

## **LAW 1508: International Law**

### *Optional Essay*

**Does the conduct of data collection for navigation and military purposes by a warship during passage through a foreign exclusive economic zone constitute ‘marine scientific research’ for the purpose of Articles 56 and 246 of UNCLOS?**

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The *United Nations Convention on the Law of the Sea* (‘UNCLOS’) sought to establish a “legal order for the seas and oceans,” as an ultimate means to ensure “peace, justice and progress for all peoples of the world.”<sup>1</sup> The final text of the Convention established maritime zones according to the geographical relationship between a State’s territory and the world’s seas, and outlined the relevant conditions to which their uses are bound. An academic dispute has arisen over the rights of one State, the United States, to conduct marine scientific research (MSR) in the exclusive economic zone (EEZ) of another State, China, and exactly what may constitute MSR. In addressing the distinction between ‘research’ and ‘survey’ activities, the United States’ use of the data it collects in the EEZ, China’s claims of a threat to its national security, and the supposed violation of customary international law, this essay considers the arguments raised by Pedrozo and Zhang in their respective articles in the *Chinese Journal of International Law*, and the extent to which the use of sonar scans and other hydrographic surveys may be classified as MSR for the purposes of Articles 56 and 246 of *UNCLOS*.

### **Distinguishing between ‘research’ and ‘survey’ activities**

*UNCLOS* falls silent on the definition of MSR and provides no list of activities that would fall into this category. It is noted that a purposive approach is to be favoured in

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<sup>1</sup> *Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) Preamble (‘UNCLOS’).

the interpretation of treaties, that is, terms are to be ascribed with their ordinary meaning in light of the object and purpose of the treaty.<sup>2</sup> The *Australian Oxford Dictionary* defines ‘research’ as “the systematic investigation into and study of materials...in order to establish facts and reach new conclusions,”<sup>3</sup> while ‘study’ is said to mean “to record the area and features of an area of land so as to construct a map, plan, or description.”<sup>4</sup> While this source is by no means authoritative, it suggests that the distinction lies in the purpose for which the sonar scans and hydrographic data in question are used. Furthermore, Article 40 of *UNCLOS* confirms that ‘research’ and ‘survey’ activities are not synonymous by expressly referencing both terms.<sup>5</sup> Zhang’s argument that, with the advent of modern ocean technologies, the distinction between marine surveillance and scientific research is increasingly opaque is compelling<sup>6</sup>, the distinction is not “clear”<sup>7</sup> as Pedrozo suggests.

### **Do sonar scans and other hydrographic surveys constitute MSR?**

Pedrozo provides a definition for MSR and the general data that are collected by hydrographic surveys; surveillance activities are said to be military, while MSR is scientific.<sup>8</sup> To my mind, these definitions do not appear incompatible: the “depth of water, configuration and nature of the natural bottom” may fall into the broad category of “physical oceanography.”<sup>9</sup> The *Vienna Convention on the Law of Treaties* (*VCLT*) provides that the terms of the treaty must be read in their context, and that

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<sup>2</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1) (*VCLT*).

<sup>3</sup> *Australian Oxford Dictionary* (Oxford University Press, 2<sup>nd</sup> ed, 2004).

<sup>4</sup> *Ibid.*

<sup>5</sup> *UNCLOS* art 40.

<sup>6</sup> Haiwen Zhang, ‘Is it Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul (Pete) Pedrozo’s Article on Military Activities in the EEZ’ (2010) 9 *Chinese Journal of International Law* 31, 36.

<sup>7</sup> Raul (Pete) Pedrozo, ‘Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China’s Exclusive Economic Zone’ (2010) 9 *Chinese Journal of International Law* 9, 11.

<sup>8</sup> *Ibid* 22.

<sup>9</sup> *Ibid* 21.

the context of a treaty comprises the whole text, including the preamble and annexes.<sup>10</sup> In interpreting the text of *UNCLOS*, Article 40 on research and survey activities does not classify “hydrographic survey[s]”<sup>11</sup> under the broader umbrella of MSR, as the two terms are individually listed.

Pedrozo appears to apply the principle of *expressio unius est exclusio alterius* in claiming that, because survey activities are not explicitly mentioned in Article 56 (although MSR is listed at 1(b)(ii)) while reference to survey activities is made in other articles, that consent is not required for survey activities in the EEZ.<sup>12</sup> It appears that a distinction between MSR and hydrographic surveys exists within *UNCLOS*, and that the omission of hydrographic surveys in the text of Article 56 suggests that this activity generally does not constitute MSR.

Article 32 of *VCLT* permits the use of extrinsic materials in interpretation, including the “preparatory work of the treaty and the circumstances of its conclusion.”<sup>13</sup> To this effect, Pedrozo highlights that during the Third United Nations Conference on the Law of the Sea, China and other States attempted to broaden the rights of coastal States in the EEZ to include a security interest.<sup>14</sup> Article 58 of *UNCLOS* affirms the freedom of navigation of all States in the EEZ.<sup>15</sup> This may be interpreted as a rejection by the final text of *UNCLOS* of China’s initial efforts in negotiations to expand its EEZ rights and jurisdiction. While this reasoning may apply in the general sense, it is important to consider the subjective element of the argument on the facts: Is the United States using the data it collects for military or scientific purposes?

