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Defending the Maritime Rules-Based Order: Regional Responses to the South China Sea Disputes

Rebecca Strating



EAST-WEST CENTER

Front cover photo: HMAS Sirius conducts a dual Replenishment at Sea with HMA Ships Arunta and Stuart as they sail home to Australia across the Java Sea, after completing a North East Asia Deployment.

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Regional Responses to the
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Honolulu, Hawai'i 96848-1601

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ISSN 1547-1349 (print) and 1547-1330 (electronic)

ISBN 978-0-86638-037-951000 (print) and

978-0-86638-001-051000 (electronic)

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List of Abbreviations

A2/AD	Anti-Access/Area Denial
AAT	Australian Antarctic Territory
ADIZ	Air Defense Identification Zone
AMIS	Australian Maritime Identification System
ANZUS	Australia, New Zealand, United States Security Treaty
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASL	Archipelagic Sea Lanes
CLCS	Commission on the Limits of the Continental Shelf
CoC	Code of Conduct
CSIL	Chinese Society of International Law
CSIS	Center for Strategic and International Studies (Washington, DC)
DoD	Department of Defense (United States)
ECS	East China Sea
EEZ	Exclusive Economic Zone
FOIP	Free and Open Indo-Pacific
FoN	Freedom of Navigation

FONOPs	Freedom of Navigation Operations
FPDA	Five-Power Defense Arrangements (United Kingdom, Australia, New Zealand, Malaysia, and Singapore)
GDP	Gross Domestic Product
GSOMIA	General Security of Military Information Agreement (Korea and Japan)
HA/DR	Humanitarian Assistance/Disaster Relief
HOR	House of Representatives (Australia)
ICJ	International Court of Justice
IPE	Indo-Pacific Endeavor (Australia)
ISEAS	Yusof Ishak Institute of Southeast Asian Studies (Singapore)
IWC	International Whaling Commission
JPDA	Joint Petroleum Development Area (Australia and Timor-Leste)
LOSC	United Nations Convention on the Law of the Sea
MOU	Memo of Understanding
MSDF	Maritime Self-Defense Force (Japan)
NM	Nautical Mile
ODA	Official Development Assistance
PLA	People's Liberation Army (China)
PLAN	People's Liberation Army Navy (China)
PRC	People's Republic of China
PRIF	Peace Research Institute of Frankfurt (Germany)
RAAF	Royal Australian Airforce
RIMPAC	Rim of the Pacific Exercise
Quad	Quadrilateral Security Dialogue (United States, Australia, Japan, and India)
RSIS	S. Rajaratnam School of International Studies (Singapore)
SCS	South China Sea

SLOC	Sea Lines of Communication
THAAD	Terminal High-Altitude Area Defense
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
US	United States
USSR	Union of Soviet Socialist Republics (former Soviet Union)

Executive Summary

The seas are an increasingly important domain for understanding the balance-of-power dynamics between a rising People's Republic of China (herein "China") and the United States (US). Specifically, disputes in the South China Sea have intensified over the past decade. Multifaceted disputes concern overlapping claims to territory and maritime jurisdiction, strategic control over maritime domain, and differences in legal interpretations of freedom of navigation. These disputes have become a highly visible microcosm of a broader contest between a maritime order underpinned by the United Nations Convention on the Law of the Sea (UNCLOS) and challenger conceptions of order that see a bigger role for rising powers in generating new rules and alternative interpretations of existing international law.

The seas are an increasingly important domain for understanding the balance-of-power dynamics between a rising People's Republic of China and the United States

The power dynamics between China and the US are rapidly transforming the regional security order. This is reflected in the prominent re-emergence of the term "Indo-Pacific," a strategic geographic expression that places special importance on the maritime domains of the Indian and Pacific Oceans. In June 2019, the US Indo-Pacific Strategy Report explicitly named China as a revisionist power

seeking to “reorder the region,” including through its assertive actions in the South China Sea. The 2019 US Indo-Pacific implementation report emphasized the need to “build a flexible, resilient network of like-minded security partners to address common challenges.” “Like-minded” states were identified as Australia, India, Japan and the Republic of Korea (herein “Korea”).

This report investigates the extent to which “like-minded states” are actually “like-minded” on maritime issues by examining responses and approaches to the South China Sea disputes. While the interests and strategies of the US, China, and maritime Southeast Asia claimant states have attracted considerable analysis, less attention has been paid to regional non-claimant states in the so-called “Indo-Pacific.” This study examines the attitudes and policies on the South China Sea of Australia, Japan, India, and Korea through the lens of strategic culture and demonstrates how material, historical, geographical, ideational, and political factors affect interests, statecraft, and the management of relations with the great powers. What stakes do these states have in the South China Sea disputes? And how do they defend their interests?

The study argues that despite the rhetoric about these states being “like-minded” on maritime issues, there are areas of difference that may prevent the development of shared interests and closer cooperation. Their characterization as “like-minded” disguises important differences in how international rules and maritime order are conceptualized, operationalized, and defended, with implications for efforts to push back against excessive maritime claims in the South China Sea and beyond. These differences are shaped by each state’s material interests, strategic calculations, and economic considerations, which are linked to how they pursue relations with China and the US in general and their perceptions of the broader security order. Each state also has a distinctive vision of the sea in relation to sovereignty and security, reflected in how they view the military freedoms of warships in territorial seas and Exclusive Economic Zones (EEZs). The study examines the responses of regional non-claimant states not only to legal and strategic dynamics in the South China Sea but also to maritime disputes in other areas such as the East China Sea, the Indian Ocean, and the Timor Sea, as well as their interpretations of maritime rules and potentially excessive maritime claims. It shows

how the application of the rules and support for international institutions can shift according to the material interests at stake, which can complicate adherence to a maritime “rules-based order.”

The study has four sections. It begins by providing context for understanding the South China Sea disputes. It then outlines how regional non-claimant states share or differ in their interpretations of maritime rules, particularly around freedom of navigation. The third section examines approaches to maritime order, demonstrating how regional non-claimant states have engaged (or not) with international dispute-resolution mechanisms in their own maritime disputes and the implications for their approaches to the South China Sea disputes. The final section concludes by providing recommendations for how regional claimant states may better align their policies in defending the maritime rules-based order in the South China Sea and beyond. Specifically it recommends that states: work together to align their interpretation of international rules; move the narrative away from freedom of navigation, which is too closely associated with US interests and operations; provide greater weight to their “rules-based order” rhetoric by ensuring that their own maritime claims conform more closely with international law; consider the use of international dispute-resolution mechanisms for disputes outside the South China Sea; demonstrate commitment to the legitimate claims of Southeast Asian nations through joint patrols; and encourage the US to ratify UNCLOS.

Defending the Maritime Rules-Based Order: Regional Responses to the South China Sea Disputes

Introduction

Over the past decade, the South China Sea has become a frontline theater of great power competition between the United States (US) and the People's Republic of China (herein "China"). Encompassing more than 1.3 million square miles, the sea is subject to a range of multifaceted and overlapping claims over land features and jurisdictions, including to: (1) fish; (2) oil and gas; (3) sovereignty over islands and rocks; (4) control of low-lying features such as reefs and shoals; (5) baselines and archipelagic waters; and (6) freedom of navigation. Perceptions of China as a rising power challenging the international "rules-based order" is exemplified by its assertive behavior in the South China Sea. In June 2019, the US Indo-Pacific Strategy Report emphasized the importance of free seas and peaceful maritime and territorial dispute resolution and explicitly named China as a revisionist power seeking

to “reorder the region” (US Department of Defense 2019, 4, 7). In 2017, US President Donald Trump’s vision for a “Free and Open Indo-Pacific” strategy at the Asia-Pacific Economic Cooperation (APEC) Summit emphasized “[a]dherence to international rules and norms, including those of freedom of navigation and overflight.”

Other US declaratory policies such as the National Security Strategy (2017) and National Defense Strategy (2018) have also inculcated strategic contestation narratives, pitting the US and China in a dyadic competition between “free and repressive visions of the future international order.” In particular, the South China Sea presents a pertinent case study of contests over the

Perceptions of China as a rising power challenging the international ‘rules-based order’ are exacerbated by its assertive behavior in the South China Sea

nature, form, and purposes of Asia’s security order and the norms and institutions that underpin it. Maritime and sovereignty disputes have become “highly visible microcosms” of contests between a US-led security order underpinned by UNCLOS and “challenger conceptions of order that see a bigger role for rising powers in generating new rules and alternative interpretations of existing international law” (Strating 2019b, 449).

The US’ emergent Indo-Pacific strategy perceives allies and partners as sharing its responsibilities for defending the region against common threats, particularly in the seas. At the 2018 Shangri-La Dialogue, then-Secretary of Defense James Mattis argued that “[t]he US offers strategic *partnerships*, not strategic *dependence* [italics added].” In Senate testimony, then-acting Secretary of Defense Patrick Shanahan suggested that the Trump Administration’s defense strategy would enable “an unmatched network of allies and partners stepping up to shoulder their share of the burden for international security” (US Department of Defense 2019, 18). The US 2019 Strategy Report (US Department of Defense 2019, 21) argued that “[m]utually beneficial alliances and partnerships are crucial to our strategy, providing a durable, asymmetric strategic advantage that no competitor or rival can match.” It also emphasized the importance

of “networked security architecture to uphold the international rules-based order,” outlining expectations that allies and partners would contribute to regional security in a number of fronts, including “[u]pholding a rules-based international order” in and beyond the seas (US Department of Defense 2019, 21, 6, 54). In November 2019, a Department of State (2019) implementation report also reinforced the need to “build a flexible, resilient network of like-minded security partners to address common challenges,” with those “like-minded” states identified as Australia, India, Japan, and the Republic of Korea (herein “Korea”).

In May 2019, a US guided missile destroyer conducted a week-long patrol in the South China Sea with a Japanese aircraft carrier, two Indian naval ships, and a Philippine patrol vessel to “promote maritime cooperation” in the “free, open Indo-Pacific.” The four-way sail-through was described as “the first engagement of its kind, highlighting coordination among *like-minded* Indo-Pacific navies [italics added]” (Panda 2019). In May 2019, the US, Japan, Korea, and Australia conducted their first joint naval drills in the Western Pacific. According to the Commander of the US Navy’s Seventh Fleet (2019) Vice Admiral Phillip Sawyer, Pacific Vanguard joined “forces from four, *like-minded* maritime nations that provide security throughout the Indo-Pacific based on shared values and common interests.” Rear Admiral Jonathan Mead, Fleet Commander of the Royal Australian Navy, echoed this language, stating that “[e]xercise Pacific Vanguard involved four *like-minded* regional partners working together to support our shared views of a free, open, and prosperous Indo-Pacific” (Commonwealth of Australia Department of Defence 2019). “Like-minded” states have also committed to defending the “rules-based order” in their foreign policy discourses. In September 2018, for instance, Japan’s Prime Minister Shinzo Abe declared at the United Nations (UN) that “[w]hat must control our sea and air spaces that are broad and wide is the rule of law, and the rules-based order.” Australia has also been a strong proponent of the rules-based order rhetoric: The phrase was used 56 times in the 2016 Defence White Paper, partly in response to China’s actions in the South China Sea (Bisley and Schreer 2018, 302).

Given this emphasis on the regional security network of US allies and partners as a crucial plank in defending the maritime “rules-based

order,” how like-minded are “like-minded” states on the South China Sea? Do these states perceive their national interests and priorities in similar or divergent ways? There has been much scholarly and public focus on the South China Sea as an arena of competition between the two great regional powers, and between China and the Southeast Asian claimant states. In contrast, this study examines and compares the approaches to South China Sea disputes of the so-called “regional non-claimant” states in the so-called “Indo-Pacific”: Australia, Japan, India, and Korea. This study examines how the “strategic culture” of these states—the material, historical, geographical, ideational, and political factors that affect statecraft and the threat and use of force—contributes to their approaches to the South China Sea (Booth and Trood 1999; Landis 2014). Strategic culture can assist in understanding how and why regional non-claimant states have different perspectives about the disputes and regional order more broadly. Factors such as size, material capacities, geography, and domestic politics can play important roles in shaping the interests of key US allies and partners. In the context of growing uncertainty around the balance-of-power transition, enhancing cooperation requires alignment of interests and values. Are “like-minded states” on the same page? What is at stake for these states in the South China Sea within the context of a rapidly transforming region?

This study proceeds in four sections. The first section provides context for understanding the South China Sea disputes. It then outlines how regional non-claimants differ in their interpretation of the maritime rules, focusing on freedom of navigation. The third section examines approaches to maritime order, specifically international dispute-resolution mechanisms and how they affect and are affected by the maritime and territorial disputes in the South China Sea. The final section concludes by providing recommendations for how regional non-claimants may more effectively contribute to defending the maritime rules-based order in the South China Sea and beyond.

Setting the Context: The South China Sea disputes

While territorial disputes in the South China Sea have existed for some time, they have intensified over the past decade. In 2009, China attached the now notorious “nine-dash” line map with a *note verbale* contesting the joint submission by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf (CLCS). First appearing in 1947, the map appeared to denote a claim to around 90 percent of the South China Sea. In the note, China claimed “indisputable sovereignty over the South China Sea Islands and the adjacent waters.” Gao and Jia (2013, 109) argued that in addition to providing sovereignty to all land features within the area, the nine-dash line could form a potential maritime boundary giving China sovereign rights to fishing, navigation, and exploration and exploitation of resources on the basis of “historic rights.” While the meaning of the nine-dash line has been strategically ambiguous and is confused by narratives that the South China Sea “belongs” to China (Gady 2015), it has been hotly contested by other littoral states that also claim maritime rights in the South China Sea under international law. Beginning in 2014, China has engaged in rapid, large-scale militarization and artificial island-building in the seas, raising alarm about its capacities and willingness to restrict navigation and deny other Southeast Asian claimant states their legal entitlements. While other states have also engaged in such activities, China has played a substantial role in militarizing the South China Sea, for example by positioning anti-ship missiles and long-range surface-to-air missiles on artificial islands, impeding the transit of warships, and using maritime militia for surveillance and intimidation purposes. These actions have precipitated concerns that China aims to revise and supplant or ignore extant maritime rules, with flow-on consequences for regional order more generally. The most significant example was Beijing’s refusal

While other states have also engaged in such activities, China has played a substantial role in militarizing the South China Sea

to acknowledge a 2016 UNCLOS Arbitral Tribunal ruling that found its claims of “historic rights” to fishing and energy resources in the South China Sea invalid under international law.

Re-ordering dynamics can take various forms. The disputes in the

South China Sea revolve around four key centers of power and control (see also Dutton 2011). At one level, the South China Sea is symbolic of the shifting balance of power in Asia, raising concerns about peace and stability in the region. Command of the seas has long been important for power projection, trade, and the

The South China Sea is symbolic of the shifting balance of power in Asia, raising concerns about peace and stability in the region

establishment or maintenance of great-power status, as expressed in Sir Walter Raleigh’s famous observation that whoever commands the seas, “commands the riches of the world, and consequently, the world itself” (cited in Bekkevold and Till 2016, 6). Analysts express concern about China’s growing maritime power and anti-access/area denial (A2/AD) capabilities within the first island chain, and whether this will reduce US strategic influence in Asia and undermine its interests in Taiwan (US Department of Defense 2019; Cronin 2017).¹ Some describe the South China Sea as a potential “flashpoint” or “crucible” for kinetic great power conflict, reflecting concerns that China’s assertions will compel the US to defend its own interests in freedom of navigation and/or the maritime rights of allies and partners (Kaplan 2011). Yet, the US is not a claimant state in the South China Sea disputes. Consequently, other analysts question whether it has *vital* interests in the seas, and whether it would risk confrontation with China to protect those interests, or those of its regional allies and partners (Taylor 2014). Chinese perspectives largely hold that US Freedom of Navigation Operations (FONOPs) in the South China Sea are illegal and that China will take necessary actions to defend sovereignty and resist American “maritime hegemonism” (Ali 2019).

