

# **On Dissection of Disputes Between China and the United States over Military Activities in Exclusive Economic Zone by the Law of the Sea**

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In South China Sea, there are two types of legal disputes. The first type is territory entitlement dispute, i.e. sovereignty adscription disputes over islands and reefs and disputes over maritime delimitation between China and some ASEAN countries; the second type is dispute over military activities (military survey, jointly military drill and so on) between China and the USA over military activities in Exclusive Economic Zone. The USA said to maintain navigation freedom and safety in adjacent sea area of South China Sea, but in reality, it insists on the so-called military activities freedom in Exclusive Economic Zone.

For sovereignty adscription disputes between China and some ASEAN countries (Vietnam and the Philippines, etc), we shall make consultation and negotiation with relevant countries and solve the problems based on international law and regional regimes; for disputes over military activities between China and the USA, we shall review systemic provisions set forth in United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) including reaching consensus according to regime of Exclusive Economic Zone and solving the problems through bilateral dialogue (Sino-USA maritime security, Sino-USA Asian-Pacific affairs consultation mechanism and so on) and consultation. This thesis expounds disputes over military activities between China and USA according to regime of the Law of the Sea.

## **I. Is Military Survey a kind of Marine Scientific Research?**

In South China Sea, the important conflicts between China and the USA embody on the opposite opinion on whether a military survey shall get advance approval of coastal state or it can be conducted freely, and difference in whether information collection in the sky of Exclusive Economic Zone and military drill in Exclusive Economic Zone shall gain approval of coastal state or they can be conducted freely. Now the author will take military survey and military drill as examples and analyze the meaning according to the law of the sea.

Because there is no such term as military survey in UNCLOS, so we can only expound it from the perspectives of peaceful uses of the sea and Marine Scientific Research.

1. Peaceful uses of the sea. In fact, the term of peaceful uses of the sea does not appear in Geneva Four Conventions on the Law of the Sea of 1958.

In Committee on the Peaceful uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction during the preparation conference on the law of the sea, there were some countries and their representatives who proposed plans on concept of peaceful uses of the sea. Such proposal is stipulated in Article 88 of UNCLOS after revised in the Conference on the Law of the Sea. Additionally, according to Paragraph 2 of Article 58 of UNCLOS, the principle of peaceful uses of the sea is also applied to Exclusive Economic Zone.

Although UNCLOS stipulates the principle of peaceful uses of the sea, it fails to give details. The reasons are the following aspects: first, at that time, the USA and Soviet Union strongly required to use immense ocean space to the greatest extent to minimize the controlling space of coastal states and gained common strategic interests; second, countries had different opinions on

the details on peace and military use which can be demonstrated in the fourth conference (1975) reviewing topic named peaceful uses of sea, peace and safety zone.

According to the aforesaid situation, the Conference on the Law of the Sea finally stipulates Article 88 in UNCLOS.

In addition, in the late 1980s, some developing countries proposed to add a general principle of nonuse of force in the law of the sea according to Paragraph 4 of Article 2 of the United Nations Charter. Such proposal was put forward again as a general principle applicable to all sea areas and finally stipulated in Article 301 of UNCLOS after amendment.

In fact, international society has the following opinions on this provision, i.e., generally speaking, military activities in the high seas and Exclusive Economic Zone are not prohibited. Such opinion can be confirmed by UNCLOS. For example, Paragraph 1 of Article 58 of UNCLOS stipulates that the freedom of navigation and overflight in traditional high seas can be exercised in Exclusive Economic Zone, and warship, as a part of these freedoms, customarily is permitted to conduct drill, patrol and supervision and so on in the high seas. These freedoms are confirmed as freedom of the high seas by Article 2 of Convention on the High Seas of 1958.

