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## **Military Activities in the Exclusive Economic Zones in the Seas in East Asia**

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### **I. Introduction**

One of the highly controversial aspects of the contemporary security environment unique to the seas in East Asia is the repeated incidents and disputes over military and intelligence gathering activities in and above the exclusive economic zone (EEZ) of coastal States conducted by military vessels or aircraft of another State. Particularly in the last decade, such incidents include the protest by China against the survey/monitoring activities of *USNS Bowditch* in the Yellow Sea in 2001 and 2002, the Indian naval headquarters' concern over the similar activities of *Bowditch* in the Indian EEZ in 2002 and 2003, the clash of the US Navy's EP-3 reconnaissance aircraft and a Chinese fighter jet over the EEZ off Hainan Island in 2001, the harassments by a Chinese Fisheries Bureau's patrol boat and surveillance aircraft of the US ocean surveillance ship *USNS Victorious* in the Yellow Sea in 2009, and the harassments and threats by Chinese Navy and other vessels against *USNS Impeccable* in China's EEZ off Hainan Island in the same year. Some of these incidents were serious enough to cause the death of a Chinese pilot and the emergency landing of the US aircraft in a Chinese airport. Similar incidents could take place in future, including "close encounters" with potentially even more dangerous consequences.

Behind these incidents, there are fundamental differences of views and positions of governments on the interpretation of international legal rules applicable to military activities, including intelligence gathering activities, in and above the EEZ of other States. The positions are divided most sharply between the United States and China, as reflected in the occasional incidents involving military and other government vessels and aircraft as illustrated above. Some other States in the East Asian region have also expressed their views of restricting military activities of another State in their EEZs. They include Bangladesh, India, Indonesia, Malaysia, Myanmar, Pakistan and the Philippines. However, these countries have generally not asserted their positions in the form of forceful operation.

The purpose of this paper is to look into the legal positions of particularly China and the United States on military activities in the EEZs of other States with a view to clarifying their differences.

The paper then explores some concrete steps which are recommended for the two countries, and for the countries in the East Asian sea region, to consider pursuing in order to avoid further incidents that could be caused through conflicting positions on military uses of the EEZ. Before doing so, however, a brief overview of the regime of EEZ under UNCLOS may be in order.

## **II. UNCLOS and the EEZ**

Until UNCLOS was adopted in 1982, the world's oceans were divided legally between the relatively narrow band of the territorial sea under the sovereignty of coastal States, which was generally between three and 12 nautical miles (nm), and the high seas beyond, where all nations enjoyed freedom of the high seas, including the use for military activities. The regime of the EEZ was introduced in UNCLOS, as a zone between the territorial sea and the high seas, where the coastal State may exercise the sovereign rights and jurisdiction for the specific purposes provided for in Part V of the Convention. Such "sovereign rights" are limited to those "for the purpose of exploring and exploiting, conserving and managing the natural resources" of the waters superjacent to the seabed and of the seabed and its subsoil, and "with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds" (Art. 56 (a)). The "jurisdiction" that the coastal State may exercise is only with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment (Art. 56 (b)).

UNCLOS provides also for the rights and duties of other States in the EEZ of the coastal State. Notably, Article 58 (1) provides that

"all States ... enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention."

UNCLOS further stipulates that the coastal States, in exercising their rights and performing their duties under the Convention, "shall have due regard to the rights and duties of other States" and shall act in a manner compatible with the provisions of the Convention (Art. 56 (2)). Just as the "due regard" duties of the coastal States, other States exercising their rights and performing their duties in the EEZ must also have due regard to the rights and duties of the coastal State, and moreover comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the

Convention and other rules of international law in so far as they are not incompatible with Part V (Art. 58 (3)).

It should be noted that during the negotiations for the draft of UNCLOS, a group of developing countries, including China, proposed to broaden the rights of the coastal State in the EEZ by obligating other States to pay due regard to the coastal State's "security interests". The proposal, however, was not adopted.<sup>1</sup>

Since it was not necessarily possible for the drafters to envisage all types of rights and jurisdiction that might arise in the future, the Convention provides that in cases where it does not attribute rights or jurisdiction to the coastal State or to other States within the EEZ, any dispute between the States parties should be resolved on the basis of equity and in the light of all the 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 (Art. 59).

