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A Chinese Perspective

Dr. Ren Xiaofeng*, Senior Colonel Cheng Xizhong

China Institute for International Strategic Studies, 6, Hua Yan BeiLi, Xiao Guan Road, Chaoyang District, Beijing, China

Abstract

Regarding the regime of military and intelligence gathering activities in the EEZ, China argues that the freedoms of navigation and overflight in the EEZ have certain restrictions including that the activity must be peaceful and not threaten to use force against the coastal State. This includes military surveys, military maneuvers, and military reconnaissance which are a form of battlefield preparation. These activities are also subject to due regard for the rights of the coastal State. China also argues that there are serious shortcomings regarding the regime of marine scientific research (MSR) in the EEZ and that marine surveys or military surveys carried out by MSR platforms require the consent of the coastal State.

Keywords: EEZ regime; Key terms; A Chinese perspective

There is a stark dichotomy of views on these issues. Some maritime experts persistently maintain that conducting military and intelligence gathering activities in the EEZ and its superjacent airspace is an exercise of freedom of navigation and overflight on the high seas and "other internationally lawful uses of the sea" related to this freedom as provided in the 1982 UNCLOS. Moreover, they argue that the activities are conducted for "peaceful purposes" and therefore do not violate international laws. However, many developing coastal States insist that these activities are an abuse of "freedom of navigation and overflight" and "other internationally lawful uses of the sea," and are "non-peaceful", having encroached on the national security interests of the coastal States. They argue that these activities undermine the peace, tranquility and good legal order in their EEZs and thus, violate their sovereign rights and exclusive jurisdiction. The legal principles on which various parties base their views are essentially the same, but their conclusions are completely different. Therefore, it is necessary to clarify and resolve the legal issues involving such activities through an examination of the basic concepts of the EEZ regime.

However, based on international discussions and practices, the EEZ regime has shortcomings which can be linked to unclear and differing conceptions of the regime. The basic concepts in the EEZ regime that are the most disputed include the specific legal regime, sovereign rights and exclusive jurisdiction, due regard, freedom of navigation and overflight, peaceful purposes, MSR, and other internationally lawful uses of the sea related to these freedom.

The preamble of the 1982 UNCLOS states that the States Parties to this Convention realize that "the problems of ocean space are closely interrelated and need to be considered as a whole". Also, when these basic concepts are interpreted, it should be borne in mind that the 1982 UNCLOS is 'pieced together and consists of' various parts produced by different working groups. Thus the treaty should be interpreted according to the general rules for such treaty interpretation, i.e., "in good faith", "in accordance with the ordinary meaning given to the terms," and "in the light of its object and purpose."

*Corresponding author. Tel.: +86-10-6201-6943; fax: +86-10-6202-1048.
E-mail address: exprescnn@hotmail.com (R. Xiaofeng).

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1. The specific legal regime

Article 55 of the 1982 UNCLOS stipulates that the EEZ is "subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention". The key components of this specific legal regime include Articles 56, 57, 58, 59 and 74. Articles 57 and 74 stipulate the principles of delimitation of the EEZ between States with opposite or adjacent coasts. The other Articles stipulate the quality and the quantity of the rights and obligations enjoyed by coastal States and other States in this area. Article 56 states that the coastal State "has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" and exclusive jurisdiction as provided for in the relevant provisions of this convention with regard to "certain issues". Article 58 states that "all States enjoy", subject to the relevant provisions of this convention, the freedoms referred to in Article 87 of "navigation and overflight" and "other internationally lawful uses of the sea related to these freedoms". This Article also stipulates that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part". Article 59 established the "basis for the resolution of conflicts regarding attribution of rights and jurisdiction in the exclusive economic zone", that is, the so-called 'residual rights rule.'

It must be emphasized that there are two "due regards" in Articles 56 and 58. The former demands that "in exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention", while the latter demands that "in exercising their rights and performing their duties under this Convention in the exclusive economic zone, other States shall have due regard to the rights and duties of the coastal State 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 international law in so far as they are not incompatible with this Part".

