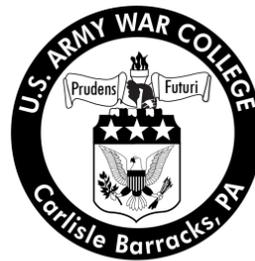


U.S.-China Military Conflicts in the Maritime Exclusive Economic Zones

by

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United States Army War College
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**U.S.-CHINA MILITARY CONFLICTS IN THE MARITIME EXCLUSIVE ECONOMIC
ZONES**

by

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ABSTRACT

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This paper examines U.S. and Chinese interests, strategies, and national security policies in the Chinese-claimed Exclusive Economic Zone in the Western Pacific. It provides an analysis of the two nations' current strategies and policies, and offers recommendations for the U.S. to accomplish its strategic goals and build a non-adversarial relationship with China.

U.S.-CHINA MILITARY CONFLICTS IN THE MARITIME EXCLUSIVE ECONOMIC ZONES

The United States and China have had recurring altercations regarding U.S. military activities in the Chinese-claimed Exclusive Economic Zones (EEZs) in the Western Pacific. The U.S. Navy, as a global sea power, customarily exercises its ability and responsibility to ensure the freedom of the seas in this region. China, as a coastal state, views U.S. military activities in its claimed EEZs as threats to China's national security and has sought to stop them by both diplomatic and military means. These conflicts clearly stem from the United States and China holding fundamentally different interpretations of international laws relating to military activities in the EEZs. Given these conflicting national interests and opposing legal viewpoints, how can the U.S. and China peacefully engage over the long-term to resolve these conflicts and work together to ensure global security, stability, and prosperity?

U.S. and Chinese Regional Interests

For the United States, preserving maritime power and freedom of navigation are top national priorities in preserving vital national interests. The 2012 Defense Strategic Guidance restates U.S. commitment to ensuring freedom of access to global commons, a vast part of which is the international waters, to enable economic growth and commerce. "The United States will continue to lead global efforts with capable allies and partners to assure access to and use of the global commons, both by strengthening international norms of responsible behavior and by maintaining relevant and interoperable military capabilities." It also links U.S. economic and security interests to "developments in the arc extending from the Western Pacific and East Asia into the Indian Ocean region and South Asia, creating a mix of evolving challenges and

opportunities.”¹ These strategic guidelines clearly reinforce U.S. interests in protecting the freedom of navigation through military means, regional partnerships, and international rules of engagement.

In addition, the 2007 U.S. Cooperative Strategy for 21st Century Seapower clearly identified global freedom of navigation as a keystone for U.S. maritime power.² Any attempt to abridge or restrict this freedom damages U.S. national security. Maritime operations, including military information gathering operations, are part of the U.S. efforts to ensure the protection of these interests.

China, however, has a set of different priorities. Top on its agenda is to secure China’s claimed maritime interests such as the recovery of the so-called “stolen territories” in the East and South China Seas,³ China’s control over the EEZs, and eventually, China’s blue-water navy with global reach. In pursuing its maritime interests, China finds itself in conflict with the United States in the Western Pacific.

U.S.-China Incidents in the South China Sea

Relatively recent altercations between the U.S. and China in the vicinity of Hainan Island in the South China Sea effectively illustrate the extent of the current conflicts. The U.S. is particularly interested in Hainan Island because of the newly-constructed Chinese submarine base located near the city of Sanya and the Jin-class ballistic missile submarines deployed there.⁴ As China continues to develop its military power in this region, the U.S. Navy has also increased its intelligence, surveillance, and reconnaissance (ISR) missions.

China objects to these U.S. military activities, viewing them as threats to its sovereignty. On 1 April 2001, a U.S. Navy EP-3 surveillance plane and Chinese F-8 fighter jet collided over the South China Sea, forcing an emergency landing of the U.S.

plane on Hainan Island and causing the death of a Chinese pilot. The 24-person U.S. crew was detained and interrogated, before being released after 11 days, and the EP-3 was dismantled and eventually returned to the U.S.

Admiral Dennis Blair, Commander-in-Chief, U.S. Pacific Command, issued a press statement about 18 hours after the collision: the EP-3 “was on a ‘routine operation’ in international airspace over the South China Sea about 70 miles off Hainan Island, when it was intercepted by PLA fighters, and one of them ‘bumped into the wing of the EP-3E aircraft.’” Adm. Blair also “revealed that the PLA fighters engaged in a pattern of ‘increasingly unsafe behavior’” and “disclosed that U.S. officials had already protested to the PRC that PLA pilots, ‘starting several months ago,’ displayed flying professionalism that was dangerous to them and to U.S. planes.” He described the EP-3 as “chugging along in broad daylight”, explaining that “big airplanes like this fly straight and level on their path,” disputing China’s claims that the EP-3 turned into the faster and smaller fighter jet.⁵

China blamed the U.S. for the mid-air collision, charging the U.S. pilot with veering suddenly into the PLA fighter. As reported by the *New York Times*, Chinese state media quoted President Jiang Zenin as saying, “The United States should apologize to the Chinese for this incident and bear all responsibilities for the consequence of the incident.” He “also called on the United States to end its frequent reconnaissance flights along China’s coast.” The spokesman for China’s Foreign Ministry, Zhu Bangzao, added that the EP-3 violated international and Chinese law by entering China’s territorial airspace and landing on Hainan Island without permission.⁶

