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## **Unauthorised Manoeuvres in Waters: US Chides M'sia Restrictions - A Rejoinder to B.A. Hamzah -**

*By Robert Beckman*

### **Synopsis**

*B.A. Hamzah's RSIS Commentary on 9 May 2017 was highly critical of challenges by the United States under its Freedom of Navigation Programme to what the US regards as excessive maritime claims by Malaysia. His comments require a response.*

### **Commentary**

#### ***Malaysia's 1996 Unilateral Declaration***

THE FOCUS of Dr B.A. Hamzah's RSIS Commentary "Unauthorised Manoeuvres in Waters" of 9 May 2017 is the unilateral Declaration submitted by the Government of Malaysia to the United Nations Secretary-General in October 1996. Kuala Lumpur deposited its instrument of ratification giving its official consent to be bound by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The Declaration sets out the understanding of the Government of Malaysia in 1996 on how some of the provisions in UNCLOS should be interpreted.

Paragraph 3 of the Declaration states that Malaysia understands that the provisions of UNCLOS do not authorise other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives, in the Exclusive Economic Zone (EEZ) without the consent of the coastal State.

#### ***Very Broad Interpretation of Restriction on Military Activities in EEZ***

Dr Hamzah gives a very broad interpretation of the types of military activities that cannot be carried out in Malaysia's EEZ without its consent. He states that "As long as the activities are military in nature and the activities result in the production of data to serve the military needs and can be use against its security, they are not allowed in the Malaysian EEZ, without its expressed consent. Unauthorised military activities are deemed not 'peaceful' and prejudicial to the security Malaysia." He seems to suggest that any military activity in the EEZ of Malaysia is deemed to be prejudicial to its security and prohibited and is subject to its consent.

To determine whether the position of Malaysia articulated by Dr Hamzah is consistent with UNCLOS, it is necessary to understand the nature of the EEZ regime. Prior to UNCLOS, the oceans were divided into territorial sea, over which a coastal State enjoyed sovereignty, and high seas, where all States enjoyed high sea freedoms.

UNCLOS created a new zone called the EEZ in which coastal States are given the exclusive right to all the natural resources within 200 nautical miles (nm) from their coasts. At the same time, all States enjoy the right to exercise high seas freedoms in the EEZ of coastal States.

Unlike the territorial sea, the EEZ is not subject to the sovereignty of the coastal State. It is a specific legal regime in which coastal States have sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, as well as other activities for the economic exploitation and exploration of the zone. At the same time, other States enjoy the freedoms of navigation and overflight and "other internationally lawful uses of the sea related to those freedoms", such as those associated with the operation of ships and aircraft.

The United States and the majority of other States take the position that the phrase "internationally lawful uses of the sea" in Article 58 was intended to preserve in the EEZ the traditional freedom to use the high seas for military purposes. Malaysia's Declaration states that other States have no right to carry out military activities in the EEZ of Malaysia without the consent of the Government of Malaysia.

Dr Hamzah argues that this position is consistent with international law because there is no rule of international law that explicitly prohibits Malaysia's jurisdiction over foreign military activities in its EEZ.

### ***No UNCLOS Provision to Govern Military Matters in EEZ***

It is true that UNCLOS does not "explicitly" prohibit a coastal State from regulating military activities by foreign warships in its EEZ. However, UNCLOS provides that the jurisdiction of a coastal State in its EEZ is limited to economic matters and other matters that might prejudice its economic rights in the EEZ.

It provides that in the EEZ the coastal State has jurisdiction as provided for in the relevant provisions of the Convention with regard to the following matters: (a) the conservation and management of the natural resources, (b) the establishment of

artificial islands, installations and structures; (c) marine scientific research; and (d) the protection and preservation of the marine environment.

There is no provision in UNCLOS giving coastal States jurisdiction to govern military or security matters in their EEZ. In fact, UNCLOS provides that except where coastal States are given express jurisdiction over specific matters in the EEZ, the high seas provisions on jurisdiction apply in the EEZ. This means that foreign warships in the EEZ are subject to the exclusive jurisdiction of the flag State and have complete immunity from the jurisdiction of any State other than the flag State.

