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**No. 198**

**Exclusive Economic Zone (EEZ) regime in East Asian waters:  
Military and intelligence-gathering activities,  
Marine Scientific Research (MSR)  
and hydrographic surveys in an EEZ**

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## ABSTRACT

Military and intelligence-gathering activities, MSR and hydrographic surveys in an EEZ are problematic and controversial issues. There are at least two reasons for this situation. Firstly, the unresolved territorial and maritime boundary disputes mean that jurisdiction over an EEZ may be unclear. States may conduct all kinds of military operations and marine research in areas that might be claimed by other states. Secondly, some of the key terms and key expressions to define and regulate these activities under the United Nations Convention on the Law of the Sea (UNCLOS) are ambiguous. This creates opportunities for countries to interpret UNCLOS for their own interest. In the past few years, some actual incidents have shown conflicts of interest between different countries. This paper discusses the nature of these conflicts and the main concerns of the opposing parties.

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# **Exclusive Economic Zone (EEZ) regime in East Asian waters: Military and intelligence-gathering activities, Marine Scientific Research (MSR) and hydrographic surveys in an EEZ<sup>1</sup>**

## **Introduction**

Seventy-one per cent of the world is covered by water. Ironically, prior to 1982, a country was only allowed control over three nautical miles of territorial sea. Since 1982, however, the width of territorial sea had been extended to 12 nautical miles. However, this was not enough for coastal states that have just begun to realize the significance of fishery resources and natural resources under the sea. The 1982 UNCLOS established the EEZ as a relevant regime extending to a maximum of 200 nautical miles from territorial sea baselines.<sup>2</sup> This means that “added together with the territorial sea and the contiguous zone, the EEZ, if claimed by all eligible nations, will comprise about one-third of the world’s oceans”.<sup>3</sup> Despite this, more disputes have emerged with the implementation of the EEZ regime. Due to the accelerating pace of globalization, commercial trade has increased tremendously. Together with the expanded requirement of military modernization to defend national interests, the sea itself has become a more dynamic arena. Consequently, with regard to the East Asian waters, there are three general kinds of marine disputes that have served as obstacles in the implementation of the EEZ regime in this area.

First, countries are claiming more offshore territories and resources. This can be seen from the territorial disputes in the East China Sea and the South China Sea, where abundant natural resources have been discovered. Such disputes have escalated

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<sup>1</sup> This working paper was made possible by contributions from my colleagues and friends. I would like to express my heartfelt gratitude to LTC Joshua Ho How Hoang, Senior Fellow at the S. Rajaratnam School of International Studies (RSIS), who supported me throughout the process of writing this paper. I would also especially like to thank Dr. Sam Bateman, Senior Fellow and Advisor to the Maritime Security Programme, who greatly inspired me with his invaluable comments. My sincere appreciation also goes to the Acting Coordinator, Ms. Jane Chan Git Yin, and Mr. Zhang Hongzhou, the Research Analyst in the Maritime Security Programme, as well as Mr. Kelvin Wong Ka Weng, Associate Research Fellow in the Military Transformations Programme, for their kind encouragement and support during my research.

<sup>2</sup> The EEZ is a specific legal regime defined in UNCLOS, Part V. According to the provisions in the EEZ regime, the coastal State has certain sovereign rights over the resources of the EEZ. However, the EEZ is not a zone where the coastal State has sovereignty over it.

<sup>3</sup> Sam J. Tangredi, “The Future of Maritime Power”, edited by Andrew T. H. Tan, *The politics of maritime power: a survey*, Routledge, 2007, p. 127.

into confrontations between China and Japan in the East China Sea, and between China and some Southeast Asian countries in the South China Sea. Although some joint exploration programmes have been proposed, the disputes are far from being resolved, at least at the fundamental level.

Second, more conflicts have emerged over coastal jurisdiction and the implementation of the resulting EEZ regime, and from the exercise of the freedoms of navigation and overflight. As coastal states tend to be more concerned with their control of resources and their sovereign rights in accordance with their respective EEZs, more states have promulgated domestic laws to regulate the activities of foreign vessels in their EEZ. Therefore, some other countries, especially the United States, which “is the most adamant to defend the freedom of navigation due to its importance for military mobility”,<sup>4</sup> feel unhappy that their freedom is being restricted.

Third, with regard to military and intelligence-gathering activities, MSR and hydrographic surveys in an EEZ, the situation has been complicated even further. Though the Law of the Sea clearly confirms that MSR should be regulated under coastal states’ consent regime,<sup>5</sup> it does not provide any specific legal regimes for military activities and hydrographic surveys.<sup>6</sup> Worse still, the law itself does not define any of the key terms, even the term “MSR”, which gives room for countries to express their different understandings. Some coastal states insist that without their consent, other countries do not have any right to access their EEZs to conduct research. On the other hand, some countries distinguish their military-related activities and hydrographic surveys from MSR. While MSR is regulated by the conventions, they consider military-related activities and hydrographic surveys within the coastal states’ EEZs as legal and are part of their freedoms of navigation and overflight in an EEZ.

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<sup>4</sup> Zou Keyuan, “Navigation of foreign vessels within China’s jurisdictional waters”, *Maritime Policy & Management*, Volume 29, Issue 4, October 2002, pp. 351–374.

<sup>5</sup> See Article 246 (2) of UNCLOS, “Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State”.

<sup>6</sup> See “Council for Security Cooperation in the Asia-Pacific Memorandum 6: The practice of the law of the sea in the Asia-Pacific”, p. 3.

This paper will focus on the implementation of the EEZ regime in relation to the conduct of military and intelligence-gathering activities, MSR and hydrographic surveys in East Asian waters. In relation to this, the paper is structured as follows. First, a background on the military and intelligence-gathering activities, MSR and hydrographic surveys in an EEZ will be provided, with emphasis on the conflicts of interpretation. Second, the perspectives of the major countries in East Asia, especially the United States and China will be reviewed to analyse their positions with respect to these issues. Third, actual incidents related to the implementation of the EEZ regime in the East Asian region will be cited. In addition, analysis will be provided to explain the concerns of the different countries involved. Finally, a future-oriented conclusion will be presented.

