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U.S. and Chinese Strategies, International Law, and the South China Sea

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Abstract: China and the U.S. are both heavily invested in the South China Sea, the first as the claimant for most of the islands, maritime features, and almost all the waters of the disputed sea, the latter as a defender of the rules-based order, freedom of navigation, and rights of its allies and security partners in the region. For more than a decade, China has used legal claims and low-level provocations, seizing, and building artificial islands that have been militarized. China claims the maritime features, islands, and waters as “historic rights,” justifying its claims and actions as legally justified, despite the 2016 arbitration ruling the nine-dash line illegal. The U.S., though not a claimant, has similarly consistently called for the rule of law and conducted dozens of freedom of navigation operations and military exercises in the disputed waters, all in the name of international law. In this article, we argue that both states are using their legal claims and international law regarding the South China Sea as opportunities to justify their military presence in the region. For China, the legal claims and actions justify military expansion and power projection into the Pacific. For the U.S., its freedom of navigation operations and other references to international law justify its strengthened deterrence of China and its continued presence in the region. The legal status of the South China Sea is, therefore, partially a pawn in a greater power struggle in the strategic rivalry between China and the U.S.

Keywords: China, United States, South China Sea, international law, freedom of navigation, UNCLOS

Introduction

Among the many tensions between the United States and China in its growing rivalry, the South China Sea disputes are increasingly impactful. This is despite the lack of any direct sovereignty claims by the U.S. The disputed islands, other maritime features, and maritime entitlements of South China Sea are no doubt a hotspot where Chinese and U.S. interests conflict. Clearly, “the South China Sea issue is becoming a strategic node in the Sino-U.S. game, and it has become the most important issue in Sino-U.S. relations, which has seriously affected the comprehensive development of the relations between the two countries.”¹ If a great power war is going to happen, it would be the U.S. and China over the South China Sea.²

The current situation could have longstanding consequences for the Indo-Pacific region and the U.S. if Chinese strategy continues in its current state, giving China an upper hand on power projection in the region, especially as the dominant power in Southeast Asia. In addition to free access to fisheries as well as oil, gas, and other seabed resources, China would have open supply lines, and the ability to limit free trade pursued by other states inside and outside the region using the South China Sea for shipping. Given the vast amount of seafaring trade in the South China Sea, through which around forty percent of

the world's trade passes,³ China now has the potential to interfere with such trade, especially trade by Taiwan, South Korea, and Japan heading toward the Indian Ocean. Neither would it be ideal to allow China to threaten access to free sea lanes that involve the transportation of more than \$1 trillion in U.S. trade annually.⁴

Despite the potential for war, the power struggle is being played out in the context of low-level provocations and claims rooted in international law. The U.S. uses freedom of navigation operations (FONOPs), issuing statements about the rule of law and the rules-based order, engages in military exercises justified for maritime security, and offers military support for alliances and security partners in the region. China maintains that its maritime claims and activities are legally justified, even though it has a different interpretation of what is stated in the United Nations Convention of the Law of the Sea (UNCLOS). In the game of global power politics, the role that international law and legal claims play in the rivalry is significant, with both the U.S. and China making constant efforts to frame their actions in the South China Sea in the context of international law and legal claims.

What is puzzling is that these states do not necessarily need to highlight international law and legal claims in their actions, yet they do so consistently and strongly. As an authoritarian state, with its own views on international law, China does not need to justify its actions through international law. As a democracy with a high degree of rule of law, the U.S. should always justify its actions through international law. Yet, as the global superpower, it also can use its military force for deterrence, compellence, and other strategic reasons without placing so much emphasis on international law. The purpose of this study is to explore how China and the U.S. emphasize legal claims and international law, and particularly why the U.S. is so heavily involved in the South China Sea from a legal perspective.

We argue that because the South China Sea disputes are rooted in interpretations of international maritime law, this has provided opportunities for the U.S. and China to use international law and legal claims as justifications for their strategies and actions in East and Southeast Asia. These strategies exist in the context of their significant strategic rivalry over power projection in the region. We first present our theory about how the legal justifications have provided opportunities for China and the U.S. to justify regional expansionism and power projection in terms of their strategic rivalry. We next provide an overview of Chinese legal justifications in the South China Sea concerning maritime claims, gray zone tactics and low-level provocations, and building and militarizing artificial islands. This section is followed by an overview of U.S. claims of defending the rules-based order, the pursuit of FONOPs and joint military exercises justified using maritime law, and providing support for allies and security partners in the region. We conclude with a discussion of potential policy options for the U.S.

