

Escalation and De-Escalation: Approaches to the South China Sea Tensions

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ABSTRACT

The South China Sea dispute is a story of action and reaction. Ever since the Philippine government initiated arbitration under the compulsory dispute settlement provisions of the United Nations Convention on the Law of the Sea, China has been behaving in a manner that has unsettled its neighbors and has practically guaranteed the continued volatility of the region. This research steps into this scenario and explores two questions: “What can escalate tensions in the South China Sea to the point of all-out war?” and “How can such an escalation be avoided or mitigated?” The complexity of the situation means that there are no straightforward answers to these questions. This research thus chose to approach the first question by limiting itself to a discussion of two broad categories of China’s escalatory actions: (1) instrumental escalations (e.g. China’s artificial island-building and possible declaration of an Air Defense Identification Zone), and (2) suggestive escalations (e.g. China’s engagement in a spectrum of threats against other South China Sea stakeholders and its conduct of enforcement activities in disputed areas). It asserts that instrumental escalatory acts invite “push back” from other countries, increasing the possibility of misperception and miscalculation during confrontations in disputed areas. On the other hand, suggestive escalatory acts engender fear and distrust among the involved countries, preventing constructive engagement and cooperation. The research then answers the second question by examining the de-escalatory potential of both direct and indirect confidence building measures to prevent or mitigate the escalation process. It concludes that direct confidence building measures (e.g. incidents at sea agreements, codes of conduct, etc.) can help minimize potentially disastrous misperceptions and miscalculations during confrontations between States, while indirect confidence building measures (e.g. dialogues and networks such as the ASEAN Regional Forum, the ASEAN Defense Ministers’ Meeting, etc.) can go a long way towards creating a constrictive environment of trust and transparency.

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LIST OF ACRONYMS

ADIZ	Air Defense Identification Zone
ADMM	ASEAN Defense Ministers' Meeting
ADMM+	ASEAN Defense Ministers' Meeting Plus
AMM	ASEAN Ministerial Meeting
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
CBM	Confidence Building Measures
CCG	China Coast Guard
CLCS	Commission on the Limits of the Continental Shelf
COLREGS	Convention on the International Regulations for Preventing Collisions at Sea
CSCAP	Council for Security Cooperation in the Asia Pacific
CUES	Code for Unplanned Encounters
DOC	Declaration on the Conduct of the Parties in the South China Sea
ECS	East China Sea
EEZ	Exclusive Economic Zone
FON	Freedom of Navigation
FONOP	Freedom of Navigation Operation
HACGAM	Heads of Asian Coast Guards Meeting
ICJ	International Court of Justice
IISS	International Institute for Strategic Studies
ILC	International Law Commission
INCSEA	Incidents at Sea Agreement
ITLOS	International Tribunal for the Law of the Sea
JIDD	Jakarta International Defense Dialogue
LTE	Low Tide Elevation
MMCA	Military Maritime Consultative Agreement
PCA	Permanent Court of Arbitration
PLAN	People's Liberation Army Navy
SCO	Shanghai Cooperation Organization
SCS	South China Sea
SLD	Shangri-la Dialogue
SOM	ASEAN Senior Officials' Meeting
TAC	Treaty of Amity and Cooperation
UNCLOS	United Nations Convention on the Law of the Sea
WPNS	West Pacific Naval Symposium

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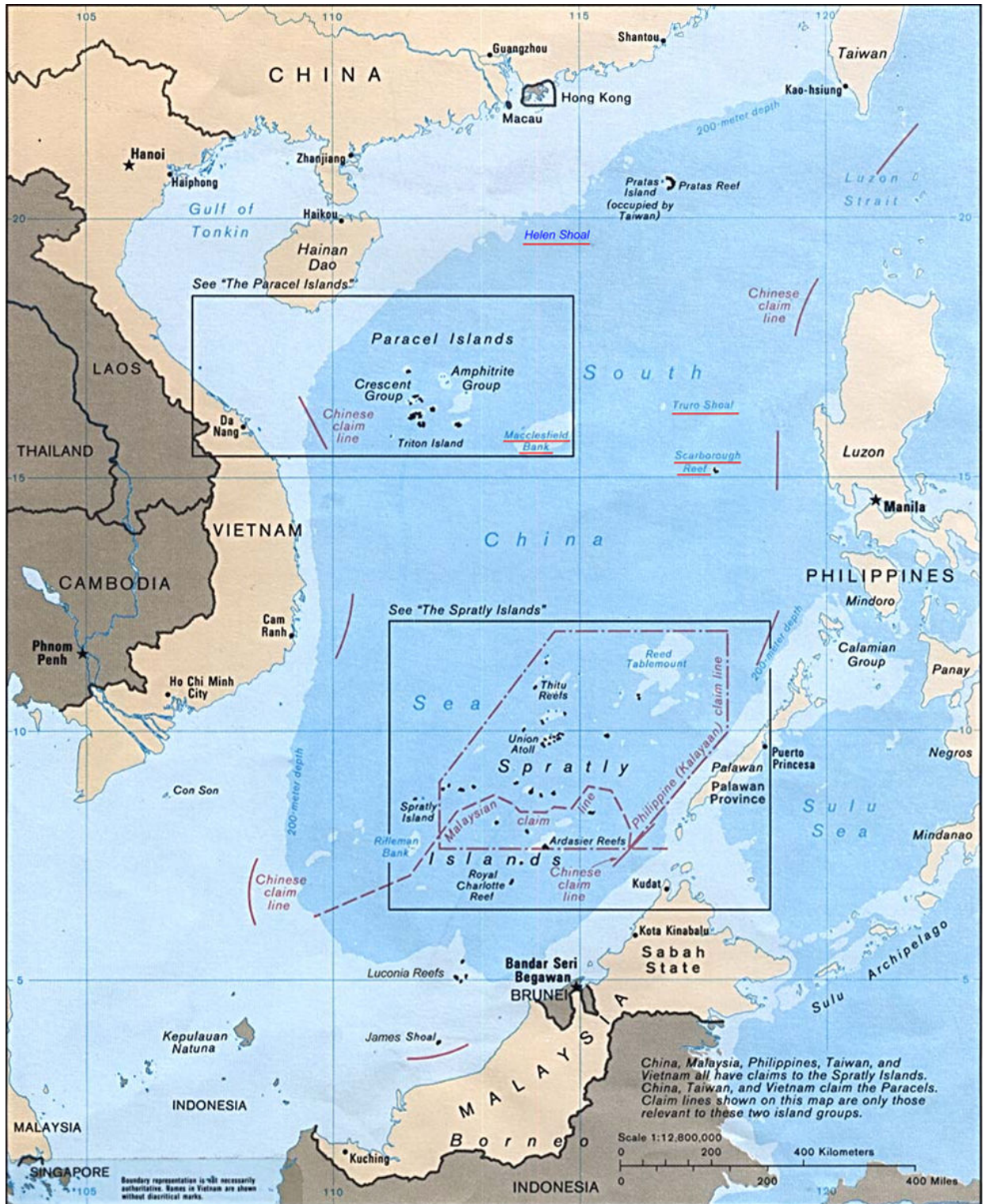
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Figure 1.1: Map of the South China Sea disputes



INTRODUCTION

The situation in the South China Sea is undeniably complex. There are no easy answers nor are there any simple solutions. Many experts and policymakers have tried (and failed) to convincingly unravel the region's puzzles, which are complicated by the fact that they sit at the precise intersection of legal, historical, political, and cultural concerns. The reality is that questions pertaining to sovereignty and control are unlikely to be resolved in the near-term. Given the situation, it is important to recognize that exclusively asking "Who owns what?" is no longer productive at this point in time. South China Sea stakeholders should instead widen its focus and give priority consideration to two simple yet urgent questions: **"What can escalate tensions to the point of all-out war?"** and **"How can such an escalation be avoided or mitigated?"**

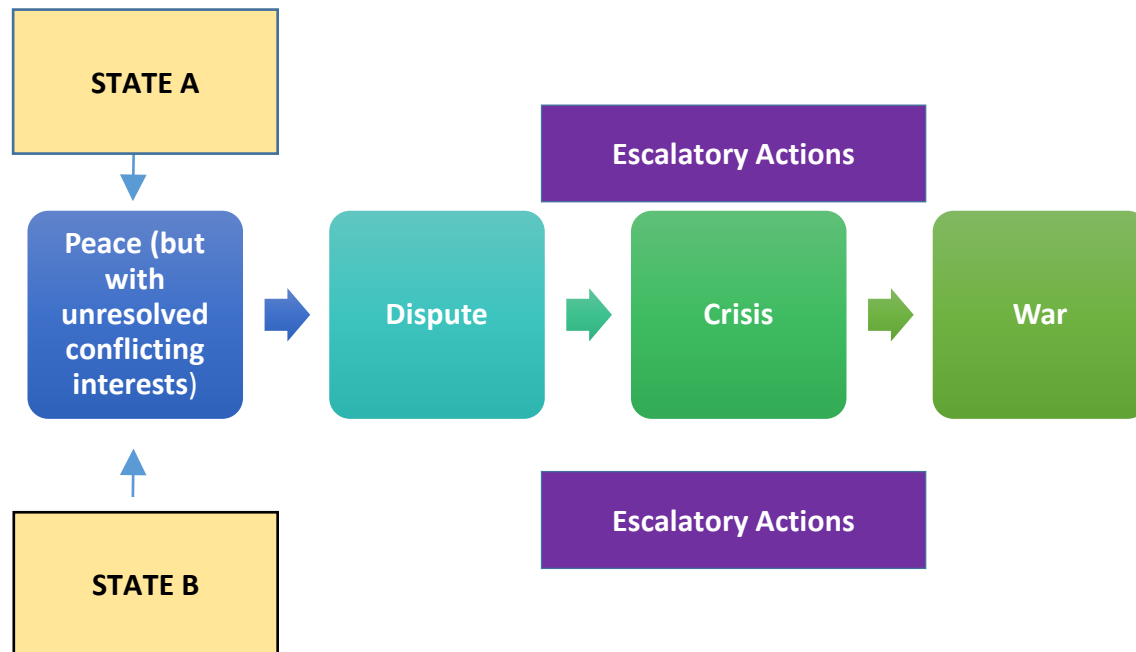
The use of the word "escalation" intuitively engenders fears of the worst. In the context of the South China Sea, it evokes vivid images of arms races and deadly confrontations. It is a word that opens the door to the possibility of a no-holds-barred, all-out war. According to Schelling, escalation is defined as the coercive side of bargaining in which the fear of even greater cost imposition motivates States to concede.¹ Morgan et. al observe that escalation is "a fundamental dynamic in which adversaries engaged in a contest for limited objectives increase the force or breadth of their attacks to gain advantage or avoid defeat."² To paraphrase Kahn, escalation is, at its core, a series of actions that brings parties to a dispute from point A (a state of dispute) to point B (a state of crisis) and even possibly to point C (a state of war) (*See Figure 1.2 below*)³. These definitions highlight the fact that escalation is a process – a means to an end, rather than an end in itself. This research proceeds from this realization and uses it as a lens to understand the current regional climate.

¹ THOMAS C. SCHELLING, *ARMS AND INFLUENCE* (2008).

² FORREST E. MORGAN ET AL., *DANGEROUS THRESHOLDS: MANAGING ESCALATIONS IN THE 21ST Century 1* (RAND Corporation 2008).

³ This formula is a simplified version of Herman Kahn's 44-rung "escalation ladder", wherein states ascend the ladder in small increments (sub-crisis maneuvers) until they reach a state of thermonuclear war at the top rung. *See generally* HERMAN KAHN, *ON ESCALATION* (2009).

Figure 1.2: Pathway to Crisis and War⁴



This research asserts that the territorial disputes⁵ among the South China Sea stakeholders⁶ have escalated into a “state of crisis”⁷ that is in peril of further escalating into war. This is due to the fact that ever since the Philippines initiated arbitration procedures against China under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS)⁸ in 2013, China has been engaging in a number of escalatory actions calculated to: improve its strategic position *vis a*

⁴ Adapted from Kahn’s escalation ladder, *supra*.

⁵ The Permanent Court of International Justice (PCIJ) defines a dispute as “a disagreement on a point of law or fact, a conflict of legal views or interests between two persons”; *See* the *Mavrommatis Palestine Concessions* (Greece v. U.K.), Judgment, 1924 P.C.I.J. (Ser. A) No. 2, at 11 (August 30). A more detailed explanation of the origins of the various territorial disputes is detailed in the succeeding sections.

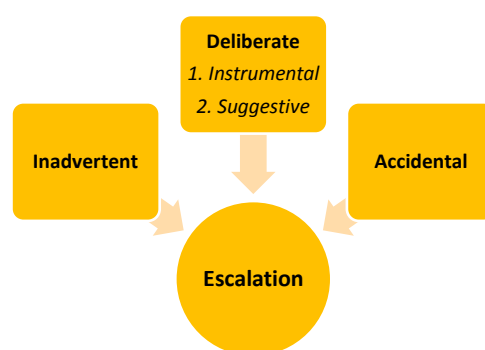
⁶ For purposes of this research, the phrase “South China Sea stakeholders” broadly pertains to the original six country claimants (Brunei, China, Malaysia, the Philippines, Taiwan, and Vietnam), other Association of Southeast Asian Nations (ASEAN) member States, and extra-regional actors such as Australia, India, Japan, Russia, and the United States.

⁷ Brecher and Wilkenfeld define a “state of crisis” as “(1) a change in type and/or an increase in intensity of disruptive interactions between two or more States, with a heightened probability of military hostilities that, in turn, (2) destabilizes their relationship and challenges the structure of an international system – global, dominant or subsystem.” (*See* MICHAEL BRECHER AND JONATHAN WILKENFELD, *A STUDY OF CRISIS* (1997)) Other commentators characterize it as an “intermediate zone between peace and war involving a situation of unanticipated threat to important values and restricted decision time which is based on a series of interactions short of war.” (*See* TIM SWEIJS ET. AL, *BACK TO THE BRINK: ESCALATION AND INTERSTATE CRISIS* (2016)).

⁸ *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, United Nations Treaty Series Vol. 1822, No. 3, available from http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter UNCLOS].

vis other country claimants, deter the Philippines from pursuing the case and insisting upon the enforcement of the award, discourage other South China Sea claimants from initiating similar cases, and warn non-claimant countries from getting involved. Unsurprisingly, other South China Sea stakeholders are pushing back, causing a further spike in tensions. **Part I** of this research thus dissects the significance of China’s actions from 2013 to 2016 in terms of how they facilitate the process illustrated in *Figure 1.2 (Pathway to War)*. In particular, this research looks at South China Sea conflict escalation in the context of four broad categories of actions: (1) island-building, (2) hinting at the possibility of a South China Sea Air Defense Identification Zone, (3) engaging in a spectrum of threats, and (4) conducting enforcement actions in disputed waters. The first two actions are “instrumental escalations” (i.e., motivated by the expectation that it is improving its strategic position in the conflict⁹), while the latter two are “suggestive escalations” (i.e., have the goal of sending a signal to the opponent or to a third party about what future escalation will or might occur in the future¹⁰). This research contends that these actions, more than any other, manufacture potentially dangerous confrontation situations, setting the stage for a possible all-out war in case the countries involved are pushed beyond the limits of their tolerance. **Part II** of this research then uses the insight derived from Part I to: (i) evaluate the de-escalation measures that are currently being used by South China Sea stakeholders, and (ii) offer other possible courses of action that would prevent, arrest or mitigate escalation.

*Figure 1.3: Mechanisms for Escalation*¹¹



Overview of the State of Crisis: The Beginnings of Escalation

⁹ TIM SWEIJS ET AL., BACK TO THE BRINK: ESCALATION AND INTERSTATE CRISIS 42 (2016), available from <http://www.hcss.nl/reports/back-to-the-brink/198/>.

¹⁰ *id.*

¹¹ MORGAN ET AL., *supra* note 2, at 29.

The South China Sea dispute can generally be geographically bifurcated (*See Figure 1.1.*) into tensions involving overlapping territorial claims by China, Taiwan and Vietnam over the Parcel Islands, and tensions involving Brunei, China, Taiwan, Malaysia, the Philippines and Vietnam over overlapping territorial claims in the Spratly Islands. Scarborough Shoal is also the subject of claims by both China and the Philippines but it is not geographically grouped with either the Paracels or the Spratlys. The various South China Sea claims are so contentious and controversial that they will not be detailed in this research, which is limited only to an examination of current escalation/de-escalation dynamics. However, it is important to note that although the historical, legal and political arguments advanced by each country are subject to debate, one basic fact is clear: With the exception of Taiwan, all South China Sea claimants are parties to the UNCLOS, the Charter of the United Nations¹² and other binding international legal instruments. As such, they are bound to comply with all relevant provisions stated therein. Each country's claims must therefore be understood and contextualized within this intricate legal framework of rights and obligations.

In any case, the regularity of the flare-ups (both military and political) in the South China Sea prompted stakeholders to consider the adoption of pacifist “rules of engagement” for country claimants. The five founding members of the Association of Southeast Asian Nations (ASEAN)¹³ thus signed the Treaty of Amity and Cooperation¹⁴ (TAC) at the 1st ASEAN Summit in 1976. The other ASEAN members (as well as a number of non-ASEAN states including China) have since acceded to the treaty. The TAC is a binding agreement that requires contracting parties to be guided by the following core principles in their relations with one another: (a) mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations, (b) the right of every State to lead its national existence free from external interference, subversion or coercion, (c) non-interference in the internal affairs of one another, (d) settlement of differences or disputes by peaceful means, (e) renunciation of the

¹² *Charter of the United Nations*, San Francisco, 26 June 1945, United Nations Treaty Series, Vol. 1, No. XVI, available from <http://www.un.org/en/charter-united-nations/> [hereinafter UN Charter].

¹³ Indonesia, Malaysia, the Philippines, Singapore and Thailand.

¹⁴ *Treaty of Amity and Cooperation in Southeast Asia*, Bali, 24 February 1976, United Nations Treaty Series, Vol. 1025, No. 15063, available from <http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/> [hereinafter TAC].

threat or use of force, and (f) effective cooperation among themselves.¹⁵ In 2002, all ten ASEAN members and China signed the Declaration on the Conduct of Parties in the South China Sea (DOC)¹⁶. The adoption of the non-binding DOC was intended to: (1) facilitate the building of trust and confidence among the signatories¹⁷, (2) encourage participation in practical cooperation activities (e.g. marine environmental protection, marine scientific research, safety of navigation and communication at sea, search and rescue operations, and combating transnational crimes)¹⁸, and (3) provide a reference point for future discussions regarding the adoption of a binding code of conduct¹⁹. It thus had a triple purpose: conflict prevention, cooperation and conflict resolution.²⁰ Although criticized for being merely hortatory, the DOC was – to a certain extent – effective in that disputants were able to exercise a measure of self-restraint in the conduct of activities that would complicate or escalate disputes (in particular, refraining from inhabiting currently uninhabited islands, reefs, shoals, cays and other features) after it was signed.²¹

The TAC and the DOC have thus far been strong expressions of regional resolve against threats of and the use of force. Together, they ushered in a period of relative peace and stability in the region even though they did not actually resolve any of the ongoing disputes.²² However, this did not last long as a pair of incidents involving China and the Philippines upset the fragile situation, directly leading to the latter’s initiation of the arbitration case.

