

The Reckless and the Resolute: Confrontation in the South China Sea

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The capabilities of the USNS *Impeccable* leave little doubt as to its purpose sailing in the South China Sea, 75 miles off the coast of China's Hainan Island.¹ As the prefix USNS implies, the *Impeccable* is a predominantly civilian-manned ocean surveillance vessel. However, it, along with several other ships, tows the sonar array system (SURTASS²) that performs acoustic collection surveillance to help locate and identify submarines. While these operations are routine peacetime activities, they would be applied to any future antisubmarine warfare.³

While the *Impeccable's* confrontation was the first widely reported naval incident between the two countries in recent years, it was not unprecedented. The USNS *Victorious*, the ship replaced by the *Impeccable*, experienced harassment by a Chinese Bureau of Fisheries vessel and repeated low-altitude passes by a Chinese navy

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maritime patrol aircraft. In that incident, the Chinese ship illuminated the US ship with a high-intensity light and during the night crossed her bow at close distance without warning. The harassment intensified with the *Impeccable* and reached a peak on March 8. A radio call demanded that the *Impeccable* leave the area or “suffer the consequences”. The *Impeccable’s* passage was also blocked by a Chinese vessel, which turned across her bow, stopped and placed obstacles in the water. One Chinese ship with guns (reported as a frigate but probably a patrol boat), closed to about 100 yards. Another came within 25 feet, despite attempts to ward it off with fire hoses.⁴ The Chinese crew also attempted to snag the cable for the towed array.⁵ The reports suggest danger of collision and injury. Thus Chinese government ships blatantly violated the norms of good seamanship and safe maneuvering and the rules of the road—formally known as the International Regulations for Avoiding Collisions at Sea.⁶

The core issue of these incidents are the two countries’ differing interpretations and applications of international law to US naval activity in China’s Exclusive Economic Zone (EEZ). While neither is likely to significantly change their positions, such incidents, with their inherent risks of escalation and disruption of Sino-American relations, could be avoided through a clearer understanding of acceptable behavior in their interaction on the high seas, as well as a better system of communication and consultation. It is imperative the two countries find a way to agree to disagree, and find a way to avoid or defuse future confrontations that could lead to larger conflict.

DIFFERING INTERPRETATIONS

The Chinese justification for harassment of these US Navy ocean surveillance ships derives from an interpretation of a provision in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The Treaty provides coastal nations with Exclusive Economic Zones (EEZs), generally extending 200 miles seaward from the coastal baseline. States have special rights in their EEZs over exploration for and use of marine resources, but the normal rights of all other states to sail and fly in the EEZ are protected.

The United States, while not yet a party to UNCLOS, does adhere to its provisions under customary international law.⁷ China is a party to the treaty. Both accept the concept of an EEZ as stated in UNCLOS as providing the coastal State sovereign rights concerning the natural resources of the zone.⁸ Differences arise regarding what activities in the EEZ are permissible under the Treaty, including naval operations. The United States emphasizes the UNCLOS rule that preserves the rights of all states in the coastal State’s EEZ to freedom of navigation, overflight and even laying pipelines and cables.⁹ It interprets this as including naval activities that are of a non-aggressive nature and done in preparation for self-defense.

When China ratified UNCLOS in 1996, it filed a declaration emphasizing *sover-*

eign rights and jurisdiction over the EEZ.¹⁰ Moreover, Chinese international lawyers justify a more restrictive interpretation, citing further treaty language, which reads: “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”¹¹

China, in adopting this position, is accused by some of attempting to treat its EEZ like territorial waters. Germany, for example, pointedly declared when it ratified the treaty that the EEZ is a new concept designed to grant coastal states certain resource rights while preserving the rights of others to conduct normal, peaceful activities in the zone, striking a delicate balance between the rights of the coastal state and other states. The German declaration concludes with this directly pertinent sentence: “In particular, the rights and jurisdiction of the coastal State in such zone do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them.”¹² This rebuff of the interpretation championed by China is perhaps a model for the United States to follow if it soon ratifies UNCLOS, as many expect it will.

On the other hand, there are other states that dispute the US interpretation and agree with China that US reconnaissance and surveillance activities conducted within its EEZ without its permission are violations of UNCLOS.¹³ In short, there is sufficient ambiguity to lead to differing interpretations, whether justified or not. The Chinese delegate to UNCLOS negotiations is quoted as saying that “freedom of scientific research in the past has meant espionage”.¹⁴ The United States remains resolute in the view that military activities on the high seas and in the EEZ are consistent with the “peaceful purpose” requirement, if they are conducted in a non-threatening fashion in order to prepare for legitimate self-defense.¹⁵ Neither side is inclined to change its position.