### **III. Issues on Which Positions are Divided**

The positions of China and some other States in East Asia and the United States and some other user States of the seas in the region are divided particularly with regard to: (1) the meaning of marine scientific research (MSR) and survey activities, (2) the right to conduct intelligence gathering activities, (3) the right to conduct military exercises, and (4) the protection of the marine environment and obligation to pay "due regard".

#### **1. Marine scientific research and "survey" activities**

The Convention, having attributed jurisdiction with regard to MSR to the coastal State, lays down detailed rules in Part XIII, which among others establishes the "consent regime" whereby other States interested in conducting MSR in the EEZ must obtain the consent of the coastal State. In addition, the Convention has several other provisions referring to "surveys" and "hydrographic surveys" in Parts other than Part XIII. Article 19 (2) in Part II, e.g., provides that carrying out of "research or survey activities" by a foreign ship in the territorial sea of a coastal State is not considered as innocent passage. Article 40 in Part III states that during transit passage through a strait used for international navigation, foreign ships, including "marine scientific research" and "hydrographic survey" ships, may not carry out any "research or survey activities" without the prior

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<sup>1</sup> See M. Nordquist, editor-in-chief, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), pp. 558-559.

authorization of the strait States.

One problem with the Convention, which is a cause of conflicting interpretation by States, is the fact that it does not contain a definition of MSR nor “survey”. From the very fact that the Convention refers to “survey” separately from “research”, and Part XIII regulates “research” activities only, it appears natural that survey activities are considered not falling under the regime of Part XIII. The United States thus interprets MSR narrowly. It clearly distinguishes MSR from various other marine data collection activities such as hydrographic survey, military data collection activities (military surveys and surveillance), environmental monitoring, the collection of marine meteorological data and other routine ocean observations, and activities related to submerged wrecks or objects of an archaeological and historical nature.<sup>2</sup> In the US view, the term *hydrographic survey* generally refers to the “obtaining of information for the making of navigational charts and safety of navigation,”<sup>3</sup> and involves collection of information about water depth, the configuration and nature of the natural bottom, the directions and force of currents, the heights and times of tides and water stages, and hazards to navigation. The data are collected for the purpose of producing nautical charts and similar products to support safety of navigation. Hydrographic surveys are, therefore, not the same as MSR, in that they include the collection and analysis of different types of data and have at their core a fundamentally different purpose.<sup>4</sup>

*Military marine data collection*, according to the United States, refers to marine data collected for military, not scientific, purposes, and can involve oceanographic, marine geological and geophysical, chemical, biological, or acoustic data. Such data can be either classified or unclassified, and are normally not released to the public or the scientific community.<sup>5</sup> The military marine data collection of the United States basically consists of *surveys* and *surveillance*. *Surveillance* ships directly support the Navy by using sonar arrays to detect and track submarines, and also to help provide locating data that promote the navigational safety of various undersea platforms.<sup>6</sup> Military oceanographic *survey* ships are engaged in acoustic, biological, physical, and geophysical surveys to enhance its information on the marine environment, using multibeam, wide-angle, precision sonar

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<sup>2</sup> Raul Pedrozo, “Coastal State Jurisdiction over Marine Data Collection in the Exclusive Economic Zone: U.S. Views”, in Peter Dutton, ed., *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (2010), p. 27.

<sup>3</sup> *Ibid.*, p. 28. Roach divides marine data collection into four categories: (1) MSR, (2) surveys (hydrographic and military), (3) operational oceanography, and (4) exploration and exploitation of natural resources and underwater cultural heritage. J.A. Roach, “Marine Data Collection: Methods and the Law”, in M. Nordquist, T. Koh and J. N. Moore, eds., *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (2009), p. 173.

