



# India, China, and differing conceptions of the maritime order

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# Introduction

The law of the sea is one of the structural pillars of the international order. The complex rules and norms that govern freedom of navigation and maritime economic activity have played a crucial role in maintaining the global commons free from policies of enclosure, coercion, and expropriation.<sup>1</sup>

This international legal regime is under threat. A growing number of rising powers, many of whom harbor historical grievances, have chosen to openly contest, selectively reinterpret, or discreetly subvert key principles of the maritime order.<sup>2</sup> Nowhere is this more evident than in Asia, where the People's Republic of China (PRC) has adopted an increasingly assertive territorial policy in the South and East China Seas, while pursuing a sophisticated form of “lawfare” that seeks to reshape the international consensus on freedom of navigation and overflight.<sup>3</sup> Asia's other great rising power, India, shares some of China's more controversial positions with regard to the United Nations Convention on the Law of the Sea (UNCLOS). For example, both India and China demand greater control and oversight over foreign military activities in their exclusive economic zones (EEZ).<sup>4</sup> Both nations have also enacted domestic legislation that enters into direct conflict with certain rights and regulations guaranteed under UNCLOS. The U.S. Department of Defense's (DOD) most recent report on freedom of navigation stipulates that the U.S. Navy routinely conduct freedom of navigation operations against numerous countries, includ-

ing India and China.<sup>5</sup> Similarly, for many years, India—much like its trans-Himalayan neighbor—was reluctant to submit its maritime territorial disputes to international arbitration, preferring to negotiate with its smaller neighbors on a bilateral basis, where the stark asymmetry in national power and state capacity would presumably work to its advantage. More broadly speaking, Asian nations have long manifested an extreme wariness at the prospect of delegating any form of sovereignty. Indeed, as one legal scholar has noted:

It is a paradox of the current international order that Asia—the most populous and economically dynamic region on the planet—arguably benefits most from the security and economic dividends provided by international law and institutions and, yet, is the wariest about embracing those rules and structures.<sup>6</sup>

Over the past few years, however, a number of signs have pointed to an important shift in India's posture, and of a clear normative divergence between Asia's two emerging great powers. In July 2014, India accepted a U.N.-rendered verdict on a long-standing, and occasionally fraught, maritime boundary dispute with Bangladesh. New Delhi abided by this judgment even though it proved to be in Dhaka's favor, more than tripling the size of Bangladesh's EEZ in the Bay of Bengal. At the same time, India's political leadership has placed a new emphasis on freedom of navigation, frequently alluding to the

importance of the issue in its diplomatic statements and public declarations, while obliquely chastising China for its “eighteenth century expansionist” behavior, and “territorialization” of the Asian maritime commons.<sup>7</sup>

Meanwhile, China’s attitude toward international arbitration, maritime disputes, and freedom of navigation and overflight in its near seas has become more, rather than less conflictual. Manila’s recent attempts to internationalize its maritime territorial dispute via the Permanent Court of Arbitration (PCA) at The Hague, have only heightened Chinese hostility toward an international legal regime which, one could argue, has long served its more global interests. Beijing’s public reaction to the most recent ruling in favor of Manila—vituperative, jingoistic, and laden with conspiracies—has startled foreign observers and troubled its neighbors.<sup>8</sup> Even more than its tone, it is the substance of China’s discourse that is cause for alarm. Chinese officials’ growing tendency to privilege self-defined “historic rights” over international law, when fused with rhetoric centered on China’s civilizational exceptionalism, raises difficult questions over the nature of Beijing’s rapport with the existing international order. Last but not least, the stationing of military assets and hardened infrastructure on some of China’s most recently redeveloped land features is in clear violation of President Xi Jinping’s pledge to not engage in further militarization of the South China Sea.<sup>9</sup>

What explains this growing normative divergence between Asia’s two rising powers? What are the domestic, ideational, and strategic drivers behind such differing conceptions of the maritime order? Finally, what does this portend for the future of crisis stability in Asia, and, more broadly, for the future of the global commons?

Drawing on a close study of the relevant strategic and legal literature, this paper will engage in a comparative analysis of both India and China’s attitudes toward the law of the sea—and toward freedom of navigation and maritime disputes in particular. It will proceed in two parts. In the first section, I will outline certain similarities in both countries’ interpretations of the law of the sea, particularly as they pertain to foreign activities in the EEZ and “contiguous zones,” but also when it comes to the extension of domestic legislation to extraterritorial waters. In the following section, the paper will chart the growing divergences—both normative and behavioral—between both nations with regard to issues such as freedom of navigation, and the settlement of maritime territorial disputes. The paper will conclude by analyzing some of the potential ramifications of these developments for the future of the global order.

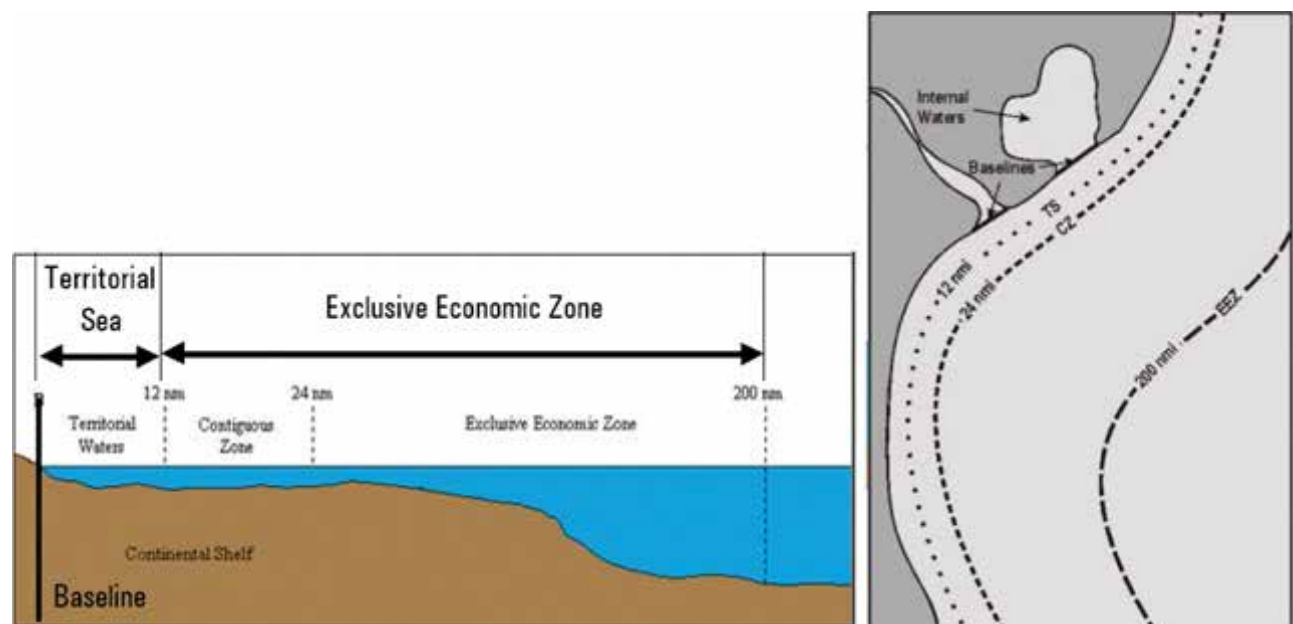
# Sino-Indian interpretations of coastal authority: Points of commonality

It is important to note, first of all, that despite UNCLOS' widespread ratification, there has never been universal agreement on certain of its structural underpinnings.<sup>10</sup> There was no golden age for maritime law, no mythical era of perfect concord. Instead, certain core features have long been contested or openly rejected by regional powers defending more expansive articulations of coastal sovereignty. Nor is there evidence of any correlation between democratic systems of government and support for

the liberal maritime order. A democracy such as Brazil, for example, continues to demand prior consent for the conduct of foreign military activities in its EEZ, whereas authoritarian Russia, which does not hesitate to violate a plethora of other international rulings, has more or less abided with the rulings of UNCLOS with regard to freedom of navigation.<sup>11</sup>

A politically diverse set of countries, ranging from Malaysia, to Iran, Vietnam, and Argentina, shares

**FIGURE 1:** DEPICTION OF DIFFERENT MARITIME ZONES



Source: Maritime Boundary Definitions, Govt. of New Zealand, available at <http://www.linz.govt.nz/sea/nautical-information/maritime-boundaries/maritime-boundary-definitions>

positions similar to that of Brazil. In many cases, notes U.S. Naval War College Professor James Kraska, this has been accompanied by the “jurisdictional creep of coastal states,” i.e. the development of domestic legislation which either conflicts with or aims to supersede international maritime law.<sup>12</sup> Recondite legal debates continue to swirl around certain points of interpretation of UNCLOS, and some states have become particularly adept at navigating these tides of confusion, utilizing other areas of international law—particularly in the environmental domain—in order to pursue their objectives of maritime enclosure. Finally, as we shall see in the course of this paper, maritime jurisprudence is continuously evolving, and with each new round of arbitration, creating new precedents which promise to affect how states will approach issues such as maritime boundary disputes and foreign military activities in their near seas.

India and China present certain intriguing similarities in their attitudes toward UNCLOS. Both nations, upon ratifying the Convention, issued their own separate declarations conditioning foreign military activities in their EEZs on demands for prior notification and/or authorization. Beijing and New Delhi have also both implemented a series of laws aimed at extending their enforcement jurisdictions deep into extraterritorial waters.

## India:

With a long history of sensitivity to naval suasion and foreign demonstrations of military strength, New Delhi has traditionally contested certain aspects of freedom of navigation for foreign warships in its near seas.<sup>13</sup> India’s declaration upon ratification of UNCLOS in 1995 thus states:

The Government of the Republic of India understands that the provisions of the convention do 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.<sup>14</sup>

Two decades prior, the Indian government had already enacted the “Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Acts 1976,” or “Maritime Zones Act,” which formally required all foreign warships to give prior notification when passing through the territorial waters of India, even when undertaking innocent passage.<sup>15</sup> The law of the sea, however, does not require prior notification or authorization for innocent passage, and coastal states that continue to make such demands are clearly violating the spirit of UNCLOS.<sup>16</sup> Another aspect of the “Maritime Zones Act” which has come under criticism are two subsections that deal with the issue of so-called “designated areas,” portions of India’s EEZ or continental shelf in which the Indian government can establish “fairways, traffic separation schemes, or any other mode of ensuring freedom of navigation that is not prejudicial to the interests of India.”<sup>17</sup> The United States and other Western powers have criticized the Indian concept of designated areas, which they view as a thinly veiled attempt to restrict freedom of navigation in India’s EEZ.<sup>18</sup> Leading Indian maritime law analysts have noted that the “Maritime Zones Act” was enacted a full six years before the signing of UNCLOS, and have recognized that therefore, “some of its provisions relating to the contiguous zone, the continental shelf, and the EEZ are not in conformity with the Convention.”<sup>19</sup> The “Maritime Zones Act,” however, has yet to be amended or put in conformity with UNCLOS. To this author’s knowledge, there is currently no evidence of any plan to do so.