CONTRADICTIONS IN EEZ POLICY?

While China has been firm in defending what it sees as its sovereign rights at sea, its own track record with regard to military activities in the EEZs of other states raises questions. Some point out that China, over the years, has violated its own position on EEZ sovereignty by operating survey ships in Japanese waters. Indeed, Tokyo often protests the presence of Chinese survey ships near Japan (within the EEZ). Yet, the vast majority of these complaints are about operations in the disputed waters of the East China Sea (near Chunxiao and Diaoyutai), which China regards as its EEZ — thus justifying its presence. Nevertheless, there have also been intrusions in undisputed Japanese EEZ waters. The *Defense of Japan 2000 White Paper* describes a Chinese “information-gathering” ship circling Japan.¹⁶ In addition, the *2001 White Paper* reports the sighting of a Chinese navy missile observation support and survey and research ship navigating off the coast of Hamamatsu on the east coast of Japan to Tsushima, while appearing to conduct information-gathering activities.¹⁷

After a record of previous intrusions that would undermine its EEZ position, Beijing appears to have insulated itself from such arguments. In early 2001, Japan and China agreed on a two-month mutual prior notification system for maritime sci-

entific research in waters between the two countries. China is to give Japan at least two months' notice when its research ships plan to enter waters "near Japan and in which Japan takes an interest" while Japan is to inform China similarly before entering waters "near" China.¹⁸ Having concluded notification arrangements with Tokyo, Beijing probably feels it has now gained immunity from accusations that its actions contradict its own interpretation of the EEZ rights.

Beijing's recent move to dispatch People's Liberation Army Navy ships to the Gulf of Aden in support of anti-piracy operations seemingly represents a further divergence from its stated interpretation of EEZ rules. In a surprising decision that was announced last December, China declared that it would send three PLA Navy ships to the Gulf of Aden to protect Chinese shipping from Somali pirates. These ships did not become full-fledged members of Task Force 151--an international flotilla

Who Decided to Become Aggressive?

Did the top Chinese leaders specifically direct or approve the confrontations in the South China Sea, the 2007 anti-satellite (ASAT) missile test two years ago, and the aggressive action against a US EP-3 aircraft eight years ago? As to the *Impeccable* affair, it appears that as soon as the top leadership in Beijing was engaged, the aggressive behavior was halted. Is it possible that the harassment of the *Victorious* and the *Impeccable* was merely a reaction by low-level officials who were frustrated with US prying?

Indeed, the early March harassments of the *Victorious* and the *Impeccable* had strange timing if the decisions were indeed being made in Beijing. To amplify the doubts that Chinese president Hu Jintao was aware initially of the aggressive actions in the South China Sea, there are the following: US Secretary of State Hillary Clinton, on her first visit abroad in the new job, had a very warm and successful visit in Beijing in late February, and her counterpart, Chinese Foreign Minister Yang Jiechi, had a similarly successful visit to Washington in early March where he set up the London G20 meeting between Presidents Hu and Obama.

It would seem bizarre for Beijing to be doing so much to foster bilateral relations and for President Hu, back in Beijing, to be directing Chinese sailors to stage near-collisions with *Impeccable* and make threats over bridge-to-bridge radio. Perhaps the most compelling argument that the orders had not come from on high is the rapid and definitive manner with which the confrontation was resolved

once it reached the highest levels of both governments. It also seems unlikely that the White House was specifically aware that, during this period of critical engagement between Washington and Beijing, the USNS *Impeccable* was engaged in activities near China that were likely to draw a reaction from the Chinese. The *Impeccable* and the *Victorious* were probably carrying out a long-established deployment and collection plan. Similar suspicions surround the notorious January 2007 anti-satellite (ASAT) missile test that successfully intercepted a decaying Chinese weather satellite and created a debris field in space. With respect to this missile shot, then-US National Security Adviser Steve Hadley, in an interview with the *New York Times*, suggested that the most senior leaders in China might not have been aware of the testing. "The question on something like this is, at what level in the Chinese government are people witting, and have they approved?" he asked. The *Times* went on to state that American officials "were uncertain whether China's top leaders, including President Hu Jintao, were fully aware of the test or the reaction it would engender." These officials, the article states, presume that President Hu was generally aware of the missile testing program but speculate that he may not have known the timing of the test. China's continuing silence suggested, at a minimum, that Hu did not anticipate a strong international reaction.³⁵