<sup>4</sup> Pedrozo, *supra* note 2, p. 28.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, p. 29.

systems that allow them to chart broad areas of the ocean floor. Such *survey* ships also collect data that are used to improve technology in undersea warfare, enemy ship detection, and charting of the world's coastlines.<sup>7</sup>

The United States' legal position on such survey and surveillance activities in the EEZ of a foreign coastal State is that they are conducted as part of the freedom of navigation and "other internationally lawful uses of the seas" under Article 58 (1), and therefore not subject to coastal State regulation. The United States has responded along such lines to other States which have questioned survey activities in their EEZs.<sup>8</sup>

The position of China on MSR and other data collection activities in the EEZ is fundamentally opposed to that of the United States. It has been pointed out that if the methods of the data collection and the motives or intended use of the data constitute the primary differences among MSR, hydrographic surveys and military surveys, this presents difficult questions, such as how such motives are to be determined and who determines that; what constitutes a "scientific purpose" or a "military purpose" and who determines that; and when does the gathering of information to make navigational charts and ensure safety of navigation become a military survey and not a hydrographic survey.<sup>9</sup> Chinese scholars generally consider that, if the US view is accepted, any kind of MSR operations can be conducted under the name of hydrographic or military surveys in the EEZs without any limitation by the coastal States, and that this would potentially give rise to the collapse of the regime of MSR as provided in the Convention.<sup>10</sup>

Zhang, Deputy Director-General of the China Institute for Marine Affairs (CIMA), argues that there is almost no difference between the scientific instruments and equipments on board survey or surveillance vessels and those on board common MSR vessels; and there is hardly any difference between the marine data collected by these vessels and those collected by other MSR vessels.<sup>11</sup> He contends that, with the application of modern ocean technology and equipment, it is now difficult to

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<sup>7</sup> *Ibid.*, p. 32.

<sup>8</sup> J. A. Roach and R. W. Smith, *Excessive Maritime Claims* (1994), p. 247. See also M. Hayashi, "Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms", *Marine Policy*, vol. 29(2005), p. 131,

<sup>9</sup> Xue Guifang, "Surveys and Research Activities in the EEZ: Issues and Prospects", in Dutton, *supra* note 2, p. 93.

<sup>10</sup> Gao Zhiguo, "China and the Law of the Sea", in Nordquist, Koh and Moore, *supra* note 3, p. 294. See also Xue Guifang, "Marine Scientific Research and Hydrographic Survey in the EEZs: Closing Up the Legal Loopholes?" *ibid.*, p. 222. See also Wu Jilu, "The Concept of Marine Scientific Research", in Dutton, *supra*, note 2, p. 65.

<sup>11</sup> Zhang Haiwen, "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", *Chinese Journal of International Law*, vol. 9 (2010), p. 31, para. 20.

distinguish between marine data collection and MSR from the perspective of the types and potential uses of collectable marine data. Therefore, marine data collecting activities could be categorized as MSR which is subject to the jurisdiction of the coastal States under Part V and Part XIII of the Convention.<sup>12</sup>

China has incorporated the basic provisions of Part XIII on MSR in its 1998 Law on the EEZ and the Continental Shelf, with further detailed regulations in the 1996 Regulations on the Management of the Foreign-Related MSR.<sup>13</sup> With regard to “surveying” activities, moreover, “partially in response to the frequent appearance of US military ships conducting surveying activities in Chinese jurisdictional waters”<sup>14</sup>, China amended in 2002 the Surveying and Mapping Law of the People's Republic of China. The Law now provides that all surveying and mapping activities conducted in the domain of China *and “other sea areas under the jurisdiction” of the PRC* shall comply with this Law, and defines “surveying and mapping” broadly as referring to:

“surveying, collection and presentation of the shape, size, spatial location and properties of the natural geographic factors or the man-made facilities on the surface, as well as the activities for processing and providing of the obtained data, information and achievements.”  
(Art. 2)

The Law further provides that foreign organizations and individuals who conduct surveying and mapping in the domain of the PRC *and other sea areas under the jurisdiction* of the PRC must obtain the approval of the competent administrative department under the State Council and competent department of the armed forces (Art. 7).<sup>15</sup>

## 2. Intelligence gathering activities

Traditionally, all major maritime powers have long been conducting intelligence gathering activities routinely as part of exercise of freedom of the high seas without facing problems as far as they were done within and above the high seas without violating the territorial sea of another State or its air space. Since it appears that no specific debate was held on this point during the negotiations for the UNCLOS draft, it would be reasonable to assume that the same freedom has been confirmed with respect to the EEZ as well, through the provision of Article 58(1). The U.S. Navy takes the view that

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<sup>12</sup> *Ibid.*, para. 14. Wu, *supra* note 10, p. 65, also states that China's view is that hydrographic surveying is part of MSR.

