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# **U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress**

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## Summary

Over the past 10 to 15 years, the South China Sea (SCS) has emerged as an arena of U.S.-China strategic competition. China's actions in the SCS—including extensive island-building and base-construction activities at sites that it occupies in the Spratly Islands, as well as actions by its maritime forces to assert China's claims against competing claims by regional neighbors such as the Philippines and Vietnam—have heightened concerns among U.S. observers that China is gaining effective control of the SCS, an area of strategic, political, and economic importance to the United States and its allies and partners. Actions by China's maritime forces at the Japan-administered Senkaku Islands in the East China Sea (ECS) are another concern for U.S. observers. Chinese domination of China's near-seas region—meaning the SCS and ECS, along with the Yellow Sea—could substantially affect U.S. strategic, political, and economic interests in the Indo-Pacific region and elsewhere.

Potential broader U.S. goals for U.S.-China strategic competition in the SCS and ECS include but are not necessarily limited to the following: fulfilling U.S. security commitments in the Western Pacific, including treaty commitments to Japan and the Philippines; maintaining and enhancing the U.S.-led security architecture in the Western Pacific, including U.S. security relationships with treaty allies and partner states; maintaining a regional balance of power favorable to the United States and its allies and partners; defending the principle of peaceful resolution of disputes and resisting the emergence of an alternative “might-makes-right” approach to international affairs; defending the principle of freedom of the seas, also sometimes called freedom of navigation; preventing China from becoming a regional hegemon in East Asia; and pursuing these goals as part of a larger U.S. strategy for competing strategically and managing relations with China.

Potential specific U.S. goals for U.S.-China strategic competition in the SCS and ECS include but are not necessarily limited to the following: dissuading China from carrying out additional base-construction activities in the SCS, moving additional military personnel, equipment, and supplies to bases at sites that it occupies in the SCS, initiating island-building or base-construction activities at Scarborough Shoal in the SCS, declaring straight baselines around land features it claims in the SCS, or declaring an air defense identification zone (ADIZ) over the SCS; and encouraging China to reduce or end operations by its maritime forces at the Senkaku Islands in the ECS, halt actions intended to put pressure against Philippine-occupied sites in the Spratly Islands, provide greater access by Philippine fisherman to waters surrounding Scarborough Shoal or in the Spratly Islands, adopt the U.S./Western definition regarding freedom of the seas, and accept and abide by the July 2016 tribunal award in the SCS arbitration case involving the Philippines and China.

The issue for Congress is whether the Administration's strategy for competing strategically with China in the SCS and ECS is appropriate and correctly resourced, and whether Congress should approve, reject, or modify the strategy, the level of resources for implementing it, or both. Decisions that Congress makes on these issues could substantially affect U.S. strategic, political, and economic interests in the Indo-Pacific region and elsewhere.

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## Introduction

This report provides background information and issues for Congress regarding U.S.-China strategic competition in the South China Sea (SCS) and East China Sea (ECS). Over the past 10 to 15 years, the South China Sea (SCS) has emerged as an arena of U.S.-China strategic competition.<sup>1</sup> China's actions in the SCS have heightened concerns among U.S. observers that China is gaining effective control of the SCS, an area of strategic, political, and economic importance to the United States and its allies and partners. Actions by China's maritime forces at the Japan-administered Senkaku Islands in the East China Sea (ECS) are another concern for U.S. observers. Chinese domination of China's near-seas region—meaning the SCS and ECS, along with the Yellow Sea—could substantially affect U.S. strategic, political, and economic interests in the Indo-Pacific region and elsewhere.

The issue for Congress is whether the Administration's strategy for competing strategically with China in the SCS and ECS is appropriate and correctly resourced, and whether Congress should approve, reject, or modify the strategy, the level of resources for implementing it, or both. Decisions that Congress makes on these issues could substantially affect U.S. strategic, political, and economic interests in the Indo-Pacific region and elsewhere.

For a brief overview of maritime territorial disputes in the SCS and ECS that involve China, see "Maritime Territorial Disputes," below, and **Appendix A**. Other CRS reports provide additional and more detailed information on these disputes.<sup>2</sup>

## Background

### U.S. Interests in SCS and ECS

#### Overview

Although disputes in the SCS and ECS involving China and its neighbors may appear at first glance to be disputes between faraway countries over a few rocks and reefs in the ocean that are of seemingly little importance to the United States, the SCS and ECS can engage U.S. interests for a variety of strategic, political, and economic reasons, including but not necessarily limited to those discussed in the sections below.

#### Specific Elements

##### *U.S. Regional Allies and Partners, and U.S. Regional Security Architecture*

The SCS, ECS, and Yellow Sea border three U.S. treaty allies: Japan, South Korea, and the Philippines. (For additional information on the U.S. security treaties with Japan the Philippines, see **Appendix B**.) In addition, the SCS and ECS (including the Taiwan Strait) surround Taiwan,

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<sup>1</sup> For more on U.S. strategic competition with China and Russia, also known as great power competition, see CRS Report R43838, *Great Power Competition: Implications for Defense—Issues for Congress*, by Ronald O'Rourke.

<sup>2</sup> See CRS In Focus IF10607, *China Primer: South China Sea Disputes*, by Ben Dolven, Susan V. Lawrence, and Ronald O'Rourke; CRS Report R42930, *Maritime Territorial Disputes in East Asia: Issues for Congress*, by Ben Dolven, Mark E. Manyin, and Shirley A. Kan; CRS Report R44072, *Chinese Land Reclamation in the South China Sea: Implications and Policy Options*, by Ben Dolven et al.; CRS Report R43894, *China's Air Defense Identification Zone (ADIZ)*, by Ian E. Rinehart and Bart Elias.

regarding which the United States has certain security-related policies under the Taiwan Relations Act (H.R. 2479/P.L. 96-8 of April 10, 1979), and the SCS borders Southeast Asian nations that are current, emerging, or potential U.S. partner countries, such as Singapore, Vietnam, and Indonesia.

In a conflict with the United States, Chinese bases in the SCS and forces operating from them<sup>3</sup> would add to a network of Chinese anti-access/area-denial (A2/AD) capabilities intended to keep U.S. military forces outside the first island chain (and thus away from China's mainland and Taiwan).<sup>4</sup> Chinese bases in the SCS and forces operating from them could also help create a bastion (i.e., a defended operating sanctuary) in the SCS for China's emerging sea-based strategic deterrent force of nuclear-powered ballistic missile submarines (SSBNs).<sup>5</sup> In a conflict with the United States, Chinese bases in the SCS and forces operating from them would be vulnerable to U.S. attack.<sup>6</sup> Attacking the bases and the forces operating from them, however, would tie down the attacking U.S. forces for a time at least, delaying the use of those U.S. forces elsewhere in a larger conflict, and potentially delay the advance of U.S. forces into the SCS. One analyst has argued that destroying the bases and countering the forces operating from them would take much more effort by U.S. forces than is commonly believed.<sup>7</sup>

Short of a conflict with the United States, Chinese bases in the SCS, and more generally, Chinese domination over or control of its near-seas region could help China to do one or more of the following on a day-to-day basis:

- control fishing operations, oil and gas exploration activities, and seabed internet cable-laying operations<sup>8</sup> in the SCS—a body of water with an area more than twice that of the Mediterranean Sea;<sup>9</sup>

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<sup>3</sup> For an overview of some of the A2/AD capabilities that China has built on sites that it occupies in the SCS, see J. Michael Dahm, *Introduction to South China Sea Military Capability Studies*, Johns Hopkins Applied Physics Laboratory, July 2020, 17 pp. See also Zachary Haver (Insikt Group), *The People's Liberation Army in the South China Sea: An Organizational Guide*, Recorded Future, January 19, 2022, 32 pp.

<sup>4</sup> The term *first island chain* refers to a string of islands, including Japan and the Philippines, that encloses China's near-seas region. The term *second island chain*, which reaches out to Guam, refers to a line that can be drawn that encloses both China's near-seas region and the Philippine Sea between the Philippines and Guam. For a map of the first and second island chains, see Department of Defense, *Military and Security Developments Involving the People's Republic of China 2022, Annual Report to Congress*, released November 29, 2022, p. 67. The exact position and shape of the lines demarcating the first and second island chains often differ from map to map.

<sup>5</sup> See, for example, Felix K. Chang, "China's Maritime Intelligence, Surveillance, and Reconnaissance Capability in the South China Sea," Foreign Policy Research Institute, May 5, 2021.

<sup>6</sup> See, for example, Kristin Huang, "Beijing's South China Sea Military Bases 'Are Vulnerable to Attack and Will Be of Little Use in a War,'" *South China Morning Post*, December 6, 2020; James Griffiths, "Beijing May Have Built Bases in the South China Sea, but that Doesn't Mean It Can Defend Them, Report Claims," *CNN*, December 7, 2020; ANI, "Do Beijing's Artificial Islands in the South China Sea Represent An Asset to Its Military" *Times, of India*, June 28, 2021.

<sup>7</sup> See Gregory B. Poling, "The Conventional Wisdom on China's Island Bases Is Dangerously Wrong," *War on the Rocks*, January 10, 2020. See also John Power, "Has the US Already Lost the Battle for the South China Sea?" *South China Morning Post*, January 18, 2020. See also David Geaney, "China's Island Fortifications Are a Challenge to International Norms," *Defense News*, April 17, 2020.

<sup>8</sup> Regarding seabed internet cable-laying operations, see, for example, Anna Gross, Alexandra Heal, Demetri Sevastopulo, Kathrin Hille, and Mercedes Ruehl, "China Exerts Control over Internet Cable Projects in South China Sea," *Financial Times*, March 13 2023.

<sup>9</sup> The National Oceanic and Atmospheric Administration (NOAA) states that the area of the South China Sea is 6.963 million square kilometers (about 2.688 million square miles)—more than twice that of the Mediterranean Sea, which is 2.967 million square kilometers (about 1.146 million square miles). (National Oceanic and Atmospheric Administration, National Geophysical Data Center, "World Ocean Volumes," accessed May 31, 2023, at <https://www.ncei.noaa.gov/sites/g/files/anmtlf171/files/2023-01/World%20Ocean%20Volumes.pdf>.)

- coerce, intimidate, or put political pressure on other countries bordering on the SCS;
- announce and enforce an air defense identification zone (ADIZ) over the SCS;
- announce and enforce a maritime exclusion zone (i.e., a blockade) around Taiwan;<sup>10</sup>
- facilitate the projection of Chinese military presence and political influence further into the Western Pacific; and
- help achieve a broader goal of becoming a regional hegemon in its part of Eurasia.

In light of some of the preceding points, Chinese bases in the SCS, and more generally, Chinese domination over or control of its near-seas region could complicate the ability of the United States to

- intervene militarily in a crisis or conflict between the People’s Republic of China and Taiwan;
- fulfill U.S. obligations under U.S. defense treaties with Japan and the Philippines and South Korea;
- operate U.S. forces in the Western Pacific for various purposes, including maintaining regional stability, conducting engagement and partnership-building operations, responding to crises, and executing war plans; and
- prevent the emergence of China as a regional hegemon in its part of Eurasia.<sup>11</sup>

A reduced U.S. ability to do one or more of the above could encourage countries in the region to reexamine their own defense programs and foreign policies, potentially leading to a further change in the region’s security architecture. Some observers believe that China is trying to use disputes in the SCS and ECS to raise doubts among U.S. allies and partners in the region about the dependability of the United States as an ally or partner, or to otherwise drive a wedge between the United States and its regional allies and partners, so as to weaken the U.S.-led regional security architecture and thereby facilitate greater Chinese influence over the region.

Some observers remain concerned that maritime territorial disputes in the ECS and SCS could lead to a crisis or conflict between China and a neighboring country such as Japan or the Philippines, and that the United States could be drawn into such a crisis or conflict as a result of obligations the United States has under bilateral security treaties with Japan and the Philippines.

### ***Principle of Nonuse of Force or Coercion***

A key element of the international order that the United States and its allies established in the years after World War II is the principle that force or coercion should not be used as a means of settling disputes between countries, and certainly not as a routine or first-resort method. Some observers are concerned that China’s actions in SCS and ECS challenge this principle and—along with Russia’s actions in Ukraine—could help reestablish the very different principle of “might

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<sup>10</sup> For a discussion of this possibility, see Lyle J. Goldstein, “China Could Announce a ‘Total Exclusion Zone’ at Any Time,” *National Interest*, October 25, 2018.

<sup>11</sup> U.S. policymakers for the past several decades have chosen to pursue, as a key element of U.S. national strategy, a goal of preventing the emergence of regional hegemons in Eurasia. For additional discussion, see CRS In Focus IF10485, *Defense Primer: Geography, Strategy, and U.S. Force Design*, by Ronald O’Rourke.

makes right” (i.e., the law of the jungle) as a routine or defining characteristic of international relations.<sup>12</sup>

### *Principle of Freedom of the Seas*

Another key element of the post-World War II international order is the principle of freedom of the seas, meaning the treatment of the world’s seas under international law as international waters (i.e., as a global commons), and freedom of operations in international waters. Freedom of the seas is sometimes referred to as freedom of navigation, although the term freedom of navigation is sometimes defined—particularly by parties who might not support freedom of the seas—in a narrow fashion, to include merely the freedom for commercial ships to pass through sea areas, as opposed to the freedom for both civilian and military ships and aircraft to conduct various activities at sea or in the airspace above. A more complete way to refer to the principle of freedom of the seas, as stated in the Department of Defense’s (DOD’s) annual Freedom of Navigation (FON) report, is “the rights, freedoms, and uses of the sea and airspace guaranteed to all nations by international law.”<sup>13</sup> DOD stated in 2015 that freedom of the seas

includes more than the mere freedom of commercial vessels to transit through international waterways. While not a defined term under international law, the Department uses “freedom of the seas” to mean all of the rights, freedoms, and lawful uses of the sea and airspace, including for military ships and aircraft, recognized under international law. Freedom of the seas is thus also essential to ensure access in the event of a crisis.<sup>14</sup>

The principle of freedom of the seas dates back about 400 years, to the early 1600s,<sup>15</sup> and is reflected in the United Nations Convention on the Law of the Sea (UNCLOS), Article 89 of which states, “No State may validly purport to subject any part of the high seas to its sovereignty.” The principle of freedom of the seas has long been a matter of importance to the United States. DOD stated in 2018 that

Throughout its history, the United States has asserted a key national interest in preserving the freedom of the seas, often calling on its military forces to protect that interest. Following independence, one of the U.S. Navy’s first missions was to defend U.S. commercial vessels in the Atlantic Ocean and Mediterranean Sea from pirates and other maritime threats. The United States went to war in 1812, in part, to defend its citizens’ rights to commerce on the seas. In 1918, President Woodrow Wilson named “absolute freedom of navigation upon the seas” as one of the universal principles for which the United States and other nations were fighting World War I. Similarly, before World War

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<sup>12</sup> See, for example, Dan Lamothe, “Navy Admiral Warns of Growing Sense That ‘Might Makes Right’ in Southeast Asia,” *Washington Post*, March 16, 2016. Related terms and concepts include the law of the jungle or the quotation from the Melian Dialogue in Thucydides’ *History of the Peloponnesian War* that “the strong do what they can and the weak suffer what they must.”

<sup>13</sup> Department of Defense, Department of Defense Report to Congress, Annual Freedom of Navigation Report, Fiscal Year 2021, Pursuant to Section 1275 of the National Defense Authorization Act for Fiscal Year (FY) 2017 (P.L. 114-328), as Amended, generated on December 2, 2021, PDF page 4 of 9.

<sup>14</sup> Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 2.

<sup>15</sup> The idea that most of the world’s seas should be treated as international waters rather than as a space that could be appropriated as national territory dates back to Hugo Grotius (1583-1645), a founder of international law, whose 1609 book *Mare Liberum* (“The Free Sea”) helped to establish the primacy of the idea over the competing idea, put forth by the legal jurist and scholar John Seldon (1584-1654) in his book 1635 book *Mare Clausum* (“Closed Sea”), that the sea could be appropriated as national territory, like the land. For further discussion, see “Hugo Grotius’ ‘Mare Liberum’—400<sup>th</sup> Anniversary,” *International Law Observer*, March 10, 2009.



II, President Franklin Roosevelt declared that our military forces had a “duty of maintaining the American policy of freedom of the seas.”<sup>16</sup>

DOD similarly stated in 2019 that

Since its founding, the United States has stood for—and fought for—freedom of the seas. As a result of that commitment, freedom of navigation has been enshrined as a fundamental tenet of the rules-based international order for the last 75 years. In that time, it has proved essential to global security and stability and the prosperity of all nations.<sup>17</sup>

Some observers are concerned that China’s interpretation of law of the sea and its actions in the SCS pose a significant challenge to the principle of freedom of the seas. Matters of particular concern in this regard include China’s so-called nine-dash map of the SCS, China’s apparent narrow definition of freedom of navigation, and China’s position that coastal states have the right to regulate the activities of foreign military forces in their exclusive economic zones (EEZs) (see “China’s Approach to the SCS and ECS,” below, and **Appendix A** and **Appendix E**).<sup>18</sup>

Observers are concerned that a challenge to freedom of the seas in the SCS could have implications for the United States not only in the SCS, but around the world, because international law is universal in application, and a challenge to a principle of international law in one part of the world, if accepted, could serve as a precedent for challenging it in other parts of the world. In general, limiting or weakening the principle of freedom of the seas could represent a departure or retreat from the roughly 400-year legal tradition of treating the world’s oceans as international waters (i.e., as a global commons) and as a consequence alter the international legal regime governing sovereignty over much of the surface of the world.<sup>19</sup>

More specifically, if China’s position on the issue of whether coastal states have the right to regulate the activities of foreign military forces in their EEZs were to gain greater international acceptance under international law, it could substantially affect U.S. naval operations not only in the SCS, but around the world, which in turn could substantially affect the ability of the United States to use its military forces to defend various U.S. interests overseas. Significant portions of

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<sup>16</sup> Department of Defense, *Department of Defense Report to Congress, Annual Freedom of Navigation Report, Fiscal Year 2018, Pursuant to Section 1275 of the National Defense Authorization Act for Fiscal Year 2018*, December 31, 2018 (generated February 28, 2019), p. 1.

<sup>17</sup> Department of Defense, *Department of Defense Report to Congress, Annual Freedom of Navigation Report, Fiscal Year 2019, Pursuant to Section 1275 of the National Defense Authorization Act for Fiscal Year (FY) 2017 (P.L. 114-328)*, generated February 28, 2020, p. 1. DOD similarly stated in 2019 in another document that

Throughout our history, the United States has asserted a key national interest in preserving the freedom of the seas, and has often relied on the U.S. military forces to protect that interest. As President Ronald Reagan said in releasing the U.S. Oceans Policy in 1983, “we will not acquiesce in unilateral actions of other states designed to restrict the rights and freedoms of the international community in navigation and overflight.”

(Department of Defense, *Indo-Pacific Strategy Report, Preparedness, Partnerships, and Promoting a Networked Region*, June 1, 2019, p. 43.)

<sup>18</sup> A country’s EEZ includes waters extending up to 200 nautical miles from its land territory. EEZs were established as a feature of international law by United Nations Convention on the Law of the Sea (UNCLOS). Coastal states have the right UNCLOS to regulate foreign economic activities in their own EEZs.

<sup>19</sup> See, for example, Peter A. Dutton, “China Is Rewriting the Law of the Sea,” *Foreign Policy*, June 10, 2023; James Stavridis, “Russia-U.K. Standoff Shows the New War at Sea Has Gone Global,” *Bloomberg*, July 2, 2021; James Holmes, “Do Russia Or China Have ‘Limited’ Or ‘Unlimited’ Political Goals?” *19FortyFive*, April 4, 2021; Malcolm Jorgensen, “China Is Overturning the Rules-Based Order from Within,” *Interpreter*, August 12, 2020; James Holmes, “China Wants Ownership of the South China Sea. Here’s Why That Can’t Happen,” *National Interest*, July 17, 2020; Lyle J. Goldstein, “China Studies the Contours of the Gray Zone; Beijing Strategists Go to School on Russian Tactics in the Black Sea,” *National Interest*, August 27, 2019; Roncevert Ganan Almond, “The Extraterrestrial [Legal] Impact of the South China Sea Dispute,” *The Diplomat*, October 3, 2017.

the world's oceans are claimable as EEZs, including high-priority U.S. Navy operating areas in the Western Pacific, the Persian Gulf, and the Mediterranean Sea.<sup>20</sup> The legal right of U.S. naval forces to operate freely in EEZ waters—an application of the principle of freedom of the seas—is important to their ability to perform many of their missions around the world, because many of those missions are aimed at influencing events ashore, and having to conduct operations from outside a country's EEZ (i.e., more than 200 miles offshore) would reduce the inland reach and responsiveness of U.S. ship-based sensors, aircraft, and missiles, and make it more difficult for the United States to transport Marines and their equipment from ship to shore. Restrictions on the ability of U.S. naval forces to operate in EEZ waters could potentially require changes (possibly very significant ones) in U.S. military strategy, U.S. foreign policy goals, or U.S. grand strategy.<sup>21</sup>

### ***Trade Routes and Hydrocarbons***

Major commercial shipping routes pass through the SCS, which links the Western Pacific to the Indian Ocean and the Persian Gulf. As of 2016, an estimated \$3.4 trillion worth of international shipping trade passed through the SCS each year.<sup>22</sup> DOD states that “the South China Sea plays an important role in security considerations across East Asia because Northeast Asia relies heavily on the flow of oil and commerce through South China Sea shipping lanes, including more than 80 percent of the crude oil [flowing] to Japan, South Korea, and Taiwan.”<sup>23</sup> In addition, the ECS and SCS contain potentially significant oil and gas exploration areas.<sup>24</sup>

<sup>20</sup> The National Oceanic and Atmospheric Administration (NOAA) calculates that EEZs account for about 30.4% of the world's oceans. (See “Comparative Sizes of the Various Maritime Zones” at the end of “Maritime Zones and Boundaries,” accessed May 31, 2023, at <https://www.noaa.gov/maritime-zones-and-boundaries>, which states that EEZs account for 101.9 million square kilometers of the world's approximately 335.0 million square kilometers of oceans.)

<sup>21</sup> See, for example, United States Senate, Committee on Foreign Relations, Committee on Foreign Relations, Hearing on Maritime Disputes and Sovereignty Issues in East Asia, July 15, 2009, Testimony of Peter Dutton, Associate Professor, China Maritime Studies Institute, U.S. Naval War College, pp. 2 and 6-7.

<sup>22</sup> “How Much Trade Transits the South China Sea?” China Power (CSIS), August 2, 2017, updated January 25, 2021, accessed May 31, 2023, at <https://chinapower.csis.org/much-trade-transits-south-china-sea/>. See also Kerem Coşar and Benjamin D. Thomas, “The Geopolitics of International Trade in Southeast Asia,” working paper, National Bureau of Economic Research, November 2020, 17 pp., accessed May 31, 2023, at <https://www.nber.org/papers/w28048>.

<sup>23</sup> Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2022*, released November 29, 2022, p. 17. See also Christian Edwards, “The South China Sea Is Fabled for Its Hidden Energy Reserves and China Wants to Block Outsiders Like the US from Finding Them,” *Business Insider*, November 13, 2018.

<sup>24</sup> See, for example, International Institute for Strategic Studies, *The Economic and Security Implications of China's Activities in the South China Sea*, November 2021, 3 pp. For contrary views regarding the importance of the SCS in connection with trade routes and hydrocarbons, see John Quiggin, “Myths That Stir Trouble in the South China Sea, A Major Shipping Route, Yes, But Vital? False Claims About the Value of These Waters Only Make Diplomacy Harder,” *Interpreter*, December 23, 2021; Ethen Kim Lieser, “How Much Oil and Gas Is Contained in the South China Sea? The Entire Contested Region Is Chock-Full Of Valuable Resources. Or Is It?” *National Interest*, February 22, 2021; Marshall Hoyle, “The South China Sea Is Overrated, Assigning the South China Sea Geostrategic Importance Based on Its Popular Sea Lanes or Assumed Oil and Gas Reserves Is Suspect,” *U.S. Naval Institute Proceedings*, June 2019. See also Mark Crescenzi and Stephen Gent, “China's Deep-Sea Motivation for Claiming Sovereignty Over the South China Sea, At the Bottom of the Contested Waters Lies a Supply of the Rare Earth Minerals Crucial to China's Tech Ambitions,” *Diplomat*, May 6, 2021.

The SCS and ECS also contain significant fishing grounds that are of interest primarily to China and other countries in the region. See, for example, Michael Perry, “Cooperative Maritime Law Enforcement and Overfishing in the South China Sea,” Center for International Maritime Security (CIMSEC), April 6, 2020; James G. Stavridis and Johan Bergenas, “The Fishing Wars Are Coming,” *Washington Post*, September 13, 2017; Keith Johnson, “Fishing Disputes Could Spark a South China Sea Crisis,” *Foreign Policy*, April 7, 2012.

## *Interpreting China's Role as a Major World Power*

China's actions in the SCS and ECS could influence assessments that U.S. and other observers make about China's role as a major world power, particularly regarding China's approach to settling disputes between states (including whether China views force and coercion as acceptable means for settling such disputes, and consequently whether China believes that "might makes right"), China's views toward the meaning and application of international law, and whether China views itself more as a stakeholder and defender of the current international order, or alternatively, more as a revisionist power that will seek to change elements of that order that it does not like.<sup>25</sup>

## *U.S.-China Relations in General*

Developments in the SCS and ECS could affect U.S.-China relations in general, which could have implications for other issues in U.S.-China relations.<sup>26</sup>

## **Maritime Territorial and EEZ Disputes Involving China**

This section provides a brief overview of maritime territorial and EEZ disputes involving China. For additional details on these disputes (including maps), see **Appendix A**. In addition, other CRS reports provide additional and more detailed information on the maritime territorial disputes.<sup>27</sup> For background information on treaties and international agreements related to the disputes, see **Appendix C**. For background information on a July 2016 international tribunal award in an SCS arbitration case involving the Philippines and China, see **Appendix D**.

## **Maritime Territorial Disputes**

China is a party to multiple maritime territorial disputes in the SCS and ECS, including in particular the following:

- a dispute over the **Paracel Islands** in the SCS, which are claimed by China and Vietnam, and occupied by China;
- a dispute over the **Spratly Islands** in the SCS, which are claimed entirely by China, Taiwan, and Vietnam, and in part by the Philippines, Malaysia, and Brunei, and which are occupied in part by all these countries except Brunei;
- a dispute over **Scarborough Shoal** in the SCS, which is claimed by China, Taiwan, and the Philippines, and controlled since 2012 by China; and
- a dispute over the **Senkaku Islands** in the ECS, which are claimed by China, Taiwan, and Japan, and administered by Japan.

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<sup>25</sup> See, for example, Charlie Dunlap, "CDR Tracy Reynolds on 'China & the Moon & the Law,'" *Lawfire*, January 23, 2023; Akshobh Giridharadas, "The South China Sea Reveals China's Grand Strategy, To Understand China's Grand Strategy, Particularly Xi's Long-Term Game, One Needs to Understand Beijing's Belligerence in the South China Sea," *National Interest*, July 1, 2021.

<sup>26</sup> For discussions of U.S.-China relations, see CRS In Focus IF10119, *China Primer: U.S.-China Relations*, by Susan V. Lawrence and Karen M. Sutter, and CRS Report R41108, *U.S.-China Relations: An Overview of Policy Issues*, by Susan V. Lawrence.

<sup>27</sup> See CRS In Focus IF10607, *China Primer: South China Sea Disputes*, by Ben Dolven, Susan V. Lawrence, and Ronald O'Rourke; CRS Report R42930, *Maritime Territorial Disputes in East Asia: Issues for Congress*, by Ben Dolven, Mark E. Manyin, and Shirley A. Kan; CRS Report R44072, *Chinese Land Reclamation in the South China Sea: Implications and Policy Options*, by Ben Dolven et al.; CRS Report R43894, *China's Air Defense Identification Zone (ADIZ)*, by Ian E. Rinehart and Bart Elias.

## EEZ Dispute<sup>28</sup>

In addition to maritime territorial disputes in the SCS and ECS, China is involved in a dispute, principally with the United States, over whether China has a right under international law to regulate the activities of foreign military forces operating within China's EEZ. The position of the United States and most other countries is that while the United Nations Convention on the Law of the Sea (UNCLOS), which established EEZs as a feature of international law, gives coastal states the right to regulate economic activities (such as fishing and oil exploration) within their EEZs, it does not give coastal states the right to regulate foreign military activities in the parts of their EEZs beyond their 12-nautical-mile territorial waters.<sup>29</sup> The position of China and some other countries (i.e., a minority group among the world's nations) is that UNCLOS gives coastal states the right to regulate not only economic activities, but also foreign military activities, in their EEZs. The dispute over whether China has a right under UNCLOS to regulate the activities of foreign military forces operating within its EEZ appears to be at the heart of incidents between Chinese and U.S. ships and aircraft in international waters and airspace dating back at least to 2001.

## Relationship of Maritime Territorial Disputes to EEZ Dispute

The issue of whether China has the right under UNCLOS to regulate foreign military activities in its EEZ is related to, but ultimately separate from, the issue of territorial disputes in the SCS and ECS:

- The two issues are related because China can claim EEZs from inhabitable islands over which it has sovereignty, so accepting China's claims to sovereignty over inhabitable islands in the SCS or ECS could permit China to expand the EEZ zone within which China claims a right to regulate foreign military activities.
- The two issues are ultimately separate from one another because even if all the territorial disputes in the SCS and ECS were resolved, and none of China's claims in the SCS and ECS were accepted, China could continue to apply its concept of its EEZ rights to the EEZ that it unequivocally derives from its mainland coast—and it is in this unequivocal Chinese EEZ that several of the past U.S.-Chinese incidents at sea have occurred.

From the U.S. perspective, the EEZ dispute is arguably as significant as the maritime territorial disputes because of the EEZ dispute's proven history of leading to U.S.-Chinese incidents at sea and because of its potential for affecting U.S. military operations not only in the SCS and ECS, but around the world.

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<sup>28</sup> In this report, the term *EEZ dispute* is used to refer to a dispute principally between China and the United States over whether coastal states have a right under international law to regulate the activities of foreign military forces operating in their EEZs. There are also other kinds of EEZ disputes, including disputes between neighboring countries regarding the extents of their adjacent EEZs.

<sup>29</sup> The legal term under UNCLOS for territorial waters is territorial seas. This report uses the more colloquial term territorial waters to avoid confusion with terms like South China Sea and East China Sea.

## China's Approach to the SCS and ECS

### Overview

China's approach to maritime disputes in the SCS and ECS, and to strengthening its position over time in the SCS, can be characterized in general as follows:

- China appears to have identified the assertion and defense of its maritime territorial claims in the SCS and ECS, and the strengthening of its position in the SCS, as important national goals.
- To achieve these goals, China appears to be employing a multielement strategy that includes diplomatic, informational, economic, military, paramilitary/law enforcement, and civilian elements.
- In implementing this strategy, China appears to be persistent, patient, and tactically flexible (i.e., it is “playing a long game”), willing to expend significant resources, and willing to absorb at least some amount of reputational and other costs that other countries might seek to impose on China in response to China's actions.<sup>30</sup>

**Table 1** summarizes China's apparent goals relating to the South China Sea, and the types of actions it undertakes in support of those goals, as assessed by the Center for a New American Security (CNAS) in a January 2020 report on China's strategy for the South China Sea.

**Table 1. China's Apparent Goals and Supporting Actions for South China Sea**

As assessed in January 2020 CNAS report

Supporting actions	Apparent goals				
	Rally support domestically	Deter U.S.	Intimidate neighbors and encourage appeasement/compliance	Tempt neighbors to cooperate in exchange for future economic benefits	Reinforce image of China as an economic powerhouse
PLA operations <sup>a</sup>	X	X	X		
China Coast Guard operations <sup>b</sup>	X	X	X		
Maritime militia swarming			X		
Dredging fleet and island construction team operations <sup>c</sup>	X	X	X		
Operations by state banks and state-owned enterprises <sup>d</sup>				X	X
State media operations <sup>e</sup>	X	X	X		

**Source:** Adapted by CRS from table on page 20 of Patrick M. Cronin and Ryan Neuhard, *Total Competition, China's Challenge in the South China Sea*, Center for a New American Security, January 2020.

<sup>30</sup> For additional discussion, see Shuxian Luo, “The Rising Power's Audiences and Cost Trade-offs: Explaining China's Escalation and Deescalation in Maritime Disputes,” *Asian Security*, published online December 21, 2021, at <https://doi.org/10.1080/14799855.2021.2012159>; Patrick M. Cronin and Ryan Neuhard, *Total Competition, China's Challenge in the South China Sea*, Center for a New American Security, January 2020, pp. 5-28; Denny Roy, “How China Is Slowly Conquering the South China Sea,” *National Interest*, May 7, 2020; and Kerry K. Gershaneck, “China's ‘Political Warfare’ Aims at South China Sea,” *Asia Times*, July 3, 2018.

- a. Includes military exercises, weapons tests, port visits, patrols throughout the SCS, military parades, and participation in echelon formation.
- b. Includes deployment of large vessels and participation in echelon formation.
- c. Includes large-scale dredging and island building, and construction of permanent facilities on disputed features.
- d. Highly visible economic projects around the region, such as bridges, ports, and rail lines.
- e. Includes propaganda about the PLA, China's influence (including its military and economic might and its political importance), U.S. decline or weakness, and other states conceding to China's preferences.

## Selected Elements

### *"Salami-Slicing" Strategy and Gray Zone Operations*

Observers frequently characterize China's approach to the SCS and ECS as a "salami-slicing" strategy that employs a series of incremental actions, none of which by itself is a *casus belli*, to gradually change the status quo in China's favor.<sup>31</sup> Other observers have referred to China's approach as a strategy of gray zone operations (i.e., operations that reside in a gray zone between peace and war),<sup>32</sup> incrementalism,<sup>33</sup> creeping annexation,<sup>34</sup> working to gain ownership through adverse possession,<sup>35</sup> or creeping invasion,<sup>36</sup> or as a "talk and take" strategy, meaning a strategy in which China engages in (or draws out) negotiations while taking actions to gain control of contested areas.<sup>37</sup> An April 10, 2021, press report, for example, states

China is trying to wear down its neighbors with relentless pressure tactics designed to push its territorial claims, employing military aircraft, militia boats and sand dredgers to dominate access to disputed areas, U.S. government officials and regional experts say.

The confrontations fall short of outright military action without shots being fired, but Beijing's aggressive moves are gradually altering the status quo, laying the foundation for China to potentially exert control over contested territory across vast stretches of the Pacific Ocean, the officials and experts say....

The Chinese are "trying to grind them down," said a senior U.S. Defense official....

"Beijing never really presents you with a clear deadline with a reason to use force. You just find yourselves worn down and slowly pushed back," [Gregory Poling of the Center for Strategic and International Studies] said.<sup>38</sup>

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<sup>31</sup> See, for example, Julian Ryall, "As Regional Tensions Rise, China Probing Neighbors' Defense," *Deutsche Welle (DW)*, October 13, 2022. Another press report refers to the process as "akin to peeling an onion, slowly and deliberately pulling back layers to reach a goal at the center." (Brad Lendon, "China Is Relentlessly Trying to Peel away Japan's Resolve on Disputed Islands," *CNN*, July 8, 2022.)

<sup>32</sup> See, for example, Masaaki Yatsuzuka, "How China's Maritime Militia Takes Advantage of the Grey Zone," *Strategist*, January 16, 2023.

<sup>33</sup> See, for example, Patrick Mendis and Joey Wang, "China's Art of Strategic Incrementalism in the South China Sea," *National Interest*, August 8, 2020.

<sup>34</sup> See, for example, Alan Dupont, "China's Maritime Power Trip," *The Australian*, May 24, 2014.

<sup>35</sup> See Ian Ralby, "China's Maritime Strategy: To Own the Oceans by Adverse Possession," *The Hill*, March 28, 2023.

<sup>36</sup> Jackson Diehl, "China's 'Creeping Invasion,'" *Washington Post*, September 14, 2014.

<sup>37</sup> The strategy has been called "talk and take" or "take and talk." See, for example, Anders Corr, "China's Take-And-Talk Strategy In The South China Sea," *Forbes*, March 29, 2017. See also Namrata Goswami, "Can China Be Taken Seriously on its 'Word' to Negotiate Disputed Territory?" *The Diplomat*, August 18, 2017.

<sup>38</sup> Dan De Luce, "China Tries to Wear Down Its Neighbors with Pressure Tactics," *NBC News*, April 10, 2021. See also Dan Altman, "The Future of Conquest, Fights Over Small Places Could Spark the Next Big War," *Foreign Affairs*, September 24, 2021.

### ***Island Building and Base Construction***

Perhaps more than any other set of actions, China's island-building (aka land-reclamation) and base-construction activities at sites that it occupies in the Paracel Islands and Spratly Islands in the SCS have heightened concerns among U.S. observers that China is rapidly gaining effective control of the SCS. China's large-scale island-building and base-construction activities in the SCS appear to have begun around December 2013, and were publicly reported starting in May 2014. Awareness of, and concern about, the activities appears to have increased substantially following the posting of a February 2015 article showing a series of "before and after" satellite photographs of islands and reefs being changed by the work.<sup>39</sup>

China occupies seven sites in the Spratly Islands. It has engaged in island-building and facilities-construction activities at most or all of these sites, and particularly at three of them—Fiery Cross Reef, Subi Reef, and Mischief Reef, all of which now feature lengthy airfields as well as substantial numbers of buildings and other structures.

**Figure 1** and **Figure 2** show reported military facilities at sites that China occupies in the SCS, and reported aircraft, missile, and radar "range rings" extending from those sites. Although other countries, such as Vietnam, have engaged in their own island-building and facilities-construction activities at sites that they occupy in the SCS, these efforts are dwarfed in size by China's island-building and base-construction activities in the SCS.<sup>40</sup>

### ***New Maritime Law That Went Into Effect on September 1, 2021***

A new Chinese maritime law that China approved in April 2021 as an amendment to its 1983 maritime traffic safety law went into effect September 1, 2021. The law seeks to impose new notification and other requirements on foreign ships entering what China describes as "sea areas under the jurisdiction" of China.<sup>41</sup> Some observers have stated that the new law could lead to increased tensions in the SCS, particularly if China takes actions to enforce its provisions.<sup>42</sup>

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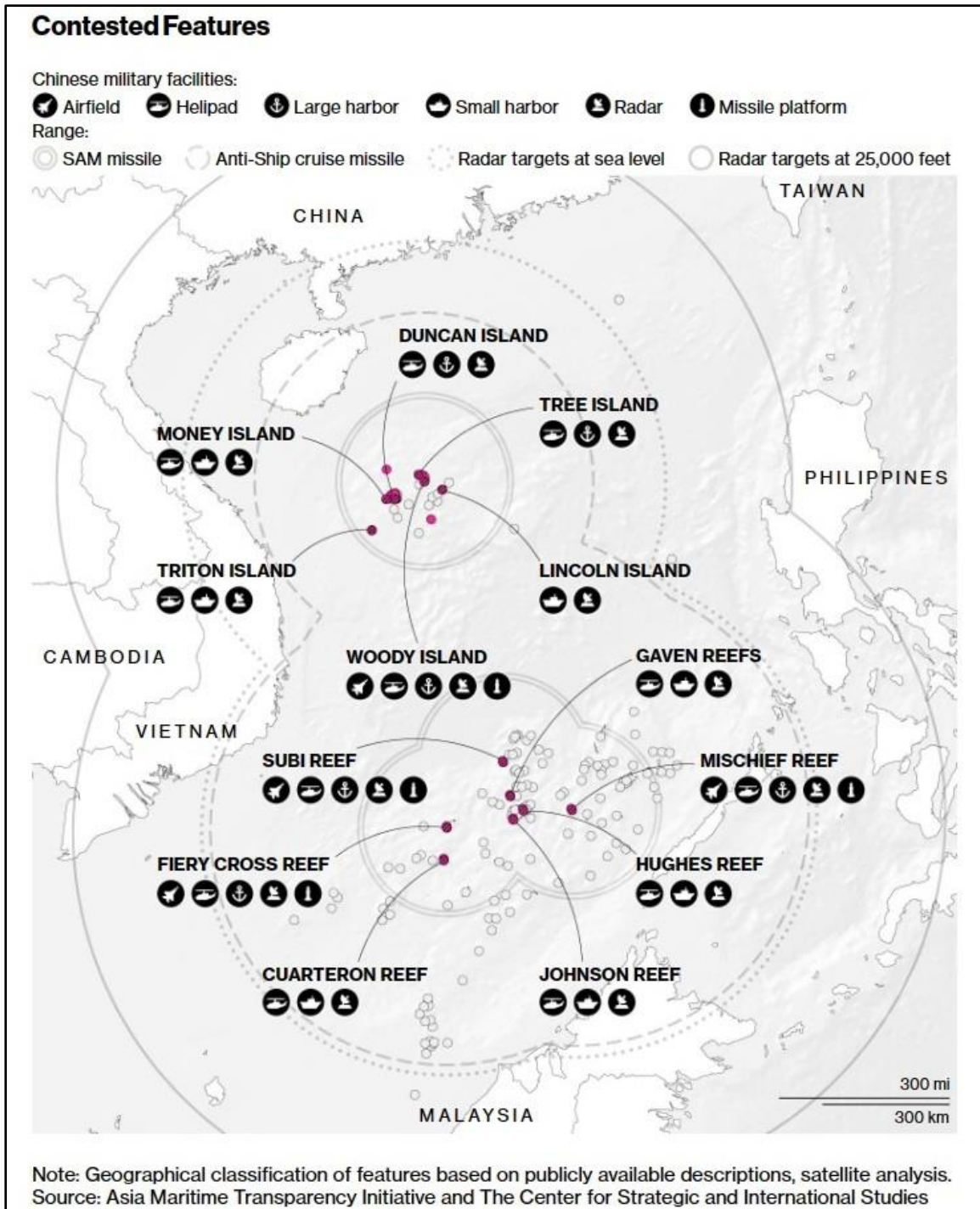
<sup>39</sup> Mira Rapp-Hooper, "Before and After: The South China Sea Transformed," Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), February 18, 2015.

<sup>40</sup> See, for example, "Vietnam's Island Building: Double-Standard or Drop in the Bucket?," Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), May 11, 2016. For additional details on China's island-building and base-construction activities in the SCS, see, in addition to **Appendix E**, CRS Report R44072, *Chinese Land Reclamation in the South China Sea: Implications and Policy Options*, by Ben Dolven et al.

<sup>41</sup> See, for example, Amber Wang, "South China Sea: China Demands Foreign Vessels Report before Entering 'Its Territorial Waters,'" *South China Morning Post*, August 30, 2021.

<sup>42</sup> See, for example, Navmi Krishna, "Explained: Why China's New Maritime Law May Spike Tensions in South China Sea," *Indian Express*, September 7, 2021; Brad Lendon and Steve George, "The Long Arm of China's New Maritime Law Risks Causing Conflict with US and Japan," *CNN*, September 3, 2021; Richard Javad Heydarian, "China's Foreign Ship Law Stokes South China Sea Tensions," *Asia Times*, September 2, 2021. See also James Holmes, "Are China And Russia Trying To Attack The Law Of The Sea?" *19FortyFive*, August 31, 2021.

Figure I. Reported Military Facilities at SCS Sites Occupied by China



**Source:** Illustration accompanying Karen Leigh, Peter Martin and Adrian Leung, “Troubled Waters: Where the U.S. and China Could Clash in the South China Sea,” *Bloomberg*, December 17, 2020.

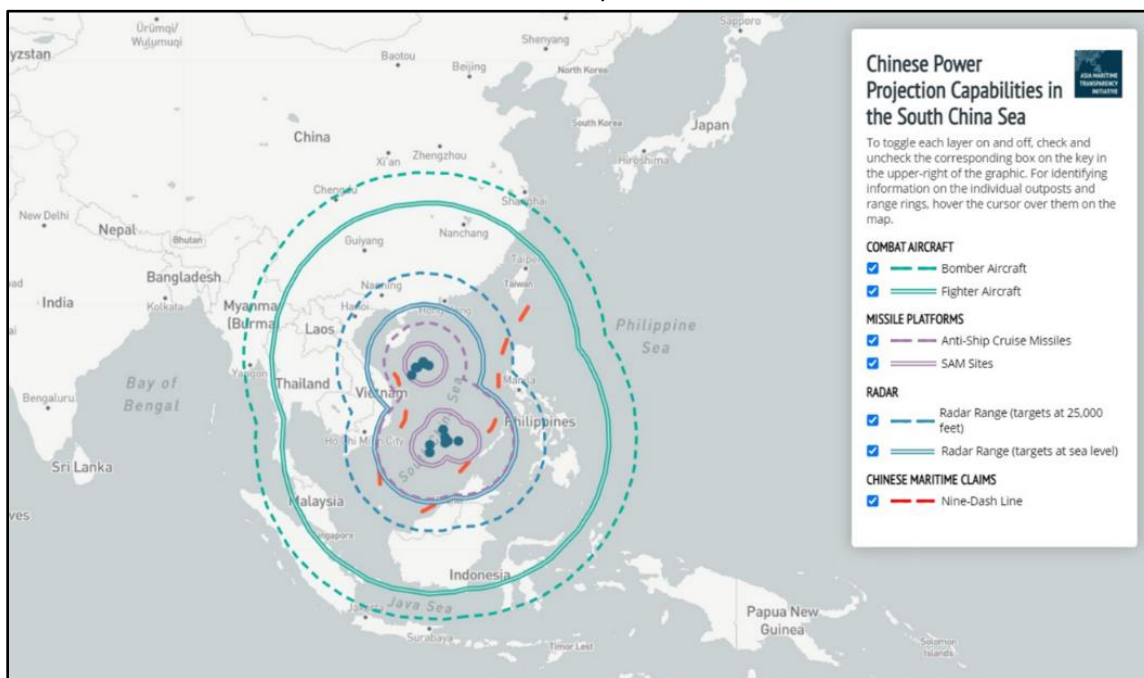
One observer—a professor of international law and the law of armed conflict at the Naval War College—stated in 2021:

China recently enacted amendments to its 1983 Maritime Traffic Safety Law, expanding its application from “coastal waters” to “sea areas under the jurisdiction of the People’s



Republic of China,” a term that is intentionally vague and not defined. Many of the amendments to the law exceed international law limits on coastal State jurisdiction that would illegally restrict freedom of navigation in the South China, East China, and Yellow Seas where China is embroiled in a number of disputed territorial and maritime claims with its neighbors. The provisions regarding the unilateral application of routing and reporting systems beyond the territorial sea violate UNCLOS. Similarly, application of the mandatory pilotage provisions to certain classes of vessels beyond the territorial sea is inconsistent with UNCLOS and IMO requirements. The amendments additionally impose illegal restrictions on the right of innocent passage in China’s territorial sea and impermissibly restrict the right of the international community to conduct hydrographic and military surveys beyond the territorial sea. China will use the amended law to engage in grey zone operations to intimidate its neighbors and further erode the rule of law at sea in the Indo-Pacific region.<sup>43</sup>

**Figure 2. Reported Chinese Aircraft, Missile, and Radar Ranges**  
From Chinese-occupied sites in SCS



**Source:** Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), “Chinese Power Projection Capabilities in the South China Sea,” at <https://amti.csis.org/chinese-power-projection/>. The information box on the right side of the figure is part of the graphic as presented at the AMTI website.

A September 2, 2021, press report stated

A new maritime law enacted by the Chinese government this week could pose a “serious threat” to freedom of navigation and free trade, the Pentagon has said.

<sup>43</sup> Online abstract for Raul (Pete) Pedrozo, “China’s Revised Maritime Traffic Safety Law,” *International Law Studies* (U.S. Naval War College), Vol. 97, 2021: 956-968. The online abstract is presented at Raul (Pete) Pedrozo, “China’s Revised Maritime Traffic Safety Law,” *International Law Studies*, U.S. Naval War College, posted June 16, 2021, at <https://digital-commons.usnwc.edu/ils/vol97/iss1/39/>. See also Nguyen Thanh Trung and Le Ngoc Khanh Ngan, “Codifying Waters and Reshaping Orders: China’s Strategy for Dominating the South China Sea,” Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), September 27, 2021.

An amendment to China's Maritime Traffic Safety Law—put into practice on September 1—requires foreign vessels to report information such as their name, call sign, current position, destination and cargo before sailing through the country's "territorial sea."...

Reached by *Newsweek* on Wednesday [September 1], Defense Department spokesperson John Supple said: "The United States remains firm that any coastal state law or regulation must not infringe upon navigation and overflight rights enjoyed by all nations under international law.

"Unlawful and sweeping maritime claims, including in the South China Sea, pose a serious threat to the freedom of the seas, including the freedoms of navigation and overflight, free trade and unimpeded lawful commerce, and the rights and interests of South China Sea and other littoral nations," he added....

In a separate response regarding the potential impact of China's maritime law on U.S. Navy operations in the region, the Pentagon's Lt. Col. Martin Meiners said: "The United States will continue to fly, sail and operate wherever international law allows."<sup>44</sup>

### *Other Actions That Have Heightened Concerns*

Additional Chinese actions in the SCS and ECS that have heightened concerns among U.S. observers include the following, among others:

- China's actions in 2012, following a confrontation between Chinese and Philippine ships at Scarborough Shoal in the SCS, to gain de facto control over access to the shoal and its fishing grounds;
- China's announcement on November 23, 2013, of an air defense identification zone (ADIZ) over the ECS that includes airspace over the Senkaku Islands;<sup>45</sup>
- frequent patrols by Chinese Coast Guard ships—some observers refer to them as harassment operations—at the Senkaku Islands;
- Chinese pressure against the small Philippine military presence at Second Thomas Shoal in the Spratly Islands, where a handful of Philippine military personnel occupy a beached (and now derelict) Philippine navy amphibious ship;<sup>46</sup>
- a growing civilian Chinese presence on some of the sites in the SCS occupied by China in the SCS, including both Chinese vacationers and (in the Paracels) permanent settlements; and
- the movement of some military systems to its newly built bases in the SCS.

A March 21, 2022, press report states

China has fully militarized at least three of several islands it built in the disputed South China Sea, arming them with anti-ship and anti-aircraft missile systems, laser and jamming equipment, and fighter jets in an increasingly aggressive move that threatens all nations operating nearby, a top U.S. military commander said Sunday [March 20].

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<sup>44</sup> John Feng, "U.S. Says China Maritime Law Poses 'Serious Threat' to Freedom of the Seas," *Newsweek*, September 2, 2021. See also Alex Wilson, "Beijing's New Law for Foreign Vessels Won't Impact US Navy in South China Sea, Pentagon Says," *Stars and Stripes*, September 2, 2021.

<sup>45</sup> See CRS Report R43894, *China's Air Defense Identification Zone (ADIZ)*, by Ian E. Rinehart and Bart Elias.

<sup>46</sup> See, for example, Patricia Lourdes Viray, "China's Blockade of Ayungin Shoal Resupply 'Objectionable'—Palace," *Philippine Star*, September 23, 2019; Patricia Louordes Viray, "China Coast Guard Blocked Resupply Mission to Ayungin Shoal," *Philippine Star*, September 19, 2019; Audrey Morallo, "China's Navy, Coast Guard 'Harassed' Filipino Troops on Resupply Mission on Ayungin—Alejano," *Philippine Star*, May 30, 2018.

U.S. Indo-Pacific commander Adm. John C. Aquilino said the hostile actions were in stark contrast to Chinese President Xi Jinping’s past assurances that Beijing would not transform the artificial islands in contested waters into military bases. The efforts were part of China’s flexing its military muscle, he said.<sup>47</sup>

### *Use of Coast Guard Ships and Maritime Militia*

China asserts and defends its maritime claims not only with its navy, but also with its coast guard and its maritime militia. Indeed, China employs its maritime militia and its coast guard more regularly and extensively than its navy in its maritime sovereignty-assertion operations.

### *Apparent Narrow Definition of “Freedom of Navigation”*

China regularly states that it supports freedom of navigation and has not interfered with freedom of navigation. China, however, appears to hold a narrow definition of freedom of navigation that is centered on the ability of commercial cargo ships to pass through international waters. In contrast to the broader U.S./Western definition of freedom of navigation (aka freedom of the seas), the Chinese definition does not appear to include operations conducted by military ships and aircraft. It can also be noted that China has frequently interfered with commercial fishing operations by non-Chinese fishing vessels—something that some observers regard as a form of interfering with freedom of navigation for commercial ships.

