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| 1. REPORT DATE (DD-MM-YYYY)<br>18-5-2005                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                             | 2. REPORT TYPE<br>FINAL      |                               | 3. DATES COVERED (From - To)                |                                                              |
| 4. TITLE AND SUBTITLE<br>China and the United Nations Convention on the Law Of the Sea:<br>Operational Challenges                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                             |                              |                               | 5a. CONTRACT NUMBER                         |                                                              |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                             |                              |                               | 5b. GRANT NUMBER                            |                                                              |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                             |                              |                               | 5c. PROGRAM ELEMENT NUMBER                  |                                                              |
| 6. AUTHOR(S)<br>CDR Steven D. Vincent. USN<br><br>Paper Advisor (if Any): CDR Peter Dutton, JAGC                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                             |                              |                               | 5d. PROJECT NUMBER                          |                                                              |
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|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                             |                              |                               | 5f. WORK UNIT NUMBER                        |                                                              |
| 7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)<br><br>Joint Military Operations Department<br>Naval War College<br>686 Cushing Road<br>Newport, RI 02841-1207                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                             |                              |                               | 8. PERFORMING ORGANIZATION<br>REPORT NUMBER |                                                              |
| 9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                             |                              |                               | 10. SPONSOR/MONITOR'S ACRONYM(S)            |                                                              |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                             |                              |                               | 11. SPONSOR/MONITOR'S REPORT<br>NUMBER(S)   |                                                              |
| 12. DISTRIBUTION / AVAILABILITY STATEMENT<br>Distribution Statement A: Approved for public release; Distribution is unlimited.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                             |                              |                               |                                             |                                                              |
| 13. SUPPLEMENTARY NOTES A paper submitted to the faculty of the NWC in partial satisfaction of the requirements of the JMO Department. The contents of this paper reflect my own personal views and are not necessarily endorsed by the NWC or the Department of the Navy.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                             |                              |                               |                                             |                                                              |
| 14. ABSTRACT<br><br>China places restrictions on the rights of foreign warships to exercise innocent passage of territorial waters, claims extensive sovereignty in its Exclusive Economic Zone (EEZ), and has made maritime claims citing "historic waters." China asserts that these actions are consistent with the provisions of the United Nations Convention On The Law Of the Sea (UNCLOS) Treaty.<br>The United States does not recognize China's claims and restrictions encroach upon U.S. national rights and interfere with the ability of the theater Combatant Commander -PACOM - to employ forces in the Western Pacific littoral.<br>PACOM must continue to conduct FON operations to assert U.S. claims while engaging regional partners such as Japan. The U.S. must assist in developing workable solutions to South China Sea maritime disputes that are consistent with U.S. interests. The U.S. should not ratify the UNCLOS Treaty until it has been modified to include a military activities exemption that addresses conduct of innocent passage and operations in EEZs. |                             |                              |                               |                                             |                                                              |
| 15. SUBJECT TERMS<br>China --- Law of The Sea --- UNCLOS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                             |                              |                               |                                             |                                                              |
| 16. SECURITY CLASSIFICATION OF:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                             |                              | 17. LIMITATION<br>OF ABSTRACT | 18. NUMBER<br>OF PAGES<br><br>27            | 19a. NAME OF RESPONSIBLE<br>PERSON                           |
| a. REPORT<br>UNCLASSIFIED                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | b. ABSTRACT<br>UNCLASSIFIED | c. THIS PAGE<br>UNCLASSIFIED |                               |                                             | 19b. TELEPHONE NUMBER (include<br>area code)<br>401-841-3556 |

NAVAL WAR COLLEGE  
Newport, RI

CHINA AND THE UNITED NATIONS CONVENTION ON THE  
LAW OF THE SEA: OPERATIONAL CHALLENGES

by

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature: \_\_\_\_\_

9 May 2005

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## Abstract

# CHINA AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: OPERATIONAL CHALLENGES

China places restrictions on the rights of foreign warships to exercise innocent passage of territorial waters, claims extensive sovereignty in its Exclusive Economic Zone (EEZ), and has made maritime claims citing “historic waters.” China asserts that these actions are consistent with the provisions of the United Nations Convention On The Law Of the Sea (UNCLOS) Treaty.

The United States does not recognize China’s claims and restrictions as legitimate. This disagreement has played out in recent Chinese-U.S. maritime incidents. The excessive Chinese claims and restrictions encroach upon U.S. national rights and interfere with the ability of the theater Combatant Commander --PACOM -- to employ forces in the Western Pacific littoral.

PACOM must continue to conduct FON operations to assert U.S. claims while engaging regional partners such as Japan. The U.S. must assist in developing workable solutions to South China Sea maritime disputes that are consistent with U.S. interests. The U.S. should not ratify the UNCLOS Treaty until it has been modified to include a military activities exemption that addresses conduct of innocent passage and operations in EEZs.

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## Introduction

In recent years, China has taken more frequent actions that appear to infringe upon U.S. national rights of navigation and overflight, and has claimed extensive sovereignty rights over its Exclusive Economic Zone (EEZ). Freedom of navigation in the global maritime environment is essential to the peace, prosperity, and national security of the United States.<sup>1</sup> The legal regime that establishes the rules for these navigational freedoms is the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>2</sup> The UNCLOS Treaty went into effect on November 16, 1994 and is arguably, “. . . the most comprehensive international negotiations ever undertaken, which now provides the foundation for the rule of law over that 70 percent of the earth covered by water.”<sup>3</sup>

Although the United States signed the convention, it was never ratified by the Senate.<sup>4</sup> President Reagan chose not to support the treaty because of concerns about the deep seabed mining provisions. Nevertheless, he directed that the U.S. would comply with the balance of UNCLOS noting that, “. . . the Convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interest of all States.”<sup>5</sup>

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<sup>1</sup> President, “The National Security Strategy Of The United States of America,” (2002): 17-20.

