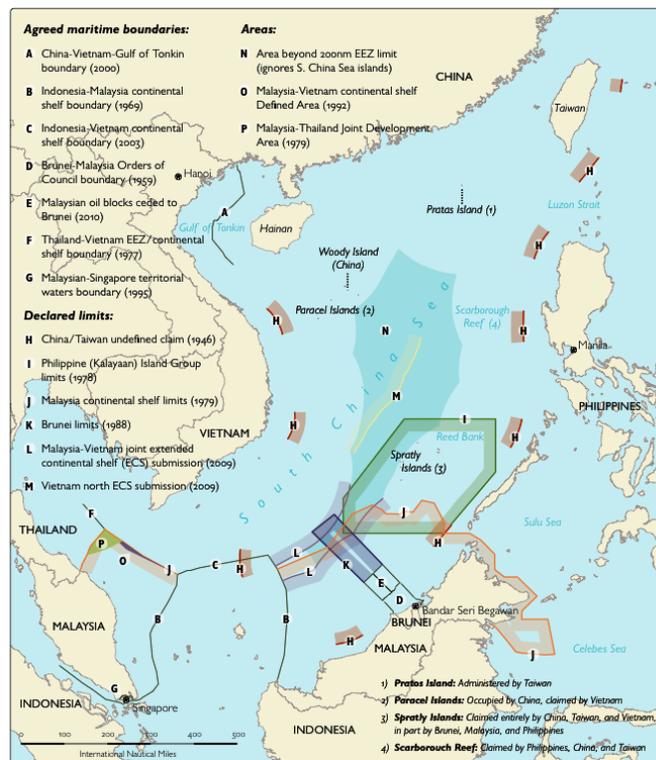


A CNA Occasional Paper

The South China Sea: Assessing U.S. Policy and Options for the Future

Michael McDevitt

November 2014





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November 2014

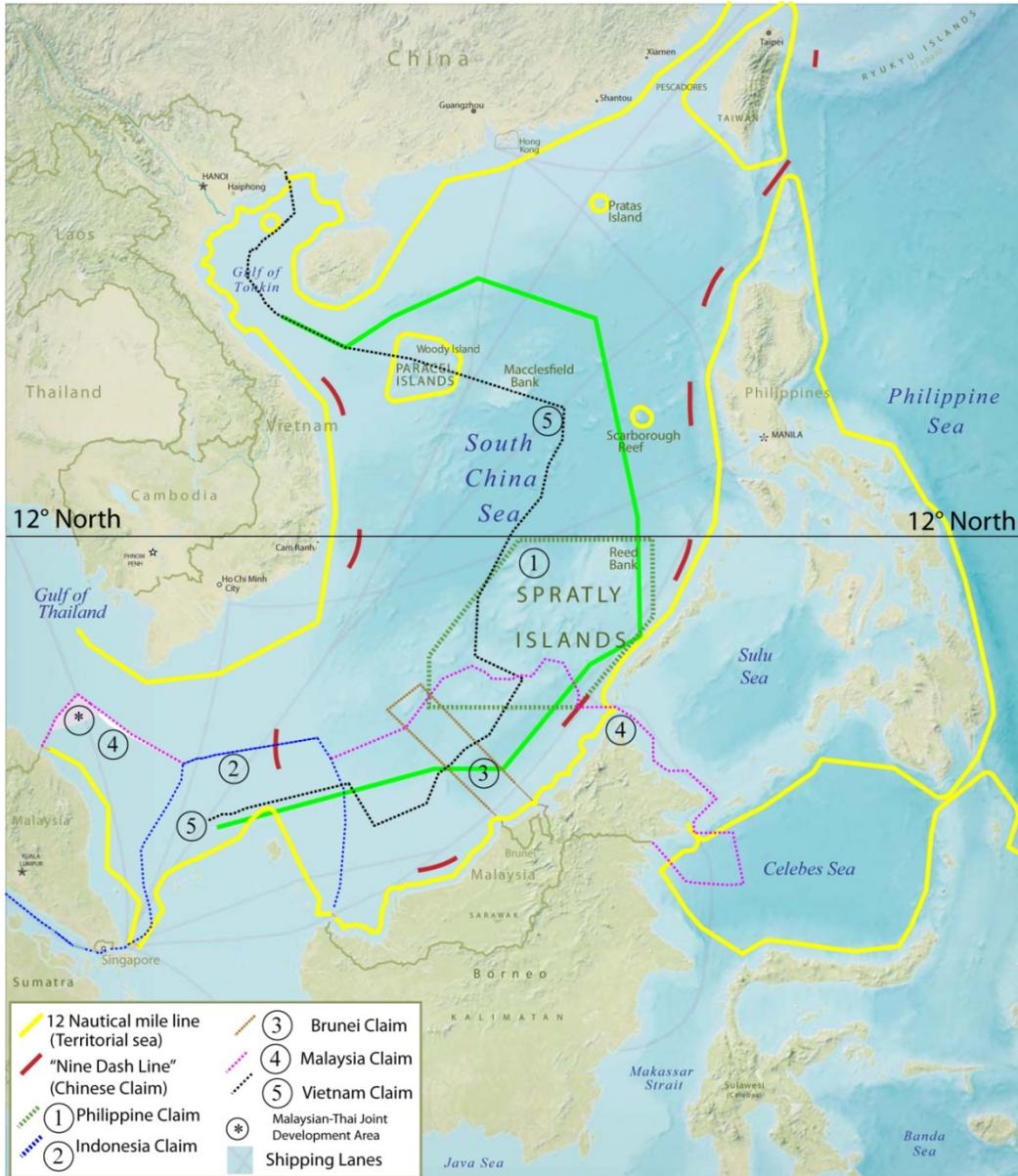
A handwritten signature in black ink, appearing to read 'E. Thompson', with a long horizontal line extending to the right.

Eric V. Thompson, Director
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ABSTRACT

The aim of this report is to propose additional policy options that the United States might pursue in the South China Sea. To this end it provides a detailed recounting of existing U.S. policy toward the South China Sea. It concludes by recommending additional policy approaches aimed toward generating a more peaceful, stable, non-confrontational, law abiding environment in the South China Sea. Along the way it will address the U.S. interests that are involved in the South China Sea. It will briefly explain what international laws apply to the South China Sea, and detail the “rules” that Washington’s policy insists all parties follow. It will then provide an overview of the legal merits of the respective claims to the islands and features in the South China Sea. The legal overview is presented not to argue for a change to existing U.S. policy of not taking a position on sovereignty claims, but to provide policy-makers with some understanding of the legal complexity of the claims issue.

Figure 1. Depiction of effective Chinese control of islands north of 12 degrees North latitude



Source: Map created by Michael Markowitz, CNA.

Executive Summary

The aim of this report is to propose additional policy options that the United States might pursue in the South China Sea. It begins with a detailed recounting of existing U.S. policy toward the South China Sea, and concludes by recommending additional policy approaches aimed toward generating a more peaceful, stable, non-confrontational, law abiding environment in the South China Sea. It also addresses U.S. interests, a legal assessment of sovereignty claims, and a primer on the “rules” embodied in international law that Washington wants all parties to follow.

What are the issues?

Competing claims to sovereignty

In the South China Sea there are approximately 180 features above water at high tide.¹ These rocks, shoals, sandbanks, reefs and cays, plus additional unnamed shoals and submerged features are distributed among four geographically different areas of that sea. These are claimed in whole or in part by China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei. China and Taiwan (the Republic of China) claim all of the land features in the South China Sea.

The problem of the nine-dash line (NDL)

This knotty sovereignty issue is greatly exacerbated by the “nine-dash line” that appears on all China’s maps of the South China Sea (SCS), and incorporates about 80 percent of the SCS. Over the past several years, Chinese actions have strongly suggested that the line is much more than a way to depict China’s claims to the land features—it is an attempt to claim China has “historic rights” to a significant portion of the resources that, under the Law of the Sea, legitimately belong to the coastal

¹ The breakdown of above water at high tide features is Pratas Islands (2), Scarborough Shoal (1), Paracel Islands (35) and Spratly Islands (140). Robert Beckman, “The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea,” *The American Journal of International Law*, Vol.1 07, No.1, January 2013, pp. 143-45.

states. This apparent attempt to rewrite “commonly accepted” international law has resulted in a number of incidents with its SCS neighbors.

China’s behavior in attempting to resolve its claims

China’s approach in the South China Sea is “peacefully coercive.” It is very effective. It has been characterized as a “salami slice” strategy: it continues to take small, incremental steps that are not likely to provoke a military response from any of the other claimants, but over time gradually change the status-quo regarding disputed claims in its favor.

The bilateral issue: U.S. military operations in China’s EEZ

Washington argues that UNCLOS permits nations to exercise “high seas freedoms,” which include, inter alia, peaceful military operations, in the Exclusive Economic Zones (EEZs) of coastal states. China disagrees. It claims that these are not peaceful activities. This disagreement has resulted in two serious incidents: the 2001 mid-air collision between a U.S. Navy surveillance aircraft (EP-3) and an intercepting Chinese navy fighter, and the 2009 episode in which Chinese fishermen and paramilitary ships harassed USNS *Impeccable*. More recently, a dangerously close intercept of a U.S. Navy P-8 maritime patrol aircraft created another diplomatic dustup.

The reality on the ground for U.S. policy-makers

China has control of all the land features in the South China Sea north of 12 degrees north latitude—essentially the northern portion of the South China Sea.

- It has controlled the Paracel Islands since 1974, and, despite Vietnam’s claim, is unlikely to ever leave.
- China effectively resolved the dispute with the Philippines over Scarborough Shoal in 2012 when it established control over the shoal. Again, it is unlikely to relinquish it.
- This means that the Spratly Islands are the only remaining features that are not completely under the physical control of Beijing (or of greater China).

This situation suggests that U.S. policy options, aimed at a peaceful rules-based outcome, need to focus on the Spratlys, which, unfortunately for those who must craft and execute policy, are the most complex and legally arcane area of the South China Sea.

Existing U.S. policy toward the South China Sea

The centrality of international law in addressing the problems in the South China Sea is the focal point of U.S. policy. Over the past four to five years, U.S. official statements have stressed the need for the contending claimants to follow the rules established by international law.

Based on public statements and Congressional testimony from serving U.S. officials, U.S. policy consists of the following elements.

- No use of force or coercion by any of the claimants to resolve sovereignty disputes or change the status-quo of disputed South China Sea features.
- Freedom of navigation, which includes unimpeded lawful navigation for commercial, private and military vessels and aircraft. Coastal states must respect the UNCLOS language that all “high seas freedoms,” including peaceful military operations, are applicable in the EEZs of coastal states.
- All maritime entitlements to any of the waters of the South China Sea must be based on international law and must be derived from land features in the South China Sea. China’s nine-dash line does not meet these criteria. In short, only land (islands and rocks) generate maritime zones, not vice versa.
- The United States takes no position on the relative merits of competing sovereignty claims. It does not choose sides; nor does it favor one country’s claim over another’s.
- An effective Code of Conduct that would promote a rules-based framework for managing and regulating the behaviour of relevant countries in the South China Sea is essential. A key part of such a document would be mechanisms such as hotlines and emergency procedures for preventing incidents in sensitive areas and managing them when they do occur in ways that prevent disputes from escalating.
- The United States supports internationally recognized dispute resolution mechanisms, including those provided for in the UNCLOS treaty.
- Washington will respond positively to small South China Sea littoral countries that are U.S. allies, officially designated “strategic partners,” or “comprehensive partners,” who want to improve their ability to patrol and monitor their own territorial waters and EEZs.²

² The Obama administration established comprehensive partnerships with Indonesia in November 2010, Vietnam in July 2013, and Malaysia in April 2014. The United States has been

- The U.S. government wants to improve access for U.S. military in areas proximate to the South China Sea.

U.S. interests

Starting in summer 2010, the Obama administration clearly signaled, through a combination of diplomacy and enhanced military engagement with SCS littoral states, that the United States does consider *establishing rule-based stability in the SCS to be an important U.S. national interest*. This includes a peaceful, non-coercive resolution of disputes over sovereignty and maritime entitlements.

The U.S. government seeks “freedom of navigation” in the South China Sea, which includes unimpeded lawful trade and commerce as well as the exercise of high seas freedoms associated with non-hostile military activities within the EEZ of China.

Like it or not, the administration has to confront the regional perception that the South China Sea has evolved into an important litmus test of its “rebalance to Asia” strategy, because a central premise of the rebalance strategy is the goal of common legally based standards of behavior that are followed throughout the region

The United States has a defense treaty with the Philippines. If China were to attack a Philippine naval or coast guard vessel, shoot down a Philippine military aircraft, or kill or wound members of the Philippine armed forces, treaty language related to attacks on “its [the Philippines] armed forces, public vessels or aircraft in the Pacific” suggests that the treaty would apply.

Finally, China is very important to the resolution of other critical issues that matter to Washington, such as ending the Iranian and North Korean nuclear programs; addressing climate change; maintaining peace in the Taiwan Strait and East China Sea; and promoting trade, investment, and economic growth. This mix of important issues provides a broader context for U.S.-China relations, and makes it clear that the South China Sea should not become the central strategic element in the overall U.S.-China relationship.

Assessing South China Sea sovereignty claims

a formal treaty ally of the Philippines since 1951. It has been a “Strategic Partner” with Singapore since 2005.

This project commissioned three separate legal analyses of the claims made to land features in the SCS. A review of these documents makes clear that in the unlikely event these sovereignty claims are taken to the International Court of Justice for resolution, the process will be long and difficult. None of the claimants has what might be called an “open and shut” legal case.

- The consensus among scholars seems to be that China and Vietnam have the best legal case to claims in the Spratly Islands. China’s claims in the Spratlys are weaker than its claims to the Paracels (also claimed by Vietnam), and depending on how certain historic actions are legally interpreted, Vietnam may have a better claim to both island chains. At the same time, U.S. policy-makers cannot lose sight of the fact that China’s claims may be superior.
- The absence of an unambiguous legal case in any of these disputes reinforces the wisdom of the U.S. policy of not taking a position regarding which country’s sovereignty claim is superior.
- The claims of the Philippines, Malaysia and Brunei to islands or rocks in the Spratly Islands are not strong as the claims of either China or Vietnam.

Summing up: Recommended options for U.S. policy toward the South China Sea

Existing U.S. policy is sensible, relatively comprehensive and proportionate to the U.S. interests involved. It is primarily diplomatic but not entirely so. It focuses on creating stability by exhorting all the parties to follow the rules of international law; it explicitly defines how Washington would like conflicts to be solved; and it includes hard-power initiatives aimed at redressing some of the power imbalance between the Philippines, Vietnam, and China. Finally, it incorporates an element of deterrence by not ignoring America’s security alliance with the Philippines as well as providing for access of U.S. naval and air forces in the Singapore and the Philippines.

- Overarching policy guidelines should include the following principles:
 - The South China Sea is not the central strategic element in the overall U.S.-China relationship.
 - The South China Sea is an issue to be managed; a permanent solution is not likely in the near term.
 - There is no one preferred format for negotiated outcomes. Bilateral negotiations should not be dismissed or portrayed as less desirable. The

reality is that because of overlapping claims, solutions that are negotiated directly by the claimants are inevitable.

- Policy should not be overwhelmingly anti-Chinese. The United States should criticize Chinese behavior along with the behavior of American friends and allies when warranted, but keep in mind China may have the best legal claim to all the land features, although that will never become legal certainty unless Beijing is willing to agree to arbitration.
- The U.S. government should remain sensitive to the efforts of littoral states to involve the United States more deeply in supporting their claims in order to balance against China.
 - o In this regard, the State Department should conduct a legal analysis of the Philippine claims. If this analysis reaches the same conclusions as the analysis prepared for this project, Manila should be quietly informed of Washington's opinion of its claims; particularly in the Spratlys.
- Washington should not announce policies that engage credibility in a way it is not prepared to back-up.
- The United States should reinforce its existing policy emphasis that international law is the basis for rules-based stability by issuing a comprehensive white paper, or a series of white papers, on the various aspects of international law that pertain to the South China Sea. Because the focus on international law has been such a centerpiece of U.S. policy, these authoritative documents should be signed by the secretary of state and given appropriate publicity. That said, a credible legal "let the chips fall where they may" approach could create diplomatic problems with friends and allies which may make it inappropriate for the secretary to personally sign the document.
- U.S. officials have publicly supported the Philippines' request for arbitration, but if the tribunal rules that it does not have jurisdiction, it will be a major setback to hopes that international law can be the basis for shaping the behavior of parties involved in South China Sea disputes. The Department of State should consider issuing a statement in strong support of the tribunal permitting the Philippines to have "its day in court" by agreeing that it does have jurisdiction.
- The Svalbard Treaty of 1925 provides a potential template for creating a provisional joint fishing and hydrocarbon protocol. This is an approach the United States should pursue with ASEAN and China.
- U.S. policy-makers should explore with ASEAN and China the possibility of establishing a Joint Development Area (JDA) in the Spratlys aimed at the

exploitation of hydrocarbons. The goal would be to find a way to allow states to share these resources without prejudicing their position on final maritime boundaries.

- U.S. policy makers should explore whether ASEAN would welcome any American involvement aimed at moving the Code of Conduct process to conclusion.
- The United States should be responsive to requests from small SCS littoral states that want assistance in improving their maritime policing and security capabilities.
- The United States needs to be completely committed to a very long term, dedicated effort to improve the Armed Forces of the Philippine's maritime capabilities. The idea of a mutually agreed upon AFP "minimum credible deterrent" plan deserves strong U.S. support. Washington should not however, explicitly expand the scope of the Mutual Defense Treaty to cover the contested Philippine claims in the Spratlys.
- Washington should ensure that planned U.S. military posture and capability improvements are portrayed as symbols of reassurance and stability inducing presence and are not characterized as attempts to directly confront China. Emphasize that the objective of the military portion of the rebalance is to ensure that the United States can fulfil its security responsibilities to U.S. allies and friends because capabilities, drawn from throughout the Pacific region, are capable of assured access whenever required.
- U.S. naval and air presence in the South China Sea should be a visible daily occurrence.
- The United States Navy should increase the duration of its exercises with SCS littoral states, and expand participation in these exercises by inviting participation from other Asian maritime states, such as Japan, Australia, South Korea, and possibly India.

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The United States is concerned that a pattern of unilateral actions and reactions in the South China Sea has increased tensions in the region. The United States strongly opposes the use or threat of force to resolve competing claims and urges all claimants to exercise restraint and to avoid destabilizing actions.

The United States has an abiding interest in the maintenance of peace and stability in the South China Sea. The United States calls upon claimants to intensify diplomatic efforts which address issues related to the competing claims, taking into account the interests of all parties, and which contribute to peace and prosperity in the region. The United States is willing to assist in any way that the claimants deem helpful. The United States reaffirms its welcome of the 1992 ASEAN Declaration on the South China Sea.

Maintaining freedom of navigation is a fundamental interest of the United States. Unhindered navigation by all ships and aircraft in the South China Sea is essential for the peace and prosperity of the entire Asia-Pacific region, including the United States.

The United States takes no position on the legal merits of the competing claims to sovereignty over the various islands, reefs, atolls, and cays in the South China Sea. The United States would, however, view with serious concern any maritime claim or restriction on maritime activity in the South China Sea that was not consistent with international law, including the 1982 United Nations Convention on the Law of the Sea.”

U.S. Department of State

Daily Press Briefing, May 10, 1995¹

¹ A statement read by Acting State Department Press Spokesman Christine Shelly, http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1995/9505/950510db.html.

Introduction: What Is the Problem?

The aim of this report is to discuss U.S. policy in the South China Sea (SCS) as well as to suggest additional policy options that the United States might pursue as it seeks to find a peaceful solution to tensions between China and the Philippines and Vietnam, and indirectly between China and Washington. These tensions stem from the seemingly intractable overlapping sovereignty claims to land features and associated water entitlements in the South China Sea. These problems are not new; as illustrated above, the first U.S. policy statement on the South China Sea disputes was made in 1995. Today's policy is virtually identical. What is different is that after almost a decade and a half of relative tranquility, the South China Sea has emerged as a cockpit of contention that raises the potential for conflict and introduces instability in Southeast Asia. The United States could become directly involved, because the Philippines, one of the contending claimants to land features in the South China Sea, is a U.S. treaty ally.

Competing claims to sovereignty

The maritime features in the South China Sea—approximately 180 named islands,² rocks, shoals, sandbanks, reefs and cays, plus unnamed shoals and submerged features distributed among four geographically different areas of that sea—are claimed in whole or in part by China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei. China and Taiwan (the Republic of China) claim all of the land features in the South China Sea. Vietnam claims the Paracel and Spratly island archipelagoes.³ The Philippines claims approximately 53 of the features in the Spratly island chain in the southern half of the South China Sea, as well as Scarborough Shoal in the central portion of the SCS. Malaysia claims a small number of land features in the Spratlys,

² The breakdown of the features above water at high tide is Pratas Islands (2), Scarborough Shoal (1), Paracel Islands (35) and Spratly Islands (140). Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea," *American Journal of International Law*, 107, no.1, (January 2013): 143-45.

³ Hanoi does not claim Scarborough Shoal or Pratas Reef.

and Brunei claims one. With the exception of Brunei, the other five claimants occupy some of the islands or features with military or paramilitary forces.

A very small number of the land features have strategic value for the claimants because they have, or could have, runways large enough to accommodate tactical jet aircraft and are adjacent to one of the world's most heavily travelled commercial shipping routes. In short, gaining sovereignty provides a foothold that could enable a country to interfere with trade to or from China and the rest of Northeast Asia. This is highly unlikely, but nonetheless, the strategic location of the Spratlys has been on the minds of strategists since the end of the First World War.⁴ Beyond this, the main reason why any of the claimants care who “owns” the many largely uninhabitable above-water land features is that sovereignty carries with it certain rights to the resources of the surrounding waters—either 12-mile territorial waters, or, if the feature is deemed an island, a 200-nautical mile exclusive economic zone (EEZ). These maritime entitlements associated with land features above-water at high tide yield ocean resources, including fish, hydrocarbons, and minerals on or beneath the ocean floor, to the sovereign state. Nationalism is also important: especially in China, pressure to not give up “our sovereign territory” plays a very important role in shaping governmental options.

The problem of the nine-dash line (NDL)

This knotty sovereignty issue is greatly exacerbated because of the “nine-dash line” that appears on all China's maps of the South China Sea, and incorporates about 80 percent of the South China Sea. For several decades this 1947 addition to Chinese maps was ignored by other countries, on the assumption that it was simply a cartographical annotation indicating China's claim to all the land features within the South China Sea.⁵ Significantly, the NDL cuts through the middle of the EEZs of the Philippines, Brunei, Malaysia, Indonesia, and Vietnam. Over the past several years Chinese actions have strongly suggested that the line is much more than a way to depict China's claims to the land features—that it is an attempt to claim a significant portion of the resources that, under the Law of the Sea, legitimately belong to the coastal states. Since Beijing has yet to state officially how the NDL affects what China claims in the South China Sea, it hamstring attempts by coastal states to engage

⁴ Marwyn S. Samuels, *Contest for the South China Sea*, (New York, Methuen 1982), 4.

⁵ In a speech delivered on September 1, 2014 the President of the Republic of China, Ma Ying-jeou, suggested that what is now known as the NDL was in-fact a way for the ROC to claim the islands of the SCS. Taiwan OOP: “Ma Ying-jeou Attends Exhibition of Historical Records for South China Sea,” Taipei Office of the President in Chinese, <http://www.president.gov.tw>.

global energy exploration firms to assist them in exploiting the resources that the United Nations Convention on the Law of the Sea (UNCLOS) says are theirs.⁶

Creating de-facto islands

A looming trouble spot is how the establishment of occupied outposts on shoals, tiny islands, or cays by all of the claimants, except Brunei, affects maritime entitlements. All of the parties have enhanced, or are in the process of enhancing, some of the small features they occupy, many of which today would not qualify for any maritime entitlements at all, in order to turn them into pseudo-islands. That could permit the occupying nation to assert a non-UNCLOS-compliant island-based maritime entitlement of a 200-nm EEZ, which, in the absence of an agreement to binding arbitration, could lead to yet more confrontation.⁷

Military operations in China's EEZ

A strictly bilateral issue between Washington and Beijing exists in both the South China Sea, and, for that matter, the East China Sea. China objects to U.S. surveillance activities

⁶ The most authoritative unofficial (there is no official Chinese position) Chinese source on the “nine-dash line” is an article co-authored by China’s representative on the International Tribunal on the Law of the Sea (ITLOS), Judge Zhiguo Gao and Professor Bing Bing Jia from Tsinghua University Law School, “The Nine Dash Line in the South China Sea: History, Status, and Implications,” *American Journal of International Law* 107, no. 1, (January 2013): 98-124, <http://jstor.org/stable/10.5305/amerjintlaw.107.1.0098>. They conclude that the “nine-dash line” has three meanings. First, it represents the title to the islands it encloses and the UNCLOS appropriate waters and sea beds generated by sovereignty over all the land features. Second, it preserves China’s “historic rights” in fishing, navigation and such other maritime activities as oil and gas development in the waters and continental shelf surrounded by the line. Third, it is likely to serve as a potential maritime delimitation line.