Provided that there is an identical comprehensive understanding of terms like sovereign rights, exclusive jurisdiction, due regard, freedom of navigation and overflight referred to in Article 87, then the regime which consists of these Articles should be the "specific legal regime." However, there is confusion and disagreement regarding the meaning of those terms. So only the following conclusions about the specific legal regime can be drawn. The EEZ is not the high seas but an area beyond and adjacent to the territorial waters of the coastal State, where the coastal State enjoys sovereign rights and exclusive jurisdiction for specific matters. It cannot be called international waters. In the EEZ, the traditional freedom of the high seas does not exist, and the "freedoms of navigation and overflight" and "other internationally lawful uses" enjoyed by other States in the EEZ are "freedoms" and "uses" restricted by the rules of the Convention and other international laws. The 'quality' or the 'quantity' of these freedoms is very different from the freedoms of the high seas in that there are more restrictions on them.

2. Sovereign rights and exclusive jurisdiction of the coastal State

Article 56 of the 1982 UNCLOS stipulates that the coastal State has sovereign rights and exclusive jurisdiction in the EEZ, which includes sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources in the area, and exclusive jurisdiction with regard to "the establishment and use of artificial islands, installations and structures, marine scientific research and protection and preservation of the marine environment". The international community has a common understanding of the concept of sovereign rights and exclusive jurisdiction. However, regarding military activities in the EEZ, the dispute includes MSR and marine surveys conducted by military vessels. This dispute is not over the meaning of exclusive jurisdiction but over the concept of MSR, marine hydrographic research and military surveys.

Based on the concept of sovereign rights and exclusive jurisdiction of the coastal State, the coastal State enjoys exclusive jurisdiction over MSR in its EEZ. It thus, has the right to formulate and implement relevant national laws and regulations for MSR in its EEZ, and has the right to exercise supervision, board and monitor any MSR platforms in its EEZ. Countries and organizations which wish to conduct MSR in the EEZ of a coastal State should respect this exclusive jurisdiction, observe relevant national laws and regulations, and comply with or abide by the supervision, boarding and monitoring by law enforcement forces of the coastal States.

3. MSR in the EEZ

Parts V and XIII of the 1982 UNCLOS provide a general regime for MSR in the world ocean. MSR in the EEZ shall be conducted with the consent of the coastal State: coastal States shall, "in normal circumstances", grant their consent for MSR projects to be carried out in accordance with the Convention "exclusively for peaceful purposes" and is designed to increase scientific knowledge of the marine environment for the benefit of all humankind. Coastal States may in their discretion

decide whether to grant or withhold their consent for MSR activities.

There are serious shortcomings in the regime. It does not define MSR on the basis of the activity. It does not establish objective criteria to determine what activities are "for the promotion of scientific knowledge of the marine environment in the interests of the whole of mankind". And it does not establish the criteria for determining "peaceful purpose". The 1982 UNCLOS Articles 248 and 249 list some reasons for the coastal State to withhold its consent to certain MSR activities conducted by another State, but the reasons listed only relate to natural resources. Nevertheless, by providing these reasons, the 1982 UNCLOS emphasizes the sovereign rights of the coastal State for natural resources and its exclusive jurisdiction over MSR in the EEZ.

The exclusive jurisdiction over MSR in the EEZ entrusted by the 1982 UNCLOS includes jurisdiction over scientific research platforms. However, the technology of MSR is advancing, including the development of aerial and space-based remote sensing platforms. Thus, the jurisdiction of the coastal State over MSR in the EEZ has become weaker. Moreover, some countries intentionally make distinctions between MSR activities and marine survey activities so as to avoid the jurisdiction of the coastal State. This practice has made the regime of MSR in the EEZ more complicated and problematic.

