

## *Chapter 7*

# Measures to Enhance Maritime Safety —Expansion of Code for Unplanned Encounters at Sea (CUES) Exercise—

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### Introduction

The volume of trade going through the East China Sea and the South China Sea that link countries in the Asia-Pacific Region is massive, and the seas serve as the main artery not only for the region but also for the world economy.

However, it is hard to say that the order of the seas is now maintained in the Asia-Pacific region. In particular, China's maritime expansion, in tandem with its economic development, is spectacular, and what China is up to is drawing keen attention. In the East China Sea, on May 24 and June 11, 2014, Chinese two Su-27 fighters flew abnormally close in succession to the OP-3C image data acquisition aircraft of the Maritime Self-Defense Force (MSDF) and the YS-11EB electronic intelligence aircraft of the Air Self-Defense Force (ASDF).<sup>1</sup> On August 5, 2016, as many as 300 Chinese fishing boats concentrated in the waters surrounding the Senkaku Islands, and Chinese government vessels followed them, repeatedly intruding into Japan's territorial sea.<sup>2</sup> Furthermore, in the South China Sea, China pressed ahead with land reclamation works and ensuing construction of military facilities. On August 19, 2014, Chinese J-11 fighter flew abnormally close to the U.S. Navy's anti-submarine patrol aircraft P-8 off Hainan Island.<sup>3</sup> Thus, on the waters in the Asia-Pacific region, concerns are mounting over dangerous incidents that could invite unexpected accidents or collisions.

Until now, a variety of confidence-building measures have been taken in relation

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<sup>1</sup> Ministry of Defense, *Chugokugunko ni Yoru Jieitaikei heno Kinsetsu ni Tsuite* [Chinese Military Aircrafts Fly Close to SDF Aircraft], May 24 and June 11, 2014, <http://www.mod.go.jp/j/press/news/2014/05/24a.html>, <http://www.mod.go.jp/j/press/news/2014/06/11c.html>.

<sup>2</sup> Japan Coast Guard, *Heisei 28 Nen 8 Gatsu Jojun no Chugoku Kosen Oyobi Chugoku Gyosen no Katsudo Jokyō ni Tsuite* [Activities of Chinese Government Vessels and Chinese Fishing Boats during the First 10 Days of August 2016], October 18, 2016, <http://www.kaiho.mlit.go.jp/info/1608-senkaku.pdf>.

<sup>3</sup> Dave Majumdar, "Chinese Fighter Buzzes U.S. Navy Surveillance Plane, Pentagon Upset," *USNI News*, August 22, 2014, <https://news.usni.org/2014/08/22/chinese-fighter-buzzes-u-s-navy-surveillance-plane-pentagon-upset/>.

to maritime safety in order to prevent such fortuitous accidents. A specific example of that is the Incidents at Sea Agreement (INCSEA) established between the United States and the Soviet Union in 1972. It was the first international agreement signed for the prevention of incidents at sea, and it served as a model for various agreements concluded subsequently. For agreements involving China, which has been cranking up its maritime activities, the United States and China established the Military Maritime Consultative Agreement (MMCA) in 1998. As exemplified by the midair collision between the U.S. Navy's EP-3E electronic surveillance aircraft and the Chinese Navy's J-8 II fighter off Hainan Island on April 1, 2001, however, dangerous incidents have been continuing incessantly even after the establishment of MMCA. In reality, even when a mechanism is in place for the prevention of accidents at sea, it is hard to say whether the mechanism is functioning satisfactorily.

In recent years, there has been a major breakthrough concerning maritime safety. On April 22, 2014, at the 14th Western Pacific Naval Symposium, which hosted top naval officials from a total of 21 countries, including Japan, the United States and China, an agreement emerged on the Code for Unplanned Encounters at Sea (CUES). This agreement set forth the code of conduct for when a naval vessel stumbles across a vessel of another country's navy.<sup>4</sup> Although CUES has several problems to be dealt with, such as that it is only a code with no obligation to comply as well as the fact that it applies only to naval vessels in the Western Pacific region, it still represents a major breakthrough because China has agreed to common rules at a multilateral forum of consultations.

Japan, along with the United States, strongly recognizes the importance of proactively addressing the maritime security issue in the East China Sea and the South China Sea from the standpoint of supporting the principles of the rule of law and the "freedom of navigation." In the "G7 Foreign Ministers' Statement on Maritime Security," issued on April 11, 2016, Japan expressed its strong opposition to any unilateral actions that could alter the status quo and increase tensions in the East and South China Seas, and reaffirmed its commitment to further international cooperation on maritime security and safety.<sup>5</sup>

Then, how should Japan get involved in future initiatives to strengthen maritime safety in the Asia-Pacific region? This paper first sorts out the characteristics of crises that have been arising at sea in the Asia-Pacific region. It then analyzes the problems with

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<sup>4</sup> Western Pacific Naval Symposium, Code for Unplanned Encounters at Sea, April 22, 2014, [www.jag.navy.mil/distrib/instructions/CUES\\_2014.pdf](http://www.jag.navy.mil/distrib/instructions/CUES_2014.pdf).

<sup>5</sup> Ministry of Foreign Affairs, *G7 Foreign Ministers' Statement on Maritime Security*, April 11, 2016.

crisis management at sea thus far conducted between the United States and China as well as the problems with crisis management at sea between Japan and China. Based on these analyses, this paper analyzes CUES and sheds light on its significance and problems, examining specific measures to help strengthen maritime safety in the Asia-Pacific region.

## 1. Characteristics of Crises at Sea

China has been making activities of its vessels and aircraft increasingly active in the East China Sea. Table 1 summarizes recent key dangerous incidents in the East China Sea, which can be organized into several categories by their characteristics.