Nearly eight years later, on 8 March 2009, the Pentagon protested the harassment of the *USNS Impeccable* (T-AGOS-23), an unarmed navy surveillance ship, by five Chinese vessels in the South China Sea. The Pentagon claimed this was the fourth instance, over a five-day period, of “increasingly aggressive conduct” which culminated in this Sunday event where the Chinese vessels “shadowed and aggressively maneuvered in dangerously close proximity to *USNS Impeccable*”. The Pentagon statement further claimed that two of the Chinese vessels stopped “directly ahead of *USNS Impeccable*, forcing *Impeccable* to conduct an emergency ‘all stop’ in order to avoid collision,” after the *Impeccable* signaled that it was seeking a safe course to depart the area.⁷ Marine Major Stewart Upton, a Pentagon spokesman stated that “(w)e expect Chinese ships to act responsibly and refrain from provocative activities that could lead to miscalculation or a collision at sea, endangering vessels and the lives of U.S. and Chinese mariners.” White House Press Secretary, Robert Gibbs said “the United States will continue to operate in those international waters...and the Chinese must observe international law.”⁸

The *Impeccable* was 75 miles south of Hainan Island in China’s claimed EEZ, performing routine operations. The ship was well equipped to perform its surveillance operations, having the ability to tow two underwater listening devices (both active and passive) and collect, process and transmit anti-submarine warfare data via satellite to shore stations.⁹ Conducting military intelligence gathering operations in a coastal state’s EEZ is considered routine and consistent with international law, according to U.S. views. “In short, nothing in the United Nations Convention on the Law of the Sea (UNCLOS) changes the right of military forces of all nations to conduct military activities

in the exclusive economic zone. Moreover, prior to and subsequent to the adoption of UNCLOS, military forces have routinely conducted military activities seaward of the 12-nautical-mile territorial sea without coastal-state notice or consent.”¹⁰

China has a very different view of U.S. military operations in the EEZ. China charged that the *Impeccable*'s activities “violated international and Chinese laws.” Chinese Foreign Ministry spokesman Ma Chaoxu said, “We demand that the United States put an immediate stop to related activities and take effective measures to prevent similar acts from happening.”¹¹ China denied any “harassment” of the *Impeccable*, saying: “it is our sovereignty for Chinese vessels to conduct activities in the country's special economic zone, and such activities are justified.”¹² Instead, China views foreign military operations in the Chinese-claimed EEZs as violations of its sovereignty. “Innocent passage by naval vessels from other countries in the territorial waters in the special economic zone is acceptable, but hostile military operations are not allowed,” said Wang Dengping, political commissar of the Armament Department of Navy of the Chinese People's Liberation Army.¹³

One Chinese scholar, Ji Guoxing, explained that “US aircraft and vessels must observe relevant Chinese laws” when operating in the Chinese-claimed EEZs. China's maritime laws are based upon Chinese interpretation of UNCLOS. By 2000, China had enacted more than 30 maritime laws and regulations, seeking to enforce restrictive regulations on foreign vessels in their claimed EEZs.¹⁴ This includes the requirement for foreign military vessels to request permission before conducting military operations in the EEZs, according to Chinese Foreign Ministry spokesperson Ma Chaoxu.¹⁵

However, China's position is debatable. Although UNCLOS calls for states to "have due regard to the rights and duties of the coastal State" and to "comply with the laws and regulations adopted by the coastal States", it also stipulates that the laws of the coastal State be "in accordance with the provisions of this Convention and other rules of international law."¹⁶ Since UNCLOS provides high-seas navigational and overflight freedoms to all states within EEZs, these additional restrictions by China are not supported.

China also objects to foreign military operations in their EEZ on the grounds that these activities "violate the fundamental principle of UNCLOS for 'peaceful uses of the sea'", as defined in UNCLOS Article 301.¹⁷ Operations conducted by ships like the *Impeccable* "openly encroach on the national security and peaceful order of China and constitute a threat of force against its territorial integrity and political independence."¹⁸ For some, the U.S. is seen to have an "adversarial mentality" towards China, with U.S. military leaders speaking of a "China threat" and identifying China as a target.¹⁹

Ji Guoxing acknowledges that China and the U.S. hold different interpretations of UNCLOS provisions for military activities in the EEZs and partially attributes these differences to the compromises made between coastal states and maritime powers during Treaty negotiations. He also argues that the basic differences in interpretations are generally divided between coastal states and maritime powers. "For China and other coastal countries, what is not authorized in the Convention is not permitted; for the US and other maritime powers, what is not explicitly prohibited in the Convention is permitted."²⁰

These altercations suggest that China is committed to challenging U.S. military activities in China's claimed EEZs, whether in defense of their sovereignty, to demonstrate China's ability to exert military power influence, or to attempt to cultivate international support for perceived U.S. aggressions. As China's military capabilities grow, the U.S. should expect the number and severity of these altercations to grow, unless and until compromise is reached.

Broader economic, stability and security issues may also be at stake in this disagreement between the U.S. and China, as representatives of global sea powers and coastal states. China may succeed in their efforts to have foreign military activities in EEZs declared a threat to national sovereignty, international peace, and stability. If so, that would represent a significant change of long-standing norms and international maritime laws, shifting from peaceful military uses of the seas toward anti-access navigational restrictions. From a U.S. perspective, this change "will determine the extent to which large swaths of the seas, including disputed maritime and land territories, are 'securitized' by coastal states rather than left open to the stabilizing influence of the naval activities of the international community. The outcome has long-term implications for the health of the global system on which the economic health and political independence of every state relies."²¹

Confidence-Building Measures

Confidence-building measures (CBMs) could help prevent maritime altercations. The U.S. and China established a Military Maritime Consultative Agreement (MMCA) in 1998 between the armed forces of both countries. This CBM was intended to increase mutual understanding, reduce opportunities for miscalculation of military intentions, and strengthen military maritime safety.²² The MMCA should provide a venue to discuss

differences in interpretation of maritime laws and share information about the standard operating procedures of each military force. However, in reality, it's considered to be a weak consultative agreement that is suspended during incidents at sea, like those described above.

