forty-eight developing and developed states from various region		Revenue sharing; living and non-living resource exploitation; right to participate in research; 12 nm territorial sea
<i>Patrimonialist and Territorialist</i>	Latin American and Caribbean	Colombia, Haiti, Jamaica, Mexico, Trinidad, Venezuela	200 nm zone over renewable resources
	Latin America	Chile, Ecuador, Peru, Panama	200 nm Territorial Sea
United States of America	N/A	N/A	Free navigation; guaranteed free transit through straits, free access to deep seabed mining
Soviet Eastern European Bloc	USSR	Albania, Hungary, Czechoslovakia, Poland, Romania, Yugoslavia	Sea-bed mining, 200 nm EEZ, continental shelf, territorial sea, fisheries transit
Western European and Group of 11	European Community plus Scandinavians	EEC and Scandinavians plus Australia, Austria, Canada, Ireland, New Zealand	Coastal Jurisdiction over fisheries; free access to deep seabed mining

(The summary of the interest of the groups of states during the negotiation process for the UNCLOS 1982)⁷⁶

⁷⁵ Id.

⁷⁶ James C F Wang, Handbook on Ocean Politic & Law, hlm. 448 (Greenwood Press, Westport, 1992) quoting Ann L Holick, US Foreign Policy and the Law of the Sea (Princeton University Press, Princenton 1981) 250-256 and Edward L Miles, 'The Structure and Effects of the Decision Process in the Seabed Committee and the Third United Nations Conference on the Law of the Sea' 31(2) International Organization 161, 161-166, 1977.

During this negotiation period of the conference, there was also suggestion from several States, i.e. Brazil, Mexico and Peru, which proposed to explicitly address the limitation of maritime activity in the EEZ.⁷⁷ Other States viewed this suggestion to be excessive and furthermore provided a reference to the provisions of the UN Charter regarding the limitation of the use of force to be sufficient to address the matter.⁷⁸ However, in the end, both proposals were dropped during the negotiation process.⁷⁹

After a series of lengthy negotiation, which was conducted in the formal forum of the Second Committee of the Conference as well as several informal consultation groups including in the *Castenada* Group⁸⁰ and the *Evensen* Group,⁸¹ the differences between both views in interpreting the early suggestion of the EEZ concept had eroded as seen in the *travaux preparatoires* of the Second Committee of the Third United Nations Conference on the Law of the Sea.⁸²

In this point, it also needs to be mentioned the essential role of informal negotiations group of states during the negotiation process of the UNCLOS 1982 (including the *Castenada* group and the *Evensen* Group).⁸³ There were a number of provisions of the UNCLOS 1982 that first discussed and formulated within the informal negotiations groups prior to be negotiated in the formal session of the conference.⁸⁴ The UNCLOS 1982 provisions on the EEZ are some examples of these provisions.⁸⁵

⁷⁷ Boleslaw Adam Boczek, supra no. 43, p., 449.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Named after Jorge Castenada, Foreign Minister of Mexico at the time.

⁸¹ Named after the Norwegian Ambassador, Head of the Norwegian Delegation to the Third UN Conference for the Law of the Sea.

⁸² Boleslaw Adam Boczek, supra no. 43, p., 449.

⁸³ Alan Beesley, *The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners – a Pattern for Future Multilateral International Conference?*, 46(2) *Law and Contemporary Problems* 183, 191, 1983.

⁸⁴ Id.

⁸⁵ Id.

