

**STATEMENT OF  
MR. PETER DUTTON  
ASSOCIATE PROFESSOR  
U.S. NAVAL WAR COLLEGE  
BEFORE THE  
UNITED STATES - CHINA ECONOMIC  
AND  
SECURITY REVIEW COMMISSION  
11 JUNE 2009**

**June 11, 2009  
Peter A. Dutton  
Associate Professor, U.S. Naval War College  
Testimony before the U.S.-China Economic and Security Review Committee  
Hearing on  
The Implications of China's Naval Modernization for the United States**

**Questions presented:** How does China's unique view of the Exclusive Economic Zone (EEZ) impact regional security? Is there room for cooperation between the U.S. Navy and the PLAN on global maritime security? If so, how?

**The United Nations Convention on the Law of the Sea (UNCLOS) and the EEZ.**

Before addressing China's 'unique' view of the EEZ, it is helpful to review the specific terms of the Convention itself.<sup>1</sup> UNCLOS Part V on the EEZ begins with Article 55, which provides coastal states the right to claim this new coastal zone and specifies that "the rights and jurisdiction of the coastal State and the rights and freedoms of other States are [to be] governed by the relevant provisions of this Convention." Article 56 then specifies that coastal states have "*sovereign rights* in the EEZ for the purpose of exploring and exploiting, conserving and managing the natural resources ... [and] *jurisdiction* ... with regard to installations and structures, *marine scientific research*, and protection and preservation of the marine environment. (emphases added)" Additionally, Article 58 provides that "In exercising its rights

... the coastal state shall have due regard to the rights and duties of other states.” There are at least three implications that flow from this Article. First, coastal states do not have sovereignty over the EEZ, but are entitled to claim exclusive resource rights to the detriment of all other states and potential claimants. The second implication is that coastal states in their EEZs are granted a measure of jurisdictional authority to regulate the activity of the vessels of other States with regard to the three specified subject matter areas. The third implication of Article 56 is that all states presumptively retain those freedoms that pre-existed the creation of coastal state authority over the EEZ, other than those affected by the rights and jurisdiction allocated to the coastal state.

Article 58 provides additional clarity about the rights of all states in the EEZ. It specifies that, “In the EEZ, all States ... enjoy ... 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.” Article 87, found in UNCLOS Part VII on the High Seas, incorporates into UNCLOS the traditional navigational and overflight freedoms enjoyed by all states beyond territorial seas. Thus, Article 58 specifically incorporates into the EEZ those preexisting navigational and overflight freedoms that all states enjoyed when the zone was previously part of the high seas. Article 58 imposes only two conditions on the exercise of these high seas freedoms in the EEZ. A state’s exercise of high seas freedoms must be “internationally lawful” and “compatible with other provisions of this Convention.”

One provision of the Convention often cited by Chinese academics in criticizing the U.S. Navy’s exercise of high sea freedoms in the EEZ as being either internationally *unlawful* or otherwise *incompatible* with other provisions of the Convention is Article 301. This Article, entitled “Peaceful uses of the seas,” states 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 (emphasis added).” The very terms of this Article make clear that it is intended to call to mind duties already imposed upon states by the U.N. Charter, rather than to create new restrictions on the use of a state’s military capacity.<sup>2</sup> Nonetheless, Chinese scholars often begin criticism of U.S. military uses of the EEZ with this provision.

### **The U.S. EEZ and the practice of coastal states.**

Shortly after the text of the United Nations Convention on the Law of the Sea was completed on December 10, 1982, President Reagan issued a Presidential Proclamation that established the U.S. EEZ.<sup>3</sup> In addition to repeating the language of Article 56 concerning sovereign rights and jurisdiction, it repeats three times that the American claim does not affect “other lawful uses of the zone, including navigation and overflight, by other states.” The proclamation makes no qualifications of any kind to limit the military activities of all states in the U.S. EEZ. Indeed, the Presidential Statement on United States Oceans Policy accompanying the Proclamation makes clear that UNCLOS protects “traditional uses of the oceans” in that “[w]ithin this Zone all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight.” The Statement further specifies that “the

United States will exercise and assert [its navigational and overflight freedoms] .. on a worldwide basis in a manner consistent with the balance of interests reflected in the convention,” and that the U.S. “will not ... acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.”

