

# UNCLOS: China, India, and the United States Navigate an Unsettled Regime

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## KEY TAKEAWAYS

Disputes over freedom of navigation represent a volatile fault line in U.S.–China relations, and a point of growing strategic convergence between the U.S. and India.

How China, India, and the U.S. define freedom of navigation, develop maritime strategies, and navigate differences will affect the maritime order for years to come.

To protect its strategic interests, the U.S. must resist Chinese attempts to restrict freedom of navigation and push back against China's unlawful maritime claims.

While there is a widely accepted international law of the sea, reflected in the U.N. Convention on the Law of the Sea (UNCLOS), the great powers of the world are divided over competing and, in some cases, incompatible, domestic maritime laws or interpretations of UNCLOS. The areas of disagreement extend to fundamental principles, such as which waters lie under a nation state's jurisdiction and what it is entitled to do, and forbid, in those waters.

Compounding the problem, some of the sharpest divisions have emerged between the world's two increasingly antagonistic superpowers, China and the United States. Their diverging approaches have already prompted several dangerous encounters at sea. Worse still, the rift has manifested in one of the most hotly contested and strategically volatile waterways of the world, the South China Sea.

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Further complicating matters, India, the other rising demographic giant of the Indo-Pacific region, differs in important ways from both the U.S. and China on key questions related to freedom of navigation. From a legal perspective, Indian laws and domestic legislation in some ways bear greater resemblance to China's than to America's. From a geopolitical perspective, however, India's enforcement, activities, and diplomacy on questions of freedom of navigation, including in the South China Sea, have begun to more closely align with the United States.

Today, the South China Sea is serving as a key battleground in a larger, more consequential struggle. How these three countries define freedom of navigation, develop their maritime strategies, and navigate their differences will leave a lasting impact on the maritime order of the 21st century.

## Background

In the aftermath of World War II, the world's capitals set about constructing a set of laws and norms that would govern earth's oceans and waterways. The first U.N. Conference on the Law of the Sea was held in Geneva in 1956, producing four treaties in the decade to follow.<sup>1</sup>

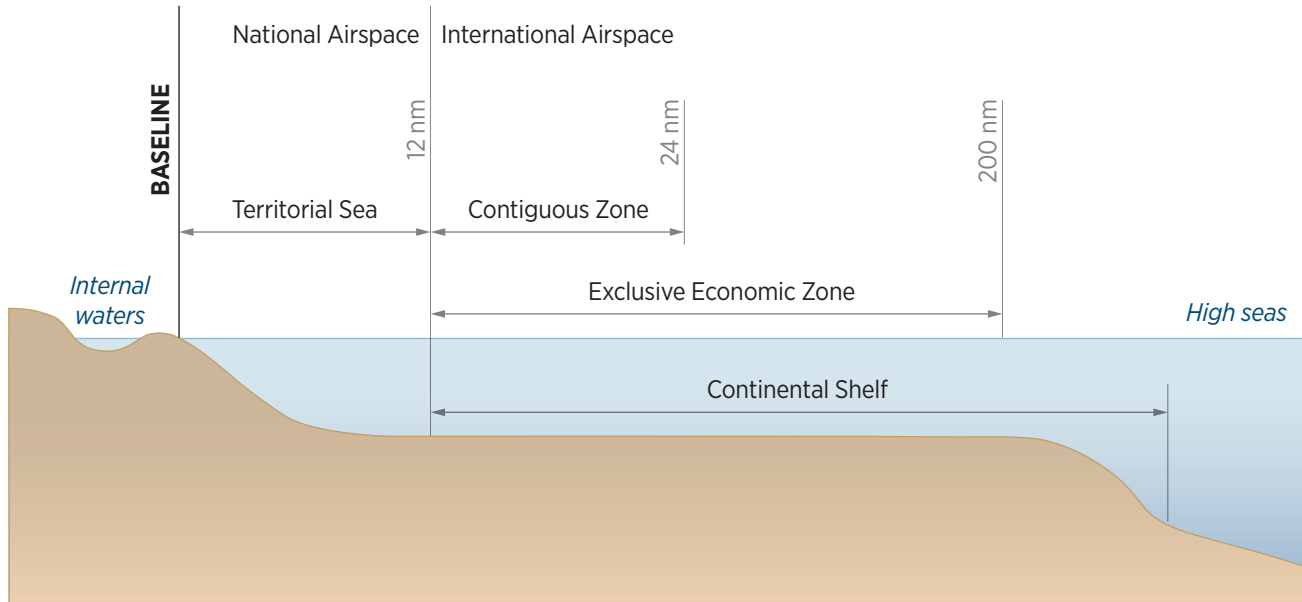
In 1973, the Third U.N. Conference on the Law of the Sea marked the beginning of a nearly decade-long conference of 160 nations. UNCLOS was completed in 1982 and entered into force in 1994. Its provisions governed everything from which rights states would enjoy in their internal waterways to the maritime rights and entitlements that could be claimed by island states and archipelagos.

Among the most consequential aspects of the new regime was the creation of exclusive economic zones (EEZs). Prior to UNCLOS, the world's oceans were effectively divided into "territorial seas"—the sovereign waters of a state extending three nautical miles (nm) from their coastline—and the "high seas," which were open to unrestricted navigation for all. UNCLOS extended the territorial sea from three nm to 12 nm, extended a "contiguous zone" 12 nm beyond that,<sup>2</sup> and granted coastal states a 200-nm EEZ in which they would have exclusive rights mainly over economic resources and exploitation activities.

China, India, and the United States were all participants in the UNCLOS negotiations. However, in 1983, the Reagan Administration signaled that, while the United States would not ratify UNCLOS, on questions of freedom of navigation and overflight and other traditional uses of the sea, UNCLOS reflected customary international law, and U.S. policy would align with its key provisions.<sup>3</sup>

FIGURE 1

## U.N. Convention on the Law of the Sea: Defined Waters



### MARITIME BOUNDARY DEFINITIONS

**Territorial Sea.** Sovereign territory of the state. Foreign civilian and military vessels have right to innocent passage.

**Contiguous Zone.** State may exercise control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws.

**Exclusive Economic Zone (EEZ).** Sovereign rights for exploring and exploiting resources, preserving marine environment, establishing artificial islands and structures.

**High Seas.** All parts of the sea that are not included in the EEZ, the territorial sea, or in the internal waters of a state. No exclusive rights.

**SOURCES:** *Law of the Sea: A Policy Primer*, "Maritime Zones," The Fletcher School of Law and Diplomacy, 2017, Chapter 2, <https://sites.tufts.edu/lawofthesea/chapter-two/> (accessed March 11, 2021), and the National Oceanic and Atmospheric Administration, "Maritime Zones and Boundaries," [https://www.gc.noaa.gov/gcil\\_maritime.html](https://www.gc.noaa.gov/gcil_maritime.html) (accessed March 11, 2021).

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When President Bill Clinton presented UNCLOS to Congress in 1994, the U.S. Senate declined to ratify it.<sup>4</sup> Nonetheless, on matters related to freedom of navigation and overflight and other traditional uses of the sea today, "in practice the United States has accepted and complies with nearly all the treaty's provisions."<sup>5</sup>

India ratified UNCLOS in 1995, and China in 1996, marking the first time that Beijing agreed to compulsory arbitration in an international treaty.<sup>6</sup> In the years since ratification, however, Chinese laws, policies, and activities have become increasingly at odds with UNCLOS. According to international maritime law expert, retired U.S. Navy Captain Raul "Pete" Pedrozo:

China has claimed thousands of square nautical miles (nm) of territorial sea that should remain international waters and a significant amount of area as internal waters that should be territorial seas. These expanded maritime zones destabilize the region by encroaching on neighboring states' EEZ and continental shelf claims in the Yellow, East China and South China Seas, as well as impeding navigational rights and freedoms of the international community in these waters.<sup>7</sup>

Over the past two decades, China's accelerating drift from UNCLOS has generated increasing friction with several of China neighbors and with the United States, creating a paradoxical rift between the compliant abstainer and the non-compliant signatory.

## **A Clash of Interests in the South China Sea**

Today, China and the U.S. diverge on several matters related to the maritime order and freedom of navigation, and nowhere are those differences more evident than in the turbulent waters of the South China Sea. The contested waterway, which hosts some \$3.4 trillion in international shipping trade each year, is host to a complex web of overlapping sovereignty claims between China and its Southeast Asian neighbors. The U.S. has largely avoided taking sides on the competing sovereignty claims but broadly seeks to deter unilateral, provocative actions that will escalate tensions.