Incident 1: The Reed Bank Interception

In 2005, the Philippine government awarded Forum Energy, a U.K.-based oil and gas company, a contract to conduct an exploratory survey of the Sampaguita gas field in the Reed Bank, an

¹⁵ *id.*, Art. 2.

¹⁶ *Declaration on the Conduct of Parties in the South China Sea*, Phnom Penh, 4 November 2002, available from http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2 [hereinafter DOC].

¹⁷ *id.*, Arts. 2 and 5.

¹⁸ *id.*, Art. 6.

¹⁹ *id.*, Arts. 7 and 10.

²⁰ STEIN TONNESSON, *THE 2002 DECLARATION ON THE CONDUCT OF PARTIES IN THE SOUTH CHINA SEA, IN POWER LAW, AND MARITIME ORDER IN THE SOUTH CHINA SEA* 19 (2015).

²¹ *id.*, at p. 92

²² *id.*, at p. 91.

area located within the Philippines' 200 nm Exclusive Economic Zone (EEZ).²³ On 2 March 2011, two Chinese patrol boats intercepted one of Forum Energy's survey ships and forced it to withdraw from Reed Bank. The Philippines immediately responded by dispatching air and sea assets to escort the survey ship.²⁴ The Chinese government subsequently issued a statement saying that "*China owns indisputable sovereignty over the [Spratly] Islands and their adjacent waters. Oil and gas exploration activities by any country or company in the waters under China's jurisdiction without permission of the Chinese government constitutes violation of China's sovereignty, rights and interests, and thus are illegal and invalid.*"²⁵ From that point forward, both governments began exchanging tense diplomatic protests over the other's activities and perceived encroachments in the disputed area.²⁶

Incident 2: The Scarborough Shoal Standoff

On 8 April 2012, a Philippine navy surveillance plane spotted eight Chinese fishing vessels anchored in the Scarborough Shoal, a chain of reefs and rocks located roughly 124 nm away from the Philippine coastline (and some 550 nm from Hainan Island, the nearest Chinese port).²⁷ The government immediately dispatched the *BRP Gregorio del Pilar* to confirm the presence of the fishing boats.²⁸ On 10 April 2012, the Philippine inspection team from the *BRP Gregorio del Pilar* boarded the Chinese boats and discovered that they were carrying illegally-collected corals, clams, and sharks.²⁹ Before they could effect an arrest, two Chinese maritime surveillance ships – *Zhongguo Haijian 75* and *Zhongguo Haijian 84* – intervened and initiated what would later become a months-long stand-off with the Philippine navy ship.³⁰ In the weeks that followed, China also pressed a variety of "pressure points" including the issuance of a travel advisory leading to the cancellation of 80 scheduled Chinese tour groups and charter flights to the

²³ Ian Storey, *China and the Philippines: Implications of the Reed Bank Incident*, CHINA BRIEF Vol. 11, Issue 8, May 2011.

²⁴ James Hookway, *Philippine Survey Ship Confronted by China, Spurring New Dispute*, WALL STREET JOURNAL (4 March 2011), <http://www.wsj.com/articles/SB10001424052748703300904576178161531819874>.

²⁵ Storey, *supra* note 23.

²⁶ *DFA Conveys Protest to Beijing Over Chinese Vessels*, GMA NEWS ONLINE (4 June 2011), <http://www.gmanetwork.com/news/story/222526/news/nation/dfa-conveys-protest-to-beijing-over-chinese-vessels>.

²⁷ Daniel Wagner et al., *China, the Philippines and Scarborough Shoal*, THE WORLD POST (20 May 2012), http://www.huffingtonpost.com/daniel-wagner/china-the-philippines-and_b_1531623.html.

²⁸ *id.*

²⁹ *id.*

³⁰ *id.*

Philippines, the cessation of banana imports from the Philippines, and the orchestration of an anti-Philippines press campaign.³¹ Tensions only eased after the U.S. acted as an informal mediator and managed to broker a deal for their mutual withdrawal from the area.³² However, only the Philippines withdrew its ships while China did not. Since then, China has retained effective control over Scarborough Shoal and has deprived Philippine fishermen of access to the area's rich fishing grounds.

A 3rd incident which did not specifically involve the Philippines should also be noted: On 6 May 2009, Malaysia and Vietnam made a joint submission to the Commission on the Limits of the Continental Shelf (CLCS) concerning the outer limits of their continental shelf beyond 200nm. The Chinese Permanent Mission to the UN took exception to this and submitted a *note verbale* to UN Secretary General Ban Ki-moon. It contained 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.

The continental shelf beyond 200 nm as contained in the joint submission by Malaysia and the Socialist Republic of Vietnam has seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea. In accordance with Article 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf, the Chinese Government seriously requests the Commission not to consider the joint submission by Malaysia and the Socialist Republic of

³¹ Carlyle A. Thayer, *Standoff in the South China Sea*, YALE GLOBAL ONLINE (12 June 2012), <http://yaleglobal.yale.edu/content/standoff-south-china-sea>.

³² Ely Ratner, *Learning the Lessons of Scarborough Reef*, THE NATIONAL INTEREST (21 November 2013), <http://nationalinterest.org/commentary/learning-the-lessons-scarborough-reef-9442?page=2>.

*Vietnam. The Chinese Government has informed Malaysia and the Socialist Republic of Vietnam of the above position.*³³

The *note verbale* included a map which for the first time showed the ambiguous “nine-dashed-line”, an offshoot of a 1940’s-era “eleven-dashed-line” Kuomintang map. China’s submission provoked intense international scrutiny and immediate protests from South China Sea country claimants.

Philippines-China UNCLOS Arbitration

On 22 January 2013, the Philippines initiated arbitration proceedings against China under Article 287 and Annex VII to the UNCLOS³⁴. In its Notification and Statement of Claim, the Philippines asserted the following claims³⁵:

1. China’s rights in regard to maritime areas in the South China Sea, like those of the Philippines, are those established by UNCLOS, and consists of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI;
2. Accordingly, China’s claims in the South China Sea based on its so-called “nine dash line” are contrary to UNCLOS and invalid;

³³ *China Note Verbale to UN Secretary General Ban Ki-moon* (7 May 2009), <http://www.documentcloud.org/documents/1341871-prc-note-against-malaysian-vietnamese-submission.html>.

³⁴ Art. 287 and Part XV of UNCLOS allows States parties to choose from amongst the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), or an arbitral tribunal to settle disputes concerning the interpretation or application of the UNCLOS. Since neither the Philippines or China indicated a choice of tribunal when they ratified the UNCLOS, the default mode of settlement – arbitration – applies. On the other hand, Art. 1 of Annex VII provides: “*Subject to the provisions of Part XV, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based.*”

³⁵ Philippines’ Notification and Statement of Claim (22 January 2013), p. 12-14, <http://www.philippineembassy-usa.org/uploads/pdfs/embassy/2013/2013-0122-Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf>.

3. Submerged features in the South China Sea that are not above sea level at high tide, and are not located in a coastal State's territorial sea, are part of the seabed and cannot be acquire by a State, or subjected to its sovereignty, unless they form part of that State's Continental Shelf under Part VI of the Convention;
4. Mischief Reef, Mckennan Reef, Gaven Reef and Subi Reef are submerged features that are not above sea level at high tide, are not islands under the Convention, are not located on China's Continental Shelf; and China has unlawfully occupied and engaged in unlawful construction activities on these features;
5. Mischief Reef and McKennan Reef are part of the Philippines' Continental Shelf under Part VI of the Convention;
6. Scarborough Shoal, Cuarteron Reef, Johnson Reef and Fiery Cross Reef are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which qualify as "rocks" under Article 121(3) of the Convention, and generate an entitlement only to a Territorial Sea no broader than 12 M; and China has unlawfully claimed maritime entitlements beyond 12 M from these features;
7. China has unlawfully prevented Philippine vessels from exploiting the living resources in the waters adjacent to Scarborough Shoal and Johnson Reef;
8. The Philippines is entitled under UNCLOS to a 12 M territorial sea, a 200 M exclusive economic zone, and a Continental Shelf under Parts II, V and VI of UNCLOS, measured from its archipelagic baselines;

9. China has unlawfully claimed rights to, and has unlawfully exploited, the living and non-living resources in the Philippines' Exclusive Economic Zone and Continental Shelf, and has unlawfully prevented the Philippines from exploiting the living and non-living resources within its Exclusive Economic Zone and Continental Shelf; and
10. China has unlawfully interfered with the exercise by the Philippines of its rights to navigation under the Convention.

Despite China's formal rejection of the arbitration process³⁶, a five-member arbitral tribunal (the "tribunal") was constituted in accordance with the UNCLOS, while the PCA was designated as the registry in the proceedings.³⁷ The Philippines filed its Memorial on 30 March 2014 and the PCA gave China until 15 December 2014 to submit its Counter-Memorial. Instead of submitting the requested document, China's Ministry of Foreign Affairs issued a Position Paper that: (i) outlined its arguments on why the arbitration falls outside the scope of the UNCLOS compulsory dispute mechanism, (ii) asserted that China had undisputable sovereignty over relevant maritime features within its "nine-dashed-line", and (iii) insisted that the Philippines was bound by the 2002 DOC to exclusively settle the dispute via consultations and negotiations.³⁸ After giving both the Philippines and China the opportunity to submit supplemental submissions, the PCA set July 2015 to be the preliminary hearing for jurisdiction. Thus, the first round of hearings was held from 7 July 2015-9 July 2015.

The tribunal issued its award on jurisdiction on admissibility on 29 October 2015. It ruled in favor of the Philippines and found, among other things, that: (a) the tribunal was properly constituted in accordance with Annex VII of the UNCLOS and that the Philippines' act of initiating the arbitration did not constitute an abuse of process, (b) China's non-appearance in the

³⁶ See China's Note Verbale to the Department of Foreign Affairs of the Philippines (19 February 2013), <https://www.documentcloud.org/documents/2165478-phl-prc-china-note-verbale.html>.

³⁷ Permanent Court of Arbitration, *Arbitration between the Republic of the Philippines and the People's Republic of China: Arbitral Tribunal Establishes Rules of Procedure and Initial Timetable*, 27 August 2013, <http://www.pcacases.com/web/sendAttach/227>.

³⁸ Position Paper of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (7 December 2014), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

proceedings does not deprive the tribunal of jurisdiction, and (c) the TAC, the DOC, and various joint statements do not preclude recourse to the compulsory dispute settlement procedures under the UNCLOS.³⁹ Four days of hearings on the merits were thereafter conducted from 24-30 November 2015.

The tribunal finally issued its award on the merits on 12 July 2016⁴⁰. It overwhelmingly ruled in favor of the Philippines and concluded that: (1) There was no evidence showing that China had historically exercised exclusive control over the waters or resources (particularly fishing resources) within its “nine-dashed-line”. It emphasized that prior to the entry into force of UNCLOS, the waters of the South China Sea beyond the territorial sea were legally part of the high seas in which vessels from any State could freely navigate and fish. Thus, the tribunal ruled that there is no legal basis for China to claim “historic rights” in the South China Sea to the extent that these are incompatible with EEZs provided in UNCLOS; (2) Although several reefs have been heavily modified by land reclamation and construction, an evaluation of their natural condition and of historical materials show that the Spratly islands – whether taken singularly or as a unit – is not capable of generating extended maritime zones. The tribunal went on to state that certain sea areas are within the Philippine EEZ because those areas are not overlapped by any possible entitlement of China; and (3) China caused severe harm to the coral reef environment and violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened or endangered species. The tribunal also found that China failed in its international legal obligation to stop the environmentally harmful practices of its fishermen.

The arbitral award is binding but, as the Philippines has realized, impossible to enforce. China unequivocally rejected the award, saying that it was “null and void” and “has no binding force”.⁴¹ Furthermore, it asserted that “China's territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards. China opposes and will never accept any claim or action based on those awards.”⁴² Perhaps to

³⁹ Phil. v. China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 413 (Perm. Ct. Arb. 2015).

⁴⁰ See generally Phil. v. China, Award, 12 July 2016 (Perm. Ct. Arb. 2016).

⁴¹ Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (12 July 2016), available from http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm.

⁴² *id.*

underline its verbal defiance, China has stepped up its assertive activities in the South China Sea, potentially putting the entire region on a trajectory towards all-out war.

PART I: ESCALATIONS

Part I of this research dissects the escalatory significance of four of China’s most controversial deliberate actions: (1) island-building, (2) hinting at the possibility of a South China Sea Air Defense Identification Zone (SCS ADIZ), (3) engaging in a spectrum of threatening behavior (including the placement of military assets on artificially-built islands, the conduct of military exercises in disputed areas, and the issuance of strong verbal warnings), and (4) conducting enforcement actions in disputed areas. The first two actions are presented and discussed in **Chapter 1** as “**instrumental escalations**” (i.e., motivated by the expectation that it is improving its strategic position in the conflict). The latter two actions are considered “**suggestive escalations**” (i.e., have the goal of sending a signal to the opponent or to a third party about what future escalation will or might occur in the future) and are discussed in **Chapter II**.

CHAPTER 1: INSTRUMENTAL ESCALATIONS

China suffered a huge strategic setback when the arbitral tribunal in the Philippines-China arbitration overwhelmingly ruled in favor of the Philippines. In an obvious effort to consolidate its hold on various disputed maritime features, it stepped up its ongoing island-building activities and even hinted at the possibility of asserting sovereignty over similarly contested airspace adjacent to the maritime areas falling within its nine-dashed-line. China appears determined to use these actions as its instruments to change the facts on the ground and ultimately, undermine the enforcement of the decision. Using this premise, the following two sections take a closer look at the legal and practical aspects of these instrumental escalatory actions, and analyze how and to what extent they cross the escalation thresholds of South China Sea stakeholders.

SECTION A. Island-building, area denial, and the need for self-restraint

China's aggressive island-building has been one of the most prominent and visually-arresting flashpoints in the South China Sea. More than any other aspect of the region's complex disputes, the dramatic transformation of several features located within China's "nine-dashed-line" has perhaps the greatest potential to trigger a confrontation that would escalate hostilities. This section of the research approaches the island-building issue in two ways: (1) how it translates to effective area denial and interference with the right of freedom of navigation (FON) under the UNCLOS, and (2) how it conflicts with the concept of "self-restraint" in international law.

Status of Features in the SCS: A Brief Background of the Facts and the Law

As a starting point, it is important to note that the UNCLOS differentiates islands, rocks, and low-tide elevations (such as reefs). This was because the instrument's drafters recognized that "the status of islands, islets and rocks had a significant influence on the determination of baselines from which maritime zones are measured".⁴³ Consequently, their characterization has the potential to impact a country's territorial limits.

As early as 1930, the Conference for the Codification of International Law already began work on a text that considered the definition of the term "islands". The Conference noted that "every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above the high-water mark."⁴⁴ The International Law Commission (ILC) subsequently incorporated much of this early codification effort to its 1956 draft articles on the law of the sea. In its report, the ILC agreed with the Conference's definition adding only the phrase "normal circumstances" so that the provision was revised to read – "Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal

⁴³ MYRON H. NORDQUIST ET AL. (EDS.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, KLUWER LAW INTERNATIONAL: THE HAGUE 322 (1995) [hereinafter Virginia Commentaries].

⁴⁴ Report of the Second Committee: Territorial Sea (Report Adopted by the Committee on 10 April 1930), Appendix 2, Sub-appendix B.

circumstances is permanently above the high-water mark.”⁴⁵ Importantly, the ILC clarified that “low-tide elevations and technical installations built on the seabed were not considered islands”.⁴⁶ These ideas were substantially accepted by UNCLOS II and UNCLOS III participants, ultimately resulting in Article 121 of the UNCLOS, which now defines an “island” as “a naturally formed area of land, surrounded by water, which is above water at high tide.”⁴⁷ Under the UNCLOS, islands which cannot “sustain human habitation or economic life of their own” are more properly termed as “rocks”⁴⁸. The former enjoys the same entitlements – a territorial sea, contiguous zone, EEZ and continental shelf – as any other land territory under the UNCLOS, while the latter is not entitled to either an EEZ or a continental shelf. On the other hand, reefs and other low-tide elevations (LTEs) are defined as “naturally formed areas of land surrounded by and above water at low tide but submerged at high tide”⁴⁹ and are “wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island”⁵⁰. Reefs and other LTE do not generate any maritime zones.⁵¹

Central to these definitions as well as to the present controversy is the meaning of the phrase “naturally-formed” for the purpose of determining the status of a maritime feature. It should be noted that the phrase “naturally-formed” was included and accepted as early as 1958, when the United States proposed its inclusion in the then-prevailing definition.⁵² The resulting 1958 Convention on the Territorial Sea and Contiguous Zone thus read –

1. *An island is a naturally-formed area of land, surrounded by water which is above water at high tide.*
2. *The territorial sea of an island is measured in accordance with the provisions of these articles.*

⁴⁵ Virginia Commentaries, *supra* at note 43, 326.

⁴⁶ *id.*

⁴⁷ UNCLOS, *id.* at note 8, Art. 121(1).

⁴⁸ UNCLOS, *id.* at note 8, Art. 121(3).

⁴⁹ UNCLOS, *id.* at note 8, Art. 13(1).

⁵⁰ UNCLOS, *id.* note 8, Art. 12(2).

⁵¹ Although the UNCLOS does not explicitly state that such low-tide elevation is not entitled to an EEZ, the arbitral tribunal in the Philippines-China arbitration considered that this restriction is necessarily implied in the Convention: that if a low-tide elevation is not entitled to a territorial sea, it is not entitled to an EEZ or continental shelf; *See Phil. v. China, id.* at note 40, 308.

⁵² Virginia Commentaries, *supra* at note 43, 327.

Despite its formal inclusion in the UNCLOS in 1982, the phrase somehow managed to elude attention until 2013, when the Philippines sought clarification of the same for the purpose of determining the status of several maritime features located in the South China Sea. According to the arbitral tribunal in the Philippines-China arbitration –

*The inclusion of the term “naturally formed” in the definition of both a low-tide elevation and an island indicates that the status of a feature is to be evaluated on the basis of its natural condition. As a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island. A low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island or installation built atop it.*⁵³

In effect, the arbitral tribunal definitively clarified that the status of a maritime feature is determined solely by its original and un-altered form.

China began transforming the physical characteristics of the South China Sea via its massive island-building program in the Spratlys, which began in late 2013. In just under three years, China was able to transform the uninhabitable to the habitable: Mischief Reef, Cuarteron Reef, Hughes Reef, Johnson South Reef, Fiery Cross Reef, the Gaven Reefs and Subi Reef are now unrecognizable as the reefs and rocks that they once were. Their original status was discussed at length by the arbitral tribunal in the Philippines-China arbitration⁵⁴, which is summarized in Table 1.a below together with publicly available information regarding their physical transformation:

⁵³ Phil. v. China, *id.* at note 40, 305.

⁵⁴ The arbitral award is cited because prior to its issuance, there was no organized discussion of the status of the relevant maritime features in the South China Sea.

