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In Defence of High Seas Freedoms

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An article in RSIS Commentaries on the recent clashes in China's Exclusive Economic Zone (EEZ) between Chinese patrol vessels and US ocean surveillance ships cited differing interpretations about rights and responsibilities in EEZs as a factor. The following commentary offers an alternative view.

ON 13 MARCH 2009, Dr Sam Bateman wrote in *RSIS Commentaries* about China's most recent harassment of United States naval ships operating in the Chinese exclusive economic zone (EEZ). Dr Bateman noted that the USNS *Impeccable* and USNS *Victorious* were involved in marine data collection for military purposes, and thus were exercising high seas freedoms in accordance with the 1982 UN Convention on the Law of the Sea (UNCLOS).

Dr Bateman also noted that marine data collection for military purposes does not fall within the legal regime of marine scientific research, which under UNCLOS may be regulated by the coastal state. We agree with Dr Bateman on these points.

Dr Bateman opined further, however, that the operations of military survey ships, such as the USNS *Bowditch*, *may* be interpreted as marine scientific research. In his view, those ships are engaged in oceanography, which falls within marine scientific research. We respectfully disagree.

Coastal State Authority

We would like to respond to Dr Bateman's discussion of the balance of interests in the EEZ, as reflected in UNCLOS. In particular, we would like to include the distinction in coastal state authority in the territorial sea compared to the EEZ; the exclusive authority of sovereign states to exercise jurisdiction and control over their warships, naval auxiliaries, military aircraft, and other public vessels; and the difference between marine data collection by naval vessels and marine scientific research.

The US accepts that the provisions in UNCLOS relating to traditional uses of the ocean reflect customary international law. We agree, therefore, with Dr Bateman's overarching point that in

accordance with UNCLOS, the EEZ is a zone of shared rights and responsibilities, in which the coastal state and the international community are obligated to exercise due regard for the rights and duties of each other. As the US noted on 8 March 1983, in exercising its right of reply at the Third UN Conference on the Law of the Sea:

This [EEZ] concept, as set forth in the Convention, recognises the interests of the coastal State in the resources of the zone and authorises it to assert jurisdiction over resource-related activities therein. At the same time, all States continue to enjoy in the zone traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone.

Military operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone.

That UNCLOS preserves high seas freedoms in the EEZ — to include the exercise of military operations -- is well-settled. In addition to the express terms of articles 58 and 87 (and by incorporation therein all of articles 88-115), and article 236 of the Convention, state practice indicates that navies routinely conduct operations in foreign EEZs without providing prior notice to or seeking consent from coastal states.

It is not uncommon for China, for example, to conduct submarine operations and intelligence collection activities in foreign EEZs, including in EEZ waters of the US in the western Pacific. It was also not uncommon for the then Soviet Union to loiter its intelligence collection vessels just outside the 3 nautical mile limit of the US territorial sea, and then later its 12 nautical mile limit.

Immunities and Sovereignty

Likewise, coastal states regularly recognise, in their respective domestic laws relating to the EEZ, the sovereign immunity of foreign warships, naval auxiliaries, other public vessels, and state aircraft. International bodies, such as the International Maritime Organization (IMO), also recognise that in matters affecting the EEZ -- such as the establishment of particularly sensitive sea areas and associated protective measures in the EEZ -- coastal states must not purport to extend authority or control over foreign warships, naval auxiliaries, or other public vessels.

With regard to Dr Bateman's distinction between the *Bowditch* and the *Impeccable*, it is important to note that the law of the sea itself draws no distinction between the immunities afforded to warships and naval auxiliaries based on design, mission, classification, propulsion, or cargo. Both *Bowditch* and *Impeccable* are naval auxiliaries entitled to full sovereign immunity.

If, hypothetically, without the consent of the coastal state, they were to conduct intelligence collection activities in its territorial sea, or if they were to conduct hydrographic or military survey activities in its territorial sea, then under article 19 of the Convention they could not claim to have engaged in innocent passage. Under article 25, the coastal state would be within its rights to demand that such activities stop. But a coastal state enjoys no like rights vis-à-vis foreign warships and auxiliaries in the EEZ.

With regard to marine data collection, the US accepts the right of coastal states to regulate marine scientific research within their respective EEZs. Marine scientific research was intentionally not defined in the Convention. But it is widely understood to describe activities undertaken in ocean and coastal waters to expand scientific knowledge of the marine environment and its processes. The

results of such research are publicly available.

In the view of the US, marine scientific research is but one of four categories (and seven sub-categories) of marine data collection. The other three categories are surveys (hydrographic and military), operational oceanography, and exploration and exploitation of natural resources and underwater cultural heritage.

Military surveys are inherently different than marine scientific research. Military surveys constitute data collection for military purposes only. The results are not disseminated to the public, and the data is often classified. Military surveys, conducted by naval vessels, are a form of military activities protected under the law of the sea as an exercise of high seas freedoms.

They may be conducted in EEZs without requirement to provide notice to the coastal state or gain coastal state permission. The *Bowditch* is a military survey vessel, and it conducts military activities, for military purposes, in the same vein as the *Impeccable* and the *Victorious*.

Freedoms of the Seas

From the Chinese perspective, when they asked the US to stop surveillance activities in the East and South China Seas and the US refused, it signified a lack of respect. The irony, of course, is that there is no surer sign of greatness in a nation or its Navy than to acknowledge and accept the exercise of navigational rights and freedoms by others. But why shouldn't the US curtail its military activities in and above the Chinese EEZ, in the interests of comity?

The answer is two-fold. First, it is an exceedingly thin line between comity and acquiescence to an excessive claim. Second, the navigational rights and freedoms established in the law of the sea are fundamental to the maintenance of public order and the development of international trade upon which depends our shared economic prosperity. As China expands its naval capability, we hope it will join other nations of the world as guarantors of freedoms of the seas.

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