Speculation also persists that senior Chinese leaders did not make the specific

decisions that resulted in the April 2001 collision of the US Navy EP-3 (on a routine reconnaissance mission) and the PLA Navy F-8 (conducting a routine intercept mission) near Hainan Island. Through personal conversations, two knowledgeable PLA Navy officers relayed that PLA Navy personnel at the Lingshui naval air base and the Yulin naval base believed that the frequency of reconnaissance flights had increased and that the standoff distance from PLA Navy ships had decreased. The middle-grade officers there on Hainan were said to be frustrated, even angry, and felt like their protests had been ignored by the Americans. F-8 pilot Lieutenant Commander Wang Wei's conduct, with his gestures and reckless passes or join-ups with the EP-3, was consistent with the attitude attributed to the PLA Navy officers at these two bases on Hainan. A PLA Navy senior officer related that, after the F-8 had fallen into the sea, the flight leader requested by radio permission to shoot down the American aircraft. Officials at Lingshui relayed the request to PLA Navy headquarters at Beijing. The request, assuming the validity of this assertion, was denied. The level of ire among the Lingshui officers was apparently not matched in Beijing.

The general consensus among China watchers — that the collision owed more to Wang Wei's reckless and poor airmanship in his highly maneuverable fighter and likely not an aggressive move by the relatively cumbersome four-engine EP-3 — has never reached Beijing's top leaders. Many had hoped that recognition of this shortcoming might bring about reforms in the Chinese government and lead to the development of a crisis management system that might include something resembling the US National Security Council. Rudimentary efforts in that direction apparently failed, and crises in China seem still to be handled without benefit of a system for supplying accurate information to top Chinese leaders, especially if it is bad or unwelcome news.

Notes

- ¹ David E. Sanger and Joseph Kahn, "US Tries to Interpret China's Silence Over Test," *New York Times*, January 22, 2007; http://www.nytimes.com/2007/01/22/world/asia/22missile.html?_r=1

that includes the United States, several European countries, and, recently, the ROK and Japan.¹⁹ This deployment marks the first time since the establishment of the PLA Navy that a force has been sent to conduct combat-like operations beyond the Chinese littoral waters. It raises questions not only how will China manage its naval expansion into distant places, but also how it would defend its interpretation of permissible operations in the EEZs of other countries.

Before the Senate Armed Services Committee, Admiral Timothy J. Keating, commander, US Pacific Command, contrasted the two simultaneously occurring events, the South China Sea confrontation and the Gulf of Aden anti-piracy operation. "The *Impeccable* incident is certainly a troubling indicator that China, particularly in the South China Sea, is behaving in an aggressive, troublesome manner, and they're not willing to abide by acceptable standards of behavior or rules of the road," he said. But, at the same time, Keating noted that China is cooperating with the international naval task force led by the United States to fight piracy in the Gulf of Aden. The two types of Chinese behavior, the admiral added, are confusing.²⁰

From Beijing's perspective, its position on these two events is clear. With respect to its operations in the Gulf of Aden, Chinese leaders are careful to justify it based on the United Nations Security Council actions authorizing the operations.²¹ China

even awaited a definitive UNSC decision before publicly declaring intent to send a naval force. Equally important, China has noted the expressed desire of the Somalia government for help in combating piracy.²² These were important factors in the unprecedented Chinese decision to dispatch a force on what is essentially a combat mission within the EEZ of another country. In citing these factors, China seems to have carefully constructed a legal framework to defend against assertions of a double standard: that is, objecting to US military activities in its EEZ while conducting such activities in another state's EEZ.

This point was reinforced with the statement by the Chinese rear admiral heading the anti-piracy operation who made clear that his force would not accept direction from others but would limit the interaction to the "exchange of information" with other ships of the multinational force,²³ thereby avoiding the possibility of being assigned tasks incompatible with Beijing's guidelines for the employment of force. In this way, the PLA Navy operations in the Gulf of Aden conform to Beijing's interpretation of the UNCLOS: that non-coastal states must obtain the coastal state's approval for military operations in an EEZ.

While the diverging interpretations of permissible activities within an EEZ under international law provide a rationale for the two countries' conduct, the problem would exist even if EEZs did not. There is something more fundamental behind the actions of Beijing and Washington in these confrontations. Beijing understandably opposes Washington's right to fly reconnaissance aircraft and position surveillance ships off the coast of China. Washington's position, if largely tacit, is that intelligence collection against the Chinese military is warranted if China attacks Taiwan or undertakes other actions that require a US military response. In other words, China is indignant at what it sees as American intrusive conduct,²⁴ and China's refusal to renounce the use of force against Taiwan compels the United States to maintain efforts to ensure success if US military intervention is required.