The first is the expansion of the scope of operations and the diversification of behaviors by naval fleets of the People's Liberation Army. Since 2008, Chinese naval vessels have passed through the waters between the main island of Okinawa and Miyako Island several times each year, and their routes of going out and returning tend to become diversified with the increasing number of their ventures into the Pacific Ocean. In January 2013, Chinese naval vessel projected fire control radar at an MSDF escort vessel. Furthermore, in June 2016, the Chinese Navy's Jiangkai I-class frigate entered the contiguous zone around the Senkaku Islands for the first time, and in the same month, the Chinese Navy's intelligence gathering vessel (AGI), on its round trip, navigated through Japan's territorial sea between Kuchinoerabu Island and Yakushima Island for the first time in 12 years. Several occurrences of Chinese unusual naval activities around Japan have been confirmed.<sup>6</sup>

The second has to do with cranked-up activities of Chinese government vessels and Chinese fishing boats. On September 7, 2010, a collision occurred between a Chinese fishing boat and a patrol boat of the Japan Coast Guard in Japan's territorial waters around the Senkaku Islands. Since October 2013, Chinese government vessels routinely intruded into Japan's territorial waters, making such intrusions around two or three times a month for about two hours from around 10 a.m. Since August 2014, Chinese government vessels have become larger, and since December 26, 2015, Chinese government vessels mounted with weapons believed to be autocannons have repeatedly entered Japan's territorial waters. In August 2016, Chinese government vessels followed Chinese fishing boats into Japan's territorial waters around the Senkaku Islands for the

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<sup>6</sup> Ministry of Defense, *Heisei 28 Nendo Boei Hakusho* [Defense of Japan 2016], pp. 52-54, p. 141.

*Table 1 Dangerous Incidents That Occurred in the East China Sea*

<b>Time</b>	<b>Incident</b>
September 2010	A Chinese fishing boat collided with a patrol vessel in Japan Coast Guard's in Japan's territorial waters around the Senkaku Islands.
March 2011	A helicopter that belongs to the SOA flew abnormally close to an MSDF escort vessel.
April 2011	A helicopter that belongs to the SOA flew abnormally close to an MSDF escort vessel.
April 2012	A helicopter that belongs to the SOA flew abnormally close to an MSDF escort vessel.
January 2013	A Chinese navy vessel projected fire control radar at an MSDF escort vessel.
April 2013	Eight Chinese government vessels simultaneously intruded into Japan's territorial waters around the Senkaku Islands.
September 2013	Eight Chinese government vessels simultaneously intruded into Japan's territorial waters around the Senkaku Islands.
May 2014	A Chinese fighter flew abnormally close to an MSDF aircraft and an ASDF aircraft.
June 2014	A Chinese fighter flew abnormally close to an MSDF aircraft and an ASDF aircraft.
December 2015	Chinese government vessels mounted with what appeared to be autocannons repeatedly intruded into Japan's territorial waters.
June 2016	The Chinese Navy Dongdiao-class AGI navigated through Japan's territorial waters near Kuchinoerabu Island and Yakushima Island for the first time in 12 years.
	The Chinese Navy's Jiangkai I-class frigate entered the contiguous zone around the Senkaku Islands for the first time.
	A Chinese fighter rapidly approached the U.S. Navy's electronic surveillance vessel.
	The Chinese Ministry of National Defense said in a statement that Japan's ASDF fighter took a provocative action against a Chinese military aircraft in the vicinity of the Senkaku Islands.
August 2016	Chinese government vessels followed Chinese fishing boats to intrude into Japan's territorial waters around the Senkaku Islands.

Source: Prepared by the author based on Ministry of Defense, *Heisei 28 Nendo Boei Hakusho [Defense of Japan 2016]*, and Japan Coast Guard, *Heisei 28 Nen 8 Gatsu Jojun no Chugoku Kosen Oyobi Chugoku Gyosen no Katsudo Jokyo ni Tsuite [Activities of Chinese Government Vessels and Chinese Fishing Boats during the First 10 Days of August 2016]*.

first time ever.<sup>7</sup> During 2016, Chinese government vessels intruded into Japan's territorial waters around the Senkaku Islands for a total of 121 times, the second largest number of annual intrusions on record.<sup>8</sup>

The third involves Chinese aircraft flying abnormally close to Japan. In March 2011, a Y-8 patrol aircraft and a Y-8 intelligence gathering aircraft made flights past the median line between Japan and China to a distance 50km short of Japan's airspace around the Senkaku Islands. The patterns of flights close to Japan as well as the types of aircraft used also became varied. Among some dangerous cases that occurred in recent years, in March 2011, a Z-9 helicopter belonging to the State Oceanic Administration (SOA) of China circled around the MSDF escort vessel Samidare as close as some 70m and above some 40m. Moreover, in April 2012 a propeller aircraft Y-12 belonging to the SOA circled around the MSDF escort vessel Asayuki as close as 50m and above 50m. In May and June 2014, two of Chinese Su-27 fighters flew abnormally close to an MSDF aircraft and an ASDF aircraft. In June 2016, an ASDF fighter took action against the Chinese aircraft's airspace violation in the vicinity of the Senkaku Islands; in response to this, Chinese Ministry of National Defense issued a statement denouncing Japan's provocation, highlighting a big difference of views between the Japanese and Chinese governments.<sup>9</sup>

Activities of Chinese vessels and aircraft in the South China Sea can be summarized as in Table 2. From around December 2000, Chinese military aircrafts flying abnormally close to the U.S. Navy's patrol aircraft has become increasingly commonplace. On April 1, 2001, a midair collision occurred between the Chinese Navy's J-8 II fighter and the U.S. Navy's EP-3E electronic surveillance aircraft off Hainan Island.<sup>10</sup> In 2014, at least five cases of near-midair collision occurred between the Chinese Air Force's fighters and the U.S. Navy's patrol aircraft.<sup>11</sup> In March 2009, the Chinese Navy's vessels, marine research vessels of the SOA, fisheries patrol boats of the Fishery Bureau, and Chinese fishing

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<sup>7</sup> Ibid., pp. 53-54. Japan Coast Guard, *Heisei 28 Nen 8 Gatsu Jojun no Chugoku Kosen Oyobi Chugoku Gyosen no Katsudo Jokyō ni Tsuite* [Activities of Chinese Government Vessels and Chinese Fishing Boats during the First 10 Days of August 2016].