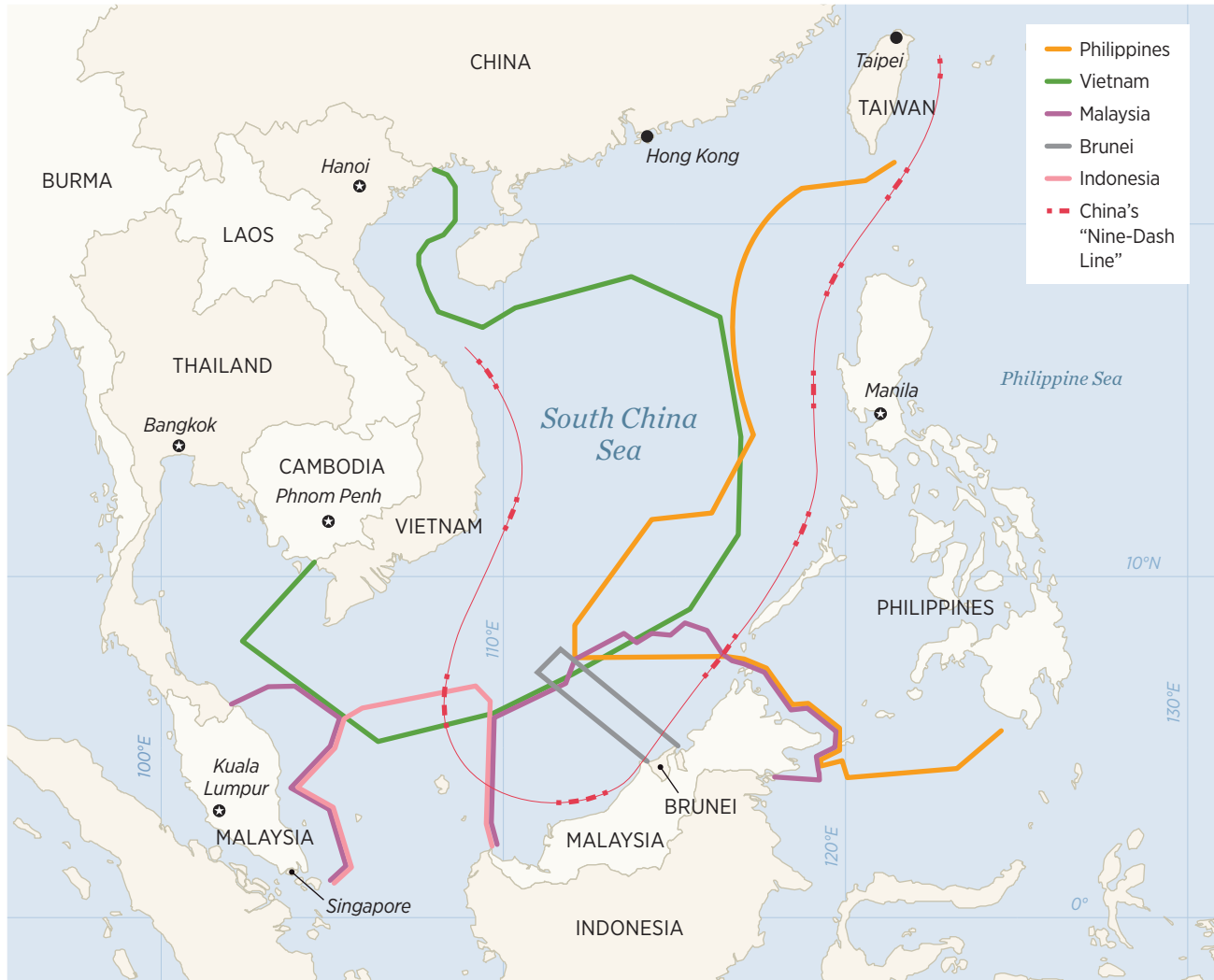
In recent years, the U.S. has condemned several aspects of China's increasingly brazen approach to the disputes there, including China's seizure of Scarborough Shoal from the Philippines, a U.S. treaty ally, in 2012; its construction of seven artificial islands in disputed waters in the mid-2010s; and its ongoing use of a vast "maritime militia"<sup>8</sup> to intimidate and infringe on the economic rights of its neighbors.

The United States has also objected to a number of China's excessive or unlawful claims, such as its attempt to claim expansive authorities over the Gulf of Bohai and the Hainan Strait by characterizing them as "internal waters" in violation of UNCLOS. According to the U.S. State Department, in total China has sought to claim 600 square nm as internal waters, and 1,175 square nm of territorial sea, that should be categorized as high seas.<sup>9</sup>

The United States has also objected to China's attempt to draw "straight baselines"<sup>10</sup> along its coast and around the Paracel Islands and the disputed Senkaku/Diaoyu Islands. As Captain Pedrozo argues, "Most of China's mainland coast does not meet the geographic requirements of UNCLOS [for strait baselines]," and, as a continental state, "China may not establish archipelagic baselines around any of its islands."<sup>11</sup>

MAP 1

## Exclusive Economic Zone (EEZ) Claims in the South China Sea



**SOURCE:** "China has Militarized the South China Sea and Got Away with It," *The Economist*, June 23, 2018, <https://www.economist.com/asia/2018/06/21/china-has-militarised-the-south-china-sea-and-got-away-with-it> (accessed March 26, 2021).

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The United States has also rejected the validity of China's infamous "nine-dash line" claim.<sup>12</sup> In a May 2009 note to the United Nations, Beijing claimed "indisputable sovereignty" over all of the islands and adjacent waters within the South China Sea, using "historic rights" as a (specious) legal justification. The U.S. State Department released a study in 2014, demonstrating what has become fairly widespread consensus: The nine-dash line has no basis in international law.<sup>13</sup>

As important, a Permanent Court of Arbitration (PCA) tribunal ruling in 2016 declared many of China's expansive claims in the South China Sea to be invalid.<sup>14</sup> The U.S. government, numerous other foreign governments (including India's), and international legal experts have recognized the authority of the ruling. "Beijing has offered no coherent legal basis for its 'Nine-Dashed Line' claim in the South China Sea since formally announcing it in 2009," explained Secretary of State Mike Pompeo in 2020. "The [2016 PCA] Tribunal's decision is final and legally binding on both parties."<sup>15</sup>

## Freedom of Navigation Disputes

Arguably the sharpest points of bilateral disagreement in the South China Sea relate to Chinese laws and practices that infringe on the U.S. military's freedom of navigation and overflight.

**The Territorial Sea.** China, for example, claims the right to restrict the "innocent passage" of foreign warships transiting through its territorial seas, demanding they first receive consent from the Chinese government. The United States and a majority of countries disagree.<sup>16</sup>

"Although UNCLOS places restrictions on ships exercising their right of transit passage, the treaty does not place any requirement for military vessels to obtain permission to enter the territorial seas of the coastal state," argues Andrew Thomson of the Naval War College. "The United States, therefore, does not recognize China's prior notification requirement."<sup>17</sup>

**China's Artificial Islands.** The United States has also objected to China's attempts to claim expansive jurisdiction around its artificial island outposts in the Spratlys. In late 2013, China began dredging sand atop seven rocks and underwater shoals there, creating seven artificial islands now totaling over 3,200 acres in aggregate.<sup>18</sup> China began constructing large military facilities on the outposts shortly after President Xi Jinping publicly pledged in 2015 that "China does not intend to pursue militarization."<sup>19</sup>

According to maritime security expert Gregory Poling, "China has constructed 72 fighter jet hangers at its three airbases in the Spratlys—Fiery Cross, Mischief, and Subi Reefs—along with another 16 on Woody Island in the Paracels." The artificial island outposts also host radar and signals intelligence facilities and anti-ship cruise missiles.<sup>20</sup>

The 2016 PCA tribunal ruled that the outposts could not be treated as natural islands entitled to a territorial sea and EEZ. Nevertheless, China has made vague and unlawful sovereignty claims around the outposts, attempting to intimidate and restrict navigation for U.S. and other foreign vessels operating near the artificial islands.<sup>21</sup>

**Sovereignty in the EEZs.** Finally, arguably the most salient dispute over freedom of navigation in the South China Sea relates to the extent of Beijing's sovereign rights and jurisdiction in its EEZ. UNCLOS grants states exclusive *economic* rights in their EEZs, as well as some tertiary rights related to artificial islands and structures, marine scientific research, and marine environmental protection. For the United States and most world capitals, EEZs are otherwise treated as open to all forms of navigation that do not involve economic exploitation, in accordance with Articles 58(2) and 87 of UNCLOS. Beijing claims more expansive rights.

