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

Updated February 6, 2020

Congressional Research Service
https://crsreports.congress.gov
R42784

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

In an international security environment described as one of renewed great power competition, the South China Sea (SCS) has emerged as an arena of U.S.-China strategic competition. U.S.-China strategic competition in the SCS forms an element of the Trump Administration's more confrontational overall approach toward China, and of the Administration's efforts for promoting its construct for the Indo-Pacific region, called the Free and Open Indo-Pacific (FOIP).

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

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

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

The Trump Administration has taken various actions for competing strategically with China in the SCS and ECS. The issue for Congress is whether the Trump Administration's strategy for competing strategically with China in the SCS and ECS is appropriate and correctly resourced, and whether Congress should approve, reject, or modify the strategy, the level of resources for implementing it, or both.

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Introduction

This report provides background information and issues for Congress regarding U.S.-China strategic competition in the South China Sea (SCS) and East China Sea (ECS). In an international security environment described as one of renewed great power competition,[1] the South China Sea (SCS) has emerged as an arena of U.S.-China strategic competition. U.S.-China strategic competition in the SCS forms an element of the Trump Administration's more confrontational overall approach toward China, and of the Administration's efforts for promoting its construct for the Indo-Pacific region, called the Free and Open Indo-Pacific (FOIP).[2]

China's actions in the SCS in recent years have heightened concerns among U.S. observers that China is gaining effective control of the SCS, an area of strategic, political, and economic importance to the United States and its allies and partners. Actions by China's maritime forces at the Japan-administered Senkaku Islands in the East China Sea (ECS) are another concern for U.S. observers. Chinese domination of China's near-seas region[3] could substantially affect U.S. strategic, political, and economic interests in the Indo-Pacific region and elsewhere.

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

For a brief overview of maritime territorial disputes in the SCS and ECS that involve China, see "Maritime Territorial Disputes," below, and **Appendix A**. Other CRS reports provide additional and more detailed information on these disputes.[4]

Background

U.S. Interests in SCS and ECS

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

[1] For additional discussion of renewed great power competition, see CRS Report R43838, *Renewed Great Power Competition: Implications for Defense—Issues for Congress*, by Ronald O'Rourke.

[2] For more on the FOIP, see CRS Report R45396, *The Trump Administration's "Free and Open Indo-Pacific": Issues for Congress*, coordinated by Bruce Vaughn.

[3] In this report, the term *near-seas region* refers to the SCS and ECS, along with the Yellow Sea.

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

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

The SCS, ECS, and Yellow Sea border three U.S. treaty allies: Japan, South Korea, and the Philippines. (For additional information on the U.S. security treaties with Japan the Philippines, see **Appendix B**.) In addition, the SCS and ECS (including the Taiwan Strait) surround Taiwan, 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) capabilities intended to keep U.S. military forces outside the first island chain (and thus away from China's mainland and Taiwan).[5] Chinese bases in the SCS and forces operating from them could also help create a bastion (i.e., a defended operating sanctuary) in the SCS for China's emerging sea-based strategic deterrent force of nuclear-powered ballistic missile submarines (SSBNs). 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. One analyst has argued that destroying the bases and countering the forces operating from them would take much more effort by U.S. forces than is commonly believed.[6]

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;
- announce and enforce an air defense identification zone (ADIZ) over the SCS;
- announce and enforce a maritime exclusion zone (i.e., a blockade) around Taiwan;[7]
- facilitate the projection of Chinese military presence and political influence further into the Western Pacific; and
- help achieve a broader goal of becoming a regional hegemon in its part of Eurasia.

[5] The term *first island chain* refers to a string of islands, including Japan and the Philippines, that encloses China's near-seas region. The term *second island chain*, which reaches out to Guam, refers to a line that can be drawn that encloses both China's near-seas region and the Philippine Sea between the Philippines and Guam. For a map of the first and second island chains, see Department of Defense, *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.

[6] See Gregory B. Poling, "The Conventional Wisdom on China's Island Bases Is Dangerously Wrong," *War on the Rocks*, January 10, 2020. See also John Power, "Has the US Already Lost the Battle for the South China Sea?" *South China Morning Post*, January 18, 2020.

[7] For a discussion of this possibility, see Lyle J. Goldstein, "China Could Announce a 'Total Exclusion Zone' at Any Time," National Interest, October 25, 2018.

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;
- 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 is trying to use disputes in the SCS and ECS to raise doubts among U.S. allies and partners in the region about the dependability of the United States as an ally or partner, or to otherwise drive a wedge between the United States and its regional allies and partners, so as to weaken the U.S.-led regional security architecture and thereby facilitate greater Chinese influence over the region.

Some observers remain concerned that maritime territorial disputes in the ECS and SCS could lead to a crisis or conflict between China and a neighboring country such as Japan or the Philippines, and that the United States could be drawn into such a crisis or conflict as a result of obligations the United States has under bilateral security treaties with Japan and the Philippines. Most recently, those concerns have focused more on the possibility of a crisis or conflict between China and Japan over the Senkaku Islands.

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—could help reestablish the very different principle of "might makes right" (i.e., the law of the jungle) as a routine or defining characteristic of international relations.[9]

Principle of Freedom of the Seas

Overview

Another key element of the U.S.-led international order that has operated since World War II is the principle of freedom of the seas, meaning the treatment of the world's seas under international law as international waters (i.e., as a global commons), and freedom of operations in international

[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 CRS In Focus IF10485, *Defense Primer: Geography, Strategy, and U.S. Force Design*, by Ronald O'Rourke.

[9] 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."

waters. Freedom of the seas is sometimes referred to as freedom of navigation, although the term freedom of navigation is sometimes defined—particularly by parties who might not support freedom of the seas—in a narrow fashion, to include merely the freedom for commercial ships to pass through sea areas, as opposed to the freedom for both civilian and military ships and aircraft to conduct various activities at sea or in the airspace above. A more complete way to refer to the principle of freedom of the seas, as stated in the Department of Defense's (DOD's) annual Freedom of Navigation (FON) report, is "the rights, freedoms, and uses of the sea and airspace guaranteed to all nations by international law."[10] DOD states that freedom of the seas

> includes more than the mere freedom of commercial vessels to transit through international waterways. While not a defined term under international law, the Department uses "freedom of the seas" to mean all of the rights, freedoms, and lawful uses of the sea and airspace, including for military ships and aircraft, recognized under international law. Freedom of the seas is thus also essential to ensure access in the event of a crisis.[11]

The principle of freedom of the seas dates back about 400 years, to the early 1600s,[12] and has long been a matter of importance to the United States. DOD states that

> Throughout its history, the United States has asserted a key national interest in preserving the freedom of the seas, often calling on its military forces to protect that interest. Following independence, one of the U.S. Navy's first missions was to defend U.S. commercial vessels in the Atlantic Ocean and Mediterranean Sea from pirates and other maritime threats. The United States went to war in 1812, in part, to defend its citizens' rights to commerce on the seas. In 1918, President Woodrow Wilson named "absolute freedom of navigation upon the seas" as one of the universal principles for which the United States and other nations were fighting World War I. Similarly, before World War II, President Franklin Roosevelt declared that our military forces had a "duty of maintaining the American policy of freedom of the seas."[13]

China's Position

Some observers are concerned that China's interpretation of law of the sea and its actions in the SCS pose a significant challenge to the principle of freedom of the seas. Matters of particular concern in this regard include China's nine-dash line in the SCS, China's apparent narrow definition of freedom of navigation, and China's position that coastal states have the right to regulate the activities of foreign military forces in their exclusive economic zones (EEZs) (see "China's Approach to the SCS and ECS," below, and **Appendix A** and **Appendix E**).[14]

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[10] Department of Defense, *Department of Defense Report to Congress, Annual Freedom of Navigation Report Fiscal Year 2018, Pursuant to Section 1275 of the National Defense Authorization Act for Fiscal Year 2018*, December 31, 2018, p. 2.

[11] 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. For further discussion, see "Hugo Grotius' 'Mare Liberum'—400th Anniversary," *International Law Observer*, March 10, 2009.

[13] Department of Defense, *Department of Defense Report to Congress, Annual Freedom of Navigation Report Fiscal Year 2018, Pursuant to Section 1275 of the National Defense Authorization Act for Fiscal Year 2018*, December 31, 2018, p. 1.

[14] 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

Observers are concerned that a challenge to freedom of the seas in the SCS could have implications for the United States not only in the SCS, but around the world, because international law is universal in application, and a challenge to a principle of international law in one part of the world, if accepted, could serve as a precedent for challenging it in other parts of the world.[15] In general, limiting or weakening the principle of freedom of the seas could represent a departure or retreat from the roughly 400-year legal tradition of treating the world's oceans as international waters (i.e., as a global commons) and as a consequence alter the international legal regime governing sovereignty over much of the surface of the world.[16]

More specifically, if China's position on the issue of whether coastal states have the right to regulate the activities of foreign military forces in their EEZs were to gain greater international acceptance under international law, it could substantially affect U.S. naval operations not only in the SCS, but around the world, which in turn could substantially affect the ability of the United States to use its military forces to defend various U.S. interests overseas. Significant portions of 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.[17] The legal right of U.S. naval forces to operate freely in EEZ waters—an application of the principle of freedom of the seas—is important to their ability to perform many of their missions around the world, because many of those missions are aimed at influencing events ashore, and having to conduct operations from outside a country's EEZ (i.e., more than 200 miles offshore) would reduce the inland reach and responsiveness of U.S. ship-based sensors, aircraft, and missiles, and make it more difficult for the United States to transport Marines and their equipment from ship to shore. Restrictions on the ability of U.S. naval forces to operate in EEZ waters could potentially require changes (possibly very significant ones) in U.S. military strategy, U.S. foreign policy goals, or U.S. grand strategy.[18]

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.[19] 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."[20] In addition, the ECS and

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right UNCLOS to regulate foreign economic activities in their own EEZs.

[15] See, for example, Lyle J. Goldstein, "China Studies the Contours of the Gray Zone; Beijing Strategists Go to School on Russian Tactics in the Black Sea," *National Interest*, August 27, 2019.

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

[17] 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.)

[18] 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.

[19] "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/.

[20] 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. See also Christian Edwards, "The South China Sea Is Fabled for Its Hidden Energy Reserves and China Wants to Block Outsiders Like the US from Finding Them," *Business Insider*,

SCS contain potentially significant oil and gas exploration areas.[21] Exploration activities there could potentially involve U.S. firms. The results of exploration activities there could eventually affect world oil prices.[22]

Interpreting China's Role as a Major World Power

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

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.[23]

Maritime Territorial and EEZ Disputes Involving China

This section provides a brief overview of maritime territorial and EEZ disputes involving China. For additional details on these disputes (including maps), see **Appendix A**. In addition, other CRS reports provide additional and more detailed information on the maritime territorial disputes.[24] For background information on treaties and international agreements related to the disputes, see **Appendix C**. For background information on a July 2016 international tribunal award in an SCS arbitration case involving the Philippines and China, see **Appendix D**.

Maritime Territorial Disputes

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

November 13, 2018.

[21] 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.

[22] For a contrary view regarding the importance of the SCS in connection with trade routes and hydrocarbons, see Marshall Hoyler, "The South China Sea Is Overrated, Assigning the South China Sea Geostrategic Importance Based on Its Popular Sea Lanes or Assumed Oil and Gas Reserves Is Suspect," *U.S. Naval Institute Proceedings*, June 2019.

[23] For discussions of U.S.-China relations, see CRS In Focus IF10119, *U.S.-China Relations*, by Susan V. Lawrence, Michael F. Martin, and Andres B. Schwarzenberg, and CRS Report R41108, *U.S.-China Relations: An Overview of Policy Issues*, by Susan V. Lawrence.

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

- 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.

EEZ Dispute[25]

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.[26] The position of China and some other countries (i.e., a minority group among the world's nations) is that UNCLOS gives coastal states the right to regulate not only economic activities, but also foreign military activities, in their EEZs. The dispute over whether China has a right under UNCLOS to regulate the activities of foreign military forces operating within its EEZ appears to be at the heart of incidents between Chinese and U.S. ships and aircraft in international waters and airspace dating back at least to 2001.

Relationship of Maritime Territorial Disputes to EEZ Dispute

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

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

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

[26] 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.

mainland coast—and it is in this unequivocal Chinese EEZ that several of the past U.S.-Chinese incidents at sea have occurred.

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

China's Approach to the SCS and ECS

This section provides a brief overview of China's approach to the SCS and ECS. For additional information on China's approach to the SCS and ECS, see **Appendix E**.

In General

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

- China appears to have identified the assertion and defense of its maritime territorial claims in the SCS and ECS, and the strengthening of its position in the SCS, as important national goals.
- To achieve these goals, China appears to be employing 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.[27]

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

"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. 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[28] or creeping invasion,[29] 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.[30]

[27] For additional discussion, see Patrick M. Cronin and Ryan Neuhard, *Total Competition, China's Challenge in the South China Sea*, Center for a New American Security, January 2020, pp. 5-28; and Kerry K. Gershaneck, "China's 'Political Warfare' Aims at South China Sea," *Asia Times*, July 3, 2018.

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

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

[30] 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.

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

As assessed in January 2020 CNAS report

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

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

a. Includes military exercises, weapons tests, port visits, patrols throughout the SCS, military parades, and participation in echelon formation.

b. Includes deployment of large vessels and participation in echelon formation.

c. Includes large-scale dredging and island building, and construction of permanent facilities on disputed features.

d. Highly visible economic projects around the region, such as bridges, ports, and rail lines.

e. Includes propaganda about the PLA, China's influence (including its military and economic might and its political importance), U.S. decline or weakness, and other states conceding to China's preferences.

Island Building and Base Construction

Perhaps more than any other set of actions, China's island-building (aka land-reclamation) and base-construction activities at sites that it occupies in the Paracel Islands and Spratly Islands in the SCS have heightened concerns among U.S. observers that China is rapidly gaining effective control of the SCS. China's large-scale island-building and base-construction activities in the SCS appear to have begun around December 2013, and were publicly reported starting in May 2014. Awareness of, and concern about, the activities appears to have increased substantially following the posting of a February 2015 article showing a series of "before and after" satellite photographs of islands and reefs being changed by the work.[31]

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

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

occupy in the SCS, these efforts are dwarfed in size by China's island-building and base-construction activities in the SCS.[32]

Other Chinese Actions That Have Heightened Concerns

In addition to island-building and base-construction activities, additional Chinese actions in the SCS and ECS that have heightened concerns among U.S. observers include the following, among others:

- China's actions in 2012, following a confrontation between Chinese and Philippine ships at Scarborough Shoal in the SCS, to gain de facto control over access to the shoal and its fishing grounds;
- China's announcement on November 23, 2013, of an air defense identification zone (ADIZ) over the ECS that includes airspace over the Senkaku Islands;[33]
- 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;[34]
- a growing civilian Chinese presence on some of the sites in the SCS occupied by China in the SCS, including both Chinese vacationers and (in the Paracels) permanent settlements; and
- the movement of some military systems to its newly built bases in the SCS.

Use of Coast Guard Ships and Maritime Militia

China asserts and defends its maritime claims not only with its navy, but also with its coast guard and its maritime militia. Indeed, China employs its coast guard and maritime militia more regularly and extensively than its navy in its maritime sovereignty-assertion operations. DOD states that China's navy, coast guard, and maritime militia together "form the largest maritime force in the Indo-Pacific."[35]

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

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

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

[34] See, for example, Patricia Lourdes Viray, "China's Blockade of Ayungin Shoal Resupply 'Objectionable'—Palace," *Philstar*, September 23, 2019; Patricia Louordes Viray, "China Coast Guard Blocked Resupply Mission to Ayungin Shoal," *Philstar*, September 19, 2019; Audrey Morallo, "China's Navy, Coast Guard 'Harassed' Filipino Troops on Resupply Mission on Ayungin—Alejano," *Philstar*, May 30, 2018.

[35] Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2018*, p. 16. See also Andrew S. Erickson, "Maritime Numbers Game, Understanding and Responding to China's Three Sea Forces," *Indo-Pacific Defense Forum*, January 28, 2019.

contrast to the broader U.S./Western definition of freedom of navigation (aka freedom of the seas), the Chinese definition does not appear to include operations conducted by military ships and aircraft. It can also be noted that China has frequently interfered with commercial fishing operations by non-Chinese fishing vessels—something that some observers regard as a form of interfering with freedom of navigation for commercial ships.

Position Regarding Regulation of Military Forces in EEZs

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

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

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

Assessments of China's Strengthening Position in SCS

Some observers assess that China's actions in the SCS have achieved for China a more dominant or more commanding position in the SCS. For example, U.S. Navy Admiral Philip Davidson, in responses to advance policy questions from the Senate Armed Services Committee for an April 17, 2018, hearing before the committee to consider nominations, including Davidson's nomination to become Commander, U.S. Pacific Command (PACOM),[36] stated that "China is now capable of controlling the South China Sea in all scenarios short of war with the United States."[37] For additional assessments of China's strengthening position in the SCS, see **Appendix F**.

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

Some Key Elements

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

- Freedom of the seas:
  - The United States supports the principle of freedom of the seas, meaning the rights, freedoms, and uses of the sea and airspace guaranteed to all nations in

[36] The name of the command has since been changed to the U.S. Indo-Pacific Command (INDOPACOM).

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

international law. The United States opposes claims that impinge on the rights, freedoms, and lawful uses of the sea that belong to all nations.

- U.S. forces routinely conduct freedom of navigation (FON) assertions throughout the world. These operations are designed to be conducted in accordance with international law and demonstrate that the United States will fly, sail, and operate wherever international law allows, regardless of the location of excessive maritime claims and regardless of current events.[38]
- The United States, like most other countries, believes that coastal states under UNCLOS have the right to regulate economic activities in their EEZs, but do not have the right to regulate foreign military activities in their EEZs. The United States will continue to operate its military ships in the EEZs of other countries consistent with this position. (For additional information regarding the U.S. position on the issue of operational rights of military ships in the EEZs of other countries, see **Appendix G**.)
- U.S. military surveillance flights in international airspace above another country's EEZ are lawful under international law, and the United States plans to continue conducting these flights.

