



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

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## Summary

This report presents policy and oversight issues for Congress arising from (1) maritime territorial disputes involving China in the South China Sea (SCS) and East China Sea (ECS) and (2) an additional dispute over whether China has a right under international law to regulate U.S. and other foreign military activities in its 200-nautical-mile maritime Exclusive Economic Zone (EEZ).

China is a party to multiple maritime territorial disputes in the SCS and ECS, including, in particular, disputes over the Paracel Islands, Spratly Islands, and Scarborough Shoal in the SCS, and the Senkaku Islands in the ECS. Maritime territorial disputes involving China in the SCS and ECS date back many years, and have periodically led to incidents and periods of increased tension. The disputes have again intensified in the past few years, leading to numerous confrontations and incidents, and heightened tensions between China and other countries in the region, particularly Japan, the Philippines, and Vietnam.

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

The issue of whether China has a right under the United Nations Convention on the Law of the Sea (UNCLOS) to regulate foreign military activities in its EEZ is related to, but ultimately separate from, the issue of maritime territorial disputes in the SCS and ECS. The two issues are related because China can claim EEZs from inhabitable islands over which it has sovereignty, so accepting China's claims to islands in the SCS or ECS could permit China to expand the EEZ zone within which China claims a right to regulate foreign military activities.

The EEZ issue is ultimately separate from the territorial disputes issue because even if all the territorial disputes in the SCS and ECS were resolved, and none of China's claims in the SCS and ECS were accepted, China could continue to apply its concept of its EEZ rights to the EEZ that it unequivocally derives from its mainland coast—and it is in this unequivocal Chinese EEZ that most of the past U.S.-Chinese incidents at sea have occurred.

China depicts its maritime territorial claims in the SCS using the so-called map of the nine dashed lines that appears to enclose an area covering roughly 80% of the SCS. China prefers to discuss maritime territorial disputes with other parties to the disputes on a bilateral rather than multilateral basis, and has resisted U.S. involvement in the disputes. Some observers believe China is pursuing a policy of putting off a negotiated resolution of maritime territorial disputes so as to give itself time to implement a strategy of taking incremental unilateral actions that gradually enhance China's position in the disputes and consolidate China's de facto control of disputed areas. China's maritime territorial claims in the SCS and ECS appear to be motivated by a mix of factors, including potentially large undersea oil and gas reserves, fishing rights, nationalism, and security concerns.

The United States does not take a position (i.e., is neutral) regarding competing territorial claims over land features in the SCS and ECS. The U.S. position is that territorial disputes should be resolved peacefully—without coercion, intimidation, threats, or the use of force—and that claims

of territorial waters and EEZs should be consistent with customary international law of the sea, as reflected in UNCLOS. U.S. officials have stated that the United States has a national interest in the preservation of freedom of navigation as recognized in customary international law of the sea and reflected in UNCLOS. The United States, like most other countries, believes that coastal states under UNCLOS do not have the right to regulate foreign military activities in their EEZs. If China's position on the issue—that coastal states do have a right under UNCLOS to regulate the activities of foreign military forces in their EEZs—were to gain greater international acceptance under international law, it could substantially affect U.S. naval operations not only in the SCS and ECS, but around the world.

Maritime territorial and EEZ disputes involving China in the SCS and ECS raise a number of policy and oversight issues for Congress, including the following:

- the risk that the United States might be drawn into a crisis or conflict over a territorial dispute involving China, particularly since the United States has bilateral defense treaties with Japan and the Philippines;
- the risk of future incidents between U.S. and Chinese ships and aircraft arising from U.S. military survey and surveillance activities in China's EEZ;
- the impact of maritime territorial and EEZ disputes involving China on the overall debate on whether the United States should become a party to UNCLOS;
- implications for U.S. arms sales and transfers to other countries in the region, particularly the Philippines, which currently has limited ability to monitor maritime activity in the SCS on a real-time basis, and relatively few modern ships larger than patrol craft in its navy or coast guard;
- implications for the stationing and operations of U.S. military forces in the region, and for U.S. military procurement programs;
- implications for interpreting the significance of China's rise as an economic and military power, particularly in terms of China's willingness to accept international norms and operate within an international rules-based order;
- the impact on overall U.S. relations with China and other countries in the region; and
- the effect on U.S. economic interests, including oil and gas exploration in the SCS and ECS by U.S. firms, and on international shipping through the SCS and ECS, which represents a large fraction of the world's seaborne trade.

Decisions that Congress makes on these issues could substantially affect U.S. political and economic interests in the Asia-Pacific region and U.S. military operations in both the Asia-Pacific region and elsewhere.

Legislation in the 112<sup>th</sup> Congress concerning maritime territorial and EEZ disputes involving China in the SCS and ECS includes S.Res. 217 and S.Res. 524, both of which have been agreed to by the Senate, and H.R. 6313, H.Res. 532, and H.Res. 616.

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## Introduction

This report presents policy and oversight issues for Congress arising from (1) maritime territorial disputes involving China in the South China Sea (SCS) and East China Sea (ECS) and (2) an additional dispute over whether China has a right under international law to regulate U.S. and other foreign military activities in its maritime Exclusive Economic Zone (EEZ).<sup>1</sup> Some of these disputes have intensified in recent years, increasing their prominence as a factor in U.S. relations with China and other countries in the region, and prompting heightened attention from U.S. policymakers. Decisions that Congress makes on issues arising from these disputes could substantially affect U.S. political and economic interests in the Asia-Pacific region and U.S. military operations in both the Asia-Pacific region and elsewhere.

As a basis for discussing the policy and oversight issues for Congress, this report first provides a brief overview of the maritime territorial and EEZ disputes involving China. China's maritime territorial disputes with the Philippines and Japan are discussed in greater detail in other CRS reports.<sup>2</sup> Additional CRS reports cover other aspects of U.S. relations with China and other countries in the region.

## Background

### Overview of Disputes

#### Maritime Territorial Disputes

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

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

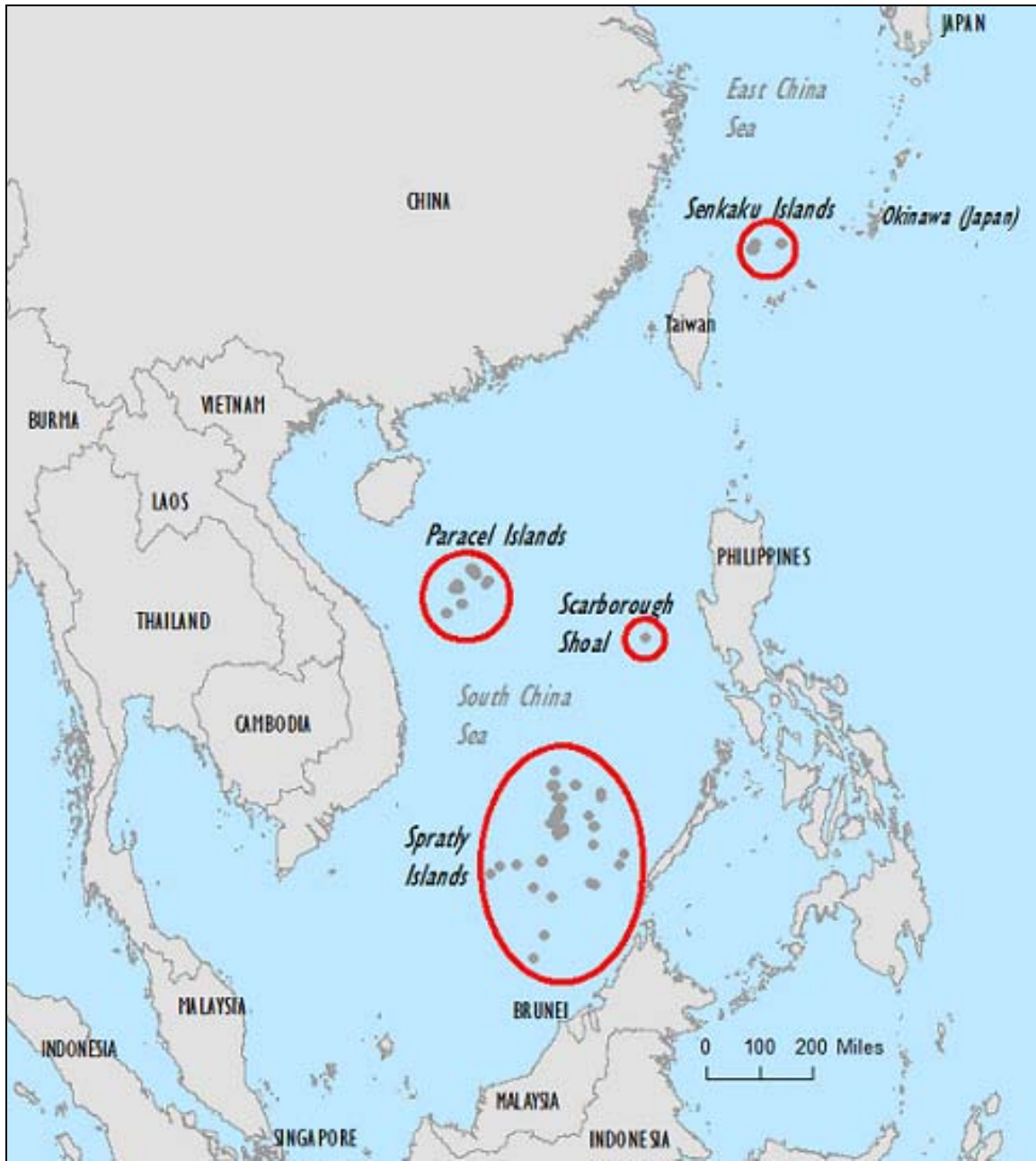
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<sup>1</sup> A country's EEZ includes waters extending up to 200 nautical miles from its land territory. Coastal states have the right under the United Nations Convention on the Law of the Sea (UNCLOS) to regulate foreign economic activities in their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

<sup>2</sup> See CRS Report RL33233, *The Republic of the Philippines and U.S. Interests*, by Thomas Lum; CRS Report R42761, *Senkaku (Diaoyu/Diaoyutai) Islands Dispute: U.S. Treaty Obligations*, by Mark E. Manyin; and CRS Report RL33436, *Japan-U.S. Relations: Issues for Congress*, coordinated by Emma Chanlett-Avery.

**Figure 1. Maritime Territorial Disputes Involving China**

Island groups involved in principal disputes



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

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

The island names used above are the ones commonly used in the United States; in other countries, these islands are known by various other names. China, for example, refers to the Paracel Islands as the Xisha islands, to the Spratly Islands as the Nansha islands, to Scarborough Shoal as Huangyan island, and to the Senkaku Islands as the Diaoyu islands.

These island groups are not the only land features in the SCS and ECS—the two seas feature other islands, rocks, shoals, and reefs, as well as some near-surface submerged features. The territorial status of some of these other features is also in dispute. For example, the **Reed Bank**, a submerged atoll northeast of the Spratly Islands, is the subject of a dispute between China and the Philippines, and the **Macclesfield Bank**, a group of submerged shoals and reefs between the Paracel Islands and Scarborough Shoal, is claimed by China, Taiwan, and the Philippines. China refers to the Macclesfield Bank as the Zhongsha islands, even though they are submerged features rather than islands.

It should also be noted that there are additional maritime territorial disputes in the Western Pacific that do not involve China.<sup>3</sup>

Maritime territorial disputes in the SCS and ECS date back many years, and have periodically led to incidents and periods of increased tension.<sup>4</sup> The disputes have again intensified in the past few years, leading to numerous confrontations and incidents involving fishing vessels, oil exploration vessels, paramilitary maritime law enforcement vessels, and naval ships. The intensification of the disputes is due in part to an increase in assertiveness by China in stating and defending its maritime territorial claims, and to increasingly assertive reactions by other countries, particularly Japan, the Philippines, and Vietnam. Energy exploration and fishing rights appear to be two underlying factors: China and other countries in the region have growing energy needs, and technological improvements in recent years have made oil and gas development in certain offshore locations more feasible. At the same time, growing demand for protein-rich foods and the depletion of certain near-shore fishing areas are encouraging fishing fleets to shift to waters further from shore.

Incidents over territorial disputes in the SCS and ECS have included standoffs between opposing vessels, ship collisions, the arrest and temporary detention of fishing vessel crew members, the roping off of waters between islands to prevent other ships from entering, the cutting of underwater cables, the firing of shots (including some with rubber bullets) from ships, the use of water cannons (high-pressure sprays) from ship to ship, and the throwing of objects such as bricks from ship to ship. Officials and private citizens have traveled to some of the disputed land features to plant flags or otherwise assert claims of sovereignty, and governments have disagreed over offshore oil and gas leasing rights.

The recent intensification of the disputes has substantially heightened tensions between China and other countries in the region, particularly Japan, the Philippines, and Vietnam. Heightened tensions have been reflected in strongly worded government statements, the cancellation of official meetings and exchanges, impassioned street protests that in some cases have included acts

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<sup>3</sup> North Korea and South Korea, for example, have not reached final agreement on their exact maritime border; South Korea and Japan are involved in a dispute over the Liancourt Rocks—a group of islets in the Sea of Japan that Japan refers to as the Takeshima islands and South Korea as the Dokdo islands; and Japan and Russia are involved in a dispute over islands dividing the Sea of Okhotsk from the Pacific Ocean that Japan refers to as the Northern Territories and Russia refers to as the South Kuril Islands.

<sup>4</sup> One observer states that “notable incidents over sovereignty include the Chinese attack on the forces of the Republic of Vietnam [South Vietnam] in the Paracel Islands in 1974, China’s attack on Vietnamese forces near Fiery Cross Reef [in the Spratly Islands] in 1988, and China’s military ouster of Philippines forces from Mischief Reef [also in the Spratly Islands] in 1995.” Peter Dutton, “Three Dispute and Three Objectives,” *Naval War College Review*, Autumn 2011: 43. A similar recounting can be found in Department of Defense, *Annual Report to Congress, Military and Security Developments Involving the People’s Republic of China*, 2011, p. 15.



such as the burning of other countries' flags, boycotts of Japanese products in China, and some attacks against Japanese citizens and businesses in China.

## **Dispute Regarding China's Rights Within Its EEZ**

In addition to maritime territorial disputes in the SCS and ECS, China is involved in a dispute, particularly with the United States, over whether China has a right under international law to regulate the activities of foreign military forces operating within China's EEZ. The position of the United States and most countries is that while the United Nations Convention on the Law of the Sea (UNCLOS), which established EEZs as a feature of international law, gives coastal states the right to regulate economic activities (such as fishing and oil exploration) within their EEZs, it does not give coastal states the right to regulate foreign military activities in the parts of their EEZs beyond their 12-nautical-mile territorial waters. The position of China and 26 other countries (i.e., a minority group among the world's nations) is that UNCLOS gives coastal states the right to regulate not only economic activities, but also foreign military activities, in their EEZs. In response to a request from CRS to identify the countries taking this latter position, the U.S. Navy states that

countries with restrictions inconsistent with the Law of the Sea Convention [i.e., UNCLOS] that would limit the exercise of high seas freedoms by foreign navies beyond 12 nautical miles from the coast are [the following 27]:

Bangladesh, Brazil, Burma, Cambodia, Cape Verde, China, Egypt, Haiti, India, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Portugal, Saudi Arabia, Somalia, Sri Lanka, Sudan, Syria, Thailand, United Arab Emirates, Uruguay, Venezuela, and Vietnam.<sup>5</sup>

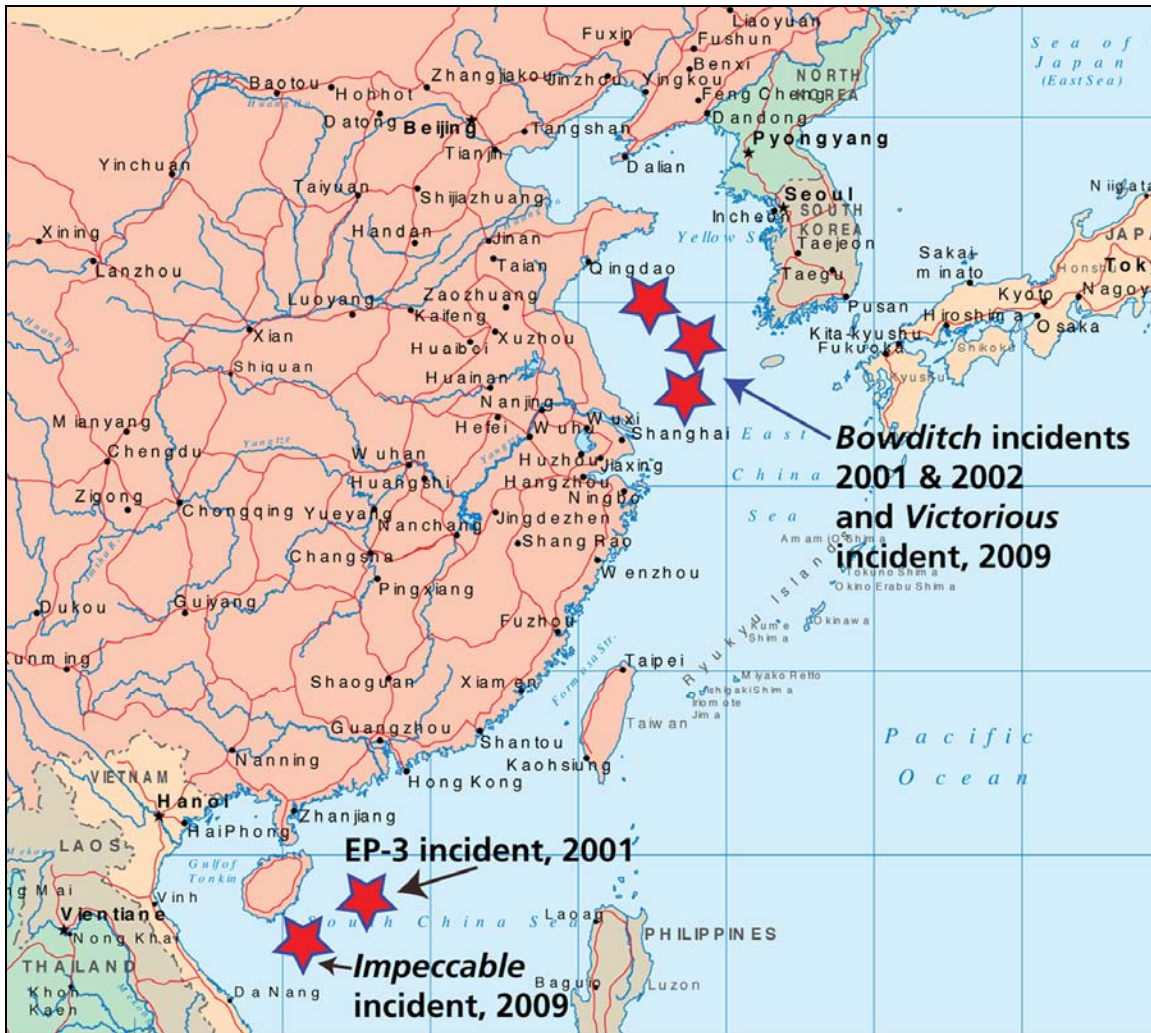
The dispute over whether China has a right under UNCLOS to regulate the activities of foreign military forces operating within its EEZ appears to be at the heart of multiple incidents between Chinese and U.S. ships and aircraft in international waters and airspace, including incidents in March 2001, September 2002, March 2009, and May 2009 in which Chinese ships and aircraft confronted and harassed the U.S. naval ships *Bowditch*, *Impeccable*, and *Victorious* as they were conducting survey and ocean surveillance operations in China's EEZ, and an incident on April 1, 2001, in which a Chinese fighter collided with a U.S. Navy EP-3 electronic surveillance aircraft flying in international airspace about 65 miles southeast of China's Hainan Island in the South China Sea, forcing the EP-3 to make an emergency landing on Hainan Island.<sup>6</sup> **Figure 2** shows the locations of these incidents.

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<sup>5</sup> Source: Navy Office of Legislative Affairs e-mail to CRS, June 15, 2012. The e-mail notes that two additional countries—Ecuador and Peru—also have restrictions inconsistent with UNCLOS that would limit the exercise of high seas freedoms by foreign navies beyond 12 nautical miles from the coast, but do so solely because they claim an extension of their territorial sea beyond 12 nautical miles.

<sup>6</sup> For discussions of some of these incidents and their connection to the issue of military operating rights in EEZs, see Raul Pedrozo, "Close Encounters at Sea, The USNS *Impeccable* Incident," *Naval War College Review*, Summer 2009: 101-111; Jonathan G. Odom, "The True 'Lies' of the *Impeccable* Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (Outside of China) Should Be Concerned," *Michigan State Journal of International Law*, vol. 18, no. 3, 2010: 16-22, accessed online September 25, 2012 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1622943](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622943); Oriana Skylar Mastro, "Signaling and Military Provocation in Chinese National Security Strategy: A Closer Look at the *Impeccable* Incident," *Journal of Strategic Studies*, April 2011: 219-244; and Peter Dutton, ed., *Military Activities in the EEZ, A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, Newport (RI), Naval War College, China Maritime Studies Institute, China Maritime Study Number 7, December 2010, 124 pp. See also CRS Report RL30946, *China-U.S. Aircraft Collision Incident of April* (continued...)

Figure 2. Locations of U.S.-Chinese Incidents at Sea and In Air



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

### Relationship of Maritime Territorial Disputes to EEZ Dispute

The issue of whether China has the right under UNCLOS to regulate foreign military activities in its EEZ is related to, but ultimately separate from, the issue of maritime territorial disputes in the SCS and ECS. The two issues are related because China can claim EEZs from inhabitable islands over which it has sovereignty, so accepting China’s claims to islands in the SCS or ECS could permit China to expand the EEZ zone within which China claims a right to regulate foreign military activities.

(...continued)

2001: *Assessments and Policy Implications*, by Shirley A. Kan et al.

The EEZ issue is ultimately separate from the territorial disputes issue because even if all the territorial disputes in the SCS and ECS were resolved, and none of China's claims in the SCS and ECS were accepted, China could continue to apply its concept of its EEZ rights to the EEZ that it unequivocally derives from its mainland coast—and it is in this unequivocal Chinese EEZ that most of the past U.S.-Chinese incidents at sea have occurred.

Press reports of maritime disputes in the SCS and ECS often focus on territorial disputes while devoting little or no attention to the related but ultimately separate EEZ dispute. From the U.S. perspective, however, the EEZ dispute is arguably as significant as the maritime territorial disputes because of its potential for leading to a U.S.-Chinese incident at sea and because of its potential for affecting U.S. military operations not only in the SCS and ECS, but around the world (see “Position Regarding Coastal State’s Rights in Its EEZ” below).

### **Negotiations Between China and ASEAN on SCS Code of Conduct**

In 2002, China and the ten member states of the Association of Southeast Asian Nations (ASEAN)<sup>7</sup> signed a non-binding Declaration on the Conduct (DOC) of Parties in the South China Sea in which the parties, among other things,

... reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea....

... undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea....

... undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner....

...reaffirm that the adoption of a [follow-on] code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective....<sup>8</sup>

U.S. officials since 2010 have encouraged ASEAN and China to develop the follow-on binding code of conduct mentioned in the final paragraph above.<sup>9</sup> In July 2011, China and ASEAN

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<sup>7</sup> The member states of ASEAN are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

<sup>8</sup> For the full text of the declaration, see **Appendix A**.

<sup>9</sup> For example, Kurt Campbell, the Assistant Secretary of State for East Asian Pacific Affairs, testified to the East Asian and Pacific Affairs subcommittee of the Senate Foreign Relations Committee on September 20, 2012, that

We support ASEAN and China's efforts to develop an effective Code of Conduct, as called for in the 2002 ASEAN-China Declaration. History has shown that a region united by rules and norms enjoys greater peace and stability, and a Code of Conduct can be an important element of the emerging rules-based order in the region. While it is up to the parties to agree to the terms of a Code of Conduct, we believe that it should be based on the widely accepted and universal principles of the UN Charter, the international law of the sea, as reflected in the Law of the Sea Convention, the Treaty of Amity and Cooperation, and the 2002 Declaration on Conduct. An

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adopted a preliminary set of principles for implementing the DOC. China and ASEAN have conducted negotiations on the code, but China has not yet agreed with the ASEAN member states on a final text.