In response to China’s actions in the South China Sea, US leaders have increasingly asserted Washington’s “strong national interest” in freedom of navigation since 2010, as part of the Obama administration’s “pivot” to Asia (Clinton 2010). At the 2015

Shangri-La Dialogue, then-Defense Secretary Ashton Carter (2015) declared that “[t]he United States will fly, sail, and operate wherever international law will allow, as we do all around the world,” at the same time launching a new Maritime Security Initiative designed to boost maritime capacity among Southeast Asian nations. Similar rhetoric was found in the 2019 Indo-Pacific Strategy report (US Department of Defense 2019, 43). Among strategic thinkers in Washington, DC, there is broad agreement that freedom of navigation is the US’ primary interest in the South China Sea. US allies and partners have also expressed concern about China’s A2/AD capabilities.² For trade, the South China Sea is particularly important for North and Southeast Asian states. As the most recent Japanese “Defense of Japan” White Paper (2019, 58) stated, “China has continued to take assertive actions with regard to issues of conflicts of interest in the maritime domain, as exemplified by its attempts to change the *status quo* by coercion and has signaled its position to realize its unilateral assertions without making any compromises.” Other regional powers, such as Australia, have also expressed concern at “the unprecedented pace and scale of China’s land reclamation activities” in the South China Sea (Commonwealth of Australia Department of Defence 2016, 58).

The second and third contests for control pertain to overlapping territorial and maritime claims between China and maritime Southeast Asian states. Sovereignty disputes concern the ownership of the hundreds of land features dotting the sea—including islands, rocks, reefs, submerged shoals, and low-lying elevations over land features—some or all of which are claimed by China, Taiwan, the Philippines, Vietnam, or Malaysia. These claims are based on legal principles for determining sovereign possession, such as effective occupation, discovery, and history. Sovereignty of these land features has the capacity to influence maritime zones and attendant rights to maritime resources, such as oil, gas, and fish, under the legal principle that “land dominates the sea.” The above five states plus Brunei and Indonesia each have claims to an Exclusive Economic Zone (EEZ) and continental shelf in the South China Sea, and Indonesia claims sovereignty over the Natuna Islands at the South China Sea’s far southern end. Principles for delimiting these maritime zones are provided under UNCLOS, yet diplomatic and legal attempts to

resolve maritime resource disputes between claimant states—such as the 2016 South China Sea arbitration—have so far failed to establish maritime boundaries, leaving a tangled web of overlapping claims in the South China Sea. The controversial nine-dash line and the “historic rights” argument were invalidated by the 2013–2016 arbitration, but this finding has been rejected by Chinese legal experts and ignored by Beijing (Chinese Society of International Law 2018). This has raised concerns that as it grows more powerful and confident, China will be able to access maritime resources that it has no legitimate right to under international law by using economic coercion or stand-over tactics. US National Security Advisor Robert O’Brien, for instance, publicly criticized Beijing for using intimidation “to try and stop ASEAN [Association of Southeast Asian Nations] nations from exploiting the offshore resources, blocking access to \$2.5 trillion of oil and gas reserves alone” (cited in Nicolas 2019).

Taken together, these three areas of control—to sea lanes, sovereignty, and maritime resources—have challenged UNCLOS-led legal order in the region. Modern disputes highlight the weaknesses of UNCLOS in maintaining maritime order and upholding the principle that the oceans are predominantly a shared resource. While the “like-minded” states have tentatively expressed hope that the Code of Conduct negotiations currently occurring between China and ASEAN states will stabilize the South China Sea, international lawyers have expressed concern about China’s efforts to extend their maritime claims beyond what is acceptable under UNCLOS using “lawfare” (legal warfare) as part of its “three warfare” strategy to persuade others to accept their claims as valid (Guilfoyle 2019b). While the US views this revisionism as problematic, its own stance on international legal obligations in the maritime domain is undermined by the refusal of Congress to ratify UNCLOS, even though it recognizes its principles as customary law. Problematically, “like-minded” states themselves also have different interpretations of international maritime rules, including navigational regimes under UNCLOS.

Defending Maritime Rules

In April 2001, a mid-air collision between a US EP-3 surveillance plane and a Chinese F-8 fighter occurred around 70 miles from the Chinese

province of Hainan, within China's EEZ but outside its territorial sea. The incident resulted in the death of a Chinese pilot, and the US plane was forced to make an emergency landing on Hainan. The incident arose because both states have different interpretations of the legality of overflight over an EEZ. In 2009, Chinese vessels attempted to obstruct the US Naval hydrographic survey vessel *Impeccable*, again outside of China's territorial waters but within its EEZ. This is one example of manoeuvres conducted by Chinese ships to prevent US naval ships from conducting surveys in the East China Sea, the Yellow Sea, or the South China Sea (see Kraska and Pedrozo 2018). In 2013, Beijing attempted to close off a section of international waters in the South China Sea for a naval exercise and reportedly "used aggressive and dangerous maneuvering" to ward off an observing US ship (Roy 2018). In April 2018, three Australian naval vessels heading to Vietnam were provoked by the Chinese Navy with a reportedly "robust exchange." Australian Prime Minister Malcolm Turnbull responded by asserting that Australia would exert and practice its right of freedom of navigation throughout the world's oceans, including the South China Sea (Reuters-Bloomberg 2018). These are just a few of the examples that are used by "like-minded" states to demonstrate China's efforts to undermine freedom of navigation in the South China Sea.

Freedom of navigation is the cornerstone of US involvement in the South China Sea. As outlined earlier, threats to freedom of navigation are viewed as central to American strategic and economic interests. The US views China's position on the South China Sea as challenging navigational rights afforded under international law, particularly those pertaining to innocent passage through the territorial seas of coastal states and the permissible activities of foreign militaries in their EEZs. Yet across the region, states—even like-minded states—have different interpretations of the activities that international law permits, including the rights of warships to innocent passage or to conduct military activities such as surveys

Across the region, states—even like-minded states—have different interpretations of the activities that international law permits within another state's EEZ

within another state's EEZ (Colin 2016, 57). "Excessive maritime claims" are those that states make that extend beyond what they are entitled to under international law. As Oxman (2006) suggests, many states succumb to the "territorial temptation" in attempting to extend their sovereignty seaward and claim sovereign rights to maritime resources in a manner inconsistent with UNCLOS. There are various ways in which states may make excessive claims, but this study focuses on two broad types. The first are claims that undermine the shared interests that states have in unrestricted access to the seas. These excessive maritime claims seek to provide coastal states with greater rights to limit the transit and activities of foreign militaries in various maritime zones. They are contrary to principles of freedom of navigation and the legal concept of the seas as *res communis*, that is, not subject to sovereign appropriation. The second type of claim

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relates to maritime zones and efforts to expand sovereign rights to areas greater than what is afforded under UNCLOS. Examples include non-compliant EEZ claims, the use of straight baselines to enclose internal waters, or the use of outlying archipelagic baselines (see section three).

The South China Sea disputes need to be interpreted in the context of ongoing disagreements about the extent to which sovereign states may extend their authority seaward.

Freedom of navigation refers to the capacities of flagged ships to transit the seas without interference from other states, apart from the limited exceptions outlined in international law. It is associated with the broader concept of *mare liberum*—or freedom of the seas—which had its genesis in the work of Dutch legal scholar Hugo Grotius in the sixteenth century. The principle that the oceans are *res communis*—available to all—and cannot be seized as property was gradually compromised through developments in the Law of the Sea in the second half of the twentieth century (Strating 2019b, 452). UNCLOS negotiations attempted to balance the Grotian concept

of the seas as a “global commons” with the security and resource concerns of coastal states, many of whom desired greater control over oceanic space and resources in the water column and seabed. There were fears in the post-colonial world that the world’s oceans would become subject to a “scramble for seabed resources” that would advantage developed states (Guilfoyle 2019a, 388). Developing states’ assertions of a 200-nautical-mile EEZ was an effort to shore up rights to maritime resources (Guilfoyle 2019a, 389). In contrast, nations with the most powerful navies—the US and the former Soviet Union (USSR)—advocated a 12-nautical-mile territorial sea and a high seas corridor to permit their navies the maximum possible room to maneuver, and they were reluctant to support EEZs on the basis that creeping jurisdiction could restrict navigational freedoms. China, on the other hand, backed developing states in their quest to exert greater sovereign rights over maritime resources. Not only did China support the establishment of a 200-nautical-mile EEZ, it “reiterated concerns regarding the right of innocent passage through the territorial sea, which it wanted to give only to civilian ships, and campaigned for the recognition of exclusive control by the coastal state of marine scientific research inside the EEZ” (Colin 2016). A key trade-off in the negotiations was support for navigational freedoms in EEZs and international straits in return for support of claims for sovereign rights over resources within EEZs (Koh and Jayakumar 1985, 39). As Carlson et al. (2013, 22–23) suggest, UNCLOS fundamentally altered the “exclusive nature” of territorial sovereignty insofar as it has defined “multiple spheres of overlapping rights, responsibilities, and political authority.” Importantly, the negotiations revealed that new developing states were in favor of extending their authority and sovereign entitlements as far seaward as they could.

In their foreign policy discourses, the four “like-minded” regional non-claimant states—Australia, Japan, India, and Korea—broadly defend freedom of navigation. Japan’s conception of a “free and open Indo-Pacific” emphasizes maritime rules, freedom of navigation and overflight, and the liberal ideal of the seas as a “global commons.” A policy speech by Prime Minister Shinzo Abe in January 2018 declared that:

[A] vast expanse of sea stretches from the Pacific Ocean to the Indian Ocean. Since ancient times the people of this region have enjoyed affluence and prosperity from this large and free body of water. Freedom of Navigation and the rule of law form their bedrock. We must ensure that these waters are a public good that brings peace and prosperity to all people without discrimination into the future. To this end we will promote the Free and Open Indo-Pacific Strategy (Government of Japan 2019).

Indian policymakers have been quoted as saying that the South China Sea:

...is part of the global commons. India, therefore, has an abiding interest in the peace and stability in the region. India firmly stands for the freedom of navigation and over-flight, and unimpeded lawful commerce, in the international waters, in accordance with international laws, notably UNCLOS. India also believes that any differences must be resolved peacefully by respecting the legal and diplomatic processes, and without resorting to threat or use of force (see Chaudhury 2019).

In 2015, Korea's then-President Park Geun-hye noted that the South China Sea issue was of "grave concern" to Seoul. At the East Asia Summit, she said that "Korea has consistently stressed that the dispute must be peacefully resolved according to international agreements and code of conduct" and that "China must guarantee the right of free navigation and flight" (cited in Shin 2015). Finally, Australian leaders have also asserted their freedom-of-navigation rights in the South China Sea in their discourses, operations, and declaratory policy with growing frequency over the past decade (Commonwealth of Australia 2017, 38, 47).

It is, however, important to differentiate the different dimensions of the principle of freedom of navigation. One dimension relates to *military* freedom of navigation, which refers to the rights of warships to transit through maritime zones and conduct permissible military activities. This is distinctive from appeals to *commercial* freedom of navigation, which relate to the capacities of merchant vessels to conduct cross-country trade via the world's oceans. Indeed, one

popular assertion made in public discussions is that conceding control of the South China Sea to China would imperil free trade (Doornbos 2019). Many states defend commercial freedom of navigation in their foreign policy discourses related to the South China Sea, including Japan, Australia, India, and Korea, because they have a stake in keeping the sea lane open for trade (Japan Ministry of Foreign Affairs 2019, 79; Commonwealth of Australia Department of Defence 2016, 57; Indian Navy 2015, 21; Moon 2019).

Any potential blockade by China would be consequential for the economies of regional maritime trading nations and could have potential energy-security ramifications for all four regional non-claimants. The United Nations Conference on Trade and Development (UNCTAD) estimates that one-third of global shipping passes through the South

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security ramifications for all four
regional non-claimants***

China Sea, and the Center for Strategic and International Studies (CSIS) estimates that \$3.37 trillion of trade flowed through the South China Sea in 2016. Japan and Korea rely on the Strait of Malacca as a gateway between the Pacific and Indian Oceans. According to CSIS's *ChinaPower* (2019), in 2016, Korea had the second highest exports (by value) through the South China Sea at \$249 billion, second to China with \$874 billion. Japan was also in the top 10, with \$141 billion worth of exports transiting the South China Sea—nearly 42 percent of its maritime trade (Sakhuja and Jha 2018, 130). More than 90 percent of Korea's crude oil imports and 30 percent of total trade pass through the South China Sea, while more than 80 percent of Japan's oil travels from the Middle East through the South China Sea (Midford 2015, 525; Shin 2015). According to Koga (2018, 18), Japan's dependence on imported oil and natural gas is likely to shape Japan's interests in the South China Sea for at least a decade. It is estimated that nearly 50 percent of Indian trade flows through the South China Sea bound for Asia and North and South America, while Australia's 2016 Defence White Paper posited that nearly two-thirds of its seaborne trade transits through the waterway. These figures have

been used to defend the interests of these states in the South China Sea, as any blockade would inflict severe economic pain.

For regional non-claimants, fears regarding the economic stakes related to blocking the passage of cargo ships have not yet been realized. Beijing argues that it does not impede commercial freedom of navigation. In the general commentary, there tends to be little analysis of existing empirical evidence for blockading the cargo ships of trading partners, as well as the likelihood of this occurring during peacetime. Given its own reliance on the South China Sea as a trading route—with nearly 40 percent of its total trade passing through it—China is unlikely to disrupt trade in peacetime as such actions would “come at a considerable financial cost to China, greatly degrade China’s standing among other countries, and could precipitate an assertive response by outside powers” (CSIS 2019). China has its own vulnerabilities in energy security, particularly the so-called “Malacca dilemma,” so named by former President Hu Jintao to reflect concerns that the Malacca Strait could be blockaded to prevent crucial energy supplies from the Middle East reaching the Chinese mainland (Strating 2019c). In the Australian example, Bateman (2016; 2020, 19) argues that the “two-thirds” figure is inflated, stating that only a little more than 20 percent of Australia’s trade passes through the South China Sea and most of this is going to and from China. Only around 5.5 percent of total Australian exports in the South China Sea are bound for countries other than China (Laurenceson 2017). Australian defense policy conforms with what Austin (2016) has described as the Pentagon’s “big lie” about China’s threats to commercial trade in the South China Sea (see Bateman 2020, 18–19). The costs of the Chinese navy blockading cargo passage in South China Sea are also prone to exaggeration, as regional sea lines of communication provide alternative routes of transportation. The Center for Strategic and International Studies (CSIS) estimates that a week-long closure of the Malacca Strait would add an additional \$64.5 million in shipping costs, just 0.08–0.10 percent of the average weekly value of trade flowing through the South China Sea. If it were extended to a year, the additional costs would drop to just 0.0015–0.0019 percent of annual trade passing through the waterway (CSIS 2019).