<sup>2</sup> United Nations Conference on the Law of the Sea, 3d, United Nations Convention on the Law of the Sea, A/CONF. 62/122 (n.p.: 1982).

<sup>3</sup> George V. Galdorisi and Kevin R. Vienna, Beyond The Law of the Sea: New Directions for U.S. Oceans Policy (Westport, CT: Praeger Publishers, 1997), xi.

<sup>4</sup> Stephen Dinan. “Skeptical Senate Eyes Sea Treaty,” Washington Times, 7 March 2005, 15.

<sup>5</sup> President, Statement, “Statement by the President On the Exclusive Economic Zone of the United States,” (10 March 1983). President Reagan’s statement says in part that, “First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans--such navigation and overflight. In this respect, the United States will recognize the rights of other States in the

One fundamentally original concept of the UNCLOS treaty is the concept of an Exclusive Economic Zone (EEZ).<sup>6</sup> In their book, *Beyond The Law Of The Sea: New Directions for U.S. Ocean Policy*, George V. Galdorisi and Kevin R. Vienna observe, “The 200-mile . . . EEZ grants coastal States increased control over the resources off their coasts, while curtailing the trend of national claims to broader territorial seas and preserving within the EEZ as many high-seas freedoms as possible.”<sup>7</sup> The EEZ claims of the world’s coastal nations encompass nearly a third of Earth’s waters.<sup>8</sup> Clearly, the implementation of EEZs is of particular concern to a maritime nation as reliant upon international trade as is the United States.

In Congressional testimony earlier this year, Admiral William J. Fallon, Commander U.S. Pacific Command (PACOM), noted that the free flow of commerce through the western Pacific trade routes is of vital interest to the United States. He observed that, “China’s growing economy, increasing demand for energy, and desire to assume more prominence in international and regional affairs will all play a key role in defining Asia’s future security

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waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States. Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.”

<sup>6</sup> Jaye Ellis, “The Exclusive Economic Zone and the United Nations Convention on the Law of the Sea,” American Journal of International Law (April 2004): 2. Ellis observes that, “. . .the concept of the EEZ is a novel one, and its implications must be worked through gradually and carefully. The fact that the EEZ does not fall within a well-recognized legal category, coupled with the need to strike delicate and difficult balances between different groups of states holding differing interests, influenced the shape of the final provisions of the LOS Convention. Many of these provisions suffer from vagueness, ambiguity, or lack of clarity; others bear the traces of negotiation and compromise. They thus present significant difficulties for those who seek to interpret or apply them.”

<sup>7</sup> George V. Galdorisi and Kevin R. Vienna, Beyond The Law of the Sea: New Directions for U.S. Oceans Policy (Westport, CT: Praeger Publishers, 1997), 150.

<sup>8</sup> Ibid.

environment.”<sup>9</sup> The National Security Strategy of the United States highlights the importance of relations between the United States and China, stating that, “The United States relationship with China is an important part of our strategy to promote a stable, peaceful, and prosperous Asia-Pacific region.”<sup>10</sup>

The U.S. has cause for great concern, therefore, when China takes actions that appear to infringe upon our international rights of navigation and overflight. This paper will review the relevant Chinese EEZ claims, particularly in the context of several recent maritime incidents, and ask the following questions: Are the Chinese EEZ claims and restrictions excessive? If so, do they encroach upon our international rights and interfere with the ability of the theater Combatant Commander --PACOM -- to employ forces in the Western Pacific littoral?

On May 14, 1996, the day before China ratified the UNCLOS treaty and promulgated their maritime claims, “. . .the *People’s Daily* launched [a propaganda campaign] with a troublingly different theme: ‘I Love Our Nation’s Blue Territory’. The newspaper explained that the sea was also national territory and urged an awakening of ‘ocean consciousness.’ The next day the government announced that the area of sea under China’s jurisdiction had that day grown from 370,000 square kilometres (sic) to some 3 million.”<sup>11</sup> This Chinese interpretation of UNCLOS is one that may lead to conflict with the United States.

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<sup>9</sup> William J. Fallon, “Testimony,” U.S. Congress, Senate, Committee on Armed Services, U.S. Pacific Command Posture, 8 March 2005.

<sup>10</sup> President, “The National Security Strategy Of The United States of America,” (September 2002): 27.

<sup>11</sup> “Seas of troubles,” The Economist (25 May 1996): 36-37.

## **China and UNCLOS**

In theory, the 1982 UNCLOS Treaty leveled the playing field and created an unambiguous set of rules for all countries to abide by. While the convention represents a major step forward in codifying many of the historical practices that had evolved into international law and crafted practical guidelines designed to promote equitable commerce, the contemporary practice does not yet mirror the theory.

China's national defense policy declares, "China . . . defends and administers its land borders and seas under its jurisdiction, safeguards the country's territorial sovereignty and maritime rights and interests, and secures both its lands and sea borders strictly in accordance with treaties and agreements it has signed with neighboring countries, and the United Nations Convention on Law of the Sea."<sup>12</sup> In reality, however, Chinese practice with regard to innocent passage, exclusive economic zones, and sovereignty claims over what China calls "Historic Waters" is largely inconsistent with UNCLOS.

### ***Innocent Passage***

Articles 17<sup>13</sup> and 18<sup>14</sup> of the UNCLOS Treaty set forth the right and definition of innocent passage; Articles 19<sup>15</sup> and 20<sup>16</sup> list actions which are contrary to innocent passage. At no point do these rules prohibit warships from exercising innocent passage and there is no articulated requirement for advance notification in order for a warship to exercise these

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<sup>12</sup> People's Republic of China. Information Office of the State Council. "White Paper on China's National Defense." (2002): 16.