This is particularly problematic for the United States, both in terms of its ability to lawfully operate in the South China Sea and the broader precedent it could set. Roughly 40 million square miles of ocean now fall within some country's EEZ. As the Congressional Research Service argues, "if China's position...were to gain greater international acceptance under international law, it could substantially affect U.S. naval operations not only in the [South China Sea], but around the world, which in turn could substantially affect the ability of the United States to use its military forces to defend various U.S. interests overseas."<sup>22</sup> This includes "high-priority U.S. Navy operating areas in the Western Pacific, the Persian Gulf, and the Mediterranean Sea."

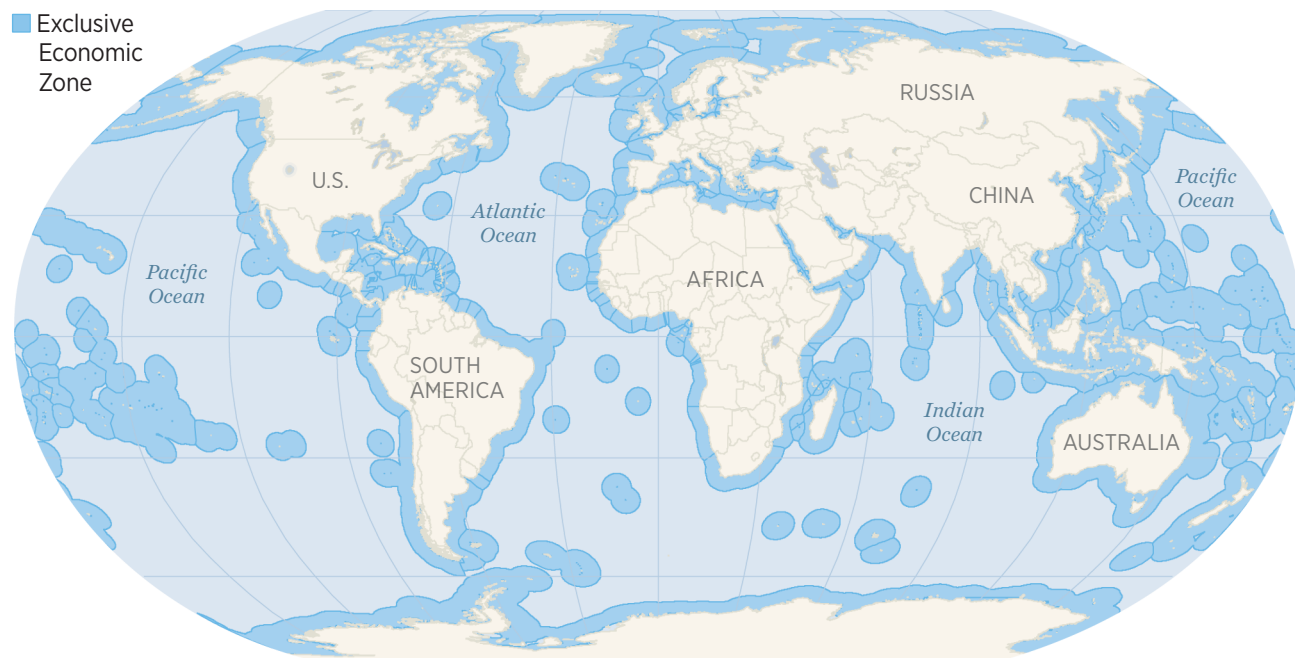
U.S. officials and experts have challenged and refuted the legal arguments China has mustered in support of its position. China's 2002 Surveying and Mapping Law, for example, argues that any form of maritime data collection, including U.S. surveillance activities, such as sonar mapping, have dual-use military and scientific purposes and therefore qualify as marine scientific research, which UNCLOS prohibits. U.S. officials contend that the data used in such operations is for military purposes only and is not banned under UNCLOS as hydrographic surveys and intelligence operations are "high seas freedoms."<sup>23</sup>

Chinese officials have also periodically claimed that Washington would never accept foreign military vessels operating in its EEZ, yet this is not the case. Foreign navies, including China's, have already operated in America's EEZ without objection. Chinese warships also regularly operate in Japan's EEZ, and those of China's Southeast Asian neighbors. The 2013 Department of Defense report on Chinese military power acknowledged that Chinese ships had begun conducting naval activities around Guam and Hawaii that year.<sup>24</sup> At the time, Admiral Samuel Locklear, the head of U.S. Pacific Command, admitted that the Chinese are conducting exercises in America's EEZ, "and we encourage their ability to do that."<sup>25</sup>



MAP 2

## The Scope of Exclusive Economic Zones (EEZs)



As shown in the map above, EEZs and other waters under national jurisdiction account for 40 percent of the world's oceans. U.S. freedom of navigation worldwide would be compromised if national governments were granted expansive authority to restrict foreign militaries from operating in their EEZs. The South China Sea, virtually all of which is covered by various EEZ claims (see map at right), has become a particular flashpoint as China has sought to restrict freedom of navigation for U.S. military vessels there.





In 2015, Chinese naval vessels entered U.S. territorial waters, passing within 12 nm of Alaska's Aleutian islands, coincidentally as the state was hosting a visit by President Barack Obama. The United States did not protest or challenge the transit.<sup>26</sup>

It is important to note that while China's more expansive interpretation of its rights within its EEZ is a minority position, it is not alone. Twenty-seven countries claim EEZ authorities beyond what is entitled by UNCLOS.<sup>27</sup> The key distinction is that while a handful of other capitals have issued diplomatic protests over U.S. naval activities in their EEZs, China is the only country to operationally challenge U.S. warships and aircraft on multiple occasions, resulting in a handful of dangerous encounters.<sup>28</sup>

**Unsafe Encounters in the South China Sea.** On July 4, 2020, the *Global Times*, China's hardline nationalist mouthpiece, engaged in an unusual Twitter exchange with the U.S. Navy. "China has a wide selection of anti-aircraft carrier weapons like DF-21D and DF-26 'aircraft carrier killer' missiles," the outlet warned.<sup>29</sup> The "South China Sea is fully within the grasp of the PLA [People's Liberation Army]; any U.S. aircraft carrier movement in the region is at the pleasure of [the] PLA."

The chief information officer of the U.S. Navy replied on Twitter the following day, accompanied by a picture of two U.S. warships: "And yet, there they are. Two U.S. Navy aircraft carriers operating in the international waters of the South China Sea. The USS Nimitz and USS Ronald Reagan are not intimidated #AtOurDiscretion."<sup>30</sup>

The exchange was just the latest bout of public sparring over freedom of navigation in the South China Sea. Unfortunately, the jostling has not been merely rhetorical. In a harbinger of things to come, in March 2001, a People's Liberation Army Navy (PLAN) frigate and reconnaissance aircraft "aggressively confronted" the USNS *Bowditch* survey ship in the Yellow Sea, forcing it to leave and return with an armed escort.<sup>31</sup> One month later, in April, a U.S. Navy EP-3 surveillance aircraft made a forced landing on China's Hainan island after colliding with a PLAN fighter over the South China Sea.

In the years to follow, other U.S. Special Mission Program ships tasked with conducting underwater military surveys and surveillance have been subjected to periodic harassment in the Western Pacific by Chinese military and civilian vessels encouraged by the Chinese government to adopt aggressive tactics. After the 2001 incident, the *Bowditch* again faced harassment from Chinese ships in 2002 and 2003.

In 2009, five Chinese vessels (three government, two civilian) confronted the USS *Impeccable* in the South China Sea, 75 miles south of Hainan Island. The *Impeccable* was ordered to leave the area or "suffer the consequences"

before a Chinese fishing trawler attempted to snag the U.S. ship's sonar array with grappling hooks, drawing fire from the *Impeccable's* water cannons. When the U.S. ship sought to disengage, its path was blocked by a Chinese warship and Chinese Marine Surveillance cutter before it was permitted to leave.<sup>32</sup>

In 2016, a Chinese warship seized a U.S. Navy drone—within the Philippines EEZ, and outside even China's unlawful nine-dash line.<sup>33</sup> Although the U.S. drone was returned days later, international law expert Julian Ku claims the seizure was “in clear violation of any possible theory of international law” and “shows that China is veering further away from a putative rules-based global order.”<sup>34</sup>

Such encounters are not restricted to naval vessels. U.S. aircraft operating in the Western Pacific have reported numerous cases of harassment and “unsafe intercepts” from Chinese aircraft in recent years. In 2017, for example, three such incidents were made public, in which Chinese military aircraft flew within 100 yards to 200 yards of U.S. surveillance planes in acts of intimidation.<sup>35</sup>

## Freedom of Navigation Operations

One of the U.S. responses to China's provocative claims and activities is to conduct freedom of navigation operations (FONOPs) in the South China Sea.