Table 1.a: Summary of the Philippines-China Arbitral Award Re: Status of Relevant Maritime Features in the South China Sea

Feature	Description	Total Reclaimed⁵⁵	Arbitral Tribunal Finding as to Original Status
Cuarteron Reef/ “Huayang Jiao” or 华阳礁 in China/ “Calderon Reef” in the Philippines	<ul style="list-style-type: none"> • Coral reef located at 08° 51’ 41” N, 112° 50’ 08” E and is the easternmost of four maritime features known collectively as the London Reefs that are located on the western edge of the Spratly Islands • Located 245.3 nautical miles from the archipelagic baseline of the Philippine island of Palawan and 585.3 nautical miles from China’s baseline point 39 adjacent to the island of Hainan 	56 acres	High-tide feature
Fiery Cross Reef/ “Yongshu Jiao” or 永暑礁 in China and “Kagitingan Reef” in the Philippines	<ul style="list-style-type: none"> • Coral reef located at 09° 33’ 00” N, 112° 53’ 25” E, to the north of Cuarteron Reef and along the western edge of the Spratly Islands, adjacent to the main shipping routes through the South China Sea. 	677 acres	High-tide feature

⁵⁵ South China Sea Island Tracker, ASIAN MARITIME TRANSPARENCY INITIATIVE, last accessed 26 September 2016), <https://amti.csis.org/island-tracker/>.

	<ul style="list-style-type: none"> • Located 254.2 nautical miles from the archipelagic baseline of the Philippine island of Palawan and 547.7 nautical miles from the China's baseline point 39 adjacent to the island of Hainan 		
Johnson Reef/ “Chigua Jiao” or 赤瓜礁 in China/ “Mabini Reef” in the Philippines	<ul style="list-style-type: none"> • Coral reef located at 9° 43' 00" N, 114° 16' 55" E and is 184.7 nautical miles from the archipelagic baseline of the Philippine island of Palawan and 570.8 nautical miles from China's baseline point 39 adjacent to Hainan 	27 acres	High-tide feature
McKenna Reef/ “Ximen Jiao” or 西门礁 in China/ “Chigua Reef” in the Philippines	<ul style="list-style-type: none"> • Coral reef located at 09° 54' 13" N, 114° 27' 53" E and is 181.3 nautical miles from the archipelagic baseline of the Philippine island of Palawan and 566.8 nautical miles from China's baseline point 39 adjacent to Hainan. 	No data	High-tide feature
Hughes Reef/ “Dongmen Jiao” or 东门礁 in China/ “Chigua Reef” in the Philippines	<ul style="list-style-type: none"> • Coral reef located at 09° 54' 48" N 114°29' 48" E and is 180.3 nautical miles from the archipelagic baseline of the Philippine island of Palawan and 567.2 nautical miles from China's baseline point 39 adjacent to Hainan. 	19 acres	Low-tide elevation

<p>Gaven Reefs/ “Nanxun Jiao” or 南薰礁 in China/ “Burgos” in the Philippines</p>	<ul style="list-style-type: none"> • A pair of coral reefs that forms part of the larger reef formation known as Tizard Bank, located directly to the north of Union Bank. Tizard Bank also includes the high-tide features of Itu Aba Island, Namyit Island, and Sand Cay. • Gaven Reef (North) is located at 10° 12' 27" N, 114° 13' 21" E and is 203.0 nautical miles from the archipelagic baseline of the Philippine island of Palawan and 544.1 nautical miles from China's baseline point 39 adjacent to Hainan. • Gaven Reef (South) is located at 10° 09' 42" N 114° 15' 09" E and is 200.5 nautical miles from the archipelagic baseline of the Philippine island of Palawan and 547.4 nautical miles from China's baseline point 39 adjacent to Hainan. 	<p>34 acres</p>	<p>North Reef (High-tide feature); South (Low-tide elevation)</p>
<p>Subi Reef/ “Zhubi Jiao” or 渚碧礁 in China/ “Zamora Reef” in the Philippines</p>	<ul style="list-style-type: none"> • Coral reef located to the north of Tizard Bank and a short distance to the south-west of the high-tide feature of Thitu Island and its surrounding Thitu Reefs • Located at 10° 55' 22" N, 114° 05' 04" E and lies on the north-western 	<p>976 acres</p>	<p>Low-tide elevation</p>

	<p>edge of the Spratly Islands</p> <ul style="list-style-type: none"> • Located 231.9 nautical miles from the archipelagic baseline of the Philippine island of Palawan and 502.2 nautical miles from China’s baseline point 39 adjacent to Hainan. 		
<p>Mischief Reef/ “Meiji Jiao” or 美济礁 in China/ “Panganiban” in the Philippines</p>	<ul style="list-style-type: none"> • Coral reef located in the center of the Spratly Islands, to the east of Union Bank and to the south-east of Tizard Bank • Located at 09° 54’ 17” N, 115° 31’ 59” E and is 125.4 nautical miles from the archipelagic baseline of the Philippine island of Palawan and 598.1 nautical miles from China’s baseline point 39 adjacent to Hainan 	1,379 acres	Low-tide elevation
<p>Second Thomas Shoal/ “Ren’ai Jiao” or 仁爱礁 in China/ “Ayungin Shoal” in the Philippines</p>	<ul style="list-style-type: none"> • Coral reef located in the center of the Spratly Islands, to the east of Union Bank and to the south-east of Tizard Bank • Located at 09° 54’ 17” N, 115° 51’ 49” E and is 104.0 nautical miles from the archipelagic baseline of the Philippine island of Palawan and 616.2 nautical miles from China’s baseline point 39 adjacent to Hainan 	No data	Low-tide elevation

Area Denial and the Right of Freedom of Navigation

China's Foreign Ministry has framed its island-building as a non-controversial force for regional good—that it would help China fulfill its international legal obligations in maritime search and rescue, disaster prevention and mitigation, marine scientific research, meteorological observation, environmental protection, navigation safety, fisheries production and other endeavors.⁵⁶ However, Chinese force projection is on everyone's mind as the country continues to convert South China Sea features into mid-ocean outposts for its military and nonmilitary assets (further discussed in Part I, Chapter 2). One cannot help but be skeptical of China's rhetoric when, so far, the newly built "islands" have been used as basis to restrict international access to large swathes of the disputed areas. Philippine and Vietnamese fishermen have been hardest hit by this sweeping area denial, as Chinese Coast Guard (CCG) and People's Liberation Army Navy (PLAN) vessels have effectively cut them off from the traditional fishing grounds located within their respective countries' EEZs. China's true position was most clearly illustrated by its reaction to the U.S. Freedom of Navigation Operations (FONOP) – a long-established U.S. policy of demonstrating its "non-acquiescence to excessive maritime claims asserted by coastal States"⁵⁷ by sailing, flying and operating anywhere that international law allows⁵⁸ without seeking prior permission from or giving advance notification to any country. The U.S. has so far conducted four FONOPs (two of which were near the artificially-built islands in the Spratlys) in the South China Sea, as shown in Table 1.b below. The FONOPs were intended to emphasize that LTEs lying outside the territorial sea of a rock or an island are not entitled to a territorial sea of their own. The Chinese government reacted strongly to each "provocative" FONOP, and asserted that the U.S. ships illegally entered the territorial waters of islands and reefs under "China's undisputable sovereignty" and that such actions "threatened China's sovereignty and

⁵⁶ Shannon Tiezzi, *Revealed: China's Reasons for Island-Building in the South China Sea*, THE DIPLOMAT (10 April 2015), <http://thediplomat.com/2015/04/revealed-chinas-reasons-for-island-building-in-the-south-china-sea/>.

⁵⁷ U.S. Department of Defense, Freedom of Navigation Program Fact Sheet 1 (March 2015), [http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20\(March%202015\).pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20(March%202015).pdf).

⁵⁸ President Barack Obama, Remarks in Joint Press Conference with Chinese President Xi (25 September 2015), available from <https://www.whitehouse.gov/the-press-office/2015/09/25/remarks-president-obama-and-president-xi-peoples-republic-china-joint>.

security interests, put the personnel and facilities on the islands and reefs at risk and endangered regional peace and stability.”⁵⁹

Table 1.b: U.S. South China Sea 2015-2016 FONOPS

Date	Ship/s involved	Sailing Course	PRC Reaction
10/27/2015	USS Lassen	w/in 12 nm of Subi Reef in the Spratlys	PRC sent 2 PLAN ships to shadow the USS Lassen; Warnings were also communicated to the ship
01/2016	USS Curtis Wilbur	w/in 12 nm of Triton Island in the Paracels	PRC conducted an identification check and warnings were communicated to the ship
05/2016	USS William P. Lawrence	w/in 12 nm of Fiery Cross Reef in the Spratlys	PRC sent 3 PLAN ships to shadow the USS William P. Lawrence and scrambled 2 fighter jets; Warnings were also communicated to the ship
10/21/2016	USS Decatur	Close to but not within 12 nm of the Paracels	PRC sent 2 PLAN ships to shadow the USS Decatur; Warnings were also communicated to the ship

China’s insistence on claiming sovereign rights over the waters of maritime features that it has artificially built up into islands is inconsistent with the UNCLOS⁶⁰, and only serves to reinforce

⁵⁹ See Foreign Ministry Spokesperson Lu Kang, Remarks on USS Lassen’s Entry into Waters near Relevant Islands and Reefs of China’s Nansha Islands (27 October 2015), available from http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1309567.shtml; Foreign Ministry Spokesperson Lu Kang, Regular Press Conference (1 February 2016), available from http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1337080.shtml; Foreign Ministry Spokesperson Lu Kang, Regular Press Conference (10 May 2016), available from http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1362106.shtml.

its *de facto* control over disputed areas. This is escalatory and sets the stage for dangerous confrontation the U.S. and others will naturally want to push back on these claims based on the rationale that inaction is equivalent to acceptance. Moreover, failure to consistently question China's version of the UNCLOS provisions relating to maritime zone entitlements, innocent passage and freedom of navigation might be considered subsequent state practice for future interpretations of the convention.⁶¹

The Concept of Self-Restraint in Territorial Disputes

Does China's "island-building" program indicate a lack of self-restraint in view of the ongoing maritime dispute?

The phrase "self-restraint" appears in Paragraph 5 of the DOC⁶², which provides that "the Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner."⁶³ Apart from a cursory (yet enlightening) mention of the duty to refrain from inhabiting uninhabited features in the SCS, the declaration unfortunately fails to define specific activities that would "complicate or escalate disputes" or "affect peace and stability."

Perhaps it would also be helpful to remember that at its core, the South China Sea dispute is a maritime delimitation problem which can and should be resolved under the auspices of UNCLOS. In such situations, Articles 74(3) and 83(3) of UNCLOS provide:

⁶⁰ See UNCLOS, *id.* at note 8, Arts. 2-7, 13, 17-25, 33, 55-58 and 87.

⁶¹ See the *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, *United Nations Treaty Series*, Vol. 1155, No. 331, Art. 31(3)(b), available from <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [hereinafter VCLT].

⁶² DOC, *id.* at note 16, par. 5.

⁶³ *id.*

Article 74. Delimitation of the exclusive economic zone between States with opposite or adjacent coasts

xxx

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

xxx

Article 83. Delimitation of the continental shelf between States with opposite or adjacent coasts

xxx

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement.

Such arrangements shall be without prejudice to the final delimitation.

xxx

Both provisions exhort claimants in an active delimitation issue to not “jeopardize or hamper the reaching of the final agreement”. International legal jurisprudence has since clarified that making permanent physical changes to the disputed area falls squarely within the ambit of this phrase. In

the *Aegean Continental Shelf Case*⁶⁴ between Greece and Turkey, the ICJ, in considering these provisions, noted the difference between activities of a transitory character and activities that risk irreparable prejudice to the position of the other party to the dispute. Greece had asked the ICJ to exercise its right to indicate interim measures and order Turkey to refrain from all seismic exploration in disputed waters (an activity involving the detonation of small explosions aimed at sending sound waves through the seabed) without its consent pending a final judgment. The ICJ declined to indicate interim measures, citing three factors: (1) the fact that seismic exploration does not involve any risk of physical damage to the seabed or subsoil, (2) that the activities are of a transitory character and do not involve the establishment of installations, and (3) that the operations did not involve the actual appropriation or other use of the natural resources. Under the circumstances, the ICJ found that Turkey's conduct did not pose risk of irreparable prejudice to Greece's rights in issue in the proceedings. In the *Guyana-Suriname UNCLOS arbitration case*⁶⁵, the arbitral tribunal similarly said that in order to be permissible, an act that causes permanent physical change would have to be undertaken pursuant to an agreement between the parties to a maritime delimitation.⁶⁶ It explicitly said that such acts, if done unilaterally, may hamper or jeopardize the reaching of a final agreement on delimitation.⁶⁷

Applying these standards to China, it becomes clear that its unilateral transformation of various features in the South China Sea pending the final resolution of the complex multistate claims over them demonstrates a lack of self-restraint. As China continues to make permanent changes, it steadily erodes whatever confidence that other states may have in its willingness to engage in meaningful and genuine negotiations. Its failure to exercise self-restraint in this sense signifies just how intractable its position is with respect to its "territory" in the South China Sea. In the *North Sea Continental Shelf Case*⁶⁸, the ICJ relevantly noted that parties to a delimitation case "are under an obligation to so conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating

⁶⁴ *Aegean Sea Continental Shelf Case (Greece v. Turk.)*, Interim Protection Order, 1976 I.C.J. 3 (September 11); *Aegean Sea Continental Shelf Case (Greece v. Turk.)*, Judgment, 1978 I.C.J. 3 (December 19).

⁶⁵ *Guy. v. Surin.*, UN Law of the Sea Annex VII Arb. Trib. (17 September 2007), available from <https://www.pcacases.com/web/sendAttach/902>.

⁶⁶ *supra*, par. 480.

⁶⁷ *supra*.

⁶⁸ *North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.)*, Judgment, 1969 I.C.J. Rep. 3 (February 20).

modification of it.”⁶⁹ To say then that that this would “complicate or escalate disputes” or “affect peace and stability” in the region is certainly an understatement. At the very least, China’s posture in the South China Sea makes it increasingly difficult to reopen bilateral discussions, since the buildup of these “islands” practically makes Chinese control over them a *fait accompli*.

Continued island-building can rapidly escalate the dispute

China’s island-building activities in the Spratlys have undoubtedly raised serious opposition from its neighbors. However, it had thus far managed to avoid a wider and more serious conflict involving extra-regional players such as the U.S. This could change, however, if China expands its reclamation and building activities to Scarborough Shoal, a strategically important atoll to both the Philippines and the U.S. due to its proximity to Luzon, the Philippines’ largest island. This is significant because Luzon contains at least three of the five military bases identified under the Philippines-U.S. Enhanced Defense Cooperation Agreement (EDCA), which permits the U.S. to station troops and supplies in the country. At a U.S. Senate Armed Services Committee Meeting in April 2016, Senator Dan Sullivan noted that “In addition to seizing and building on a shoal long claimed by the Philippines, a militarized Scarborough—with an air-search radar—would give the PRC full overwatch of flights in and out of northern Philippines, and the deployment of coastal defense cruise missiles there would allow the PRC to hold U.S. forces based and operating in the Philippines at risk,” adding that “The strategic implications for U.S. and allied forces operating in Southeast Asia are undeniable”⁷⁰ (See *Figure 1.4 below*). During the June 2016 Shangri-la Security Forum, US Pacific Command Chief Harry Harris also said that Chinese construction on Scarborough Shoal would become “a mechanism by which China would have de facto control over the South China Sea in any scenario short of war.”⁷¹ The shoal thus represents what Batongbacal calls a possible “red line” for the Philippines-U.S.

⁶⁹ *supra*, par. 85.

⁷⁰ Bill Gertz, *Pentagon Warns of Conflict Over Chinese Build-up On Disputed Island*, FREE BEACON (29 April 2016) <http://freebeacon.com/national-security/pentagon-warns-conflict-chinese-buildup-disputed-island/>.

⁷¹ David Twee, *Shoal may Become Military Line in Sand in South China Sea*, BLOOMBERG (5 June 2016), <http://www.bloomberg.com/news/articles/2016-06-05/small-shoal-risks-becoming-line-in-sand-on-south-china-sea-spats>.

military alliance⁷² especially since, unlike the Spratlys, it may be covered by a 1951 Mutual Defense Treaty⁷³ that obliges the U.S. to defend Scarborough Shoal.

Figure 1.4: Strategic Significance of a Chinese Military Base on Scarborough Shoal⁷⁴



SECTION B. Establishment of an Air Defense Identification Zone (ADIZ) in the South China

Sea

In November 2013, China, unilaterally and without prior consultation with its neighbors, declared an ADIZ over the East China Sea (ECS) in order to “improve the country’s capacity to

⁷² Jay Batongbacal, *Scarborough Shoal: A Red Line?*, ASIA MARITIME TRANSPARENCY INITIATIVE (25 April 2016), <https://amti.csis.org/scarborough-shoal-red-line/>.

⁷³ *Mutual Defense Treaty Between the Republic of the Philippines and the United States of America*, Washington D.C., 30 August 1951, United Nations Treaty Series, Vol. 17, No. 133.

⁷⁴ See *China’s Continued Military Build-Up on Contested Islands in the South China Sea is Boosting Risk of Conflict*, NATIONAL SECURITY NEWS (5 May 2016), available from <http://www.nationalsecurity.news/2016-05-05-the-pentagon-said-that-chinas-continued-military-build-up-on-contested-islands-in-south-china-sea-is-boosting-risk-of-conflict-2.html>.

identify aircraft and avoid misjudgment”⁷⁵. The declaration was immediately met with opposition from Japan, South Korea and Taiwan due to the fact that parts of the so-called ECS ADIZ overlapped with their existing ADIZs while other parts subjected parts of international airspace to Chinese control. Moreover, China’s move stoked fears that it intended to use the ECS ADIZ as a way to buttress its territorial claims in disputed areas, including the Senkaku/Diaoyu Islands (claimed by China, Japan and Taiwan) and the Ieodo/Suyan Reef (claimed by China and South Korea). These fears were further reinforced by the restrictive rules that Chinese officials applied to the ECS ADIZ: All foreign aircraft flying in the ECS ADIZ are now required to identify themselves to the Ministry of National Defense, the administrative organ of the ECS ADIZ.⁷⁶ Failure or refusal to do so authorizes the Chinese armed forces to respond with “defensive emergency measures”.⁷⁷ Despite China’s denials, commentators interpreted these rules as being a form of creeping Chinese sovereignty in the ECS.⁷⁸ U.S. Secretary of State John Kerry even said that the ECS ADIZ “constitutes an attempt to change the status quo in the East China Sea”.⁷⁹

Ever since China declared the ECS ADIZ, a sword of Damocles has hung over stakeholders to the South China Sea dispute. Just a month after that declaration, China’s then ambassador to the Philippines, responding to questions about whether a similar ADIZ would be set up in the South China Sea, said that China was entitled to decide “where and when to set up the new air defense identification zone.”⁸⁰ It appears that China has adopted a “wait-and-see” attitude with respect to a South China Sea ADIZ. This was evident from the January 2016 statement of the Chinese Foreign Ministry Spokesperson when he said –

⁷⁵ *China’s ADIZ to improve identification: FM Spokesman*, XINHUA (3 December 2013) http://news.xinhuanet.com/english/china/2013-12/03/c_132938467.htm.

⁷⁶ *Announcement of the Air Defense Identification Rules for the East China Sea Air Defense Identification Zone of the PRC*, XINHUANET (23 November 2013) http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm.

⁷⁷ *supra*.