Actually, Paragraph 2 of Article 19 of UNCLOS does not regard any drill with arms, launching, landing or taking on board of any military device or any aircraft as innocent passage in the territorial sea. Article 30 of UNCLOS stipulates that if any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately. There is no similar provision in seas other than the territorial sea; Article 95 (Paragraph 2 of Article 58) of UNCLOS stipulates that warships on the high seas have complete immunity from the jurisdiction of any state other than the flag state. In addition, Paragraph 1 of Article 298 of UNCLOS stipulates that for disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, a State may declare in writing that it does not accept any procedure provided for by a compulsory procedure leading to binding award.

It is clear that although UNCLOS sets forth peaceful uses of the sea as a general principle and does not generally prohibit military activities in Exclusive Economic Zone except coexistence with use or threatened use of force in the United Nations Charter, not any form of military activities in any place is admitted because Exclusive Economic Zone is a kind of sea with special legal status where military activities shall be limited to some extent. The limitations are mainly as follows:

Firstly, rights and obligations of the coastal State shall be due regarded; provisions of the coastal State and other laws and regulations shall be observed, for example, Paragraph 3 of Article 58 of UNCLOS. But the problem is UNCLOS does not set forth details of “due regard” which becomes the disputed focus.

Secondly, the provisions on prohibition of abuse of right shall be applied. For example, Article 300 of UNCLOS provides that States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right. In other words, the basic component for application of principle of abuse of right is that the abuse of right will cause losses to other state.

Although the USA is not a state party to UNCLOS, performance of treaty in good faith is a

kind of obligation under international law, and many systems of UNCLOS have become customary rules, the USA shall observe. For example, Article 26 of Vienna Convention on the Law of Treaties sets forth that Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

2. Relationship between Marine Scientific Research and Military Activities. I'd talk about the military activities by analyses the relationship between it and Marine Scientific Research.

Item F of Paragraph 1 of Article 87 of UNCLOS regards freedom of Marine Scientific Research as one of freedom at the high seas. But what position Marine Scientific Research can stand in Exclusive Economic Zone is a question hard to define.

In addition, UNCLOS does not define "Marine Scientific Research". We can conclude from relevant articles, for example, Article 243 and Paragraph 3 of Article 246, Marine Scientific Research shall be made for peaceful purpose and increasing scientific knowledge of the marine scientific research for the benefit of all mankind, the content of which includes studying the essence of phenomena and processes occurring in the marine environment and the interrelations between them.

Moreover, Item J of Paragraph 2 of Article 19 of UNCLOS divides marine scientific research into research and survey activities. Item G of Paragraph 1 of Article 21 of UNCLOS provides that the coastal State may adopt laws and regulations relating to innocent passage through the territorial sea in respect of marine scientific research and hydrographic surveys. The former is treated as a noxious activity and the latter is treated as an innocent activity. In other words, survey activity is treated as a noxious activity and hydrographic survey is treated as an innocent activity. Meanwhile, survey activity is a part of marine scientific research, so there are some problems in formulation and interpretation of articles which arise different opinions and practices of different countries.

Generally speaking, the so-called hydrographic survey refers to collection of information for making chart and navigation safety including collection of data in shallow sea area such as depth of water, submarine topography, velocity of seawater flow, hypo mode, danger in navigation. But Section 13 of UNCLOS does not refer to survey activity, so it shall be beyond Section 13, i.e. it shall not be governed by Section 13.

The important issue in Exclusive Economic Zone is that whether the scientific research into marine natural environment except for hydrographic survey conducted by warship belongs to marine scientific research set forth in UNCLOS.

For this question, the USA, UK and some countries consider that the investigation made by a warship does not aim at military issues but marine scientific research which is different to military survey, so it is not governed by Section 13 of UNCLOS. Most of developing countries regard military activities as a part of the whole marine scientific research and hold the opinion that these activities are certainly governed by Section 13 of UNCLOS. The specific limitations are as follows: marine scientific research shall be conducted exclusively for peaceful purposes; marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea; States and competent international organizations shall make available by publication and dissemination through appropriate channels information on proposed major programs and their objectives as well as knowledge resulting from marine scientific research; marine scientific research in the exclusive economic zone shall be conducted with the consent of the coastal State; and other various obligations.

