



Understanding the Freedom of Navigation Doctrine and China-US Relations in the South China Sea

Legal Concepts, Practice, and Policy Implication

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Executive Summary

The South China Sea has evolved from a territorial and maritime dispute between China (including Taiwan) and the other four claimant states, to a show of force primarily featuring the United States, as a strong maritime power and a user State of the South China Sea, and China, as a growing regional maritime power struggling to pursue its maritime interests as a coastal State. China and the United States, both having legitimate interests in the South China Sea, have divergent views on several issues: freedom of navigation, state practice of international law, and approaches to maritime dispute management and etc.

The patrols performed by the US navy vessels Lassen, Curtis Wilbur, and William P. Lawrence stem from the US policy of asserting freedom of navigation in the South China Sea. Both China and the United States view freedom of navigation as vital to their national interests, but differ in defining the proper exercise of that freedom in at least two ways. First, they disagree on whether certain types of military activities in coastal States' Exclusive Economic Zones (EEZs) fall within the scope of freedom of navigation. The categories of military activities which have proven controversial include those that will potentially impact the marine environment and those which could be categorized as marine scientific research and require prior permission from coastal States. Second, while China and the United States do not contest the existence of a right of 'innocent passage' in territorial seas under the 1982 United Nations Conventions on the Law of the Sea (UNCLOS), they differ on the specific rights of 'warships.' The United States believes that warships enjoy the same right to innocent passage as commercial vessels, while China mandates in its domestic law that flag states of warships exercising innocent passage must obtain prior permission from coastal States.

This report outlines the perspectives of the US and China in the South China Sea dispute including their divergent legal interpretation on navigation regime associated with the concept of freedom of navigation, and discusses the relationship between military activity and freedom of navigation. The debate on the legitimacy of military activities in a foreign country's EEZ reflects the competing interests of two groups, the user States and the coastal States inspired by the doctrine of *Mare Liberum* and *Mare Clausum* respectively. The report looks into the role of the third party compulsory dispute settlement mechanism of UNCLOS in addressing these divergences. The report also discusses the efforts in bridging the conceptual and perception gap from both the academic and policy perspectives.

Despite the divergent legal interpretations and perception gap, the United States and China have shown the political willingness to keep the South China Sea dispute under control and to enhance maritime cooperation. Whether this balance might continue during the Trump administration is not yet clear. Both the United

States and China should endeavor to avoid escalation stemming from confrontations or tensions triggered by frequent US freedom of navigation operations or the Chinese construction of military facilities on the reclaimed features in the Spratly Islands. China and the United States share interests in maintaining peace and stability in this region and should further enhance maritime cooperation on nontraditional security.

Military Activities in EEZ = Freedom of Navigation?

The freedom of navigation existed across huge expanses of ocean space until the middle of the 20th century. At this time, states began to claim a greater number of rights over extended maritime zones in pursuit of their economic interests, which resulted in the creation of the Exclusive Economic Zone (EEZ) in UNCLOS.¹ One example was US President Truman's 1945 Proclamation on the Continental Shelf, in which the United States asserted exclusive sovereign rights over the resources, contributing to the creation of the regime of Continental Shelf in UNCLOS. The accumulation of Coastal States' rights over extended maritime areas had to be countered by the preexisting interests of third States to retain the freedoms of the high seas. A number of rules were adopted to balance the freedoms of navigation with the newly acquired rights of the coastal States. The means to resolve conflicts over these competing interests was an essential part of the overall regulation of these freedoms of the high seas in the EEZ and on the continental shelf.

A number of questions arise from the interpretation of the scope of freedom of navigation, especially under the EEZ regimes.

- **Does a state enjoy the same right of freedom of navigation in the EEZ of a foreign State as it does in the high sea?**
- **What kind of activities falls within the scope of freedom of navigation in the EEZ of a foreign coastal State?**

Military activities in the EEZ were a controversial issue during the negotiations of the text of UNCLOS and continue to be so in state practice.² Some coastal States such as Bangladesh, Brazil, Cape Verde, Malaysia, Pakistan and Uruguay contend that other states cannot carry out military exercises or maneuvers in or over their EEZ without their consent. Their concern is that such uninvited military activities could threaten their national security or undermine their resource sovereignty.³ Many developing coastal countries contend that such activities are detrimental to their national security and therefore are not within the meaning of peaceful uses of the sea also stipulated by UNCLOS. They argue that those activities clearly intended for military purposes are already non-peaceful and cannot be undertaken. Some states, including those in the Asia-Pacific region, have formulated unilateral legislation prohibiting or restricting intelligence gathering and military activities, including military exercises, of foreign naval and air forces in and above their EEZ. On the other hand, other states advance a different interpretation. Indeed, some maritime powers, such as the United States, insist on the freedom of military activities in the EEZ out of concern that their naval and air access and mobility could be severely restricted by the global EEZ enclosure movement. Those activities are within the meaning and the exercise of the freedom of the sea, particularly the freedom of navigation

and overflight, which are explicitly recognized in UNCLOS.

What is EEZ?

