

## The U.S.-China Incidents at Sea Agreement: A Recipe for Disaster

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### INTRODUCTION

On May 25, 1968, after making several close passes of the *USS Essex*, a Soviet Tu-16 Badger bomber crashed into the Norwegian Sea as it was attempting another pass, killing the entire crew.<sup>1</sup> Two weeks earlier, Soviet warships had collided with the *USS Walker* in the Sea of Japan after the U.S. destroyer maneuvered to prohibit the Soviet ships from disrupting flight operations on board the *USS Hornet*.<sup>2</sup> These incident culminated nearly a decade of dangerous incidents between U.S. and Soviet naval forces – close passes by low-flying aircraft, intentional shouldering (bumping) of surface ships, threatening maneuvers, and mock surface and air attacks against U.S. naval vessels – and laid the groundwork for the negotiation and signing of the Incidents at Sea (INCSEA) Agreement by the governments of the United States and the U.S.S.R. in 1972.

INCSEA was signed in Moscow by then Secretary of the Navy John Warner and Soviet Admiral Sergei Gorshkov, and, for the next forty years, it all but eliminated unsafe and unprofessional aerobatics and ship handling when U.S. and Soviet (later Russian) forces operated in close proximity to one another on the high seas. A Protocol extending the prohibition on simulated attacks to nonmilitary ships was signed in 1973.<sup>3</sup> That same year, nearly 150 U.S. and Soviet warships deployed to the Eastern Mediterranean in an effort to support their respective allies during the Yom Kippur War. Despite the heightened tensions, no serious incidents occurred

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1. John Murphy, *Cold War Warriors: Incidents at Sea*, EMMITSBURG NEWS-JOURNAL (2010), [http://www.emmitsburg.net/archive\\_list/articles/misc/cww/2010/sea.htm](http://www.emmitsburg.net/archive_list/articles/misc/cww/2010/sea.htm).

2. Eric A. McVadon, *The Reckless and the Resolute: Confrontation in the South China Sea*, 5 CHINA SECURITY (2009).

3. Agreement on the Prevention of Incidents On and Over the High Seas, U.S.-U.S.S.R., May 25, 1972, 23 U.S.T. 1168; Protocol to the Agreement on the Prevention of Incidents On and Over the High Seas, May 22, 1973, 24 U.S.T. 1063.

between the two navies, thanks in part to INCSEA.<sup>4</sup> Granted, there have been problems, such as the Black Sea Bumping incident in 1988 off the Crimean Peninsula, discussed below, but generally both sides have lived up to their obligations under the agreement. For example, two years after the agreement entered into force, the number of incidents fell from one hundred to forty per year.<sup>5</sup>

Citing the successes and benefits of INCSEA and the growing number of dangerous encounters between U.S. and Chinese forces in the Western Pacific over the past decade, experts in Beijing and Washington have increasingly argued that the time has come for the United States and the People's Republic of China (PRC) to enter into a similar agreement. In 2007, Admiral Timothy Keating indicated during his nomination hearing to be the Commander of U.S. Pacific Command that the United States should negotiate an INCSEA agreement with the PRC.<sup>6</sup> Retired Rear Admiral Eric McVaden echoed this sentiment after the *USNS Impeccable* incident in 2009, as did Retired Rear Admiral Sam Bateman of the Royal Australian Navy.<sup>7</sup> Additionally, Professors Mark Valencia and John Van Dyke, among other academics, have also called for an INCSEA agreement to reduce tensions between China and the United States.<sup>8</sup>

The proponents argue that such an agreement is necessary to improve military-to-military relations and prevent incidents at sea and in the air between U.S. armed forces and the People's Liberation Army (PLA). Similar calls were made in the mid-1990s when the United States and China were negotiating the Military Maritime Consultative Agreement (MMCA), which was eventually signed in January 1998.<sup>9</sup> Policy makers in the U.S. Departments of State and Defense have consistently rejected those calls, and rightly so. Most recently, in January 2011, Admiral Gary Roughead,

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4. Charles A. Meconis, *U.S.-China Confidence-Building More Important Than Detargeting*, GLOBAL BEAT, July 14, 1998, <http://www.bu.edu/globalbeat/pubs/ib39.html>.

5. McVaden, *supra* note 2.

6. Shirley A. Kan, *U.S.-China Military Contacts: Issues for Congress* (Cong. Res. Service RL 32496), Feb. 10, 2012, at 26.

7. McVaden, *supra* note 2; Sam Bateman, *Solving the "Wicked Problems" of Maritime Security: Are Regional Forums Up to the Task?*, 33 CONTEMPORARY SOUTHEAST ASIA, 1, 1-28 (Apr. 2011); Yang Fang, *Exclusive Economic Zone (EEZ) Regime in East Asian Waters: Military and Intelligence Gathering Activities, Marine Scientific Research (MSR) and Hydrographic Surveys in the EEZ* (RSIS, Working Paper No. 198, May 21, 2010), available at <http://www.rsis.edu.sg/publications/WorkingPapers/WP198.pdf>.

8. Mark J. Valencia, *The South China Sea: Back To Future?* EAST SEA (SOUTH CHINA SEA) STUDIES (Jul. 15, 2011), available at <http://www.nghiencuubiendong.vn/en/conferences-and-seminars/-second-international-workshop/582-the-south-china-sea-back-to-future-by-mark-j-valencia>; EAST-WEST CENTER, *MILITARY AND INTELLIGENCE GATHERING ACTIVITIES IN THE EXCLUSIVE ECONOMIC ZONE: CONSENSUS AND DISAGREEMENT, A SUMMARY OF THE BALI DIALOGUE* (June 27-28, 2002), <http://www.eastwestcenter.org/sites/default/files/private/BaliDialogue.pdf>.

9. Agreement on Establishing a Consultation Mechanism To Strengthen Military Maritime Safety, U.S.-China, Jan. 19, 1998, T.I.A.S. No. 12,924 [hereinafter MMCA].

Chief of Naval Operations, indicated in response to a question by the *Financial Times* regarding the need to negotiate an INCSEA agreement with the PRC that:

We have one. It is called the rules of the road [International Regulations for Preventing Collisions at Sea]. My view is that the international protocols are adequate for us to have a very safe and co-operative interaction at sea. In my mind, we don't have to have a set of separate rules for a country and how navies operate together. . . . To say that we need something like that [INCSEA] almost defines the type of relationship – that you are unable to operate within the norms of the international structure and that you need something apart – I am just not there.<sup>10</sup>

In short, although an INCSEA agreement could, in theory, reduce the possibility of miscalculation during un-alerted sea encounters between U.S. and Chinese naval and air forces, there are many reasons that the United States should not pursue such an arrangement. First, unlike the Soviet Navy, the PLA Navy is not a “blue water” navy with global reach and responsibilities. Elevating the PLA Navy to such a stature would not be in the best interests of the United States. Second, the United States and the Soviet Union shared a common interest in freedom of navigation and access to the world's oceans. U.S. and Chinese interpretations of the law of the sea are diametrically opposed and cannot be reconciled. Third, INCSEA is a navy-to-navy agreement. However, the bulk of PRC harassment and aggressive behavior against U.S. ships is conducted by PRC non-military law enforcement agencies and civilian proxies (e.g., small cargo ships and fishing trawlers). An INCSEA agreement would not apply to these vessels and aircraft. Fourth, INCSEA is a Cold War instrument. Defining the U.S.-China relationship in such terms would be counter-productive for both nations. Fifth, based on its activities in the near seas over the past several decades, China can hardly be characterized as a responsible state actor. Its actions in the South China Sea, in particular, are inconsistent with the spirit and intent of INCSEA and reflect a series of broken promises, intimidation, and aggressive behavior towards its neighbors. Finally, unlike 1972, the International Regulations for Preventing Collisions at Sea (COLREGS) and other international and regional arrangements provide internationally recognized and accepted measures that can be used to prevent incidents at sea.<sup>11</sup> New measures are unnecessary.

