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China's Actions in South and East China Seas: Implications for U.S. Interests—Background and Issues for Congress

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Summary

China's actions in recent years in the South China Sea (SCS)—particularly its island-building and base-construction activities at sites that it occupies in the Spratly Islands—have heightened concerns among U.S. observers that China is rapidly gaining effective control of 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 to consider his nomination to become Commander, U.S. Pacific Command (PACOM), stated that "China is now capable of controlling the South China Sea in all scenarios short of war with the United States." Chinese control of the SCS—and, more generally, Chinese domination of China's near-seas region, meaning the SCS, the East China Sea (ECS), and the Yellow Sea—could substantially affect U.S. strategic, political, and economic interests in the Indo-Pacific region and elsewhere.

China is a party to multiple territorial disputes in the SCS and ECS, including, in particular, disputes over the Paracel Islands, Spratly Islands, and Scarborough Shoal in the SCS, and the Senkaku Islands in the ECS. Up through 2014, U.S. concern over these disputes centered more on their potential for causing tension, incidents, and a risk of conflict between China and its neighbors in the region, including U.S. allies Japan and the Philippines and emerging partner states such as Vietnam. While that concern remains, particularly regarding the potential for a conflict between China and Japan, U.S. concern since 2014 (i.e., since China's island-building activities in the Spratly Islands were first publicly reported) has shifted increasingly to how China's strengthening position in the SCS is making the SCS an arena of direct U.S.-Chinese strategic competition in a global context of renewed great power competition.

In addition to territorial disputes in the SCS and ECS, China is involved in a dispute, particularly 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 dispute appears to be at the heart of multiple incidents between Chinese and U.S. ships and aircraft in international waters and airspace since 2001, and has potential implications not only for China's EEZs, but for U.S. naval operations in EEZs globally.

A key issue for Congress is how the United States should respond to China's actions in the SCS and ECS—particularly its island-building and base-construction activities in the Spratly Islands—and to China's strengthening position in the SCS. A key oversight question for Congress is whether the Trump Administration has an appropriate strategy for countering China's "salami-slicing" strategy or gray zone operations for gradually strengthening its position in the SCS, for imposing costs on China for its actions in the SCS and ECS, and for defending and promoting U.S. interests in the region.

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Introduction

Focus of Report

This report provides background information and issues for Congress regarding China's actions in the South China Sea (SCS) and East China Sea (ECS), with a focus on implications for U.S. strategic and policy interests. Other CRS reports focus on other aspects of maritime territorial disputes involving China.[1]

Issue for Congress

A key issue for Congress is how the United States should respond to China's actions in the SCS and ECS—particularly China's island-building and base-construction activities in the Spratly Islands in the SCS—and to China's strengthening position in the SCS. A key oversight question for Congress is whether the Trump Administration has an appropriate strategy for countering China's "salami-slicing" strategy or gray zone operations for gradually strengthening its position in the SCS, for imposing costs on China for its actions in the SCS and ECS, and for defending and promoting U.S. interests in the region. Decisions that Congress makes on these issues could substantially affect U.S. strategic, political, and economic interests in the Asia-Pacific region and elsewhere.

Terminology Used in This Report

In this report, the term China's *near-seas region* refers to the SCS, ECS, and Yellow Sea.[2] 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.[3] The term *exclusive economic zone (EEZ) dispute* is used in this report 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.[4]

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[1] For details on the individual maritime territorial disputes in the ECS and SCS, and on actions taken by the various claimant countries in the region, see CRS Report R42930, *Maritime Territorial Disputes in East Asia: Issues for Congress*, by Ben Dolven, Mark E. Manyin, and Shirley A. Kan. For an in-depth discussion of China's land reclamation and facility-construction activities at several sites in the Spratly Islands, see CRS Report R44072, *Chinese Land Reclamation in the South China Sea: Implications and Policy Options*, by Ben Dolven et al. For an in-depth discussion of China's air defense identification zone in the ECS, see CRS Report R43894, *China's Air Defense Identification Zone (ADIZ)*, by Ian E. Rinehart and Bart Elias. For a short discussion of the issues discussed in this report, see CRS In Focus IF10607, *South China Sea Disputes: Background and U.S. Policy*, by Ben Dolven, Susan V. Lawrence, and Ronald O'Rourke.

[2] The Yellow Sea is the body of water that separates China from the Korean Peninsula. It can be viewed as a northern limb or extension of the ECS.

[3] For a map of the first and second island chains, see Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2015*, p. 87. The exact position and shape of the lines demarcating the first and second island chains often differ from map to map.

[4] 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. There are also other kinds of EEZ disputes, including disputes between neighboring countries regarding the extents of their adjacent EEZs.

Background

U.S. Interests in SCS and ECS

Although maritime territorial 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 situation in the SCS and ECS can engage U.S. interests for a for a variety of strategic, political, and economic reasons, including but not necessarily limited to those discussed in the sections below.[5]

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. In addition, the SCS and ECS (including the Taiwan Strait) surround Taiwan, 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 would add to a regional network of Chinese anti-access/area-denial (A2/AD) forces intended to keep U.S. military forces outside the first island chain (and thus away from China's mainland). Among other things, Chinese bases in the SCS and forces operating from them could 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). In a conflict with the United States, Chinese bases in the SCS and forces operating from them would be vulnerable to U.S. attack. 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.

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 and oil and gas exploration activities in the SCS;
- coerce, intimidate, or put political pressure on other countries bordering on the SCS;
- enforce an air defense identification zone (ADIZ) over the SCS that some observers believe China might declare at some point in the future;
- facilitate the projection of Chinese military presence further into the Western Pacific; and
- help achieve a broader goal of becoming a regional hegemon in its part of Eurasia.[6]

[5] For additional discussion the overall U.S. strategic context in which the issues in this report may be considered, see **Appendix A**.

[6] See, for example, Gary Roughead, "China, Time and Rebalancing," Hoover Institution, undated (but with copyright of 2014), accessed March 25, 2014, at http://www.hoover.org/taskforces/military-history/strategika/11/roughead; Jim Talent, "The Equilibrium of East Asia," *National Review Online*, December 5, 2013; Robert E. Kelly, "What Would

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 China and Taiwan;
- fulfill U.S. obligations under U.S defense treaties with Japan and the Philippines and South Korea;[7]
- 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.[8]

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 may be 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.[9]

Principle of Nonuse of Force or Coercion

A key element of the U.S.-led international order that has operated since 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 Crimea and eastern Ukraine—help reestablish the very different principle of "might makes right" as a routine or defining characteristic of international relations.[10]

Principle of Freedom of the Seas

Another key element of the U.S.-led international order that has operated since World War II is 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. The principle is often referred to in

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Chinese Hegemony Look Like?" *The Diplomat*, February 10, 2014. See also Ryan Martinson and Katsuya Yamamoto, "Three PLAN [PLA Navy] Officers May Have Just Revealed What China Wants in the South China Sea," *National Interest*, July 9, 2017.

[7] For more on the U.S. treaties with Japan and the Philippines, see **Appendix B**.

[8] 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. For additional discussion, see **Appendix A**.

[9] For additional background information on these treaties, see **Appendix B**.

[10] 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."

shorthand as freedom of the seas. It is also sometimes referred to as freedom of navigation, although this term can be 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 navigate (i.e., pass through) sea areas, as opposed to the freedom for both commercial and naval ships to conduct various activities at sea. 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 "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."[11] The principle of freedom of the seas dates back hundreds of years.[12]

Some observers are concerned that China's actions in the SCS appear to challenge the principle that the world's seas are to be treated under international law as international waters. If such a challenge were to gain acceptance in the SCS region, it would have broad implications for the United States and other countries 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. Overturning the principle of freedom of the seas, so that significant portions of the seas could be appropriated as national territory, would overthrow hundreds of years of international legal tradition relating to the legal status of the world's oceans and significantly change the international legal regime governing sovereignty over the surface of the world.[13]

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[11] *U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2017*, December 13, 2017, p. 2. DOD states the following:

> The United States has, throughout its history, advocated for the freedom of the seas for economic and security reasons....
>
> Freedom of the seas, however, 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. Conflicts and disasters can threaten U.S. interests and those of our regional allies and partners. The Department of Defense is therefore committed to ensuring free and open maritime access to protect the stable economic order that has served all Asia-Pacific nations so well for so long, and to maintain the ability of U.S. forces to respond as needed.
>
> (Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 1, 2.)

[12] 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.

[13] One observer states (quoting from his own address to Japan's Ministry of Foreign Affairs):

> A very old debate has been renewed in recent years: is the sea a commons open to the free use of all seafaring states, or is it territory subject to the sovereignty of coastal states? Is it to be freedom of the seas, as Dutch jurist Hugo Grotius insisted? Or is it to be closed seas where strong coastal states make the rules, as Grotius' English archnemesis John Selden proposed?
>
> Customary and treaty law of the sea sides with Grotius, whereas China has in effect become a partisan of Selden. Just as England claimed dominion over the approaches to the British Isles, China wants to make the rules governing the China seas. Whose view prevails will determine not just who controls waters, islands, and atolls, but also the nature of the system of maritime trade and commerce. What happens in Asia could set a precedent that ripples out across the globe. The outcome of this debate is a big deal.
>
> (James R. Holmes, "Has China Awoken a Sleeping Giant in Japan?" *The Diplomat*, March 1, 2014. See

Some observers are concerned that if China's position that coastal states have a right under international law 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, 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 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.[14] 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 more than 200 miles offshore would reduce the inland reach and responsiveness of ship-based sensors, aircraft, and missiles, and make it more difficult 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 or U.S. foreign policy goals.[15]

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. An estimated $3.4 trillion worth of international shipping trade passes through the SCS each year.[16] 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."[17] In addition, the ECS and

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also Roncevert Ganan Almond, "Lords of Navigation: Grotius, Freitas, and the South China Sea," *The Diplomat*, May 22, 2016.)

See also Roncevert Ganan Almond, "The Extraterrestrial [Legal] Impact of the South China Sea Dispute," *The Diplomat*, October 3, 2017.

[14] 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 June 6, 2014, at http://www.gc.noaa.gov/gcil_maritime.html, which states that EEZs account for 101.9 million square kilometers of the world's approximately 335.0 million square kilometers of oceans.)

[15] 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.

[16] A blog post by the Center for Strategic and International Studies (CSIS) states:

> Writings on the South China Sea frequently claim that $5.3 trillion worth of goods transits through the South China Sea annually, with $1.2 trillion of that total accounting for trade with the U.S. This $5.3 trillion figure has been used regularly since late 2010, despite significant changes in world trade over the last five-plus years.
>
> In pursuit of an accurate estimation, [the] ChinaPower [project at CSIS] constructed a new dataset for South China Sea trade using common shipping routes, automatic identification system (AIS) data, and bilateral trade flows. This approach relied on calculating a summation of all bilateral trade flowing through the South China Sea. ChinaPower found that an estimated $3.4 trillion in trade passed through the South China Sea in 2016. These estimates represent a sizeable proportion of international trade, constituting between 21 percent of global trade in 2016, but is nonetheless 36 percent smaller than the original $5.3 trillion.
>
> ("How Much Trade Transits the South China Sea?" China Power (CSIS), accessed July 10, 2018, at https://chinapower.csis.org/much-trade-transits-south-china-sea/.)

[17] Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2017*, May 15, 2017, p. 41.

SCS contain potentially significant oil and gas exploration areas.[18] Exploration activities there could potentially involve U.S. firms. The results of exploration activities there could eventually affect world oil prices.

Interpreting China's Rise as a Major World Power

As China continues to emerge as a major world power, observers are assessing what kind of international actor China will ultimately be. China's actions in the SCS and ECS could influence assessments that observers might make on issues such as 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,[19] 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.

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.[20]

Overview of Maritime Disputes in SCS and ECS

Maritime Territorial Disputes

China is a party to multiple maritime territorial disputes in the SCS and ECS, including in particular the following (see **Figure 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.

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[18] See, for example, Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 5. The SCS and ECS also contain significant fishing grounds that are of interest primarily to China and other countries in the region.

See also 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.

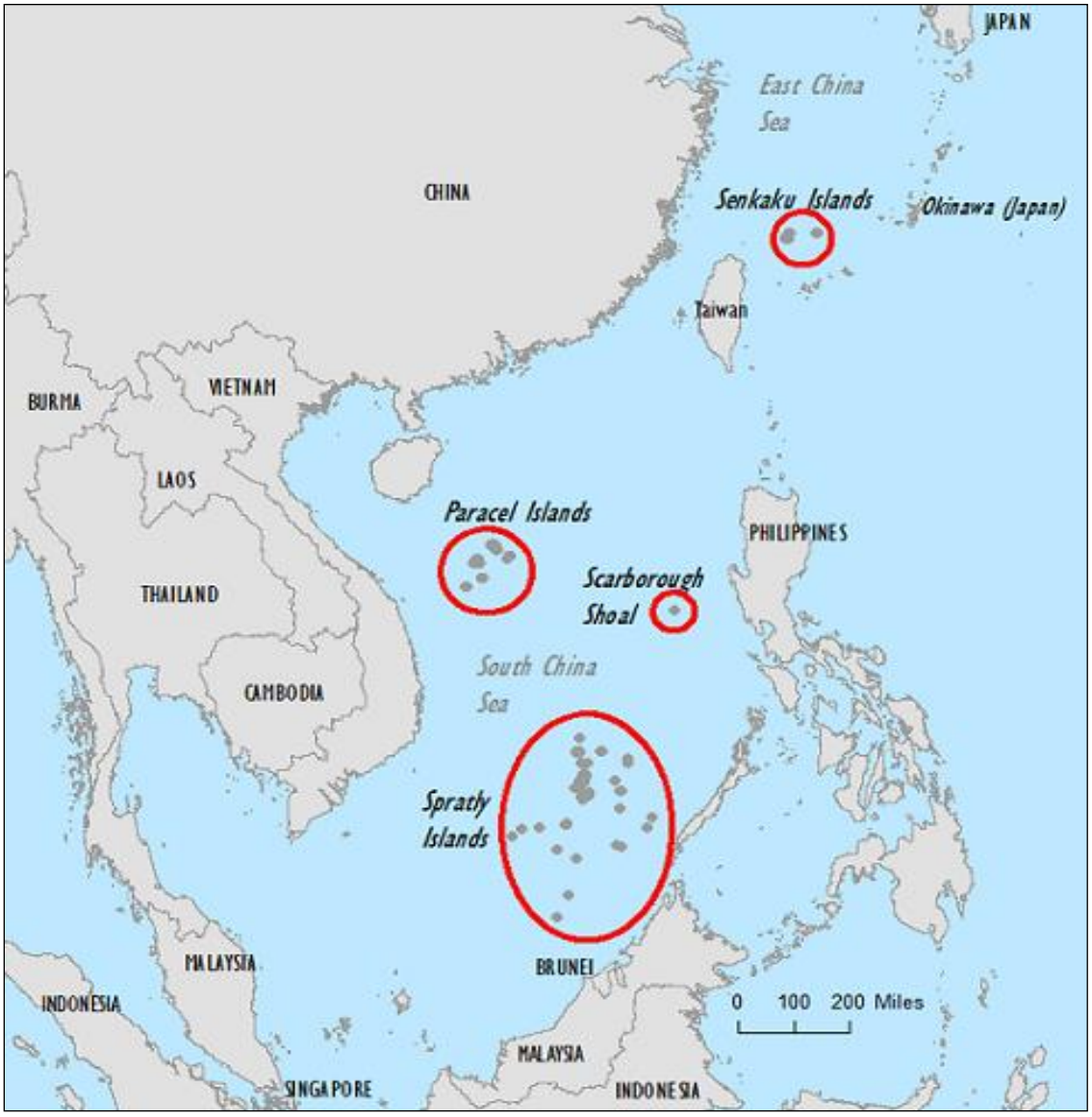
[19] DOD states that "In January 2013, the Philippines requested that an arbitral tribunal set up under the Law of the Sea Convention address a number of legal issues arising with respect to the interpretation and application of the Convention.... How China responds to a potential ruling from the arbitral tribunal will reflect China's attitude toward international maritime law." (Department of Defense, Asia-Pacific Maritime Security Strategy, undated but released August 2015, p. 17.) See also Isaac B. Kardon, "The Enabling Role of UNCLOS in PRC Maritime Policy," Asia Maritime Transparency Initiative (Center for Strategic & International Studies), September 11, 2015.

[20] For a survey of issues in U.S.-China relations, see CRS Report R41108, *U.S.-China Relations: An Overview of Policy Issues*, by Susan V. Lawrence.

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.[21]

Figure 1. Maritime Territorial Disputes Involving China

Island groups involved in principal disputes



Source: Map prepared by CRS using base maps provided by Esri.

Note: Disputed islands have been enlarged to make them more visible.

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.[22] There are additional maritime territorial

[21] 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.

[22] For example, the Reed Bank, a submerged atoll northeast of the Spratly Islands, is the subject of a dispute between

disputes in the Western Pacific that do not involve China.[23] Maritime territorial disputes in the SCS and ECS date back many years, and have periodically led to diplomatic tensions as well as confrontations and incidents at sea involving fishing vessels, oil exploration vessels and oil rigs, coast guard ships, naval ships, and military aircraft.[24]

Dispute Regarding China's Rights within Its EEZ

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.[25] 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 states 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.[26]

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.

[23] 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.

[24] 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.

[25] 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.

[26] 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

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.[27]

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

- 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;[28]
- 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

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> 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.)

[27] 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.

[28] 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 September 25, 2012, at 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.

was flying in international airspace about 135 miles east of Hainan Island[29]—DOD characterized the intercept as "very, very close, very dangerous";[30] 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."[31]

Figure 2 shows the locations of the 2001, 2002, and 2009 incidents listed in the first two bullets above. The incidents shown in **Figure 2** are the ones most commonly cited prior to the December 2013 involving the *Cowpens*, but some observers list additional incidents as well.[32]

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.
>
> 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

[29] Source for location: Transcript of remarks by DOD Press Secretary Rear Admiral John Kirby at August 22, 2014, press briefing, accessed September 26, 2014, 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.

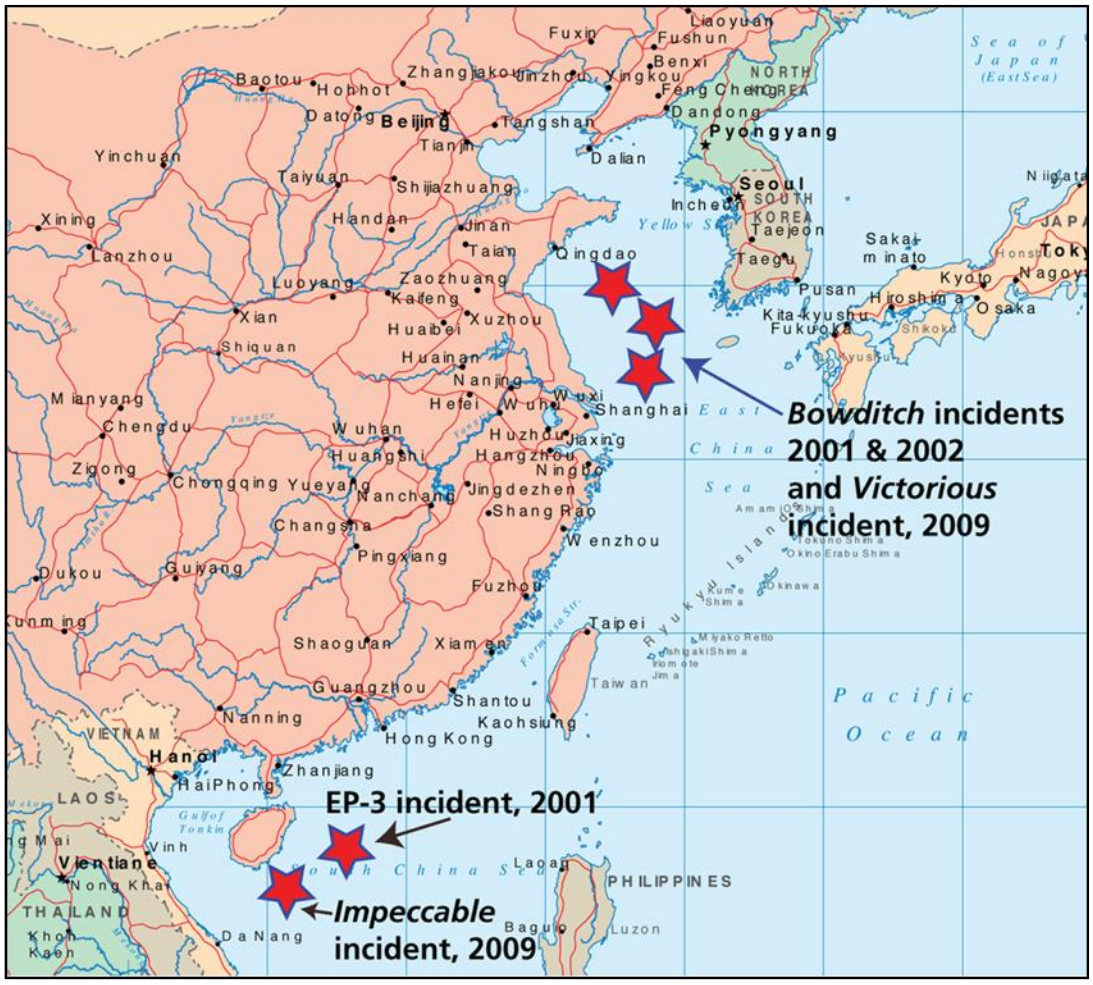
[30] Source: Transcript of remarks by DOD Press Secretary Rear Admiral John Kirby at August 22, 2014, press briefing, accessed September 26, 2014, at http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5493.