Adopted at the Third United Nations Conference on the Law of the Sea (1982), the **Exclusive Economic Zone (EEZ)** is defined as an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

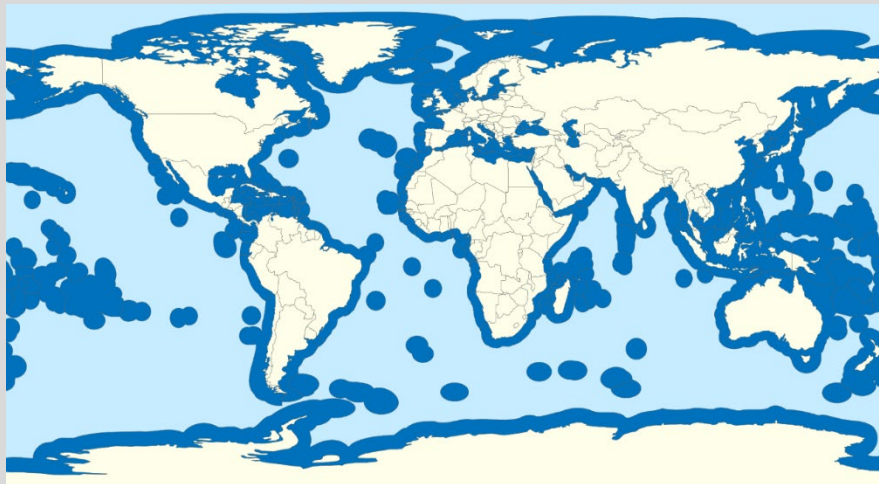


Figure 1. EEZs of the World⁴

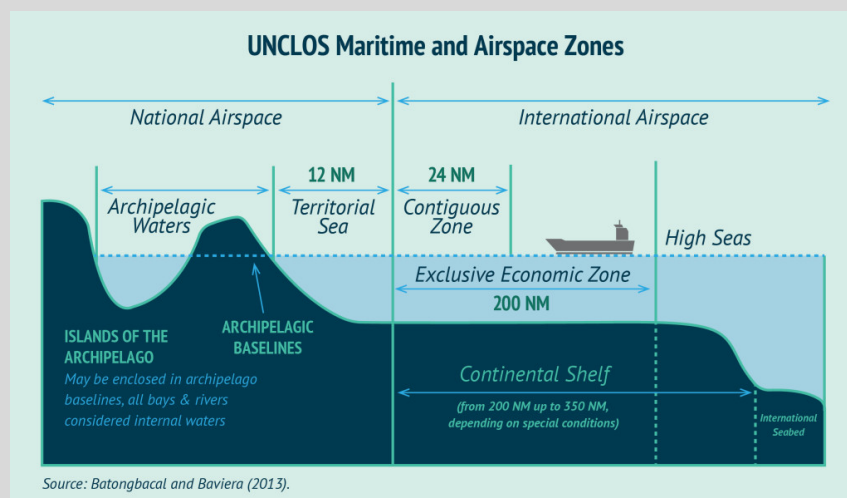


Figure 2. An Illustrated Explanation of Key UNCLOS Terms⁵

As technology advances, misunderstandings regarding military activities, such as intelligence gathering in foreign EEZs are bound to increase. Military activities by foreign nations in or over others' EEZs are becoming more frequent due to the rise in the size and quality of the navies of many nations, and technological advances that allow navies to better utilize oceanic areas. At the same time, coastal States are placing increasing importance on control of their EEZs. Of the 1700 warships expected to be built during the next few years, a majority will be smaller, coastal patrol vessels and corvettes, suggesting even further coastal State emphasis on control of their EEZs.

The ambiguity and controversy regarding the legitimacy of activities in a foreign country's EEZ includes various activities with military nature, such as intelligence gathering activities, hydrographic surveys, marine scientific research, military surveys, and military maneuvers.

Intelligence Gathering Activities

Traditionally, intelligence gathering activities have been regarded as part of the exercise of freedom of the high seas and therefore, through Article 58 (1), lawful in the EEZ as well. All major maritime powers have been routinely conducting such activities without protest from the coastal State concerned, unless they became excessively provocative. The US Navy expressly takes the view that such activities are part of high seas freedoms.⁶ However, this position appears to be facing increasingly serious challenges as new, highly intrusive intelligence gathering systems are being developed and employed by several military powers. Of particular concern are the increasing Electronic Weapons (EW) capabilities and the widespread moves to develop information warfare (IW) capabilities.⁷ Airborne Signals Intelligence (SIGINT) missions are often provocative as visible efforts to penetrate the electronic secrets of the targeted country. Indeed, important aspects of regional SIGINT and EW capabilities may invite attack, and thus encourage pre-emption.

Intelligence gathering activities in EEZs are likely to become more controversial and more dangerous.⁸ In Asia, this disturbing prospect reflects the increasing and changing demands for technical intelligence; robust weapons acquisition programs, especially increasing electronic warfare capabilities; and widespread development of information warfare capabilities. Further, the scale and scope of maritime and airborne intelligence collection activities are likely to expand rapidly over the next decade to a level unprecedented in peacetime.⁹ They will not only become more intensive, but also generally be more intrusive. They will generate tensions and more frequent crises; they will produce defensive reactions and escalatory dynamics, and ultimately lead to less stability in the most affected regions, especially in Asia.¹⁰

There also continues to be disagreement on whether some military intelligence gathering activities are scientific research and should be under a consent regime.¹¹ The United States and other maritime powers argue that hydrographic and 'military' surveys are distinct from marine scientific research and are, therefore, not restricted by the consent provisions of UNCLOS. Other states argue that such surveys are a form of scientific research, or that they threaten the security of the state and should not be allowed in the EEZ without the coastal State's consent. Indeed, some states have enacted national laws to this effect.¹² Also, some argue that because of the peaceful purposes provisions of UNCLOS, some other military activities

may not be permitted in the EEZ, such as the implanting of devices which are capable of rendering ineffective the defense of the coastal state.

Can these new activities be categorized “other internationally lawful uses of the sea” related to the freedom of navigation and overflight? It appears that provisions of the UNCLOS are not adequate to regulate the use of these new EW and IW technologies by military vessels and aircraft. Thus, as Hayashi contends, it would be highly desirable for the question to be studied in depth with the goal of common understanding or agreement before serious incidents occur.¹³

Hydrographic Survey/Marine Scientific Research/Military Survey

Marine scientific research, hydrographic surveying and military surveys all overlap to some extent. Some military surveys, particularly military oceanographic research, are virtually the same as marine scientific research, but a lot of military surveying is not, particularly that which constitutes intelligence collection and has no economic value. Some forms of military acoustic research may also have no commercial or economic value. Hydrographic surveying may be conducted both for civil and military purposes but the nature of the activity will be essentially the same regardless of the actual purpose of the surveys.