## **China's Approach to Territorial Disputes**

### **Some Key Elements**

China's approach toward maritime territorial disputes in the SCS and ECS includes the following elements, among others:<sup>10</sup>

- China depicts its maritime territorial claims in the SCS using the so-called map of the nine dashed lines (see “Map of the Nine Dashed Lines” below).
- China argues that its maritime territorial claims in the SCS and ECS have historical routes going back hundreds of years.
- China often characterizes its maritime territorial claims in the SCS and ECS as “indisputable,” although they are disputed by other parties.
- China states that it wants to resolve its maritime territorial disputes peacefully. At the same time, while it periodically has been cooperative in managing its disputes, it has indicated no readiness to back down or compromise on its claims.
- China prefers to discuss maritime territorial disputes with other parties to the disputes on a bilateral rather than multilateral basis. Some observers believe China prefers bilateral talks because China is much larger than any other country in the region, giving China a potential upper hand in any bilateral meeting.
- China generally has resisted multilateral approaches to resolving maritime territorial disputes, stating that such approaches would internationalize the disputes, although the disputes are by definition international even when addressed on a bilateral basis. (China's participation with the ASEAN states in the 2002 DOC and in negotiations with the ASEAN states on the follow-on binding code of conduct represents a departure from this general preference.) Some observers believe China generally resists multilateral approaches because

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effective Code of Conduct would also create a rules-based framework for managing and regulating the conduct of parties in the South China Sea, including preventing and managing disputes.

(Testimony [prepared statement] of Kurt Campbell, Assistant Secretary of State Bureau of East Asian and Pacific Affairs, U.S. Department of State, Before the Senate Foreign Relations Committee, Subcommittee on East Asian and Pacific Affairs, September 20, 2012, [on] Maritime Territorial Disputes and Sovereignty Issues in Asia, p. 5.)

<sup>10</sup> In addition to the elements listed here, Chinese officials in early 2010, according to some press reports, began describing their territorial claims in the South China Sea as a “core interest”—a phrase that was interpreted as meaning that, for the Chinese, the issue is comparable in importance to China's interest in Taiwan and Tibet. Whether these press reports were accurate—that is, whether Chinese officials in 2010 actually described China's territorial claims in the SCS as a core interest—is a matter of some dispute. Accurate or not, accounts of the reported “core interest” formulation prompted concern among observers. Later in 2010, it was reported that China appeared to have backed away from the idea of describing its claims in the SCS as a core interest. For additional information on China's reported position on this issue during 2010, see **Appendix B**.

they could give smaller countries in the region (principally the ASEAN member states) an opportunity to present a united front to China, which could reduce advantages China might gain from being larger than any other individual country in the region.

- China has resisted U.S. involvement in the disputes.<sup>11</sup>
- Some observers believe China is pursuing a policy of putting off a negotiated resolution of maritime territorial disputes so as to give itself time to implement a strategy of taking incremental unilateral actions, none of them individually significant enough to provoke an open conflict, that over time wear down the resistance of other parties, gradually enhance China's position in the disputes, and consolidate China's *de facto* control of disputed areas. (See "Strategy of Incremental Actions" below.)
- China increasingly is using ships from its paramilitary maritime law enforcement agencies, rather than ships from its regular Navy, to assert and defend its maritime territorial claims. Some observers believe China also uses civilian fishing ships to assert and defend its maritime territorial claims. (See "Use of Law Enforcement Agency Ships and Fishing Vessels" below.)

Elements like those above are not unique to China: other countries in the region, for example, argue that their own maritime territorial claims have historical roots or are indisputable, or have indicated little or no readiness to back down or compromise on their claims.<sup>12</sup>

## Map of the Nine Dashed Lines

China often presents its territorial claims in the SCS using the so-called map of the nine dashed lines—a Chinese map of the SCS showing nine dashed line segments that, if connected, would enclose an area covering roughly 80% of the SCS (**Figure 3**).

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<sup>11</sup> One set of observers states:

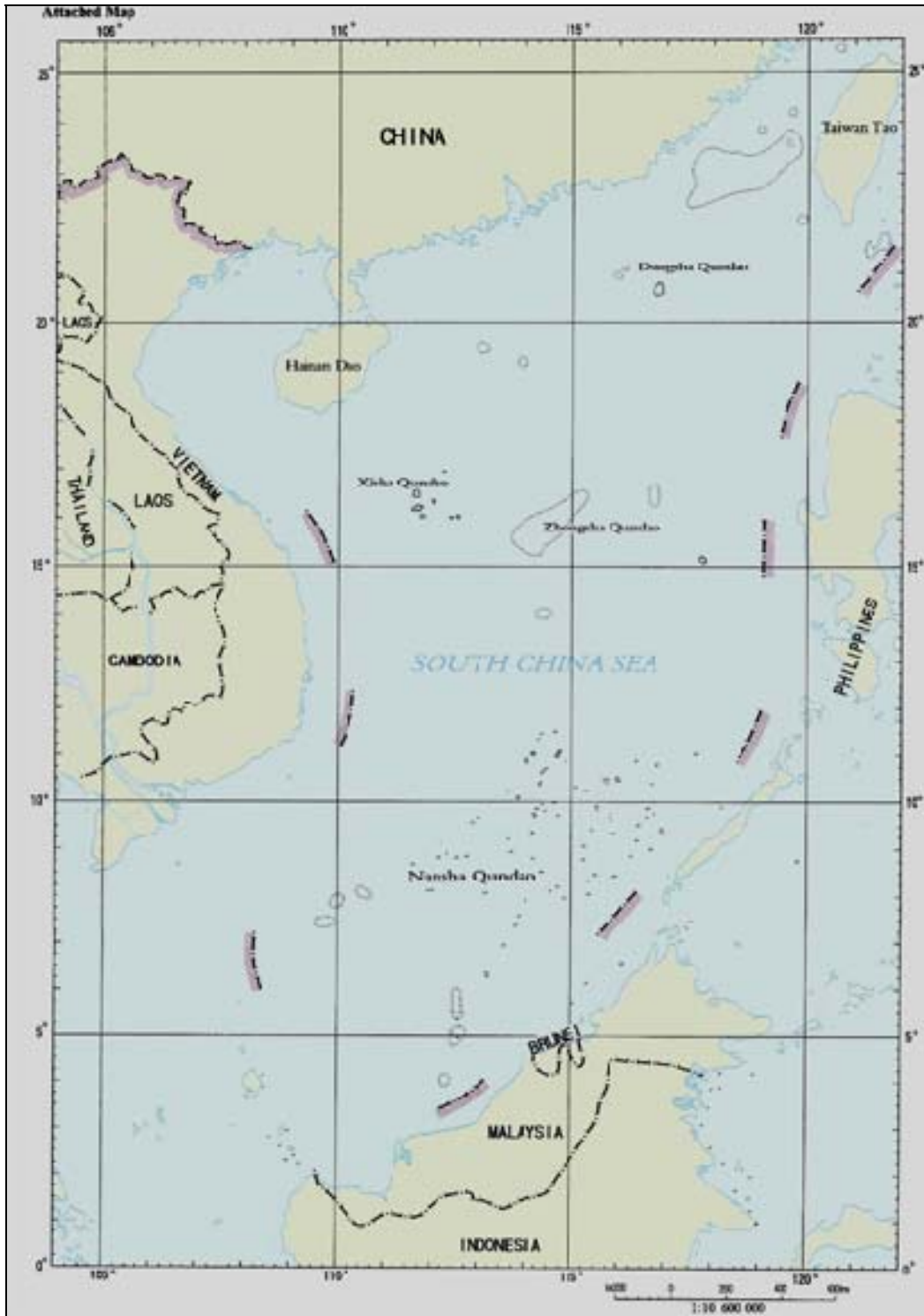
Since 2010, when Hillary Clinton re-affirmed that freedom of navigation in the South China Sea was a U.S. national interest, a key aim of China's policy in the South China Sea has been to discourage U.S. involvement and the internationalisation of the disputes. From Beijing's perspective, ASEAN countries have been using the U.S. as a hedge to counter-balance its growing power, and Washington has been using them to expand its regional presence. Beijing also fears that U.S. involvement will internationalise the territorial disputes in the South China Sea, isolating China and further hindering its efforts to achieve its desired outcome.

(International Crisis Group, *Stirring Up the South China Sea ([Part] I)*, Asia Report Number 223, April 23, 2012, p. 7.)

<sup>12</sup> See, for example, Matthew Pennington, "Japan PM: No Compromise With China On Island Claim," *Yahoo.com (Associated Press)*, September 26, 2012.

**Figure 3. Map of the Nine Dashed Lines**

Example submitted by China to the United Nations in 2009



**Source:** Communication from China to the United Nations dated May 7, 2009, English version, accessed online on August 30, 2012 at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_vnm\\_37\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm).

The area inside the nine dashes far exceeds what is claimable as territorial waters under customary international law of the sea as reflected in UNCLOS, and, as shown in **Figure 4**, includes waters that are within the claimable EEZs (and in some places are quite near the coasts) of the Philippines, Malaysia, Brunei, and Vietnam.

**Figure 4. EEZs Overlapping Zone Enclosed by Map of Nine Dashed Lines**



**Source:** Source: Eurasia Review, September 10, 2012.

**Notes:** (1) The red line shows the area that would be enclosed by connecting the dashes in the map of the nine dashed lines. Although the label on this map states that the waters inside the red line are “China’s claimed territorial waters,” China has maintained ambiguity over whether it is claiming full sovereignty over the entire area enclosed by the nine dashed lines. (2) The EEZs shown on the map do not represent the totality of maritime territorial claims by countries in the region. Vietnam, to cite one example, claims all of the Spratly Islands, even though most or all of the islands are outside the EEZ that Vietnam derives from its mainland coast.

The map of the nine dashed lines, also called the U-shaped line or the cow tongue, predates the establishment of the People’s Republic of China (PRC) in 1949. The map has been maintained by the PRC government, and maps published in Taiwan also show the nine dashes.<sup>13</sup> In a document

<sup>13</sup> DOD states that

Beginning in the 1930s and 1940s, the Republic of China began publishing regional maps with a dashed line around the perimeter of South China Sea. After taking power in 1949, the CCP [Chinese Communist Party] maintained this claim. Both the PRC and Taiwan continue to base their South China Sea claims on that broad delineation....

Before the CCP took power in 1949, the Chinese government regarded the South China Sea as a region of geostrategic interest and a part of China’s “historical waters.” As early as the 1930’s, the (continued...)

submitted to the United Nations on May 7, 2009, that included the map as an attachment, China stated:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map [of the nine dashed lines]). The above position is consistently held by the Chinese Government, and is widely known by the international community.<sup>14</sup>

China has maintained some ambiguity over whether it is using the map of the nine dashed lines to claim full sovereignty over the entire sea area enclosed by the nine dashed lines, or something less than that.<sup>15</sup> It does appear clear, however, that China at a minimum claims sovereignty over

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(...continued)

Republic of China was considering a broad line delineating the South China Sea as Chinese territory. The “U-shaped” dashed line that began appearing on Chinese maps in 1947 continues to define PRC claims to the South China Sea.

(Department of Defense, *Annual Report to Congress, Military and Security Developments Involving the People’s Republic of China*, 2011, pp. 15 and 39. The government of the Republic of China moved to Taiwan in 1949.)

Another observer states:

China and Taiwan maintain overlapping, related claims to all the islands in the South China Sea. In 1947 the Nationalist government of the Republic of China began to publish maps with a U-shaped series of lines in the South China Sea delineating its maritime boundaries.... These maps were based on a 1935 internal government report prepared to define the limits of China, many parts of which were dominated by outside powers at the time. Though the exact nature of the claim was never specified by the Nationalist government, the cartographic feature persisted in maps published by the Communist Party after it came to power on the mainland in 1949, and today the U-shaped line’s nine dashes in the South China Sea remain on maps published both in China and on Taiwan.

(Peter Dutton, “Three Disputes and Three Objectives, China and the South China Sea,” *Naval War College Review*, Autumn 2011: 44-45.)

Another observer states:

The prevailing basis for China’s historic claims to the SCS (South China Sea) is the U-shaped line (also called nine-dotted line, or nine-dash line) officially drawn on the Chinese map in 1947 by the then-Chinese Nationalist Government, which was originally an “eleven-dotted-line”. After the Communist Party of China took over mainland China and formed the People’s Republic of China in 1949, the line was adopted and revised to nine as endorsed by Zhou Enlai.

(Hong Nong, “Interpreting the U-shape Line in the South China, Sea,” accessed online on September 28, 2012, at <http://chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/>.)

<sup>14</sup> Communication from China to the United Nations dated May 7, 2009, English version, accessed online on August 30, 2012 at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_vnm\\_37\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm).

<sup>15</sup> One observer states:

The Chinese government appears to maintain a studied policy of ambiguity about the line’s meaning. Among Chinese scholars and officials, however, there appear to be four dominant schools of thought....

**Sovereign Waters.** The first approach taken by some Chinese policy analysts is that the expanse enclosed by the U-shaped line should be considered fully sovereign Chinese waters, subject to the complete measure of the government’s authority, presumably as either internal waters or territorial seas....

**Historic Waters.** Some Chinese have suggested that the concept of “historic waters” enables the government legitimately to claim broad control over the South China Sea. The concept, a variation on China’s claim of sovereignty in the South China Sea, reflects the view held by many Chinese academics and policy makers that the nine-dash line represents a claim to historic waters, historic

(continued...)



the island groups inside the nine dashed lines—China’s domestic Law on the Territorial Sea and Contiguous Zone, enacted in 1992, specifies that China claims sovereignty over all the island groups inside the nine dashed lines.<sup>16</sup>

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(...continued)

“title,” or at least some kind of exclusive rights to administer the waters and territory within the line’s boundaries....

**Island Claims.** Some Chinese academics and policy makers view the U-shaped line as asserting a claim to sovereignty over all the islands, rocks, sandbars, coral heads, and other land features that pierce the waters of the South China Sea, as well as to whatever jurisdiction international law of the sea allows coastal states based on sovereignty over these small bits of land....

**Security Interests.** Finally, a fourth Chinese perspective is that the U-shaped line reflects China’s long-standing maritime security interests in the South China Sea and that these security interests should have legal protection. The Chinese have long viewed the Bohai Gulf, the Yellow Sea, the East China Sea, and the South China Sea—the “near seas”—as regions of core geostrategic interest and as parts of a great defensive perimeter established on land and at sea to protect China’s major population and economic centers along the coasts.

(Peter Dutton, “Three Disputes and Three Objectives, China and the South China Sea,” *Naval War College Review*, Autumn 2011: 45-48.)

Another observer states:

There are four schools of thoughts among China’s academics on the interpretation of this line, namely the line of boundary, the line of historic waters, the line of historic rights and the line of ownership of the features. [The] “Line of Boundary” theory simply indicates that the U-shape line defines the limit or extent of China’s territory. The basis of this theory is comparatively weak in international law, and has been criticized even by some Chinese scholars....

We have to realize that the formulation of the concept of historic waters requires an adjustment of the generally accepted law of the sea regimes...

There also exists the separable term of ‘historic rights’—normally in high seas areas, but without any connotations as to sovereignty in the locale, such as historic fishing rights. The 2006 Barbados/Trinidad and Tobago Arbitration case entails the argument of historic rights of fishing. The term ‘historic rights’ is broader than that of ‘historic waters’. In its widest sense, it implies that a State claiming to exercise certain jurisdictional rights in what usually basically satisfy the same, or at least similar, supposed requirements for establishing ‘historic waters’ claims per se, particularly those of continuous and long usage with the acquiescence of relevant other States....

Currently, the theory of “sovereignty + UNCLOS + historic rights” prevails among the Chinese scholars. According to this theory, China enjoys sovereignty over all the features within this line, and enjoys sovereign right and jurisdiction, defined by the UNCLOS, for instance, EEZ and continental shelf when the certain features fulfill the legal definition of Island Regime under Article 121 of UNCLOS. In addition to that, China enjoys certain historic rights within this line, such as fishing rights, navigation rights and priority rights of resource development.

(Hong Nong, “Interpreting the U-shape Line in the South China, Sea,” accessed online September 28, 2012, at <http://chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/>.)

<sup>16</sup> Peter Dutton, “Three Disputes and Three Objectives, China and the South China Sea,” *Naval War College Review*, Autumn 2011: 45, which states: “In 1992, further clarifying its claims of sovereignty over all the islands in the South China Sea, the People’s Republic of China enacted its Law on the Territorial Sea and Contiguous Zone, which specifies that China claims sovereignty over the features of all of the island groups that fall within the U-shaped line in the South China Sea: the Pratas Islands (Dongsha), the Paracel Islands (Xisha), Macclesfield Bank (Zhongsha), and the Spratly Islands (Nansha).” See also International Crisis Group, *Stirring Up the South China Sea ([Part] 1)*, Asia Report Number 223, April 23, 2012, pp. 3-4.

## Motivations for Claims

China's maritime territorial claims in the SCS and ECS appear to be motivated by several factors, including the following:

- **Oil and gas reserves and mineral deposits.** The SCS and ECS are believed to include potentially large undersea oil and gas reserves as well as seabed mineral deposits. As mentioned earlier, China has growing energy needs, and technological improvements in recent years have made oil and gas development in certain offshore locations more feasible. Sovereignty over inhabitable islands in the SCS and ECS would permit China to claim EEZs around those islands, bringing some of these resources under China's control.
- **Fishing rights.** The waters of the SCS and ECS include multiple fishing areas. As mentioned earlier, growing demand for protein-rich foods and the depletion of certain near-shore fishing areas are encouraging regional fishing fleets to shift to waters further from shore. Sovereignty over inhabitable islands in the SCS and ECS would permit China to claim EEZs around those islands, bringing some of those fishing areas under China's control.
- **Nationalism.** China's view that its maritime territorial claims in the SCS and ECS have deep historical roots and are indisputable has helped make the claims a matter of national pride. Defending China's position in disputes over the islands has become a focus of nationalistic zeal in China.<sup>17</sup>
- **Shipping lanes.** A large fraction of the world's seaborne trade, including a significant percentage of oil shipped from the Persian Gulf to China, Japan, and other countries in the region, passes through the SCS. Sovereignty over islands in the SCS and ECS would permit China to use them as locations for monitoring that shipping and, in time of crisis or conflict, potentially protecting or interdicting it.
- **Security buffer zones.** Sovereignty over islands in the SCS and ECS would permit China to declare territorial waters around them to a distance of 12 nautical miles, and to use them as locations for monitoring and responding to operations by foreign naval forces in surrounding waters. This could enhance China's ability to use the SCS and ECS as security buffer zones for protecting the Chinese mainland from foreign naval forces, including, for example, U.S. naval forces responding to a crisis or conflict involving Taiwan. Sovereignty over islands in the SCS and ECS would also permit China to declare EEZs around the inhabitable islands out to a distance of 200 nautical miles. Since China believes it has a right under international law to regulate the activities of foreign military

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<sup>17</sup> One set of observers states that

Beijing has deliberately imbued the South China Sea disputes with nationalist sentiment by perpetually highlighting China's historical claims. This policy has led to a growing domestic demand for assertive action. While Beijing has been able to rein in nationalist sentiment over the South China Sea when it adopts a specific policy, this heated environment still limits its policy options and its ability to manage the issue.

(International Crisis Group, *Stirring Up the South China Sea ([Part] I)*, Asia Report Number 223, April 23, 2012, executive summary. See also pp. 26-28.)

forces in its EEZ, declaring such EEZs could, in China's view, further enhance China's ability to use the SCS and ECS as security buffer zones.

- **Ballistic missile submarine bastion.** China has built a submarine base at Hainan island in the SCS.<sup>18</sup> Some observers believe that China in coming years will operate ballistic missile submarines from that base as part of China's strategic nuclear deterrent force. Increasing control of the SCS could help China use the SCS as a secure operating bastion for those submarines.<sup>19</sup>

Motives like those above are not unique to China; the maritime territorial claims of other countries in the region appear to be motivated by similar factors, particularly those relating to oil and gas reserves, fishing rights, nationalism, and security concerns.<sup>20</sup>

## Strategy of Incremental Actions

Regarding the strategy of incremental actions that some observers believe China is pursuing, one observer states:

Since the mid-1990s, China has pursued a strategy of delaying the resolution of the dispute. The goal of this strategy is to consolidate China's claims, especially to maritime rights or jurisdiction over these waters, and to deter other states from strengthening their own claims at China's expense, including resource development projects that exclude China. Since the mid-2000s, the pace of China's efforts to consolidate its claims and deter others has increased through diplomatic, administrative and military means. Although China's strategy seeks to consolidate its own claims, it threatens weaker states in the dispute and is inherently destabilizing. As a result, the delaying strategy includes efforts to prevent the escalation of tensions while nevertheless seeking to consolidate China's claims.<sup>21</sup>

Another observer states:

[W]hat about an adversary that uses "salami-slicing," the slow accumulation of small actions, none of which is a *casus belli*, but which add up over time to a major strategic change? U.S. policymakers and military planners should consider the possibility that China is pursuing a salami-slicing strategy in the South China Sea, something that could confound Washington's military plans....

The goal of Beijing's salami-slicing would be to gradually accumulate, through small but persistent acts, evidence of China's enduring presence in its claimed territory, with the intention of having that claim smudge out the economic rights granted by UNCLOS and perhaps even the right of ships and aircraft to transit what are now considered to be global commons. With new "facts on the ground" slowly but cumulatively established, China would hope to establish *de facto* and *de jure* settlements of its claims....

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<sup>18</sup> Hainan island is shown in **Figure 3** and **Figure 4**. China's ownership of Hainan island is not in dispute.

<sup>19</sup> For an article discussing this motive, see Michael Richardson, "A Nuclear Dimension To China's Maritime Claims," *Singapore Straits Times*, September 3, 2012: 21.

<sup>20</sup> For a discussion of the nationalism factor, see Patrick M. Cronin, "Statesmen Need Patience to Calm Public Jingoism As Disputes Flare," *Global Times* ([www.globaltimes.cn](http://www.globaltimes.cn)), September 12, 2012.

<sup>21</sup> M. Taylor Fravel, "China's Strategy in the South China Sea," *Contemporary Southeast Asia*, Vol. 33, No. 3 (2011): 292-319.

... the Pentagon intends to send military reinforcements to the region and is establishing new tactical doctrines for their employment against China's growing military power. But policymakers in Washington will be caught in a bind attempting to apply this military power against an accomplished salami-slicer. If sliced thinly enough, no one action will be dramatic enough to justify starting a war. How will a policymaker in Washington justify drawing a red line in front of a CNOOC oil rig anchoring inside Vietnam's EEZ, or a Chinese frigate chasing off a Philippines survey ship over Reed Bank, or a Chinese infantry platoon appearing on a pile of rocks near the Spratly Islands? When contemplating a grievously costly war with a major power, such minor events will appear ridiculous as *casus belli*. Yet when accumulated over time and space, they could add up to a fundamental change in the region....

A salami-slicer puts the burden of disruptive action on his adversary. That adversary will be in the uncomfortable position of drawing seemingly unjustifiable red lines and engaging in indefensible brinkmanship. For China, that would mean simply ignoring America's Pacific fleet and carrying on with its slicing, under the reasonable assumption that it will be unthinkable for the United States to threaten major-power war over a trivial incident in a distant sea.<sup>22</sup>

## **Use of Law Enforcement Agency Ships and Fishing Vessels**

### *Law Enforcement Agency Ships: Overview*

China increasingly is using ships from its paramilitary maritime law enforcement agencies, rather than ships from China's navy—known formally as the People's Liberation Army (PLA) Navy, or PLAN—to assert and defend its claims in the SCS and ECS. China has several paramilitary maritime law enforcement agencies, including China Marine Surveillance (CMS), the Fisheries Law Enforcement Command (FLEC), the China Coast Guard, the Maritime Safety Administration (MSA), and the Customs Anti-Smuggling Bureau.

While the ships operated by these agencies are unarmed or lightly armed, they can nevertheless be effective in confrontations with unarmed fishing vessels or other ships. The CMS, FLEC, and MSA fleets reportedly are being modernized rapidly, and some of the newest ships operated by

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<sup>22</sup> Robert Haddick, "Salami Slicing in the South China Sea," *SmallWarsJournal.com*, August 3, 2012. Another observer similarly states:

Sporadic acts of coercion and intimidation may not produce outcomes as visible or decisive as a battlefield victory. A series of showdowns may pass without an end in sight or any tangible gain for China. But, the cumulative effects of a continuing stalemate could induce strategic fatigue that in turn advances China's aims. Short of a shooting war, Chinese provocations are too slight for the United States to intervene militarily. Staying below the escalation threshold adds maneuver room to test U.S. steadfastness while solidifying its own claims.