In 1975, the states within the *Evensen* Group proposed a compromised view, which would serve as a middle ground between the views that proposed the EEZ to be included within the full jurisdiction of the coastal states and the views that consider the EEZ as a part of the high seas. The *Evensen* Group suggested that the EEZ should be considered as a *sui generis* area, which included neither within the territorial sea nor the high seas.⁸⁶ Furthermore, the coastal states would have sovereign right jurisdiction in the EEZ with focus to the natural resources in the area, in contrast to sovereignty retained by the coastal states in the territorial sea.⁸⁷

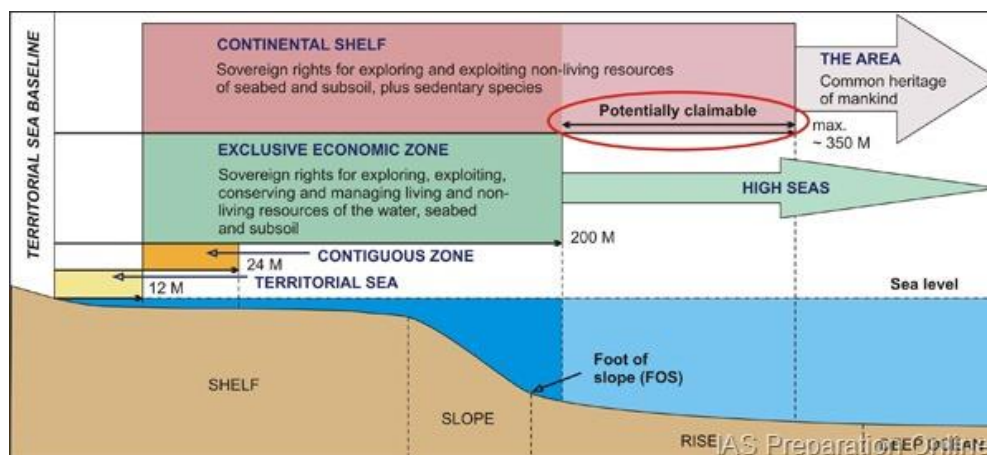
The compromise between the two contrasting views in regards to the rights and the scope of the freedoms retained by the third states in the EEZ of a particular coastal state, had finally reached and adopted in the provisions as formulated in the Informal Composite Negotiating Text (ICNT), which was generally similar, with a slight grammatical revision, to the formulation of the agreed Article 58(1) of the UNCLOS 1982⁸⁸:

In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and 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.

⁸⁶ *George V Galdorisi and Alan G Kaufman*, supra no. 58, hlm. 270.

⁸⁷ *Id.*

⁸⁸ *Boleslaw Adam Boczek*, supra no. 43, hlm. 449.



The Exclusive Economic Zone and Others Maritime Zones along Its Respective Coastal States' Jurisdiction pursuant to the Provisions of UNCLOS 1982⁸⁹

The Provisions of The UNCLOS 1982 and Practice of The States on The Issue of Foreign Military Activities in The EEZ Another State

The Provisions of the UNCLOS 1982 regarding Foreign Military Activities in the EEZ of Another State

After the establishment of the UNCLOS 1982 and its subsequent entry into force in 1994, the legal regime of the EEZ has comprised roughly 35.81% from the total world ocean.⁹⁰ This means that after the enforcement of the UNCLOS 1982, more than one-third of the world oceans have now ruled under some sort of jurisdiction of the coastal states, namely the sovereign right, especially with regards to the natural resources as well as the environmental aspect of such specific activity.⁹¹

The aforementioned facts have caused the major maritime states, notwithstanding to the agreed formulation concerning to the rights of other states

⁸⁹ Raja Raja Cholan, "United Nations Convention on the Law of the Sea", available at <https://www.iaspreparationonline.com/united-nations-convention-on-the-law-of-the-sea-unclos/>, accessed on 30 August 2017.

⁹⁰ Boleslaw Adam Boczek, supra no. 43, p., 447.

⁹¹ United Nation Convention on the Law of the Sea, supra no. 5, Article 73.

in the EEZ of another state as stipulated in the article 58(1) UNCLOS 1982, remain insisted that the coastal states should consider that the military activities in the EEZ (of another state) are permissible and lawful.⁹² Those major maritime states argue that the provisions of the UNCLOS 1982 continue to provide a freedom of navigation and over-flight, which also include the operation naval vessel and military airplane in the EEZ of another states.⁹³ These states base its suggestion from the ‘text and legislative history’ of Article 58 UNCLOS 1982.⁹⁴

Regarding this issue, Ambassador Tommy Koh of Singapore, the President of the Third Conference of the Law of the Sea had been noted to comment,⁹⁵

“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 [...]”