Further, MSR activities are very diverse. The process, the operations, the characteristics, and the goal of MSR cannot be captured by this simple term. Thus, it is difficult to differentiate MSR from marine survey activities. Further, many expeditions collect data at sea and divide it later as to purpose and use.

Law regulates the actions of the legal person and governs the activities of the actor. If a law cannot provide permissive, restrictive or prohibitive orders for the legal person, then it is not a successful law. The 1982 UNCLOS does not define MSR on the basis of action, and it does not define MSR for "exclusive peaceful purposes" and the "promotion of scientific knowledge of the marine environment in the interests of the whole of mankind". Nor does it define the operational modes, and means of MSR. Thus the MSR regime in the EEZ is largely undefined leading to conflicting positions regarding jurisdiction.

The 1982 UNCLOS, by entrusting the coastal State with exclusive jurisdiction over MSR in its EEZ, has actually entrusted the coastal State with the jurisdiction and the right of supervision over MSR platforms and their activities in EEZ. Thus, the scientific research platforms of other states operating in the EEZ of a coastal State must observe the coastal State's relevant laws and regulations, and they have the obligation of submitting to on-the-spot supervision and jurisdiction of the coastal State. If "marine surveys" or "military surveys" carried out by MSR platforms were to be excluded from the scope of MSR, a MSR platform could carry out in the EEZ "marine surveys" and "military surveys" in the guise of MSR without any restrictions. Surely, this was not what was intended. Eventually, this would lead to a collapse of the present MSR regime in the EEZ.

4. "Freedoms of navigation and overflight" and "Other internationally lawful uses of the sea"

Article 58 of the 1982 UNCLOS states that "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 other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships and aircraft, …… and compatible with the other provisions of this Convention". Presently, the main dispute over this stipulation is the "quality" and the quantity of these "freedoms of navigation and overflight" and "other internationally lawful uses of the sea related to them". Some countries argue that their military and reconnaissance activities in EEZ of other States are protected by the "freedoms of navigation and overflight" or "other internationally lawful uses of the sea related" to these freedoms stipulated in the Convention. Other States maintain that these activities are abuses of the freedoms of navigation and overflight, or that these activities are not included in the stipulated freedoms and are not internationally lawful uses.

Our understanding of "freedom of navigation and overflight" and "other international lawful uses of the sea" in the EEZ is as follows.

First, "freedoms of navigation and overflight" in the EEZ are no longer freedoms of the high seas in the traditional sense because: (1) the 1982 UNCLOS has already excluded the EEZ from the high seas; (2) though Article 58 stipulates that other States enjoy some freedoms in the EEZ, at the same time, the Convention explicitly requests that "in exercising their rights and performing their duties under this Convention in the EEZ, States shall have due regard to the rights and duties of the coastal State 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 international law in so far as they are not incompatible with this Part"; (3) the freedoms exercised in the EEZ must not contravene the regime of the EEZ, and (4) the 1982 UNCLOS requests that while exercising high seas freedoms, all States must have due regard for the interests of other States in *their* exercise of high seas freedoms.

Second, "freedoms of navigation and overflight" in the EEZ does not include the freedom to conduct military and reconnaissance activities in the EEZ and its superjacent airspace. Such activities encroach or infringe on the national security interests of the coastal State, and can be considered a use of force or a threat to use force against that State. The 1982 UNCLOS clearly states that the EEZ should be used only for peaceful purposes. Military activities in the EEZ violate the principle that in exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

Third, the term "other internationally lawful uses of sea" does not include the freedom to conduct military activities in the EEZ of another State. Viewed either from the perspective of the EEZ regime or from the coastal State's right to protect its own national security interests, coastal States have the right to restrict or even prohibit the activities of foreign military vessels and aircraft in and over its EEZ. To interpret the "freedoms of navigation and overflight" in the EEZ as the freedoms to conduct military and reconnaissance activities, to perform military deterrence or battlefield preparation, and intelligence gathering, obviously contradicts the lofty spirit and goal of the 1982 UNCLOS, viz. "establishing through this convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment."