As China pushes and probes, regional expectations that Washington should do something would inevitably mount even as weaker nations look for signs of wavering U.S. resolve. The prospects of recurring confrontations with little hope of direct U.S. intervention could weigh heavily on Southeast Asian capitals. Applied with patience and discipline, such a strategy of exhaustion could gradually erode regional confidence and undermine the political will to resist.

(Toshi Yoshihara, "War By Other Means: China's Political Uses of Seapower," *The Diplomat* (<http://thediplomat.com>), September 26, 2012.)

these agencies are relatively large. One new ship, for example, has a displacement of 5,400 tons, making it larger than a U.S. Navy frigate or a U.S. Coast Guard National Security Cutter.<sup>23</sup>

Some observers view China's use of these ships rather than PLAN ships as reflecting a desire by China to defend its claims in a non-aggressive manner, and to reduce the chances of an incident turning into a greater crisis or conflict. Another possibility is that China's use of these ships, rather than PLAN ships, is simply a consequence of China's view that the territories in question belong to China, and are thus most appropriately administered by internal law enforcement assets. (In that connection, it can be noted that Japan uses Japan Coast Guard vessels to enforce its control of waters surrounding the Senkaku Islands.) China's use of paramilitary maritime law enforcement ships rather than PLAN ships could pose a dilemma for other countries in the region who do not have equivalent ships in their own maritime forces; for those countries, the only ships available to send out in response to the deployment of Chinese paramilitary law enforcement ships might be regular navy ships, in which case sending them out might leave those other countries vulnerable to the accusation that they were escalating the crisis.<sup>24</sup>

### ***Law Enforcement Agency Ships: Coordination Among Agencies***

Some observers have raised questions regarding the degree to which the operations of the paramilitary maritime law enforcement agencies are controlled by the central government or coordinated with one another. One set of observers, for example, states:

The conflicting mandates and lack of coordination among Chinese government agencies, many of which strive to increase their power and budget, have stoked tensions in the South China Sea. Repeated proposals to establish a more centralised mechanism have foundered while the only agency with a coordinating mandate, the foreign ministry, does not have the authority or resources to manage other actors. The Chinese navy's use of maritime tensions to justify its modernisation, and nationalist sentiment around territorial claims, further compound the problem. But more immediate conflict risks lie in the growing number of law

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<sup>23</sup> For a review of the ships operated by these agencies, see Trefor Moss, "China's Other Navies," *Jane's Defence Weekly*, July 11, 2012: 28-29, 31-32. For an in-depth survey, see Lyle J. Goldstein, *Five Dragons Stirring Up the Sea, Challenge and Opportunity in China's Improving Maritime Enforcement Capabilities*, Newport (RI), Naval War College, China Maritime Studies Institute, China Maritime Study Number 5, April 2010, 39 pp.

<sup>24</sup> One observer states:

Employing non-navy assets in clashes over territory reveals a sophisticated, methodical strategy for securing China's maritime claims. The use of non-military means eschews escalation while ensuring that disputes remain localized. Specifically, it deprives the United States and other outside powers the rationales to step in on behalf of embattled capitals in the region.

At the same time, noncombat ships empower Beijing to exert low-grade but unremitting pressure on rival claimants to South China Sea islands and waters. Constant patrols can probe weaknesses in coastal states' maritime-surveillance capacity while testing their political resolve. Keeping disputes at a low simmer, moreover, grants China the diplomatic initiative to turn up or down the heat as strategic circumstances warrant.

(Toshi Yoshihara, "War By Other Means: China's Political Uses of Seapower," *The Diplomat* (<http://thediplomat.com>), September 26, 2012. See also Trefor Moss, "China's Not-So-Hard Power Strategy," *The Diplomat* (<http://thediplomat.com>), June 28, 2012; "China's Great White Fleet—Will China's Secret Fleet Soon Outnumber The US Navy?" *Forbes* ([www.forbes.com](http://www.forbes.com)), June 19, 2012; Trefor Moss, "China's Other Navies," *Jane's Defence Weekly*, July 11, 2012: 28-29, 31-32. James R. Holmes, "China's Small Stick Diplomacy," *The Diplomat* (<http://thediplomat.com>), May 21, 2012, accessed October 3, 2012, at <http://thediplomat.com/2012/05/21/chinas-small-stick-diplomacy/>.)

enforcement and paramilitary vessels playing an increasing role in disputed territories without a clear legal framework....

China's maritime policy circles use the term "Nine dragons stirring up the sea" to describe the lack of coordination among the various government agencies involved in the South China Sea. Most of them have traditionally been domestic policy actors with little experience in foreign affairs. While some agencies act aggressively to compete with one another for greater portions of the budget pie, others (primarily local governments) attempt to expand their economic activities in disputed areas due to their single-minded focus on economic growth. Yet despite the domestic nature of their motivations, the implications of their activities are increasingly international.<sup>25</sup>

### *Fishing Vessels*

Some observers believe China also uses civilian fishing ships to assert and defend its maritime territorial claims. One observer states that:

the fishing fleet is an unofficial maritime auxiliary that Beijing can deploy to stoke "managed confrontation" with neighbors whose seaborne interests contradict China's. [Jens] Kastner portrays it<sup>26</sup> as a stick with which the Chinese government can stir up maritime Asia at opportune moments, whether to solidify its claims to contested islands and seas, appease a restive populace at home, or support a cross-strait offensive against Taiwan....

Does Beijing control the whereabouts and actions of fishing boats directly? It's not entirely clear, and Chinese diplomats aren't saying. There must be some mix between conscious action and opportunism. While they may or may not exercise operational command over a given boat, Chinese officials can certainly encourage its skipper to ply his trade in disputed water—and respond if he runs into trouble.<sup>27</sup>

## **U.S. Position on These Issues**

### **Some Key Elements**

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

- The United States does not take a position (i.e., is neutral) regarding competing territorial claims over land features.
- Territorial disputes should be resolved peacefully, without coercion, intimidation, threats, or the use of force.

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<sup>25</sup> International Crisis Group, *Stirring Up the South China Sea ([Part] I)*, Asia Report Number 223, April 23, 2012, executive summary. See also pp. 8-9, 12-13, 19-22, 40-41.

<sup>26</sup> This is a reference to Jens Kastner, "China's Fishermen Charge Enemy Lines," *Asia Times Online* ([www.atimes.com](http://www.atimes.com)), May 16, 2012.

<sup>27</sup> James R. Holmes, "China's Small Stick Diplomacy," *The Diplomat* (<http://thediplomat.com>), May 21, 2012, accessed October 3, 2012, at <http://thediplomat.com/2012/05/21/chinas-small-stick-diplomacy/>. See also Jens Kastner, "China's Fishermen Charge Enemy Lines," *Asia Times Online* ([www.atimes.com](http://www.atimes.com)), May 16, 2012.

- Claims of territorial waters and EEZs should be consistent with customary international law of the sea, as reflected in UNCLOS, and must therefore, among other things, derive from land features.
- The United States has a national interest in the preservation of freedom of navigation as recognized in customary international law of the sea and reflected in UNCLOS.
- The United States, like most other countries, believes that coastal states under UNCLOS have the right to regulate economic activities in their EEZs, but do not have the right to regulate foreign military activities in their EEZs.

### **Position Regarding Territorial Disputes in SCS**

On August 3, 2012, the State Department issued the following press statement on the United States position regarding maritime territorial disputes in the SCS:

As a Pacific nation and resident power, the United States has a national interest in the maintenance of peace and stability, respect for international law, freedom of navigation, and unimpeded lawful commerce in the South China Sea. We do not take a position on competing territorial claims over land features and have no territorial ambitions in the South China Sea; however, we believe the nations of the region should work collaboratively and diplomatically to resolve disputes without coercion, without intimidation, without threats, and without the use of force.

We are concerned by the increase in tensions in the South China Sea and are monitoring the situation closely. Recent developments include an uptick in confrontational rhetoric, disagreements over resource exploitation, coercive economic actions, and the incidents around the Scarborough Reef, including the use of barriers to deny access. In particular, China's upgrading of the administrative level of Sansha City and establishment of a new military garrison there covering disputed areas of the South China Sea run counter to collaborative diplomatic efforts to resolve differences and risk further escalating tensions in the region.

The United States urges all parties to take steps to lower tensions in keeping with the spirit of the 1992 ASEAN Declaration on the South China Sea and the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea. We strongly support ASEAN's efforts to build consensus on a principles-based mechanism for managing and preventing disputes. We encourage ASEAN and China to make meaningful progress toward finalizing a comprehensive Code of Conduct in order to establish rules of the road and clear procedures for peacefully addressing disagreements. In this context, the United States endorses the recent ASEAN Six-Point Principles on the South China Sea.

We continue to urge all parties to clarify and pursue their territorial and maritime claims in accordance with international law, including the [United Nations] Law of the Sea Convention. We believe that claimants should explore every diplomatic or other peaceful avenue for resolution, including the use of arbitration or other international legal mechanisms as needed. We also encourage relevant parties to explore new cooperative arrangements for managing the responsible exploitation of resources in the South China Sea.

As President Obama and Secretary Clinton have made clear, Asia-Pacific nations all have a shared stake in ensuring regional stability through cooperation and dialogue. To that end, the United States actively supports ASEAN unity and leadership in regional forums and is undertaking a series of consultations with ASEAN members and other nations in the region

to promote diplomatic solutions and to help reinforce the system of rules, responsibilities and norms that underpins the stability, security and economic dynamism of the Asia-Pacific region.<sup>28</sup>

## **Position Regarding Coastal State's Rights in Its EEZ**

Regarding a coastal state's rights within its EEZ, Scot Marciel, then-Deputy Assistant Secretary, Bureau of East Asian and Pacific Affairs, stated the following as part of his prepared statement for a July 15, 2009, hearing before the East Asian and Pacific Affairs subcommittee of the Senate Foreign Relations Committee:

I would now like to discuss recent incidents involving China and the activities of U.S. vessels in international waters within that country's Exclusive Economic Zone (EEZ). In March 2009, the survey ship USNS Impeccable was conducting routine operations, consistent with international law, in international waters in the South China Sea. Actions taken by Chinese fishing vessels to harass the Impeccable put ships of both sides at risk, interfered with freedom of navigation, and were inconsistent with the obligation for ships at sea to show due regard for the safety of other ships. We immediately protested those actions to the Chinese government, and urged that our differences be resolved through established mechanisms for dialogue—not through ship-to-ship confrontations that put sailors and vessels at risk.

Our concern over that incident centered on China's conception of its legal authority over other countries' vessels operating in its Exclusive Economic Zone (EEZ) and the unsafe way China sought to assert what it considers its maritime rights.

China's view of its rights on this specific point is not supported by international law. We have made that point clearly in discussions with the Chinese and underscored that U.S.

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<sup>28</sup> State Department press statement on South China Sea available online at <http://www.state.gov/r/pa/prs/ps/2012/08/196022.htm>. See also:

- Testimony [prepared statement] of Kurt Campbell, Assistant Secretary of State Bureau of East Asian and Pacific Affairs, U.S. Department of State, Before the Senate Foreign Relations Committee, Subcommittee on East Asian and Pacific Affairs, September 20, 2012, [on] Maritime Territorial Disputes and Sovereignty Issues in Asia, p. 4;
- Secretary of State Clinton's remarks at the ASEAN Regional Forum in Phnom Penh, Cambodia, on July 12, 2012, available online at <http://www.state.gov/secretary/rm/2012/07/194987.htm>;
  - the statement issued by the State Department on July 22, 2011, available online at <http://www.state.gov/secretary/rm/2011/07/168989.htm>;
  - Secretary of State Hillary Clinton's statement of July 22, 2011, available online at <http://translations.state.gov/st/english/texttrans/2011/07/20110723125330su0.9067433.html#axzz26O0bbCWG>;
- Secretary of Defense Robert Gates' remarks at a meeting of defense ministers from ASEAN member states and additional countries on October 12, 2010, , available online at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4700>;
  - Secretary of State Clinton's remarks at the National Convention Center in Hanoi, Vietnam, on July 23, 2010, available online at <http://www.state.gov/secretary/rm/2010/07/145095.htm>;
  - the prepared statement of Scot Marciel, Deputy Assistant Secretary, Bureau of East Asian and Pacific Affairs, before the Subcommittee on East Asian and Pacific Affairs of the Senate Foreign Relations Committee on July 15, 2009, available online at <http://www.state.gov/p/eap/rls/rm/2009/07/126076.htm>.



vessels will continue to operate lawfully in international waters as they have done in the past.<sup>29</sup>

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

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

As previously noted, our military activity in this region is routine and in accordance with customary international law as reflected in the 1982 Law of the Sea Convention.<sup>30</sup>

As suggested by the passage above, the potential stakes for the United States of the EEZ issue are not just regional, but global: If China's position on whether coastal states have a right under UNCLOS to regulate the activities of foreign military forces in their EEZs were to gain greater international acceptance under international law, it could substantially affect U.S. naval operations not only in the SCS and ECS (see **Figure 5** for EEZs in the SCS and ECS), but around the world, which in turn could substantially affect the ability of the United States to use its military forces to defend various U.S. interests overseas.

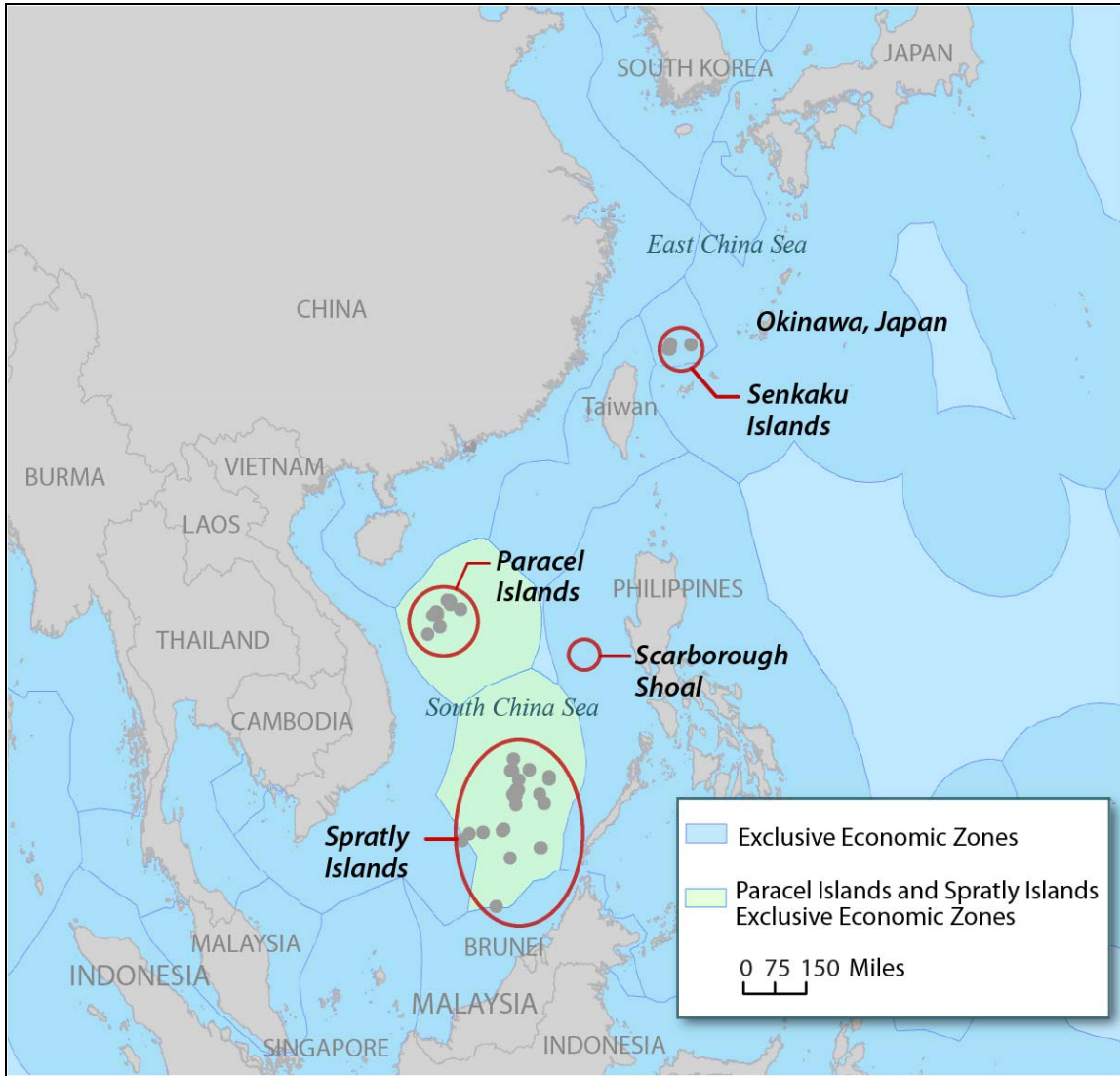
As shown in **Figure 6**, significant portions of the world's oceans are claimable as EEZs, including high-priority U.S. Navy operating areas in the Western Pacific, the Persian Gulf, and the Mediterranean Sea. The legal right of U.S. naval forces to operate freely in EEZ waters is important to their ability to perform many of their missions around the world, because many of those missions are aimed at influencing events ashore, and having to conduct operations from more than 200 miles offshore would reduce the inland reach and responsiveness of ship-based sensors, aircraft, and missiles, and make it more difficult to transport Marines and their equipment from ship to shore. Restrictions on the ability of U.S. naval forces to operate in EEZ waters could potentially require a change in U.S. military strategy or U.S. foreign policy goals.

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<sup>29</sup> [Statement of] Deputy Assistant Secretary Scot Marciel, Bureau of East Asian & Pacific Affairs, U.S. Department of State, before the Subcommittee on East Asian and Pacific Affairs, Committee on Foreign Relations, United States Senate, July 15, 2009, [hearing on] Maritime Issues and Sovereignty Disputes in East Asia, p. 5.

<sup>30</sup> Testimony [prepared statement] of Deputy Assistant Secretary of Defense Robert Scher, Asian and Pacific Security Affairs, Office of the Secretary of Defense, before the Subcommittee on East Asian and Pacific Affairs, Senate Committee on Foreign Relations, United States Senate, July 15, 2009, [hearing on] Maritime Issues and Sovereignty Disputes in East Asia, pp. 3-4.

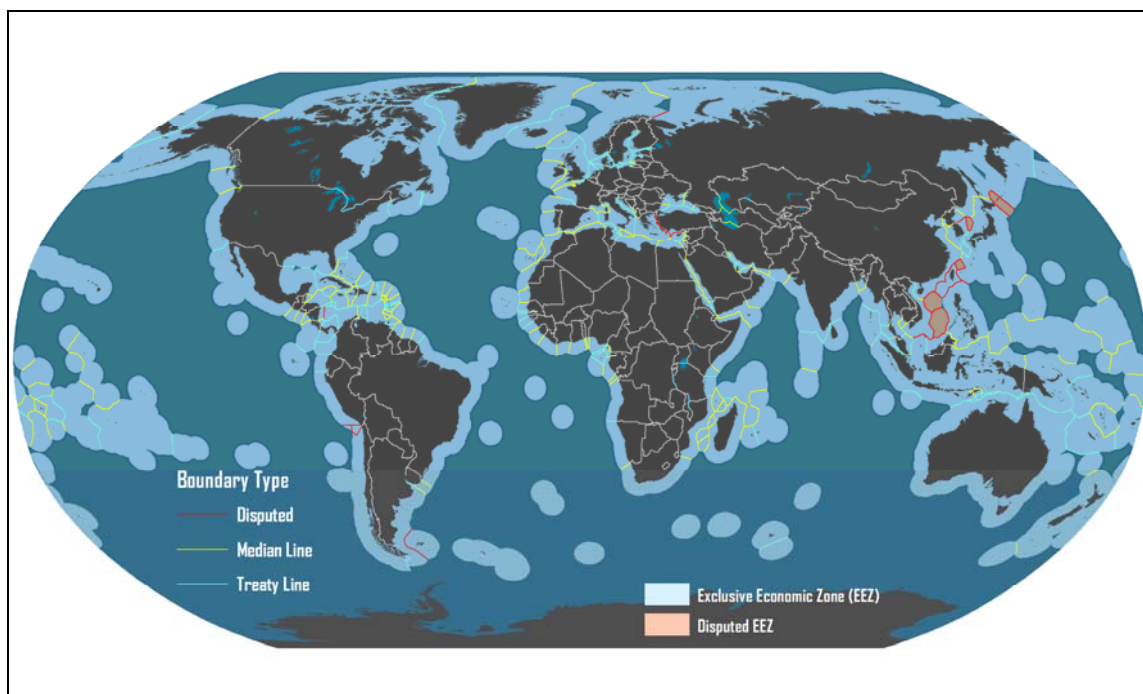
Figure 5. EEZs in South China Sea and East China Sea



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

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

Figure 6. Claimable World EEZs



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

One observer states:

What makes the Chinese case so significant for U.S. interests is that the impact of our dispute with China over characterization of its EEZ could affect how *all* EEZ's are characterized everywhere around the world. By tying their legal perspective to the legal characterization of the EEZ generally, were China's perspective to become accepted, it could affect the way international law views EEZ's everywhere. Thus, inasmuch as EEZs cover more than one third of all the world's oceans and, of course, one hundred percent of all coastal regions, island regions, and many of the world's strategic chokepoints and sea lines of communication, China's legal perspectives undermine the interests of all maritime powers and the United States, as the primary guarantor of maritime security, in particular....

Although American perspectives on the law of the sea are shared by approximately 140 of the current 157 members of UNCLOS,<sup>31</sup> with the remainder agreeing with China to one degree or another that as coastal states they have the right to impose legal restrictions on foreign military activities in their EEZ's, we cannot take the current state for granted. Indeed, the Chinese perspective holds some attraction even among China's neighbors. Despite the fact that their governments remain among those that are on record as accepting traditional military freedoms in the EEZ, representatives from the Philippines, Indonesia, and other

<sup>31</sup> The figure of 157 was the number of members when this passage was written; the total subsequently grew to 162 as of September 2012. This author appears to have identified approximately 17 members of UNCLOS who do not share U.S. perspectives on the law of the sea. As noted earlier, the U.S. Navy lists 27 countries with restrictions inconsistent with UNCLOS that would limit the exercise of high seas freedoms by foreign navies beyond 12 nautical miles from the coast.

regional states sometimes quietly express general support for the Chinese perspective, if for no other reason than it could help them hold rising Chinese naval power at bay....

An arc of anti-access is developing across the southern Asian landmass from the Arabian Sea to the Sea of Japan. Of the handful of remaining states that officially maintain legal perspectives that challenge traditional military freedoms of navigation in and above the EEZ, a concentration of these states is situated along the southern coasts of Asia astride some of the most critically important sea lines of communication in the world. In this region, Iran, Pakistan, India, Bangladesh, Burma, Malaysia, China and North Korea all maintain laws that assert some right of control over foreign military activities in the EEZ. Vietnam too can be added to this list, although it has chosen to draw grossly excessive baselines, rather than to assert EEZ control as its anti-access legal method of choice. This is in addition to the occasional tacit approval for anti-access perspectives sometimes expressed by scholars and officials from the few remaining regional states not already listed here. Some of these countries have been building strong regional navies, while others have been actively seeking nuclear capacity or conventional anti-access technologies similar to China's in order to provide teeth to their legal perspectives.<sup>32</sup>

Some observers, in commenting on China's resistance to U.S. military survey and surveillance operations in China's EEZ, have argued that the United States would similarly dislike it if China or some other country were to conduct military survey or surveillance operations within the U.S. EEZ. Skeptics of this view might argue that U.S. policy accepts the right of other countries to operate their military forces freely in waters outside the 12-mile U.S. territorial waters limit, and that the United States during the Cold War acted in accordance with this position by not interfering with Soviet ships (including intelligence-gathering vessels known as AGIs<sup>33</sup>) that operated close to the United States and Soviet bombers that periodically flew close to U.S. airspace. The U.S. Navy states that

When the commonly recognized outer limit of the territorial sea under international law was three nautical miles, the United States recognized the right of other states, including the Soviet Union, to exercise high seas freedoms, including surveillance and other military operations, beyond that limit. The 1982 Law of the Sea Convention moved the outer limit of the territorial sea to twelve nautical miles. In 1983, President Reagan declared that the United States would accept the balance of the interests relating to the traditional uses of the oceans reflected in the 1982 Convention and would act in accordance with those provisions

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<sup>32</sup> United States Senate, Committee on Foreign Relations, Committee on Foreign Relations, Hearing on Maritime Disputes and Sovereignty Issues in East Asia, July 15, 2009, Testimony of Peter Dutton, Associate Professor, China Maritime Studies Institute, U.S. Naval War College, pp. 2 and 6-7

<sup>33</sup> AGI was a U.S. Navy classification for the Soviet vessels in question in which the A meant auxiliary ship, the G meant miscellaneous purpose, and the I meant that the miscellaneous purpose was intelligence gathering. One observer states:

During the Cold War it was hard for an American task force of any consequence to leave port without a Soviet "AGI" in trail. These souped-up fishing trawlers would shadow U.S. task forces, joining up just outside U.S. territorial waters. So ubiquitous were they that naval officers joked about assigning the AGI a station in the formation, letting it follow along—as it would anyway—without obstructing fleet operations.