- Maritime territorial disputes:
  - The United States takes no position on competing claims to sovereignty over disputed land features in the ECS and SCS, but the United States *does* have a position on how competing claims should be resolved: These disputes, like international disputes in general, should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law.
  - Parties should avoid taking provocative or unilateral actions that disrupt the status quo or jeopardize peace and security. The United States does not believe that large-scale island-building with the intent to militarize outposts on disputed land features is consistent with the region's desire for peace and stability.
  - The Senkaku Islands are under the administration of Japan. Unilateral attempts to change the status quo there raise tensions and do nothing under international law to strengthen territorial claims.
  - 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. China's maritime claims in the SCS, exemplified by the preposterous nine-dash line, are unfounded, unlawful, and unreasonable, and are without legal, historic, or geographic merit.[39]

[38] Statements such as this one, including in particular the phrase "the United States will fly, sail, and operate wherever international law allows," have become recurring elements of U.S. statements issued either in connection with specific FON operations or as general statements of U.S. policy regarding freedom of the seas. See, for example, the Navy statement quoted in Ben Werner, "Beijing Irked at Twin U.S. South China Sea FONOPS," *USNI News*, November 22, 2019.

[39] Department of State, *A Free and Open Indo-Pacific, Advancing a Shared Vision*, November 4, 2019, states on page 23: "PRC maritime claims in the South China Sea, exemplified by the preposterous 'nine-dash line,' are unfounded, unlawful, and unreasonable. These claims, which are without legal, historic, or geographic merit, impose real costs on other countries. Through repeated provocative actions to assert the nine-dash line, Beijing is inhibiting ASEAN

- China's unilateral efforts to assert illegitimate maritime claims threaten other nations' access to vital natural resources, undermine the stability of regional energy markets, and increase the risk of conflict.[40] The United States will not accept attempts to assert unlawful maritime claims at the expense of law-abiding nations.[41]

Freedom of Navigation (FON) Program

U.S. Navy ships challenge what the United States views as excessive maritime claims made by other countries, and otherwise carry out assertions of operational rights, as part of the U.S. FON program for challenging maritime claims that the United States believes to be inconsistent with international law. The FON program began in 1979, involves diplomatic activities as well as operational assertions by U.S. Navy ships, and is global in scope, encompassing activities and operations directed not only at China, but at numerous other countries around the world, including U.S. allies and partner states.

DOD's record of "excessive maritime claims DOD challenged through operational assertions and activities during the period of October 1, 2017, through September 30, 2018, 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.[42]

In a November 19, 2019, speech in Manila, Secretary of Defense Mark Esper reportedly stated that the United States had conducted "more freedom of navigation operations in the past year or so than we have in the past 20-plus years."[43] For additional information on the FON program, see **Appendix H**.

Issues for Congress

Strategy for Competing Strategically with China in SCS and ECS

Overview

A key issue for Congress is whether the Trump Administration's strategy for competing strategically with China in the SCS and ECS is appropriate and correctly resourced, and whether Congress should approve, reject, or modify the strategy, the level of resources for implementing

members from accessing over $2.5 trillion in recoverable energy reserves, while contributing to instability and the risk of conflict."

[40] In a November 20, 2019, speech in Hanoi, Secretary of Defense Mark Esper reportedly stated, "China's unilateral efforts to assert illegitimate maritime claims threaten other nations' access to vital natural resources, undermine the stability of regional energy markets, and increase the risk of conflict." (Phil Stewart and James Pearson, "U.S. to Provide Ship to Vietnam to Boost South China Sea Patrols," *Reuters*, November 20, 2019.)

[41] In a November 20, 2019, speech in Hanoi, Secretary of Defense Mark Esper reportedly stated, "We will not accept attempts to assert unlawful maritime claims at the expense of law-abiding nations." (As quoted in Robert Burns, "Esper Accuses China of Intimidating Smaller Asian Nations," *Associated Press*, November 20, 2019.)

[42] Department of Defense, *Department of Defense Report to Congress, Annual Freedom of Navigation Report [for] Fiscal Year 2018, Pursuant to Section 1275 of the National Defense Authorization Act for Fiscal Year 2018*, pp. 2-3.

[43] As quoted in Andreo Calonzo and Glen Carey, "U.S. Increased Sea Patrols to Send Message to China, Defense Secretary Says," *Bloomberg*, November 19, 2019. See also Deutsche Presse-Agentur and Associated Press, "US to Boost Military Alliance with Philippines as South China Sea Tensions Grow," *South China Sea Morning Post*, November 19, 2019.

it, or both. Decisions that Congress makes on these issues could substantially affect U.S. strategic, political, and economic interests in the Indo-Pacific region and elsewhere.

As noted earlier, competing strategically with China in the SCS and ECS forms an element of the Trump Administration's more confrontational overall approach toward China and its efforts for promoting the FOIP construct. It is possible, however, for an observer to support a more confrontational approach toward China and the FOIP construct but nevertheless conclude that the United States should not compete strategically with China in the SCS and ECS, or that the Trump Administration's strategy for doing so is not appropriate or correctly resourced. Conversely, it is possible for an observer to disagree with the Trump Administration's overall approach toward China or the FOIP construct, but nevertheless conclude that the United States should compete strategically with China in the SCS and ECS, and that the Trump Administration's strategy for doing so is appropriate and correctly resourced. Whether to compete strategically with China in the SCS and ECS, and if so how, is a choice for U.S. policymakers to make, based on an assessment of the potential benefits and costs of engaging in such a competition in the context of overall U.S. policy toward China,[44] U.S. policy toward the Indo-Pacific,[45] and U.S. foreign policy in general.

Potential U.S. Goals in a Strategic Competition

General Goals

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

- fulfilling U.S. security commitments in the Western Pacific, including treaty commitments to Japan and the Philippines;
- maintaining and enhancing the U.S.-led security architecture in the Western Pacific, including U.S. security relationships with treaty allies and partner states;
- maintaining a regional balance of power favorable to the United States and its allies and partners;
- defending the principle of peaceful resolution of disputes, under which disputes between countries should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law, and resisting the emergence of an alternative "might-makes-right" approach to international affairs;
- defending the principle of freedom of the seas, meaning the rights, freedoms, and uses of the sea and airspace guaranteed to all nations in international law, including the interpretation held by the United States and many other countries concerning operational freedoms for military forces in EEZs;

[44] For more on overall U.S.-China relations, see CRS In Focus IF10119, *U.S.-China Relations*, by Susan V. Lawrence, Michael F. Martin, and Andres B. Schwarzenberg, and CRS Report R41108, *U.S.-China Relations: An Overview of Policy Issues*, by Susan V. Lawrence.

[45] For more on U.S. policy toward the Indo-Pacific, see CRS Report R45396, *The Trump Administration's "Free and Open Indo-Pacific": Issues for Congress*, coordinated by Bruce Vaughn; CRS In Focus IF11047, *The Asia Pacific: Challenges and Opportunities for U.S. Policy*, by Emma Chanlett-Avery et al.

- preventing China from becoming a regional hegemon in East Asia, and potentially as part of that, preventing China from controlling or dominating the ECS or SCS; and
- pursing these goals as part of a larger U.S. strategy for competing strategically and managing relations with China.

Specific Goals

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

- dissuading China from
  - carrying out additional base-construction activities in the SCS,
  - moving additional military personnel, equipment, and supplies to bases at sites that it occupies in the SCS,[46]
  - initiating island-building or base-construction activities at Scarborough Shoal in the SCS,
  - declaring straight baselines around land features it claims in the SCS,[47] or
  - declaring an air defense identification zone (ADIZ) over the SCS; and
- encouraging China to
  - reduce or end operations by its maritime forces at the Senkaku Islands in the ECS,
  - halt actions intended to put pressure against Philippine-occupied sites in the Spratly Islands,
  - encouraging China to halt actions intended to put pressure against the small Philippine military presence at Second Thomas Shoal in the Spratly Islands (or against any other Philippine-occupied sites in the Spratly Islands);
  - adopt the U.S./Western definition regarding freedom of the seas, including the freedom of U.S. and other non-Chinese military vessels to operate freely in China's EEZ; and
  - accept and abide by the July 2016 tribunal award in the SCS arbitration case involving the Philippines and China (see **Appendix D**).

[46] A June 20, 2019, press report states that "China has deployed at least four J-10 fighter jets to the contested Woody Island in the South China Sea, the first known deployment of fighter jets there since 2017." (Brad Lendon, "South China Sea: Image Shows Chinese Fighter Jets Deployed to Contested Island," *CNN*, June 20, 2019.)

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

Some Additional Considerations Regarding Strategic Competition

Competing with China's Approach in the SCS and ECS

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

- China appears to have identified the assertion and defense of its maritime territorial claims in the SCS and ECS, and the strengthening of its position in the SCS, as important national goals.
- To achieve these goals, China appears to be employing 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. strategy for competing strategically with China in the SCS and ECS might be to achieve its goals if that strategy were one or more of the following:

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

Aligning Actions with Goals

In terms of identifying specific actions for a U.S. strategy for competing strategically with China in the SCS and ECS, a key element would be to have a clear understanding of which actions are intended to support which U.S. goals, and to maintain an alignment of actions with policy goals. For example, U.S. FON operations, which often feature prominently in discussions of actual or potential U.S. actions, can directly support a general goal of defending the principle of freedom of the seas, but might support other goals only indirectly, marginally, or not at all.[48] A summary of U.S. actions and how they align with U.S. goals might produce a U.S. version of the summary of China's apparent goals and supporting actions shown in **Table 1**.

Cost-Imposing Actions

Cost-imposing actions are actions intended to impose political/reputational, institutional, economic, or other costs on China for conducting certain activities in the ECS and SCS, with the aim of persuading China to stop or reverse those activities. Such cost-imposing actions need not

[48] For discussions bearing on this issue, see, for example, Caitlin Doornbos, "Freedom-of-Navigation Ops Will Not Dent Beijing's South China Sea Claims, Experts Say," *Stars and Stripes*, April 4, 2019; James Holmes, "Are Freedom of Navigation Operations in East Asia Enough?" *National Interest*, February 23, 2019; Zack Cooper and Gregory Poling, "America's Freedom of Navigation Operations Are Lost at Sea, Far Wider Measures Are Needed to Challenge Beijing's Maritime Aggression," *Foreign Policy*, January 8, 2019.

be limited to the SCS and ECS. As a hypothetical example for purposes of illustrating the point, one potential cost-imposing action might be for the United States to respond to unwanted Chinese activities in the ECS or SCS by moving to suspend China's observer status on the Arctic Council.[49] Expanding the potential scope of cost-imposing actions to regions beyond the Western Pacific might make it possible to employ elements of U.S. power that cannot be fully exercised if the examination of potential cost-imposing strategies is confined to the Western Pacific. It might also, however, expand, geographically or otherwise, areas of tension or dispute between the United States and China.

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

Contributions from Allies and Partners

Another factor that policymakers may consider is the potential contribution that could be made to a U.S. strategy for competing strategically with China in the SCE and ECS by allies such as Japan, the Philippines, Australia, the UK, and France, as well as potential or emerging partner countries such as Vietnam, Indonesia, and India. Most or all of the countries just mentioned have taken steps of one kind or another in response to China's actions in the SCS and ECS.[50]

For U.S. policymakers, one key question is how effective those steps by allies and partner countries have been, whether those steps could be strengthened, and whether they should be undertaken independent of or in coordination with the United States. 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,[51] and what

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[49] For more on the Arctic Council, see CRS Report R41153, *Changes in the Arctic: Background and Issues for Congress*, coordinated by Ronald O'Rourke. In a May 6, 2019, speech about the Arctic in Finland, Secretary of State Michael Pompeo stated that "China has observer status in the Arctic Council, but that status is contingent upon its respect for the sovereign rights of Arctic states." (State Department, "Looking North: Sharpening America's Arctic Focus," Remarks, Michael R. Pompeo, Secretary of State, Rovaniemi, Finland, May 6, 2019, accessed August 20, 2019, at https://www.state.gov/looking-north-sharpening-americas-arctic-focus/.)

[50] See, for example, Richard Heydarian, "ASEAN Members Start Standing Up to China's Maritime Aggression," *Nikkei Asian Review*, February 3, 2020. Regarding recent actions by Indonesia specifically, see, for example, Niharika Mandhana, "In South China Sea Confrontation, Indonesia Resists China—Cautiously," *Wall Street Journal*, January 17, 2020; Arys Aditya and Harry Suhartono, "U.S., Japan May Invest in Indonesia Islands Near South Chinas Sea," *Bloomberg*, January 17, 2020; Ian Storey, "What Can Indonesia Do in Its Stand-off with China over the Natunas?" Straits Times, January 10, 2020; Prashanth Parameswaran, "Deterrence and South China Sea Strategy: What Do the Latest China-Indonesia Natuna Tensions Tell Us?" *Diplomat*, January 8, 2020. Regarding actions by Malaysia specifically, see, for example, Philip Bowring, "Potent New Challenge to Beijing's Nine-Dash Line," *Asia Sentinel*, January 8, 2020; Ted Regencia, "Malaysia FM: China's 'Nine-Dash Line' Claim 'Ridiculous,'" *Al Jazerra*, December 21, 2019; Joseph Sipalan, Liz Lee, Vincent Lee, and Gabriel Crossley, "Beijing Censures Malaysia Over Fresh South China Sea Claim," *Reuters*, December 17, 2019.

[51] See, for example, Hal Brands, "A Filipino Battleground in China-U.S. Cool War," *Japan Times*, September 23, 2019; Raissa Robles, "Duterte's South China Sea U-Turn: Illegal Climbdown, or Clever Gambit for Oil?" *South China Morning Post*, September 11, 2019; Eimor Santos, "Experts Warn PH vs. Siding with China on UNCLOS Revision," *CNN*, September 6, 2019; Richard Heydarian, "How Rodrigo Duterte's Latest Beijing Visit Marks a Crossroads for China, the Philippines and Asia," *South China Morning Post*, September 1, 2019; Richard Javad Heydarian, "Duterte's Game in Beijing," *Asia Maritime Transparency Initiative*, August 29, 2019; Andreo Calonzo and Claire Jiao, "Philippines Prefers China Loans Over U.S. 'Strategic Confusion' in South China Sea," *Bloomberg*, May 20, 2019; Ana P. Santos and David Pierson, "Duterte Heeds to Pressure to Confront China as Midterms Approach in the

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.[52]

Trump Administration's Strategy for Competing Strategically

Overview

The Trump Administration's strategy for competing strategically with China in the SCS and ECS includes but is not necessarily limited to the following:

- criticizing China's actions in the SCS, and reaffirming the U.S. position on issues relating to the SCS and ECS, on a recurring basis;
- conducting naval presence and FON operations in the SCS and Taiwan Strait transits with U.S. Navy ships and (more recently) U.S. Coast Guard cutters;
- conducting overflight operations in the SCS and ECS with U.S. Air Force bombers;[53]
- bolstering U.S. military presence and operations in the Indo-Pacific region in general, and developing new U.S. military concepts of operations for countering Chinese military forces in the Indo-Pacific region.[54]
- maintaining and strengthening diplomatic ties and security cooperation with, and providing maritime-related security assistance to, countries in the SCS region; and
- encouraging allied and partner states to do more individually and in coordination with one another to defend their interests in the SCS region.[55]

U.S. actions to provide maritime-related security assistance to countries in the region are being carried out to a large degree under the Indo-Pacific Maritime Security Initiative (IP MSI), an initiative (previously named the Southeast Asian MSI) that was originally announced by the

Philippines," *Los Angeles Times*, April 15, 2019; Michael Mazza, "US-Philippine Defense Tensions Weaken Regional Security," *Nikkei Asian Review*, March 22, 2019; Prashanth Parameswaran, "China's Creeping South China Sea Challenge in the Spotlight With New Facility," *Diplomat*, February 7, 2019. See also CRS In Focus IF10250, *The Philippines*, by Thomas Lum and Ben Dolven; Richard Javad Heydarian, "US, Philippines Tacitly Realign Against China," *Asia Times*, October 11, 2018; Richard Javad Heydarian, "US, Philippines Floating Back Together Again," *Asia Times*, September 6, 2018.

[52] For articles relating to this question, see Kristin Huang, "Philippines Joining Beijing's South China Sea Drill 'Shows Nations Are Hedging Bets' in Sino-US Tussle," *South China Morning Post*, October 9, 2018; 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.

[53] See, for example, Dzirhan Mahadzir, "Air Force Keeping Up Presence Operations Over South China Sea," *USNI News*, December 11, 2019; Liu Zhen, "US Warplanes on Beijing's Radar in South China Sea, American Air Force Chiefs Say," *South China Morning Post*, December 9, 2019.

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

[55] See, for example, Eileen Ng, "US Official Urges ASEAN to Stand Up to Chine in Sea Row," *Associated Press*, October 31, 2019.

Obama Administration in May 2015[56] and subsequently legislated by Congress[57] to provide, initially, $425 million in maritime security assistance to those four countries over a five-year period. In addition to strengthening security cooperation with U.S. allies in the region, the United States has taken actions to increase U.S. defense and intelligence cooperation with Vietnam and Indonesia.[58]

Recent Specific Actions

Recent specific actions taken by the Trump Administration include but are not necessarily limited to the following:

- As an apparent cost-imposing measure, DOD announced on May 23, 2018, that it was disinviting China from the 2018 RIMPAC (Rim of the Pacific) exercise.[59]
- In November 2018, national security adviser John Bolton said the U.S. would oppose any agreements between China and other claimants to the South China Sea that limit free passage to international shipping.[60]
- In January 2019, the then-U.S. Chief of Naval Operations, Admiral John Richardson, reportedly warned his Chinese counterpart that the U.S. Navy would treat China's coast guard cutters and maritime militia vessels as combatants and respond to provocations by them in the same way as it would respond to provocations by Chinese navy ships.[61]

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[56] 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).

[57] 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).

[58] See, for example, Robert Burns, "Mattis Pushes Closer Ties to Vietnam Amid Tension with China," *Associated Press*, October 14, 2018; 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.

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

[60] Jake Maxwell Watts, "Bolton Warns China Against Limiting Free Passage in South China Sea," *Wall Street Journal*, November 13, 2018.

[61] See Demetri Sevastopulo and Kathrin Hille, "US Warns China on Aggressive Acts by Fishing Boats and Coast

- On March 1, 2019, Secretary of State Michael Pompeo stated, "As the South China Sea is part of the Pacific, any armed attack on Philippine forces, aircraft, or public vessels in the South China Sea will trigger mutual defense obligations under Article 4 of our Mutual Defense Treaty [with the Philippines]."[62] (For more on this treaty, see **Appendix B**.)