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10. *Interview Transcript: Admiral Gary Roughead*, FT.COM (Jan. 18, 2011), <http://www.ft.com/cms/s/0/993b0ca4-234d-11e0-8389-0144feab49a.html#ixzz1DTsRJZR5>.

11. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20 1972, 28 U.S.T. 3459 [hereinafter COLREGS]. COLREGS include a series of requirements for steering and sailing, lights and shapes, and sound and light signals for both

## I. THE U.S.-USSR INCSEA AGREEMENT

INCSEA negotiations began in earnest in 1971. The first round was held in Moscow, followed by a second round in Washington, D.C. in early 1972. On May 25, 1972, INCSEA was signed by the parties in Moscow and immediately entered into force. At the same time, COLREGS was being negotiated by the member governments of the International Maritime Organization (IMO). However, COLREGS was not adopted by the IMO until October 20, 1972 and COLREGS Rules of the Road did not enter into force until July 15, 1977.<sup>12</sup>

Because COLREGS had not yet entered into force, U.S. and Soviet forces were not required to observe COLREGS Rules of the Road during their encounters at sea. Consequently, INCSEA, first and foremost, reaffirmed the parties' obligations under Article 18 of the Vienna Convention on the Law of Treaties to refrain from acts that would defeat the object and purpose of COLREGS.<sup>13</sup> In this regard, Article II specifically requires ship commanders to strictly observe the letter and spirit of COLREGS, which contains a set of requirements designed to promote safety of navigation when conducting operations on the high seas.<sup>14</sup> In addition, Article III provides that:

- When operating in close proximity, ships shall remain well clear to avoid risk of collision;
- When operating in the vicinity of a formation, ships shall avoid maneuvering in a manner that would hinder the evolutions of the formation;
- Formations shall not conduct maneuvers in internationally recognized traffic separation schemes;
- Ships engaged in surveillance shall stay at a distance that avoids the risk of collision and shall avoid executing maneuvers embarrassing or endangering the ship under surveillance;
- When operating in sight of one another, ships shall use signals prescribed in COLREGS, the International Code of Signals (ICS) or other mutually agreed signals;
- Ships shall not simulate attacks, launch any object in the direction of a passing ship or illuminate the navigation bridge of a passing ship;

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good and restricted visibility. *See also* U.S. COAST GUARD, COMDTINST M16672.2D, NAVIGATION RULES INTERNATIONAL-INLAND (Oct. 19, 2009), *available at* [http://www.navcen.uscg.gov/pdf/navRules/COMDTINST%20M16672.2D\\_NavRules\\_\(Corrected\).pdf](http://www.navcen.uscg.gov/pdf/navRules/COMDTINST%20M16672.2D_NavRules_(Corrected).pdf).

12. COLREGS, *supra* note 11.

13. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

14. COLREGS, *supra* note 11, at art. 2.

- When conducting exercises with submerged submarines, exercising ships shall show the appropriate signals prescribed by the ICS; and
- When approaching ships engaged in launching or recovering aircraft and replenishment underway, ships shall take appropriate measures not to hinder maneuvers of such ships and shall remain well clear.<sup>15</sup>

Article IV similarly provides that aircraft commanders shall use caution in approaching aircraft and ships of the other party operating on or over the high seas, in particular ships engaged in launching or recovering aircraft.<sup>16</sup> Additionally, Article IV prohibits simulated attacks against aircraft and ships, aerobatics over ships, and the dropping of objects near ships that may cause a hazard to the ship or constitute a hazard to navigation. Finally, Article VI requires that parties provide notice to mariners and notice to airmen in advance of any actions on the high seas that represent a danger to navigation or to aircraft in flight.<sup>17</sup> These notices are required by the International Maritime Organization/International Hydrographic Organization World-Wide Navigational Warning Service and the International Civil Aviation Organization Aeronautical Information Service.<sup>18</sup>

## II. IS A U.S-PRC INCSEA NECESSARY?

Over the past decade, as China has struggled to expand its maritime boundaries in waters off its coast, assert sovereignty over disputed islands and vast maritime resources in the South China and East China Seas, and enhance its naval capabilities to counter U.S. dominance in the Western Pacific. There have been a number of close encounters between Chinese and U.S. ships and aircraft operating in China's claimed zone of interest. Although there have been numerous such encounters, the most notable incidents occurred in 2001 and 2009.

On March 23, 2001, the *USNS Bowditch* was threatened by a PLA Navy Jianheu III-class frigate and ordered to leave China's EEZ. At the time of the incident,<sup>19</sup> the *Bowditch* was legally conducting a routine

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15. COLREGS, *supra* note 11, at art. 3.

16. COLREGS, *supra* note 11, at art. 4.

17. COLREGS, *supra* note 11, at art. 4.

18. Int'l Maritime Org. [IMO], *World-Wide Navigational Warning Service*, ann. 1 ¶4.2.1.3.12, Res. A.706(17) (Nov. 16 1991); International Standards and Recommended Practices: Aeronautical Information Services, International Civil Aviation Organization, Convention on International Civil Aviation, Annex 15 ¶5.1.1.1.(1) (13th ed. July 2010).