International Law & the Chinese-U.S. Strategic Rivalry

There is no doubt that China perceives the South China Sea and the maritime features therein as its own, and there is likewise no doubt that the U.S. wants to defend the rules-

based order in the region. Yet, the U.S. pursues these goals within the broader bilateral and regional strategies of both states in their greater strategic rivalry. Both China and the U.S. have used the South China Sea disputes in a legal context to justify regional hegemony and military activities in the sea and the broader Pacific Ocean. For China, the disputed status of the sea and its maritime features provides an opportunity to seize these features, building artificial islands with military bases, thereby extending China's reach in the Pacific. The status quo is highly convenient for China's strategy of extending power in the region because the other disputants lack leverage in halting Chinese actions. Even the 2016 legally binding UNCLOS Annex VII arbitration ruling has not stopped China from continuing to militarize its seized and artificially built up islands, nor its harassment of other states' military and civilian vessels.

Despite the potential for armed conflict and difficulty resolving these disputes, in recent times, states are finding that war is an ineffective strategy for acquiring territorial and maritime rights. At the same time, small land grabs and rulings by international courts and tribunals are much more effective. States now find that engaging in low-level provocations can be useful as legal evidence for resolving these types of international conflicts in their favor.⁵ Our analysis looks at the use of the coast guard, paramilitary, and/or civilian vessels to pursue assertive actions in a disputed area.⁶ We define low-level provocations as actions that remain below the threshold of war (with casualties under one hundred). States engaging in a combination of legal claims and low-level provocations can attempt to build legal records of ownership. Under acquisitive prescription, unclear or even faulty initial claims to territorial and maritime rights can be made legitimate being by regularly sustained over time. When one state displays authority and the other state acquiesces, "those are the *sine qua non* of acquisitive prescription."⁷ The nature of customary international law benefits challenger states because continued claims and actions can be used as legal grounds in the future. Although UNCLOS provides clear rules on many maritime issues, the Convention does not give clear guidelines about defining overlapping maritime claims, thereby leaving gaps in the interpretation of the law of the sea. Customary international law fills this gap as an additional legal means of assessing competing maritime claims. The International Court of Justice defines customary international law in Article 38(1)(b) as something which arises out of "a general practice" of states, which implies that states should exercise continuous practice to have their jurisdiction acknowledged by the international community. For instance, the issue of Pedra Branca, Middle Rocks, and South Ledge (ICJ 2008) between Singapore and Malaysia illustrates the significance of the continuing practice. The court acknowledged that, under this standard, ownership of Pedra Branca belonged to Malaysia until as late as 1980, but that it later passed to Singapore as the latter carried out various acts, such as installing naval communications equipment, while the former lacked such evidence of continuous exercising of its rights.⁸

In this context, as the provoking claimant in the South China Sea, China is attempting to use legal claims and low-level provocations to justify what it sees as sovereignty and near full control of the sea with its islands and maritime features. The idea is that, over time, these

maritime claims will change from contention to a legally recognized claim under customary international law.⁹ Even if the defending states protest, a sustained claim by the challenger still gradually strengthens the challenger state's legal grounds.¹⁰ In this context, China has been able to effectively control maritime features that may hold legal ground, despite the strong ruling in the 2016 arbitration case brought by the Philippines. In *Philippines v. China*, the Philippines deliberately avoided addressing any questions of territorial sovereignty over disputed islands. Doing so would have allowed China an opportunity to present evidence supporting historic Chinese control of the islands, and thereby establish sovereignty based on historic title, effective authority, or control of the territory.¹¹

Because of UNCLOS, international law has become an essential aspect of the disputes between China and the other disputants, as well as Chinese-U.S. disagreements about the South China Sea. Regardless of their membership status in UNCLOS, states find that they still must strategize their claims with the Law of the Sea in mind, including the U.S. and China. Although states can exempt themselves from UNCLOS dispute resolution mechanisms, several states have taken advantage of Annex VII, which allows them to request a tribunal to deal with maritime issues regardless of another state's consent or participation. What this means is that Annex VII rulings, as in the case of the Philippines against China, are legally binding and compulsory on all UNCLOS member states, regardless of a member state's not wanting to comply. Although China did not participate in the *Philippines v. China* arbitration case, China consistently justified participation based on legal arguments, including referring to exceptions in Article 298 of UNCLOS. Article 298 allows states to opt-out of the compulsory procedures pertaining to "disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations," (Article 298. 1(a)), "disputes concerning military activities" (Article 298. 1 (b)), and "disputes concerning law enforcement activities regarding the exercise of sovereign rights," (Article 298. 1 (b)) if states issue declarations concerning these. In this regard, China made a declaration that it "does not accept any of the procedures . . . concerning all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."¹²

Likewise, China has consistently argued its maritime claims and control of militarized artificial islands as legal and justified, though based on its own interpretations of UNCLOS and its version of international law. Since UNCLOS allows states to make declarations or statements when ratifying, China also made declarations such that China "shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of two hundred nautical miles and the continental shelf." While UNCLOS allows full sovereignty to states within their immediate territorial waters, it grants only limited jurisdictional rights over their respective Exclusive Economic Zones (EEZs). In another list of declarations, China advocates a position allowing any coastal state to require any "foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships" to be qualified as innocent passage. The Chinese view is different from the understanding held in the West that the right of innocent passage shall not prejudice the passage of any ship types. Such differences in opinion, according to Bernard Cole, stem from the Chinese view of

international law as “historically used by Western nations for imperialistic purposes against developing countries.”¹³