This may be because, at the end of the day, Indian security managers remain deeply uncomfortable with the prospect of routinized foreign intelligence gathering activities in India’s EEZ.<sup>20</sup> As one prominent Indian naval analyst notes:

New Delhi’s real dilemma is that while it opposes Chinese aggression in the South China Sea, it also disagrees with Washington’s interpretation of maritime law and the freedoms enjoyed by foreign warships in littoral spaces. In particular, India does not concur with US attempts at claiming a “right to uninterrupted

passage” in coastal waters without the prior permission of the subject state—especially in areas that are deemed to be within a nation’s territorial waters. New Delhi’s view on the subject, in fact, broadly corresponds with Beijing—particularly on the need for prior notification by foreign warships before entering a coastal state’s territorial waters or EEZ claiming innocent passage.<sup>21</sup>

New Delhi’s unease extends beyond the maritime probing actions of its traditional military rivals such as Pakistan and China, to encompass operations conducted by more friendly maritime powers such as the U.S. Navy. Indeed, like China, India has officially protested against U.S. intelligence gathering and survey activities in its EEZ on multiple occasions—against the USNS Bowditch in 2001 and 2004, and against the USNS Mary Sears in 2007.<sup>22</sup> In the case of the USNS Mary Sears, India’s Ministry of External Affairs issued a diplomatic note stating that the U.S. vessel had been conducting marine scientific research (MSR) in its EEZ without its permission. As we shall see in the following section, the conflation of lawful military activities with MSR is one that is often made by regional challengers to freedom of navigation in EEZs. In this particular case, the U.S. State Department responded to India’s accusations with a note that elegantly framed the crux of the United States’ continued disagreements with India over foreign military activities in the EEZ, as well as over the “Maritime Zones Act”:

The United States recalls that coastal state jurisdiction in the EEZ is limited to resource-related matters. While Article 56 of the United Nations Convention of the Law of the Sea (UNCLOS) recognizes coastal state exclusive resource rights, as well as jurisdiction over offshore installations, MSR and protection of the marine environment, in the EEZ, Article 58 of the Convention specifically provides that all states enjoy in the zone the traditional high seas freedoms of navigation and overflight and other internationally lawful uses of the sea. Consistent with international law, the

mission of the USNS Mary Sears is to collect marine data at various locations for military, not scientific, purposes. Accordingly, the conduct of military survey operations within a nation’s EEZ is not MSR and does not require permission from or prior notification of the coastal state. We follow the same policy in our own EEZ, requiring neither notification nor consent for foreign military survey activities in the U.S. EEZ.

The United States also takes this opportunity to reaffirm its protest of those provisions of the Maritime Zones of India Act of 1976, which purport to assert jurisdiction over the EEZ in a manner that is contrary to international law as reflected in UNCLOS. Insofar as the 1976 Act is applied to foreign military vessels engaged in military activities in the EEZ, to include military surveys and hydrographic surveys, a requirement for prior permission from Indian authorities is contrary to customary international law and UNCLOS. Accordingly, the Government of the United States rejects the claim to require consent for military activities in the EEZ. ... The United States calls on India to respect the freedoms and rights guaranteed to all nations under international law for uses of the sea and airspace.<sup>23</sup>

India’s domestic legislation also conflicts with international maritime law with regard to criminal jurisdiction. Under Section 188 of India’s 1973 “Code of Criminal Procedure,” an offense committed by a non-citizen against “any ship or aircraft registered in India,” may be “dealt with in respect of such offense as it had been committed at any place within India at which he may be found.”<sup>24</sup> According to customary international law, however, the state in which the offender’s ship is registered, its flag state, has primary jurisdiction over events on board said ship, provided the crime was committed in international waters.<sup>25</sup> In some cases, when a serious offense is committed against a citizen of another state, the victim’s state can claim a right to prosecute, under the so-called passive personality principle.<sup>26</sup> This usually only oc-



curs, however, when the flag state agrees to not prosecute the offender.

These differences over jurisdiction rights have been cast in a stark light during the *Enrica Lexie* case, a protracted legal battle pitting India against Italy following the killing of two Indian fishermen by two Italian marines in 2012.<sup>27</sup> The two marines, who were part of a protection force aboard an Italian flagged oil tanker, the *Enrica Lexie*, claimed that they mistook the fishermen for pirates attempting to board the vessel. While the exact nature of the incident is still under dispute, it clearly occurred 20.5 nautical miles off India's coast, and therefore outside India's territorial waters. India subsequently detained the Italian marines, and has continuously asserted that it is in its rights to try the marines under Indian law, severely straining relations between Rome and New Delhi.<sup>28</sup> In 2013, India's Supreme Court refuted Italy's claim that Indian criminal jurisdiction did not extend beyond its territorial waters, with one of its judges, Justice P. Chlameswar, making the following revealing statement:

I am of the opinion that sovereignty is not given, but is only asserted. No doubt, under the Maritime Zones Act, Parliament expressly asserted sovereignty of this country over the territorial waters but simultaneously asserted its authority to determine/alter the limit of the territorial waters.<sup>29</sup>

In short, India's Supreme Court was arguing that, for the purposes of this particular case, India's contiguous zone (the portion of its EEZ stretching from 12 to 24 nautical miles) could be considered part of its territorial waters. Both marines have since been returned to Italy<sup>30</sup> but at the time of writing, the dispute over jurisdiction is still ongoing, and has been submitted to the Permanent Court of Arbitration at The Hague.<sup>31</sup>

## China:

Beijing has long had a fraught relationship with the global maritime order, and with the law of the sea.

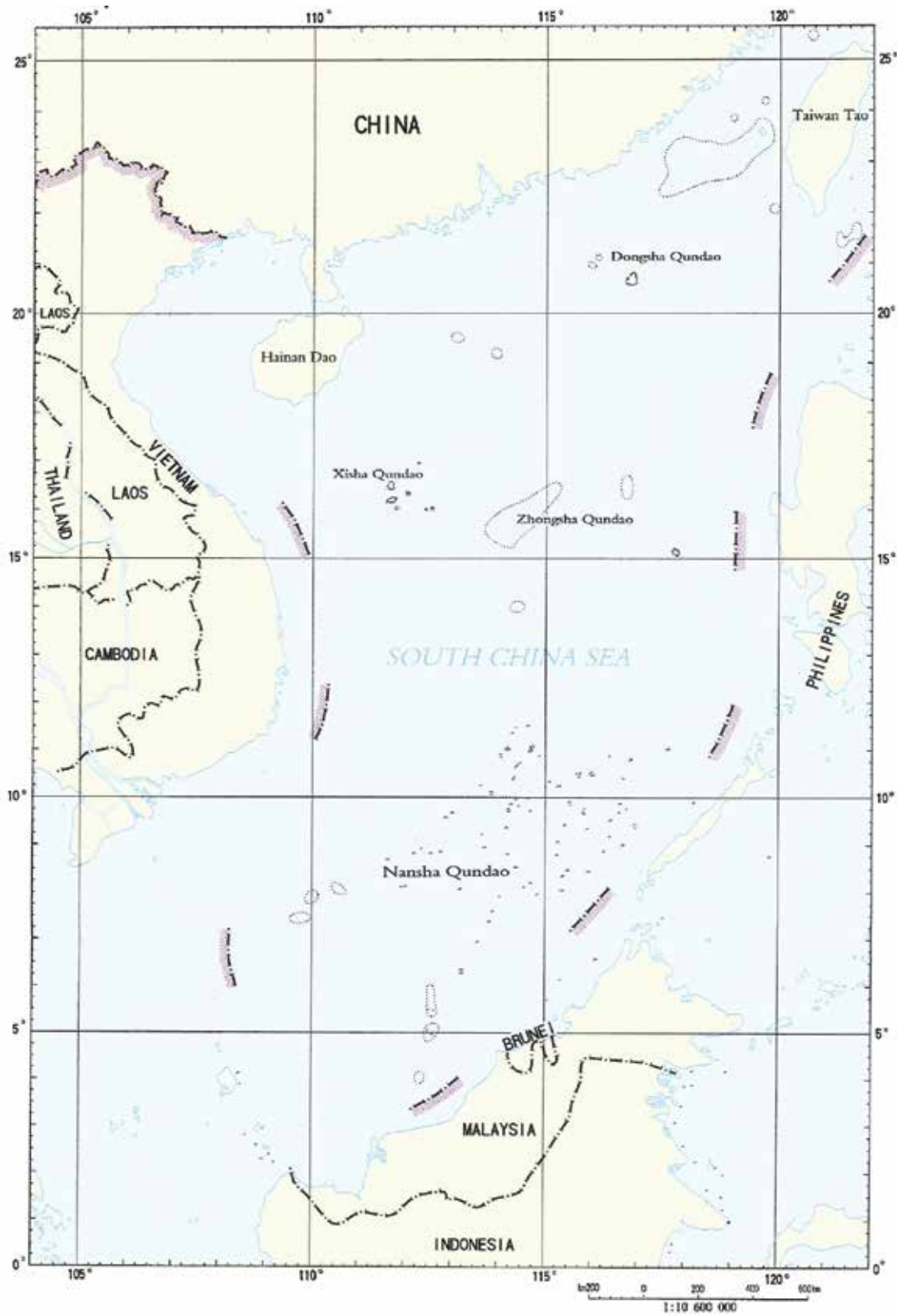
Even prior to Communist rule, Beijing already entertained expansive—and deeply controversial—maritime territorial claims. Indeed, the infamous nine- or eleven-dash line, a U-shaped demarcation that encompasses a wide swathe of the South China Sea, is a cartographical creation of China's former nationalist government, subsequently adopted by the Maoist regime.<sup>32</sup> This dashed line, sometimes also referred to by Chinese commentators as their “traditional maritime boundary line,” is a projection of what PRC officials describe as being their area of “historic rights”—a somewhat nebulous designation that appears to imply a claim to privileged access and exploitation, or even to the right to establish an exclusionary sphere of influence.<sup>33</sup> Close observers of Chinese naval developments have noted that this rhetoric has been accompanied, under the presidency of Xi Jinping, by an increased focus on the concept of “ocean defense,” and on the need for China to more vigorously assert its sovereignty, both on land and in its near seas—a domain which some Chinese strategic pundits tellingly designate as their “blue national soil.”<sup>34</sup>

The U-shaped line now has become a ubiquitous feature of Beijing's maritime policy, even appearing on Chinese passports. In May 2009, the Chinese government transmitted notes verbales incorporating the dashed line to the U.N. and requested that they be circulated to all U.N. member states. The map was accompanied by the following statement:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese government, and is widely known by the international community.<sup>35</sup>

Over the past few years, the PRC has repeatedly reiterated its unique claims, citing “abundant historical evidence.”<sup>36</sup> This state-driven narrative on the alleged historicity of Chinese jurisdiction over large tracts of the Asian maritime commons has been ac-

**FIGURE 2: CHINA'S SOUTH CHINA SEA INSET MAP ATTACHED TO ITS 2009 NOTE VERBALE**



Available at: [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf)

accompanied by an effort to present China as a unique civilizational power, and by a tendency to oppose, in a somewhat binary fashion, Western universalism to Sinic exceptionalism.<sup>37</sup> These frameworks of analysis all seem to come to the same overarching conclusion—a unique power such as China should be allowed to adopt a unique set of behaviors, especially when operating within its own civilizational sphere. Implicit in Xi Jinping’s “China Dream” is the notion that the PRC should be recognized as a peer competitor to the United States, and that this will only occur once China recovers its historic preponderance in East Asia.<sup>38</sup> Indeed, in many ways, certain leading Chinese strategic thinkers seem to believe that their nation’s momentum has propelled it into a post-rules category of its own.<sup>39</sup>

This line of thinking, however, should not be reduced to merely a collection of elite worldviews, or to a strategic subculture. Nor should it be perceived as a novel intellectual phenomenon, even though it has become more prominent and hubristic in its formulation since the financial crisis of 2008.<sup>40</sup> Instead, it has been deeply cemented into a body of domestic legislation that has evolved over the course of several decades.

