

Military Exercises in the Exclusive Economic Zones: The Chinese Perspective

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Abstract

Over the past several decades, multilateral discussions concerning the law of the sea have resulted in a growing recognition of the importance of maritime resources and space by many of the world's nations. The 1982 UN Convention on the Law of the Sea (UNCLOS) is a comprehensive treaty that went into effect on 16 November 1994 in order to create a legal regime governing the peaceful use of the oceans and its resources. The UNCLOS provides guidance on various maritime matters, ranging from pollution to environmental protection, from resources rights to military activities. The Convention also created Exclusive Economic Zones (EEZ). Such zones extend two hundred nautical miles from the shores of coastal states. In particular, the EEZ regime developed new principles relating both to the rights and the responsibilities of coastal and maritime states within their sphere of influence, including how to conduct military exercises. Whereas in the West, states are mostly agreed on the fact that navigation and military exercises should be based on the concept of 'navigation-al freedom', within non-Western contexts (i.e. East Asia), a widely shared opinion is that foreign battleships engaging in military operations in a country's EEZ are considered to be harmful to the country's national security and such activities should therefore be prohibited. Within such a framework, this article intends to investigate the Chinese perspective with regards to military activities in the EEZ. In doing so, it is argued that despite acknowledging the need of both coastal and maritime states to extend surveillance and control beyond their territorial seas, misunderstandings regarding military activities in foreign EEZs are bound to increase if both parties do not simultaneously take both views into account.

Keywords

military activities, Exclusive Economic Zones (EEZ), United Nations Convention on the Law and Sea, UNCLOS, sovereignty, China, East Asia

1. Introduction

This article aims to contribute to the debate surrounding the historical and political narratives that over time have shaped the different, and in many cases hostile, positions taken towards the man-

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agement of military activities in the Exclusive Economic Zone (EEZ) by coastal states and maritime powers.² Whereas in the West, a consistent majority of states believe that navigation and military exercises need not be conducted with the consent of the coastal state, within non-Western contexts (i.e. East Asia, Latin America or Africa), a widely shared opinion is instead that foreign vessels engaging in military operations in a country's EEZ may be harmful to the country's national security, and such activities should therefore be prohibited or at least conducted *with the consent of the coastal state*. In order to better exemplify the complicated puzzle of military activities in the EEZ regime, this article illustrates how the issue has been discussed in a non-Western context, and more precisely, in the East Asian region.³ In light of the recent attention by the international community and the scholarship regarding China's growing role in the region, the analysis focuses on the position of the People's Republic of China (PRC) as a case study.

In the last decade, due to the fast-growing security concerns at issue between China and other East Asian countries (such as on-going territorial disputes with Vietnam and the Philippines in the South China Sea), as well as between China and the United States, the Chinese perspective is indeed an interesting case to study in order to understand why this topic has become particularly crucial when considering the status of maritime affairs in the region. For this purpose, we will first describe the historical development of the EEZ regime in the United Nations Convention on the Law of the Sea (UNCLOS), intended to highlight the need to acknowledge an 'Asian perspective' on the matter. This is because, despite discussions about the EEZ regime that date back to the late 1950s, misunderstandings between coastal and maritime states, driven by Western-led biases and maintained by Latin American, African and Asian states, are rarely taken into account when dealing with the East Asian region. In particular, the narrative that underpins China's current position on the EEZ regime appears to receive even less consideration over time; instead, the PRC's stance is often defined as assertive or increasingly aggressive when compared with the past, even though such a view does not take into account the historical narrative that has contributed to China's behaviour. For this purpose, the third section intends to broadly contextualise China's position on the EEZ regime. The aim is to show that, since the beginning, Western-led biases together with national security concerns have been two important determinants that affect the debate concerning the Chinese perspective on the EEZ regime. On top of this, political rivalries in the region have further contributed to make the EEZ regime as problematic and controversial as it is today. The fourth section will discuss the main historical and political narratives that have shaped China's position on the UNCLOS with a focus on its most relevant articles about the EEZ regime (Articles 55 and 58). The article concludes that despite the high level of multilateral maritime cooperation achieved over the last 50 years, in the East Asian

2 With regard to this debate, maritime states/powers are often opposed to coastal states. For the purposes of this article, the term refers to those countries that see maritime power and the management of oceans' resources as strategically important in order to increase their power potential at the global level.

3 In the literature, international regimes are defined as a set of principles, norms, rules and procedures, implicit or explicit, around which actors' expectations converge around a specific issue area. See Stephen D Krasner, 'Structural causes and regime consequences: Regimes as intervening variables' in Stephen D Krasner (ed), *International Regimes* (Cornell University Press 1983) 372.



region the current status of the disputes dealing with military activities in the EEZ are unlikely to be solved by relying on international law-making standards and procedures alone; instead, multilateral solutions should also be incentivized by improving the political conditions and dialogue among states. Last but not least, the intent of this article is not to discuss in detail the legal merits of the UNCLOS or the EEZ regime. Rather, other than the general overview on the current state of affairs that will be provided, the main focus is directed at contextualising the discourse within a larger perspective – in particular, the relevance of such debate in the broader field of international relations.