### *Position Regarding Regulation of Military Forces in EEZs*

As mentioned earlier, the position of China and some other countries (i.e., a minority group among the world’s nations) is that UNCLOS gives coastal states the right to regulate not only economic activities, but also foreign military activities, in their EEZs.

### *Depiction of United States as Outsider Seeking to “Stir Up Trouble”*

Along with its preference for treating territorial disputes on a bilateral rather than multilateral basis (see **Appendix E** for details), China resists and objects to U.S. involvement in maritime disputes in the SCS and ECS. Statements in China’s state-controlled media sometimes depict the United States as an outsider or interloper whose actions (including freedom of navigation operations) are meddling or seeking to “stir up trouble” (or words to that effect) in an otherwise peaceful regional situation. Potential or actual Japanese involvement in the SCS is sometimes depicted in China’s state-controlled media in similar terms. Depicting the United States in this manner can be viewed as consistent with goals of attempting to drive a wedge between the United States and its allies and partners in the region and of ensuring maximum leverage in bilateral (rather than multilateral) discussions with other countries in the region over maritime territorial disputes.

### *Additional Elements*

For additional information on China’s approach to the SCS and ECS, including elements discussed briefly above as well as the so-called map of the nine-dash line that China uses to depict its claims in the SCS, see **Appendix E**.

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<sup>47</sup> Jim Gomez and Aaron Favila, “AP Exclusive: US Admiral Says China Fully Militarized Isles,” *Associated Press*, March 21, 2022.

## Assessments of China's Strengthened Position in SCS

Some observers assess that China's actions in the SCS have achieved for China a more dominant or more commanding position in the SCS. For example, U.S. Navy Admiral Philip Davidson, in responses to advance policy questions from the Senate Armed Services Committee for an April 17, 2018, hearing before the committee to consider nominations, including Davidson's nomination to become Commander, U.S. Pacific Command (PACOM),<sup>48</sup> stated that "China is now capable of controlling the South China Sea in all scenarios short of war with the United States."<sup>49</sup> For additional assessments of China's strengthened position in the SCS, see **Appendix F**.

## U.S. Position Regarding Issues Relating to SCS and ECS

### Overview

The U.S. position regarding issues relating to the SCS and ECS includes the following elements, among others:

- Freedom of the seas:
  - The United States supports the principle of freedom of the seas, meaning the rights, freedoms, and uses of the sea and airspace guaranteed to all nations in international law. The United States opposes claims that impinge on the rights, freedoms, and lawful uses of the sea that belong to all nations.
  - U.S. forces routinely conduct freedom of navigation (FON) assertions throughout the world. These operations are designed to be conducted in accordance with international law and demonstrate that the United States will fly, sail, and operate wherever international law allows, regardless of the location of excessive maritime claims and regardless of current events.<sup>50</sup>
  - The United States, like most other countries, believes that coastal states under UNCLOS have the right to regulate economic activities in their EEZs, but do not have the right to regulate foreign military activities in their EEZs. The United States will continue to operate its military ships in the EEZs of other countries consistent with this position. (For additional information regarding the U.S. position on the issue of operational rights of military ships in the EEZs of other countries, see **Appendix G**.)
  - U.S. military surveillance flights in international airspace above another country's EEZ are lawful under international law, and the United States plans to continue conducting these flights.

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<sup>48</sup> The name of the command has since been changed to the U.S. Indo-Pacific Command (INDOPACOM).

<sup>49</sup> Advance Policy Questions for Admiral Philip Davidson, USN Expected Nominee for Commander, U.S. Pacific Command, p. 18. See also pp. 8, 16, 17, 19, and 43. See also Hannah Beech, "China's Sea Control Is a Done Deal, 'Short of War With the U.S.,'" *New York Times*, September 20, 2018.

<sup>50</sup> Statements such as this one, including in particular phrases such as "the United States will fly, sail, and operate wherever international law allows," have become recurring elements of U.S. statements issued either in connection with specific FON operations or as general statements of U.S. policy regarding freedom of the seas. See, for example, 7th Fleet Public Affairs, "7th Fleet Destroyer conducts Freedom of Navigation Operation in South China Sea," Commander, U.S. 7th Fleet, January 20, 2022, accessed May 31, 2023, at <https://www.c7f.navy.mil/Media/News/Display/Article/2904786/7th-fleet-destroyer-conducts-freedom-of-navigation-operation-in-south-china-sea/>.

- Maritime territorial disputes:
  - China’s maritime claims in the SCS are unfounded, unlawful, and unreasonable, and are without legal, historic, or geographic merit.<sup>51</sup> China’s claims to offshore resources across most of the SCS are completely unlawful, as is its campaign of bullying to control them. China has no legal grounds to unilaterally impose its will on the region, and has offered no coherent legal basis for its nine-dashed line claim in the SCS since formally announcing it in 2009.
  - The U.S. position on China’s maritime claims in the SCS is aligned with the July 12, 2016, award of the arbitral tribunal that was constituted under UNCLOS (a treaty to which China is a party) in the case that the Philippines brought against China. The tribunal’s award rejected China’s maritime claims as having no basis in international law and sided squarely with the Philippines on almost all claims. As specifically provided in UNCLOS, the tribunal’s decision is final and legally binding on both parties.
  - Consistent with the tribunal’s award, China cannot lawfully assert a maritime claim—including any EEZ claims derived from Scarborough Reef and the Spratly Islands—vis-a-vis the Philippines in areas that the tribunal found to be in the Philippines’ EEZ or on its continental shelf. China’s harassment of Philippine fisheries and offshore energy development within those areas is unlawful, as are any unilateral actions by China to exploit those resources. Since China has failed to put forth a lawful, coherent maritime claim in the SCS, the United States rejects any claim by China to waters beyond a 12-nautical mile territorial sea derived from islands it claims in the Spratly Islands (without prejudice to other states’ sovereignty claims over such islands).
  - The United States stands with its Southeast Asian allies and partners in protecting their sovereign rights to offshore resources, consistent with their rights and obligations under international law, and rejects any push to impose a situation of might makes right in the SCS or the wider region. China’s unilateral efforts to assert illegitimate maritime claims threaten other nations’ access to vital natural resources, undermine the stability of regional energy markets, and increase the risk of conflict.<sup>52</sup> The United States will not accept attempts to assert unlawful maritime claims at the expense of law-abiding nations.<sup>53</sup>

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<sup>51</sup> Department of State, *A Free and Open Indo-Pacific, Advancing a Shared Vision*, November 4, 2019, states on page 23: “PRC maritime claims in the South China Sea, exemplified by the preposterous ‘nine-dash line,’ are unfounded, unlawful, and unreasonable. These claims, which are without legal, historic, or geographic merit, impose real costs on other countries. Through repeated provocative actions to assert the nine-dash line, Beijing is inhibiting ASEAN members from accessing over \$2.5 trillion in recoverable energy reserves, while contributing to instability and the risk of conflict.”

<sup>52</sup> In a November 20, 2019, speech in Hanoi, Secretary of Defense Mark Esper stated, “China’s unilateral efforts to assert illegitimate maritime claims threaten other nations’ access to vital natural resources, undermine the stability of regional energy markets, and increase the risk of conflict.” (U.S. Embassy and Consulate in Vietnam, “Secretary of Defense Mark T. Esper Remarks at Diplomatic Academy of Vietnam,” November 20, 2019, Hanoi, Vietnam.)

<sup>53</sup> In a November 20, 2019, speech in Hanoi, Secretary of Defense Mark Esper stated, “We will not accept attempts to assert unlawful maritime claims at the expense of law-abiding nations.” (U.S. Embassy and Consulate in Vietnam, “Secretary of Defense Mark T. Esper Remarks at Diplomatic Academy of Vietnam,” November 20, 2019, Hanoi, Vietnam.)

- The United States takes no position on competing claims to sovereignty over disputed land features in the ECS and SCS, but the United States *does* have a position on how competing claims should be resolved: These disputes, like international disputes in general, should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law.
- Parties should avoid taking provocative or unilateral actions that disrupt the status quo or jeopardize peace and security. The United States does not believe that large-scale island-building with the intent to militarize outposts on disputed land features is consistent with the region's desire for peace and stability.
- Claims of territorial waters and EEZs should be consistent with customary international law of the sea and must therefore, among other things, derive from land features. Claims in the SCS that are not derived from land features are fundamentally flawed.
- The Senkaku Islands are under the administration of Japan. Unilateral attempts to change the status quo there raise tensions and do nothing under international law to strengthen territorial claims.

For examples of U.S. statements in 2020-2022 describing the U.S. position on issues relating to the SCS and ECS, see **Appendix G**.

### **Freedom of Navigation (FON) Program**

Under the U.S. Freedom of Navigation (FON) program, U.S. Navy ships and other U.S. military forces challenge what the United States views as excessive maritime claims made by other countries, and otherwise carry out assertions of operational rights. The FON program began in 1979,<sup>54</sup> involves diplomatic activities as well as operational assertions by U.S. Navy ships and other military forces, and is global in scope, encompassing activities and operations directed not only at China, but at numerous other countries around the world, including U.S. allies and partner states. DOD stated in 2015 that

As part of the Department's routine presence activities, the U.S. Navy, U.S. Air Force, and U.S. Coast Guard conduct Freedom of Navigation operations. These operational activities serve to protect the rights, freedoms, and lawful uses of the sea and airspace guaranteed to all nations in international law by challenging the full range of excessive maritime claims asserted by some coastal States in the region. The importance of these operations cannot be overstated. Numerous countries across the Asia-Pacific region assert excessive maritime claims that, if left unchallenged, could restrict the freedom of the seas. These excessive claims include, for example, improperly-drawn straight baselines, improper restrictions on the right of warships to conduct innocent passage through the territorial seas of other States, and the freedom to conduct military activities within the EEZs of other States. Added together, EEZs in the USPACOM region constitute 38 percent of the world's oceans. If these excessive maritime claims were left unchallenged, they could restrict the ability of the United States and other countries to conduct routine military operations or exercises in more than one-third of the world's oceans.<sup>55</sup>

<sup>54</sup> For a history of the origin of the FON program, see James Kraska, "An Archival History of the Creation and Early Implementation of the Freedom of Navigation Program," Chapter 10 (pages 206-237) of Myron H. Nordquist, John Norton Moore, and Ronán Long, editors, *Cooperation and Engagement in the Asia-Pacific Region*, Center for Oceans Law and Policy, Volume: 23, 2020 (publication date: 28 November 28, 2019).

<sup>55</sup> Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 23-24.

DOD publishes an annual report on the FON program that includes a listing of FON operations conducted to challenge excessive maritime claims by various countries, including China. DOD's report for FY2022 summarizes

excessive maritime claims that DoD challenged during the period of October 1, 2021, through September 30, 2022, to preserve the rights, freedoms, and uses of the sea and airspace guaranteed to all nations by international law. In sum, the United States challenged 22 excessive maritime claims of 15 claimants. The report cites each claimant's specific laws, regulations, and other proclamations articulating the excessive maritime claims in brackets. To maintain the operational security of U.S. military forces, DoD Annual FON Reports include only general geographic information on the location of operational challenges and do not specify the precise number of challenges to each excessive maritime claim.<sup>56</sup>

For additional information on the FON program, see **Appendix H**.

## Taiwan Strait Transits

In addition to conducting FON operations in the Spratly and Paracel islands, U.S. Navy ships (and also occasionally U.S. Coast Guard cutters or allied navy ships) steam through the Taiwan Strait to assert navigational rights under international law.<sup>57</sup> The Taiwan Strait appears to have a minimum width of more than 67 nautical miles; at other points, its width is greater, and in some locations exceeds 120 nautical miles.<sup>58</sup> Subtracting 12 nautical miles of territorial seas (i.e., what are commonly referred to as territorial waters) from either side of the strait leaves a central corridor of international waters running through the strait with an apparent minimum width of more than 43 nautical miles that is beyond the territorial sea of any coastal state, where high seas freedoms of navigation and overflight apply in accordance with international law.<sup>59</sup>

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<sup>56</sup> Department of Defense, *Department of Defense Report to Congress, Annual Freedom of Navigation Report, Fiscal Year 2022, Pursuant to Section 1275 of the National Defense Authorization Act for Fiscal Year (FY) 2017 (P.L. 114-328), as Amended*, generated December 6, 2022, p. 4.

<sup>57</sup> See, for example, U.S. 7th Fleet Public Affairs, "7th Fleet Destroyer Transits Taiwan Strait," Commander, U.S. 7th Fleet, September 9, 2023; Ben Blanchard, "US, Canadian Warships Transit Taiwan Strait in Latest Joint Mission," *Reuters*, September 9, 2023; Sam LaGrone, "U.S., Canadian Warships Transit Taiwan Strait," *USNI News*, September 9 (updated September 10), 2023; "US, Canada Sail Warships Through the Taiwan Strait in a Challenge to China," *Associated Press*, September 9, 2023; Ben Blanchard with additional reporting by Ryan Woo, "US Coast Guard Ship Transited Taiwan Strait after Blinken's China Visit," *Reuters*, June 22, 2023.

<sup>58</sup> Source: CRS measurements of the strait's width using the distance measurement tool of Google Maps (<https://www.google.com/maps>). The minimum width of more than 67 nautical miles that was found by CRS measurement is toward the strait's northern end; the widths of more than 120 nautical miles are generally toward the strait's southern end. The Google Maps distance measurement tool provides measurements in statute miles, which CRS converted into nautical miles.

<sup>59</sup> For example, a statement issued on June 3, 2023, by the U.S. Navy's 7th Fleet regarding a Taiwan Strait transit that was being conducted at that time by a U.S. Navy destroyer and a Canadian navy frigate stated that the transit was being conducted "through waters where high-seas freedoms of navigation and overflight apply in accordance with international law. The ships transit through a corridor in the Strait that is beyond the territorial sea of any coastal State." (U.S. 7th Fleet Public Affairs, "7th Fleet Destroyer Transits Taiwan Strait," June 3, 2023.) Two days later, following an incident during that transit in which a Chinese navy destroyer crossed in front of the U.S. Navy destroyer in an unsafe manner, a statement issued by the U.S. Indo-Pacific Command (USINDOPACOM) stated:

In accordance with international law, [the U.S. Navy destroyer] USS Chung-Hoon (DDG 93) and [the Canadian navy frigate] HMCS Montreal (FFH 336) conducted a routine south to north Taiwan Strait transit June 3 through waters where high seas freedoms of navigation and overflight apply. During the transit, [the] PLA(N) [i.e., Chinese navy] LUYANG III [class destroyer] DDG 132 (PRC LY 132) executed maneuvers in an unsafe manner in the vicinity of Chung-Hoon. The PRC

(continued...)

## Issues for Congress

### U.S. Strategy for Competing Strategically with China in SCS and ECS

#### Overview

Whether and how to compete strategically with China in the SCS and ECS is a choice for U.S. policymakers to make, based on an assessment of the potential benefits and costs of engaging in such a competition in the context of overall U.S. policy toward China,<sup>60</sup> U.S. policy toward the Indo-Pacific,<sup>61</sup> and U.S. foreign policy in general.

A key issue for Congress is whether and how the Biden Administration's strategy for competing strategically with China in the SCS and ECS is appropriate and correctly resourced, and whether Congress should approve, reject, or modify the strategy, the level of resources for implementing it, or both. Decisions that Congress makes on these issues could substantially affect U.S. strategic, political, and economic interests in the Indo-Pacific region and elsewhere.

#### *Potential Broader Goals*

For observers who conclude that the United States should compete strategically with China in the SCS and ECS, potential broader U.S. goals for such a competition include but are not necessarily limited to the following, which are not listed in any particular order and are not mutually exclusive:

- fulfilling U.S. security commitments in the Western Pacific, including treaty commitments to Japan and the Philippines;
- maintaining and enhancing the U.S.-led security architecture in the Western Pacific, including U.S. security relationships with treaty allies and partner states;
- maintaining a regional balance of power favorable to the United States and its allies and partners;
- defending the principle of peaceful resolution of disputes, under which disputes between countries should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law, and

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LY 132 overtook Chung-Hoon on their [i.e., Chung-Hoon's] port side and crossed their [i.e., Chung-Hoon's] bow at 150 yards. Chung-Hoon maintained course and slowed to 10 kts to avoid a collision. The PRC LY 132 crossed Chung-Hoon's bow a second time starboard to port at 2,000 yards and remained off Chung-Hoon's port bow. The LY 132's closest point of approach was 150 yards and its actions violated the maritime 'Rules of the Road' of safe passage in international waters.

(U.S. Indo-Pacific Command Public Affairs, "USINDOPACOM Statement on Unsafe Maritime Interaction," June 5, 2023.)

<sup>60</sup> For more on overall U.S.-China relations, see CRS In Focus IF10119, *China Primer: U.S.-China Relations*, by Susan V. Lawrence and Karen M. Sutter, and CRS Report R41108, *U.S.-China Relations: An Overview of Policy Issues*, by Susan V. Lawrence.

<sup>61</sup> For more on U.S. policy toward the Indo-Pacific, see CRS Insight IN11814, *Biden Administration Plans for an Indo-Pacific Economic Framework*, coordinated by Brock R. Williams; CRS In Focus IF11678, *The "Quad": Security Cooperation Among the United States, Japan, India, and Australia*, coordinated by Emma Chanlett-Avery; CRS In Focus IF11052, *The United Kingdom, France and the Indo-Pacific*, by Bruce Vaughn, Derek E. Mix, and Paul Belkin.



- resisting the emergence of an alternative “might-makes-right” approach to international affairs;
- defending the principle of freedom of the seas, meaning the rights, freedoms, and uses of the sea and airspace guaranteed to all nations in international law, including the interpretation held by the United States and many other countries concerning operational freedoms for military forces in EEZs;
  - preventing China from becoming a regional hegemon in East Asia, and potentially as part of that, preventing China from controlling or dominating the ECS or SCS; and
  - pursuing these goals as part of a larger U.S. strategy for competing strategically and managing relations with China.

### *Potential Specific Goals*

For observers who conclude that the United States should compete strategically with China in the SCS and ECS, potential specific U.S. goals for such a competition include but are not necessarily limited to the following, which are not listed in any particular order and are not mutually exclusive:

- dissuading China from
  - carrying out additional base-construction activities in the SCS,
  - moving additional military personnel, equipment, and supplies to bases at sites that it occupies in the SCS,
  - initiating island-building or base-construction activities at Scarborough Shoal in the SCS,
  - declaring straight baselines around land features it claims in the SCS,<sup>62</sup> or
  - declaring an air defense identification zone (ADIZ) over the SCS,<sup>63</sup> and
- encouraging China to
  - reduce or end operations by its maritime forces at the Senkaku Islands in the ECS,
  - halt actions intended to put pressure against Philippine-occupied sites in the Spratly Islands,

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<sup>62</sup> For a discussion regarding the possibility of China declaring straight baselines around land features it claims in the SCS, see “Reading Between the Lines: The Next Spratly Legal Dispute,” Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), March 21, 2019.

<sup>63</sup> For more on the possibility of China declaring an ADIZ over the SCS, see, for example, Minnie Chan, “South China Sea: Beijing ‘Doesn’t Want to Upset Neighbours’ with Air Defence Zone,” *South China Morning Post*, November 25, 2020; Carl O. Schuster, “[Opinion] The Air Defense Identification Zone—China’s next South China Sea aggression?” *Rappler*, July 7, 2020; Aie Balagtas See and Jeffrey Maitem, “US Watching if Beijing Declares Air Defense Zone in South China Sea,” *BenarNews*, June 24, 2020 (also published as BenarNews, “US Watching if Beijing Declares Air Defense Zone in South China Sea,” *Radio Free Asia*, June 24, 2020); Roy Mabasa, “US Commander: ADIZ over South China Sea Will Impact All Nations in Region,” *Manila Bulletin*, June 24, 2020; Minnie Chan, “Beijing’s Plans for South China Sea Air Defence Identification Zone Cover Pratas, Paracel and Spratly Islands, PLA Source Says,” *South China Morning Post*, May 31, 2020; Ben Werner, “New Air Bases, Baby Cabbage Key to Chinese Long-Term Claims in South China Sea,” *USNI News*, June 3, 2020; “China’s Next Move in the South China Sea,” *Economist*, June 18, 2020.

- encouraging China to halt actions intended to put pressure against the small Philippine military presence at Second Thomas Shoal in the Spratly Islands (or against any other Philippine-occupied sites in the Spratly Islands);
- adopt the U.S./Western definition regarding freedom of the seas, including the freedom of U.S. and other non-Chinese military vessels to operate freely in China's EEZ; and
- accept and abide by the July 2016 tribunal award in the SCS arbitration case involving the Philippines and China (see **Appendix D**).

### *China's Approach in the SCS and ECS*

As stated earlier, China's approach to the maritime disputes in the SCS and ECS, and to strengthening its position over time in the SCS, can be characterized in general as follows:

- China appears to have identified the assertion and defense of its maritime territorial claims in the SCS and ECS, and the strengthening of its position in the SCS, as important national goals.
- To achieve these goals, China appears to be employing a multielement strategy that includes diplomatic, informational, economic, military, paramilitary/law enforcement, and civilian elements.
- In implementing this strategy, China appears to be persistent, patient, and tactically flexible (i.e., it is "playing a long game"), willing to expend significant resources, and willing to absorb at least some amount of reputational and other costs that other countries might seek to impose on China in response to China's actions.

The above points raise a possible question as to how likely a U.S. strategy for competing strategically with China in the SCS and ECS might be to achieve its goals if that strategy were one or more of the following:

- one-dimensional rather than multidimensional or whole-of-government;
- halting or intermittent rather than persistent;
- insufficiently resourced; or
- reliant on imposed costs that are not commensurate with the importance that China appears to have assigned to achieving its goals in the region.

### *Aligning Actions with Goals*

In terms of identifying specific actions for a U.S. strategy for competing strategically with China in the SCS and ECS, a key element would be to have a clear understanding of which actions are intended to support which U.S. goals, and to maintain an alignment of actions with policy goals. For example, U.S. FON operations (FONOPs), which often feature prominently in discussions of actual or potential U.S. actions, can directly support a general goal of defending the principle of freedom of the seas, but might support other goals only indirectly, marginally, or not at all.<sup>64</sup> A

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<sup>64</sup> For discussions bearing on this issue, see, for example, Caitlin Doornbos, "Freedom-of-Navigation Ops Will Not Dent Beijing's South China Sea Claims, Experts Say," *Stars and Stripes*, April 4, 2019; James Holmes, "Are Freedom of Navigation Operations in East Asia Enough?" *National Interest*, February 23, 2019; Zack Cooper and Gregory Poling, "America's Freedom of Navigation Operations Are Lost at Sea, Far Wider Measures Are Needed to Challenge Beijing's Maritime Aggression," *Foreign Policy*, January 8, 2019. See also John Grady, "U.S. Indo-Pacific Diplomacy Efforts Hinge On FONOPS, Humanitarian Missions," *USNI News*, December 4, 2019.

summary of U.S. actions and how they align with U.S. goals might produce a U.S. version of the summary of China's apparent goals and supporting actions shown in **Table 1**.

### *Cost-Imposing Actions*

Cost-imposing actions are actions intended to impose political/reputational, institutional, economic, or other costs on China for conducting certain activities in the ECS and SCS, with the aim of persuading China to stop or reverse those activities. Such cost-imposing actions need not be limited to the SCS and ECS. As a hypothetical example for purposes of illustrating the point, one potential cost-imposing action might be for the United States to respond to unwanted Chinese activities in the ECS or SCS by moving to suspend China's observer status on the Arctic Council.<sup>65</sup> In a May 6, 2019, speech in Finland, then-Secretary of State Pompeo stated (emphasis added)

The United States is a believer in free markets. We know from experience that free and fair competition, open, by the rule of law, produces the best outcomes.

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<sup>65</sup> For more on the Arctic Council in general, see CRS Report R41153, *Changes in the Arctic: Background and Issues for Congress*, coordinated by Ronald O'Rourke. Paragraph 37 of the Arctic Council's rules of procedure states the following:

Once observer status has been granted, Observers shall be invited to the meetings and other activities of the Arctic Council unless SAOs [Senior Arctic Officials] decide otherwise. Observer status shall continue for such time as consensus exists among Ministers. Any Observer that engages in activities which are at odds with the Council's [Ottawa] Declaration [of September 19, 1996, establishing the Council] or these Rules of Procedure shall have its status as an Observer suspended.

Paragraph 5 of Annex II of the Arctic Council's rules of procedure—an annex regarding the accreditation and review of observers—states the following:

Every four years, from the date of being granted Observer status, Observers should state affirmatively their continued interest in Observer status. Not later than 120 days before a Ministerial meeting where Observers will be reviewed, the Chairmanship shall circulate to the Arctic States and Permanent Participants a list of all accredited Observers and up-to-date information on their activities relevant to the work of the Arctic Council.

(Arctic Council, *Arctic Council Rules of Procedure*, p. 9. The document was accessed May 31, 2023, at <https://oaarchive.arctic-council.org/handle/11374/940>.)

Paragraph 4.3 of the Arctic Council's observer manual for subsidiary bodies states in part

Observer status continues for such time as consensus exists among Ministers. Any Observer that engages in activities which are at odds with the Ottawa Declaration or with the Rules of Procedure will have its status as an Observer suspended.

(Arctic Council, *Observer Manual for Subsidiary Bodies*, p. 5. The document was accessed May 31, 2023, at <https://oaarchive.arctic-council.org/handle/11374/939>.)

See also Alyson JK Bailes, "Understanding The Arctic Council: A 'Sub-Regional' Perspective," *Journal of Military and Strategic Studies*, Vol. 15, Issue 2, 2013: 48, accessed May 31, 2023, at [https://ciaotest.cc.columbia.edu/journals/jomass/v15i2/f\\_0030237\\_24448.pdf](https://ciaotest.cc.columbia.edu/journals/jomass/v15i2/f_0030237_24448.pdf); Brianna Wodiske, "Preventing the Melting of the Arctic Council: China as a Permanent Observer and What It Means for the Council and the Environment," *Loyola of Los Angeles International and Comparative Law Review*, Vol. 315, Issue 2, 2014 (November 1, 2014): 320, accessed May 31, 2023, at <https://digitalcommons.lmu.edu/ilr/vol36/iss2/5/>; Sebastian Knecht, "New Observers Queuing Up: Why the Arctic Council Should Expand—And Expel," Arctic Institute, April 20, 2015; Evan Bloom, "Establishment of the Arctic Council," undated, accessed May 31, 2023, at <https://2009-2017.state.gov/e/oes/ocns/opa/arc/ac/establishmentarcticcouncil/index.htm>, which states, "The following paper was authored by Evan Bloom in July 1999 when serving as an attorney in the Office of the Legal Adviser at the U.S. Department of State. Mr. Bloom is now the Director of the Office of Oceans and Polar Affairs for the Bureau of Oceans and International Environmental and Scientific Affairs at the U.S. Department of State"; Kevin McGwin, "After 20 years, the Arctic Council Reconsiders the Role of Observers," *Arctic Today*, October 24, 2018.

But all the parties in the marketplace have to play by those same rules. Those who violate those rules should lose their rights to participate in that marketplace. Respect and transparency are the price of admission.

And let's talk about China for a moment. **China has observer status in the Arctic Council, but that status is contingent upon its respect for the sovereign rights of Arctic states.** The U.S. wants China to meet that condition and contribute responsibly in the region. But China's words and actions raise doubts about its intentions.<sup>66</sup>

Expanding the potential scope of cost-imposing actions to regions beyond the Western Pacific might make it possible to employ elements of U.S. power that cannot be fully exercised if the examination of potential cost-imposing strategies is confined to the Western Pacific. It might also, however, expand, geographically or otherwise, areas of tension or dispute between the United States and China.

Actions to impose costs on China can also impose costs, or lead to China imposing costs, on the United States and its allies and partners. Whether to implement cost-imposing actions thus involves weighing the potential benefits and costs to the United States and its allies and partners of implementing those actions, as well as the potential consequences to the United States and its allies and partners of not implementing those actions.

### *Contributions from Allies and Partners*

Another factor that policymakers may consider are the contributions to a combined U.S.-allied-partner state strategy for competing strategically with China in the SCS and ECS that are made by allies such as Japan, the Philippines, Australia, the UK, France, and Germany, as well as potential or emerging partner countries such as Vietnam, Indonesia, and India. Most or all of the countries just mentioned have taken steps of one kind or another in response to China's actions in the SCS and ECS.<sup>67</sup> Until the later months of 2021, a particular question had concerned the kinds of actions that then-Philippine president Rodrigo Duterte might be willing to take, given what had been, until the later months of 2021, his frequently nonconfrontational policy toward China regarding the SCS.<sup>68</sup> Since the later months of 2021, and particularly since Ferdinand Marcos Jr. assumed the office of President of the Philippines on June 30, 2022, Philippine actions, while continuing to show an interest in seeking cooperative arrangements with China where possible,<sup>69</sup>

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<sup>66</sup> State Department, "Looking North: Sharpening America's Arctic Focus, Remarks, Michael R. Pompeo, Secretary of State, Rovaniemi, Finland, May 6, 2019," accessed May 31, 2023, at <https://2017-2021.state.gov/looking-north-sharpening-americas-arctic-focus/index.html>.

<sup>67</sup> See, for example, Richard Javad Heydarian, "Australia-Philippines Pact Takes Hard New Aim at China," *Asia Times*, September 11, 2023; Aaron-Matthew Lariosa, "Australia, Philippines Commit to Strategic Partnership, Pledge Joint Patrols," *USNI News*, September 11, 2023; Tom Lowrey, "Australia and the Philippines to Run Joint Naval Patrols through South China Sea," *ABC News (Australia)*, September 8, 2023; Ryo Nakamura, "South Korea, India Rebuke Beijing over South China Sea Claims," *Nikkei Asia*, August 21, 2023; Hyonhee Shin, Trevor Hunnicutt, and David Brunnstrom, "US, Japan and South Korea Condemn 'Dangerous and Aggressive Actions' by China," *Reuters*, August 18, 2023; Tim Fish, "Update—Pushing back: Addressing Chinese Assertiveness in the South China Sea," *Jane's Defence Weekly*, May 26, 2023; Richard Javad Heydarian, "Philippines-Vietnam Teaming Up on China in South China Sea," *Asia Times*, May 25, 2023; Jim Gomez, "Australia to Provide Surveillance Drones to Philippines amid South China Sea Tensions," *Associated Press*, May 18, 2023. See also Asia Maritime Transparency Initiative (AMTI), "Update: Who's Taking Sides on China's Maritime Claims?" Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), originally published September 24, 2020, and updated periodically thereafter.

<sup>68</sup> See, for example, Alexis Romero, "Marcos Cites Need for Constant Dialogue between Philippines, China," *Philippine Star*, June 9, 2023.

<sup>69</sup> See, for example, Yew Lun Tian and Neil Jerome Morales, "China, Philippines Agree to Handle Disputes Peacefully, (continued...)"

have also reflected a greater willingness to confront China regarding the SCS and to work with the United States and other countries in doing so.<sup>70</sup> Philippine actions are discussed further in the section below on the Biden Administration's strategy.

Certain U.S. actions appear intended in part to encourage U.S. allies and partners in Southeast Asia to take stronger steps to challenge or oppose China on matters relating to the SCS.<sup>71</sup> U.S. actions to provide maritime-related security assistance to countries in the region have been carried out in part under the Indo-Pacific Maritime Security Initiative (IP MSI), an initiative (previously named the Southeast Asian MSI) that was originally announced by the Obama Administration in May 2015<sup>72</sup> and subsequently legislated by Congress<sup>73</sup> to provide, initially, \$425 million in maritime security assistance to those four countries over a five-year period. In addition to strengthening security cooperation with U.S. allies in the region, the United States has taken actions to increase U.S. defense and intelligence cooperation with Vietnam and Indonesia.<sup>74</sup>

Some observers have argued that there may be limits to how far U.S. allies and partners in the region might be willing to go to challenge or oppose China on matters relating to the SCS, particularly if doing so could antagonize China or create a risk of becoming involved in a U.S.-

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Boost Cooperation," *Reuters*, January 5, 2023; Ian C Sayson, Andreo Calonzo, and Shery Ahn, "Philippines' Marcos Eyes China Compromise on South China Sea," *Bloomberg*, September 24, 2022; Jim Gomez, "Marcos Plays Balancing Act in Meeting with China's FM," *Associated Press*, July 6, 2022; Reuters, "South China Sea: Philippines' Marcos Wants 'to Resolve the Conflicts' with Beijing, Says He's Open to Working with China's Military," *South China Morning Post*, July 6, 2022; Andreo Calonzo, "Philippines' Marcos Open to Military Exchanges With China," *Bloomberg*, July 5, 2022.

<sup>70</sup> See, for example, Richard Javad Heydarian, "Australia-Philippines Pact Takes Hard New Aim at China," *Asia Times*, September 11, 2023; Aaron-Matthew Lariosa, "Australia, Philippines Commit to Strategic Partnership, Pledge Joint Patrols," *USNI News*, September 11, 2023; Tom Lowrey, "Australia and the Philippines to Run Joint Naval Patrols through South China Sea," *ABC News (Australia)*, September 8, 2023; Andreo Calonzo, Clarissa Batino, and Manolo Serapio Jr., "Philippines Steps Up Exposure of China 'Bullying' in Sea Row," *Bloomberg*, August 24, 2023; Richard Javad Heydarian, "Philippines Gathering Allies to Tame China at Sea," *Asia Times*, August 23, 2023; Karishma Vaswani, "China Finds How to Lose Friends and Influence in Asia, The Philippines Is Standing Up to Beijing at a Time of Increased External and Internal Pressures. It Won't Be the Only One," *Bloomberg*, August 21, 2023; Neil Jerome Morales, "Philippines to Resupply South China Sea Troops after Beijing's Block," *Reuters*, August 19, 2023; Richard Javad Heydarian, "Marcos Defies China Amid New S China Sea Tensions," *Asia Times*, August 8, 2023.

<sup>71</sup> See, for example, Hau Dinh and Yves Dam Van, "US to ASEAN: Reconsider Deals with Blacklisted China Firms," *Associated Press*, September 10, 2020; Lynn Kuok, "Southeast Asia Stands to Gain as US Hardens South China Sea Stance," *Nikkei Asian Review*, August 17, 2020; Bhavan Jaipragas, "US Shift on South China Sea May Help Asean's Quiet 'Lawfare' Resolve Dispute," *South China Morning Post*, July 17, 2020.

<sup>72</sup> Secretary of Defense Speech, IISS Shangri-La Dialogue: "A Regional Security Architecture Where Everyone Rises," As Delivered by Secretary of Defense Ash Carter, Singapore, Saturday, May 30, 2015, accessed May 31, 2023, at <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1945>. See also Prashanth Parameswaran, "America's New Maritime Security Initiative for Southeast Asia," *The Diplomat*, April 2, 2016; Prashanth Parameswaran, "US Launches New Maritime Security Initiative at Shangri-La Dialogue 2015," *The Diplomat*, June 2, 2015; Aaron Mehta, "Carter Announces \$425M in Pacific Partnership Funding," *Defense News*, May 30, 2015. See also Megan Eckstein, "The Philippines at Forefront of New Pentagon Maritime Security Initiative," *USNI News*, April 18, 2016 (updated April 17, 2016).

<sup>73</sup> Section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (S. 1356/P.L. 114-92 of November 25, 2015; 10 U.S.C. 2282 note), as amended by Section 1289 of the National Defense Authorization Act for Fiscal Year 2017 (S. 2943/P.L. 114-328 of December 23, 2016).

<sup>74</sup> See, for example, White House, "Joint Leaders' Statement: Elevating United States-Vietnam Relations to a Comprehensive Strategic Partnership," September 11, 2023; Peter Baker and Katie Rogers, "Biden Forges Deeper Ties With Vietnam as China's Ambition Mounts," *New York Times*, September 10, 2023; Jon Emont, Catherine Lucey, and Katy Stech Ferek, "Biden Seeks Stronger Vietnam Ties in Bid to Counter China," *Wall Street Journal*, September 10, 2023; Matt Viser and Meryl Kornfield, "Biden Visits Vietnam to Bolster Alliance Confronting China," *Washington Post*, September 10, 2023; Sui-Lee Wee, "Vietnam and U.S. Forge Deeper Ties as Worries Rise About China," *New York Times*, September 8, 2023.

China dispute or confrontation.<sup>75</sup> For U.S. policymakers, a key question is how effective the steps taken by allies and partner countries have been, whether those steps could be strengthened, and whether they should be undertaken independent of or in coordination with the United States.

### Trump Administration's Strategy

The Trump Administration's strategy for competing strategically with China in the SCS and ECS included but was not necessarily limited to the following general lines of effort:<sup>76</sup>

- exposing and criticizing China's actions in the SCS (including so-called naming-and-shaming actions),<sup>77</sup> and reaffirming the U.S. position on issues relating to the SCS and ECS, on a recurring basis;
- imposing economic sanctions on Chinese firms and officials linked to China's activities in the SCS;
- conducting naval presence and FON operations in the SCS and Taiwan Strait transits with U.S. Navy ships and (more recently) U.S. Coast Guard cutters;
- conducting overflight operations in the SCS and ECS with U.S. Air Force bombers;<sup>78</sup>
- bolstering U.S. military presence and operations in the Indo-Pacific region in general, and developing new U.S. military concepts of operations for countering Chinese military forces in the Indo-Pacific region.<sup>79</sup>
- maintaining and strengthening diplomatic ties and security cooperation with, and providing maritime-related security assistance to, countries in the SCS region; and
- encouraging allied and partner states to do more individually and in coordination with one another to defend their interests in the SCS region.<sup>80</sup>

Specific actions taken by the Trump Administration included the following, among others:

- As an apparent cost-imposing measure, DOD announced on May 23, 2018, that it was disinclined to invite China to participate in the 2018 RIMPAC (Rim of the Pacific) exercise.<sup>81</sup>

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<sup>75</sup> See, for example, Derek Grossman, "Biden Hopes for Vietnam Breakthrough, Washington and Hanoi Have Been Inching Closer, But It's a Complicated Dance," *Foreign Policy*, May 9, 2023.

<sup>76</sup> For additional discussion of the Trump Administration's strategy for competing strategically with China in the SCS and ECS, see, for example, Felix K. Chang, "From Pivot to Defiance: American Policy Shift in the South China Sea," *Foreign Policy Research Institute*, August 24, 2020; Michael McDevitt, "Washington Takes a Stand in the South China Sea," *CNA* (Arlington, VA), September 8, 2020.

<sup>77</sup> See, for example, Wendy He, and Haridas Ramasamy, "Naming and Shaming China: America's Strategy of Rhetorical Coercion in the South China Sea," *Contemporary Southeast Asia*, vol. 42, no. 3, 2020: 317–345.

<sup>78</sup> See, for example, Caitlin Doornbos, "Air Force sends pair of B-1B bombers on mission over South China Sea," *Stars and Stripes*, May 27, 2020; Kristin Huang, "US-China Tensions in South China Sea Fuelled by Increase in Military Operations," *South China Morning Post*, May 10, 2020; Dzirhan Mahadzir, "Air Force Keeping Up Presence Operations Over South China Sea," *USNI News*, December 11, 2019; Liu Zhen, "US Warplanes on Beijing's Radar in South China Sea, American Air Force Chiefs Say," *South China Morning Post*, December 9, 2019.

<sup>79</sup> For a brief discussion of these new concepts of operations, see CRS Report R43838, *Renewed Great Power Competition: Implications for Defense—Issues for Congress*, by Ronald O'Rourke.

<sup>80</sup> See, for example, Eileen Ng, "US Official Urges ASEAN to Stand Up to China in Sea Row," *Associated Press*, October 31, 2019.

<sup>81</sup> RIMPAC is a U.S.-led, multilateral naval exercise in the Pacific involving naval forces from more than two dozen countries that is held every two years. At DOD's invitation, China participated in the 2014 and 2016 RIMPAC (continued...)

- In November 2018, national security adviser John Bolton said the U.S. would oppose any agreements between China and other claimants to the South China Sea that limit free passage to international shipping.<sup>82</sup>
- In January 2019, the then-U.S. Chief of Naval Operations, Admiral John Richardson, reportedly warned his Chinese counterpart that the U.S. Navy would treat China's coast guard cutters and maritime militia vessels as combatants and respond to provocations by them in the same way as it would respond to provocations by Chinese navy ships.<sup>83</sup>
- On March 1, 2019, then-Secretary of State Michael Pompeo stated, "As the South China Sea is part of the Pacific, any armed attack on Philippine forces, aircraft, or public vessels in the South China Sea will trigger mutual defense obligations under Article 4 of our Mutual Defense Treaty [with the Philippines]."<sup>84</sup> (For more on this treaty, see **Appendix B**.)
- On July 13, 2020, then-Secretary Pompeo issued a statement that strengthened, elaborated, and made more specific certain elements of the U.S. position regarding China's actions in the SCS. (For the text of this statement, see **Appendix G**.)
- On August 26, 2020, then-Secretary Pompeo announced that the United States had begun "imposing visa restrictions on People's Republic of China (PRC) individuals responsible for, or complicit in, either the large-scale reclamation, construction, or militarization of disputed outposts in the South China Sea, or the PRC's use of coercion against Southeast Asian claimants to inhibit their access to offshore resources."<sup>85</sup>
- On January 14, 2021, then-Secretary Pompeo announced additional sanctions against Chinese officials, including executives of state-owned enterprises and officials of the Chinese Communist Party and China's navy "responsible for, or complicit in, either the large-scale reclamation, construction, or militarization of

exercises. DOD had invited China to participate in the 2018 RIMPAC exercise, and China had accepted that invitation. DOD's statement regarding the withdrawal of the invitation was reprinted in Megan Eckstein, "China Disinvited from Participating in 2018 RIMPAC Exercise," *USNI News*, May 23, 2018. See also Gordon Lubold and Jeremy Page, "U.S. Retracts Invitation to China to Participate in Military Exercise," *Wall Street Journal*, May 23, 2018. See also Helene Cooper, "U.S. Disinvites China From Military Exercise Amid Rising Tensions," *New York Times*, May 23, 2018; Missy Ryan, "Pentagon Disinvites China from Major Naval Exercise over South China Sea Buildup," *Washington Post*, May 23, 2018; James Stavridis, "U.S. Was Right to Give China's Navy the Boot," *Bloomberg*, August 2, 2018.

<sup>82</sup> Jake Maxwell Watts, "Bolton Warns China Against Limiting Free Passage in South China Sea," *Wall Street Journal*, November 13, 2018.

<sup>83</sup> See Demetri Sevastopulo and Kathrin Hille, "US Warns China on Aggressive Acts by Fishing Boats and Coast Guard; Navy Chief Says Washington Will Use Military Rules of Engagement to Curb Provocative Behavior," *Financial Times*, April 28, 2019. See also Shirley Tay, "US Reportedly Warns China Over Hostile Non-Naval Vessels in South China Sea," *CNBC*, April 29, 2019; Ryan Pickrell, "China's South China Sea Strategy Takes a Hit as the US Navy Threatens to Get Tough on Beijing's Sea Forces," *Business Insider*, April 29, 2019; Tyler Durden, "'Warning Shot Across the Bow:' US Warns China On Aggressive Acts By Maritime Militia," *Zero Hedge*, April 29, 2019; Ankit Panda, "The US Navy's Shifting View of China's Coast Guard and 'Maritime Militia,'" *Diplomat*, April 30, 2019; Ryan Pickrell, "It Looks Like the US Has Been Quietly Lowering the Threshold for Conflict in the South China Sea," *Business Insider*, June 19, 2019.

<sup>84</sup> State Department, Remarks With Philippine Foreign Secretary Teodoro Locsin Jr., Remarks [by] Michael R. Pompeo, Secretary of State, March 1, 2019, accessed May 31, 2023, at <https://2017-2021.state.gov/remarks-with-philippine-foreign-secretary-teodoro-locsin-jr/index.html>.

<sup>85</sup> Department of State, "U.S. Imposes Restrictions on Certain PRC State-Owned Enterprises and Executives for Malign Activities in the South China Sea," press statement, Michael R. Pompeo, Secretary of State, August 26, 2020.

disputed outposts in the South China Sea, or the PRC's use of coercion against Southeast Asian claimants to inhibit their access to offshore resources in the South China Sea."<sup>86</sup>

- Also on January 14, 2021, the Commerce Department added China's state-owned Chinese National Offshore Oil Corporation (CNOOC) to the Entity List, restricting exports to that firm, citing CNOOC's role in "helping China intimidate neighbors in the South China Sea."<sup>87</sup>

## Biden Administration's Strategy

### Overview

The Biden Administration has continued a number of the general lines of effort listed above in the section on the Trump Administration's strategy. Among other things, the Biden Administration has reaffirmed the U.S. position on issues relating to the SCS and ECS, worked to strengthen ties with allies and partners in the region, and continued U.S. efforts to provide maritime-related security assistance to those countries.<sup>88</sup> The Navy and Air Force have continued to operate in the broader waters of the SCS and the airspace above,<sup>89</sup> and the Navy has continued to conduct FON operations in the SCS and transits of the Taiwan Strait,<sup>90</sup> with some observers comparing the frequency of FON operations and Taiwan Strait transits to their frequency during the Trump Administration.

### Cooperation with the Philippines

As noted earlier, since the later months of 2021, and particularly since Ferdinand Marcos Jr. assumed the office of President of the Philippines on June 30, 2022, Philippine actions, while continuing to show an interest in seeking cooperative arrangements with China where possible,<sup>91</sup> have also reflected a greater willingness to confront China regarding the SCS.<sup>92</sup> U.S.-Philippine

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<sup>86</sup> Department of State, "Protecting and Preserving a Free and Open South China Sea," January 14, 2021. See also Matthew Lee, "US Imposes New Sanction on Beijing over South China Sea," *Associated Press*, January 14, 2021.

<sup>87</sup> Department of Commerce, "Commerce Adds China National Offshore Oil Corporation to the Entity List and Skyryzon to the Military End-User List," January 14, 2021. See also Ben Lefebvre, "U.S. Bans Exports to China's State-Owned Oil Company CNOOC," *Politico Pro*, January 14, 2021.

<sup>88</sup> See, for example, Joe Gould, "U.S. to Announce Donation of Cargo Aircraft, Cutters to the Philippines," *Politico Pro*, May 1, 2023; John Bradford, "U.S. Coast Guard Is Helping Southeast Asians Protect Their Seas," *Foreign Policy*, March 9, 2023; Benar News, "In Historic Visit, Harris Reiterates US Support for Philippines in Sea Dispute," *Radio Free Asia*, November 22, 2022; Jason Gutierrez, "In Philippines, Harris Promises Support and Denounces China," *New York Times*, November 22, 2022; Feliz Solomon, "Kamala Harris Seeks to Strengthen Philippines Alliance Amid Fraught China Relations," *Wall Street Journal*, November 22, 2022; Niniek Karmini, "US Pushes Defense Ties with Indonesia as China Strengthens," *Associated Press*, November 21, 2022; Doug G. Ware, "In Jakarta, Austin Promises More Military Exercises with Indonesia to Ensure 'Free and Open' Indo-Pacific," *Stars and Stripes*, November 21, 2022; Steve Holland and David Brunnstrom, "Biden, Philippines' Marcos Discuss Tensions in South China Sea," *Reuters*, September 22, 2022; Gregory B. Poling, "The United States Is Deeply Invested in the South China Sea, As China Postures, Washington Remains Committed," *Foreign Policy*, August 14, 2022.

<sup>89</sup> See, for example, Willard Cheng, "US Plans to Increase Presence in South China Sea," *ABS-CBN News*, October 18, 2022.

<sup>90</sup> See, for example, Alex Wilson, "Navy Sends Destroyer through Taiwan Strait Less than a Week after Chinese Exercises," *Stars and Stripes*, April 17, 2023; Heather Mongilio, "U.S. Will Continue Taiwan Strait Transits, FONOPs in Western Pacific Despite Growing Tension with China," *USNI News*, August 8, 2022; Al Jazeera, "US to Conduct 'Air and Maritime Transits' in Taiwan Strait," *Al Jazeera*, August 13, 2022.

<sup>91</sup> See footnote 69.

<sup>92</sup> See footnote 70.



security cooperation, which was constrained during Duterte’s period as president, has strengthened substantially under President Marcos.<sup>93</sup> Reported developments in 2023 include the following:

- In February 2023, the United States and the Philippines announced an agreement to expand their Enhanced Defense Cooperation Arrangement (EDCA) to permit U.S. military access to four additional military facilities in the Philippines.<sup>94</sup> In April 2023, the two governments identified the four additional sites.<sup>95</sup>
- Also in February 2023, the United States and the Philippines agreed to restart U.S.-Philippine joint patrols in the SCS, which had been suspended in 2016, during Duterte’s period as president. The Philippines reportedly has also held talks with Japan and Australia about conducting joint patrols in the SCS with those countries.<sup>96</sup>
- In March 2023, it was reported that “Japan, the Philippines and the United States plan to set up a trilateral framework involving their national security advisers” for “boosting deterrence against China and preparing for a potential crisis over Taiwan.”<sup>97</sup>

<sup>93</sup> See, for example, Karen Lema and Mikhail Flores, “US Considering Seeking Access to More Philippine Bases, Admiral Says,” *Reuters*, September 14, 2023; Cliff Harvey Venzon, “US, Philippines Plan Upgrades in Airport, Navy Base Near Taiwan,” *Bloomberg*, September 13, 2023; Aaron-Matthew Lariosa, “U.S., Philippines Forces Training in Tandem As Countries’ Alliance Expands,” *USNI News*, July 18, 2023; Sayumi Take, “Philippines Boosting U.S., Japan Security Ties: Foreign Minister,” *Nikkei Asia*, May 16, 2023; Daniel Heng, “Philippines’ New Military Deal with US: Will It Tilt Power Balance in South China Sea?” *Channel News Asia*, May 14, 2023; Seth Robson, “Revived Alliance Brings US Forces Back to Subic Bay in the Philippines,” *Stars and Stripes*, May 8, 2023; Jeff Mason, Trevor Hunnicutt, and David Brunnstrom, “Amid China Pressure, US and Philippines Recommit to Security Alliance,” *Reuters*, May 2, 2023; Ryo Nakamura, “U.S. and Philippines Rapidly Draw Near to Counter China,” *Nikkei Asia*, May 2, 2023; Aamer Madhani and Jim Gomez, “Biden: US-Philippines ‘Ironclad’ Partners amid China Tension,” *Washington Post*, May 1, 2023; Ryo Nakamura, “U.S. ‘Ready’ to Aid Philippine Resupplies in South China Sea: Admiral,” *Nikkei Asia*, May 1, 2023; Ellen Nakashima, “Philippine President’s White House Visit Reflects Sharp Upturn in Ties,” *Washington Post*, May 1, 2023; Tom Rogan, “Philippines-US Alliance Moves past Duterte Dysfunction,” *Washington Examiner*, May 1, 2023; Katie Rogers, “Biden Meets Marcos in Washington Amid Tensions With China,” *New York Times*, May 1, 2023; Demetri Sevastopulo, “Joe Biden Says US Commitment to Defending Philippines Is ‘Iron Clad,’” *Financial Times*, May 1, 2023.

<sup>94</sup> Jim Garamone, “U.S.-Philippine Alliance Strengthens as it Enters New Phase,” *DOD News*, February 2, 2023.

<sup>95</sup> Department of Defense, “Philippines, U.S. Announce Locations of Four New EDCA Sites,” news release, April 3, 2023; Department of Defense, “Readout of U.S.-Philippines 2+2 Ministerial Dialogue,” news release, April 11, 2023; Rene Acosta, “Philippines Announce 4 New Locations to Host U.S. Troops,” *USNI News*, April 3, 2023; Jim Gomez, “Philippines Names 4 New Camps for US Forces amid China Ffury,” *Associated Press*, April 3, 2023; Karen Lema, “Philippines Reveals Locations of 4 New Strategic Sites for U.S. Military Pact,” *Reuters*, April 3, 2023.

<sup>96</sup> Reuters, “Joint Philippines-U.S. Patrols in South China Sea May Begin by Third Quarter – Envoy,” *Reuters*, May 8, 2023; Karen Lema, “Japan, Australia May Conduct South China Sea Patrols with U.S., Philippine—Ambassador,” *Reuters*, February 28, 2023; Agence France Presse, “US ‘Committed’ To Joint Sea Patrols With Philippines: US Navy Chief,” *Barron’s*, February 22, 2023; Karen Lema, “Australia, Philippines Discuss joint South China Sea Patrols,” *Reuters*, February 22, 2023; Jim Gomez and Edna Tarigan, “Philippines Eyes South China Sea Patrols with US, Australia,” *Associated Press*, February 22, 2023; Karen Lema, “Philippines, U.S. Discuss Joint Coast Guard Patrols in South China Sea,” *Reuters*, February 20, 2023.

