

# CHINA'S ILLEGAL AIRSPACE CLAIMS IN THE SOUTH CHINA SEA: WHY AND HOW THE INTERNATIONAL COMMUNITY SHOULD PUSH BACK

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*"We must be free not because we claim freedom,  
but because we practice it."  
- William Faulkner*

## I. INTRODUCTION

There are myriad categories of tension between the People's Republic of China [hereinafter "China"]<sup>1</sup> and the United States including technology,<sup>2</sup> standards development,<sup>3</sup> intellectual property,<sup>4</sup> and social

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<sup>1</sup> For the purpose of the article "China" refers to the People's Republic of China and not the Republic of China – Taiwan.

<sup>2</sup> Shiyin Chen et al., *Secretive Chinese Committee Draws Up List to Replace U.S. Tech*, BLOOMBERG NEWS (Nov. 16, 2021), <https://www.bloomberg.com/news/articles/2021-11-16/secretive-chinese-committee-draws-up-list-to-replace-u-s-tech#xj4y7vzkg> (reporting that China is accelerating plans to compete in cloud and semiconductor markets); Kathrin Hille et al., *Huawei v the U.S.: Trump Risks a Tech Cold War*, FIN. TIMES (May 24, 2019), <https://www.ft.com/content/78ffbf36-7e0a-11e9-81d2-f785092ab560> (reporting the U.S. efforts to limit the ability of Huawei to buy from suppliers whom rely on American technology, implicating broader concerns with semiconductor markets and trade generally).

<sup>3</sup> Matt Sheehan et al., *Three Takeaways From China's New Standards Strategy*, CARNEGIE: ENDOWMENT FOR INT'L PEACE (Oct. 28, 2021), <https://carnegieendowment.org/2021/10/28/three-takeaways-from-china-s-new-standards-strategy-pub-85678> (reporting China's national strategy related to technical standards, targeted at growing the role of Chinese participation in standards development organizations in order to wield greater influence and distort the neutrality of decisions, forcing Chinese standards on the rest of the world); Alexi Drew, *The Critical Geopolitics of Standards Setting*, RUSI: TRANSATLANTIC DIALOGUE ON CHINA (May 7, 2021), <https://rusi.org/explore-our-research/projects/transatlantic-dialogue-china/critical-geopolitics-standards-setting> (arguing that technical standards is a source of economic, political, and normative power where Chinese private industry actors with centrally directed strategic motivations are able to leverage flaws in the system).

<sup>4</sup> Dennis C. Blair & Jon M. Huntsman Jr., *IP Commission 2021 Review: Updated Recommendations*, COMM'N ON THE THEFT OF AM. INTELL. PROP. (Mar. 2021) (outlining the challenge of intellectual property theft and proposing some ways in which the United States may affect protection through speed, enforcement, and informing U.S. businesses about threats to intellectual property abroad), [https://www.nbr.org/wp-content/uploads/pdfs/publications/ip\\_commission\\_2021\\_recommendations\\_mar2021.pdf](https://www.nbr.org/wp-content/uploads/pdfs/publications/ip_commission_2021_recommendations_mar2021.pdf).

influence<sup>5</sup> – but none more dangerous than the two powers’ conflicting legal positions regarding the airspace in the South China Sea. For years, the United States has engaged in freedom of navigation operations (“FONOPs”) to contest China’s excessive maritime and airspace claims in the South China Sea, relying upon customary international law and the United Nations Convention on the Law of the Sea (“UNCLOS”) for authority.<sup>6</sup> The United States defines excessive maritime claims as, “unlawful attempts by coastal States to restrict the rights and freedoms of navigation and overflight as well as other lawful uses of the sea.”<sup>7</sup> Such claims may come in the form of States’ laws, regulations, or other declarations.<sup>8</sup> One purpose of FONOPs is to evidence noncompliance and disagreement with the excessive claims to prevent them from inadvertently manifesting into customary international law through silent acquiescence.<sup>9</sup> The United States is sometimes accompanied by coalition partners in FONOPs in and around the Taiwan Strait, and other areas of the South China Sea.<sup>10</sup> By exhibiting overt objections through FONOPs as a multinational concerted force, the United States and its partners are able to deliver a more powerful message to the politic of China – disagreement with China’s excessive claims.

Over the past decade China has claimed increasingly excessive airspace, required aircraft navigational requirements unsupported by international law, and harassed foreign military aircraft lawfully flying in and

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<sup>5</sup> Aynne Kokas & Oriana Skylar Mastro, *The Soft War That America Is Losing*, AUSTL. FIN. REV. (Jan. 15, 2021) (arguing that the United States is losing “soft power” which is “the ability to get what you want through persuasion or attraction in the forms of culture, values, and policies”).

<sup>6</sup> DEP’T OF DEF., ANNUAL FREEDOM OF NAVIGATION REPORT FISCAL YEAR 2021 2 (2021) (declaring that “the United States will continue to challenge such unlawful claims. The United States will uphold the rights, freedoms, and unlawful uses of the sea for the benefit of all nations—and will stand with like-minded partners doing the same”); Arjun Gupta, *The South China Sea: The Nexus of Political and Legal Disputes*, 28 SUPREMO AMICUS, Jan. 2022, at 1, 3, <https://supremoamicus.org/wp-content/uploads/2022/01/Arjun-Gupta.pdf>; Jon Marek, *US-China International Law Disputes in the South China Sea*, WILD BLUE YONDER ONLINE J. (July 9, 2021), <https://www.airuniversity.af.edu/Wild-Blue-Yonder/Article-Display/Article/2685294/>; Nguyen Dang & Lan Anh, *China’s Maritime Coercive Diplomacy in the South China Sea Since 2011* 155 (Jan. 18, 2022) (Ph.D. dissertation, University of Hamburg) (citing various FONOPs that the U.S. had conducted over the years); *China Fires Aircraft-Carrier Killer Missile in Warning to U.S.*, AL JAZEERA: ECON. (Aug. 27, 2020), <https://aljazeera.com/economy/2020/8/27/china-fires-aircraft-carrier-killer-missile-in-warning-to-us> [hereinafter *China Fires Aircraft-Carrier Killer Missile*].

<sup>7</sup> DEP’T OF DEF., ANNUAL FREEDOM OF NAVIGATION REPORT, *supra* note 6, at 2 (internal quotations omitted).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> Liza Lin & James T. Areddy, *Record Chinese Aircraft Sorties Near Taiwan Prompt U.S. Warning*, WALL ST. J. (Oct. 3, 2021), <https://www.wsj.com/articles/record-chinese-aircraft-sorties-near-taiwan-prompt-u-s-warning-11633282326>; see Yimou Lee & Ben Blanchard, *Taiwan Says It Needs to be Alert to ‘Over the Top’ Military Activities by China*, REUTERS (Oct. 5, 2021), <https://www.reuters.com/world/asia-pacific/taiwan-says-needs-be-alert-chinas-military-activities-2021-10-05/> (“Japanese, U.S., British, Dutch, Canadian and New Zealand navies held joint drills near Okinawa”).

around the South China Sea. This article analyzes China's airspace claims and provides recommendations on how the international community can and perhaps should respond. Section II explains why the South China Sea coastal States and the United States are interested in the South China Sea, highlighting the economic riches and strategic importance of the waterway. Section III provides a snapshot of international confrontations in the South China Sea over the past twenty years, starting with a midair collision in 2001 between China and the United States. Section IV synthesizes the legal backdrop for national and international airspace in order to understand the issues presented. Sections V and VI discuss China's and the United States' legal and policy positions on the South China Sea, respectively; China asserting it has historic rights based upon customary international law, and the United States asserting that UNCLOS controls the maritime legal issues within the four corners of the agreement. Section VII is a legal analysis of China's claims in the South China Sea based upon UNCLOS and treaty interpretations pursuant to the Vienna Convention on the Law of Treaties, ultimately concluding that China's excessive airspace claims are unlawful. Section VIII provides suggestions as to how the international community can effectively object to China's claims including strategic messaging, overflight, and surface operations by operating warships in China's claimed territorial seas to object to the airspace above. Section IX juxtaposes the risks associated with increased interactions or continued acquiescence by the international community, concluding that opposing China's claims is required to avoid erosion of international law. Finally, Section X concludes that the best course of action is to openly object to China's claims and use public affairs messaging to mitigate any potential escalation from increasingly overt and potentially escalatory, but necessary, operations.

## II. THE IMPORTANCE OF THE SOUTH CHINA SEA

The South China Sea is similar to the East China Sea in that both are congested with civil aviation, and subject to complex and conflicting territorial and maritime claims between the coastal nations fueled by the Seas' strategic importance.<sup>11</sup> The South China Sea is made up of approximately 200 land features including islets, rocks, and reefs, mostly incompatible with human habitation.<sup>12</sup> There are four major groups of land features in the South China Sea: the Paracel Islands (Xisha Qundao); Pratas Islands (Dongsha Qundao); Scarborough Shoal and Macclesfield Bank (Zhongsha Qundao) which are all below sea level; and, the Spratly Islands (Nansha Qundao) which are the most contested due to their proximate

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<sup>11</sup> See generally Su Jinyuan, *The East China Sea Air Defense Identification Zone and International Law*, 14 CHINESE J. INT'L L. 271, 300 (2015).

<sup>12</sup> Gupta, *supra* note 6, at 3.

location to strategic shipping lanes.<sup>13</sup> In addition to having strategic significance, these waters are desirable for economic and political reasons.<sup>14</sup>

The South China Sea is a strategic “maritime hub linking two oceans and three continents.”<sup>15</sup> Nearly \$3.4 trillion of trade—one-third of global trade, over 40% of China’s total trade, and over 60% of China’s maritime trade—travels through the South China Sea, lending credibility to the belief that the commercial routes are the primary motivation for control.<sup>16</sup> In addition, the waters are flush with natural resources including fertile fishing grounds, natural gas, and oil.<sup>17</sup> Moreover, it has several strategic choke-points including the Strait of Malacca, Singapore Strait, Sunda Strait, and Lombok Strait.<sup>18</sup> These choke-points are strategically important because they are essential to military operations, logistics, expediency of global transit, and access during armed conflict. For example, the United States transits between the Pacific and Indian oceans using these sea-lanes, making the South China Sea an important military artery.<sup>19</sup>

The regional territories directly affected by China’s excessive claims are Brunei, Malaysia, Taiwan, Vietnam, and the Philippines. Indonesia, as well as Japan, North Korea, and South Korea, have a regional stake although they are not in competition for sovereignty or control. China believes—without specifically identifying the United States—that “some forces” outside the region wish the South China Sea to fall into disorder resulting in destabilization.<sup>20</sup> To the contrary, the United States’ interest in these disputes is unrelated to ultimate sovereignty, but rather narrowly focused on a peaceful and lawful resolution consistent with international law. A peaceful resolution is imperative for many reasons: avoiding international armed conflict; fair disposition of the plethora of economic resources which will benefit and stabilize the region; and, peaceful enforcement of treaties and customary international law proving that world powers are capable of

<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> JINMING LI, CHINA’S MARITIME BOUNDARIES IN THE SOUTH CHINA SEA: HISTORICAL AND INTERNATIONAL LAW PERSPECTIVES 3 (2021).

<sup>16</sup> Gupta, *supra* note 6, at 6; *see also* Marek, *supra* note 6 (commenting on the global concerns related to the 3.4 trillion dollar trade route); Dang & Ahn, *supra* note 6, at 34 (stating that 3.4 trillion USD passed through in 2016 – over 60% of China’s maritime trade transited the South China Sea in 2016).

<sup>17</sup> Gupta, *supra* note 6, at 2; Jim Sciutto, *Exclusive: China Warns U.S. Surveillance Plane*, CNN POL. (Sept. 15, 2015), <https://www.cnn.com/2015/05/20/politics/south-china-sea-navy-flight>; Dang & Ahn, *supra* note 6, at 34.

<sup>18</sup> LI, *supra* note 15, at 3.

<sup>19</sup> Gupta, *supra* note 6, at 6.

<sup>20</sup> *Wang Yi Speaks with Vietnamese Foreign Minister Bui Thanh Son on the Phone*, MINISTRY FOREIGN AFF.’S OF THE PEOPLE’S REPUBLIC OF CHINA (Apr. 14, 2022), [https://www.mfa.gov.cn/eng/zxxx\\_662805/202204/t20220415\\_10668407.html](https://www.mfa.gov.cn/eng/zxxx_662805/202204/t20220415_10668407.html) [hereinafter *Wang Yi Speaks with Vietnamese Foreign Minister*] (documenting a discussion between State Councilor and Foreign Minister Wang Yi of the People’s Republic of China, and Vietnamese Foreign Minister Bui Thanh Son – noting that both China and Vietnam are socialist countries).

effective diplomacy. The United States would not benefit from disorder and destabilization in the Pacific. Understanding the legal claims enlightens each State's motivations.