## **Part I: Background of the military and intelligence-gathering activities, MSR, hydrographic surveys in the EEZ and the ambiguous expressions of the law**

### **1. Unclear EEZ boundaries in East Asia**

Article 55 of UNCLOS defines the EEZ as:

*“an area beyond and adjacent to the territorial sea, subject to the special 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”.*<sup>7</sup>

In Article 57, the EEZ coverage is clearly limited and “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”.<sup>8</sup> However, the seas of East Asia are so problematic that many countries have overlapping EEZs, which are caused in some instances by the use of excessive territorial sea straight baselines. Some EEZs are relatively confined but countries continue contending for authorities over broader areas of waters. As a result, more conflicts have emerged over the undefined EEZs. These troublesome areas have

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<sup>7</sup> The United Nations Convention on the Law of the Sea (UNCLOS), Article 55.

<sup>8</sup> The United Nations Convention on the Law of the Sea (UNCLOS), Article 57.

become the arenas of conflict where the disputing countries compete in undertaking military and intelligence-gathering activities, MSR and hydrographic surveys. This is very notable in the rising conflict between Sino-Japanese relations over the East China Sea.

## **2. Rights and duties of the coastal and other states**

According to Article 56, a coastal state has sovereign rights over resources and jurisdiction in respect to artificial islands; installations; MSR; and the preservation and protection of the marine environment.<sup>9</sup> This indicates that the coastal state has the right to conduct MSR and has jurisdiction over research by other countries that launch MSR within their respective EEZs.

According to Article 58 (1), other states have certain rights referred to as freedoms in Article 87 (high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines), and “other internationally lawful uses of the sea” related to those freedoms in this article.<sup>10</sup> However, it is very difficult to identify activities which are within freedoms of “other internationally lawful uses of the sea” and which are not. In reality, it is still not clear whether activities involving weapons are included within those freedoms as countries’ attitudes towards these activities conducted within a coastal state’s EEZ are divergent.<sup>11</sup>

With regard to their duties, Articles 56 and 58 state that both coastal states and other states shall have “due regard” to each other’s rights and duties. This means that the coastal states should not interfere with the freedom of other states’ navigation and overflight within their EEZs and other states should not hamper the rights and duties of the coastal state in their EEZs when exercising the freedom of navigation and overflight in and above EEZs.

However, the situation is more complicated than it seems, as conflicts emerged while coastal, as well as other states (especially the United States) express different

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<sup>9</sup> The United Nations Convention on the Law of the Sea (UNCLOS), Article 56.

<sup>10</sup> The United Nations Convention on the Law of the Sea (UNCLOS), Article 58 (1).

<sup>11</sup> R. R. Churchill and A. V. Lowe, *The law of the sea*, third edition, Manchester University Press, 1999, p. 427.

perspectives concerning the practice of the Law of the Sea with regard to military and intelligence-gathering activities, MSR and hydrographic surveys. These conflicts, especially those concerning military and intelligence-gathering activities and hydrographic surveys in an EEZ have remained and it is likely that these issues will not be resolved in the near future. “Part of the problem is that UNCLOS does not define key terms such as ‘military activity’, ‘MSR’ or ‘military survey’.”<sup>12</sup> Although UNCLOS has established a separate part to regulate MSR, we cannot find any definition about MSR. The definition of key terms is so essential that it determines whether these activities should be regulated by relevant provisions in UNCLOS as well as the scope of jurisdiction of coastal states and the freedom of other states. This opportunity has been seized by opposing parties who have different interpretations and contributed to the conflicts over activities such as military activities, military surveys, intelligence information collection, hydrographic surveys, etc.

The conflicts over hydrographic surveys have been revealed in the Council for Security Cooperation in the Asia-Pacific (CSCAP) Memorandum No. 6:

*“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 maritime 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.”*<sup>13</sup>

Similarly, conflicts over military-related activities have occurred between coastal states and other states. The United States and its supporters regard:

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<sup>12</sup> Sam Bateman, “Clashes at sea: When Chinese vessels harass U.S. ships”, 13 March 2009, RSIS Commentaries.

<sup>13</sup> “Council for Security Cooperation in the Asia-Pacific Memorandum 6: The practice of the law of the sea in the Asia-Pacific”, (Marine scientific research and hydrographic surveying), p. 3.



*“military surveying as similar to hydrographic surveying and thus part of the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms, and conducted with due regard to the rights and duties of the coastal State”.*<sup>14</sup>

Some coastal states such as Bangladesh, Brazil, Cape Verde, Malaysia, Pakistan and Uruguay persist that other states should not conduct military exercises in or over their EEZs without their consent. Their major concern is that these activities are prejudicial to their national security and will undermine their marine resource sovereignty rights. Faced with the military modernization requirement, more countries have developed advanced military forces. Coastal states that do not have such sophisticated weapons and technologies tend to be sensitive to such activities as manifested by the desire to control their EEZs through the frequent patrolling of their respective zones. Moreover, they also view these activities as not being peaceful use of the seas. However, the U.S.-led states contend that their freedom extends to the conduct of military activities and should not be hampered by the “global EEZ enclosure movement”.<sup>15</sup> Actual cases reveal that most of the time, coastal states have insisted that their sovereign rights have been hampered by the military activities or intelligence information-gathering activities carried out by the other states over their EEZs. On the other hand, the other parties argue that they are exercising their freedom of navigation and overflight. However, distinguishing the navigation and overflight freedoms from the military activities is a controversial issue. As such, the problems are far from being resolved.

Since a grey area has been caused by UNCLOS which has not mentioned military and intelligence-gathering activities and hydrographic surveys, there are discussions trying to clarify some controversial issues such as whether these activities should be governed by a consent regime and whether they are included within “other internationally lawful uses of the sea” since they are navigation-related. In order to facilitate the implementation of the EEZ regime in regional countries, the Ocean

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<sup>14</sup> Ibid, footnote, p. 3.

<sup>15</sup> Mark J. Valencia, “Introduction: military and intelligence-gathering activities in the exclusive economic zones: Consensus and disagreement II”, *Marine Policy* 29, Vol. 29, 2005, p. 98.