We further argue that China is making use of both legal strategies and low-level provocations to demonstrate state practice as a means to demonstrate effective control and thus bolster its claims. State practice involves “diplomatic correspondence, policy statements, press releases, official manuals on legal questions, the opinions of official legal advisers, comments by governments on drafts produced by the International Law Commission, state legislation and national judicial decisions, etc.”¹⁴ all of which China regularly pursues. Similarly, coercive tools, including “surveillance, patrols, and response at sea,” can be interpreted as actions pursued in order “to protect sovereignty.”¹⁵ International law traditionally has consisted of treaty law and customary law.¹⁶ Although a state cannot change treaty law, it can attempt to change customary international law through continuing effective control and regular usage of disputed territory and waters. For example, “fishing reinforced by a robust maritime presence on disputed islands and features, also strengthens” the claimant state’s aggressive position because “demonstrated usage, occupation, and administration are all relevant to ownership under UNCLOS.”¹⁷

By pursuing legal claims, China justifies its continued presence in the South China Sea. Using effective control and claims of historic rights, China attempts to justify military actions, seizure of maritime features turned into artificial militarized islands and engaging in other low-level provocations. Such low-level provocations “can yield benefits to challenger states at a low cost when they are viewed as the challenger state’s simple exercise of its maritime rights. Even if the defender does protest against these violations, the challenger can claim that low-level provocations are an extension of its sovereignty, gradually accumulating them in an ever-growing record of legal precedent.”¹⁸ All of these attempts to construe these behaviors as legally justified actions by China not only demonstrate the state’s resolve to the other disputants but, more importantly, they effectively signal power projection and balancing against U.S. military presence in the region. Thus, the legal status of the South China Sea and its maritime features is a pretext for Chinese strategy in the much more significant strategic rivalry between the U.S. and China, determining which state will have greater relative power in the region.

For the U.S., the disputed status of the South China Sea justifies staying highly involved in the region. Based upon such justification, the U.S. is able to maintain a significant naval and air presence and, most importantly, balance against China’s rise in power. Although the U.S. is not a claimant in the South China Sea, because of its strategic interests in the region, the U.S. similarly uses international law based on UNCLOS. The U.S. justifies its military presence, mainly through FONOPs, military exercises, statements about the rule of law, and supporting allies and security partners. Although the U.S. would prefer that China withdraws its legal claims in the South China Sea and waters, as well as cease its militarized actions in the South China Sea, the status quo provides continued justification for the U.S. to remain an active player in the region. Because of its alliances and relationships with

security partners, the U.S. can justify providing military support and conducting joint military exercises. Still, these relationships by themselves do not offer an adequate strategic rationale for such extensive military activities and involvement in the region. By claiming to defend the rules-based order and maintain maritime security, the U.S. has been able to stay heavily involved in Southeast Asia. This heavy involvement provides a clear deterrent against China's expansionism and rises as a major power.



Figure 1. Chinese and U.S. Strategy over the South China Sea: Lawfare

In sum, we surmise that both China and the U.S. are partially playing out their rivalry by taking advantage of disputed waters in the South China Sea, making claims based on international law. In China's case, the objective is to spread influence and counter U.S. power projection in the region. For the U.S., the primary purpose of involvement in the South China Sea disputes is to deter China's expansionism into the Pacific and to maintain U.S. power projection in the region. Framing its actions as protecting the rules-based order and international law, the U.S. is able to justify its strategic actions in East Asia, providing an effective balancing strategy against China.

China's Strategy in the South China Sea

First, we start by demonstrating how China's strategy in the South China Sea is to use legal claims to expand power projection and balance against U.S. influence and military presence in the region. It is certainly true that China's maritime claims are partially pursued to acquire resources, mainly fisheries, oil and natural gas, and seabed minerals. Yet China's long-range strategy is to create spheres of influence in the Pacific, in which China would dominate the waters around Taiwan and the South China Sea. The U.S. would dominate the areas around Japan and South Korea.¹⁹

In the twenty-first century, China has adopted a more assertive regional strategy using

legal claims, arguing that it has indisputable sovereignty over the entire South China Sea. These claims include all islands, features, and waters therein, by emphasizing historic rights and sovereignty over island groups and the majority of the South China Sea. The first significant use of legal claims to justify China's expansionist strategy was in 2009 when China submitted to the U.N. a *note verbale* and map outlining the nine-dash line and claiming the waters of almost the entire South China Sea. The claim was and continues to be deliberately ambiguous and not consistent at all with the rules of UNCLOS. Still, it did its job by provoking legal responses by the other disputants: Vietnam, the Philippines, Malaysia, Brunei, Taiwan, as well as by the U.S., Japan, and other major powers. By 2010, China's actions in the South China Sea had become much more assertive and high profile.²⁰ China's claims in the South China Sea continued to be couched in deliberately vague legal claims of historical rights with references to domestic Chinese laws and implications of customary international law regarding territorial sovereignty, which does not fall under the rules of UNCLOS. Rather than claiming individual islands and maritime features, China has claimed groups of islands based on baseline claims that are part of UNCLOS. Though these baseline claims are not valid, China nevertheless continues to claim baselines and historic rights to the islands, maritime features, and waters of the South China Sea.