SEEKING A SOLUTION

The repetition of risky encounters between the two countries again points to the need for a formal mechanism for dealing with maritime incidents between the two countries. As retired Australian Rear Admiral Sam Bateman put it, "It is important that incidents such as the recent ones are not allowed to escalate. In a scenario not unlike that of the USS *Pueblo* off North Korea in 1968, China could be tempted to seize an unarmed MSC survey vessel in its EEZ. Or in a similar provocative action, the US might begin to escort its survey vessels with naval warships."²⁵ Thus there is a clear need for confidence-building measures and a code of conduct to mitigate escalation.

While some suggest that China should go to the United Nations to establish and clarify its position, the Chinese already think the EEZ rules work their way. The point to be made to the senior Chinese leadership is that we agree to disagree on EEZ rules, but how we then react or avoid overreaction is the matter to be resolved. For

example, China might legitimately employ noisemakers to foil acoustic collection or otherwise mask submarine emissions, but it cannot physically snag the towed array or stage near-collisions.

At least on paper, the United States and China have developed a framework to resolve such incidents. In 1998, the two countries established a mechanism called the Military Maritime Consultative Agreement, which included maritime and aviation safety working groups; however, the agreement fell apart after the 2001 EP-3 incident. Following the collision between the planes, then-Secretary of State Colin Powell attempted to utilize the MMCA framework to call an emergency meeting to investigate the accident. But, when he called the Chinese foreign minister, Chinese officials made it clear they had no interest in the agreement that they had signed. Instead, they insisted Washington halt the reconnaissance flights and subsequently suspended the MMCA talks — an action former Deputy Assistant Secretary of State Randy Shriver labeled a counterintuitive response if there ever was one.²⁶ In the context of the recent incident, Shriver stated that we have the vehicle for managing incidents at sea, but the Chinese are not particularly interested in a rules-based, operator-to-operator approach to safety on the high seas. They have other (probably strategic) objectives in play.

Despite unfavorable past experiences, a new bilateral environment accompanied by pressing economic and other issues that demand cooperation presents a fresh opportunity. This time an effort to revisit the MMCA should aim at a higher level in the Chinese government thereby depriving lower level officials the chance to reject the idea. The goal would be either to seek a direct remedy from the top, or to propose that the highest levels of each government direct the prompt convening of a meeting of the MMCA principals and its safety working groups. The goal of the meeting would not be to resolve the fundamental divergence, but to establish procedures to govern conduct during confrontations such as with the EP-3 and *Impeccable*. There is precedent with the 1972 US-Soviet Incidents at Sea Agreement (INCSEA), where violations would be handled jointly by senior officials.

INCSEA AS PRECEDENT

Before INCSEA, encounters with the Soviets were often dangerous and outcomes unpredictable. After INCSEA, that was rarely the case. As this author experienced first-hand in the 1960s and 1970s, “games of chicken” on the seas led to loss on both sides, in terms of military equipment and lives. The many close calls (see insert) illustrate an atmosphere where actions by officers of both navies at sea and in the air were exacerbating tensions with consequent political fallout and the risk of escalation.²⁷

Soviet naval ships routinely shadowed and often harassed or interfered with operations of the US Navy and other NATO countries. Some incidents were deliberate expressions of policy, while others were attributable to aggressiveness or even inexperience. Soviet fighters often intercepted US Navy P-2 and P-3s. Aircraft carriers

were shadowed endlessly by Soviet “trawlers” and occasionally by Bear aircraft.

The US employed such tactics as surprising Soviet Navy ships by flying aircraft low and at high speed, remaining below the radar horizon and escaping detection until the last minute. In this way, Soviet activities could be observed.²⁸ American carrier-based pilots reportedly flew sufficiently low over Soviet warships to snag radio antenna wires between masts with lowered tailhooks—likely apocryphal but representative of the aggressive attitudes at the time. In less aggressive activities, from the Iceland Defense Force, US fighters intercepted Soviet Bear aircraft, and P-3s were sent to locate Soviet submarines and even simulate attacks on Soviet surface ship formations.²⁹

High-risk activities reached a peak in 1967. On 10 and 11 May of that year, Soviet navy ships collided with the destroyer USS *Walker* in the Sea of Japan as it was attempting to fend off Soviet efforts to disrupt the flight operations of the carrier USS *Hornet* that USS *Walker* was escorting. Then-Congressman Gerald R. Ford suggested that the US Navy be authorized to use its guns to respond. Soon after, a Soviet navy Tu-16 Badger aircraft cart wheeled into the Norwegian Sea while “buzzing” the carrier USS *Essex* during flight operations, killing the Soviet crew of seven.