Policy Research Foundation in Tokyo published a text called “Guidelines for Navigation and Overflight in the Exclusive Economic Zone”. Though the text has no binding effect, it provides some principles which are aimed at creating some common understandings within this region. Referring to hydrographic surveys in the EEZs of coastal states, the text suggests that these activities should not be carried out without the consent of coastal states. As for military-related activities in the EEZs, the text proposes that the warships or aircraft that are going to undertake such activities should inform the coastal states in advance and if possible, invite observers from coastal states to witness their activities.<sup>16</sup> This means that military activities are not subjected to coastal states’ consent while consent for hydrographic surveys is required. The reason why the text considers hydrographic surveys and military activities differently has been explained by Sam Bateman, who pointed out that military activities have essentially been regarded as part of the high sea freedom of navigation and overflight in this text while hydrographic surveys are of economic value to coastal states which should be regulated more strictly.<sup>17</sup>

## **Part II: The perspectives of the major countries**

Though the Cold War has ended, other traditional and non-traditional security issues have been challenging humanity every day. The “global war on terror” now has become the lexicon for many countries to stretch their powers to a wider area of the world. Other troubling elements, such as smuggling, piracy and the proliferation of weapons of mass destruction, have emerged as well. All these security issues have to some extent justified navies’ presence and operations at sea. The United States, China, Japan, India, the United Kingdom and some other major countries have become more active in participating in military activities and intelligence research, MSR and hydrographic surveys. However, divergent positions exist between these countries

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<sup>16</sup> Ocean Policy Research Foundation of Japan, “Guidelines for navigation and overflight in the Exclusive Economic Zone”, 16 September 2005, available at: [http://www.sof.or.jp/en/report/pdf/200509\\_20051205\\_e.pdf](http://www.sof.or.jp/en/report/pdf/200509_20051205_e.pdf) (accessed 17 March 2010), pp. 8–10 and pp. 12–13.

<sup>17</sup> Sam Bateman, “Security and the Law of the Sea in East Asia: Navigation Regimes and Exclusive Economic Zones”, edited by David Freestone, Richard Barnes and David Ong, *The Law of the Sea: Progress and Prospects*, Oxford University Press, 2006, p. 385.

concerning all these activities within the EEZ waters. The major countries divided all concepts into three general categories of activities: military and intelligence-gathering activities, MSR and hydrographic surveys, albeit overlapping exists in their definitions. Based on these categories, attitudes are varied. Consequently, key issues are likely to be the causes of debates. One of these issues is the legality of conducting military and intelligence-gathering activities in or over other countries' EEZs without prior consent of the coastal states. In relation to this, whether these activities should require consent from coastal states is another key issue. The third issue is concerned with distinguishing military and intelligence-gathering activities and hydrographic surveys from MSR and the related corresponding restrictions by the UNCLOS consent regime. Below, two contrary perspectives are presented to highlight the rising conflicts over these issues.

### **The U.S. perspective**

As far as Asia-Pacific is concerned, all the countries are members of the 1982 UNCLOS, except for the United States, Thailand, Cambodia and North Korea. As the dominant sea power, the United States insists on its navigation and overflight freedom as well as unrestricted military activities and marine survey in other countries' EEZs. Its activities are not effectively restricted by UNCLOS. "However, some jurisdictional claims have tended to develop at variance with the provisions of the Treaty. Regardless of whether the United States ever ratifies the treaty, it argues that many of its provisions have already become customary international law."<sup>18</sup>

The United States insists upon at least two principles. First, military activities should be defined within navigation and overflight freedoms in an EEZ, and such freedoms should not be impeded by coastal states. Second, military activities and hydrographic surveys should be distinguished from MSR, thus they should not be regulated under the MSR consent regime.

With regard to the military and intelligence-gathering activities, the United States

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<sup>18</sup> Mark J. Valencia, Kazumine Akimoto, "Report of the Tokyo meeting and progress to date", *Marine Policy*, Vol. 29, Issue 2, 2005, p. 101.

insists on the mobility of its naval and air forces beyond its EEZ and continues to use the phrase “international waters”. The definition of “international waters” given by *The Commander’s Handbook on the Law of Naval Operation* is:

*“For operational purposes, international waters include all ocean areas not subject to the territorial sovereignty of any nation. All waters seaward of the territorial sea are international waters in which the high seas freedoms of navigation and overflight are preserved to the international community. International waters include contiguous zones, exclusive economic zones, and high seas.”*<sup>19</sup>

The position of the United States regarding military activities, hydrographic surveys and MSR within coastal states’ EEZs has been expressed overtly in its report to the Senate by the Committee on Foreign Relations of the United States on 19 December 2007, in which some recommendations and comments regarding the resolution of ratification of the UNCLOS have been expressed. Though according to Article 309 and Article 310 of the UNCLOS the understandings and statements within this report do not have any legal effect, they at least contribute to our knowledge about U.S. interpretation of some of the key concepts in UNCLOS, inter alia, “military activities” and “MSR”, which is of significance to our understanding of U.S. policy orientation. With respect to the freedoms of navigation and overflight within EEZ, the fourth understanding of this report essentially expresses its interpretation of “other internationally lawful uses of the sea related to these freedoms” in UNCLOS Article (1) as follows:

*“(A) All States enjoy high seas freedoms of navigation and overflight and all other internationally lawful uses of the sea related to these freedoms, including, inter alia, military activities, such as anchoring, launching and landing of aircraft and other military devices, launching and recovering water-borne craft, operating military*

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<sup>19</sup> U.S. Department of Navy, *The Commander’s Handbook on the Law of Naval Operations*, Edition July 2007, pp. 1–9.

*devices, intelligence collection, surveillance and reconnaissance activities, exercises, operations, and conducting military surveys; and (B) Coastal State actions pertaining to these freedoms and uses must be in accordance with the Convention.*”<sup>20</sup>

It implies that the United States considers the military activities as part of their navigation and overflight freedoms and such freedoms should not be obstructed by coastal states. This is one of the key differences between the United States and China in terms of the explanation of “other internationally lawful uses of the sea related to these freedoms” in Article 58 (1). The United States interprets them much more broadly and inclusively to its own favour, but China in a narrower and more exclusive way.

Further, in its fifth understanding, the United States asserts that

*“‘Marine scientific research’ does not include, inter alia—*

*(A) prospecting and exploration of natural resources; (B) hydrographic surveys; (C) military activities, including military surveys; (D) environmental monitoring and assessment pursuant to Section 4 of Part XII; or (E) activities related to submerged wrecks or objects of an archaeological and historical nature.*”<sup>21</sup>

In this statement, the United States distinguishes military activities and hydrographic surveys from MSR, intending to exempt their military activities and hydrographic surveys conducted within other states’ EEZs from coastal states’ jurisdiction.

This means, as the United States has asserted, that these activities are not related to resource exploration and do not need consent from the coastal states. In addition, the United States claims that the results of the military and hydrographic surveys would not necessarily be published or released like scientific research.<sup>22</sup>

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<sup>20</sup> “Convention on the Law of the Sea”, Report to the Senate by Mr. Biden, from the Committee on Foreign Relations, together with minority views, 110th Congress 1st Session, Exec. Rept. 110–9, 19 December 2007, pp. 20–21.