See also Sebastian Strangio, “Joint South China Sea Patrols Could Begin in 2023, Philippine Official Says,” *Diplomat*, August 10, 2023; Jason Gutierrez (Benar News), “Philippines, US to Launch Joint South China Sea Patrols This Year: Official,” *Radio Free Asia*, August 9, 2023; Kristine Daguno-Bersamina, “Philippines, US Expected to Start Joint Patrols in West Philippine Sea by Year-End—NSC,” *Philippine Star*, August 5, 2023; Yusuke Takeuchi and Yukihiro Sakaguchi, “U.S., Philippines and Japan eye regular South China Sea exercises,” *Nikkei Asia*, June 17, 2023.

<sup>97</sup> Kyodo News, “Japan, Philippines, U.S. to Set Up 3-Way Security Framework,” *Kyodo News*, March 28, 2023.

- Also in May 2023, the United States and the Philippines released updated bilateral defense guidelines<sup>98</sup> that, among other things, addressed the circumstances under which U.S. forces would come to the aid of the Philippines under the 1951 U.S.-Philippines mutual defense treaty.<sup>99</sup>
- In early June 2023, Philippine coast guard cutters participated in a first-ever trilateral exercise with U.S. and Japanese coast guard cutters that took place in SCS waters off Bataan province.<sup>100</sup>

## Press Reports

A January 27, 2021, press report stated that

[President] Biden reaffirmed in a telephone call with the Japanese prime minister the U.S.'s commitment to defend uninhabited islands controlled by Japan and claimed by China that have been a persistent point of contention between the Asian powerhouses. Meanwhile, newly confirmed U.S. Secretary of State Antony Blinken rejected Chinese territorial claims in a call with his Philippine counterpart and emphasized U.S. alliances in talks with top Australian and Thai officials.<sup>101</sup>

A January 28, 2021, press report similarly stated

One week into the job, US President Joe Biden has sent a clear warning to Beijing against any expansionist intentions in East and Southeast Asia.

In multiple calls and statements, he and his top security officials have underscored support for allies Japan, South Korea, Taiwan and the Philippines, signaling Washington's rejection of China's disputed territorial claims in those areas.

On Wednesday [January 27], Biden told Japanese Prime Minister Yoshihide Suga that his administration is committed to defending Japan, including the Senkaku Islands, which are claimed both by Japan and China, which calls them the Diaoyu Islands.

That stance was echoed by Defense Secretary Lloyd Austin, who told Japanese counterpart Nobuo Kishi on Saturday that the contested islands were covered by the US-Japan Security Treaty.

Austin affirmed that the United States "remains opposed to any unilateral attempts to change the status quo in the East China Sea," according to a Pentagon statement on the call. expansionist intentions in East and Southeast Asia.<sup>102</sup>

A January 22, 2021, press report stated

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<sup>98</sup> *The United States and the Republic of the Philippines Bilateral Defense Guidelines*, undated, 6 pp., accessed June 5, 2023, at <https://media.defense.gov/2023/May/03/2003214357/-1/-1/0/THE-UNITED-STATES-AND-THE-REPUBLIC-OF-THE-PHILIPPINES-BILATERAL-DEFENSE-GUIDELINES.PDF>.

<sup>99</sup> See, for example, Felix K. Chang, "America and the Philippines Update Defense Guidelines," Foreign Policy Research Institute (FPRI), May 24, 2023.

<sup>100</sup> Yuichi Shiga, "Japan, U.S., Philippines Reinforce Collaboration in Marine Security," *Nikkei Asia*, June 2, 2023; CNN Philippines Staff, "PH, Japan, and US to Hold First Trilateral Joint Coast Guard Drills in June," *CNN*, May 29, 2023; Andreo Calozzo, "US, Japan, Philippines to Hold Drills Amid China Tensions," *Bloomberg*, May 28 (updated May 29), 2023; Rene Acosta, "Philippine Coast Guard Will Hold First-Ever Trilateral Exercise with U.S., Japan," *USNI News*, May 23, 2023.

<sup>101</sup> Isabel Reynolds, "Biden Team Slams China Claims in Swift Calls to Asia Allies," *Bloomberg*, January 27 (updated January 28), 2021.

<sup>102</sup> Sylvie Lanteaume (Agence France-Presse), "In Multiple Messages, Biden Warns Beijing over Expansionism," *Yahoo News*, January 28, 2021. See also Wendy Wu and Teddy Ng, "China-US Tension: Biden Administration Pledges to Back Japan and Philippines in Maritime Disputes," *South China Morning Post*, January 28, 2021.

Washington's defense treaty with Tokyo applies to the Japan-administered Senkaku Islands, the new U.S. national security adviser confirmed Thursday [January 21], in an early show of support for an ally regarding a source of regional tension.

In a 30-minute phone call that marked the first official contact between high-level officials from the two countries since U.S. President Joe Biden took office Wednesday, Jake Sullivan and Japanese counterpart Shigeru Kitamura reaffirmed the importance of the alliance.

Sullivan said the U.S. opposes any unilateral actions intended to harm Japan's administration of the Senkakus—which are claimed by China as the Diaoyu—and is committed to its obligations under the treaty, according to the Japanese government's readout. The call was requested by Tokyo.<sup>103</sup>

A February 24, 2021, press report stated

The Pentagon has urged Beijing to stop sending government vessels into Japanese waters, following more incursions by China's coast guard vessels near the Senkaku Islands over the weekend.

Beijing's continued deployment of ships near the islets controlled by Japan "could lead to miscalculation"—or physical and material harm, Department of Defense spokesperson John Kirby said Tuesday [February 23]....

Nations should be "free from coercion and able to pursue economic growth consistent with accepted rules and norms," Pentagon press secretary John Kirby told reporters during Tuesday's off-camera briefing.

He said the Chinese government, through its actions, was undermining the rules-based international order, one in which Beijing itself has benefited.

"We would urge the Chinese to avoid actions, using their Coast Guard vessels, that could lead to miscalculation and potential physical, if not—and material harm," Kirby said, according to a DoD read-out.<sup>104</sup>

A March 25, 2021, press report stated that

Taiwan and the United States have signed their first agreement under the Biden administration, establishing a Coast Guard Working Group to coordinate policy, following China's passing of a law that allows its coast guard to fire on foreign vessels....

The defacto Taiwanese ambassador to the United States, Hsiao Bi-khim, signed the agreement in Washington on Thursday [March 25], her office said in a statement.

"It is our hope that with the new Coast Guard Working Group, both sides will forge a stronger partnership and jointly contribute even more to a free and open Indo-Pacific region."

U.S. Acting Assistant Secretary of State for East Asian and Pacific Affairs Sung Kim was at the signing ceremony, the office said.<sup>105</sup>

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<sup>103</sup> Masaya Kato and Shohei Kanaya, "Team Biden Assures Japan that Senkakus Fall Under Security Treaty," *Nikkei Asia*, January 22, 2021.

<sup>104</sup> John Feng, "Pentagon Warns China About 'Miscalculation' Over Actions in Japanese Waters," *Newsweek*, February 24, 2021. See also Kyodo News, "U.S. Raps China on Activities Near Senkakus, Says It Supports Japan," *Kyodo News*, February 24, 2021; Kyodo News, "Pentagon Says Remarks on Senkaku Islands Sovereignty Were 'Error,'" *Kyodo News*, February 27, 2021.

<sup>105</sup> Ben Blanchard, "Taiwan, U.S. to Strengthen Maritime Coordination After China Law," *Reuters*, March 25, 2021.

## Tables Showing Reported SCS FON Operations and Taiwan Strait Transits

**Table 2** and **Table 3** show reported U.S. Navy FON operations during the Trump and Biden Administrations, respectively.<sup>106</sup> Reported FON operations do not necessarily include all FON operations. **Table 4** shows reported annual numbers of U.S. Navy FON operations in the SCS and Taiwan Strait transits (TSTs) conducted by Commander, U.S. Pacific Fleet (CPF) forces from 2012 through 2020. (CRS on January 31, 2023, requested the figures for 2021 and 2022 from the Navy and will update **Table 4** to include those figures when they are received.) Note that the data in **Table 2** and **Table 4** do not entirely agree. **Figure 3** shows the approximate reported locations of some FON operations in 2016-2019.

**Table 2. Reported FON Operations in SCS During Trump Administration**

Details shown are based on press reports

Date	Location in SCS	U.S. Navy Ship	Notes
May 25, 2017	Mischief Reef in Spratly Islands	<i>Dewey</i> (DDG-105)	
July 2, 2017	Triton Island in Paracel Islands	<i>Stethem</i> (DDG-63)	
August 10, 2017	Mischief Reef in Spratly Islands	<i>John S. McCain</i> (DDG-56)	
October 10, 2017	Paracel Islands	<i>Chaffee</i> (DDG-90)	
January 7, 2018	Paracel Islands	<i>McCampbell</i> (DDG-85)	
January 17, 2018	Scarborough Shoal	<i>Hopper</i> (DDG-70)	
March 23, 2018	Mischief Reef in Spratly Islands	<i>Mustin</i> (DDG-89)	
May 27, 2018	Tree, Lincoln, Triton, and Woody islands in Paracel Islands	<i>Antietam</i> (CG-54) and <i>Higgins</i> (DDG-76)	The U.S. Navy reportedly considers that the Chinese warships sent to warn off the U.S. Navy ships maneuvered in a “safe but unprofessional” manner.
September 30, 2018	Gaven and Johnson Reefs in Spratly Islands	<i>Decatur</i> (DDG-73)	This operation led to a tense encounter between the <i>Decatur</i> and a Chinese destroyer.
November 26, 2018	Paracel Islands	<i>Robert Smalls</i> (CG-62) (ex- <i>Chancellorsville</i> )	
January 7, 2019	Tree, Lincoln, and Woody islands in Paracel Islands	<i>McCampbell</i> (DDG-85)	
February 11, 2019	Mischief Reef in Spratly Islands	<i>Spruance</i> (DDG-111) and <i>Preble</i> (DDG-88)	
May 6, 2019	Gaven and Johnson Reefs in Spratly Islands	<i>Preble</i> (DDG-88) and <i>Chung Hoon</i> (DDG-93)	
May 19, 2019	Scarborough Shoal in Spratly Islands	<i>Preble</i> (DDG-88)	
August 28, 2019	Fiery Cross Reef and Mischief Reef in Spratly Islands	<i>Wayne E. Meyer</i> (DDG-108)	
September 13, 2019	Paracel Islands	<i>Wayne E. Meyer</i> (DDG-108)	
November 20, 2019	Mischief Reef in Spratly Islands	<i>Gabrielle Giffords</i> (LCS-10)	
November 21, 2019	Paracel Islands	<i>Wayne E. Meyer</i> (DDG-108)	

<sup>106</sup> See also Gina Harkins, “US Military Operations Challenging China’s Territorial Claims Peaked Under Trump,” *Military.com*, March 22, 2021.

Date	Location in SCS	U.S. Navy Ship	Notes
January 25, 2020	Spratly Islands	<i>Montgomery</i> (LCS-8)	
March 10, 2020	Paracel Islands	<i>McCampbell</i> (DDG-85)	
April 28, 2020	Paracel Islands	<i>Barry</i> (DDG-52)	
April 29, 2020	Gaven Reef in Spratly Islands	<i>Bunker Hill</i> (CG-52)	
May 28, 2020	Woody Island and Pyramid Rock in Paracel Islands	<i>Mustin</i> (DDG-89)	
July 14, 2020	Cuarteron Reef and Fiery Cross Reef in Spratly Islands	<i>Ralph Johnson</i> (DDG-114)	
August 27, 2020	Paracel Islands	<i>Mustin</i> (DDG-89)	
October 9, 2020	Paracel Islands	<i>John S. McCain</i> (DDG-56)	
December 22, 2020	Spratly Islands	<i>John S. McCain</i> (DDG-56)	The operation was directed against excessive maritime claims by the People's Republic of China, Taiwan, and Vietnam.
December 24, 2020	Con Dao Islands	<i>John S. McCain</i> (DDG-56)	The operation was directed against excessive maritime claims by Vietnam. The islands, which are part of Vietnam, are located about 150 miles south of Ho Chi Minh City.

**Source:** Table prepared by CRS based on press reports about each operation. Reported FON operations do not necessarily include all FON operations.

**Notes:** Reported dates may vary by one day due to the difference in time zones between the United States and the SCS. Regarding the entry for March 10, 2020, a press report on China's state-controlled media states "Since late January, US warships have travelled within 12 nautical miles of the South China Sea islands in Chinese territory five separate times. Three instances happened close to one another on March 10, 13, and 15." (Cheng Hanping, "US Steps Up Maritime Provocations in Attempt to Distract China's COVID-19 Fight," *Global Times*, March 22, 2020.) On February 27, 2023, announced that CG-62, originally named *Chancellorsville*, would be renamed *Robert Smalls*. On March 1, 2023, CG-62's listing in the Naval Vessel Register (<https://www.nvr.navy.mil>, accessed June 5, 2023) was updated to reflect the change. For further discussion of change in the ship's name, see CRS Report RS22478, *Navy Ship Names: Background for Congress*, by Ronald O'Rourke.

In general, China has objected to U.S. Navy FON operations in the SCS, sometimes characterizing them as illegal (a characterization the United States rejects), and stated that it sent Chinese Navy ships and/or aircraft to warn the U.S. Navy ships to leave the areas in question. The FON operation conducted on September 30, 2018, led to an intense encounter, discussed elsewhere in this report, between the U.S. Navy ship that conducted the operation (the USS *Decatur* [DDG-73]) and the Chinese Navy ship that was sent to warn it off.<sup>107</sup>

<sup>107</sup> For the discussion of this tense encounter, see the paragraph ending in footnote 141 and the citations at that footnote.

**Table 3. Reported FON Operations in SCS During Biden Administration**

Details shown are based on press reports

Date	Location in SCS	U.S. Navy Ship	Notes
February 5, 2021	Paracel Islands	<i>John S. McCain</i> (DDG-56)	The operation was directed against excessive maritime claims by the People's Republic of China, Taiwan, and Vietnam.
February 17, 2021	Spratly Islands	<i>Russell</i> (DDG-59)	This operation was directed against unlawful restrictions on innocent passage by the People's Republic of China, Taiwan, and Vietnam.
May 20, 2021	Paracel Islands	<i>Curtis Wilbur</i> (DDG-54)	
July 12, 2021	Paracel Islands	<i>Benfold</i> (DDG-65)	
September 8, 2021	Mischief Reef in Spratly Islands	<i>Benfold</i> (DDG-65)	
January 20, 2022	Paracel Islands	<i>Benfold</i> (DDG-65)	This operation was directed against unlawful restrictions on innocent passage by the People's Republic of China, Taiwan, and Vietnam, and excessive maritime claims (straight baselines) by the People's Republic of China.
July 13, 2022	Paracel Islands	<i>Benfold</i> (DDG-65)	
July 16, 2022	Spratly Islands	<i>Benfold</i> (DDG-65)	
November 29, 2022	Spratly Islands	<i>Robert Smalls</i> (CG-62) (ex- <i>Chancellorsville</i> )	
March 24, 2023	Paracel Islands	<i>Milius</i> (DDG 69)	
April 10, 2023	Mischief Reef in Spratly Islands	<i>Milius</i> (DDG 69)	

**Source:** Table prepared by CRS based on press reports about each operation. Reported FON operations do not necessarily include all FON operations.

**Note:** Reported dates may vary by one day due to the difference in time zones between the United States and the SCS. On February 27, 2023, announced that CG-62, originally named *Chancellorsville*, would be renamed *Robert Smalls*. On March 1, 2023, CG-62's listing in the Naval Vessel Register (<https://www.nvr.navy.mil>, accessed June 5, 2023) was updated to reflect the change. For further discussion of change in the ship's name, see CRS Report RS22478, *Navy Ship Names: Background for Congress*, by Ronald O'Rourke.

A January 11, 2023, press report stated

The US hasn't changed its policy on sending Navy vessels through the Taiwan Strait, the Pentagon said, describing a decline in the number of transits last year as nothing out of the ordinary.

"Many factors affect the planning and execution of these operations including ship and aircraft availability, other military operations and exercises both in the Indo-Pacific and around the world, weather, and geopolitical events," Pentagon spokesman John Supple said in a statement.

Supple was responding to a query from Bloomberg News about data that showed the number of US naval transits through the strait fell to the lowest level in four years in 2022 even as China steps up military pressure on the island.

Data compiled by Bloomberg showed the US 7th Fleet sent nine warships through the waters separating China and Taiwan last year. The Navy also conducted four “freedom-of-navigation operations” through the South China Sea, the fewest in six years, trips it says show its dedication to a “free and open Indo-Pacific.”

Supple said Taiwan Strait transits were “consistent with historical norms.” He said the number of freedom of navigation exercises was “consistent with the historical average number of operations conducted over the past 10 years.”

The decline in US naval activity contrasts with the roughly 1,700 warplanes that China sent into Taiwan’s sensitive air-defense identification zone last year, almost double the number from 2021.<sup>108</sup>

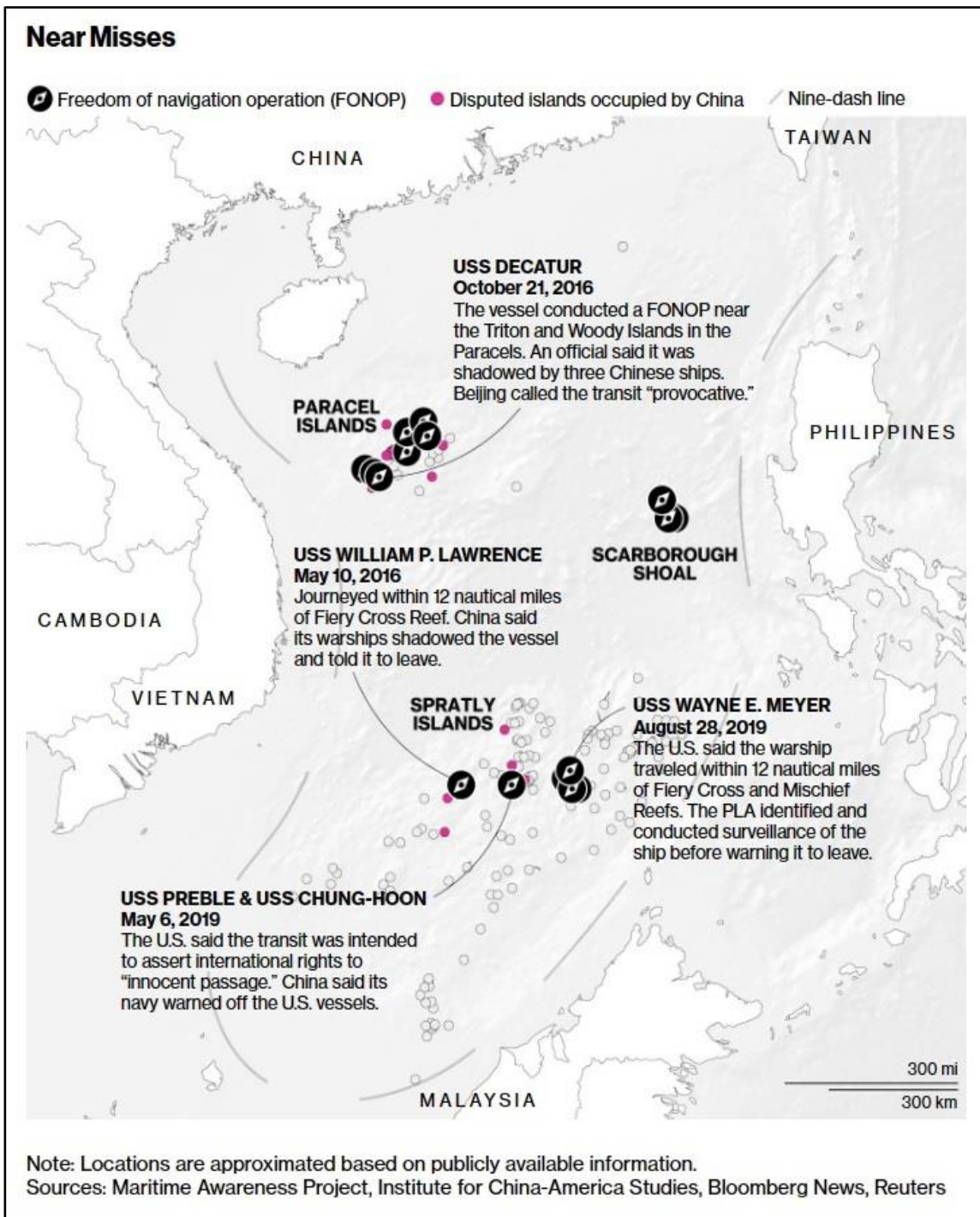
**Table 4. Reported Numbers of U.S. Navy SCS FONOPs and Taiwan Strait Transits**

Year	SCS FONOPs	Taiwan Strait transits
2012	5	9
2013	2	12
2014	3	4
2015	2	1
2016	3	12
2017	6	3
2018	5	3
2019	7	9
2020	8	13
2021	5	15
2022	5	13

**Sources:** For 2012 through 2020: U.S. Navy information paper, “Taiwan Strait Transit (TST) passages and Freedom of Navigation operations (FONOPS) conducted by CPF [Commander, U.S. Pacific Fleet] forces in the South China Sea (SCS) from CY 2012 through 17 Feb 2021,” undated, provided by Navy Office of Legislative Affairs to CRS on February 24, 2021. For 2021 and 2022: email from Navy Office of Legislative Affairs, September 13, 2023, providing figures from DOD’s J3 Operations Directorate.

<sup>108</sup> Nick Wadhams, “Pentagon Says Policy on Taiwan Strait Transits Is Unchanged Despite 2022 Decline,” *Bloomberg*, January 11, 2023. See also Kari Soo Lindberg, “US Cuts Taiwan Transits Even as China Steps Up Military Pressure,” *Bloomberg*, January 6, 2023.

Figure 3. Approximate Reported Locations of FONOPs in 2016-2019



**Source:** Illustration accompanying Karen Leigh, Peter Martin and Adrian Leung, "Troubled Waters: Where the U.S. and China Could Clash in the South China Sea," *Bloomberg*, December 17, 2020.

As an example of a statement regarding a U.S. FON operation, the U.S. Navy 7<sup>th</sup> Fleet stated, in regard to the November 29, 2022, FON operation shown in **Table 3**, that



The PRC's statement about [the alleged illegality of] this mission<sup>109</sup> is false. USS Chancellorsville (CG 62)<sup>110</sup> conducted this FONOP in accordance with international law and then continued on to conduct normal operations in waters where high seas freedoms apply. The operation reflects our continued commitment to uphold freedom of navigation and lawful uses of the sea as a principle. The United States is defending every nation's right to fly, sail, and operate wherever international law allows, as USS Chancellorsville did here. Nothing the PRC says otherwise will deter us.

The PLA Southern Theater Command's statement is the latest in a long string of PRC actions to misrepresent lawful U.S. maritime operations and assert its excessive and illegitimate maritime claims at the expense of its Southeast Asian neighbors in the South China Sea. The PRC's behaviors stands in contrast to the United States' adherence to international law and our vision of a free and open Indo-Pacific region. All nations, large and small, should be secure in their sovereignty, free from coercion, and able to pursue economic growth consistent with accepted international rules and norms.

On November 29, 2022, USS Chancellorsville (CG 62) asserted navigational rights and freedoms in the South China Sea near the Spratly Islands, consistent with international law. At the conclusion of the operation, USS Chancellorsville exited the excessive claim area and continued operations in the South China Sea. The freedom of navigation operation ("FONOP") upheld the rights, freedoms, and lawful uses of the sea recognized in international law by challenging restrictions on innocent passage imposed by the People's Republic of China (PRC), Vietnam, and Taiwan.

Unlawful and sweeping maritime claims in the South China Sea pose a serious threat to the freedom of the seas, including the freedoms of navigation and overflight, free trade, and unimpeded commerce, and freedom of economic opportunity for South China Sea littoral nations.

The United States challenges excessive maritime claims around the world regardless of the identity of the claimant. Customary international law of the sea as reflected in the 1982 Law of the Sea Convention provides for certain rights and freedoms and other lawful uses of the sea to all nations. The international community has an enduring role in preserving the freedom of the seas, which is critical to global security, stability, and prosperity.

The United States upholds freedom of navigation for all nations as a principle. As long as some countries continue to claim and assert limits on rights that exceed their authority under international law, the United States will continue to defend the rights and freedoms of the sea guaranteed to all. No member of the international community should be intimidated or coerced into giving up their rights and freedoms.

The PRC, Vietnam, Taiwan, Malaysia, Brunei, and the Philippines each claim sovereignty over some or all of the Spratly Islands. The PRC, Vietnam, and Taiwan purport to require either permission or advance notification before a foreign military vessel engages in "innocent passage" through the territorial sea. Under customary international law as reflected in the Law of the Sea Convention, the ships of all states—including their warships—enjoy the right of innocent passage through the territorial sea. International law does not allow for the unilateral imposition of any authorization or advance-notification requirement for innocent passage, so the United States challenged these requirements. By engaging in innocent passage without giving prior notification to or asking permission from any of the claimants, the United States challenged the unlawful restrictions imposed by the

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<sup>109</sup> See, for example, Al Jazeera and Reuters, "China Says US Ship 'Illegally Intruded' in Waters Near Spratlys," *Al Jazeera*, November 29, 2022.

<sup>110</sup> On February 27, 2023, announced that CG-62, originally named *Chancellorsville*, would be renamed *Robert Smalls*. On March 1, 2023, CG-62's listing in the Naval Vessel Register (<https://www.nvr.navy.mil>, accessed June 5 2023) was updated to reflect the change. For further discussion of change in the ship's name, see CRS Report RS22478, *Navy Ship Names: Background for Congress*, by Ronald O'Rourke.

PRC, Taiwan, and Vietnam. The United States demonstrated that innocent passage is not subject to such restrictions.

U.S. forces operate in the South China Sea on a daily basis, as they have for more than a century. They routinely operate in close coordination with like-minded allies and partners who share our commitment to uphold a free and open international order that promotes security and prosperity. All of our operations are conducted safely, professionally, and in accordance with international law. These operations demonstrate that the United States will fly, sail, and operate wherever international law allows—regardless of the location of excessive maritime claims and regardless of current events.<sup>111</sup>

## **Assessing the Administration’s Strategy**

In assessing whether the Administration’s strategy for competing strategically with China in the SCS and ECS is appropriate and correctly resourced, potential questions that Congress may consider include but are not necessarily limited to the following:

- Has the Administration correctly assessed China’s approach to the maritime disputes in the SCS and ECS, and to strengthening its position over time in the SCS?
- Has the Administration correctly identified the U.S. goals to be pursued in competing strategically with China in the SCS and ECS? If not, how should the Administration’s list of U.S. goals be modified?
- Are the Administration’s actions correctly aligned with its goals? If different goals should be pursued, what actions should be taken to support them?
- Has the Administration correctly incorporated cost-imposing strategies and potential contributions from allies and partners into its strategy? If not, how should the strategy be modified?
- Is the Administration requesting an appropriate level of resources for implementing its strategy? If not, how should the level of resources be modified?
- How does the Administration’s strategy for competing strategically in the SCS and ECS compare with China’s approach to the maritime disputes in the SCS and ECS, and to strengthening its position over time in the SCS?

Some observers have questioned whether U.S. strategy for competing strategically with China in the SCS and ECS is adequately resourced, particularly in terms of funding for maritime-related security assistance for countries in the region. Funding levels for security assistance to countries in the SCS, they argue, are only a small fraction of funding levels for U.S. security assistance recipients in other regions, such as the Middle East. One observer, for example, stated in 2018 that

today there is a large and persistent gap between the level of importance the U.S. government has attached to the Indo-Pacific and what annual appropriations continue to prioritize at the State Department and Pentagon. A bipartisan consensus has emerged to the extent that major foreign policy speeches and strategy documents now conclude that the Indo-Pacific is the central organizing principle for the U.S. government, but you would not know it by reading the last two administrations’ budget submissions. If budgets are truly policy, the administration and Congress have a long way to go....

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<sup>111</sup> U.S. 7th Fleet Public Affairs, “7th Fleet Cruiser Conducts Freedom of Navigation Operation in South China Sea,” Commander, U.S. 7th Fleet, November 28, 2022. See also 7th Fleet Public Affairs, “7th Fleet Destroyer Conducts Freedom of Navigation Operation in South China Sea,” U.S. 7th Fleet, July 12, 2022.

Despite the growing acceptance that the Indo-Pacific and U.S.-Chinese competition represents America's most pressing long-term challenge, there remains a stark contrast between how the administration and Congress continue to budget for Asian security matters compared to other international issues. This is not to argue that other priorities, such as European Command and countering Russian in Ukraine, are not important. They are and deserve budgetary support. Some will argue that this budgetary emphasis demonstrates a bias towards those theaters at the expense of Asia. There may be some truth to this. Understanding and responding to the Russia threat as well as the terrorism challenge remains a part of America's national security muscle memory, where support can quickly be galvanized and resources persistently applied. Significant work still needs to be done to translate the emerging understanding of America's long-term position in the Indo-Pacific by senior leaders and congressional staff into actual shifts in budgetary priority.

To be fair, in recent years Congress, with administration support, has taken important actions in the theater, including the creation and funding of the Maritime Security Initiative in 2015, funding of the Palau Compact in 2017, resourcing some of Indo-Pacific Command's unfunded requirements in 2018, devoting resources for dioxin remediation in Vietnam, and reorganizing and raising the lending limit for the Overseas Private Investment Corporation as part of the BUILD Act. But the issue remains that the scale of resource commitment to the region continues to fall short of the sizable objectives the U.S. government has set for itself....

Continuing to give other functional issues and regional challenges budgetary priority will not bring about the shift in national foreign policy emphasis that the United States has set for itself. As Washington's mental map of the Indo-Pacific matures, the next step in implementing this new consensus on China will fall to the administration, elected officials, and senior congressional staff to prioritize resource levels for the region commensurate with the great power competition we find ourselves in.<sup>112</sup>

## Additional Writings by Observers

**Appendix I** presents a bibliography of some recent writings by observers regarding U.S. strategy for competing strategically with China in the SCS and ECS.

## Risk of Incident, Crisis, or Conflict Involving U.S. Forces

### Risk Relating to U.S. and Chinese Military Operations In SCS

Some observers—citing both past incidents dating back to 2001 between U.S. and Chinese ships and aircraft in China's near-seas areas (see **Appendix A**), as well as more recent events—have expressed concern that stepped-up U.S. and Chinese military ship and aircraft operations in the SCS could increase the risk of a miscalculation or inadvertent action that could cause an accident or lead to an incident that in turn could escalate into a crisis or conflict.<sup>113</sup> An April 5, 2023, press report stated:

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<sup>112</sup> Eric Sayers, "Assessing America's Indo-Pacific Budget Shortfall," *War on the Rocks*, November 15, 2018.

<sup>113</sup> See, for example, James Stavridis, "Near-Collisions at Air and Sea Show China's New Recklessness, If US Forces Hadn't Shown Restraint, Scores of Lives Could Have Been Lost. Wars Have Started for Less," *Bloomberg*, June 6, 2023; Sarang Shidore, "Could a US-China War Begin over the Philippines?" *Responsible Statecraft*, May 15, 2023. Ted Galen Carpenter, "Washington's Involvement in Territorial Disputes Could Trigger a War with China," *Cato Institute*, March 22, 2021; Kurt M. Campbell, Ali Wyne, "The Growing Risk of Inadvertent Escalation Between Washington and Beijing," *Lawfare*, August 16, 2020; Minnie Chan, "US Spy Planes in South China Sea 'Creating Risk' for Civilian Aircraft," *South China Morning Post*, August 12 (updated August 13), 2020. For an example of a (continued...)

The United States has “strong indications” that Chinese leader Xi Jinping could be losing control over the gray zone “harassment” tactics that his military and paramilitary forces have been using against neighboring countries and the US, a senior intelligence officer warned today.

“We have strong indications that Xi Jinping—and I’m an intelligence guy—Xi Jinping is not aware of everything his security forces are doing,” Rear Adm. Mike Studeman, commander of the Office of Naval Intelligence, told an audience here at the Sea Air Space exposition. “We think it’s a function of the unwieldiness of China’s governance model. There are dangers of dictatorships.”

Studeman highlighted a variety of China’s harassment tactics used against fishermen from Vietnam and the Philippines, such as ramming other vessels or spraying them with high-power water cannons. The Chinese military also frequently tries to harass US Navy warships as they transit the South China Sea. The Pentagon refers to these transgressions as “gray zone” actions because they are below the standards of what would constitute acts of war. Studeman also referenced incidents where Chinese pilots flew dangerously close to US and Australian military aircraft.

In one incident, Studeman said, a Chinese pilot ejected chaff in the form of metal scraps from his aircraft—normally used to distract guided air-to-air missiles—while flying in front of an Australian P-8 [maritime patrol aircraft], leading the plane’s engines to ingest the material. The admiral today said the Australian crew was lucky they landed safely.

The severity and frequency of incidents like these may not always be making their way to Xi Jinping or other Chinese Communist Party elites, Studeman said.

“There are dangers in how totalitarian states operate,” he said. “The truth doesn’t always flow very quickly in the dictatorships, and if it’s bad news, sometimes that gets adulterated on the way up to [the top]. We see some of that happening.”<sup>114</sup>

In June 2023, following a Taiwan Strait transit during which a Chinese navy ship crossed in front of the U.S. Navy ship in what the United States described as an unsafe manner, a White House spokesperson and other observers expressed concern over possibility that unsafe actions by Chinese ships and aircraft operating near U.S. ships and aircraft in the Taiwan Strait and the SCS could eventually lead to an accident or incident.<sup>115</sup>

## Risk Relating to Maritime Territorial Disputes Involving Allies

Some observers remain concerned that maritime territorial disputes in the ECS and SCS could lead to a crisis or conflict between China and a neighboring country such as Japan or the Philippines, and that the United States could be drawn into such a crisis or conflict as a result of obligations the United States has under bilateral security treaties with Japan and the

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perspective from an observer from China, see Zhou Bo, “The Risk of China-US Military Conflict Is Worryingly High,” *Financial Times*, August 25, 2020. See also “America and China Try to Prevent Military Mishaps and Miscalculations,” *Economist*, June 16, 2022; *Risky Competition: Strengthening U.S.-China Crisis Management*, International Crisis Group, Asia Report Number 324, May 20, 2022, 34 pp.

<sup>114</sup> Justin Katz, “Xi Likely ‘Not Aware’ of All Chinese Gray Zone Operations, US Intel Officer Says,” *Breaking Defense*, April 5, 2023. For an excerpt from Studeman’s prepared remarks, see **Appendix E**.

<sup>115</sup> Andrea Shalal and Daphne Psaledakis, “After Dangerous Encounters, US Accuses China of Military ‘Aggressiveness,’” *Reuters*, June 6, 2023; Laura Kelly, “China’s Belligerence in Taiwan Strait Poses New Challenge to US,” *The Hill*, June 6, 2023; James Stavridis, “Near-Collisions at Air and Sea Show China’s New Recklessness, If US Forces Hadn’t Shown Restraint, Scores of Lives Could Have Been Lost. Wars Have Started for Less,” *Bloomberg*, June 6, 2023.

Philippines.<sup>116</sup> Regarding this issue, potential oversight questions for Congress include the following:

- Have U.S. officials taken appropriate and sufficient steps to help reduce the risk of maritime territorial disputes in the SCS and ECS escalating into conflicts?
- Do the United States and Japan have a common understanding of potential U.S. actions under Article IV of the U.S.-Japan Treaty on Mutual Cooperation and Security (see **Appendix B**) in the event of a crisis or conflict over the Senkaku Islands? What steps has the United States taken to ensure that the two countries share a common understanding?
- Do the United States and the Philippines have a common understanding of how the 1951 U.S.-Philippines mutual defense treaty applies to maritime territories in the SCS that are claimed by both China and the Philippines, and of potential U.S. actions under Article IV of the treaty (see **Appendix B**) in the event of a crisis or conflict over the territories? What steps has the United States taken to ensure that the two countries share a common understanding?<sup>117</sup> As noted earlier, in May 2023, the United States and the Philippines released updated bilateral defense guidelines that, among other things, clarified the circumstances under which U.S. forces would come to the aid of the Philippines under the 1951 U.S.-Philippines mutual defense treaty.<sup>118</sup>
- Aside from public statements, what has the United States communicated to China regarding potential U.S. actions under the two treaties in connection with maritime territorial disputes in the SCS and ECS?
- Has the United States correctly balanced ambiguity and explicitness in its communications to various parties regarding potential U.S. actions under the two defense treaties?
- How do the two treaties affect the behavior of Japan, the Philippines, and China in managing their territorial disputes? To what extent, for example, would they help Japan or the Philippines resist potential Chinese attempts to resolve the disputes through intimidation, or, alternatively, encourage risk-taking or brinksmanship behavior by Japan or the Philippines in their dealings with China

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<sup>116</sup> See, for example, Brian K. Chappell and Robert G. Angevine, *United States-China Gray Zone Conflict in the 2027 to 2032 Battlespace*, Institute for Defense Analyses (IDA), April 2023, 26 pp.; Joel Gehrke, “Laser Incident Points to Risk of Clash between China and US Treaty Ally,” *Washington Examiner*, February 14, 2023.

<sup>117</sup> As mentioned earlier, on March 1, 2019, Secretary of State Michael Pompeo stated that “as the South China Sea is part of the Pacific, any armed attack on Philippine forces, aircraft, or public vessels in the South China Sea will trigger mutual defense obligations under Article 4 of our Mutual Defense Treaty [with the Philippines].” For articles bearing more generally on this issue, see, for example, Jason Gutierrez, “Philippine Official, Fearing War With China, Seeks Review of U.S. Treaty,” *New York Times*, March 5, 2019; Jim Gomez (Associated Press), “Philippines Frets about War at Sea for US,” *Navy Times*, March 5, 2019; Rigoberto D. Tiglao, “US Will Defend PH in a South China Sea War? Don’t Bet on It,” *Manila Times*, March 4, 2019; Richard Javad Heydarian, “U.S. Ambiguity Is Pushing the Philippines Toward China,” *National Interest*, February 8, 2019; Richard Heydarian, “How Washington’s Ambiguity in South China Sea Puts the Philippine-US Alliance at a Crossroads,” *South China Morning Post*, January 31, 2019; Gregory Poling and Eric Sayers, “Time to Make Good on the U.S.-Philippine Alliance,” *War on the Rocks*, January 21, 2019; Malcolm Cook, “Philippine Alliance Angst,” *Interpreter*, January 18, 2019; Raissa Robles, “Philippine Defence Chief Urges Review of US Treaty Amid South China Sea Tensions,” *South China Morning Post*, January 17, 2019; Patrick N. Cronin and Richard Javad Heydarian, “This Is How America and the Philippines Can Upgrade Their Alliance,” *National Interest*, November 12, 2018; Agence France-Presse, “US Will Be ‘Good Ally’ to Philippines if China Invades, Defence Official Promises,” *South China Morning Post*, August 17, 2018.

<sup>118</sup> See, for example, Felix K. Chang, “America and the Philippines Update Defense Guidelines,” Foreign Policy Research Institute (FPRI), May 24, 2023.

on the disputes? To what extent do they deter or limit Chinese assertiveness or aggressiveness in their dealings with Japan the Philippines on the disputes?

- Has the DOD adequately incorporated into its planning crisis and conflict scenarios arising from maritime territorial disputes in the SCS and ECS that fall under the terms of the two treaties?

A January 5, 2023, press report states

China and the Philippines have agreed to set up a direct communications channel between their foreign ministries on the South China Sea to handle disputes peacefully, they said on Thursday [January 5].

Their agreement, which contained 14 elements aimed at cooling security tensions and boosting economic cooperation, comes as they strive to mend a relationship hurt after the Philippines won a 2016 arbitral ruling that invalidated China's expansive claims in the South China Sea.<sup>119</sup>

## Whether United States Should Ratify UNCLOS

Another issue for Congress—particularly the Senate—is how competing strategically with China in the SCS and ECS might affect the question of whether the United States should become a party to the United Nations Convention on the Law of the Sea (UNCLOS).<sup>120</sup> UNCLOS and an associated 1994 agreement relating to implementation of Part XI of the treaty (on deep seabed mining) were transmitted to the Senate on October 6, 1994.<sup>121</sup> In the absence of Senate advice and consent to adherence, the United States is not a party to UNCLOS or the associated 1994 agreement. During the 112<sup>th</sup> Congress, the Senate Foreign Relations Committee held four hearings on the question of whether the United States should become a party to the treaty on May 23, June 14 (two hearings), and June 28, 2012.

Supporters of the United States becoming a party to UNCLOS argue or might argue one or more of the following:

- The treaty's provisions relating to navigational rights, including those in EEZs, reflect the U.S. position on the issue; becoming a party to the treaty would help lock the U.S. perspective into permanent international law.
- Becoming a party to the treaty would give the United States greater standing for participating in discussions relating to the treaty—a “seat at the table”—and thereby improve the U.S. ability to call on China to act in accordance with the treaty's provisions, including those relating to navigational rights, and to defend U.S. interpretations of the treaty's provisions, including those relating to whether coastal states have a right under UNCLOS to regulate foreign military activities in their EEZs.<sup>122</sup>

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<sup>119</sup> Yew Lun Tian, Liz Lee, and Neil Jerome Morales, “China, Philippines Agree to Handle Disputes Peacefully, Boost Cooperation,” *Reuters*, January 5, 2023. See also Kathleen Magramo, “China and Philippines agree to ‘manage differences’ on South China Sea,” *CNN*, January 5, 2023; Kathrin Hille, “China and Philippines Vow to Handle Maritime Tensions with ‘Friendly Consultations,’” *CNN*, January 4, 2023.

<sup>120</sup> For additional background information on UNCLOS, see **Appendix C**.

<sup>121</sup> Treaty Document 103-39.

<sup>122</sup> See, for example, Andrew Browne, “A Hole in the U.S. Approach to Beijing,” *Wall Street Journal*, May 20, 2014.

- At least some of the ASEAN member states want the United States to become a member of UNCLOS, because they view it as the principal framework for resolving maritime territorial disputes.
- Relying on customary international law to defend U.S. interests in these issues is not sufficient, because it is not universally accepted and is subject to change over time based on state practice.<sup>123</sup>

Opponents of the United States becoming a party to UNCLOS argue or might argue one or more of the following:

- China's ability to cite international law (including UNCLOS) in defending its position on whether coastal states have a right to regulate foreign military activities in their EEZs<sup>124</sup> shows that UNCLOS does not adequately protect U.S. interests relating to navigational rights in EEZs; the United States should not help lock this inadequate description of navigational rights into permanent international law by becoming a party to the treaty.
- The United States becoming a party to the treaty would do little to help resolve maritime territorial disputes in the SCS and ECS, in part because China's maritime territorial claims, such as those depicted in the map of the nine-dash line, predate and go well beyond what is allowed under the treaty and appear rooted in arguments that are outside the treaty.
- The United States can adequately support the ASEAN countries and Japan in matters relating to maritime territorial disputes in the SCS and ECS in other ways, without becoming a party to the treaty.
- The United States can continue to defend its positions on navigational rights on the high seas by citing customary international law, by demonstrating those rights with U.S. naval deployments (including those conducted under the FON program), and by having allies and partners defend the U.S. position on the EEZ issue at meetings of UNCLOS parties.<sup>125</sup>

## Legislative Activity in 2023

Legislation in 2023 relating to the SCS and/or the ECS includes but is not necessarily limited to South China Sea and East China Sea Sanctions Act of 2023 (S. 591), which was introduced in the Senate on March 1, 2023.

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<sup>123</sup> See, for example, Patricia Kine, "Signing Treaty Would Bolster US Against China, Russia Seapower: Lawmaker," *Military.com*, January 16, 2019.

<sup>124</sup> For a discussion of China's legal justifications for its position on the EEZ issue, see, for example, Peter Dutton, "Three Disputes and Three Objectives," *Naval War College Review*, Autumn 2011: 54-55. See also Isaac B. Kardon, "The Enabling Role of UNCLOS in PRC Maritime Policy," Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), September 11, 2015.

<sup>125</sup> For articles providing general arguments against the United States becoming a party to UNCLOS, see Steven Groves, "This Senate May Smile on Faulty Law of the Sea Treaty," Heritage Foundation, March 19, 2021; Ted Bromund, James Carafano, and Brett Schaefer, "7 Reasons US Should Not Ratify UN Convention on the Law of the Sea," *Daily Signal*, June 2, 2018.

## Appendix A. Maritime Territorial and EEZ Disputes in SCS and ECS

This appendix provides background information on maritime territorial and EEZ disputes in the SCS and ECS that involve China. Other CRS reports provide additional and more detailed information on these disputes.<sup>126</sup>

### Maritime Territorial Disputes

China is a party to multiple maritime territorial disputes in the SCS and ECS, including in particular the following (see **Figure A-1** for locations of the island groups listed below):

- a dispute over the **Paracel Islands** in the SCS, which are claimed by China and Vietnam, and occupied by China;
- a dispute over the **Spratly Islands** in the SCS, which are claimed entirely by China, Taiwan, and Vietnam, and in part by the Philippines, Malaysia, and Brunei, and which are occupied in part by all these countries except Brunei;
- a dispute over **Scarborough Shoal** in the SCS, which is claimed by China, Taiwan, and the Philippines, and controlled since 2012 by China; and
- a dispute over the **Senkaku Islands** in the ECS, which are claimed by China, Taiwan, and Japan, and administered by Japan.

The island and shoal names used above are the ones commonly used in the United States; in other countries, these islands are known by various other names.<sup>127</sup>

These island groups are not the only land features in the SCS and ECS—the two seas feature other islands, rocks, and shoals, as well as some near-surface submerged features. The territorial status of some of these other features is also in dispute.<sup>128</sup> There are additional maritime territorial disputes in the Western Pacific that do not involve China.<sup>129</sup> Maritime territorial disputes in the SCS and ECS date back many years, and have periodically led to diplomatic tensions as well as

<sup>126</sup> See CRS In Focus IF10607, *China Primer: South China Sea Disputes*, by Ben Dolven, Susan V. Lawrence, and Ronald O'Rourke; CRS Report R42930, *Maritime Territorial Disputes in East Asia: Issues for Congress*, by Ben Dolven, Mark E. Manyin, and Shirley A. Kan; CRS Report R44072, *Chinese Land Reclamation in the South China Sea: Implications and Policy Options*, by Ben Dolven et al.; CRS Report R43894, *China's Air Defense Identification Zone (ADIZ)*, by Ian E. Rinehart and Bart Elias. See also Benjamin J. Sacks, *The Political Geography of the South China Sea Disputes*, A RAND Research Primer, Report PE-A2021-1, RAND, October 2022, 31 pp.

<sup>127</sup> China, for example, refers to the Paracel Islands as the Xisha islands, to the Spratly Islands as the Nansha islands, to Scarborough Shoal as Huangyan island, and to the Senkaku Islands as the Diaoyu Islands.

<sup>128</sup> For example, the Reed Bank, a submerged atoll northeast of the Spratly Islands, is the subject of a dispute between China and the Philippines, and the Macclesfield Bank, a group of submerged shoals and reefs between the Paracel Islands and Scarborough Shoal, is claimed by China, Taiwan, and the Philippines. China refers to the Macclesfield Bank as the Zhongsha islands, even though they are submerged features rather than islands.

<sup>129</sup> North Korea and South Korea, for example, have not reached final agreement on their exact maritime border; South Korea and Japan are involved in a dispute over the Liancourt Rocks—a group of islets in the Sea of Japan that Japan refers to as the Takeshima islands and South Korea as the Dokdo islands; and Japan and Russia are involved in a dispute over islands dividing the Sea of Okhotsk from the Pacific Ocean that Japan refers to as the Northern Territories and Russia refers to as the South Kuril Islands.



confrontations and incidents at sea involving fishing vessels, oil exploration vessels and oil rigs, coast guard ships, naval ships, and military aircraft.<sup>130</sup>

### Figure A-I. Maritime Territorial Disputes Involving China

Island groups involved in principal disputes



Source: Map prepared by CRS using U.S. Department of State boundaries.

### EEZ Dispute and U.S.-Chinese Incidents at Sea

In addition to maritime territorial disputes in the SCS and ECS, China is involved in a dispute, principally with the United States, over whether China has a right under international law to regulate the activities of foreign military forces operating within China's EEZ. The position of the United States and most other countries is that while the United Nations Convention on the Law of

<sup>130</sup> One observer states that "notable incidents over sovereignty include the Chinese attack on the forces of the Republic of Vietnam [South Vietnam] in the Paracel Islands in 1974, China's attack on Vietnamese forces near Fiery Cross Reef [in the Spratly Islands] in 1988, and China's military ouster of Philippines forces from Mischief Reef [also in the Spratly Islands] in 1995." Peter Dutton, "Three Dispute and Three Objectives," *Naval War College Review*, Autumn 2011: 43. A similar recounting can be found in Department of Defense, *Annual Report to Congress, Military and Security Developments Involving the People's Republic of China*, 2011, p. 15.

the Sea (UNCLOS), which established EEZs as a feature of international law, gives coastal states the right to regulate economic activities (such as fishing and oil exploration) within their EEZs, it does not give coastal states the right to regulate foreign military activities in the parts of their EEZs beyond their 12-nautical-mile territorial waters.<sup>131</sup>

The position of China and some other countries (i.e., a minority group among the world's nations) is that UNCLOS gives coastal states the right to regulate not only economic activities, but also foreign military activities, in their EEZs. In response to a request from CRS to identify the countries taking this latter position, the U.S. Navy stated in 2012 that

countries with restrictions inconsistent with the Law of the Sea Convention [i.e., UNCLOS] that would limit the exercise of high seas freedoms by foreign navies beyond 12 nautical miles from the coast are [the following 27]:

Bangladesh, Brazil, Burma, Cambodia, Cape Verde, China, Egypt, Haiti, India, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Portugal, Saudi Arabia, Somalia, Sri Lanka, Sudan, Syria, Thailand, United Arab Emirates, Uruguay, Venezuela, and Vietnam.<sup>132</sup>

Other observers provide different counts of the number of countries that take the position that UNCLOS gives coastal states the right to regulate not only economic activities but also foreign military activities in their EEZs. For example, one set of observers, in an August 2013 briefing, stated that 18 countries seek to regulate foreign military activities in their EEZs, and that 3 of these countries—China, North Korea, and Peru—have directly interfered with foreign military activities in their EEZs.<sup>133</sup>

The dispute over whether China has a right under UNCLOS to regulate the activities of foreign military forces operating within its EEZ appears to be at the heart of incidents between Chinese and U.S. ships and aircraft in international waters and airspace, including

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<sup>131</sup> The legal term under UNCLOS for territorial waters is territorial seas. This report uses the more colloquial term territorial waters to avoid confusion with terms like South China Sea and East China Sea.

<sup>132</sup> Source: Navy Office of Legislative Affairs email to CRS, June 15, 2012. The email notes that two additional countries—Ecuador and Peru—also have restrictions inconsistent with UNCLOS that would limit the exercise of high seas freedoms by foreign navies beyond 12 nautical miles from the coast, but do so solely because they claim an extension of their territorial sea beyond 12 nautical miles. DOD states that

Regarding excessive maritime claims, several claimants within the region have asserted maritime claims along their coastlines and around land features that are inconsistent with international law. For example, Malaysia attempts to restrict foreign military activities within its Exclusive Economic Zone (EEZ), and Vietnam attempts to require notification by foreign warships prior to exercising the right of innocent passage through its territorial sea. A number of countries have drawn coastal baselines (the lines from which the breadth of maritime entitlements are measured) that are inconsistent with international law, including Vietnam and China, and the United States also has raised concerns with respect to Taiwan's Law on the Territorial Sea and the Contiguous Zone's provisions on baselines and innocent passage in the territorial sea. Although we applaud the Philippines' and Vietnam's efforts to bring its maritime claims in line with the Law of the Sea Convention, more work remains to be done. Consistent with the long-standing U.S. Freedom of Navigation Policy, the United States encourages all claimants to conform their maritime claims to international law and challenges excessive maritime claims through U.S. diplomatic protests and operational activities.

(Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 7-8.)