<sup>8</sup> “*Kosen Ryokai Shinnyū 121 Seki Sakunen · Senkaku Shuben Kako 2 Banme*” [121 Chinese Government Vessels Intruded into Japan's Territorial Waters Last Year, the Second Largest on Record around the Senkaku Island], *Mainichi Shimbun*, January 5, 2017.

<sup>9</sup> Ministry of Defense, *Heisei 28 Nendo Boei Hakusho* [Defense of Japan 2016], pp. 54-56.

<sup>10</sup> Shirley Kan, “China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications,” *CRS Report for Congress*, October 10, 2011, p. 14.

<sup>11</sup> Greg Torode and Megha Rajagopalan, “Chinese Interceptions of US Military Planes Could Intensify Due to Submarine Base,” *Reuters*, August 28, 2014.

boats approached the U.S. Navy's ocean surveillance ship and obstructed its navigation. On August 19, 2014, in China's exclusive economic zone (EEZ) off Hainan Island, the Chinese Navy's J-11 fighter flew as close as 35ft to the U.S. Navy's P-8A patrol aircraft, made a "barrel role" acrobatic flight as if to show off its weapons aboard, and committed an extremely dangerous act of flying within 45ft in front of the U.S. aircraft.<sup>12</sup> On May 17, 2016, Chinese military aircraft flew as close as 50ft to the U.S. Navy's EP-3 electronic surveillance aircraft over the South China Sea; the U.S. Department of Defense termed the Chinese aircraft's act as the "unsafe" interruption of the course of the U.S. aircraft.<sup>13</sup>

The incidents that have taken place in the South China Sea can be characterized in two ways: firstly by the frequent occurrences of cases of abnormally close flights or approaches, and secondly by the clear involvement of Chinese military.

Taking these events into account, the common characteristics of the crises at sea that have been occurring in the East and South China Seas are the frequent occurrences of the dangerous incidents of abnormally close flights or approaches and the conspicuous activities of Chinese military, which involves Chinese naval vessels and military aircraft, Chinese government vessels, and Chinese fishing boats.

*Table 2 Dangerous Incidents That Occurred in the South China Sea*

<b>Time</b>	<b>Incident</b>
April 2001	A Chinese fighter and an electronic surveillance aircraft of the U.S. Navy collided in midair off Hainan Island.
March 2009	Chinese navy vessels, marine research vessels of the SOA, fishery patrol boats of the Fishery Bureau, and Chinese fishing boats approached the U.S. Navy's ocean surveillance ship and obstructed its navigation.
December 2013	Chinese naval vessel crossed at an extremely close range in front of a U.S. navy cruiser.
August 2014	A Chinese fighter flew abnormally close to the U.S. Navy's patrol aircraft.
May 2016	A Chinese fighter flew abnormally close to the U.S. Navy's electronic surveillance aircraft.

Source: Prepared by the author based on Ministry of Defense, *Heisei 28 Nendo Boei Hakusho* [Defense of Japan 2016], pp.56-61, pp.141-142; Robert O'Rourke, "Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress," *CRS Report*, June 6, 2017, pp. 7-12.

<sup>12</sup> Peter Dutton and Andrew Erickson, "When Eagle Meets Dragon: Managing Risk in Maritime East Asia," *Real Clear Defense*, March 25, 2015, [http://www.realcleardefense.com/articles/2015/03/25/when\\_eagle\\_meets\\_dragon\\_managing\\_risk\\_in\\_maritime\\_east\\_asia\\_107802.html](http://www.realcleardefense.com/articles/2015/03/25/when_eagle_meets_dragon_managing_risk_in_maritime_east_asia_107802.html).

<sup>13</sup> Michael S. Schmidt, "Chinese Aircraft Fly Within 50 Feet of U.S. Plane Over South China Sea, Pentagon Says," *New York Times*, May 18, 2016.

## 2. Problems with Crisis Management at Sea by the United States and China

While dangerous incidents at sea do not cease to occur between the United States and China and between Japan and China in the Asia-Pacific region, a variety of moves were attempted to manage such crises in the past. The pioneering effort in confidence-building measures at sea was INCSEA. The key matters of the 10-article agreement signed by the United States and the Soviet Union in May 1972 can be divided broadly into the following four categories: (1) regulations of hazardous movements (Articles III and VI); (2) prohibition of harassment (Articles III and IV); (3) strengthening of communication (Articles V, VI and VII); and (4) regular consultations and exchanges of information between the Navies (Article IX).<sup>14</sup> In May 1973, a supplementary protocol was established to expand the application of INCSEA to non-military ships and aircraft.<sup>15</sup> INCSEA has been positively evaluated overall because both the United States and the Soviet Union saw the common interest of preventing hapless accidents and enhancing communication.<sup>16</sup> In particular, the systematic implementation of annual meetings, one of the ways to strengthen bilateral communication, is assessed as an effective approach, as evident by the fact that INCSEA's annual meetings were sustained even after the Soviet Union's invasion of Afghanistan in December 1979.<sup>17</sup>

In October 1994, far out in the Yellow Sea, the U.S. Navy's aircraft carrier *Kitty Hawk* came upon the Chinese Navy's Han-class nuclear-powered submarine. The U.S. flattop detected the Chinese submarine, and the U.S. Navy's S-3 antisubmarine patrol aircraft continued surveillance of the submarine. This prompted China to send two fighters to the scene, and the volatile situation continued for nearly 70 hours. Eventually, the Chinese submarine left the scene and the situation calmed down. This incident prompted the United States and China to launch their MMCA negotiations, on the model of INCSEA between the United States and the Soviet Union.<sup>18</sup>

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<sup>14</sup> U.S. Department of State, "Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas," May 25, 1972, <https://www.state.gov/t/isn/4791.htm>.