2. The UNCLOS and the EEZ Regime: historical developments

Historically, there has always been a clear distinction between ‘territorial waters’ and the ‘high seas’. Whereas the former refers to a belt of coastal waters extending to 12 nautical miles from the baseline of a coastal state, the latter denotes open waters with unrestricted navigation for all. Since the UNCLOS entered into force in 1994, State Parties have been provided with an international regime aimed at peaceful maritime and ocean management. At present, 167 states plus the European Union have ratified the Convention.⁴ Nevertheless, although the treaty was established as a comprehensive means of addressing a wide range of legal issues in the maritime context, the Convention is ambiguous about the issues concerning the military domain and the use of force in the oceans.⁵ More specifically, it does not ‘explicitly regulate military activities in the EEZ or the high seas.’⁶ In the UNCLOS, EEZs are considered to be highly strategic areas of interest, which have a profound impact on the management and conservation of the *resources* of the oceans. Essentially, the Convention recognises ‘the right of the coastal States to have jurisdiction over the resources of some 38 million square nautical miles of ocean space’, where ‘to the coastal State falls the right to exploit, develop, manage and conserve all resources – fish or oil, gas or gravel, nodules or sulphur – to be found in the waters, on the ocean floor and in the subsoil of an area extending 200 miles from its shore.’⁷

Despite the principles set out in the UNCLOS regulating the management of the resources of the coastal states in the EEZs, no provision has been provided with regards to *how* and *which* military activities should be conducted in such areas. For instance, amongst the main points of contention is that within the broad category of so-called military activities, the confusion with regards to *how* such activities have been defined by different countries over time further complicates the puzzle. That is, although maritime activities in the military sphere are often addressed generically as ‘military exercises’, in the case of military activities in the EEZs, disagreements have emerged with regards to

4 For a chronological list of ratifications, see the United Nations Division of Ocean Affairs and the Law of the Sea, available at <www.un.org> (last updated 7 January 2015).

5 Jing Geng, ‘The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS’ (2012) 28(74) *Utrecht Journal of International and European Law* 22.

6 *ibid* 24.

7 United Nations Division of Ocean Affairs and the Law of the Sea, ‘The United Nations Convention on the Law of the Sea, A historical perspective’ (1998) <www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#-Exclusive%20Economic%20Zone> accessed 25 July 2015.



states' Surveillance and Research Operations (SROs), Marine Scientific Research (MSRs) and hydrographic surveys.⁸ For instance, the United States does not consider MSRs to be neither military activities nor hydrographic surveys. In this light, such activities are not considered to be the same as resource exploration and they do not require the consent of the coastal state. According to China, however, MSR activities should be carried on with the consent of the coastal state and the research results, similarly to hydrographic surveys, should benefit both parties. Moreover, they should not be publicly published.⁹

From the outset, the innovation of the UNCLOS lay in the fact that for the very first time in the international law domain, coastal states and maritime powers (apparently) had come to an agreement on many contentious issues concerning the law of the sea. For this reason, the treaty was initially considered to be a significant innovation with regards to international treaty making and the management of ocean issues. At the same time, during the Third UN Conference (UNCLOS III) in 1973, it became clear that the UNCLOS had become a double-edged sword in the realm of international law-making: that is, the Convention was not only an instrument to address international law practices and misunderstandings, but it was also an instrument that further exacerbated the divide among states concerning the international management of the oceans.

More clearly, to some states, the position of maritime powers towards the EEZ regime was representative of the great political dilemma anchored in the legacies and power dynamics established with the bipolar international system as a result of the Cold War conflict. Specifically, the main implication was that in the 1970s, a discrete number of developing states began to share in the idea that both the United States and the Soviet Union – the two preeminent naval powers at that time – had the sole common interest of ensuring that the evolving legal regime governing the international seas had as a main priority the protection of their global interests (maritime and naval interests). This motivation helps explain why, since negotiations started at the end of the 1950s, some countries were already sceptical about the real success of such initiative and were struggling to instead conclude an agreement where they would be assured that the rights of developing states would also be guaranteed.¹⁰

Going back to the genesis of the EEZ regime within the UNCLOS, it was indeed the United States that first inaugurated the debate over EEZs' territorial rights. In the immediate aftermath of WWII (specifically, on 28 September 1945), the United States declared its willingness to control marine

8 For an updated analysis of the current debate on the Exclusive Economic Zone, see Gemma Andreone, 'The Exclusive Economic Zone' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015).

9 Yang Fang, 'Exclusive Economic Zone (EEZ) Regime in East Asia Waters: Military and intelligence-gatherings activities, Marine Scientific Research (MSR) and hydrographic surveys in an EEZ' (2010) RSIS Working Paper No 198, 11 <www.rsis.edu.sg/wp-content/uploads/rsis-pubs/WP198.pdf> accessed 25 July 2015.