Since 1979 the U.S. Departments of Defense and State have jointly run the FONOPs program, which “involve[s] naval units transiting disputed areas to avoid setting the precedent that the international community has accepted these unlawful claims.”<sup>36</sup>

China is far from the only country targeted by the program: In 2019, the U.S. government used FONOPs to challenge unlawful claims by 22 countries. However, since the mid-2010s, the United States has been conducting a growing number of FONOPs directed at China, particularly in the South China Sea. Based on publicly available information, the United States conducted one FONOP in the South China Sea in 2015, three in 2016, four in 2017, six in 2018, eight in 2019, and nine in 2020,<sup>37</sup> although the number of actual FONOPs may be higher than those publicly reported.

Chinese officials often condemn the FONOPs program, and Chinese vessels regularly shadow, if not harass, U.S. ships and aircraft conducting FONOPs. In 2018, the USS *Decatur* was forced to take evasive maneuvers in the South China Sea when a Chinese destroyer “approached it an attempt to force it off-course and induce it to leave.” The destroyer radioed the U.S.

vessel, threatening: “You are on [a] dangerous course. If you don’t change course [you] will suffer consequences.”<sup>38</sup>

After a recent U.S. FONOP near the Paracel Islands in October 2020, China claimed it had dispatched its military to track the U.S. Navy destroyer and chase it away, a claim disputed by U.S. officials. Chinese officials later called the U.S. operation “blatant navigation hegemony and military provocation.”<sup>39</sup>

**The Chinese Understanding of Freedom of Navigation.** In public, Chinese officials often seek to downplay the rift with the U.S. over freedom of navigation, claiming that China would *never* seek to restrict freedom of navigation in the South China Sea. “When has freedom of navigation in the South China Sea ever been affected?” asked Admiral Sun Jianguo, deputy chief of the Joint Staff of the Central Military Committee, in 2016. “It has not, whether in the past or now, and in the future there won’t be a problem as long as nobody plays tricks.”<sup>40</sup>

However, Chinese scholars and officials, including Admiral Sun, have repeatedly revealed that when they speak of freedom of navigation, they refer only to *commercial* vessels, not *military* vessels, a distinction with no basis in UNCLOS or international law. Here are a few notable examples:

- “China doesn’t believe the United States’ military surveillance and reconnaissance in China’s exclusive economic zone is freedom of navigation.” —*China Daily*, 2015<sup>41</sup>
- “No freedom of navigation for warships and airplanes.” —Chinese Ambassador to the Philippines Zhao Jianhua, 2015<sup>42</sup>
- “The Chinese side cares more about navigation safety and freedom in the South China Sea than any other countries including some country outside the region. Commercial shipping is different from military actions.” —Chinese Foreign Ministry, 2015<sup>43</sup>
- U.S. FONOPs have “gone beyond the scope of freedom of navigation. It is a political provocation and the purpose is to test China’s response.” —Vice Foreign Minister Liu Zhenmin, 2015<sup>44</sup>
- U.S. freedom of navigation “is actually deprivation of others’ freedom” and “for its gunboats to run wild in other country’s territorial waters.” —China Military Online, 2016<sup>45</sup>

- “China consistently opposes so-called military freedom of navigation which brings with it a military threat and which challenges and disrespects the international law of the sea.” —Admiral Sun Jiangou, 2016<sup>46</sup>
- “Why does U.S. come so close to China’s islands? Freedom of Navigation? You know and I know that’s b-----, right?” —Senior Colonel Zhou Bo on CCTV, 2016
- “Beijing has always insisted that freedom of navigation should not cover military ships.” —Chinese analyst Wang Wenfeng, 2017<sup>47</sup>

Even the frequent claims from Chinese officials that Beijing would never interfere with commercial navigation merit scrutiny. Chinese civilian and military vessels regularly harass fishing vessels from neighboring countries, preventing them from operating in disputed waters claimed by China. Beijing has also prevented South China Sea claimants from conducting energy survey operations in disputed waters.

In a December 2016 speech, Admiral Scott Swift warned that ships and aircraft operating near China’s artificial islands in the Spratlys “are subject to superfluous warnings that threaten routine *commercial* and military operations. Merchant vessels that have navigated shipping lanes freely on behalf of lawful international commerce are diverted after entering so-called military zones.”<sup>48</sup>

## India: Between Beijing and Washington

When it comes to freedom of navigation and the maritime order, India stands somewhere between China and the U.S. In some arenas, India’s domestic laws resemble China’s more closely than America’s (A). At the same time, New Delhi’s geopolitical and diplomatic approaches to UNCLOS and freedom of navigation have begun converging more closely with America’s and diverging more sharply from China’s (B).

### **A. Convergences with China, Divergences from the United States.**

India shares China’s position on foreign warships requiring prior consent to conduct innocent passage through its territorial waters. India’s Maritime Zones Act of 1976 states: “Foreign warships including submarines and other underwater vehicles may enter or pass through the territorial waters after giving prior notice to the Central Government.”<sup>49</sup> Upon ratification of UNCLOS in 1995, India submitted a declaration that elevated the requirement from prior notification to prior consent.<sup>50</sup>

China and India have also both passed domestic legislation demanding prior consent for any foreign military vessels conducting activities in their EEZs. For India, this includes “exercises or maneuvers, in particular those including the use of weapons or explosions.”<sup>51</sup> Notably, the United States still conducts FONOPs directed at India and designed to signal its non-recognition of India’s requirement for prior consent.

“Viewed through an Indian prism, unannounced forays through territorial waters and EEZs under the rubric of ‘innocent passage’ or ‘freedom of navigation’ are a problematic proposition,” writes Indian naval expert Abhijit Singh.<sup>52</sup> “Even though UNCLOS permits continuous and expeditious passage—necessitated by needs of navigation—a maneuver undertaken solely for the purpose of scoring political points would be an illegitimate act, even if technically legal.”

In the 2000s, India protested U.S. military survey vessels operating in its EEZ, including around the Andaman and Nicobar Islands in the eastern Indian Ocean. As Beijing has done, New Delhi claimed that the vessels were conducting “marine scientific research,” an economic activity prohibited by UNCLOS. The State Department responded in one case in 2007 by rejecting India’s argument. It explained:

[C]oastal state jurisdiction in the EEZ is limited to resource-related matters... Military operations, exercises, and activities have always been regarded as internationally lawful uses of the sea... We follow the same policy in our own EEZ, requiring neither notification nor consent for foreign military survey activities in the U.S. EEZ...the United States rejects the claim to require consent for military in the EEZ.<sup>53</sup>

It should be noted that while the Indian government has largely accepted the reality of U.S. FONOPs, they remain a controversial topic inside India. In April 2021, the U.S. conducted a FONOP near India’s Lakshadweep Islands to challenge India’s demand for prior consent to conduct military operations in its EEZ. Rather than reporting the operation in the annual FONOPs report, per past practice, the U.S. 7th Fleet issued a statement shortly after the operation concluded,<sup>54</sup> drawing an unusual amount of attention and criticism from the Indian media in the process.

India also appears to diverge from the U.S. and UNCLOS on the question of straight baselines. Specifically, the Indian government has attempted to draw straight baselines around the Lakshadweep Islands and the Andaman and Nicobar Islands. A United Nations body rejected the Andaman request, noting that straight baselines only apply to archipelagic *nation-states*, not

provinces or administrative sub-regions of an existing state. Granting India's request "would result in unreasonably extensive territorial limits that could infringe upon the territorial waters of other states as well the right of innocent passage."<sup>55</sup> UNCLOS also does not allow straight baselines if the water-to-land ratio exceeds 9:1, which it likely does in the case of the Andamans.<sup>56</sup>

The Indian government appears undecided on how to proceed. As Karan Tripathi and Guarav Rana note,<sup>57</sup> "India's Ministry of External Affairs passed a notification in 2009 declaring the [Andamans] baseline...but only on the western coast of the islands. This has not been put into action yet, and if India were to create a baseline on the eastern coast as well, it will encircle the entire archipelago."

Finally, India has yet to update its Maritime Zones Act, which predates UNCLOS, but contains provisions that are at odds with UNCLOS as it permits the Indian government to establish "designated areas" within its EEZ and continental shelf where it can establish "fairways" and "traffic separation schemes," ostensibly infringing on others' rights to navigate those waterways. In practice, however, the policy has not generated any discernible tensions with the United States.