In response to China's expansionist strategies, the Obama administration in the U.S. brought up the South China Sea dispute at the 2010 ASEAN meeting, with then-Secretary of State Hillary Clinton announcing the U.S. interest in the disputed waters. This move signaled that the U.S. was not willing to agree to any such spheres of influence. China interpreted this as a direct challenge to the Chinese claims for the South China Sea maritime features. As a result, China increased its maritime activity in the region and continuously worked to expand its naval and weapons systems, while continuing to maintain that its maritime claims are legally justified.

In 2011, China sent another *note verbale* to the U.N., claiming that "China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ), and Continental Shelf;"²¹ an apparent reference to UNCLOS. In response to the 2013 Philippine arbitration against China, despite its lack of participation, China nevertheless issued position papers and dozens of official statements about lack of jurisdiction, specifically with regard to UNCLOS. For example, in January 2013, the Chinese response to the Philippine Notification and Statement of Claims starting the arbitration case clearly referenced UNCLOS: "It follows that the Philippines' claims do not fall within China's Declaration of August 25th, 2006, because they do not: concern the interpretation or application of Articles 15, 74, and 83..."²² The Chinese Foreign Ministry followed up with a statement in April 2013 arguing that the Philippine claims brought to the Tribunal could not be under the Tribunal's jurisdiction, because, "In accordance with international law, and especially the principle of the law of the sea, 'land dominates the sea,' determined territorial sovereignty is the precondition for, and the basis of maritime delimitation."²³ In December 2014, in response to the Tribunal's request for a Counter-Memorial, China similarly submitted a position paper arguing that the Tribunal could not consider Philippine claims without also considering sovereignty

questions and maritime delimitation. These were issues of which China had declared optional exception for jurisdiction using UNCLOS Article 298.

All of these, and many other statements made by the Foreign Ministry, consistently referenced international law, justifying China's legal claims, and arguing against the demands of the Philippines and other disputants. Most of China's legal claims and statements during this time justified why the arbitration tribunal did not have jurisdiction, and arguing that China's territorial sovereignty claims were consistent with international law.²⁴ After the arbitration award in favor of the Philippines in 2016, China continued to cite legal arguments to justify why it did not need to comply with the ruling. The typical argument was that the ruling was invalid since the Tribunal did not have jurisdiction.²⁵ Other forms of Chinese legal claims involve the creation of terminology about archipelagos, different than UNCLOS, that justify China's legal claim for the Spratly (Nansha) Islands and policy statements about the Chinese rule of law, avoiding mention of UNCLOS.²⁶

China has also pursued gray-zone tactics and low-level provocations in its attempts to solidify the legal grounds for its claim under customary international law. By using limited, naval and coast guard actions short of force, which depend upon the operations of non-state vessels such as fishing and commercial vessels, Chinese military incursions have been limited in nature. These actions are not quite hostile enough to warrant a military response, which would escalate into conflict. Rather than war, it is likely that the South China Sea disputes will continue as a "slow boil."²⁷ For example, in March 2009, five Chinese vessels surrounded USNS *Impeccable*, a civilian-operated ocean-surveillance ship, seventy-five miles off the coast of Hainan Island. Two Chinese fishing trawlers stopped ahead of the *Impeccable* and dropped pieces of wood in the water to block its exit, forcing the *Impeccable* to stop to avoid a collision. During this incident, five Chinese vessels aggressively maneuvered in close proximity to the U.S. vessel. The action was considered as harassment of the U.S. ocean-surveillance ship in international waters.²⁸ This approach is "calibrated to expand Chinese influence without triggering conflict,"²⁹ also referred to as a cabbage strategy or salami slicing. Since then, China has repeatedly engaged in maritime activities in other states' EEZs, while simultaneously denying maritime access to these same states in China's own EEZ and claimed waters. Most recently, in 2019 and 2020, Chinese ships have surveyed waters in the EEZs of Vietnam and Malaysia, where Chinese Coast Guard ships protected Chinese survey ships, triggering confrontations with Vietnamese and Malaysian naval forces.

