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Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress

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Summary

China's actions for asserting and defending its maritime territorial and exclusive economic zone (EEZ) claims in the East China (ECS) and South China Sea (SCS) have heightened concerns among observers that China may be seeking to dominate or gain control of its near-seas region, meaning the ECS, the SCS, and the Yellow Sea. Chinese domination over or control of this region could substantially affect U.S. strategic, political, and economic interests in the Asia-Pacific region and elsewhere.

China is a party to multiple territorial disputes in the SCS and ECS, including, in particular, disputes over the Paracel Islands, Spratly Islands, and Scarborough Shoal in the SCS, and the Senkaku Islands in the ECS. China depicts its territorial claims in the SCS using the so-called map of the nine-dash line that appears to enclose an area covering roughly 90% of the SCS. Some observers characterize China's approach for asserting and defending its territorial claims in the ECS and SCS 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.

In addition to territorial disputes in the SCS and ECS, China is involved in a dispute, particularly with the United States, over whether China has a right under international law to regulate the activities of foreign military forces operating within China's EEZ. The dispute appears to be at the heart of incidents between Chinese and U.S. ships and aircraft in international waters and airspace in 2001, 2002, 2009, 2013, and 2014.

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

- The United States supports the principle that disputes between countries should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law.
- The United States supports the principle of freedom of seas, meaning the rights, freedoms, and uses of the sea and airspace guaranteed to all nations in international law. The United States opposes claims that impinge on the rights, freedoms, and lawful uses of the sea that belong to all nations.
- The United States takes no position on competing claims to sovereignty over disputed land features in the ECS and SCS.
- Although the United States takes no position on competing claims to sovereignty over disputed land features in the ECS and SCS, the United States *does* have a position on how competing claims should be resolved: Territorial disputes should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law.
- Claims of territorial waters and EEZs should be consistent with customary international law of the sea and must therefore, among other things, derive from land features. Claims in the SCS that are not derived from land features are fundamentally flawed.
- Parties should avoid taking provocative or unilateral actions that disrupt the status quo or jeopardize peace and security. The United States does not believe that large-scale land reclamation with the intent to militarize outposts on disputed land features is consistent with the region's desire for peace and stability.

- The United States, like most other countries, believes that coastal states under UNCLOS have the right to regulate economic activities in their EEZs, but do not have the right to regulate foreign military activities in their EEZs.
- U.S. military surveillance flights in international airspace above another country's EEZ are lawful under international law, and the United States plans to continue conducting these flights as it has in the past.
- The Senkaku Islands are under the administration of Japan and unilateral attempts to change the status quo raise tensions and do nothing under international law to strengthen territorial claims.

China's actions for asserting and defending its maritime territorial and EEZ claims in the ECS and SCS raise several potential policy and oversight issues for Congress, including whether the United States has an adequate strategy for countering China's "salami-slicing" strategy, whether the United States has taken adequate actions to reduce the risk that the United States might be drawn into a crisis or conflict over a territorial dispute involving China, and whether the United States should become a party to the United Nations Convention on the Law of the Sea (UNCLOS).

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Introduction

This report provides background information and issues for Congress on maritime territorial and exclusive economic zone (EEZ)[1] disputes in the East China (ECS) and South China Sea (SCS) involving China, with a focus on how these disputes may affect U.S. strategic and policy interests. Other CRS reports focus on other aspects of these disputes:

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

For a short discussion of the issues discussed in this report, see CRS In Focus IF10607, *South China Sea Disputes: Background and U.S. Policy*, by Ben Dolven, Susan V. Lawrence, and Ronald O'Rourke.

China's actions for asserting and defending its maritime territorial and EEZ claims in the ECS and SCS raise several potential policy and oversight issues for Congress. Decisions that Congress makes on these issues could substantially affect U.S. strategic, political, and economic interests in the Asia-Pacific region and elsewhere.

This report uses the term China's *near-seas region* to mean the Yellow Sea, the ECS, and the SCS. This report uses the term *EEZ dispute* 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.

Background

Why Certain Countries Consider These Disputes Important

Although the maritime disputes discussed in this report at first glance may appear to be disputes over a few seemingly unimportant rocks and reefs in the ocean, these disputes are considered important by China, other countries in the region, and the United States for a variety of strategic, political, and economic reasons, including those briefly outlined below.

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

China and Other Countries in Region

The disputes discussed in this report are considered important by China and other countries in the region for the following reasons, among others:

- **Trade routes.** Major commercial shipping routes pass through these waters. An estimated $3.4 trillion worth of international shipping trade passes through the SCS each year.[2] Much of this trade travels to or from China and other countries in the region.
- **Fish stocks and hydrocarbons.** The ECS and SCS contain significant fishing grounds and potentially significant oil and gas exploration areas.[3]

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[2] In recent years, the value of international trade passing through the SCS each year was frequently stated by various parties as being about $5.3 trillion. A July 24, 2015, Department of Defense (DOD) news report, for example, states:

> In a security forum panel discussion in Aspen, Colorado, Navy Adm. Harry B. Harris Jr. said China's assertiveness in the South China Sea is an issue the American public must know about and the United States must address....
>
> Each year, he noted, more than $5.3 trillion in global sea-based trade relies on unimpeded sea lanes through the South China Sea, adding that the Strait of Malacca alone sees more than 25 percent of oil shipments and 50 percent of all natural gas transits each day.
>
> (Terri Moon Cronk, "Pacom Chief: China's Land Reclamation Has Broad Consequences," *DoD News*, July 24, 2015.)

An August 2017 estimate by the China Power team at the Center for Strategic and International Studies (CSIS) estimates the figure at $3.4 billion. The China Power team states:

> Writings on the South China Sea frequently claim that $5.3 trillion worth of goods transits through the South China Sea annually, with $1.2 trillion of that total accounting for trade with the U.S. This $5.3 trillion figure has been used regularly since late 2010, despite significant changes in world trade over the last five-plus years....
>
> In pursuit of an accurate estimation, ChinaPower constructed a new dataset for South China Sea trade using common shipping routes, automatic identification system (AIS) data, and bilateral trade flows. This approach relied on calculating a summation of all bilateral trade flowing through the South China Sea. ChinaPower found that an estimated $3.4 trillion in trade passed through the South China Sea in 2016. These estimates represent a sizeable proportion of international trade, constituting between 21 percent of global trade in 2016, but is nonetheless 36 percent smaller than the original $5.3 trillion.
>
> ("How Much Trade Transits the South China Sea?" China Power (CSIS). August 2, 2017, accessed August 16, 2017, at: https://chinapower.csis.org/much-trade-transits-south-china-sea/

An August 2015 DOD report to Congress states:

> Maritime Asia is a vital thruway for global commerce, and it will be a critical part of the region's expected economic growth. The United States wants to ensure the Asia-Pacific region's continued economic progress. The importance of Asia-Pacific sea lanes for global trade cannot be overstated. Eight of the world's 10 busiest container ports are in the Asia-Pacific region, and almost 30 percent of the world's maritime trade transits the South China Sea annually, including approximately $1.2 trillion in ship-borne trade bound for the United States. Approximately two-thirds of the world's oil shipments transit through the Indian Ocean to the Pacific, and in 2014, more than 15 million barrels of oil passed through the Malacca Strait per day.
>
> (Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 1. The report was submitted in response to Section 1259 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (H.R. 3979/P.L. 113-291 of December 19, 2014).

[3] DOD states:

> There are numerous, complex maritime and territorial disputes in the Asia-Pacific region. The presence of valuable fish stocks and potential existence of large hydrocarbon resources under the East and South China Seas exacerbate these complicated claims. A United Nations report estimates

(continued...)

- **Military position.** Some of the disputed land features are being used, or in the future might be used, as bases and support locations for military and law enforcement (e.g., coast guard) forces, which is something countries might do not only to improve their ability to assert and defend their maritime territorial claims and their commercial activities in surrounding waters, but for other reasons as well, such as attempting to control or dominate the surrounding waters and airspace.
- **Nationalism.** The maritime territorial claims have become matters of often-intense feelings of nationalism. The governments of China and some of the other countries in the region have constructed extensive historical, legal, and political narratives about their maritime territorial claims that both reflect and reinforce intense feelings of nationalism, which can make it more difficult for governments to compromise on maritime disputes (or easier for them to argue to others why they cannot afford to compromise on them).

China Specifically

In addition to the factors cited above, some observers believe that China wants to achieve a greater degree of control over its near-seas region in part for one or more of the following reasons:

- to create a buffer zone inside the so-called first island chain[4] for keeping U.S. military forces away from China's mainland in time of conflict;
- to 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);[5] and
- to help achieve a broader goal of becoming a regional hegemon in its part of Eurasia.[6]

(...continued)

> that the South China Sea alone accounts for more than 10 percent of global fisheries production. Though figures vary substantially, the Energy Information Administration estimates that there are approximately 11 billion barrels and 190 trillion cubic feet of proved and probable oil and natural gas reserves in the South China Sea and anywhere from one to two trillion cubic feet of natural gas reserves, and 200 million barrels of oil in the East China Sea. Claimants regularly clash over fishing rights, and earlier attempts at joint development agreements have faltered in recent years.
>
> (Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 5.)

See also Keith Johnson, "Fishing Disputes Could Spark a South China Sea Crisis," *Foreign Policy*, April 7, 2012.

[4] The first island chain is a term that refers to a string of islands, including Japan and the Philippines, that encloses China's near-seas region. The so-called second island chain, which reaches out to Guam, includes both China's near-seas region and the Philippine Sea between Guam and the Philippines. 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.

[5] See, for example, Mathieu Duchatel and Eugenia Kazakova, "Tensions in the South China Sea: the Nuclear Dimension," *SIPRI*, July-August 2015; "S China Land Reclamation Aimed at Distracting US from Hainan," *Want China Times*, September 12, 2015. For more on China's emerging SSBNs force, which observers believe will be based at a facility on Hainan Island in the SCS, see CRS Report RL33153, *China Naval Modernization: Implications for U.S. Navy Capabilities—Background and Issues for Congress*, by Ronald O'Rourke.

[6] See, for example, Gary Roughead, "China, Time and Rebalancing," Hoover Institution, undated (but with copyright (continued...)

United States

For a brief discussion of some elements of the strategic context from a U.S. perspective in which the maritime disputes discussed in this report may be considered, see **Appendix A**. The maritime disputes discussed in this report are considered important by the United States for several reasons, including those discussed below.

Nonuse of Force or Coercion as a Means of Settling Disputes Between Countries

The maritime disputes discussed in this report pose a potential challenge to two key elements of the U.S.-led international order that has operated since World War II. One of these key elements 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 some of China's actions in asserting and defending its territorial claims in the ECS and SCS challenge this principle and could help reestablish the very different principle of "might makes right" as a routine or defining characteristic of international relations.[7]

Freedom of the Seas

A second key element of the U.S.-led international order that has operated since World War II is the treatment of the world's seas under international law as international waters (i.e., as a global commons), and freedom of operations in international waters. The principle is often referred to in shorthand as freedom of the seas. It is also sometimes referred to as freedom of navigation, although this term can be defined—particularly by parties who might not support freedom of the seas—in a narrow fashion, to include merely the freedom to navigate (i.e., pass through) sea areas, as opposed to the freedom for conducting various activities at sea. A more complete way to refer to the principle, 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 in international law."[8] The principle of freedom of the seas dates back hundreds of years.[9] DOD states:

> The United States has, throughout its history, advocated for the freedom of the seas for economic and security reasons....
>
> Freedom of the seas, however, includes more than the mere freedom of commercial vessels to transit through international waterways. While not a defined term under international law, the Department uses "freedom of the seas" to mean all of the rights,

(...continued)

of 2014), accessed Marh 25, 2014, at http://www.hoover.org/taskforces/military-history/strategika/11/roughead; Jim Talent, "The Equilibrium of East Asia," *National Review Online*, December 5, 2013; Robert E. Kelly, "What Would Chinese Hegemony Look Like?" *The Diplomat*, February 10, 2014. See also Ryan Martinson and Katsuya Yamamoto, "Three PLAN [PLA Navy] Officers May Have Just Revealed What China Wants in the South China Sea," *National Interest*, July 9, 2017.

[7] See, for example, Dan Lamothe, "Navy Admiral Warns of Growing Sense That 'Might Makes Right' in Southeast Asia," *Washington Post*, March 16, 2016.

[8] *U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2015*, accessed April 27, 2016, at http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON_Report_FY15.pdf.

[9] 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.

> freedoms, and lawful uses of the sea and airspace, including for military ships and aircraft, recognized under international law. Freedom of the seas is thus also essential to ensure access in the event of a crisis. Conflicts and disasters can threaten U.S. interests and those of our regional allies and partners. The Department of Defense is therefore committed to ensuring free and open maritime access to protect the stable economic order that has served all Asia-Pacific nations so well for so long, and to maintain the ability of U.S. forces to respond as needed.[10]

Some observers are concerned that China's maritime territorial claims, particularly as shown in China's so-called map of the nine-dash line (see "Map of Nine-Dash Line" below), appear to challenge the principle that the world's seas are to be treated under international law as international waters. If such a challenge were to gain acceptance in the SCS region, it would have broad implications for the United States and other countries not only in the SCS, but around the world, because international law is universal in application, and a challenge to a principle of international law in one part of the world, if accepted, could serve as a precedent for challenging it in other parts of the world. Overturning the principle of freedom of the seas, so that significant portions of the seas could be appropriated as national territory, would overthrow hundreds of years of international legal tradition relating to the legal status of the world's oceans and significantly change the international legal regime governing sovereignty over the surface of the world.[11]

Some observers are concerned that if China's position on whether coastal states have a right under international law to regulate the activities of foreign military forces in their EEZs (see "Dispute Regarding China's Rights within Its EEZ") were to gain greater international acceptance under international law, it could substantially affect U.S. naval operations not only in the SCS and ECS, but around the world, which in turn could substantially affect the ability of the United States to use its military forces to defend various U.S. interests overseas. Significant portions of the world's oceans are claimable as EEZs, including high-priority U.S. Navy operating areas in the Western Pacific, the Persian Gulf, and the Mediterranean Sea.[12] The legal right of U.S. naval forces to operate freely in EEZ waters—an application of the principle of freedom of the seas—is important to their ability to perform many of their missions around the world, because many of those missions are aimed at influencing events ashore, and having to conduct operations from more than 200 miles offshore would reduce the inland reach and responsiveness of ship-based

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[10] Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 1, 2.

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

> A very old debate has been renewed in recent years: is the sea a commons open to the free use of all seafaring states, or is it territory subject to the sovereignty of coastal states? Is it to be freedom of the seas, as Dutch jurist Hugo Grotius insisted? Or is it to be closed seas where strong coastal states make the rules, as Grotius' English archnemesis John Selden proposed?
>
> Customary and treaty law of the sea sides with Grotius, whereas China has in effect become a partisan of Selden. Just as England claimed dominion over the approaches to the British Isles, China wants to make the rules governing the China seas. Whose view prevails will determine not just who controls waters, islands, and atolls, but also the nature of the system of maritime trade and commerce. What happens in Asia could set a precedent that ripples out across the globe. The outcome of this debate is a big deal.
>
> (James R. Holmes, "Has China Awoken a Sleeping Giant in Japan?" *The Diplomat*, March 1, 2014. See also Roncevert Ganan Almond, "Lords of Navigation: Grotius, Freitas, and the South China Sea," *The Diplom*at, May 22, 2016.)

[12] 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.)

sensors, aircraft, and missiles, and make it more difficult to transport Marines and their equipment from ship to shore. Restrictions on the ability of U.S. naval forces to operate in EEZ waters could potentially require changes (possibly very significant ones) in U.S. military strategy or U.S. foreign policy goals.[13]

Risk of United States Being Drawn into a Crisis or Conflict

Many observers are concerned that ongoing 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.[14]

Security Structure of Asia-Pacific Region

Chinese domination over or control of its near-seas region could have significant implications for the security structure of the Asia-Pacific region. In particular, Chinese domination over or control of its near-seas area could greatly complicate the ability of the United States to intervene militarily in a crisis or conflict between China and Taiwan. It could also complicate the ability of the United States to fulfill its obligations under its defense treaties with Japan, South Korea, and the Philippines. More generally, it could complicate the ability of the United States to 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. Developments such as these could in turn 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 structure.

U.S.-China Relations

Developments regarding China's maritime territorial and EEZ disputes in the ECS and SCS could affect U.S.-China relations in general, which could have implications for other issues in U.S.-China relations.[15]

Interpreting China's Rise as a Major World Power

As China continues to emerge as a major world power, observers are assessing what kind of international actor China will ultimately be. China's actions in asserting and defending its maritime territorial and EEZ disputes in the ECS and SCS could influence assessments that observers might make on issues such as China's approach to settling disputes between states (including whether China views force and coercion as acceptable means for settling such disputes, and consequently whether China believes that "might makes right"), China's views toward the meaning and application of international law,[16] and whether China views itself more as

[13] 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.

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

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

[16] DOD states that "In January 2013, the Philippines requested that an arbitral tribunal set up under the Law of the Sea Convention address a number of legal issues arising with respect to the interpretation and application of the Convention.... How China responds to a potential ruling from the arbitral tribunal will reflect China's attitude toward (continued...)

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. Strategic Goal of Preventing Emergence of Regional Hegemon in Eurasia

As mentioned earlier, some observers believe that China is pursuing a goal of becoming a regional hegemon in its part of Eurasia, and that achieving a greater degree of control over its near-seas region is a part of this effort. From a U.S. standpoint, such an effort would be highly significant, because 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.[17]

Overview of Maritime Disputes

Maritime Territorial Disputes

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

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

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. 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.

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.[18] There are additional maritime territorial disputes in the Western Pacific that do not involve China.[19]

(...continued)

international maritime law." (Department of Defense, Asia-Pacific Maritime Security Strategy, undated but released August 2015, p. 17.) See also Isaac B. Kardon, "The Enabling Role of UNCLOS in PRC Maritime Policy," Asia Maritime Transparency Initiative (Center for Strategic & International Studies), September 11, 2015.