⁷ Robert Beckman, “Large Scale Reclamation Projects in the South China Sea: China and International Law,” *RSIS Commentary* 213/2014, 29 October 2014, rsispublications@ntu.edu.sg According to Beckman China cannot use reclamation to convert submerged reefs into islands capable of supporting human habitation or economic life of their own that are entitled to maritime zones of their own, because an “island” is defined as a “naturally formed” area of land surrounded by and above water at high tide. If a feature is above water at high tide because of reclamation works, it is an “artificial island”. Under UNCLOS, an artificial island is not entitled to any maritime zones of its own, not even a 12 nm territorial sea. Therefore, the reclamation works on features that are submerged at high tide will not change their legal status. However, determining the maritime zone is not as clear if China converts any of the three “rocks” it occupies into an island.

in its coastal EEZ. There is a decided difference of opinion regarding what military activities are permitted in an EEZ: Washington argues that UNCLOS permits nations to exercise “high seas freedoms” in the EEZs of coastal states. These “high seas freedoms” include the right to conduct peaceful military activities, which include, inter alia, surveillance and military surveys. China disagrees. It claims that these are not peaceful activities. This disagreement regarding surveillance has already resulted in two serious incidents: the 2001 mid-air collision between a U.S. Navy surveillance aircraft (EP-3) and an intercepting Chinese navy fighter, and the 2009 episode in which Chinese fishermen and paramilitary ships harassed USNS *Impeccable*, which was conducting undersea surveillance.⁸ More recently, a dangerously close intercept of a U.S. Navy P-8 maritime patrol aircraft created another diplomatic dustup.⁹

All of these potentially destabilizing issues revolve around the central question of how the countries involved, especially China, choose to interpret customary international law as embodied in both the UNCLOS convention itself and the precedential findings of cases heard by recognized international tribunals such as the International Court of Justice (ICJ), international arbitral tribunals, or the International Tribunal for the Law of the Sea (ITLOS). To make any sensible policy prescriptions, any recommendations regarding policy should be grounded in a solid appreciation of what international law has to say on these matters, and which countries are compliant with the law and which are not.

The centrality of international law

The centrality of international law to the problems in the South China Sea is well understood by the Obama administration, and is repeatedly reflected in public declaratory U.S. policy. Over the past four to five years, U.S. official statements have focused on the need for the contending claimants to follow the rules established by international law. As Secretary of State John Kerry said during his December 2013 visit to Vietnam:

Claimants have a responsibility to clarify their claims and to align their claims with international law and to pursue those claims within

⁸ Captain Raul Pedrozo, JAGC, U.S. Navy, “Close Encounters at Sea: The USNS Impeccable Incident,” *Naval War College Review* 62, no. 3 (Summer 2009): 102.

⁹ Christopher P. Cavas, “Chinese Fighter Buzzes U.S. Patrol Aircraft: Pentagon: Intercept Very Dangerous, Very Unprofessional,” *Defense News*, August 22, 2014, <http://www.defensenews.com/article/20140822/DEFREG02/308220025/Chinese-Fighter-Buzzes-US-Patrol-Aircraft>.

international peaceful institutions. Those countries can engage in arbitration and other means of negotiating disputes peacefully.¹⁰

This legally rooted policy approach was stated even more forcefully in congressional testimony by Assistant Secretary of State for East Asian and Pacific Affairs Daniel Russel in February 2014:

International law makes clear the legal basis on which states can legitimately assert their rights in the maritime domain or exploit marine resources....We do take a strong position that maritime claims must accord with customary international law. This means that all maritime claims must be derived from land features and otherwise comport with the international law of the sea.¹¹

When it comes to the competing sovereignty claims, the United States has a policy of taking no position on the relative merits of any country's claims in the South China Sea. As noted above, for the South China Sea this policy dates from 1995 when China occupied Mischief Reef in the Spratly Island chain, a feature that is also claimed by the Philippines and Vietnam.¹²

¹⁰ Joint Press Availability With Vietnamese Deputy Prime Minister and Foreign Minister Pham Binh Minh, December 12, 2013, <http://www.state.gov/secretary/remarks/2013/12/218747.htm>.

¹¹ Testimony of Daniel Russel, Assistant Secretary of State for East Asia and the Pacific before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific, February 5, 2014, "Maritime Disputes in East Asia," <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>.

¹² In East Asia, the policy of not taking a position on competing claims dates back to at least 1971, when the Okinawa Reversion Treaty was being deliberated in the U.S. Senate, and the issue of sovereignty over the Senkaku/Diaoyu Islands was an issue. Okinawa Reversion Hearings, cited in Mark E. Manyin, "Senkaku (Diaoyu/Diaoyu Tai) Islands Dispute: U.S. Treaty Obligations," Congressional Research Service, R42761, January 22, 2013. <https://www.fas.org/sgp/crs/row/r42761.pdf>. Washington and Tokyo reached agreement on the reversion of the Okinawa prefecture to Japan in June 1971 (entered into force on May 15, 1972). The United States returned the Senkaku's to Japanese authority since they were considered part of Okinawa prefecture. When the agreement went to the Senate for advice and consent, the Foreign Relations Committee heard complaints from Taipei, at the time still an official U.S. ally, about including the Senkaku's in the reversion. As a result, the Senate included a minute that said, "The Committee reaffirms that the provisions of the agreement do not affect claims of sovereignty with respect to the Senkaku or Tiao Yu Tai (*sic*, Diaoyu Tai) islands by any state."

The reality on the ground

The reality for policy-makers is that China has control of all the land features in the South China Sea north of 12 degrees north latitude—essentially the northern portion of the South China Sea. It has controlled the Paracel Islands since 1974, and, despite Vietnam’s claim, is unlikely to ever leave. Vietnam has apparently concluded that the use of force to try to restore its control is out of the question.

From its perspective, China resolved the sovereignty dispute with the Philippines over Scarborough Shoal in 2012 when it established control over the shoal. Again, it is unlikely to relinquish it. The government of the Philippines is in no position to even begin to contemplate the use of force to recover Scarborough, and the United States is not going to become involved in any attempt to expel the Chinese.

Finally, Pratas Island has been in the hands of Taiwan (the Republic of China) since 1945, which means that “greater China” has had undisputed control for almost 70 years.

The Spratly Islands are the only remaining features that are not completely under the physical control of Beijing (or of greater China). This situation suggests that U.S. policy options, aimed at a peaceful rules-based outcome, need to focus on the Spratlys, which, unfortunately for those who must craft and execute policy, are the most complex and legally arcane area of the South China Sea.

In the Spratlys, China is at a disadvantage vis-à-vis Vietnam. Some independent legal assessments suggest that Hanoi has the superior legal claim, and it occupies three times as many features as China, all of which are within land-based aircraft range of Vietnam’s airfields. China is also at a disadvantage vis-à-vis the Philippines. While Philippine claims to many of the Spratly features are legally very suspect, the existence of the U.S.-Philippine Mutual Defense Treaty and the recently concluded military access agreement with the United States provide a useful deterrent to precipitous coercive action by Beijing.

What this report covers

This report will provide a detailed recounting of existing U.S. policy, and then conclude by weighing additional policy approaches. Along the way it will address the U.S. interests that are involved in the South China Sea. It will briefly explain what international laws apply to the South China Sea, and detail the “rules” that Washington’s policy insists all parties follow. It will then provide an overview of the legal merits of the respective claims to the islands and features in the South China Sea.

This overview of sovereignty claims is presented not to argue for a change to existing U.S. policy but to provide policy-makers with some understanding of the legal complexity of the claims issue.

Chapter 1. Publically Stated U.S. Policy

In the case of the South China Sea, U.S. policy has been public and clear; senior U.S. officials have made numerous authoritative public statements. A number of statements from both Secretary of State Kerry and former Secretary of State Clinton have laid out the basic policy framework.¹³ The following is a typical statement from Secretary Kerry:

As a Pacific nation, and the resident power, the United States has a national interest in the maintenance of peace and stability, respect for international law, unimpeded lawful commerce, and freedom of navigation in the South China Sea. As we have said many times before, while we do not take a position on a competing territorial claim over land features, we have a strong interest in the manner in which the disputes of the South China Sea are addressed and in the conduct of the parties. We very much hope to see progress soon on a substantive code of conduct in order to help ensure stability in this vital region.¹⁴

None of the claimants, including China, can be in doubt about U.S. policy, since it has been a staple of U.S. talking points whenever senior U.S. officials have visited East Asia. It has also been made clear directly to the Chinese on many occasions. One example was in September 2013, when Kerry and the Chinese foreign minister met in New York City:

¹³ Here is a prime example from Clinton: “The United States has a national interest, as every country does, in the maintenance of peace and stability, respect for international law, freedom of navigation, unimpeded lawful commerce in the South China Sea. The United States does not take a position on competing territorial claims over land features, but we believe the nations of the region should work collaboratively together to resolve disputes without coercion, without intimidation, without threats.” Remarks at Press Availability, July 23, 2010, Hanoi, Vietnam, <http://www.state.gov/secretary/rm/2010/07/145095.htm>.

¹⁴ John Kerry, Remarks at the U.S.-ASEAN Ministerial Meeting Bandar Seri Begawan, Brunei, July 1, 2013, <http://www.state.gov/secretary/remarks/2013/07/211377.htm>.

Both ministers noted that the South China Sea is a topic for discussion by leaders at the East Asia Summit in Brunei. They each saw some signs of progress in the outcome of meetings held in the last few weeks between China and ASEAN. But the Secretary underscored the U.S. view that it is very important for all claimants to clarify their claims in ways that are consistent with international law and he reaffirmed the U.S. position that the conduct in disputed areas must be careful and without intimidation; that the U.S. strongly urges diplomatic and peaceful means only to address these areas of difference; and restated the long-held U.S. principles that are at stake in the South China Sea.¹⁵

A very specific official statement from the U.S. government regarding the South China Sea was made on February 5, 2014, by Assistant Secretary Russel. His testimony is the most comprehensive public statement available to date. Because of its specificity and candor it is worth including several verbatim sections:

On the U.S. desire for a Code of Conduct between China and ASEAN (the Association of Southeast Asian Nations) to prevent escalation, he said:

In the South China Sea, we continue to support efforts by ASEAN and China to develop an effective Code of Conduct. Agreement on a Code of Conduct is long overdue and the negotiating process should be accelerated. This is something that China and ASEAN committed to back in 2002 when they adopted their Declaration on the Conduct of Parties in the South China Sea. An effective Code of Conduct would promote a rules based framework for managing and regulating the behavior of relevant countries in the South China Sea. A key part of that framework, which we and many others believe should be adopted quickly, is inclusion of mechanisms such as hotlines and emergency procedures for preventing incidents in sensitive areas and managing them when they do occur in ways that prevent disputes from escalating.¹⁶

On the importance of customary international law (i.e., the UN Convention on the Law of the Sea, UNCLOS), Russel had this to say:

¹⁵ Read-Out of Secretary Kerry's Meeting With Chinese Foreign Minister Wang Yi, September 26, 2013, <http://www.state.gov/r/pa/prs/ps/2013/09/214801.htm>.

¹⁶ Assistant Secretary Russel, testimony, "Maritime Disputes in East Asia," <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>.

International law makes clear the legal basis on which states can legitimately assert their rights in the maritime domain or exploit maritime resources....We take a strong position that maritime claims must be derived from land features and otherwise comport with the international law of the sea. So while we are not siding with one claimant against another, we certainly believe that claims in the South China Sea that are not derived from land features are fundamentally flawed.¹⁷

This statement referred implicitly to China's "nine-dash line." Russel went on to become more explicit, and was the first U.S. government official to convey an official U.S. position on the "nine-dash line." He said:

There is a growing concern (that)...China is (attempting) to assert control over the area contained in the so called "nine-dash line," despite the objections of its neighbors and despite the lack of any explanation or apparent basis under international law regarding the scope of the claim itself. China's lack of clarity with regard to its South China Sea claims has created uncertainty, insecurity and instability in the region. It limits the prospect for achieving a mutually agreeable resolution or equitable joint development arrangements among the claimants. I want to emphasize the point that under international law, maritime claims in the South China Sea must be derived from land features. *Any use of the "nine-dash line" by China to claim maritime rights not based on land features would be inconsistent with international law.* (Emphasis added.)¹⁸

The importance of the Russel testimony is that it reflects an evolution of U.S. policy, from general exhortations asking for all parties to abide by international law, to more specific public statements on maritime claims that are not in accordance with UNCLOS. This more explicitly "legalist" approach is certainly warranted, and has been encouraged by both the Philippines and Vietnam. This position is a bit awkward for U.S. policy-makers: the U.S. Senate has not ratified the UNCLOS treaty,¹⁹ and, as a result,

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ It takes 67 of 100 senators to ratify a treaty. In the summer of 2012, the Obama administration mounted a comprehensive push for ratification that many observers, including this author, thought was very well conceived. However, Republican Senator Jim DeMint of South Carolina managed to get 34 Republican senators to pledge to oppose ratification, meaning that the Obama attempt would fail. Matt Cover, "GOP Senators Sink Law of Sea Treaty:

some question Washington's credibility when it criticizes others for not abiding by the treaty.²⁰

This is nonsense; not only did Washington play a large role in crafting the treaty, it also has abided by its provisions since 1982 when President Reagan so directed, while also declaring that most of the treaty reflected customary international law.²¹ While it is unfortunate that Washington has not ratified UNCLOS—and, given the partisan divide in the U.S. Senate, is unlikely to do so in the foreseeable future—this should not deter the U.S. government from speaking out on noncompliance by claimants involved in South China Sea disputes. As Russel put it, "...all claimants—not only China—should clarify their claims in terms of international law, including the law of the sea."²²

On January 22, 2013, the Philippines officially notified China that it had instituted arbitral proceedings against China under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).²³ China has refused to participate in the

This Threat to Sovereignty," CNSNEWS.COM, <http://cnsnews.com/news/article/gop-senators-sink-law-sea-treaty-threat-sovereignty>.

²⁰ Jose Katigbok, "Obama calls on US Senate to ratify UNCLOS," *Philippine Star*, May 30, 2014, <http://www.philstar.com/headlines/2014/05/30/1329020/obama-calls-us-senate-ratify-unclos>.

²¹ Ronald Reagan, "United States Ocean Policy," March 19, 1983, quoted in <http://www.oceanlaw.org/content/president-reagans-policy-oceans-and-law-sea>.

²² *Ibid.*

²³ The Philippines' request for arbitration raises three central issues. The most important is whether China can lawfully make any maritime claim based on its nine-dash line, either to sovereignty over the waters or to sovereign rights to the natural resources within the waters. The Philippines requests the arbitral panel to rule that China can only claim rights to maritime space in maritime zones measured from land territory (including islands), and that claims based on the nine-dash line are not consistent with UNCLOS. The main purpose of the case seems to be to challenge the legality of China's claim to historic rights and jurisdiction inside the nine-dash line.

The second major issue raised is a Philippine request for a ruling that all of the "islands" occupied by China (the naturally formed areas of land above water at high tide) are really only "rocks" entitled to no more than a 12-nm territorial sea because they cannot "sustain human habitation or economic life of their own," as set out in Article 121(3) of UNCLOS. It also requests the tribunal to declare that China has unlawfully claimed maritime entitlements beyond 12 nm from these features.

The third major issue raised addresses the geographic features that are currently occupied by China but do not meet the definition of an "island" as set out in Article 121(1) because they are not naturally formed areas of land above water at high tide (these being Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef). The Philippines argues that such features are not subject to a claim of sovereignty and that China's occupation of them is illegal because they are part of the continental shelf of the Philippines. Robert Beckman, "The Philippine v. China Case and the South China Sea Disputes," Asia Society/ Lee Kwan Yew SPP Conference, March 13-15, 2013, <http://cil.nus.edu.sg/wp/wp-content/uploads/2013/03/Beckman-Asia-Society-LKY-SPP-March-2013-draft-of-6-March.pdf>.

proceedings, and is likely to continue to do so but that is not a bar to arbitral action. The current uncertainty regarding this Philippine course of action is whether the arbitral panel will conclude that it has jurisdiction to hear the arbitration request. U.S. policy has supported the Philippine case against China currently before the arbitration panel registered with the Permanent Court of Arbitration (PCA),²⁴ because the Philippine action, while controversial within ASEAN, is very much in line with the U.S. desire for disputes to be resolved peacefully through the use of an international tribunal. This is a major development in the evolution of trying to peacefully resolve issues of maritime entitlements not directly related to sovereignty. (The UNCLOS Convention does not deal with matters of sovereignty.)

Finally, it is also important to note that U.S. policy involves more than exhortations and rhetoric; it also involves closer security cooperation with treaty allies such as the Philippines and strategic partners such as Singapore to improve U.S. military access to facilities close to the South China Sea. Of equal significance, U.S. policy also includes helping South China Sea littoral states, especially the Philippines and Vietnam, improve their capacity to police their own territorial waters and EEZs, by providing excess naval hardware to the Philippines and fast patrol boats for Vietnam and the Philippines. The provision of capacity-building assistance was announced by Secretary Kerry in Hanoi, Vietnam, in December 2013:

No region can be secure in the absence of effective law enforcement in territorial waters. And because of that, today I am also pleased to announce \$32.5 million in new U.S. assistance for maritime law enforcement in Southeast Asian states. This assistance will include, among other things, training and new fast-patrol vessels for coast guards. Building on existing efforts like the Gulf of Thailand initiative, this assistance will foster greater regional cooperation on maritime issues and ultimately provide the ability of Southeast Asian nations ... to police and monitor their waters more effectively.

In particular, peace and stability in the South China Sea is a top priority for us and for countries in the region. We are very concerned by and strongly opposed to coercive and aggressive tactics to advance territorial claims. Claimants have a responsibility to clarify their claims and to align their claims with international law and to

²⁴ The PCA acts as a registrar. The arbitration panel itself consists of four individuals appointed by the ITLOS President, after the Government of the Philippines appoints one. For US support see, Marie Harf, Deputy Department of State spokesperson, "Philippine South China Sea Arbitration Case Filing," March 30, 2014, <http://www.state.gov/r/pa/prs/ps/2014/03/224150.htm>.

pursue those claims within international peaceful institutions. Those countries can engage in arbitration and other means of negotiating disputes peacefully. We support ASEAN's efforts with China to move quickly to conclude a code of conduct.²⁵

Following his stop in Vietnam, Secretary Kerry went on to the Philippines, where he very explicitly linked Philippine security, the South China Sea, and U.S. security assistance. He also implicitly provided support for the government of the Philippines in its arbitration case against China.

The United States is committed to working with the Philippines to address its most pressing security challenges. That's why we are negotiating a strong and enduring framework agreement [which has subsequently been signed but is now subject to a Philippine court challenge] that would enhance defence cooperation under our alliance, including through an increased rotational presence of U.S. forces in Philippines. And that's why we have committed \$40 million for a new initiative to improve the Philippines's maritime security and maritime domain awareness.

That's also why we support efforts to reduce tensions surrounding the territorial and maritime disputes in the South China Sea in two important ways - first, we strongly support ASEAN's efforts with China to move quickly to conclude a code of conduct as a key to reducing the risk of accidents or miscalculation. In that process, we think that claimants have a responsibility to clarify their claims and to align their claims with international law. That is the way to proceed in resolving any disputes over the South China Sea - peacefully, and with international law.

Second, we support internationally recognized dispute resolution mechanisms such as those that are provided in the Law of the Sea Convention. The United States strongly opposes the use of intimidation, coercion, or aggression to advance territorial claims.

²⁵ Kerry, "Joint Press Availability with Vietnamese Deputy Prime Minister and Foreign Minister Pham Binh Minh."

And I assured the foreign secretary that the United States remains firmly committed to the security of the Philippines and the region.²⁶

To sum up, there are no mysteries when it comes to the U.S. policy approach to the territorial disputes in the South China Sea. The public record is clear. Washington's approach consists of the following:

- There should be no use of force or coercion by any of the claimants to resolve sovereignty disputes or change the status-quo of disputed South China Sea features.
- Strong support for freedom of navigation, which includes unimpeded lawful navigation for commercial, private and military vessels and aircraft; as well as insisting that coastal states respect the UNCLOS Convention's language that all "high seas freedoms" are applicable to military operations in the EEZs of coastal states.
- All maritime entitlements to any of the waters of the South China Sea must be based on international law and must be derived from land features in the South China Sea. China's nine-dash line does not meet these criteria. In short, only land (islands and rocks) generate maritime zones, not vice versa.
- The United States government takes no position on the relative merits of competing sovereignty claims. The United States does not choose sides; nor does it favor one country's claim over another's.
- Since, the sovereignty disputes over the features in South China Sea do not appear to be resolvable in the foreseeable future, a Code of Conduct that stipulates a rule based framework for managing and regulating the behavior of relevant countries in the South China Sea is necessary. A key part of such a document would be mechanisms such as hotlines and emergency procedures for preventing incidents in sensitive areas and managing them when they do occur in ways that prevent disputes from escalating.
- Support internationally recognized dispute resolution mechanisms, including those provided for in the UNCLOS treaty.

²⁶ John Kerry, "Remarks by Secretary of State John Kerry and Philippine Foreign Secretary Albert del Rosario," December 17, 2013 Manila, Philippines, <http://translations.state.gov/st/english/texttrans/2013/12/20131217289069.html>.

- Washington will improve security relationships with small South China Sea littoral countries and help, as requested, to improve the capacity of those countries that are either U.S. allies or officially designated “strategic partners” or “comprehensive partners” to patrol and monitor their own territorial waters and EEZs.²⁷
- Washington will seek to improve access for the U.S. military in countries near to the South China Sea.²⁸

²⁷ The Obama administration established “comprehensive partnerships” with Indonesia in November 2010, Vietnam in July 2013, and Malaysia in April 2014. The United States has been a formal treaty ally of the Philippines since 1951, and is a “strategic partner” with Singapore; a relationship that was formalized in 2005 when the Strategic Framework Agreement with Singapore was signed.

²⁸ Until 2014 this only applied to Singapore, but in April 2014 President Obama and Philippine President Benigno Aquino announced an agreement that will improve U.S. military access to the Philippines. Press briefing by Deputy National Security Advisor for Strategic Communication Ben Rhodes and NSC Senior Director for Asian Affairs Evan Medeiros, Grand Millennium Hotel, Kuala Lumpur, Malaysia, April 27, 2014, <http://www.whitehouse.gov/the-press-office/2014/04/27/press-briefing-deputy-national-security-advisor-strategic-communication>.

Chapter 2. What U.S. Strategic Interests Are Involved?

Starting in summer 2010, the Obama administration has clearly signaled, through a combination of diplomacy and enhanced military engagement with SCS littoral states, that the United States does consider *establishing rule-based stability in the SCS to be an important U.S. national interest*. Since 2010, the United States has become much more involved in the day-to-day security dynamics between China and SCS littoral states—and, while remaining neutral about the merits of respective sovereignty claims, it is not neutral about assertive behavior.²⁹ Since its position was outlined at the 2010 ASEAN Regional Forum (ARF), whether it wishes to or not, the United States has “skin in the game.” This has focused regional attention on the credibility of the administration’s East Asia rebalance strategy, because a central premise of the rebalance strategy is the goal of common legally based standards of behavior that are followed throughout the region.³⁰

That said, it is also important to keep the South China Sea in perspective as it relates to other pressing security issues, such as the situation with Russia and Eastern Europe, the Palestinian-Israeli issue, the mess in Iraq and Syria, and the desire to leave a stable Afghanistan behind when the United States leaves. While Beijing’s cooperation in the resolution of these issues is not central, China’s emergence as a global political and diplomatic presence is important, especially in the Middle East. China is very important to the resolution of other critical issues that matter to Washington, such as the Iranian and North Korean nuclear programs; addressing climate change; maintaining peace in the Taiwan Strait and East China Sea; and promoting trade, investment, and economic growth. This mix of important issues provides a broader context for U.S.-China relations, and makes it clear that the South China Sea should not become the central

²⁹ Secretary of State Hillary Clinton, remarks at Press Availability, July 23, 2010, Hanoi, Vietnam, <http://www.state.gov/secretary/rm/2010/07/145095.htm>.

³⁰ Euan Graham, “Southeast Asia in the U.S. Rebalance: Perceptions from a Divided Region,” *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, 35, no 3, (December 2013): 305-322.

strategic element in the overall U.S.-China relationship.³¹ Nor, as some commentators have suggested, should U.S.-China differences in the South China Sea be portrayed as the beginning of an incipient cold war with China.³²

Below, we discuss some of the specific U.S. interests involved.

Freedom of navigation and U.S. military activities in China's EEZ

When U.S. government officials speak of “freedom of navigation” in the South China Sea, they are combining two distinctly different aspects of freedom of navigation: unimpeded lawful trade and commerce, and the right to conduct non-hostile military activities.

During testimony before the Senate in 2012, then secretary of state Hillary Clinton made the point that the first, of the aforementioned aspects of freedom of navigation in the South China Sea was a “vital interest.”³³ Data tend to support this claim. More than half of the world's annual merchant fleet tonnage passes through the Strait of Malacca, and the Indonesian Straits of Sunda, and Lombok. These straits link the Indian Ocean with the South China Sea, and most of that maritime traffic is either coming from or going onward through the South China Sea. According to the U.S. Energy Information Administration (EIA), almost a third of global crude oil and over half of global LNG trade passes through the South China Sea, making it one of the most important trade routes in the world. The United Nations Conference on Trade and Development (UNCTAD) *Review of Maritime Transport 2011* estimated that 8.4 billion

³¹ Jeffery Bader, Kenneth Lieberthal, and Michael McDevitt, “*Keeping the South China Sea in Perspective*,” Foreign Policy Brief, Brookings Institution, August 2014, p. 8. <http://www.brookings.edu/research/papers/2014/08/south-china-sea-perspective-bader-lieberthal-mcdevitt>.