<sup>13</sup> United Nations Conference on the Law of the Sea, 3d, United Nations Convention on the Law of the Sea, Article 17, A/CONF. 62/122 (n.p.: 1982). (See Appendix A).

<sup>14</sup> Ibid., Article 18, (See Appendix A).

<sup>15</sup> Ibid., Article 19, (See Appendix A).

<sup>16</sup> Ibid., Article 20, (See Appendix A).

rights. However, when China ratified the UNCLOS treaty in 1996, it cited Chinese domestic law and asserted that the warships of all foreign nations would still be required to obtain advance approval from China prior to exercising innocent passage of Chinese territorial seas.<sup>17</sup>

Although China had the right to issue a statement when it ratified UNCLOS, those statements or restrictions may not contravene the regulations of the Treaty.<sup>18</sup> Accordingly, the United States does not recognize the Chinese advance notification requirement.<sup>19</sup> Neither does Australia, which constantly tests the innocent passage clause by sending warships through the Taiwan Strait unannounced.<sup>20</sup> As Zou Keyuan notes in an analysis of Chinese policy, “. . . after its ratification of the Convention, China is obliged to harmonize its domestic law with that Convention.”<sup>21</sup>

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<sup>17</sup> United Nations, Division for Ocean Affairs and the Law of the Sea, “Declarations and statements - China,” United Nations Convention on the Law of the Sea. 24 January 2005. <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty6.asp>> [6 May 2005]. “The People’s Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State.”

<sup>18</sup> United Nations, Division for Ocean Affairs and the Law of the Sea, “Declarations and statements,” United Nations Convention on the Law of the Sea. 24 January 2005. <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm)> [6 May 2005]. “Article 310 of the Convention allows States and entities to make declaration or statements regarding its application at the time of signing, ratifying or acceding to the Convention, which do not purport to exclude or modify the legal effect of the provisions of the Convention.”

<sup>19</sup> Department of Defense, Maritime Claims Reference Manual, DoD 2005.1-M (Washington, DC: January 1997), 2-86 - 2-88.

<sup>20</sup> Tom Allard, “PM Defends ‘Innocence’ Of Ships In China Row,” Sydney Morning Herald, 30 April 2001. The article relates that two Australian Navy frigates and a supply ship transited the Strait of Taiwan -- claimed Chinese territorial waters -- on April 17, 2001. When China protested, Australia claimed that the ships were exercising ‘innocent passage.’

<sup>21</sup> Zou Keyuan, “Innocent passage for warships: The Chinese doctrine and practice,” Ocean Development and International Law, (July 1998): vol 29, 215.

### ***Exclusive Economic Zone (EEZ)***

An innovation of the 1982 UNCLOS Treaty was the creation of EEZs set forth in Articles 55 through 58.<sup>22</sup> These zones ensure that coastal states maintain a significant degree of control over the natural resources off their coasts while retaining a substantial portion of the navigational and over-flight freedoms associated with the high seas region.<sup>23</sup> Military ship and aircraft activities are not explicitly limited in the EEZ, so long as their activities do not involve exploitation of the resources resident in the EEZ. China sees the EEZ differently.

During development of the UNCLOS Treaty, Chinese delegate Li Ching made it clear that China did not concur with the EEZ concept. “China’s contention is that the essence of the new zone lies in the exclusiveness of coastal State jurisdiction. This contention explains why China repudiated the idea that the economic zone should be regarded as part of the high seas. If that zone were considered to be included in the high seas, so runs the argument, there would be no sense in labeling it as exclusive.”<sup>24</sup> Not surprisingly, upon ratification in 1996 China asserted full sovereign rights over a 200 nautical mile EEZ.<sup>25</sup> This assertion only adds to the complexities of the new EEZ concept.

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<sup>22</sup> United Nations Conference on the Law of the Sea, 3d, United Nations Convention on the Law of the Sea, Articles 55 to 58, A/CONF. 62/122 (n.p.: 1982), (see Appendix A).

<sup>23</sup> George V. Galdorisi and Kevin R. Vienna, Beyond The Law of the Sea: New Directions for U.S. Oceans Policy (Westport, CT: Praeger Publishers, 1997), 150.

<sup>24</sup> Li Ching, “Statement,” United Nations Convention on the Law of the Sea, Second Committee, 1 August 1974, quoted in Shih-Chung Tung, *The Policy Of China In The Third United Nations Conference On The Law Of The Sea* (Geneva: The Graduate Institute of International Studies, January 1981), 60.

<sup>25</sup> United Nations, Division for Ocean Affairs and the Law of the Sea, “Declarations and statements - China,” United Nations Convention on the Law of the Sea, 24 January 2005. <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty6.asp>> [6 May 2005]. “In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People’s Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf.”

### ***Chinese Sovereignty Claims over “Historic Waters”***

China’s claim of exclusive jurisdiction and sovereignty over a 200 nautical mile EEZ is contrary to the provisions of the Treaty. Further complicating the issue are China’s broad claims of historic waters with associated EEZs and restrictions on EEZ activities that are contrary to the provisions of the Treaty.<sup>26</sup>

Upon ratification of UNCLOS, China promulgated its “Blue Territory” by stating, “The People’s Republic of China reaffirms its sovereignty over all its archipelagos and islands as listed in article 2 of the Law of the People’s Republic of China on the territorial sea and the contiguous zone, which was promulgated on 25 February 1992.”<sup>27</sup> In one sweeping move -- citing “historic waters” and the UNCLOS treaty as justification -- the Chinese claimed nearly eighty percent of the South China Sea as their own, to the exclusion of virtually all other countries on the South China Sea littoral. These “historic waters” included the resource-rich Mischief Reef atoll in the Spratly Islands -- an atoll that China forcibly occupied the year prior to Treaty ratification, despite legitimate claims by the Philippines and other South China Sea littoral nations.<sup>28</sup>

China, with an eye for a steady supply of raw materials to feed its industrial engine, is shouldering aside other regional nations and casting a wide net of claimed sovereignty. The implications of exclusive Chinese sovereignty over such a wide area -- an area astride some

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<sup>26</sup> John Pomfret, “China is Rising,” Washington Post National Weekly Edition, (October 29-November 4 2001): 2.

