A CODE OF CONDUCT FOR THE SOUTH CHINA SEA:

POLITICS, PRINCIPLES AND POSSIBLE PROVISIONS

by

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INTRODUCTION AND CURRENT POLITICAL CONTEXT

A rash of run-ins between China and rival claimants in disputed areas in the South China Sea has prompted a search for a conflict avoidance and management mechanism. In January 2012, the Association of Southeast Asian Nations (ASEAN) and China began negotiating a Code of Conduct (CoC) to govern activities in the area and there are hopes that it will be agreed, presented and approved at the ASEAN-China 2012 summit in November. This paper briefly reviews recent relevant geopolitical developments and then focuses on the principles and provisions that might infuse and be incorporated in a CoC for the South China Sea.

There have been several significant geopolitical developments regarding the South China Sea. Indeed, it would appear that the region is at several tipping points regarding regional security architecture. Key questions include:

- will ASEAN maintain its centrality in its own creation (EAS)?

- will the U.S. attempt to drive the agenda and emphasize negotiations and deliverables as opposed to ASEAN's more *laissez faire* approach?
- will U.S-China rivalry dominate ASEAN 'Plus' forums?
- will U.S. robust participation survive the coming change of administrations or key personnel?

Fortunately there have been some positive new developments.

1. An ASEAN-China working group is negotiating a CoC that will be based on the previously agreed Declaration of Conduct (DoC) and the Guidelines for its implementation.
2. China and Vietnam have agreed to a 6 point bilateral arrangement to settle their maritime disputes and there are hopes that it could be a model for all of East Asia.
3. China has announced a nearly 475 U.S. million dollar fund for China-ASEAN maritime cooperation.
4. China hosted in Haikou in mid December 2011 what may be the first in a series – a conference on freedom of navigation – a very important topic for the U.S. and Japan.

Although there has been some progress, the current situation raises more questions than answers. The U.S.-China competition for the "hearts and minds" of Southeast Asian countries has begun to overshadow and influence the disputes and the ASEAN attempt to manage them. The U.S. has told China to "play by the rules" i.e., the law of the sea, although it has not itself ratified the Convention. Indeed, it appears that despite its denials and claims to neutrality, the U.S. has sided with the ASEAN claimants (its ally the Philippines, and Brunei, Malaysia and Vietnam). Ironically, U.S. backing may make it more difficult for ASEAN and China to agree on a CoC because some claimants may be more assertive and even take riskier actions

than they otherwise would, increasing instability in the South China Sea. Some even argue that this works to the US advantage by pushing some ASEAN members toward the U.S.

The U.S. "pivot" towards Asia in defense policy and the accompanying announced intention to place troops in Darwin – that may also involve U.S. warships and intelligence gathering platforms - has unsettled the region. Indonesia is wary of it because it puts it geographically and politically in between the U.S. and China. Indeed, Indonesia's Foreign Minister Marty Natalegawa has said "What I would hate to see is for the agreement to provoke a reaction and counter-reaction that would create a vicious circle of tensions and mistrust". The commander of all Indonesian armed forces, General Agus said that the military has begun assessing the potential impacts on Indonesia and the use of Indonesian sea lanes and airspace.[1] He added that "I believe the U.S. respects our sovereignty. We need to settle on the rules of engagement".[2] He also raised concerns regarding the fact that the U.S. has not ratified the 1982 UNCLOS. President Yudhoyono asked for an official meeting with President Obama to hear for himself that the U.S. has no intention of disturbing Australia's neighbors.[3] The Philippines and Vietnam support the U.S. 'pivot', while the position many of other ASEAN members seems to be in flux.

Ratcheting up the pressure, the U.S. has told ASEAN that it must come up with a clear common position on a CoC[4] . There is a lot riding on the success of the venture. Success – defined as agreement and implementation of a robust CoC)-- would relieve some of this

[1] Bagus B T Saragih, RI "vigilant" on Darwin plan, *The Jakarta Post,* 18 November 2011.

[2] Associated Press, U.S., Filipino forces plan combat drills at oil rigs near South China Sea waters Beijing claims, *Washington Post*, 19 January 2012.

[3] South China Sea tensions overshadow new U.S. military engagement, *Businessinsider.com*, 23 January 2012; Jim Lobe, Call for U.S. naval build up in South China Sea, January 2012..www.atimes,com/a times/China/NA 12Ad01.html.

[4] Obama tells ASEAN to have a common, clear position on Spratlys dispute, MaritmeSecurity.Asia, 19 November 2011.

pressure from the U.S. on both China and ASEAN, and diminish – but certainly not eliminate -- the opportunity for U.S.-China political conflict over the issue. Of course the proof of the pudding will be in its observance and "enforcement". But first the parties will have to negotiate a text that is both acceptable to all and effective as well – a rather tall order given the diversity of interests of the ten ASEAN members (only four are claimants) and those of China.

Some pressure is good – but too much pressure could crack or even split ASEAN. As Simon Tay puts it, "the tenor and intention of that engagement (America with ASEAN on the South China Sea issues) can be a concern."[5] By allowing the U.S. to base troops in Darwin, Australia may well have helped "strain" a regional grouping whose increased unity is in its clear long-term interests.[6] On the other hand, some think having Australia host the American troops and assets is better for ASEAN than having them ensconced in ASEAN itself.[7]

ASEAN as an organization has no official position on the South China Sea disputes. It continues to seek consensus among its members – claimants and non-claimants alike – as well as with China. But progress has been slow. Neither the ASEAN Foreign Ministers' Meeting in Siam Reap in January 2012, nor the following ASEAN-China meeting in Beijing produced significant advances. One problem is the Philippines insistence on including a clause which will mandate the separation of the South China Sea into disputed and non-disputed areas.

The robustness of the process is also uncertain given the leadership lineup in ASEAN-- Cambodia this year and Brunei next year followed by Myanmar and then Laos. Several of these countries are considered somewhat closer to China than other ASEAN members. Indeed, Cambodia's neutral position on the disputes themselves may favor China's attempts to

[5] Special Report, ASEAN nations welcome U.S., 29 December 2011.

[6] Robert Ayson, Loosening the U.S.-China strait jacket, *PacNet Newsletter,* 6 December 2011.

[7] U.S. 'the lesser evil' to ASEAN: Malaysian scholar, *The Jakarta Post,* 3 December 2011.

demur, delay and obfuscate. Moreover, although ASEAN has become adept at hedging and balancing, its unity, diplomatic skills and style will certainly be tested.[8] Indeed, ASEAN's method of "decision-making based on consensus, consultation, and proceeding in a step by step manner"[9] may not be appropriate for this task.

Cambodia's agenda for its year of leadership includes promotion of ASEAN-China co-operation, maintenance of a neutral position on the South China Sea issues, regaining of trust and confidence among the claimant states, improvement of the situation through informal and frank dialogue at both the bilateral and multilateral levels, and enhancement of the effectiveness of regional mechanisms. That is a very ambitious agenda and may dilute the effort to achieve a CoC.

But even the ASEAN claimants seem far apart. When no real ASEAN support for its proposal to separate disputed areas from non-disputed areas was forthcoming, the Philippines Foreign Minister, Albert del Rosario criticized the process saying "so you are signing an agreement with [China]. It's supposed to be a code of conduct, but [China] is saying, on the other hand, that they own everything. So how do you exact your code of conduct from a partner to the transaction who says he owns everything?"[10] For the Philippines, a Code—especially a weak one would be insufficient. Vietnam supports a strong Code because it would help constrain the behavior of its ancient arch-enemy—China. Malaysia and Brunei have been relatively quiet regarding a Code.. Presumably they support a Code but may not want to push the issue vis a vis China.

[8] Yang Razali Kassim, Will ASEAN's hedging strategy work?, *Today*, 14 January 2012.

[9] Countries relying on 3rd-party dispute mechanism encouraging: S. Jayakumar, *Channelnewsasia.com,* 19 January 2012.

[10] PHL seeks ASEAN support for possible China Meet on Spratly ROS, *GMA News*, 15 January 2012.

Meanwhile, Indonesia is worried about the U.S.- China dynamic and would like to see a robust Code which it hopes would reduce opportunity for conflict between the two. Indeed, as immediate past Chair of ASEAN, it is continuing its efforts to help forge agreement. Singapore and Thailand seem to be somewhere in the middle on the South China Sea issues and on the strength of a Code of Conduct.

Thus it is likely that the fundamental drivers of the disputes —sovereignty, nationalism and access to resources –will continue to bedevil the negotiations, and the future for a robust Code --like the DoC before it –is dim. In this vacuum, incidents are likely to increase. And as China's military might grows and the U. S. steps up its military involvement in the region, the window of opportunity for peaceful settlement is closing.

PRINCIPLES FOR A CODE OF CONDUCT

The following principles[11] are derived from the DoC, the Guidelines for their implementation, the 1982 UN Convention on the Law of the Sea and various other international agreements.

