

Creeping Jurisdiction MUST STOP

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China is playing fast and loose in claiming rights to territory on and beneath the South China Sea. The United States could help the situation by joining the United Nations Convention on the Law of the Sea.

Access and use of the global commons, particularly the sea and the air space, is a core element of U.S. military and commercial power. In times of war, control of the commons may be ensured by military means. In peacetime it is sought through international law and diplomacy and through limited military responses when the rules governing use of the commons are breached. In some cases, a peacetime incident may quickly result in

A Chinese newspaper from 2 April 2001 displays a file photo of one of the country's F-8 fighters and carries the headline: "A U.S. spy plane destroys our airforce plane." Not exactly. The jet collided with a U.S. Navy EP-3E Aries II about 70 nautical miles from Hainan Island. After the EP-3E was forced to land on Hainan, Chinese authorities captured and held 24 naval aviators and essentially stripped down the damaged aircraft, only one of several incidents that have increased tension between the two countries and between China and its neighbors.

a reaffirmation of traditional freedoms of the sea. In others, a more concerted effort, combining diplomacy with demonstration, is needed to return to adherence to international norms. This latter combination appears to be the case regarding China and the South China Sea. As noted recently by Patrick Cronin and Paul Giarra:

Chinese assertiveness over its region is growing as fast as China's wealth and perceived power trajectory. Beijing's unwelcome intent appears to give notice that China is opting out of the Global Commons.¹

Though not a new phenomenon, China's increasingly assertive activities in the South China Sea are drawing concern that the country is seeking regional hegemony at the expense of its neighbors in Southeast Asia as well as the United States, Japan, and South Korea.²

China's challenge to international norms regarding freedom of the seas is no small matter. The South China Sea, which spans an area of nearly 650,000 square miles, is host to the second-busiest sea lane in the world, reaching from the Strait of Singapore in the south to the northern tip of Taiwan in the north and bordering on China, Taiwan, the Philippines, Indonesia, Brunei, Malaysia, Singapore, and Vietnam. It was reported that in 2006 "nearly 50 percent of the world's crude oil, 66 percent of its natural gas, and 40 percent of the world trade" transited through this sea.³

Freedom of navigation is not the only matter of importance to the region. Energy is an issue, because the sea floor is believed to be the repository of large deposits of oil and gas, making jurisdiction an economic interest of all of the coastal states and a security interest to China's energy- and resource-hungry industrial sector.

Strategic and economic factors in the South China Sea have led to disputes over sovereignty and control of resources and

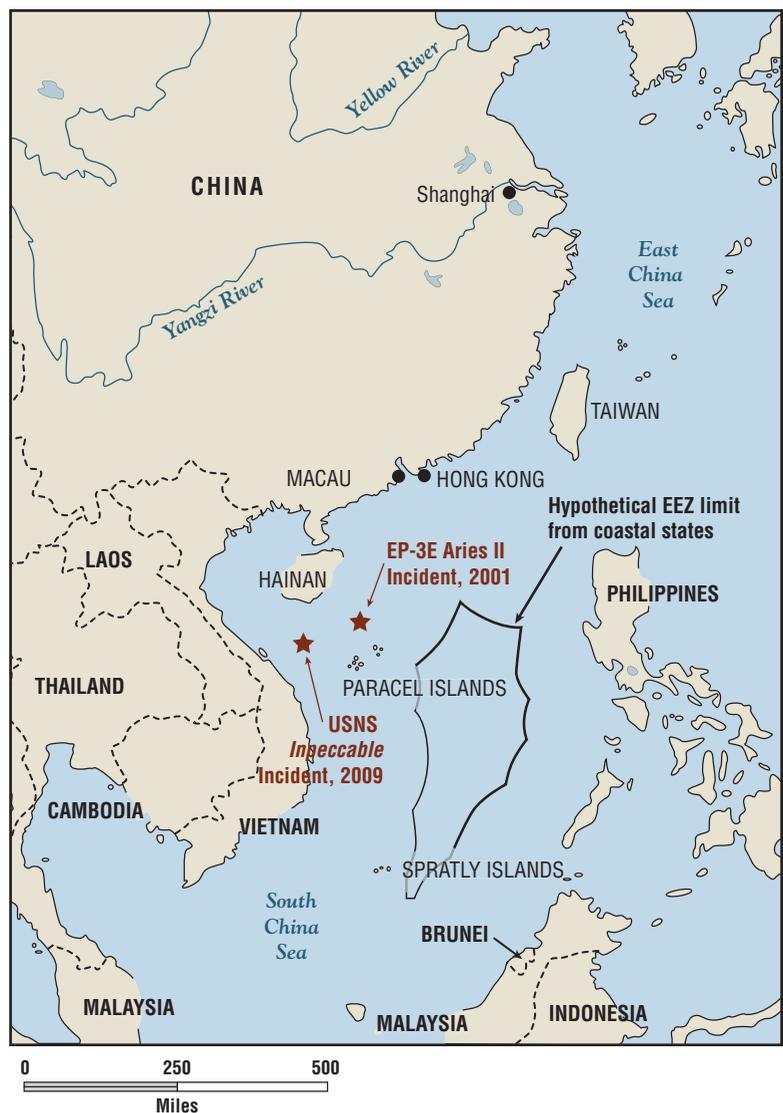
activities there. As a global power with interests in the region, the United States must work in cooperation with friends, allies, and partners, including China, to protect its rights under international law.

