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Promoting Peace and Stability in the Maritime Order Amid China's Rise

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Executive Summary

- A shift in the balance of maritime power in the Indo–Pacific region is contributing to rising tensions. This shift is accompanied by a mismatch in perceptions between the United States and China, which is in turn driving a dangerous great-power rivalry at sea.
- China’s growing presence, assertive behavior, and expansive claims in the maritime domain are also provoking a backlash among China’s neighbors and even some countries far from its shores. While these tensions have thus far remained under control, they could erupt into conflict if not carefully managed.
- To promote peace and stability in the South China Sea and beyond, the United States should pursue a bilateral *détente* with China in the maritime domain while also promoting the development of a more inclusive regional and global maritime order.
- The specific steps the United States should implement include:
 - Incentivize reduced militarization of the disputes in the South China Sea and East China Sea, and support compromise between China and other claimants to maritime jurisdiction and rights;
 - Significantly reduce the frequency of freedom of navigation operations, and instead promote bilateral and regional agreements on military activities at sea; and
 - Build more robust maritime crisis-management mechanisms with China.

Shifting power at sea: Rising maritime tensions in the Indo-Pacific

The oceans have become a central site of tension and competition among states in the Pacific and Indian Oceans in recent years. Numerous factors have contributed to this dynamic, including nationalist sentiment in many states in the region, competition for increasingly scarce natural resources, and developments and deadlines in the law of the sea regime. At perhaps the most basic structural level, this tension has stemmed from two ongoing shifts in relative power resulting from China's economic and military growth: first, the shifting balance of power between the United States and China, and second, the shifting balance of power between China and its neighbors.¹

China's rise as a maritime power

Over the past few decades, China's rapid economic development has driven explosive growth in Chinese demand for the ocean's natural resources, including fish and offshore oil and gas. This has motivated Chinese companies and fisherfolk to exploit these resources to the fullest extent possible. China's sea-borne trade, foreign economic investments, and overseas diaspora have also increased dramatically.

China's economic rise has also enabled the Chinese party-state to invest significant resources in modernizing its military and maritime law-enforcement capabilities. Over the past two decades in particular, China has dramatically increased its naval and coast guard presence in the nearby waters of the East China and South China Seas, while also expanding its naval and marine-research presence in waters beyond those areas.² This growth has enabled the Chinese government to defend and promote greater resource

¹ I am grateful for comments from Michael Swaine, Mike Mochizuki, Shuxian Luo, and Trita Parsi, as well as from Charles Glaser on an earlier version of this paper. I also thank Shuxian Luo for her expert help with fact-checking and sourcing several of the paper's claims and assessments.

² Chubb, Andrew. "PRC Assertiveness in the South China Sea: Measuring Continuity and Change, 1970–2015." *International Security*, vol. 45, no. 3, Winter 2021. 79–121; <https://direct.mit.edu/isec/article/45/3/79/95273/PRC-Assertiveness-in-the-South-China-Sea-Measuring>; Manicom, James. *Bridging Troubled Waters: China, Japan, and Maritime Order in the East China Sea*. Washington. Georgetown University Press, 2014.

extraction by Chinese people and companies, while also protecting China's sea-borne trade and overseas interests.

China has also used these capabilities to defend more vigorously its manifold claims in disputes with neighboring countries over control of small reefs and islands and marine resources in the South China and East China Seas (see Appendix). These actions have been driven in part by Beijing's sense of historical grievance over perceived exploitation by maritime powers and weaker neighbors to the detriment of China's "maritime rights and interests" (*haiyang quanyi*, 海洋权益).³

Disputed islands in South China and East China Seas⁴



Source: Map prepared by CRS using U.S. Department of State boundaries.

³ Although China's claims in the South China Sea generally predate the growth of its maritime power over the past two or three decades, its growing power has enabled it to be more assertive in enforcing those claims. This trend dates back to at least 2006–2009, prior to Xi Jinping's tenure as president, though Xi Jinping has also demonstrated a clear willingness to adopt a tough stance on maritime issues, especially in the 2012–16 period, in response to what China perceived as provocations by other claimants and the United States. Chubb. "PRC Assertiveness." 79–121; Chubb. "Xi Jinping and China's Maritime Policy." Brookings Institution, January 22, 2019.

<https://www.brookings.edu/articles/xi-jinping-and-chinas-maritime-policy>; Odell, Rachel Esplin. *Mare Interpretatum: Continuity and Evolution in States' Interpretations of the Law of the Sea*. Cambridge. Massachusetts Institute of Technology, 2020. Ch. 6. <https://dspace.mit.edu/handle/1721.1/130597>.

⁴ O'Rourke, Ronald. "U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress." Congressional Research Service, July 13, 2021. <https://crsreports.congress.gov/product/pdf/R/R42784>

Beyond these disputes, China's maritime rise has had a different effect on its stance toward freedom of navigation. Beijing has never claimed the right to interfere with the navigation of commercial shipping transiting through the South China Sea, nor has it ever done so. Rather, the traditional disagreement between the United States and China regarding what the United States calls freedom of navigation has been over what type of military activities the United States may conduct in waters near China's coast. China strongly objects to U.S. freedom of navigation operations, FONOPs, within 12 nautical miles of territory it controls or within the waters of the island groups it claims in the South China Sea (see Appendix). Beijing has also objected to U.S. surveillance and reconnaissance operations in its exclusive economic zone.

However, over the past decade there has been an evolution in China's stance toward freedom of navigation that has been little remarked upon by observers in Washington. As China's navy and civilian marine scientific research fleet has expanded its operations in other states' straits, exclusive economic zones, or EEZs, and continental shelves, its interpretation of the law of the sea related to freedom of navigation has increasingly moved toward that of the United States. It has asserted the right of transit passage in Japanese straits where Japan does not recognize that right, and it has affirmed navigational freedoms in the Arctic's Northwest Passage that Canada claims as its internal waters. In both cases, these positions are closer to that of the United States than to the respective U.S. ally.⁵

Similarly, China has registered official objections to U.S. naval surveillance and operations in its EEZ less frequently over the past decade, despite the ongoing, intense pace of such operations. When China does object to such activities, it rarely does so on the grounds of international law; rather, it cites the political provocation and threats to safety posed by such operations. This likely reflects the fact that China is increasingly conducting such operations in the EEZs of other nations, including off Guam and Hawaii, and in Japanese waters just beyond the limits of Japan's 12-nautical mile territorial seas — operations China has defended as in accordance with international law.⁶

⁵ Odell. *Mare Interpretatum*. Ch. 7. 289–98.

⁶ Odell. *Mare Interpretatum*. Ch. 7. 313–18.

U.S. reactions to China's maritime rise

The United States has long been accustomed to exercising a dominant presence throughout the world's key straits, sea lanes, and approaches to the coastlines of most countries. For the past century, and especially under the post-World War II international order, exercising command of the global maritime commons has been central to U.S. grand strategy.⁷ This command enables the United States to defend its territories, protect its overseas investments and citizens, maintain access to resources, and project power to other continents for military interventions. It also enables the United States to act against piracy, terrorism, smuggling, and proliferation, and to mount humanitarian and disaster relief operations – activities that have directly served U.S. interests while also providing public goods to other countries.

From China's perspective, its increased naval and coast guard operations in the South China and East China Seas are normal and to be expected from a country as large as China.

The United States has long relied upon the rhetoric of “freedom of the seas” and “freedom of navigation” to legitimize and sustain its command of the maritime commons. It has vigorously promoted norms that limit coastal states' jurisdiction over maritime commerce and especially foreign military navigation and operations.⁸ In a world where America's maritime power far surpasses that of other nations, such norms have disproportionately served U.S. military power and access and supported a status quo regime in which the United States is the lead enforcer of maritime law and order.

⁷ Posen, Barry R. “Command of the Commons: The Military Foundation of U.S. Hegemony.” *International Security*, vol. 28, no. 1, Summer 2003. 5–46.

<https://www.belfercenter.org/publication/command-commons-military-foundation-us-hegemony>.

⁸ Prior to World War I, before the United States emerged as the world's foremost naval power, Washington used freedom-of-the-seas rhetoric in part to restrain the unfettered naval power of Great Britain, the previous maritime hegemon, and to defend the rights of neutral shipping during wartime. In that period, the United States favored narrow territorial seas but opposed the right of innocent passage for warships in the territorial sea. As America's naval power grew, however, it began to use the concept of freedom of navigation instead primarily to advocate its own largely unfettered military access to the world's oceans. Odell. *Mare Interpretatum*. Ch. 5. 204–16.

In light of America's predominant power at sea, China's neighbors — especially U.S. allies in the region — have at times sought to enlist the United States in pushing back against China's increasing maritime assertiveness. Since Barack Obama's first term, the United States has responded by involving itself more in the disputes, generally through speeches and statements with nominally neutral language about freedom of navigation and peaceful resolution of disputes. It has also increased the tempo of its freedom of navigation operations in the South China Sea.⁹

During the Trump administration, this eventually extended to sanctions and Secretary of State Pompeo's full-throated endorsement, in summer 2020, of the award in the *Philippines v. China* case on the South China Sea disputes four years earlier, in which an arbitral tribunal appointed under Annex VII of UNCLOS ruled in favor of most of the Philippines' arguments (see Appendix). Notably, Southeast Asian states distanced themselves from this statement.¹⁰ This pattern has over time shown how countries bordering the South China Sea desire the United States to push back on China's most expansive claims, while also seeking to avoid the South China Sea becoming a venue for great-power conflict in which they are forced to align against Beijing and risk undermining their economic and political relations with China.

Mismatched perceptions and the risk of great–power conflict

As China's emergence as a maritime power has collided with America's longstanding dominance at sea, a mismatch in the perceptions of these two nations has developed. From China's perspective, its increased naval and coast guard operations in the South China and East China Seas are normal and to be expected from a country as large as China. Far from threatening freedom of navigation, China believes such operations help

⁹ For an account of U.S.–China relations in the South China Sea in this period, see Fravel, M. Taylor. "Threading the Needle: The South China Sea Disputes and U.S.–China Relations," in *Strategic Adjustment and the Rise of China: Power and Politics in East Asia*. Robert Ross and Øystein Tunsjø, eds. Ithaca. Cornell University Press, 2017. 233–60. <http://taylorfravel.com/documents/research/fravel.2017.threading.the.needle.pdf>.