[31] 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 Plan over South China Sea: Pentagon," *Reuters*, May 19, 2016; Jamie Crawford, "Pentagon: 'Unsafe' Intercept over South China Sea," *CNN*, May 19, 2016.

[32] 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 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 August 9, 2013, at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5270. As of September 26, 2014, a video of part of the incident was posted on YouTube at http://www.youtube.com/watch?v=TiyeUWQObkg.

standards for encounters at sea, such as the Code for Unplanned Encounters at Sea (CUES),[33] which was signed in April 2014.[34]

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



Source: 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. Detail of map shown on p. 6.

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

[33] For more on the CUES agreement, see "2014 Code for Unplanned Encounters at Sea (CUES)" below.

[34] Department of Defense, *Asia-Pacific Maritime Security Strategy, undated but released August 2015*, pp. 14-15.

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 most of the past U.S.-Chinese incidents at sea have occurred.

Press reports of maritime disputes in the SCS and ECS often focus on territorial disputes while devoting little or no attention to the EEZ dispute. From the U.S. perspective, however, 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.

For background information on treaties and international agreements related to the disputes, see **Appendix C**.

For background information on the July 2016 tribunal award in the SCS arbitration case involving the Philippines and China, see **Appendix D**.

China's Approach to the SCS and ECS

In General

In general, 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 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 an integrated, whole-of-society strategy that includes diplomatic, informational, economic, military, paramilitary/law enforcement, and civilian elements.[35]
- In implementing this integrated strategy, China appears to be persistent, patient, tactically flexible, 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.

"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. At least one Chinese official has used the term "cabbage strategy" to refer to a strategy of consolidating control over disputed islands by wrapping those islands, like the concentric leaves of a cabbage, in successive layers of occupation and protection formed by fishing boats, Chinese Coast Guard ships, and then finally Chinese

[35] For a discussion with an emphasis on the diplomatic and informational aspects of this strategy, see Kerry K. Gershaneck, "China's 'Political Warfare' Aims at South China Sea," *Asia Times*, July 3, 2018.

naval ships.[36] 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), of creeping annexation[37] or creeping invasion,[38] 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.[39]

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 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.[40]

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. 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.[41] 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

[36] See Harry Kazianis, "China's Expanding Cabbage Strategy," *The Diplomat*, October 29, 2013; Bonnie S. Glaser and Alison Szalwinski, "Second Thomas Shoal Likely the Next Flashpoint in the South China Sea," *China Brief*, June 21, 2013, accessed August 9, 2013, at https://jamestown.org/program/second-thomas-shoal-likely-the-next-flashpoint-in-the-south-china-sea/; Rafael M. Alunan III, "China's Cabbage Strategy," *Business World* (*Manila)*, July 8, 2013. See also Loida Nicolas Lewis, Rodel Rodis, and Walden Bello, "China's 'Cabbage Strategy' in West PH Sea," *Philippine Daily Inquirer*, July 27, 2013; Huseyin Erdogan, "China Invokes 'Cabbage Tactics' in South China Sea," *Anadolu Ajansi*, March 25, 2015.

[37] See, for example, Alan Dupont, "China's Maritime Power Trip," *The Australian*, May 24, 2014.

[38] Jackson Diehl, "China's 'Creeping Invasion," *Washington Post*, September 14, 2014.

[39] 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.

[40] Mira Rapp-Hooper, "Before and After: The South China Sea Transformed," Asia Maritime Transparency Initiative (CSIS), February 18, 2015.

[41] See, for example, "Vietnam's Island Building: Double-Standard or Drop in the Bucket?," Asia Maritime Transparency Initiative (CSIS), May 11, 2016.

> 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....
>
> 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.[42]

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.[43] In July 2018, it was reported that "China is quietly testing electronic

[42] 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 (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.

[43] 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; Reuters Staff, "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 (CSIS), May 9, 2018; "China Has Put

warfare assets recently installed at fortified outposts in the South China Sea…."[44] 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.[45]

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.

Other Chinese Actions That Have Heightened Concerns

In addition to the island-building and base-construction activities discussed above, additional Chinese actions in the SCS and ECS have heightened concerns among U.S. observers. Following a confrontation in 2012 between Chinese and Philippine ships at Scarborough Shoal, China gained de facto control over access to the shoal and its fishing grounds. Subsequent Chinese actions that have heightened concerns among U.S. observers, particularly since late 2013, include the following, among others:

- China's announcement on November 23, 2013, of an air defense identification zone (ADIZ) over the ECS that includes airspace over the Senkaku Islands;[46]
- 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;[47]
- the implementation on January 1, 2014, of fishing regulations administered by China's Hainan province applicable to waters constituting more than half of the SCS, and the reported enforcement of those regulations with actions that have included the apprehension of non-Chinese fishing boats;[48] and

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)," *The Strategist*, May 21, 2018; Steven Stashwick, "China's New Missiles in the Sptratlys 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.

[44] Amanda Macias, "China Is Quietly Conducting Electronic Warfare Tests in the South China Sea," *CNBC*, July 5, 2018.

[45] Jesse Johnson, "In First, China Permanently Stations Search-and-Rescue Vessel in South China Sea's Spratly Chain," *Japan Times*, July 29, 2018.

[46] See CRS Report R43894, *China's Air Defense Identification Zone (ADIZ)*, by Ian E. Rinehart and Bart Elias.

[47] See, for example, Audrey Morallo, "China's Navy, Coast Guard 'Harassed' Filipino Troops on Resupply Mission on Ayungin—Alejano," *Philstar*, May 30, 2018. See also "A Game of Shark And Minnow," *New York Times Magazine* online news graphic accessed March 10, 2014, at http://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/. See also Ben Blanchard, "China Says [It] Expels Philippine [Vessels] from Disputed Shoal," *Reuters.com*, March 10, 2014; Oliver Teves (Associated Press), "Philippines Protests China Stopping Troop Resupply," *Kansas City Star*, March 11, 2014; Kyodo News International, "Philippines Protests Chinese Actions in Disputed Sea," *Global Post*, March 3, 2014.

[48] See, for example, Natalie Thomas, Ben Blanchard, and Megha Rajagopalan, "China apprehending boats weekly in disputed South China Sea," *Reuters.com*, March 6, 2014.

- 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.

Use of Coast Guard Ships, Maritime Militia, and Oil Platforms

Coast Guard Ships

China makes regular use of China Coast Guard (CCG) ships to assert and defend its maritime territorial claims, with Chinese Navy ships sometimes available over the horizon as backup forces.[49] China has, by far, the largest coast guard of any country in the region, and is currently building many new ships for its Coast Guard.[50] Many CCG ships are unarmed or lightly armed, but can be effective in asserting and defending maritime territorial claims, particularly in terms of confronting or harassing foreign vessels that are similarly lightly armed or unarmed.[51] In March 2018, China announced that control of the CCG would be transferred from the civilian State Oceanic Administration to the Central Military Commission.[52] The transfer occurred on July 1, 2018.[53] In addition to being available as backups for CCG ships, Chinese navy ships conduct exercises that in some cases appear intended, at least in part, at reinforcing China's maritime claims.[54] On May 22, 2018, it was reported that China's navy and coast guard had conducted their first joint patrols in disputed waters off the Paracel Islands in the SCS, and had expelled at least 10 foreign fishing vessels from those waters.[55]

Fishing Boats/Maritime Militia and Oil Platforms

China also uses civilian fishing ships as a form of maritime militia, as well as mobile oil exploration platforms, to assert and defend its maritime claims. U.S. analysts in recent years have paid increasing attention to the role of China's maritime militia as a key tool for implementing China's salami-slicing strategy.[56] DOD states that

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[49] See Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2015*, pp. 3, 7, and 44, and Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 14.

[50] See, for example, Office of Naval Intelligence, *The PLA Navy, New Capabilities and Missions for the 21st Century*, 2015, pp. 44-46.

[51] See, for example, Megha Rajagopalan and Greg Torode, "China's civilian fleet a potent force in Asia's disputed seas," *Reuters.com*, March 5, 2014.

[52] See, for example, David Tweed, "China's Military Handed Control of the Country's Coast Guard," *Bloomberg*, March 26, 2018.

[53] See, for example, Global Times, "China's Military to Lead Coast Guard to Better Defend Sovereignty," *People's Daily Online*, June 25, 2018.

[54] See, for example, Trefor Moss and Rob Taylor, "Chinese Naval Patrol Prompts Conflicting Regional Response," *Wall Street Journal*, February 20, 2014.

[55] Catherine Wong, "China's Navy and Coastguard Stage First Joint Patrols Near Disputed South China Sea Islands as 'Warning to Vietnam,'" *South China Morning Post*, May 22, 2018.

[56] See, for example, Jonathan Odom, "China's maritime Militia," *Straits Times*, June 16, 2018; Andrew S. Erickson, "Understanding China's Third Sea Force: The Maritime Militia," Fairbank Center, September 8, 2017; Andrew Erickson, "New Pentagon China Report Highlights the Rise of Beijing's Maritime Militia," *National Interest*, June 7, 2017; Ryan Pickrell, "New Pentagon Report Finally Drags China's Secret Sea Weapon Out Of The Shadows," *Daily Caller*, June 7, 2017; Conor M. Kennedy and Andrew S. Erickson, "Hainan's Maritime Militia: All Hands on Deck for Sovereignty Pt. 3," *Center for International Maritime Security*, April 26, 2017; Conor M. Kennedy and Andrew S. Erickson, "Hainan's Maritime Militia: Development Challenges and Opportunities, Pt. 2" *Center for International*

> The CMM [China Maritime Militia] is a subset of China's national militia, an armed reserve force of civilians available for mobilization to perform basic support duties. Militia units organize around towns, villages, urban sub-districts, and enterprises, and vary widely from one location to another. The composition and mission of each unit is based on local conditions and personnel skills. In the South China Sea, the CMM plays a major role in coercive activities to achieve China's political goals without fighting, part of broader PRC military doctrine that states that confrontational operations short of war can be an effective means of accomplishing political objectives.
>
> A large number of CMM vessels train with and support the PLAN and CCG in tasks such as safeguarding maritime claims, protecting fisheries, logistics, search and rescue (SAR), and surveillance and reconnaissance. The government subsidizes various local and provincial commercial organizations to operate militia vessels to perform "official" missions on an ad hoc basis outside of their regular commercial roles. The CMM has played significant roles in a number of military campaigns and coercive incidents over the years, including the 2011 harassment of Vietnamese survey vessels, the 2012 Scarborough Reef standoff [with the Philippines], and the 2014 Haiyang Shiyou-981 oil rig standoff [with Vietnam].
>
> In the past, the CMM rented fishing vessels from companies or individual fishermen, but it appears that China is building a state-owned fishing fleet for its maritime militia force in the South China Sea. Hainan Province, adjacent to the South China Sea, has ordered the building of 84 large militia fishing vessels for Sansha City.[57]

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 would regard as a form of interfering with freedom of navigation for commercial ships. An August 12, 2015, press report states (emphasis added):

Maritime Security, April 10, 2017; Andrew Erickson, "Hainan's Maritime Militia: China Builds A Standing Vanguard, Pt. 1," *Center for International Maritime Security*, March 25, 2017; 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, China Maritime Studies Institute, U.S. Naval War College, Newport, RI, March 2017, 22 pp.; Michael peck, "'Little Blue Sailors': Maritime Hybrid Warfare Is Coming (In the South China Sea and Beyond)," *National Interest*, December 18, 2016; Peter Brookes, "Take Note of China's Non-Navy Maritime Force," *The Hill*, December 13, 2016; Christopher P. Cavas, "China's Maritime Militia a Growing Concern," *Defense News*, November 21, 2016; Christopher P. Cavas, "China's Maritime Militia—Time to Call Them Out?" *Defense News*, September 18, 2016; Conor M. Kennedy and Andrew S. Erickson, "Riding A New Wave of Professionalization and Militarization: Sansha City's Maritime Militia," *Center for International Maritime Security*, September 1, 2016; John Grady, "Experts: China Continues Using Fishing Fleets for Naval Presence Operations," *USNI News*, August 17, 2016; David Axe, "China Launches A Stealth Invasion in the South China Sea," *Daily Beast*, August 9, 2016; Andrew S. Erickson and Conor M. Kennedy, "Countering China's Third Sea Force: Unmask Maritime Militia Before They're Used Again," *National Interest*, July 6, 2016; Andrew S. Erickson and Conor M. Kennedy, "China's Maritime Militia, What It Is and How to Deal With It," *Foreign Affairs*, June 23, 2016.

[57] Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2017*, p. 56. See also pp. i, 12.

> 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 shooed 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 navigation must be observed in accordance with international law. **No freedom of navigation for warships and airplanes**."[58]

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.[59]

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.[60]

A February 22, 2018, press report states the following:

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[58] Jim Gomez, "Chinese Diplomat Outlines Limits to Freedom of Navigation," *Military Times*, August 12, 2015.

[59] Erik Slavin, "Chinese Admiral Contests Freedom of Navigation in South China Sea," *Stars and Stripes*, July 19, 2016.

[60] 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.

> 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 54th 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.
>
> "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.[61]

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.[62]

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

[61] "Chinese Expert: Freedom of Navigation ≠ Freedom of Military Operations in South China Sea," China Military Online," February 22, 2018.

[62] Liu Xiaoming, "China Will Not Tolerate US Military Muscle-Flexing Off Our Shores," *Guardian (UK)*, June 27, 2018.

military ships and aircraft, guaranteed to all nations under international law."[63] 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.[64]

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 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.[65]

Depiction of United States as Outsider Seeking to "Stir Up Trouble"

Along with its above-discussed preference for treating territorial disputes on a bilateral rather than multilateral basis, 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 seeking to "stir up trouble" 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 U.S. 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.

July 2018 Press Report Regarding Chinese Radio Warnings

A July 31, 2018, press report stated:

> The Philippines has expressed concern to China over an increasing number of Chinese radio messages warning Philippine aircraft and ships to stay away from newly fortified islands and other territories in the South China Sea claimed by both countries, officials said Monday.
>
> A Philippine government report showed that in the second half of last year alone, Philippine military aircraft received such Chinese radio warnings at least 46 times while patrolling near artificial islands built by China in the South China Sea's Spratly archipelago.

[63] *U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2017*, December 13, 2017, p. 2.

[64] 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.

[65] See, for example, Donald K. Emmerson, "China Challenges Philippines in the South China Sea," *East Asia Forum*, March 18, 2014.

> The Chinese radio messages were "meant to step up their tactics to our pilots conducting maritime air surveillance in the West Philippine Sea", the report said, using the Philippine name for the South China Sea.
>
> A Philippine air force plane on patrol near the Chinese-held islands received a particularly offensive radio message in late January according to the Philippine government report.
>
> It was warned by Chinese forces that it was "endangering the security of the Chinese reef. Leave immediately and keep off to avoid misunderstanding," the report said.
>
> Shortly afterwards, the plane received a veiled threat: "Philippine military aircraft, I am warning you again, leave immediately or you will pay the possible consequences."
>
> The Filipino pilot later "sighted two flare warning signals from the reef", said the report, which identified the Chinese-occupied island as Gaven Reef.
>
> Philippine officials have raised their concern twice over the radio transmissions, including in a meeting with Chinese counterparts in Manila earlier this year that focused on the Asian countries' long-unresolved territorial disputes, according to two officials who spoke on condition of anonymity because they were not authorised to discuss the issue publicly.
>
> It is a new problem that emerged after China transformed seven disputed reefs into islands using dredged sand in the Spratlys…
>
> The messages used to originate from Chinese coastguard ships in past years but US military officials suspect transmissions now are also being sent from the Beijing-held artificial islands, where far more powerful communications and surveillance equipment has been installed along with weapons such as surface-to-air missiles.
>
> "Our ships and aircraft have observed an increase in radio queries that appear to originate from new land-based facilities in the South China Sea," Commander Clay Doss, public affairs officer of the US 7th Fleet, said by email in response to questions about the Chinese messages.
>
> "These communications do not affect our operations," Doss said….
>
> US Navy ships and aircraft communicate routinely with regional navies, including the Chinese navy.
>
> "The vast majority of these communications are professional, and when that is not the case, those issues are addressed by appropriate diplomatic and military channels," Doss said.[66]

For discussion of some additional elements of China's approach to maritime disputes in the SCS and ECS, including China's nine-dash line in the SCS, see **Appendix E**.

U.S. Position on Maritime Disputes in SCS and ECS

Some Key Elements

The U.S. position on territorial and EEZ disputes in the Western Pacific (including those involving China) includes the following elements, among others:

- The United States supports the principle that disputes between countries should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law.

[66] Associated Press, "Philippines Raises Concern Over Chinese Radio Warnings to Stay Away from South China Sea Islands," *South China Morning Post*, July 31, 2018. See also Ryan Pickrell, "'Leave Immediately Or You Will Pay': China Is Threatening Foreign Ships and Planes, But the US Military Isn't Changing a Thing," *Business Insider*, August 1, 2018.

- The United States supports the principle of freedom of 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.
- The United States takes no position on competing claims to sovereignty over disputed land features in the ECS and SCS.
- Although the United States takes no position on competing claims to sovereignty over disputed land features in the ECS and SCS, the United States *does* have a position on how competing claims should be resolved: Territorial disputes should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law.
- 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.
- 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 land reclamation with the intent to militarize outposts on disputed land features is consistent with the region's desire for peace and stability.
- 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.
- 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 as it has in the past.[67]
- The Senkaku Islands are under the administration of Japan and unilateral attempts to change the status quo raise tensions and do nothing under international law to strengthen territorial claims.

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 F**.

Freedom of Navigation (FON) Program

U.S. Navy ships challenge what the United States views as excessive maritime claims and carry out assertions of operational rights as part of the U.S. Freedom of Navigation (FON) program for challenging maritime claims that the United States believes to be inconsistent with international law.[68] DOD's record of "excessive maritime claims that were challenged by DoD operational

[67] At an August 26, 2014, press briefing, DOD Press Secretary Rear Admiral John Kirby, when asked about U.S. military surveillance flights close to China, replied in part: "We're going to continue to fly in international airspace the way we've been, just like we're going to continue to sail our ships in international waters the way we've been." (Source: transcript of press briefing, accessed September 26, 2014, at http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5495.) See also Bill Gertz, "Pentagon: No Plan to Reduce Spy Flights," *Washington Free Beacon*, August 26, 2014; Bill Gertz, "White House Rejects Chinese Demand to End U.S. Spy Flights," *Washington Free Beacon*, September 15, 2014.

[68] The State Department states that

> U.S. forces engage in Freedom of Navigation (FON) operations to assert the principles of international law and free passage in regions with unlawful maritime sovereignty claims. FON

assertions and activities during the period of October 1, 2016, to September 30, 2017, in order to preserve the rights, freedoms, and uses of the sea and airspace guaranteed to all nations by international law" includes a listing for multiple challenges that were conducted to challenge Chinese claims relating to "excessive straight baselines; jurisdiction over airspace above the exclusive economic zone (EEZ); restriction on foreign aircraft flying through an Air Defense

---

> operations involve units transiting disputed areas, thereby showing that the international community has not accepted these unlawful claims. ISO coordinates State Department clearance for FON operations.
>
> (State Department, "Military Exercises and Operational Coordination," accessed May 10, 2018, at http://www.state.gov/t/pm/iso/c21539.htm.)

The State Department also states about the FON program that

> U.S. policy since 1983 provides that 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 Law of the Sea (LOS) 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. The FON Program since 1979 has highlighted the navigation provisions of the LOS Convention to further the recognition of the vital national need to protect maritime rights throughout the world. The FON Program operates on a triple track, involving not only diplomatic representations and operational assertions by U.S. military units, but also bilateral and multilateral consultations with other governments in an effort to promote maritime stability and consistency with international law, stressing the need for and obligation of all States to adhere to the customary international law rules and practices reflected in the LOS Convention.
>
> (State Department, "Maritime Security and Navigation," accessed May 10, 2018, at http://www.state.gov/e/oes/ocns/opa/maritimesecurity/index.htm.)

A DOD list of DOD Instructions (available at http://www.dtic.mil/whs/directives/corres/ins1.html) includes a listing for DOD Instruction C-2005.01 of October 12, 2005, on the FON program, and states that this instruction replaced an earlier version of the document dated June 21, 1983. The document itself is controlled and not posted at the website. A website maintained by the Federation of American Scientists (FAS) listing Presidential Decision Directives (PDDs) of the Clinton Administration for the years 1993-2000 (http://www.fas.org/irp/offdocs/pdd/index.html) states that PDD-32 concerned the FON program. The listing suggests that PDD-32 was issued between September 21, 1994 and February 17, 1995.