10 Together with the United States and the Soviet Union, France, Japan and the United Kingdom formed a special interest group called 'the Great Maritime Powers.' See Robert Beckman and Tara Davenport, 'The EEZ Regime: Reflections after 30 Years' (LOSI Conference Paper, Seoul, 2012) 1-41.



resources and coastal fisheries beyond its territorial seas, claiming state sovereignty over the high seas.¹¹ Yet this declaration – from here on known as the ‘Truman Proclamation’ – was perceived as a real watershed in the domain of international law. Just two years later, two other states, Chile and Peru, declared full authority over the ocean zones extending 200 miles from their coasts.¹² From 1948 to 1951, other Latin American states followed the United States’ claim about the EEZ, with the result that a second fundamental turning point occurred in 1952. It was when, with the ‘Santiago Declaration,’ that the Governments of Chile, Ecuador and Peru for the first time proclaimed ‘as a norm of their international maritime policy that they each possess *exclusive sovereignty* and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical from these coasts.’¹³ The above declarations resulted in the first ever United Nations Conference on the Law of the Sea held between 1956 and 1958, an international event that profoundly affected the course of discussion with regards to dispute management between coastal and maritime states. Although the United Nations rejected the proposal of the Santiago Declaration, which was to recognise the ‘exclusive’ sovereignty of the coastal states in the EEZ, it nevertheless ‘provided a small victory for those seeking extending coastal States control, recognizing sovereignty rights of coastal States on the soil and subsoil of the coastal shelf beyond the territorial sea.’¹⁴ Almost two decades after the Santiago Declaration, at the beginning of the 1970s, other Asian and African states declared their support to Latin America countries, thus adding further doubts as to whether the benefits of joining UNCLOS were more real for the developing states or the developed ones. That Latin American countries were not working alone was highlighted first with the Colombo Meeting in 1971, followed by the Addis Ababa Declaration of 2 July 1973. The position of these countries was rooted in the fact that the debate concerning the law of the sea was still too Western-biased and thus in line with the Cold War’s dynamic of juxtaposing ‘developed vs. developing’ countries. The result was a Working Paper titled ‘The Exclusive Economic Zone Concept’ presented by Kenya, within which it was clearly affirmed that ‘the present regime of the high seas benefits only the developed countries.’¹⁵ In this light, African and Asian states decided to support the cause of their predecessors, therefore sustaining at the international level the idea that the regime of the high seas was in fact contributing to the on-going divide between developing and developed countries.

In the context of international law, an exhaustive analysis with regards to the debate over military exercises in the Exclusive Economic Zones is provided by Valdorisi and Kaufman’s work. According

11 According to Prof Ji, the US has always sustained its own interpretation of the EEZ regime, as exemplified by the fact that it continues to use the phrase ‘international waters’ rather than ‘high seas’ whereas the former is never mentioned in the UNCLOS. See Ji Guoxing, ‘The Legality of the “Impeccable Incident”’ (2009) 5(2) China Security 16.

12 George V Valdorisi and Alan G Kaufman, ‘Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict’ (2002) 32(2) California Western International Law Journal 253, 259.

13 Moreover, ‘the exclusive jurisdiction and sovereignty over this maritime zone shall also encompass exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof’. Chile, Ecuador and Peru. Declaration on the maritime zone (signed at Santiago on 18 August 1952) 1006 UNTS 325 (emphasis added).

14 Following the Santiago Declaration, the Latin American states signed two other international agreements in 1970, the Montevideo Declaration on the Law of the Sea and the Lima Declaration, see Valdorisi and Kaufman (n 12) 261.

15 See the Report of the Thirteenth Session of the Asian-African Consultative Committee (Lagos, January 1972) 18-25.



to the authors, the real puzzle is due to the fact that, despite the many declarations advanced by states prior to the UNCLOS in the 1950s and despite the fact that ‘food for thought’ had been provided by different cultural contexts (ranging from the United States to Latin American countries to Asian and African states), all coastal states ‘did not purport to seek sovereignty for its own sake, for the sake of territorial expansion, or for defense of the nation from a military threat’¹⁶. More clearly, ‘they rationalized their need for sovereignty as needed to protect and utilize natural resources of their marine environment’.¹⁷ To put it even more pragmatically: ‘Their interests were *economic and environmental in nature*’.¹⁸ Although recognising that security interests were already perceived to be of strategic importance both to coastal and maritime states when initially debating on the EEZ, at that time they were not seriously taken into consideration not only in the course of the various declarations but also during the treaty’s drafting with the result that, at present, misunderstandings over military exercises within Exclusive Economic Zones are still at stake. This complexity further explains why the lack of attention given to (coastal and maritime states’) national interests and security concerns resulted in the fact that today the EEZ regime remains a *sui generis regime*. It is neither inclusive (i.e. the effective possibility for maritime states to exercise sovereignty rights over the EEZ *jointly* with coastal states) nor exclusive (i.e. the rights of coastal states to exclude *a priori* maritime states from conducting military exercises in the EEZ).

If we move from the sphere of international law to the context of international politics, although solutions concerning military activities in the EEZ are often considered to be solvable only through the implementation of so-called Marine Policy Regimes, the level of agreement reached among the main actors involved is quite low.¹⁹ In this light, it is unlikely to underestimate the political implications that were at stake in the course of the UNCLOS Conferences since the beginning, especially with regards to the degree of ‘universal applicability’ of the EEZ regime. More specifically, since negotiations initiated in the 1950s, we have seen two main overlapping dynamics: (1) Western-led biases affecting developing countries’ view of the divide between coastal states and maritime powers as a consequence of the ‘East vs. West’ divide; and (2) the predominance of the environmental and economic dimensions over security concerns. However, the political implications with regards to military activities in the EEZ were not considered a top priority to either group both before and after the establishment of the UNCLOS (1982).