¹⁰ Heydarian, Richard Javad. "US fails to build regional coalition against China." *Asia Times*, August 7, 2020. <https://asiatimes.com/2020/08/us-fails-to-build-regional-coalition-against-china>. For Secretary of State Pompeo's statement, see "U.S. Position on Maritime Claims in the South China Sea." United States Department of State, July 13, 2020. <https://asean.usmission.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/>. See also remarks by Assistant Secretary of State David R. Stilwell. "The South China Sea, Southeast Asia's Patrimony, and Everybody's Own Backyard." July 14, 2020, <https://asean.usmission.gov/the-south-china-sea-southeast-asias-patrimony-and-everybodys-own-backyard/>.

protect commercial shipping from threats posed by piracy and natural disasters. China's only direct access to deep water is in the South China Sea, making its naval base at Sanya on Hainan Island the most obvious and suitable operating base for its naval forces, especially its submarines. Land reclamation and the building of outposts on reefs it controls in the Spratlys are a way for China to secure its operating environment and enhance its maritime domain awareness; near-constant U.S. military surveillance in the waters near those bases, from China's perspective, implies a fundamental lack of empathy on the part of the United States. In its maritime disputes, Beijing thinks other powers have taken advantage of it, and the U.N. Convention on the Law of the Sea, or UNCLOS, regime has disadvantaged it in that it has effectively left China with relatively limited access to marine natural resources – this notwithstanding that China accounts for almost a fifth of the world's population.

As China's emergence as a maritime power has collided with America's longstanding dominance at sea, a mismatch in the perceptions of these two nations has developed.

From the U.S. perspective, America's naval power and the norms that sustain it are not only central to protecting U.S. interests but also pose little threat to China – provided China does not engage in aggressive action that would spark a U.S. military response. China's denunciations of U.S. military operations are thus taken as a signal that China desires to expel the United States from the region and establish control over the South China Sea, if not beyond, in part to permit it greater freedom of action to coerce Taiwan or countries elsewhere in Asia. The United States also perceives China's activities in the South China Sea to be, at best, disproportionate overreactions to the minor provocations of weaker powers, and at worst aggressive bullying of the weak by the strong.

This mismatch in perceptions risks creating greater tension and worsening the potential for conflict. This is especially exacerbated when the disputes and anxieties between

China and its neighbors assume the context of great-power competition between China and the United States. While Beijing thinks the United States is exploiting such disputes to weaken China, Washington fears its credibility and influence are dependent on standing up against China's excessive claims and deterring aggressive action by Beijing. This is especially true when alliance commitments are involved, as in the case of the Sino–Japanese disputes over the Senkaku (Diaoyu) Islands and the Sino–Philippine disputes in the Spratlys and Scarborough Shoal.

Other nations' reactions to China's maritime rise

These circumstances illustrate why an analysis of the tensions in maritime Asia in recent decades cannot be limited to U.S.–China dynamics. Although the mismatch in perceptions of interests and threats between these two major powers is a driver of those tensions, China's conflicts with its neighbors also act as an independent source of tension that can interact with great-power competition in potent ways. As China has exercised its growing power and presence more assertively, it has in turn provoked backlashes among neighbors and among other nations even farther afield. These states have their own nationalist populations that fear losing ground in disputes with China over islands and maritime boundaries, or resent the encroachments of Chinese vessels into their maritime jurisdictions and resources. At the same time, these states have occasionally engaged in provocations of their own that feed into an action-reaction escalation dynamic in disputes.

In Northeast Asia, this dynamic is most evident between China and Japan. The dispute over the Senkaku (Diaoyu) Islands and China's assertion of a greater coast guard and naval presence in the waters around those islands has been a key driver of Japan's suspicion of Chinese intentions.¹¹ More generally, China's more frequent operations in Japanese-controlled straits and EEZs over the past two decades have also unnerved many in Japan, leading the Japanese government at times to issue official demarches

¹¹ For a detailed analysis of trends in Chinese operations near the Senkaku (Diaoyu) Islands, see Mochizuki, Mike, and Jiaxu Han. "Is China Escalating Tensions With Japan in the East China Sea?" *The Diplomat*, September 16, 2020. <https://thediplomat.com/2020/09/is-china-escalating-tensions-with-japan-in-the-east-china-sea/>.

to Chinese diplomats objecting to certain PLA passages.¹² This same anxiety was evident in how many in Japan read as an indication of aggressive intent provisions in China's new coast guard law that permit the Chinese Coast Guard to use force to defend Chinese sovereignty.¹³

A similar pattern has unfolded in China's relations with Southeast Asian nations bordering the South China Sea. China's expansive claims to sovereignty over the South China Sea islands and assertions of sovereign or historic rights in nearly all the waters of the South China Sea, coupled with its assertive maritime law-enforcement and maritime militia presence and its land reclamation operations on the reefs and islands it had long occupied in the Spratlys, have alienated public and elite opinion in the region.¹⁴ This is most evidently true in countries that have direct territorial or maritime boundary disputes with China, especially the Philippines and Vietnam. But it is also true in other countries bordering the South China Sea, such as Singapore and Indonesia. In the latter case tensions have emerged in consequence of China's claim to traditional fishing grounds in Indonesia's EEZ in the southernmost reaches of the South China Sea, far from China's mainland but within the nine-dash line on Chinese maps of the area.¹⁵

China's insistence upon an expansive version of its claims in the South China Sea, grounded in historic rights and amorphously linked to its nine-dash line map of the waters, has introduced acrimony into its otherwise generally positive diplomatic

¹² Ironically, China has often defended those operations by using the same norms and rhetoric of freedom of navigation that the United States uses to defend its own military operations in waters near China. Odell. *Mare Interpretatum*. Chs. 7 and 10.

¹³ It is worth noting that, despite some areas of ambiguity that could permit more expansive or aggressive action, the provisions in China's new coast guard law governing the use of force in many ways resemble the laws and practices of other states in the region, including the United States and Japan. "Force Majeure: China's Coast Guard Law in Context." CSIS Asia Maritime Transparency Initiative, March 31, 2021. <https://amti.csis.org/force-majeure-chinas-coast-guard-law-in-context>. See also Samuels, Richard J. "New Fighting Power!: Japan's Growing Maritime Capabilities and East Asian Security." *International Security*, vol. 32, no. 3, Winter 2007. 84–112. <https://direct.mit.edu/isec/article/32/3/84/11919/New-Fighting-Power-Japan-s-Growing-Maritime>. For an alternative perspective on the unique and potentially worrisome features of China's new coast guard law, see Sakamoto, Shigeki. "China's New Coast Guard Law and Implications for Maritime Security in the East and South China Seas." *Lawfare*, February 16, 2021. <https://www.lawfareblog.com/chinas-new-coast-guard-law-and-implications-maritime-security-east-and-south-china-seas>.

¹⁴ Seah, Sharon, Hoang Thi Ha, Melinda Martinus, and Pham Thi Phuong Thao. "The State of Southeast Asia: 2021 Survey Report." Singapore. ISEAS-Yusof Ishak Institute, February 10, 2021. <https://www.iseas.edu.sg/wp-content/uploads/2021/01/The-State-of-SEA-2021-v2.pdf>.

¹⁵ The "nine-dash line" is based on a map originally published by the Republic of China government in 1948 depicting China's claims in the South China Sea by way of an eleven-dash line circumscribing most of the sea. For a description of China's claims and activities in Indonesia's EEZ, see Odell. *Mare Interpretatum*. Ch. 9. 377, 388, 395–97.

relations with Southeast Asian states.¹⁶ This has squandered some of the goodwill Beijing had built up during a decade of “smile diplomacy” at the start of the 21st century.¹⁷ Although the Association of Southeast Asian Nations has traditionally been very loath to issue any statements directly criticizing China’s stance in the South China Sea disputes, in part due to its consensus-based model and the reluctance of some ASEAN nations not involved in the disputes to offend China, in summer 2020 ASEAN was able finally to issue a joint statement calling for the South China Sea disputes to be resolved in accordance with UNCLOS — an implicit swipe at Beijing’s insistence that other sources of international law, including general and customary law, ought to play a role in resolving the disputes in addition to UNCLOS.¹⁸

China’s maritime rise has created tensions even with countries as far afield as Latin America, as China’s distant-water fishing fleets have ventured abroad in search of richer catches than are available in depleted waters near China.

Tensions have also arisen regarding China’s increased naval and civilian research activities beyond waters where it claims jurisdiction. India, the Philippines, and Indonesia have each raised objections when Chinese civilian government research vessels conducted research surveying the ocean floor in their exclusive economic zones or archipelagic waters without permission — activities that UNCLOS subjects to coastal state authorization. Ironically, the United States has often clashed with China in the past

¹⁶ For an account tracing the evolution of China’s claim to historic rights and its nine-dash line map, see Odell. *Mare Interpretatum*. Ch. 9. See also the Appendix to this brief.

¹⁷ Fravel, M. Taylor. “Things Fall Apart: Maritime Disputes and China’s Regional Diplomacy,” in *China’s Challenges*. Jacques deLisle and Avery Goldstein, eds. Philadelphia. University of Pennsylvania Press, 2014. 204–226. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466488.