<sup>27</sup> United Nations, Division for Ocean Affairs and the Law of the Sea, “Declarations and statements - China,” United Nations Convention on the Law of the Sea, 24 January 2005.  
<<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty6.asp>> [6 May 2005].

<sup>28</sup> John Pomfret, “China is Rising,” Washington Post National Weekly Edition, (October 29-November 4 2001): 2.

of the world's most heavily trafficked sea lanes -- are enormous. Japan, one of China's major economic competitors and a historical adversary, receives seventy percent of its crude oil through the route that China now claims to own.<sup>29</sup> Rather than exercise negotiation and arbitration in a murky area of international law, China has used its might to forcibly establish a claim.<sup>30</sup>

The UNCLOS Treaty specifically preserves freedoms of navigation and overflight in an EEZ; the same rights normally associated with activity on the high seas. Since the purpose of the EEZ is to preserve the economic rights of the coastal state, Article 56 assigns jurisdiction to the coastal nation for, “. . . the establishment and use of artificial islands, installations and structures (and) marine scientific research.”<sup>31</sup> China, however, deviates from the Convention provisions and sets its own rules for what is acceptable activity in its EEZ and asserts “sovereign rights and jurisdiction”<sup>32</sup> over its EEZ waters. The Chinese have consistently argued that marine surveys of EEZ waters were not benign, in fact posed a threat, and that the coastal nation should be allowed to regulate them.<sup>33</sup> In another example

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<sup>29</sup> Ibid.

<sup>30</sup> Zou Keyuan, “Historic Rights in International Law and in China's Practice,” Ocean Development and International Law, (April 2001): 163. The author notes that, “Since there are no definite rules in international law which govern the status of maritime historic rights, China's claim is not a violation of international law. Similarly, since there are no such rules, it is doubtful whether China's claim could be established in international law.”

<sup>31</sup> United Nations Conference on the Law of the Sea, 3d, United Nations Convention on the Law of the Sea, Article 56, A/CONF. 62/122 (n.p.: 1982), (See Appendix A).

<sup>32</sup> United Nations, Division for Ocean Affairs and the Law of the Sea, “Declarations and statements - China,” United Nations Convention on the Law of the Sea. 24 January 2005. <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty6.asp>> [6 May 2005].

<sup>33</sup> Li Ching, “Statement,” United Nations Convention on the Law of the Sea, Second Committee, 1 August 1974, quoted in Shih-Chung Tung, *The Policy Of China In The Third United Nations Conference On The Law Of The Sea* (Geneva: The Graduate Institute of International Studies, January 1981), 105, “. . .all marine scientific research activities have potential military applications. They will always serve military and political purposes as well as economic interests, whether directly or indirectly, and they therefore constitute a danger to national security and sovereignty. For example, the measuring of the depth of the sea, of the

of ambiguity, the Chinese have implied that any military activity in their claimed EEZ is unauthorized.<sup>34</sup> This is clearly inconsistent with the enjoyment of high seas freedoms that the Convention authorizes in an EEZ.

### **UNCLOS Operational Reality**

The United States does not recognize China's restrictions on military activities in the EEZ. In fact, the official U.S. Navy policy states that since EEZs preserve high-seas freedoms, ". . . the existence of an exclusive economic zone in an area of naval operations need not, of itself, be of operational concern to the naval commander.."<sup>35</sup>

This disagreement between China and the U.S., however, has moved beyond the realm of debate and into the real world. Two incidents that highlight this change are the April 2001 collision between a U.S. EP-3 and a Chinese fighter and the 2001-2002 confrontations involving U.S. maritime survey vessels in the Yellow Sea. In an April 6, 2001 article in *Newsweek Korea*, Bates Gill sheds some light on the Chinese thought process, noting that, "China's policy in the current (EP-3) episode plays up its 'victim mentality,' and

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temperature of its water, or of pressure or salinity anywhere in the ocean does not in itself constitute military research, but the aggregate of the data collected could well be of use to warships and particularly to the sophisticated navies of the major maritime powers."

<sup>34</sup>Jeanette Greenfield, China's Practice in the Law of the Sea (Oxford: Clarendon Press 1992), 92. "China has stated that normal navigation and overflight would be unaffected, although any other activities in such zone would require consent through concluded agreements. 'Normal' navigation has not been defined in detail, and no reference made as to whether this simply means innocent passage as defined by China within the territorial sea. According to the write Shao Jim, passage in the zone is subject to the coastal states' sovereign rights, and for instance military use of the zone would not be maintainable in terms of the traditional freedom of the high seas."

<sup>35</sup> Department of the Navy, The Commander's Handbook On The Law Of Naval Operations, Naval Warfare Pub 1-14M (Washington, DC: October 1995), Art 2.4.2.

accounts for its emotional rhetoric, unreasonable demands, and steadfast -- if wrongheaded -- insistence on dragging out this incident longer than it needs to.”<sup>36</sup>

On 1 April 2001, a Chinese J-8 interceptor approached a US Navy EP-3 unarmed surveillance aircraft operating in international airspace in the South China Sea. After two aggressive passes less than five feet from the EP-3, the Chinese pilot apparently miscalculated and collided with the EP-3. The J-8 broke apart and crashed with the subsequent loss of the pilot, while the EP-3 was able to recover and make an emergency landing on Chinese territory on Hainan Island.<sup>37</sup> Despite the facts that the encounter took place in international airspace and the collision was the result of aggressive Chinese actions, China saw no reason to apologize.

