



24TH ASIA-PACIFIC ROUNDTABLE

7-9 JUNE 2010 • KUALA LUMPUR

**STRENGTHENING COMPREHENSIVE AND
COOPERATIVE SECURITY IN THE ASIA-PACIFIC**

“Enhancing Maritime Security”

Military Activities in Asian EEZs Conflict Ahead?

(PowerPoint)

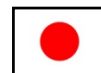
by

**Dr Mark J. Valencia
Research Associate
National Asia Research Program (NARP)
The National Bureau of Asian Research
USA**

Sponsored by



Supported by



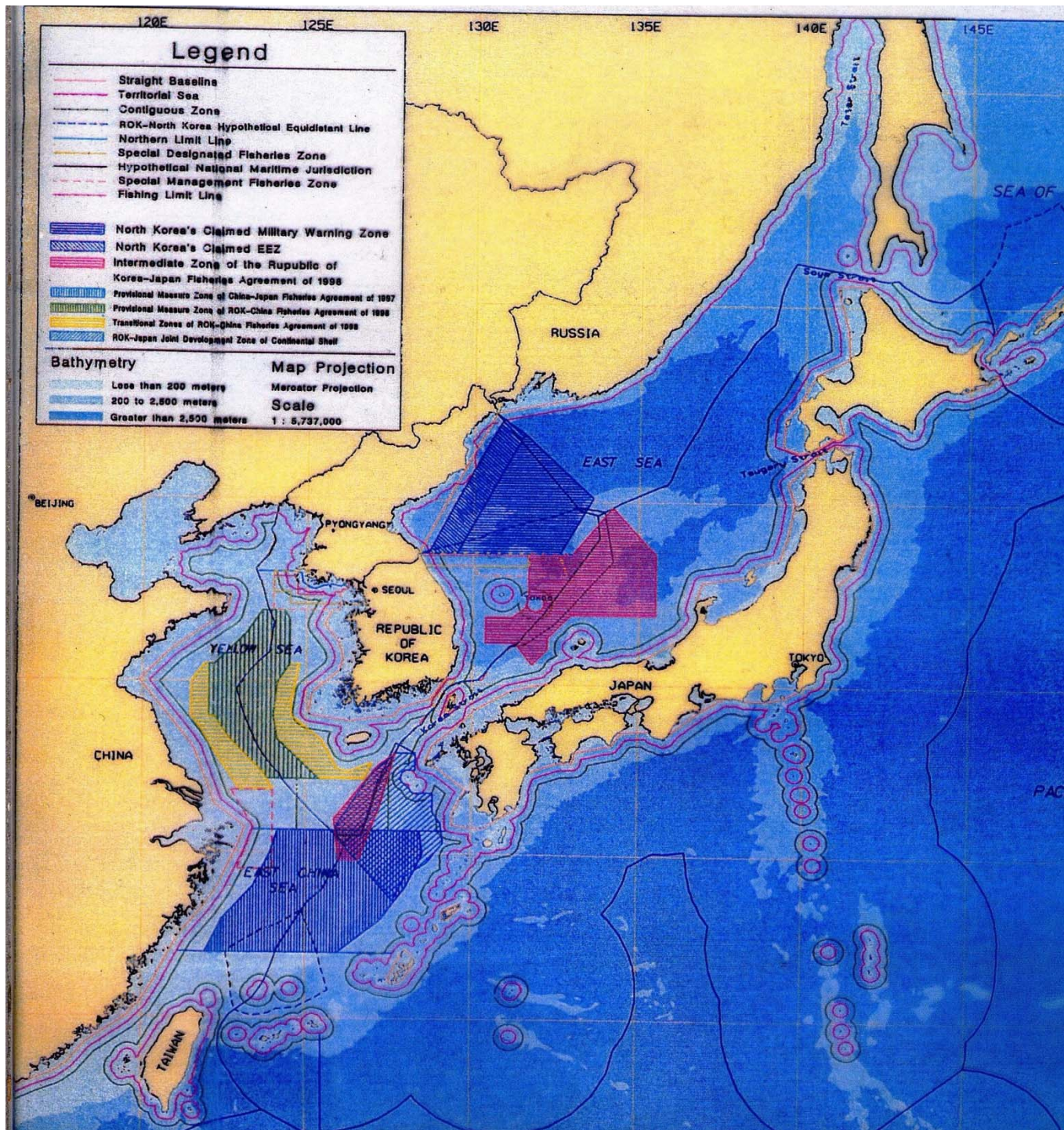
CONCURRENT SESSION ONE Tuesday, 08 June, 2010 1715hrs – 1845hrs

MILITARY ACTIVITIES IN ASIAN EEZS CONFLICT AHEAD?



TALKING POINTS

- **WHAT IS THE PROBLEM?**
- **WHY IS IT A PROBLEM?**
- **DISAGREEMENTS ON THE ISSUES**
- **OPTIONS FOR RESOLVING THE ISSUES**
- **THE IMPLICATIONS OF THE DO-
NOTHING ALTERNATIVE**