¹⁸ “Cohesive and Responsive ASEAN.” Chairman’s Statement of the 36th ASEAN Summit, June 26, 2020. <https://asean.org/storage/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf>. See also Gomez, Jim. “ASEAN takes position vs China’s vast historical sea claims,” The Associated Press, June 27, 2020. <https://apnews.com/094a46218f808f6943e326200e6452a7>; Odell. *Mare Interpretatum*. Ch. 11. 472–74. For an exposition of China’s rhetorical reliance on general and customary international law in addition to UNCLOS to justify its claims in the South China Sea, see Odell. *Mare Interpretatum*. Ch. 8 and 9. 339–42, 360–61, 389–92.

when Beijing has objected to similar U.S. research operations within China's EEZ.¹⁹

Philippine officials have also objected to China's naval passages within its archipelagic waters without prior notification or permission and without activating satellite-based automatic identification signals.²⁰

China's maritime rise has created tensions even with countries as far afield as Latin America, as China's distant-water fishing fleets have ventured abroad in search of richer catches than are available in depleted waters near China. Countries including Ecuador, Colombia, Chile, Peru, and Argentina have objected to the activities of Chinese fishing fleets hovering at the 200-nautical mile limit of their EEZs. These activities are often technically legal even while violating the spirit of sustainable fishing, but they sometimes involve violations of regional fisheries management organizations' rules or illegal incursions into EEZs that are usually beyond the capacity of these states to monitor or track.²¹ The resulting diplomatic tensions mirror those of the post-World War II decades, when these same Latin American states objected to unsustainable distant-water fishing by American, Norwegian, Japanese, and Russian fishing and whaling fleets along their coasts.²²

These matters addressed, China's alienation of its neighbors and other nations should not be overstated. Despite the tensions, most countries see an overarching interest in

¹⁹ American naval lawyers would likely point out that those U.S. surveys were conducted by non-commissioned ships of the U.S. Navy, which they contend are exempt from coastal state regulation, while the Chinese surveys discussed here were conducted by civilian government research vessels. Many states, however, view this as a distinction without a difference.

²⁰ U.S. naval forces pass through the archipelagic waters of the Philippines and Indonesia without prior notification or permission on a regular basis. Prior notice or permission is technically not required by Philippine law or by UNCLOS, as long as states stay within designated or traditional sea lanes. For considerations of incidents in India's EEZ and the EEZ and archipelagic waters of the Philippines, see Odell. *Mare Interpretatum*. Ch. 7. 298–300. Regarding China's survey operations in Indonesia's archipelagic waters, see McBeth, John. "China, Indonesia on a collision course at sea." *Asia Times*, January 15, 2021.

https://asiatimes.com/2021/01/china-indonesia-on-a-collision-course-at-sea_trashed.

²¹ Mallory, Tabitha, and Ian Ralby. "Evolution of the Fleet: A Closer Look at the Chinese Fishing Vessels off the Galapagos." Center for International Maritime Security (CIMSEC), October 19, 2020.

<https://cimsec.org/evolution-of-the-fleet-a-closer-look-at-the-chinese-fishing-vessels-off-the-galapagos>; Etchegaray, Álvaro. "China's fishing in South American waters raises questions, fears." *SupChina*, February 21, 2021.

<https://supchina.com/2021/02/21/chinas-fishing-in-south-american-waters-raises-questions-fears>; Torrico, Gonzalo. "South America plans regional response to squid overfishing." *China Dialogue Ocean*, January 13, 2021.

<https://chinadialogueocean.net/15979-squid-overfishing-south-america-plans-regional-response>.

²² Those tensions motivated Chile, Peru, and Ecuador to be the world's first three nations to declare exclusive zones extending 200 nautical miles from their coasts, in 1947 — a dramatic expansion of coastal state jurisdiction that the United States and other maritime powers did not recognize for more than three decades, until lobbying by those Latin American states resulted in the adoption of the EEZ regime in the UNCLOS negotiating text and its widespread emulation among other nations. Odell. *Mare Interpretatum*. Chs. 3 and 4. 140, 152–53.

preserving their economic relationships and maintaining the peace with Beijing. Most notably, the Philippines under President Rodrigo Duterte has prioritized its ties with China, rejecting the more confrontational approach toward China of his predecessor, Benigno Aquino III. Likewise, Vietnam has declined to follow the Aquino government's example by refraining from initiating its own arbitration case against China. Countries such as Indonesia and Malaysia periodically jockey with Chinese forces at sea and have been critical of China's maritime law-enforcement activities in waters they claim while generally trying to keep such frictions below the level of serious conflict to prevent them from negatively affecting broader bilateral ties. ASEAN nations have distanced themselves from U.S. statements, notably but not only Secretary Pompeo's July 2020 endorsement of the award in *Philippines v. China*, that adopt a directly critical stance against Beijing in the South China Sea disputes. Even Japan, the United States' bedrock ally in East Asia, has sought to maintain positive overall bilateral ties with China over the past eight years despite making no progress toward resolving its maritime disputes with Beijing.

Moreover, China has exhibited a willingness to adjust course in response to criticism, especially in waters where it does not claim sovereign rights or jurisdiction. When India and the Philippines objected to China's marine scientific research in their EEZs or unannounced naval transits through Philippine archipelagic waters, the Chinese government initially denied engaging in such activity but soon thereafter changed its practices and began coordinating its activities with the Indian and Philippine governments.²³ In response to Latin American countries' objections, the Chinese government has begun to exercise tighter controls of its distant-water fishing fleets, deflagging vessels shown to be engaging in illegal fishing activities.²⁴

Even in the more contentious waters of the South China Sea, China has exercised some restraint, especially since 2016, refraining from occupying new islands or reefs in the Spratlys or conducting large-scale land reclamation operations at Scarborough Shoal, as many feared it might in reaction to the 2016 arbitration award or as a next step after its

²³ Odell. *Mare Interpretatum*. Ch. 7. 298–300, 318–21.

²⁴ "China to implement 3-month fishing moratorium off the Galapagos." *La Prensa Latina*, August 5, 2020. <https://www.laprensa-latina.com/china-to-implement-3-month-fishing-moratorium-off-the-galapagos>.

reclamation in the Spratlys. China has also negotiated initial agreements covering the joint development of oil and gas resources and joint management of fisheries with the Duterte government in the Philippines and with the Yudhoyono administration in Indonesia in 2014.²⁵ China has continued to impose an annual fishing moratorium in the South China Sea north of the 12th parallel, and it has used its coast guard and massive maritime militia presence to defend its resource exploration and extraction and to obstruct other countries from extracting resources in waters they claim as their own. But in conducting such operations, China has generally refrained from the use of force.²⁶

Viewed cynically, China's partial restraint is a skillful exercise of "gray-zone" coercion and exemplifies its preference for "winning without fighting." In the case of Scarborough Shoal, Beijing likely refrained from reclamation operations in part due to strong warnings against such action sent privately by the United States, together with the more conciliatory approach of the new Duterte administration in the Philippines and China's sense that it had achieved sufficient security for itself after its reclamation in the

²⁵ Regarding the Indonesia–China fisheries agreement, see Salim, Tama, and Bagus T. Saragih. "Indonesia takes on China." *The Jakarta Post*, January 25, 2015.

<https://www.thejakartapost.com/news/2015/01/25/indonesia-takes-china.html>; Lu He. "印尼突然翻脸：废止与中国渔业协议 (Indonesia unilaterally abolishes fisheries agreement with China)." *Duowei News*, January 26, 2015.

<https://www.dwnews.com/%E5%85%A8%E7%90%83/59632141/%E5%8D%B0%E5%B0%BC%E7%AA%81%E7%84%B6%E7%BF%BB%E8%84%B8%E5%BA%9F%E6%AD%A2%E4%B8%8E%E4%B8%AD%E5%9B%BD%E6%B8%94%E4%B8%9A%E5%8D%8F%E8%AE%AE>. Regarding the Philippines–China joint development arrangement, see Jennings, Ralph.

"Heralding Deal with China, Philippines Restarts Offshore Oil–Gas Exploration in Disputed Sea." *Voice of America*, November 4, 2020.

<https://www.voanews.com/east-asia-pacific/heralding-deal-china-philippines-restarts-offshore-oil-gas-exploration-disputed>. Regarding an informal fishing deal Duterte claimed to have struck with Xi Jinping, see Aguilar, Krissy. "Palace: No verbal fishing agreement between Duterte, China's Xi." *Inquirer.Net*, April 23, 2021.

<https://globalnation.inquirer.net/195467/palace-no-verbal-fishing-agreement-between-duterte-chinas-xi#ixzz71qqKOH4s>.

²⁶ Ketian Zhang's research shows that China has tended to use military force less in the South China Sea disputes as its power has grown, instead resorting to more non-military forms of coercion. Zhang, Ketian. *Calculating Bully: Explaining Chinese Coercion*. Cambridge, Massachusetts: Institute of Technology, 2018.

<https://dspace.mit.edu/handle/1721.1/122472>. Some of China's increased maritime law-enforcement activities have involved the use of force – for example, China sank a Vietnamese fishing boat in April 2020. Vu, Khanh. "Vietnam protests Beijing's sinking of South China Sea boat." *Reuters*, April 3, 2020.

<https://www.reuters.com/article/us-vietnam-china-southchinasea/vietnam-protests-beijings-sinking-of-south-china-sea-boat-idUSKBN21M072>. In context, this is not an abnormal level of force relative to the fishing enforcement

activities of other states in the South China Sea and is less aggressive than the maritime law-enforcement practices of Indonesia, which has sunk hundreds of foreign fishing boats in recent years, and Malaysia, which has not only sunk many foreign fishing boats; it shot and killed a Vietnamese fisherman last year. Sukumaran, Tashny. "South China Sea clash raises Vietnam–Malaysia tensions after fisherman shot dead." *South China Morning Post*, August 18, 2020.

<https://www.scmp.com/week-asia/politics/article/3097863/south-china-sea-clash-raises-vietnam-malaysia-tensions-after>; "Malaysia sinks 13 foreign fishing boats for trespassing its waters." *Vietnam Investment Review*, July 27, 2020.

<https://vir.com.vn/malaysia-sinks-13-foreign-fishing-boats-for-trespassing-its-waters-78088.html>; "Indonesia Sinks 51 Confiscated Fishing Vessels." *The Maritime Executive*, May 5, 2019.

<https://www.maritime-executive.com/article/indonesia-sinks-51-confiscated-fishing-vessels>; Beech, Hannah, and Muktitia Suhartono. "China Chases Indonesia's Fishing Fleets, Staking Claim to Sea's Riches." *The New York Times*, March 31, 2020. <https://www.nytimes.com/2020/03/31/world/asia/indonesia-south-china-sea-fishing.html>.