**B. Divergences from China, Convergences with the United States.** One of the more notable contrasts between India and China is their approaches to international arbitration. Whereas China flatly rejected a 2016 PCA judgment that invalidated several of its claims in the South China Sea, in July 2014 India accepted a ruling from the PCA that expanded Bangladesh's EEZ in the Bay of Bengal by over 300 percent, awarding the country roughly 12,000 square nm of the nearly 16,000 square nm under dispute between Bangladesh and India.<sup>58</sup>

A second point of divergence is the different responses by China and India to U.S. naval activities. Namely, the Indian navy has *not* challenged or harassed U.S. vessels during operations in its EEZ.<sup>59</sup> "The US regularly carries out intelligence and survey missions in India's EEZ. These used to occasion protests from New Delhi in the past. In these fraught times, however, the government and navy prefer to remain silent on US operations in the EEZ," explained Indian analyst Manoj Joshi in 2019. "There is no record of the Indian Navy having attempted to thwart US Navy ships as they challenged India's demand that they get prior consent for military exercises or maneuvers in the EEZ."<sup>60</sup>



## India and the South China Sea

In recent years, India has become an increasingly vocal advocate for UNCLOS and freedom of navigation, particularly in the South China Sea. India has stakes in the game. Several of India's top strategic and economic partners in the Association of Southeast Asian Nations (ASEAN) are direct parties to the South China Sea disputes. Moreover, over 90 percent of India's international trade volume is conducted by sea, of which 55 percent traverses the South China Sea.<sup>61</sup>

India has also become indirectly embroiled in the competing sovereignty claims in the Spratlys. In 2006, Indian energy firm ONGC signed a production-sharing agreement with Petro-Vietnam, granting it exploration rights in two offshore Vietnamese deep-water blocks. One of them, Block 128, falls within China's claimed nine-dash line.

When the agreement was renegotiated in 2011, China opposed "any country engaging in oil and gas exploration and development activities in waters under China's jurisdiction."<sup>62</sup> The nationalist *Global Times* warned India that "its actions in the South China Sea will push China to the limit."<sup>63</sup> Despite failing to find any resources in the area, ONGC has repeatedly extended its contract in Block 128, reportedly at the behest of the Indian government. In 2019, China dispatched a geological survey ship and dozens of escort ships to conduct survey operations "around areas where India's ONGC has oil exploration projects."<sup>64</sup>

In July 2011, the Chinese navy reportedly contacted an Indian warship navigating through the South China Sea on a goodwill visit to Vietnam and told it that it was operating in Chinese waters.<sup>65</sup> The Indian warship ignored the call and proceeded to its destination unhindered. A year later, in June 2012, four Indian naval ships left the Philippines bound for South Korea and were greeted with, "Welcome to the South China Sea, Foxtrot-47" by PLAN frigates, which later escorted the Indian ship for 12 hours.<sup>66</sup> While neither incident provoked a confrontation, they captured the attention of New Delhi.

In December 2012, Indian Chief Admiral D. K. Joshi made a rare public proclamation about India's willingness to protect its interests in the South China Sea: "When the requirement is there, for example, in situations where our country's interests are involved, for example ONGC...we will be required to go there and we are prepared for that," Joshi told a news conference. "Now, are we preparing for it? Are we having exercises of that nature? The short answer is yes."<sup>67</sup>

Since then, the Indian navy has indeed enjoyed a more regular presence in the South China Sea, increasing the tempo of visits and exercises with



friendly nations. In May 2019, this expanded presence culminated in the Indian navy engaging in a rare “joint sail” through the South China Sea with the navies of Japan, the Philippines, and the United States.<sup>68</sup>

**Diplomatically Active, Operationally Limited.** While the South China Sea has begun to occupy more of India’s strategic attention, New Delhi “remains acutely conscious of its official position of neither being party to the [sovereignty] disputes nor taking sides.”<sup>69</sup> The Indian government is also cognizant of its operational limitations and its inherent geographic disadvantages vis-à-vis China in the South China Sea. In 2018, Indian Chief of Naval Staff Admiral Sunil Lanba bluntly admitted: “We can match what forces China can bring to bear in the [Indian Ocean Region]. But in the South China Sea, the dice is loaded in their [sic] favor.”<sup>70</sup>

The Indian navy’s 2009 Maritime Doctrine<sup>71</sup> and 2015 Maritime Security Strategy<sup>72</sup> label the South China Sea as a “secondary” area of maritime interest. Nevertheless, the novel “U.S.–India joint strategic vision for the Asia Pacific and Indian Ocean region,” signed in 2015, committed the two sides to cooperating on “safeguarding maritime security and ensuring freedom of navigation and over flight throughout the region, *especially* in the South China Sea.”<sup>73</sup>

After the landmark 2016 PCA tribunal award invalidated China’s claims in the South China Sea, foreign capitals generally adopted one of three positions: (1) deeming the verdict invalid or refraining from any commentary, (2) making a bland reference to the importance of freedom of navigation and UNCLOS, or (3) insisting that China respect the verdict. India opted to stake out a position between the second and third approaches. Foreign Secretary S. Jaishankar “not only urged ‘all parties to show utmost respect for the UNCLOS’ but also noted that ‘the authority of [the tribunal] and its awards is recognized in Part XV of the UNCLOS itself’—an implicit statement of support for the binding nature of the award.”<sup>74</sup>

More recently, during a virtual East Asia Summit in November 2020, now-External Affairs Minister S. Jaishankar “stated that the Code of Conduct negotiations [between China and ASEAN now under negotiation] should not be prejudicial to legitimate interests of third parties and should be fully consistent with UNCLOS.”<sup>75</sup>

Finally, India has underscored support for freedom of navigation in joint statements and government interactions with regional partners, including Japan,<sup>76</sup> Indonesia,<sup>77</sup> and Vietnam,<sup>78</sup> among others.

## China in the Indian Ocean

After decades of making only rare forays in the Indian Ocean, in late 2008 the Chinese navy began operating routine anti-piracy patrols there. In 2013 and 2014, Chinese nuclear and conventional submarines began regular operations in the Indian Ocean.

A 2014 “Blue Book of the Indian Ocean Region” published by several Chinese think tanks explained: “In the past, China’s Indian Ocean strategy was based on ‘moderation’ and ‘maintaining the status quo,’ but the changing dynamics of international relations necessitates China play a more proactive role in affairs of the region.”<sup>79</sup> China’s 2015 *Defense White Paper* emphasized the need to safeguard China’s “national sovereignty and maritime rights and interests” and “protect the security of strategic [sea lines of communication].”<sup>80</sup> In doing so, the Chinese government was laying the foundations for a vastly expanded presence in the Indian Ocean.

In 2015, Chinese entities assumed control of operations at Pakistan’s Gwadar port, and Beijing announced its largest-ever defense export deal: the sale of eight submarines to Islamabad, India’s nuclear-armed rival. The same year, China announced it would be opening its first overseas military base in the Western Indian Ocean, at the Port of Doraleh in Djibouti.

In a lecture that year, Secretary Jaishankar declared: “Those who are resident in this region have the primary responsibility for peace stability and prosperity in the Indian Ocean.”<sup>81</sup> The official *China Daily* retorted: “India alone cannot assure the security of the Indian Ocean, even if it regards the Indian Ocean as its backyard and wishes no one to compete with it there.... If the Pacific is big enough to accommodate China and the US, so is the Indian Ocean [big enough] to accommodate India and China.”<sup>82</sup>

As China’s military footprint in the Indian Ocean has increased, so have its influence and activities in key capitals across the region, including the island states of Sri Lanka and the Maldives.

In 2015, Prime Minister Narendra Modi launched a “Neighborhood First” policy, under which he signed new maritime security cooperation agreements with regional partners, providing new forms of government assistance and aid, bolstering India’s military presence in its Andaman and Nicobar Islands, and establishing the 2018 regional maritime Information Fusion Centre for the Indian Ocean Region near New Delhi.<sup>83</sup> The U.S., France, and Japan have already dispatched permanent liaison officers to the center, and more are expected to follow.<sup>84</sup>

New Delhi is also establishing an extensive, multi-country coastal radar chain network that includes 46 coastal radar stations in India. Mauritius,

Sri Lanka, and the Seychelles are reportedly already “integrated” in the network, and talks are underway with the Maldives, Myanmar, and Bangladesh to include them as well.<sup>85</sup> India has also concluded roughly two dozen “white shipping agreements” with foreign capitals to monitor commercial maritime traffic in the Indian Ocean.<sup>86</sup>

At an operational level, India’s chief of naval staff admits that the country is now tracking Chinese submarines when they enter the Indian Ocean.<sup>87</sup> In December 2019, Indian press reports suggested that “Indian warships drove away a Chinese oceanic research vessel indulging in suspicious activity near the strategically-located Andaman and Nicobar archipelago.”<sup>88</sup> A Chinese *Shi Yan-1* surveillance vessel was reportedly “forced to leave the area” after being discovered by a U.S.-made P-8I maritime patrol aircraft used by the Indian navy. “Our stand is that if you have to do anything in our EEZ, you have to notify us first,” explained navy chief Admiral Karambir Singh.