Starting in 1958 with the “Declaration of the New Government of China on the Territorial Sea,” Beijing has enacted a battery of domestic laws that all claim exclusive sovereignty over a “territorial sea adjacent” to Taiwan, as well as contested groupings of islands and/or rocks in the South and East China Seas such as the Paracels, Spratlys, and Senkakus.<sup>41</sup> China’s domestic legislation also asserts its right to apply straight baselines when defining its territorial sea and internal waters. China’s coastline, however, does not meet the geographic conditions required for establishing straight baselines.<sup>42</sup>

China’s 1992 “Law on the Territorial Sea and the Contiguous Zone” goes one step further than India’s “Maritime Zones Act” by distinguishing between freedom of navigation for military vessels and freedom of navigation for commercial ships, and by demanding not only prior *notification* of all foreign

warships engaging in innocent passage, but also prior *authorization*:

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.<sup>43</sup>

This is an important distinction, and one that was also reportedly debated within India before New Delhi signed UNCLOS.<sup>44</sup> Meanwhile, Article 13 of China’s 1992 law declares that Beijing can opt to extend its penal jurisdiction beyond its territorial waters, and into the contiguous zone:

The People’s Republic of China has the right to exercise control in the contiguous zone to prevent and impose penalties for activities infringing the laws or regulations concerning security, the customs, finance, sanitation or entry and exit control within its land territory, internal waters or territorial sea.<sup>45</sup>

Like India, China issued a statement upon ratification of UNCLOS that reiterated its restriction of innocent passage, while demonstrating a troubling elasticity in its claims of sovereignty, which it extends far beyond its territorial waters:

In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People’s Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive zone of 200 nautical miles and the continental shelf. ... The People’s Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state.<sup>46</sup>

Another law passed two years later, the 1998 “Law of the People’s Republic of China on the EEZ and the Continental Shelf,” is somewhat ambiguous in its wording, first claiming that “all states shall, on the premise that they comply with international law and the laws and regulations of the People’s Republic of China, enjoy the freedom of navigation in and flight over its exclusive economic zone,” before reaffirming China’s “historic rights” in its Article 14: “The provisions in this Law shall not affect the rights that the People’s Republic of China has been enjoying ever since the days of the past.”<sup>47</sup>

As James Kraska notes, within the same law, China appears to “take away with one hand what it gives with another.”<sup>48</sup> This “legal layering,” with three different, overlapping, and conflicting sources of legitimacy for Chinese maritime actions—domestic law, the law of the sea as interpreted by China, and the more amorphous claims derived from so-called Chinese historic rights—appears deliberately engineered to sow confusion, and instill ambiguity.<sup>49</sup>

Indeed, as one report for the U.S. DOD wryly observes:

Leveraging a set of rotating arguments, with several legal justifications in play allows for movement from one legal argument to another should the previous suffer flaws in legal validity. Thus, if one argument fails, others can be swiftly leveraged to create, in the aggregate, an overall plausible legal case.<sup>50</sup>

China has been far more deliberate than India in its pursuit of “lawfare”—which the People’s Liberation Army (PLA) and civilian strategists categorize as one of the “three warfares” (san zhan), along with public opinion warfare and psychological warfare.<sup>51</sup> Over the years, Chinese maritime law experts have proven particularly adept at contesting or selectively reinterpreting certain aspects of UNCLOS. Chinese officials have thus attempted to equate U.S. sonar activity with MSR, which would not be permissible in China’s EEZ without Beijing’s express permission. China’s 2002 “Surveying and Mapping Law” declares

that any form of maritime data collection in China’s EEZ—including hydrographic research—is “subject to approval by the administrative department for surveying and mapping of the Army.”<sup>52</sup>

Chinese legal experts have also argued that U.S. intelligence gathering operations constitute a transgression of the “peaceful purposes clause” of UNCLOS, and are therefore in violation of the law of the sea.<sup>53</sup> This argument, however, is widely considered to be unfounded.<sup>54</sup> Indeed, UNCLOS only stipulates that nation-states must “refrain from any threat or use of force against the territorial integrity or political independence of any state,” and does not prohibit the collection of hydrographic intelligence in foreign EEZs.<sup>55</sup> During the Cold War, both superpowers routinely conducted such operations. Perhaps more importantly, the People’s Liberation Army Navy (PLAN) does not practice what it preaches, frequently gathering maritime intelligence of its own in foreign EEZs, including those of India and the United States.<sup>56</sup>

Last but not least, the PRC has attempted to leverage environmental activism for its own, more pragmatic purposes, entering into direct partnerships with NGOs that combat the damaging second-order effects of sonar use on marine mammal populations.<sup>57</sup> Chinese maritime law specialists have argued that U.S. and Japanese submarines and survey vessels, in effect, are producing a form of sound pollution in China’s EEZ, in the form of underwater acoustic propagation.

## **A difference in strategic behaviors:**

Although there may be some intriguing commonalities in India and China’s attitudes toward freedom of navigation and penal jurisdiction in their near seas, it is also necessary to draw out some clear distinctions. First of all, China’s domestic legislation is clearly more restrictive with regard to freedom of navigation than India’s. Whereas New Delhi only demands prior notification for innocent passage through its territorial waters, Beijing states that foreign naval

powers must also seek prior authorization. Both countries may be hostile to foreign military intelligence gathering activities in their EEZs, but Chinese legal experts have been more proactive in their attempts to reinterpret key features of UNCLOS and weaponize environmental activism to their advantage. China is also far more expansive in its maritime territorial claims, and ambitious in its pursuit of alleged historic rights. New Delhi remains mired in a long-standing maritime dispute with Islamabad over the delineation of its coastal and maritime boundary in the Rann of Kutch area, and its relationship with Sri Lanka is occasionally strained by mutual accusations of illegal fishing in the Palk Strait.<sup>58</sup> Both of these disputes, however, are low-intensity and cover relatively circumscribed geographic areas. In contrast, Beijing is embroiled in tense, occasionally volatile, territorial disputes with virtually all of its maritime neighbors, ranging from Indonesia to Japan and the Philippines. Both nations' military track records are also different. Indeed, while some of India's past conflicts have had a naval subcomponent, their principal drivers have always been on land. The PRC, however, has twice in the past initiated armed hostilities with Vietnam over disputed maritime territory—once in 1974 over the Paracels, and once in 1988 over the Spratlys.<sup>59</sup>

Most importantly, both nations have adopted very different strategic behaviors in response to perceived violations of their self-defined norms. Whereas until now India's opposition to foreign military activity in its EEZ has simply taken the form of diplomatic protests, China has behaved in a much more assertive and truculent manner, harassing U.S. survey vessels, engaging in acts of dangerous maritime brinkmanship, and regularly coercing its smaller, less powerful neighbors.<sup>60</sup>

An in-depth, comparative analysis of the strategic behavior of both nations' navies and maritime enforcement agencies is beyond the ambit of this paper. Rather, the next section will take the form of an illustrative comparison, by scrutinizing how both countries have reacted to two landmark judgments by the Permanent Court of Arbitration: the July 2014 UNCLOS ruling on the India-Bangladesh maritime boundary dispute, and the more recent arbitration over the South China Sea. I will argue that the manner in which the two rising powers have reacted to the negative results of these rulings can help us better understand the evolution of their attitudes toward the current maritime order. Indeed, whereas India is progressively emerging as a more stalwart defender of the law of the sea, China's posture has become more openly adversarial.

# A tale of two judgments

## **The India-Bangladesh maritime boundary dispute:**

On July 7, 2014, the arbitral tribunal at The Hague delivered its verdict on the long-standing Bangladesh-India maritime boundary dispute. This judgment, which ruled massively in Bangladesh's favor, came two years after a landmark International Tribunal for the Law of the Sea (ITLOS) ruling on the Bangladesh-Myanmar maritime dispute. Ever since its independence in 1971, Bangladesh had found itself forced to contend with something of a paradox. Despite the maritime character of the young nation, the concavity of its coastline, along with the instability of its littoral geography (due, amongst other things, to rising sea levels and the steady erosion of some of its coastal features along the Bengal Delta), had resulted in it possessing what appeared, in the eyes of most Bangladeshis, to be a disproportionately small EEZ.<sup>61</sup> Furthermore, its very location in the center of the Bay of Bengal—wedged between the EEZs of India and Myanmar—seemed to ensure that it would never be able to fully leverage the full benefits of the “blue economy.”<sup>62</sup>

As Sarah Watson has aptly noted:

Bangladesh's long, concave coastline makes maritime boundary disputes almost inevitable. Under a standard application of maritime boundary law, the intersecting arcs of India's and Myanmar's 200 nautical mile EEZs would

cut off Bangladesh's access to the continental shelf and leave it with a disproportionately small EEZ relative to the length of its coastline.<sup>63</sup>

Despite several rounds of bilateral negotiations over decades with both of its neighbors, Bangladesh remained, in the words of Rear Admiral M. Kurshed Alam (Retd.), the secretary of the Maritime Affairs Unit at the Bangladesh Ministry of Foreign Affairs, “stuck 100 nautical miles at sea.”<sup>64</sup> This meant that,

Despite being a maritime nation, we could only wade knee-deep. Both our neighbors drew equidistant lines, and we were stuck. While the garment industry has provided an important source of economic growth for our people, we urgently needed to find new means to diversify our economy and alleviate our population's poverty. We needed a focus on the “blue economy,” on deep-sea fishing, and natural gas exploitation.<sup>65</sup>

The last point bears mention. Indeed, the discovery of large natural gas deposits in the Bay of Bengal had coincided with a marked uptick in maritime friction between Bangladesh and Myanmar. In 2008, Myanmar's survey ships, escorted by the Myanmar Navy, had entered a contested maritime area to begin exploratory drilling for natural gas. Dhaka responded by dispatching a flotilla of its own, triggering a tense three-week standoff.<sup>66</sup>

On October 8, 2009, after extensive internal discussions and with some trepidation, Bangladesh served arbitration to both India and Myanmar.<sup>67</sup> According to Rear Admiral Kalam, Myanmar's immediate reaction was one of hostility, with its officials accusing Dhaka of having "stabbed it in the back."<sup>68</sup> After its initial fit of pique, however, the Myanmar government accepted external arbitration on the dispute, and became progressively more cooperative. According to some external observers, this may have been because Naypyidaw, like Dhaka, had realized that the continued irresolution of the Bangladesh-Myanmar boundary dispute was hurting its economic interests by frightening off energy companies and investors.<sup>69</sup> New Delhi, in the meantime, adopted a wait-and-see strategy, closely coordinating with Myanmar (even helping to provide it with good legal representation), and reaffirming the equidistance principle.<sup>70</sup>