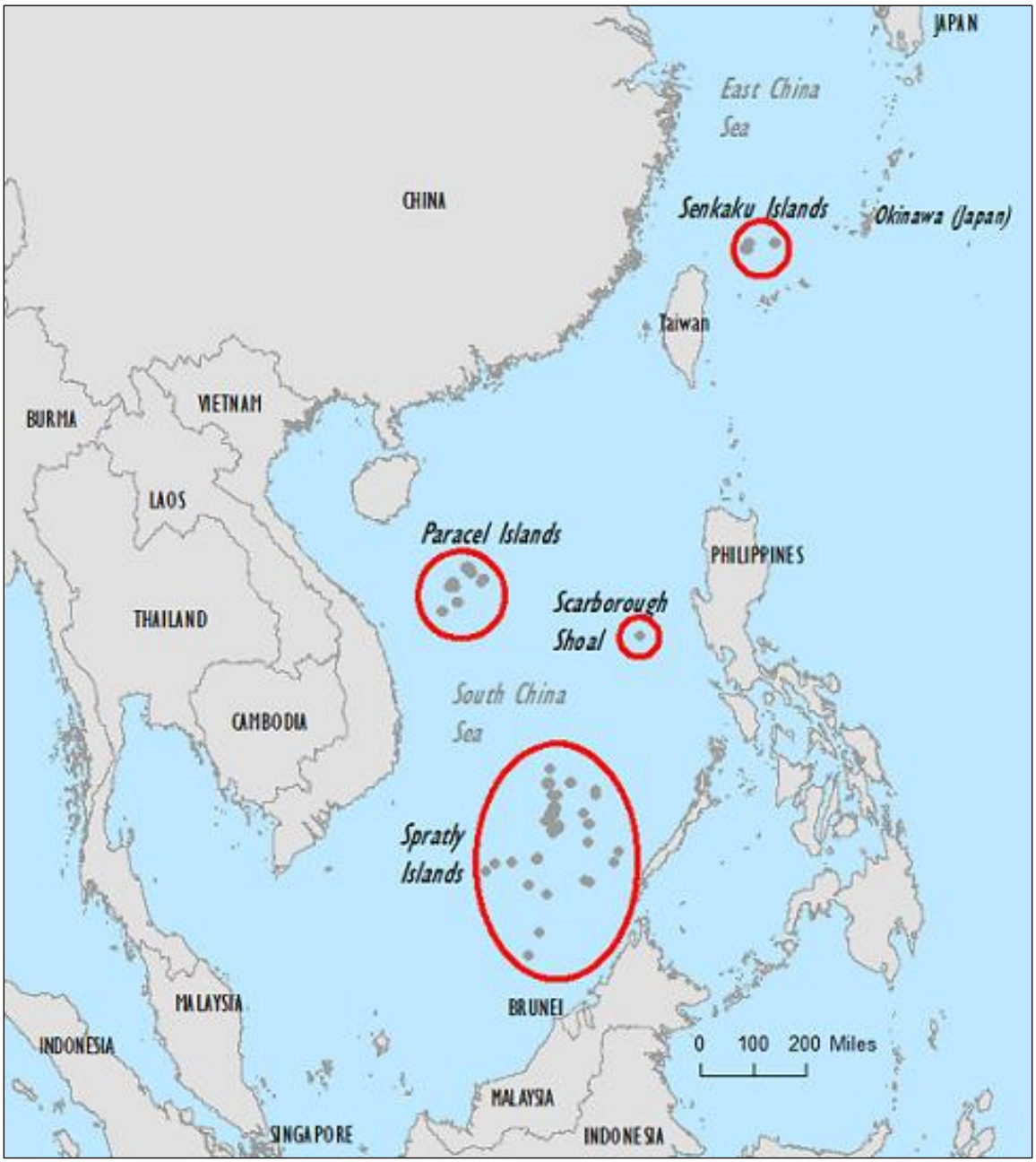
[17] For additional discussion of this long-standing goal, see **Appendix A**.

[18] 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.

[19] 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 (continued...)

Figure 1. Maritime Territorial Disputes Involving China

Island groups involved in principal disputes



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

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

(...continued)

and Russia refers to as the South Kuril Islands.

Maritime territorial disputes in the SCS and ECS date back many years, and have periodically led to incidents and periods of increased tension.[20] The disputes have again intensified in the past few years, leading to numerous confrontations and incidents involving fishing vessels, oil exploration vessels and oil rigs, coast guard ships, naval ships, and military aircraft. The intensification of the disputes in recent years has substantially heightened tensions between China and other countries in the region, particularly Japan, the Philippines, and Vietnam.

Dispute Regarding China's Rights within Its EEZ

In addition to maritime territorial disputes in the SCS and ECS, China is involved in a dispute, principally with the United States, over whether China has a right under international law to regulate the activities of foreign military forces operating within China's EEZ. The position of the United States and most 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.[21] 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.[22]

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

[21] 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.

[22] 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

(continued...)

Other observers provide different counts of the number of countries that take the position that UNCLOS gives coastal states the right to regulate not only economic activities but also foreign military activities in their EEZs. For example, one set of observers, in an August 2013 briefing, stated that 18 countries seek to regulate foreign military activities in their EEZs, and that 3 of these countries—China, North Korea, and Peru—have directly interfered with foreign military activities in their EEZs.[23]

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;[24]
- 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[25]—DOD characterized the intercept as "very, very close, very dangerous";[26] and

(...continued)

> 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.)

[23] 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.

[24] 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.

[25] 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=
(continued...)

- 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."[27]

Figure 2 shows the locations of the 2001, 2002, and 2009 incidents listed in the first two bullets above. The incidents shown in **Figure 2** are the ones most commonly cited prior to the December 2013 involving the *Cowpens*, but some observers list additional incidents as well. 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).[28]

DOD states 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.

(...continued)

5493. Chinese officials stated that the incident occurred 220 kilometers (about 137 statute miles or about 119 nautical miles) from Hainan Island.

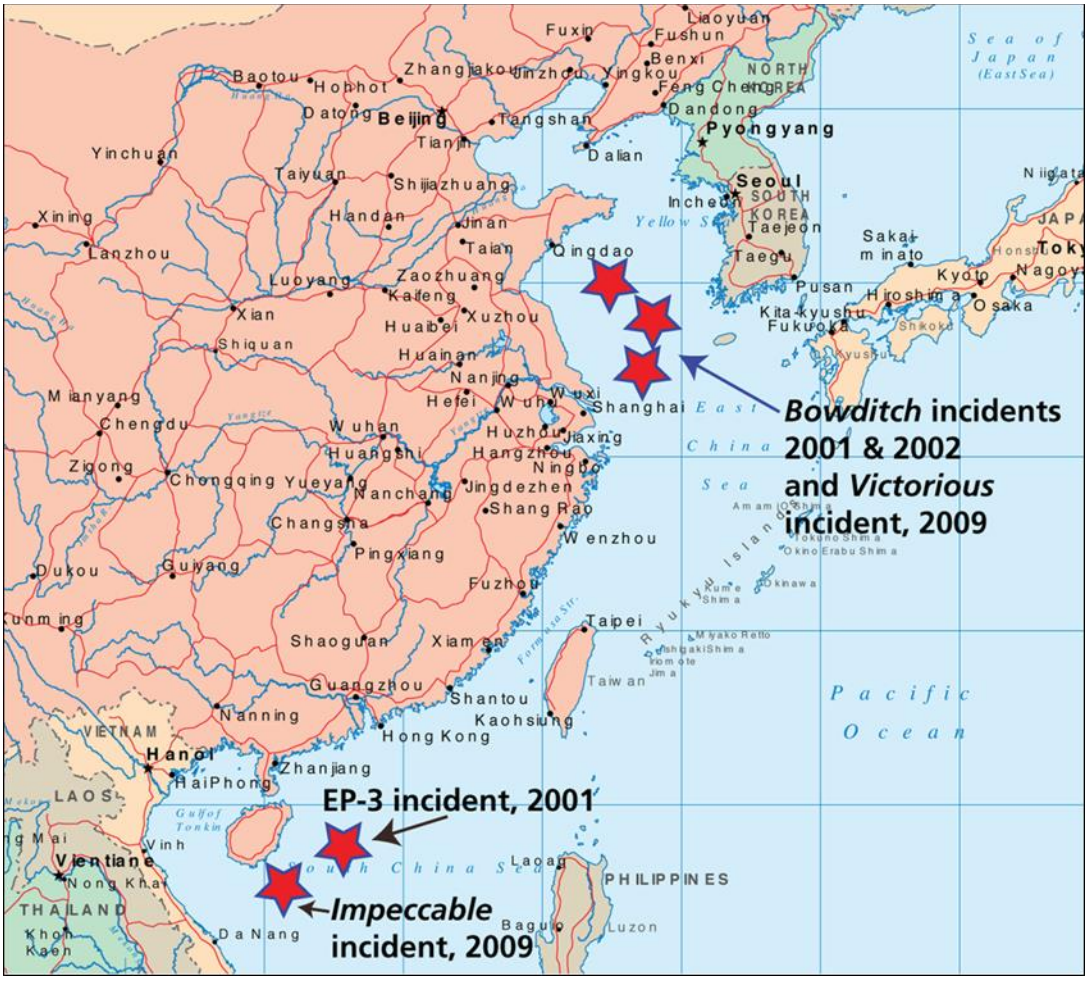
[26] Source: Transcript of remarks by DOD Press Secretary Rear Admiral John Kirby at August 22, 2014, press briefing, accessed September 26, 2014, at http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5493.

[27] See, for example, Michael S. Schmidt, "Chinese Aircraft Fly Within 50 Feet of U.S. Plane Over South China Sea, Pentagon Says," *New York Times*, May 18, 2016; Thomas Gibbons-Neff, "Chinese Jets Intercept U.S. Recon Plane, Almost Colliding Over South China Sea," *Washington Post*, May 18, 2016; Idrees Ali and Megha Rajagopalan, "Chinese Jets Intercept U.S. Military Plan over South China Sea: Pentagon," *Reuters*, May 19, 2016; Jamie Crawford, "Pentagon: 'Unsafe' Intercept over South China Sea," *CNN*, May 19, 2016.

[28] 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.

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),[29] which was signed in April 2014.[30]

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



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

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

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

Relationship of Maritime Territorial Disputes to EEZ Dispute

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

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

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

Treaties and Agreements Related to Disputes

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

UN Convention on Law of the Sea (UNCLOS)

The United Nations Convention on the Law of the Sea (UNCLOS) establishes a treaty regime to govern activities on, over, and under the world's oceans. UNCLOS was adopted by Third United Nations Conference on the Law of the Sea in December 1982, and entered into force in November 1994. The treaty established EEZs as a feature of international law, and contains multiple provisions relating to territorial waters and EEZs. As of February 3, 2017, 168 nations were party to the treaty, including China and most other countries bordering on the SCS and ECS (the exceptions being North Korea and Taiwan).[31]

The treaty and an associated 1994 agreement relating to implementation of Part XI of the treaty (on deep seabed mining) were transmitted to the Senate on October 6, 1994.[32] In the absence of Senate advice and consent to adherence, the United States is not a party to the convention and the associated 1994 agreement. A March 10, 1983, statement on U.S. ocean policy by President Ronald Reagan states that UNCLOS

[31] Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as of February 3, 2017, accessed April 7, 2017, at: http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#. A similar list, in alphabetical order by country name, is posted at http://www.un.org/Depts/los/reference_files/status2010.pdf.

[32] Treaty Document 103-39.

> 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.[33]

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

1972 Convention on Preventing Collisions at Sea (COLREGs)

China and the United States, as well as more than 150 other countries (including all those bordering on the South East and South China Seas other than Taiwan),[34] 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."[35] Although commonly referred to as a set of rules or regulations, this multilateral convention is a binding treaty. The convention applies "to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels."[36] It thus applies to military vessels, paramilitary and law enforcement (i.e., coast guard) vessels, maritime militia vessels, and fishing boats, among other vessels.

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[33] 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.

[34] 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.

[35] 28 UST 3459; TIAS 8587. The treaty was done at London October 20, 1972, and entered into force July 15, 1977. The United States is an original signatory to the convention and acceded the convention entered into force for the United States on July 15, 1977. China acceded to the treaty on January 7, 1980. A summary of the agreement is available at http://www.imo.org/About/Conventions/ListOfConventions/Pages/COLREG.aspx. The text of the convention is available at https://treaties.un.org/doc/Publication/UNTS/Volume%201050/volume-1050-I-15824-English.pdf.

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

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

> 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[37] 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.[38]

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

> 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.[39]

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),[40] unanimously agreed to a Code for Unplanned Encounters at Sea (CUES). CUES, a

[37] 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.

[38] 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.

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

[40] 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.

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.[41] 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."[42]

DOD states that

> Going forward, the Department is also exploring options to expand the use of CUES to include regional law enforcement vessels and Coast Guards. Given the growing use of maritime law enforcement vessels to enforce disputed maritime claims, expansion of CUES to MLE [maritime law enforcement] vessels would be an important step in reducing the risk of unintentional conflict.[43]

U.S. Navy officials have stated that the CUES agreement is working well, and that the United States (as noted in the passage above) is interested in expanding the agreement to cover coast guard ships.[44] Officials from Singapore and Malaysia reportedly have expressed support for the idea.[45] An Obama Administration fact sheet about Chinese President Xi Jinping's state visit to the United States on September 24-25, 2015, stated:

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[41] 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.

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

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

[44] 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.

[45] 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.

> 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.[46]

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.[47] 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.[48] The MOU as signed in November 2014 included an annex on rules of behavior for safety of surface-to-surface encounters. An additional annex on rules of behavior for safety of air-to-air encounters was signed on September 15 and 18, 2015.[49]

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....

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[46] "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.

[47] 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.

[48] DOD states that

> In 2014, then-Secretary Hagel and his Chinese counterpart signed a historic Memorandum of Understanding (MOU) on Rules of Behavior for Safety of Air and Maritime Encounters. The MOU established a common understanding of operational procedures for when air and maritime vessels meet at sea, drawing from and reinforcing existing international law and standards and managing 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?" The 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.

[49] 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.

> ... 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....[50]

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."[51] On May 18 and 19, 2017, it was reported that the China and the ASEAN countries had agreed on the framework.[52] An article from a Chinese news outlet stated:

> All countries involved have agreed not to release the framework document, but to maintain it as an internal document at this time since the consultation will continue and they do not want any external interference, [Vice-Foreign Minister] Liu [Zhenmin] said.
>
> "Against the backdrop of economic globalization, China and ASEAN countries should continue making our regional rules to guide our own actions and protect our common interests," Liu said.[53]

Another press report stated that Liu Zhemin "called on others to stay out [of the negotiations], apparently a coded message to the United States. 'We hope that our consultations on the code are not subject to any outside interference,' Liu said."[54]

An August 3, 2017, press report stated:

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[50] 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.

[51] 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.

[52] 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.

[53] 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.

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

> Southeast Asian ministers meeting this week are set to avoid tackling the subject of Beijing's arming and building of manmade South China Sea islands, preparing to endorse a framework for a code of conduct that is neither binding nor enforceable.
>
> The Association of South East Asian Nations (ASEAN) has omitted references to China's most controversial activities in its joint communique, a draft reviewed by Reuters shows.
>
> In addition, a leaked blueprint for establishing an ASEAN-China code of maritime conduct does not call for it to be legally binding, or seek adherence to the United Nations Convention on the Law of the Sea (UNCLOS)....
>
> Analysts and some ASEAN diplomats worry that China's sudden support for negotiating a code of conduct is a ploy to buy time to further boost its military capability....
>
> The agreed two-page framework is broad and leaves wide scope for disagreement, urging a commitment to the "purposes and principles" of UNCLOS, for example, rather than adherence.
>
> The framework papers over the big differences between ASEAN nations and China, said Patrick Cronin of the Center for a New American Security.
>
> "Optimists will see this non-binding agreement as a small step forward, allowing habits of cooperation to develop, despite differences," he said.
>
> "Pessimists will see this as a gambit favorable to a China determined to make the majority of the South China Sea its domestic lake."[55]

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

> 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.[56]

Some observers have argued that China has been dragging out the negotiations on the COC for years as part of a "talk and take strategy," meaning a strategy in which China engages in (or draws out) negotiations while taking actions to gain control of contested areas. A May 25, 2017, news report states:

> To call negotiations between China and the ten-country Association of South-East Asian Nations (ASEAN) over rival claims in the South China Sea "drawn out" would be a gross understatement. At the centre of the matter is an unsquareable circle: the competing claims of China and several South-East Asian countries. Nobody wants to go to war; nobody wants to be accused of backing down.

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

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

> Still, at a meeting of senior Chinese and ASEAN officials on May 18th, something happened: the two sides agreed on a "framework" for a code of conduct. An official from Singapore (which currently co-ordinates ASEAN-China relations) called the agreement a sign of "steady progress"....
>
> ASEAN members called for a legally binding code of conduct as far back as 1996....
>
> Since then, code-of-conduct negotiations have proceeded glacially.... Last July, after China received an unfavourable ruling on its maritime claims in a case brought by the Philippines to a tribunal in The Hague, China agreed to expedite the talks....
>
> The draft framework will be presented to ASEAN and Chinese foreign ministers at a conference in August. This will then form the basis for the thorny negotiations to follow. The text has not (yet) been leaked. But its most salient feature may be what it appears to lack: any hint of enforcement mechanisms or consequences for violations. China has long rejected a legally binding agreement—or indeed any arrangement that could limit its actions in the South China Sea.
>
> The result, explains Ian Storey, of the ISEAS-Yusof Ishak Institute, a think-tank in Singapore, is a framework "that makes China look co-operative…without having to do anything that might constrain its freedom of action". ASEAN, meanwhile, gets the appearance of progress. "The ASEAN secretariat is a bureaucracy, and bureaucrats like process," explains Mr Storey.[57]

July 2016 Tribunal Award in SCS Arbitration Case Involving 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

[57] "China and ASEAN Declare Progress in the South China Sea," The Economist, May 25, 2017. See also Mark J. Valencia, "A South China Sea Code of Conduct? Don't Get Your Hopes Up," *The Diplomat*, May 30, 2017.

the award. China, however, has declared the ruling null and void.[58] 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 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 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

[58] 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.

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.[59]

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:

> 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

[59] 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 United Nations Convention on the law of the Sea between The Republic of the Philippines and The Peope'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.

> 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..[60]

Another observer stated:

> 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.[61]

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

[61] 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.

China's Approach to Disputes

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 3**). 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 4**, includes waters that are within the claimable EEZs (and in some places are quite near the coasts) of the Philippines, Malaysia, Brunei, and Vietnam.

The map of the nine-dash line, also called the U-shaped line or the cow tongue,[62] 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.[63] In a document submitted to the United Nations on May 7, 2009, that included the map as an attachment, China stated:

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.[64]

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.[65] 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.[66] 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.

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[62] 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 3**) show each line segment as being dashed.

[63] See Department of Defense, *Annual Report to Congress, Military and Security Developments Involving the People's Republic of China*, 2011, pp. 15 and 39; Peter Dutton, "Three Disputes and Three Objectives, China and the South China Sea," *Naval War College Review*, Autumn 2011: 44-45; Hong Nong, "Interpreting the U-shape Line in the South China, Sea," accessed on September 28, 2012, at http://chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/.

[64] 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.

[65] 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.

[66] 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.

Figure 3. Map of the Nine-Dash Line

Example submitted by China to the United Nations in 2009

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

Figure 4. 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.

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.[67] 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.[68]

[67] Peter Dutton, "Three Disputes and Three Objectives, China and the South China Sea," *Naval War College Review*, Autumn 2011: 45, which states: "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.

[68] 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

(continued...)

Apparent Narrow Definition of "Freedom of Navigation"

China regularly states that it supports freedom of navigation and has not interfered with freedom of navigation. China, however, appears to hold a narrow definition of freedom of navigation that is centered on the ability of commercial cargo ships to pass through international waters. In contrast to the broader U.S./Western definition of freedom of navigation, the Chinese definition does not appear to clearly include operations conducted by military ships and aircraft. It can also be noted that China has frequently interfered with commercial fishing operations by non-Chinese fishing vessels—something that some observers would regard as a form of interfering with freedom of navigation. An August 12, 2015, press report states (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**."[69]

A July 19, 2016, press report states:

> 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.

(...continued)

> Verbales also included China's assertion that it has "indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof." China's actions and rhetoric have left unclear the precise nature of its maritime claim, including whether China claims all of the maritime area located within the line as well as all land features located therein.
>
> (Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 8.)