DOD states 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.
>
> Over the past two years, the Department has undertaken an effort to reinvigorate our Freedom of Navigation program, in concert with the Department of State, to ensure that we regularly and consistently challenge excessive maritime claims. For example, in 2013, the Department challenged 19 excessive maritime claims around the world. In 2014, the Department challenged 35 excessive claim–an 84 percent increase. Among those 35 excessive maritime claims challenged in 2014, 19 are located in U.S. Pacific Command's geographic area of responsibility, and this robust Freedom of Navigation program will continue through 2015 and beyond.
>
> (Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 23-24.)

Identification Zone (ADIZ) without the intent to enter national airspace; domestic law criminalizing survey activity by foreign entities in the EEZ; prior permission required for innocent passage of foreign military ships through the TTS; and actions/statements that indicate a claim to a TTS [territorial sea] around features not so entitled."[69]

Assessments of China's Strengthening Position in SCS

Some observers now assess that China's actions in the SCS have achieved for China a more dominant or more commanding position in the SCS. One observer, for example, writes in a March 28, 2018, commentary piece that

> as Beijing's regional clout continues to grow, it can be hard for weaker nations to resist it, even with these allies' support. Barely three weeks after the [the U.S. aircraft carrier Carl] Vinson's visit [to Vietnam], the Vietnamese government bowed to Chinese pressure and canceled a major oil drilling project in disputed South China waters.
>
> It was yet another sign of the region's rapidly shifting dynamics. For the last decade, the United States and its Asian allies have been significantly bolstering their military activities in the region with the explicit aim of pushing back against China. But Beijing's strength and dominance, along with its diplomatic, economic and military reach, continues to grow dramatically....
>
> Western military strategists worry that China will, in time, be able to block any activity in the region by the United States and its allies. Already, satellite photos show China installing sophisticated weapons on a range of newly-reclaimed islands where international law says they simply should not be present. In any war, these and other new weapons that China is acquiring could make it all but impossible for the U.S. Navy and other potential enemies of China to operate in the area at all....
>
> China's increasing confidence in asserting control over the South China Sea has clearly alarmed its neighbors, particularly the Philippines, Vietnam, Malaysia, Indonesia and Brunei, all of whom have competing territorial claims over waters that China claims for itself. But it also represents a major and quite deliberate challenge to the United States which, as an ally to all these nations, has essentially staked its own credibility on the issue.
>
> Over the last several years, it has become common practice for U.S. warships to sail through nearby waters, pointedly refusing to acknowledge Chinese demands that they register with its unilaterally-declared air and maritime "identification zones" (which the United States and its allies do not recognize)....
>
> None of this, however, addresses the seismic regional change produced by China's island-building strategy....
>
> ... China sees this confrontation as a test case for its ability to impose its will on the wider region—and so far it is winning....
>
> The United States remains the world's preeminent military superpower, and there is little doubt it could win a fight with China almost anywhere else in the world. In its own backyard, however, Beijing is making it increasingly clear that it calls the shots. And for now, there is little sign anyone in Washington—or anywhere else—has the appetite to seriously challenge that assumption.[70]

An April 9, 2018, article from a Chinese media outlet states the following:

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[69] *U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2017*, December 13, 2017, p. 3.

[70] Peter Apps, "Commentary: How Beijing Is Winning in the South China Sea," *Reuters*, March 28, 2018.

> The situation in the South China Sea has been developing in favor of China, said Chinese observers after media reported that China is conducting naval drills in the region, at the same time as "three US carrier battle groups passed by" the area.
>
> "The regional strategic situation is tipping to China's side in the South China Sea, especially after China's construction of islands and reefs," Chen Xiangmiao, a research fellow at the National Institute for the South China Sea, told the Global Times on Sunday.
>
> China has strengthened its facilities in the region and conducted negotiations and cooperation on the South China Sea, which have narrowed China's gap in power with the US, while gaining advantages over Japan and India, according to Chen.[71]

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 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**....

[71] Global Times, "China Has Upper Hand in South China Sea: Expert," *China Military online*, April 9, 2018.

> 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."[72]

A May 8, 2018, press report states:

> China's neighbors and rivals fear that the Asian powerhouse is slowly but surely establishing the foundation of an Air Defense Identification Zone (ADIZ) in one of the world's most important and busy waterways….
>
> Boosting China's missile defense system in the area would allow it to progressively restrict the movement as well as squeeze the supply lines of smaller claimant states, all of which maintain comparatively modest military capabilities to fortify their sea claims."[73]

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

> All these developments [in the SCS], coupled with the lack of any concerted or robust response from the United States and its allies and partners in the region, point to the inevitable conclusion that the sovereignty dispute in the SCS has – irreversibly – become a foregone conclusion. Three compelling reasons justify this assertion….
>
> First, China sees the SCS issue as a security matter of paramount importance, according it the status of a "core interest" – on par with resolution of the Taiwan question….
>
> Second, the sovereignty of SCS waters is a foregone conclusion partly because of U.S. ambivalence toward Chinese military encroachment….
>
> Third, the implicit acquiescence of ASEAN [Association of Southeast Asian Nations] states toward China's moves in the SCS has strengthened its position that all features and waters within the "nine-dashed line" belongs to Beijing….
>
> The above three factors – Beijing's sharpened focus on national security, lack of American resolve to balance China in the SCS, and ASEAN's prioritization of peace and stability over sovereignty considerations – have contributed to the bleak state of affairs today….
>
> From the realist perspective, as Beijing accrues naval dominance in the SCS, the rules meant to regulate its behavior are likely to matter less and less—underscoring the geopolitical truism that 'might is right.' While China foreswears the use of coercive force on its Southeast Asian neighbors and may indeed have no offensive intentions today, it has now placed itself in a position to do so in future.

[72] Advance Policy Questions for Admiral Philip Davidson, USN Expected Nominee for Commander, U.S. Pacific Command, pp. 8. 16. 17. 18, 19, and 43.

[73] Richard Javad Heydarian, "Short of War, China Now Controls South China Sea," *Asia Times*, May 8, 2018.

> In other words, while it had no capacity nor intent to threaten Southeast Asian states previously, it has developed the requisite capabilities today.[74]

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

> the South China Sea is being increasingly dominated militarily by China at both its eastern and western ends. This is what researchers at the US Naval War College meant when they told the author that Chinese militarization activities in the region are an attempt to create the equivalent of a "strategic strait" in the South China Sea. In other words, through the more or less permanent deployment of Chinese military power at both extreme ends of the South China Sea – Hainan and Woody Island in the west, and the new (and newly militarized) artificial islands in the east – Beijing is seeking to transform the South China Sea from an international SLOC into a Chinese-controlled waterway and a strategic chokepoint for other countries….
>
> This amalgamation of force means that China's decades-long "creeping assertiveness" in this particular body of water has become a full-blown offensive. What all this means is that China is well on its way toward turning the South China Sea in a zone of anti-access/area denial (A2/AD). This means keeping military competitors (particularly the US Navy) out of the region, or seriously impeding their freedom of action inside it.[75]

A June 1, 2018, press report states:

> Through its navy, coast guard, a loose collection of armed fishing vessels, and a network of military bases built on artificial islands, Beijing has gained de facto control of the South China Sea, a panel of Indo-Pacific security experts said Friday.
>
> And the implications of that control—militarily, economically, diplomatically—are far-reaching for the United States and its partners and allies in the region.
>
> "Every vessel [sent on a freedom of navigation transit] is shadowed" by a Chinese vessel, showing Beijing's ability to respond quickly events in areas it considers its own, retired Marine Lt. Gen. Wallace "Chip" Gregson said during an American Enterprise Institute forum.[76]

Another observer writes in a June 5, 2018, commentary piece that

> It's over in the South China Sea. The United States just hasn't figured it out yet….
>
> It is past time for the United States to figure out what matters in its relationship with China, and to make difficult choices about which values have to be defended, and which can be compromised.[77]

A June 21, 2018, editorial states:

> America's defence secretary, James Mattis, promised "larger consequences" if China does not change track [in the SCS]. Yet for now [Chinese President Xi Jinping], while blaming America's own "militarisation" as the source of tension, must feel he has accomplished much. He has a chokehold on one of the world's busiest shipping routes and is in a position to make good on China's claims to the sea's oil, gas and fish. He has gained strategic depth in any conflict over Taiwan. And, through the sheer fact of possession, he has underpinned China's fatuous historical claims to the South China Sea. To his people, Mr Xi can paint it

[74] Jansen Tham, "Is the South China Sea Dispute a Foregone Conclusion?" *The Diplomat*, May 10, 2018.

[75] Richard A. Bitzinger, "Why Beijing is Militarizing the South China Sea," *Asia Times*, May 10, 2018.

[76] John Grady, "Panel: Chinese Navy, Maritime Militia Has Given Beijing De Facto Control of the South China Sea," *USNI News*, June 1, 2018.

[77] Robert Farley, "The South China Sea Conundrum for the United States," *The Diplomat*, June 5 2018.

> all as a return to the rightful order. Right now, it is not clear what the larger consequences of that might be.[78]

Another observer writes in a July 17, 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….
>
> In late July 2017, Beijing threatened Vietnam with military action if it did not stop oil and gas exploration in Vietnam's exclusive economic zone, according to a report by the BBC's Bill Hayton. Hanoi stopped drilling. Earlier this year, Vietnam again attempted to drill, and Beijing issued similar warnings….
>
> Other countries, including the U.S., failed to express support for Vietnam or condemn China's threats. Beijing has also pressured Brunei, Malaysia and the Philippines to agree to "joint development" in their exclusive economic zones—a term that suggests legitimate overlapping claims.
>
> Meanwhile China is accelerating its militarization of the South China Sea. In April, it deployed antiship cruise missiles, surface-to-air missiles and electronic jammers to artificial islands constructed on Fiery Cross Reef, Subi Reef and Mischief Reef. In May, it landed long-range bombers on Woody Island.
>
> 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.[79]

Issues for Congress

U.S. Response to China's Actions in SCS and ECS

Overview

Up through 2014, U.S. concern over maritime territorial and EEZ disputes involving China centered more on their potential for causing tension, incidents, and a risk of conflict between China and its neighbors in the region, including U.S. allies Japan and the Philippines and emerging partner states such as Vietnam. While that concern remains, particularly regarding the potential for a conflict between China and Japan,[80] U.S. concern since 2014 (i.e., since China's island-building activities in the Spratly Islands were first publicly reported) has shifted increasingly to how China's strengthening position in the SCS is making the SCS an arena of direct U.S.-Chinese strategic competition in a global context of renewed great power competition.[81]

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[78] "China Has Militarised the South China Sea and Got Away with It," *Economist*, June 21, 2018.

[79] Lynn Kuok, "China Is Winning in the South China Sea," *Wall Street Journal*, July 17, 2018.

[80] See, for example, Grant Newsham, "Japan, China Headed for Showdown 'Down South,'" *Japan Forward*, July 27, 2018; Wendell Minnick, "Insight: The East China Sea's 'Knuckle Junction,'" *Shephard Media*, July 16, 2018.

[81] For discussion of the shift to an era of renewed great power competition, see CRS Report R43838, *A Shift in the International Security Environment: Potential Implications for Defense—Issues for Congress*, by Ronald O'Rourke.

A key issue for Congress is how the United States should respond to China's actions in the SCS and ECS—particularly its island-building and base-construction activities in the Spratly Islands—and to China's strengthening position in the SCS. A key oversight question for Congress is whether the Trump Administration has an appropriate strategy for countering China's "salami-slicing" strategy or gray zone operations for gradually strengthening its position in the SCS, for imposing costs on China for its actions in the SCS and ECS, and for defending and promoting U.S. interests in the region.

Review of China's Approach

In considering how to respond to China's actions in the SCS and ECS, an initial step can be to review China's approach to the region. As stated earlier, in general, 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 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 an integrated, whole-of-society strategy that includes diplomatic, informational, economic, military, paramilitary/law enforcement, and civilian elements.
- In implementing this integrated strategy, China appears to be persistent, patient, tactically flexible, 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. response might be to achieve U.S. goals if it were

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

Potential U.S. Goals

General Goals

Potential general U.S. goals in responding to China's actions in the SCS and ECS include but are not necessarily limited to the following, which are not mutually exclusive:

- **fulfilling security commitments**—fulfilling U.S. security commitments in the Western Pacific, including treaty commitments to Japan and the Philippines;
- **maintaining and enhancing regional security architecture**—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 favorable regional balance of power**—maintaining a regional balance of power that is favorable to the United States and its allies and partners;

- **defending principle of peaceful resolution of disputes**—defending the principle under the current U.S.-led international order that 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 resisting the emergence of an alternative "might-makes-right" approach to international affairs;
- **defending principle of freedom of the seas**—defending the principle under the current U.S.-led international order of freedom of 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; and
- **preventing emergence of a regional hegemon**—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.

Specific Goals

Potential specific U.S. goals in responding to China's actions in the SCS and ECS include but are not necessarily limited to the following, which are not mutually exclusive:

- dissuading China from carrying out any additional base-construction activities that it might be planning for sites that it occupies in the SCS;
- dissuading China from moving any additional military personnel, equipment, and supplies to bases at sites that it occupies in the SCS, and persuading China to remove military personnel, equipment, and supplies that have already been moved to those bases;
- dissuading China from initiating island-building or base-construction activities at Scarborough Shoal;
- dissuading China from declaring an ADIZ over the SCS;[82]
- encouraging China to reduce or end Chinese Coast Guard ships at the Senkaku Islands in the ECS;
- 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);
- encouraging China to provide greater access by Philippine fisherman to waters surrounding Scarborough Shoal or in the Spratly Islands;
- encouraging China to 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
- encouraging China to accept and abide by the July 2016 tribunal award in the SCS arbitration case involving the Philippines and China (see **Appendix D**).

[82] Some observers believe China may be getting close to announcing an ADIZ over the SCS. See, for example, Frances Mangosing, "China Soon to Establish South China Sea Exclusion Zone—Analyst," *Inquirer (Philippines)*, May 16, 2018.

Aligning Actions with Goals

In terms of identifying specific actions that are intended to support U.S. policy goals, a key element would be to have a clear understanding of which actions are intended to support which goals, and to maintain an alignment of actions with policy goals. For example, U.S. freedom of navigation (FON) operations can directly support a general goal of defending principle of freedom of the seas, but might support other goals only indirectly, marginally, or not at all.

Contributions from Allies and Partners

In assessing how the United States should respond to China's actions in the SCS, another factor that policymakers may consider is the potential contribution that could be made by allies such as Japan, the Philippines, Australia, the UK, and France, and potential or emerging partner nations 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.[83]

For U.S. policymakers, one key question is how effective those steps have been, whether those steps could be strengthened, and whether they should be undertaken independent of or in coordination with the United States. A second key question concerns the kinds of actions that Philippine president Rodrigo Duterte might be willing to take, given his largely nonconfrontational policy toward China regarding the SCS,[84] and what implications Philippine reluctance to take certain actions may have for limiting or reducing the potential effectiveness of U.S. options for responding to China's actions in the SCS.[85]

U.S. Actions During Obama Administration

In apparent response to China's actions in the SCS and ECS, the United States during the Obama Administration took a number of actions, including the following:

- reiterating the U.S. position on maritime territorial claims in the area in various public fora;
- expressing strong concerns about China's island-building and base-construction activities, and calling for a halt on such activities by China and other countries in the region;

[83] For discussions of some of these actions, see Zachary Keck, "Britain Is Planning to Send an Aircraft Carrier to the South China Sea," *National Interest*, July 24, 2018; Nick Miller, "Australian Navy to Accompany UK's 'Show of Strength' in South China Sea," *Sydney Morning Herald*, July 21, 2018; Ralph Jennings, "Surge in South China Sea Naval Exercises in 2018 Vexes Beijing," *VOA News*, July 16, 2018; Tuan N. Pham, "The World is Pushing Back in the South China Sea," *East Asia Forum*, June 29, 2018; Wesley Rahn, South China Sea: France and Britain Join the US to Oppose China," *DW (Deutsche Welle)*, June 27, 2018; Peter M. Solomon, "Tackling the South China Sea Together: British and French Navies Chart a Course," *Journal of Political Risk*, June 26, 2018; Agence France-Presse, "France Challenges Beijing in South China Sea," *Straits Times*, June 12, 2018; Jonas Parello-Plesner, "The French Navy Stands Up to China," *Wall Street Journal*, June 7, 2018; Richard Javad Heydarian, "Europe Lends America Muscle in South China Sea," *Asia Times*, June 6, 2018; Liu Zhen, "France, Britain to Sail Warships in Contested South China Sea to Challenge Beijing," *South China Morning Post*, June 4, 2018; Aparna Pande & Satoru Nagao, "A South China Sea Change?" American Interest, June 4, 2018; Nicola Smith, "UK Sens 'Strongest of Signals' on Free Navigation in South China Sea," *Telegraph (UK)*, June 3, 2018.

[84] For further discussion, see, for example, JC Gotinga, "Philippines' Lacklustre Fight in the South China Sea," *Al Jazeera*, May 22, 2018. See also CRS In Focus IF10250, *The Philippines*, by Thomas Lum and Ben Dolven.

[85] For articles relating to this question, see Richard Heydarian, "Duterte Needs Trump to Counter Chinese Naval Threat," *Nikkei Asian Review*, July 17, 2018; Gregory B. Poling and Conor Cronin, "The Dangers of Allowing U.S.-Philippine Defense Cooperation to Languish," War on the Rocks, May 17, 2018.

- taking steps to improve the ability of the Philippines, Vietnam, Malaysia, and Indonesia to maintain maritime domain awareness (MDA) and patrol their EEZs, including the Southeast Asia Maritime Security Initiative (MSI), an initiative announced by the Obama Administration in May 2015[86] and subsequently legislated by Congress[87] to provide $425 million in maritime security assistance to those four countries over a five-year period;
- taking steps to strengthen U.S. security cooperation with Japan, the Philippines, Vietnam, and Singapore, including signing an agreement with the Philippines that provides U.S. forces with increased access to Philippine bases, increasing the scale of joint military exercises involving U.S. and Philippine forces, relaxing limits on sales of certain U.S. arms to Vietnam,[88] and operating U.S. Navy P-8 maritime patrol aircraft from Singapore;[89]
- expressing support for the idea of Japanese patrols in the SCS;[90] and
- stating that the United States would support a multinational maritime patrol of the SCS by members of ASEAN.[91]

Some observers, both during and after the Obama Administration, have criticized the Obama Administration for not doing enough to counter China's actions in the SCS and ECS. In particular, they have argued that the Obama Administration did not:

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[86] On May 30, 2015, in a speech at an international conference on security, Secretary of Defense Ashton Carter stated the following: "Today, I am pleased to announce that DoD will be launching a new Southeast Asia Maritime Security Initiative. And thanks to the leadership of the Senators here today… [ellipse as in original] and others, Congress has taken steps to authorize up to $425 million dollars for these maritime capacity-building efforts." (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 August 7, 2015, 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).

[87] 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).

[88] See, for example, Michael R. Gordon, "U.S. Eases Embargo on Arms to Vietnam," *New York Times*, October 2, 23014; Associated Press, "U.S. Eases Ban on Arms Sales to Vietnam," *Wall Street Journal*, October 3, 2014; Lesley Wroughton and Andrea Shalal, "US Eases Arms Embargo Against Vietnam for Maritime Security," *Reuters*, October 2, 2014; Aaron Mehta, "US State Department Opens Door to maritime Defense Weapon Sales To Vietnam," *Defense News*, October 2, 2014; Aaron Mehta, "New Vietnam Ruling Could Open Door To Further Exports," *Defense News*, October 4, 2014. See also "U.S. Delivers Patrol Boats, Cutter to Vietnam," *Maritime Executive*, May 25, 2017; Mai Nguyen, "U.S. Delivers Ship to Vietnam Coast Guard," U.S. News & World Report, May 26, 2017.

[89] See, for example, Dan De Luce, "Singapore Approves U.S. Surveillance Flights," *Foreign Policy*, December 7, 2015; Mike Yeo, "U.S. to Deploy Navy P-8A Poseidon Aircraft to Singapore," *USNI News*, December 8, 2015; David Brunnstrom, "U.S. to Deploy Spy Plane in Singapore amid China Tensions," *Reuters*, December 8, 2015.

[90] Tim Kelly and Nobuhiro Kubo, "U.S. Would Welcome Japan Air Patrols in South China Sea," *Reuters*, January 29, 2015; Sam LaGrone, "U.S. 7th Fleet CO: Japanese Patrols of South China Sea 'Makes Sense,'" *USNI News*, January 29, 2015.