After several major incidents, the Soviets finally agreed to start talks on safety at sea.³⁰ The talks produced INCSEA, a tangible result. Conduct by both sides became generally more responsible. The risk of investigation under INCSEA and charges for violations of the agreement acted as a deterrent to officers on both sides. Under the agreement, each side had a mechanism to report dangerous conduct, thus deterring many risky and provocative actions. The average number of incidents per year dropped from over 100 in the 1960s to 40 by 1974. The 1973 Arab-Israeli War saw close to 100 Soviet ships intermingling with US forces in tense circumstances, yet no serious incidents occurred.³¹

When violations did occur, they were resolved smoothly because a mechanism was in place to adjudicate, review procedures, and correct transgressions. INCSEA not only provided rules but was also something of a safety valve. Indignation, frustration, ideological differences, and the like could be vented. The wronged would be heard and the reckless chastised. INCSEA worked because neither government wanted collisions or escalation.

INCSEA WITH CHINA?

The top leadership in China seems to share the desire to avoid escalation. If nothing else, proposing use of the MMCA to develop an agreement could be a way to start a conversation between top leaders where both sides could be candid about their reasons, rationale and readiness to avoid a recurrence. However, both the United States and China have expressed opposition to replicating the 1972 US-Soviet INCSEA agreement because that agreement was clearly made between adversaries.

Any new agreement will inevitably repeat many of the common sense rules of the

road laid out in the INCSEA document. However, a new direction might be undertaken in certain important ways. First, it may be critical to incorporate additional and modified provisions that change the language and tone, so as to avoid misunderstandings and unwanted associations. In essence, an agreement with China might be conceived as prescribing procedures for *coordination* (in place of the emphasis on incidents). These might be called a Military Maritime Coordination Procedures Agreement (MMCPA). CPA is already a widely familiar term both at sea and in the air; it stands for closest point of approach, or the minimum distance calculated when a ship or aircraft is approaching another ship or aircraft. A minimum CPA for ships while conducting surveillance could be agreed upon. A similar minimum distance could be prescribed for aircraft. Additionally, the agreement could become a coordination method that, to a far greater extent than INCSEA, employs communications as an additional buffer (beyond the written rules) to avoid collisions or other incidents. For instance, a vessel or aircraft about to commence surveillance would reveal its presence, and then both sides would keep each other apprised of movements of interest.

With respect to language or tone, the agreement with China, in line with the coordination theme, could replace the confrontational thrust generally associated with INCSEA with a collegial and professional quality. Moreover, the wording, as compared to that of INCSEA, should be amplified and updated to reflect technological advances, and the scope might be broadened to include vessels and aircraft of government agencies other than the armed forces, since such vessels have been involved in recent events.

In general (see appendix for details), MMCPA would cover the activities of military, government and auxiliary ships and aircraft on the high seas and in the airspace above. Approaching vessels and aircraft would announce by radio maneuvers of interest to the other country. The agreement would, like INCSEA, prohibit interference with naval formations and require special consideration for maneuvers in areas of heavy sea traffic. Also like INCSEA, MMCPA would envision the negotiation of minimum distances for closure and prohibit simulated attacks and the use of strong lights or lasers to illuminate ship bridges and aircraft cockpits.

SURPRISE RESOLUTION

As it happened, the March 2009 incident ended unexpectedly. A March 20 Chinese news report started with the declaration that the Chinese military was ready to call an end to the standoff with the United States after diplomatic efforts had reduced tensions. It was stated that top commanders did not have plans to increase the military presence in the South China Sea and that military analysts agreed it was time to end the dispute and move on with more important issues concerning Sino-US relations.³² This occurred despite the fact that Beijing had followed Washington's declaration that it was sending a destroyer to escort the *Impeccable* with an announcement that it would augment patrols in the South China Sea, converting

decommissioned naval ships and possibly acquiring fishing boats to join the effort.³³ In addition, the USNS *Impeccable* was said to be remaining in the area.³⁴

The surprise ending was consistent with many China watchers' expectations that the top leadership would conclude that this confrontation was not the issue upon which Beijing and Washington should be expending time, effort and hard-earned goodwill. An overriding need required China and the United States to stop squabbling over EEZ rules and intelligence collection rights and move on to the issues facing the G20, the Six-Party process, global climate change, among other things.

Although this confrontation finished peacefully, it is by no means a permanent resolution. The USNS *Impeccable* continues to sail off Hainan and US reconnaissance aircraft still fly through China's EEZ. The potential for trouble will persist. The short-term solution was the apparent mutual recognition of the importance of other issues. The mid-term solution might resemble the described coordination agreement with the Chinese that would make surveillance and confrontation less risky to the bilateral relationship and to those involved at sea and in the air. The toughest issues can be resolved through the adoption of cooperative undertakings, such things as broad maritime cooperation that will serve to build trust and confidence between Beijing and Washington—which now feel the need to continue to hedge in the form of military readiness to confront the other. Engagement can serve to reduce the need to hedge. ☪