Spratlys.²⁷ Moreover, it is possible that China pursued compromise with the Philippines only to mitigate the damage done to its claims by the tribunal award in the *Philippines v. China* case.²⁸

China has exhibited a willingness to adjust course in response to criticism, especially in waters where it does not claim sovereign rights or jurisdiction.

It is noteworthy that China has not rejected the possibility of compromise over maritime disputes – in particular in the South China Sea. On the contrary, Chinese officials regularly affirm China’s willingness to “resolve disputes by peaceful means through dialogue and consultation by parties directly concerned” and to pursue practical arrangements and joint development of resources pending final resolution.²⁹ Despite its insistence on defending its sovereignty and maritime rights and interests, then, China still aims to maintain harmonious relationships with Southeast Asian nations. To some extent, it conditions such positive ties on a degree of deference to China as their powerful and benevolent neighbor – a condition that, of course, some Southeast Asian nations find grating and, particularly on sovereignty issues, unacceptable. Even without explicit signs of deference, however, Beijing may be more willing to compromise in these disputes when it finds itself in a stronger position and when neighboring states adopt a less confrontational approach toward relations with China.³⁰

²⁷ Sevastopulo, Demetri, Geoff Dyer, and Tom Mitchell. “Obama forced Xi to back down over South China Sea dispute.” *Financial Times*, July 12, 2016. <https://www.ft.com/content/c63264a4-47f1-11e6-8d68-72e9211e86ab>; Cooper, Zack, and Jake Douglas. “Successful Signaling at Scarborough Shoal?” *War on the Rocks*, May 2, 2016. <https://warontherocks.com/2016/05/successful-signaling-at-scarborough-shoal>.

²⁸ Some observers in the Philippines and beyond initially objected to the 2018 Sino–Philippine memorandum of understanding on joint development precisely because the arbitration award essentially vacated any possible grounds for China to claim oil and gas resources in much of the central, southern, and eastern reaches of the South China Sea, except within 12 nautical miles from land features above high tide. As it has unfolded, however, Philippine observers have become more positive about the arrangement, as indications suggest it will be a commercial profit-sharing contract between the Philippine government and the China National Offshore Oil Corporation that does not require the Philippines to compromise its sovereign rights. De Castro, Renato Cruz. “A Philippine–China Deal on Joint Development in the Making?” CSIS Asia Maritime Transparency Initiative, November 3, 2020. <https://amti.csis.org/a-philippine-china-deal-on-joint-development-in-the-making/>.

²⁹ “Wang Yi Laid Out Three Basic Facts of the Issue of the South China Sea.” Foreign Ministry of the People’s Republic of China, September 9, 2020. https://www.fmprc.gov.cn/ce/cqbelfast/eng/zqzxw_1/t1814210.htm.

³⁰ M. Taylor Fravel found that China was more willing to make greater compromises in disputes over land borders when it was in a stronger position on the ground. See his *Strong Borders Secure Nation: Cooperation and Conflict in China’s Territorial Disputes*. Princeton. Princeton University Press, 2008. Thus far, this pattern has not directly repeated in maritime disputes, where China, especially over the past decade, has shown somewhat less willingness

By contrast, Beijing has generally been less open to such compromise in the case of the Senkaku (Diaoyu) dispute in the East China Sea, stemming in large part from its sense of historical victimization at the hands of Imperial Japan, a sensitivity that is particularly acute on issues related to territory and history. On the question of maritime boundaries in the East China Sea, China has in the past shown some willingness to compromise. The administration of Hu Jintao, 2002–12, negotiated a compromise agreement on oil and gas extraction in the East China Sea, green-lighting joint development with Japan in areas near the median line. However, that deal fell apart in part due to perceptions in China that it was too conciliatory toward Japan.³¹

Seeking bilateral détente and a more inclusive maritime order

Despite the risks of conflict engendered by these interrelated tensions between China and the United States and between China and its neighbors, there are possible pathways for stabilizing the maritime order that could better safeguard U.S. interests. An understanding of those pathways must begin with a clearer understanding of what those interests are. Core U.S. interests in the Western Pacific and the South China Sea in particular are usually ill-defined and exaggerated.³² Stated succinctly, they include (1) prevention of armed conflict over territory, resources, and jurisdiction in the region, especially conflict that could escalate to direct U.S.–China war; (2) the free flow of commercial shipping through the area’s sea lanes and straits; and (3) sufficient U.S. military access to enable U.S. forces to monitor, and if necessary, counter, Chinese military activity that could be directed against the United States or its allies.

to compromise, but this could change in the future, especially if China’s perceptions of threat were to decline. Odell. *Mare Interpretatum*. Ch. 11.

³¹ Luo, Shuxian. *Take it to the Sea: Nonmilitary Actors in China’s Maritime Disputes and Crisis Management*. Baltimore: Johns Hopkins University, 2021. 197–201; “Dangerous Waters: China–Japan Relations on the Rocks.” International Crisis Group, Report No. 245, April 8, 2013. 44.

<https://www.crisisgroup.org/asia/north-east-asia/china/dangerous-waters-china-japan-relations-rocks>. See also the Appendix of this brief for more details on the Sino–Japanese maritime boundary dispute in the East China Sea.

³² Herscovitch, Benjamin. “A Balanced Threat Assessment of China’s South China Sea Policy.” Cato Institute, August 28, 2017. <https://www.cato.org/policy-analysis/balanced-threat-assessment-chinas-south-china-sea-policy>.

Although the United States is accustomed to exercising naval dominance in the waters of the Western Pacific, including the South China Sea, such control is not necessary in order to preserve these core U.S. interests. On the contrary, striving to maintain such dominance is likely to precipitate conflict that would undermine those interests.³³ As pathways for managing the ongoing and inevitable transition away from U.S. dominance in a way that preserves peace and stability in the regional maritime order, two options are considered here: (1) establishing a U.S.–China détente, and (2) building an inclusive maritime order. The first of these options is preferable to ever-worsening maritime competition and conflict with China, but it is inferior to the second option, which would provide a more durable and equitable outcome from the perspective of U.S. interests and regional peace and prosperity. These options are not mutually exclusive, and the best path forward would be one that combines bilateral confidence-building measures with endeavors to build a more inclusive regional and global maritime order.

Prospects for a U.S.–China maritime détente

Despite the intense U.S.–China rivalry at sea, some factors could prove conducive to a U.S.–China maritime détente in the South China Sea. The most immediate of these is that the United States is not a party to the South China Sea and East China Sea disputes. It is not a claimant to any of the land features in those areas, and both seas are so small that there are few areas beyond 200 nautical miles from any major coastline where the United States or other nations could lay claim to common resources.

U.S. allies Japan and the Philippines do have direct stakes in those disputes. Yet the Sino–Japanese dispute over the Senkaku (Diaoyu) islands and the disputes between China and the Philippines in the Spratlys and Scarborough Shoal have gained an outsized importance in recent years as indicators of America’s commitment to its allies. While emphasizing these commitments may serve, albeit modestly, to deter aggressive

³³ Van Hooft, Paul. “Don’t Knock Yourself Out: How America Can Turn the Tables on China by Giving Up the Fight for Command of the Seas.” *War on the Rocks*, February 23, 2021. <https://warontherocks.com/2021/02/dont-knock-yourself-out-how-america-can-turn-the-tables-on-china-by-giving-up-the-fight-for-command-of-the-seas>.

Chinese conduct in these islands, it also contributes to an escalating militarization of these disputes that could trigger crises or lead China to test U.S. resolve in ways that would harm U.S. interests. In light of the limited intrinsic value of these disputed islands and reefs, overstressing their significance could actually weaken the credibility of America's alliance commitments, as China and other nations may find it hard to accept that Washington would risk war with Beijing over small, uninhabited islands that it doesn't even recognize as the sovereign possessions of its allies. From this perspective, the United States has an interest in de-emphasizing the military and alliance dimensions of these disputes in order to avoid having to prove U.S. credibility in a conflict, instead encouraging more effective bilateral management of the disputes between China and U.S. allies.

Core U.S. interests in the Western Pacific and the South China Sea in particular are usually ill-defined and exaggerated.

Beyond the disputes over islands and maritime boundaries, China's interpretations of navigational freedoms are increasingly converging with those of the United States as its own naval power grows. Increasingly, China shares an interest with the United States in securing access to the EEZs, straits, and archipelagic waters of other nations for its naval, marine-research, and coast guard vessels. Therefore, the United States and China, as the world's two largest naval powers, could in principle reach agreement on freedom of navigation in peacetime without making any concessions on matters of core interest to either side. This is what the United States and the Soviet Union did during the détente period of the Cold War: Moscow's growing naval power eventually caused it to adopt in large measure the U.S. position on freedom of navigation.³⁴

In the South China Sea today, Washington could reduce the frequency of its military operations in sensitive areas — such as close to disputed islands and reefs or within the 12-nautical mile territorial sea limit — without granting any concessions to China's legal

³⁴ Odell. *Mare Interpretatum*. Ch. 5. 216–25.

claims and in exchange for guarantees from China about the inviolability of freedom of navigation in the South China Sea, including for military vessels.³⁵ Right now, the intense rivalry between the United States and China and souring public opinion in both countries makes it seem unlikely that such a deal could be achieved. This could change in the future, however, if domestic political incentives and priorities in each country were to shift, or, more likely, if a crisis motivates both sides to enter into a more stable arrangement. A precedent for such a development can be found in how a collision between U.S. and Soviet naval ships in 1988 precipitated an agreement between the United States and Soviet Union on innocent passage in territorial seas the following year.³⁶

One objection to a détente of this kind that is sometimes raised concerns the importance of U.S. surveillance and reconnaissance operations in the South China Sea for antisubmarine warfare and U.S. nuclear strategy. For the United States to maintain its ability to disable China's submarines and nuclear forces, it may be important for U.S. forces to conduct frequent surveillance near China's Sanya naval base in Hainan, where the PLA bases the bulk of its submarines, including its nuclear-armed ballistic missile submarines. It is difficult to gauge how important these close-in operations are, since submarine operations and antisubmarine capabilities are highly classified on both sides. However, it is possible that such operations may not be crucial, as the United States could track submarines leaving the South China Sea using passive sonar systems that are already positioned along key straits, probably in the egresses from the South China Sea. Even if air and naval operations closer to Sanya are necessary to track Chinese submarines, it is likely their frequency could be reduced, with the United States relying instead on satellite imagery and other intelligence to alert its air and naval platforms in-theater when these vessels are preparing to get under way.