China claims to have sovereign control over most of the South China Sea, while the United States and its allies insist on freedom of navigation and overflight in international waters and airspace respectively.<sup>21</sup> Along with competing interests come provocative interactions, often in the airspace over the contested areas. In general, military aircraft are often challenged or escorted by another nation's military aircraft. The People's Liberation Army (PLA), China's military, maintains many military aircraft including fighters, bombers, special mission aircraft, and unmanned aerial vehicles.<sup>22</sup> Displaying their military bravado, China's forces regularly challenge U.S. aircraft operating lawfully in international airspace over the South China Sea.<sup>23</sup> China shakes its finger at the United States for *inventing* the concept of "international waters," and sending warships and military aircraft to "flex its muscles around the world,"<sup>24</sup> a quite hypocritical position considering China's use of military vessels and aircraft throughout the region,<sup>25</sup> and its claim to land features located wholly within other State's exclusive economic zones.

In order to fully clutch the gravity of China's airspace claims, we must first examine the perilous conflicts and confrontations that have

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<sup>21</sup> Jacob Bentley-York, *Australia Says China Warship Fired Laser at its Patrol Plane*, THE SUN: U.S. NEWS (Feb. 19, 2022), <https://www.the-sun.com/news/4727202/chinese-destroyer-fires-laser-australian-warplane/>; *China Fires Aircraft-Carrier Killer Missile*, *supra* note 6.

<sup>22</sup> OFF. OF SEC'Y OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 55-57 (2021).

<sup>23</sup> Associated Press, *The U.S. says Chinese intercept could have caused an air collision*, NAT'L PUB. RADIO (Dec. 30, 2022), <https://www.npr.org/2022/12/30/1146170609/u-s-says-chinese-intercept-could-have-caused-air-collision>.

<sup>24</sup> Dep't Boundary & Ocean Aff's, *China Stays Committed to Peace, Stability and Order in the South China Sea*, MINISTRY FOREIGN AFF.'S CHINA (Mar. 23, 2022), [https://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/zjzg\\_663340/bianhaisi\\_eng\\_665278/plpbo/202204/t20220409\\_10666104.html](https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zjzg_663340/bianhaisi_eng_665278/plpbo/202204/t20220409_10666104.html).

<sup>25</sup> See, e.g., John Feng, *China Air Force Warns Away Suspected U.S. Aircraft on Patrol Near Taiwan*, NEWSWEEK (Sept. 7, 2021), <https://www.newsweek.com/china-air-force-warns-away-suspected-us-aircraft-patrol-near-taiwan-1626542>; Lyric Li & Christian Shepherd, *Chinese Jets Menace Taiwan, Pressuring U.S. Support of Island's Defenses*, WASH. POST (Oct. 6, 2021), [https://www.washingtonpost.com/world/asia\\_pacific/china-taiwan-warplanes-military/2021/10/06/9873e05a-2584-11ec-8739-5cb6aba30a30\\_story.html](https://www.washingtonpost.com/world/asia_pacific/china-taiwan-warplanes-military/2021/10/06/9873e05a-2584-11ec-8739-5cb6aba30a30_story.html); Lee & Blanchard, *supra* note 10; Ramy Inocencio, *Taiwan "Very Concerned That China is Going to Launch a War" to Take Over*, CBS NEWS (Oct. 5, 2021), <https://www.cbsnews.com/news/taiwan-china-war-us-warning-record-number-chinese-military-flights/>; Rebecca Falconer, *Taiwan's Military Scrambles Jets After Detecting 39 Chinese Warplanes*, AXIOS (Jan. 23, 2022), <https://www.axios.com/2022/01/24/taiwans-military-scrambles-jets-after-detecting-39-chinese-warplanes>; Ben Blanchard, *Taiwan Warns Chinese Aircraft in its Air Defence Zone*, REUTERS (Feb. 24, 2022), <https://www.reuters.com/world/asia-pacific/taiwan-reports-nine-chinese-aircraft-its-air-defence-zone-2022-02-24/>.

occurred over the past couple decades, highlighting several of the more aggressive interactions.

### III. BRIEF HISTORICAL REVIEW OF AIRSPACE INTERACTIONS

#### A. *Operational Picture*

China claims that it “always adheres to peaceful settlement of disputes in the South China Sea through negotiation and consultation . . . in accordance with international law.”<sup>26</sup> For years, however, China has been attempting to enforce an unlawful “de facto ADIZ [Air Defense Identification Zone]” in the South China Sea against aircraft in and around their claimed national airspace, over the land features it controls – issuing warnings to military aircraft ordering them to not approach Chinese-occupied land features and associated airspace.<sup>27</sup>

China’s operations in the South China Sea are a “slow accumulation of small changes, none of which in isolation amounts to a *casus belli* [an act or situation provoking or justifying war], but which add up over time to a substantial change in the strategic picture.”<sup>28</sup> Much like an artist crafting a painting, China executes strategic political and military brush strokes which on their own are indiscernible; however, by the time the observer can recognize the picture, the painting is complete. Here, opportunely, China’s hope is that other States will not realize China’s objectives until their political and military painting is complete. Over the past couple decades China has ramped up their tolerance for confrontation in the airspace over the South China Sea, adding more brush strokes to their South China Sea sovereignty

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<sup>26</sup> Dep’t Boundary & Ocean Aff’s, *supra* note 24; see Bingyao Li & Tao Yu, *Island Territorial Disputes and China’s ‘Shelving Disputes and Pursuing Joint Development’ Policy*, ISLAND STUD. J. Nov. 2022, at 37, 39 (internal quotation omitted).

<sup>27</sup> MICHAEL PILGER, ADIZ UPDATE: ENFORCEMENT IN THE EAST CHINA SEA, PROSPECTS FOR THE SOUTH CHINA SEA, AND IMPLICATIONS FOR THE UNITED STATES 10 (2016) (emphasis added).

<sup>28</sup> *Id.* at 2; Robert Haddick, Commentary, *America Has No Answer to China’s Salami-Slicing*, WAR ON THE ROCKS (Feb. 6, 2014), <https://warontherocks.com/2014/02/america-has-no-answer-to-chinas-salami-slicing/> (purporting that China has a history of “salami slicing” their way to control, as they did in the East China Sea).

portrait. Unfortunately, our journey starts with a perilous midair collision in 2001.

### B. *Airspace Confrontations with the United States*

On April 1, 2001, a People's Liberation Army Navy (PLAN) F-8<sup>29</sup> fighter jet collided with a U.S. Navy EP-3E Aries II<sup>30</sup> surveillance aircraft, causing damage to the U.S. military plane which then made an emergency landing in China.<sup>31</sup> The PLAN fighter jet was destroyed, and China's pilot was killed.<sup>32</sup> The midair collision occurred in international airspace approximately 50 miles southeast of China-controlled Hainan Island.<sup>33</sup> In his descent immediately following the collision, the U.S. pilot sent out a series of mayday and distress calls on an international frequency; after receiving no response he ultimately landed the aircraft at Hainan Island.<sup>34</sup> China responded by stating that the U.S. aircraft had "entered Chinese airspace

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<sup>29</sup> SHIRLEY A. KAN ET AL., CONG. RSCH. SERV., RL 30946, CHINA-U.S. AIRCRAFT COLLISION INCIDENT OF APRIL 2001: ASSESSMENTS AND POLICY IMPLICATIONS 16 (2001) ("The F-8 "Finback" is a two engine, single seat air superiority fighter with a secondary ground attack role. The F-8 was designed in the 1960s and built in the late 1970s. An improved version, the F-8II, was introduced in 1996 with more powerful engines, improved avionics, and a modernized cockpit. The F-8II airframe is designed primarily for speed (maximum speed of Mach 2.2), and displays modest maneuverability for fighter aircraft. It has been compared in appearance and aeronautical performance to the U.S. F-4 Phantom, a 1960s era aircraft.") (footnote omitted).

<sup>30</sup> KAN ET AL., *supra* note 29, at 16 ("The EP-3E Aries is a maritime reconnaissance and signals intelligence (SIGINT) aircraft derived from P-3 Orion aircraft. The P-3 Orion is a long range, land-based anti-submarine warfare (ASW) patrol aircraft. The P-3 airframe is designed primarily for range and endurance. The EP-3E is equipped with sensitive receivers and antennas to capture a wide range of electronic emissions. The plane has a maximum speed of about 400 mph. An EP-3E mission flight profile would be typified by slow, level speed to maximize fuel. The EP3E crew includes up to 24 pilots, linguists, cryptographers, and technicians.")

<sup>31</sup> Elisabeth Rosenthal with David E. Sanger, *U.S. Plane in China After It Collides with Chinese Jet*, N.Y. TIMES (Apr. 2, 2001), <https://www.nytimes.com/2001/04/02/world/us-plane-in-china-after-it-collides-with-chinese-jet.html>; see also Raul Pedrozo, *Does the Revised U.S. South China Sea Policy Go Far Enough?*, 99 INT'L L. STUD. SER. U.S. NAVAL WAR COL. 72, 74-75 (2022) (citation omitted); Marek, *supra* note 6 (noting that this was the "first international airspace incident").

<sup>32</sup> Rosenthal with Sanger, *supra* note 31; see also Pedrozo, *supra* note 31, at 90 (citation omitted); Marek, *supra* note 6 (noting that this was the "first international airspace incident").

<sup>33</sup> Rosenthal with Sanger, *supra* note 31; Kim Zetter, *Burn After Reading: Snowden Documents Reveal Scope of Secrets Exposed to China in 2001 Spy Plane Incident*, THE INTERCEPT (Apr. 10, 2017), <https://theintercept.com/2017/04/10/snowden-documents-reveal-scope-of-secrets-exposed-to-china-in-2001-spy-plane-incident/> ("...crew members had jettisoned documents out an emergency hatch as they flew over the sea and had managed to destroy some signals-collection equipment before the plane fell into the hands of the Chinese, it was highly probable China had still obtained classified information from the plane ... secrets that were exposed to China – which turned out to be substantial though not catastrophic." "[T]he information the investigators considered the most sensitive on the plane were the tasking instructions for collecting data from China. These revealed information such as what data the U.S. was interested in collecting and the frequencies and call signs China used for its data.") (internal quotations omitted).

<sup>34</sup> Zetter, *supra* note 33 (The collision had cut the Chinese fighter jet in half, and caused the U.S. spy plane to roll upside down and immediately depressurize, dropping 14000 feet while shaking violently.).

without permission and landed on a Chinese airfield,” claiming that the lawful *force majeure* aircraft landing required China’s permission which was not granted.<sup>35</sup>

Objectively, the PLAN pilot violated standard intercept conventions which impute the more maneuverable aircraft [China’s fighter jet] with the responsibility to avoid collision, and require the intercepting aircraft [China’s fighter jet] to maintain at least a 500 foot distance.<sup>36</sup> The U.S. surveillance plane was operating in autopilot at the time of the interception, compelling evidence that China’s fighter jet was responsible for the collision.<sup>37</sup> Still unclear is whether China’s unsafe midair maneuvering and unsafely-close escort was a political, military, or aircraft commander decision.<sup>38</sup> Unfortunately, this was not the last China-U.S. airspace encounter.

China continued asserting control and demanding retreat from their claimed national airspace. Several years later in May 2015, China issued eight warnings to a U.S. surveillance aircraft: “Foreign military aircraft. This is Chinese navy. You are approaching our military alert zone. *Leave immediately.*”<sup>39</sup> In September 2015, China’s navy again issued eight warnings directed at a U.S. surveillance aircraft in the South China Sea.<sup>40</sup> Despite flying in international airspace, the U.S. aircraft was ordered out of the area during each of the eight warnings, at least once to the following effect: “This is the Chinese navy, *you go!*”; followed by “This is the Chinese navy, this is the Chinese navy, *please go away, to avoid misunderstanding.*”<sup>41</sup>

These verbal interactions, while not resulting in collisions, continued through the years and became more confrontational and escalatory starting in 2018. In November 2018, following a near collision of surface vessels, China demanded that the United States cease sending warships and military aircraft close to the regionally contested islands in the South China

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<sup>35</sup> Rosenthal with Sanger, *supra* note 31 (noting that it was unclear whether the allegation of entering airspace without permission related to the initial encounter or the emergency landing); Zetter, *supra* note 33; KAN ET AL., *supra* note 29, at 20 (explaining that the *force majeure* right “exists by analogy to the right of ships in distress to enter national waters and the duty of states to render assistance to such ships,” as well as the “elementary considerations of humanity”).

<sup>36</sup> KAN ET AL., *supra* note 29, at 18.

<sup>37</sup> Zetter, *supra* note 33 (stating that the plane was in autopilot for the return to base).

<sup>38</sup> Compare Zetter, *supra* note 33 (stating that “it is unclear whether that is a result of political decision from Beijing, a military decision by the Chinese Air Force or the judgments of Chinese pilots”), with Rosenthal with Sanger, *supra* note 31 (documenting that China’s position was that “the U.S. plane violated aviation rules and suddenly veered toward and approached the Chinese plane”);

<sup>39</sup> Ankit Panda, *China Issues 8 Warnings to U.S. Surveillance Plane in South China Sea*, THE DIPLOMAT (May 21, 2015), <https://thediplomat.com/2015/05/china-issues-8-warnings-to-us-surveillance-plane-in-south-china-sea/> (emphasis added).

<sup>40</sup> Sciutto, *supra* note 17.

<sup>41</sup> *Id.* (emphasis added).