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

> "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.[70]

A March 4, 2017, press report states:

> 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.[71]

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 (see "Freedom of the Seas"), an alternative term for referring to the U.S./Western definition of freedom of navigation is freedom of the seas, meaning "the rights, freedoms, and uses of the sea and airspace guaranteed to all nations in international law."[72] When Chinese officials state that China supports freedom of navigation, China is referring to its narrow definition of the term, and is likely *not* expressing agreement with or support for the U.S./Western definition of the term.

"Salami-Slicing" Strategy and "Cabbage" Strategy

Observers frequently characterize China's approach for asserting and defending its territorial claims in the ECS and SCS as a "salami-slicing" strategy that employs a series of incremental actions, none of which by itself is a *casus belli*, to gradually change the status quo in China's favor. At least one Chinese official has used the term "cabbage strategy" to refer to a strategy of consolidating control over disputed islands by wrapping those islands, like the leaves of a cabbage, in successive layers of occupation and protection formed by fishing boats, Chinese Coast Guard ships, and then finally Chinese naval ships.[73] Other observers have referred to China's approach as a strategy of creeping annexation[74] or creeping invasion,[75] or as a "talk and

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

[71] 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.

[72] *U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2015*, accessed April 27, 2016, at http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON_Report_FY15.pdf.

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

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

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

take" strategy, meaning (as noted earlier) a strategy in which China engages in (or draws out) negotiations while taking actions to gain control of contested areas.[76]

Use of Coast Guard Ships, Fishing Boats/Maritime Militia, Oil Platforms

Coast Guard Ships

China makes regular use of China Coast Guard (CCG) ships to assert and defend its maritime territorial claims, with Chinese Navy ships sometimes available over the horizon as backup forces.[77] China has, by far, the largest coast guard of any country in the region, and is currently building many new ships for its Coast Guard.[78] Many CCG ships are unarmed or lightly armed, but can be effective in asserting and defending maritime territorial claims, particularly in terms of confronting or harassing foreign vessels that are similarly lightly armed or unarmed.[79] In addition to being available as backups for CCG ships, Chinese navy ships conduct exercises that in some cases appear intended, at least in part, at reinforcing China's maritime claims.[80]

Maritime Militia

China also uses civilian fishing ships as a form of maritime militia, as well as mobile oil exploration platforms, to assert and defend its maritime claims. U.S. analysts in recent years have paid increasing attention to the role of China's maritime militia as a key tool for implementing China's salami-slicing strategy.[81] DOD states that

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[76] 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.

[77] 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.

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

[79] See, for example, Megha Rajagopalan and Greg Torode, "China's Civilian Fleet A Potent Force in Asia's Disputed Waters," *Reuters.com*, March 5, 2014.

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

[81] See, for example, 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, (continued...)

> The CMM [China Maritime Militia] is a subset of China's national militia, an armed reserve force of civilians available for mobilization to perform basic support duties. Militia units organize around towns, villages, urban sub-districts, and enterprises, and vary widely from one location to another. The composition and mission of each unit is based on local conditions and personnel skills. In the South China Sea, the CMM plays a major role in coercive activities to achieve China's political goals without fighting, part of broader PRC military doctrine that states that confrontational operations short of war can be an effective means of accomplishing political objectives.
>
> A large number of CMM vessels train with and support the PLAN and CCG in tasks such as safeguarding maritime claims, protecting fisheries, logistics, search and rescue (SAR), and surveillance and reconnaissance. The government subsidizes various local and provincial commercial organizations to operate militia vessels to perform "official" missions on an ad hoc basis outside of their regular commercial roles. The CMM has played significant roles in a number of military campaigns and coercive incidents over the years, including the 2011 harassment of Vietnamese survey vessels, the 2012 Scarborough Reef standoff [with the Philippines], and the 2014 Haiyang Shiyou-981 oil rig standoff [with Vietnam].
>
> In the past, the CMM rented fishing vessels from companies or individual fishermen, but it appears that China is building a state-owned fishing fleet for its maritime militia force in the South China Sea. Hainan Province, adjacent to the South China Sea, has ordered the building of 84 large militia fishing vessels for Sansha City.[82]

Preference for Treating Disputes on Bilateral Basis

China prefers to discuss maritime territorial disputes with other 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 DOC and in negotiations with the ASEAN states on the follow-on binding code of conduct represents a departure from this general preference.)

As noted earlier, 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.[83] China resists and objects to U.S. involvement in the disputes.

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.[84] It can be noted, however, that there are significant differences between China's approach to its near-

(...continued)

"China's Maritime Militia, What It Is and How to Deal With It," *Foreign Affairs*, June 23, 2016.

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

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

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

seas region and the U.S. approach—both in the 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.[85]

Chinese Actions That Have Heightened Concerns

China's actions since 2009 for asserting and defending its maritime territorial and exclusive economic zone (EEZ) claims in the East China (ECS) and South China Sea (SCS) have heightened concerns among observers that China may be seeking to dominate or gain control of its near-seas region. Following a confrontation in 2012 between Chinese and Philippine ships at Scarborough Shoal, China gained *de facto* control over access to the shoal. Subsequent Chinese actions for asserting and defending China's claims in the ECS and SCS and China's position on the issue of whether it has the right to regulate foreign military activities in its EEZ that have heightened concerns among observers, particularly since late 2013, include the following:

- frequent patrols by Chinese Coast Guard ships—some observers refer to them as harassment operations—at the Senkaku Islands;
- China's announcement on November 23, 2013, of an air defense identification zone (ADIZ) for the ECS that includes airspace over the Senkaku Islands;[86]
- ongoing 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;[87]
- the previously mentioned December 5, 2013, incident in which a Chinese navy ship put itself in the path of the U.S. Navy cruiser *Cowpens*, forcing the *Cowpens* to change course to avoid a collision;
- the implementation on January 1, 2014, of fishing regulations administered by China's Hainan province applicable to waters constituting more than half of the SCS, and the reported enforcement of those regulations with actions that have included the apprehension of non-Chinese fishing boats;[88]
- land-reclamation and facility-construction activities, begun in December 2013 and publicly reported starting in May 2014, at several locations in the SCS occupied by China (primarily the Spratly islands) that observers view as a

[85] 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.

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

[87] For a discussion of the situation at Second Thomas Shoal, see "A Game of Shark And Minnow," *New York Times Magazine* online news graphic accessed March 10, 2014, at http://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/. See also Ben Blanchard, "China Says [It] Expels Philippine [Vessels] from Disputed Shoal," *Reuters.com*, March 10, 2014; Oliver Teves (Associated Press), "Philippines Protests China Stopping Troop Resupply," *Kansas City Star*, March 11, 2014; Kyodo News International, "Philippines Protests Chinese Actions in Disputed Sea," *Global Post*, March 3, 2014.

[88] See, for example, Natalie Thomas, Ben Blanchard, and Megha Rajagopalan, "China Apprehending Boats Weekly in Disputed South China Sea," *Reuters.com*, March 6, 2014.

prelude to the construction of expanded Chinese facilities and fortifications at those locations;[89]

- moving a large oil rig in May 2014 into waters that are near the Paracels and inside Vietnam's claimed EEZ, and using dozens of Chinese Coast Guard and Chinese navy ships to enforce a large keep-away zone around the rig, leading to numerous confrontations and incidents between Chinese and Vietnamese civilian and military ships; and
- the previously mentioned August 19, 2014, incident 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.

A March 12, 2017, press report states:

> China has extended its maritime jurisdiction to cover all seas under its jurisdiction in an effort to resolutely safeguard the country's maritime rights and interests, said a work report of the Supreme People's Court (SPC) on Sunday.
>
> This was achieved by the issuance of a regulation on judicial interpretation, said the report, to be delivered by Chief Justice Zhou Qiang to the fifth session of the 12th National People's Congress, noting that the regulation contributed to China's strategy of becoming a major maritime power.
>
> According to the regulation in effect since last August, jurisdictional seas not only include inland waters and territorial seas, but also cover regions including contiguous zones, exclusive economic zones, continental shelves, and other sea areas under China's jurisdiction.
>
> Chinese citizens or foreigners will be pursued for criminal liability if they engage in illegal hunting or fishing, or killing endangered wildlife in China's jurisdictional seas.[90]

China's Land Reclamation and Facility-Construction Activities

China's land reclamation and facility-construction activities in the SCS have attracted particular attention and concern among observers, particularly since mid-February 2015,[91] due to the apparent speed and scale of the activities and their potential for quickly and significantly changing the status quo in the SCS. DOD states that

> China paused its two-year land reclamation effort in the Spratly Islands in late 2015 after adding over 3,200 acres of land to the seven features it occupies; other claimants

[89] See CRS Report R44072, *Chinese Land Reclamation in the South China Sea: Implications and Policy Options*, by Ben Dolven et al. See also Edward Wong and Jonathan Ansfield, "To Bolster Its Claims, China Plants Islands in Disputed Waters," New York Times, June 16, 2014; Trefor Moss, "China Rejects Philippines' Call for Construction Freeze," Wall Street Journal, June 16, 2014; Wendell Minnick, "Beijing Continues S. China Sea Expansion," Defense News, June 14, 2014; Joel Guinto, "China Building Dubai-Style Fake Islands in South China Sea," Bloomberg News, June 11, 2014; David Dizon, "Why China Military Base in West PH Sea Is A 'Game-Changer,'" ABS-CBN News, June 10, 2014; Andrew Erickson and Austin Strange, "Pandora's Sandbox, China's Island-Building Strategy in the South China Sea," Foreign Affairs, July 13, 2014.

[90] Xinhua, "China's Maritime Jurisdiction Extends to Cover All Jurisdictional Seas," *Global Times*, March 12, 2017.

[91] Awareness of, and concern about, China's land reclamation activities in the SCS among observers appears to have increased substantially following the posting of an article showing a series of "before and after" satellite photographs of islands and reefs being changed by the work. (Mira Rapp-Hooper, "Before and After: The South China Sea Transformed," Asia Maritime Transparency Initiative [Center for Strategic and International Studies], February 18, 2015.)

> reclaimed approximately 50 acres of land over the same period. As part of this effort, China excavated deep channels to improve access to its outposts, created artificial harbors, dredged natural harbors, and constructed new berthing areas to allow access for larger ships. Development of the initial four features—all of which were reclaimed in 2014—has progressed to the final stages of primary infrastructure construction, and includes communication and surveillance systems, as well as logistical support facilities.
>
> At the three features where the largest outposts are located, China completed major land reclamation efforts in early October 2015 and began transitioning to infrastructure development, with each feature having an airfield—each with approximately 9,800 foot-long runways—and large ports in various stages of construction. Additional substantial infrastructure, including communications and surveillance systems, is expected to be built on these features in the coming year.
>
> China's Government has stated 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 China 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 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.[92]

DOD stated in 2015 that

> [China's] Recent land reclamation activity has little legal effect, but will support China's ability to sustain longer patrols in the South China Sea....
>
> One of the most notable recent developments in the South China Sea is China's expansion of disputed features and artificial island construction in the Spratly Islands, using large-scale land reclamation. Although land reclamation–the dredging of seafloor material for use as landfill–is not a new development in the South China Sea, China's recent land reclamation campaign significantly outweighs other efforts in size, pace, and nature.
>
> In the 1970s and 1980s, the Philippines and Malaysia conducted limited land reclamation projects on disputed features, with Vietnam and later Taiwan initiating efforts. At the time, the Philippines constructed an airfield on Thitu Island, with approximately 14 acres of land reclamation to extend the runway. Malaysia built an airfield at Swallow Reef in the 1980s, also using relatively small amounts of reclaimed land. Between 2009 and 2014, Vietnam was the most active claimant in terms of both outpost upgrades and land reclamation. It reclaimed approximately 60 acres of land at 7 of its outposts and built at least 4 new structures as part of its expansion efforts. Since August 2013, Taiwan has reclaimed approximately 8 acres of land near the airstrip on Itu Aba Island, its sole outpost.
>
> China's recent efforts involve land reclamation on various types of features within the South China Sea. At least some of these features were not naturally formed areas of land that were above water at high tide and, thus, under international law as reflected in the Law of the Sea Convention, cannot generate any maritime zones (e.g., territorial seas or exclusive economic zones). Artificial islands built on such features could, at most, generate 500-meter safety zones, which must be established in conformity with

[92] Department of Defense, *Annual Report to Congress [on] Military and Security Developments Involving the People's Republic of China 2016*, p. 13. The report presents figures and photographs of the reclamation sites on pp. 14-20. See also pp. i, 7, and 44.

> requirements specified in the Law of the Sea Convention. Although China's expedited land reclamation efforts in the Spratlys are occurring ahead of an anticipated ruling by the arbitral tribunal in the Philippines v. China arbitration under the Law of the Sea Convention, they would not be likely to bolster the maritime entitlements those features would enjoy under the Convention.
>
> Since Chinese land reclamation efforts began in December 2013, China has reclaimed land at seven of its eight Spratly outposts and, as of June 2015, had reclaimed more than 2,900 acres of land. By comparison, Vietnam has reclaimed a total of approximately 80 acres; Malaysia, 70 acres; the Philippines, 14 acres; and Taiwan, 8 acres. China has now reclaimed 17 times more land in 20 months than the other claimants combined over the past 40 years, accounting for approximately 95 percent of all reclaimed land in the Spratly Islands.
>
> All territorial claimants, except Brunei, maintain outposts in the South China Sea, which they use to establish presence in surrounding waters, assert their claims to sovereignty, and monitor the activities of rival claimants. All of these claimants have engaged in construction-related activities. Outpost upgrades vary widely but broadly are composed of land reclamation, building construction and extension, and defense emplacements.
>
> At all of its reclamation sites, China either has transitioned from land reclamation operations to infrastructure development, or has staged construction support for infrastructure development. As infrastructure development is still in its early stages, it remains unclear what China ultimately will build on these expanded outposts. However, China has stated publicly that the outposts will have a military component to them, and will also be used for maritime search and rescue, disaster prevention and mitigation, marine scientific research, meteorological observation, ecological environment conservation, navigation safety, and fishery production. At the reclamation sites currently in the infrastructure phase of development, China has excavated deep channels and built new berthing areas to allow access for larger ships to the outposts. China is also completing construction of an airstrip at Fiery Cross Reef, joining the other claimants with outposts–Malaysia, Philippines, Taiwan, and Vietnam–that have an airstrip on at least one of their occupied features, and may be building additional ones.
>
> Though other claimants have reclaimed land on disputed features in the South China Sea, China's latest efforts are substantively different from previous efforts both in scope and effect. The infrastructure China appears to be building would enable it to establish a more robust power projection presence into the South China Sea. Its latest land reclamation and construction will also allow it to berth deeper draft ships at outposts; expand its law enforcement and naval presence farther south into the South China Sea; and potentially operate aircraft–possibly as a divert airstrip for carrier-based aircraft–that could enable China to conduct sustained operations with aircraft carriers in the area. Ongoing island reclamation activity will also support MLEs' ability to sustain longer deployments in the South China Sea. Potentially higher-end military upgrades on these features would be a further destabilizing step. By undertaking these actions, China is unilaterally altering the physical status quo in the region, thereby complicating diplomatic initiatives that could lower tensions.[93]

For additional discussion of China's land reclamation 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.

[93] Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 15-17.

U.S. Position on Disputes

Some Key Elements

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

- The United States supports the principle that disputes between countries should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law.
- The United States supports the principle of freedom of seas, meaning the rights, freedoms, and uses of the sea and airspace guaranteed to all nations in international law. The United States opposes claims that impinge on the rights, freedoms, and lawful uses of the sea that belong to all nations.
- The United States takes no position on competing claims to sovereignty over disputed land features in the ECS and SCS.
- Although the United States takes no position on competing claims to sovereignty over disputed land features in the ECS and SCS, the United States *does* have a position on how competing claims should be resolved: Territorial disputes should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law.
- Claims of territorial waters and EEZs should be consistent with customary international law of the sea and must therefore, among other things, derive from land features. Claims in the SCS that are not derived from land features are fundamentally flawed.
- Parties should avoid taking provocative or unilateral actions that disrupt the status quo or jeopardize peace and security. The United States does not believe that large-scale land reclamation with the intent to militarize outposts on disputed land features is consistent with the region's desire for peace and stability.
- The United States, like most other countries, believes that coastal states under UNCLOS have the right to regulate economic activities in their EEZs, but do not have the right to regulate foreign military activities in their EEZs.
- U.S. military surveillance flights in international airspace above another country's EEZ are lawful under international law, and the United States plans to continue conducting these flights as it has in the past.[94]
- The Senkaku Islands are under the administration of Japan and unilateral attempts to change the status quo raise tensions and do nothing under international law to strengthen territorial claims.

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

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.[95]

As part of his prepared statement for the same hearing, Robert Scher, then-Deputy Assistant Secretary of Defense, Asian and Pacific Security Affairs, Office of the Secretary of Defense, stated that

> we reject any nation's attempt to place limits on the exercise of high seas freedoms within an exclusive economic zones [sic] (EEZ). Customary international law, as reflected in articles 58 and 87 of the 1982 United Nations Convention on the Law of the Sea, guarantees to all nations the right to exercise within the EEZ, high seas freedoms of navigation and overflight, as well as the traditional uses of the ocean related to those freedoms. It has been the position of the United States since 1982 when the Convention was established, that the navigational rights and freedoms applicable within the EEZ are qualitatively and quantitatively the same as those rights and freedoms applicable on the high seas. We note that almost 40% of the world's oceans lie within the 200 nautical miles EEZs, and it is essential to the global economy and international peace and security that navigational rights and freedoms within the EEZ be vigorously asserted and preserved.
>
> As previously noted, our military activity in this region is routine and in accordance with customary international law as reflected in the 1982 Law of the Sea Convention.[96]

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[95] [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.

[96] 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.

For additional information on the issue of operational rights in EEZs, see **Appendix C**.

Freedom of Navigation (FON) Program

U.S. Navy ships challenge what the United States views as excessive maritime claims and carry out assertions of operational rights as part of the U.S. Freedom of Navigation (FON) program for challenging maritime claims that the United States believes to be inconsistent with international law.[97] DOD's record of "excessive maritime claims that were challenged by DoD operational assertions and activities during the period of October 1, 2015 through September 30, 2016, in order to preserve the rights, freedoms, and uses of the sea and airspace guaranteed to all nations under international law" includes a listing for multiple challenges that were conducted to challenge Chinese claims relating to "Excessive straight baselines; jurisdiction over airspace above the EEZ; restriction on foreign aircraft flying through an Air Defense Identification Zone (ADIZ) without the intent to enter national airspace; domestic law criminalizing survey activity

[97] The State Department states that

> U.S. Naval forces engage in Freedom of Navigation operations to assert the principles of International Law and free passage in regions with unlawful maritime sovereignty claims. FON operations involve naval units transiting disputed areas to avoid setting the precedent that the international community has accepted these unlawful claims. ISO coordinates DOS clearance for FON operations.
>
> (Source: State Department website on military operational issues, accessed March 22, 2013, at http://www.state.gov/t/pm/iso/c21539.htm. See also the web page posted at http://www.state.gov/e/oes/ocns/opa/maritimesecurity/index.htm.)