³⁵ So long as broader military tensions exist between the two sides, especially over Taiwan, such an agreement would not obviate all military tensions and potential for maritime crises. If war were to break out over Taiwan or some other hotspot, the United States and China would both strive for advantage in the maritime domain. UNCLOS is a maritime order of peacetime and would likely be disregarded in a time of war, though the laws of naval warfare would still apply and could act as constraints on U.S. and Chinese actions.

³⁶ Odell. *Mare Interpretatum*. Ch. 5. 222–224.

China's interpretations of navigational freedoms are increasingly converging with those of the United States as its own naval power grows.

Stable nuclear deterrence may also depend upon both sides accepting some degree of vulnerability to the threat posed by the opposing side's nuclear forces. This amounts to "mutually assured destruction" and reduces the incentive for either side to attempt a first strike to incapacitate the other's nuclear forces, or to use nuclear weapons first out of fear that they are about to be destroyed. Seen in this light, a more survivable second-strike capability on China's part by way of imperfectly tracked nuclear-armed submarines could actually be stabilizing. Even if some Chinese submarines were to escape U.S. tracking or loiter in the South China Sea as a bastion, the United States would still have an enormous margin of superiority over China's nuclear forces, including in its own unrivaled fleet of nuclear-armed submarines. The threat of retaliation from such forces would be more than sufficient to deter China from launching a nuclear first strike.

Although a bilateral maritime détente of the kind just outlined would be a welcome alternative to growing great-power friction at sea, there are also potential pitfalls to be considered. If the two sides were able to set aside their disputes over maritime order, it could be tempting for the United States and China to establish a maritime "G-2" of sorts, with regional or functional divisions of labor or spheres of influence that permit expansive military freedoms for both countries. A maritime G-2 could lead to a dynamic in which the United States and China enable each other to engage in unsustainable fishing, oil drilling, or deep-sea mining or to disregard the legitimate security interests of other countries. If the United States were to completely ignore or actively green-light norm violations by China in the South China or East China Seas, more states could feel justified in staking excessive claims elsewhere in the oceans in ways that could destabilize maritime disputes or endanger marine ecosystems.

A bilateral arrangement of this sort could prove disadvantageous not only for the region and the world but also for America's interests. It could engender anxiety on the part of countries such as Japan, the Philippines, and India in their disputes with China. Spheres of influence, as Evan Sankey has argued, are stabilizing only insofar as the countries within them submit to them.³⁷ Although some weaker states might bandwagon with China, others might pursue a more assertive balancing strategy against Beijing. This could be most dangerous in the case of Japan, which is not a weak state by any measure, and the dispute over the Senkaku (Diaoyu) Islands. A Sino-Japanese war over this issue could escalate beyond the disputed islands, thereby activating U.S. alliance commitments and dragging the United States into war despite its desire to avoid such an outcome.

A more inclusive maritime order

Instead of a maritime G-2, it would be better if the United States combined bilateral confidence-building mechanisms with China with more robust support for regional and global efforts to negotiate new norms to govern the maritime order. The current global maritime order is best considered as an interlocking set of institutions, agreements, and norms intended to standardize and govern how we interact at sea and manage the oceans. Some of these institutions and agreements, such as the International Maritime Organization and the United Nations Convention on the Law of the Sea, operate at a global level with near-universal participation. Others are more regional or bilateral in nature.

Notwithstanding these institutions and the important role they play in ocean governance, many aspects of the maritime order remain highly contested or ungoverned. This is perhaps most noteworthy in the wide range of disputes among states over how to draw maritime boundaries and allocate natural resources.³⁸ It is also

³⁷ Sankey, Evan R. "Reconsidering Spheres of Influence." *Survival*, vol. 62, no. 2, 2020. 37-47. <https://www.tandfonline.com/doi/abs/10.1080/00396338.2020.1739947>.

³⁸ Such disputes have always been a contentious feature of international political life, but they became particularly controversial in the decades after World War II. Some of them were resolved when UNCLOS was negotiated, 1973-82, and went into effect in 1994. However, UNCLOS has created or exacerbated other disagreements. It enabled states to claim much broader jurisdiction at sea, including over marine resources in an exclusive economic zone extending out to 200 nautical miles from shore and a continental shelf that could potentially extend even farther. This led to an even

evident in persistent disagreements as to the meaning of “freedom of navigation” under the law of the sea, especially regarding maritime military activities.³⁹ Given states’ sensitivity to these issues, closely related as they are to sovereignty and national security, UNCLOS permits states to declare themselves exempt from binding arbitration over matters related to maritime boundary delimitation and military navigation. In addition, UNCLOS broadly fails to address issues related to fishery resources on the high seas beyond states’ exclusive economic zones.

In light of these gaps, arguably the most significant challenge facing the global maritime order is not China’s defiance of some existing standards: It is the absence of clear standards. Thus, rather than decrying China’s threat to the “rules-based order” in a rhetorical ritual of great-power rivalry, U.S. diplomatic energy would be better spent leading and supporting efforts to build and strengthen that order in its maritime dimension.⁴⁰ Some international efforts are already under way to negotiate rules to address weaknesses in the maritime order. Negotiations continue in the U.N. context, for instance, over a new agreement on questions of biodiversity beyond national jurisdiction, which would help address issues related to overfishing in the high seas. The United States should devote more effort to supporting these talks. It would be especially helpful if the United States Senate were finally to ratify UNCLOS – not primarily as a means of competing with China but as a means of sustaining a more universal global maritime order.

further proliferation of overlapping claims to sovereign rights between neighboring countries. Although UNCLOS admonished states to engage in peaceful negotiation to determine the boundaries between their overlapping claims and provided some guidelines and mechanisms for doing so equitably, those provisions were not made binding. Moreover, many of the most complex issues affecting maritime boundary delimitation – such as the extent to which islands are entitled to exclusive economic zones and continental shelves, and whether maritime space between two states should be divided evenly or states with a naturally prolonged continental shelf should be privileged – were left ambiguous and unresolved. For an analysis of ongoing contestation regarding the maritime entitlements of islands, see Odell. *Mare Interpretatum*. Ch. 4. 174–181.

³⁹ Although UNCLOS affirmed high-seas freedoms within exclusive economic zones and the right of innocent passage through territorial seas, its text was sprinkled with vague caveats and conspicuous omissions that coastal states insisted upon to preserve their options to restrict those rights and freedoms. Today, maritime powers such as the United States and the United Kingdom insist upon broad latitude for military vessels to exercise innocent passage in territorial seas without notification or permission, and to exercise broadly unrestricted high-seas freedoms beyond the 12-nautical mile limit. By contrast, many coastal states, especially but not exclusively in the Global South, seek to limit the freedom of major naval powers to conduct passage through their territorial seas and straits and conduct unfettered military exercises and surveys in their EEZs. For an overview of these disagreements, see Odell. *Mare Interpretatum*. Ch. 4. 157–174.

⁴⁰ Odell. “Why it’s wrong for the US to label China a threat to the ‘world order.’” *Responsible Statecraft*, March 20, 2021. <https://responsiblestatecraft.org/2021/03/20/why-its-wrong-for-the-us-to-label-china-a-threat-to-the-world-order>.

If global agreements such as UNCLOS and one that would protect biodiversity beyond national jurisdiction are to succeed in introducing order to the oceans, it is critical that China participate in them. This means that the United States should not try to marginalize China as a pariah in the global maritime regime – an effort that is in any event almost guaranteed to fail in light of the unavoidable growth in Beijing’s power in international institutions. It should instead encourage China’s responsible participation in such agreements alongside the United States and other nations.

In light of the logistical and political challenges associated with universal global negotiations, there is also a need for more regional action. Regional maritime agreements would, indeed, be especially beneficial in the crowded oceans of the Indo–Pacific. Some of these regional negotiations should address matters related to marine conservation and shipping-lane security as a way of mitigating zero-sum competition for jurisdiction and control in disputed waters in favor of more cooperative efforts at fisheries management and enforcement of maritime law. Other negotiations should address contentious issues related to military activities at sea and the national security concerns and interests of coastal states and maritime powers alike.

At this stage, given the tensions and mistrust between Washington and Beijing, it would be better if such efforts were led by a more neutral party, such as the Association of Southeast Asian Nations. These negotiations should involve all coastal states in the region, from Northeast and Southeast Asia to South Asia and Oceania.

The most significant challenge facing the global maritime order is not China’s defiance of some existing standards: It is the absence of clear standards.

In regional negotiations over military activities at sea, the United States should be willing to loosen up on some of its longstanding maritime dogmas, such as its refusal to provide prior notification before conducting innocent passage through other states’ territorial seas or its refusal to provide notification to coastal states before conducting

live-fire military exercises in exclusive economic zones. One basis for such compromise lies in the guidelines for foreign military activities in EEZs developed by the EEZ Group 21, which was convened from 2002 to 2005 and again several years later by the Ocean Policy Research Foundation, a Japanese think tank, with experts from major countries throughout the Indo–Pacific, including the United States, China, India, Japan, Australia, Vietnam, the Philippines, Indonesia, South Korea, and Russia.⁴¹

In the same spirit, the United States should also dramatically reduce the frequency of its freedom of navigation operations, which are especially concentrated against the maritime claims of countries in the U.S. Indo–Pacific Command’s area of operations.⁴² Such operations are arguably not necessary to preserve freedom of navigation norms from a legal perspective, especially not on a frequent basis.⁴³ Moreover, such operations serve to alienate friends and allies even as they ratchet up tensions with adversaries and competitors. Verbal protest and diplomatic negotiation should instead be the favored tools for promoting U.S. preferences regarding freedom of navigation.⁴⁴

These compromises would not represent an appeasement of China’s demands. On the contrary, they would be a more farsighted means of helping limit the vulnerability of weaker countries – and perhaps eventually the United States itself – to China’s growing

⁴¹ EEZ Group 21. “Guidelines for Navigation and Overflight in the Exclusive Economic Zone.” Ocean Policy Research Foundation, September 26, 2005.