Although this incident was the most significant, it was not the only close call. In the months prior to the collision there had been as many as 44 intercepts of U.S. reconnaissance flights in international airspace near China, with Chinese fighters frequently coming as close as 30 feet to the U.S. aircraft.<sup>38</sup> A series of incidents involving the USNS *Bowditch* lack the drama of the EP-3 incident, but are just as disturbing.

In September 2002 the unarmed U.S. Navy oceanographic survey ship USNS *Bowditch* was conducting maritime survey operations approximately sixty miles off the Chinese coast in the Yellow Sea.<sup>39</sup> Although *Bowditch* was inside China’s claimed EEZ, the

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<sup>36</sup> Bates Gill, “Hainan Incident: Loud Wake-Up Call for the Region,” Newsweek Korea, (6 April 2001).

<sup>37</sup> Peter Felstead, “Inside Account Further Exonerates EP-3 Pilot,” Jane’s Military Aerospace News, 18 May 2001.

<sup>38</sup> Ibid.

<sup>39</sup> Robert Burns, “U.S. claims Chinese planes harassed unarmed Navy ship in Yellow Sea,” The Associated Press. 28 September 2002. News/Wires, Lexis-Nexis. Dayton, OH: Lexis-Nexis, (29 September 2002).

ship was well outside the 12 mile territorial sea limit and therefore entitled to exercise all high seas freedoms of navigation -- including maritime survey operations.

This incident provides important insight into the Chinese perspective on maritime sovereignty. In addition to China's unique views on the degree of exclusivity in its EEZ, China is particularly suspect of maritime research ships.<sup>40</sup> In fact, the Chinese government accused the *Bowditch* of engaging in "criminal activity."<sup>41</sup> Chinese military forces responded aggressively, making low level passes over the ship and sending ships to intercept *Bowditch*.

This was not the first encounter that *Bowditch* had had with Chinese forces while operating in international waters. In 2001, a Chinese frigate chased the U.S. ship from the Yellow Sea and Chinese maritime patrol aircraft made low passes on *Bowditch* in international waters, despite the fact that she was being escorted by a U.S. Navy guided missile cruiser.<sup>42</sup>

## **The Chinese Double Standard**

The Chinese view is that the UNCLOS Treaty gives them every right to restrict innocent passage and the right to restrict survey and other military operations in its EEZ.

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<sup>40</sup> Heng, Li. "What's US Vessel up to on Chinese Waters?" People's Daily Online, 29 September 2002. <[http://english.people.com.cn/200209/29/print20020929\\_104144.html](http://english.people.com.cn/200209/29/print20020929_104144.html)> [21 March 2005]. "US defense officials insisted that Dowditch (sic) conducted activities on high seas beyond the 12 sea mile boundary line of China's territorial waters. In fact, according to related articles of the United Nations Convention on the Law of the Sea, the waters still belong to China's Exclusive Economic Zone (EEZ). . . . Foreign aircraft and vessels must abide by international principles and laws of the coastal countries when crossing EEZs, and any actions harming the sovereignty, security and interests of the coastal countries are forbidden, according to the Convention, that is, the principle of 'innocent passage'."

<sup>41</sup> Bill Gertz and Rowan Scarborough, "Bowditch Fight," Inside The Ring, 27 September 2002, <<http://www.gertzfile.com/gertzfile/ring092702.html>> [21 March 2005].

<sup>42</sup> James C. Bussert, "China Taps Many Resources For Coastal Defense," SIGNAL Magazine, (November 2002).

The actions to the EP-3 and *Bowditch* incidents, in China's view, are in accordance with international law. However, China does not hesitate to employ the same methods as the U.S. Navy when it suits its purposes.

China is routinely and systematically conducting maritime surveys inside Japan's claimed EEZ, the very "criminal act" that *Bowditch* was accused of committing. In fact, Chinese survey vessels have even entered Japanese territorial seas -- a clear violation of Japan's sovereignty.<sup>43</sup> What is even more ominous is that these surveys are not limited to East China Sea where the EEZs of China and Japan meet and there is a natural friction in the competition for resources.

From 14 May to 5 June 2000, a Chinese intelligence ship methodically, "... cruised disputed waters northward in the Sea of Japan, cut east to the Pacific Ocean, and then looped in a southerly arc past Okinawa to China. In the glass-walled operations room of the Japanese coast guard, the pencil line plotting the ship's course completed a neat circle around Japan's heartland."<sup>44</sup> These surveys are overtly military and China is making little effort to maintain any other pretense.<sup>45</sup> One Japanese official observed that, "My guess is that China

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<sup>43</sup> "Protecting Japan/MSDF Faces New Challenges After Cold War's End," Foreign Broadcast Information Service, Tokyo Daily Examines MSDF's Role in Monitoring Suspicious Ships Around Japan, (Langley, VA: FBIS, 5 January 2004).

<sup>44</sup> Doug Struck and Rajiv Chandrasekaran, "Nations Across Asia Keep Watch On China," Washington Post, 19 October 2001, p. 23.