<sup>133</sup> Source: Joe Baggett and Pete Pedrozo, briefing for Center for Naval Analysis Excessive Chinese Maritime Claims Workshop, August 7, 2013, slide entitled "What are other nations' views?" (slide 30 of 47). The slide also notes that there have been "isolated diplomatic protests from Pakistan, India, and Brazil over military surveys" conducted in their EEZs.

- incidents in March 2001, September 2002, March 2009, and May 2009, in which Chinese ships and aircraft confronted and harassed the U.S. naval ships *Bowditch*, *Impeccable*, and *Victorious* as they were conducting survey and ocean surveillance operations in China's EEZ;
- an incident on April 1, 2001, in which a Chinese fighter collided with a U.S. Navy EP-3 electronic surveillance aircraft flying in international airspace about 65 miles southeast of China's Hainan Island in the South China Sea, forcing the EP-3 to make an emergency landing on Hainan Island;<sup>134</sup>
- an incident on December 5, 2013, in which a Chinese navy ship put itself in the path of the U.S. Navy cruiser *Cowpens* as it was operating 30 or more miles from China's aircraft carrier *Liaoning*, forcing the *Cowpens* to change course to avoid a collision;
- an incident on August 19, 2014, in which a Chinese fighter conducted an aggressive and risky intercept of a U.S. Navy P-8 maritime patrol aircraft that was flying in international airspace about 135 miles east of Hainan Island<sup>135</sup>—DOD characterized the intercept as “very, very close, very dangerous”;<sup>136</sup> and
- an incident on May 17, 2016, in which Chinese fighters flew within 50 feet of a Navy EP-3 electronic surveillance aircraft in international airspace in the South China Sea—a maneuver that DOD characterized as “unsafe.”<sup>137</sup>

**Figure A-2** shows the locations of the 2001, 2002, and 2009 incidents listed in the first two bullets above. The incidents shown in **Figure A-2** are the ones most commonly cited prior to the December 2013 involving the *Cowpens*, but some observers list additional incidents as well.<sup>138</sup>

<sup>134</sup> For discussions of some of these incidents and their connection to the issue of military operating rights in EEZs, see Raul Pedrozo, “Close Encounters at Sea, The USNS *Impeccable* Incident,” *Naval War College Review*, Summer 2009: 101-111; Jonathan G. Odom, “The True ‘Lies’ of the *Impeccable* Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (Outside of China) Should Be Concerned,” *Michigan State Journal of International Law*, vol. 18, no. 3, 2010: 16-22, accessed May 31, 2023, at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1622943](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622943); Oriana Skylar Mastro, “Signaling and Military Provocation in Chinese National Security Strategy: A Closer Look at the *Impeccable* Incident,” *Journal of Strategic Studies*, April 2011: 219-244; and Peter Dutton, ed., *Military Activities in the EEZ, A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, Newport (RI), Naval War College, China Maritime Studies Institute, China Maritime Study Number 7, December 2010, 124 pp. See also CRS Report RL30946, *China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications*, by Shirley A. Kan et al.

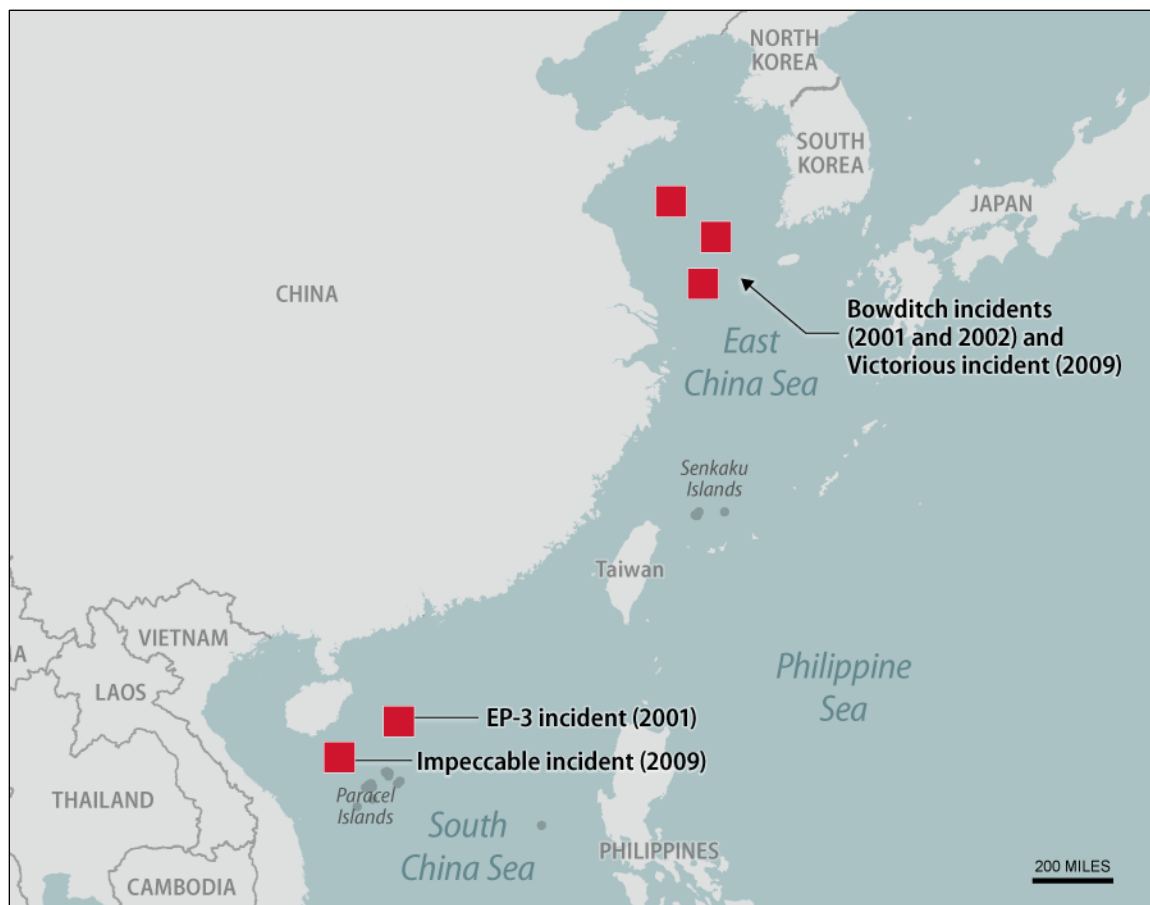
<sup>135</sup> Source for location: Transcript of remarks by DOD Press Secretary Rear Admiral John Kirby at August 22, 2014, press briefing, accessed May 31, 2023, at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5493>. Chinese officials stated that the incident occurred 220 kilometers (about 137 statute miles or about 119 nautical miles) from Hainan Island.

<sup>136</sup> Source: Transcript of remarks by DOD Press Secretary Rear Admiral John Kirby at August 22, 2014, press briefing, accessed May 31, 2023, at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5493>.

<sup>137</sup> See, for example, 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; Thomas Gibbons-Neff, “Chinese Jets Intercept U.S. Recon Plane, Almost Colliding Over South China Sea,” *Washington Post*, May 18, 2016; Idrees Ali and Megha Rajagopalan, “Chinese Jets Intercept U.S. Military Plane over South China Sea: Pentagon,” *Reuters*, May 19, 2016; Jamie Crawford, “Pentagon: ‘Unsafe’ Intercept over South China Sea,” *CNN*, May 19, 2016.

<sup>138</sup> For example, one set of observers, in an August 2013 briefing, provided the following list of incidents in which China has challenged or interfered with operations by U.S. ships and aircraft and ships from India's navy: EP-3 Incident (April 2001); USNS *Impeccable* (March 2009); USNS *Victorious* (May 2009); USS *George Washington* (July-November 2010); U-2 Intercept (June 2011); INS [Indian Naval Ship] *Airavat* (July 2011); INS [Indian Naval Ship] *Shivalik* (June 2012); and USNS *Impeccable* (July 2013). (Source: Joe Baggett and Pete Pedrozo, briefing for Center for Naval Analysis Excessive Chinese Maritime Claims Workshop, August 7, 2013, slide entitled “Notable EEZ (continued...)”)

**Figure A-2. Locations of 2001, 2002, and 2009 U.S.-Chinese Incidents at Sea and In Air**



**Source:** Map prepared by CRS based on map shown on page 6 of Mark E. Redden and Phillip C. Saunders, *Managing Sino-U.S. Air and Naval Interactions: Cold War Lessons and New Avenues of Approach*, Washington, Center for the Study of Chinese Military Affairs, Institute for National Strategic Studies, National Defense University, September 2012.

DOD stated in 2015 that

The growing efforts of claimant States to assert their claims has led to an increase in air and maritime incidents in recent years, including an unprecedented rise in unsafe activity by China's maritime agencies in the East and South China Seas. U.S. military aircraft and vessels often have been targets of this unsafe and unprofessional behavior, which threatens the U.S. objectives of safeguarding the freedom of the seas and promoting adherence to international law and standards. China's expansive interpretation of jurisdictional authority beyond territorial seas and airspace causes friction with U.S. forces and treaty allies operating in international waters and airspace in the region and raises the risk of inadvertent crisis.

Incidents with China," (slides 37 and 46 of 47.) Regarding an event involving the *Impeccable* reported to have taken place in June rather than July, see William Cole, "Chinese Help Plan For Huge War Game Near Isles," Honolulu Star-Advertiser, July 25, 2013: 1. See also Bill Gertz, "Inside the Ring: New Naval Harassment in Asia," July 17, 2013. See also Department of Defense Press Briefing by Adm. Locklear in the Pentagon Briefing Room, July 11, 2013, accessed May 31, 2023, at <https://web.archive.org/web/20130712184831/http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5270>.

There have been a number of troubling incidents in recent years. For example, in August 2014, a Chinese J-11 fighter crossed directly under a U.S. P-8A Poseidon operating in the South China Sea approximately 117 nautical miles east of Hainan Island. The fighter also performed a barrel roll over the aircraft and passed the nose of the P-8A to show its weapons load-out, further increasing the potential for a collision. However, since August 2014, U.S.-China military diplomacy has yielded positive results, including a reduction in unsafe intercepts. We also have seen the PLAN implement agreed-upon international standards for encounters at sea, such as the Code for Unplanned Encounters at Sea (CUES),<sup>139</sup> which was signed in April 2014.<sup>140</sup>

On September 30, 2018, an incident occurred in the SCS between the U.S. Navy destroyer *Decatur* (DDG-73) and a Chinese destroyer, as the *Decatur* was conducting a FON operation near Gaven Reef in the Spratly Islands. In the incident, the Chinese destroyer overtook the U.S. destroyer close by on the U.S. destroyer's port (i.e., left) side, requiring the U.S. destroyer to turn starboard (i.e., to the right) to avoid the Chinese ship. U.S. officials stated that at the point of closest approach between the two ships, the stern (i.e., back end) of the Chinese ship came within 45 yards (135 feet) of the bow (i.e., front end) of the *Decatur*. As the encounter was in progress, the Chinese ship issued a warning by radio stating, "If you don't change course your [sic] will suffer consequences." One observer, commenting on the incident, stated, "To my knowledge, this is the first time we've had a direct threat to an American warship with that kind of language." U.S. officials characterized the actions of the Chinese ship in the incident as "unsafe and unprofessional."<sup>141</sup>

A November 3, 2018, press report states the following:

The US Navy has had 18 unsafe or unprofessional encounters with Chinese military forces in the Pacific since 2016, according to US military statistics obtained by CNN.

"We have found records of 19 unsafe and/or unprofessional interactions with China and Russia since 2016 (18 with China and one with Russia)," Cmdr. Nate Christensen, a spokesman for the US Pacific Fleet, told CNN.

A US official familiar with the statistics told CNN that 2017, the first year of the Trump administration, saw the most unsafe and or unprofessional encounters with Chinese forces during the period.

<sup>139</sup> For more on the CUES agreement, see "2014 Code for Unplanned Encounters at Sea (CUES)" below.

<sup>140</sup> Department of Defense, *Asia-Pacific Maritime Security Strategy, undated but released August 2015*, pp. 14-15.

<sup>141</sup> John Power and Catherine Wong, "Exclusive Details and Footage Emerge of Near Collision Between Warships in South China Sea," *South China Morning Post*, November 4, 2018. See also Jane Perlez and Steven Lee Myers, "'A Game of Chicken': U.S. and China Are Risking a Clash at Sea," *New York Times*, November 8, 2018; Geoff Ziezulewicz, "Video Shows Near Collision of US and Chinese Warships," *Navy Times*, November 5, 2018; John Grady, "Panel: Chinese Warships Acting More Aggressively Towards Foreign Navies in the South China Sea," *USNI News*, October 16, 2018; Bill Gertz, "Bolton Warns Chinese Military to Halt Dangerous Naval Encounters," *Washington Free Beacon*, October 12, 2018; James Holmes, "South China Sea Showdown: What Happens If a U.S. Navy and Chinese Vessel Collide?" *National Interest*, October 6, 2018; Kristin Huang and Keegan Elmer, "Beijing's Challenge to US Warship in South China Sea 'Deliberate and Calculated,' Observers Say," *South China Morning Post*, October 5, 2018; Stacie E. Goddard, "The U.S. and China Are Playing a Dangerous Game. What Comes Next?" *Washington Post*, October 3, 2018; Brad Lendon, "Photos Show How Close Chinese Warship Came to Colliding with US Destroyer," *CNN*, October 3, 2018; Ben Werner, "China's Atypical Response To US Navy FONOPS May Be a Message to Trump Administration," *USNI News*, October 3, 2018; Gordon Lubold and Jeremy Page, "Pentagon Says Chinese Ship Harrassed a U.S. Vessel," *Wall Street Journal*, October 1, 2018; Barbara Starr and Ryan Browne, "Chinese Warship in 'Unsafe' Encounter with US Destroyer, Amid Rising US-China Tensions," *CNN*, October 1, 2018; Ben Werner, "Destroyer USS Decatur Has Close Encounter With Chinese Warship," *USNI News*, October 1, 2018.

At least three of those incidents took place in February, May and July of that year and involved Chinese fighter jets making what the US considered to be “unsafe” intercepts of Navy surveillance planes.

While the 18 recorded incidents only involved US naval forces, the Air Force has also had at least one such encounter during this period....

The US Navy told CNN that, in comparison, there were 50 unsafe or unprofessional encounters with Iranian military forces since 2016, with 36 that year, 14 last year and none in 2018. US and Iranian naval forces tend to operate in relatively narrow stretches of water, such as the Strait of Hormuz, increasing their frequency of close contact.<sup>142</sup>

DOD states that

The PRC has long challenged foreign military activities in its claimed *exclusive economic zone (EEZ)* in a manner that is inconsistent with the rules of customary international law as reflected in the United Nations Convention on the Law of the Sea. However, in recent years, the PLA has begun conducting the same types of military activities inside and outside the First Island Chain in the EEZs of other countries, including the United States. This activity highlights China’s double standard in the application of its interpretation of international law. Examples include sending intelligence collecting ships to collect [information] on military exercises such as the Rim of the Pacific (RIMPAC) exercise off Hawaii in 2014 and 2018, [the] TALISMAN SABER [exercise] off Australia in 2017, 2019, and 2021, and operating near Alaska in 2017 and 2021. PRC survey ships are also extremely active in the South China Sea and they frequently operate in the claimed EEZs of other nations in the region such as the Philippines, Vietnam, and Malaysia.<sup>143</sup>

## Relationship of Maritime Territorial Disputes to EEZ Dispute

The issue of whether China has the right under UNCLOS to regulate foreign military activities in its EEZ is related to, but ultimately separate from, the issue of territorial disputes in the SCS and ECS:

- The two issues are related because China can claim EEZs from inhabitable islands over which it has sovereignty, so accepting China’s claims to sovereignty over inhabitable islands in the SCS or ECS could permit China to expand the EEZ zone within which China claims a right to regulate foreign military activities.
- The two issues are ultimately separate from one another because even if all the territorial disputes in the SCS and ECS were resolved, and none of China’s claims in the SCS and ECS were accepted, China could continue to apply its concept of its EEZ rights to the EEZ that it unequivocally derives from its mainland coast—and it is in this unequivocal Chinese EEZ that several of the past U.S.-Chinese incidents at sea have occurred.

Press reports of maritime disputes in the SCS and ECS sometimes focus on territorial disputes while devoting little or no attention to the EEZ dispute, or do relatively little to distinguish the

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<sup>142</sup> Ryan Browne, “US Navy Has Had 18 Unsafe or Unprofessional Encounters with China since 2016,” *CNN*, November 3, 2018. See also Kristin Huang, “China Has a History of Playing Chicken with the US Military—Sometimes These Dangerous Games End in Disaster,” *Business Insider*, October 2, 2018.

<sup>143</sup> Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People’s Republic of China 2022*, p. 18 (emphasis as in original). See also Christopher Woody, “This New Defense Department Map Shows How China Says One Thing and Does Another with Its Military Operations at Sea,” *Business Insider*, August 17, 2018.

EEZ dispute from the territorial disputes. From the U.S. perspective, the EEZ dispute is arguably as significant as the maritime territorial disputes because of the EEZ dispute's proven history of leading to U.S.-Chinese incidents at sea and because of its potential for affecting U.S. military operations not only in the SCS and ECS, but around the world.

## Appendix B. U.S. Security Treaties with Japan and Philippines

This appendix presents brief background information on the U.S. security treaties with Japan and the Philippines.

### U.S.-Japan Treaty on Mutual Cooperation and Security

The 1960 U.S.-Japan treaty on mutual cooperation and security<sup>144</sup> states in Article V that

Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.

The United States has reaffirmed on a number of occasions over the years that since the Senkaku Islands are under the administration of Japan, they are included in the territories referred to in Article V of the treaty, and that the United States “will honor all of our treaty commitments to our treaty partners.”<sup>145</sup> (At the same time, the United States, noting the difference between administration and sovereignty, has noted that such affirmations do not prejudice the U.S. approach of taking no position regarding the outcome of the dispute between China, Taiwan, and Japan regarding who has sovereignty over the islands.) Some observers, while acknowledging the U.S. affirmations, have raised questions regarding the potential scope of actions that the United States might take under Article V.<sup>146</sup>

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<sup>144</sup> Treaty of mutual cooperation and security, signed January 19, 1960, entered into force June 23, 1960, 11 UST 1632; TIAS 4509; 373 UNTS.

<sup>145</sup> The quoted words are from Secretary of Defense Chuck Hagel, in “Media Availability with Secretary Hagel En Route to Japan,” April 5, 2014, accessed May 31, 2023, at <https://web.archive.org/web/20150905125246/http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5405>. See also, for example, Kyodo News, “U.S. Will Defend Senkakus Under Security Treaty, Biden Tells Suga,” *Kyodo News*, November 12, 2020; Seth Robson and Hana Kusumoto, “Biden Doubles Down on Pledge to Defend Senkakus in Call with Japan’s New Leader,” *Stars and Stripes*, October 5, 2021.

<sup>146</sup> See, for example, Yoichiro Sato, “The Senkaku Dispute and the US-Japan Security Treaty,” Pacific Forum CSIS, September 10, 2012 (PacNet #57); James R. Holmes, “Thucydides, Japan and America,” *The Diplomat*, November 27, 2012; Shigemi Sato, “Japan, U.S. To Discuss Revising Defense Guidelines,” *DefenseNews.com* (*Agence France-Presse*), November 11, 2012; Martin Fackler, “Japan Seeks Tighter Pact With U.S. To Confront China,” *NYTimes.com*, November 9, 2012; “Japan, U.S. To Review Defense Guidelines,” *Japan Times*, November 11, 2012; “Defense Official To Visit U.S. To Discuss Alliance,” *Kyodo News*, November 8, 2012; Yuka Hayashi, “U.S. Commander Chides China Over ‘Provocative Act,’” *Wall Street Journal*, February 16, 2013: 7; Julian E. Barnes, “U.S., Japan Update Plans To Defend Islands,” *New York Times*, March 20, 2013. See also Kiyoshi Takenaka, “China ‘Extremely Concerned’ About U.S.-Japan Island Talk,” *Reuters*, March 21, 2013; Wendell, Minnick, “Senkakus Could Be Undoing of Asia Pivot,” *Defense News*, April 15, 2013: 16; Item entitled “U.S. Warns China” in Bill Gertz, “Inside the Ring: NSA Contractor Threat,” *Washington Times*, June 19, 2013; Anthony Fensom, “Yamaguchi: China Military Build-Up Risks Accident,” *The Diplomat*, June 21, 2013.



## U.S.-Philippines Mutual Defense Treaty<sup>147</sup>

The 1951 U.S.-Philippines mutual defense treaty<sup>148</sup> states in Article IV that

Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.

Article V states that

For the purpose of Article IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific.

The United States has reaffirmed on a number of occasions over the years its obligations under the U.S.-Philippines mutual defense treaty.<sup>149</sup> On May 9, 2012, Filipino Foreign Affairs Secretary Albert F. del Rosario issued a statement providing the Philippine perspective regarding the treaty's application to territorial disputes in the SCS.<sup>150</sup> U.S. officials have made their own statements regarding the treaty's application to territorial disputes in the SCS.<sup>151</sup>

As mentioned earlier, on March 1, 2019, then-Secretary of State Michael Pompeo stated, "As the South China Sea is part of the Pacific, any armed attack on Philippine forces, aircraft, or public vessels in the South China Sea will trigger mutual defense obligations under Article 4 of our Mutual Defense Treaty [with the Philippines]."<sup>152</sup> A July 11, 2021, statement from Secretary of State Antony Blinken issued in connection with the fifth anniversary of the July 12, 2016, arbitral tribunal ruling on the South China Sea stated that the United States "reaffirm[s] that an armed attack on Philippine armed forces, public vessels, or aircraft in the South China Sea would invoke U.S. mutual defense commitments under Article IV of the 1951 U.S.-Philippines Mutual Defense Treaty."<sup>153</sup>

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<sup>147</sup> For additional discussion of U.S. obligations under the U.S.-Philippines mutual defense treaty, see CRS Report R43498, *The Republic of the Philippines and U.S. Interests—2014*, by Thomas Lum and Ben Dolven.

<sup>148</sup> Mutual defense treaty, signed August 30, 1951, entered into force August 27, 1952, 3 UST 3947, TIAS 2529, 177 UNTS 133.

<sup>149</sup> See, for example, the Joint Statement of the United States-Philippines Ministerial Dialogue of April 30, 2012, available at <https://2009-2017.state.gov/r/pa/prs/ps/2012/04/188977.htm>, which states in part that "the United States and the Republic of the Philippines reaffirm our shared obligations under the Mutual Defense Treaty, which remains the foundation of the U.S.-Philippines security relationship." See also Associated Press, "US: Will Stand by Allies in Disputes with China," *Military.com*, April 3, 2014.

<sup>150</sup> Statement of Secretary del Rosario regarding the Philippines-U.S. Mutual Defense Treaty, May 9, 2012, accessed May 31, 2023, at <https://www.officialgazette.gov.ph/2012/05/09/statement-of-secretary-del-rosario-regarding-the-philippines-u-s-mutual-defense-treaty-may-9-2012/>.

<sup>151</sup> See, for example, Agence France-Presse, "Navy Chief: US Would 'Help' Philippines In South China Sea," *DefenseNews.com*, February 13, 2014; Manuel Mogato, "U.S. Admiral Assures Philippines of Help in Disputed Sea," *Reuters.com*, February 13, 2014.

<sup>152</sup> For citations, see footnote 84.

<sup>153</sup> State Department, "Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea," press statement, Antony J. Blinken, Secretary of State, July 11, 2021. See also Sarah Zheng and Jun Mai, "South China Sea: US-Philippines Treaty Covers Chinese Attack, Blinken Says," *South China Morning Post*, July 12, 2021.

## Appendix C. Treaties and Agreements Related to the Maritime Disputes

This appendix briefly reviews some international treaties and agreements that bear on the issues discussed in this report.

### UN Convention on Law of the Sea (UNCLOS)

#### Overview of UNCLOS

The United Nations Convention on the Law of the Sea (UNCLOS) “lays down a comprehensive regime of law and order in the world’s oceans and seas[,] establishing rules governing all uses of the oceans and their resources.”<sup>154</sup> It builds on four 1958 law of the sea conventions to which the United States, following Senate consent to ratification, became a party in 1961, and which entered into force between 1962 and 1966.<sup>155</sup> All four treaties remain in force for the United States.<sup>156</sup>

UNCLOS was adopted in 1982 as the “culmination of more than 14 years of work involving participation by more than 150 countries representing all regions of the world, all legal and political systems and the spectrum of socio/economic development.”<sup>157</sup> The treaty was modified in 1994 by an agreement relating to the implementation of Part XI of the treaty, which relates to the seabed and ocean floor and subsoil thereof that are beyond the limits of national jurisdiction. UNCLOS entered into force in November 1994. The treaty established EEZs as a feature of international law, and contains multiple provisions relating to territorial waters and EEZs. As of July 21, 2023, 168 nations plus the European Union were party to the treaty.<sup>158</sup> As discussed further in the next section, the United States is not a party to the treaty.

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<sup>154</sup> United Nations, “United Nations Convention on the Law of the Sea of 10 December 1982, Overview and full text,” updated June 28, 2019, accessed May 31, 2023, at [https://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm).

<sup>155</sup> These are the Convention on the Territorial Sea and Contiguous Zone, which entered into force on September 10, 1964, the Convention on the Continental Shelf, which entered into force on 10 June 10, 1964, the Convention on the High Seas, which entered into force on September 30, 1962, and the Convention on Fishing and Conservation of Living Resources of the High Seas, which entered into force on March 20, 1966. The four 1958 treaties resulted from the first Conference on the Law of the Sea (UNCLOS I), which took place in 1958. (For additional discussion, see United Nations, “United Nations Conference on the Law of the Sea,” undated, accessed May 31, 2023, at [http://legal.un.org/diplomaticconferences/1958\\_los/](http://legal.un.org/diplomaticconferences/1958_los/), and United Nations, “1958 Geneva Conventions on the Law of the Sea,” undated, accessed May 31, 2023, at <http://legal.un.org/avl/ha/gclos/gclos.html>.)

<sup>156</sup> See Department of State, *Treaties in Force, Section 2, Multilateral Treaties in Force as of January 1, 2019*, pp. 526, 501, 525, and 516, respectively.

<sup>157</sup> United Nations, “United Nations Convention on the Law of the Sea of 10 December 1982, Overview and full text,” updated June 28, 2019, accessed May 31, 2023, at [https://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm). More specifically, the treaty resulted from the Third United Nations Conference on the Law of the Sea (UNCLOS III), which took place between 1973 and 1982. For additional discussion, see United Nations, “Third United Nations Conference on the Law of the Sea,” undated, accessed May 31, 2023, at [http://legal.un.org/diplomaticconferences/1973\\_los/](http://legal.un.org/diplomaticconferences/1973_los/).

<sup>158</sup> Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as of July 21, 2023, accessed September 14, 2023, at [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm).

## U.S. Not a Party to UNCLOS

As noted above, the United States is not a party to UNCLOS.<sup>159</sup> Although the United States is not a party to UNCLOS, the United States accepts and acts in accordance with the non-seabed mining provisions of the treaty, such as those relating to navigation and overflight, which the United States views as reflecting customary international law of the sea.

The United States did not sign UNCLOS when it was adopted in 1982 because the United States objected to the seabed mining provisions of Part XI of the treaty. Certain other countries also expressed concerns about these provisions.<sup>160</sup> The United Nations states that “To address certain difficulties with the seabed mining provisions contained in Part XI of the Convention, which had been raised, primarily by the industrialized countries, the Secretary-General convened in July 1990 a series of informal consultations which culminated in the adoption, on 28 July 1994, of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. The Agreement entered into force on 28 July 1996.”<sup>161</sup>

The United States signed the 1994 agreement on July 29, 1994, and U.S. administrations since then have supported the United States becoming a party to UNCLOS. The United Nations includes the United States on a list of countries for which the 1994 agreement is in a status of “provisional application,” as of November 16, 1994, by virtue of its signature.<sup>162</sup>

The 1982 treaty and the 1994 agreement were transmitted to the Senate on October 6, 1994, during the 103<sup>rd</sup> Congress, becoming Treaty Document 103-39. Subsequent Senate action on Treaty Document 103-39, as presented at [Congress.gov](https://www.congress.gov),<sup>163</sup> can be summarized as follows:

- In 2004, during the 108<sup>th</sup> Congress, the Senate Foreign Relations Committee held hearings on Treaty Document 103-39 and reported it favorably with a resolution of advice and consent to ratification with declarations and understandings. No further action was taken during the 108<sup>th</sup> Congress, and the matter was re-referred to the committee at the sine die adjournment of the 108<sup>th</sup> Congress.
- In 2007, during the 110<sup>th</sup> Congress, the committee held hearings on Treaty Document 103-39 and reported it favorably with a resolution of advice and consent to ratification with declarations, understandings, and conditions. No

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<sup>159</sup> The United States is not a signatory to the treaty. On July 29, 1994, the United States became a signatory to the 1994 agreement relating to the implementation of Part XI of the treaty. The United States has not ratified either the treaty or the 1994 agreement.

<sup>160</sup> In a March 10, 1983, statement on U.S. oceans policy, President Reagan stated, “Last July, I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries. The United States does not stand alone in those concerns. Some important allies and friends have not signed the convention. Even some signatory states have raised concerns about these problems.” (Ronald Reagan Presidential Library & Museum, “Statement on United States Oceans Policy,” undated, accessed May 31, 2023, at <https://www.reaganlibrary.gov/research/speeches/31083c>.)

<sup>161</sup> United Nations, “Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982,” updated September 2, 2016, accessed May 31, 2023, at [https://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_part\\_xi.htm](https://www.un.org/depts/los/convention_agreements/convention_overview_part_xi.htm).

<sup>162</sup> United Nations, “Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982,” status as of February 7, 2023, accessed May 31, 2023, at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-6-a&chapter=21&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-6-a&chapter=21&clang=_en).

<sup>163</sup> United Nations Convention on the Law of the Sea, Senate Consideration of Treaty Document 103-39, accessed May 31, 2023, at <https://www.congress.gov/treaty-document/103rd-congress/39>. For a timeline of selected key events relating to the treaty, see Department of State, “Law of the Sea Convention,” accessed May 31, 2023, at <https://www.state.gov/law-of-the-sea-convention/>.

further action was taken during the 110<sup>th</sup> Congress, and the matter was re-referred to the committee at the sine die adjournment of the 110<sup>th</sup> Congress.

- In 2012, during the 112<sup>th</sup> Congress, the committee held hearings on Treaty Document 103-39. No further action was taken during the 112<sup>th</sup> Congress.

The full Senate to date has not voted on the question of whether to give its advice and consent to ratification of Treaty Document 103-39. The latest Senate action regarding Treaty Document 103-39 recorded at Congress.gov is a hearing held by the Senate Foreign Relations Committee on June 28, 2012.

### 1983 Statement on U.S. Oceans Policy

A March 10, 1983, statement on U.S. oceans policy by President Ronald Reagan states that UNCLOS

contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.

Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention and international law.

First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

Third, I am proclaiming today an Exclusive Economic Zone in which the United States will exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast. This will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf.<sup>164</sup>

### 1972 Convention on Preventing Collisions at Sea (COLREGs)

China and the United States, as well as more than 150 other countries (including all those bordering on the South East and South China Seas, but not Taiwan),<sup>165</sup> are parties to an October 1972 multilateral convention on international regulations for preventing collisions at sea, commonly known as the collision regulations (COLREGs) or the “rules of the road.”<sup>166</sup> Although

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<sup>164</sup> Statement on United States Oceans Policy, March 10, 1983, accessed May 31, 2023, at <https://www.reaganlibrary.gov/archives/speech/statement-united-states-oceans-policy>, and <https://2009-2017.state.gov/documents/organization/143224.pdf>.

<sup>165</sup> Source: International Maritime Organization, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions, As at 28 February 2014*, pp. 86-89. The Philippines acceded to the convention on June 10, 2013.

<sup>166</sup> 28 UST 3459; TIAS 8587. The treaty was done at London October 20, 1972, and entered into force July 15, 1977. The United States is an original signatory to the convention and acceded the convention entered into force for the United States on July 15, 1977. China acceded to the treaty on January 7, 1980. A summary of the agreement is (continued...)

commonly referred to as a set of rules or regulations, this multilateral convention is a binding treaty. The convention applies “to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels.”<sup>167</sup> It thus applies to military vessels, paramilitary and law enforcement (i.e., coast guard) vessels, maritime militia vessels, and fishing boats, among other vessels.

In a February 18, 2014, letter to Senator Marco Rubio concerning the December 5, 2013, incident involving the *Cowpens*, the State Department stated the following:

In order to minimize the potential for an accident or incident at sea, it is important that the United States and China share a common understanding of the rules for operational air or maritime interactions. From the U.S. perspective, an existing body of international rules and guidelines—including the 1972 International Regulations for Preventing Collisions at Sea (COLREGs)—are sufficient to ensure the safety of navigation between U.S. forces and the force of other countries, including China. We will continue to make clear to the Chinese that these existing rules, including the COLREGs, should form the basis for our common understanding of air and maritime behavior, and we will encourage China to incorporate these rules into its incident-management tools.

Likewise, we will continue to urge China to agree to adopt bilateral crisis management tools with Japan and to rapidly conclude negotiations with ASEAN<sup>168</sup> on a robust and meaningful Code of Conduct in the South China in order to avoid incidents and to manage them when they arise. We will continue to stress the importance of these issues in our regular interactions with Chinese officials.<sup>169</sup>

In the 2014 edition of its annual report on military and security developments involving China, the DOD states the following:

On December 5, 2013, a PLA Navy vessel and a U.S. Navy vessel operating in the South China Sea came into close proximity. At the time of the incident, USS COWPENS (CG 63) was operating approximately 32 nautical miles southeast of Hainan Island. In that location, the U.S. Navy vessel was conducting lawful military activities beyond the territorial sea of any coastal State, consistent with customary international law as reflected in the Law of the Sea Convention. Two PLA Navy vessels approached USS COWPENS. During this interaction, one of the PLA Navy vessels altered course and crossed directly in front of the bow of USS COWPENS. This maneuver by the PLA Navy vessel forced USS COWPENS to come to full stop to avoid collision, while the PLA Navy vessel passed less than 100 yards ahead. The PLA Navy vessel’s action was inconsistent with internationally recognized rules concerning professional maritime behavior (i.e., the Convention of International Regulations for Preventing Collisions at Sea), to which China is a party.<sup>170</sup>

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available at <http://www.imo.org/About/Conventions/ListOfConventions/Pages/COLREG.aspx>. The text of the convention is available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201050/volume-1050-I-15824-English.pdf>.

<sup>167</sup> Rule 1(a) of the convention.

<sup>168</sup> ASEAN is the Association of Southeast Asian Nations. ASEAN’s member states are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

<sup>169</sup> Letter dated February 18, 2014, from Julia Frifield, Assistant Secretary, Legislative Affairs, Department of State, to The Honorable Marco Rubio, United States Senate. Used here with the permission of the office of Senator Rubio. The letter begins: “Thank you for your letter of January 31 regarding the December 5, 2013, incident involving a Chinese naval vessel and the USS Cowpens.” The text of Senator Rubio’s January 31, 2014, letter was accessed May 31, 2023, at <http://www.rubio.senate.gov/public/index.cfm/2014/1/rubio-calls-on-administration-to-address-provocative-chinese-behavior>.

<sup>170</sup> Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People’s Republic of China 2014*, p. 4.

A May 20, 2020, press report stated

The Pentagon said the US military has had “unsafe” encounters with the Chinese armed forces in the South China Sea during the COVID-19 pandemic, which is also a source of deepening tension between the two countries.

There have been “at least nine” concerning incidents involving Chinese fighter jets and US aircraft in the skies above the contested waterway since mid-March, Reed Werner, the deputy assistant secretary of defense for Southeast Asia, told Fox News on Tuesday, adding that China continues to engage in “risky and escalatory behavior.”

A defense official told Insider that some incidents were considered unsafe, though the specific details behind the incidents are unclear.

Werner also told Fox News that a Chinese escort ship sailing with a Chinese aircraft-carrier group maneuvered in an “unsafe and unprofessional way” near the US Navy guided-missile destroyer USS Mustin in the South China Sea last month.

Chinese media reports indicated that a Chinese navy flotilla led by the Liaoning was conducting “mock battles” in the South China Sea in April.

Werner told Fox that the Pentagon found “the current trend line very worrisome,” adding that the US has lodged several formal and informal complaints in response to recent incidents.

“We’ve made démarches,” he said, adding that this is a regular occurrence.<sup>171</sup>

Esper, speaking at an online event hosted by the International Institute for Strategic Studies, said the U.S. policy has always been backed up by its actions like FONOps and other presence operations. Last year marked “the greatest number of freedom of navigations operations in the South China Sea in the 40-year history of the FONOps program, and we will keep up the pace this year.”

The Navy conducted nine FONOps operations in the South China Sea in 2019. Six FONOps have been conducted in the South China Sea this year, starting with the Littoral Combat Ship USS Montgomery (LCS-8) in January, destroyer USS McCampbell (DDG-85) in March, cruiser USS Bunker Hill (CG-52) and destroyer USS Barry (DDG-52) in separate operations in April, destroyer USS Mustin (DDG-89) in May and destroyer USS Ralph Johnson (DDG-114) in the latest operation on July 14.<sup>172</sup>

In April 5, 2023, remarks at a conference, Rear Admiral Mike Studeman, Commander, Office of Naval Intelligence (ONI) stated:

When it chooses, China also intentionally violates COLREGs and CUES, two agreements designed for safety at sea.... China has signed both, but ignores them at unpredictable times. One example is a PLA LUYANG destroyer dangerously cutting across the bow of a US destroyer in 2018. Another Chinese tactic we’ve seen recently involves a PLA auxiliary putting themselves on a collision course with a foreign vessel, falsely signaling that they’ve lost control of steerage, and claiming “stand-on” rights to force the other ship to give way

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<sup>171</sup> Ryan Pickrell, “Pentagon Says China’s Military Is Challenging the US with ‘Risky’ Run-ins in the South China Sea During the Pandemic,” *Business Insider*, May 20, 2020. See also Richard Javad Heydarian, “US Pushes Back on China in South China Sea,” *Asia Times*, May 18, 2020; Philip Heijmans, “U.S.-China Confrontation Risk Is Highest in the South China Sea,” *Bloomberg*, May 27, 2020.

<sup>172</sup> Dzirhan Mahadzir, “SECDEF Esper: U.S. Will ‘Keep Up the Pace’ of South China Sea Freedom of Navigation Operations,” *USNI News*, July 21, 2020.

and change course. These behaviors reflect a brazen disregard for basic safety guidelines and show how flagrantly China flouts international strictures they promised to abide.<sup>173</sup>

The CUES agreement cited above is discussed in the next section.

On June 5, 2023, following an incident during a transit of the Taiwan Strait by a U.S. Navy destroyer and a Canadian navy frigate, in which a Chinese navy destroyer crossed in front of the U.S. Navy destroyer in an unsafe manner, a statement issued by the U.S. Indo-Pacific Command (USINDOPACOM) stated:

In accordance with international law, [the U.S. Navy destroyer] USS Chung-Hoon (DDG 93) and [the Canadian navy frigate] HMCS Montreal (FFH 336) conducted a routine south to north Taiwan Strait transit June 3 through waters where high seas freedoms of navigation and overflight apply. During the transit, [the] PLA(N) [i.e., Chinese navy] LUYANG III [class destroyer] DDG 132 (PRC LY 132) executed maneuvers in an unsafe manner in the vicinity of Chung-Hoon. The PRC LY 132 overtook Chung-Hoon on their [i.e., Chung-Hoon's] port side and crossed their [i.e., Chung-Hoon's] bow at 150 yards. Chung-Hoon maintained course and slowed to 10 kts to avoid a collision. The PRC LY 132 crossed Chung-Hoon's bow a second time starboard to port at 2,000 yards and remained off Chung-Hoon's port bow. The LY 132's closest point of approach was 150 yards and its actions violated the maritime 'Rules of the Road' of safe passage in international waters.<sup>174</sup>

## **2014 Code for Unplanned Encounters at Sea (CUES)**

On April 22, 2014, representatives of 21 Pacific-region navies (including China, Japan, and the United States), meeting in Qingdao, China, at the 14<sup>th</sup> Western Pacific Naval Symposium (WPNS),<sup>175</sup> unanimously agreed to a Code for Unplanned Encounters at Sea (CUES). CUES, a nonbinding agreement, establishes a standardized protocol of safety procedures, basic communications, and basic maneuvering instructions for naval ships and aircraft during unplanned encounters at sea, with the aim of reducing the risk of incidents arising from such encounters.<sup>176</sup> The CUES agreement in effect supplements the 1972 COLREGs Convention (see previous section); it does not cancel or lessen commitments that countries have as parties to the COLREGS Convention.

Two observers stated that “the [CUES] resolution is non-binding; only regulates communication in ‘unplanned encounters,’ not behavior; fails to address incidents in territorial waters; and does not apply to fishing and maritime constabulary vessels [i.e., coast guard ships and other maritime

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<sup>173</sup> Rear Admiral Mike Studeman, Commander, Office of Naval Intelligence, “Dangers Posed by China’s Frontline Forces,” remarks as prepared for the Sea Air and Space Conference, Washington, DC, April 5, 2023.

<sup>174</sup> U.S. Indo-Pacific Command Public Affairs, “USINDOPACOM Statement on Unsafe Maritime Interaction,” June 5, 2023.

<sup>175</sup> For more on the WPNS, see Singapore Ministry of Defense, “Fact Sheet: Background of the Western Pacific Naval Symposium, MCMEX, DIVEX and NMS,” March 25, 2011, accessed May 31, 2023, at [https://www.nas.gov.sg/archivesonline/data/pdfdoc/MINDEF\\_20110325001/MINDEF\\_20110325003.pdf](https://www.nas.gov.sg/archivesonline/data/pdfdoc/MINDEF_20110325001/MINDEF_20110325003.pdf).

<sup>176</sup> See, for example, “Navy Leaders Agree to CUES at 14<sup>th</sup> WPNS,” Navy News Services, April 23, 2014; Austin Ramzy and Chris Buckley, “Pacific Rim Deal Could Reduce Chance of Unintended Conflict in Contested Seas,” *New York Times*, April 23, 2014; Megha Rajagopalan, “Pacific Accord on Maritime Code Could Help Prevent Conflicts,” *Reuters.com*, April 22, 2014.

For additional background information on CUES, see Mark E. Redden and Phillip C. Saunders, *Managing Sino-U.S. Air and Naval Interactions: Cold War Lessons and New Avenues of Approach*, Washington, Center for the Study of Chinese Military Affairs, Institute for National Strategic Studies, National Defense University, September 2012, pp. 8-9. The text of the previous 2003 CUES Review Supplement was accessed May 31, 2023, at <https://web.archive.org/web/20130320014047/http://navy.mil.my/wpns2012/images/stories/dokumen/WPNS%202012%20PRESENTATION%20FOLDER/ACTION%20ITEMS%20WPNS%20WORKSHOP%202012/CUES.PDF>.

law enforcement ships], which are responsible for the majority of Chinese harassment operations.”<sup>177</sup>

DOD stated in 2015 that

Going forward, the Department is also exploring options to expand the use of CUES to include regional law enforcement vessels and Coast Guards. Given the growing use of maritime law enforcement vessels to enforce disputed maritime claims, expansion of CUES to MLE [maritime law enforcement] vessels would be an important step in reducing the risk of unintentional conflict.<sup>178</sup>

U.S. Navy officials have stated that that the United States (as noted in the passage above) is interested in expanding the agreement to cover coast guard ships.<sup>179</sup> Officials from Singapore and Malaysia reportedly have expressed support for the idea.<sup>180</sup> An Obama Administration fact sheet about Chinese President Xi Jinping’s state visit to the United States on September 24-25, 2015, stated the following:

The U.S. Coast Guard and the China Coast Guard have committed to pursue an arrangement whose intended purpose is equivalent to the Rules of Behavior Confidence Building Measure annex on surface-to-surface encounters in the November 2014 Memorandum of Understanding between the United States Department of Defense and the People’s Republic of China Ministry of National Defense.<sup>181</sup>

A November 3, 2018, press report published following an incident in the SCS between a U.S. Navy destroyer and a Chinese destroyer stated the following:

The U.S. Navy’s chief of naval operations has called on China to return to a previously agreed-upon code of conduct for at-sea encounters between the ships of their respective navies, stressing the need to avoid miscalculations.

During a Nov. 1 teleconference with reporters based in the Asia-Pacific region, Adm. John Richardson said he wants the People’s Liberation Army Navy to “return to a consistent adherence to the agreed-to code that would again minimize the chance for a miscalculation that could possibly lead to a local incident and potential escalation.”

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<sup>177</sup> Jeff M. Smith and Joshua Eisenman, “China and America Clash on the High Seas: The EEZ Challenge,” *The National Interest*, May 22, 2014.

<sup>178</sup> Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 31.

<sup>179</sup> See, for example, Rosalin Amthieson, “Chinese Navy in South China Sea Draws U.S. Admiral’s Praise,” *Bloomberg*, April 26, 2016; Michael Fabey, “Sino-U.S. Naval Drills Pay Off, Greenert Says,” *Aerospace Daily & Defense Report*, August 20, 2015; David Tweed, “U.S. Seeks to Expand China Navy Code to Coast Guard, Swift Says,” *Bloomberg Business*, August 25, 2015; Christopher P. Cavas, “New CNO Richardson Invited To Visit China,” *Defense News*, August 25, 2015; Nina P. Calleja, “Positive Relations With China A Must—US Admiral,” *Philippine Daily Inquirer*, August 26, 2015; Shannon Tiezzi, “US Admiral: China ‘Very Interested’ in RIMPAC 2016,” *The Diplomat*, August 27, 2015; Andrea Shalal, “U.S., Chinese Officers Encouraged by Use of Rules for Ship Meetings,” *Reuters*, January 20, 2016; Prashanth Parameswaran, “US Wants Expanded Naval Protocol Amid China’s South China Sea Assertiveness,” *The Diplomat*, February 18, 2016.

<sup>180</sup> See, for example, Prashanth Parameswaran, “Malaysia Wants Expanded Naval Protocol Amid South China Sea Disputes,” *The Diplomat*, December 4, 2015; Prashanth Parameswaran, “What Did the 3<sup>rd</sup> ASEAN Defense Minister’s Meeting Plus Achieve?” *The Diplomat*, November 5, 2015. See also Lee YingHui, “ASEAN Should Choose CUES for the South China Sea,” *East Asia Forum*, April 6, 2016. See also Hoang Thi Ha, “Making the Cues Code Work in the South China Sea,” *Today*, September 8, 2016.

<sup>181</sup> “FACT SHEET: President Xi Jinping’s State Visit to the United States,” September 25, 2015, accessed May 31, 2023, at <https://www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states>.



The CNO cited a case in early October when the U.S. Navy's guided-missile destroyer Decatur reported that a Chinese Type 052C destroyer came within 45 yards of the Decatur as it conducted a freedom-of-navigation operation in the South China Sea.

However, he added that the "vast majority" of encounters with Chinese warships in the South China Sea "are conducted in accordance with the Code of Unplanned Encounters at Sea and done in a safe and professional manner." The code is an agreement reached by 21 Pacific nations in 2014 to reduce the chance of an incident at sea between the agreement's signatories.<sup>182</sup>

See also the April 5, 2023, remarks from the Commander, Office of Naval Intelligence, regarding the compliance of China's military forces with the COLREGs treaty and the CUES agreement that are quoted in the previous section on the COLREGS treaty.

## 2014 U.S.-China MOU on Air and Maritime Encounters

In November 2014, the U.S. DOD and China's Ministry of National Defense signed a Memorandum of Understanding (MOU) regarding rules of behavior for safety of air and maritime encounters.<sup>183</sup> The MOU makes reference to UNCLOS, the 1972 COLREGs convention, the Convention on International Civil Aviation (commonly known as the Chicago Convention), the Agreement on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety (MMCA), and CUES.<sup>184</sup> The MOU as signed in November 2014 included an annex on rules of behavior for safety of surface-to-surface encounters. An additional annex on rules of behavior for safety of air-to-air encounters was signed on September 15 and 18, 2015.<sup>185</sup>

An October 20, 2018, press report states the following:

Eighteen nations including the U.S. and China agreed in principle Saturday [October 20] to sign up to guidelines governing potentially dangerous encounters by military aircraft, a

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<sup>182</sup> Mike Yeo, "Top US Navy Officer Tells China to Behave at Sea," *Defense News*, November 3, 2018.

<sup>183</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.

<sup>184</sup> DOD stated in 2015 that

In 2014, then-Secretary Hagel and his Chinese counterpart signed a historic Memorandum of Understanding (MOU) on Rules of Behavior for Safety of Air and Maritime Encounters. The MOU established a common understanding of operational procedures for when air and maritime vessels meet at sea, drawing from and reinforcing existing international law and standards and managing risk by reducing the possibility of misunderstanding and misperception between the militaries of the United States and China. To date, this MOU includes an annex for ship-to-ship encounters. To augment this MOU, the Department of Defense has prioritized developing an annex on air-to-air encounters by the end of 2015. Upon the conclusion of this final annex, bilateral consultations under the Rules of Behavior MOU will be facilitated under the existing MMCA forum.

(Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 30.)

For additional discussion of the MOU, see Peter A. Dutton, "MOUs: The Secret Sauce to Avoiding a U.S.-China Disaster?" *National Interest*, January 30, 2015; Mira Rapp-Hooper and Bonnie Glaser, "In Confidence: Will We Know If US-China CBMs Are Working?" *Asia Maritime Transparency Initiative (AMTI)* (Center for Strategic and International Studies [CSIS]), February 4, 2015; Mira Rapp-Hooper, "What's in a Confidence Building Measure?" *Lawfare*, February 8, 2015; Peter Dutton and Andrew Erickson, "When Eagle Meets Dragon: Managing Risk in Maritime East Asia," *Real Clear Defense*, March 25, 2015.

<sup>185</sup> For a critical commentary on the annex for air-to-air encounters, see James Kraska and Raul "Pete" Pedrozo, "The US-China Arrangement for Air-to-Air Encounters Weakens International Law," *Lawfare*, March 9, 2016.

step toward stabilizing flashpoints but one that leaves enough wiggle room to ignore the new standards when a country wants.

The guidelines essentially broaden a similar agreement reached by the U.S. and China three years ago and are an attempt to mitigate against incidents and collisions in some of the world's most tense areas....

The in-principle agreement, which will be put forward for formal adoption by the group of 18 nations next year, took place at an annual meeting of defense ministers under the aegis of the 10-country Association of Southeast Asian Nations, hosted by Singapore. Asean nations formally adopted the new guidelines themselves Friday.

"The guidelines are very useful in setting norms," Singapore's defense minister Ng Eng Hen told reporters after the meeting. "All the 18 countries agreed strong in-principle support for the guidelines."...

The aerial-encounters framework agreed to Saturday includes language that prohibits fast or aggressive approaches in the air and lays out guidelines on clear communications including suggestions to "refrain from the use of uncivil language or unfriendly physical gestures."

Signatories to the agreement, which is voluntary and not legally binding, would agree to avoid unprofessional encounters and reckless maneuvers....

The guidelines fall short on enforcement and geographic specifics, but they are "better than nothing at all," said Evan Laksmana, senior researcher with the Center for Strategic and International Studies in Jakarta. "Confidence-building surrounding military crises or encounters can hardly move forward without some broadly agreed-upon rules of the game," he said.<sup>186</sup>

## **Negotiations on SCS Code of Conduct (COC)**

In 2002, China and the 10 member states of ASEAN signed a nonbinding Declaration on the Conduct (DOC) of Parties in the South China Sea in which the parties, among other things,

... reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea....

... undertake to 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....

... undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner....

... reaffirm that the adoption of a [follow-on] code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective....<sup>187</sup>

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<sup>186</sup> Jake Maxwell Watts, "Defense Chiefs Seek Friendlier Skies Over Asia's Military Flashpoints," *Wall Street Journal*, October 20, 2018.

<sup>187</sup> Text as taken from [https://asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2](https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2).

In July 2011, China and ASEAN adopted a preliminary set of principles for implementing the DOC. U.S. officials since 2010 have encouraged ASEAN and China to develop the follow-on binding Code of Conduct (COC) mentioned in the final quoted paragraph above. China and ASEAN have conducted negotiations on the follow-on COC, but China has not yet agreed with the ASEAN member states on a final text.