When ITLOS delivered its ruling on the Bangladesh-Myanmar maritime boundary in March 2012, the judgment proved somewhat revolutionary. Not only was it the first time that the tribunal had actually ruled on a maritime boundary dispute, its verdict was also in many aspects quite creative, both in its prioritization of equity over legal orthodoxy, and in its creation of so-called "gray areas."<sup>71</sup> Citing past cases of concavity and of middle countries "enclaved" between other nations' EEZs in the North Sea and the Caribbean, ITLOS agreed to an adjustment of the provisional equidistance line to remedy the "cut-off effect" of Bangladesh's southward projection. Moreover, as the tribunal held jurisdiction over both the continental shelf and superjacent waters, it decided to establish zones of shared resource jurisdiction (see Fig. 3), providing the following explanation:

In the area beyond Bangladesh's exclusive economic zone that is within the limits of Myanmar's exclusive economic zone, the maritime boundary delimits the Parties' rights with respect to the seabed and subsoil of the continental shelf but does not otherwise limit Myanmar's rights with respect to the exclusive economic zone, notably those with respect to the superjacent waters.<sup>72</sup>

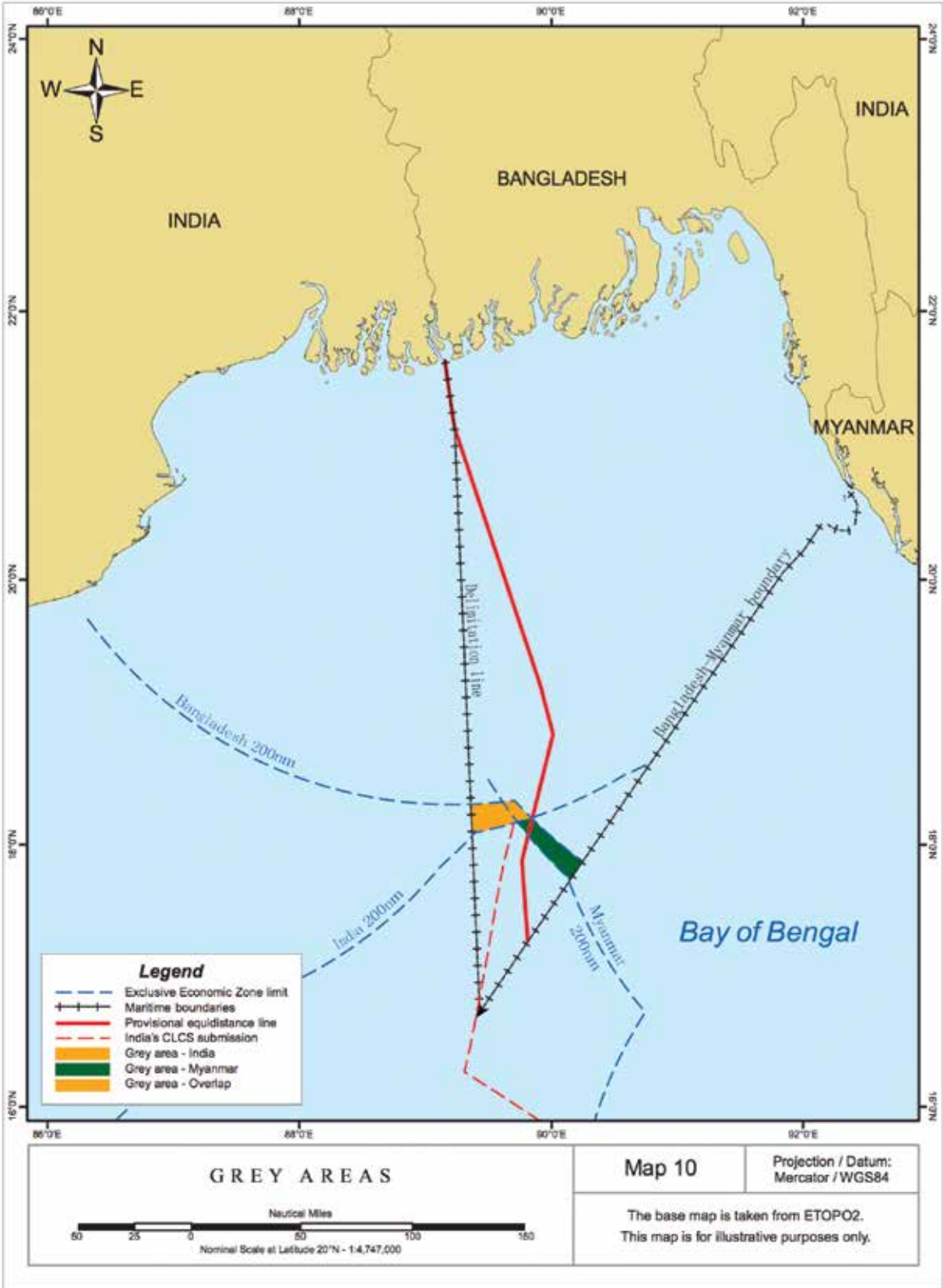
In short, Bangladesh could exploit the continental shelf, while Myanmar held sway over the resources of the superjacent waters. A similar way of adjudicating overlapping entitlements was employed by the PCA-registered tribunal in its 2014 ruling on the India-Bangladesh maritime boundary dispute. Indeed, in many ways, the 2012 ITLOS verdict—which had led to a peaceful resolution of the long-simmering maritime tensions between Dhaka and Naypyidaw—helped shape the judgment issued by the arbitral tribunal two years later.

Thus, although the tribunal rejected Bangladesh's desire to apply an "angle-bisector" method<sup>73</sup> to determine its maritime boundary line, it still factored in the concavity of the nation's coastline with a view of applying a genuinely equitable solution. Like in the ITLOS ruling of 2012, the arbitrators at The Hague—employing virtually identical language—agreed to an adjustment of Bangladesh's equidistance line, noting that:

In the delimitation of the exclusive economic zone and the continental shelf, concavity per se is not necessarily a relevant circumstance. However, when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result. The Tribunal further notes that, on account of the concavity of the coast in question, the provisional equidistance line it constructed in the present case does produce a cut-off effect on the maritime projection of Bangladesh and that the line if not adjusted would not result in achieving an equitable solution, as required by articles 74 and 83 of the Convention.<sup>74</sup>

The results of this ruling, and of the adjustment of the Bangladesh-India maritime boundary line, were hugely beneficial to Dhaka. Bangladesh's EEZ had vastly expanded in size, with the weaker nation receiving 19,467 sq. kilometers out of the total 25,602 sq. kilometers in dispute.<sup>75</sup> By any measure, this was a stunning victory

**FIGURE 3: GRAY AREAS IN THE BAY OF BENGAL**



Source: Bay of Bengal Maritime Boundary Arbitration Between Bangladesh and India-Case No. 2010-16 (The Hague: Permanent Court of Arbitration, 2014), p.159, available at <http://www.pcacases.com/web/view/18>.



for Bangladesh, and a no less startling reversal of fortune for its great power neighbor, India. Yet despite the extent of this setback, New Delhi's official reaction was remarkably gracious. While the Bangladesh government and media openly exulted over the results of the ruling, India's Ministry of External Affairs issued the following approving statement:

The Arbitration Tribunal for Delimitation of Maritime Boundary between Bangladesh and India, established under Annex VII of the UN Convention of Law of the Sea (UNCLOS), rendered its award on July 7, 2014. We respect the verdict of the Tribunal and are in the process of studying the award and its full implications. 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.<sup>76</sup>

Ever since, the ruling—and India's positive reaction to it—have acquired something of a totemic quality, not only to Indian officials desirous of displaying their nation's "responsible stakeholder credentials," but also to their U.S. counterparts.<sup>77</sup> Indeed, U.S. military or diplomatic officials now openly contrast India's constructive attitude with the perceived intransigence of Asia's other great rising power, China. At the inaugural Raisina Dialogue, held in New Delhi in January 2016, U.S. Pacific Command (PACOM) commander Admiral Harry Harris Jr. drew a not-so-veiled comparison between both countries:

While some countries seek to bully smaller nations through intimidation and coercion, I note with admiration India's example of peaceful resolution of disputes with your neighbors in the waters of the Indian Ocean. India, indeed, stands like a beacon on a hill, building a future on the power of ideas...not on castles of sand that threaten the rules-based architecture that has served us all so very well.<sup>78</sup>

Abraham Denmark, the former deputy assistant secretary of defense for East Asia, also referred to the India-Bangladesh maritime boundary resolution in the course of a congressional testimony only a few days before the arbitral tribunal's verdict on the South China Sea. India's measured response to the judgment, noted Denmark, was "an example we would encourage China to follow."<sup>79</sup> Unfortunately, as we shall see, this was not to be the case.<sup>80</sup>

## The ruling over the South China Sea:

After months of tension and unsuccessful bilateral discussions with Beijing over its occupation of Scarborough Shoal in 2012, the Philippines decided to internationalize its maritime dispute. Over the course of the next few months, Filipino officials and legal experts discreetly compiled over 4,000 pages of claims and intricate argumentation.<sup>81</sup> Then, on January 23, 2013, Manila formally announced that it had begun an arbitration case against China under the provisions of Annex VII of UNCLOS. Manila's queries did not pertain to issues of direct sovereignty—as UNCLOS does not provide legal authority for adjudicating such issues—but rather sought to dispel ambiguity on certain elements of China's claims, such as its U-shaped line, as well as clarify the status of certain of the features, man-made or otherwise, held by China in the South China Sea.

Manila's submission was structured around a few core arguments:

- The features in the Spratly Archipelago and Macclesfield Bank are low tide elevations or rocks, not natural islands, and are therefore only entitled to a 12 nautical mile territorial sea (or to a 500-meter safety zone, if an artificial island) and not to an EEZ.
- China's "historic claims"—in the form of the dashed or U-shaped line—had no legal, or even historic, basis and violated Philippine rights under UNCLOS.

- Beijing’s fishing, industrial, and law enforcement activities in the South China Sea violated UNCLOS.