Sea.<sup>42</sup> The United States responded consistent with prior statements that they will continue to “fly, sail and operate wherever international law allows.”<sup>43</sup> Without addressing international law, China asserted that U.S. behavior undermined China’s “authority and security interests.”<sup>44</sup>

In August 2018, China’s military forces warned a U.S. military aircraft operating in international airspace six times, demanding that the lawful aircraft “*leave immediately*.”<sup>45</sup> China instructed the aircraft to “*leave immediately and keep out* to avoid any misunderstanding.”<sup>46</sup> The United States responded: “I am a sovereign immune U.S. naval aircraft conducting lawful military activities beyond the national airspace of any coastal state. In exercising these rights guaranteed by international law, I am operating with due regard for the rights and duties of all states.”<sup>47</sup> Undeterred, China continued: “I am warning you again, *leave immediately or you will pay the possible consequences*.”<sup>48</sup> Despite the provocative exchange, no aircraft were specifically targeted and no further escalation ensued.<sup>49</sup>

In August 2020, things escalated when a U.S. aircraft flying in international airspace allegedly entered what China considered to be a “no-fly zone” during a live-fire naval drill, prompting China to fire two missiles in response.<sup>50</sup> At this point, this risk for miscalculation was rising.

On or about March 20, 2022, a U.S. P-8A<sup>51</sup> Poseidon patrol aircraft was repeatedly warned by China claiming that the aircraft had illegally entered what China claimed as its territory: “China has sovereignty over the Spratly Islands, as well as surrounding maritime areas, *stay away immediately to avoid misjudgment*.”<sup>52</sup> The U.S. aircraft responded with familiar language: “I am a sovereign immune United States naval aircraft conducting lawful

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<sup>42</sup> Matthew Pennington, *US Pushes Back at China’s Warning to Avoid Islands It Claims in South China Sea*, MILITARY TIMES (Nov. 9, 2018), <https://www.militarytimes.com/news/your-military/2018/11/09/us-pushes-back-at-chinas-warning-to-avoid-islands-it-claims-in-south-china-sea/>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Ryan Pickrell, ‘*Keep Out!*’: *China Sent 6 Warnings to a U.S. Navy Plane, But the U.S. Didn’t Back Down*, BUS. INSIDER (Aug. 10, 2018), <https://www.businessinsider.com/keep-out-china-warns-us-navy-plane-in-south-china-sea-2018-8> (emphasis added).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *China Fires Aircraft-Carrier Killer Missile*, *supra* note 6.

<sup>51</sup> For a description of the P-8A Poseidon, see *P-8A Poseidon Multi-mission Maritime Aircraft*, AM.’S NAVY (last updated Apr. 23, 2021), <https://www.navy.mil/Resources/Fact-Files/Display-FactFiles/Article/2166300/p-8a-poseidon-multi-mission-maritime-aircraft-mma/>.

<sup>52</sup> Jim Gomez & Aaron Favila, *AP Exclusive: US Admiral Says China Fully Militarized Isles*, ASSOCIATED PRESS: NEWS (Mar. 21, 2022), <https://apnews.com/article/business-china-beijing-xi-jinping-south-china-sea-d229070bc2373be1ca515390960a6e6c> (emphasis added).

military activities beyond the national airspace of any coastal state.”<sup>53</sup> Continuing, “exercising these rights is guaranteed by international law and I am operating with due regard to the rights and duties of all states.”<sup>54</sup> While interactions with the United States outnumber those with other countries due to the frequency and pervasive presence of the U.S. military in the Pacific, other States have been victims of China’s airspace threats. For example, China has increased its antagonistic behavior toward Taiwan.

### C. *China’s Interactions with Taiwan*

In addition to hostile interactions with U.S. military aircraft, China has amped up its harassment of Taiwan in a similar manner. China has been sending its planes near Taiwan’s airspace in escalating volume and frequency throughout the past couple years.<sup>55</sup> In September 2021, China mobilized 19 PLA warplanes into Taiwan’s ADIZ.<sup>56</sup> The following day, in skies south of Taiwan, a U.S. military aircraft was warned: “This is the Chinese air force. You are approaching China’s territorial airspace. *Leave immediately* or you will be intercepted.”<sup>57</sup> On October 5, 2021, China flew 56 military aircraft into Taiwan’s ADIZ, totaling 148 flights of the same nature over a four day period.<sup>58</sup> Taiwan mobilized combat aircraft in order to intercept China’s sorties, issued radio warnings, and engaged missile systems in order to track the airspace activity.<sup>59</sup> On January 23, 2022, China executed a large-scale movement of 39 aircraft into Taiwan’s ADIZ.<sup>60</sup> Then on February 24, 2022 – the same day that Russia invaded Ukraine – China sent nine aircraft into Taiwan’s ADIZ consisting of eight fighter jets and one reconnaissance aircraft.<sup>61</sup> Such provocative military activity is potentially destabilizing, risks miscalculation, and “undermines regional peace and stability.”<sup>62</sup> Taiwan asserts that China’s “grey zone” warfare described above is intended to wear down Taiwan’s military and to test their pre-planned responses.<sup>63</sup> Similar to the U.S. flights, China’s military aircraft do not fly into Taiwan’s national airspace over its territorial waters, but rather into Taiwan’s ADIZ.<sup>64</sup> In an

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Richard McGregor, *Biden and Xi Talk of a Clash of Civilizations. But the Real Shared Goal is Dominance*, THE GUARDIAN (May 2, 2021), <https://www.theguardian.com/commentisfree/2021/may/02/america-has-woken-up-to-the-threat-posed-by-china-it-may-already-be-too-late>.

<sup>56</sup> Feng, *supra* note 25.

<sup>57</sup> Feng, *supra* note 25 (emphasis added).

<sup>58</sup> Li & Shepherd, *supra* note 25; Lee & Blanchard, *supra* note 10; *see also* Inocencio, *supra* note 25 (quoting the United States Department of State).

<sup>59</sup> Lin & Areddy, *supra* note 10; *see also* Inocencio, *supra* note 25 (quoting the United States Department of State).

<sup>60</sup> Falconer, *supra* note 25; *see also* Blanchard, *supra* note 25.

<sup>61</sup> Blanchard, *supra* note 25.

<sup>62</sup> Falconer, *supra* note 25 (quoting the United States State Department and Department of Defense).

<sup>63</sup> Lee & Blanchard, *supra* note 10.

<sup>64</sup> *Id.*

effort to deescalate tensions in the region, the United States has urged China to “cease its military, diplomatic, and economic pressure and coercion against Taiwan.”<sup>65</sup> Unfortunately, China’s actions do not target only the United States and Taiwan. China has also confronted Australia, another superpower, in international airspace.

#### D. *China’s Interactions with Australia, a U.S. Ally and Regional Power*

In February 2022, tensions escalated beyond verbal between China and Australia. The Australian Defense Department stated that a PLAN surface vessel (warship) fired a laser at one of its surveillance aircraft – P-8A Poseidon – which detected a laser illumination while flying over Australia’s northern approaches.<sup>66</sup> China responded claiming that Australia’s statements run counter to facts and are “pure disinformation,” further stating that China’s vessel conducted itself in a safe and professional manner in accordance with international law and practice.<sup>67</sup> Australia proclaimed that lasers have the ability to injure or temporarily blind the pilots, and such unprofessional and unsafe conduct is a serious safety incident, putting the lives of the crew in danger.<sup>68</sup> While no further evidence was released, it would seem farfetched for Australia to invent a provocative laser tale from thin-air. A reasonable person would conclude that China did in fact engage Australia’s aircraft with a laser and attempted to disarm the negative publicity by launching the term “disinformation” untargeted into the air without supporting evidence to rebut Australia’s narrative.

#### E. *China Punching Above Its Weight Class*

China seems to be exaggerating its capabilities and activities to enhance a deterrent stance against the United States and regional threats, using its military to maximize a façade of force known as “gunboat diplomacy.”<sup>69</sup> The People’s Liberation Army is exercising and displaying

<sup>65</sup> Inocencio, *supra* note 25 (quoting the United States Department of State).

<sup>66</sup> Bentley-York, *supra* note 21.

<sup>67</sup> *Foreign Ministry Spokesperson Wang Wenbin’s Regular Press Conference on February 22, 2022*, MINISTRY FOREIGN AFF.’S CHINA (Feb. 22, 2022), [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/202202/t20220222\\_10644531.html](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202202/t20220222_10644531.html) [hereinafter *Wenbin’s Regular Press Conference on February 22, 2022*].

<sup>68</sup> Bentley-York, *supra* note 21.

<sup>69</sup> See Oriana Skylar Mastro, *The PLA’s Evolving Role in China’s South China Sea Strategy*, CHINA LEADERSHIP MONITOR 1 (Dec. 1, 2020), [https://www.prcleader.org/\\_files/ugd/af1ede\\_f71a824eb6ab4471bbfd674b1de9d558.pdf](https://www.prcleader.org/_files/ugd/af1ede_f71a824eb6ab4471bbfd674b1de9d558.pdf) [hereinafter Mastro, *The PLA’s Evolving Role*]; Dang & Ahn, *supra* note 6, at 23 (“The sheer demonstration of an actor’s capabilities (not intent) can act as a form of gunboat diplomacy, signaling to another party the ability to act if provoked, and therefore the damage that will be done to the other party should this situation occur. At its most passive, according to Le Miere, a naval force may simply be showcasing its capabilities to an adversary in order to deter an attack.”) (internal quotations omitted) (citations omitted).

capabilities most relevant to contingencies against the United States in the South China Sea, demonstrating that it can respond quickly to threats against its interests in the region.<sup>70</sup> Undeterred, the reputational cost of countermeasures and negative international press appear acceptable to China.<sup>71</sup> As a result, they currently trade a damaged reputation for substantive strategic gains in the South China Sea.<sup>72</sup>

Understanding the risks and threats posed by China in the South China Sea, we must next examine the legal framework within which to analyze the legality of its airspace claims.

#### IV. GENERAL LEGAL FRAMEWORK

Over time, “[s]overeignty has developed into a multilevel and multifaceted concept,” no longer exclusive to Westphalian principles.<sup>73</sup> Customary international law, as well as international aviation conventions, establishes that nations have full sovereignty over their national airspace – inclusive of the airspace over territorial seas – and that all aircraft have a right of overflight with respect to all other areas, i.e. international airspace.<sup>74</sup>

A number of conventions and treaties codifying existing customary international law resolve that, generally, territorial waters and national airspace extend only 12 nautical miles from land.<sup>75</sup> Specifically, pursuant to UNCLOS—the most relevant convention—the territorial sea extends 12 nautical miles from the baseline,<sup>76</sup> which is established by the “low-water line along the coast.”<sup>77</sup> Both coastal and archipelagic governments are permitted to claim territorial seas up to the 12 nautical mile threshold.<sup>78</sup> Since airspace is tied to its subjacent surface, it logically flows that national airspace extends to the identical 12 nautical mile mark. For land formed naturally, the mechanics of drawing a baseline and its related territorial sea measurements are quite settled, although occasionally subject to dispute. However, with modern technology land creation has become increasingly common. States are now capable of adding to their territory by reclaiming sand and other materials to build habitable land where the sea once found its tide. Such constructed land is referred to as “artificial,” carrying its own difficulties affecting maritime zones and airspace regimes.

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<sup>70</sup> Mastro, *The PLA's Evolving Role*, *supra* note 69, at 5.

<sup>71</sup> Dang & Ahn, *supra* note 6, at 147.

<sup>72</sup> *Id.* at 147.

<sup>73</sup> Li & Yu, *supra* note 26, at 48.

<sup>74</sup> KAN ET AL., *supra* note 29, at 20.

<sup>75</sup> Rosenthal with Sanger, *supra* note 31.

<sup>76</sup> U.N. Convention on the Law of the Sea, art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397,

<sup>77</sup> *Id.* art. 5.

<sup>78</sup> Gupta, *supra* note 6, at 12.

An artificial island is a constructed feature which is not naturally formed.<sup>79</sup> “A coastal state shall have the exclusive right to construct and to authorize and regulate the construction, operation, and use of artificial islands” in their exclusive economic zone.<sup>80</sup> Despite the authority to build artificial islands, such creations “do not possess the status of islands.”<sup>81</sup> As a result, they are not entitled to a territorial sea of their own, “and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”<sup>82</sup> Consequently, *de jure* there may not be any lawful airspace claims associated with artificial islands.

Submerged features and low-tide elevations are neither subject to sovereignty nor maritime zones when located beyond the territorial sea of a coastal State.<sup>83</sup> When located within the territorial sea, a low-tide elevation is entitled to extend the coastal baseline, and thus the territorial sea, resulting in extended national airspace over the territorial sea zone. Entirely underwater features, however, are incapable of generating maritime zones,<sup>84</sup> and therefore are not entitled to national airspace claims. Similarly, rocks which are incapable of sustaining human habitation or economic life of their own are not permitted an exclusive economic zone or continental shelf,<sup>85</sup> but may extend territorial waters and national airspace if found within a State's territorial sea.