³² See for example, Geoff Dyer, “U.S. v. China: is this the new Cold War?” *FT Magazine*, (February 20, 2014), <http://www.ft.com/cms/s/2/78920b2e-99ba-11e3-91cd-00144feab7de.html#axzz3CqkFg33G> or Nguyen Manh Hung, “Op-Ed: Could Conflict in the South China Sea Lead to a ‘New Cold War?’” *Asia Society*, October 2, 2012, <http://asiasociety.org/blog/asia/op-ed-could-conflict-south-china-sea-lead-new-cold-war>.

³³ Hillary Clinton, “Testimony before the Senate Committee on Foreign Relations on Ratification of the Law of the Sea,” May 23, 2012, <http://www.cfr.org/global-governance/clintons-testimony-law-sea-convention-may-2012/p28340>.

tons of total world maritime trade in 2010 transited the South China Sea—this volume equates to more than half of the world's annual merchant fleet tonnage.³⁴

In dollar value that equates to roughly \$5.3 trillion in natural resources, goods, and materials that sail through the South China Sea, U.S. trade accounts for \$1.2 trillion of this total.³⁵ It is important to point out that the South China Sea is not the only route for ships to reach East Asia from the Indian Ocean and vice-versa. It is the shortest and most efficient, and hence is the cheapest route to use for transporting goods via the South China Sea. But if a crisis did occur that made it unsafe for commercial traffic to transit the SCS, other, less efficient, routes would be available.³⁶

When the United States speaks to China on “freedom of navigation,” it is not referring to any Chinese hindrances to legitimate maritime trade; China rightly points out that it has no interest in obstructing maritime commerce, and has never done so.³⁷ Beijing has to some degree appeared perplexed at why Washington keeps raising the issue of “freedom of navigation.” The real issue for Washington is that China objects to U.S. surveillance activities in its EEZ. The two countries have a decided difference of opinion on what military activities are permitted in the EEZ of China. Washington argues that UNCLOS permits nations to exercise “high seas freedoms” in the EEZs of coastal states. These “high seas freedoms” include the right to conduct peaceful military activities, which include, inter alia, surveillance and military surveys. China disagrees, claiming that these are unfriendly or “hostile” activities. This disagreement regarding surveillance has already caused two serious incidents: the 2001 mid-air collision between a U.S. Navy surveillance aircraft (EP-3) and an intercepting Chinese navy fighter, and the 2009 episode in which Chinese fishermen and paramilitary ships harassed USNS *Impeccable*, which was conducting undersea surveillance.³⁸

³⁴ Cited in U.S. Energy Information Administration, “Analysis Brief, The South China Sea,” February 7, 2013, <http://www.eia.gov/countries/regions-topics.cfm?fips=scs>.

³⁵ Bonnie Glaser, “Armed Clash in the South China Sea,” Contingency Planning Memorandum No.14, Council on Foreign Relations, April 2012, <http://www.cfr.org/world/armed-clash-south-china-sea/p27883>.

³⁶ One alternative route would be to leave the Indian Ocean via Indonesia’s Sunda or Lombok Straits and then sail north through the Makassar Strait, transiting the Celebes Sea, passing south of the Philippine island of Mindanao into the Pacific, and then proceeding north to East Asian ports. Another alternative is to proceed all the way around Australia to enter the South Pacific and then head north to East Asia via the Coral Sea and then via either the Solomon Sea or Bismarck Sea.

³⁷ Yang Zewei, “The Freedom of Navigation in the South China Sea: An ideal or a reality,” *Beijing Law Review*, 2012, 3, 137-144, <http://dx.doi.org/10.4236/blr.2012.33019>.

³⁸ Pedrozo, “Close Encounters at Sea: The USNS Impeccable Incident,” p. 102.

The United States believes that nothing in UNCLOS or state practice changes the right of any nation's military forces to conduct military activities in EEZs without first having to notify the coastal state and gain its consent. China disagrees; it claims that any nation that undertakes reconnaissance activities in China's EEZ without having notified China and gaining its permission is in violation of Chinese domestic law and international law.

The official U.S. government position on this issue is spelled out in President Clinton's October 1994 transmittal of the LOS Convention to the U.S. Senate for ratification:

The Convention carefully balances the interests of States in controlling activities off their own coasts with those of all States in protecting the freedom to use ocean spaces without undue interference. It specifically preserves and elaborates the rights of military and commercial navigation and overflight in areas under coastal State jurisdiction and on the high seas beyond. It guarantees passage for all ships and aircraft through, under and over straits used for international navigation and archipelagos. It also guarantees the high seas freedoms of navigation, overflight and the laying and maintenance of submarine cables and pipelines in the EEZ and on the continental shelf.³⁹

More specifically, the transmittal document states:

Military activities, such as anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, operations and conducting military surveys are recognized historic high seas uses that are preserved by article 58. Under that article, all States have the right to conduct military activities within the EEZ, but may only do so consistently with the obligation to have due regard to coastal State resource and other rights, as well as the rights of other States as set forth in the Convention. It is the duty of the flag State, not the right of the coastal State, to enforce this "due regard" obligation.

The concept of "due regard" in the convention balances the obligations of both the coastal State and other States within the EEZ. Article 56(2) provides that coastal States "shall have due regard to the rights and duties of other States" in

³⁹ William J. Clinton, "MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, WITH ANNEXES, DONE AT MONTEGO BAY, DECEMBER 10, 1982 (THE "CONVENTION"), AND THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982, WITH ANNEX, ADOPTED AT NEW YORK, JULY 28, 1994 (THE "AGREEMENT"), AND SIGNED BY THE UNITED STATES, SUBJECT TO RATIFICATION, ON JULY 29, 1994," October 7, 1994, (Washington DC, Government Printing Office, 1994) p. VI.

the EEZ. Article 58(3) places similar requirements on other States in exercising their rights, and in performing their duties, in the EEZ.⁴⁰

The U.S. view is succinctly summarized by Captain Raul (Pete) Pedrozo, a retired U.S. Navy maritime lawyer who until this year taught at the Naval War College. According to Captain Pedrozo:

China's views on coastal State authority in the exclusive economic zone (EEZ) are not supported by State practice, the negotiating history of the United Nations Convention on the Law of the Sea (UNCLOS), or a plain reading of Part V of the Convention. All nations may legitimately engage in military activities in foreign EEZs without prior notice to, or consent of, the coastal State concerned. Efforts were made during the negotiations of UNCLOS to broaden coastal State rights and jurisdiction in the EEZ to include security interests. However, the Conference rejected these efforts and the final text of the Convention (Article 58) ultimately preserved high seas freedoms of navigation and overflight and other internationally lawful uses of the seas related to those freedoms, to include military activities, in the EEZ.⁴¹

Pedrozo's former colleague at the U.S. Naval War College, Peter Dutton, also a retired U.S. Navy international lawyer, wrote a separate article elaborating on how and why the decisions leading to the current language of Article 58 were reached:

The creation of the exclusive economic zone in 1982 by UNCLOS...was a carefully balanced compromise between the interests of the coastal states in managing and protecting ocean resources and those of maritime user states in ensuring high seas freedoms of navigation and over flight, including for military purposes. Thus in the EEZ the coastal state was granted sovereign rights to resources and jurisdiction to make laws related to those resources, while high seas freedoms of navigation were specifically preserved for all states, to ensure the participation of maritime powers in the convention.⁴²

⁴⁰ Ibid, p. 24.

⁴¹ Captain Raul Pedrozo, JAGC, USN (ret.), "Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone," *Chinese Journal of International Law* 9 (2010), Oxford University Press, pp. 9-29, <http://chinesejil.oxfordjournals.org/content/9/1/9.full>.

⁴² Peter Dutton, "Three Disputes and Three Objectives: China and the South China Sea," *Naval War College Review* 64, no. 4 (Autumn 2011): 54.

Despite the clear negotiation record, China is attempting to undo this carefully balanced compromise between coastal states and user states. Until agreed-upon rules for Sino-U.S. maritime interactions in China's EEZ are established, China's desire to limit military activity in its EEZ is likely to be a source of direct Sino-U.S. friction—and could lead to another incident in the future.⁴³

A rules-based order in East Asia

Speaking at the East West Center in Honolulu, Secretary Kerry made clear that achieving a rules-based regional order was central to the Obama administration's vision for East Asia:

Important opportunities can and should be realized through a rules-based regional order, a stable regional order on common rules and norms of behavior that are reinforced by institutions. And that's what holds the greatest potential for all of us for making progress. We support this approach, frankly, because it encourages cooperative behavior. It fosters regional integration. It ensures that all countries, big and small – and the small part is really important – that they have a say in how we work together on shared challenges. I want you to know that the United States is deeply committed to realizing this vision.⁴⁴

Having rules and following them has been a centerpiece of U.S. policy toward the South China Sea and Southeast Asia, and is intertwined with the Obama administration's overall East Asian policy—the “rebalance to Asia.” Since the earliest days of President Obama's first term, there has been a focus on Southeast Asia. This was evidenced by Secretary Clinton's visit to the ASEAN secretariat in February 2009, and Washington's accession to ASEAN's Treaty of Amity and Cooperation in 2009, which was a

⁴³ For Chinese views on military activities in their EEZ, see four papers in Peter Dutton, editor, *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law*, Naval War College, China Maritime Studies Institute, No 7, December 2010, https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7_Military-Activities-in-the-.pdf.

⁴⁴ Secretary of State John Kerry, “Remarks at the East West Center on the U.S. Vision for the Asia-Pacific,” Honolulu, Hawaii, 14 August 2014, <http://iipdigital.usembassy.gov/st/english/texttrans/2014/08/20140814305641.html#ixzz3B3fyWzwJ>.

prerequisite ASEAN “rule” that the United States had to follow if it wanted to become a member of the annual heads of state meeting called the East Asian Summit (EAS).⁴⁵

Secretary Clinton more directly involved the United States in the South China Sea at the July 2010 meeting of the ASEAN Regional Forum (ARF) in Hanoi. She surprised China by indicating that Washington was willing to facilitate multilateral discussions on the disputed territories of the South China Sea. She also said that the United States was opposed to any use of coercion or threats of force to resolve conflicting claims. Clinton justified her statement of concern by saying, “The United States, like every nation, has a national interest in freedom of navigation, open access to Asia’s maritime commons and *respect for international law* in the South China Sea.” (Emphasis added.)⁴⁶

Taking this step directly involved the United States in the South China Sea in a strategic rather than a tactical fashion. China was furious over Clinton’s comments, not least because previously it had succeeded in keeping the sovereignty issue and the need to comport with international law off the ARF agenda and that of other Asian multinational meetings. Chinese officials denounced Clinton’s efforts to “internationalize” the issue; both the Chinese foreign and defense ministries criticized her for intervening in the South China Sea dispute, essentially saying that the South China Sea was none of America’s business.⁴⁷

By inserting itself more directly into SCS sovereignty issues, Washington was responding to a perceived demand signal from Vietnam and the Philippines, which were worried about Chinese assertiveness in the SCS.⁴⁸ Washington itself was worried about Chinese behavior, notably in the USNS *Impeccable* incident in the spring of 2009, which from the U.S. perspective was a blatant example of China’s failure to follow the

⁴⁵ Jeffery A. Bader, *Obama and China’s Rise: An Insider’s Account of America’s Asia Strategy*, (Washington DC, Brookings Institution Press 2012), pp.9-17. Bader writes, “During its transition and opening days, the Obama administration looked for ways to demonstrate that from the beginning it intended to place much greater emphasis on U.S. relations with Asia...the U.S. needed to rebuild its presence and relations in parts of the world where it appeared distracted, which first of all meant East Asia.”

⁴⁶ Secretary of State Hillary Clinton, remarks at Press Availability, July 23, 2010, Hanoi, Vietnam, <http://www.state.gov/secretary/rm/2010/07/145095.htm>.

⁴⁷ Gordon Chang, “Hillary Clinton Changes America’s China Policy: the Secretary of State Pulls a 180 on Beijing,” *Forbes*, July 28, 2010. <http://www.forbes.com/2010/07/28/china-beijing-asia-hillary-clinton-opinions-columnists-gordon-g-chang.html>.

⁴⁸ The best analysis of Chinese assertiveness in the 2009-2011 timeframe is by Dr. Michael Swaine of the Carnegie Endowment and Dr. M. Taylor Fravel of MIT. See Michael D. Swaine and M. Taylor Fravel, “China’s Assertive Behavior: Part Two: the Maritime Periphery,” *China Leadership Monitor* 35 (Summer 2011), Hoover Institute, Stanford University, <http://www.hoover.org/publications/china-leadership-monitor/8146>.

“due regard” principles in both UNCLOS and the International Regulations for Preventing Collisions at Sea 1972 (COLREGS).⁴⁹

The Clinton statement at the Hanoi ARF meeting accomplished an important objective. It reminded the participants, including China, that the United States intended to remain a serious strategic player in East Asia and *that peace and stability in the SCS was a U.S. interest*. It also linked the need to abide with international law to the security situation in the South China Sea.

Furthermore, it foreshadowed the announcement of the U.S. rebalance to Asia strategy. This strategy includes an integrated mix of diplomatic, economic, budgetary, and security initiatives. Specific military posture changes are focused on Southeast Asia, and are intended to increase U.S. presence through rotational deployment, more frequent port visits, and improved military-to-military engagements and training exercises with the Philippines, Vietnam, and Singapore.⁵⁰

In 2011, Thomas Donilon, then President Obama’s national security adviser, saw the notion of equating international law with security and stability, as being clearly linked to the need to follow the rules. Writing in the *Financial Times*, he stated:

Security in the region requires that international law and norms be respected, that commerce and freedom of navigation are not impeded, that emerging powers build trust with their neighbors, and

⁴⁹ The incident took place 75 miles south of the island of Hainan in China’s EEZ and was due to a Chinese disregard for international legal norms. For a legally accurate view, see Peter Dutton, “Three Disputes and Three Objectives: China and the South China Sea,” pp. 54-55.

⁵⁰ During his November 2011 trip to Asia, President Obama announced the creation of a U.S. Marine Corps rotational presence in Australia. It is planned to eventually gradually grow to 2,500—a full Marine Expeditionary Unit (MEU). This is likely to trigger an increase in the number of amphibious ships based permanently in the Western Pacific so that these Marines will have the lift necessary to be employed within the region. The Obama announcement built upon the announcement that then secretary of defense Robert Gates had made earlier in 2011, at the Shangri-La Dialogue in Singapore, that several of the U.S. Navy’s newest surface combatants, known as the Littoral Combat Ships (LCSs), would be permanently stationed in Singapore. Finally, the idea of reestablishing some sort of rotation presence in the Philippines has apparently been realized with the signing of the Enhanced Defense Cooperation Agreement (EDCA) with Manila in April 2014. Collectively, these posture announcements were intended to signal that the rebalance strategy includes improving U.S. presence in Southeast Asia. That presence has been sparse since the 1992 failure to renew the U.S.-Philippine basing agreement, which triggered the withdrawal of all permanently assigned U.S. forces and the closing of U.S. military facilities in the Philippines.

that disagreements are resolved peacefully without threats or coercion.⁵¹

Reassuring the region that the “rebalance” is still a goal of the U.S. administration

An important interest of the United States involves the credibility of America’s ability and political willingness to continue its post-World War II role as regional balancer. Many East Asian observers worry about this, and note that China’s power is growing while the United States is facing political gridlock, declining defense budgets, and isolationist public opinion polling—all of which point to a trend of disengagement from many of America’s overseas involvements.

Besides the aforementioned defense budget reductions and political dysfunction in Washington, there is a perception of weakness in how the White House has responded to the Syrian civil war, especially the “red line” regarding chemical weapons that was not a red line after all. Russia’s aggression in seizing Crimea, and supporting Ukrainian separatists along with the emergence of ISIS as a threat to Iraq and the greater Middle East are other events that cause Asians to be skeptical over how committed the U.S. administration is to the rebalance strategy and to its security guarantees to Asian friends and allies. As a result, the administration continues to argue that its commitment to East Asia is firm. It follows that:

The United States has a critical interest in providing reassurance to its allies and partners in the region that it will maintain a strong security presence to prevent a power vacuum from developing as China rises. That requires a continuing active engagement in the South China Sea, taking steps that encourage responsible behavior and discouraging coercion by all parties.⁵²

Adding to regional skepticism is the fact that neither the national security advisor nor the secretary of defense is considered an “Asia hand.” One of the key aspects of the current policy approach is to emphatically reassure the region that the administration remains committed to the rebalance strategy in general, and to Southeast Asia in particular. During his visit to Brunei in July 2013 for the ASEAN ministerial meeting,

⁵¹ Tom Donilon, “America Is Back in the Pacific and Will Uphold the Rules,” *Financial Times*, November 27, 2011, <http://www.ft.com/cms/s/0/4f3febac-1716-11e1-b00e-00144feaadc0.html>.

⁵² Bader, Lieberthal, McDevitt, “*Keeping the South China Sea in Perspective*,” p. 3.

Secretary of State John Kerry spoke directly to Obama's second-term commitment to the rebalance strategy:

I know that some people have wondered whether in the second term of the Obama Administration, and with a new Secretary of State, are we going to continue on the path that we have been on? And the answer, I say to all of you directly, is yes. Not just yes, but we hope to increase the effort. So we are committed to ensuring a peaceful, stable, and prosperous Southeast Asia, and that's why we're working together on a whole range of both traditional and non-traditional security issues from wildlife trafficking to human trafficking - trafficking in persons - to non-proliferation, humanitarian assistance, and disaster relief, and so much more.⁵³

In November 2013 Ambassador Susan Rice, the current national security advisor, delivered an address laying out the administration's continued commitment to the rebalance. She stressed the multidimensional nature of the rebalance—it is not just about security—and provided more specificity on what the administration hopes to achieve during its final three years in office.

Rebalancing toward the Asia Pacific remains *a cornerstone* of the Obama Administration's foreign policy. No matter how many hotspots emerge elsewhere, we will continue to deepen our enduring commitment to this critical region. Our friends in Asia deserve and will continue to get our highest level attention. (Emphasis added).⁵⁴

After specifically highlighting that the Obama administration is showing commitment to the Asia Pacific by dispatching a number of high-level delegations to the region, which is viewed in East Asia as an important indication of the administration's interest, Rice went on to say:

I'd like to take this opportunity to outline what we aim to achieve in the Asia Pacific over the next three years. Ultimately, America's purpose is to establish a more stable security environment in Asia, an open and transparent economic environment, and a liberal political environment that respects the universal rights and freedoms of all. . .

⁵³ John Kerry, "Remarks at the U.S.-ASEAN Ministerial Meeting," Bandar Seri Begawan, July 1, 2013, <http://www.state.gov/secretary/remarks/2013/07/211377.htm>.

⁵⁴ Susan E. Rice, "America's Future in Asia," November 20, 2013, Georgetown University, <http://www.whitehouse.gov/the-press-office/2013/11/21/remarks-prepared-delivery-national-security-advisor-susan-e-rice>.

In the near term, President Obama will continue to lay the critical foundations for lasting progress in four key areas—enhancing security, expanding prosperity, fostering democratic values, and advancing human dignity.⁵⁵

While she did not specifically address the maritime disputes in East Asia, including those in the South China Sea, she did specifically address the importance that the rebalance places on strengthening allied relationships as well as the military-posture aspects of the rebalance strategy:

We are making the Asia Pacific more secure with American alliances—and an American force posture—that are being modernized to meet the challenges of our time. By 2020, 60 percent of our fleet will be based in the Pacific, and our Pacific Command will gain more of our most cutting-edge capabilities.

We are updating and diversifying our security relationships in the region to address emerging challenges as effectively as we deter conventional threats. We are urging our allies and partners to take greater responsibility for defending our common interests and values....To diversify the network of security relationships in the region, we are strengthening trilateral cooperation with our allies and our security partners and encouraging them to cooperate more closely among themselves.⁵⁶

In short, since the start of President Obama's second term in 2013, the administration has been very active in trying to reassure U.S. allies and friends that the United States remains serious regarding its role as a force for stability in Asia. Strategically, whether the administration intended it or not, the South China Sea has evolved into an important litmus test of its "rebalance to Asia" strategy.

Defense treaty obligations to the Philippines

Another U.S. interest is its defense treaty with the Philippines. While some Philippine claims overlap with those of Vietnam and Malaysia, Manila's most worrisome issues are with Beijing, which takes serious issue with all of Manila's claims. In April 2012, the SCS was the site of a confrontation between the Philippines and China over an

⁵⁵ Ibid.

⁵⁶ Ibid.

uninhabitable feature known as Scarborough Shoal that resulted in China being in control of the feature. This dispute has quieted down but has not yet been resolved. It did serve as a wake-up call to U.S. diplomatic and security officials to the possibility, admittedly slim, that the United States could become directly involved in a crisis with China because of our treaty obligations with the Philippines.

It is not that the Mutual Defense Treaty with the Philippines obligates Washington to take sides over the sovereignty question of Scarborough Shoal; it does not. In fact, U.S. policy-makers have repeatedly pointed out that Washington takes no position on sovereignty claims, including those made by the Philippines on portions of the Spratly group annexed *after* the Mutual Defense Treaty with the Philippines was signed on August 30, 1951. (The Philippine government claimed portions of the Spratly Islands in 1971 and it annexed them in 1978.)⁵⁷

This means that the United States probably would not become militarily involved if the Chinese seized a feature occupied or claimed by the Philippines—as they essentially did in the case of Scarborough Shoal. But, if in the process of doing so, China were to attack a Philippine naval or coast guard vessel, shoot down a Philippine military aircraft, or kill or wound members of the Philippine armed forces, treaty language related to attacks on “its [the Philippines’] armed forces, public vessels or aircraft in the Pacific” (the South China Sea is considered as being in the Pacific) suggests that the treaty would apply.⁵⁸

The treaty requires that either party will, in the event of an attack, “act to meet the common dangers in accordance with its constitutional processes.”⁵⁹ The U.S. decision regarding its response in accordance with the terms of the treaty would immediately be under the regional microscope. America’s friends and allies, along with China, would watch Washington’s response very closely and reach their own conclusions regarding how effective the rebalance strategy was in maintaining a stable and peaceful East Asian region. The premise rationalizing forward U.S. military presence is that it deters conflict; for deterrence to be effective, however, the United States must be perceived as having both the ability and the political will to act.

Although credibility is an essential part of Washington’s attempt to reassure friends and allies that the United States is a force for stability in the face of Chinese power, Washington does not want to get into a conflict with China over inconsequential rocks

⁵⁷ Samuels, *Contest for the South China Sea*, pp.89, 96.

⁵⁸ Mutual Defense Treaty between the United States and the Republic of the Philippines, August 30, 1951, http://avalon.law.yale.edu/20th_century/phil001.asp.

⁵⁹ *Ibid.*, Article II.

and shoals in the South China Sea claimed by the Philippines.⁶⁰ (This is addressed in detail below in chapter 5.)

Now that Washington is more deeply involved, can it do anything to improve the situation? It makes a great deal of sense for U.S. policy to focus on international law in general and UNCLOS in particular, because Washington has no direct leverage when it comes to resolution of the sovereignty disputes. To that end, chapter 4 reviews what UNCLOS has to say that is directly relevant to the South China Sea disputes.

⁶⁰ The Philippine claims to the Spratlys originated in 1956 when Tomas Cloma, the Philippine owner of a fishing company and director of the Philippine Maritime Institute, claimed he had “discovered” the Spratlys in 1947. Wanting to establish a cannery and develop the guano deposits in the islands, he decided in 1956 to take formal possession, first on behalf of the government of the Philippines and then, when they equivocated, as a separate government of the Free Territory of Freedomland, “*Kalayaan*.” Cloma appointed himself the “Chairman, Supreme Council of State,” and posted a document in English, entitled *Notice to the Whole World*, listing all the features he claimed (about 50, among the Spratly group). Not surprisingly, his declaration was strongly protested by the Republic of China (Taiwan), the PRC, and South Vietnam, as well as France, the United Kingdom, and the Netherlands, which were representing their colonies in Southeast Asia. Cloma eventually “sold” Freedomland to the Marcos government for one Philippine peso, and in July 1971 the government of the Philippines made an official claim to the 53 islands of the Cloma claim, asserting they were terra nullius. The single best discussion of the Cloma episode is found in Bill Hayton, *The South China Sea: The Struggle for Power in Asia*, (Yale University Press, 2014), pp.64-70. This very recent book fills out the story of this unusual episode first told in detail by Samuels, *Contest for the South China Sea*, pp. 81-85; and Haydee B. Yorac, “The Philippine Claim to the Spratly Island Group,” *Philippine Law Journal* 58, 1983, <http://law.upd.edu.ph/plj/>.

Chapter 3. China's Approach to Maritime Claims in the South China Sea

The reason that the South China Sea has received so much commentary and associated concern is that China has slowly but surely begun to actively assert its authority over many of the features and much of the water space in the South China Sea. It has a long record of coercive behavior in the SCS. It took full control of the Paracels from South Vietnam (RVN) in a 1974 military action, and since 1988, when it seized Johnson Island following a bloody gun-battle with Vietnam (DRV), it has begun to assert its power in areas around the Spratlys. It effectively seized Scarborough Shoal from the Philippines in a non-violent takeover in 2012.⁶¹

In his well-regarded work that explores China's ocean frontier, Australian scholar Dr. Greg Austin concludes that Chinese claims in the South China Sea are motivated by the unshakable conviction that the land features in the SCS legitimately belong to China according to commonly accepted standards of international law. He argues that resources are important, but are not the primary motivation.⁶² This is probably an accurate assessment when it comes to the "unshakeable belief" that the land features all belong to China. But, it is not correct to imply that China has been scrupulous in following the rules associated with maritime zones and features that are spelled out in UNCLOS. It has not—and, for that matter, neither have other claimants.