<sup>45</sup> See, "Military Aims of China's Ocean Forays -- Objective Not Just Resources," Foreign Broadcast Information Service, Japan: Scholar Underscores Military, Strategic Aims of PRC Surveys in Japan's EEZ, (Langley, VA: FBIS, 1 October 2004). "As an example of a military survey by the PLA navy. . . in 2000 a Yanbing-class icebreaker/intelligence ship conducted an intelligence collection operation in which it circumnavigated Japan. The operation lasted from 14 May to 5 June, with repeated intelligence-collection operations involving back-and-forth activities in the Tsushima strait, the Tsugaru strait, the waters off the Boso peninsula, and in the vicinity of Amami Oshima island. Beginning this year, they have expanded the scope of the surveys, going from Minami Daito to the area around Okino-tori-shima and then to the waters of the western Pacific. On top of that, the surveys have taken on a deeper military coloration, and it appears that they have been collecting the intelligence necessary for submarine navigation/operations and/or laying mines."

is looking to the rear of Taiwan, with which it has a unification issue, and is gathering data for submarine activities with an eye on the island of Guam, the US base of operations.”<sup>46</sup>

In November 2004, the Japanese Maritime Self Defense Force detected a Chinese nuclear attack submarine operating submerged near the coast of Japan.<sup>47</sup> Although it is not clear whether the Chinese submarine was operating in Japanese territorial waters in violation of the rules for innocent passage, what is clear is that for the next three days, in an uncharacteristic use of force, Japanese forces chased the Chinese submarine for hundreds of miles.<sup>48</sup> Clearly, China will not hesitate to ignore the UNCLOS when international law is inconvenient. One can only imagine how China would have reacted to a foreign submarine found in its territorial waters.

### **Operational Consequences for PACOM**

The differing views held by the United States and China over maritime boundaries has great significance for U.S. national security. The military forces of the United States provide a critical deterrent against foreign aggression that might affect the global flow of commerce. In order for U.S. forces to be a credible deterrent they must have access. In its analysis of the national security implications inherent in the UNCLOS convention, the U.S. Department of Defense emphatically stated that, “Assurance that key sea and air lines of communication will remain open as a matter of international legal right and will not become

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<sup>46</sup> “Can Japan End Weak-Knee Policy Toward China?; The Maritime State Japan’s Seas Being Violated,” Foreign Broadcast Information Service, Japan’s Moves To Protect Maritime Rights, PRC Activities in EEZ Viewed, (Langley, VA: FBIS, 1 July 2004).

<sup>47</sup> Martin Fackler, “Japanese Pursuit Of Chinese Sub Raises Tensions,” The Wall Street Journal, 15 November 2004, 20.

<sup>48</sup> Ibid.

contingent upon approval by coastal or island nations is an essential requirement for implementing our national security strategy.”<sup>49</sup> China’s policies and actions place this freedom at risk. If they are allowed to prevail in their claims, the negative operational consequences for USPACOM are tremendous.

If China is allowed to prevail in its claims of sovereign jurisdiction over enormous ocean areas, this would seriously degrade the ability of U.S. forces to conduct peacetime operations in a critical region. Not only would the U.S. Air Force and Navy be unable to operate in much of the south-east Asian littoral, but forces responding to contingencies in other regions could be forced to take alternate routes that would significantly restrict the ability of the U.S. to quickly respond to a crisis.<sup>50</sup>

Second, without U.S. presence, important partners such as Singapore and the Philippines would no longer benefit from the stabilizing influence that the presence of U.S. forces provides. Instead, as the emerging naval power in the region, Chinese ships would be free to exert their influence unchecked.

Lastly, any freedom of navigation operations conducted by U.S. forces take on a new level of risk as the mere presence of U.S. forces in China’s claimed EEZ could result in hostilities. U.S. forces and Allies, like Australia, routinely conduct freedom of navigation (FON) operations in order to oppose illegitimate maritime claims. These operations are not intended to be antagonistic. Rather, they are intended to serve as just one element in the

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<sup>49</sup> Department of Defense, National Security And The Convention On The Law Of The Sea 2nd ed. (Washington, DC: January 1996), 9.

<sup>50</sup> Dana Robert Dillon, “How the Bush Administration Should Handle China and South China Sea Maritime Territorial Disputes,” Backgrounder #1470, Washington, DC: The Heritage Foundation, 2001, 2. “If Washington continues to allow Beijing’s willful misinterpretation of the United Nations Convention on the Law of the Sea (UNCLOS) to remain unchallenged, the South China Sea will become a *de facto* Chinese lake, the countries of Southeast Asia will be subject to Beijing’s interpretations of international law and sovereignty, and the American Navy will have to ask permission from China to transit this vital international waterway.”

discourse between nations.<sup>51</sup> However, with China's extreme sensitivity to sovereignty, most U.S. FON operations will almost certainly be viewed as blatantly provocative.<sup>52</sup>

## **What Next?**

To the United States and China, the same words in the UNCLOS Treaty mean entirely different things. The two nations have what would seem to be irreconcilable differences regarding basic issues relevant to military and quasi-military operations in the waters of south-east Asia. In most relationships, the disagreeing parties would be best served to part ways and avoid the issues. In fact, that may be just what China wants. If the U.S. accedes to China's demands -- demands which the U.S. feels are not consistent with international law, then China wins. So what should PACOM do?

First, U.S. forces in PACOM must continue to conduct a robust program of freedom of navigation and overflight into the disputed areas. These operations must be an integral element in the theater commander's range of Flexible Deterrent Options. If the U.S. fails to adequately voice disagreement with China's position, its claims could evolve into accepted international practice. The U.S. is one of the few countries with the military capability to

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<sup>51</sup> George V. Galdorisi and Kevin R. Vienna, *Beyond The Law of the Sea: New Directions for U.S. Oceans Policy* (Westport, CT: Praeger Publishers, 1997), 131: "The articulated purpose of the FON program is to preserve and protect the global mobility of U.S. forces, and the navigation and overflight rights of all ocean uses. The program is designed to be peaceful rather than provocative and to impartially reject excessive maritime claims of allied, friendly, neutral, and unfriendly States alike. The effectiveness of the FON Program as a 'lever' to gain full coastal State compliance with the navigation and overflight provisions of the Convention has been positive for the most part, although the value of asserting these rights has begun to be weighed against the negative effects of a policy built around continual protest and assertion."