An archipelagic state is defined as “a State constituted wholly by one or more archipelagos and may include other islands.”<sup>86</sup> A true archipelagic state is entitled to national airspace over their territorial waters, identical to that of coastal nations. Customary international law, as well as adjudications by courts and tribunals, confirms that continental States may not take advantage of archipelagic baselines even if their territory includes a

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<sup>79</sup> Ryan Mitchell, *An International Commission of Inquiry for the South China Sea: Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 VAND. J. TRANSNAT'L L. 749, 761 (2016).

<sup>80</sup> U.N. Convention on the Law of the Sea, *supra* note 76, art. 60, 1833 U.N.T.S. at 419-20; Mitchell, *supra* note 79, at 762.

<sup>81</sup> U.N. Convention on the Law of the Sea, *supra* note 76, art. 60, 1833 U.N.T.S. at 419-20.

<sup>82</sup> *Id.*

<sup>83</sup> U.S. DEP'T OF STATE, BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, LIMITS IN THE SEAS NO. 150 PEOPLE'S REPUBLIC OF CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA 6 (2022) [hereinafter BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S]; Dang & Ahn, *supra* note 6, at 36 (stating that low-tide elevations do not generate any maritime zones).

<sup>84</sup> *See generally* U.N. Convention on the Law of the Sea, *supra* note 76, sec. 2, 1833 U.N.T.S. at 400-03 (providing maritime zones for island, rocks, and low-tide elevations, as well as other features, but none which are perpetually submerged).

<sup>85</sup> Mario Gervasi & Roberto Virzo, *Lighthouses and Lightships*, MAX PLANCK ENCYC. OF PUB. INT'L L. (Oct. 2020), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e159> (citing U.N. Convention on the Law of the Sea, *supra* note 76, 121(3), 1833 U.N.T.S. at 442).

<sup>86</sup> U.N. Convention on the Law of the Sea, *supra* note 76, art. 46(a), 1833 U.N.T.S. at 414.

group of islands.<sup>87</sup> Consequently, as a continental State, China does not have the legal right to claim archipelagic status. Demonstrably, archipelagic status is conferred through the United Nations, and while 22 nations claim it, China is not one of them.<sup>88</sup>

While the legality of national airspace over territorial waters is clear, restrictions on international airspace beyond territorial waters remain subject to debate. One method of restriction is an ADIZ, defined by the 1944 Convention on International Civil Aviation [hereinafter “Chicago Convention”] as “[s]pecial designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of air traffic services (ATS).”<sup>89</sup> ADIZs are largely used during peacetime operations over land or territorial waters where overflight is restricted,<sup>90</sup> or where there are potential dangers to aircraft.<sup>91</sup> Notably, the Chicago Convention is not applicable to State (including military) aircraft.<sup>92</sup>

Importantly, UNCLOS states that, “sovereignty extends to the air space over the territorial sea” – not beyond.<sup>93</sup> An ADIZ extends beyond national airspace and is monitored by the coastal nation in order to give its military forces adequate time to respond to incoming threats.<sup>94</sup> The ADIZ concept is derived from a State’s inherent right to self-defense established by customary international law, now codified in the U.N. Charter.<sup>95</sup> The theory is that an ADIZ will serve as an early warning zone in order to prevent rather than repel an attack.<sup>96</sup> Civil and state aircraft entering a littoral State’s national airspace generally comply with identification requirements as a prerequisite to entry.<sup>97</sup> Since the ADIZ falls outside of sovereign controlled

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<sup>87</sup> BUREAU OF OCEANS & INT’L ENV’L & SCI. AFF.’S, *supra* note 83, at 8.

<sup>88</sup> Oriana Skylar Mastro, *How China is Bending the Rules in the South China Sea*, LOWY INST.: THE INTERPRETER (Feb. 17, 2021), <https://www.lowyinstitute.org/the-interpreter/how-china-bending-rules-south-china-sea> [hereinafter Mastro, *How China is Bending the Rules*].

<sup>89</sup> Convention on International Civil Aviation (Chicago Convention) Annex 15, Dec. 7, 1944, 15 U.N.T.S. 295, [https://www.icao.int/publications/Documents/7300\\_9ed.pdf](https://www.icao.int/publications/Documents/7300_9ed.pdf); *see* 14 C.F.R. 99.3 (defining an ADIZ as “airspace over land or water in which ready identification, location and control of all aircraft ... is required in the interest of national security”).

<sup>90</sup> Chicago Convention, *supra* note 89, art. 9, 15 U.N.T.S. at 5-6.

<sup>91</sup> *Id.* Annex 2.

<sup>92</sup> *Id.* art. 3(a) (state aircraft are government owned and operated aircraft for official government purposes; e.g. military aircraft).

<sup>93</sup> U.N. Convention on the Law of the Sea, *supra* note 76, art. 2, 1833 U.N.T.S. at 400.

<sup>94</sup> Lin & Areddy, *supra* note 10.

<sup>95</sup> Jinyuan, *supra* note 11, at 283 (citation omitted); *see* U.N. Charter art. 51 (“Nothing in the present Charter shall impair the *inherent right of individual or collective self-defence* if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”) (emphasis added).

<sup>96</sup> Jinyuan, *supra* note 11, at 281.

<sup>97</sup> *Id.* at 283 (citing Chicago Convention, *supra* note 89, art. 11, 15 U.N.T.S. at 6-7; *id.* art. 3(c), 15 U.N.T.S. at 2).

areas (e.g. national airspace), its enforcement is left largely to varied State practice.

## V. CHINA'S POSITION ON NATIONAL AIRSPACE IN THE SOUTH CHINA SEA

China has not claimed an ADIZ in the South China Sea. Rather, it asserts historic rights over the airspace based on prior use of the land features and surrounding sea.

### A. *China's Current Airspace Claims*

The South China Sea falls within the PLA's Southern Theater Command.<sup>98</sup> The Southern Theater Command often publishes statements claiming that the U.S. military has trespassed into China's territory; U.S. operations are destroying peace and stability in the region; the United States is violating and demonstrating disregard for international rules, norms, and law; and, U.S. behavior is an act of hegemony and military provocation – attempting to flex their [U.S.] discourse power domestically and abroad.<sup>99</sup> Despite their claims of “territory,” China has yet to draw its territorial water baselines for the Pratas Islands, Scarborough Shoal and Macclesfield Bank, and the Spratly Islands, over which it claims at least some level of sovereignty.<sup>100</sup> As a result, it is not entitled to any colorable claims of national airspace.

Despite having no formally drawn maritime regimes, China claims nearly all of the South China Sea as its own territory.<sup>101</sup> Beyond merely claiming as such, China functionally controls a majority of the area to the exclusion of other regional and coastal States.<sup>102</sup>

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<sup>98</sup> OFF. OF SEC'Y OF DEF., *supra* note 22, at 97.

<sup>99</sup> Mastro, *The PLA's Evolving Role*, *supra* note 69, at 10 (stating that, “while official statements do not articulate that the United States is the target of the exercises, the timing, media strategy, and capabilities exercised suggest that the U.S. is the target audience ... playing a central role in attempts to deter and dissuade the United States from engaging in military operations in the South China Sea”).

<sup>100</sup> Dep't Boundary & Ocean Aff's, *supra* note 24.

<sup>101</sup> Gomez & Favila, *supra* note 52.

<sup>102</sup> Gupta, *supra* note 6, at 12.



China’s “nine-dash line” [seen above] is a vague demarcation of the portions of the South China Sea in which it claims to have some level of sovereignty and control.<sup>103</sup> The origin of the nine-dash line dates back to 1936, found on a map from the *New Atlas of China’s Construction*.<sup>104</sup> Despite its near 100-year existence, it has never been associated with defined coordinates which would indicate at least a negligible degree of legitimacy, but rather seems to be arbitrarily drawn.<sup>105</sup> Regardless, it covers approximately 90 percent of the water and airspace in the South China Sea.<sup>106</sup>

China’s domestic law, not customary international law, aims to limit foreign militaries from operating in whatever portion of the sea China recognizes as its exclusive economic zone – arguing that military assets conducting intelligence, surveillance, and reconnaissance missions are considered to be conducting “scientific research,” an abuse of the right to overfly the EEZ.<sup>107</sup> China contends that military activities fall outside the

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<sup>103</sup> PILGER, *supra* note 27, at 8; Marek, *supra* note 6; OFF. OF SEC’Y OF DEF., *supra* note 22, at 15; Mastro, *How China is Bending the Rules*, *supra* note 87 (“While China has not been specific about the extent of its claims, it uses a “nine-dash line” which swoops down past Vietnam and the Philippines, and towards Indonesia, encompassing virtually all of the South China Sea.”); Dang & Ahn, *supra* note 6, at 40 (stating that “the Chinese government has never clarified the meaning of the line” – but arguing that “according to Wu Shicun, President of the National Institute for South China Sea Studies, the nine-dash line is based on the theory of sovereignty + UNCLOS + historic rights”) (internal quotations omitted); LI, *supra* note 15, at 89-133 (providing a thorough overview of the nine-dash line and its controversies).

<sup>104</sup> Gupta, *supra* note 6, at 2 (citations omitted).

<sup>105</sup> Marek, *supra* note 6.

<sup>106</sup> Gupta, *supra* note 6, at 10.

<sup>107</sup> Marek, *supra* note 6 (citations omitted); KAN ET AL., *supra* note 29, at 20.



definition of “over-flight” as referenced in UNCLOS,<sup>108</sup> drawing a distinction between movement rights and operational rights.<sup>109</sup> In addition to China’s unreasonably expansive interpretation of UNCLOS, it has also shifted foreign policy regarding the South China Sea, resulting in significant impacts to, and destabilization of, the region. Some, but not all, of China’s policy changes can be attributed to changes in their political leadership.

President Xi Jinping was elected President in the spring of 2013.<sup>110</sup> On September 25, 2015, in a joint press conference, he stated that “China does not intend to pursue militarization” in the South China Sea.<sup>111</sup> In 2016, he adjusted course and asserted that China will pursue building *defenses* in the South China Sea.<sup>112</sup> Despite past assurances that China would not construct military bases on its reclaimed artificial islands in the South China Sea, China now claims that it has the right to develop islands in the South China Sea in whatever way it sees fit, and has subsequently “armed the islands with anti-ship and anti-aircraft missile systems, laser and jamming equipment, and fighter jets[.]”<sup>113</sup> China has fabricated over 3200 acres of artificial islands, home to over 3000 meters of runways, naval berthing, aircraft hangars, ammunition bunkers, missile silos, and radar sites for both sea and air.<sup>114</sup>

China’s militarization on the Spratly Islands is advanced enough to support military operations including anti-ship and anti-aircraft missiles, and jamming equipment, although it does not yet have a significant presence of combat aircraft.<sup>115</sup> Regardless, China’s military build-up and weaponization on these manmade artificial islands contribute to destabilization in the region.<sup>116</sup> While China has overtly “fully militarized” several islands that it built in the South China Sea, all or part of the sea is also claimed by the

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<sup>108</sup> Jinyuan, *supra* note 11, at 290 (citing *see, e.g., Ren Xiaofeng & Cheng Xizhong, A Chinese Perspective*, 29 MARINE POL’Y 142 (2005)).

<sup>109</sup> Jinyuan, *supra* note 11, at 291 (citing Charles E. Pirtle, *Military Uses of Ocean Space and the Law of the Sea in the Millennium*, 31 OCEAN DEV. & INT’L L. 7 (2000)).

<sup>110</sup> OFF. OF SEC’Y OF DEF., *supra* note 22, at 41.

<sup>111</sup> Dang & Ahn, *supra* note 6, at 144-45.

<sup>112</sup> *Id.* at 145.

<sup>113</sup> Gomez & Favila, *supra* note 52; *see China Fires Aircraft-Carrier Killer Missile*, *supra* note 6 (reporting that China fired on intermediate-range ballistic missile in response to U.S. aerial activities in a “no-fly zone”).

<sup>114</sup> Mastro, *The PLA’s Evolving Role*, *supra* note 69, at 3 (citing Alexander Neill, *South China Sea: What’s China’s Plan for Its ‘Great Wall of Sand’?*, BBC NEWS (July 14, 2020), <https://www.bbc.com/news/world-asia-53344449>); Sciutto, *supra* note 17 (offering a snapshot of the expansion as of 2015 which included 2000 acres of reclaimed island expansion in waters as deep as 300 feet).

<sup>115</sup> OFF. OF SEC’Y OF DEF., *supra* note 22, at 103-04; Dang & Ahn, *supra* note 6, at 134-35, 138-43 (detailing a large portion of the construction China has completed in the South China Sea).

<sup>116</sup> Gomez & Favila, *supra* note 52.

Philippines, Vietnam, Malaysia, Taiwan, and Brunei.<sup>117</sup> Moreover, the presence and use of military capabilities permit China to continue enforcing national airspace over land features that are not entitled to such claims. Militarization of land features is another brush stroke to sovereignty that China added in its effort to enforce airspace claims that are unsubstantiated by international law.