<sup>13</sup> See generally Zou Keyuan, *China's Marine Legal System and the Law of the Sea* (2005), p. 277 *et seq.*

<sup>14</sup> Xue, *supra* note 9, p. 97.

<sup>15</sup> English translation available at <http://www.asianlii.org/cn/legis/cen/laws/samlotproc506/>

such activities are definitely part of high seas freedom.<sup>16</sup> It has been also pointed out on behalf of the United States that intelligence collection is addressed in only one article (Article 19) relating to innocent passage<sup>17</sup>, and a similar restrictive provision does not appear in Part V of the Convention regarding the EEZ, and therefore such activity is permitted without coastal State consent under Article 58(1) of the Convention.<sup>18</sup>

On the other hand, according to the Chinese scholars' views as summarized by Judge Gao Zhiguo, intelligence gathering activities conducted in and above the EEZ by foreign vessels and aircraft run counter to the principle of "peaceful purposes" or "peaceful use" of the Convention, and constitute "military and battlefield preparation in nature, and thus ... a threat of force against the coastal State."<sup>19</sup> The principle of peaceful purposes or use is contained in, among others, Article 88 which provides that the high seas shall be reserved for peaceful purposes, and this applies also to the EEZ through Article 58 (2). Further, Article 301 requires States to 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 UN Charter.

Against such interpretation of the Chinese scholars, it is pointed out for the United States that intelligence gathering activities are lawful and non-aggressive military activities consistent with the UN Charter and can be conducted in the EEZ without coastal State consent.<sup>20</sup> According to this view, the Convention makes a clear distinction between "threat or use of force" and other military activities such as intelligence collection. Article 19(2)(a) repeats the language of Article 301<sup>21</sup>, and Article 19(2)(b)–(f) restricts other military activities in the territorial sea. And Article 19(2)(c) specifically regards ships navigating the territorial seas not innocent if they engage in "any act aimed at collecting information to the prejudice of the defense or security of the coastal state". No such provisions on information collection appear with respect to the high seas or the EEZ. Therefore, in the U.S. view, intelligence collection is not covered by the non-use of force provision of Article 301 of the Convention.<sup>22</sup> In the Commentary accompanying the message of President Clinton to the

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<sup>16</sup> Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (1995), Sections 2.4.2. and 2.4.3.

<sup>17</sup> Article 19 (2) (c) regards passage of a foreign vessel through the territorial sea as not innocent if it engages in "any act aimed at collecting information to the prejudice of the defence or security of the coastal State".

<sup>18</sup> Pedrozo, *supra* note 2, p. 29.

<sup>19</sup> Gao, *supra* note 10, pp. 293-294.

<sup>20</sup> Pedrozo, *supra* note 2, p. 30.

<sup>21</sup> Article 19 (2) (a) provides that ships transiting the territorial sea in innocent passage shall not engage in "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."

<sup>22</sup> Pedrozo, *supra* note 2, p. 30.