On August 4, 2021, it was reported that

China and the Asean nations have agreed on part of the text of the long-awaited code of conduct for the South China Sea, Chinese Foreign Minister Wang Yi said in an address in which he described the US as “the biggest troublemaker” in the disputed waterway....

The resumed negotiations on the code of conduct—including agreement on its preface—“demonstrated once again that as long as the common political will to move forward with consultations is maintained, no difficulty can stand in our way, whether it be a raging epidemic or external interference,” Wang said, according to a Chinese foreign ministry readout....

The framework for a code of conduct was agreed in 2017, although the decision to keep the draft text private was criticised as an effort by Beijing to block the US from getting involved....

Diplomats from China and the Asean countries completed a first reading of the code’s draft negotiating text in July 2019, a move that Beijing touted as “major progress”. Since then, there has been no significant movement—mostly because of the pandemic, which made face-to-face talks more difficult.

The two sides held their first senior officials’ meeting since the outbreak to negotiate further progress on the code of conduct in June.<sup>188</sup>

Some observers have argued that China has been dragging out the negotiations on the COC for years as part of a “talk and take strategy,” meaning a strategy in which China engages in (or draws out) negotiations while taking actions to gain control of contested areas.<sup>189</sup> A September 28, 2020, press report states

During last month’s ASEAN Regional Forum, foreign ministers from the 10 members of the Association of Southeast Asian Nations (ASEAN) once again called for an expedited negotiation of the Code of Conduct for the South China Sea (COC). But there are many obstacles that will have to be overcome before the long-expected agreement sees the light of day....

ASEAN and China have previously made many joint statements claiming or promising progress in the negotiations over the COC. In 2017, the two sides announced a draft Framework COC, and in 2018, a Single Draft Negotiating Text (SDNT). The year after that brought the 20-page First Draft of the planned COC. But all these achievements have been insufficient to settle the bilateral disputes. According to some officials involved in the negotiation process, the First Draft in particular contains a number of serious disagreements in the positions of China and the ASEAN claimants.

In August 2018, when the content of the SDNT was announced, Chinese Foreign Minister Wang Yi unilaterally announced that this COC would be finalized within three years.

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<sup>188</sup> Laura Zhou, “Beijing and Asean’s Long-Awaited South China Sea Code of Conduct Inches Forward,” *South China Morning Post*, August 4, 2021.

<sup>189</sup> See, for example, “China and ASEAN Declare Progress in the South China Sea,” *The Economist*, May 25, 2017; Lee YingHui, “A South China Sea Code of Conduct: Is Real Progress Possible?” *The Diplomat*, November 18, 2017; Huong Le Thu, “The Dangerous Quest for a Code of Conduct in the South China Sea,” *Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS])*, July 13, 2018.

Given what has happened since, however, one wonders how the COC can possibly be concluded within that deadline....

Fundamentally, the situation is simple: ASEAN countries want to curb China's behavior, but China does not want its actions to be constrained. ASEAN has little or nothing that it can do to force China to agree on an effective and substantial COC, so the negotiations have continued to deadlock on key issues.

While there is technically a SDNT that forms the basis for discussions, the parties remain stalemated on the same issues as in the past.<sup>190</sup>

A June 22, 2021, press report states

After almost 20 years, time is running out for the Association of Southeast Asian Nations (ASEAN) to enter into any code of conduct agreement to manage tensions in the disputed South China Sea.

At a recent webinar, titled, "ASEAN at the Crossroads: Fostering Strengths for Addressing Regional Issues" and hosted by the Stimson Center and the Mekong Environment Forum, experts expressed little optimism around any substantive negotiations aimed at concluding a code consistent with international law.

"ASEAN simply cannot restrain China's actions in the Spratlys and Vietnam wants to include the Paracels but Beijing's brazen acts undermines all trust," says Bill Hayton, associate fellow at Chatham House in London....

The clock continues to tick faster on this sensitive issue particularly since ASEAN and China have agreed to finalize the COC by 2022. The 2021 ASEAN leadership, rests with Brunei, also a claimant nation, but it's doubtful that the sultanate will conclude any code consensus among the 10-member Association of Southeast Asian Nations....

Beijing's strident belief that the code of conduct's geographic reach must correspond to its nine-dash line claim remains a huge stumbling block for ASEAN. Furthermore, there's a chasm between ASEAN and China on the undefined legal status of the COC.<sup>191</sup>

A July 17, 2021, press report states

Negotiations between Beijing and its neighbours for a code of conduct on activities in the South China Sea are facing more uncertainty as tensions rise over the contested waterway, with one observer saying the process "could even end in a stalemate"

Beijing's push to get the code of conduct agreed to, repeatedly calling for the process to be sped up, is seen by some as an effort to block the United States from getting involved in disputes over the resource-rich waters, most of which China claims as its own.

Diplomats from China and the 10-member Association of Southeast Asian Nations completed a first reading of the "draft negotiating text" of the code in July 2019, but no significant progress has been made since then—mostly because of the pandemic making it harder to hold face-to-face talks.

But wariness over China's growing assertiveness in the region has also made rival claimants like Vietnam, the Philippines and Malaysia "less willing" to push forward negotiations, according to Wu Shicun, president of the National Institute for South China Sea Studies, a think tank in Hainan.

"The rise in China's hard power in the South China Sea has not led to a parallel rise in soft power," Wu said during a conference in Shanghai last week. "Also there is still this unease

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<sup>190</sup> Viet Hoang, "The Code of Conduct for the South China Sea: A Long and Bumpy Road," *Diplomat*, September 28, 2020.

<sup>191</sup> James Borton, "South China Sea Code of Conduct Clock Runs Down," *Washington Times*, June 22, 2021.

and hostility from littoral countries towards China's rise, so they're still apprehensive about whether China is seeking regional rule-making dominance through the code of conduct negotiations."

America's increased military activity in the South China Sea could also complicate talks on the code of conduct, he said.

"[That] could make it more and more difficult for China and the Asean countries to reach an agreement on a code of conduct text, and there is a risk the negotiations could even end in a stalemate or at least a difficult birth," Wu said....

[Carl Thayer, emeritus professor at the University of New South Wales, Canberra] said formal negotiations between China and Asean were "highly likely" to resume.

"China pressures Asean to complete the [code of conduct] negotiations as a legal ploy to block the United States from intruding in the South China Sea," Thayer said. "Asean members want to resume negotiations as a means of restraining China's assertiveness. But it is clear ... that Asean is in no rush to complete an agreement ... that is not binding."

Thayer said there were still issues to be addressed.

"There are at least four major issues that need to be resolved before agreement can be reached ... the geographic scope, the legal status of the [code of conduct], enforcement measures and the role of third parties who are not mentioned in the current draft," he said.<sup>192</sup>

A July 21, 2021, blog post stated

It has been one of the diplomatic world's longest gestations. A quarter century ago, the idea of a regional code of conduct for the South China Sea was a gleam in the eye of Southeast Asia's foreign ministers. Twenty-five years later, the code is only a little closer to being delivered. In the interim, its would-be midwives have earned millions of air miles and generated many mountains of paper, but the baby has still not seen the light of day.

It was on July 21, 1996, that a meeting of foreign ministers from the Association of Southeast Asian Nations (ASEAN) in Jakarta, Indonesia, first "endorsed the idea of concluding a regional code of conduct in the South China Sea which will lay the foundation for long term stability in the area and foster understanding among claimant countries." Their idea was a response to China's occupation of Mischief Reef, just 130 miles from the Philippine island of Palawan, a year and a half earlier....

This July, the big dog is still marking its territory in the South China Sea, there's little sign of long-term stability, and "understanding" among the claimant countries is wearing thin. Earlier this month, the Chinese foreign ministry spokesman Zhao Lijian declared, "China and ASEAN countries ... actively promote consultations on the 'Code of Conduct in the South China Sea' with major progress." This is not a view shared in ASEAN foreign ministries.

Negotiators from ASEAN and China have so far produced a "Declaration" on a code of conduct (in 2002), "Guidelines on the Implementation of the Declaration" (in 2011), a "Framework" for a code (in 2017), and a "Single Draft Negotiating Text" (in 2018), but a final code of conduct remains just as elusive as ever....

Through draft after draft, the problems have remained the same. According to Ian Storey, a senior fellow at the ISEAS-Yusof Ishak Institute in Singapore, there have always been three sticking points: "First, what should the geographical scope of the agreement be? Should it include the Paracel Islands, as Vietnam wants but China doesn't, or Scarborough Shoal, as the Philippines wants but China doesn't. Second, should the COC [code of

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<sup>192</sup> Laua Zhou, "South China Sea Code of Conduct Talks 'May End in Stalemate' as Tensions Rise," *South China Morning Post*, July 17, 2021.

conduct] include a list of dos and don'ts? Beijing won't want to tie its hands by agreeing to a ban on those activities. Third, should the COC be legally binding? Most ASEAN member states appear to support that, but China is opposed."

It would be wrong to think that talks have been continuous over the past quarter century. According to Storey, "Pretty much nothing happened at all between 2002 and 2011." For years China refused to deal with ASEAN as a group. Beijing preferred to deal with the other claimants one-on-one where its economic and military heft would count for more. Fearful of this, the smaller ASEAN states opted to stand together. The talks became deadlocked over whether the Southeast Asian nations would even be allowed to discuss the South China Sea collectively without Chinese representatives in the room.

It was only when the Philippines initiated a legal case against China in an international arbitral tribunal in January 2013 that Beijing suddenly started to take interest again. That same year, China began turning the seven reefs it occupied in the Spratly Islands into huge military bases. In the words of Huong Le Thu, a senior analyst with the Australian Strategic Policy Institute, "China has used the prospect of a COC as a Holy Grail to entice the region. The protracted process diverted their attention while Beijing advanced its strategic objectives."...

In November 2018, Chinese Premier Li Keqiang told an audience in Singapore that he hoped negotiations on the code of conduct could be concluded "within three years." No informed observers believe that is likely. The COVID-19 pandemic prevented any meetings during 2020, and talks only tentatively resumed last month. At present, the negotiators are faced with a "Single Draft Negotiating Text" a lengthy screed still containing all the rival positions. As Storey noted, "The next step will be to actually start negotiations and decide what to keep in and what to throw out. That will be when sparks start to fly."

Many Southeast Asian diplomats believe the outcome is less important than the process. Former Singaporean Ambassador-at-Large Bilahari Kausikan recently told the Anakut podcast, "The COC is an instrument being used by both sides, not just China, to manage the relationship. When the relationship is tense, we don't discuss the COC. When the relationship improves, we pretend to discuss the COC." The scheduled meetings provide a framework for the ASEAN states to exchange views with China, and that is purpose enough.

But there isn't even a single position within ASEAN.... To put it simply, the five states bordering the South China Sea have much more at stake than the other ASEAN nations.

... Sourabh Gupta, a resident senior fellow at the Institute for China-America Studies in Washington (a think tank that shares key personnel with China's National Institute for South China Sea Studies) said there are three key issues for Beijing. One is the geographic scope of the code of conduct. The other two are just as problematic. According to Gupta, Beijing believes, "There should be no role for external companies in key areas of marine economic cooperation, primarily oil and gas development, nor any joint military exercising with extra-regional states." Beijing is equally opposed to outside parties—such as courts or arbitral tribunals—being involved in adjudicating disputes. Gupta said Beijing is adamant "that all disputes must be settled by consensus, perhaps with resort to the Leaders' Summit as final resort. This is a red-line issue for Beijing."

Vietnam and the other littoral countries are equally adamant that the United Nations Convention on the Law of the Sea should set the rules in the South China Sea, just as it does elsewhere in the world. Not all ASEAN members are quite so fixed in this view, however. B.A. Hamzah, the director of the Centre for Defence and International Security Studies at the National Defence University of Malaysia, argued that "Thailand, Burma, Cambodia, and Laos do not contest China's jurisdiction at sea. Their support for the

ASEAN consensus on the South China Sea is artificial—lukewarm at best. Each ASEAN member has its own economic and security interests to pursue.”...

Ultimately, the Southeast Asian states want a code of conduct because they believe it will constrain China’s behavior. China, on the other hand, sees no reason to agree to allow its behavior to be constrained. Instead, it wants the code of conduct to constrain the United States. In Hamzah’s view, “Beijing wants the COC to restrain U.S. military adventures in the South China Sea and other areas in the region. China’s logic is, if the COC cannot keep the U.S. military at bay, why should Beijing ratify it? To China, ASEAN has been working as a proxy for Washington. So, no deal.”

The idea of a code of conduct constraining freedom of navigation for U.S., Japanese and other outside navies isn’t going to fly in either Washington or most Southeast Asian capitals. According to Le Thu, “China wants a fast conclusion of a COC on its own terms, but I think most Southeast Asian states wouldn’t want to rush into concluding a weak COC.” And since neither ASEAN nor anyone else can either compel or induce China to compromise, the prospects for agreement look just as far away as they did back in 1996.

One thing everyone interviewed for this article concurred on is that the chances of an agreed code of conduct in the next five years are remote. Instead, we should expect another piece of paper restating all the parties’ commitments to the 2002 Declaration and their hopes for progress toward something stronger in the future.<sup>193</sup>

A March 27, 2023, press report stated:

Indonesia hopes that it can play a vital role in accelerating the negotiations for the Code of Conduct (COC) in the South China Sea this year, according to Indonesian Ambassador Agus Widjojo.

Indonesia is currently the chairman of this year’s Association of Southeast Asian Nations (ASEAN). A joint working group of diplomats gathered in Jakarta earlier this month to discuss the status of the code.

In an exclusive interview with CNN Philippines, Indonesia’s envoy to the country Agus Widjojo said that while the negotiations are progressing, there is still much work to be done.

“We are entering the third part of the 1/3 of the COC,” said Widjojo. “But in diplomacy, it could be anything. The most important is the parties are willing to meet each other and talk to each other.”

Widjojo also gave a preview of what could be the biggest challenge in finalizing the COC.

“The parties involved in the negotiations have foundation and perspective,” the Indonesian envoy said.

“If you have differences, how could you meet? So, it’s important to have a basis for win-win approach, win-win interest, and a balance of interests between all parties concerned,” he explained.

Widjojo said that Indonesia remains committed to intensifying the negotiations for the COC in order to come up with an “effective and credible COC.”

“Indonesia expects the COC that reflects international norms, and aligned to international law including the United Nations Convention on the Law of the Sea (UNCLOS),” added Widjojo.

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<sup>193</sup> Bill Hayton, “After 25 Years, There’s Still No South China Sea Code of Conduct,” *Foreign Policy*, July 21, 2021. See also Charissa Yong, “The Seemingly Never-Ending Quest for a South China Sea Code of Conduct,” *Straits Times*, May 23, 2022.

The Indonesian ambassador said that they are also pushing for a legally binding code.

"I don't know if there is other alternative than making it legally binding. We hope that the code of conduct would be legally binding for all parties concerned," he added.<sup>194</sup>

An August 21, 2023, press report stated:

The process for developing a Code of Conduct began in 2002 and was meant to be a tension-management mechanism between China and the Southeast Asian claimants: Brunei, Malaysia, the Philippines and Vietnam. ASEAN's intent was to create space for the parties to negotiate the delimitation of their disputed maritime boundaries. But the glacial pace of the Code of Conduct process has allowed China to build up military capabilities and consolidate operational control over its claimed waters and features in the South China Sea. With the strategic context and rationale today being fundamentally different than it was two decades ago, the Code of Conduct is due for a serious reassessment by ASEAN....

... After more than 20 years of negotiation, it is unclear whether both sides will ever agree on major issues related to the Code of Conduct, such as enforcement and geographical scope. Moreover, the spirit of 'self-restraint' described in the 2002 declaration has been absent for a decade, demonstrated by China's largely cost-free use of grey-zone tactics during this time.

China has used the Code of Conduct process to buy time while asserting operational control over additional disputed territories and waters (and militarising some occupied features) at the expense of nearly all Southeast Asian claimants and littoral states.... ASEAN leaders have preferred instead to focus on salvaging the Code of Conduct process, agreeing to a Single Draft Negotiating Text in 2018 and issuing Guidelines to accelerate negotiations for the Code of Conduct in the South China Sea under Indonesia's leadership in July 2023. Notably, ASEAN members have found during the many maritime crises in recent years that the various crisis-communication channels developed with China are largely defunct.<sup>195</sup>

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<sup>194</sup> Tristan Nodalo, "Indonesia Pushes for Legally Binding Code of Conduct, Urges Need for South China Sea 'hotline,'" *CNN Philippines*, March 27, 2023.

<sup>195</sup> Evan A. Laksmana, "The South China Sea Talks Between ASEAN and China," International Institute for Strategic Studies (IISS), August 21, 2023. See also Prashanth Parameswaran, "What's Behind the New China-ASEAN South China Sea Code of Conduct Talk Guidelines?" *Asia Dispatches (Wilson Center)*, July 25, 2023; Ian Storey, "Swimming in Circles – the Quest for a South China Sea Code of Conduct, Two Decades on, Talks between Asean and China Continue and Are Supposed to Accelerate, but Real Progress Is Nowhere in Sight," *Straits Times*, July 24, 2023; Niniek Karmini and Jim Gomez, "China and ASEAN Agree to Try to Conclude Nonaggression Pact on Sea Feud in 3 Years," *Associated Press*, July 13, 2023.



## Appendix D. July 2016 Tribunal Award in Philippines-China SCS Arbitration Case

This appendix provides background information on the July 2016 tribunal award in the SCS arbitration case involving the Philippines and China.

### Overview

In 2013, the Philippines sought arbitration under UNCLOS over the role of historic rights and the source of maritime entitlements in the South China Sea, the status of certain maritime features and the maritime entitlements they are capable of generating, and the lawfulness of certain actions by China that were alleged by the Philippines to violate UNCLOS. A tribunal was constituted under UNCLOS to hear the case.

China stated repeatedly that it would not accept or participate in the arbitration and that, in its view, the tribunal lacked jurisdiction in this matter. China's nonparticipation did not prevent the case from moving forward, and the tribunal decided that it had jurisdiction over various matters covered under the case.

On July 12, 2016, the tribunal issued its award (i.e., ruling) in the case. The award was strongly in favor of the Philippines—more so than even some observers had anticipated. The tribunal ruled, among other things, that China's nine-dash line claim had no legal basis; that none of the land features in the Spratlys is entitled to any more than a 12-nm territorial sea; that three of the Spratlys features that China occupies generate no entitlement to maritime zones; and that China violated the Philippines' sovereign rights by interfering with Philippine vessels and by damaging the maritime environment and engaging in reclamation work on a feature in the Philippines' EEZ.

Under UNCLOS, the award is binding on both the Philippines and China (China's nonparticipation in the arbitration does not change this). There is, however, no mechanism for enforcing the tribunal's award. The United States has urged China and the Philippines to abide by the award. China, however, has declared the ruling null and void.<sup>196</sup> Philippine President Rodrigo Duterte, who took office just before the tribunal's ruling, has not sought to enforce it.

The tribunal's press release summarizing its award states the following in part:

The Award is final and binding, as set out in Article 296 of the Convention [i.e., UNCLOS] and Article 11 of Annex VII [of UNCLOS].

**Historic Rights and the 'Nine-Dash Line':** ... On the merits, the Tribunal concluded that the Convention comprehensively allocates rights to maritime areas and that protections for pre-existing rights to resources were considered, but not adopted in the Convention. Accordingly, the Tribunal concluded that, to the extent China had historic rights to resources in the waters of the South China Sea, such rights were extinguished to the extent they were incompatible with the exclusive economic zones provided for in the Convention. The Tribunal also noted that, although Chinese navigators and fishermen, as well as those of other States, had historically made use of the islands in the South China Sea, there was no evidence that China had historically exercised exclusive control over the waters or their

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<sup>196</sup> For discussions of China's compliance with the award, see Julian Ku and Christopher Mirasola, "Analysis: Chinese South China Sea Operations Ambiguous After Ruling," *USNI News*, October 17, 2016; Julian Ku and Chris Mirasola, "Tracking China's Compliance with the South China Sea Arbitral Award," *Lawfare*, October 3, 2016; Tuan N. Pham, "The South China Sea Ruling: 1 Month Later," *The Diplomat*, August 12, 2016.

resources. The Tribunal concluded that there was no legal basis for China to claim historic rights to resources within the sea areas falling within the ‘nine-dash line’.

**Status of Features:** ... Features that are above water at high tide generate an entitlement to at least a 12 nautical mile territorial sea, whereas features that are submerged at high tide do not. The Tribunal noted that the reefs have been heavily modified by land reclamation and construction, recalled that the Convention classifies features on their natural condition, and relied on historical materials in evaluating the features. The Tribunal then considered whether any of the features claimed by China could generate maritime zones beyond 12 nautical miles. Under the Convention, islands generate an exclusive economic zone of 200 nautical miles and a continental shelf, but “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” ... the Tribunal concluded that none of the Spratly Islands is capable of generating extended maritime zones. The Tribunal also held that the Spratly Islands cannot generate maritime zones collectively as a unit. Having found that none of the features claimed by China was capable of generating an exclusive economic zone, the Tribunal found that it could—without delimiting a boundary—declare that certain sea areas are within the exclusive economic zone of the Philippines, because those areas are not overlapped by any possible entitlement of China.

**Lawfulness of Chinese Actions:**... Having found that certain areas are within the exclusive economic zone of the Philippines, the Tribunal found that China had violated the Philippines’ sovereign rights in its exclusive economic zone by (a) interfering with Philippine fishing and petroleum exploration, (b) constructing artificial islands and (c) failing to prevent Chinese fishermen from fishing in the zone. The Tribunal also held that fishermen from the Philippines (like those from China) had traditional fishing rights at Scarborough Shoal and that China had interfered with these rights in restricting access. The Tribunal further held that Chinese law enforcement vessels had unlawfully created a serious risk of collision when they physically obstructed Philippine vessels.

**Harm to Marine Environment:** The Tribunal considered the effect on the marine environment of China’s recent large-scale land reclamation and construction of artificial islands at seven features in the Spratly Islands and found that China had caused severe harm to the coral reef environment and violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species. The Tribunal also found that Chinese authorities were aware that Chinese fishermen have harvested endangered sea turtles, coral, and giant clams on a substantial scale in the South China Sea (using methods that inflict severe damage on the coral reef environment) and had not fulfilled their obligations to stop such activities.

**Aggravation of Dispute:** Finally, the Tribunal considered whether China’s actions since the commencement of the arbitration had aggravated the dispute between the Parties. The Tribunal found that it lacked jurisdiction to consider the implications of a stand-off between Philippine marines and Chinese naval and law enforcement vessels at Second Thomas Shoal, holding that this dispute involved military activities and was therefore excluded from compulsory settlement. The Tribunal found, however, that China’s recent large-scale land reclamation and construction of artificial islands was incompatible with the obligations on a State during dispute resolution proceedings, insofar as China has inflicted irreparable harm to the marine environment, built a large artificial island in the Philippines’ exclusive economic zone, and destroyed evidence of the natural condition of features in the South China Sea that formed part of the Parties’ dispute.<sup>197</sup>

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<sup>197</sup> Permanent Court of Arbitration press release, “The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China),” July 12, 2016, pp. 1-2. The full text of the award is: PCA Case N° 2013-19, In the Matter of the South China Sea Arbitration before An Arbitral Tribunal Constituted Under Annex VII to the 1982 (continued...)

## Reported Chinese Characterization of Arbitral Award as “Waste Paper”

When the arbitral panel’s award was announced, China stated that “China does not accept or recognize it,” and that the award “is invalid and has no binding force.”<sup>198</sup> A July 20, 2017, article states that “at an official briefing immediately after the ruling, Vice Foreign Minister Liu Zhenmin twice called it ‘nothing more than a piece of waste paper,’ and one that ‘will not be enforced by anyone.’”<sup>199</sup> A November 22, 2017, press report states the following:

An eight-page essay pumped through social media and Chinese state newspapers in recent days extolled the virtues of president Xi Jinping.

Among his achievements, in the Chinese language version, was that he had turned the South China Sea Arbitration at The Hague—which found against China—into “waste paper”.

It was an achievement that state news agency Xinhua’s lengthy hymn, entitled “Xi and His Era”, did not include in the English version for foreign consumption.<sup>200</sup>

## Assessments and Related Events Regarding Impact of Arbitral Award

### One Year Later

In July 2017, a year after the arbitral panel’s award, some observers assessed the impact to date of the award. For example, one observer stated the following:

One year ago, China suffered a massive legal defeat when an international tribunal based in The Hague ruled that the vast majority of Beijing’s extensive claims to maritime rights and resources in the South China Sea were not compatible with international law. Beijing was furious.

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United Nations Convention on the Law of the Sea between The Republic of the Philippines and The People’s Republic of China, Award, Arbitral Tribunal: Judge Thomas A. Mensah (Presiding Arbitrator), Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred H.A. Soons, Judge Rüdiger Wolfrum, Registry: Permanent Court of Arbitration, 12 July 2016, 479 pp. Further information and documents on the case can be found at <http://www.pcacases.com/web/view/7>.

<sup>198</sup> See, for example, Jane Perlez, “Tribunal Rejects Beijing’s Claims in South China Sea,” *New York Times*, July 12, 2016; Thomas E. Kellogg, “The South China Sea Ruling: China’s International Law Dilemma,” *The Diplomat*, July 14, 2017.

<sup>199</sup> Bill Hayton, “Bill Hayton: Beijing Takes South China Sea Ruling Seriously,” *Nikkei Asia*, July 20, 2017.

<sup>200</sup> Kirsty Needham, “‘Xi and his Era’: China Adopts a Triumphant Tone as US World Leadership Falter,” *Sydney Morning Herald*, November 22, 2017. See also Willard Cheng, “China Rejects Hague Ruling Anew, Cites ‘Agreement’ with Duterte to ‘Close the Old Chapter,’” *ABS-CBN News*, September 25, 2020; Wu Shicun, “Give Burial at Sea to South China Sea Arbitration Ruling,” *Global Times*, December 10, 2020 (similar version published as *Global Times*, “Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration,” *People’s Online Daily*, December 11, 2020); National Institute for South China Sea Studies (research team formed under direction of Shicun Wu), “A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration,” *Asian Yearbook of International Law*, vol. 24 (2018): 151-293 (print publication date October 22, 2020), accessed May 31, 2023, at <https://brill.com/display/book/edcoll/9789004437784/BP000019.xml>.

See also Tristan Nodalo, “China Claims US ‘Mastermind’ Behind South China Sea Arbitration Case; US Says It’s ‘An Insult to PH,’” *CNN Philippines*, July 18, 2023; Beijing Newsroom, Karen Lema, and Bernard Orr, “China Blasts US for Forcing it to Accept South China Sea Ruling,” *Reuters*, July 12, 2023.

At an official briefing immediately after the ruling, Vice Foreign Minister Liu Zhenmin twice called it “nothing more than a piece of waste paper,” and one that “will not be enforced by anyone.” And yet, one year on, China is, in many ways, abiding by it....

China is not fully complying with the ruling—far from it. On May 1, China imposed a three-and-a-half-month ban on fishing across the northern part of the South China Sea, as it has done each year since 1995. While the ban may help conserve fish stocks, its unilateral imposition in wide areas of the sea violates the ruling. Further south, China’s occupation of Mischief Reef, a feature that is submerged at high tide and the tribunal ruled was part of the Philippines’ continental shelf, endures. Having built a vast naval base and runway here, China looks like it will remain in violation of that part of the ruling for the foreseeable future.

But there is evidence that the Chinese authorities, despite their rhetoric, have already changed their behavior. In October 2016, three months after the ruling, Beijing allowed Philippine and Vietnamese boats to resume fishing at Scarborough Shoal, west of the Philippines. A China Coast Guard ship still blocks the entrance to the lagoon, but boats can still fish the rich waters around it. The situation is not perfect but neither is China flaunting its defiance....

Much more significantly, China has avoided drilling for oil and gas on the wrong side of the invisible lines prescribed by the United Nations Convention on the Law of the Sea (UNCLOS)....

... the ruling means China has no claim to the fish, oil or gas more than 12 nautical miles from any of the Spratlys or Scarborough Shoal.

The Chinese authorities appear not to accept this....

There are clear signs from both China’s words and deeds that Beijing has quietly modified its overall legal position in the South China Sea. Australian researcher Andrew Chubb noted a significant article in the Chinese press in July last year outlining the new view....

... China’s new position seems to represent a major step towards compliance with UNCLOS and, therefore, the ruling. Most significantly, it removes the grounds for Chinese objections to other countries fishing and drilling in wide areas of the South China Sea....

Overall, the picture is of a China attempting to bring its vision of the rightful regional order (as the legitimate owner of every rock and reef inside the U-shaped line) within commonly understood international rules. Far from being “waste paper,” China is taking the tribunal ruling very seriously. It is still some way from total compliance but it is clearly not deliberately flouting the ruling.<sup>201</sup>

Another observer stated the following:

A year ago today, an arbitral tribunal formed pursuant to the United Nations Convention for the Law of the Sea issued a blockbuster award finding much of China’s conduct in the South China Sea in violation of international law. As I detailed that day on this blog and elsewhere, the Philippines won about as big a legal victory as it could have expected. But as many of us also warned that day, a legal victory is not the same as an actual victory.

In fact, over the past year China has succeeded in transforming its legal defeat into a policy victory by maintaining its aggressive South China Sea policies while escaping sanction for its non-compliance. While the election of a new pro-China Philippines government is a key factor, much of the blame for China’s victory must also be placed on the Obama Administration....

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<sup>201</sup> Bill Hayton, “Beijing shifts strategy in South China Sea,” *Nikkei Asian Review*, July 12, 2017.

International law seldom enforces itself, and even the reputational costs of violating international law do not arise unless other states impose those costs on the law-breaker. Both the Philippines and the U.S. had policy options that would have raised the costs of China's non-compliance with the award. But neither country's government chose to press China on the arbitral award....

Looking back after one year, we cannot say (yet) that U.S. policy in the South China Sea is a failure. But we can say that the U.S. under President Obama missed a huge opportunity to change the dynamics in the region in its favor, and it is hard to know whether or when another such opportunity will arise in the future.<sup>202</sup>

## **Two Years Later**

Another observer writes in a May 10, 2018, commentary piece that

Two years after an international tribunal rejected expansive Chinese claims to the South China Sea, Beijing is consolidating control over the area and its resources. While the U.S. defends the right to freedom of navigation, it has failed to support the rights of neighboring countries under the tribunal's ruling. As a result, Southeast Asian countries are bowing to Beijing's demands....

While Beijing's dramatic military buildup in the South China Sea has received much attention, its attempts at "lawfare" are largely overlooked. In May, the Chinese Society of International Law published a "critical study" on the South China Sea arbitration case. It rehashed old arguments but also developed a newer one, namely that China is entitled to claim maritime zones based on groups of features rather than from individual features. Even if China is not entitled to historic rights within the area it claims, this argument goes, it is entitled to resources in a wide expanse of sea on the basis of an exclusive economic zone generated from outlying archipelagoes.

But the Convention on the Law of the Sea makes clear that only archipelagic states such as the Philippines and Indonesia may draw straight archipelagic baselines from which maritime zones may be claimed. The tribunal also explicitly found that there was "no evidence" that any deviations from this rule have amounted to the formation of a new rule of customary international law.

China's arguments are unlikely to sway lawyers, but that is not their intended audience. Rather Beijing is offering a legal fig leaf to political and business elites in Southeast Asia who are already predisposed to accept Beijing's claims in the South China Sea. They fear China's threat of coercive economic measures and eye promises of development through offerings such as the Belt and Road Initiative.

Why did Washington go quiet on the 2016 tribunal decision? One reason is Philippine President Rodrigo Duterte's turn toward China and offer to set aside the ruling. The U.S. is also worried about the decision's implications for its own claims to exclusive economic zones from small, uninhabited land features in the Pacific.

The Trump administration's failure to press Beijing to abide by the tribunal's ruling is a serious mistake. It undermines international law and upsets the balance of power in the region. Countries have taken note that the tide in the South China Sea is in China's favor, and they are making their strategic calculations accordingly. This hurts U.S. interests in the region.<sup>203</sup>

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<sup>202</sup> Julian Ku, "Assessing the South China Sea Arbitral Award after One Year: Why China Won and the U.S. is Losing," *Lawfare*, July 12, 2017.

<sup>203</sup> Lynn Kuok, "China Is Winning in the South China Sea," *Wall Street Journal*, July 17, 2018.

A July 12, 2018, press report stated the following:

The Philippines is celebrating today the second anniversary of its landmark arbitration award against China's territorial claims in the South China Sea handed down by an arbitral tribunal in The Hague....

Until now, the Philippines remains sharply divided on how to leverage its arbitration award. Filipino President Rodrigo Duterte has repeatedly downplayed the relevance of the ruling by questioning its enforceability amid China's vociferous opposition.

Soon after taking office in mid-2016, Duterte declared that he would "set aside" the arbitration award in order to pursue a "soft landing" in bilateral relations with China. In exchange, he has hoped for large-scale Chinese investments as well as resource-sharing in the South China Sea....

Other major leaders in the Philippines, however, have taken a tougher stance and continue to try to leverage the award to resist China's expanding footprint in the area.

The Stratbase-Albert Del Rosario Institute, an influential think tank co-founded by former Philippine Secretary of Foreign Affairs Albert del Rosario, hosted today a high-level forum on the topic at the prestigious Manila Polo Club.

Del Rosario oversaw the arbitration proceedings against China under Duterte's predecessor, Benigno Aquino. He opened the event attended by dignitaries from major Western and Asian countries with a strident speech which accused China of trying to "dominate the South China Sea through force and coercion."

He defended the arbitration award as an "overwhelming victory" to resist "China's unlawful expansion agenda."

The ex-top diplomat also accused the Duterte administration of acquiescence to China by acting as an "abettor" and "willing victim" by soft-pedaling the Philippines' claims in the South China Sea and refusing to raise the arbitration award in multilateral fora.

The keynote speaker of the event was Vice President Leni Robredo, who has recently emerged as the de facto leader of the opposition against Duterte. Though falling short of directly naming Duterte, her spirited speech served as a comprehensive indictment of the administration's policy in the South China Sea....

Her keynote address, widely covered by the local media, was followed by an even more spirited speech by interim Supreme Court Chief Justice Antonio Carpio, another leading critic of Duterte's foreign policy.

The chief magistrate, who also oversaw the Philippines' arbitration proceedings against China, lashed out at Duterte for placing the landmark award in a "deep freeze."

He called on the Duterte administration to leverage the award by negotiating maritime delimitation agreements with other Southeast Asian claimant states such as Malaysia and Vietnam which welcomed the arbitral tribunal's nullification of China's nine-dashed-line map.

He also called on the Philippines to expand its maritime entitlement claims in the area, in accordance to the arbitration award, by applying for an extended continental shelf in the South China Sea at the UN.<sup>204</sup>

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<sup>204</sup> Richard Javad Heydarian, "United Front Mounts Against Duterte's China Policy," *Asia Times*, July 12, 2018.

Another July 12, 2018, press report stated the following:

Tarpaulins bearing the words “Welcome to the Philippines, province of China” were seen hanging from several footbridges in Metro Manila Thursday, two years after the country won its arbitration case against China.

The red banners bore the Chinese flag and Chinese characters.

It is unclear who installed the tarpaulins, which are possible reference to a “joke” by President Rodrigo Duterte that the country can be a province of the Asian giant.

“He (Xi Jinping) is a man of honor. They can even make us ‘Philippines, province of China,’ we will even avail of services for free,” Duterte said in apparent jest before an audience of Chinese-Filipino business leaders earlier in 2018. “If China were a woman, I’d woo her.”...

In a Palace briefing, presidential spokesperson Harry Roque said enemies of the government are behind the tarpaulins.

A report on ANC said that the Metro Manila Development Authority already took the banners down.

The tarpaulins sparked outrage among social media users.<sup>205</sup>

A July 17, 2018, press report stated the following:

Protesters held a rally in front of the Chinese Consulate [in San Francisco] before proceeding to the Philippine Consulate downtown, demanding that China “get out of Philippine territory in the West Philippine Sea.” The protest was timed with others in Los Angeles and Vancouver on the second anniversary of the UN’s Permanent Court of Arbitration ruling that China had no right to the territory it was claiming.

Filipino American Human Rights Advocates (FAHRA) in a statement celebrated the court’s finding that “China’s historical claim of the “nine-dash line” [is] illegal and without basis.”

“China continues to violate the UN’s decision with the backing of its puppet Philippine government headed by President Duterte, who is deceived by the ‘build, build, build’ economic push while China establishes a ‘steal, steal, steal’ approach to islands and territories belonging to the Exclusive Economic Zone (EEZ) of the Philippines as determined by UN,” the statement lamented.

FAHRA also found it unacceptable that Filipino fishermen must now ask permission to fish in the Philippine waters from “a Chinese master.”

“Duterte is beholden to the \$15-billion loan with monstrous interest rate and China’s investments in Boracay and Marawi, at the expense of Philippine sovereignty,” FAHRA claimed. “This is not to mention that China remains to be the premier supplier of illegal drugs to the country through traders that include the son, Paolo Duterte, with his P6 billion shabu shipment to Davao,” it further charged.

The group demanded that “China abide by the UN International Tribunal Court’s decision two years ago, to honor the full sovereignty of the Philippines over all territories at the Exclusive Economic Zone (EEZ) including the West Philippine Sea and the dismantling of the nuclear missiles and all military facilities installed by the Chinese government at the Spratly islands meant to coerce the Filipinos and all peace-loving people of Southeast Asia who clamor for equal respect and equal sovereignty in the area” among others.<sup>206</sup>

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<sup>205</sup> Banners Welcome Visitors to ‘Philippines, Province of China,’” *Philippine Star*, July 12, 2018.

<sup>206</sup> Jun Nucum, “‘China Out of West PH Sea’ Protests Mark 2<sup>nd</sup> Year of Int’l Court Ruling,” *Philippine Daily Inquirer*, (continued...)

## Four Years Later

A September 23, 2020, press report states

Mounting domestic pressure led President Rodrigo Duterte to make his most strident defence yet of a 2016 arbitration ruling in favour of the Philippines' claims in the South China Sea, one analyst has said, as critics of the leader welcomed his maiden speech before the UN General Assembly on Tuesday.

"The Award is now part of international law, beyond compromise and beyond the reach of passing governments to dilute, diminish or abandon," Duterte said in a pre-recorded speech aired in New York on Tuesday.

"We firmly reject attempts to undermine it," the leader said, without naming China. "We welcome the increasing number of states that have come in support of the award and what it stands for—the triumph of reason over rashness, of law over disorder, of amity over ambition."

Detractors of Duterte praised the unexpected mention of the award and urged him to go further in securing international support, while one expert noted the speech came at a time the Philippines was facing critical domestic issues, such as the coronavirus pandemic and a perception Duterte had been leaning too far towards China....

Earlier, foreign secretary Teodoro Locsin, Jr, had rejected raising the arbitral win at the UN General Assembly.

"We will lose in the UN which is dominated by countries grateful to China for its indisputable generosity in development aid," he said.

On Wednesday, Locsin said Duterte's assertion showed the president was not an "alipin" (slave) of the US.

"He was alipin to the reality he inherited: a China already in possession of our reef thanks to [US President Barack] Obama giving it to China when our navy and the Chinese navy had a stand-off, and the US told both to stand down and leave," Locsin said. "We left, China stayed and reclaimed [Scarborough]."

Speaking from Beijing, Philippine ambassador Chito Sta. Romana said: "The president's speech at the UN is an excellent articulation of the administration's independent foreign policy.

"It reflects the strategic approach of supporting the UN at a time of escalating global tensions, upholding the rule of international law and the peaceful settlement of disputes," he said.

"It also captures the administration's policy of developing friendly relations with all countries while maintaining our principled position on issues of national sovereignty and sovereign rights."<sup>207</sup>

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July 17, 2018. See also Hoang Thi Ha and Ian Storey, "A Missed Chance in the South China Sea Has Come Back to Haunt Asean," *South China Morning Post*, July 15, 2020.

<sup>207</sup> Raissa Robles, "South China Sea: Duterte's UN Speech Defending Award Wins Praise—Even from Critics," *South China Morning Post*, September 23, 2020. See also ABS-CBN News, "Why Did Duterte Raise Arbitral Win vs China Before UN after 4 years?" *ABS-CBN News*, September 24, 2020.



## Five Years Later

A July 9, 2021, press report stated

Filipino fisherman Randy Megu has often braved the storms that spring up in the South China Sea, but these days he has a greater fear: seeing a Chinese maritime enforcement vessel on the horizon.

Five years after a landmark international arbitration court ruling repudiated China's claims to the waters where Megu fishes, the 48-year-old complains that his encounters with Chinese boats are more frequent than ever....

He said other fishermen had reported being rammed or blasted with water cannons while working in what they considered their historic fishing grounds—which they had hoped to secure after the ruling in The Hague in 2016.

China's foreign ministry reiterated on Friday [July 9] that Beijing did not accept the ruling nor any claims or actions based on it....

"The data here is very clear," said Greg Poling of Washington's Center for Strategic and International Studies. "Chinese Coast Guard ships and the militia are in the Philippines' EEZ more than they were five years ago."...

"We firmly reject attempts to undermine it; nay, even erase it from law, history and our collective memories," Foreign Minister Teodoro Locsin said in a statement last month.

The country has made 128 diplomatic protests over China's activities in contested waters since 2016, and coast guard and bureau of fisheries vessels have conducted "sovereign" patrols in the Philippines' EEZ.

But the Philippines has done little else to press its claim under firebrand President Rodrigo Duterte, who has made the relationship with China a key part of his foreign policy and said it is "inutile" to try to challenge its vastly bigger neighbour.

After some of his cabinet stepped up rhetoric over the waters early this year, Duterte barred them from speaking out.

"China is more in control. The only thing the Duterte government can point to is they haven't had a major incident," Poling said. "If you just keep surrendering to the bully, of course there won't be a fight."...

China's presence has also grown elsewhere in the South China Sea. It has continued to strengthen artificial islands equipped with secured ports, airstrips and surface-to-air-missiles.

Confrontations with Vietnam have set back energy projects. Malaysia has complained about the actions of Chinese vessels. Their presence have also drawn concern in Indonesia—even though it is not technically a claimant state.

Occasional freedom of navigation operations by the U.S. Navy have challenged China's claims but show no sign of discouraging Beijing from deploying vessels around the Philippines or elsewhere.<sup>208</sup>

A July 11, 2021, statement from Secretary of State Antony Blinken stated

Freedom of the seas is an enduring interest of all nations and is vital to global peace and prosperity. The international community has long benefited from the rules-based maritime order, where international law, as reflected in the UN Law of the Sea Convention, sets out the legal framework for all activities in the oceans and seas. This body of international law

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<sup>208</sup> Karen Lema, "Five Years After South China Sea Ruling, China's Presence Around Philippines Only Growing," *Reuters*, July 9, 2021.

forms the basis for national, regional, and global action and cooperation in the maritime sector and is vital to ensuring the free flow of global commerce.

Nowhere is the rules-based maritime order under greater threat than in the South China Sea. The People's Republic of China (PRC) continues to coerce and intimidate Southeast Asian coastal states, threatening freedom of navigation in this critical global throughway.

Five years ago, an Arbitral Tribunal constituted under the 1982 Law of the Sea Convention delivered a unanimous and enduring decision firmly rejecting the PRC's expansive South China Sea maritime claims as having no basis in international law. The Tribunal stated that the PRC has no lawful claim to the area determined by the Arbitral Tribunal to be part of the Philippines' exclusive economic zone and continental shelf. The PRC and the Philippines, pursuant to their treaty obligations under the Law of the Sea Convention, are legally bound to comply with this decision.

The United States reaffirms its July 13, 2020 policy regarding maritime claims in the South China Sea. We also reaffirm that an armed attack on Philippine armed forces, public vessels, or aircraft in the South China Sea would invoke U.S. mutual defense commitments under Article IV of the 1951 U.S.-Philippines Mutual Defense Treaty.

We call on the PRC to abide by its obligations under international law, cease its provocative behavior, and take steps to reassure the international community that it is committed to the rules-based maritime order that respects the rights of all countries, big and small.<sup>209</sup>

A July 12, 2021, press report stated

In recent months, Manila has produced photographs of hundreds of Chinese “militia” vessels moored in Whitsun Reef and other parts of its 200-nautical-mile (370-km) EEZ. It has also raised concerns about a possible takeover of another reef in the strategic and resource-rich waterway.

Amid domestic pressure to confront Beijing, which claims nearly the entire South China Sea, the Philippines is becoming more assertive of its maritime claims. The U.S., its oldest ally, is meanwhile enlisting Indo-Pacific and Western allies in a campaign to try and keep China's maritime expansion in check....

The ramped-up patrols have been backed by a flurry of diplomatic protests filed by the Department of Foreign Affairs, invoking the July 12, 2016, ruling by an international tribunal in The Hague, which adjudicated that China's sweeping ownership claim of the South China Sea based on “historic rights” has “no legal basis.” Beijing rejects the ruling.

Marking the fifth anniversary of that legal victory, Philippine Foreign Affairs Secretary Teodoro Locsin Jr. last month said “the award is final” and “continues to be a milestone in the corpus of international law.”

“It dashed among others a ‘nine-dash line’—and any expectation that possession is 9/10ths of the law,” Locsin said, in a snipe at China, which bases its extensive claims on its unilateral nine-dash line demarcation....

Southeast Asian nations have directly and indirectly used the ruling to strengthen their maritime claims, according to analysts. Vietnam, another disputant with China, has considered a similar legal action. The U.S., Japan, Australia, the U.K, France, and Germany have all backed the court's decision....

Carl Thayer, professor emeritus at the University of New South Wales in Canberra, said, “If the Philippines had not filed a claim for arbitration under UNCLOS [the United Nations Convention on the Law of the Sea], Philippine inaction could be used by China to argue

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<sup>209</sup> State Department, “Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea,” press statement, Antony J. Blinken, Secretary of State, July 11, 2021.

that the Philippines acquiesced to its claims to land features and marine resources in the South China Sea.”

“Other claimant states, such as Vietnam and Malaysia, would have been left with little choice but to put up or shut up,” Thayer said....

“It’s not presumptuous to surmise that, being legally defeated by the award, Beijing decided that it would instead push on physically in the South China Sea, focusing on exerting might over right,” said Collin Koh, a research fellow at S. Rajaratnam School of International Studies in Singapore....

In the Philippines, the death last month of former President Benigno “Noynoy” Aquino, Duterte’s predecessor, brought to the fore the arbitration victory as his significant foreign policy legacy, which supporters likened to David going against Goliath. How politicians will use it to make China accountable is shaping up as an issue for the national elections in May next year.

Washington and its allies, for their part, have moved to enforce the 2016 ruling through freedom of navigation operations, Thayer said.<sup>210</sup>

A July 12, 2021, press report from a Chinese media outlet stated (emphasis as in original)

On July 12, 2016, the so-called arbitral tribunal of the South China Sea issue, under America’s manipulation and at the request of the Aquino III administration of the Philippines, staged a farce of completely negating China’s sovereign rights over the South China Sea by releasing its “arbitration award”. Five years have passed, and the international community has gradually seen through the nature of this event.

Thanks to the united efforts of China and other regional countries over the past five years, the South China Sea situation has made a fundamental turnaround, and the Chinese government’s stance of “no acceptance, no participation, no recognition” is also widely confirmed and accepted by the international community....

**Throwing the “award” into the garbage heap of history is an imperative step to establish the authority of international law and maintain the international order based on it....**

It’s clear that the “South China Sea arbitration” directed by the US, a country known for its violation of international law, is just another case in point of its unscrupulous, disguised distortion of the law and disruption of international relations.

**Throwing the “award” into the garbage heap of history is the only choice to maintain lasting peace and stability in the South China Sea and cement the China-ASEAN community of shared future.**<sup>211</sup>

A July 21, 2021, blog post stated

The ruling did not halt Chinese expansion and aggression strategy. China continues to claim the Nine-Dash Line boundary and has doubled down on weapons. The Subi and Mischief fortified sea features sport naval facilities, military airfields and air defenses. Their anti-aircraft and anti-ship missiles create an air-sea crossfire.

However, exposing the regime’s abuse of weaker neighbors has cost China diplomatically. The Filipino theft operation demolishes two key CCP [Chinese Communist Party] propaganda narratives: that China is the leader of the developing world and is the champion of plurality by ending Western/American hegemony. I think the decision impeaches the

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<sup>210</sup> Cliff Venzon, “Manila Confronts Beijing 5 Years After South China Sea Ruling,” *Nikkei Asia*, July 12, 2021.

<sup>211</sup> Wu Shicun, “How Did South China Sea Arbitration Award End Up in Farce?” *People’s Online Daily*, July 12, 2021.

CCP dictatorship's claim to world leadership and its very legitimacy as a responsible governing body. Perhaps that's what [Chinese President] Xi fears.

Alas, the ruling also reveals the weakness of international law. Ultimately, navies enforce maritime law, not courts. The only navy in the western Pacific capable of deterring Chinese aggression flies the Stars and Stripes.<sup>212</sup>

A July 19, 2021, opinion piece stated that

on July 12, 2016, the obscure court in the Hague rocked the world by invalidating China's claim to the "Nine-Dash Line," an area encompassing most of the South China Sea. In the five years since, China has not fully complied with the decision. However, the decision has caused China to amend its behavior, and has emboldened other states—including the U.S.—to challenge China under international law....

When the decision was issued, some commentators dismissed it. After all, the Permanent Court of Arbitration has no navy to enforce its decisions. However, the decision has had a significant impact on China's actions and the behavior of neighboring states....

First, China is running scared of the decision....

Before, during, and after the decision was released,... China may have dismissed the arbitration, but it was unable to ignore the potential costs to its legitimacy at home and abroad.

Second, China has partially complied with the decision. China has not abandoned its artificial islands, nor has it renounced its claims to territory within the Nine-Dash Line. Its navy, coast guard, and maritime militia vessels continue to operate in a dangerous manner. However, China has consistently allowed Filipino fishermen to access Scarborough Shoal since shortly after the decision—although it continues to harass them. China has also ceased building new islands in the Spratlys. Its last known island-building activity anywhere in the South China Sea was in the Paracels in mid-2017, although it has fortified existing infrastructure....

The decision has also impacted the behavior of other states. After the fourth anniversary of the decision in 2020, U.S. Secretary of State Michael Pompeo declared that Beijing's claims to the South China Sea are "completely unlawful." He stated the U.S.'s position that the arbitral ruling is "legally binding." After several years of détente between Filipino President Duterte and Xi Jinping, the Philippines formally recognized the arbitral decision contemporaneously with Secretary Pompeo's statement, and has been more vocal about asserting its rights under the arbitration. Several of China's neighbors have used the decision to justify their own actions and positions against China. The Philippines and Vietnam cite the decision when protesting China's blocking them from fishing. In 2019, Malaysia referenced the decision in a filing to a UN Commission, prompting a sharp rebuke from China. Indonesia also referenced the decision in a 2019 submission to the UN and again in a 2020 diplomatic communication to the UN Secretary-General. China swiftly denounced the filing and the decision. Vietnam and Indonesia have reportedly considered filing lawsuits like the Philippines'. Each time rumors of lawsuits arise, China issues a strong warning to its neighbors against filing claims.

A perennial debate in American law schools is whether international law is actually law. After all, unlike domestic law, international law has no dedicated enforcement mechanism. However, the Philippines-China arbitration has the force of law. China's compliance with the decision in the Philippines-China arbitration has hardly been perfect. But the decision has changed the behavior of China, the U.S., and China's neighbors. It has set the terms by which any future negotiations will occur. The Philippines-China arbitration is being

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<sup>212</sup> Austin Bay, "Law of the Sea Court Ruling Continues to Challenge Chinese Aggression," *Creators Syndicate*, July 21, 2021.

enforced by the behavior of the world's states. Every time a state invokes the ruling in the international arena, it strengthens the decision's importance and weight. And with each denunciation, China reveals its own fear of the decision. The effect and importance of the decision is likely to increase over time as more states assert and comply with it. The Philippines-China arbitration cannot be ignored—by China or the world.<sup>213</sup>

An August 3, 2021, opinion piece stated

Five years on, how does the balance sheet of China's de facto compliance (it has ruled out de jure recognition), or lack of, with the landmark South China Sea Arbitration Award stack up?

It ranges from the good, to the bad, to the downright ugly.