<sup>52</sup> Dale G. Stephens, "The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations." *California Western International Law Journal* 29, no. 2 (Spring 1999): 287-288. Stephens, addresses the importance of challenging excessive maritime claims by the use of military forces. "... while undoubtedly sometimes politically charged, the American approach to challenging what it perceives to be excessive maritime claims is consistent with the decision in *Anglo Norwegian Fisheries* (1951 I.C.J. 116). There, it was suggested that the general 'toleration of a notorious claim' was sufficient to render a claim valid. This is all the more relevant today when States are actively engaging in multiple conscious actions in order to crystallize nascent rules in favor of their own sovereign maritime interests."

demonstrate a challenge to an excessive claim as opposed to the mere filing of a diplomatic protest. However, these operations must be taken with great caution.

As evidenced by China's reactions to the U.S. EP-3 and the USNS *Bowditch*, China is not opposed to using military force to back up its claims. This is the essence of the dilemma: The use of military force is one of the more assertive ways for the U.S. to demonstrate disagreement with China's claims, yet it is entirely likely that the mere presence of U.S. military forces exercising unannounced transit passage of Chinese territorial waters, conducting military or survey operations in China's EEZ, or operating in an area that China claims as "historic waters" could be viewed by China as a brazenly provocative act that it must oppose with force. Thus what the U.S. views as an inherently non-offensive action may in fact be viewed by the Chinese as an openly provocative and result in conflict escalation.

The U.S. has to remember that this is not an issue where a clear line can be drawn in the sand. China and the U.S. draw those same lines at fundamentally different points. The U.S. must also remember that at the operational and tactical levels that the professional military officers from both countries are engaged in professionally defending their countries interests as they see them. The inherent danger is that the Chinese officer may see hostile intent or even a hostile act in an activity that the U.S. officer views as benign.

The U.S. must be mindful of China's emerging sense of international prominence. As Brahma Chellaney, an Indian scholar, notes, "At the core of the challenge is the need to find discreet ways to impose limits on the exercise of Chinese power while respecting China's right to be a world power."<sup>53</sup> At the operational and tactical levels it is critical that U.S. forces tasked with conducting FON operations be familiar with the basic Chinese views. The

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<sup>53</sup> Brahma Chellaney. "China reconstructs past to chart future," The Japan Times, 25 October 2004.

U.S. should not refrain from asserting its rights, but those tasked with showing the flag must clearly understand how their actions can be viewed from the Chinese perspective. This knowledge may prove crucial in avoiding unintended escalation.

To address this challenge, PACOM should seek out greater opportunities for interaction between U.S. and Chinese military officers. Even though disagreement and enmity may persist at the national level, operational level warriors can only benefit from an open and constructive dialogue. A statement made by Chinese President Jiang Zemin to Admiral Joseph Prueher when Prueher was in command of PACOM is insightful. President Zemin observed that, “Before we can build trust, we need to build understanding.”<sup>54</sup>

One key step PACOM must take as part of its Theater Security Cooperation Plan (TSCP) is to engage Japan and assist it in implementing a robust and viable maritime strategy that resists Chinese expansionism. As a major economic force and one of our key allies in the region, Japan has much to offer.

Additionally, the United States must take an active role in facilitating resolution of the various and often conflicting South China Sea maritime claims made by the various regional nations.<sup>55</sup> The U.S. has carefully avoided the appearance of taking sides in the dispute by assuming a posture of “active neutrality”. However, as Ralph Cossa of the Pacific Forum Center for Strategic and International Studies points out, “A continued U.S. military presence puts the ‘active’ in any policy of active neutrality in the South China

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<sup>54</sup> Joseph W. Prueher, “Shaping Our Future in the Asia-Pacific,” Joint Forces Quarterly (Autumn/Winter 1997-98): 60.

<sup>55</sup> Pacific Forum CSIS, *Security Implications of Conflict in the South China Sea: Exploring Potential Triggers of Conflict*, A Pacific Forum CSIS Special Report, (Honolulu: 1998), v. Countries with conflicting claims to parts (or all) of the Spratly Islands in the South China Sea claims include Brunei, China, Malaysia, the Philippines, Taiwan, Vietnam.

Sea.”<sup>56</sup> The Association of Southeast Asia Nations (ASEAN) has worked hard to develop a “code of conduct” to regulate maritime activity and avoid armed conflict in the South China Sea. China has pledged to abide by the code, but as the Heritage Foundation notes “. . . China’s refusal to restrain its activities in the area has led only to a non-binding political declaration.”<sup>57</sup>

Using PACOM’s TSCP as a starting point, the U.S. can work with the various countries (less China) to identify workable solutions. Building on this work, the United States should then adopt a recommendation proposed by the Heritage Foundation that the U.S., “. . . will respect the negotiated results of an ASEAN covenant on South China Sea issues that supports American interests.”<sup>58</sup> Such an agreement would give the U.S. international legitimacy with which to leverage greater cooperation from China.

Finally, the United States should not ratify the UNCLOS Convention until the ambiguities regarding warship innocent passage rights and military operations in the EEZ are resolved. This is commonly referred to as the “military activities” exemption.<sup>59</sup> President

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<sup>56</sup> Ibid., ix.

<sup>57</sup> Dana Robert Dillon, Balbina Y. Hwang, and John J. Tkacik, Jr., “ASEAN Regional Forum: Promoting U.S. Interests,” Background #1659, Washington, DC: The Heritage Foundation, 2003, 7.