1.BE FORWARD LOOKING (TOWARD AN INTERIM OR DURABLE SOLUTION)

[11] Principle means an accepted rule of action

Many observers are skeptical regarding the success of the negotiations on a CoC. They point to the nearly ten year gap between the agreement on the DoC in 2002 and the Guidelines for its implementation in late 2011 as well as the weakness and vagueness of their provisions, the lack of an enforcement mechanism, and the numerous incidents in the area despite these agreements to exercise 'self-restraint.' Worse, outside powers have exploited the differences among the claimants and the lack of progress to insert themselves in the process. The situation has reached a point where either the claimants must resolve the issues among themselves or incidents will multiply and draw in outside powers. These are reasons why the CoC should be forward looking and contain some hope of both robust implementation and real commitment to work toward a political solution –both interim and durable.

2.BUILD TRUST AND CONFIDENCE

(Adapted from *Wikipedia*)

Confidence building measures (CBMs) are actions taken to reduce fear of attack or-- in the South China Sea context, fear of a rival claimant obtaining an unfair advantage-- in a conflict situation. CBMs emerged from attempts by the Cold War superpowers and their military alliances (the North Atlantic Treaty Organisation and the Warsaw Pact) to avoid nuclear war by accident or miscalculation. However, CBMs now exist at many other levels of conflict situations all over the globe. The actions which constitute confidence building measures provide a negative feedback to conflict, which in turn ameliorates the tension that would otherwise grow exponentially and could eventually turn into a war. Confidence-building measures are intended to reduce fear and suspicion and enhance the predictability of state behavior.

This typically involves exchanging information and making it possible to verify this information, especially information regarding armed forces and military equipment.

Relevant Examples

1. CBMs dealing with troop movements and exercises:

a. Notification of maneuvers (with different procedures and length of advance notice for different types and sizes of maneuvers).

b. Notification of alert exercises and mobilization drills.

c. Notification of naval activities outside of normal areas.

d. Notification of aircraft operations and flights near sensitive and border areas.

e. Notification of other military activities "out of garrison" that could be misinterpreted.

2. CBMs dealing with border tensions.

a. Set up demilitarized zones in sensitive border areas. Depending on the sensitivity of the area and the tensions between the two countries, certain types of weapons and units could be excluded from these areas.

b. Establish joint patrols in such areas.

c. Establish fixed observation posts in such areas manned by representatives from the border nations.

d. Set up sensors (ground, tower, air, tethered aerostat) to supplement these patrols and observation posts.

3. CBMs dealing with actions which might be interpreted as provocative.

a. Agreement should be reached on acceptable and unacceptable military activities, especially in sensitive and border areas.

b. Clear limits should be placed on those military activities, such as mobilizations and calling up selected reserves, which could lead to misunderstandings. Notification procedures should be established for practice movements.

4. CBMs dealing with communications.

a. Direct ("hot line") communications systems should be established between heads of state, chiefs of military forces (defense ministers), general staffs, and units in contact across a border.

b. The use of coded military message traffic (on-line and off-line cryptography) should be limited.

5. CBMs and functionalism. Certain functional areas of military-to-military cooperation should be assessed for their possible value as confidence-builders, even between adversary nations. These include search and rescue (SAR) missions for aircraft and shipping; disaster relief; hurricane tracking; civic action; humanitarian projects.

6. CBMs dealing with ways of expanding CBMs.

a. Establish a regional or subregional mechanism, similar to the Conference on Security and Cooperation in Europe (CSCE) to study confidence-building measures and ways to improve and increase them.

b. Discuss CBMs at the periodic conferences of service chiefs.

CBMs may also include exchanges of information, personnel, weapons, extra-military contacts and training and education.

Confidence Building Viewed As A Process

An alternative analytic approach to understanding confidence building looks at broader process concepts rather than concentrating on specific measures.[12] This 'transformation' view perceives conventional understandings of confidence building as incomplete and focuses on

[12] James Macintosh, Confidence Building in the Arms Control Process: A Transformation View: Department of Foreign Affairs and International Trade, Arms Control and Disarmament Studies Number 2, 1996, , Ottawa, Canada (JX 1974.M32 1996).

why and how developing confidence building arrangements can help to improve security relations. Confidence building, according to the transformation view, is a distinct activity undertaken by policy makers with the minimum intention of improving some aspects of a traditionally antagonistic security relationship through security policy coordination and cooperation. It entails the comprehensive process of exploring, negotiating, and then implementing tailored measures, including those that promote interaction, information exchange, and constraint. It also entails the development and use of both formal and informal practices and principles associated with the cooperative development of CBMs. When conditions are supportive, the confidence building process can facilitate, focus, synchronize, amplify, and generally structure the potential for a significant positive transformation in the security relations of participating states. Thus, the confidence building process involves more than simply the production of a confidence building agreement and should not be confused with what specific CBMs do.

The serious pursuit of legitimate confidence building arrangements, according to the transformation view, is an activity that is particularly well-suited to fostering positive changes in security thinking (transformation) when conditions are supportive. This is due to the activity's fundamentally cooperative character and the reinforcing nature of the confidence building measures that comprise an arrangement. Confidence building, because of its basic character, is able to facilitate and structure the potential for change in security relationships when at least some states are dissatisfied with, and beginning to question*, status quo* security policies and approaches.

A particularly important dimension of the transformation view is the proposition that the changes in security thinking facilitated by confidence building can become institutionalized as a collection of new rules and practices stipulating how participating states should cooperate and compete with each other in their security relationship. This restructured relationship redefines expectations of normal behavior among participating states. Confidence building appears to offer considerable promise as a security management approach. However, this potential cannot be fully realized unless a policy-relevant and conceptually sound

understanding of the confidence building process and how it works animates application efforts (Text drawn from the executive summary of *Confidence Building in the Arms Control Process: A Transformation View)*

3. BE A PRECEDENT AND MODEL

ASEAN and China have an opportunity—perhaps even a responsibility--to not only achieve agreement on a CoC for the South China Sea but to demonstrate to the rest of the world how it should deal with such political problems. Indeed, the CoC could be a precedent not only for the region but a model for other maritime regions in Asia and indeed the world.

4. FORMAL, ENFORCEABLE AND BINDING

The term can be broken down into its respective parts:

Formal: with official authorization; following or being in accord with accepted forms, conventions, or regulations;

Enforceable: to compel observance of; and

Binding: creating a legal obligation, presumably with sanctions for breaking the agreement.

5. NON-PREJUDICIAL TO CLAIMS AND RIGHTS

This is a standard "disclaimer" in provisional agreements regarding co-operation in maritime activities in disputed areas. There has been unfortunate previous experience in the region in this regard and this provision is necessary to allay fears that co-operative activities in areas of overlapping claims could constitute acquiescence or recognition of the validity of opposing claims. 'Baselines' should be added to the list of claims that will not be prejudiced by such co-operative action because some claimed baselines in the region are controversial.

6. PURPOSES AND PRINCIPLES OF THE CHARTER OF THE UNITED NATIONS

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

The Organization and its Members, in pursuit of the Purposes above, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

7. UNIVERSALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW

"International law represents the essence of the progress of civilization towards a world ruled by law rather than by force. It took thousands of years of effort, hundreds of wars, and the sacrifice of millions of lives to achieve it. It is thus a very precious possession of all human beings, and must be carefully protected."[13]

The key words in the heading are of course "universally recognized". There are few international laws which have truly "universal" support. And therein lays the dilemma. Perhaps the best that can be hoped for is agreement to abide by those international laws that ASEAN and China profess to adhere to. But then there are different interpretations of many

[13] Christopher Weeramantry and John Burroughs, International Law and Peace: A Peace Lesson, A web-based part of Hague Appeal for Peace, Peace Lessons from Around the World, www.haguepeace.org

international laws—even within the ASEAN –China region. It may therefore be necessary to spell out the principle laws the CoC is referring to and to incorporate at least in the CoC preamble reference to the Charter of the United Nations and to the 1982 UN Convention on the Law of the Sea.

8.THE FIVE PRINCIPLES OF PEACEFUL COEXISTENCE

(Adapted from *Wikipedia*)

The Five Principles of Peaceful Coexistence, known in India as the Panchsheel (from Sanskrit, panch:five, shila:rock), are a set of principles to govern relations between states. Their first formal codification in treaty form was in an agreement between by China and India in 1954. They were enunciated in the preamble to the "Agreement (with exchange of notes) on trade and intercourse between the Tibet Region of China and India", which was signed in Peking on 29 April 1954. This agreement stated the five principles as:

1. Mutual respect for each other's territorial integrity and sovereignty,
2. Mutual non-aggression,
3. Mutual non-interference in each other's internal affairs,
4. Equality and mutual benefit, and
5. Peaceful co-existence

An underlying intent of the Five Principles was that newly independent states after decolonization would be able to develop a new and more principled approach to international relations.

9. THE 1982 UN CONVENTION ON THE LAW OF THE SEA

(*Adapted from Tullio Treves, Judge of the International Tribunal for the Law of the Sea, Professor at the University of Milan, Italy, Wikipedia*)

The United Nations Convention on the Law of the Sea was opened for signature at Montego Bay, Jamaica, on 10 December 1982. It entered into force on 14 November 1994 and

is presently binding for 160 States, as well as the European Community. It is considered the "constitution of the oceans" and represents the result of an unprecedented, and so far never replicated, effort at codification and progressive development of international law. The more than 400 articles of the text and of the nine annexes that are an integral part of it are the most extensive and detailed product of codification activity States have ever attempted and successfully concluded under the aegis of the United Nations.