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

DOD states that

> As part of the Department's routine presence activities, the U.S. Navy, U.S. Air Force, and U.S. Coast Guard conduct Freedom of Navigation operations. These operational activities serve to protect the rights, freedoms, and lawful uses of the sea and airspace guaranteed to all nations in international law by challenging the full range of excessive maritime claims asserted by some coastal States in the region. The importance of these operations cannot be overstated. Numerous countries across the Asia-Pacific region assert excessive maritime claims that, if left unchallenged, could restrict the freedom of the seas. These excessive claims include, for example, improperly-drawn straight baselines, improper restrictions on the right of warships to conduct innocent passage through the territorial seas of other States, and the freedom to conduct military activities within the EEZs of other States. Added together, EEZs in the USPACOM region constitute 38 percent of the world's oceans. If these excessive maritime claims were left unchallenged, they could restrict the ability of the United States and other countries to conduct routine military operations or exercises in more than one-third of the world's oceans.
>
> Over the past two years, the Department has undertaken an effort to reinvigorate our Freedom of Navigation program, in concert with the Department of State, to ensure that we regularly and consistently challenge excessive maritime claims. For example, in 2013, the Department challenged 19 excessive maritime claims around the world. In 2014, the Department challenged 35 excessive claim–an 84 percent increase. Among those 35 excessive maritime claims challenged in 2014, 19 are located in U.S. Pacific Command's geographic area of responsibility, and this robust Freedom of Navigation program will continue through 2015 and beyond.
>
> (Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 23-24.)

by foreign entities in the EEZ; [and] prior permission required for innocent passage of foreign military ships through the TTS [territorial sea].”[98]

Issues for Congress

Maritime territorial and EEZ disputes in the SCS and ECS involving China raise several potential policy and oversight issues for Congress, including those discussed below.

U.S. Strategy for Countering China’s “Salami-Slicing” Strategy

Particularly in light of the potential implications for the United States if China were to achieve domination over or control of its near-seas areas, one potential oversight issue for Congress is whether the United States has an adequate strategy for countering China’s “salami-slicing” strategy.

A Notional Framework for Devising, Implementing, and Assessing a Strategy

A notional framework for devising, implementing, and assessing a U.S. strategy for countering China’s salami-slicing strategy in the ECS and SCS might include the following five elements:

- **goals and measures**—establishing and articulating a clear set of U.S. policy goals, and measures or benchmarks of success in achieving those goals;
- **identifying actions**—identifying specific actions that are intended to support those goals;
- **implementation**—implementing those actions;
- **assessment**—evaluating the success of those actions against the measures or benchmarks of success; and
- **iteration**—deciding whether to continue implementing the strategy, stop implementing it, or modify it in some way.[99]

Regarding the first item above—establishing and articulating a clear set of U.S. policy goals—potential U.S. policy goals in connection with countering China’s salami-slicing strategy in the ECS and SCS might include, but are not necessarily limited to, one or more of the following, which are not mutually exclusive:

- **defending peaceful resolution of disputes**—defending the principle under the current U.S.-led international order that disputes between countries should be resolved peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with international law, and resisting the emergence of an alternative “might-makes-right” approach to international affairs;
- **defending freedom of the seas**—defending the principle under the current U.S.-led international order of freedom of seas, meaning the rights, freedoms, and uses of the sea and airspace guaranteed to all nations in international law, including the interpretation held by the United States and many other countries concerning operational freedoms for military forces in EEZs;

[98] *U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2016*, accessed April 7, 2017, at http://policy.defense.gov/Portals/11/FY16%20DOD%20FON%20Report.pdf.

[99] See also Jonathan Greenert, “Defining the Ends, Means, and Ways of SCS Strategy,” *Cipher Brief*, January 31, 2017.

- **fulfilling security commitments**—fulfilling U.S. security commitments in the Western Pacific, including treaty commitments;
- **maintaining regional security architecture**—maintaining and enhancing the U.S.-led security architecture in the Western Pacific, including U.S. security relationships with treaty allies and partner states;
- **maintaining favorable regional balance of power**—maintaining a regional balance of power that is favorable to the United States and its allies and partners; and
- **preventing emergence of a regional hegemon**—preventing China from becoming a regional hegemon in East Asia, and potentially as part of that, preventing China from controlling or dominating the ECS or SCS.

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

On the basis of the above notional framework, potential oversight questions for Congress in assessing the Administration's strategy for countering China's salami-slicing strategy include the following:

- **Policy goals.** Has the Administration clearly identified and articulated a set of U.S. policy goals? If so, are the Administration's goals appropriate? Should other goals be added? Should some be dropped or modified? Has the Administration established adequate benchmarks or measures of success in achieving U.S. policy goals?
- **Actions.** Has the Administration identified adequate actions for supporting U.S. policy goals? Has the Administration implemented those actions at an appropriate pace? Has the Administration maintained a clear alignment between actions and policy goals?
- **Results.** How effective have the Administration's actions been in supporting U.S. goals? Should the current U.S. strategy for countering China's salami-slicing tactics be continued, ended, or modified?

U.S. Actions During Obama Administration

Overview

In apparent response to China's "salami-slicing" strategy, the United States during the Obama Administration took a number of actions, including the following:

- reiterating the U.S. position on maritime territorial claims in the area in various public fora;
- expressing strong concerns about China's land reclamation and facilities-construction activities, and calling for a halt on such activities by China and other countries in the region;
- taking steps to improve the ability of the Philippines and Vietnam to maintain maritime domain awareness (MDA) and patrol their EEZs;

- taking steps to strengthen U.S. security cooperation with Japan, the Philippines, Vietnam, and Singapore, including signing an agreement with the Philippines that provides U.S. forces with increased access to Philippine bases, increasing the scale of joint military exercises involving U.S. and Philippine forces, relaxing limits on sales of certain U.S. arms to Vietnam,[100] and operating U.S. Navy P-8 maritime patrol aircraft from Singapore;[101]
- expressing support for the idea of Japanese patrols in the SCS;[102] and
- stating that the United States would support a multinational maritime patrol of the SCS by members of ASEAN.[103]

DOD "Lines of Effort"

DOD stated in 2015 that it

> is enhancing our efforts to safeguard the freedom of the seas, deter conflict and coercion, and promote adherence to international law and standards.
>
> The Department of Defense, in concert with our interagency partners, therefore is employing a comprehensive maritime security strategy [for the Asia-Pacific region] focused on four lines of effort: strengthening U.S. military capabilities in the maritime domain; building the maritime capacity of our allies and partners; leveraging military diplomacy to reduce risk and build transparency; and, strengthening the development of an open and effective regional security architecture.
>
> *DoD LINES OF EFFORT*
>
> *First, we are strengthening our military capacity to ensure the United States can successfully deter conflict and coercion and respond decisively when needed.* The Department is investing in new cutting-edge capabilities, deploying our finest maritime capabilities forward, and distributing these capabilities more widely across the region. The effort also involves enhancing our force posture and persistent presence in the region, which will allow us to maintain a higher pace of training, transits, and operations. The United States will continue to fly, sail, and operate in accordance with international law, as U.S. forces do all around the world.

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

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

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

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

> *Second, we are working together with our allies and partners from Northeast Asia to the Indian Ocean to build their maritime capacity.* We are building greater interoperability, updating our combined exercises, developing more integrated operations, and cooperatively developing partner maritime domain awareness and maritime security capabilities, which will ensure a strong collective capacity to employ our maritime capabilities most effectively.
>
> *Third, we are leveraging military diplomacy to build greater transparency, reduce the risk of miscalculation or conflict, and promote shared maritime rules of the road.* This includes our bilateral efforts with China as well as multilateral initiatives to develop stronger regional crisis management mechanisms. Beyond our engagements with regional counterparts, we also continue to encourage countries to develop confidence-building measures with each other and to pursue diplomatic efforts to resolve disputed claims.
>
> *Finally, we are working to strengthen regional security institutions and encourage the development of an open and effective regional security architecture.* Many of the most prevalent maritime challenges we face require a coordinated multilateral response. As such, the Department is enhancing our engagement in ASEAN-based institutions such as the ASEAN Defense Ministers Meeting Plus (ADMM-Plus), ASEAN Regional Forum (ARF), and the Expanded ASEAN Maritime Forum (EAMF), as well as through wider forums like the Western Pacific Naval Symposium (WPNS) and Indian Ocean Naval Symposium (IONS), which provide platforms for candid and transparent discussion of maritime concerns.[104]

Joint Exercises with Other Countries

Regarding joint exercises with other countries in the region, DOD stated in 2015 that

> U.S. Pacific Command maintains a robust shaping presence in and around the South China Sea, with activities ranging from training and exercises with allies and partners to port calls to Freedom of Navigation Operations and other routine operations. They are central to our efforts to dissuade conflict or coercion, preserve the freedom of the seas and our access to the region, encourage peaceful resolution of maritime disputes and adherence to the rule of law, and to strengthen our relationships with partners and allies....
>
> The Department is also pursuing a robust slate of training exercises and engagements with our allies and partners that will allow us to explore new areas of practical bilateral and multilateral maritime security cooperation, build the necessary interoperability to execute multilateral operations, and promote regional trust and transparency. We are increasing the size, frequency, and sophistication of our regional exercise program, with a particular focus on developing new exercises with Southeast Asian partners and expanding our multilateral exercise program. We have also begun incorporating a maritime focus into many of these engagements in order to tailor our training to address regional partners' evolving requirements.[105]

Efforts to Build Allied and Partner Capacity

Regarding efforts to build allied and partner capacity, DOD in 2015 stated:

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[104] Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 19-20. Italics as in original.

[105] Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 23, 24. For details on some of these joint exercises, see pp. 24-25.

Given the growing array of challenges the United States and our allies face in the maritime domain, one of the Department's top priorities is to enhance the maritime security capacity of our allies and partners, both to respond to threats within their own territories as well as to provide maritime security more broadly across the region. The Department is not only focused on providing enhanced capabilities, but also on helping our partners develop the necessary infrastructure and logistical support, strengthen institutions, and enhance practical skills to develop sustainable and capable maritime forces. The Department is particularly focused on helping our partners enhance their maritime domain awareness and establish a common maritime operating picture that would facilitate more timely and effective regional responses to maritime challenges.

In Northeast Asia, the Department of Defense is working closely with Japan to augment its already extremely capable maritime forces. The United States and Japan recently announced new Guidelines for Japan-U.S. Defense Cooperation, which will enable the U.S. Armed Forces and the Self-Defense Forces to work more closely together to support peace and security, including in the maritime domain. Our expanded bilateral cooperation will now encompass a wide range of activities from peacetime cooperation on shared maritime domain awareness up to cooperation in a contingency.

We are also working together with Japan to improve the maritime-related capabilities of the JSDF, which is especially salient given the new Guidelines for U.S.-Japan Defense Cooperation. The United States is augmenting Japan's amphibious capabilities for island defense, including through sales of AAVs and V-22 Ospreys. Through the sale of E-2D Hawkeyes and Global Hawk Unmanned Aerial Vehicles, Japan is improving its ability to monitor the maritime domain and airspace around the country, an issue of particular importance given the large increase in Chinese and Russian air and naval activity in the area, including continuing Chinese incursions in the vicinity of the Senkaku Islands.

In Southeast Asia, the Department's first priority is working together with our allies and partners to develop the most effective mix of capabilities to provide credible maritime defenses and patrol capabilities. At the Shangri-La Dialogue on May 30, 2015, Secretary Carter announced the Southeast Asia Maritime Security Initiative, a new effort to work together with our allies and partners in Southeast Asia to build greater regional capacity to address a range of maritime challenges.[106] As part of this initiative, DoD, in coordination with the Department of State, will consult with our allies and partners to ascertain their needs and requirements more effectively and to explore new opportunities for maritime collaboration. In particular, we are focused on several lines of effort: working with partners to expand regional maritime domain awareness capabilities, with an effort to work towards a regional common operating picture; providing the necessary infrastructure, logistics support, and operational procedures to enable more effective maritime response operations; further strengthening partner nation operational capabilities and resilience by deepening and expanding bilateral and regional maritime

[106] On May 30, 2015, in a speech at an international conference on security, Secretary of Defense Ashton Carter stated: "Today, I am pleased to announce that DoD will be launching a new Southeast Asia Maritime Security Initiative. And thanks to the leadership of the Senators here today… [ellipse as in original] and others, Congress has taken steps to authorize up to $425 million dollars for these maritime capacity-building efforts." (Secretary of Defense Speech, IISS Shangri-La Dialogue: "A Regional Security Architecture Where Everyone Rises," As Delivered by Secretary of Defense Ash Carter, Singapore, Saturday, May 30, 2015, accessed August 7, 2015, at http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1945. See also Prashanth Parameswaran, "America's New Maritime Security Initiative for Southeast Asia," *The Diplomat*, April 2, 2016; Prashanth Parameswaran, "US Launches New Maritime Security Initiative at Shangri-La Dialogue 2015," *The Diplomat*, June 2, 2015; Aaron Mehta, "Carter Announces $425M In Pacific Partnership Funding," *Defense News*, May 30, 2015.

Carter's reference to the authorization of up to $425 million appears to be a reference to the South China Sea Initiative, an effort that would be created by Section 1261 of the Senate-passed version of H.R. 1735, the FY2016 National Defense Authorization Act (see "Legislative Activity in 2017").

exercises and engagements; helping partners strengthen their maritime institutions, governance, and personnel training; and identifying modernization or new system requirements for critical maritime security capabilities. To support this initiative, the Department is working to maximize and rebalance Title 10 security cooperation resources to prioritize the Southeast Asia region more effectively.

Even before this initiative, and in conjunction with the Department of State and the U.S. Coast Guard, we have dramatically expanded our maritime security assistance in recent years. In the Philippines, the Department is providing coastal radar systems and assisting the Department of State with naval maintenance capacity building as well as providing interdiction vessels, naval fleet upgrades, communications equipment, and aircraft procurement. We are helping Vietnam bolster its maritime ISR and command and control within their maritime agencies, and we are working with Malaysia to build maritime law enforcement training capacity and interagency coordination to help improve their maritime domain awareness. The Department also is working with Indonesia to increase its patrol capacity, ISR integration, and maintenance capability. In 2015, we established new bilateral working groups with both Indonesia and Vietnam to help clarify their maritime defense requirements.

An additional priority for the Department is helping our partners develop the institutional structures and procedures necessary to manage their growing maritime forces effectively. This includes establishing unified maritime agencies, such as the Malaysian Maritime Enforcement Agency (MMEA), as well as developing standard training protocols and procedures for maritime personnel. For example, the Defense Threat Reduction Agency (DTRA) is helping to construct a Philippine National Coast Watch Center in Manila that will assist the Philippine Coast Guard (PCG) in assuming increased responsibility for enhancing information sharing and interagency coordination in maritime security operations. Brunei, Indonesia, Malaysia, and Vietnam are similarly improving their maritime capabilities.

One of the Department's top priorities is to promote greater maritime domain awareness, which is an essential capability for all coastal States. Given the size of the Asian maritime domain, no coastal State can provide effective maritime domain awareness on its own. This is why DoD is working closely with partners in the Asia-Pacific region to encourage greater information sharing and the establishment of a regional maritime domain awareness network that could provide a common operating picture and real-time dissemination of data. Singapore has been a leading partner in this effort. Together, we have established the Singapore Maritime Information-Sharing Working Group, an ideal platform to share best practices and lessons learned from recent regional maritime activities and explore options for increased information sharing across partnerships in the Asia-Pacific region. The near-term iterations of the working group will be bilateral and then expand to include other regional partners to participate in this community of interest. The United States and Singapore also are working together to support Singapore's development of the Information Fusion Center (IFC) into an interagency information-sharing hub for the region.

A key element of DoD's approach to maritime security in Southeast Asia is to work alongside capable regional partners. There is broad regional agreement on the importance of maritime security and maritime domain awareness, and we're working closely with our friends in Australia, Japan, South Korea, and elsewhere to coordinate and amplify our efforts toward promoting peace, stability, and prosperity in Asia. In part, we are partnering trilaterally to achieve these goals. In November 2014, President Obama, Prime Minister Abe, and Prime Minister Abbott hosted their first trilateral meeting and agreed to expand maritime cooperation, trilateral exercises, and defense development. The Department is working with these two allies in a coordinated fashion to maximize the

> efficiency and effectiveness of our maritime security capacity building efforts in Southeast Asia, beginning with the Philippines.[107]

Figure 5 shows a table that DOD presented in connection with the passage quoted above.

Figure 5. Table from August 2015 DOD Report

Select DoD Maritime Capacity Building Efforts in Southeast Asia

	Initiative	Authority	Timeframe
Indonesia	Ministry of Defense Technical Expert.	Section 1081 Ministry of Defense Advisor Program (MoDA)	Arrived March 2015
	Integrated Maritime Surveillance System (IMSS): 18 coastal surveillance stations, 11 ship-based radars, 2 regional and 2 fleet command centers ($51M) Note: FMF provided sustainment and integration in following years.	Section 1206 of the National Defense Authorization Act (NDAA) for FY 2006, as amended (Section 1206)	Funded FY2006-2008 Delivered 2011
	Reform of defense planning, defense strategy, and budget development and execution system and processes.	Defense Institution Reform Initiative (DIRI)	2013 to present
	Upgrade TNI Bell helicopters and Navy Special Forces Equipment, including 12 RHIBs ($27M).	Section 1206	2010 funding, RHIBs delivered 2012
Malaysia	Integrated Maritime Surveillance System: 8 coastal surveillance radar stations, 28 small boats and associated maritime interdiction training, Joint Regional Command Center ($42M).	Section 1206	Funded FY2007, 2008, 2011 Delivered 2010-2011
Philippines	National Coast Watch Center ($19M).	Cooperative Threat Reduction Program	2013-2017
	Coast Watch Radar System.	Section 1206	
	Reform of defense planning system.	DIRI	2005-2012
Vietnam	Provision of WMD detection equipment; improved communications; construct coast guard training center; maritime security workshops ($21M).	Cooperative Threat Reduction Program	FY2014-2015
	Law enforcement, advisory, and boat maintenance training ($405K).	Counternarcotics and Global Threats Authority	FY2014-2015

Source: Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, p. 27.

April 2016 Press Report on U.S. Actions

An April 18, 2016, press report on U.S. actions to bolster the maritime security capabilities of Southeast Asian countries stated:

[107] Department of Defense, *Asia-Pacific Maritime Security Strategy*, undated but released August 2015, pp. 25-28.