⁷⁸ See for example Christopher K. Lamont, *Conflict in the Skies: the Law of Air Defense Identification Zones*, AIR AND SPACE LAW VOL. 30, No. 3, 200 (2014); 2014 ANNUAL REPORT TO CONGRESS, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 239 (2014); and Roncevert Almond, *Clearing the Skies Above the East China Sea*, HARVARD NATIONAL SECURITY JOURNAL VOL. 7 (2016) pp. 126-198, p.133.

⁷⁹ John Kerry, *Statement on the East China Sea Air Defense Identification Zone* (23 November 2013), available from <http://www.state.gov/secretary/remarks/2013/11/218013.htm>.

⁸⁰ Michael Pilger, *ADIZ Update: Enforcement in the East China Sea, Prospects for the South China Sea, and Implications for the United States*, US-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 7 (2 March 2016). http://origin.www.uscc.gov/sites/default/files/Research/ADIZ%20Update_0.pdf

*As for whether or not China will set up an air defense identification zone [in the South China Sea], the decision will be made based on a full assessment of the security situation and our needs. We believe that the overall situation in the South China Sea is stable. We stand ready to make joint efforts with all relevant parties to safeguard peace and stability of the South China Sea. Meanwhile, we hope that relevant countries would not flex military muscles by sending aircraft and vessels. Instead, they should take concrete actions to uphold peace and stability of the South China Sea together with China.*⁸¹

Immediately after the issuance of the Philippines-China arbitral award in July 2016, Liu Zhenmin, China's vice foreign minister, told a press conference in Beijing that China had the right to declare an ADIZ in the South China Sea but that its declaration depended on the level of threat that the country faced.⁸² Should China push through with a South China Sea ADIZ, commentators widely believe that this action will cause a spike in regional tensions.

ADIZs: concept, history and status in international law

The 1944 Chicago Convention on International Civil Aviation⁸³ defines an ADIZ as a “special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of air traffic service.”⁸⁴ Beckman and Phan clarifies this definition to mean that ADIZs are “zones beyond the territorial sea in which a State unilaterally declares that aircraft entering the zone

⁸¹ Pilger, *supra*, citing Michael Pilger, Open Source Center, PRC MOFA: Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on January 4, 2016.

⁸² Katie Hunt and Steven Jiang, *South China Sea: China may Establish an Air Defense Zone After Losing Court Ruling*, CNN (13 July 2016), <http://www.cnn.com/2016/07/13/asia/south-china-sea-ruling-reaction-adiz/>.

⁸³ *Convention on International Civil Aviation*, Chicago, 7 December 1944, United Nations Treaty Series, Vol. 15, No. 295, available from <https://treaties.un.org/doc/Publication/UNTS/Volume%2015/volume-15-II-102-English.pdf> [Hereinafter ICAO Convention]

⁸⁴ ICAO Convention, *supra*, Annex XV.

must identify themselves in order to protect its security from attack by hostile aircraft.”⁸⁵ They further explain that “foreign aircraft may exercise freedom of overflight within the zone, but if they fail to identify themselves in advance, they are subject to being interrogated or intercepted so that the coastal State can determine whether or not they have a hostile intent.”⁸⁶

It should be noted that the ADIZ concept is not new. China is by no means the first country to declare an ADIZ nor is it likely to be the last. In fact, the very first ADIZ was established by the US during the Cold War as a way to guard against an aerial attack from the Soviet Union. The US now maintains five ADIZs in which it requires all foreign aircrafts intending to enter US airspace to identify themselves in advance. Besides the US, over a dozen other countries (including the Philippines and Vietnam in Southeast Asia) have declared some form of ADIZ since the 1950’s.⁸⁷ Thus, ADIZs have been “an accepted part of the security architecture for decades”⁸⁸.

Some commentators have pointed to the long history and relatively wide use of ADIZs as evidence of their recognition under customary international law. However, this is doubtful given that the concept has yet to meet the ICJ’s basic threshold for the establishment of an international custom – the existence of settled state practice coupled with *opinio juris sive necessitatis* (belief that this practice is rendered obligatory by the existence of a rule of law requiring it).⁸⁹ For one thing, state practice is not uniform and the regulations tend to vary from country to country. The reality is that ADIZs have an uncertain status under international law due to the fact that none of the instruments governing airspace – the ICAO Convention, the 1958 Convention on the High Seas⁹⁰, the 1958 Convention on Territorial Sea and Contiguous Zone⁹¹, and the UNCLOS – specifically permits or prohibits their declaration.

⁸⁵ Robert Beckman and Hao Duy Phan, *Air Defence Identification Zones: Implications for Freedom of Overflight and Maritime Disputes*, paper presented in December 2014 at the “South China Sea: Cooperation for Regional Security and Development” at Da Nang, Vietnam.

⁸⁶ *supra*.

⁸⁷ Countries with officially declared ADIZs include the United States, the United Kingdom, Canada, Russia, Japan, South Korea, North Korea, China, Taiwan, the Philippines, Vietnam, Pakistan, India, Sweden, Norway, and Iceland.

⁸⁸ Lamont, *supra* at note 78, 190.

⁸⁹ See the North Sea Continental Shelf Case (Ger. v. Den.), Judgment, 1969 I.C.J. Rep. 3 (February 20); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

⁹⁰ *Convention on the High Seas*, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. 450, No. 11.

An ADIZ will be a flashpoint in the South China Sea

Given that numerous countries have declared their ADIZs without incident, and given that the ADIZ concept is not illegal *per se* or inconsistent with any international legal principle, can a Chinese ADIZ in the SCS really become a critical regional flashpoint that can escalate the dispute? The answer is likely to be in the affirmative, especially if China intends to: (1) use it in a way that violates the freedom of overflight over the EEZ and on the high seas and/or (2) use it to advance its sovereignty claims over disputed areas.

Airspace, like maritime areas, can pertain to territorial or extraterritorial zones. The 1919 Paris Convention on Relating to the Regulation of Aerial Navigation already contained a provision recognizing that all States “have complete and exclusive sovereignty over the air space above its territory”.⁹² It defined “territory” as “including the national territory, both that of the mother territory and of the colonies, and the territorial waters adjacent thereto”.⁹³ Language expressing the same or similar ideas appeared in subsequent treaties such as the Ibero-American Convention Relating to Air Navigation⁹⁴ and the Pan-American Convention Relating to Commercial Aviation⁹⁵. The concept expressed in these earlier conventions eventually evolved into the version codified in the 1944 Chicago Convention – that all States have “complete and exclusive sovereignty over the airspace above their territory”⁹⁶ and that “territory” for this purpose is defined as “the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.”⁹⁷ This was further affirmed by Article 2 of the UNCLOS which provides that “the sovereignty of a coastal State extends to an adjacent belt of

⁹¹ *Convention on the Territorial Sea and Contiguous Zone*, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. No. 516, No. 205.

⁹² *Convention Relating to the Regulation of Aerial Navigation*, Paris, 13 October 1919, *League of Nations Treaty Series*, Vol. 11, No. 173, Art. 1 [hereinafter Paris Convention].

⁹³ *id.*

⁹⁴ The Ibero-American Convention Relating to Air Navigation was signed at Madrid, Spain, on 1 November 1926.

⁹⁵ The Pan-American Convention on Commercial Aviation was signed at Havana, Cuba, on 20 February 1928.

⁹⁶ ICAO Convention, *id.* at note 83, Art. 1.

⁹⁷ ICAO Convention, *id.* at note 83, Art. 2.

sea, described as the territorial sea, and to the air space above the territorial sea”⁹⁸. Under the UNCLOS, every State is entitled to establish a territorial sea of up to 12 nautical miles measured from its baselines determined in accordance with the Convention.⁹⁹ Despite the customary and conventional relationship between the territorial sea and its adjacent airspace, the UNCLOS is silent on whether foreign aircraft are entitled to a right similar to the right of innocent passage for foreign ships in the territorial sea. This silence was due to the fact that during the preparatory phase for the drafting of the Convention, the ILC found that no such right existed as a matter of custom.¹⁰⁰ In any case, there appears to be no doubt as to the absoluteness of coastal State’s exercise of absolute sovereignty over its airspaces up to its territorial sea.

The legal status of airspace adjacent to maritime zones beyond the territorial sea – the contiguous zone, the EEZ and the high seas – is a little bit more complicated. The UNCLOS provides for the exercise of limited jurisdiction in the contiguous zone, which extends up to 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.¹⁰¹ No mention whatsoever is made of the authority to regulate the airspace above the contiguous zone. This has led Oduntan to conclude that “in the airspace above the contiguous zone, there can be no sovereignty” and that “the jurisdictional powers exercisable over such airspace (if any at all) would also have to fall within the parameters of the reasons why the zone was created.”¹⁰² With respect to the EEZ – defined as an area beyond and adjacent to the territorial sea up to 200 nautical miles measured from the coastal State’s baselines – the UNCLOS likewise limits the coastal State’s exercise of jurisdiction only to:

- a) *sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or*

⁹⁸ In Art. 49 of the UNCLOS, the same sovereignty is also extended to archipelagic waters as well as the to airspace above such waters.

⁹⁹ UNCLOS, *id.* at note 8, Art. 3.

¹⁰⁰ International Law Commission, *The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session, A/CONF.13/4* (24 February to 27 April 1958), available http://legal.un.org/diplomaticconferences/lawofthesea-1958/docs/english/vol_I/7_A-CONF-13-4_PrepDocs_vol_I_e.pdf.

¹⁰¹ UNCLOS, *id.* at note 8, Art. 33; The provisions states that within the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, (b) punish infringement of the above laws and regulations committed within the territory or its territorial sea.

¹⁰² GBENGA ODUNTAN, SOVEREIGNTY AND JURISDICTION IN THE AIRSPACE AND OUTERSPACE 135 (2012).

non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

i. the establishment and use of artificial islands, installations and structures;

ii. marine scientific research;

iii. the protection and preservation of the marine environment;

*c) other rights and duties provided for in this Convention.*¹⁰³

It does not provide for the exercise of any jurisdictional rights in the airspace above the EEZ. Moreover, Article 58 of the Convention makes it quite clear that within the airspace above the EEZ, all States are entitled to exercise the freedom of overflight, which is included as one of the freedoms of the high seas listed in Article 87. Kraska and Pedrozo thus believe that the airspace above the EEZ is “international airspace”¹⁰⁴.

Given the apparent clarity of current international law on the jurisdiction and sovereign rights of coastal States within their respective maritime zones and adjacent airspaces, one might be tempted to conclude that ADIZs are in themselves inconsistent with the exercise of the freedom of overflight and that they are likely to be flashpoints in international relations. However, many commentators believe that the imposition of mere reporting obligations on civil and military aircraft does not necessarily violate the UNCLOS and that the freedom of overflight, for all intents and purposes, remains unimpeded.¹⁰⁵ While that may be true for the ADIZs declared by

¹⁰³ UNCLOS, *id.* at note 8, Art. 56(1).

¹⁰⁴ JAMES KRASKA AND RAUL PEDROZO, *INTERNATIONAL MARITIME SECURITY LAW*, Martinus Nijhoff 289 (2013).

¹⁰⁵ Peter Dutton, *Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace*, 103 AM. J. INT’L L. (2009); Julian Ku, *Why the US is not invoking international law to oppose China’s ADIZ*, OPINIO JURIS (8 December 2013), <http://opiniojuris.org/2013/12/08/china-correct-adiz-necessarily-violate-international-law-doesnt-make-right/>; Jaemin Lee, *China’s Declaration of an Air Defense Identification Zone in the East China Sea*:

most States, the same thing may not automatically be said for a Chinese ADIZ. According to Lee, China's compliance with UNCLOS "may depend on how it implements its ADIZ declaration: whether as an enhanced flight information gathering scheme (albeit for national security purposes) or as a tight military control and surveillance scheme."¹⁰⁶ Unfortunately, the way it has implemented the ECS ADIZ signifies a decided preference for the latter. This is clear from the fact that its existing ADIZ regulations already go above and beyond what is required by other States: China requires reporting by all aircraft even though said aircraft is merely transiting through without intending to enter Chinese airspace. Failure to comply authorizes China to adopt the ominously-phrased "defensive emergency measures". Lee thus notes that a Chinese-style ADIZ "arguably replaces the information gathering function of other ADIZs with a military enforcement function by formulating the ADIZ as a military emergency action plan".¹⁰⁷ He further points out that this is in sharp contrast to the measures that can be taken by other States for non-compliance with their ADIZ regulations. Other States only subject non-complying foreign aircraft to administrative or regulatory penalties in accordance with the general statutory mandate of national aviation authorities.¹⁰⁸ Should China declare a South China Sea ADIZ in the same mold as its ECS ADIZ, any State that subsequently tests China's regulations in the South China Sea will likely be met with a strong response, potentially triggering an escalation of hostilities in an already tense region.

As early as 1977, Cuadra already observed that ADIZs can facilitate a form of creeping sovereignty beyond existing territories, saying that –

The seaward extension of one aspect of sovereignty, although it may itself have no legal validity, potentially may serve as precedent for seaward extensions of other aspects of sovereignty. Thus, the question naturally arises whether, when linked with resource recovery zones for

Implications for Public International Law, 18 AM. SOC'Y. INT'L. L. 17 (19 August 2014) <https://www.asil.org/insights/volume/18/issue/17/china%E2%80%99s-declaration-air-defense-identification-zone-east-china-sea>; and J Ashley Roach, *Air Defense Identification Zones*, THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (February 2015) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e237>.

¹⁰⁶ Lee, *supra* at note 105.

¹⁰⁷ *supra*.

¹⁰⁸ *supra*.

*fisheries and the seabed, these zones in the airspace may harden into claims of full territorial sovereignty rather than the limited control they now represent.*¹⁰⁹

A South China Sea ADIZ assumes an escalatory function if, as Vuving believes, it will be used as a “sovereignty marker” which can be used as basis for area-denial.¹¹⁰ He noted that although an ADIZ is not a territorial claim in its truest sense, it can be used to exercise some forms of sovereignty rights and administration over the airspace of a territory.¹¹¹ According to Waxman, an ADIZ can also become an escalatory action if China uses it to “create facts in the sky to advance its bargaining position over disputed territory below”¹¹². Thus, if China’s claims to such an ADIZ were accepted, then it would have further reinforced China’s assertions of a substantially expanded set of rights within its so-called “nine-dashed-line”.¹¹³ According to Cheng, the imposition of an ADIZ will present other States with a stark choice: concede to China or take increased risk.¹¹⁴ Thus, Vuving further theorized that other South China Sea stakeholders (including the United States and Japan) will likely engage in some sort of push-back because “acceptance or acquiescence by foreign aircraft of an ADIZ may be interpreted as recognition of (China’s) effective exercise of sovereignty over a territory.”¹¹⁵ These circumstances could ultimately lead to a rise in the incidents of aerial miscalculation and confrontation. According to Justice Carpio from the Philippines, this is already happening since China has begun to impose a type of “quasi-ADIZ” in the South China Sea, which can be gleaned from the fact that any Philippine plane that flies over the Spratlys receives a stern warning from China via two-way radio to “stay away from the area”.¹¹⁶

¹⁰⁹ Elizabeth Cuadra, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, 18 VA. J. INT’L. 485, 486.

¹¹⁰ Alexander Vuving, *ADIZ in the South China Sea: Nine-Dash-Line 2.0*, THE NATIONAL INTEREST (25 July 2016), <http://nationalinterest.org/feature/adiz-the-south-china-sea-nine-dash-line-20-17121?page=5>.

¹¹¹ *supra*.

¹¹² Matthew Waxman, *China’s ADIZ at 1 Year: International Legal Issues*, ASIAN MARITIME TRANSPARENCY INITIATIVE (25 November 2014), <https://amti.csis.org/chinas-adiz-at-one-year-international-legal-issues/>.

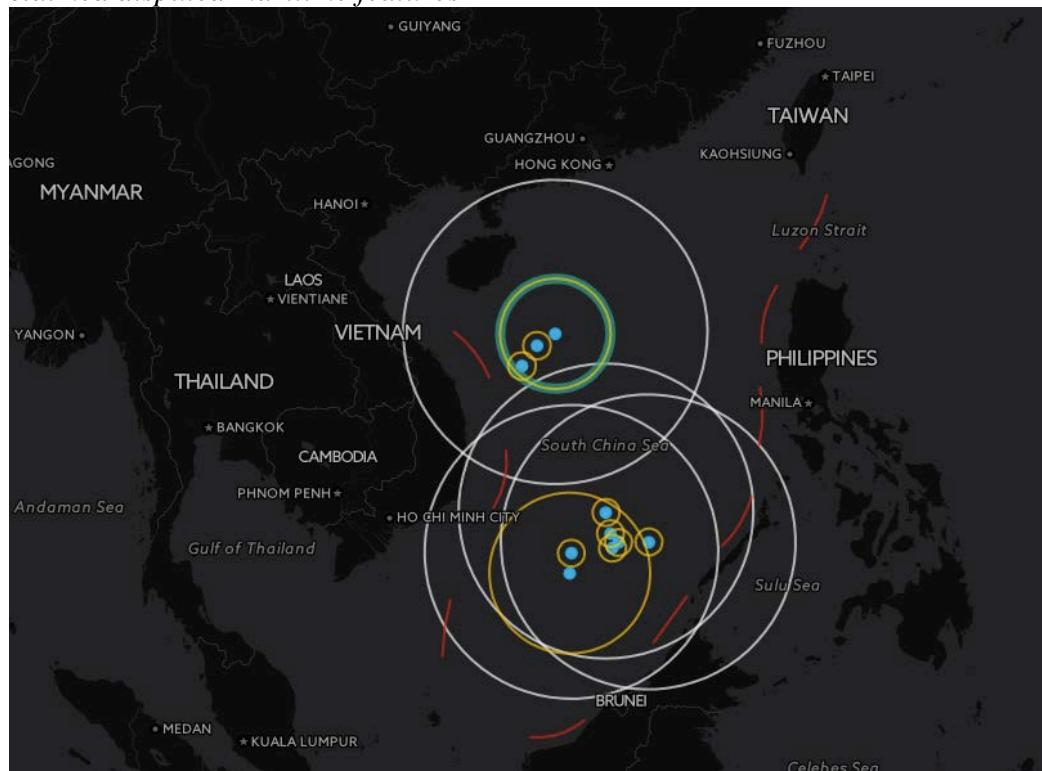
¹¹³ Dean Cheng, *China’s ADIZ as Air Denial*, NATIONAL INTEREST (4 December 2013), <http://nationalinterest.org/commentary/chinas-adiz-area-denial-9492>.

¹¹⁴ *supra*.

¹¹⁵ Vuving, *supra* at note 110.

¹¹⁶ Prashanth Parameswaran, *China Enforcing Quasi-ADIZ in the South China Sea: Philippine Justice*, THE DIPLOMAT (13 October 2015), <http://thediplomat.com/2015/10/china-enforcing-quasi-adiz-in-south-china-sea-philippine-justice/>.

Figure 1.5: Projected map of SCS ADIZ based on current enforcement capacities reckoned from claimed disputed maritime features¹¹⁷



¹¹⁷ Center for Strategic and International Studies, *Map of Chinese Detection/Defense Capabilities in the South China Sea*, available from https://csis.carto.com/viz/4c461308-d73e-11e5-9a49-0e3ff518bd15/embed_map.