### B. East China Sea Comparison

Dating back to 2013, China claims an East China Sea ADIZ wherein it “require[s]” planes to identify themselves when entering the zone which extends 200 nautical miles from China’s coast.<sup>118</sup> In order to enforce its requirements, “China’s armed forces [have] adopt[ed] *defense emergency measures* to respond to aircraft that do not cooperate in the identification or otherwise refuse to follow the instructions.”<sup>119</sup> While often regarded as provocative, the phrasing “defense emergency measures” in Chinese refers to preventative acts such as tracking and monitoring.<sup>120</sup> Regardless, these measures mirror those that China has implemented in the South China Sea, essentially broadening their ADIZ to an undeclared area as part of its brush stroke to sovereignty tactics. In the East China Sea, China attempts to enforce its ADIZ requirements against military aircraft, contrary to standard international law and State practice.<sup>121</sup> The same is true in the South China Sea, except with even less force since China does not have a declared ADIZ. U.S. military aircraft, in both the East China and South China Seas, do not comply with the zone and China’s requests.<sup>122</sup> Congruently, China attempts on a sporadic basis to challenge U.S. military aircraft in the South China Sea. Attempting only sporadic disputes, China has not rigidly enforced its ADIZ against military aircraft in the East China Sea.<sup>123</sup>

As of 2016, the challenges with declaring an ADIZ in the South China Sea were numerous: few airfields; limited radar infrastructure; harsh maritime environment; rough weather; inadequate fuel storage and transportation; limited aircraft support infrastructure; limited personnel support infrastructure; and an underdeveloped joint command structure.<sup>124</sup> These may still be some of many reasons why China has not yet declared a formal ADIZ in the South China Sea in 2023; however, with increased

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<sup>117</sup> OFF. OF SEC’Y OF DEF., *supra* note 22, at 15-16; Gomez & Favila, *supra* note 52; *China Fires Aircraft-Carrier Killer Missile*, *supra* note 6.

<sup>118</sup> Lin & Areddy, *supra* note 10.

<sup>119</sup> Jinyuan, *supra* note 11, at 284-85.

<sup>120</sup> Jinyuan, *supra* note 11, at 285.

<sup>121</sup> *Id.* at 289 (citation omitted).

<sup>122</sup> *See generally* Lin & Areddy, *supra* note 10 (noting that U.S. commercial aircraft have complied with the identification requirements, but that U.S. state aircraft “wouldn’t honor the zone”).

<sup>123</sup> PILGER, *supra* note 27, at 4.

<sup>124</sup> *Id.* at 8-10.

militarization, artificial land, and presence, a declared ADIZ may be on the horizon. China is slowly trying to establish separate factors of sovereignty and control so that when it does declare an ADIZ it has recent State practice at which to point, rather than a spaghetti bowl of contested international airspace claims, which would otherwise be the case.

### C. *Legal Position*

While seemingly contrary to their actions, “China firmly opposes the *willful threat or use of force*,” as well as “unilateralism, protectionism and *bullying acts*,”<sup>125</sup> in dealing with international disputes such as the South China Sea. China declares that peace, development, equity, justice, democracy, and freedom are the common values of humanity.<sup>126</sup> It believes that all countries are equal members of the world order, despite their size, strength, or wealth.<sup>127</sup> China’s position politically is that it firmly adheres to the peaceful development of the U.N.-centered world order, and is not in pursuit of hegemony or greater global influence outside of their region.<sup>128</sup> China is implicitly then in pursuit of regional hegemony, rather than a balanced order.

The international community has recently been tested by Russia’s 2022 invasion of Ukraine. This conflict has thrust upon States a platform to formally voice their general positions on the law of armed conflict and unsettled areas of international law, as well as international disputes. In response to questions about the Russia-Ukraine war, China stated that, “[t]he legitimate security concerns of any country should be respected, and the purposes and principles of the U.N. Charter should be jointly upheld.”<sup>129</sup> While China boasts compliance with international law and the U.N. Charter in reference to the Russia-Ukraine war, it has flatly rejected a legal ruling by the South China Sea Arbitration Tribunal, demonstrating the hypocrisy in their self-portrayal as a responsible actor in the international system.<sup>130</sup>

In 2013, the Philippines filed a claim against China pursuant to Annex VII to UNCLOS.<sup>131</sup> As a result, an arbitral tribunal was constituted in

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<sup>125</sup> *Position Paper on China’s Cooperation with the United Nations*, MINISTRY FOREIGN AFF.’S CHINA (Oct. 22, 2021), [https://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/wjzcs/202110/t20211022\\_9609380.html](https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/wjzcs/202110/t20211022_9609380.html) [hereinafter *Position Paper on China’s Cooperation*] (emphasis added).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Wenbin’s Regular Press Conference on February 22, 2022*, *supra* note 67.

<sup>130</sup> Pratik Jakhar, *Whatever Happened to the South China Sea Ruling?*, LOWY INST.: THE INTERPRETER (July 12, 2021), <https://www.lowyinstitute.org/the-interpreter/whatever-happened-south-china-sea-ruling>.

<sup>131</sup> U.N. Convention on the Law of the Sea, *supra* note 76, Annex VII, 1833 U.N.T.S. at 571-74.

the matter of the South China Sea.<sup>132</sup> Importantly, the tribunal ruled the following: UNCLOS comprehensively governs the claims between the Philippines and China in the South China Sea and thus any claim to historic rights is invalid; none of the Spratly Islands generate an EEZ and to the extent areas are within the Philippines EEZ they exclude any claims by China; China violated the Philippines EEZ; and, the situation has been exacerbated by China's building and militarizing artificial islands.<sup>133</sup> Six years later, the United States released Limits in the Seas No. 150 which details the U.S. legal and policy arguments against China's excessive maritime claims in the South China Sea.<sup>134</sup> Regardless, China asserts that the South China Sea Arbitration Award is null and void, and that the U.S. Department of State Limits in the Seas No. 150 misinterprets international law, and "misrepresents the historical context and the *status quo* of the South China Sea issue."<sup>135</sup>

China declares sovereignty by historic rights which it contends are "consistent and solidly grounded in history and law" over the South China Sea Islands—Pratas Islands, Paracel Islands, Scarborough Shoal and Macclesfield Bank, and Spratly Islands—informally claiming internal waters, territorial seas, contiguous zones, exclusive economic zones, and continental shelf rights.<sup>136</sup> While admitting that UNCLOS is a "package deal reached . . . through negotiation and compromise," China contrarily asserts that "UNCLOS does not negate the historic rights established through practice in the long course of history."<sup>137</sup> China claims that its historic rights date back over 2,000 years, established throughout history and recognized

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<sup>132</sup> South China Sea Arbitration (Phil. v. China), PCA Case No. 2013–19, Award, ¶ 2 (Perm. Ct. Arb. 2016) [hereinafter South China Sea Arbitration].

<sup>133</sup> See *id.* ¶ 1203; Robert D. Williams, *Tribunal Issues Landmark Ruling in South China Sea Arbitration*, LAWFARE (Jul 12, 2016), <https://www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration>.

<sup>134</sup> BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 11.

<sup>135</sup> Dep't Boundary & Ocean Aff's, *supra* note 24; see also Pedrozo, *supra* note 31, at 73 (stating that the PRC has refused to recognize the tribunal's competency, participate in the proceedings, or accept the award); Gomez & Favila, *supra* note 52 (stating that China "dismissed the [tribunal's] ruling as a sham and continues to defy it"); Mitchell, *supra* note 79, at 752, 758 (discussing China's argument that the arbitration lacked jurisdiction over the matter because territorial sovereignty is outside the scope of UNCLOS, and because China objected in a 1996 official declaration under Article 298 that "it does not accept provisions for binding dispute resolution under UNCLOS Part XV insofar as they relate to . . . sea boundary delimitations or so-called historic rights") (internal quotations omitted); Gupta, *supra* note 6, at 14 ("Whereas both China and the Philippines are parties to the UNCLOS, China officially sais in 2006 that it would not accept compulsory dispute settlement for maritime boundary delimitation"); Dang & Ahn, *supra* note 6, at 41 (quoting China's white paper as stating that its "territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards and that China does not accept or recognize those awards") (internal quotations omitted) (citations omitted).

<sup>136</sup> Dep't Boundary & Ocean Aff's, *supra* note 24; Dang & Ahn, *supra* note 6, at 35 (translating the islands into English).

<sup>137</sup> Dep't Boundary & Ocean Aff's, *supra* note 24 (emphasis added).

affirmatively by the international community.<sup>138</sup> There is no evidence, however, that China negotiated for historic rights during the several iterations of UNCLOS conferences. Despite their own silence, China argues that UNCLOS' silence concerning historic rights is governed by "general international law."<sup>139</sup> The tribunal disagreed with this position and concluded that historic rights for China in the South China Sea do not exist. Not only did China refuse to recognize the jurisdiction of the tribunal, it also declined to validate any of the legal theories the tribunal used to rule against it and ultimately in favor of the Philippines.

While China argues that the U.S. Limits in the Seas No. 150 is "full of fabrications and falsehoods," "preposterous," and "sheer political manipulation," it refers only vaguely to international law as the backbone of its position, lacking reference to any substantial State practice, *opinio juris*, or other forms of valid legal theories.<sup>140</sup> Nevertheless, the Department of Boundary and Ocean Affairs in China,<sup>141</sup> claims that requiring foreign warships to provide notification and obtain prior approval from a coastal State before entering territorial waters to conduct innocent passage is consistent with UNCLOS.<sup>142</sup>

After not gaining much international law support in their South China Sea behaviors, the National People's Congress (China) amended the PRC's domestic National Defense Law in 2020, broadening the legal justification for the PLA to mobilize in support of defending economic

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<sup>138</sup> *Id.*; see Mastro, *How China is Bending the Rules*, *supra* note 87 ("Chinese leaders are relying on a historical argument to buttress their claims[.]"); LI, *supra* note 15, at 21-86 (providing a thorough review of historical records of the South China Sea).

<sup>139</sup> Dep't Boundary & Ocean Aff's, *supra* note 24.

<sup>140</sup> *Id.* (stating, for example: (1) that there are more than 20 continental states in the world that claim outlying archipelagos as a unit, without naming any States, whether the archipelago consists of natural features capable of sustaining human life (i.e. islands), whether such features are within the continental States lawful territorial waters, and whether the unnamed subject states assert the same excessive claims as China regarding baselines, territorial waters, and exclusive economic zones; and, (2) that historic rights as a legal principle existed before and still exist after UNCLOS entered into force, confirmed by "State practice and international jurisprudence," without naming a single State, practice, or judicial case); Michael Strupp, *Spratly Islands*, MAX PLANCK ENCYC. OF PUB. INT'L L. (Mar. 2008), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1357> ("China has never officially clarified its legal standpoint in this affair, but uses references such as 'vested historic rights of China' over the South China Sea and/or at least the features found therein."); Jinyuan, *supra* note 11, at 279 (stating that "custom" is made up of (1) the behavior of states, and (2) the subjective belief that such behavior is "law").

<sup>141</sup> *The Department of Boundary and Ocean Affairs*, MINISTRY FOREIGN AFF.'S CHINA, [https://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/zjzg\\_663340/bianhaisi\\_eng\\_665278/](https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zjzg_663340/bianhaisi_eng_665278/) ("Main functions: The Department of Boundary and Ocean Affairs develops policies concerning land and maritime boundaries, guides and coordinates external work concerning oceans and seas, manages land boundary delimitation and demarcation and joint inspections with neighboring countries, handles external boundary matters and cases concerning territories, maps and place names, and engages in diplomatic negotiations on maritime delimitation and joint development.").

<sup>142</sup> Dep't Boundary & Ocean Aff's, *supra* note 24.

“development interests.”<sup>143</sup> This amendment gave China domestic legal authority for its South China Sea airspace restrictions and requirements, arguably another brush stroke toward its desired legal legitimacy.

## VI. UNITED STATES' OBJECTIONS TO CHINA'S EXCESSIVE AIRSPACE CLAIMS

The United States is interested in “maintaining maritime security, upholding freedom of navigation [including unimpeded passage for commercial shipping], and ensuring that disputes are settled peacefully.”<sup>144</sup> Principally, the United States aims to maintain freedom of navigation by all ships and aircraft in the South China Sea and contribute to the peace and prosperity in the region, without taking a position as to competing claims of sovereignty.<sup>145</sup> The United States asserts that China’s “claims to offshore resources across most of the South China Sea are completely unlawful, as is its campaign of bullying to control them.”<sup>146</sup> China “use[s] intimidation to undermine the sovereign rights of Southeast Asian coastal states in the South China Sea, bully them out of offshore resources, assert unilateral dominion, and replace international law with ‘might makes right.’”<sup>147</sup> While the United States has no claims to the water features in dispute, it has deployed aircraft for decades to “patrol free navigation in international . . . airspace.”<sup>148</sup> The United States, and the majority of the international community, believes that UNCLOS provides freedom of navigation and overflight for foreign vessels and aircraft, outside territorial waters and its associated national airspace.<sup>149</sup>

The United States claims that “[t]he PRC’s expansive maritime claims in the South China Sea are inconsistent with international law as reflected in the 1982 United Nations Convention on the Law of the Sea.”<sup>150</sup> The U.S. position is that the excessive claims “gravely undermine the rule of

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<sup>143</sup> OFF. OF SEC’Y OF DEF., *supra* note 22, at 3.