Senate transmitting UNCLOS, it is underlined specifically that none of the provisions of Articles 88, 301, etc. create new rights or obligations, imposes restrictions upon military operations, or impairs the inherent right of self-defense, and that generally military activities which are consistent with international law principles are not prohibited by any provisions of the Convention.<sup>23</sup> It is recalled that the clear intention of the United States and the USSR during the negotiations of the draft of UNCLOS was to avoid specific discussion of the limitation of military activities and they considered the peaceful purposes clauses were not intended to impose any restrictions on military activities at sea, but simply represented the application to the law of the sea of the UN Charter's ban on the threat or use of force.<sup>24</sup>

### 3. Military exercises

It has generally been recognized for a long time that military exercises or maneuvers were part of freedom of the high seas and naval powers conducted them routinely on the high seas. No serious debate was held on the issue during UNCLOS negotiations and no specific provision is made in UNCLOS on such activities. Several coastal States, however, declared in signing or ratifying UNCLOS that such activities, particularly those involving weapons or explosives, would not be allowed in the EEZ without the consent of the coastal State. These States include in the East Asian sea region, Bangladesh, India, Malaysia and Pakistan, as well as some others in other regions like Brazil, Cape Verde, and Uruguay.<sup>25</sup> Against these States, several States including Germany, Italy, the Netherlands, and the United Kingdom, filed declarations with opposing views.<sup>26</sup> The United States has also taken the firm position that "military activities, such as ... launching and landing of aircraft, ... exercises, operations ... [in the EEZ] are recognized historic high seas uses that are preserved by Article 58."<sup>27</sup>

The views of China on this issue of military maneuvers in the EEZ of another State do not appear to have been clearly stated. One may assume that China, with a rapidly growing naval fleet, has no dispute at least in principle with the views of the United States and other major maritime powers on need to conduct military exercises in the EEZ of other countries.

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<sup>23</sup> Message from the President of the United States transmitting United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. Senate 103<sup>rd</sup> Congress, 2<sup>nd</sup> Session. Treaty Doc. 103-39, pp. iii and 94.

<sup>24</sup> See Hayashi, *supra* note 8, p. 125.

<sup>25</sup> See [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm).

<sup>26</sup> *Ibid.*

<sup>27</sup> Message from the President of the United States..., *supra* note 23, p. 24.

#### 4. Protection of the marine environment and obligation to pay “due regard”

After the USNS *Impeccable* incident occurred on 5 March 2009 in the South China Sea<sup>28</sup>, China’s Foreign Ministry spokesperson stated that the U.S. Navy ship’s unauthorized access into waters under the jurisdiction of China for the purpose of undertaking military surveys violated UNCLOS and Chinese laws. According to the Deputy Chief Captain of the East China Sea Corps of the China Marine Surveillance Forces in Shanghai, the operations of *Impeccable*, which introduced a shielded cable into the sea and emitted sound waves in order to investigate underwater targets, conduct surveys, undertake instrument experiments, or investigate the ocean’s environment constituted “pollution of the marine environment” under UNCLOS<sup>29</sup>. Thus he alleged that the United States violated UNCLOS and was responsible for the damage caused to fishermen by such illegal activities.<sup>30</sup>

Indeed, under UNCLOS, the coastal State has the jurisdiction with regard to the protection and preservation of the marine environment in the EEZ, but such jurisdiction is only to the extent as provided for in the Convention (Art. 56 (1)(b)(iii) ). As discussed above, the United States takes the view that such military survey activities in the EEZ are part of freedom of the high seas and thus the coastal States have no right to regulate. On the other hand, UNCLOS also provides that user States of the EEZ of a coastal State shall have “due regard” to the rights and duties of the coastal State in accordance with the Convention provisions and other rules of international law not incompatible with Part V (on the EEZ) (Art. 58(3) ). By way of example, it was pointed out that a warship inside the EEZ might choose not to conduct certain operations, like a gunnery exercise intentionally targeting a whale migration, paying due regard to environmental interests of the coastal

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<sup>28</sup> For a detailed analysis of the *Impeccable* incident, see Jonathan Odom, “The True ‘Lies’ of the *Impeccable* Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (Outside China) Should be Concerned”, *Michigan State Journal of International Law*, vol. 18, no. 3 (2010), p. 1.

<sup>29</sup> Yu Zhirong, “Jurisprudential Analysis of the U.S. Navy’s Military Surveys in the Exclusive Economic Zones of Coastal Countries”, in Dutton, *supra* note 2, p. 42. UNCLOS defines “pollution of the marine environment” as follows:

“the introduction by man, directly or indirectly, of substances or energy into the marine environment which results or is likely to result in such deleterious effects as harm to living resources and marine life, ... hindrance to marine activities, including fishing and other legitimate uses of the sea, ... ” (Art. 1 (4) )

<sup>30</sup> *Ibid.*, p. 43.