China’s reaction was both swift and irate. In February 2013, the Chinese government issued a note verbale outlining its position, and flatly refused to participate in the arbitration process.<sup>82</sup> China’s position was articulated around what it called the “Four Noes Policy”: non-admission, non-participation, non-acceptance, and non-implementation.<sup>83</sup> In October 2015, UNCLOS announced that it held juris-

diction over the case, despite Chinese protestation. The ruling—a hefty tome of over 500 pages—was finally delivered 10 months later, on July 12, 2016.<sup>84</sup> It proved to be sweepingly in Manila’s favor, indeed almost unexpectedly so. Although many foreign, and even Chinese, observers had begun to suspect that the verdict would not be to Beijing’s liking, few thought that it would provide such a decisive repudiation of the Chinese narrative on the South China Sea. As one can see via this table summary, Manila’s claims were virtually all upheld:

**FIGURE 4: SUMMARY OF THE TRIBUNAL’S RULING**

The Philippines’ final submission	The tribunal’s ruling
1. China’s maritime entitlements in the South China Sea may not extend beyond those permitted by (UNCLOS).	China’s claims cannot extend beyond those defined by UNCLOS.
2. China’s claims within its “nine-dash line” that exceed its entitlements under UNCLOS are unlawful.	China’s claims to historic rights within the “nine-dash line” are incompatible with UNCLOS.
3. Scarborough Shoal generates no EEZ or continental shelf.	Scarborough Shoal’s high-tide features are rocks, and thus generate neither an EEZ nor a continental shelf.
4. Mischief Reef, Second Thomas Shoal, and Subi Reef are low-tide elevations that generate no maritime entitlements.	These features are low-tide elevations, thus have no maritime entitlements.
5. Mischief Reef and Second Thomas Shoal are part of the EEZ and continental shelf of the Philippines.	These features are part of the EEZ and continental shelf of the Philippines.
6. Gaven Reef and McKennan Reef are low-tide elevations that generate no maritime entitlements, but may be used to determine baselines.	Gaven Reef (North) and McKennan Reef are rocks. Gaven Reef (South) is a low-tide elevation.
7. Johnson Reef, Cuarteron Reef, and Fiery Cross Reef generate no entitlements to an EEZ or continental shelf.	Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are rocks, generating no EEZ or continental shelf entitlements.
8. China has unlawfully interfered with the Philippines’ exercise of sovereign rights over resources in its EEZ and continental shelf.	China violated the Philippines’ sovereign rights in its EEZ by (a) interfering with Philippine fishing and petroleum exploration, (b) constructing artificial islands, and (c) failing to stop Chinese fishermen fishing in the zone.

The Philippines' final submission	The tribunal's ruling
9. China has unlawfully failed to prevent its nationals and vessels from exploiting living resources in the Philippines' EEZ.	China violated the Philippines' sovereign rights in its EEZ by (a) interfering with Philippine fishing and petroleum exploration, (b) constructing artificial islands, and (c) failing to stop Chinese fishermen fishing in the zone.
10. China has unlawfully interfered with Philippine fishermen's traditional fishing activities at Scarborough Shoal.	Fishermen from the Philippines and China have traditional fishing rights at Scarborough Shoal, and China interfered with these rights by restricting access.
11. China has violated its obligations under UNCLOS to protect the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef, and Subi Reef.	China caused severe harm to the coral reef environment and violated its obligation to preserve and protect fragile ecosystems and endangered species.
12. China's occupation of and construction activities on Mischief Reef violate UNCLOS provisions on artificial islands and environmental protection, and constitute unlawful acts of attempted appropriation.	China's land reclamation and construction of artificial islands have caused severe harm to coral reefs. China has violated its obligation to protect the marine environment. Chinese fishermen have been harvesting endangered species. Chinese authorities were aware of these activities and failed to stop them.
13. China has breached UNCLOS obligations around Scarborough Shoal through dangerous operation of law enforcement vessels and endangerment of Philippine vessels.	China, through the conduct of Chinese law enforcement vessels around Scarborough Shoal, endangered Philippine vessels and personnel in violation of UNCLOS.
14. China has unlawfully aggravated and extended the disputes. At Second Thomas Shoal, it has (a) interfered with the Philippines' rights of navigation, (b) prevented the rotation and resupply of Philippine personnel, and (c) endangered the health and well-being of those personnel. In addition, China has (d) conducted dredging, artificial island-building, and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef, and Subi Reef.	China has violated its obligations to refrain from aggravating or extending disputes during the settlement process. The tribunal lacks jurisdiction on submissions (a) to (c).
15. China shall respect the rights and freedoms of the Philippines and comply with its duties under UNCLOS.	Both parties are obliged to comply with UNCLOS.

"Landmark South China Sea Ruling Could Revive Negotiations," *International Crisis Group: Pursuit of Peace Blog*, July 12, 2016, available at <http://blog.crisisgroup.org/worldwide/2016/07/12/landmark-south-china-sea-ruling-could-revive-negotiations/>.

A foretaste of the upcoming Chinese furor was provided by the former State Councilor Dai Bingguo, who gave a speech at the Carnegie Endowment for International Peace in Washington, 10 days before the ruling.<sup>85</sup> The former official used the occasion to lay out some of the counterarguments that have since been almost ritually deployed by the Chinese

government in an effort to delegitimize the arbitration case. Dai Bingguo dismissed the upcoming judgment as "nothing more than a piece of paper," and in a speech laden with historical resentment and references to age-old grievances, issued veiled threats to the Philippines, urging it not to make "any further provocation," otherwise China "would not sit idle."

He then proceeded to accuse the United States of inflaming the situation through its militarization of the South China Sea, and obliquely accused Washington of engaging in “political intrigue” by encouraging Manila to initiate the arbitration process behind the scenes.<sup>86</sup>

Dai Bingguo’s speech, which was extensively carried in both the Chinese media and on Chinese government websites, may well go down in history as one of the first clear indicators of an inflection point in modern China’s diplomacy and stance vis-à-vis the world order. Indeed, the emphasis, once again, on China’s civilizational exceptionalism, and on the need for the West to view Chinese strategic behavior in a category of its own, somehow distinct from the existing rules-based architecture, is deeply troubling.<sup>87</sup>

In the months following the ruling, China has not displayed any signs of a desire for greater accommodation. The PRC has consistently held that Manila has violated its alleged bilateral agreement with Beijing not to initiate arbitration by a third party, and that China never agreed to the procedure.<sup>88</sup> Therefore, according to China, the judgment is invalid. This argument, however, does not hold water. Indeed, under Article 9 of UNCLOS Annex VII, the absence of a party, or its failure to defend its case, does not bar the proceedings in any way.<sup>89</sup>

Meanwhile, Chinese officials continue to lambast alleged U.S. hypocrisy, most notably over its contin-

ued failure to ratify UNCLOS, and to make passing references to “certain countries outside the region” attempting to “deny China’s sovereign rights and interests in the South China Sea through the arbitration.”<sup>90</sup> This vein of conspiracism, which runs deep in an increasingly nationalistic China, has also led to accusations of perfidy aimed at the tribunal itself, with some questioning one of the jurists’ impartiality on the basis of his Japanese nationality, or suggesting that Manila “hired all the judges.”<sup>91</sup>

There is no doubt that the July 2016 judgment, with its reaffirmation of many of the core values undergirding the law of sea and freedom of navigation, is a positive and encouraging development. However, in many ways, it is also a turning point, and one that is not devoid of risk. As Roy Kamphausen has noted, the arbitral decision could turn out to be something of a “mixed blessing” for the United States, as:

Prior to the award, China’s ambiguity with regard to its claims allowed for freedom of rhetoric and political maneuver. However, the clarity provided by the ruling—which outlines what can and cannot be claimed in the South China Sea—removes much of that ambiguity, laying bare how insupportable those claims are. China has now painted itself into an awkward corner with few good face-saving policy choices available.<sup>92</sup>

## Conclusion: What ramifications for the future of the maritime order?

The study of these two landmark judgments is revelatory in many aspects. Not only do the complex verdicts add considerably to the existing body of maritime jurisprudence, they also provide critical insights into how Asia's two great rising powers are engaging with the extant global order. For many decades, Beijing and New Delhi have nourished a post-colonial sense of victimization, and an animus toward the international adjudication of territorial disputes.<sup>93</sup> This report has showed that this era of shared grievances may be coming to an end, and that a growing normative divergence now separates both nations.<sup>94</sup>

India has become less hostile and more overtly supportive of the existing maritime order. New Delhi's positive reaction to the ruling in Dhaka's favor, along with the Modi administration's increasingly full-throated defense of freedom of navigation, provide clear evidence of this shift in India's mindset and behavior.<sup>95</sup> In many ways, however, this transition remains a work in progress. Indeed, India is far from fully aligned with the norms and regulations guaranteed under UNCLOS. As described in the first section of this report, India's criminal and maritime legislation remains in violation of certain core tenets of the law of the sea. Although Narendra Modi frequently stresses the importance of freedom of navigation and overflight, India's official reaction to the South China Sea ruling was relatively cautious and measured.<sup>96</sup> New Delhi has flatly refused to engage in joint freedom of navigation patrols in the South China Sea, and

some Indian analysts have expressed their discomfort with the ruling, suggesting that it could potentially have negative externalities for India in its ongoing maritime dispute with Pakistan.<sup>97</sup> Only a few months prior to the ruling, India signed a "common position statement" with Russia and China, which called for all disputes in the South China Sea "to be addressed through negotiations and agreements between the parties concerned."<sup>98</sup> Although the statement went on to stress the importance of respecting the provisions of UNCLOS, it raised eyebrows in certain Western capitals, which viewed it as excessively deferential to China's position on its territorial disputes.<sup>99</sup> All this suggests that even though India's attitude toward the law of the sea is in the midst of a transition, this shift may be more gradual and piecemeal in its manifestations than some might have hoped.<sup>100</sup>

On the other hand, China's reaction to the most recent ruling on the South China Sea has the merit of injecting a chilling dose of clarity. Indeed, it has become evident that Beijing is openly hostile to the liberal maritime order. In the months following the verdict, China has thus attempted, with only a very limited degree of success, to create a countervailing coalition of nations hostile to the ruling.<sup>101</sup> It has staunchly refused to abide by the tribunal's verdict, accelerating its militarization of reclaimed land features in the South China Sea.

There are now two major questions going forward. The first is how China will manage the growing

tensions between its regional and global strategies. Indeed, as the PLAN and People's Liberation Army Air Force widen their areas of operation, they will become increasingly dependent on the very rules of freedom of navigation and overflight that Beijing insists on violating in its own near seas.