First, the good. For the first time since the South China Sea tensions burst into public view three decades ago with Beijing's promulgation of its territorial sea law, China has gone a significant way toward acknowledging the exclusive sovereign right and jurisdiction of a counterpart claimant state within the nine-dash line. This is a significant development. In November 2018, Beijing initialed a memorandum of understanding with Manila to exploit oil and gas resources cooperatively on the latter's continental shelf on terms that hew to the national patrimony clause of the Philippine Constitution and effectively admit its sovereign right and jurisdiction. This acknowledgment in the memorandum is only implicit—explicitly, the memorandum specifies that the activities of the two countries' authorized enterprises "will be without legal prejudice to [their governments'] respective legal positions." (To protect its legal interest, Manila inscribed a preambular provision stating that such cooperation "in relevant maritime areas [would be] consistent with applicable rules of international law"—the tribunal's award, in short.) Setting the legal gymnastics aside, if the two countries' authorized enterprises can seal the service contract (the first whereas clause of every Philippine government oil and gas service contract specifies that the resource belongs to Manila), it will mark the first instance and set a creative precedent of China bringing its development activities on the continental shelf of a counterpart claimant state within the nine-dash line into compliance with the arbitration award. If Beijing can replicate this "service contractor" model on Hanoi's and Kuala Lumpur's continental shelf, it could effectively take the sting out of the sovereignty-linked quarrels in the South China Sea. It will also breathe life into the joint development principle proposed by Chinese leader Deng Xiaoping in the late-1980s.

On a lesser note, China has observed a number of red lines laid down by Manila. It has ceased to reclaim additional land in the South China Sea (Beijing has built upward, not outward); hasn't occupied a new feature; hasn't built structures on Scarborough Shoal; has restored Filipino artisanal fishers' access in principle to their traditional fishing grounds near the shoal; has restricted the activities of its fishing militia on the Philippines' continental shelf to the territorial sea of the features that it (Beijing) occupies; and has refrained in principle from interfering with Philippine resupply missions to the latter's grounded vessel on Second Thomas Shoal (although on this last point, the tribunal reserved its opinion citing a lack of jurisdiction). And in an unusual display of goodwill, China—or rather China's Guangdong Fishery Mutual Insurance Association—even tendered an apology to Manila in August 2019 for a boat collision incident that had occurred two months earlier.

Next, the bad. China shows no sign of vacating its occupation and buildup on Mischief Reef. Because the reef is a low-tide elevation on the Philippines' continental shelf, regulatory power over the construction and operation of an artificial island on the reef vests exclusively with Manila. Beijing has shown no hint of reversing this illegality (to its minor credit, it has not deployed combat jets to the reef's airstrip). On the contrary, it has asserted

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<sup>213</sup> Jill Goldenziel, "Here's Why China Is Afraid Of An Obscure International Court," *Forbes*, July 19, 2021.

its sovereignty in the sea and airspace surrounding Mischief Reef. With regard to its fishing militia, Beijing continues to obfuscate on its very existence, let alone its swarming presence and purposes—even when the militia might be engaged in UNCLOS-compliant activities. This raises questions about the intent and reliability of China’s public communications. Beijing established a new administrative district covering the Spratly Islands in April 2020, and its coast guard continues to harass Filipino vessels at times on the latter’s continental shelf. Rather than being chastened by the arbitral award, Beijing still launches the occasional vituperative attack against its “unjust and unlawful” character and vows to “never accept any claim or action based on [its decisions].” It also misrepresents Manila’s suspension of the implementation of the award as a supposed “consensus” to return to “the right track of settling maritime issues through bilateral friendly negotiation and consultation.”

Finally, to the downright ugly. As of July 12, 2016, China had claimed on paper—but had never exercised in practice—the sovereign right and jurisdiction to explore and exploit the living and nonliving resources within the exclusive economic zone and continental shelf of a counterpart claimant state in the South China Sea. Five years since, even this low bar of restraint has been shredded. Chinese vessels have brazenly conducted survey activity—an exclusive coastal state right—at points on Vietnam’s and Malaysia’s continental shelf. Those activities have no conceivable basis in the “land dominates the sea” principle. It also has in effect turned “undisputed waters” into disputed spaces. Beijing’s ostensible purpose is to discourage Hanoi and Kuala Lumpur from collaborating with international oil firms to exploit their resource entitlements within the nine-dash line, and funnel them toward a Chinese national oil company-linked development strategy. A provision to this effect is even being pressed within the code of conduct negotiations. Regardless, these Chinese survey activities fly in the face of the tribunal’s award, violate international law, and have touched off a blizzard of diplomatic protest notes by interested Western and non-Western member states.

Phillipine President Rodrigo Duterte has been the difference-maker on China’s contrasting approaches to de facto compliance with the award: good-to-middling on the Philippines’ continental shelf; ugly and abusive on Vietnam’s and Malaysia’s shelf, where the underlying logic of the award applies interpretatively too. Through his own inimitable style of outreach (castigated as “defeatist”), Duterte has incentivized China to walk back an expansively drawn exclusive claim in the Philippines’ quadrant of the South China Sea, if only implicitly, that no amount of prior diplomatic browbeating and coercion of Beijing has accomplished over the past three decades. Of course, had the arbitral tribunal not ruled as overwhelmingly in Manila’s favor, it is inconceivable that China would have conceded this claim within the nine-dash line—regardless of Duterte’s softness toward Beijing or not. If Hanoi contemplates instituting its own third-party dispute settlement proceedings against Beijing at a future date, it would do well to bear in mind that, from a political standpoint, the most challenging decisions will arrive on its desk the day after the tribunal’s award lands—just as it did for Duterte.<sup>214</sup>

## **Subsequent Perspective**

An April 13, 2022, blog post stated

When in 2016 the Arbitral Tribunal issued its watershed ruling in the case between the Philippines and China, responses from the international community were lacklustre. The Asian Maritime Transparency Initiative’s “arbitration support tracker” suggests that eight governments have publicly called for the Tribunal’s ruling to be respected, 35 have made positive statements but stopped short of calling for it to be implemented, and eight have

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<sup>214</sup> Sourabh Gupta, “The South China Sea Arbitration Award Five Years Later,” *Lawfare*, August 3, 2021.

publicly rejected it. Given the diplomatic and economic influence that China can wield, it is arguably surprising that the number of repudiations of the Tribunal's award is not higher.

From the outset, China refused to participate in the case, but the Tribunal nevertheless found that it had the right to proceed. Although the Tribunal's award is only binding on the parties to the case – the Philippines and China – it has clearly changed the international legal dynamics of regional maritime disputes and addressed but [sic] key uncertainties in the existing law of the sea....

It is increasingly clear that the majority of South China Sea littoral states base their claims on the Tribunal's award. This became evident in 2009 when Vietnam alone, and jointly with Malaysia, made submissions to the UN Commission on the Limits of the Continental Shelf (CLCS), provoking protests and counter-protests. Malaysia's December 2019 partial submission to the CLCS prompted a wave of diplomatic notes. From these exchanges, it is clear that the Philippines, Malaysia, Indonesia and Vietnam all take the view that the Arbitration award represents an authoritative interpretation of international law, that the South China Sea islands are legally rocks and that China's nine-dash line claims are invalid.

China has consistently and vociferously rejected the ruling and there are no mechanisms by which it can be enforced.

This is hardly news, but the fact these states have increasingly referred to the Tribunal's ruling to back up their positions is significant. Both Indonesia and the Philippines made direct reference to the award in their diplomatic notes, with respect to its decision that none of the Spratly Islands generate exclusive economic zones or continental shelf entitlements, while the language contained in Vietnam's diplomatic note is entirely consistent with its findings. Moreover, extra-regional players including the United States, United Kingdom, Australia, France, Germany and Japan also weighed in to support UNCLOS, the rule of law and the award. The 2016 award case therefore now underpins the maritime claims of the majority of the South China Sea littoral states, as well as the perspectives of extra-regional players, and has had a substantial impact on the international *legal* dynamics of South China Sea disputes.

Of course, the key caveat here is that China has consistently and vociferously rejected the ruling and there are no mechanisms by which it can be enforced. Nonetheless, the way that the award of the Arbitral Tribunal is now embedded in the positions of states both within and beyond the South China Sea suggests that its findings will not simply evaporate as readily as Beijing might wish. There is every indication that China will maintain not only its claims to sovereignty over all of the disputed South China Sea islands, but to maritime areas within the nine-dash line as well. Unfortunately, and ominously, this clash of legal and spatial visions would seem to set the stage for ongoing friction and incidents in the South China Sea as coastal states attempt to assert jurisdiction of "their" waters and marine resources whilst China continues to maintain its claims within the nine-dash line.<sup>215</sup>

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<sup>215</sup> Clive Schofield, "Law of the sea: A Contested Watershed Ruling," *Interpreter*, April 13, 2022.

## Appendix E. China's Approach to Maritime Disputes in SCS and ECS

This appendix presents additional background information on China's approach to the maritime disputes in the SCS and ECS.<sup>216</sup>

### Island Building and Base Construction

DOD stated in 2017 that

In 2016, China focused its main effort on infrastructure construction at its outposts on the Spratly Islands. Although its land reclamation and artificial islands do not strengthen China's territorial claims as a legal matter or create any new territorial sea entitlements, China will be able to use its reclaimed features as persistent civil-military bases to enhance its presence in the South China Sea and improve China's ability to control the features and nearby maritime space. China reached milestones of landing civilian aircraft on its airfields on Fiery Cross Reef, Subi Reef, and Mischief Reef for the first time in 2016, as well as landing a military transport aircraft on Fiery Cross Reef to evacuate injured personnel....

China's Spratly Islands outpost expansion effort is currently focused on building out the land-based capabilities of its three largest outposts—Fiery Cross, Subi, and Mischief Reefs—after completion of its four smaller outposts early in 2016. No substantial land has been reclaimed at any of the outposts since China ended its artificial island creation in the Spratly Islands in late 2015 after adding over 3,200 acres of land to the seven features it occupies in the Spratlys. Major construction features at the largest outposts include new airfields—all with runways at least 8,800 feet in length—large port facilities, and water and fuel storage. As of late 2016, China was constructing 24 fighter-sized hangars, fixed-weapons positions, barracks, administration buildings, and communication facilities at each of the three outposts. Once all these facilities are complete, China will have the capacity to house up to three regiments of fighters in the Spratly Islands.

China has completed shore-based infrastructure on its four smallest outposts in the Spratly Islands: Johnson, Gaven, Hughes, and Cuarteron Reefs. Since early 2016, China has installed fixed, land-based naval guns on each outpost and improved communications infrastructure.

The Chinese Government has stated that these projects are mainly for improving the living and working conditions of those stationed on the outposts, safety of navigation, and research; however, most analysts outside China believe that the Chinese Government is attempting to bolster its de facto control by improving its military and civilian infrastructure in the South China Sea. The airfields, berthing areas, and resupply facilities on its Spratly outposts will allow China to maintain a more flexible and persistent coast guard and military presence in the area. This would improve China's ability to detect and challenge activities by rival claimants or third parties, widen the range of capabilities available to China, and reduce the time required to deploy them....

China's construction in the Spratly Islands demonstrates China's capacity—and a newfound willingness to exercise that capacity—to strengthen China's control over disputed areas, enhance China's presence, and challenge other claimants....

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<sup>216</sup> For additional discussion, see Andrew Chubb, *Dynamics of Assertiveness in the South China Sea: China, the Philippines, and Vietnam, 1970–2015*, National Bureau of Asian Research, May 2022, 45 pp.; or Andrew Chubb, "PRC Assertiveness in the South China Sea, Measuring Continuity and Change, 1970–2015," *International Security*, Winter 2020–2021: 79–121.)



In 2016, China built reinforced hangars on several of its Spratly Island outposts in the South China Sea. These hangars could support up to 24 fighters or any other type of PLA aircraft participating in force projection operations.<sup>217</sup>

In April, May, and June 2018, it was reported that China has landed aircraft and moved electronic jamming equipment, surface-to-air missiles, and anti-ship missile systems to its newly built facilities in the SCS.<sup>218</sup> In July 2018, it was reported that “China is quietly testing electronic warfare assets recently installed at fortified outposts in the South China Sea....”<sup>219</sup> Also in July 2018, Chinese state media announced that a Chinese search and rescue ship had been stationed at Subi Reef—the first time that such a ship had been permanently stationed by China at one of its occupied sites in the Spratly Islands.<sup>220</sup>

A January 25, 2023, press report stated

A newly emerged satellite image shows a Chinese air defense facility on the Paracel Islands, which analysts say indicates the People’s Liberation Army now has surface-to-air missiles at the ready permanently in both the contested archipelagos in the South China Sea....

A satellite image of what appears to be a newly-built but completed missile battalion on Woody Island within the Paracel group has surfaced this week on Twitter.

The image—credited to Maxar Technologies, a space technology firm, and allegedly taken last April—shows four buildings with retractable roofs at a site on Woody (Yongxing in Chinese), the largest of the Paracel Islands in the South China Sea.

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<sup>217</sup> Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People’s Republic of China 2017*, May 15, 2017, pp. 9-10, 12, 40, 54. See also the following posts from the Asia Maritime Transparency Initiative (AMTI), a project of the Center for Strategic and International Studies (CSIS): “Exercises Bring New Weapons to the Paracels” (May 24, 2018); “China Lands First Bomber on South China Sea Island” (May 18, 2018); “An Accounting of China’s Deployments to the Spratly Islands” (May 9, 2018); “Comparing Aerial and Satellite Images of China’s Spratly Outposts” (February 16); “A Constructive Year for Chinese Base Building” (December 14, 2017); “UPDATE: China’s Continuing Reclamation in the Paracels” (August 9, 2018); “UPDATED: China’s Big Three Near Completion” (June 29, 2017); “A Look at China’s SAM Shelters in the Spratlys” (February 23, 2017); “China’s New Spratly Island Defenses” (December 13, 2016); “Build It and They Will Come” (August 1, 2016); “Another Piece of the Puzzle” (February 22, 2016). See also Greg Torode, “Concrete and Coral: Beijing’s South China Sea Building Boom Fuels Concerns,” *Reuters*, May 23, 2018; Jin Wu, Simon Scarr, and Weiyi Cai, “Concrete and Coral: Tracking Expansion in the South China Sea,” *Reuters*, May 24, 2018; Sofia Lotto Persio, “China is Building Towns in the South China Sea That Could House Thousands of Marines,” *Newsweek*, May 24, 2018.

<sup>218</sup> See CRS Report R44072, *Chinese Land Reclamation in the South China Sea: Implications and Policy Options*, by Ben Dolven et al. See also Alex Lockie, “China Has Jamming Equipment in the South China Sea—and the US May ‘Not Look Kindly on It,’” *Business Insider*, April 18, 2018; Amanda Macias, “China Quietly Installed Defensive Missile Systems on Strategic Spratly Islands in Hotly Contested South China Sea,” *CNBC*, May 2, 2018; David Brunnstrom with additional reporting by Ben Blanchardf, “China Installs Cruise Missiles on South China Sea Outposts: *CNBC*,” *Reuters*, May 2, 2018; Asia Times Staff, “China ‘Crosses Threshold’ with Missiles at South China Sea Outposts,” *Asia Times*, May 4, 2018; Mike Yeo, “How Far Can China’s Long-Range Missiles Reach in the South China Sea?” *Defense News*, May 4, 2018; Richard Javad Heydarian, “Short of War, China Now Controls South China Sea,” *Asia Times*, May 8, 2018; “An Accounting of China’s Deployments to the Spratly Islands,” Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), May 9, 2018; “China Has Put Missiles on Islands in the South China Sea,” *Economist*, May 10, 2018; Malcolm David, “China’s Strategic Strait in the South China Sea (Part 1),” *Strategist*, May 21, 2018; Steven Stashwick, “China’s New Missiles in the Spratlys May be a Turning Point,” *China Focus*, June 13, 2018; Bill Gertz, “China Adds Advanced Missiles to South China Sea Islands,” *Washington Free Beacon*, June 14, 2018; Paul McCleary, “China Has Built ‘Great Wall of SAMs’ In Pacific: US Adm. Davidson,” *Breaking Defense*, November 17, 2018.

<sup>219</sup> Amanda Macias, “China Is Quietly Conducting Electronic Warfare Tests in the South China Sea,” *CNBC*, July 5, 2018.

<sup>220</sup> Jesse Johnson, “In First, China Permanently Stations Search-and-Rescue Vessel in South China Sea’s Spratly Chain,” *Japan Times*, July 29, 2018.

One of the buildings has its roof partially open, showing what appears to be surface-to-air missiles (SAM) launchers inside.

ImageSat International, a space intelligence company, first detected the appearance, removal and reappearance of HQ-9 SAM launchers on Woody Island in 2016.

But the new satellite image, which RFA could not verify independently, shows that the PLA has completed building an air defense base resembling those on the three artificial islands that it has fully militarized.

Similar structures with retractable roofs were detected on Subi, Mischief and Fiery Cross reefs, part of the Spratly Islands in the South China Sea, Tom Shugart, adjunct Senior Fellow at the Center for a New American Security, wrote on Twitter.

They are permanent facilities that can house long-range missile batteries that would expand China's reach in disputed areas.<sup>221</sup>

A December 20, 2022, press report stated

China is building up several unoccupied land features in the South China Sea, according to Western officials, an unprecedented move they said was part of Beijing's long-running effort to strengthen claims to disputed territory in a region critical to global trade.

While China has previously built out disputed reefs, islands and land formations in the area that it had long controlled—and militarized them with ports, runways and other infrastructure—the officials presented images of what they called the first known instances of a nation doing so on territory it doesn't already occupy. They warned that Beijing's latest construction activity indicates an attempt to advance a new status quo, even though it's too early to know whether China would seek to militarize them....

The officials said new land formations have appeared above water over the past year at Eldad Reef in the northern Spratlys, with images showing large holes, debris piles and excavator tracks at a site that used to be only partially exposed at high tide. A 2014 photo of the reef, previously reported to have been taken by the Philippine military, had depicted what the officials said was a Chinese maritime vessel offloading an amphibious hydraulic excavator used in land reclamation projects.

They said similar activities have also taken place at Lankiam Cay, known as Panata Island in the Philippines, where a feature had been reinforced with a new perimeter wall over the course of just a couple of months last year. Other images they presented showed physical changes at both Whitsun Reef and Sandy Cay, where previously submerged features now sit permanently above the high-tide line.<sup>222</sup>

For additional discussion of China's island-building and facility-construction activities, see CRS Report R44072, *Chinese Land Reclamation in the South China Sea: Implications and Policy Options*, by Ben Dolven et al.

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<sup>221</sup> RFA [Radio Free Asia] Staff, "China Puts Missile Bases on Disputed South China Sea Islands, Analysts Say," *Radio Free Asia*, January 25, 2023.

<sup>222</sup> Philip Heijmans, "China Accused of Fresh Territorial Grab in South China Sea," *Bloomberg*, December 20, 2022. See also Dan Parsons and Tyler Rogoway, "China's Man-Made South China Sea Islands Like You've Never Seen Them Before," *The Drive*, October 27, 2022.

## Use of Coast Guard Ships and Maritime Militia

### Coast Guard Ships

#### *Overview*

The China Coast Guard (CCG) is much larger than the coast guard of any other country in the region,<sup>223</sup> and it has increased substantially in size through the addition of many newly built ships. China makes regular use of CCG ships to assert and defend its maritime claims, particularly in the ECS, with Chinese navy ships sometimes available over the horizon as backup forces. DOD states that

The CCG is subordinate to the PAP [People's Armed Police] and is responsible for a wide range of maritime security missions, including defending the PRC's sovereignty claims; fisheries enforcement; combating smuggling, terrorism, and environmental crimes; as well as supporting international cooperation. In 2021, the Standing Committee of China's National People's Congress passed the Coast Guard Law which took effect on 1 February 2021. The legislation regulates the duties of the CCG, to include the use of force, and applies those duties to seas under the jurisdiction of the PRC. The law was met with concern by other regional countries that may perceive the law as an implicit threat to use force, especially as territorial disputes in the region continue.

The CCG's rapid expansion and modernization has made it the largest maritime law enforcement fleet in the world. Its newer vessels are larger and more capable than [its] older vessels, allowing them to operate further off shore and remain on station longer. A 2019 academic study published by the U.S. Naval War College estimates the CCG has over 140 regional and oceangoing patrol vessels (or more than 1,000 tons displacement). Some of the vessels are former PLAN [PLA Navy] vessels, such as corvettes, transferred to the CCG and modified CCG operations. The newer, larger vessels are equipped with helicopter facilities, high-capacity water cannons, interceptor boats, and guns ranging from 20 to 76 millimeters. In addition, the same academic study indicates the CCG operates more than 120 regional patrol combatants (500 to 999 tons), which can be used for limited offshore operations, and an additional 450 coast patrol craft (100 to 499 tons).<sup>224</sup>

In March 2018, China announced that control of the CCG would be transferred from the civilian State Oceanic Administration to the Central Military Commission.<sup>225</sup> The transfer occurred on July 1, 2018.<sup>226</sup>

A January 30, 2023, blog post stated

China's coast guard presence in the South China Sea is more robust than ever. An analysis of automatic identification system (AIS) [i.e., ship transponder] data from commercial

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<sup>223</sup> For a comparison of the CCG to other coast guards in the region in terms of cumulative fleet tonnage in 2010 and 2016, see the graphic entitled "Total Coast Guard Tonnage of Selected Countries" in China Power Team, "Are Maritime Law Enforcement Forces Destabilizing Asia?" China Power (Center for Strategic and International Studies [CSIS]), updated August 26, 2020, accessed May 31, 2023, at <https://chinapower.csis.org/maritime-forces-destabilizing-asia/>.

<sup>224</sup> Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2022*, p. 78.

<sup>225</sup> See, for example, David Tweed, "China's Military Handed Control of the Country's Coast Guard," *Bloomberg*, March 26, 2018.

<sup>226</sup> See, for example, Global Times, "China's Military to Lead Coast Guard to Better Defend Sovereignty," *People's Daily Online*, June 25, 2018. See also Economist, "A New Law Would Unshackle China's Coastguard, Far from Its Coast," *Economist*, December 5, 2020; Katsuya Yamamoto, "The China Coast Guard as a Part of the China Communist Party's Armed Forces," Sasakawa Peace Foundation, December 10, 2020.

provider MarineTraffic shows that the China Coast Guard (CCG) maintained near-daily patrols at key features across the South China Sea in 2022. Together with the ubiquitous presence of its maritime militia, China's constant coast guard patrols show Beijing's determination to assert control over the vast maritime zone within its claimed nine-dash line....

AMTI analyzed AIS data from the year 2022 across the five features most frequented by Chinese patrols: Second Thomas Shoal, Luconia Shoals, Scarborough Shoal, Vanguard Bank, and Thitu Island. Comparison with data from 2020 shows that the number of calendar days that a CCG vessel patrolled near these features increased across the board....

The incomplete nature of AIS data means that these numbers are likely even higher. Some CCG vessels are not observable on commercial AIS platforms, either because their AIS transceivers are disabled or are not detectable by satellite AIS receivers. In other cases, CCG vessels have been observed broadcasting incomplete or erroneous AIS information....

The behavior of CCG vessels observed on patrol in 2022 was similar to that of years past. But AIS data tells only part of the story of the CCG's influence in the Spratly Islands and its friction with Southeast Asian law enforcement, which took new forms in 2022. Oil and gas standoffs, a recurring feature of the last three years prior, were not as prominent in 2022, likely due to the success of the previous CCG harassment....

As Southeast Asian claimants continue to operate in the Spratly Islands in 2023, the constant presence of China's coast guard and maritime militia makes future confrontations all but inevitable.<sup>227</sup>

### ***Law Passed by China on January 22, 2021***

A January 22, 2021, press report stated

China passed a law on Friday [January 22] that for the first time explicitly allows its coast guard to fire on foreign vessels, a move that could make the contested waters around China more choppy....

China's top legislative body, the National People's Congress standing committee, passed the Coast Guard Law on Friday, according to state media reports.

According to draft wording in the bill published earlier, the coast guard is allowed to use "all necessary means" to stop or prevent threats from foreign vessels.

The bill specifies the circumstances under which different kind of weapons—hand-held, ship borne or airborne—can be used.

The bill allows coast guard personnel to demolish other countries' structures built on Chinese-claimed reefs and to board and inspect foreign vessels in waters claimed by China.

The bill also empowers the coastguard to create temporary exclusion zones "as needed" to stop other vessels and personnel from entering.

Responding to concerns, Chinese foreign ministry spokeswoman Hua Chunying said on Friday that the law is in line with international practices.<sup>228</sup>

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<sup>227</sup> "Flooding the Zone: China Coast Guard Patrols in 2022," Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), January 30, 2023. See also Damien Cave, "China Creates a Coast Guard Like No Other, Seeking Supremacy in Asian Seas," *New York Times*, June 12 (updated June 13), 2023.

<sup>228</sup> Yew Lun Tian, "China Authorises Coast Guard to Fire on Foreign Vessels if Needed," *Reuters*, January 22, 2021. See also Wataru Okada, "China's Coast Guard Law Challenges Rule-Based Order," *Diplomat*, May 28, 2021; Nguyen Thanh Trung, "How China's Coast Guard Law Has Changed the Regional Security Structure," Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), April 12, 2021; Kawashima (continued...)

On February 19, 2021, the State Department stated that

the United States joins the Philippines, Vietnam, Indonesia, Japan, and other countries in expressing concern with China's recently enacted Coast Guard law, which may escalate ongoing territorial and maritime disputes.

We are specifically concerned by language in the law that expressly ties the potential use of force, including armed force by the China Coast Guard, to the enforcement of China's claims in ongoing territorial and maritime disputes in the East and South China Seas.

Language in that law, including text allowing the coast guard to destroy other countries' economic structures and to use force in defending China's maritime claims in disputed areas, strongly implies this law could be used to intimidate the PRC's maritime neighbors.

We remind the PRC and all whose force operates—whose forces operate in the South China Sea that responsible maritime forces act with professionalism and restraint in the exercise of their authorities.

We are further concerned that China may invoke this new law to assert its unlawful maritime claims in the South China Sea, which were thoroughly repudiated by the 2016 Arbitral Tribunal[1] ruling. In this regard, the United States reaffirms its statement of July 13<sup>th</sup>, 2020 regarding maritime claims in the South China Sea.

The United States reminds China of its obligations under the United Nations Charter to refrain from the threat or use of force, and to conform its maritime claims to the International Law of the Sea, as reflected in the 1982 Law of the Sea Convention. We stand firm in our respective alliance commitments to Japan and the Philippines.<sup>229</sup>

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Shin, "China's Worrying New Coast Guard Law, Japan Is Watching the Senkaku Islands Closely," *Diplomat*, March 17, 2021; Editorial Board, "China's New Coast Guard Law Appears Designed to Intimidate," *Japan Times*, March 4, 2021; Ryan D. Martinson, "The Real Risks of China's New Coastguard Law, The Use-of-Force Provisions Are Just the Beginning," *National Interest*, March 3, 2021; Sumathy Permal, "Beijing Bolsters the Role of the China Coast Guard," Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), March 1, 2021; Katsuya Yamamoto, "Concerns about the China Coast Guard Law—the CCG and the People's Armed Police," Sasakawa Peace Foundation, February 25, 2021; Asahi Shimbun, "New Chinese Law Raises Pressure on Japan around Senkaku Islands," *Asahi Shimbun*, February 24, 2021; Ryan D. Martinson, "Gauging the Real Risks of China's New Coastguard Law," *Strategist*, February 23, 2021; Eli Huang, "New Law Expands Chinese Coastguard's Jurisdiction to at Least the First Island Chain," *Strategist*, February 16, 2021; Shigeki Sakamoto, "China's New Coast Guard Law and Implications for Maritime Security in the East and South China Seas," *Lawfare*, February 16, 2021; Expert Voices, "Voices: The Chinese Maritime Police Law," Maritime Awareness Project, February 11, 2021 (includes portions with subsequent dates); Seth Robson, "China Gets More Aggressive with Its Sea Territory Claims as World Battles Coronavirus," *Stars and Stripes*, February 1, 2021; Shuxian Luo, "China's Coast Guard Law: Destabilizing or Reassuring?" *Diplomat*, January 29, 2021; Shigeki Sakamoto, "China's New Coast Guard Law and Implications for Maritime Security in the East and South China Seas," *Lawfare*, February 16, 2021; Michael Shoebridge, "Xi Licenses Chinese Coastguard to be 'Wolf Warriors' at Sea," *Strategist*, February 15, 2021; "New Law Institutionalises Chinese Maritime Coercion," *Oxford Analytica Daily Brief*, February 15, 2021.

<sup>229</sup> U.S. Department of State, "Department Press Briefing—February 19, 2021," Ned Price, Department Spokesperson, Washington, DC, February 19, 2021. During the question-and-answer portion of the briefing, the following exchange occurred:

QUESTION: I have two quick questions about the Chinese coast guard law. Have you raised concern directly with Beijing? And secondly, has the U.S. seen any examples of concerning behavior since the law was passed in either the South China Sea or the East China Sea?

MR PRICE: For that, I think, Demetri, we would want to—we might want to refer you to DOD for instances of concerning behavior—for concerning behavior there. When it comes to the coast guard law, of course, we have been in close contact with our allies and partners, and we mentioned a few of them in this context: the Philippines, Vietnam, Indonesia, Japan, and other countries that face the type of unacceptable PRC pressure in the South China Sea. I wouldn't want to characterize any conversations with Beijing on this. Of course, we have emphasized that, especially at the outset of

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On March 16, 2021, following a U.S.-Japan “2+2” ministerial meeting that day in Tokyo between Secretary of State Blinken, Secretary of Defense Lloyd Austin, Japanese Foreign Minister Toshimitsu Motegi, and Japanese Defense Minister Nobuo Kishi, the U.S.-Japan Security Consultative Committee released a U.S.-Japan joint statement for the press that stated in part that the minister “expressed serious concerns about recent disruptive developments in the region, such as the China Coast Guard law.”<sup>230</sup>

## Maritime Militia

China also uses its maritime militia—also referred to as the People’s Armed Forces Maritime Militia (PAFMM)—to defend its maritime claims. The PAFMM essentially consists of fishing-type vessels with armed crew members. In the view of some observers, the PAFMM—even more than China’s navy or coast guard—is the leading component of China’s maritime forces for asserting its maritime claims, particularly in the SCS. U.S. analysts have paid increasing attention to the role of the PAFMM as a key tool for implementing China’s salami-slicing strategy, and have urged U.S. policymakers to focus on the capabilities and actions of the PAFMM.<sup>231</sup> DOD states the following about the PAFMM:

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this administration, our—the first and foremost on our agenda is that coordination among our partners and allies, and we have certainly been engaged deeply in that.

See also Demetri Sevastopulo, Kathrin Hille, and Robin Harding, “US Concerned at Chinese Law Allowing Coast Guard Use of Arms,” *Financial Times*, February 19, 2021; Simon Lewis, Humeyra Pamuk, Daphne Psaledakis, and David Brunnstrom, “U.S. Concerned China’s New Coast Guard Law Could Escalate Maritime Disputes,” *Reuters*, February 19, 2021.

<sup>230</sup> Department of State, “U.S.-Japan Joint Press Statement,” Media Note, Office of the Spokesperson, March 16, 2021. See also Ralph Jennings, “Maritime Law Expected to Give Beijing an Edge in South China Sea Legal Disputes,” *VOA*, March 15, 2021; Junko Horiuchi, “Japan, U.S. Express ‘Serious Concerns’ over China Coast Guard Law,” *Kyodo News*, March 16, 2021.

<sup>231</sup> For additional discussions of the PAFMM, see, for example, Brad Lendon, “‘Little Blue Men’: Is a Militia Beijing Says Doesn’t Exist Causing Trouble in the South China Sea?” *CNN*, August 12, 2023; “The Ebb and Flow of Beijing’s South China Sea Militia,” Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), November 9, 2022; Samuel Cranny-Evans, “Analysis: How China’s Coastguard and Maritime Militia May Create Asymmetry at Sea,” *Jane’s Defence Weekly*, July 13, 2022; Zachary Haver, “Unmasking China’s Maritime Militia,” *BenarNews*, May 17, 2021; Ryan D. Martinson, “Xi Likes Big Boats (Coming Soon to a Reef Near You),” *War on the Rocks*, April 28, 2021; Andrew S. Erickson and Ryan D. Martinson, “Records Expose China’s Maritime Militia at Whitsun Reef, Beijing Claims They Are Fishing Vessels. The Data Shows Otherwise,” *Foreign Policy*, March 29, 2021; Zachary Haver, “China’s Civilian Fishing Fleets Are Still Weapons of Territorial Control,” Center for Advanced China Research, March 26, 2021; Chung Li-hua and Jake Chung, “Chinese Coast Guard an Auxiliary Navy: Researcher,” *Taipei Times*, June 29, 2020; Gregory Poling, “China’s Hidden Navy,” *Foreign Policy*, June 25, 2019; Mike Yeo, “Testing the Waters: China’s Maritime Militia Challenges Foreign Forces at Sea,” *Defense News*, May 31, 2019; Laura Zhou, “Beijing’s Blurred Lines between Military and Non-Military Shipping in South China Sea Could Raise Risk of Flashpoint,” *South China Morning Post*, May 5, 2019; Andrew S. Erickson, “Fact Sheet: The People’s Armed Forces Maritime Militia (PAFMM),” April 29, 2019, [andrewerickson.com](http://andrewerickson.com); Jonathan Manthorpe, “Beijing’s Maritime Militia, the Scourge of South China Sea,” *Asia Times*, April 27, 2019; Ryan D. Martinson, “Manila’s Images Are Revealing the Secrets of China’s Maritime Militia, Details of the Ships Haunting Disputed Rocks Show China’s Plans,” *Foreign Policy*, April 19, 2021; Brad Lendon, “Beijing Has a Navy It Doesn’t Even Admit Exists, Experts Say. And It’s Swarming Parts of the South China Sea,” *CNN*, April 13, 2021; Samir Puri and Greg Austin, “What the Whitsun Reef Incident Tells Us About China’s Future Operations at Sea,” International Institute for Strategic Studies (IISS), April 9, 2021; Drake Long, “Chinese Maritime Militia on the Move in Disputed Spratly Islands,” *Radio Free Asia*, March 24, 2021; Andrew S. Erickson, “China’s Secretive Maritime Militia May Be Gathering at Whitsun Reef, Boats Designed to Overwhelm Civilian Foes Can Be Turned into Shields in Real Conflict,” *Foreign Policy*, March 22, 2021; Dmitry Filipoff, “Andrew S. Erickson and Ryan D. Martinson Discuss China’s Maritime Gray Zone Operations,” Center for International Maritime Security (CIMSEC), March 11, 2019; Jamie Seidel, “China’s Latest Island Grab: Fishing ‘Militia’ Makes Move on Sandbars around Philippines’ Thitu Island,” *News.com.au*, March 5, 2019; Gregory Poling, “Illuminating the South China Sea’s Dark Fishing Fleets,” Stephenson Ocean Security Project (Center for continued...)

**Background & Missions.** The People's Armed Forces Maritime Militia (PAFMM) is a subset of China's national militia, an armed reserve force of civilians available for mobilization that is ultimately subordinate to the Central Military Commission through the National Defense Mobilization Department. Throughout China, militia units organize around towns, villages, urban sub-districts, and enterprises, and vary widely in composition and mission.

PAFMM vessels train with and assist the People's Liberation Army Navy (PLAN) and the China Coast Guard (CCG) in tasks such as safeguarding maritime claims, surveillance and reconnaissance, fisheries protection, logistics support, and search and rescue. China employs the PAFMM in gray zone operations, or "low-intensity maritime rights protection struggles," at a level designed to frustrate effective response by the other parties involved. China employs PAFMM vessels to advance its disputed sovereignty claims, often amassing them in disputed areas throughout the South and East China Seas. In this manner, the PAFMM plays a major role in coercive activities to achieve China's political goals without fighting, and these operations are part of broader Chinese military theory that sees confrontational operations short of war as an effective means of accomplishing strategic objectives.

**Operations.** PAFMM units have been active for decades in maritime incidents and combat operations throughout China's near seas and in these incidents PAFMM vessels are often used to supplement CCG cutters at the forefront of the incident, giving the Chinese the capacity to outweigh and outlast rival claimants. In March of 2021, hundreds of Chinese militia vessels moored in Whitsun Reef, raising concerns the Chinese planned to seize another disputed feature in the Spratly Islands. Other notable incidents include standoffs with the Malaysian drill ship *West Capella* (2020), defense of China's HYSY-981 oil rig in waters disputed with Vietnam (2014), occupation of Scarborough Shoal (2012), and harassment of USNS *Impeccable* and *Howard O. Lorenzen* (2009 and 2014). Historically the maritime militia also participated in China's offshore island campaigns in the 1950s, the 1974 seizure of the Paracel Islands from South Vietnam, and the occupation of Mischief Reef in the Spratly Islands in 1994.

The PAFMM also protects and facilitates PRC fishing vessels operating in disputed waters. For example, from late December 2019 to mid-January 2020, a large fleet of over 50 PRC fishing vessels operated under the escort of multiple China Coast Guard patrol ships in Indonesian claimed waters northeast of the Natuna Islands. At least a portion of the PRC ships in this fishing fleet were affiliated with known traditional maritime militia units, including a maritime militia unit based out of Beihai City in Guangxi province. While most traditional maritime militia units operating in the South China Sea continue to originate from townships and ports on Hainan Island, Beihai is one of a number of increasingly prominent maritime militia units based out of provinces in the PRC. These mainland based maritime militia units routinely operate in the Spratly Islands and in the southern South China Sea, and their operations in these areas are enabled by increased funding from the PRC government to improve their maritime capabilities and grow their ranks of personnel.

**Capabilities.** Through the National Defense Mobilization Department, Beijing subsidizes various local and provincial commercial organizations to operate PAFMM vessels to perform "official" missions on an ad hoc basis outside of their regular civilian commercial activities. PAFMM units employ marine industry workers, usually fishermen, as a

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Strategic and International Studies), January 9, 2019; Andrew S. Erickson, "Shining a Spotlight: Revealing China's Maritime Militia to Deter its Use," *National Interest*, November 25, 2018; Todd Crowell and Andrew Salmon, "Chinese Fisherman Wage Hybrid 'People's War' on Asian Seas," *Asia Times*, September 6, 2018; Andrew S. Erickson, "Exposed: Pentagon Report Spotlights China's Maritime Militia," *National Interest*, August 20, 2018; Jonathan Odom, "China's Maritime Militia," *Straits Times*, June 16, 2018; Conor M. Kennedy and Andrew S. Erickson, *China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA*, China Maritime Report No. 1, Naval War College, China Maritime Studies Institute, Newport, RI, March 2017, 22 pp.

supplement to the PLAN and the CCG. While retaining their day jobs, these mariners are organized and trained, often by the PLAN and the CCG, and can be activated on demand. Additionally, starting in 2015, the Sansha City Maritime Militia in the Paracel Islands has developed into a salaried full-time maritime militia force equipped with at least 84 purpose-built vessels armed with mast-mounted water cannons for spraying and reinforced steel hulls for ramming along with their own command center in the Paracel Islands. Lacking their normal fishing responsibilities, Sansha City Maritime Militia personnel, many of whom are former PLAN and CCG sailors, train for peacetime and wartime contingencies, often with light arms, and patrol regularly around disputed South China Sea features even during fishing moratoriums. Additionally, since 2014, China has built a new Spratly backbone fleet comprising at least 235 large fishing vessels, many longer than 50 meters and displacing more than 500 tons. These vessels were built under central direction from the Chinese government to operate in disputed areas south of twelve degrees latitude that China typically refers to as the “Spratly Waters,” including the Spratly Islands and southern SCS. Spratly backbone vessels were built for prominent PAFMM units in Guangdong, Guangxi, and Hainan Provinces. For vessel owners not already affiliated with PAFMM units, joining the militia was a precondition for receiving government funding to build new Spratly backbone boats. As with the CCG and PLAN, new facilities in the Paracel and Spratly Islands enhance the PAFMM’s ability to sustain operations in the South China Sea.<sup>232</sup>

## Apparent Narrow Definition of “Freedom of Navigation”<sup>233</sup>

China regularly states that it supports freedom of navigation and has not interfered with freedom of navigation. China, however, appears to hold a narrow definition of freedom of navigation that is centered on the ability of commercial cargo ships to pass through international waters. In contrast to the broader U.S./Western definition of freedom of navigation (aka freedom of the seas), the Chinese definition does not appear to include operations conducted by military ships and aircraft. It can also be noted that China has frequently interfered with commercial fishing operations by non-Chinese fishing vessels—something that some observers regard as a form of interfering with freedom of navigation for commercial ships.

An August 12, 2015, press report states the following (emphasis added):

China respects freedom of navigation in the disputed South China Sea but will not allow any foreign government to invoke that right so its military ships and planes can intrude in Beijing’s territory, the Chinese ambassador [to the Philippines] said.

Ambassador Zhao Jianhua said late Tuesday [August 11] that Chinese forces warned a U.S. Navy P-8A [maritime patrol aircraft] not to intrude when the warplane approached a Chinese-occupied area in the South China Sea’s disputed Spratly Islands in May....

“We just gave them warnings, be careful, not to intrude,” Zhao told reporters on the sidelines of a diplomatic event in Manila....

When asked why China shoed away the U.S. Navy plane when it has pledged to respect freedom of navigation in the South China Sea, Zhao outlined the limits in China’s view.

“Freedom of navigation does not mean to allow other countries to intrude into the airspace or the sea which is sovereign. No country will allow that,” Zhao said. “We say freedom of

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<sup>232</sup> Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People’s Republic of China 2022*, pp. 79-80.

<sup>233</sup> For additional discussion, see Jonathan G. Odom, “Effort to Discredit U.S. Freedom of Navigation Report Falls Short,” Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), August 20, 2020.



navigation must be observed in accordance with international law. **No freedom of navigation for warships and airplanes.**<sup>234</sup>

A July 19, 2016, press report states the following:

A senior Chinese admiral has rejected freedom of navigation for military ships, despite views held by the United States and most other nations that such access is codified by international law.

The comments by Adm. Sun Jianguo, deputy chief of China's joint staff, come at a time when the U.S. Navy is particularly busy operating in the South China Sea, amid tensions over sea and territorial rights between China and many of its neighbors in the Asia-Pacific region.

"When has freedom of navigation in the South China Sea ever been affected? It has not, whether in the past or now, and in the future there won't be a problem as long as nobody plays tricks," Sun said at a closed forum in Beijing on Saturday, according to a transcript obtained by Reuters.

"But China consistently opposes so-called military freedom of navigation, which brings with it a military threat and which challenges and disrespects the international law of the sea," Sun said.<sup>235</sup>

A March 4, 2017, press report states the following:

Wang Wenfeng, a US affairs expert at the China Institute of Contemporary International Relations, said Beijing and Washington obviously had different definitions of what constituted freedom of navigation.

"While the US insists they have the right to send warships to the disputed waters in the South China Sea, Beijing has always insisted that freedom of navigation should not cover military ships," he said.<sup>236</sup>

A February 22, 2018, press report states the following:

Hundreds of government officials, experts and scholars from all over the world conducted in-depth discussions of various security threats under the new international security situation at the 54<sup>th</sup> Munich Security Conference (MSC) from Feb. 16 to 18, 2018.

Experts from the Chinese delegation at the three-day event were interviewed by reporters on hot topics such as the South China Sea issue and they refuted some countries' misinterpretation of the relevant international law.

The conference included a panel discussion on the South China Sea issue, which China and the Association of Southeast Asian Nations (ASEAN) countries have been committed to properly solving since the signing of the draft South China Sea code of conduct.

Senior Colonel Zhou Bo, director of the Security Cooperation Center of the International Military Cooperation Office of the Chinese Ministry of National Defense, explained how some countries' have misinterpreted the international law.

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<sup>234</sup> Jim Gomez, "Chinese Diplomat Outlines Limits to Freedom of Navigation," *Military Times*, August 12, 2015.

<sup>235</sup> Erik Slavin, "Chinese Admiral Contests Freedom of Navigation in South China Sea," *Stars and Stripes*, July 19, 2016.

<sup>236</sup> Shi Jiangtao, "Future of South China Sea Disputes Depends on Washington, Says China's Legislature Spokeswoman," *South China Morning Post*, March 4, 2017. See also Erik Slavin, "Chinese Legal Draft Could Pose Challenge for [U.S.] Navy in South China Sea," *Stars and Stripes*, February 17, 2017; Ben Blanchard, "China Considering Making Foreign Submersibles Travel on Surface," *Reuters*, February 17, 2017; "Draft Maritime law Revisions Say China May Bar Foreign Ships from Passing Through Its Waters," *Global Times*, February 16, 2017.

“First of all, we must abide by the United Nations Convention on the Law of the Sea (UNCLOS),” Zhou said. “But the problem now is that some countries unilaterally and wrongly interpreted the ‘freedom of navigation’ of the UNCLOS as the ‘freedom of military operations’, which is not the principle set by the UNCLOS,” Zhou noted.<sup>237</sup>

A June 27, 2018, opinion piece in a British newspaper by China’s ambassador to the UK stated that

freedom of navigation is not an absolute freedom to sail at will. The US Freedom of Navigation Program should not be confused with freedom of navigation that is universally recognised under international law. The former is an excuse to throw America’s weight about wherever it wants. It is a distortion and a downright abuse of international law into the “freedom to run amok”.

Second, is there any problem with freedom of navigation in the South China Sea? The reality is that more than 100,000 merchant ships pass through these waters every year and none has ever run into any difficulty with freedom of navigation....

The South China Sea is calm and the region is in harmony. The so-called “safeguarding freedom of navigation” issue is a bogus argument. The reason for hyping it up could be either an excuse to get gunboats into the region to make trouble, or a premeditated intervention in the affairs of the South China Sea, instigation of discord among the parties involved and impairment of regional stability....

China respects and supports freedom of navigation in the South China Sea according to international law. But freedom of navigation is not the freedom to run amok. For those from outside the region who are flexing their muscles in the South China Sea, the advice is this: if you really care about freedom of navigation, respect the efforts of China and Asean countries to safeguard peace and stability, stop showing off your naval ships and aircraft to “militarise” the region, and let the South China Sea be a sea of peace.<sup>238</sup>

A September 20, 2018, press report stated the following:

Chinese Ambassador to Britain Liu Xiaoming on Wednesday [September 19] said that the freedom of navigation in the South China Sea has never been a problem, warning that no one should underestimate China’s determination to uphold peace and stability in the region....

Liu stressed that countries in the region have the confidence, capability and wisdom to deal with the South China Sea issue properly and achieve enduring stability, development and prosperity.

“Yet to everyone’s confusion, some big countries outside the region did not seem to appreciate the peace and tranquility in the South China Sea,” he said. “They sent warships and aircraft all the way to the South China Sea to create trouble.”

The senior diplomat said that under the excuse of so-called “freedom of navigation,” these countries ignored the vast sea lane and chose to sail into the adjacent waters of China’s islands and reefs to show off their military might.

“This was a serious infringement” of China’s sovereignty, he said. “It threatened China’s security and put regional peace and stability in jeopardy.”

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<sup>237</sup> “Chinese Expert: Freedom of Navigation ≠ Freedom of Military Operations in South China Sea,” China Military Online,” February 22, 2018.

<sup>238</sup> Liu Xiaoming, “China Will Not Tolerate US Military Muscle-Flexing Off Our Shores,” *Guardian (UK)*, June 27, 2018.

Liu stressed that China has all along respected and upheld the freedom of navigation and over-flight in the South China Sea in accordance with international law, including the United Nations Convention on the Law of the Sea.

“Freedom of navigation is not a license to do whatever one wishes,” he said, noting that freedom of navigation is not freedom to invade other countries’ territorial waters and infringe upon other countries’ sovereignty.

“Such ‘freedom’ must be stopped,” Liu noted. “Otherwise the South China Sea will never be tranquil.”<sup>239</sup>

A May 7, 2019, press report stated the following:

“The US’ excuse of freedom of navigation does not stand because international law never allowed US warships to freely enter another country’s territorial waters,” Zhang Junshe, a senior research fellow at the PLA Naval Military Studies Research Institute, told the *Global Times* on Monday [May 6].<sup>240</sup>

A March 17, 2020, press report in China’s state-controlled media stated

The US side is using “freedom of navigation” as an excuse to repeatedly enter the South China Sea to flex its muscles and cause trouble, which are acts of hegemony that violate international law, threatening peace and stability in the region, People’s Liberation Army (PLA) Southern Theater Command spokesperson Li Huamin said after the US naval activities on March 10, noting that the US warship was expelled by Chinese naval and aerial forces.”<sup>241</sup>

In contrast to China’s narrow definition, the U.S./Western definition of freedom of navigation is much broader, encompassing operations of various types by both commercial and military ships and aircraft in international waters and airspace. As discussed earlier in this report, an alternative term for referring to the U.S./Western definition of freedom of navigation is freedom of the seas, meaning “all of the rights, freedoms, and lawful uses of the sea and airspace, including for military ships and aircraft, guaranteed to all nations under international law.”<sup>242</sup> When Chinese officials state that China supports freedom of navigation, China is referring to its own narrow definition of the term, and is likely *not* expressing agreement with or support for the U.S./Western definition of the term.<sup>243</sup>

## Preference for Treating Territorial Disputes on Bilateral Basis

China prefers to discuss maritime territorial disputes with other regional parties to the disputes on a bilateral rather than multilateral basis. Some observers believe China prefers bilateral talks because China is much larger than any other country in the region, giving China a potential upper hand in any bilateral meeting. China generally has resisted multilateral approaches to resolving

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<sup>239</sup> “No One Should Underestimate China’s Determination to Uphold Peace in South China Sea: Chinese Ambassador,” *Xinhuanet*, September 20, 2018.

<sup>240</sup> Leng Shumei and Liu Xuanzun (*Global Times*), “China Warns US Ships to Leave Sea,” *People’s Daily Online*, May 7, 2019.

<sup>241</sup> Liu Xuanzun, “US Intrusions in S.China Sea Can Be Stopped by Electromagnetic Weapons: Experts,” *Global Times*, March 17, 2020. As shown in **Table 2**, a U.S. Navy ship conducted an FON operation near the Paracel Islands in the SCS on March 10, 2020.

<sup>242</sup> Department of Defense, Department of Defense Report to Congress, Annual Freedom of Navigation Report, Fiscal Year 2021, Pursuant to Section 1275 of the National Defense Authorization Act for Fiscal Year (FY) 2017 (P.L. 114-328), as Amended, generated on December 2, 2021, PDF page 4 of 9.

<sup>243</sup> See also Tuan N. Pham, “Chinese Double Standards in the Maritime Doman,” *The Diplomat*, August 19, 2017; Mark J. Valencia, “The US-China Maritime Surveillance Debate,” *The Diplomat*, August 4, 2017.

maritime territorial disputes, stating that such approaches would internationalize the disputes, although the disputes are by definition international even when addressed on a bilateral basis. (China’s participation with the ASEAN states in the 2002 Declaration of Conduct (DOC) and in negotiations with the ASEAN states on the follow-on binding code of conduct (COC) [see **Appendix C**] represents a departure from this general preference.) Some observers believe China is pursuing a policy of putting off a negotiated resolution of maritime territorial disputes so as to give itself time to implement the salami-slicing strategy.<sup>244</sup>

## Map of Nine-Dash Line

China depicts its claims in the SCS using the so-called map of the nine-dash line—a Chinese map of the SCS showing nine line segments that, if connected, would enclose an area that is often described in press reports as covering 80% or more of the part of the SCS that is situated between China, Taiwan, the Philippines, Brunei, the part of Malaysia that is on the Island of Borneo, and Vietnam (**Figure E-1**). The SCS as defined by the International Hydrographic Organization (IHO) also includes an additional sea area to the south and west situated between the southern tip of mainland Vietnam, the westernmost shore of Borneo, Belitung Island between Borneo and southern Sumatra, and the eastern shores of south-central Sumatra and the southern part of the Malay Peninsula. Another way to characterize this additional sea area would be to describe it as the waters between the Gulf of Thailand and the Java Sea.<sup>245</sup> The State Department calculates that when the entire IHO-defined area of the SCS (including the additional sea area just described) is taken into account, the nine-dash line encloses 62% of the waters of the SCS.<sup>246</sup>

The area inside the nine line segments far exceeds what is claimable as territorial waters under customary international law of the sea as reflected in UNCLOS, and, as shown in **Figure E-2**, includes waters that are within the claimable EEZs (and in some places are quite near the coasts) of the Philippines, Malaysia, Brunei, and Vietnam. The U.S. position is that the nine-dash line is “preposterous.”<sup>247</sup>

<sup>244</sup> See, for example, Donald K. Emmerson, “China Challenges Philippines in the South China Sea,” *East Asia Forum*, March 18, 2014.