Furthermore, China also is trying to rewrite "commonly accepted" international law—specifically, to generate a Chinese claim to resources that lie far beyond those associated with land features. In effect, that is what China's "nine-dash line" claim appears to be all about. It argues that China has "historic rights," which are circumscribed by the nine-dash line, to justify access to resources that are on the

⁶¹ See Hayton, *South China Sea*, pp 121-150 for a thorough discussion of how China used economic leverage as well as aggressive use of both fishing boats and constabulary vessels to frustrate Philippine and Vietnamese efforts to survey potential oil and gas fields.

⁶² Greg Austin, *China's Ocean Frontier: International Law, Military Force and National Development*, (Sydney and Melbourne: Allen & Unwin, 1998), p.4.

continental shelf and within the EEZs of Vietnam, Indonesia, Malaysia, Brunei, and the Philippines.⁶³ The case, discussed above, that the Philippines brought before the arbitral panel is intended to address the legal legitimacy of the nine-dash line.⁶⁴ It is hoped that the arbitral panel will decide to undertake the arbitration, as that would, once and for all, clarify the economic uncertainty created by this extra-legal attempt by Beijing to deprive SCS coastal states of two of their legitimate economic assets, fisheries and seabed resources.

Chinese security interests

For Beijing, controlling the SCS is important because, as a “near sea,” it is both a security buffer for South China and the vital commercial route for Chinese trade, including 80 percent of its oil imports. Whether it is a “core interest,” like Taiwan or Tibet, was a hotly debated topic in 2010, after a *New York Times* report asserted that China had made this statement in a meeting with a senior U.S. government official. Although the article triggered considerable interest among American China specialists, no evidence was uncovered that could attribute this apparent expansion of China’s vital interests to include the SCS.⁶⁵

Nonetheless, whether or not China officially includes the SCS in its formulations of “core interests,” under the leadership of President Xi Jinping China’s actions suggest that “control” of the SCS is very high on its list of interests. Because it involves China’s sovereignty, under Xi it is in fact treated as a “core interest.” In a speech made at a Politburo meeting dedicated to China’s diplomatic approach to its peripheral neighbors, Xi is reported to have said that China “must...improve the ability to safeguard maritime rights and interests, and resolutely safeguard our country’s maritime rights....” He went on to speak about safeguarding China’s “core interests.”⁶⁶

From a strategic security perspective, China has four interests in the South China Sea: First, it wants to protect its territory and its economic center of gravity from attack

⁶³ See footnote 6.

⁶⁴ See footnote 23.

⁶⁵ M. Taylor Fravel, “China’s Strategy in the South China Sea,” *Contemporary Southeast Asia* 33 (2011), 292-320, p. 296.

⁶⁶ “Xi Jinping’s Important Speech to the Periphery Diplomacy Work Conference,” Xinhua, October 25, 2013 cited in Bonnie Glaser, “Peoples Republic of China Maritime Disputes,” Statement before the House Armed Services Subcommittee on Seapower and Projection Forces and the House Foreign Affairs Subcommittee on the Asia-Pacific, January 14, 2014. [CSIS.org/files/attachment/ts14014_glaser.pdf](https://www.csis.org/files/attachment/ts14014_glaser.pdf).

from the sea. Second, it wants to ensure that when its seaborne raw materials approach its ports from the south or from the Indian Ocean region, they cannot be interdicted. Third, it likewise wants to ensure that its maritime exports can pass unmolested via the South China Sea to South Asia, Africa, and Europe. Finally, it is enticed by the glittering economic-strategic prospect of greatly reducing its dependence on oil and natural gas that has to travel through two problematic chokepoints (Straits of Hormuz and Malacca) by laying claim to and exploiting the hydrocarbon resources (real and imagined) of the South China Sea. Arguably, one of China's key strategic objectives is to reduce its dependency on African and Persian Gulf oil that must travel long and potentially vulnerable sea lanes to China (this is often referred to as China's "Malacca Dilemma" because a good number of these resource imports travel via the Malacca Strait chokepoint).

If SCS oil reserves turn out to match the most optimistic predictions, this strategic objective could become a reality. This would solve the Malacca Dilemma once and for all, by making large reserves of oil and gas available to China from one of its own "near seas"—a location more secure and potentially less prone to interdiction. When viewed from this perspective, it is not difficult to understand China's willingness to worry many of its neighbors, and apparently sacrifice much of the goodwill developed with ASEAN through years of careful "peaceful development" diplomacy, by becoming increasingly assertive in its approach to sovereignty and the concomitant resource issues in the SCS.

China's behavior

As mentioned above, China's behavior in the South China Sea took a turn for the worse during 2012, when it used coercion to force the Philippines out of Scarborough Shoal. China scholar Bonnie Glaser captured this in a statement before the House Foreign Affairs Committee, "Beijing as an Emerging Power in the South China Sea":

China's behavior in the South China Sea is deliberate and systematic: its actions are not the unintentional result of bureaucratic politics and poor coordination. In fact, the spate of actions by China in recent months suggests exemplary interagency coordination, civil-military control and harmonization of its political, economic and military objectives. The clear pattern of bullying and intimidation of the other claimants is evidence of a top leadership decision to escalate China's coercive diplomacy. This has implications not only for the Philippines

and Vietnam, the primary targets of China's coercive efforts, but also has broader regional and global implications.⁶⁷

In her statement, she also pointed out that China's claims, policies, ambitions, behavior, and capabilities are significantly different from those of other claimants:

Beijing refuses to engage in multilateral discussions on the territorial and maritime disputes in the region, preferring bilateral mechanisms where it can apply leverage over smaller, weaker parties. China rejects a role for the International Court of Justice (ICJ) or the International Tribunal on the Law of the Sea (ITLOS) in resolving the territorial and maritime disputes in the South China Sea. Although Beijing has agreed to eventually enter into negotiations to reach a Code of Conduct for the South China Sea, Chinese officials have recently stated that discussions can only take place "when conditions are ripe."⁶⁸

Over the last two years, China's approach in the South China Sea has been characterized as a "salami slice" strategy: it continues to take small, incremental steps that are not likely to provoke a military response from any of the other claimants, but over time gradually change the status-quo regarding disputed claims in its favor. Some Chinese have unofficially referred to this as a "cabbage" approach—referring to the layer-by-layer way in which an occupied feature is surrounded. Whatever one calls it, the strategy has been very effective.⁶⁹

A crucial feature of the Chinese approach is to carefully avoid the direct involvement of the PLA Navy to the extent possible. The China Coast Guard and China's vast fishing fleet have been in the lead in patrolling the South China Sea and aggressively asserting its claims to territory and associated fishing grounds. The most publicized acts include chasing non-Chinese fishing boats away from Chinese-claimed fishing grounds, trying to forestall Philippine efforts to resupply its detachment of Philippine Marines on a grounded hulk on Second Thomas Shoal, and keeping Philippine fishermen away from their traditional fishing grounds around Scarborough Shoal. In May 2014, China positioned its first deep-sea oil exploration rig in Vietnam's EEZ. The Chinese claimed

⁶⁷Bonnie Glaser, Statement Before the House Foreign Affairs Committee, "Beijing as an Emerging Power in the South China Sea," September 12, 2012, <http://csis.org/testimony/beijing-emerging-power-south-china-sea>.

⁶⁸ Ibid.

⁶⁹ "China boasts of strategy to "recover" islands occupied by the Philippines," *China Daily Mail*, May 28, 2013, (a translation of a TV interview with Major General Zhang Zhaozhong), <http://chinadailymail.com/2013/05/28/china-boasts-of-strategy-to-recover-islands-occupied-by-philippines/>.

it was within their EEZ/continental shelf that extends from the western portion of the Paracel Islands, which they have occupied since 1974. Since the Vietnamese don't recognize Chinese sovereignty over the Paracels, they argued that this was Vietnam's EEZ and that by drilling in it the Chinese were clearly violating Vietnamese sovereignty.

Obviously anticipating trouble, the Chinese initially had their rig escorted by around 80 vessels—a mix of fishing boats, coast guard vessels, and, reportedly, seven PLA Navy ships.⁷⁰ Vietnam responded by dispatching about 20 coast guard and fisheries surveillance ships. The ensuing melee ebbed and flowed for over a month, as ships routinely rammed one another and inundated one another with high-pressure water cannons. One Vietnamese fishing boat capsized after being rammed; fortunately, the crew was rescued. After two months, the rig was moved out of Vietnam's EEZ, probably to avoid an approaching typhoon. Since that time, Hanoi and Beijing have managed to put relations back on an even keel; however, many ASEAN states were clearly very disturbed by China's unilateral and provocative action.⁷¹

So too was the White House. During a July 1, 2104 press conference Deputy National Security Advisor Ben Rhodes had this to say about China's approach to disputes in the South China Sea, "Our point is simply that we don't want to see a process where a big nation—a bigger nation can bully a smaller one to get its way on territorial disputes."⁷²

As one expert has observed, "It looks to Southeast Asia like China has taken off the gloves." He was referring to the hard-nosed approach that China has been pursuing in the South China Sea since it effectively seized control of Scarborough Shoal from the Philippines in 2012. In effect, Chinese actions are "scaring the hell out of Southeast Asia."⁷³

At the same time, Beijing also continues to tout the centrality of its relations with its ASEAN neighbors. In October 2013, during a visit to Indonesia, China's president, Xi Jinping, announced a new Chinese initiative, which he called the "New Maritime Silk Road." The basic idea involves "five links" along a maritime route that stretches from

⁷⁰ Carlyle A Thayer, "China and Vietnam Square Off in War of Attrition Over Disputed Waters," *Asian Currents* (Asian Studies Institute of Australia), June 2014, <https://www.scribd.com/doc/231875269/Thayer-China-and-Vietnam-Square-Off-in-War-of-Attrition-Over-Disputed-Waters>.

⁷¹ Gregory Poling, "Recent Trends in the South China Sea and U.S. Policy," A Report of the Sumitro Chair in Southeast Asian Studies, CSIS, July 2014, p. 4, www.csis.org.

⁷² Briefing with Deputy National Security Advisor for Strategic Communications Ben Rhodes, July 1, 2014. <http://iipdigital.usembassy.gov/st/english/texttrans/2014/07/20140702303143.html#axzz3GtEw5WpY>.

⁷³ Ernest Bower, director of CSIS East Asia Program, podcast, 11 June 2014. Cited in David Tweed, "China Seeks Great Power Status After Sea Retreat," *Bloomberg News*, July 3, 2014.

China through the South China Sea, to Indonesia, Singapore, Malaysia, Burma, Sri Lanka, and India; to the east coast of Africa and through the Red Sea and Suez; through the Eastern Mediterranean to Chinese-managed ports in Greece; and then overland to North Sea ports.⁷⁴ The “five links” are:

- Upgrading and expanding maritime infrastructure
- Improving connectivity between ports
- Enhancing maritime cooperation in areas such as fishing, search and rescue, and navigational safety
- Enhancing regional and sub-regional economic cooperation, which includes expanding economic cooperation zones and improving transnational production chains
- Enhancing cultural exchanges and people-to-people relations.

It seems likely that the New Maritime Silk Road Initiative was generated because China needed to present a more benign face to its peripheral neighbors in order to counterbalance the anxieties that Southeast Asians have regarding Beijing’s “hard-nosed” approach to sovereignty issues in the South China Sea. The message seems to be that China is offering a choice. States that take actions directly challenging Chinese claims will face demonstrations of Chinese power in all its various guises; however, states that pursue moderate policies or acquiesce to Chinese claims will reap mutually beneficial economic and political rewards.⁷⁵

⁷⁴ Shannon Tiezzi, “Maritime Silk Road vs. The String of Pearls,” *The Diplomat*, February 13, 2014, <http://thediplomat.com/2014/02/the-maritime-silk-road-vs-the-string-of-pearls/>.

⁷⁵ Bonnie Glaser and Deep Pal, “Is China’s Charm Offensive Dead?” *China Brief: A journal of analysis and information*, XIV, issue 15, Jamestown Foundation, July 31, 2014. www.jamestown.org/China_Brief_Vol_14_issue_15_4_.pdf.

Chapter 4. What Are the “Rules” Associated With the Juridical Regime of Maritime Features?

Since so much of U.S. policy rests on urging adherence to international law and the UNCLOS Convention, following the rules as it were, this chapter presents a short synopsis of the basic “rules” of international law associated with maritime claims, which, aside from case law precedents, is embodied in UNCLOS. The following is what the convention has to say regarding the basic ground rules associated with the Law of the Sea. Having a grasp of these fundamentals helps understand the particulars of various claims and competing national rationales associated with sovereignty claims in the SCS. (As a reminder, UNCLOS is silent on the issue of how to determine sovereignty. It is not silent on what procedures states should follow to resolve issues of disputed sovereignty.)

The foundation “rule” of maritime zones is that:⁷⁶

- Land generates maritime zones, not vice versa.⁷⁷

⁷⁶ This section is a synopsis of a paper prepared for this project by Captain J. Ashley Roach, USN, JAGC, (retired). This paper develops the author’s presentation at the Center for International Law, National University of Singapore on January 21, 2011, *available at* <http://cil.nus.edu.sg/programmes-and-activities/past-events/cil-seminar-series-developments-in-jurisprudence-on-sovereignty>.

In addition to his distinguished naval service, Captain Roach also served as attorney adviser in the Office of the Legal Adviser, U.S. Department of State, from 1988 until he retired at the end of January 2009. He was responsible for law of the sea matters. He has taught, advised and published extensively on national maritime claims and other law of the sea issues, including piracy and armed robbery at sea. He has negotiated, and participated in the negotiation of, numerous international agreements involving law of the sea issues. He received his LL.M. (highest honors in public international law and comparative law) from the George Washington University School of Law in 1971 and his J.D. from the University of Pennsylvania Law School in 1963.

⁷⁷ *North Sea Continental Shelf Cases* (Ger. v. Den.; Ger. v. Neth.), 1969 ICJ Rep. 3, 22 para. 19, and 29 para. 39, *available at* <http://www.icj-cij.org/docket/files/52/5561.pdf>.

What are the maritime zones?

- Territorial sea: The sovereignty of a coastal state extends, beyond its land territory and internal waters to an adjacent belt of sea, described as territorial sea. Sovereignty extends to air space over the territorial sea and to its seabed and subsoil. The maximum breadth of the territorial sea is 12 nautical miles (a nautical mile is 6,076 feet long). It is measured from a nation's baselines.⁷⁸
- The exclusive economic zone (EEZ) is a maritime area beyond and adjacent to the territorial sea in which the coastal state has sovereign rights and jurisdiction. These rights are less than full sovereignty. All states have freedoms of navigation and overflight in EEZ. The maximum breadth of the EEZ is 200 nautical miles from baselines from which the breadth of the territorial sea is measured.⁷⁹
- The continental shelf comprises the seabed and subsoil of the submarine areas beyond the territorial sea throughout the natural prolongation of the land territory to the outer edge of the continental margin. The continental margin is the submerged prolongation of the land mass of a coastal state. It consists of the seabed and subsoil of the shelf, the slope, and the rise. The maximum breadth of the continental shelf is 200 miles from baseline (*irrespective of the actual conditions of the sea bed*) or more if certain criteria are met.⁸⁰

What land features generate maritime zones?

- Islands are defined as naturally formed areas of land surrounded by water, which are above water at high tide.⁸¹ Maritime zones of islands are the same as for land areas along the coast: a territorial sea not to exceed 12 miles; an EEZ

⁷⁸ United Nations Convention on the Law of the Sea, Montego Bay, Dec. 10, 1982, entered into force November 10, 1994, 1833 UNTS 397, arts. 2 & 3, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (hereinafter, LOS Convention).

⁷⁹ *Ibid.*, Part V.

⁸⁰ *Ibid.*, art. 76.

⁸¹ *Ibid.*, art. 121(1). The ICJ has stated that all of article 121 is customary international law. *Nicaragua v. Colombia*, 2012 ICJ Rep., para. 139.

of 200 miles; and a continental shelf at least 200 miles.⁸² There is no minimum size for islands.⁸³

- Rocks are islands which cannot sustain human habitation or have an economic life of their own. *They are entitled only to a territorial sea.* They are not entitled to an EEZ or a continental shelf.⁸⁴ It is not clear how many islands would be legally judged to be “rocks,” as, unfortunately, there is no agreement as to which features meet the criteria of being a rock, rather than an island.⁸⁵

Because of the lack of a clearly defined criteria, most States with features that might be deemed juridical rocks according to a plain reading of UNCLOS, have gone ahead and claimed EEZs from them. Japan’s claim to Okinotorishima and Venezuela’s claim to Aves Island are examples.⁸⁶ With one recent exception in 2012, the International Court of Justice (ICJ) has, in earlier cases, declined to make a distinction between rocks and islands. This is a particularly important point regarding the Spratly dispute.⁸⁷

- For islands on atolls and islands having fringing reefs, the baseline is the seaward low-water line of the reef shown by the appropriate symbol on official

⁸² LOS Convention, art. 121(2).

⁸³ *Nicaragua v. Colombia*, ICJ judgment, para. 37, citing *Qatar v. Bahrain*, ICJ Reports 2001, p. 99, para. 197. See case note at 107 AJIL 396-403 (2013).

⁸⁴ LOS Convention, art. 121(3).

⁸⁵ See the discussion in V. Prescott and C. Schofield, *The Maritime and Political Boundaries of the World* 61-89 (Leiden: Nijhoff, 2nd ed. 2005). ITLOS Judge Vukas has expressed his disagreement with EEZ claims from the Kerguelen Islands (declaration in the 2000 *Monte Confurco* Case (*Seychelles v. France*), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_6/Declaration.Vukas.E.pdf, and around Heard Island and the McDonald Islands (lengthy declaration in the 2002 *Volga* Case (*Russian Federation v. Australia*), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_11/decl.Vukas.E.pdf).

⁸⁶ See J.A. Roach, *Maritime Boundary Delimitation: United States Practice*, 44 ODIL 1, Table 1 at 12-19 (2013).

⁸⁷ The ICJ has agreed that Quitasueño (QS 32) in the Western Caribbean is a rock under article 121(3) and entitled only to a 12-mile territorial sea. This is an exception; in cases involving the distinction between rocks and islands the ICJ has declined to rule on whether Serpents’ Island in the Black Sea and Roncador, Serrana, the Albuquerque Cays and the East-Southeast Cays in the Western Caribbean are rocks. *Nicaragua v. Colombia*, ICJ judgment, para. 183 (2012). *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, ICJ Rep. 2009, pp. 122-123, para. 187; *Nicaragua v. Colombia*, 2012 judgment, para. 180.

charts.⁸⁸ Thus the breadth of the territorial sea of these features is measured from that low-water line.

- Low-tide elevations (LTEs) are naturally formed areas of land, surrounded by *and above water at low tide, but submerged at high tide.*⁸⁹ An LTE situated wholly outside the territorial sea of the mainland or islands has no territorial sea of its own.⁹⁰ *LTEs cannot be appropriated.*⁹¹ *Sovereignty claims to such features are invalid. Similarly, artificially enhancing an LTE so that it is above water at high tide does not change its legal status as an LTE.*
- Features below water at low tide (permanently submerged) have no maritime zones and are not subject to sovereignty claims.⁹² *Sovereignty claims to such features are also invalid.*
- Similarly, artificial islands, installations, and structures do not possess the status of islands. *They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone, or the continental shelf.*⁹³

How does a state acquire sovereignty?⁹⁴

Maritime features generate maritime zones for the state which has sovereignty over them. What if sovereignty is disputed or not agreed upon by all claimants? Precedential judgments are scarce. Over the past 80 years, only 12 sovereignty disputes have been submitted to international judicial or arbitral tribunals. This is not because of a paucity of disputes; worldwide, over 20 islands or groups of islands are the subjects of

⁸⁸ LOS Convention, art. 6.

⁸⁹Ibid., art. 13(1).

⁹⁰ Ibid., art. 13(2).

⁹¹ *Nicaragua v. Colombia*, ICJ 2012 judgment, para. 26.

⁹² Embassy Bogotá Note No. 694, Sept. 8, 1972 (“Quita Sueño, being permanently submerged at high tide, is at the present time not subject to the exercise of sovereignty”), 1307 UNTS 383. The ICJ subsequently determined that one small feature of Quitasueño (QS 32) is above water at high tide. *Nicaragua v. Colombia*, 2012 Judgment, para. 37.

⁹³ LOS Convention, art. 60(8).

⁹⁴ This section is a synopsis drawn from Raul (Pete) Pedrozo, *An Analysis of the Competing Claims in the South China Sea*, a CNA occasional paper, August 2014, p. 3. <https://www.cna.org/sites/default/files/research/IOP-2014-U-008433.pdf>.

sovereignty disputes. Some of these disputes are quite contentious; others are more or less dormant; few have been resolved.⁹⁵

In general, territorial sovereignty can be acquired in one of five ways: accretion, cession, conquest, occupation, and prescription. Accretion involves the expansion of existing territory under the sovereignty of a state through a geographical or geological process (e.g., volcanic activity). Cession occurs when one state transfers its territory to another state pursuant to a treaty; however, “the transferee cannot receive any greater rights than those possessed by the transferor.”⁹⁶ Conquest—the acquisition of territory by force—was historically considered a lawful mode of acquiring sovereignty, but has been illegal since October 1945 following the entry into force of the *United Nations Charter* (Article 2(4)).⁹⁷ Prescription involves the occupation of another state’s territory over a long period of time. In order for prescription to apply, the occupying state must show that its display of state authority (*à titre de souverain*) over the other state’s territory was public, peaceful, and uninterrupted for a long period of time. This of course, is why five different nations have been occupying features in the Spratlys for decades.⁹⁸

Finally, a state may acquire sovereignty over territory that is not under the control of any other state (*terra nullius*), to the extent that the state effectively occupies the territory. Discovery alone, however, without subsequent acts of effective occupation, does not confer title to territory; rather, “an inchoate title of discovery must be completed within a reasonable period by effective occupation of the region claimed to be discovered.”⁹⁹ Moreover, an inchoate title will not “...prevail over the continuous and

⁹⁵ J. Ashley Roach, “Sovereignty Over Maritime Features,” August 27, 2013. Unpublished paper prepared for this project. Authors possession. pp. 8-9.

⁹⁶ D.P. O’Connell, *Territory, International Law*, 437, Vol. 1 (2nd ed.), Stevens & Sons, 1970; see also James Crawford, *Acquisition and Transfer of Territorial Sovereignty, Brownlie’s Principles of International Law* 217 (8th ed.), Oxford University Press, 2012.

⁹⁷ Charter of the United Nations, June 26, 1945, Article 2(4) provides that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state....” See also, Monique Chemillier-Gendreau, *Sovereignty over the Parcel and Spratly Islands* (Brill/Martinus Nijhoff Publishers, 2000), at p. 16 and Annex 18 (Note dated 8 March 1928 from Mr. Bourgouin). According to Chemillier-Gendreau, “Wars of conquest, as a source of new sovereignty over a territory, are now prohibited. Conquest by force entails a situation of military occupation which is always illegal and which, failing an agreement concluded between the States concerned, cannot be transformed into law, even with the passage of time.”

⁹⁸ O’Connell, *International Law* (2nd ed.), p. 423; see also Brownlie, (8th ed.), p. 216.

⁹⁹ *Island of Palmas Case (Netherlands/U.S.A.)*, U.N. Rep., Vol. II, p. 829 (1928), at p. 846.

peaceful display of authority by another State; for such display may prevail even over a prior, definite title put forward by another State.”¹⁰⁰

A *terra nullius* claim to sovereignty based on effective occupation “involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.”¹⁰¹ Effective occupation requires the actual, and not the nominal, taking of possession. “This taking of possession consists in acts, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.”¹⁰²

The degree of actual administration (*effectivités*) that must be established by the occupying state, however, may vary, particularly in cases of remote and uninhabited areas. Under such circumstances, tribunals have recognized that “sovereignty cannot be exercised in fact at every moment on every point of a territory” and that “[t]he intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved...”¹⁰³ Accordingly, some tribunals have “been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim...particularly...in the case of claims to sovereignty over areas in thinly populated or unsettled countries.”¹⁰⁴ This exception to the general rule that there must be an actual and continuous display of authority by the occupying state is explained in detail in the record of a 1931 case involving a remote island in the Eastern Pacific.¹⁰⁵

¹⁰⁰ *Ibid.*

¹⁰¹ *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J., Series A/B, No. 53 (1933), at p. 45.

¹⁰² *Clipperton Island Arbitration (Mexico v. France)*, 2 R.I.A.A. 1105 (1931), at p. 393. [The cited pages are from the English translation at 26 Am. J. Int’l L. 390, at 393-394 (1932).]

¹⁰³ *Island of Palmas Case (Netherlands/U.S.A.)*, U.N. Rep., Vol. II, p. 829 (1928), p. 831, at p. 840.

¹⁰⁴ *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J., Series A/B, No. 53 (1933), at p. 46. *See also Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12, at p. 43.

¹⁰⁵ *Clipperton Island Arbitration (Mexico v. France)*, 2 R.I.A.A. 1105 (1931), at pp. 393-394. [The cited pages are from the English translation at 26 Am. J. Int’l L. 390, at 393-394 (1932).] (“It is beyond doubt that...the actual...taking of possession is a necessary condition of occupation. ...Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. ...There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.”)