State.<sup>31</sup> In the United States view, in such a case, because of the protections provided by sovereign immunity, the flag state, not the coastal state, has the sole right to enforce upon its naval vessels the obligation to exercise “due regard”.<sup>32</sup>

#### IV. Toward a Better Cooperative Mechanism

The above discussion makes it clear that wide divergence exists between the views and legal positions of governments and scholars of the United States on the one hand and of China on the other on several crucial aspects of military uses of the EEZ, particularly in the East China Sea region. Some of the conflicting positions have actually led to dangerous incidents at sea or in the air, and they could well be repeated in the future. Diplomatic efforts have been made to improve the situation with some concrete results, including the setting up in 1998 of the Military Maritime Consultative Agreement (MMCA). Apparently, however, the MMCA did not help to prevent the EP-3 incident and has not been working as it was expected<sup>33</sup>.

As Prof. Wachman of Fletcher School warns, if the United States and China, both feeling their actions legitimated by law and fundamental principles, persevere in risky displays of determination rather than devising mutually acceptable limits that will safeguard the interests of both, one should be unsurprised if defiance leads once again to miscalculation, conflict and loss.<sup>34</sup> Several suggestions have been made to avoid further confrontation and establish a better confidence-building or cooperative mechanism. Particularly the following should be considered or re-evaluated as starting points or models.

First, a number of authors, including Chinese and American, have suggested that the United States and China should negotiate a so-called incidents at sea (INCSEA) agreement, i.e., a navy-to-navy agreement for prevention of incidents at sea, on the bases of, and learning lessons from various

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<sup>31</sup> James Kraska, “Resources Rights and Environmental Protection in the Exclusive Economic Zone: The Functional Approach to Naval Operations”, in Dutton, *supra* note 2, p. 82.

<sup>32</sup> *Ibid.*, p. 83.

<sup>33</sup> According to a US author, MMCA, which was specifically established to facilitate consultations between the U.S. Department of Defense and the PRC Ministry of National Defense for the “purpose of promoting common understandings regarding activities undertaken by their respective maritime and air forces when operating in accordance with international law,” has failed to live up to expectations primarily because of the China’s unwillingness to engage in a serious debate on this important issue. Raul Pedrozo, “Close Encounters at Sea: The USNS *Impeccable* Incident”, *Naval War College Review*, vol. 62, no. 3 (Summer 2009), p. 109.

<sup>34</sup> Alan Wachman, “Playing by or Playing with the Rules of UNCLOS?” in Dutton, *supra* note 2, p. 117.

examples of such agreement.<sup>35</sup> Griffiths, who has a long and deep involvement in INCSEA arrangements, believes that such agreements are the best example of innovative modern confidence-building mechanism that has been adopted and adapted to a wide variety of circumstances, and suggests that the United States and China should establish a “much more comprehensive, robust, and effective military maritime safety-comanagement arrangement that will continue to work no matter how tense any future situation might become”, drawing lessons from the experiences of MMCA and a series of INCSEA and other confidence management arrangements.<sup>36</sup>

Second, it is suggested that the existing MMCA should be revisited and replaced with a new agreement. McVadon, e.g., proposes that the new agreement, which might be called a Military Maritime Coordination Procedures Agreement (MMCPA), containing much of the contents of INCSEA Agreements, and conceived as prescribing procedures for *coordination* in place of the emphasis on incidents, such as closest point of approach (CPA), or the minimum distance calculated when a ship or aircraft is approaching another ship or aircraft, could be agreed upon. Additionally, the agreement could become a coordination method that, to a far greater extent than INCSEA agreements, employs communications as an additional buffer (beyond the written rules) to avoid collisions or other incidents.<sup>37</sup>