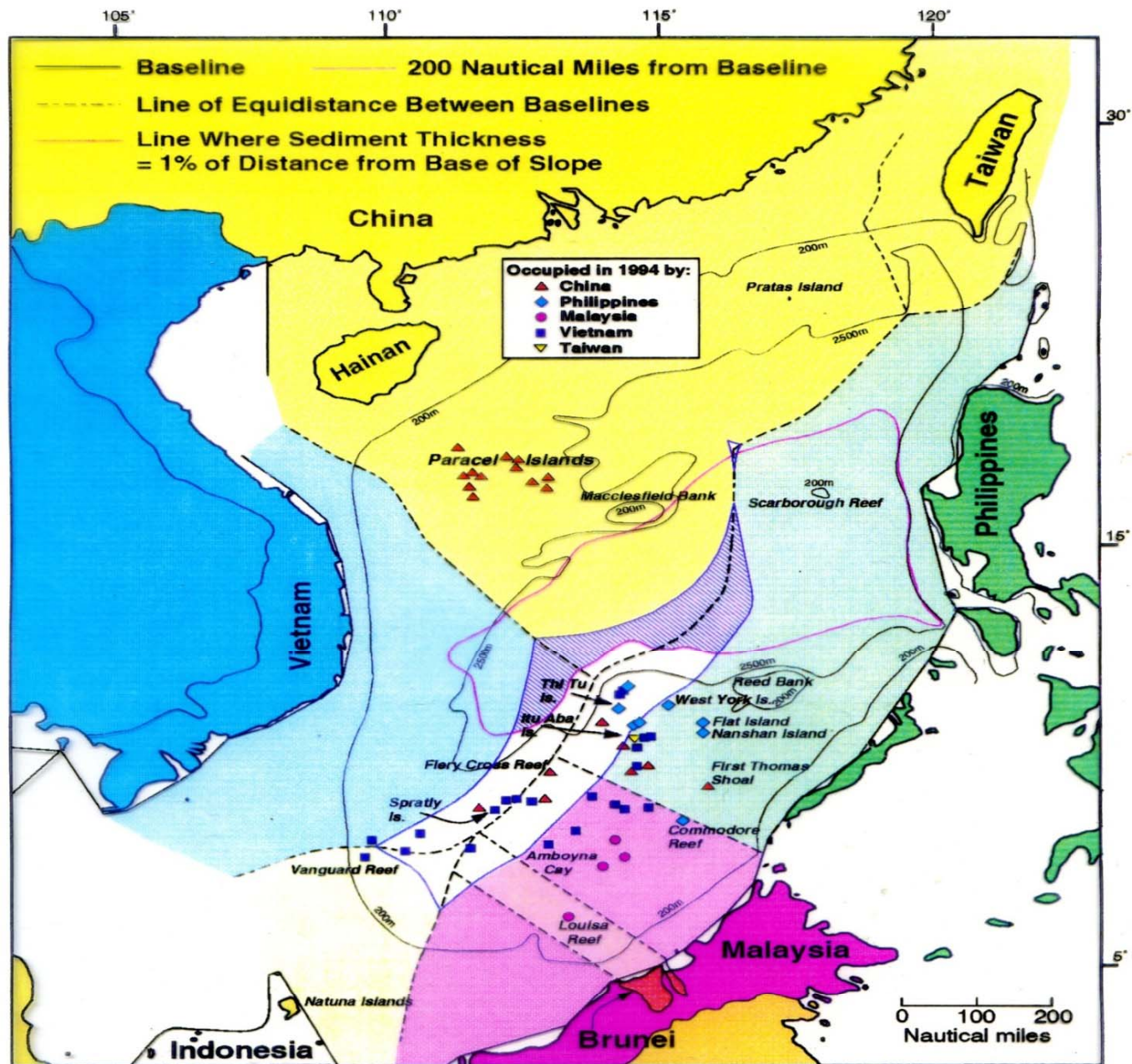
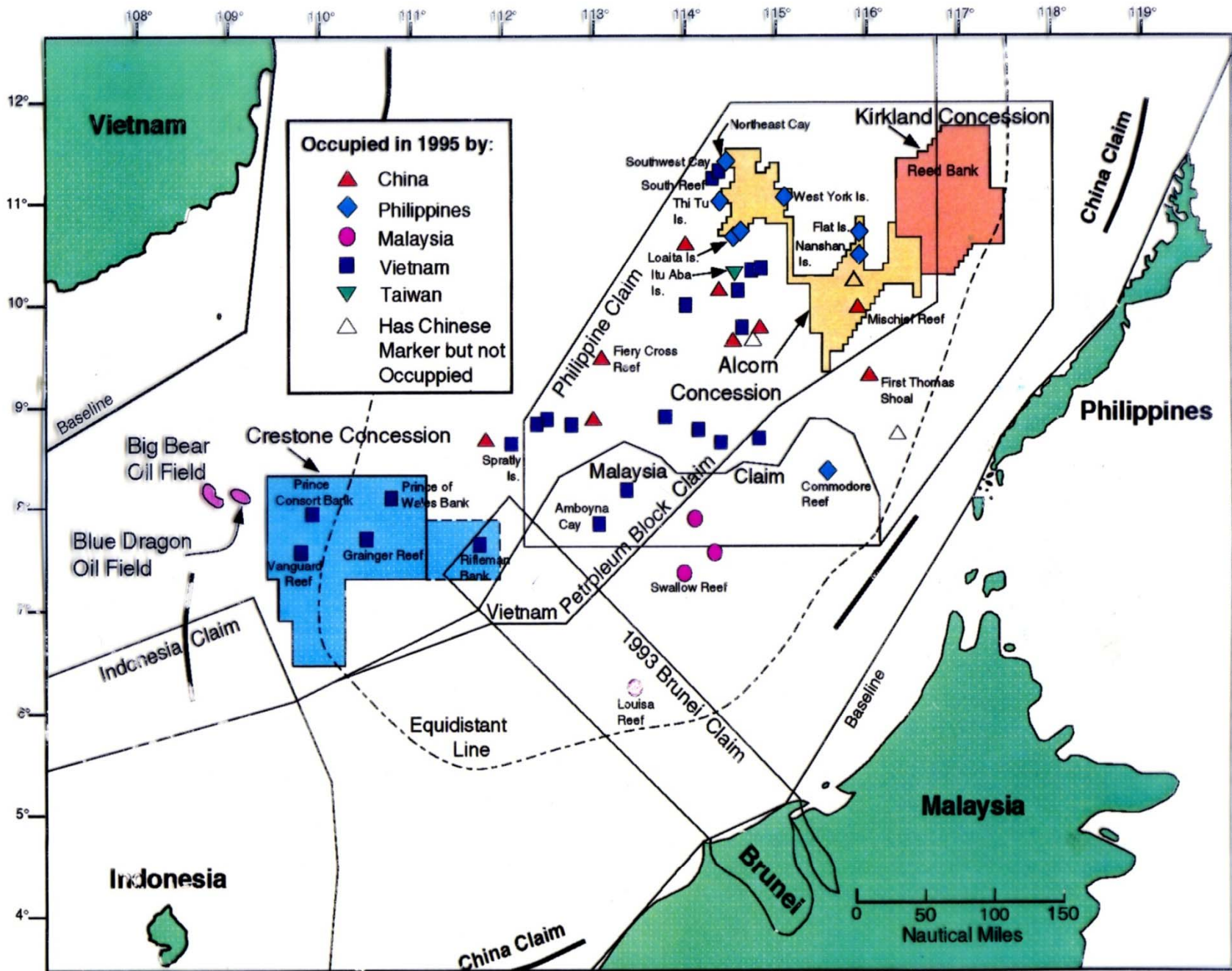