The aggressive involvement of Chinese fishing and other civilian ships in such incidents is one of many examples of China's use of non-government actors to assist the military. These actions thereby avoid Chinese military vessels having to justify any military actions legally. By avoiding Chinese naval operations, and using paramilitary forces made up of armed civilians in reserve, often referred to as a maritime militia,³⁰ its Coast Guard, and multiple other maritime militias,³¹ China can claim not to have control over these maritime activities. As a civilian organization, the Coast Guard has the responsibility of monitoring

the area under its jurisdiction, such that employing it, and its maritime militias, is not regarded as the same as taking military action, which carries with it a danger of escalating to war. Therefore, employing the Coast Guard implies that the area in dispute falls within a state's claimed jurisdiction. Thus, Beijing uses its Coast Guard in such cases because it offers a "more official but no less challenging tactic."³² It is an instrument for signaling a less-aggressive foreign policy, which is consistent with its legal claims for jurisdiction over maritime features and waters in the South China Sea. China employs these tactics in an attempt to accumulate legal evidence in its favor. By strengthening its legal basis, China hopes to justify its presence in the South China more fully, and more specifically, explain its military actions and militarized construction atop its islands.

This strategy is not unique to the South China Sea. In the East China Sea, China claims the Senkaku/Diaoyu Islands and waters, a claim which is disputed by Japan. The Chinese government has similarly used low-level provocations to build its legal case. For example, according to a former commanding officer of a vessel operating in the territorial waters of the Senkaku/Diaoyu Islands, "an order came directly from the central government based on a plan devised in 2006 to regularly send patrol ships to the area."³³ This position is "due to fear in Beijing that, (if China were to go to the international courts), but had never sent ships to patrol to the islands, China might lose the claimed territory."³⁴ In both of these statements, there is a reference to effective control and patrolling as efforts to create a legal record.

In addition to expanding its maritime fleet in the area, perhaps the most provocative aspect of China's projection strategy is its acquisition, buildup, and militarization of several maritime features, turning them into artificial islands in the South China Sea. China consistently claims these "islands" are legally within Chinese territorial waters based on historic title, again using international maritime law to justify its actions. Despite the 2016 ruling that the artificial islands are not actually islands, but rocks, reefs, and shoals, China has built up these maritime features and built infrastructure that makes them habitable in an attempt to consolidate maritime claims based on historic rights.³⁵ States with contested maritime territorial claims like China believe that since the islands and waters, are already theirs, protection of the islands and waters falls within their jurisdiction. Despite the 2016 arbitration ruling against China's claims on these features being designated as islands, China continues to claim them as such, with the usual attendant maritime entitlements.

China regularly conducts naval exercises that are claimed as legitimate. When the U.S. and American allies perform similar exercises in the disputed sea, China responds harshly, albeit within the context of international law. For example, in response to operations by littoral combat ship U.S.S. *Gabrielle Giffords* in June 2020, Col. Li Huamin, a spokesman of the Chinese military's Southern Theater Command, responded by stating that "This provocative conduct by the United States gravely violates the relevant international laws and rules, and seriously violates Chinese sovereignty and security interests."³⁶

Although China claims these "islands" are Chinese based on historic rights, the purpose

for the militarized “islands” is to provide China with the ability to hold at bay the activities of the U.S. military, particularly submarines, surface ships, and airplanes, operating in what China sees as its maritime domain.³⁷ Such control and militarization allow China to not only have open access to the Pacific through the South China Sea, but also the ability to extend to the “second island chain.” This access reaches to U.S. naval vessels in the Pacific, U.S. bases and airfields, and U.S. territory with long-range missiles, as well as second-strike nuclear capabilities. By extending its access into the Pacific, China is signaling to the U.S. that it is also projecting power and can launch realistic strikes against the U.S.³⁸ Since the U.S. and its allies took no significant steps to deter Chinese acquisition and building up of artificial islands out of shoals and reefs from 2013 to the present,³⁹ China essentially was granted *carte blanche* to build the islands and militarize them. The U.S. and its smaller allies and friends, particularly Vietnam and the Philippines, were unwilling or unable to deter the ever-creeping Chinese threat effectively.

U.S. Strategy in the South China Sea

The U.S. strategy in the South China Sea is focused on maritime security, supporting its allies and security partners, defending the freedom of navigation, and limiting China’s ability to further build and militarize outposts within the framework of international law. Under the Obama administration, many debated whether the issue was really about the disputed South China Sea or a larger U.S.-China power struggle, and whether Chinese control of the disputed sea affected U.S. foreign policy.⁴⁰ As we have argued, this predominantly legalized approach is part of a broader strategy to deter China’s rise in power. Despite not being a ratifying member of UNCLOS, the U.S. government has consistently argued in favor of UNCLOS laws, and the U.S. follows UNCLOS as customary international law. All of the actions that the U.S. takes regarding the South China Sea have consistently complied with international maritime law, regardless of the political party of the presidential administration.