At the same time, both coastal and maritime states face a further challenge today: unlike when the UNCLOS was signed, the bipolar international system has now been replaced by a fast-paced multipolar order. As Peter Katzenstein affirmed:

16 Valdorisi and Kaufman (n 12) 262.

17 *ibid.*

18 *ibid* (emphasis added).

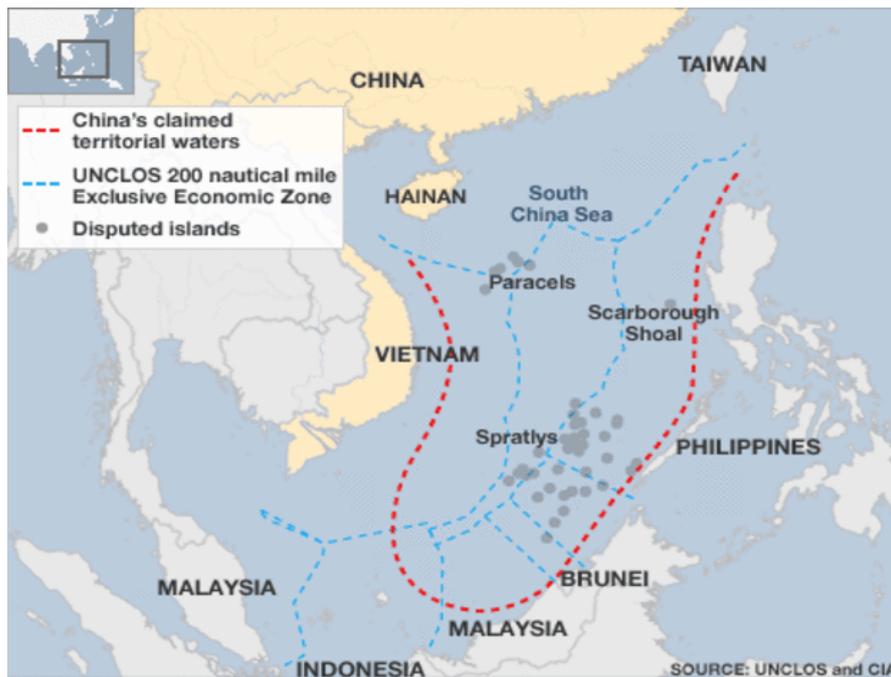
19 A Marine Policy Regime is ‘a set of agreements among a defined group of actors specifying: (1) the distribution of power and authority for the marine geographical region; (2) a system of rights and obligations for the members of the group; and (3) a body of rules and regulations that are supposed to govern the behavior of the members’, see Mark J Valencia, ‘Regional Maritime Regime Building: Prospects in Northeast and Southeast Asia’ (2000) 31 *Ocean Development & International Law* 223, 231.



The end of the Cold War has altered fundamentally the way we see the world. ... Power politics is now occurring in complex regional context that undercut the stark assumption of the international system as unmitigated anarchy and these regional contexts are making possible a variety of processes that put into question some conventional categories of analysis.²⁰

Therefore, the necessity to both coastal states and maritime powers to emphasise security concerns over economic and environmental activities in the EEZ also increased vis-à-vis the strategic role played by regions and emerging countries in world affairs, within which East Asia and the PRC are two exemplificative cases. Similarly, the security priorities of states not only within their own territorial borders, but also in the marine and ocean environments, have moved beyond proper territorial rights and often include overlapping regional and global interests and dynamics. In the following, we will discuss the Chinese views on the EEZ regime.

Fig. 1 The South China Sea Dispute



Source: Eurasia Review, 2012

20 Peter J Katzenstein, 'Regionalism and Asia' (2000) 5(3) *New Political Economy* 353, 353.



3. China and the EEZ regime: a matter of national security

The dichotomy of ‘developing vs. developed countries’ in the UNCLOS exemplifies how, since the end of the 1950s, the discussion concerning states’ interests in the EEZ was driven by a commonality of interests among the different stakeholders involved with the treaty’s discussion and its implementation. At the same time, the priority of economic and environmental interests over security concerns accounted for the fact that military activities in the EEZ were not problematized enough so as to found a common working ground for both coastal and maritime states. In 2004, Galdorisi and Kaufman offered four main reasons why military activities in the EEZ by foreign nations are becoming more and more relevant: the accelerating pace of globalisation, the tremendous increase in world trade, the rise in the size and quality of the navies of many nations, and technological advances that exploit oceanic rise.²¹ Today, however, we believe that one more reason, which does not exclude any of the above, is particularly relevant when analysing the current status of the EEZ regime, and that is the growing attention devoted by China to military affairs, both within its regional sphere of influence (i.e. East Asia) as well as from a global perspective, as the PRC’s stance towards the EEZ regime demonstrates.