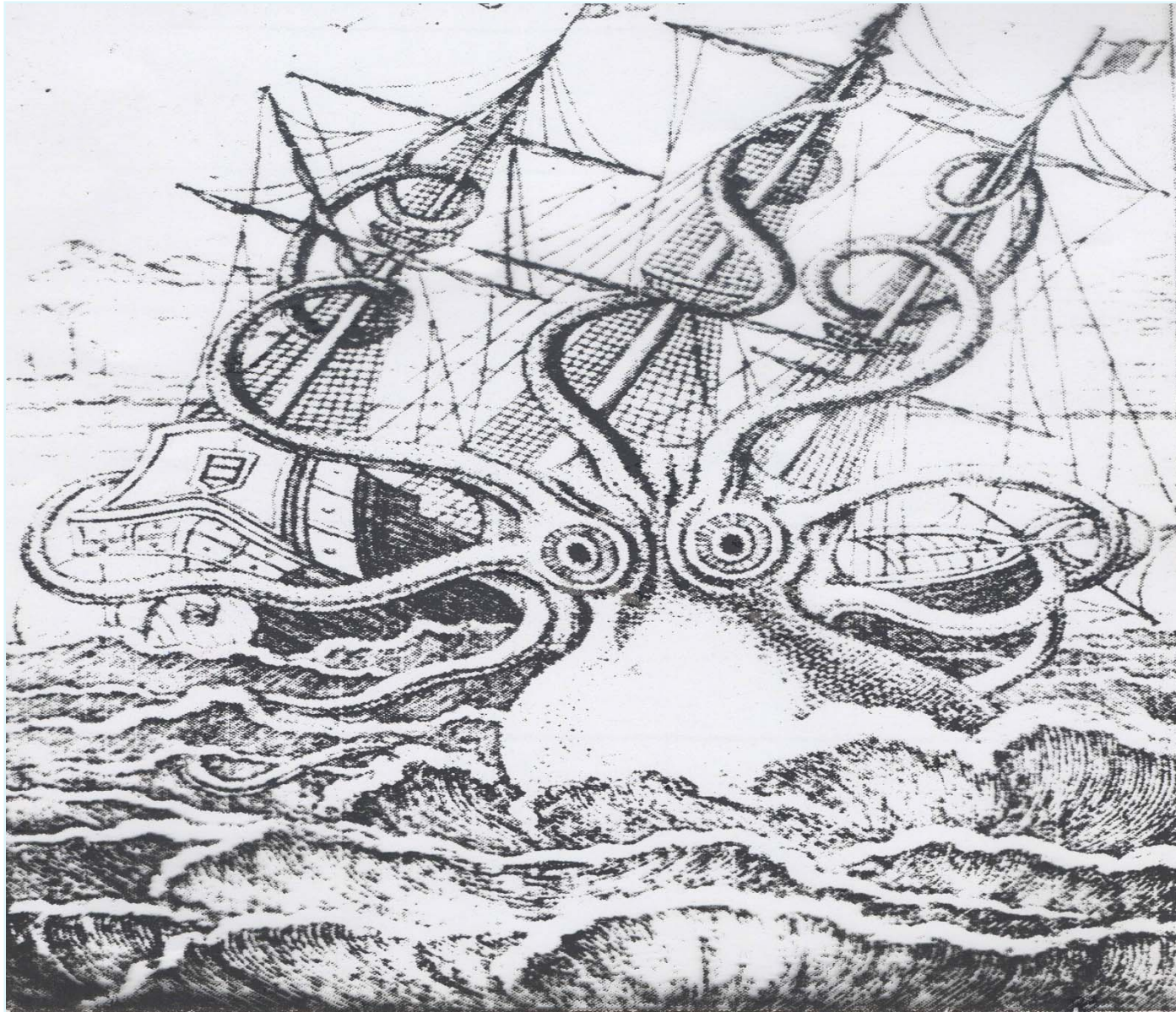


