



South China Sea Ruling: Implications for Quad Interests

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The views expressed are my own and do not reflect the official policy or position of the Department of the Navy, Department of Defense, or the U.S. Government.

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Introduction

China's expansive maritime claims in the South China Sea attempt to upend the legal order, and present the greatest test to international maritime norms since Germany's unrestricted U-boat campaign in World War II. The July 12, 2016 Arbitration Award brought by the Philippines under Annex VII of UNCLOS brought greater clarity to the situation in the South China Sea. The findings and decision of the Arbitration Tribunal promote the rule of law in the oceans, and strengthen a rules-based order in East Asia that enhances international security and stability. The Quad States have a profound security interest in promoting the Arbitration Award.

The United States, Japan, India, and Australia (Quad States) have a vital national interest in promoting and strengthening maritime rules, norms, regimes and laws, which are reflected in customary international law and the United Nations Convention on the Law of the Sea (UNCLOS).¹ Freedom of navigation and overflight in the oceans are essential for the viability of U.S., Japanese and Australian collective defense treaties, and a key enabler of U.S. grand strategy.² Likewise, these liberal norms are promoted in the 2016 United States and India Joint Statement on Enduring Global Partners in the 21st Century,³ the 2015 India-Japan Special Strategic and Global Partnership⁴ and the 2016 Australia-Japan Strategy for Cooperation in the Pacific,⁵ and implied by the 2009 India-Australia strategic partnership, which capitalizes on multilateral institutions for regional stability.⁶

Quad States have a special interest in encouraging states to preserve freedom of the seas. For more than one hundred years, the cornerstone of U.S. and Allied national security strategy has focused on preventing the rise of a hegemonic power in Europe or Asia. Freedom of the seas is essential to this strategy because the seas connect the United States with its allies, friends, and partners in both regions. The South China Sea is the maritime fulcrum in East Asia, where the United States has treaty commitments to Japan, Korea, Thailand, Australia, and the Philippines, and legislative obligations to provide defense assistance to Taiwan. The rule of law in the oceans provides an important force multiplier

¹ United Nations Convention on the Law of the Sea, Montego Bay Dec. 10, 1982, entered into force Nov. 10, 1994, 1833 U.N.T.S. 397(1982).

² Barry Posen, Command of the Commons, 28 *International Security* 5, 5 (2003).

³ JOINT STATEMENT: The United States and India: Enduring Global Partners in the 21st Century, June 7, 2016, para. 15.

⁴ Joint Statement on India and Japan Vision 2025: Special Strategic and Global Partnership Working Together for Peace and Prosperity of the Indo-Pacific Region and the World, December 12, 2015.

⁵ Australia-Japan Strategy for Cooperation in the Pacific, February 14, 2016.

⁶ India-Australia Joint Declaration on Security Cooperation, November 12, 2009.

for U.S. and Allied military operations and diplomacy. Consequently, the navigation and overflight rules accepted in the region have great strategic consequence.

International law, including customary law, the Arbitration Award under Annex VII of UNCLOS and the U.S. Freedom of Navigation (FON) program offer some of the best tools for preserving the order of the oceans in East Asia, and for averting conflict in the South China Sea. The value and strength of international law can be magnified through three lines of effort by the new U.S. administration and Quad State partners. First, states should implement lawful countermeasures against China to induce compliance with the international law of the sea. Second, states should supplement U.S. FON operations with their own programs to tangibly challenge China's unlawful claims. Third, the July 12, 2016 Arbitration Award should be regarded as a "final and binding" statement of the law in the South China Sea, and Quad States should embrace the decision to guide their diplomacy and naval operations.

1. Lawful Countermeasures to Induce Compliance

First, Quad States should implement lawful countermeasures against states that violate the rules reflected in UNCLOS. President Reagan envisioned this approach in 1983. In the aftermath of the U.S. decision not to ratify UNCLOS in 1982, President Reagan issued a U.S. Statement on Oceans Policy. That policy has stood the test of time and remains in effect today. While objecting to the 1982 framework for seabed mining in Part XI (which was restructured in 1994 to accommodate President Reagan's objections), the President announced three decisions "to promote and protect the oceans interests of the United States in a manner consistent" with what he called the "fair and balanced" rules reflected in UNCLOS.