The Convention has 320 articles, set out in seventeen parts, as well as nine annexes. Parts II to XI concern the different maritime zones: territorial sea and contiguous zone, straits used for international navigation, archipelagic waters, the exclusive economic zone, the continental shelf, the high seas, the International Seabed Area, and special provisions on the regime of islands and of enclosed and semi-enclosed seas. Parts XII to XIV concern specific marine activities and questions in all areas: the protection of the environment, marine scientific research, and the development and transfer of marine technology. Part XV (and annexes 5 to 8) concerns the settlement of disputes. Parts XVI and XVII set out general and final clauses.

A selective list of the main substantive provisions of the Convention, focusing on those that introduce changes or new concepts in the traditional law of the sea includes the following:

a) the maximum breadth of the territorial sea is fixed at 12 miles and that of the contiguous zone at 24 miles;
b) a "transit passage" regime for straits used for international navigation is established, while non-suspendable innocent passage applies to straits for which there is an alternative route and to straits connecting the high seas or an economic zone to the territorial sea of a State;
c) States consisting of archipelagos, provided certain conditions are satisfied, can be considered as "archipelagic States", the outermost islands being connected by "archipelagic baselines" so that the waters inside these lines are archipelagic waters (similar to internal waters but with a right of innocent passage and a right of archipelagic sea lanes passage similar to transit passage through straits, for third States);

d) a 200-mile exclusive economic zone including the seabed and the water column, may be established by coastal States in which such States exercise sovereign rights and jurisdiction on all resource-related activities, including artificial islands and installations, marine scientific research and the protection of the environment;

e) other States enjoy in the exclusive economic zone high seas freedoms of navigation, over flight, laying of cables and pipelines and other internationally lawful uses of the sea connected with these freedoms;

f) a rule of reciprocal "due regard" applies to ensure compatibility between the exercise of the rights of the coastal States and of those of other States in the exclusive economic zone;

g) the notion of the continental shelf has been confirmed, although with newly define external limits: in view of the applicability of the exclusive economic zone to the seabed up to 200 miles the continental shelf, that independently of geomorphologic considerations expands up to 200 miles, is relevant for States that have not established an exclusive economic zone and for those that claim a continental shelf beyond 200 miles a claim that can be successful if certain geomorphologic, distance and depth conditions are satisfied and which can be ascertained with the co-operation and the concurrence of the Commission on the limits of the continental shelf, a 21 member body elected by the Meeting of the State Parties to the Convention;

h) a complex regime, substantially amended by the 1994 Implementation Agreement, has been established for the Area, that together with its resources is proclaimed the common heritage of mankind; the International Seabed Authority (whose members are all parties to the Convention and having its seat in Kingston, Jamaica) being the "machinery" entrusted with the supervision and regulation of exploration and exploitation of the resources;

i) a series of very detailed, and sometimes prescient, articles deal with the protection of the marine environment setting out general principles (for the first time in a multilateral treaty) and rules about competence for law-making and enforcement as well as on

safeguards, making the Convention the framework for the existing and future universal, regional and bilateral agreements; and

j) detailed provisions concerning marine scientific research, based on the principle of consent of the coastal State, consent which should be the norm for pure research and discretionary for resource-oriented research.

The Convention – differently from other codification conventions – has put its application and interpretation under the jurisdiction of international judges and arbitrators. Compulsory jurisdiction either of the International Tribunal for the Law of the Sea, of the International Court of Justice or of arbitral tribunals, is the rule, although with important limitations and exceptions. Cases submitted to adjudication on the basis of the Convention since 1994 prove that, although slowly, States are considering submission to judicial or arbitral settlement of their disputes as something normal in international maritime relations, and not a hostile act. A number of agreements concerning law of the sea matters, such as the 1995 United Nations Fish Stocks Agreement, have adopted the dispute-settlement provisions of the Law of the Sea Convention for the settlement of disputes concerning their application and interpretation, even when a party to the dispute is not a party to the Convention. These provisions may be seen as bridges making different law of the sea conventions a “system”.

10. SELF RESTRAINT

In international affairs this in general means exercising self control over nationalistic passion, desires and actions. In the context of the South China Sea disputes and a Code it could be manifested as a pledge of no further occupations of uninhabited features, no further construction on already occupied features, no vitriolic public accusations and criticisms, and no threat or use of force, military exercises, hydrocarbon exploration or drilling, marine scientific research, fishing or enforcement of national regulations in disputed areas. By this definition all claimants and several other interested parties have not been exercising self-restraint in the disputed areas.

11. PEACEFUL USES/PURPOSES[14]

The term "peaceful use" or "peaceful purposes" is used in the 1982 UNCLOS Convention in the Preamble, and Articles 88, 141, 143(1), 147(2)(d), 155(2), 240(a), 246(3), and 301. Among these, only the Preamble and Article 301 in its title use the term "peaceful uses", rather than "peaceful purposes". There appears to be no substantial difference in the purpose that these two terms intend to pursue.[15] Apart from the preambular paragraph, which expresses the desirability of establishing a legal order of the seas and oceans that will promote their peaceful uses, these Articles may be divided into the following four groups:

1) Article 88, providing that the high seas and (through Article 58(2) the EEZ shall be reserved for peaceful purposes.
2) Articles 141, 143(1), 147(2(3) and 155(2) relating to the reservation of the Area beyond the limits of national jurisdiction for use exclusively for peaceful purposes. Articles 143(1) and 147(2)(3) specifically require that marine scientific research (MSR) and "installations" in the Area be exclusively for peaceful purposes.
3) Article 240(a) laying down the principle that MSR shall be conducted exclusively for peaceful purposes, and Article 246(3) relating to the coastal State's consent to be granted for MSR projects in the EEZ or on the continental shelf that would be conducted by other States exclusively for peaceful purposes.
4) Article 301, applicable generally to all aspects of the rights and duties of States Parties, requiring them to refrain from any threat or use of force again the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the UN Charter.

[14] The following is a lightly edited extract from M. Hayashi, Military and intelligence gathering activities in the EEZ: definitions of key terms *in* M.J. Valencia and K. Akimoto, guest editors, *Marine Policy*, V. 29, n. 2,, March 2005, pp. 123-125.

[15] See M. Nordquist, Editor-in-chief, United Nations Convention on the Law of the Sea 1982: A Commentary, VIII, M. Nijhoff, The Hague, 1995, 90, which states that Article 88, setting out the general principle that the high seas are to be used for peaceful purposes, "echoes a theme" contained in the Preamble and Article 301.

No definition is given in the Convention regarding "peaceful uses/purposes". The term is found in several multilateral treaties concluded before UNCLOS III. By the peaceful purposes clause, some of them mean complete demilitarization; others prohibit only certain types of military activities. Upon examination of such treaties, including the Antarctic Treaty, the Outer Space Treaty, the Moon Treaty and the Seabed Arms Control Treaty, Boczek concludes that no agreed understanding of the notion of peaceful purposes had emerged prior to UNCLOS III, and that the term "peaceful purposes" must be construed within the context and circumstances of each specific instrument in which it is employed.[16]

The controversy over the peaceful uses/purposes clause has been mainly regarding whether it entails prohibition or limitation of all military activities, or if not all, then what military activities are prohibited. It is clear that the peaceful purposes/uses clauses in Articles 88 and 301 at least prohibit those military activities that threaten or use force in a manner inconsistent with the UN Charter. The question thus hinges on what constitutes a threat or use of force inconsistent with the Charter. It is generally understood that the Charter prohibition includes not only the direct use of force across borders, but also the use of indirect armed force[17].

Obviously, the Charter and subsequent legal developments in the United Nations system have not taken into account highly advanced technologies, in particular the latest electronic warfare (EW) capabilities which are becoming increasingly more intensive and intrusive. A crucial question is whether some of the EW related activities conducted in or above the EEZ should be considered to be inconsistent with the Charter and thus the peaceful purposes clauses of the Convention. Particularly relevant in this context are active signals intelligence (SIGINT) activities conducted from aircraft and ships, some of which are deliberately

[16] B. Boczek, Peaceful purposes provisions of the United Nations Convention on the Law of the Sea, *Ocean Development and International Law,* v. 20, 1989, p. 363.

[17] B. Simma, ed., The Charter of the United Nations: A Commentary, Munchen, 1995, 1995, p. 113. "Indirect force" refers to the participation of one State in the use of force by another State, as well as to a State's participation in the use of force by unofficial bands organized in a military manner. *Ibid*.

provocative, intending to generate programmed responses. Other SIGINT activities intercept naval radar and emitters, enabling them to locate, identify and track (and thus plan electronic or missile attacks against) surface ships[18]. Still others may interfere with communication and computer systems. These activities appear to involve far greater interference with the communication and defense systems of the targeted coastal State than any traditional intelligence gathering activities conducted from outside national territory. However, the question remains, 'Are such electronic activities a use of or threat of force?' Perhaps providing some guidance in this matter, the U.S. and Australia have declared that a cyber attack on either of their computer systems will be considered the same as a physical attack and responded to accordingly.