[91] Sam LaGrone, "U.S. 7th Fleet Would Support ASEAN South China Sea patrols," *USNI News*, March 20, 2015. See also "US Navy Head Calls For Regional Force to Patrol S China Sea," *Today*, March 18 (updated March 19), 2015; Andrea Chen and Agencies, "Asean Nations React Coolly to US Navy Commander's Call for Joint Patrols in South China Sea," *South China Morning Post*, March 19, 2015; Sharon Chen, "U.S. Navy Urges Southeast Asian Patrols of South China Sea," *Bloomberg News*, March 17, 2015.

- react strongly enough to China's occupation of Scarborough Shoal in 2012;
- react strongly enough to China's island-building and base-construction activities in the Spratly Islands starting around December 2013;
- do enough in terms of conducting and offering sufficiently clear and strong legal rationales for U.S. freedom of navigation (FON) operations in the SCS;
- do enough to publicize, rhetorically support, and enforce the July 2016 tribunal award in the SCS arbitration case involving the Philippines and China; and
- in general, impose sufficiently strong costs on China's for its actions in the SCS and ECS.

As a result of the above, these critics have argued, the Obama Administration in effect sent a message to China that the United States would not strongly oppose China's actions in the SCS and ECS—a message, these critics have argued, that may have encouraged and accelerated China's actions.

Supporters of the Obama Administration's actions in response to China's actions in the SCS and ECS have argued that those actions were substantial and proportionate to China's actions and successful in

- deterring China from initiating island-building and base-construction activities at Scarborough Shoal;
- having U.S. military aircraft disregard the ADIZ that China declared over the ECS, and in deterring China from declaring an ADIZ over the SCS;[92]
- imposing political and reputational costs on China for its actions in the ECS and SCS during this time; and
- working with regional allies and partners to impose costs on China and strengthen the U.S.-led security architecture for the region.

U.S. Actions During Trump Administration

Overview

In addition to continuing to implement the Southeast Asia MSI (see discussion above) and conducting freedom of navigation (FON) operations in the SCS (see next section), the Trump Administration reportedly has taken other actions to promote U.S. interests in that area. These steps include actions to increase U.S. defense and intelligence cooperation with Vietnam and Indonesia, and U.S. assistance to improve the maritime security capabilities of the two countries.[93] A January 9, 2018, press report states the following:

> The United States has accused China of "provocative militarisation" of disputed areas in the South China Sea and will continue sending vessels to the region to carry out freedom-of-navigation patrols, according to a top US adviser on Asia policy.

[92] For more on the ADIZ over the ECS, see CRS Report R43894, *China's Air Defense Identification Zone (ADIZ)*, by Ian E. Rinehart and Bart Elias.

[93] See, for example, Bill Gertz, "Trump Courts Vietnam to Ward Off Beijing in South China Sea," *Asia Times*, November 14, 2017; William Gallo, "Mattis in Southeast Asia, Amid Fresh US Focus on China," *VOA News*, January 22, 2018; Richard Javad Heydarian, "Mattis Signals Harder Line in South China Sea," *Asia Times*, January 25, 2018; Patrick M. Cronin and Marvin C. Ott, "Deepening the US-Indonesian Strategic Partnership," The Diplomat, February 17, 2018; Nike Ching, "US, Vietnam to Cooperate on Freedom of Navigation in Disputed South China Sea," *VOA News*, July 9, 2018.

> Brian Hook, a senior adviser to US Secretary of State Rex Tillerson, said on Tuesday [January 9] that the issue of the South China Sea was raised at all diplomatic and security dialogues between China and the US...
>
> "China's provocative militarisation of the South China Sea is one area where China is contesting international law. They are pushing around smaller states in ways that put a strain on the global system," Hook said during a media telephone conference.
>
> "We are going to back up freedom-of-navigation operations and let them know we will fly, sail and operate wherever international law allows."...
>
> "We strongly believe China's rise cannot come at the expense of the values and rule-based order. That order is the foundation of peace and stability in the Indo-Pacific and also around the world," Hook said.
>
> "When China's behaviour is out of step with these values and these rules we will stand up and defend the rule of law."[94]

May 3, 2018, Statement About "Near-Term and Long-Term Consequences"

A May 3, 2018, press report stated the following:

> The United States has raised concerns with China about its latest militarization of the South China Sea and there will be near-term and long-term consequences, the White House said on Thursday [May 3].
>
> U.S. news network CNBC reported on Wednesday that China had installed anti-ship cruise missiles and surface-to-air missile systems on three manmade outposts in the South China Sea. It cited sources with direct knowledge of U.S. intelligence.
>
> Asked about the report, White House spokeswoman Sarah Sanders told a regular news briefing: "We're well aware of China's militarization of the South China Sea. We've raised concerns directly with the Chinese about this and there will be near-term and long-term consequences."
>
> Sanders did not say what the consequences might be.[95]

May 23, 2018, Withdrawal of Invitation to RIMPAC Exercise

On May 23, 2018, DOD announced that it was disinviting China from the 2018 RIMPAC (Rim of the Pacific) exercise. 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 exercises. DOD had invited China to participate in the 2018 RIMPAC exercise, and China had accepted that invitation.

Observers who have argued for the United States to take stronger actions in response to China's actions in the ECS and SCS have argued that the United States should, among other things, not invite China to participate in the 2018 RIMPAC exercise, on the grounds that doing so would in effect reward China for its recent actions in the ECS and SCS. They have also argued that the information gained from observing Chinese naval forces operate during the exercise would be outweighed by the information that China would gain from observing U.S. and other allied and partner navies operate during the exercise. Once DOD had issued the invitation to China to

[94] Kinling Lo, "US Accuses Beijing of 'Provocative Militarisation' of South China Sea," *South China Morning Post*, January 9, 2018.

[95] David Brunnstrom, "U.S. Says Will Be Consequences for China's South China Sea Militarization," *Reuters*, May 3, 2018.

participate in the 2018 RIMPAC exercise, these observers have argued that the invitation should be withdrawn.

Supporters of having China participate in RIMPAC exercises have argued that they are valuable for maintaining a constructive working relationship with China's navy—something, they argue, that could be of particular value if there were a U.S.-Chinese incident at sea or a U.S.-China crisis over some issue. They have also argued that China's participation in RIMPAC exercises provides opportunities to encourage China's navy to adopt U.S. and Western norms relating to issues such as freedom of navigation and avoidance of incidents at sea, and that the information gained from observing China's naval forces operate during the exercise is not outweighed by the information gained by China from observing U.S., allied, and partner navies operate during the exercises, particularly since China could observe the exercise using intelligence-gathering ships or perhaps other means, even without participating in the exercise.

A statement from DOD about the withdrawal of the invitation for China to participate in the 2018 RIMPAC exercise states:

> The United States is committed to a free and open Indo-Pacific. China's continued militarization of disputed features in the South China Sea only serve to raise tensions and destabilize the region. As an initial response to China's continued militarization of the South China Sea we have disinvited the PLA Navy from the 2018 Rim of the Pacific (RIMPAC) Exercise. China's behavior is inconsistent with the principles and purposes of the RIMPAC exercise.
>
> We have strong evidence that China has deployed anti-ship missiles, surface-to-air missile (SAM) systems, and electronic jammers to contested features in the Spratly Islands region of the South China Sea. China's landing of bomber aircraft at Woody Island has also raised tensions.
>
> While China has maintained that the construction of the islands is to ensure safety at sea, navigation assistance, search and rescue, fisheries protection, and other non-military functions the placement of these weapon systems is only for military use.
>
> We have called on China to remove the military systems immediately and to reverse course on the militarization of disputed South China Sea features.
>
> We believe these recent deployments and the continued militarization of these features is a violation of the promise that President Xi made to the United States and the World not to militarize the Spratly Islands.[96]

A May 23, 2018, press report states:

> The Pentagon rescinded an invitation to China to participate in an international military exercise in the Pacific Ocean next month, signaling disapproval to Beijing for what U.S. officials say is its refusal to stop militarizing South China Sea islands.
>
> Defense Secretary Jim Mattis, after weeks of internal debate within the Pentagon, concluded that China shouldn't be allowed to participate in the American-led biennial Rim of the Pacific exercise, slated to begin in June, according to U.S. officials. The invitation's withdrawal hasn't been previously disclosed.
>
> Chinese officials in Washington were notified of the decision Wednesday morning, said the U.S. officials. China's top diplomat, State Councilor Wang Yi, criticized the Pentagon's decision in comments while visiting the State Department Wednesday.

[96] DOD statement as reprinted in Megan Eckstein, "China Disinvited from Participating in 2018 RIMPAC Exercise," *USNI News*, May 23, 2018.

> "We find that a very unconstructive move, nonconstructive move," Mr. Wang told reporters. "We hope the U.S. will change such a negative mindset."...
>
> After The Wall Street Journal published [an initial version of] this article on Wednesday [May 23], Pentagon officials called their move "an initial response" to China's militarization of the islands.
>
> "We have strong evidence that China has deployed anti-ship missiles, surface-to-air missile (SAM) systems, and electronic jammers to contested features in the Spratly Islands region of the South China Sea," Lt. Col. Chris Logan, a Pentagon spokesman, said in a statement. "China's landing of a bomber aircraft at Woody Island has also raised tensions."
>
> Eric Sayers, of the Center for Strategic and International Studies, a think tank in Washington, and a former adviser to U.S. Pacific Command, said the Pentagon move "will be a minor blow to the PLA Navy's prestige."
>
> He said, "It will also send the signal to Beijing that China cannot expect to continue to militarize the South China Sea and still be treated as a welcomed member of the international maritime community."
>
> But, Mr. Sayers added, the Trump administration must still develop an overall strategy in the Indo- Pacific region if it hopes to influence the maritime domain there. "Thus far, there is little evidence or new initiatives one can point to that distinguishes this administration's regional policy from the previous one," he said.
>
> The decision to rescind the invitation came after more than a month of internal Trump administration debate about China, including the timing of any rescission, the officials said, especially given the trade talks.
>
> Top State Department officials initially advised against rescinding the invitation, hoping that diplomatic interventions would convince China to at least remove missiles from those islands, said the U.S. officials. State Department officials didn't immediately respond to a request for comment.
>
> But Pentagon officials held the view that it was time to impose a cost on the Chinese for their behavior in the South China Sea, the officials said.[97]

June 3, 2018, Press Report About Potential Increase in U.S. Patrols

A June 3, 2018, press report states:

> The United States is considering intensified naval patrols in the South China Sea in a bid to challenge China's growing militarization of the waterway, actions that could further raise the stakes in one of the world's most volatile areas.
>
> The Pentagon is weighing a more assertive program of so-called freedom-of-navigation operations close to Chinese installations on disputed reefs, two U.S. officials and Western and Asian diplomats close to discussions said.
>
> The officials declined to say how close they were to finalizing a decision.
>
> Such moves could involve longer patrols, ones involving larger numbers of ships or operations involving closer surveillance of Chinese facilities in the area, which now include electronic jamming equipment and advanced military radars.

[97] Gordon Lubold and Jeremy Page, "U.S. Retracts Invitation to China to Participate in Military Exercise," Wall Street Journal," *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.

> U.S. officials are also pushing international allies and partners to increase their own naval deployments through the vital trade route as China strengthens its military capabilities on both the Paracel and Spratly islands, the diplomats said, even if they stopped short of directly challenging Chinese holdings.
>
> "What we have seen in the last few weeks is just the start, significantly more is being planned," said one Western diplomat, referring to a freedom of navigation patrol late last month that used two U.S. ships for the first time.
>
> "There is a real sense more needs to be done."…
>
> Critics have said the patrols have little impact on Chinese behavior and mask the lack of a broader strategy to deal with China's growing dominance of the area….
>
> U.S. Defence Secretary Jim Mattis warned in Singapore on Saturday [June 2] that China's militarization of the South China Sea was now a "reality" but that Beijing would face unspecified consequences.[98]

Potential Distractions

Some observers have expressed concern that the Trump Administration's focus on North Korea has sometimes distracted the Administration from the situation in the South China Sea, permitting China to more easily increase or consolidate its gains in the area.[99] Other observers have expressed concern that the Trump Administration's focus on reducing the U.S. trade deficit with China could distract the Administration from other issues relating to China, including China's actions in the SCS.[100]

Freedom of Navigation (FON) Operations in SCS

Obama Administration FON Operations

At a September 17, 2015, hearing before the Senate Armed Services Committee on DOD's maritime security strategy in the Asia-Pacific region, DOD witnesses stated, in response to questioning, that the United States had not conducted a freedom of navigation (FON) operation within 12 miles of a Chinese-occupied land feature in the Spratly Islands since 2012. This led to a public debate in the United States (that was watched by observers in the Western Pacific) over whether the United States should soon conduct such an operation, particularly given China's occupation of Scarborough Shoal in 2012 and China's island-building activities at sites that its occupies in the SCS.

[98] Greg Torode and Idrees Ali, "U.S. Weighs More South China Sea Patrols to Confront 'New Reality' of China," Reuters, June 3, 2018. See also Ryan Browne, "US B-52s Fly By Contested Islands Amid Rising Tensions with China," *CNN*, June 5, 2018; Tara Copp, "US B-52s Again Fly in Contested Airspace of South China Sea Claims," *Air Force Times,* June 6, 2018.

[99] See Zachary Keck, "China Is Gaining Control of the South China Sea (Thanks to North Korea)," *National Interest,* December 21, 2017; Dan De Luce, "With Trump Focused on North Korea, Beijing Sails Ahead in South China Sea," *Foreign Policy,* November 16, 2017.

[100] See, for example, Paul J. Leaf, "Taiwan and the South China Sea Must Be Taken Off the Back Burner," *National Interest,* June 18, 2018.

Opponents argued that conducting a FON operation could antagonize China[101] and give China an excuse to militarize its occupied sites in the SCS.[102] Supporters argued that *not* conducting such an operation was inconsistent with the underlying premise of the U.S. FON program that navigational rights which are not regularly exercised are at risk of atrophy; that it was inconsistent with the U.S. position of taking no position on competing claims to sovereignty over disputed land features in the SCS (because it tacitly accepts Chinese sovereignty over those features); that it effectively rewarded (rather than imposed costs on) China for its assertive actions in the SCS, potentially encouraging further such actions; and that China intends to militarize its occupied sites in the Spratly Islands, regardless of whether the United States conducts FON operations there.

The Obama Administration reportedly considered, for a period of weeks, whether to conduct such an operation in the near future. Some observers argued that the Obama Administration's extended consideration of the question, and the press reporting on that deliberation, unnecessarily raised the political stakes involved in whether to conduct what, in the view of these observers, should have been a routine FON operation.[103]

The Obama Administration decided in favor of conducting the operation, and the operation reportedly was conducted near the Chinese-occupied site of Subi Reef on October 27, 2015 (which was October 26, 2015, in Washington, DC), using the U.S. Navy destroyer *Lassen* in conjunction with a U.S. Navy P-8 maritime patrol aircraft flying overhead.

Statements from executive branch sources about the operation that were reported in the press created some confusion among observers regarding how the operation was conducted and what rationale the Obama Administration was citing as the legal basis for the operation. In particular, there was confusion among observers as to whether the United States was defending the operation as an expression of the right of innocent passage[104]—a rationale, critics argued, that would

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[101] A September 18, 2015, press report, for example, stated the following:

> China said on Friday [September 18] it was "extremely concerned" about a suggestion from a top U.S. commander that U.S. ships and aircraft should challenge China's claims in the South China Sea by patrolling close to artificial islands it has built....
>
> Chinese Foreign Ministry spokesman Hong Lei said China was "extremely concerned" about the comments and China opposed "any country challenging China's sovereignty and security in the name of protecting freedom of navigation".
>
> "We demand that the relevant country speak and act cautiously, earnestly respect China's sovereignty and security interests, and not take any risky or provocative acts," Hong said at a daily news briefing.

(Ben Blanchard and Megha Rajagopalan, "China 'Extremely Concerned' By Proposed U.S. Challenge to Claims," *Reuters*, September 18, 2015. See also "Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on September 18, 2015," accessed September 18, 2015, at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1298026.shtml.) See also Lyle Goldstein, "How Will China Respond In the South China Sea? Ask the Soviet Union," *National Interest*, November 2, 2015.

[102] See, for example, Doug Bandow and Eric Gomez, "Further Militarizing the South China Sea May Undermine Freedom of Navigation," *The Diplomat*, October 22, 2015.

[103] See, for example, Michael Mazza, "In South China Sea, A Slow Death for Freedom of Navigation," American Enterprise Institute, October 16, 2015; Euan Graham, "South China Sea Dispute: US Challenge May Fall Into China Trap," *Lowy Institute*, October 19, 2015; Sydney J. Freedberg, "The Price of Delay: US Navy To Challenge Chinese Claims," *Breaking Defense*, October 26, 2015; Andrea Shalal, Matt Spetalnick, and David Brunnstrom, "Insight—As Obama Weighed Patrol to Counter China, Pentagon Urged Faster Action," *Reuters*, October 28, 2015.

[104] See, for example, Christopher P. Cavas, "Navy Chiefs Talk, New Details On Destroyer's Passage," *Defense News*, October 31, 2015; Sam LaGrone, "U.S. Destroyer Made an 'Innocent Passage' Near Chinese South China Sea Artificial Island in Recent Mission," *USNI News*, November 2, 2015; David Bosco, "How Far Did the United States Go

muddle the legal message sent by the operation, possibly implying U.S. acceptance of Chinese sovereignty over Subi Reef, which would inadvertently turn the operation into something very different and perhaps even self-defeating from a U.S. perspective.[105]

A second FON operation in the SCS was conducted on January 29, 2016, near Triton Island in the Paracel Islands, by the U.S. Navy destroyer C*urtis Wilber*.[106] A third FON operation in the SCS was conducted on May 10, 2016, in which the destroyer *William P. Lawrence* conducted an innocent passage within 12 nautical miles of Fiery Cross Reef, a Chinese-occupied feature in the Spratly Islands that is also claimed by Taiwan, Vietnam, and the Philippines.[107] A fourth FON operation in the SCS occurred on October 21, 2016, involving the destroyer *Decatur* operating near the Paracel Islands.[108] This was the final announced FON operation in the South China Sea during the Obama Administration.

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with the Lassen Operation?" *Lawfare*, November 3, 2015; Adam Klein, "An Answer to the Innocent Passage Mystery?" *Lawfare*, November 6, 2015.

[105] See, for example, Adam Klein, "What Did The Navy Do In The South China Sea?" *Lawfare*, November 4, 2015; Brendan S. Mulvaney, "The Unintended Consequences of the US Freedom of Navigation Operations in the South China Sea," *The Diplomat*, November 4, 2015; Timothy Choi, "Why the US Navy's First South China Sea FONOP Wasn't a FONOP," *The Diplomat*, November 4, 2015; Anthony Cowden, "Opinion: USS Lassen's Transit of Subi Reef Was Not So 'Innocent,'" *USNI News*, November 4, 2015; Euan Graham, "Innocent Passage: Did the US Just Fumble Its South China Sea Strategy?" *Lowy Institute Interpreter*, November 4, 2015; Sam LaGrone, "Confusion Continues to Surround U.S. South China Sea Freedom of Navigation Operation," *USNI News*, November 5, 2015; Keith Johnson and Dan De Luce, "Washington's Muddled Message in the South China Sea," *Foreign Policy*, November 5, 2015; Bonnie S. Glaser and Peter A. Dutton, "The U.S. Navy's Freedom of Navigation Operation around Subi Reef: Deciphering U.S. Signaling," *National Interest*, November 6, 2015; Demetri Sevastopulo and Geoff Dyer, "US Navy Operations Send Muddled Message to China," *Financial Times*, November 7, 2015; Andrea Shalal, "U.S. Patrol Sought to Avoid Provocation, Not Reinforce China Island Claim: Officials," *Reuters*, November 7, 2015; Sam LaGrone, "McCain Seeks Clarity on Recent U.S. South China Sea Freedom of Navigation Operation," *USNI News*, November 10, 2015; James Holmes, "How Washington Can Get Back on Course in the South China Sea," *Foreign Policy*, November 12, 2015; Raul "Pete" Pedrozo and James Kraska, "Can't Anybody Play This Game? US FON Operations and law of the Sea," *Lawfare*, November 17, 2015; Joseph A. Bosco, "South China Sea Aftermath," Center for Strategic and International Studies, November 24, 2015 (PacNet#80).

[106] See Jane Perlez, "U.S. Challenges China's Claim of Islands With Maritime Operation," *New York Times*, January 30, 2016; Sam LaGrone, "U.S. Destroyer Challenges More Chinese South China Sea Claims in New Freedom of Navigation Operation," *USNI News*, January 30, 2016; Barbara Starr and Joshua Berlinger, "U.S. Navy Sends Ship Near Disputed Island in South China Sea," *CNN*, January 31, 2016; Sam LaGrone, "China Upset Over 'Unprofessional' U.S. South China Sea Freedom of Navigation Operation," *USNI News*, January 31, 2016 (updated February 1, 2016); Ben Blanchard, "China Says U.S. Seeks 'Hegemony' After South China Sea Sailing," *Reuters*, February 1, 2016; Gregory Poling, "South China Sea FONOP 2.0: A Step in the Right Direction," Asia Maritime Transparency Initiative, February 2, 2016; Shannon Tiezzi, "China Rejects Latest US FONOP in the South China Sea," *The Diplomat*, February 2, 2016; Lawfare Staff, "Water Wars: U.S. Navy Back for FON in the South China Sea," *Lawfare*, February 5, 2016; Sam Bateman, "Revealed: America's 'Soft' Operation in the South China Sea," *National Interest*, February 9, 2016; Truong-Minh Vu and Jeremy Lagelee, "U.S. Navy Sets the Record Straight on FONOPs," *National Interest*, February 24, 2016.