<sup>15</sup> U.S. Department of State, "Protocol to the Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas Signed May 25, 1972," May 22, 1973.

<sup>16</sup> Kazuo Asai, "*Kaijo Jiko Boshi Kyoutei (INCSEA) ni Okeru Shinrai Josei – Kako no Jirei to Nicchu Kai Ku Remraku Mekanizumu no Kadai—*" [Confidence-Building in the Agreement on the Prevention of Incidents On and Over the High Seas (INCSEA) – Past Cases and Problems with the Japan-China Maritime and Air Communication Mechanism], *Reference*, No.770, March 2015, p. 75.

<sup>17</sup> Sean M. Lynn-Jones, "A Quiet Success for Arms Control: Preventing Incidents at Sea," *International Security*, Vol. 9, No.4, Spring 1985, p. 176.

<sup>18</sup> The National Institute for Defense Studies, *NIDS China Security Report 2013*, January 2014, p. 29.

MMCA, signed on January 19, 1998, comprises of nine articles. The key clauses of MMCA include (1) the mechanisms for consultation (annual meetings, working groups, and special meetings) (Article II), (2) a summary of the proceedings and a free exchange of views (Articles III and IV), and (3) administrative procedures (Articles VII, VIII, and XI).<sup>19</sup> However, unlike INCSEA, MMCA does not have the common rules spelled out.

Compared with INCSEA, MMCA is seen as not functioning so effectively.<sup>20</sup> Aside from the impact of the third Taiwan Strait crisis in 1995-1996, this is mainly because of the difference between the United States and China in the interpretation of the U.N. Convention on the Law of the Sea (UNCLOS), particularly the interpretation related to surveillance missions within the EEZ.

Dangerous incidents are occurring repeatedly despite numerous rounds of meetings held, including the midair collision between the U.S. and Chinese military aircrafts off Hainan Island in April 2001 and the alleged obstruction of navigation of the U.S. Navy's ocean surveillance ship by Chinese government vessels in the South China Sea in March 2009.

Indeed, the problems in the crisis management at sea by the United States and China are firstly the repeated occurrences of similar dangerous incidents, and secondly, the existing chasm in the interpretation of the UNCLOS in relation to surveillance missions in the EEZ.

Given such stalemate of MMCA, some called for the establishment of INCSEA, which was seen as a success between the United States and the Soviet Union, between the United States and China as well. The idea was considered, but has yet to be realized. Prof. Pete Pedrozo of the U.S. Naval War College cites five points as reasons for this. First, the Chinese Navy, unlike the Soviet Union's Navy, is not a blue-water navy, and it is not in the national interest of the United States to treat it the same as the Soviet Navy. Second, the United States and Soviet Union shared the common interest in the principle of the "freedom of navigation," while the United States and China differ significantly in the interpretation of the UNCLOS. Third, INCSEA is an agreement between two navies, and thus does not apply to law-enforcement agencies, private ships, and aircraft with which China is making great use in maritime activities. Fourth, INCSEA came out of

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<sup>19</sup> U.S. Department of State, "Agreement on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety," January 19, 1998, <https://www.state.gov/s/t/treaty/tias/107495.htm>.

<sup>20</sup> Asai, "Kaijo Jiko Boshi Kyoutei (INCSEA) ni Okeru Shinrai Josei" [Confidence-Building in the Agreement on the Prevention of Incidents On and Over the High Seas (INCSEA)], p. 79.

the Cold War, and it is unproductive to apply INCSEA to U.S.-China relations. Fifth, it is hard to describe China as a responsible state entity, and it is also hard to believe that China will comply with the spirit of INCSEA. Finally, unlike the situation in 1972 when INCSEA was established, there already exist many rules to prevent accidents at sea.<sup>21</sup>

However, this analysis is no longer viable, as the situation has changed significantly. Firstly, China has developed its naval abilities not only for the adjacent waters but also for the deep waters, and China is aiming to build a blue-water navy. Secondly, although the difference in the interpretation of the UNCLOS is still present, as pointed out above, there are also emerging signs of China changing its stance on the principle of the “freedom of navigation.” Thirdly, as a recent example of rules for preventing accidents at sea, CUES has been agreed upon, with China also accepting the common rules. Therefore, rather than considering whether INCSEA should be signed between the United States and China, it is necessary to explore responses that will ensure more effective maritime safety in light of these changes.