The text of the Presidential Proclamation and Statement were further amplified by a simultaneously-issued White House Fact Sheet on United States Oceans Policy. It stated that “The EEZ is a maritime area in which the coastal state may exercise *certain limited powers* as recognized under international law. The EEZ is not the same as the concept of the territorial sea ... [which] means that the freedom of navigation and overflight and other internationally lawful uses of the sea will remain the same within the zone as they are beyond it (emphasis added).” It further emphasized that “Unimpeded commercial and military navigation and overflight are critical to the national interest of the United States. The United States will continue to act to ensure the retention of the necessary rights and freedoms.”

Although the U.S. EEZ Proclamation was issued during the Cold War, there is ample record that the U.S. respected the right of the Soviet Union and its client states to undertake military activities in and above the coastal waters of the United States outside the territorial sea. Soviet intelligence-collection ships, hydrographic research vessels, space-support ships and military reconnaissance flights regularly operated off U.S. coastlines without U.S. legal objection.<sup>4</sup> This continues to reflect U.S. policy and doctrine. The U.S. Navy’s Commander’s Handbook on the Law of Naval Operations, for instance, states that “the coastal nation cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the exclusive economic zone ... [s]ince all ships and aircraft, including warships and military aircraft, enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms.”<sup>5</sup> Additionally, Presidential Proclamations establishing Marine Protected Areas and Marine Sanctuaries in U.S. waters to preserve important natural and cultural resources direct that they be established in accordance with international law and Presidential Proclamation 5030 in order to prevent infringement of international freedoms of navigation in the U.S. EEZ.<sup>6</sup>

### **China’s views and laws related to the EEZ and the potential impact on U.S. naval operations in East Asia.**

The views of the vast majority of states are in alignment with U.S. views concerning the legal status of the EEZ. According to the Department of Defense Maritime Claims Reference Manual, of the 150 states with maritime claims, 127 states recognize the right of all states to undertake military activities in the EEZ and 23 make some form of claim to regulate foreign military activities in their EEZ.<sup>7</sup> China is among this small minority.

Chinese legal scholars employ various arguments to justify their government’s claim of authority to broadly regulate foreign military activities in China’s EEZ. Perhaps the most comprehensive and authoritative Article of Chinese perspectives on this topic was written by two scholars from the China Institute for International Strategic Studies.<sup>8</sup> Apparently relying on an overbroad interpretation of the grant to coastal states of jurisdiction in the EEZ by Article 56, they articulate

the perspective that “freedom of navigation and overflight” and “other international[ly] lawful uses of the sea in the EEZ ... are no longer freedoms of the high seas in the traditional sense,” because UNCLOS separates the EEZ from the high seas and the EEZ is therefore different. From this they conclude that states no longer have the “freedom to conduct military activities in the EEZ of another state” and that a coastal state has the jurisdictional “right to [make laws that] restrict or even prohibit the activities of foreign military vessels and aircraft in and over its EEZ.” In a substantial broadening of the meaning of Article 301, they argue in particular that “military and reconnaissance activities in the EEZ ... 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 the state.”

If the U.S. were to accept China’s ‘unique’ legal interpretations of UNCLOS, it could have a significant impact on current U.S. naval activities in part because China claims nearly the entire East and South China Seas as its EEZ. These claims are based in part on China’s 1992 territorial sea law--under which China claims sovereignty over Diaoyu (Senkaku) Islands in the East China Sea, and in the South China Sea China claims the Dongsha (Pratas) Islands, the Xisha (Paracel) Islands, the Zhongsha (Macclesfield Bank) Islands and the Nansha (Spratly) Islands.<sup>9</sup> China’s 1998 EEZ law then claims an “exclusive economic zone ... extending 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”<sup>10</sup> Additionally, in the East China Sea, China’s position in its dispute with Japan over EEZ rights is that in addition to any EEZ that accrues from the Diaoyu Islands (not to mention Taiwan) China is entitled to claim all the waters extending from its coastline eastward to the footsteps of the Ryukyu Island chain.<sup>11</sup> These sovereignty and jurisdictional claims to sea space, when combined with China’s broad assertion of authority to restrict or prohibit foreign military activities in the EEZ, begs the question, is China attempting to shape international law to restrict or limit U.S. naval power in East Asia? Or are China’s actions simply designed to create a maritime buffer zone similar to its territorial cushions from major continental powers?