<sup>21</sup> Ibid, p. 21.

<sup>22</sup> Mark J. Valencia, Kazumine Akimoto, “Report of the Tokyo meeting and progress to date”, *Marine Policy*, Vol. 29, Issue 2, 2005, pp. 101–106.

## **The Chinese perspective**

China continues to argue that the freedoms of navigation and overflight in an EEZ should be qualified. It believes that the aforementioned activities are essentially forms of warfare, especially military-related activities which violate the “peaceful purpose” and threaten the coastal states’ security and their sovereign rights. Therefore, these should be strictly controlled by the coastal states.<sup>23</sup>

With regard to MSR, China’s principle is that these kinds of activities should be based on the respect for the sovereignty of the coastal states. Therefore, MSR should not be carried out without the prior consent or implied consent of the coastal states. As the largest developing country, China has contributed substantially to the regime of MSR in the 1982 UNCLOS through these formulations:

*“The coastal States should have ‘exclusive jurisdiction’ in regard to marine scientific activities in their economic zones and that express consent should be obtained for such activities.”*<sup>24</sup>

In addition, China considers that the research results should mutually benefit both parties; thus the coastal states should have equal rights to the results of a survey. Without the consent of the coastal states, such results cannot be published or released.

As to the hydrographic surveys, China and the other states “have specifically claimed that hydrographic surveys might only be conducted in their EEZs with their consent”.<sup>25</sup> On 29 August 2002, China revised its *Surveying and Mapping Law of the People’s Republic of China*, Article 2 which states that:

*“All surveying and mapping activities in the territorial air, land and waters of the People’s Republic of China, as well as other sea areas under its jurisdiction shall be conducted in*

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<sup>23</sup> Dr. Ren Xiaofeng, Senior Colonel Cheng Xizhong, “A Chinese Perspective”, *Marine Policy*, Vol. 29, Issue 2, 2005, pp. 139–146.

<sup>24</sup> Zou Keyuan, “Governing Marine Scientific Research in China”, *Ocean Development & International Law*, Vol. 34, Issue 1, 2003, p. 4.

<sup>25</sup> Sam Bateman, “Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research”, *Marine Policy*, 29, 2005, pp. 163–174.

*compliance with this Law.*<sup>26</sup>

By using the term “all surveying and mapping activities”, this law has explicitly applied its legal effect to hydrographic surveys. Further, Article 7 of this law asserts that:

*“Foreign organisations or individuals that wish to conduct surveying and mapping in the territorial air, land or waters, as well as other sea areas under the jurisdiction of the People’s Republic of China shall be subject to approval by the administrative department for surveying and mapping under the State Council and the competent department for surveying and mapping of the army, and they shall observe the provisions of relevant laws and administrative rules and regulations of the People’s Republic of China.”*<sup>27</sup>

Through this article, China established a consent regime over all of the surveying and mapping activities within its waters, and the term “other sea areas” implicitly means its inclusion of EEZ waters.

Furthermore, China’s EEZ and Continental Shelf Act of 1998 required foreign states to observe international law and the laws and regulations of the People’s Republic of China.<sup>28</sup> Although UNCLOS Article 58 (1) applies the high sea navigation and overflight freedoms to the EEZ, UNCLOS Article 58 (3) stresses that “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”.<sup>29</sup> Thus, China is concerned more about the Article 58 (3) of UNCLOS as limiting such freedoms and requires that the activities conducted within China’s EEZ by foreign countries should comply with China’s domestic law.

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<sup>26</sup> Surveying and Mapping Law of the People’s Republic of China, Article 2, available at: <http://en.sbsm.gov.cn/article/LawsandRules/Laws/200710/20071000003241.shtml> (accessed 20 November 2009).

<sup>27</sup> Ibid., Article 7.

<sup>28</sup> Article 11 of China’s Exclusive Economic Zone and Continental Shelf Act of 1998, available at: [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn\\_1998\\_eez\\_act.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf) (accessed 20 November 2009).

<sup>29</sup> *The United Nations Convention on the Law of the Sea* (UNCLOS), Article 58 (3).

Moreover, China has explicitly disagreed with the notion of “international waters”, which has been used by the United States. For the United States, it interprets the “international waters” as an area including the EEZs and high seas; whereas China considers the notion of “international waters” as a non-legal term as it is solely used by the United States rather than something to be addressed by the UNCLOS provisions.<sup>30</sup>

Basically, the United States and China’s conflict with each other over military and intelligence-gathering activities, MSR and hydrographic surveys in an EEZ, and eventually these fundamental conflicts have led to several incidents and confrontations in the past few years. Moreover, when observing all these incidents and confrontations between the United States and China, it will be easy to find that most of the incidents have taken place in the South China Sea, in areas that are claimed by China as EEZs but used routinely by the U.S. Navy. China is concerned that its national jurisdiction over parts of the South China Sea is increasingly challenged by the U.S. concern for the mobility of its navies and its status as the greatest maritime power in the world.

Recently, some scholars have suggested that, as a long-term interest, China should accept what the United States is doing in its EEZ now. As an emerging naval power, China will inevitably be a major player at the global levels to pursue its interests.<sup>31</sup> In fact, it is believed that China has already undertaken many survey activities that are suspected as being military-related in the EEZs of Japan and other neighbouring countries. In the future, China definitely will engage in more survey activities in EEZs of other coastal states. This is essentially in the same way as what the United States has done to China in the past years.<sup>32</sup>

Currently China is actively participating in many global activities, especially issues related to maritime safety and security, such as combating piracy, protecting the

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<sup>30</sup> Ji Guoxing, “The legality of the ‘Impeccable incident’”, *China Security*, Vol. 5 No. 2, Spring 2009, p. 17.

<sup>31</sup> This view has been expressed by Professor Robert Beckman who gave a presentation on the topic of “UNCLOS and the Maritime Security of China” in the conference of “China and East Asia Strategic Dynamics”. The conference was organised by S. Rajaratnam School of International Studies (RSIS) on 11–12 March 2010.

