

# THE UNITED STATES, CHINA, AND FREEDOM OF NAVIGATION IN THE SOUTH CHINA SEA

JAMES W. HOUCK\*  
NICOLE M. ANDERSON\*\*

## INTRODUCTION

The need for a uniform understanding of international norms regarding freedom of navigation is increasingly important as more States develop capacity to act in the international maritime realm.<sup>1</sup> Nowhere is the issue of freedom of navigation more contentious, with more potential to spark wider conflict, than in the South China Sea (SCS). Both the United States and China profess an interest in the free navigation of commercial vessels in the region. Beyond commercial shipping, however, the two nations disagree on the important issue of freedom of navigation for military vessels. The United States believes all nations have wide latitude under international law to conduct military activities at sea. China argues that U.S. military activities in the SCS infringe on Chinese sovereignty. The resolution of this dispute, which has resulted in several confrontations at sea between the two nations, has implications for peace and security in the SCS and beyond.

## I. FREEDOM OF NAVIGATION

In its most elemental form, freedom of navigation is a ship's or aircraft's right to transit the maritime domain and conduct operations during such transits. Three factors help determine freedom of navigation rights. First, sovereignty over land territory must be established because maritime rights and duties generally emanate from sovereign state coastal territory or offshore islands. Sovereignty is, of course, a source of major dispute in the SCS with China, Philippines, Vietnam, Malaysia, Brunei, and Taiwan all making claims to various land features.<sup>2</sup> Important as these

---

\* Interim Dean and Distinguished Scholar in Residence, Penn State University Dickinson School Law.

\*\* First Lieutenant, U.S. Marine Corps, Penn State University Dickinson School of Law Class of 2014.

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

2. DAVID LAI, ASIA-PACIFIC: A STRATEGIC ASSESSMENT 61-62 (2013), available at [www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=1155](http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=1155).

competing claims are, their merits and potential resolution are beyond the scope of this Article.

Second, assuming that sovereignty over land territory and boundaries is clearly established, various maritime zones are derived by measuring distances from land features. While these measurements are often straightforward and undisputed, frequently they are not. China, for example, measures its territorial sea from a series of “straight baselines” along the Chinese coast.<sup>3</sup> The United States argues these baselines are drawn without regard to the United Nations Convention on the Law of the Sea (UNCLOS or the Convention) rules and impermissibly increase Chinese sovereignty over its near-coastal waters.<sup>4</sup> Separately, and entirely outside any UNCLOS framework, China claims a major portion of the SCS through assertion of a controversial “9-Dash Line.”<sup>5</sup> Again, while the legitimacy of these boundaries is a key factor in regional disputes, a discussion of China’s claimed sea boundaries under UNCLOS or its 9-Dash Line is beyond the scope of this Article.

Third, once maritime zones are established in relation to sovereign territory, the final analysis relevant to determining freedom of navigation rights concerns the types of operations permitted within specific maritime zones. The controlling international agreement governing permissible conduct within international maritime zones, as well as the zones themselves, is UNCLOS. UNCLOS represents one of the most widely accepted international conventions, with 166 current member states.<sup>6</sup> China is a party to UNCLOS; the United States is not. Although the United States has not ratified the Convention, the U.S. government has long maintained that UNCLOS provisions represent customary international law with which the United States is committed to observing.<sup>7</sup>

3. BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP’T OF STATE, SERIES A NO. 43, STRAIGHT BASELINES: PEOPLE’S REPUBLIC OF CHINA 43 (1972) (*retyped* 1978).

4. See U.S. DEP’T OF DEFENSE, FREEDOM OF NAVIGATION REPORT FOR FISCAL YEAR 2013 (2014), available at <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY2013%20DOD%20Annual%20FON%20Report.pdf> (identifying China as having excessive maritime claims); see also Bonnie S. Glaser, *Armed Clash in the South China Sea*, 14 COUNCIL FOREIGN REL. CONTINGENCY PLANNING MEMORANDA 3 (2012), available at [http://i.cfr.org/content/publications/attachments/CPA\\_contingencymemo\\_14.pdf](http://i.cfr.org/content/publications/attachments/CPA_contingencymemo_14.pdf).