<https://nippon.zaidan.info/seikabutsu/2005/00816/pdf/0001.pdf>; “Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia–Pacific.” Ocean Policy Research Foundation, October 30, 2013.

https://www.spf.org/_opri_media/publication/pdf/2014_03_02.pdf. For a discussion of the history of these guidelines, see Odell. “How Nongovernmental Actors Can Improve Crisis Management in U.S.–China Relations” in “Finding Firmer Ground: The Role of Civil Society and NGOs in U.S.–China Relations.” The Carter Center, February 2021. 62–64. <https://us-china.report/wp-content/uploads/2021/02/Finding-Firmer-Ground-Report-PDF.pdf>.

⁴² Odell. “How Strategic Norm–Shaping Undergirds America’s Command of the Commons.” MIT Department of Political Science, no. 23, 2019. <https://dx.doi.org/10.2139/ssrn.3451412>.

⁴³ Santicola, Ryan. “Legal Imperative: Deconstructing Acquiescence in Freedom of Navigation Operations.” *National Security Law Journal*, vol. 5, no. 59, 2016–17).

[https://heinonline.org/HOL/LandingPage?handle=hein.journals/nseclj5&div=7&id=&page=](https://heinonline.org/HOL/LandingPage?handle=hein.journals/nseclj5&div=7&id=&page=;); Aceves, William J. “The Freedom of Navigation Program: Study of the Relationship between Law and Politics.” *Hastings International and Comparative Law Review*, vol. 19, no. 2, 1995. 259–326. For perspectives defending the need for operational assertions and not diplomatic protest alone, see Root, Joshua L. “The Freedom of Navigation Program: Assessing 35 Years of Effort.” *Syracuse Journal of International Law and Commerce*, vol. 43, no. 2, 2015. 321–52.

[https://heinonline.org/HOL/LandingPage?handle=hein.journals/sjilc43&div=10&id=&page=](https://heinonline.org/HOL/LandingPage?handle=hein.journals/sjilc43&div=10&id=&page=;); Stephens, Dale. “The Legal Efficacy of Freedom of Navigation Assertions,” in *Issues in International Law and Military Operations*. International Law Studies. Richard B. Jacques, ed. Newport. Naval War College, 2006. 235–56.

<https://digital-commons.usnwc.edu/ils/vol80/iss1/10/>.

⁴⁴ Odell. “US should stop using naval operations to impose ‘international order.’” *Responsible Statecraft*, April 13, 2021. <https://responsiblistatecraft.org/2021/04/13/us-should-stop-using-naval-operations-to-impose-international-order/>; Etzioni, Amitai. “Freedom of Navigation Assertions: The United States as the World’s Policeman.” *Armed Forces & Society*, vol. 42, no. 3, 2015. 1–17. <https://journals.sagepub.com/doi/10.1177/0095327X15599635>.

naval power. Neither must this mean that large swaths of ocean will become no-go zones for the United States Navy. Instead, it would mean that in peacetime, the U.S. military would need to communicate more with coastal states in the interest of promoting mutual transparency, peace, and stability.

Recommendations for the United States

To lay the groundwork for this more inclusive and stabilizing maritime order, the United States should reform its current approach to the South China Sea and East China Sea disputes, freedom of navigation, and maritime crisis management.

The most basic change the United States should take is to change the tenor of its rhetoric on freedom of navigation and the South China Sea disputes. Washington should avoid conflating freedom of navigation for commercial and military vessels, and it should avoid conflating disagreements over navigational freedoms with disputes over islands, reefs, and natural resources. In some respects these issues overlap, but for the most part they are distinct and should be addressed separately.⁴⁵ Although China has objected to U.S. freedom of navigation operations close to the territory it controls and has interfered with the efforts of other states to explore and extract resources in EEZs that overlap with China's claimed areas, Beijing has not interfered with commercial shipping through the important shipping lanes of the South China Sea.

Instead, the most likely threats to free commercial shipping at sea in the modern maritime order come from nonstate and nontraditional threats, including piracy, terrorism, accidental collisions, and natural disasters. Management of such threats can be successfully accomplished only when littoral states have well-developed maritime law-enforcement capacity and when they work together to coordinate their efforts. In the busy waters of the South China Sea, this will require user states such as the United States, Japan, and South Korea, as well as the states bordering the sea, including China

⁴⁵ China's claims in the Spratlys could enable it to justify restricting U.S. military access to the waters and airspace around the Spratly Islands themselves. However, this is not a generalized threat to freedom of navigation in the South China Sea, but instead a challenge to the U.S. ability to gather intelligence about the PLA's presence in the Spratlys or to intervene in the disputes over the islands. Generally, vessels navigating through the South China Sea avoid the Spratlys due to the treacherous nature of navigation through those waters, instead sailing through the central South China Sea between the Paracels and Spratlys.

and Southeast Asian nations, to coordinate efforts to guard against and respond to such threats.

Washington should avoid conflating freedom of navigation for commercial and military vessels, and it should avoid conflating disagreements over navigational freedoms with disputes over islands, reefs, and natural resources.

Even in the more fractious areas of maritime disputes and military activities at sea, there are a number of ways the United States can promote greater transparency, cooperation, peace, and stability in the maritime order.

The South China Sea and East China Sea disputes

- **Exercise dual deterrence in contentious disputes between China and U.S. allies and reduce the militarization of the disputes.** The United States should underscore that it does not take a position on sovereignty in the disputes over the Senkaku (Diaoyu) Islands and the South China Sea islands. While affirming its general commitments to defend allies against attack but stressing its neutrality in the island disputes, it should press China and all parties to reduce their unilateral naval and coast guard operations near the islands and engage in direct negotiations to manage the disputes. Washington should also privately make clear to Japan and the Philippines that it will not automatically become involved militarily should they initiate military confrontation over the disputes or escalate the dispute with a unilateral provocation that upsets the status quo.
- **Support ongoing negotiations between ASEAN and China over a code of conduct to govern the South China Sea, and urge all nations involved to issue a declaration of no-first-use of force in the disputes.** More generally, the United States should be flexible and supportive of mutual compromise, whether in bilateral joint development or in the code-of-conduct talks. It should not intervene

to pressure ASEAN members to reject compromise agreements. Instead, the United States should applaud and welcome progress toward cooperation among South China Sea claimants. The memorandum of understanding China and the Philippines signed in 2018 on joint development in the South China Sea is such a case.

- **Encourage pragmatic solutions for the joint exercise of jurisdiction in the South China Sea.** One example here would be the recommendation of former acting assistant secretary of state for East Asian and Pacific Affairs Susan Thornton to turn Mischief Reef into a collaborative scientific research center.⁴⁶ Another example would be the establishment of a Spratlys Marine Peace Park – an endeavor that Taiwan has officially supported in the past. Alternatively, claimant states could establish a joint conservation zone with shared authority and without prejudice to underlying legal claims, with cooperative participation from user states such as the United States.⁴⁷
- **Avoid the temptation to act as the unilateral enforcer of the arbitration award in the *Philippines v. China* case.** Sanctions (such as those announced by Secretary Pompeo in 2020) or military operations (such as frequent U.S. freedom of navigation operations in the Spratlys) intended to enforce the arbitration award on China will have little salutary effect. On the contrary, they risk causing China to double down on its position and could embroil the United States in a conflict that does not directly relate to core U.S. interests. Assuming the mantle of unilateral enforcer of the award is also not a credible move, given the United States has not

⁴⁶ Thornton, Susan. "Averting Conflict in the South China Sea: Steps To Restore Rules And Restraint," in "The Future of US Policy toward China: Recommendations for the Biden Administration." Ryan Hass, Ryan McElveen, and Robert D. Williams, eds. Brookings Institution and Yale Law School Paul Tsai China Center, November 2020. 46–51.

https://www.brookings.edu/wp-content/uploads/2020/11/FP_20201210_us_china_monograph.pdf. Mischief Reef is in many ways the most fraught of China's current disputed island territorial claims, in light of the tribunal's finding in *Philippines v. China* that Mischief Reef, the largest of China's artificial islands, is naturally a low-tide elevation located on the Philippines' continental shelf and not susceptible to a Chinese sovereignty claim.

⁴⁷ Odell. "How Nongovernmental Actors Can Improve Crisis Management in U.S.–China Relations," in "Finding Firmer Ground." 61–62. See also McManus, John, Kwang–Tsao Shao, and Szu–Yin Lin. "Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan." *Ocean Development & International Law*, vol. 41, no. 3, July 2010. 270–280.

<https://www.tandfonline.com/doi/abs/10.1080/00908320.2010.499303>; Ward, Oliver. "The overlooked casualty in the South China Sea dispute." *ASEAN Today*, Jan. 31, 2019.

<https://www.aseantoday.com/2019/01/the-overlooked-casualty-in-the-south-china-sea-dispute>.

ratified UNCLOS and there are various discrepancies between America's maritime claims and the legal reasoning of the tribunal.⁴⁸ It is instead best for China and the Philippines to work out a stable *modus vivendi* in their dispute – as they have done in the years since the award was issued.

- **Do not encourage Vietnam or others to initiate arbitration against China without China's agreement to participate in the process.** Although peaceful resolution of disputes through legal means serves the interests of the United States and the international community, formal dispute settlement through international tribunals and arbitration bodies should not be seen as a panacea. If such mechanisms are imposed without the willing participation of all parties to the dispute, they can prevent peaceful compromise and realistic resolutions. Rulings that may seem to be *faits accomplis* or effective “weapons of the weak” for smaller states can in fact shrink the space for pragmatic bargaining and compromise between nations, while creating a destabilizing mismatch between international law and realities on the ground that actually discredits the law and weakens the overall legal order.