One view from Southeast Asia is that discourses on the importance

of the South China Sea as a trading sea lane provide non-littoral states with a rationale to justify their involvement in the South China Sea to their domestic audiences, yet it is China and Southeast Asian countries that would be most affected by trade restrictions. Economic concerns are viewed as “a pretext” for advancing the rights of naval vessels in the South China Sea; in other words, the legitimate commercial freedom-of-navigation interests of non-claimant states provide a convenient smokescreen for advancing interests in military freedom of navigation (RSIS (S. Rajaratnam School of International Studies) 2017, 8). As Vuving (2014, 7) points out, the more important thing at stake is the role of the South China Sea in contributing to US leadership: “US naval supremacy in the Western Pacific, of which the South China Sea is a critical part, is a key to its regional primacy in the Indo-Pacific, which in turn is a major pillar undergirding the US-led liberal world order.” It is the security implications of restrictions to military freedom of navigation that are of most concern to the US and supporters of the US-led regional order, such as Australia and Japan. In the post-World War Two period, freedom of the sea became less about trade and more about the rights of naval forces to project power as they move freely in the seas. While ensuring commercial freedom of navigation through the establishment of open and secure sea lines of communication is important for all global maritime trading nations, including the “like-minded” states, these states hold different conceptions of military freedom of navigation under international law and the types of operations that the US conducts to defend its naval entitlements.

The security implications of restrictions to military freedom of navigation are of most concern to supporters of the US-led regional order

Freedom of navigation under international law

Excessive maritime claims can be split into two broad categories: those inconsistent with the legal divisions of the ocean and related airspace, and illegal restrictions on navigation and overflight rights (Freund

2017). In the latter category, contestation over military navigation and overflight tends to concern where warships are permitted to travel under international law and the types of military activities that may be undertaken in maritime zones, particularly in the EEZs of coastal states. Under international law, there are three types of navigational regimes:

1. Innocent passage
2. Transit passage through international straits
3. Archipelagic sea lanes (ASL) passage through archipelagic waters

Each navigational regime contains specific rules about transit and coastal-state authority. According to Article 17 of UNCLOS, “ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea,” that is, within 12 nautical miles of a coastal states’ baseline. Passage refers to continuous and expeditious (“ordinary”) navigation and is innocent if it does not prejudice the “peace, good order, or security of the coastal State,” which precludes the threat or use of force, surveillance, fishing, and an array of other activities detrimental to the coastal state (Articles 18 and 19). Innocent passage requires these vessels to be travelling in a continuous and expeditious manner, avoiding stopping or anchoring except in *force majeure* circumstances.

A key site of contest is whether warships have the right to innocent passage *without prior notification*, as types of vessels are not specified in UNCLOS. The US interprets “innocent passage” to include warships without prior notification, but this interpretation is not universally shared. Some legal scholars view military freedom of navigation as subject to “creeping coastal state jurisdiction” as states assert that foreign warships require prior authorization to transit through their territorial seas, constituting a “territorialization” of the EEZ (Schofield, Lee, and Kwon 2013, 1; Townsend-Gault 2013). This jurisdictional creep occurs when states enact domestic legislation that either undermines international law or seeks to supersede it (Oxman 2016; Roach and Smith 2012, 161-180). China’s 1992 “Law on the Territorial Sea” states that “foreign ships for military purposes shall be subject to approval by the Government

of the People's Republic of China for entering the territorial sea of the People's Republic of China." Beijing requires that a foreign state "obtain advance approval from or give prior notification... for the passage of its warships through the territorial sea" (People's Republic of China 2006). Yet Beijing is not consistent on the issue of innocent passage. For example, in 2015, five Chinese Navy ships transited within 12 nautical miles of the Aleutian Islands off the coast of Alaska, classified as within US territorial waters. Beijing did not seek prior permission, however, as per its own demands in its own claimed territorial sea in the South China Sea. The flotilla did not provoke a political response from Washington because it conformed to US interpretation of international law (Morton 2016, 929). The Chinese navy also exercised innocent passage in the English Channel in 2017, with no protest from either Britain or France.

Another point of difference between the US and China is that the US believes international law provides all nations expansive rights to conduct military activities at sea, whereas China argues that US military activities infringe on Chinese sovereignty in the South China Sea. UNCLOS does not explicitly address which, if any, military activities are permissible within coastal states' EEZs and which "high sea freedoms" may be exercised in EEZs. Under Article 87, UNCLOS provides that high sea freedoms "shall be exercised by all States with *due regard* for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area" (emphasis added). The relationship between the high seas and EEZs was left ambiguous, and the phrase "due regard" opened the space for political contests between the territorial and maritime orders: that is, between states who wish to be able to sail, fly, and operate in the broadest space and those that seek greater sovereign control over the waters. Beijing is also not consistent with the rules around military activities and surveillance in EEZs. In 2017 and 2018,

***The inconsistency emerges
from a belief that the South
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international law***

the Chinese navy sent a Type 815 Axillary General Intelligence vessel designed for surveillance and reconnaissance to observe Talisman Sabre in Australia's EEZ (Greene 2019). The inconsistency emerges from a belief that the South China Sea is subject to Chinese domestic legislation rather than international law. The US clearly views efforts to restrict innocent passage and military activities in the South China Sea as a derogation of principles of freedom of navigation under international law. The question is whether the US regional allies and partners share this interpretation and how this affects their attitudes to China's assertions in the South China Sea.

Navigational regimes and state practice

Australia and Japan hold similar interpretations to the US of military freedom of navigation. Australian declaratory policy argues that "it is vital to Australian interests that the guarantees in the 1982 United Nations Convention on the Law of the Sea (LOSC) providing for freedom of navigation are retained, upheld, and respected by all States." Australia's concern for freedom of navigation particularly relates to the chokepoints and archipelagic sea lanes to its north. As Kaye (2008, 2) argues, "It is in Australia's interest to support the existing international legal regime, which has proven so effective in keeping international sea lanes open and flowing." However, Australia's stance on military freedom of navigation also reflects its reliance on the US alliance and

the deterrence capabilities it provides as an offshore balancer in the region. Wirth (2019), for example, argues that Australia's interest in freedom of navigation is intimately tied with alliance politics and sustained advocacy for US-led regional order. From the Australian viewpoint, any efforts that restrict the capacities of the US Navy to

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Despite this state interest, Australia has sought to restrict freedom of navigation in its coastal areas when it has suited its security interests and in ways that have been considered excessive by the US. Following the September 11 terrorist attacks, the Howard government announced a controversial “Maritime Identification Zone” extending up to 1,000 nautical miles from Australia’s coastline, in which the government would institute a “surveillance or interception zone” that would run into the maritime zones of its neighbors (Rothwell and Moore 2009, 43). The proposal raised compliance issues with the Law of the Sea, and despite adjusting the policy, the replacement Australian Maritime Identification System was also problematic in terms of legal consistency (Klein 2006). Australia’s compulsory pilotage system introduced in 2005 over the Torres Strait also raised concerns about consistency with the Law of the Sea (Rothwell and Moore 2009; Bateman and White 2009). Other examples include “the declaration of prohibited anchorage areas around undersea cables in the EEZ, the introduction of mandatory ship reporting in parts of the EEZ adjacent to the Great Barrier Reef, and the declaration of the entire Australian EEZ as a submarine exercise area” (Bateman 2015, 62). Essentially, these policies reflect attempts by Australia’s government to extend its security jurisdiction seaward, calling into question Australia’s own commitment to the maritime “rules-based order.”

Japan interprets freedom-of-navigation provisions similarly to Australia and the US, with freedom of navigation and overflight a central element to its Free and Open Indo-Pacific discourses. Japan’s attitude to the South China Sea and freedom of navigation is tied to broader strategic concerns about the ongoing US commitment and presence in Asia. Sato (2016, 283), for instance, argues that Japan had been less concerned than the US about China’s claims and operations in the South China Sea, but it supports principles of freedom of navigation and US operational assertions as it desires the US to maintain its military presence in the region. As with many other states, China’s activities have compelled Tokyo to clarify its position on the South China Sea, and the Japanese Ministry of Defense’s (2019) declaratory policy has focused on violations of UNCLOS and China’s unilateral attempts to alter the *status quo* by force. Japan advocates that principles of freedom of navigation “should be

applied to both commercial and military vessels, prohibiting coastal states from requiring prior notification or authorization for foreign warships to exercise innocent passage,... [that] military vessels have a right to innocent passage, and that coastal states' security is covered under Articles 19 and 25 of UNCLOS" (RSIS 2017, 11). For Japan, the issue of Beijing's capacity to restrict freedom of navigation in the South China Sea is also linked to its interests in the East China Sea. As the US has become more outspoken on issues of freedom of navigation, it has become "in Japan's interest to be seen as supporting the same principles in order to sustain US support for Japan in the East China Sea" (Drifte 2016, 5; discussed further below).

However, like Australia, Japan's interpretation of freedom-of-navigation provisions deviates from UNCLOS when it has suited its security interests. While Japan generally claims a 12-nautical-mile territorial sea, it claims a 3-nautical-mile territorial sea through its straits that are less than 12 nautical miles in width, leaving a "high seas corridor with no right of transit passage through the straits" (Bateman 2020, 32). Odell's (2020) research has demonstrated how the Japanese government is strategically ambiguous in its position toward military exercises in its EEZ and has at times considered imposing restrictions on foreign warships. She finds a number of areas where Japan's interpretation has tended towards a more expansive conception of coastal-state jurisdiction, including its interpretation of navigation through territorial straits. Japan has also "taken aggressive action against the so-called North Korean 'spy ships' in its EEZ despite these vessels theoretically having high sea freedoms of navigation" (Bateman 2020, 77–78).

Across the international community, states interpret innocent passage differently and claim certain security rights in their territorial seas including requiring prior notification and/or authorization. Others require prior consent to military exercises within their EEZs and continental shelves. While UNCLOS does not "permit a coastal State from excluding warships from its waters for failure to notify the coastal State or seek its authorization," this has not prevented states from asserting what Kaye (2008, 6–8) describes as "security jurisdiction." He points out that states seeking restrictions make up just over 50 percent of the international community, which raises questions as to "whether such behavior might serve in the long term

to undermine the efficacy of the LOSC [United Nations Convention on the Law of the Sea] in this or other areas.” More than 60 states have claimed some sort of security jurisdiction through demands for notification or authorization of different types, including a number of South China Sea claimant states such as Vietnam, Malaysia, and Indonesia (Kaye 2008, 8). One workshop in Southeast Asia noted that “the phrase ‘Freedom of Navigation’ has become a sensitive topic for some ASEAN states because they perceived user states as using the phrase frequently to push for extensive navigational rights” (RSIS 2017, 6). “Like-minded” regional non-claimant states India and Korea also stress the importance of freedom of navigation in their foreign policy discourses. Yet, as Table 1 demonstrates, they hold different interpretations of innocent passage, and in India’s case, what military freedoms exist in EEZs. Both India and Korea request prior notification of warships transiting through their territorial sea.

Table 1. Military freedom of navigation claims: Innocent passage and military exercises in EEZs (US Navy 2019)

State	Military Freedom of Navigation Claims
United States	Interprets innocent passage to includes warships—no prior notification necessary
China	<p><i>Claims not recognized by the US:</i></p> <ul style="list-style-type: none"> • Requires prior permission for innocent passage of foreign military ships. Requires prior permission or an international agreement for foreign aircraft to fly over the territorial sea • Claims authority to exercise powers within its contiguous zone to prevent or punish infringement of its security, customs, fiscal, or sanitary laws, regulations, or entry-exit control within its land territories, internal waters, or territorial sea • Claims that all surveying and mapping activities by foreign entities in the territorial air, land, and waters, as well as other sea areas under PRC jurisdiction, require approval • Announced the establishment of an Air Defense Identification Zone (ADIZ) in the East China Sea
Australia	Interprets innocent passage to includes warships—no prior notification necessary

State	Military Freedom of Navigation Claims
Japan	Interprets innocent passage to include warships—no prior notification necessary
South Korea	<i>Claims not recognized by the US:</i> <ul style="list-style-type: none"> • Requires three-day prior notification for foreign warships or non-commercial government vessels
India	<i>Claims not recognized by the US:</i> <ul style="list-style-type: none"> • Requires foreign warships to provide notice before entering territorial sea • Enables government to declare waters as historic • Claims authority over contiguous zone for security purposes • Requires 24-hour prior notice from vessels entering EEZ with cargoes “including dangerous goods and chemicals, oil, noxious liquid, harmful substances, and radioactive material”

Seoul’s official position has largely consisted of vague statements supporting freedom of navigation and the peaceful resolution of disputes through dialogue, and it has attempted to remain neutral on the South China Sea in its public diplomacy. As Jaehyon (2016, 36) notes, Korea “has long been unclear on its stand regarding the territorial disputes in the South China Sea.” As the South China Sea disputes escalated, Korean leaders were forced to clarify their position: At the 2015 East Asia Summit, then-President Park Geun-hye stated that disputes must be resolved in accordance with international law and specifically named China, arguing that it must “guarantee the right of free navigation and flight” (Moon and Boo 2017, 14). However, Korea requires a three-day prior notification for foreign

warships or non-commercial government vessels, and in 2014 and 2016, the US conducted operational assertions to protest this requirement (see Appendix Two; US Navy 2019). Seoul’s position on innocent passage is closer to Beijing’s interpretation, although China requires “prior authorization.”

Seoul's position on innocent passage is closer to Beijing's interpretation, although China requires prior authorization

India has also increased its public advocacy around freedom of navigation, “obliquely chastising China for its ‘eighteenth century

expansionist' behavior and 'territorialization' of the Asian maritime commons" (Rehman 2017, 2). At the Shangri-La Dialogue in 2016, the Indian Defense Minister highlighted India's concerns about freedom of navigation in the South China Sea. Yet, India's position on military freedom of navigation in its EEZ is closer to China's. During UNCLOS negotiations, it contested certain rights of foreign warships in its territorial waters and EEZ. Upon ratification, India made a declaration that it understands that the convention does "not authorize other states to carry out in the EEZ and on the continental shelf military exercises or maneuvers, in particular those including the use of weapons or explosions, without the consent of the coastal state" (UN Treaty Collection 2020). There is a tension between India's position about freedom of navigation in the South China Sea and its own efforts to extend domestic legislation and external control within and beyond its territorial waters. While India's maritime security strategy emphasizes "the importance of maintaining freedom of navigation and strengthening the international legal regime at sea, particularly UNCLOS, for all-round benefit," it also stipulates India's own "freedom to use the seas for our national purposes, under all circumstances" (Indian Navy 2015, 6). India, along with China, has made efforts to restrict military freedom of navigation in its EEZ and claims a security jurisdiction within the contiguous zone (24 nautical miles from baseline). It demands prior consent for military exercises and maneuvers in its EEZ, which is in breach of international law. India also "requires 24-hour prior notice from vessels entering EEZ with cargoes including dangerous goods and chemicals, oil, noxious liquid and harmful substances, and radioactive material" (US Navy 2019).