Figure 8. Allocation of the South China Sea out to 200 nm (Paracels have full effect)



SERIES OF SERIOUS INCIDENTS



THE DAMAGED EP3 ON THE GROUND ON HAINAN ISLAND



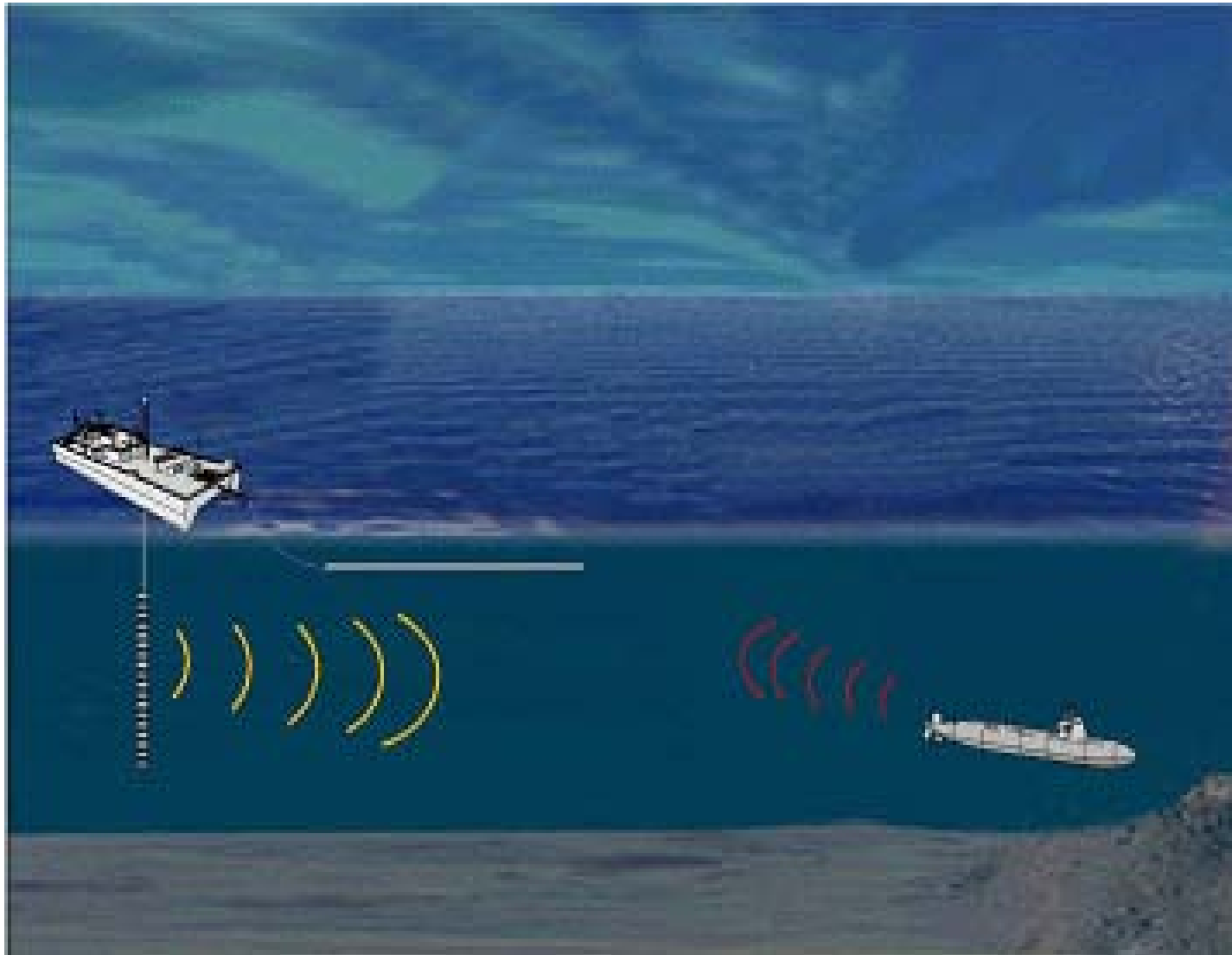


USNS Bowditch (T-AGS 62) is a Pathfinder class oceanographic survey ship. She is the third ship in the class and is a part of a 29 ship Special Mission Ship program that operates in the South China Sea.



USNS *Impeccable* (T-AGOS-23) is an Impeccable-class ocean surveillance ship acquired by the U.S. Navy in 2001 and assigned to the Navy's Special Missions Program. The mission of *Impeccable* is to directly support the Navy by using SURTASS passive and active low frequency sonar arrays to **detect and track undersea threats**







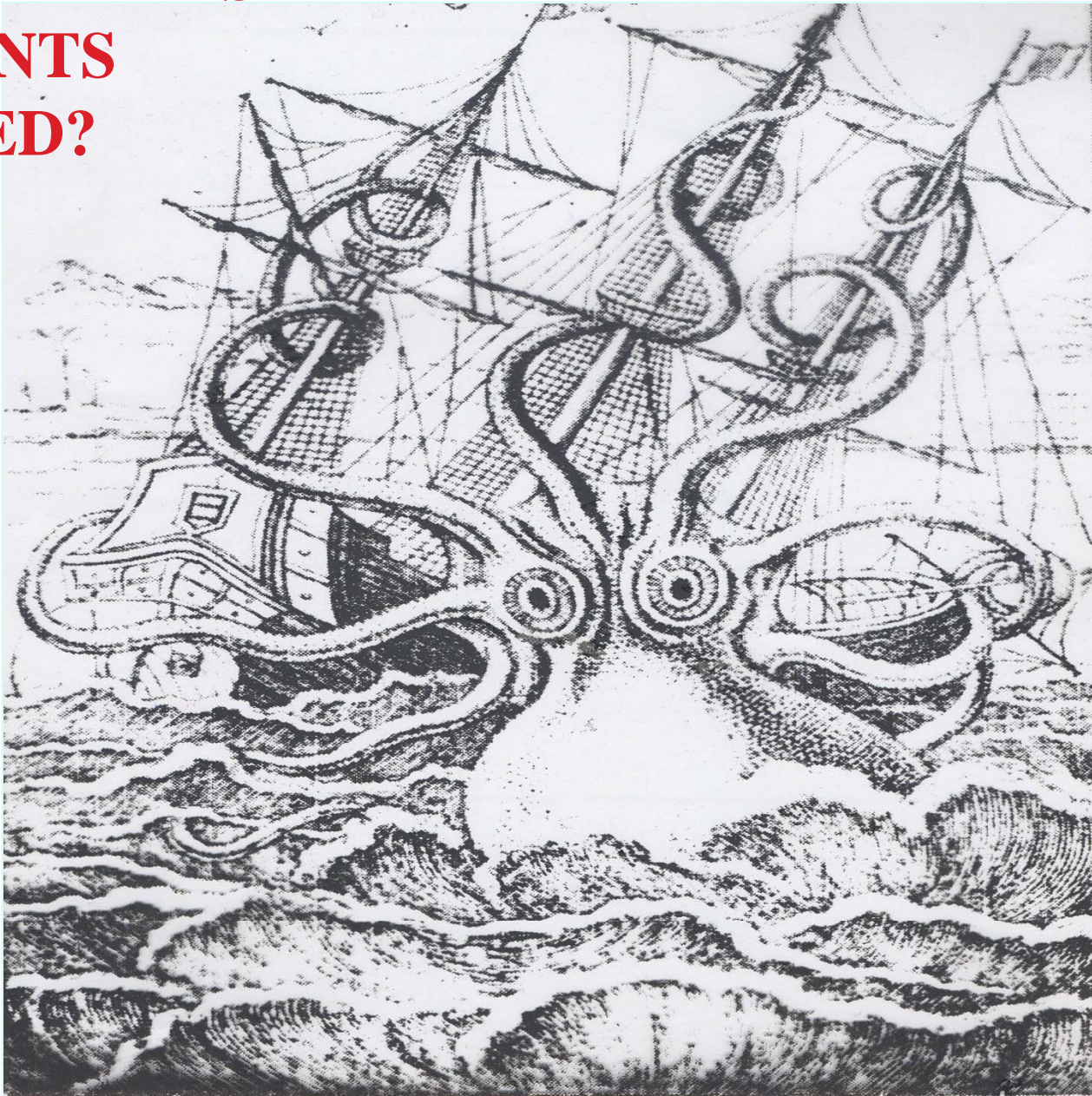
- CHINESE INTELLIGENCE GATHERING VESSELS AND AIRCRAFT FREQUENT THE JAPANESE CLAIMED EEZ.
- JAPAN CONSIDERS THESE FORAYS PROVOCATIVE AND THREATENING.
- PARTICULARLY GALLING WAS THE NOVEMBER 2004 DETECTION OF A CHINESE SUBMARINE IN ITS TERRITORIAL WATERS