Reagan's decision still resonates for the United States, and offers a way forward for all states confronted by China's noncompliance of UNCLOS. Reagan's policy is important to reproduce in its entirety because it contains a caveat that has been lost on recent U.S. administrations. Reagan stated:

[T]he United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans – such as navigation and overflight. *In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in [UNCLOS], so long as the rights and freedoms of the United States and others are recognized by such coastal states* [italics added].⁷

Reagan's policy reflects a classic *quid pro quo* and the entire basis of positive law: the United States agrees to respect other states maritime claims only if they respect U.S. claims. This statement expresses a willingness to invoke countermeasures against states that are not in compliance with UNCLOS by withholding recognition of their claims until such time as they recognize valid U.S. claims. For the United States, the Reagan policy was never renounced, but in practice it has fallen into desuetude. Reagan's caveat is an important, but unutilized tool of international law available to all states.

States should withdraw recognition of China's rights under UNCLOS to the extent that Beijing does not respect reciprocal rights in international law. Instead, each Quad State

⁷ Statement by the President, 19 Weekly Comp. Pres. Doc. 383 (Mar.10, 1983).

automatically affords China full rights to operate freely on the oceans, including in their territorial seas in innocent passage and EEZs without restriction, while China dangerously impedes and hampers foreign warships and military aircraft operating in areas under its claimed sovereignty or jurisdiction. In September 2015, for example, a flotilla of five PLA Navy warships transited through the Bering Sea north of the Aleutian Islands, and then headed south to conduct innocent passage between two of the Aleutian Islands.⁸ A Pentagon spokesperson stated that the operation “...was a legal transit of U.S. territorial seas conducted in accordance with [UNCLOS].”⁹ Similarly, Chinese warships have conducted military activities, including intelligence collection, in the U.S. EEZ near Guam and Hawaii, and conduct military activities in the EEZ of India, Japan, and Australia as well. In the aftermath of a 2015 Chinese maritime intelligence operation near Hawaii, a U.S. Pacific Fleet spokesperson stated, “... it is a fundamental right of all nations for military ships and aircraft to operate in international waters and airspace in accordance with well-established international law.”¹⁰

Although Quad States recognizes China’s navigational rights and freedoms, China routinely purports to deny them the same. These acts by China constitute a breach of legal obligations under UNCLOS and customary international law, and are internationally wrongful acts within the law of state responsibility. Injured states are entitled to take lawful countermeasures to induce compliance against China for violating their maritime rights by denying PLA Naval and Air forces those same rights. This is not a “tit-for-tat” or demand for reciprocal treatment, but rather a lawful measure short of coercion or the use of force to induce compliance on the part of a state that has breached its legal obligations.

Countermeasures flow from the customary international law of state responsibility, as reflected in the International Law Commission’s Articles of State Responsibility.¹¹ States bear responsibility for acts that are attributable to them under international law, and that constitute a breach of an international obligation under either treaty law or customary law.¹² The injured state may invoke countermeasures against the responsible state to induce compliance. The situation involving China presents a classic model of countermeasures, since countermeasures must be proportionate,¹³ not affect the rights of third states,¹⁴ and not involve violation of preemptory norms, such as basic standards of human rights.¹⁵

For its part, the United States should act true to its 1983 Oceans Policy of observing and respecting foreign maritime claims only to the extent that other coastal states respect U.S. rights at sea. In particular, since China does not respect UNCLOS rules governing innocent passage of warships in its territorial sea or high seas freedoms of navigation and overflight of military vessels and aircraft in its EEZ, the United States should withhold observation of those rights from Chinese military ships and aircraft until such time as China conforms its policy to the law. Such action constitutes lawful countermeasures in international law, and serves an instrumental function to produce compliance by China.¹⁶

⁸ Page and Lubold, Chinese Navy Ships Came Within 12 Nautical Miles of U.S. Coast, Wall St. J., Sept. 4, 2015.

⁹ Ibid.

¹⁰ Wyatt Olson, Report: China dispatching surveillance vessels off Hawaii, Stars and Stripes, Sept. 4, 2015.

¹¹ International Law Commission, Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 annex, U.N. Doc. A/RES 56/83 (12 Dec. 2001).

¹² Articles on State Responsibility, Arts. 1-2.

¹³ Ibid., Art. 59.

¹⁴ Ibid., Art. 47(3).

¹⁵ Ibid., Art. 50.

¹⁶ Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Rep. 1997, p. 7, and pp. 56-57, para. 87.

Countermeasures could have a real and even dispositive impact on Chinese maritime behavior because China lacks access to the open ocean, except through transit of its neighbors' EEZ. In particular, China may enter the Pacific Ocean through the Sea of Japan and East China Sea only by transiting Japan's EEZ, which stretches from Hokkaido to Okinawa and the Ryukyu Islands in the South. China also routinely operates in India's EEZ on voyages to and from Pakistan and the Persian Gulf, yet China purports to close the South China Sea to Indian warships and purports to ban Indian oil and gas leases, even within Vietnam's EEZ. Quad States could regain diplomatic initiative if they denied Chinese naval and air forces the legal right to traverse their EEZ as a temporary measure to induce China to restore freedom of navigation and overflight to foreign warships and military aircraft in its EEZ.