There is a significant lack of substantive military-to-military interactions from junior to senior levels that would serve to ensure real maritime safety. During preparations for the Feb 2012 visit of China's Vice President, Xi Jinping, to Washington, the U.S. urged China "to signal the importance a sustained and reliable bilateral military relationship by announcing an agenda of bilateral military exchanges for the coming year." In response, Xi neutrally stated that "I appreciate that position." But, no schedules or milestones were set.²³ Building trust and strong mil-to-mil relationships will be challenging without these military engagements.

U.S.-China interpretations of international law and core interests regarding military activities in the EEZs remain in opposition. As China's military capabilities increase, including anti-area/access denial (A2/AD) weapons, ships, and aircraft, these incidents may occur more frequently and may escalate to dangerous levels. To prevent further loss of life and dangerous maritime conditions, "it would be best if the two countries formulated 'rules of the road' to reduce the probability of repeat accidents and to avoid protracted disputes over international law like those witnessed."²⁴

In May 1972, the United States and the Soviet Union signed such an agreement to help prevent incidents, like collisions and maneuvering interference, between the two navies, on and over the high seas.²⁵ This agreement, known as an Incidents at Sea (INCSEA) agreement, was negotiated following a series of dangerous and threatening

ship and aircraft encounters in the late 1960s. INCSEA is widely regarded as a successful confidence-building measure that decreased dangerous incidents through “constraints on military activities and improvements on communications.”²⁶ Most notably, INCSEA “proved its merit by keeping the peace during the tensest times the two navies have experienced since the agreement was signed.” U.S. and U.S.S.R. vessels and aircraft that engaged in the 1973-Arab-Israeli War effectively employed the agreement to avoid collisions and further escalate tensions.²⁷

Based upon this past INCSEA success, questions have been raised regarding the benefits of negotiating a similar U.S.-China bilateral agreement. The time may not be right for such an agreement, in part because it would impart a greater status to Chinese naval power than is warranted today. A greater challenge is China’s current refusal to fully engage in military-to-military exchanges with the U.S. At present, when tensions are escalated, China suspends the MMCA, rather than seek increased communications. Until both parties view an INCSEA as being in their best interests, reliance on international laws, norms and alliances may be the best possible way to maintain peaceful engagements. However, when the time is right, INCSEA success may depend on simplicity. The U.S.-U.S.S.R. INCSEA was “carefully crafted to address specific remedies to specific problems” that could be understood by the junior officers that implement it.²⁸

History and Interpretations of the Laws of the Sea

Two primary legal frameworks for codifying maritime laws are the 1982 United Nations Convention on the Law of the Sea (UNCLOS)²⁹ and customary international laws of the sea. UNCLOS defines maritime security regimes that delineate jurisdictions, rights and responsibilities for navigation and the control of marine resources. The

Treaty provides mechanisms for the peaceful resolution of disputed claims and seeks to balance the competing interests of coastal states and maritime powers. For the purposes of this paper, references to UNCLOS include the 1982 Treaty and the subsequent 1994 Agreement that addressed seabed mining provisions contained in Part XI of the Convention. The boundaries of these maritime regimes are shown in Figure 1.