APPENDIX

CONCEPTUAL OUTLINE FOR US-CHINA MILITARY

MARITIME COORDINATION PROCEDURES AGREEMENT (MMCPA)

Based on the concept, as described in the article, of an agreement to facilitate coordination, what follows is a very much abbreviated version (in the form of working guidelines, not formal language) of an agreement with China, by a new name. Procedures from the 1972 INCSEA agreement appear in regular font, while new suggestions are bolded and include the author's explanatory comments in italics:

Geographic scope: The navigation of the high seas including EEZs and flight over the high seas [thus effectively excluding territorial waters—just as in 1972]

Types of vessels and aircraft covered: Ships, **other vessels**, and aircraft of the naval forces, naval auxiliaries, and **other government agencies** of the United States and China—whether alone or in formation.

Bases and premise:

- International Regulations for Preventing Collisions at Sea (Rules of the Road)
- International law codified in the 1958 Geneva Convention on the High Seas
- Instruction of the commanding officers of their respective ships to observe strictly the letter and spirit of these fundamental guidelines.

Article 10 of the Geneva Convention provides an underlying basis: 1. Every State shall take such measures for ships under its flag as are necessary to ensure safety

at sea with regard, inter alia, to: (a) *The use of signals, the maintenance of communications and the prevention of collisions...* [This new proposal gives emphasis to radio and other electronic means of exchanging information that now seem available and appropriate for use between the United States and China. INCSEA contemplated visual signals and communications. The suggested requirement, described below in some detail, to make a voluntary announcement of impending arrival in the vicinity also sets a better tone—collegial and professional rather than adversarial or confrontational]

Conduct by ships, **other vessels** [patrol craft and other types not called ships could be involved], and aircraft:

- Avoid ship collisions by adhering to Rules of the Road; **announce when a deviation from the Rules is intended and receive acknowledgement; e.g., electing to stop or turn away when in the position of a privileged crossing ship and obligated normally to maintain course and speed.**
- Avoid aircraft collisions by adhering to ICAO (International Civil Aviation Organization) visual or instrument flight rules and take extraordinary precautions when operations require deviation from such practices; e.g., operating in “due regard” status where an aircraft is responsible over the high seas for separation from other aircraft.
- Do not interfere in the “formations” of the other party.
- Avoid maneuvers in areas of heavy sea traffic where international traffic schemes exist.
- Surveillance ships are to maintain a safe distance from the object of investigation so as to avoid “embarrassing or endangering the ships under surveillance” [consider a minimum distance rule, possibly 500 yards or meters, without mutual consent for a closer approach].
- Use accepted international signals including bridge-to-bridge radio circuits when ships maneuver near one another; after initial contact, automated position-reporting means may be utilized as available, but intentions must be announced for maneuvering in the immediate vicinity, perhaps within 2,000 yards.
- Do not simulate attacks with actions such as pointing guns, missile launchers, torpedo tubes; locking on with fire-control radars, launching objects toward, or illuminating with powerful lights or lasers the bridges of the other party’s ships or cockpits of aircraft.
- Inform vessels when submarines are exercising near them.
- Require aircraft commanders, **in addition to complying with ICAO rules for collision avoidance**, to use the greatest caution and prudence in approaching aircraft and ships of the other party and not permitting simulated attacks against aircraft or ships, performing aerobatics over ships, or dropping hazardous objects near them.
- Require the ship or aircraft arriving in the vicinity of the other party’s ships, vessels, or aircraft to announce on bridge-to-bridge radio, a specified radio frequency (to be monitored when surveillance is likely or observed), or other advanced reporting means the following “approach report”:

- » Identity (as best known) of unit(s) being approached, call sign of transmitting vessel or aircraft, identity or composition of approaching unit or group, position (relative or geographic), altitude, course and speed, intentions. These could be formatted to facilitate use by those with lack of language skill.
- » The approach report from a US Navy aircraft might sound as follows: “The following is a US-China MMCPA approach report. Unidentified PLA Navy ships 45 miles northwest of Hainan Island, this is US Navy 7937, one EP-3 aircraft 14 miles south of your formation at flight level 215 on a course of 025 at 335 knots expecting to transit your position and proceed northward. Do you have known aircraft in your vicinity? Over.”
- » The approach report from a PLA Navy surface group might be composed at follows: “The following is a US-China MMCPA approach report. Unidentified US Navy aircraft carrier formation 225 miles east of Djibouti, this is PLA Navy destroyer 136 in company with another destroyer and a frigate at 12 degrees 10 minutes north latitude and 46 degrees 38 minutes east longitude on a course of 295 at 12 knots. We are considering coming left to 185 to avoid interference with your ongoing flight operations and to avoid heavy merchant traffic. When will you complete flight operations? Over.”

