

Rough Waters in the South China Sea: Navigation Issues and Confidence-Building Measures

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S U M M A R Y In the wake of a collision between a U.S. spy plane and a Chinese jet fighter off the coast of Hainan in April 2001, verbal skirmishing between the United States and China revealed sharply different conceptions of jurisdictional and navigational principles. These differences persist and will likely be the cause of future conflicts; they have already caused strife among countries ringing the South China Sea. Central to these conflicts are the exclusive economic zones (EEZ) that extend 200 nm into the sea from coastal nations' baselines. Created by the UN Law of the Sea Convention, these zones attempt to accommodate coastal states' interest in controlling offshore resources and maritime powers' interests in maintaining freedom of navigation. But ambiguities in the Convention's language combined with coastal states' proliferating EEZ claims have created a tinderbox. The situation will remain volatile as long as the focus remains on jurisdictional disputes. But confidence-building efforts aimed more narrowly—on practical navigation issues and managing “incidents at sea”—offer a starting point for first bilateral and then multilateral agreements.

The April 1, 2001, collision between a U.S. spy plane and a Chinese jet fighter 70 nm off the southeast coast of Hainan dramatically brought to the world's attention an ongoing area of dispute between the United States and China: the rules governing navigation in the exclusive economic zones (EEZ) of the South China Sea. The United States says that its spy plane was flying over international waters and had freedom of navigation. China says that it was flying in China's EEZ and was subject to the laws and regulations of China. Though the return of the plane to U.S. soil brought the incident to an end, the underlying causes of the dispute remain and similar disputes can be expected to erupt. China demands that the United States halt its spy flights off the Chinese coast, the United States, saying its flights are standard and legal, resumed the flights in early May.

This dispute, though exceptionally high profile, is one of many that occur each year on and over the South China Sea. Conflicts over freedom of navigation in EEZs are increasing in the South China Sea—a semi-enclosed sea bounded by China, Vietnam, the Philippines, Malaysia, Brunei, and Indonesia, in which extended jurisdictional claims are replacing the high seas with EEZs. Today, with virtually all travel through the South China Sea passing through one or more EEZs, the rules of navigation are frequently contested. The nations rimming the sea have all had their disputes, and just as the U.S.-China conflict is not likely to be the last between those two nations, there are likely to be further disputes between other nations, and disputes of increasing intensity. To reduce the number and intensity of the disputes, a multilateral confidence-building arrangement focused on the practical issues of navigation (as opposed to the territorial issues) would be ideal, but a regional agreement is most likely to be achieved in increments, with bilateral agreements paving the way. The agreements should, while respecting the resource regulations of coastal states, guarantee freedom of navigation and regulate the behavior of naval activities in the air and on the sea in the EEZs. First steps in this direction were taken in January 1998, when China and the United States entered into a Military Maritime Consultative Agreement (MMCA) designed to establish a

consultation mechanism comprising annual meetings, working groups, and special meetings to strengthen military maritime safety and prevent accidents at sea. Though a meeting was held in July 1998, the agreement was shelved by the Bush administration. But the MMCA could serve as the first step in confidence-building measures; eventually, it could be a model for a regional agreement.

The South China Sea

The South China Sea is a strategic waterway providing the key maritime link between the Indian Ocean and East Asia. Sea lines of communication (SLOCs) of the South China Sea are a matter of life and death for the Asia Pacific countries, and SLOC security has been a fundamental factor contributing to regional economic development. More than 41,000 ships a year pass through the South China Sea, more than double the number that pass through the Suez Canal, and nearly triple the total for the Panama Canal. More than half of the world's annual merchant-fleet tonnage passes through the straits of Malacca, Sunda, and Lombok. For the United States, the Malacca Strait is critical to the mobility and flexibility of its Seventh Fleet.