Key Terms Defined¹⁴

Hydrographic Survey: Hydrography is the branch of applied science, which deals with the measurement, and description of the physical features of the navigable portion of the earth's surface [seas] and adjoining coastal areas, with special reference to their use for the purpose of navigation. Hydrographic surveying “looks” into the ocean to see what the seafloor looks like.

Marine Scientific Research (MSR): (a) any study or investigation of the marine environment and experiments related thereto; (b) MSR is of such a nature as to preclude any clear or precise distinction between pure scientific research and industrial or other research conducted with a view to commercial exploitation or military use (definition from Third UNCLOS in 1973).

Military Survey: Part of military surveying consists of military oceanographic research, which is virtually the same as MSR. However, military surveys also include intelligence collection, which is not part of MSR.

Sam Bateman tries to make a distinction between hydrographic surveying and marine scientific research, particularly whether a State might undertake hydrographic surveys without the prior authorization of the coastal State.¹⁵ The controversy regarding the conduct of hydrographic surveys in an EEZ (and other types of “surveys” that are not resource related such as “military surveys”) was succinctly summed up in

memorandum No. 6 issued by the Council for Security cooperation in the Asia Pacific (CSCAP) on the Practice of the Law of the Sea in the Asia Pacific as follows:

“Different opinions exist as to whether coastal State jurisdiction extends to activities in the EEZ such as hydrographic surveying and collection of other marine environmental data that is not resource-related or is not done for scientific purposes. While UNCLOS has established a clear regime for marine scientific research, there is no specific provision in UNCLOS for hydrographic surveying. Some coastal States require consent with respect to hydrographic surveys conducted in their EEZ by other States while it is the opinion of other States that hydrographic surveys can be conducted freely in the EEZ”.

Hydrographic data now has much wider application than just for the safety of navigation. It has many uses associated with the rights and duties of a coastal State in its EEZ. Trends over the years with technology and the greater need for hydrographic data have brought hydrographic surveying and marine scientific research closer together and similar considerations would now seem to apply to the conduct of hydrographic surveying in the EEZ as well as apply to the conduct of marine scientific research in that zone.

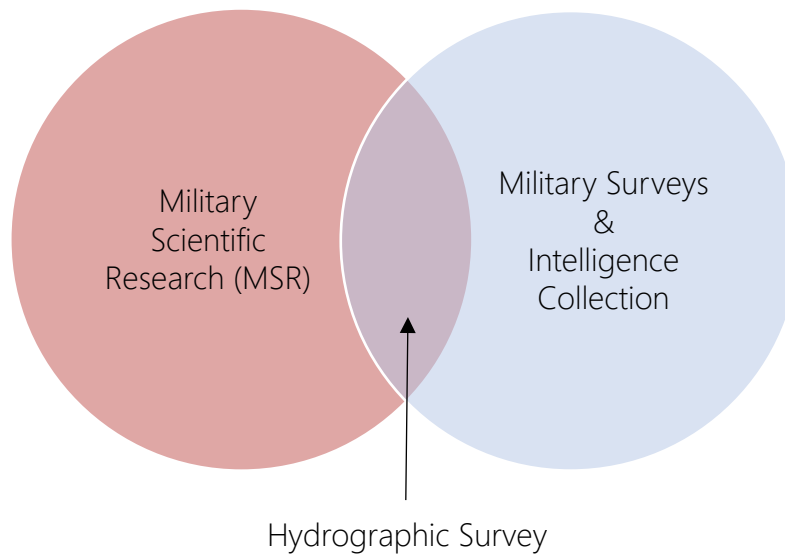


Figure 3: Marine Scientific Research, Military Surveys and Hydrographic Surveying

The United States regards military surveying as similar to hydrographic surveying and thus as part of the high seas freedoms of navigation and overflight and other international lawful uses of the sea related to those freedoms, and conducted with due regard to the rights and duties of the coastal State.¹⁶ The position of the United States is that while coastal State consent must be obtained in order to conduct marine scientific research in its EEZ, the coastal State cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities.¹⁷ Similarly, the United Kingdom regards military data gathering (MDG) as a fundamental high seas freedom available in the EEZ.¹⁸ Other

states, including China, have specifically claimed that hydrographic surveys can only be conducted in their EEZs with their consent.¹⁹

A most serious challenge to the exemption of hydrographic and military surveys came from China, which reportedly enacted a law in December 2002, elaborating on its 1998 law on the EEZ, stating that any “survey or mapping activities” cannot involve State secrets or hurt the State, and that all such surveys must have prior permission.²⁰ Earlier in September 2002, China reportedly lodged protests with the US Government, charging that the USNS Bowditch had conducted monitoring and reconnaissance activities without its approval in its EEZ. The vessel, according to press reports, was engaged in hydrographic surveys some 60 miles off the Chinese coast, and was buzzed by Chinese patrol planes and received threats to leave the area.²¹ China appears to believe that “military hydrographic survey” activities in the EEZ are, in a military sense, a type of battlefield preparation and thus a threat of force against the coastal State, consequently violating the principle of peaceful use of the sea.²² Further clarification is needed as to the exact contents of the law and the intention of related pronouncements before making any judgment. But if the law requires all hydrographic surveys in its EEZ to obtain prior permission, it is clearly contrary to the strongly held position of the US, and could become a source of serious tension in the future.