For many years, China remained negative toward making progress in military confidence-building measures with the United States. In particular, China continued to entertain concerns about giving legitimacy to the United States that kept undertaking surveillance missions within China’s EEZ. In early 2012, however, Chinese President Xi Jinping gave the instructions not only to avoid incidents but also to push ahead with the building of cooperative relations with the U.S. forces as part of a “new model of major country relationship.”<sup>22</sup>

In November 2014, the U.S. Department of Defense and the Chinese Ministry of National Defense concluded a memorandum of understanding on the Rules of Behavior for Safety of Air and Maritime Encounters to set forth rules for safe behaviors of the navies and air forces for avoidance of unexpected collisions, using as references the UNCLOS, the Convention on the International Regulations for Preventing Collisions at Sea (COLREG), and CUES.<sup>23</sup>

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<sup>21</sup> Pete Pedrozo, “The U.S.-China Incidents at Sea Agreement: A Recipe for Disaster,” *Journal of National Security Law & Policy*, Vol.6, No.1, August 29, 2012, p. 209. Regarding the third reason given above, under the additional protocol signed in 1973, INCSEA is applicable to non-military ships and aircraft.

<sup>22</sup> Bonnie Glaser, “A Step Forward in US-China Military Ties: Two CBM Agreements,” Asia Maritime Transparency Initiatives, November 11, 2014, <https://amti.csis.org/us-china-cbms-stability-maritime-asia/>

<sup>23</sup> Memorandum of Understanding Between The Department of Defense of the United States of America and the Ministry of National Defense of the People’s Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, November 12, 2014.

On September 25, 2015, Chinese President Xi Jinping and then U.S. President Barack Obama agreed to pursue the application of the November 2014 Memorandum of Understanding to the U.S. Coast Guard and the China Coast Guard as well.<sup>24</sup> In May 2016, the MMCA working group met in Hawaii and confirmed the further enhancement of maritime safety between the U.S. and Chinese Navies. In November 2016, the staff of the U.S. Pacific Forces attended the MMCA meeting and held in-depth discussions on the November 2014 Memorandum of Understanding.<sup>25</sup>

Thus, the United States and China are in the process of holding discussions toward building a cooperative relationship by sharing the awareness about the first problem with the crisis management at sea by the United States and China, that is, the repeated occurrences of similar dangerous incidents. Signs of change are also beginning to emerge about the second problem, which relates with the gap between the two countries in the interpretation of the UNCLOS pertaining to surveillance missions in the EEZ.

### 3. Problems with Crisis Management at Sea by Japan and China

Under the influence of the U.S.-China agreement in 1998, Japan and China promptly commenced consideration, in the same year, of a bilateral agreement on the prevention of maritime incidents.

In April 2007, at the summit meeting between Prime Minister of Japan Shinzo Abe and then Chinese Prime Minister Wen Jiao, it was agreed that “a communication mechanism between the two defense authorities will be established, and thereby, prevent the occurrence of unforeseen circumstances at sea.” They also attained the common understanding that they firmly “adhere to making the East China Sea a ‘Sea of Peace, Cooperation and Friendship’.”<sup>26</sup>

On April 21, 2008, the first Joint Working Group meeting at the section chief level was held in Beijing for the establishment of a communication mechanism between the defense authorities of the two countries. At the third Joint Working Group meeting held in June 2012, it was agreed that the maritime communication mechanism would be constructed, consisting of: (1) annual meetings and experts’ meetings; (2) high-level

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<sup>24</sup> “FACT SHEET: President Xi Jinping’s State Visit to the United States,” September 25, 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states>.

<sup>25</sup> U.S. Department of Defense, *Annual Report to Congress Military and Security Developments Involving the People’s Republic of China 2017*, p. 88.

<sup>26</sup> Ministry of Foreign Affairs, *Japan-China Joint Press Statement*, April 11, 2007.

hotlines between the defense authorities of Japan and China; and (3) communications between naval vessels and aircrafts, with the objectives of increasing mutual understanding and relationships of trust, enhancing defense cooperation, avoiding unexpected collisions, and preventing unforeseen consequences in waters and airspace from escalating into military clashes or political problems.<sup>27</sup>

Subsequently, the bilateral consultations became bogged down for about two and a half years, due in part to Japan's nationalization of the Senkaku Islands in September 2012 and the January 2013 incident where a Chinese military vessel projected fire control radar at an MSDF escort vessel. However, talks resumed at the fourth Joint Working Group meeting in January 2015. On November 25, 2016, the six Joint Working Group meeting was held, but both sides only agreed to continue consultations by holding further rounds of discussion and deepening their respective stances.<sup>28</sup>

Between Japan and China, there is a unique mechanism that does not exist between the United States and China; more specifically, there is the Japan-China High-Level Consultation on Maritime Affairs, a forum for regular consultations on maritime issues at large. With the recognition that it is important to deepen the mutual understanding about the organizations and work of Japanese and Chinese maritime agencies, the first-round meeting was held in Hangzhou, China, in May 2012, drawing together the representatives of the Cabinet Secretariat (National Ocean Policy Secretariat), Ministry of Foreign Affairs, Ministry of Defense, Ministry of Land, Infrastructure, Transport and Tourism, Japan Coast Guard, Fisheries Agency, Ministry of the Environment, Ministry of Education, Culture, Sports, Science and Technology, and Agency for Natural Resources and Energy, from Japan, and the representatives of from the Ministry of Foreign Affairs, Ministry of National Defense, Ministry of Public Security, Ministry of Transport, Ministry of Agriculture, National Energy Administration, State Oceanic Administration, and the General Staff Headquarters, from China.<sup>29</sup> On June 29, 2017, the seventh round meeting of the Japan-China High-Level Consultation on Maritime Affairs was held, where the two countries agreed on the strengthening of cooperation between Japanese

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<sup>27</sup> Ministry of Defense, *Heisei 25 Nendo Boei Hakusho* [Defense of Japan 2013], p. 238.

<sup>28</sup> Ministry of Defense, *Kai Ku Renraku Mekanizumu ni Tsuite* [On the Maritime and Aerial Communication Mechanism], November 25, 2016, [http://www.mod.go.jp/j/approach/exchange/nikoku/asia/china/kaijou\\_mechanism.html](http://www.mod.go.jp/j/approach/exchange/nikoku/asia/china/kaijou_mechanism.html).