But the SLOCs are hardly secure. The provisions of the UN Law of the Sea Convention (LOSC) relating to the principle of freedom of navigation are interpreted variously by different countries. Many navies, including those of the maritime powers (nations with blue-water navies), are maneuvering in EEZs of the South China Sea, where multiplying and overlapping jurisdictional claims confuse the rules of passage. In addition, sea piracy and pollution, which observe no national borders, are on the increase. The inability to control them threatens SLOC security.

LOSC, EEZ, and Freedom of Navigation

The UN Law of the Sea Convention was opened for signature in 1982, after more than 14 years of negotiations, and entered into force in November 1994. LOSC contributes to the building of a stable maritime regime. To date, 135 countries have ratified it.

Ship traffic through the South China Sea is more than double that through the Suez Canal and triple that through the Panama Canal

*Some seek to
'internationalize'
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'territorialize' it*

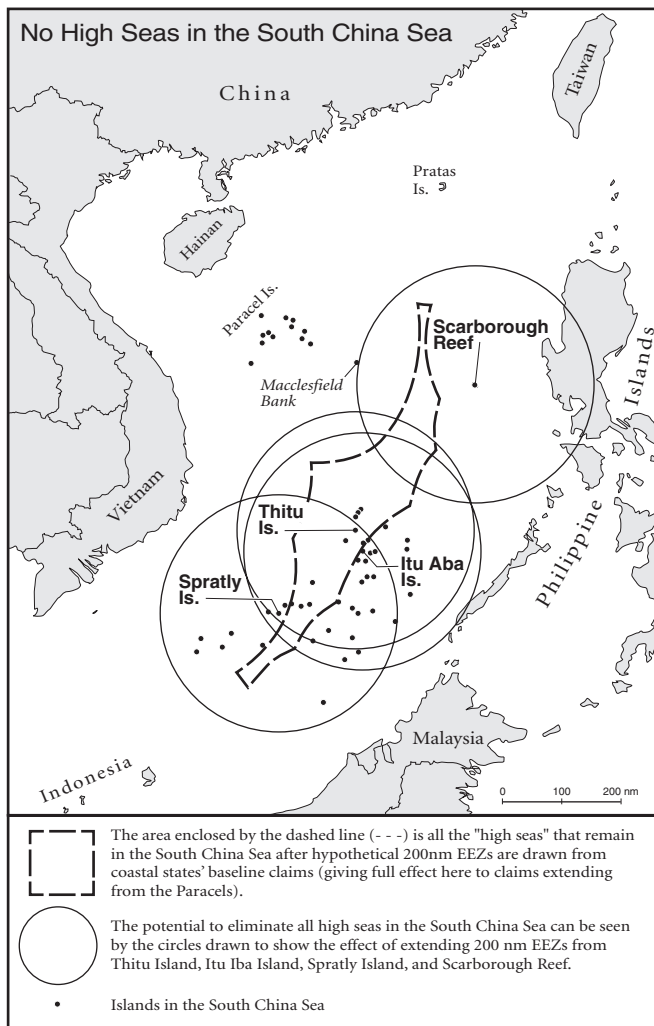
Though the United States played a key role in its formulation, it wasn't until 1994 that a U.S. president signed the Convention, and the U.S. Senate has yet to ratify it. Nevertheless, its provisions are widely observed, although it offers only general rules and principles and is ambiguous on many issues. The EEZ, which the treaty formalized, is one of the most widely accepted products of the Convention.

Based on the earlier concepts of "exclusive fishing zone" and "fishing protection zone," the EEZ regime attempts to accommodate the competing interests of coastal states and the maritime powers—the former seeking greater control over offshore resources, and the latter concerned with maintaining their traditional freedom of action in waters beyond coastal states' territorial seas.