CHAPTER 2: SUGGESTIVE ESCALATIONS

Throughout the arbitration process and even after the award was handed down by the arbitral tribunal, China also engaged in two classes of activities that provoked strong responses from the Philippines and other South China Sea stakeholders. The first class pertains to a spectrum of threats which include the placement of military assets on artificially-built islands, the conduct of military exercises in disputed areas, and the issuance of verbal warnings. The second class refers to the conduct of enforcement actions in disputed areas. These activities function as “suggestive escalations” in that they signal China’s readiness and capability to use, if necessary, even greater force than what has been previously shown. In other words, China has adopted a coercive “back-off-or-else” attitude with respect to its South China Sea claims.¹¹⁸

Framework for analysis

Quite a number of political scientists have studied the concept of coercion and, more specifically, coercive diplomacy. Schelling analyzed the two aspects of coercion: deterrence and compellence. He differentiated the two concepts by characterizing deterrence as being more passive: in a dyadic relationship, the burden of action is shifted to the opponent, which could then trigger a response from the coercer. According to Schelling, deterrence then is “to prevent from action by fear of consequences.”¹¹⁹ In contrast, he describes compellence as the complete opposite of deterrence: it involves “initiating an action (or an irrevocable commitment to action) that can cease, or become harmless, only if the opponent responds.”¹²⁰ It is “inducing his withdrawal, or his acquiescence, or his collaboration by an action that threatens to hurt, often one that could not forcibly accomplish its aim but that, nevertheless, can hurt enough to induce compliance.”¹²¹ Finally, Schelling emphasized that coercion is not simply about the threat of

¹¹⁸ It should be fairly noted that China is not the only country that has engaged in these types of tactics in disputed areas. However, it is beyond dispute that no other country has done so in quite such a bold, aggressive and provocative manner as China.

¹¹⁹ Schelling, *supra* at note 1, 70-71.

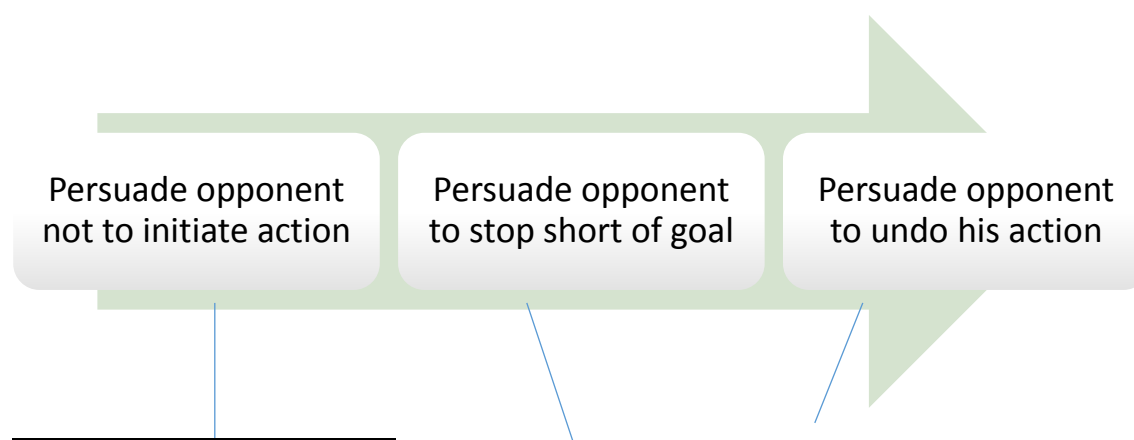
¹²⁰ Schelling, *supra* at note 1, 72.

¹²¹ Schelling, *supra* at note 1, 80.

violence but the threat of further violence – in a progressive manner – if compliance is not forthcoming.¹²²

George later built on Schelling’s notion of compellence and developed the concept of “coercive diplomacy”, which he defines as “essentially a diplomatic strategy, one that relies on the threat of force rather than the use of force. If force must be used to strengthen diplomatic efforts at persuasion, it is employed in an exemplary manner, in the form of quite limited military action, to demonstrate resoluteness and willingness to escalate to high levels of military action if necessary.”¹²³ To this end, he adds that “The employment of force is coupled with – i.e., preceded, accompanied or followed by – appropriate communications to the opponent. The coercive strategy, therefore, has a signaling, bargaining, negotiating character that is built into the conceptualization and conduct of military operations.”¹²⁴ He thus asserts that coercive diplomacy is a “complex political-diplomatic strategy” where if force is used, it is merely used to protect interests and “the credibility of one’s determination to use more force if necessary.”¹²⁵ Finally, he consolidated both his and Schelling’s ideas into a continuum model in which deterrence may be attempted before the opponent has initiated an action, and coercive diplomacy employed afterwards either to persuade the opponent merely to halt or undo an action (*Figure 1.6*).

Figure 1.6: Deterrence – Coercive Diplomacy Continuum



¹²² Lisa Nemeth, *The Use of Pauses in Coercion: An Examination in Theory* (21 May 2009) (unpublished monograph, School of Advanced Military Studies, United States Army Command and General Staff College) p. 5.

¹²³ Alexander L. George, *Introduction: The Limits of Coercive Diplomacy*, in *LIMITS OF COERCIVE DIPLOMACY 2* (Alexander L. George and William E. Simmons, eds., 2nd rev. ed., 1994).

¹²⁴ George, *supra*, p. 18.

¹²⁵ George, *supra* at note 123, p. 12.



DETERRENCE

COERCIVE DIPLOMACY

Freedman largely agreed with George when he described coercion as the “deliberate and purposive use of overt threats to influence another’s strategic choices”¹²⁶. Byman and Waxman, too, give a nod to George’s description when they reiterated that coercion is “the use of threatened force including the limited use of actual force.”¹²⁷ Pape deviates a bit as he viewed coercion through a cost-benefit analysis lens: he defined it as “efforts to change the behavior of a state by manipulating costs and benefits.”¹²⁸

The above ideas are relevant to this research in that they provide some insight into the rationale for China’s assertive posture. That China is encountering pushback from the Philippines (as well as from other ASEAN member States, the U.S., Japan, etc.) is not surprising, given that its actions are once again treading in the legal gray zone. As a result, this research argues that China’s suggestive actions create a volatile environment that, when triggered by a certain act or acts which test their limits, could escalate into all-out war.

Section A. Military Assets and Military Exercises in Disputed Areas; Verbal Warnings

The build-up of military assets, the conduct of military exercises, and the issuance of verbal warnings are not in themselves controversial. Indeed, the discussion in the preceding section on the strategy of coercive diplomacy (under which these broad classes of actions undoubtedly fall under) makes them seem part of normal state-to-state interactions. This is where international relations and international law tend to part ways – the former treats coercion as an innocuous aspect of foreign policy while the latter assigns it a reprehensible character when done in the context of an existing dispute. Thus in evaluating China’s actions using an international law lens,

¹²⁶ LAWRENCE FREEDMAN, STRATEGIC COERCION: CONCEPTS AND CASES 3 (1998).

¹²⁷ DANIEL BYMAN AND MATTHEW WAXMAN, THE DYNAMICS OF COERCION: AMERICAN FOREIGN POLICY AND THE LIMITS OF MILITARY MIGHT 3 (2002).

¹²⁸ ROBERT A. PAPE, BOMBING TO WIN 45 (1996).

analysis necessarily shifts to a determination of whether such activities constitute unlawful “threats of force” in order to gain an advantage in an ongoing dispute,

Sandurska defines a “threat of force” as “a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with.”¹²⁹ Brownlie, meanwhile, believes that the “threat to use force” consists of “an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government.”¹³⁰ Although threats of force do not attract as much scholarly attention as the actual use of force, they are nonetheless prohibited under Article 2(4) of the United Nations Charter¹³¹, which provides:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

This particular Charter provision has been described by the ICJ in the *Nicaragua Case* as having customary status¹³² and as being a “peremptory norm from which states cannot derogate.”¹³³ This universally binding principle is reiterated in, among other instruments, Article 301 of the UNCLOS¹³⁴, the preamble as well as Article 52 of the Vienna Convention on the Law of Treaties¹³⁵, and throughout the TAC¹³⁶. Threatening to use force is specifically proscribed by

¹²⁹ Romana Sandurska, *Threats of Force*, 82 Am. J. Int’l L. 242 (1988).

¹³⁰ IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 364 (1963).

¹³¹ UN Charter, *id.* at note 12, Art. 2(4).

¹³² Nicaragua Case, *supra* at note 90, para. 100.

¹³³ *supra*.

¹³⁴ UNCLOS, *id.* at note 8, Art. 301; It provides: “In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”

¹³⁵ VCLT, *id.* at note 63; The Preamble contains a paragraph which states: “Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all”. On the other hand, Art. 52 provides: “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

¹³⁶ See generally TAC, *id.* at note 14.

international law because of its potential to escalate tensions and lead to the actual use of force in otherwise non-violent situations. Given the relatively clear state of international law on threats of force, the next issue that must be addressed is whether China's demonstrations of force amount to prohibited threats of force.

Stürchler describes a demonstration of force as a situation –

*Where State A, in the form of non-routine military deployments, build-ups, maneuvers, tests or other militarized acts signals preparedness and resolve to use armed force on a particular issue under dispute with state B. The initiation of militarized acts in a period of high tension is a firm indication that a demonstration of force is at play.*¹³⁷

He suggests that any militarized act can qualify as a demonstration of force: military deployment, troop build-up, maneuvers or tests, provided that they signal readiness and resolve to use armed force on a particular issue at dispute with another state.¹³⁸ He further qualifies this by disclaiming that not all militarized acts amount to an unlawful demonstration of force in violation of Article 2(4) of the UN Charter. The acts only violate the UN Charter if they actively attempt to intimidate through specific threats, troop concentrations or displays of force that remove any doubt of non-hostile intent. Stürchler believes this can be determined by looking at certain markers (e.g. non-routine, suspiciously-timed, scaled-up, intensified, geographically proximate, staged in the exact mode of a potential military class and easily attributable to a foreign policy message¹³⁹). Under those circumstances, the threat becomes both targeted and visible as an effort to exercise military pressure.¹⁴⁰ Moreover, he asserts that a State must credibly communicate its readiness to use force in a particular dispute. It is not required that certainty exists that force will be used, that it is imminent or that it be framed within specific

¹³⁷ NICHOLAS STÜRCHLER, *THE THREATS OF FORCE IN INTERNATIONAL LAW* 172 (2007).

¹³⁸ *id.*, at 261.

¹³⁹ *id.*

¹⁴⁰ *id.*, at 264.

demands and deadlines.¹⁴¹ According to him, what matters is that the use of force is sufficiently alluded to and thereby increases the shared risk of military encounter.¹⁴²

China's act of deploying a significant portion of its navy and coast guard fleet to the South China Sea is a clear demonstration of military pressure. Moreover, it has deployed surface-to-air missile launchers and a radar system on Woody Island in the Paracels.¹⁴³ More recently, China flew an H-6K nuclear-capable bomber over the Scarborough Shoal and posted photos on the government's Weibo account.¹⁴⁴ These actions fulfill some of Stürchler's markers: the acts are non-routine, they are suspiciously-timed, they are geographically proximate and they are easily attributable to China's foreign policy message of telling other South China Sea stakeholders to back off from challenging China's nine-dashed-line claims. These actions are also consistent with China's policy of maintaining a rotating Chinese Coast Guard (CCG)/People's Liberation Army Navy (PLAN) presence in the South China Sea, and with its ongoing facilities (including runways, radars, floating nuclear power plants¹⁴⁵, ports, hangars, etc.) construction program in the Spratlys to ensure optimum logistics support for assets based (or those that will be based) there. Experts believe that the rapid pace of construction could allow China to deploy dozens of fighter jets and ships to the islands in the near term, effectively turning them into distant-water military installations. This could potentially make it easier for China to operate and safeguard its interests in the South China Sea without having to return to the nearest Chinese port, allowing it to apply constant pressure on other countries maintaining some form of air and sea presence in the area.

Like other South China Sea stakeholders, China has also been regularly conducting military exercises involving its ships and aircraft. Unlike the others', however, China's exercises have

¹⁴¹ *id.*, at 273.

¹⁴² *id.*, 273.

¹⁴³ Harry J. Kazianis, *Is China Deploying Anti-Ship Missiles in the South China Sea?*, THE NATIONAL INTEREST (23 March 2016), available from <http://nationalinterest.org/blog/the-buzz/china-deploying-anti-ship-missiles-islands-the-south-china-15577>.

¹⁴⁴ Jesse Johnson, *China Flies Nuclear-Capable Bomber Near the Scarborough Shoal, Vows to Make South China Sea Patrol Regular Practice*, JAPAN TIMES (19 July 2016), available from <http://www.japantimes.co.jp/news/2016/07/19/world/china-announces-closure-part-south-china-sea-waters-due-military-exercises/#.WCCYEOErIdU>.

¹⁴⁵ Stephen Chen, *Could China Build the World's Smallest Nuclear Power Plant and Send it to the South China Sea?*, SOUTH CHINA MORNING POST (11 October 2016), available from <http://www.cnbc.com/2016/10/11/could-china-build-the-worlds-smallest-nuclear-power-plant-and-send-it-to-the-south-china-sea.html>.

been strategically provocative due to either or a combination of their timing, location, or nature. One example of questionable timing was the PLAN exercise held from 5 July to 11 July 2016 in the Paracels area of the South China Sea, just days before the PCA's scheduled release of the award in the Philippines-China arbitration.¹⁴⁶ China also used the exercise as a reason to declare a 1,300 sq km "no sail zone" for its duration, in violation of the UNCLOS provisions on the freedom of navigation.¹⁴⁷ Moreover, the area in question is an area whose ownership is being claimed by China, Vietnam and Taiwan. Another example is its 13 September to 19 September joint military exercise with Russia (dubbed as the "Joint Sea 2016"), which marked the first time that the annual drill was held in the South China Sea. Both China and Russia deployed some of their best air and sea assets to participate in the exercises including: numerous fixed-wing airplanes, helicopters, guided missile destroyers, frigates, landing ships, supply ships, amphibious tanks, as well as hundreds of marines. In this sense, Joint Sea 2016 was an outright show of force. However, what was most striking about these highly publicized joint military exercises was the nature of the activities: in addition to standard activities such as maneuvering drills, sea crossing, light weapons shooting, and search and rescue, they also included "coordinated three-dimensional island seizing", island defense, and anti-submarine operations.¹⁴⁸ Such drills are not standard and, given the context in which they are conducted, are clearly intended to convey a not-too-subtle message to other South China Sea stakeholders. The most recent example occurred as a reaction the latest US FONOPS. A few days after the USS Decatur exercised its freedom of navigation in waters near the Paracels, China suddenly announcement that a military exercise would be held near that same area from 26 to 27 October.¹⁴⁹ The message conveyed by this surprise move is clear: FONOPS and any other "provocative" actions would trigger a strong response from China.

¹⁴⁶ Charlie Campbell, *China Launches Naval Drills In the South China Sea Before Key Maritime Ruling*, TIME (4 July 2016), available from <http://time.com/4392502/south-china-sea-beijing-philippines-court-ruling/>.

¹⁴⁷ See *Announcement Regarding South China Sea Exercises*, available from <http://www.msa.gov.cn/html/xinxichaxungongkai/gkml/HXJG/Hainan/20160703/DA5AB846-B3D6-4054-8D53-A9222BA3C9A4.html> (in Chinese).

¹⁴⁸ *China, Russia Start Joint Navy Drill in the South China Sea*, XINHUA (13 September 2016), available from http://news.xinhuanet.com/english/2016-09/13/c_135685439.htm.

¹⁴⁹ See <http://www.msa.gov.cn/page/article.do?articleId=B05E319D-F31D-4A6B-AB3C-31C94855D6FD&channelId=D3340711-057B-494B-8FA0-9EEDC4C5EAD9>. (in Chinese)

Finally, China has been actively issuing verbal warnings to other South China Sea stakeholders. Chinese officials have publicly stated, for example, that there would be a "price to pay"¹⁵⁰ for further interference from the US and that China is willing to "replay the Korean and Vietnam war"¹⁵¹ if the US stirs up any conflict. They have denounced the Philippines-China arbitration as a prelude to making the South China Sea a "cradle of war"¹⁵² Chinese government-owned newspaper Global Times ran an article that warned the Australian government against "interfering" in South China Sea matters, saying that "If Australia steps into South China Sea waters, it will be an ideal target for China to warn and strike".¹⁵³ A Chinese military advisor has reportedly threatened Singapore by saying that "'It's inevitable for China to strike back at Singapore, and not just on the public opinion front.'" He also said that "Since Singapore has gone thus far, we have got to do something, be it retaliation or sanction. We must express our discontent."

Taken all together, China's posturing continues to stoke an atmosphere of tension in the region. It continues to agitate the current of state of crisis, setting the stage for escalation into all-out war should a confrontation between/among states occur as a result of feeling of being threatened or harassed by China.

Section B. Enforcement Actions in Disputed Areas

The UNCLOS established the various maritime zones (*Figure 1.7*) and clearly identified the extent of a coastal State's rights in each of these zones. Internal waters, archipelagic waters, territorial waters, and straits fall under the sovereignty of the coastal State. This means that

¹⁵⁰ Ross Logan, *Will the China and the US be at War Next Week? Beijing Set to Defy Hague Ultimatum*, EXPRESS (9 July 2016), available from <http://www.express.co.uk/news/world/687897/China-US-war-next-week-Beijing-defy-Hague-sea-ultimatum>

¹⁵¹ Chris Summers, *China's Blunt Warning to America: 'We're Ready for Repeat of Korean War or Vietnam if US Military Stirs Up Any Conflict in the South China Sea'*, THE DAILY MAIL (20 May 2016), available from <http://www.dailymail.co.uk/news/article-3600609/China-warns-U-S-ready-repeat-Korean-War-Vietnam-American-military-stirs-conflict-South-China-Sea.html>.

¹⁵² *Angry China Warns Against Cradle of War in the South China Sea After Hague Ruling*, STRAITS TIMES (13 July 2016), available from <http://www.straitstimes.com/asia/east-asia/china-vows-to-protect-south-china-sea-sovereignty-after-hague-ruling>

¹⁵³ Peter Symonds, *China Issues Warning to Australia Over South China Sea*, WORLD SOCIALIST WEBSITE (2 August 2016), available from <https://www.wsws.org/en/articles/2016/08/02/aust-a02.html>

within these zones, the coastal State has absolute regulatory and enforcement power (limited only by its various international legal obligations)¹⁵⁴. In contrast, the coastal State only exercises sovereign rights in the contiguous zone, the EEZ and on the continental shelf. Thus, it will only have the right to exclusively exercise a limited form of spatial jurisdiction¹⁵⁵ for the following specifically identified purposes:

Within the contiguous zone:

- (a) preventing the infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;¹⁵⁶ and
- (b) punishing the infringement of the above laws and regulations committed within its territory or territorial sea.¹⁵⁷

Within the EEZ:

- (a) legislating and enforcing laws and regulations related to the exploration and exploitation, conservation and management the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, current and winds;¹⁵⁸
- (b) constructing, as well as authorizing and regulating the construction, operation and use of artificial islands, installations and structures¹⁵⁹
- (c) legislating and enforcing laws and regulations relating to customs, fiscal, health, safety and immigration in such artificial islands, installations and structures;¹⁶⁰
- (d) regulating, authorizing and conducting marine scientific research;¹⁶¹

¹⁵⁴ YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* (2ND ED.) 130 (2015).

