China’s New Maritime Legal Enforcement Strategy in the South China Sea: Legal Warfare and an Emerging Contest Over Norms at Sea

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Abstract

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China’s New Maritime Legal Enforcement Strategy in the South China Sea: Legal Warfare and an Emerging Contest Over Norms at Sea

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China has over the past several years begun to implement a new Maritime Law Enforcement (MLE) strategy in the South China Sea. This new MLE strategy utilizes vessels from China’s rapidly expanding MLE agencies, reinforced by PLA naval and other military assets, to assert the country’s claims against other Southeast Asian claimants, particularly Vietnam and the Philippines. A noticeably dramatic increase in the number of incidents at sea in disputed areas has occurred alongside the implementation of this new strategy, escalating tensions to dangerous levels. China’s MLE strategy is an evolution in thinking from previous PLA doctrine, and is in many ways the operationalized extension of concepts such as ‘legal warfare’. The employment of the strategy not only risks upsetting China’s relations with its neighbouring countries, but may also be suggestive of an emerging contest between China and the US over international norms at sea.
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Chapter 1 Introduction

As China continues to develop economically, surpassing Japan this year as the world’s second largest economy, the rapid modernization of the country’s armed forces is also proceeding apace. This is particularly evident in the recent modernization of the People’s Liberation Army-Navy (PLAN), which has developed the world’s first Anti-Ship Ballistic Missile (ASBM) and launched its first aircraft carrier in July of 2011. Economic development is closely tied to the legitimacy and survival of the Communist Party of China (CCP), and though these domestic considerations are the primary consideration in China’s foreign policy, the resources required to maintain such a high level of growth must increasingly be imported from overseas. China has been forced to respond accordingly, urging its corporations to ‘go out’ in search of oil and other commodities in areas like the Middle East and Africa, leading to new missions for the PLAN as it attempts to protect these increasingly global interests.

The heightened importance of the vital Sea Lines of Communication (SLOCs), the maritime highways by which the critical natural resources are transported, may be leading to a shift in the geopolitics of the Asia Pacific region. This is particularly true for rising economic powers such as China, which now relies upon a substantial amount of its oil imports to be transported through the SLOCs in the Malacca Strait and in the South China Sea (SCS). This new dynamic may be creating the foundation for an emerging strategic rivalry between the US and China over the future security environment in the Asia-pacific region, a rivalry which is likely to intensify in the years ahead.

These developments give rise to many questions about the content and character of this rivalry, the understanding of which has significant implications for international
security not only in the Asia Pacific region but globally. Now more than ever it is necessary to ask what type of power China will become as a result of the monumental economic growth it has experienced over the last several decades. Will China be content to play within the rules of the current international system as a status quo power, becoming what Robert Zoellick termed a “responsible stakeholder”? Or will China attempt to revise the rules of that system, seeking to shape them in accordance with its own interests? The most important aspect of China’s rise may be its unprecedented rise as a maritime power, and the most important question, the manner in which China decides to employ its newly acquired naval power.

According to Paul Kennedy as a rising power China would inevitably be prone to go to war with an established power like America. The International Relations literature is filled with similar conclusions, with some arguing that China is a revisionist power pursuing regional hegemony and that it will eventually come into conflict with the US. “China cannot rise peacefully,” the American scholar John Mearsheimer bluntly asserts in a recent article. Yet many in China refuse to accept the inherent implications of such logic, and have asserted time and time again that China’s rise will be peaceful. The most recent example of this can be seen in an article published on the Chinese foreign Ministry’s website written by State Councilor Dai Bingguo, where he forcefully and eloquently rejected characterizations of China’s foreign policy of the type scholars like Mearsheimer might advance in their arguments.

Yet, despite being a clearly impassioned and sincere reassertion of a more subdued and low key Chinese approach to foreign affairs, there are growing indications that a shift has taken place within Chinese foreign policy, moving it in a more assertive
In this regard Chinese actions speak louder than words. There have been a number of recent incidents including those involving US naval vessels in the maritime areas along China’s coast, where the Chinese navy, supported by maritime paramilitary forces and an increasingly confrontational campaign of ‘legal warfare’, has begun aggressively enforcing expansive definitions of sovereignty and jurisdiction. Chinese maritime strategy is currently focused on consolidating control over this area, defined by Chinese naval strategists as the ‘near seas,’ (consisting of the Yellow, South and East China Seas) through the development of what are officially referred to by the United States as “anti-access/ area denial” (A2AD) capabilities. The modernization of China’s armed forces has caused a shift in the balance of power of the Asia Pacific region, and the acquisition of certain capabilities could potentially threaten the ability of the United States military to operate in the region.

With much of the area along its maritime periphery subject to competing claims from neighboring states, China has found it necessary to legitimize not only its’ own claims but also its presence, military and otherwise, in these areas. The use of international law has become increasingly prominent in the evolution of China’s active territorial disputes in the region, the settlement of which remains an unlikely prospect and where the risk of escalation remains high. China’s claims over nearly the entire South China Sea have little support under international law and arguments used to justify expansive definitions of sovereignty and jurisdiction in this area are in contradiction with current customary norms that have been codified into international law, including the United Nations Convention on the Law of the Sea (UNCLOS). China is increasingly attempting to actively enforce these claims through the use of both military and
nonmilitary assets, which has in turn caused an alarming increase in the number of incidents at sea in the area.

At the same time China has also used international law to challenge the ability of other foreign militaries to operate in these same waters. Both Chinese statements and actions have exhibited a clear preference for the revision of certain international legal norms including the Freedom of Navigation (FON) of military vessels. Due to the nature of international law, China’s legal revisionism in this regard represents a potential threat to the interests of maritime powers such as the United States not only in the Asia Pacific region but around the globe. The United States has historically been a virulent defender of navigational freedoms for its’ armed forces, and can be expected to continue to do so in the future. China’s attempt to revise the international norm of freedom of navigation presents a potentially serious conflict of interests between China and the United States in the maritime areas where this norm is being challenged. There is a danger that this conflict could become entangled in either the larger shifting balance of power in the region or the escalation of smaller scale incidents at sea, leading to increasing tension or even conflict.

However, though these indications of revisionist elements in Chinese foreign policy should not and cannot be ignored, neither should they be exaggerated to the point of assuming that China is as a result a revisionist power with which it is not possible to cooperate in areas of common interest both within and outside the region. Conflict between the US and China is not predestined, and many opportunities for cooperation still exist, though they are likely to be located further from China’s shores. Despite these troubling trends, there is an ongoing debate within China over which will continue to
determine the content of Chinese maritime strategy and the manner in which it will be pursued.

That said, a more assertive view in line with many of the Realist arguments made by Mearsheimer not only exists within certain areas of the Chinese foreign policy establishment, but is also currently dominant in this debate. There are traditionally strong realpolitik tendencies in China’s foreign policy making establishment, which can be traced back into the country’s imperial history, and working with the individuals and interests that fall into this camp will prove a challenge for US foreign policy makers. The strategic mindset in China generated by this logic has tended to not only mistake conciliatory gestures for weakness, but also to view a more active U.S. effort in the region as an effort to contain or strategically encircle China.

As a result U.S. foreign policy today finds itself confronted with a paradox. We must meet China’s Realism with a Realism of our own or risk being seen as weak and encouraging assertive behavior. The U.S. must maintain its' previous policy of strategically hedging against the possibility that these elements of revisionism within Chinese foreign policy will emerge as part of a larger more expansive revisionist agenda by continuing to re-engage with the region. Yet at the same time, this approach is likely to be taken within China as confirming evidence of hostile U.S. intentions and reinforce mutual suspicions. Such tendency will exacerbate the aforementioned geostrategic concerns and lead to increased rivalry along China’s maritime periphery over the next several years. There is a fine line in between these two aspects that must be walked with care and can be met only with the brave and creative power of hopeful, intelligent minds on both sides of the Pacific.
Chapter 2 Theoretical Background

There are several different schools of thought in international relations through which it would be possible to view the recent developments in Chinese foreign policy in the South China Sea. I will argue for a mix of two of them, realism and constructivism. Though these schools have at times been assumed by some to be mutually exclusive, I will argue that this is not the case and that they overlap in important areas which tend to be overlooked by either side. Realism and the assumptions about power in the international system that flow from it is an indispensable tool to understanding the shifting strategic balance of power in the Asia Pacific region today.

However, a preoccupation with power could cause one to overlook other important variables that may also exert an important influence on the future direction of events, including the rules and norms of which the international system is composed. These rules and norms, embodied in international law, exert a power of their own which are ignored only at the peril of a nation’s foreign policy. Furthermore, it is necessary to open up the ‘black box’ with which Realist theory tends to discount important variables at the state level of analysis, such as cultural and historical factors that may influence decision making. Constructivist theory is a useful tool to overcoming these limitations, and can more aptly help to conceptualize the rules and norms of the international system.

The time has long past for the field of international relations to begin taking into account indirect sources of power such as international law, otherwise it may find itself unable to account for driving factors in the the most important global security issue facing the world today, the relationship between the US and China and their overlapping interests in the South China Sea.
While much ink has been spilled on the subject in international relations literature, the exact definition of what constitutes a revisionist or status quo state remains under theorized. This is problematic due to the conclusions that follow from a state being deemed ‘revisionist,’ which would in the minds of many necessitate a strategy of containment, not dissimilar to the US policy toward the Soviet Union advanced by individuals like George Kennan in the 1940’s. I welcome the attempts of, and will seek to build from, the work of authors such as Ian Johnston that help to move toward a more precise conception, allowing for degree in revisionist tendency. To analyze China’s maritime strategy and the territorial disputes in the South China Sea I will utilize his five point indicator of what constitutes a revisionist power, which includes not only the traditional realist focus on the balance of power, but also the accepted norms in the international system that compose the ‘rules of the game’.\textsuperscript{11}

Over the years Realism has remained the most prominent school of thought in international relations. Realism is generally seen as one school of thought in international relations, though there are two discernible varities: offensive and defensive. Classic or Offensive Realism tends to focus more on human nature and the drive to power, whereas Neo or Defensive Realism sees the problem as systemic in nature. Very different conclusions follow from each. Defensive realists remain concerned with power, but see the state as concerned primarily with security. Due to the anarchic nature of the international system states are inherently insecure, and seek power as a means to enure their security. However, because of the nature of the system, an increase in security in one state is often viewed as a corresponding decrease in the security of another, creating what is known as a “security dilemma”.\textsuperscript{12}
In Classic Realism states tend to want to continue to expand their power until they become the hegemon in the system, thus the alternate term of Offensive Realism. A state is generally seen as either a status quo or revisionist power, but what precisely defines revisionist or status quo is matter of debate amongst scholars. According to offensive realists such as Hans Morgenthau “the policy of the status quo aims at the maintenance of the distribution of power as it exists as a particular moment in history,” and “is opposed to the reversal of the power relations between two or more nations.”

Power Transition theorists such as Orangski and Kugler have defined them in reference to “the rules of the game,” and status quo states as having participated in their creation, and as a result of this participation, receiving benefit from these rules that revisionist states do not. It is precisely for this reason, from lack of participation in the formation of the rules of the game, that revisionist states are dissatisfied with and “desire to redraft the rules,” in ways that are more beneficial to them and reflect to a greater extent their growing power. However, “neither Morgenthau nor Organski and Kugler provide ways one could determine the degree to which any particular state wanted to reverse current power relations or desired to redraft rules of the game.”

Amongst realist scholars Robert Gilpin made a significant progression from these earlier works through his theory on change in the international system, which he thought occurred at different rates between three different components of the system, including the balance of power, prestige, and the rules of the game. The rules of the game were defined as “a set of rights and rules that govern or at least influence the interactions among states.” Prestige is seen as closely linked to but also distinct from power, defined by Gilpin as “the reputation for power”. Power is defined in terms of economic and
military capabilities, whereas prestige “refers primarily to the perceptions of other states with respect to a state’s capacities and its ability and willingness to exercise power.” These two components are often in conflict with one another and the “differential rate of change” between them was seen by Gilpin as “both the cause and the consequence of international political change.” This change is initiated by the revisionist state which seeks to fundamentally alter, through either words or actions, all of these components, leading to hegemonic war and the eventually “the replacement of a declining dominant power by a rising dominant power”.

This process of systemic change has very recently been utilized by and expanded upon by Randall Schweller, another IR scholar falling into the realist camp, who sees the ordering of the international system being achieved largely through prestige. Building off of the differential rate of change between power and prestige in Gilpin’s theory, Schweller argues that this leads to a period of time, “roughly twenty five years,” in which there is intense power competition between the declining hegemon and the rising power. He devises a larger cyclical pattern whereby the balance of power fluctuates between equilibrium and disequilibrium, including five separate states of (1) a stable order, (2) the deconcentration and deligitimation of the hegemon’s power, (3) arms buildup and the formation of alliances, (4) a resolution of the international crisis, often through hegemonic war, and (5) system renewal. Schweller agrees with the importance Gilpin places on prestige, which decides “who will order and govern the international system, the nature of that order, and how that order will be provided (whether by coercive or legitimate authority).”
The last part is particularly crucial for Schweller however, and is the origin of the second step of the five part cycle, the deligitimation of the hegemon’s power. Delegitimation involves two components: “the deligitimating rhetoric (the discourse of resistance) and cost imposing strategies that fall short of full fledged balancing strategies.” This is the phase which the authors argue the international system has currently entered into. I am in agreement with this conclusion, though will argue that this delegitimation is more than just rhetoric, it is both a rhetorical and physical attack on certain international legal norms that are central to the composition of the current international system. Such an effort is being executed through cost imposing strategies that fall short of full fledged balancing, a point to which I will return after some initial discussion of international law and norms.

The case study material used by Schweller is both well researched and analyzed, yet another entire body of evidence that would support their claims is overlooked, namely, China’s approach to certain critical international legal norms. In order to more clearly begin to lay out the theoretical background for my own work in this regard, I will first turn to the work of an author who’s theoretical foundation is less easy to classify, being first and foremost an expert on China. Like Schweller, Ian Johnston also draws upon Gilpin’s previous work and makes an important contribution by operationalizing the problem of defining status quo behavior with a set of indicators for state behavior, looking at China’s words and actions in regard to international institutions and accepted international norms. While China’s participation rates in international institutions has undoubtedly increased over the years, Johnston notes that participation is a necessary but not sufficient cause for status quo behavior. In order to determine China’s status quo or
revisionist approach to the rules of the game it is necessary to look to two other indicators. These indicators are: 1) Whether or not the state follows the rules and norms of the institution once inside and 2) whether or not the state attempts to change those rules and norms “in ways that defeat the original purpose of the institution.”

Membership is only important to the extent that a state is in compliance with the rules and norms of the institution.

To determine China’s compliance Johnston also looks to what are determined to be generally accepted international norms, under which he includes norms such as international free trade and sovereignty, finding that China has generally been in compliance with these norms. A state’s acceptance or rejection of the rules and norms of international institutions is an important indicator of revisionist preferences. Johnston makes an important contribution by allowing norms to enter the discussion. The inclusion of the term norms in Johnston’s criteria is not in and of itself an important contribution, as the two words have essentially the same meaning and are used interchangeably throughout his chapter. The importance lies in opening up the definition to an alternate body of literature in international relations that tends to originate with a new school of thought referred to as Constructivism.

Under Constructivism the importance of norms in international relations is once again being recognized in the field of political science after a somewhat extensive period of neglect. International law has also tended to be overlooked in mainstream international relations theory, but has also received attention by Constructivist scholars, for obvious reasons. After all, there is perhaps no institution better suited to study the effects of norms on state behavior. One of the most important sources of international
law, customary international law, consists entirely of norms, which become legally binding upon acceptance within a critical mass of states. The other source of international law, international treaties or conventions, are generally a codification of these preexisting norms, which can also shape the development and emergence of new customary norms. Conventions can be considered institutions in and of themselves as they are formed between a multiplicity of state actors with the intention of influencing their behavior in accordance with agreed upon international norms.

While Johnston’s contribution to include accepted norms in the international system was a positive step, his case selection of international institutions and norms examined in the article overlooks the importance of the institution of international law. In a more recent article with the same goals as Johnston’s, examining whether or not China should be considered a revisionist state, Barry Buzan notes these norms are embodied in the ‘primary institutions’ of the international system, which includes the institution of international law. These institutions “define what behavior is and is not seen as legitimate” and are “composed of principles, norms, and rules that underpin deep and durable practices.” In this way Buzan will serve to integrate the use of norms with the institutions in which they are embedded.

In order to determine China’s orientation in regard to the rules of the game I will look at the primary institution of international law, in particular the law of the sea as embodied in the United Nations Convention on the Law of the Sea (UNCLOS). I will then examine both China’s words and actions in regard to important norms of freedom of navigation and sovereignty at sea to determine if it is in compliance with the rules and norms defined by the institution. Both Johnston and Buzan conclude that there is
evidence of limited revisionism in Chinese foreign policy, a conclusion which I share and will return to. However their analysis overlooks important factors in Chinese foreign policy and cannot account for changes that have emerged after publication that suggest not only a failure to comply but in important areas an attempt to change accepted international norms. There are growing indications that China’s current positions and behavior risk upsetting recognized norms of international law in the maritime areas off their coast, including those dealing with freedom of navigation and sovereignty at sea.