In either case, China has embarked on a program of confrontation of U.S. hydrographic survey vessels in China’s EEZ and in the aftermath of the 2001 EP-3 Incident also objected to U.S. surveillance and reconnaissance flights in the airspace above its EEZ. In addition to the legal arguments against foreign military activities in its EEZ presented above, in the case of U.S. hydrographic surveys China also objects on the basis of the grant of jurisdiction over “marine scientific research” to coastal states under UNCLOS Article 56. Again, this is a case of the overbroad reading of a jurisdictional grant to coastal states.

In fact, UNCLOS carefully distinguishes between “research” and “surveys.” While Article 56 grants coastal states the authority to regulate marine scientific research in support of the economic purposes for which the EEZ was created, surveys were not included within this jurisdictional grant. Surveys are distinct from marine scientific research in that surveys are undertaken to study the non-commercial characteristics of maritime environment in order to gain an improved understanding of the navigational and hydrographic characteristics of an area of water. Indeed, out of respect for a coastal state’s sovereignty in its territorial sea, UNCLOS specifies that “carrying out research *or survey activities*” is a violation of innocent passage.<sup>12</sup> However, the EEZ, unlike the territorial sea, is not a zone of coastal state sovereignty. It is a zone

in which all states have a substantial interest in safe navigation among other interests. Thus, that Article 56 did not include a grant of jurisdiction to coastal states over *both* research *and* survey activities in the EEZ is no accident. Accordingly, while resource-related research can be regulated by the laws of the coastal state, hydrographic surveys may not be.<sup>13</sup>

Nonetheless, China's 2002 Surveying and Mapping Law purports to control all surveying activities "in the waters under China's jurisdiction," a clear reference to China's EEZ, and specifies that "for the purpose of this law, surveying ... include[s] the activities conducted to determine, collect and formulate the key elements of physical geography." Additionally, China's law provides that "Foreign organizations ... that wish to conduct surveying ... in the sea areas under the jurisdiction of the People's Republic of China shall be subject to [government] approval."<sup>14</sup> Accordingly, Chinese objections to U.S. hydrographic survey activities in the EEZ cite both international law, in reference to China's broad interpretation of its jurisdictional authority to regulate marine scientific research under UNCLOS Article 56, and China's domestic law.<sup>15</sup>

### **Problematic aspects of China's perspective on international law of the sea.**

The Chinese approach to law of the sea is problematic on several levels. In a strictly legal sense, it is an attempt to carve out a regional exception to the traditional freedoms of access and rights of maritime communication that have long been protected by international law because they enhance global economic development and promote international political stability. Additionally, law is law, or not at all. In other words, an East Asian regional exception to a rule of international law undermines the applicability of the rule in all places. This could have serious consequences.

At stake ... is whether international law [of the sea, as a whole] is interpreted in such a way as to promote the peaceful military uses of the seas or, by contrast, whether law becomes a means to promote the kind of anti-access, national-security focused interpretation that Beijing is attempting to impose. The outcome of this larger struggle will determine the extent to which large swaths of the seas, including disputed maritime and land territories, are "securitized" by coastal states rather than left open to the stabilizing influence of the naval activities of the international community. The outcome has long-term implications for the health of the global system on which the economic health and political independence of every state relies.<sup>16</sup>

Increased maritime instability would be the logical and inevitable result of the universal application of interpretations of international law of the sea that remove the authority of all states to use non-sovereign maritime zones for traditional naval purposes. This is particularly problematic inasmuch as approximately 38% of the world's oceans are covered by the EEZ. Just as the lack of governance on land results in the disruptive spill-over effects of failed states, so too at sea would a removal of international authority to provide order result in increased zones of instability. Like Somalia, some key coastal states with long coastlines and extensive EEZs have

little or no capacity to provide maritime stability and order. Remove international law authorities to provide order in these regions, and all order is removed.