As China’s actions in the South China Sea became more aggressive in 2010 and 2011, claimant states Vietnam and the Philippines turned to the U.S. to challenge China, given their relative power weakness vis-à-vis China.⁴¹ Around the same time, President Obama’s administration began engaging in its strategy of rebalancing toward Asia. Better known as the “Asia pivot,” in late 2011, the U.S. became involved in the South China Sea dispute, with a strategy of pursuing FONOPs, strengthening alliances in the region, engaging in multilateral military exercises in the region, and issuing statements about the rule of law. Though the pivot was not explicitly targeted at any specific country, it was apparent that China was the focus. The Obama administration framed U.S. interests in policy toward the South China Sea as such: “America’s policy continues to be one valued on principles of peaceful resolutions of disputes, lawful settlement of things like territorial disputes like the South China Sea, or anywhere else, freedom of navigation, freedom of commerce.”⁴²

Disputes in the region entered a new phase in 2015, as China began pressing its case not only regionally, but as part of a broader great-power strategy on a global scale. Since

2015, China has viewed the new U.S. maritime strategy in its “pivot to Asia” as an attempt at counterbalancing China’s “Belt and Road” initiatives, proposed in 2013 by President Xi Jinping. China has interpreted the U.S. maritime strategy begun under the Obama administration, and the more aggressive strategy under the Trump administration, as a sign that the U.S. global strategy has shifted to become an all-out drive at great-power competition designed to contain the rise of China.⁴³

In 2015, the Asia-Pacific Maritime Security Strategy published by the U.S. Department of Defense focused heavily on the South China Sea disputes.⁴⁴ The rebalancing strategy has continued under President Trump’s administration under increased auspices of the Department of Defense. There have been diplomatic jabs at China regarding its failure to comply with international maritime law. The 2017 National Security Strategy (NSS) directly called out China for its “efforts to build and militarize outposts in the South China Sea,” which “endanger the free flow of trade, threaten the sovereignty of other nations, and undermine regional stability.” In July 2020, the U.S. Department of State issued a strong statement about China’s aggression in South China Sea, signaling support for other disputants’ positions. The 2017 NSS criticized China for militarization that limits access for the U.S. in the region. In outlining the U.S. strategy, the document stated that the U.S. would “maintain a forward military presence capable of deterring and, if necessary, defeating any adversary.”⁴⁵ While it did not name these adversaries, it was implied that in addition to North Korea, the U.S. had China in mind.

The U.S. government has three primary interests in the South China Sea: 1) trade routes and free sea-lanes, 2) defense ties with allies and partners in the region, and 3) balance of power against China.⁴⁶ The official maritime objectives of the Department of Defense are to safeguard freedom of navigation for air and naval commercial and military vessels as recognized by UNCLOS, to deter conflict and coercion, and to promote the rule of international law.⁴⁷ All of these objectives are framed in the context of international maritime law, and only one of them explicitly refers to balancing against China. The U.S. position on the South China Sea has been deliberately ambiguous, taking no position on sovereign rights, but expressing concern that China does not follow the rules-based order set by UNCLOS, again emphasizing international law. Until July 2020, the U.S. policy position on the South China Sea was ambiguous. The exceptions were statements made about respect for the rules-based order and a 2019 statement by the Department of State acknowledging that the U.S. is obligated to defend against any armed attacks on Philippine vessels, forces, or aircraft in the South China Sea. The 2020 statement has provided more explicit support for the Philippines, Vietnam, and Malaysia and criticized China’s actions and claims in the South China Sea.

The U.S. strategy has not made clear what exactly the red line is in the U.S. deterrence strategy, nor what the U.S. would be resolved to do in response to further Chinese actions in the South China Sea.⁴⁸ Instead, the emphasis is consistently on the rules-based order and supporting international maritime law, but not explicit deterrence or balancing of China.

Multiple U.S. presidential administrations from Clinton, Bush II, Obama, and now Trump have all been wary of engaging in active deterrence of Chinese aggression and island-building. The concern has been to not rock the boat concerning U.S.-Chinese relations, or sometimes to pursue Chinese cooperation on an issue like North Korea.⁴⁹ The lack of clear policy statements and emphasis on international maritime law means that there is no clear signal to China about how the U.S. would respond militarily to further Chinese expansionism, especially in allied waters, such as those of the Philippines. The purpose of this position has been flexibility, preventing antagonizing China, and avoiding China taking military actions beyond a certain point. The proclamation of a red line would invite Chinese responses up to that point and put the U.S. in a position where it must militarily respond to Chinese actions beyond that point, a scenario to which the U.S. has not been willing to commit.⁵⁰

The predominant strategy of the U.S. in the context of international law has been the freedom of navigation operations pursued since 2015. The 2017 National Security Strategy explicitly stated that the U.S. was committed to freedom of the seas, an apparent reference to UNCLOS Article 87 referring to the high seas, and Section 3, Articles 17-26, referring to territorial seas and innocent passage. Defined as “operational challenges against excessive maritime claims,” freedom of navigation is an institutionalized program that is pursued not only in the South China Sea but in other regions of the world as well.⁵¹ The U.S. has carried out 22 FONOPs since October 2015, with the frequency rising over time. The intensity of military operations near the South China Sea is also increasing,⁵² “credibly demonstrat[ing] U.S. resolve and capabilities without being unnecessarily incendiary or provocative.”⁵³ Although these are carried out strictly in the context of upholding freedom of navigation, U.S. policymakers understand their purpose to be a part of the U.S. deterrence strategy against China.⁵⁴