<sup>58</sup> Dana Robert Dillon, “How the Bush Administration Should Handle China and South China Sea Maritime Territorial Disputes,” Background #1470, Washington, DC: The Heritage Foundation, 2001, 9. The Heritage Foundation report goes on to say that, “The prospect that ASEAN might reach an accord on the disposition of maritime claims in the region that could gain international recognition would oblige China to join or face the increasing concerns in the region that stem from its overbearing territorial and EEZ claims in the South China Sea.”

<sup>59</sup> John A. Duff, “A Note on the United States and the Law of the Sea: Looking Back and Moving Forward.” Ocean Development and International Law, Vol. 35 (2004): 201. Duff cites testimony in October 2003 from then Vice CNO Admiral Michael G. Mullen (on behalf of the Joint Chiefs of Staff) to the Senate Foreign Relations Committee during hearings on UNCLOS. Duff notes that Admiral Mullen, “. . . reiterated the concerns raised by others in the defense community and agreed that the ‘military activities’ exemption condition was of paramount importance in a U.S. move toward accession. The Admiral also agreed that accession was warranted.” Duff cites the as reference for Admiral Mullen’s testimony: <http://foreign.senate.gov/testimony/2003/MullenTestimony031021.pdf>

Reagan's Executive Order made it U.S. policy to abide by the great majority of the Treaty, especially those sections germane to ship and aircraft navigation. The U.S. is therefore already in functional compliance. A case could even be made that the international acceptance of the Treaty -- even by those nations who have not ratified it -- has given the Treaty the force of international law.<sup>60</sup>

It is apparent that China does not intend to abide by the letter of the law -- at least not when it does not suit its purposes. Therefore, the U.S. must level the playing field in order to work through the issues. Ratifying the UNCLOS Treaty may actually take away the very flexibility that PACOM needs in dealing with China. Were the U.S. to ratify the Treaty tomorrow, the problems discussed in this paper would persist, but PACOM would have fewer "legal" options available under international law in order to respond to China's excessive claims and provocations.

## **Conclusion**

China's maritime claims and the restrictions China places on military and survey operations in its territorial waters and EEZ are excessive. Neither is consistent with the United Nations Convention on the Law of the Sea -- a Treaty that China has ratified. These excessive claims and improper restrictions encroach on the rights of other nations to exercise routine freedoms of navigation and overflight.

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<sup>60</sup> Frank Gaffney, "'River Kwai Syndrome' Plays in Law of the Sea," U.S. Naval Institute Proceedings, (March 2005): 2. "Fortunately, the United States and its Navy can continue to enjoy freedom of navigation without becoming party to the Law of the Sea regime. Just as it has done for the past 22 years, the United States can conform to international law in this area and address bilaterally any issues that arise (as was done with the EP-3 incident with China in 2001). Such an approach maximizes U.S. leverage and minimizes the risks associated with multilateral compulsory dispute resolutions or tribunals."

For the U.S. and PACOM, the Chinese encroachment in south-east Asia threatens the ability of U.S. forces to routinely operate in a critical region, to support our allies, and interferes with the mobility required to respond to other regions. The Chinese actions pose a danger and directly threaten U.S. national security.

The U.S. must continue to assert its rights in the face of the Chinese claims while making every effort to ensure that its forces abide by the spirit and intent of the UNCLOS Treaty. At the same time, the U.S. should not ratify the Treaty until its flaws and ambiguities are resolved. It is critical for the U.S. to remain cognizant of the Chinese view. No matter how vehemently the U.S. and China disagree, this is an emotional national issue that China will not back away from easily.

Finally, every effort must be taken to ensure that there is no unintended escalation. This is an enormously complex issue that has significant national, theater-strategic, and operational implications. As Ralph Cossa notes in his assessment of potential sources of conflict in the South China Sea, “While all parties no doubt have in mind certain ‘lines in the sand’ which should not be crossed, most lines are not clearly defined. While some strategic ambiguity as to possible responses to hostile acts may be useful, tactical ambiguity regarding what constitutes sufficient provocation could prove fatal.”<sup>61</sup>

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<sup>61</sup> Pacific Forum CSIS, Security Implications of Conflict in the South China Sea: Exploring Potential Triggers of Conflict. A Pacific Forum CSIS Special Report. (Honolulu: 1998), ix.

## Appendix A

### Selected Articles from the United Nations Convention on the Law Of the Sea

#### *Article 17* *Right of innocent passage*

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

#### *Article 18* *Meaning of passage*

1. Passage means navigation through the territorial sea for the purpose of:
  - (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
  - (b) proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

#### *Article 19* *Meaning of innocent passage*

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
  - (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
  - (b) any exercise or practice with weapons of any kind;
  - (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
  - (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
  - (e) the launching, landing or taking on board of any aircraft;
  - (f) the launching, landing or taking on board of any military device;
  - (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
  - (h) any act of wilful and serious pollution contrary to this Convention;
  - (i) any fishing activities;
  - (j) the carrying out of research or survey activities;

- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

*Article 20*  
*Submarines and other underwater vehicles*

In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.

*Article 55*  
*Specific legal regime of the exclusive economic zone*

The exclusive economic zone is 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.”

*Article 56*  
*Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*

1. In the exclusive economic zone, the coastal State has:
  - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
  - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
    - (i) the establishment and use of artificial islands, installations and structures;
    - (ii) marine scientific research;
    - (iii) the protection and preservation of the marine environment;
  - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

*Article 57*  
*Breadth of the exclusive economic zone*

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

*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 (Freedom of the High Seas) 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.

*Article 87*  
*Freedom of the high seas*

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
  - (a) freedom of navigation;
  - (b) freedom of overflight;
  - (c) freedom to lay submarine cables and pipelines, subject to Part VI;
  - (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
  - (e) freedom of fishing, subject to the conditions laid down in section 2;
  - (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

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