In addition to freedom of navigation and overflight for the purpose of undertaking maritime security operations, international law of the sea has long protected the right of states to send naval forces abroad for the purpose of gathering information, undertaking exercises, engaging in diplomacy, and signaling political concerns. In this regard, full naval access to the maritime commons has, for instance, enabled peaceful use of naval power to signal the existence of political ‘red-lines’ or even to demonstrate shifts in power.<sup>17</sup> Additionally, information gathered from outside a coastal state’s sovereign zone can provide a stabilizing influence as major powers seek, such as the NATO and Warsaw Pact states once did, to enhance global security through improved understanding of each other’s capabilities and intentions.

### **Opportunities to enhance cooperation and reduce confrontation**

There is some reason to hope that as Chinese naval power grows, Chinese leaders may gain insight into the benefits of the access-oriented bases of international law of the sea. China’s decision to participate in anti-piracy operations in the Gulf of Aden, though couched in terms of authorization by the United Nations Security Council and the consent of the Somali Transitional Federal Government, is an encouraging opportunity to demonstrate the power of a global maritime partnership to bring about the order and stability necessary for the well-functioning of the global system on which the economic health and political strength of all major countries relies.<sup>18</sup> Such operations enable China to participate meaningfully in the provision of the ‘global goods’ that come from maritime humanitarian and constabulary operations which are meaningfully supported by reasonable interpretations of international law of the sea.

Additionally, cooperation is more likely to occur between Chinese and American naval forces the further away they operate from the East Asian coastal regions. China’s relatively recent history of invasion from the sea seems understandably to have left scars in its national psyche that make it likely that the presence of U.S. naval vessels in its EEZ will remain a source of friction. However, China’s aspirations to play a global role as a responsible major power and its willingness to undertake security operations in parallel, if not exactly in direct cooperation, with the U.S. and other maritime states in the Gulf of Aden suggests that future such opportunities will present themselves and should be welcomed. The more that China works with the U.S. and like-minded states away from its shores, the greater the chance that the essential factor of trust will begin to enter into the equation of U.S.-China relations in East Asia. Should opportunities arise for cooperation in East Asia, such as humanitarian assistance or disaster relief, China should be welcomed as a partner. China’s new hospital ship may provide opportunities in this regard.

In the meantime, the U.S. needs to reassert its leadership role as an advocate for the importance of the access-oriented bases of international law of the sea. A comprehensive strategic communications plan should be developed and coordinated across the agencies of the U.S. government. Additionally, since UNCLOS is the basis of most modern international law of the sea—either as a matter of treaty responsibilities for parties, or as a matter of customary law for

non-parties--the U.S. should ratify the Convention in order to more effectively exercise leadership from within its ranks, not just from outside them.

---

<sup>1</sup> All references to the text on UNCLOS are taken from the official English language version, which can be found at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/UNCLOS-TOC.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm).

<sup>2</sup> See, e.g., Oxman, Bernard H., "The Regime of Warships Under the United Nations Convention on the Law of the Sea" (1984), 24 Virginia Journal of International Law at pp. 811-863.

<sup>3</sup> Proclamation 5030, March 10, 1983, 19 Weekly Compilation of Presidential Documents 383 (March 14, 1983). The text of the President's Statement on United States Oceans Policy that accompanied the Proclamation is also included at this location. The text of all three documents, including the White House Fact Sheet, is available on the website of the Legal Office of the Food and Agriculture Organization of the United Nations, at <http://faolex.fao.org/docs/pdf/usa2642.pdf>.

<sup>4</sup> See, e.g., Cuban Armed Forces and the Soviet Military Presence, Reprint of Department of State Special Report No. 103 (August 1982), available at <http://www.disam.dsca.mil/pubs/Vol%205-2/Cuban.pdf>.