¹⁵⁵ *supra*, at 123 and 132.

¹⁵⁶ UNCLOS, *id.* at note 8, Art. 33(1)(a).

¹⁵⁷ UNCLOS, *id.* at note 8, Art. 33(1)(b).

¹⁵⁸ UNCLOS, *id.* at note 8, Art. 56(1)(a); To this end, Art. 73(1) of the UNCLOS also provides that the coastal State may “take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in accordance with the UNCLOS. The ITLOS in the *M/V Virginia Case* (ITLOS Case No. 19, 14 April 2014, para. 257) further clarified that Art. 73(1) also includes the confiscation of vessels in the EEZ.

¹⁵⁹ UNCLOS, *id.* at note 8, Arts. 56(1) and 60(1).

¹⁶⁰ UNCLOS, *id.*, at note 8, Art. 60(2).

- (e) legislating and enforcing laws related to the protection and preservation of the marine environment;¹⁶² and
- (f) legislating and enforcing laws related to dumping and vessel-sourced pollution.¹⁶³

On the Continental Shelf:

- (a) exploring and exploiting natural resources (consisting of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species);¹⁶⁴
- (b) constructing, as well as authorizing and regulating the construction, operation and use of artificial islands, installations and structures;¹⁶⁵
- (c) legislating and enforcing laws and regulations relating to customs, fiscal, health, safety and immigration in such artificial islands, installations and structures;¹⁶⁶
- (d) regulating, authorizing and conducting marine scientific research;¹⁶⁷ and
- (e) authorizing and regulating drilling for all purposes; and¹⁶⁸
- (f) legislating and enforcing laws related to dumping and vessel-sourced pollution.¹⁶⁹

The implication of this is that the coastal State will have no basis for insisting on rights beyond what is explicitly stipulated in the UNCLOS. Finally, the high seas and The Area are deemed as international maritime zones and as such, are not subject to the sovereignty or sovereign rights of any State.

¹⁶¹ UNCLOS, *id.* at note 8, Art. 246(1).

¹⁶² UNCLOS, *id.* at note 8, Art. 56(1)(b)(iii).

¹⁶³ UNCLOS, *id.* at note 8, Arts. 210, 211 and 220.

¹⁶⁴ UNCLOS, *id.* at note 8, Art. 77.

¹⁶⁵ UNCLOS, *id.* at note 8, Art. 80.

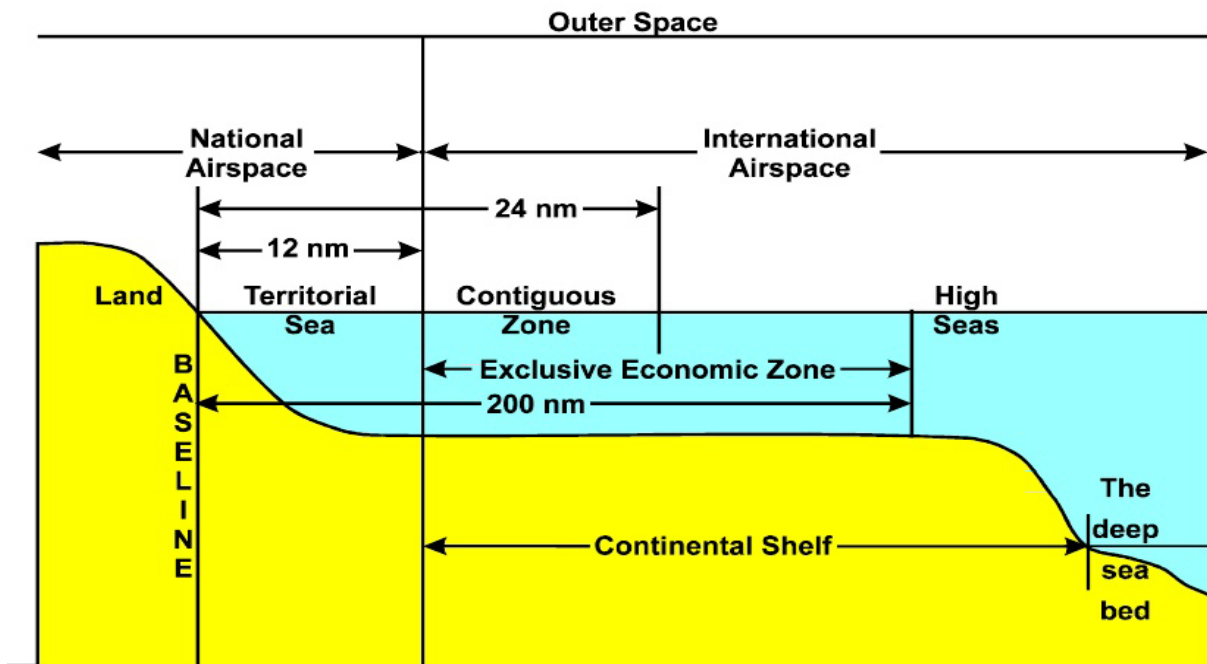
¹⁶⁶ *id.*

¹⁶⁷ UNCLOS, *id.* at note 8, Art. 246(1).

¹⁶⁸ UNCLOS, *id.* at note 8, Art. 81.

¹⁶⁹ UNCLOS, *id.* at note 8, Art. 210(5).

Figure 1.7: Legal regimes of the oceans and airspace under UNCLOS



South China Sea enforcement controversy and its escalatory potential

Against this international legal backdrop, the South China Sea situation presents a troubling enforcement controversy for two main reasons:

First reason:

The peaceful implementation of legislative and enforcement rules under the UNCLOS are premised on the assumption that all coastal States adhere to the established maritime zones regime. It only becomes problematic if there is a significant deviation from this premise resulting in jurisdictional overlaps. Unfortunately, this is precisely what China is doing by insisting on its

nine-dashed-line, which runs right through the EEZs of virtually all the coastal States surrounding the South China Sea (*Figure 1.8*). China's deviation creates unnecessary uncertainty and lack of predictability with respect to legislation and enforcement in the overlapping areas, especially since it has so far maintained the ambiguity of the nine-dashed-line with respect to the character of the waters or the features found therein.

Figure 1.8: South China Sea EEZs vis a vis China's nine-dashed-line claim



This is best exemplified by China's imposition of unilateral fishing bans for "conservation purposes" in various disputed parts of the South China Sea. From May-August 2016, for example, China declared a ban on all types of fishing in some of its maritime "territories", including Scarborough Shoal and the Paracels, both of which are located in the EEZs of the Philippines and Vietnam respectively.¹⁷⁰ The annual fishing ban is enforced by China's Coast

¹⁷⁰ *VTFU Slams China's Fishing Ban*, VIETNAM NEWS (21 May 2016), <http://vietnamnews.vn/politics-laws/297056/vftu-slams-chinas-fishing-ban.html#6wdd78ZDVLfiKcgu.97>.

Guard (CCG) and local fisheries bureaus, who have used violence¹⁷¹ (including resort to intentional ramming and the use of water cannons) and serious intimidation tactics (including blockades, dangerous maneuvers, and the use of megaphones to convey threatening messages)¹⁷² to prevent Philippine and Vietnamese fishermen from fishing in the covered areas. If UNCLOS were to be followed, both the Philippines and Vietnam – not China – have the exclusive sovereign right in this case (except in certain cases identified in international law, such as in the case of migratory and trans-boundary fish stocks) to explore, exploit, conserve and manage fisheries resources.¹⁷³ China’s continued insistence on exercising as-yet-undefined rights within the nine-dashed-line thus significantly increases the possibility of clashes between its law enforcement vessels and fishermen/law enforcement vessels from other countries who adhere to the UNCLOS provisions.

Beyond exercising legislative and enforcement powers in disputed areas, China has also taken it one step further by using its vessels to prevent other countries from exercising similar powers in their lawful maritime zones under UNCLOS. This happened during the 2012 Scarborough Shoal stand-off between the Philippines and China described earlier in this research and, more recently, in the waters of Indonesia’s Natuna Islands (located along the northwest coast of Borneo on the South China Sea). In March and in June 2016, Indonesian patrol boats attempted to detain Chinese vessels engaged in illegal fishing within its EEZ but were prevented from doing so each time by CCG ships escorting the fishing vessels.¹⁷⁴ While China has no territorial claim on the Natunas themselves¹⁷⁵, it apparently treats the surrounding waters as part of the “historic fishing grounds” within the nine-dashed line. China’s Foreign Ministry Spokesperson even characterized these waters as areas “where China and Indonesia have overlapping claims for maritime rights

¹⁷¹ See for example Humphrey Hawksley, *Beaten up by China for Going Fishing*, BBC NEWS (8 January 2016), <http://www.bbc.com/news/magazine-35234183>.

¹⁷² See for example Chiara Zambrano, *Chinese Vessels Block Pinoy Fishermen in Scarborough Shoal*, ABS-CBN NEWS (14 July 2016), <http://news.abs-cbn.com/news/07/14/16/chinese-vessel-blocks-pinoy-fishermen-in-scarborough-shoal>.

¹⁷³ UNCLOS, *id.* at note 8, Art. 56, Art. 61.

¹⁷⁴ See Abdul Ruff, *China-Indonesia Clash of Interests in the South China Sea*, FOREIGN POLICY NEWS (22 June 2016), <http://foreignpolicynews.org/2016/06/22/china-indonesia-clash-interests-south-china-sea/>.

¹⁷⁵ Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference (12 November 2015), available from http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1314306.shtml.

and interests.”¹⁷⁶ By engaging in enforcement actions against Chinese vessels, the Spokesperson insists that Indonesia “violated international laws including the UN Convention on the Law of the Sea (UNCLOS) and the Declaration on the Conduct of the Parties in the South China Sea (DOC).”¹⁷⁷ He further urged Indonesia “to stop taking actions that complicate, exaggerate the dispute and undermine peace and stability, and handle the fishery issue at sea in a constructive way.”¹⁷⁸

Second Reason:

China has been increasingly relying on its “white-hulled” CCG vessels to conduct frontline enforcement activities in the South China Sea rather than on its “grey-hulled”, more heavily-armed PLAN ships. The ostensible rationale for this shift is that CCG vessels are less likely to be considered threatening or escalatory by other countries even in instances where they operate in disputed waters (including the EEZs of other countries). Unfortunately, China’s actions have had the opposite effect, especially since the CCG has assumed a more aggressive, almost navy-like role. Since 2013, CCG vessels have been involved in the majority of documented South China Sea clashes (*Table 1.c*).¹⁷⁹ Larger CCG vessels are reported to be “bullying and harassing” other countries’ much smaller fishing vessels in their respective EEZs under the guise of legitimate “law enforcement activities”.¹⁸⁰ Regional tensions have risen as a result, with countries like the Philippines, Vietnam and Indonesia all adopting increasingly defensive postures.

*Table 1.c: Summary of CCG incidents in the South China Sea from 2013-2016*¹⁸¹

Date	Countries Involved	Vessels	Description and Location of the Incident
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¹⁷⁶ Foreign Ministry Spokesperson Hua Chunying’s Remarks on Indonesian Navy Vessels Harassing and Shooting Chinese Fishing Boats and Fishermen (19 June 2016), available from http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1373402.shtml.

¹⁷⁷ *supra*.

¹⁷⁸ *supra*.

¹⁷⁹ Greg Torode, *Chinese Coast Guard is responsible for 2/3 of clashes in the South China Sea*, REUTERS (7 September 2016), <http://www.businessinsider.com/chinese-coast-guard-reponsible-majority-clashes-south-china-sea-2016-9>

¹⁸⁰ *supra*.

¹⁸¹ See *China Power*, Center for International and Strategic Studies, available from <http://chinapower.csis.org/maritime-forces-destabilizing-asia/>.

3/20/2013	PRC-VN	<ul style="list-style-type: none"> • 1 CCG vessel • 5 VN fishing vessels 	A CCG vessel intercepted Vietnamese fishing vessels operating near the Paracels within the Vietnamese EEZ. It fired flares directly on one of the fishing vessels, causing it to catch fire.
5/8/2013	PRC-RP	<ul style="list-style-type: none"> • 2 CCG vessels; 1 PLAN ship; 3 PRC fishing vessels • 1 RP civilian vessel 	Chinese vessels harassed and prevented the civilian Philippine vessel from re-supplying the BRP Sierra Madre. The standoff occurred near Second Thomas Shoal within the Philippine EEZ.
7/7/2013	PRC-VN	<ul style="list-style-type: none"> • 1 CCG vessel • 1 VN fishing vessel 	A CCG vessel intercepted and boarded a Vietnamese fishing vessel while it was operating in waters near the Paracels within the Vietnamese EEZ. CCG officers seized the catch and equipment.
1/7/2014	PRC-VN	<ul style="list-style-type: none"> • 1 CCG vessel • 1 VN fishing vessel 	A CCG vessel intercepted and boarded a Vietnamese fishing vessel while it was operating in waters near the Paracels within the Vietnamese EEZ. CCG officers seized the catch and equipment.
1/27/2014	PRC-RP	<ul style="list-style-type: none"> • 1 CCG vessel 	CCG vessels fired water cannons at Philippine fishing vessels when they attempted to fish in

		<ul style="list-style-type: none"> • 2 RP fishing vessels 	Scarborough Shoal within the Philippine EEZ.
3/1/2014	PRC-VN	<ul style="list-style-type: none"> • 1 CCG vessel • 1 VN fishing vessel 	A CCG vessel intercepted and boarded a Vietnamese fishing vessel while it was operating in waters near the Paracels within the Vietnamese EEZ. CCG officers seized the catch and equipment.
3/9/2014-3/29/2014	PRC-RP	<ul style="list-style-type: none"> • 4 CCG vessels • 1 RP navy ship; 2 RP marine surveillance vessels 	Within the Philippine EEZ, CCG ships intercepted and blocked two Philippine civilian ships on a re-supply mission to the BP Sierra Made which was beached on Second Thomas Shoal. CCG ships subsequently intercepted and blocked similar re-supply missions by Philippine government ships.
5/1/2014-7/15/2014	PRC-VN	<ul style="list-style-type: none"> • 4 CCG vessels; 6 PLAN ships; 40 PRC fishing vessels; several unknown PRC vessels • 10 VN Coast Guard 	China deployed an oil rig near the Paracels within Vietnam's EEZ. Vietnam challenged the structure and China responded by sending a flotilla of ships to cluster around the area. Vietnam likewise sent its own vessels. As a result, several violent collisions occurred. CCG vessels also fired water cannons.

		vessels; 4 VN marine surveillance vessels; 10 VN fishing vessels; several unknown VN vessels	
8/15/2014	PRC-VN	<ul style="list-style-type: none"> • 3 CCG vessels • 3 VN fishing vessels 	CCG vessels stopped and boarded Vietnamese fishing vessels that were operating near the Paracels within the Vietnamese EEZ. CCG officers seized the fishermen's catch and destroyed their equipment
11/27/2014	PRC-VN	<ul style="list-style-type: none"> • 3 CCG vessels • 2 VN fishing vessels 	CCG vessels rammed and fired water cannons at Vietnamese fishing vessels operating in waters near the Paracels within the Vietnamese EEZ.
1/29/2015	PRC-RP	<ul style="list-style-type: none"> • 1 CCG vessel • 3 RP fishing vessels 	A CCG vessel rammed Philippine fishing vessels operating near the Scarborough Shoal within the Philippine EEZ.
4/11/2015	PRC-RP	<ul style="list-style-type: none"> • 3 CCG vessels 	CCG vessels approached and boarded Philippine fishing vessels while they were operating in

		<ul style="list-style-type: none"> • 2 PRC fishing vessels 	Scarborough Shoal within the Philippine EEZ. CCG officials threatened the fishermen at gunpoint, stole their catch and destroyed their equipment
4/18/2015	PRC-RP	<ul style="list-style-type: none"> • 3 CCG vessels • Unknown number of RP fishing vessels 	CCG vessels fired water cannons on Philippine fishing vessels as they were approaching the Scarborough Shoal within the Philippine EEZ.
6/7/2015	PRC-VN	<ul style="list-style-type: none"> • 1 CCG vessel • 1 VN fishing vessel 	CCG confronted a Vietnamese fishing vessel operating in the Paracels within the Vietnamese EEZ. It fired a water cannon at the fishing vessel for 2 hours, injuring the fishermen and damaging the equipment.
6/10/2015	PRC-VN	<ul style="list-style-type: none"> • 4 CCG vessels • 1 VN fishing vessel 	CCG confronted a Vietnamese fishing vessel operating in the Paracels within the Vietnamese EEZ. CCG officers boarded the fishing vessel, damaged their property, and stole their catch and equipment.
7/31/2015	PRC-VN	<ul style="list-style-type: none"> • 3 CCG vessels • 1 VN fishing vessel 	CCG confronted a Vietnamese fishing vessel operating in the Paracels within the Vietnamese EEZ. CCG officers boarded the fishing vessel, beat the fishermen with electric batons, and seized their catch and equipment.
9/29/2015	PRC-VN	<ul style="list-style-type: none"> • Unknown 	Chinese vessels rammed a Vietnamese fishing

		<p>PRC vessels</p> <ul style="list-style-type: none"> • 3 VN fishing vessels 	<p>vessel while it was operating in the Paracels within the Vietnamese EEZ. Five Chinese men then boarded the fishing vessel, threatened the fishermen with electric bludgeons and knives, and stole their navigation equipment and catch. The fishing vessel later sank and the crew were rescued by another Vietnamese fishing vessel.</p>
11/13/2015	PRC-VN	<ul style="list-style-type: none"> • 3 CCG vessels; 1 PLAN ship • 1 VN fishing vessel 	<p>CCG and PLAN vessels confronted Vietnamese fishing vessels near Subi Reef in the Spratlys, repeatedly fired flares and pointed weapons. The Vietnamese fishing vessels leaves.</p>
2/5/2016	PRC-RP	<ul style="list-style-type: none"> • 3 CCG vessels, 2 PLAN ships • 1 RP navy ship 	<p>Chinese CCG and PLAN vessels harassed a Philippine navy cargo ship (BRP Laguna) near Half-Moon Shoal in the Spratlys within the Philippine EEZ while it was on a troop transport and re-supply mission. The Chinese vessels conducted prolonged “hostile maneuvers”.</p>
2/28/2016	PRC-RP	<ul style="list-style-type: none"> • 4 CCG vessels, 5 PLAN ships • unknown number of RP fishing vessels 	<p>CCG vessels and PLAN ships prevented Philippine fishing vessels from entering the Jackson Atoll in the Spratlys located within the Philippine EEZ, eventually chasing them away.</p>

3/5/2016- 3/6/2016	PRC-RP	<ul style="list-style-type: none"> • 3 CCG vessels • 2 RP fishing vessels 	CCG vessels rammed Philippine fishing vessels attempting to enter Scarborough Shoal located within the Philippine EEZ. The following day, the CCG used laser devices and powerful lights to blind the fishermen.
3/6/2016	PRC-VN	<ul style="list-style-type: none"> • 1 CCG vessel • 1 VN fishing vessel 	CCG officers boarded the Vietnamese fishing vessel while the latter was operating in waters near the Paracel islands within the Vietnamese EEZ. CCG officers then seized the fishermen's catch and destroyed equipment.
3/14/2016	PRC-RP	<ul style="list-style-type: none"> • 2 CCG vessels • 2 RP fishing vessels 	CCG vessels prevented Philippine fishing vessels from entering the Scarborough Shoal within the Philippine EEZ. The Philippine fishermen managed to fish for about 8 days in nearby waters before they were approached by a CCG vessel displaying blinking lights and verbally told to leave. Conflict erupted when both crews started throwing rocks and bottles.
3/19/2016	PRC-RI	<ul style="list-style-type: none"> • 2 CCG vessels, 1 PRC fishing vessel • 1 RI maritime surveillance vessel 	An Indonesian maritime surveillance vessel (under control of the Ministry of Marine Affairs and Fisheries) discovered a Chinese fishing vessel fishing illegally in waters near the Natunas within its EEZ. Indonesia personnel boarded the vessel, detained the crew and attempted to tow the vessel to its base. It was prevented from doing so when a CCG vessel rammed the fishing boat in an attempt to pry it loose. Another CCG vessel was on stand by

			beside it. Indonesia released the vessel but continued to detain the apprehended fishermen.
3/22/2016	PRC-RP	<ul style="list-style-type: none"> • 2 CCG vessels • 2 RP fishing vessels 	CCG vessels harassed and rammed Philippine fishing vessels, preventing them from entering Scarborough Shoal within the Philippine EEZ.
6/17/2016	PRC-RI	<ul style="list-style-type: none"> • 2 CCG vessels; 12 PRC fishing vessels • 4 RI navy ships 	Indonesian navy ship detected PRC fishing vessels in the waters off the Natunas within Indonesia’s EEZ, and fired warning shots. CCG vessels attempted to prevent the arrest but other Indonesia navy ships prevented to intervention.
7/9/2016	PRC-VN	<ul style="list-style-type: none"> • 2 CCG vessels • 2 VN fishing vessels 	CCG ships rammed Vietnamese fishing vessels near Discovery Reef in the Paracels within the Vietnamese EEZ.