<sup>32</sup> Mark J. Valencia, “A Maritime Security Regime for Northeast Asia: Part I”, *Policy Forum Online*, 27 February 2008, available at: <http://www.nautilus.org/fora/security/08017Valencia.html> (accessed 16 March 2010).



marine environment and some other traditional or non-traditional issues. Therefore, it is in China's interest to give its priority to the freedom of navigation and overflight and to review its position on military and survey activities in the EEZs rather than keep its navy at bay. However, such a view is not favourable for China if we consider more about China's grand strategy and its national interests under the current situation. For decades, the sovereignty issue is the top consideration of China's elites. Together with its historic experience, which is called "centuries of humiliation", China tends to be sensitive and conservative to protect its national unification and territorial integration. So far, China has at least two kinds of issues that remain unresolved—the Taiwan issue and maritime boundary disputes with Japan and a number of Southeast Asian countries. The building of a naval base in Hainan province and the presence of military forces around coastal areas are evidence of China's concern with consolidating and defending its national interest. From China's perspective, the United States is the greatest obstacle in the Taiwan issue through its continuing arms sales to Taiwan and its military alliance with Taiwan.

Moreover, the United States is the main factor for China to think twice over its South China Sea issue, regardless of the intention of the United States to get involved in this dispute. From this perspective, China's stance over U.S. activities within its coastal areas is more easily understood. Allowing foreign access to its EEZs may compromise China's military security, especially if foreign powers exploit this access to conduct intelligence-gathering activities. This is the reason why China condemned the United States for violating the principle of "peaceful uses of the seas". Therefore, at least in the foreseeable future, China's position over military activities, hydrographic surveys and MSR within coastal states' EEZ is not going to change.

### **Part III: Incidents in East Asian waters: reasons and arguments**

The major incidents in recent years include: the *Impeccable* incident between China and the United States in China's EEZ; the collision between the U.S. Navy EP-3E ARIES II signals surveillance aircraft and a People's Liberation Army Navy (PLAN) J-8II interceptor fighter jet in Hainan within China's EEZ; the Democratic People's

Republic of Korea's (DPRK) "spy ships" in Japanese waters that resulted in Japanese military violence in the Chinese EEZ; and the China-Japan MSR in disputed waters—the Okinotori Islands dispute.

An examination of these cases will explore the reasons behind difficulties faced in achieving agreement in implementation of the EEZ regime in this region. The analysis will be based on three aspects: the differences in positions and interpretations of the relevant principles of UNCLOS, the unclear territorial delimitation as another factor of the conflict on military surveys and military activities and national interest as the root reason which guides the countries' behaviours.

## 1. The Impeccable Incident

On 8 March 2009, a brief confrontation occurred between Chinese vessels and the USNS *Impeccable* in the South China Sea, which is about 75 miles (120 kilometres) south of the Hainan province of China. The Pentagon accused the Chinese vessels of harassing its country's ship. It considers their presence in the South China Sea as exercising their freedom of navigation, and the subsequent Chinese behaviour as "reckless and dangerous manoeuvre".<sup>33</sup> However, the Chinese Foreign Ministry spokesman, Ma Zhaoxa, countered that "the U.S. claims are gravely in contravention of the facts and confuse black and white, and they are totally unacceptable to China;" and the behaviour of the USNS *Impeccable* had violated the international law and threatened China's national security.<sup>34</sup> In the same period, similar incidents have been reported by the Pentagon, such as the ensuing tension between Chinese vessels and the USNS *Victorious* in the Yellow Sea on 4 March and 5 May 2009.<sup>35</sup>

Many scholars who are interested in these incidents have expressed differing views about the nature of the incidents in China's EEZ. The major concern is whether the activities of the *Impeccable* were indeed MSR-related. Some scholars considered

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<sup>33</sup> "Pentagon says Chinese vessels harassed U.S.", *CNN.com*, 9 March 2009, available at: <http://www.cnn.com/2009/POLITICS/03/09/us.navy.china/index.html> (accessed 10 December 2009).

<sup>34</sup> Yuli Yang, "China says U.S. ship violated international law", *CNN.com*, 10 March 2009, available at: <http://www.cnn.com/2009/WORLD/asiapcf/03/10/us.navy.china/index.html>, (accessed 17 May 2009).

<sup>35</sup> Barbara Starr, "Chinese boats harassed U.S. ship, officials say", *CNN.com*, 5 May 2009, available at: <http://www.cnn.com/2009/WORLD/asiapcf/05/05/china.maritime.harassment/>, (accessed 17 May 2009).

the activities to be different from MSR and believed that “the work by the *Impeccable* involved marine data collection for military purposes”.<sup>36</sup> Therefore, it should be defined as military-oriented activities and should not be restricted by the consent regime, which the MSR required.<sup>37</sup>

However, other scholars such as Mark Valencia<sup>38</sup> and Ji Guoxing<sup>39</sup>, stood by China’s position to argue on some aspects. First, the USNS *Impeccable*’s activities cannot be easily defined as MSR or military-oriented activities; therefore, these definitely should not be equated with navigational freedom. Second, the United States has been criticized due to its unwillingness to ratify UNCLOS; therefore, it “does not have much credibility interpreting it to its advantage”.<sup>40</sup> Third, what had been done within China’s EEZ is believed to be intelligence-gathering activities, which are often equated with espionage, and are certainly viewed as unfriendly acts. The real intention of the *Impeccable* has been identified as “probably tracking Chinese submarines” because of U.S. concerns about China’s Yulin submarine base (also known as Sanya submarine base) in Hainan.<sup>41</sup> Moreover, based on the missions that the *Impeccable* had undertaken, these were non-peaceful and thus violated the international law on the principle of “peaceful uses of the seas”. Finally, aside from China, there are quite a number of countries—including Brazil, India, Malaysia and Vietnam—that disagree with the U.S. concept of “international waters” and have therefore set appropriate restrictions against the U.S. activities.

Despite the differences in opinions, all the scholars are worried that the number of such incidents is likely to increase in the future due to the lack of trust and transparency in the China-U.S. relationship.<sup>42</sup> This is indeed the case as in May 2009 five similar confrontations have been recorded by the U.S. Defense Department.<sup>43</sup>

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<sup>36</sup> Sam Bateman, “Clashes at sea: when Chinese vessels harass U.S. ship”, RSIS Commentaries, 13 March 2009.

<sup>37</sup> Patrick J. Neher, Pedrozo & J. Ashley Roach, “In defence of High Seas Freedoms”, RSIS Commentaries, 24 March 2009.

<sup>38</sup> Mark Valencia, “The Impeccable Incident: Truth and Consequences”, *China Security*, Vol. 5 No. 1, Winter 2009, pp. 22–28.

<sup>39</sup> Ji Guoxing, “The legality of the ‘Impeccable Incident’”, *China Security* Vol. 5 No. 2, Spring 2009, pp. 16–21.

<sup>40</sup> *Ibid.* 29.

<sup>41</sup> *Ibid.* 29.

<sup>42</sup> *Ibid.* 29.