Maps, history, and sovereignty

China, Vietnam, and more recently the Philippines have invested considerable effort in locating ancient maps to bolster their claims to sovereignty in the Paracels and Spratly Islands. However, when determining sovereignty over territory, international law makes a clear distinction “between the concept of geographical awareness and that of discovery, their legal effects being fundamentally different.”¹⁰⁶

...[A]n island or an archipelago, can easily have been known from time immemorial to navigators frequenting those parts, to geographers keen to extend their work to include all territories regardless of who owns them, yet at the same time never have formed the object of any ‘discovery’ producing legal effect.¹⁰⁷

Accordingly, the maps cited by all three countries in support of their respective claims fall into the category of documents that “merely prove a general knowledge of the area, but are not useful to the legal argument.”¹⁰⁸

The reality is that the probative value of historic maps is questionable. International tribunals have treated maps with a considerable degree of caution and have consistently held that maps, particularly those submitted by the parties to a dispute, carry very little probative weight in determining ownership of a disputed territory. As the ICJ stated in a 1986 case:

...in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute territorial title, that is, [a map is not] a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.¹⁰⁹

¹⁰⁶ Ibid.

¹⁰⁷ Ibid., p. 56.

¹⁰⁸ Ibid., pp. 59-60.

¹⁰⁹ *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Reports 1986, p. 554, at pp. 582-583. *Accord Island of Palmas Case (Netherlands/U.S.A.)*, R.I.A.A., Vol. II, p. 829 (1928), p. 831, at pp. 852-854, available at http://legal.un.org/riaa/vol_II.htm; *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999, p. 1045, at pp. 1096-1100; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, I.C.J. Reports 2002, p. 625, at pp. 666-668; *Case Concerning the Frontier Dispute (Benin/Niger)*, I.C.J. Reports 2005, p. 90, at pp. 117-120; *Case Concerning Territorial and Maritime Dispute Between*

An exception to this rule may apply in cases where a map falls “into the category of physical expressions of the will of the State or States concerned..., for example, when maps are annexed to an official text of which they form an integral part.”¹¹⁰ However, except in this clearly defined case, “maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.”¹¹¹

The use of maps also relates to the broader question of using “history” to justify a sovereignty claim. This approach also runs into considerable difficulty:

China’s claim to the Spratlys on the basis of history runs aground on the fact that the region’s past empires did not exercise sovereignty. In pre-modern Asia, empires were characterized by undefined, unprotected, and often changing frontiers. The notion of suzerainty prevailed.¹¹²

A similar conclusion is made by a Norwegian expert, concerning the pre-modern-period evidence used by some of the South China Sea claimants to support their positions:

First, maritime power was volatile. The hegemony in the South China Sea shifted between several states. Second, the Spratly and Paracel Islands were mainly seen as a source of danger. And third, there was not at the time any concept of national sovereignty. Islands were

Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007, p. 659, at pp. 722-724. See also, Florian Dupuy and Pierre-Marie Dupuy “A Legal Analysis of China’s Historic Rights Claim in the South China Sea” *American Journal of International Law*, 107, no. 1 (Jan. 2013), pp. 124-141, at pp. 133-134.

¹¹⁰ *Ibid.*, pp. 95-163.

¹¹¹ *Ibid.*, “[M]aps can...have no greater legal value than that of corroborative evidence endorsing a conclusion at which the court has arrived by other means unconnected with the maps. In consequence, except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title. The only value they possess is as evidence of an auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable...presumption such as to effect a reversal of the onus of proof.” Other factors that the Court may take into consideration when determining the probative weight to be given to a map “relate to the neutrality of their sources towards the dispute in question and the parties to that dispute.”

¹¹² Mohan Malik, “Historical Fiction: China’s South China Sea Claims,” *World Affairs Journal*, May/ June 2013. <http://www.worldaffairsjournal.org/article/historical-fiction-china%E2%80%99s-south-china-sea-claims>.

discovered, described, and to some extent exploited, but they were not claimed or disputed in a legal sense.¹¹³

The Chairman of the Center for International Law in Manila agrees that it is a *non-sequitur* “to say that either China or Vietnam exercised effective occupation of the Spratlys during the pre-modern times....”¹¹⁴ The concept of “effective occupation...did not exist in either of their legal systems during the pre-modern era.”¹¹⁵ While he is not a disinterested commentator, his explanation is useful:

The ancient Confucian legal system, applicable to both China and Vietnam until the 1900s, does not have a counterpart...of what is traditionally now known in international law as “effective occupation.” The concept in Chinese law was that a ruler had jurisdiction over persons, and not over territory. Sovereignty was a function of social organization, history and loyalty of subjects. Territorial jurisdiction was measured in terms of zones of influence, rather than physical boundaries. Maritime boundaries were unheard of as sovereignty (over persons) was co-terminus with the coast. The oceans, and the islands found therein, were relevant only to navigation, *i.e.*, areas of hazards which must be avoided. Control over maritime areas was limited to ports and waterways and merely to guard against smuggling and piracy. Clearly, all these characterizations of the prevailing law in both countries negate the existence of effective occupation until recent years when both countries integrated the Western concept of territorial sovereignty into their respective legal systems.¹¹⁶

The unhappy reality is that UNCLOS has no provisions on how to determine sovereignty over offshore islands. Because there is no treaty that governs the issue of sovereignty, the rules of customary international law and relevant case law on the acquisition and loss of territory pertain. Territorial sovereignty disputes cannot be resolved unless the claimant states reach agreement between themselves or consent to refer the disputes to the International Court of Justice or an international arbitral tribunal. Given the sensitivity and complexity of the disputes, this is not likely to

¹¹³ Stein Tønnesson, “An International History of the Dispute in the South China Sea,” East Asian Institute Working Paper No. 71, Mar. 16, 2001, p. 5. <http://www.cliostein.com/documents/2001/01%20rep%20eai.pdf>.

¹¹⁴ Harry L. Roque, Jr, “China’s Claim to the Spratlys Islands Under International Law,” *Journal of Energy & Natural Resources Law* 15 (1997): 189-211, p.204.

¹¹⁵ *Ibid.*, p. 203.

¹¹⁶ *Ibid.*, pp. 203-204.

happen, even though lack of surety of title will stand in the way of incentivizing private investors—especially in the oil and gas field—to make investments in projects which are located in disputed regions. The desire to obtain such “surety of title” was one underlying reason that Bangladesh and Myanmar agreed to refer their longstanding boundary disputes to ITLOS for adjudication.¹¹⁷

Furthermore, there are still unresolved legal interpretations, based on case law, that make some of the claims and activities open to question. As discussed above, differentiating between an “island” and a “rock” is an area of legal uncertainty that is directly relevant to the Spratlys. Because there is no legal agreement on differentiating between rocks and islands in order to determine maritime zones, most states with features that might be considered rocks have gone ahead and claimed EEZs from them.

Legal ambiguity also exists regarding low-tide elevations. LTEs are naturally formed areas of land, surrounded by and above water at low tide, *but submerged at high tide*.¹¹⁸ International law rules are that an LTE cannot be appropriated,¹¹⁹ and thus sovereignty claims to such features are invalid. But over the years, China and other claimants have ignored this recent ICJ decision and today the Chinese are busy enhancing LTEs through dredging or construction, to make sure they are above water at high tide—i.e., turning them into de facto islands.¹²⁰ As de facto islands, can they become de jure ones? Again, UNCLOS specifically states that artificial islands, installations, and structures do not have the status of islands, that they do not have territorial seas of their own, and that their presence does not affect the delimitation of the territorial sea, the exclusive economic zone, or the continental shelf.¹²¹ But, this provision was primarily intended to apply to oil platforms or other manmade structures resting on the continental shelf; the status of an “enhanced” naturally formed LTE that has been transformed into an island has not been specifically addressed by the ICJ. This is

¹¹⁷ Mark Rosen, “*Myanmar vs Bangladesh: The International Tribunal for the Law of the Sea; Implications of the case for the Bay of Bengal and Elsewhere*,” April 2013, <https://www.cna.org/research/2013/myanmar-bangladesh>.

¹¹⁸ LOS Convention, art. 13(1).

¹¹⁹ *Nicaragua v. Colombia*, ICJ 2012 judgment, para. 26.

¹²⁰ China is creating new islands on Johnson South, Cuateron and Gaven Reefs. See James Hardy and Sean O’Connor, “China Builds Another Island in South China Sea,” *IHS Jane’s Defense Weekly*, 30 September 2014. http://www.janes.com/artcile/43757/china-builds-another-island-in-south-china-sea?utm_campaign.

¹²¹ LOS Convention, art. 60(8).

particularly pertinent for China since it is not occupying any Spratly feature that could legitimately be considered an island in its own right.¹²²

¹²² Beckman, "Large Scale Reclamation Projects in the South China Sea: China and International Law," *RSIS Commentary* 213/2014.

Figure 2. Sovereignty claims in the South China Sea



Source: U.S. Department of Defense's Annual Report on China to Congress, 2012.

Chapter 5. The Legal Merits of the Overlapping Claims to Sovereignty

A central argument associated with this project was that U.S. policy-makers should have as complete an understanding as possible regarding the respective merits of the various sovereignty claims in the South China Sea in order to ensure that policy positions would be grounded on the best legal information available. To that end, specific legal analyses of the various claimants were commissioned from experienced international law specialists: three retired USN Judge Advocate General Corps officers.¹²³ They were asked to conduct a balanced “let the chips fall where they may” assessment. Captain Pedrozo conducted an analysis of Vietnam’s and China’s competing claims to the Paracels and Spratly islands; Captain Roach examined Malaysia’s and Brunei’s claims to a handful of Spratly features; and Captain Rosen explored the Philippine claim to a significant portion of the Spratly chain and to Scarborough Shoal. Because of their length, these analyses are published as separate documents, but a summary of the findings is included below. In addition to these specifically commissioned studies, we consulted several other analyses conducted by third-party experts, in order to ensure as complete a picture as possible of the legal merits of respective claims.

It is important to emphasize that these analyses of the merits of respective claims in the South China Sea were *not* undertaken as a preliminary to a recommendation that the United States depart from its long-held position of not taking a position on competing sovereignty claims in the South China Sea. That is neither the intent nor one of the recommendations of the project. In fact, after reviewing many of the most highly regarded third-party assessments of the claims, along with the three specifically commissioned studies, we believe that the complexity of the overlapping claims and legal arguments made to support them confirms the wisdom of this U.S. policy.

Before reviewing a summary of the work produced by these specialists, a brief overview of the claims to features in the South China Sea is provided below:

¹²³ All three spent significant time during their active-duty careers involved in international law and the maritime domain in general and the Law of the Sea Convention in particular. In retirement they have continued their legal involvement with UNCLOS related issues.

- Japan claimed and occupied all of the features in the South China Sea from 1939 onward and placed them under the jurisdiction of the governor general of Taiwan.¹²⁴ It renounced these claims in the 1951 San Francisco Peace Treaty; however, unfortunately, the renunciation documents did not also entail devolution or the reversion of territory to any previous owner or claimant.¹²⁵
- China (the People's Republic of China) and Taiwan (the Republic of China) claim all the land features in the South China Sea based on history and first discovery by Chinese seafarers. These claims include the Paracels, the Spratlys, and Scarborough Shoal. They both also claim the Pratas Islands, which Taiwan occupies; no other country contests the PRC/ROC Pratas claim.¹²⁶ The Chinese and Taiwanese claims also ignore the prohibition on attempting to appropriate totally submerged features, and claim Macclesfield Bank—a series of reefs which happen to be totally submerged in all tidal conditions.
 - Since 1956 Taiwan (the ROC) has continuously occupied the largest feature in the Spratly chain, Itu Aba or Taiping Island. (The ROC physically “abandoned” the Spratlys from 1950 to 1956. During this time the Spratlys were effectively deserted, but the ROC did not abandon its claim.)¹²⁷ It has also occupied an associated feature, three miles away from Itu Aba, known as Zhongzhou Reef, since 1995. Itu Aba has a natural water supply, facilities for a garrison and a C-130 capable airfield. During World War II the Imperial Japanese Navy used it as an advanced submarine base.
- Following World War II, occupation of the Paracels was split between France (devolved to South Vietnam), which held the southwestern (Crescent) group of islands, and the ROC, which held the northeastern (Amphitrite) group. The

¹²⁴ Samuels, *Contest for the South China Sea*, p. 64.

¹²⁵ *Ibid.*, p. 77. See also, Kimie Hara, "The San Francisco Peace Treaty and Frontier Problems in The Regional Order in East Asia A Sixty Year Perspective," *The Asia-Pacific Journal*, 10, Issue 17, no. 1, April 23, 2012. <http://www.japanfocus.org/-Kimie-HARA/3739>.

¹²⁶ During WW II, the Japanese military had a weather station and other facilities on Pratas Island. In May 1945 a combined Australian and U.S. raiding party embarked in the submarine USS *Bluegill* (SS-242) stormed the island. They found that the Japanese had already evacuated. They destroyed Japanese facilities, raised the U.S. flag, claimed the island for the United States, and named it “Bluegill Island.” The United States never officially pursued the claim.

¹²⁷ Samuels, *Contest for the South China Sea*, p. 81.

ROC evacuated its forces in 1950. Starting in 1955 the PRC undertook a gradual build-up of forces in the eastern group centered on the largest of the Paracels, Woody Island. In 1974, it forcefully expelled South Vietnam from the western portion of the Paracels. Since that time China has occupied the entire Paracel chain. Vietnam continues to claim the Paracels.¹²⁸

- China also occupies seven small rocks or LTEs in the Spratlys, none of which would likely meet the UNCLOS definition of an island. China was late to the “landrush” for Spratly features that took place from the late 1960s through the 1980s, and all of the 13 or so natural Spratly features that might meet the UNCLOS definition of an island were already occupied by Taiwan, Vietnam, the Philippines, or Malaysia.¹²⁹ The Chinese occupied six Spratly features in 1988 and Mischief Reef in 1995.
- Vietnam claims all of the Paracel and Spratly Island archipelagoes. Vietnam occupies the most features in the Spratlys, between 25-28. Importantly, six of those features might meet the UNCLOS definition of an island. Hanoi’s largest holding is Spratly Island itself. Vietnam claimed the Spratlys following the 1951 San Francisco Treaty officially ending the war with Japan. Vietnamese occupation of features did not begin until 1973 (RVN—South Vietnam). In 1975, three weeks before the fall of Saigon, the DRV seized six of the Spratlys from the RVN to ensure they did not fall into Chinese hands.¹³⁰ After Vietnam was unified in 1975, occupation was gradually expanded in scope.
- The Philippines claim Scarborough Shoal and a significant section of the Spratlys, which it has named the Kalayaan Island Group (KIG).
 - The Philippine claim to Scarborough Shoal is based on continuous occupation of the feature starting during the period when the Philippines was still a U.S. colony, despite the fact the Scarborough was outside of the 1898 “Treaty Box” that Spain ceded to the United States.
 - The Philippines occupy seven Spratly features, some that might meet the UNCLOS criteria for an island, and 2 submerged reefs. The Philippines became involved in Spratly claims in 1956, when the features were

¹²⁸ See Hayton, *South China Sea*, pp.70-78, for a detailed account of the 1974 seizure of the Crescent Group from then U.S. ally South Vietnam by China. Despite RVN requests for assistance from the U.S. Seventh Fleet, Washington chose not to become involved.

¹²⁹ UNCLOS article 121(3); to wit, can sustain human habitation or have an economic life its own.

¹³⁰ Hayton, *South China Sea*, p. 79.

suddenly “discovered” and claimed by an enterprising Philippine businessman.¹³¹ Since 1971, it has officially claimed a group of approximately 53 Spratly features (the KIG).

- Malaysia claims seven islands or rocks in the Spratly group, two of which are occupied by Vietnam, and one by the Philippines. Malaysia also claims two low-tide elevations and three totally submerged reefs that are on its continental shelf.
 - Malaysia has constructed sturdy mini-naval stations with small boat basins on the four above-water features it claims; only one of these, Swallow Reef, might satisfy the UNCLOS criteria for being an island.
 - The Malaysian claim dates from 1979 and is based on the fact that the features it claims are on its continental shelf.¹³²
- Brunei claims one feature in the Spratlys, Louisa Reef, which may be a low-tide elevation and not an island. Its claim is based on the fact that Louisa Reef is on its continental shelf.¹³³

¹³¹ Hayton, *South China Sea*, p. 66. Hayton suggests that Manila’s interest in the Spratlys dates to 1946 when shortly after independence the vice president /foreign minister suggested that the Manila would claim the Spratlys as essential to its security. There was no follow-up. To elaborate on footnote 60, following Tomas Cloma’s proclamation announcing Freedomland, the Philippine government did not know what action to take, particularly since it was greeted with a storm of protests from Vietnam, the ROC, the PRC, and France (which still claimed the Spratlys). The British and the Dutch also made official inquiries. But Manila never totally disowned the Cloma discovery, and, in 1971, President Ferdinand Marcos formally announced a claim to 53 of the Spratly group on the basis that the islands were *res nullius*. In 1972, Kalayaan or what is known today as the Kalayaan Island Group (KIG) was made part of Palawan Province. Marcos formally annexed KIG in 1978. Samuels, *Contest for the South China Sea*, pp. 81-91. Samuels argues convincingly that the Cloma incident was not a bit of comic opera, as it is sometimes portrayed, but was the catalyst that drew the interests of both the ROC and PRC as well as Vietnam back to the issue of the status of the features in the Spratly group and got the Philippines involved in dispute over sovereignty.

¹³² J. Ashley Roach, *Malaysia and Brunei: An Analysis of their Claims in the South China Sea*, a CNA occasional paper, August 2014, pp.10-14. <https://www.cna.org/sites/default/files/research/IOP-2014-U-008434.pdf>.

¹³³ *Ibid.*, p. 39.

China versus Vietnam

Captain Pedrozo's findings, on the claims of China versus those of Vietnam, are summarized below:¹³⁴

- Based on the arguments and evidence submitted by the claimants and general principles of international law related to the acquisition of territory, it would appear that Vietnam clearly has a superior claim to the South China Sea islands.
- Vietnam's title to the Paracels is well founded in both history and law. Beginning in the early 18th century, Vietnam demonstrated a clear intent to assert sovereignty over the islands through the establishment of a government-sponsored company to exploit and manage the resources of the archipelago. That intent was confirmed by the annexation of the islands and symbolic acts of sovereignty in the early 19th century, followed by peaceful, effective, and continuous administration of the islands by successive Nguyen dynasties until the advent of the French colonial period. France continued to effectively administer the islands on behalf of Vietnam and physically took possession and occupied the Paracels in the 1930s. Thereafter, France continued to assert its sovereignty over the Paracels until its departure from Indochina in 1956. Following the French withdrawal, South Vietnam (and subsequently a united Vietnam) effectively administered the islands and never ceased to assert Vietnamese sovereignty over the archipelago, even after China illegally occupied a portion of the islands in 1956 and the entire archipelago in 1974.
- On the other hand, the first demonstration of Chinese sovereignty over the Paracels did not occur until 1909, two centuries after Vietnam had legally and effectively established its title to the islands. Moreover, China's illegal occupation of Woody Island in 1956, and its occupation of the entire

¹³⁴ After 33 years of active duty in the Army and Navy JAGC, Captain Pedrozo joined the faculty of the Naval War College as an associate professor at the Naval War College in the International Law Department, Center for Naval Warfare Studies. He retired from that position in 2014. He has published widely on maritime issues in East Asia, and is recognized for his expertise in law of the sea, law of armed conflict, arms control, unmanned systems, counter-proliferation, piracy, counter narcotics, the Arctic, international peace operations, humanitarian assistance/domestic relief operations and transnational organized crime. For the complete report, see Raul (Pete) Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea*, a CNA occasional paper, August 2014, <https://www.cna.org/sites/default/files/research/IOP-2014-U-008433.pdf>.

archipelago by force in 1974, clearly violate Article 2(4) of the UN Charter and accordingly do not confer a clear legal title to the Paracels.

- With regard to the Spratlys, France annexed the islands as *terra nullius* in the 1930s—at the time, occupation by force was a valid method of acquiring sovereignty over territory. Great Britain, which had controlled some of the Spratly Islands in the 1800s, abandoned its claims following the French annexation and effective occupation, so French title to the Spratlys was legally and soundly established. France’s title to the archipelago was ceded to South Vietnam in the 1950s, and the South Vietnamese government (and subsequently a united Vietnam) effectively and peacefully controlled the islands until ROC forces illegally occupied Itu Aba Island in 1956 and PRC forces illegally occupied a number of islets in the archipelago in 1988.
- The ROC’s occupation of Itu Aba Island in 1946 and 1956, and the PRC’s invasion of the Spratlys in 1988, violate Article 2(4) of the UN Charter and cannot confer clear title to the Spratlys to either Taiwan or China. The fact that China may have challenged Vietnamese sovereignty over the Spratlys between 1951 and 1988, rights that were legally ceded by France to Vietnam, does not in and of itself create a clear title for China.

The Pedrozo analysis differs in part from some other third-party analyses. One of those is by Dr. Marwyn S. Samuels, an American scholar who wrote the first detailed study on the origins of the disputes between China, Vietnam, and the Philippines. He used Vietnamese and Chinese sources for this analysis, *Contest for the South China Sea*.¹³⁵ He concluded that China had the better claim to the Paracels, but that China’s claim to the Spratlys was “highly questionable.”¹³⁶ His judgments were partially echoed by Australian scholar Dr. Greg Austin, who has legal training. In his well-regarded *China’s Ocean Frontier*, published in 1998,¹³⁷ Austin found that China had “superior rights in the Paracels,” but the legal complexity of the disputed Spratly claims meant that the “PRC claims to the entire Spratly group are at least equal to any other.”¹³⁸ Another analysis, by Daniel J. Dzurek, a former official in the U.S. Department of State Office of the Geographer, finds that of the Spratly claims, “Taiwan’s claim is the best of

¹³⁵ Samuels, *Contest for the South China Sea*.

¹³⁶ *Ibid.*, p. 68.

¹³⁷ Austin, *China’s Ocean Frontier: International Law, Military Force, and National Development*.

¹³⁸ *Ibid.*, p. 161.

a bad lot... [and] the PRC's claim is especially strong vis-a-vis Vietnam under the principle of estoppel." Dzurek is not a lawyer.¹³⁹

Importantly, on the other hand, Pedrozo's findings are supported by Professor Monique Chemillier-Gendreau in her work, *Sovereignty over the Paracel and Spratly Islands*. Professor Chemillier-Gendreau is a legal scholar and professor emeritus at Paris University-Diderot.¹⁴⁰

The Philippine claims

Captain Mark Rosen conducted a detailed review of the Philippine claims in the South China Sea.¹⁴¹ The Philippine claims are of particular significance to U.S. policy-makers because of the U.S. - Philippine Mutual Defense Treaty of 1951 and how that might involve the United States and China in conflict resulting from disagreements between China and the Philippines over claims in the South China Sea.

Because of this possibility, it is important that U.S. policy-makers have a clear understanding of the legal merits of Philippine claims. Rosen summarizes the situation as follows:

The starting point for understanding the disputes between the Philippines and other claimants to features in the South China Sea is

¹³⁹ Daniel J. Dzurek, "The Spratly Islands Dispute: Who's On First?" *Maritime Briefing*, 2, no. 1, (1996), International Boundaries Research Unit, Department of Geography, University of Durham, UK., <http://www-ibru.dur.ac.uk>.

¹⁴⁰ Monique Chemilleir-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, (English translation), (Springer 2000).

¹⁴¹ Mark E. Rosen is a retired Navy captain (JAGC) and has served in various international law positions in the Pentagon including the ocean policy legal advisor to the deputy chief of naval operations for plans, policy, and operations; political military planner, Strategic Plans and Policy Directorate (J-5), Joint Staff. He is an international and national security lawyer and has authored numerous international and operational law studies in such areas as maritime disputes, law of the sea, law of armed conflict, international agreements, and arms control. Rosen holds adjunct faculty appointments from Virginia Polytechnic University and the George Washington University School of Law. He holds A.B. and J.D. degrees from the University of Georgia and an LLM from the University of Virginia, and is a member of the State Bars of Georgia and Virginia (Corporate Counsel Designation) and various federal courts. For the complete report see, Mark E. Rosen, JD, LL, *Philippine Claims in the South China Sea: A Legal Analysis*, a CNA occasional paper, August 2014, <https://www.cna.org/sites/default/files/research/IOP-2014-U-008435.pdf>.

to recall the legal origins of the Philippine archipelago as well as international law concerning entitlement to maritime features.

The Republic of the Philippines was seen as an archipelago by its former colonial rulers—Spain and the United States. To the outside world, it consisted of a large “box” wherein both the waters and the features were considered part of the Philippines. Over time, the Philippines abandoned the “box” and modified its claims to conform to the 1982 UN Law of the Sea Convention. It did so in a number of enactments commencing in 1961 and ending in 2009. The 101 archipelagic baselines that form the modern-day Philippines are UNCLOS compliant.

The Philippines has asserted claims to Scarborough Shoal as well as a collection of 50 [Spratly island] features which are known collectively as the Kalayaan island group (KIG). The Philippine claims to sovereignty over the features known as Scarborough Shoal and the KIG are independent of its archipelagic status both legally and historically.

Because Scarborough Shoal is a feature which exists above high tide, it is capable of sovereign appropriation under international law. Historical evidence surrounding this particular feature is unpersuasive: most mariners charted this feature only in order to caution vessels to remain well clear of it since it was a hazard to navigation. Similarly, the presence of itinerant fishermen from either China or the Philippines is legally insufficient to establish a legal presence. However, there is evidence that the Philippines and the U.S. Navy visited the feature, charted it, and exercised law enforcement jurisdiction over the features. That evidence is hardly a legal “slam dunk,” but the evidence supporting Philippine sovereignty appears stronger. The fact that it is 400 nautical miles closer to the Philippines than to China and well within the Philippine EEZ weighs in on this determination.