12.PROTECT HUMAN RIGHTS

(Adapted from *Wikipedia*)

Human rights are commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being. Human rights are thus conceived as universal (applicable everywhere) and egalitarian (the same for everyone). These rights may exist as natural rights or as legal rights, in both national and international law. The doctrine of human rights in international practice, within international law, global and regional institutions, in the policies of states and in the activities of non-governmental institutions has been a cornerstone of public policy around the world. However, the strong claims made by the doctrine of human rights continue to provoke considerable skepticism and debate about the content, nature and justifications of human rights to this day. Indeed, the question of what is meant by a "right" is itself controversial and the subject of continued philosophical debate.

Human rights can be classified and organized in a number of different ways. At an international level the most common categorization of human rights has been to divide them

[18] See generally, Desmond Ball, Intelligence collection operation and EEZs: the implications of new technology *in* M.J. Valencia and K, Akimoto, *Marine Policy*, Special Issue, v. 28, n. 1, January 2004, pp. 67-82.

into civil and political rights, and economic, social and cultural rights. Civil and political rights are enshrined in articles 3 to 21 of the *Universal Declaration of Human Rights* (UDHR)[19] and in the *International Covenant on Civil and Political Rights (ICCPR)*. Economic, social and cultural rights are formalized in articles 22 to 28 of the *Universal Declaration of Human Rights* (UDHR) and in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

The *UDHR* included both economic, social and cultural rights and civil and political rights because it was based on the principle that the different rights could only successfully exist in combination. The ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil and political rights, as well as social, economic and cultural rights.

Although accepted by the signatories to the *UDHR*, most do not in practice give equal weight to the different types of rights. Some Western cultures have often given priority to civil and political rights, sometimes at the expense of economic and social rights such as the right to work, to education, and to health and housing. Similarly the ex Soviet bloc countries and Asian countries have tended to give priority to economic, social and cultural rights, but have often failed to provide civil and political rights.

Human rights violations occur when actions by state (or non-state) actors abuse, ignore, or deny basic human rights (including civil, political, cultural, social, and economic rights). Furthermore, violations of human rights can occur when any state or non-state actor breaches any part of the *UDHR* treaty or other international human rights or humanitarian law. In regard to human rights violations of United Nations laws, Article 39 of the United Nations Charter designates the UN Security Council (or an appointed authority) as the only tribunal that may determine UN human rights violations. The UN Security Council has interceded with peace

[19] A declaration adopted by the United Nations General Assembly (10 December 1948 at Palais de Chaillot, Paris). It consists of 30 articles which have been elaborated in subsequent international treaties, regional human rights instruments, national constitutions and laws. In 1966 the UN General Assembly adopted the two detailed Covenants, which comprise the International Bill of Human Rights; and in 1976, after the Covenants had been ratified by a sufficient number of individual nations, the Bill became international law.

keeping forces, and other states and treaties (NATO) have intervened in situations to protect human rights.

13. PROTECTION OF THE MARINE ENVIRONMENT

> "Marine environment" is the physical , chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and the oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof;

This definition is derived *verbatim* from the draft mining code for prospecting for polymetallic nodules in the international seabed area.[20]

14. PROACTIVE CONSULTATION

(Adapted from *Wikipedia*)

Proactive behavior involves acting in advance of a future situation, rather than just reacting. A proactive stance builds on foreknowledge and creativity to anticipate and see the situation (even a conflict or a crisis) as an opportunity; and to influence the system constructively instead of only reacting to it. The objective is to create opportunity and a competitive advantage. The proactive stance considers the contribution each stakeholder can make to the issue.

In the context of the South China Sea disputes , in its simplest form, it means knowing what national actions will be "of interest" to other parties involved in a disputed area and informing the relevant parties and perhaps explaining to them the pending action. In a more advanced form it could also mean offering to cooperate on the task at hand.

[20] International Seabed Authority, Fifth Session, Kingston, Jamaica, 9-27 August, 1999, Press Release, http://www.isa.org.jm/en/documents/PRESS/PRESS_1999/press-release_SB_5_22.htm

15. COOPERATION

(Adapted from *Wikipedia*).

Cooperation is the process of working or acting together. It is the alternative to working separately in competition. Cooperation is the process by which the components of a system work together to achieve its global properties. In other words, individual components that appear to be "selfish" and independent work together to create a highly complex, greater-than-the-sum-of-its-parts system. But even if all members of a group would benefit if all cooperate, individual self-interest may not favor cooperation. There are four main conditions that tend to be necessary for cooperative behavior to develop: an overlap in goals; a chance of future encounters with the same country; memory of past encounters with that country; and a positive value associated with future outcomes.

16.FREEDOM OF NAVIGATION

This principle is extremely important to external maritime powers like the United States and Japan. There is little controversy regarding the freedom of navigation for commercial vessels. Traditionally the freedom of the high seas also included the use of the high seas for military maneuvers or exercises, including the use of weapons[21]. This freedom has been incorporated in the 1982 UNCLOS, and it has been generally believed, particularly by maritime powers, that this applies also to the EEZ. However, upon signing or ratifying the Convention, several States, including Bangladesh, Brazil, Cape Verde, Pakistan, Malaysia and Uruguay, declared that such military activities are not permitted in their EEZs without their consent.[22]

[21] The following is a lightly edited extract from Hayashi, *supra* n. 17, pp. 128-129.

[22] UN Division for Ocean Affairs and the Law of the Sea, The Law of the Sea: Declarations and statements will respect to the United Nations Convention on the Law of the Sea and to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, United Nations, 1997, pp. 4 and 22 (Brazil), 5 and 22 (Cape Verde), 31 (India), 33 (Malaysia), and 45 (Uruguay). For the declarations of Bangladesh and Pakistan, see *Law of the Sea Bulletin*, No. 46, p. 14 and No. 34, p. 7, respectively. The declarations of most of these States (i.e., Bangladesh, Brazil, India, Pakistan and Malaysia) refer to "military exercises or maneuvers in particular involving use of weapons or explosives" or similar expression, while Uruguay's declaration mentions (all) "military exercises" and Cape Verde's only "exercises with weapons".

Sharply opposing declarations were filed by Germany, Italy, the Netherlands and the United Kingdom[23]. The U.S. has also taken the position that "military activities, such as …launching and landing of aircraft, … exercises, operations … [in the EEZ] are recognized historic high seas uses that are preserved by Article 58[24].

Several commentators stress that Article 58 permits military maneuvers generally within EEZs without the consent of the coastal States.[25] Others, however, argue that the Convention has not given any clear rule on this issue. Thus, Vukas says that the problem of the legality of military maneuvers and ballistic exercises temporarily preventing other States from using a vast area of the high seas remains unresolved[26]. While simple naval maneuvers can be considered to be associated with the freedom of navigation, Scovazzi argues that it would be more difficult to sustain that an extended test of weapons, such as launching torpedoes and firing artillery or the covert laying of arms within an EEZ, are to be included among the uses associated with the operation of ships, and aircraft.[27] Churchill and Lowe point out that it is not clear whether such activities as naval exercises involving weapons testing are included within the freedom of navigation and over flight and other internationally lawful uses of the sea related to them[28].

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[23] *Ibid,* pp. 29 (Germany, 31 (Italy), and 35 (Netherlands), *Law of the Sea Bulletin*, p. 14 (United Kingdom).

[24] Message from the President of the United States transmitting the United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. Senate 103rd Congress, 2nd session, Treaty Doc. 103-39 (hereinafter "President Clinton's Message"), pp. iii and 94.

[25] E.g., B. Kwiatkowska, Military uses in the EEZ: a reply, *Marine Policy*, v. 11, 1987, p. 249; B. Kwiatkowska, The 200 Mile Exclusive Economic Zone in the New law of the Sea, 1989, pp. 211-212; B. Oxman, The regime of warships under the United Nations Convention on the Law of the Sea, *Virginia Journal of International Law*, v. 24, 1984, p. 832; and R.W.G. de Muralt, The military aspects of the new Law of the Sea Convention, *Netherlands Law Review*, v. 32, 1985, p. 95.

[26] B. Vukas, Peaceful uses of the sea, denuclearization and disarmament, in R. Dupuy and Vignes, editors, A Handbook on the New Law of the Sea, Martinus Nijhoff, Dordrecht, 1991, p. 1253.

[27] T. Scovazzi, The evolution of international law of the sea: new issues, new challenges, Hague Academy Recueil des Cours, 286, 2000, p. 167.

[28] R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd edition, Manchester University Press, 1999, p. 427.

Lowe has also contended that there are plausible arguments for the reference of a dispute over the legality of naval maneuvers and exercises to Article 59 on residual rights[29].

It can be concluded from the foregoing that State practice and commentators are divided on whether military maneuvers, and particularly those involving the use of weapons, in the EEZ of a foreign State without its consent are internationally lawful uses of the sea. The majority of commentators tend to argue that naval exercises of reasonable scale without the use of weapons are permitted.