Notwithstanding the aforementioned suggestions, as already explained in preceded part of this research, from the beginning of the negotiation process of the UNCLOS 1982, there were states that had contrasting views and comprehend that any other rights which not explicitly given to other states should be retained by the coastal states as so far it is not impede the freedom of navigation recognized by the international law.⁹⁶ These states viewed that the coastal states would have right to limit foreign military activities in its EEZ.⁹⁷

⁹² Raul (Pete) Pedrozo, Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China’s Exclusive Economic Zone, 9 Chinese Journal of International Law 9, 12[6], 2010.

⁹³ Stephen Rose, Naval activity in the exclusive economic zone—Troubled waters ahead?, 21(2) Ocean Development & International Law 123, 127, 1990.

⁹⁴ Yoshifumi Tanaka, supra no. 74, p., 369.

⁹⁵ Jon M. Van Dyke, Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country, 28 Marine Policy 29, 31, 2004.

⁹⁶ Boleslaw Adam Boczek, supra no. 43, p., 455.

⁹⁷ Yoshifumi Tanaka, supra no. 74, p., 369.

In addition to the two-abovementioned states' suggestions, scholars had also noted a third view from states that consider this issue should be based on the residual right of the state in the EEZ pursuant to the provisions of the UNCLOS 1982.⁹⁸ Furthermore, should there are question relating to the foreign military activities in the EEZ, states would need to settle the dispute pursuant to Article 59 UNCLOS 1982.⁹⁹

The major maritime states furthermore argue that since the right to control such navigation of naval vessel and maritime airplane was not attributed to the coastal states by the provisions of the UNCLOS 1982, thus by virtue of the residual right principle, other states retain the right to freely navigate the EEZ of another states, which being considered as part of the high seas.¹⁰⁰ However the same principle also understood by coastal states that any rights not clearly provided by UNCLOS 1982 to foreign states, included for military activities in EEZ, should be retain by coastal states.¹⁰¹

Scholars had considered that there are four main contentious issues regarding the issue of foreign military activities in the EEZ of another state: (1) due regard to the rights and duties of the coastal state, (2) compliance with laws and regulations of the coastal state that adopted in accordance with the provisions of the Convention', (3) not constitute an abuse of rights', and (4) for peaceful purposes.¹⁰²

The issue of 'due regards' is based on the provision of Article 58(3) UNCLOS 1982 that stipulate the coastal state, in conducting its sovereign rights for the natural resources in the EEZ, shall have to 'due regard the rights and duties of the coastal state.'¹⁰³ Although the UNCLOS 1982 once again failed to provide clear

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ Yoshifumi Tanaka, *supra* no. 74, p., 369.

¹⁰¹ Boleslaw Adam Boczek, *supra* no. 43, p., 455-456.

¹⁰² Chuah Meng Soon, *Restrictions on Foreign Military Activities in the Exclusive Economic Zone: Major Powers' 'Lawfare'*, 42(1) *Journal of the Singapore Armed Force* 12, 16.

¹⁰³ United Nations Convention on the Law of the Sea, *supra* no. 5, Article 58 (3).

definition of the term 'due regards',¹⁰⁴ the general accepted term describes due regards as 'to give fair consideration.'¹⁰⁵ Some states interpret the provisions as an obligation of the coastal states, when enforcing their sovereign right in the EEZ, should honour other states rights, including the rights related to the military activities of other states in its EEZ as the activities should be considered lawful under the provisions of the UNCLOS 1982.¹⁰⁶