[107] See, for example, Jane Perlez, "U.S. Sails Warship Near Island in South China Sea, Challenging Chinese Claims," *New York Times*, May 10, 2016; Sam LaGrone, "U.S. Destroyer Passes Near Chinese Artifical Island in South China Sea Freedom of Navigation Operation," *USNI News*, May 10, 2016; Michael Martina, Greg Torode, and Ben Blanchard, "China Scrambles Fighters as U.S. Sails Warship Near Chinese-Claimed Reef," *Reuters*, May 11, 2016; Zack Cooper and Bonnie S. Glaser, "How America Picks Its Next Move in the South China Sea," The National Interest, May 11, 2016; Julian Ku, "We've Seen This Movie Before: The Latest U.S. 'Innocent Passage' Freedom of Navigation Operation in the South China Sea," *Lawfare*, May 11, 2016.

[108] Idrees Ali and Matt Spetalnick, "U.S. Warship Challenges China's Claims in South China Sea—Officials," *Reuters*, October 21, 2016; Sam LaGrone, "U.S. Warship Conducts South China Sea Freedom of Navigation Operation," *USNI News*, October 21, 2016; David B. Larter, "U.S. Destroyer Challenges China's Claims in the South China Sea," *Navy Times*, October 21, 2016; Matthew Pennington, "US Navy Destroyer Operates in Waters Claimed by China," *Military.com*, October 22, 2016; Ankit Panda, "South China Sea: US Navy Destroyer Asserts Freedom of Navigation in

Trump Administration FON Operations

As of early May 2017, the Trump Administration had not conducted any announced FON operations in the SCS, and the Department of Defense reportedly had turned down proposals from the Navy to conduct such operations, prompting some observers to argue that the Trump Administration, in its first few months in office, appeared to be more hesitant about conducting FON operations in the SCS than the Obama Administration was during its final 15 months in office (i.e., since October 2015).[109] DOD officials stated that in spite of the absence of announced FON operations in the SCS, U.S. policy on such operations had not changed, and that the United States intended to conduct FON operations in the SCS in the near future.[110]

On May 25, 2017, the Navy conducted a FON operation in the SCS, sending the U.S. Navy destroyer *Dewey* within six nautical miles of Mischief Reef.[111] Chinese officials state that Chinese warships warned the *Dewey* to leave the area.[112]

On July 2, 2017, the Navy conducted another FON operation, sending the destroyer *Stethem* (DDG-63) within 12 nautical miles of Triton Island in the Paracels. Chinese officials stated that they sent ships and aircraft to area to warn the *Stethem* to leave the area.[113]

On August 10, 2017, the Navy conducted another FON operation, sending the destroyer *John S. McCain* (DDG-56) within 12 nautical miles of Mischief Reef. Chinese press reports stated that Chinese forces repeatedly warned the *McCain* to leave the area.[114]

Paracel Islands," *The Diplomat*, October 22, 2016.

[109] Helene Cooper, "Trump's Turn Toward China Curtails Navy Patrols in Disputed Zones," *New York Times*, May 2, 2017; Erik Slavin, "Despite Navy Requests, No Operations Near Disputed South China Sea Islands," *Stars and Stripes*, May 3, 2017; Mira Rapp-Hooper and Charles Edel, "Adrift in the South China Sea," *Foreign Affairs*, May 18, 2017.

[110] See, for example, Himani Sarkar, "No Change in U.S. Navy Freedom of Navigation Patrols: Commander," *Reuters*, May 8, 2017.

[111] See, for example, Gordon Lubold, "U.S. Navy Conducts First South CHina Sea Navigation Operation Under President Trump," *Wall Street Journal*, May 24, 2017; Sam LaGrone, "U.S. Warship Came Within 6 Miles of Chinese Artificial Island in Toughest Challenge Yet to Beijing South China Sea Claims," *USNI News*, May 25, 2016; Idrees Ali and David Brunnstrom, "U.S. Warship Drill Meant to Defy China's Claim Over Artificial Island: Officials," Reuters, May 26, 2017.

[112] See, for example, "China Warned Navy Destroyer USS Dewey to leave Area Near Man-made Island, [Chinese] Official Says," *Fox News*, May 25, 2017. Some sources state that the operation occurred on May 24.

For brief a review of the five FON operations reported between October 27, 2015, and May 25, 2017, see Eleanor Freund, "Freedom of Navigation in the South China Sea: A Practical Guide," Asia Maritime Transparency Initiative (CSIS), August 10, 2017. For a longer review on which this shorter review is based, see Eleanor Freund, *Freedom of Navigation in the South China Sea: A Practical Guide*, Harvard Kennedy School, June 2017, 43 pp. (Belfer Center for Science and International Affairs, Special Report).

[113] See, for example, Sam LaGrone, "Updated: USS Stethem Conducts Freedom of Navigation Operation Past Triton Island in South China Sea," *USNI News*, July 2, 2017; Lucas Tomlinson, "Exclusive: Pentagon Sails Destroyer Near Disputed Island in South China Sea, Officials Say," *Fox News*, July 2, 2017; Gordon Lubold and Jeremy Page, "U.S. Navy Patrols Near Disputed Island in South China Sea," *Wall Street Journal*, July 3, 2017; "U.S. Warship Sails Near Disputed Island in South China Sea," *Reuters*, July 3, 2017; Shi Jiangtao, "Chinese Warships and Fighter Jets Sent to Warn Off US Destroyer in South China Sea, Beijing Says," *South China Morning Post*, July 3, 2017; Simon Denyer and Thomas Gibbons-Neff, "China Vows to Step Up Air, Sea Patrols After U.S. Warship Sails Near Disputed Island," *Washington Post*, July 3, 2017.

[114] See, for example, Sam LaGrone, "USS John S. McCain Conducts South China Sea Freedom of Navigation Operation Past Mischief Reef; 3rd South China Sea FONOP This Year," *USNI News*, August 10, 2017; Lucas Tomlinson, "US Destroyer Sails Near Artificial Chinese Island in South China Sea," *Fox News*, August 10, 2017; "South China Sea: Chinese Military Tells US Ship 10 Times to Turn Around," *Guardian (UK)*, August 10, 2017; Chris Buckley, "Beijing Warns U.S. Over Navy Patrol in South China Sea," *New York Times*, August 11, 2017.

On October 10, 2017, the Navy reportedly conducted another FON operation, sending the destroyer *Chafee* (DDG-90) near (but reportedly not within 12 nautical miles of) land features in the Paracels.[115] Chinese press reports stated that Chinese forces warned the *Chafee* to leave the area.[116]

On January 17, 2018, the Navy reportedly conducted another FON operation, sending the destroyer *Hopper* (DDG-70) within 12 nautical miles of Scarborough Shoal.[117] China reportedly sent a Chinese navy ship to warn the *Hopper* to leave the area.[118]

On March 23, 2018, the Navy reportedly conducted another FON operation, sending the destroyer *Mustin* (DDG-89) within 12 nautical miles of Mischief Reef in the Spratly Islands.[119] China reportedly sent Chinese navy ships to warn the *Mustin* to leave the area.[120]

On May 27, 2018, the Navy reportedly conducted another FON operation, sending the cruiser *Antietam* (CG-54) and destroyer *Higgins* (DDG-76) within 12 nautical miles of four of the Paracel Islands—reportedly, Tree, Lincoln, Triton, and Woody islands.[121] China reportedly sent Chinese navy ships and aircraft to warn the *Antietam* and *Higgins* to leave the area.[122] The U.S. Navy reportedly considers that the Chinese warships in question maneuvered in a "safe but unprofessional" manner.[123]

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[115] See, for example, Idrees Ali, "Exclusive: U.S. Warship Sails near Islands Beijing Claims in South China Sea—U.S. Officials," *Reuters,* October 10, 2017; Zachary Cohen and Ryan Browne, "US Navy Detroyer Sails Near Disputed Island in South China Sea," *CNN,* October 10, 2017.

[116] See CNTV, "China Warms US Warship to Leave After It Sails Near Xisha Islands," *People's Daily Online,* "October 11, 2017. See also Sam LaGrone, "China Chides U.S. Over Latest South China Sea Freedom of Navigation Operation," USNI News, October 11, 2017.

[117] Bill Gertz, "Pentagon Denies Chinese Warship Drove U.S. Destroyer From S. China Sea," *Washington Free Beacon,* January 24, 2018; Lucas Tomlinson, "US Destroyer Sails Near Contested Reef in South China Sea Angering Beijing," *Fox News*, January 20, 2018; Ankit Panda, "South China Sea: US Destroyer Conducts Freedom of Navigation Operations Near Scarborough Shoal," *The Diplomat,* January 21, 2018.

See also Greg Torode and Philip Wen, "As U.S. Goes Quiet on Close Naval Patrols, China Speaks Out," *Reuters,* January 23, 2018; Sam LaGrone, "U.S. Warship Sails Past Disputed South China Sea Artificial Island in Freedom of Navigation Operation," *USNI News,* March 23, 2018; "U.S. Destroyer Sails Near Chinese-Held Island," *Maritime Executive,* March 23, 2018.

[118] Bill Gertz, "Pentagon Denies Chinese Warship Drove U.S. Destroyer From S. China Sea," *Washington Free Beacon,* January 24, 2018.

[119] See, for example, Idrees Ali, "Exclusive: U.S. Warship Sails near Disputed Islands in South China Sea, Officials Say," *Reuters*, March 23, 2018; Sam LaGrone, "U.S. Warship Sails Past Disputed South China Sea Artificial Island in Freedom of Navigation Operation," *USNI News,* March 23, 2018; "U.S. Destroyer Sails Near Chinese-Held Island," *Maritime Executive,* March 23, 2018.

[120] Sam LaGrone, "U.S. Warship Sails Past Disputed South China Sea Artificial Island in Freedom of Navigation Operation," *USNI News,* March 23, 2018; "U.S. Destroyer Sails Near Chinese-Held Island," *Maritime Executive,* March 23, 2018.

[121] Idrees Ali, "Exclusive: U.S. Warships Sail Near South China Sea Islands Claimed by Beijing," *Reuters,* May 27, 2018; Anna Giaritelli, "US Navy Ships Sail by South China Sea Islands in Symbolic, Defiant Move," *Washington Examiner*, May 27, 2018; Ben Westcott, Steven Jiang, and Joshua Berlinger, "US Sails Warships Past Disputed Islands in South China Sea," *CNN*, May 28, 2018; Jesse Johnson, "China Vows to Boost 'Combat Readiness' After U.S. Sails Two Warships Near South China Sea Islands," *Japan Times*, May 28, 2018; Ben Werner, "Two U.S. Warships Conduct South China Sea Freedom Of Navigation Operation," *USNI News*, May 29, 2018; Victoria Leoni, "The US Navy Just Sailed Through Chinese-Claimed Waters Again," Navy Times, May 29, 2018.

[122] Steven Lee Myers, "China Warns 2 American Warships in South China Sea," *New York Times,* May 27, 2018; Jesse Johnson, "China Vows to Boost 'Combat Readiness' After U.S. Sails Two Warships Near South China Sea Islands," *Japan Times*, May 28, 2018; Ben Werner, "Two U.S. Warships Conduct South China Sea Freedom Of Navigation Operation," *USNI News*, May 29, 2018.

[123] "U.S. Navy: Chinese Warships Maneuvered in 'Unprofessional' Manner," *CBS News,* May 29, 2018.

A September 1, 2017, press report states that

> The Pentagon for the first time has set a schedule of naval patrols in the South China Sea in an attempt to create a more consistent posture to counter China's maritime claims there, injecting a new complication into increasingly uneasy relations between the two powers.
>
> The U.S. Pacific Command has developed a plan to conduct so-called freedom-of-navigation operations two to three times over the next few months, according to several U.S. officials, reinforcing the U.S. challenge to what it sees as excessive Chinese maritime claims in the disputed South China Sea. Beijing claims sovereignty over all South China Sea islands and their adjacent waters.
>
> The plan marks a significant departure from such military operations in the region during the Obama administration, when officials sometimes struggled with when, how and where to conduct those patrols. They were canceled or postponed based on other political factors after what some U.S. officials said were contentious internal debates.
>
> The idea behind setting a schedule contrasts with the more ad hoc approach to conducting freedom-of-navigation operations, known as "fonops" in military parlance, and establish more regularity in the patrols. Doing so may help blunt Beijing's argument that the patrols amount to a destabilizing provocation each time they occur, U.S. officials said....
>
> Officials described the new plan as a more predetermined way of conducting such patrols than in the past, though not immutable. The plan is in keeping with the Trump administration's approach to military operations, which relies on giving commanders leeway to determine the U.S. posture. In keeping with policies against announcing military operations before they occur, officials declined to disclose where and when they would occur....
>
> In a new facet, some freedom-of-navigation patrols may be "multi-domain" patrols, using not only U.S. Navy warships but U.S. military aircraft as well.
>
> Thus far, there have been three publicly disclosed freedom-of-navigation operations under the Trump administration. The last one was conducted on Aug. 10 by the navy destroyer, the USS John S. McCain, which days later collided with a cargo ship, killing 10 sailors.
>
> That patrol around Mischief Reef—one of seven fortified artificial islands that Beijing has built in the past three years in the disputed Spratlys archipelago—also included an air component.
>
> According to U.S. officials, two P-8 Poseidon reconnaissance aircraft flew above the McCain in a part of the operation that hadn't been previously disclosed. More navigation patrols using warships likely now will include aircraft overhead, they said."[124]

An October 12, 2017, blog post states the following:

> The [reported October 10, 2017,] FONOP is the fourth in just five months and demonstrates that the Trump administration is accepting a higher frequency for these operations. After the Obama administration initiated South China Sea operations in October 2015, beginning with challenges to Chinese and other South China Sea claimant state possessions in the Spratly group, it only carried out three additional operations in 2016.
>
> Critics of the Obama administration's approach to the U.S. Navy's freedom of navigation operations in the South China Sea suggested that the relative infrequency and perception that the operations were subject of the overall ebbs and flows of the U.S.-China bilateral relationship undermined their stated utility as legal signaling tools. Even with stepped up FONOPs this year, the Trump administration hasn't changed the fundamentals of U.S.

[124] Gordon Lubold and Jeremy Page, "U.S. Readies Plan to Increase Patrols in South China Sea," *Wall Street Journal*, September 1, 2017.

South China Sea policy, which continues to remain agnostic about sovereignty claims and focuses exclusively on freedom of navigation, overflight, and the preservation of international law and order in the region.

With the exception of USS Dewey's May 2017 FONOP around Mischief Reef—notable for being the first FONOP this year—successive Trump administration FONOPs have attracted comparatively less attention in the press. Proponents of these operations in the United States have argued that they should not be seen as noteworthy events, but more as a fact of life in the South China Sea—a reminder of the U.S. Navy's forward presence in the area and its commitment to freedom of navigation.

A corollary of the increased pace of operations this year is that a slowdown in U.S. FONOPs could appear to be motivated by broader diplomatic concerns in the bilateral U.S.-China relationship.[125]

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-**

[125] Ankit Panda, "South China Sea: Fourth US FONOP in Five Months Suggests a New Operational Rhythm," *The Diplomat*, October 12, 2017.

> **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."

- 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."[126]

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.[127]

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

[126] James Kraska, "The Legal Rationale for Going Inside 12," Asia Maritime Transparency Initiative (Center for Strategic & International Studies), September 11, 2015. See also James Kraska, "The Nine Ironies of the South China Sea Mess," *The Diplomat*, September 17, 2016.

[127] 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.

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 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."[128]

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 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

[128] 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.

> 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.[129]

What FON Operations Can—and Cannot—Accomplish

As mentioned earlier, in terms of identifying specific actions that are intended to support U.S. policy goals, a key element would be to have a clear understanding of which actions are intended to support which goals, and to maintain an alignment of actions with policy goals. U.S. freedom of navigation (FON) operations can directly support a general goal of defending principle of freedom of the seas, but might support other goals only indirectly, marginally, or not at all.

[129] Peter A. Dutton and Isaac B. Kardon, "Forget the FONOPs—Just Fly, Sail and Operate Wherever International Law Allows," *Lawfare*, June 10, 2017.

Cost-Imposing Actions

Some of the actions taken to date by the United States, as well as some of those suggested by observers who argue in favor of stronger U.S. actions, are intended to impose costs on China for conducting certain activities in the ECS and SCS, with the aim of persuading China to stop or reverse those activities. Cost-imposing actions can come in various forms (e.g., reputational/political, institutional, or economic).[130]

Although the potential additional or strengthened actions often relate to the Western Pacific, potential cost-imposing actions do not necessarily need to be limited to that region. 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.[131] Expanding the potential scope of cost-imposing actions to regions beyond the Western Pacific can 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 may 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.

Potential Further U.S. Actions Suggested by Observers

Some observers argue that the current response to China's actions in the SCS is inadequate, and have proposed taking stronger actions. **Appendix G** presents a bibliography of some recent writings by these observers. In general, actions proposed by these observers include (but are not limited to) the following:

- making a statement (analogous to the one that U.S. leaders have made concerning the Senkaku islands and the U.S.-Japan treaty on mutual cooperation and security) that clarifies what the United States would do under the U.S.-Philippines mutual defense treaty in the event of certain Chinese actions at Scarborough Shoal, Second Thomas Shoal, or elsewhere in the SCS;[132]
- further increasing and/or accelerating actions to strengthen the capacity of allied and partner countries in the region to maintain maritime domain awareness (MDA) and defend their maritime claims by conducting coast guard and/or navy patrols of claimed areas;
- further increasing U.S. Navy operations in the region, including sending U.S. Navy ships more frequently to waters within 12 nautical miles of Chinese-

[130] For an example of a report that discusses potential cost-imposing strategies in some detail, see Patrick M. Cronin, The Challenge of Responding to Maritime Coercion, Center for a New American Security, Washington, September 2014.

[131] For more on the Arctic Council, see CRS Report R41153, *Changes in the Arctic: Background and Issues for Congress*, coordinated by Ronald O'Rourke.

[132] See, for example, Zack Cooper and Mira Rapp-Hooper, "Protecting the Rule of Law on the South China Sea," *Wall Street Journal*, March 31, 2016; Bill Gertz, "U.S. Mulls Pledge on Disputed Philippines Outpost," *Washington Times*, February 24, 2016.

occupied sites in the SCS, and conducting FON operations in the SCS jointly with navy ships of U.S. allies;

- further strengthening U.S. security cooperation with allied and partner countries in the region, and with India, to the point of creating a coalition for balancing China's assertiveness;[133] and
- taking additional actions to impose costs on China for its actions in its near-seas region, such as inviting Taiwan to participate in the 2018 RIMPAC exercise.[134]

Risk of United States Being Drawn into a Crisis or Conflict

As mentioned earlier, 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. 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?
- 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

[133] An August 2015 press report states that "The Philippines defense chief said he asked the visiting U.S. Pacific commander on Wednesday [August 26] to help protect the transport of fresh Filipino troops and supplies to Philippine-occupied reefs in the disputed South China Sea by deploying American patrol planes to discourage Chinese moves to block the resupply missions." (Jim Gomez, "Philippines Seeks U.S. Help to Protect Troops in Disputed Sea," *Military Times,* August 2 6, 2015. See also Agence France-Presse, "Spokesman: US, Philippines Hold Talks On Boosting Military Capacity," *Defense News*, August 26, 2015; Manuel Mogato, "Philippines Seeks 'Real-Time' U.S. Help in Disputed South China Sea," *Reuters,* August 27, 2015.

[134] Taiwan has reportedly asked the United States to be invited to RIMPAC. See, for example, "Taiwan Eyes Golden Opportunity to Take Part in RIMPAC Exercise: MND," *Focus Taiwan*, May 30, 2018; Jonathan Chin, "US Drill a 'Superb' Opportunity: Minister," *Taipei Times*, May 31, 2018. See also Aaron Tu and Jonathan Chin, "US Keeping China Out of Drills Presents Opportunity for Taiwan, Observers Say," *Taipei Times,* May 28, 2018.

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 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?

Whether United States Should Ratify UNCLOS

Another issue for Congress—particularly the Senate—is the potential impact of China's actions in the SCS and ECS on the question of whether the United States should become a party to the United Nations Convention on the Law of the Sea (UNCLOS).[135] 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.[136] 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 112th 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.[137]
- 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.

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

[135] For additional background information on UNCLOS, see **Appendix B**.

[136] Treaty Document 103-39.