5. See BEN DOLVEN ET AL., CONG. RESEARCH SERV., R42930, MARITIME TERRITORIAL DISPUTES IN EAST ASIA 12 (2013).

6. *Chronological List of Ratifications of, Accessions and Successions to the Convention and the related Agreements*, UNITED NATIONS, [www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm) (last updated Sept. 20, 2013).

7. *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: Hearing Before the S. Comm. On Foreign Rel.*, 112th Cong. (2012) (statement of Hillary Rodham Clinton, U.S. Sec’y of State).

Within the overall UNCLOS framework, the United States and China disagree to what extent UNCLOS and customary international law of the sea allow military activities within the area known as the Exclusive Economic Zone (EEZ), an area that generally extends as far as 200 miles from a coastal state's shore or natural offshore islands.<sup>8</sup> The EEZ provides a coastal state with "sovereign rights" for exploring, exploiting, and conserving natural resources and "jurisdiction" with regard to activities such as "marine scientific research" and "the protection and preservation of the marine environment."<sup>9</sup>

China and the United States agree that the EEZ is established for the economic benefit of coastal states and that ships and aircraft of all nations have navigation and overflight rights in the EEZ. The two powers disagree sharply, however, on the extent to which these rights apply to military operations by state warships, aircraft, and naval auxiliaries.

## II. THE UNITED STATES' POSITION

The United States has consistently asserted the right to conduct military activities in EEZs around the world,<sup>10</sup> including China's.<sup>11</sup> In asserting these rights, the United States relies on a series of arguments based on UNCLOS text, international state practice, and UNCLOS negotiating history.

### A. Textual Arguments

UNCLOS does not expressly address which, if any, military activities may be conducted in an EEZ without coastal state consent. Nonetheless, the United States argues that military activities are justified by what UNCLOS says, and, importantly, what it does not say.

The United States argues that UNCLOS Article 87 provides that "the high seas are open to all states" and that "[f]reedom of the high seas"

---

8. For purposes of this Article, the Chinese EEZ is considered to extend approximately 200 miles from the Chinese mainland. *See* UNCLOS, *supra* note 1, art. 57.

9. *Id.* art. 56.

10. Maritime Disputes and Sovereignty Issues in East Asia: Hearing before the Sen. Comm. on Foreign Rel., 111th Cong. (2009) (statement of Robert Scher, U.S. Deputy Assistant Sec'y of Defense).

11. RONALD O'ROURKE, CONG. RESEARCH SERV., R42784, MARITIME TERRITORIAL AND EXCLUSIVE ECONOMIC ZONE (EEZ) DISPUTES INVOLVING CHINA 33 (2013), *available at* [www.fas.org/sgp/crs/row/R42784.pdf](http://www.fas.org/sgp/crs/row/R42784.pdf).

includes the “freedom of navigation [and] overflight.”<sup>12</sup> These rights are preserved in the EEZ by Article 58, which declares that all states “enjoy . . . the freedoms of navigation and overflight referred to in article 87 . . . and other internationally lawful uses of the sea related to these freedoms.”<sup>13</sup> The United States contends that “other internationally lawful uses of the sea” includes military activities.<sup>14</sup>

The most significant limitation on the right of freedom of navigation and overflight in the EEZ is that it be exercised with “due regard to the . . . laws and regulations adopted by the coastal State in accordance with [UNCLOS] and other rules of international law . . . .”<sup>15</sup> Again, the United States contends that no provision in UNCLOS or other rule of international law restricts, or authorizes China to restrict, U.S. military vessels and aircraft from engaging in military activities in the EEZ.