The debate concerning the Chinese position in the EEZ is linked, according to many, to the growing assertiveness of China regarding international affairs, and in particular, with regards to the implementation of its military defence apparatus as an instrument to deal with sovereignty and territorial disputes *within* and *outside* its territorial borders in the East Asian region.²² Specifically, whereas in the past China has always maintained a ‘low profile’ in disputed waters, emphasising the development of trade and economic relations in its interactions with Southeast Asian claimants, today’s China has not only reclaimed land on a large scale for the construction of buildings and ports, as in the Spratly Islands for instance, but it has also expanded its naval presence in the EEZs of other countries (Guam, Australia and Hawaii).²³

On top of this, a major point of concern was the first public Chinese Military Strategy White Paper released by the Chinese Ministry of National Defense on 26 May 2015.²⁴ Since then, the White Paper has become a subject increasingly analysed by Western and Chinese media outlets.²⁵ Within the document, Beijing exemplified the main threats China would be able to face with a modern mili-

21 Valdorisi and Kaufman (n 12) 255.

22 Julian Ryall, ‘US-China war “inevitable” unless Washington drops demands over South China Sea’ (*The Telegraph*, 26 May 2015) <www.telegraph.co.uk/news/worldnews/asia/china/11630185/US-China-war-inevitable-unless-Washington-drops-demands-over-South-China-Sea.html> accessed 25 July 2015.

23 Xue Li and Xu Yanzhuo, ‘China Should Adjust its South China Sea Policy’ (*The Diplomat*, 8 June 2015) <<http://thediplomat.com/2015/06/china-should-adjust-its-south-china-sea-policy/>> accessed 25 July 2015.

24 Ministry of National Defense, ‘China’s Military Strategy’ (*The State Council Information Office of the People’s Republic of China*, May 2015) <<http://eng.mod.gov.cn/Database/WhitePapers/>> accessed 25 July 2015.

25 ‘中国政府发表《中国的军事战略》白皮书’ (Chinese government published ‘China’s military strategy’ White Paper, Xinhua, 26 May 2015 <http://news.xinhuanet.com/politics/2015-05/26/c_1115407433.htm> accessed 25 July 2015).



tary apparatus, including new threats from 'hegemonism, power-politics and neo-interventionism'.²⁶ More specifically, the main strategic tasks of modernised armed forces for the Chinese leadership when focusing on maritime operations would be a shift in the focus of the People's Liberation Army (PLA) Navy from 'offshore water defense' to 'open seas protection'.²⁷ To some, it signifies that 'the PLA is seeking to shift away from a narrow focus of defence of its territory and near-periphery toward the ability to defend and secure Chinese national interests further abroad'.²⁸ In particular, Beijing will be following a two-path strategy: in the South China Sea, it is building up its maritime surveillance forces in the area and strengthening effective control over the features it occupies. At the same time, Chinese vessels are expanding their areas of interest in order to assert Beijing's interests in what is called the 'nine-dash line'.²⁹

Yet, from the Chinese perspective, the PRC's position on the EEZs seems easy to understand, and it would not be based on China's willingness to play a hegemonic role within or outside the East Asian region. As explained in 2014 by the Chinese Minister of Defense, China 'makes no compromise, no concession and no trading in the fight of what is considered to be a matter of *national sovereignty*'.³⁰ In this light, China's rights within its own EEZ are not an expanding strategy of the recent shift from 'offshore water defense' to 'open seas protection', but are only driven by Beijing's *core interests* at stake, primarily national sovereignty. Indeed, to justify China's position on the EEZs only because of this 'new assertiveness' sounds like a partial explanation. As a matter of fact today, with respect to the EEZ regime, many other states, which are not even considered to be part of the developing world anymore, have argued for a different understanding of how military activities in the EEZ should, or at least could, be conducted. For instance, the PRC is not standing alone when asserting that the UNCLOS poorly considered the view of many non-Western states over the EEZ regime; indeed, in addition to China, 27 other states have already expressed their growing concern over the issue, including Cambodia, India, Malaysia, Thailand, Vietnam, Bangladesh and the Maldives. Considering the stance of Brazil, for instance, when ratifying the UNCLOS in 1988, Brazil declared that 'the Brazilian Government understands that the provisions of the Convention do not authorize other States to carry out military exercises or maneuvers, in particular, those including the use of weapons

26 See Ministry of National Defense, 'China Military Strategy' (n 24).

27 For an exhaustive analysis of China's PLA, see Dennis J Blasko, *The Chinese Army Today. Tradition and Transformation for the 21st Century* (2nd ed, Routledge 2012).

28 Nong Hong, 'Messages from China's National Defense White Paper' (*Asia Maritime Transparency Initiative*, 2 June 2015) <<http://amti.csis.org/messages-from-chinas-national-defense-white-paper/>> accessed 25 July 2015.

29 Gregory Poling, 'Beijing's South China Sea strategies: consolidation and provocation' (*East Asia Forum*, 28 March 2015) <www.eastasiaforum.org/2014/03/28/beijings-south-china-sea-strategies-consolidation-and-provocation/> accessed 25 July 2015.