19. Shirley A. Kan et al., *China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications* (Cong. Res. Service RL 30946), Oct. 10, 2001; *see*

military hydrographic survey in the Yellow Sea. A week later, on April 1, a PLA Air Force F-8 fighter aircraft collided with a U.S. EP-3 plane that was conducting a routine reconnaissance flight approximately seventy miles off the coast of Hainan Island. The PLA Air Force pilot ejected from his aircraft but was lost at sea. The severely damaged EP-3 plane was required to make an emergency landing at the Lingshui military airstrip on Hainan Island, and the crew was held captive for eleven days until their release was negotiated by the U.S. ambassador.<sup>20</sup> Washington strongly protested both of these incidents diplomatically as unprofessional and unsafe, arguing that the U.S. platforms were engaged in lawful military activities in the EEZ consistent with the law of the sea. Beijing responded that the presence of U.S. reconnaissance aircraft and Special Mission Ships (SMS) in the Chinese EEZ presented a threat to their national security. The matter was additionally addressed at various meetings of the MMCA, including a special meeting in Guam in September 2001 and a working group meeting in Beijing in December 2001.<sup>21</sup>

Eight years later, on March 8, 2009, three PRC government vessels – a PLA Navy intelligence ship, a State Oceanographic Administration (SOA) patrol vessel, and a Fisheries Law Enforcement Command (FLEC) patrol vessel – and two commercial cargo ships interfered with a U.S. oceanographic surveillance ship, *USNS Impeccable*, engaged in lawful military activities in the PRC EEZ. The two cargo ships, acting under the direction of the PRC government vessels, made several close passes behind the U.S. ship in an attempt to snag the towed-array cable protruding from the stern of the ship. When those efforts were unsuccessful, the cargo ships intentionally stopped in front of the *Impeccable*, forcing it to make an emergency all-stop to avoid a collision.<sup>22</sup> A similar incident occurred in May 2009, when two Chinese fishing vessels came within ninety feet of the *USNS Victorious*, prompting the unarmed ship to use its water hose to ward-off the Chinese boats.<sup>23</sup>

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generally Chris Plante, *U.S. Quietly Resumes Surveillance Flights off China*, CNN (May 5, 2001), available at <http://edition.cnn.com/2001/US/05/15/us.china.plane/index.html>; Mark Oliva, *Before EP-3, China Turned Away U.S. Research Ship in International Waters*, STARS AND STRIPES, May 20, 2001; Raul Pedrozo, *Close Encounters at Sea: The USNS Impeccable Incident*, 60 NAVAL WAR COLLEGE REVIEW 101, 101-111 (2009); Raul Pedrozo, *Beijing's Coastal Real Estate: A History of Chinese Naval Aggression*, FOREIGN AFF., Nov. 15, 2010, available at <http://www.foreignaffairs.com/articles/67007/raul-pedrozo/beijings-coastal-real-estate>.

20. Pedrozo, *Close Encounters at Sea*, *supra* note 19, at 107.

21. Kan, *supra* note 6.

22. Ann Scott Tyson, *China Draws U.S. Protest over Shadowing of Ships*, WASH. POST, Mar. 10, 2009, at A8; Dan De Luce, *Chinese Ships "Harassed ISNS Impeccable,"* AGENCE FRANCE-PRESSE, Mar. 10, 2009; Pedrozo, *Close Encounters at Sea*, *supra* note 19; Pedrozo, *Beijing's Coastal Real Estate*, *supra* note 19.

23. *Pentagon Reports Naval Incident in Yellow Sea*, VOICE OF AM. (May 5, 2009), <http://www.voanews.com/english/news/a-13-2009-05-05-voa24-68787162.html>.

While it might appear that the signing of an INCSEA agreement could have positive effects on U.S.-China military-to-military relations and encounters at sea and bring some marginal benefits, there are reasons that the United States should not go down this road.

### III. NAVAL CAPABILITIES

During the 1960s and early 1970s, the Soviet Union embarked on a massive shipbuilding program in an effort to challenge the United States as a naval power. The Soviet submarine fleet was the largest in the world, significantly outnumbering the U.S. submarine force.<sup>24</sup> Similarly, the U.S. fleet had only nine cruisers – the Soviets had twenty-five, armed with surface-to-surface missiles, cruise missiles, torpedoes, and antisubmarine weapons. In a massive show of force, the Soviets conducted Exercise Okean in 1970, a large-scale naval command and control exercise involving over 200 ships.<sup>25</sup> In addition, Soviet ships established a noticeable presence off the western and eastern United States, including the construction of a submarine base in Cienfuegos, Cuba. Therefore, although the U.S. Navy maintained a considerable technological edge, as well as carrier superiority, the Soviet Navy was a formidable force, on par with its U.S. counterpart.<sup>26</sup>

By contrast, although the PLA Navy is the largest naval force in Asia, it pales in comparison with the size and capabilities of the Cold War-era Soviet Navy. Additionally, U.S. naval forces outnumber the PLA Navy in all major categories – surface combatants (102 to 75), submarines (71 to 60), and aircraft carriers (11 to 0).<sup>27</sup> The PLA Navy has gradually increased its out-of-area deployments since 2000 and continues to improve its naval capabilities, including an active aircraft carrier research and development program; development of an anti-ship ballistic missile with a range of over 1,500 km; improved over-the-horizon targeting; production of Jin-class nuclear-powered ballistic missile submarines and nuclear-powered attack submarines, as well as Yuan-class diesel-electric attack submarines; and increased acquisition of domestically produced surface combatants. Nevertheless, China has a long way to go yet before it becomes a true “blue water” navy.<sup>28</sup> In fact, the PLA Navy is still part of the Army. And the

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24. *U.S. Naval Strategy in the 1970s*, 30 NAVAL WAR COLLEGE NEWPORT PAPERS, No. 30 (John B. Hattendorf ed., 2007).

25. *Id.*

26. *Id.*

27. NAVAL VESSEL REGISTER, FLEET SIZE, <http://www.nvr.navy.mil/nvrships/fleet.htm>; OFFICE OF THE SEC’Y OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 2010: REP. TO CONGRESS (2010); *see also* Michael Wines, *China: New Aircraft Carrier Is a Vintage Soviet Model*, N.Y. TIMES, Mar. 14, 2012, at A12 (reporting on China’s aircraft carrier expected to be put into service in late 2012).

28. OFFICE OF THE SEC’Y OF DEF., *supra* note 27; Christopher D. Yung et al., *China’s*

U.S. Navy does not seem to be intimidated by China's military advances in recent years. As the Commander of the U.S. 7th Fleet recently indicated, China's new "carrier killer" missile does not create an "insurmountable vulnerability" for U.S. carriers and will not "force the U.S. Navy to change the way it operates in the Pacific."<sup>29</sup>

In short, the Soviet Navy was a true global blue water navy. Its ships operated around the world with impunity and erased the image that the USSR was solely a continental power. The PLA Navy has not achieved a similar global status. In this regard, INCSEA also gave the Soviet Navy something the Red Army didn't have – a bilateral relationship with its U.S. counterpart. Since the Soviet Union had traditionally been considered a land power, INCSEA elevated the prestige of the Soviet Navy at home and abroad.<sup>30</sup> An INCSEA agreement with the PRC would significantly enhance the stature of the PLA Navy by suggesting it was a naval power on par with U.S. and former Soviet Navies. It would also force the U.S. Navy to treat the PLA Navy as an equal, something which it clearly is not. Perhaps more importantly, however, the prestige gained by signing an INCSEA agreement could lead the Chinese government to allocate a larger percentage of the defense budget to the PLA Navy. In 2010, the PLA Navy was already receiving more than one-third of a defense budget that has experienced double-digit growth for the last twenty years.<sup>31</sup>

#### IV. NAVY-TO-NAVY AGREEMENT

INCSEA is a navy-to-navy agreement. Consequently, it only applies to the naval and air forces of the parties. In this regard, it is important to note that between 2005 and 2009, the overwhelming majority of Chinese interference and harassment with U.S. ships and aircraft operating in the South China, East China and Yellow Seas was by ships and aircraft operated by the State Oceanographic Administration (SOA) and the Fisheries Law Enforcement Command (FLEC).