As one U.S. scholar has aptly noted:

Although Chinese commentators object to the application of these rules and norms off China's coasts, the Chinese have yet to articulate how their approach to achieving regional objectives can be reconciled with the imperatives of managing the global maritime system.<sup>102</sup>

The second major question is how the United States and its allies can best manage a rivalry that is now clearly also ideological in nature. In the past, Sino-U.S. military competition could be attributed to some of the more traditional drivers of the security dilemma: misperception, miscommunication, and an almost mechanical action-reaction dynamic.<sup>103</sup> Beijing's clear-cut opposition to last year's ruling has—depressingly—demonstrated that the roots of these tensions go far deeper. Long-standing observers of the PRC would no doubt point to the regime's intellectual roots, and to the Marxist vision of international law as an instrument for the exertion of power—to be shaped, utilized, or discarded at will—rather than as a set of objective norms.<sup>104</sup>

More broadly, Chinese maritime revisionism seems almost irreconcilably at odds with the core norms that have long undergirded the global order.<sup>105</sup> Although Washington has been the prime architect of this normative edifice since the end of World War II, it will require the support of its allies and partners to maintain it. The stakes could not be higher. Indeed, China's assault on freedom of navigation in the maritime domain could be only the first salvo in what could morph into an increasingly bitter legal and ideological struggle for the future of the global commons. For instance, there is already a substantial body of Chinese scholarly literature on “outer space lawfare,” which seeks to assert the PRC's vertical

sovereignty over the portions of outer space directly above China's terrestrial borders.<sup>106</sup>

Unfortunately, however, the United States currently appears somewhat isolated in its stalwart defense of freedom of navigation. Barring a few exceptions such as Japan and France, most countries have been unwilling to risk Beijing's ire by vigorously defending freedom of navigation in the contested waters of the South China Sea.<sup>107</sup> Meanwhile, Chinese diplomats have grown ever more adept at fomenting intraregional divisions, whether within Southeast Asia or the European Union.<sup>108</sup> The tepid international response and the Association of Southeast Asian Nations' (ASEAN) growing timidity in the face of the PRC's violations are causes for serious concern, as they run the risk of reinforcing China's impression that international law is merely an American tool.<sup>109</sup>

One of the core tasks of the Trump administration will be to demonstrate why this is not the case, and how even countries such as India—with its historically ambivalent attitude toward UNCLOS—have come to view the law of the sea as an essential public good. Ideally, this would be accompanied by more routinized—but perhaps less publicized—freedom of navigation patrols (FONOPS), involving not only the United States, but also some of its key allies.<sup>110</sup> Efforts should also be made to enhance and further institutionalize subregional naval groupings of fellow defenders of the global commons, with an emphasis on regular joint exercises in the South and East China Seas—in the vein of the recent joint drills involving Japanese, French, U.S., and British military forces in the East China Sea.<sup>111</sup> A resuscitation of the so-called “Quad”—the grouping of Asia's four main democratic maritime powers (Japan, India, Australia, and the United States)—could also prove invaluable, although it may prove challenging to overcome some lingering political sensitivities in both New Delhi and Canberra.<sup>112</sup> While the United States' efforts to dissuade China from illegally expanding its military presence in the South China Sea have thus far failed, there are perhaps other, more asymmetric forms of leverage that could be applied—maybe in the form of targeted financial sanctions against

Chinese construction firms proven to engage in land reclamation activities.<sup>113</sup>

Last but not least, the United States will need to assure its regional partners that the defense of freedom of navigation is woven into its strategic DNA, and is not up for negotiation. Donald Trump's deep-rooted aversion to multilateral arrangements—ranging from NATO to the Paris Agreement—has damaged U.S. credibility overseas, and raised doubts over its continued willingness to buttress the global sys-

tem. Concerns have already grown in certain Asian capitals over the current administration's seemingly more transactional approach to statecraft, along with its de-emphasis of the role of values in American foreign policy.<sup>114</sup> Washington should thus work to dispel any notion that it may come to accommodate Beijing's more egregious territorial ambitions in exchange for Chinese cooperation on other issues.<sup>115</sup> Indeed, if such a "G-2 grand bargain" were ever to take place, it may well constitute the coup de grâce to an increasingly battered maritime order.

## Endnotes

1. For a seminal discussion of the importance of the global commons for U.S. leadership and global stability, see: Barry R. Posen, "Command of the Commons: The Military Foundations of U.S. Hegemony," *International Security* 28, no. 1 (2003): 5-46.
2. James Kraska, "Sovereignty at Sea," *Survival* 51, no. 3 (2009): 13-18.
3. U.S. Air Force officer and legal expert Charles Dunlap has succinctly defined lawfare as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective." See: Major General Charles Dunlap Jr., "Lawfare—A Decisive Element of 21<sup>st</sup> Century Conflicts?" *Joint Forces Quarterly* 54 (2009): 34-39.
4. See Zhang Haiwen and Vijay Sakhuja, "Security in the Maritime Commons," in Ashley Tellis and Sean Mirski (Eds.), *Crux of Asia: China, India, and the Emerging Global Order* (Washington, DC: Carnegie Endowment for International Peace, 2013): 145-165.
5. U.S. Department of Defense (DOD) *Freedom of Navigation (FON) Report for Fiscal Year 2016* (Arlington, Virginia: U.S. Department of Defense, 2017), available at <http://policy.defense.gov/Portals/11/FY16%20DOD%20FON%20Report.pdf?ver=2017-03-03-141349-943>.
6. Simon Chesterman, "Asia's Ambivalence about International Law and Institutions: Past, Present, and Futures," *The European Journal of International Law* 27, no. 4 (2017): 945-978. Chesterman notes, for instance, that Asian countries have the lowest rate of acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ) and of membership of the International Criminal Court (ICC). They are also the least likely to have signed conventions such as the International Covenant on Civil and Political Rights (ICCPR).
7. Victor Mallet and Jonathan Soble, "India's Narendra Modi Embraces Japan as He Chides China," *Financial Times* (September 02, 2014), available at <http://www.ft.com/cms/s/0/61256b7e-3263-11e4-a5a2-00144feabdc0.html#axzz4fZK9ZdUe>. "South China Sea: Modi Calls for Utmost Respect of International Laws, Says Force Can Complicate the Issue," *Press Trust of India*, September 08, 2016, available at <http://www.dnaindia.com/india/report-south-china-sea-modi-calls-for-utmost-respect-of-international-laws-says-force-can-complicate-the-issue-2253202>.
8. "China's Defiance in the South China Sea," *The New York Times*, August 13, 2016, available at [http://www.nytimes.com/2016/08/14/opinion/sunday/chinas-defiance-in-the-south-china-sea.html?\\_r=0](http://www.nytimes.com/2016/08/14/opinion/sunday/chinas-defiance-in-the-south-china-sea.html?_r=0).
9. Chinese analysts increasingly view the U.S.' defense of freedom of navigation in the South and East China Seas as being part of a broader "emerging (ideological) battlefield," in Southeast Asia. See: Adam P. Liff, "China and the US Alliance System," *The China Quarterly* 229 (March 2017): 1-29.
10. For President Xi Jinping's public pledge not to militarize man-made features in the South China Sea, see: *Remarks by President Obama and President Xi of the People's Republic of China in Joint Press Conference* (Washington, DC: White House Office of the Press Secretary, September 25, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/09/25/remarks-president-obama-and-president-xi-peoples-republic-china-joint>.
11. UNCLOS has been ratified by 167 states and the European Union. The U.S. has signed but not yet ratified the treaty, despite a growing bipartisan consensus in favor of ratification. Notwithstanding this lingering issue, the U.S. strictly abides by all the provisions of UNCLOS, with the U.S. military becoming one of its staunchest defenders. See: Stewart M. Patrick, "(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty," *The Atlantic*, June 10, 2012, available at <https://www.theatlantic.com/international/archive/2012/06/-almost-everyone-agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301/>.
12. On Brazil's hostility to foreign military activities in its EEZ and expansive offshore claims, see Kari Lipschutz, "Brazil's Maritime Claim: A Threat to UNCLOS?" *Yale Journal of International Affairs* 6, no.1 (2011): 113-115. See also: James Kraska, *Global Swing States and the Maritime Order* (Washington, DC: German Marshall Fund of the United States, 2012).
13. On Brazilian political elites' ambivalence toward the existing liberal order, see Matias Spektor, "Brazil: Shadows of the Past and Contested Ambitions," in William I. Hitchcock et al. (Eds.) *Shaper Nations: Strategies for a Changing World* (Cambridge, MA: Harvard University Press, 2016): 17-36.
14. James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (New York: Oxford University Press, 2011): 291-329. The term "naval suasion", used to describe the political application of naval force, was first coined by Edward Luttwak. See: Edward Luttwak, *The Political Uses of Seapower* (Baltimore, MD: The Johns Hopkins University Press, 1974): 4. On New Delhi's historic sensitivity to extra-regional naval presence, see: Iskander Rehman, "From an Ocean of Peace to a Sea of Friends: The Evolution of India's Attitude Towards Maritime Multilateralism," in Waheguru Pal Singh Sidhu et al. (Eds.), *Shaping the Emerging World: India and the Multilateral Order* (Washington: Brookings



- Institution Press, 2013): 131-157. Also David Bewster, *India's Ocean: The Story of India's Bid For Regional Leadership* (New York: Routledge, 2014): 37-38.
14. See: *India—Declaration Upon Ratification* (New York: United Nations Division for Ocean Affairs and the Law of the Sea), available at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm).
  15. See: *The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, Act No. 80 of 28 May 1976* (New Delhi: Parliament of India, 1976), available at [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDF-FILES/IND\\_1976\\_Act.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDF-FILES/IND_1976_Act.pdf).
  16. William K. Agyebeng, "Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea," *Cornell International Law Journal* 39, no. 2 (2006): 392.
  17. See in particular subsections 5a and 5b of *The Maritime Zones Act, 1976, Act No. 80 of 28 May 1976* (New Delhi: Parliament of India, 1976).
  18. Stephen Rose, "Naval Activity in the Exclusive Economic Zone—Troubled Waters Ahead?" *Ocean Development and International Law* 21 (1990): 125-126.
  19. O.P. Sharma, "India and the United Nations Convention on the Law of the Sea," *Ocean Development and International Law* 26 (1995): 391-412.
  20. O.P. Sharma, "Enforcement Jurisdiction in the EEZ—The Indian Experience," *Ocean Development and International Law* 24, no. 2 (1993): 155-178.
  21. Abhijit Singh, "The Escalating South China Sea Dispute: Lessons for India," *IDSIA Strategic Comment* (March 01, 2016), available at [http://www.idsa.in/idsacomments/the-escalating-south-china-sea-dispute\\_asingh\\_010316](http://www.idsa.in/idsacomments/the-escalating-south-china-sea-dispute_asingh_010316).
  22. George G. Gilboy and Eric Heginbotham, *Chinese and Indian Strategic Behavior: Growing Power and Alarm* (New York: Cambridge University Press, 2012): 91.
  23. Quoted in Ashley J. Roach and Robert W. Smith, *Excessive Maritime Claims: Third Edition* (Leiden: Martinus Nijhoff, 2012): 385-386.
  24. See: *The Code of Criminal Procedure, 1973, Act No. 2 of 1974* (New Delhi: Parliament of India, 1974), available at <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf>.
  25. Article 97 of UNCLOS thus states, that "in the event of an incident of navigation which gives rise to the penal responsibility of any person in the service of the ship, no penal proceedings may be instituted against such a person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national." See: UNCLOS-Part VII High Seas, Art. 97, available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/part7.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/part7.htm).
  26. See Tim Stephens & Donald R. Rothwell, "The LOSC Framework for Maritime Jurisdiction and Enforcement 30 years on," *International Journal of Marine and Coastal Law* 27, no. 1 (2012): 701-709. Also Danielle Ireland-Piper, "Extra-territorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?" *The Melbourne Journal of International Law* 1, no. 3 (2012), available at <http://www.austlii.edu.au/au/journals/MelbJIntLaw/2012/5.html>
  27. For a detailed Italian summary of the confrontation, see: "The Case of The Enrica Lexie: Technical Analysis of the Positions," Attached document to the document no. 051695 (registered at the Public Prosecutor's Office in Rome on 13th March 2013), available at [http://www.seeninside.net/piracy/ftp/EN\\_1306\\_Enrica\\_Lexie\\_Technical\\_Analysis\\_expose\\_annex-C\\_analysis\\_of\\_the\\_positions\\_June\\_2013.pdf](http://www.seeninside.net/piracy/ftp/EN_1306_Enrica_Lexie_Technical_Analysis_expose_annex-C_analysis_of_the_positions_June_2013.pdf).
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  29. "Sovereignty is Not Given, But Asserted," *Outlook*, January 18, 2013, available at <http://www.outlookindia.com/newswire/story/sovereignty-is-not-given-but-asserted-sc/787367>.
  30. "India Lets Italian Marine Go Home as UN Mediates Over Fishermen Shooting," *The Guardian*, May 26, 2016, available at <https://www.theguardian.com/world/2016/may/26/india-lets-italian-marine-salvatore-girone-go-home-as-un-mediates-over-fishermen-shooting>.
  31. See: *Case View: The "Enrica Lexie" Incident (Italy v. India)* (The Hague: Permanent Court of Arbitration Case, 2015-28), available at <https://pcacases.com/web/view/117>.
  32. For a detailed analysis of China's long-standing U-shaped line, see: Mashiro Miyoshi, "China's U-Shaped Line Claim in the South China Sea: Any Validity Under International Law?" *Ocean Development and International Law* 43 (2012): 1-17.
  33. There is a great degree of ambiguity in international maritime law over what precisely constitutes "historic waters," a state of affairs which, until now, China seems to have been content to leverage to its advantage. A 1960s U.N. study has suggested that three factors should be taken into account in order to demand extended maritime jurisdiction due to alleged histor-