From the U.S. perspective, the lack of any express UNCLOS prohibition against military activities in the EEZ is telling when compared to language regulating military activities in other zones. For example, provisions governing the territorial sea describe acts that do not satisfy the definition of “innocent passage” and are “prejudicial to the peace, good order or security of the coastal State,” such as “launching, landing or taking on board” of any aircraft or military device, fishing activities, research or survey activities, and “any threat or use of force against the sovereignty.”<sup>16</sup> However, the articles regulating activities in the EEZ do not contain similar prohibitions, suggesting that had the UNCLOS drafters wanted to similarly restrict military activities in the EEZ, they would have done so.

### *B. State Practice Arguments*

State practice has generally supported military activities in the EEZ. China’s interpretation that “UNCLOS gives coastal states the right to regulate not only economic activities, but also foreign military activities,

12. UNCLOS, *supra* note 1, art. 87. The “high seas” are all parts of the seas that are not included in the EEZ, the territorial sea or internal waters of a state, or in the archipelagic waters of an archipelagic state. *Id.* art. 86.

13. *Id.* art. 58.

14. *Id.*; see Joe Baggett & Pete Pedrozo, Briefing for Center for Naval Analysis Excessive Chinese Maritime Claims Workshop 20 (Aug. 7, 2013) (on file with author) [hereinafter *CNA Maritime Claims Workshop*](citing Third U.N. Conference on the Law of the Sea, vol. XVII at 240, 243, U.N. Doc. A/CONF.62/WS/37 and ADD.1-2).

15. UNCLOS, *supra* note 1, art. 58.

16. *Id.* art. 19; see also *id.* arts. 38–39, 53 (describing the rights and duties of ships and aircraft exercising the rights of transit passage and archipelagic sea lanes passage respectively).

in their EEZs,” is a viewpoint effectively held by only twenty-seven other countries.<sup>17</sup> Even though most states have adopted policies consistent with the U.S. interpretation, only a handful of states actually conduct military activities in foreign EEZs. States known to operate military vessels in foreign EEZs without notice include the United States, Russia, Australia, South Africa, the United Kingdom (U.K.), and, ironically, China.<sup>18</sup> Australia and South Africa both conduct military activities in foreign EEZs throughout the Pacific without coastal State consent.<sup>19</sup> Similarly, the U.K. operates three hydrographic survey ships and two oceanographic survey vessels in foreign EEZs around the world.<sup>20</sup>

During the Cold War, Soviet intelligence-gathering vessels, known as AGIs, operated off the coasts of the United States.<sup>21</sup> The AGIs were trailing U.S. forces so frequently that U.S. naval officers “joked about assigning the AGI a station in the formation” of the fleet operations.<sup>22</sup> The mutual understanding between the United States and Soviets during the Cold War regarding military activities in the EEZ reflected the view of both countries that their respective vessels were entitled to operate within the others’ EEZ. Today, Russia maintains a fleet of seventy-four electronic surveillance and survey ships that operate in foreign EEZs around many parts of the world without coastal State consent.<sup>23</sup>

China recently acknowledged that it too conducts surveillance and marine data collection in the EEZ of foreign states, including the United States.<sup>24</sup> On June 1, 2013, at the maritime security session of the Shangri-La Dialogue, high-ranking Chinese military officials confirmed that China

---

17. Bangladesh, Brazil, Burma, Cambodia, Cape Verde, China, Egypt, Haiti, India, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Portugal, Saudi Arabia, Somalia, Sri Lanka, Sudan, Syria, Thailand, United Arab Emirates, Uruguay, Venezuela, and Vietnam. O’ROURKE, *supra* note 11, at 4 (citing E-mail from Navy Office of Legislative Affairs to Cong. Research Serv. (June 15, 2012)).

18. See *CNA Maritime Claims Workshop*, *supra* note 14, at 6; see also Raul (Pete) Pedrozo, *Responding to Ms. Zhang’s Talking Points on the EEZ*, 10 CHINESE J. INT’L L. 207 (2011).