30 Jeff M Smith and Joshua Eisenman, 'China and America clash on the High Seas: the EEZ challenge' (*The National Interest*, 22 May 2014) <<http://nationalinterest.org/feature/china-america-clash-the-high-seas-the-eez-challenge-10513>> accessed 25 July 2015 (emphasis added).



or explosives, in the exclusive economic zones, without the consent of the coastal States.³¹ This is why, according to Zanotti, 'the exclusive economic zone does not fall either under the concept of sovereignty prevailing in the territorial seas, or under the concept of freedom, which characterizes the high seas'.³²

Nonetheless, it is also true that the PRC is the coastal state that appears to be the most reluctant to allow foreign countries to conduct military activities within its own EEZ, stressing that the issue represents a matter of national security. At the same time, despite the emphasis placed by China on its sovereignty principles, the controversy seems to be supported also by the legal misunderstandings that have emerged from the UNCLOS itself. Therefore, rather than considering the Chinese position on the EEZ merely as a direct manifestation of China's 'offensive strategies' at the regional or even global level, we should also consider that in fact many ambiguities exist within the domain of international law concerning the management of the seas and oceans. According to some scholars, the effectiveness of the UNCLOS depends not only on its implementation or application procedures, but even more so on 'how the Convention can be interpreted by the different States involved in the dispute' (both coastal and maritime).³³

4. Historical and political narratives of relevant articles related to the Chinese position on the EEZ Regime

Without a doubt, through a legal perspective, the greatest puzzle is driven by the fact that the EEZ regime is indeed a *sui generis regime*.³⁴ However, as noted by Yang Fang, 'the seas of East Asia are so problematic that many countries have overlapping EEZs, which are caused in some instances by the use of excessive territorial sea straight baselines'.³⁵ On top of this, further incomprehension is due to Article 58 UNCLOS, which, despite specifically addressing the meaning of 'freedom of navigation' within the treaty, does not consider the issue of security and military interests when dealing with freedom of navigation. More clearly:

In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply

31 Differently, in 1995, the Italian Government declared, that, 'according to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zones. In particular, the rights and jurisdiction of the coastal States in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them': see Tullio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' (2001) 286 *Recueil Des Cours: Collected Courses of the Hague Academy of International Law* 39, 164.

32 *ibid* 164-65.

33 Beckman and Davenport (n 10) 3.

34 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art 55.

35 Yang Fang (n 9) 3.



with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.³⁶

In this light, practical problems arise because ‘with respect to military uses of the EEZ, the Convention does not make clear whether military activities are included in the freedoms of navigation and overflight and other internationally uses of the sea available under articles 58 and 87 of the LOS Convention.’³⁷ It means that Article 58 is not clear on how so-called ‘freedoms’ with regards to ‘other internationally lawful uses of the seas’ would include military exercises/activities. Therefore, the question concerning which type of military activities can or should be allowed, as well as how they can be conducted within a country’s EEZ, was left unresolved.³⁸

China has always being considered an active participant in the discussion surrounding the UNCLOS. From 1973 to 1982, the Chinese delegation attended all 12 sessions conducted over a decade. On 12 December 1982, China signed the Convention and finally ratified it on 15 May 1996. In particular, the Chinese working papers that were presented to UNCLOS III were related to nine fundamental aspects: (1) the territorial seas, (2) the straits and use for international navigation, (3) the EEZ, (4) the continental shelf, (5) the area beyond the limits of national jurisdiction, (6) marine environmental protection, (7) marine research, (8) transfer of marine technology, and (9) dispute settlements.³⁹ Shortly after the ratification, during the 3rd Meeting of the Ninth National People’s Congress in 1998, China passed the Law of the People’s Republic of China on the Exclusive Economic Zone and Continental Shelf. With a total of 16 articles, the Law illustrated for the very first time the Chinese position on those issues that were left largely unresolved by the UNCLOS regarding the EEZ and, in particular, MSR. With regards to surveillance and research operations, two main articles are considered to be the most relevant. The first is Article 9, according to which foreign states carrying out marine scientific research within China’s EEZ should comply first and foremost with the laws and regulations of the People’s Republic of China.⁴⁰ The second is Article 12, which clarifies that if the Chinese government perceives that its laws and regulations concerning its EEZ are being violated, it has the right to adopt ‘necessary measures’ in order to ensure compliance with the PRC’s legal

36 UNCLOS, art 58.

37 Sam Bateman, ‘The Regime of the Exclusive Economic Zone: Military Activities and the Need to Compromise?’ in Tafsir Malick Ndiaye and Rudiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement Disputes* (Brill 2007) 572.

38 In particular, with regards to ‘freedoms of navigation’, see UNCLOS, art 87.

39 Keyuan Zou, ‘China’s exclusive economic zone and continental shelf: developments, problems and prospects’ (2001) 25 *Marine Policy* 71.

40 Law of the People’s Republic of China on the Exclusive Economic Zone and Continental Shelf, art 9: ‘All international organizations, foreign organizations or the individuals shall obtain approval from the competent authorities of the People’s Republic of China for carrying out marine scientific research in its exclusive economic zone and on its continental shelf, and shall comply with the laws and regulations of the People’s Republic of China.’



settings.⁴¹

Notwithstanding the fact that, as a State Party, China should comply with the UNCLOS's laws and regulations, maritime states are similarly required to comply with the laws and regulations adopted by the coastal states, if and only if such laws are in accordance with the Convention and other rules of international law. The result is that, 'if a coastal State adopts laws and regulations on matters over which it does not have jurisdiction under UNCLOS, there is no obligation on other States to comply with such laws and regulations'.⁴² More specifically, it means that although Chinese leadership requires maritime powers to conduct SROs or MSR under the guidance and/or with the permission of the coastal state as stated by Chinese law, other states, such as the United States, are more likely to appeal to Article 58 UNCLOS – which does not specify which military activities can be conducted – believing that research activities in the EEZ are part of the freedoms of lawful use of the seas and therefore does not require them to be accountable to the Chinese jurisdiction.