Freedom of navigation can be interpreted broadly or narrowly. For example, states are obligated by the UN Charter and the 1982 UNCLOS not to threaten or use force against the security (i.e., the territorial integrity or political independence) of other States. But it is not clear when, where and how the deployment of certain systems might "prejudice the defense or security of the coastal State". Maritime powers deploy various kinds of devices, installations and structures for military purposes in the sea including in the EEZs of other countries[30]. Examples include sonar monitoring or surveillance systems like acoustic array systems placed on the continental shelf, and navigational aids for submarines and warships. Two approaches have been advanced for justifying the use of such objects for military purposes. One is to interpret them as "other internationally lawful uses of the sea" under Article 58(1), and the other is to consider them as "installations and structures" that under Article 60 would not require the consent of the coastal State.

Regarding the first approach, some authors have argued that certain types of devices, installations and structures for military purposes come under Article 58(1) because they are "uses of the sea related to [the freedom of navigation … and of laying of submarine cables], such as those associated with the operation of ships … and submarine cables …, and compatible

[29] A.V. Lowe, Rejoinder, *Marine Policy*, v. 11, 1987, p. 250.

[30] This section is a lightly edited extract from Hayashi, *supra* n. 17, p. 129.

with the other provisions of this Convention." For example, according to Rauch, acoustic array systems on the continental shelf, which are networks of large fixed acoustic detection devices linked to shore-based processing units, may be subsumed under the freedom to lay submarine cables since their key functions of transmitting electronic impulses and information to terminals or other receivers have common elements[31]. Churchill and Lowe[32], Treves[33] and Boczek[34] also consider that certain types of sensor arrays could be related to the freedom to lay submarine cables. With regard to seabed devices for navigation aids for submarines and other warships, Treves and Boczek argue that they could be considered as being "associated with the operation of ships"[35].

For obvious reasons, the use of devices, installations and structures for military purposes is little publicized apart from the well-known fact that the U.S and the former USSR deployed the Sonar Surveillance System (SOSUS) and the Soviet Ocean Surveillance System (SOSS) on the continental shelf off the U.S., and in the North Sea and the Mediterranean[36]. Hence the paucity of relevant practice of States, meaning a hasty conclusion is not warranted. However, it may tentatively be suggested that the use of devices, installations and structures for military purposes, except weapon systems, would be permitted in the EEZ of another State, subject to the "due regard" requirement.

On the other hand, it should be noted that the deployment of armed mines[37] and other weapon systems would not be justified under Articles 88 and 301, except for the purpose of

[31] E. Rauch, Military uses of the oceans, *German Yearbook of International Law*, v. 28. 1985, pp. 256-257.

[32] Churchill and Lowe, *supra* n.31, p. 427.

[33] T. Treves, Military installations, structures and devices on the seabed, *Americal Journal of International Law*, v. 74, 1980, pp. 842-843.

[34] Boczek, *supra* n. 19, p. 454.

[35] I*bid*; Treves, *supra* n. 36.

[36] Rauch, *supra* n. 34, p. 256; Churchill and Lowe, *supra* n. 31.

[37] "Armed mines", in the usage of the United States, are mines which are either emplaced with all safety devices

legitimate self-defense, nor under Article 58 since they are likely to interfere seriously with the exercise of freedom of navigation and other rights in the EEZ[38] such as the right of the coastal State to protect and manage its resources and environment. The latter would arguably be a failure of the duty of due regard.

One type of military use of the seas that has been relatively overlooked is the deployment and use of expendable marine instruments—both actively managed and autonomous. These instruments are deployed for collecting data about the water column for use in naval operations including anti-submarine warfare, MSR, and the commercial ocean industry, and are essential to promote safe navigation. Warships and research vessels routinely deploy such instruments extensively while navigating almost any waters. One author estimates that since their introduction 30 years earlier, millions have been deployed worldwide prior to the mid-1990s[39]. Despite their extensive use, probably because such instruments are not particularly threatening to the coastal environment, apparently coastal States have historically ignored their deployment[40]. The legal regime applicable to expendable marine instruments in EEZs would depend upon the type of data collected and whether they are deployed and used for MSR purposes, for navigational purposes, or military purposes including those that might threaten force against the coastal State. In the case of the former, they would generally be subject to the consent regime in Part XIII of the LOS Convention and in the case of the latter would be illegal per the UN Charter.

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withdrawn, or are armed following emplacement, so as to detonate when pre-set parameters (if any) are satisfied. Department of the Navy, The Commander's Handbook on the Law of Naval Operations, 1995 sections 2.4.2 and 2.4.3., section 9.2.1.

[38] In the Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), the International Court of Justice held that by laying mines in the territorial sea of Nicaragua, the US violated, inter alia, the non-use of force principle and the freedom of navigation. *ICJ Reports* 1986. Although the case concerned mines in the territorial sea, similar arguments could be made with regard to EEZs especially where mines are laid in navigational routes.

[39] J. Kraska, Oceanographic and naval deployments of expendable marine instruments under U.S. and international law, Ocean Deployment and International Law, v. 20, 1995, p. 314. The US Federal Government alone releases tens of thousands of them for scientific research and military purposes each year. *Ibid.*, p. 313.

[40] *Ibid.,* p. 337.

17. DUE REGARD (FOR THE INTERESTS OF OTHER CLAIMANTS AND INTERESTED STATES)

A definition of 'due regard' in this context might include the following: the motivation for the act should not impede the exercise of rights by other States or infringe upon the interests of other States; the means and methods of the act should not affect or impede the exercise of rights by other States or undermine the legal regime of the sea area; and the actual act should not make the rights of other States ineffective, irrelevant or invalid.

The principle language for this principle is derived from UNCLOS Article 58(1) "Rights and Duties of other States in the exclusive economic zone" which refers to Article 87(1) Freedom of the high Seas. Article 58(3) 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 and shall comply with the laws and regulations adopted by the coastal State" in accordance with the Convention provisions and other rules of international law in so far as they are not incompatible with Part V (on the EEZ). In turn, under Article 56(2), the coastal State is required to have due regard to the rights and duties of other States in exercising its rights and performing its duties in the EEZ. The Convention thus tries to maintain the balance of interests and rights of the coastal State and other States in the EEZ. But a critical question is what constitutes fulfillment or violation of the obligation of "due regard".[41]

Article 58(1) gives maritime states the right to engage in "other internationally lawful uses of the sea related to these freedoms [of navigation and over flight], such as those associated with the operations of ships [and] aircraft".[42] Although the sentence in Article 58(1) goes on to say that such uses must be "compatible with the other provisions of this

[41] The following is an edited extract from Hayashi, *supra n.17, p. 35.*

[42]The following is extracted from J.M. Van Dyke, Military ships and planes operating in the exclusive economic zone of another country *in* M.J. Valencia and K. Akimoto, guest editors, *Marine Policy*, Special Issue, v. 28, n.1, January 2004, p. 35.

convention", some authors have asserted that this phrase allows warships to engage in virtually unlimited activities in the EEZ of other countries.[43] Other authors contend that warships must act with due regard for the interests of the coastal State. One of the UNCLOS III negotiators, Orrego Vicuna, has stated explicitly, "that the limitations of military uses in the exclusive economic zone are greater than those applied to similar activities carried out in the high seas", and that a coastal State could "demand that a warship abandon the exclusive economic zone" if it failed to respect coastal state concerns.[44]

18. NON-ABUSE OF RIGHTS

"Abuse of right" means the unnecessary or arbitrary exercise of rights, jurisdiction and freedoms, or interference with the exercise of rights by another State, or the abuse or misuse of powers by a State causing injury to another State. Article 300 of the 1982 United Nations Convention on the Law of the Sea (the 1982 UNCLOS)[45] provides that States Parties "shall exercise the rights, jurisdiction and freedoms recognized in this convention in a manner which would not constitute an abuse of right."[46] This provision, enunciating the principle of non-abuse of rights, emerged toward the end of the UNCLOS III negotiations out of two previously tabled informal proposals. One was the proposal by Mexico to the effect that all States should exercise their rights and jurisdictions recognized in the Convention in such a manner as to not

[43]B. Oxman, The regime of warships under the United nations Convention on the Law of the Sea, *Virginia Journal of International Law*, v. 24,1984, p.832; E.L. Richardson, Power, mobility and the Law of the Sea, *Foreign Affairs*, 1979-80, p. 916.

[44] O.F. Vicuna, *The Exclusive Economic Zone*, Cambridge University Press, Cambridge, 1989, p. 111.

[45]Hereafter all "Articles" refer to Articles in the United Nations Convention on the Law of the Sea, December 10, 1982 U.N.A/CONF.62//22,1982. (1982 UNCLOS).

[46]This commentary on abuse of rights is a lightly edited extract from Hayashi, supra n.17, p.35.

unnecessarily or arbitrarily harm the rights of other States or the interests of the international community.