19. *CNA Maritime Claims Workshop*, *supra* note 14, at 6.

20. *Id.*

21. AGI was a U.S. Navy classification for the Soviet vessels in question in which the A meant auxiliary ship, the G meant miscellaneous purpose, and the I meant that the miscellaneous purpose was intelligence gathering. O’ROURKE, *supra* note 11, at 36 n.67.

22. James R. Holmes, *China’s Small Stick Diplomacy*, DIPLOMAT (May 21, 2012), <http://thediplomat.com/2012/05/21/chinas-small-stick-diplomacy/>.

23. *CNA Maritime Claims Workshop*, *supra* note 14, at 6.

24. KIMBERLY HSU & CRAIG MURRAY, CHINA ECON. & SEC. REVIEW COMM’N, CHINA’S EXPANDING MILITARY OPERATIONS IN FOREIGN EXCLUSIVE ECONOMIC ZONES 1 (2013), available at [http://origin.www.uscc.gov/sites/default/files/Research/Staff%20Backgrounder\\_China%20in%20Foreign%20EEZs.pdf](http://origin.www.uscc.gov/sites/default/files/Research/Staff%20Backgrounder_China%20in%20Foreign%20EEZs.pdf).

has sent its ships into the United States' EEZ.<sup>25</sup> U.S. Admiral Samuel Locklear, Commander of U.S. Forces in the Pacific, confirmed that China's Navy has "started 'reciprocating' the US Navy's practice of sending ships and aircraft into the 200-nautical mile zone off China's coast."<sup>26</sup> This activity is ironic because China continues to intercept foreign military and fishing vessels, the United States included,<sup>27</sup> and attempts to force them to leave.<sup>28</sup> In March 2009, for example, a China Maritime Surveillance patrol vessel intercepted the USNS Impeccable, a U.S. Navy vessel,<sup>29</sup> while it was conducting a military survey in China's EEZ.<sup>30</sup> The Impeccable was radioed by the Chinese patrol vessel and told that it shouldn't be operating "without the permission of the Chinese government."<sup>31</sup>

### C. Negotiating History

Comments made during and shortly after the UNCLOS negotiations shed light on how participants intended the Convention to be interpreted. Ambassador Tommy T.B. Koh from Singapore, the President of UNCLOS III,<sup>32</sup> recognized that the text of UNCLOS did not explicitly provide clarity on permissible military conduct in the EEZ, but he noted "it was the general understanding that the text we negotiated and agreed upon *would permit* such activities to be conducted."<sup>33</sup> Furthermore, Ambassador Koh has spoken about certain coastal states trying to apply territorial sea sovereignty rights in the EEZ, which he noted "is not consistent with the

25. Rory Medcalf, *Maritime Game-Changer Revealed at Shangri-La Dialogue*, DIPLOMAT (June 2, 2013), <http://thediplomat.com/flashpoints-blog/2013/06/02/maritime-game-changer-revealed-at-shangri-la-dialogue/>; Kathrine Hille, *Chinese Navy Begins US Economic Zone Patrols*, FIN. TIMES (June 2, 2013), [www.ft.com/intl/cms/s/0/02ce257e-cb4a-11e2-8ff3-00144feab7de.html#axzz2eckOysT2](http://www.ft.com/intl/cms/s/0/02ce257e-cb4a-11e2-8ff3-00144feab7de.html#axzz2eckOysT2).

26. Hille, *supra* note 25; *see also* U.S. DEP'T OF DEF., ANN. REPORT TO CONG.: MILITARY & SEC. DEV. INVOLVING CHINA 39 (2013) (showing that the PLA Navy has been conducting military activities in foreign EEZs and has been spotted several times in the U.S. EEZ around Guam and Hawaii).