> Defense Secretary Ash Carter said the department recently released funding under the Maritime Security Initiative, which totals $425 million total over five years. Nearly 85 percent of this year's funding, about $42 million of $50 million total, will go to the Philippines....
>
> The Maritime Security Initiative will "enable our partners in the South China Sea (SCS) region to detect activity within their sovereign territorial domain more effectively, share information with domestic and international partners, and contribute to regional peace and security," according to a summary of the Fiscal Year 2016 Southeast Asia Maritime Security Initiative programs obtained by USNI News. FY 2016 projects, costing about $50 million, are meant to help the Philippines, Vietnam, Malaysia, Indonesia and Thailand increase maritime security and maritime domain awareness, while also working with Brunei, Singapore and Taiwan on training and headquarter-level integration.
>
> Philippines
>
> MSI funds four separate projects between the United States and the Philippines this year, costing nearly $42 million.
>
> First, to assist Filipino military and law enforcement organizations, a maritime and joint operations center support project will "provide automatic identification systems (AIS) sensors, communications-network enhancements (software and hardware), and training to increase and strengthen the command and control (C2) relationships among the individual capabilities of the Armed Forces of the Philippines (AFP), the Philippines Coast Guard, and the Philippines National Coast Watch Center (NCWC)."
>
> The Navy's Space and Naval Warfare Systems Command (SPAWAR) will oversee the biggest part of this project – equipment upgrades for the three organizations to create a common operating picture, worth nearly $15 million....
>
> Second in the summary of projects is a maritime intelligence, surveillance and reconnaissance (ISR) improvement project worth nearly $18 million....
>
> In a third program, Naval Sea Systems Command (NAVSEA) will help determine what command, control, communications, and computers (C4) may be needed for Hamilton-class high- endurance cutters the Philippines bought from the U.S. Coast Guard under the Excess Defense Articles program....
>
> Vietnam
>
> The Pentagon included nearly $1.8 million for programs with Vietnam, primarily to understand what Vietnam's current capabilities are and assess what might be useful in the FY 2017 MSI programs....
>
> Malaysia
>
> SPAWAR will outfit Malaysia with $1.2 million in secure communications and an expanded Malaysia Armed Forces (MAF) common operating picture to connect the Royal Malaysian Flight Operations Center, Operational Forces, and MAF headquarters....
>
> Indonesia

U.S. Pacific Command will help outfit operations centers with commercial off-the-shelf (COTS) mobile devices with Android applications for data collection, assessment, analysis, and dissemination to Indonesia Maritime Command Centers.[108]

[108] Megan Eckstein, "The Philippines at Forefront of New Pentagon Maritime Security Initiative," *USNI News*, April 18, 2016 (updated April 17, 2016).

Actions Announced in November 2015

A fact sheet released by the Obama Administration on November 17, 2015, stated:

> We are increasing the maritime security capacity of our allies and partners, to respond to threats in waters off their coasts and to provide maritime security more broadly across the region. We are not only focused on boosting capabilities, but also helping our partners develop the necessary infrastructure and logistical support, strengthen institutions, and enhance practical skills to develop sustainable and capable maritime forces.
>
> **Advancing Maritime Capabilities**
>
> *We are expanding our regional maritime capacity building efforts by:*
>
> — Committing $119 million in FY 2015 to develop Southeast Asian maritime capabilities and will seek to provide $140 million in assistance during FY 2016 subject to appropriation, totaling more than $250 million over two years.
>
> — Developing regional maritime security programs and funds to rapidly respond to evolving challenges.
>
> — Pursuing the Southeast Asia Maritime Security Initiative announced by Secretary of Defense Ash Carter at the Shangri-La Dialogue, a new effort to work together with our allies and partners in Southeast Asia to build a shared maritime domain awareness architecture that will help countries share information, identify potential threats, and work collaboratively to address common challenges.
>
> — Coordinating with our strong allies Japan and Australia on maritime security assistance to align and synchronize regional security and law enforcement assistance programs for maximum effect.
>
> — Funding will be allocated to Southeast Asian countries, including the Philippines, Vietnam, Indonesia, and Malaysia, including as described below.
>
> *The United States is expanding its maritime cooperation with the Philippines:*
>
> — The Philippines remains the largest recipient of maritime security assistance, and will receive a record $79 million in bilateral assistance of the FY 2015 funds allocated for developing Southeast Asian maritime capabilities. This assistance is largely focused on building the training and logistical base for expanding the Philippine Navy, Coast Guard, and Air Forces' ability to conduct operations within waters off the Philippines' coasts. We are assisting with naval maintenance capacity building as well as providing interdiction vessels, naval fleet upgrades, communications equipment, and aircraft procurement.
>
> — We are prioritizing transfer of maritime related Excess Defense Articles (EDA) to rapidly enhance capability within limited budgets. The United States intends to grant the high-endurance U.S. Coast Guard Cutter (USCGC) Boutwell to the Philippine Navy, the third ship of its class that we have provided in the past few years. This will provide the Philippines the ability to maintain greater maritime presence and patrols throughout its EEZ. We are also in the process of transferring the research vessel R/V Melville to support naval research and law enforcement capabilities.
>
> — We will continue to support the National Coast Watch System and assist the Philippines through the Global Security Contingency Fund (GSCF), building capacity in Philippine maritime vessel maintenance, training, law enforcement support, and intelligence assistance to expand the country's ability to detect, track, and interdict where necessary criminal and terrorist elements involved in the smuggling of sensitive items and illicit goods.

— We will hold increased and more complex exercises and training with U.S. government agencies and U.S. Pacific Command to increase interoperability and professionalization.

— We will continue assisting improvements in security at ports to prevent illegal activity and illegal shipments.

The United States is expanding its maritime assistance to Vietnam by:

— Increasing maritime program assistance to $19.6 million in FY 2015 to support developing Southeast Asian maritime capabilities which we will seek to expand by providing $20.5 million in FY 2016 subject to appropriation. We are helping Vietnam bolster its maritime Intelligence, Surveillance, and Reconnaissance (ISR) and command and control within Vietnam's maritime agencies.

— Lifting the ban on sales of maritime-related lethal capabilities to allow development of Vietnam's maritime capacity and encourage interoperability with other regional forces.

— Expanding bilateral training and exercises, focusing on disaster relief and humanitarian issues.

The United States is expanding its maritime assistance to Indonesia by:

— Maintaining robust security assistance programs, with nearly $11 million in maritime-related assistance in FY 2015 and almost $10 million planned for FY 2016 subject to appropriations.

— Increasing Indonesia's patrol capacity, ISR integration, and maintenance capacity to enhance the Indonesian government's ability to protect its maritime areas, safeguard its natural resources, and contribute to regional security and stability.

— Supporting the Indonesian Coast Guard's organizational development, focusing on human resource capacity, technical skills, and educational partnerships.

The United States is assisting Malaysia by:

— Providing almost $500,000 in FY 2015 and planning to provide over $2 million in FY 2016, subject to appropriation, to work with Malaysia to build maritime law enforcement training capacity and interagency coordination to help improve their maritime domain awareness.

— Enhancing port security to prevent illicit activity and transshipment of illegal goods.[109]

Freedom of Navigation (FON) Operations in SCS

At a September 17, 2015, hearing before the Senate Armed Services Committee on DOD's maritime security strategy in the Asia-Pacific region, DOD witnesses stated, in response to questioning, that the United States had not conducted a freedom of navigation (FON) operation

[109] "FACT SHEET: U.S. Building Maritime Capacity in Southeast Asia," November 17, 2015, accessed November 24, 2015, at https://www.whitehouse.gov/the-press-office/2015/11/17/fact-sheet-us-building-maritime-capacity-southeast-asia. For press reports on these actions, see, for example, Michael D. Shear, "China in Mind, Obama Pledges Military Aid to Allies in Southeast Asia," *New York Times*, November 17, 2015; Josh Lederman and Kathleen Hennessey, "In Signal to China, Obama to Give 2 Ships to Philippines," *Associated Press*, November 17, 2015; Philippine News Agency, "US Identifies 2 Ships to be Given to PHL," *Manila Bulletin*, November 18, 2015; Manuel Mogato, "U.S. Raises Military Aid to Philippines Amid Sea Tension with China," *Reuters*, November 25, 2015.

See also "FACT SHEET: Advancing the Rebalance to Asia and the Pacific," November 16, 2015, accessed November 24, 2015, at https://www.whitehouse.gov/the-press-office/2015/11/16/fact-sheet-advancing-rebalance-asia-and-pacific.

within 12 miles of a Chinese-occupied land feature in the Spratly Islands since 2012. This led to a public debate in the United States (that was watched by observers in the Western Pacific) over whether the United States should soon conduct such an operation. Opponents argued that conducting such an operation could antagonize China[110] and give China an excuse to militarize its occupied sites in the SCS.[111] Supporters argued that *not* conducting such an operation was inconsistent with the underlying premise of the U.S. FON program that navigational rights which are not regularly exercised are at risk of atrophy; that it was inconsistent with the U.S. position of taking no position on competing claims to sovereignty over disputed land features in the SCS (because it tacitly accepts Chinese sovereignty over those features); that it effectively rewarded (rather than imposed costs on) China for its assertive actions in the SCS, potentially encouraging further such actions; and that China intends to militarize its occupied sites in the Spratly Islands, regardless of whether the United States conducts FON operations there.

The Obama Administration reportedly considered, for a period of weeks, whether to conduct such an operation in the near future. Some observers argued that the Obama Administration's extended consideration of the question, and the press reporting on that deliberation, unnecessarily raised the political stakes involved in whether to conduct what, in the view of these observers, should have been a routine FON operation.[112]

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

Statements from executive branch sources about the operation that were reported in the press created some confusion among observers regarding how the operation was conducted and what rationale the Obama Administration was citing as the legal basis for the operation. In particular, there was confusion among observers as to whether the United States was defending the operation as an expression of the right of innocent passage[113]—a rationale, critics argued, that would

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[110] A September 18, 2015, press report, for example, stated:

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

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

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

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

[113] See, for example, Christopher P. Cavas, "Navy Chiefs Talk, New Details On Destroyer's Passage," *Defense News*, (continued...)

muddle the legal message sent by the operation, possibly implying U.S. acceptance of Chinese sovereignty over Subi Reef, which would inadvertently turn the operation into something very different and perhaps even self-defeating from a U.S. perspective.[114]

A second FON operation in the SCS was conducted on January 29, 2016, near Triton Island in the Paracel Islands, by the U.S. Navy destroyer C*urtis Wilber*.[115] A third FON operation in the SCS was conducted on May 10, 2016, in which the destroyer *William P. Lawrence* conducted an innocent passage within 12 nautical miles of Fiery Cross Reef, a Chinese-occupied feature in the Spratly Islands that is also claimed by Taiwan, Vietnam, and the Philippines.[116] A fourth FON operation in the SCS occurred on October 21, 2016, involving the destroyer *Decatur* operating near the Paracel Islands.[117] This was the final announced FON operation in the South China Sea during the Obama Administration.

(...continued)

October 31, 2015; Sam LaGrone, "U.S. Destroyer Made an 'Innocent Passage' Near Chinese South China Sea Artificial Island in Recent Mission," *USNI News*, November 2, 2015; David Bosco, "How Far Did the United States Go with the Lassen Operation?" *Lawfare*, November 3, 2015; Adam Klein, "An Answer to the Innocent Passage Mystery?" *Lawfare*, November 6, 2015.

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

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

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

[117] Idrees Ali and Matt Spetalnick, "U.S. Warship Challenges China's Claims in South China Sea—Officials," *Reuters*, October 21, 2016; Sam LaGrone, "U.S. Warship Conducts South China Sea Freedom of Navigation Operation," *USNI*

(continued...)

As of early May 2017, the Trump Administration had not conducted any announced FON operations in the SCS, and the Department of Defense reportedly had turned down proposals from the Navy to conduct such operations, prompting some observers to argue that the Trump Administration, in its first few months in office, appeared to be more hesitant about conducting FON operations in the SCS than the Obama Administration was during its final 15 months in office (i.e., since October 2015).[118] DOD officials stated that in spite of the absence of announced FON operations in the SCS, U.S. policy on such operations had not changed, and that the United States intended to conduct FON operations in the SCS in the near future.[119]

On May 25, 2017, the Navy conducted a FON operation, sending the U.S. Navy destroyer *Dewey* within six nautical miles of Mischief Reef, a low-tide elevation in the Spratly Islands that China has, through reclamation and construction activities, turned into an artificial island with a long aircraft runway and other facilities.[120] Chinese officials state that Chinese warships warned the *Dewey* to leave the area.[121]

On July 2, 2017, the Navy conducted another FON operation, sending the destroyer *Stethem* (DDG-63) within 12 nautical miles of Triton Island in the Paracels. Chinese officials stated that they sent ships and aircraft to area to warn the *Stethem* to leave the area.[122]

On August 10, 2017, the Navy conducted another FON operation, sending the destroyer *John S. McCain* (DDG-56) within 12 nautical miles of Mischief Reef. Chinese press reports stated that Chinese forces repeatedly warned the *McCain* to leave the area.[123]

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News, October 21, 2016; David B. Larter, "U.S. Destroyer Challenges China's Claims in the South China Sea," *Navy Times*, October 21, 2016; Matthew Pennington, "US Navy Destroyer Operates in Waters Claimed by China," *Military.com*, October 22, 2016; Ankit Panda, "South China Sea: US Navy Destroyer Asserts Freedom of Navigation in Paracel Islands," *The Diplomat*, October 22, 2016.

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

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

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

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

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

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

[123] See, for example, Sam LaGrone, "USS John S. McCain Conducts South China Sea Freedom of Navigation (continued...)

A June 18, 2017, press report states:

> US efforts to contest maritime claims by Beijing in the South China Sea remain unchanged under the administration of Donald Trump, according to a senior US naval officer.
>
> But while the US is continuing "freedom of navigation operations" (Fonops) by warships, the country's military is being quieter about the strategy.
>
> Speaking during a visit to China, Admiral Scott Swift, commander of the US Pacific Fleet, confirmed the policy of talking less about efforts to challenge China's maritime claims.
>
> "I think it's a very positive step that current policy . . . is that we're not going to talk about freedom of navigation operations in the South China Sea," he said in an interview aboard the USS Sterett, a destroyer that visited the Chinese Southern Naval base in Zhanjiang last week....
>
> Under the administration of Barack Obama, the US had begun to publicise such operations, partly as a way to reassure its allies in the region, said Bonnie Glaser, an expert on China at the Center for Strategic and International Studies in Washington.
>
> Under the Trump administration, she said, "a decision was made to not discuss" Fonops....
>
> Since 2013 the US has conducted an average of two such operations per year against Chinese claims, according to a US Navy spokesperson. "I don't see how those operations in the South China Sea should be viewed from a navy perspective as any more consequential than they are anywhere else," said Admiral Swift. The quieter approach equated to a softer US posture in the region, he added.[124]

A July 20, 2017, press report states that

> President Trump approved a Pentagon plan this year that will require regular challenges to China's excessive maritime claims in the South China Sea, Breitbart News has learned.
>
> Defense Secretary Jim Mattis sent the plan to the White House in April that outlines a schedule for the whole year of when U.S. Navy ships will sail through international waters China illegally claims, according to a U.S. official....
>
> Under the new plan, the White House will already be aware of the planned operations so that they will not be "a surprise" every time a request comes up the chain of command, and they will be approved faster than before, the official said.
>
> Having them approved faster will allow the operations to be conducted on a "very routine, very regular" basis, with the benefit of making each operation part of a regular program to keep the waters open, versus a "one-off event."...
>
> Under the plan, FONOP requests will begin with the U.S. Navy's 7th Fleet, go up to Pacific Fleet, to Pacific Command, to the Pentagon, and then to the National Security Council.

(...continued)

Operation Past Mischief Reef; 3rd South China Sea FONOP This Year," *USNI News*, August 10, 2017; "South China Sea: Chinese Military Tells US Ship 10 Times to Turn Around," *Guardian (UK)*, August 10, 2017; Chris Buckley, "Beijing Warns U.S. Over Navy Patrol in South China Sea," New York Times, August 11, 2017.

[124] Charles Clover, "US Navy Adopts Lower-Key Approach in South China Sea," *Financial Times*, June 18, 2017.

> The Pentagon will also send the requests to the State Department the same time they are sent to the NSC, to make sure they do not undermine any concurrent diplomatic initiatives, the official said....
>
> Early on in the Trump administration, FONOP requests being sent to the Pentagon were not being approved and forwarded to the White House, as first reported by Breitbart News in March, and later by the New York Times in May.
>
> The official said at the time that Mattis did not want to approve and send up any piecemeal requests to the White House until an overall plan could be devised.[125]

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,**

[125] Kristina Wong: Exclusive: Trump's Pentagon Plans to Challenge Chinese Claims in South China Sea," *Breitbart*, July 20, 2017.

although the owner of features may maintain a 500-meter vessel traffic management zone to ensure navigational safety."

- Regarding features in the water whose sovereignty has been resolved and which do qualify for a 12-nautical-mile territorial sea, "**Warships and commercial vessels of all nations are entitled to conduct transit in innocent passage in the territorial sea** of a rock or island of a coastal state, although aircraft do not enjoy such a right."[126]

These three legal points appear to create at least four options for the rationale to cite as the legal basis for conducting an FON operation within 12 miles of Chinese-occupied sites in the SCS:

- One option would be to state that since there is a dispute as to the sovereignty of the site or sites in question, that site or those sites are *terra nullius*, that the United States consequently is not obligated to observe requirements of a theoretical territorial sea, and that U.S. warships thus have a right to transit within 12 nautical miles of the site or sites as an exercise of high seas freedom under article 87 of the Law of the Sea Convention.
- A second option, if the site or sites were LTEs prior to undergoing land reclamation, would be to state that the site or sites are not entitled to a 12-nautical-mile territorial sea, and that U.S. warships consequently have a right to transit within 12 nautical miles as an exercise of high seas freedom.
- A third option would be to state that the operation was being conducted under the right of innocent passage within a 12-nautical-mile territorial sea.
- A fourth option would be to not provide a public rationale for the operation, so as to create uncertainty for China (and perhaps other observers) as to exact U.S. legal rationale.

If the fourth option is not taken, and consideration is given to selecting from among the first three options, then it might be argued that choosing the second option might inadvertently send a signal to observers that the legal point associated with the first option was not being defended, and that choosing the third option might inadvertently send a signal to observers that the legal points associated with the first and second options were not being defended.[127]

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

> 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....

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

[127] See, for example, 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.

The Pentagon said the U.S. warship did a simple military exercise while close to the artificial island—executing a "man overboard" rescue drill. Such drills may not be conducted in innocent passage, and therefore indicate the Dewey exercised high seas freedoms near Mischief Reef. The U.S. exercise of high seas freedoms around Mischief Reef broadly repudiates China's claims of sovereignty over the feature and its surrounding waters. The operation stands in contrast to the flubbed transit by the USS Lassen near Subi Reef on October 27, 2015, when it appeared the warship conducted transit in innocent passage and inadvertently suggested that the feature generated a territorial sea (by China or some other claimant). That operation was roundly criticized for playing into China's hands, with the muddy legal rationale diluting the strategic message. In the case of the Dewey, the Pentagon made clear that it did not accept a territorial sea around Mischief Reef—by China or any other state. The United States has shoehorned a rejection of China's sovereignty over Mischief Reef into a routine FON operation.

Mischief Reef is not entitled to a territorial sea for several reasons. First, the feature is not under the sovereignty of any state. Mid-ocean low-tide elevations are incapable of appropriation, so China's vast port and airfield complex on the feature are without legal effect. The feature lies 135 nautical miles from Palawan Island, and therefore is part of the Philippine continental shelf. The Philippines enjoys sovereign rights and jurisdiction over the feature, including all of its living and non-living resources....

Second, even if Mischief Reef were a naturally formed island, it still would not be entitled to a territorial sea until such time as title to the feature was determined. Title may be negotiated, arbitrated or adjudicated through litigation. But mere assertion of a claim by China is insufficient to generate lawful title. (If suddenly a new state steps forward to claim the feature—Britain, perhaps, based on colonial presence—would it be entitled to the presumption of a territorial sea?) Even Antarctica, an entire continent, does not automatically generate a territorial sea. A territorial sea is a function of state sovereignty, and until sovereignty is lawfully obtained, no territorial sea inures.

Third, no state, including China, has established baselines around Mischief Reef in accordance with article 3 of UNCLOS. A territorial sea is measured from baselines; without baselines, there can be no territorial sea. What is the policy rationale for this construction? Baselines place the international community on notice that the coastal state has a reasonable and lawful departure from which to measure the breadth of the territorial sea. Unlike the USS Lassen operation, which appeared to be a challenge to some theoretical or "phantom" territorial sea, the Dewey transit properly reflects the high seas nature of the waters immediately surrounding Mischief Reef as high seas.