However, under UNCLOS the right of foreign warships to conduct military activities in the EEZ of another State is not unlimited. UNCLOS provides that in exercising their rights in the EEZ, States must have “due regard” for the “rights and duties” of the coastal State. This means that foreign warships cannot exercise their rights in a manner that would interfere with the sovereign rights of the coastal State to the natural resources in its EEZ.

They should not conduct military exercises in the middle of a rich fishing ground, oil field or sensitive marine area as such activities may harm the economic interests of the coastal State. At the same time, it should also be noted that while foreign warships are required to have due regard to the “rights and duties” of the coastal State, they are not required to have due regard to the “security interests” of the coastal State.

### ***Nuclear-powered Vessels & Vessels Carrying Nuclear Materials***

Malaysia’s 1996 Declaration also states that nuclear-powered vessels and vessels carrying nuclear weapons must comply with three restrictions in Malaysia’s territorial sea. First, such vessels must confine their passage to sea lanes designated by Malaysia.

Second, such vessels must carry documents and observe special precautionary measures as specified by international agreements. Third, until such time as the international agreements referred to in article 23 of UNCLOS are concluded and Malaysia becomes a party thereto, such vessels must obtain prior authorisation before entering the territorial sea of Malaysia.

Article 23 of UNCLOS states that when exercising the right of innocent passage through the territorial sea, such vessels must carry documents and observe special precautionary measures established for such vessels by international agreements. These documents and measures are set out in codes and regulations of the International Maritime Organization (IMO) and the International Atomic Energy Agency (IAEA). The effect of article 23 is to require such vessels to comply with the relevant instruments when exercising the right of innocent passage.

Article 23 provides that such foreign vessels have the right to exercise innocent passage through the territorial sea of any State so long as they carry documents and observe special precautionary measures established for such vessels by the IAEA and IMO.

It does not give a coastal State the power to deny passage to vessels which comply with those requirements simply because the coastal State is not a party to those international agreements. If the article were interpreted in this way, it would give a coastal State the power to deny the right of innocent passage to such vessels indefinitely.

### ***Consequences if Malaysia Amended its Legislation***

It follows from the above analysis that the statements in Malaysia's 1996 Declaration are not consistent with how the majority of States interpret the provisions in UNCLOS. However, it is not clear to what extent, if at all, Malaysia has attempted in practice to assert jurisdiction over foreign vessels as set out in its Declaration.

Dr Hamzah has called for Malaysia to enact legislation to enable it to effectively enforce the restrictions on foreign vessels that are set out in its Declaration. It would be unwise for Malaysia to take such measures. For example, if it attempted to restrict the activities of military vessels in its EEZ, other States are likely to make official protests, and the US is likely to conduct freedom of navigation operations in Malaysia's EEZ.

In addition, a dispute could arise between Malaysia and a State party to UNCLOS on the interpretation or application of the provisions in UNCLOS, and the other State could invoke the compulsory binding dispute settlement procedures, and institute proceedings against Malaysia. In such case, the court or tribunal's decision is unlikely to be to Malaysia's liking.

### ***Right of US to Challenge Maritime Claims***

Dr Hamzah also states that Malaysia views UNCLOS as a treaty that is applicable only to States parties. He implies that because the US is not a party to UNCLOS, it has no right to invoke its provisions unless the provisions in UNCLOS have become customary international law.

However, UNCLOS provides that "all States" have the rights set out in UNCLOS, not just "States parties". Furthermore, the US takes the position that the provisions in UNCLOS on the EEZ and passage rights in the territorial sea are binding on all States under customary international law. Consequently, it has the right to challenge the maritime claims of other States which it believes are not consistent with UNCLOS.

The issue that must be considered by the Government of Malaysia is whether it is in its national interest to challenge provisions in UNCLOS that are accepted by the vast majority of States, alienate a superpower, and risk being hauled before an international court or tribunal. The safer course of conduct may be to let the Declaration remain, but take no action to make it part of Malaysian law or attempt to enforce it.

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