The EEZ is a specific water area different from territorial seas and from high seas. It does not belong to the high seas, and is subject to the specific legal regime established in LOSC. LOSC stipulates that in the EEZ, the coastal state has sovereign rights over the exploration and exploitation of natural resources and has jurisdiction over marine scientific research; the establishment and use of artificial islands, installations and structures; and the protection and preservation of the marine environment (Article 56). LOSC also stipulates that in the EEZ, all states enjoy freedom of navigation and freedom of overflight, and in exercising their rights in the 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 provisions regarding the EEZ) (Article 58). Evidently LOSC recognizes the continued freedom of navigation through the waters of an EEZ, but the freedom is subject to the laws and regulations of the coastal state that are in conformity with the appropriate articles of LOSC.

As for air navigation in the EEZ, "In any event, the application of this freedom of the air in EEZ or of the special conventions that regulate it, must be understood not as an extension of the regime of the high seas, but as a part of the zone's regime, and, consequently, subject to the same rules, restrictions, and modalities that emanate from the accommodation of uses and interests to the extent applicable."¹

There are now two trends regarding the nature of the EEZ, one favored by the maritime powers, and the other favored by coastal states. The maritime powers want to "internationalize" the EEZ. They hold that the EEZ has to be *assimilated* into the high seas without much concern for the jurisdiction of the coastal state over the resources. The coastal states want to "territorialize" the EEZ. They maintain that the interests of the coastal states must predominate in the EEZ, *subordinating* the freedom of navigation to the satisfaction of those interests. The national security concerns of many regional countries might often lead to conflicts between navigation rights and



coastal states' rights of control over their EEZs. The challenge is to find a balanced relationship among the vital interests involved in the issue.

High Seas and International Waters

Traditionally, *high seas* and *international waters* had the same meaning, i.e., sea areas beyond territorial seas were high seas, and belonged to international waters. But since the formulation of LOSC, this is no longer the case.

High seas are now defined as those parts of the world oceans beyond the limits of national jurisdiction. According to LOSC, high seas refer to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State" (Article 86). LOSC has not addressed the term international waters.

Maritime powers now use the term international waters in place of the term "high seas" and maintain their traditional definition. For example, the United States holds that: "All waters seaward of the territorial sea are international waters where the ships and aircraft of all States enjoy the high seas freedom of navigation and overflight"; "International waters include the contiguous zone, exclusive economic zone, and high seas"; The international respect for freedom of the seas guarantees legal access up to the territorial waters of all coastal countries of the world."ⁱⁱ It is the United States' intention to equate the EEZ with high seas in freedom of navigation.

The freedoms of the high seas comprise the freedom of navigation and overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing, and freedom of scientific research. But when these freedoms are applied in the EEZ, they are subject to relevant laws and regulations of coastal states. Freedom of navigation and overflight in EEZs is subject to the resource-related rights of coastal states.

Different countries have different attitudes toward the stand taken by the maritime powers. Some support it; some oppose it; and many countries have reservations and take a neutral stance. Meanwhile, the

United States regards others' EEZs as international waters, while demanding that foreign planes in its "Air Defense Identification Zone" (500 miles from its shores) obey its procedures and fly according to its stipulated course.

Existing Problems in the EEZs of the South China Sea

Due to the different interpretations of the freedom of navigation in EEZs and overlapping jurisdictional claims in the South China Sea, many problems now exist.

Military activities and the danger of encounters and collisions. Regarding the issue of military uses of the EEZ, the coastal states have a firm basis for opposing any non-peaceful use of their EEZs. Article 301 holds special importance in this regard because it requires the abstention 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 question here is what "peaceful use" means—is a spy flight peaceful? And what if it were interfering with communications or targeting sites? Another issue is whether foreign naval and air forces have total freedom in the EEZ. "There is no doubt that the key principle of the 1982 Convention is that foreign war fleets have open access to the EEZ, since in effect it is an integral part of the freedom of navigation and overflight. The exercise of this right, however, is subject to some restrictions in reference to that zone, such as the limitations of a political nature and those that are derived from economic rights."ⁱⁱⁱ

The United States, Russia, Japan, China, and some regional countries have conducted surveillance or spying activities off the coasts of others. One report says that the United States flies more than 400 reconnaissance missions per year around China, an average of over one per day. Other well-informed sources say that Japan-based U.S. electronic-intelligence-gathering (ELINT) aircraft have for the past year been flying about four missions per week off the Chinese coast.