However, scholars had also suggested pursuant to the principle of 'due regards' foreign military activities in EEZ of another state should 'not be permissible' if it barred the coastal state in exercising its sovereign rights in the EEZ that include exploration and exploitation of marine resources, navigation, and marine environmental protection.¹⁰⁷ Scholars had also considered that state intending to conducting military activities in EEZ another state need to due regards the fishing vessels and installations in the EEZ to protect the safety and protect human life and the installations from the risk of the military activities.¹⁰⁸ Another cautious consideration would also need to be taken for military activities that conducted in 'clearly defined area of special mandatory measures' under Article 211(6) (a) or other marine protected areas for environmental protection.¹⁰⁹

With regards, the second contentious issue on the compliance of foreign states towards the states' laws and regulations of the coastal states, scholars took noted that there are at least eighteen states¹¹⁰ that had enacted domestic legislations on the issue of foreign military activities in the maritime zones (territorial sea and EEZ), including by using argument of environmental control.¹¹¹ These legislations should always-encapsulated UNCLOS 1982 provisions and honoured the rights and obligation of foreign states.

¹⁰⁴ Chuah Meng Soon, *supra* no. 102, p., 16.

¹⁰⁵ *Id.*

¹⁰⁶ Boleslaw Adam Boczek, *supra* no. 43, p., 455.

¹⁰⁷ Yoshifumi Tanaka, *supra* no. 74, p., 370.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ German Navy, *Commander's Handbook: Legal Bases for the Operations of Naval Forces*, 2002.

¹¹¹ Chuah Meng Soon, *supra* no. 102, p., 16.

The subsequent issue of the “abuse of rights” is should be enacted both to the foreign states who might done the military activities in another state’s EEZ as well as for the coastal states.¹¹² In every step, states (foreign states as well as coastal states) are required to always honour the rights of another states.

The term ‘for peaceful purposes’ that construed as the fourth contentious issues, is arguably related to the issue of lawfulness of the military activities, it is noted that the provisions of the Article 58(1) UNCLOS that stipulated the freedom awarded to other States in the EEZ should only be for an ‘internationally lawful uses of the sea.’¹¹³ Consequently, the military activity of other States in the EEZ should also adhered to the provisions of Article 88 of the UNCLOS 1982 that enforced in the EEZ pursuant to the Article 58(2) of the UNCLOS 1982.¹¹⁴ Article 88 UNCLOS 1982 mandated that the activity of other states in the EEZ should have a ‘peaceful purposes.’¹¹⁵

Some scholars had suggested that state’s military activities in the another state’s is always lawful and has a peaceful purpose as enshrined in the international law since the UNCLOS 1982 contain provisions that stipulated naval vessel had a ‘privileged status’, including immunity from ‘judicial settlement of dispute settlement’, which ‘incompatible with the meaning of innocent passage.’¹¹⁶ It also comprises as a specific activity which ‘permissible’ to be conducted beyond the territorial sea of any states.¹¹⁷

However, a report of the Secretary General of the United Nations in 1985¹¹⁸ explained that the ‘military activities which are consistent with the principles of the principles international law embodied in the Charter of the United Nations (UN), in particular with Article 2(4) and Article 51, are not prohibited by the

¹¹² Id., hlm. 17.

¹¹³ United Nation Convention on the Law of the Sea, supra no. 5, Article 58(1).

¹¹⁴ Boleslaw Adam Boczek, supra no. 43, p., 451.

¹¹⁵ Id., p., 457.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Secretary General of the United Nations, General and Complete Disarmament – Study on the Naval Arms Race – Report of the Secretary General, paragraph 188, (UN Doc A/40/535).

Convention on the Law of the Sea'.¹¹⁹ Article 2(4) of the UN Charter prohibits the use of force 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.'¹²⁰ The provisions adapted in the provisions of Article 301 of the UNCLOS 1982 clearly indicate the adoption of the principle of the Article 2(4) UN Charter in the UNCLOS 1982.