Reported FON Operations and Taiwan Strait Transits

In addition to conducting FON operations in the Spratly and Paracel islands, U.S. Navy ships (and more recently at least one U.S. Coast Guard cutter) have steamed through the Taiwan Strait on a recurring basis.[63] As mentioned earlier, FON operations can directly support a general U.S. goal of defending principle of freedom of the seas, but might support other U.S. goals only indirectly, marginally, or not at all.[64]

Table 2 shows reported U.S. Navy FON operations during the Trump Administration; **Table 3** shows reported annual numbers of U.S. Navy FON operations in the SCS and Taiwan Strait transits since 2014. Note that the data in these two tables do not entirely agree: **Table 2** shows four reported FON operations in the SCS in 2017, while **Table 3** shows six for that year, and **Table 2** shows eight reported FON operations in the SCS in 2019, while **Table 3** shows seven for that year (perhaps because the data for **Table 3** treat the actions of November 20 and 21, 2019, as being part of a single FON operation rather than two separate FON operations).

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

[62] State Department, Remarks With Philippine Foreign Secretary Teodoro Locsin, Jr., Remarks [by] Michael R. Pompeo, Secretary of State, March 1, 2019, accessed August 21, 2019 at https://www.state.gov/remarks-with-philippine-foreign-secretary-teodoro-locsin-jr/. See also Regine Cabato and Shibani Mahtani, "Pompeo Promises Intervention If Philippines Is Attacked in South China Sea Amid Rising Chinese Militarization," *Washington Post*, February 28, 2019; Claire Jiao and Nick Wadhams, "We Have Your Back in South China Sea, U.S. Assures Philippines," *Bloomberg*, February 28 (updated March 1), 2019; Jake Maxwell Watts and Michael R. Gordon, "Pompeo Pledges to Defend Philippine Forces in South China Sea, Philippines Shelves Planned Review of Military Alliance After U.S. Assurances," *Wall Street Journal*, March 1, 2019; Jim Gomez, "Pompeo: US to Make Sure China Can't Blockade South China Sea," Associated Press, March 1, 2019; Karen Lema and Neil Jerome Morales, "Pompeo Assures Philippines of U.S. Protection in Event of Sea Conflict, *Reuters*, March 1, 2019; Raissa Robles, "US Promises to Defend the Philippines from 'Armed Attack' in South China Sea, as Manila Mulls Review of Defence Ttreaty," *South China Morning Post*, March 1, 2019; Raul Dancel, "US Will Defend Philippines in South China Sea: Pompeo," *Straits Times*, March 2, 2019; Ankit Panda, "In Philippines, Pompeo Offers Major Alliance Assurance on South China Sea," *Diplomat*, March 4, 2019; Mark Nevitt, "The US-Philippines Defense Treaty and the Pompeo Doctrine on South China Sea," *Just Security*, March 11, 2019; Zack Cooper, "The U.S. Quietly Made a Big Splash about the South China Sea; Mike Pompeo Just Reaffirmed Washington Has Manila's back," *Washington Post*, March 19, 2019.

[63] See, for example, Iain Marlow and Adela Lin, "U.S. Warship Sails Taiwan Strait After Trade Deal, Election," *Bloomberg*, January 17, 2020; Ben Blanchard, "U.S. Warship transits Taiwan Strait Less Than Week After Election," *Reuters*, January 16, 2020; Caitlin Doornbos, "Navy Sends Guided-Missile Cruiser Through Taiwan Strait in Eighth Transit There This Year," *Stars and Stripes*, November 13, 2019; Lucas Tomlinson, "US Warship Sails Through Taiwan Strait in Message to China," Fox News, November 12, 2019.

[64] For a discussion bearing on this issue, see, for example, Zack Cooper and Gregory Poling, "America's Freedom of Navigation Operations Are Lost at Sea, Far Wider Measures Are Needed to Challenge Beijing's Maritime Aggression," *Foreign Policy*, January 8, 2019. See also John Grady, "U.S. Indo-Pacific Diplomacy Efforts Hinge On FONOPS, Humanitarian Missions," *USNI News*, December 4, 2019.

Table 2. Reported FON Operations in SCS During Trump Administration

Details shown are based on press reports

Date	Location in SCS	U.S. Navy Ship	Notes
May 25, 2017	Mischief Reef in Spratly Islands	*Dewey* (DDG-105)	
July 2, 2017	Triton Island in Paracel Islands	*Stethem* (DDG-63)	
August 10, 2017	Mischief Reef in Spratly Islands	*John S. McCain* (DDG-56)	
October 10, 2017	Paracel Islands	*Chaffee* (DDG-90)	
January 17, 2018	Mischeif Reef in Spratly Islands	*Hopper* (DDG-70)	
March 23, 2018	Mischeif Reef in Spratly Islands	*Mustin* (DDG-89)	
May 27, 2018	Tree, Lincoln, Triton, and Woody islands in Paracel Islands	*Antietam* (CG-54) and *Higgins* (DDG-76)	The U.S. Navy reportedly considers that the Chinese warships sent to warn off the U.S. Navy ships maneuvered in a "safe but unprofessional" manner.
September 30, 2018	Gaven and Johnson Reefs in Spratly Islands	*Decatur* (DDG-73)	This operation led to a tense encounter between the *Decatur* and a Chinese destroyer.
November 26, 2018	Paracel Islands	*Chancellorsville* (CG-62)	
January 7, 2019	Tree, Lincoln, and Woody islands in Paracel Islands	*McCampbell* (DDG-85)	
February 11, 2019	Mischief Reef in Spratly Islands	*Spruance* (DDG-111) and *Preble* (DDG-88)	
May 6, 2019	Gaven and Johnson Reefs in Spratly Islands	*Preble* (DDG-88) and *Chung Hoon* (DDG-93)	
May 19, 2019	Scarborough Shoal in Spratly Islands	*Preble* (DDG-88)	
August 28, 2019	Fiery Cross Reef and Mischief Reef in Spratly Islands	*Wayne E. Meyer (DDG-108)*	
September 13, 2019	Paracel Islands	*Wayne E. Meyer (DDG-108)*	
November 20, 2019	Mischief Reef in Spratly Islands	*Gabrielle Giffords (LCS-10)*	
November 21, 2019	Paracel Islands	*Wayne E. Meyer (DDG-108)*	
January 25, 2020	Spratly Islands	*Montgomery (LCS-8)*	

Source: Table prepared by CRS based on press reports about each operation.

Notes: Reported dates may vary by one day due to the difference in time zones between the United States and the SCS.

In general, China has objected each U.S. Navy FON operation in the SCS and has stated that it sent Chinese Navy ships and/or aircraft to warn the U.S. Navy ships to leave the areas in question. The FON operation conducted on September 30, 2018, led to an intense encounter, discussed elsewhere in this report, between the U.S. Navy ship that conducted the operation (the USS *Decatur* [DDG-73]) and the Chinese Navy ship that was sent to warn it off.[65]

[65] For the discussion of this tense encounter, see the paragraph ending in footnote 89 and the citations at that footnote.

Table 3. Reported Annual Numbers of U.S. Navy SCS FONOPs and Taiwan Strait Transits

Year	SCS FONOPs	Taiwan Strait transits
2014	0	n/a
2015	2	n/a
2016	3	12
2017	6	5
2018	5	3
2019	7	9

Source: For SCS FONOPs: U.S. Navy information as reported in David B. Larter, "In Challenging China's Claims in the South China Sea, the US Navy Is Getting More Assertive," *Defense News*, February 5, 2020; John Power, "US Freedom of Navigation Patrols in South China Sea Hit Record High in 2019," *South China Morning Post*, February 5, 2020. **For Taiwan Strait transits:** David B. Larter, "In Challenging China's Claims in the South China Sea, the US Navy Is Getting More Assertive," *Defense News*, February 5, 2020

Assessing the Trump Administration's Strategy

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

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

Some observers have proposed modifying the Trump Administration's strategy for competing strategically with China in the SCS and ECS. In many (though not all) cases, the proposed modifications involve taking actions that these observers believe would make for a stronger or more effective U.S. strategy. **Appendix I** presents a bibliography of some recent writings by observers recommending various modifications to the Trump Administration's strategy.

Some observers have questioned whether the Trump Administration is adequately resourcing its strategy for competing strategically with China in the SCS and ECS, particularly in terms of funding for maritime-related security assistance for countries in the region. Funding levels for security assistance to countries in the SCS, they argue, are only a small fraction of funding levels

for U.S. security assistance recipients in other regions, such as the Middle East. On observer, for example, stated in 2018 that

> today there is a large and persistent gap between the level of importance the U.S. government has attached to the Indo-Pacific and what annual appropriations continue to prioritize at the State Department and Pentagon. A bipartisan consensus has emerged to the extent that major foreign policy speeches and strategy documents now conclude that the Indo-Pacific is the central organizing principle for the U.S. government, but you would not know it by reading the last two administrations' budget submissions. If budgets are truly policy, the administration and Congress have a long way to go….
>
> Despite the growing acceptance that the Indo-Pacific and U.S.-Chinese competition represents America's most pressing long-term challenge, there remains a stark contrast between how the administration and Congress continue to budget for Asian security matters compared to other international issues. This is not to argue that other priorities, such as European Command and countering Russian in Ukraine, are not important. They are and deserve budgetary support. Some will argue that this budgetary emphasis demonstrates a bias towards those theaters at the expense of Asia. There may be some truth to this. Understanding and responding to the Russia threat as well as the terrorism challenge remains a part of America's national security muscle memory, where support can quickly be galvanized and resources persistently applied. Significant work still needs to be done to translate the emerging understanding of America's long-term position in the Indo-Pacific by senior leaders and congressional staff into actual shifts in budgetary priority.
>
> To be fair, in recent years Congress, with administration support, has taken important actions in the theater, including the creation and funding of the Maritime Security Initiative in 2015, funding of the Palau Compact in 2017, resourcing some of Indo-Pacific Command's unfunded requirements in 2018, devoting resources for dioxin remediation in Vietnam, and reorganizing and raising the lending limit for the Overseas Private Investment Corporation as part of the BUILD Act. But the issue remains that the scale of resource commitment to the region continues to fall short of the sizable objectives the U.S. government has set for itself….
>
> Continuing to give other functional issues and regional challenges budgetary priority will not bring about the shift in national foreign policy emphasis that the United States has set for itself. As Washington's mental map of the Indo-Pacific matures, the next step in implementing this new consensus on China will fall to the administration, elected officials, and senior congressional staff to prioritize resource levels for the region commensurate with the great power competition we find ourselves in.[66]

Risk of United States Being Drawn into a Crisis or Conflict

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

[66] Eric Sayers, "Assessing America's Indo-Pacific Budget Shortfall," *War on the Rocks*, November 15, 2018.

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?[67]
- Aside from public statements, what has the United States communicated to China regarding potential U.S. actions under the two treaties in connection with maritime territorial disputes in the SCS and ECS?
- Has the United States correctly balanced ambiguity and explicitness in its communications to various parties regarding potential U.S. actions under the two defense treaties?
- How do the two treaties affect the behavior of Japan, the Philippines, and China in managing their territorial disputes? To what extent, for example, would they help Japan or the Philippines resist potential Chinese attempts to resolve the disputes through intimidation, or, alternatively, encourage risk-taking or brinksmanship behavior by Japan or the Philippines in their dealings with China 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 how competing strategically with China in the SCS and ECS might affect the question of whether the United States should become a party to the United Nations Convention on the Law of the Sea (UNCLOS).[68] 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.[69] In the absence of Senate advice and

[67] As mentioned earlier, on March 1, 2019, Secretary of State Michael Pompeo stated that "As the South China Sea is part of the Pacific, any armed attack on Philippine forces, aircraft, or public vessels in the South China Sea will trigger mutual defense obligations under Article 4 of our Mutual Defense Treaty [with the Philippines]." For citations, see footnote 62. For articles bearing more generally on this issue, see, for example, Jason Gutierrez, "Philippine Official, Fearing War With China, Seeks Review of U.S. Treaty," *New York Times*, March 5, 2019; Jim Gomez (Associated Press), "Philippines Frets about War at Sea for US, *Navy Times*, March 5, 2019; Rigoberto D. Tiglao, "US Will Defend PH in a South China Sea War? Don't Bet on It," *Manila Times*, March 4, 2019; Richard Javad Heydarian, "U.S. Ambiguity Is Pushing the Philippines Toward China," *National Interest*, February 8, 2019; Richard Heydarian, "How Washington's Ambiguity in South China Sea Puts the Philippine-US Alliance at a Crossroads," *South China Morning Post*, January 31, 2019; Gregory Poling and Eric Sayers, "Time to Make Good on the U.S.-Philippine Alliance," *War on the Rocks*, January 21, 2019; Malcolm Cook, "Philippine Alliance Angst," *Interpreter*, January 18, 2019; Raissa Robles, "Philippine Defence Chief Urges Review of US Treaty Amid South China Sea Tensions," *South China Morning Post*, January 17, 2019; Patrick N. Cronin and Richard Javad Heydarian, "This Is How America and the Philippines Can Upgrade Their Alliance," *National Interest*, November 12, 2018; Agence France-Presse, "US Will Be 'Good Ally' to Philippines if China Invades, Defence Official Promises," *South China Morning Post*," August 17, 2018.

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

[69] Treaty Document 103-39.

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.[70]
- 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.[71]

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

- China's ability to cite international law (including UNCLOS) in defending its position on whether coastal states have a right to regulate foreign military activities in their EEZs[72] 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.

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

[71] See, for example, Patricia Kine, "Signing Treaty Would Bolster US Against China, Russia Seapower: Lawmaker," *Military.com*, January 16, 2019.

[72] 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.

- 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.[73]

Legislative Activity in 2019

FY2020 National Defense Authorization Act (H.R. 2500/S. 1790)

House

H.R. 2500 was reported by the House Armed Services Committee (H.Rept. 116-120) on June 19, 2019) and passed by the House, 220-197, on July 12, 2019. **Section 1241** of H.R. 2500 as passed by the House states the following:

> SEC. 1241. Modification of Indo-Pacific Maritime Security Initiative.
>
> (a) Types of assistance and training.—Subsection (c)(2)(A) of section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (10 U.S.C. 2282 note) is amended by inserting "the law of armed conflict, the rule of law, and" after "respect for".
>
> (b) Notice to Congress on assistance and training.—Subsection (g)(1) of such section is amended—
>
> (1) in subparagraph (A), by inserting at the end before the period the following: ", the specific unit or units whose capacity to engage in activities under a program of assistance or training to be provided under subsection (a) will be built under the program, and the amount, type, and purpose of the support to be provided";
>
> (2) by redesignating subparagraph (F) as subparagraph (J); and
>
> (3) by inserting after subparagraph (E) the following new subparagraphs:
>
> "(F) Information, including the amount, type, and purpose, on assistance and training provided under subsection (a) during the three preceding fiscal years, if applicable.
>
> "(G) A description of the elements of the theater campaign plan of the geographic combatant command concerned and the interagency integrated country strategy that will be advanced by the assistance and training provided under subsection (a).
>
> "(H) A description of whether assistance and training provided under subsection (a) could be provided pursuant to—
>
> "(i) section 333 of title 10, United States Code, or other security cooperation authorities of the Department of Defense; or
>
> "(ii) security cooperation authorities of the Department of State.
>
> "(I) An identification of each such authority described in subparagraph (H).".
>
> (c) Annual monitoring reports.—Such section is amended—
>
> (1) by redesignating subsection (h) as subsection (j); and

[73] 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.

(2) by inserting after subsection (g) the following new subsection:

"(h) Annual monitoring reports.—

"(1) IN GENERAL.—Not later than December 31, 2019, and annually thereafter, the Secretary of Defense shall submit to the appropriate committees of Congress a report setting forth, for the preceding calendar year, the following:

"(A) Information, by recipient foreign country, on the status of funds allocated for assistance and training provided under subsection (a), including funds allocated but not yet obligated or expended.

"(B) Information, by recipient foreign country, on the delivery and use of assistance and training provided under subsection (a).

"(C) Information, by recipient foreign country, on the timeliness of delivery of assistance and training provided under subsection (a) as compared to the timeliness of delivery of assistance and training previously provided to the foreign country under subsection (a).

"(2) APPROPRIATE COMMITTEES OF CONGRESS DEFINED.—In this subsection, the term 'appropriate committees of Congress' has the meaning given the term in subsection (g)(2).".

(d) Limitations.—Such section, as so amended, is further amended by inserting after subsection (h), as added by subsection (c)(2), the following:

"(i) Limitations.—

"(1) ASSISTANCE OTHERWISE PROHIBITED BY LAW.—The Secretary of Defense may not use the authority in subsection (a) to provide any type of assistance or training that is otherwise prohibited by any provision of law.

"(2) PROHIBITION ON ASSISTANCE TO UNITS THAT HAVE COMMITTED GROSS VIOLATIONS OF HUMAN RIGHTS.—The provision of assistance and training pursuant to a program under subsection (a) shall be subject to the provisions of section 362 of title 10, United States Code.

"(3) ASSESSMENT, MONITORING, AND EVALUATION OF PROGRAMS AND ACTIVITIES.—The provision of assistance and training pursuant to a program under subsection (a) shall be subject to the provisions of section 383 of title 10, United States Code.".

(e) Report.—

(1) IN GENERAL.—Not later than January 31, 2020, the Secretary of Defense, with the concurrence of the Secretary of State, shall submit to the appropriate congressional committees a report on the implementation of the Indo-Pacific Maritime Security Initiative under section 1263 of the National Defense Authorization Act for Fiscal Year 2016, as amended by this section.

(2) MATTERS TO BE INCLUDED.—The report required by paragraph (1) shall include the following:

(A) Objectives of the Initiative, including—

(i) a discussion of United States security requirements that are satisfied or enhanced under the Initiative; and

(ii) an assessment of progress toward each such objective and the metrics used to assess such progress.

(B) A discussion of how the Initiative relates to, complements, or overlaps with other United States security cooperation and security assistance authorities.

(C) A description of the process and criteria by which the utilization of each such authority or authorities described in subparagraph (B) is determined.

(D) An assessment, by recipient foreign country, of—

(i) the country's capabilities relating to maritime security and maritime domain awareness;

(ii) the country's capability enhancement priorities, including how such priorities relate to the theater campaign strategy, country plan, and theater campaign plan relating to maritime security and maritime domain awareness;

(E) A discussion, by recipient foreign country, of—

(i) priority capabilities that the Department of Defense plans to enhance under the Initiative and priority capabilities the Department plans to enhance under separate United States security cooperation and security assistance authorities; and

(ii) the anticipated timeline for assistance and training for each such capability.

(F) Information, by recipient foreign country, on the delivery and use of assistance and training provided under the Initiative.

(G) Any other matters the Secretary of Defense determines should be included.

(3) FORM.—The report required by paragraph (1) shall be submitted in unclassified form without any designation relating to dissemination control, but may include a classified annex.