[137] See, for example, Andrew Browne, "A Hole in the U.S. Approach to Beijing," *Wall Street Journal*, May 20, 2014.

- 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[138] 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.[139]

Legislative Activity in 2018

National Defense Authorization Act for Fiscal Year 2019/John S. McCain National Defense Authorization Act for Fiscal Year 2019 (H.R. 5515/S. 2987)

House Committee Report

In H.R. 5515 as reported by the House Armed Services Committee (H.Rept. 115-676 of May 15, 2018), **Section 1254** states:

> SEC. 1254. Modification, redesignation, and extension of Southeast Asia Maritime Security Initiative.
>
> (a) Modification and redesignation.—
>
> (1) IN GENERAL.—Subsection (a) of section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92; 129 Stat. 1073; 10 U.S.C. 2282 note), as amended by section 1289 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328; 130 Stat. 2555), is further amended—

[138] 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 (Center for Strategic & International Studies), September 11, 2015.

[139] For an article providing general arguments against the United States becoming a party to UNCLOS, see 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.

(A) in paragraph (1), by striking "South China Sea" and inserting "South China Sea and Indian Ocean"; and

(B) in paragraph (2), by striking "the 'Southeast Asia Maritime Security Initiative'" and inserting "the 'Indo-Pacific Maritime Security Initiative'".

(2) CONFORMING AMENDMENT.—The heading of such section is amended to read as follows:

"Sec. 1263. Indo-Pacific Maritime Security Initiative.".

(b) Covered countries.—Subsection (e)(2) of such section is amended by adding at the end the following:

"(D) India.".

(c) Designation of additional countries.—Such section is further amended—

(1) in subsection (e)(1), by striking "subsection (f)" and inserting "subsection (g)";

(2) by redesignating subsections (f), (g), and (h) as subsections (g), (h), and (i), respectively; and

(3) by inserting after subsection (e) the following:

"(f) Inclusion of additional countries.—The Secretary of Defense, with the concurrence of the Secretary of State, is authorized to include additional foreign countries under subsection (b) for purposes of providing assistance and training under subsection (a) and additional foreign countries under subsection (e)(2) for purposes of providing payment of incremental expenses in connection with training described in subsection (a)(1)(B) if, with respect to each such additional foreign country, the Secretary determines and certifies to the appropriate committees of Congress that it is important for increasing maritime security and maritime domain awareness in the Indo-Pacific region.".

(d) Extension.—Subsection (i) of such section, as redesignated, is amended by striking "September 30, 2020" and inserting "September 30, 2023".

House Floor Action

On May 22, 2018, as part of its consideration of H.R. 5515, the House agreed to by voice vote H.Amdt. 644, an en bloc amendment including, inter alia, amendment number 91 as printed in H.Rept. 115-698 of May 21, 2018, providing for consideration of H.R. 5515. Amendment 91 added Section 1298, which states:

SEC. 1298. Modification to annual report on military and security developments involving the People's Republic of China.

Paragraph (22) of section 1202(b) of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106–65; 10 U.S.C. 113 note), as most recently amended by section 1261 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115–91; 131 Stat. 1688), is further amended by striking "activities in the South China Sea" and inserting the following:

""activities—

"(A) in the South China Sea;

"(B) in the East China Sea, including in the vicinity of the Senkaku islands; and

"(C) in the Indian Ocean region.".

Senate

In S. 2987 as reported by the Senate Armed Services Committee (S.Rept. 115-262 of June 5, 2018), **Section 1064** states:

> SEC. 1064. United States policy with respect to freedom of navigation and overflight.
>
> (a) Declaration of policy.—It is the policy of the United States to fly, sail, and operate throughout the oceans, seas, and airspace of the world wherever international law allows.
>
> (b) Implementation of policy.—In furtherance of the policy set forth in subsection (a), the Secretary of Defense should—
>
> (1) plan and execute a robust series of routine and regular air and naval presence missions throughout the world and throughout the year, including for critical transportation corridors and key routes for global commerce;
>
> (2) in addition to the missions executed pursuant to paragraph (1), execute routine and regular air and maritime freedom of navigation operations throughout the year, in accordance with international law, including the use of expanded military options and maneuvers beyond innocent passage; and
>
> (3) to the maximum extent practicable, execute the missions pursuant to paragraphs (1) and (2) with regional partner countries and allies of the United States.

Section 1241 of S. 2987 as reported states:

> SEC. 1241. Redesignation, expansion, and extension of Southeast Asia Maritime Security Initiative.
>
> (a) Redesignation as Indo-Pacific Maritime Security Initiative.—
>
> (1) IN GENERAL.—Subsection (a)(2) of section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (10 U.S.C. 333 note) is amended by striking "the 'Southeast Asia Maritime Security Initiative'" and inserting "the 'Indo-Pacific Maritime Security Initiative'".
>
> (2) CONFORMING AMENDMENT.—The heading of such section is amended to read as follows:
>
> "SEC. 1263. Indo-Pacific Maritime Security Initiative".
>
> (b) Expansion.—
>
> (1) EXPANSION OF REGION TO RECEIVE ASSISTANCE AND TRAINING.—Subsection (a)(1) of such section is amended by inserting "and the Indian Ocean" after "South China Sea" in the matter preceding subparagraph (A).
>
> (2) RECIPIENT COUNTRIES OF ASSISTANCE AND TRAINING GENERALLY.—Subsection (b) of such section is amended—
>
> (A) in paragraph (2), by striking the comma at the end and inserting a period; and
>
> (B) by adding at the end the following new paragraphs:
>
> "(6) Bangladesh.
>
> "(7) Sri Lanka.".
>
> (3) COUNTRIES ELIGIBLE FOR PAYMENT OF CERTAIN INCREMENTAL EXPENSES.—Subsection (e)(2) of such section is amended by adding at the end the following new subparagraph:
>
> "(D) India.".

(c) Extension.—Subsection (h) of such section is amended by striking "September 30, 2020" and inserting "December 31, 2025".

Regarding Section 1241, S.Rept. 115-262 states:

Redesignation, expansion, and extension of Southeast AsiaMaritime Security Initiative (sec. 1241)

The committee recommends a provision that would amend section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92) to: redesignate the Southeast Asia Maritime Security Initiative as the Indo-Pacific Maritime Security Initiative; add Bangladesh and Sri Lanka as recipient countries of assistance and training; add India as a covered country eligible for payment of certain incremental expenses; and extend the authority under the section through December 31, 2025.

The committee continues to strongly support efforts under the Southeast Asia Maritime Security Initiative aimed at enhancing the capabilities of regional partners to more effectively exercise control over their maritime territory and to deter adversaries. The committee is encouraged by the progress that has been made under the initiative, and notes that to date, the Department of Defense has utilized the authority under section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92), as amended, to support specified partner capacity-building efforts in the region, to include the provision of training, sustainment support, and participation in multilateral engagements. The committee recognizes that the initiative was designed to support a long-term capacity building effort, which will require increased resources in future years as requirements are established and refined, as programs mature, and as the regional security environment continues to evolve.

The committee believes the Department's efforts to improve maritime domain awareness and maritime security should be fully integrated into a U.S. strategy for a free and open Indo-Pacific. Therefore, the committee supports redesignating the authority under section 1263 as the Indo-Pacific Maritime Security Initiative, the inclusion of Bangladesh and Sri Lanka as recipient countries, and the addition of India as a covered country to encourage its participation in regional security initiatives of this kind. Furthermore, as a demonstration of the United States' commitment to allies and partners in the region, the committee supports the extension of the Indo-Pacific Maritime Security Initiative through the end of 2025.

Beyond the Indo-Pacific Maritime Security Initiative, the committee encourages the Department to make use of the full complement of security cooperation authorities available to the Department, particularly those under section 1241 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328), to enhance the capabilities of foreign security partners in South and Southeast Asia to protect mutual security interests. (Pages 296-297)

Section 1245 of S. 2987 as reported states:

SEC. 1245. Prohibition on participation of the People's Republic of China in Rim of the Pacific (RIMPAC) naval exercises.

(a) Sense of Congress.—It is the sense of Congress that—

(1) the pace and militarization by the Government of the People's Republic of China of land reclamation activities in the South China Sea is destabilizing the security of United States allies and partners and threatening United States core interests;

(2) these activities of the Government of the People's Republic of China adversarially threaten the maritime security of the United States and our allies and partners;

(3) no country that acts adversarially should be invited to multilateral exercises; and

(4) the involvement of the Government of the People's Republic of China in multilateral exercises should undergo reevaluation until such behavior changes.

(b) Conditions for future participation in RIMPAC.—The Secretary of Defense shall not enable or facilitate the participation of the People's Republic of China in any Rim of the Pacific (RIMPAC) naval exercise unless the Secretary certifies to the congressional defense committees that China has—

(1) ceased all land reclamation activities in the South China Sea;

(2) removed all weapons from its land reclamation sites; and

(3) established a consistent four-year track record of taking actions toward stabilizing the region.

A June 26, 2018, statement of Administration policy regarding S. 2987 stated:

Prohibition on Participation of the People's Republic of China in Rim of the Pacific (RIMPAC) Naval Exercises. The Administration objects to section 1245 because China's participation in RIMPAC and other military-to-military events may be appropriate or inappropriate in any given year, depending on numerous other factors. Section 1245 would place restrictions on the Secretary of Defense's ability to manage a strategic relationship in the context of competition, limiting DOD's options on China and ability to act in the national security interest of the United States.[140]

Section 1251 of S. 2987 as reported states:

SEC. 1251. Report on military and coercive activities of the People's Republic of China in South China Sea.

(a) In general.—Except as provided in subsection (d), immediately after the commencement of any significant reclamation or militarization activity by the People's Republic of China in the South China Sea, including any significant military deployment or operation or infrastructure construction, the Secretary of Defense, in coordination with the Secretary of State, shall submit to the congressional defense committees, and release to the public, a report on the military and coercive activities of China in the South China Sea in connection with such activity.

(b) Elements of report to public.—Each report on a significant reclamation or militarization activity under subsection (a) shall include a short narrative on, and one or more corresponding images of, such significant reclamation or militarization activity.

(c) Form.—

(1) SUBMITTAL TO CONGRESS.—Any report under subsection (a) that is submitted to the congressional defense committees shall be submitted in unclassified form, but may include a classified annex.

(2) RELEASE TO PUBLIC.—If a report under subsection (a) is released to the public, such report shall be so released in unclassified form.

(d) Waiver.—

(1) RELEASE OF REPORT TO PUBLIC.—The Secretary of Defense may waive the requirement in subsection (a) for the release to the public of a report on a significant reclamation or militarization activity if the Secretary determines that the release to the public of a report on such activity under that subsection in the form required by subsection (c)(2) would have an adverse effect on the national security interests of the United States.

[140] Executive Office of the President, *Follow-On to Statement of Administration Policy, S. 2987—John S. McCain National Defense Authorization Act for Fiscal year 2019*, June 26, 2018, p. 9.

> (2) NOTICE TO CONGRESS.—If the Secretary issues a waiver under paragraph (1) with respect to a report on an activity, not later than 48 hours after the Secretary issues such waiver, the Secretary shall submit to the congressional defense committees written notice of, and justification for, such waiver.

Regarding Section 1251, S.Rept. 115-262 states:

> **Report on military and coercive activities of the People's Republic of China in the South China Sea (sec. 1251)**
>
> The committee recommends a provision that would require the Secretary of Defense, in coordination with the Secretary of State, to submit to the congressional defense committees and release to the public, a report on the military and coercive activities of China in the South China Sea in connection with such activity immediately after the commencement of any significant reclamation or militarization activity by the People's Republic of China in the South China Sea, including any significant military deployment or operation or infrastructure construction.
>
> The committee is concerned that sufficient information has not been made publicly available in a timely fashion regarding China's reclamation and militarization activities of China in the South China Sea. Therefore, the committee urges the Secretary of Defense to determine that the public interest in selective declassification of China's activities in the South China Sea outweighs the potential damage from disclosure. The Secretary should consider mandating that the directors of National Geospatial-Intelligence Agency and the Defense Intelligence Agency provide the Bureau of Intelligence and Research (INR) at the State Department with declassified aircraft-generated imagery and supporting analysis describing Chinese activities of concern. The committee also urges that the State Department brief and distribute the reports to the media and throughout Southeast Asia. (Page 300)

Conference

In the conference report (H.Rept. 115-874 of July 25, 2018) on H.R. 5515, **Section 1086** states:

> SEC. 1086. UNITED STATES POLICY WITH RESPECT TO FREEDOM OF NAVIGATION AND OVERFLIGHT.
>
> (a) DECLARATION OF POLICY.—It is the policy of the United States to fly, sail, and operate throughout the oceans, seas, and airspace of the world wherever international law allows.
>
> (b) IMPLEMENTATION OF POLICY.—In furtherance of the policy set forth in subsection (a), the Secretary of Defense should—
>
> (1) plan and execute a robust series of routine and regular air and naval presence missions throughout the world and throughout the year, including for critical transportation corridors and key routes for global commerce;
>
> (2) in addition to the missions executed pursuant to paragraph (1), execute routine and regular air and maritime freedom of navigation operations throughout the year, in accordance with international law, including, but not limited to, maneuvers beyond innocent passage; and
>
> (3) to the maximum extent practicable, execute the missions pursuant to paragraphs (1) and (2) with regional partner countries and allies of the United States.

Section 1252 of H.R. 5515 states:

> SEC. 1252. REDESIGNATION, EXPANSION, AND EXTENSION OF SOUTHEAST ASIA MARITIME SECURITY INITIATIVE.

(a) REDESIGNATION AS INDO-PACIFIC MARITIME SECURITY INITIATIVE.—

(1) IN GENERAL.—Subsection (a)(2) of section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (10 U.S.C. 333 note) is amended by striking ''the 'Southeast Asia Maritime Security Initiative' '' and inserting ''the 'Indo-Pacific Maritime Security Initiative' ''.

(2) CONFORMING AMENDMENT.—The heading of such section is amended to read as follows:

''SEC. 1263. INDO-PACIFIC MARITIME SECURITY INITIATIVE.''.

(b) EXPANSION.—

(1) EXPANSION OF REGION TO RECEIVE ASSISTANCE AND TRAINING.—Subsection (a)(1) of such section is amended by inserting ''and the Indian Ocean'' after ''South China Sea'' in the matter preceding subparagraph (A).

(2) RECIPIENT COUNTRIES OF ASSISTANCE AND TRAINING GENERALLY.—Subsection (b) of such section is amended—

(A) in paragraph (2), by striking the comma at the end and inserting a period; and

(B) by adding at the end the following new paragraphs:

''(6) Bangladesh.

''(7) Sri Lanka.''.

(3) COUNTRIES ELIGIBLE FOR PAYMENT OF CERTAIN INCREMENTAL EXPENSES.—Subsection (e)(2) of such section is amended by adding at the end the following new subparagraph:

''(D) India.''.

(c) EXTENSION.—Subsection (h) of such section is amended by striking ''September 30, 2020'' and inserting ''December 31, 2025''.

Section 1259 of H.R. 5515 states:

SEC. 1259. PROHIBITION ON PARTICIPATION OF THE PEOPLE'S REPUBLIC OF CHINA IN RIM OF THE PACIFIC (RIMPAC) NAVAL EXERCISES.

(a) CONDITIONS FOR FUTURE PARTICIPATION IN RIMPAC.—

(1) IN GENERAL.—The Secretary of Defense shall not enable or facilitate the participation of the People's Republic of China in any Rim of the Pacific (RIMPAC) naval exercise unless the Secretary certifies to the congressional defense committees that China has—

(A) ceased all land reclamation activities in the South China Sea;

(B) removed all weapons from its land reclamation sites; and

(C) established a consistent four-year track record of taking actions toward stabilizing the region.

(2) FORM.—The certification under paragraph (1) shall be in unclassified form but may contain a classified annex as necessary.

(b) NATIONAL SECURITY WAIVER.—

(1) IN GENERAL.—The Secretary of Defense may waive the certification requirement under subsection (a) if the Secretary determines the waiver is in the national security interest of the United States and submits to the congressional defense committees a detailed justification for the waiver.

(2) FORM.—The justification required under paragraph (1) shall be in unclassified form but may contain a classified annex as necessary.

Section 1262 of H.R. 5515 states:

SEC. 1262. REPORT ON MILITARY AND COERCIVE ACTIVITIES OF THE PEOPLE'S REPUBLIC OF CHINA IN SOUTH CHINA SEA.

(a) IN GENERAL.—Except as provided in subsection (d), immediately after the commencement of any significant reclamation, assertion of an excessive territorial claim, or militarization activity by the People's Republic of China in the South China Sea, including any significant military deployment or operation or infrastructure construction, the Secretary of Defense, in coordination with the Secretary of State, shall submit to the appropriate congressional committees, and release to the public, a report on the military and coercive activities of China in the South China Sea in connection with such activity.

(b) ELEMENTS OF REPORT TO PUBLIC.—Each report on the commencement of a significant reclamation, an assertion of an excessive territorial claim, or a militarization activity under subsection (a) shall include a short narrative on, and one or more corresponding images of, such commencement of a significant reclamation, assertion of an excessive territorial claim, or militarization activity.

(c) FORM.—

(1) SUBMISSION TO CONGRESS.—Any report under subsection (a) that is submitted to the appropriate congressional committees shall be submitted in unclassified form, but may include a classified annex.

(2) RELEASE TO PUBLIC.—If a report under subsection (a) is released to the public, such report shall be so released in unclassified form.

(d) WAIVER.—

(1) RELEASE OF REPORT TO PUBLIC.—The Secretary of Defense may waive the requirement in subsection (a) for the release to the public of a report on the commencement of any significant reclamation, an assertion of an excessive territorial claim, or a militarization activity by the People's Republic of China in the South China Sea if the Secretary determines that the release to the public of a report on such activity under that subsection in the form required by subsection (c)(2) would have an adverse effect on the national security interests of the United States.

(2) NOTICE TO CONGRESS.—If the Secretary issues a waiver under paragraph (1) with respect to a report on an activity, not later than 48 hours after the Secretary issues such waiver, the Secretary shall submit to the appropriate congressional committees written notice of, and justification for, such waiver.

(e) APPROPRIATE CONGRESSIONAL COMMITTEES DEFINED.—In this section, the term ''appropriate congressional committees'' means—

(1) the congressional defense committees; and

(2) the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives.

Regarding Section 1262, H.Rept. 115-874 states:

Report on military and coercive activities of the People's Republic of China in South China Sea (sec. 1262)

The House bill contained a provision (sec. 1261) that would require Secretary of Defense, in consultation with the Director of National Intelligence and the Secretary of State, to submit a report to appropriate congressional committees on a quarterly basis describing

China's activities in the Indo-Pacific region, and to disseminate the report to regional allies and partners and provide public notification, as appropriate. The provision would require that the dissemination and availability of the report and public notification be made in a manner consistent with national security and the protection of classified national security information.

The Senate amendment contained a similar provision (sec. 1251) that would require the Secretary of Defense, in coordination with the Secretary of State, to submit to the congressional defense committees and release to the public, a report on the military and coercive activities of China in the South China Sea in connection with such activity immediately after the commencement of any significant reclamation or militarization activity by the People's Republic of China in the South China Sea, including any significant military deployment or operation or infrastructure construction.

The House recedes with an amendment that would clarify that the required report shall be submitted to the congressional defense committees immediately after the commencement of any significant reclamation, assertion of an excessive territorial claim, or military activity by the People's Republic of China in the South China Sea.

The conferees are concerned that sufficient information has not been made publicly available in a timely fashion regarding China's reclamation and militarization activities in the South China Sea. Moreover, the conferees recognize that China has engaged in provocative military activities elsewhere throughout the Indo-Pacific Region, including the East China Sea, the Taiwan Strait, and the Indian Ocean. The conferees urge the Secretary of Defense to give full consideration to the strategic and public interest in selective declassification of China's activities in the South China Sea and elsewhere in the Indo-Pacific region. (Pages 993-994)

Section 1288 of H.R. 5515 states:

SEC. 1288. MODIFICATION OF FREEDOM OF NAVIGATION REPORTING REQUIREMENTS.

Subsection (a) of section 1275 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328; 130 Stat. 2540), as amended by section 1262(a)(1) of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115–91; 131 Stat. 1689), is further amended by striking ''the Committees on Armed Services of the Senate and the House of Representatives'' and inserting ''the Committee on Armed Services and the Committee on Foreign Relations of the Senate and the Committee on Armed Services and the Committee on Foreign Affairs of the House of Representatives''.

Appendix A. Strategic Context from U.S. Perspective

This appendix presents a brief discussion of some elements of the strategic context from a U.S. perspective in which the issues discussed in this report may be considered. There is also a broader context of U.S.-China relations and U.S. foreign policy toward the Asia-Pacific that is covered in other CRS reports.[141]

Shift in International Security Environment

World events have led some observers, starting in late 2013, to conclude that the international security environment has undergone a shift from the familiar post-Cold War era of the past 20 to 25 years, also sometimes known as the unipolar moment (with the United States as the unipolar power), to a new and different situation that features, among other things, renewed great power competition with China and Russia and challenges by these two countries and others to elements of the U.S.-led international order that has operated since World War II.[142] China's actions in the SCS and ECS can be viewed as one reflection of that shift.