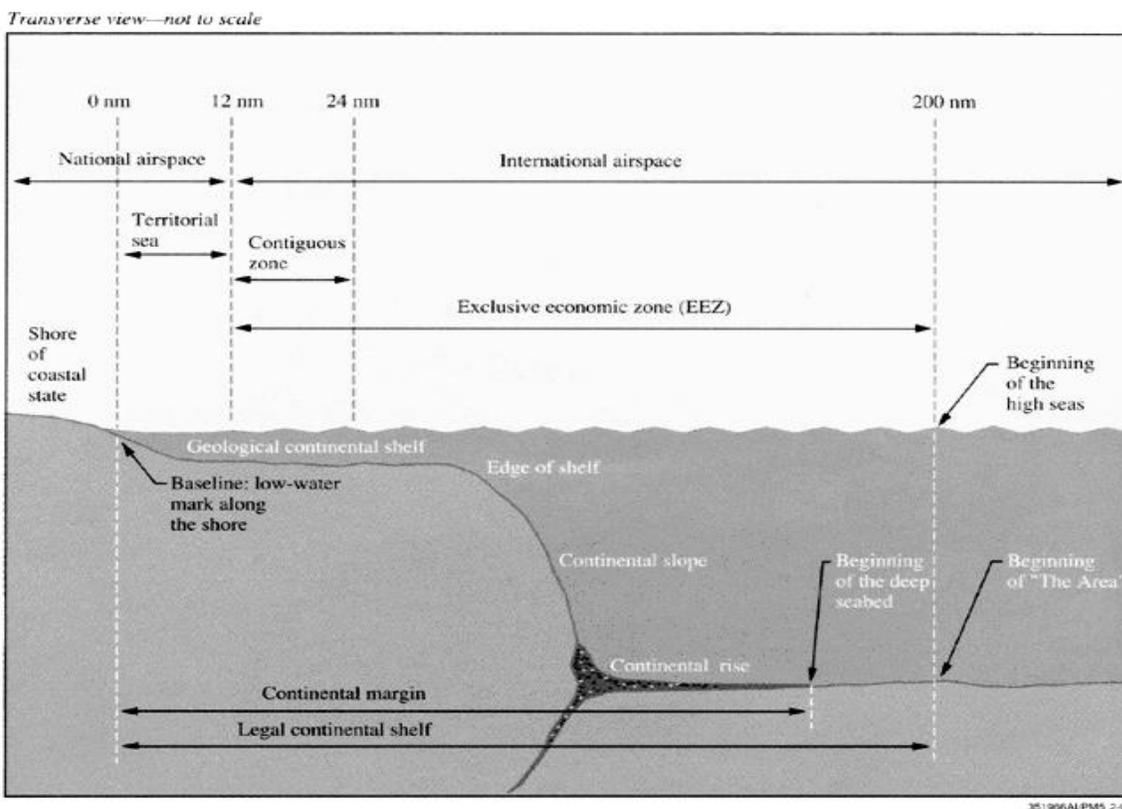


Figure 1: Diagram of Maritime Regions³⁰

A major impetus behind UNCLOS was the ever-growing number of international maritime disputes during the 20th century and the escalating instability caused by these conflicts. The Third United Nations Conference on the Law of the Sea convened in New York in 1973 with the “hope for a more stable order, promoting greater use and better management of ocean resources and generating harmony and goodwill among States

that would no longer have to eye each other suspiciously over conflicting claims.”³¹

Most recently, Thailand became the 162nd nation to ratify the Convention in May 2011.

China ratified the Treaty in 1996, shortly after Japan and South Korea, in spite of lingering maritime safety concerns and disputed claims with neighbors.³²

Although the U.S. has not yet ratified UNCLOS, it maintains EEZs around the U.S. coast lines based on President Ronald Reagan’s Presidential Proclamation 5030 in 1983. In accordance with international law, Reagan claimed UNCLOS EEZ rights for U.S. coastal areas and pledged U.S. compliance with EEZ navigation and overflight rights and freedoms for all states.³³ The U.S. also adheres to the 1994 UNCLOS Agreement.

One critical feature of UNCLOS was the creation of the EEZ, a new maritime regime between territorial waters and the high seas. The EEZ gives coastal states the “jurisdiction over the resources of some 38 million square nautical miles of ocean space” and limits their rights to make territorial claims restricting navigation.³⁴ UNCLOS Part V (EEZ) Article 56 grants coastal states the “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.”³⁵ Article 58.1 gives all states the “freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines,”³⁶ thereby equating EEZ freedoms with those defined for the high seas. In addition, Article 58.2 stipulates that “Articles 88 to 115 (for the high seas) and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this

Part.”³⁷ The UNCLOS EEZ strikes a powerful, but contested, balance between resource rights for coastal states and high-seas navigational freedoms for sea powers.

While UNCLOS is widely considered to be the most significant contribution to maritime law in the 20th century, it is not definitive. In particular, UNCLOS does not explicitly address military vessels or activities in EEZs and leaves open the interpretation of significant concepts, like “peaceful purposes,” “innocent passage,” and so on. This lack of clarity leaves room for coastal states and sea powers to apply opposing interpretations to EEZ rights and jurisdictions, based upon their different national interests. From the U.S. perspective, UNCLOS EEZs are consistent with freedoms of the high seas and international laws. Therefore, the lack of navigational and operational restriction on military vessels and aircraft in EEZs is intentional because sea powers want no restrictions on their military operations. From China’s perspective, the omission of EEZ military operations indicates that foreign military operations are not permitted in EEZs.

In addition, the Chinese view foreign military operations, like ISR missions, as a violation of “peaceful uses of the seas,” since they represent a “threat or use of force against the territorial integrity or political independence of any State,” as specified by UNCLOS Article 301.³⁸ The U.S. considers these military activities to be “peaceful, stabilizing military activities that have characterized great power politics at least since the 19th century.”³⁹ They are also consistent “with the principles of international law embodied in the Charter of the United Nations,”⁴⁰ which is also a stipulation of Article 301.

In addition to UNCLOS, customary international laws of the sea also regulate maritime activities. They were first formulated by the Dutch over 400 years ago to ensure freedom of the seas. These laws change with the norms of the times and are defined by the sea powers that enforce and defend them. The scope and type of accepted military maritime activities, including all peace-keeping and war-fighting activities, have long been governed by customary international laws and so favor the sea powers. Dr. Charles E. Pirtle of Georgetown University characterizes the rules for military activities on the oceans as “hegemonic in nature” and states that “these rules protect the rights of all states to use the seas for military purposes, but in practice they exist primarily to serve the security interests of the most powerful states in the international system who define them, enforce them, and utilize them as force multipliers in the formulation of their maritime strategies.”⁴¹ Today, the U.S., as the sole global sea power, enforces these rules against encroachment by coastal states.

International maritime laws are important to maintain global peace and stability, which is vital to global commerce. Gaining acceptance for defined maritime rights and responsibilities provides a legal framework to peacefully resolve disputed claims. While current laws are largely consistent with U.S. interests, laws alone cannot ensure national interests. They must be enforced by maritime power. Charles Pirtle explained “there is a reciprocal relationship between law and power that governs the military uses of ocean space, and it will be the stability of the balance of power at sea, rather than the LOS Convention itself, that will determine the degree to which the movement and operational rights of seaborne forces will be protected in the new millennium.”⁴²

Challenges of legal interpretations, changing norms, and violations will also require that these rights be enforced.