AGIs were configured not just to cast nets, but to track ship movements, gather electronic intelligence, and observe the tactics, techniques, and procedures by which American fleets transact business in great waters.

(James R. Holmes, "China's Small Stick Diplomacy," *The Diplomat* (<http://thediplomat.com>), May 21, 2012, accessed October 3, 2012, at <http://thediplomat.com/2012/05/21/chinas-small-stick-diplomacy/>)

in exercising its navigational and overflight rights as long as other states did likewise. He further proclaimed that all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight, in the Exclusive Economic Zone he established for the United States consistent with the 1982 Convention.<sup>34</sup>

## **Broader Regional Context**

Maritime territorial and EEZ disputes involving China occur in a broader regional context formed by several other elements, including but not limited to the following:

- the growing economic importance of the Asia-Pacific region in general;<sup>35</sup>
- the growing size and importance of China's economy in particular;<sup>36</sup>
- the growing economies of Southeast Asian countries, and the development of regional multilateral bodies such as ASEAN;<sup>37</sup>
- potential new trade agreements with Asia-Pacific countries, such as the Trans-Pacific Partnership (TPP);<sup>38</sup>
- China's military modernization effort;<sup>39</sup>
- an announced U.S. strategic "rebalancing" toward the Asia-Pacific region that includes military, diplomatic, and economic initiatives;<sup>40</sup>
- significant issues other than maritime territorial and EEZ disputes that influence U.S. relations with China,<sup>41</sup> including U.S. relations with arms sales to Taiwan;<sup>42</sup>

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<sup>34</sup> Navy Office of Legislative Affairs e-mail to CRS dated September 4, 2012.

<sup>35</sup> For further discussion, see CRS Report R41969, *Rising Economic Powers and the Global Economy: Trends and Issues for Congress*, by Raymond J. Ahearn.

<sup>36</sup> For further discussion, see CRS Report RL33534, *China's Economic Conditions*, by Wayne M. Morrison.

<sup>37</sup> For further discussion, see CRS Report R40933, *United States Relations with the Association of Southeast Asian Nations (ASEAN)*, coordinated by Thomas Lum; and CRS Report R40583, *U.S. Accession to the Association of Southeast Asian Nations' Treaty of Amity and Cooperation (TAC)*, by Mark E. Manyin, Michael John Garcia, and Wayne M. Morrison.

<sup>38</sup> For further discussion, see CRS Report R42694, *The Trans-Pacific Partnership Negotiations and Issues for Congress*, coordinated by Ian F. Fergusson.

<sup>39</sup> For further discussion, see CRS Report RL33153, *China Naval Modernization: Implications for U.S. Navy Capabilities—Background and Issues for Congress*, by Ronald O'Rourke.

<sup>40</sup> For further discussion, see CRS Report R42448, *Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia*, coordinated by Mark E. Manyin. See also CRS Report R42146, *In Brief: Assessing DOD's New Strategic Guidance*, by Catherine Dale and Pat Towell; and CRS Report RS22570, *Guam: U.S. Defense Deployments*, by Shirley A. Kan.

<sup>41</sup> For further discussion, see, for example, CRS Report R41108, *U.S.-China Relations: Policy Issues*, by Susan V. Lawrence and David MacDonald; CRS Report RL33536, *China-U.S. Trade Issues*, by Wayne M. Morrison; CRS Report RL32496, *U.S.-China Military Contacts: Issues for Congress*, by Shirley A. Kan; and CRS Report RL34729, *Human Rights in China and U.S. Policy*, by Thomas Lum.

<sup>42</sup> For further discussion, see CRS Report R41952, *U.S.-Taiwan Relationship: Overview of Policy Issues*, by Shirley A. Kan and Wayne M. Morrison; and CRS Report RL30957, *Taiwan: Major U.S. Arms Sales Since 1990*, by Shirley A. Kan.

- concerns over North Korea's nuclear weapon and other military programs,<sup>43</sup> and
- political, economic, and security issues other than territorial and EEZ disputes that influence U.S. relations with other countries in the region, including Japan, South Korea, the Philippines, Vietnam, Singapore, and Australia.<sup>44</sup>

## Issues for Congress

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

### Risk of United States Being Drawn Into a Crisis or Conflict

One potential issue for Congress concerns the risk that the United States might be drawn into a crisis or conflict over a territorial dispute involving China, particularly since the United States has bilateral defense treaties with Japan and the Philippines. U.S. officials, concerned about the risk that a misunderstanding or miscalculation might cause a dispute over island territories to escalate into a conflict, have urged parties involved in the disputes to exercise restraint and avoid taking provocative actions.<sup>45</sup> A March 22, 2012, press report stated:

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<sup>43</sup> For further discussion, see CRS Report R41259, *North Korea: U.S. Relations, Nuclear Diplomacy, and Internal Situation*, by Emma Chanlett-Avery and Ian E. Rinehart, and CRS Report RL34256, *North Korea's Nuclear Weapons: Technical Issues*, by Mary Beth Nikitin.

<sup>44</sup> For further discussion, see, for example, CRS Report RL33436, *Japan-U.S. Relations: Issues for Congress*, coordinated by Emma Chanlett-Avery; CRS Report R41481, *U.S.-South Korea Relations*, coordinated by Mark E. Manyin; CRS Report RL33233, *The Republic of the Philippines and U.S. Interests*, by Thomas Lum; CRS Report R40208, *U.S.-Vietnam Relations in 2012: Current Issues and Implications for U.S. Policy*, by Mark E. Manyin; CRS Report RS20490, *Singapore: Background and U.S. Relations*, by Emma Chanlett-Avery; and CRS Report RL33010, *Australia: Background and U.S. Relations*, by Bruce Vaughn.

<sup>45</sup> For example, on September 15, 2012, while en route to Tokyo, Secretary of Defense Leon Panetta held a press briefing during which the following exchange occurred:

QUESTION: You know, and the question and your comments on the territorial disputes and bringing this up with China.

As—as you—I know the United States urges a peaceful resolution in Egypt (inaudible) size, [sic: East China Sea?] but as you know, the U.S. does have mutual defense (inaudible) with Japan and the Philippines in particular.

Are you increasingly concerned that the United States could get dragged into some kind of military or security conflict given the events of recent months in the Southside (inaudible) [sic: South China Sea?]?

SECRETARY. PANETTA: Well, you know, I—I—I am concerned that—that—that, you know, when these—these countries engage in provocations of one kind or another over these various islands that it raises the possibility that a misjudgment on—on one side or the other could result in—in violence and could result in conflict and that conflict would then, you know, have the potential of expanding.

So it's for that reason that both Secretary Clinton and myself will strongly urge that—that these countries, rather than engaging in that kind of provocative behavior, engage in an effort to find ways to peacefully resolve these kinds of issues.

And we're going to, you know, we're going to face more of this, countries are searching for resources, there's going to be questions raised as to who has jurisdiction over these areas. There has got to be a peaceful way to resolve these issues.

And to the credit of the Asian nations, they developed a code of conduct to try to provide a format

(continued...)

“Since there are no conventional arms-control regimes, or pre-established frameworks designed to manage escalation, the real possibility exists for conflict within the maritime domain that is not at the time, the place, or for the duration for our choosing,” said retired Adm. Patrick Walsh, who left his job as Pacific Fleet commander two months ago.

“The absence of a regime or framework to de-tension the area also creates equal probability for conflict that is regional in context, extending beyond the borders of the Taiwan Strait involving U.S. treaty allies, regional partners as well as multinational commercial interests.”<sup>46</sup>

A September 17, 2012, press report stated:

Although the Obama administration has been eager to bolster security cooperation with Manila, U.S. officials do not want to be forced to become militarily involved in obscure territorial feuds.

“I’m pretty frank with people: I don’t think that we’d allow the U.S. to get dragged into a conflict over fish or over a rock,” said a senior U.S. military official, speaking on the condition of anonymity to discuss deliberations within the Obama administration. “Having allies that we have defense treaties with, not allowing them to drag us into a situation over a rock dispute, is something I think we’re pretty all well aligned on.”<sup>47</sup>

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

The 1960 U.S-Japan treaty on mutual cooperation and security<sup>48</sup> states in Article V that

Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.

The United States has reaffirmed on a number of occasions over the years that since the Senkaku Islands are under the administration of Japan, they are included in the territories referred to in Article V of the treaty. (At the same time, the United States, noting the difference between administration and sovereignty, has noted that such affirmations do not prejudice the U.S. position of neutrality regarding the outcome of the dispute between China, Taiwan, and Japan regarding who has sovereignty over the islands.)<sup>49</sup> Some observers, while acknowledging U.S.

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(...continued)

for that. I will—I will strongly urge the Chinese and others to participate in an effort to not only adhere to that code, but find a way to be able to enforce it effectively.

(Transcript of press briefing, available online at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5113>. See also Wendell Minnick, “As Bickering Continues Over Disputed Islands, Experts Plot 5 Likely Scenarios,” *Defense News*, September 24, 2012: 32.)

<sup>46</sup> Bill Gertz, “Beijing’s Dangerous Game,” *Washington Free Beacon* (<http://freebeacon.com>), March 22, 2012, accessed October 3, 2012, at <http://freebeacon.com/beijings-dangerous-game/>.

<sup>47</sup> Craig Whitlock, “Panetta To Urge China, Japan To Ease Tensions,” *Washington Post*, September 17, 2012: 6.

<sup>48</sup> Treaty of mutual cooperation and security, signed January 19, 1960, entered into force June 23, 1960, 11 UST 1632; TIAS 4509; 373 UNTS.

<sup>49</sup> For example, at a September 20, 2012, hearing before the East Asian and Pacific Affairs subcommittee of the Senate Foreign Relations Committee, the following exchange occurred:

SENATOR JIM WEBB: In 2004 the Bush administration stated that the U.S.-Japan Security Treaty (continued...)

affirmations that the Senkaku Islands are covered under Article V, have raised questions regarding the scope of potential U.S. actions under Article V. One observer, for example, states:

Despite the US rhetoric that the alliance applies to “all areas under the Japanese administration,” Japan sees a loophole in the US position. Because Japan has been asked by the United States to shoulder “primary responsibility” for its territorial defense, a growing number of Japanese believe that the US commitment to retaking the Senkakus if Japan loses administrative control to an invasion by China would be unavailable....

The US stance on the Senkakus can simply but specifically be phrased against any attempt by military means to alter the status quo of Japanese administration of the Senkakus...

US policy on the Senkaku dispute is perceived as ambiguous by its primary ally, Japan. This perceived ambiguity needs to be clarified to keep the US-Japan alliance solid.<sup>50</sup>

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(...continued)

extended to the Senkakus. Deputy Secretary Armitage made a comment “there is no question with the United States that the Japan-U.S. Security Treaty obligation extends to the Senkakus.” Secretary Clinton, as I mentioned in my opening comments, reiterated this position in 2010. I assume this is still our official position on the U.S.-Japan Security Treaty.

CAMPBELL: Yes, Senator. In fact I believe the first time this was articulated as the U.S. position was actually in 1997; much more forcefully, clearly, firmly by Deputy Secretary Armitage; Secretary Clinton, again, in 2010; and three days ago by Secretary Panetta in Tokyo.

WEBB: Last week the Japanese government announced its intention to purchase land on the Senkaku Islands. And again, as I mentioned in my opening statement, I think there has been some misinterpretation internationally about what their intention was as opposed to sovereignty, administration and land ownership on top of something. Has the administration given a view on the legal—legal impact of this type of a purchase, and whether it actually affects sovereignty?

CAMPBELL: Senator, we have not. We have stated very clearly that we want this issue to be resolved peacefully through dialogue between Japan and China. Secretary Panetta and Secretary Clinton have stated this very clearly.

We are concerned, as you indicated by recent demonstrations, and frankly the potential for the partnership between Japan and China to fray substantially in this environment. That is not in our strategic interests and clearly would undermine the peace and stability in Asia/Pacific as a whole. So, we very much want a process of reengagement dialogue to continue and to build between Tokyo and Beijing.

Our position is clear. We do not take a position on the ultimate sovereignty of these islands. We do acknowledge clearly through the process that you have set out, Senator, that Japan maintains effective administration of control. And third, that as such this falls clearly under Article V of the Security Treaty. But it is also the case that we believe that in the current environment we want to focus more on issues associated with the maintenance of peace and stability, and less on the particular details of this very complex and challenging matter.

(Transcript of hearing.)

Similarly, at a State Department press briefing on August 16, 2010, Assistant Secretary of State Philip J. Crowley stated: “The Senkaku Islands are under the administrative control of the Government of Japan. Article 5 states that the treaty applies to the territories under the administration of Japan. So that if you ask today would the treaty apply to the Senkaku Islands, the answer is yes.” (Transcript of press briefing available online at <http://www.state.gov/r/pa/prs/dpb/2010/08/146001.htm>.)

<sup>50</sup> Yoichiro Sato, “The Senkaku Dispute and the US-Japan Security Treaty,” PacNet #57 (Pacific Forum CSIS, Honolulu, Hawaii), September 10, 2012, accessed online October 2, 2012 at <http://csis.org/files/publication/Pac1257.pdf>.



## **U.S.-Philippines Mutual Defense Treaty<sup>51</sup>**

The 1951 U.S.-Philippines mutual defense treaty<sup>52</sup> states in Article IV that

Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.

Article V states that

For the purpose of Article IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific.

The United States has reaffirmed on a number of occasions over the years its obligations under the U.S.-Philippines mutual defense treaty.<sup>53</sup> On May 9, 2012, Filipino Foreign Affairs Secretary Albert F. del Rosario issued a statement providing the Philippine perspective regarding the treaty's application to territorial disputes in the SCS.<sup>54</sup> The following day, at a State Department press briefing, the following exchange occurred:

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<sup>51</sup> For additional discussion of U.S. obligations under the U.S.-Philippines mutual defense treaty, see CRS Report RL33233, *The Republic of the Philippines and U.S. Interests*, by Thomas Lum.

<sup>52</sup> Mutual defense treaty, signed August 30, 1951, entered into force August 27, 1952, 3 UST 3947, TIAS 2529, 177 UNTS 133.

<sup>53</sup> See, for example, the Joint Statement of the United States-Philippines Ministerial Dialogue of April 30, 2012, available online at <http://www.state.gov/r/pa/prs/ps/2012/04/188977.htm>, which states in part that “The United States and the Republic of the Philippines reaffirm our shared obligations under the Mutual Defense Treaty, which remains the foundation of the U.S.-Philippines security relationship.”

<sup>54</sup> The statement stated in part (underlining as in the original):

As stated in the MDT's [Mutual Defense Treaty's] preamble, both the Philippines and the U.S. desire to publicly declare, through the MDT, their sense of unity and common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific Area. (refer to the 3<sup>rd</sup> paragraph of the MDT's preamble.)...

On January 6, 1979, U.S. Secretary of State Cyrus Vance in his letter to Philippine Foreign Secretary Carlos P. Romulo, cited Article V of the MDT and stated that “... as provided in Article V, an attack on Philippine armed forces, public vessels or aircraft in the Pacific would not have to occur within the metropolitan territory of the Philippines or island territories under its jurisdiction in the Pacific in order to come within the definition of Pacific area in Article V.”....

On May 24, 1999, US Ambassador to the Philippines Thomas C. Hubbard wrote a letter to Foreign Secretary Domingo L. Siazon affirming that “the US Government stands by its statements in the Vance-Romulo letter of January 6, 1979.” Moreover, in the same letter, Amb. Hubbard cited Defense Secretary William Cohen's statement that “the US considers the South China Sea to be part of the Pacific Area.”....

It is important to note that, even in the absence of an actual armed attack against either the Philippines and the U.S., Article III of the MDT provides that the Philippines and the US, “through their Foreign Ministers or their deputies, will consult together from time to time regarding the implementation of this Treaty and whenever in the opinion of either of them the territorial integrity, political independence or security of either of the Parties is threatened by external armed attack in the Pacific.”

(Statement of Secretary del Rosario regarding the Philippines-U.S. Mutual Defense Treaty, May 9, 2012, accessed September 20, 2012, at <http://www.gov.ph/2012/05/09/statement-of-secretary-del-rosario>)

(continued...)

QUESTION: The Philippines said yesterday that Secretary Clinton and Secretary Panetta has pledged to honor the 1951 Mutual Defense Treaty, if Philippines were under attack in South China Sea, the U.S. will—would protect them from attack. Is this the case?

MS. [VICTORIA] NULAND [STATE DEPARTMENT SPOKESPERSON]: Well, first, with regard to the South China Sea in general and the ongoing dispute over this issue, as the Secretary has said many times—we'll say it again—we urge that diplomatic efforts be used to resolve the current situation. We support any kind of collaborative, diplomatic process by the claimants to resolve the disputes without any kind of coercion, and in that regard, we urge restraint and we discourage any kind of escalation of tensions. We opposed the threat or use of force in any way.

That said, in the context of the visit here, as we always do when we meet with Philippine leaders, we reconfirmed our commitment to the Mutual Defense Treaty.

QUESTION: So if the U.S.—

MS. NULAND: I'm not going to get into any hypotheticals. That was a very good effort though.<sup>55</sup>

At a September 20, 2012, hearing before the East Asian and Pacific Affairs subcommittee of the Senate Foreign Relations Committee, Senator Richard Lugar asked Kurt Campbell, the Assistant Secretary of State, Bureau of East Asian and Pacific Affairs, "... is there a common understanding now of United States obligations under the United States-Philippine Mutual Defense Treaty in Manila and in Washington. And how do these understandings relate to the South China Sea? And are we (inaudible) on this, both in our dialogue with the Philippines as well as with ourselves?" Campbell replied in part that

there is a critical defense component to it [the U.S.-Philippines relationship] as well that you articulated that you have seen that we are working on in terms of our strategic dialogues. And I think more will be clear as we go forward in the months and years to come....

Now, we stand by and fully honor our MDT commitments....

We have a much more effective set of cooperation on maritime domain awareness. We are shifting some of our military collaboration, which in the past has been primarily involved in

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(...continued)

rosario-regarding-the-philippines-u-s-mutual-defense-treaty-may-9-2012/.)

<sup>55</sup> Transcript of press briefing, available online at <http://www.state.gov/r/pa/prs/dpb/2012/05/189645.htm>. Similarly, in remarks to the press by Secretary of State Hillary Clinton and Philippines Foreign Secretary Albert del Rosario on June 23, 2011, the following exchange occurred:

QUESTION: Good afternoon, Madam Secretary, Secretary del Rosario. From ABS-CBN [a media organization in the Philippines]. The Spratly issue is what preoccupies many Filipinos right now as far as foreign affairs is concerned. And one question that keeps cropping up is: What will America do if China attacks Filipino forces in the Spratly Islands?...

SECRETARY CLINTON: Well, as to your first question, the United States honors our Mutual Defense Treaty and our strategic alliance with the Philippines. I'm not going to discuss hypothetical events, but I want to underscore our commitment to the defense of the Philippines....

Transcript of Remarks With Philippines Foreign Secretary Albert del Rosario After Their Meeting, June 23, 2011, available online at <http://www.state.gov/secretary/rm/2011/06/166868.htm>.

critical issues in Mindanao. And we're focused more now on issues associated with naval coordination cooperation.

We've just recently inaugurated the National Coast Watch System. And we're looking to articulate a number of new areas for diplomacy going forward. And I would say that behind the scenes our diplomacy with the Philippines in the last several months have been—has been extraordinarily intense, and we will continue with that process going forward.<sup>56</sup>

One observer states:

The United States could be drawn into a China-Philippines conflict because of its 1951 Mutual Defense Treaty with the Philippines.... American officials insist that Washington does not take sides in the territorial dispute in the South China Sea and refuse to comment on how the United States might respond to Chinese aggression in contested waters. Nevertheless, an apparent gap exists between American views of U.S. obligations and Manila's expectations. In mid-June 2011, a Filipino presidential spokesperson stated that in the event of armed conflict with China, Manila expected the United States would come to its aid. Statements by senior U.S. officials may have inadvertently led Manila to conclude that the United States would provide military assistance if China attacked Filipino forces in the disputed Spratly Islands.

With improving political and military ties between Manila and Washington, including a pending agreement to expand U.S. access to Filipino ports and airfields to refuel and service its warships and planes, the United States would have a great deal at stake in a China-Philippines contingency. Failure to respond would not only set back U.S. relations with the Philippines but would also potentially undermine U.S. credibility in the region with its allies and partners more broadly. A U.S. decision to dispatch naval ships to the area, however, would risk a U.S.-China naval confrontation....

...Washington should clarify in its respective dialogues with Manila and Hanoi the extent of the United States' obligations and commitments as well as the limits of likely U.S. involvement in future disputes. Clarity is necessary both to avoid a scenario in which regional actors are emboldened to aggressively confront China and to avert a setback to U.S. relations with regional nations due to perceptions of unfulfilled expectations.<sup>57</sup>

## **Potential Oversight Questions for Congress**

Potential oversight questions for Congress include the following:

- How much risk is there of the United States being drawn into a crisis or conflict over maritime territorial disputes involving China in the SCS and ECS, particularly those involving Japan and the Philippines, with whom the United States has bilateral defense treaties?
- Have U.S. officials taken appropriate and sufficient steps to help reduce the risk of maritime territorial disputes in the SCS and ECS escalating into conflicts?

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<sup>56</sup> Transcript of hearing.

<sup>57</sup> Bonnie S. Glaser, *Armed Clash in the South China Sea*, Council on Foreign Relations, Center for Preventive Action, April 2012, pp. 2, 8.

- Do the United States and Japan have a common understanding of potential U.S. actions under Article IV of the U.S.-Japan Treaty on Mutual Cooperation and Security in the event of a crisis or conflict over the Senkaku Islands? What steps has the United States taken to ensure that the two countries share a common understanding?
- Do the United States and the Philippines have a common understanding of how the 1951 U.S.-Philippines mutual defense treaty applies to maritime territories in the SCS that are claimed by both China and the Philippines, and of potential U.S. actions under Article IV of the treaty in the event of a crisis or conflict over the territories? What steps has the United States taken to ensure that the two countries share a common understanding?
- Aside from public statements, what has the United States communicated to China regarding potential U.S. actions under the two treaties in connection with maritime territorial disputes in the SCS and ECS?
- Has the United States correctly balanced ambiguity and explicitness in its communications to various parties regarding potential U.S. actions under the two defense treaties?
- How do the two treaties affect the behavior of Japan, the Philippines, and China in managing their territorial disputes? To what extent, for example, would they help Japan or the Philippines resist potential Chinese attempts to resolve the disputes through intimidation, or, alternatively, encourage risk-taking or brinkmanship behavior by Japan or the Philippines in their dealings with China on the disputes? To what extent do they deter or limit Chinese assertiveness or aggressiveness in their dealings with Japan the Philippines on the disputes?
- Has the Department of Defense (DOD) adequately incorporated into its planning crisis and conflict scenarios arising from maritime territorial disputes in the SCS and ECS that fall under the terms of the two treaties?<sup>58</sup>

## **Risk of U.S.-China Incidents in China's EEZ**

Another potential oversight issue for Congress concerns the risk of future incidents between U.S. and Chinese ships and aircraft arising from U.S. military survey and surveillance activities in the EEZ that China unequivocally derives from its mainland coast. As mentioned earlier, the dispute between China and other countries, particularly the United States, over whether China has a right under UNCLOS to regulate the activities of foreign military forces operating within its EEZ appears to be at the heart of multiple incidents between Chinese and U.S. ships and aircraft in China's EEZ in 2001, 2002, and 2009.