2. Supplement U.S. FON Operations

The United States is the only nation to have a formal Freedom of Navigation (FON) program. Started by President Jimmy Carter in 1979, the FON program consists of three elements: (1) diplomatic demarches to protest unlawful maritime claims and illegal conduct at sea; (2) bilateral military-to-military engagement to provide greater clarity and understanding among armed forces; and (3) freedom of navigation operations (FONOPS) as a tangible expression of U.S. rejection of unlawful maritime claims. It was clear from the very beginning that diplomatic demarches would not be sufficient to contain unlawful claims, and that actual FONOPS would be necessary to demonstrate U.S. resolve.¹⁷

With the end of the Cold War, the number of U.S. FONOPS declined precipitously, from about 35 per year in the 1980s to as few as five or six in the early- and mid-2000s. As the U.S. force structure has declined and the threat from China has emerged, there is now a greater commonality of interests among Quad States. Asia's four great democracies should conduct FONOPS individually and in concert through combined operations.

Just as the assertions of freedom of navigation and overflight in the Gulf of Sidra in 1981 and 1989, and the Black Sea Bumping incident in 1988 elevated tension to preserve an open order of the oceans, FONOPS in the South China Sea may generate blowback from Beijing that worsens bilateral relationships, at least temporarily. Accepting such costs and weathering Chinese criticism are essential if the Quad States seek to preserve the rule of law that is essential for maintaining sea lines of communication that connect friends and allies in the Indo-Asia-Pacific region.

FONOPS generate international public goods, and burden sharing of their costs should be more evenly leveled among allies and strategic partners. Japan and India, for example, have large, advanced and capable maritime forces well positioned to conducting FONOPS. So far, Australia, Japan, and India have passed the buck to the United States, but this strategy has decreasing utility, as China grows more powerful. Combined FONOPS remove the optic that freedom of the seas is about a U.S.-China major power dispute, and converts the issue into one of China standing against the rights and freedoms of the international community. Furthermore, state practice by several states or many states reinforces customary international law more powerfully than state practice by a single state.

¹⁷ Elliott Richards, *Power, Mobility, and Law of the Sea*, 58 *Foreign Affairs* 902, 902 (1979-1980).

3. Leverage the South China Sea Arbitration

The July 12, 2016, Arbitration Award rejected China's outlandish claims to the South China Sea. The United States position is that the decision is "final and binding" on the parties.¹⁸ Although China has stated that it would not comply with the decision, the Award has permanently changed the legal and political seascape of the South China Sea. Over time, the normative force and authority of the Award decision will grow. Quad States should facilitate that process by promoting the Award decision as a matter of policy.

The Arbitration Award is comprised of four main elements, and each element affects freedom of navigation and overflight and regional security. To get greater mileage from the Award, Quad States should: (A) Amplify Rejection of the Nine-dash Line; (B) Conform FONOPS to the Arbitration Award; and (C) Engage Multilateral Institutions.

A. Amplify Rejection of the Nine-dash Line

The tribunal decision struck down China's Nine-dash Line, rejecting *in toto* Beijing's vast and illegal claims over some 90 percent of the South China Sea. The tribunal found that UNCLOS contains a comprehensive system of maritime zones, which does not accommodate any external type of zone, such as historic waters.¹⁹ If there were any preexisting or earlier rights or agreements concerning historic rights to the waters, they were superseded by UNCLOS if they are incompatible.²⁰ Similarly, the legal regimes of the continental shelf and the EEZ are incompatible with another state enjoying historic rights to the same resource.²¹ This finding simply reflects a longstanding norm in international law, as set forth in the Vienna Convention on the Law of Treaties that the later in time legal authority prevails over earlier laws or treaties.²²

The tribunal's decision should be referenced in Quad State bilateral and multilateral diplomatic venues and channels, military engagement, and communications with China. In particular, Quad State naval forces should integrate the Arbitration Award into its pre-planned responses to challenges at sea by Chinese authorities concerning alleged encroachments on "Chinese sovereignty" or "Chinese waters" in the region. By pressing the importance of the Award as a key foundation of a rules-based international order, states magnify its normative force, much as repeated references to liberty and freedom in the 1990 Copenhagen Document of the Helsinki Process transformed the Soviet bloc.