U.S. Debate and Position on UNCLOS

The United States signed the UNCLOS Treaty in 1994 but the Congress has not yet ratified it. At the heart of the U.S. debate regarding the ratification of the UNCLOS treaty is this central question, posed by Scott Borgerson at the Council for Foreign Relations: “(w)hether the convention expands the rule of law or sacrifices sovereignty.”⁴³ There is clear agreement in the U.S. on the vital, national importance of ensuring maritime security, stability, and power, given the global impact of the seas. As the 2007 U.S. Cooperative Strategy for 21st Century Seapower states, “70% of the world is water, 80% of the world lives on or near the coastline and 90% of our commerce sails across it. Any disruption in that chain caused by instability has a direct impact on American quality of life.”⁴⁴ However, opinions are divided on how to best preserve U.S. unfettered access to this vast ocean space. Some argue that U.S. sovereignty and interests are best served by projecting U.S. hard power to control the seas and limiting reliance on international, multilateral alliances that inherently compromise our interests. Others view that the UNCLOS can be a win-win solution for U.S. interests. That is, it strengthens the international rule of law, for which the U.S. was a primary sponsor and beneficiary, and endorses U.S. sovereignty over significant marine resources.

The U.S. written opposition to UNCLOS is provided by a relatively small group of conservative U.S. government representatives, educational and research institutions, U.N. opponents, and readers of online blogs that share an overarching view that the treaty infringes on U.S. sovereignty and interests. This group includes one leading think tank, the Heritage Foundation. They espouse an Athenian view of power, in line with

the Greek historian Thucydides, in which “the strong do what they can and the weak suffer what they must.”⁴⁵ They hold that the unrivaled U.S. Navy has the power projection capabilities to protect American interests; and any adherence to flawed international organizations or treaties unnecessarily subjugates the U.S. and threatens its sovereignty.⁴⁶ Variations on this argument are offered by The National Center for Public Policy Research, a communications and research foundation; USA Survival, an educational foundation; Hotair.com, a large right-of-center Internet blog; and a number of high-powered journalists.

Their argument, however, fails to address the very real, present-day threats to U.S. maritime interests and sovereignty that cannot be solved solely by the application of hard power and that will exist so long as the U.S. fails to join the 160+ states that have ratified the UNCLOS treaty. Today, U.S. influence on UNCLOS commissions, regarding such issues as outer limits of the continental shelf, rights to Arctic resources, and conflicting boundary disputes in Pacific waters, is tempered by the inability to directly participate in deliberations. As John Negroponte testified before the Senate Foreign Relations Committee in September 2007, “we -- the country with the most to gain and lose on the law of the sea issues -- are sitting on the sidelines.”⁴⁷ Negroponte further states that recommendations are being made by the Commission on the Limits of the Continental Shelf that “could well create precedents, positive and negative, on the future outer limit of the U.S. shelf” and “(w)e need to be on the inside to protect our interests.”⁴⁸

In addition, many maritime states, including China, have made claims that are contrary to UNCLOS, like the extension of territorial sea rights into EEZs. These

overreaching claims seek to restrict navigational freedoms and military operations in EEZs, but UNCLOS provides a powerful legal framework to counter these claims and peacefully resolve these disputes.⁴⁹ As U.S. Navy Commander James Kraska explained, “(s)ince the United States was the principal sponsor of the international system developed in the wake of World War II, the evolution of sea power as an outgrowth of international maritime law plays to a unique American strength.”⁵⁰ He saw movement away from a “struggle for power” and toward a “struggle for law”, “a contest to interpret and shape the legal regimes of the global maritime partnership.”⁵¹ To protect its interests, U.S. civilian, military, legal, business, science and environmental representatives must be leading players in the struggle to shape the present and future maritime security environment.

Another opposing UNCLOS argument was given by the late Jeane J. Kirkpatrick, the Reagan administration’s Ambassador to the United Nations and National Security Council member. She gave testimony before the Senate Armed Services Committee in 2004, reiterating the administration’s belief that the UNCLOS was a “bad bargain” for the U.S. She cited specific implications to U.S. constitutional, political, industrial, and economic interests, including deep seabed mining, mandatory technology transfers, uncertain U.S. representation on UNCLOS councils/commissions, and redundancy with other bilateral agreements.⁵² Ms. Kirkpatrick’s evaluation of the 1994 Agreement is that it failed to fundamentally change the Treaty and so failed to make UNCLOS a good bargain for the U.S.

Many U.S. maritime security and legal experts disagree with this assessment of the 1994 Agreement. Scott Borgerson examined the Reagan administration’s

objections to UNCLOS, concluded that “all six...objections were fixed to the satisfaction of the United States” and provided a convincing justification of his claim with a detailed analysis of the complex set of related documents.⁵³ If UNCLOS opponents can agree that the 1994 Agreement satisfied most, if not all, of the U.S. objections, then it should be possible to perform a full analysis of the benefits of the Treaty, along with a rigorous risk assessment to weigh the costs of not ratifying the Treaty.

U.S. support for UNCLOS and the 1994 Agreement comes from an extensive and comprehensive group of civilian and uniformed senior leaders from all the elements of U.S. national power. The list of endorsements resembles a “Who’s Who” in the worlds of maritime and national security leaders and authorities, including President Obama. Every major diplomatic, information, military and economic community is amply represented. Several maritime groups have provided online resources that capture the full spectrum of U.S. interests in UNCLOS, including the Navy JAG Corps⁵⁴ and the Center for Oceans Law and Policy (COLP)⁵⁵ at the University of Virginia’s School of Law.