The U.S. wishes to equate the EEZ with the high seas for the purpose of navigation

US-deployed TMD components in the Sea would arouse strong opposition from China

China conducts similar missions in the three China Seas, but with much less frequency. It is reported that China operates a major ELINT facility within Lingshui Airbase, where the EP-3E spy plane was grounded. The EP-3E incident is the latest in a series of close encounters between the United States and China. U.S. sources say, “Chinese fighters repeatedly have interfered with U.S. air operations over the South China Sea and nearby waters. In one case a fighter flew so close to one U.S. aircraft that it broke up a formation of carrier aircraft.”^{iv} “U.S. aircraft routinely fly such missions, and the Chinese routinely intercept and monitor them. U.S. military sources estimate one-third of these missions prompt the Chinese to scramble their aircraft.”^v

Dangers of encounters and collisions do exist. The April 1 collision may have been preceded by another potentially dangerous incident on the sea. It is reported that on March 24, 2001, the Chinese Jiangwei III-class frigate *Huangshi* switched on its gunnery control radar and closed to within 100 m of the U.S. underwater surveillance vessel *Bowditch*, which was tracking the Chinese nuclear-powered ballistic missile submarine *Xia* in the Yellow Sea at the time of the incident. And the April 1 air collision may be followed by other clashes if no measures are taken. On May 28, 2001, as a U.S. ship was conducting intelligence-gathering activities in the East China Sea, a Chinese Y8 plane flew over the ship several times, and there was a standoff.

Conflicts over the activities of survey ships. Seeking resource security, littoral states are increasing their surveys for oil and gas resources in their overlapping EEZs. China has sent several survey ships to the South China Sea, and this has aroused several protests from Vietnam and the Philippines.

The disputes between China and Japan in the East China Sea serve as an example. For decades, China and Japan have clashed over each other’s survey activities in contested and overlapping areas in the East China Sea. The latest round of tensions followed a sharp rise in the number of Chinese survey vessels in the past two years, in areas that Japan considers to be within its own EEZ. Japan wants notification before

Chinese maritime research ships enter its EEZ; China says that it does not recognize the EEZ announced unilaterally by Japan and that its activities are in accordance with international law.

The controversial deployment of sea-based TMD component.

It is reported that the U.S. Defense Department has concluded that a sea-based component using the Aegis air defense system is critical to the success of the theater missile defense (TMD) system. Missiles launched from sea-based systems could avoid being misled by decoys by destroying an enemy missile in its boost phase, shortly after lift-off. But to do so, the surface ships and submarines carrying the anti-ballistic missiles would have to be rather close to the launch site—within a few hundred miles.^{vi} The South China Sea is one possible place for deploying such a sea-based component. The sea-based component’s mobility and need for proximity to a country’s coast illustrate the U.S. Navy’s growing concern with freedom of navigation in the South China Sea. If the U.S. deploys sea-based TMD components in the South China Sea, it would arouse strong opposition from China.

The need for coordinated anti-piracy measures in EEZs.

Sea piracy has emerged as a growing and significant threat to maritime security in the Asia Pacific region. Piracy in Southeast Asia has generally accounted for about 60 percent of the total reported piracy in the world. According to the International Maritime Organization, pirate attacks in the year 2000 rose by 57 percent over the previous year to 469 incidents worldwide; more than two-thirds of these attacks occurred in Asian waters, and 75 were in the Malacca Strait.

Defining piracy is a problem. Under LOSC, piracy is limited to an illegal act committed on the high seas. Because most attacks occur within territorial waters, they fall outside the LOSC definition. LOSC is at fault in this regard, but littoral states should fill the gap.