This "creeping jurisdiction" reflects India's desire to exert greater sovereign authority over the maritime space than the US views as acceptable under international law. The US conducted operational assertions against India's requirement for authorization of military exercises or maneuvers in its EEZ in 1999, 2008–2013, and 2015–2017 (see Appendix Two; US Navy 2019). It also conducted FONOPs against India's claim that warships need prior permission to enter its territorial sea in 1995, 1996, 1997, 1999, 2001, 2007, and 2011 and against its claims to authority over its contiguous zone for security purposes in 2001 (see Appendix Two; US Navy 2019). While

India views China's actions in the South China Sea as an aggression of sorts—and one that could encourage similar assertions in the Indian Ocean—its interpretation of military freedom of navigation is different from that of the US and other “like-minded” states.

Defending maritime rules: Like-minded states and the “FONOP dilemma”

Interpretative differences have implications for how regional “like-minded” states can align their strategic interests and cooperate to defend the maritime “rules-based order” in the South China Sea. Since 1979, the US has sought to defend its vision of freedom of navigation through its Freedom of Navigation Program. This is a US-specific program with legal, diplomatic, and operational stages that challenge different types of excessive maritime claims and demonstrate a commitment to protecting its maritime freedoms. It is a global program that targets excessive maritime claims from allies and foes alike and includes the use of bilateral diplomacy, diplomatic protests, and operational assertions known as FONOPs. Protests may be made against a range of “excessive maritime claims”: claims that impose restrictions on innocent passage that do not accord with UNCLOS; impermissible EEZ and airspace use limitations; improperly drawn baselines or archipelagic claims; and excessive historic waters claims (see Appendix One; Freund 2017).

In the early period after UNCLOS came into operation, from 1995 to 2006, China was only subject to FONOPs in 1996 and 2000 (US Department of Defense 2020). From 2007 onward, operational assertions have been made against China every year. In the South China Sea, the US has increased FONOPs in response to Beijing's increasingly assertive behavior. The Trump administration has conducted FONOPs with greater frequency and regularity than previous administrations, although it is important to note that the US also regularly conducts operational assertions targeted at excessive claims made by Vietnam, Malaysia, and Taiwan (see Appendix One). FONOPs are widely perceived in US foreign-policy circles as a tactic, not a strategy, and not alone capable of rolling back China's assertions in the South China Sea. Nevertheless, they have been the primary instrument of the Trump administration's defense of the maritime rule-based order in the South China Sea, and thus they

merit consideration of what US allies and partners think about these operations and their own willingness to participate.

For its part, China objects to what it sees as incursions into its territorial waters. In its view, the US FONOPs violate Chinese sovereignty and international law. Additionally, China's Foreign Ministry has argued that US FONOPs "deliberately stir up troubles and create tensions" and threaten China's sovereignty and security in the South China Sea (Roy 2018; Blanchard 2018). These discourses attempt to cast the US as a destabilizing presence in the South China Sea: FONOPs are presented as US bullying in the region, exploiting broader narratives about the neo-colonial aspects of US policies and practices in Asia and the Western dominance of the liberal "rules-based order." While Washington argues that FONOPs are a legal protest and not designed as a show of force, some Chinese legal experts present FONOPs as the US imposing its "maritime hegemony"

over navigation (Zhang 2010). In other words, the US is presented as protecting its own national interests at the expense of the regional community, an argument that encompasses diverse legal interpretations of the

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freedoms of navies in maritime zones. In the context of the binary between the free seas and the exercise of sovereign authority, China's narrative is deployed as a way of influencing other states to side with its territorial conceptualization of sea space.

Part of the problem for the US is that FONOPs remain a unilateral assertion of its interpretation of international law. Consequently, some experts have called upon other states to join the US in asserting their legal rights in a form of collective approbation of China's actions (Ku 2018). Odom, for example, argues that "the United States and other like-minded States should conduct FONOPs and other presence operations in the South China Sea on a routine basis, in order to preserve the freedom of the seas that is guaranteed to all nations under international law" (Odom 2019, 171). The rationale for such actions is based on the collective legitimacy of the message and regional credibility. Indeed, the US has encouraged allies and

partners to join its Freedom of Navigation Program (see Wroe 2016). In February 2019, Commander of the Indo-Pacific Command Admiral Phil Davidson testified that the US “will continue the recent pace of freedom-of-navigation operations in the South China Sea and will include allies and partners in future missions” (Werner 2019).

This provides a potentially important role for “like-minded” allies and partners in challenging excessive maritime claims in the South China Sea and supporting UNCLOS-led maritime “rules-based order.” Problematically though, public and scholarly discussions often confuse US-style FONOPs and the freedom-of-navigation exercises of other states, which has led to assertions that regional non-claimants other than the US have conducted FONOPs. The *US Naval Institute News*, for instance, posited that “[a]llies and partners in the region notice when US Navy ships conduct FONOPS. Other nations are now following the US lead and performing their own FONOPS” (Werner 2019). The UK’s amphibious ship *Albion* conducted a FONOP-style operation near the Paracel Islands in 2018 on its way to Vietnam from Japan, most likely to protest China’s excessive use of archipelagic baselines around the group. China responded by dispatching a warship and helicopters and warning London that its actions could threaten a possible trade deal (Kelly 2018). Reports have also suggested that France may have conducted a FONOP in the South China Sea, although this has not been confirmed. At this stage, however, Asian partners have appeared unwilling to conduct unilateral, surface FONOP-style transits.

Distinguishing between FONOPs and freedom-of-navigation exercises is not mere pedantry: Engagement with such activities reveals the extent to which regional non-claimant states will defend their interpretation of maritime rules, such as by conducting innocent passage or challenging illegitimate territorial sea claims. Conducting FONOPs would also signal a change in foreign and defense policy for these “like-minded” states, which could precipitate pushback from Beijing. In contrast, routine “business as usual” operations are considered by some policymakers as the best way to uphold freedom-of-navigation norms without further destabilizing of the region. Some officials in the Trump Administration have recognized the reluctance of regional allies and partners to conduct their own surface FONOPs. Former Assistant Secretary of Defence for Asian and Pacific Affairs

Randall Schriver welcomed states stepping up naval activities in the South China Sea but argued that “Australia and other US allies could exert even more pressure on Beijing if they further lifted their presence in the South China Sea, at a time when the US had stepped up its own naval patrols to challenge China’s claims to disputed islands.... If not freedom-of-navigation operations... [they might just participate in] joint patrols, presence operations” (Stewart 2018).

For regional states, the balance between economic and security priorities is an important one for determining whether to conduct FONOPs. While Australia and Japan are strongly aligned with the US in security terms, and both support the US conducting FONOPs in the South China Sea, they remain risk averse when it comes to conducting surface FONOPs of their own, which have become narrowly interpreted in public discourse as transits within 12 nautical miles of a Chinese-claimed feature that would be specifically employed to challenge China’s excessive maritime claims. While Sino-Japanese relations remain strained, its trade relationship has expanded, and China is a top trading partner, absorbing nearly 20 percent of Japanese exports, a mere 0.5 percent more than the next country, the US. Prime Minister Abe has argued that “China is an indispensable country for the Japanese economy to keep growing. We need to use some wisdom so that political problems will not develop and affect economic issues” (Ivanovitch 2018). Australia’s rules-based order rhetoric has targeted China’s actions in the South China Sea and—along with foreign-interference legislation and the banning of the Chinese telecommunications company Huawei—has contributed to frosty relations with Beijing. Public discourse on the South China

Sea in Australia has become totemic of concerns about Chinese interference within Australia’s parliamentary democracy. Politicians that have expressed support for a more “neutral” position on the South China Sea have attracted criticism that they

***Australia's hesitance to
push China too far on the
South China Sea disputes
reflects trade dependence***

are subject to undue influence from Beijing (Martin 2019). Although the US remains the top provider of foreign direct investment to

Australia, more than 30 percent of Australia's exports flow to China, and Beijing has significant economic levers in commodities, tertiary education, and tourism. Australia's hesitance to push China too far on the South China Sea disputes reflects trade dependence. While Australia's security behavior in other areas—such as its “Pacific step-up” policies—reinforce the importance of the US alliance, it has displayed a reluctance to fully commit to a confrontational approach in its foreign policy discourses, including in its approach to FONOPs. Leaders continue to emphasize Australia's “comprehensive strategic partnership” with China and the idea that Australia does not have to “choose sides” (White 2017).

Publicly, President Trump has declared that the US would “love to have Australia involved” in freedom-of-navigation exercises in the South China Sea. Officially, Australia respects the rights of other states to conduct these operations and reserves the right to employ them under international law. An area of confusion is the difference between a surface FONOP and an overflight exercise in which maritime patrol aircraft enter within 12 nautical miles of Chinese claimed features in airspace. Australia, for instance, has been willing to conduct the latter but not the former. The Royal Australian Airforce (RAAF) has conducted its Operation Gateway program since the early 1980s. This has included freedom-of-navigation overflight patrols in the South China Sea, which have occasionally invoked the ire of the Chinese military. Yet Australia has no formal global FONOP program to challenge excessive maritime claims through surface operational assertions. Leaders have made it clear that Australia engages in a different type of program for supporting freedom of navigation than the US. That framing seeks to deflect US pressure without outright refusing to conduct FONOPs, while also maintaining their use as a future escalatory option. Australia's reluctance stems from an unwillingness to risk regional stability or economic relations with China. Former Australian Minister for Foreign Affairs Julie Bishop argued that Australian FONOPs could escalate tensions in the South China Sea, while former Chief of Defense Angus Houston suggested that they would draw a sharp rebuke from Beijing (Riordan 2016; Hutchens 2017). There are also operational risks: In April 2019, for instance, three Royal Australian ships transiting the South China Sea on their way to Vietnam were reportedly harassed by Chinese navy

vessels in a routine presence operation (Graham 2019). This reluctance to move beyond the *status quo* of operational presence in the South China Sea ultimately reflects Australia's position as a middle power wedged between two great powers. Ultimately, if Australia does see a right under UNCLOS to sail its warships within 12 nautical miles of Chinese-held features, it is not a right that it has been keen to defend operationally. If the balance of strategic, economic, and legal interests shifts, then Australia may be prepared to alter the calculation and take greater risks in the South China Sea, but so far, Canberra has pursued complementary activities rather than replicating the US model of challenging excessive maritime claims.

Despite not conducting FONOPs itself, Japan strongly supports the right of the US to conduct them (Japan Ministry of Defense 2018, 193). In 2015, Tetsuo Kotani (2015) argued that it was unlikely that the Japanese Maritime Self-Defense Force would join freedom-of-navigation operations inside 12 nautical miles of Chinese-occupied features “until the

Japan does not conduct FONOPs itself, but strongly supports the right of the US to conduct them

Japanese government is sure about their legal status.” While the Arbitral Tribunal initiated under UNCLOS clarified the nature of the features, at the time of writing this has not opened the way for unilateral or joint FONOPs, including by Japan. In 2016, Chinese Ministry of Defense officials sought to discourage the Japanese Maritime Self-Defense Force from joining US-led FONOPs, stating: “[W]e are firmly opposed to Japanese attempts to send its self-defense forces to join the so-called freedom-of-navigation operations by the US in the South China Sea” (Panda 2016). There have been discussions about the Japanese conducting air patrols similar to Australia's Operation Gateway, although these have yet to occur. While Operation Gateway runs out of the Butterworth base in Malaysia and is linked to Australia's involvement in the Five Power Defense Arrangements (FPDA), the South China Sea is geographically distant from Japan's military bases, posing operational limitations.

Japan's hesitance to conduct FONOPS is at least partly linked to the fact that it views the East China Sea, the Sea of Japan, and the

open seas of the Western Pacific as its primary domain of maritime concern. Koga (2018, 21–22) argues that “theoretically speaking, Japan’s reinterpretation of Article 9 of the Constitution in July 2014 enabled Japan to exercise a collective self-defense right, and Japan now has an option to dispatch the Maritime Self-Defense Force to protect its allies or partners in the South China Sea.” Yet, Japan’s naval assets are concentrated in the East China Sea which makes the prospect of deeper involvement in the South China Sea limited “because the Japanese military is already overstretched with its patrols in the East China Sea” (Drifte 2016, 22). Of particular concern for Japan was China’s declaration of an Air Defence Identification Zone (ADIZ) over the East China Sea in 2013. This reflects both the operational and geographical limitations that have affected Japan’s choices around whether to employ FONOPs in the South China Sea.

In contrast with Australia and Japan, India and Korea present somewhat qualified or muted positions on FONOPs. This is not overly surprising given that they interpret freedom of navigation differently. Both states tend to offer support for freedom of navigation as a general principal, rather than conducting FONOPs, and have themselves been the subject of US FONOPs (as has Japan). Singh (2016, 19) argues that “[v]iewed through an Indian prism, unannounced forays through territorial waters and EEZs under the rubric of “innocent passage” or “freedom of navigation” are a problematic proposition.” India’s concern with the more expansive view of the rights of warships is that it could allow China to increase its presence in the Indian Ocean. While the Indian Government can see China’s actions in the South China Sea as an aggression of sorts, its view of military freedom

The South China Sea is ‘yet to be updated as a full priority in Indian maritime strategy’

of navigation is different from that of the US. Compared with other internal and external security issues facing India, the South China Sea is “yet to be updated as a full priority in the Indian maritime strategy. This is also an important likely reason

why India has been so far hesitant to participate in joint FONOPs in the [South China Sea]” (Granados 2018). The South China Sea has instead been identified by the Indian Navy as a secondary area

of interest, along with the Southern Ocean, the East China Sea, the Western Pacific, and the Mediterranean Sea (Indian Navy 2015, 32). Yet, at the same time, Singh (2016, 17) suggests that Indian policymakers are “acutely” aware that the South China Sea is a “test case for international maritime law.”

Korea is in an awkward position on FONOPs. Seoul offered “tepid responses” to the FONOP conducted by USS Lassen near Subi Reef in October 2015 (Easley and Park 2018, 250). Like Australia, Korea is a middle-sized power with a significant trading relationship with China. China is Korea’s biggest partner in terms of imports and exports (Republic of Korea Ministry of Foreign Affairs 2018, 63–64). Korea’s economy relies on exports, which account for more than one-half of the country’s gross domestic product (GDP), and a quarter of Korea’s exports flow to China. Seoul has also suffered economic retaliation from China after its agreement with Washington to deploy the anti-ballistic missile Terminal High-Altitude Area Defense (THAAD) system. Beijing’s so-called “doghouse diplomacy” included low-level sanctions that impacted the Korean economy: Hyundai’s sales dropped 64 percent, Lotte’s supermarket sales fell 95 percent, and the banning of Chinese tour groups to Korea resulted in an estimated revenue loss of US\$15.6 billion in 2017 (Volodzko 2017). To placate China’s THAAD concerns, President Moon presented his Chinese counterpart Xi Jinping with a “three no’s” policy, promising no further deployment of THAAD, no participation in US missile-defense networks, and no trilateral alliance with the US and Japan. China’s actions reinforced to the Moon administration that its economy was too dependent upon Chinese customers and that Korea needed to protect its economy by diversifying its economic and diplomatic profile. In November 2017, the Moon government released its New Southern Policy as part of this effort, targeting ASEAN states and India in particular (Republic of Korean Ministry of Foreign Affairs 2018, 78–90).