The Director of COLP, John Norton Moore, has provided a comprehensive summary of the vital interests for the U.S. with regard to UNCLOS ratification: “(1) Restoring United States Oceans Leadership; (2) Protecting United States Oceans Interests; and (3) Enhancing United States Foreign Policy”.⁵⁶ These interests are underpinned by the “security, stability, and seapower” strategy defined in the current U.S. Maritime Strategy.⁵⁷ They also encompass all of the protections and authorities required by the U.S. military to perform their maritime security and ISR missions, namely freedom of navigation through all waters; no restrictions on military operations

and activities in EEZs and the high seas; protection for U.S. military personnel, ships and aircraft while performing their missions; and strong international rule of law to support a stable and secure maritime environment.

President Obama has expressed his support for UNCLOS. In November 2011, at the East Asia Summit (EAS), Obama “reiterated the U.S. commitment to ensuring freedom of navigation in the South China Sea and stressed the need to settle sovereignty disputes in accordance with international law, including the (UNCLOS).”⁵⁸ According to the White House Fact Sheet on the 2011 EAS, Obama further emphasized the importance of international laws, stating: “full and active U.S. engagement in the region’s multilateral architecture helps to reinforce the system of rules, responsibilities, and norms that underlies regional peace, stability, and prosperity.”⁵⁹ In addition, the 2010 National Security Strategy stated that the U.S. will pursue ratification of UNCLOS.⁶⁰

While the list of U.S. supporters for UNCLOS ratification is impressive and the written arguments are persuasive, sovereignty concerns remain. This may be the time to continue to exercise caution and not rush to ratify. By current estimates, the U.S. will remain unmatched as a global seapower and will be well able to defend and enforce international maritime laws that protect our national interests for at least the next 20 years. In this position, there is less risk for the U.S. to wait to ratify, while UNCLOS matures and unintended consequences are resolved. U.S. adherence to UNCLOS and international laws may be sufficient to endorse their validity and importance, as well as justify U.S. maritime activities around the globe. Waiting to ratify also prevents U.S.

maritime power from being blunted to just one vote among the 162 UNCLOS ratifiers. Treaties of great complexity, like UNCLOS, should be carefully considered.

Conclusions

The U.S. should maintain its strong naval presence in the Asia-Pacific region to enforce freedom of navigation and continue to perform legal information collection operations (and other customary military operations) in the region's EEZs and the high seas. These military operations provide information essential to U.S. national security and interests and are necessary to meet security commitments to the Pacific partners. Following U.S. interpretation of international laws, U.S. warships and surveillance aircraft should continue to travel freely within these waters and air space, without giving prior notification or seeking authorization from China or other coastal states.

The principal risk is continued or increased altercations between U.S. and China, possibly resulting in escalating conflicts and further loss of life. To reduce the likelihood of military altercations, the U.S. should continue to engage China in CBMs to build trust and negotiate compromises. Significant CBMs are essential to peaceful interactions, including junior and senior military-to-military relationships and rules of engagement for maritime safety.

Although China has not accepted U.S. invitations to further develop military CBMs, both U.S. and Chinese senior leaders have recently reiterated their intent to partner together to ensure shared national interests of security, stability, and prosperity. While shared economic interests will continue to provide opportunities to partner, opposing core security interests and views of international law will continue to cause conflicts and highlight a deep lack of trust and understanding. In 2012, U.S. presidential elections and the changes in Chinese leadership will further complicate the

development of this partnership. Developing trust will not be easily or quickly accomplished, but is necessary to protect national interests and peacefully negotiate compromises for areas of conflict.

As the U.S. rebalances their defense strategy toward Asia-Pacific, the U.S. must effectively apply all elements of national power in the maritime environment to protect national interests and build a strong relationship with China. The relationship between the U.S. and China will be stressed by the ongoing U.S.-China power transition. As China becomes more powerful and seeks to alter the international system to better reflect its national interests, the U.S. will struggle to maintain partnerships and protect its interests. One measure of success may be the degree to which peace is maintained over the next 30 years.

Maintaining and expanding strategic partnerships in the region is also critical to U.S. interests. Multilateral and bilateral agreements that emphasize long-term commitments, building capacity, supporting development, and ensuring security are essential. U.S. ratification of UNCLOS should be delayed until concerns regarding national interests have been resolved, but the U.S. should continue to adhere to UNCLOS provisions. Peacefully resolving conflicts according to international laws and customs is of critical importance.

Consistent and clearly articulated U.S. regional policies are necessary to affirm intentions, priorities, and commitments. Central to these policies should be U.S. intentions to maintain good relations with China. Additionally, the U.S. should continue to reiterate their support for China's development and make clear that their intention is not to strategically contain or encircle China. The U.S. should also continue to

participate in regional economic alliances, like ASEAN, and commit to significant engagement with established and developing Pacific economic powers.

The long-term challenge for the U.S. in the Asia-Pacific region will be one of adaptation, to an international system that incorporates Asian interests and the balanced use of hard and soft power to accomplish a peaceful transition.

Endnotes

¹ U.S. Department of Defense, *Sustaining U.S. Global Leadership: Priorities for 21st Century Defense* (Washington, DC: U.S. Department of Defense, January 2010), http://www.defense.gov/news/Defense_Strategic_Guidance.pdf (accessed January 16, 2012), 2.

