TERMS OF REFERENCE FOR AN ARF EEPS STUDY ON LESSONS-LEARNT AND BEST PRACTICES CONCERNING INCIDENTS AT SEA

Background

The *Terms of Reference for the ARF Experts/Eminent Persons (EEPs)[1]* describe a role for the EEPs in providing non-binding and professional views or recommendations to the ARF participants, when they are requested to undertake in-depth studies and research or serve as resource persons in an ARF meeting on issues of relevance to their expertise. The ARF Chair or any ARF participant may propose to activate the EEPs for the above-mentioned tasks. Such proposals will be collected by the ARF Chair and circulated to all ARF participants. In the absence of any objection from concerned ARF participants, the proposals will be put into effect.

In 2015 the ARF EEPs recommended that the "existing study on preventive diplomacy be updated and, in particular, that the ASEAN Secretariat be tasked with compiling a list of lessons-learnt and best practices concerning maritime incidents in the region."[2] In response, ARF Senior Officials invited the EEPs "to provide further details on the initiative, including submitting a terms of reference or concept paper.'[3]

These Terms of Reference have been prepared in response to this invitation. They propose that the EEPs, rather than the ASEAN Secretariat, be activated to undertake a study on lessons-learnt and best practices concerning incidents at sea, given the expertise which resides within the EEPs group on these matters.

OBJECTIVES

The objectives of this activity are to provide non-binding and professional views from ARF EEPs to ARF participants on lessons-learnt and best practices concerning maritime incidents in the region, including recommendations on measures to prevent and manage incidents at sea.

ISSUES TO BE STUDIED

Background

Incidents at sea involving warships, patrol vessels, military aircraft, fishing vessels or research vessels of regional countries occur regularly. Incidents have also involved naval vessels, naval auxiliaries and military aircraft of extra-regional countries.

This trend is likely to continue unless effective measures are put in place to prevent and manage such incidents. While serious escalation of tensions has not occurred so far as a consequence of these incidents, a situation could develop in the future leading to the possible loss of life, or even the sinking of a vessel. The risks of such a situation

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[1] *Co-Chair's Paper on the Terms of Reference for the ARF Experts/Eminent Persons (EEPs),* para 4.
[2] *Co-Chairs' Summary Report of the 9th Meeting of the ASEAN Regional Forum Experts and Eminent Persons*, para 46, recommendation (b).
[3] *Summary Report ASEAN Regional Forum Senior Officials' Meeting, Kuching, Sarawak, Malaysia, 10 June 2015*, para 50.

are increasing as naval activity in the region increases and more warships, patrol vessels and surveillance aircraft are deployed into disputed waters.

Further Study

The following is an indicative list of issues for further study:

- *Existing arrangements.* Annex A provides a list of current regional agreements and arrangements concerning incidents at sea. Annex B lists current regional forums that consider issues associated with incidents at sea.
- *Prospective Policy Level Agreement.* Existing agreements concerning incidents at sea are mainly documents covering actions at the tactical level i.e. for implementing by ships and aircraft at sea. A policy level agreement for implementation at a strategic and operational level by government authorities might also be considered.
- *Non-Naval vessels and aircraft.* Existing agreements only apply to naval vessels and aircraft, and not for example, to coast guard patrol vessels.
- *Submarines.* Existing agreements do not apply to submarine operations. This is a serious limitation with increased numbers of submarines in the region bringing greater risks of serious incidents at sea. An incident involving a submarine could have serious consequences.
- *Law of the Sea Issues.* Law of the sea issues are a major area of disagreement. Major differences relate to claims to regulate the activities of foreign military forces operating in another country's exclusive economic zone (EEZ), and claims to require prior notification or authorisation of innocent passage by foreign warships through the territorial sea. However, these differences are unlikely to be reconciled in the foreseeable future.
- *Nature of Agreements.* The existing agreements are mostly voluntary and non-binding. No enforcement mechanism is available and there is no apparent follow-up on lessons learned after an incident has occurred.
- *Regular consultative arrangements.* These are important to discuss the state of play with agreements and to follow up on any incidents that have occurred.
- *Common Procedures and Language.* Common communications procedures and language have been shown to be important elements of any effective agreement.
- *Law enforcement operations.* Issues related to maritime law enforcement operations such as:
    - Live fire or other actions endangering human life should not be used;
    - Countries should exchange information and contact details for agencies conducting law enforcement operations; and
    - The importance of law enforcement cooperation in border areas and areas of overlapping maritime jurisdiction.
- *Dangerous Behaviour.* An agreement might be possible to refrain from dangerous behaviour. This could possibly be based on the US-USSR Agreement on the Prevention of Dangerous Military Activities.
- *Managing Incidents.* A 'whole of government' approach is important for managing incidents at sea, covering maritime law enforcement, fisheries, marine environmental protection, and other relevant agencies. Similarly, a

principle might be established for countries to accept responsibility for the actions of all their national flag vessels both state and non-state.