The different spheres of jurisdiction over waters in the South China Sea have caused severe problems in the regional fight against piracy. Given the sensitivities

in the region regarding maritime jurisdiction and sovereignty, cross-jurisdictional arrangements between the region's coastal states have been conspicuously absent. The restrictions on cross-jurisdictional rights written into most countries' maritime agreements have undermined efforts against piracy. In a number of instances, pirates have used this legal gap to their advantage, deliberately fleeing to territorial or archipelagic waters, or to areas of contested jurisdiction, where it is most risky for naval vessels to operate unilaterally. Overlapping claims over EEZs further complicate the problem. Littoral countries are generally unwilling to prosecute offenders for acts of piracy committed in overlapping EEZs, and prefer to deport them instead.

Disputes over fishing. Continuing population growth in regional countries has placed heavy pressure on the region's fishing industry. Countries in the region are expanding their fishing efforts, and disputes among them over fishing have been increasing. Fishermen are routinely arrested and their equipment confiscated by coast guard authorities in the region. Chinese fishing boats are frequently sighted off Palawan, situated east of the disputed Spratly Islands, and several incidents involving naval units from the Philippines and Chinese fishing boats have been reported. In March 2000, Vietnamese fishermen were arrested by the Philippine navy and coast guard on Fearless Shoal, near the southern tip of Palawan. On June 25, 2001, the captain of a Malaysian vessel suspected of illegal fishing in Indonesian waters was reportedly shot by an Indonesian navy boat.

Disputed EEZ claims, outright poaching, and the ambiguity regarding the extent to which coastal states can govern the passage of foreign vessels in their EEZs are factors contributing to the fishing disputes. While recognizing the rights of vessels, including fishing vessels, of all states to enjoy freedom of navigation in the EEZ, LOSC stipulates that coastal states have sovereign rights over living and non-living resources in EEZs, and that foreigners cannot fish without permission. It further stipulates that "Nationals of other States fishing in the EEZ shall comply with the conservation measures and with the other terms and

conditions established in the laws and regulations of the coastal State" (Article 62:4). Thus, a coastal state can require foreign fishing vessels in its EEZ to obey its fishing laws and regulations, but the extent to which a coastal state could govern the passage of foreign fishing vessels in its EEZ is controversial. For example, Malaysia's Fisheries Act of 1985 "allows foreign vessels to exercise the right of innocent passage in Malaysian fishery waters which are the waters of the EEZ," but "the law requires prior notification for fisheries vessels to enter the Malaysian EEZ."^{vii} The provisions have aroused protests from Thailand.

A Confidence-Building Arrangement

To reduce the continued threat to SLOC security in the South China Sea, regional countries must establish confidence-building measures on navigation, or a navigational code of conduct. These might begin with the United States and China, since their conflicts may be the most dangerous of all. Based on the 1998 MMCA, the two sides might formulate an agreement along the lines of the 1972 "Incidents at Sea" agreement (INCSEA) between the United States and Soviet Union, which has proven effective in regulating the interaction of their fleets on the high seas. One defense analyst suggested: "A Chinese-American Incidents at Sea Agreement would be desirable because it would supplement the security dialogue of MMCA with formal rules of interaction. This would reduce both the likelihood of inadvertent clashes, as well as promote understanding and reduce the long-term likelihood of conflict."^{viii}

The value of a regional INCSEA agreement lies in the obligation of regional countries to consult regularly on safety. The purpose of a regional INCSEA would be to prevent collisions at sea and in the air that could affect relations among regional countries; to minimize the chance of accidents resulting from normal activities; and to develop more predictable standard operating procedures at sea for promoting mutually beneficial regional cooperation in naval operations.