NOTES

¹ The prefix USNS, not USS, indicates that these are not warships but rather vessels operated primarily by civilians (with some uniformed Navy personnel) to do special missions and technical tasks for the US Navy.

² Tactical-Auxiliary General Ocean Surveillance

³ Surveillance Towed Array Sensor System

⁴ It was reported that the crew of the *Impeccable* used fire hoses to try to stop the approach, but the Chinese crew stripped to their underwear and came within about 25 feet. “US protests ‘harassment’ of USNS *Impeccable* by Chinese vessels,” *Los Angeles Times*, March 9, 2009, <http://www.latimes.com/news/nationworld/world/la-fg-impeccable-china10-2009mar10,0,5014118.story?track=rss>

⁵ “Pentagon says Chinese vessels harassed US ship,” CNN, March 9, 2009, <http://www.cnn.com/2009/POLITICS/03/09/us.navy.china/>

⁶ The COLREGS, as they are sometimes called, are premised on the need to avoid collisions at sea—as reflected in the title. Obviously, actions to heighten the danger of collision are not anticipated. Extracts from Rules 2 and 8 are illustrative of obligations:

Rule 2

(a) Nothing in these Rules shall exonerate any vessel, or the owner, master, or crew thereof, from the consequences of any neglect to comply with these Rules or of the *neglect of any precaution which may be required by the ordinary practice of seamen*, or by the special circumstances of the case.

Rule 8

(d) *Action taken to avoid collision with another vessel shall be such as to result in passing at a safe*

distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.

(e) If necessary to avoid collision or allow more time to assess the situation, a vessel may slacken her speed or take all way off by stopping or reversing her means of propulsion.

(f)

(i) A vessel which, by any of these rules, is *required not to impede the passage or safe passage of another vessel* shall when required by the circumstances of the case, take early action to allow sufficient sea room for the safe passage of the other vessel.

(ii) A vessel required not to impede the passage or safe passage of another vessel is not relieved of this obligation *if approaching the other vessel so as to involve risk of collision and shall, when taking action, have full regard to the action which may be required by the rules of this part*.

(iii) A vessel the passage of which is not to be impeded remains *fully obliged to comply with the rules of this part when the two vessels are approaching one another so as to involve risk of collision*. [Emphasis supplied.]

⁷ President Clinton signed the Convention in 1994 and passed it to the Senate for the required ratification. After a decade and a half of delay, the Senate may ratify it in 2009. China ratified it in 1996.

⁸ UNCLOS Article 56 (1) states: 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 seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. [Emphasis supplied.]

⁹ Article 58 (1) states with respect to permissible activities in another country's EEZ: In the exclusive economic zone, *all States...enjoy...the freedoms...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....* [Emphasis supplied.]

¹⁰ Article 310 of the Convention allows States and entities to make declarations 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*. Upon ratifying the treaty in 1996, China, nevertheless, made the following declaration with respect to jurisdiction over its EEZ: 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. This declaration is at the website of United Nations Oceans and Law of the Sea, Division for Ocean Affairs and the Law of the Sea, Declarations and statements; http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification. Listed alphabetically under China.

¹¹ UNCLOS Article 58 (3); http://www.un.org/Depts/los/convention_agreements/texts/unclos/part5.htm

¹² *Ibid*. Listed alphabetically under Germany.

¹³ The diverse views on military activities in an EEZ expressed authoritatively by UNCLOS delegates and specialists of several countries including China, the United States, Singapore, Mexico and others are described in Van Dyke, Jon M., "Military Ships and Planes Operating in the EEZ of Another Country," undated paper, <http://www.hawaii.edu/elp/publications/faculty/TokyoPaperFinal.doc>, pp. 3-6. On p. 5, Van Dyke stated: "[C]ountries have remained conflicted about this issue, expressing the view that they made strategic sacrifices during the Convention's

negotiations in order to achieve a universally acceptable Convention, and are still uneasy about other countries' military activities close to their coasts....”

¹⁴ Wallace, Michele, “The Right of Warships to Operate in the Exclusive Economic Zone as Perceived by Delegates to the Third United Nations Law of the Sea Convention” in Jon M. Van Dyke, Lewis M. Alexander, and Joseph R. Morgan (eds.), *International Navigation: Rocks and Shoals Ahead?* Honolulu: Law of the Sea Institute, 1988, pp. 345, 346-47; as cited in <http://www.hawaii.edu/elp/publications/faculty/TokyoPaperFinal.doc>.

¹⁵ Article 58 of UNCLOS concerning EEZs, refers to the applicability of Article 88, which states: “The high seas shall be reserved for peaceful purposes.”