5. Peaceful purposes vs. peaceful uses

Article 58 of UNCLOS refers to Article 88 and states that the EEZ "shall be reserved for peaceful purposes". Article 246 quotes from Article 240 and emphasizes that MSR in the EEZ should be conducted "exclusively for peaceful purposes". Besides these provisions, the term "peace", either alone or together with the terms "security and good order", appears in various regimes stipulated by the 1982 UNCLOS. The intent is to emphasize the 'peaceful use of the sea' or to "preserve the sea for peaceful purposes." However, except for the regime of the territorial sea, the 1982 UNCLOS does not interpret or further explain the terms "peaceful purpose" and "peaceful uses." Since the 1982 UNCLOS came into force, there has been a sharp increase in military uses of the EEZ. Thus, the meaning of "peaceful purpose" and "peaceful use" have stimulated arguments.

The following is our viewpoint. There are two meanings of "peaceful purpose" or "peaceful use" as indicated by international conventions concluded before the 1982 UNCLOS. The first meaning is "complete non-military use," such as in the Antarctic Treaty (December 1, 1959). Article 1 of that Treaty stipulates that the Antarctic area is preserved for peaceful purposes and all measures of military characteristics including establishing military bases, building fortifications, holding military maneuvers and carrying out tests of any kind of weapons are prohibited". It is thus clear that so far as this Treaty is concerned, "peaceful purpose" means prohibiting all measures or activities with military characteristics. The second meaning is prohibiting some listed military measures or activities, such as in the Outer Space Treaty (January 27, 1969). This Treaty states that "outer space shall be used exclusively for peaceful purposes", and Article 4 of the Treaty lists specific prohibited military activities.

In the 1960s and 1970s, when the UN Seabed Committee discussed the issue of peaceful use of seabed, there were two viewpoints regarding the meaning of "peaceful purpose". One was that "peaceful purpose" meant non-militarization, i.e., prohibiting the use of the seabed for any military purpose. The other meaning was that the decisive factor of whether it was a "peaceful purpose" was whether the military activities were defensive or whether the military activities complied with the principles of international law embodied in the UN Charter.

At the third Conference of UNCLOS, these viewpoints were expressed. Ecuador and the United States could be considered representative of each of these two groups. At the 1976 New York Session of the Conference, the Ecuadorian representative proposed that the use of maritime space only for peaceful purposes must mean complete non-militarization, ruling out all military activities. He also recommended that the future Convention on the Law of the Sea must give a clear-cut definition to the concept of peaceful use, provide a guarantee for preventing the use of maritime space for nuclear confrontation, and stipulate that non-peaceful use is illegal. The American representative alleged that the term peaceful purpose does not rule out military activities in general. Indeed, the United States has persistently maintained that carrying out military activities for peaceful purposes is entirely in line with the United Nations Charter and principles of international law. At this conference, some countries also proposed that some specific actions should be prohibited to satisfy the "peaceful purpose" requirement, such as the establishment and usage of facilities for purposes other than economic reasons in areas under coastal State jurisdiction without permission of that State; the use or

threat of use of force; building of military fortifications and bases; conducting nuclear tests and deployment and storage of nuclear weapons, naval exercises and rocket tests; the display of marine forces; exercising rights in a manner which threatens the coastal State, and the establishment of security zones on the sea not adjacent to its own territorial sea. However, because of the opposition of the then two superpowers, the issue was shelved.