METHODOLOGY

A working group of EEPs with expertise in maritime issues will be convened by ARF EEP co-chairs.

These EEPs will work together to draft a paper on lessons-learnt and best practices concerning maritime incidents in the region, including recommendations on measures to prevent and manage incidents at sea.

The ARF EEP co-chairs will determine the chairmanship and composition of the working group, membership of which will be a on a voluntary basis.

The working group will exchange drafts and comments by email.

Suggested EEPs recommendation to the ARF:

> *The EEPs recommend that the ARF Chair propose that the EEPs undertake a study on lessons-learnt and best practices concerning incidents at sea, in accordance with the following terms of reference.*

> *The aim of the study should be to develop a list of lessons-learnt and best practices on procedures concerning maritime incidents in the region with a view to recommending what action might be possible to improve on current agreements and arrangements.*

> *The study should:*
> - *verify the list of agreements and other arrangements in Annex A, deleting from the list and/or adding to it as required;*
> - *identify the lessons learnt and best practices based on experience with the existing measures; and*
> - *recommend possible further measures, including a possible policy-level agreement that would assist in preventing and managing incidents at sea.*

TIMEFRAME

It is proposed that the working group completes its paper for consideration by all EEPs at the 2017 EEPs meeting in Australia.

It is envisaged that, subject to agreement by EEPs at their meeting in Australia in 2017, the paper will be submitted to the 2017 ARF SOM with a view to its transmission to ARF Foreign Ministers at the 2017 ASEAN Regional Forum.

FUNDING

EEPs' participation in the working group activities will be self-funded or funded by their own ARF participating country.

ANNEX A

CURRENT MEASURES

Regional Agreements

- The 2001Malaysian-Indonesian agreement for Preventing Incidents at Sea (MALINDO);
- 2002 Declaration on Conduct of Parties in the South China Sea (DOC);
- Western Pacific Naval Symposium (WPNS) Code for Unplanned Encounters between Ships (CUES) agreed in 2014 (the Indian Ocean Naval Symposium (IONS) has also agreed to adopt CUES);
- Bilateral 'Cold War' type INCSEA agreements between Russia and the US (originally 1972)[4], South Korea (1994) and Japan (1993);
- 1988 US-USSR Joint Statement on Uniform Acceptance of Rules of International Law Governing Innocent Passage;
- 1989 US-USSR Agreement on the Prevention of Dangerous Military Activities;
- 1998 US-China Military Maritime Consultative Agreement (MMCA);
- 2011 Agreement between China and Vietnam on basic principles guiding settlement of sea-related issues;
- 2015 Agreement between Russia and North Korea to prevent dangerous military activities
- 2014 Memorandum of Understanding (MOU) between US Department of Defense and China's Ministry of National Defense on Notification of Major Military Activities Confidence-Building Measures Mechanism (MOU-CBMM); and
- 2014 U.S.-China Memorandum of Understanding on the Rules of Behavior for the Safety of Air and Maritime Encounters (MOU-Rules). This has three annexes:
  Annex I: Terms of Reference for Safety of Air and Maritime Encounters
  Annex II: Rules of Behavior for Safety of Surface-to-Surface Encounters
  Annex III: Rules of Behavior for Safety of Air-to-Air Encounters

Other Regional Measures

- *Hot Lines.* Several hot lines or Direct Communications Links (DCL) have been set up across the region, most recently a defence hot line between ASEAN member countries, to provide a crisis management mechanism and reduce the risks of incidents at sea. As well as hot lines between military headquarters, hot lines have been effective between coast guards such as in Northeast Asia between the coast guards of China, Japan and South Korea.
- *Crisis Management Mechanisms.* To assist in managing the operational situation around disputed islands in the East China Sea, Japan and China have established discussions on a maritime communication mechanism (MCM) to improve communication and crisis management and serve as a CBM. The

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[4] The INCSEA Agreement between the US and the Russian Federation originated in 1972 but was updated in 1997 and 1998.

mechanism might comprise regular meetings, hot lines and an agreement on common radio frequencies between military vessels and aircraft

- *Information Sharing Centres.* The Republic of Singapore Navy has established the Information Fusion Centre (IFC) with international liaison officers (ILOs) from around 20 countries. While the IFC is not mandated to act as a crisis management facility, it does provide a possible link between respective national headquarters through its ILOs. Singapore also has long-standing navy-to-navy "ops to ops" links with its neighbours to coordinate maritime security in the Malacca and Singapore Straits.