A Contest for International Legal Norms at Sea?

Though China has been a strict defender of traditional definitions of sovereignty in the sense of the Westphalian conception of inviolability, compliance with this norm has been largely limited to China’s land territory. This is to a certain extent a result of the Westphalian conception of sovereignty itself, which pertained primarily to land areas, while sovereignty in the maritime areas beyond a state’s shore were somewhat more imprecise and the norms in this area less established until recently. In order to determine whether China is revising international norms pertaining to maritime sovereignty, it is necessary to look at both China’s words and actions in its maritime territorial disputes. For the purposes of this thesis, China’s dispute in the South China Sea will be used. Upon examination of this dispute it will become clear that China is not only failing to adhere to but also seeking to change generally accepted international norms regarding the breadth of state sovereignty at sea. In order to examine this case, it is necessary to establish first the process through which customary norms evolve and then in particular how the
various customary norms of sovereignty at sea have evolved over time to their current state.

*International Law and the Customary Process*

International law is derived from a number of sources including both international treaties or conventions and custom. A Convention is similar to a treaty as it is a formal agreement between concerned states, only as where treaties are often formed between two states bilaterally or between a limited number of states, “conventions tend to attract several states as parties, as they are concerned with major issues of broad international interest.” These Conventions establish rules and norms for the conduct and signatory states and have become more prominent in international law as transnational and global concerns continue to grow in an era of globalization. There have been numerous Conventions signed over the past fifty years, including those on human rights, the laws of war, and even chemical weapons, but the relevant convention for the purposes of this paper, and one which will be a central focus of this thesis, is the United Nations Convention on the Law of the Sea (UNCLOS).

The customary process determines how the rules and norms that define customary international law are “developed, maintained, and changed”. Customary norms develop differently from treaties or convention law in that they are not formally negotiated nor agreed upon by signatory states. Rather, one might say that the customary process involves “a constant negotiation,” of states through their words or actions, referred to as ‘state practice’. Customary norms are constantly evolving, they live and die by the metric of state practice. Once this state practice reflects a general acceptance of the norm
among the society of nations, the norm can be said to have attained opinio juris, whereby the norm causes states to perceive “a legal obligation to adhere to that practice.” It is not necessary for every single state to be in agreement with the norm, rather that a majority of state practice reflects that the norm has become accepted in the international community.

Once an international norm has attained opinio juris it can be said to exercise a binding authority upon all states in the international system to adhere to it, though this is somewhat of a half truth as states can opt out of being bound by the norm, taking the position of a persistent objector. A state may choose not to be bound by the norm and is allowed to do so as long as it persistently objects, either through word or deed. There is disagreement among international legal scholars over which is more important, word or deed, but particularly in the case of international maritime law, some scholars have argued that state action is a more important determinant. “Specific physical State action and counter-action in a very public and concrete manner plays a much more compelling role in the establishment of international legal norms.” Such an assessment is shared by the International Law Association (ILA), which came to similar conclusions in a 2000 report on the formation of customary law. Such perceptions may cause a state to resort to policies that emphasize the importance of physical action in order to enforce their position as a persistent objector to certain international customary norms.

The role of the persistent objector is equally important to that of status quo states in the customary process, for in order for opinio juris to be reached there must be an effective lack of protest. “If other governments do not object and take similar actions, the general practice is recognized as a legal rule.” Likewise, if a sufficient number of states
were to persistently object to a norm that had attained opinio juris, the norm could evolve in the other direction and change into a new customary norm advocated through persistent objection. “Behavior contrary to a custom contains within itself the seeds of a new rule and if it is endorsed by other nations, the previous law will disappear and be replaced, or alternatively there could be a period of time during which the two customs co-exist until one of them is generally accepted, as was the position for many years in regard to the limits of the territorial sea” (more on this below).\textsuperscript{35} This persistent objection thus risks violating the status quo of currently existing customary international norms, and persistent objectors may be seen as revisionist by status quo states due to the potential threat they may pose to cause a shift in accepted international norms.

This division between status quo and revisionist states in regard to customary international law will be a central focus of this paper. As was the case with UNCLOS, customary law can also be codified into convention or treaty law, giving what had previously been considered customary norms more precision as well as power. However, even if codified, the customary norms embodied in the convention remain customary norms for states which are not a party to that convention, perpetuating the same dynamic as if they had remained customary law. Indeed, when a customary norm has been codified within a convention which a status quo state is not a member, the threat posed by a revisionist state that is a member of the convention. This is due to the fact that the revisionist state has a “seat at the table” so to speak, and is more able to influence the future direction of the evolution of the norm within the legal apparatus set forth within the convention.
Freedom and Sovereignty at Sea: Historical evolution of International Law

The predominant view on sovereignty at sea can best be described as customary international law, which has since been codified into treaty law with the signing of the UNCLOS. The origin of customary international law of the sea predated the Treaty of Westphalia, and is embodied in the book Mare Liberum, written by the Dutch scholar Hugo Grotius in 1608. In it, he put forward the position which has come to be referred to as the “freedom of the seas,” arguing that since the oceans were “common to all… and adapted for use by all,” that they “cannot be the property of anyone.”

In fact, according to the legal scholar Louis Henkin the law of the sea was “for 300 years the most stable and least controversial branch of international law.”

Grotius’ conception of freedom of the seas remained the predominant norm governing the maritime domain until the latter part of the nineteenth century.

By the end of the eighteenth century growing security concerns by coastal states, pertaining primarily to the proximity of foreign navies to their coastlines, led to an evolution of the norm. Coastal states began to claim areas out into the sea in a way that resembled claims to sovereignty on land. These claims became referred to as the “territorial sea,” an often poorly defined maritime area within which, if they had the requisite naval power to enforce it, states could claim jurisdiction and control over. The concept of the territorial sea was in effect an extension of state sovereignty and security concerns out from the land and into the maritime areas off the state’s coast. As more and more states began to claim a territorial sea the concept had become generally accepted state practice by the end of the 19th century. The concept could be considered to have attained opinio juris by the first UNCLOS in 1958, where the Convention on the
Territorial Sea and Contiguous Zone was developed. Agreement however on the breadth of the territorial sea could not be reached, despite a general agreement upon the status quo three mile rule. A significant split had emerged at UNCLOS I between “those states (including the US) which supported the status quo and those promoting more expansive territorial sea claims.” This split would factor prominently at the second UNCLOS in 1960, where agreement on the breadth of the territorial sea proved equally elusive, despite an offer of compromise by the US and Canada to move the limits from three to six nautical miles, instead of the twelve advocated by some states.

UNCLOS III was more successful in reaching agreement on the territorial sea, which would extended to twelve nautical miles. After 1960 customary norms in regard to the territorial sea began to change as “the drive for a twelve mile territorial sea became stronger and the opposition to it eroded.” The definition of rights granted within the territorial sea was also precisely spelled out by the convention: “the sovereignty of the coastal State extends, beyond its land territory to an adjacent belt of sea, described as the territorial sea.” This sovereignty extended “to the air space over the territorial sea as well as to its sea bed and subsoil.” This marked a stark shift since the norm had begun to evolve toward the end of the 18th century out of the previous “freedom of the seas,” and introduced the concept of sovereignty that had been applied on land centuries before at the Treaty of Westphalia into the maritime domain. The third UNCLOS had codified what had developed into customary law, providing the coastal state with “the same sovereignty over its territorial sea, as it has in respect to its other land territory.”

There was however an exception made to this sovereignty, the right of innocent passage. Article 17 of the UNCLOS states that “ships of all States, whether coastal or
land-locked, enjoy the right of innocent passage through the territorial sea.” This passage is innocent so long as it “is not prejudicial to the peace, good order or security of the coastal State.” This reflects the security concerns that were the initial impetus behind the emergence of the norm of a territorial sea, banning acts such as military exercises and intelligence collection in the zone. At the same time, it also reflects the persistence of the previous freedom of the seas, with the right of innocent passage being “the result of an attempt to reconcile freedom of ocean navigation with the theory of territorial waters. While recognizing the necessity of granting to littoral States a zone of waters along the coast, the family of nations was unwilling to prejudice the newly gained freedom of the seas.”42 With the emergence of the norm had also emerged a tension between the freedom of the seas and sovereignty of the seas, between coastal and maritime States.

The convention also created two new maritime zones that extended past the territorial sea, zones where the previous freedoms would be more absolutely maintained. These zones were the Exclusive Economic Zone (EEZ), which extended out 200 nautical miles from shore, and the Continental Shelf, which in accordance with certain technical determinants, could reach out as far as 350 nautical miles respectively. These zones were created primarily for economic purposes, and the security concerns over sovereign jurisdiction and the passage of foreign military vessels was restricted to the territorial sea, despite attempts by some states to extend these concerns further. The zones had emerged from previous customary norms that had begun to gather momentum over the decades leading up to the third UNCLOS whereby coastal states had begun claiming exclusive fishing zones, “some under the guise of expanded territorial seas and some based on a new type of fishing zone located outside those seas.”43 The maritime States supported the
formation of the latter instead of an extended territorial sea, yet “feared that if the coastal States acquired exclusive fishing rights, its jurisdiction would continue to expand to other uses and would interfere also with navigation, scientific research and military uses in wider coastal zones.” While states were given jurisdiction and rights over the resources in the EEZ, other freedoms that had been enshrined in the freedom of the seas, including military use of the EEZ, remained intact.

China was amongst the coastal states pushing for restricted freedoms in the EEZ, and even after having both signed and ratified UNCLOS III, has attempted to argue for and implement an interpretation of the treaty that would amount to an extension of the sovereign rights and jurisdiction that are applicable only in the territorial sea. In fact, while China attempts to justify its actions in reference to UNCLOS, these actions are motivated by an earlier Chinese view of sovereignty in the maritime areas off China’s coast that predates both UNCLOS and the evolution of the customary norms embodied in it. The origins of China’s position in the South China Sea predate both the Chinese Communist Party’s ascension to power as well as UNCLOS, and are part of China’s Imperial legacy when the area was regarded as ‘historic waters’ over which the country exercised ‘indisputable sovereignty.’ The evolution of the customary norms regarding sovereignty at sea did not evolve how China would have liked, though this has not stopped China from continuing to attempt to shift this evolution in what it sees as a more agreeable direction. China has positioned itself at the forefront of the divide that has become evident over the past century beginning with the first law of the sea conference, between states attempting to extend sovereign powers into the maritime domain, and those who seek to maintain freedoms of navigation at sea. This position may become a
focal point in the emerging geostrategic competition between China and the US, a
competition which will be defined in the years ahead by the tension between the conflict
between maritime powers and coastal states, between the freedom of the seas and
sovereignty at sea.

China’s record of peacefully settling the territorial disputes in which it has been
involved has been impressive and indicates a general willingness to compromise on
territorial claims, though it remains to be seen if this pattern will apply to China’s current
active offshore maritime territorial disputes. In fact, there are growing indications that
this pattern of compromise may not extend to China’s approach to sovereignty in the
maritime periphery where these territorial disputes are located. This approach, which
seeks to emphasize and extend the sovereign rights of coastal states beyond their
territorial seas, is in contravention to international norms and definitions of maritime
sovereignty currently existing in customary international law which has become codified
in UNCLOS.

*The Power of International Law*

Until recently international relations scholars have tended to discount the role
international law might play in the conduct of foreign affairs. Realist authors such as
Hans Morgenthau have been essentially relegated international law the status of being
largely irrelevant, seeing it as overshadowed by the larger power dynamics at work as
states vie for supremacy in the international arena. In the absence of any international
legal body able to enforce decisions, it is largely left up to a state to decide if they want to
abide by international laws. These laws can often be in conflict with the national interests
of a state. For this reason, “governments,” says Morgenthau, “are always anxious to
shake off the restraining influence that international law might have upon their foreign
policies… and to evade legal obligations that might be harmful to them”.\textsuperscript{47} To realist
scholars like Morgenthau, power was an end in and of itself, and the state that achieved it
by acquiring the greatest amount of wealth and subsequent military forces that wealth
could purchase, was the state that would survive. International law was part of a
dangerous inclination toward idealism that realist scholars like Morgenthau saw as
having led American and other foreign policies array in the lead up to World War II.

Later Neorealist scholars such as Kenneth Waltz defined power differently,
denying it the causal role attributed by the earlier realist scholars. “To define ‘power’ as
‘cause’ confuses process with outcome. To identify power with control is to assert that
only power is needed to get one’s way. That is obviously false.”\textsuperscript{48} Waltz took a more
systemic approach, claiming that actors were interested in security rather than power
alone, power being only a means toward achieving that end. Some have pointed out that
international law could very well have been included in this system, if not for the
defining principle of Waltz’s system being anarchy, which was “by definition
incompatible with law.”\textsuperscript{49} Waltz claimed that the international system was anarchic for
similar reasons to Morgenthau’s argument for power, namely the lack of a legal sovereign
existing above the power of the states to enforce order.

However, as international relations continued to evolve as a field Constructivism
emerged and put forward a new conceptions of power and the structure of the
international system. Anarchy as the defining principle of the international order was
called into question and came to be seen as increasingly conditional, operating in some
cases but not in others. Anarchy is, as Alexander Wendt has stated, “what states make of it.” Anarchy may have different meanings for different actors, and this anarchical structure can be mitigated through the achievement of shared understandings, or norms, between the different states in that system. These norms create “patterns of practice,” that “greatly reduce uncertainty among actors… thereby increasing confidence that what actions one takes will be followed by certain consequences and responses from others.”

One would be hard pressed to find a more apt definition of customary international law than this sentence, since the customary process is exactly that, patterns of practice.

These patterns generated a power of their own, referred to as “the power of practice.” According to the constructivists power was defined not only by the material components emphasized by realists like Morgenthau and Waltz, but also by “ideological structures and institutionalized norms”. Power is not always the ability to directly control or influence the actions of other states. International Relations and the national security strategies of the United States have for too long been focused on this direct aspect of power. Power can also be exercised indirectly, and the normative structures of international law provide a power of their own through the legitimacy they lend to a State’s foreign policy. The power of international law can “qualify or condition the use of non-legal power by States,” through legal obligation and the loss of legitimacy that would come with failing to adhere to those obligations.

This indirect aspect of power exists in a reciprocal relationship with more direct forms of power previously outlined by realist scholars like Morgenthau and Waltz, with the more traditional forms of power, including military power, influencing the formation of international law. “Although all States are equally entitled to participate in the
customary process, in general, it may be easier for more powerful States to behave in ways in which will significantly influence the development, maintenance, or change of customary rules.” A more powerful state in the traditional sense of the term, will be more able to influence the evolution of more indirect forms of power including the norms that compose the customary process of international legal development. And since these shared customary norms affect the conduct of States in the international system, they could also be considered a determining factor in the balance of power in that system. This is certainly the case in regard to the norm of freedom of navigation, which provides the legal basis for the traditional determinants of US power, military vessels and aircraft, to maintain their forward presence in and above the vast expanse of oceans spanning the globe.

Due to the fact that more powerful states are more likely to cause a normative shift and corresponding change in customary international law, efforts by more traditionally powerful states to change currently existing international law may be of greater concern to status quo states that attempt to uphold these norms than would a challenge from a less powerful competitor. Revisionism in regard to international legal norms may also overlap with and influence other concerns in regard to military capabilities and future intentions. For this reason challenges posed by China’s approach to the norms of freedom of navigation and sovereignty at sea may be regarded by status quo powers such as the US as more potentially threatening than would be challenges from less powerful states. While China is not alone in its opposition to these norms, it is the first state to actively challenge them while simultaneously possessing a credible
potential to emerge in the not so distant future as a peer competitor of the US in terms of military and economic power.

Both of these countries already have for some time been placing increased importance upon the indirect power of international law. US military forces and national security policy have over the past several decades attempted to uphold currently existing customary norms that allow unfettered access to the global maritime commons through their Freedom of Navigation program. The use of international law or ‘legal warfare’ is an essential component of China’s strategy of “winning without fighting” in the South China Sea. China’s attempts to revise recognized norms of international law relating to freedom of navigation and sovereignty at sea are becoming the focal point of increasing strategic competition between the US and China.

Deligitimation and the Balance of Power at Sea

The challenge posed by China’s attempts to revise international norms relating to international law at sea is not itself alone a sufficient determinant for whether or not to regard China as a revisionist power. Challenging the rules of the game must also exist concurrently along with a 1) clear preference for redistributing power in the international system, as well as 2) behavior aimed at achieving such a goal. In regard to both China’s preferences and behavior toward the distribution of power, Johnston concludes that there is evidence of ‘limited revisionism’ in Chinese foreign policy. China’s limited revisionist preferences are most evident in China’s intention to reunify Taiwan with the mainland through the “one China policy,” but less so in regard to ambitions for regional hegemony and China’s claims in the South China Sea. Johnston finds the evidence for
China’s claims in the South China Sea “somewhat more speculative,” and scant proof for China pursuing regional hegemony. Johnston notes that “the corrolaries to these revisionist aims are subgoals related to reducing the obstacles to changing the status quo, namely U.S. Military power in the region.”