(4) DEFINITION.—In this section, the term "appropriate congressional committees" means—

(A) the congressional defense committees; and

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

Section 1247 of H.R. 2500 as passed by the House states the following:

SEC. 1247. Modification of annual report on military and security developments involving the People's Republic of China.

(a) Annual report.—Subsection (a) of section 1202 of the National Defense Authorization Act for Fiscal Year 2000 (10 U.S.C. 113 note) is amended by inserting ", in consultation with the heads of other Federal departments and agencies as appropriate," after "the Secretary of Defense".

(b) Matters to be included.—Subsection (b) of such section is amended by adding at the end the following:

"(29) Developments relating to the China Coast Guard (in this paragraph referred to as the 'CCG'), including an assessment of—

"(A) how the change in the CCG's command structure to report to China's Central Military Commission affects the CCG's status as a law enforcement entity;

"(B) the implications of the CCG's command structure with respect to the use of the CCG as a coercive tool in 'gray zone' activity in the East China Sea and the South China Sea; and

"(C) how the change in the CCG's command structure may affect interactions between the CCG and the United States Navy.

"(30) An assessment of the nature of Chinese military relations with Russia, including what strategic objectives China and Russia share and are acting on, and on what objectives they misalign.

"(31) An assessment of—

"(A) China's expansion of its surveillance state;

"(B) any correlation of such expansion with its oppression of its citizens and its threat to United States national security interests around the world; and

"(C) an overview of the extent to which such surveillance corresponds to the overall respect, or lack thereof, for human rights.".

(c) Specified congressional committees.—Subsection (c) of such section is amended—

(1) in paragraph (1), by striking "and the Committee on Foreign Relations" and inserting ", the Committee on Foreign Relations, and the Select Committee on Intelligence"; and

(2) in paragraph (2), by striking "and the Committee on International Relations" and inserting ", the Committee on Foreign Affairs, and the Permanent Select Committee on Intelligence".

Conference

In the conference report (H.Rept. 116-333 of December 9, 2019) on S. 1790, **Section 1251** states

SEC. 1251. MODIFICATION OF INDO-PACIFIC MARITIME SECURITY INITIATIVE.

(a) Types of Assistance and Training.—Subsection (c)(2)(A) of section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (10 U.S.C. 2282 note) is amended by inserting ``the law of armed conflict, the rule of law, and'' after ``respect for''.

(b) Notice to Congress on Assistance and Training.—Subsection (g)(1) of such section is amended—

(1) in subparagraph (A), by inserting at the end before the period the following: ``, the specific unit or units whose capacity to engage in activities under a program of assistance or training to be provided under subsection (a) will be built under the program, and the amount, type, and purpose of the support to be provided'";

(2) by redesignating subparagraph (F) as subparagraph (J); and

(3) by inserting after subparagraph (E) the following new subparagraphs:

``(F) Information, including the amount, type, and purpose, on assistance and training provided under subsection (a) during the three preceding fiscal years, if applicable.

``(G) A description of the elements of the theater campaign plan of the geographic combatant command concerned and the interagency integrated country strategy that will be advanced by the assistance and training provided under subsection (a).

``(H) A description of whether assistance and training provided under subsection (a) could be provided pursuant to—

``(i) section 333 of title 10, United States Code, or other security cooperation authorities of the Department of Defense; or

``(ii) security cooperation authorities of the Department of State.

`(I) An identification of each such authority described in subparagraph (H).''.

(c) Annual Monitoring Reports.—Such section is amended—

(1) by redesignating subsection (h) as subsection (j); and

(2) by inserting after subsection (g) the following new subsection:

``(h) Annual Monitoring Reports.—

``(1) In general.—Not later than March 1, 2020, and annually thereafter, the Secretary of Defense shall submit to the appropriate committees of Congress a report setting forth, for the preceding calendar year, the following:

``(A) An assessment, by recipient foreign country, of—

``(i) the country's capabilities relating to maritime security and maritime domain awareness;

``(ii) the country's capability enhancement priorities, including how such priorities relate to the theater campaign strategy, country plan, and theater campaign plan relating to maritime security and maritime domain awareness;

``(B) A discussion, by recipient foreign country, of—

``(i) priority capabilities that the Department of Defense plans to enhance under the authority under subsection (a) and priority capabilities the Department plans to enhance under separate United States security cooperation and security assistance authorities; and

``(ii) the anticipated timeline for assistance and training for each such capability.

``(C) Information, by recipient foreign country, on the status of funds allocated for assistance and training provided under subsection (a), including funds allocated but not yet obligated or expended.

``(D) Information, by recipient foreign country, on the delivery and use of assistance and training provided under subsection (a).

``(E) Information, by recipient foreign country, on the timeliness of the provision of assistance and training under subsection (a) as compared to the timeliness of the provision of assistance and training previously provided to the foreign country under subsection (a).

``(F) A description of the reasons the Department of Defense chose to utilize the authority for assistance and training under subsection (a) in the preceding calendar year.

``(G) An explanation of any impediments to timely obligation or expenditure of funds allocated for assistance and training under subsection (a) or any significant delay in the delivery of such assistance and training.

``(2) Appropriate committees of congress defined.—In this subsection, the term `appropriate committees of Congress' has the meaning given the term in subsection (g)(2).''.

(d) Limitation.—Such section, as so amended, is further amended by inserting after subsection (h), as added by subsection (c)(2), the following:

``(i) Limitation.—The provision of assistance and training pursuant to a program under subsection (a) shall be subject to the provisions of section 383 of title 10, United States Code.''.

Regarding Section 1251, H.Rept. 116-333 states

Modification of Indo-Pacific Maritime Security Initiative (sec. 1251)

The House amendment contained a provision (sec. 1241) that would modify the authority for the Indo-Pacific Maritime Security Initiative to include additional elements of assistance and training, require additional information for congressional notifications, mandate an annual report, and incorporate an assessment, monitoring, and evaluation program. The provision would also require a one-time report on the initiative.

The Senate bill contained no similar provision.

The Senate recedes with an amendment that would, among other modifications, make clarifying changes to the required annual report on the initiative and strike the requirement for a one-time report. The conferees note that units to receive assistance under the Indo-Pacific Maritime Security Initiative undergo required "Leahy Law" human rights vetting before such assistance is provided.

Section 1252 of H.Rept. 116-333 states

SEC. 1252. EXPANSION OF INDO-PACIFIC MARITIME SECURITY INITIATIVE AND LIMITATION ON USE OF FUNDS.

(a) Expansion of Recipient Countries.—Subsection (b) of section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (10 U.S.C. 333 note) is amended by adding at the end the following new paragraphs:

``(8) The Federated States of Micronesia.

``(9) The Independent State of Samoa.

``(10) The Kingdom of Tonga.

``(11) Papua New Guinea.

``(12) The Republic of Fiji.

``(13) The Republic of Kiribati.

``(14) The Republic of the Marshall Islands.

``(15) The Republic of Nauru.

``(16) The Republic of Palau.

``(17) The Republic of Vanuatu.

``(18) The Solomon Islands.

``(19) Tuvalu.''.

(b) Limitation on Use of Funds.—

(1) In general.—None of the funds authorized to be appropriated for the Indo-Pacific Maritime Security Initiative under such section may be obligated or expended to provide training or assistance to a recipient country described in any of paragraphs (8) through (19) of subsection (b) of such section until the date on which the Secretary of Defense, with the concurrence of the Secretary of State, submits to the appropriate committees of Congress a report on security cooperation with and security assistance to such countries.

(2) Report.—The report referred to in paragraph (1) shall include the following:

(A) An identification of elements of the theater campaign plan of the geographic combatant command concerned and the interagency integrated country strategy that will be advanced by expansion of security cooperation and assistance programs and activities to such recipient countries.

(B) An assessment of the capabilities, and a description of the capability enhancement priorities, of each such country.

(C) A description of the manner in which United States security cooperation and assistance authorities, including assistance provided pursuant to other security cooperation authorities of the Department of Defense or security assistance authorities of the Department of State, may be used to enhance the priority capabilities of each such country.

(D) A description, as appropriate, of the manner in which the Secretary of Defense, together with the Secretary of State, shall ensure that security cooperation with and security

assistance to such countries complement regional engagement efforts undertaken by United States allies, including the Pacific Step-Up efforts of the Government of Australia and the ``Pacific Reset'' efforts of the Government of New Zealand.

(E) A description of absorption capacity and sustainability issues for each such country and a plan to resolve such issues.

(F) An identification of the estimated annual cost for such assistance and training for fiscal years 2020 through 2025.

(c) Appropriate Committees of Congress Defined.—In this section, the term ``appropriate committees of Congress'' means—

(1) the congressional defense committees;

(2) the Committee on Foreign Relations and the Subcommittee on State, Foreign Operations, and Related Programs of the Committee on Appropriations of the Senate; and

(3) the Committee on Foreign Affairs and the Subcommittee on State, Foreign Operations, and Related Programs of the Committee on Appropriations of the House of Representatives.

Section 1258 of H.Rept. 116-333 states

SEC. 1258. STATEMENT OF POLICY AND SENSE OF CONGRESS ON, AND STRATEGY TO FULFILL OBLIGATIONS UNDER, MUTUAL DEFENSE TREATY WITH THE REPUBLIC OF THE PHILIPPINES.

(a) Statement of Policy.—It is the policy of the United States that—

(1) while the United States has long adopted an approach that takes no position on the ultimate disposition of the disputed sovereignty claims in the South China Sea, disputing states should—

(A) resolve their disputes peacefully without the threat or use of force; and

(B) ensure that their maritime claims are consistent with international law; and

(2) an armed attack on the armed forces, public vessels, or aircraft of the Republic of the Philippines in the Pacific, including the South China Sea, would trigger the mutual defense obligations of the United States under Article IV of the Mutual Defense Treaty ``to meet common dangers in accordance with its constitutional processes''.

(b) Sense of Congress.—It is the sense of Congress that the Secretary of State and the Secretary of Defense should—

(1) affirm the commitment of the United States to the Mutual Defense Treaty;

(2) preserve and strengthen the military alliance of the United States with the Republic of the Philippines;

(3) prioritize efforts to develop a shared understanding of alliance commitments and defense planning; and

(4) provide appropriate support to the Republic of the Philippines to strengthen the self-defense capabilities of the Republic of the Philippines, particularly in the maritime domain.

(c) Strategy Required.—

(1) In general.—Not later than 1 year after the date of the enactment of this Act, the Secretary of Defense, in consultation with the Secretary of State, shall submit to the appropriate committees of Congress a report that sets forth the strategy of the Department of Defense for achieving the objectives described in subsection (b).

(2) Elements of strategy.—The strategy required by paragraph (1) shall include the following:

(A) A description of the national security interests and objectives of the United States furthered by the Mutual Defense Treaty.

(B) A description of the regional security environment, including—

(i) an assessment of threats to both the United States and the Republic of the Philippines national security interests in the region and the role of the Department in addressing such threats;

(ii) a description of the strategic security challenges that are detrimental to regional peace and global stability, including challenges posed by the People's Republic of China, violent extremist organizations, and natural disasters; and

(iii) a description of each violent extremist organization that presents a threat to the Republic of the Philippines, including, with respect to each such organization—

(I) the primary objectives of the organization;

(II) an assessment of—

(aa) the capacity and capability of the organization;

(bb) the transnational threat posed by the organization;

(cc) recent trends in the capability and influence of the organization;

(dd) the potential for the organization to reconstitute, expand, or otherwise pose a significant transnational threat; and

(ee) the conditions that contribute to efforts of the organization to reconstitute, expand, or pose such a threat; and

(III) a description of the metrics used to assess the capability and influence of the organization.

(C) A description of Department objectives with the Republic of the Philippines, including—

(i) the benchmarks for assessing progress towards such objectives; and

(ii) the Department strategy to achieve such objectives, including through—

(I) defense cooperation;

(II) use of security cooperation authorities; and

(III) other support or activities in the Republic of the Philippines.

(D) An identification of all current and planned Department resources, programs, and activities to support the strategy required by paragraph (1), including a review of the necessity of an ongoing named operation and the criteria used to determine such necessity.

(d) Definitions.—In this section:

(1) Appropriate committees of congress.—The term ``appropriate committees of Congress'' means—

(A) the congressional defense committees; and

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

> (2) Mutual defense treaty.—The term ``Mutual Defense Treaty'' means the Mutual Defense Treaty between the Republic of the Philippines and the United States of America, done at Washington August 30, 1951.

Section 1260 of H.Rept. 116-333 states in part:

> SEC. 1260. MODIFICATION OF ANNUAL REPORT ON MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA.
>
> (a) Modification to Annual Report Requirements.—Section 1202 of the National Defense Authorization Act for Fiscal Year 2000 (10 U.S.C. 113 note) is amended as follows:
>
> …
>
> (2) In subsection (b)—
>
> …
>
> (B) by adding at the end the following:
>
> ``(29) Developments relating to the China Coast Guard, including an assessment of—
>
> ``(A) how the change in the Guard's command structure to report to China's Central Military Commission affects the Guard's status as a law enforcement entity;
>
> ``(B) the implications of such command structure with respect to the use of the Guard as a coercive tool to conduct `gray zone' activities in the East China Sea and the South China Sea; and
>
> ``(C) how the change in such command structure may affect interactions between the Guard and the United States Navy….

South China Sea and East China Sea Sanctions Act of 2019 (H.R. 3508/S. 1634)

House

H.R. 3508, a bill "to impose sanctions with respect to the People's Republic of China in relation to activities in the South China Sea and the East China Sea, and for other purposes," was introduced on June 26, 2019.

Senate

S. 1634, a bill "to impose sanctions with respect to the People's Republic of China in relation to activities in the South China Sea and the East China Sea, and for other purposes," was introduced on May 23, 2019.

U.S.-China Economic and Security Review Act of 2019 (S. 987)

Senate

S. 987, a bill "to implement the recommendations of the U.S.–China Economic and Security Review Commission, and for other purposes," was introduced on April 2, 2019.

Section 8 of S. 987 as introduced requires the Secretaries of Defense and Homeland Security to jointly submit a report on the China Coast Guard (CCG) that includes, among other things, "The implications of the new command structure of the CCG with respect to the use of the CCG as a coercive tool in 'gray zone' activity in the East China Sea and the South China Sea."

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

This appendix provides background information on maritime territorial and EEZ disputes in the SCS and ECS that involve China. Other CRS reports provide additional and more detailed information on these disputes.[74]

Maritime Territorial Disputes

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

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

The island and shoal names used above are the ones commonly used in the United States; in other countries, these islands are known by various other names.[75]

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.[76] There are additional maritime territorial disputes in the Western Pacific that do not involve China.[77] 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.[78]

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

[75] 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.

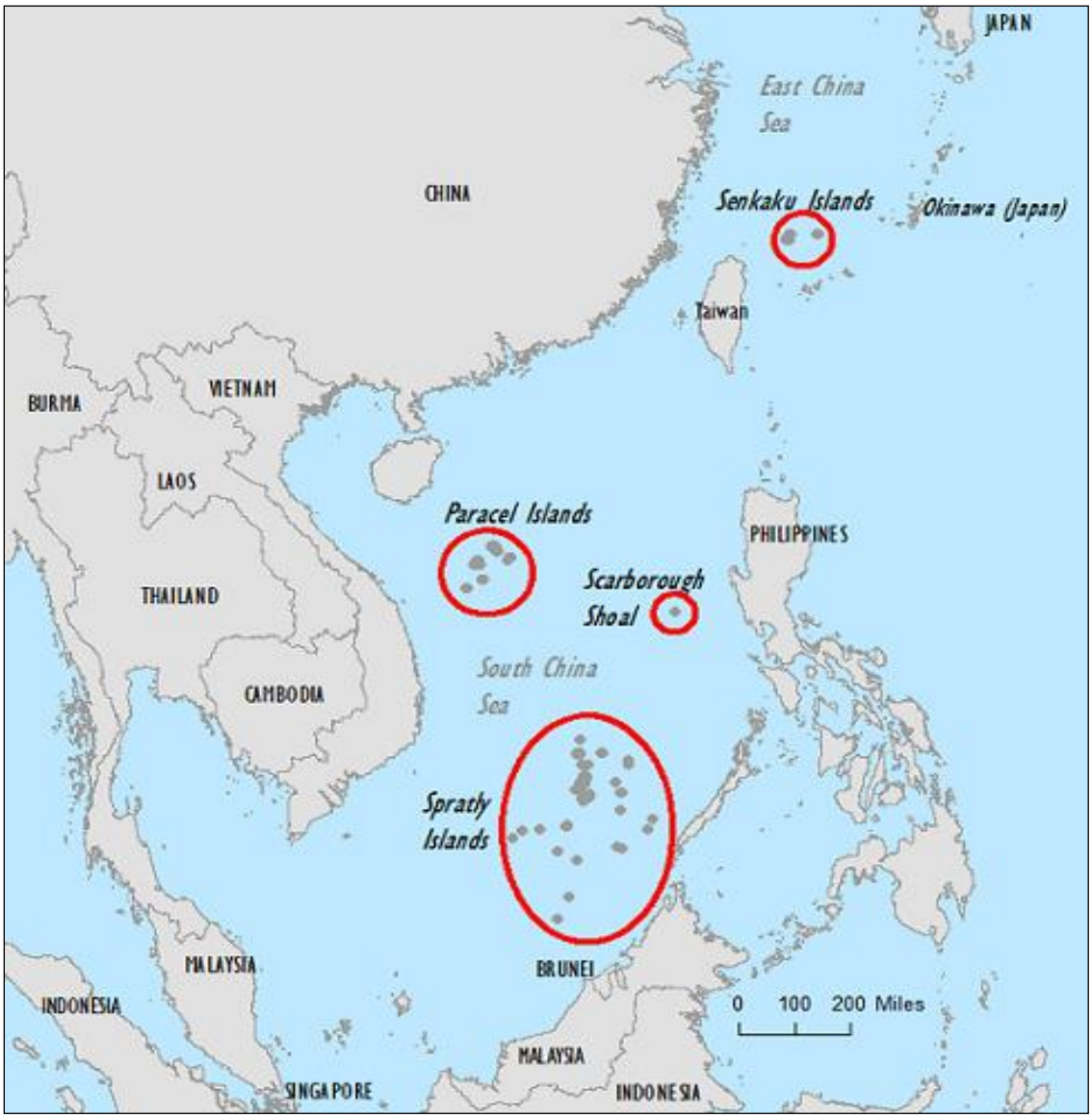
[76] For example, the Reed Bank, a submerged atoll northeast of the Spratly Islands, is the subject of a dispute between China and the Philippines, and the Macclesfield Bank, a group of submerged shoals and reefs between the Paracel Islands and Scarborough Shoal, is claimed by China, Taiwan, and the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

[77] 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.