<sup>29</sup> Ministry of Foreign Affairs, *First Round Meeting of the Japan-China High-Level Consultation on Maritime Affairs*, May 16, 2012, [http://www.mofa.go.jp/mofaj/area/china/jc\\_kk\\_1205.html](http://www.mofa.go.jp/mofaj/area/china/jc_kk_1205.html).

and Chinese maritime law enforcement agencies and search and rescue cooperation.<sup>30</sup> Looking at these developments, consultations between the two countries are being held regularly, with the participation of Japanese and Chinese players necessary to consider maritime safety. Going forward, it is important to have effective discussions proceed at the bilateral consultations and translate them into actual behaviors.

Even with various mechanisms constructed and forums of regular consultation established, the real issue in the crisis management at sea by Japan and China lies in the fundamental problem that dangerous incidents do not cease to occur, potentially giving rise to unexpected accidents and collisions.

#### **4. Beyond the Code for Unplanned Encounters at Sea (CUES)**

For international rules governing collisions at sea, there is CORLEG, enacted in October 1972 by the International Maritime Organization (IMO).<sup>31</sup> COLREG is applicable to all ships, and since the convention is not a set of rules specifically written for naval vessels, it has no provisions, naturally, for the projection of fire control radar or simulated attacks.

Compared with COLREG, the significance of CUES signed on April 2014 lies in that it has presented a certain range of rules for naval vessels, making up for the non-applicability of COLREG. More than anything else, the fact that China has agreed to the common rules at a forum of multilateral negotiations was a very productive development.

Initially, China was not so positive about the conclusion of CUES. But it is said that Chinese President Xi Jinping agreed to the signing of CUES in late 2013, making the political decision that the dangerous incidents that repeatedly occurred up to then should not be allowed to escalate further.<sup>32</sup>

The problems with CUES include the limited applicability to navies operating in the Western Pacific and the lack of legal binding force and compliance obligations. In other words, as the code's scope of application is very limited, it is not applicable to government vessels and fishing boats, or naval vessels outside of the Western Pacific region.

The crises at sea between the United States and China and between Japan and

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<sup>30</sup> Ministry of Foreign Affairs, *Seventh Round Meeting of the Japan-China High-Level Consultation on Maritime Affairs (Outcome)*, June 30, 2016, [http://www.mofa.go.jp/mofaj/press/release/press4\\_004784.html](http://www.mofa.go.jp/mofaj/press/release/press4_004784.html).

<sup>31</sup> Ministry of Foreign Affairs, *Convention on the International Regulations for Preventing Collisions at Sea of 1972*, October 20, 1972, [www.mofa.go.jp/mofaj/gaiko/treaty/pdfs/B-S52-0125\\_1.pdf](http://www.mofa.go.jp/mofaj/gaiko/treaty/pdfs/B-S52-0125_1.pdf).

<sup>32</sup> Ashley Townshend and Rory Medcalf, "Shifting Waters: China's new passive assertiveness in Asian maritime security," *LOWY Institute Report*, April 2016, pp. 4-7, 12.

China mean that dangerous incidents involving unexpected accidents or collisions still occur. It is true that consultations continued and attempts were made to establish hotlines under various mechanism so far. But the continuation of consultations failed to reduce the number of dangerous incidents. As for hotlines, there was the stark reality that in the crisis between China and Vietnam in May 2014 over the Haiyang Shiyou 981 oil rig of China National Offshore Oil Corporation in waters south of the Parcel Islands, the hotline was certainly there but was completely dead.<sup>33</sup>

However, the clue to breaking from this stark reality can actually be found in CUES, which stipulates the minimum rules. That is because China led the efforts to conclude CUES at the 14th Western Pacific Naval Symposium<sup>34</sup> and indicated its intention to expand CUES through talks with the United States, Australia, Singapore, Indonesia, Brunei and some other countries.<sup>35</sup> Furthermore, at the unofficial meeting of defense ministers of China and ASEAN member states in October 2015, China made known its intention to conduct CUES exercise, along with search and rescue and disaster relief exercises.<sup>36</sup> And in March 2016, in consultations with Singapore, China agreed to have the China Coast Guard participate in CUES exercise.<sup>37</sup>

The more important factor is the emerging possibility that China may accept the “freedom of navigation,” just as the United States does. James Kraska, professor in the Stockton Center for the Study of International Law at the U.S. Naval War College, offers his analysis: “If the PRC Navy evolves into a blue-water force, it may become apparent that maritime roadblocks are not in Beijing’s best interest.”<sup>38</sup> It may be construed that China, as the stronger naval power supported by its economic development, which has made the aggressive maritime expansion possible, is beginning to recognize that the “open sea (*Mare Liberum*)” is more advantageous for it than the “closed sea (*Mare Clausum*).”

The basics of the international rules for the sea are provided for in UNCLOS, adopted in April 1982. In Paragraph 1, Article 87, UNCLOS provides for the freedom

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<sup>33</sup> Ibid., p. 34.

<sup>34</sup> The Chinese PLA Navy, *WPNS 2014*, April 21, 2014, <http://wpns.mod.gov.cn/>

<sup>35</sup> Townshend and Medcalf, “Shifting Waters,” p. 10.

<sup>36</sup> “China-ASEAN Defense Ministers’ Informal Meeting Kicks Off in Beijing,” *China Military Online*, October 16, 2015, [http://english.chinamil.com.cn/news-channels/china-military-news/2015-10/16/content\\_6726730.htm](http://english.chinamil.com.cn/news-channels/china-military-news/2015-10/16/content_6726730.htm).