I would agree with Johnston’s conclusion on regional hegemony but argue that China’s approach to the South China Sea disputes has changed significantly since the article was published in 2004. What appeared in 2004 as a move toward multilateral diplomacy has since given way over the last several years to an increasingly aggressive attempt to assert China’s claims in the South China Sea. China’s previously discussed positions regarding legal norms at sea are integrally linked to its desire to enforce its claims in territorial disputes along China’s maritime periphery, particularly in the South China Sea. China is actively seeking to implement these preferences through a campaign of ‘legal warfare’ currently being implemented by military and maritime paramilitary organizations.

In regard to the key question of whether or not China is balancing US power in the Asia Pacific region, the evidence is mixed. In the international relations literature balancing can take place two ways: either internally (through economic and subsequent military expansion) or externally (through alliances aimed at opposing the hegemon). Johnston concludes that Chinese behavior in regard to Taiwan, planning to limit the ability of US forces to intervene in the event of conflict, is a “dangerous exception” to what is otherwise a generally status quo orientation in regard to the balance of power. As will be discussed in greater detail later on, the Chinese military has been undergoing a continuous and rapid modernization of its forces over the last several decades, which as
Johnston notes “has been aimed in large measure at developing capabilities to deter and/or slow the application of US military power in the region.” But he concludes that China is primarily concerned with Taiwan, “not the US strategic presence in the region per se nor necessarily other military contingencies,” in the South China Sea or elsewhere.

This remains true to a large extent today, with the primary focus of PLA planning focused on Taiwan, yet the military is also focusing on reducing the ability of US forces to intervene in other disputes, including those in the South China Sea. The military forces that might have at one time been solely aimed at potential Taiwan contingencies also have potential application further from China’s shores due to both the fungibility of naval and aerial assets in general as well as recent developments in force structure. Developments of most concern to the US military are asymmetric threats originating primarily from China’s missile and submarine development programs. While there can be little doubt that this trend causes concern in the US Pacific Command, it does not necessarily fall into accordance with the definition of balancing. However, there is much more of an indication of what Schweller termed deligimation, in particular the use of implementation of cost imposing strategies carried out through growing naval and maritime paramilitary forces.

In addition to attempting to deligitimize the maritime legal norms that underwrite the US military presence at sea, China is also utilizing cost imposing strategies carried out as part of the assigned missions of these forces. According to the article “states can impose costs on a unipolar power in a variety of ways, ranging from the mere withdrawal of goodwill to actual attacks on its soil.” These strategies are designed to allow the rising power to “attempt to shape the environment without directly confronting the
hegemon.” Such a strategic orientation, attempting to maintain strategic goals through indirect confrontation without the use of force has a long lineage in ancient Chinese strategic thought and is evident in China’s current strategy of “winning without fighting,” in the South China Sea, a strategy which is being implemented through a campaign of ‘legal warfare’ and enforced by expanding naval and maritime paramilitary power.
Chapter 3 International Law and Norms

Legal Warfare

While China’s legal arguments have been conducted on the pretext of adhering to international legal institutions such as UNCLOS, both China’s actions and legal arguments are fundamentally at odds with the original intent of such legislation. According to the 2010 US Congressional report on the country’s defense and security developments, China “appears to be making concerted efforts, through enacting domestic legislation inconsistent with international law, misreading the negotiations and text of UNCLOS, and overlooking decades of state practice in attempts to justify a minority interpretation providing greater authority by littoral states over activities within the Exclusive Economic Zone (EEZ).”

Consistent with these ends China’s military and scholarly legal experts have initiated an international legal campaign, termed ‘legal warfare’ according to recent Chinese military strategy. Legal Warfare is one of the ‘three warfares’ (san zhong zhanfa) approved by the CCP Central Committee and Central Military Commission (CMC) in 2003. This new addition to military strategy was developed by the PLA for use in conjunction with military and non military means and China has now “incorporated the concept of legal warfare into its attempts to shape international opinion and interpretation of international law.” The concept first appeared in a book published in 1999, “Unrestricted Warfare”, in which the two Colonels in the People’s Liberation Army (PLA) Qiao Liang and Wang Xiangsui wrote about “international law warfare” in terms of “means and methods to fight a non-military war.” The concept has since been mentioned in Chinese publications such as Renmin Haijun (People’s Navy), where a May
2006 article referred to “the use of law as a weapon” in modern warfare, which is defined in the article as “a political and legal battle of safeguarding national sovereignty and territorial integrity against enemy countries’ military interference.” The concept of legal warfare would suggest that the leadership in both the CCP and CMC is decidedly pursuing a concept of warfare used to advance its national security interests short of outright kinetic battle between military forces.

Such a conception of warfare is fitting of the ancient Chinese military strategist Sun Tzu and his conception of “winning without fighting.” This conception of warfare bears a striking resemblance to thoughts of the late Prussian strategist Carl Von Clausewitz who said that war is a strategic undertaking not easily reduced to its tactical components alone, ultimately a “continuation of politics by other means.” Clausewitz’s dictum however, also bears a striking resemblance to Mao’s understanding of war as a political undertaking, which emphasized strategic over tactical success. Mao paid close attention to the Chinese strategic thinkers that came before him, as has China’s leadership in the years since. Perhaps in no other country does history continue to exercise influence in the present as it does in China and this history of strategic thinking shapes China’s current approach toward foreign policy. This includes China’s territorial disputes in the South China Sea, where the Chinese leadership is currently pursuing a strategy of “winning without fighting”.

Using law as an instrument of power is also consistent with current Chinese legal culture and the prevailing conception of ‘rule of law’ (*fazhi*) within the country. Though interpretation of the term is debatable, the characters fa and zhi can also be translated as “rule by law,” which is a more accurate categorization of the Chinese legal system today,
whereby the government maintains final authority and the law is used as a tool to govern more effectively. This domestic orientation toward the rule of law is now entering over into the international arena, where China sees legal warfare as an indispensable weapon to use in consolidating its claims in the areas along its maritime periphery. In fact the two often overlap, with Chinese domestic laws often being used to supplement or circumvent international law that is not in congruence with Chinese national security interests.

China’s approach toward the use of international law manifests itself in a dualistic orientation, taking the form of two different paths, one passive, the other active. The passive use of international law pertains primarily to China’s legal claims in areas such as the South China Sea, where the the long term regional balance of military power continues to shift in its favor. This passive orientation seeks to exploit ambiguity in existing international law so as to delay any solution of the disputes that would be unfavorable for its interests. On the other side of the equation is a much more problematic active effort to use international law so as to more effectively be able to exercise control over the areas along China’s maritime periphery. This active use of international law, in line with the concept of legal warfare, is highly problematic in two respects. First, it significantly raises the risk of escalating tension between China and the other claimants to the territorial disputes in the South China Sea, Secondly, it presents a direct challenge to the ability of the United States military to continue operating in the EEZ’s of East and Southeast Asia, particularly those contained within China’s claims in the South China Sea and other areas along its maritime periphery. Furthermore, due to the nature of
customary international law China’s use of legal warfare could cause a shift in existing international norms surrounding freedom of navigation in the EEZ.

China’s attempts to exploit legal ambiguity in international law is not an uncommon tactic of states in the international system as they seek to maximize their interests. This approach is evident with China’s approach to the territorial disputes in the South China Sea, where the government prefers to maintain legal maneuverability through persistent ambiguity and remains hesitant to enter into meaningful multilateral negotiations on the subject. Where China’s approach differs however is the use of active legal efforts in areas where the government is embracing the use of international law through the doctrine of legal warfare. These areas pertain primarily to the attempted enforcement of sovereign jurisdiction in the EEZ, whether it be in the form of preventing foreign military activities or the harassment of maritime and civilian vessels of other claimants. In this respect a very different Chinese orientation toward international law is visible as the foremost weapon in its attempts to consolidate control over its maritime periphery, focusing on the legitimacy that it provides in terms of global public opinion, and attempting to undermine the legal basis for foreign presence in the areas it claims under its jurisdiction.

Recent incidents in the South China Sea have helped to clarify China’s legal claims in the area, yet a significant amount of ambiguity remains and the exact basis for and extent of China’s claims in the area remains uncertain. This ambiguity is likely to persist in official Chinese pronouncements on the area as it benefits China’s position.

What is clear is that China’s legal arguments not only cover the increasingly specific area and basis for their territorial claims, but also what activities, including military
surveillance, China will or will not permit foreign countries to undertake in the areas which it considers fall under this claim. While some in China may be of the mindset that continued ambiguity benefits their strategic position in the South China Sea, if allowed to persist this is likely to prove just the opposite. If China does not bring its claims and interpretations of international norms into compliance with those embodied in the UNCLOS, this will likely prove detrimental to China’s claims in the region as well as the overall strategic environment in the Asia Pacific region. If China seeks to continue to maintain its ambiguous and expansive definition of sovereignty in the South China Sea, this will adversely effect any possibility of compromise over conflicting claims in the future.

China’s claims in the area have already caused tension with China’s regional neighbors and even the United States at times. The legal basis of China’s arguments in respect to both its’ maritime claims and permissible activities within those areas can find little support under currently existing international law. Even more so, China’s current legal position poses a potential threat to the sustainability of international norms currently embodied in such legislation as the United Nations Convention on the Law of the Sea (UNCLOS), including the freedom of navigation.

While the fundamental tension in the South China Sea is more strategic in nature than it is over disagreements on international law, this does not negate the importance of international law to the disputes, as it is “the primary field of battle chosen by the parties to contest their claims.” China has asserted sovereign rights and jurisdiction over the EEZ that are in contradiction to those granted it under UNCLOS, including the ability to regulate foreign military activities in this area. While states are entitled under the
convention to sovereign rights and jurisdiction in the territorial sea (which extends out to twelve miles from shore), there is a fundamental distinction drawn within the convention between the territorial sea and high seas freedoms, including the freedom of navigation, that are to be maintained in the EEZ (which extends from 12-200 miles offshore). China is not only failing to comply with the accepted definition of sovereign jurisdiction in the EEZ as granted by UNCLOS, but is also attempting to change accepted access oriented norms through a sustained and active legal campaign. This campaign is aimed at restricting the ability of foreign militaries, including the United States Navy, to be able to operate in these areas.

**Sovereignty and the South China Sea**

China’s legal claims in the South China Sea continue to remain shrouded in the midst of significant ambiguity over both the scope and their basis in international law, but over the past several years a discernible trend of steadily clarifying these claims has emerged out of a series of exchanges between China and other claimants in international legal bodies beginning in May of 2009. Compelled by an approaching deadline set for the middle of the month, Vietnam and Malaysia made a joint submission to the UN Committee on the Limits of the Continental Shelf (UNCLCS). The UNCLCS is a legal body empowered under Article 76 of the UNCLOS charter to “make recommendations to coastal states about the limits of their continental shelves beyond 200 nautical miles.” It is important to note that the CLCS was intended to be a technical and not a legal body, and “it does not therefore adjudicate on submissions.” The state can then on the basis of this recommendation establish limits that are “final and binding.”
In order for any of the original members of UNCLOS (who ratified the treaty in 1994) to claim an extended continental shelf, it was required that they submit the necessary scientific and technical data to CLCS by May 13, 2009. Though this deadline had been moved back once from an initial deadline in 2004, because of problems states were having with gathering the required materials necessary for submission, the 2009 deadline was final if a state wanted to make any claim then or at anytime in the future. Vietnam and Malaysia’s claims were submitted in this regard, one made jointly concerning the Spratlys, the other by Vietnam alone which pertained largely to the Paracels. The submissions were required by the deadline and though not intended to be provocative or to increase tension, this was precisely the effect they had on the disputes, serving as a primary catalyst in recent escalation over the last several years.

China reacted to these submissions by submitting several note verbals to the UNCLCS in protest, reasserting China’s own claims in the South China sea. An initial round of protest and counter protest letters took place following the initial submissions in 2009, and then a subsequent round occurred recently in 2011 following a protest of China’s claims in a letter submitted to the CLCS by the Philippines. The content of China’s notes from these two periods helps to clarify China’s legal positioning on the disputes, though significant ambiguity remains as to the exact scope and legal basis of China’s claims in the area. This is likely intentional as China’s claims are exceedingly weak under international law and would likely fare very poorly if the disputes were to be brought before international arbitration, an unlikely prospect for reasons to be discussed toward the end of the section.
China’s claims in the South China Sea are expansive and encompass practically the entire body of water, covering some 1,350,000 million square miles of maritime territory. These claims can be traced back to and are outlined in the ‘nine dotted line’ map first published by the Guomindang (KMT) government in 1948. The lines on the map stretch over a thousand miles southward of China’s shores and the precise definition of what these lines pertain to has still not been clarified by the Chinese government, likely because the lack of clarification benefits China’s negotiating position by allowing maximum flexibility. The map was tabled for the first time in an international legal body when China submitted a copy of the map to the UNCLCS in its 2009 note verbal protesting the Vietnamese-Malaysian joint submission, eliciting a strong reaction from other claimants and eventually from other concerned countries in Southeast Asia who are not directly party to the disputes.

While the map represents what are assumed to be China’s claims in the South China Sea, the exact contents of what is claimed within the lines, as well as the legal basis for these claims has been subject of much debate. Over time there have emerged four discernible lines of argument amongst Chinese officials and legal scholars regarding what legal claims are represented within the map. These have included both sovereign and historic waters, claims to the islands themselves and China’s perceived security interests within the depicted area. These different legal justifications are not mutually exclusive in Chinese views and have been used to supplement one another and “in combination, China’s claims are tantamount to a claim of full sovereignty over the South China Sea.”
Figure #1: China’s ‘Nine Dotted Line’ Map
*Source: Official letter submitted to UNCLCS
In 2011 the Philippines submitted a note verbal to the CLCS in response to the original Vietnam-Malaysian submission of 2009, claiming that China’s 9 dotted line map had “no basis under international law.” China’s note verbal submitted in response to the note has perhaps come the closest to specifying what exactly China is claiming and the international legal basis for such claims. China responded by stating that its claims to the Spratlys (Nansha in Chinese) are “clearly defined”. The note stated that China’s assertion of sovereignty over all of the islands in the South China Sea can likewise be traced back to the KMT government when they published in 1935 a list of the “names of 132 islands, reefs, and low tide elevations in the South China Sea, of which 28 were in the Paracel Islands archipelago (Xisha Qundao) and 96 in the Spratly Islands archipelago (Nansha Qundao).” Furthermore, the note stated that under UNCLOS and the 1992 and 1998 laws the Spratlys (Nansha) were “fully entitled to Territorial Sea, EEZ and Continental Shelf.”

This would seem to support the third view of the map in regard to China’s claims, implying that they are based off of the ability of the capacity of island territories to generate their own maritime zones as granted within UNCLOS. Such an interpretation is further supported by China’s 2009 note which stated China’s claims to sovereignty over the islands and their “adjacent waters.” The argument would be that if taken together the EEZ’s from all of the islands China claims in the SCS would purportedly equal the area claimed by China in the nine dotted line map. However this argument is problematic not only because of the fact that China’s claims to the various islands in the area are disputes
by numerous other claimants, but it is unlikely that the island territories would be capable of generating EEZ’s to sufficiently support China’s expansive claims.

Part VIII of UNCLOS, the “Regime of Islands,” deals specifically with this issue, and prove problematic for any country, including China, who were to try to base their claims on the capacity of the islands in the Spratlys to generate their own individual maritime zones. Article 121 entitles an island to the same maritime zones as other land territory, including both an EEZ and continental shelf of its own. However, this is only if the islands are capable of generating an EEZ or continental shelf of their own, there would be no grounds for the submissions on the outer continental shelf. If the features are not considered islands but rather ‘rocks,’ which are not above water at high tide and “cannot sustain human habitation or an economic life of their own”, they would be unable to generate either an EEZ or continental shelf.81

Since the majority of the roughly 250 features in the Spratlys are not above water at high tide and have no ability to sustain human habitation or support an economy of their own, very few of them, possibly 12 or 13 at most (1 or 2 by a more conservative estimate) would actually be considered to be islands.82 Claims by any state, including China, to the Spratlys and surrounding waters based on the interpretation that they are capable of generating surrounding maritime zones would find little support under international law.

The submissions by Vietnam and Malaysia to the UNCLCS would, if accepted, affect the dispute in important ways. They have the potential to significantly simplify the dispute, but this is unlikely given that the submissions would prove problematic for the claims of other countries involved in the dispute who base part or all of their claims on
the premise that the Spratlys are a chain of islands. Vietnam and Malaysia’s submissions in effect “do not consider that any of the features in the Spratlys may be categorized as an island.”

However, it is highly unlikely that the disputes will reach the point of international arbitration. While the CLCS is tasked with making recommendations, it is unlikely that the committee will be able to solve the disputes, since it is not empowered to rule on contested claims. The possibility of bringing the dispute for arbitration before an international legal body was recently suggested by President Benigno Aquino, who stated that the Philippines was considering submitting the case to the International Tribunal on the Law of the Sea (INTLOS). However, were the Philippines to decide to proceed with such action it is unlikely that the case could be heard by the court, not however because the court lacks in the authority to do so. While CLCS is a technical body without the ability to adjudicate disputes, according to UNCLOS the ITLOS has jurisdiction over “any dispute which is submitted to it in accordance with Part XV (Settlement of Disputes) of the Convention concerning the interpretation or application of the Convention.”