As a feature on the Philippine continental shelf, Mischief Reef is not only incapable of ever generating a territorial sea but also devoid of national airspace. Aircraft of all nations may freely overfly Mischief Reef, just as warships and commercial ships may transit as close to the shoreline as is safe and practical.

The Dewey transit makes good on President Obama's declaration in 2016 that the Annex VII tribunal for the Philippines and China issued a "final and binding" decision....

The United States will include the Dewey transit on its annual list of FON operations for fiscal year 2017, which will be released in the fourth quarter or early next year. How will the Pentagon account for the operation—what was challenged? The Dewey challenged China's claim of "indisputable sovereignty" to Mischief Reef as one of the features in the South China Sea, and China's claim of "adjacent" waters surrounding it. This transit cuts

> through the diplomatic dissembling that obfuscates the legal seascape and is the most tangible expression of the U.S. view that the arbitration ruling is "final and binding."[128]

Regarding this same FON operation, two other observers stated:

> The 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

[128] James Kraska, "Dewey Freedom of Navigation Operation Challenges China's Sovereignty to Mischief Reef," *Lawfare*, May 25, 2017. See also Ankit Panda, "The US Navy's First Trump-Era South China Sea FONOP Just Happened: First Takeaways and Analysis," *The Diplomat*, May 25, 2017.

> 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.[129]

Cost-Imposing Actions

Some of the actions taken to date by the United States, as well as some of those suggested by observers who argue in favor of stronger U.S. actions, are intended to impose costs on China for conducting certain activities in the ECS and SCS, with the aim of persuading China to stop or

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

reverse those activities. Cost-imposing actions can come in various forms (e.g., reputational/political, institutional, or economic).[130]

Although the potential additional or strengthened actions listed in the previous section all relate to the Western Pacific, potential cost-imposing actions do not necessarily need to be limited to that region. As a hypothetical example for purposes of illustrating the point, one potential cost-imposing action might be for the United States to respond to unwanted Chinese activities in the ECS or SCS by opposing the renewal of China's observer status on the Arctic Council.[131] Expanding the potential scope of cost-imposing actions to regions beyond the Western Pacific can make it possible to employ elements of U.S. power that cannot be fully exercised if the examination of potential cost-imposing strategies is confined to the Western Pacific. It may also, however, expand, geographically or otherwise, areas of tension or dispute between the United States and China.

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

Potential Further U.S. Actions Suggested by Observers

Some observers, viewing China's ongoing activities in its near-seas region, argue that the current U.S. strategy for countering China's salami-slicing strategy as outlined above is inadequate, and have proposed taking stronger actions. **Appendix D** presents a bibliography of some recent writings by these observers. In general, actions proposed by these observers include (but are not limited to) the following:

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

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

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

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

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

- further strengthening U.S. security cooperation with allied and partner countries in the region, and with India, to the point of creating a coalition for balancing China's assertiveness;[133] and
- taking additional actions to impose costs on China for its actions in its near-seas region, such as disinviting China to the 2016 RIMPAC (Rim of the Pacific) exercise, a U.S.-led multilateral naval exercise that takes place every two years, and/or inviting Taiwan to participate in the exercise.

Risk of United States Being Drawn into a Crisis or Conflict

Another potential issue for Congress is whether the United States has taken adequate actions to reduce the risk that the United States might be drawn into a crisis or conflict over a territorial dispute involving China. Potential oversight questions for Congress include the following:

- Have U.S. officials taken appropriate and sufficient steps to help reduce the risk of maritime territorial disputes in the SCS and ECS escalating into conflicts?
- Do the United States and Japan have a common understanding of potential U.S. actions under Article IV of the U.S.-Japan Treaty on Mutual Cooperation and Security (see **Appendix B**) in the event of a crisis or conflict over the Senkaku Islands? What steps has the United States taken to ensure that the two countries share a common understanding?
- Do the United States and the Philippines have a common understanding of how the 1951 U.S.-Philippines mutual defense treaty applies to maritime territories in the SCS that are claimed by both China and the Philippines, and of potential U.S. actions under Article IV of the treaty (see **Appendix B**) in the event of a crisis or conflict over the territories? What steps has the United States taken to ensure that the two countries share a common understanding?
- Aside from public statements, what has the United States communicated to China regarding potential U.S. actions under the two treaties in connection with maritime territorial disputes in the SCS and ECS?
- Has the United States correctly balanced ambiguity and explicitness in its communications to various parties regarding potential U.S. actions under the two defense treaties?
- How do the two treaties affect the behavior of Japan, the Philippines, and China in managing their territorial disputes? To what extent, for example, would they 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

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

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

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

Whether United States Should Ratify UNCLOS

Another issue for Congress—particularly the Senate—is the impact of maritime territorial and EEZ disputes involving China on the question of whether the United States should become a party to UNCLOS. As mentioned earlier, the treaty and an associated 1994 agreement relating to implementation of Part XI of the treaty (on deep seabed mining) were transmitted to the Senate on October 6, 1994.[134] In the absence of Senate advice and consent to adherence, the United States is not a party to the convention and the associated 1994 agreement. 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.[135]
- At least some of the ASEAN member states want the United States to become a member of UNCLOS, because they view it as the principal framework for resolving maritime territorial disputes.
- Relying on customary international law to defend U.S. interests in these issues is not sufficient, because it is not universally accepted and is subject to change over time based on state practice.

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

- 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[136] shows that UNCLOS does not adequately protect U.S.

[134] Treaty Document 103-39.

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

[136] 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 (continued...)

interests relating to navigational rights in EEZs; the United States should not help lock this inadequate description of navigational rights into permanent international law by becoming a party to the treaty.

- The United States becoming a party to the treaty would do little to help resolve maritime territorial disputes in the SCS and ECS, in part because China's maritime territorial claims, such as those depicted in the map of the nine-dash line, predate and go well beyond what is allowed under the treaty and appear rooted in arguments that are outside the treaty.
- The United States can adequately support the ASEAN countries and Japan in matters relating to maritime territorial disputes in the SCS and ECS in other ways, without becoming a party to the treaty.
- The United States can continue to defend its positions on navigational rights on the high seas by citing customary international law, by demonstrating those rights with U.S. naval deployments (including those conducted under the FON program), and by having allies and partners defend the U.S. position on the EEZ issue at meetings of UNCLOS parties.

Legislative Activity in 2017

FY2018 National Defense Authorization Act (H.R. 2810/S. 1519)

House Committee Report

In H.R. 2810 as reported by the House Armed Services Committee (H.Rept. 115-200 of July 6, 2017), **Section 1267** states:

> SEC. 1267. Sense of Congress on freedom of navigation operations in the South China Sea.
>
> It is the sense of Congress that—
>
> (1) the United States has a national interest in maintaining freedom of navigation, respect for international law, and unimpeded lawful commerce in the South China Sea;
>
> (2) the United States should condemn any assertion that limits the right to freedom of navigation and overflight; and
>
> (3) the United States should keep to a regular and routine schedule for freedom of navigation operations in the sea and air.

H.Rept. 115-200 states:

> Assessment of Freedom of Navigation Operations in the South China Sea
>
> The committee supports recent Freedom of Navigation Operations (FONOP) in the South China Sea that challenge arbitrary limitations that are in contravention of the United Nations Convention on the Law of the Sea. Therefore, the committee directs the Secretary of Defense, in consultation with the Secretary of State, to provide a report to the congressional defense committees, the Committee on Foreign Affairs of the House of Representatives, and the Committee on Foreign Relations of the Senate, not later than

(...continued)

Strategic & International Studies), September 11, 2015.

> November 30, 2017, that outlines U.S. policy and strategy regarding freedom of navigation in the global commons and a plan for conducting FONOPs in the South China Sea with regularity and frequency. The report shall be submitted in unclassified form but may contain a classified annex. (Page 198)

House Floor Action

On July 12, 2017, as part of its consideration of H.R. 2810, the House agreed to by voice vote H.Amdt. 176, an en bloc amendment that included, inter alia, amendment 75 as printed in H.Rept. 115-212 of July 11, 2017, on H.Res 431, providing for the consideration of H.R. 2810. As summarized by H.Rept. 115-212, Amendment 75 "Ensures the full reporting of freedom of navigation operations, including maritime claims that go unchallenged." The amendment became **Section 1289** of H.R. 2810 as passed by the House. Section 1289 states:

> SEC. 1289. Modification of annual update of Department of Defense Freedom of Navigation Operations report.
>
> (a) In general.—Subsection (b) of section 1275 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328; 130 Stat. 2540) is amended by adding at the end the following:
>
> "(4) For each country identified under paragraph (1) as making an excessive maritime claim challenged by the United States under the program referred to in subsection (a), the types and locations of excessive maritime claims by such country that have not been challenged by the United States, if any, under the program referred to in subsection (a).".
>
> (b) Effective date.—The amendment made subsection (a) takes effect of the date of the enactment of this Act and applies with respect to each report required to be submitted under section 1275 of the National Defense Authorization Act for Fiscal Year 2017 on or after such date of enactment.

Senate

In S. 1519 as reported by the Senate Armed Services Committee (S.Rept. 115-125 of July 10, 2017), Section 1261 states (emphasis added):

> SEC. 1261. Asia-Pacific Stability Initiative.
>
> (a) In general.—The Secretary of Defense may carry out a program of activities described in subsection (b) for the purpose of enhancing stability in the Asia-Pacific region. The program of activities shall be known as the "Asia-Pacific Stability Initiative".
>
> (b) Activities.—The activities described in this subsection are the following:
>
> (1) Activities to increase the presence and enhance the posture of the United States Armed Forces in the Asia-Pacific region.
>
> (2) Bilateral and multilateral military training and exercises with allies and partner nations in the Asia-Pacific region.
>
> (3) Activities to improve military and defense infrastructure in the Asia-Pacific region in order to enhance the responsiveness and capabilities of the United States Armed Forces in that region.
>
> (4) Activities to enhance the storage and pre-positioning in the Asia-Pacific region of equipment of the United States Armed Forces.
>
> (5) Activities to build the defense and security capacity of the United States Armed Forces in the Asia-Pacific region and, using the authorities specified in subsection (c), the defense and security capacity of allies and partner nations in that region.

(c) Activities To build defense and security capacity of allies and partner nations.—The activities to build the defense and security capacity of allies and partner nations in the Asia-Pacific region described in subsection (b)(5) may include activities under the authorities of the Department of Defense as follows:

(1) Section 2282 of title 10, United States Code, or section 333 of such title (its successor section), relating to authority to build the capacity of foreign security forces.

(2) Section 332 of title 10, United States Code, relating to defense institution capacity building for friendly foreign countries and international and regional organizations.

(3) Section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (10 U.S.C. 2282 note), relating to the Southeast Asia Maritime Security Initiative.

(4) Section 1206 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (10 U.S.C. 2282 note), relating to training of security forces and associated ministries of foreign countries to promote respect for the rule of law and human rights.

(5) Any other authority available to the Secretary of Defense for the purpose of building the defense and security capacity of allies and partner nations in the Asia-Pacific region.

(d) Transfer requirements.—

(1) USE OF FUNDS ONLY PURSUANT TO TRANSFER.—Funds available for the Asia-Pacific Stability Initiative may be used for activities described in subsections (b) and (c) only pursuant to a transfer of such funds to or among either or both of the following accounts of the Department of Defense:

(A) Military personnel accounts.

(B) Operation and maintenance accounts.

(2) EFFECT ON AUTHORIZATION AMOUNTS.—The transfer of an amount available for the Asia-Pacific Stability Initiative to an account under the authority provided by paragraph (1) in a fiscal year shall be deemed to increase the amount authorized for such account for such fiscal year by an amount equal to the amount transferred.

(3) CONSTRUCTION WITH OTHER TRANSFER AUTHORITY.—The transfer authority provided by paragraph (1) is in addition to any other transfer authority available to the Department of Defense by law.

(e) Notification requirements.—Not later than 15 days before that date on which a transfer of funds under subsection (d) takes effect, the Secretary of Defense shall notify the Committees on Armed Services of the Senate and the House of Representatives in writing of the transfer. Each notice of a transfer of funds shall include the following:

(1) A detailed description of the project or activity to be supported by the transfer of funds, including any request of the Commander of the United States Pacific Command for support, urgent operational need, or emergent operational need to be satisfied by the project or activity.

(2) The amount to be transferred and expended on the project or activity.

(3) A timeline for expenditure of the transferred funds.

(f) Funding.—Amounts for the Asia- Pacific Stability Initiative shall be derived from amounts authorized to be appropriated for fiscal year 2018 for the Department of Defense for operation and maintenance by section 301 and available for the Asia-Pacific Stability Initiative as specified in the funding table in section 4301.

(g) Duration of transfer authority.—The authority in subsection (d) to transfer funds expires September 30, 2019.

(h) Asia-Pacific region defined.—In this section, the term "Asia-Pacific region" means the region that falls under the responsibility and jurisdiction of United States Pacific Command.

Regarding Section 1261, S.Rept. 115-125 states:

Asia-Pacific Stability Initiative (sec. 1261)

The committee recommends a provision that would authorize the Secretary of Defense to establish the Asia-Pacific Stability Initiative and provide the necessary guidelines and authorities for the Department of Defense to execute and implement it. The recommended provision would outline the stated objective of the initiative, the authorized activities, and funding authorities to be used. The recommended provision would also ensure that the Department of Defense retains a maximum amount of flexibility in carrying out the initiative.

To ensure the security and prosperity of the region, and to enhance U.S. military power in the region, the United States must demonstrate that it intends to remain a significant guarantor of security through targeted funding to realign our force posture, improve operationally relevant infrastructure, fund additional exercises, pre-position equipment, and build capacity with our allies and partners.

During his testimony before the Senate Committee on Armed Services on April 27, 2017, Admiral Harry B. Harris, Jr., Commander of United States Pacific Command, stated that, "this effort will reassure our regional partners and send a strong signal to potential adversaries of our persistent commitment to the region." As the initiative evolves in the coming years, the committee expects to work closely with the Department to make this initiative a reality and secure the freedom and prosperity of the region for another generation. (Page 265)

Section 1265 of S. 1519 as reported states:

SEC. 1265. United States policy with respect to freedom of navigation operations and overflight beyond the territorial seas.

(a) Findings.—Congress makes the following findings:

(1) Since the Declaration of Independence in 1776, which was inspired in part as a response to a "tyrant" who "plundered our seas, ravaged our Coasts" and who wrote laws "for cutting off our Trade with all parts of the world", freedom of seas and promotion of international commerce have been core security interests of the United States.

(2) Article I, section 8 of the Constitution of the United States establishes enumerated powers for Congress, which include regulating commerce with foreign nations, punishing piracies and felonies committed on the high seas and offenses against the law of nations, and providing and maintaining a Navy.

(3) For centuries, the United States has maintained a commitment to ensuring the right to freedom of navigation for all law-abiding parties in every region of the world.

(4) In support of international law, the longstanding United States commitment to freedom of navigation and ensuring the free access to sea lanes to promote global commerce remains a core security interest of the United States.

(5) This is particularly true in areas of the world that are critical transportation corridors and key routes for global commerce, such as the South China Sea and the East China Sea, through which a significant portion of global commerce transits.

(6) The consistent exercise of freedom of navigation operations and overflights by United States naval and air forces throughout the world plays a critical role in safeguarding the freedom of the seas for all lawful nations, supporting international law, and ensuring the continued safe passage and promotion of global commerce and trade.

(b) Declaration of policy.—It is the policy of the United States to fly, sail, and operate throughout the oceans, seas, and airspace of the world wherever international law allows.

(c) Implementation of policy.—In furtherance of the policy set forth in subsection (b), the Secretary of Defense shall—

(1) plan and execute a robust series of routine and regular naval presence missions and freedom of navigation operations (FONOPs) throughout the world, including for critical transportation corridors and key routes for global commerce;

(2) execute, in such critical transportation corridors, routine and regular naval presence missions and maritime freedom of navigation operations throughout the year;

(3) in addition to the operations executed pursuant to paragraph (2), execute routine and regular maritime freedom of navigation operations throughout the year, in accordance with international law, including the use of expanded military options and maneuvers beyond innocent passage; and

(4) to the maximum extent practicable, execute freedom of navigation operations pursuant to this subsection with regional partner countries and allies of the United States.

Section 1266 of S. 1519 as reported states:

SEC. 1266. Sense of Congress on the importance of the rule of law in the South China Sea.

It is the sense of Congress that—

(1) the South China Sea is a vitally important waterway for global commerce and for regional security, with almost 30 percent of the maritime trade of the world transiting the South China Sea annually;

(2) the People's Republic of China is undermining regional security and prosperity and challenging international rules and norms by engaging in coercive activities and attempting to limit lawful foreign operations in the South China Sea;

(3) a tribunal determined "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," and that "Chinese law enforcement vessels had unlawfully created a serious risk of collision when they physically obstructed Philippine vessels";

(4) the arbitral tribunal award of July 2016 stated that there is "no legal basis for China to claim historic rights to resources within the sea areas falling within the nine-dash line"; and

(5) the United States should play a vital role in securing the South China Sea and ensuring freedom of navigation and overflight for all countries by undertaking freedom of navigation operations on a regular and consistent basis, as well as maintaining persistent presence operations in the region.

Regarding Section 1266, S.Rept. 115-125 states:

Sense of Congress on the importance of the rule of law in the South China Sea (sec. 1266)

The committee recommends a provision that would express a sense of Congress on the importance of maintaining the rule of law in the South China Sea. The committee notes that certain activities by China have recently called into question its commitment to the rule of law, and furthermore are continuing to destabilize the security of the region. Such actions directly threaten the national security interests of the United States. The committee also notes that a United Nations arbitral tribunal declared in July 2016 that

China has no legal basis to claim rights to the resources within its nine-dash line, invalidating the assertions of the Chinese government. The tribunal also went on to outline a number of actions that China had recently taken that were unlawful and created a serious risk of collision. These actions are alarming to the committee. These concerns are only compounded by the fact that the United States has taken only limited actions or operations in the last several months to ensure freedom of navigation and overflight in the South China Sea. As the United States has the unique capabilities to carry out such activities, the committee is concerned that the absence of such sends a signal to the Chinese government that their actions will go uncontested. The committee urges the United States government to play a vital role in securing the South China Sea and ensuring freedom of navigation. (Page 268)

Section 1267 of S. 1519 as reported states (emphasis added):

SEC. 1267. Sense of Congress on the importance of the relationship between the United States and Japan.