- *Bilateral Fisheries Agreements.* In Northeast Asia, three bilateral fisheries agreements are in force: between South Korea and Japan (1999); between China and Japan (2000); and between South Korea and China (2001). These are all intended to deal with fisheries issues pending delimitation of boundaries of EEZs by setting up joint fishing zones in the overlapping areas. They include measures that should help prevent incidents between fishing vessels and/or fisheries enforcement vessels of the parties. In Southeast Asia, China and Vietnam entered into an agreement in 2000 on joint fisheries management in the Gulf of Tonkin.

- *Other Bilateral Arrangements.* Other bilateral arrangements exist in the region that potentially contribute to preventing and managing incidents at sea, including joint development zones and joint or coordinated patrols in border areas. The Jakarta Treaty of 1982 between Indonesia and Malaysia provides Malaysia with a right of access and communication through Indonesian archipelagic waters between East and West Malaysia.

ANNEX B

Regional Forums

The following regional forums consider issues concerning incidents at sea:

- *ARF Inter-Sessional Meeting on Maritime Security (ARF ISM).* The ARF-ISM has developed successive ARF Work Plans for Maritime Security. The current plan is focused on the priority areas of shared awareness and information-sharing, confidence-building measures (CBMs) based on international and regional legal frameworks, and capacity-building for maritime law enforcement.
- *ASEAN Defence Ministers Meeting Plus (ADMM Plus) Maritime Security Expert Working Group (MSEWG).* The MSEWG is attended mainly by defence officials and naval officers. It focusses on military cooperation, operational issues and confidence-building.
- *ASEAN Maritime Forum (AMF).* This was established to improve maritime security and cooperation within ASEAN. It addresses the full range of maritime issues, including law of the sea issues.
- *Expanded ASEAN Maritime Forum (EAMF).* This includes all members of the East Asian Summit (EAS). It brings into play national maritime administrations, as well as naval and coast guard officers and diplomats, to look at a full range of maritime issues.
- *Western Pacific Naval Symposium (WPNS).* This is a major forum for naval dialogue and cooperation bringing together leaders from the navies of the Western Pacific to discuss issues of common concern.[5]

With incidents also involving coast guard vessels, other regional forums are also relevant:

- *Heads of Asian Coast Guard Agencies Meetings (HACGAM).* These are assuming greater importance, particularly as coast guards expand in the region and are increasingly used for sovereignty assertion in disputed waters.[6] These meetings were established in 2004 to provide a combined regional response to piracy, but have since widened their scope to include other maritime security issues.
- *North Pacific Coast Guard Forum (NPCGF).* This was initiated by the Japn Coast Guard in 2000 as a venue to share information on matters related to combined operations, illegal drug trafficking, maritime security, fisheries enforcement, illegal migration, and maritime domain awareness.[7]

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[5] Current WPNS members are: Australia, Brunei, Cambodia, Canada, Chile, China, France, Indonesia, Japan, the Republic of Korea (ROK), Malaysia, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Tonga, Thailand, Singapore, the U.S. and Vietnam, as well as four observer countries — Bangladesh, India, Mexico and Pakistan.

[6] Current HACGAM participants are: Australia, Bangladesh, Brunei, Cambodia, China, Hong Kong-China, India, Indonesia, Japan, ROK, Laos, Malaysia, Maldives, Myanmar, Pakistan, Philippines, Singapore, Sri Lanka, Thailand and Vietnam.

[7] Current NPCGF membership includes agencies from Canada, China, Japan, ROK, Russia, and the United States.

- *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).*[8] The ReCAAP Information Sharing Centre (ISC) in Singapore exchanges information on incidents of piracy and armed robbery against ships and supports capacity-building among contracting partners and elsewhere. The coast guard or national maritime administration are mostly its focal point of contact in the contracting parties rather than the navy.

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[8] The twenty Contracting Parties to ReCAAP are Australia, Bangladesh, Brunei, Cambodia, China, Denmark, India, Japan, ROK, Laos, Myanmar, Netherlands, Norway, Philippines, Singapore, Sri Lanka, Thailand, U.K., U.S., and Viet Nam.