Freedom of navigation and maritime order

- **Significantly reduce freedom of navigation operations and stress the diplomatic element of the freedom of navigation program instead.** Refrain from using FONOPs as a means of indirectly intervening in disputes over territory and maritime jurisdiction, sending signals in crises, or making a show of force as a matter of geopolitical competition. Avoid highly provocative operations very close to China's coast, such as those within the 12-nautical mile territorial sea limit, with the exception, when necessary to protest an excessive claim, of occasional FONOPs through key straits used for international navigation.

⁴⁸ On these discrepancies, especially regarding the maritime entitlements of small islands and reefs, see Odell. *Mare Interpretatum*. Chs. 4 and 5. 174–77, 230–31 (Table 5.3); Nordquist, Myron. H. “UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?” in *The South China Sea Arbitration: The Legal Dimension*. S. Jayakumar, Tommy Koh, Robert Beckman, Tara Davenport, and Hao D. Phan, eds. Northampton. Edward Elgar Publishing, Inc., 2018. 176–204.
<https://www.elgaronline.com/view/edcoll/9781788116268/9781788116268.00017.xml>.

- **Make an agreement with China whereby it affirms freedom of navigation for military vessels in the South China Sea and the United States agrees to reduce the frequency of its operations** near disputed islands and within China’s claimed territorial waters, without prejudicing Washington’s legal positions on China’s claims.
- **Support negotiations for a new regional agreement on foreign military activities within EEZs and territorial seas in a venue like the ASEAN Regional Forum.** This could build on a version of the guidelines for navigation and overflight in the exclusive economic zone developed by the EEZ Group 21. These guidelines represent the sort of common-sense compromises that ought to typify a more inclusive regional maritime order. As part of this effort, the United States should be willing to accept some modifications in its own traditionally maximal conception of military navigational freedoms, in part as a way to reduce other nations’ sense of vulnerability to China’s growing power and to promote greater transparency and predictability in the maritime sphere.⁴⁹
- **Ratify UNCLOS, as well as a future international agreement on biodiversity beyond national jurisdiction** (pending a satisfactory outcome of the U.N.–sponsored negotiations). Short of such ratification, continue to affirm these regimes and participate to the extent possible in meetings and negotiations under them. Do not oppose China’s participation in the international maritime order, especially when it is not acting in a domineering manner but instead as one of many states contributing experts to bodies such as the International Tribunal on the Law of the Sea.
- **Support collaborative maritime security to confront shared maritime challenges such as piracy, smuggling, weapons proliferation, human trafficking, and illegal and unregulated fishing.** This could take the shape of a maritime peacekeeping

⁴⁹ Odell. “How Nongovernmental Actors Can Improve Crisis Management in U.S.–China Relations,” in “Finding Firmer Ground.” 62–64.

force under the United Nations with contributions from member states, or a comparable regional effort coordinated through the ASEAN Regional Forum.⁵⁰

Maritime crisis prevention and management

- **Fully implement agreements with China, reached in 2014–15, on notification of major military activities and encounters between air forces and naval vessels at sea.** Conduct regular dialogues with China to review implementation of these agreements and resolve outstanding disagreements about their interpretation, as well as the interpretation of regional and international agreements to which the United States and China are parties, such as the International Regulations for Preventing Collisions at Sea and the Code for Unplanned Encounters at Sea.⁵¹
- **Revitalize longstanding annual talks under the U.S.–China Military Maritime Consultative Agreement,** which stalled amid mutual recriminations in late 2020. These talks are an important opportunity for discussion of past bilateral agreements, clarification about the ongoing maritime activities of both sides, and progress toward new agreements. They should also be expanded beyond the most senior levels to involve more regular contacts between U.S. and Chinese officers throughout the chain of command.⁵²
- **Follow through on a 2015 pledge to pursue an agreement with China on how to manage encounters involving coast guard vessels.** Given China’s heavy reliance on its coast guard to conduct maritime law-enforcement operations in its near seas, such an agreement is needed to fill a gap unaddressed in bilateral agreements thus far achieved and to prevent incidents at sea between Chinese coast guard vessels and U.S. naval or coast guard ships.⁵³

⁵⁰ Norton, Richard, and Kathleen A. Walsh. “Blue Hulls at Sea: The Time for Maritime Peacekeeping Has Come.” Working paper, n.d.

⁵¹ For an overview of the state of these agreements, see Odell. “How Nongovernmental Actors Can Improve Crisis Management in U.S.-China Relations,” in “Finding Firmer Ground.” 58–61.

⁵² Griffiths, David. “U.S.–China Maritime Confidence Building: Paradigms, Precedents, and Prospects.” U.S. Naval War College, *China Maritime Study* No. 6, July 2010.

<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1005&context=cmsi-red-books>.

⁵³ “Fact Sheet: President Xi Jinping’s State Visit to the United States.” The White House, Office of the Press Secretary, September 25, 2015.

- **Improve U.S.–China crisis communications channels between military and civilian entities.** The U.S. Department of Defense–PRC Ministry of Defense dialogue on crisis communication, initiated in October 2020, is one important means of enhancing these channels, but a comparable dialogue should also be established between the U.S. State Department and Chinese Foreign Ministry given their important roles during political-military crises. As part of these dialogues, the two sides should discuss principles that could prevent emergence or escalation of crises that emerge at sea.⁵⁴
- **Acknowledge mutual vulnerability in the nuclear realm.** In addition to enhancing nuclear stability and prospects for future nuclear arms control, this would enable the United States to reduce the frequency of its surveillance and reconnaissance operations in the South China Sea. Short of such a shift in U.S. nuclear strategy and doctrine, U.S. forces should strive as far as possible to rely less on such operations and more on sensors in straits around the South China Sea and other forms of satellite and signals intelligence.

Implementing these recommendations can prepare the United States to play a positive role at a time when the balance of maritime power is shifting. By supporting an inclusive maritime order based on rules that respect the security and economic interests of countries large and small, Washington can help to channel China’s rising maritime power in a constructive direction. Prioritizing inclusive maritime security over great-power rivalry will better serve U.S. interests by enhancing safe shipping and sustainable resource management and by minimizing the likelihood of crises and conflict.

<https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states>.

⁵⁴ For an analysis of existing U.S.–China crisis management mechanisms, see Odell. “How Nongovernmental Actors Can Improve Crisis Management in U.S.–China Relations.” in “Finding Firmer Ground.” 48–50, 58–61.

Appendix

Disputes in the East China and South China Sea

Maritime boundaries in the East China Sea

The East China Sea is a semi-enclosed sea surrounded by China, Taiwan, Japan, and the Korean Peninsula. The bordering countries stake overlapping claims to sovereign rights to the sea's resources and jurisdiction over the sea and its airspace. Delimiting the precise boundaries of these claims – especially in the wake of the UNCLOS regime that went into effect in the 1990s, permitting states to claim EEZs of up to 200 nautical miles and continental shelves extending up to 350 nautical miles – has thus far proven elusive. Today, China's maritime claims overlap with North Korea's, South Korea's, and Japan's; instead of final boundary agreements, these countries have managed their overlapping claims with provisional arrangements for fisheries management, de facto acknowledgments of administrative zones, and mutual restraint in resource extraction. For the most part, these mechanisms have proven sufficient for managing conflict, but tensions occasionally flare over local incidents with fisherfolk.

The dispute between China and Japan over seabed resources has proven perhaps the most intractable, as China uses the natural prolongation principle to claim a continental shelf extending to the Okinawa Trough near the Ryukyus, while Japan insists on an equidistant median-line boundary for both the water column (and its fishery resources) and the continental shelf (with its hydrocarbon and mineral resources). A 2008 agreement on joint development of oil and gas resources was never fully implemented, foundering on the shoals of flare-ups in 2010 and 2012 in the Sino–Japanese dispute over a nearby group of islands known in Japanese as Senkaku and Chinese as Diaoyu.

Senkaku (Diaoyu) Islands

This is a group of small, uninhabited rocky islands in the central East China Sea north of Taiwan and the southernmost inhabited Japanese islands of Okinawa Prefecture. Japan and China – as well as the Republic of China government on Taiwan – claim sovereignty over the islands. Since 1971, when the United States reverted control of Okinawa Prefecture back to the Japanese government, Japan has exercised administrative control over the islands. Since 1992, Tokyo has officially denied the

existence of a dispute over the islands.⁵⁵ After a diplomatic dustup when the Japanese government purchased the islands from private Japanese owners in 2012, China has begun operating coast guard vessels near the islands on a much more frequent basis. The United States does not take a position on the underlying dispute over sovereignty, though it does acknowledge Japanese administrative control over the islands and it has stated that Article V of the U.S.–Japan security treaty, which commits each nation to take action in the event of “an armed attack against either Party in the territories under the administration of Japan,” covers the Senkaku Islands.⁵⁶

Maritime boundaries in the South China Sea

The South China Sea is a semi-enclosed sea surrounded by China, Taiwan, the Philippines, Malaysia, Brunei, Indonesia, and Vietnam. Each of these countries claims exclusive economic zones and continental shelves extending from their main territories, often overlapping with other states’ claimed waters. In addition, there are hundreds of mostly uninhabited small islands, reefs, and shoals in these waters that are claimed by more than one of these bordering states. Quite apart from these island disputes, negotiating the boundaries among these states’ overlapping claims would still be a mammoth task, but the island disputes complicate that task exponentially, especially since China treats the Paracel and Spratly Islands as collective groups and claims EEZs and continental shelves extending from those archipelagoes – a position rejected by other claimants.⁵⁷ China’s ill-defined claim to historic rights in the South China Sea and its use of a nine-dash line on its maps to depict a vague claim to nearly all of the South China Sea also act as barriers to progress in boundary delimitation.⁵⁸ As a result, many of the maritime boundaries between states’ maritime jurisdictional claims in the South China Sea – especially near the contested islands – have not been delimited.