<sup>43</sup> Lucy Hornby, “China urges U.S. to halt surveillance near its shores”, *Reuters*, 27 August 2009, available at: <http://www.reuters.com/article/topNews/idUSTRE57Q1ZU20090827> (accessed 23 November 2009).

Most scholars believe that the best way to solve this problem is for both the U.S. and Chinese administrations to make some compromises to mitigate the tension. However, little progress has been achieved despite some effort made. In a dialogue which was held from 26 to 27 August 2009, China proposed that the United States should reduce and eventually end military surveillance by both aircraft and ships close to its shores after a series of territorial disputes earlier this year.<sup>44</sup> However, given the growing profiles of China and the United States at sea, there is little possibility that both parties will make any concessions.

## **2. Hainan Island Incident: Collision between USN EP3 and a Chinese fighter**

This is an earlier but similar incident to that involving the *Impeccable*. This is a collision between a U.S. EP3 surveillance aircraft and China's J-8II interceptor fighter jet. The incident occurred in China's EEZ—70 miles (110 kilometres) south of the Hainan Island on 1 April 2001—and caused the death of a Chinese pilot. The EP-3 was forced to make an emergency landing in Hainan. After the event, both countries strongly defended themselves on various grounds. The United States asserted that its EP-3 was carrying on a routine reconnaissance mission off the coast of China and was exercising its overflight freedom over “international waters”. China, however, argued that such freedom is not absolute and defined the U.S. act as an illegal behaviour that violated international law. Furthermore, China demanded an official apology and called upon the United States to stop its frequent reconnaissance flights along its coast. The United States apologised but refused to stop flying over China's EEZs and indeed its flights are continuing after the incident. In response to this incident, once again scholars held differing views.<sup>45</sup>

Eight years later, the occurrence of the *Impeccable* incident at least explains to us that neither the United States nor China has changed their positions in this issue. Interestingly, both the *Impeccable* and Hainan Island incidents took place in the South China Sea, a volatile region claimed by China and five other competitors in Southeast

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<sup>44</sup> Ibid.

<sup>45</sup> Valencia, Mark J., & Ji, Guoxing, “The “North Korean” Ship and U.S. Spy Plane Incidents: Similarities, Differences, and Lessons Learned”, *Asian Survey*, Sep/Oct 2002, Vol. 42 Issue 5, p. 723.

Asia. This is because of the different understandings of the Law of the Sea; sovereignty sensitiveness and national interest are other factors impacting the maritime stability and resulted in quarrels while conducting activities within coastal states claimed as EEZs.

### 3. DPRK's "spy ships" in Japanese waters

In December 2001, Japanese coast guard ships found an unidentified ship which resembled a fishing trawler in Japan's EEZ. After the ship ignored their warnings, they pursued and fired at the unidentified 100-ton ship located in the East China Sea. After a fierce gun battle, the ship sank within China's EEZ, taking 15 lives.<sup>46</sup> Initially, 25 Japanese coastal guard vessels joined the chase. Finally, four ships cornered the suspected ship in China's EEZ. More than 590 rounds of ammunition were fired by one of the closest Japanese vessels.<sup>47</sup> According to Japanese officials, they began to suspect that the ship was a North Korean spy ship or a smuggling ship when it refused to stop after receiving warning messages from the Japanese Coast Guard. The Coast Guard ships were forced to resort to violence after the suspected ship ignored their warnings.<sup>48</sup> This incident caused tension between Japan and DPRK, subsequently dragging China into yet another incident.

North Korea denounced Japan with angry remarks, calling it "a crime" that is "nothing but the brutal piracy and unpardonable terrorism of a modern brand that could be committed only by samurais of Japan in defiance of international laws".<sup>49</sup>

Japan's concern was that the ship was detecting intelligence in its EEZ and should be expelled from its waters.<sup>50</sup> The incident was further complicated with the

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<sup>46</sup> "Suspected Spy Ship Sunk by Japanese Coast Guard", *VOA News*, 22 December 2001, available at: <http://www1.voanews.com/english/news/a-13-a-2001-12-22-27-Suspected-66437337.html?moddate=2001-12-22> (accessed 17 May 2009).

<sup>47</sup> Valencia, Mark J. & Ji Guoxing, "The "North Korean" Ship and U.S. Spy Plane Incidents: Similarities, Differences, and Lessons Learned", *Asian Survey*, Sep/Oct 2002, Vol. 42 Issue 5, p. 723.

<sup>48</sup> "Suspected Spy Ship Sunk by Japanese Coast Guard", *VOA News*, 22 December 2001, available at: <http://www1.voanews.com/english/news/a-13-a-2001-12-22-27-Suspected-66437337.html?moddate=2001-12-22> (accessed 17 May 2009).

<sup>49</sup> James Brooke, "North Korea Calls Japan's Sinking of Mystery Boat 'Brutal Piracy'", *New York Times*, 27 December 2001, available at:

<http://www.nytimes.com/2001/12/27/world/north-korea-calls-japan-s-sinking-of-mystery-boat-brutal-piracy.html> (accessed 17 May 2009).

<sup>50</sup> Julian Ryall, "North Korea Accused after Japan Sinks 'Spy' Ship", *The Scotsman*, 24 December 2001.

inclusion of China. Initially, the Japanese Coast Guard suspected that the ship was from China, as the ship was painted with Chinese characters and its crew waved red flags, which, at first glance, could be easily mistaken as Chinese flags.<sup>51</sup> “Even when the pursuing coast guard vessels opened fire on the ship, they still thought the vessel was a Chinese fishing boat”.<sup>52</sup>

Given the misunderstanding of the nationality of the ship, the intention of the Japanese pursuit was put into question. With the possible nationality of the ship identified, what was then the intention of the Japanese coast guards?

Although UNCLOS has granted the coastal states the rights to “board, inspect and arrest a foreign ship within its EEZ to ensure compliance with its laws and regulations ... there is no Japanese domestic law allowing such use of force in its EEZ”.<sup>53</sup> As indicated above, the number of vessels involved, along with the disastrous result, is incomparable in recent history. In other words, there was no right of such hot pursuit which could be conducted so violently into the EEZ of another country. Moreover, the legality of hot pursuit extended into a third state is disputable. Theoretically, the right of hot pursuit under UNCLOS Article 111 (3) is allowed to be conducted into the EEZ and even contiguous zone of the flag state or a third state as long as all the other conditions are met.<sup>54</sup> But in reality, the current state practice is that many/most coastal states require prior notification and many/most foreign states provide prior notification as a sign of respect and in keeping with the principles of international law and “comity of nations”.<sup>55</sup>

For China, its express concern was the violence of the pursuit which occurred in its EEZ. From its position, this incident put China in an unfavourable position because its coastal rights were not respected.<sup>56</sup> This incident was further complicated because

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<sup>51</sup>James Brooke (NYT), “World Briefing | Asia: Japan: ‘Spy’ Ship Found”, *New York Times*, 27 February 2002, p. 14.