Uncertainty Regarding Future U.S. Role in World

The overall U.S. role in the world since the end of World War II in 1945 (i.e., over the past 70 years) is generally described as one of global leadership and significant engagement in international affairs. A key aim of that role has been to promote and defend the open international order that the United States, with the support of its allies, created in the years after World War II. In addition to promoting and defending the open international order, the overall U.S. role is generally described as having been one of promoting freedom, democracy, and human rights, while criticizing and resisting authoritarianism where possible, and opposing the emergence of regional hegemons in Eurasia or a spheres-of-influence world.

Certain statements and actions from the Trump Administration have led to uncertainty about the Administration's intentions regarding the future U.S. role in the world. Based on those statements and actions, some observers have speculated that the Trump Administration may want to change the U.S. role in one or more ways. A change in the overall U.S. role could have profound implications for U.S. foreign policy, including U.S. policy regarding maritime territorial and EEZ disputes involving China.[143]

U.S. Grand Strategy

Discussion of the above-mentioned shift in the international security environment has led to a renewed emphasis in discussions of U.S. security and foreign policy on grand strategy and geopolitics. From a U.S. perspective, grand strategy can be understood as strategy considered at a global or interregional level, as opposed to strategies for specific countries, regions, or issues.

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[141] See, for example, CRS Report R41108, *U.S.-China Relations: An Overview of Policy Issues*, by Susan V. Lawrence, and CRS Report R42448, *Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia*, coordinated by Mark E. Manyin.

[142] For additional discussion, see CRS Report R43838, *A Shift in the International Security Environment: Potential Implications for Defense—Issues for Congress*, by Ronald O'Rourke.

[143] For additional discussion, see CRS Report R44891, *U.S. Role in the World: Background and Issues for Congress*, by Ronald O'Rourke and Michael Moodie.

Geopolitics refers to the influence on international relations and strategy of basic world geographic features such as the size and location of continents, oceans, and individual countries.

From a U.S. perspective on grand strategy and geopolitics, it can be noted that most of the world's people, resources, and economic activity are located not in the Western Hemisphere, but in the other hemisphere, particularly Eurasia. In response to this basic feature of world geography, U.S. policymakers for the past several decades have chosen to pursue, as a key element of U.S. grand strategy, a goal of preventing the emergence of a regional hegemon in one part of Eurasia or another, on the grounds that such a hegemon could represent a concentration of power strong enough to threaten core U.S. interests by, for example, denying the United States access to some of the other hemisphere's resources and economic activity. Although U.S. policymakers have not often stated this key national strategic goal explicitly in public, U.S. military (and diplomatic) operations in recent decades—both wartime operations and day-to-day operations—can be viewed as having been carried out in no small part in support of this key goal.[144]

Focus on Great Power Competition with China and Russia

The Trump Administration's December 2017 National Security Strategy (NSS)[145] and the 11-page unclassified summary of its January 2018 National Defense Strategy (NDS)[146] reorient U.S. national security strategy and, within that, U.S. defense strategy, toward an explicit primary focus on great power competition with China and Russia and on countering Chinese and Russian military capabilities. The new U.S. strategy orientation set forth in the 2017 NSS and 2018 NDS is sometimes referred to a "2+3" strategy, meaning a strategy for countering two primary challenges (China and Russia) and three additional challenges (North Korea, Iran, and terrorist groups).[147]

Concept of a Free and Open Indo-Pacific (FOIP)

In addition to the 2017 NSS and 2018 NDS, the Trump Administration has highlighted the concept of a free and open Indo-Pacific (FOIP), with the term Indo-Pacific referring to the Indian Ocean, the Pacific Ocean, and the countries (particularly those in Eurasia) bordering on those two oceans. The concept, which is still being fleshed out by the Trump Administration, appears to be a general U.S foreign policy and national security construct for the region, but observers view it as one that includes a military component.[148]

[144] For additional discussion, see CRS Report R43838, *A Shift in the International Security Environment: Potential Implications for Defense—Issues for Congress*, by Ronald O'Rourke.

[145] Office of the President, *National Security Strategy of the United States of America*, December 2017, 55 pp.

[146] Department of Defense, *Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge*, undated but released January 2018, 11 pp.

[147] For more on the 2017 NSS and 2018 NDS, see CRS Insight IN10842, *The 2017 National Security Strategy: Issues for Congress*, by Kathleen J. McInnis, and CRS Insight IN10855, *The 2018 National Defense Strategy*, by Kathleen J. McInnis.

[148] For more on the Indo-Pacific, see CRS Insight IN10888, *Australia, China, and the Indo-Pacific*, by Bruce Vaughn; CRS In Focus IF10726, *China-India Rivalry in the Indian Ocean*, by Bruce Vaughn; and CRS In Focus IF10199, *U.S.-Japan Relations*, coordinated by Emma Chanlett-Avery.

Challenge to U.S. Sea Control and U.S. Position in Western Pacific

Observers of Chinese and U.S. military forces view China's improving naval capabilities as posing a potential challenge in the Western Pacific to the U.S. Navy's ability to achieve and maintain control of blue-water ocean areas in wartime—the first such challenge the U.S. Navy has faced since the end of the Cold War.[149] More broadly, these observers view China's naval capabilities as a key element of an emerging broader Chinese military challenge to the long-standing status of the United States as the leading military power in the Western Pacific.[150]

Regional U.S. Allies and Partners

The United States has certain security-related policies pertaining to Taiwan under the Taiwan Relations Act (H.R. 2479/P.L. 96-8 of April 10, 1979).[151] The United States has bilateral security treaties with Japan, South Korea, and the Philippines, and an additional security treaty with Australia and New Zealand.[152] In addition to U.S. treaty allies, certain other countries in the Western Pacific can be viewed as current or emerging U.S. security partners.

[149] The term blue-water ocean areas is used here to mean waters that are away from shore, as opposed to near-shore (i.e., littoral) waters. Iran is viewed as posing a challenge to the U.S. Navy's ability to quickly achieve and maintain sea control in littoral waters in and near the Strait of Hormuz. For additional discussion, see CRS Report R42335, *Iran's Threat to the Strait of Hormuz*, coordinated by Kenneth Katzman.

[150] For more on China's naval modernization effort, see CRS Report RL33153, *China Naval Modernization: Implications for U.S. Navy Capabilities—Background and Issues for Congress*, by Ronald O'Rourke. For more on China's military modernization effort in general, see CRS Report R44196, *The Chinese Military: Overview and Issues for Congress*, by Ian E. Rinehart.

[151] For further discussion, see CRS In Focus IF10275, *Taiwan: Select Political and Security Issues*, by Susan V. Lawrence.

[152] For a summary, see "U.S. Collective Defense Arrangements," accessed July 24, 2015, at http://www.state.gov/s/l/treaty/collectivedefense/.

Appendix B. U.S. 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[153] 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."[154] (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.[155]

U.S.-Philippines Mutual Defense Treaty[156]

The 1951 U.S.-Philippines mutual defense treaty[157] states in Article IV that

[153] Treaty of mutual cooperation and security, signed January 19, 1960, entered into force June 23, 1960, 11 UST 1632; TIAS 4509; 373 UNTS.

[154] The quoted words are from Secretary of Defense Chuck Hagel, in "Media Availability with Secretary Hagel En Route to Japan," April 5, 2014, accessed April 9, 2014, at http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5405. See also Associated Press, "US: Will Stand by Allies in Disputes with China," *Military.com,* April 3, 2014.

[155] 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.

[156] 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.

[157] Mutual defense treaty, signed August 30, 1951, entered into force August 27, 1952, 3 UST 3947, TIAS 2529, 177 UNTS 133.

> 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.[158] 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.[159] U.S. officials have made their own statements regarding the treaty's application to territorial disputes in the SCS.[160]

[158] See, for example, the Joint Statement of the United States-Philippines Ministerial Dialogue of April 30, 2012, available at http://www.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.

[159] Statement of Secretary del Rosario regarding the Philippines-U.S. Mutual Defense Treaty, May 9, 2012, accessed September 20, 2012, at http://www.gov.ph/2012/05/09/statement-of-secretary-del-rosario-regarding-the-philippines-u-s-mutual-defense-treaty-may-9-2012/.

[160] 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.

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)

The United Nations Convention on the Law of the Sea (UNCLOS) establishes a treaty regime to govern activities on, over, and under the world's oceans. UNCLOS was adopted by Third United Nations Conference on the Law of the Sea in December 1982, and 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 May 10, 2018, 168 nations were party to the treaty, including China and most other countries bordering on the SCS and ECS (the exceptions being North Korea and Taiwan).[161]

The treaty 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.[162] In the absence of Senate advice and consent to adherence, the United States is not a party to the convention and the associated 1994 agreement. A March 10, 1983, statement on U.S. ocean 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.[163]

[161] Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as of April 3, 2018, accessed May 10, 2018, at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#. A similar list, in alphabetical order by country name, is posted at http://www.un.org/Depts/los/reference_files/status2010.pdf.

[162] Treaty Document 103-39.

[163] United States Ocean Policy, Statement by the President, March 10, 1983, accessed April 15, 2015, at http://www.state.gov/documents/organization/143224.pdf. The text is also available at http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm.

UNCLOS builds on four 1958 law of the sea conventions to which the United States is a party: the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources of the High Seas.

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),[164] 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."[165] Although 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."[166] 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[167] 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.[168]

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[164] 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.

[165] 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 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.

[166] Rule 1(a) of the convention.

[167] 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.

[168] 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 March 13, 2014, at http://www.rubio.senate.gov/public/index.cfm/2014/1/rubio-calls-on-administration-to-address-provocative-

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.[169]

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 14th Western Pacific Naval Symposium (WPNS),[170] 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.[171] 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 law enforcement ships], which are responsible for the majority of Chinese harassment operations."[172]

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chinese-behavior.

[169] Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2014*, p. 4.

[170] For more on the WPNS, see Singapore Ministry of Defense, "Fact Sheet: Background of the Western Pacific Naval Symposium, MCMEX, DIVEX and NMS," updated March 25, 2011, accessed October 1, 2012, at http://www.mindef.gov.sg/imindef/news_and_events/nr/2011/mar/25mar11_nr/25mar11_fs.html.

[171] See, for example, "Navy Leaders Agree to CUES at 14th 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 October 1, 2012, at http://navy.mil.my/wpns2012/images/stories/dokumen/WPNS%202012%20PRESENTATION%20FOLDER/ACTION%20ITEMS%20WPNS%20WORKSHOP%202012/CUES.PDF.

[172] Jeff M. Smith and Joshua Eisenman, "China and America Clash on the High Seas: The EEZ Challenge," *The National Interest*, May 22, 2014.

DOD states 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.[173]

U.S. Navy officials have stated that the CUES agreement is working well, and that the United States (as noted in the passage above) is interested in expanding the agreement to cover coast guard ships.[174] Officials from Singapore and Malaysia reportedly have expressed support for the idea.[175] 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.[176]

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.[177] The MOU makes reference to UNCLOS, the 1972 COLREGs convention, the Conventional 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.[178] The MOU as signed in November 2014 included an annex on rules of

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[173] Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 31.

[174] 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.

[175] 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 3rd 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.

[176] "FACT SHEET: President Xi Jinping's State Visit to the United States," September 25, 2015, accessed November 24, 2015, at https://www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states.

[177] 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.

[178] DOD states 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

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.[179]

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....[180]

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 March 8, 2017, China announced that the first draft of a framework for the COC had been completed, and that "China and ASEAN countries feel satisfied with this."[181] On May 18 and 19,

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> 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 (Center for Strategic and International Studies)*, 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.

[179] 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.

[180] Text as taken from https://cil.nus.edu.sg/rp/pdf/2002%20Declaration%20on%20the%20Conduct%20of%20Parties%20in%20the%20South%20China%20Sea-pdf.pdf.

[181] See, Ben Blanchard, "China Says First Draft of South China Sea Code of Conduct Ready," *Reuters*, March 8, 2017;

2017, it was reported that the China and the ASEAN countries had agreed on the framework.[182] An article from a Chinese news outlet stated the following:

> All countries involved have agreed not to release the framework document, but to maintain it as an internal document at this time since the consultation will continue and they do not want any external interference, [Vice-Foreign Minister] Liu [Zhenmin] said.
>
> "Against the backdrop of economic globalization, China and ASEAN countries should continue making our regional rules to guide our own actions and protect our common interests," Liu said.[183]

Another press report stated that Liu Zhemin "called on others to stay out [of the negotiations], apparently a coded message to the United States. 'We hope that our consultations on the code are not subject to any outside interference,' Liu said."[184]

An August 3, 2017, press report stated the following:

> Southeast Asian ministers meeting this week are set to avoid tackling the subject of Beijing's arming and building of manmade South China Sea islands, preparing to endorse a framework for a code of conduct that is neither binding nor enforceable.
>
> The Association of South East Asian Nations (ASEAN) has omitted references to China's most controversial activities in its joint communique, a draft reviewed by Reuters shows.
>
> In addition, a leaked blueprint for establishing an ASEAN-China code of maritime conduct does not call for it to be legally binding, or seek adherence to the United Nations Convention on the Law of the Sea (UNCLOS)....
>
> Analysts and some ASEAN diplomats worry that China's sudden support for negotiating a code of conduct is a ploy to buy time to further boost its military capability....
>
> The agreed two-page framework is broad and leaves wide scope for disagreement, urging a commitment to the "purposes and principles" of UNCLOS, for example, rather than adherence.
>
> The framework papers over the big differences between ASEAN nations and China, said Patrick Cronin of the Center for a New American Security.
>
> "Optimists will see this non-binding agreement as a small step forward, allowing habits of cooperation to develop, despite differences," he said.
>
> "Pessimists will see this as a gambit favorable to a China determined to make the majority of the South China Sea its domestic lake."

An August 6, 2017, press report stated the following:

Hong Thao Nguyen, "A Code of Conduct for the South China Sea: Effective Tool or Temporary Solution?" *Maritime Awareness Project*, March 28, 2017. The second of these two sources identifies the reported draft as being that of a framework for the COC rather than a full draft text of the COC.

[182] Ben Blanchard, "China, ASEAN Agree on Framework for South China Sea Code of Conduct," *Reuters*, May 18, 2017; Agence France-Presse, "China, ASEAN Agree on Draft Framework for South China Sea Code," *Yahoo News*, May 19, 2017; Li Xiaokun and Mo Jingxi, "Guideline for Conduct Pact in South China Sea OK'd," *People's Daily Online (from China Daily)*, May 19, 2017.

[183] Li Xiaokun and Mo Jingxi, "Guideline for Conduct Pact in South China Sea OK'd," *People's Daily Online (from China Daily)*, May 19, 2017.

[184] Ben Blanchard, "China, ASEAN Agree on Framework for South China Sea Code of Conduct," *Reuters*, May 18, 2017.

> Southeast Asian nations agreed with China on Sunday [August 6] to endorse a framework for a maritime code of conduct that would govern behavior in disputed waters of the South China Sea, a small step forward in a negotiation that has lasted well over a decade.
>
> Though not the long-discussed code itself, the framework sets out parameters for discussion of an agreement intended to bring predictability to a potential flashpoint as China increasingly asserts its military presence over the area in the face of rival claims.
>
> The 10 countries of the Association of Southeast Asian Nations will meet with China at the end of August to discuss legalities for negotiations on the code of conduct, with formal talks beginning soon after, Philippines department of foreign affairs spokesman Robespierre Bolivar said Sunday.
>
> The endorsement of the framework, which was tentatively agreed to in May, came during a bilateral meeting between China and Asean on the sidelines of a series of security-oriented meetings that will conclude Tuesday.
>
> The unsticking of the framework after years of obstruction is widely seen as a concession by China, which has opposed any legally binding code on maritime engagement, stepped up naval patrols and built artificial islands to enforce its claims, equipping them with military weapons.
>
> Beijing's move to allow discussion on the code of conduct follows a resetting of ties with the Philippines under President Rodrigo Duterte, who in October—just four months after taking office—visited Beijing and declared a new friendship between the two countries.[185]

An August 8, 2017, blog post about the framework states the following:

> In Manila on 6 August 2017, the foreign ministers of ASEAN and China endorsed the framework for the Code of Conduct for the South China Sea (COC).
>
> While the framework is a step forward in the conflict management process for the South China Sea, it is short on details and contains many of the same principles and provisions contained in the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC) which has yet to be even partially implemented.
>
> The text includes a new reference to the prevention and management of incidents, as well as a seemingly stronger commitment to maritime security and freedom of navigation. However, the phrase "legally binding" is absent, as are the geographical scope of the agreement and enforcement and arbitration mechanisms.
>
> The framework will form the basis for further negotiations on the COC. Those discussions are likely to be lengthy and frustrating for those ASEAN members who had hoped to see a legally binding, comprehensive and effective COC.[186]

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. A May 25, 2017, news report states the following:

> To call negotiations between China and the ten-country Association of South-East Asian Nations (ASEAN) over rival claims in the South China Sea "drawn out" would be a gross understatement. At the centre of the matter is an unsquareable circle: the competing claims

[185] Jake Maxwell Watts, "China, Asean to Test Waters on South China Sea," *Wall Street Journal*, August 6, 2017. See also "ASEAN Foreign Ministers Endorse Framework of COC in South China Sea," *Xinhua*, August 6, 2017; Cao Siqi, "China, ASEAN Approve Sea Code," *Global Times*, August 6, 2017.

[186] Ian Storey, "Assessing the ASEAN-China Framework for the Code of Conduct for the South China Sea," ISEAS—Yusof Ishak Institute, August 8, 2017.

> of China and several South-East Asian countries. Nobody wants to go to war; nobody wants to be accused of backing down.
>
> Still, at a meeting of senior Chinese and ASEAN officials on May 18th, something happened: the two sides agreed on a "framework" for a code of conduct. An official from Singapore (which currently co-ordinates ASEAN-China relations) called the agreement a sign of "steady progress"....
>
> ASEAN members called for a legally binding code of conduct as far back as 1996....
>
> Since then, code-of-conduct negotiations have proceeded glacially.... Last July, after China received an unfavourable ruling on its maritime claims in a case brought by the Philippines to a tribunal in The Hague, China agreed to expedite the talks....
>
> The draft framework will be presented to ASEAN and Chinese foreign ministers at a conference in August. This will then form the basis for the thorny negotiations to follow. The text has not (yet) been leaked. But its most salient feature may be what it appears to lack: any hint of enforcement mechanisms or consequences for violations. China has long rejected a legally binding agreement—or indeed any arrangement that could limit its actions in the South China Sea.
>
> The result, explains Ian Storey, of the ISEAS-Yusof Ishak Institute, a think-tank in Singapore, is a framework "that makes China look co-operative…without having to do anything that might constrain its freedom of action". ASEAN, meanwhile, gets the appearance of progress. "The ASEAN secretariat is a bureaucracy, and bureaucrats like process," explains Mr Storey.[187]

An August 1, 2018, press report states:

> Southeast Asian nations are expected to welcome an initial negotiating draft of a nonaggression pact with China on the South China Sea, but critics warn that the protracted talks provide a diplomatic cover for Beijing's tenacious aggression in the disputed waters….
>
> In the South China Sea disputes, which have pitted China, Taiwan and four ASEAN member states — Brunei, Malaysia, the Philippines and Vietnam — the group is expected to announce an agreement with Beijing on an initial negotiating draft of a so-called "code of conduct," a proposed set of regional norms and rules aimed at preventing the long-seething disputes from degenerating into a shooting war.
>
> Philippine Foreign Secretary Alan Peter Cayetano said Tuesday before flying to Singapore that talks on the code could be concluded this year or next. Other Asian diplomats have not been as optimistic….
>
> Greg Poling, director of the U.S.-based Asia Maritime Transparency Initiative, which monitors developments in the South China Sea, said highlighting the draft code of conduct in the summit will be "more political theater than substance at this point" given the lack of agreement on areas it will cover and whether the pact should be legally binding after more than 15 years of talks.
>
> Without any major concessions, especially from China, Poling said the talks would drag further while China presses actions to reinforce its vast territorial claims "without paying

[187] "China and ASEAN Declare Progress in the South China Sea," The Economist, May 25, 2017. See also Mark J. Valencia, "A South China Sea Code of Conduct? Don't Get Your Hopes Up," *The Diplomat,* May 30, 2017. See also Lee YingHui, "A South China Sea Code of Conduct: Is Real Progress Possible?" *The Diplomat*, November 18, 2017.

much price because the code of conduct process offers diplomatic cover to claim it is seeking a peaceful and fair settlement."[188]

[188] Jim Gomez and Annabelle Liang (Associated Press), "Progress in Sea Feud, Koreas Stir ASEAN, Though Rifts Pester," *Fox News,* August 1, 2018.

