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Title	EEZs: US Must Unclench its Fist First
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Citation	Hamzah, B. A. (2009). EEZs: US Must Unclench its Fist First. (RSIS Commentaries, No. 037). RSIS Commentaries. Singapore: Nanyang Technological University.
Date	2009-04-09
URL	http://hdl.handle.net/10220/39848
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EEZs: US Must Unclench its Fist First

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9 April 2009

Military activities in the exclusive economic zones of other countries are likely to remain controversial in the near future if efforts to curb them fail. The recent actions by United States vessels in China's EEZ have undermined efforts to rebuild confidence at sea. This article is a rejoinder to the views of three US naval analysts in response to a commentary by Sam Bateman of RSIS. With this, we close the discussion on the issue.

THE *USNS Impeccable*, a US surveillance ship, was on a mission to map the ocean floor when China asked it to leave its Exclusive Economic Zone on 8 March 2009. If the *Impeccable* was, as claimed, to be exercising the right of navigation in the EEZ, it should have just sailed through and China would have no reason to be upset. Instead, the ship was in the area for several days. Several similar unauthorised activities in the past have made China jittery.

In April 2001, for example, a Chinese fighter (F8) crashed, killing its pilot after colliding with a US spy aircraft (EP-3E). A month later the *Bowditch* was spotted conducting surveillance in Chinese EEZ. And, on March 4 2009, Washington complained that *The USNS Victorious* was also harassed by China about 125 nautical miles from China's coast.

Defying Logic

The spying activities are in contravention of Chinese laws notably the 1992 Law on the Territorial Sea and the Contiguous Zone; the 1992 Law of Surveying and Mapping (revised in 2002) and the 1996 Regulations on the Management of Foreign-Related Marine Scientific Research. That the US has chosen to ignore them, claiming they are inconsistent with international practice, is unfortunate.

Such spats have made diplomacy look cheap as they could have been avoided. Washington's decision to continue challenging state practice against the conduct of military exercises or manoeuvres in others' EEZ does not augur well with its new foreign policy asking others to unclench their fists. The US policy also defies logic.

Washington has insisted that military exercises that involved the use of weapons, the launching of

aircraft, espionage and interference with coastal communications in the EEZ of other countries are allowed under customary international law. But the jurists are still divided on the right of states to conduct military activities in the EEZ of other countries simply because the concept of the EEZ itself remains part of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which the US has not ratified. To evolve into customary law a state practice has to be widely accepted over a long period of time. Most jurists insist that a customary practice, even when it is general and consistent, is not customary law unless an *opinion juris* or a sense of legal obligation or duty is present.

UNCLOS has been cited as the reference for what states can or cannot do in the EEZ. Unfortunately, UNCLOS is ambiguous and it has left a jarring lacuna. Terms like marine scientific research, hydrographic survey and survey activities are not defined in UNCLOS. The term “military surveys” is not mentioned at all in Part XI of UNCLOS. What constitutes peaceful activities in the EEZ is also not defined in UNCLOS. Whilst this is so, conducting espionage and military activities in the EEZ of another state that has legislation against such practice is an unfriendly act and invites trouble.

Moreover, states are required to refrain from any threat or use of force against the territorial integrity or political independence of any state.

US and UNCLOS

Washington’s policy of dividing the ocean into national waters and international waters ignores changes in law of the sea. The US Navy, for example, continues to treat the EEZ as part of the high seas. In the high seas all states are allowed to exercise the freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines and freedom of fishing. Of course, such freedoms must be exercised with due regard to the interests of other states.

UNCLOS has defined EEZ as an area which is beyond and adjacent to the territorial sea, not beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Within the EEZ the coastal state has the sovereign rights to explore, exploit and manage the natural resources, the right to establish artificial islands, right over marine scientific research as well as the right to protect and preserve the marine environment. But such rights must be exercised with due regard to the duties of other states.

Insisting on the right of conducting activities in the EEZ which can be perceived as threatening and intimidating to the security or sovereignty of the coastal state runs contrary to the preamble of UNCLOS to “facilitate international communication and to promote the peaceful uses of the seas and oceans”. Unless the act of spying and collecting data of the ocean floor in the EEZ of China by the *Impeccable*, *Bowditch* and *Victorious* does not constitute military activities or violating Chinese legislation, Beijing is wrong to be angry with Washington. China must also respect the right of the freedom of navigation under international law which in the above incidents has been breached.

Maritime powers should not exploit the legal ambiguity. Instead, they should strive to strengthen maritime security by respecting national legislation, removing fears of military threat and changing the rules of engagement on hostile assertions.

Time for US to ratify UNCLOS?

The politicians must rein in their overzealous naval and air force commanders from conducting operational activities that can undermine maritime security especially in hostile geographical environment. Every effort must be made to stop military and intelligence activities in EEZs which are likely to become controversial and dangerous in the future by rewriting the law and revising the rules of engagement. This is a tall order but it is possible. This is the best time to do it when the fund for such military activities could be channelled into more productive economic activities.

Just as war is too important to be left to generals, security at sea should not be left to admirals and captains.

The time has come for the Obama administration to ratify UNCLOS. It should also work towards rebuilding confidence at sea. It is my view that conducting military activities in the EEZ of other countries can be counterproductive and cannot promote confidence- building at sea. Washington must unclench its fist first before it expects others to do so.

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