While the US has encouraged Korea to “speak out” on issues related to the South China Sea, Korean leaders have avoided making strong statements on the issue. In 2015, for example, President Park stated that “China is Korea’s largest trading partner, and China has a huge role to play in upholding peace and stability on the Korean Peninsula.... As for the South China Sea, the security and freedom

of navigation are very important for Korea. We are watching with concern...[and] hope that the situation does not deteriorate” (Easley and Park 2018, 250). Due to geographical priorities and operational constraints, Korea is also reluctant to participate in FONOPs, as the country contends with more significant issues on the Korean peninsula, such as North Korea and efforts at denuclearization, which include a role for China. Korea has largely attempted to avoid the South China Sea disputes: In the maritime arena, maritime border disputes with China in the East China Sea and the Yellow Sea are bigger priorities, as well as a decades-long battle over ownership of the submerged Ieodo-Suyan (Socotra) rock, which both Korea and China consider to be lying within their respective EEZs (Fox 2019). In 2018, a Korean warship entered what Beijing considers its territorial waters without permission. Korean officials emphasized that the warship was not conducting a FONOP, but was rather taking refuge from a typhoon and did not have time to seek permission from Beijing. The Koreans, however, did not confirm whether or not they considered the waters to be part of China’s territorial sea (South Korean warship sails by disputed South China Sea islands 2018).

Some in the Trump Administration have expressed frustration that “like-minded” states have not committed to FONOPs. The US Ambassador to Australia Arthur Culverhouse, Jr., for example, urged Canberra to find its “backbone” on freedom-of-navigation operations (Coorey 2019). While “like-minded states” have thus far refused to engage in FONOPs, they have contributed to maritime order in the South China Sea in other ways, including through operational presence, capacity building, and improving interoperability with Southeast Asian states (discussed further below).

Defending the Maritime Order

In the South China Sea disputes, there are two dominant politico-legal orders at play. The first is a territorial order concerned with sovereignty, with its own set of rules about territorial acquisition and ownership of land, such as islands and rocks. Determination of sovereignty may include historical and empirical facts, such as which state discovered the territory or whether it can demonstrate “effective occupation.”

In international relations, some scholars refer to sovereignty as the “constitution of international society” as it provides the foundational norms that constitute the international community of sovereign states (Philpott 2002; James 1986). The other relevant legal order relates to the oceans and entitlements of states to the use of seas and rights to maritime resources, led primarily by UNCLOS, the so-called Constitution for the Oceans (Churchill 2015, 27). The South China Sea disputes are “mixed”: They involve questions of ownership and sovereignty as well as maritime jurisdiction and appropriate uses of the seas. This has led claimant states to employ a range of strategies to defend their maritime and territorial claims, including historical justification, artificial island building, and facilitating effective occupation.

UNCLOS provides the framework for determining rights to maritime resources and use of the seas and for resolving disputes that inevitably arise between states that wish to stake their claims to often-valuable resources. As such, it is designed to provide maritime order, namely: the presence of relatively stable patterns of behavior of states in oceanic affairs; clear and coherent rules governing the use of the seas and entitlements to maritime resources; and effective mechanisms for maritime dispute resolution and conflict avoidance. The above section highlighted some of the problems with “clear and coherent rules” in governing maritime space, as even “like-minded” states have differing interpretations of what freedom of navigation does (and does not) entail.

Nevertheless, UNCLOS has played an important role in establishing maritime order since it came into effect in 1994, as it provides for a range of processes and institutions for solving seemingly intractable problems between states in maritime affairs. The ongoing South China Sea disputes,

however, have highlighted the limits of international law in settling maritime disputes. This section considers non-claimant state responses to the use of international maritime-order mechanisms in the South China Sea, such as the 2016 South China Sea Arbitral Tribunal

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maritime disputes***

instituted under UNCLOS and the implications that the Tribunal's ruling potentially holds for seemingly excessive maritime claims. It also considers how the non-claimant state have contributed to maritime order by participating in (or avoiding) formal resolution processes in their own disputes.

In 2013, the Philippines' Aquino government initiated international arbitral proceedings under Annex VII of UNCLOS against China over certain disputes in the South China Sea. Manila's decision to proceed with dispute-resolution processes was a consequence of Beijing's aggressiveness, the US lack of commitment to its treaty obligations, and concerns about ASEAN's capacities to defend the Philippines' interests (Roberts 2018, 195). Beijing's assertion of control over the Scarborough Shoal in 2012, located just 124 nautical miles off of the main island of Luzon, was a critical moment in the Philippines' calculations. In the same year, ASEAN failed to produce a joint communique under Cambodia's chairmanship due to disagreements among the Southeast Asian states about how to handle China's increasing confidence in pursuing its maritime interests. Doubts had also arisen in Manila about whether Article Five of the Mutual Defense Treaty with the US covered territorial disputes arising in the South China Sea. In response, China declared it did "not accept the arbitration initiated by the Philippines" and refused to participate in the proceedings. In a white paper, China argued that at the heart of maritime disputes were the contested claims of sovereign ownership of the various land features in the Spratly island chain and that under the principle that "land dominates the sea," issues of sovereignty must first be resolved before maritime boundaries may be delimited. The Arbitral Tribunal ruled that it could hear seven of the 15 submissions, declaring that it would not "rule on any question of sovereignty over land territory and would not delimit any maritime boundary between the Parties."

One area of disagreement was the classification of land features—whether they are islands, rocks, or low-lying elevations—which has implications for the maritime entitlements that may flow from their possession. Article 121 of UNCLOS stipulates that islands generate a territorial sea and *potentially* a 200-nautical-mile EEZ and continental shelf. Rocks are only entitled to a 12-nautical-mile territorial sea, and artificial high-tide elevations and low-lying formations such as

reefs are entitled only to a maximum 500-meter safety zone. One of the consequences of UNCLOS was that it encouraged states to seek sovereignty over land features that were previously considered materially insignificant in order to access the maritime rights they bestowed. In 2016, the Arbitral Tribunal issued three key findings:

1. Beijing's claims to "historic rights" within the nine-dash line were inconsistent with international law.
2. None of the features subject to the arbitration could be legally classified as islands.
3. The features had no entitlements to an EEZ or continental shelf (Roberts 2018).

The tribunal found that none of the features in the Spratly Islands was capable of generating an EEZ or continental shelf, and therefore there was no jurisdictional obstacle to the court ruling on disputes between the Philippines and China. Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North) were found to be rocks incapable of sustaining human habitation or economic life on their own and therefore unable to generate entitlements to an EEZ or continental shelf under Article 121(3) of UNCLOS. Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef, and Second Thomas Shoal were found to be low-tide formations (Permanent Court of Arbitration 2016, 174). The Tribunal found that "notwithstanding the use of the term 'land' in the physical description of a low-tide elevation, such low-tide elevations do not form part of the land territory of a State in the legal sense. Rather they form part of the submerged landmass of the State and fall within the legal regimes for the territorial sea or continental shelf" (Permanent Court of Arbitration 2016, 132). China's claim to Mischief Reef, therefore, generated no EEZ or continental shelf; rather, Mischief Reef was found to be part of the Philippines' EEZ and continental shelf (Permanent Court of Arbitration 2016, 41).

Responses to the 2016 UNCLOS Arbitral Tribunal

Both the use of arbitration proceedings by the Philippines and the ruling itself were subject to some controversy in the international

community and among international lawyers, As expected, China rejected the ruling, signifying China's new confidence that it could "shape the global institutions it once only grudgingly endured" (Kardon 2018). Yet, the responses among "like-minded" regional non-claimant states were also mixed. Australia, the US, and Japan (along with New Zealand) belonged to a group of eight countries that explicitly called for the ruling to be respected (Storey 2016). In July 2016, Australian Minister for Foreign Affairs Julie Bishop announced that Australia would support the rights of all countries that resolve disputes peacefully following international law, including UNCLOS, and that it would continue to exercise its rights related to the freedom of overflight and the freedom of navigation pursuant to international law. At a high-level 2019 trilateral meeting, leaders of Japan, the US, and Australia "underscored the importance of the July 2016 Philippines-China Arbitral Tribunal's award" and noted that the Tribunal's award was final and legally binding on both states.

In 2013, India's General V.K. Singh expressed support for "the Philippines' decision to seek international arbitration to settle its dispute with China" (Chaturvedy 2015, 371). Not naming China, he argued that "[a]s a State Party to UNCLOS, India urges all parties to show utmost respect for UNCLOS, which establishes the international legal order of the seas and oceans" (Jawli 2016, 90). Following the arbitral ruling, however, India released a statement that "*noted* the Award of the Arbitral Tribunal [emphasis added]" (Indian Ministry of External Affairs 2016). In contrast to Australia and Japan, India stopped short of calling for compliance with the award, indicating a weaker position on the arbitral award than the other states (Asia Maritime Transparency Initiative 2016). *The China Daily*—a state-owned newspaper—printed a map on its front page that it claimed demonstrated the support of more than 70 states for China's position on the issue of whether South China Sea disputes should be resolved through arbitration or negotiations. India was represented as one of the states in China's camp, despite its neutral statement (Kim 2016).

Similarly, Korea's Ministry of Foreign Affairs (2016) took "*note* of the arbitration award issued on July 12, and hopes, following the award, that the South China Sea disputes will be resolved through peaceful and creative diplomatic efforts [emphasis added]."

Its statement also emphasized the importance of resolving disputes according to “internationally established norms of conduct.” This cautious response was partly due to the need to manage relations between the US and China: It was reported that Seoul turned down an “unofficial” request from the US to express its stance before the Arbitral Tribunal handed down a verdict, reflecting its desire to avoid Beijing’s ire (Lee 2016). These diplomatic positions reveal that regional partners of the US held different responses to the use of arbitration in the case of the South China Sea. They also highlight differing conceptions of the use of dispute-resolution mechanisms in establishing maritime order. Such a mixed response from “rules-preservationist” states, and the international community more broadly, suppressed the mobilization of pressure that may have helped compel China to respect the arbitral ruling. The fact that the US has been unwilling to enforce the ruling and that the Philippines under the Duterte regime since 2016 has failed to prosecute the ruling (preferring instead to pursue bilateral joint development negotiations) has hindered the contribution of the Arbitral Tribunal to upholding the maritime “rules-based order” in the South China Sea.

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These dynamics around the Arbitral Tribunal’s award and China’s practice of non-recognition carry important implications for the regional non-claimant states in this study. China’s response demonstrates the ability of bigger powers to ignore international rules and institutions when it suits their interests, undermining the capacity of maritime law to establish maritime order. For non-great powers, this flouting of recognized principles for the delimitation of maritime zones could have future effects on their own capacities to access maritime resources under international law. In this sense, the South China Sea has become a critical test for security and the capacity of international law and maritime dispute resolutions to establish and maintain maritime order. It remains uncertain whether

China approaches its entitlements to the South China Sea (the “near seas”) as a special case, based on strategic and national considerations and geographical proximity, or if its success in exerting its own vision of maritime order in the South China Sea will embolden Beijing to challenge international maritime law in other areas, such as the Indian Ocean. The second prospect—that the South China Sea is a litmus test for challenging or redesigning mechanisms of maritime order more broadly—has potential implications for regional non-claimant states seeking to protect their own legally bestowed entitlements in geographically proximate areas.

The erosion of UNCLOS-led order for establishing EEZs and continental shelf claims could have significant impacts on regional states. These states have their own maritime entitlements under UNCLOS. In the case of the island continent of Australia, its maritime entitlements are considerably disproportionate to its population size and power capabilities. These material interests compel an interest in maintaining a UNCLOS-led maritime order. Australia claims a four-million-square-mile EEZ, the third largest in the world. Yet, at the same time, some of its own maritime claims potentially undermine the order for determining maritime jurisdiction and entitlements. Maritime disputes reflect problems *within* the maritime “rules-based order,” as UNCLOS itself has encouraged excessive claim-making through the provision of generous maritime jurisdictions (Strating 2019b). For instance, 0.8 million square miles of Australia’s EEZ are derived from a potentially excessive maritime claim off the coast of the Australian Antarctic Territory (AAT). This EEZ is dubious under international law—under the principle that “land dominates the sea”—because the 1959 Antarctic Treaty froze sovereignty claims in Antarctica, meaning that the AAT is not recognized as Australia’s sovereign territory. The US protested the claim in 1995 (US Navy 2019). After Australia’s submission to the Commission on the Limits of the Continental Shelf (CLCS) in 2004, in which it requested the Commission not to take action on its maritime Antarctic claims, the US, Japan, and India responded with notes expressing the position that they do not recognize territorial sovereignty in Antarctica and therefore do not recognize marine areas or the continental shelf adjacent to Antarctica as subject to the sovereign rights of any state (CLCS 2020a).

The US Navy maritime claims manual reveals other baseline claims from “like-minded” states that it views as excessive. With certain restrictions, Law of the Sea permits the use of ‘straight baselines’—drawn between features and coastlines—to determine maritime zones. Excessive or arbitrary use of baselines may expand a state’s maritime jurisdiction by pushing the boundary outward. As an archipelagic nation, Japan is surrounded by sea and has a vast EEZ under international law—the eighth largest in the world. Like Australia, Japan relies on international rules of law to shore up its own entitlements. Yet, it also has potentially excessive maritime claims: The US views Japan’s use of straight baselines as inconsistent with international law, and the US Navy conducted FONOPs against Japan’s use of straight baselines in 1999, 2010, 2012, and 2016 (see Appendix Two; Odell 2020). The US also conducted operational assertions against Korea’s straight baseline claims in 1999, 2014, and 2016 (see Appendix Two; US Navy 2019). China’s challenges to international law raise serious tensions for regional non-claimant states regarding their own conduct: How can they continue to defend the maritime “rules-based order” while asserting their own potentially excessive maritime claims without appearing as hypocritical in their criticism of Beijing?

UNCLOS arbitral award is only final and binding on China and the Philippines, yet it nevertheless has the potential to set a high legal standard on what constitutes an island as opposed to a rock, which may have implications for the maritime claims of other regional states that may be considered “excessive.” The 2016 Arbitral Tribunal ruling provided a definition of a “rock” for the purposes of generating an EEZ, clarifying Article 121(3) under UNCLOS and setting a potentially high legal standard for what constitutes an island. Australia, for example, claims an EEZ around Heard Island and McDonald Islands in the Southern Ocean. Yet, if the standards developed by the tribunal were to apply here, these may not qualify as islands for the purposes of delimiting maritime jurisdiction. Similarly, the US declares an EEZ around Maro Reef, Palmyra Atoll, Kingman Reef, and Howland and Baker Islands in the Pacific Ocean, which would likely be considered rocks if the standard established by the arbitral award were applied. The arbitral award is not the final word on how rocks are defined in international law (Talmon 2017). Yet,

when the US presents itself as the arbiter of excessive maritime claims through its FONOP program—although it is not a signatory to UNCLOS—then questionable claims to EEZs around uninhabitable land features undermine the legitimacy of how the maritime rules-based order is defended.

In another unresolved dispute, Beijing does not recognize Japan's EEZ claim around Okinotorishima Atoll. In 2004, Chinese officials began to describe Okinotorishima—located in the southernmost point of the Japanese archipelago—as “rocks” rather than “islands.” The dispute with China does not concern territorial ownership of Okinotorishima, but rather whether Japan can legitimately claim an EEZ. Japan claims that the features are significant enough to claim a 200-nautical-mile EEZ, constituting approximately 154,500 square miles, larger than Japan's total land territory. This position is driven by its own strategic interests as well as the area's potentially valuable fisheries and mineral deposits. Some international lawyers, such as Jon Van Dyke, have agreed with China's view that Okinotorishima meets the description of an “uninhabitable” rock that “cannot sustain economic life of its own” under Article 121(3) of UNCLOS (Yoshikawa 2007, 2). Further, the features are supported by steel and concrete walls, raising concerns about whether they should be considered *artificial* islands under UNCLOS, and therefore not entitled to an EEZ.