² U.S. Department of the Navy, U.S. Marine Corps, U.S. Coast Guard, *A Cooperative Strategy for 21st Century Seapower* (Washington, DC: U.S. Department of the Navy, U.S. Marine Corps, U.S. Coast Guard, October 2007), <http://www.navy.mil/maritime/MaritimeStrategy.pdf> (accessed November 6, 2011).

³ See David Lai's discussion of Chinese views on its "lost or stolen territories" in the East and South China Seas in his book *The United States and China in Power Transition*, Carlisle, PA: Strategic Studies Institute, 2011.

⁴ Hans M. Kristensen, "New Chinese SSBN Deploys to Hainan Island", *FAS Strategic Security Blog*, <http://www.fas.org/blog/ssp/2008/04/new-chinese-ssbn-deploys-to-hainan-island-naval-base.php> (accessed February 19, 2012).

⁵ Shirley A. Kan et al, "China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications," *Congressional Research Service*, October 2001, http://assets.opencrs.com/rpts/RL30946_20011010.pdf (accessed February 19, 2012).

⁶ Erik Eckholm, "Collision in China: The Overview; China Faults U.S. in Incident; Suggest Release of Crew Hinges on Official Apology," *New York Times*, April 04, 2001, <http://www.nytimes.com/2001/04/04/world/collision-china-overview-china-faults-us-incident-suggests-release-crew-hinges.html?pagewanted=print&src=pm> (accessed February 19, 2012).

⁷ "Pentagon says Chinese vessels harassed U.S. ships", *CNN.com*, March 9, 2009, http://articles.cnn.com/2009-03-09/politics/us.navy.china_1_chinese-ships-chinese-vessels-chinese-media?_s=PM:POLITICS (accessed February 19, 2012).

⁸ "U.S. protests harassing of Navy ship by Chinese", *Associated Press*, March 9, 2009, <http://www.msnbc.msn.com/id/29596179/> (accessed February 19, 2012).

⁹ *The Military-Today.com Impeccable Class Home Page*, http://www.military-today.com/navy/impeccable_class.htm (accessed February 19, 2012).

¹⁰ Captain Raul Pedrozo, "Close Encounters at Sea," *Naval War College Review* 62, no.3 (Summer 2009): 102, <http://www.usnwc.edu/getattachment/d11a2362-fa30-4742-8ec4-c8bed2025114/Close-Encounters-at-Sea--The-USNS-Impeccable-Incid> (accessed January 16, 2012).

¹¹ "China says U.S. naval ship breaks int'l, Chinese law," *Xinhuanet.com*, March 10, 2009, http://news.xinhuanet.com/english/2009-03/10/content_10983647.htm (accessed February 19, 2012).

¹² "Navy lawmaker: Violation of China's sovereignty not allowed", *Xinhuanet.com*, March 10, 2009, http://news.xinhuanet.com/english/2009-03/10/content_10985038.htm (accessed February 19, 2012).

¹³ *Ibid.*

¹⁴ Ji Guoxing, "The Legality of the Impeccable Incident", *China Security* 5, no. 2 (Spring 2009):18, <http://www.chinasecurity.us/pdfs/Issue14full.pdf> (accessed November 6, 2011).

¹⁵ "Navy lawmaker: Violation of China's sovereignty not allowed," *Xinhuanet.com*.

¹⁶ United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea (A historical perspective)* (New York: United Nations, 1998), http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm (accessed November 6, 2011), 44.

¹⁷ *Ibid.*, 138.

¹⁸ Ji Guoxing, "The Legality of the Impeccable Incident", 18.

¹⁹ *Ibid.*, 21.

²⁰ *Ibid.*, 19.

²¹ Peter Dutton and John Garofano, "China Undermines Maritime Laws," *Far Eastern Economic Review*, Apr 2009 (accessed January 16, 2012), 45.

²² United States of America Department of Defense and People's Republic of China Ministry of National Defense, *Agreement Between The Department of Defense of The United States of America and The Ministry of National Defense of the People's Republic of China on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety* (Washington, DC: U.S. Department of Defense, January 1998), <http://www.fas.org/nuke/control/sea/text/us-china98.htm> (accessed November 6, 2011).

²³ Bonnie S. Glaser, "Xi Visit Underscores Rising Mutual Expectations," *Pacific Forum CSIS*, February 21, 2012, <http://csis.org/files/publication/Pac1212.pdf> (accessed March 11, 2012).

²⁴ Margaret K. Lewis, "An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident," *New York University Law Review* 77, no. 1404 (November 2002): 1, in LexisNexis Academic (accessed January 16, 2012).

²⁵ The Government of the United States of America and the Government of the Union of Soviet Socialist Republics, *Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents on and Over the High Seas* (Washington, DC: The Government of the United States of America, May 1972), <http://www.state.gov/t/isn/4791.htm> (accessed January 23, 2012).

²⁶ Sean M. Lynn-Jones, "A Quiet Success for Arms Control: Preventing Incidents at Sea," *International Security* 9, no. 4 (Spring 1985): 154, in JSTOR (accessed January 23, 2012).

²⁷ Ensign Michael Hughes, "Ensuring 'Fair Winds and Following Seas': A Proposal for a Sino-American Incident at Sea Agreement," 56 *Naval Law Review* 56, no. 275, (July 01, 2008): 5, in LexisNexis Academic (accessed January 23, 2012).

²⁸ *Ibid.*, 11.

²⁹ United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *United Nations Convention on the Law of the Sea of 10 December 1982, Overview and Full Text* (New York: United Nations, 1998), http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed November 6, 2011).

³⁰ Director of National Intelligence, Typical Offshore Regions and Zones, March 1996, http://www.dni.gov/nic/PDF_GIF_otherprod/endgame/351966.gif (accessed March 3, 2102).