⁵⁵ Drifte, Reinhard. “The Japan-China Confrontation Over the Senkaku/Diaoyu Islands – Between ‘shelving’ and ‘dispute escalation.’” *The Asia-Pacific Journal*, vol. 12, issue 30, no. 3, July 27, 2014. <https://apjif.org/2014/12/30/Reinhard-Drifte/4154/article.html>.

⁵⁶ “The Senkakus (Diaoyu/Diaoyutai) Dispute: U.S. Treaty Obligations.” Congressional Research Service, March 1, 2021. <https://fas.org/sqp/crs/row/R42761.pdf>.

⁵⁷ In treating these islands as units, China has declared straight baselines around the Paracel Islands, from which its claimed territorial sea and EEZ extend. It has not issued baselines around the Spratly Islands, but has reserved the right to do so and has asserted that it views them as a unit. China has also declared straight baselines around the Diaoyu (Senkaku) Islands in the East China Sea, with one set of baselines surrounding several islands and a separate smaller set of baselines around a more distant island in the group. Odell. *Mare Interpretatum*. Ch. 8. 336–52.

⁵⁸ Contrary to common rhetoric and assumptions in Washington, China has not actually claimed all of the waters within the nine-dash line as “internal waters” or “territorial waters.” Rather, it treats the line as one piece of evidence of the historical basis for its claims to the islands of the South China Sea and their adjacent waters. For an account of the emergence of China’s historic rights claim in the 1990s and the evolution of China’s rhetorical references to the nine-dash line map over the past decade, see Odell. *Mare Interpretatum*. Ch. 9. See also Hayton, Bill. “The Modern Creation of China’s ‘Historic Rights’ Claim in the South China Sea.” *Asian Affairs*, vol. 49, no. 3, July 2018. 370–82. <https://www.tandfonline.com/doi/abs/10.1080/03068374.2018.1487689>; Hayton, Bill. “The Modern Origins of China’s South China Sea Claims: Maps, Misunderstandings, and the Maritime Geobody.” *Modern China*, vol. 45, no. 2, March 2019. 127–70. <https://journals.sagepub.com/doi/abs/10.1177/0097700418771678>.

Paracel Islands

This is a group of approximately 150 small islands and reefs with a total surface area of around three square miles, located in the northwest quadrant of the South China Sea, about 150 nautical miles south of China’s Hainan Island and 170 nautical miles east of Vietnam’s coast. Vietnam, China, and Taiwan claim the islands, but they have been fully controlled by the People’s Republic since 1974, when Chinese forces evicted Vietnam from the Crescent group in the west of the Paracels. The PRC had stationed forces on the northeastern Amphitrite group of the Paracels since 1955, while South Vietnam had inherited control of the Crescent group from French Indochina in 1956. Today, China officially denies there is a dispute with Vietnam over the islands.⁵⁹ The United States does not take a position in the sovereignty dispute over the Paracels.

Scarborough Shoal

The Scarborough Shoal, known as Huangyan Dao in China and Panatag Shoal in the Philippines, is a small atoll composed of a chain of reefs and rocks surrounding an inner lagoon, located in the east-central section of the South China Sea, about 120 nautical miles west of the Philippines’ Luzon Island and 450 nautical miles from the nearest points on China’s Hainan Island and Taiwan. China, Taiwan, and the Philippines claim sovereignty over the shoal. The United States does not take a position on sovereignty over Scarborough Shoal, though it has warned China against conducting land reclamation operations on the feature.

Spratly Islands

This is a group of almost 200 islands, reefs, and shoals in the southeast reaches of the South China Sea claimed in whole or in part by China and Taiwan, Vietnam, the Philippines, Malaysia, and Brunei. Vietnam, China, and Taiwan claim all of the islands and reefs in the Spratlys, while the Philippines claims a subset of features in the eastern Spratlys in what it calls the Kalayaan Island Group. Malaysia claims about a dozen islands and reefs within its 200–nautical mile EEZ and continental shelf, while Brunei claims one feature within its EEZ and continental shelf.

About 50 of these features, including all of those with any significant surface area above water at high tide, as well as several “low-tide elevations” (features that are above water only at low tide) and fully submerged features, have been physically occupied by claimant states. Vietnam controls about two dozen of the islands and

⁵⁹ Yi Xiangliang. “外交部边海司副司长易先良就中建南项目举行吹风会 (Briefing on the Zhongjiannan Project).” Foreign Ministry of the People’s Republic of China, June 14, 2014. https://www.fmprc.gov.cn/web/wjb_673085/zjzg_673183/t1165600.shtml.

reefs in or near the Spratlys, the Philippines occupies nine features, the PRC occupies seven features, Malaysia occupies five features, and Brunei controls none.⁶⁰ Taiwan has controlled Itu Aba (also known as Taiping Island), which is the largest island in the Spratlys, since 1956 – the longest continuous occupation of any of the islands. Vietnam and the Philippines began their occupations in the 1970s, amidst growing awareness of the presence of significant deposits of natural gas in the seabed of the South China Sea. China and Malaysia each occupied several features in the Spratlys in the 1980s; China, Malaysia, and the Philippines occupied a few more features in the 1990s. The disputes quieted down in the first decade of the 21st century but began to heat up again after 2009, when a deadline for states to submit data to the Commission on the Limits of the Continental Shelf precipitated a flare-up of tensions among South China Sea claimants and as China began to develop an ever-greater maritime law-enforcement presence in the Spratlys.

Philippines v. China arbitration case and Chinese land reclamation

In the wake of a 2012 Sino–Philippine standoff over Scarborough Shoal that resulted in China establishing effective control of the feature, the Philippines initiated an arbitration case in early 2013 under UNCLOS provisions against China regarding its claims and conduct in the South China Sea.⁶¹ China refused to participate in the arbitration, in part on the grounds that the case unavoidably implicated matters related to sovereignty and maritime boundaries, neither of which was subject to binding arbitration in light of certain exclusions granted in UNCLOS.⁶² Further, in late 2013, China began major land reclamation operations on the seven reefs it controlled in the Spratlys, converting three of them (Mischief, Subi, and Fiery Cross Reefs) into large artificial islands with long airstrips, hangars, ports, and support buildings.

The tribunal appointed by the Permanent Court of Arbitration for the case issued an award in July 2016. This had significant implications for the sovereignty disputes and especially for maritime-boundary delimitations around the Spratlys. Among many other findings, the tribunal declared that Mischief Reef is a feature that does not exist above water at high tide and is located on the continental shelf of the Philippines and therefore cannot be subject to Chinese sovereignty; that no land feature in the Spratlys meets the standards under Article 121(3) of UNCLOS to qualify for an exclusive

⁶⁰ Vuving, Alexander. “South China Sea: Who Occupies What in the Spratlys?” *The Diplomat*, May 6, 2016. <https://thediplomat.com/2016/05/south-china-sea-who-claims-what-in-the-spratlys>.

⁶¹ For a detailed account of the Scarborough Shoal standoff, see Green, Michael, Kathleen Hicks, Zack Cooper, John Schaus, and Jake Douglas. “Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence.” Center for International and Strategic Studies, May 9, 2017. 95–124. <https://www.csis.org/analysis/countering-coercion-maritime-asia>.

⁶² “Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines.” October 30, 2015. https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml; Chinese version: “中华人民共和国外交部关于应菲律宾共和国请求建立的南海仲裁案仲裁庭关于管辖权和可受理性问题裁决的声明(全文)” http://www.xinhuanet.com/politics/2015-10/30/c_1116991261.htm.

economic zone or continental shelf of its own; that straight baselines for the territorial sea and other maritime zones cannot be drawn around the islands as a group; and that China is not entitled to treat the waters around the Spratlys or in the South China Sea more broadly (or within the nine-dash line on China's maps) as historic waters with any unique historic rights.⁶³ China flatly rejected the award and has issued various official and quasi-official rebuttals.⁶⁴

U.S. position in the Spratly disputes

For the most part, the United States does not take a position on sovereignty over land features in the Spratlys. However, Washington – partially under the Obama administration and more fully under the Trump and Biden administrations – has affirmed the 2016 award in *Philippines v. China*, including its rejection of Chinese sovereignty over Mischief Reef and its rejection of Chinese claims to maritime resources in the waters of the Spratlys beyond 12 nautical miles from any high-tide elevations. In so doing, it has effectively sided with the Philippines against China in the disputes. The Trump and Biden administrations have also indicated that mutual-defense provisions in the U.S.–Philippine security treaty would apply in the event of a Chinese attack on “Philippine armed forces, public vessels, or aircraft in the South China Sea.”⁶⁵

⁶³ “Award in the matter of the South China Sea Arbitration before an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China.” July 12, 2016. *Philippines v. China*. PCA Case No. 2013-19.

<https://pcacases.com/web/sendAttach/2086>.

⁶⁴ State Council Information Office of the People's Republic of China. “China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea.” White paper, July 13, 2016. https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm; Chinese version: “中国坚持通过谈判解决中菲在南海争议白皮书。” <http://www.scio.gov.cn/37236/38180/Document/1626701/1626701.htm>. See also Chinese Society of International Law. “The South China Sea Arbitration Awards: A Critical Study.” *Chinese Journal of International Law*, vol. 17, no. 2, June 2018. 207–748.

<https://academic.oup.com/chinesejil/article/17/2/207/4995682>. Yaping Wang argues that China's intense propaganda campaign against the award was motivated by a desire to pacify a more hardline domestic public, even as it pursued a relatively moderate policy reaction to the award. Wang, Yaping. *The Dog that Barks: Understanding Propaganda Campaigns on Territorial Disputes*. Charlottesville. University of Virginia, 2018.

<https://doi.org/10.18130/V3-WNGE-BN81>.

⁶⁵ Lee, Matthew. “Biden backs Trump rejection of China's South China Sea claim.” *The Associated Press*, July 11, 2021.

<https://apnews.com/article/business-government-and-politics-china-south-china-sea-5ea0eeb76a57d529dc982caeb802c456>.

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