## India’s Different Approach to the United States

India’s approach to Chinese naval activities in the Indian Ocean contrasts sharply with its growing acceptance of U.S. Naval activities there. As noted previously, India has begun to de-emphasize differences with the United States over freedom of navigation while substantially expanding military cooperation and geopolitical coordination with the United States in the Indian Ocean region.

The evolution has been dramatic. In December 2020, a prominent Indian naval expert and former naval officer told this author that there is growing reluctance within the Indian military and government to highlight differences with the United States on freedom of navigation. Instead, now is “a time for solidarity with the U.S. and an occasion to close ranks with partners to meet the China challenge.” Similarly, as a 2020 report in *The Wall Street Journal* contends:

A leading member of the Non-Aligned Movement during the Cold War, New Delhi used to call for all external powers to remove their military bases and presence from the area. These days, New Delhi is comfortable with the U.S. maintaining its strategic base at Diego Garcia, a British territory island located about 1,100 miles southwest of the southern tip of India. It is steadily intensifying its military and diplomatic cooperation with the U.S., France, Australia and Japan—all nations that share New Delhi’s concerns about China’s attempts to establish itself as Asia’s dominant power.<sup>89</sup>

According to Minister Jaishankar, the diverging approaches to Chinese and Indian activities in the Indian Ocean reflect changing geopolitical realities:

The U.S., very honestly, was very much a source of concern, even a threat. To-day, the U.S. is seen much more as a partner. What we are seeing in the Indian Ocean is the coming together of converging interests of different players who are comfortable with each other politically, who have a shared concern for the global commons.<sup>90</sup>

When the Maldives signed a defense pact with the United States in 2020, its first with any country other than India, the move was “welcomed” in New Delhi. The Indian government was reportedly shown a preview draft of the pact, and its approval marked a departure from the past for New Delhi, “which has long expressed discomfort with the idea of extra-regional powers meddling in its backyard.”<sup>91</sup> The pact followed high-level, behind-the-scenes coordination between Washington and New Delhi amid political crises in Sri Lanka and the Maldives in recent years.<sup>92</sup>

In 2016, India signed the Logistics Exchange Memorandum of Agreement (LEMOA) with Washington that made it easier for the two nations’ navies to visit each other’s port facilities, refuel each other at sea, and conduct joint exercises.<sup>93</sup> In July 2020, one month after a deadly clash at the disputed Chinese–Indian border, the Indian navy conducted a joint military exercise with the U.S. aircraft carrier *Nimitz* near the Andaman and Nicobar Islands, the strategically located island chain near the mouth of the Strait of Malacca.<sup>94</sup> Long wary of allowing any foreign military presence in the Andamans, India in October 2020 allowed U.S. surveillance aircraft to use the islands to refuel and resupply under the LEMOA pact.<sup>95</sup>

At the U.S.–Indian “2+2” foreign and defense minister dialogue in October 2020, India and the United States signed a new bilateral military pact that will establish “protocols for the exchange of intelligence in real time and will significantly enhance the level of cooperation between the Indian and U.S. navies.”<sup>96</sup> At the same meeting, the two sides signed the final of four foundational military agreements, the Basic Exchange and Cooperation Agreement, which facilitates the sharing of geospatial intelligence.

In November 2020 in the Bay of Bengal, India hosted the first “Quad” naval exercises among Australia, India, Japan, and the United States since 2007.<sup>97</sup> In 2018, Indian army Chief General Bipin Rawat explained that India

was “getting into an engagement with [the Quad] to ensure there is freedom of navigation in the oceans.... We want to ensure there is safe passage for everyone in the region.”<sup>98</sup>

Australia had been lobbying to rejoin the annual India–Japan–U.S. Malabar exercises for several years. India repeatedly rejected those requests, doubtful of Australia’s commitment to the Quad and fearful of provoking Beijing. The deadly crisis at the Chinese–Indian border in 2020, and growing Australian pushback against Chinese coercion, appear to have put both fears to rest.

## Recommendations for the U.S.

In order to advance its maritime interests and defend freedom of navigation, Congress and the Administration should:

**Send a Permanent Representative to the Information Fusion Centre in Singapore.** It was encouraging that the United States sent a permanent representative to participate in the new maritime Information Fusion Centre established in New Delhi in 2018. However, the United States still does not have a permanent representative at the older, more established, maritime Information Fusion Centre in Singapore established in 2009. The United States should remedy that in 2021.

**Hold China Accountable to Its Agreements, Including the Code for Unplanned Encounters at Sea (CUES) Agreement.** China and the United States were among the 21 signatories to the 2014 CUES agreement, a roadmap for handling dangerous incidents at sea. “[O]ur interactions with Chinese ships continue to be professional and CUES helps clarify intentions and prevent miscommunication,” explained one U.S. Navy commander in 2015.<sup>99</sup> Other U.S. Naval officials and operators have reported their verbal interactions with the Chinese military as “friendly.”

However, the CUES agreement is not legally binding and, as one U.S. Naval expert explained on background, China “doesn’t regard FONOPs as ‘unplanned’ nor do they [sic] always feel compelled to use CUES in waters they ‘control.’” Further complicating matters, “the bulk of [Chinese] harassment and aggressive behavior against U.S. ships is conducted by [Chinese] non-military law enforcement agencies and civilian proxies (e.g., small cargo ships and fishing trawlers)” that are not bound by CUES.<sup>100</sup>

The United States and partners such as India should encourage the use of CUES by all parties in the South China Sea, and China should face widespread diplomatic condemnation when it fails to do so. The United States should also hold the Chinese government responsible for provocative actions by China’s

People's Armed Force Maritime Militia (PAFMM), which works at the behest of the Chinese government with implausible deniability. Some analysts now see the PAFMM “even more than China’s navy or coast guard [as] the leading component of China’s maritime forces for asserting its maritime claims.”<sup>101</sup>

**Encourage Indian Alignment with the United States on Freedom of Navigation.** New Delhi has put forth a praiseworthy effort to promote security and stability in the Indian Ocean and played a constructive role in the South China Sea. “In practice, India’s been more helpful than any non-Western or Japanese source on the South China Sea disputes. They’ve [sic] said more about China’s provocative behavior than half the ASEAN states have,” one prominent U.S. scholar claimed, speaking on background.

Some experts interviewed for this *Backgrounder* suggested that Indian statements on Chinese activities in the South China Sea should be more direct and specific. According to an analysis by the Asia Maritime Transparency Initiative, India has yet to join other countries in stating explicitly that China’s claim to “historic rights” in the South China Sea is illegal. Nor has India stated that none of China’s artificial islands is entitled to EEZs, as Indonesia, the Philippines, and the United States have done.<sup>102</sup>

Others would like to see India align its domestic legislation and signing statements more closely with UNCLOS. For reasons reviewed in the conclusion below, this may prove challenging. Finally, the United States should consider initiating with India a high-level dialogue on freedom of navigation in the Indian Ocean, ideally as a component of the 2+2 defense and foreign ministers meeting, as it should involve officials from both the Departments of State and Defense.

**Sustain the Diplomatic Pressure on China and Consider Reciprocity.** In coordination with India, Japan, and Australia, the U.S. government should continue to condemn provocative Chinese actions and claims in the South China Sea. That includes regularly reinforcing the binding nature of the 2016 PCA tribunal award. The United States, Australia, Japan, and India should also consider issuing a comprehensive Quad statement on the South China Sea.

Gregory Poling advocates “going after China’s illegal fishing, maritime militia, and hydrocarbon surveyors” while making it clear that “future malign activity, such as illegal oil and gas drilling or new military construction, would bring new sanctions.”<sup>103</sup>

Furthermore, the United States could work with likeminded partners and allies to signal to Beijing that if it continues to violate international law and restrict others’ freedom of navigation, they are prepared to take reciprocal countermeasures. Maritime security expert James Kraska contends that



since China does not respect UNCLOS rules governing innocent passage of warships in its territorial sea or high seas freedoms of navigation and over flight of military vessels and aircraft in its EEZ, the United States (and its partners) should withhold those rights from Chinese military ships and aircraft until such time as China conforms its policy to UNCLOS.<sup>104</sup>

China, Kraska argues, is “zone-locked, lacking access to the open ocean, except through the transit of a neighbors’ EEZ.”

**Conduct Routine, Regular FONOPs.** The United States should continue FONOPs in the South China Sea at least twice per quarter, the pace established in 2019 (and exceeded in 2020). U.S. Naval ships should continue to sail within 12 nm of underwater rocks and low-tide elevations in the Spratlys that China subsequently turned into artificial islands. UNCLOS and existing international law clearly dictate that these elevations cannot be “upgraded” and re-classified as “natural islands” entitled to territorial seas and EEZs simply by dredging sand atop them.