MALAYSIA AND VIETNAM PROTEST MILITARY
EXERCISES IN THEIR EEZS WITHOUT CONSENT
JAPAN CONSIDERS THOSE BY CHINA AS
“UNFRIENDLY” AND POSSIBLY THREATENING





**WHAT IS GOING ON?
HOW ARE THESE
INCIDENTS
RELATED?**



THERE IS A NEXUS OF POLITICAL AND TECHNOLOGICAL DEVELOPMENTS IN BOTH COASTAL STATES AND MARITIME POWERS

- **EXTENDED JURISDICTION AND CHANGING PERCEPTION OF THE EXTENT OF THE NATION**
- **OVERLAPPING CLAIMS AND BOUNDARY DISPUTES ADD SENSITIVITY**
- **COASTAL STATE DESIRE TO PROTECT ITS EXTENDED JURISDICTIONAL AREAS AND KEEP MARITIME POWERS AWAY**
- **NEW THREATS –MARITIME TERRORISM, SMUGGLING OF WMD, PIRACY, GUN SMUGGLING TO INSURRECTIONISTS**
- **RISE IN SIZE AND CAPABILITIES OF NAVIES--ARMS COMPETITION**
- **TECHNOLOGICAL ADVANCES IN SIGINT--MORE INTENSIVE AND INTRUSIVE; CYBERWARFARE FROM AIR AND SEA BORNE PLATFORMS**
- **FUNDAMENTAL DISAGREEMENT AND CONFUSION REGARDING THE REGIME GOVERNING MILITARY ACTIVITIES IN THE EEZ**

- **SOME COASTAL STATES ARGUE THAT CERTAIN UNCLOS PROVISIONS FORMULATED MORE THAN 25 YEARS AGO IN A VERY DIFFERENT POLITICAL AND TECHNOLOGICAL ENVIRONMENT SHOULD BE INTERPRETED IN THE LIGHT OF THESE NEW CIRCUMSTANCES.**
- **WHAT ARE THE SPECIFIC ISSUES?**

THE DISAGREEMENTS REGARDING THE INTERPRETATIONS OF 1982 UNCLOS PROVISIONS GENERALLY RELATE TO THE EXACT PRESUMED MEANING OF THE TERMS IN THE CONVENTION AS WELL AS THE MEANING OF SPECIFIC ARTICLES.

SOME COASTAL STATES ARGUE THAT THE CONVENTION WAS A SERIES OF PACKAGE DEALS AND THAT NON –RATIFIERS OF THE CONVENTION HAVE NO RIGHT TO UNILATERALLY INTERPRET THEIR MEANING IN THEIR FAVOR PARTICULARLY IF THEY DID NOT HOLD UP THEIR END OF THE BARGAIN

- **THERE ARE SPECIFIC DIFFERENCES WITH REGARD TO THE MEANING OF ‘FREEDOM’ OF NAVIGATION AND OVERFLIGHT IN AND ABOVE THE EEZ. SOME COASTAL STATES TAKE THE POSITION THAT THESE FREEDOMS CAN BE LIMITED BY CERTAIN REGULATIONS -- NATIONAL, REGIONAL OR INTERNATIONAL –WHILE MARITIME POWERS TEND TO ARGUE THAT THEY ARE NEARLY ABSOLUTE.**
 - **THERE ARE ALSO DIFFERENT INTERPRETATIONS REGARDING THE PRECISE MEANING OF THE CONVENTION'S PHRASE ALLOWING "**OTHER INTERNATIONALLY LAWFUL USES**" OF THE SEA IN THE EEZ. SOME WOULD ARGUE THAT IT INCLUDES ALL MILITARY ACTIVITIES. OTHERS ARGUE THAT IT CLEARLY DOES NOT INCLUDE ACTIVITIES THAT DAMAGE COMPONENTS OF THE ENVIRONMENT E.G. MAMMALS OR THREATEN THE USE OF FORCE AGAINST THE COASTAL STATE**
 - **THE INTERPRETATION OF THIS PHRASE WILL IN TURN BE AFFECTED BY THE INTERPRETATION OF SUCH TERMS AS ‘**DUE REGARD**’, **NON-ABUSE OF RIGHTS**, ‘**PEACEFUL USE**’, ‘**PEACEFUL PURPOSE**’, AND **THE OBLIGATION NOT TO THREATEN OR USE FORCE AGAINST OTHER COUNTRIES.****
-
- **IN THIS CONTEXT, QUESTIONS ARISE AS TO WHETHER SOME MILITARY AND INTELLIGENCE GATHERING ACTIVITIES ARE A LAWFUL EXERCISE OF THE FREEDOM OF NAVIGATION AND OVERFLIGHT, WHETHER THEY ARE A NON-ABUSE OF RIGHTS, WHETHER THEY PAY "DUE REGARD" TO THE INTERESTS OF THE COASTAL COUNTRIES, AND WHETHER THEY ARE A THREAT TO THE PEACE AND SECURITY AS WELL AS THE INTERESTS OF THE COASTAL COUNTRIES..**