An INCSEA-type arrangement in the South China Sea could take different forms and operate at different

Different spheres of jurisdiction in the Sea have caused severe problems in the fight against piracy

levels. Initially, its contents could be simple and later, more comprehensive. The development of a mutual prior-notification regime for surface and air reconnaissance missions might be the first step. Prior notification is a procedure normally frowned upon by the U.S. military out of fear that it could represent the first step down the slippery slope toward prior approval. But, “[t]he fact that a country has a right to fly surveillance missions in international waters adjacent to another country without prior notification does not preclude them from providing such notification as a military confidence-building measure.”^{ix} The agreement on a mutual prior notification mechanism reached between China and Japan in mid-February 2001, pertaining to maritime research activities in the Chinese and Japanese EEZs, provides a useful model for regional countries to study.

An INCSEA-type arrangement might be bilateral at first and multilateral later. An immature multilateral approach could quickly become bogged down by particularistic interests. “China is also unlikely to accept a regional solution to the problems of accidents at sea: it has a marked preference for bilateral agreements that escape the influence of third parties.”^x Putting aside China’s considerations, a multilateral agreement would be more feasible once a number of regional bilateral agreements have been established.

In the longer term, a comprehensive regional INCSEA for the South China Sea, together with supervisory mechanisms, would be needed to prevent or minimize conflict escalation and the likelihood that potentially dangerous naval confrontations would occur. Its contents might include the following.

- Definition and clarification of the extent of the jurisdiction coastal states have over resources and

marine scientific research in the EEZ, vis-à-vis the detailed application of the principle of freedom of navigation in the EEZ

- A set of rules to govern air-to-air and air-to-sea encounters, including methods of preventing aircraft collisions; rules governing the interception of reconnaissance aircraft and of engagement at sea; and standard operating procedures
- Procedures governing notification of the intent to conduct marine research in the EEZ
- Procedures governing notification of the intent to conduct naval exercises in the EEZ
- Procedures to prevent the collision of submarines with other undersea craft and with surface craft
- Regulations governing the tracking of submarines
- Emergency consultation systems, such as on the deployment of sea-based TMD components
- Procedures to prevent the escalation of conflicts that result from accidental or unintended weapons use, or unauthorized weapons use by subordinates, and implementation of a reporting process for such incidents
- The means for increasing military transparency, especially with regard to naval build-ups and naval strategy
- Plans for cooperative action to guarantee transportation of oil and gas imports
- Anti-piracy measures and systems for joint patrol
- Cooperation in humanitarian assistance, search and rescue, mine countermeasures, and cooperation in combating drug trafficking and illegal migration
- Regulations governing fishing
- A regime governing sea transport of ultrahazardous radioactive materials
- Initiatives for the protection of the environment

Since the U.S.-China conflict is the most dangerous, confidence building should begin with them

Notes

ⁱ Francisco Orrego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature under International Law*. Cambridge University Press, 1989, p. 106.

ⁱⁱ Dennis Mandsager, "The US Freedom of Navigation Program: Policy, Procedure, and Future," in Michael N. Schmitt (editor), "The Law of Military Operation," *International Law Studies*, Vol. 72. Naval War College Press, Newport, Rhode Island, 1998, p. 114, 117.

ⁱⁱⁱ Francisco Orrego Vicuna, op. cit., p. 120.

^{iv} Norman Friedman, "Confronting the Chinese," Proceedings, May 2001, p. 101.

^v www.Stratfor.com, April 2, 2001.

^{vi} Mark J. Valencia, "Beijing is Setting the Stage for Trouble in the South China Sea." *International Herald Tribune*, 3 July 2000.

^{vii} Mark J. Valencia, *Malaysia and the Law of the Sea: The Foreign Policy Issues, the Options, and their Implications*. Institute of Strategic and International Studies, Malaysia, 1991, p.116.

^{viii} Julian Schofield, "The Prospects for a Sino-American Incidents at Sea Agreement." *The Korean Journal of Defense Analysis*, Vol. XI, No.1, Summer 1999, p. 93.

^{ix} Ralph A. Cossa, "US-China Relations: The Crew's Home; Now What." *PacNet* 15A, 16 April 2001.

^x Julian Schofield, op. cit., p. 97.

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