Publication of result of activities of warships, especially survey and gaining consent of the coastal State in advance and relevant obligations are unaccepted by major marine powers, so in order to make military survey escape the regulation of Section 13 of UNCLOS, they always insist on principle of freedom. In other words, it is impossible for many marine powers to publicize survey result. It is hard for them to conduct survey with consent of the coastal State in advance. They insist on principle of freedom to conduct survey. These are the main reasons why compromise on military survey can not be reached in conference on the law of the sea, so relevant issues can not be provided for.

In brief, whether military survey is included in marine scientific research is directly related to safety interest of relevant countries and has highly political nature, so it has little possibility to solve this problem within the law of the sea. However, it is a practical issue which can not be avoided, so it shall be judged according to situation of certain activities under Paragraph 3 of Article 58, that is to say, whether rights and obligations of the coastal State or its safety are taken into consideration or due regarded in those activities.

## **II. Whether Military Drill is Peaceful Act or Provocative Act**

Generally speaking, for military drill exercised in the territorial sea and exclusive economic zone in other country, we can only protest those which influence our national defense safety. As to the military drill exercised in exclusive economic zone of China, we shall express our concerns to the drill country hoping it respect our rights and interests in exclusive economic zone including national defense safety and solve the problems through dialogue and consultation.

Now, the joint military drill between the USA and other countries is obviously beyond the scope of general military drill in terms of scale and frequency and has clear objectives and non-peaceful intention, so it attracts extensive attention. Especially, these military drills are near sea areas governed by China, their danger is more serious. Meanwhile, they will continue this type of drill in the future, especially this kind of act representing military power and solved by non-peaceful means seriously breaches the main aspect of consultation through dialogue and cooperation in international relations and principle of international law of settlement of disputes in a peaceful way at present. This requires the USA to adopt equal attitude to negotiate and consult with relevant countries to avoid conflict more serious even arms race.

It's a pity that there is no concept or term of military drill in the law of the sea. Still, we shall review it combining with other articles of the law of the sea. The military drill in general meaning refers to army training exercised by army troops, fleets and so on through imitating or setting actual combat. This kind of drill needs occupy wind sea area in a certain period and excludes navigation, fishing and other activities from those sea areas during this period. The laws of the sea regulating military drill in international society are Convention on the High Seas and UNCLOS. Article 2 of Convention on the High Seas stipulates that the freedoms in the high sea include freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, freedom to fly over the high seas besides other issues. These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom in the high seas. Article 87 of UNCLOS adds two freedoms (freedom to construct artificial islands and other installations permitted under international law, freedom of scientific research) besides the aforesaid four freedoms. It also provides that these freedoms shall be exercised by all states with

due regard for the interests of other States in their exercise of the freedom in the high seas.

It is clear to see that Convention on the High Seas and UNCLOS give listed provisions on freedom in the high seas and require a state exercising such freedoms to reasonably take care of or give due regard to interests of other States in exercising of the freedom of the high seas.

Military drill in the high seas is regarded as one of traditional freedoms in the high seas. Its theoretical foundation is that there is no relevant provision on prohibition of military drill in the law of the sea, and the so-called non-prohibited act in the high seas is a freedom. There are also scholars holding the opinion that military drill in the high seas is not a freedom.

It can clearly be seen that there are different opinions on military drill in the high seas and there lacks corresponding definite rule in international society, but in fact there are many states exercising military drill in the high seas which has become a kind of custom. Therefore, we shall pay more attention to military drill in exclusive economic zone.

For military drill in exclusive economic zone, there are three types of opinions in international society without uniform consensus.

In the course of formulating UNCLOS, there is no discussion on military drill, so it can be reviewed from the perspective of peaceful uses of sea. The articles related to peaceful uses of sea are Article 88, Paragraph 2 of Article 58 and Article 301 of UNCLOS. And as stated above, these articles do not define peaceful purpose, so clear definition has not still made. Therefore, military drill in exclusive economic zone shall be analyzed specifically according to its features and nature, especially we shall combine purpose of legislation on exclusive economic zone and relevant systems to make review and find solution.