The 1982 UNCLOS applies the principle of "peaceful uses" of the sea to different sea areas and activities in the following ways:

- The first is to define, elaborate and blend the principle of "peaceful uses" of the sea into specific marine activities. For example, Article 19 stipulates: "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State"; passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (b) any exercise or practice with weapons of any kind; (c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State; (d) any act of propaganda aimed at affecting the defense or security of the coastal State; (e) the launching, landing or taking on board of any aircraft; (f) the launching, landing or taking on board of any military device; (g) any act of willful and serious pollution contrary to this Convention; (h) the carrying out of research or survey activities; (i) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; (j) any other activity not having a direct bearing on passage. We hold that Article 19 is the only article in UNCLOS which defines the principle of peaceful uses of the sea.
- The second way is to directly graft the elaborated rule of "peaceful uses" onto certain regimes. For example, the Convention grafts the regime of innocent passage onto the regime of straits used for international navigation and archipelagic sealanes passage, thereby carrying the principle of "peaceful uses" of the sea along with it. Article 39 stipulates that ships and aircraft, while exercising the right of transit passage, have the obligation to "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations." Article 45 directly applies the regime of innocent passage in straits used for international navigation. Articles 52, 53 and 54 apply the regime of innocent passage and the regime of transit passage in archipelagic waters and archipelagic sealanes passage.
- The third way is to emphasize "peaceful uses" of the sea in general terms only, but without specific criteria. For example, Article 301 only mentions "peaceful use" of the sea in general terms and stipulates that "in exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations". Article 58 refers to the provisions of Article 88 and stipulates that "the high seas shall be reserved for peaceful purposes". Article 141 stipulates "the Area shall be open to use exclusively for peaceful purposes by all States". Article 240 provides that "MSR shall be conducted exclusively for peaceful purposes".

The dispute focuses on the meaning of "peaceful use" of EEZ. The activities causing such disputes are mainly military surveys, military maneuvers, military reconnaissance activities and other activities not having a direct bearing on passage or overflight conducted by foreign military vessels and aircraft in the EEZ and in the air space above it. The coastal countries hold that these activities are encroachments on their national security because they are an electronic prelude to invasion and thus a threat to use force, and therefore not a "peaceful use" of the sea.

How do scholars of international law view this issue? There are three scholarly interpretations of this principle. The first interpretation is that "peaceful use" of the EEZ does not prohibit military activities conducted in a general way, and that the exclusive use of the high seas for "peaceful purpose" only means that all States using the high seas bear the obligation of non-aggressive uses. Another view based on modern international law is that the presence of navy forces in the sea area under the jurisdiction of a State, just as any other naval operations of a State beyond its national territory, may or may not be legal. Their activities must be in accord with the generally recognized principles of modern international law and the UN Charter. If they contravene these principles they are illegal. The third interpretation is that the provision regarding "peaceful use" of the sea is purely academic without any practical meaning.

In defining the regime of innocent passage, the 1982 UNCLOS has already interpreted "peaceful uses" of the sea. As naval weapon systems evolve, non-innocent passage activities as stipulated by the 1982 UNCLOS are increasingly conducted in the EEZ. If the current

international law indicates that the activities carried out in the territorial waters of the coastal State are prejudicial to the peace of the coastal State, then the same activities carried out in the EEZ, are also prejudicial to the peace, good order and security of the coastal State, and thus should be considered "non-peaceful" and be prohibited.

To sum up, our understanding of "peaceful purposes" or "peaceful uses" in the EEZ is as follows:

1. The "peaceful purposes" provision is an explicit legal criterion. Once this criterion is incorporated in the 1982 UNCLOS, it should have legal effect; that is, the use of sea areas for non-peaceful purposes is illegal.
2. If the "peaceful purpose" provision does not mean "complete non-militarization" and does not prohibit normal navigation and overflight of naval vessels and military aircraft in and above the EEZ, then it does obligate States Parties not to engage in "aggressive" activities or undertake activities contrary to the UN Charter.
3. The "peaceful purpose" provision has different legal requirements for the coastal State and other States in different types of waters—the territorial waters, the EEZ and the high seas. The definition of innocent passage in the 1982 UNCLOS defines "peaceful uses" in other sea areas.
4. At present, based upon the rapid technological evolution of military equipment, it is necessary for the international community to clearly prohibit or restrict in the EEZ and its superjacent airspace certain activities which are "non-innocent," and harmful to the peace, security and good order of the coastal countries.