- ic rights. 1) The exercise of authority over the area by the state claiming the historic title; 2) the continuity of this exercise of authority throughout history; 3) the attitude of foreign states (implying their absence of open contestation). None of these conditions are met with regard to China's U-shaped line. For the U.N. study, see: "Juridical Regime of Historic Waters," U.N. Doc. A/CN.4/143, in *Yearbook of the International Law Commission*, Vol.II, 1962, pp.1-26. For a broader discussion of China's historic maritime claims, see: Zhou Keyuan, *Law of the Sea in East Asia: Issues and Prospects* (New York: Routledge, 2005): 137-153.
34. See: Ryan D. Martinson, "Panning for Gold: Assessing Chinese Maritime Strategy from Primary Sources," *Naval War College Review* 69, no. 3 (2016): 23-45. On the Chinese concept of "blue national soil," see: Dean Cheng, "China's Blue Soil," *War on the Rocks*, August 02, 2013, available at <http://warontherocks.com/2013/08/chinas-blue-soil/>.
  35. Permanent Mission of the People's Republic of China, Notes Verbales CML/17/2009 and CML/18/2009, May 7, 2009, (New York: U.N. Division for Ocean Affairs and the Law of the Sea, 2009), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf).
  36. Permanent Mission of the People's Republic of China, Note Verbale CML/8/2011, April 14, 2011, (New York: U.N. Division for Ocean Affairs and the Law of the Sea, 2011), available at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf).
  37. Sinologist Lucian Pye famously described China as a "civilization state pretending to be a (nation) state." Lucian W. Pye, *The Spirit of Chinese Politics* (Cambridge, MA: Harvard University Press, 1992): 235. More recently, this argument has been utilized to justify a special treatment, or demand preferential rights, for China on the world stage. See, for example: Wang Gungwu, "China and the U.S.: A Tale of Two Civilizations," *The American Interest*, March 01, 2016, available at <http://www.the-american-interest.com/2016/03/01/a-tale-of-two-civilizations/>. For a more theoretical treatment, see: Zhang Yonjijin and Barry Buzan, "The Tributary System of International Politics," *The Chinese Journal of International Politics* 5 (2012): 3-36.
  38. See, for example: Liu Mingfu, *The China Dream: Great Power Thinking and Strategic Posture in the Post-American Era* (New York: CN Times Books, 2015).
  39. See, for example, Shi Yin hong's comments in Peter Hartcher, "South China Sea: The Fight China Will Take to the Brink of War," *The Sydney Morning Herald*, April 26, 2016, available at <http://www.smh.com.au/comment/south-china-sea-the-fight-china-will-take-to-the-brink-of-war-20160425-goe3zi.html>.
  40. Princeton professor Tom Christensen has convincingly argued that China's relative success in weathering the 2008 recession "remade Chinese popular and elite psychology," rendering it both more confident abroad, and fearful of unrest at home. Thomas Christensen, *The China Challenge: Shaping the Choices of a Rising Power* (New York: W.W. Norton and Company Inc., 2015), Chapter 8. This constitutes a break with the early 2000s, during which Beijing seemed more temperate in the conduct of its foreign policy, and more sensitive to the concerns of its neighbors. See, for example: Avery Goldstein, "An Emerging China's Grand Strategy: A Neo-Bismarckian Turn?" in G. John Ikenberry and Michael Mastando (Eds.) *International Relations Theory and the Asia-Pacific* (New York: Columbia University Press, 2003): 57-106.
  41. See: *Declaration of the New Government of China on the Territorial Sea* (Beijing: Standing Committee of the National People's Congress, 1958), available at <https://www.documentcloud.org/documents/1341822-declaration-of-the-government-of-the-prc-on.html>.
  42. UNCLOS specifies that straight baselines may be drawn only in two specific geographic situations, (a) "in localities where the coastline is deeply indented and cut into," or (b), "if there is a fringe of islands along the coast in its immediate vicinity." See *Limits in the Seas 117: China's Straight Baselines Claim* (Washington, DC: United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, 1996), available at <http://www.state.gov/documents/organization/57692.pdf>. Some Chinese analysts have cautiously recognized that as "other states have sought further explanation from China" on its use of straight baselines, the "issue will need further clarification." See: Wu Jilu, "China's Marine Legal System—An Overall Review," *Ocean and Coastal Law Journal* 17, no. 2: 291.
  43. *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, Art.6* (Beijing: Standing Committee of the National People's Congress, 1992), available at [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383846.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383846.htm). See also: Hyun-Soo Kim, "The 1992 Chinese Territorial Sea Law in the Light of the UN Convention," *The International and Comparative Law Quarterly* 43, no. 4 (1994): 894-904.
  44. According to O.P. Sharma, it was the Indian Navy that insisted on moving away from prior authorization and toward prior notification prior to the signing of UNCLOS. See: O.P. Sharma, "India and the United Nations Convention on the Law of the Sea," *Ocean Development and International Law* 26 (1995): 391-412.

45. *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*, Art.13 (Beijing: Standing Committee of the National People's Congress, 1992), available at [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383846.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383846.htm).
46. *China: Statement Upon Ratification of the United Nations Convention on the Law of the Sea of 10 December 1982*, June 7, 1996, available at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#China Upon ratification](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China Upon ratification).
47. *Law of the People's Republic of China on the EEZ and the Continental Shelf* (Beijing: Standing Committee of the People's Congress, 1998), available at <http://library.uoregon.edu/ec/e-asia/read/ecozone.pdf>.
48. James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (New York: Oxford University Press, 2011): 315.
49. One Chinese scholar recently noted, referring to the U-shaped line, that, "the claim's ambiguity has merit from the Chinese perspective because it helps avoid controversies that could be caused by its precise definition and leaves room for interpretation." Xue Chen, "Misinterpretation and Consequences of Arbitration: A Chinese Perspective," *CSIS Asia Maritime Transparency Initiative*, August 9, 2016, available at <https://amti.csis.org/misinterpretation-consequences-arbitration-chinese-perspective/>.
50. Stefan Halper, "Executive Summary," in Stefan Halper (Project Dir.) *China: The Three Warfares* (Washington, DC: Office of the Secretary of Defense, 2013): 53.
51. See: Elsa Kania, "The PLA's Strategic Thinking on the Three Warfares," *China Brief* 16, no. 3 (August 22, 2016), available at [http://www.jamestown.org/programs/chinabrief/single/?tx\\_ttnews%5Bttnews%5D=45723&#.V9h-tfkrLcs](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Bttnews%5D=45723&#.V9h-tfkrLcs). See also: Dean Cheng, "Winning Without Fighting: Chinese Legal Warfare," (Washington, DC: The Heritage Foundation, 2012), available at <http://www.heritage.org/research/reports/2012/05/winning-without-fighting-chinese-legal-warfare>.
52. *Surveying and Mapping Law of the People's Republic of China* (Beijing: Standing Committee of the National People's Congress, 2002), available at [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383865.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383865.htm).
53. Yu Zhirong, "Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries," in Peter Dutton (Ed.) *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons* (Newport, RI: Naval War College China Maritime Studies Institute, 2010), available at [https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7\\_Military-Activities-in-the-.pdf](https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7_Military-Activities-in-the-.pdf).
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55. For a detailed refutation of this argument, see: Raul Pedrozo, *The Bull in the China Shop: Raising Tensions in the Asia-Pacific Region* (Newport, RI: U.S. Naval War College International Law Studies, 2014): 83. available at <https://www.usnwc.edu/getattachment/a79b504a-46bf-45be-a587-9ed51592a289/The-Bull-in-the-China-Shop--Raising-Tensions-in-th.aspx>
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64. RADM Kalam (Secretary Maritime Affairs Unit, Bangladesh Ministry of Foreign Affairs), interviewed by Iskander Rehman at Dhaka, December 13, 2015.
  65. Ibid.
  66. Alan Johnston, “Bangladesh and Burma in Oil Row,” *BBC News*, November 03, 2008, available at [http://news.bbc.co.uk/2/hi/south\\_asia/7706261.stm](http://news.bbc.co.uk/2/hi/south_asia/7706261.stm).
  67. One Bangladeshi scholar has noted that: “Transforming a bilateral issue into an international one was not an easy task for Bangladesh, until a few incidents subsequently led her to veer toward the move. That an internationalization of a bilateral issue antagonizes the concerned party is fresh in Bangladesh’s memory from its own experience of internationalizing the water issue with India in the late seventies much to the chagrin of the latter.” Abdul Kalam Azad, “Demarcation of the Maritime Boundary Between Bangladesh and Myanmar: Politico-Security and Economic Implications,” Comments at the 7<sup>th</sup> Berlin Conference on Asian Security (BCAS), July 2, 2013.
  68. Author’s interview of RADM Kalam, Dhaka, December 13, 2015. Shortly after the ruling, tensions flared up once again in the Bay of Bengal, as well as along the land border. Some regional commentators linked these developments to Myanmar’s initial frustration over the arbitration request. See: Lawi Weng, “Burma, Bangladesh in Warship Standoff,” *The Irrawaddy*, October 12, 2009, available at [http://www2.irrawaddy.com/article.php?art\\_id=16979](http://www2.irrawaddy.com/article.php?art_id=16979).
  69. Sarah Watson, “The Bangladesh-Myanmar Dispute: Lessons for Peaceful Resolution,” *CSIS Asian Maritime Transparency Initiative*, October 19, 2015, available at <https://amti.csis.org/the-bangladeshmyanmar-maritime-dispute-lessons-for-peaceful-resolution/>.
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  73. Bangladesh had basically argued that the overall direction of each state’s coast should be determined, (depicted in the form of straight lines) and that the angle produced by these lines should then be bisected to produce a boundary line. See: Dominic Roughton et al. *UNCLOS Annex VII Tribunal Decides Bangladesh-India Maritime Boundary Dispute*, (London: Herbert Smith Freehills Dispute Resolution, 2014), available at <http://hsfnotes.com/arbitration/about/team/>.
  74. *Bay of Bengal Maritime Boundary Arbitration Between Bangladesh and India*-Case No. 2010-16 (The Hague: Permanent Court of Arbitration, 2014): 91, available at <http://www.pcacases.com/web/view/18>.
  75. Naomi Burke, “Annex VII Tribunal Delimits Maritime Boundary Between Bangladesh and India in the Bay of Bengal,” *American Society of International Law Insights* 20, no. 18 (2014) available at <https://www.asil.org/insights/volume/18/issue/20/annex-vii-arbitral-tribunal-delimits-maritime-boundary-between>. And Haroon Habib, “Bangladesh Wins Maritime Dispute With India,” *The Hindu*, July 9, 2014, available at <http://www.thehindu.com/news/national/bangladesh-wins-maritime-dispute-with-india/article6191797.ece>.
  76. *Official Spokesperson’s response to a question on the award of the Tribunal on the Maritime Boundary Arbitration between India and Bangladesh* (New Delhi: Ministry of External Affairs), July 8, 2014, available at <http://mea.gov.in/outgoing-visit-detail.htm?23575/Official+Spokespersons+response+to+a+question+on+the+award+of+the+Tribunal+on+the+Maritime+Boundary+Arbitration+between+India+and+Bangladesh>.
  77. Indian External Affairs Minister Sushma Swaraj has thus posited that, “India preaches what it practices and the agreement with Bangladesh on our maritime boundary should stand out as an example to others.” See: Sushma Swaraj, “Speech by External Affairs Minister at the Inauguration of the Raisina Dialogue in New Delhi” (New Delhi: Ministry of External Affairs, March 1, 2016) available at <http://mea.gov.in/Speeches-Statements.htm?dtl/26432>.
  78. Admiral Harry B. Harris Jr., “Raisina Dialogue Remarks-Let’s Be Ambitious Together” (remarks, Honolulu, HI: PACOM, March 2, 2016) available at <http://www.pacom.mil/Media/Speeches-Testimony/Article/683842/raisina-dialogue-remarks-lets-be-ambitious-together/>.
  79. *Testimony of Abraham M. Denmark, Deputy Assistant Secretary of Defense for East Asia, U.S. Department of Defense*: Abraham Denmark, Deputy Assistant Secretary of Defense for East Asia (Washington, D.C.: House Committee on Armed Services Subcommittee on Seapower and Projection Forces and House Committee on Foreign Affairs Subcommittee on Asia and the Pacific July 7, 2016) available at <http://docs.house.gov/meetings/AS/AS28/20160707/105160/HRG-114-AS28-Wstate-DenmarkA-20160707.pdf>.