<sup>144</sup> Bonnie S. Glaser, *Conflict in the South China Sea: Contingency Planning Memorandum Update*, COUNCIL ON FOREIGN REL., CTR. FOR PREVENTATIVE ACTION (Apr. 7, 2015), <https://www.cfr.org/report/conflict-south-china-sea>; see *China Fires Aircraft-Carrier Killer Missile*, *supra* note 6.

<sup>145</sup> Pedrozo, *supra* note 31, at 74.

<sup>146</sup> *Id.* at 73 (citing Press Statement, Michael R. Pompeo, Secretary of State, U.S. Position on Maritime Claims in the South China Sea (July 13, 2020)); see also *China Fires Aircraft-Carrier Killer Missile*, *supra* note 6 (reporting that the U.S. announced a tougher stance in rejecting China’s claims to offshore resources – “completely unlawful”); Mastro, *How China is Bending the Rules*, *supra* note 87 (“[B]oth the United States and Australia have risks China’s wrath by officially stating that China’s claims in the South China Sea are unlawful”); Dang & Ahn, *supra* note 6, at 150 (stating that the U.S. has “explicitly critic[i]zed China for the island-building, construction and deployment activities, putting forwards [sic] specific suggestions to reduce tensions . . .”).

<sup>147</sup> Press Statement, Michael R. Pompeo, Secretary of State, U.S. Position on Maritime Claims in the South China Sea (July 13, 2020), <https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/index.html>.

<sup>148</sup> Gomez & Favila, *supra* note 52.

<sup>149</sup> Marek, *supra* note 6.

<sup>150</sup> BUREAU OF OCEANS & INT’L ENV’L & SCI. AFF.’S, *supra* note 83, at 1, 30.

law.”<sup>151</sup> Although not a party to UNCLOS, the United States asserts that the unanimous arbitral tribunal ruling that, “the Convention [UNCLOS] superseded any historic rights, or other sovereign rights or jurisdiction in excess of the limits imposed therein,” is binding on the parties.<sup>152</sup> Moreover, consistent with the tribunal ruling, the United States contends that China is not permitted to claim sovereign rights over low-tide elevations which are located within the exclusive economic zone or continental shelf of another State.<sup>153</sup>

The arbitral tribunal’s decision has a direct impact on national airspace which limits are rooted in maritime zones. Since China is not entitled to any historic rights in the South China Sea, and does not have lawful sovereignty over any of the low-tide elevations, claiming national airspace is a legal impossibility—a *fortiori* China cannot lawfully claim even a *de facto* ADIZ. Without a lawful ADIZ, there are no lawful airspace requirements with which to comply. Regardless, the United States does not believe that military aircraft are required to comply with ADIZ requirements absent any intent to enter another State’s national airspace. The United States’ position can be found in the Commander’s Handbook on the Law of Naval Operations, which states in relevant part that:

The United States does not recognize the right of a coastal State to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. Accordingly, U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with ADIZ procedures established by other States, unless the United States has specifically agreed to do so.<sup>154</sup>

As a consequence of its unlawful claims, China has effectively “disrupted long-standing international law and norms, thereby solidifying its illegal claims in the SCS to the detriment of the other SCS claimants, as well as the international community at large.”<sup>155</sup> While China’s claims are not solidified in international law, they have solidified destabilization in the South China Sea. Unlike the other regional States, China benefits from chaos in the South China Sea, particularly when the alternative is a decrease in power, control,

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<sup>151</sup> *Id.* at 30.

<sup>152</sup> BUREAU OF OCEANS & INT’L ENV’L & SCI. AFF.’S, *supra* note 83, at 2 (citing *South China Sea Arbitration*, *supra* note 132, at ¶ 278).

<sup>153</sup> *South China Sea Arbitration*, *supra* note 132, at ¶ 1203(B)(4); see U.N. Convention on the Law of the Sea, *supra* note 76, art. 48, 1833 U.N.T.S. at 415.

<sup>154</sup> NAVY WARFARE DEV. COMMAND, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS at 2-17 (2017); see also *id.* at 1-9, 2-14, 2-17.

<sup>155</sup> Pedrozo, *supra* note 31, at 77.

and claimed sovereignty. Currently, coastal States have overlapping claims rather than undisputed maritime zones and national airspace.

## VII. LEGAL ANALYSIS OF CHINA'S SOUTH CHINA SEA AIRSPACE CLAIMS

All of the islands or island groups in the South China Sea are claimed by more than one State;<sup>156</sup> consequently, there are overlapping airspace claims. Since there are so many overlapping claims, it is inevitable that tensions will rise as each coastal nation attempts to secure some level of sovereignty over their claimed land features and airspace. Unfortunately for many of the coastal nations, China has more economic, political, and military power – powerful deterrents for any State desiring to push back against China's unlawful claims. Most of the regional States lack the economic stability and military strength to effectuate a fruitful resistance to China's invasive claims, despite having the political and international support of the world's super powers. As a result, China has engaged extensively in coercive diplomacy throughout the South China Sea,<sup>157</sup> clashing with its regional rivals on countless occasions.<sup>158</sup>

### *A. Domestic Law Does Not Affect International Law*

China relies heavily upon its 2020 National Defense Law amendment which provides a domestic legal landscape for defending economic interests, in combination with its plainly refuted historic rights theory, for the purpose of legitimizing their airspace claims in the South China Sea. It claims maritime zones that are clearly prohibited by and contrary to international law, and then projects airspace claims based upon its unlawful maritime claims. Fortunately, the Vienna Convention on the Law of Treaties (VCLT) provides clear guidance regarding the role of domestic law in international affairs.

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<sup>156</sup> BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 3 (detailing that the following territories claim the respective islands: Philippines (Scarborough Reef and some of the Spratly Islands), Malaysia (some of the Spratly Islands), Brunei (Louisa Reef, within the Spratly Islands), Vietnam (Spratly Islands and Paracel Islands), and Taiwan (all islands and island groups)).

<sup>157</sup> Dang & Ahn, *supra* note 6, at 21 (explaining that coercive diplomacy is a threat-based strategy “employed to influence another’s choices without a waging war” – achieving one’s political objectives economically, by “a threat of punishment for noncompliance that he will consider credible and potent enough to persuade him to comply with the demand”); *Id.* at 24 (“Maritime coercive diplomacy activities can range from the use of limited naval forces to attack or occupy disputed land features at sea, military exercises in contested areas, blockades to harassment, physical interference with foreign activities, deployment of offshore oil rigs with the support of navy and paramilitary forces to construction works in disputed features.”).

<sup>158</sup> Dang & Ahn, *supra* note 6, at 43-49 (2022) (documenting a long history of confrontations and disputes between China and other coastal nations in the South China Sea).



China acceded to VCLT in 1997.<sup>159</sup> Although the United States is not a party, it often turns to VCLT for customary guidance on treaty interpretation. In relevant part, VCLT provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>160</sup> This clause means that China’s domestic laws have no influence in interpreting UNCLOS, nor may they provide any relief for failing to follow its terms. Here, China cannot rely upon its National Defense Law amendment to justify internationally that it has sovereignty over the airspace in the South China Sea. China’s domestic law justification does not fly.

### *B. Historic Rights Cannot Exist Outside of UNCLOS*

VCLT also states that agreements outside the treaty may provide context for interpreting the terms of the agreement, to include: “(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; [and.] (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty,”<sup>161</sup> neither of which exist related to UNCLOS. China did not enter into any separate agreement regarding historic rights of the South China Sea, nor the concept of historic rights generally. As a result, this term is excluded from any legal analysis related to airspace which draws its boundaries from maritime zones. Moreover, VCLT permits context for interpretation to derive from “any subsequent agreement between the parties; . . . subsequent practice in the application . . . [or] relevant rules of international law” – such factors may be taken into account when interpreting a treaty.<sup>162</sup> Here, there are no subsequent agreements, and there is no right of historic use in international law. UNCLOS intentionally excluded the concept of historic rights from the agreement. This logic is further bolstered by subsequent State practice, to wit: persistent and continuous objections to sovereignty based on historic rights.

Finally, VCLT permits countries to find special meaning in particular terms or clauses when it is established that “the parties so intended.”<sup>163</sup> It is clear that the parties to UNCLOS did not intend for historic rights to survive the agreement’s ratification. The term was excluded from an otherwise comprehensive treaty that addresses the law of the sea and related airspace sovereignty. Recognizing historic rights would undermine the efficacy of UNCLOS and customary international law by permitting

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<sup>159</sup> Chapter XXIII Law of Treaties: 1.Vienna Convention on the Law of Treaties, at 1 (last viewed Apr. 27, 2022), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf>.

<sup>160</sup> Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

<sup>161</sup> *Id.* art. 31(2).

<sup>162</sup> *Id.* art. 31(3).

<sup>163</sup> *Id.* art. 31(4).

inconsistent and unrecognized State practice to form binding legal regimes. Such interpretations must be flatly rejected.

VCLT does provide a crack in the window through which China can argue that UNCLOS “(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”<sup>164</sup> China may claim that the meaning of historic rights is ambiguous since the pre-existing legal theory is not specifically controverted in UNCLOS – i.e. UNCLOS does not say “historic rights no longer exist.” China may argue that, since it is not explicitly rejected in the text, it would then be manifestly absurd and unreasonable to presume that it is no longer a valid legal theory. This would make *some* sense if UNCLOS did not otherwise create maritime and airspace regimes manifestly contrary to the concept of historic rights. The establishment of national and international airspace pursuant to UNCLOS is all but ambiguous, absurd, or unreasonable. In fact, it is exceptionally well-defined that national airspace can only exist over areas that are entitled to territorial waters. The historic rights concept is not ambiguous for it is completely absent from the agreement; and the application of UNCLOS by its four-corners reading does not lead to a result that is absurd or unreasonable. To the contrary, UNCLOS—in the sphere of airspace—provides a sensible, rational, and equitable balance between States’ rights and those of the international community. UNCLOS took the formerly thorny and inconsistent practice of maritime law and airspace, and distilled it down to undemanding parameters and guidance, significantly simplifying the once complicated question of where aircraft could legally fly. It is unambiguous that China does not have lawful airspace rights in the South China Sea based upon its historic rights theory.

One author suggests that even a prior ICJ ruling “ignored discovery and historic claims.”<sup>165</sup> Importantly, however, UNCLOS does not include either of these antiquated and no-longer-existent concepts in maritime law. The term “historic rights” is not mentioned anywhere in UNCLOS, nor is there a consistent understanding universally of what these words do, or should, mean.<sup>166</sup> As a result, the historic rights theory does not exist in customary international law.

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<sup>164</sup> *Id.* art. 32.

<sup>165</sup> LI, *supra* note 15, at 207.

<sup>166</sup> BUREAU OF OCEANS & INT’L ENV’L & SCI. AFF.’S, *supra* note 83, at 9 (citing *South China Sea Arbitration*, *supra* note 132, at ¶ 225 (“[t]he term ‘historic rights’ is general in nature [. . . and] may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty”)); Mastro, *How China is Bending the Rules*, *supra* note 87 (“[T]he U.N Convention for [sic] the Law of the Sea (UNCLOS) does not grant signatories the right to make claims based on historical legacy, and the concept of historic claims lacks clear basis in international law.” (internal quotations omitted)).

The International Court of Justice (ICJ) stated that the “construction of navigational aids . . . can be legally relevant in the case of very small islands” and “must be considered sufficient to support [a State’s] claim that it has sovereignty over [them],” particularly when there are no dissenting States or protests.<sup>167</sup> China has built some systems which it can claim to be navigational aids within the South China Sea; however, they were mostly built on artificial islands which by definition are not entitled to any maritime rights, and thus no airspace claims, regardless of what may be constructed thereon. Moreover, the persistent objections both militarily and politically by coastal, regional, and other interested States, confirm there are not a few but numerous dissenting States and protests. Conclusively, even navigational aids do not give China airspace rights in the South China Sea.

C. *Arbitral Tribunal Ruled Historic Claims Do Not Exist*

China ratified UNCLOS on June 7, 1996,<sup>168</sup> without any reservation or objection to the absence of “historic rights” from the agreement. For States with legal objections, UNCLOS provides a forum through which disputes can be adjudicated between parties. Exercising that remedy in UNCLOS, the Philippines brought a claim against China related to the South China Sea.<sup>169</sup> In 2016, the South China Sea Arbitral Tribunal essentially dismissed China’s claims to much of the South China Sea, stating there was no evidence that China had historically exercised exclusive control,<sup>170</sup> and rejected China’s maritime claims in the South China Sea as having no basis in international law.<sup>171</sup> It determined that China had no legal basis for affirming ancient rights to marine boundaries and other resources within the nine-dash line.<sup>172</sup> “The Tribunal concluded that the Convention [UNCLOS] is clear in allocating sovereign rights to the Philippines with respect to sea areas in its exclusive economic zone, having found that Mischief Reef, Second Thomas Shoal, and Reed Bank are submerged at high tide, form part of the Philippines’ exclusive economic zone and continental shelf, and are not overlapped by any possible entitlement of China.”<sup>173</sup> Despite such a clear ruling, the verdict has had little

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<sup>167</sup> Gervasi & Virzo, *supra* note 85.

<sup>168</sup> BUREAU OF OCEANS & INT’L ENV’L & SCI. AFF.’S, *supra* note 83, at 5.

<sup>169</sup> *South China Sea Arbitration*, *supra* note 132, at ¶ 1203.