Following the 2001 incidents involving the *USNS Bowditch* and the EP-3 discussed above, Beijing began to modify its legal justification for interfering with U.S. SMS operating in the Chinese EEZ. At the same time,

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*Out of Area Naval Operations: Case Studies, Trajectories, Obstacles, and Potential Solutions*, 3 INST. FOR NAT'L STRATEGIC STUD. CHINA STRATEGIC PERSP. (Dec. 2010).

29. Eric Talmadge, *U.S. Admiral: Carrier Killer Won't Stop US Navy*, HUFFINGTON POST (Feb. 15, 2011), available at <http://www.huffingtonpost.com/huff-wires/20110215/as-us-china-carrier-killer/>.

30. Peter J. Brown, *US and China Can't Calm South China Sea*, ASIA TIMES, Jan. 4, 2010, available at <http://www.atimes.com/atimes/China/LF04Ad01.html>.

31. *China's Defense Budget*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/world/china/budget.htm>; Chitranjan Sawant, *Dramatic Development of Chinese Navy*, MERINEWS, Apr. 24, 2010, available at <http://www.merineews.com/article/dramatic-development-of-chinese-navy/15805089.shtml>.

the types of platforms and tactics used to harass U.S. ships also changed. For example, in 2002, the PRC enacted the Surveying and Mapping Law, which illegally purports to regulate all marine data collection, including hydrographic surveys and military marine data collection, in waters under Chinese jurisdiction.<sup>32</sup> Concurrently, the platforms used to harass U.S. SMSs shifted from PLA Navy ships to SOA ships. Similarly, in 2006-2007, Beijing began to claim U.S. interference with their exclusive resource rights and environmental jurisdiction in the EEZ, citing their 1999 Marine Environment Protection Law and the ongoing litigation in U.S. federal courts over the U.S. Navy's use of sonar during training exercises.<sup>33</sup> This new legal argument brought a shift in interference platforms – patrol vessels from the FLEC. These agencies do not report to the Ministry of National Defense. Additionally, China's state, regional, and local governments have recently increased the number and capability of their maritime law enforcement vessels in order to stop illegal fishing in their EEZ. Command and control of the various maritime law enforcement vessels, however, remains a challenge for the Chinese, as they sort out the responsibilities and missions of these enforcement agencies. A navy-to-navy or even a military-to-military INCSEA agreement would not apply to these non-military entities. This raises serious concerns since non-PLA vessels have been the source of most of the recent incidents involving dangerous maneuvers and COLREG violations.<sup>34</sup>

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32. Surveying and Mapping Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2002) art. 2, 2002 China Law LEXIS 2354 (China Law 2002). The law violates Parts V and XIII of the United Nations Convention on the Law of the Sea, which distinguish between coastal state jurisdiction over marine scientific research in the EEZ and user state freedoms to engage in other survey/marine data collection activities in the EEZ. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

33. Marine Environment Protection Law of the People's Republic of China, (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 25, 1999), art. 2, 1999 China Law LEXIS 1127 (China Law 1999). The law violates many of the provisions of Part XII of UNCLOS, including Article 236, which exempts sovereign immune vessels from compliance with the environmental provisions of the convention. UNCLOS, *supra* note 32, at art. 236.

34. *Japan Protests to Beijing over Chasing in East China Sea*, Agence France-Presse, May 4, 2010 (A Japanese survey vessel was pursued by a PRC maritime surveillance ship and ordered to leave "Chinese waters" about 198 nm northwest of Amami Oshima Island); *Japan Protests Chinese Chopper that Neared Warship*, WASHINGTONPOST.COM, Mar. 7, 2011, available at <http://www.washingtonpost.com/wp-yn/content/article/2011/03/07/AR2011030701545.html> (SOA helicopters come within 90 meters of two Japanese destroyers that were conducting routine patrols in the vicinity of the Senkaku Islands); Emmanuel, *Philippine-PRC Spratly Islands Spat + PR Spin*, INT'L POL. ECON. ZONE (Mar. 6, 2011) (Two CMS patrol boats threatened a Filipino survey ship that was conducting a seismic survey for oil and gas in the vicinity of Reed Bank Emmanuel); *VN Demands China Stop Sovereignty Violations*, VIETNAMPLUS (May 29, 2011), <http://en.vietnamplus.vn/Home/VN-demands-China-stop-sovereigntyviolations/20115/18615.vnplus> (Three CMS patrol

Since 2009, civilian proxies have been used to interfere with U.S. SMSs operating in Chinese-claimed waters. As mentioned above, the *Impeccable* and *Victorious* incidents involved harassment by commercial cargo ships and fishing trawlers, respectively, not PRC government vessels. Although it is clear from the videos taken by the U.S. ships that the civilian vessels were operating as government proxies, the PLA Navy vessels on scene did not directly participate in the harassment.<sup>35</sup> Although the PRC has a legal obligation – under both the U.N. Convention on the Law of the Sea (UNCLOS)<sup>36</sup> and COLREGS – to ensure vessels flying its flag operate with due regard for the safety of other maritime traffic, a military-to-military or government-to-government INCSEA agreement would not have prevented these incidents.

#### V. COLD WAR AGREEMENT

INCSEA was negotiated during the height of the Cold War and reflected the adversarial relationship that existed between the world's two superpowers. By the mid-1960s, the Soviet Navy was challenging U.S. ships and aircraft around the globe at every opportunity. Both sides routinely engaged in dangerous maneuvers, such as “playing chicken” or shouldering ships, “buzzing” ships with surveillance aircraft, simulating attacks by aiming weapon systems at or using fire control radar to track ships and aircraft, and illuminating the bridge of ships with searchlights. Although there have been a number of incidents at sea between the PLA Navy and U.S. ships and aircraft, many of which have gone unreported in the press, the intensity of those encounters, while unsafe and unprofessional, has not risen to the level of U.S.-Soviet harassment in the 1960s and 1970s. In fact, PLA involvement in harassment of U.S. ships and aircraft has decreased significantly since the 2001 EP-3 and *Bowditch* incidents.

Since 2001, air intercepts of U.S. reconnaissance aircraft operating within two hundred nautical miles of the Chinese coast have been a frequent occurrence. However, unlike the EP-3 incident, PLA Air Force pilots have conducted these intercepts in a much more professional and safe manner. Additionally, confrontations between the PLA Navy and U.S. Navy ships have decreased significantly, with most of the challenges to U.S. operations in China's EEZ being conducted by non-military government vessels or commercial cargo ships and fishing trawlers. In short, the intensity and frequency of interference by the PLA Navy are

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vessels harass and cut the survey cable of a Vietnamese survey ship operating approximately 116 nm off Dai Lanh, well within Vietnam's EEZ).