27. *CNA Maritime Claims Workshop*, *supra* note 14, at 7 (citing seven notable U.S. military confrontations by the Chinese military in China's EEZ since 2001).

28. O'ROURKE, *supra* note 11, at 20–27.

29. *Maritime Issues and Sovereignty Disputes in East Asia: Hearing Before the Sen. Comm. On Foreign Relations*, 111th Cong. 5 (2009) (statement of Scot Marciel, Deputy Assistant Sec'y of State).

30. Bill Gertz, *Inside the Ring: New Naval Harassment in Asia*, WASH. TIMES (July 17, 2013), [www.washingtontimes.com/news/2013/jul/17/inside-the-ring-new-naval-harassment-in-asia/?page=all](http://www.washingtontimes.com/news/2013/jul/17/inside-the-ring-new-naval-harassment-in-asia/?page=all).

31. William Cole, *Chinese Help Plan for Huge War Game Near Isles*, HONOLULU STAR-ADVERTISER (July 25, 2013), [www.staradvertiser.com/s?action=logIn&f=y&id=216895851&id=216895851](http://www.staradvertiser.com/s?action=logIn&f=y&id=216895851&id=216895851).

32. Pedrozo, *supra* note 18, at 208.

33. *Id.* at 208–11.

intention of those of us who negotiated this text, and is not consistent with the correct interpretation of this part [Part V] of the Convention.”<sup>34</sup> The United States further points out that of the few statements made by China at the time of ratifying UNCLOS, only one related to military activities.<sup>35</sup> The statement related only to activities in the territorial sea, saying nothing about China’s objections to military activities in a coastal State’s EEZ.

### III. CHINA’S POSITION

China rejects the position that military activities are permissible in a coastal state’s EEZ without prior permission.<sup>36</sup> This position is “based on national security interests . . . exclusive jurisdiction over marine scientific research and resource management [and] environmental protection interests.”<sup>37</sup>

As a threshold matter, China argues that since the United States is not a party to UNCLOS, the United States has no standing to make textually-

34. 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* 54–55 (Myron H. Nordquist, Tommy T.B. Koh and John Norton Moore eds., 2009); *see also* UNCLOS Declarations of numerous maritime states:

Germany Declaration: “According to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them.”

Italy Declaration: “In particular, the rights and jurisdiction of the coastal State in such zone do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them.”

Netherlands Declaration: “The Convention does not authorize the coastal State to prohibit military exercises in its exclusive economic zone.”

United Kingdom Declaration: “The United Kingdom considers that declarations and statements not in conformity with articles 309 and 310 include, inter alia, the following: . . . those which are not in conformity with the provisions of the Convention relating to the exclusive economic zone or the continental shelf, including those which claim coastal state jurisdiction over all installations and structures in the exclusive economic zone or on the continental shelf, and those which purport to require consent for exercises or manoeuvres (including weapons exercises) in those areas.”

*Declarations and Statements*, U.N. Oceans & Law of the Sea (June 7, 1996), [www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#) [hereinafter *UNCLOS Declarations and Statements*].

35. “China reaffirms that the provisions of the . . . Convention . . . concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request . . . a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State.” *UNCLOS Declarations and Statements*, *supra* note 34.

36. *See* Zewei Yang, *The Freedom of Navigation in the South China Sea: An Ideal or a Reality?*, 3 *BEIJING L. REV.* 137, 140–41 (2012).

37. *CNA Maritime Claims Workshop*, *supra* note 14, at 14.

based arguments. Although this argument has no legal consequence, it is useful as a diversion from substantive issues more difficult for China to answer. Moreover, the fact that the United States attempts to benefit from UNCLOS without joining the Convention also enhances the perception that the United States remains an intermeddling hegemon with little interest in true partnership with regional nations.