<sup>245</sup> For maps showing the SCS as defined by the IHO, including the additional sea area just described, see “Marine Gazetteer Placedetails,” *Marineregions.org*, last edited January 18, 2017, accessed May 31, 2023, at <https://www.marineregions.org/gazetteer.php?p=details&id=4332>; and Permanent Court of Arbitration, *PCA Case No 2013-19, In the Matter of an Arbitration before an Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Republic of the Philippines and The People’s Republic of China, Award on Jurisdiction and Admissibility*, 29 October 2015, Figure 1 on page 3.

<sup>246</sup> The State Department states, “Media reports [discussing the percentage of the SCS enclosed by the nine-dash line] frequently refer to estimates of 80 percent or higher. The exact percentage depends upon the assumed geographic extent of the South China Sea. The dashed line encompasses 62 percent of the waters in the South China Sea when using the limits that are described in the International Hydrographic Organization’s (IHO) *S-23 Limits of the Oceans and Seas* (1953), available from IHO at [http://www.iho.int/iho\\_pubs/IHO\\_Download.htm#S-23](http://www.iho.int/iho_pubs/IHO_Download.htm#S-23). The *S-23* describes the limits for the South China Sea as including the Taiwan Strait, the Gulf of Tonkin, and what is sometimes referred to as the Natuna Sea.” (United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Office of Ocean and Polar Affairs, *Limits in the Seas No. 143, China: Maritime Claims in the South China Sea*, December 5, 2014, p. 4, footnote 11.)

<sup>247</sup> Department of State, *A Free and Open Indo-Pacific, Advancing a Shared Vision*, November 4, 2019, states on page 23: “PRC maritime claims in the South China Sea, exemplified by the preposterous ‘nine-dash line,’ are unfounded, unlawful, and unreasonable. These claims, which are without legal, historic, or geographic merit, impose real costs on other countries. Through repeated provocative actions to assert the nine-dash line, Beijing is inhibiting ASEAN members from accessing over \$2.5 trillion in recoverable energy reserves, while contributing to instability and the risk of conflict.”

The map of the nine-dash line, also called the U-shaped line or the cow tongue,<sup>248</sup> predates the establishment of the People's Republic of China (PRC) in 1949. The map has been maintained by the PRC government, and maps published in Taiwan also show the nine line segments.<sup>249</sup>

In a document submitted to the United Nations on May 7, 2009, which included the map shown in **Figure E-1** as an attachment, China stated the following:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map [of the nine-dash line]). The above position is consistently held by the Chinese Government, and is widely known by the international community.<sup>250</sup>

The map does not always have exactly nine dashes. Early versions of the map had as many as 11 dashes, and maps of China published by the Chinese government in June 2014 and August 2023 include 10 dashes.<sup>251</sup> The exact positions of the dashes have also varied a bit over time.

China has maintained ambiguity over whether it is using the map of the nine-dash line to claim full sovereignty over the entire sea area enclosed by the nine-dash line, or something less than that.<sup>252</sup> Maintaining this ambiguity can be viewed as an approach that preserves flexibility for China in pursuing its maritime claims in the SCS while making it more difficult for other parties to define specific objections or pursue legal challenges to those claims. It does appear clear, however, that China at a minimum claims sovereignty over the island groups inside the nine line segments—China's domestic Law on the Territorial Sea and Contiguous Zone, enacted in 1992, specifies that China claims sovereignty over all the island groups inside the nine line segments.<sup>253</sup>

<sup>248</sup> The map is also sometimes called the map of the nine dashed lines (as opposed to nine-dash line), perhaps because some maps (such as **Figure E-1**) show each line segment as being dashed.

<sup>249</sup> See Department of Defense, *Annual Report to Congress, Military and Security Developments Involving the People's Republic of China*, 2011, pp. 15 and 39; Peter Dutton, "Three Disputes and Three Objectives, China and the South China Sea," *Naval War College Review*, Autumn 2011: 44-45; Hong Nong, "Interpreting the U-shape Line in the South China Sea," accessed May 31, 2023, at <http://chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/>.

<sup>250</sup> Communication from China to the United Nations dated May 7, 2009, English version, accessed May 31, 2023, at [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf).

<sup>251</sup> Regarding the August 2023 map, see, for example, Andreas Aditya Salim, "China's Fluctuating South China Sea Dash Lines," *Jakarta Post*, September 6, 2023; Colin Clark, "New Chinese 10-Dash Map Sparks Furor across Indo-Pacific: Vietnam, India, Philippines, Malaysia," *Breaking Defense*, September 1, 2023; Cliff Harvey Venzon, "China's Fresh Map Claims Over Taiwan, Disputed Sea Stir Protests," *Bloomberg*, September 1, 2023. For an article discussing the June 2014 map in general (but not that it includes 10 dashes), see Ben Blanchard and Sui-Lee Wee, "New Chinese Map Gives Greater Play to South China Sea Claims," *Reuters*, June 25, 2014. See also "China Adds Another Dash to the Map," *Maritime Executive*, July 4, 2014.

<sup>252</sup> See Andrew Browne, "China's line in the Sea," *Wall Street Journal*, April 1, 2014; Peter Dutton, "Three Disputes and Three Objectives, China and the South China Sea," *Naval War College Review*, Autumn 2011: 45-48; Hong Nong, "Interpreting the U-shape Line in the South China Sea," accessed May 31, 2023, at <http://chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/>. See also Ankit Panda, "Will China's Nine Dashes Ever Turn Into One Line?" *The Diplomat*, July 1, 2014. For a more general discussion of ambiguity in China's statements regarding the SCS, see Oriana Skylar Mastro, "What are China's Leaders Saying about the South China Sea? The Rhetoric Weaves between Cooperative and Competitive, Leaving the Question of What—and Who—to Believe," *Interpreter*, February 24, 2021.

<sup>253</sup> Peter Dutton, "Three Disputes and Three Objectives, China and the South China Sea," *Naval War College Review*, Autumn 2011: 45, which states the following: "In 1992, further clarifying its claims of sovereignty over all the islands in the South China Sea, the People's Republic of China enacted its Law on the Territorial Sea and Contiguous Zone, which specifies that China claims sovereignty over the features of all of the island groups that fall within the U-shaped line in the South China Sea: the Pratas Islands (Dongsha), the Paracel Islands (Xisha), Macclesfield Bank (Zhongsha), and the Spratly Islands (Nansha)." See also International Crisis Group, *Stirring Up the South China Sea ([Part] I)*, Asia Report Number 223, April 23, 2012, pp. 3-4.

China's implementation on January 1, 2014, of a series of fishing regulations covering much of the SCS suggests that China claims at least some degree of administrative control over much of the SCS.<sup>254</sup>

An April 30, 2018, blog post states the following:

In what is likely a new bid to reinforce and even expand China's sweeping territorial claims in the South China Sea, a group of Chinese scholars recently published a "New Map of the People's Republic of China."

The alleged political national map, reportedly first published in April 1951 but only "discovered" through a recent national archival investigation, could give new clarity to the precise extent of China's official claims in the disputed waters.

Instead of dotted lines, as reflected in China's U-shaped Nine-Dash Line claim to nearly all of the South China Sea, the newly discovered map provides a solid "continuous national boundary line and administrative region line."

The Chinese researchers claim that through analysis of historical maps, the 1951 solid-line map "proves" beyond dispute that the "U-boundary line is the border of China's territorial sea" in the South China Sea.

They also claim that the solid administrative line overlaying the U-boundary "definitely indicated that the sovereignty of the sea" enclosed within the U-boundary "belonged to China."

The study, edited by the Guanghua and Geosciences Club and published by SDX Joint Publishing Company, has not been formally endorsed by the Chinese government.<sup>255</sup>

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<sup>254</sup> DOD states that

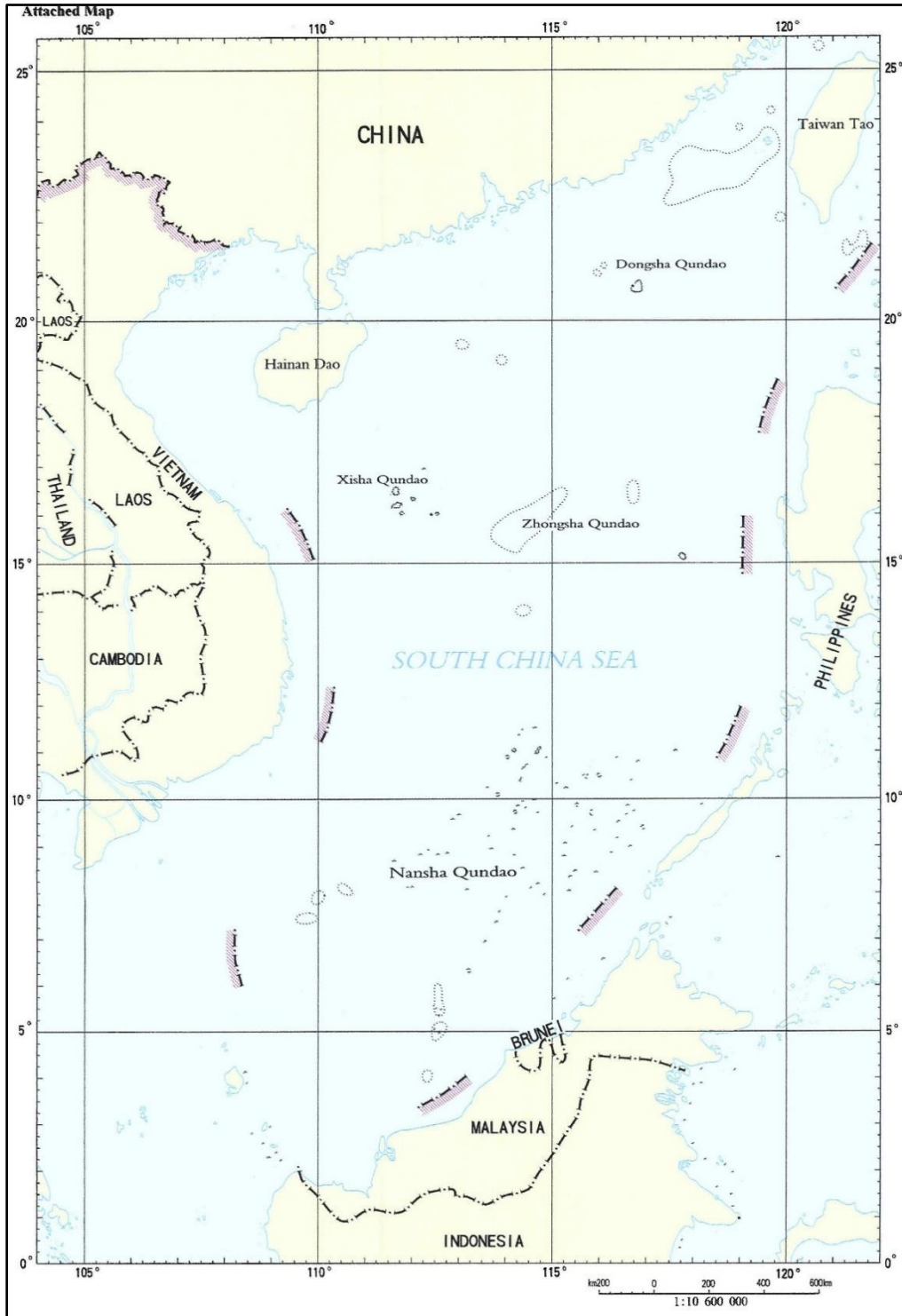
China has not clearly defined the scope of its maritime claims in the South China Sea. In May 2009, China communicated two Notes Verbales to the UN Secretary General stating objections to the submissions by Vietnam and Malaysia (jointly) and Vietnam (individually) to the Commission on the Limits of the Continental Shelf. The notes, among other things, included a map depicting nine line segments (dashes) encircling waters, islands and other features in the South China Sea and encompassing approximately two million square kilometers of maritime space. The 2009 Note Verbales also included China's assertion that it has "indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof." China's actions and rhetoric have left unclear the precise nature of its maritime claim, including whether China claims all of the maritime area located within the line as well as all land features located therein.

(Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 8.)

<sup>255</sup> Richard Javad Heydarian, "China's 'New' Map Aims to Extend South China Sea Claims," *National Interest*, April 30, 2018. A similar version was published in *Asia Times* on April 29, 2018. See also "How the 'Nine-Dash Line' Fuels Tensions in the South China Sea, China Has Co-Opted a Cartographic Mistake to Bully Its Neighbours," *Economist*, February 10, 2023.

### Figure E-1. Map of the Nine-Dash Line

Example submitted by China to the United Nations in 2009



**Source:** Communication from China to the United Nations dated May 7, 2009, English version, accessed May 31, 2023, at [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf). The image as shown here has been cropped to eliminate additional white space around the map's perimeter.

**Figure E-2. EEZs Overlapping Zone Enclosed by Map of Nine-Dash Line**

**Source:** Source: Eurasia Review, September 10, 2012.

**Notes:** (1) The red line shows the area that would be enclosed by connecting the line segments in the map of the nine-dash line. Although the label on this map states that the waters inside the red line are “China’s claimed territorial waters,” China has maintained ambiguity over whether it is claiming full sovereignty over the entire area enclosed by the nine line segments. (2) The EEZs shown on the map do not represent the totality of maritime territorial claims by countries in the region. Vietnam, to cite one example, claims all of the Spratly Islands, even though most or all of the islands are outside the EEZ that Vietnam derives from its mainland coast.

A January 18, 2022, press report states

China appears to be shifting from the so-called “nine-dash line” toward a new legal theory to support its expansive claims in the South China Sea, although analysts say its alternative is also problematic under international law.

In comments to reporters last week, Malaysian Foreign Minister Saifuddin Abdullah said Beijing now “speaks less of the ‘nine-dash line’ and more often of the ‘Four Sha’.” He said the shift toward has been witnessed by member countries of the Association of Southeast Asian Nations (ASEAN) and “is even more serious” than the old claim.

“Four Sha,” or Four Sands Archipelagos, are the four island groups in the South China Sea that Beijing claims to hold “historical rights” to. China calls them “Dongsha Qundao,” “Xisha Qundao,” “Zhongsha Qundao,” and “Nansha Qundao.” Internationally, they are known as Pratas Islands, Paracel Islands, the Macclesfield Bank area and Spratly Islands.

The concept they may be eclipsing, the nine-dash line, is a U-shaped line encircling most of the South China Sea that China has been using to demarcate its sovereignty over the sea.



An international tribunal in 2016 invalidated the line saying China has no legal basis for it. Although Beijing rejected the ruling, other nations have endorsed it.

“The nine-dash line has proven to be a really easy target for critics of China’s South China Sea claims,” Julian Ku, a professor at the Hofstra University School of Law in Long Island, New York State, said.

“It was also directly considered and rejected by the South China Sea Arbitral Tribunal in 2016.”

“China’s Four Sha theory was not directly considered by the tribunal ruling, although it would also be difficult to support,” Ku said, adding: “Still, it is a less dramatic claim and it is also not based solely on historical claims.”...

Bill Hayton, a journalist-turned-scholar who wrote an acclaimed book on the South China Sea, said the Four Sha theory has been “emerging slowly, with a boost after the arbitration tribunal ruling.”

“The Four-Sha is an attempt to develop an UNCLOS-like justification for control over the South China Sea with some sort of legal basis,” he said. UNCLOS is the acronym for the UN Convention of the Law on the Sea.

“But everyone else is still rejecting it,” Hayton added.

Each of the archipelagos in the Four Sha consists of a large number of scattered outlying features, most of which are submerged under water. Beijing insists that they are to be treated as whole units for purposes of sovereignty and maritime entitlements.

The Zhongsha Qundao, or Macclesfield Bank area, is actually entirely underwater, and not an archipelago, experts say.

Ku from the Hofstra University said although the first-known attempt by Chinese officials to advance Four Sha as a new legal theory was recorded at a closed-door meeting with U.S. State Department officials in 2017, “the Four Sha are not new to China’s claims in the South China Sea.”

The Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China, adopted by China in 1992, declared the four island groups. They were also mentioned in a 2016 white paper issued by China disputing the Philippines’ claims in the South China Sea arbitral process.

“These new Chinese legal justifications are no more lawful than China’s nine-dash line claim but it is more confusing and less simple to criticize,” Ku said.

A U.S. State Department report on China’s South China Sea claims that was published this month, ‘Limits in the Seas’, does not mention Four Sha concept. But it does analyze the People’s Republic of China (PRC) sovereignty claim over Dongsha, Xisha, Zhongsha and Nansha. It concludes that China’s assertions of sovereignty are “unlawful.”<sup>256</sup>

## Comparison with U.S. Actions Toward Caribbean and Gulf of Mexico

Some observers have compared China’s approach toward its near-seas region with the U.S. approach toward the Caribbean and the Gulf of Mexico in the age of the Monroe Doctrine.<sup>257</sup> It can be noted, however, that there are significant differences between China’s approach to its near-

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<sup>256</sup> Radio Free Asia, “Malaysian FM Sees Shift in China’s Justification of Sweeping South China Sea Claims,” *Radio Free Asia*, January 18, 2022.

<sup>257</sup> See, for example, Robert D. Kaplan, “China’s Budding Ocean Empire,” *The National Interest*, June 5, 2014.

seas region and the U.S. approach—both in the 19<sup>th</sup> and 20<sup>th</sup> centuries and today—to the Caribbean and the Gulf of Mexico. Unlike China in its approach to its near-seas region, the United States has not asserted any form of sovereignty or historical rights over the broad waters of the Caribbean or Gulf of Mexico (or other sea areas beyond the 12-mile limit of U.S. territorial waters), has not published anything akin to the nine-dash line for these waters (or other sea areas beyond the 12-mile limit), and does not contest the right of foreign naval forces to operate and engage in various activities in waters beyond the 12-mile limit.<sup>258</sup>

## April 2023 Remarks by Commander, Office of Naval Intelligence

In April 5, 2023, remarks at a conference, Rear Admiral Mike Studeman, Commander, Office of Naval Intelligence (ONI) stated the following about the actions of China’s military forces:

Russia is not alone in playing with fire in the international commons and risking serious escalation. Like its close friend, China seems to think it's also okay to conduct high-risk activities with its frontline forces.

The Chinese have been periodically flying their fighters much closer to U.S. aircraft than ever before. For many years, the Chinese would react to U.S. operations in international airspace, but they would stand-off by a matter of miles on average. However, in the last few years, we’ve experienced over 100 fighter intercepts that have approached within 100 feet of U.S. and allied aircraft, sometimes within 10 to 20 feet of those aircraft. This means that if there's one single twitch of the stick in the cockpit of those fighters, disaster is just a second away. This photo (referring to supporting graphics) shows how close a PRC J-11 fighter jet flew near the cockpit of a U.S. RC-135, one of our unarmed surveillance aircraft flying in international airspace.

These kinds of dangerous PRC behaviors are not just concentrated against the U.S., but are also directed at our allies. In May 2022, a Chinese J-16 fighter harassed an unarmed Australian P-8 patrol aircraft operating in international airspace in the eastern portion of the South China Sea, far away from China. While crossing in front, without warning the Chinese pilot dispensed clouds of chaff, the thin aluminum strips used to evade a radar-guided missile in combat. The chaff was ingested into the jet engines of the Australian aircraft, endangering the crew, which was lucky to bring back the jet safely.

In the East China Sea, Chinese fighters have also harried Canadian patrol aircraft engaged in patrols in international airspace designed to help enforce U.N. Security Council Resolution sanctions against North Korea. China signed on to those U.N. resolutions, yet still acts in risky, highly assertive ways that hazard air crews. These kinds of interactions are occurring all too frequently, though China will either deny they occur or blame others when they occur.

It's not just close proximity operations that we worry about. China routinely engages in radio intimidation, giving repeated warnings to ships and aircraft operating in international spaces, threatening consequences. Threatening with language insinuating that China has unilateral control over what the rest of the world recognizes as international air and waterspace.

On the surface of the sea, Chinese Maritime Militia vessels, the China Coast Guard, and the PLA Navy operate in synchronicity to pressure foreign forces inside the so-called “nine-dashed line,” which is China’s massive, illegal, extraterritorial claim to most of the South China Sea. The Militia and Coast Guard have rammed foreign ships, water cannoned other vessels, interfered with legitimate resource exploration activities sponsored by other nations, driven off Southeast Asia nations’ fishermen in their own waters, and engaged in

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<sup>258</sup> See, for example, James R. Holmes, “The Nine-Dashed Line Isn’t China’s Monroe Doctrine,” *The Diplomat*, June 21, 2014, and James Holmes, “China’s Monroe Doctrine,” *The Diplomat*, June 22, 2012.

many other harassment tactics as they try to enforce their unlawful claims and cow other nations into giving China de facto control of whatever Beijing unilaterally claims in contravention of the U.N. Convention of the Law of the Sea (UNCLOS),

When it chooses, China also intentionally violates COLREGs and CUES, two agreements designed for safety at sea. COLREGs are International Regulations for Preventing Collisions at Sea, which were published by the International Maritime Organization in 1972. CUES stands for the Code for Unplanned Encounters at Sea, which has been in existence since 2014. China has signed both, but ignores them at unpredictable times. One example is a PLA LUYANG destroyer dangerously cutting across the bow of a US destroyer in 2018. Another Chinese tactic we've seen recently involves a PLA auxiliary putting themselves on a collision course with a foreign vessel, falsely signaling that they've lost control of steerage, and claiming "stand-on" rights to force the other ship to give way and change course. These behaviors reflect a brazen disregard for basic safety guidelines and show how flagrantly China flouts international strictures they promised to abide.

The Chinese also menace with military-grade lasers, like the recent case of a Coast Guard ship lasing a Philippine resupply ship making for one of the Philippine's outposts in the South China Sea. True professionals, the Philippines have recognized the best way to deal with this is not by responding with guns or missiles. They know their best "weapon system" is a video camera to show the world what's happening and expose China's pattern of bullying and unsafe behavior. China also directed eye-damaging lasing against an Australian patrol aircraft monitoring a PLA Task Group operating just north of Australia, and in the past has used lasers against U.S. pilots landing in Djibouti.

There are other ways China systematically bends, breaks, or tries to skirt around international norms, conventions, and laws. For ten years, the Chinese have been covertly attempting to build up a number of cays in the Spratly Islands zone. We have seen them try to raise submerged or partly submerged sandbars and reefs to become above-water features by dumping loads of sandbags. Their auxiliaries have been offloading tractors to bulldoze sand around to further enlarge these features.

The Chinese lawfare gambit is to try to use these features as anchor points to claim exclusive economic zones and territorial water rights using a new rationale they concocted called "offshore archipelagos for continental states." China knows manmade islets don't qualify for any Exclusive Economic Zone (EEZ) claims, so they try to build them up secretly and pretend they naturally formed. At the same time, they are desperately trying to reshape the U.N. Convention on the Law of the Sea (UNCLOS), or at least alter the way it is interpreted, which today clearly defines what is a continental state and what is an archipelagic state. China is definitively, based on many factors under UNCLOS, the former and not the latter. (Fiji, Philippines, Indonesia, however, are examples of nations that are officially able to claim archipelagic status.)

Just like their unlawful claim to own everything inside the "nine-dashed line," most recently Beijing has illegally claimed jurisdiction over the Taiwan Strait, a highly-trafficked international waterway. More disturbingly, Beijing has started to slowly condition the region to the possibilities of "boarding and inspections" in these international spaces using its Maritime Safety Administration forces. China is likely going to slowly, patiently, lay the groundwork to justify future extraterritorial and extralegal actions in the Taiwan Strait, either directed at Taiwan or any other foreign forces it feels shouldn't operate there—all of which constitutes a direct threat to a major international sea line of communication.

Not only does the region have to worry about what China's frontline forces are doing beyond their legitimate borders as they try to control more areas in the First Island Chain, but many countries have been confronted with even more invasive operations. China's auxiliaries often operate without permission in other nations' EEZs doing military and resource surveys. Chinese distant water fishing fleets continue to illegally overexploit and

deplete fishing stocks in other nations' littorals. And Chinese surveillance balloons have recklessly and repeatedly flown through scores of nations' sovereign airspaces in clear violation of international law.

#### DOES XI JINPING HAVE CONTROL OVER HIS FRONTLINE FORCES?

All of these activities beg several questions. The first one we need to ask ourselves is whether or not Xi Jinping has lost control of his frontline forces. Are the frontline forces free to do what they like, or are these high-risk tactics deliberated on and approved on high by Xi Jinping?

Well, first, it's clear that Xi Jinping wants to be in control of everything. In a remarkable bureaucratic feat of maneuvering, Xi has been able to throw out the collective leadership practices that marked the last 50 years of how China made decisions. He has concentrated more power than anyone since Mao. He has successfully placed himself in charge of all major "Leading Groups," which coordinate everything from national security to domestic policy. Xi also eliminated the power of other networks and factions that had been serving as counterbalancing forces within the Chinese decision-making system. Recall the image of Hu Jintao, the former president, being physically lifted out of his seat, manhandled and escorted out of the last National Party Congress. That was Xi symbolically proclaiming there is no other power except his own in today's China. So, Xi is clearly in charge, and he's notoriously architected a chain of command so that all major decisions either flow up or down from him.

Let's consider a second possibility: Has Xi Jinping unleashed forces that he can't control? Has he given excess license to his subordinates to take actions at the tactical level, even if they carry potential strategic effects? Do commanders of frontline forces exercise too much freedom of action, because Xi is preoccupied or overburdened?

Indeed, it's hard to believe that Xi can maintain enough span of control to allow him to have cognizance of everything that his forces are doing. Overconcentration of power at the top naturally creates gaps and seams in governance. It is very possible Xi has been surprised, pretended he wasn't, and covered down with damage control measures while trying to sustain the image of infallibility of his rule.

A glimmer of insight into this dynamic takes us out to the far west of China, to the Line of Actual Control (LAC) with India, where an aggressive Western Military Region commander orchestrated patrols and set up encampments beyond China's lines in the first of a series of major provocations, violating years of protocols that had kept peace on the LAC. The friction ultimately led to dozens of deaths and bloodletting in Galwan Valley in mid-2020, creating near-war conditions between two nuclear powers and quickly destroying years of hard-earned bilateral trust. In this case study, one has to conclude Xi Jinping is either geopolitically incompetent...or Xi was compelled to provide retrospective support, doubling down on the miscalculation of his generals. To some, it smells a lot like a military region commander became the tail that wagged the Beijing dog.

A third important question: Does Xi Jinping actively encourage assertive, even belligerent execution of his policies because he values loyalty to the China dream above everything else, literally at almost any cost? In the fever to realize China's rise, is he willing to brook almost anything that his forces do so long as China ends up being advantaged, comes out on top, or looks strong? It's reasonable to think that Xi may be either explicitly or implicitly sending the message down chain that it's better to over-execute than to under-execute. It's better to err on the side of aggressiveness. So Xi, in effect, may be consciously letting his wolf warriors and hawks loose on China's neighbors and other nations.

#### IMPLICATIONS OF XI JINPING'S CHOICES

Let's put this all back together. The truth about the motivations, behaviors, and controls over China's frontline forces is likely found somewhere in the middle of all three of the central questions offered above.

Chairman Xi has certainly emerged as one of the most powerful leaders China has ever seen. He does act like an emperor eagerly building empire. He clearly whips up fervency for China's rejuvenation. And he does support using almost any measure and method available to achieve his dream of supremacy, the sooner the better. With a remarkable degree of tone-deafness, Xi continues to demonstrate a willingness to sanction tactics and approaches long after they prove to be counterproductive to China's reputation and long-term interests, even if they erode trust for China in the region, and even if they make everything the PRC do seem suspect.

We have strong indications that Xi Jinping is generally aware of most things his frontline forces are doing, but not everything they are doing, which is perhaps a function of the unwieldiness of China's governance model. History warns us of the dangers of dictatorships, the distortions in totalitarian states, where the truth doesn't always flow quickly to an all-powerful authoritarian. Bad news is adulterated on the way up to Big Brother. Half-truths, falsities, incomplete data, and rosier-than-right reports thrive in bureaucratically threatening systems, because civil servants and generals are perpetually scared. They quite naturally protect themselves because there are few safeguards or protections for individuals. And history tells us that in tyrannical societies of this nature, this phenomenon is only going to get worse with time as information is increasingly modified to provide news the autocrat wants to hear.

What this means, overall, is that we're living in more unpredictable and dangerous times, when anything can happen. Going forward, the Indo-Pacific region and the world must not just contend with the dread of a hulking, temperamental China, but also its ever-growing war machine, which is a destabilizing force unto itself. We must not just grapple with the idea that China is becoming increasingly comfortable with using raw, naked power to advance its interests in almost every sector. Now we also need to worry about Chinese minions of all stripes that are eager to please, feel like they have a license to over-execute, and in their zealotry may end up committing a number of tactical mistakes or mishaps that could result in ruinous strategic outcomes. Recall the 2001 disaster, when an over-exuberant and under-skilled Chinese pilot hit a U.S. EP-3 operating on a routine patrol in international airspace.

The U.S. recognizes all these dangers, of course, and is responsibly trying to make sure we have reliable lines of communication with the Chinese, including "hot lines." While we have multiple physical means of communicating with the PLA, the CCP generally continues to view communications as a lever to reward or punish not just the U.S., but nearly all foreign interlocutors. Simply stated, the PLA will talk only when they perceive such communication as an advantage—not, unfortunately, during an unfolding crisis, not following an incident, and to not to discuss strategic frictions. It would be in their best interest to do so, of course, especially since senior Chinese leaders may get a better set of facts (and sooner) from the American side than their own.

Meanwhile we can expect China to continue executing its grand strategy, which involves applying significant energy to advance its creeping expansionistic agenda. They'll move forward using enticements, like dangling Belt and Road Initiative capital, and they'll move forward using "gray zone" coercion, because they think these carrots and sticks work. But, unfortunately, we may not be able to trust that Xi is going to be sufficiently in control of his frontline forces.

This problem will likely get worse as China fields more unmanned systems. China is already deploying thousands of unmanned systems and the prospects that China will employ them for additional surveillance, harassment, exploitation, interference, and intimidation is high. We've already seen China deploy an incredible number of buoys--

floating and anchored, unmanned surface vehicles, and unmanned underwater vehicles in the First Island Chain, around Taiwan, West Philippine Sea, Bering Sea, Central Pacific, near Australia, Indian Ocean, polar regions, and even around Africa. What are they doing with all these systems, the world should wonder?

In the end, if you exercise ultimate power, then you also own ultimate responsibility for what your forces do. Xi is the authoritarian atop an absolutist state, and he has the power to alter what his forces do or don't do. Xi remains the accountable entity for all actions of his frontline forces.

#### CHINA'S RATIONALE FOR AGGRESSIVE FRONTLINE FORCE BEHAVIORS

If a Chinese official was here, he would reject all the above and claim China is the real victim in all this. He would say the U.S. remains locked into a "Cold War mindset" using outdated alliance systems, or blocs, that threaten China. He would declare that U.S. operations in the Indo-Pacific generate friction among nations and profess that our presence is fundamentally destabilizing. He would say America shouldn't be in the Western Pacific in the first place. He might mention what a Chinese Defense Minister said years ago, that "Asia is for Asians," a term coined by Imperial Japan in WWII—the same regime that touted the "East Asian Co-Prosperty Sphere" (which, by the way, has striking parallels to China's Belt and Road Initiative language).

The PRC official would say America and its allies constantly operate in China's waters, in China's airspace, or on China's periphery. He would never admit that U.S. forces are actually operating lawfully in the international commons. He would proclaim that foreign air and maritime operations anywhere inside the first and second island chains are designed to keep China down, stop its rise, contain, encircle, and threaten China's "core sovereignty" interests.

Truth told, this perspective makes a whole lot of sense if you're stuck in a paranoid Marxist-Leninist-style government that has a fundamental need of an archenemy—a longstanding opponent that China can blame for whatever ills affect the country, whatever sacrifices the country must make, or whatever actions they feel they must take externally in the name of "defense" for their country against a supposed implacable hegemon. This fear mongering is never going to go away on the Chinese side.

For all these reasons, China thinks America and its allies need to be pushed back and out. And they constantly experiment with novel ways to do that. Chinese academies, think tanks, and the PLA work round the clock to develop new tactics and techniques for their frontline forces, and they keep using whatever measures they can get away with—no matter how risky--if they think it helps achieve China's goals.

On 60 minutes, Admiral Paparo, the Pacific Fleet commander, recently asked an important question. When China talks about America containing them, he asks, "China, are you doing anything that should be contained?" An analogy applies here. It's like your neighbor not just claiming their own house and yard, but the public street in front of their house, the sidewalks, and then your own front lawn. And when you go out to deal with the attack dogs the neighbor left on your own front lawn, the offending neighbor himself feigns offense and cries, "you're containing me!" Perhaps the neighbor should stick to his own legal property and simply follow public ordinances instead.<sup>259</sup>

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<sup>259</sup> Rear Admiral Mike Studeman, Commander, Office of Naval Intelligence, "Dangers Posed by China's Frontline Forces," remarks as prepared for the Sea Air and Space Conference, Washington, DC, April 5, 2023.

## Appendix F. Assessments of China's Strengthened Position in SCS

This appendix provides additional information on assessment of China's strengthened position in the SCS.

U.S. Navy Admiral Philip Davidson, in responses to advance policy questions from the Senate Armed Services Committee for an April 17, 2018, hearing before the committee to consider nominations, including Davidson's nomination to become Commander, U.S. Pacific Command (PACOM), stated the following in part (emphasis added):

With respect to their actions in the South China Sea and more broadly through the Belt and Road Initiative, the Chinese are clearly executing deliberate and thoughtful force posture initiatives. China claims that these reclaimed features and the Belt and Road Initiative [BRI] will not be used for military means, but their words do not match their actions....

While Chinese air forces are not as advanced as those of the United States, they are rapidly closing the gap through the development of new fourth and fifth generation fighters (including carrier-based fighters), long range bombers, advanced UAVs, advanced anti-air missiles, and long-distance strategic airlift. In line with the Chinese military's broader reforms, Chinese air forces are emphasizing joint operations and expanding their operations, such as through more frequent long range bomber flights into the Western Pacific and South China Sea. As a result of these technological and operational advances, the Chinese air forces will pose an increasing risk not only to our air forces but also to our naval forces, air bases and ground forces....

In the South China Sea, the PLA has constructed a variety of radar, electronic attack, and defense capabilities on the disputed Spratly Islands, to include: Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Hughes Reef, Johnson Reef, Mischief Reef and Subi Reef. These facilities significantly expand the real-time domain awareness, ISR, and jamming capabilities of the PLA over a large portion of the South China Sea, presenting a substantial challenge to U.S. military operations in this region....

China's development of forward military bases in the South China Sea began in December 2013 when the first dredger arrived at Johnson Reef. Through 2015, China used dredging efforts to build up these reefs and create manmade islands, destroying the reefs in the process. Since then, China has constructed clear military facilities on the islands, with several bases including hangars, barracks, underground fuel and water storage facilities, and bunkers to house offense and defensive kinetic and non-kinetic systems. These actions stand in direct contrast to the assertion that President Xi made in 2015 in the Rose Garden when he commented that Beijing had no intent to militarize the South China Sea. Today these forward operating bases appear complete. The only thing lacking are the deployed forces.

Once occupied, China will be able to extend its influence thousands of miles to the south and project power deep into Oceania. The PLA will be able to use these bases to challenge U.S. presence in the region, and any forces deployed to the islands would easily overwhelm the military forces of any other South China Sea-claimants. **In short, China is now capable of controlling the South China Sea in all scenarios short of war with the United States....**

Ultimately, BRI provides opportunities for China's military to expand its global reach by gaining access to foreign air and maritime port facilities. This reach will allow China's military to extend its striking and surveillance operations from the South China Sea to the Gulf of Aden. Moreover, Beijing could leverage BRI projects to pressure nations to deny

U.S. forces basing, transit, or operational and logistical support, thereby making it more challenging for the United States to preserve international orders and norms....

With respect to the Indo-Pacific region, specifically, I am concerned that some nations, including China, assert their interests in ways that threaten the foundational standards for the world's oceans as reflected in the Law of the Sea Convention. This trend is most evident off the coast of China and in the South China Sea where China's policies and activities are challenging the free and open international order in the air and maritime domains. China's attempts to restrict the rights, freedoms, and lawful uses of the sea available to naval and air forces is inconsistent with customary international law and as President Reagan said in the 1983 Statement on United States Oceans Policy, "the United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight."<sup>260</sup>

At a January 19, 2021, hearing before the Senate Armed Services Committee on the nomination of retired General Lloyd Austin to be Secretary of Defense, the following exchange occurred (emphasis added):

SENATOR ANGUS KING:

Now we're—we're turning our attention and have been for the last several years to the Asia Pacific and particularly to China. And I've asked a question of a number of people that have appeared before this committee—I'd like your thoughts on what does China want? What do you believe China's strategic goals are? Are they looking to be the dominant world power or regional hegemon? An economic power? What is their—what are their goals? Because it seems to me in order to determine how we best counter or cooperate we need to understand where they're headed.

RETIRED GENERAL LLOYD AUSTIN:

Yeah, I think it's all of that. **They're already a regional hegemon** and I think their goal is to be a dominant world power. And—and they are working across the spectrum to compete with us in a number of areas and it will take a whole of government approach to— to push back on their efforts in a credible way.

Not to say that we won't see things down the road that—that are in our best interest that we can cooperate with China on. But you know, we do things that are in our best interest. But certainly, some of the things that we've seen from them in recent past in terms of coercive behavior in the region and around the globe tend to—tend to make us believe that they really want to be a dominant world power.<sup>261</sup>

It has been a long-standing goal of U.S. grand strategy to prevent the emergence of a regional hegemon in one part of Eurasia or another.<sup>262</sup>

A March 11, 2023, press report stated:

Beijing is becoming the dominant force in the South China Sea, through which trillions of dollars in trade passes each year, a position it has advanced step-by-step over the past decade. With incremental moves that stay below the threshold of provoking conflict, China has gradually changed both the geography and the balance of power in the area.

<sup>260</sup> Advance Policy Questions for Admiral Philip Davidson, USN Expected Nominee for Commander, U.S. Pacific Command, pp. 8, 16, 17, 18, 19, and 43. See also Hannah Beech, "China's Sea Control Is a Done Deal, 'Short of War With the U.S.," *New York Times*, September 20, 2018.

<sup>261</sup> Transcript of hearing as provided by CQ.com.

<sup>262</sup> For further discussion, see CRS In Focus IF10485, *Defense Primer: Geography, Strategy, and U.S. Force Design*, by Ronald O'Rourke.



The disputed sea is ringed by China, Taiwan and Southeast Asian nations, but Beijing claims nearly all of it. It has turned reefs into artificial islands, then into military bases, with missiles, radar systems and air strips that are a problem for the U.S. Navy. It has built a large coast guard that among other things harasses offshore oil-and-gas operations of Southeast Asian nations, and a fishing militia that swarms the rich fishing waters, lingering for days.

The U.S. missed the moment to hold back China's buildup in part because it was focused on collaborating with Beijing on global issues such as North Korea and Iran, and was preoccupied by wars in Iraq and Afghanistan. China also stated outright in 2015 that it didn't intend to militarize the South China Sea...

Former U.S. and Southeast Asian officials and security analysts warn that China's gains in the waters are now so entrenched that, short of military conflict, they are unlikely to be reversed.

"They have such a reach now into the South China Sea with sea power and air power" they could obstruct or interfere with international trade, said retired Adm. Harry B. Harris Jr., who long was a senior naval officer in the region and led the U.S. Pacific Command from 2015 to 2018. The U.S. would have to decide if it would go to war with China if it carried out such actions, he said.<sup>263</sup>

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<sup>263</sup> Niharika Mandhana, "How Beijing Boxed America Out of the South China Sea," *Wall Street Journal*, March 11, 2023.

## Appendix G. U.S. Position on Issues Relating to SCS and ECS, and Operational Rights in EEZs

This appendix presents U.S. statements describing the U.S. position on issues relating to the SCS and ECS, and additional background information on the issue of operational rights of military ships in the EEZs of other countries.

### Issues Relating to SCS and ECS<sup>264</sup>

On July 13, 2020, then-Secretary of State Michael Pompeo issued a statement that strengthened, elaborated, and made more specific certain elements of the U.S. position. The text of the statement is as follows:

The United States champions a free and open Indo-Pacific. Today we are strengthening U.S. policy in a vital, contentious part of that region—the South China Sea. We are making clear: Beijing’s claims to offshore resources across most of the South China Sea are completely unlawful, as is its campaign of bullying to control them.

In the South China Sea, we seek to preserve peace and stability, uphold freedom of the seas in a manner consistent with international law, maintain the unimpeded flow of commerce, and oppose any attempt to use coercion or force to settle disputes. We share these deep and abiding interests with our many allies and partners who have long endorsed a rules-based international order.

These shared interests have come under unprecedented threat from the People’s Republic of China (PRC). Beijing uses intimidation to undermine the sovereign rights of Southeast Asian coastal states in the South China Sea, bully them out of offshore resources, assert unilateral dominion, and replace international law with “might makes right.” Beijing’s approach has been clear for years. In 2010, then-PRC Foreign Minister Yang Jiechi told his ASEAN counterparts that “China is a big country and other countries are small countries and that is just a fact.” The PRC’s predatory world view has no place in the 21<sup>st</sup> century.

The PRC has no legal grounds to unilaterally impose its will on the region. Beijing has offered no coherent legal basis for its “Nine-Dashed Line” claim in the South China Sea since formally announcing it in 2009. In a unanimous decision on July 12, 2016, an Arbitral Tribunal constituted under the 1982 Law of the Sea Convention—to which the PRC is a state party—rejected the PRC’s maritime claims as having no basis in international law. The Tribunal sided squarely with the Philippines, which brought the arbitration case, on almost all claims.

As the United States has previously stated, and as specifically provided in the Convention, the Arbitral Tribunal’s decision is final and legally binding on both parties. Today we are aligning the U.S. position on the PRC’s maritime claims in the SCS with the Tribunal’s decision. Specifically

- The PRC cannot lawfully assert a maritime claim—including any Exclusive Economic Zone (EEZ) claims derived from Scarborough Reef and the Spratly Islands—vis-a-vis the Philippines in areas that the Tribunal found to be in the Philippines’ EEZ or on its continental shelf. Beijing’s harassment of Philippine

<sup>264</sup> For examples of statements of the U.S. position other than those shown here, see Michael Pillsbury, ed., *A Guide to the Trump Administration’s China Policy Statements*, Hudson Institute, August 2020, 253 pp. Examples can be found in this publication by searching on terms such as “South China Sea,” “East China Sea,” “freedom of navigation,” and “freedom of the seas.”

fisheries and offshore energy development within those areas is unlawful, as are any unilateral PRC actions to exploit those resources. In line with the Tribunal's legally binding decision, the PRC has no lawful territorial or maritime claim to Mischief Reef or Second Thomas Shoal, both of which fall fully under the Philippines' sovereign rights and jurisdiction, nor does Beijing have any territorial or maritime claims generated from these features.

- As Beijing has failed to put forth a lawful, coherent maritime claim in the South China Sea, the United States rejects any PRC claim to waters beyond a 12-nautical mile territorial sea derived from islands it claims in the Spratly Islands (without prejudice to other states' sovereignty claims over such islands). As such, the United States rejects any PRC maritime claim in the waters surrounding Vanguard Bank (off Vietnam), Luconia Shoals (off Malaysia), waters in Brunei's EEZ, and Natuna Besar (off Indonesia). Any PRC action to harass other states' fishing or hydrocarbon development in these waters—or to carry out such activities unilaterally—is unlawful.
- The PRC has no lawful territorial or maritime claim to (or derived from) James Shoal, an entirely submerged feature only 50 nautical miles from Malaysia and some 1,000 nautical miles from China's coast. James Shoal is often cited in PRC propaganda as the “southernmost territory of China.” International law is clear: An underwater feature like James Shoal cannot be claimed by any state and is incapable of generating maritime zones. James Shoal (roughly 20 meters below the surface) is not and never was PRC territory, nor can Beijing assert any lawful maritime rights from it.

The world will not allow Beijing to treat the South China Sea as its maritime empire. America stands with our Southeast Asian allies and partners in protecting their sovereign rights to offshore resources, consistent with their rights and obligations under international law. We stand with the international community in defense of freedom of the seas and respect for sovereignty and reject any push to impose “might makes right” in the South China Sea or the wider region.<sup>265</sup>

An April 9, 2020, DOD statement stated

The Department of Defense is greatly concerned by reports of a China Coast Guard vessel's collision with and sinking of a Vietnam fishing vessel in the vicinity of the Paracel Islands in the South China Sea.

The PRC's behavior stands in contrast to the United States' vision of a free and open Indo-Pacific region, in which all nations, large and small, are secure in their sovereignty, free from coercion, and able to pursue economic growth consistent with accepted international rules and norms. The United States will continue to support efforts by our allies and partners to ensure freedom of navigation and economic opportunity throughout the entire Indo-Pacific.

The COVID-19 pandemic underscores the importance of the rules based international order, as it sets the conditions that enable us to address this shared threat in a way that is transparent, focused, and effective. We call on all parties to refrain from actions that would destabilize the region, distract from the global response to the pandemic, or risk needlessly contributing to loss of life and property.<sup>266</sup>

In an April 22, 2020, statement, then-Secretary of State Mike Pompeo stated

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<sup>265</sup> Department of State, “U.S. Position on Maritime Claims in the South China Sea,” press statement, Michael R. Pompeo, Secretary of State, July 13, 2020.

<sup>266</sup> Department of Defense, “China Coast Guard Sinking of a Vietnam Fishing Vessel,” April 9, 2020.

Even as we fight the [COVID-19] outbreak, we must remember that the long-term threats to our shared security have not disappeared. In fact, they've become more prominent. Beijing has moved to take advantage of the distraction, from China's new unilateral announcement of administrative districts over disputed islands and maritime areas in the South China Sea, its sinking of a Vietnamese fishing vessel earlier this month, and its "research stations" on Fiery Cross Reef and Subi Reef. The PRC continues to deploy maritime militia around the Spratly Islands and most recently, the PRC has dispatched a flotilla that included an energy survey vessel for the sole purpose of intimidating other claimants from engaging in offshore hydrocarbon development. It is important to highlight how the Chinese Communist Party (CCP) is exploiting the world's focus on the COVID-19 crisis by continuing its provocative behavior. The CCP is exerting military pressure and coercing its neighbors in the SCS, even going so far as to sink a Vietnamese fishing vessel. The U.S. strongly opposes China's bullying and we hope other nations will hold them to account too.<sup>267</sup>

An April 29, 2020, statement from the U.S. Navy 7<sup>th</sup> Fleet stated

Unlawful and sweeping maritime claims in the South China Sea pose a serious threat to the freedom of the seas, including the freedoms of navigation and overflight and the right of innocent passage of all ships.

The U.S. position on the South China Sea is no different than that of any other area around the world where the international law of the sea as reflected in the 1982 Law of the Sea Convention provides for certain rights and freedoms and other lawful uses of the sea to all nations. The international community has an enduring role in preserving the freedom of the seas, which is critical to global security, stability, and prosperity.

As long as some countries continue to claim and assert limits on rights that exceed what is provided for under international law as reflected in the Law of the Sea Convention, the United States will continue to demonstrate its resolve to uphold these rights and freedoms for all. No member of the international community should be intimidated or coerced into giving up their rights and freedoms.

China, Taiwan, Vietnam, Malaysia, Brunei and the Philippines each claim sovereignty over some or all of the Spratly Islands. China, Vietnam, and Taiwan purport to require either permission or advance notification before a military vessel or warship engages in "innocent passage" through the territorial sea. Under international law as reflected in the Law of the Sea Convention, the ships of all States—including their warships—enjoy the right of innocent passage through the territorial sea. The unilateral imposition of any authorization or advance-notification requirement for innocent passage is not permitted by international law, so the United States challenged those requirements. By engaging in innocent passage[s] without giving prior notification to or asking permission from any of the claimants, the United States challenge[s] the unlawful restrictions imposed by China, Taiwan, and Vietnam. The United States demonstrated that innocent passage may not be subject to such restrictions.

U.S. forces operate in the South China Sea on a daily basis, as they have for more than a century. All of our operations are designed to be conducted in accordance with international law and demonstrate the United States will fly, sail, and operate wherever

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<sup>267</sup> Department of State, "The United States and ASEAN are Partnering to Defeat COVID-19, Build Long-Term Resilience, and Support Economic Recovery," Press Statement, Michael R. Pompeo, Secretary of State, April 22, 2020. See also A. Ananthakshmi and Rozanna Latiff, "U.S. Says China Should Stop 'Bullying Behaviour' in South China Sea," *Reuters*, April 18, 2020; Gordon Lubold and Dion Nissenbaum, "With Trump Facing Virus Crisis, U.S. Warns Rivals Not to Seek Advantage," *Wall Street Journal*, April 20, 2020; Brad Lendon, "Coronavirus may be giving Beijing an opening in the South China Sea," *CNN*, April 7, 2020; Agence France-Presse, "US Warns China Not to 'Exploit' Virus for Sea Disputes," *Channel News Asia*, April 6, 2020.

international law allows—regardless of the location of excessive maritime claims and regardless of current events.

The United States upholds freedom of navigation as a principle. The Freedom of Navigation Program’s missions are conducted peacefully and without bias for or against any particular country. These missions are based in the rule of law and demonstrate our commitment to upholding the rights, freedoms, and lawful uses of the sea and airspace guaranteed to all nations.<sup>268</sup>

Regarding a call between Secretary of State Antony Blinken and Philippine Secretary of Foreign Affairs Locsin, a January 27, 2021, State Department statement stated that in the call, Blinken

reaffirmed that a strong U.S.-Philippine Alliance is vital to a free and open Indo-Pacific region. Secretary Blinken stressed the importance of the Mutual Defense Treaty for the security of both nations, and its clear application to armed attacks against the Philippine armed forces, public vessels, or aircraft in the Pacific, which includes the South China Sea. Secretary Blinken also underscored that the United States rejects China’s maritime claims in the South China Sea to the extent they exceed the maritime zones that China is permitted to claim under international law as reflected in the 1982 Law of the Sea Convention. Secretary Blinken pledged to stand with Southeast Asian claimants in the face of PRC pressure.<sup>269</sup>

On February 19, 2021, the State Department stated that

we reaffirm the [above-cited] statement of July 13<sup>th</sup>, 2020 [by then-Secretary of State Pompeo] regarding China’s unlawful and excessive maritime claims in the South China Sea. Our position on the PRC’s maritime claims remains aligned with the 2016 Arbitral Tribunal’s finding that China has no lawful claim in areas it found to be in the Philippines exclusive economic zone or continental shelf.

We also reject any PRC claim to waters beyond the 12 nautical mile territorial sea from islands it claims in the Spratlys. China’s harassment in these areas of other claimants, state hydrocarbon exploration or fishing activity, or unilateral exploitation of those maritime resources is unlawful.<sup>270</sup>

On March 16, 2021, following a U.S.-Japan “2+2” ministerial meeting that day in Tokyo between Secretary of State Blinken, Secretary of Defense Lloyd Austin, Japanese Foreign Minister Toshimitsu Motegi, and Japanese Defense Minister Nobuo Kishi, the U.S.-Japan Security Consultative Committee released a U.S.-Japan joint statement for the press that stated in part:

Amid growing geopolitical competition and challenges such as COVID-19, climate change, and revitalizing democracy, the United States and Japan renewed their commitment to promoting a free and open Indo-Pacific and a rules-based international order.

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<sup>268</sup> Source: Text of statement as reprinted in Sam LaGrone, “USS Bunker Hill Conducts 2<sup>nd</sup> South China Sea Freedom of Navigation Operation This Week,” *USNI News*, April 29, 2020. The 7<sup>th</sup> Fleet issued the statement in connection with a freedom of navigation (FON) operation conducted by a U.S. Navy ship in the South China Sea on April 29, 2020, that is shown in **Table 2**.

<sup>269</sup> Department of State, “Secretary Blinken’s Call with Philippine Secretary of Foreign Affairs Locsin,” January 27, 2021. See also Mohammad Zargham and Karen Lema, “U.S. Stands with SE Asian Countries Against China Pressure, Blinken Says,” *Reuters*, January 27 (updated January 28), 2021; Sebastian Strangio, “Biden Administration Reaches out to Southeast Asian Allies,” *Diplomat*, January 28, 2021; Ken Moriyasu, “US Vows to Defend Philippines, Including in South China Sea,” *Nikkei Asia*, January 29, 2021; Frances Mangosing, “New Pentagon Chief Commits Support for PH in South China Sea,” *Philippine Daily Inquirer*, February 10, 2021.