Article 51 of the UN Charter regulates the act of self-defence in the face of imminent threat.¹²¹ Both provisions had clearly underlined that to be categorized as having a peaceful purpose as well as lawful under international law, the military activities of a state in the EEZ of another state should be in accordance with the stipulation of Article 2(4) UN Charter thus it should refrain from using force against other state with the exception of the use of force sanctioned under the Chapter VII of the UN Charter.¹²² The examples of the practices of those provisions were the military operation against Iraq in 1991 sanctioned under the UN Security Council Resolution 678 and the naval conflict during the Falkland War 1982 which arguably conducted pursuant to the principle of self defence.¹²³

Furthermore, in addition to adhere the provisions of the UNCLOS 1982 and the UN Charter, to be considered of having a peaceful purpose, the military activities of a particular state should also observe other international law provisions that might regulate the military activities in the, for example the *San Remo Manual on Armed Conflict at Sea* as well as to avoid unnecessary damages or loss to other states.¹²⁴

It is thus safe to suggest that the state that conducting the military activities in other state's EEZ the particular state should be able to show evidence (burden of proof), beyond reasonable doubt, to support its claim that the military activities it

¹¹⁹ Satya N Nandan, Shabtai Rosenne and Neal R Grady (ed), United Nations Convention on the Law of the Sea 1982 A Commentary, Vol. III, hlm. Martinus Nijhoff, Dordrecht, 1985, hlm 91.

¹²⁰ Charter of the United Nations, supra no. 26, Article 2(4).

¹²¹ Id., Article 51.

¹²² Satya N Nandan, Shabtai Rosenne and Neal R Grady (ed), supra no. 116, p., 91.

¹²³ R R Churchill and A V Lowe, supra no. 7, p., 423-424.

¹²⁴ Chuah Meng Soon, supra no. 102, p., 17.

conducted have a peaceful purpose and not posing any threat towards the coastal state. To said the otherwise, the coastal state should also provide significant prove to support its claim that the military activities in its EEZ posed a threat which infringe Article 2(4) UN Charter and Article 301 UNCLOS 1982.

The aforementioned facts consequently caused for the suggestion that over-generalizing that the foreign military activities in another state's EEZ would always be construe as a lawful activity under the international law should be considered as an excessive approach in extending the principle of freedom of navigation. Furthermore, the direct notions of such activities are prohibited, should also be considered as a zealous approach towards territorialism.¹²⁵

The absent of such explicit legal provisions that regulate this matter supposedly caused each military activity in other state EEZ should be analysed on case per case basis 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.'¹²⁶ This is essential to clearly determined the nature of the military activities *vis a vis* the provisions of Article 2(4) UN Charter since it would provide a comprehensive view on the activity in question as well as to accommodate the interest of the coastal state and the state conducting the military activity in a proper manner.

Moreover, the determination process of the dispute over the military activities in the EEZ could also be settled pursuant to the provision of Article 298(1)(b) UNCLOS 1982 and thus the disputing parties may, if upon 'signing, ratifying or accessing' to the convention had explicitly in writing selected, choose another method to settled the dispute.¹²⁷ As consequences, the disputed parties should first agree for method of settlement prior to discussing the matter.

¹²⁵ Id., p., 14.

¹²⁶ United Nation Convention on the Law of the Sea, supra no. 5, Article 59.

¹²⁷ Mahmoudi, Said, Foreign Military Activities in the Swedish Economic Zone, 11 (3) The International Journal of Marine and Coastal Law 365, 375, 1996.

Practice of the States

After analysing the provisions of UNCLOS 1982 that potentially related to the military activities in the EEZ of another state, the research will continue and discuss several example of the state's practice over the issue.