<sup>170</sup> Jakhar, *supra* note 130.

<sup>171</sup> Pedrozo, *supra* note 31, at 73 (citing *South China Sea Arbitration*, *supra* note 132, at ¶ 184; see also OFF. OF SEC’Y OF DEF., *supra* note 22, at 103).

<sup>172</sup> Gupta, *supra* note 6, at 17 (reporting that the tribunal acknowledged evidence that Chinese, as well as other nationalities, navigators and fisherman historically used the islands while reserving that it did not have the jurisdiction to comment on sovereignty. “Prior to the Convention, the Tribunal held that the waters of the South China Sea outside the territorial sea were legally part of the high seas, where vessels from any country might freely sail and fish. As a result, the Tribunal determined that China’s historical navigation and fishing in the South China Sea amounted to the exercise of high seas freedoms rather than a historic right, and that there was no evidence that China had historically exercised exclusive control over the South China Sea’s waters or prevented other countries from exploiting their resources.”).

<sup>173</sup> *Id.*

to no impact on China's conduct, reducing the judgment to a mere moral victory for the Philippines.<sup>174</sup> China has continued to reclaim land in order to build land-water features in the region, subsequently militarizing the artificial islands.<sup>175</sup> Irrespective of China's disregard, the ruling is lawful and may still be enforced by the Philippines with or without the assistance of partner nations. Ignoring the ruling does not invalidate it, despite China's greatest hopes. The tribunal's decision is still binding law on the parties, even if China refuses to presently comply.

*D. China Agreed in the Declaration on the Conduct of Parties to Not Restrict Overflight*

On November 4, 2002, all relevant regional parties to the South China Sea disputes – including China – signed the Declaration on the Conduct of Parties in the South China Sea [hereinafter “Declaration”].<sup>176</sup> Within the Declaration, signatories committed to adhere to the U.N. Charter as well as UNCLOS, proclaiming their “respect for and commitment to the freedom of navigation in *and overflight above the South China Sea*[.]”<sup>177</sup> The territories agreed to exercise restraint in order to not complicate or escalate disputes.<sup>178</sup> Moreover, China agreed not to “inhabit[] . . . the presently uninhabited islands, reefs, shoals, cays, and other features[.]”<sup>179</sup> While China has seen changes to its political Administration since 2002, it is still party to and bound by the signed Declaration. In fact, the parties are negotiating a supplemental agreement expected to be titled the South China Sea Code of Conduct to further supplement the Declaration.

China has violated the Declaration by attempting to, and in some cases successfully, restrict overflight of the South China Sea. Moreover, any habitation that China has implemented since 2002 is in violation of the Declaration. These are linked in many ways because China claims some of its national airspace, or quasi-ADIZ, based upon its occupation of land features in the South China Sea. Since the habitation is unlawful in violation of an international agreement, any claimed national airspace derived from the same has no legal basis. Irrespective of its habitation violations, China's unlawful airspace restrictions and harassment have demonstrated a blatant disregard of its agreed upon but wholly unobserved commitment to the *freedom of overflight* above the South China Sea.

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<sup>174</sup> Jakhar, *supra* note 130.

<sup>175</sup> *Id.*

<sup>176</sup> *Declaration on the Conduct of Parties in the South China Sea*, ASS'N OF SE. ASIAN NATIONS (May 14, 2012), <https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2/>.

<sup>177</sup> *Id.* (emphasis added).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

*E. Air Defense Identification Zones Do Not Apply to Military Aircraft*

The resurgence of the ADIZ as a defense and safety measure may largely be credited to a “heightened concern over terrorist attacks employing hijacked commercial aircraft,” and partly credited to maritime disputes, and safety of international civil aviation.<sup>180</sup> To the extent this is true, there is no need for China to be concerned with U.S. military aircraft flying in the South China Sea as the U.S. military is unmistakably not a terrorist organization, not involved in the relevant maritime disputes, and not a risk to civil aviation. Regardless, coastal States declare ADIZs for a multitude of reasons and appears to be relatively common State practice.

In general, requiring aircraft identification in an ADIZ does not unduly interfere with the freedom of air navigation and overflight over the EEZ or high seas areas.<sup>181</sup> Regardless, requiring *anything* from a sovereign immune aircraft in international airspace raises questions about the strength and limits of sovereignty. Ultimately, where and how an ADIZ operates is subject to lengthy debate.

As a matter of course, ADIZs only exist in international airspace. Yet, airspace beyond a States’ land area and territorial sea—i.e. international airspace—cannot be validly claimed.<sup>182</sup> Therefore, “no ADIZ requires prior consent for the entry of foreign aircraft [into the ADIZ which is outside national airspace]. . . since littoral States only exercise[] limited control that falls far short of sovereignty.”<sup>183</sup> To further complicate things, customary international law is applied differently to civilian and State aircraft. Civilian aircraft often comply with ADIZ requirements when they intend to enter a State’s national airspace. On the other hand, military aircraft are sovereign immune and are not held to the same requirements as civilian aircraft. Unfortunately, due to inconsistent State practice there is no customary international law regarding the right and implementation of ADIZs.<sup>184</sup> There is a cogent legal argument, however, that States should be permitted to identify aircraft intending to enter national airspace in order to protect their national security.<sup>185</sup> Nevertheless, there exists no such national security justification for aircraft not intending to enter a State’s national airspace.<sup>186</sup> To the extent that civilian aircraft are not required to provide responses to ADIZ demand, the legal justification is considerably weaker when aimed at sovereign immune military aircraft.

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<sup>180</sup> Jinyuan, *supra* note 11, at 302.

<sup>181</sup> *Id.* at 277.

<sup>182</sup> Chicago Convention, *supra* note 89, arts. 1-2, 15 U.N.T.S. at 2; *see* U.N. Convention on the Law of the Sea, *supra* note 76, art. 58(2), 1833 U.N.T.S. at 419; *id.* art. 89, 1833 U.N.T.S. at 433; Jinyuan, *supra* note 11, at 276.

<sup>183</sup> Jinyuan, *supra* note 11, at 276-77.

<sup>184</sup> *Id.* at 280.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

F. *UNCLOS Clearly Prohibits China's Excessive Airspace Claims and Requirements*

China holds that the activities of the U.S. EP-3 in 2001 went far beyond the limit of freedom of overflight authorized in UNCLOS.<sup>187</sup> It claims that military activities directed at the coastal state such as reconnaissance and intelligence gathering, military exercises and maneuvers, testing of military weapons, and scientific research, are prohibited activities even when conducted outside of national airspace.<sup>188</sup>

It is a fundamental principle that the “land dominates the sea;” that is to say that maritime regimes exist only relative to land features under the authority of coastal States.<sup>189</sup> One Chinese scholar suggests that between national and international airspace there exists a buffer zone, derived from the notion that the legal regime of the airspace is related to its subjacent territory – in this case, the contiguous maritime zone.<sup>190</sup> This idea, that the airspace is reflective of the law of the sea regime, is both accurate and contrary to China's position.

UNCLOS operates under the presumption that the *status quo* is freedom of navigation, and the restrictions on such freedoms are predicated upon States' lawfully asserted rights. With this in mind, the territorial sea is functionally sovereign territory, but for the surface right of innocent passage, a right intentionally not mirrored in the airspace above the territorial seas – i.e. there is no innocent passage for aircraft. Innocent passage—continuous and expeditious passage through the territorial sea—is permitted only if the surface vessel does not prejudice the “peace, good order, or security” of the coastal nation with activities that would otherwise be permitted outside of the coastal State's territorial waters including but not limited to: any threat or use of force against the coastal State; use of weapons; information collection; and launching or recovering aircraft.<sup>191</sup> In other words, surface vessels like warships have freedom of navigation in all waters, but are restricted from their actions only in territorial waters where innocent passage standards are required; *ipso facto*, outside territorial waters, the activities prohibited during innocent passage are permitted. Since the airspace is reflective of the water over which it exists, the airspace above international waters – i.e. anywhere beyond territorial waters – contains no limits on overflight or prejudicial

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<sup>187</sup> *Id.* at 291 (internal citation omitted).

<sup>188</sup> *Id.* at 291.

<sup>189</sup> BUREAU OF OCEANS & INT'L ENV'L & SCI. AFF.'S, *supra* note 83, at 6 (citing North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 96 (Feb. 20)).

<sup>190</sup> Jinyuan, *supra* note 11, at 282 (citing J.C. COOPER, EXPLORATION IN AEROSPACE LAW: SELECTED ESSAYS 197 (I.A. Vlasic ed. 1968)).

<sup>191</sup> See U.N. Convention on the Law of the Sea, *supra* note 76, arts. 17-19, 1833 U.N.T.S. at 404-05.

activities, subject only to other existing restrictions such as threats of an armed attack and safety of navigation, *inter alia*.

From another angle, the airspace through international straits is treated as international airspace. An international strait is created when there are overlapping territorial seas,<sup>192</sup> connecting high seas, or EEZs on either side.<sup>193</sup> Surface vessels are permitted to sail in their normal mode of operation through international straits.<sup>194</sup> The exception for straits applies to the overlapping territorial waters which would otherwise be restricted under the innocent passage regime. Innocent passage restrictions are lifted for navigation through international straits so that ships can operate in their normal mode in territorial waters lawfully, in addition to where they can already operate in their normal mode – before and after the strait. Since international straits are overlapping territorial seas, ships operate in the contiguous zones and EEZs of the coastal nations before and after their transit through the strait. Ships are permitted to operate in their normal mode of operation through the overlapping territorial seas (i.e. international strait) as an exception,<sup>195</sup> *a fortiori* they must be permitted to do the same before and after the strait—without restriction. Similarly, aircraft are permitted to fly through international straits, over the overlapping territorial seas of the coastal States. While aircraft would be otherwise restricted from flying over a State's territorial seas (national airspace), this exception exists in order for aircraft to transit from international airspace to international airspace, through national airspace above overlapping territorial seas. Applying the surface rationality to the air, military aircraft fly in their normal mode of transit over the strait, and thus must be otherwise unrestricted before and after the strait while flying over the contiguous zone, and EEZ. As a result, military aircraft are essentially unrestricted in international airspace outside the air adjacent to territorial seas (“States do not have the right to limit navigation or exercise any control for security purposes in EEZs”).<sup>196</sup>

China could also argue that permitted military activities in the EEZ should be frozen at the level of capabilities and technology that existed at the time that UNCLOS was ratified, consistent with customary international law at that time.<sup>197</sup> Again, this flips UNCLOS on its head. UNCLOS starts with the idea that freedom of navigation is king, restricted only by the lawfully claimed rights of coastal States. With this in mind, the presumption is that advances in military technology will be the rule, and unless they violate

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<sup>192</sup> Off. of the Staff Judge Advocate, U.S. Indo-Pacific Command, *International Straits*, 97 INT'L L. STUD. 39, 40 (2021).

<sup>193</sup> See U.N. Convention on the Law of the Sea, *supra* note 76, art. 37, 1833 U.N.T.S. at 411.

<sup>194</sup> See U.N. Convention on the Law of the Sea, *supra* note 76, arts. 38-39, 1833 U.N.T.S. at 411-12.

<sup>195</sup> See *id.* arts. 38-39, 1833 U.N.T.S. at 411-12.

<sup>196</sup> Mastro, *How China is Bending the Rules*, *supra* note 87.

<sup>197</sup> Jinyuan, *supra* note 11, at 292.

UNCLOS, they are permitted. Moreover, UNCLOS contemplates and analyzes the use of military technology in the form of intelligence gathering, weapons use, and aircraft launch and recovery under the innocent passage regime, authorizing all “prejudicial” actions so long as they take place outside of a coastal State’s 12 nautical mile territorial seas. To opine that in 1982 no developed country took notice of technological developments up until that moment in time and anticipated that technology would continue to further develop in the future, is naïve and implausible. UNCLOS operates under the presumption that in the EEZ, coastal States’ rights are prioritized only with respect to exploration and exploitation of resources and economic interests, and that absent or beyond such interests priority is given to the international community’s freedom of navigation.<sup>198</sup> Since the airspace is reflective of the maritime zone over which it exists, the only logical conclusion is that military activities outside national airspace are lawful and authorized.

One author alludes to the notion that contested waters – in this case, EEZs – are subject to different rules.<sup>199</sup> Again, this notion actually fares against China’s claims. If contested land features without clear sovereignty are incapable of establishing maritime zones and national airspace because an entering aircraft would not know from what State they would require permission, then China’s claims are *prima facie* unlawful since every land feature in the South China Sea has disputed sovereignty claims between at least two suitors. The South China Sea is rife with contested waters and airspace, making prejudice to a coastal nation an impossible task since one does not know which nation they may be prejudicing.

It is clear, for many reasons, that China’s airspace claims in the South China Sea are unlawful. The question then remains how and to what extent the international community should refute such claims. In doing so, State’s must balance the risk of eroding international law with the risk of military escalation.

## VIII. HOW TO BEST CHALLENGE CHINA’S UNLAWFUL CLAIMS

### A. *Formally Object to China’s Unlawful Excessive Airspace Claims*

In international practice, a State must make a clear and open objection to “alleged acts of sovereignty infringement if it wishes to avoid being disadvantaged in future judicial proceedings.”<sup>200</sup>

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<sup>198</sup> *Contra* Jinyuan, *supra* note 11, at 294 (arguing that the rights of the coastal State should be prioritized above all others).