This text was accepted by consensus in a smaller negotiation group. Subsequently, the U.S. submitted another text, providing simply that States should not abuse the rights or misuse the powers recognized in the Convention. On the basis of these texts, the Informal Plenary adopted the text of Article 300 at the resumed eighth session in 1980, on the understanding that the abuse of rights was in relation to those of other States, and that Articles 300, 301 (Peaceful uses of the seas) and 302 (Disclosure of information) would go in as a single package.[47] According to an authoritative commentary on the Convention, this "presumably means the abuse of a State's own rights to the disadvantage of another State or States".[48] The fact that the reference to the interests of the international community that had been included in the Mexican proposal was omitted from the final text would also support this interpretation. The application of Article 300 is thus limited to relations between States Parties to the Convention and concerns the unnecessary or arbitrary exercise of rights, jurisdiction and freedoms or the abuse or the misuse of powers by such a State Party.[49]

Generally in international law, abuse of rights refers to the exercising by a State of a right "either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State."[50] More concretely, it has been pointed out that such an abuse may arise in three distinct legal situations. First, a State is hindered in the enjoyment of its own rights, and, as a consequence, suffers injury. Second, a right is exercised intentionally for an end which is different from that for which the right has been created; with the result that injury is caused. And third, a State

[47] Myron Nordquist, *supra* n. 18, p.151.

[48] *Ibid*.

[49] *Ibid*., p. 152.

[50] A. Kiss, 'Abuse of rights', in *Encyclopedia of Public International Law*, North-Holland, Amsterdam, 1992, v. 1, p. 4.

exercises its rights in an arbitrary manner, causing injury to other States but without clearly violating their rights.[51]

International law thus prohibits the abuse of rights,[52] and this principle of non-abuse of rights is often found in treaties. The three situations mentioned above are all relevant to the context of the various uses of the EEZ. For example, a State may use a certain area for navigation by military vessels which cause injury to the fishing or environmental interests of the coastal State, either violating, or even without violating, the latter's rights. There could also be situations in which certain activity in the name of MSR is undertaken for non-MSR purposes, injuring the security interests of the coastal State. In any case, the fundamental element in the application of the non-abuse of rights principle is the existence of injury resulting from such an abuse.[53] After the EP-3 incident in April 2001, in addition to the violation of Article 58 of the 1982 UNCLOS, China accused the US of exceeding the "over flight freedom" principle and abusing that principle.[54]

CONTENT OF A CODE[55]

Ideally, what should such a code contain? Some suggestions can be gleaned from the earlier ASEAN-China DoC, various agreements to manage incidents at sea and dangerous military activities, and other similar sources. First there has to be agreement on where, to whom and to what the Code applies. Should it cover all of the South China Sea and any actor therein, or just the "disputed areas" and the national claimants? How should it treat non-state actors and Taiwan which is also a claimant? To be comprehensive, it should govern all activities,

[51] *Ibid*., p. 5.

[52] *Ibid*.

[53] *Ibid*., p. 7.

[54] *People's Daily Online*, http://Fpengpeopledaily.com.cn/200104/04/

[55] Mark J. Valencia, A new Code of Conduct for the South China Sea, *Japan Times*, 21 December 2011; See Appendices I and II for a Draft Code of Conduct and a Commentary on the Code.

e.g., resource exploration and exploitation, marine scientific research, and military activities. As a fundament it should reaffirm the parties' commitment to the purposes and principles of the United Nations, the 1982 Law of the Sea, and China's five principles of peaceful coexistence, and that the parties will interact on the basis of equality and mutual respect

Right up front should be a clause stating that nothing in the code prejudices any party's sovereign rights or jurisdiction in its claimed territory, territorial sea, continental shelf, EEZ or its rights and responsibilities under the 1982 Law of the Sea (UNCLOS). It should reaffirm the use of the sea only for peaceful purposes and the resolution of disputes without the threat or use of force in accordance with international law, including the 1982 UNCLOS. It should also reaffirm freedom of navigation and over flight consonant with international law.

The parties should also recommit to exercise self restraint in the conduct of activities that might complicate or escalate disputes, including refraining from occupying presently uninhabited features. And they should agree to negotiate provisional arrangements of a practical nature to manage and share the resources and activities in disputed areas. The modalities, scope and locations of bilateral and multilateral cooperation should be agreed upon by the parties concerned prior to their actual implementation.

And the parties should agree to notify each other of any pending activities including military exercises in waters of interest to other parties, i.e., areas claimed by others.

There is a clear need for a specific clause addressing the question of arrest and detention of fishing vessels and crew of fellow claimants. As part of the CoC the parties might even agree to negotiate voluntary guidelines regarding military activities in foreign EEZs, particularly active and intrusive intelligence gathering.

There are two provisions that are probably critical to its effectiveness. One is an agreement to be bound by the Code and to develop a mechanism to explore alleged violations thereof. It should have the robustness of a treaty even if it is not called one. The second is to encourage "outside" parties to adhere and accede to the CoC. A secretariat — or a special office in the ASEAN Secretariat might be helpful in implementing and publicizing the code. Dispute settlement should be compulsory and might be referred to the existing 1976 Bali Treaty of

Amity and Cooperation dispute settlement provisions, the International Court of Justice or the Tribunal for the Law of the Sea.

If such a code can be agreed by ASEAN and China, it will certainly bode well for the sea, the region, and all concerned, and may serve as a model for other disputed seas like the East China Sea. But first there must be agreement on the principles that will inspire and be manifested in the Code.

APPENDIX 1

DRAFT CODE OF CONDUCT FOR THE SOUTH CHINA SEA

15 FEBRUARY 2012

(BASED ONTHE DoC, GUIDELINES FOR DoC IMPLEMENTATION, INCSEA/DMA AGREEMENTS AND EEZ GROUP 21 GUIDELINES)

THE PARTIES:

REAFFIRMING THEIR DETERMINATION TO CONSOLIDATE AND DEVELOP THE FRIENDSHIP AND

COOPERATION EXISTING BETWEEN THEIR PEOPLE AND GOVERNMENTS WITH THE VIEW OF PROMOTING A 21ST CENTURY-ORIENTED PARTNERSHIP OF GOOD NEIGHBORLINESS AND MUTUAL TRUST;

COGNIZANT OF THE NEED TO PROMOTE A PEACEFUL, FRIENDLY AND HARMONIOUS ENVIRONMENT IN THE SOUTH CHINA SEA FOR THE ENHANCEMENT OF PEACE, STABILITY, ECONOMIC GROWTH AND PROSPERITY IN THE REGION;

DESIRING TO ENHANCE FAVORABLE CONDITIONS FOR A PEACEFUL AND DURABLE SOLUTION OF DIFFERENCES AND DISPUTES AMONG THE COUNTRIES CONCERNED;

HEREBY AGREE TO THE FOLLOWING:

1.THE PARTIES REAFFIRM THEIR COMMITMENT TO THE PURPOSES AND PRINCIPLES OF THE CHARTER OF THE UNITED NATIONS, THE 1982 UN CONVENTION ON THE LAW OF THE SEA, THE FIVE PRINCIPLES OF PEACEFUL COEXISTENCE, AND UNIVERSALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW WHICH SERVE AS THE BASIC NORMS GOVERNING STATE-TO-STATE RELATIONS, AND TO EXPLORING WAYS TO BUILD TRUST AND CONFIDENCE IN ACCORDANCE WITH THESE PRINCIPLES ON THE BASIS OF EQUALITY AND MUTUAL RESPECT;

2. NOTHING CONTAINED IN THIS CODE OR ACTIVITIES TAKING PLACE PURSUANT TO IT SHOULD BE INTERPRETED AS PREJUDICING THE POSITION OF ANY PARTY IN ITS CLAIMS TO BASELINES, SOVEREIGN RIGHTS OR JURISDICTION IN ITS CLAIMED TERRITORY, TERRITORIAL SEA, CONTINENTAL SHELF, EEZ, OR ITS RIGHTS AND RESPONSIBILITIES THEREIN UNDER THE 1982 UNCLOS.