Exclusive economic zone is a kind of special sea area between the territorial sea and the high seas and enjoys special legal status, which is reflected in jurisdiction of states. Therefore, for military drill exercised by other state in exclusive economic zone of China, we shall make specific analysis on influence and nature of such drill.

From the above-mentioned information, we can learn that regime of exclusive economic zone includes the thought of uses of resources in most suitable and effective way, including bestowing sovereign rights over resources to the costal state which is obliged to give suitable maintenance and manage resources, therefore, we can analyze whether military drill imposes influence on maintenance and management of resources and marine environment to demonstrate that whether the using state gives due regard to rights and obligations of costal state.

It is remarkable that most issues related to military activities in the high seas and exclusive economic zone have political nature and most issues belong to military secret, so especially the aforesaid military powers and marine powers tried their best to avoid clear provision on military activities (including military drill), which leads the efforts made by a part of developing countries for maximizing rights and interests in exclusive economic zone obstructed, so the relevant articles of UNCLOS have obvious deficits which lead to different interpretation and state practices. Therefore, for military drill, we shall make one judgment for an individual case according to status of nature of each military drill especially the provision set forth in Paragraph 3 of Article 58 of UNCLOS.

It is gratifying that rights and obligations undistributed in exclusive economic zone even conflicts may be settled according to Article 59 of UNCLOS, based on equality and by reference to all relevant situations, taking into consideration the importance of the related interests on each party and the whole international society. This provisional article is instructive to issues on

military drill with high-tech characteristics in new times.

In addition, for a dispute over military activities, a state may not accept compulsory procedure of UNCLOS through statement in writing, so especially China and the USA shall build trust between two countries and specifically utilize marine safety consultation mechanism including conclusion of treaty like agreement on prevention of maritime accident to prevent escalation and worsen of marine disputes.

In short, for military drill of other state in exclusive economic zone of China, our countermeasures are limited. Except for the aforesaid settlement through dialogue, China may also accumulate state practice step by step through continuing to issue strong protest and declaration to make it become hard law or unwritten law. In addition, as a state party, China may put forward amendment through simplified procedure to amend systems relevant to military drill to make the USA, a non-contracting party, embarrassed. However, although we can put forward amendment to UNCLOS through simplified procedure, the procedure on amendment is extremely demanding, so the possibility of adopting an amendment is very little.

### **III. Conclusion**

China faces many marine issues, the settlement of which needs support from theory and system of the law of the sea. But the law of the sea is not omnipotent and the law is always hysteretic, therefore, in the situation that international, regional and bilateral agreements or systems on marine issues can not be amended or improved, it is especially important to further improve national marine policies and legislations.

As to South China Sea issues, China shall take measures to avoid its internationalization, complication and enlargement issues, therefore, it is important to avoid worsening South China Sea before its final settlement by formulating cooperation agreement or work agreement of lower level and field based on the principle of Shelving Disputes and Joint Development, and trying hard to conclude a legally binding agreement. Meanwhile, China shall set dialogue and consultation mechanism with the USA on military issues to enhance mutual trust, seek understanding and consensus, avoid misjudgment and conflict, maintain peace and stability of South China Sea especially guarantee navigation safety and freedom in South China Sea, maintain common interests of international society.

Although China insists on peaceful means to solve dispute related to marine issues, when disputes over South China Sea issues can not be solved in peaceful means, and other state challenges China, damages our sovereignty and integrity of territory, China shall appropriately use military force. At the same time, China shall strengthen cooperation on marine issues between Taiwan and China Mainland to jointly safeguard interests of Chinese nationality.

The author considers the important task of China for marine issues is to formulate national marine development strategy and its plan, especially issue policy documents on marine issues including South China Sea issues recently, and make more publicity. Meanwhile, China shall take effective measures to strengthen cooperation on marine issues between Taiwan and China Mainland.