<sup>37</sup> Kor Kian Bang, “China, Asean Agree to Examine S’pore Proposal on South China Sea,” *The Straits Times*, March 2, 2016, <http://www.straitstimes.com/asia/east-asia/china-asean-agree-to-examine-spore-proposal-on-south-china-sea>.

<sup>38</sup> James Kraska, “Sovereignty at Sea,” *Survival*, vol.51, no.3, June-July 2009, p. 17.

of the high seas, and acknowledges the freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, and freedom of scientific research. Under Paragraph 1, Article 58, UNCLOS permits the freedoms referred to in Article 87 in the EEZ as well. UNCLOS and relevant rules do not have detailed guidelines for military activities on the high seas and in the EEZ, virtually allowing a broad range of freedoms. UNCLOS's provisions concerning security are unclear in many points, and different states may interpret them differently.<sup>39</sup> In other words, the basics of the international rules for the sea lie in the "freedom of navigation."

In particular, some changes are beginning to be noticed in Chinese perception of surveillance activities within the EEZ. According to the U.S. Department of Defense's Annual Report to Congress Military and Security Developments Involving the People's Republic of China 2013, the Chinese Navy is beginning to approve of surveillance activities within the EEZ without prior permission of coastal states, and the Chinese Navy is known to have conducted surveillance activities within the U.S. EEZ off Guam and Hawaii several times in the past. Surveillance activities within the EEZ were confirmed also during the 2012 Rim of the Pacific (RIMPAC) exercise. It is becoming clearer that surveillance activities within China's EEZ is lawful and China's refusal to allow surveillance activities within the China's EEZ is unlawful.<sup>40</sup>

In July 2014, China participated in the RIMPAC for the first time, sending four naval vessels (a destroyer, a frigate, a replenishment vessel, and a hospital ship). In addition to those, China deployed an AGI and conducted surveillance activities within the U.S. EEZ off the Big Island. Commenting on this, Admiral Samuel Locklear, commander of the U.S. Pacific Fleet, said, "military operations and survey operations in another country's [Exclusive Economic Zone]...are within international law and are acceptable."<sup>41</sup> This evaluation is truly a noteworthy event.

On September 3, 2015, when the 70th anniversary victorious military parade was held in Beijing, an event that marked an epoch-making turning point in problems over the UNCLOS occurred. On September 4, five vessels of the Chinese Navy, including

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<sup>39</sup> Asai, "Kaijo Jiko Boshi Kyoutei (INCSEA) ni Okeru Shinrai Josei" [Confidence-Building in the Agreement on the Prevention of Incidents On and Over the High Seas (INCSEA)], p. 72.

<sup>40</sup> U.S. Department of Defense, *Annual Report to Congress Military and Security Developments Involving the People's Republic of China 2013*, p. 39.

<sup>41</sup> Sam LaGrone, "U.S. Pacific Commander: Chinese Spy Ship Off Hawaii Has An Upside," *USNI News*, July 29, 2014, <https://news.usni.org/2014/07/29/u-s-pacific-commander-chinese-spy-ship-hawaii-upside>.

a guided missile destroyer, a frigate, and a replenishment vessel, navigated through the Bering Sea off Alaska, and made an innocent passage through the U.S. territorial waters around the Aleutian Islands.<sup>42</sup> Prof. Peter Dutton, director of the China Maritime Studies Institute at the U.S. Naval War College, described the Chinese fleet's movements as a big advancement in the way Chinese vessels operate, and said that "it's not a surprise in a sense that the Chinese have been continually expanding their presence in Eurasia."<sup>43</sup> Thus, China, like the United States, is coming closer to the international norm in international law. In fact, the U.S. Department of Defense, in "The Asia-Pacific Maritime Security Strategy" released in 2015, had the positive evaluation that Chinese naval vessels are acting in accordance with CUES.<sup>44</sup>

The National Security Strategy, formulated in December 2013, explicitly stated: "as a maritime state, Japan will play a leading role...in maintaining and developing "Open and Stable Seas," which are upheld by maritime order based upon such fundamental principles as the rule of law."<sup>45</sup> In order to enhance maritime security in the Asia-Pacific region, the principles of CUES should be spread widely. Through further international cooperation to mutually affirm the principles of CUES, it is necessary for Japan to adopt the following specific measures: (1) to conduct exercises to enhance the effectiveness of CUES; (2) to expand the scope of CUES application to ships of maritime law enforcement agencies; (3) to expand the scope of CUES application to across the world, instead of limiting the applicability to just navies operating in the Western Pacific; and (4) to establish legal binding force and compliance obligations for CUES, by creating punitive clauses.

## 5. Way Ahead for Code for Unplanned Encounters at Sea (CUES) Exercise

First of all, exercise should be conducted in order to ensure the wide penetration of the ideas of CUES. Table 3 summarizes major CUES exercise held in recent years.

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<sup>42</sup> Shannon Tiezzi, "Confirmed: Chinese Navy Entered US Territorial Waters off Alaska," *The Diplomat*, September 4, 2015, <http://thediplomat.com/2015/09/confirmed-chinese-navy-entered-us-territorial-waters-off-alaska/>

<sup>43</sup> "Five Chinese ships seen off Alaska coast, Pentagon says," *BBC News*, September 3, 2015, <http://www.bbc.com/news/world-us-canada-34131429>

<sup>44</sup> U.S. Department of Defense, *The Asia-Pacific Maritime Security Strategy: Achieving US National Security Objectives in a Changing Environment*, August 2015, p. 15, 30.

<sup>45</sup> Cabinet Secretariat, *Kokka Anzen Hosho Senryaku* [National Security Strategy], December 17, 2013, p. 14.