Related Discussion in the Philippines-China Arbitral Award

In relation to the above, it should also be noted that in its 12 July 2016 Award, the arbitral tribunal in the Philippines-China arbitration also addressed the Philippines’ Submission No. 13 (regarding China’s operation of law enforcement vessels in a dangerous manner¹⁸²). The Philippines alleged that “China operated its law enforcement vessels in a dangerous manner,

¹⁸² The submission specifically related to incidents occurring in the Scarborough Shoal between Chinese law enforcement vessels and Philippine Coast Guard and surveillance ships on 28 April 2012 and 26 May 2012.

causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal.”¹⁸³ It asserted that China breached its obligations relating to safe navigation under Article 94¹⁸⁴ of the UNCLOS as well as related provisions of the COLREGS.¹⁸⁵

The arbitral tribunal found that China violated its obligations under the UNCLOS and COLREGS when its law enforcement vessels repeatedly behaved in ways that were “irreconcilable with an obligation of responsible navigation.”¹⁸⁶ It specifically noted that –

*“Where Chinese vessels were under an obligation to yield, they persisted; where the regulations called for a safe distance, they infringed it. The actions are not suggestive of occasional negligence in failing to adhere to the COLREGS, but rather point to a conscious disregard of what the regulations require. The various violations are underscored by factors such as the large disparity in size of the Chinese and Philippine vessels, the shallow waters in which the incidents took place, and the creation of a 2-meter high wake causing additional risk to Philippine crews.”*¹⁸⁷

By virtue of this conduct, the the tribunal found that China violated Rules 2, 6, 7, 8, 15 and 16 of the COLREGS and, as a consequence, breached Article 94 of the UNCLOS. Even assuming that Chinese vessels were engaged in a legitimate enforcement action, the tribunal found that such must still comply with guidelines set by international law.¹⁸⁸

¹⁸³ Philippines-China arbitration, *supra* at note 40, para. 1059.

¹⁸⁴ UNCLOS, *supra* at note 8, Arts. 94(3), 94(4) and 94(5); Art. 94(5) provides: “In taking measures called for in paragraphs 3 and 4, each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.” The arbitral tribunal thus clarified that Article 94 of UNCLOS incorporates the COLREGS into the convention and is thus binding on China. It follows that a violation of the COLREGS as “generally accepted international regulations” concerning measures necessary to ensure maritime safety, constitutes a violation of UNCLOS itself.

¹⁸⁵ Philippines-China arbitration, *supra* at note 40, para. 1059.

¹⁸⁶ Philippines-China arbitration, *supra* at note 40, para. 1094.

¹⁸⁷ Philippines-China arbitration, *supra* at note 40, para. 1105.

¹⁸⁸ Philippines-China arbitration, *supra* at note 40, para. 1095; *See also* para. 1106 citing Resolution MSC.303(87) adopted by IMO’s Maritime Safety Committee Resolution on 17 May 2010 entitled “Assuring Safety During Demonstrations, Protests or Confrontations on the High Seas”.

What Next?

Over the past five years, China has been allotting an annual budget of around \$1.74 billion to increase the numbers and to bulk up the capabilities of its CCG fleet.¹⁸⁹ It now possesses the largest coast guard in the world, counting 205 vessels (95 of which displace over 1,000 tons)¹⁹⁰ in its active fleet. Some of its more more formidable vessels include the CCG3210 (originally the Yuzheng-310) and the CCG2184 (originally the Haijian-84), which are former Chinese naval vessels but which have been repurposed for the CCG. Instead of water cannons, these vessels come armed with machine guns and other light weapons. Most recently, China also introduced the world's two largest super-cutters – *Haijing 2901* (entered into service in May 2015) and *Haijing 3901* (entered into service January 2016) – to its CCG fleet. According to one Chinese daily, both of the new 12,000-ton vessels are capable of ramming a 9,000-ton vessel without sustaining and damage to itself.¹⁹¹

The revitalization of China's maritime enforcement fleet is consistent with the pattern of actions it has taken thus far. All are calculated to convey a not-so-subtle threat of even greater use of force should other countries continue insisting on their UNCLOS rights within their respective EEZs. In some cases (as was recognized by the Philippines-China arbitral tribunal), some measure of force was actually used in order to assert this point. China has thus been engaging in “suggestive escalations” that lay the groundwork for a potential deadly confrontation which in turn, could trigger an all-out confrontation among involved States.

¹⁸⁹ China Power, *supra* at note 181.

¹⁹⁰ *supra*.

¹⁹¹ Todd Crowell, *A Coast Guard Arms Race*, Real Clear Defense (23 May 2016), http://www.realcleardefense.com/articles/2016/05/23/a_coast_guard_arms_race_109386.html.

PART II: DE-ESCALATION

Part I of this research answered the question **“What can escalate tensions to the point of all-out war?”** by highlighting the significance of China’s escalatory actions over the last three years. It was asserted that these actions stoked the existing volatility of the region to a point where one major confrontation has the potential to trigger the escalation process and take the stakeholders from the current state of crisis to a state of war. The following Chapters now turn to the question: **“How can such an escalation be avoided or mitigated?”**

The first step in answering this question lies in recognizing two key characteristics that can be extrapolated from the escalatory acts described in Part I. The first characteristic is drawn from the two instrumental escalatory acts in Chapter I. “Island-building” and “threatening the establishment of an ADIZ” both attempt to assert a form of *de facto* control and area-denial in disputed areas. These acts significantly improve China’s strategic position *vis a vis* other South China stakeholders due to their ability to “alter the facts on the ground”, ultimately affecting and obfuscating the application of the law (i.e. it can be used as a basis for a claim of right where previously there may have been none). This characteristic increases the possibility of escalation to war because it practically invites “pushback” from other South China Sea stakeholders – they will likely feel the need to register some form of official objection to Chinese assertions in the South China Sea. In such a scenario, there is a high probability for the occurrence of potentially disastrous miscalculations and misperceptions. Meanwhile, the second characteristic is observable in the two suggestive escalatory acts described in Chapter II. Both the acts of “engaging in a spectrum of threats” and “conducting enforcement actions in disputed waters” suggest the possibility of future harm against opposing countries. The groundwork of fear and distrust that these actions have laid caused other South China Sea stakeholders to take preemptive defensive measures, including spending more on military modernization as well as investing time and resources on alliance formation. These reactions are likely meant to “balance” against China, which is increasingly perceived as the region’s greatest security threat.

The second step in answering the question posed above is identifying measures that directly engages these two characteristics. Given the facts, this research asserts that maritime confidence building measures (CBMs) will be the most useful for diffusing the tensions associated with the escalatory actions that China has engaged in thus far.

According to Acharya, CBMs are defined as “attempts to make clear to concerned states, through a use of a variety of measures, the true nature of potentially threatening military activities”.¹⁹² Within the context of a post-Cold War Asia Pacific region, Acharya further explains that the term is “generally understood broadly as including both formal and informal measures, whether unilateral, bilateral or multilateral, that address, prevent or resolve uncertainties among states, including both military, and political elements.”¹⁹³ On the other hand, the UN is of the opinion that no single definition fully captures the concept of CBMs and that they should instead be understood in light of their two main objectives.¹⁹⁴ First, it should be understood that CBMs are meant to “contribute to, reduce or, in some instances, even eliminate the causes for mistrust, fear, tensions and hostilities, all of which are significant factors in the continuation of the international arms build-up in various regions and, ultimately, also on a world-wide scale.”¹⁹⁵ In other words, they are intended to “reduce strategic uncertainty.”¹⁹⁶ Second, they are intended to “reinforce confidence where it already exists.”¹⁹⁷ Thus, it can be said that any action – whether they be bilateral or multilateral – that achieves these objectives can be broadly considered a CBM.

Medcalf and Heinrichs classify CBMs as either “direct” (i.e. measures which specifically relate to disputed zones, potentially threatening actions or offensive capabilities) or “indirect” (i.e.

¹⁹² Amitav Acharya, The ASEAN Regional Forum: Confidence Building (not officially published) (on file with the author on his website), p. 7-8. Available from <http://www.amitavacharya.com/sites/default/files/ASEAN%20Regional%20Forum-Confidence%20Building.pdf>.

¹⁹³ *supra*, p. 8.

¹⁹⁴ United Nations, Comprehensive Study on Confidence Building Measures, Department of Political and Security Council Affairs, United Nations Center for Disarmament, Report of the Secretary General, A/36/474, New York, 1982, available from <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/HomePage/ODAPublications/DisarmamentStudySeries/PDF/SS-7.pdf>.

¹⁹⁵ United Nations, Comprehensive Study on Confidence Building Measures, Department of Political and Security Council Affairs, United Nations Center for Disarmament, Report of the Secretary General, A/36/474, New York, 1982, available from <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/HomePage/ODAPublications/DisarmamentStudySeries/PDF/SS-7.pdf>, p. 6

¹⁹⁶ Acharya, *supra* at note 193.

¹⁹⁷ *supra*, p.6.

measures which have a less tangible or immediate relationship with the dispute although they may still exert a positive influence in the long run”).¹⁹⁸ **Chapter 1** thus examines a number of direct CBMs that can be taken including the negotiation and conclusion of: a comprehensive incidents-at-sea agreement, a network of hotline agreements, and a binding Code of Conduct (COC). These practical measures are intended to address the first characteristic of the escalatory acts described above - that is, the characteristic of provoking pushback from other countries. This research focuses on the ability of direct CBMs to reduce miscalculations and misperceptions during pushback operations mounted in response to China’s assertions of *de facto* control and area-denial. On the other hand, **Chapter 2** looks into the role and function of indirect CBMs (focusing in particular on existing regional networks such as the ASEAN Regional Forum (ARF), the Asian Defense Ministers’ Meeting (ADMM) and the ADMM-Plus (ADMM+)) in addressing the second characteristic of the escalatory acts described in Part I – the characteristics of laying a groundwork of fear and distrust. This research argues that the de-escalatory value of these networks and dialogues lies in their ability to facilitate an environment of transparency and openness, which could in turn lead to more constructive engagement of controversial issues.

At the outset, it should be noted that regional de-escalation is not as farfetched as it may initially seem. In fact, the ASEAN and China have both recently reaffirmed in numerous joint declarations their commitment to exploring avenues for cooperation and to promoting mutual trust and understanding. They have even committed to a series of maritime CBMs that would help maintain regional peace and stability, ensure maximum safety at sea, promote good neighborliness, reduce risks during mutual unplanned encounters in air and sea, and strengthen cooperation among their navies.¹⁹⁹ These broad declarations clearly signal a desire to avert escalation of the current situation to an all-out war. This mindset, more than anything, makes de-escalation possible. It should also be acknowledged that the Philippines-China dynamic – arguably one of the more sensitive bilateral relationships in the region – underwent a marked shift after Philippine President Rodrigo Duterte assumed office at the end of July 2016. In stark

¹⁹⁸ Rory Medcalf and Raoul Heinrichs, *Crisis and Confidence: Major Powers and Maritime Security in Indo-Pacific Asia*, LOWY INSTITUTE FOR INTERNATIONAL POLICY 26 (June 2011).

¹⁹⁹ See Joint Statement of the 19th ASEAN-China Summit to Commemorate the 25th Anniversary of ASEAN-China Dialogue Relations; 2016-2020 Plan of Action to Implement the Joint Declaration on the ASEAN-China Strategic Partnership for Peace and Prosperity; Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the DOC (25 July 2016); Joint Statement on the Application of the Code of Unplanned Encounters at Sea in the South China Sea; See also China’s Defense White Paper (May 2015).

contrast to his predecessor, then President Benigno S. Aquino, President Duterte now exhibits a greater willingness to consult and negotiate with China on South China Sea issues, even going so far as to tone down the overall hostile posture of his country.²⁰⁰ Although it is too soon to tell if the Philippines' apparent foreign policy shift is going to yield strategic benefits for the country, it cannot be denied that it has caused China to be less immediately assertive of its claims, facilitating discussions on the implementation of various de-escalation measures.

CHAPTER 1: DIRECT MARITIME CONFIDENCE BUILDING MEASURES

²⁰⁰ See for example *Duterte in China: Xi Lauds Milestone Duterte Visit*, BBC NEWS (20 October 2016), available from <http://www.bbc.com/news/world-asia-37700409>; Jane Perlez, *Rodrigo Duterte and Xi Jinping Agree to Reopen South China Sea Talks*, NEW YORK TIMES (20 October 2016), available from <http://www.nytimes.com/2016/10/21/world/asia/rodrigo-duterte-philippines-china-xi-jinping.html>; Wilson Lee Flores, *How Duterte Conquered Beijing with his Maverick Style and Bold Diplomacy*, PHILIPPINE STAR (30 October 2016), available from <http://www.philstar.com/sunday-life/2016/10/30/1638593/how-duterte-conquered-beijing-his-maverick-style-bold-diplomacy>; and Richard Heydarian, *Philippines: Rodrigo Duterte's Pivot to China*, AL JAZEERA (14 October 2016), available from <http://www.aljazeera.com/indepth/opinion/2016/10/philippines-rodrigo-duterte-pivot-china-161012062518615.html>.

As a result of the escalatory actions described in Part I of this research, the last three years have witnessed a sharp increase in the number of unplanned encounters between ships (whether navy-to-navy, navy-to-civilian, or civilian-to-civilian) and aircraft in the disputed areas in the South China Sea. The “incidents” (particularly those occurring within the context of push-back operations), as well as their subsequent handling by the involved countries, continue to contribute to the rising tensions among the South China Sea stakeholders. Furthermore, they present active threats to regional peace and stability because of their potential to trigger the escalation process (*shown in Figure 1.2*) leading to a possible all-out war, and also because they undermine continuing diplomatic efforts among concerned countries. Given the volatility of the situation, the main problem is that there appears to be a lack of practical responses to incidents in the South China Sea. The measures that are in play now urgently need to be re-examined in light of their limited ability to address the demands and dynamics of the current situation.

This Chapter examines two direct CBMs – (1) incidents at sea/hotline agreements, and (2) a binding Code of Conduct – using a functionalist approach. According to Mittrany, a functionalist approach “helps manage inter-state conflicts through cooperation in low-politics and non-controversial areas.”²⁰¹ The basic idea is that cooperation in areas such as “rules of the road” for air and sea encounters, hotline agreements, or even a binding Code of Conduct for South China Sea stakeholders is a practical starting point for cooperation since they are generally accepted as necessary and non-controversial. Negotiating and entering into these arrangements will help establish a “habit of cooperation” that can ultimately facilitate further cooperation in other, more controversial areas.²⁰² Despite this potential, this research has nonetheless also found these CBMs to be burdened with a number of limitations that, unless addressed, will seriously limit their usefulness as take-off points for cooperation.

Section A. “Rules of the Road” for Air and Sea Encounters; Hotline Agreements

²⁰¹ David Mittrany, *The Functionalist Approach to World Organization*, INTERNATIONAL AFFAIRS XXIV (July 1948).

²⁰² See Rommel C. Balaoi, A Functionalist Approach to the Management of Conflicts in the South China Sea: Option for China and ASEAN Claimants, Paper presented during the 4th China-ASEAN Research Institutes Roundtable, University of Hong Kong (18-20 October 2001).

The “incidents at sea agreement” (INCSEA) concept originated from the Cold War tensions between the US and the USSR, when both countries were heavily investing in ships and submarines. After almost a decade of dangerous high seas encounters, the two countries finally concluded a US-Soviet Incidents at Sea Agreement (US-USSR INCSEA). Interestingly, negotiations would not have moved forward had it not been for two critical incidents. In 1967, a Soviet destroyer collided with the USS Walker in the Sea of Japan. Two days later, another Soviet destroyer crashed into the USS Walker again, prompting then President Lyndon Johnson to propose a “safety at sea” discussion with the USSR, which was ignored. In 1970, the HMS Ark Royal collided into a Soviet destroyer. This time, it was the USSR that approached the US to begin talks the following year. US-USSR INCSEA discussions began in earnest in 1971. By 1972, the parties had already concluded and signed the final negotiated document covering navy-to-navy encounters. In 1973, a protocol was signed that extended the coverage of the U.S.-USSR INCSEA to non-military shipping.²⁰³

The US-USSR INCSEA reflected the adversarial relationship of the parties in that it was primarily designed as a crisis management tool. Its provisions were meant to prevent the escalation of tensions in case of unplanned encounters on the high seas. It provided a simple, non-intrusive and non-controversial set of instructions on how each country’s ships and submarines when in range of the other country’s vessels. The US-USSR INCSEA was such an effective incident avoidance tool and CBM that, since its adoption, over twenty other bilateral INCSEAs have been negotiated and concluded. Notwithstanding its functional success, the most important characteristic of the US-USSR INCSEA is its provision for the establishment of an annual review mechanism. The US and the USSR committed to engage in regular constructive dialogues in order to work through recent issues of friction as well as reinforce any areas of ongoing maritime cooperation. The regular contact between the two countries went a long way towards building trust and confidence.

²⁰³ Protocol to the Agreement on the Prevention of Incidents On and Over the High Seas, U.S.-U.S.S.R, 22 May 1973, 24 U.S.T. 1063.