35. See generally Pedrozo, *Close Encounters at Sea*, *supra* note 19; Pedrozo, *Beijing's Coastal Real Estate*, *supra* note 19.

36. UNCLOS, *supra* note 32, at arts. 92 and 94.

significantly less than the level of activity engaged in by the Soviet Navy during the height of the Cold War.

Beijing has repeatedly emphasized that it has embarked on a “peaceful rise” in the Pacific. During his January 2011 state visit to the United States, President Hu Jintao reaffirmed China’s resolve to “pursue peaceful development” and committed Beijing to achieving a higher level of cooperation with Washington based on “mutual respect and mutual benefit.”<sup>37</sup> In a speech to American business leaders in Washington, President Hu indicated that the United States and China should “stay committed to promoting peace, stability and cooperation in the Asia-Pacific region and . . . work closely with each other on the basis of mutual respect,” specifically calling for closer military cooperation.<sup>38</sup> If China is truly interested in building a long-term, meaningful military-to-military relationship with the United States that is based on trust and confidence, a Cold War-era instrument that highlights an adversarial, rather than a cooperative, relationship would be counter-productive.

#### VI. NATIONAL VIEWS ON THE LAW OF THE SEA

INCSEA worked because the United States and the Soviet Union held, for the most part, similar views of the law of the sea. Both nations shared a common interest in preserving navigational rights and freedoms throughout the world’s oceans and routinely teamed up to advance this agenda during the negotiations of Part III (straits used for international navigation), Part IV (archipelagic states) and Part V (EEZ) of UNCLOS.

This common interest is best illustrated by the signing of an agreement in Jackson Hole, Wyoming, in 1989 following the Black Sea Bumping incident in 1988.<sup>39</sup> On February 12, 1988, the *USS Caron* and *USS Yorktown* were intentionally bumped, respectively, by a Soviet Mirka-II class frigate (*SKR-6*) and a Soviet Krivak-I class frigate (*Bezzavetny*) while engaged in innocent passage in the USSR’s claimed territorial sea off the Crimean Peninsula. The U.S. ships were conducting a freedom of navigation assertion to challenge the Soviet’s excessive maritime claim that foreign warships required coastal state permission to engage in innocent

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37. *A Historic Push for China-U.S. Friendship, A Great Boost for World Peace and Development*, EMBASSY OF PEOPLE’S REPUBLIC OF CHINA IN THE U.S., Jan. 26 2011, available at <http://www.china-embassy.org/eng/zmgx/t790205.htm>.

38. Michael Wines, *In Speech, Hu Calls for Closer Cooperation With U.S.*, N.Y. TIMES, Jan. 20, 2011, <http://thecaucus.blogs.nytimes.com/2011/01/20/in-speech-hu-calls-for-closer-cooperation-with-u-s/>.

39. Union of Soviet Socialist Republics-United States: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, Jackson Hole, Wyoming, Sept. 23, 1989, 28 I.L.M. 1444.

passage through the territorial sea.<sup>40</sup> Eighteen months later, on September 23, 1989, after several rounds of discussions in Moscow and Washington, the Soviet Union changed its position and issued a joint statement with the United States indicating that “all ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.”<sup>41</sup>

The United States and China, on the other hand, do not share a common interest in freedom of navigation and overflight. On the contrary, the PRC’s views on the legality of military activities in the EEZ are diametrically opposed to the views of the United States. China argues that military activities in their EEZ, such as U.S. Sensitive Reconnaissance Operations (SRO) and other SMS operations, are hostile acts and therefore violate the “peaceful purposes” provisions of UNCLOS Articles 88, 141 and 301. Beijing additionally argues that such operations impair state security interests and damage China’s sovereign rights and jurisdiction in the EEZ. Accordingly, China insists that it has a right to impose restrictions on military activities in the EEZ, including prohibiting surveillance and reconnaissance operations as well as other military marine data collection activities. China’s claims have no basis in customary international law or UNCLOS and are not supported by state practice.<sup>42</sup>

The United States, conversely, argues that nations may conduct military activities in foreign EEZs, including intelligence collection and military marine data collection, without coastal state notice or consent. Washington cites state practice, the negotiating history of UNCLOS and Articles 56, 58, and 86 of the Convention in support of its position. Article 56 grants coastal states broad resource-related rights and jurisdiction over the marine environment and marine scientific research (MSR) in the EEZ. However, Article 56 and the second sentence of Article 86 clearly provide that all high seas freedoms that are not resource-related, and other internationally lawful uses of the seas related to those freedoms, such as military activities, apply seaward of the territorial sea and may be exercised by all nations in the EEZ. More importantly, UNCLOS regulates peacetime intelligence collection in only one limited circumstance – ships engaged in innocent passage in the territorial sea may not commit “any act aimed at collecting information to the prejudice of the defense or security of the coastal state.”<sup>43</sup>

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40. *Soviets Bump 2 Navy Ships in Black Sea: U.S. Says Act Was Unprovoked, Lodges Protest with Envoy*, L.A. TIMES, Feb. 14, 1988, at A1.

41. *Supra* note 39.

42. Raul (Pete) Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China’s Exclusive Economic Zone*, 9 CHINESE J. INT’L L. 9 (2010); Raul (Pete) Pedrozo, *Responding to Ms. Zhang’s Talking Points on the EEZ*, 10 CHINESE J. INT’L L. 207 (2011); Pedrozo, *Close Encounters at Sea*, *supra* note 19; Pedrozo, *Beijing’s Coastal Real Estate*, *supra* note 19.

43. UNCLOS, *supra* note 32, at art. 19(2)(c).

A similar restriction does not appear in Article 56 of the Convention, which sets out the rights, jurisdiction, and duties of the coastal state in the EEZ. Therefore, nations may collect intelligence in and over foreign EEZs without coastal state notice or consent.<sup>44</sup>

This conclusion is supported by statements of Ambassador Tommy T. B. Koh, president of the Third U.N. Conference on the Law of the Sea, which resulted in the UNCLOS. Speaking at a Law of the Sea conference in Singapore in 2008, Ambassador Koh observed, “I find a tendency on the part of some coastal states . . . to assert their sovereignty in the EEZ. This . . . is not consistent with the intention of those of us who negotiated this text and is not consistent with the correct interpretation of . . . [Part V] of the Convention.”<sup>45</sup> Years earlier, in response to Brazil’s understanding that UNCLOS does not authorize other states to engage in military activities in the EEZ without coastal state consent, Ambassador Koh similarly held that “nowhere is it clearly stated whether [a] state may or may not conduct military activities in the [EEZ] . . . of a coastal state. But it was the general understanding that the text we negotiated and agreed upon would permit such activities to be conducted.”<sup>46</sup>

It is also important to note that UNCLOS does not treat intelligence collection as a threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state in violation of the U.N. Charter. Article 19(2)(c) clearly distinguishes collecting intelligence from “threat or use of force,” which is discussed as a separate prohibited activity in Article 19(2)(a) for ships engaged in innocent passage. This issue was resolved by the Security Council in 1960 following the shoot down of a U.S. U-2 spy plane near Sverdlovsk, Russia. An effort by the Soviet Union to have the Security Council decide that the activity of the U.S. spy plane was an act of aggression was soundly defeated seven to two (with two abstentions), thereby reaffirming the legality of peacetime intelligence collection under the U.N. Charter.<sup>47</sup> This view is shared by most experts.<sup>48</sup>

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44. *Supra* note 34.