The area has strategic significance because of its location in the Pacific Ocean between the first and second island chains. China wants rights to conduct seabed surveys to locate deep water passages between Japan, Taiwan, and the Philippines for submarine use. It conducted such oceanographic research in Japan's claimed EEZ in 2004, which was officially protested by Japan (Yoshikawa 2007, 1–2). Approval is required at least six months in advance for oceanographic research within a coastal state's EEZ, but China argued that it did not require such permission because it was conducting activities in the high seas. In early 2019, Japan again lodged an official protest when a Chinese government fishing vessel was spotted by the Japanese Coast Guard in the claimed EEZ around Okinotorishima without Tokyo's permission (Ryall 2019). The 2016 Arbitral Tribunal ruling makes Japan's case that the atoll is an island under international law even more tenuous. In response, the Foreign Minister Fumio Kishida

argued that “since 1931, when the interior ministry recognized this island (as Okinotorishima), it has been an island. The verdict does not set the standards for what constitutes rock” (Akayo 2016). It is not only China that protests Japan’s EEZ claim around the atoll: Korea also views it as rocks rather than islands and, along with China, disputed Japan’s claim before the CLCS in 2008 (CLCS 2020b). The Commission refused to rule on Japan’s claim, which means the EEZ is a unilateral declaration by the Japanese government and not recognized by the CLCS.

One problematic area for some regional non-claimant states is the use of archipelagic baselines. Since the Arbitral Tribunal, Chinese lawyers have attempted to defend China’s claims to the South China Sea by arguing that there is a “parallel customary law concept of outlying archipelagos” (Guilfoyle 2019b, 1014). China’s “Four Shas” (four sands) strategy involves constructing straight archipelagic baselines around the island groups of Pratas Islands, Paracel Islands, Spratly Islands, and the Macclesfield Bank. It attempts to make a legal case that the “Four Shas” are in China’s historical territorial waters and part of its EEZ and continental shelf (Guilfoyle 2019b, 1015). The Chinese Society of International Law (CSIL) (2018) argued that the Spratly chain forms “an indivisible part of an even larger archipelago including the Zhongsha Qundao (consisting of features including the Macclesfield Bank and the Scarborough Shoal).” If they were accepted as outlying archipelagos, they would be entitled to extensive maritime entitlements. However, Article 47 of UNCLOS stipulates that archipelagic baselines are only legal if they comprise a state’s “main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.” However, the land mass under question is well below the 9:1 ratio and therefore “vastly disproportionate” to China’s claimed maritime entitlements (Ku and Mirasola 2017).

The Andaman and Nicobar Islands are a chain of 572 islands under Indian sovereignty that generate an EEZ of 0.23 million square miles out of India’s total EEZ of 0.9 million square miles, despite comprising just 0.2 percent of India’s landmass (Smith 2014). During UNCLOS negotiations, India’s position was that “no distinction be made between an archipelago constituting a single state and an archipelago being an integral part of a coastal state” (Tripathi and Rana 2017).

However, other states were concerned about navigational interests if there was a proliferation of outlying archipelago claims. The CSIL (2018, 490–492) used India as an example to support its outlying archipelago arguments, as well as Australia’s outlying archipelagic claims to the Houtman Abrolhos Islands and the Furneaux Group. It claimed that the outlying archipelagos had been established as customary international law and that “[s]ince the adoption of the Convention, the practice of continental States with respect to their outlying archipelagos has strengthened the relevant rules of customary international law” (CSIL 2018, 490–486). India’s 2009 drawing of a straight archipelagic baseline on the Western coast of the Andaman and Nicobar Islands was not recognized by the US on the grounds that it violates Article 7(3) of UNCLOS, which stipulates that “sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters” (US Navy 2019). These examples of potentially excessive claims highlight how material interests make it difficult for even “like-minded” states to collectively defend a maritime order based on the preservation of rules.

Like-minded states and maritime dispute resolution

Regional non-claimant states have, at various times, participated in or avoided formal resolution processes in their own maritime disputes, which have affected their responses to disputes in the South China Sea. In the East China Sea, Korea and Japan have a long-running contest over the Dokdo/Takeshima Features, which are effectively occupied by Korea. In this dispute, Korea’s views on Japan are similar to the views of Western states on China’s actions in the South China Sea. Japan claims that it acquired Dokdo/Takeshima as *terra nullius* in 1905, whereas Korea argues that Japan’s occupation was an illegal usurpation because Dokdo/Takeshima had already been incorporated into Korea’s Ullungdo County in 1900. As Korea was officially annexed by Japan in 1910, Japan’s Dokdo/Takeshima claim has been viewed in Korea as “a precursor to Japanese imperialism” (Strating 2019b, 458). The 1951 San Francisco Peace Treaty signed by the allies and Japan was supposed to settle the issue of who owned an array of islands occupied by Japan during World War Two. While Article 2(6) officially renounced Japan’s

rights to the Spratly Islands and the Paracel Islands, it did not specify who owned Dokdo/Takeshima. The ambiguity of the Treaty has led to a number of long-running disputes, including over Dokdo/Takeshima, Senkaku/Diaoyu (Japan and China), and Kuril Islands/Northern Territories (Japan and Russia) (Hara 2004, 1). The San Francisco Treaty left out Dokdo/Takeshima despite previously including it as a territory to be returned to Korea. Chapter II, Article 2(a) of the final text mandated that “Japan, recognizing the independence of Korea, renounces all rights, title and claims to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.” This has contributed to Dokdo/Takeshima’s ambiguous status. With little material gain to be made from ownership, the dispute is largely driven by ideational rather than material factors and is one of several nationalist disputes that impede relations between Tokyo and Seoul.

Successive Korean governments have pursued effective control of Dokdo/Takeshima, including through the deployment of coastguards, lighthouses, and a Dokdo Management Office. There are also disputes over whether Dokdo/Takeshima might be considered islands or rocks and, consequently, whether an EEZ may be generated. While Japan claims that Dokdo/Takeshima are islands, Korea’s approach is that Dokdo/Takeshima are “small uninhabited islets” that “should not be able to generate EEZs and continental shelves” (Van Dyke 2009, 52). Korea’s interest is in establishing *sovereignty* rather than demonstrating that the features are habitable for the purposes of claiming an EEZ. Japan, meanwhile, has used its efforts to take the sovereignty issue to the International Court of Justice (ICJ) as a way of defending its actions in relation to the rules-based order. Tokyo presents itself as the “norm protector” insofar as it has sought to use international dispute-resolution mechanisms, while this option is rejected by Korea on the grounds that there is no dispute (Strating 2019b, 461).

The contest between Japan and China over the Senkaku/Diaoyu “islands”—a set of eight small uninhabited features in the East China Sea—also has its roots in the ambiguity of the San Francisco Treaty. In the Okinawa Reversion Treaty of June 1971, the US transferred administrative rights to Japan. China, however, argues that it has historical claims to territorial ownership, and its opposition to Japanese occupation has escalated since Tokyo nationalized the islands in 2012. Similar to the language it uses to defend its claims to

the land features and adjacent waters in the South China Sea, Beijing argues that Tokyo does not have “the right understanding of history” and that China has been “indisputably” sovereign from ancient times. In response, Japan denies that a conflict even exists, reflecting Japan’s position as the effective occupier. While there are clear motivating factors—such as an estimated 50–80-year supply of oil and gas resources in the surrounding seabed—the dispute is also triggered by historical grievances and the symbolic politics of national identity

***Disputes may be triggered by
the symbolic politics of
national identity***

(Strating 2019b). There are similarities between the Dokdo/Takeshima and the Senkaku/Diaoyu disputes, but in the latter case Japan’s position is reversed, as it insists that there is no dispute in the case of Senkaku/Diaoyu, just as Korea insists that there

is no dispute in the case of Dokdo/Takeshima. While Japan favors the involvement of the International Court of Justice for resolving the Dokdo/Takeshima dispute, it opposes ICJ involvement in the Senkaku/Diaoyu case. This highlights the different attitudes taken on the use of dispute-resolution mechanisms according to how states are positioned; the refusal of effective occupiers to allow arbitration at the ICJ reflects a desire to avoid losing what they already *de facto* possess. Problematically, these disputes also undermine the territorial legal order and make it more challenging to resolve associated maritime claims because of the principle that “land dominates the sea.”

The responses of regional non-claimant states to disputes in the South China Sea can be linked to contests in other maritime areas. It is possible to see motivating drivers in the South China Sea disputes—nationalism, historical grievances, territoriality, resources—that also feature in disputes involving “like-minded” states in the East China Sea. For instance, Japan’s efforts to push back against Chinese assertiveness in the South China Sea “is perceived as necessary to maintain US support against Chinese policies in the East China Sea.... This linkage has become an important rationale for Prime Minister Abe’s policy of creating the political and constitutional environment to deepen security cooperation under the bilateral Japan-US security treaty” (Drifte 2016, II). In the East China Sea, Japan is concerned

about what it views as China's trespassing in its territorial waters around the Senkaku Islands: China intruded only twice in 2011, compared with 188 times in 2013 after Japan nationalized the islands (Hatakeyama 2019, 467). Korea, in contrast, has largely tried to avoid involvement in South China Sea issues, focusing instead on its own maritime disputes, such as Dokdo/Takeshima and its dispute with China over economic rights and ownership of the Socotra Rock in the Yellow Sea.

For Northeast Asian states, the South and East China Seas are conceptually linked, as Korea, Japan, and China are engaged in various disputes over land features. The East China Sea territorial disputes, like those in the South China Sea, stem not just from material factors but also from ideational factors—history, national identity, and domestic politics—that hinder prospects for dispute resolution in the maritime domain. Some analysts suggest that Korea's cautious response to the Arbitral Tribunal's ruling reflects "anxiety about how this ruling might stir up the dispute over Dokdo with Japan" (Lee 2016). A Korean Foreign Ministry spokesperson, for instance, stated that "the contents of the ruling [on the South China Sea dispute] and the legal implications [and the relevance of the ruling to the Dokdo issue] will be scrupulously examined by the government" (Lee 2016). Yet these are two different types of cases: Dokdo/Takeshima is a territorial dispute that would need to be brought before an international court, likely the International Court of Justice, not a maritime dispute that can be arbitrated under Annex VII of UNCLOS. The East China Sea disputes also highlight the limits of rallying "like-minded" states to adopt consistent positions that support the maritime "rules-based order." Korea and Japan hold different, and at times contradictory, views on the use of legal arbitration to settle maritime sovereign disputes. As effective occupiers, Korea and Japan have similar material and ideational motivations that shape their approaches to dispute-resolution mechanisms. The nationalist rhetoric and domestic political uses of maritime disputes can render it difficult for states to back down on territorial claims in the East China Sea as well as the South China Sea.

While disputes in the East China Sea and the South China Sea are linked, for Japan and Korea the East China Sea has priority because it involves their territorial integrity and maritime resources and, due

to proximity, it is geostrategically more significant to both states than the South China Sea. The Dokdo/Takeshima dispute is one issue among a number that prevent cooperation between Japan and Korea in the face of a revisionist China and distract from countering assertive Chinese activities in the South China Sea. For example, the Korean government recently announced it would not renew the 2016 General Security of Military Information Agreement (GSOMIA), an intelligence-sharing agreement with Japan, although the two countries have shared interests in this area. In 2019, Russian-Chinese joint air patrols over Dokdo/Takeshima drew protests from Japan and Korea, and both launched warplanes to intercept the Russian-Chinese mission. Korean warplanes fired hundreds of warning shots toward the Russian A-50 military aircraft. Closer military cooperation between China and Russia is an undesirable prospect for both Korea and Japan, particularly as Japan has its own long-running dispute with Russia over four islands in the Kurils archipelago, an island chain thought to be rich in fish stocks and with promising

oil and natural-gas potential. The tensions between Korea and Japan put pressure on the US alliance system in Asia, which matters for how US allies and partners can effectively uphold the maritime order in the South China Sea and beyond.

Other disputes involving the “like-minded” rule-preservationist states demonstrate some of the weaknesses in the existing maritime legal order. For example,

The tensions between Korea and Japan put pressure on how US allies and partners can effectively uphold the maritime order in the South China Sea and beyond

one significant site of discord between Australia and Japan is the issue of whaling. This has been an irritant in the relationship between the two countries largely because of domestic politics in Australia concerning Japan’s scientific whaling program in the Southern Ocean, near Antarctica. Civil-society pressure compelled Canberra to seek resolution through international courts. In 2014, Australia successfully challenged this program in the International Court of Justice, only for Japan to resume its program two years later, choosing

to exclude itself from relevant jurisdictions (McCurry and Weaver 2018). While this is permissible under international law, much like Australia's refusal to submit to compulsory jurisdiction for the purposes of resolving maritime boundary disputes, such actions undermine the legal mechanisms that are designed to promote order of the seas. In a joint statement, Australia's Minister for Foreign Affairs Marise Payne and Environment Minister Melissa Price said the Australian government was "extremely disappointed" by Japan's decision (McCurry and Weaver 2018). In 2018, at the International Whaling Convention (IWC) in Brazil, a decision was adopted that Japan had failed to make a case that it needed to kill whales to study them. This caused Japan to withdraw from the IWC and resume commercial whaling for the first time in 30 years, in contravention of the 1986 global ban on commercial whaling and Article 65 of UNCLOS, which mandates that states work towards the conservation of marine mammals. Tokyo's promise to suspend its annual expeditions to the Southern Ocean does not absolve it from environmental responsibilities in its own EEZ. Japan's decision has raised concerns that it could set a precedent for other countries to follow suit. In 2012, Korea dropped its plans to resume whaling in its coastal waters due to international criticism.

Exclusions are built into the UNCLOS-led order: States make declarations and reservations to carve out exemptions for themselves when it suits their national interests. One area in which this is permitted under UNCLOS is the use of third-party dispute-resolution mechanisms. Of the non-regional claimant states, Korea and Australia do not accept third-party arbitration on adjudication of maritime boundaries under Article 298. In recent years, however, some non-regional claimant states have engaged productively in dispute-resolution mechanisms in order to resolve long-standing maritime boundary disputes. For many years, India and Australia were both reluctant to submit maritime boundary disputes with smaller neighbors to international arbitration. India's maritime dispute with Bangladesh concerned EEZ boundaries in the Bay of Bengal. India's preference for bilateral negotiations reflected the belief that "the stark asymmetry in national power and state capacity would presumably work to its advantage" (Rehman 2017, 1). Similarly, Australia's advocacy for bilateral negotiation in the long-running

dispute with Timor-Leste over maritime boundaries in the Timor Sea was driven by a *realpolitik* appreciation of the precarious economic situation of the new East Timorese state and the power imbalance in bilateral relations that significantly favored Australia (Strating 2017). Both attitudes mirrored China's long-running advocacy for bilateral negotiations in the South China Sea, reflecting its relative power compared with that of the Southeast Asian claimants.