The KIG claim is much like the Chinese nine-dash-line claim which China uses to justify its claims to features and waterspace. Using this methodology to claim territories in large areas of water is not, standing alone, likely to be regarded as legally sufficient to establish sovereignty over ocean territories. By contrast, the claim of Vietnam devolves from a legal annexation document issued by the French in 1933 that has specific coordinates and affects specific territories....The legal annexation by France was, at the time, a lawful method of territorial acquisition and its rights devolved to Vietnam. French activity prior to World War II supports their sovereign claims.

The subsequent occupation of the [Spratly] territories named in the French annexation by armed forces from the ROC, and the Philippines was not lawful, because, since 1945, international law has no longer respected the forceful acquisition of territory from another state.

Itu Aba (Taiping), Thitu Island (Pagasa), Loaita (Kota), and possibly Northeast Cay (Parola) are small islands (high-tide features) which are derivative of the original French claims and are now being occupied by the ROC and Philippines, respectively. There is no evidence that France and later Vietnam abandoned their claims; indeed, there is evidence that from time to time the Vietnamese authorities took actions to reassert their sovereignty over these areas. In the period immediately following World War II, France/Vietnam seem to have acquiesced in the occupation of Itu Aba by the ROC and neither France nor, later, Vietnam took sufficient actions to protest continued occupation by the ROC. As a result, the ROC could make the case that it acquired title to Itu Aba by prescription [which is similar to the common law principle of adverse possession - open, visible, and continuous use with knowledge of the original owner]. As regards the four high-tide features listed above that are currently occupied by the Philippines, there is insufficient evidence that France/Vietnam abandoned their claims to these features. Put another way, even though upwards of 60 years have passed since these areas were militarily occupied by the Philippines, it does not change their status legally since Vietnam took a series of actions after World War II to reinforce the original French claims to these territories (although some questions of fact may exist regarding actions taken by Vietnam regarding the Northeast Cay). The political realities of uprooting Philippine citizens from these areas (especially Thitu) may be something different entirely.

West York Island (Likas), Nanshan Island (Lawak), Flat Island (Patag), and Lankiam Cay (Panata) are four very small islands in the KIG area which are currently being occupied by the Philippines. While Vietnam might argue that these small islands were covered by its original claim, they are not clearly identified in the original annexation document and there is little or no historical evidence to support continued activity to reassert sovereignty. Similarly, China has produced no evidence that it annexed and occupied these features. Absent evidence that Vietnam actively disputed sovereignty, the Philippines was legally justified in classifying the features as *terra nullius* when it occupied them in the late 1960s. Title in these four small islands should vest to the Philippines.

The high-tide elevations in the KIG that are currently occupied by Vietnam should presumptively remain in Vietnamese hands. As noted previously, even though China may have encompassed the Spratlys on maps prior to their occupation by Vietnam in the 1970s, China never took the next step and occupied the features through human contact or administrative actions. The same can be said about the KIG claim: the publication of the Philippine claim in 1971 took place well after many of these features were occupied by Vietnam. Thus, Vietnam was justified in classifying the features as *terra nullius* when it occupied them. Vietnamese claims to these high-tide elevations are not connected to the earlier claims by France; rather, they are made strictly on the basis of physical occupation after World War II.

The Philippines is entitled to a 200-nm EEZ and continental shelf [as measured from its archipelagic baselines]. That entitlement includes sovereignty over features which are classified as low-tide elevations, such as Reed Bank and Mischief Reef....Under international law, these features are not susceptible to sovereignty or occupation. Chinese interference with the Philippines' use and management of its continental shelf resources is illegal. Other features within the KIG which are being illegally occupied by China and Taiwan include Subi Reef (Zhubi Reef), Zhongzhou Jio Reef, Gaven Reef, McKennan Reef, and Cornwallis South Reef....

The pending arbitration action by the Philippines versus China pursuant to Annex VII to the UNCLOS should have a salutary effect from a legal governance perspective since the arbitral panel is being presented with an opportunity to "codify" many of the legal principles discussed in this report. Even though China continues to boycott the activities of the arbitral panel, it does so at its peril....

The arbitral panel will hopefully play an important but small role in helping advance conflict resolution in the South China Sea. These disputes are likely to remain, because it is unlikely that any court would ever award a single country title to all of the disputed features in the Spratlys, and, thus, it is necessary to undertake a feature-by-feature examination of the positions of each country. Complicating this process are the resource implications of tiny islands such as Itu Aba, Thitu, and Spratly Island - each of which would generate huge maritime zones unless a court were given an opportunity to intervene and give the island less than full effect [as has happened in a few cases decided by the International Tribunal for Law of the Sea and the International Court of Justice]....

As regards the Philippines, these legal conclusions are reached:

- The Philippines has a superior claim to Scarborough Shoal.
- Reed Bank should be legally classified as a feature which is part of the Philippine continental shelf.
- The ubiquitous KIG claim by the Philippines carries little legal weight. It stands on the same footing as the nine-dashed-line claim. Also, it was made later than the claims of China, the ROC, and Vietnam.
- The Philippines has a superior claim to four specific high-tide elevations in the KIG based on a principle of first discovery and effective occupations—namely, West York, Nanshan Island, Flat Island, and Lankiam Cay.
- The Philippines is illegally occupying two small islands in the KIG that are the rightful property of Vietnam (based on the French annexation document): Thitu (Pagasa) Island and Loaita (Kota) Island. It is possible that Northeast Cay should be included on this list, but more evidence is needed.

Rosen raises an important point when he writes, “It is unlikely that any court would ever award a single country title to all of the disputed features in the Spratlys.” Is it possible to claim sovereignty over the 140-odd islets, rocks, reefs, shoals, and sand banks above water at high tide that are spread over some 164,000 square miles of ocean, based on a handful of acts of occupation? In other words, would a court or arbitral body be willing to consider the Spratlys as a single territorial unit, or, because of the island group’s sprawl and remoteness, could other acts of discovery and occupation by other, faraway countries be legitimate? In short, would arbitration have to be addressed feature by feature?

It should be noted that Rosen’s analysis of the Philippine claims assumes that Vietnam’s Spratly claim is superior to China’s regarding Itu Aba and a few other small islands/high-tide elevations. Determining whose claim is superior is not a cut-and-dried process. Indeed, Rosen commented that Itu Aba could cede to Taiwan under a theory of prescription since it lawfully came into temporary possession of the territory in the period immediately following World War II and has openly possessed the island ever since then.

Finally, as another expert, Clive Schofield, writes, “...the important point to note is that none of these sovereignty claims is especially compelling.”¹⁴² His conclusion was

¹⁴² Clive Schofield, “Dangerous Ground: a Geopolitical Overview of the South China Sea,” p. 11, in Sam Bateman and Ralf Emmers, eds., *Security and International Politics in the South China*

influenced by the 1995 study by Daniel Dzurek, of the International Boundaries Research Unit, whose 66-page paper “The Spratly Islands Dispute: Who’s on First?” was the first in-depth, third-party analysis of the Spratly sovereignty dispute.¹⁴³ Dzurek opined that the legal credibility of a claim depends on when the legal principle of *estoppel* is judged to have come into effect. (This principle bars a party from asserting a claim if it is inconsistent with a position the party previously took – i.e., the party cannot change its mind.) This judgment is something a court would have to wrestle with.

The claims of Malaysia and Brunei

Captain J. Ashley Roach explored the claims of Malaysia and Brunei to a small number of features in the Spratlys.¹⁴⁴ Malaysia’s involvement in the Spratlys was the result of its continental shelf claim of 1979, followed in December of that year by the publication of a map that drew protests from Malaysia’s neighbors, including China, Indonesia, Vietnam, and the Philippines. Malaysia’s claim, which is based on the presence of the islands and rocks in its claimed continental shelf and EEZ jurisdiction, is considered by some legal analysts to be very weak.¹⁴⁵

This would be true if either China’s or Vietnam’s claims to the entire Spratly archipelago were judged to be superior. However, Roach raises the same point that Rosen did in his discussion of Philippine claims. Much depends on whether sovereignty over the entire Spratly archipelago is seen as a single territorial unit, or whether occupation by Malaysia of discrete previously unoccupied features could be legitimate. This is only one of the many issues an arbitral tribunal would have to sort out. Captain Roach’s findings regarding Malaysia are as follows:

Sea: Towards a cooperative management regime, Routledge Security in Asia Pacific Series, paper edition, 2012.

¹⁴³ Daniel J. Dzurek, “The Spratly Island Dispute: Who’s on First?” p. 109. Dzurek served in the U.S. State Department as chief of the Spatial, Environmental, and Boundary Analysis Division in the Office of the Geographer, and has published extensively on maritime boundary issues.

¹⁴⁴ See footnote 71 for Captain Roach’s biographical sketch. The complete report is J. Ashley Roach, *Malaysia and Brunei: An Analysis of their Claims in the South China Sea*, a CNA occasional paper, August 2014, <https://www.cna.org/sites/default/files/research/IOP-2014-U-008434.pdf>.

¹⁴⁵ E.P. Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime*, (The Hague: Nijhoff, 1998), pp, 254, 256.

The only features claimed by Malaysia that could generate maritime zones are the islands named Swallow Reef, Amboyna Cay (Vietnam occupied), Barque Canada Reef (Vietnam occupied) and Commodore Reef/Rizal Reef (Philippine occupied), and the rocks forming Erica Reef, Investigator Shoal, and Mariveles Reef. The islands are entitled to a territorial sea, EEZ, and continental shelf. The rocks are entitled only to a 12-mile territorial sea.

The other features [claimed by Malaysia] are either low-tide elevations lying more than 12 miles from an island or mainland or submerged at low tide. They have no maritime zone entitlements and are not subject to appropriation. The State from whose continental shelf these features rise has sovereign rights to them.

Assuming that the Spratlys are not treated as a single unit for sovereignty purposes, there is insufficient evidence to state definitely which State (Malaysia or Vietnam) has sovereignty over the islands and rocks in the Spratlys claimed by Malaysia. It would appear that the Philippines and China have the weakest cases as to these features.

As to the features not subject to appropriation that rise from Malaysia's continental shelf, Malaysia clearly has sovereign rights over them, i.e., the low-tide elevations Dallas Reef and Ardasier Reef, and the submerged features James Shoal and North Luconia Shoals and South Luconia Shoals.

Regarding Brunei, there is only one feature in the Spratlys that Brunei claims, Louisa Reef. The basis for this claim is that it is on Brunei's continental shelf—the same rationale that Malaysia used for its claims to Spratly features. In fact, Malaysia in the past had also claimed Louisa Reef, but has apparently quietly dropped that claim given that that its neighbor's rationale is identical to its own. Since that feature is considered part of the Spratly claim, this means that both China and Vietnam also claim Louisa Reef.

There is also some uncertainty whether Louisa Reef is an island (more likely a rock), or is a low-tide elevation. Captain Roach concludes:

China's claim to Louisa Reef is not mentioned in the 2013 *American Journal of International Law* Agora on the South China Sea. (NB: he does not address Vietnam's claim to the Spratlys.)¹⁴⁶

¹⁴⁶ The January 2013 edition of the *American Journal of International Law* (AJIL) features an Agora on the South China Sea Disputes. One of the articles in the Agora is by Robert Beckman, entitled "The UN Convention on the Law of the Sea and the Maritime Disputes in the South

Brunei, on the other hand, maintains its claim to Louisa Reef. Accordingly, to the extent that Louisa Reef is an island and subject to appropriation, Brunei would appear to have the better claim to sovereignty over Louisa Reef. If, on the other hand, Louisa Reef is either a low-tide elevation or a submerged feature, it is not subject to appropriation and is simply part of Brunei's continental shelf. In any case, China likely has no plausible claim to the waters of Brunei's EEZ included within the nine-dash line.

While Malaysia and Brunei are minor players compared to China, Taiwan, Vietnam, and the Philippines, their claims will both have to be taken into account in order to achieve a comprehensive and durable resolution to the overlapping sovereignty claims in the Spratlys.

Summing up the legal analyses

In reviewing these legal analyses, it is clear that in the unlikely event these sovereignty claims are taken to the International Court of Justice for resolution, the process will be long and difficult. None of the claimants has what might be called an “open and shut” legal case—although the consensus among scholars seems to be that China's claims in the Spratlys are weaker than its claims to the Paracels.

The reality is that China has occupied the entire Paracel group for 40 years, and—short of military action by Vietnam to try and recapture the archipelago—will never leave. While it took its current hold over Scarborough Shoal only recently, there is no reason to suspect that China will lessen its grip unless some sort of bargain is reached with Manila that acknowledges Chinese sovereignty in return for access for Philippine fishermen.

The issue is more complicated in the Spratlys. China, Taiwan, Vietnam, Malaysia, and the Philippines all permanently occupy features in the Spratly group; many have done so for several decades. Perpetuation of the status quo in terms of occupation is probably the most likely, and perhaps best, outcome. For those who hope for a permanent resolution to the issue of sovereignty, it is likely to come about in only one of four ways:

China Sea”. In addition to Beckman's article, the Agora comprises two other papers: “The Nine-Dash Line in the South China Sea: History, Status, and Implications” by Zhiguo Gau and Bing Bing Jia, and “A Legal Analysis of China's Historic Rights Claim in the South China Sea” by Florian Dupuy and Pierre-Marie Dupuy, pp-95-163. Available at <http://www.jstor.org/discover/10.5305/amerjintelaw.107.1.fm>.

- All parties agree to undertake judicial arbitration.
- All parties agree to freeze in place, tabling the issue of ultimate sovereignty in favor of a cooperative regime for resource exploitation and management.
- Individual claimants reach an understanding with China, renouncing their sovereignty claims in return for economic preference.
- The most powerful uses force to expel rival claimants.

Chapter 6. Conclusions and Recommendations Regarding U.S. Policy and the South China Sea

Keep the South China Sea in perspective¹⁴⁷

Washington policy-makers face a multitude of pressing security issues. These include stabilizing Eastern Europe as Russia attempts to carve out a new sphere of influence; confronting the new threat of ISIS in Iraq and Syria while also dealing with terrorism more broadly in the Middle East and Africa; and winding down the ongoing conflict in Afghanistan, where American service people continue to die. Attempting to bring permanent stability to the Palestinian-Israeli conflict is also a major issue. While Beijing's cooperation in the resolution of these issues is not central, China's emergence as a global political and diplomatic presence is important, especially in the Middle East. Similarly, China is very important in other critical issues that matter to Washington, such as dealing with the Iranian and North Korean nuclear programs; addressing climate change; maintaining peace in the Taiwan Strait and East China Sea; and promoting trade, investment, and economic growth.

This mix of important issues provides a broader context for U.S.-China relations, and makes clear that the South China Sea should not become the central strategic element in the overall U.S.-China relationship. In short, the first order of business for U.S. policy regarding the South China Sea is to keep the issue in perspective.

¹⁴⁷ This is the title of a Brookings Foreign Policy Brief coauthored by Jeffery Bader, Kenneth Lieberthal, and Michael McDevitt, "*Keeping the South China Sea in Perspective*," September 2, 2014, <http://www.brookings.edu/blogs/up-front/posts/2014/09/02-china-challenges-south-china-sea>. This section is drawn from this report.

Existing policy is comprehensive and sensible

Chapter 1 of this report presented a review of existing policy. In sum, that policy consists of the following main points:

- There must be no use of force or coercion by any of the claimants to resolve sovereignty disputes or change the status-quo of disputed South China Sea features.
- There must be freedom of navigation, which includes both unimpeded lawful navigation for commercial, private, and military vessels and aircraft; insisting that coastal states respect the UNCLOS Convention’s language that all “high seas freedoms” are applicable to military operations in the EEZs of coastal states.
- All maritime entitlements to any of the waters of the South China Sea must be based on international law and be derived from land features in the South China Sea. China’s nine-dash line does not meet these criteria. In short, the land (islands and rocks) generates maritime zones, not vice versa.
- The U.S. government takes no position on the relative merits of competing sovereignty claims. The United States does not choose sides; nor does it favor one country’s claim over another’s.
- Since, the sovereignty disputes over the features in South China Sea do not appear to be resolvable in the foreseeable future, a Code of Conduct that stipulates a rules-based framework for managing and regulating the behaviour of relevant countries in the South China Sea is necessary. A key part of such a document would be mechanisms such as hotlines and emergency procedures for preventing incidents in sensitive areas and managing them when they do occur in ways that prevent disputes from escalating.
- The U.S. supports internationally recognized dispute resolution mechanisms, including those provided for in the UNCLOS treaty, as a peaceful way to solve South China Sea issues.
- Washington will improve security relationships with South China Sea littoral countries and help, as requested, improve the capacity of those countries that are either U.S. allies or officially designated “strategic partners” or

“comprehensive partners” to patrol and monitor their own territorial waters and EEZs.¹⁴⁸

- Seek to improve access for the U.S. military in countries near to the South China Sea.¹⁴⁹

It is difficult to find fault with this policy approach: it is primarily diplomatic but not entirely so. It focuses on creating stability by exhorting all the parties to follow the rules of international law; it explicitly defines how Washington would like conflicts to be solved; and it includes hard-power initiatives aimed at redressing some of the power imbalance between the Philippines, Vietnam, and China. Finally, it incorporates an element of deterrence by not ignoring America’s security alliance with the Philippines as well as providing for access of U.S. naval and air forces in the Singapore and, provided legal challenges are resolved, with the Philippines.

As noted in chapter 1, the administration’s public rhetoric has, over time, become far more specific and less “diplomatic”; it now specifically calls China’s actions destabilizing and bullying. Instead of giving vague exhortations, it also has become more specific in its commentary regarding the “rules.” It has been especially specific in addressing the most destabilizing aspect of the disputes in the South China Sea: the nine-dash line.

But despite being judged sensible and proportionate, given the U.S. interests involved, the Obama administration has been criticized from both the right and the left for not being “tough” enough with China.¹⁵⁰ The simple reason for the criticism is that China has essentially ignored U.S. exhortations to follow the rules, to stop pushing other

¹⁴⁸ The Obama administration established comprehensive partnerships with Indonesia in November 2010, Vietnam in July 2013, and Malaysia in April 2014. The United States has been a formal treaty ally of the Philippines since 1951, and is a “Strategic Partner” with Singapore; a relationship that was formalized in 2005 when the Strategic Framework Agreement with Singapore was signed.

¹⁴⁹ This has been accomplished with Singapore, and hopefully with the Philippines because of the April 2014 agreement announced by President Obama and President Aquino to grant US military access to several Philippine bases. This agreement still has to clear Philippine legal hurdles. Press briefing by Deputy National Security Advisor for Strategic Communication Ben Rhodes and NSC Senior Director for Asian Affairs Evan Medeiros, Grand Millennium Hotel, Kuala Lumpur, Malaysia, April 27, 2014 <http://www.whitehouse.gov/the-press-office/2014/04/27/press-briefing-deputy-national-security-advisor-strategic-communication>.

¹⁵⁰ See for example, Elbridge Colby and Ely Ratner, “Roiling the Waters,” *Foreign Policy*, January/February 2014, http://www.foreignpolicy.com/articles/2014/01/21/roiling_the_waters.

claimants around, and to seek third-party arbitration to resolve claims. Beijing apparently believes that national interest trumps adherence to international law.¹⁵¹

Beijing is convinced that Washington has needlessly complicated its policies in the South China Sea. In a number of Track II meetings associated with the South China Sea, Chinese interlocutors argue that since 2010 U.S. policy has been aimed at encouraging Japan, Vietnam and the Philippines to stand up to it, forcing it to use more coercive measures to get its way, with the result these countries will become closer to and more dependent on the United States. Beijing wants Washington to just butt out of the South China Sea maritime territorial disputes.¹⁵²

Besides denying this Chinese charge, U.S. officials interviewed as part of this project inevitably argue that China needs to recognize that the developments it dislikes are not the result of a U.S. effort to contain China or complicate its rise, but rather are the repercussions from its own actions (including statements) that make many of its neighbors fearful and leads them to seek a strong U.S. presence as a source of reassurance. China's policies give the impression of not appreciating that being tough with its neighbors simply frightens them. In short, this lack of self-awareness by Chinese interlocutors leaves some U.S. officials wondering if China knows what is good for it. In their view, China is not acting in its own best interests. This tone sometimes creeps into public statements.¹⁵³

Arguably, China knows exactly what it is doing. Its leaders can read a map. The realities of geography are that other claimants to South China Sea islands are always going to live in the shadow of China. China is a permanent part of Asia—and despite Washington's assertion that the United States is a Pacific power, this is not the same as being a resident Asian power. The United States is *in* Asia, but not *of* Asia, and presumably one day it could simply pack up and leave—a luxury that China's neighbors do not have. China is already the largest trading partner with all of its Southeast Asian neighbors, and their economies are increasingly interlinked.¹⁵⁴ At a

¹⁵¹ Zhao Zilu and Xian Fengli, Guojia anquan weiji juece [National security crisis decision making] (Beijing: Current Affairs Publishing House, 2006), cited in Alastair Iain Johnston, *The Development of Military Crisis Management Theory in China*, manuscript awaiting publication.

¹⁵² Not for attribution conferences and workshops in New York, Washington, Singapore and Beijing between November 2013 and September 2014.

¹⁵³ For example, "China - as a strong and rising power - should hold itself to a high standard of behavior; to willfully disregard diplomatic and other peaceful ways of dealing with disagreements and disputes in favor of economic or physical coercion is destabilizing and dangerous." Daniel R. Russel, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Testimony Before the Senate Foreign Relations Committee, "The Future of U.S.-China Relations," Washington, DC, June 25, 2014.

¹⁵⁴ Bilihari Kausikan, "ASEAN-China Relations: Building a Common Destiny," *The American Interest*, September 23, 2014, <http://www.the-american-interest.com/articles/2014/09/23/>

recent Track II meeting in Southeast Asia, one ASEAN participant captured this reality perfectly: “We are all afraid of China, but we are also afraid of what China might do to our economy if we cross them.”¹⁵⁵ Finally, it is important to recognize the importance that China’s domestic issues have in President Xi Jinping’s approach to the SCS. In China, domestic politics always trumps foreign policy concerns.¹⁵⁶ Being tough on China’s sovereignty claims provides important political cover for Xi’s politically difficult attempts to reorient China’s economics, stamp out corruption in the Chinese Communist Party (CCP), and curb the power of provincial party secretaries who frequently act as regional despots.¹⁵⁷

These factors, plus the fact that China has the largest and most powerful Asian military shape Beijing’s policy approach to the SCS. Its military modernization program, now past its 20th year, continues to be well planned and well executed. As a result, China’s conventional weapons capability is far superior to that of its neighbors, including India, and most certainly will remain so, at least for the foreseeable future.

So far, China’s actions in the South China Sea have not harmed its economy: its neighbors still line up seeking to improve relations; and, with the possible exception of India and Japan, they are not able to credibly defend themselves.

Beijing may not appreciate that its ASEAN neighbors simply want to retain their autonomy, but it does understand that its small neighbors do not want to choose between the United States and China. They all want the best possible relationship with both.¹⁵⁸ Since these small countries will always be China’s neighbors, and they will always need China more than it needs them, China can exercise great latitude in how it goes about trying to redress what it believes are historic injustices that a weak China suffered. By implication, these injustices were exacerbated in the years before Xi

asean-china-relations-building-a-common-destiny. In an excellent speech on the topic of China and ASEAN, the former Singapore permanent secretary of foreign affairs notes, “Chinese investments in infrastructure are binding Southwestern China and Southeast Asia into one economic and hence one strategic and political space.”

¹⁵⁵ Not-for-attribution conference in Southeast Asia, September 14, 2014.

¹⁵⁶ Chas Freeman, private communication with author, June 2014.

¹⁵⁷ Off-the-record discussion with U.S. Embassy Beijing official, September 26, 2014. See also Yun Sun, “China’s New Calculations in the South China Sea,” *Asia-Pacific Bulletin No. 267*, East-West Center, Washington DC, June 10, 2014, <http://www.eastwestcenter.org/publications/china%E2%80%99s-new-calculations-in-the-south-china-sea>, and Zheng Wang, “Bad Memories, Good Dream: The Legacy of Historical Memory and China’s Foreign Policy,” *Special Forum, Asan Forum* 3, no. 5, p. 13, <http://www.theasanforum.org/bad-memories-good-dream-the-legacy-of-historical-memory-and-chinas-foreign-policy/>.

¹⁵⁸ Kausikan, “ASEAN-China Relations: Building a Common Destiny.”

Jinping assumed China's leadership—a time in which its policy was too conciliatory, with the result that much of what Beijing views as its sovereign territory in the Spratlys is now held by others.

These factors are the reason that it is so difficult to get results from existing U.S. policy. When it comes to the South China Sea, China has asymmetric advantages over the United States in terms of its geography, history, military capabilities, and interests. Finally, and most importantly, Beijing believes it has right and history on its side. It really does believe that all the land features and resources belong to China.¹⁵⁹

Framework for considering policy options

When this project was initiated, its initial hypothesis was that the range of new policy options was not unlimited, and that in general terms they could be grouped into four broad categories. These categories are not intended to be mutually exclusive; an approach might be formed by drawing from elements of each category. The categories are:

- Become more actively involved in resolving sovereignty issues.
- Follow Beijing's advice and stop interfering in the South China Sea.
- Take a much more assertive posture with China.
- Enhance existing policy approaches.

This is the framework that will be used to explore policy options that are developed within the following overarching guidelines for U.S. policy regarding the South China Sea.

¹⁵⁹ These observations on Chinese opinions of the harm created by conciliatory Chinese policies over the past 30 years and the sincere Chinese beliefs about its “ownership” of the land and resources of the SCS were strongly reinforced during a 25-26 September 2014 high-level Track II conference in Beijing dedicated to issues related to maritime security in general and the SCS in particular. See also Zheng Wang, “Bad Memories, Good Dream,” pp. 9-12.