Military Maneuvers

Traditionally, the freedom of the high seas included the use of the high seas for military maneuvers or exercises, including the use of weapons. This freedom has been incorporated in UNCLOS, and it has been generally believed, particularly by maritime States, that this applies also to the EEZ. However, upon signing or ratifying UNCLOS, several States, including Bangladesh, Brazil, Cape Verde, Pakistan, Malaysia and Uruguay, declared that such kind of military activities are not permitted in the EEZ without the consent of the coastal State.²³ Sharply opposing declarations have been filed by Germany, Italy, the Netherlands and the United Kingdom.²⁴ The US has also taken the position that “military activities, such as... launching and landing of aircraft, ...exercises, operations...[in the EEZ] are recognized historic high seas uses that are

...the problem of the legality of military maneuvers and ballistic exercises which temporarily prevent other States from using a vast area of the high seas remains unresolved.

preserved by Article 58.”²⁵ The US takes the view that the high seas freedoms include “task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities and ordnance testing and firing,” and that “existence of the EEZ in an area of naval operations need not, of itself, be of operational concern to the naval commander.”²⁶

Vukas says that the problem of the legality of military maneuvers and ballistic exercises which temporarily prevent other States from using a vast area of the high seas remains unresolved.²⁷ While a simple naval maneuver can be considered to be associated with the freedom of navigation, Scovazzi argues that it would be more difficult to sustain that an extended test of weapons, such as launching torpedoes and firing artillery or the covert laying of arms within an EEZ, are to be included among the uses associated with the operation

of ships, aircraft and submarine cable.²⁸ Churchill and Lowe point out that it is not clear whether such activities as naval exercises involving weapons testing are included within the freedom of navigation and overflight and other internationally lawful uses of the sea related to them.²⁹ Lowe has also contended that there are plausible arguments for the reference of a dispute over the legality of naval maneuvers and exercise to Article 59 on residual rights.³⁰

It must be concluded from the foregoing that State practice and commentators are divided on whether military maneuvers, and particularly those involving use of weapons, in the EEZ of a foreign State without its consent are internationally lawful uses of the sea. Commentators tend to argue that naval exercises of reasonable scale without the use of weapons are permitted.

Dispute Settlement on Military Activities Under UNCLOS

The debate on the legitimacy of military activities in a foreign country's EEZ involves not only the United States and China. It reflects the competing interests of two groups, the user states and the coastal States inspired by the doctrine of *Mare Liberum* and *Mare Clausum* respectively. **The question is whether the third-party dispute settlement mechanism of UNCLOS could solve the problem should the countries fail to address their difference.**

The UNCLOS is praised as one of the most important constitutive instruments in international law, not only because of its contribution in regulating resources management, but also because of its mandatory dispute settlement system. However, the highly political nature of naval activities on the high seas has typically led to a marginalized role of courts and tribunals in the legal regulation of military uses of the ocean.³¹ Article 298 1 (b) provides the States the right to exclude 'military activities' from compulsory dispute settlement. The minimal substantive regulations along with an optional exclusion covering military activities on the high seas and in the EEZ are indicative of a preference on the part of States not to use compulsory third-

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party procedures for resolving disputes about military activities. The optional exclusion is beneficial to naval powers, such as the United States as a user state, not wishing to have their military activities questioned through an international process. The exclusion satisfies "the preoccupation of the naval advisors...that activities by naval vessels should not be subject to judicial

proceedings in which some military secrets might have to be disclosed."³² An optional exclusion is also beneficial to coastal states, such as China, that could use the exception to prevent review of any of their interference with naval exercises in their EEZ.

The categories of military activities which have proven controversial include those potentially having an impact on the marine environment and those which could be categorized as marine scientific research and require prior permission from coastal States. The majority of marine scientific research disputes will be referred to mandatory dispute settlement system as a means of controlling coastal State authority over this inclusive use of the oceans. Disputes concerning marine scientific research were subject to compulsory dispute settlement entailing binding decisions "when the coastal State had allegedly acted in contravention of specified international standards or criteria for the conduct of marine scientific research which were applicable to the coastal State."³³ However, the potential utility of compulsory proceedings

entailing a binding decision for the majority of marine scientific research disputes may be lessened because of the minor nature of the violation versus the costs of international judicial or arbitral proceedings and because of the scope of the exceptions to mandatory jurisdiction.

Compulsory dispute settlement entailing binding decisions is not available with respect to research in the coastal State's EEZ or continental shelf in accordance with Article 246 or to decisions by a coastal State to order suspension or cessation of a research project.³⁴ The scope of these exceptions has a considerable impact on the conduct of marine scientific research in a large expanse of water and favors the coastal States over those States and international organizations conducting marine research. The substantive rules that would require the coastal State to grant consent under normal circumstances for marine scientific research projects in the EEZ delayed or denied unreasonably provide the researching State with some leverage over the coastal State.³⁵

On the other hand, when considering the range of difficulties that researching States and organizations may face in their research efforts, it may well seem that mandatory dispute settlement has a vital role to play in ensuring the proper interpretation and application of the substantive rules of UNCLOS. For example, **compulsory dispute settlement could be used to keep the power of coastal States over research activities in check, maintaining an international standard.** Birnie argues that third-party interpretation is also necessary since many of the terms used are either ambiguous or opaque as a result of the political compromises necessary to achieve consensus.³⁶ The existence of possible third-party intervention may persuade coastal State to adhere to the standards in the Convention. Certainly without external avenues of review, coastal States have less incentive to adhere to the conditions of the Convention when violations may enable them to acquire additional knowledge from the research projects.

Another controversial legal concept existing between user States and coastal States is about the right of warship. While China and the United States do not contest the existence of a right of

The United States believes that warships enjoy the same right to innocent passage as commercial vessels, while China mandates in its domestic law that flag states of warships exercising innocent passage must obtain prior permission from coastal States.