Though the aforementioned part of UNCLOS refers to the ability of the ITLOS to make compulsory binding decisions on cases involving the settlement of disputes, there are however limitations to the ability of the tribunal to do so, making it equally unlikely that it would be able to hear or rule on the dispute. These limitations stem from a loophole in the UNCLOS that allows for a state to file a reservation on this section, in effect allowing the state to opt out of any commitment to be bound by such decisions. Article 298 pertains to instances of binding decisions, but also allows States and entities
“to declare that they exclude the application of the compulsory binding procedures for
the settlement of disputes” under the Convention in respect of certain specified categories
of disputes. China has exercised its ability to take advantage of this loophole, and “does
not accept any of the procedures provided for in Section 2 (Compulsory Binding
Procedures for the Settlement of Disputes) of Part XV of the Convention.”\textsuperscript{87} Since China
refuses to be bound by Art. 298, ITLOS has the jurisdiction to hear the case only by
mutual consent, meaning that China would have to agree to allow the Philippines to
submit its claim to the court. This is highly unlikely to happen as China’s rationale for
making such a reservation would be to avoid falling under the authority of the court in
instances where it did not find it advantageous or agreeable to its national security
concerns.

While arbitration in an international legal body remains an unlikely prospect for
the aforementioned reasons, the CLCS submissions by Malaysia and Vietnam do
nonetheless mark a new development in the evolution of legal arguments by the various
claimants to the disputes, creating a divide between those countries that base their claims
in the South China Sea on the islands in the South China Sea being just that, islands, and
those that do not. The submissions may indicate an effort by Malaysia and Vietnam to
shift the emphasis in the disputes from the islands themselves to maritime zones
generated by the coastlines of the states themselves.

These moves would be in line with emerging trends in international law regarding
maritime delimitation whereby islands are awarded “significantly reduced effect,” in
international arbitration, “especially when they are located a significant distance off
mainland coasts.”\textsuperscript{88} This trend would strongly favor the Southeast Asian states which are
located in much closer proximity to the Spratlys than China, whose Hainan island is some 650 nautical miles (nm) from the islands. As a result of this trend “the potential influence of islands on maritime delimitation boundaries has generally been discounted,” a fact that would strongly favor the ASEAN claimants in the event that the disputes do eventually reach the point of international arbitration. Treating the Spratlys as rocks under UNCLOS would not only significantly simplify the dispute but would also potentially defuse much of the tension that has resulted historically from an effort by the various claimants to occupy the islands in the hopes of strengthening their legal position.

The basis for these previous efforts lies in a slightly flawed interpretation of relevant international law pertaining to sovereignty over land features, an issue separate from UNCLOS but one nonetheless central to the disputes. UNCLOS, as a maritime law, does not pertain specifically to sovereignty over land features and is ultimately unable to address the issue of sovereignty over the islands themselves. The relevant international law in this regard requires that a credible claim to sovereignty on the grounds of discovery to be followed by a “continuous and peaceful display of authority.” Improper interpretation of this principle resulted in a rush to occupy features in the Spratlys beginning in the late 1970s.

While some displays of authority may have been continuous, they have not always been peaceful. The struggle for control of the islands has led to armed confrontation of several different occasions. Following the forceful occupation of the Paracel islands in 1974 and a brief conflict with Vietnam, China has been increasingly assertive in the Spratlys island dispute. In 1988 it once again clashed with Vietnamese forces, sinking several Vietnamese boats and occupying Fiery Cross Reef. In 1995
China occupied and constructed military installations on Mischief Reef located within 
the Philippines EEZ.

There are indications that this misinterpretation has also been reinforced by a 
perception in the region that recent ICJ cases in 2002 and 2008 supported such an 
interpretation. States would do well to take note of the fact also that an act of 
administration, after a dispute is known to exist, “would be immaterial as a matter of 
international law.”91 A new rush to occupy features remains a distinct possibility 
however, with recent events suggesting this perception could still cause history to repeat 
itself. In May of 2011 Chinese ships are reported to have unloaded construction materials 
on a previously unoccupied feature in the Spratlys, Amy Douglas Reef, which resides 
within the Philippines Exclusive Economic Zone.92 This event not only reflects the 
persistence of previous problematic interpretations of international law and bears a stark 
similarity to China’s previous occupation of Mischief Reef in 1995, but is also in 
violation of the Declaration on a Code of Conduct (DOC), signed between China and the 
ASEAN claimants in 2002.

The agreement was the product of nearly a decade of negotiations between China 
and ASEAN states and helped to stabilize and eventually reduce somewhat the tension 
that had built during the previous period. However, while a step in the right direction, 
these negotiations ultimately resulted in a largely ineffective document, the 
implementation of which has been problematic if not largely nonexistent. The 
Declaration is itself largely reflective of the balance of power and attempts by the weaker 
ASEAN states to compel China into an agreement so as to ensure their security. China’s 
influence in the negotiations was undeniable. During negotiations both Vietnam and the
Philippines had insisted that the Code of Conduct (COC) be binding, but China resisted this. The result was a non binding declaration on eventually reaching a COC, not an actual COC itself.

Incidents such as those in May of 2011 involving Chinese ships “represent the most serious breach of the agreement to date.” In light of such incidents many in ASEAN have begun to emphasize the necessity of implementing the DOC and forming an actual COC. Negotiations led by Indonesia as chair of ASEAN have moved closer to implementing the agreement, with new Guidelines on Implementation of the DOC being agreed upon in July at the 2011 ASEAN Regional Forum (ARF). While these guidelines, like the DOC before them are a step in the right direction, many analysts have been critical of their ability to reduce tension in the region, describing the signing as “much exaggerated good news”. The guidelines, eight in all, are said to focus on non-security issues such as environment protection, marine science and transnational crime. Neither the DOC or the guidelines addresses the behaviour of the various claimant’s naval and maritime paramilitary forces. As a result it is likely to have little effect on mitigating what has become an alarming trend of increasing incidents at sea in the area between the claimant nations and even at times external powers. This trend is only likely to become more pronounced in the near future, as persistent disagreements over applicable international law in offshore maritime zones become more entrenched and domestic legislation vying to assert the legal right to forcefully assert sovereign jurisdiction in disputed waters make such an agreement increasingly imperative.
Legal Warfare and Maritime Enforcement

China’s approach of intentional ambiguity in regard to its claims in the South China Sea may represent a more passive tactic to avoid unwanted obligations or restrictions imposed by international law, yet a developing trend suggests a much more active use of international law to advance China’s territorial ambitions in the South China Sea. Such an approach would be in line with the ‘Legal Warfare’ doctrine incorporated into PLA military strategy in 2003. This more active approach includes both the passive of domestic legislation as well as increasingly aggressive attempts to enforce such legislation in the areas falling within what China deems to be its jurisdiction and maritime sovereignty. These efforts can be seen in two separate but overlapping disputes in the area, one involving China’s increasingly aggressive enforcement of its claims within the South China Sea, the other numerous attempts by China to limit the ability of foreign militaries, including the US Navy, to operate in China’s Exclusive Economic Zone (EEZ).

Law on Island Protection

While domestic legislation such as the Surveying and Mapping Law was intended to challenge the legal foundation of the right of foreign militaries to operate in China’s exclusive economic zone, another piece of recent domestic legislation, The Law on Island Protection, may have a similar impact regarding rights of the various Southeast Asian claimants in the South China Sea. At present, the law has attempted to create a legal foundation for aggressive Chinese action against other Southeast Asian claimant states,
causing significant alarm and raising the potential for misunderstanding or even escalation.

The Law on Island Protection, which went into force in March of 2010, provides a domestic legal basis to strengthen maritime sovereignty claims and enforce jurisdiction over uninhabited islands through various maritime enforcement agencies. The law on Island protection is perhaps the most problematic domestic legislation yet to come out of China, for it purports to provide maritime enforcement agencies the authority to enforce claims in the disputed waters of the SCS, an action that has already begun to significantly increase tension in the area as the various agencies begin implementing the law. Just as can be seen in disputes over military surveillance in the EEZ, China is attempting to enforce its interests through the passage of domestic legislation which is at odds with international law. Even more problematic is the actual implementation of the legislation as China is now currently “backing up its claim by demonstrating that it has legal jurisdiction over the South China Sea.”

Incidents at Sea in the region have become commonplace over the last several years but the disputes in the South China Sea have recently escalated to levels “not seen since the end of the cold war,” and over the first six months of 2011 have witnessed “a new wave of Chinese aggressive assertion of sovereignty claims in incidents involving the Philippines and Vietnam.” These actions are specifically the type of actions enabled by the 2010 legislation, which is increasingly used as a justification for such incidents. The uniform Chinese response to these incidents has been that the Chinese maritime enforcement agencies conducting “completely normal marine law enforcement activities in China’s jurisdictional area.” The incidents would not only suggest that China’s
definition of its jurisdictional area now includes the EEZ’s of both Vietnam and the Philippines, but also that it is increasingly willing to forcefully assert its jurisdiction in those areas, significantly raising the risk for escalation if this trend were to continue.

Vietnam and the Philippines have taken a very different view of these activities, and have protested against what China sees as “normal law enforcement activities,” claiming that such activities not only violate their own sovereignty, but are equally in violation of both the DOC and UNCLOS.\textsuperscript{101} Since the beginning of 2011 the Philippines have reported as many as 6 separate incidents (including the aforementioned May 2011 incidents) involving what they have deemed “intrusions” into what is considered their sovereign territory. The first such incident occurred in February of 2011, when a Chinese PLAN frigate threatened to and then opened fire on Filipino fishermen near Jackson Atoll, some 140 nautical miles off the coast of Palawan island. After stating that the boats were in “Chinese territory.”\textsuperscript{102} Another such incident occurred off Palawan near Reed Bank on March the 2\textsuperscript{nd} when two vessels of the China Marine Surveillance (CMS) aggressively confronted and threatened to ram a survey vessel commissioned by the Philippine’s government.\textsuperscript{103} This March 2\textsuperscript{nd} incident may have served as a turning point in the Philippine’s approach to the dispute and strategic orientation toward defense issues.

Several important incidents have also occurred involving Vietnam, the first of which occurred in May, though it was subsequently revealed that similar incidents had occurred as far back as 2008 but had not previously been made public.\textsuperscript{104} The first such incident also involved vessels from the CMS, one of which cut the cable of a Vietnamese exploration vessel, the Binh Minh 02. The incident occurred in Block 148, an area that according to Vietnam not only falls within its EEZ but is also not even in dispute. China
however responded by describing the “law enforcement activities” undertaken by the CMS ships as “completely justified,” contending that the Vietnamese ship was operating “illegally” within China’s jurisdiction.105

A second such incident occurred on June 9th near Vanguard Bank involving a Chinese fishing boat which had been specially equipped with a “cable cutting device”. Two Chinese CMS vessels came to the aid of what the Chinese government referred to as a ship in distress, characterizing the Vietnamese ship as “putting the lives and safety of the Chinese fishermen in serious danger.” This remains a disputable assertion and the possession of a special devise by the Chinese fishing boat would suggest a certain amount of premeditation in the incident, a possibility supported by the fact that the had been previously harassed in a similar manner by Chinese vessels.

China sees the surveying actions of Vietnam and the Philippines as “violating an understanding to forego unilateral development of maritime resources.”106 It could be argued that such unilateral activities are in violation of the DOC, yet the contention by both Vietnam and the Philippines that areas in which certain incidents occurred are not in dispute casts doubt upon such an assertion. Such assertions would further suggest what is perceived as an expanding scope of China’s claims in these areas. However, it is less likely that China’s claims have expanded than China is now stepping up enforcement over areas which it has always claimed within the territory of the nine dotted line map, but had previously been more passive toward under Deng Xiaoping’s policy of shelving disputes for joint development. The passage of the Law on Island Protection as well as its subsequent implementation at the hand of China’s naval and maritime paramilitary forces would suggest that it is in fact Deng’s previous policy which has been shelved in favor of
a more aggressive assertion of territorial sovereignty in the disputes areas of the South China Sea. The law also has the potential to overlap with a separate but overlapping dispute between China and the US over military activities in the Exclusive Economic Zone (EEZ). Since the passage of the law no such trend has been observed, yet, previous incidents would suggest that such a possibility cannot be quickly discounted.

Military Surveillance in the EEZ

All involved countries in the South China Sea territorial disputes have both signed and ratified the United Nations Convention on the Law of the Sea (UNCLOS) Charter as of 1996 so it is both natural that they would attempt to bring their arguments into conformity with the legislation, as it is a requirement of their membership. UNCLOS was an extensive and comprehensive agreement which must necessarily be seen as a codification of previously existing customary law and sought to clarify the jurisdiction and rights in regard to maritime territory. It was a carefully balanced compromise between the interests of both coastal states and maritime powers over the extent of state sovereignty at sea. This compromise has come under strain as various states attempt to exploit ambiguity in the legislation in accordance with their own security interests, blurring the line that was drawn between the sovereign rights in the territorial sea and lesser rights in new maritime zones created under the convention.

The difference in security interests has in turn resulted in differing interpretations of what rights are granted within a state’s exclusive economic zone (EEZ), including the right of freedom of navigation and overflight in the EEZ. The differing interpretations of what activities are permissible within the EEZ has led to friction and at times serious
incidents in the US-China relationship, amounting to what Aaron Friedberg has
described as “a quiet drama unfolding for over a decade.” The incidents have involved
both naval vessels and military aircraft traversing the waters and airspace of China’s
EEZ. These incidents have at times seriously risked the possibility of miscalculation or
accidental escalation and will likely to continue to retain these qualities into the coming
years, presenting a serious challenge for Sino-US relations in the 21st Century.

Encounters between Chinese military and civilian vessels and those of the US
Navy has become increasingly frequent over the last several years in the South China
Sea. These encounters have at times been severe and reached become crisis situations
with the potential for escalation. In March of 2009 a series of Chinese naval vessels and
fishing trawlers confronted and harassed the USNS Impeccable some 75 miles off the
coast of Hainan island. According to the US the fishing trawlers acted aggressively
toward the Impeccable, forcing the ship to execute an emergency stop, then trying to snag
the towed Sonar Array. A similar incident occurred several months later on June 11th,
when a Chinese submarine also tried to confiscate the same piece of equipment from the
USS John McCain while the ship was conducting exercises with Southeast Asian navies
off the coast of the Philippines.

China justified these confrontations by reference to domestic legislation, which
exists in contradiction to international law as embodied in UNCLOS. Through the
passage of such domestic legislation, China has attempted to extend its sovereign rights
within the EEZ to include regulating freedoms such as navigation and overflight which
granted elsewhere in the convention. Under the UNCLOS charter states were authorized
to claim an EEZ up to 200 miles, which provided “sovereign rights for exploring and
exploiting natural resources,” within the limits of the EEZ.” Chinese scholars have argued that other countries operating in the EEZ must pay due regard to the China’s internal laws, including the 2002 law on surveying and mapping, which bans all forms of survey, including military and hydrographic, in China’s EEZ without government consent. This law was passed several months after a similar incident occurred in March of 2001, when the USNS Bowditch was forced by a Chinese PLAN Destroyer to exit the Chinese EEZ in the East China Sea. The 2002 law on Survey and Mapping was an attempt to overcome weak support under currently existing international by strengthen China’s position in regard to this dispute through domestic legislation. This domestic legislation the basis and underlying Chinese legal rationale for continued encounters between Chinese and US ships at sea, including the incidents in the Spring of 2009.