However, despite the controversial understandings about the regulation of military activities in the EEZ, MSR, SROs and more generally, UNCLOS' regulation, we could ask whether the Chinese perspective has brought into question international law simply because of the UNCLOS' different interpretations by coastal and maritime powers, or rather whether there could be other factors at stake. That is, in the East Asian region, contention and discontent are not exclusively driven by legal misunderstandings or by the inaccuracies of international law, but rather, being that East Asia is a region heavily affected by growing political rivalries, the 'hard core complexity' of the issue inevitably requires including the territorial disputes of the region itself. On top of this, the United States' ambition in the region has further exacerbated the context of such disputes: from 2001 to 2014, a substantial number of maritime incidents occurred between the PRC and the United States in the EEZ of East Asia.⁴³ Moreover, as was clearly stated in the 2014 CRS Report for Congress, from the standpoint of US strategic policy, if China may be seeking to dominate its near-seas region, it would be highly significant, because it has been a longstanding US strategic goal to prevent the emergence of a regional hegemon in one part of Eurasia or other.⁴⁴

Against this background, we can affirm that at present two main narratives stand out to explain China's position on military activities in the EEZ. The first should be considered within a global perspective and is rooted in the fact that when dealing with oceans' management and maritime disputes,

41 Law of the People's Republic of China on the Exclusive Economic Zone and Continental Shelf, art 12: 'The People's Republic of China may, in the exercise of its sovereignty right to explore, exploit, conserve and manage, the living resources in the exclusive economic zones take such measures, including, boarding, inspection, arrest, detention and judicial processes, as may be necessary to ensure compliance with the laws and regulations of the People's Republic of China. The People's Republic of China shall have the rights to take necessary measures against the violation of its laws and regulations in the exclusive economic zone and on the continental shelf, to pursue the legal responsibilities by law and may exercise the right of hot pursuit.'

42 Beckman and Davenport (n 10) 11.

43 See Ronald O'Rourke, 'Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes involving China: Issues for Congress' [2015] Congressional Research Service 1-99.

44 *ibid* 21.



since the end of the 1950s, the international community has had to confront numerous difficulties on how to enforce a legal (binding) international framework with universal applicability despite the bipolarization of the world system and the cultural divide between the East and the West. In other words, the first narrative deals with the real possibility of establishing an international maritime regime combining the interests of both coastal states and maritime powers. However, the result was that regardless of the fact that the UNCLOS was initially considered to be a successful tool in managing maritime disputes 'worldwide', scepticism has grown with regards to its universal applicability. According to the author's analysis, China would fit perfectly within such a picture. He postulates that when the Chinese Government sent delegations to the Third UN Conference of the Law of the Sea, China used this international event to attack those considered by China as the two 'superpowers' – the former Soviet Union and the United States – thus 'accusing them of hegemonism in the global oceans rather than deliberating detailed provisions in favour of its national interests'.⁴⁵ The second narrative is bound instead to a regional dimension, particularly to the specificity of China's role and strategies within the region. As a matter of fact, although the issue of maritime security has always been considered to be a global issue, the concept of maritime security when applied to the South China Sea still presents 'its own uniqueness'.⁴⁶ This is why, not only within the domain of international politics but also from a legal perspective, the misinterpretations existing within the UNCLOS resulted in a necessity to expand understanding about China's position. More clearly, according to Dupuy and Dupuy, the PRC's stance towards the EEZ regime in the South China Sea is bound to the concept of so-called 'historic rights', according to which the degree of confusion and controversy in international law is coupled with the argument that, since the 1950s, China has been reclaiming extensive territorial claims and sovereignty rights in the South China Sea, and in particular, 'the Pratas (Dongsha), Paracels (Xisha), Macclefield bank (Zhongsha) and the Spratlys (Nansha)'.⁴⁷

At the same time, when it comes to military exercises in the East Asian region, the United States' predominant position should be considered as another highly destabilizing factor driving China's behaviour. This is because President Obama's 'pivot to Asia' was interpreted by Beijing as a clear counter-measure used by the US government to impede China's growing economic and geopolitical power. However, as exemplified by scholarship in the PRC, the China-United States rivalry once again stands as a partial explanation for the Chinese position in what could be defined as a more holistic approach. In an article published in 2011, Jin Yongming, Director of the Research Center of Law and Sea at the Shanghai Academy of Social Science, stated that the South China Sea dispute (南海问题 *nanghai wenti*) implies two different types of legal disputes: the first is the dispute between China and the ASEAN countries (that is, the South China Sea dispute). In this regard, sovereignty rights about

45 Keyuan Zou, 'China's Ocean Policymaking: Practice and Lessons' (2012) 40 *Coastal Management* 145, 146.

46 See Sichun Wu and Keyuan Zou, *Maritime Security in the South China Sea: Regional Implications and International Cooperation* (Ashgate 2009).