<sup>5</sup> The Commander's Handbook on the Law of Naval Operations (NWP 1-14M) July 2007, p. 2-9, available at [http://www.nwc.navy.mil/cnws/ild/documents/1-14M\\_\(Jul\\_2007\)\\_NWP.pdf](http://www.nwc.navy.mil/cnws/ild/documents/1-14M_(Jul_2007)_NWP.pdf).

<sup>6</sup> Executive Order 13158, Marine Protected Areas, 65 Federal Register 34909, May 26, 2000, available at <http://mpa.gov/pdf/eo/execordermpa.pdf>.

<sup>7</sup> Maritime Claims Reference Manual (June 2008), available at <http://www.dtic.mil/whs/directives/corres/html/20051m.htm>.

<sup>8</sup> Ren Xiaofeng and Cheng Xizhong, A Chinese Perspective, 29 Marine Policy (2005), pp. 139-146.

<sup>9</sup> Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, February 25, 1992.

<sup>10</sup> Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, June 26, 1998.

<sup>11</sup> Peter Dutton, Carving Up the East China Sea, Naval War College Review, Spring 2007, pp. 45-68, available at [http://www.usnwc.edu/cnws/cmsi/documents/Dutton\\_Carving%20Up%20the%20East%20China%20Sea\\_Spring07.pdf](http://www.usnwc.edu/cnws/cmsi/documents/Dutton_Carving%20Up%20the%20East%20China%20Sea_Spring07.pdf).

<sup>12</sup> Article 19(j).

<sup>13</sup> Peter Dutton and John Garofano, China Undermines Maritime Laws, Far Eastern Economic Review, April 3, 2009, available at <http://www.feer.com/essays/2009/april/china-undermines-maritime-laws>.

<sup>14</sup> Surveying and Mapping Law of the People's Republic of China, August 29, 2002, Articles 2 and 7

<sup>15</sup> Chinese Foreign Ministry Spokesperson Ma Zhaoxu stated on March 13: "When it comes to foreign vessels acting in China's exclusive economic zones, there are clear provisions in the United Nations Convention on the Law of the Sea, the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China, and the Regulations of the People's Republic of China on the Management of Foreign-related Marine Scientific Research." Mr. Ma claimed the Impeccable "engaged in activities in China's exclusive economic zones without our permission."

<sup>16</sup> Dutton and Garofano, China Undermines Maritime Laws.

<sup>17</sup> See, e.g., Peter Dutton, Scouting, Signaling, and Gatekeeping: Chinese Naval Operations in Japanese Waters and the International Law Implications, U.S. Naval War College China Maritime Studies #2, February 2009, available at [http://www.usnwc.edu/cnws/cmsi/documents/China%20Maritime%20Study\\_2\\_Dutton\\_Naval%20Operations%20in%20Japanese%20Waters%20and%20the%20International%20Law%20Implications.pdf](http://www.usnwc.edu/cnws/cmsi/documents/China%20Maritime%20Study_2_Dutton_Naval%20Operations%20in%20Japanese%20Waters%20and%20the%20International%20Law%20Implications.pdf).

<sup>18</sup> Peter Dutton, Charting a Course: U.S.-China Cooperation at Sea, China Security, Winter 2009, p. 11-26, available at [http://www.chinasecurity.us/index.php?option=com\\_content&view=Article&id=220](http://www.chinasecurity.us/index.php?option=com_content&view=Article&id=220).

Filename: 0  
Directory: \\hqnadcm0734\gsdd\$\Web\_team\uscc\hearings\2009hearings\written\_testimonies\09\_06\_11\_wrts  
Template: C:\Documents and Settings\Jertman\Application Data\Microsoft\Templates\Normal.dot  
Title: STATEMENT OF  
Subject:  
Author: peter  
Keywords:  
Comments:  
Creation Date: 6/11/2009 7:56:00 AM  
Change Number: 2  
Last Saved On: 6/11/2009 7:56:00 AM  
Last Saved By: Jertman  
Total Editing Time: 7 Minutes  
Last Printed On: 6/11/2009 7:56:00 AM  
As of Last Complete Printing  
Number of Pages: 7  
Number of Words: 3,826 (approx.)  
Number of Characters: 20,587 (approx.)