3. THE PARTIES UNDERTAKE TO USE THE SEA FOR PEACEFUL PURPOSES ONLY. IN PARTICULAR, THE PARTIES CONCERNED WILL RESOLVE THEIR TERRITORIAL AND JURISDICTIONAL DISPUTES BY PEACEFUL MEANS, WITHOUT RESORTING TO THE THREAT OR

USE OF FORCE, THROUGH FRIENDLY CONSULTATIONS AND NEGOTIATIONS BY SOVEREIGN STATES DIRECTLY CONCERNED, IN ACCORDANCE WITH UNIVERSALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW, INCLUDING THE 1982 UN CONVENTION ON THE LAW OF THE SEA;

4. THE PARTIES REAFFIRM THEIR RESPECT FOR AND COMMITMENT TO THE FREEDOM OF NAVIGATION IN AND OVERFLIGHT ABOVE THE WATERS OUTSIDE OF CLAIMED INTERNAL, TERRITORIAL AND ARCHIPELAGIC WATERS IN THE SOUTH CHINA SEA AS PROVIDED BY UNIVERSALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW INCLUDING THE 1982 UN CONVENTION ON THE LAW OF THE SEA;

5. THE PARTIES WILL EXERCISE SELF RESTRAINT IN THE CONDUCT OF ACTIVITIES THAT WOULD COMPLICATE OR ESCALATE DISPUTES AND NEGATIVELY AFFECT PEACE AND STABILITY INCLUDING, AMONG OTHERS, REFRAINING FROM OCCUPATION AND/OR CONSTRUCTION ON PRESENTLY UNINHABITED ISLANDS, REEFS, SHOALS, CAYS, AND OTHER FEATURES AND TO HANDLE THEIR DIFFERENCES IN A CONSTRUCTIVE MANNER;

6. PENDING THE PEACEFUL SETTLEMENT OF TERRITORIAL AND JURISDICTIONAL DISPUTES, THE PARTIES CONCERNED WILL INTENSIFY EFFORTS TO SEEK WAYS, IN THE SPIRIT OF COOPERATION AND MUTUAL UNDERSTANDING, TO BUILD TRUST AND CONFIDENCE BETWEEN AND AMONG THEM BY:

--ESTABLISHING MILITARY HOTLINES;
--HOLDING DIALOGUES AND EXCHANGING VIEWS AS APPROPRIATE BETWEEN THEIR DEFENSE AND MILITARY OFFICIALS;
--NOTIFYING, ON A VOLUNTARY BASIS, OTHER PARTIES CONCERNED OF ANY IMPENDING ACTIVITIES , ESPECIALLY MILITARY ACTIVITIES IN WATERS OF INTEREST TO OTHER PARTIES;
--ENSURING JUST AND HUMANE TREATMENT OF ALL PERSONS WHO ARE EITHER IN DANGER

OR DISTRESS;

--EXCHANGING RELEVANT INFORMATION ON A VOLUNTARY BASIS

7. THE PARTIES WILL ENDEAVOR TO DETERMINE AND AGREE WHICH FEATURES AND AREAS ARE IN DISPUTE AND WHICH ARE UNDISPUTED;

8. PENDING A COMPREHENSIVE AND DURABLE SETTLEMENT OF THE DISPUTES, THE PARTIES CONCERNED WILL EXPLORE AND MAY UNDERTAKE COOPERATIVE ACTIVITIES IN THE DISPUTED AREAS INCLUDING ENTERING INTO PROVISIONAL ARRANGEMENTS OF A PRACTICAL NATURE WITH RESPECT TO:

--MARINE ENVIRONMENTAL PROTECTION;

--MARINE SCIENTIFIC RESEARCH;

--SAFETY OF NAVIGATION AND COMMUNICATION AT SEA;

--SEARCH AND RESCUE OPERATIONS;

--COMBATING OF TRANSNATIONAL CRIME, INCLUDING BUT NOT LIMITED TO TRAFFICKING IN ILLICIT DRUGS, PIRACY AND ARMED ROBBERY AT SEA, AND ILLEGAL TRAFFIC IN ARMS.

--SHARING, OR JOINT DEVELOPMENT OF RESOURCES IN AREAS OF OVERLAPPING CLAIMS.

SUCH ACTIVITIES MAY, BY PRIOR AGREEMENT, BE EXTENDED TO UNDISPUTED AREAS. THE MODALITIES, SCOPE AND LOCATIONS OF BILATERAL AND MULTILATERAL COOPERATION SHOULD BE AGREED BY THE PARTIES CONCERNED PRIOR TO THEIR ACTUAL IMPLEMENTATION.

9. THE PARTIES STAND READY TO CONTINUE THEIR CONSULTATIONS AND DIALOGUES CONCERNING RELEVANT ISSUES, THROUGH MODALITIES TO BE AGREED BY THEM, INCLUDING REGULAR CONSULTATIONS ON THE OBSERVANCE OF THIS CODE, FOR THE PURPOSE OF PROMOTING GOOD NEIGHBORLINESS AND TRANSPARENCY, ESTABLISHING HARMONY, MUTUAL UNDERSTANDING AND COOPERATION, AND FACILITATING PEACEFUL RESOLUTION OF DISPUTES AMONG THEM. A SECRETARIAT SHALL BE ESTABLISHED AND FUNDED BY THE PARTIES FOR THESE PURPOSES.

10. THE PARTIES CONSIDER THIS CODE FORMALLY BINDING AND WILL RESPECT ITS PROVISIONS AND TAKE ACTIONS CONSISTENT THEREWITH;

11. THE PARTIES CONCERNED WILL DISCUSS AND EXPLORE INCSEA AGREEMENTS AS WELL AS AGREEMENT ON VOLUNTARY GUIDELINES FOR MILITARY ACTIVITIES IN OTHERS' EEZS.

12. THE PARTIES ENCOURAGE OTHER COUNTRIES TO RESPECT THE PRINCIPLES CONTAINED IN THIS CODE AND TO CONSIDER FORMALLY ACCEDING THERETO;

APPENDIX II

A COMMENTARY ON THE DRAFT CODE OF CONDUCT FOR THE SOUTH CHINA SEA

Introductory Paragraphs

The first question that must be answered is who should be 'the parties'? Is it the claimants only, all of ASEAN and China, or all who want to be parties? As with most of the suggested provisions, these introductory paragraphs are taken directly from the DoC. Since the DoC parties agreed to

this wording previously, it should not present a problem for them now. The only difference is that in paragraph two, the words “between ASEAN and China” after “In the South China Sea” have been deleted. The intent of this new wording is to have the Code appeal and be applicable to all who might accede to it – not just the claimants and China and not just ASEAN and China. After all, stability, peace and security in the South China Sea is in the interest of all – both within the maritime region and those using it.

Provision 1

Again this provision is taken directly from the DoC (Provisions 1 and 2) and reiterates the parties’ commitment to the fundaments of international law and law of the sea for this region as well as the five principles of peaceful co-existence (see Principles) and China’s off repeated refrain to pursue international relations “on the basis of equality and mutual respect”.

Provision 2

This is a standard “disclaimer” in provisional agreements regarding co-operation in maritime activities in disputed areas (see Principles). There has been unfortunate experience in the region in this regard and this provision is necessary to allay fears that such co-operative activities in areas of overlapping claims could constitute acquiescence or recognition of the validity of opposing claims. ‘Baselines’ have been added to the list of claims that will not be prejudiced by such co-operative action because many claimed baselines in the region are controversial.

Provision 3

This provision is also taken for the most part from the DoC (Provision 4). However, it is prefaced by the general exhortation to use the sea for peaceful purposes only, as stipulated in the 1982 UNCLOS[56]. The term peaceful purpose is itself somewhat controversial (see Principles).

Provision 4

This is Provision 3 in the DoC with two important modifications. The words "waters outside claimed internal, territorial and archipelagic waters" are substituted for "South China Sea". Not the entire South China Sea[57] is subject to the freedom of navigation regime. Also the word

[56] Articles 88, 141, 143(1), 147(2)(d), 155(2), 24091), 246(3) and 301.

[57] The International Hydrographic Organization defines the limits of the South China Sea as follows: (Wikipedia)
On the South. The Eastern and Southern limits of Singapore and Malacca Straits [A line joining Tanjong Datok, the Southeast point of Johore $1^0$22'N $104^0$17'E) through Horsburgh Reef to Pulo Koko, the Northeastern extreme of Britain Island ($1^0$13.5'N $104^0$35'E). The Northeastern coast of Sumatra] as far West as Tanjong Kedabu ($1^0$06'N $102^0$58'E) down the East coast of Sumatry to Lucipara Point ($3^0$14'S $106^0$05'E) thence to Tanjong Nanka, the Southwest extremity of Banka Island, through this island to Tanjong Berikat the Eastern point ($2^0$34'S $106^0$51'E), on to Tanjong Djemang ($2^0$36'S $107^0$37'E) in Billiton, along the North coast of this island to Tanjong Boeroeng Mandi ($2^0$46'S $108^0$16'E) and thence a line to Tanjong Sambar ($3^0$00'S $110^0$19'E) the Southwest extreme of Borneo.
On the East. From Tanjong Sambar through the West coast of Borneo to Tanjong Sampanmangio, the North point, thence a like to West points of Balabac and Secam Reefs, on to the West point of Bancalan Island and to Cape Buliluyan, the Southwest point of Palawan, through this island to Cabuli Point, the Northern point thereof, thence to the Northwest point of Busuanga and to Cape Calavite in the island of Mindoro, to the Northwest point of Lubang Island and to Point Fuego ($14^0$08'N) in Luzon Island, through this island to Cape Engano, the Northeast point of Luzon, along a line joining this cape with the East point of Balintang Island (20^0N) and to the East point of Y'Ami Island ($21^0$05'N) thence to Garan Bi, the Southern point of Taiwan (Formosa), through this island to Santyo (25^0N) its North Eastern Point.
On the North. From Fuki Kaku the North point of Formosa to Kiushan Tao (Turnabout Island) on to the South point of Haitan Tao ($25^0$25'N) and thence Westward of the parallel of $25^0$24' North to the coast of Fukien.
On the West. The Mainland, the Southern limit of the Gulf of Thailand and the East coast of the Malay Peninsula.