³¹ United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea (A historical perspective)*.

³² United Nations, *Table recapitulating the status of the Convention and of the related Agreements, as at 20 September 2011* (New York: United Nations, September 2011), http://www.un.org/Depts/los/reference_files/status2010.pdf (accessed March 4, 2012).

³³ Ronald Reagan, *Proclamation 5030—Exclusive Economic Zone of the United States of America* (Washington, DC, The White House, March 10, 1983), <http://www.archives.gov/federal-register/codification/proclamations/05030.html> (accessed November 6, 2011).

³⁴ United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea (A historical perspective)*.

³⁵ United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *United Nations Convention on the Law of the Sea of 10 December 1982, Overview and Full Text*, 43-44.

³⁶ *Ibid.*, 44.

³⁷ *Ibid.*, 44.

³⁸ *Ibid.*, 138.

³⁹ Peter Dutton and John Garofano, "China Undermines Maritime Laws," *Far Eastern Economic Review*, Apr 2009 (accessed January 16, 2012), 45.

⁴⁰ United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *United Nations Convention on the Law of the Sea of 10 December 1982, Overview and Full Text*, 138.

⁴¹ Charles E. Pirtle, "Military Uses of Ocean Space and the Law of the Sea in the New Millennium," *Ocean Development & International Law* 31, 1-2 (2000): 8, in Taylor & Francis Online (accessed January 16, 2012).

⁴² *Ibid.*, 9.

⁴³ Scott Borgerson, "The National Interest and the Law of the Sea," *Council Special Report*, no. 46 (May 2009): 17, <http://www.cfr.org/global-governance/national-interest-law-sea/p19156> (accessed on January 16, 2012).

⁴⁴ U.S. Department of the Navy, U.S. Marine Corps, U.S. Coast Guard, "A Cooperative Strategy for 21st Century Seapower, Maritime Strategy At A Glance", October 2007, <http://www.navy.mil/maritime/display.asp?page=strglance.html> (accessed November 6, 2011).

⁴⁵ Thucydides, *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War*, rev. ed., trans. Richard Crawley, ed. Robert B. Strassler, (New York: Free Press, 2008), 352.

⁴⁶ Steven Groves, "Accession to the U.N. Convention on the Law of the Sea in Unnecessary to Secure U.S. Navigational Rights and Freedoms," *Backgrounders*, no. 2599 (2011), <http://www.heritage.org/research/reports/2011/08/accession-to-un-convention-law-of-the-sea-is-unnecessary-to-secure-us-navigational-rights-freedoms> (accessed January 16, 2012).

⁴⁷ John D. Negroponete, Deputy Secretary, U.S. Department of State, *Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention before the Senate Committee on Foreign Relations*, 110th Cong., 1st sess., September 27, 2007, <http://www.virginia.edu/colp/pdf/NegroponeteTestimony070927.pdf> (accessed January 16, 2012), 10.

⁴⁸ *Ibid.*

⁴⁹ For examples of disputed maritime claims that have been resolved through UNCLOS arbitration, see the Permanent Court of Arbitration UNCLOS home page at http://www.pca-cpa.org/showpage.asp?pag_id=1288.

⁵⁰ Commander James Kraska, JAGC, U.S. Navy, Grasping "The Influence of Law on Sea Power", *Naval War College Review*, 62, no. 3 (Summer 2009): 121, www.virginia.edu/colp/pdf/kraska-influence-of-law-on-seapower.pdf (accessed January 16, 2012).

⁵¹ *Ibid.*

⁵² Jeane J. Kirkpatrick, *Testimony before the Senate Committee on Armed Services*, 108th Con., 2nd sess., April 8, 2004, <http://armed-services.senate.gov/statemnt/2004/April/Kirkpatrick.pdf> (accessed January 16, 2012).

⁵³ Scott Borgerson, "The National Interest and the Law of the Sea," 12.

⁵⁴ *The U.S Navy JAG Corps' The Convention of the Law of the Sea Home Page*, http://www.jag.navy.mil/organization/code_10_law_of_the_sea.htm (accessed November 6, 2011).

⁵⁵ *The Center for Oceans Law and Policy Home Page*, <http://www.virginia.edu/colp/los.html> (accessed November 6, 2011).

⁵⁶ John Norton Moore, *Senate Advice and Consent to the Law of the Sea Convention: Urgent Unfinished Business before the Senate Committee on Foreign Relations*, 108th Con., 1st sess., October 14, 2003, <http://www.virginia.edu/colp/pdf/foreign-relations-testimony.pdf> (accessed January 16, 2012), 7-14.

⁵⁷ U.S. Department of the Navy, U.S. Marine Corps, U.S. Coast Guard, "A Cooperative Strategy for 21st Century Seapower, Maritime Strategy At A Glance".

⁵⁸ Bonnie Glaser and Brittany Billingsley, "US-China Relations: US Pivot to Asia Leaves China off Balance," *Comparative Connections, Center for Strategic and International Studies*, January 2012, http://csis.org/files/publication/1103qus_china.pdf (accessed March 10, 2012).

⁵⁹ The White House, Office of the Press Secretary, "Fact Sheet: East Asia Summit," November 19, 2011, <http://www.whitehouse.gov/the-press-office/2011/11/19/fact-sheet-east-asia-summit> (accessed March 10, 2012).

⁶⁰ Barack Obama, *National Security Strategy* (Washington, DC: The White House, May 2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (accessed November 6, 2011), 50.