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<sup>58</sup> At a September 20, 2012, hearing before the East Asian and Pacific Affairs subcommittee of the Senate Foreign Relations Committee, Kurt Campbell, the Assistant Secretary of State, Bureau of East Asian and Pacific Affairs, stated in his prepared remarks: "We have also coordinated closely with our colleagues at the Department of Defense to ensure that our South China Sea diplomacy is supported by an effective and well-calibrated defense strategy." (Testimony [prepared statement] of Kurt Campbell, Assistant Secretary of State Bureau of East Asian and Pacific Affairs, U.S. Department of State, Before the Senate Foreign Relations Committee, Subcommittee on East Asian and Pacific Affairs, September 20, 2012, [on] Maritime Territorial Disputes and Sovereignty Issues in Asia, p. 5. Campbell's prepared statement did not elaborate on how U.S. defense strategy supports U.S. diplomacy toward the South China Sea.)

## **Option of Reducing U.S. Survey and Surveillance Activities in China's EEZ**

One option for reducing the risk of incidents between U.S. and Chinese ships and aircraft in China's EEZ would be to reduce U.S. military survey and surveillance activities conducted there. Supporters of this option might argue one or more of the following:

- There are alternative ways to collect some of the information collected through these activities.
- Information collected through these activities is not worth the risk they create of a U.S.-Chinese incident at sea that could lead to a larger U.S.-Chinese crisis.<sup>59</sup>
- The 2001 aircraft collision leading to the emergency landing of the damaged U.S. EP-3 electronic surveillance aircraft on China's Hainan island caused a serious incident in U.S.-Chinese relations, and may have led to an intelligence loss because of the opportunity it provided for China to inspect the EP-3 before it was transported back to the United States.<sup>60</sup>

Opponents of this option might argue one or more of the following:

- Although there are alternative ways to collect some of the information, they are less effective or incapable of collecting certain types of information.
- Reducing U.S. military survey and surveillance activities conducted in China's EEZ would reduce U.S. military preparedness for conducting potential combat operations in the region.<sup>61</sup>
- Reducing U.S. military survey and surveillance activities conducted in China's EEZ could be viewed as rewarding China for resisting those operations, which could encourage further Chinese resistance, or as acceding to China's position on whether coastal states have a right under UNCLOS to regulate the activities of foreign military forces in their EEZs, which could encourage greater international acceptance of China's position, or as signaling a weakening U.S. security commitment to the region.<sup>62</sup>

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<sup>59</sup> One observer, for example, states that

the United States should review its surveillance and reconnaissance activities in the air and waters bordering China's twelve-mile territorial sea and assess the feasibility of reducing their frequency or conducting the operations at a greater distance. Any modification of U.S. close-in surveillance and reconnaissance activities requires assessment of whether those sources are uniquely valuable or other intelligence collection platforms can provide sufficient information about Chinese military developments. The United States should not take such a step unilaterally; it should seek to obtain a concession from Beijing in return lest China interpret the action as evidence of U.S. decline and weakness.

(Bonnie S. Glaser, *Armed Clash in the South China Sea*, Council on Foreign Relations, Center for Preventive Action, April 2012, p. 8.)

<sup>60</sup> For a discussion, see, for example, page 28 of CRS Report RL30946, *China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications*, by Shirley A. Kan et al.

<sup>61</sup> For a discussion of the value of maritime surveillance operations in preparing for potential combat operations, see, for example, pages 29-31 of CRS Report RL30946, *China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications*, by Shirley A. Kan et al.

<sup>62</sup> One observer, for example, states:

The U.S. Navy should continue conducting military activities in China's EEZ and in other foreign (continued...)

## **Option of Entering Into a U.S.-China Incidents-at-Sea (INCSEA) Agreement**

Another option for reducing the risk of incidents between U.S. and Chinese ships and aircraft in China's EEZ would be to enter into an agreement with China regulating the behavior of U.S. Chinese ships and aircraft that are operating in proximity with one another. Such an agreement could be broadly similar to the May 1972 U.S.-Soviet agreement on the prevention of incidents on and over the high seas, commonly known as the Incidents-at-Sea (INCSEA) agreement.<sup>63</sup>

Supporters of this option could argue one or more of the following:

- The May 1972 U.S.-Soviet INCSEA agreement is regarded by observers as having been successful in helping to reduce the risk of incidents between U.S. and Soviet ships and aircraft during the Cold War.
- A broadly similar agreement with China could reduce the risk of incidents involving U.S. and Chinese ships and aircraft, and could be useful in that regard as a confidence-building measure.
- The terms of such an agreement could be drafted to be consistent with the U.S. position on whether a coastal state has the right to regulate foreign military forces operating in their EEZs.

Opponents of this option could argue one or more of the following:

- The May 1972 U.S.-Soviet INCSEA agreement reflected the strategic nuclear arms competition then underway between the United States and the Soviet Union, and the consequent desire to take steps to prevent incidents that could escalate to a strategic nuclear war. In contrast, the United States and China are not involved in an equivalent strategic nuclear arms competition.
- China and the United States are already parties to the October 1972 multilateral convention on the international regulations for preventing collisions at sea (commonly known as the COLREGs or the "rules of the road"),<sup>64</sup> as well as the

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(...continued)

EEZ's where our military and national security interests require us to conduct those activities. Not only are these activities permissible under international law, but they support military training requirements and assist in building situational awareness of other nations' military and maritime law enforcement activities in order to help determine military intent. Additionally, they serve the purpose of challenging excessive maritime claims that have the potential of undermining freedom of navigation. Failure to operate in areas where we have a legal right to operate would set an adverse precedent that could impact freedom of navigation worldwide. These military activities should be conducted routinely, and without advance notice or consent, in accordance with international law.

(China's Active Defense Strategy and its Regional Impact, Prepared statement by Stacy A. Pedrozo, CAPT, JAGC, USN1, U.S. Navy Military Fellow, Council on Foreign Relations, Before the U.S.-China Economic & Security Review Commission, United States House of Representatives, First Session, 112<sup>th</sup> Congress, January 27, 2011, pp. 8-9. (The title page mistakenly shows a date of January 27, 2010.)

<sup>63</sup> 23 UST 1168; TIAS 7379; UNTS 151. The agreement was signed at Moscow on May 25, 1972, and entered into force the same day.

<sup>64</sup> 28 UST 3459; TIAS 8587. The treaty was done at London October 20, 1972, and entered into force July 15, 1977. A summary of the agreement is available online at <http://www.imo.org/about/conventions/listofconventions/pages/colreg.aspx>.

multilateral Code for Unalerted Encounters at Sea (CUES),<sup>65</sup> a voluntary code produced by the Western Pacific Naval Symposium (WPNS),<sup>66</sup> and the 1998 bilateral U.S.-Chinese Military Maritime Consultative Agreement (MMCA), which is aimed at reducing the chances of confrontation between the two countries' militaries at sea and in the air.<sup>67</sup>

- Chinese vessels violated both the COLREGs and Article 94 of UNCLOS in past incidents with U.S. ships.<sup>68</sup> Consequently, signing a new INCSEA-like agreement with China could be viewed as rewarding China for those violations and be of questionable value in preventing future U.S.-Chinese incidents at sea.<sup>69</sup>

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<sup>65</sup> For more on CUES, see Mark E. Redden and Phillip C. Saunders, *Managing Sino-U.S. Air and Naval Interactions: Cold War Lessons and New Avenues of Approach*, Washington, Center for the Study of Chinese Military Affairs, Institute for National Strategic Studies, National Defense University, September 2012, pp. 8-9. The text of the 2003 CUES Review Supplement was accessed October 1, 2012, at <http://navy.mil.my/wpns2012/images/stories/dokumen/WPNS%202012%20PRESENTATION%20FOLDER/ACTION%20ITEMS%20WPNS%20WORKSHOP%202012/CUES.PDF>.

<sup>66</sup> As described in one press release, the WPNS

The Western Pacific Naval Symposium (WPNS) comprises navies whose countries border the Pacific Ocean region. It was inaugurated in 1988 after navy chiefs attending the International Seapower Symposium in 1987 agreed to establish a forum where leaders of regional navies could meet to discuss cooperative initiatives. Under the WPNS, member countries convene biennially to discuss regional and global maritime issues.

As of October 2010, WPNS membership stands at 20 members and four observers. They are:

Members: Australia, Brunei, Cambodia, Canada, Chile, France, Indonesia, Japan, Malaysia, New Zealand, Papua New Guinea, People's Republic of China, Philippines, Republic of Korea, Russia, Singapore, Thailand, Tonga, United States of America and Vietnam

Observers: Bangladesh, India, Mexico and Peru

(Singapore Ministry of Defense, "Fact Sheet: Background of the Western Pacific Naval Symposium, MCMEX, DIVEX and NMS," updated March 25, 2011, accessed October 1, 2012 at [http://www.mindef.gov.sg/imindef/news\\_and\\_events/nr/2011/mar/25mar11\\_nr/25mar11\\_fs.html](http://www.mindef.gov.sg/imindef/news_and_events/nr/2011/mar/25mar11_nr/25mar11_fs.html). See also the website for the 2012 WPNS at <http://www.navy.mil.my/wpns2012/>.)

<sup>67</sup> For more on the MMCA, see CRS Report RL32496, *U.S.-China Military Contacts: Issues for Congress*, by Shirley A. Kan.

<sup>68</sup> For a detailed argument that the behavior of Chinese ships in the March 2009 U.S.-Chinese incident at sea in China's EEZ violated the COLREGs and Article 94 of UNCLOS, see Jonathan G. Odom, "The True 'Lies' of the *Impeccable* Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (Outside of China) Should Be Concerned," *Michigan State Journal of International Law*, vol. 18, no. 3, 2010: 16-22. Accessed online September 25, 2012 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1622943](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622943).

<sup>69</sup> One observer taking this position states:

This assertive and aggressive behavior of the Chinese Navy and other maritime law enforcement agencies has led to recent discussions concerning whether the U.S. needs to enter into some type of INCSEA or INCSEA-like agreement with the Chinese. During a recent interview [published in the *Financial Times* on January 11, 2011], the Chief of Naval Operations, ADM Gary Roughead, said his view was that such an agreement was unnecessary, even though he acknowledged that the potential for "missteps" was there. "To say that we need something like that almost defines the type of relationship—that you are unable to operate within the norms of the international structure and that you need something apart and I am just not there," he said. I fully concur with the CNO's position and also believe that an INCSEA agreement is a bad idea for several reasons—(1) China and the U.S. are not Cold War adversaries and to enter into such a bilateral agreement would suggest that type of relationship, (2) China and the U.S. have already agreed to procedures as members of the Western Pacific Naval Symposium—these rules, entitled the "Code for Unalerted Encounters at Sea" (CUES) cover situations where all member countries encounter other maritime forces—they provide specific navigational practices and procedures to ensure safety of navigation and mariners, and (3) both China and the U.S. are already parties to the Collision Regulations and

(continued...)

## Potential Oversight Questions for Congress

Potential oversight questions for Congress include the following:

- What changes, if any, were made to the frequency or nature of U.S. military survey and surveillance operations in China's EEZ following the incidents between Chinese and U.S. ships and aircraft of 2001, 2002, and 2009? What effect have any such changes had on U.S. military preparedness for conducting potential combat operations in the region?
- How well can information collected by U.S. military survey and surveillance operations in China's EEZ be collected through other means?
- What process does the Administration use to balance the desire to avoid U.S.-Chinese incidents in China's EEZ against the preparedness benefits of operating survey and surveillance operations in China's EEZ and the desire to avoid taking actions that could be viewed as rewarding China for resisting those operations or as acceding to China's view on whether coastal states have a right under UNCLOS to regulate the activities of foreign military forces in their EEZs?
- What are the potential advantages and disadvantages for the United States of entering into an INCSEA-like agreement with China? How interested would China be in an INCSEA-like agreement?<sup>70</sup>

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(...continued)

must abide by their provisions as a matter of international law. The failure of Chinese flagged vessels to abide by existing agreements does not mean that we should create yet another agreement with a similar content and purpose.

(China's Active Defense Strategy and its Regional Impact, Prepared statement by Stacy A. Pedrozo, CAPT, JAGC, USN1, U.S. Navy Military Fellow, Council on Foreign Relations, Before the U.S.-China Economic & Security Review Commission, United States House of Representatives, First Session, 112<sup>th</sup> Congress, January 27, 2011, p. 8. (The title page mistakenly shows a date of January 27, 2010.)

Another observer suggests taking steps other than a new INCSEA-like agreement:

Operational safety measures and expanded naval cooperation between the United States and China can help to reduce the risk of an accident between ships and aircraft. The creation of the Military Maritime Consultative Agreement (MMCA) in 1988 was intended to establish "rules of the road" at sea similar to the U.S.-Soviet Incidents at Sea Agreement (INCSEA), but it has not been successful. Communication mechanisms can provide a means to defuse tensions in a crisis and prevent escalation. Political and military hotlines have been set up, though U.S. officials have low confidence that they would be utilized by their Chinese counterparts during a crisis. An additional hotline to manage maritime emergencies should be established at an operational level, along with a signed political agreement committing both sides to answer the phone in a crisis. Joint naval exercises to enhance the ability of the two sides to cooperate in counter-piracy, humanitarian assistance, and disaster relief operations could increase cooperation and help prevent a U.S.-China conflict.

(Bonnie S. Glaser, *Armed Clash in the South China Sea*, Council on Foreign Relations, Center for Preventive Action, April 2012, pp. 4-5.)

<sup>70</sup> For a discussion of various factors bearing on these questions, see Mark E. Redden and Phillip C. Saunders, *Managing Sino-U.S. Air and Naval Interactions: Cold War Lessons and New Avenues of Approach*, Washington, Center for the Study of Chinese Military Affairs, Institute for National Strategic Studies, National Defense University, September 2012, 35 pp.



- Is the number of countries that share China’s view on whether coastal states have a right under UNCLOS to regulate the activities of foreign military forces in their EEZs growing, and if so, what steps is the Administration taking to stop or reverse this growth? What activities is the Administration taking, vis-a-vis China or other countries, to reinforce the U.S. position on whether coastal states have a right under UNCLOS to regulate the activities of foreign military forces in their EEZs?
- One of the 27 countries listed earlier (see “Dispute Regarding China’s Rights Within Its EEZ”) as having restrictions inconsistent with UNCLOS that would limit the exercise of high seas freedoms by foreign navies beyond 12 nautical miles from the coast is Portugal. Given Portugal’s status as a NATO ally and a historical maritime power, to what extent do Portugal’s restrictions make it harder for the United States to defend its position on the question of whether coastal states have the right to regulate foreign military activities in their EEZs? What steps has the Administration taken to encourage Portugal, as a NATO ally that derives collective security benefits from U.S. defense efforts, to end its restrictions and affirm the U.S. position on the question of whether coastal states have the right to regulate foreign military activities in their EEZs?
- Another one of the 27 countries listed earlier is Thailand—a country with a coast on the Gulf of Thailand, a body of water that opens onto the South China Sea.<sup>71</sup> Given Thailand’s status as the United States’ oldest ally in Southeast Asia (as described by DOD) and as the host country for the annual Cobra Gold exercise, the United States’ longest-standing military exercise in the Pacific,<sup>72</sup> what steps has the Administration taken to encourage Thailand to end its restrictions that would limit the exercise of high seas freedoms by foreign navies beyond 12 nautical miles from the coast and affirm the U.S. position on the question of whether coastal states have the right to regulate foreign military activities in their EEZs?
- Another one of the 27 listed earlier is Vietnam—a country whose relations with the United States have improved in recent years, in part because of China’s activities in the SCS. What steps has the Administration taken to encourage

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<sup>71</sup> Thailand has another coast on the Andaman Sea, which leads in one direction into the Bay of Bengal and the Indian Ocean, and in another direction to the Strait of Malacca that links the Indian Ocean to the SCS.

<sup>72</sup> A DOD news article about the 2012 Cobra Gold exercise states:

Cobra Gold, the United States’ longest-standing military exercise in the Pacific, kicks off this weekend, bringing together more than 10,000 members of the U.S. and six other militaries to focus on interoperability and multinational coordination and training...

This year’s exercise is the 31<sup>st</sup> iteration of the annual exercise hosted by Thailand and the United States since 1980...

Experience gained during the exercise helps ensure participants are able to work together to respond to crises across the range of military operations, [Marine Corps Maj. Christian Devine, a U.S. Pacific Command spokesman] said...

U.S. participation in Cobra Gold 12 also supports the United States’ and Pacom’s [U.S. Pacific Command’s] commitment to Thailand, its oldest ally in the region, and to regional partnership, prosperity and security in the Asia-Pacific region, he said.

(Donna Miles, “Cobra Gold 2012 to Promote Partnership, Interoperability,” *American Forces Press Service (DOD)*, accessed online September 25, 2012, at <http://www.defense.gov/news/newsarticle.aspx?id=66803>.)

Vietnam to end its restrictions that would limit the exercise of high seas freedoms by foreign navies beyond 12 nautical miles from the coast and affirm the U.S. position on the question of whether coastal states have the right to regulate foreign military activities in their EEZs?

- China in recent years has begun to operate small numbers of navy ships in the Indian Ocean (for anti-piracy operations), the Persian Gulf, and the Mediterranean Sea. Chinese officials are also concerned about the security of their maritime oil supply routes from the Persian Gulf. To what extent have U.S. officials communicated to Chinese officials that, in light of these developments, China arguably has an increasing interest in changing its position on whether coastal states have a right under UNCLOS to regulate the activities of foreign military forces in their EEZs?

In connection with the final question above, one observer states:

China has repeatedly asserted that no nation can conduct military activities in its EEZ without prior permission, an argument which I believe will ultimately backfire on a growing Chinese Navy. It is doubtful that China would want to seek the permission of Japan before conducting military surveys in Japan's EEZ, or from the U.S. when sending submarines to circumnavigate Guam, or from Vietnam when conducting military exercises within its EEZ or within the EEZ of its offshore islands.<sup>73</sup>

Another observer states:

China's approach to the normative relationship between coastal states and foreign military power in the EEZ is shortsighted in that it focuses on China's regional objectives, seemingly without regard to the importance of naval power to the security of sea-lanes around the globe. China relies for its economic growth and development on those very sea-lanes. Thus there appears to be a gap between China's expression of antiaccess legal norms and its own global interests, since the logical result of a normative shift from international access to the EEZ toward coastal-state authority to exclude foreign military power would be an expanded zone of instability at sea and increased sanctuary for such destabilizing elements as piracy, human trafficking, and illegal weapons and narcotics trafficking.<sup>74</sup>

## **Whether United States Should Ratify United Nations Convention on the Law of the Sea (UNCLOS)**

Another issue for Congress—particularly the Senate—is the impact of maritime territorial and EEZ disputes involving China on the overall debate on whether the United States should become a party to UNCLOS. UNCLOS was adopted by Third United Nations Conference on the Law of the Sea in December 1982, and entered into force in November 1994. The treaty contains multiple provisions relating to territorial waters and EEZs. As of September 21, 2012, 162 nations

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<sup>73</sup> China's Active Defense Strategy and its Regional Impact, Prepared statement by Stacy A. Pedrozo, CAPT, JAGC, USNI, U.S. Navy Military Fellow, Council on Foreign Relations, Before the U.S.-China Economic & Security Review Commission, United States House of Representatives, First Session, 112<sup>th</sup> Congress, January 27, 2011, p. 5. (The title page mistakenly shows a date of January 27, 2010.)

<sup>74</sup> Peter Dutton, "Three Dispute and Three Objectives," *Naval War College Review*, Autumn 2011: 62.

were party to the treaty, including China and most other countries bordering on the SCS and ECS (the exceptions being North Korea and Taiwan).<sup>75</sup>

The treaty and an associated 1994 agreement relating to implementation of Part XI of the treaty (on deep seabed mining) were transmitted to the Senate on October 6, 1994.<sup>76</sup> In the absence of Senate advice and consent to adherence, the United States is not a party to the convention and the associated 1994 agreement. During the 112<sup>th</sup> Congress, the Senate Foreign Relations Committee held four hearings on the question of whether the United States should become a party to the treaty on May 23, June 14 (two hearings), and June 28, 2012. For excerpts from the prepared statements for those hearings see **Appendix C**.

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

- The treaty's provisions relating to navigational rights, including those in EEZs, reflect the U.S. position on the issue; becoming a party to the treaty would help lock the U.S. perspective into permanent international law.
- Becoming a party to the treaty would give the United States greater standing for participating in discussions relating to the treaty—a “seat at the table”—and thereby improve the U.S. ability to call on China to act in accordance with the treaty's provisions, including those relating to navigational rights, and to defend U.S. interpretations of the treaty's provisions, including those relating to whether coastal states have a right under UNCLOS to regulate foreign military activities in their EEZs.<sup>77</sup>
- At least some of the ASEAN member states want the United States to become a member of UNCLOS, because they view it as the principal framework for resolving maritime territorial disputes.<sup>78</sup>

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<sup>75</sup> Source: Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 21 September 2012, accessed September 26, 2012 at [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#The United Nations Convention on the Law of the Sea](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea). A similar list, in alphabetical order by country name, is posted at [http://www.un.org/Depts/los/reference\\_files/status2010.pdf](http://www.un.org/Depts/los/reference_files/status2010.pdf).

<sup>76</sup> Treaty Document 103-39.

<sup>77</sup> One observer, for example, states that

both U.S. and regional policymakers should seek to create mechanisms to build trust, prevent conflict, and avoid escalation.

First, the United States should ratify UNCLOS; though it voluntarily adheres to its principles and the Obama administration has made a commitment to ratify the convention, the fact that the United States has not yet ratified the treaty lends credence to the perception that it only abides by international conventions when doing so aligns with its national interests. Ratifying UNCLOS would put this speculation to rest. It would also bolster the U.S. position in favor of rules-based behavior, give the United States a seat at the table when UNCLOS signatories discuss such issues as EEZ rights, and generally advance U.S. economic and strategic interests.

(Bonnie S. Glaser, *Armed Clash in the South China Sea*, Council on Foreign Relations, Center for Preventive Action, April 2012, pp. 7-8.)

<sup>78</sup> For example, Dino Patti Djalal, Indonesia's ambassador to the United States, in remarks at the Center for Strategic and International Studies (CSIS) in Washington, DC, on December 1, 2011, stated that, in light of the new U.S. emphasis on maritime issues in the region, becoming a party to the treaty “has become a strategic necessity” for the United States. Source: Video of Djalal's remarks accessed online October 4, 2012, at <http://csis.org/multimedia/video-bali-debrief-insiders-perspective-november-summits>. See the segment between 29:55 and 31:10; the strategic necessity quote itself starts at about 30:30.

- Relying on customary international law to defend U.S. interests in these issues is not sufficient, because it is not universally accepted and is subject to change over time based on state practice.

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

- China's ability to cite international law (including UNCLOS) in defending its position on whether coastal states have a right to regulate foreign military activities in their EEZs<sup>79</sup> shows that UNCLOS does not adequately protect U.S. interests relating to navigational rights in EEZs; the United States should not help lock this inadequate description of navigational rights into permanent international law by becoming a party to the treaty.
- The United States becoming a party to the treaty would do little to help resolve maritime territorial disputes in the SCS and ECS, in part because China's maritime territorial claims, such as those depicted in the map of the nine dashed lines, predate and go well beyond what is allowed under the treaty and appear rooted in arguments that are outside the treaty.
- The United States can adequately support the ASEAN countries and Japan in matters relating to maritime territorial disputes in the SCS and ECS in other ways, without becoming a party to the treaty.
- The United States can continue to defend its positions on navigational rights on the high seas by citing customary international law, by demonstrating those rights with U.S. naval deployments (including those conducted under the U.S. Freedom of Navigation [FON] program),<sup>80</sup> and by having allies and partners defend the U.S. position on the EEZ issue at meetings of UNCLOS parties.

Potential oversight questions for the Congress—particularly the Senate—include the following:

- How would becoming a party to UNCLOS affect the U.S. ability to call on China to act in accordance with the treaty's provisions, including those relating to navigational rights, and to defend U.S. interpretations of the treaty's provisions, including those relating to the EEZ issue?
- How well can the United States defend its positions on navigational rights on the high seas by citing customary international law, by demonstrating those rights with U.S. naval deployments (including those conducted under the FON program), and by having allies and partners defend the U.S. position on the EEZ issue at meetings of UNCLOS parties?