Recommended overarching policy guidelines¹⁶⁰

The policy options that will be discussed below are based on the premise that the South China Sea should not become the central strategic element in the overall U.S.-China relationship. U.S. policy in the South China Sea cannot be overwhelmingly anti-Chinese. U.S. policy-makers, while justifiably decrying Chinese tactics, cannot lose sight of the fact that China may have the best claim to sovereignty over many of the land features in the SCS. Analyses suggest a legal coin toss between China and Vietnam, especially in the Spratlys, where neither claim is especially strong.¹⁶¹ Similarly, most analyses find that the Philippine claim to a large section of the Spratlys would likely be found without legal merit. This is a particularly important policy consideration since the Philippines is a treaty ally. U.S. officials also have to remain sensitive to efforts by littoral states other than China to involve the United States more deeply in supporting their claims in order to counterbalance China. The fact is that the South China Sea presents the United States with difficult dilemmas in balancing and choosing among competing interests—particularly with China.

The bottom line for U.S. policy is to avoid being drawn unintentionally into a conflict with China in response to an incident that does not engage its vital interests. *Therefore Washington should not announce policies that engage credibility in a way that it is not prepared to back up.*

Exploring the policy options framework

Option 1: Become more actively involved in resolving sovereignty issues.

This option considers how the United States might become more actively involved in trying to resolve the disputes in the Spratlys by encouraging the Philippines, Vietnam, and Malaysia to reconcile their competing claims. The basic rationale for departing

¹⁶⁰ This section is taken from Bader, Lieberthal, and McDevitt, “*Keeping the South China Sea in Perspective.*” p.8.

¹⁶¹ See Chapter 5. In the analysis commissioned for this project Captain Pedrozo found that Vietnam has the superior claim. Other experts, however, find the opposite. For a more complete discussion see Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea.*

from the long-standing U.S. policy of not becoming involved on the issue of sovereignty claims is the proposition that negotiating a resolution to these differences would set a positive example for subsequent resolution with China, would make it easier for ASEAN to speak with one voice to China, and would create useful legal precedents that could more broadly apply to other maritime disputes in East Asia.

When this idea was raised during interviews conducted in the Philippines, Malaysia, Singapore, and Vietnam, both with government officials and with serious students of the SCS, the same judgment emerged—without exception, everyone thought this would be a bad idea. Concerns included the fear that such a U.S. policy approach would have a negative impact on ASEAN solidarity, and could trigger a unilateral Chinese use of force to forestall any reconciliation among the ASEAN claimants. This would especially be the case if at the end of the reconciliation process Vietnam held a stronger position in the Spratlys than it does today. Finally, it would fatally compromise the U.S. position as an “honest broker” that is not taking sides.

These concerns seem reasonable, but in the interest of conducting a balanced assessment of the full range of options, the following discussion gives an example of how such an approach might unfold.

The least complicated of the overlapping Spratly claims are those between the Philippines and Malaysia. Reconciling these overlapping claims might proceed as follows:

- Manila would renounce its claim to islands, rocks, and LTEs that Malaysia currently controls, and vice versa. In practice, this would mean: the Philippines would renounce its claim to the rocks named Eric, Investigator, and Marvelles Reefs and to the LTE Ardasier Reef, which Malaysia controls, while Malaysia would renounce its claim to the Commodore Reef/Rizal Reef, which the Philippines controls.
- Then either the Philippines or Malaysia could attempt to reconcile its claims with Vietnam. No matter which country approached Vietnam, the key compromise that Hanoi would have to make would be to back away from its claim to *all* of the Spratlys in order for the next step to be taken. This would be a very difficult proposition because of worries about setting a precedent that China might exploit. Hanoi would also need a really compelling public rationale to avoid a nationalist outburst like those that took place when the Chinese

National Offshore Oil Company (CNOOC) drilling rig began operations in the contested waters where Vietnam's and China's EEZs overlap.¹⁶²

- Third, it must be assumed that Hanoi is persuaded that its claim to the Spratlys in their entirety would not be upheld by any arbitral panel. As Ashley Roach writes in his analysis of Malaysia claims:¹⁶³

Do the Spratlys indeed form such a unit so that, in the words of Max Huber in his *Island of Palmas* Award, the fate of the main part may determine that of the remainder? The arbitration between Eritrea and Yemen is the case most analogous to the Spratlys. In that case sovereignty over the many islands in the Red Sea between the opposite coasts of Eritrea and Yemen was in dispute. The Tribunal found that the evidence did not support Yemen's claim of natural or physical unity for the entire island chain in dispute. Rather the Tribunal analyzed the evidence that applied to each of the six groups of islands and divided sovereignty over the groups between Eritrea and Yemen.¹⁶⁴

- Fourth, once Hanoi agreed to the reconciliation process it could then proceed as follows:
 - Malaysia would renounce its claim to Amboyna Cay and Banque Canada Reef, which Vietnam currently occupies.
 - Vietnam would renounce its claim to the features Eric, Investigator, and Marvelles Reefs and the LTE Ardasier Reef, which Malaysia controls.

These two steps would solve the claims overlap between Malaysia and Vietnam.

¹⁶² Carlyle A. Thayer, "China's Oil Rig Gambit: South China Sea Game Changer?" *The Diplomat*, May 12, 2014, <http://thediplomat.com/2014/05/chinas-oil-rig-gambit-south-china-sea-game-changer/>; and Thayer, "China and Vietnam Square Off in War of Attrition Over Disputed Waters."

¹⁶³ Roach, *Malaysia and Brunei: An Analysis of their Claims in the South China Sea*, a CNA occasional paper, p.27.

¹⁶⁴ *Eritrea v. Yemen*, Award in the First Stage of Proceedings (Territorial Sovereignty and Scope of Dispute), Oct. 9, 1998, paras. 461-464, 22 RIAA 209, 314-315 (2006), 40 ILM 900, 969-970 (2001), available at http://legal.un.org/riaa/cases/vol_XXII/209-332.pdf and http://www.pca-cpa.org/showfile.asp?fil_id=458.

- Fifth, the Philippines would renounce its claim in favor of Vietnam to Thitu Island (the second largest Spratly), Northeast Cay, and Loaita Island. In the process, Manila would also have to abandon its claim to the section of the Spratlys enclosed in its dotted-line box surrounding what it calls the Kalayaan Island Group (KIG), and disestablish that political entity (it was annexed in 1978). This would be very difficult for Manila, despite the fact that its claim has little or no legal credibility, and the reality that the Philippines is never likely to attempt to force Vietnam, China, or Taiwan off the 18 features that those countries already occupy in the KIG.
- Finally, Vietnam would renounce its claim in favor of the Philippines to four features that Manila can credibly claim based on a principle of first discovery and effective occupation: West York, Nanshan, Flat Islands, and Lankiam Cay. Vietnam would probably argue that these small islands were covered by its original claim, but they are not clearly identified in the original French annexation document and there is little or no historical evidence to support continued activity to reassert sovereignty.

This action would complete the reconciliation of claims among ASEAN claimants, while setting an important precedent for dealing with China. All three ASEAN states would also have to recognize that LTEs and totally submerged features, such as Reed Bank or James Shoal, that are on the recognized continental shelf of one of them belong to that coastal state. Making these compromises would be very difficult in terms of public reaction, and would require persuasive arguments that by reconciling claims with one another, they would be making it easier for ASEAN to speak with one voice to China, and possibly make it easier to proceed to develop resources within their respective EEZs.

This approach comes close to the suggestion made by a number of observers that the best way to bring the Spratly drama to a close would be to resort to the well-established legal principle of *uti possidetis*, which means that in absence of agreement to the contrary, everybody is entitled to keep what they have.¹⁶⁵ While the process suggested above is not a perfect example of this principle, it is very close.

Finally the three participants would need to come to some agreement over what features they would consider an island, as defined by UNCLOS, and which features they would collectively agree are rocks. Because of the proximity of many of these features, 200-nm EEZs drawn from features that claimants assert are islands would overlap one

¹⁶⁵ Chas W. Freeman, "A New Set of Great Power Relationships," Remarks to the 8th International Conference on East Asian Studies, Liaoning University, Shenyang, Liaoning, China, September 2014. In author's possession.

another, and would overlap the EEZ drawn from the coastal base-line of each state. Reconciling EEZs is necessary in order to remove any ambiguity over ownership of resources.

The biggest worry with this approach is how China would react when it became aware of the Philippine-Vietnam agreement, which would strengthen Vietnam's position in the Spratlys. The features that the Philippines would cede to Vietnam would be the 2nd, 5th, and 10th largest of the 13 largest features in the Spratlys. Would this action become a trigger for a Chinese use of force, seizing features before the Vietnamese could take possession?

The many pitfalls and political difficulties associated with this policy option make it appear to be a politically unrealistic and potentially counter-productive policy approach for Washington to either encourage or sponsor. Nonetheless, were Washington to suggest to ASEAN itself, potentially with Indonesia (because it has no claim to any of the Spratly Islands) that it might examine more closely the possibilities and risks associated with such an initiative, it could make ASEAN's voice stronger in pushing for a code of conduct while clearing away the uncertainty implicit in its overlapping claims.

Option 2: Take Beijing's advice, and stop interfering in the South China Sea.

Ever since the Hanoi ARF meeting in 2010 when Secretary Clinton publicly discussed the principles guiding U.S. policy toward the SCS, China has been anxious to tell Washington to butt out. China's then foreign minister reacted sharply and negatively to Secretary Clinton's initiative. He in essence said that the South China Sea was none of America's business and warned other claimants not to be drawn in by U.S. blandishments.¹⁶⁶ This remains China's position.

Now, four years after the United States became more actively involved diplomatically and when U.S. credibility is much more deeply involved, it is not realistic to expect or suggest that U.S. policy would simply follow Beijing's frequent calls for Washington to diplomatically remove itself from involvement in the South China Sea. It not only would be a crushing loss of credibility for the Obama administration, both at home and in East Asia—it also would mean walking away from the legitimate U.S. interests that were discussed in chapter 2.

¹⁶⁶ Bader, Lieberthal, and McDevitt, "Keeping the South China Sea in Perspective," p. 5.

However, if a country such as Indonesia decided to take on a leading role in trying to broker a solution, that could permit Washington to lower its diplomatic profile regarding issues associated with the South China Sea. Heretofore, Indonesia has been circumspect in its approach to China and South China Sea issues. But a combination of events gives a hint that this position could change. First, Jakarta has become increasingly concerned that China's nine-dash line includes some of the waters surrounding its Natuna gas field in Indonesia's Riau Islands province. According to a Jakarta press report, an Indonesian Air Force air commodore has recently stated that China's nine dash line "will have an impact on the security of Natuna waters." As long ago as 1997, Indonesia's then foreign minister expressed concerns about this potential problem for Indonesia. His preferred approach was dialogue and negotiation, which apparently went nowhere.¹⁶⁷ That might change with the inauguration of President Joko Widodo. During his campaign, he emphasized strengthening the country's identity as a maritime power and becoming what he called a "global maritime axis." In comments since the election in July, Widodo has called for the establishment of a maritime ministry and has said that his government would be willing to mediate maritime territorial disputes in the region (i.e., in the South China Sea).¹⁶⁸

This creates a potential opportunity for Washington to encourage ASEAN's most influential member to become more actively involved in trying to reconcile the disputes, or at least conclude the long-hoped-for Code of Conduct which contains specific mandates. This would not necessarily lower Washington's profile; however, if Jakarta were willing to gradually assume a more open leadership role in dealing with China regarding the Spratlys and the nine-dash line, it could shift the primary voice regarding a rules-based solution from Washington to Jakarta, and thereby encourage Beijing to recognize that ASEAN's largest and most influential state questioned the nine-dash line and wanted assurances from China that it was not attempting to encroach on the resources found on Indonesia's continental shelf.

¹⁶⁷ Heru, "Indonesia: China Includes Part of Natuna Waters in its Map," Jakarta *ANTRA Online*, March 13, 2014. For more detail on this issue see Zachary Keck, "China's Newest Maritime Dispute," *The Diplomat*, March 20, 2014, <http://thediplomat.com/2014/03/chinas-newest-maritime-dispute/>. For an excellent overview of Indonesia's concerns regarding China's SCS claims, see Prashanth Parameswaran, "Indonesia Avoids Open Territorial Dispute with China, Despite Concerns," *The China Brief*, Jamestown Foundation XIV, issue 13, July 3, 2014, <http://www.jamestown.org/single/>.

¹⁶⁸ Brian Harding, "Jokowi's Big Maritime Plans for Indonesia Need International Support," *World Politics Review*, September 3, 2014, <http://www.worldpoliticsreview.com/articles/14026/jokowi-s-big-maritime-plans-for-indonesia-need-international-support>.

Option 3: Take a much more assertive posture with Beijing.

As mentioned above, the first order of business for U.S. policy regarding the South China Sea is to keep it in perspective. The South China Sea should not become the central strategic element in the overall U.S.-China relationship. A military confrontation with China over claims that the United States has no direct interest in makes no sense in the broader scheme of the U.S.-China relationship—unless of course, China's actions result in invoking U.S. treaty obligations.

Some commentators have called for the Obama administration to use more “hard power” to deter China. The United States is already sending important deterrent signals: the U.S.-Philippine Defense Treaty and the recently signed agreement to provide U.S. military access to Philippine bases combine to form a credible threat of hard-power involvement if China uses force against the Philippine armed forces. These agreements are backstopped by efforts to improve the ability of both the Philippines and Vietnam to police their own waters.

More direct U.S. military involvement in the South China Sea would be one way to pursue this objective. The United States already demonstrates its presence in that region through routine transits of U.S. Navy warships. The Navy already conducts a significant number of port calls to the Philippines (for example, 140 in 2014). The U.S. military conducts routine bilateral and multi-lateral exercises with its ASEAN counterparts, and the new defense cooperation agreement with the Philippines (provided that legal challenges in the Philippines do not stall de facto implementation) suggests that there are more bilateral exercises in the offing. More direct military involvement would simply mean increasing the scope, duration, and complexity of these ongoing activities.

Still, it would not be wise overtly to militarize the U.S. approach to the South China Sea, particularly since China has been at pains to minimize the direct involvement of the PLA in its efforts to enforce its writ in the South China Sea. This does not mean that the PLA Navy has not also been present in the SCS, because it has. It too conducts routine exercises and presence operations, to include resupply of PLA garrisons in the Spratlys, and is often “just over the horizon” in support of its coast guard.

However, a more assertive approach does not, and should not, rest exclusively on military activity. As already discussed, American diplomacy has become more verbally assertive over the course of 2014. The policy of putting the public spotlight on China, or for that matter, on other claimants that are behaving in ways that go beyond international law and generate instability, is a policy approach that can be employed judiciously. (This will be discussed in more detail in the examination of the next option, since it can be considered a continuation of existing policy.)

It is not plausible or desirable to try to persuade China to change its behavior in the South China Sea by American military presence alone. While credibility is an essential part of Washington's attempt to reassure friends and allies that the United States is a force for stability in the face of Chinese power, Washington does not want to get into a conflict with China over inconsequential rocks and shoals in the South China Sea.

Option 4: Enhance existing policy approaches.

As previously discussed, it is the judgment of this analysis that existing U.S. policy is comprehensive and sensible. It is primarily diplomatic, and heavily legalistic in tone and approach, but not entirely so. The administration has rightly placed great emphasis on abiding by customary international law in general and the Convention on the Law of the Sea in particular. But, the unhappy reality is that there are areas in both international law and UNCLOS that are unclear or open to a range of interpretations that China and others exploit. A policy approach that simply insists that all parties follow international law is too vague; it is not a specific enough statement of what the US government means or finds fault with.¹⁶⁹

Expand the legal approach to policy

To rectify this problem, this project recommends that the U.S. Department of State issue a white paper, or a series of white papers, on the various aspects of international law that pertain to the South China Sea. These should be signed by the secretary of state, and appropriately publicized. These documents should be even-handed, and must name specific cases where any country's claims or actions violate international law.¹⁷⁰ A prime example of this would be the Chinese-created baselines around the Paracel Islands.¹⁷¹ According to UNCLOS, only archipelagic states are permitted draw baselines around island chains—and China is not an archipelagic state.¹⁷²

¹⁶⁹ An important exception to this critique is the April testimony of Assistant Secretary of State Russel that was discussed in detail in chapter 1.

¹⁷⁰ Care must be exercised to not attempt to prejudge legal outcomes for issues surrounding sovereignty that have not been legally scrutinized by a court, the case of Philippine claims to KIG is an example.

¹⁷¹ Beijing has also drawn illegal baselines around the Senkaku/ Diaoyu Islands in the East China Sea.

¹⁷² U.S. Department of State, *Limits in the Seas No. 117: Straight baseline Claim: China*, p 8. <http://www.state.gov/e/oes/ocns/opa/c16065.htm>. The document says, "China (or Vietnam) would not be allowed to establish archipelagic straight baselines around the Paracel Islands, since the LOS Convention is quite clear in stating that an archipelagic State 'means a State constituted wholly by one or more archipelagoes and may include other islands'...As

The issues that such a paper (or papers) should address might include official U.S. positions on the following:

- *Military activities in the EEZ of another state.* See pages 14-16 for a discussion of the U.S. position.
- *China's nine-dash line.* It is critical that the U.S. government continue to shine a spotlight, first cast by Assistant Secretary Russel, on what is the single most contentious aspect of China's approach to the SCS, namely, its nine-dash line. Washington needs to speak authoritatively and against the notion that "historic rights" can trump the agreements that are now embodied in the UNCLOS treaty. Ideally, this would be the subject of a separate authoritative legal white paper, perhaps endorsed by leading maritime legal experts from around the world. A systematic legal rebuttal of the notion of the nine-dash line and the vague legal arguments in support of "historic rights" is a much more sensible approach than merely asking China what it stands for.¹⁷³
- *Low-tide elevations (LTEs), or totally submerged features, are not capable of appropriation.* LTEs are defined in UNCLOS as naturally formed areas of land, surrounded by and above water at low tide, *but submerged at high tide.*¹⁷⁴ According to a 2012 ICJ finding, an LTE cannot be appropriated,¹⁷⁵ and sovereignty claims to such features are invalid. But China and other claimants have ignored this recent ICJ decision; they continue to claim these features, and, in some cases, are (or were at one time) busy building or enhancing these LTEs through landfill, to make sure they are above water at high tide—i.e., turning them into de facto islands.

continental states, China and Vietnam cannot establish archipelagic straight baselines around islands belonging to them." (The *Limits in the Seas* series is issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State. The series aims to examine coastal states' maritime claims and/or boundaries and assess their consistency with international law. These studies represent the views of the U. S. government only on the specific matters discussed therein and does not necessarily reflect an acceptance of the limits claimed.)

¹⁷³ For example, see the article co-authored by China's representative on the International Tribunal on the Law of the Sea (ITLOS), Judge Zhiguo Gao, and Professor Bing Bing Jia from Tsinghua University Law School, "The Nine Dash Line in the South China Sea: History, Status, and Implications," *American Journal of International Law* 107, no. 1, January 2013, pp. 98-124, <http://jstor.org/stable/10.5305/amerjintlaw.107.1.0098>.

¹⁷⁴ United Nations Law of the Sea Convention (UNCLOS), art. 13(1). http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

¹⁷⁵ *Nicaragua v. Colombia*, ICJ 2012 judgment, para. 26.

China's claims to totally submerged features such as Mischief Reef, Macclesfield Bank and others in the Spratlys that lie on the continental shelves of the Philippines, Malaysia, and Vietnam should also be addressed in detail: under UNCLOS and the decisions of international courts and tribunals, low-tide elevations and submerged features are not subject to claim to sovereignty.¹⁷⁶

- *Artificial islands:* UNCLOS specifically states that artificial islands, installations, and structures do not possess the status of islands and have no territorial sea of their own, and that their presence does not affect the delimitation of the territorial sea, the exclusive economic zone, or the continental shelf.¹⁷⁷ But, this provision could be interpreted as applying only to oil platforms or other manmade structures resting on the continental shelf. Whether it would apply to a naturally formed LTE that has been transformed into an island has not been specifically addressed by any court, although U.S. legal experts maintain that the status of a maritime feature must be determined by its original natural state.

This is particularly pertinent for China since it is currently not occupying any Spratly feature that could legitimately be considered an island in its own right. The “shortage” of islands in the Spratlys for China to occupy is presumably the reason that it is conducting significant dredging operations in the Spratlys. It is in the process of turning several of its occupied features that are rocks or LTEs into full-fledged islands using dredged ocean bottom as landfill.¹⁷⁸ China will almost certainly attempt to claim island maritime entitlements from these features, which means that the EEZs from these new islands will overlap the coastal EEZs of Vietnam and the Philippines, creating new areas of dispute.

- *Archipelagic baselines.* China's baselines around the Paracels and Senkaku/Diaoyu Islands have already been mentioned. This issue may appear trivial, but baselines form the starting point for measuring an EEZ: thus, they permit a more expansive maritime entitlement claim. Some Chinese scholars are arguing for baselines around the Spratlys; were that to occur, it would

¹⁷⁶ Robert Beckman, Director, Centre for International Law, National University of Singapore, “Offshore Geographic Features and their Significance to Sovereignty and Maritime Claims,” <http://cil.nus.edu.sg/wp/wp-content/uploads/2014/08/Beckman-NISCSS-2014-August-Geographic-Features-10-Aug-2014.pdf>.

¹⁷⁷ LOS Convention, art. 60 (8).

¹⁷⁸ China occupies four LTEs and three rocks, see Robert Beckman's PowerPoint briefing, <http://cil.nus.edu.sg/wp/wp-content/uploads/2014/08/Beckman-Geographic-Features-NISCSS-Beijing-Aug-2014.pdf>.

create a huge EEZ that would encompass most of the southern half of the South China Sea.¹⁷⁹

- *Official comment in support of the Philippine request for arbitration.* The State Department should weigh the impact of a strong statement in support of a finding that the arbitral tribunal does have jurisdiction. On February 19, 2013, Beijing officially objected to the Philippine request and made it clear that it would not take part in the proceedings. Its non-participation does not halt the tribunal; it simply means that China's views will not be heard. In an effort to unofficially ensure that China's position is understood, in early 2014 a group of Chinese legal scholars published a book entitled *The South China Sea Arbitration: A Chinese Perspective*. It is an edited volume whose purpose is to provide an *amicus curiae* brief of sorts that presents arguments why the tribunal does not have jurisdiction, and should not hear the case. Instead, they argue, the tribunal should refer the dispute back to the Philippines and China for them to reach a negotiated settlement.

In addition to the nine-dash line, the Philippines' request addresses some of the less definitive areas that UNCLOS and subsequent case law have not fully addressed. If the arbitral tribunal decides it has jurisdiction, and then finds in favor of the Philippines, this would be an important step in achieving a worldwide legal consensus on what international law has to say regarding important aspects of the South China Sea dispute. On the contrary, if it rules that it does not have jurisdiction, that would be a major setback to any hopes that international law, rather than power, would be the basis for shaping the behavior of parties involved in South China Sea disputes.

Limits in the legal approach to policy:

- UNCLOS has no provisions regarding how to determine sovereignty over offshore islands. There is no international treaty that governs the issue of sovereignty; instead, the rules of customary international law and relevant case law on the acquisition and loss of territory pertain. Territorial sovereignty disputes cannot be resolved, however, unless the claimant states reach agreement between or among themselves, or consent to refer the disputes to the International Court of Justice or another international arbitral tribunal. Given the sensitivity and complexity of the disputes in the SCS, this is unlikely; China, when it acceded to UNCLOS, did so with the reservation that it would

¹⁷⁹ Stefan Talmon and Bing Bing Jia, eds., *The South China Sea Arbitration: A Chinese Perspective* (Oxford and Portland, Oregon: Hart Publishing, 2014), Preface.

not be bound by any mandatory international dispute resolution mechanisms. Many other countries have made this reservation.

- Extant case law is still not definitive as to how to interpret various provisions of UNCLOS. This is a particularly relevant shortcoming when it comes to urging the various SCS claimants to follow international law. One of the most important issues is how to legally differentiate between an “island” and a “rock.” This is important because an “island” rates a 12-nm territorial sea and a 200-nm EEZ, whereas a “rock” rates a territorial sea but no EEZ. There is no legal agreement on which features meet the UNCLOS article 121(3) criteria for being an island—to wit, it must be able to sustain human habitation or have an economic life of its own. A few tribunals, in reaching judgments, could have provided clarity on these questions but have declined to do so. There is no unambiguous legal way to differentiate between rocks and islands, and thus determine appropriate maritime zones. As a result, most states with features that might be considered rocks have taken advantage of this uncertainty: they have gone ahead and treated them as islands and maximized the maritime resource potential by claiming EEZs from them.
- Delimitation of EEZs is a major issue. Even if sovereignty claims were suddenly all reconciled, the delimitation of overlapping EEZs, which occur throughout the South China Sea, would be an equally daunting task. The May-July 2014 confrontation between China and Vietnam over the CNOOC oil rig HYSY 981 is a good example of the overlapping EEZ problem. The rig was drilling within Vietnam’s EEZ, but the EEZ from the Chinese-occupied Paracel Islands overlapped Vietnam’s EEZ. The rig was moored in this overlap. Even if Hanoi had recognized China’s claim to the Paracels, the EEZ overlap would still have had to be delimited in order to avoid a dispute. The only way there would be no dispute would be if China abandoned the Paracels to Vietnam—which, of course, is not going to happen.