It is the sense of Congress that—

(1) the United States and Japan are indispensable partners in tackling global challenges, and have pledged significant support for efforts to counter violent extremism (including the threat of the Islamic State), combat the proliferation of weapons of mass destruction, prevent piracy, and assist the victims of conflict and disaster worldwide;

(2) the security alliance between the United States and Japan has evolved considerably over many decades and will continue to transform as a partnership, sharing greater responsibilities, dedicated to ensuring a secure and prosperous Asia-Pacific region and world;

(3) **the alliance between the United States and Japan is essential for ensuring maritime security and freedom of navigation, commerce, and overflight in the waters of the East China Sea**;

(4) **Japan, a cornerstone of peace in the Asia-Pacific region, stands as a strong partner of the United States in efforts to uphold respect for the rule of law and to oppose the use of coercion, intimidation, or force to change the regional or global status quo, including in the East China Sea and the South China Sea, which are among the busiest waterways in the world**;

(5) the United States and Japan are committed to working together towards a world in which the Democratic People's Republic of Korea (DPRK) does not threaten global peace and security with its weapons of mass destruction and illicit activities, and in which it respects human rights and its people can live in freedom;

(6) **the alliance between the United States and Japan should be strengthened to maintain peace and stability in the Asia-Pacific region and beyond, to confront emerging challenges, and to safeguard maritime security and ensure freedom of navigation, commerce, and overflight in the East China Sea and the South China Sea**;

(7) **although the United States Government does not take a position on sovereignty of the Senkaku Islands, the United States acknowledges that the islands are under the administration of Japan and opposes any unilateral actions that would seek to undermine their administration by Japan**; and

(8) **the unilateral actions of a third party will not affect the United States acknowledgment of the administration of Japan over the Senkaku Islands, and the United States remains committed under the Treaty of Mutual Cooperation and Security with Japan to respond to any armed attack in the territories under the administration of Japan**.

Section 1267, S.Rept. 115-125 states:

> **Sense of Congress on the importance of the relationship between the United States and Japan (sec. 1267)**
>
> The committee recommends a provision that would express the sense of Congress that the United States and Japan are indispensable partners and that our security alliance will continue to ensure a secure and prosperous region and world. The committee notes that the Government of Japan remains committed to our bilateral security relationship and that it is making all necessary contributions and actions to maintain our alliance.
>
> The committee also notes that certain threats in the Asia-Pacific region have been increasing recently and that countering those threats will depend even more on a strong partnership between our two countries. In recognition of these evolving regional dynamics and of Japan's unwavering commitment, the committee urges the Administration to make clear, unequivocal statements regarding our security relationship with Japan and about Japan's territorial integrity. (Page 268)

S.Rept. 115-125 states:

> **Southeast Asia Maritime Security Initiative**
>
> The committee continues to strongly support efforts under the Southeast Asia Maritime Security Initiative aimed at enhancing the capabilities of regional partners to more effectively exercise control over their maritime territory and to deter adversaries. The committee notes that to date, the Department of Defense has utilized the authority under section 1263 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92), as amended, to support specified partner capacity-building efforts in the region, to include the provision of training, sustainment support, and participation in multilateral engagements. The committee further notes that section 1241 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328) included a significant reform of the security cooperation authorities available to the Department intended to enhance the ability of the Department to respond to evolving security challenges with flexible authorities related to the provision of training, equipment, and other support to foreign security partners with mutual security interests and objectives.
>
> Of particular note, section 1241 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328) provides the Secretary of Defense with a permanent, global authority to provide training, equipment, and sustainment support to build the capacity of foreign security partners to perform counterterrorism operations, counter-weapons of mass destruction operations, counter-illicit trafficking operations, counter-transnational organized crime operations, maritime and border security operations, military intelligence operations, and operations or activities that contribute to an international coalition operation determined by the Secretary to be in the national interest of the United States.
>
> Additionally, sections 1241 through 1247 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328) included numerous other authorities intended to enhance security cooperation activities, including authorizing military-to-military exchanges and operational support to friendly foreign countries to enable ongoing operations. The committee believes these security cooperation authorities provide the Department with enhanced flexibility to operate effectively in a continuously evolving and complex global security environment. The committee further believes that these authorities are particularly relevant to the security environment in South Asia and Southeast Asia and directs the Department to make use of the full complement of security cooperation authorities available to the Department, particularly those under section 1241 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328), to enhance the capabilities of foreign security partners in the region to protect mutual security interests.

> To this end, the committee directs the Department to continue with the Maritime Security Initiative through the title 10 authorities for security cooperation established in the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328). In addition, the committee believes that, consistent with new authorities, the Secretary should expand the Department's efforts under the Maritime Security Initiative to encompass additional countries, including Bangladesh, Sri Lanka, and Burma. In addition, the Secretary should also include India among the countries eligible for payment of incremental expenses in connection with training under the Initiative. (Pages 276-277)

Strengthening Security in the Indo-Asia-Pacific Act (H.R. 2621)

House

H.R. 2621 was introduced on May 24, 2017. **Section 301** of H.R. 2621 as introduced states:

> SEC. 301. Assessment of freedom of navigation operations in the South China Sea.
>
> (a) Findings.—Congress finds the following:
>
> (1) The United States has a national interest in maintaining freedom of navigation, freedom of the seas, respect for international law, and unimpeded lawful commerce, in the South China Sea.
>
> (2) On February 4, 2017, Secretary of Defense James Mattis stated, "Freedom of navigation is absolute, and whether it be commercial shipping of our U.S. Navy, we will practice in international waters and transit international waters as appropriate.".
>
> (3) In February 24, 2016, Admiral Harry Harris, Jr., Commander of the United States Pacific Command, stated that "Chinese coercion, artificial island construction, and militarization in the South China Sea threaten the most fundamental aspect of global prosperity—freedom of navigation.".
>
> (4) In July 2016, the Permanent Court of Arbitration of the Hague ruled that China's claims to "historic rights" across a vast expanse of the South China Sea were not valid under the United Nations Convention on the Law of the Sea.
>
> (5) The Permanent Court also said that none of the land formations in the Spratly Islands in the South China Sea—regardless of the party in control—are large enough to warrant an extension of the exclusive maritime zones beyond the existing boundary of 12 miles from disputed features in the South China Sea.
>
> (6) The United States Navy has routinely conducted freedom of navigation operations within 12 miles of disputed features in the South China Sea.
>
> (7) On February 24, 2016, Admiral Harris stated that "these operations [freedom of navigation operations] are an important military tool to demonstrate America's commitment to the rule of law, including the fundamental concept of freedom of navigation".
>
> (b) Sense of congress.—It is the sense of Congress that—
>
> (1) the United States should condemn any assertion that limits the right to freedom of navigation and overflight; and
>
> (2) the United States should keep to a regular and routine schedule for Freedom of Navigation Operations in the sea and air.
>
> (c) Assessment required.—

(1) IN GENERAL.—The Secretary of Defense, in consultation with the Secretary of State, shall conduct an assessment of United States policy on conducting Freedom of Navigation Operation patrols in the South China Sea.

(2) ELEMENTS.—The assessment required under paragraph (1) shall include the following:

(A) A review of United States policy regarding freedom of navigation in the global commons, including in the South China Sea.

(B) A plan for conducting freedom of navigation operations in the South China Sea with regularity and frequency.

(d) Report required.—

(1) IN GENERAL.—Not later than September 30, 2017, the Secretary of Defense shall submit to the congressional defense committees, the Committee on Foreign Affairs of the House of Representatives, and the Committee on Foreign Relations of the Senate a report that includes the assessment required under subsection (c).

(2) FORM.—The report required under paragraph (1) shall be submitted in unclassified form and may include a classified annex.

South China Sea and East China Sea Sanctions Act of 2017 (S. 659)

Senate

S. 659 was introduced on March 15, 2017. The text of the bill is as follows:

SECTION 1. Short title; table of contents.

(a) Short title.—This Act may be cited as the "South China Sea and East China Sea Sanctions Act of 2017".

(b) Table of contents.—The table of contents for this Act is as follows:...

SEC. 2. Findings.

Congress makes the following [18] findings:...

SEC. 3. Definitions.

In this Act:

(1) ACCOUNT; CORRESPONDENT ACCOUNT; PAYABLE-THROUGH ACCOUNT.—The terms "account", "correspondent account", and "payable-through account" have the meanings given those terms in section 5318A of title 31, United States Code.

(2) ALIEN.—The term "alien" has the meaning given that term in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)).

(3) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term "appropriate congressional committees" means—

(A) the Committee on Foreign Relations, the Committee on Armed Services, the Committee on Banking, Housing, and Urban Affairs, and the Select Committee on Intelligence of the Senate; and

(B) the Committee on Foreign Affairs, the Committee on Armed Services, the Committee on Financial Services, and the Permanent Select Committee on Intelligence of the House of Representatives.

(4) CHINESE PERSON.—The term "Chinese person" means—

(A) an individual who is a citizen or national of the People's Republic of China; or

(B) an entity organized under the laws of the People's Republic of China or otherwise subject to the jurisdiction of the Government of the People's Republic of China.

(5) FINANCIAL INSTITUTION.—The term "financial institution" means a financial institution specified in subparagraph (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (K), (M), (N), (P), (R), (T), (Y), or (Z) of section 5312(a)(2) of title 31, United States Code.

(6) FOREIGN FINANCIAL INSTITUTION.—The term "foreign financial institution" has the meaning given that term in section 1010.605 of title 31, Code of Federal Regulations (or any corresponding similar regulation or ruling).

(7) KNOWINGLY.—The term "knowingly", with respect to conduct, a circumstance, or a result, means that a person has actual knowledge, or should have known, of the conduct, the circumstance, or the result.

(8) PERSON.—The term "person" means any individual or entity.

(9) UNITED STATES PERSON.—The term "United States person" means—

(A) a United States citizen or an alien lawfully admitted for permanent residence to the United States; or

(B) an entity organized under the laws of the United States or of any jurisdiction within the United States, including a foreign branch of such an entity.

SEC. 4. Policy of the United States with respect to the South China Sea and the East China Sea.

It is the policy of the United States—

(1) to support the principle that disputes between countries should be resolved peacefully consistent with international law;

(2) to reaffirm its unwavering commitment and support for allies and partners in the Asia-Pacific region, including longstanding United States policy—

(A) regarding Article V of the Mutual Defense Treaty, signed at Washington August 30, 1951 (3 UST 3947), between the United States and the Philippines; and

(B) that Article V of the Mutual Defense Assistance Agreement, with Annexes, signed at Tokyo March 8, 1954 (5 UST 661), between the United States and Japan, applies to the Senkaku Islands, which are administered by Japan; and

(3) to support the principle of freedom of navigation and overflight and to continue to use the sea and airspace wherever international law allows.

SEC. 5. Sense of Congress with respect to the South China Sea and the East China Sea.

It is the sense of Congress that—

(1) the United States—

(A) opposes all claims in the maritime domains that impinges on the rights, freedoms, and lawful use of the seas that belong to all countries;

(B) opposes unilateral actions by the government of any country seeking to change the status quo in the South China Sea through the use of coercion, intimidation, or military force;

(C) opposes actions by the government of any country to interfere in any way in the free use of waters and airspace in the South China Sea or East China Sea;

(D) opposes actions by the government of any country to prevent any other country from exercising its sovereign rights to the resources of the exclusive economic zone and continental shelf by making claims that have no support in international law; and

(E) upholds the principle that territorial and maritime claims, including with respect to territorial waters or territorial seas, must be derived from land features and otherwise comport with international law;

(2) the People's Republic of China should not continue to pursue illegitimate claims and to militarize an area that is essential to global security;

(3) the United States should—

(A) continue and expand freedom of navigation operations and overflights;

(B) reconsider the traditional policy of not taking a position on individual claims; and

(C) respond to provocations by the People's Republic of China with commensurate actions that impose costs on any attempts to undermine security in the region;

(4) the Senkaku Islands are covered by Article V of the Mutual Defense Assistance Agreement, with Annexes, signed at Tokyo March 8, 1954 (5 UST 661), between the United States and Japan; and

(5) the United States should firmly oppose any unilateral actions by the People's Republic of China that seek to undermine Japan's control of the Senkaku Islands.

SEC. 6. Sanctions with respect to Chinese persons responsible for China's activities in the South China Sea and the East China Sea.

(a) Initial imposition of sanctions.—On and after the date that is 60 days after the date of the enactment of this Act, the President shall impose the sanctions described in subsection (b) with respect to—

(1) any Chinese person that contributes to construction or development projects, including land reclamation, island-making, lighthouse construction, building of base stations for mobile communications services, building of electricity and fuel supply facilities, or civil infrastructure projects, in areas of the South China Sea contested by one or more members of the Association of Southeast Asian Nations;

(2) any Chinese person that is responsible for or complicit in, or has engaged in, directly or indirectly, actions or policies that threaten the peace, security, or stability of areas of the South China Sea contested by one or more members of the Association of Southeast Asian Nations or areas of the East China Sea administered by Japan or the Republic of Korea, including through the use of vessels and aircraft to impose the sovereignty of the People's Republic of China in those areas;

(3) any Chinese person that engages, or attempts to engage, in an activity or transaction that materially contributes to, or poses a risk of materially contributing to, an activity described in paragraph (1) or (2); and

(4) any person that—

(A) is owned or controlled by a person described in paragraph (1), (2), or (3);

(B) is acting for or on behalf of such a person; or

(C) provides, or attempts to provide—

(i) financial, material, technological, or other support to a person described in paragraph (1), (2), or (3); or

(ii) goods or services in support of an activity described in paragraph (1), (2), or (3).

(b) Sanctions described.—

(1) BLOCKING OF PROPERTY.—The President shall block, in accordance with the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), all transactions in all property and interests in property of any person subject to subsection (a) if such property and interests in property are in the United States, come within the United States, or are

(2) EXCLUSION FROM UNITED STATES.—The Secretary of State shall deny a visa to, and the Secretary of Homeland Security shall exclude from the United States, any person subject to subsection (a) that is an alien.

(3) CURRENT VISA REVOKED.—The issuing consular officer, the Secretary of State, or the Secretary of Homeland Security (or a designee of one of such Secretaries) shall revoke any visa or other entry documentation issued to any person subject to subsection (a) that is an alien, regardless of when issued. The revocation shall take effect immediately and shall automatically cancel any other valid visa or entry documentation that is in the alien's possession.

(c) Exceptions; penalties.—

(1) INAPPLICABILITY OF NATIONAL EMERGENCY REQUIREMENT.—The requirements of section 202 of the International Emergency Economic Powers Act (50 U.S.C. 1701) shall not apply for purposes of subsection (b)(1).

(2) COMPLIANCE WITH UNITED NATIONS HEADQUARTERS AGREEMENT.—Paragraphs (2) and (3) of subsection (b) shall not apply if admission to the United States is necessary to permit the United States to comply with the Agreement regarding the Headquarters of the United Nations, signed at Lake Success June 26, 1947, and entered into force November 21, 1947, between the United Nations and the United States.

(3) PENALTIES.—The penalties provided for in subsections (b) and (c) of section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) shall apply to a person that violates, attempts to violate, conspires to violate, or causes a violation of regulations prescribed under subsection (b)(1) to the same extent that such penalties apply to a person that commits an unlawful act described in subsection (a) of such section 206.

(d) Additional imposition of sanctions.—

(1) IN GENERAL.—The President shall prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States of a correspondent account or a payable-through account by a foreign financial institution that the President determines knowingly, on or after the date that is 60 days after the date of the enactment of this Act, conducts or facilitates a significant financial transaction for a person subject to subsection (a) if the Director of National Intelligence determines that the Government of the People's Republic of China has—

(A) declared an air defense identification zone over any part of the South China Sea;

(B) initiated reclamation work at another disputed location in the South China Sea, such as at Scarborough Shoal;

(C) seized control of Second Thomas Shoal;

(D) deployed surface-to-air missiles to any of the artificial islands the People's Republic of China has built in the Spratly Island chain, including Fiery Cross, Mischief, or Subi Reefs;

(E) established territorial baselines around the Spratly Island chain;

(F) increased harassment of Philippine vessels; or

(G) increased provocative actions against the Japanese Coast Guard or Maritime Self-Defense Force or United States forces in the East China Sea.

(2) REPORT.—

(A) IN GENERAL.—The determination of the Director of National Intelligence referred to in paragraph (1) shall be submitted in a report to the President and the appropriate congressional committees.

(B) FORM OF REPORT.—The report required by subparagraph (A) shall be submitted in unclassified form, but may include a classified annex.

SEC. 7. Determinations and report on Chinese companies active in the South China Sea and the East China Sea.

(a) In general.—The Secretary of State shall submit to the appropriate congressional committees a report that identifies each Chinese person the Secretary determines is engaged in the activities described in section 6(a).

(b) Consideration.—In preparing the report required under subsection (a), the Secretary of State shall make specific findings with respect to whether each of the following persons is involved in the activities described in section 6(a):

(1) CCCC Tianjin Dredging Co., Ltd.

(2) CCCC Dredging (Group) Company, Ltd.

(3) China Communications Construction Company (CCCC), Ltd.

(4) China Petroleum Corporation (Sinopec Group).

(5) China Mobile.

(6) China Telecom.

(7) China Southern Power Grid.

(8) CNFC Guangzhou Harbor Engineering Company.

(9) Zhanjiang South Project Construction Bureau.

(10) Hubei Jiangtian Construction Group.

(11) China Harbour Engineering Company (CHEC).

(12) Guangdong Navigation Group (GNG) Ocean Shipping.

(13) Shanghai Leading Energy Shipping.

(14) China National Offshore Oil Corporation (CNOOC).

(15) China Oilfield Services Limited (COSL).

(16) China Precision Machinery Import/Export Corporation (CPMIEC).

(17) China Aerospace Science and Industry Corporation (CASIC).

(18) Aviation Industry Corporation of China (AVIC).

(19) Shenyang Aircraft Corporation.

(20) Shaanxi Aircraft Corporation.

(21) China Ocean Shipping (Group) Company (COSCO).

(22) China Southern Airlines.

(23) Zhan Chaoying.

(24) Sany Group.

(25) Chinese persons affiliated with any of the entities specified in paragraphs (1) through (24).

(c) Submission and form.—

(1) SUBMISSION.—The report required by subsection (a) shall be submitted not later than 60 days after the date of the enactment of this Act and every 180 days thereafter until the date that is 3 years after the date of the enactment of this Act.

(2) FORM.—The report required by subsection (a) shall be submitted in unclassified form, but may include a classified annex if the Secretary of State determines it is necessary for the national security interests of the United States to do so.

(3) PUBLIC AVAILABILITY.—The Secretary of State shall publish the unclassified part of the report required by subsection (a) on a publicly available website of the Department of State.

SEC. 8. Prohibition against documents portraying the South China Sea or the East China Sea as part of China.

The Government Publishing Office may not publish any map, document, record, electronic resource, or other paper of the United States (other than materials relating to hearings held by committees of Congress or internal work product of a Federal agency) portraying or otherwise indicating that it is the position of the United States that the territory or airspace in the South China Sea contested by one or more members of the Association of Southeast Asian Nations or the territory or airspace of areas of the East China Sea administered by Japan or the Republic of Korea is part of the territory or airspace of the People's Republic of China.

SEC. 9. Prohibition on facilitating certain investments in the South China Sea or the East China Sea.

(a) In general.—No United States person may take any action to approve, facilitate, finance, or guarantee any investment, provide insurance, or underwriting in the South China Sea or the East China Sea that involves any person with respect to which sanctions are imposed under section 6(a).

(b) Enforcement.—The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to take such actions, including the promulgation of such rules and regulations, as may be necessary to carry out the purposes of this section.

(c) Penalties.—The penalties provided for in subsections (b) and (c) of section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) shall apply to a person that violates, attempts to violate, conspires to violate, or causes a violation of regulations prescribed under this section to the same extent that such penalties apply to a person that commits an unlawful act described in subsection (a) of such section 206.

(d) Exception.—Subsection (a) shall not apply with respect to humanitarian assistance, disaster assistance, or emergency food assistance.

SEC. 10. Department of Justice affirmation of non-recognition of annexation.