A Sea of Tension

With its strategic position and the potential value of its energy resources, the South China Sea has become an area of tension and conflict both for the sea's coastal states and for the United States. U.S. Energy Information Administration data for the period 1974–2001 includes:

- Four incidents of armed confrontation at sea between China and Vietnam, resulting in the loss of at least 88 lives
- Eight incidents, including gunfire between Chinese and Philippine warships
- Three incidents between the Philippines and Vietnam
- One incident between Malaysia and the Philippines, and one between Taiwan and Vietnam

Add to this several incidents between the United States and China, including the April 2001 collision of a Chinese jet with a U.S. Navy EP-3E Aries II as it was patrolling



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A map adapted from China's original "nine-dash chart" indicates that country's perceived territorial claims, including the Exclusive Economic Zones it has claimed around the "rocks" of the Spratley and Paracel islands, where the Chinese have harassed U.S. surveillance vessels.



A Dolphin helicopter swings bear-proof “apple houses” onto China’s *Xue Long* icebreaker at the North Pole on 19 August 2010. China is not only operating an icebreaker in the Arctic Ocean, it has also “applied for observer status in the Arctic Council, and engaged in trade talks with Canadian aboriginal peoples,” the authors point out.

above the Exclusive Economic Zone (EEZ) about 70 nautical miles from the home of a major Chinese submarine base, Hainan Island northwest of the Paracel Islands, that resulted in the loss of the Chinese jet and pilot and a forced emergency landing of the U.S. aircraft on the island. In 2009, the USNS *Impeccable* (T-AGOS-23) was harassed while conducting surveillance operations in international waters, also more than 70 miles off the coast of Hainan Island. Similar incidents involved the USNS *Bowditch* (T-AGS-62) in 2001 and 2002 in the Chinese EEZ in the Yellow Sea.

The common element of most of the conflicts is China’s perception of its national security and international responsibilities. The country sees itself in a contest with its neighbors over control of the seafloor energy resources of the South China Sea. With regard to the United States, China sees a powerful force that could threaten its interests at sea either as a sole adversary or in cooperation with other states bordering on the South China Sea.

China’s claims to those resources rest in part on historic claims illustrated in a map in which a series of nine dashed lines indicate some degree of jurisdiction over virtually all of the waters of the region (a similar claim has been made by Taiwan). With regard to U.S. naval operations, China has argued that the 1982 United Nations Convention on the Law of the Sea (UNCLOS) prohibits foreign military operations within its EEZ, a contention found nowhere in the text of the convention itself. China has raised the stakes by stating that control of the South China Sea and its resources is a core national interest on par with its claims to Tibet, Taiwan, and Xinjiang.