Additional diplomatic policy options:

- *Shared exploitation of resources, starting with fish.*¹⁸⁰ Because disputes over the boundaries of EEZs are likely to persist for the indefinite future, the United States should encourage the claimant states to reach agreements on fishing zones that allow fishermen from all the claimants to fish in their traditional waters without interference—but subject to overall limitations in order to

¹⁸⁰ This recommendation and supporting analysis is taken from the paper that conducted a legal assessment of the Philippine claims written by Mark Rosen. See, Rosen, *Philippine Claims in the South China Sea: A Legal Analysis*, a CNA occasional paper, August 2014, pp. 42-43.

prevent overfishing or threats to endangered species. Due to the absence of recognized sovereignty over land features and associated maritime zones, there are great lapses in the ability of marine management authorities in all of the coastal states to enter the region, conduct fisheries surveys, and actively manage the catch of those that are licensed to fish. For example, since China enacted its fishing ban in January 2014,¹⁸¹ virtually all of the regional states have said that they regard the ban as illegal and that they will not enforce the ban against ships flying their flag. Dueling laws will create a legal vacuum since no one is in charge. The net result will almost certainly be considerable amounts of unlicensed and unregulated fishing.

The Rome-based Food and Agriculture Organization (FAO) of the United Nations is a relatively neutral reporter on the condition of the world's fisheries. The FAO noted these trends concerning the South China Sea:

The number of vessels in the region is increasing and there has been a trend of increasing motorization and total fleet capacity in the region although a large fraction of the fisheries are classified as "small scale" fishing operations (as contrasted with the operation of large "commercial" or "factory" ships)...The picture that emerges is one of a fishery that has been under heavy fishing pressure for more than 30 years and which has been fished down considerably.¹⁸²

Part IX (Article 123) of UNCLOS primarily focuses on fishing and provides a strong policy imperative for cooperation either on a multilateral basis or through an appropriate regional organization, such as ASEAN. Unfortunately, the precise legal mandates in that section are not spelled out. Also, ASEAN is not like the European Union—which has both legal personality and significant legal, regulatory, and judicial powers—and has not shown any appetite for forcibly injecting itself into this complex and highly contentious matter.

¹⁸¹ U.S.-China Economic and Security Review Commission Staff Report, *China's New Fishing Regulations Seek to Justify and Consolidate Control in the South China Sea*, January 27, 2014, available at http://www.uscc.gov/research_security. The text of the new fisheries law can be accessed at the Hainan Maritime Safety Administration website, http://www.hnmsa.gov.cn/news_2489.aspx. China has approximately 110 ocean-going ships and 1,050 patrol craft available to enforce the fisheries edict.

¹⁸² FAO *Regional Overview of Fisheries and Aquaculture in Asian and the Pacific 2012* Publication 2012/26 (2013) Available at: <http://www.fao.org/docrep/017/i3185e/i3185e00.pdf>.

The United States appears to have an opportunity to insert itself, in alignment with other states, in order to promote the establishment of provisional measures to prevent further collapse of the region's fisheries and decline in the environmental health of the contested waters.

It would obviously be best if a joint development arrangement could be negotiated under the auspices of ASEAN or the United Nations. Perhaps, the Svalbard Treaty of 1925¹⁸³ would provide a useful model for establishing a joint development zone. That treaty, which remains in force, vests Norway with sovereign rights over the Spitsbergen archipelago but grants rights to various states (including Russia, Italy, Japan, the Netherlands, and the United States) that were present on Svalbard Island when the treaty was concluded—i.e., rights to maintain their population centers and exploit the natural resources in their areas that they occupy.

As a policy approach, one course of action would be to borrow from or adapt the Svalbard Treaty to address the issue of multi-lateral development in the Spratly region of the South China Sea. Establishing a “Spratly zone” would have to surmount the problem of choosing who should be vested with sovereign rights—choosing either China or Vietnam (the two countries with the most legally compelling claims) would probably be a deal killer, so a more creative adaptation of Svalbard might have the U.N. act in the role that Norway fulfills for Svalbard Island. Once accomplished, the allocation of rights in maritime zones (and resources) which are derivative of the territories could proceed. Since the primary purpose of establishing this zone is to uphold the regional cooperation obligations of states in UNCLOS Article 123, it would seem that this zone is fully UNCLOS compliant.

- *Joint development of hydrocarbon resources in the South China.* A recommendation frequently mentioned is the idea of joint projects among claimants to develop the oil and gas resources of the South China Sea in cases where EEZs overlap.¹⁸⁴ A detailed legal analysis of the issues involved was recently completed by international lawyers in Singapore. They had this to say:

If a state party to UNCLOS is not able to reach an agreement through negotiations on its EEZ or continental shelf boundaries with an adjacent or opposite State, and it is not

¹⁸³ The Svalbard Treaty, <http://www.jus.uio.no/english/services/library/treaties/01/1-11/svalbard-treaty.xml>.

¹⁸⁴ For example, see Bader, Lieberthal and McDevitt, “*Keeping the South China Sea in Perspective*,” p. 9.

willing or able to request an international court or tribunal to delimit the maritime boundary, certain obligations are triggered under UNCLOS. First, both States have an obligation to make every effort to enter into “provisional arrangements of a practical nature” pending a final agreement on their maritime boundary. Second, they have an obligation not to take any actions that would jeopardize or hamper the reaching of a final agreement on the maritime boundary, including the unilateral exploitation of the hydrocarbon resources in the area of overlapping claims. In such circumstances, it may be in their common interest to set aside the negotiations on the maritime boundary and consider entering into a Joint Development Area (JDA) as a provisional arrangement of a practical nature.

A JDA enables the two States to share the hydrocarbon resources without prejudicing their position in the final maritime boundary. However, JDAs are not an easy solution. They are generally not possible unless several essential factors are present. First, the two States must have a certain level of trust in each other. Second, they must have a common desire to set aside their competing claims and jointly develop the resources. Third, and perhaps most important, they must have the political will necessary to set aside their differences and convince their domestic audience that it is in their national interest to cooperate by sharing the natural resources. Fourth, they must agree on an area for joint development which is politically acceptable to both sides.

If these factors are present, the details of the JDA can be negotiated. Several models are available, and the legal and technical issues which must be addressed are fairly well understood. If the necessary trust and political will are present, the details can be worked out through negotiations. If they are not present, it may be in the best interests of the two States to resolve the maritime boundary by referring it to a court or tribunal.¹⁸⁵

¹⁸⁵ Robert Beckman and Leonardo Bernard, Centre for International Law, National University of Singapore, “Framework for the Joint Development of Hydrocarbon Resources,” a paper for the International Symposium on Peaceful Use of the Sea and Maritime Cooperation, Zhejiang University, Hangzhou, China, 22-23 June 2013, <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/08/BECKMAN-AND-BERNARD-FRAMEW>

Actually getting any of the parties to agree to a JDA would be difficult, but the United States could attempt to facilitate such an outcome without prejudicing its position of not taking sides in the sovereignty questions. Quietly sounding out the Philippines is something Washington could do, because the area which seems to be the most obvious candidate for joint development is centered in the Philippines-claimed KIG, where the largest islands (with the exception of Taiwan-occupied Itu Aba) are claimed and occupied by China, the Philippines, and Vietnam. If those three claimants could begin serious discussions on defining the areas in dispute, it would be a major step forward.¹⁸⁶ Likewise, a JDA focused on fisheries management in the vicinity of Scarborough Shoals is another candidate because only two parties are involved—China and the Philippines. In either case the issue of the NDL, if it has not been found non-UNCLOS compliant by the arbitral panel, would have to be set aside to avoid the problem of Beijing claiming what belongs to China is China's, and what belongs to other claimants is 50% China's.

- *Adopt a position of neutrality when it comes to negotiated outcomes.* The U.S. position should evolve from an emphasis on multi-lateral solutions, and begin to voice support for the entire range of possible negotiating forums and methods without expressing an insistence on any one. Bilateral negotiations, as recently demonstrated by Indonesia and the Philippines, can be useful in solving maritime disputes.¹⁸⁷ Multilateral negotiations by the states directly concerned will almost certainly be necessary at some stage to reconcile the overlapping claims where these involve more than two parties.
- *Consider more USG involvement in the Code of Conduct (COC) process.* A central element of existing U.S. policy is Washington's strong support for a negotiated Code of Conduct among the ASEAN member states and China. It is mentioned here not as a new initiative, but to highlight the importance of putting some sort of agreed-upon framework in place that codifies rules, procedures, and regulations regarding behavior. As Assistant Secretary Russel put it:

ORK-FOR-THE-JOINT-DEVELOPMENT-OF-HYDROCARBON-RESOURCES.pdf. In his paper that assessed Philippine claims, Mark Rosen sketched out a conceptual approach to profit sharing and management—in other words, a JDA. See Rosen, *Philippine Claims in the South China Sea: A Legal Analysis*, a CNA occasional paper, August 2104, pp. 43-45.

¹⁸⁶Robert Beckman, Director, Centre for International Law, Singapore. "Legal Framework for Joint Development in the South China Sea," p. 17, <http://cil.nus.edu.sg/wp/wp-content/uploads/2012/12/Beckman-Paper-Hainan-Dec-6-7-submitted-Nov-22.pdf>.

¹⁸⁷ Arif Havas Oegroeseno, "How Indonesia and the Philippines solved their maritime disputes," *The Diplomat*, June 14, 2014, <http://thediplomat.com/2014/06/how-indonesia-and-the-philippines-solved-their-maritime-dispute/>.

Agreement on a Code of Conduct is long overdue and the negotiating process should be accelerated. This is something that China and ASEAN committed to back in 2002 when they adopted their Declaration on the Conduct of Parties in the South China Sea. An effective Code of Conduct would promote a rules based framework for managing and regulating the behaviour of relevant countries in the South China Sea. A key part of that framework, which we and many others believe should be adopted quickly, is inclusion of mechanisms such as hotlines and emergency procedures for preventing incidents in sensitive areas and managing them when they do occur in ways that prevent disputes from escalating.¹⁸⁸

The basic problem with the COC process between ASEAN and China is that it has divided ASEAN into two groups—claimants and non-claimants—and, as a result, ASEAN cannot reach consensus within itself. This allows China to drag its feet while inexorably changing the facts and the geography of its holdings in the Spratlys. Meanwhile, working groups that were formed to implement the 2002 Declaration on Conduct of the Parties (DOC) are still not finished; they are stalled over discussions on cooperative measures. Incidentally, Beijing has suggested that it wants a completed DOC before concluding a COC.

Policy-makers at State need to weigh whether they want to go beyond exhortation regarding the COC, and begin to offer suggestions that ASEAN focus its efforts with China on implementing the DOC while at the same time focusing internally on reaching a consensus among its member states on the essential elements of a COC.¹⁸⁹ As an alternative, it is worth considering whether it might be more effective to reach a separate understanding between China and South China Sea littoral states (Vietnam, Philippines, Malaysia, Brunei, and Indonesia), rather than involving the whole of ASEAN.

¹⁸⁸ Assistant Secretary Russel, testimony, “Maritime Disputes in East Asia,” <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>.

¹⁸⁹ Achieving an ASEAN consensus on a COC draft is something that Indonesia attempted following the July 2012 ASEAN foreign ministers’ meeting that failed to agree on the wording of a South China Sea issues statement in Phnom Penh. The Indonesian effort produced a so-called “zero-draft” of a COC. The “zero-draft” initiative apparently failed because some ASEAN members feared that China would reject a draft tabled by ASEAN alone. For a complete discussion of this issue see Carlyle Thayer, “An ‘Early Harvest’ Package for the Code of Conduct in the South China Sea,” Presentation to International Conference on the East Sea Disputes, Ho Chi Minh City, Vietnam, July 25-26, 2014, <https://www.scribd.com/doc/235195901/Thayer-An-Early-Harvest-Package-for-the-Code-of-Conduct-in-the-South-Chins-Sea>.

Enhancing U.S. military posture and building the maritime capabilities of littoral states

There is no question that China's conduct in the past few years has caused ASEAN littoral states—especially Vietnam and the Philippines, but also to a lesser degree, Malaysia and Indonesia—to seek closer security ties with the United States. The U.S. should be responsive to requests from any of the South China Sea littoral states to improve its maritime policing and security capabilities. Obviously, each request would have to be considered individually, but in general the Washington inter-agency process should be predisposed to respond not only through direct military assistance and sales, but also by encouraging other U.S. allies in East Asia such as Japan and Australia to continue, and, if possible, increase, their contributions to improved maritime capabilities for the littoral nations. It goes without saying the objective is to improve the ability of littoral states to defend adequately their legitimate maritime zones.

- *The United States should go “all-out” in helping the Philippines modernize its maritime forces.*

The April 2012 standoff with China over Scarborough Shoal highlighted the fact that the Philippines is virtually defenseless at sea. While Manila has increased its defense budget, it will long remain virtually defenseless along its South China Sea maritime frontier. Applying “Band-Aids,” such as giving the Philippine Navy excess defense equipment (e.g., 40-year-old former U.S. Coast Guard cutters that are likely to quickly become inoperable because of machinery breakdowns), is simply inexcusable if Washington truly wants to improve Philippine capacity.

The reality is that a Philippine defense build-up large enough to enable the Philippines to deter Chinese assertiveness will require a generational military assistance effort on the part of the United States, akin to U.S. efforts with South Korea following the Korean War. Policy-makers need to reach a decision on whether it serves U.S. interests for the Philippines to gradually acquire the ability to credibly defend its South China Sea holdings against a Chinese use of force. The decision should be a positive one, even if it increases the prospect of direct U.S. involvement, provided Washington clarifies with Manila the obligations the U.S. will meet under the Mutual Defense Treaty. The Department of Defense must dedicate both experienced planners and military expertise to a systematic institutional effort helping modernize the Armed Forces of the Philippines (AFP).

The April 2014 agreement between Manila and Washington to initiate a decade-long Enhanced Defense Cooperation Agreement (EDCA) includes in its charter U.S. support for the long-term modernization of the AFP, with the goal of putting into

place a “minimum credible defense.”¹⁹⁰ Unfortunately, the Philippine Supreme Court may find the agreement unconstitutional, and, according to press reports, the legal challenge has caused implementation plans to grind to a halt.¹⁹¹ This should not mean that discussions regarding Philippine military modernization must also be halted; they have gone on for years, since long before EDCA was developed. The vision of a “minimum credible deterrent” must be specifically defined through in-depth bilateral discussions. The resulting agreed upon plan deserves Washington’s support, whether or not EDCA survives the uncertainties of the Philippine legal processes.

- *The U.S.-Philippine MDT should not be explicitly expanded to apply to all Philippine claims to features in the South China Sea*

Given what appears to be the legally questionable basis for most of the Philippines’ claims in the Spratlys, explicitly agreeing that the U.S.-Philippines Mutual Defense Treaty embraces territory claimed by the Philippines in the SCS would be a very risky attempt at deterrence. Washington certainly does not want a conflict with China over claims that are not legally credible. Private official dialogue should make clear that U.S. treaty obligations are specific and do not cover all types of GOP actions.

- *The United States should help Vietnam improve its command and control and maritime surveillance capabilities.*

Vietnam is strengthening its maritime security posture. Over the past decade, Hanoi has moved to establish closer relationships with non-regional powers, particularly the United States and India.¹⁹² In addition to seeking powerful friends,

¹⁹⁰ The White House, Office of the Press Secretary, “Fact Sheet: United States-Philippines Bilateral Relations,” April 28, 2014. For details of the EDCA, see Carl Thayer, “Analyzing the U.S.-Philippine Enhanced Defense Cooperation Agreement,” *The Diplomat*, May 2, 2014, <http://thediplomat.com/2014/05/analyzing-the-us-philippines-enhanced-defense-cooperation-agreement/>.

¹⁹¹ Three different petitions to find the EDCA unconstitutional are before the Philippine Supreme Court. Filed by former senators, leftwing congressmen and a public employee union there is apparently no near-term resolution in sight. Trefor Moss, “U.S.-Philippine Defense Pact Mired in Court Challenge: Pact Faces Years in Limbo Due to Legal Challenges,” *Wall Street Journal*, September 23, 2014, <http://online.wsj.com/articles/u-s-philippines-defense-pact-mired-in-court-challenge-1411460229>.

¹⁹² For instance, see Juan Pinalez, “Vietnam Representatives Visit USS George Washington,” Navy News Service, NNS110309-12 (9 March 2011), <http://1.usa.gov/19EeWdk>; Patrick Barta, “U.S., Vietnam in Exercises Amid Tensions With China,” *Wall Street Journal* (16 July 2011), <http://on.wsj.com/18DVBbE>; “India, Vietnam: Testing China’s Patience,” *IRGA* (26 September

Vietnam has been making serious investments in its own maritime capabilities.¹⁹³ The most newsworthy have been the six Kilo-class submarines ordered from Russia in 2009, two of which were delivered during 2014.¹⁹⁴ In addition, Vietnam has ordered six Russian-built Gepard-class corvettes. The first two, fitted for attacking surface ships, are already in commission; the second two, still being built, will be optimized for anti-submarine warfare. Vietnam is also producing under licence at least ten 550-ton fast-attack craft that are fitted with anti-ship cruise missiles. When combined with the so-called Bastion Coastal Defence System which is also from Russia, and consists of truck-mounted anti-ship cruise missiles—and the announced purchase of four very modern Dutch corvettes of the SIGMA class. Vietnam is putting in place a modest but capable off-shore naval force. Finally, the Vietnamese Air Force has 20-odd Su-27/30 aircraft that are capable of maritime strike.¹⁹⁵

Knitting all these off-the-shelf purchases together into an integrated force, is something the United States can and should do; if Hanoi so requests. The United States can help integrate command and control of its maritime security forces, because, on October 2, 2014, Washington announced that it was partially lifting the ban on lethal weapons sales to Vietnam, in order to allow Hanoi to strengthen its maritime security posture. Whether or not American defense firms will be approached to help with the coordination of Vietnam's maritime defences remains to be seen. But Hanoi's overall intent is clear. It is investing significant resources to make certain it can defend its maritime claims and avoid a replay of the 1988 South Johnson Reef clash with the PLA Navy in which two of its landing craft were sunk, a third was badly damaged, and 64 men were killed.

2011), <http://bit.ly/1cpqvlv>; and Donald Kirk, "Seoul and Hanoi Eye a Glowing Partnership," *Asia Times Online* (10 November 2011), <http://bit.ly/1c6rdaL>.

¹⁹³ The United States is involved in a modest fashion. During his December visit to Vietnam and the Philippines, Secretary Kerry announced \$32.5 million in new U.S. assistance for maritime law enforcement in Southeast Asian states. This assistance will include training and new fast-patrol vessels for coast guards. Building on existing efforts such as the Gulf of Thailand initiative, this assistance will foster greater regional cooperation on maritime issues and ultimately enable Southeast Asian nations to carry out humanitarian activities and to police and monitor their waters more effectively. See Kerry, Joint Press Availability With Vietnamese Deputy Prime Minister and Foreign Minister Pham Binh Minh, December 12, 2013, <http://www.state.gov/secretary/remarks/2013/12/218747.htm>.

¹⁹⁴ "Vietnam Receives its first Russian Kilo-class submarine," *Want China Times*, <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20140106000034&cid=1101>.

¹⁹⁵ Defense Industry Daily Staff, "Vietnam's Russian Restocking: Subs, Ships, Sukhois, and More," August 28, 2014, <http://www.defenseindustrydaily.com/vietnam-reportedly-set-to-buy-russian-kilo-class-subs-05396/>.

- *Washington should emphasize that U.S. posture in the Pacific theater is focused on the ability to project power in support of U.S. friends and allies.*

Rather than provoke a direct confrontation with China at sea, the U.S. message must be one of reassurance. Specifically, China cannot push the United States out of East Asia without starting a war to attempt it. The U.S. military will win the on-going “capabilities competition” with China that pits Chinese access denial against American assured access. To support this commitment the newest ships, aircraft and other electronic and cyber capabilities that enter the U.S. military inventory are being assigned to the Pacific theater.

More directly, an expansion *in duration* of the U.S. Navy naval exercise program with ASEAN states should be considered so that the rolling series of exercises the USN already conducts takes place over a longer period of time, and as appropriate, is augmented by additional USN forces. Involving the participation of other Asian maritime nations that have interests in the South China Sea—such as Japan, Australia, South Korea, or even India—would also both contribute to regional capacity building as well as illustrate the importance that China’s neighbors place on peaceful outcomes in the South China Sea.

- *The U.S. navy should maintain a daily presence somewhere in the South China Sea*

Being “present” in a geographic sense equates to proximity. Strategically, proximity yields influence and options. Unfortunately in the case of the South China Sea, it can also fuel threat perceptions and increase friction producing interactions. Nonetheless, proximity also contributes to reassurance, an important U.S. interest. Thus, it is important the U.S. Navy continue routinely operate in the South China Sea. Transiting to and from port visits in Vietnam and the Philippines ensures proximity. Fortunately the stalled EDCA should not adversely impact on the growing frequency of routine U.S. Navy port visits to Philippine ports. In 2011 there were 44 ship visits; this number doubled to 88 in 2012,¹⁹⁶ and grew to 140 in 2013. (The number does not include USN vessels that took part in the relief efforts in the aftermath of super-Typhoon Yolanda.)¹⁹⁷ These visits mean that some US Navy presence in the South China Sea is almost a daily occurrence. This should continue.

¹⁹⁶ Gina Harkins and Sara Fellman, “Navy wants to expand Philippine presence, create temporary base,” *Navy Times*, July 27, 2013, <http://www.navytimes.com/article/20130727/NEWS/307270004/Navy-wants-expand-Philippine-presence-create-temporary-base>.

¹⁹⁷ Elena L. Asen, “Expect more US Navy ship visits—Goldberg,” *Manila Bulletin*, October 9, 2014, <http://www.mb.com.ph/expect-more-us-navy-ship-visits-ambassador-goldberg/>.

Summing up: Recommended options for U.S. policy toward the South China Sea

Existing U.S. policy is sensible, relatively comprehensive and proportionate to the U.S. interests involved. The U.S. should continue to focus on international law and the importance of a rules based framework for behavior in the South China Sea.

- Overarching policy guidelines should include the following principles:
 - The South China Sea is not the central strategic element in the overall U.S.-China relationship.
 - The South China Sea is an issue to be managed; a permanent solution is not likely in the near term.
 - There is no one preferred format for negotiated outcomes. Bilateral negotiations should not be dismissed or portrayed as less desirable. The reality is that because of overlapping claims solutions that are negotiated directly by the claimants are inevitable.
 - Policy should not be overwhelmingly anti-Chinese. The United States should criticize Chinese behavior along with the behavior of American friends and allies when warranted, but keep in mind China may have the best legal claim to all the land features, although that will never become legal certainty unless Beijing is willing to agree to arbitration.
 - The U.S. government should remain sensitive to the efforts of littoral states to involve the United States more deeply in supporting their claims in order to balance against China.
 - In this regard, the State Department should conduct a legal analysis of the Philippine claims. If this analysis reaches the same conclusions as the analysis prepared for this project, Manila should be quietly informed of Washington's opinion of its claims; particularly in the Spratlys.
 - Washington should not announce policies that engage credibility in a way it is not prepared to back-up.
- The United States should reinforce its existing policy emphasis that international law is the basis for rules based stability by issuing a comprehensive white paper, or a series of white papers, on the various aspects of international law that pertain to the South China Sea. Because the focus on international law has been such a

centerpiece of U.S. policy, these authoritative documents should be signed by the secretary of state and given appropriate publicity. That said, a credible legal “let the chips fall where they may” approach could create diplomatic problems with friends and allies which may make it inappropriate for the secretary to personally sign the document.

- U.S. officials have publicly supported the Philippines’ request for arbitration, but if the tribunal rules that it does not have jurisdiction, it will be a major setback to hopes that international law can be the basis for shaping the behavior of parties involved in South China Sea disputes. The Department of State should consider issuing a statement in strong support of the tribunal permitting the Philippines to have “its day in court” by agreeing that it does have jurisdiction.
- The Svalbard Treaty of 1925 provides a potential template for creating a provisional joint fishing and hydrocarbon protocol. This is an approach the United States should pursue with ASEAN and China.
- U.S. policy-makers should explore with ASEAN and China the possibility of establishing a Joint Development Area (JDA) in the Spratlys aimed at the exploitation of hydrocarbons. The goal would be to find a way to allow states to share these resources without prejudicing their position on final maritime boundaries.
- U.S. policy makers should explore whether ASEAN would welcome any American involvement aimed at moving the Code of Conduct process to conclusion.
- The United States should be responsive to requests from small SCS littoral states that want assistance in improving their maritime policing and security capabilities.
- The United States needs to be completely committed to a very long term, dedicated effort to improve the Armed Forces of the Philippine’s maritime capabilities. The idea of an agreed upon AFP “minimum credible deterrent” plan deserves strong U.S. support. Washington should not however, explicitly expand the scope of the Mutual Defense Treaty to cover the contested Philippine claims in the Spratlys.
- Washington should ensure that planned U.S. military posture and capability improvements are portrayed as symbols of reassurance and stability inducing presence and are not characterized as attempts to directly confront China. Emphasize that the objective of the military portion of the rebalance is to ensure that the United States can fulfil its security responsibilities to U.S. allies and friends. American capabilities, drawn from throughout the Pacific region, are capable of assured access whenever required.
- U.S. naval and air presence in the South China Sea should be a visible daily occurrence.

- The United States Navy should increase the duration of its exercises with SCS littoral states, and expand participation in these exercises by inviting participation from other Asian maritime states, such as Japan, Australia, South Korea, and possibly India.





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