There are states that declared that they consider any residual rights other than that explicitly stated in the UNCLOS 1982's provisions of the EEZ should be retained by the coastal state. This include the military activities in the EEZ, should be control under the coastal states jurisdiction since it may construes as a threat to their peace and security.¹²⁸

In addition to the several states, which already stated earlier, Brazil, Cape Verde and Uruguay, there are also other states, which share a similar view, which include India, Malaysia, Pakistan and Bangladesh that had declared, that the military activities of other States within their EEZ should only be permitted 'with the consent of the coastal state'.¹²⁹ These States had also incorporated their comprehension on the issue into their domestic legislation.¹³⁰

Other states, such as Indonesia, had not made any declaration regarding this matter upon its ratification of the UNCLOS 1982. However in its practices Indonesia had implemented a similar view with the aforementioned group as it had rejected a proposal from a neighbouring state to conducting 'maritime security exercise in the Indonesian EEZ'.¹³¹ Indonesia had also interfered with the United States Navy vessel which operated in the Indonesia's EEZ in the past.¹³²

The People's Republic of China (China) is also staunchly rejected the views for a freedom in conducting military activities in the EEZ of another State. Over the years, China had launched various 'protest' action against the military activities of

¹²⁸ Boleslaw Adam Boczek, *supra* no. 43, p. 455-456.

¹²⁹ Donald R Rothwell and Tim Stephens, *supra* no. 1, p., 280.

¹³⁰ Boleslaw Adam Boczek, *supra* no. 43, p., 455-456.

¹³¹ Raul (Pete) Pedrozo, *Military Activities In and Over the Exclusive Economic Zone*, in Myron H Nordquist, Tommy T B Koh and John Norton Moore (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Martinus Nijhoff, Dordrecht, 2008, p., 237-238.

¹³² *Id.*

other state in particular the United States (US), which conducting 'hydrographic surveys or military surveys' and 'intelligence gathering activity' within the China's EEZ.¹³³

In September 2002, Chinese Government 'launched a protest to the US Government over the 'monitoring and reconnaissance activities' which being conducted by *USNS Bowditch* in Chinese EEZ in the East China Sea,¹³⁴ without Beijing's prior consents.¹³⁵ The Chinese Government considered such activities as a violation of the 'principle peaceful uses of the seas' in accordance with Article 88 UNCLOS 1982 as it comprise as 'battlefield preparation and thus a threat of force to the coastal state'.¹³⁶ The Chinese view was rejected by the US which argued that the activities of the vessel was lawful under the Article 58(1) UNCLOS 1982 since the survey was 'an exercise of the freedom of navigation' retained by the US vessel under the provisions of the UNCLOS 1982.¹³⁷

The Chinese Government action had also a caused another encounter with the US military on April 2001, when the Chinese fighter plane was involved in a fatal 'mid-air collision' with the US Navy EP-3E (Aries II) airplane which was conducting 'a routine reconnaissance mission' some '70 miles off the Chinese coast'.¹³⁸ The pilot of the Chinese airplane went missing after the collision and the US airplane was forced to make emergency landing in the Hainan Island.¹³⁹ The Chinese Government perceived 'that the performance of reconnaissance in its EEZ constitutes an abuse of the right of overflight.'¹⁴⁰ The US Government comprehended that the US airplane was practicing its right of 'flying in

¹³³ Zhinguo Gao, 'China and the Law of the Sea' in Myron H Nordquist, Tommy T B Koh and John Norton Moore (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Martinus Nijhoff, Dordrecht, 2008, p., 288-291.

¹³⁴ Chuah Meng Soon, *supra* no. 102, p., 18.

¹³⁵ *Id.*

¹³⁶ Zhinguo Gao, *supra* no. 133, p., 289.

¹³⁷ *Id.*

¹³⁸ *Id.*, p., 290.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

international airspace' notwithstanding the fact that the location of the incident was on the airspace above Chinese EEZ.¹⁴¹

A potentially more serious incident happened in March 2009 when USNS *Impeccable*, a US ocean surveillance vessel, ordered to leave Chinese EEZ within 75 nm south of the Hainan Island when it was conducting maritime scientific research in the area.¹⁴² USNS *Impeccable* departed the scene only to return the next day escorted by a US Navy destroyer.¹⁴³ The US complained for the hostility shown by the Chinese whereas the Chinese asserted that the conduct of the US vessels in Chinese EEZ was illegal.¹⁴⁴ Furthermore, the Chinese claimed that the USNS *Impeccable* activities were an 'abuse of rights'¹⁴⁵ and having a 'non-peaceful purposes' in contravene with Article 301 UNCLOS 1982.¹⁴⁶