¹⁶ Assumed to be conducting information gathering operations since the ship was casting its equipment into the sea and rotating its antennas. *Defense of Japan 2000 White Paper* English translation by Urban Connections, p. 49; <http://www.infoasia.co.jp>

¹⁷ *Defense of Japan 2001 White Paper* available at <http://www.jda.go.jp/e/pab/wp2001/youyaku/by1301030000.htm>

¹⁸ “Japan, China agree on 2-month maritime notice system,” Japan Policy & Politics, Kyodo News Agency, Feb 19, 2001; available at http://findarticles.com/p/articles/mi_m0XPO/is_2001_Feb_19/ai_70709776.

¹⁹ Interestingly, Seoul and Tokyo decided to send ships only after Beijing had done so. The Chinese ships, although remaining independent, are communicating with Task Force 151 ships by e-mail and bridge-to-bridge radio, and exchanging information on operations and positions, thus participating substantially, if not officially, in the multinational undertaking to protect maritime activity in the Gulf of Aden. It is not clear if the JMSDF ship is part of TF 151 or simply cooperating.

²⁰ Al Pessin , “US Admiral Calls for Renewed US-China Military Talks,” VOANews.com, 19 March 2009; <http://www.voanews.com/english/2009-03-19-voa63.cfm>

²¹ “Remarks by Vice Minister He Yafei at the UNSC Ministerial Meeting On Counter Piracy off the Coast of Somalia,” Ministry of Foreign Affairs of the PRC, 17 December 2008, <http://www.fmprc.gov.cn/eng/wjb/zzjg/gjs/gjxw/t526519.htm>

²² “Vice Foreign Minister He Yafei Meets with Foreign Minister of the Transitional Federal Government (TFG) of Somalia Ali Ahmed Jama,” Ministry of Foreign Affairs of the PRC, 17 December 2008, <http://www.fmprc.gov.cn/eng/wjb/zzjg/gjs/gjxw/t526947.htm>

²³ “Chinese Navy sends most sophisticated ships on escort mission off Somalia,” *China View: Window of China*, 26 December 2008; http://news.xinhuanet.com/english/2008-12/26/content_10565179.htm

²⁴ The author met with a think-tanker from a prominent Shanghai university on April 2, 2009. He described the widely held view among the Chinese public that, issues of international law aside, the United States should not conduct operations in areas of sensitivity to China—such as near this new nuclear submarine base. He went on to say that there are only small areas that fall into this category.

²⁵ Bateman made this statement in a give-and-take in the Nelson Report on March 16, 2009.

²⁶ Nelson Report, March 11, 2009

²⁷ The descriptions of the circumstances that led to and then resulted from the INCSEA agreement are a combination of the author’s recollections of personal experiences in his career in the US Navy and reports from that period, which were refreshed, reaffirmed, and augmented by reading numerous documents and articles, prominently including the following three: (1) Winkler, David F., “IncSea, games of “chicken,” and fortunate timing,” *Sea Power*, April 2001, available at http://findarticles.com/p/articles/mi_qa3738/is_200104/ai_n8932960/; (2) David N. Griffiths,

“Catalyst for Confidence: 25 Years of INCSEA,” available at http://www.noac-national.ca/article/griffiths/incsea_bydavidngriffiths.html; (3) Rose Gottemoeller, “US-Russia Cooperation on Iran: Aftermath of the Summer War in Georgia,” *Pro et Contra*, July-August 2008; <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=22449&prog=zru>

²⁸ The author recalls conducting a similar maneuver in a P-2 aircraft, over Soviet ships in the Sea of Japan in 1962.

²⁹ As Commander of the Iceland Defense Force 1986-89, the author routinely directed F-15s from Iceland to intercept Soviet Bear aircraft and sent P-3s to find Soviet submarines and to simulate attacks on Soviet surface ship formations. These activities benefited from the, by then, well-established IncSea rules.

³⁰ A US Navy officer involved in the last incident involving the USS *Essex* explained how this dangerous pass over his ship had led to that Soviet plane crashing into the sea; his Soviet counterpart solemnly note that his son had been on that flight.

³¹ *Ibid.*

³² *Ibid.*

³³ Jane Macartney, “China ends naval stand-off and credits Barack Obama,” *Times Online*, March 21, 2009; <http://www.timesonline.co.uk/tol/news/world/asia/article5942562.ece>

³⁴ “Sino-US sea standoff appears to have ended,” *China Daily*.

³⁵ David E. Sanger and Joseph Kahn, “US Tries to Interpret China’s Silence Over Test,” *New York Times*, January 22, 2007; http://www.nytimes.com/2007/01/22/world/asia/22missile.html?_r=1