80. Chinese officials have bristled at such comments, retorting that “there is no comparison between both cases.” See KJM Varma, “China Rejects US Advice to Follow India’s Example Over SCS Row,” *Outlook*, July 13, 2016, available at <http://www.outlookindia.com/newswire/story/china-rejects-us-advise-to-follow-indias-example-over-scs-row/946514>.
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87. See, for example, the following comments, “Unlike traditional western powers, China, an oriental civilization that goes back five thousand years, has distinctive culture, values, political thinking and view of the world. For China, the South China Sea issue is all about territorial sovereignty, security, development and maritime rights and interests. It is all about preventing further tragic losses of territory. China’s thinking is as simple as that.” Dai Bingguo, “Speech at the China-US Dialogue on the South China Sea Between Chinese and US Think Tanks,” at Carnegie Endowment for International Peace, Washington, D.C. (July 5, 2016) available at <http://www.uscnpm.org/blog/2016/07/06/dai-bingguo-south-china-sea-between-chinese-and-us-think-tanks/>.
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98. *Joint Communique of the 14<sup>th</sup> Meeting of the Foreign Ministers of the Russian Federation, the Republic of India, and the People's Republic of China* (New Delhi: Ministry of External Affairs, April 18, 2016), available at [http://mea.gov.in/bilateral-documents.htm?dtl/26628/Joint\\_Communicu\\_of\\_the\\_14th\\_Meeting\\_of\\_the\\_Foreign\\_Ministers\\_of\\_the-Russian\\_Federation\\_the\\_Republic\\_of\\_India\\_and\\_the\\_Peoples\\_Republic\\_of\\_China](http://mea.gov.in/bilateral-documents.htm?dtl/26628/Joint_Communicu_of_the_14th_Meeting_of_the_Foreign_Ministers_of_the-Russian_Federation_the_Republic_of_India_and_the_Peoples_Republic_of_China).
99. According to Mohan Malik, the "please-all" joint communique was an "act of diplomatic tap-dancing by New Delhi." See: Mohan Malik, "India's Response to the South China Sea Verdict," *The American Interest*, July 22, 2016, available at <http://www.the-american-interest.com/2016/07/22/indias-response-to-the-south-china-sea-verdict/>.
100. One could argue that India is undergoing a similar normative shift vis-a-vis other core international norms, such as the Responsibility to Protect (R2P). See: Sumit Ganguly, "India and the Responsibility to Protect," *International Relations* 30, no. 3 (2016): 362-374.
101. Jeremy Page, "Beijing's Claims of South China Sea Support May Not Hold Water," *The Wall Street Journal*, June 17, 2016, available at <http://www.wsj.com/articles/beijings-claims-of-south-china-sea-support-may-not-hold-water-1466138014>.
102. Alan Wachmann, "Playing by or Playing with the Rules of UNCLOS?," in Peter Dutton (Ed.) *Military Activities in the EEZ: A U.S-China Dialogue on Security and International Law in the Maritime Commons* (Newport, RI: China Maritime Studies Institute, U.S. Naval War College, 2010), available at [https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7\\_Military-Activities-in-the-pdf](https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7_Military-Activities-in-the-pdf).
103. For a good discussion of the various drivers of this military competition, see: Adam P. Liff and G. John Ikenberry, "Racing Toward Tragedy? China's Rise, Military Competition in the Asia-Pacific, and the Security Dilemma," *International Security* 39, no. 2 (2014): 52-91.
104. China's first generations of international jurists were strongly influenced by Soviet legal theory, which viewed international law as little more than the "agreed will of a number of states," and as a tool for ideological warfare. See: Robert Knox, "Marxist Approaches to International Law," in Anne Orford and Florian Hoffman, *The Oxford Handbook of International Law* (New York: Oxford University Press, 2016): 306-326. See also: China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill, 2005). On early China's interpretation of maritime law, see: Hungdah Chiu, "Communist China's Attitude Toward International Law," *The American Journal of International Law* 60, no. 2 (1966): 245-267.
105. Some analysts have attributed these growing tensions to more immutable aspects of China's strategic culture. See, for example: Christopher A. Ford, "Realpolitik with Chinese Characteristics: Chinese Strategic Culture and the Modern Communist Party-State," in Ashley J. Tellis et al. (Eds.) *Strategic Asia 2016-2017: Understanding Strategic Cultures in the Asia-Pacific* (Seattle, WA: National Bureau for Asian Research, 2016).
106. See Chapter 4, Section II in: Orde F. Kittrie, *Law as a Weapon of War: Lawfare* (New York: Oxford University Press, 2016).
107. David Roman, "France to Push for Coordinated EU Patrols in South China Sea," *Bloomberg News*, June 5, 2016, available at <http://www.bloomberg.com/news/articles/2016-06-05/france-to-push-for-coordinated-eu-patrols-in-south-china-sea>.
108. China proved successful, behind the scenes, at leveraging its economic ties to Greece and Hungary, which combined their efforts to prevent the EU from issuing a strong statement in support of the PCA ruling. See: Rem Korteweg, *Europe and its South China Sea Dilemma* (London: Center for European Reform, October/November 2016), available at <http://www.cer.org.uk/publications/archive/bulletin-article/2016/europe-and-its-south-china-sea-dilemma>. And Theresa Fallon, "The EU, the South China Sea, and China's Successful Wedge Strategy," *Asia Maritime Transparency Initiative*, October 13, 2016, available at <https://amti.csis.org/eu-south-china-sea-chinas-successful-wedge-strategy/>.
109. The 2017 Chairman of ASEAN's statement was remarkably weak in comparison to its predecessors, making no note of China's land reclamation activities in the South China Sea, and triggering widespread speculation that Beijing had successfully pressured individual ASEAN nations behind closed doors. See: *Chairman's Statement of the 30<sup>th</sup> ASEAN Summit* (Association of Southeast Asian Nations, April 29, 2017), available at [http://asean.org/storage/2017/04/Chairs-Statement-of-30th-ASEAN-Summit\\_FINAL.pdf](http://asean.org/storage/2017/04/Chairs-Statement-of-30th-ASEAN-Summit_FINAL.pdf). See also: Paterno Esmaquel II, "Philippines Denies China Hand in ASEAN Statement," *Rappler*, May 2, 2017, available at <http://www.rappler.com/nation/168628-philippines-denial-china-lobbying-asean-statement>.

110. As Ashley Tellis has noted, “FONOPS should be managed just as Sensitive Reconnaissance Operations (SRO) currently are: they should be regular, unpublicized, undertaken at the discretion of the PACOM commander, and not tied to any specific Chinese behaviors elsewhere.” See: *Protecting American Primacy in the Indo-Pacific: Testimony by Ashley J. Tellis, Tata Chair for Strategic Affairs, Carnegie Endowment for International Peace* (Washington, DC: Senate Armed Services Committee, April 25, 2017), transcript available at [https://www.armed-services.senate.gov/imo/media/doc/Tellis\\_04-25-17.pdf](https://www.armed-services.senate.gov/imo/media/doc/Tellis_04-25-17.pdf).
111. See: “French Warship Arrives For Joint Drills With Japan as North Korean Tensions Rise,” *The Japan Times*, April 29, 2017, available at <http://www.japan-times.co.jp/news/2017/04/29/national/french-warship-arrives-joint-drills-japan-north-korean-tensions-rise/#.WQuIRGnyuCg>.
112. Dhruva Jaishankar, “It’s Time to Resuscitate the Asia-Pacific Quad,” *Brookings Order from Chaos Blog*, January 9, 2017, available at <https://www.brookings.edu/blog/order-from-chaos/2017/01/09/its-time-to-resuscitate-the-asia-pacific-quad/>.
113. See Zack Cooper, “Saving Ourselves from Water Torture in the South China Sea,” *War on the Rocks*, February 23, 2016, available at <https://warontherocks.com/2016/02/saving-ourselves-from-water-torture-in-the-south-china-sea/>. And Emily Tamkin, “Rubio Calls for Sanctions on Beijing for South China Sea Antics,” *Foreign Policy*, December 7, 2016, available at <http://foreignpolicy.com/2016/12/07/rubio-calls-for-sanctions-on-beijing-for-south-china-sea-antics/>.
114. Author’s conversations with officials in Jakarta, Hanoi, and New Delhi (December 2016 and April 2017). On the dilution of values-based language in U.S. public diplomacy, see: Julian Borger, “Rex Tillerson: America First Means Divorcing Our Policy From Our Values,” *The Guardian*, May 3, 2017, available at <https://www.theguardian.com/us-news/2017/may/03/rex-tillerson-america-first-speech-trump-policy>.
115. See Helene Cooper, “Trump’s Turn Towards China Curtails Navy Patrols in Disputed Zones,” *The New York Times*, May 2, 2017, <https://www.nytimes.com/2017/05/02/world/asia/navy-south-china-sea.html>.

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