<sup>52</sup> Valencia, Mark J. & Ji Guoxing, “The “North Korean” Ship and U.S. Spy Plane Incidents: Similarities, Differences, and Lessons Learned”, *Asian Survey*, Sep/Oct 2002, Vol. 42 Issue 5, p. 723.

<sup>53</sup> Ibid.

<sup>54</sup> *The United Nations Convention on the Law of the Sea* (UNCLOS), Article 111 (3) expresses that “The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State”.

<sup>55</sup> Email dated 5 January 2010 from Dr. Maxim Q. Mejia Jr. who is Assistant Professor in Maritime Law and Policy at the World Maritime University (WMU).

<sup>56</sup> China’s Foreign Ministry spokesman Zhang Qiyue commented on Japan’s using of force in China’s EEZ, *Xinhua News*, 26 December 2001, available at: [http://news.xinhuanet.com/news/2001-12/26/content\\_210956.htm](http://news.xinhuanet.com/news/2001-12/26/content_210956.htm) (accessed 17 May 2009).

of the overlapping EEZs. There is no clear EEZ boundary between Japan and China in the East China Sea. The incident highlighted this sensitive issue. Both China and Japan have contested for bigger marginal territories within the overlapped EEZ, and so far the boundary issue is far from being resolved. According to Japanese statements, they “recognize the median line between the Ryukyu Islands and the Chinese mainland as a provisional EEZ boundary but China refuses to recognize this line, and negotiations on the boundary are stalemated”.<sup>57</sup> Therefore, the unclear boundary resulted in ambiguous jurisdiction for both countries.

#### **4. China-Japan MSR in disputed waters-the Okinotori Islands disputes**

As mentioned above, China and Japan have overlapping claims and unresolved water boundary issues in the East China Sea. In the past decade, China conducted some MSR activities in what were considered as disputed waters in the East China Sea as well as some other waters around the Asia-Pacific. As a result, the Sino-Japanese official relations suffered a decline. “Tokyo alleged that China had unlawfully incurred into Japan’s exclusive economic zone (EEZ), while Beijing indicated that there were unsettled maritime boundaries.”<sup>58</sup>

One of the most notable recent scenarios between China and Japan is the Okinotori Islands dispute. The Okinotori Islands consist of two barren islets that are located about 1,700 km. south of Tokyo, in the western Pacific area. The size of the smaller islet is roughly equal to a twin bed, while the bigger one is merely as large as a bedroom. In view of this, Japan claimed the 200-mile-EEZ surrounding these two islands as part of their territory, effectively increasing Japan’s EEZ. Over the past two decades, Japan had spent hundreds of millions of dollars to keep them above water.<sup>59</sup>

One of the Japanese concerns is the strategic significance of these two islands that are located between Taiwan and Guam, where a U.S. military base is located.<sup>60</sup>

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<sup>57</sup> Valencia, Mark J. & Ji Guoxing, “The “North Korean” Ship and U.S. Spy Plane Incidents: Similarities, Differences and Lessons Learned”, *Asian Survey*, Sep/Oct2002, Vol. 42 Issue 5, p. 723.

<sup>58</sup> Steven Wei Su, “The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update”, *Ocean Development & International Law*, 2005, Vol. 36 Issue 1, p. 45.

<sup>59</sup> Peter J Brown, “China all at sea over Japan island row”, *Asia Times*, 4 March 2010, available at: <http://www.atimes.com/atimes/China/LC04Ad04.html> (accessed 10 March 2010).

<sup>60</sup> Norimitsu Onishi, “Japan and China Dispute a Pacific Islet”, *New York Times*; 7 October 2005, p. 4.

More importantly, China's vessels frequently conduct marine activities in this region, and this has aroused Japanese resentment. Therefore, the expanded EEZ brought about by these two islets will affirm the basis of Japan to exclude the entrance of Chinese vessels.

However, China challenged Japan's position with the argument that the Okinotori Islands are merely "two rocks" and, according to UNCLOS Article 121, "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf".<sup>61</sup> Moreover, China has long been sending their oceanographic vessels into the EEZ as claimed by Japan.<sup>62</sup>

In the light of these events, together with some other territorial disputes, friction between China and Japan has become divisive over the years. In the past decade, however, both countries had agreed to negotiate, from which a series of frameworks had been conceived. One of these was the requirement of a prior notification for future MSRs in disputed waters and this resulted in an agreement between China and Japan on 13 February 2001.<sup>63</sup> However, after April 2002, Japan had protested to China on various occasions because China's frequent "incursions" had violated the agreement and hurt their relations.<sup>64</sup> This is partly because "the 2001 notification agreement, a *note verbale*, sidesteps the issue noting that the agreement is binding in waters that are of 'concern' to the other party".<sup>65</sup> Therefore, much is left to be desired as both are not willing to compromise their fundamental interests.

### **Conclusion: The way forward**

Overall, the situation in the East Asian waters remains problematic. First, different interpretations of the EEZ regime exist, especially on the issues of coastal state jurisdiction over military activities, MSR and hydrographic surveys, navigation and overflight freedoms. The distinction between these activities is often unclear and they

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<sup>61</sup> *The United Nations Convention on the Law of the Sea* (UNCLOS), Article 121.

<sup>62</sup> Norimitsu Onishi, "Japan and China Dispute a Pacific Islet", *New York Times*; 7 October 2005, p. 4.

<sup>63</sup> "LEAD: Japan, China agree on 2-month maritime notice system", *Kyodo News*, Tokyo, 13 February 2001.

<sup>64</sup> Valencia, Mark J, "The East China Sea dispute: context, claims, issues and possible solutions", *Asian perspective*, Vol. 31, No. 1, 2007, pp. 130-133.

<sup>65</sup> James Manicom, "Sino-Japanese Cooperation in the East China Sea: Limitations and Prospects", *Contemporary Southeast Asia*, Vol. 30. No. 3 (2008), p. 468.



are subject to different regimes. Second, the unclear EEZ boundary between some countries, especially China and Japan in the East China Sea and contenders in the South China Sea, makes jurisdiction over the EEZ more ambiguous. Furthermore, their contentions, as manifested either by aggressive military activities (violent or non-violent) make the security situation in the East Asian waters more unstable.