45. Tommy T. B. Koh, *Remarks on the Legal Status of the Exclusive Economic Zone*, in *FREEDOM OF SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION* 53 (Myron H. Nordquist et al. eds., 2009).

46. *CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION* (Jon M. Van Dyke ed., 1985).

47. Oliver J. Lissitzyn, *The Role of International Law and an Evolving Oceans Law*, in *ELECTRONIC RECONNAISSANCE FROM THE HIGH SEAS AND INTERNATIONAL LAW*, 61 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 566 (Richard B. Lillich & John Norton Moore eds., 1980).

48. Wines, *supra* note 38; Pedrozo, *Responding*, *supra* note 42; Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 *MARINE POLICY* 123 (2005), available at <http://www.sciencedirect.com/science/article/pii/S0308597X04000806> (“Commentators generally agree that, based on various provisions of

Similarly, UNCLOS distinguishes between marine scientific research and surveys in Part II (Articles 19 and 21), Part III (Articles 39 and 40), Part IV (Articles 52 and 54), Part V (Articles 56 and 58) and Part VII (Article 87). The term “marine scientific research” was intentionally chosen in order to distinguish MSR from other forms of marine data collection, such as hydrographic surveys and military oceanographic surveys. The reason that UNCLOS uses different terminology in these various articles is obvious. Coastal states may regulate both MSR and surveys in their territorial seas, archipelagic waters, international straits, and archipelagic sea lanes, but in their contiguous zones and EEZs, they may regulate only MSR.<sup>49</sup>

As China develops a greater blue water capability, it may change its position with regard to military activities in the EEZ, just as the Soviet Union did in 1989 regarding the right of innocent passage. At present, however, Beijing is interested in only two things: 1) the complete cessation of U.S. SRO flights and SMS operations in and over China’s claimed EEZ, and 2) a reduction of large-scale U.S. unilateral and bilateral military exercises in China’s EEZ. As a result, the PRC will seize the opportunity during INCSEA negotiations to extract concessions from the United States on its position regarding the legality of military activities in the EEZ. The Soviets tried to do the same thing during the initial round of INCSEA negotiations in the 1970s by demanding that the agreement include a stand-off distance – i.e., no maneuvers within a certain distance of the other side’s ship or aircraft. Appropriately, the U.S. delegation rejected the Soviet proposal, but it is unlikely, judging from the history of U.S. attempts to address Chinese demands,<sup>50</sup> that a U.S. delegation would be as successful with the PRC. If the PRC was able to persuade the United States to agree to stand-off distances from Chinese territory, China’s next step would be to reduce the number of SRO flights and SMS operations, with its final objective being the complete elimination of U.S. surveillance and reconnaissance operations in the PRC EEZ.

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the Convention ... it may be concluded that ... Articles 88 and 301 do not prohibit all military activities on the high seas and in EEZs, but only those that threaten or use force in a manner inconsistent with the UN Charter.”)

49. Raul (Pete) Pedrozo, *Coastal State Jurisdiction over Marine Data Collection in the Exclusive Economic Zone: US Views*, in *MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS*, CHINA MARITIME STUDY NO. 7, NAVAL WAR COLLEGE CHINA MARITIME STUDIES INSTITUTE 23-36 (Peter Dutton ed., 2010).

50. Examples include the failure of the United States to deploy the *USS George Washington* into the Yellow Sea after Beijing objected to the participation of the carrier in several joint U.S.-ROK naval exercises after the sinking of the Korean warship *Cheonan* in March 2010. And most recently, there was the Obama administration decision not to sell F-16s to Taiwan in September 2011 after Beijing objected to the sale.

## VII. CHINA AS A RESPONSIBLE STATE ACTOR

The PRC has shown an unwillingness to serve as a responsible state actor and comply with the terms of existing agreements. If past practice is any indication, China will continue to violate COLREGS and the “due regard” safety standards contained in various international instruments.

In the Western Pacific, China has broken a series of promises made with regional players. For instance, the PRC routinely conducts marine scientific research in Japan’s EEZ in violation of a 2001 agreement that requires prior notification before MSR can be conducted in the other party’s EEZ.<sup>51</sup> Similarly, despite having agreed to abide by the 2002 ASEAN Declaration on the Conduct of Parties in the South China Sea, also called the Code of Conduct, Chinese actions in the Spratlys and Paracels have repeatedly violated the letter and spirit of the code. The Code of Conduct requires, *inter alia*, that parties undertake to resolve their disputes by peaceful means, without resorting to the threat or use of force and to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability.<sup>52</sup> Yet, the following examples show that the PRC has violated that Code of Conduct by:

Continuing its military build-up on Mischief Reef, despite protests from the Philippine government;<sup>53</sup>

- Repeated use of force against Vietnamese fishing boats and arrests of their crews since 2005;<sup>54</sup>

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51. John Tkacik, Jr., *China’s New Challenge to the U.S.-Japan Alliance*, THE HERITAGE FOUNDATION (July 13, 2004), available at <http://www.heritage.org/research/reports/2004/07/chinas-new-challenge-to-the-us-japan-alliance>; James J. Przystup, *Japan-China Relations: Not the Best of Times*, INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NATIONAL DEFENSE UNIVERSITY (2004), available at [http://www.csis.org/files/media/isis/pubs/0403qjapan\\_china.pdf](http://www.csis.org/files/media/isis/pubs/0403qjapan_china.pdf); Bernard D. Cole, *Beijing’s Strategy of Sea Denial*, 6 CHINA BRIEF (May 9, 2007), available at [http://www.jamestown.org/single/?nocache=1&tx\\_ttnews%5Btt\\_news%5D=4001](http://www.jamestown.org/single/?nocache=1&tx_ttnews%5Btt_news%5D=4001); see also *supra* note 34.

52. Declaration on the Conduct of Parties in the South China Sea, Association of Southeast Asian Nations – China, Nov. 4, 2002, available at <http://www.aseansec.org/13163.htm>.