To the extent Chinese commentators make specific legal arguments based in UNCLOS itself, they often begin from the proposition that military activities in the EEZ are not expressly permitted by UNCLOS, and therefore are prohibited without coastal state consent.<sup>38</sup> It is unclear whether this insistence on positive legal authorization is a consistent feature of Chinese legal theory or merely a law of the sea expediency. In any case, it stands in contradiction to the longstanding Lotus Principle, long endorsed by the United States, that “whatever is not prohibited by law is permitted.”<sup>39</sup>

China’s primary UNCLOS textually-based argument is that military activities in the EEZ conducted without the coastal State’s consent violate UNCLOS Article 301, which requires that states “shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the [U.N. Charter].”<sup>40</sup> Chinese commentators argue that U.S. military activities in the EEZ are facilitating the collection of data that could be used to support military operations against China in violation of Article 301, as well as Article 88, which states that “the high seas shall be reserved for peaceful purposes.”<sup>41</sup>

The U.S. disagrees, arguing that Article 301 merely restates Article 2(4) of the UN Charter, which directs member states to “refrain . . . from the threat or use of force against the territorial integrity or political independence of any state.”<sup>42</sup> Accordingly, military activities are permitted within the EEZ to the extent they do not violate Article 2(4) and are otherwise not prohibited by UNCLOS. Within UNCLOS, Article 19(2)

38. See 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, 29 (2010); see also O’ROURKE, *supra* note 11, at 4.

39. See *SS Lotus (Fr. v. Turk.)*, 1927 PCIJ (Ser. A) No. 10, at 18; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 238 (July 8).

40. UNCLOS, *supra* note 1, art. 301.

41. *Id.* art. 88. Zhang Haiwen, *Is it Safeguarding the FON or Maritime Hegemony of the US?*, 9 CHINESE J. INT’L L. 31, 44–45 (2010); see also Yu Zhirong, *Jurisprudential Analysis of the U.S. Navy’s Military Surveys in the Exclusive Economic Zones of Coastal Countries*, 7 CHINESE MAR. STUDIES INST. 37, 45 (2010).

42. U.N. Charter art. 2, para. 4.



reiterates the Charter's language and lists activities considered "prejudicial to the peace, good order or security of the coastal State."<sup>43</sup> Even though Article 19 deals specifically with territorial sea, the Article distinguishes between "threat or use of force" in 19(2)(a), and an "act aimed at collecting information to the prejudice of the defence or security of the State" in 19(2)(c).<sup>44</sup> The distinction between these two activities is important because it demonstrates an understanding that peacetime intelligence collection is an activity distinct from the "threat or use of force."<sup>45</sup> Foreign ships transiting the territorial sea in innocent passage may not collect "information to the prejudice of the defence or security of the coastal State,"<sup>46</sup> however, since no similar restriction appears in the convention regarding the EEZ, the United States argues that such activities are permitted in the EEZ.<sup>47</sup>

#### IV. THE FUTURE OF MILITARY ACTIVITIES IN THE SOUTH CHINA SEA AND BEYOND

Although UNCLOS provides no black-letter rule about what military activities are permissible without coastal State permission, the use of traditional international legal analysis relying on UNCLOS text and negotiating history, as well as state practice, suggests that the U.S. legal position is stronger than China's by significant measure. Although China's current arguments seem unlikely to prevail in any traditional legal forum or debate, it is increasingly unclear whether that matters. Indeed, Chinese arguments regarding the SCS, including military activities in the EEZ, seem more designed to win political and diplomatic points that, in turn, could ultimately influence state practice to China's benefit and alter the underlying legal framework.

Consider, for example, that in the post-Snowden era,<sup>48</sup> international and U.S.-domestic audiences may be increasingly resistant to real or perceived U.S. surveillance. China has spoken out against surveillance, noting that "China's cultural values uphold the principle of 'not doing to others what

---

43. UNCLOS, *supra* note 1, art. 19.

44. *Id.*

45. Pedrozo, *supra* note 18, at 216.

46. UNCLOS, *supra* note 1, art. 19.

47. Raul (Pete) Pedrozo, *Coastal State Jurisdiction over Marine Collection in the Exclusive Economic Zone*, 7 CHINESE MAR. STUD. INST. 23, 23–36 (2010).