Yet Chinese claims are ambiguous. Does the nine-dash chart signify territorial claims to the South China Sea and the seafloor, or does it apply only to the rocks and their territorial sea within the marked zone? Are the claims really a “core interest,” or are they a starting point for negotiating the division of fishing and energy resources of the region?⁴

China’s arguments and actions reflect its regional perspective and willingness to exercise its military in pursuit of regional interests. This is changing as China becomes increasingly reliant on distant sea lanes for access to strategic and critical materials, particularly energy from the Persian Gulf, minerals from Africa, and recently, resources passing the Arctic. Security of sea lanes is now becoming a part of its strategic world view.

China has been participating in international anti-piracy patrols in the Gulf of Aden. It also operates an icebreaker in the Arctic Ocean, has applied for observer status in the Arctic Council, and has engaged in trade talks with Canadian aboriginal peoples. The Chinese appear to be pursuing two different and conflicting policies: regional sea control beyond their territorial sea and freedom of navigation through the regional seas and local EEZs of other coastal states. China’s actions in regional governance are ambiguous as well. It has sought observer status in the Arctic Council at the same time it has sought to marginalize the U.S. role in China-ASEAN (Association of Southeast Asian Nations) relations.

Regional Issues and International Law

While the United States and China deal with maritime operations in the EEZ, the rest of the region must address

the maze of overlapping claims to the resources of the South China Sea. China has been attempting to extend its authority over the sea and the seabed, sometimes by force. Its smaller neighbors must rely on diplomatic protests, limited military responses, and application of international pressure to conform to international law and discourage aggression.

All of the region's coastal states are party to UNCLOS, so it is the common legal basis for determining rights and jurisdiction in the South China Sea. While the United States has not yet joined the convention, it follows President Ronald Reagan's 1983 proclamation in which he stated that the United States would observe the provisions on navigation, the EEZ, and the continental shelf in reciprocity with other nations.⁵ The convention addresses both of the key issues with regard to activities in the EEZ:

Navigation in the EEZ: Coastal states have control of living and mineral resources while high-seas navigation rights are maintained for ships and aircraft. Military surveillance is not singled out from other activities in the EEZ; it is only with regard to innocent passage through the territorial sea that surveillance is identified and prohibited.

National Jurisdiction in the EEZ and Continental Shelf: The convention recognizes exclusive rights over the living and mineral resources within the EEZ of coasts and inhabitable islands. Uninhabitable rocks do not have an EEZ, only a 12-mile territorial sea. Disputes over control of resources in the South China Sea have focused primarily on claims to islands and jurisdiction in their accompanying EEZ and on disputes over whether certain outcrops are rocks or islands. Claims by China and by some other states have sometimes been outlandish regarding habitability or historic title.

China's Conflicting Perspectives

Efforts to extend China's control over the South China Sea run afoul of UNCLOS. Examples of China's legal overreach include:

- Claiming that military aircraft do not have the right of overflight over the Exclusive Economic Zone: overflight of the EEZ is specifically recognized by the convention, and military surveillance is not limited



The United States has not yet joined the U.N. Convention on the Law of the Sea, but President Ronald Reagan—here, addressing the United Nations in 1983—did issue a proclamation earlier that year, stating that this country “would observe the provisions on navigation, the EEZ, and the continental shelf in reciprocity with other nations.” In spite of those endorsements, U.S. credibility “is weakened by its own failure to join UNCLOS,” the authors say.

- Interfering with U.S. government vessels operating beyond the 12-mile territorial sea, notably Chinese interference with the USNS *Impeccable* and USNS *Bowditch* because they were “moving about in China’s Exclusive Economic Zone”
- Claiming that uninhabitable rocks in the Paracels and Spratleys are habitable so that China can claim they are islands with their own 200-nm EEZ, and en-

gaging in military operations to take possession of the rocks from other countries.