53. ENERGY INFORMATION ADMINISTRATION, COUNTRY ANALYSIS BRIEFS – SOUTH CHINA SEA (Mar. 2008), available at [http://www.eia.gov/emeu/cabs/South\\_China\\_Sea/pdf.pdf](http://www.eia.gov/emeu/cabs/South_China_Sea/pdf.pdf); Eleanor, *China’s Naval Buildup – Mischief Reef and More*, ELEANOR DUCKWALL’S SPOTLIGHT (July 7, 2009), available at <http://sixthcolumn.typepad.com/duckwalls/2009/07/chinas-naval-buildup-mischief-reef-and-more.html>; *Spratly Islands Dispute*, 21 INVENTORY OF CONFLICT & ENVIRONMENT CASE STUDIES (May 1997), available at <http://www1.american.edu/TED/ice/spratly.htm>; L.D., *History of Chinese Imperialism in Vietnam: From Nam Viet To Paracel/Spratly*, PARACEL AND SPRATLY ISLANDS FORUM, available at <http://paracelspratlyislands.blogspot.com/2008/01/history-of-chinese-imperialism-in.html>.

54. *China Seizes Vietnamese Fishing Boat*, DEUTSCHE PRESSE-AGENTUR, Apr. 19, 2010, available at [http://www.monstersandcritics.com/news/asiapacific/news/article\\_1549166.php/China-seizes-Vietnamese-fishing-boat](http://www.monstersandcritics.com/news/asiapacific/news/article_1549166.php/China-seizes-Vietnamese-fishing-boat).

- Firing warning shots at three Filipino fishing vessels operating in the vicinity of Jackson Atoll on February 25, 2011, well within the Philippine EEZ;<sup>55</sup>
- Exercise of economic coercion, threatening U.S. and international oil and gas companies, including Exxon/Mobil (in 2008) and BP (in 2007), with loss of business opportunities in mainland China if they did not stop joint exploration ventures with Vietnam in the South China Sea;<sup>56</sup>
- Its declaration in March 2010 that the South China Sea was a “core interest” for China, a position previously reserved for Tibet, Xinjiang, and Taiwan;<sup>57</sup>
- Imposition of unilateral fishing bans for the northern section of the South China Sea in April 2010 and May 2011, and the escorting of PRC fishing vessels in the South China Sea by armed FLEC patrol boats;<sup>58</sup>
- Conducting an unprecedented military exercise in the South China Sea involving ships and aircraft from all three PRC fleets in July 2010 and a large scale exercise in June 2011 involving fourteen ships and two aircraft;<sup>59</sup>
- Imposition of an economic embargo on the transfer of rare earth minerals to Japan in September 2010 after Japanese officials arrested a Chinese fishing boat captain for intentionally ramming into two Japanese Coast Guard vessels;<sup>60</sup>
- Harassment of a Filipino research vessel (M/V Voyager) in March 2011 that was conducting a seismic survey in the vicinity of Reed Bank, 85 nautical miles from Palawan Island;<sup>61</sup>

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55. TESSA Jamandre, *China Fired at Filipino Fishermen in Jackson Atoll*, ABS-CBN NEWS, June 3, 2011, available at <http://www.abs-cbnnews.com/-depth/06/02/11/china-fired-filipino-fishermen-jackson-atoll>.

56. Peter Navarro, *China Stirs over Offshore Oil Pact*, ASIA TIMES ONLINE (July 23, 2008), available at <http://www.atimes.com/atimes/printN.html>.

57. Peter Lee, *US Goes Fishing for Trouble*, ASIA TIMES ONLINE (July 29, 2010), available at <http://www.atimes.com/atimes/China/LG29Ad02.html>.

58. Greg Torode, *China Ban on Fishing as Tension Runs High*, SOUTH CHINA MORNING POST, May 16, 2010; Nguyen Dang Thang, *Implications for Territorial Disputes – Analysis*, EURASIA REVIEW, June 13, 2011, available at <http://www.eurasiareview.com/13062011-china%E2%80%99s-fishing-ban-in-south-china-sea-implications-for-territorial-disputes-analysis/>.

59. Greg Torode & Minnie Chan, *For China, War Games Are Steel Behind the Statements*, SOUTH CHINA MORNING POST, July 31, 2010, at 1.

60. Martin Fackler & Ian Johnson, *Japan Retreats in Test of Wills with the Chinese*, N.Y. TIMES, Sept. 25, 2010, at A1.

61. Al Labita, *Philippines Embraces US, Repels China*, ASIA TIMES ONLINE (Mar. 22, 2011), available at [http://www/atimes.com/atimes/Southeast\\_Asia/MC23Ae01.html](http://www/atimes.com/atimes/Southeast_Asia/MC23Ae01.html); *Philippine-*

- Severing of the exploration cable of a Vietnamese survey ship (Binh Minh 02) on May 26, 2011, that was conducting a seismic survey 116 nautical miles off the Vietnamese coast and harassment of another Vietnamese survey vessel (Viking II) on June 9, 2011, that was conducting a seismic survey 60 nautical miles off the Vietnamese coast; both incidents were well within Vietnam's claimed EEZ;<sup>62</sup> and
- Challenging an Indian naval vessel forty-five nautical miles off the coast of Vietnam in July 2011 and warning Indian oil companies in September 2011 not to enter into joint oil exploration projects with Vietnam in the South China Sea.<sup>63</sup>

China has also repeatedly failed to comply with its 2008 agreement with Japan to jointly explore oil and gas resources in the East China Sea.<sup>64</sup> In short, when it comes to military activities in the EEZ, China wants the international community to “do what I say, not what I do.” And when it comes to joint development of ocean resources, China operates on the principle, “what is mine is mine, what is yours is also mine but we are willing to share yours.”

#### VIII. INTERNATIONAL INCIDENTS AT SEA RULES AND REGULATIONS

While I agree with Rear Admiral McVadon that de-escalatory mechanisms are necessary to reduce the possibility of miscalculation between U.S. and PRC forces operating in proximity of one another and that an INCSEA agreement could contribute to de-escalation, existing mechanisms already regulate encounters at sea.<sup>65</sup> As Admiral Roughead has correctly pointed out, an INCSEA agreement is unnecessary because internationally and regionally accepted measures – including the MMCA, the Western Pacific Naval Symposium (WPNS) Code for Unalerted Encounters at Sea (CUES), COLREGS, International Code of Signals, UNCLOS, and the International Civil Aviation Organization Rules of the

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*PRC Spratly Islands Spat + PR Spin*, *supra* note 34; Alena Mae S. Flores, *UK Oil Firm Completes South China Sea Survey*, MANILA STANDARD TODAY, Mar. 23, 2011, available at <http://www.manilastandardtoday.com/insideBusiness.htm?f=2011/march/23/business3.isx&d=2011/march/23>.

62. *VN Demands China Stop Sovereignty Violations*, *supra* note 34.

63. Ben Bland & Girija Shivakumar, *China Confronts Indian Vessel in South China Sea*, FT.COM, Aug. 31, 2011, available at <http://www.ft.com/intl/cms/s/0/883003ec-d3f6-11e0-b7eb-00144feab49a.html#axzz1fE6rKcaA>.