48. Jack Shafer, *Live and Let Leak: State Secrets in the Snowden Era*, 93 FOREIGN AFF. 136 (2014); *The Snowden Effect*, ECONOMIST (Aug. 10, 2013), [www.economist.com/blogs/democracyinamerica/2013/08/american-surveillance](http://www.economist.com/blogs/democracyinamerica/2013/08/american-surveillance).

you don't want others to do to you.”<sup>49</sup> Snowden's leaks of U.S. National Security Agency (NSA) surveillance caused an international backlash for the United States as reports of U.S. intelligence activities in Mexico,<sup>50</sup> Brazil,<sup>51</sup> and France<sup>52</sup> came to light. Brazil's President Dilma Rousseff, to cite one example, cancelled her state visit to the United States after disclosures that the NSA had been spying in Brazil and her personal communications.<sup>53</sup> At the September 2013 U.N. General Assembly, President Rousseff publicly condemned U.S. spying activities and called “espionage among friendly nations ‘totally unacceptable.’”<sup>54</sup>

In a law of the sea context, the risk for the United States is that the Chinese theme will gain favor internationally. By making the surveillance culture appear to be a U.S. or western ideal, China may be able to garner support from states that do not have sophisticated maritime surveillance capabilities. A small number of states have already started changing their positions to align more with China. Portugal, a NATO ally, has adopted certain restrictions on military activities in the EEZ,<sup>55</sup> as has Thailand.<sup>56</sup> Even Vietnam, with SCS interests similar to the United States, has adopted restrictions on military activities in the EEZ.

U.S. domestic support for overseas surveillance operations could also wane, particularly if these operations are perceived as harmful to overall U.S.-Chinese relations, or, to the extent overseas surveillance operations are premised on reciprocal rights for Chinese vessels to engage in surveillance in U.S. waters. The fact that the U.S. public, to the extent it was aware, tolerated Soviet AGIs in U.S. waters during the Cold War does not necessarily mean similar Chinese surveillance would be accepted today. Yet, the willingness to permit reciprocal activities in the U.S. EEZ is critical to the U.S. argument that it has these rights in foreign EEZs.

49. Li Keqiang, *Premier Li Keqiang Gives Joint Written Interview to Media from ASEAN Countries*, XINHUANET (Oct. 10, 2013), [http://news.xinhuanet.com/english/china/2013-10/08/c\\_125496903.htm](http://news.xinhuanet.com/english/china/2013-10/08/c_125496903.htm).

50. Jens Glusig et al., *Fresh Leaks on US Spying*, SPIEGEL ONLINE (Oct. 20, 2013), [www.spiegel.de/international/world/nsa-hacked-email-account-of-mexican-president-a-928817.html](http://www.spiegel.de/international/world/nsa-hacked-email-account-of-mexican-president-a-928817.html).

51. Harold Trinkunas, *U.S.-Brazil Relations and NSA Electronic Surveillance*, BROOKINGS INST. (Sept. 18, 2013), [www.brookings.edu/blogs/up-front/posts/2013/09/18-us-brazil-nsa-surveillance-trinkunas](http://www.brookings.edu/blogs/up-front/posts/2013/09/18-us-brazil-nsa-surveillance-trinkunas).

52. *Snowden Leaks: France Summons Envoys Over Spying Claims*, BBC (Oct. 21, 2013), [www.bbc.co.uk/news/world-europe-24607880](http://www.bbc.co.uk/news/world-europe-24607880).