6. Residual rights rule

Article 59 of the 1982 UNCLOS stipulates that in cases where the Convention does not attribute rights or jurisdiction to the coastal State or to other States within the EEZ, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all 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. This is the rule of "residual rights." Reasonable interpretation of this rule is of great significance to the issue of the military use of the EEZ.

However, different conclusions could be reached based on different perspectives. One interpretation is that if the rule of "residual rights" applies to the EEZ regime, then the EEZ regime is not purely a system for distribution of marine natural resources but a comprehensive legal regime which covers a large part of the world ocean and the airspace above it as well as all human activities therein, such as navigation, overflight and military usage. If this is so, then "residual rights" should include "all other rights" which occur in the EEZ and which have not yet been distributed in the present EEZ regime. In this case, discussions on the legal issue of the military uses of EEZ should continue within the regime of the EEZ.

Another interpretation is that the rule of "residual rights" does not apply to the improvement of the EEZ regime as a system for distribution of natural resources, but instead is to be used for resolving future disputes, e.g., military and reconnaissance activities in the EEZ. Then the dispute is not about the EEZ regime itself, but rather about certain activities in this sea area. In this case, the military and reconnaissance activities in the EEZ and its superjacent air space have nothing to do with the EEZ regime and should be discussed as an issue stemming from "exclusive security zones."

We hold that when discussing the issue of the military uses of the EEZ through the perspective of residual rights, the following key questions should be addressed. Do "residual rights" refer to "residual rights" under the EEZ regime or "residual rights" which already exist or are newly created for the EEZ? Does the right of military use of the EEZ belong to the former or the latter? Should the issue of military uses of the EEZ be discussed as part of the EEZ regime or outside of the EEZ regime, such as a coastal State security zone, or a regime of maritime military uses?

What we are discussing here is not the EEZ regime itself, but the military and reconnaissance activities conducted by military vessels and aircraft in the sea area called "EEZ" and the airspace above it. Can these activities be carried out in this sea area and airspace? If so, to what extent can these activities be carried out? To what extent will coastal countries accept these activities? It seems that we are formulating a "new regime" for maritime military uses in a changing environment. We sincerely hope that this new regime will contribute to the peace, tranquility and good order in the offshore areas of all coastal States.

7. Due regards

Articles 56 and 58 of UNCLOS have, respectively stipulated that the coastal States and other States should have due regard for the rights and obligations of other nations when exercising their rights and obligations in line with the Convention. Although the Convention did not clearly explain the term "due regard," the wording of Articles 56 and 58 after "due regard" is of significance. The former provides that the coastal State should have due regard to the rights and duties of other

States and "shall act in a manner compatible with the provisions of this Convention", while the latter stipulates that other States should have due regard to the rights and duties of the coastal State 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 international law in so far as they are not incompatible with this Part".

The two "due regards" do not mean that when conflicts arise between the coastal State exercising its rights and another State exercising its freedoms, the two parties have equal rights. This point can be seen from the different 'qualities' and 'quantities' (nature and extent) of the rights and the freedoms of the two "due regards".

In its EEZ, the coastal State enjoys sovereign rights of ownership, exploration, exploitation, conservation and management of its natural resources, exclusive jurisdiction over the protection and preservation of the marine environment, MSR, and the establishment and use of artificial islands, installations and structures. These rights and jurisdiction form the core part of the EEZ regime. Other States only enjoy certain freedoms subject to the regime of the EEZ. To be more specific, the actions of other States should be subject to the sovereign rights and the exclusive jurisdiction of the coastal States. Logically speaking, when resolving conflicts between these two categories of rights, the sovereign rights and exclusive jurisdiction of the coastal States should be considered superior.