The law was an attempt to shore up arguments that lack support within international law including UNCLOS by using domestic legal mechanisms to circumvent this weakness. China’s law on Surveying and Mapping attempts to supplement an argument made by Chinese legal scholars that military and hydrographic surveys are considered Marine Scientific Research (MSR) and thus are subject to coastal state jurisdiction. This is however a fallacious argument as military and hydrographic surveys are distinctly separate from MSR under UNCLOS and as such the conduct of these activities are not contingent upon coastal state consent. This differentiation is not hard to appreciate and is readily self apparent. Such arguments simply conflate these terms in an effort to support legal arguments conducive to increased coastal state power not granted under the UNCLOS and the extension of sovereign security concerns limited currently only to the territorial sea. The majority of other signatories to the Convention,
including the United States, disagree with this interpretation, insisting that the coastal state has no right to encroach upon these freedoms.\textsuperscript{118}

Incidents between the US and China in the EEZ have not been limited to the maritime domain however. The most serious incident between the US and China in the EEZ occurred in April of 2001 when a US EP-3 Aries II plane was forced to execute an emergency landing on China’s Hainan island after colliding with a Chinese J-8 fighter jet in the airspace over China’s EEZ. The collision caused the Chinese plane to crash, resulting in the loss of the pilot’s life. All 11 members of the US crew were taken hostage in a tense standoff that lasted for over a week, with the crew subsequently being released only after China persuaded the US to publicly apologize for the incident.\textsuperscript{119}

A similar incident occurred quite recently in the airspace above China’s EEZ in the East China Sea. On June 29, 2011 two Chinese Sukhoi 27 fighter jets attempted to intercept an American U2 spy plane, which reportedly eluded the jets after crossing over an unofficial boundary line in the Taiwan Strait.\textsuperscript{120} The Global Times subsequently quoted the Chinese Defense Ministry as stating that “we demand that the US respect China’s sovereignty and security interests.” The continuance of such flights and according to an article in the China Daily, the official newspaper of the Chinese Communist Party, “the onus is on the US to avoid such provocative flights.”\textsuperscript{121}

The US however gave no ground in its response to the incident, with Chairman of the Joint Chiefs of Staff Admiral Mike Mullen steadfastly asserting US intent to continue such operations despite these demands. "The Chinese would see us move out of there," he said. "We're not going to do that, from my perspective.” From the perspective of the United States, attempts by China to restrict navigational freedoms in the EEZ potentially
challenge the ability of the US military to operate within any part of the China’s maritime periphery, including nearly the entire South China Sea. Furthermore, due to the malleable nature of customary international law, if China’s interpretation of permissible activities in the EEZ were to become generally accepted, it is possible that China’s interpretation could become the accepted norm applicable to all EEZs.\footnote{The potential for a shift within international law from access oriented to access denial norms in the EEZ remains at present limited, this does not mean that the threat of such a shift can be ignored by the US. For all these reasons there is little indication or reason to expect that the US will respond to Chinese provocations with anything different than Admiral Mullen’s recent comments reaffirming US commitment to these operations.}

Such an occurrence would be wholly unacceptable to the United States and is seen as a potential risk to the country’s national security. The South China Sea is by itself one of the most strategically important waterways in the entire world. but over one third of the world’s ocean surface is currently designated as exclusive economic zone. While the potential for a shift within international law from access oriented to access denial norms in the EEZ remains at present limited, this does not mean that the threat of such a shift can be ignored by the US. For all these reasons there is little indication or reason to expect that the US will respond to Chinese provocations with anything different than Admiral Mullen’s recent comments reaffirming US commitment to these operations.

China’s position is equally intransigent if not increasingly provocative in light of recent attempts to enforce such a position, particularly when that position has little support in current international law. This is evident when one examines both the history of and negotiations over the international law of the sea as well as relevant state practice. International law of the sea is embodied in treaty law established at the third United Nations Convention on the Law of the Sea (UNCLOS III). UNCLOS is the largest and most extensive international treaty in the history of international relations. The treaty has subsequently been signed and ratified by over 160 different countries, making it larger in
terms of membership than even the World Trade Organization (WTO), with 153 members at the time of writing.\textsuperscript{123}

The current convention was a monumental undertaking encompassing nearly a decade of negotiations, beginning in the 1970s and ending in 1982 with the signing of the Convention. UNCLOS III updated the previous two law of the sea conventions (UNCLOS I and II) and emerged in response to a growing trend of coastal state’s attempting to “unilaterally expand the breadth of their respective territorial seas.”\textsuperscript{124}

The final result of the Convention was the product of carefully orchestrated efforts to balance the sovereign interests of coastal states with international freedoms of seafaring states, creating increased economic privileges for coastal state’s while preserving freedoms of navigation.

The product of this compromise was the creation of the concept of an EEZ from areas which had previously been defined under international law as the “high seas”. New ‘sovereign rights’ were granted in the EEZ pertaining to economic interests including natural resources but the freedoms granted under the previous high seas regime, including those of navigation and overflight, remained intact in the EEZ. The language used in UNCLOS is instructive in this regard: it is the exclusive “economic” zone of a state, not the ‘military’ or ‘security’ zone.\textsuperscript{125} There was a clear distinction drawn between a state’s ‘sovereign rights’ granted in the EEZ for economic purposes, and the more expansive definition of sovereignty state’s were entitled to within the twelve mile territorial sea. China’s various current legal arguments have evolved over time but ultimately amount to little more than an effort to resurrect a debate that had been settled at the third convention on the law of the sea.\textsuperscript{126}
China’s position is a minority position not recognized by the overwhelming majority of the UNCLOS members. Only fifteen out of 192 UN member states currently support China’s attempts to limit freedom of navigation in the EEZ. The negotiating history of the convention makes the differentiation between EEZ and territorial sea quite clear, and attempts by coastal state countries, including China, to exert sovereign authority in the EEZ were debated and subsequently dismissed during these negotiations. While the list of states could be expanded to include an additional ten states that either claim a territorial sea out to 200 miles or jurisdiction in the contiguous zone extending to 24 miles from shore, these additional positions equally find no support under current international law. Whether these states are included or not, it remains clear that China’s position is a minority position not supported by and in contradiction of both the negotiating history and text of UNCLOS.

Despite this some analysts have made the argument that certain norms and principles embodied in the UNCLOS pertaining to rights in the EEZ “may be inappropriate and should be examined in the light of new circumstances.” There can be little doubt that there were some dissenting voices at the UNCLOS negotiations and that advances in technology and the changing nature of maritime security threats merit review of the sections pertaining to the EEZ. This point is most apt in regard to technological changes, with what had been previously limited to purely passive forms of surveillance giving way to more active forms that could not have been foreseen at the time UNCLOS was written. There is a compelling case to be made that “the perception of the very scope of the nation is changing, and along with it, the maritime dimension of the security paradigm.” This was after all the reason that the third UNCLOS conference emerged some three decades ago. However, other trends including emerging maritime security threats such as piracy and smuggling would seem to reinforce the need for freedoms of
navigation to be retained in these areas, so as to enable international security cooperation in the pursuit of combating these threats. Despite these trends, a shift in customary international law surrounding the rights of foreign militaries in the EEZ is unlikely to occur for the foreseeable future.

China’s attempts to unilaterally re-negotiate restrictions on freedom of navigation in the EEZ through the active pursuit of coastal state powers in the area are likely to fail for a number of reasons. In order for a norm to become customary international law it must first become accepted by a ‘critical mass’ of states. The definition of critical mass is difficult to determine with precision but empirical research suggests that the tipping point at which the shift from norm to customary international law “rarely occurs before one third of the total states in the system adopt the norm.” By this standard, since at most 26 states including China currently adopt a position of attempting to limit freedom of navigation in the EEZ, there is hardly a critical mass of states and the norm is far from reaching a tipping point in China’s favor. Nearly fifty additional states would be required to reach this theoretical threshold, and there is very little indication of widespread movement in this direction. Instead it is much more likely that the overwhelming majority of opinion permitting high seas freedoms in the EEZ will continue to remain customary international law for the foreseeable future.

While the risk of a shift in globally accepted customary norms pertaining to freedom of navigation should not be overestimated, the threat of such norms taking hold within the Asia Pacific region is real and immediate. According to the US State Department, “since World War II more than 75 coastal nations have asserted various maritime claims that threaten those freedoms.” Moreover, of the fifteen countries currently purporting to limit freedom of navigation in the EEZ, a number of these countries are located in South and Southeast Asia, potentially threatening the
development of an “arc of anti access” across the region. The states falling into this arc are concentrated “along the southern coasts of Asia astride some of the most critically important sea lines of communication in the world.” It is possible that these norms could proliferate within the region through attempts by rival claimants to affirm their sovereign jurisdiction in areas of the South China Sea, leading to the development of a more widespread Anti-Access, Area Denial (A2AD) climate that would pervade the entire region. Attempts by other regional powers to constrain a more assertive China could ironically provide international legal support for China’s own A2AD strategy which they are attempting to counteract.

Such an environment would severely restrict access to and freedom of navigation in the global maritime commons, a development which is of great concern to the United States government, whose recent National Military Strategy specifically voices concern that “access to and freedom of maneuver within the global commons are being increasingly challenged.” The global maritime commons is one of four global commons listed in the report (the other three being air, space and cyberspace). Not only are these areas being challenged through the development of A2AD strategies, they are being increasingly challenged in the Asia Pacific region, a region where in the years ahead US “strategic priorities and interests will increasingly emanate from.” The US military has for the last half century or more served as the guarantor of free and open access to these commons, and these freedoms have served as the foundation for the continued success and prosperity of the global economy.
As can be seen from the US position during the negotiations over the Third UNCLOS, the recognition of the threat posed by excessive maritime claims to the global maritime commons is not new. This recognition has produced not only diplomatic efforts such as those evident at the conference but also active military programs aimed at actively promoting these international norms through state practice. The Freedom of Navigation (FON) Assertion Program was established in March 1979 under the Carter Administration and has been administered by every subsequent US administration since. According to the US State Department it remains the official policy of the US government to “exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Law of the Sea (LOS) Convention.”

In addition to the diplomatic component, the FON Program is enacted through “operational assertions by US military units.” While the majority of these operations remain unknown to the general public, according to official figures published by the US State Department, since the beginning of the program “US military ships and aircraft have exercised their rights and freedoms against objectionable claims of more than 35 nations at the rate of some 35-40 per year.” This would amount to possibly more than a thousand such operations having been conducted over the last several decades. Since 2007 these operations began to focus on countering the Chinese position on military activities in the EEZ, with numerous operational assertions conducted by US military assets during each subsequent year up through at least 2010. This is a new development, and it is worth noting that even during or after tense periods in the early
2000s involving incidents such as those involving the Ep-3 in 2001 and USNS Bowditch in 2002, the US did not conduct FON assertions against China. The year 2007 seems to mark a shift in the US FON program with regard to China. Although data is not currently available after 2010, it is likely that such operations are occurring on an ongoing basis.

As this trend seems set to continue, the tension between the US and China over permissible military activities in the EEZ may be putting the two states on a collision course over accepted international norms in the South China Sea. While the FON program “is not intended to be provocative,” and “impartially rejects excessive maritime claims of allied, friendly, neutral, and unfriendly states alike,” the program is likely to be seen as such by the Chinese and may become a focal point of increasing tension between the two countries as they each attempt to enforce their various interpretations of applicable legal norms in the EEZ.\(^{141}\) The competition between the US and China over accepted international maritime legal norms has become the defining feature of a larger trend of geostrategic competition beginning to emerge in the Sino-US relationship, which may be creating a security dilemma between the two countries. This security dilemma stems from these disagreements over international legal norms in the EEZ and the fundamental tension between maritime powers and coastal states, and is becoming embedded in the larger geostrategic trends and shifting balances of power within the Asia Pacific region.

The issue may influence US perceptions of a rising China to the extent of seeing it as an increasingly revisionist power in regard to areas that the US defines as critical to its national security. China’s position on permissible activities in the EEZ could be seen as a
threat to the continued forward deployed presence of US forces in the region because of the extent of the disputed maritime areas claimed by China off its coast. This is a potentially game changing conclusion in its own right, and there are indications that such concern is already influencing US strategy, yet an even greater threat might be seen as originating from China’s legal revisionism. This legal revisionism has the potential to threaten the operational ability of US forces not only in the region but globally due to the international nature of customary legal norms. A shift in the accepted international legal norms governing military transit in the EEZ would not be limited to the region but would by their very definition be international and effect US forces operating around the globe. The US FON program has for the past thirty years been aimed at preventing just such a shift from taking place, and all indications are that it will continue to do so in the years ahead. China on the other hand, for a number of strategic and nationalistic reasons to be elaborated on in subsequent chapters, is coming to view US military operations in its EEZ as increasingly unacceptable and is likely to push for an end to them.

Neither side is likely to acquiesce to the views of the other, and if the US and China continue to talk past one another on the diplomatic front, there is a real danger that the resulting tension will play out at the operational level in the maritime areas off China’s coast. If this tension is not properly managed in the coming years, there is a serious threat that incidents at sea either directly between the US and China or indirectly between China and one of the ASEAN countries could potentially spiral out of control and threaten US security forces and commitments in the region. The situation demands the immediate and intensive involvement of the international community in order to bring about a reduction in tension and prevent such incidents from occurring.
Chapter 4 Military Modernization and Maritime Enforcement

In addition to the active promotion of international legal norms that threaten to limit the ability of US forces to operate in the areas comprising China’s ‘Near Seas,’ and potentially in EEZ’s around the world, China is also developing a force structure and power projection capabilities that would allow it to enforce these preferences if it chose to. China’s military buildup is beginning to shift the balance of power in the Asia Pacific region, a development viewed with some concern by both the US and many other countries in Southeast Asia. When presenting a new report on China’s military and security developments in the country, a senior US defense department (DOD) official stated that these developments were “potentially destabilizing,” a comment which was strongly criticized and openly dismissed by Beijing.\(^{142}\)

China’s growing economy has enabled a steady build up of its armed forces over the past decade. The previously mentioned report being presented by the US DOD official estimated China’s total defense expenditures at 160 billion dollars for 2010.\(^{143}\) China’s defense budget is notoriously problematic to accurately estimate due to a lack of transparency, yet by China’s own accounts, between 2000 and 2008 the official state defense budget more than doubled from $27.9 billion to 60.1 billion.\(^{144}\) By 2011 this number had more than tripled, with official Chinese estimates putting the number at over $90 billion.\(^{145}\) Reports indicate that the PLAN continues to receive “preferential budget treatment,” acquiring an increasing share of allocated resources over the last several years.\(^{146}\) Along with the defense budget there has been a simultaneous increase in indigenous production capability of the Chinese shipbuilding industry in the last ten years.\(^{147}\) This progress has resulted in a new generation of warships, numbering at least
Due to the fungibility of mission type for modern naval platforms, many of these ships could be used in a number of given contingencies, including those involving conflict in the South China Sea.

In addition to the modernization of its naval forces China is also pursuing the expansion and utilization of civilian maritime agencies. According to a recent US Department of Defense report “China is leveraging both civilian enforcement and naval assets in pursuit of its territorial objectives.” To focus solely on the modernization of the Chinese PLA-Navy (PLAN) would be to overlook a significant trend emerging across the Asia Pacific region, the development of coast guard or naval paramilitary forces by various countries. This trend is perhaps most pronounced in China where a myriad of different maritime enforcement agencies (MEA’s) have been growing exponentially in size recently. It is currently not clear to what extent these organization are acting as a unified congruous whole, but it is likely that they are competing for an increasing amount of resources allotted for maritime enforcement by the Chinese central government. Their growth cannot be ignored, for even though many of the ships are unarmed and may represent an attempt to avoid direct naval confrontation, these ships still will likely increase the potential for direct or indirect escalation in the crisis.

According to a recent Department of Defense report, “Beijing wishes to present the issue of regional maritime territory as one of law enforcement rather than military rivalry.” Domestic Chinese legislation such as the Law on Island Protection is intended to provide the legal foundation for China’s campaign of legal warfare in the South China Sea. The Chinese maritime enforcement agencies (MEA’s) will be at the forefront of this campaign, with the aim of achieving strategic objectives while “winning without
fighting”. The Chinese likely calculate that “the employment of naval assets in these matters raises the risk of escalation.”\textsuperscript{152} The employment and expansion of civilian maritime enforcement agencies could thus be seen as an effort to avoid escalation\textsuperscript{153}, and in particular to avoid the involvement of US forces in any conflict scenario. However, in the event conflict were to occur, a prospect that currently should not be overstated, China has also been rapidly modernizing its more traditional military forces and implementing what the US has referred to as an Anti-Access/ Area Denial (A2AD) strategy in the country’s maritime periphery. The legal warfare campaign that they are inseparably a part of has already raised tension in and the risk of miscalculation by the various claimant states.

While China’s strategy has been characterized as increasingly assertive or even aggressive by many analysts, it is a calculated assertion of what China sees as its jurisdiction in the SCS and is intended to simultaneously reduce the risk for military conflict over the dispute. Despite this intention, the possibility that territorial disputes between China and several other Southeast Asian states may escalate in the near future into naval warfare can not be discounted. Indeed there is growing reason to be concerned for the possibility of armed conflict in the area. What today might be best characterized as a strategy of ‘winning without fighting,’ may tomorrow give way to the necessity of ‘fighting to win’ if China were to feel compelled to forcefully defend its claims in the face of increased threats and perceived strategic encirclement.
Chinese PLA-Navy Modernization

The rise of the Chinese Navy and China’s turn outwards toward the maritime domain is one of the most underreported developments of the 21st century, precisely because it is already beginning to shape the direction of events in the Asia Pacific region and will eventually also do so on a global scale. However, at present, Chinese maritime strategy remains focused along China’s maritime periphery in the region, an area where China has considerable disputes with its neighbors over maritime territory, including in the South China Sea. Developments in military capability continue to proceed apace and progress in naval capabilities in particular has developed rapidly over the past decade. According to the US Department of Defense, the PLA-Navy (PLAN) currently possesses “some 75 principal surface combatants, more than 60 submarines, 55 medium and large amphibious ships, and roughly 85 missile-equipped small combatants.”¹⁴ The Chinese navy of today stands in stark comparison with the Chinese Navy of thirty years ago, and progress in this regard has proceeded along with a fundamental shift in how the Chinese view maritime power.