Third, it was suggested that multilateral agreement is needed on a set of voluntary guidelines for military and intelligence-gathering activities in foreign EEZs, providing indicators of friendly (and unfriendly) behavior and help parties avoid unnecessary incidents at sea without banning any activities outright.<sup>38</sup> In 2005, a group of experts (called “EEZ Group 21”) mostly from the Pacific countries under the main sponsorship of the Ocean Policy Research Foundation (OPRF) developed such a set of Guidelines for Navigation and Overflight in the EEZ.<sup>39</sup> The document sets out the guidelines recommended for coastal States and other States in exercising their rights and performing their duties with respect to the EEZs of the former, including maritime surveillance, military activities, non-interference with electronic systems, MSR and hydrographic surveying. The

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<sup>35</sup> Ji Guoxing, “The Legality of the ‘Impeccable Incident’”, *China Security* (World Security Institute) vol. 5, no. 2 (Spring 2009), p. 23; Peng Guangqian, “China’s Maritime Rights and Interests”, in Dutton, *supra* note 2, p. 21; Wachman, *supra* note 34, p. 117; A. Skaridov, “Military Activity in the EEZ: Exclusive or Excluded Right?” in Nordquist, Koh and Moore, *supra* note 3, pp. 258-259.

<sup>36</sup> David Griffiths, U.S.-China Maritime Confidence Building: Paradigms, Precedents, and Prospects. *China Maritime Study*, No. 6 (July 2010), p. 22.

<sup>37</sup> Eric A. McVadon, “The Reckless and the Resolute: Confrontation in the South China Sea”, *China Security*, vol. 5, no. 2 (Spring 2009), pp. 9-11.

<sup>38</sup> Mark Valencia, “The *Impeccable* Incident: Truth and Consequences”, *China Security*, vol. 5, no. 2 (Spring 2009), p. 31.

<sup>39</sup> See OPRF, Guidelines for Navigation and Overflight in the Exclusive Economic Zone: A Commentary (OPRF, Tokyo, 2006).

Guidelines were, however, rejected by US Navy lawyers, including Pedrozo who regards them as “unacceptable even as a starting point for further discussion because they are aimed at restricting maritime freedoms set forth in UNCLOS and other international instruments”.<sup>40</sup>

Pedrozo does not support the conclusion of an INCSEA agreement between China and the United States, either, arguing that there exists already the MMCA, which should be activated by both parties acting in good faith.<sup>41</sup> He stresses also that, as the United States has suggested repeatedly, Chinese ships and aircraft should abide by internationally recognized codes and signals, particularly the Code for Unalerted Encounters at Sea (CUES), issued by the Western Pacific Naval Symposium. The CUES offers, according to Pedrozo, safety measures and procedures, as well as a means to limit mutual interference and uncertainty and to facilitate communication when warships, submarines, public vessels, or naval aircraft make contact.<sup>42</sup>

Fourth, there is an encouraging sign of renewed efforts being made among ASEAN members in particular for the adoption of a legally binding Code of Conduct of Parties for the South East China Sea. Once the Code is agreed upon by the ASEAN members and China, consideration should be given to opening it for wider participation by the other States in the East Asian region as well as other user States, including the United States and Australia.

## V. Conclusion

As reminded recently by David Griffiths, the tactical-level interaction at sea between China and the United States is too vital and complex to be governed solely by legal arrangements and political postures, and it is too important to be conducted on-scene by best guesses about each other’s intentions.<sup>43</sup> The two States, therefore, should start exploring a new process for agreeing on robust confidence-building or cooperative measures dealing with practical military activities, particularly in the EEZs. The process could start with a bilateral approach. It should however not exclude the simultaneous efforts by the States interested in the East Asian Sea region to draft a new multilateral instrument of a practical nature. For both bilateral and multilateral approaches, there have already been several efforts made formally and informally from which to draw plenty of lessons, particularly those discussed above.

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<sup>40</sup> Raul Pedrozo, “Military Activities in and over the Exclusive Economic Zone”, in Nordquist, Koh and Moore, *supra* note 3, p. 246.

<sup>41</sup> Pedrozo, *supra* note 33, pp. 109-110

<sup>42</sup> *Ibid.*

<sup>43</sup> Griffiths, *supra* note 36, p. 1.