The relevant terms used in the provisions of the 1982 UNCLOS also show that the sovereign rights enjoyed by the coastal States are superior. The term "sovereign rights" first appeared in the 1958 Geneva Convention on the Continental Shelf, and was used to refer to the rights of the coastal States over their continental shelf. These rights are sovereign, natural, comprehensive and superior to the rights of other States. However, in the balance created by the EEZ regime, the sovereign rights and exclusive jurisdiction enjoyed by the coastal State are restricted by the 1982 UNCLOS and other rules of general international law. But these restrictions do not necessarily degrade the superiority of the rights of the coastal States. Therefore, the 1982 UNCLOS obliges the coastal States and other States to "act in a manner compatible with the provisions of this Convention", but requires other States to "comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law …".

During the drafting of the 1982 UNCLOS, one scholar concluded that the breadth of the rights of the coastal States within the EEZ and the sovereign nature of the rights of the coastal States regarding the exploration of the resources within the EEZ, give the coastal States indisputable superiority when conflicts arise between the rights of the coastal States and other States. Specifically, as between the exercise of the exclusive rights by the coastal State and the enjoyment of navigational freedoms by other States, priority should be given to the coastal States regarding the resolution of the conflict of rights.

The object of due regard should be the lawful rights of the actor instead of the unlawful or disputable rights per se. Secondly, the requirement for and the means and methods of "due regard" is different for the different actors. Thirdly, the "due regard" test consists of the following elements: the motivation of the act should not impede the exercise of rights by the other side or infringe upon the interests of the other side; the means and methods of the act should not affect or impede the exercise of rights by the other side or undermine the legal system of the sea area; and the actual act should not make the rights of the other side ineffective or invalid. To make the principle of "due regard" effective, the relevant rights should first be allocated to the States Parties regarding the use of EEZ. Only on the basis of a clear allocation of these rights can the international community produce the rules of practice, supervision and dispute settlement.

8. Conclusions

The legal issue of military and reconnaissance activities in the EEZ and its superjacent air space is both complicated and simple, both old and new. Various countries have searched diligently to find and develop arguments to support their positions based on their respective national interests. This issue is complicated because these activities are conducted in the EEZ and the air space above it. Thus, all parties concerned should analyze the issues and determine the legal basis for their own positions. The issue is simple because the key is not the EEZ regime itself but the specific military and reconnaissance activities. Are these activities in accordance with international law - anywhere? It is an old issue because it was already discussed during the negotiation of the 1982 UNCLOS. But, at the time the Cold War and its chief antagonists prevented full discussion of these issues. Now it is also a new issue, because the military and reconnaissance activities conducted in the past with a lower level of technology were largely concentrated in territorial waters and its superjacent airspace. And the 1982 UNCLOS provided adequate protection to the coastal State. Now these activities are increasingly conducted in the EEZ, but the adverse affect on the coastal State is the same, although the coastal State has less legal protection.

There seem to be two ways forward. One is to continue the discussion with the objective of improving the EEZ regime. The other way is to discuss the military

uses of the sea within and outside of the EEZ regime and put forward guidelines regarding maritime activities in peace time.

Some suggest that the issues can be resolved in several steps. First, would be a formulation of a set of legal criteria for military activities in the EEZ, taking into account recent and past State practices as well as the current and future trends in naval equipment and technology. Then, on the basis of these criteria, those military activities in the EEZ which are legal and those which are illegal could be delineated and differentiated. Next would be a formulation of concrete procedures, mechanisms, and ways and means of monitoring such activities. These mechanisms could be bilateral or multilateral. It may be better to start bilaterally, because the disputes originate bilaterally. The next step would be to formulate principles and guidelines for the activities of foreign military vessels and aircraft in and over the EEZ. These steps are linked and should be taken in sequence. Principles and guidelines can be formulated only after ''legal criteria'' and an ''effective monitoring mechanism'' are established.