Alternatively, according to the National Institute for South China Sea Studies in China, China is considered the main target of U.S. FONOPs.⁵⁵ China’s interest in U.S. FONOPs is reflected in the number of articles written about this topic in Chinese.⁵⁶ Recently, Col. Wu Qian, a spokesman for the Chinese Ministry of National Defense, argued that FONOPs are mere excuses for U.S. interference in the region: “As a country lying outside the region, the United States has been using the excuse of ‘freedom of navigation’ to dispatch military-use ships and planes to make provocations in the East and South China Seas.”⁵⁷

After the Trump administration came into office, FONOPs were upgraded from the innocent territorial sea to passing through the waters 12 nm off the Paracel Islands and features and the Spratly Islands and features. In the past, this operation was performed by a single destroyer, but in May 2018, the FONOPs involved both cruisers and destroyers. This operation was the first time that a single cruiser was dispatched to perform such a mission, achieving a breakthrough in operational strength. The U.S. had demonstrated its increasingly stringent position on the issue of freedom of navigation in the South China Sea.⁵⁸ For the entire year of 2019, the U.S. Navy deployed three aircraft carriers—the U.S.S.

John C. Stennis (CVN-74), U.S.S *Ronald Reagan* (CVN-76), and U.S.S *Abraham Lincoln* (CVN-72)—traveling to the South China Sea, accounting for thirty percent of the current U.S. aircraft carrier fleet.⁵⁹ Most recently, the U.S. sent two aircraft carrier strike groups, the *Nimitz* and *Ronald Reagan*, to conduct FONOPs and naval drills in the South China Sea in early July 2020, stating: “These efforts support enduring U.S. commitments to stand up for the right of all nations to fly, sail, and operate wherever international law allows.”⁶⁰ Though it was not officially acknowledged, the FONOPs were conducted at the same time as Chinese naval exercises in disputed waters. In addition to stating that the Chinese actions were counterproductive to stability in the region, the U.S. Department of Defense specifically cited the effects as violating the 2002 Declaration on the Conduct of Parties in the South China Sea and the efforts of China “to assert unlawful maritime claims and disadvantage its Southeast Asian neighbors in the South China Sea.”⁶¹

With its allies and security partners in the region, the U.S. Navy has also conducted several joint military exercises, and carrier group transits through or near the South China Sea. In 2019, the U.S. conducted 85 such military exercises.⁶² One of the best-known military exercises is *Balikatan*, conducted with the Philippines, Singapore, and Thailand, signaling a united front of a U.S.-led military presence and engagement in the region. Another joint exercise is the *Rim of the Pacific*, held every two years, which is the largest maritime exercise internationally, involving the armed forces of multiple states, including Japan, South Korea, Thailand, Malaysia, Indonesia, and Singapore.⁶³ These military exercises “not only bolster the overall capabilities and capacities of ASEAN (the Association of Southeast Asian Nations) navies but make it easier for them to work alongside the U.S. military in times of need.”⁶⁴

There have also been several joint military exercises with Japan conducted in the South China Sea. In March 2018, the helicopter destroyer *Ise* of the Japan Maritime Self-Defense Forces, along with U.S. forces, conducted joint military operations in the South China Sea. In August 2018, a Japanese attack submarine conducted its first joint drills with U.S. forces in the South China Sea. From August to October 2018, the Japanese helicopter carrier *Kaga*, together with U.S. naval forces, conducted joint military exercises in the South China Sea and the Indian Ocean. In October 2018, Japanese amphibious combat troops and U.S. forces conducted joint exercises under the motto of “capture the island” in the Philippines.⁶⁵ Another joint exercise with the U.S. occurred in September 2019. The five-day exercise for the ten countries of ASEAN, which includes Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, and Vietnam, was led by the U.S. and Thailand and included eight warships, four aircraft, and one thousand two hundred and sixty personnel from eleven nations.⁶⁶

The combined U.S. strategy of FONOPs, promotion of a rules-based order, military exercises, and support for allies and security partners are all compliant with international law. As the dominant power in the world, the U.S. has the ability to promote a rules-based order when it sees rising powers like China challenging not only the status quo but the rules-

based order itself. At the same time, these actions, strategies, and policies provide a clear opportunity to justify continued and extended military presence, activities, and support for allies and security partners in the region. As noted by former Secretary of Defense Ash Carter in 2015, “As a Pacific nation, a trading nation, and a member of the international community, the United States has every right to be involved and concerned.”⁶⁷

Conclusion

The South China Sea represents two parallel issues, first as maritime legal disputes between China and several states in Southeast Asia, and second, as a game of power politics between China and the U.S. As maritime disputes, China and the other disputants have heavily focused on international law, specifically UNCLOS, but also what China sees as potential customary international law. China consistently claims its “historic rights” to almost all of the South China Sea, its island groups, rocks, reefs, and shoals, and the waters not only surrounding these maritime features but throughout much of the sea. While framing its claims legally, China also has pursued low-level provocations against several disputants, seizing maritime features, building artificial islands that are now militarized, and denying access to other states’ military and civilian vessels. We have argued in this study that China uses its legalized maritime claims in the South China Sea as a means to expand its military power into the Pacific, much further beyond its longstanding limited control of the waters just off the coast of China. We have provided an overview of China’s legal approach and how it relates to the power struggle with the U.S.