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<sup>79</sup> For a discussion of China's legal justifications for its position on the EEZ issue, see, for example, Peter Dutton, "Three Dispute and Three Objectives," *Naval War College Review*, Autumn 2011: 54-55.

<sup>80</sup> For more on the FON program, see <http://www.state.gov/e/oes/ocns/opa/maritimesecurity/>, <http://www.state.gov/t/pm/iso/c21539.htm>, and <http://policy.defense.gov/OUSDPOffices/ASDforGlobalStrategicAffairs/CounteringWeaponsofMassDestruction/FON.aspx>.

## U.S. Arms Sales and Transfers to Philippines or Other Countries

Another issue for Congress concerns U.S. arms sales and transfers to other countries in the region, particularly the Philippines, which currently has limited ability to monitor maritime activity in the SCS on a real-time basis (i.e., maintain so-called maritime domain awareness, or MDA), and relatively few modern ships larger than patrol craft in its navy or coast guard for patrolling its EEZ, which includes Scarborough Shoal and some of the Spratly Islands (see **Figure 4**). One observer states:

Steps could be taken to further enhance the capability of the Philippines military to defend its territorial and maritime claims and improve its indigenous domain awareness, which might deter China from taking aggressive action. Similarly, the United States could boost the maritime surveillance capabilities of Vietnam, enabling its military to more effectively pursue an anti-access and area-denial strategy. Such measures run the risk of emboldening the Philippines and Vietnam to more assertively challenge China and could raise those countries' expectations of U.S. assistance in a crisis.<sup>81</sup>

U.S. officials have expressed support for efforts to improve Philippine maritime capabilities. On October 3, 2012, for example, Deputy Secretary of Defense Ashton Carter stated, as part of the U.S. strategic rebalancing toward the Asia-Pacific, "We are focused on building the Philippines' maritime security presence and capabilities, and strengthening their maritime domain awareness."<sup>82</sup>

The United States recently transferred to the Philippines two 3,350-ton Hamilton-class high-endurance cutters that originally entered service with the U.S. Coast Guard in 1967. (Hamilton-class cutters are being phased out of U.S. Coast Guard service as they are replaced by new Legend-class National Security Cutters, or NSCs.) The first Hamilton-class cutter was transferred in May 2011 and entered service with the Philippine Navy in December 2011. The second was transferred in May 2012 and is scheduled to enter service by the end of 2012. The United States has also transferred to the Philippines an ex-U.S. Navy 390-ton Cyclone-class patrol boat; the ship entered service with the Philippines Navy in 2004. Numerous other ex-U.S. Navy ships (particularly amphibious tank landing ships, or LSTs) were transferred to the Philippine Navy in the 1970s, but only a few of these are still in service.

The Philippines is interested in acquiring additional ships and aircraft to modernize its navy and coast guard. In late 2011, it was reported that the Philippines is interested in acquiring a third Hamilton-class cutter,<sup>83</sup> three offshore patrol vessels,<sup>84</sup> and two to five helicopters for its two Hamilton-class cutters.<sup>85</sup> In January 2012, the Philippines signed a five-year agreement with

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<sup>81</sup> Bonnie S. Glaser, *Armed Clash in the South China Sea*, Council on Foreign Relations, Center for Preventive Action, April 2012, p. 5.

<sup>82</sup> Remarks by Deputy Secretary of Defense [Ashton] Carter at the Woodrow Wilson Center, October 3, 2012, accessed online on October 17, 2012, at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5130>.

<sup>83</sup> See, for example, Jaime Laude, "Military Set to Acquire 2 More Hamilton-class Cutters," *Philippine Star* ([www.philstar.com](http://www.philstar.com)), September 4, 2011.

<sup>84</sup> Alexis Romero, "Navy Planning to Acquire Seven Vessels Next Year," *Philippine Star* ([www.philstar.com](http://www.philstar.com)), December 29, 2010.

<sup>85</sup> Alexis Romero, "AFP to Buy Endurance ship, 2 Naval Helicopters," *Philippine Star* ([www.philstar.com](http://www.philstar.com)), September 19, 2011; Alexis Romero and Jaime Laude, "Noy Inaugurates 2 Newly Commissioned Ships," *Philippine Star* ([www.philstar.com](http://www.philstar.com)), December 15, 2011.

Italy's defense ministry that would expedite the acquisition of Italian equipment, including possibly frigates and aircraft.<sup>86</sup> In July 2012, the Philippines announced a \$1.8 billion fund to acquire a refurbished frigate, C-130 aircraft, utility and combat helicopters, and other equipment.<sup>87</sup> It was also reported that month that the Philippine Coast Guard would acquire 12 new patrol boats from Japan.<sup>88</sup> In addition to Italy and Japan, other countries that reportedly have offered defense equipment to the Philippines include South Korea, the United Kingdom, and France.<sup>89</sup> An August 7, 2012, press report states:

The Americans have already agreed to transfer two naval vessels<sup>90</sup> to an underpowered Philippine navy, and deployment of fighter jets, a coastal radar system and even increased numbers of American troops on the ground in the Philippines are under discussion....

Lieutenant Colonel Miko Okol, spokesman for the Philippine air force, says surface attack aircraft, attack helicopters, long-range patrol aircraft and radar are among the items already approved for purchase and soon to be put up for bid. A request for a squadron of F-16 aircraft has been made to US defence officials.<sup>91</sup>

Potential oversight questions for Congress include the following:

- What kinds of equipment—such as land-based radars, land-based maritime patrol aircraft, unmanned aerial vehicles (UAVs), ships, patrol craft, sea-based helicopters, and command-and-control systems—is the United States offering for sale or transfer to the Philippines to improve the ability of the Philippines to maintain maritime domain awareness and patrol its EEZ?
- Based on expected deliveries to the U.S. Coast Guard of new NSCs, how quickly could additional Hamilton-class cutters be made available for transfer to the Philippines?
- Given the age and the operation and maintenance costs of Hamilton-class cutters, should the United States instead (or additionally) offer the Philippines new-built cutters, such as the NSCs, Offshore Patrol Cutters (OPCs), and Fast Response Cutters (FRCs) now being acquired by the U.S. Coast Guard?<sup>92</sup>

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<sup>86</sup> Alexis Romero, "DND Signs Five-year Agreement With Italy," *Philippine Star* ([www.philstar.com](http://www.philstar.com)), February 8, 2012; Philippine Department of National Defense press release, "Gazmin signs agreement with Italian Defense Minister," February 6, 2012, accessed September 28, 2012, at <http://www.scribd.com/doc/80630878/DND-OPA-Press-Release-Gazmin-Signs-Agreement-With-Italian-Defense-Minister-6-February-2012>. See also "PH Wants More Frigates, Missiles," *Manila Standard Today* (<http://manilastandardtoday.com>), July 29, 2012.

<sup>87</sup> Manuel Mogato, "Philippines Refuses to Budge on South China Sea Row," *Reuters*, July 23, 2012.

<sup>88</sup> Jerry E. Esplanada, "Philippines to Get 12 New Patrol Boats from Japan," *Philippine Daily Inquirer*, July 30, 2012; Adam Westlake, "Philippine Coast Guard Gets 12 New Patrol Boats From Japan," *Japan Daily Press* (<http://japandailynews.com>), July 30, 2012; Jerry E. Esplanada, "Philippines To Get 12 New Patrol Boats From Japan," *Philippine Daily Inquirer* (<http://global.nation.inquirer.net>), July 30, 2012.

<sup>89</sup> Alexis Romero, "DND Signs Five-year Agreement With Italy," *Philippine Star* ([www.philstar.com](http://www.philstar.com)), February 8, 2012.

<sup>90</sup> This is a reference to the two Hamilton-class cutters.

<sup>91</sup> Sunshine Lichauco de Leon, "US Support Points To A New Era Of Military Co-Operation As China Flexes Its Muscles," *The Guardian (UK)*, August 7, 2012: 15.

<sup>92</sup> For more information on NSCs, OPCs (which have not yet entered procurement), and FRCs, see CRS Report R42567, *Coast Guard Cutter Procurement: Background and Issues for Congress*, by Ronald O'Rourke.

One press report about the 12 new patrol boats that the Philippines are to receive from Japan stated that the boats are "a (continued...)"

- How much capacity does the Philippines have for absorbing newly acquired ships, aircraft, and other equipment? How quickly can the Philippines assimilate new equipment, and how well would the Philippines be able to maintain it over time?
- What effect will the acquisition of new equipment have on how the Philippines manages its maritime territorial disputes with China? How might it affect the risk of the United States being drawn into a crisis or conflict between China and the Philippines over maritime territorial disputes in the SCS (see “Risk of United States Being Drawn Into a Crisis or Conflict” above)? How might it affect the need for the United States to station or operate ships and aircraft in the region (see “Stationing and Operations of U.S. Forces in the Region” below)?
- What effect do maritime territorial disputes with China have on potential U.S. arms sales or transfers to other countries in the region, such as Japan, Vietnam, or Malaysia?

## **U.S. Military Forces**

Another issue for Congress concerns the implications of maritime territorial disputes involving China in the SCS and ECS for the stationing and operations of U.S. military forces in the region, and for U.S. military procurement programs.

### **Stationing and Operations of U.S. Forces in the Region**

As part of the U.S. strategic rebalancing to the Asia-Pacific announced in January 2012, U.S. Marines have begun conducting rotational training deployments to Darwin, on Australia’s northern coast. In addition, the U.S. Navy will station up to four Navy Littoral Combat Ships (LCSs) at Singapore, at the southern end of the SCS, with the first LCS scheduled to deploy there in 2013 for an initial trial deployment.<sup>93</sup> LCSs displace about 3,000 tons, making them the size of a corvette (i.e., light frigate) or coast guard cutter, and can be equipped (depending their embarked mission modules) to counter small boats or mines or submarines.<sup>94</sup>

In addition to these two widely reported actions, additional recent developments concerning the stationing or operations of U.S. military forces in the region include the following:

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(...continued)

nice step up from the decades-old ships the Philippines usually get from the U.S. military.” (Adam Westlake, “Philippine Coast Guard Gets 12 New Patrol Boats From Japan,” *Japan Daily Press* (<http://japandailypress.com>), July 30, 2012) Another press report similarly stated: “Unlike the decades-old and stripped-down ships the Philippines gets from the United States, the 12 patrol boats the Philippine Coast Guard will most likely get from Japan in 2014 ‘will all be brand-new,’ according to a top official of the Japanese Embassy in Manila.” (Jerry E. Esplanada, “Philippines To Get 12 New Patrol Boats From Japan,” *Philippine Daily Inquirer* (<http://global.nation.inquirer.net>), July 30, 2012).

<sup>93</sup> An intention to station LCSs at Singapore was first announced by then-Secretary of Defense Robert Gates in a speech at a conference in Singapore in June 2011; see Address to International Institute for Security Studies (Shangri-La Dialogue), as delivered by Secretary of Defense Robert M. Gates, Shangri-La Hotel, Singapore, June 4, 2011, accessed online October 1, 2012, at <http://www.defense.gov/speeches/speech.aspx?speechid=1578>.

<sup>94</sup> For more on the LCS program, see CRS Report RL33741, *Navy Littoral Combat Ship (LCS) Program: Background and Issues for Congress*, by Ronald O’Rourke.

- U.S. Navy ships, including attack submarines, have begun to make more frequent port calls at Philippine ports.<sup>95</sup>
- A January 27, 2012, press report quoted Philippine Secretary of Defense Voltaire Gazmin as saying that the Philippines was considering a U.S. proposal to deploy land-based P-3 Orion maritime patrol aircraft to the Philippines on a temporary, rotating basis, and that the head of the U.S. Pacific Command had proposed the deployment of P-3s in August 2011.<sup>96</sup>
- A July 2, 2012, press report quoted Philippine President Benigno Aquino as saying that the Philippines might ask the United States to deploy land-based P-3 Orion maritime patrol aircraft to the Philippines to help monitor the SCS. The report stated that the Philippines has offered the United States greater access to airfields and military facilities in exchange for more equipment and training. The report stated that DOD offered to share real-time surveillance data with the Philippines while seeking wider access to air fields.<sup>97</sup>
- An August 8, 2012, press report stated that the United States has decided to use RQ-4 Global Hawk land-based unmanned aerial vehicles (UAVs) to monitor Chinese activity around the Senkaku Islands, and also conduct surveillance around Okinawa.<sup>98</sup>
- On August 27, 2012, it was reported that the U.S. Navy was sending P-3s to the Philippines. The report stated that the Navy declined to specify the number of P-3s involved, but that the aircraft “are believed to be sent over to help keep an eye on China and territorial disputes it is having with its neighbors in the south Pacific.”<sup>99</sup>
- In August and September 2012, U.S. Marines conducted joint exercises with Japanese troops to sharpen the skills of the Japanese troops for expelling opposing forces from remote islands. Although U.S. and Japanese forces often train together, this reportedly was the first U.S.-Japan exercise devoted to island defense.<sup>100</sup> An additional such exercise was reportedly canceled in late October 2012.<sup>101</sup>

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<sup>95</sup> See, for example, Alexis Romero, “US Submarine Docks At Subic,” *Philippine Star*, June 26, 2012: 1; Alexis Romero, “Another US Submarine to Dock In Subic,” *Philippine Star* ([www.philstar.com](http://www.philstar.com)), September 6, 2012.

<sup>96</sup> Manuel Mogato, “Philippines Studying U.S. Offer to Deploy Spy Planes,” *Reuters*, January 27, 2012.

<sup>97</sup> Manuel Mogato and Stuart Grudgings, “Exclusive: Philippines May Ask for U.S. Spy Planes Over South China Sea,” *Reuters*, July 2, 2012.

<sup>98</sup> J. Michael Cole, “US To Deploy Drones Over Diaoyutais,” *Tapei Times (Taiwan)*, August 8, 2012. (The Senkaku Islands are known in Taiwan as the Diaoyutai islands.)

<sup>99</sup> “Navy P-3 South Pacific,” *Defense Daily*, August 27, 2012: 4. A September 2, 2012, press report stated that the United States had sent a P-3 for a different purpose—as part of a U.S.-Australian Coast Watch South project that is intended to improve the ability of the Philippines to monitor its southern waters, particularly for purposes of tracking movements of terrorists and international crime syndicates. (Jaime Laude, “US To Deploy Spy Plane In 5-Day Sea Exercises,” *Philippine Star*, September 2, 2012.)

<sup>100</sup> See, for example, Yuka Hayashi, “U.S., Japan Train For Island Defense,” *Wall Street Journal*, September 25, 2012: 12.

<sup>101</sup> Jiji News Service, “Japan, U.S. Abandon Drill to ‘Retake’ Isle,” *Japan Times* ([www.japantimes.co.jp](http://www.japantimes.co.jp)), October 21, 2012. For an earlier press report that such a drill was being considered, see Agence France-Presse, “Japanese, U.S. Troops Mull Drill To Take Island: Reports,” *DefenseNews.com*, October 14, 2012.



- On October 3, 2012, Deputy Secretary of Defense Ashton Carter stated, as part of the U.S. strategic rebalancing toward the Asia-Pacific, “With the Philippines, we are exploring options for rotational force deployments in priority areas.”<sup>102</sup>

In early September 2012, the Philippine Department of National Defense denied a news report which had stated that the U.S. Marine Corps was planning to establish an “advance command post” on the Philippine island of Palawan, whose west coast faces the Spratly Islands.<sup>103</sup>

## **U.S. Weapon Acquisition Programs**

U.S. military operations in connection with maritime territorial and EEZ disputes involving China might have implications for U.S. weapon acquisition programs, including programs for acquiring land-based aircraft and UAVs for conducting surveillance of the SCS and ECS, and programs for acquiring non-lethal weapons for U.S. Navy surface ships.

## **Potential Oversight Questions for Congress**

Potential oversight questions for Congress include the following:

- What additional actions regarding the stationing or operations of U.S. forces in the region is the Administration planning? Is the Administration keeping Congress informed of these plans on a full and timely basis?
- How much are changes in the stationing and operations of U.S. forces in the region being driven by maritime territorial and EEZ disputes involving China, and how much are they driven by other regional factors, such as a general concern over China’s military modernization effort?
- Should additional U.S. ships or aircraft be stationed at locations close to the SCS or ECS? Should forward-deployments of U.S. naval forces to the SCS or ECS be reduced, increased, or maintained at current levels?
- How might changes in the stationing and operations of U.S. forces in the region affect the potential need for arms sales and transfers to the Philippines or other countries in the region (see “U.S. Arms Sales and Transfers to Philippines or Other Countries” above)? How might they affect the behavior of China, Japan, the Philippines, and Vietnam regarding their maritime territorial disputes?
- Are Japanese and ASEAN (particularly Philippine) expectations regarding future stationing and operations of U.S. forces in the region aligned with U.S. expectations?
- Are U.S. decisions regarding the stationing and operations of U.S. forces in the region adequately guided by strategy, with a clearly defined end state and measures of success?

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<sup>102</sup> Remarks by Deputy Secretary of Defense [Ashton] Carter at the Woodrow Wilson Center, October 3, 2012, accessed online on October 17, 2012, at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5130>.

<sup>103</sup> Philippine Star (with Alexis Romero), “DND Denies Plan for US Command Post in Palawan,” *Philippine Star* ([www.philstar.com](http://www.philstar.com)), September 6, 2012. The information that was being denied was reported in Dario Agnote, “U.S. Marines To Set Up Marine Command Post Facing South China Sea,” *Kyodo News*, September 4, 2012.

- Are planned procurement numbers of Global Hawk UAVs, other UAVs, and land-based P-8 maritime patrol aircraft sufficient for performing surveillance operations in the SCS or ECS while leaving enough to adequately perform missions in other parts of the world?
- What kinds of non-lethal weapons are on board U.S. Navy surface ships operating in the SCS or ECS? Should these ships be equipped with additional non-lethal weapons so as to give them a greater array of options for exerting force in a confrontation against other ships in the SCS or ECS without resorting to lethal weapons?
- What are the intended operations of the LCSs that are to be stationed at Singapore? Would these LCSs benefit from having equipment that is different from, or in addition to, standard LCS equipment?

## Interpreting China's Rise

Another issue for Congress is what China's actions regarding the maritime territorial and EEZ disputes might mean for interpreting the significance of China's rise as an economic and military power, particularly in terms of China's willingness to accept international norms and operate within an international rules-based order. In a speech at China's Central Party School in Beijing on September 6, 2012, for example, Singapore Prime Minister Lee Hsien Loong stated:

ASEAN and China have wider interests at stake in the South China Sea issue too, besides sovereignty and maritime rights. Many countries are watching us closely. They will read how China deals with difficult bilateral problems with its neighbours as a sign of what China's rise means for the world.<sup>104</sup>

Another observer states, "I have come to believe we are testing a proposition in the South China Sea—whether might makes right.... In short, Beijing is deploying superior power in an effort to repeal basic geometry and clearly written treaty law."<sup>105</sup>

Another observer states that

the US concern most widely understood and repeated is the potential threat to "freedom of navigation".... This, however, is not the real issue. It is really about bullying....

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<sup>104</sup> Speech by Prime Minister Lee Hsien Loong At Central Party School on 6 Sep[tember] 2012, "China and the World—Prospering Progressing Together," English version, paragraph 35. Another observer, in discussing maritime territorial and EEZ disputes involving China, states:

Underlying the concern of other states about China's behavior and international law perspectives is the question of what kind of major power China will become as it continues to rise. Will it use its increased power to achieve only its own interests, at the expense of the important interests of others? If so, this is a win-lose path that is likely to lead to continued tensions and possibly even conflict. Or will China undertake a more active leadership role from within the current architecture of norms, institutions, and international law and seek to develop win-win solutions to problems of overlapping interests?

(Peter Dutton, "Three Dispute and Three Objectives," *Naval War College Review*, Autumn 2011: 63.)

<sup>105</sup> James R. Holmes, "A Bold Stand in the South China Sea," *The Diplomat/The Naval Diplomat* (<http://thediplomat.com/the-naval-diplomat>), August 2, 2012, accessed October 3, 2012, at <http://thediplomat.com/the-naval-diplomat/2012/08/02/a-bold-stand-in-the-south-china-sea/>.

... what the US government should be talking about is making the world safe from unlawful international coercion....

In effect, this is a struggle between two visions of international order for Asia. The US vision includes a system of norms and international laws that ensure, among other things, that small states are protected from predation by larger states and that dispute resolution procedures should be fair.

China, on the other hand, appears to favor restoring a Chinese sphere of influence in East and Southeast Asia such as the Middle Kingdom enjoyed anciently. Under this arrangement, the rules of international interaction would reflect basic Chinese interests. Beijing would expect regional governments not to take major decisions that run contrary to Chinese preferences. Beijing's current unwillingness to base Chinese claims in the Law of the Sea treaty may reflect the sentiment that this mostly Western-written body of law will not be needed when China resumes its historical position of regional dominance.

Some observers see the China-US contention over the South China Sea as simply a squabble between two great powers that are both seeking regional domination. Each is acting in its respective hegemonic self-interest rather than in defense of some higher principle. In this case, however, US intervention is clearly aligned with the interests of the Southeast Asian countries, which seek to avoid domination by China or any other great power. China is trying to implement a might-makes-right order, while the United States is trying to ensure that smaller countries do not get steamrolled. This is the real issue, and US officials should make it clear.<sup>106</sup>

An August 29, 2012, press report stated:

When China launched its first deep-water oil rig in May, Cnooc [China National Offshore Oil Corporation] Ltd. Chairman Wang Yilin delivered a message to employees and his Communist Party superiors about what it meant to Beijing's ambitions abroad.

"Large-scale deep-water rigs are our mobile national territory and a strategic weapon," he told a crowd gathered at Cnooc's glittering headquarters in central Beijing as well as rig workers by videoconference.<sup>107</sup>

In commenting on the remark quoted above, one observer states:

[T]he legal position [reflected in the quote] is unclear: the CNOOC Chairman is asserting something that does not exist as there is nothing in the law of the sea that recognizes platforms or structures as sovereign territory, even though they are considered under title i.e. ownership of the state that put them there. In general they have much more salience in the political than in the legal realm and this appears to be what China is attempting to expand. Chairman Yilin's language suggests that China's intends using CNOOC platforms to slowly wrest control of offshore areas by creating an ambiguous political-legal aura of authority and control. Possession is nine-tenths of the law in any language and if China—as in the game of Go—can establish an advantageous position then it will do so....

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<sup>106</sup> Denny Roy, "South China Sea: Not Just About 'Free Navigation,'" *Asia Pacific Bulletin*, August 14, 2012, accessed online October 2, 2012 at <http://www.eastwestcenter.org/publications/south-china-sea-not-just-about-free-navigation>.

<sup>107</sup> Brian Spegele and Wayne Ma, "For China Boss, Deep-Water Rigs Are a 'Strategic Weapon,'" *Wall Street Journal* (<http://online.wsj.com>), August 29, 2012.

What [China's] words (and actions) reveal is that it continues to regard the sea as *territory*, as compared the Western view that has prevailed for the past 300 years of the sea as space open to all subject only to limited restrictions. China attempted to assert its view during the negotiations which resulted in the 1982 UN Convention on the Law of the Sea (UNCLOS) but failed to have it accepted. Some states are nonetheless sympathetic to its position and, while none assert it as vigorously as China, may well be tempted to follow its lead if it crushes the objections of its neighbors and gains the level of control over the South China Sea to which it feels it is entitled. If it does, and its 'blue water' naval capability expands, then it is likely it will be able to subtly shift the international rules governing the maritime domain in its favor.<sup>108</sup>

Potential oversight questions for Congress include the following:

- What do China's actions regarding the maritime territorial and EEZ disputes indicate in terms of China's willingness to accept international norms and operate within an international rules-based order? What is the Administration's view on this question?
- Has the Administration adequately communicated to China that China's actions regarding the maritime territorial and EEZ disputes are being taken into account by U.S. and other observers in assessing whether China is willing to accept international norms and operate within an international rules-based order?
- What would be the potential implications for U.S. policy if China does not, on these disputes, want to accept international norms and rules?