<sup>199</sup> *Id.* at 291.

<sup>200</sup> Li & Yu, *supra* note 26, at 42-43 (referencing disputes in the South China Sea related to the Treaty of San Francisco to which China was not invited to participate, but where Vietnam made claims to the Spratlys).



It appears that China is brush stroking its way to declaring an ADIZ in the South China Sea sometime in the predictable foreseeable future. The United States should express that an ADIZ declaration by China in the South China Sea would unequivocally not be recognized.<sup>201</sup> To the extent practical, regional nations and nations with blue water navies should join in this preemptive objection. A concerted opposition will put both China and the international community on notice about the legal position of the United States and its partners, and the expected objections through military demonstrations should China continue painting its current path. Moreover, an anticipatory objection will inform China that its current brush stroke to sovereignty tactics is not unnoticed.

In regard to China's current South China Sea claims, "the United States should confirm that it does not recognize any maritime claims associated with [specified] features and conduct[] its . . . air operations accordingly."<sup>202</sup> The United States should declare that it does not recognize any of the claimed maritime zones in the South China Sea related to land features that do not warrant entitlement—such as artificial islands—and clearly delineate the areas where the United States believes overflight is authorized. Similar to the preemptive ADIZ objection, other affected and interested nations should publicly join in overtly rejecting China's maritime and airspace claims. Confirming this position will put China, as well as other coastal nations, on notice that the United States and its partners intend to fly in these contested areas, and that such overflight is not a threat but rather an exercise of freedom of air navigation consistent with international law. Putting the impacted countries on notice will preemptively *deescalate* future airspace FONOPs.

### *B. Conduct Overt Operations Displaying Noncompliance*

The United States and its capable partners should fly surveillance missions directly overhead the contested maritime features, and sail warships as close to shore as physically and safely as possible.<sup>203</sup> Although not the focus of this article, sailing surface vessels close to shore presents an interesting conundrum – whether sailing in such a manner is innocent passage, authorized by UNCLOS, rather than an objection to the claimed territorial seas which are reflective of national airspace. The solution is to avoid the innocent passage regime by having surface vessels conduct actions intentionally and overtly prejudicial to the peace, good order, and security of the land feature; e.g. artificial island. Clear public affairs messaging will be paramount in these higher risk operations, but unmistakably objecting to unlawful territorial water claims requires unmistakably *not* conducting innocent passage. Operations that may risk escalation but may be properly

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<sup>201</sup> Glaser, *supra* note 144.

<sup>202</sup> Pedrozo, *supra* note 31, at 92.

<sup>203</sup> See Sciutto, *supra* note 17.

mitigated by effective messaging may include intelligence collection, use of fire control radars, and launching and recovering unmanned aerial vehicles (as opposed to a much riskier and more escalatory manned aircraft). The alternative is essentially a demonstration of innocent passage which could be perceived as acquiescence and recognition of China's unlawful claims.

The United States and its partners should continue to fly over the disputed features in the South China Sea. Without any clearly resolved sovereignty claims, these features may be treated as if they do not generate maritime zones, and in turn, do not generate national airspace.<sup>204</sup> Notice or consent is not required since there is no clear claimant to the disputed features.<sup>205</sup> Aircraft should pass within 12 nautical miles and conduct military operations—e.g. intelligence gathering—in these areas. Airspace objections are much simpler to execute because there is no airspace equivalent of innocent passage through national airspace; i.e. the presence of the aircraft itself is prejudicial. To the extent there are disputed land features which would be entitled to U.S. recognized national airspace once conflicting sovereignty claims are resolved, a more mitigated measure would be to respect the national airspace surrounding these features despite there currently being no nation to recognize. The United States will want to be careful not to play a role in the sovereignty disputes; therefore, avoiding what may in the future be valid national airspace may be prudent. Moreover, flying over these areas may have an adverse desired effect—China may ramp up its kinetic opposition to other regional claims in order to secure sovereignty. While the suggested maneuvers are a calculated risk for the United States, flying over contested areas which may have valid national airspace claims in the future is the most effective means by which the United States can demonstrate that without unequivocal sovereignty, national airspace cannot exist.

All of these proposals risk China opening fire on a U.S. vessel or aircraft, further escalating tensions between the powers; but with proper coordination, communication, and public affairs, any aggression by China would be clearly viewed as escalatory, and illegal.

*C. Leverage the Arbitral Tribunal Ruling in Future Agreements and in Practice*

The United States should assist the Philippines in demanding that the arbitration ruling be incorporated into the South China Sea Code of Conduct, still under negotiations between the regional States.<sup>206</sup> The Code of Conduct presents a *sui generis* opportunity to help restore order, and the fair and proper administration of international law into the South China Sea

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<sup>204</sup> Pedrozo, *supra* note 31, at 73.

<sup>205</sup> *Id.*

<sup>206</sup> Jakhar, *supra* note 130.

which has otherwise run amuck. The dilemma with the currently stalled Code of Conduct is that China has sufficient leverage over the coastal nations at the table, risking that China will steamroll its unlawful claims into the agreement much the same way that it dismissed the lawful tribunal judgment the Philippines obtained against it. The United States, as well as other developed nations, must guide the negotiations without acting as a participant. This guidance can be done by assuring the less powerful regional players that their positions, if consistent with UNCLOS, will be supported by the political branches of their partners, and consequently their armed forces.

The United States can also use the arbitral tribunal ruling as part of its international legal justification for operations in the South China Sea. Adding the relevant portions of the ruling to legal explanations does not take away from the formerly lone UNCLOS arguments. In the event another dispute is filed and receives a favorable ruling, the United States must not repeat its mistake of taking a back seat to enforcement. Delayed enforcement of the former ruling was a strategic error, but delayed enforcement related to a second ruling could be catastrophic.

#### IX. CONCEIVABLE CONSEQUENCES

China has a proven ability to apply pressure to achieve political goals, accurately anticipating the United States' and regional States' reactions.<sup>207</sup> The United States' cautious and slow responses gave way for China's decisive and fast construction in the South China Sea.<sup>208</sup> With rising tensions resulting from China's relentless pursuit of control, it is unlikely that the great powers operating in the region – India, Russia, Japan, and the United States – will ever have a friendly and stable relationship with China, at least not in the near future.<sup>209</sup> Additionally, a strict and rigid adjudication of the conflicting claims bears the risk of destabilizing the region.<sup>210</sup> The second best, but still desirable, outcome is an economically fruitful political arrangement wherein States can equitably share resources without prejudice to territorial, maritime, and airspace claims.<sup>211</sup>

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<sup>207</sup> Dang & Ahn, *supra* note 6, at 170.

<sup>208</sup> *Id.* at 171.

<sup>209</sup> See Sam Roggeveen, Commentary, *Don't Let the China Hawks Frighten You*, LOWY INST. (Jan. 10, 2021), <https://www.lowyinstitute.org/publications/don-t-let-china-hawks-frighten-you> (discussing whether China is a threat to Australia, and ultimately concluding that China would need military bases closer to Australia which is a distant prospect, or China would have to sail a fleet to Australian shores, neither of which is likely due to the power competition among closer powers in the region).

<sup>210</sup> Strupp, *supra* note 140.

<sup>211</sup> *Id.*

### A. *Risk of Action*

One risk of taking action that simultaneously fails to deter China's aggression is that matters may escalate putting the United States in a position where they must "fight and win."<sup>212</sup> As discussed above, China has increased the force and frequency with which it is confronting the U.S. military flying throughout the South China Sea. With China's "increased military tempo and its extensive publicity," it is evident that "China wants the world, and especially the United States, to know that its military can inflict great costs on any country that threatens its South China Sea position."<sup>213</sup> The outcome may be another air collision similar to the 2001 incident, or worse, outright miscalculation resulting in a kinetic response from China, and ultimately an undesired armed conflict.

Another risk is that the United States' friendly regional partners may feel slighted by excessive U.S. involvement in what is otherwise a regional dispute. Clearly, the United States and its partners have a vested interest in the fair and equitable disposition of the South China Sea dispute—avoiding increased hostilities in the region, ensuring freedom of navigation and overflight, securing trade routes and strategic navigation, and generally ensuring that international law is not eroded by acquiescence to unlawful claims—however, the core of the dispute is sovereignty affecting maritime and airspace claims to which the United States has no direct entitlement, other than being a beneficiary of freedom of navigation.

Both of these risks can be significantly mitigated if not completely avoided with proper messaging and savvy foreign policy. It is important for the United States to support its regional partners without alienating them, and to protest China's unlawful claims without provoking it.

### B. *Risk of Inaction*

Without United States' and coalition partner intervention and enforcement of international law, countries like the Philippines will lose their economic livelihoods in industries such as fishing and other South-China-Sea-based sectors.<sup>214</sup> If China is permitted to unlawfully control the economic resources and trade routes in the South China Sea, the impact will be felt globally. Regional partners may suffer economic and humanitarian losses, and a strategic military shift will be inevitable. Perhaps most concerning, China will be in an optimal position to invade Taiwan in pursuit of reunification, a target President Xi Jinping has long but forgotten.

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<sup>212</sup> Gomez & Favila, *supra* note 52 (quoting Admiral John C. Aquilino, United States Navy).

<sup>213</sup> Mastro, *The PLA's Evolving Role*, *supra* note 69, at 11.

<sup>214</sup> Jakhar, *supra* note 130.

In addition to economic devastation, China's erosion of UNCLOS and other customary international law norms will weaken the balance of power, currently the *status quo* in international diplomacy. China's largely successful deflection of the South China Sea ruling has reinforced its ability to get away with ignoring international law when convenient.<sup>215</sup> If the process by which customary international law is created and enforced is dismantled, the infection may spread to other areas of law including the U.N. Charter and the Law of Armed conflict, which is already currently being challenged by Russia's invasion of Ukraine. "The founding of the United Nations was a milestone in humanity's pursuit of peace and development";<sup>216</sup> therefore, the United States must play a role in preventing its collapse—a tangible threat if China's challenges go unchecked.

In order to put continued indecisiveness into perspective, it may be worth looking to the East China Sea which is further along China's brush strokes to sovereignty plan. China has a history of achieving goals through baby-steps, ultimately amounting to large international movements. A repeat of its East China Sea airspace regime is a realistic consequence of inaction.

## X. CONCLUSION

The United States and China are engaged in "strategic competition," both endeavoring to shape the conduct of the other.<sup>217</sup> Optimally, the United States desires greater cooperation with China on global issues such as terrorism, epidemics, climate change, and nuclear proliferation.<sup>218</sup> More realistically, the United States wants to prevent China from obtaining autonomous power by unlawful means in the South China Sea, extinguishing any hope for peacefulness which may exist in the region.

"[T]he United States still holds a decisive military advantage due to its ability to project power and sustain operations across vast distances,"<sup>219</sup> but the United States must tactfully exercise its military strength in order to guarantee a judicious resolution of the South China Sea dispute. One of the strengths for the United States is that "China does not benefit from maintaining a general and absolute 'sovereignty belongs to China' policy."<sup>220</sup> If China alienates all of its regional partners, it may risk isolation—a shattering result if realized.

China's domestic problems are largely untroublesome.<sup>221</sup> If China is diplomatically crafty and maintains its economic control, it will indisputably

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<sup>215</sup> *Id.*

<sup>216</sup> *Position Paper on China's Cooperation*, *supra* note 125.

<sup>217</sup> Mastro, *The PLA's Evolving Role*, *supra* note 69, at 2.

<sup>218</sup> Glaser, *supra* note 144.

<sup>219</sup> Mastro, *The PLA's Evolving Role*, *supra* note 69, at 10.

<sup>220</sup> Li & Yu, *supra* note 26, at 48.

<sup>221</sup> See Roggeveen, *supra* note 209.

become the biggest economy in the world, “and eventually the most capable military power in Asia,” based largely upon its population.<sup>222</sup> Additionally, China has made enormous strides in advancing and implementing military technology.<sup>223</sup> The concern for countries like Australia is that the leading power in the Indo-Pacific will no longer be an ally – e.g. the United States – but rather a provocative competitor, China.<sup>224</sup>

China’s claimed airspace in the South China Sea is unlawful. Its domestic law and historic rights theories have no foundation in either customary international law or treaty. All reasonable interpretations of UNCLOS through the lens of VCLT conclude that China’s legal theories cease to exist. Moreover, a legally established arbitral tribunal has ruled definitively that China has no lawful airspace rights in the South China Sea. China’s actions even run contrary to the Declaration it signed regarding activity in the South China Sea, a clear violation of its international obligations to the coastal States.

The United States and coalition partners must be expeditious and steadfast in their efforts to enforce international law over this vital airspace. It is imperative that the coastal nations with valid claims to the airspace maintain their sovereignty, and do not let their claims perish, eroding the international law construct. The United States, along with its coalition partners, must prevent China from obtaining exclusive control of the South China Sea. In the same way “[d]emocracies die behind closed doors,”<sup>225</sup> so too will airspace rights die behind inaction.

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