LET'S EXAMINE THE CONCRETE ISSUES

- **IS THE US LEGALLY CORRECT IN ITS ASSERTION OF “FREEDOM OF NAVIGATION AND OVERFLIGHT OF THE HIGH SEAS” TO JUSTIFY THE OPERATIONS OF ITS MILITARY AIRCRAFT AND VESSELS IN OTHERS’ EEZS?**
- **THIS DEPENDS ON WHAT EXACTLY THE EP3 AND THE IMPECCABLE WERE DOING – WHICH IS CLASSIFIED**
- **BOTH HAVE THE CAPABILITY TO TRACK AND DO TARGET ANALYSIS AND PLANNING**

- **WERE THE ACTIVITIES FOR “PEACEFUL PURPOSES” OR DID THEY “THREATEN THE USE OF FORCE”?**
- **WERE THEY AN “ABUSE OF RIGHTS”?**
- **DID EACH SIDE PAY “DUE REGARD” TO THE RIGHTS OF THE OTHER?**

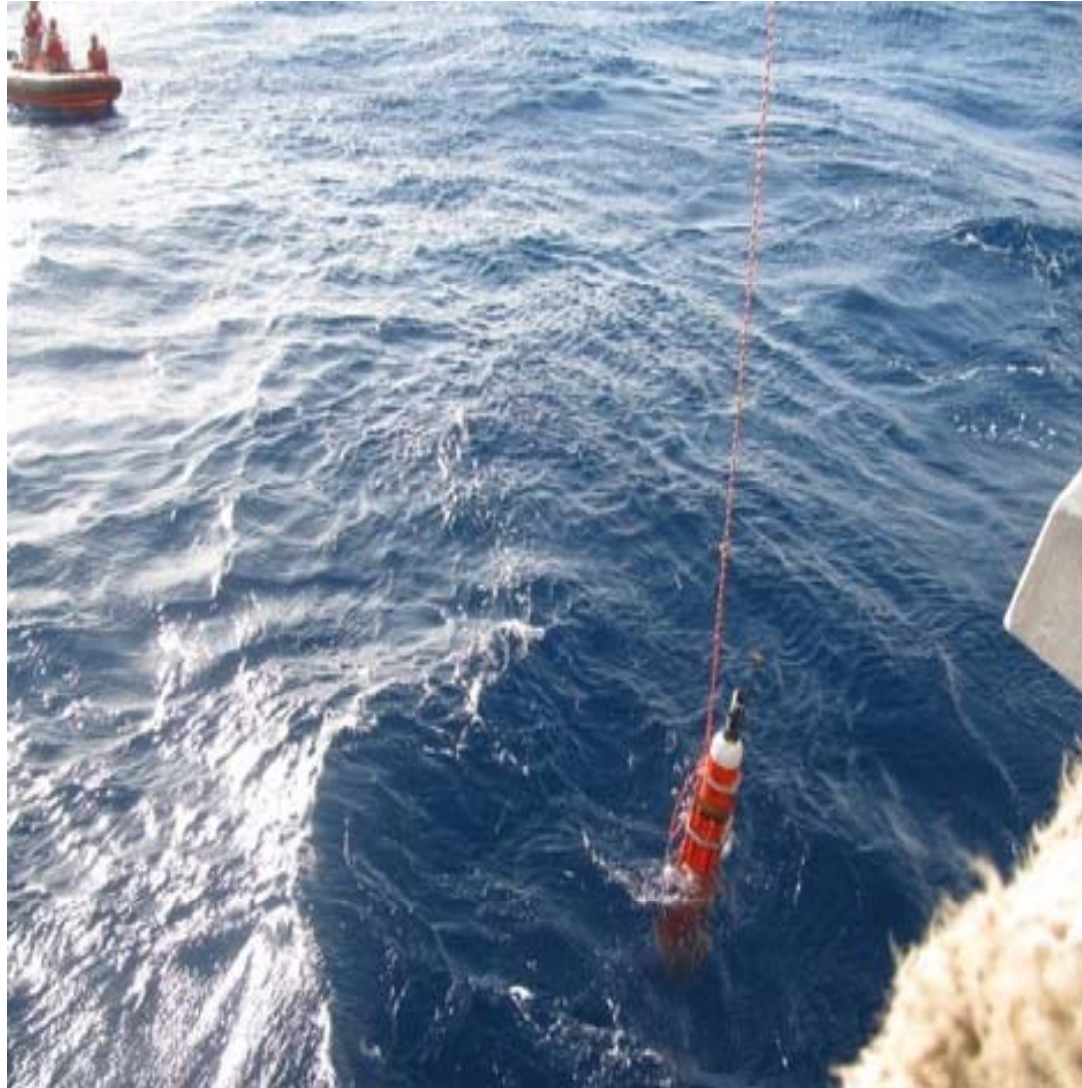
- **IS THE US LEGALLY CORRECT THAT THE BOWDITCH IS UNDERTAKING HYDROGRAPHIC SURVEYS AND IS THEREFORE NOT SUBJECT TO THE EEZ CONSENT REGIME FOR MARINE SCIENTIFIC RESEARCH?—IT DEPENDS IN PART ON WHAT DATA THE BOWDITCH COLLECTS AND WHAT IT IS USED FOR**
- **ALSO UNCLOS ARTICLE 258 WOULD SEEM TO APPLY TO BOTH THE BOWDITCH AND THE IMPECCABLE**

**CAN STATES LEGALLY PROHIBIT OR
CONSTRAIN FOREIGN MILITARY
EXERCISES OR SOME ASPECTS
THEREOF IN THEIR EEZ?**

- **THE POINT OF ALL THIS IS –**
- **THE ANSWERS ARE NOT A “SLAM DUNK” AND THERE ARE SEVERAL SIDES TO THE ARGUMENT**
- **AND EACH IS HOLDING TO THEIR INTERPRETATIONS**