In any matter before any United States court, upon request of the court or any party to the matter, the Attorney General shall affirm the United States policy of not recognizing the de jure or de facto sovereignty of the People's Republic of China over territory or airspace contested by one or more members of the Association of Southeast Asian Nations in the South China Sea or the territory or airspace of areas of the East China Sea administered by Japan or the Republic of Korea.

SEC. 11. Non-recognition of Chinese sovereignty over the South China Sea or the East China Sea.

(a) United states armed forces.—The Secretary of Defense may not take any action, including any movement of aircraft or vessels that implies recognition of the sovereignty of the People's Republic of China over territory or airspace contested by one or more members of the Association of Southeast Asian Nations in the South China Sea or the territory or airspace of areas of the East China Sea administered by Japan or the Republic of Korea.

(b) United states flagged vessels.—No vessel that is issued a certificate of documentation under chapter 121 of title 46, United States Code, may take any action that implies recognition of the sovereignty of the People's Republic of China over territory or airspace contested by one or more members of the Association of Southeast Asian Nations in the South China Sea or the territory or airspace of areas of the East China Sea administered by Japan or the Republic of Korea.

(c) United states aircraft.—No aircraft operated by an air carrier that holds an air carrier certificate issued under chapter 411 of title 49, United States Code, may take any action that implies recognition of the sovereignty of the People's Republic of China over territory or airspace contested by one or more members of the Association of Southeast Asian Nations in the South China Sea or the territory or airspace of areas of the East China Sea administered by Japan or the Republic of Korea.

SEC. 12. Prohibition on certain assistance to countries that recognize Chinese sovereignty over the South China Sea or the East China Sea.

(a) Prohibition.—Except as provided by subsection (c) or (d), no amounts may be obligated or expended to provide foreign assistance to the government of any country identified in a report required by subsection (b).

(b) Report required.—

(1) IN GENERAL.—Not later than 60 days after the date of the enactment of this Act, and every 180 days thereafter until the date that is 3 years after such date of enactment, the Secretary of State shall submit to the appropriate congressional committees a report identifying each country that the Secretary determines recognizes, after the date of the enactment of this Act, the sovereignty of the People's Republic of China over territory or airspace contested by one or more members of the Association of Southeast Asian Nations in the South China Sea or the territory or airspace of areas of the East China Sea administered by Japan or the Republic of Korea.

(2) FORM.—The report required by paragraph (1) shall be submitted in unclassified form, but may include a classified annex if the Secretary of State determines it is necessary for the national security interests of the United States to do so.

(3) PUBLIC AVAILABILITY.—The Secretary of State shall publish the unclassified part of the report required by paragraph (1) on a publicly available website of the Department of State.

(c) Exception.—This section shall not apply with respect to Taiwan, humanitarian assistance, disaster assistance, emergency food assistance, or the Peace Corps.

(d) Waiver.—The President may waive the application of subsection (a) with respect to the government of a country if the President determines that the waiver is in the national interests of the United States.

Appendix A. Strategic Context from U.S. Perspective

This appendix presents a brief discussion of some elements of the strategic context from a U.S. perspective in which the maritime disputes discussed in this report may be considered. There is also a broader context of U.S.-China relations and U.S. foreign policy toward the Asia-Pacific that is covered in other CRS reports.[137]

Shift in International Security Environment

World events have led some observers, starting in late 2013, to conclude that the international security environment has undergone a shift from the familiar post-Cold War era of the last 20 to 25 years, also sometimes known as the unipolar moment (with the United States as the unipolar power), to a new and different situation that features, among other things, renewed great power competition with China and Russia and challenges by these two countries and others to elements of the U.S.-led international order that has operated since World War II.[138] China's actions to assert and defend its maritime territorial claims can be viewed as one reflection of that shift.

U.S. Grand Strategy

Discussion of the above-mentioned shift in the international security environment has led to a renewed emphasis in discussions of U.S. security and foreign policy on grand strategy and geopolitics. From a U.S. perspective, grand strategy can be understood as strategy considered at a global or interregional level, as opposed to strategies for specific countries, regions, or issues. Geopolitics refers to the influence on international relations and strategy of basic world geographic features such as the size and location of continents, oceans, and individual countries.

From a U.S. perspective on grand strategy and geopolitics, it can be noted that most of the world's people, resources, and economic activity are located not in the Western Hemisphere, but in the other hemisphere, particularly Eurasia. In response to this basic feature of world geography, U.S. policymakers for the last several decades have chosen to pursue, as a key element of U.S. grand strategy, a goal of preventing the emergence of a regional hegemon in one part of Eurasia or another, on the grounds that such a hegemon could represent a concentration of power strong enough to threaten core U.S. interests by, for example, denying the United States access to some of the other hemisphere's resources and economic activity. Although U.S. policymakers have not often stated this key national strategic goal explicitly in public, U.S. military (and diplomatic) operations in recent decades—both wartime operations and day-to-day operations—can be viewed as having been carried out in no small part in support of this key goal.[139]

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

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

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

U.S. Strategic Rebalancing to Asia-Pacific Region

A 2012 DOD strategic guidance document[140] and DOD's report on the 2014 Quadrennial Defense Review (QDR)[141] state that U.S. military strategy will place an increased emphasis on the Asia-Pacific region. Although Obama Administration officials stated that this U.S. strategic rebalancing toward the Asia-Pacific region, as it is called, is not directed at any single country, many observers believe it is intended to a significant degree as a response to China's military modernization effort and its assertive behavior regarding its maritime territorial claims.

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

Observers of Chinese and U.S. military forces view China's improving naval capabilities as posing a potential challenge in the Western Pacific to the U.S. Navy's ability to achieve and maintain control of blue-water ocean areas in wartime—the first such challenge the U.S. Navy has faced since the end of the Cold War.[142] More broadly, these observers view China's naval capabilities as a key element of an emerging broader Chinese military challenge to the long-standing status of the United States as the leading military power in the Western Pacific.[143]

Regional U.S. Allies and Partners

The United States has certain security-related policies pertaining to Taiwan under the Taiwan Relations Act (H.R. 2479/P.L. 96-8 of April 10, 1979).[144] The United States has bilateral security treaties with Japan, South Korea, and the Philippines, and an additional security treaty with Australia and New Zealand.[145] In addition to U.S. treaty allies, certain other countries in the Western Pacific can be viewed as current or emerging U.S. security partners.

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[140] Department of Defense, Sustaining U.S. Global Leadership: Priorities for 21st Century Defense, January 2012, 8 pp. For additional discussion, see CRS Report R42146, *Assessing the January 2012 Defense Strategic Guidance (DSG): In Brief*, by Catherine Dale and Pat Towell.

[141] Department of Defense, Quadrennial Defense Review 2014, 64 pp. For additional discussion, see CRS Report R43403, *The 2014 Quadrennial Defense Review (QDR) and Defense Strategy: Issues for Congress*, by Catherine Dale.

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

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

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

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

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

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

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

The 1960 U.S.-Japan treaty on mutual cooperation and security[146] 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."[147] (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.[148]

U.S.-Philippines Mutual Defense Treaty[149]

The 1951 U.S.-Philippines mutual defense treaty[150] states in Article IV that

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

[147] 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.

[148] See, for example, Yoichiro Sato, "The Senkaku Dispute and the US-Japan Security Treaty," PacNet #57 (Pacific Forum CSIS, Honolulu, Hawaii), September 10, 2012, accessed October 2, 2012, at http://csis.org/files/publication/Pac1257.pdf; 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.

[149] 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.

[150] 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.[151] 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.[152] U.S. officials have made their own statements regarding the treaty's application to territorial disputes in the SCS.[153]

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

[152] 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/.

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

Appendix C. Operational Rights in EEZs

This appendix presents additional background information on the issue of operational rights in EEZs.

As mentioned earlier, 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 C-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 C-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.[154]

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)[155] 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 likewise. He further proclaimed that all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the

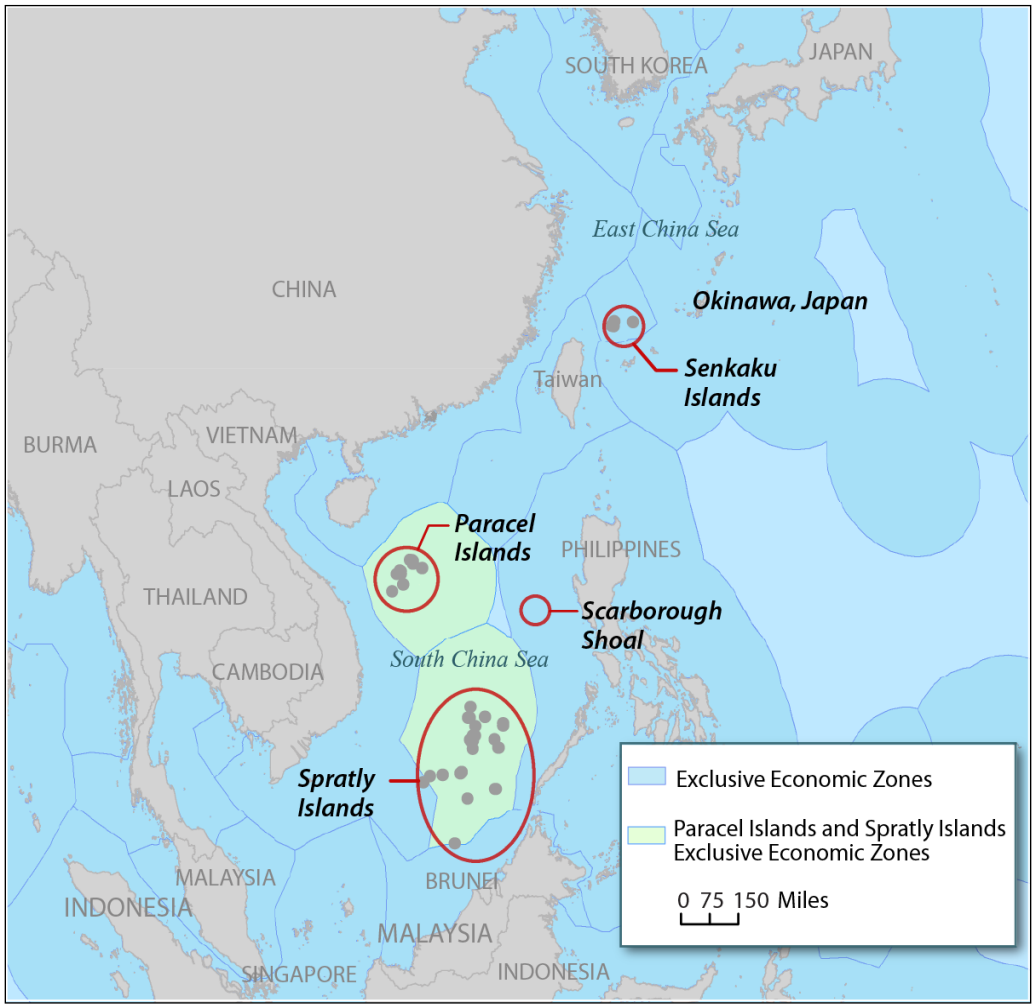
[154] The National Oceanic and Atmospheric Administration (NOAA) calculates that EEZs account for about 30.4% of the world's oceans. (See the table called "Comparative Sizes of the Various Maritime Zones" at the end of "Maritime Zones and Boundaries, accessed June 6, 2014, at http://www.gc.noaa.gov/gcil_maritime.html,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

[155] 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:

> 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/)

freedoms of navigation and overflight, in the Exclusive Economic Zone he established for the United States consistent with the 1982 Convention.[156]

Figure C-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.

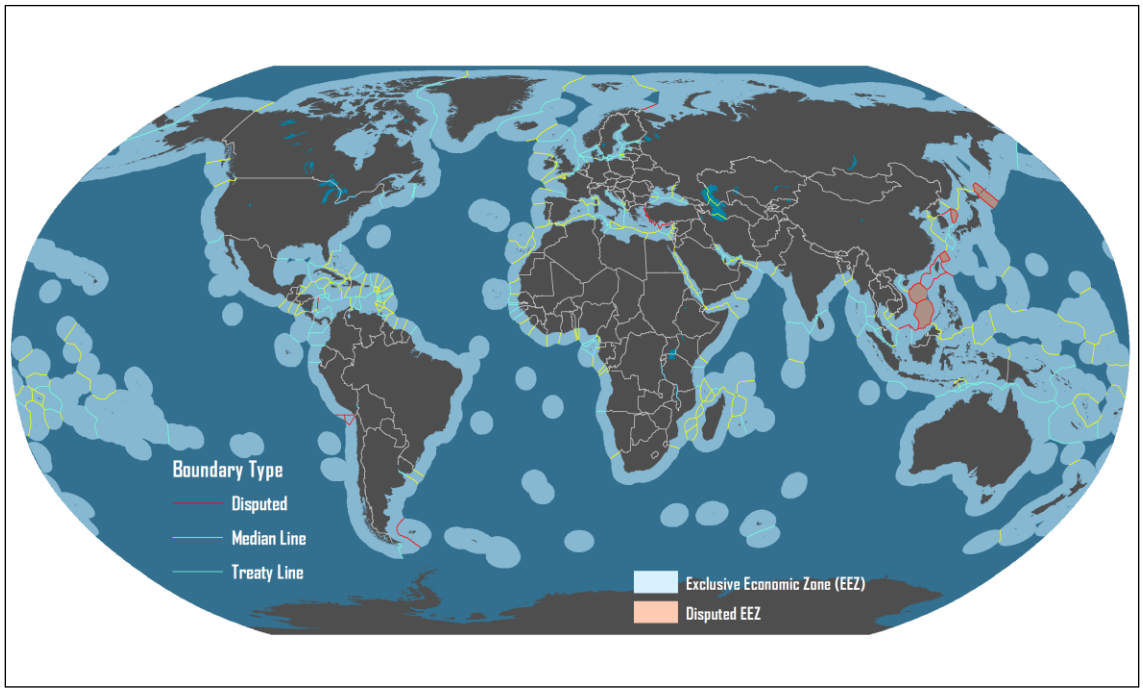
DOD states that

> 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

[156] 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.[157]

Figure C-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.[158] 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.

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

[158] 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."[159]

One observer stated:

> 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

[159] 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.

China maritime legal specialist Isaac Kardon, China interprets the EEZ articles in the United Nations Convention on the Law of the Sea (UNCLOS) as granting a coastal state jurisdiction to enforce its domestic laws prohibiting certain military activities—e.g., those that it interprets to threaten national security, economic rights, or environmental protection—in its EEZ. China's domestic laws include such provisions, while those of the United States do not. Those rules would allow China to justify its seemingly contradictory approach to AGI operations—or, as Kardon put it, "to have their cake and eat it too." Therefore, under the Chinese interpretation of UNCLOS, its actions are neither hypocritical nor illegal—yet do not justify similar surveillance against China.

Here, noted legal scholar Jerome Cohen emphasizes, the U.S. position remains the globally dominant view—"since most nations believe the coastal state has no right to forbid surveillance in its EEZ, they do not have domestic laws that do so." This renders China's attempted constraints legally problematic, since "international law is based on reciprocity." To explain his interpretation of Beijing's likely approach, Cohen invokes the observation that a French commentator made several decades ago in the context of discussing China's international law policy regarding domestic legal issues: "I demand freedom from you in the name of your principles. I deny it to you in the name of mine."

Based on his personal experience interacting with Chinese officials and legal experts, Kardon adds, "China is increasingly confident that its interpretation of some key rules and—most critically—its practices reinforcing that interpretation can over time shape the Law of the Sea regime to suit its preferences."

But China is not putting all its eggs in that basket. There are increasing indications that it is attempting to promote its EEZ approach vis-à-vis the U.S. not legally but politically. "Beijing is shifting from rules- to relations-based objections," Naval War College China Maritime Studies Institute Director Peter Dutton observes. "In this context, its surveillance operations in undisputed U.S. EEZs portend an important shift, but that does not mean that China will be more flexible in the East or South China Seas." The quasi-authoritative Chinese commentary that has emerged thus far supports this interpretation....

[A recent statement from a Chinese official] suggests that Beijing will increasingly oppose U.S. SROs on the grounds that they are incompatible with the stable, cooperative Sino-American relationship that Beijing and Washington have committed to cultivating. The Obama Administration must ensure that the "new-type Navy-to-Navy relations" that Chinese Chief of Naval Operations Admiral Wu Shengli has advocated to his U.S. counterpart does not contain expectations that U.S. SROs will be reduced in nature, scope, or frequency....

China's conducting military activities in a foreign EEZ implies that, under its interpretation, some such operations are indeed legal. It therefore falls to China now to clarify its stance—to explain why its operations are consistent with international law, and what sets them apart from apparently similar American activities.

If China does not explain away the apparent contradiction in a convincing fashion, it risks stirring up increased international resentment—and undermining its relationship with the U.S. Beijing is currently engaging in activities very much like those it has vociferously opposed. That suggests the promotion of a double standard untenable in the international system, and very much at odds with the relationships based on reciprocity, respect, and cooperation that China purports to promote....

If, however, China chooses to remain silent, it will likely have to accept—at least tacitly, without harassing—U.S. surveillance missions in its claimed EEZ. So, as we watch for

> clarification on Beijing's legal interpretation, it will also be important to watch for indications regarding the next SROs in China's EEZ.[160]

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: "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."[161]

[160] Andrew S. Erickson and Emily de La Bruyere, "China's RIMPAC Maritime-Surveillance Gambit," *The National Interest*, July 29, 2014. See also Andrew S. Erickson, "PRC National Defense Ministry Spokesman Sr. Col. Geng Yansheng Offers China's Most-Detailed Position to Date on Dongdiao-class Ship's Intelligence Collection in U.S. EEZ during RIMPAC Exercise," (*Andrew S. Erickson*), August 1, 2014. See also Michael Auslin, "Wishful Thinking on China's Navy," *AEIdeas*, July 30, 2014.

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

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

This appendix presents a bibliography of some recent writings by observers who have suggested options for strengthening U.S. actions for countering China's "salami-slicing" strategy, organized by date, beginning with the most-recent item.

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Ely Ratner, "The False Choice of War or Accommodation in the South China Sea," *Lowy Institute Interpreter*, June 30, 2017. (Responds to the June 26, 2017, item below from Hugh White.)

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Satoru Mori, "Thinking About Long-Term Strategy in the South China Sea," *Asia Maritime Transparency Initiati*ve, January 13, 2017.

Ross Babbage, "It Is High Time to Outmaneuver Beijing in the South China Sea," *War on the Rocks*, December 28, 2016.

Harry J. Kazianis, "Four Ways Donald Trump Can Deter Beijing in the South China Sea," *Real Clear Defense*, November 25, 2016.

Ryan Pickrell, "How The US Should Respond To China's Secret Weapon," *Daily Caller*, September 24, 2016.

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Megan Eckstein, "Experts Advocate Harder Stance Against Illegal Claims In South China Sea," *USNI News*, September 22, 2016.

Christopher P. Cavas, "China's Maritime Militia—Time to Call Them Out?" *Defense News*, September 18, 2016.

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James A. Lyons and Richard D. Fisher Jr., "Countering Beijing's South China Sea Defiance," *Washington Times*, August 1, 2016.

Associated Press, "Former U.S. Pacific Command Head: U.S. Should Defend Reef Off Philippines," *Military Times*, July 13, 2016.

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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.

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