Regarding the incident, a retired Chinese high ranking general noted to had commented, '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'.¹⁴⁷ The US remains steadfast and consider the navigation of the military vessels in the EEZ equal to the high seas.¹⁴⁸

As shown in the aforementioned few examples, the most prominent state, which supports the military activities in the other state's EEZ is the United States of America. Although the US is currently not party to the UNCLOS 1982, however it involved closely in the negotiation process for the convention. The US Government perceived that 'military operations, exercises and activities' in other states EEZ are a 'lawful uses of the seas'.¹⁴⁹

The view of the US is an extreme view to preserve their view of freedom of the seas. Other states, such as France, Italy, the Netherlands and the United

¹⁴¹ Id.

¹⁴² Chuah Meng Soon, supra no. 102, p., 17.

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ United Nations Convention on the Law of the Sea, supra no. 5, Article 300.

¹⁴⁶ Chuah Meng Soon, supra no. 102, p., 17.

¹⁴⁷ Id.

¹⁴⁸ Id.

¹⁴⁹ Donald R Rothwell and Tim Stephens, supra no.1, p., 280.

Kingdom,¹⁵⁰ had also ‘contested’ the view of states which see that the military activities in the EEZ of other states should with the consent of the coastal state, however, those states mainly based their arguments that the residual rights retained from rights which had not awarded to the coastal should be awarded to international community.¹⁵¹

Interim Solutions

In the wake of this ambiguity for interpreting the provisions as well as the practice of the states with regard to the foreign military within another state EEZ, several *interim* solutions may be able to be suggested. The main purpose of these solutions would be to decrease the possibility for open conflict between the involved states, whilst in the same time opening the path for peaceful settlement of dispute between them.

It is also need to be noted the high level of political consideration involved in this issue.¹⁵² Consequently, a conclusive response and explanation over the issue would be impossible to be given.¹⁵³

Furthermore, the provisions of Article 298(1)(b) UNCLOS 1982 has exempted compulsory dispute settlement for dispute over military activities, which states may declare whilst ratifying or accessing to UNCLOS 1982.¹⁵⁴ Added by the fact that warship retain sovereign immunity, making it very difficult for any international judicial dispute settlement for taking concrete and meaningful role, without prior consent of the involved states, over any incident that may arise from this issue.¹⁵⁵

In the time being, as one of the interim solution, states should consider any dispute related to this matter on a case per case bases. Furthermore, a guideline for

¹⁵⁰ Id.

¹⁵¹ Boleslaw Adam Boczek, supra no. 43, p., 451.

¹⁵² Yoshifumi Tanaka, supra no. 74, p., 369.

¹⁵³ Id.

¹⁵⁴ United Nations Convention on the Law of the Sea, supra no. 5, Article 298(1)(b).

¹⁵⁵ Yoshifumi Tanaka, supra no. 74, p., 369.

navigation and overflight in the EEZ¹⁵⁶ had been prepared by a group of prominent international scholars in the field of the international law of the sea. The Guidelines for Navigation and Over-flight in the Exclusive Economic Zone may arguably be able to join the conflicting view concerning military activity in the EEZ. The guideline could serve as a 'basis for a common understanding and approach to issues arising from the implementation of the EEZ regime'¹⁵⁷ in particular for 'military and intelligence gathering activities in the EEZ of another State'.¹⁵⁸

Article 38(1)(d) ICJ Statute has clearly stipulate that the Court is able to apply 'teachings of the most highly qualified publicists' as subsidiary source of international law in deciding a dispute.¹⁵⁹ Consequently, the usage of the aforementioned guidelines should also serve a similar purpose to overcome the void in legal clarity over the issue.