Attributing motives to Chinese actions is difficult under the best of circumstances. In the South China Sea, it is even more so. Chairman of the Joint Chiefs of Staff Admiral Mike Mullen recently said that China’s “heavy in-



One example of China's running “afoul of UNCLOS” was its interference with U.S. ships “operating beyond the 12-mile territorial sea.” In March 2009, this Chinese trawler attempted to snag the towed array of the USNS *Impeccable* with a grappling hook. The ship, eventually harassed by five Chinese vessels, was operating in international waters.

vestments of late in modern, expeditionary maritime and air capabilities seem oddly out of step with their stated goal of territorial defense,” while Secretary of Defense Robert Gates accused China’s top military officers of not following the same policy as senior political leaders who have worked to develop other aspects of the U.S.-China relationship.⁶

As a large and increasingly industrial state, China is concerned with matters of access to strategic and critical materials, especially oil and gas and industrial minerals. In the short term, China may give its regional interests highest priority. As it grows as a global economic power, however, it will find that freedom of navigation and overflight worldwide are essential to its security.

Increasing dependence on sea lanes for imports of oil and minerals and access to export markets will push for a shift of priority on global mobility over control of the regional sea. A key reason for China to support UNCLOS is the “transit passage” provisions that assure the unimpeded passage of commercial vessels and the warships that are increasingly called on to escort them through the Straits of Singapore and Malacca, the Strait of Hormuz, and other chokepoints through which its critical imports flow.

The U.S. Role in the South China Sea

China’s interests in authority over the South China Sea are clear in its “nine-dash” chart that encloses all of the international waters and portions of foreign EEZ in the region.⁷ Promulgating this claim, which intrudes deeply into areas claimed by other regional coastal states, sets up a situation in which the United States serves to balance China’s growing regional naval capability.

During Secretary of State Hillary Clinton’s visit to Hanoi, Vietnam, in 2010, she addressed the disputes and emphasized the need for regional resolution. While China appears to prefer to address its smaller neighbors on a one-on-one basis, the multilateral approach is favored by the smaller states as a process that is better balanced with the greater power of China. Recognizing this, China objected to Secretary Clinton’s support of the multilateral approach. In the end, however, the benefits of economic development of regional oil and gas deposits depend on an equitable regional settlement among the coastal states. The U.S. interest lies in ensuring that a peaceful process leading to an equitable settlement is implemented.

The United States depends on support from ASEAN members to maintain effective operations in the South China Sea, so its responses to China must respect regional interests and concerns. While the United States is seen by the member states as a friend, they also know that U.S. interests are at times different from their own. The United States cannot take their support for granted. To do so may not just weaken joint responses to Chinese aggressiveness; it may put other multilateral maritime initiatives at risk, such as the Proliferation Security Initiative and anti-piracy resolutions in the U.N. Security Council.

ASEAN member states must be assured that the United States will provide a balance to growing power without becoming a threat to their interests. The United States can make this clear by emphasizing that its actions will conform with UNCLOS. As long as U.S. actions are compatible with and in support of the convention, ASEAN states will feel secure in U.S. maritime activities in their region,



Secretary of State Hillary Clinton participates in a news conference with Vietnamese Foreign Minister Pham Gia Kiem at the 2010 ASEAN summit in Hanoi. Secretary Clinton stressed the need to resolve disputes in the region but expressed U.S. “support of the multilateral approach,” over which China objected. According to the authors, “The U.S. interest lies in ensuring that a peaceful process leading to an equitable settlement [over regional oil and gas deposits] is implemented.”

and China will know that there are limits that bind U.S. activities in the region.

While the credibility of the U.S. commitment to the convention is currently undercut by the country's non-party status, this can be overcome by completing the effort of the previous administration to secure the advice and consent of the Senate to join the convention and then submit its ratification.⁸

What Does the Future Hold?

In attempting to increase its control and extend its authority throughout the South China Sea by applying domestic legislation to international waters, China has created a conflict both with its neighbors and with UNCLOS. China's claims are not just a threat to navigation in the South China Sea. They are a threat to the global commons and to international law that was developed to protect the rights of both coastal states and distant-waters states in those regions.