None of these developments has received more attention than China’s aircraft carrier program. The long awaited launch of China’s first aircraft carrier took place on August 9, 2011, when the ex-Soviet Kutsenov class aircraft carrier Varyag set sail for sea trials from its dock in Dalian harbor were it had previously been undergoing a process of retrofitting.¹⁵ The event marked a significant milestone in China’s ongoing efforts to develop an aircraft carrier program.¹⁶ Surrounding the launch of the first carrier, likely to be renamed Shi Lang, was another announcement that China has also begun constructing 2 of its own indigenously built aircraft carriers at a Jiangnan Shipyard in Shanghai. It was
previously thought that China would develop an indigenous carrier capability within the next 5-10 years, but it is possible that the progress in domestic shipbuilding and changes in the degree of foreign assistance could alter these projections.\textsuperscript{157}

Regardless of the timing for the construction of the new indigenous carriers, development of an ability to use and effectively deploy aircraft carriers is a long and arduous process that requires extensive training which is likely to take the better part of the decade. The Chinese Defense Ministry recently confirmed that they had initiated an aircraft carrier pilot training program, which is now taking place on land domestically at specially constructed locations including Xian and Wuhan. This training program has likely been operational for some time, and has also been assisted by foreign countries including Brazil, who announced in May 2009 that it would assist China in this effort. According to the Chinese Defense Ministry Shi Lang will be used primarily for “training and research purposes”, which confirmed earlier reports stating that it was likely be used as a training platform in the next several years.\textsuperscript{158} The research aspect is more in doubt and while the Chinese Defense Ministry undoubtedly has an incentive to present the ship in as inoffensive a manner as possible, it must also be noted that the ship is undoubtedly a warfighting instrument and currently possesses advanced on deck weaponry including a ten barreled gatling gun Close in Weapon System (CIWS).\textsuperscript{159}

As with many new vessels being brought on line within the PLAN fleet structure in recent years including, China’s first aircraft carrier is likely to be assigned to in the South Sea Fleet and located at China’s new Yulin Naval base on Hainan Island. When completed the other two indigenous carriers will likely also be based here.\textsuperscript{160} The base is also home to China’s new nuclear submarines and surface combatants, suggesting that
the South China Sea is receiving high priority in PLA planning. It is likely that the indigenous platforms could take the form a medium sized carrier designed for “limited, air defense dominant missions.” This will have important implications for the South China Sea disputes, where even a small amount of Chinese air power “could confer tremendous advantage.”

Aircraft carriers do not operate alone, but rather in conjunction with other aspects of the naval fleet and developments in other areas are equally important if a carrier is to be deployed effectively. The production of new indigenous destroyers and frigates was necessary to offset a traditional lack of air defense (AAW) capability in the fleet. The Luyang class I and II destroyers were an improvement on the previous Luhai class design developed in the late 1990’s. New Jiangkai class II frigates are armed with vertically launched HQ-7 missiles. These new frigates will likely replace the older Jianghu class, leaving China with an increasingly capable and modern surface fleet.

Another important development has been the significant improvement in the amphibious capability of China’s navy. Production of the LHD Yuzhao (Type 71) is a recent striking example of this progression. Displacing over 17,000 tons, it is capable of deploying at least 4 helicopters and 4 air cushion landing craft, as well as up to 800 troops. It is the “first Chinese naval vessel capable of force projection as defined by Western navies.” The first ship was commissioned in 2007 and based with the South Sea Fleet. Two more have been subsequently finished construction and were launched in 2011. In all, at least 18 new amphibious ships have been commissioned since 2000. These developments could have important implications for the South China Sea if the disputes were to escalate back to the point of contests over occupation.
While the development of a more capable surface fleet marks a significant departure from previous focus on more asymmetric strategies involving submarines and missile production, these traditional aspects of China’s military modernization continue to progress alongside the new developments. According to the US Department of Defense, China “has the most active land based ballistic and cruise missile program in the world.” This program has produced missiles such as the DH-10 land attack cruise missile (LACM) and increasingly capable anti-ship cruise missiles such as the YJ-62, which the Luyang II destroyers are armed with. China has also “developed the world’s first anti-ship ballistic missile (ASBM),” capable of attacking aircraft carriers out to the Western Pacific Ocean. The US Navy has deemed that the Chinese have a “workable design” of the missile, and according to head of Pacific Command Admiral Robert Willard, the ASBM has reached “initial operating capability”. A report by Taiwan stated that the missiles had been “produced and deployed in small numbers,” yet PLA Chief of Staff General Chen Bingde has stated that the missiles are still in the testing phase and are not as of yet operational. This may suggest not only different conceptions of the term ‘operational’ between the US and Chinese militaries, but also that the deployed missiles have not been fully tested on a moving ship at sea. Despite such uncertainties, when China does field this new technology over the next several years it is likely to have a range of up to 2700 kilometers, exceeding initial US DOD estimates of 1500 km, posing a potentially serious threat to US aircraft carriers and other ships operating out into the Western Pacific.

The indigenous production of both nuclear and conventional powered submarines continue to progress steadily. Production of the Jin Class nuclear powered ballistic
missile submarines (SSBN) will eventually leave China with a more solid sea based nuclear deterrent force when problems with the JL-2 missile system can be overcome. Once established, this development will be an important component of China’s objective to maintain a 2nd strike capability in the face of emerging challenges to China’s land based strategic missile forces from advances in conventional strike, C4ISR and missile defense capabilities. Adapting to these changes was deemed necessary for the continued reliance upon the country’s strategy of ‘assured retaliation’, whereby costs of a retaliatory strike are sufficient to deter aggression. These SSBN’s will be located in and traverse the South China Sea, an area which is “integral to its (China’s) nuclear submarine strategy”. Along with many of China’s aircraft carriers, the Jin Class subs will be based at China’s now completed Yulin naval base on Hainan island. This new base contains an underground facility that will provide the submarine force with direct access to the deep water of the South China Sea, significantly increasing their ability to avoid detection.

While the base will provide an important development in this regard, it is also worth noting that the stealth capability of these submarines still lags behind that of the more modern navies. A 2009 report by the US Office of Naval Intelligence (ONI), which was subsequently retracted from public view, revealed that China’s indigenous submarines, particularly its nuclear submarines, remained comparatively more noisy than their Russian counterparts. This makes it easier for foreign military and intelligence services to track the subs at sea using sonar, an activity undertaken by naval surveillance vessels or other submarines. The presence of this information in an official report by the ONI would suggest that the US was aware of the acoustic signatures of Chinese
submarines, information likely gleamed through such operations.\textsuperscript{175} The sensitivity of this information may have been a factor in the report having been withdrawn.

Despite the comparative gap with more modern navies, there is a clear trend in the development of both Chinese nuclear and conventional powered submarines toward quieter, more capable ships. Two new Shang class nuclear powered attack subs (SSN’s) have recently entered service and it is thought that China might add up to 5 Type-095 SSNs in the coming years.\textsuperscript{176} Once it enters into service, the Type 095 will be a considerable improvement for China’s nuclear powered submarines in stealth capability. The Yuan conventional attack sub (SS) is a follow up to the also indigenously produced Song class SS, and it is thought that the submarine may possess air independent propulsion technology (AIP). If so, this would likewise be a significant improvement for China’s conventional submarine fleet in terms of both quieting technology as well as endurance, allowing the Yuan subs to remain at sea longer without surfacing. The Song, Yuan, and Shang subs will all be well armed, “capable of launching the new CH-NX-13 ASCM, once the missile completes development and testing.”\textsuperscript{177} Little information about this cruise missile is publicly available other than that it is in the development and testing phase.

\textit{Evolving Maritime Strategy}

These developments in the PLA over the past decade have given China an increased power projection capability across the Asia-Pacific region. While many of the platforms being developed could potentially fulfill extra-regional roles, as has been the case in the Gulf of Aden, the PLAN is focused on building global reach, not a global
navy built on a model similar to that of the United States. Despite progress toward what has been termed ‘far seas’ operations, Chinese naval strategy “appears to remain focused on the East Asia region,” or primarily what China defines as its ‘near seas.’

The near seas include the Bohai Gulf, the Yellow, East and South China Seas. China has important strategic concerns within this area, including the PLA-Navy’s previous historical mission of preventing invasion by foreign forces coming from the sea. Perhaps most importantly though, this area is home to all of China’s remaining territorial disputes. These disputes are maritime in nature and the protection of “territorial integrity and sovereignty have clearly been identified as primary missions for the PLA in the ‘New Historic Missions’.” Of these disputes, the South China Sea may be receiving the highest priority.

In fact, the South China Sea may be second in priority only to Taiwan, which has historically been and remains the “main strategic direction” (zhuyao zhanlue fangxiang) of PLA planning. However, as relations have improved between the mainland and Taiwan over the past several years this has allowed attention to shift outward past Taiwan into the near seas and toward the South China Sea in particular. This maritime area beyond Taiwan defined as China’s near seas also falls inside what is termed the ‘1st island chain’ in Chinese naval strategy. This island chain stretches form the Kurile Islands in northern Japan down to Indonesia’s province of Sumatra. The chain is composed of a series of multiple strategic chokepoints and is “considered by many Chinese analysts to be a potential barrier that could be used to prevent Chinese military and civilian vessels from gaining access to the Pacific.”
This maritime area, in the near seas that lie within the 1st island chain, has been the focus of PLAN doctrine since the concept of “offshore active defense” (jinhai jiji fangyu) which was instituted in 1986. The definition of offshore is not a precise but rather remains somewhat of a flexible term, used by Chinese naval analysts generally in
reference to the near seas or areas within the first island chain. This was a historic evolution of missions for the PLA-Navy at the time, which had previously been oriented much closer to shore under the concept of “coastal defense” that had dominated strategic thinking up until that time. Whereas coastal defense with “resisting invasion and defending the homeland,” the new offshore strategy began to appreciate a growing importance for the maritime domain in Chinese national security strategy. These ideas, for both offshore defense and the conception of the island chains are attributable to the late Admiral Liu Huaqing, who died in January of 2011 and is generally referred to as the “father of the modern Chinese Navy.”

This strategic shift in naval strategy marked a more fundamental shift in China’s orientation toward the world, moving China from being a continental to a maritime power. The first step in this evolution has been to protect China’s interests and territorial claims in the areas along China’s maritime periphery that fall within the near seas. This transition has evolved rapidly and China’s maritime strategy continues to evolve. It is important to note however that “naval power is not the sole, or even the most important, determinant of maritime power.” China is increasingly relying on the maritime power generated from civilian maritime enforcement agencies (MEA’s), which are becoming the enforcement arm of China’s legal warfare campaign in the near seas area, in particular the South China Sea. These forces are likely to play a greater role in Chinese maritime strategy as it continues to evolve in the future.
Maritime Enforcement Agencies (MEA’s)

This focus on developing power projection capabilities out into China’s near seas areas does not necessarily mean that China intends to nor necessarily desires a military conflict with major naval powers such as the United States in this area. Rather China would like to achieve its strategic objectives by “winning without fighting,” in line with the famous dictum by ancient Chinese military strategist Sun Tzu.185 This has implications for the Southeast Asian claimant States involved in the South China Sea disputes and also particularly the United States, who China does not want to draw into any prospective military confrontation in the area. As a result, China may be pursuing a strategy of undermining the will of the claimant states in Southeast Asia through increasing power projection and enforcement capabilities deployed in a manner that stops short of inciting a shooting war, a situation which could potentially draw in US forces. Short of an actual wartime scenario, direct involvement of US forces in the territorial disputes between China and its Southeast Asian neighbors remains unlikely, and Chinese strategy may be proceeding along these lines of such a calculation.186 Congruent with such a strategy, China is now simultaneously rapidly expanding its maritime paramilitary forces in order to enforce Chinese claims and interpretations of international law in the South China Sea. Backed by the increasing power projection capabilities of the PLA described above, the expansion of China’s maritime enforcement agencies is part of the strategy of ‘winning without fighting’ in the South China Sea disputes. According to US naval analysts military forces are not “likely to be at the heart of the next tactical confrontation. The more likely risk would come from miscalculation
of China’s maritime law enforcement fleet or from fishermen acting as proxies for those agencies.”

As the PLA-Navy’s designated mission has expanded from simply ‘coastal defense,’ outward toward the ‘near’ and ‘far seas’ defense concepts, these various organizations have filled the gap and been tasked with responsibility for the enforcement of China’s maritime territorial sovereignty and jurisdiction. China does not possess a Coast Guard per se in the sense of a large coordinated coastal defense force similar to the that of the United States, but rather what might be considered the country’s Coast Guard consists of at least five different maritime enforcement agencies responsible for enforcing China’s domestic, and what China deems to be applicable international law within its territorial waters and EEZ. These include the Maritime Police, Fisheries Law Enforcement Command (FLEC), Maritime Safety Administration (MSA), China Marine Surveillance (CMS) and the General Administration of Customs (GAC), many of which have been expanding exponentially in terms of both fleet size and operational intensity over the last several years.

Despite the fact that a clear trend has emerged over the past decade with the central government continuing to place these organizations increasingly under its authority, problems may persist with command and control of these agencies. What could previously be considered “maritime militias managed on a regional basis,’ have been reorganized and transformed into “nationally funded, owned and operated maritime forces.” Despite ongoing problems of horizontal coordination between them as each various organization vies for its share of scarce resources, these are not rogue actors in the sense that they lack government oversight. All of the various agencies are ultimately
responsible to the Central Military Commission (CMC), and they continue to be “arms of the Chinese state.” It remains to be seen what effect the organizations will have or in what ways they will influence the dispute, but interagency competition could easily prove to be a destabilizing factor if lines of authority are not more clearly drawn and operational command more centralized in the years ahead.

What is commonly referred to as China’s Coast Guard, known as the Haijing (Maritime Police), is only among four other organizations and “neither the largest or most prestigious” of them. It is however the most heavily armed. Several ships including the Haijing 1001, the most modern ship in the fleet, and several converted Jianghu class frigates given to the maritime police by the PLA-Navy are armed with 37mm deck guns. Other smaller patrol boats in the fleet such as the Type 218, the new standard cutter for the organization, are armed with 14.5mm machine guns. The primary mission of the agency is crime fighting, but responsibility also includes non-traditional maritime security threats such as including maritime terrorism and piracy. The maritime police is subordinate to the Ministry of Public Security (MPS) and in particular the Border Control Department, which is an elite unit of the People’s Armed Police (PAP). All maritime police vessels are manned by active members of the PAP.

Two other organizations, the Fisheries Law Enforcement Command (FLEC) and the General Administration of Customs (GAC), also possess armed vessels. The exact size of the GAC fleet currently remains uncertain but estimates put it at approximately 150 vessels. However it is certain that a number of these vessels are armed patrol boats that conduct anti-smuggling operations, the primary mission of the agency, in Chinese ports and harbors. There are currently around 135 ships in the FLEC fleet, with nine
over 1,000 tons. Some of these ships, including the largest patrol vessel in the fleet, the Yuzheng 88, are armed with either machine or anti-aircraft guns. PLAN replenishment ship, is armed with two 37mm deck guns. FLEC is part of the Ministry of agriculture and is currently one of the smaller organizations with only a thousand personnel in its ranks, though the organization has been receiving new cutters recently and is set to receive an additional five 3,000 ton vessels over the next five years.

As the name would suggest, the Fisheries Law Enforcement Command is responsible for the prevention of illegal fishing, a problem that is gaining particular attention in Beijing, and may be conferring an increased amount of prestige and influence upon the agency. The agency has been at the center of China’s attempts to impose a unilateral fishing ban in the South China Sea over the last several years, a policy strongly objected to by Vietnam, as the ban occurs during the height of the Vietnamese fishing seasons and primarily affects Vietnamese nationals who normally fish in the area. Ships such as the 4,450 ton Yuzheng 311 have made numerous patrols in disputes waters of the South China Sea. It is also worth noting that the activities of the ships in the FLEC have not been limited to fisheries enforcement. Along with several civilian fishing vessels, a FLEC ship was one of several official ships involved in the 2009 Impeccable incident. These vessels, along with those of other maritime enforcement agencies which are also receiving increasing funding, are being used as an enforcement arm of the Chinese state in its campaign of legal warfare in the South China Sea.

Along with the FLEC, both the China Marine Surveillance (CMS) and the Maritime Safety Administration (MSA) have become an integral part of China’s campaign of legal warfare in the South China Sea. In contrast to the other agencies the
vessels of both the CMS and MSA are however unarmed. This is an important distinction since both of these agencies are receiving a comparably larger amount of increased funding and domestic political support. They both currently have ambitious plans for expansion in terms of both patrol vessels as well as fixed wing and helicopter air forces. The MSA currently possesses a fleet of some 207 patrol boats, primarily smaller vessels, along with “four large sea rescue helicopters and 10 medium-sized ones in addition to four fixed-wing aircraft in service since it was founded in 2001.”¹⁹⁸ The service has been acquiring a number of large cutters over the past several years, many of which are capable of deploying medium and large air assets, the number of which is expected to double over the next five years. One of these new larger cutters, the Haixun 31, was recently deployed through the South China Sea to Singapore in a show of resolve by China. The ship is capable of deploying to sea for upwards of forty days at a time without refueling.¹⁹⁹

Subordinate to the Ministry of Transport (MOT), the manpower of the MSA is by far the largest among the five organizations, with some 20,000 personnel thought to be among its ranks. The agency is primarily responsible for safety and navigation at sea with missions including search and rescue, but is also tasked with the “implementation of domestic and international laws.”²⁰⁰ These laws include controversial domestic legislation such as the survey and mapping law of 2002 and the Island Protection Law of 2009. This law enforcement capacity has taken on a surveillance component, of both foreign vessels and offshore installations. It is thought that the MOT “wields considerable influence in formulating China’s maritime policies,” including to have been “the major impetus pushing forth the unprecedented naval deployments to the Gulf of Aden.”²⁰¹
With apparent influence extending to new PLAN missions such as counter piracy in areas outside China’s traditional operating areas, and also recent deployments such as that of the Haixun 31 in the South China Sea, it is highly likely that the MSA will continue to remain an important weapon in China’s legal warfare campaign to achieve strategic objectives in the area.