- COMING
ATTRACTIONS

UNMANNED SUB WHICH CAN RUN INDEFINITELY ON OCEAN THERMAL ENERGY



THE LITTORAL COMBAT FLEET

LCS 2 Underway for Builder's Trials
(Photo courtesy of General Dynamics)



Leading edge: A mockup of Northrop Grumman's RQ-4 Global Hawk spy plane is displayed in Tokyo on March 24. AP PHOTO

**Japan gets U.S. pitch to buy spy drones
But questions remain whether sensitive tech will be exported**



- **THE DO-NOTHING OPTION**

- **WHERE THE TEXT OF A GOVERNING TREATY LEAVES MATTERS AMBIGUOUS OR UNRESOLVED, THE PRACTICE OF STATES WILL BECOME PARTICULARLY IMPORTANT IN DETERMINING THE PROPER INTERPRETATION OF THE TREATY'S PROVISIONS.**
- **IF A LARGE NUMBER OF COASTAL COUNTRIES ENACT UNILATERAL NATIONAL LEGISLATION PROHIBITING MILITARY AND INTELLIGENCE GATHERING ACTIVITIES IN AND ABOVE THEIR EEZS, THEN THE PROHIBITION AGAINST CONDUCTING SUCH EXERCISES COULD BECOME PART OF CUSTOMARY INTERNATIONAL LAW THROUGH STATE PRACTICE, DESPITE THE OPPOSITION OF A FEW COUNTRIES.**

- **AT ANOTHER END OF THE SPECTRUM THE OPTION WOULD BE TO INCREASE DIALOGUE, CBMS, AND COOPERATIVE EFFORTS AMONG THE STATES INVOLVED AND STRIVE FOR COLLECTIVE COMPROMISE AND CONSENSUS. THIS DIALOGUE MIGHT HAVE AS ITS OBJECTIVE THE DEVELOPMENT OF AGREED VOLUNTARY GUIDELINES REGARDING MILITARY AND INTELLIGENCE GATHERING ACTIVITIES IN FOREIGN EEZS.**

OPTIONS FOR ACTION

- **CHINA –US BILATERAL AGREEMENT
(THE CONFRONTATIONS HAVE STOPPED FOR THE
TIME BEING PERHAPS DUE TO A HIGH LEVEL
UNDERSTANDING—BUT THE FUNDAMENTAL
PROBLEM REMAINS AND EXTENDS BEYOND
CHINA AND THE US)**
- **THE INTERNATIONAL TRIBUNAL FOR THE LAW
OF THE SEA**
- **A REGIONAL APPROACH LED BY
ASEAN OR CHINA- ASEAN**



© KURT JONES 2003

THREAT OF USE OF FORCE

- Although some commentators interpret Article 2(4) as banning only the use of force directed at the territorial integrity or political independence of a state, the more widely held opinion is that these are merely intensifiers, and that the article constitutes a general prohibition, subject only to the exceptions stated in the Charter (self-defence and Chapter VII action by the Security Council). The latter interpretation is also supported by the historic context in which the Charter was drafted, the preamble specifically states that "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind" is a principal aim of the UN as such. This principle is now considered to be a part of customary international law, and has the effect of banning the use of armed force except for two situations authorized by the UN Charter. Firstly, the Security Council, under powers granted in articles 24 and 25, and Chapter VII of the Charter, may authorize collective action to maintain or enforce international peace and security. Secondly, Article 51 also states that: "Nothing in the present Charter shall impair the inherent right to individual or collective self-defence if an armed attack occurs against a state"

Espionage Boat Incident in the Sea Southwest of Kyushu (Image provided by the Japan Coast Guard)



- **WAS JAPAN LEGALLY CORRECT IN PURSUING AND FIRING ON WHAT TURNED OUT TO BE A NORTH KOREAN SPY SHIP IN CHINA'S EEZ?**

PEACEFUL USES/PURPOSES

- 1. THE TERM IS FOUND IN NINE PLACES IN THE TREATY BUT MOST IMPORTANT IS ARTICLE 88 WHICH PROVIDES THAT THE HIGH SEAS AND (THROUGH ARTICLE 58 (2) THE EEZ SHALL BE RESERVED FOR PEACEFUL PURPOSES. THERE IS NO DEFINITION OF THE TERM IN THE CONVENTION**
- 2. THE CONTROVERSY IS WHETHER IT ENTAILS A PROHIBITION OR LIMITATION OF ALL MILITARY ACTIVITIES, OR IF NOT, THEN WHAT PARTICULAR MILITARY ACTIVITIES ARE PROHIBITED, IF ANY**
- 3. MANY ANALYSTS CONCLUDE THAT THE CLAUSE PROHIBITS ONLY THOSE ACTIVITIES THAT THREATEN OR USE FORCE IN A MANNER INCONSISTENT WITH THE UN CHARTER**
- 4. FOR THESE ANALYSTS, THE ANSWER THAN HINGES ON WHAT CONSTITUTES A THREAT OR USE OF FORCE INCONSISTENT WITH THE CHARTER**
- 5. SOME DEVELOPING COASTAL STATES ARGUE THAT NEITHER THE CONVENTION NOR THE CHARTER FORESAW ADVANCES IN TECHNOLOGY, PARTICULARLY IN INTENSIVE AND INTRUSIVE EW AND SIGINT CAPABILITIES**
- 6. SOME ACTIVE ELINT/SIGINT CONDUCTED FROM AIRCRAFT AND SHIPS ARE DELIBERATELY INTENDED TO GENERATE RESPONSES THAT CAN BE MONITORED FOR PURPOSES OF PLANNING AN ATTACK. OTHER SIGINT ACTIVITIES ACQUIRE THE LOCATION AND TRACK SHIPS FOR THE PURPOSE OF PLANNING ELECTRONIC OR MISSILE ATTACKS AGAINST THEM. SOME INTERFERE WITH SHORE TO SEA COMMUNICATIONS OR JAM A NATION'S OR MILITARY'S ELECTRONIC SYSTEMS.**
- 7. CHINA ARGUES THAT SUCH ACTIVITIES ARE "PREPARATION OF THE BATTLEFIELD" AND THAT THESE ARE A THREAT OF USE OF FORCE AND NEED TO BE ADDRESSED**