China's efforts to enclose the local commons are short-sighted. It is growing into the role of a global power with its own interests in access and use of the global commons. In fact, the balance between coastal interests and distant-water concerns may now be in the process of tipping toward the latter. Gail Harris, writing in *The Diplomat*, stated: "Chinese strategists now also believe in order to protect their economic development they must maintain the security of their sea lines of communications, something that requires a navy capable of operating well beyond coastal waters."⁹

As for military surveillance in the EEZ, China can become as accustomed to U.S. monitoring as the United States did during the Cold War to the presence of antennastrewn Soviet "fishing trawlers" outside its own territorial sea. It can be expected that China will monitor the arrivals and departures of U.S. and other warships from stations outside the territorial seas of other nations using its highly capable fleet of quiet, air-independent submarines.

In the long term, China's increasingly global interests will drive it to support the same freedoms of navigation that have been championed by other global trading states. Until that time, the United States must preserve the navigation rights enshrined in the Law of the Sea by continuing to demonstrate them in practice. It must also support efforts by coastal states to reach a fair division of the EEZ and continental shelf.

The broader U.S. strategy for the South China Sea must follow three tracks. First, protect the rights of navigation for all through both diplomacy and demonstration. Second, work with the People's Liberation Army Navy to help it recognize that China's long-term interest in freedom of navigation is far more important to its national security than short-term efforts to control navigation in the EEZ. Third, promote regional resolution of jurisdictional claims over islands and seafloor resources of the South China Sea based on the principles of UNCLOS.

To this end, the United States must also recognize that regional influence depends not just on power but on its

judicious application, as noted by Professor Barry Posen:

So command of the commons will provide more influence, and prove more militarily lethal, if others can be convinced that the United States is more interested in constraining regional aggressors than in achieving regional dominance.¹⁰

It is important to keep in mind that our friends and allies do not want to see the United States have an unbounded role in the South China Sea. For them, UNCLOS is important in keeping U.S. involvement in balance with regional interests. If the United States fails to accept the convention's obligations and limits as well as its rights, then its reputation, even with its allies, will be diminished.

In spite of President Reagan's endorsement of the provisions related to navigation, the EEZ, and the continental shelf, the credibility of the United States as the champion of international law is weakened by its own failure to join UNCLOS. Joining would strengthen U.S. leadership at sea, and that will serve the interests of all parties in the South China Sea.

U.S. policy is, and should remain, to demonstrate and demand adherence to the rights of navigation and overflight and promote regional resolution of issues of territorial and resource jurisdiction defined in UNCLOS. An important element of this strategy is for the United States to join the convention and re-establish itself as a champion of the international rule of law at sea while we enjoy the rights recognized by UNCLOS. ❀

1. Patrick Cronin and Paul Giarra, "China's Dangerous Arrogance," *The Diplomat*, 23 July 2010.

2. Ibid.

3. Kevin X. Li and Jin Cheng, "Maritime Law and Policy for Energy Security in Asia: A Chinese Perspective," *Journal of Maritime Law and Commerce*, Vol. 37, No. 4 (October 2006), as cited in Harnit Kank, "Maritime Issues in South China Sea: A Review of Literature," Institute of Peace and Security Studies, New Delhi, India.

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6. Voice of America, 10 June 2010. Available at www.voanews.com/english/news/asia/Top-US-Officer-Concerned-About-Chinas-Military-Buildup-Lack-of-Contact-96067679.html

7. Li Jinming and Li Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note," *Ocean Development and International Law*, Vol. 34 (2003), pp. 287-295.

8. See George Galdorisi and Scott Truver, "Treaty at a Crossroads," U.S. Naval Institute *Proceedings*, July 2007, pp. 50-57.

9. Gail Harris, "The right U.S. Pacific Strategy?" *The Diplomat*, 24 August 2010 <<http://the-diplomat.com/2010/08/24/evolving-us-pacific-strategy/>>

10. Barry R. Posen, "Command of the Commons, The Military Foundation of U.S. Hegemony," *International Security*, Vol. 28m, No. 1 (Summer 2003), p. 44.

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