In 2016, Timor-Leste initiated the world's first United Nations Compulsory Conciliation (2016) process to resolve its Timor Sea dispute with Australia. Prior to Timor-Leste's independence in 2002, there was an acknowledgement that the new state would rely upon oil and gas revenues in the contested area. The contest arose from differing legal positions on how to create a maritime boundary: Australia favored the principle of national prolongation which would extend the boundary closer to East Timor's coast line, while the negotiators working on behalf of East Timor favored a median line. Three months before Timor-Leste became a new state, Australia withdrew from Article 298 of UNCLOS on third-party arbitration of adjudication of maritime boundaries. This indicated Australia's preference for bilateral negotiations ahead of international arbitration. While the 2002 Timor Sea Treaty produced a successful example of joint development in one area of the Timor Sea, the dispute over the Greater Sunrise gas field intensified after 2007 when a newly installed government in Timor-Leste pressed for a pipeline to be built from the field to the country's south coast, a position opposed by Australia and the joint-venture partners.

This impasse provoked Timor-Leste to seek compulsory conciliation under Annex VII of UNCLOS. Australia initially disputed its jurisdiction, drawing parallels with China's response to the arbitration proceedings brought against it by the Philippines. In September 2016, the Conciliation Commission found itself competent to conduct the conciliation proceedings. At the time, Australia was under increasing pressure domestically and internationally to deal with the Timor Sea issue in accordance with its own "rules-based order" rhetoric, which it had directed at Beijing in the wake of the 2016 Arbitral Tribunal decision on the South China Sea. China had "publicly and privately used Australia's protracted dispute over its maritime boundary with East Timor to accuse Canberra of

hypocrisy when it raises its concerns over Beijing's behavior in the South China Sea" (Wroe 2018). Australia's consistent attempts to avoid negotiating boundaries allowed China (and others) to accuse Australia of hypocrisy. The new Timor Sea Treaty, signed in 2018 and ratified in August 2019, provided Australian representatives with a tangible example of Australia's commitment to the "rules-based order." In Parliament, Australia's then-Minister for Foreign Affairs Julie Bishop described the signing as a "landmark for international law and the rules-based order" (Commonwealth of Australia House of Representatives 2018, 70). Ratification, however, was delayed by a year, which allowed Australia to continue to accrue revenues even after the treaty gave Timor-Leste 100 percent of the Joint Petroleum Development Area's (JPDA) upstream revenues, again opening Australia to criticism about its treatment of its smaller neighbor.

In the Timor Sea dispute, Australia consistently denied Timor-Leste's attempts to have the boundary dispute settled in an international court. The compulsory conciliation was effective partly because it operated as a facilitated bilateral negotiation that produced a non-binding report, rather than an arbitration with a binding outcome imposed by a court. But the structural context was also important: Canberra's shift was driven in part by concerns over China's actions in the South China Sea as well as concerns that its actions in the Timor Sea dispute opened it up to

Canberra's shift was driven in part by concerns that its actions in the Timor Sea dispute opened it up to accusations of hypocrisy from Beijing

accusations of hypocrisy from Beijing. The treaty allowed Australia to demonstrate conformity with its own "rules-based order" rhetoric. While intending to pressure China into conforming to UNCLOS in the South China Sea, Australia's values-based public diplomacy effort ultimately compelled it to alter its approach in the Timor Sea (see Strating 2019a).

In 2014, India accepted an international verdict on a maritime boundary dispute with Bangladesh. Bangladesh served India (and Myanmar) notification of arbitration proceedings regarding maritime

boundaries in the Bay of Bengal in 2009 after an Indian survey ship, reportedly accompanied by two Indian naval vessels, entered disputed waters (Rosen and Jackson 2017, iii). Due to the concave geography of Bangladesh's coastline around the Bay of Bengal, Dhaka felt its position between India and Myanmar constrained its access to full EEZ and continental-shelf entitlements if the other states tried to establish boundaries based on simple equidistance (Rehman 2017, 11). Such an approach under international law would have "cut off" Bangladesh's EEZ and continental-shelf claims. On the issue of the contested area, the 2014 judgment ruled predominantly in favor of Bangladesh, which received nearly 8,000 square miles out of the 10,000 square miles in dispute (Rehman 2017, 12). Yet Rosen and Jackson point out that "India retained a greater proportion of EEZ than Bangladesh relative to the ratio of their relevant coastlines, a standard measure of whether the delimitation of a maritime boundary is equitable" (Rosen and Jackson 2017, iv). Immediately after the award, an Indian Ministry of External Affairs (2014) spokesperson said India would accept the award and highlighted the benefits of such an approach: "We believe that the settlement of the maritime boundary will further enhance mutual understanding and goodwill between India and Bangladesh by bringing to closure a long-pending issue. This paves the way for the economic development of this part of the Bay of Bengal, which will be beneficial to both countries." India's acceptance of the ruling has compelled leaders in the US to contrast India's approach to dispute resolution with China's actions in the South China Sea that "threaten the rules-based architecture" (Harry Harris cited in Rehman 2017, 14). For these regional non-claimant states, conformance to a rules-based approach has strengthened the basis for pressuring China to change its approach to the South China Sea. For instance, India's General V.K. Singh reiterated at the fifth East Asia Summit that territorial disputes must be settled through peaceful means "as was done by India and Bangladesh recently using the mechanisms provided under UNCLOS (United Nations Convention on Law of the Sea)" (Indian Ministry of External Affairs 2015).

While Australia was originally reluctant to proceed with the compulsory conciliation with Timor-Leste, it ultimately participated in the facilitated negotiation in good faith. Similarly, acceptance

of arbitration by India suggests that it considered the process to be fair. The actions of these regional non-claimant states signaled to China that maritime disputes must be resolved in accordance with international law. Although it seems counterintuitive, these two examples highlight one of the ways in which China's actions in the South China Sea have inadvertently contributed to bolstering the international maritime order. According to Rehman, India's positive response to the international arbitral process displayed its "responsible stakeholder credentials" in contrast to

India's positive response to the international arbitral process displayed its 'responsible stakeholder credentials' in contrast to China's refusal

China's refusal to respect the 2016 ruling. Canberra's "rules-based order" rhetoric also exposed it to accusations of hypocrisy from Beijing. Concern about China's efforts to revise the rules-based order in the South China Sea played a part in compelling both Australia and India to engage in maritime dispute-resolution processes under UNCLOS, providing generally positive models of order-generating behavior. Such examples not only contribute to the legitimacy of international maritime law and dispute-resolution processes, they also counter China's "lawfare" strategy that has targeted the hypocrisy and double standards of states that are critical of its stance on the South China Sea.

Operational presence and maritime security cooperation

One of the contemporary challenges posed in the South China Sea is the so-called "*grey zone tactics*" employed by China's paranaul forces to assert sovereign claims to disputed land features and adjacent waters (Erickson and Martinson 2019, 1–2). Described as a "cabbage strategy," China's maritime coast guard, fishing fleets, and maritime militia form layers of pressure that constitute its first line of maritime defense (Green et al. 2017, 11–12). Such coercive tactics compromise the capacities of smaller Southeast Asian states to access maritime resource entitlements. One example is the harassment by Chinese patrol ships of Philippine

vessels transporting materials to its outpost at Second Thomas Shoal in the Spratly Islands (Green et al. 2017, 169). Another example in 2014 was the standoff when China placed an exploratory oil rig—HYSY 981—in an oil block claimed by Hanoi within Vietnam’s claimed EEZ (Green et al. 2017, 202). In 2019, Vietnam repeatedly asked China to withdraw its survey ship Haiyang Dizhi 8 from its EEZ. According to Le Thu (2019a), Beijing “openly disputed” the legality of Vietnam’s continental shelf rights under UNCLOS.

Such actions pose a diplomatic challenge for regional non-claimant states. Some strategists have argued that “like-minded” states such as Australia need to support Southeast Asian states and more openly criticize China’s actions in the South China Sea (Le Thu 2019b). Hanoi has been pushing the internationalization of the dispute, arguing that the South China Sea has become “not only the shared interest but also a shared responsibility of all countries” (Du Nhat 2019). In August 2019, Australia, Japan, and the US released a joint statement expressing serious concern about “coercive unilateral actions that could alter the *status quo* and increase tensions” and disrupt long-standing oil and gas projects in the South China Sea, but avoided naming China as the aggressor (Japan, United States, and Australia 2019).

China’s activities in Vietnam’s EEZ have raised particular issues for India, which has economic and strategic interests in this dispute because it also has exploitation and exploration basins in energy blocks within Vietnam’s EEZ. In a joint statement with Vietnam in 2013, India’s Ministry of External Affairs “reaffirmed all the rights of the countries to have the rights in the Exclusive Economic Zone.” In 2012, India’s Chief of Navy said that the Indian Navy could be deployed in order to protect those interests (Sakhuja and Jha 2018, 125). Indian warships have also routinely visited the South China Sea for port visits and other operational activities, and India has advocated for enhanced maritime security cooperation and increased maritime deployments to the South China Sea as part of its “Act East” (formerly “Look East”) policies. In May 2016, for example, four Indian Navy warships sailed into the South China Sea on a two-and-a-half-month operational deployment to Southeast Asia and the northwest Pacific, and in 2019, India participated in joint naval drills with the US, Japan, and the Philippines (Sakhuja and Jha 2018,

128). Experts predict that India will continue to emphasize security cooperation with Southeast Asian states as part of its Act East policies but is likely to focus on low-hanging fruit, such as Humanitarian Assistance and Disaster Relief (HA/DR) operations, rather than FONOPs (Granados 2018).

One response to grey-zone challenges has been to assist claimant states with building maritime capacity to defend their sovereign rights, as well as conducting joint naval drills. These actions reflect efforts by the US to promote naval interoperability among like-minded states. Japan, Korea, and Australia have also increased investment and activities in maritime capacity building in Southeast Asia. Japan's pacifist constitution has traditionally restricted its military engagements to those that provide "self-defense," but a more expansive reinterpretation of Article 9 by the Abe government in 2014 now includes collective self-defense and rights to assist an ally under attack. Japan and the US held their first bilateral naval drill in the South China Sea in October 2015, the same month that the USS Lassen made its high-profile transit within 12 nautical miles of Subi Reef. In 2016, Japanese Defense Minister Tomomi Inada declared that Japan would "increase engagement in the South China Sea through training cruises with the US Navy and multilateral exercises with regional navies" (Pennington 2016). In 2018, a Japanese Maritime Self-Defense Force (MSDF) submarine conducted anti-submarine drills with three destroyers that were on a long-term mission around Southeast Asia. In the same year, the US Navy's Ronald Reagan Strike Group joined a Japanese defense flotilla for joint military exercises in the South China Sea.

In the 2016 "Vientiane Vision," Japan and ASEAN agreed to "promote joint efforts in upholding international law and increasing capacity-building" (Japan Ministry of Defense 2016). In 2010 and 2011, Japan announced strategic partnerships with Vietnam and the Philippines, respectively, and Japan has become the largest provider of Official Development Assistance (ODA) for both Vietnam and the Philippines, a move that is partly aimed at bolstering maritime security cooperation (Easley and Kim 2018, 328; Strating 2019c). Japan's Self-Defense Forces have provided maritime patrol vessels and planes to these states and have engaged in joint training to strengthen UNCLOS-led order in the South China Sea. As Hatakeyama (2019,

472) notes, the arms-trade-ban policy (Three Principles) was relaxed in 2011, which has allowed Tokyo to provide this kind of support “if such provisions contributed to peace and security.” Japan’s coast guard has also increased its presence in the South China Sea over the past two decades through port calls, joint military exercises and drills with navies and air forces, and education and training programs that emphasize the rule of law and maintenance of the maritime rules-based order (Hatakeyama 2019, 476–478; Sato 2016, 274). Japan’s efforts to manage China’s rise involve maintaining an alliance with

***Japan's efforts to manage
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cooperation in Southeast Asia***

the US and expanding maritime security cooperation in Southeast Asia in order to support a “rules-based order” and ensure that China cannot just “walk into” a leadership vacuum in the region (Easley and Kim 2019, 382).

For its part, Australia has increased its operational presence in the South China Sea since 2014, maintaining a program

of freedom-of-navigation activities that do not breach the critical 12-nautical-mile threshold, as well as building maritime capacity and improving interoperability in Southeast Asia. Australian defense exercises in the South China Sea are typically bilateral or multilateral and include port visits, passage exchange, coordinated naval activities, and other exchanges to develop interoperability with partners in and beyond Southeast Asia. In terms of operational presence, the number of Australian ships transiting the South China Sea increased by one per annum over the past six years: In 2014, Australia had five ships operating in the South China Sea; by 2018, there were nine. All exercises took place in international waters and outside any disputed areas including the Spratly Islands area (Commonwealth of Australia 2019, 95). In 2016, the US, Japan, and Australia conducted joint naval drills in the South China Sea, and in September 2018, Australia and the US performed joint naval exercises in the region, although Australian vessels reportedly “avoided disputed areas” (Mourdoukoutos 2018). As part of Australia’s freedom-of-navigation engagements, it established the Indo-Pacific Endeavor (IPE) in 2017,

the largest joint task group in more than 40 years, which transited through the South China Sea in 2017 and 2019. In the inaugural year of the IPE, a total of eight ships operated in the South China Sea for 254 days, compared with 43 days in 2014 (Commonwealth of Australia 2018). A joint task force commands a naval flotilla that has travelled each year to selected partner states in the Indo-Pacific for several months to conduct security cooperation activities. Australian Defence Personnel work alongside “partner security forces to support the development of regional maritime security capacity” and “rules-based global security” (Commonwealth of Australia Department of Defence 2018, 20). The IPE has focused on military-to-military and governmental relations, grassroots engagement, and public diplomacy, presenting Australia as a “partner of choice” in the region.

Korea has also focused on capacity building in its engagement with Southeast Asia. Its maritime security cooperation may be interpreted as an effort to hedge against dependence on China by expanding its relations with Southeast Asian states without outwardly contributing to containment strategies aimed at China. In 2010, a Joint Declaration on ASEAN-Korea Strategic Partnership for Peace and Prosperity was aimed at deepening cooperation across political, economic, and security arenas in the period from 2016 to 2020 to address regional and global challenges of common concern. A 2015 Plan of Action highlighted maritime security and maritime cooperation as an important part of ASEAN-Korean relations, promising to “[p]romote maritime security and safety, freedom of navigation and over flight, unimpeded commerce, the exercise of self-restraint, the non-use of force or the threat to use force, and resolution of disputes by peaceful means, in accordance with universally recognized principles of international law” (see also ASEAN 2019). Korea’s efforts have also been bilateral: In 2013, Seoul signed a memo of understanding (MOU) with Manila expanding defense cooperation, followed by a US\$420 million contract to export 12 FA-50 fighter jets to the Philippines (Song 2014). It also vowed to enhance cooperation through capacity building, technical cooperation, knowledge exchange, and the sharing of best practices across a range of domains, including safety at sea, ship and port security, search and rescue, and marine conservation. Yet, while Korea has long desired a blue-water fleet capable of operating in the far seas, such as the South China

Sea, its attentions have been necessarily constrained to the Korean peninsula and the East China and Yellow Seas. In 2018, with growing optimism about rapprochement with North Korea, the Korean navy announced plans to develop a naval fleet capable of global operations (Harris 2018).