Appendix D. July 2016 Tribunal Award in SCS Arbitration Case Involving Philippines and China

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.[189] 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

[189] 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.[190]

[190] 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 Nº 2013-19, In the Matter of the South China Sea Arbitration before An Arbitral Tribunal Constituted Under Annex VII to the 1982

Assessments of 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.
>
> 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.[191]

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.

[191] Bill Hayton, "Beijing shifts strategy in South China Sea," *Nikkei Asian Review*, July 12, 2017.

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....
>
> 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.[192]

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."[193] The first of the two passages quoted above 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.'" 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.[194]

[192] 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.

[193] 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.

[194] Kirsty Needham, "'Xi and his Era': China adopts a triumphant tone as US world leadership falters," *Sydney Morning Herald*," November 22, 2017.

Assessments and Events 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.[195]

A July 12, 2018, press report stated:

> 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….

[195] Lynn Kuok, "China Is Winning in the South China Sea," *Wall Street Journal*, July 17, 2018.

> 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.[196]

Another July 12, 2018, press report stated:

> 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.

[196] Richard Javad Heydarian, "United Front Mounts Against Duterte's China Policy," *Asia Times*, July 12, 2018.

> A report on ANC said that the Metro Manila Development Authority already took the banners down.
>
> The tarpaulins sparked outrage among social media users.[197]

A July 17, 2018, press report stated:

> 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.[198]

[197] Banners Welcome Visitors to 'Philippines, Province of China,'" *Philstar*, July 12, 2018.

[198] Jun Nucum, "'China Out of West PH Sea' Protests Mark 2nd Year of Int'l Court Ruling," Philippine Daily Inquirer, July 17, 2018.

Appendix E. Additional Elements of China's Approach to Maritime Disputes

This appendix presents background information on additional elements of China's approach to the maritime disputes in the SCS and ECS.

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 covering roughly 90% (earlier estimates said about 80%) of the SCS (**Figure E-1**). 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 map of the nine-dash line, also called the U-shaped line or the cow tongue,[199] 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.[200]

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.[201]

The map does not always have exactly nine dashes. Early versions of the map had as many as 11 dashes, and a map of China published by the Chinese government in June 2014 includes 10 dashes.[202] The exact positions of the dashes have also varied a bit over time.

[199] 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.

[200] 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 on September 28, 2012, at http://chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/.

[201] Communication from China to the United Nations dated May 7, 2009, English version, accessed on August 30, 2012, at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm.

[202] For an article discussing this new 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.

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 on August 30, 2012, at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm.

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.

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.[203] 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.[204]

[203] 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 September 28, 2012, 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.

[204] 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.[205]

An April 30, 2018, blog post states:

> 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.[206]

April 2018 Press Report of Proposal for Continuous Boundary Line in SCS

An April 22, 2018, press report states the following:

> Researchers are proposing a new boundary in the South China Sea that they say will help the study of natural science while potentially adding weight to China's claims over the disputed waters, according to a senior scientist involved in the government-funded project.
>
> The new boundary will help to define more clearly China's claims in the contested region, but it is not clear whether or when it will be officially adopted by Beijing, the scientist said.

---

[205] 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.)

[206] 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.

A precise continuous line will split the Gulf of Tonkin between China and Vietnam, go south into waters claimed by Malaysia, take a U-turn to the north along the west coast of the Philippines and finish at the southeast of Taiwan.

For decades, China's sovereign claim in the South China Sea has been murky, in large part because of the use of a segmented, vaguely located borderline known as the 'nine-dash line'.

A United Nations tribunal ruled in July 2016 that China had no legal basis to claim the area within the dash lines. One reason for China losing the case was that it could not define the territory precisely.

However, analysts said Beijing was unlikely to officially change the nine-dash line any time soon, in the face of potential international opposition....

The vast area of blue outlined by the new boundary, hanging on a map like a Christmas stocking under South China, overlaps the dashes and fills in the gaps. It includes all contested waters, such as the Paracel Islands, the Spratly Islands, James Shoal and Scarborough Shoal.

The boundary would determine for the first time the exact area that China claimed to own with historic rights in the South China Sea, according to the researcher.

Its purpose was partly the study of natural science and partly driven by a political motivation "to strengthen China's claims" over the waters to prepare for possible changes in its South China Sea policy in the future, the researcher said.

Within the boundary, China would claim the right to activities ranging from fishing, prospecting and mining for energy or mineral resources to the construction of military bases with deep water ports or airports.

Other countries' access to these rights would, however, be open for discussion, as is the case at Scarborough Shoal, which China controls but allows Philippine fishing boats to access.

While Beijing would consider the area within the boundary its territory, other countries would still have freedom of navigation, the researcher said....

"Soon we will have a clear idea of what belongs to us in the South China Sea and what does not," said the researcher. "This will allow us to better plan and coordinate the efforts to protect our national interest in the region while reducing the risk of conflict with other countries caused by the absence of a border over the ocean."...

"More often, when we are sending vessels out to the sea or looking down at an area via satellite, we are not sure whether it was our water," said the researcher in the boundary-drawing project.

"The nine-dash line can no longer meet the demands of increasing Chinese activities in the South China Sea."...

The continuous boundary was generated not only by curve-extending, gap-filling algorithms on computer. It was also based on a solid piece of historic evidence, according to the project team.

In 1951, an official map approved by the central government of China marked the China-claimed area in the South China Sea with a pair of non-stopping lines. There was an inner black line indicating the sovereign boundary and an outer red line representing where China could exercise administrative power.

"We were thrilled when we found the map," the researcher said. "It is something we can show the world."

A detailed description of the map was published by the project team in a paper in domestic academic journal China Science Bulletin in March this year.

Its authors recommended using the continuous U-shape boundary line as a replacement for the nine-dash line.

The "U-boundary is the border of China's sea in the South China Sea, and its sovereignty belongs to China", the authors wrote in the paper.

It "can further express the certainty of the integrity, continuity and border of China's seas in the South China Sea", they wrote, adding that it was "more vivid, accurate, complete and scientific".

Professor Yu Minyou, director of the China Institute of Boundary and Ocean Studies at Wuhan University, said that if the old map was published with government approval, which was usually the case in China, "it surely will add legal weight to China's claim" in the region....

But other countries should bear in mind that it did not represent the Chinese government's position as long as the dash lines stayed on official maps, Yu said, adding that China's strategy for the South China Sea was "open and clear".

"China wants to achieve peace, stability, harmony and prosperity in the region," he said. "We are willing to share natural resources with other countries and leave the disputes to be solved in the future.

"What we are doing now is creating a suitable environment for the final settlement of the issue."

A government expert at the National Institute for South China Sea Studies in Haikou, Hainan, said the continuous boundary would serve as a useful tool for some studies of natural science.

But it was highly unlikely to be printed on an official map, said the expert, who requested not to be named because he was not allowed to speak to overseas media about sensitive issues.

"To my knowledge, the Chinese government currently has no plan to change the dash lines," he said. "Most diplomats and ocean law experts will oppose joining the dashes."

The tension in the South China Sea has eased significantly in recent times, with neighbouring countries such as the Philippines and Vietnam no longer seeking direct confrontation with China over disputed areas.

"Things are moving towards the right direction," the government expert said. "It is not the best time to cut a boundary."[207]

September 2017 Press Report of Potential New "Four-Sha" Legal Claim

A September 21, 2017, press report states the following:

> The Chinese government recently unveiled a new legal tactic to promote Beijing's aggressive claim to own most of the strategic South China Sea.

[207] Stephen Chen, "China's Claims in South China Sea 'Proposed by Continuous Boundary for the First Time,'" *South China Morning Post*, April 22, 2018. See also Tuan N. Pham, "Now is Not the Time to Back Down in the South China Sea," *The Diplomat*, May 2, 2018.

> The new narrative that critics are calling "lawfare," or legal warfare, involves a shift from China's so-called "9-Dash Line" ownership covering most of the sea.
>
> The new lawfare narrative is called the "Four Sha"—Chinese for sand—and was revealed by Ma Xinmin, deputy director general in the Foreign Ministry's department of treaty and law, during a closed-door meeting with State Department officials last month.
>
> China has claimed three of the island chains in the past and recently added a fourth zone in the northern part of the sea called the Pratas Islands near Hong Kong.
>
> The other locations are the disputed Paracels in the northwestern part and the Spratlys in the southern sea. The fourth island group is located in the central zone and includes Macclesfield Bank, a series of underwater reefs and shoals.
>
> China calls the island groups Dongsha, Xisha, Nansha, and Zhongsha, respectively.
>
> Ma, the Foreign Ministry official, announced during the meetings in Boston on Aug. 28 and 29 that China is asserting sovereignty over the Four Sha through several legal claims. He stated the area is China's historical territorial waters and also part of China's 200-mile Exclusive Economic Zone that defines adjacent zones as sovereign territory. Beijing also claims ownership by asserting the Four Sha are part of China's extended continental shelf.
>
> U.S. officials attending the session expressed surprise at the new Chinese ploy to seek control over the sea as something not discussed before....
>
> A State Department notice at the end of what was billed as an annual U.S.-China Dialogue on the Law of the Sea and Polar Issues made no mention of the new Chinese lawfare tactic.
>
> The statement said only that officials from foreign affairs and maritime agencies "exchanged views on a wide range of issues related to oceans, the law of the sea, and the polar regions."[208]

A September 25, 2017, blog post about the claim states the following:

> While dropping or even de-emphasizing China's Nine-Dash Line claim in favor of the Four Shas has important diplomatic and political implications, the legal significance of such a shift is harder to assess. The constituent parts of China's Four Sha claims have long been set forth publicly in Chinese domestic law and official statements. Based on what we know so far, these new Chinese legal justifications are no more lawful than China's Nine-Dash Line claim. The challenge for critics of Chinese claims in the South China Sea, however, will be effectively explaining and articulating why this shift does not actually strengthen China's legal claims in the South China Sea.
>
> The Four Sha claim has a long pedigree in Chinese law and practice. China's 1992 law on the territorial sea and contiguous zone, for example, declared that China's land territory included the "Dongsha island group, Xisha island group, Zhongsha island group, [and] Nansha island group." A 2016 white paper disputing the Philippines' claims in the South China Sea arbitral process similarly claimed that:
>
> > China's Nanhai Zhudao (the South China Sea Islands) consist of Dongsha Qundao (the Dongsha Islands), Xisha Qundao (the Xisha Islands), Zhongsha Qundao (the Zhongsha Islands) and Nansha Qundao (the Nansha Islands). These Islands include, among others, islands, reefs, shoals and cays of various numbers and sizes....
>
> In a 2016 white paper, Beijing stated that, "China has, based on Nanhai Zhudao [the "Four Sha"], internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf." Neither the white paper nor the Beacon's report explain how China derives these maritime zones from the four island groups....

[208] Bill Gertz, "Beijing Adopts New Tactic for S. China Sea Claims," *Washington Free Beacon*, September 21, 2017.

> Because China is not constituted "wholly by one or more archipelagos" (think Indonesia or the Philippines), the U.S. and most countries would view straight baselines around an island group as contrary to the UN Convention on the Law of the Sea (UNCLOS)....
>
> For this reason, this new Chinese legal strategy is even weaker than the Nine-Dash Line given that it clearly violates UNCLOS (e.g., Articles 46 and 47). Most Chinese defenses of the Nine Dash Line argued that the claim predated China's accession to UNCLOS and therefore not governed by it. Despite the legal weaknesses of its possible new strategy, China may still reap some benefits from trading the Nine-Dash Line for the Four Shas.
>
> First, the Chinese leadership may have realized that the Nine Dash Line has become too much of a diplomatic liability. The Nine-Dash Line is completely sui generis and no other state has made a historic maritime claim anything like it. For this reason, the Nine-Dash Line makes China an easy target for foreign criticism in a way that straight baselines around island groups probably will not.
>
> Second, by adopting language more similar to that found in UNCLOS, China may be betting that it can tamp down criticism, and win potential partners in the region....
>
> Third, and most intriguingly, China may have concluded that it can better shape (or undermine, depending on your point of view) the law of the sea by adopting UNCLOS terminology....
>
> So while we might be encouraged to see the Nine-Dash Line pass into the (legal) dustbins of history, we should be skeptical about whether the Four Shas herald a new more modest Chinese role in the South China Sea. China's legal justification for the Four Shas is just as weak, if not weaker, than its Nine-Dash Line claim. But explaining *why* the Four Shas is weak and lawless will require sophisticated legal analysis married with effective public messaging.[209]

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.[210] It can be noted, however, that there are significant differences between China's approach to its near-seas region and the U.S. approach—both in the 19th and 20th 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.[211]

[209] Julian Ku and Chris Mirasola, "The South China Sea and China's 'Four Sha' Claim: New legal Theory, Same Bad Argument," *Lawfare*, September 25, 2017. Material in brackets and italics as in original.

[210] See, for example, Robert D. Kaplan, "China's Budding Ocean Empire," *The National Interest*, June 5, 2014.

[211] 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.

Appendix F. U.S. Position on Operational Rights in EEZs

This appendix presents additional background information on the U.S. position on the issue of operational rights of military ships in the EEZs of other countries.

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.[212]

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.

[212] [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 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.[213]

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 F-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 F-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.[214]

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)[215] that operated close to the United States or with Soviet bombers and surveillance aircraft that periodically flew close to U.S. airspace. 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 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

---

[213] 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.

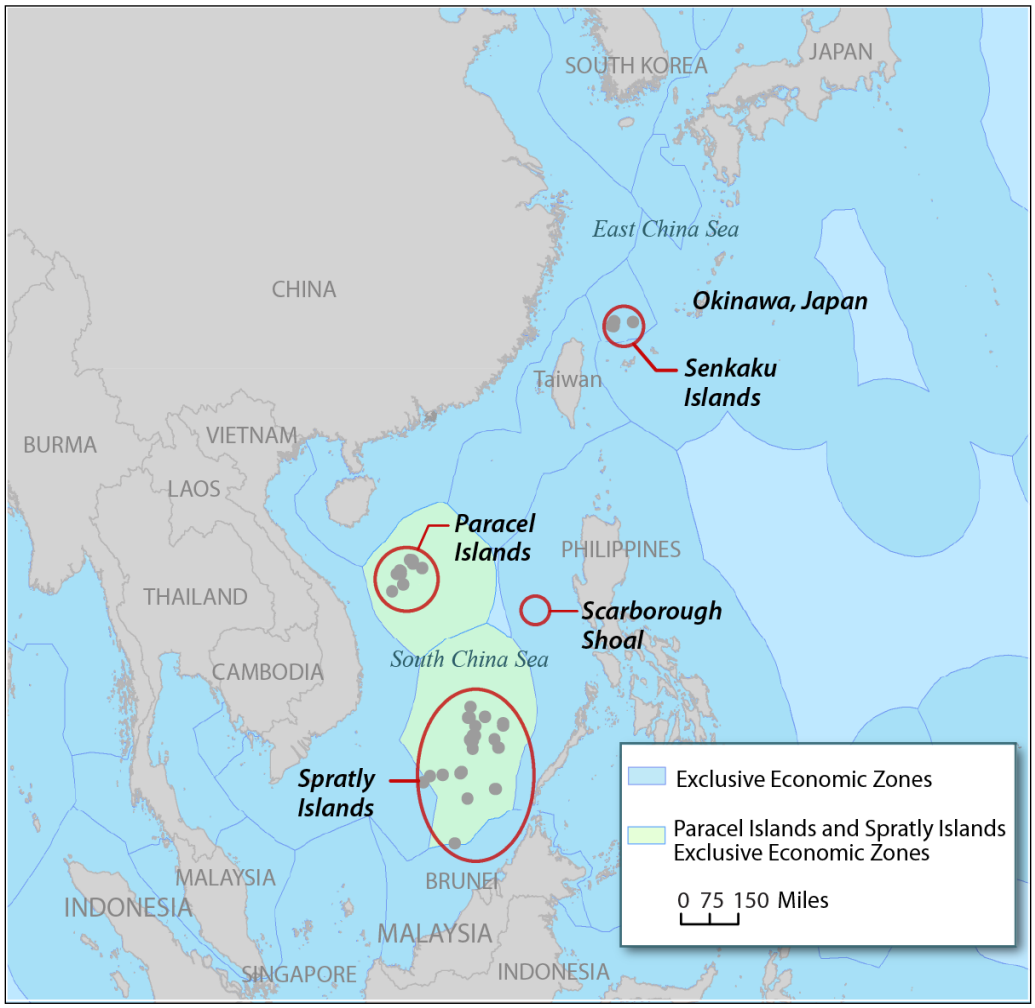
[214] The National Oceanic and Atmospheric Administration (NOAA) calculates that EEZs account for about 30.4% of the world's oceans. (See the table called "Comparative Sizes of the Various Maritime Zones" at the end of "Maritime Zones and Boundaries, accessed June 6, 2014, at http://www.gc.noaa.gov/gcil_maritime.html, which states that EEZs account for 101.9 million square kilometers of the world's approximately 335.0 million square kilometers of oceans.)

[215] 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.
>
> 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, accessed October 3, 2012, at http://thediplomat.com/2012/05/21/chinas-small-stick-diplomacy/)

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.[216]

Figure F-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.

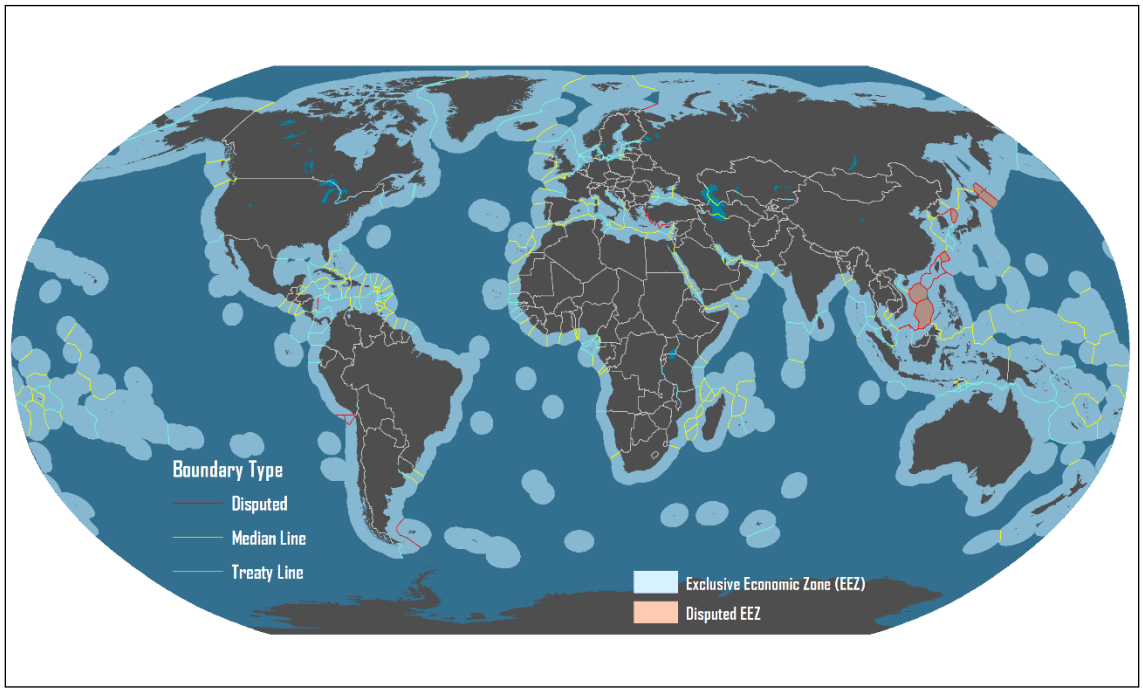
DOD states that

> the PLA Navy has begun to conduct military activities within the Exclusive Economic Zones (EEZs) of other nations, without the permission of those coastal states. Of note, the United States has observed over the past year several instances of Chinese naval activities in the EEZ around Guam and Hawaii. One of those instances was during the execution of the annual Rim of the Pacific (RIMPAC) exercise in July/August 2012. While the United States considers the PLA Navy activities in its EEZ to be lawful, the activity undercuts

[216] Navy Office of Legislative Affairs email to CRS dated September 4, 2012.

China's decades-old position that similar foreign military activities in China's EEZ are unlawful.[217]

Figure F-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.[218] The ship conducted operations inside U.S. EEZ off Hawaii, where the exercise was located. A July 29, 2014, press report stated that

> The high profile story of a Chinese surveillance ship off the cost 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.

[217] Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2013*, p. 39.

[218] 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.

> "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."[219]

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 nations' 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 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

[219] 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.

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.[220]

[220] Andrew S. Erickson and Emily de La Bruyere, "China's RIMPAC Maritime-Surveillance Gambit," *The National*

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."[221]

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.

[221] Erik Slavin, "Chinese Ship Spies on Valiant Shield, And That's OK With US," *Stars and Stripes*, September 22, 2014.

Appendix G. Options Suggested by Observers for Strengthening U.S. Actions

This appendix presents a bibliography of some recent writings by observers who have suggested options (or are reporting on options suggested by others) for strengthening U.S. actions for responding to China's actions in the SCS and ECS, organized by date, beginning with the most-recent item.

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