[78] One observer states that "notable incidents over sovereignty include the Chinese attack on the forces of the Republic

Figure A-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.

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.

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

In addition to maritime territorial disputes in the SCS and ECS, China is involved in a dispute, principally with the United States, over whether China has a right under international law to regulate the activities of foreign military forces operating within China's EEZ. The position of the United States and most other countries is that while the United Nations Convention on the Law of 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.[79]

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.[80]

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

[79] 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.

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

> Regarding excessive maritime claims, several claimants within the region have asserted maritime claims along their coastlines and around land features that are inconsistent with international law. For example, Malaysia attempts to restrict foreign military activities within its Exclusive Economic Zone (EEZ), and Vietnam attempts to require notification by foreign warships prior to exercising the right of innocent passage through its territorial sea. A number of countries have drawn coastal baselines (the lines from which the breadth of maritime entitlements are measured) that are inconsistent with international law, including Vietnam and China, and the United States also has raised concerns with respect to Taiwan's Law on the Territorial Sea and the Contiguous Zone's provisions on baselines and innocent passage in the territorial sea. Although we applaud the Philippines' and Vietnam's efforts to bring its maritime claims in line with the Law of the Sea Convention, more work remains to be done. Consistent with the long-standing U.S. Freedom of Navigation Policy, the United States encourages all claimants to conform their maritime claims to international law and challenges excessive maritime claims through U.S. diplomatic protests and operational activities.
>
> (Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 7-8.)

these countries—China, North Korea, and Peru—have directly interfered with foreign military activities in their EEZs.[81]

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;[82]
- an incident on December 5, 2013, in which a Chinese navy ship put itself in the path of the U.S. Navy cruiser *Cowpens* as it was operating 30 or more miles from China's aircraft carrier *Liaoning*, forcing the *Cowpens* to change course to avoid a collision;
- an incident on August 19, 2014, in which a Chinese fighter conducted an aggressive and risky intercept of a U.S. Navy P-8 maritime patrol aircraft that was flying in international airspace about 135 miles east of Hainan Island[83]—DOD characterized the intercept as "very, very close, very dangerous";[84] 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."[85]

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[81] 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.

[82] 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.

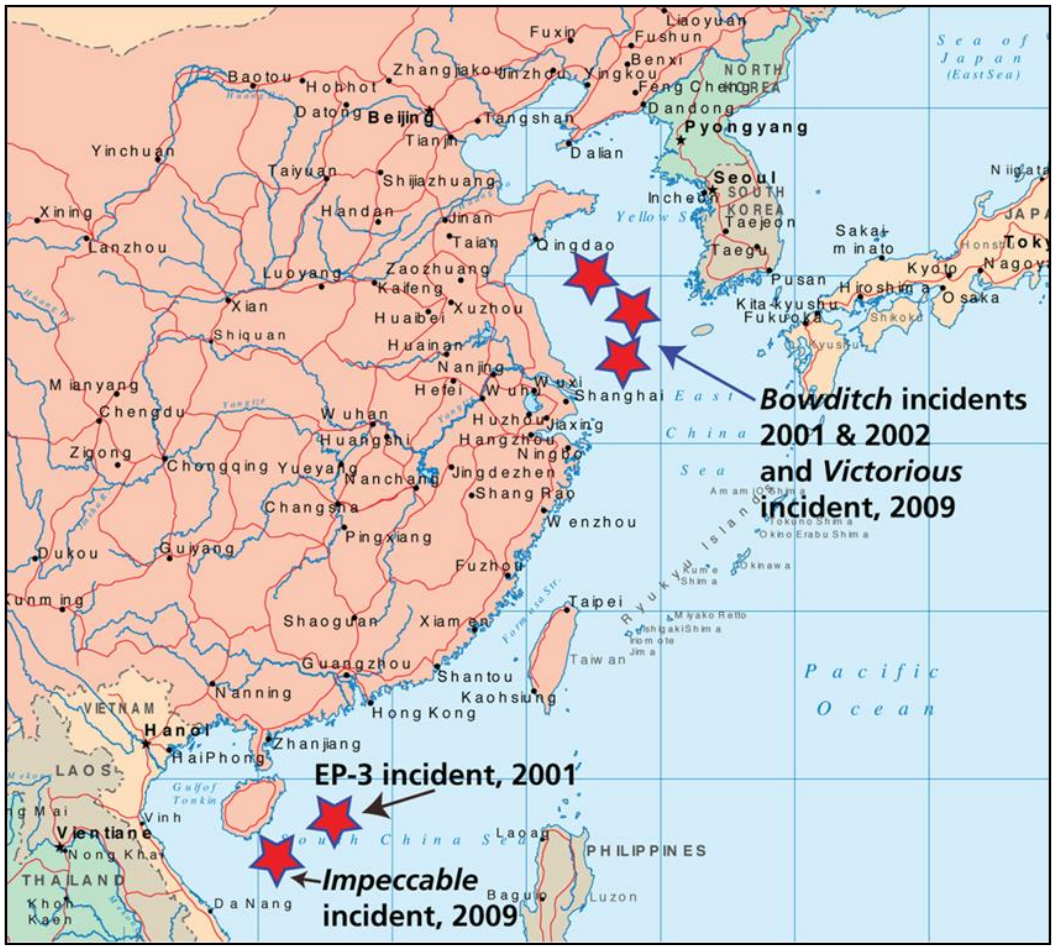
[83] Source for location: Transcript of remarks by DOD Press Secretary Rear Admiral John Kirby at August 22, 2014, press briefing, accessed September 26, 2014, at http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5493. Chinese officials stated that the incident occurred 220 kilometers (about 137 statute miles or about 119 nautical miles) from Hainan Island.

[84] 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.

[85] 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,

Figure A-2 shows the locations of the 2001, 2002, and 2009 incidents listed in the first two bullets above. The incidents shown in **Figure A-2** are the ones most commonly cited prior to the December 2013 involving the *Cowpens*, but some observers list additional incidents as well.[86]

Figure A-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.

"Pentagon: 'Unsafe' Intercept over South China Sea," *CNN*, May 19, 2016.

[86] 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.

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 standards for encounters at sea, such as the Code for Unplanned Encounters at Sea (CUES),[87] which was signed in April 2014.[88]

On September 30, 2018, an incident occurred in the SCS between the U.S. Navy destroyer *Decatur* (DDG-73) and a Chinese destroyer, as the *Decatur* was conducting a FON operation near Gaven Reef in the Spratly Islands. In the incident, the Chinese destroyer overtook the U.S. destroyer close by on the U.S. destroyer's port (i.e., left) side, requiring the U.S. destroyer to turn starboard (i.e., to the right) to avoid the Chinese ship. U.S. officials stated that at the point of closest approach between the two ships, the stern (i.e., back end) of the Chinese ship came within 45 yards (135 feet) of the bow (i.e., front end) of the *Decatur*. As the encounter was in progress, the Chinese ship issued a warning by radio stating, "If you don't change course your [sic] will suffer consequences." One observer, commenting on the incident, stated, "To my knowledge, this is the first time we've had a direct threat to an American warship with that kind of language." U.S. officials characterized the actions of the Chinese ship in the incident as "unsafe and unprofessional."[89]

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

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

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

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

> The US Navy has had 18 unsafe or unprofessional encounters with Chinese military forces in the Pacific since 2016, according to US military statistics obtained by CNN.
>
> "We have found records of 19 unsafe and/or unprofessional interactions with China and Russia since 2016 (18 with China and one with Russia)," Cmdr. Nate Christensen, a spokesman for the US Pacific Fleet, told CNN.
>
> A US official familiar with the statistics told CNN that 2017, the first year of the Trump administration, saw the most unsafe and or unprofessional encounters with Chinese forces during the period.
>
> At least three of those incidents took place in February, May and July of that year and involved Chinese fighter jets making what the US considered to be "unsafe" intercepts of Navy surveillance planes.
>
> While the 18 recorded incidents only involved US naval forces, the Air Force has also had at least one such encounter during this period….
>
> The US Navy told CNN that, in comparison, there were 50 unsafe or unprofessional encounters with Iranian military forces since 2016, with 36 that year, 14 last year and none in 2018. US and Iranian naval forces tend to operate in relatively narrow stretches of water, such as the Strait of Hormuz, increasing their frequency of close contact.[90]

DOD states that

> Although China has long challenged foreign military activities in its maritime zones in a manner that is inconsistent with the rules of customary international law as reflected in the LOSC, the PLA has recently started conducting the very same types of military activities inside and outside the first island chain in the maritime zones of other countries. This contradiction highlights China's continued lack of commitment to the rules of customary international law.
>
> Even though China is a state party to the LOSC [i.e., UNCLOS], China's domestic laws restrict military activities in its exclusive economic zone (EEZ), including intelligence collection and military surveys, contrary to LOSC. At the same time, the PLA is increasingly undertaking military operations in other countries' EEZs. The map on the following page [not reproduced here] depicts new PLA operating areas in foreign EEZs since 2014. In 2017, the PLAN conducted air and naval operations in Japan's EEZ; employed an AGI [intelligence-gathering ship] ship, likely to monitor testing of a THAAD system in the U.S. EEZ near the Aleutian Islands; and employed an AGI ship to monitor a multi-national naval exercise in Australia's EEZ. PLA operations in foreign EEZs have taken place in Northeast and Southeast Asia, and a growing number of operations are also occurring farther from Chinese shores.[91]

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:

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

[91] Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2018*, pp. 67-68. See also Christopher Woody, "This New Defense Department Map Shows How China Says One Thing and Does Another with Its Military Operations at Sea," *Business Insider*, August 17, 2018.

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

Press reports of maritime disputes in the SCS and ECS sometimes focus on territorial disputes while devoting little or no attention to the EEZ dispute, or do relatively little to distinguish the EEZ dispute from the territorial disputes. From the U.S. perspective, the EEZ dispute is arguably as significant as the maritime territorial disputes because of the EEZ dispute's proven history of leading to U.S.-Chinese incidents at sea and because of its potential for affecting U.S. military operations not only in the SCS and ECS, but around the world.

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

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

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

The 1960 U.S.-Japan treaty on mutual cooperation and security[92] 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."[93] (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.[94]

U.S.-Philippines Mutual Defense Treaty[95]

The 1951 U.S.-Philippines mutual defense treaty[96] states in Article IV that

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

[93] 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.

[94] 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.

[95] 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.

[96] 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.[97] 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.[98] U.S. officials have made their own statements regarding the treaty's application to territorial disputes in the SCS.[99]

As mentioned earlier, on March 1, 2019, Secretary of State Michael Pompeo stated, "As the South China Sea is part of the Pacific, any armed attack on Philippine forces, aircraft, or public vessels in the South China Sea will trigger mutual defense obligations under Article 4 of our Mutual Defense Treaty [with the Philippines]."[100]

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

[98] 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/.

[99] 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.

[100] For citations, see footnote 62.

Appendix C. Treaties and Agreements Related to the Maritime Disputes

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

UN Convention on Law of the Sea (UNCLOS)

Overview of UNCLOS

The United Nations Convention on the Law of the Sea (UNCLOS) "lays down a comprehensive regime of law and order in the world's oceans and seas[,] establishing rules governing all uses of the oceans and their resources."[101] It builds on four 1958 law of the sea conventions to which the United States, following Senate consent to ratification, became a party in 1961, and which entered force between 1962 and 1966.[102] All four treaties remain in force for the United States.[103]

UNCLOS was adopted in 1982 as the "culmination of more than 14 years of work involving participation by more than 150 countries representing all regions of the world, all legal and political systems and the spectrum of socio/economic development."[104] The treaty was modified in 1994 by an agreement relating to the implementation of Part XI of the treaty, which relates to the seabed and ocean floor and subsoil thereof that are beyond the limits of national jurisdiction. UNCLOS entered into force in November 1994. The treaty established EEZs as a feature of international law, and contains multiple provisions relating to territorial waters and EEZs. As of April 8, 2019, 168 nations were party to the treaty.[105] As discussed further in the next section, the United States is not a party to the treaty.

[101] United Nations, "United Nations Convention on the Law of the Sea of 10 December 1982, Overview and full text," updated June 28, 2019, accessed August 2, 2019, at https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm.

[102] These are the Convention on the Territorial Sea and Contiguous Zone, which entered into force on September 10, 1964, the Convention on the Continental Shelf, which entered into force on 10 June 10, 1964, the Convention on the High Seas, which entered into force on September 30, 1962, and the Convention on Fishing and Conservation of Living Resources of the High Seas, which entered into force on March 20, 1966. The four 1958 treaties resulted from the first Conference on the Law of the Sea (UNCLOS I), which took place in 1958. (For additional discussion, see United Nations, "United Nations Conference on the Law of the Sea," undated, accessed August 2, 2019, at http://legal.un.org/diplomaticconferences/1958_los/, and United Nations, "1958 Geneva Conventions on the Law of the Sea," undated, accessed August 2, 2019, at http://legal.un.org/avl/ha/gclos/gclos.html.)

[103] See Department of State, *Treaties in Force, Section 2, Multilateral Treaties in Force as of January 1, 2019*, pp. 526, 501, 525, and 516, respectively.

[104] United Nations, "United Nations Convention on the Law of the Sea of 10 December 1982, Overview and full text," updated June 28, 2019, accessed August 2, 2019, at https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm. More specifically, the treaty resulted from the Third United Nations Conference on the Law of the Sea (UNCLOS III), which took place between 1973 and 1982. For additional discussion, see United Nations, "Third United Nations Conference on the Law of the Sea," undated, accessed August 2, 2019, at http://legal.un.org/diplomaticconferences/1973_los/.

[105] Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as of February 3, 2017, accessed December 13, 2018, at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#.

U.S. Not a Party to UNCLOS

As noted above, the United States is not a party to UNCLOS.[106] Although the United States is not a party to UNCLOS, the United States accepts and acts in accordance with the non-seabed mining provisions of the treaty, such as those relating to navigation and overflight, which the United States views as reflecting customary international law of the sea.

The United States did not sign UNCLOS when it was adopted in 1982 because the United States objected to the seabed mining provisions of Part XI of the treaty. Certain other countries also expressed concerns about these provisions.[107] The United Nations states that "To address certain difficulties with the seabed mining provisions contained in Part XI of the Convention, which had been raised, primarily by the industrialized countries, the Secretary-General convened in July 1990 a series of informal consultations which culminated in the adoption, on 28 July 1994, of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. The Agreement entered into force on 28 July 1996."[108]

The United States signed the 1994 agreement on July 29, 1994, and U.S. administrations since then have supported the United States becoming a party to UNCLOS. The United Nations includes the United States on a list of countries for which the 1994 agreement is in a status of "provisional application," as of November 16, 1994, by virtue of its signature.[109]

The 1982 treaty and the 1994 agreement were transmitted to the Senate on October 6, 1994, during the 103rd Congress, becoming Treaty Document 103-39. Subsequent Senate action on Treaty Document 103-39, as presented at Congress.gov,[110] can be summarized as follows:

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

[106] The United States is not a signatory to the treaty. On July 29, 1994, the United States became a signatory to the 1994 agreement relating to the implementation of Part XI of the treaty. The United States has not ratified either the treaty or the 1994 agreement.

[107] In a March 10, 1983, statement on U.S. oceans policy, President Reagan stated, "Last July, I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries. The United States does not stand alone in those concerns. Some important allies and friends have not signed the convention. Even some signatory states have raised concerns about these problems." (Ronald Reagan Presidential Library & Museum, "Statement on United States Oceans Policy," undated, accessed August 2, 2019, at https://www.reaganlibrary.gov/research/speeches/31083c.)

[108] United Nations, "Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982," updated September 2, 2016, accessed August 1, 2019, at https://www.un.org/depts/los/convention_agreements/convention_overview_part_xi.htm.

[109] United Nations, "Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982," status as of August 1, 2019, accessed August 1, 2019, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-6-a&chapter=21&clang=_en.

[110] United Nations Convention on the Law of the Sea, Senate Consideration of Treaty Document 103-39, accessed July 31, 2019, at https://www.congress.gov/treaty-document/103rd-congress/39. For a timeline of selected key events relating to the treaty, see Department of State, "Law of the Sea Convention," March 7, 2019, accessed July 30, 2019, at https://www.state.gov/law-of-the-sea-convention/.

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

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

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

1983 Statement on U.S. Ocean Policy

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.[111]

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),[112] 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."[113] Although

[111] 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.

[112] 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.

[113] 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

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."[114] 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[115] 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.[116]

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.[117]

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

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

[115] 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.

[116] 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-chinese-behavior.

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

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),[118] 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.[119] 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."[120]

DOD stated in 2015 that

> Going forward, the Department is also exploring options to expand the use of CUES to include regional law enforcement vessels and Coast Guards. Given the growing use of maritime law enforcement vessels to enforce disputed maritime claims, expansion of CUES to MLE [maritime law enforcement] vessels would be an important step in reducing the risk of unintentional conflict.[121]

U.S. Navy officials have stated that the CUES agreement is generally working well, and that the United States (as noted in the passage above) is interested in expanding the agreement to cover coast guard ships.[122] Officials from Singapore and Malaysia reportedly have expressed support

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[118] 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.

[119] 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.

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

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

[122] 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.

for the idea.[123] 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.[124]

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

> The U.S. Navy's chief of naval operations has called on China to return to a previously agreed-upon code of conduct for at-sea encounters between the ships of their respective navies, stressing the need to avoid miscalculations.
>
> During a Nov. 1 teleconference with reporters based in the Asia-Pacific region, Adm. John Richardson said he wants the People's Liberation Army Navy to "return to a consistent adherence to the agreed-to code that would again minimize the chance for a miscalculation that could possibly lead to a local incident and potential escalation."
>
> The CNO cited a case in early October when the U.S. Navy's guided-missile destroyer Decatur reported that a Chinese Type 052C destroyer came within 45 yards of the Decatur as it conducted a freedom-of-navigation operation in the South China Sea.
>
> However, he added that the "vast majority" of encounters with Chinese warships in the South China Sea "are conducted in accordance with the Code of Unplanned Encounters at Sea and done in a safe and professional manner." The code is an agreement reached by 21 Pacific nations in 2014 to reduce the chance of an incident at sea between the agreement's signatories.[125]

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.[126] 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.[127] The MOU as signed in November 2014 included an annex on rules of

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[123] 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.

[124] "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.