‘innocent passage’ in territorial seas under the UNCLOS, they differ on the specific rights of ‘warships.’ The United States believes that warships enjoy the same right to innocent passage as commercial vessels, while China mandates in its domestic law that flag states of warships exercising innocent passage must obtain prior permission from coastal States. Article 30 of UNCLOS stipulates that a coastal State may require a foreign warship to leave its territorial sea immediately if the ship does not comply with the laws and regulations of the coastal State. Coastal States have attempted to subject military vessels to further regulation by requiring either prior authorizations or prior notification before the exercise of the right of innocent passage.

Articles 95 and 96 of UNCLOS provide for the complete immunity of warships as well as ships owned or operated by a State and used only on government non-commercial service on the high seas. Immunity is also accorded to these vessels in the territorial sea of a state, subject to certain rules relating to innocent passage.³⁷ Any claims brought before the national courts of States, other than the relevant flag State, can be excluded from national jurisdiction on the basis of sovereign immunity. Reference to sovereign immunity was not included in Article 298, as it was considered inappropriate — and would be anomalous — for international courts and tribunals that hear disputes between sovereign States.³⁸

Clash of Freedom of Navigation and Coastal States' Interests in the SCS

The US has a strong interest in and is actively involved in East Asia — specifically in the SCS dispute. Skeptics have traditionally asked an important question: Why should the US care about a dispute among Asian countries in a region so far from the United States when there are far more pressing US foreign policy considerations? There are many elements to this concern, one of which is freedom of navigation. The United States' Freedom of Navigation Program challenges territorial claims on the world's oceans and airspace that are considered excessive by the United States, using diplomatic protests and/or by operational activities.³⁹

The US government has repeatedly defined freedom of international navigation as one key aspect of its security concerns. For the US government, such freedom also includes that for the warships of the US navy. Given the history of US military involvement in East Asia, US demands for innocent passage (i.e. without having to inform the governments of countries immediately bordering the ocean) of its warships is usually used as an assurance that none of the Asian governments can have the right to demand it.⁴⁰ As such, the geography of the SCS area means that its legal ownership and the right to use it are open for contention by

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countries other than those that directly border the water areas. Outside powers such as the United States and Japan are equally important actors in the dispute due to their identification of possible threats to their commercial and military interests. The US holds that China's excessive maritime claims in the SCS are adversely affecting freedom of navigation and regional stability in Southeast Asia, while China argues that

freedom of navigation is never a problem in that region. A case study is selected as follows, among many similar to it, to show the trend of conflicting interests of maritime powers and coastal States regarding the freedom of navigation.⁴¹

On Sunday 1 April 2001, a US Navy EP-3 surveillance plane collided with a Chinese F-8 fighter jet in the airspace above China's claimed 200 nautical miles Exclusive EEZ. The accident resurrected arguments concerning, *inter alia*, state interpretation of Article 58 of UNCLOS, and more specifically, whether the distinct legal regime created by the establishment of an EEZ has imposed limitations on 'pre-existing rights' on the high seas.

The Hainan Incident: Debate between China and the US

The Chinese View

First, the US military surveillance plane violated the principle of 'free over-flight' according to international law,⁴² because the collision occurred in airspace near China's coastal waters, and within China's EEZ. According to article 58 (1) of UNCLOS all states enjoy freedom of over-flight within this zone. However, at the same time, article 58 (3) stipulates that 'States shall have due regard to the rights and duties of the coastal States'. The Chinese view was that the flight 'posed a threat to the national security of China', and that such flights went far beyond the scope of 'over-flight' and abused the principle of over-flight freedom.⁴³

Secondly, it was illegal for the US military plane to enter China's territorial airspace and land at a Chinese airport without approval. The US plane's action constituted an infringement upon China's sovereignty and territorial space.

Thirdly, according to Chinese domestic laws and international laws, China had the right to investigate the root cause of the incident, and the plane itself.⁴⁴

The American View

First, the US was engaging in traditional military activities over international seas, which are legally permissible, and was conducted with due regard to China's rights and duties as a coastal State.

Secondly, the EP-3 made an emergency landing following the collision and was the sovereign property of the United States. It should therefore not have been boarded or examined in any way.

Thirdly, maritime law dating back hundreds of years had established a precedent of 'safe harbor' for military vessels and their crews, in distress. Therefore, entering into Chinese airspace was not illegal,⁴⁵ and the crew should have been returned to the US without any delay.

It is almost impossible to draw any conclusion from the widely differing accounts of the collision.⁴⁶ Both states alleged that the accident resulted from the dangerous maneuvers of the other states pilot. The only

fact on which both states agreed was that the collision occurred over the SCS, approximately 70 nautical miles from Hainan, in the airspace over China's EEZ. Whilst the US has officially complained to China, prior to this collision, about the 'aggressive actions' of Chinese jets when intercepting US surveillance planes,⁴⁷ the Chinese have also complained to the US about the presence, and increased frequency, of US surveillance flights over China's EEZ.⁴⁸

The validity of the legal arguments forwarded by both the US and China rest in part on their different interpretations of Article 58 of UNCLOS. Article 58 provides that within the EEZ:

Article 58

Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, 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.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

The phrase 'other internationally lawful uses', and the incorporation of High Sea 'rights' contained in articles 88-115, were considered by the major maritime powers, including the US, as a safeguard of the 'pre-existing rights' on the high seas with regard to military operations involving ships and aircraft within the EEZ.⁴⁹

However, the 'freedoms referred to in Article 87 which regulate the freedom of the high seas, are subject to the restriction of 'being compatible with other parts of this convention.'⁵⁰ Thus the rights of 'freedom of over-flight' and 'freedom of navigation' are subject to 'being compatible' with Article 88, which limits the use of the high seas to 'peaceful purposes,' and article 301 which reads:

Article 301

Peaceful uses of the seas

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.