While the like-minded states express concern about China's claims in the South China Sea, in naval engagement more generally there is a tendency to maintain engagement with the Chinese Navy. In 2018, however, the US disinvented the Chinese Navy from participating in the biennial Rim of the Pacific Exercise (RIMPAC). A Department of Defense spokesman justified the decision by stating that “[t]he United States is committed to a free and open Indo-Pacific. China’s continued militarization of disputed features in the South China Sea only serves to raise tensions and destabilize the region” (Eckstein 2018). Yet in the same year, Australia maintained its invitation for a Chinese warship to participate in Exercise Kakadu. At the seventieth anniversary of the Chinese navy, the US sent a low-level delegation and “unlike its close allies Australia, Japan, and Korea, the United States did not send a ship to take part in Tuesday’s naval parade reviewed by Xi himself” (Blanchard 2019). While regional non-claimants are reluctant to conduct US-style FONOPs, they have nevertheless contributed to supporting maritime order in the South China Sea in other ways, including increasing their operational presence through port visits, training, maritime capacity building, and other activities.

Conclusion

China’s assertions in the maritime and aerial domains of the South China Sea (and the East China Sea) have been widely viewed as an attempt to unilaterally alter the US-led regional *status quo* (Japan Ministry of Foreign Affairs 2013, 12). As part of its Indo-Pacific strategy, the US has emphasized the importance of “like-minded” states in defending the “rules-based order,” including in maritime domains. The “like-minded” characterization disguises important differences in the ways in which international rules and maritime order are conceptualized, operationalized, and defended, with implications for efforts to push back against excessive maritime claims in and beyond the South China Sea. “Like-minded” states also share different

worldviews and conceptions of regional order that hinder the forging of closer relations, including in the maritime domain (see for example Chacko and Davis 2017). The responses of “like-minded” US allies and partners—Australia, Japan, Korea, and India—are shaped by their own material interests, strategic calculations, and economic considerations and are linked to how they manage their relations with the two great powers of the Indo-Pacific region, the US and China. While the non-regional claimant states have economic and energy interests in the South China Sea as a trading thoroughfare, they are in the difficult bind of wanting to defend freedom of navigation but in a way that does not escalate tensions, raise the risk of great-power conflict, or result in economic retaliation. The ambivalence of the international community, including these “like-minded” states, has permitted China to disrupt the *status quo* by changing the facts on the ground through the slow and incremental use of “salami-slicing” tactics (Haddick 2012).

The unique strategic cultures of “like-minded” states—the historical, geographical, ideational, and political factors that feed into statecraft—also contribute to how they have sought to defend the maritime “rules-based order” in the South China Sea. For Japan and Australia, challenges to the maritime order in the South China Sea reflect broader threats to regional order, which is reflected in Indo-Pacific discourses that use the “rules-based order” as a proxy for US leadership. Both states consider their alliances with the US as the “cornerstone” of their national security (Japan Ministry of Defense 2019, 4; Brown and Raynor 2001). Japan, under the Abe administration, has become more outwardly defense-focused as China rises. Yet, despite continued commitments to the US alliance in policy and practice, both Japan and Australia have displayed reluctance to use FONOPs to defend the maritime “rules-based order” in the South China Sea, opting for other strategies such as operational presence, joint naval drills, and maritime security cooperation. In contrast, Korea’s hedging has been expressed in its foreign policy discourse, which refers to a “balanced” foreign policy. While on some issues Korea has attempted to balance with the US (such as the adoption of THAAD), it has largely adopted a middle-ground stance to manage its own “sandwich” dilemma. This has contributed to Korea’s relatively neutral position on the South China Sea (Moon and Boo 2017; Shin 2016). India’s long-term strategic culture has tended towards autonomy, as reflected in its leadership of the non-

alignment movement during the Cold War. As Rehman (2017, 1) notes, this has been coupled with an “extreme wariness” more broadly towards delegating sovereignty or embracing international laws. Indian analysts have noted Delhi’s reluctance to take sides and its adoption of a qualified position on issues such as FONOPs. Yet China’s assertive behavior in the maritime domain brings new dilemmas for India as it seeks to protect its own maritime security in the Indian Ocean without moving too close to Washington.

As key architects of the Indo-Pacific, Australia and Japan seek to maintain US preponderance in the region and balance against more assertive behavior by China, without embracing the overt strategic competition narratives employed by the US (Koga 2019, 287; Baldino and Bloomfield 2018, 3). India has also embraced the “Indo-Pacific.” While states deploy similar phrasing around the Indo-Pacific—“rules-based order,” “free and open,” “inclusive”—these terms can mean different things. As Chacko and Barthwal-Datta (2020) argue, there is lack of clarity about the nature of the term “Indo-Pacific”: Is it conceptual, geographic, or strategic? For instance, the US has a Free and Open Indo-Pacific “strategy,” yet other regional “like-minded” states eschew the term “strategy,” including Japan which has seemingly dropped “strategy” from its concept of a Free and Open Indo-Pacific (Koga 2019, 288). Is it a containment strategy? Similar confusion can be observed about the nature and purpose of the renewed Quadrilateral Security Dialogue—the “Quad”—between the US, Australia, Japan, and India, *vis-à-vis* its role in balancing against an increasingly assertive China. As Pan argues (2014, 453), the Indo-Pacific is not a politically neutral term, but “a manufactured super-region designed to hedge against a perceived Sino-centric regional order.” It is fuelled by the collective anxieties of “like-minded” states about China’s rising influence in Asia, yet India’s vision of the Indo-Pacific is demonstrably different from that of the other states. Chacko and Barthwal-Datta (2020) note that “India’s Indo-Pacific vision rests on multipolarity: where no singular power dominates, where China does not appear to be excluded or isolated, and Russia is included.” Korea has been less enthusiastic about the new regional nomenclature, instead adopting a wait-and-see approach on the Indo-Pacific, reflecting its “middle-ground” stance. On his visit to Seoul in November 2017, US President Trump suggested to President Moon that Korea participate in the “Free

and Open Indo-Pacific” strategy. Moon’s economic advisor rejected the idea, suggesting that the “Free and Open Indo-Pacific” was a Japanese idea and that Japan was “attempting to create an Indo-Pacific alignment that connects India, Australia, Japan, and the US, but Korea doesn’t need to be a part of that” (Kim and Jung 2017; Kim 2018). These comments highlight the importance of the fractious relationship between Korea and Japan in the domestic politics of both states, including the contest over Dokdo/Takeshima mentioned earlier.

In supporting a maritime “rules-based order” in the South China Sea and beyond, this analysis suggests that regional non-claimant states should seek greater alignment on the nature of rules and order in Asia. This is increasingly important as the shifting balance of power dynamics between a rising China and the US transform the regional security order and as the future engagement and presence of the US remain uncertain. To support the maritime rules-based order in the South China Sea, non-regional claimants should:

- Work together to align their interpretation of maritime rules, particularly in relation to military freedom of navigation, and look to find common ground on issues concerning maritime security jurisdiction and excessive maritime claims.
- Operationalize their “rules-based order” rhetoric by aligning maritime claims more closely with international law. Non-compliance undermines the legitimacy of international law. Successive UN General Assembly resolutions on oceans and the Law of the Sea have called upon states to harmonize legislation with UNCLOS, which includes the “like-minded” rules-preservationist states (United Nations General Assembly 2017). While “like-minded” states call for other states to obey the “rules-based order,” their own jurisdictional creep may undermine their capacity to persuade rising China to respect international law in the South China Sea, and to counter China’s “lawfare” strategies.
- Consider the use of international dispute-resolution mechanisms in resolving their own maritime disputes and support claimant states in using such resolution mechanisms in their disputes.
- Demonstrate their commitment to maritime rules beyond FONOPs and defending the US primary interest in military

freedom of navigation. This should include conducting joint patrols with Southeast Asian states and continuing to support the capacities of smaller maritime states to defend their legal entitlements through collective capacity building, training, exercises, and maritime security cooperation.

- Encourage the US to ratify UNCLOS.

Already, regional powers have moved in various degrees to diversify their foreign and economic relationships, including through maritime security cooperation in Southeast Asia. This may be interpreted as a way of assisting smaller states to defend their own entitlements under international law as well as bolstering cooperation with non-great powers. Yet, the use of “like-minded” rhetoric disguises divergent perspectives on regional order that affect how states defend the maritime rules and the extent to which they are willing to push back against challengers such as China in the South China Sea.

Appendix 1. US FONOPs in the South China Sea, 2017-2018

Year	State	Nature of Disputed Claim
2018	China	Straight baselines not drawn in accordance with the Law of the Sea [Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China, 15 May 1996]
2018	China	Domestic law criminalizing survey activity by foreign entities in the EEZ [Order No. 75, Surveying and Mapping Law, December 2002]
2018	China	Jurisdiction over airspace above the EEZ [Order No. 75, Surveying and Mapping Law, December 2002]
2018	China	Security jurisdiction claimed in the contiguous zone [Law on the Territorial Sea and Contiguous Zone, February 1992]
2018	China	Prior permission required for innocent passage of foreign military ships through the territorial sea [Declaration upon Ratification of 1982 Law of the Sea Convention, 7 June 1996]
2018	China	Actions and statements that indicate a claim to a territorial sea around features not so entitled (i.e., low-tide elevations)
2018	Malaysia	Prior consent required for military exercises or maneuvers in the EEZ [Declaration upon Ratification of the 1982 Law of the Sea Convention, 14 October 1996]
2018	Taiwan	Prior notification required for foreign military or government vessels to enter the territorial sea [Law on the Territorial Sea and the Contiguous Zone, Article 7, 21 January 1998]
2018	Vietnam	Prior notification required for foreign warships to enter the territorial sea [Law of the Sea of Vietnam, Law No. 18/2012/QH13, Article 12, 21 June 2012]
2018	Vietnam	Straight baselines not drawn in accordance with the Law of the Sea [Statement of 12 November 1982 by the Government of the Socialist Republic of Viet Nam on the Territorial Sea Baseline of Viet Nam, 12 November 1982]
2017	China	Excessive straight baselines
2017	China	Jurisdiction over airspace above the EEZ
2017	China	Domestic law criminalizing survey activity by foreign entities in the EEZ
2017	China	Prior permission required for innocent passage of foreign military ships through the territorial sea

Year	State	Nature of Disputed Claim
2017	China	Actions/statements that indicate a claim to a territorial sea around features not so entitled
2017	Malaysia	Prior consent required for military exercises or maneuvers in the EEZ
2017	Taiwan	Prior notification required for foreign military or government vessels to enter the territorial sea
2017	Vietnam	Prior notification required for foreign warships to enter the territorial sea
2017	Vietnam	Excessive straight baselines

Source: Collated from US Department of Defense, *Annual freedom of navigation [FON] reports 2017–2018*. FON reports prior to 2017 do not specify the area in which operational assertions took place.

**Appendix 2. US FONOPs directed at “like-minded states,”
1995–2018**

Year	State	Nature of Disputed Claim
2018	Japan	Straight baselines not drawn in accordance with the Law of the Sea [Enforcement Order of the Law on Territorial Sea and the Contiguous Zone, Cabinet Order No. 210 of 1977, as amended by Cabinet Order No. 383 of 1993, Cabinet Order No. 206 of 1996, and Cabinet Order No. 434 of 2001, 2 April 2002]
2017	India	Prior consent required for military exercises or maneuvers in the EEZ
2016	India	Prior consent required for military exercises or maneuvers in the EEZ; security jurisdiction claimed in the contiguous zone
2016	Japan	Excessive straight baselines
2016	Korea	Excessive straight baselines; prior notification required for foreign military or government vessels to enter the territorial sea
2015	India	Prior consent required for military exercises or maneuvers in the EEZ
2014	India	Authorization required for foreign military exercises or maneuvers in the EEZ
2014	Korea	Excessive straight baselines; prior notification required for foreign military or government vessels to enter the territorial sea
2013	India	Authorization required for military exercises or maneuvers in the EEZ
2012	India	Authorization required for military exercises or maneuvers in the EEZ
2012	Japan	Excessive straight baselines
2011	India	Authorization required for military exercises or maneuvers in the EEZ; prior notification required for foreign warships to enter the territorial sea
2010	India	Authorization required for military maneuvers in the EEZ
2010	Japan	Excessive straight baselines
2009	India	Authorization required for military maneuvers in the EEZ
2008	India	Prior consent required for military maneuvers in the EEZ
2007	India	Prior consent required for military maneuvers in the EEZ

Year	State	Nature of Disputed Claim
2001	India	24-nautical-mile security zone; prior authorization required for warships to enter the territorial sea
1999	India	Prior notification required for warships to enter the territorial sea; prior permission required for military exercises or maneuvers in the EEZ; Gulf of Mannar designated as historic waters
1999	Japan	Excessive baseline claims
1999	Korea	Excessive baseline claims
1997	India	Prior permission required for warships to enter the territorial sea
1996	India	Prior permission required for warships to enter the territorial sea
1995	India	Prior notification required for warships to enter the 12-nautical-mile territorial sea; historic claim to the Gulf of Mannar

Source: Collated from US Department of Defense, *Annual freedom of navigation [FON] reports 1995–2018*, after the ratification of UNCLOS. No FONOPs were conducted against Australia during this period.

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Endnotes

1. A2/AD capabilities allow states to deny access or deployment of foreign militaries and prevent military activities by other countries.
2. The author is grateful for conversations with more than 50 policy, naval, and defence experts, academics, and diplomats during a three-month fellowship with East-West Center in Washington, DC, from June to September 2019.

Acknowledgments

I would like to thank the East-West Center in Washington, DC, for hosting me from June to September 2019 as a Visiting Asian Studies Scholar, particularly Satu Limaye, Ellen Frost, and Sarah Wang as well as Sidney B. Westley at the East-West Center in Honolulu. This program allowed me to spend three months in Washington, where I took part in more than 50 meetings with maritime, defense, and foreign-policy experts on issues related to the South China Sea. I would also like to thank Mark Witzke for valuable research assistance while I was at the East-West Center. Although there are too many to acknowledge individually, I do wish to sincerely thank all those who sat with me and gave me their perspective on these thorny and complex issues. These conversations were an invaluable resource for this report. I am also grateful to the Institute of Southeast Asian Studies in Singapore for hosting me as a Visiting Affiliate Fellow in November 2019, during which time I wrote a large amount of this report. I would also thank the School of Humanities and Social Sciences and the Arts, Commerce, and Social Sciences College at La Trobe University for approving and funding the research sabbatical that enabled me to spend valuable time in the US and in Southeast Asia. Finally, I would like to thank Diana Heatherich and Matt Smith from La Trobe Asia and my supportive colleagues in the Department of Politics, Media, and Philosophy at La Trobe University.



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About this issue

The seas are an increasingly important domain for understanding the balance-of-power dynamics between a rising People's Republic of China and the United States. Specifically, disputes in the South China Sea have intensified over the past decade. Multifaceted disputes concern overlapping claims to territory and maritime jurisdiction, strategic control over maritime domain, and differences in legal interpretations of freedom of navigation. These disputes have become a highly visible microcosm of a broader contest between a maritime order underpinned by the United Nations Convention on the Law of the Sea (UNCLOS) and challenger conceptions of order that see a bigger role for rising powers in generating new rules and alternative interpretations of existing international law. This issue examines the responses of non-claimant regional states—India, Australia, South Korea, and Japan—to the South China Sea disputes.

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