China’s long-term strategy will focus on accelerating its negotiation of the “legal guidelines,” giving these guidelines the force of law to resolve maritime claims.⁶⁸ If China continues its expansionism, essentially displacing the U.S. as a great power in the region, “global geopolitics will have entered a new and very different era. Southeast Asia will inevitably be rendered subordinate and compliant to China’s will.”⁶⁹ If China can effectively enforce its maritime claims in the South China Sea, this would be the highest level of territorial expansionism since that of Imperial Japan.⁷⁰

Though not a claimant in the South China Sea, the U.S. has also pursued significant involvement in the disputes, mainly through pushing for a rules-based order, conducting FONOPs and military exercises within the legal bounds of UNCLOS, and providing support to allies and security partners in the region. Despite the need for stronger U.S. deterrence of China’s actions in the South China Sea and the broader region, the U.S. government must remain pragmatic in its approach, which is why the U.S. makes such an effort in framing its actions as consistent with international law. To avoid the risk of escalating into armed conflict and to avoid the Chinese perception of the situation as a “long-term contest with the United States” which is “inevitable” and something that “must be won,” the U.S. strategy in the region must continue to comply with international law, the code of conduct, and other agreements signed between the two powers.⁷¹ The U.S. government must also continue to be consistent in its statements and rhetoric about the South China Sea and

Chinese expansionism more broadly, especially concerning Chinese military domination of the South China Sea. More broadly, the U.S. Congress should seriously reconsider ratifying the UNCLOS treaty, which would make the U.S. much more credible in its legal criticism of China and insistence on a rules-based order. For the U.S. to be a major factor in promoting legal guidelines, UNCLOS membership would render its strategy concerning the South China Sea more effective.

Since 2015, China has been viewing FONOPs targeting the South China Sea as a cause for concern concerning Sino-U.S. great-power competition. China sees the matter as one not only applicable to the region itself but whose subtext carries broader implications for grand strategy. While China views the South China Sea as the cornerstone on which to make concrete its ambitions to become a superpower, the U.S. uses the disputes as an opportunity to justify maintaining and expanding its military presence in the region in the context of grand-strategy competition. U.S. strategy toward the South China Sea has never been more critical than now. Despite the lack of U.S. sovereign claims to any of the islands, rocks, reefs, and shoals in the waters there, this disputed area is arguably at the crux of future U.S.-China great power relations. This dispute is “the immediate arena where two alternative geopolitical paradigms are contesting for supremacy.”⁷² Because of its status as the leader of the rules-based order, the U.S. can continue to justify its military presence to promote freedom of navigation, defend its allies and security partners and their maritime rights, and challenge China’s power projection. U.S. strategy in this region must be steadfast, assertive, and make clear to China that the U.S. will not be giving up its power presence or leaving the region anytime soon.

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FIGURES AND TABLES: All figures and tables should be professional in appearance. Provide figures as separate data files instead of as pictures embedded within the Word document. Location of illustrations should be indicated by a note in the text (e.g., "Table 1 about here").

BIOGRAPHICAL SKETCH: authors must include a brief biographical sketch, including institutional affiliation, primary publications, and relevant experience. Length should be 200 words or less.

REFERENCES: JPWS uses The Chicago Manual of Style's notes and bibliography system with endnotes. For further information on references, please consult The Chicago Manual of Style, 17th edition.

Books: Feldman, Lily Gardner. *Germany's Foreign Policy of Reconciliation: From Enmity to Amity* (Lanham, MD: Rowman and Littlefield Publishers, 2012), 20-33.

Book chapters: Roehrig, Terence. "Stability or Instability? The US Response to North Korean Nuclear Weapons." In *North Korea and Nuclear Weapons: Entering the New Era of Deterrence* (Washington DC: Georgetown University Press, 2017), edited by Sung Chull Kim and Michael Cohen, 129-56.

Journal articles: Friedberg, Aaron. "The Future U.S.-China Relations: Is Conflict Inevitable?" *International Security* 32, no. 2 (2005): 7-35.

Online sources: Bonenberger, Adrian. "The War No One Notices in Ukraine," *New York Times*, June 20, 2017. <https://www.nytimes.com/2017/06/20/opinion/ukraine-russia.html>

For multiple notes referencing the same work, please use the following shortened note form after the first reference.

Feldman, Germany's Foreign Policy of Reconciliation, 73-78.