B. Conform FONOPS to the Arbitration Award

The tribunal also determined the legal status of the features in the South China Sea, seven of which have been converted by China into massive artificial islands. The legal status of the features determines whether an entitlement exists to a maritime zone of sovereignty

¹⁸ The White House, Press Briefing by Press Secretary Josh Earnest, July 13, 2016.

¹⁹ Arbitration Award, para. 231.

²⁰ *Ibid.*, para. 246-47.

²¹ *Ibid.*, para. 243, para. 244.

²² Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980., Art. 30.

(territorial sea), or other zones of sovereign rights and jurisdiction (EEZ and continental shelf), and therefore the navigational regime applicable to foreign warships and military aircraft. There are only three types of features in the Spratly Islands, each with distinct legal and political consequences that affect freedom of navigation and overflight:

(1) Submerged features are always underwater. As part of the seabed or continental shelf, they are incapable of appropriation by any state, and are never a basis for a maritime zone, such as a territorial sea or national airspace.

(2) Low-tide elevations (LTEs) are underwater at high tide, but above water at low tide.²³ Such features also are incapable of appropriation by any state, as they are also part of the seabed. Low-tide elevations normally do not generate a maritime zone, unless they are situated within the territorial sea of an island or mainland.

(3) Rocks are features above water at high tide, and may generate a territorial sea of up to 12 nm. The territorial sea is under the sovereignty of the coastal state, and sovereignty extends to the airspace above the territorial sea, on the surface of the water and in the water column, and on the seabed. Foreign warships may exercise innocent passage in the territorial sea. There is no right of over flight, and submarines that operate in innocent passage must travel on the surface and show their flag.²⁴

The tribunal decision promotes freedom of navigation and overflight in two major ways. First, it invalidates the idea that the numerous LTEs in the South China Sea have any entitlement to generate a territorial sea or territorial airspace. About half of the features occupied by China are LTEs that are not entitled to a territorial sea, and about half are rocks entitled to a territorial sea.

China has transformed seven features into artificial islands – three rocks (Cuarteron Reef, Fiery Cross Reef, Johnson Reef, and Gaven Reef North) and four LTEs (Hughes Reef, Subi Reef and Mischief Reef).²⁵ LTEs are not entitled to a territorial sea and are not subject to appropriation or territorial title by any state.²⁶

Second, the Arbitration Award provides greater fidelity to the test in UNCLOS Article 121(3) concerning what types of features may generate an EEZ and continental shelf. Islands that can sustain human habitation are entitled to a territorial sea, as well as an EEZ of up to 200 nm and continental shelf. The tribunal determined that no feature in the region is an island that can sustain human habitation, regardless of which state has lawful title to them. This finding greatly diminishes the value of the features to the claimants, and restricts the possible area over which claimants may exercise sovereign rights and jurisdiction. China has stated that military activities in its EEZ require its permission, but because there are no natural land features capable of sustaining human habitation in the Spratly Islands, there are no EEZs generated by the features.

²³ Arbitration Award, para. 280.

²⁴ Article 19(2), UNCLOS. Foreign states also may enjoy a right of assistance entry into the territorial sea in response to cases of force majeure. See Commander's Handbook on the Law of Naval Operations (U.S. Naval War College July 2007), para. 2.5.2.1.

²⁵ Arbitration Award, para. 1203(6)(B)(3)(c).

²⁶ *Ibid*, para. 1203(6)(B)(3)(b). As a subset of islands, rocks are not entitled to an EEZ.

C. Engage Multilateral Institutions

Third, states should raise the diplomatic costs of Chinese misconduct in the South China Sea by pursuing complaints, either individually or in concert with other states, in multilateral institutions. States should raise the issue of freedom of navigation and overflight at the UN Security Council as one of the most compelling threats to international peace and security. Even if other members decline to join the effort, doing so conveys the gravity of the issue. States should also pursue China’s violations of multilateral UN treaties at the appropriate UN organization exercising Secretariat functions or cognizance over the instrument, as set forth in Figure 1.

	Chinese Violations	Associated Institutions
1	UNCLOS	International Maritime Organization and UN General Assembly
2	Convention on the International Maritime Organization ²⁷	International Maritime Organization
3	International Regulations for Preventing Collisions at Sea (COLREGS) ²⁸	International Maritime Organization
4	Constitution of the UN Nations Food and Agricultural Organization ²⁹	UN Food and Agricultural Organization
5	UN GA Resolution 2997 ³⁰	UN Environment Program and UN General Assembly
6	Convention on International Civil Aviation ³¹	International Civil Aviation Organization

Figure 1: Multilateral Institutions to address China’s maritime violations

China has committed numerous violations Chapter V (EEZ), Chapter VI (Continental Shelf) and Part VII (High Seas) of UNCLOS, and COLREGS,³² which should be brought before the IMO. China also has international legal responsibility for the actions of its civilian fishing fleet and maritime militia. Flag states must exercise effective jurisdiction over their ships, and maintain effective control over their operations. Chinese Coast Guard ships also violated COLREGS, and China’s dangerous activities should be offered as an agenda item at the Flag State Implementation (FSI) subcommittee of the Maritime Safety Committee of IMO.