The issue is further complicated by the lack of consensus as to what constitutes ‘peaceful purposes.’⁵¹ In addition, Article 58 (3) provides that in exercising their rights and performing their duties in the EEZ, “states shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State” in accordance with the convention provisions and other rules of international law, in so far as they are not incompatible with Part V (on the EEZ). The Chinese argument is that US surveillance activities are not considered to be of peaceful purpose. Such activities do not accord ‘due regard to the rights and duties of the coastal State’ in that they threaten the security of China. Their argument is supported, in part, by declarations made by a number of states to the effect that provisions of the Convention do not authorize other states to conduct military exercises or maneuvers within the EEZ, without the consent of the coastal State.⁵²

In turn, under Article 56 (2), the coastal State is required to have due regard to the rights and duties of other states in exercising its rights and performing its duties in the EEZ. Churchill and Lowe have stated that the effect of these declarations, if adopted, would be to ‘close off enormous areas of the seas for such routine military activities.’⁵³ This attempt to balance rights and interests of states is restated in Article 59 of UNCLOS.⁵⁴

“In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interest of the coastal State and any other State or States, the conflict 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”.

But UNCLOS gives no clear guidance either as to the meaning of ‘due regard’ or what constitutes ‘equity’, other than ‘relevant circumstances’, and the respective importance of the interests involved to the parties as well as the international community as a whole. Thus, there are no specific criteria except, perhaps, that the activity should not interfere with the ‘rights and interest’ of the states concerned. There is no agreement on what constitutes such rights and interests, nor is there agreement as to whether the interference must be unreasonable or not, and whether it could be or must be actual or potential.

The different views have already resulted in several incidents in the EEZs of the Asia-Pacific region. Major incidents include the March 2001 confrontation between the US Navy survey vessel Bowditch and a Chinese frigate in China's EEZ; the April 2001 collision between a US EP3 surveillance plane and a Chinese jet fighter over China's EEZ; the December 2001 Japanese Coast Guard pursuit of and firing at a North Korean spy vessel in its and China's EEZ; the clash between Chinese vessels and a US ocean surveillance ship in China's EEZ in 2009; and Vietnam's protest against Chinese live fire exercises in Vietnam's claimed EEZ in 2015.

Efforts to Bridge the Conceptual and Perception Gap

The Ocean Policy Research Institute (formerly Ocean Policy Research Foundation) organized a series of international conferences titled “Regime of the Exclusive Economic Zone – Issues and Responses” from 2003 to 2005 inviting experts to establish a framework on navigation and overflight in the Exclusive Economic Zone. At the final conference, participants adopted a proposal titled *Guidelines for Navigation and Overflight in the Exclusive Economic Zone* (Guidelines). However, the participants did not reach consensus that the Guidelines should be sent to the policymakers of the countries involved for their consideration. Given that seven years have elapsed since the Guidelines were published and the security environment of the seas in East Asia has drastically changed, OPRF organized a two-year study project for reviewing the Guidelines that was conducted between 2012 and 2013. As the result, *the Principles for Building Confidence and Security in the Exclusive Economic Zones of the ASIA-PACIFIC* was drawn up by the participants of the project.

During the workshop on “EEZ: Challenges and Issues”,⁵⁵ there was an agreement that **the exercise of the freedom of navigation and over flight in and above EEZs should not interfere with or undermine the rights or ability of the coastal State to protect and manage its own resources and its environment.**⁵⁶

There was also agreement that activities for the purpose of marine scientific research should not occur without the consent of the coastal State. However, there is still disagreement regarding the different interpretations of the relevant UNCLOS provisions, the means of attempting to resolve the disagreements, and even whether or not there is a need to resolve such disagreements.

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The disagreements relating to the interpretations of UNCLOS provisions generally relate to the exact presumed meaning of the terms in the convention, as well as the meaning of specific articles. For example, there are specific differences with regard to the meaning of ‘freedom’ of navigation and overflight in and above the EEZ, i.e., whether such freedoms can be limited by certain regulations — national, regional or international — or whether such freedoms are absolute.

There are also different interpretations regarding the precise meaning of UNCLOS’s phrase that allows ‘other internationally lawful uses’ of the sea in the EEZ. For example, some argue that it clearly does not include warfare in the EEZ of a non-belligerent, while others would insist that under circumstances such

as self-defense, such activities are allowed. The interpretation of this phrase will in turn be affected by the interpretation of such terms as ‘due regard’, ‘non-abuse of rights’, ‘peaceful use’, ‘peaceful purpose’, and the obligation not to threaten or use force against other countries. In this context, questions arise as to whether some military and intelligence gathering activities are lawful exercises of the freedom of navigation and overflight, whether they are a non-abuse of rights, whether they pay ‘due regard’ to the interests of the coastal countries, and whether they are a threat to peace and security as well as the interests of the coastal countries.

What is clear is that it is no longer accurate to say that the freedom of navigation exists in the EEZs of other countries to the same extent that it exists on the high seas.⁵⁷ Coastal States have acted to control such navigation to protect their coastal living resources, to guard against marine pollution, and to protect the security of coastal populations, and it can be anticipated that such assertions of coastal State control will continue. In many cases, these claims have been approved by the IMO and by other regional and global organizations. As [Van Dyke](#) claimed, the balance between navigation and other national interests continues to develop, and navigational freedoms appear to be disappearing during this evolutionary process,⁵⁸ at least in the EEZ.