FONOPs should be de-politicized and de-sensationalized. The Obama Administration several times seemingly delayed or downgraded FONOPs in order to avoid offending Beijing at a time the Administration was seeking China’s cooperation on other challenges. This sends the signal that freedom of navigation is political and negotiable.

That said, FONOPs need not be high-publicity affairs. Regular, routine operations and transits of the South China Sea are arguably just as effective at signaling U.S. non-recognition of China’s unlawful claims. Isaac Kardon and Peter Dutton believe that “consistent practice of free navigation, not the reactive FONOP, is the policy best suited to respond to Chinese assertiveness in the SCS [South China Sea]. This is especially true in areas such as the Spratly Islands where China has made no actual legal claims to challenge.”<sup>105</sup>

FONOPs can simultaneously be conducted more quietly and more robustly. Kraska recommends conducting FONOPs not just with single ships and airplanes, but also “squadrons, such as surface action groups and aircraft carrier and expeditionary strike groups.”<sup>106</sup>

Finally, the U.S. government should try to persuade likeminded partners to conduct their own FONOPs “independently.” As Poling notes, “allowing Beijing to sell a narrative that the disputes are a bilateral U.S.–China issue is counterproductive.”<sup>107</sup> Were other countries to conduct their own FONOPs or joint sails through contested waters in the South China Sea, China’s bilateral narrative would become harder to maintain.



## Conclusion

Two decades into the 21st century, the maritime order remains in a state of contested flux. At stake is nothing less than who will determine the law of the sea. Will it be the consensus reached by most of the world's capitals after decades of painstaking negotiations? Or will it be whatever the Chinese Communist Party decides?

The United States, one of the few major powers not to ratify UNCLOS, has ironically become the de facto guardian of the UNCLOS regime as it regards freedom of navigation and overflight. China, the non-compliant signatory, has emerged as the greatest potential threat to that regime. Straddling a position somewhere in between, India's approach to UNCLOS and freedom of navigation has begun evolving in ways that are aligning more closely with the U.S. and the established law of the sea.

For India and the United States, freedom of navigation has become yet another geopolitical fault line over which the two democracies find themselves increasingly, albeit imperfectly, aligned. Bringing India and other like-minded powers into even greater congruence with the United States and UNCLOS would prove advantageous for a variety of reasons.

However, the escalating Chinese–Indian rivalry and the Chinese military's entry into the Indian Ocean has created competing tensions and incentives for the Indian government. On one hand, it has offered India greater impetus to be more diplomatically active in regards to the South China Sea. On the other hand, selectively applying its existing patchwork of domestic laws, some of which conflict with UNCLOS, offers India the flexibility to adopt different approaches to Indian Ocean activities by partners, such as the U.S., and antagonists, such as China. New Delhi may thus be unwilling to bring its domestic legislation into greater alignment with UNCLOS, even as its external diplomacy increasingly emphasizes the importance of the convention. One creative solution may be for India to rewrite some of its maritime laws to conform more closely with UNCLOS while carving out exemptions for countries with which India has active territorial disputes, helping the Indian government to preserve some flexibility. While suboptimal, it would be an improvement over the status quo.

For now, U.S. experts say, India should keep exploring for energy sources in Vietnamese waters, sailing and exercising regularly in the South China Sea, ignoring unlawful Chinese warnings, regularly reaffirming its support for UNCLOS and its opposition to unilateral provocations, and drawing contrasts between China's disregard for international arbitration and its own compliance.

At the other end of the spectrum lies China, currently “embroiled in tense, occasionally volatile, territorial disputes with virtually all of its maritime neighbors, ranging from Indonesia to Japan and the Philippines,” argues Iskander Rehman.<sup>108</sup> Its rejection of the 2016 PCA ruling on the South China Sea, he contends, “has the merit of injecting a chilling dose of clarity.... Beijing is openly hostile to the liberal maritime order.”

It is important to acknowledge that, for China and the U.S., the recent sparring in the South China Sea did not create a new bilateral rift over freedom of navigation. It expanded and complicated an existing one.

In annual delegations to Beijing in the early and mid-2010s, this author encountered frequent objections from senior Chinese government officials to what they described at the time as “close-in surveillance” operations by the U.S. The officials acknowledged that it was a long-standing practice of the U.S. military, but that China was no longer weak and found the policy humiliating. It was not “contributing to enhancing mutual trust among friends.”

The Chinese Communist Party confronts a dilemma. It is increasingly dissatisfied with the existing maritime order but was one of the influential authors of that order. Altering the status quo—preventing the U.S. from continuing routine operations in the South China Sea—would necessitate a provocative, unilateral effort against a powerful adversary supported by decades of precedent, formidable military capabilities, a network of regional alliances, and widespread international support. Beijing knows that it is unlikely to find many willing partners in any effort to dislodge the U.S. from the Western Pacific, or to fundamentally rewrite the rules of UNCLOS in its favor, even if there might be room for negotiations on less salient points of contention.

It should nonetheless be alarming to U.S. officials that China is already engaging in a high degree of risk-taking and provocative behavior at a time when America retains the military and diplomatic high ground. That raises concerning questions about China’s future approach to the issue if, as expected, the gap in military capabilities continues to narrow in the years ahead.

Something will have to give. It strains credulity to envision scenarios in which the United States will be deterred from navigating vital waterways that it has routinely patrolled for decades. To use the Chinese Communist Party’s term, freedom of navigation is a non-negotiable “core interest” for America.

“The U.S. fought its first war following independence to ensure freedom of navigation,” recalled then-Commander of U.S. Pacific Command Admiral Harry Harris in a 2016 speech in Australia, referencing the First Barbary War of 1801 to 1805. The United States launched that conflict in response to pirate raids on U.S. merchant ships emanating from a confederation of North African states. As Admiral Harris says, “We will not allow a shared

domain to be closed down unilaterally no matter how many bases are built on artificial features in the South China Sea. We will cooperate when we can but we will be ready to confront when we must.”<sup>109</sup>

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APPENDIX TABLE 1

## U.S. Freedom of Navigation Operations Directed at China (Page 1 of 2)

The United States conducts freedom of navigation operations (FONOPs) to operationally challenge excessive or unlawful sovereignty claims. The number of U.S. FONOPs directed at China in the South China Sea has been growing since China constructed seven artificial islands there in the mid-2010s.

| Fiscal Year | Excessive or Unlawful Chinese Claims Challenged by U.S. FONOPs  |
|-------------|---|
| 1992        | <ul style="list-style-type: none"> <li>• Prior permission for warship to enter 12-nautical-mile territorial sea</li> </ul>  |
| 1993        | <ul style="list-style-type: none"> <li>• Prior permission for warships to enter 12-nautical-mile territorial sea</li> </ul>   |
| 1995        | <ul style="list-style-type: none"> <li>• Prior permission for warship to enter 12-nautical-mile territorial sea</li> </ul>  |
| 2007        | <ul style="list-style-type: none"> <li>• Claims jurisdiction of superadjacent airspace over the exclusive economic zone</li> <li>• Domestic law criminalizes survey activity by foreign entities in any waters under the jurisdiction of the coastal states</li> </ul>  |
| 2008        | <ul style="list-style-type: none"> <li>• Jurisdiction over airspace above the Exclusive Economic Zone (EEZ)</li> <li>• Domestic law criminalizing survey activity by foreign entities in EEZ</li> </ul>   |
| 2009        | <ul style="list-style-type: none"> <li>• Jurisdiction over airspace above EEZ</li> <li>• Domestic law criminalizing survey activity by foreign entities in EEZ</li> </ul>   |
| 2010        | <ul style="list-style-type: none"> <li>• Jurisdiction over airspace above EEZ</li> <li>• Domestic law criminalizing survey activity by foreign entities in EEZ</li> </ul>   |
| 2011        | <ul style="list-style-type: none"> <li>• Jurisdiction over airspace above EEZ</li> <li>• Domestic law criminalizing survey activity by foreign entities in EEZ</li> <li>• Excessive straight baselines</li> <li>• Prior permission required for innocent passage of foreign military ships through territorial sea</li> </ul>   |
| 2012        | <ul style="list-style-type: none"> <li>• Jurisdiction over airspace above EEZ</li> <li>• Domestic law criminalizing survey activity by foreign entities in EEZ</li> <li>• Prior permission required for innocent passage of foreign military ships through territorial sea</li> </ul>   |
| 2013        | <ul style="list-style-type: none"> <li>• Excessive straight baselines</li> <li>• Security jurisdiction in contiguous zone</li> <li>• Jurisdiction over airspace above EEZ</li> <li>• Domestic law criminalizing survey activity by foreign entities in EEZ</li> <li>• Prior permission required for innocent passage of foreign military ships through territorial sea</li> </ul>   |
| 2014        | <ul style="list-style-type: none"> <li>• Excessive straight baselines</li> <li>• Jurisdiction over airspace above EEZ</li> <li>• Restriction on foreign aircraft flying through an Air Defense Identification Zone (ADIZ) without the intent to enter national airspace</li> <li>• Domestic law criminalizing survey activity by foreign entities in EEZ</li> </ul>   |
| 2015        | <ul style="list-style-type: none"> <li>• Excessive straight baselines</li> <li>• Jurisdiction over airspace above EEZ</li> <li>• Restriction on foreign aircraft flying through an ADIZ without the intent to enter national airspace</li> <li>• Domestic law criminalizing survey activity by foreign entities in EEZ</li> <li>• Prior permission required for innocent passage of foreign military ships through territorial sea</li> </ul> |
| 2016        | <ul style="list-style-type: none"> <li>• Excessive straight baselines</li> <li>• Jurisdiction over airspace above EEZ</li> <li>• Restriction on foreign aircraft flying through an ADIZ without the intent to enter national airspace</li> <li>• Domestic law criminalizing survey activity by foreign entities in EEZ</li> <li>• Prior permission required for innocent passage of foreign military ships through territorial sea</li> </ul> |