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<sup>10</sup> *VCLT* art 31(2).

<sup>11</sup> *UNCLOS* art 11.

<sup>12</sup> Pedrozo, above n 7, 22.

<sup>13</sup> *VCLT* art 32.

<sup>14</sup> Pedrozo, above n 7, 10.

<sup>15</sup> *UNCLOS* art 58(1).

## **The use of data: China's claims of a threat to national security, and of inconsistency with the peaceful provisions of UNCLOS**

China is said to argue that military activities pose a threat to its national security and contravene the peaceful purpose of *UNCLOS*.<sup>16</sup> Prejudice to the “peace, good order or security” of the coastal State is addressed in Article 19, where it is given that the collection of information that threatens the defence or security of the coastal State is prohibited. Pedrozo’s application of the *Lotus* principle appears sound – that sovereign states may act in any way so long as they do not contravene an explicit prohibition.<sup>17</sup> In the alternative, it must be determined that the manner in which the data collected by the United States are used threatens Chinese security. Article 26 of *VCLT* provides that parties to a treaty must adhere to it “in good faith.”<sup>18</sup> Pedrozo asserts that the information from military marine data collection is used “exclusively for military purposes and to promote safety of navigation,”<sup>19</sup> but does not cite any authority to this effect. The ordinary use of such sonar scans and surveys is “to support safety of navigation.”<sup>20</sup> As Zhang does not provide an alternative motive for the United States’ collection of data, without substantive evidence to the contrary, it must be assumed that the United States’ data are collected in good faith for surveillance and not for research or other purposes.

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<sup>16</sup> Pedrozo, above n 7, 25.

<sup>17</sup> *SS Lotus (France v Turkey)* PCIJ Rep (1927) Series A No 10.

<sup>18</sup> *VCLT* art 26.

<sup>19</sup> Pedrozo, above n 7, 22.

<sup>20</sup> Australasian Hydrographic Society, *About hydrographic surveys* (2007) < <http://www.ahs.asn.au/aboutus.html> > Accessed 20 August 2013.

## **The inconsistency of China's domestic law with customary international law and UNCLOS**

If hydrographic surveys are not to be counted as MSR, is China's domestic regulation inconsistent with *UNCLOS*? The *VCLT* outlines that, where domestic and international law are at odds, treaty obligations cannot be avoided on the basis of domestic law.<sup>21</sup> The relevant domestic legislation appears to include hydrographic surveys and military activities as outlined by Pedrozo.<sup>22</sup> It is clear from Article 55 of *UNCLOS* that the "other sea areas under [China's] jurisdiction"<sup>23</sup> in the domestic law provision would include the EEZ. The domestic regulations appear inconsistent with the exclusivity of MSR and hydrographic surveys concluded thus far. In order to establish whether the provisions of China's internal law in regulating these activities are in breach of customary international law, we must consider what is reasonably regarded as 'customary' in this area.

It is noted that the EEZ is shown by the practice of States to have become part of customary international law.<sup>24</sup> Turning to examples of international state practice, importance is placed on the practice of specially-affected States.<sup>25</sup> Zhang's evidence that Australia and Canada actively seek permission of the coastal State before conducting hydrographic surveys in the EEZ of another State, and that other countries also have domestic legislation on the issue, infer a customary legal basis for the need of the coastal State's consent in carrying out such activities.<sup>26</sup> It may be that *UNCLOS* sought to codify these and other elements of customary law, or that a new custom has evolved around the treaty obligations. Where a practice emerges that is not in strict or

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<sup>21</sup> *VCLT* art 27.

<sup>22</sup> Pedrozo, above n 7, 21.

<sup>23</sup> *UNCLOS* art 55.

<sup>24</sup> *Continental Shelf (Libya v Malta)* ICJ Rep (1985) 13, 34.

<sup>25</sup> *North Sea Continental Shelf (Germany v Denmark; Germany v The Netherlands)* [1969] ICJ Reps 3, 42.

<sup>26</sup> Zhang, above n 6, 45.

literal compliance with the treaty's terms (but is nevertheless performed in intended compliance) and is performed habitually or at the acquiescence of others, it may be taken to establish an agreement regarding the treaty's interpretation.<sup>27</sup> If the practice of seeking consent before conducting surveillance in the coastal State's EEZ is taken into account in interpreting the treaty, this may give rise to a more liberal definition of MSR. Pedrozo's statement that only 26 States support China's position is, as described by Zhang, "falla[cious]" according to the *argumentum ad populum* principle.<sup>28</sup> However, further examples of international practice would be required to establish the customary nature of Australia and Canada's actions; it is unclear whether Zhang's citation of these States is exhaustive or merely provided as an example.

## **Conclusion**

On balance, it appears that the conduct of data collection for navigation and military purposes during passage through a foreign EEZ does not constitute MSR for the purpose of Articles 56 and 246 of *UNCLOS*. While some States actively seek permission from the coastal State before undertaking such exercises, the explicit and implied distinctions between 'research' and 'survey' activities in the text of *UNCLOS*, together with the negotiating history of the treaty, do not suggest that the United States is in violation of its treaty obligations.

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<sup>27</sup> *VCLT* art 31(3)(b).

<sup>28</sup> Zhang, above n 6, 45.