The author interviewed a few scholars and government officials from China and the United States on the issue of whether the third party forum of UNCLOS plays an important role in addressing the clash between freedom of navigation and coastal States’ interests. Wu Shicun, a leading Chinese scholar on the SCS studies, denies the role of third party mechanism in helping solve the Sino-US conflict in China’s EEZ, such as the cases discussed above.⁵⁹ Likewise, Ramses Amer points out that major powers, in particular the US do not want any third party to interfere its security policies. The US wants the freedom to go everywhere with its military fleet while China is very keen to uphold its claims in the SCS.⁶⁰ Wu Jilu, an official from the State Ocean Administration of China insists that any military activities relating to military investigation, military survey, and military information gathering fall into the category of ocean scientific research which requires prior permission from the coastal States. However, he also points out that China should also consider the necessity in the future of conducting surveys in foreign states’ EEZ in the future. He suggests that the government and armed forces from China and the United States should learn from the US-Russia Agreement and enhance exchange and cooperation. Consequently, incidents do occur between the two actors. John Moore, likewise also points out the fact that China, as a growing maritime power, will likely be faced with the same dilemma as the United States of balancing freedom of navigation and its security interests in the future is growing into a maritime power in the future.⁶¹

The number of high-level meetings and mutual visits between the two militaries has increased notably in order to implement the important consensus reached by Chinese President Xi Jinping and the former US President Obama that the Asia-Pacific region should be a cooperative arena for China and the US to strengthen coordination and cooperation instead of one for conflict. In recent years, China’s Ministry of National Defense and the US Department of Defense have held several rounds of consultations on the establishment of a notification mechanism for major military activities and *Rules of Behavior for the Safety of Air and Maritime Encounters* in order to manage differences over sensitive issues in a constructive way. China’s Ministry of National Defense and the US Department of Defense formally signed the newly added annexes, i.e. “Military Crisis Notification” attached to the notification mechanism for major military activities and “Air Encounters” attached to *Rules of Behavior for the Safety of Air and Maritime Encounters* in 2015. The two sides agreed to continue consultation on the other annexes to notification mechanism for

major military activities. This was an important step to better understand each other's strategic intentions, promote strategy mutual trust, manage crisis and prevent risks.

In addition to bilateral approaches, the two militaries have also worked closely under the framework of the Asia-Pacific multilateral security dialogue mechanism. The two navies signed the Code of Unplanned Encounters at Sea (CUES) in 2014, which will reduce misunderstanding and miscalculation of military air and marine maneuvers of all countries in order to prevent air and marine accidents and secure regional stability. The two navies have conducted many exercise for implementing CUES since it was adopted.

Challenges in the South China Sea Under the Trump Administration

The December 2016 incident involving a US unmanned underwater vehicle (UUV) was neatly wrapped up on December 20 after China returned the vehicle. The legal debate that arose during this UUV incident focused on three aspects: the legitimacy of the Chinese action, whether the UUV enjoyed sovereign immunity, and the legal status of the location where it was seized. First of all, the Pentagon said that the UUV had been “unlawfully seized.” China defended its action as having been taken “in order to prevent the device from causing harm to the safety of navigation and personnel of passing vessels.” Second, the Pentagon stated, and James Kraska and Raul Pedrozo argued in depth, that the UUV is a “sovereign immune vessel of the US Navy, which was conducting routine operations in the international waters of the South China Sea.”⁶² The opposing argument pertains to the legal question of whether the “sovereign immunity” provided in Article 32 of the United Nations Convention on the Law of the Sea (UNCLOS) extends to drones or any other equipment deployed from state vessels.⁶³ Third, the location where China seized the UUV was referred to by the United States as “international waters,” in which it claims to enjoy unrestricted rights to exercise freedom of navigation. From the littoral states’ perspective, however, this location is within the exclusive economic zone (EEZ) of the Philippines, a maritime zone in which the scope of freedom of navigation does not necessarily equal the freedoms entitled in the High Sea authorities according to Article 87 of UNCLOS.

The two countries have carefully managed their differences in a way that reflects their respective national interests without triggering the nerves of the other.

The divergent legal interpretations of the UUV incident are only a small part of a much larger debate about the legitimacy of military activities in a foreign country’s EEZ, which is a long-standing legal question that has categorized China as a coastal State and the United States as a user state. The divergence includes interpretations of key UNCLOS concepts, including “freedom of navigation,” “innocent passage,” “peaceful use of the ocean,” and “due regard.” The two countries have carefully managed their differences in a way that reflects their respective national interests without triggering the nerves of the other. In 2016, the United States increased the frequency of its naval patrols in and outside the 12 nautical mile zones of the Spratly and Paracel Islands under the name of innocent passage and freedom of navigation, all without challenging China’s sovereignty claims. Compared with its strong reaction to the 2001 EP-3 incident and the 2009 Impeccable incident, during which a strong nationalism dominated public discourse, China reacted with low-profile official protests, without objecting to the doctrine of freedom of navigation itself. The behavior of the United States and China reflects the

political willingness of both countries to keep the South China Sea dispute under control and to enhance maritime cooperation despite these divergent views.

Whether this balance might continue during the Trump administration is not yet clear. During his confirmation hearing, Secretary of State Rex Tillerson took a tougher stance against China's presence in the South China Sea. He contested China's sovereignty claim in the South China Sea, saying China's "access to those islands is not going to be allowed."⁶⁴ Recently, however, he has reportedly pushed President Donald Trump to reaffirm the one-China policy after he had indicated that it should be reconsidered. Secretary of Defense James Mattis also seems to be eager to walk back the rhetoric a little, suggesting during his inaugural trip to Tokyo that there is "no need for dramatic US military moves in [the] South China Sea."⁶⁵ At the same time, however, Steve Bannon, the appointed senior counselor to the president, said "there is no doubt" that the United States is "going to war in the South China Sea in 5 to 10 years."⁶⁶ Sean Spicer, Trump's White House press secretary, claimed that "we're going to make sure that we defend international territories from being taken over by one country."⁶⁷ Notably, the words "freedom of navigation"—the linchpin of Obama-era declamations of US interests in the South China Sea—were not mentioned at the briefing. Whether this signaled a sharp departure in the US approach to handling China's territorial claims at sea remains to be seen. All these comments from key members of Trump's foreign policy team suggest an uncertain US policy in the South China Sea.