53. Trinkunas, *supra* note 51.

54. Daniel Trotta, *Dilma Rousseff's UN Speech*, HUFFINGTON POST (Sept. 24, 2013), [www.huffingtonpost.com/2013/09/24/dilma-rousseff-un-speech\\_n\\_3981952.html](http://www.huffingtonpost.com/2013/09/24/dilma-rousseff-un-speech_n_3981952.html).

55. *CNA Maritime Claims Workshop*, *supra* note 14, at 15.

56. *UNCLOS Declarations and Statements*, *supra* note 34 (identifying military exercises in the EEZ as a non-peaceful use without coastal State consent).

Fortunately for the United States, East Asian maritime nations generally favor UNCLOS norms and share a wariness (and in some cases outright hostility) toward suspected Chinese territorial ambitions. ASEAN, in some degree of partnership with the United States, seems to represent the most likely limiting factor to China's growing power in the region. According to China Premier Li Keqiang, "China is now ASEAN's biggest trading partner and ASEAN China's third largest trading partner."<sup>57</sup> Economic interdependence may yet provide the necessary disincentive for Chinese overreaching in the region.

In the meantime, however, ASEAN has not persuaded China to reconsider its aggressive maritime legal and political claims, and China continues to delay the creation of a Code of Conduct for the South China with ASEAN. Chinese officials continue to express a willingness to engage in dialogue over a Code of Conduct,<sup>58</sup> however, Chinese Foreign Minister Wang Yi made it clear that China prefers a gradual process, saying, "[s]ome countries are looking for a quick fix [to the disputes] and are hoping to thrash out a code in a day; this approach is neither realistic nor serious."<sup>59</sup> After ten years of episodic negotiations, China's concerns about a rushed process ring hollow. Most recently, Chinese officials told ASEAN members that China wants to "actively discuss . . . the signing of a treaty on good-neighborliness, friendship and cooperation to consolidate the political foundation for our strategic mutual trust."<sup>60</sup> China's suggestion for creating new agreements and treaties that have no enforcement mechanisms is distracting and prevents ASEAN from taking meaningful action to restrain China.

Like ASEAN, the United States' ability to influence Chinese positions on the EEZ appears limited. At least in the short term, the strategy most likely to succeed appears to be continued engagement to reduce the possibility of an operational confrontation between ships or aircraft that could lead to wider conflict, harming the interests of both nations. Existing agreements such as the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREGs), the multilateral Code for Unalerted Encounters at Sea (CUES), and the 1998 bilateral U.S.-Chinese

---

57. Li Keqiang, *supra* note 49.

58. *See China Ready to Continue Talks on South China Sea COC*, XINHUANET (Oct. 9, 2013), [http://news.xinhuanet.com/english/china/2013-10/10/c\\_125503952.htm](http://news.xinhuanet.com/english/china/2013-10/10/c_125503952.htm).

59. Joanna Chiu, *Beijing Tells ASEAN to be Realistic in Hopes for South China Sea Code of Conduct*, S. CHINA MORNING POST (Aug. 6, 2013), [www.scmp.com/news/china/article/1294453/foreign-minister-wang-yi-says-china-no-hurry-sign-south-china-sea-accord](http://www.scmp.com/news/china/article/1294453/foreign-minister-wang-yi-says-china-no-hurry-sign-south-china-sea-accord).

60. Li Keqiang, *supra* note 49.

Military Maritime Consultative Agreement (MMCA) provide a framework for continued engagement.<sup>61</sup>

Apart from continued bilateral engagement at the operational level to prevent conflict with China in the SCS, and continued multilateral engagement with China and ASEAN to encourage Chinese flexibility pursuant to mutually advantageous political and economic arrangements, the United States has one major opportunity it has so far failed to exploit. Were the United States to join UNCLOS, it would, at a minimum, remove a significant distraction from international law of the sea discourse and perhaps provide the United States an opportunity to change a current dynamic that seems increasingly to favor coastal state control over all activities, military included, in global EEZs.

---

61. O'ROURKE, *supra* note 11, at 49–52.