64. *Supra* note 34; *Japan and China Agree To Speed up Gas Fields Talks*, ENERGY-DAILY.COM, July 27, 2010, available at [http://www.energy-daily.com/reports/Japan\\_and\\_China\\_agree\\_to\\_speed\\_up\\_gas\\_fields\\_talks\\_999.html](http://www.energy-daily.com/reports/Japan_and_China_agree_to_speed_up_gas_fields_talks_999.html).

65. McVadon, *supra* note 2.

Air – could and should be used to prevent incidents at sea and in the air. Additionally, both sides could renew the previous practice of observing each other’s military exercises or participating in joint military drills in order to help improve understanding of one another and build mutual trust between the two militaries. For instance, in 2006, PLA officers were invited to observe the U.S.-sponsored *Valiant Shield* exercise in the Western Pacific. The following year, then Chairman of the Joint Chiefs of Staff, General Peter Pace was invited to observe a PLA military exercise in mainland China. The PLA Navy and the U.S. Navy also conducted joint exercises in 2006. The first phase involved a communications and passing exercise off the coast of Hawaii and a search and rescue exercise (SAREX) off the southern California coast in September 2006. Phase two was conducted in November 2006 and involved a second SAREX off the coast of Hainan Island in the South China Sea between two U.S. surface combatants and a PLA Navy destroyer and a tanker.<sup>66</sup>

MMCA was established specifically to facilitate consultations between the U.S. Department of Defense and the PRC Ministry of National Defense for the “purpose of promoting common understandings regarding activities undertaken by their respective maritime and air forces.”<sup>67</sup> Consultations were to occur on an annual basis or more frequently if agreed by the parties.<sup>68</sup> Similarly, WPNS aims to increase naval cooperation in the western Pacific among navies by providing a forum for discussion of maritime issues and a flow of information and opinion between naval professionals leading to common understanding and agreement. China and the United States are both members of the group and participate fully in the annual symposia. To achieve its aims, WPNS has four objectives: to discuss and elaborate cooperative initiatives, to explore new ways of enhancing friendship and professional cooperation, to develop navy-to-navy relationships at a working level, and to discuss professional areas of mutual cooperation.<sup>69</sup>

In furtherance of these objectives, WPNS undertook to develop a document to establish procedures to prevent incidents at sea. Suggestions to develop an INCSEA agreement were rejected by the WPNS Service Chiefs, reasoning that “INCSEA related to bilateral tensions and was an agreement at a political level,” whereas WPNS relates to multilateral cooperation at a professional level. Instead, the Service Chiefs elected to develop a code that is today CUES.<sup>70</sup> This WPNS code offers safety

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66. Adam R. Cole & Marc Ayalin, *U.S., China Complete 2nd Phase SAREX Off Southern China*, NAVY.MIL (Nov. 21, 2006), available at [http://www.navy.mil/search/display.asp?story\\_id=26734](http://www.navy.mil/search/display.asp?story_id=26734).

67. MMCA, *supra* note 9, at art. I.

68. *Id.* at art. II.

69. *The Western Pacific Naval Symposium*, 14 SEMAPHORE (2006) available at [http://www.navy.gov.au/Publication:Semaphore\\_-\\_Issue\\_14,\\_2006](http://www.navy.gov.au/Publication:Semaphore_-_Issue_14,_2006).

70. *Id.*

measures and procedures, as well as a means to limit mutual interference and uncertainty and to facilitate communication when warships, submarines, public vessels, or naval aircraft make contact. Standard safety procedures are contained in Part 3, standard communications procedures in Part 4, and selected signals vocabulary and basic maneuvering instructions in Part 5.<sup>71</sup> For example, Part 3 provides that ships engaged in surveillance should remain clear of platforms under surveillance so as to avoid the risk of collision. Ship captains are also encouraged to employ good seamanship and avoid carrying out maneuvers that could endanger the object under surveillance or cause it to deviate from its intended course and speed. Additionally, Commanding Officers are called on to maintain safe separation between their vessels and those of other nations. Finally, actions that should be avoided against other vessels and aircraft include: simulation of attacks; discharge or signal rockets, weapons, or other objects; illumination of bridges or cockpits; use of lasers that may cause harm to personnel or damage equipment; and aerobatics. Part 4 encourages ship captains to use appropriate sound, light, and flag signals related to maneuvers being undertaken, and identifies radio communications as the preferred method of communicating information in a timely manner under CUES.

CUES also reflects the due regard obligations found in COLREGS Rule 2, UNCLOS Articles 56 and 58, and the Chicago Convention's Article 3. In this regard, COLREGS provides in Rule 2(b) that "due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved."<sup>72</sup> Article 56(2) of UNCLOS similarly provides that in exercising its rights and performing its duties in the EEZ, "the coastal State shall have due regard to the rights and duties of other States." A similar duty is placed on user states by Article 58(3), which provides that in exercising their rights and performing their duties in the EEZ, "States shall have due regard to the rights and duties of the coastal State." Article 94 of UNCLOS further provides that every state shall take measures for vessels flying their flags, necessary to "ensure safety at sea with regard, *inter alia*, to . . . the use of signals, the maintenance of communications and the prevention of collisions." Finally, although the Chicago Convention does not apply to state aircraft, Article 3 requires state aircraft to operate with "due regard for the safety of navigation of civil aircraft."<sup>73</sup> Observance of the due regard

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71. NORTH ATLANTIC TREATY ORGANIZATION, MTP-1(E) Vol. I: MULTINATIONAL MARITIME TACTICAL INSTRUCTIONS AND PROCEDURES (2010); Pedrozo, *Close Encounters at Sea*, *supra* note 19.

72. COLREGS, *supra* note 11, at Rule 2(b).

73. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

standard can be reinforced through the issuance of notices to mariners and airmen of any maritime activity that might represent a danger to navigation or to aircraft in flight.

#### CONCLUSION

Although well intended, the MMCA has not had its desired effect because the PRC has repeatedly failed to use the MMCA process to engage in a serious discussion on the EEZ. Rather, it repeatedly uses MMCA as a platform to espouse government opposition to U.S. arms sales to Taiwan. The PRC also repeatedly attempts to hijack the MMCA agenda and use it as a platform to object to U.S. military activities in the EEZ, despite the fact that the PRC conducts military activities in other nations' EEZs. Certainly, if the PRC would put forth a good faith effort, MMCA could be used as a forum for dialogue to gain commitment from the PRC to adhere to the WPNS CUES procedures. These procedures were specifically developed as safety measures to limit mutual interference and uncertainty and facilitate communication when foreign military ships and aircraft make contact at sea. More importantly, they have been tested and exercised by WPNS navies, and they work.

The PRC has failed to comply with its treaty obligations under UNCLOS, COLREGS, and the Chicago Convention. PRC compliance with the legal obligations under these various instruments would significantly enhance safety of navigation and overflight in the Western Pacific. Creating yet another mechanism, an INCSEA agreement, likely to be ignored by the PRC, would be counterproductive. If the PRC truly wants to be recognized as a responsible state actor that promotes global peace and security, then it must abide by its obligations under international law and refrain from acts that endanger ships and aircraft of other nations operating in and over China's EEZ.