<sup>270</sup> U.S. Department of State, “Department Press Briefing—February 19, 2021,” Ned Price, Department Spokesperson, Washington, DC, February 19, 2021.

The United States and Japan acknowledged that China's behavior, where inconsistent with the existing international order, presents political, economic, military, and technological challenges to the Alliance and to the international community. The Ministers committed to opposing coercion and destabilizing behavior toward others in the region, which undermines the rules-based international system. They reaffirmed their support for unimpeded lawful commerce and respect for international law, including freedom of navigation and overflight and other lawful uses of the sea. The Ministers also expressed serious concerns about recent disruptive developments in the region, such as the China Coast Guard law. Further, they discussed the United States' unwavering commitment to the defense of Japan under Article V of our security treaty, which includes the Senkaku Islands. The United States and Japan remain opposed to any unilateral action that seeks to change the status quo or to undermine Japan's administration of these islands. The Ministers underscored the importance of peace and stability in the Taiwan Strait. They reiterated their objections to China's unlawful maritime claims and activities in the South China Sea and recalled that the July 2016 award of the Philippines-China arbitral tribunal, constituted under the 1982 Law of the Sea Convention, is final and legally binding on the parties.<sup>271</sup>

A July 11, 2021, statement from Secretary of State Antony Blinken issued in connection with the fifth anniversary of the July 12, 2016, arbitral tribunal ruling on the South China Sea stated

Freedom of the seas is an enduring interest of all nations and is vital to global peace and prosperity. The international community has long benefited from the rules-based maritime order, where international law, as reflected in the UN Law of the Sea Convention, sets out the legal framework for all activities in the oceans and seas. This body of international law forms the basis for national, regional, and global action and cooperation in the maritime sector and is vital to ensuring the free flow of global commerce.

Nowhere is the rules-based maritime order under greater threat than in the South China Sea. The People's Republic of China (PRC) continues to coerce and intimidate Southeast Asian coastal states, threatening freedom of navigation in this critical global throughway.

Five years ago, an Arbitral Tribunal constituted under the 1982 Law of the Sea Convention delivered a unanimous and enduring decision firmly rejecting the PRC's expansive South China Sea maritime claims as having no basis in international law. The Tribunal stated that the PRC has no lawful claim to the area determined by the Arbitral Tribunal to be part of the Philippines' exclusive economic zone and continental shelf. The PRC and the Philippines, pursuant to their treaty obligations under the Law of the Sea Convention, are legally bound to comply with this decision.

The United States reaffirms its July 13, 2020 policy regarding maritime claims in the South China Sea. We also reaffirm that an armed attack on Philippine armed forces, public vessels, or aircraft in the South China Sea would invoke U.S. mutual defense commitments under Article IV of the 1951 U.S.-Philippines Mutual Defense Treaty.

We call on the PRC to abide by its obligations under international law, cease its provocative behavior, and take steps to reassure the international community that it is committed to the rules-based maritime order that respects the rights of all countries, big and small.<sup>272</sup>

A November 19, 2021, press statement by the State Department stated

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<sup>271</sup> Department of State, "U.S.-Japan Joint Press Statement," Media Note, Office of the Spokesperson, March 16, 2021. See also Lara Jakes, Motoko Rich and John Ismay, "Visiting Japan, Top U.S. Envoys Set Combative Tone for China Talks," *New York Times*, March 16, 2021.

<sup>272</sup> State Department, "Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea," press statement, Antony J. Blinken, Secretary of State, July 11, 2021. See also Jennifer Hansler and Brad Lendon, "US Warns China It Stands Behind South China Sea Ruling and Is Committed to Philippine Defense," *CNN*, July 12, 2021.

Two days ago, the People's Republic of China (PRC) Coast Guard blocked and used water cannons against Philippine resupply ships en route to Second Thomas Shoal in the South China Sea.

The United States stands with our ally, the Philippines, in the face of this escalation that directly threatens regional peace and stability, escalates regional tensions, infringes upon freedom of navigation in the South China Sea as guaranteed under international law, and undermines the rules-based international order.

On July 12, 2016, an Arbitral Tribunal constituted under the 1982 Law of the Sea Convention, delivered a unanimous and enduring decision firmly rejecting the PRC's claims to Second Thomas Shoal and to waters determined to be part of the Philippines' exclusive economic zone. The PRC and the Philippines, pursuant to their treaty obligations under the Law of the Sea Convention, are legally bound to comply with this decision. The PRC should not interfere with lawful Philippine activities in the Philippines' exclusive economic zone.

The United States stands with our Philippine allies in upholding the rules-based international maritime order and reaffirms that an armed attack on Philippine public vessels in the South China Sea would invoke U.S. mutual defense commitments under Article IV of the 1951 U.S. Philippines Mutual Defense Treaty.

The United States strongly believes that PRC actions asserting its expansive and unlawful South China Sea maritime claims undermine peace and security in the region.<sup>273</sup>

On January 12, 2022, the State Department released a document entitled *Limits in the Seas No. 150, People's Republic of China: Maritime Claims in the South China Sea*. In releasing the document, the State Department stated

The Department's *Limits in the Seas* studies are a longstanding legal and technical series that examine national maritime claims and boundaries and assess their consistency with international law. This most recent study, the 150th in the *Limits in the Seas* series, concludes that the PRC asserts unlawful maritime claims in most of the South China Sea, including an unlawful historic rights claim.

This study builds on the Department's 2014 analysis of the PRC's ambiguous "dashed-line" claim in the South China Sea.<sup>274</sup> Since 2014, the PRC has continued to assert claims to a wide swath of the South China Sea as well as to what the PRC has termed "internal waters" and "outlying archipelagos," all of which are inconsistent with international law as reflected in the 1982 Law of the Sea Convention.<sup>275</sup>

The executive summary of *Limits in the Seas No. 150* states in part:

The PRC's expansive maritime claims in the South China Sea are inconsistent with international law as reflected in the 1982 United Nations Convention on the Law of the Sea ("Convention")....

The PRC claims "sovereignty" over more than one hundred features in the South China Sea that are submerged below the sea surface at high tide and are beyond the lawful limits of any State's territorial sea. Such claims are inconsistent with international law, under

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<sup>273</sup> Department of State, "On the Situation in the South China Sea," press statement, Ned Price, Department Spokesperson, November 19, 2021. See also Bill Gertz, "U.S. Threatens Military Response to China in South China Sea Dispute," *Washington Times*, November 19, 2021.

<sup>274</sup> Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 143 China: Maritime Claims in the South China Sea*, December 5, 2014, 24 pp.

<sup>275</sup> Department of State, "Study on the People's Republic of China's South China Sea Maritime Claims," Media Note, Office of the Spokesperson, January 12, 2022.

which such features are not subject to a lawful sovereignty claim or capable of generating maritime zones such as a territorial sea....

The PRC has either drawn, or asserts the right to draw, “straight baselines” that enclose the islands, waters, and submerged features within vast areas of ocean space in the South China Sea. None of the four “island groups” claimed by the PRC in the South China Sea (“Dongsha Qundao,” “Xisha Qundao,” “Zhongsha Qundao,” and “Nansha Qundao”) meet the geographic criteria for using straight baselines under the Convention. Additionally, there is no separate body of customary international law that supports the PRC position that it may enclose entire island groups within straight baselines....

The PRC asserts claims to internal waters, a territorial sea, an exclusive economic zone, and a continental shelf that are based on treating each claimed South China Sea island group “as a whole.” This is not permitted by international law. The seaward extent of maritime zones must be measured from lawfully established baselines, which are normally the low-water line along the coast. Within its claimed maritime zones, the PRC also makes numerous jurisdictional claims that are inconsistent with international law.

The PRC asserts that it has “historic rights” in the South China Sea. This claim has no legal basis and is asserted by the PRC without specificity as to the nature or geographic extent of the “historic rights” claimed.

The overall effect of these maritime claims is that the PRC unlawfully claims sovereignty or some form of exclusive jurisdiction over most of the South China Sea. These claims gravely undermine the rule of law in the oceans and numerous universally-recognized provisions of international law reflected in the Convention. For this reason, the United States and numerous other States have rejected these claims in favor of the rules-based international maritime order within the South China Sea and worldwide.<sup>276</sup>

On December 19, 2022, the State Department stated

The United States supports the Philippines’ continued calls upon the People’s Republic of China (PRC) to respect the international law of the sea in the South China Sea, as reflected in the UN Convention on the Law of the Sea, and its legal obligations pursuant to the 2016 arbitral ruling. The reported escalating swarms of PRC vessels in the vicinity of Iroquois Reef and Sabina Shoal in the Spratly Islands interfere with the livelihoods of Philippine fishing communities, and also reflect continuing disregard for other South China Sea claimants and states lawfully operating in the region. Furthermore, we share the Philippines’ concerns regarding the unsafe encounter that the PRC Coast Guard initiated with Philippines naval forces in the South China Sea, as documented before the Senate of the Philippines on December 14.

The United States stands with our ally, the Philippines, in upholding the rules-based international order and freedom of navigation in the South China Sea as guaranteed under international law.<sup>277</sup>

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<sup>276</sup> Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150, People’s Republic of China: Maritime Claims in the South China Sea*, January 2022, p. 1. Along with *Limits in the Seas No. 150*, the State Department also released a supplementary document, Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150, People’s Republic of China: Maritime Claims in the South China Sea, State Practice Supplement*, January 2022, 94 pp. The various *Limits in the Seas* studies are pasted at <https://www.state.gov/limits-in-the-seas/>.

For articles discussing *Limits in the Seas No. 150*, see, for example, John Grady, “Panel: New U.S. South China Sea Report Designed to Push Back Against Beijing’s Expansive Claims,” *USNI News*, January 25, 2022; Alec Caruana, “Having its Cake and Eating it Too, The U.S. and State Practice in Outlying Archipelagos,” *Institute for China-America Studies*, January 18, 2022.

<sup>277</sup> Department of State, “U.S. Support for the Philippines in the South China Sea,” press statement, Office of the Spokesperson, December 19, 2022.



On February 13, 2023, the State Department stated

The United States stands with our Philippine allies in the face of the People’s Republic of China (PRC) Coast Guard’s reported use of laser devices against the crew of a Philippine Coast Guard ship on February 6 in the South China Sea. The PRC’s conduct was provocative and unsafe, resulting in the temporary blindness of the crewmembers of the BRP Malapascua and interfering with the Philippines’ lawful operations in and around Second Thomas Shoal. More broadly, the PRC’s dangerous operational behavior directly threatens regional peace and stability, infringes upon freedom of navigation in the South China Sea as guaranteed under international law, and undermines the rules-based international order.

As reflected in an international tribunal’s legally binding decision issued in July 2016, the People’s Republic of China has no lawful maritime claims to Second Thomas Shoal. The United States reiterates, pursuant to the 1982 Law of the Sea Convention, the 2016 arbitral decision is final and legally binding on the PRC and the Philippines, and we call upon the PRC to abide by the ruling.

The United States stands with our Philippine allies in upholding the rules-based international maritime order and reaffirms an armed attack on Philippine armed forces, public vessels, or aircraft, including those of the Coast Guard in the South China Sea, would invoke U.S. mutual defense commitments under Article IV of the 1951 U.S. Philippines Mutual Defense Treaty.<sup>278</sup>

A July 11, 2023, press statement by the State Department stated:

Today marks the seventh anniversary of an Arbitral Tribunal constituted under the 1982 Law of the Sea Convention firmly rejecting the People’s Republic of China’s (PRC) expansive South China Sea maritime claims, including any PRC claim to the area determined by the Arbitral Tribunal to be part of the Philippines’ exclusive economic zone and continental shelf, as well as any resources therein. Under the terms of the Convention, this ruling is final and legally binding on the Philippines and the PRC.

The United States reaffirms its July 13, 2020, policy regarding maritime claims in the South China Sea. We continue to urge Beijing to comport its maritime claims with international law as reflected in the 1982 Law of the Sea Convention; cease its routine harassment of claimant state vessels lawfully operating in their respective exclusive economic zones; halt its disruption to states’ sovereign rights to explore, exploit, conserve, and manage natural resources; and end its interference with the freedoms of navigation and overflight of states lawfully operating in the region.

We will continue working with allies and partners to advance a free and open Indo-Pacific, one that is at peace and grounded in respect for international law.<sup>279</sup>

An August 5, 2023, press statement by the State Department stated

The United States stands with our Philippine allies in the face of dangerous actions by the Coast Guard and maritime militia of the People’s Republic of China (PRC) to obstruct an August 5 Philippine resupply mission to Second Thomas Shoal in the South China Sea. Firing water cannons and employing unsafe blocking maneuvers, PRC ships interfered

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<sup>278</sup> Department of State, “U.S. Support for the Philippines in the South China Sea,” press statement, Ned Price, Department Spokesperson, February 13, 2023. See also Jim Gomez, “US Renews Warning It’ll Defend Philippines after China Spat,” *Associated Press*, February 14, 2023; Julia Mueller, “US Warns It Will Defend Philippines after China Laser Report,” *The Hill*, February 14, 2023; Niha Masih, “U.S. Criticizes China’s Use of Laser on Philippine Coast Guard,” *Washington Post*, February 13, 2023.

<sup>279</sup> Department of State, “Seventh Anniversary of the Philippines–China South China Sea Arbitral Tribunal Ruling,” Press Statement, Matthew Miller, Department Spokesperson, July 11, 2023.

with the Philippines' lawful exercise of high seas freedom of navigation and jeopardized the safety of the Philippine vessels and crew.

Such actions by the PRC are inconsistent with international law and are the latest in repeated threats to the status quo in the South China Sea, directly threatening regional peace and stability. By impeding necessary provisions from reaching the Filipino servicemembers stationed at Second Thomas Shoal, the PRC has also undertaken unwarranted interference in lawful Philippine maritime operations.

As made clear by an international tribunal's legally binding decision issued in July 2016, the PRC has no lawful claim to the maritime area around Second Thomas Shoal, which is located well within the Philippines' exclusive economic zone.

The United States reiterates, pursuant to the 1982 Law of the Sea Convention, the arbitral decision is final and legally binding on the PRC and the Philippines. The United States calls upon the PRC to abide by the arbitral ruling as well as to respect the freedom of navigation – a right to which all states are entitled.

The United States reaffirms an armed attack on Philippine public vessels, aircraft, and armed forces—including those of its Coast Guard in the South China Sea—would invoke U.S. mutual defense commitments under Article IV of the 1951 U.S. Philippines Mutual Defense Treaty.<sup>280</sup>

## **Operational Rights in EEZs**

Regarding a coastal state's rights within its EEZ, Scot Marciel, then-Deputy Assistant Secretary, Bureau of East Asian and Pacific Affairs, stated the following as part of his prepared statement for a July 15, 2009, hearing before the East Asian and Pacific Affairs Subcommittee of the Senate Foreign Relations Committee:

I would now like to discuss recent incidents involving China and the activities of U.S. vessels in international waters within that country's Exclusive Economic Zone (EEZ). In March 2009, the survey ship USNS Impeccable was conducting routine operations, consistent with international law, in international waters in the South China Sea. Actions taken by Chinese fishing vessels to harass the Impeccable put ships of both sides at risk, interfered with freedom of navigation, and were inconsistent with the obligation for ships at sea to show due regard for the safety of other ships. We immediately protested those actions to the Chinese government, and urged that our differences be resolved through established mechanisms for dialogue—not through ship-to-ship confrontations that put sailors and vessels at risk.

Our concern over that incident centered on China's conception of its legal authority over other countries' vessels operating in its Exclusive Economic Zone (EEZ) and the unsafe way China sought to assert what it considers its maritime rights.

China's view of its rights on this specific point is not supported by international law. We have made that point clearly in discussions with the Chinese and underscored that U.S. vessels will continue to operate lawfully in international waters as they have done in the past.<sup>281</sup>

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<sup>280</sup> Department of State, "U.S. Support for the Philippines in the South China Sea," Press Statement, Matthew Miller, Department Spokesperson, August 5, 2023.

<sup>281</sup> [Statement of] Deputy Assistant Secretary Scot Marciel, Bureau of East Asian & Pacific Affairs, U.S. Department of State, before the Subcommittee on East Asian and Pacific Affairs, Committee on Foreign Relations, United States Senate, July 15, 2009, [hearing on] Maritime Issues and Sovereignty Disputes in East Asia, p. 5.

As part of his prepared statement for the same hearing, Robert Scher, then-Deputy Assistant Secretary of Defense, Asian and Pacific Security Affairs, Office of the Secretary of Defense, stated that

we reject any nation's attempt to place limits on the exercise of high seas freedoms within an exclusive economic zones [sic] (EEZ). Customary international law, as reflected in articles 58 and 87 of the 1982 United Nations Convention on the Law of the Sea, guarantees to all nations the right to exercise within the EEZ, high seas freedoms of navigation and overflight, as well as the traditional uses of the ocean related to those freedoms. It has been the position of the United States since 1982 when the Convention was established, that the navigational rights and freedoms applicable within the EEZ are qualitatively and quantitatively the same as those rights and freedoms applicable on the high seas. We note that almost 40% of the world's oceans lie within the 200 nautical miles EEZs, and it is essential to the global economy and international peace and security that navigational rights and freedoms within the EEZ be vigorously asserted and preserved.

As previously noted, our military activity in this region is routine and in accordance with customary international law as reflected in the 1982 Law of the Sea Convention.<sup>282</sup>

As mentioned earlier in the report, if China's position on whether coastal states have a right under UNCLOS to regulate the activities of foreign military forces in their EEZs were to gain greater international acceptance under international law, it could substantially affect U.S. naval operations not only in the SCS and ECS (see **Figure G-1** for EEZs in the SCS and ECS), but around the world, which in turn could substantially affect the ability of the United States to use its military forces to defend various U.S. interests overseas. As shown in **Figure G-2**, significant portions of the world's oceans are claimable as EEZs, including high-priority U.S. Navy operating areas in the Western Pacific, the Persian Gulf, and the Mediterranean Sea.<sup>283</sup>

Some observers, in commenting on China's resistance to U.S. military survey and surveillance operations in China's EEZ, have argued that the United States would similarly dislike it if China or some other country were to conduct military survey or surveillance operations within the U.S. EEZ. Skeptics of this view argue that U.S. policy accepts the right of other countries to operate their military forces freely in waters outside the 12-mile U.S. territorial waters limit, and that the United States during the Cold War acted in accordance with this position by not interfering with either Soviet ships (including intelligence-gathering vessels known as AGIs)<sup>284</sup> that operated

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<sup>282</sup> Testimony [prepared statement] of Deputy Assistant Secretary of Defense Robert Scher, Asian and Pacific Security Affairs, Office of the Secretary of Defense, before the Subcommittee on East Asian and Pacific Affairs, Senate Committee on Foreign Relations, United States Senate, July 15, 2009, [hearing on] Maritime Issues and Sovereignty Disputes in East Asia, pp. 3-4. See also Raul (Pete) Pedrozo, "Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone," *Chinese Journal of International Law*, 2010: 9-29.

<sup>283</sup> The National Oceanic and Atmospheric Administration (NOAA) calculates that EEZs account for about 30.4% of the world's oceans. (See the table called "Comparative Sizes of the Various Maritime Zones" at the end of "Maritime Zones and Boundaries, accessed May 31, 2023, at <https://www.noaa.gov/maritime-zones-and-boundaries>, which states that EEZs account for 101.9 million square kilometers of the world's approximately 335.0 million square kilometers of oceans.)

<sup>284</sup> AGI was a U.S. Navy classification for the Soviet vessels in question in which the A meant auxiliary ship, the G meant miscellaneous purpose, and the I meant that the miscellaneous purpose was intelligence gathering. One observer states the following:

During the Cold War it was hard for an American task force of any consequence to leave port without a Soviet "AGI" in trail. These souped-up fishing trawlers would shadow U.S. task forces, joining up just outside U.S. territorial waters. So ubiquitous were they that naval officers joked about assigning the AGI a station in the formation, letting it follow along—as it would anyway—without obstructing fleet operations.

(continued...)

close to the United States or with Soviet bombers and surveillance aircraft that periodically flew close to U.S. airspace.

**Figure G-1. EEZs in South China Sea and East China Sea**



**Source:** Map prepared by CRS using basemaps provided by Esri. EEZs are from the Flanders Marine Institute (VLIZ) (2011). Maritime Boundaries Geodatabase, version 6. Available at <http://www.vliz.be/vmdcdata/marbound>.

**Note:** Disputed islands have been enlarged to make them more visible.

The U.S. Navy states that

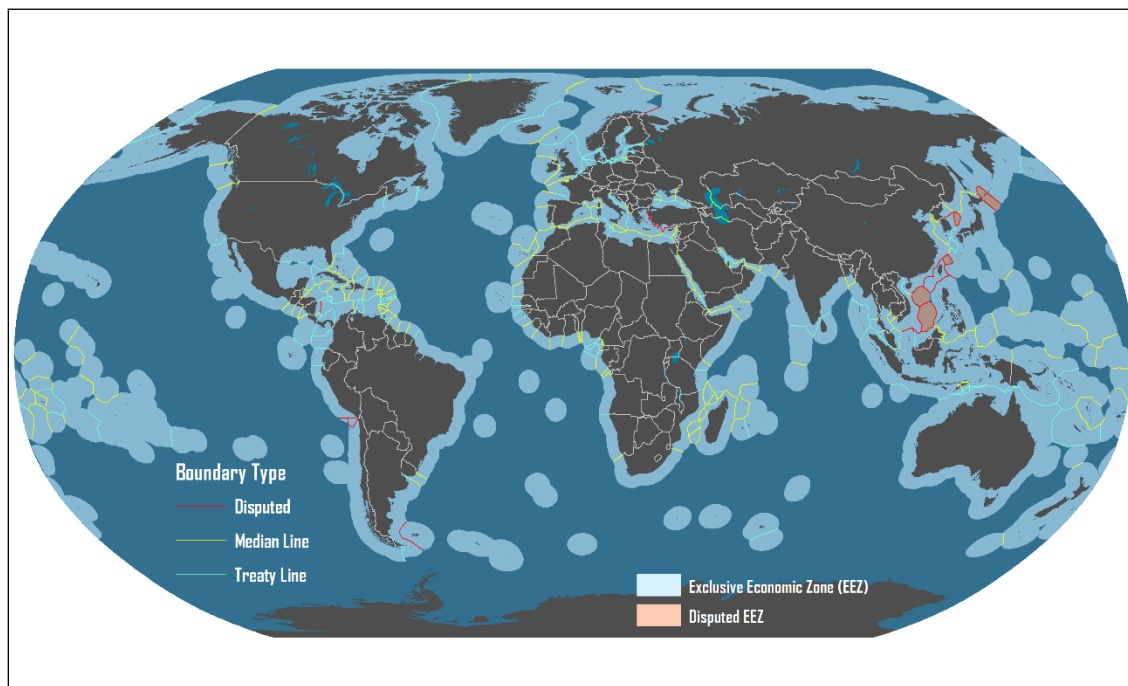
When the commonly recognized outer limit of the territorial sea under international law was three nautical miles, the United States recognized the right of other states, including the Soviet Union, to exercise high seas freedoms, including surveillance and other military

AGIs were configured not just to cast nets, but to track ship movements, gather electronic intelligence, and observe the tactics, techniques, and procedures by which American fleets transact business in great waters.

(James R. Holmes, "China's Small Stick Diplomacy," *The Diplomat*, May 21, 2012.

operations, beyond that limit. The 1982 Law of the Sea Convention moved the outer limit of the territorial sea to twelve nautical miles. In 1983, President Reagan declared that the United States would accept the balance of the interests relating to the traditional uses of the oceans reflected in the 1982 Convention and would act in accordance with those provisions in exercising its navigational and overflight rights as long as other states did likewise. He further proclaimed that all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight, in the Exclusive Economic Zone he established for the United States consistent with the 1982 Convention.<sup>285</sup>

**Figure G-2. Claimable World EEZs**



**Source:** Map designed by Dr. Jean-Paul Rodrigue, Department of Global Studies & Geography, Hofstra University, using boundaries plotted from Maritime Boundaries Geodatabase available at <http://www.vliz.be/vmdcdata/marbound>. The map is copyrighted and used here with permission. A version of the map is available at <http://people.hofstra.edu/geotrans/eng/ch5en/conc5en/EEZ.html>.

In July 2014, China participated, for the first time, in the biennial U.S.-led Rim of the Pacific (RIMPAC) naval exercise, the world's largest multilateral naval exercise. In addition to the four ships that China sent to participate in RIMPAC, China sent an uninvited intelligence-gathering ship to observe the exercise without participating in it.<sup>286</sup> The ship conducted operations inside U.S. EEZ off Hawaii, where the exercise was located. A July 29, 2014, press report stated that

<sup>285</sup> Navy Office of Legislative Affairs email to CRS dated September 4, 2012.

<sup>286</sup> See, for example, Sam LaGrone, "China Sends Uninvited Spy Ship to RIMPAC," *USNI News*, July 18, 2014; William Cole, "Chinese Spy Ship Off Hawaii Keeps Track of RIMPAC," *Star Advertiser*, July 18, 2014; Jeremy Page, "Chinese Ship Spies on U.S.-Led Drills," *Wall Street Journal*, July 19, 2014; Andrew S. Erickson and Emily de La Bruyere, "Crashing Its Own Party: China's Unusual Decision to Spy On Joint Naval Exercises," *Wall Street Journal, China Real Time*, July 19, 2014; Phil Stewart, "Update 1—China Sends Spy Ship Off Hawaii During U.S.-Led Drills," *Reuters*, July 21, 2014.

The high profile story of a Chinese surveillance ship off the coast of Hawaii could have a positive aspect for U.S. operations in the Pacific, the head of U.S. Pacific Command (PACOM) said in a Tuesday [July 29] afternoon briefing with reporters at the Pentagon.

“The good news about this is that it’s a recognition, I think, or acceptance by the Chinese for what we’ve been saying to them for sometime,” PACOM commander Adm. Samuel Locklear told reporters.

“Military operations and survey operations in another country’s [Exclusive Economic Zone]—where you have your own national security interest—are within international law and are acceptable. This is a fundamental right nations have.”<sup>287</sup>

One observer stated the following:

The unprecedented decision [by China] to send a surveillance vessel while also participating in the RIMPAC exercises calls China’s proclaimed stance on international navigation rights [in EEZ waters] into question...

During the Cold War, the U.S. and Soviets were known for spying on each other’s exercises. More recently, Beijing sent what U.S. Pacific Fleet spokesman Captain Darryn James called “a similar AGI ship” to Hawaii to monitor RIMPAC 2012—though that year, China was not an official participant in the exercises....

... the spy ship’s presence appears inconsistent with China’s stance on military activities in Exclusive Economic Zones (EEZs).... That Beijing’s AGI [intelligence-gathering ship] is currently stationed off the coast of Hawaii suggests either a double standard that could complicate military relations between the United States and China, or that some such surveillance activities are indeed legitimate—and that China should clarify its position on them to avoid perceptions that it is trying to have things both ways....

In its response to the Chinese vessel’s presence, the USN has shown characteristic restraint. Official American policy permits surveillance operations within a nation’s EEZ, provided they remain outside of that nation’s 12-nautical mile territorial sea (an EEZ extends from 12 to 200 nautical miles unless this would overlap with another nation’s EEZ). U.S. military statements reflect that position unambiguously....

That consistent policy stance and accompanying restraint have characterized the U.S. attitude toward foreign surveillance activity since the Cold War. Then, the Soviets were known for sending converted fishing ships equipped with surveillance equipment to the U.S. coast, as well as foreign bases, maritime choke points, and testing sites. The U.S. was similarly restrained in 2012, when China first sent an AGI to observe RIMPAC....

China has, then, sent a surveillance ship to observe RIMPAC in what appears to be a decidedly intentional, coordinated move—and in a gesture that appears to contradict previous Chinese policy regarding surveillance and research operations (SROs). The U.S. supports universal freedom of navigation and the right to conduct SROs in international waters, including EEZs, hence its restraint when responding to the current presence of the Chinese AGI. But the PRC opposes such activities, particularly on the part of the U.S., in its own EEZ....

How then to reconcile the RIMPAC AGI with China’s stand on surveillance activities? China maintains that its current actions are fully legal, and that there is a distinct difference between its operations off Hawaii and those of foreign powers in its EEZ. The PLAN’s designated point of contact declined to provide information and directed inquiries to China’s Defense Ministry. In a faxed statement to Reuters, the Defense Ministry stated that Chinese vessels had the right to operate “in waters outside of other country’s territorial

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<sup>287</sup> Sam LaGrone, “U.S. Pacific Commander: Chinese Spy Ship Off Hawaii Has An Upside,” *USNI News*, July 29, 2014. Material in brackets as in original. See also Paul McLeary, “PACOM Chief: US Not Worried About Chinese Intel Ship off Hawaiian Coast,” *Defense News*, July 29, 2014.

waters,” and that “China respects the rights granted under international law to relevant littoral states, and hopes that relevant countries can respect the legal rights Chinese ships have.” It did not elaborate.

As a recent *Global Times* article hinted—China’s position on military activities in EEZs is based on a legal reading that stresses the importance of domestic laws. According to China maritime legal specialist Isaac Kardon, China interprets the EEZ articles in the United Nations Convention on the Law of the Sea (UNCLOS) as granting a coastal state jurisdiction to enforce its domestic laws prohibiting certain military activities—e.g., those that it interprets to threaten national security, economic rights, or environmental protection—in its EEZ. China’s domestic laws include such provisions, while those of the United States do not. Those rules would allow China to justify its seemingly contradictory approach to AGI operations—or, as Kardon put it, “to have their cake and eat it too.” Therefore, under the Chinese interpretation of UNCLOS, its actions are neither hypocritical nor illegal—yet do not justify similar surveillance against China.

Here, noted legal scholar Jerome Cohen emphasizes, the U.S. position remains the globally dominant view—“since most nations believe the coastal state has no right to forbid surveillance in its EEZ, they do not have domestic laws that do so.” This renders China’s attempted constraints legally problematic, since “international law is based on reciprocity.” To explain his interpretation of Beijing’s likely approach, Cohen invokes the observation that a French commentator made several decades ago in the context of discussing China’s international law policy regarding domestic legal issues: “I demand freedom from you in the name of your principles. I deny it to you in the name of mine.”

Based on his personal experience interacting with Chinese officials and legal experts, Kardon adds, “China is increasingly confident that its interpretation of some key rules and—most critically—its practices reinforcing that interpretation can over time shape the Law of the Sea regime to suit its preferences.”

But China is not putting all its eggs in that basket. There are increasing indications that it is attempting to promote its EEZ approach vis-à-vis the U.S. not legally but politically. “Beijing is shifting from rules- to relations-based objections,” Naval War College China Maritime Studies Institute Director Peter Dutton observes. “In this context, its surveillance operations in undisputed U.S. EEZs portend an important shift, but that does not mean that China will be more flexible in the East or South China Seas.” The quasi-authoritative Chinese commentary that has emerged thus far supports this interpretation....

[A recent statement from a Chinese official] suggests that Beijing will increasingly oppose U.S. SROs on the grounds that they are incompatible with the stable, cooperative Sino-American relationship that Beijing and Washington have committed to cultivating. The Obama Administration must ensure that the “new-type Navy-to-Navy relations” that Chinese Chief of Naval Operations Admiral Wu Shengli has advocated to his U.S. counterpart does not contain expectations that U.S. SROs will be reduced in nature, scope, or frequency....

China’s conducting military activities in a foreign EEZ implies that, under its interpretation, some such operations are indeed legal. It therefore falls to China now to clarify its stance—to explain why its operations are consistent with international law, and what sets them apart from apparently similar American activities.

If China does not explain away the apparent contradiction in a convincing fashion, it risks stirring up increased international resentment—and undermining its relationship with the U.S. Beijing is currently engaging in activities very much like those it has vociferously opposed. That suggests the promotion of a double standard untenable in the international system, and very much at odds with the relationships based on reciprocity, respect, and cooperation that China purports to promote....

If, however, China chooses to remain silent, it will likely have to accept—at least tacitly, without harassing—U.S. surveillance missions in its claimed EEZ. So, as we watch for clarification on Beijing’s legal interpretation, it will also be important to watch for indications regarding the next SROs in China’s EEZ.<sup>288</sup>

In September 2014, a Chinese surveillance ship operated in U.S. EEZ waters near Guam as it observed a joint-service U.S. military exercise called Valiant Shield. A U.S. spokesperson for the exercise stated the following: “We’d like to reinforce that military operations in international commons and outside of territorial waters and airspace is a fundamental right that all nations have.... The Chinese were following international norms, which is completely acceptable.”<sup>289</sup>

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<sup>288</sup> Andrew S. Erickson and Emily de La Bruyere, “China’s RIMPAC Maritime-Surveillance Gambit,” *The National Interest*, July 29, 2014. See also Andrew S. Erickson, “PRC National Defense Ministry Spokesman Sr. Col. Geng Yansheng Offers China’s Most-Detailed Position to Date on Dongdiao-class Ship’s Intelligence Collection in U.S. EEZ during RIMPAC Exercise,” (*Andrew S. Erickson*), August 1, 2014. See also Michael Auslin, “Wishful Thinking on China’s Navy,” *AEIdeas*, July 30, 2014.

<sup>289</sup> Erik Slavin, “Chinese Ship Spies on Valiant Shield, And That’s OK With US,” *Stars and Stripes*, September 22, 2014.



## Appendix H. U.S. Freedom of Navigation (FON) Program

This appendix provides some additional background information on the U.S. Freedom of Navigation (FON) program.

### DOD Instructions and Presidential Directives

Current and predecessor DOD Instructions and presidential directives regarding freedom of navigation and the FON program include but are not necessarily limited to the following:

- DOD Instruction S-2005.01 of October 20, 2014;<sup>290</sup>
- DOD Instruction C-2005.01 of October 12, 2005;<sup>291</sup>
- DOD Instruction C-5030.44 of October 12, 2005;<sup>292</sup>
- DOD Instruction C-2005.1 of June 21, 1983;<sup>293</sup>
- Presidential Decision Directive 32 of January 23, 1995;<sup>294</sup>
- National Security Directive 49 of October 12, 1990;<sup>295</sup>
- National Security Decision Directive 265 of March 16, 1987;<sup>296</sup>
- National Security Decision Directive 72 of December 13, 1982;<sup>297</sup> and
- National Security Decision Directive 20 of January 29, 1982.<sup>298</sup>

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<sup>290</sup> A list of DODIs that includes DODI S-2005.01 is available at <https://www.esd.whs.mil/Directives/issuances/dodi/>. The document is controlled (i.e., classified), and its text is not publicly available.

<sup>291</sup> For a list that includes this document, see Cryptome, “Some DOD Directives and Instructions,” June 17, 2009, accessed May 31, 2023, at <https://cryptome.org/dodi/dod-dodi.htm>. As discussed in earlier versions of this CRS report (see versions dated February 8, 2023, or earlier), this DOD Instruction was previously listed by DOD at <https://www.esd.whs.mil/Directives/issuances/dodi/>, which at the time stated that this instruction replaced an earlier version of the document dated June 21, 1983 (i.e., DOD Instruction C-2005.1).

<sup>292</sup> A list of DODIs that includes DODI C- 5030.44 is available at <https://www.esd.whs.mil/Directives/issuances/dodi/>. The document is controlled (i.e., classified), and its text is not publicly available. It is also listed at Cryptome, “Some DOD Directives and Instructions,” June 17, 2009, accessed May 31, 2023, at <https://cryptome.org/dodi/dod-dodi.htm>.

<sup>293</sup> References to this document can be found in Department of Defense, *Maritime Claims Reference Manual*, DoD 2005. 1-M, July 12, 1990, accessed May 31, 2023, at <https://apps.dtic.mil/sti/pdfs/ADA268214.pdf>.

<sup>294</sup> For the declassified text of this document, see <https://irp.fas.org/offdocs/pdd/pdd-32.pdf> or PDF pages 78 through 82 of 660 of the document posted at <https://clinton.presidentiallibraries.us/items/show/101150>. A history of the origin of the FON program published in 2019 stated that Presidential Decision Directive 32 “is the current version of the US FON policy....” James Kraska, “An Archival History of the Creation and Early Implementation of the Freedom of Navigation Program,” Chapter 10 (pages 206-237) of Myron H. Nordquist, John Norton Moore, and Ronán Long, editors, *Cooperation and Engagement in the Asia-Pacific Region*, Center for Oceans Law and Policy, Volume: 23, 2020 (publication date: November 28, 2019). The statement about Presidential Decision Directive 32 is on page 218.

<sup>295</sup> For the declassified text of this document, see <https://irp.fas.org/offdocs/nsd/nsd49.pdf>.

<sup>296</sup> For the declassified text of this document, see <https://irp.fas.org/offdocs/nsdd/nsdd-265.htm>.

<sup>297</sup> For the declassified text of this document, see <https://irp.fas.org/offdocs/nsdd/nsdd-72.pdf>.

<sup>298</sup> For the declassified text of this document, see <https://irp.fas.org/offdocs/nsdd/nsdd-20.pdf>. The document focuses primarily on U.S. participation in the negotiations that eventually produced the United Nations Convention on the Law of the Sea (UNCLOS), but also states that “the United States will also continue to exercise its rights with respect to navigation and overflight against claims that the United States does not recognize in accordance with established procedures and review for that program.”

See also the National Security Council memorandum of February 1, 1979 that led to the formalization of the FON program in 1979.<sup>299</sup>

## Legal Arguments Relating to FON Operations

In assessing U.S. FON operations that take place within 12 nautical miles of Chinese-occupied sites in the SCS, one question relates to whether to conduct such operations, exactly where, and how often. A second question relates to the rationale that is cited as the legal basis for conducting them. Regarding this second question, one U.S. specialist on international law of the sea states the following regarding three key legal points in question (emphasis added):

- Regarding features in the water whose sovereignty is in dispute, “Every feature occupied by China is challenged by another claimant state, often with clearer line of title from Spanish, British or French colonial rule. The nation, not the land, is sovereign, which is why there is no territorial sea around Antarctica—it is not under the sovereignty of any state, despite being a continent. **As the United States has not recognized Chinese title to the features, it is not obligated to observe requirements of a theoretical territorial sea.** Since the territorial sea is a function of state sovereignty of each rock or island, and not a function of simple geography, **if the United States does not recognize any state having title to the feature, then it is not obligated to observe a theoretical territorial sea** and may treat the feature as *terra nullius*. Not only do U.S. warships have a right to transit within 12 nm [nautical miles] of Chinese features, they are free to do so as an exercise of high seas freedom under article 87 of the Law of the Sea Convention, rather than the more limited regime of innocent passage. Furthermore, whereas innocent passage does not permit overflight, high seas freedoms do, and U.S. naval aircraft lawfully may overfly such features.... More importantly, **even assuming that one or another state may have lawful title to a feature, other states are not obligated to confer upon that nation the right to unilaterally adopt and enforce measures that interfere with navigation, until lawful title is resolved.** Indeed, observing any nation’s rules pertaining to features under dispute legitimizes that country’s claim and takes sides.”
- Regarding features in the water whose sovereignty has been resolved, “It is unclear whether features like Fiery Cross Reef are rocks or merely low-tide elevations [LTEs] that are submerged at high tide, and after China has so radically transformed them, it may now be impossible to determine their natural state. Under the terms of the law of the sea, states with ownership over naturally formed rocks are entitled to claim a 12 nm territorial sea. On the other hand, **low-tide elevations in the mid-ocean do not qualify for any maritime zone whatsoever.** Likewise, artificial islands and installations also generate no maritime zones of sovereignty or sovereign rights in international law, **although the owner of features may maintain a 500-meter vessel traffic management zone** to ensure navigational safety.”

<sup>299</sup> National Security Council memorandum, Subject: Navigation and Overflight Policy Paper, February 1, 1979. The declassified text of this memorandum and its attached navigation and overflight policy paper are reprinted on pages 223-236 of James Kraska, “An Archival History of the Creation and Early Implementation of the Freedom of Navigation Program,” Chapter 10 (pages 206-237), of Myron H. Nordquist, John Norton Moore, and Ronán Long, editors, *Cooperation and Engagement in the Asia-Pacific Region*, Center for Oceans Law and Policy, Volume: 23, 2020 (publication date: November 28, 2019).

- Regarding features in the water whose sovereignty has been resolved and which do qualify for a 12-nautical-mile territorial sea, “**Warships and commercial vessels of all nations are entitled to conduct transit in innocent passage in the territorial sea** of a rock or island of a coastal state, although aircraft do not enjoy such a right.”<sup>300</sup>

These three legal points appear to create at least four options for the rationale to cite as the legal basis for conducting an FON operation within 12 miles of Chinese-occupied sites in the SCS:

- One option would be to state that since there is a dispute as to the sovereignty of the site or sites in question, that site or those sites are *terra nullius*, that the United States consequently is not obligated to observe requirements of a theoretical territorial sea, and that U.S. warships thus have a right to transit within 12 nautical miles of the site or sites as an exercise of high seas freedom under article 87 of the Law of the Sea Convention.
- A second option, if the site or sites were LTEs prior to undergoing land reclamation, would be to state that the site or sites are not entitled to a 12-nautical-mile territorial sea, and that U.S. warships consequently have a right to transit within 12 nautical miles as an exercise of high seas freedom.
- A third option would be to state that the operation was being conducted under the right of innocent passage within a 12-nautical-mile territorial sea.
- A fourth option would be to not provide a public rationale for the operation, so as to create uncertainty for China (and perhaps other observers) as to exact U.S. legal rationale.

If the fourth option is not taken, and consideration is given to selecting from among the first three options, then it might be argued that choosing the second option might inadvertently send a signal to observers that the legal point associated with the first option was not being defended, and that choosing the third option might inadvertently send a signal to observers that the legal points associated with the first and second options were not being defended.<sup>301</sup>

Regarding the FON operation conducted on May 24, 2017, near Mischief Reef, the U.S. specialist on international law of the sea quoted above states the following:

This was the first public notice of a freedom of navigation (FON) operation in the Trump administration, and may prove the most significant yet for the United States because it challenges not only China’s apparent claim of a territorial sea around Mischief Reef, but in doing so questions China’s sovereignty over the land feature altogether....

The Pentagon said the U.S. warship did a simple military exercise while close to the artificial island—executing a “man overboard” rescue drill. Such drills may not be conducted in innocent passage, and therefore indicate the Dewey exercised high seas freedoms near Mischief Reef. The U.S. exercise of high seas freedoms around Mischief

<sup>300</sup> James Kraska, “The Legal Rationale for Going Inside 12,” Asia Maritime Transparency Initiative (AMTI) (Center for Strategic and International Studies [CSIS]), September 11, 2015. See also James Kraska, “The Nine Ironies of the South China Sea Mess,” *The Diplomat*, September 17, 2016.

<sup>301</sup> See, for example, James Holmes, “No, China Doesn’t Want Confrontation in the South China Sea,” *National Interest*, January 29, 2018; Joseph Bosco, “US FONOPs Actually Conceded Maritime Rights to China,” *The Diplomat*, March 8, 2017; James Holmes, “America’s Latest South China Sea FONOP Did More Harm Than Good,” *National Interest*, October 30, 2016. For an alternative view, see Julian Ku, “The Latest US Freedom of Navigation Operation Opens the Legal Door to More Aggressive US Challenges to China’s Artificial Islands,” *Lawfare*, October 24, 2016; Julian Ku, “U.S. Defense Department Confirms USS Decatur Did Not Follow Innocent Passage and Challenged China’s Excessive Straight Baselines,” *Lawfare*, November 4, 2016.

Reef broadly repudiates China's claims of sovereignty over the feature and its surrounding waters. The operation stands in contrast to the flubbed transit by the USS Lassen near Subi Reef on October 27, 2015, when it appeared the warship conducted transit in innocent passage and inadvertently suggested that the feature generated a territorial sea (by China or some other claimant). That operation was roundly criticized for playing into China's hands, with the muddy legal rationale diluting the strategic message. In the case of the Dewey, the Pentagon made clear that it did not accept a territorial sea around Mischief Reef—by China or any other state. The United States has shoehorned a rejection of China's sovereignty over Mischief Reef into a routine FON operation.

Mischief Reef is not entitled to a territorial sea for several reasons. First, the feature is not under the sovereignty of any state. Mid-ocean low-tide elevations are incapable of appropriation, so China's vast port and airfield complex on the feature are without legal effect. The feature lies 135 nautical miles from Palawan Island, and therefore is part of the Philippine continental shelf. The Philippines enjoys sovereign rights and jurisdiction over the feature, including all of its living and non-living resources....

Second, even if Mischief Reef were a naturally formed island, it still would not be entitled to a territorial sea until such time as title to the feature was determined. Title may be negotiated, arbitrated or adjudicated through litigation. But mere assertion of a claim by China is insufficient to generate lawful title. (If suddenly a new state steps forward to claim the feature—Britain, perhaps, based on colonial presence—would it be entitled to the presumption of a territorial sea?) Even Antarctica, an entire continent, does not automatically generate a territorial sea. A territorial sea is a function of state sovereignty, and until sovereignty is lawfully obtained, no territorial sea inures.

Third, no state, including China, has established baselines around Mischief Reef in accordance with article 3 of UNCLOS. A territorial sea is measured from baselines; without baselines, there can be no territorial sea. What is the policy rationale for this construction? Baselines place the international community on notice that the coastal state has a reasonable and lawful departure from which to measure the breadth of the territorial sea. Unlike the USS Lassen operation, which appeared to be a challenge to some theoretical or "phantom" territorial sea, the Dewey transit properly reflects the high seas nature of the waters immediately surrounding Mischief Reef as high seas.

As a feature on the Philippine continental shelf, Mischief Reef is not only incapable of ever generating a territorial sea but also devoid of national airspace. Aircraft of all nations may freely overfly Mischief Reef, just as warships and commercial ships may transit as close to the shoreline as is safe and practical.

The Dewey transit makes good on President Obama's declaration in 2016 that the Annex VII tribunal for the Philippines and China issued a "final and binding" decision....

The United States will include the Dewey transit on its annual list of FON operations for fiscal year 2017, which will be released in the fourth quarter or early next year. How will the Pentagon account for the operation—what was challenged? The Dewey challenged China's claim of "indisputable sovereignty" to Mischief Reef as one of the features in the South China Sea, and China's claim of "adjacent" waters surrounding it. This transit cuts through the diplomatic dissembling that obfuscates the legal seascape and is the most tangible expression of the U.S. view that the arbitration ruling is "final and binding."<sup>302</sup>

Regarding this same FON operation, two other observers stated the following:

The Dewey's action evidently challenged China's right to control maritime zones adjacent to the reef—which was declared by the South China Sea arbitration to be nothing more

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<sup>302</sup> James Kraska, "Dewey Freedom of Navigation Operation Challenges China's Sovereignty to Mischief Reef," *Lawfare*, May 25, 2017. See also Ankit Panda, "The US Navy's First Trump-Era South China Sea FONOP Just Happened: First Takeaways and Analysis," *The Diplomat*, May 25, 2017.

than a low tide elevation on the Philippine continental shelf. The operation was hailed as a long-awaited “freedom of navigation operation” (FONOP) and “a challenge to Beijing’s moves in the South China Sea,” a sign that the United States will not accept “China’s contested claims” and militarization of the Spratlys, and a statement that Washington “will not remain passive as Beijing seeks to expand its maritime reach.” Others went further and welcomed this more muscular U.S. response to China’s assertiveness around the Spratly Islands to challenge China’s “apparent claim of a territorial sea around Mischief Reef... [as well as] China’s sovereignty over the land feature” itself.

But did the Dewey actually conduct a FONOP? Probably—but maybe not. Nothing in the official description of the operation or in open source reporting explicitly states that a FONOP was in fact conducted. Despite the fanfare, the messaging continues to be muddled. And that is both unnecessary and unhelpful.

In this post, we identify the source of ambiguity and provide an overview of FONOPs and what distinguishes them from the routine practice of freedom of navigation. We then explain why confusing the two is problematic—and particularly problematic in the Spratlys, where the practice of free navigation is vastly preferable to the reactive FONOP. FONOPs should continue in routine, low-key fashion wherever there are specific legal claims to be challenged (as in the Paracel Islands, the other disputed territories in the SCS); they should not be conducted—much less hyped up beyond proportion—in the Spratlys. Instead, the routine exercise of freedom of navigation is the most appropriate way to use the fleet in support of U.S. and allied interests....

... was the Dewey’s passage a FONOP designed to be a narrow legal challenge between the US and Chinese governments? Or was it a rightful and routine exercise of navigational freedoms intended to signal reassurance to the region and show U.S. resolve to defend the rule sets that govern the world’s oceans? Regrettably, the DOD spokesman’s answer was not clear. The distinction is not trivial....

The U.S. should have undertaken, and made clear that it was undertaking, routine operations to exercise navigational freedoms around Mischief Reef—rather than (maybe) conducting a FONOP.

The first problem with conducting FONOP operations at Mischief Reef or creating confusion on the point is that China has made no actual legal claim that the U.S. can effectively challenge. In fact, in the Spratlys, no state has made a specific legal claim about its maritime entitlements around the features it occupies. In other words, not only are there no “excessive claims,” there are no clear claims to jurisdiction over water space at all. Jurisdictional claims by a coastal state begin with an official announcement of baselines—often accompanied by detailed geographic coordinates—to put other states on notice of the water space the coastal state claims as its own.

China has made several ambiguous claims over water space in the South China Sea. It issued the notorious 9-dashed line map, for instance, and has made cryptic references that eventually it might claim that the entire Spratly Island area generates maritime zones as if it were one physical feature. China has a territorial sea law that requires Chinese maritime agencies only to employ straight baselines (contrary to international law). And it formally claimed straight baselines all along its continental coastline, in the Paracels, and for the Senkaku/Diaoyu Islands, which China claims and Japan administers. All of these actions are contrary to international law and infringe on international navigational rights. These have all been subject to American FONOPs in the past—and rightly so. They are excessive claims. But China has never specified baselines in the Spratlys. Accordingly, no one knows for sure where China will claim a territorial sea there. So for now, since there is no specific legal claim to push against, a formal FONOP is the wrong tool for the job. The U.S. Navy can and should simply exercise the full, lawful measure of high seas freedoms in and around the Spratly Islands. Those are the right tools for the job where no actual coastal state claim is being challenged.

Second, the conflation of routine naval operations with the narrow function of a formal FONOP needlessly politicizes this important program, blurs the message to China and other states in the region, blunts its impact on China's conduct, and makes the program less effective in other areas of the globe. This conflation first became problematic with the confused and confusing signaling that followed the FONOP undertaken by the USS Lassen in the fall of 2015. Afterward, the presence or absence of a FONOP dominated beltway discussion about China's problematic conduct in the South China Sea and became the barometer of American commitment and resolve in the region. Because of this discussion, FONOPs became reimagined in the public mind as the only meaningful symbol of U.S. opposition to Chinese policy and activity in the SCS. In 2015 and 2016 especially, FONOPs were often treated as if they were the sole available operational means to push back against rising Chinese assertiveness. This was despite a steady U.S. presence in the region for more than 700 ship days a year and a full schedule of international exercises, ample intelligence gathering operations, and other important naval demonstrations of U.S. regional interests.

In consequence, we should welcome the apparent decision not to conduct a FONOP around Scarborough Shoal—where China also never made any clear baseline or territorial sea claim. If U.S. policy makers intend to send a signal to China that construction on or around Scarborough would cross a red line, there are many better ways than a formal FONOP to send that message....

The routine operations of the fleet in the Pacific theater illustrate the crucial—and often misunderstood—difference between a formal FONOP and operations that exercise freedoms of navigation. FONOPs are not the sole remedy to various unlawful restrictions on navigational rights across the globe, but are instead a small part of a comprehensive effort to uphold navigational freedoms by practicing them routinely. That consistent practice of free navigation, not the reactive FONOP, is the policy best suited to respond to Chinese assertiveness in the SCS. This is especially true in areas such as the Spratly Islands where China has made no actual legal claims to challenge.<sup>303</sup>

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<sup>303</sup> Peter A. Dutton and Isaac B. Kardon, "Forget the FONOPs—Just Fly, Sail and Operate Wherever International Law Allows," *Lawfare*, June 10, 2017.

## Appendix I. Writings by Observers Regarding U.S. Strategy for Competing Strategically with China in SCS and ECS

This appendix presents a bibliography of some writings since January 2021 by observers regarding U.S. strategy for competing strategically with China in the SCS and ECS, organized by date, beginning with the most recent item. In some of the article titles below, COIN means counterinsurgency.

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