The CMS currently possesses “about 300 marine surveillance ships, including 30 ships rated over 1,000 tons, and 10 planes, including four helicopters”. A massive planned expansion would propel the fleet to some 350 vessels by 2015, and up to 520 by 2020. It is important to note that the CMS currently possesses fixed wing aircraft and helicopters, perhaps as many as 9, which are capable of operating from the decks of some of the larger CMS vessels. This number is set to rise to 16 by 2015. One of the larger organizations in terms of manpower, currently around 9,000 men, this number will also expand dramatically by 2015 to some 15,000 personnel. Significantly, a majority of these men and ships are expected to be deployed to the South China Sea.

The organization is under the State Oceanographic Administration (SOA) and in addition to smaller provincial, municipal and county level units, is generally divided into three separate regional headquarters with three distinct fleets similar to that of the PLA-Navy (North, East and South fleets). The South China Sea fleet currently has 13 ships, two planes and one helicopter, and as mentioned above, this number is likely to expand significantly over the coming years as the area becomes a focus of new deployments. The deployment of newest ship, CMS 75, reported to be the fastest and most seaworthy in the fleet, with a 5,000 nautical mile sailing range, fits this pattern and was assigned to the fleet. New CMS branches have recently been built on Hainan island and possibly in even
in the islands of the South China Sea. The CMS has been regularly patrolling the South China Sea since 2007, and according to the deputy director of CMS, the agency “will carry out regular sea patrols more frequently to strengthen law enforcement in Chinese related waters in 2011.” Law enforcement within China’s territorial waters and EEZ is a primary mission of the CMS, along with environmental protection, and scientific research.

Such missions have repeatedly brought the CMS into confrontations with both foreign energy survey and US military vessels over the past several years in the South China Sea. Sometimes in combination with the PLA-Navy or Chinese fishing trawlers, the CMS has been involved in a number of incidents in the area, including the March 2nd Reed Bank incident, the first cable cutting incident with Vietnam and “reportedly fired warning shots at Filipino fishing boats on February 25th and at Vietnamese fishing trawlers on June 1st. These last incidents involving live fire and the threat of direct action against civilian fishermen are perhaps the most troubling, even more so due to the fact that they also involved the PLA-Navy. Since the CMS vessels are unarmed, it must be inferred that these shots were fired by PLAN vessels.

The two organizations have a strong relationship, with many of the CMS personnel having former naval service, and closely coordinate with one another. In 2008 the deputy director and Party Secretary of CMS Sun Shuxian suggested that the CMS would become “a reserve unit under the Navy.” It is unclear if this has come to pass, yet these incidents would suggest that at the very least coordination between the two remains close. CMS ships have also been involved in multiple encounters with US surveillance vessels and newer additions to the fleet may possess sonar capabilities,
which could be used in the tracking of submarines.\textsuperscript{211} This is fitting with recent Chinese publications which have discussed possible anti-submarine warfare (ASW) roles of the maritime enforcement agencies.\textsuperscript{212} An ASW role would involve deployment of ASW capable aircraft or weaponry aboard CMS vessels in time of crisis. However, it is also possible that they would play a peacetime role in foreign submarine tracking efforts that fall short of wartime ASW operations. Due to the close cooperation between the PLA-Navy and the CMS, the organization would be an ideal candidate in the event that it were decided that the maritime enforcement agencies were to play a role in either ASW or monitoring operations.

The growth and expansion in both role and size of China’s various maritime enforcement agencies is likely to have an important impact on the South China Sea territorial disputes in the coming years. A primary mission of these organizations, in particular the FLEC, CMS, and MSA, will be to enforce domestic Chinese law and China’s interpretation of relevant international law including the UNCLOS in China’s contested maritime periphery. Chinese leadership has assigned this mission in an effort to frame the dispute as a law enforcement matter so as to avoid the possibility of escalation and avoid drawing in foreign powers into the dispute. This is an evolution of the concept of ‘legal warfare’ embodied in Chinese military doctrine, taking the concept and applying it to civilian paramilitary agencies that fill the gap between military and civilian.

These civilian agencies are being used as “proxies for what would have traditionally been military activity.”\textsuperscript{213} With the CMS as a particularly strong example, it is evident that the missions of these maritime paramilitary organizations often overlap considerably with those of the PLA-Navy, and the lines between the two are becoming
increasingly blurred. While the use of the various MEA’s may be a calculated move to avoid escalation, it could have the reverse effect in reality by lowering barriers to confrontation that would otherwise exist for traditional military forces at sea. As previously mentioned, there have already been numerous incidents between Chinese MEA’s and foreign naval vessels, between rival maritime paramilitary forces and even between these forces and civilian boats and fishermen. Despite the avoidance of escalation thus far, any combination of these various scenarios could provide the key ingredients leading to diplomatic confrontation or even traditional military conflict.

The trend of recent Chinese aggressive action in the South China Sea could become highly problematic for regional security if allowed to continue unopposed. However, regional and international powers have already begun organizing a collective response to such action. The success of such efforts will depend heavily on China’s response and willingness to promote new regional security concepts in the maritime domain that take into account the interests of all nations in the continued freedom of navigation in the South China Sea.
Chapter 5 US and Regional Response

China’s efforts to consolidate control over territorial claims in the South China Sea while simultaneously deligitimizing the presence of US forces in those waters has greatly increased tension and the possibility for military escalation in the area. Chinese military modernization continues to shift the balance of power in the region in China’s direction and when combined with an increasingly assertive foreign policy in the South China Sea, has created growing concern amongst both China’s maritime Southeast Asian neighbors and the United States. What is best described as limited Chinese revisionism in the area may nonetheless be seen by these nations, particularly the US, as a threat the scope of which is anything but limited. The US and ASEAN have repeatedly stated that they welcome China’s rise as a great power in the international system; they just want to assure that China’s rise is a peaceful one. President Obama stated during Hu Jintao’s 2011 visit to Washington DC that “we just want to make sure that the rise... occurs in a way that reinforces international norms and international rules, and enhances security and peace, as opposed to it being a source of conflict either in the region or around the world.”

Concern among the US and its partners and allies in the region over Chinese actions has become increaisngly apparent over the past year. On a recent trip to the region, US Secretary of Defense Leon Panetta stated quite bluntly that “we (the US) are concerned about China.” Similar concerns were evident several months before at the July 2011 ASEAN Regional Forum held in Bali, where US Secretary of State Hillary Clinton stated that “recent incidents in the South China Sea threaten peace and stability in the region.” Furthermore, such incidents “endanger the safety of life at sea, escalate
tensions, undermine freedom of navigation, and pose risks to lawful unimpeded commerce and economic development.”

The leadership within ASEAN has drawn similar conclusions, and at the end of the 18th ASEAN Summit in May 2011 deemed the disputes in the South China Sea as having “the potential to undermine the stability of our region.” The ASEAN Summit had been originally intended to focus on efforts to create a regional economic zone by 2015, but the President of Indonesia who was hosting the conference, Susilo Bambang Yudhoyono, gave prominence to these security concerns in his keynote speech, noting that peace and stability in the region were the foundation and a fundamental requirement for successful economic cooperation. Like the separate disputes between China and ASEAN and China and the US, concerns amongst the US and ASEAN countries over China’s claims and actions in the South China Sea have begun to overlap.

Indeed, in the face of growing concern within ASEAN over Chinese actions and the shifting balance of power, leaders in Southeast Asian countries have begun to look to the US for signs that it remains committed to maintaining a presence in the region in order to continue ensuring peace and stability remain unchallenged in the years ahead. The US has been responsive to those concerns and has begun to re-engage with the region after a period in which many of the capitals in Southeast Asia perceived the US as being distracted by events in the Middle East and preoccupied with counter-terror efforts. In addition to official statements, US policy and strategic doctrines have reaffirmed the importance of the region to US interests and reemphasized US commitment to maintaining its presence as a Pacific power.
In an article recently published in Foreign Policy magazine entitled “America’s Pacific Century,” US Secretary of State Hillary Clinton declared that the US currently stands at a “pivot point” in its strategic orientation. This pivot point rests between the wars in Iraq and Afghanistan and the importance of the Asia Pacific region, between the past and the future. As those wars wind down, we will need to expand efforts to pivot to new global realities.” Such a pivot “will not be easy,” but the Secretary expressed American commitment to seeing through “one of the most important diplomatic efforts of our time.” In order to accomplish this goal the US leadership will be required to “lock in a substantially increased investment—diplomatic, economic, strategic, and otherwise—in the Asia Pacific region.” One of the more unrecognized foreign policy successes of the Obama Administration has been their achievements in already laying the groundwork for this effort, an effort which is set to gather steam in the months and years ahead.

The importance of the region was echoed in the US Department of Defense’s 2011 Military Strategy, which stated that “the nation’s strategic priorities and interests will increasingly emanate from the Asia Pacific region.” The Strategy also noted that the US remained “concerned about the extent and strategic intent of China’s military modernization and assertiveness in the Yellow Sea, East China Sea, and South China Sea,” or the ‘Near Seas.’ There is an emphasis placed upon the importance of maintaining access to the ‘Global Commons,’ defined as “shared areas of sea, air, and space.” These areas, including the global maritime commons, “are being increasingly challenged,” by the development of “anti access and area denial (A2AD) capabilities and strategies to constrain US and international freedom of action.” The importance of the global maritime commons is specifically mentioned, since the earth’s ocean areas “enable
the bulk of the joint force’s forward deployment and sustainment, as well as the commerce that underpins the global economic system.”

As a result of the importance of these areas the US military will “take a strong role in international efforts to safeguard access, sustain security, and promote responsible global norms in the global commons.” From the US perspective, promotion of responsible maritime norms at sea would undoubtedly include the freedom of navigation, and one of the primary challenges to this norm is located in the South China Sea, through China’s employment of what the US DOD refers to as the development of A2AD capabilities and strategy. Directly after discussing concerns about China, the Strategy states that the US “will be prepared to demonstrate the will and commit the resources needed to oppose any nation’s actions that jeopardize access to and use of the global commons, or that threaten our allies.”

In her Foreign Policy article Secretary Clinton clearly lays out the key components of America’s strategy in the Asia Pacific region, one of which includes the strengthening of US bilateral alliances. “Our treaty alliances with Japan, South Korea, Australia, the Philippines, and Thailand are the fulcrum for our strategic turn to the Asia-Pacific,” Secretary Clinton states in the article. The US has been working to strengthen alliances with not only important Southeast Asian countries involved in the disputes such as the Philippines, but also recognizing the importance of long time allies positioned at the Southern tip of the region. The US has been discussing expanded security cooperation with Australia and the two countries recently agreed to increase US military access to and ability to jointly operate with their Australian counterparts, The Reed Bank Incident in March of 2011 seems to have marked a turning point the Philippines approach to the
disputes in the South China Sea, and has also spurred requests for increasing security cooperation with the US, which the US has began to deliver on with a Hamilton class cutter being delivered recently.\(^{225}\)

In addition to focusing on important allies like Australia and the Philippines, another component the strategy focuses on developing new partnerships with emerging powers in the region including Singapore, Vietnam, Malaysia and Indonesia. The US will deploy littoral combat ships to Singapore and security cooperation with Malaysia continues to be both vigorous and an open secret in the region.\(^{226}\) Cooperation between the US and Vietnam, as well as the US and Indonesia, has been increasing in recent years, and each are important in their own right.

Each of these developing relationships overlaps with a third and important component of the US strategy outlined in Secretary Clinton’s article: an emphasis on developing and US active participation in multilateral institutions in the region. This marks a new approach to our security relationships in the region, moving from the previous hub and spoke approach to one built on a web of interconnections. This approach was first outlined by former Director of National Intelligence Dennis Blair in a 2001 article.\(^{227}\) Instead of focusing solely on bilateral relationships between the U.S. and its allies, with little relationship existing amongst the allies themselves, the U.S. is pushing for more interconnected alliances and partnerships, with relationships becoming stronger in all directions.

According to the Secretary of State “addressing complex transnational challenges of the sort now faced by Asia requires a set of institutions capable of mustering collective action.”\(^{228}\) Such a set of institutions would form a “coherent regional architecture” in
Asia that “would reinforce the system of rules and responsibilities, from protecting intellectual property to ensuring freedom of navigation, that form the basis of an effective international order.” Not only did the Secretary specifically focus on rules that form the international order, specifically making note of FON, but also expressly tied in legitimacy, stating that “in multilateral settings, responsible behavior is rewarded with legitimacy.” Embracing this multilateral effort will allow the US to pursue pivotal security interests including upholding global norms and rules such as the freedom of navigation, and focusing on the positive support such institutions can offer to strengthening the legitimacy of such norms. Cooperation with emerging regional powers including Malaysia as well as Vietnam and Indonesia has been instrumental in promoting this new approach to regional security.

The US-Vietnamese security relationship has been expanding steadily over the last several years. In 2008 Vietnamese Prime Minister Nguyen Tan Dung traveled to the US and became the “first Vietnamese premier to visit the Pentagon since 1975”. Along with Secretary of Defense Robert Gates, Premier Dung announced the creation of a “security dialogue” with the US. This was followed by a visit by Defense Minister Thanh to Washington in 2009, who also met with Secretary Gates. As previously mentioned, this security cooperation has expanded and embraced cooperation in the maritime domain, including cooperation in “sea security”.

Vietnam’s growing ties with the US should not however be seen as an attempt at outright alliance formation. Instead of openly attempting to balance against China, Vietnam is taking a softer yet forceful approach of attempting to ‘internationalize’ the dispute by drawing in actors from outside the region, hoping to bring China back to the
negotiating table. This approach will be welcomed by countries that are directly involved in the maritime disputes including the Philippines, Malaysia, and to a lesser extent Indonesia. This might indicate a growing cohesiveness within the maritime countries involved in the dispute, though it is also important to note that disputes still exist between the ASEAN countries themselves over maritime boundaries.

In 2010 Vietnam took the chair position in ASEAN and was influential in pushing the South China Sea disputes onto the agenda at the ASEAN Regional Forum (ARF) in July. US Secretary of State Hillary Clinton made an important speech declaring that the US had a ‘national interest’ in promoting not only freedom of navigation but also respect for international law in the South China Sea. China was reported to have been caught off guard by the announcement and reacted angrily, criticizing the US for asking others to abide by UNCLOS, a law it has not even ratified. The content of the speech should hardly have come as a surprise to the Chinese though if they had been paying attention to public statements made by high ranking US officials from both the State and Defense Departments over the previous six months. While the setting was possibly a surprise, the Chinese reaction likely has more to do with the US role in “internationalizing” the dispute. A more proactive US role runs contrary to China’s preference to deal with the disputes bi-laterally, a preference not shared by many of the ASEAN countries who want to negotiate as a group.

By once again embracing the ARF after a brief hiatus under the previous administration, Secretary Clinton has reaffirmed the importance of our relationships with the ASEAN countries. This will serve to maneuver around previously thorny issues with countries like Indonesia, which has previously expressed concern over US footprint in
areas such as the Malacca Strait. Indonesia’s previous role throughout the 1990’s in brokering the original talks between ASEAN countries and China over the South China Sea disputes could offer a solid push back in the right direction toward a legally binding Code of Conduct (COC). In a letter to UNCLCS submitted shortly before the ARF conference Indonesia not only contested China’s claims but made reference to its previous “impartial yet active role”. While part of China’s claims in the SCS overlap with the Natuna islands which are located within Indonesia’s EEZ, Indonesia is “not a claimant state” to the Spratly islands.

As Indonesia continues to further consolidate its democratic foundation there are a myriad of issues on which cooperation between the US and Indonesia is possible. The two countries share an overlapping interest in the maritime commons. As an archipelagic nation, Indonesia was a driving force behind the founding of UNCLOS and as such can be expected to be a determined defender of its principles in the years ahead. This was evident in the recent letter to the CLCS, which strongly challenged China’s claims in the South China Sea, stating that the 9 dotted line map China presented with its letter “clearly lacks international legal basis.” Perhaps the most important aspect of the letter was Indonesia’s position on the regime of islands question, where it weighed in with Vietnam and Malaysia insisting that many of the “features in the South China Sea do not deserve an EEZ or continental shelf of their own.” To consider them otherwise “encroaches the legitimate interest of the global community.” As chair of ASEAN in 2011 Indonesia has once again resumed its previous active role in the working toward resolution of the disputes, achieving what some perceived as a diplomatic breakthrough at the 2011 ARF held in Bali.
Most importantly, these components enable the continued forward deployed presence of US forces in the region, which have provided for the freedom of navigation and upheld peace and security in the region, creating the conditions necessary for regional economies to prosper over the last several decades. In response to concerns over recent Chinese actions in the region, US Secretary of Defense Leon Panetta responded by saying, “The most important thing we can do is to project our force into the Pacific — to have our carriers there, to have our fleet there, to be able to make very clear to China that we are going to protect international rights to be able to move across the oceans freely.”