APPENDIX TABLE 1

## U.S. Freedom of Navigation Operations Directed at China (Page 2 of 2)

| Fiscal Year | Excessive or Unlawful Chinese Claims Challenged by U.S. FONOPs   |
|-------------|--|
| 2017        | <ul style="list-style-type: none"> <li>Excessive straight baselines (Paracel Islands)</li> <li>Jurisdiction over airspace above EEZ (South and East China Seas)</li> <li>Restriction on foreign aircraft flying through an ADIZ without the intent to enter national airspace (East China Sea)</li> <li>Domestic law criminalizing survey activity by foreign entities in EEZ (South China Sea)</li> <li>Prior permission required for innocent passage of foreign military ships through territorial sea (Paracel Islands)</li> <li>Actions/statements that indicate a claim to a territorial sea around features not so entitled (Spratly Islands)</li> </ul>  |
| 2018        | <ul style="list-style-type: none"> <li>Straight baselines not drawn in accordance with the law of the sea (Paracel Islands)</li> <li>Restrictions on foreign aircraft flying through an ADIZ without the intent to enter national airspace (East China Sea)</li> <li>Domestic law criminalizing survey activity by foreign entities in EEZ (South China Sea)</li> <li>Jurisdiction over airspace above EEZ (South and East China Seas)</li> <li>Claims security jurisdiction in the contiguous zone (South China Sea)</li> <li>Prior permission required for innocent passage of foreign military ships through territorial sea (Paracel and Spratly Islands)</li> <li>Actions and statements that indicate a claim to a territorial sea around features not so entitled (Spratly Islands)</li> </ul>  |
| 2019        | <ul style="list-style-type: none"> <li>Straight baseline claims (Paracel Islands)</li> <li>Restrictions on foreign aircraft flying through an ADIZ without the intent to enter national airspace (East China Sea)</li> <li>Criminalization of survey activity by foreign entities in EEZ (South China Sea and East China Sea)</li> <li>Jurisdiction over airspace above EEZ (South China Sea and East China Sea)</li> <li>Security jurisdiction over the contiguous zone (South China Sea)</li> <li>Prior permission required for innocent passage of foreign military ships through territorial sea (Paracel Islands and Spratly Islands)</li> <li>Territorial sea and airspace around features not so entitled (Spratly Islands)</li> </ul>  |
| 2020        | <ul style="list-style-type: none"> <li>Straight baseline claims (South China Sea)</li> <li>Restrictions on foreign aircraft flying through an ADIZ without the intent to enter national airspace (East China Sea)</li> <li>Criminalization of surveying and mapping activities by foreign entities which do not obtain approval from or cooperate with the People's Republic of China (South China Sea and East China Sea)</li> <li>Jurisdiction over all surveying and mapping activities "in the territorial air, land, and waters, as well as other sea areas under PRC jurisdiction," without distinction between marine scientific research and military surveys (South China Sea and East China Sea)</li> <li>Security jurisdiction over the contiguous zone (South China Sea and East China Sea)</li> <li>Prior permission required for innocent passage of foreign military ships through the territorial sea (South China Sea)</li> <li>Territorial sea and airspace around features not so entitled (South China Sea)</li> </ul> |
| 2021        | <ul style="list-style-type: none"> <li>Permission or advance notification required of foreign military vessels for innocent passage through territorial sea (Spratly Islands)</li> </ul>   |

**NOTE:** List of incidents is current through April 19, 2021.

**SOURCE:** Heritage Foundation research.

APPENDIX TABLE 2

## U.S. Freedom of Navigation Operations Directed at India

The United States conducts freedom of navigation operations (FONOPs) to operationally challenge excessive or unlawful sovereignty claims. The majority of U.S. FONOPs directed at India challenge the country's demand for prior authorization or consent to conduct military exercises or maneuvers in its Exclusive Economic Zone (EEZ).

| Fiscal Year | Excessive or Unlawful Indian Claims Challenged by U.S. FONOPs  |
|-------------|--|
| 1992        | <ul style="list-style-type: none"> <li>• Prior notification required for warship to enter 12-nautical-mile territorial sea</li> </ul>  |
| 1993        | <ul style="list-style-type: none"> <li>• Prior notification required for warship to enter 12-nautical-mile territorial sea</li> <li>• Historic claim to Gulf of Mannar</li> </ul>  |
| 1995        | <ul style="list-style-type: none"> <li>• Prior permission required for warship to enter territorial sea</li> </ul>   |
| 1996        | <ul style="list-style-type: none"> <li>• Prior permission required for warship to enter territorial sea</li> </ul>   |
| 1997        | <ul style="list-style-type: none"> <li>• Prior permission required for warship to enter territorial sea</li> </ul>   |
| 1999        | <ul style="list-style-type: none"> <li>• Prior notification required for warship to enter territorial sea</li> <li>• Prior permission required for military exercises and maneuvers in EEZ</li> <li>• Gulf of Mannar as historic waters</li> </ul> |
| 2003        | <ul style="list-style-type: none"> <li>• 24-nautical-mile security zone</li> <li>• Prior authorization required for warships to enter territorial sea</li> </ul>   |
| 2007        | <ul style="list-style-type: none"> <li>• Requirement for prior consent for military maneuvers in EEZ</li> </ul>  |
| 2008        | <ul style="list-style-type: none"> <li>• Authorization required for military maneuvers in EEZ</li> </ul>   |
| 2009        | <ul style="list-style-type: none"> <li>• Authorization required for military maneuvers in EEZ</li> </ul>   |
| 2010        | <ul style="list-style-type: none"> <li>• Authorization required for military maneuvers in EEZ</li> </ul>   |
| 2011        | <ul style="list-style-type: none"> <li>• Authorization required for military exercises or maneuvers in EEZ</li> <li>• Prior notification required for foreign warships to enter territorial sea</li> </ul>   |
| 2012        | <ul style="list-style-type: none"> <li>• Authorization required for military exercises or maneuvers in EEZ</li> </ul>  |
| 2013        | <ul style="list-style-type: none"> <li>• Authorization required for military exercises or maneuvers in EEZ</li> </ul>  |
| 2014        | <ul style="list-style-type: none"> <li>• Authorization required for foreign military exercises or maneuvers in EEZ</li> </ul>  |
| 2015        | <ul style="list-style-type: none"> <li>• Prior consent required for military exercises or maneuvers in EEZ</li> </ul>  |
| 2016        | <ul style="list-style-type: none"> <li>• Prior consent required for military exercises or maneuvers in EEZ</li> <li>• Security jurisdiction claimed in contiguous zone</li> </ul>  |
| 2017        | <ul style="list-style-type: none"> <li>• Prior consent required for military exercises or maneuvers in EEZ (Indian Ocean)</li> </ul>   |
| 2019        | <ul style="list-style-type: none"> <li>• Prior consent required for military exercises or maneuvers, in particular those involving use of weapons or explosives, in EEZ (Indian Ocean)</li> </ul>  |
| 2021        | <ul style="list-style-type: none"> <li>• Asserted navigational rights and freedoms approximately 130 nautical miles west of Lakshadweep Islands, inside EEZ, without requesting prior consent</li> </ul>   |

**NOTE:** List of incidents is current through April 19, 2021.

**SOURCE:** Heritage Foundation research.

## Endnotes

1. The United States is still party to these instruments, although they are somewhat ambiguous on the finer points of the law.
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