Solutions to these problems may not be possible for a long time. However, some principles should not be ignored as they may constitute positive factors to ease the tensions.

Firstly, coastal states should enhance the transparency of their national legislation. As some countries have ratified the conventions and have introduced their own domestic laws to regulate the activities of foreign vessels and aircrafts over their EEZs, these efforts will be better appreciated if their transparency is enhanced. This could be done by widely disseminating the related information.<sup>66</sup>

Secondly, dialogue and mutually acceptable resolutions or agreements are necessary. These can be achieved at the bilateral level and perhaps be expanded into the regional level if conditions are favourable.<sup>67</sup> This can represent the best effort to forge a common interpretation of all the key principles, concepts and conventions.

However, one of the key points is the criterion for the definition of legal terms such as “due regard”, “peaceful purpose”, and especially the definitions of “MSR”, “military activities”, “hydrographic surveys” and other contentious terms. These terms should be clearly defined by all countries. This is the premise for any further negotiation. In the past few years, some research and academic institutions had tried to give us some definitions, such as the recommendations made by Ocean Policy Research Foundation of Japan.<sup>68</sup> However, it is essentially important to promote them to a governmental level, to discuss them in a broader sense and eventually to reach a regional consensus.

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<sup>66</sup> Hasjim Djalal, Alexander Yankovb, and Anthony Berginc, “Draft guidelines for military and intelligence-gathering activities in the EEZ and their means and manner of implementation and enforcement”, *Marine Policy* Vol. 29, Issue 2, 2005, pp. 175–183.

<sup>67</sup> *Ibid.*, p. 176.

<sup>68</sup> Ocean Policy Research Foundation of Japan, “Guidelines for navigation and overflight in the Exclusive Economic Zone”, 16 September 2005, available at: [http://www.sof.or.jp/en/report/pdf/200509\\_20051205\\_e.pdf](http://www.sof.or.jp/en/report/pdf/200509_20051205_e.pdf) (accessed 7 February 2010), pp. 5–6.

Thirdly, a suggestion to ease tensions caused by frequent incidents at sea is to establish Incidents at Sea Agreement (INCSEA). A successful precedent has been provided by the United States and the Union of Soviet Socialist Republics (USSR) through the agreement of “Prevention of Incidents On and Over the High Seas” in 1972.<sup>69</sup> The U.S.-Soviet INCSEA has been proven to be a very effective instrument for tension mitigation and confidence building since the frequency of incidents at sea between the two powers have been well managed and the concept has been applied by many other countries such as agreements between German and Poland, Turkey and Greece, India and Pakistan, etc. But so far there is no such agreement signed between the United States and China. Though they have signed the Military Maritime Consultative Agreement (MMCA)<sup>70</sup> in 1998, the MMCA has failed to prevent incidents such as the EP-3 incident and the *Impeccable* incident. And after the incidents, both accused each other for violation of the agreement but neither of them incurred any legal responsibilities. The MMCA has no binding effect since it merely produces a consultation mechanism for regular meetings rather than any concrete measures to prevent or respond to unexpected incidents. However, the MMCA could be a useful mechanism for further negotiations between China and the United States to reach a substantive and enduring agreement like INCSEA to deal with their conflicts at sea.

Finally, referring to the quarrels within disputed EEZ waters in East Asia, the best solution definitely lies on the settlement of the disputes. However, in the near future, the delimitation of all the unresolved boundaries, such as the straight-line maritime boundaries in the South China Sea, is highly unlikely. This is partly because the nature of maritime boundary making in this region is quite problematic. The geographic conditions in this region are complex with many littoral and adjacent countries around the same body of waters and the delimitation of even a single boundary usually

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<sup>69</sup> “Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas”, available at: <http://www.state.gov/www/global/arms/treaties/sea1.html> (accessed 22 March 2010).

<sup>70</sup> “Agreement between the Department of Defense of the United States of America and the Ministry of National Defense of the People’s Republic of China on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety”, available at: <http://www.fas.org/nuke/control/sea/text/us-china98.htm> (accessed 22 March 2010).

involves more than two countries.<sup>71</sup> Furthermore, take the situation of bilateral boundaries in Southeast Asia as an example that “of the approximately 60 maritime boundaries required in the region, less than twenty per cent have so far been fully resolved”.<sup>72</sup>

What is even more complicated is that some multilateral maritime boundary disputes involve more contenders and each country uses various reasons to defend their own arguments. This can be exemplified by the South China Sea dispute, which is very tricky and countries seem to have no specific expectation on it concerning the settlement of boundary issues in the short term. Thus, perhaps one of the most effective ways for contentious countries to deal with their disorders and quarrels at sea under the current situation is to establish interim agreements between themselves pending their final resolution of the boundaries issues. However, in order to grant the interim agreements enough binding effect, all details should be discussed and clarified, such as the location of the disputed areas, the procedures to implement the agreement, the penalty for any contravention of the agreement, etc.

Another approach could be the functional approach—a cooperative mechanism requires claimants to shelve the territorial disputes first and to start with joint development and some other non-traditional security cooperation projects, which definitely can be applied to joint military exercises, MSR and hydrographic survey in disputed areas as well. “Unfortunately, support for a functional approach in the South China Sea has been largely rhetorical so far without any good practical examples of it having effect.”<sup>73</sup> Therefore, it is imperative for regional countries to lay down more concrete measures for existing proposals as well as any new initiatives in the future.

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<sup>71</sup> Sam Bateman, “Conclusion: the prospects for a cooperative management regime”, edited by Sam Bateman and Ralf Emmers, *Security and international politics in the South China Sea: towards a cooperative management regime*, Routledge, 2009, p. 236. Maritime boundaries are required when two countries are either adjacent to each other on the same body of land (e.g. Indonesia, Brunei and Malaysia on the east coast of Borneo) or opposite each other (e.g. Indonesia and Malaysia near the Malacca Strait).

<sup>72</sup> Sam Bateman, Joshua Ho, and Jane Chan, “Good order at sea in Southeast Asia”, S. Rajaratnam School of International Studies (RSIS) policy paper, April 2009, p. 18.

<sup>73</sup> Sam Bateman, Commentary on “Energy and Geopolitics in the South China Sea: Implication for ASEAN” by Michael Richardson, published in the Institute of Southeast Asian Studies Report No. 8, 2009, p. 44.

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