47 Florian Dupuy and Pierre-Marie Dupuy, 'A legal analysis of China's Historic Rights claims in the South China Sea' (2013) 107 *The American Journal of International Law* 124, 126.



reefs and seas, as well as national interests, are the main priorities driving the PRC's behaviour.⁴⁸

The second dispute refers specifically to the China-United States military activities in the EEZ 专属经济区内的军事活动 (*zhuanshu jingji qu nei de junshi huodong*), with a focus on how different interpretations emerged with regards to military measurement activities and joint military exercises. In this light, the United States' stance to freely navigate other states' coastal waters in the region without asking permission of the coastal state and by claiming the right to respect freedom of navigation would be in substance just an expedient to freely conduct military activities within China's EEZ. According to the author, the real issue at stake is whether so-called military measurement activities could be classified as marine scientific research activities, given the fact that the UNCLOS did not specifically address such a concern.⁴⁹

As such, he suggested that the solutions to the problem would have to be addressed in a distinct manner: whereas with ASEAN countries (such as Vietnam or the Philippines), which all claim ownership of the territory, consultations should be conducted bilaterally, or preferably multilaterally, through the involvement of regional institutions.⁵⁰ With the United States, the military activities' controversy should be addressed by studying the UNCLOS, with the intent to reach an agreement over the EEZ, as well as through the use of bilateral dialogues, such as the China-US Asia Pacific Consultation Mechanism (中美亚太事务磋商机制 *zhong mei yatai shiwu cuoshang jizhi*).⁵¹ In this regard, the two solutions pinpoint the two different dimensions or rather the two types of 'ad hoc' regional strategies China intends to follow: regional multilateral organisations and forums with ASEAN States, and the use of international law-making mechanisms or bilateral forums with the United States.

5. Conclusion

Is it fair to interpret China's position on the EEZ regime as a consequence of the growing role the PRC is willing to play with regards to maritime security and ocean management within and outside the East Asian region? Or would it be more appropriate to contextualise the Chinese position within the historical and political narratives that have shaped the non-Western perspectives of the UNCLOS and the EEZ regime since the 1950s? In fact, Beijing seems to have dismissed the image of a low profile country in the region, where instead a certain growing assertiveness when conducting military activities in the EEZ seems to better explain China's national interests within and outside the 'nine-dash line'. This is why US officials have often portrayed the Chinese position as 'doublethink behaviour' – that is, Chinese officials consider the UNCLOS text as sacrosanct, but they reserve themselves

48 See Jin Yongming, '中美专属经济区内军事活动 争议的海洋法剖析' (A Dissection of Disputes between China and the United States over Military Activities in the Exclusive Economic Zone by the Law of the Sea) (2011) 19(11) *Pacific Journal* 74.

49 *ibid* 76.

50 *ibid*

51 *ibid* 74.



the prerogative to supersede the treaty language whenever it goes against China's national interests and sovereignty principles.⁵²

Yet, as illustrated above, the main source of contention between coastal and maritime states lies in the fact that ever since the first discussions over EEZs in the 1950s, the rationalisation of interests advanced by both groups of states was heavily dependent on their economic and environmental interests rather than security concerns. The result was that, in the 1970s, what was driving states' interests within the UNCLOS discussion was mainly the exploitation and the management of the oceans' resources and thus, during the drafting of the Convention and subsequent ratifications, security concerns were only partially taken into account. At the same time, this article illustrated that another narrative was also at stake within the UNCLOS's initial settlement, which was the fact that developing states (in Asia, Africa and Latin America) were not sharing the same interests and ideas regarding military activities as the two major naval powers of that time, the United States and the Soviet Union. The result is that still today, overlapping concepts exist with regards to how such activities have been defined. The main divergences are particularly due to the fact that whether the United States distinguishes military activities and hydrographic surveys from MSR – where the former are not related to resource exploration and therefore they believe (in line with the UNCLOS) that such activities need not be conducted with the consent of the coastal states – the PRC adopted a different view, that is, Article 58 UNCLOS, which stated that 'all States should have due regard to the rights and duties of coastal States and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of the international law in so far as they are not incompatible with this part'.⁵³ On top of this, despite overlapping definitions and different legal interpretations, China is in fact pursuing a double regional strategy with regards to military activities in the EEZ: whereas its behaviour stands as highly competitive towards the United States due to their current political rivalry in the Asia-Pacific region, China's regional strategy towards ASEAN States seems, to a certain extent, less concerned by competition dynamics, driven by China's willingness to strengthen multilateral mechanisms with institutional platforms like the Expanded ASEAN Maritime Forum. In this light, political dialogues – through diplomatic channels, such as Track-II Diplomacy and think tank symposiums – might provide concrete measures in order to fill the gap left by the UNCLOS with regards to security and military interests and activities in the EEZ.

52 James R Holmes, 'China's Doublethink on the Law of the Sea' (*The Diplomat*, 5 June 2013) <<http://thediplomat.com/2013/06/chinas-doublethink-on-the-law-of-the-sea/>> accessed 25 July 2015.

53 UNCLOS, art 58; see also Yang Fang (n 9) 8-9.