## **U.S. Relations with Countries in the Region**

Another issue for Congress concerns how U.S. diplomacy regarding maritime territorial and EEZ disputes involving China plays into overall U.S. relations with China and other countries in the region. In response to the recent intensification of some of these disputes, U.S. officials have devoted more attention to them as part of overall U.S. diplomacy toward the region. In general, the intensification of the disputes and the increased attention paid to them by U.S. officials have added tension to the U.S.-Chinese relationship while strengthening U.S. relations with other countries in the region, particularly the Philippines and Vietnam. Indeed, the issue of territorial disputes in the SCS and ECS involving China appears to be one of the most important drivers of improved U.S. ties in recent years with the Philippines and Vietnam.

U.S. relations with China, Japan, the Philippines, Vietnam, and other countries in the region are affected by many factors, and are covered in depth in other CRS reports.<sup>109</sup> For purposes of this CRS report, potential oversight issues for Congress include the following:

- Are U.S. officials giving too little weight, too much weight, or about the right amount of weight to maritime territorial and EEZ disputes in the SCS and ECS involving China in overall U.S. diplomacy toward the region? Should the United

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<sup>108</sup> Martin Murphy, "Deep-Water Oil Rigs as Strategic Weapons," accessed online October 3, 2012, at <http://www.murphyonpiracy.com/2012/09/05/deep-water-oil-rigs-as-strategic-weapons/>. Italics as in original.

<sup>109</sup> See "Broader Regional Context" in "Background" for citations to CRS reports covering U.S. relations with various individual countries in the region.

States play a more active role or a less active role in promoting a resolution to the maritime territorial disputes?

- To what degree are maritime territorial disputes involving China becoming a barrier to U.S.-Chinese cooperation on other issues? To what degree are they acting to improve U.S. ties with Japan, the Philippines, Vietnam, and other countries in the region? Are U.S. officials appropriately balancing the potential for increased tensions with China against improved ties with these other countries in their diplomacy regarding maritime territorial disputes involving China?
- How does U.S. diplomacy on maritime territorial disputes involving China affect the behavior of China toward Japan and the ASEAN countries, and vice versa? What affect might this have on the risk of these disputes escalating into a crisis or conflict?
- Has the United States been effective in its engagement with regional multilateral organizations such as ASEAN?

## **Economic Interests**

Another issue for Congress concerns the effect of maritime territorial and EEZ disputes involving China on U.S. economic interests, including oil and gas exploration in the SCS and ECS by U.S. firms, and on international shipping through the SCS and ECS, which represents a large fraction of the world's seaborne trade, including a significant percentage of oil shipped from the Persian Gulf to China, Japan, and other countries in the region.

## **Oil and Gas Exploration**

Maritime territorial disputes in the SCS and ECS have led to disputes between countries in the region over offshore oil and gas leasing rights, which creates uncertainty and risk for U.S. firms that may want to participate in offshore oil and gas exploration activities in the area. At a July 15, 2009, hearing before the Senate Foreign Relations Committee on maritime disputes and sovereignty issues in East Asia, Scot Marciel, then-Deputy Assistant Secretary of State, Bureau of East Asian and Pacific Affairs, stated that

Starting in the summer of 2007, China told a number of U.S. and foreign oil and gas firms to stop exploration work with Vietnamese partners in the South China Sea or face unspecified consequences in their business dealings with China.

We object to any effort to intimidate U.S. companies. During a visit to Vietnam in September 2008, then-Deputy Secretary of State John Negroponte asserted the rights of U.S. companies operating in the South China Sea, and stated that we believe that disputed claims should be dealt with peacefully and without resort to any type of coercion. We have raised our concerns with China directly. Sovereignty disputes between nations should not be addressed by attempting to pressure companies that are not party to the dispute.<sup>110</sup>

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<sup>110</sup> [Statement of] Deputy Assistant Secretary Scot Marciel, Bureau of East Asian & Pacific Affairs, U.S. Department of State, before the Subcommittee on East Asian and Pacific Affairs, Committee on Foreign Relations, United States Senate, July 15, 2009, [hearing on] Maritime Issues and Sovereignty Disputes in East Asia, p. 4.

One approach for managing the issue is for parties to pursue joint ventures for the leasing of oil rights in areas of unresolved territorial sovereignty.<sup>111</sup> One set of observers states:

A key component of China's position in the South China Sea (for the Spratly Islands in particular) has been "setting aside the disputes and engaging in joint development". Deng Xiaoping first proposed this to Filipino Vice President Salvador Laurel during his visit in June 1986. Since then, Beijing has repeatedly used the term "joint development" when accusing other claimants of unilaterally developing natural resources in the region. Officials and analysts have defended the proposal by saying that China is making a tremendous compromise by offering joint development of a region that legally belongs to it, and that unilateral development efforts by Vietnam, Malaysia and Philippines can be seen as a complete rejection of Chinese good-will.

Beijing has failed to implement any joint development plan [in the SCS] with other claimants since the launch of the proposal, which has been rejected primarily because of the precondition China set—that the other claimants must accept Chinese sovereignty over the disputed territories before joint development is discussed or implemented. Beijing's interpretation of "joint" means that China must be a partner in every single joint project, which is very difficult for the other claimants to accept. In the one case where agreement was reached with the Philippines and Vietnam, the proposal ultimately failed due to public hostility against it in the Philippines. Other claimants have never accepted this condition but China has failed to come up with any viable alternatives. Most South East Asian claimants do not see the grounds for joint development at all. In their views, the Spratly Islands are their territory and there is no need to share it with any other countries.<sup>112</sup>

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<sup>111</sup> One observer, for example, states that

Resource cooperation is another preventive option [to avert a crisis and conflict in the SCS] that is underutilized by claimants in the South China Sea. Joint development of petroleum resources, for example, could reduce tensions between China and Vietnam, and between China and the Philippines, on issues related to energy security and access to hydrocarbon resources. Such development could be modeled on one of the many joint development arrangements that exist in the South and East China seas.

(Bonnie S. Glaser, *Armed Clash in the South China Sea*, Council on Foreign Relations, Center for Preventive Action, April 2012, p. 6.)

Two other observers state:

Privately, some chief executives of Chinese energy companies have spoken recently of their desire to form offshore joint ventures with western companies. Such joint exploitation could proceed by means of agreements resting expressly on a "without prejudice" basis – where companies, and the states in which they are domiciled, would make clear that mutual oil and gas exploration and production would occur "without prejudice" to their parent country's sovereign claims. The competing claimant countries could agree among themselves as to which companies might participate in extraction in the areas in dispute.

In the current climate, companies are unlikely on their own to reach such understandings.... Why doesn't the photo-op "East Asia Summit", which the US and China attend, appoint a panel of eminent people from nations with no claim to the disputed sea? They should be tasked to propose a solution modelled on the Antarctic one, with formulae dividing the energy profits. As the saying goes: "30 per cent of something is a lot better than 100 per cent of nothing."

(James Clad and Robert Manning, "What Roosevelt Would Do In The South China Sea," *Financial Times*, September 5, 2012: 9. (The reference in the title is to President Theodore Roosevelt, who brokered a peace agreement between Russia and Japan in 1906.)

<sup>112</sup> International Crisis Group, *Stirring Up the South China Sea ([Part] I)*, Asia Report Number 223, April 23, 2012, pp. 29-30.

At a September 20, 2012, hearing before the East Asian and Pacific Affairs subcommittee of the Senate Foreign Relations Committee, Kurt Campbell, the Assistant Secretary of State for East Asian Pacific Affairs, testified to the Senate Foreign Relations Committee on September 20, 2012, stated in his prepared statement:

We also encourage relevant parties to explore new cooperative arrangements for managing the exploitation of resources in the South China Sea. For example, as Secretary Clinton discussed at the ASEAN Regional Forum this July in Cambodia, this could include equitable joint exploration and exploitation arrangements for hydrocarbon resources in areas of unresolved claims. Joint exploration would not only allow claimants to reap material benefits, but could also help to build the habits of cooperation and collaboration that will ultimately be needed to resolve these disputes.<sup>113</sup>

During his spoken remarks at the hearing, he referred to the above point and also stated:

In 2008 Japan and China agreed to develop oil and gas resources in waters near the Senkaku Islands in an effort to focus on the benefits of economic cooperation. This cooperation was cut short in 2010 when a Chinese fishing captain rammed a Japanese Coast Guard vessel near the islands.<sup>114</sup>

The failure of the above-mentioned China-Japan energy cooperation agreement has led some observers to question whether it is a feasible model for use in the SCS.

## **Commercial Shipping**

Many discussions of the maritime territorial disputes in the SCS and ECS note that the disputed territories sit astride major commercial shipping lanes. China has stated that it has no intention of interfering with international shipping going through the area. Skeptics might argue that China could change its intentions at a future point, and that China showed an apparent willingness to use trade flows as a source of leverage in dispute with Japan in late 2010, when China halted shipments of rare earth materials to Japan following Japan's arrest and detention of the captain of a Chinese fishing vessel that had rammed two Japanese coast guard ships.<sup>115</sup> The cost of shipping items through the SCS or ECS could also be affected during a crisis or conflict in the region by an increase in insurance rates for ships moving through the area.

## **Potential Oversight Questions for Congress**

Potential oversight questions for Congress include the following:

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<sup>113</sup> Testimony [prepared statement] of Kurt Campbell, Assistant Secretary of State Bureau of East Asian and Pacific Affairs, U.S. Department of State, Before the Senate Foreign Relations Committee, Subcommittee on East Asian and Pacific Affairs, September 20, 2012, [on] Maritime Territorial Disputes and Sovereignty Issues in Asia, p. 5.

<sup>114</sup> Transcript of hearing. For further discussion of the issue, see Clive Schofield, ed., *Maritime Energy Resources in Asia, Legal Regimes and Cooperation*, Seattle, National Bureau of Asian Research, NBR Special Report #37, February 2012, 160 pp.

<sup>115</sup> For additional discussion of this incident, see CRS Report R42510, *China's Rare Earth Industry and Export Regime: Economic and Trade Implications for the United States*, by Wayne M. Morrison and Rachel Tang. See also the discussion of the incident in CRS Report RL33436, *Japan-U.S. Relations: Issues for Congress*, coordinated by Emma Chanlett-Avery.

- To what extent have the interests of U.S. gas and oil exploration companies been affected by maritime territorial disputes involving China?
- What is the likelihood that China might take actions to interfere with non-Chinese shipping moving through the SCS and ECS during a crisis or conflict over disputed maritime territories in the SCS or ECS?

## **Legislative Activity in 112<sup>th</sup> Congress**

### **S.Res. 524 (Agreed to by the Senate)**

This resolution, reaffirming the strong support of the United States for the 2002 declaration of conduct of parties in the South China Sea among the member states of ASEAN and the People's Republic of China, and for other purposes, was introduced on July 23, 2012, and agreed to in Senate without amendment and an amended preamble by unanimous consent on August 2, 2012.

### **S.Res. 217 (Agreed to by the Senate)**

This resolution, calling for a peaceful and multilateral resolution to maritime territorial disputes in Southeast Asia, was introduced on June 27, 2011, and considered, and agreed to without amendment and with a preamble by unanimous consent the same day.

### **H.R. 6313**

This bill to promote peaceful and collaborative resolution of maritime territorial disputes in the South China Sea and its environs and other maritime areas adjacent to the East Asian mainland was introduced on August 2, 2012.

### **H.Res. 532**

This resolution, calling for a peaceful and collaborative resolution of maritime territorial disputes in the South China Sea and its environs and other maritime areas adjacent to the East Asian mainland, was introduced on July 15, 2011.

### **H.Res. 616**

This resolution, expressing the sense of the House of Representatives regarding United States relations with the People's Republic of China, was introduced on April 16, 2012. Paragraph 8 of the resolution "encourage[s] the peaceful resolution of maritime territorial disputes in the South China Sea and East China Sea, and support efforts to facilitate a multilateral, peaceful process to resolve these disputes."



## **Appendix A. 2002 Declaration on Conduct of Parties in South China Sea**

The text of the 2002 Declaration on the Conduct of Parties in the South China Sea is as follows:<sup>116</sup>

### DECLARATION ON THE CONDUCT OF PARTIES IN THE SOUTH CHINA SEA

The Governments of the Member States of ASEAN and the Government of the People's Republic of China,

REAFFIRMING their determination to consolidate and develop the friendship and cooperation existing between their people and governments with the view to promoting a 21<sup>st</sup> century-oriented partnership of good neighbourliness and mutual trust;

COGNIZANT of the need to promote a peaceful, friendly and harmonious environment in the South China Sea between ASEAN and China for the enhancement of peace, stability, economic growth and prosperity in the region;

COMMITTED to enhancing the principles and objectives of the 1997 Joint Statement of the Meeting of the Heads of State/Government of the Member States of ASEAN and President of the People's Republic of China;

DESIRING to enhance favourable conditions for a peaceful and durable solution of differences and disputes among countries concerned;

HEREBY DECLARE the following:

1. The Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations;
2. The Parties are committed to exploring ways for building trust and confidence in accordance with the above-mentioned principles and on the basis of equality and mutual respect;
3. The Parties reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;
4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

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<sup>116</sup> Text as taken from: <http://www.aseansec.org/13163.htm>.

5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including:

- a. holding dialogues and exchange of views as appropriate between their defense and military officials;
- b. ensuring just and humane treatment of all persons who are either in danger or in distress;
- c. notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise; and
- d. exchanging, on a voluntary basis, relevant information.

6. Pending a comprehensive and durable settlement of the disputes, the Parties concerned may explore or undertake cooperative activities. These may include the following:

- a. marine environmental protection;
- b. marine scientific research;
- c. safety of navigation and communication at sea;
- d. search and rescue operation; and
- e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

The modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation.

7. The Parties concerned stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them, including regular consultations on the observance of this Declaration, for the purpose of promoting good neighbourliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes among them;

8. The Parties undertake to respect the provisions of this Declaration and take actions consistent therewith;

9. The Parties encourage other countries to respect the principles contained in this Declaration;

10. The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.

Done on the Fourth Day of November in the Year Two Thousand and Two in Phnom Penh, the Kingdom of Cambodia.

## **Appendix B. Whether China Considers Its SCS Territorial Claims to Be a “Core Interest”**

According to some press reports, Chinese officials in early 2010 began describing their territorial claims in the South China Sea a “core interest”—a phrase that was interpreted as meaning that, for the Chinese, the issue is comparable in importance to China’s interest in Taiwan and Tibet. Whether these reports were accurate—that is, whether Chinese officials in 2010 actually described China’s territorial claims in the SCS as a core interest—is a matter of some dispute. Accurate or not, accounts of the reported “core interest” formulation prompted concern and among observers.

A July 3, 2010, press report stated:

American and European experts who assembled here [in Stockholm] in early June [2010] for the semi-annual Stockholm China Forum were a bit taken aback when their Chinese colleagues defined the South China Sea as a “core national interest” of the People’s Republic [of China]. The Chinese have long used this diplomatic term in discussing Tibet and Taiwan to signify issues that go to the heart of its national sovereignty.

The academics were not speaking out of turn. According to The New York Times, Chinese leaders told visiting Obama administration officials earlier this spring that Beijing would not tolerate interference in the South China Sea, a vast expanse that is a major maritime transit area, because the entire region was a “core interest” of their nation.<sup>117</sup>

Later in 2010, it was reported that China appeared to have backed away from this claim. An October 13, 2010, press report states:

A senior U.S. defense official said the Chinese, at least in some recent meetings, appeared to have “backed away” from characterizing the South China Sea as a “core” interest and may be seeking to find “other ways to articulate their approach” to the disputed waters. The official said it is “probably fair to conclude that there is some internal debate in Beijing about exactly how they approach this set of issues.”...

Earlier this year, Beijing had characterized the South China Sea as one of its “core national interest”—on a par with Tibet and Taiwan—meaning it saw no room for compromise, though some officials have questioned whether that was a formal position....

The U.S. officials provided few details about how they reached their conclusion that the Chinese leadership may be rethinking how to address South China Sea disputes.<sup>118</sup>

An October 23, 2010, press report states:

The Chinese government has effectively backed away from a new state policy which it had conveyed to the United States and considers the South China Sea as part of its “core

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<sup>117</sup> Bruce Stokes, “China’s New Red Line At Sea,” *National Journal*, July 3, 2010.

<sup>118</sup> Adam Entous, “In Asia, Tone Lightens On Sea Disputes,” *Wall Street Journal*, October 13, 2010: 15. See also Thom Shanker, “U.S. And China Soften Tone Over Disputed Seas,” *New York Times*, October 13, 2010; Paul Richter, “China Seeks To Ease Tensions,” *Los Angeles Times*, October 13, 2010: 4.

interests” that concern China’s sovereignty and territorial integrity, sources close to the matter said Friday [October 22].

Beijing informed Washington in March that it sees the South China Sea as a core interest, along with Taiwan and Tibet. But in recent meetings, Chinese officials have been refuting such claims, the sources said.

The apparent change in China’s policy comes in the wake of growing wariness among Southeast Asian nations, as well as other players such as the United States, about China’s arrogance amid its increasing military presence in the South China Sea.

China’s “core interest” policy has drawn protests from the United States and member nations of the Association of Southeast Asian Nations, some that have territorial disputes with Beijing in the South China Sea.

The sources said, though, that China may no longer use the term “core interest,” but it remains unclear if China will ease its hard-line stance on protecting its maritime interests, which also includes the East China Sea....

According to the sources, China first informed the United States about this policy when U.S. Deputy Secretary of State Jim Steinberg and his delegation visited China in March. In May, Chinese State Councilor Dai Bingguo officially conveyed China’s stance to U.S. Secretary of State Hillary Clinton during the countries’ strategic and economic dialogue in Beijing, the sources said.

But the Chinese officials have told U.S. officials lately that they did not say the South China Sea was a “core interest,” the sources said. During their Oct. 11 meeting in Hanoi, Chinese Defense Minister Liang Guanglie did not even mention the matter to U.S. Defense Secretary Robert Gates.

A senior Pentagon official said China’s move to back down from its earlier strategy on the South China Sea was likely influenced by discussions within China. Beijing’s shift in its policy is believed to be out of consideration to the United States, with some Chinese officials arguing that a continued hard-line stance on China’s part will limit the flexibility of the emerging economy’s diplomatic strategies.<sup>119</sup>

Another set of observers states:

In early 2010, speculation arose that China had defined the South China Sea disputes as one of its “core interests”, a term traditionally reserved for matters of national sovereignty such as Taiwan, Tibet and Xinjiang, where China is unwilling to compromise its position and would resort to force, if necessary. Reports first suggested that Chinese officials used this expression during a private meeting with U.S. officials in March 2010, and then cited U.S. Secretary of State Hillary Clinton as claiming that the senior Chinese leader responsible for foreign policy repeated this declaration in May 2010. However, another senior U.S. official has since asserted that the term “national priority” rather than “core interest” was used. Chinese researchers almost unanimously agree that the government has not made any conscious policy decision to rank the South China Sea as a core interest at the same level as an issue such as Taiwan. However, the mere speculation coupled with Beijing’s refusal to

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<sup>119</sup> “China Retracts Policy on S. China Sea, Tells U.S.,” *The Mainichi Daily News*, October 23, 2010. See also Edward Wong, “China Hedges Over Whether South China Sea Is a ‘Core Interest’ Worth War,” *New York Times*, March 30, 2011.

publicly refute these rumours further increased the already growing concerns among ASEAN countries that China was becoming more assertive regarding this issue.<sup>120</sup>

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<sup>120</sup> International Crisis Group, *Stirring Up the South China Sea ([Part] I)*, Asia Report Number 223, April 23, 2012, p. 4.

## **Appendix C. Excerpts from 2012 Hearings on UNCLOS**

During the 112<sup>th</sup> Congress, the Senate Foreign Relations Committee held hearings on the question of whether the United States should become a party to the treaty on May 23, June 14, and June 28, 2012. Below are some excerpts from the prepared statements for those hearings.

### **May 23, 2012, Hearing**

Witnesses at this hearing included Secretary of State Hillary Clinton, Secretary of Defense Leon Panetta, and Chairman of the Joint Chiefs of Staff Martin Dempsey.

Secretary Clinton stated the following as part of her prepared statement:

As the world's foremost maritime power, the United States benefits from the Convention's favorable freedom of navigation provisions. These are the provisions that enable our vessels to transit the maritime domain—including the high seas, international straits, and the exclusive economic zones and territorial seas of other countries...

[T]he Convention secures the rights we need for U.S. military ships, and the commercial ships that support our forces, to meet national security requirements in four major ways:

- by limiting coastal States' territorial seas to 12 nautical miles;
- by affording our military and commercial vessels and aircraft necessary passage rights, not requiring permission, through other countries' territorial seas and archipelagoes, as well as through straits used for international navigation (such as the critical right of submarines to transit submerged through such straits);
- by setting forth maximum navigational rights and freedoms for our vessels and aircraft in the exclusive economic zones of other countries and in the high seas; and
- by affirming the authority of U.S. warships and government ships to board stateless vessels on the high seas, which is vital to our maritime security, counter-narcotic, and counter-proliferation efforts and operations, including the Proliferation Security Initiative.

As a non-party to the Convention, the United States must rely on customary international law as a legal basis for invoking and enforcing these norms. But it is risky to assume that customary law will preserve these norms forever. There are increasing pressures from some coastal States to augment their control over the activities of other nation's vessels off their coasts in a manner that would alter the balance of interests struck in the Convention.

Joining the Convention would secure our navigational rights and our ability to challenge other countries' behavior on the firmest and most persuasive legal footing, including in critical areas such as the South China Sea and the Arctic. Only as a Party to the Convention

can the United States best protect the navigational freedoms enshrined in the Convention and exert the level of influence that reflects our status as the world's foremost maritime power.<sup>121</sup>

Secretary Panetta stated the following as part of his prepared statement:

The Law of the Sea Convention is the bedrock legal instrument underpinning public order across the maritime domain. We are the only permanent member of the U.N. Security Council that is not a party to it. This puts us at a distinct disadvantage when it comes to disputes over maritime rights and responsibilities with the 162 parties to the Convention, several of which are rising powers.

The basic idea of the Convention is to establish some basic rules of the road—to define what can be done, where, in the world's oceans. More precisely, it provides for:

- The legal divisions of maritime space and accompanying rights of innocent passage through territorial waters;
- Transit passage through vital international straits;
- High seas freedoms of navigation, and over-flight, and other internationally lawful uses of the sea related to those freedoms in the exclusive economic zone, and beyond; and
- Sovereign immunity to warships, naval auxiliaries and other government vessels and aircraft.

In other words, it reflects what has been the longstanding practice of our military and gives the United States the international foundation to promote, project and protect its global role as the world's leading maritime power....

If we are not at the table, then who will defend our interests? Who will lead the discussion to influence the further development and interpretation of the Law of the Sea? It is only by being there to protect our rights that we would ensure that our sovereignty is not whittled away by the excessive claims and erroneous interpretations of others. It would give us the power and credibility to support and promote the peaceful resolution of disputes within a rules-based order.

... by joining the Convention, we can secure our navigational freedoms and global access for military and commercial ships, aircraft, and undersea fiber optic cables. As it currently stands, we are forced to assert our rights to freedom of navigation through customary international law, which can change to our detriment. Treaty law remains the firmest legal foundation upon which to base our global presence, on, above, and below the seas. By joining the Convention, we would help lock in rules favorable to freedom of navigation and our global mobility....

... our new defense strategy emphasizes the strategically vital arc extending from the Western Pacific and East Asia into the Indian Ocean region and South Asia. Becoming a party to the Convention would strengthen our position in this key area. For example, numerous countries sit astride critical trade and supply routes and propose restrictions on access for military

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<sup>121</sup> Written Testimony of Hillary Rodham Clinton, Secretary, U.S. Department of State, Before the Senate Foreign Relations Committee on May 23, 2012 [hearing on] Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Party XI of the Law of the Sea Convention [Senate Treaty Document 103-39], pp. 1-3, 7-8.

vessels in the Indian Ocean, Persian Gulf, and the South China Sea. The United States has long declared our interests and respect for international law, freedom of navigation, and peaceful resolution of disputes. We have demonstrated our commitment to those interests through our consistent presence and engagement in these critical maritime regions.

By not acceding to the Convention, we give up the strongest legal footing for our actions. We undercut our credibility in a number of Asia-focused multilateral venues—just as we're pushing for a rules-based order in the region and the peaceful resolution of maritime and territorial disputes in the South China Sea and elsewhere. How can we argue that other nations must abide by international rules when we haven't joined the treaty that codifies those rules?...