Secretary of State Clinton echoed this sentiment in her Foreign Policy article: “The challenges of today's rapidly changing region -- from territorial and maritime disputes to new threats to freedom of navigation to the heightened impact of natural disasters -- require that the United States pursue a more geographically distributed, operationally resilient, and politically sustainable force posture.” Clinton also mentioned US efforts to enhance its presence in Southeast Asia, including “looking at ways to enhance our operational access” there.

The US should cautiously embrace opportunities for increasing its own bilateral relationships with ASEAN countries. The Chinese are particularly sensitive to a notion of strategic encirclement due to their modern history. This is particularly true in the case of countries in the area of what was formerly Indochina, including Vietnam. In order to acknowledge this perception and prevent the development of any potentially destabilizing security partnerships, it is necessary to attempt to as much as possible take into account China’s own security concerns. The US decision to embrace multilateralism and emerging security architecture in the region is a positive development in this regard,
for it can support traditional US bi-lateral alliances and emerging partnerships, while simultaneously including China in shaping the regional security environment in the future. Secretary Clinton’s decision to re-embrace the ARF and President Obama’s attendance at the EAS in November of 2011 are a positive steps in this direction, and the US should continue to vigorously embrace these institutions and support their potential in defining the future regional security architecture in the Asia Pacific region.

In the midst of increasing demands for physical austerity at home in the US, this strategy will also make it possible to maintain U.S. influence in the region without significantly increasing the U.S. footprint and corresponding fiscal costs associated with such an effort. That such domestic pressures have emerged in the United states cannot be denied, yet as Secretary of State Clinton has stated “rather than pull back from the world, we need to press forward and renew our leadership. Those who say that we can no longer afford to engage with the world have it exactly backward -- we cannot afford not to. For more than six decades, the United States has resisted the gravitational pull of these ‘come home’ debates and the implicit zero-sum logic of these arguments. We must do so again.”

Many in China have meanwhile openly embraced these calls for reduced US military presence abroad, particularly in the Asia Pacific region. Directly following the Standard and Poors decision to downgrade the US sovereign debt rating, commentary in official Chinese media attacked US military spending, suggesting that the US should reduce its military defense expenditure. Articles in state run papers such as Xinhua accused the US of overspending on its military in order to “meddle everywhere in international affairs, advancing hegemonism, and paying no heed to whether the economy can support this,” recommending that the US “change its policies of
interference abroad.” The Chinese reaction in official newspapers to America’s pivot to the Asia Pacific has echoed similar concerns. An editorial published in the People’s Daily several weeks after Secretary Clinton’s Foreign Policy article, responded by accusing the US of “causing trouble everywhere,” and “remaining stuck in the traditional mindset of hegemony.” The article further went on to refer to “historic changes,” taking place in the regional balance of power and what was seen as declining US “confidence about maintaining its leadership role.” Perhaps most importantly though, the article asserted that the Pacific would “never become a ‘monopolized ocean’ of the United States.” The leadership in the CCP is likely concerned over the policy articulated by Secretary of State Clinton, in particular the strengthening of alliances, the building of new partnerships with new countries in the region, and the maintenance of an extensive forward deployed presence in the region. According to some analysts “in Beijing’s eyes, these measures are part of a subtle framework of strategic containment and can harm Chinese security interests and undermine the Chinese Communist Party’s rule.”

Concern on both sides of the Pacific about applicable international legal norms at sea and a shifting regional balance of power may be creating a zero sum security dilemma between the US and China in the Asia Pacific region.

It is possible that many in Beijing see the balance of power shifting in their favor and may be beginning to promote a more assertive foreign policy they feel justified by this shift. However, this has created concern in the US, with the Secretary of Defense Leon Panetta recently stating that a strong US military presence in the region “is essential to restrain Chinese assertiveness.” As China reemerges toward what it sees as its rightful place in the region, including consolidating its claims over disputed islands and maritime
areas in the South China Sea, efforts to do so may create serious tension with established maritime powers, including the United States, who view this as a potentially serious challenge to the freedom of navigation in the region. As articulated by Secretary of Defense Robert Gates in a speech given in Tokyo in 2011, the US believes “that customary international law, as reflected in the UN Convention on the Law of the Sea, provides clear guidance on the appropriate use of the maritime domain, and rights of access to it.” Concerns that China is failing to abide by these norms and even alter them are exacerbated by technological advances in the Chinese military, including the PLA-Navy, which have been described by US officials including the new Secretary of Defense Panetta as “a challenge to U.S. forces in the region.” Perhaps most concerning to the US however is the utilization of both military and paramilitary assets to enforce a campaign of legal warfare in these areas aimed at changing the current status quo in areas like the South China Sea.

While these indications of Revisionism in Chinese foreign policy remain limited and the threat they pose to US national interests should not be exaggerated, neither can they or should they be dismissed or overlooked. While it will remain possible to cooperate with China on maritime security in areas outside the near seas, disputes over customary international legal norms at sea “will not be easily resolved.” In fact senior US officials including former Secretary of State Robert Gates have conceded that it would “be impossible to compromise” on these international legal norms including the freedom of navigation in areas including the EEZ. Though China might only exhibit what can objectively be viewed as limited indications of revisionism in its foreign policy, the US might perceive and come to interpret these indications as anything but limited. Due to
the geostrategic importance of the area they cover and the international legal norms involved, the limits of Chinese revisionism may currently be testing the comfort levels of the US national security establishment and what it sees as fundamental rights designed to maintain access to the global commons in both sea and air. Increasing focus on these aspects in US national security documents would suggest such a possibility. As China continues to rise in the years ahead, compromise over disputed territory and restrictive interpretations of international law in the South China Sea may become equally impossible for Beijing, setting the two powers up for an increasingly zero sum strategic competition over the both the rules of and the very game itself in the Asia Pacific region.

Washington should never cease trying to evaluate Chinese perceptions of national interest in the South China Sea, yet it is becoming increasingly clear that the interests of the two countries may be becoming at odds in the area. The challenge China poses to both international legal norms and the balance of power in the region must be met with a steady, confident, and determined American leadership. There could be trouble ahead if claims by Chinese authors that America is increasingly less able to demonstrate commitment to leadership in the region come true. Such Chinese analysts may become emboldened to recommend more assertive Chinese posturing in the international system in order to test the limits of American power. But if America continues to act with the increasingly engaged, active leadership that it has demonstrated over the last several years, there is no indication that the unique role that Washington has played in the region for the last several decades as a strategic balancer will come under serious threat. While American presence in other regions may have become strained and even controversial at times, this is not the case in Asia. “In Asia, the American presence is welcomed with
open arms.” Beneath all the talk of relative capability and shifting balance of power, the reality of regional perception remains ultimately in favor of a continued strong American presence. The region does not want any individual power to dominate or become hegemonic, but if they were forced to chose, ultimately would prefer an emboldened American presence to Chinese regional hegemony. Both China and the US would do well to remember this. Assertive actions on behalf of China meant to cow its neighbors into conceding to its interests will do little more than to reinforce the current strength of US forward deployed presence in the area. The US should be assured by this reality and continue to avoid overreacting to the challenges posed by China in the maritime domain, and continue with its current policy of reengaging with the region. There remains however the possibility for miscalculation on both sides, as perceptions of rising and declining powers may influence or exaggerate threat assessments in the region, and intentions may become blurred in the shifting balance of power.
Chapter 6 Conclusion

The Power of International Law and UNCLOS

Due to the nature of the interconnected and globalized international economic order, China and the US remain as dependant upon one another’s success as ever before. The interconnectedness of that order is and will continue to be enabled by the freedoms in and access to the global commons that have allowed these connections to develop over the last half century. The US is right to interpret the international customary legal norms as being in favor of these principles, yet the US has still not officially become a party to the Convention that codified many of the customary norms into international law. US failure to ratify UNCLOS places the US in a comparatively vulnerable position in regard to the evolution of international legal norms that could be avoided by ratifying the convention. If the US were to ratify the convention this would serve to reduce much of the uncertainty and tension over international legal norms such as the freedom of navigation, allowing the US to treat the norms under the more solid foundation of treaty or convention law, rather than the continual evolution of customary law. This reliance on customary law predisposes the US to action intended to uphold navigational freedoms, and while action is an important part of the sources causing the evolution of customary international law, physical action using traditional forms of military power will prove insufficient to meet the challenge from China and other countries in their efforts to extend the sovereign security rights granted in the maritime area.

As a nation the US has for too long taken for granted the freedoms of access to the maritime commons enshrined in UNCLOS and can no longer afford to delay action in their defense. The US should without delay move to ratify the convention. Action on this
effort has been openly endorsed by not only the Obama but the previous Bush administration as well, not to mention the unyeilding support of both the Departments of State and Defense. The US Navy has been particularly vocal in its call for ratification, with the Chief of Naval Operations Gary Roughead recently stating that “the Department of the Navy strongly supports accession to the Law of the Sea Convention (UNCLOS). The United States must continue to take maximum advantage of the navigational rights contained in the Convention. Ratification would enhance stability for international maritime rules and ensure our access to critical air and sea lines of communication.”

The Obama Administration has heard these calls and since taking office has pushed for the ratification of UNCLOS, though resistance from conservative voices within and outside of Congress has once again moved to block accession to the convention.

While the US was instrumental in the negotiations leading up to the signing of the third UNCLOS, resistance to the convention has proved detrimental to the US effort to accede to the convention, beginning in 1982 with the failure to sign by President Reagan. Concerns over the sea bed mining authorit and the loss of sovereign authority were addressed in a 1994 amendment, allowing President Clinton to sign the amended convention shortly thereafter. Concerns have continued to emanate from conservative elements within the country, often times voicing similar arguments. Conservative authors have argued that the convention would not provide any rights that customary law has not already engendered. Acceding to the convention is thus unnecessary and the best way for the US to protect those rights is with a strong Navy. This analysis fails to account for the dynamic nature of customary international law and overlooks the stablizing affect ratification of the convention would have upon the norms relating to freedom of
navigation for the US. While a strong Navy will undoubtedly be critical to securing US national security interests in the Asia Pacific region, the US will be placing itself at a serious strategic disadvantage if it fails to fully appreciate the power of international law in the conduct of its foreign policy.

Failure by the Congress to ratify UNCLOS will only embolden and enable China’s efforts to delegitimate the US forward deployed presence through attacks on the international legal norms embodied in the convention. China has been quick to repeatedly criticize and point to the US failure to ratify the convention, attempting to create a distinction between the positions of the two powers and provide legitimacy for its own positions while seeking to deligitimize those of the US. However, China’s current approach to international maritime law is increasingly in violation of many of the rules and norms embodied in the convention. Membership in an international legal institution does not in and of itself mean that a state is in compliance with the norms promoted within that institution. In fact at times membership can indicate the exact opposite, as has been observed to be the case with international human rights treaties. Though China is a member of international human rights treaties including the UN International Covenant on Civil and Political Rights, the voices of reasonable and honest dissent continue to be silenced by the repressive hand of state security within the country. Similarly, while China is a member of UNCLOS, when combined with its reservations before ratification, China’s subsequent words and actions following accession have rendered its membership in UNCLOS essentially meaningless.

This does not however mean that the US should be itself dissuaded from ratification. Like all international law, UNCLOS is a compromise of competing interests
and inherently imperfect, yet it essentially provides for and protects many of the maritime rights deemed essential by the US and its foreign policy establishment. In fact, China’s membership is all the more reason for the US to ratify, for while imperfect, membership brings with it the ability to influence and shape the future direction of the convention and the international law of the sea. Membership would not only stabilize and strengthen the norms of freedom of navigation for the US, it would also allow the US a seat at the table of the international legal bodies enabled by UNCLOS to deal with the interpretation and evolution of the rules and norms embodied within it.

There has been renewed discussion of a push for hearings and an effort on ratification of UNCLOS in the Senate. Now is the time for the proponents of UNCLOS in the US leadership to vocally support ratification, lest they once again by drowned out by conservative voices who have staunchly opposed it for the last several decades. Not to ratify the treaty going forward could present a challenge to the national security of the United States in the midst of an increasing geostrategic competition with China in the Asia Pacific region. To fail to appreciate the indirect power of international law may leave the US exposed to an effort by China to deligitimize our presence in the region.

China’s MLE Strategy and an Emerging Contest over Norms at Sea

Though China’s maritime strategy is fluid and continues to evolve, I have attempted to provide in the thesis key elements that are currently shaping and would indicate an overall picture of China’s strategic approach in the South China Sea. I have argued that this approach is and will increasingly be defined by the growth in maritime paramilitary forces and the corresponding legal enforcement strategy that has provided
the impetus for that growth. The decision to focus on maritime paramilitary forces can be seen as an extension of the previous ‘legal warfare’ concept that emerged in the late 1990s and became incorporated in PLA doctrine in 2003. While legal warfare was essentially more of an academic approach to contest certain legal norms China did not agree with and promote those it did, China’s emerging maritime legal enforcement strategy has a more operational focus.

Whether it is confronting US forces conducting military surveillance in the EEZ or Southeast Asian claimants to the disputes in the South China Sea, China’s maritime enforcement agencies are adopting an increasingly confrontational approach that poses a serious challenge to regional stability going forward. China is attempting to delegitimize not only the presence of the US Navy, but also that of the Southeast Asian nations who make claim to the numerous islands and maritime features in the South China Sea. It is this new operational component that is of greatest concern to the US and other interested actors. While ostensibly an effort to reduce the chances of escalation, China’s maritime legal enforcement strategy is instead likely to have exactly the opposite effect, and will exacerbate the previously existing conflict of interests present in the region.

This conflict manifests itself in the long standing territorial disputes between China and its neighbors, but also increasingly between the US and China over the legitimate international norms at sea. This emerging contest over norms at sea is likely to exacerbate preexisting structural tensions surrounding shifting balances in regional military power and is likely to be perceived by the US as a long term threat to the international global order. These two factors, ideological and material, are likely to become mutually re-enforcing, as the contest over norms not only threatens the
legitimacy of US forces in the region, but a considerable shift in the regional balance of power could potentially provide the means to enforce that threat and physically restrict their ability to operate in a given area. US threat perception surrounding material capabilities is also likely to be amplified by the normative threat posed by China’s position, and this threat perception could become magnified in the years ahead if China were to continue to persist in challenging these norms. If allowed to developed unchecked, such a dynamic could come to define the US-China relationship going forward, a relationship that would be defined by competition, overshadowing the numerous opportunities for cooperation between the two major powers.

The direction of China’s military modernization and its orientation toward pivotal international norms has given rise to concern within the Asia Pacific region over its future intentions in the South China Sea. Yet it is China’s recent actions there which have been the greatest cause for concern. While these actions might be increasingly undertaken by civilian maritime enforcement agencies, the reality that they are ultimately supported by China’s growing ability to project traditional military power into areas including the South China Sea is lost on few if any of those involved. The fact that PLAN vessels are often not far over the horizon during incidents\(^2\) testifies to this reality. For this reason, Chinese efforts to enforce foreign policy preferences through the use of civilian agencies as part of an MLE strategy may have unforeseen consequences which Chinese leaders did not intend, including escalating tension that could potentially spiral out of control and lead to conflict involving traditional military forces. China’s approach to the South China Sea will likely serve as a litmus test for China’s proclaimed ‘peaceful rise,’ and
escalation in the area, particularly to the point of military conflict, would have disastrous results for China’s overall strategy.

While US foreign policy is currently attempting to shift in a manner which best protects its interests in the region and the stability of the global commons, including maritime areas such as the South China Sea, this shift remains in process. In order to be successful, future US policy must account for and respond to the Chinese MLE strategy that I have laid out here. The US should continue to meet China’s legal warfare with a similarly subtle foreign policy that takes into account the power of international law, a policy already evident in the Freedom of Navigation program run jointly by the State and Defense Departments. We should be open and frank about our areas of disagreement with China. Veiled references that refrain from mentioning China by name are not lost upon the Chinese leadership and may in fact exacerbate a Chinese proclivity to see subtle efforts at containment. The US leadership should continue to communicate clearly to China that the US does not seek to contain China’s rise, but at the same time seeks to remain fully present and engaged in the region and to uphold certain fundamental international norms.

That the next century will be a “Pacific century” can no longer be in doubt. What remains to be seen is whether China and the US can work together with the other regional powers to create a regional security environment that continues to promote peace and prosperity for all countries involved. Fundamental differences over applicable norms in the global maritime commons may suggest that this will be an increasingly difficult task, posing an immense challenge for policy makers on both sides of the Pacific.
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