DUE REGARD

- 1. ACCORDING TO ARTICLES 58 (1) AND 58 (3) BOTH THE COASTAL STATE AND THE USER STATE MUST HAVE DUE REGARD TO THE RIGHTS AND DUTIES OF EACH OTHER IN THE EEZ BUT THERE IS NO DEFINITION OF DUE REGARD IN THE CONVENTION**
- 2. BASED ON THE DRAFTING HISTORY, IT CAN BE INTERPETED TO MEAN THAT 1.THE MOTIVATION FOR THE ACT SHOULD NOT IMPEDE THE EXERCISE OF RIGHTS BY OTHER STATES OR INFRINGE UPON THEIR INTERESTS;2. NOT AFFECT OR IMPEDE THE EXERCISE OF RIGHTS BY OTHER STATES OR UNDERMINE THE LEGAL REGIME OF THE SEA AREA; AND 3.THE ACT SHOULD NOT RENDER THOSE RIGHTS INEFFECTIVE, IRRELEVANT, OR INVALID**
- 3. EXAMPLES THAT DO NOT PAY DUE REGARD TO THE RIGHTS OF THE COASTAL STATE MIGHT INCLUDE**
 - A LIVE WEAPONS EXERCISE THAT DOES SIGNIFICANT DAMAGE TO A STATE'S ENVIRONMENTAL OR NATURAL RESOURCES**
 - USE OF SONAR THAT VIOLATE THE LAWS OF THE COASTAL STATE**
 - INTERFERENCE WITH THE STATE'S MANAGEMENT OF ITS RESOURCES AND ENVIRONMENT INCLUDING MONITORING OR ENFORCEMENT OF THE COASTAL STATE'S LAWS**
 - A MILITARY ACTIVITY THAT INTERFERES WITH THE STATE'S PEACEFUL USE OF THE SEA, EG FISHING**

ABUSE OF RIGHTS

- **ARTICLE 300**
 - **SHALL NOT ABUSE RIGHTS**
 - **PART OF A PACKAGE WITH PEACEFUL USES OF THE SEA**
- **ONE DEFINITION IS 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 THAT CAUSES INJURY TO ANOTHER STATE**

IN PRACTICE ABUSE OF RIGHTS OCCURS WHEN

- 1. A STATE IS HINDERED IN THE ENJOYMENT OF ITS OWN RIGHTS**
- 2. A RIGHT IS EXERCISED TO AN END DIFFERENT FROM THAT FOR WHICH IT WAS CREATED**

- 3. A RIGHT IS EXERCISED IN AN ARBITRARY MANNER**

- **HOWEVER, INJURY MUST BE CAUSED**

E.G. 1. USE OF AN AREA FOR NAVIGATION THAT CAUSES INJURY TO A COASTAL STATE'S FISHING OR ENVIRONMENTAL INTERESTS

2. AN ACTIVITY UNDERTAKEN IN THE NAME OF MSR FOR NON MSR PURPOSES INJURING THE SECURITY INTERESTS OF THE COASTAL STATE

THERE ALSO CONTINUES TO BE DISAGREEMENT WHETHER SOME MILITARY INTELLIGENCE GATHERING AND 'HYDROGRAPHIC SURVEYS' IN AN EEZ ARE SCIENTIFIC RESEARCH AND SHOULD BE UNDER A CONSENT REGIME

▪

- **THE UNITED STATES AND OTHER MARITIME POWERS ARGUE THAT MILITARY INTELLIGENCE-GATHERING ACTIVITIES ('MILITARY SURVEYS') AND HYDROGRAPHIC SURVEYS ARE DISTINCT FROM MARINE SCIENTIFIC RESEARCH AND ARE THEREFORE NOT RESTRICTED BY THE PROVISIONS OF THE 1982 UNCLOS.**
- **BUT SOME ARGUE THAT BECAUSE OF THE PEACEFUL PURPOSES PROVISIONS OF THE CONVENTION, AT LEAST SOME SURVEY ACTIVITIES MAY NOT BE PERMITTED, SUCH AS THE IMPLANTING OF DEVICES WHICH ARE CAPABLE OF RENDERING INEFFECTIVE THE DEFENSES OF THE COASTAL STATE.**

- **THERE IS ALSO DISAGREEMENT ON HOW TO DEAL WITH THESE UNCERTAINTIES**

- **THE ISSUES MAY BE DEALT WITH THROUGH NATIONAL LEGISLATION. ALTHOUGH THIS IS NOT THE IDEAL, NATIONAL GOVERNMENTS MAY BE FORCED TO DEAL WITH THESE MATTERS UNILATERALLY IN ORDER TO PROTECT THEIR SECURITY AND OTHER INTERESTS.**

—

- **WHERE THE TEXT OF A GOVERNING TREATY LEAVES MATTERS AMBIGUOUS OR UNRESOLVED, THE PRACTICE OF STATES WILL BECOME PARTICULARLY IMPORTANT IN DETERMINING THE PROPER INTERPRETATION OF THE TREATY'S PROVISIONS. IF A LARGE NUMBER OF COASTAL COUNTRIES ENACT UNILATERAL NATIONAL LEGISLATION PROHIBITING THE EXERCISE OF MILITARY AND INTELLIGENCE GATHERING ACTIVITIES IN AND ABOVE THEIR EEZ, THEN THE PROHIBITION AGAINST CONDUCTING SUCH EXERCISES COULD BECOME PART OF CUSTOMARY INTERNATIONAL LAW THROUGH STATE PRACTICE, DESPITE THE OPPOSITION OF A FEW COUNTRIES.**
- **ANOTHER OPTION IS BILATERAL OR REGIONAL ARRANGEMENTS BETWEEN MARITIME POWERS AND COASTAL COUNTRIES AS WELL AS BETWEEN ADJACENT AND OPPOSITE NEIGHBORING COUNTRIES. BUT THEN THE RULES MAY DIFFER BETWEEN VARIOUS BILATERAL OR REGIONAL ARRANGEMENTS**