[125] Mike Yeo, "Top US Navy Officer Tells China to Behave at Sea," *Defense News,* November 3, 2018.

[126] 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.

[127] 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

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.[128]

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

> Eighteen nations including the U.S. and China agreed in principle Saturday [October 20] to sign up to guidelines governing potentially dangerous encounters by military aircraft, a step toward stabilizing flashpoints but one that leaves enough wiggle room to ignore the new standards when a country wants.
>
> The guidelines essentially broaden a similar agreement reached by the U.S. and China three years ago and are an attempt to mitigate against incidents and collisions in some of the world's most tense areas….
>
> The in-principle agreement, which will be put forward for formal adoption by the group of 18 nations next year, took place at an annual meeting of defense ministers under the aegis of the 10-country Association of Southeast Asian Nations, hosted by Singapore. Asean nations formally adopted the new guidelines themselves Friday.
>
> "The guidelines are very useful in setting norms," Singapore's defense minister Ng Eng Hen told reporters after the meeting. "All the 18 countries agreed strong in-principle support for the guidelines."…
>
> The aerial-encounters framework agreed to Saturday includes language that prohibits fast or aggressive approaches in the air and lays out guidelines on clear communications including suggestions to "refrain from the use of uncivil language or unfriendly physical gestures."
>
> Signatories to the agreement, which is voluntary and not legally binding, would agree to avoid unprofessional encounters and reckless maneuvers….
>
> The guidelines fall short on enforcement and geographic specifics, but they are "better than nothing at all," said Evan Laksmana, senior researcher with the Center for Strategic and International Studies in Jakarta. "Confidence-building surrounding military crises or encounters can hardly move forward without some broadly agreed-upon rules of the game," he said.[129]

> meet at sea, drawing from and reinforcing existing international law and standards and managing risk by reducing the possibility of misunderstanding and misperception between the militaries of the United States and China. To date, this MOU includes an annex for ship-to-ship encounters. To augment this MOU, the Department of Defense has prioritized developing an annex on air-to-air encounters by the end of 2015. Upon the conclusion of this final annex, bilateral consultations under the Rules of Behavior MOU will be facilitated under the existing MMCA forum.
>
> (Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 30.)

For additional discussion of the MOU, see Peter A. Dutton, "MOUs: The Secret Sauce to Avoiding a U.S.-China Disaster?" *National Interest*, January 30, 2015; Mira Rapp-Hooper and Bonnie Glaser, "In Confidence: Will We Know If US-China CBMs Are Working?" *Asia Maritime Transparency Initiative (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.

[128] 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.

[129] Jake Maxwell Watts, "Defense Chiefs Seek Friendlier Skies Over Asia's Military Flashpoints," *Wall Street Journal*, October 20, 2018.

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....[130]

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."[131] On May 18 and 19, 2017, it was reported that the China and the ASEAN countries had agreed on the framework.[132]

A May 18, 2017, press report stated that [China's Vice-Foreign Minister] 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."[133]

An August 3, 2017, press report stated that "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-

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[130] 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.

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

[132] 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.

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

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)."[134]

An August 6, 2017, press report stated that "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…. 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."[135] 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.[136]

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.[137] An October 22, 2018, press report stated the following:

> One of the Chinese provisions in the [draft South China Sea code of conduct] states, "The Parties shall not hold joint military exercises with countries from outside the region, unless the parties concerned are notified beforehand and express no objection."
>
> China also proposed cooperation on the marine economy "shall not be conducted in cooperation with companies from countries outside the region."
>
> A State Department spokesperson told VOA the United States is concerned by reports China has been pressing members of the Association of Southeast Asian Nations "in the closed-door talks, to accept restrictions on their ability to conduct exercises with security

[134] Manuel Mogato, "China Set for Easy Ride from ASEAN on Disputed South China Sea," *Reuters*, August 3, 2017.

[135] 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.

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

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

> partners, and to agree not to conduct oil and gas exploration in their claimed waters with energy firms based in countries which are not part of the ongoing negotiations."
>
> "These proposals, if accepted, would limit the ability of ASEAN nations to conduct sovereign, independent foreign and economic policies and would directly harm the interests of the broader international community," added the State Department spokesperson….
>
> "In other words, China would like a veto over all the military exercises held by ASEAN countries with other nations. I think this really provides some evidence that China indeed is trying to limit American influence in the region, one might go so far as to say to push American military presence out of the region eventually, but certainly in the area of the South China Sea," said Bonnie Glaser, director of the China Power Project at the Center for Strategic and International Studies in Washington.[138]

A September 6, 2018, blog post stated that "any system to effectively manage the South China Sea disputes would require three things, none of which are achieved yet in the draft text. First, an effective COC would need to be geographically defined…. Second, an effective COC would need a dispute settlement mechanism…. Third, any effective regime to manage the South China Sea disputes would need detailed provisions on fisheries management and oil and gas development."[139] An October 29, 2018, press report states that "The Philippines on Monday [October 29] said a set of rules intended to prevent conflict in the South China Sea need not legally compel countries to follow it—an issue of importance for the Chinese government."[140] A November 14, 2018, press report stated the following:

> A rulebook to settle disputes in the hotly contested South China Sea should be finished in three years, Chinese Premier Li Keqiang said on Tuesday [November 13], insisting his nation does not seek "hegemony or expansion."
>
> Li's comments appeared to be the first clear timeframe for finishing the code of conduct. Talks have dragged on for years, with China accused of delaying progress as it prefers to deal with less powerful countries on a one-to-one basis.[141]

[138] Nike Ching, "South China Sea Code of Conduct Gains Momentum as China Moves to Complete Militarization," *VOA*, October 22, 2018.

[139] Gregory B Poling, "South China Sea Code of Conduct Still a Speck on the Horizon," *East Asia Forum*, September 6, 2018.

[140] Cliff Venzon, "Philippines Hints at Compromise on South China Sea Dispute Pact," *Nikkei Asian Review*, October 29, 2018.

[141] Jerome Taylor, "Beijing Wants South China Sea Code Finished in Three Years," *Philippine Star*, November 14, 2018. See also Lee Chyen Yee, "Chinese Premier Li Says Talks on South China Sea Code Should End in Three Years," *Reuters*, November 12, 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.[142] 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

[142] 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.[143]

[143] 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.[144]

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.

[144] 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.[145]

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."[146] 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.[147]

[145] 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.

[146] 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.

[147] 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.[148]

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

> The Philippines is celebrating today the second anniversary of its landmark arbitration award against China's territorial claims in the South China Sea handed down by an arbitral tribunal in The Hague….
>
> Until now, the Philippines remains sharply divided on how to leverage its arbitration award. Filipino President Rodrigo Duterte has repeatedly downplayed the relevance of the ruling by questioning its enforceability amid China's vociferous opposition.
>
> Soon after taking office in mid-2016, Duterte declared that he would "set aside" the arbitration award in order to pursue a "soft landing" in bilateral relations with China. In exchange, he has hoped for large-scale Chinese investments as well as resource-sharing in the South China Sea….

[148] 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.[149]

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

> Tarpaulins bearing the words "Welcome to the Philippines, province of China" were seen hanging from several footbridges in Metro Manila Thursday, two years after the country won its arbitration case against China.
>
> The red banners bore the Chinese flag and Chinese characters.
>
> It is unclear who installed the tarpaulins, which are possible reference to a "joke" by President Rodrigo Duterte that the country can be a province of the Asian giant.
>
> "He (Xi Jinping) is a man of honor. They can even make us 'Philippines, province of China,' we will even avail of services for free," Duterte said in apparent jest before an audience of Chinese-Filipino business leaders earlier in 2018. "If China were a woman, I'd woo her."…
>
> In a Palace briefing, presidential spokesperson Harry Roque said enemies of the government are behind the tarpaulins.

[149] 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.[150]

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

> Protesters held a rally in front of the Chinese Consulate [in San Francisco] before proceeding to the Philippine Consulate downtown, demanding that China "get out of Philippine territory in the West Philippine Sea." The protest was timed with others in Los Angeles and Vancouver on the second anniversary of the UN's Permanent Court of Arbitration ruling that China had no right to the territory it was claiming.
>
> Filipino American Human Rights Advocates (FAHRA) in a statement celebrated the court's finding that "China's historical claim of the "nine-dash line" [is] illegal and without basis."
>
> "China continues to violate the UN's decision with the backing of its puppet Philippine government headed by President Duterte, who is deceived by the 'build, build, build' economic push while China establishes a 'steal, steal, steal' approach to islands and territories belonging to the Exclusive Economic Zone (EEZ) of the Philippines as determined by UN," the statement lamented.
>
> FAHRA also found it unacceptable that Filipino fishermen must now ask permission to fish in the Philippine waters from "a Chinese master."
>
> "Duterte is beholden to the $15-billion loan with monstrous interest rate and China's investments in Boracay and Marawi, at the expense of Philippine sovereignty," FAHRA claimed. "This is not to mention that China remains to be the premier supplier of illegal drugs to the country through traders that include the son, Paolo Duterte, with his P6 billion shabu shipment to Davao," it further charged.
>
> The group demanded that "China abide by the UN International Tribunal Court's decision two years ago, to honor the full sovereignty of the Philippines over all territories at the Exclusive Economic Zone (EEZ) including the West Philippine Sea and the dismantling of the nuclear missiles and all military facilities installed by the Chinese government at the Spratly islands meant to coerce the Filipinos and all peace-loving people of Southeast Asia who clamor for equal respect and equal sovereignty in the area" among others.[151]

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

[151] 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. China's Approach to Maritime Disputes in SCS and ECS

This appendix presents additional background information on China's approach to the maritime disputes in the SCS and ECS.[152]

Island Building and Base Construction

DOD stated in 2017 that

> In 2016, China focused its main effort on infrastructure construction at its outposts on the Spratly Islands. Although its land reclamation and artificial islands do not strengthen China's territorial claims as a legal matter or create any new territorial sea entitlements, China will be able to use its reclaimed features as persistent civil-military bases to enhance its presence in the South China Sea and improve China's ability to control the features and nearby maritime space. China reached milestones of landing civilian aircraft on its airfields on Fiery Cross Reef, Subi Reef, and Mischief Reef for the first time in 2016, as well as landing a military transport aircraft on Fiery Cross Reef to evacuate injured personnel....
>
> China's Spratly Islands outpost expansion effort is currently focused on building out the land-based capabilities of its three largest outposts—Fiery Cross, Subi, and Mischief Reefs—after completion of its four smaller outposts early in 2016. No substantial land has been reclaimed at any of the outposts since China ended its artificial island creation in the Spratly Islands in late 2015 after adding over 3,200 acres of land to the seven features it occupies in the Spratlys. Major construction features at the largest outposts include new airfields—all with runways at least 8,800 feet in length—large port facilities, and water and fuel storage. As of late 2016, China was constructing 24 fighter-sized hangars, fixed-weapons positions, barracks, administration buildings, and communication facilities at each of the three outposts. Once all these facilities are complete, China will have the capacity to house up to three regiments of fighters in the Spratly Islands.
>
> China has completed shore-based infrastructure on its four smallest outposts in the Spratly Islands: Johnson, Gaven, Hughes, and Cuarteron Reefs. Since early 2016, China has installed fixed, land-based naval guns on each outpost and improved communications infrastructure.
>
> The Chinese Government has stated that these projects are mainly for improving the living and working conditions of those stationed on the outposts, safety of navigation, and research; however, most analysts outside China believe that the Chinese Government is attempting to bolster its de facto control by improving its military and civilian infrastructure in the South China Sea. The airfields, berthing areas, and resupply facilities on its Spratly outposts will allow China to maintain a more flexible and persistent coast guard and military presence in the area. This would improve China's ability to detect and challenge activities by rival claimants or third parties, widen the range of capabilities available to China, and reduce the time required to deploy them....

[152] For additional discussions of China's approach to maritime disputes in the SCS and ECS, see Anders Corr, "China's Technological and Strategic Innovations in the South China Sea," Journal of Political Risk, March 2019 (posted March 21, 2019); and James Holmes, "Inside China's 'People's War' Plan for the South China Sea," *National Interest*, November 23, 2019.

> 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.[153]

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.[154] In July 2018, it was reported that "China is quietly testing electronic warfare assets recently installed at fortified outposts in the South China Sea…."[155] 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.[156]

For additional discussion of China's island-building and facility-construction activities, see CRS Report R44072, *Chinese Land Reclamation in the South China Sea: Implications and Policy Options*, by Ben Dolven et al.

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[153] 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.

[154] 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 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; Paul McCleary, "China Has Built 'Great Wall of SAMs' In Pacific: US Adm. Davidson," *Breaking Defense*, November 17, 2018.

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

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

Use of Coast Guard Ships and Maritime Militia

Coast Guard Ships

DOD states that the China Coast Guard (CCG) is the world's largest coast guard.[157] It is much larger than the coast guard of any country in the region, and it has increased substantially in size in recent years through the addition of many newly built ships. China makes regular use of CCG ships to assert and defend its maritime claims, particularly in the ECS, with Chinese navy ships sometimes available over the horizon as backup forces.[158] The Defense Intelligence Agency (DIA) states the following:

> Under Chinese law, maritime sovereignty is a domestic law enforcement issue under the purview of the CCG. Beijing also prefers to use CCG ships for assertive actions in disputed waters to reduce the risk of escalation and to portray itself more benignly to an international audience. For situations that Beijing perceives carry a heightened risk of escalation, it often deploys PLAN combatants in close proximity for rapid intervention if necessary. China also relies on the PAFMM—a paramilitary force of fishing boats—for sovereignty enforcement actions….
>
> China primarily uses civilian maritime law enforcement agencies in maritime disputes, employing the PLAN [i.e., China's navy] in a protective capacity in case of escalation.
>
> The CCG has rapidly increased and modernized its forces, improving China's ability to enforce its maritime claims. Since 2010, the CCG's large patrol ship fleet (more than 1,000 tons) has more than doubled in size from about 60 to more than 130 ships, making it by far the largest coast guard force in the world and increasing its capacity to conduct extended offshore operations in a number of disputed areas simultaneously. Furthermore, the newer ships are substantially larger and more capable than the older ships, and the majority are equipped with helicopter facilities, high-capacity water cannons, and guns ranging from 30-mm to 76-mm. Among these ships, a number are capable of long-distance, long-endurance out-of-area operations. In addition, the CCG operates more than 70 fast patrol combatants ([each displacing] more than 500 tons), which can be used for limited offshore operations, and more than 400 coastal patrol craft (as well as about 1,000 inshore and riverine patrol boats). By the end of the decade, the CCG is expected to add up to 30 patrol ships and patrol combatants before the construction program levels off.[159]

In March 2018, China announced that control of the CCG would be transferred from the civilian State Oceanic Administration to the Central Military Commission.[160] The transfer occurred on July 1, 2018.[161] On May 22, 2018, it was reported that China's navy and the CCG had conducted

[157] Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2018*, p. 71.

[158] 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.

[159] Defense Intelligence Agency, *China Military Power, Modernizing a Force to Fight and Win*, 2019, pp. 66, 78. A similar passage appears in Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2018*, pp. 71-72.

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

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

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.[162]

Maritime Militia

China also uses the People's Armed Forces Maritime Militia (PAFMM)—a force that essentially consists of fishing ships with armed crew members—to defend its maritime claims. In the view of some observers, the PAFMM—even more than China's navy or coast guard—is the leading component of China's maritime forces for asserting its maritime claims, particularly in the SCS. U.S. analysts in recent years have paid increasing attention to the role of the PAFMM as a key tool for implementing China's salami-slicing strategy, and have urged U.S. policymakers to focus on the capabilities and actions of the PAFMM.[163]

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[162] 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. For additional discussion of China's coast guard, see Andrew S. Erickson, Joshua Hickey, and Henry Holst, "Surging Second Sea Force: China's Maritime Law-Enforcement Forces, Capabilities, and Future in the Gray Zone and Beyond," *Naval War College Review,* Spring 2019; Teddy Ng and Laura Zhou, "China Coast Guard Heads to Front Line to Enforce Beijing's South China Sea Claims," *South China Morning Post*, February 9, 2019; Ying Yu Lin, "Changes in China's Coast Guard," *Diplomat,* January 30, 2019.

[163] For additional discussion of the PAFMM, see, for example, Gregory Poling, "China's Hidden Navy," *Foreign Policy*, June 25, 2019; Mike Yeo, "Testing the Waters: China's Maritime Militia Challenges Foreign Forces at Sea," *Defense News*, May 31, 2019; Laura Zhou, "Beijing's Blurred Lines between Military and Non-Military Shipping in South China Sea Could Raise Risk of Flashpoint," *South China Morning Post,* May 5, 2019; Andrew S. Erickson, "Fact Sheet: The People's Armed Forces Maritime Militia (PAFMM)," April 29, 2019, Andrewerickson.com; Jonathan Manthorpe, "Beijing's Maritime Militia, the Scourge of South China Sea," *Asia Times,* April 27, 2019; Dmitry Filipoff, "Andrew S. Erickson and Ryan D. Martinson Discuss China's Maritime Gray Zone Operations," Center for International Maritime Security (CIMSEC), March 11, 2019; Jamie Seidel, "China's Latest Island Grab: Fishing 'Militia' Makes Move on Sandbars around Philippines' Thitu Island," *News.com.au,* March 5, 2019; Gregory Poling, "Illuminating the South China Sea's Dark Fishing Fleets," Stephenson Ocean Security Project (Center for Strategic and International Studies), January 9, 2019; Andrew S. Erickson, "Shining a Spotlight: Revealing China's Maritime Militia to Deter its Use," *National Interest*, November 25, 2018; Todd Crowell and Andrew Salmon, "Chinese Fisherman Wage Hybrid 'People's War' on Asian Seas," *Asia Times*, September 6, 2018; Andrew S. Erickson, "Exposed: Pentagon Report Spotlights China's Maritime Militia," *National Interest,* August 20, 2018; Jonathan Odom, "China's Maritime Militia," *Straits Times*, June 16, 2018; 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 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.