But this is only a geographic definition. The South China Sea contains internal waters, territorial seas, archipelagic waters and parts of straits and sealanes. Should the Code apply to waters and airspace under undisputed national

"the" preceding "universally recognized principles of international law" is omitted because it is not clear what "the universally recognized principles of international law" are in this context. It should be understood that the meaning of freedom of navigation and overflight as used in the 1982 UN Convention on the Law of the Sea is not universally agreed. Indeed several states in the region have interpretations of this term that differ from that of maritime powers (see Principles).

Provision 5

This is Provision 5 in the DoC. However the phrase "occupation and/or construction on presently uninhabited" islands etc. is substituted for "from action of inhabiting on the presently uninhabited" islands etc. Occupation (settlement) can be more transient and less permanent than inhabiting and its use here is intended to be more restrictive than "inhabiting". Also added is a prohibition on new construction on unoccupied features.

Provision 6

This is also taken from DoC Provision 5 with some important modifications. "Establishing military hotlines" is added because some parties have already done so, e.g. Vietnam and China. Also, the phrase "notifying, on a voluntary basis, other parties concerned of any impending joint/combined exercise" is modified to: "impending military exercise in waters of interest to other parties". Although the original phrase was reportedly aimed at US exercises with its allies and others in the South China Sea, any military exercise by any country, particularly a party to the agreements, in waters claimed by another could be provocative and should be communicated in advance as a courtesy. Such wording is derived from the China-Japan

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jurisdiction or only to disputed waters and then only to EEZs? Should it apply to continental shelves – both original and 'extended'? Given the sensitivities inherent in the definition perhaps it is best to leave it vague, i.e., "the South China Sea".

agreement for the East China Sea. The last example "exchanging on a voluntary basis, relevant information" is, in the context of the U.S. initiative for regional maritime domain awareness, not innocuous. But the words "on a voluntary basis" should allay fears that this clause could be used to elicit protected information.

Provision 7

This is a response to the Philippines initiative for a ZoPFF/C. Note that it says "the parties will endeavor". This is little more than what is going on already.

Provision 8

This is DoC Provision 6 with some important additions. The phrase "entering into provisional arrangements of a practical nature with respect to" is added. This verbiage is from the 1982 UNCLOS Articles 74(3) and 83(3). Also added to the type of provisional arrangements is "sharing, or joint development of resources in areas of overlapping claims".

This Provision is perhaps the most problematic. First, there is disagreement on what constitutes marine scientific research.[58] Second, there seem to be differing interpretations of joint

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61. "Marine scientific research" (MSR)[1] means activities undertaken in the marine environment to enhance specific knowledge regarding the nature and natural processes of the seas and oceans, the seabed and subsoil; The 1982 UNCLOS does not define "marine scientific research."[2] Indeed specific attempts at UNCLOS III to include a definition of MSR in the Convention were unsuccessful.[3] MSR includes oceanography, marine biology, fisheries research, scientific ocean drilling and coring, and geological/geophysical scientific surveying, as well as other activities with a scientific purpose.[4] There is a tendency in practice to use the term "marine scientific research" loosely when referring to all kinds of data collection (research) conducted at sea. However, not all data collection conducted at sea necessarily comes within the scope of the marine scientific research regime established by Part XIII of the 1982 UNCLOS.[5] Indeed, some argue that other activities, such as resource exploration, prospecting and hydrographic surveying are governed by different legal regimes. However, these activities may be difficult to distinguish in practice and this creates a problem in the application and enforcement of the regime.

Ships and a variety of other platforms, such as submersibles, installations and buoys or Ocean Data Acquisition System (ODAS), aircraft and satellites might conduct MSR. The ships might be categorized as oceanographic research vessels, hydrographic surveying vessels, or fisheries research vessels, but few of these categories are exclusive. For example, an oceanographic vessel may conduct what some may classify as fisheries research and vice versa. Most hydrographic surveying vessels also have the capability to conduct oceanographic research and indeed may routinely do so as part of hydrographic surveying, e.g. the taking of bottom samples and the collection of data on currents and tidal streams.

Military surveys collect data that is important, even essential, for effective submarine operations, anti-submarine warfare, mine warfare and mine countermeasures, particularly in waters such as the South and East China Seas where oceanographic and underwater acoustic conditions vary widely with uneven bottom topography, fast tidal streams and a relatively high level of marine life.

Intelligence collection activities conducted in the EEZ could also be conceivably considered as coming within the scope of "scientific research" and thus within the scope of the MSR regime in the 1982 UNCLOS.[6] Indeed UNCLOS Convention Article 258 reads "The deployment and use of any type of scientific research installations or equipment in any area of the marine environment shall be subject to the same conditions as are prescribed in this Convention for the conduct or marine scientific research in any such area.

However, the U.S. and other maritime powers are strongly of the view that while intelligence collection activities are within the scope of research, they are associated with the freedoms of navigation and over flight in the EEZ and not under the jurisdiction of the coastal State. This is because intelligence data is only used for military purposes and is not released to the public. However, in the types and potential uses of data gathered, the boundaries between "military surveys", "intelligence collection" and marine scientific research may be difficult to determine, and one vessel may concurrently undertake several activities. Given the confusion and overlap in concept and practice, and the possibility that some may intentionally blur the distinction between these activities to elude the jurisdiction of the coastal State, this definition emphasizes intent, i.e., "to enhance scientific knowledge".

[1] The following is an edited extract from Sam Bateman, Hydrographic surveying in the EEZ; differences and overlaps with marine scientific research *in* M. J. Valencia and K. Akimoto, guest editors, *Marine Policy*, Special Issue, v. 29, n.1, March 2005,pp. 164-165.

development among the prospective parties. And thirdly, there is disagreement as to what claims are legally valid and thus what areas are legally in dispute. The admonition that "the modalities, scopes and locations of bilateral and multilateral so-operation should be agreed upon by the parties concerned prior to their actual implementation" is very important and intended to prevent unilateral actions in waters claimed by others under the rubric of "co-operation" but without their knowledge or consent.

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[2] G. V. Galdorisi, and K.R. Vienna, *Beyond the Law of the Sea – New Directions for US Oceans Policy*, Praeger, Westport, 1997.

[3] A.H.A. Soons, Implementation of the marine scientific research regime in the South Pacific, Final Report*, FFA Report* 95/14 and SOPAC Joint Contribution Report 101, Honiara, Forum Fisheries Agency, 24 October 1994.

[4] J.A. Roach and R.W. Smith, Excessive maritime claims, *International Law Studies*, v. 66, Newport, R.I., Naval War College; 1994, p. 248.

[5] Part XIII of UNCLOS provides that coastal States have the exclusive right to regulate, authorize and conduct MSR in their EEZ (including the contiguous zone) and on their continental shelf, p. 6.

[6] Ship and Ocean Foundation and East West Center, The regime of the Exclusive Economic Zone: issues and responses, *A Report of the Tokyo Meeting*, 19-20 February 2003, p. 6.

Provision 9

This is DoC Provision 7. It is a weak approximation of an enforcement clause in that it provides for "regular consultations on the observance of this Code". Such consultations could include discussions of alleged violations. It establishes a secretariat to monitor adherence to the Code and encourage and organise regular consultations regarding the implementation and observance of the Code. Alternatively the Provision could refer disputes to the High Council established by the ASEAN Treaty of Amity and Cooperation in Southeast Asia (TAC)[59] to which Brazil, China, India, Japan and the U.S. have acceded. However, in the 35 years since the TAC's signing in 1976, the dispute settlement mechanism has never been used.

Provision 10

This is <u>the</u> key provision. Some want the Code to be exhortative only while others prefer a binding instrument. This draft language would make the Code "formally binding", i.e., give it the status of a Treaty. In any case, to openly and wilfully violate the Code would bring public approbrium and possible sanctions by the other parties. While this is not spelled out, the latter is always an option. Another option would be to settle for another political document but with politically binding language regarding the settlement of disputes by peaceful means according

[59] *Article 14* - To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the high Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony.

Article 15 - In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in the dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.

Article 16 - The foregoing provision of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. However, this shall not preclude the other High Contracting Parties not party to the dispute from offering all possible assistance to settle the said dispute. Parties to the dispute should be well disposed towards such offers of assistance.

to international law including the 1982 UNCLOS. Such a document could be upgraded compared to the DoC by having it be signed by heads of state.

Provision 11

This Provision encourages the parties to deal with two problems on the horizon. One is the rapid modernisation and expansion of navies and airforces and the resultant growing frequency and intensity of military incidents, thus creating the need for INCSEA agreements. This Provision also highlights intelligence gathering activities in and over others' claimed EEZs. This is not just an issue between China and the U.S. but will soon become manifest for many others in the region. This provision simply encourages the parties to explore voluntary "guidelines" for such activities so as to diminish the potential for misunderstanding, miscalculation and conflict.

Provision 12

This is also a key provision of the DoC (Provision 9) except that added here is the opening of the Code (Treaty) to accession by other countries from outside the region but having a presence and maritime activities within it. In this sense, it is similar to the TAC.