... there are some who claim that accession to the Convention will restrict our military's operations and activities, or limit our ability to collect intelligence in territorial seas. Quite simply, they are wrong. The Convention in no way harms our intelligence collection activities or constrains our military operations. On the contrary, U.S. accession to the Convention secures our freedom of navigation and over-flight rights as bedrock treaty law.<sup>122</sup>

General Dempsey stated as part of his prepared statement that

joining the Convention would give our day-to-day maritime operations a firmer, codified legal foundation. It would enable and strengthen our military efforts, not limit them.

We currently rely on customary international law and physical presence to secure global freedom of access. But there is risk in this approach. Tradition is a shaky basis upon which to rest our national security and the protection of our forces. Customs can be disputed, and they can change.

Joining the Convention would provide legal certainty to our navigational freedoms and legitimacy to our maritime operations that customary law simply cannot. It would affirm critical navigational freedoms and reinforce the sovereign immunity of our warships as they conduct these operations. These include the right of transit through international straits, the right to exercise high seas freedoms in foreign exclusive economic zones, and the right of innocent passage through foreign territorial seas. The Convention would also provide a stronger legal basis for some important activities such as stopping and boarding stateless vessels—ships often used by pirates, traffickers, and terrorists.

Second, joining the Convention would provide a consistent and effective legal framework for opposing challenges to the rules-based international order in the maritime domain. Around the globe we are witnessing nations expanding their naval capabilities. We are also seeing countries expand their maritime claims—in the direction of restricting movement on the oceans. Illegitimate expansionism could become particularly problematic in the Pacific and the Arctic, two regions whose importance to our security and our economic prosperity will only increase over the next several decades. The Convention would provide us an important tool to help stave off jurisdictional creep in these areas and to resolve future conflicts peacefully and with less risk of escalation.

Last, being a member of the Convention would better allow the United States to exercise global security leadership—a critical component of our global strategy. Our absence from the

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<sup>122</sup> Secretary of Defense Leon E. Panetta, Law of the Sea Convention—Submitted Statement, Senate Foreign Relations Committee, Wednesday, May 23, 2012, pp. 1-3.



Convention separates us from our partners and allies. It places us in the company of those who disdain the rule of international law....

The global security environment is changing. The Pacific and the Arctic are becoming increasingly important. And some nations appear increasingly willing to assert themselves and to push the boundaries of custom and tradition in a negative direction.<sup>123</sup>

## **June 14, 2012, 10:00 a.m., Hearing**

Witnesses at this hearing included Admiral James A. Winnefeld, Jr., the Vice Chairman of the Joint Chiefs of Staff, Admiral Jonathan W. Greenert, the Chief of Naval Operations, Admiral Robert J. Papp, Jr., the Commandant of the U.S. Coast Guard, General William M. Fraser, III, the Commander of U.S. Transportation Command, General Charles H. Jacoby, Jr., the Commander of U.S. Northern Command, and Admiral Samuel J. Locklear, III, Commander of U.S. Pacific Command.

Admiral Winnefeld stated the following as part of his prepared statement:

Still others say [joining the convention] means our naval activities will be restricted in or beyond areas in which we now operate. This is false as well. In fact, if we do not join the Convention, we are more at risk than ever of nations attempting to impose such limitations under evolving interpretations of customary international law.

Customary international law is not static and joining the Convention will protect us from persistent attempts to erode the protection of customary international law, as a number of states, including those with growing economic and military power, advance national laws that attempt to restrict our maritime activities, particularly within the bounds of their Exclusive Economic Zones. This is contrary to the Convention, but is a trend that is real and pressing and that could place your Navy at an enormous legal disadvantage. Joining will allow us to go on the offensive against such self-serving “lawfare” activity that runs counter to our vital interests. Nations that would challenge us in the maritime domain are delighted that we have not joined....

Joining will also give us stronger standing to advance treaty arguments in support of partners who are being intimidated over disputes that should be resolved peacefully and voluntarily under the Convention. Candidly, I find it awkward to suggest that other nations should follow rules that we haven’t even formally agreed to ourselves.<sup>124</sup>

Admiral Greenert stated the following as part of his prepared statement:

As the world’s preeminent maritime power, the United States will benefit from the support LOSC provides to our operations. Our ability to deter aggression, contain conflict, and fight and win our nation’s wars depends upon our ability to freely navigate the world’s oceans. The rules inherent in LOSC support worldwide access for military and commercial ships and aircraft without requiring permission of other countries, such as in the archipelagic waters of countries like Indonesia.... The Convention... establishes broad navigational rights and

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<sup>123</sup> Statement of General Martin E. Dempsey, USA, Chairman, Joint Chiefs of Staff, Before the Senate Committee on Foreign Relations [hearing on] Law of the Sea, 23 May 2012, pp. 3-5.

<sup>124</sup> Admiral James A. Winnefeld, Jr., Vice Chairman of the Joint Chiefs of Staff, Written Statement to Senate Foreign Relations Committee, 14 June, 2012, p. 2.

freedoms for our ships and aircraft in the exclusive economic zones of other nations and on the high seas; and reinforces the sovereign status of our vessels....

[The convention] defines the extent of control nations can legally assert at sea and prescribes procedures to counter excessive maritime claims. Acceding to LOSC [Law of the Sea Convention] will increase our credibility in invoking and enforcing the treaty's provisions and maximize our influence in the interpretation and application of the law of the sea. Recent interference with our operations in the Western Pacific and rhetoric by Iran to close the Strait of Hormuz underscore the need to use the Convention to clearly identify and respond to violations of international law that seek to constrain access to international waters....

Our absence [of membership from the convention] could provide an excuse for nations to selectively choose among Convention provisions or abandon it altogether, thereby eroding the navigational freedoms we enjoy today....

As a party to LOSC, we will be in a better position to counter the efforts of nations to restrict freedom of the seas. The United States should not rely on customs and traditions for the legal basis of our military and commercial activity when we can instead use this Convention.<sup>125</sup>

General Fraser stated the following as part of his prepared statement:

Currently, the United States relies upon customary international law as the primary legal basis to secure global freedom of access. However, as emerging powers around the world grow and modernize, states may seek to redefine or reinterpret customary international law in ways that directly conflict with our interests, including freedom of navigation and overflight, potentially challenging our global mobility needs. This Convention represents the best guarantee against erosion of essential navigation and overflight freedoms that we take for granted through reliance on customary international law. Accession will give the United States leverage to counter efforts by other nations seeking to reshape current internationally accepted rules we depend on for transporting cargo and passengers....

The Convention would also support freedom of navigation and overflight in emerging areas of strategic importance including the South China Sea and the Arctic. The defense strategy requires continued and future access to navigational routes throughout Asia, particularly in the South China Sea, in order to sustain our forces in that region.... We need U.S. leadership as a party to the Convention to influence and lead this discussion. In both regions, the Convention will help defend our rights to transport cargo and personnel against nations attempting to assert extended territorial claims.<sup>126</sup>

Admiral Locklear stated the following as part of his prepared statement:

Most important to me as the Commander of U.S. Pacific Command are the protections contained in the Convention for our navigational rights and freedoms, over-flight rights and freedoms, military activities, and our rights to transit international straits and choke points without impediment. With more than half the world's ocean area within my AOR, forces assigned to me rely on these basic rights, freedoms, and uses daily to accomplish their mission. All of the foregoing rights and freedoms are specifically protected by the Convention.

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<sup>125</sup> Statement of Admiral Jonathan Greenert, Chief of Naval Operations, Before the Senate Committee on Foreign Relations [hearing] on Law of the Sea Convention, 14 June 2012, pp. 2-3.

<sup>126</sup> Statement of General William M. Fraser III, USAF, Commander, United States Transportation Command, Before the Senate Foreign Relations Committee [hearing on] Law of The Sea Convention, June 14, 2012, pp. 2-4.

As we look into the future, our status as a non-party will increasingly disadvantage the United States. Presently, the United States is forced to rely on customary international law as the basis for asserting our rights and freedoms in the maritime domain. In situations where coastal states assert maritime claims that exceed the rights afforded to them by the Convention, USPACOM challenges such claims through a variety of means including the U.S. Freedom of Navigation program, military-to-military communications, and diplomatic protests issued through the State Department. When challenging such excessive claims through military-to-military or diplomatic exchanges, the United States typically cites customary international law and the relevant provisions of the Convention. Unfortunately, because we are not a party to the Convention, our challenges are less credible than they would otherwise be. Other States are less persuaded to accept our demand that they comply with the rules set forth in the Convention, given that we have not joined the Convention ourselves.

In addition, as you know, customary international law depends in part on State practice and is subject to change over time. This is less so in the case of treaty or convention-based international law, which comes from written and agreed upon terms and conditions that are contained in such treaties or conventions. Ironically, by not being a party to the Convention and relying on customary international law, our rights within the maritime domain are less well defined than the rights enjoyed by virtually all of the other nations within the PACOM AOR, and around the world with over 160 Nations as parties. Moreover, by remaining outside the Convention, we leave ourselves potentially in a situation where other nations feel they can ignore the Convention's provisions when dealing with the United States, in favor of what they may view as less clear and more subjective obligations that may exist in customary international law.

As the Asia Pacific region continues to rise, competing claims and counter claims in the maritime domain are becoming more prominent. Nowhere is this more prevalent than in the South China Sea. Numerous claimants have asserted broad territorial and sovereignty rights over land features, sea space, and resources in the area. The United States has consistently encouraged all parties to resolve their disputes peacefully through a rules-based approach. The Convention is an important component of this rules-based approach and encourages the peaceful resolution of maritime disputes. Here again though, the effectiveness of the U.S. message is somewhat less credible than it might otherwise be, due to the fact that we are not a party to the Convention.

Some States in the USPACOM AOR have adopted deliberate strategies vis-à-vis the United States to try to manipulate international law to achieve desired ends. Such strategies are infinitely more achievable when working within the customary international law realm, versus the realm of treaty-based law. By joining the Convention, we greatly reduce this interpretive maneuver space of others and we place ourselves in a much stronger position to demand adherence by others to the rules contained in the Convention – rules that we have been following, protecting and promoting from the outside for many decades.

Additionally, while convention or treaty-based international law is less subject to change and interpretation, it is not immune from change. Parties can collectively agree to change the rule-set in a treaty or adopt particular interpretations of its provisions, in accordance with the terms of the treaty. Given that over 160 nations are currently parties to the Convention, if the rule-set were to change, we might no longer be able to argue that the existing, favorable set of rules under the Convention reflects customary international law. We would be forced to either accept the new rule-set or act as a persistent objector, either of which would come with its own risks. Moreover, our continued status as a non-party allows States an enhanced ability to co-opt the existing text of the Convention and attempt to re-interpret its rules contrary to the original intent that we and other maritime powers helped to negotiate. It would be much more beneficial for the United States to lead the international community in

this crucial area of international law from within the Convention, rather than from the outside.<sup>127</sup>

## **June 14, 2012, 2:30 p.m., Hearing**

Witnesses at this hearing included the Honorable Donald Rumsfeld, former U.S. Secretary of Defense, the Rumsfeld Foundation; the Honorable John Negroponte, former U.S. Deputy Secretary of State; the Honorable John B. Bellinger, III, former Legal Adviser, U.S. Department of State, Arnold & Porter LLP; and Mr. Steven Groves, Bernard and Barbara Lomas Fellow, The Heritage Foundation.

Former Secretary Rumsfeld stated the following as part of his prepared statement:

The most persuasive argument for the Law of the Sea Treaty is the U.S. Navy's desire to shore up international navigation rights. It is true that the Treaty might produce some benefits, clarifying some principles and perhaps making it easier to resolve certain disputes. But our Navy has done quite well without this treaty for the past two hundred years, relying often on centuries-old, well-established customary international law to assert navigational rights. Ultimately, it is our naval power that protects international freedom of navigation. The Law of the Sea Treaty would not make a large enough additional contribution to counterbalance the problems it would create.<sup>128</sup>

Former Secretary Negroponte stated the following as part of his prepared statement:

Third, and especially acute as it relates to current tensions in the Persian Gulf or naval mobility in the Pacific, the United States today forfeits legal authority to other states, some of them less than friendly to US interests, that seek to restrict rights enshrined in the Law of the Sea central to American national security strategy, such as the freedom of navigation.

Relatedly, the United States also puts its sailors in unneeded jeopardy when carrying out the Freedom of Navigation (FON) program to contest Law of the Sea abuses.

Fourth, the United States is limited in its leadership ability to act within the convention to help mitigate maritime disputes between strategic allies, such as Japan and Korea, and in strategically important regions, such as the Gulf of Aden or the South China Sea.<sup>129</sup>

John Bellinger III stated the following as part of his prepared statement:

Today, I would like to explain why the [George W. ] Bush Administration decided, after a careful review, to support the Law of the Sea Convention....

First and foremost, the Bush Administration concluded that the Convention was beneficial to the United States military, especially during a time of armed conflict, because it provided clear treaty-based navigational rights for our Navy, Coast Guard, and aircraft. This was

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<sup>127</sup> Statement of Admiral Samuel J. Locklear, III, U.S. Navy, Commander, U.S. Pacific Command, Before the Committee on Foreign Relations, United States Senate, June 14, 2012, pp. 3-5.

<sup>128</sup> Senate Foreign Relations Committee, Prepared Testimony by Former Secretary of Defense Donald Rumsfeld, Embargoed Until June 14, 2012, p. 3.

<sup>129</sup> Statement of Ambassador John Negroponte, Before the Foreign Relations Committee, US Senate, Washington, DC, June 14, 2012, p. 2.

especially important for the Bush Administration as we asked our military to take on numerous new missions after the 9-11 attacks during the Global War on Terrorism; several countries had challenged U.S. military activities in their territorial waters, and the Administration concluded that it was vital to have a treaty-based legal right to support our freedom of movement and activities....

Some have suggested that it is not necessary for the United States to join the Convention in order to enjoy its benefits because the main provisions of the treaty are now accepted as “customary international law.” According to this argument, the United States can enjoy international freedom of navigation and exploit the resources on the U.S. extended continental shelf and on the deep seabed, without having to assume any obligations ourselves under the treaty, because these provisions have become accepted as customary international law.

Reliance on customary international law to protect U.S. interests is insufficient for many reasons:...

Fourth, relying on customary international law does not guarantee that even the benefits we do currently enjoy are secure over the long term. Customary international law is not the most solid basis upon which to protect and assert U.S. navigational and economic rights. It is not universally accepted and may change over time based on State practice. We therefore cannot assume that customary law will always continue to mirror the Convention, and we need to lock in the Convention’s rights as a matter of treaty law. Indeed, it is surprising that opponents of the Convention who are usually critical of the haziness and unpredictability of “customary international law” should urge the U.S. military and U.S. businesses to rely on it to protect their essential interests.<sup>130</sup>

Steven Groves stated the following as part of his prepared statement:

In 1993, the Department of Defense issued an Ocean Policy Review Paper on “the currency and adequacy of U.S. oceans policy, from the strategic standpoint, to support the national defense strategy.” The paper concluded that U.S. national security interests in the oceans have been protected even though the U.S. is not party to UNCLOS:

U.S. security interests in the oceans have been adequately protected to date by current U.S. ocean policy and implementing strategy. U.S. reliance on arguments that customary international law, as articulated in the non-deep seabed mining provisions of the 1982 Law of the Sea Convention, and as supplemented by diplomatic protests and assertion of rights under the Freedom of Navigation Program, have served so far to preserve fundamental freedoms of navigation and overflight with acceptable risk, cost and effort.

Almost 20 years later, there is no evidence that suggests a change in circumstances such that U.S. accession to UNCLOS has become essential to the successful execution of the U.S. Navy’s global mission.

Throughout its history, the United States has successfully protected its maritime interests despite not being an UNCLOS member. The reason is simple; Enjoyment of the convention’s navigational provisions is not restricted to UNCLOS members. Those provisions represent widely accepted customary international law, some of which has been

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<sup>130</sup> Testimony of John B. Bellinger III, Partner, Arnold & Porter LLP, United States Senate Committee on Foreign Relations, June 14, 2012, pp. 2-3, 6-8.

recognized as such for centuries. UNCLOS members and nonmembers alike are bound by the convention's navigational provisions.

The body of international law known as the "law of the sea" was not invented in 1982 when UNCLOS was adopted, but rather "has its origins in the customary practice of nations spanning several centuries." It developed as customary international law, which is "that body of rules that nations consider binding in their relations with one another. It derives from the practice of nations in the international arena and from their international agreements." Although not a party to UNCLOS, the United States is bound by and acts in accordance with the customary international law of the sea and considers the UNCLOS navigational provisions as reflecting international law.

Most of the UNCLOS navigational provisions have long been recognized as customary international law. The convention's articles on navigation on the high seas (Articles 86–115, generally) and passage through territorial waters (Articles 2–32, generally) were copied almost verbatim from the Convention on the High Seas and the Convention on the Territorial Sea and the Contiguous Zone, both of which were adopted in 1958. The United States is party to both conventions, which are considered to be codifications of widely accepted customary international law.

Similar to other multilateral conventions, such as the Vienna Convention on Diplomatic Relations, UNCLOS is said to "have codified settled customary international law or to have 'crystallized' emerging customary international law." UNCLOS codified customary law relating to navigation on the high seas and through territorial waters and "crystallized" emerging customary law, such as the concepts of "transit passage" through international straits and "archipelagic sea-lanes passage." As summarized by Defense Department official John McNeill in 1994, UNCLOS "contains a comprehensive codification of long-recognized tenets of customary international law which reflect a fair balance of traditional ocean uses." In short, the convention's navigational provisions have attained such a status that all nations—UNCLOS members and nonmembers alike—are expected to adhere to them.

One way to determine the extent to which UNCLOS's navigational provisions have achieved the status of binding international law is to study the behavior of nations. Behavior in conformity with the convention—known as "state practice"—is additional evidence that its navigational provisions reflect international law. Indications that a state is acting in conformity with international law may be found in states' "legislation, the decisions of their courts, and the statements of their official government and diplomatic representatives." A nation's inaction regarding a particular navigational provision may also be viewed as state practice because it can be deemed to be acquiescence.

The consistent practice of states—maritime states, coastal states, UNCLOS members, and nonmembers—indicates that the UNCLOS navigational provisions are almost universally accepted law. *The Restatement of the Law, Third, of the Foreign Relations Law of the United States* notes:

[B]y express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed mining, as statements of customary law binding upon them apart from the Convention.

This has long been the U.S. position. Since the Reagan Administration, the official U.S. policy has been that the UNCLOS provisions on the traditional uses of the oceans, including the provisions on navigation and overflight, confirm international law and practice. Specifically, in March 1983, President Ronald Reagan announced the U.S. oceans policy in light of his decision not to sign UNCLOS. Reagan announced that "the United States is

prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight” and “will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.”

Reagan’s 1983 oceans policy statement confirmed what was already widely recognized: that the navigational provisions of UNCLOS generally reflect customary international law and as such must be respected by all nations.

Yet proponents of U.S. accession to UNCLOS maintain that the United States cannot fully benefit from these navigational rights unless it is a party to the convention, which “provides” and “preserves” these rights. This is simply incorrect. The United States enjoys the same navigational rights as UNCLOS parties enjoy.

At the December 1982 final plenary meeting of the Third United Nations Conference on the Law of the Sea, some nations took the opposite position, contending that any nation that chose not to join the convention would forgo all of these rights. On March 8, 1983, the United States, exercising its right to reply, expressly rejected that position:

Some speakers discussed the legal question of the rights and duties of States which do not become party to the Convention adopted by the Conference. Some of these speakers alleged that such States must either accept the provisions of the Convention as a “package deal” or forgo all of the rights referred to in the Convention. This supposed election is without foundation or precedent in international law. It is a basic principle of law that parties may not, by agreement among themselves, impair the rights of third parties or their obligations to third parties. Neither the Conference nor the States indicating an intention to become parties to the Convention have been granted global legislative power....

The United States will continue to exercise its rights and fulfil its duties in a manner consistent with international law, including those aspects of the Convention which either codify customary international law or refine and elaborate concepts which represent an accommodation of the interests of all States and form part of international law.

In sum, it is not essential or even necessary for the United States to accede to UNCLOS to benefit from the certainty and stability provided by its navigational provisions. Those provisions either codify customary international law that existed well before the convention was adopted in 1982 or “refine and elaborate” navigational rights that are now almost universally accepted as binding international law....

One prominent proponent of U.S. accession to UNCLOS recently stated that opposition to the convention was not based on “facts” or “evidence” but rather on “ideology and mythology.” The facts and evidence, however, are as follows:...

- For more than 200 years before UNCLOS was adopted in 1982 and for 30 years since then, the U.S. Navy has successfully protected U.S. maritime interests regardless of the fact that the U.S. has not joined the convention;
- The U.S. Navy has never been successfully denied access to any international strait or archipelagic water and regularly exercises its freedom of navigation and overflight rights on the high seas and “innocent passage” through territorial waters;

- The U.S. Navy’s *Commander’s Handbook on the Law of Naval Operations* is the preeminent operational manual regarding navigational rights and is considered the gold standard by maritime nations worldwide, many of which have adopted it for use by their own navies; and,
- The United States is a member of the International Maritime Organization and a founding member of the Arctic Council—organizations in which it actually means something to have a “seat at the table.”...

The U.S. Navy’s support for the navigational rights enshrined in UNCLOS is far outweighed by the convention’s non-navigational provisions. The practices of the Navy and the navies of other major maritime powers created the very customary international law upon which the navigational provisions of UNCLOS are based. The Navy enjoys those same navigational rights and freedoms despite non-accession to the treaty. The Navy’s insistence that a failure to join UNCLOS will hinder its ability to conduct its global mission successfully is belied by the facts and demonstrably disproved by history.<sup>131</sup>

## **June 28, 2012, Hearing**

Witnesses at this hearing included Thomas J. Donohue, President and Chief Executive Officer, U.S. Chamber of Commerce; Jack N. Gerard, President and Chief Executive Officer, American Petroleum Institute; Jay Timmons, President and Chief Executive Officer, National Association of Manufacturers; and Lowell C. McAdam, Chairman and Chief Executive Officer, Verizon Communications Inc.

Thomas Donohue stated the following as part of his prepared statement for the hearing:

The U.S. shipping industry depends heavily on the rights enshrined in the Law of the Sea Convention. At any given time, hundreds of U.S. flag ships and ships owned by U.S. companies rely on the freedom of navigation rights codified in the Convention while in transit through the world’s oceans. Unsurprisingly, U.S. shipping companies have long been ardent supporters of accession to the Convention. The Chamber of Shipping of America has been a longtime supporter of the Convention and has testified and written letters to this Committee urging the Senate to approve the Treaty.

The Convention guarantees rights of innocent passage through territorial seas, transit passage through straits and archipelagoes, and freedom of all vessels on the high seas. Seafaring vessels, such as container ships, crude oil tankers, and bulk carriers, carry over 95 percent of all goods imported to or exported from the United States. Guaranteeing their free movement is both an economic and a national security concern, as these ships transport the majority of this country’s oil and other crucial commodities and goods.

The Convention’s detractors argue that U.S. ships can rely on customary international law to ensure their mobility. But customary international law is not well-suited to the needs of business. By definition, it is hard to find and apply customary law because it does not exist in one place. Its rules can and will shift over time. Shipping companies benefit from a set of stable, written rules that they can easily reference during a dispute. The Law of the Sea

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<sup>131</sup> Hearing before the United States Senate Committee on Foreign Relations on The Law of the Sea Convention (Treaty Doc. 103-39), Prepared statement of Steven Groves, Bernard and Barbara Lomas Fellow, Margaret Thatcher Center for Freedom, The Heritage Foundation, June 14, 2012, 2:30 p.m., pp. 12-16.



Convention serves this function by codifying key navigational rights in a single, central authority.

Furthermore, robust U.S. leadership on maritime issues is just as important as a set of treaty-based rules. Without U.S. participation, there is a greater likelihood that countries will successfully assert divergent views on the application of the Convention's navigational rules. As a non-party, the U.S. lacks credibility to enforce the consistent application of norms embodied in the Convention. The shipping industry—and industry in general—will benefit from a strong, treaty-based rule of law guided by the United States.<sup>132</sup>

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<sup>132</sup> Before the Committee on Foreign Relations of the United States Senate, Hearing on the United Nations Convention on the Law of the Sea, Testimony of Thomas J. Donohue, President and Chief Executive Officer, U.S. Chamber of Commerce, June 28, 2012, pp. 6-7.