DOD states that "the PAFMM is the only government-sanctioned maritime militia in the world," and that it "has organizational ties to, and is sometimes directed by, China's armed forces."[164] DIA states that

> The PAFMM 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 subdistricts, and enterprises, and they vary widely from one location to another. The composition and mission of each unit reflects local conditions and personnel skills. In the South China Sea, the PAFMM plays a major role in coercive activities to achieve China's political goals without fighting, part of broader Chinese military doctrine that states that confrontational operations short of war can be an effective means of accomplishing political objectives.
>
> A large number of PAFMM vessels train with and support the PLA and CCG in tasks such as safeguarding maritime claims, protecting fisheries, and providing logistic support, search and rescue (SAR), and surveillance and reconnaissance. The Chinese government subsidizes local and provincial commercial organizations to operate militia ships to perform "official" missions on an ad hoc basis outside their regular commercial roles. The PAFMM has played a noteworthy role in a number of military campaigns and coercive incidents over the years, including the harassment of Vietnamese survey ships in 2011, a standoff with the Philippines at Scarborough Reef in 2012, and a standoff involving a Chinese oil rig in 2014. In the past, the PAFMM rented fishing boats from companies or individual fisherman, 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, ordered the construction of 84 large militia fishing boats with reinforced hulls and ammunition storage for Sansha City, and the militia took delivery by the end of 2016.[165]

Apparent Narrow Definition of "Freedom of Navigation"

An August 12, 2015, press report states the following (emphasis added):

> China respects freedom of navigation in the disputed South China Sea but will not allow any foreign government to invoke that right so its military ships and planes can intrude in Beijing's territory, the Chinese ambassador [to the Philippines] said.
>
> Ambassador Zhao Jianhua said late Tuesday [August 11] that Chinese forces warned a U.S. Navy P-8A [maritime patrol aircraft] not to intrude when the warplane approached a Chinese-occupied area in the South China Sea's disputed Spratly Islands in May....
>
> "We just gave them warnings, be careful, not to intrude," Zhao told reporters on the sidelines of a diplomatic event in Manila....
>
> When asked why China 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**."[166]

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[164] Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2018*, p. 71.

[165] Defense Intelligence Agency, *China Military Power, Modernizing a Force to Fight and Win*, 2019, p. 79. A similar passage appears in Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2018*, p. 72.

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

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.[167]

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.[168]

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

> Hundreds of government officials, experts and scholars from all over the world conducted in-depth discussions of various security threats under the new international security situation at the 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

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

[168] 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.

> 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.[169]

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.[170]

A September 20, 2018, press report stated the following:

> Chinese Ambassador to Britain Liu Xiaoming on Wednesday [September 19] said that the freedom of navigation in the South China Sea has never been a problem, warning that no one should underestimate China's determination to uphold peace and stability in the region….
>
> Liu stressed that countries in the region have the confidence, capability and wisdom to deal with the South China Sea issue properly and achieve enduring stability, development and prosperity.
>
> "Yet to everyone's confusion, some big countries outside the region did not seem to appreciate the peace and tranquility in the South China Sea," he said. "They sent warships and aircraft all the way to the South China Sea to create trouble."
>
> The senior diplomat said that under the excuse of so-called "freedom of navigation," these countries ignored the vast sea lane and chose to sail into the adjacent waters of China's islands and reefs to show off their military might.
>
> "This was a serious infringement" of China's sovereignty, he said. "It threatened China's security and put regional peace and stability in jeopardy."

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

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

> Liu stressed that China has all along respected and upheld the freedom of navigation and over-flight in the South China Sea in accordance with international law, including the United Nations Convention on the Law of the Sea.
>
> "Freedom of navigation is not a license to do whatever one wishes," he said, noting that freedom of navigation is not freedom to invade other countries' territorial waters and infringe upon other countries' sovereignty.
>
> "Such 'freedom' must be stopped," Liu noted. "Otherwise the South China Sea will never be tranquil."[171]

A May 7, 2019, press report stated the following:

> "The US' excuse of freedom of navigation does not stand because international law never allowed US warships to freely enter another country's territorial waters," Zhang Junshe, a senior research fellow at the PLA Naval Military Studies Research Institute, told the Global Times on Monday [May 6].[172]

In contrast to China's narrow definition, the U.S./Western definition of freedom of navigation is much broader, encompassing operations of various types by both commercial and military ships and aircraft in international waters and airspace. As discussed earlier in this report, an alternative term for referring to the U.S./Western definition of freedom of navigation is freedom of the seas, meaning "all of the rights, freedoms, and lawful uses of the sea and airspace, including for military ships and aircraft, guaranteed to all nations under international law."[173] 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.[174]

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.[175]

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[171] "No One Should Underestimate China's Determination to Uphold Peace in South China Sea: Chinese Ambassador," *Xinhuanet*, September 20, 2018.

[172] Leng Shumei and Liu Xuanzun (Global Times), "China Warns US Ships to Leave Sea," People's Daily Online, May 7, 2019.

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

[174] 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.

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

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**).

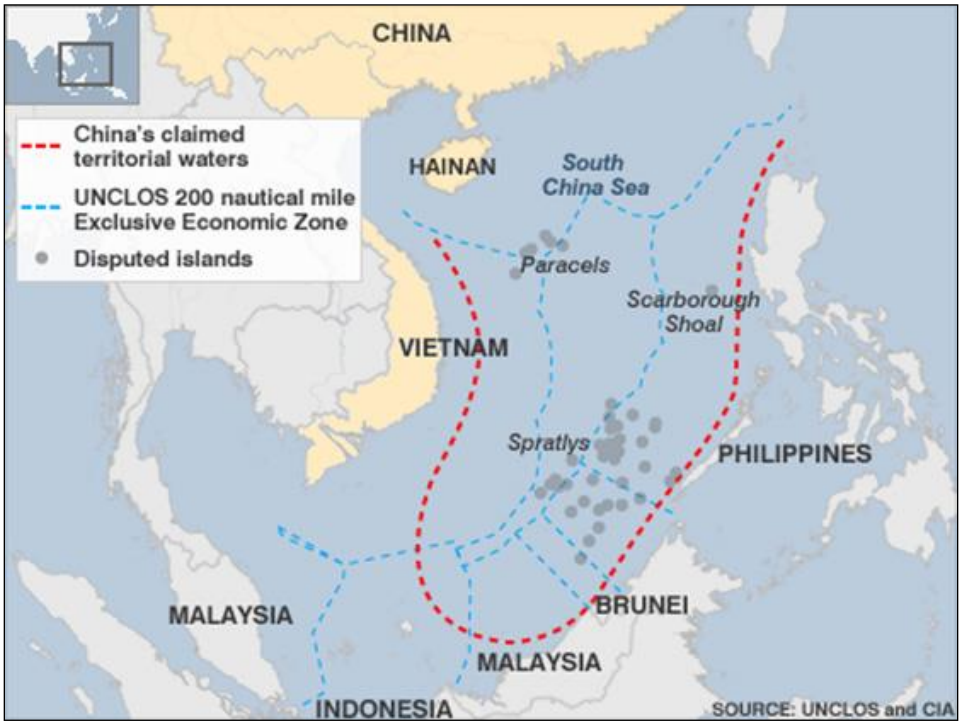
Figure E-1. Map of the Nine-Dash Line

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.

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. As noted earlier in this report, the U.S. position is that the nine-dash line is "preposterous."[176]

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.

The map of the nine-dash line, also called the U-shaped line or the cow tongue,[177] 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.[178]

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

[177] 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.

[178] 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

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.[179]

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.[180] The exact positions of the dashes have also varied a bit over time.

China has maintained ambiguity over whether it is using the map of the nine-dash line to claim full sovereignty over the entire sea area enclosed by the nine-dash line, or something less than that.[181] 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.[182] 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.[183]

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/.

[179] 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.

[180] 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.

[181] 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.

[182] 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.

[183] 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

An April 30, 2018, blog post states the following:

> In what is likely a new bid to reinforce and even expand China's sweeping territorial claims in the South China Sea, a group of Chinese scholars recently published a "New Map of the People's Republic of China."
>
> The alleged political national map, reportedly first published in April 1951 but only "discovered" through a recent national archival investigation, could give new clarity to the precise extent of China's official claims in the disputed waters.
>
> Instead of dotted lines, as reflected in China's U-shaped Nine-Dash Line claim to nearly all of the South China Sea, the newly discovered map provides a solid "continuous national boundary line and administrative region line."
>
> The Chinese researchers claim that through analysis of historical maps, the 1951 solid-line map "proves" beyond dispute that the "U-boundary line is the border of China's territorial sea" in the South China Sea.
>
> They also claim that the solid administrative line overlaying the U-boundary "definitely indicated that the sovereignty of the sea" enclosed within the U-boundary "belonged to China."
>
> The study, edited by the Guanghua and Geosciences Club and published by SDX Joint Publishing Company, has not been formally endorsed by the Chinese government.[184]

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.[185] 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.[186]

> 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.)

[184] 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.

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

[186] 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. Assessments of China's Strengthening Position in SCS

This appendix provides additional information on assessment of China's strengthening position in the SCS.

One observer 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.[187]

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

> 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.

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

> "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.[188]

U.S. Navy Admiral Philip Davidson, in responses to advance policy questions from the Senate Armed Services Committee for an April 17, 2018, hearing before the committee to consider nominations, including Davidson's nomination to become Commander, U.S. Pacific Command (PACOM), stated the following in part (emphasis added):

> With respect to their actions in the South China Sea and more broadly through the Belt and Road Initiative, the Chinese are clearly executing deliberate and thoughtful force posture initiatives. China claims that these reclaimed features and the Belt and Road Initiative [BRI] will not be used for military means, but their words do not match their actions....
>
> While Chinese air forces are not as advanced as those of the United States, they are rapidly closing the gap through the development of new fourth and fifth generation fighters (including carrier-based fighters), long range bombers, advanced UAVs, advanced anti-air missiles, and long-distance strategic airlift. In line with the Chinese military's broader reforms, Chinese air forces are emphasizing joint operations and expanding their operations, such as through more frequent long range bomber flights into the Western Pacific and South China Sea. As a result of these technological and operational advances, the Chinese air forces will pose an increasing risk not only to our air forces but also to our naval forces, air bases and ground forces....
>
> In the South China Sea, the PLA has constructed a variety of radar, electronic attack, and defense capabilities on the disputed Spratly Islands, to include: Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Hughes Reef, Johnson Reef, Mischief Reef and Subi Reef. These facilities significantly expand the real-time domain awareness, ISR, and jamming capabilities of the PLA over a large portion of the South China Sea, presenting a substantial challenge to U.S. military operations in this region....
>
> China's development of forward military bases in the South China Sea began in December 2013 when the first dredger arrived at Johnson Reef. Through 2015, China used dredging efforts to build up these reefs and create manmade islands, destroying the reefs in the process. Since then, China has constructed clear military facilities on the islands, with several bases including hangars, barracks, underground fuel and water storage facilities, and bunkers to house offense and defensive kinetic and non-kinetic systems. These actions stand in direct contrast to the assertion that President Xi made in 2015 in the Rose Garden when he commented that Beijing had no intent to militarize the South China Sea. Today these forward operating bases appear complete. The only thing lacking are the deployed forces.
>
> Once occupied, China will be able to extend its influence thousands of miles to the south and project power deep into Oceania. The PLA will be able to use these bases to challenge U.S. presence in the region, and any forces deployed to the islands would easily overwhelm the military forces of any other South China Sea-claimants. **In short, China is now capable of controlling the South China Sea in all scenarios short of war with the United States**....
>
> Ultimately, BRI provides opportunities for China's military to expand its global reach by gaining access to foreign air and maritime port facilities. This reach will allow China's military to extend its striking and surveillance operations from the South China Sea to the

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

> 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."[189]

A May 8, 2018, press report states the following:

> 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."[190]

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.
>
> In other words, while it had no capacity nor intent to threaten Southeast Asian states previously, it has developed the requisite capabilities today.[191]

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

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

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

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.[192]

A June 1, 2018, press report states the following:

> 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.[193]

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.[194]

A June 21, 2018, editorial states the following:

> 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 all as a return to the rightful order. Right now, it is not clear what the larger consequences of that might be.[195]

Another observer writes in a July 17, 2018, commentary piece that

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

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

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

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

> 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.[196]

A January 2, 2020, press report states

> The battle for the South China Sea is heating up. Vietnam. Malaysia. The Philippines. All have drawn lines in the sandbars against China. But it may already be too late.
>
> This past year, Vietnam stood its ground over the right to deploy an oil rig within its UN-mandated waters. Malaysia complained publicly of interference by the Chinese coastguard. The Philippines moved to secure its Scarborough Shoal islands. And, all the while, new nations have been joining the Freedom of Navigation pushback over Beijing's claims to the South China Sea.
>
> China's aggressive military moves have forced members of the traditionally timid Association of Southeastern Nations (ASEAN) to reassess their stance.
>
> Many are already focused on modernising their armed forces, with defence spending in the region doubling over the past 15 years. That spending is moving away from counter-terrorism efforts towards higher-level conventional warfare.
>
> But nations like Singapore, Malaysia and Thailand are beginning to realise they cannot stand alone. September marked a seismic shift in the region's thinking.
>
> Ten Southeast Asian nations joined the United States Navy in five days of war-games. While it involved only eight warships and four aircraft, it marked an unprecedented step down the path towards regional unity.
>
> But Chairman Xi Jinping's bellicose assertion of his nine-dash-line South China Sea policy is yet to be checked….
>
> "The PRC is currently consolidating and normalising control of the SCS seized in 2015 following 20 years of hybrid warfare," former ADF intelligence analyst Dr Mark Baily warns in an essay published by the Australian Naval Institute.

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

> "Their normalisation phase will include civilian settlement of the artificial military base-islands, establishment of a 'patriotic tourist industry' and cynical insistence that the artificial military base-islands it forcibly seized are sovereign territory and therefore possess territorial seas and exclusive economic zones," he wrote.
>
> Their existence represents both a strategic and ideological victory for Beijing.
>
> The island fortresses extend the range of combat aircraft, ships and missiles. They also act as surveillance platforms over any shipping that passes through the South China Sea.
>
> "China's facilities have probably already reached a level of capability that no outside combatant which enters the South China Sea, however covertly, can be completely confident it is not being tracked," says Professor James Goldrick of UNSW Canberra.
>
> And there is danger in thinking of the island fortresses as China's "great wall of sand". It entrenches Beijing's goal of "regarding the waters that lie between them and the mainland as Chinese territory".
>
> Whether or not these islands are unsinkable aircraft carriers or immovable targets is irrelevant, Mr Goldrick says. "They're a very public statement of China's power under its nationalist narrative of "reunifying a supposed ideal Chinese nation-state on equally supposed ideal historical boundaries"….
>
> As a result, Dr Baily says, regional nations must band together to block China's next expansionist ambition.
>
> "While the danger has been recognised 15 years too late, initiatives such as the Indo-Pacific Maritime co-ordination cell may help prevent losing strategic control of the Indian Ocean."[197]

A January 18, 2020, press report states

> Before assuming his post as commander of the United States Indo-Pacific Command, Admiral Philip S. Davidson issued a stark warning about Washington's loosening grip in the fiercely contested South China Sea.
>
> "In short, China is now capable of controlling the South China Sea in all scenarios, short of war with the United States," Davidson said during a Senate confirmation hearing ahead of his appointment as the top US military official in the region in May 2018.
>
> For many analysts, the dire assessment was a long-overdue acknowledgement of their concerns. Today, there is a growing sense it did not go far enough.
>
> Washington's strategic advantage in the waterway, which holds massive untapped oil and gas reserves and through which about a third of global shipping passes, has diminished so much, according to some experts, that it is powerless to prevent Beijing from restricting access during peacetime and could struggle to gain the upper hand even in the event of an outright conflict with Chinese forces.
>
> China, which claims almost the entire waterway, has tipped the balance of power not just through a massive build-up of its navy, they say, but also through the presence of a de facto militia made up of ostensibly non-military vessels and an island-building campaign, the profound strategic value of which has been lost on US policymakers.…
>
> "The US has lost advantage throughout the spectrum of operations, from low-level interaction against China's maritime militia to higher-end conflict scenarios," said James Kraska, a former US Navy commander who lectures at the Naval War College.

[197] Jamie Seidel, "'We Are Losing Control': China's 'Dangerous' South China Sea Plan Almost Complete," *News.com.au*, January 2, 2020.

"In other words, China has escalation dominance, because it has the power to deter any US turn towards escalation. The US is outmatched in all of the scenarios."…

"The biggest issue of control is maritime awareness," said Oriana Mastro, an assistant professor of security studies at Georgetown University.

"Before China can control the airspace and the water, they have to know what's there. So when you look at these islands and China says, 'don't worry it's just a bunch of radars and sensors', for someone who is more military-minded, that is the foundation of control – to be able to identify who is doing what and where."…

Tong Zhao, a senior fellow at the Carnegie-Tsinghua Centre for Global Policy, said Beijing had secured some "initial advantages" in a long-term competition that had only just begun.

"China's capability to mass produce modern naval vessels and advanced coastguard ships at a faster rate than anyone else also contributes to Beijing's confidence that it can gradually shift the military balance in this region to its favour," said Zhao.

But Zhao stressed that China's advantages were not set in stone, noting that Washington had the resources to develop powerful capabilities such as new medium- and intermediate-range missiles.

"With support from its allies, many of whom are increasingly worried about China's military domination, the United States can use such new capabilities to threaten the operation of PLA military vessels and aircraft and thus seriously challenge any military domination that China may seek to establish," he said.

Other Chinese commentators have attempted to downplay Beijing's rising dominance altogether.

"The US, in particular, is well aware of the fact that China cannot control the South China Sea," said Hu Bo, director of the Centre for Maritime Strategy Studies at Peking University, in an analysis published last year by the South China Sea Strategic Situation Probing Initiative.

"Yet, it continues to direct domestic and international attention to such a possibility with various policies," Hu Bo added.

Despite US efforts to push back against Beijing, many analysts believe Washington has been slow to take the prospect of Chinese control of the waterway seriously, in particular neglecting the military and strategic significance of its artificial islands.

"These bases would likely prove quite useful in the event of armed conflict between the United States and China," said Zachary Haver, a Washington-based China analyst.

The mistaken perception that the islands were of little practical use and could be easily destroyed during a conflict because of their isolated location had fuelled complacency, said Greg Poling, a fellow with the Southeast Asia Programme at the Centre for Strategic and International Studies.

"On day one of a conflict, they allow China to control the South China Sea," said Poling, who recently published a widely shared essay on the War on The Rocks website warning against the "dangerously wrong" conventional wisdom about the man-made features.[198]

"Because of the islands, the Chinese are positioned in a way that lets them dominate the South China Sea, and the Americans are not.

"The Americans would be in a position of fighting into the South China Sea.

[198] The article referred to is Gregory B. Poling, "The Conventional Wisdom on China's Island Bases Is Dangerously Wrong," *War on the Rocks*, January 10, 2020.