In addition to the uncertainty and unpredictability of the Trump administration's policy, the debate about the presence of the USCG in the South China Sea might be another point of friction between the United States and China. On November 29, 2016, Admiral Paul Zukunft, the USCG commandant, spoke at the Brookings Institution about sending USCG ships to the South China Sea to maintain regional order. From the US perspective, as USCG vice commandant Charles Michel has argued, there is reason to think that China might respond more positively to USCG white hulls than US Navy cruisers and destroyers, and that the coast guard can more easily maneuver the "narrow door of diplomacy."⁶⁸ However, the argument that the USCG should have a more visible presence in the South China Sea highlights a misunderstanding about coast guard roles and thereby risks increasing the chance of conflict with China and possibly other claimant states, especially Indonesia and Malaysia.

In addition, if the USCG's presence in the South China Sea aims, as the USCG commandant claimed, at working with coast guards of regional allies and partners to enforce those countries' laws, this is also legally problematic. This is a problem of international rather than domestic law; US experts have suggested in Track 2 settings that USCG activity in the South China Sea is not prohibited by domestic law, and in any case Congress would likely ratify this proposal if doing so would enhance the security of maritime trade routes. However, to conduct law-enforcement activities, such as boarding fishing boats on behalf of regional partners, the USCG would need the authority and jurisdiction to operate in relevant waters. This would likely be worked out through bilateral agreements with relevant countries, which would require recognition of those countries' territorial claims—something the United States has been unwilling to do so far. Likewise, even in uncontested waters that fall within the absolute sovereign control of a coastal State, critics of the USCG will argue that a foreign state's law-enforcement activities will impinge on the sovereignty and jurisdiction of the coastal States, which has been a long-standing concern for some countries in Southeast Asia. Strong opposition from Malaysia and Indonesia to the Regional Maritime Security Initiative proposed by Admiral Thomas Fargo, the former US Pacific Commander, is a typical example. Hence, it is very likely

that the USCG's contributions in Southeast Asian waters will be limited to capacity building, with no extensions into active law enforcement.

All these recent developments suggest that the competition between China and the United States will become a salient feature of the geopolitics of the South China Sea. One of the root causes is the structural contradiction between an established power and an emerging one, encompassing competition for geopolitical strategic advantage, sea power, and dominance over the international order in East Asia. This competition will continue to intensify as a result of China's rise and the United States' comprehensive strategic adjustment in the Asia-Pacific. Although the Trump administration has not yet clearly expressed its South China Sea policy, from the perspective of some Chinese analysts the United States has sent signals that it will bolster its military presence in the region. Even after Secretary Mattis softened his position, China does not seem to take this as persuasive due to the uncertainty inherent in Trump's Asia policy. *The Navy Times* reported on February 12 of 2017 that "the Navy is planning fresh challenges to China's claims in the South China Sea," which would be a clearer indication of the Trump administration's future policy direction than the statements currently offered by top officials.

Despite the above illustration of a worst-case scenario, we should not be too pessimistic about the future of the US-China relationship in the South China Sea. The UUV incident could not have been resolved in six days without the prior military trust-building efforts made by both countries. Both sides have learned from the 2001 EP-3 incident, the 2009 USNS Impeccable encounter, and the recent underwater drone incident how best to manage crises at sea. Current crisis-management mechanisms between the two countries—such as the memoranda of understanding (MOU) on "Notification of Major Military Activities" and "Rules of Behavior"—are playing a crucial role in dealing with emergencies and preventing the escalation of tensions arising from unplanned and unwanted incidents at sea or in the air.

China and the United States should seek to preserve good faith and a positive spirit in their military relations, despite the divergence in their legal views on maritime issues.

China and the United States should seek to preserve good faith and a positive spirit in their military relations, despite the divergence in their legal views on maritime issues. As far as the South China Sea dispute is concerned, they should maintain interactive military relations in order to guard against misjudgment, reduce confrontation, and manage and control crises. Both

countries should endeavor to avoid escalation stemming from confrontations or tensions triggered by frequent US freedom of navigation operations or the Chinese construction of military facilities on the reclaimed features in the Spratly Islands. China and the United States share interests in maintaining peace and stability in this region and further enhancing maritime cooperation on nontraditional security. The benefits of such efforts should not be underestimated. Both countries should remain calm, guard against misinterpretation, and expand channels for military exchange and communication. Both countries should also advance existing crisis-management mechanisms based on the principles of the US-China Military Maritime Consultative Agreement and the two MOUs signed in 2014 so that such mechanisms can play a greater role in the future.

In order to resolve this paradox, China and the United States have no choice but to engage each other and maintain regular consultations on how they can coexist with their respective core interests. After all, the Asia Pacific is big enough for both countries to share and exert their respective influence without constantly

being at each other's throats. While China's rise stands a good chance of triggering a regional power shift, the United States needs to acknowledge China's rise and its core interests. Similarly, China must respect the legitimate interests of the United States in the South China Sea, especially freedom of navigation in line with UNCLOS, which in any case is also in China's common interest. What would work practically in the favor of both countries is to explore the fields of developing maritime cooperation between China and the United States. Joint efforts in anti-piracy in the Gulf of Aden have provided one successful example.

Providing search and rescue at sea and humanitarian assistance would be areas for both countries to take a lead in this region with their naval capacity. It will be in China and the United States' interests to initiate a regional mechanism in line with the safety and security of navigation, e.g. an Incidents at Sea Agreement (INCSEA) or a Code for Unplanned Encounters at Sea (CUES) in this region.

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