China’s maritime militia also does not comply with Food and Agricultural Organization (FAO) guidelines for the handling of commercial fishing vessels and illegal

²⁷ 1948 Convention on the International Maritime Organization, 289 U.N.T.S. 48.

²⁸ 1972 International Convention for Preventing Collisions at Sea, 1050 U.N.T.S. 16.

²⁹ I Basic Texts of the Food and Agricultural Organization of the United Nations 3 (2015).

³⁰ UN General Assembly resolution 2997 (XXVII) of 15 December 1972.

³¹ 1944 Convention on International Civil Aviation, 15 U.N.T.S. 295.

³² Arbitration Award, para. 1123.

unregulated, unreported (IUU) fishing. Flag states have a legal duty to take measures to ensure fishing vessels that fly their flag are not conducting IUU fishing.³³

China's fishing techniques and artificial island construction destroyed the fragile marine environment and intentionally killed endangered species of coral, turtles, and giant clams. These issues should be brought before the United Nations Environment Program (UNEP) as inconsistent with China's obligations under the East Asian Seas initiative.³⁴

Finally, China's commercial aircraft flights to its occupied features in the South China Sea traverse the Ho Chi Minh Flight Information Region (FIR) air traffic control area without proper clearance, endangering civil aviation in violation of the 1944 Chicago Convention and FIR rules set forth by the International Civil Aviation Organization (ICAO). In January 2016, for example, Vietnam complained to ICAO that 46 Chinese flights that failed to obtain proper clearance.³⁵ The United States and other nations should support Vietnam at ICAO to protect the integrity and safety of the worldwide civil aviation system.³⁶

4. Conclusion

Twenty years ago Ambassador John D. Negroponte argued: "The freedom of the seas was not given to mankind. It was won – won through scholarly and legal debate and in naval engagement."³⁷ Quad States should take the lead as champion for the freedom of the seas, and the international laws, rules, norms and regimes that support it. The instability in the South China Sea is in no small part a symptom of the uneven and lackadaisical approach states have taken to freedom of the seas. Contemporary challenges and a new U.S. Administration provide an opportunity to reconsider past assumptions that freedom of the seas is a cost-free public good that will persevere on the strength of its own logic and without more robust and unified action among the world's major democracies.

Countries have been reticent to speak plainly and honestly about China's unlawful claims. To refocus the problem, we should change the way we describes and challenge maritime claims that lack a basis in international law. Such claims currently are described as "excessive" maritime claims because they exceed the limits or rules of the law of the sea reflected in UNCLOS.³⁸ The term "excessive," however is unnecessarily ambiguous and equivocating, and it suggests that the line between "reasonable" and "excessive" is quite blurred. In reality, the standards for lawful claims are rather forthright and simple. In any event, while there may be reasonable disagreement about the scope of maritime claims under UNCLOS, those disputes concerning China are not of that type.

Shaping the law of the sea is a strategic imperative. The role of international law in the South China Sea is important because the seas form a single, coherent, inter-connected geography, subject to a single set of norms, rules, laws, and institutions. The challenges in

³³ Fisheries Advisory Opinion, ITLOS 2015, para.741.

³⁴ Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region (1983) and Action Plan for the Protection and Sustainable Development of the Marine and Coastal Areas of the East Asian Region (1994). China and nine other states are members of the East Asian Seas Action Plan.

³⁵ Vu Trong Khan, Vietnam Says China's Flights to South China Sea a Threat to Air Safety, Wall St. J. Jan. 9, 2016.

³⁶ Hanoi Slams 'Erroneous Statements' on China Island Flights, Daily Mail, Jan. 13, 2016.

³⁷ John D. Negroponte, Who Will Protect Freedom of the Seas?, 86 Dep't of State Bull. 41 (Oct. 1986).

³⁸ See, e.g., Limits in the Seas No: 112: "United States Responses to Excessive National Maritime Claims," U.S. Dep't. of State, Mar. 9, 1992.

the South China Sea form an inflection point in the international law of the sea. The rule of law in the oceans has been a source of security, prosperity and stability. If states fail to take seriously freedom of navigation and overflight, the liberal order of the oceans will unwind. China will establish hegemony in East Asia, and the deteriorating maritime order will profoundly undermine Quad State security.