Regarding the usage of the guideline, some states which also supports the view that other states may have the full right for conducting military activities in other state's EEZ, had sounded its rejection of the guideline as it being considered redundant and unnecessary since, according to them, the UNCLOS 1982 had provide a very comprehensive provisions on the matter which also includes the guaranteed of the rights of states for conducting military activities within other states EEZ.¹⁶⁰

On the other hand, the states which had contrasting opinion and supporting for a more stringent coastal states control of the EEZ, consider the guideline as 'a good working point, starting point' for the settlement this issue and as such in support for its usage.¹⁶¹

¹⁵⁶ Mark J Valencia and Kazumine Akimoto, *Guidelines for Navigation and Overflight in the Exclusive Economic Zone*, 30 *Marine Policy* 704, 2006.

¹⁵⁷ Alexander Skaridov, 'Military Activity in the EEZ: Exclusive or Excluded Right?' in Myron H Nordquist, Tommy T B Koh and John Norton Moore (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention*, Martinus Nijhoff, Dordrecht, 2008, p., 264.

¹⁵⁸ Mark J Valencia and Kazumine Akimoto, *supra* no. 156, p., 708.

¹⁵⁹ Statute of the International Court of Justice, 18 April 1946, 33USTS993, article 38(1)(b).

¹⁶⁰ Raul (Pete) Pedrozo, *supra* no. 131, p. 246-247.

¹⁶¹ Edited Transcript of Question and Answer Session Panel III: Military Activity in the EEZ, *supra* no. 67, 301.

In addition to the aforementioned solutions, specifically related to the environmental and safety concern, states conducting military activities in the EEZ of another state, should also consider for communicating with the coastal states based on humanitarian and environmental concern, to ensure the safety of human life and the protection of marine protected areas.¹⁶²

Conclusion

The UNCLOS 1982 is established to serve as a comprehensive legal instrument in the field of the law of the sea. It also aimed to supersede the four pre-existing conventions as well as to incorporate any novel principles, which had developed among the international community in recent years. Among those new principles was the EEZ.

The EEZ was established as a *sui generis* legal regime for maritime zone under sovereign rights jurisdiction of the coastal state with focus on the exploitation and management of the natural resources in the area. It serves as middle-ground for the contesting views that consider that since the EEZ was essential to the coastal states, thus some sort of coastal state's jurisdiction should be enforced in the area beyond the jurisdiction concerning natural resources and with the views that consider the EEZ as a part of the high seas, which the same freedom should be applied in the area.

However as the focus of the EEZ provisions are for the exploration, exploitation, and management of the resources in the area, the provisions are silent on the issue of military activities within the EEZ. It had not provides any explicit provisions over the matter. Those facts thus consequently resulted to dispute over the interpretation the provisions of the UNCLOS 1982 related to the issue.

One interpretation supports the view that military activities of in the EEZ of another state should only be conducted with the consent of the coastal state. Another view comprehends that military activity in the other state EEZ is lawful

¹⁶² Yoshifumi Tanaka, *supra* no. 74, p., 370.

and part of the freedom obtained by international community as such does not required any permission from the coastal state as the EEZ itself construed as part of the high seas. These differences in interpreting the provisions of UNCLOS 1982 had even inflicted to several fatal incident between the US and the Chinese over US military activities within the Chinese EEZ.

As both side of the aisle insisted to force their own respective interpretation over the matter, a middle ground need to be found to solve the dispute. A different approach, arguably, need to be taken. The current approach which views the military activities in other states EEZ in general had proved its failure to solve this dispute.

Thus a case per case basis approach, of the military operations, military exercise, military manoeuvres, as well as military intelligence gathering, to see a specific activities on a specific locality and on the basis of equity as well as in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties, should provide a better mechanism to solve the issue which should be mutually agreed by the parties to the dispute since there is possibility that one side or both side of the parties to the dispute had denounced the compulsory method provided in the convention. In the meantime, as a departure stage to venture further in solving this issue, a non-binding guideline, which had established by a prominent group of scholars, could be used as it was established with a careful consideration of both groups of states interest and views.

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