*Table 3 CUES Exercise in Recent Years*

Time	Venue	Participating Vessels
June 2014	Off Surabaya	The Indonesian Navy's patrol vessel, the Chinese Navy's training vessel Zhenghe
December 2014	Gulf of Aden	The U.S. Navy's Aegis destroyer Sterett, the Chinese Navy's fleet escort force (frigate Yuncheng, replenishment ship Chaohu)
February 2015	South China Sea	The U.S. Navy's littoral combat ship Fort Worth, the Chinese Navy's frigate Hensui
May 2015	West of Manila	MSDF escort vessels Harusame and Amagiri, the Philippine Navy's frigate Ramon Alcaraz
August 2015	Malaysia	MSDF escort vessels Murasame and Ikazuchi, the Malaysian Navy's corvette Perak
May 2016	Vietnam	The French Navy's amphibious vessel Tonnerre, a Vietnamese vessel (Plan)
	Malaysia	MSDF escort vessels Makinami and Suzunami, the Malaysian Navy's corvette Keda
August 2016	Qingdao, Shandong Province	The U.S. Navy's Aegis destroyer Benfold, the Chinese Navy's frigate Daqing
April 2017	South China Sea	The U.S. Navy's Aegis destroyer Stethem, the Chinese Navy's vessels (Plan)
May 2017	Malaysia	MSDF escort vessel Kirisame, the Malaysian Navy's frigate Jebat
June 2017	Zhanjiang, Guangdong Province	The U.S. Navy's Aegis destroyer Sterett, the Chinese Navy's vessels (Plan)

Source: Prepared by the author based on the official websites of the Navies of the participating countries.<sup>46</sup>

Following the conclusion of CUES in April 2014, the first exercise took place off Surabaya in June 2014 between the Chinese Navy's training vessel Zhenghe and the Indonesian Navy's patrol vessel 813.<sup>47</sup> Subsequently in December 2014, the Chinese Navy's 18th escort fleet (the frigate Yuncheng and the replenishment vessel Chaohu) and the U.S. Navy's Aegis destroyer Sterett conducted the first-ever China-U.S. joint exercise in the Gulf of Aden, where many countries are jointly engaged in anti-piracy operations; this exercise also incorporated CUES exercise. Zhang Chuanshu, deputy chief of staff of

<sup>46</sup> (Plan) indicates that while press reports said the plan for the implementation of CUES exercise was announced, whether the exercise was actually conducted could not be confirmed.

<sup>47</sup> Ministry of National Defense, the People's Republic of China, "Chinese training ship taskforce wraps up visit to Indonesia," June 9, 2014, [http://eng.mod.gov.cn/DefenseNews/2014-06/09/content\\_4514963.htm](http://eng.mod.gov.cn/DefenseNews/2014-06/09/content_4514963.htm).



Based on the above, the characteristics of the major CUES exercises in recent years can be analyzed and summarized as follows:

Firstly, the exercises were conducted immediately after the establishment of CUES. Secondly, all of them were carried out as bilateral exercises, instead of as multilateral exercises.

Thirdly, the United States and China carried out CUES exercises every year, at various venues, including the Gulf of Aden, the South China Sea, and in waters just off China.

Fourthly, China carried out CUES exercises only with the United States, except for Indonesia.

Fifthly, the MSDF has not carried out CUES exercises with the United States, but they are carrying out the exercises with member states of the Association of Southeast Asian Nations (ASEAN), such as the Philippines and Malaysia, in waters around the partner countries.

In consideration of the above, what should Japan push ahead now, after a lapse of three years since establishment of CUES? Japan and the United States should reaffirm the ideas of CUES and promote exercises to enhance the effectiveness of CUES as multilateral exercises among Japan, the United States, China and including ASEAN countries. In doing so, it could be an effective measure to urge China to host multilateral exercises for CUES.

## Conclusion

According to the latest 2016 Freedom of Navigation (FON) Report released by the U.S. Department of Defense, the United States has been conducting the “freedom of navigation” operation at various venues in the world, including China, since 1991. Of the 22 countries where the United States is conducting that operation, 12 are in the Asia-Pacific region.<sup>54</sup> The United States, through the “freedom of navigation” operation, has been striving to persuade China to alter its overly aggressive claim for jurisdictional authority, and China, for its part, is beginning to show moves to accept the “freedom of navigation.”

Prof. Kraska of the U.S. Naval War College has been developing an argument about

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<sup>54</sup> U.S. Department of Defense, Freedom of Navigation (FON) Report for Fiscal Year 2016, March 6, 2017, <http://policy.defense.gov/Portals/11/FY16%20DOD%20FON%20Report.pdf?ver=2017-03-03-141349-943>.

naval power in the EEZ by bouncing off the proposition of “Whether the Mechanisms Are Really Necessary.”<sup>55</sup> Generally, the mechanisms are recognized as effective in many ways. In particular, a forum of regular consultations can be effective not only for the avoidance of a crisis but also in a state of crisis. However, that alone is not sufficient. The necessary and sufficient condition is that actors share good manners of observe the rules, which can be developed only by going through multiple exercises.

More importantly, going beyond the insistence on the strict observance of the rules, countries should mutually confirm their claims made at international maritime conferences through the regular implementation of multilateral CUES exercises aimed at maritime safety. Countries should also mutually improve and enhance the “seamanship” and “professionalism” of observing the maritime rules.

Consultations and the establishment of hotlines are nothing more than tools. The most important thing is for the actors to renew their awareness of the objective of maintaining maritime safety. Now more than ever, what is needed is “seamanship” and “professionalism.”

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<sup>55</sup> James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics*, Oxford University Press, 2011, pp. 229-231.