"It is irresponsible of US planners to talk about these [islands] like they are just sitting ducks or just target practice when they're definitely not," said Poling, while stressing his view that China would seek to avoid any military conflict with the US.…

Many analysts believe US forces would struggle to destroy the outposts at an "acceptable cost", requiring massive numbers of missiles and bombs and the diversion of aircraft and vessels needed to fight elsewhere, given that any major confrontation would be likely to occur during a broader conflict in Northeast Asia, possibly involving Japan or Taiwan.

With the US lacking any nearby military facilities that could provide groundfire or immediate air cover, its vessels would be vulnerable to China's advanced missile arsenal, which is widely considered among the most sophisticated on earth.

"The nature of warfare is changing rapidly with the development of drones, hypersonic weapons and other new missile capabilities," said Gordon Houlden, director of the China Institute at the University of Alberta.

"It is not easy to foresee how these may affect the utility of fixed island bases. But already [China's] existing missile technology would make the approaches to the Western Pacific dangerous for US aircraft carriers and other surface vessels."…

James Holmes, a former US Navy officer who teaches at the Naval War College, said policymakers had been caught off guard by China's creeping control of the waterway due to its use of ostensibly non-military vessels such as fishing boats as a de facto maritime militia.

"In 2012, after Scarborough Shoal, I took to including a slide in my South China Sea presentations depicting the fishing fleet as the vanguard of Chinese sea power. It was a laugh line that year and for some time after," said Holmes, referring to how China took control of the shoal after a prolonged stand-off with the Philippines.

"You don't get laughs any more. But by the time we got serious about the maritime militia and [the Chinese coastguard], Beijing had accomplished most of what it wanted."

Washington's waning dominance has not gone unnoticed among Southeast Asian claimants also at loggerheads with Beijing. Nearly half of the citizens of Asean (the Association of Southeast Asian Nations) have little or no confidence in the US to provide regional security, according to the State of Southeast Asia: 2020 Survey carried out by the Singapore-based ISEAS-Yusof Ishak Institute.

More than three-quarters of respondents believed US engagement in the region had declined under the Trump administration.

At the same time, 54 per cent said they would choose the US if forced to align themselves with either Washington or Beijing, although responses varied considerably by country, with majorities in Thailand, Indonesia, Cambodia, Brunei, Laos, Malaysia and Myanmar favouring Beijing.

"While there are concerns that the US may be losing interest or disengaging from the region, there's also concern in the region about China's behaviour and long-term strategic intention," said Collin Koh, a research fellow at the S. Rajaratnam School of International Studies in Singapore. "Therefore regional countries still look forward to counting on the US in the South China Sea."

Even if the balance has tipped in favour of Beijing, policy analysts in the US and its allies caution against fatalism.

"Beijing will not get its way through international custom as long as navies demonstrate on behalf of freedom of the sea," said Holmes, who argues the competition is not yet lost.

But although the Trump administration appears to have ramped up the frequency of FONOPs, analysts caution against overplaying their impact.

> "There have been far too many wild statements from American politicians about the FONOPS being a way to 'push back' against China," said Bill Hayton, a South China Sea expert at Chatham House in London. "FONOPS are a means of asserting, and thereby maintaining, the law of the sea. They aren't intended to diminish the power of China's artificial island bases."
>
> There is wide agreement that Washington's ability to convince allies and partners to join any effort to push back against Chinese control will be key to the future of the waterway.
>
> Some suggest these efforts need to include establishing a regular US military presence in Southeast Asia, which would alleviate operational limitations arising from its dependence on far-flung bases in Japan, South Korea and Guam.
>
> But such a base appears an unlikely prospect at present, as even Washington's closest Southeast Asian ally, the Philippines, moves closer to Beijing under populist leader Rodrigo Duterte.
>
> "Unlike the Middle East, in Southeast Asia the US can't rely on local shore bases from which to project power. Vietnam won't allow it – despite the growing illusions about this in Washington – and nor will the current Philippine government," said Hayton.
>
> "However, all Southeast Asian governments are concerned about China's bullying behaviour and will continue to facilitate the presence of the US and other navies in the region as a counterbalance."
>
> In the absence of a major new military footprint in the region, Washington could settle for boosting the fighting capabilities of its allies, or forging closer relations with non-traditional partners, although this year's US presidential election casts some uncertainty over the direction of future policy.
>
> "Korea, Australia and the Philippines and strategic partnerships with India and Vietnam should all be leveraged, and the US should integrate and operate with their forces and provide them with higher-end capabilities," said the Naval War College's Kraska.[199]

A January 27, 2020, press report stated

> China's recent activities in the South China Sea, which include bullying Vietnam and Malaysia over ocean drilling and ramming Philippine fishing vessels near Scarborough Shoals, top the list of Asian security concerns, a panel of experts said last week.
>
> "China is in the driver's seat" in the region since it has completed its island-building campaign on coral reefs that can support the persistent deployment of coast guard and paramilitary vessels to back up territorial claims, Gregory Poling, the director of the Center for Strategic and International Studies Asia Maritime Transparency Initiative said [on January 22] Wednesday during the CSIS Asia Forecast 2020 panel discussion.
>
> "There are literally hundreds of players out there hopped up on nationalism," Poling adding, explaining it's not just China who could spark a crisis growing out of a small incident.
>
> With Vietnam and Malaysia, there are incentives for China to pave over some of the damage from previous disputes, Poling said. However, he added Beijing is currently taking a more adversarial approach, buoyed by its recent success blocking oil and gas exploration by Hanoi and Malaysia in disputed waters. China appears intent on "harassing in blocks [of the ocean] where drilling has begun," shutting down those operations, he said.

[199] John Power, "Has the US Already Lost the Battle for the South China Sea?" *South China Morning Post*, January 18, 2020.

The sheer size of the Chinese coast guard and its naval militia make this possible, Poling said. "China has more boats," and no Asian nation can match it when pressure like that is applied "in a war of attrition."

So far, the United States has remained on the sidelines of these disputes, taking a neutral course of conducted freedom of navigation operations to maintain open passage for all nations through contested waters.

If push came to shove, say between Beijing and Hanoi over mineral exploration and drilling, Poling said the U.S. would make loud protests but would likely avoid a military confrontation. If the dangerous incident involved the Philippines, a U.S. ally, the matter would become more complicated for Washington.

Philippine President Rodrigo Duterte has at times tried distancing himself from the United States. But the country's military and the public strongly favor closer ties to the U.S. over ties to China, Poling said. The U.S. denounced China's actions during the previous ramming incident, but Poling said It's unclear what would happen if "another Philippine fishing boat goes down" and "China called our bluff."[200]

[200] John Grady, "Panel: China Now Well Positioned to Bully Neighbors in South China Sea," *USNI News*, January 27, 2020.

Appendix G. 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.[201]

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.

[201] [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.[202]

As mentioned earlier in the report, if China's position on whether coastal states have a right under UNCLOS to regulate the activities of foreign military forces in their EEZs were to gain greater international acceptance under international law, it could substantially affect U.S. naval operations not only in the SCS and ECS (see **Figure G-1** for EEZs in the SCS and ECS), but around the world, which in turn could substantially affect the ability of the United States to use its military forces to defend various U.S. interests overseas. As shown in **Figure G-2**, significant portions of the world's oceans are claimable as EEZs, including high-priority U.S. Navy operating areas in the Western Pacific, the Persian Gulf, and the Mediterranean Sea.[203]

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)[204] 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

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[202] 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.

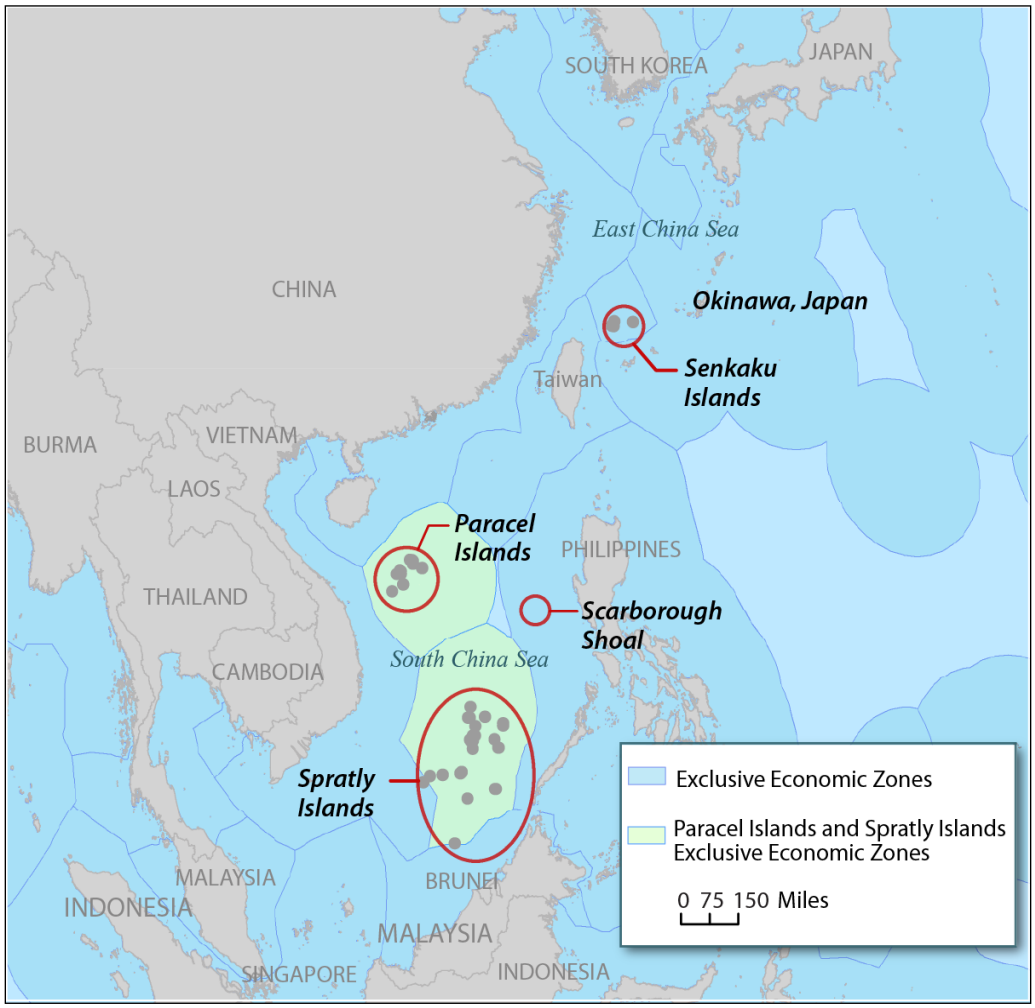
[203] The National Oceanic and Atmospheric Administration (NOAA) calculates that EEZs account for about 30.4% of the world's oceans. (See the table called "Comparative Sizes of the Various Maritime Zones" at the end of "Maritime Zones and Boundaries, accessed June 6, 2014, at http://www.gc.noaa.gov/gcil_maritime.html,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

[204] 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.[205]

Figure G-1. EEZs in South China Sea and East China Sea



Source: Map prepared by CRS using basemaps provided by Esri. EEZs are from the Flanders Marine Institute (VLIZ) (2011). Maritime Boundaries Geodatabase, version 6. Available at http://www.vliz.be/vmdcdata/marbound.

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

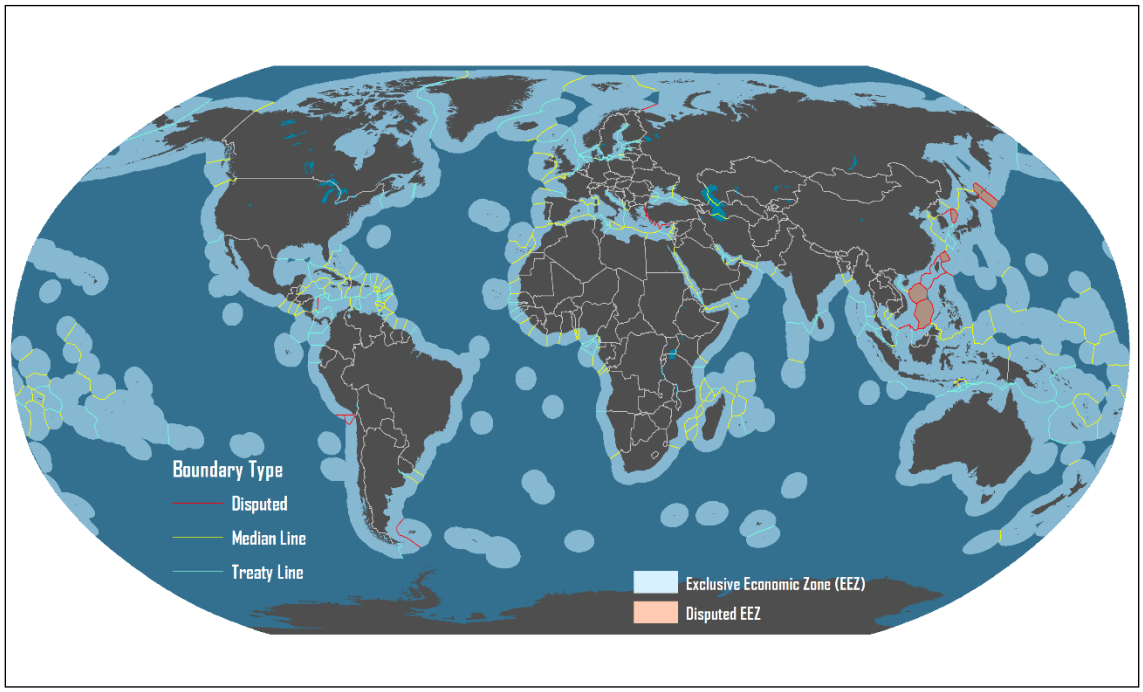
DOD states that

> 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

[205] 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.[206]

Figure G-2. Claimable World EEZs



Source: Map designed by Dr. Jean-Paul Rodrigue, Department of Global Studies & Geography, Hofstra University, using boundaries plotted from Maritime Boundaries Geodatabase available at http://www.vliz.be/vmdcdata/marbound. The map is copyrighted and used here with permission. A version of the map is available at http://people.hofstra.edu/geotrans/eng/ch5en/conc5en/EEZ.html.

In July 2014, China participated, for the first time, in the biennial U.S.-led Rim of the Pacific (RIMPAC) naval exercise, the world's largest multilateral naval exercise. In addition to the four ships that China sent to participate in RIMPAC, China sent an uninvited intelligence-gathering ship to observe the exercise without participating in it.[207] 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.

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

[207] 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."[208]

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

[208] 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.[209]

[209] 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."[210]

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.

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

Appendix H. U.S. Freedom of Navigation (FON) Program

This appendix provides additional background information on the U.S. Freedom of Navigation (FON) program.

Overview

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 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.[211]

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.[212]

A DOD list of DOD Instructions 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.[213] A website maintained by the Federation of American Scientists (FAS) listing Presidential Decision Directives (PDDs) of the Clinton Administration for the years 1993-2000 states that PDD-32 concerned the FON program. The listing suggests that PDD-32 was issued between September 21, 1994 and February 17, 1995. [214]

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

[211] State Department, "Military Exercises and Operational Coordination," accessed August 13, 2019, at https://2009-2017.state.gov/t/pm/iso/c21539.htm.

[212] State Department, "Maritime Security and Navigation," accessed August 13, 2019, at https://2009-2017.state.gov/e/oes/ocns/opa/maritimesecurity/.

[213] The list is posted at https://www.esd.whs.mil/Directives/issuances/dodi/.

[214] The website is at http://www.fas.org/irp/offdocs/pdd/index.html.

> 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.[215]

Legal Arguments Relating to FON Operations

In assessing U.S. FON operations that take place within 12 nautical miles of Chinese-occupied sites in the SCS, one question relates to whether to conduct such operations, exactly where, and how often. A second question relates to the rationale that is cited as the legal basis for conducting them. Regarding this second question, one U.S. specialist on international law of the sea states the following regarding three key legal points in question (emphasis added):

- Regarding features in the water whose sovereignty is in dispute, "Every feature occupied by China is challenged by another claimant state, often with clearer line of title from Spanish, British or French colonial rule. The nation, not the land, is sovereign, which is why there is no territorial sea around Antarctica—it is not under the sovereignty of any state, despite being a continent. **As the United States has not recognized Chinese title to the features, it is not obligated to observe requirements of a theoretical territorial sea.** Since the territorial sea is a function of state sovereignty of each rock or island, and not a function of simple geography, **if the United States does not recognize any state having title to the feature, then it is not obligated to observe a theoretical territorial sea** and may treat the feature as *terra nullius*. Not only do U.S. warships have a right to transit within 12 nm [nautical miles] of Chinese features, they are free to do so as an exercise of high seas freedom under article 87 of the Law of the Sea Convention, rather than the more limited regime of innocent passage. Furthermore, whereas innocent passage does not permit overflight, high seas freedoms do, and U.S. naval aircraft lawfully may overfly such features.... More importantly, **even assuming that one or another state may have lawful title to a feature, other states are not obligated to confer upon that nation the right to unilaterally adopt and enforce measures that interfere with navigation, until lawful title is resolved.** Indeed, observing any nation's rules pertaining to features under dispute legitimizes that country's claim and takes sides."
- Regarding features in the water whose sovereignty has been resolved, "It is unclear whether features like Fiery Cross Reef are rocks or merely low-tide elevations [LTEs] that are submerged at high tide, and after China has so radically transformed them, it may now be impossible to determine their natural state. Under the terms of the law of the sea, states with ownership over naturally formed rocks are entitled to claim a 12 nm territorial sea. On the other hand, **low-tide elevations in the mid-ocean do not qualify for any maritime zone whatsoever. Likewise, artificial islands and installations also generate no maritime zones of sovereignty or sovereign rights in international law,**

[215] Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 23-24.

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."[216]

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.[217]

Regarding the FON operation conducted on May 24, 2017, near Mischief Reef, the U.S. specialist on international law of the sea quoted above states the following:

> This was the first public notice of a freedom of navigation (FON) operation in the Trump administration, and may prove the most significant yet for the United States because it challenges not only China's apparent claim of a territorial sea around Mischief Reef, but in doing so questions China's sovereignty over the land feature altogether....
>
> The Pentagon said the U.S. warship did a simple military exercise while close to the artificial island—executing a "man overboard" rescue drill. Such drills may not be

[216] 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.

[217] 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.

> 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."[218]

Regarding this same FON operation, two other observers stated the following:

[218] 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.

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 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.[219]

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

Appendix I. Proposals for Modifying U.S. Strategy

This appendix presents a bibliography of some writings by observers who have proposed modifying the Trump Administration's strategy for competing strategically with China in the SCS and ECS, organized by date, beginning with the most recent item.

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