The South China Sea region currently does not have its own INCSEA or any comprehensive regime to address maritime incidents. Whenever such incidents occur, the countries involved usually prefer to deal with it on a bilateral ad hoc basis. Naval hotline agreements²⁰⁴ have also helped diffuse tensions to a certain extent. Hotlines have been defined as “a confidence and security building measure which means to provide rapid, reliable and confidential communication between any two defense establishments.”²⁰⁵ Put another way, they are “official channels of communication established between the command authorities of two states, for use in an emergency or during periods of heightened tension.”²⁰⁶ China and ASEAN have recently agreed to establish a foreign ministers hotline – the so-called Direct Communication Link (DCL) initiative²⁰⁷ – and have gone so far as to adopt formal Guidelines for its implementation in response to maritime emergencies.²⁰⁸ However, the overall value of such an arrangement may be limited. Graham has in fact questioned the overall effectiveness of hotline agreements, noting that data on past practice is patchy and that available evidence points to their lack of functionality in actual crisis situations.²⁰⁹ He further asserts that such hotlines are particularly useless in a scenario where one side decides to escalate deliberately, and they may even make matters worse because they can be used as a tool for deception and propaganda.²¹⁰ He concludes by saying that hotlines are more symbolic than practical.²¹¹

The following INCSEA-type instruments are potentially more useful:

²⁰⁴ In 2011, the Philippines and Vietnam entered into two separate information sharing and hotline arrangements between their navies and coast guards. A permanent hotline to combat illegal, unreported and unregulated fishing will also be concluded by the end of 2015. (See the 2011 Memorandum of Understanding for the Enhancement of Mutual Cooperation and Information Sharing between the Vietnamese People’s Navy and the Philippine Navy; the 2011 Memorandum of Agreement on the Establishment of a Hotline Communication between the Vietnam Marine Police and the Philippine Coast Guard. See also PH, *Vietnam to put up Permanent Hotline vs Illegal Fishing*, SUN STAR MANILA (26 July 2015), <http://www.sunstar.com.ph/manila/local-news/2015/07/26/ph-vietnam-put-permanent-hotline-vs-illegal-fishing-421032>).

²⁰⁵ *ASEAN hotline for Maritime Disputes*, BRUNEI TIMES (12 February 2014), available from <http://www.bt.com.bn/news-national/2014/02/12/asean-hotline-formaritime-disputes>.

²⁰⁶ Euan Graham, *Maritime Hotlines in East Asia*, S. RAJARATNAM SCHOOL OF INTERNATIONAL STUDIES POLICY BRIEF, Nanyang Technological University (May 2014), p.3.

²⁰⁷ Prashanth Parmawesan, *ASEAN Sets Up New Hotline amid South China Sea Tensions*, THE DIPLOMAT (4 November 2015). Available at <http://thediplomat.com/2015/11/asean-sets-up-new-hotline-amid-south-china-sea-tensions/>.

²⁰⁸ Joint Statement of the 19th ASEAN-China Summit to Commemorate the 25th Anniversary of ASEAN-China Dialogue Relations.

²⁰⁹ Graham, *supra* at note 205, p. 7.

²¹⁰ *supra*.

²¹¹ *supra*.

(a) The *Convention on the International Regulations for Preventing Collisions at Sea (COLREGS)*²¹² and the *Code for Unplanned Encounters (CUES)*²¹³

All of the countries involved in the South China Sea tensions are parties to the COLREGs, which were adopted on 20 October 1972, and entered into force on 15 July 1977. The COLREGs were designed to update and eventually replace the Collision Regulations of 1960²¹⁴, which were annexed to the Final Act of the 1960 version of the International Convention for Safety of Life at Sea (SOLAS) Convention²¹⁵. The COLREGs apply to “all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels”.²¹⁶ They are also incorporated by reference in to the UNCLOS by virtue of Article 94(3). Its broad and far-reaching coverage thus makes it applicable to virtually all incidents at sea, between any vessels, anywhere in the world. These regulations provide clear steering and sailing rules as well as guidelines for lights, shapes, sounds and signals.²¹⁷ They also pay particular attention to collision avoidance and standard procedures in the event of a collision.

The COLREGs are widely viewed as the original “rules of the road” for the oceans. Its key provisions have been incorporated into or have served as the basis for similar agreements, including the West Pacific Naval Symposium’s²¹⁸ 2014 CUES, an Asia Pacific maritime communications agreement that had been in the works for almost ten years.²¹⁹

²¹² *Convention on the International Regulations for Preventing Collisions at Sea*, London, 20 October 1972, United Nations Treaty Series, Vol. 1050, No. 16.

²¹³ West Pacific Naval Symposium, *Code for Unplanned Encounters at Sea*, 17 June 2014, available from <https://news.usni.org/2014/06/17/document-conduct-unplanned-encounters-sea>.

²¹⁴ *Collision Regulations of 1960*, in International Convention for the Safety of Life at Sea, United Nations Treaty Series, Vol. 1184, No. 2.

²¹⁵ *supra*.

²¹⁶ COLREGS, *supra* at note 211, Rule 1(a).

²¹⁷ See generally <http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/COLREG.aspx>.

²¹⁸ The WPNS currently has 24 member countries: Australia, Bangladesh, Brunei, Cambodia, Canada, Chile, China, France, India, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, South Korea, Russia, Singapore, Thailand, Tonga, United States and Vietnam.

²¹⁹ The idea of adopting a code that would serve as a “coordinated means of communication to maximize safety at sea” was first proposed during the 7th WPNS symposium in 2000 and was on the agenda in every succeeding symposium. By the 12th WPNS in 2012, only China voiced objections to the adoption of such a code, saying that it would not agree to the creation of binding “rules” but would consider a non-binding version.

The CUES is a non-binding document that establishes a standardized communications and maneuvering protocol during unplanned naval encounters at sea, which occurs when “naval ships or naval aircraft of one State meet casually with a naval ship or military aircraft of another State”²²⁰. It “offers safety measures and a means to limit mutual interference and uncertainty”²²¹ and prescribes “safety procedures, a basic communications plan and basic maneuvering instructions for naval ships and naval aircraft during unplanned encounters at sea.”²²² The CUES also lists the provocative actions that should be avoided by commanding officers of naval ships, including:

- Simulation of attacks by aiming guns, missiles, fire control radars, torpedo tubes or other weapons in the direction of vessels or aircraft encountered;
- Except in cases of distress, the discharge of signal rockets, weapons or other objects in the direction of vessels or aircraft encountered;
- Illumination of the navigation bridges or aircraft cockpits;
- The use of laser in such a manner as to cause harm to personnel or damage to equipment onboard vessels or aircraft encountered; and
- Aerobatics in the vicinity of ships encountered.

The COLREGs and the CUES are the only multilateral INCSEA regimes that are applicable to the South China Sea region. But for all their promise of being tools for confidence building and cooperation, some of the inherent characteristics of these INCSEAs impede their ability to prevent or manage maritime incidents. The COLREGs, for example, are binding on parties but the instrument itself does not contain any provisions relating to its enforcement. Violations are generally dealt with by the flag state and the consideration of issues arising from incidents at sea is more or less a discretionary state responsibility. On the other hand, the most obvious limitations of the CUES are that:

1. *It is a voluntary code.* The CUES states in no uncertain terms that “it does not constitute an international agreement or treaty, and as such, is not legally binding under international

²²⁰ CUES, *supra* at note 212, Sec. 1.3.2.

²²¹ CUES, *supra* at note 212, Sec. 1.1.2.

²²² CUES, *supra* at note 212, Sec. 1.2.1.

law.”²²³ Thus, even though all naval ships are encouraged to observe the CUES, there is no real guarantee that the counterpart ship will likewise observe its provisions. China has in fact stated that “it won’t necessarily observe the new code of conduct for navies”.

2. *Unlike the COLREGs, CUES only applies to naval ships.* South China Sea maritime incidents tend to be mixed encounters between naval ships, civilian law enforcement vessels, and fishing boats. Because CUES is not applicable to many of these encounters, its usefulness in the SCS is limited.
3. *It only applies to international waters.* The CUES may have limited usefulness in the South China Sea since a significant number of encounters occur in disputed waters. In particular, countries that claim all or part of the Spratlys have controversial interpretations of what constitutes “international waters”.
4. *It is underspecified.* – Although the CUES provides naval authorities with guidelines and instructions in case of unplanned encounters, it fails to stipulate critical details (for example: ships are required to provide “warnings” of dangerous activities but are not told when these warnings should be issued²²⁴). It still leaves room for ambiguity and possible conflict.

Notwithstanding the existence of these two INCSEA-type arrangements, maritime encounters have been happening with increasing frequency among non-military ships (i.e., Coast Guard ships, marine scientific research vessels, fishing boats, etc.) in disputed South China Sea waters as a result of China’s provocative assertions of control and area-denial, as well as its beyond-the-border enforcement actions.²²⁵ This reality means that:

First, although any form of confrontation is undesirable, some analysts view the frequency of these particular type of encounters in a positive way: the lack of naval confrontations and “the prevalence of coast guards and fishing vessels is a sign of restraint.”²²⁶ The theory is that “regional players deliberately use lightly armed Coast Guard and other paramilitary ‘white hull’ vessels to enforce their claims. Because these units do not have the ability to escalate force the

²²³ CUES, *supra* at note 212, Sec. 1.6.1.

²²⁴ Erik French, *Improving Order in the East China Sea*, MAKING WAVES, Vol. 33, No. 5.1. (15 May 2015).

²²⁵ Tran Truong Thuy, *Code of Conduct, Prevention and Management of Incidents in the South China Sea*, POWER, LAW AND MARITIME ORDER IN THE SOUTH CHINA SEA (Truong Thuy and Le Thuy Trang eds., 2015).

²²⁶ Steven Stashwick, *South China Sea: Conflict Escalation and Miscalculation Myths*, THE DIPLOMAT (25 Sept 2015). Available at <http://thediplomat.com/2015/09/south-china-sea-conflict-escalation-and-miscalculation-myths/>

way warships do, it in fact signals their desire to avoid escalation. And while ‘grey hull’ vessels may be just over the horizon providing an implicit threat of force, they can also provide a further constraint on potential incidents: their very presence compels parties to consider how far to escalate without inviting more serious responses.”²²⁷ More than anything, it hints at the mindset of the parties and their desire to avoid war.

Second, there is merit to expanding the existing CUES or drafting a new region-specific INCSEA. Doing so at the soonest possible opportunity may address the apparent regulatory limitations and gaps that are further highlighted by these encounters. Malaysia²²⁸, Singapore²²⁹, and most recently, the Philippines²³⁰, all called for the expansion of the CUES to cover non-naval coastguard ships and to apply to waters considered as “territorial waters” in the the South China Sea. The rationale behind their proposals is the idea that misperception and miscalculation are more likely to happen among non-navy ships in unplanned encounters in disputed areas. Notably, China has agreed in principle to consider these proposals for CUES expansions.²³¹ This is crucial because because China’s support and buy-in to the CUES expansion will ultimately help guarantee its effectiveness as a de-escalation measure.

(c) *The China – US Agreements: the Military Marine Consultative Agreement (MMCA)*²³² and *the Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters (MOU)*²³³

²²⁷ *supra*.

²²⁸ Prashanth Parameswaran, *Malaysia Wants Expanded Naval Protocol Amid South China Sea Disputes*, THE DIPLOMAT (4 December 2015), available from <http://thediplomat.com/2015/12/malaysia-wants-expanded-naval-protocol-amid-south-china-sea-disputes/>.

²²⁹ Prashanth Parameswaran, *Singapore Wants to Defuse South China Sea Tensions with Naval Protocol*, THE DIPLOMAT (2 March 2016), available from <http://thediplomat.com/2016/03/singapore-wants-to-defuse-south-china-sea-tensions-with-naval-protocol/>.

²³⁰ Frances Mangosing, *PH Proposes to Expand Agreement on Air, Naval Encounters*, INQUIRER NEWS (27 May 2016), available from <http://globalnation.inquirer.net/139720/ph-proposes-to-expand-agreement-on-air-naval-encounters>.

²³¹ Kor Kian Beng, *China, ASEAN Agree to Examine S’pore Proposal on South China Sea*, STRAITS TIMES (2 March 2016), available from <http://www.straitstimes.com/asia/east-asia/china-asean-agree-to-examine-spore-proposal-on-south-china-sea>.

²³² Agreement Between the Department of Defense of the United States of America and the Ministry of National Defense of the People’s Republic of China on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety, U.S.-China, 19 January 1998.

Apart from the COLREGs and the CUES, the most important INCSEA-type arrangements in the SCS involve China and the US, the countries with the two largest naval presences in the area.

In 1998, China and the US concluded the MMCA in order to encourage “consultations between delegations authorized by the Department of Defense and the Ministry of National Defense for the purpose of promoting common understandings regarding recent activities undertaken by their respective maritime and air forces when operating in accordance with international law, including the principles and regimes reflected in the UNCLOS.”²³⁴ The identified mechanisms for consultations under the MMCA were: Annual meetings (on measures to promote safe maritime practices, communications procedures when ships encounter each other, interpretation of the Rules of the Nautical Road and avoidance of accidents-at-sea); Working groups to study and discuss agenda items agreed by consensus at annual meetings; and Special meetings for the purpose on consulting on specific matters of concern relating to the activities at sea of their respective maritime and air forces.²³⁵ Although the MMCA was intended to enhance trust and confidence between the two countries, its impact is limited by the fact that it does not provide formal rules of interaction to operationalize the outcome of the consultations. Thus in 1999, US and China mutually produced a document entitled “a Study on Sino-US Maritime Navigational Safety Including Communications” as the first step towards the creation of common signal procedures, collision avoidance protocols and other rules of engagement. However, discussions on the matter were slow and the process was eventually overtaken by several unplanned air and sea encounters between the two countries.²³⁶

²³³ Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, U.S.-China, 10 November 2014.

²³⁴ *supra*, at note 231, Art. 1.

²³⁵ *supra*, at note 231, Art. 2.

²³⁶ In the South China Sea, there were at least three notable confrontations occurring within areas being claimed by China as part of its EEZ. In March 2009, the *USNS Impeccable*, an unarmed navy surveillance ship, was allegedly harassed by five Chinese ships – a navy intelligence ship, a government fisheries patrol vessel, a state oceanographic patrol vessel, and two fishing trawlers – forcing it to use a fire hose and take emergency evasive maneuvers in order to avoid collision. Later that year, a Chinese submarine navigated so close to *USS John McCain* that it ended up hitting an underwater sonar array being towed by the US ship. In December 2013, a People’s Liberation Army Navy (PLAN) ship confronted the *USS Cowpens*, a U.S. missile cruiser, while the latter was traversing international waters in the South China Sea. The Chinese ship put itself directly in the *USS Cowpens*’ path, forcing the *Cowpens* commanding officer to issue a “full stop” order in order to avoid collision. Moreover, the Chinese ship allegedly ignored radio warnings from the *Cowpens* and declined to change its course.

In 2014, the parties finally entered into an operationalized version of the MMCA. The Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters (MOU) and its Annexes provides clear behavioral guidelines in case of surface-to-surface encounters in the open seas. Many of these guidelines were borrowed or based on the COLREGs or the CUES,²³⁷ which have both been agreed to by US and China. Those that pertain to the rights of military vessels explicitly reaffirm the UN Charter²³⁸ and the UNCLOS.²³⁹ These provisions are the source for what Valencia calls the MOU's "most glaring loophole"²⁴⁰ – that the agreement is made "without prejudice to either side's starkly different policy perspectives on military activities in China's EEZ".²⁴¹ China has in fact stated on more than one occasion that it would not tolerate foreign military presence in areas it considers part of its EEZ, including areas in which its alleged ownership is being disputed by some its ASEAN neighbors.^{242,243} On the other hand, the US insists that it is entitled to a full suite of activities that are consistent with the freedom of navigation and overflight, as well as other internationally lawful uses of EEZs.²⁴⁴ It also maintains that coastal states must have due regard for the rights and duties of other states exercising those freedoms in a manner that is compatible with UNCLOS, which in itself is a codification of customary international law.²⁴⁵ This lack of clarity will likely be a continuing source of friction between the two countries, as was shown by China's reactions to the US FONOPs. China's hard military response undoubtedly demonstrated how quickly a maritime encounter in the South China Sea can escalate absent clearly defined rules of engagement.

²³⁷ See for example Sec. 2.iii of Annex I, which was based CUES, para. 1.5.1 and para. 1.3.4 – "Military vessels enjoy sovereign immunity and are therefore immune from jurisdiction from any State other than the flag state."

²³⁸ UN Charter, *id.* at note 12; See for example Sec. 2.iv of Annex I, which was based in part on Art. 51 of the UN Charter – "Military vessels and military aircraft may act to defend themselves".

²³⁹ UNCLOS, *id.* at note 8; See for example Sec. 2.vi of Annex I, which was based on Arts. 58 and 87 of UNCLOS – "When military vessels and military aircraft of a side exercise their rights, freedom and lawful uses of the sea and airspace under international law, they are to have due regard for the rights, freedoms and lawful uses of the sea and airspace by the other side's military vessels and military aircraft under international law".

²⁴⁰ Mark Valencia, *The U.S.-China MOU on Air and Maritime Encounters*, THE DIPLOMAT (17 November 2014), available at <http://thediplomat.com/2014/11/the-us-china-mou-on-air-and-maritime-encounters/>

²⁴¹ *supra*; See also MOU, *id.* at note 232, Sec. 2vi, Annex I.

²⁴² "Law of the People's Republic of China on the Exclusive Economic Zone and Continental Shelf", Ministry of Land and Resources of the People's Republic of China. Available at http://www.mlr.gov.cn/mlrenglish/laws/200710/t20071011_656313.htm.

²⁴³ From among the ASEAN member countries, this view is shared by Cambodia, Malaysia, Myanmar, Thailand and Vietnam.

²⁴⁴ Art. 87 of the UNCLOS enumerate some of the available freedoms, including: navigation, overflight, the laying of submarine cables, building of artificial islands, fishing and scientific research.

²⁴⁵ Kimberly Hsu and Craig Murray, *China's Expanding Military Operations in Foreign Exclusive Economic Zones*, US-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH BACKGROUNDER (19 June 2013).

Section B. Adoption of a Binding Code of Conduct

Earlier in this research, the 2002 DOC was briefly introduced as one of the foundational documents for maintaining peace and stability in the South China Sea. Despite its modest success as a practical confidence building measure for reducing confrontation and encouraging self-restraint, it should nonetheless be noted that its implementation was seriously limited by the fact that the ASEAN member States and China only agreed on the Guidelines for its Implementation in 2011.²⁴⁶ The Guidelines contain eight points and provide that:

1. The implementation of the DOC should be carried out in a step-by-step approach in line with the provisions of the DOC;
2. The Parties to the DOC will continue to promote dialogue and consultations in accordance with the spirit of the DOC;
3. The implementation of activities or projects as provided for in the DOC should be clearly identified;
4. The participation in the activities or projects should be carried out on a voluntary basis;
5. Initial activities to be undertaken under the ambit of the DOC should be confidence-building measures;
6. The decision to implement concrete measures or activities of the DOC should be based on consensus among parties concerned, and lead to the eventual realization of a Code of Conduct (COC);
7. In the implementation of the agreed projects under the DOC, the services of the Experts and Eminent Persons, if deemed necessary, will be sought to provide specific inputs on the projects concerned; and

²⁴⁶Guidelines for the Implementation of the DOC (2011), available from <http://www.asean.org/storage/images/archive/documents/20185-DOC.pdf>.

8. Progress of the implementation of the agreed activities and projects under the DOC shall be reported annually to the ASEAN-China Ministerial Meeting.²⁴⁷

As a result, no concrete trust and confidence-building projects have been done under its auspices. This inaction in turn contributed to the delay in the adoption of a binding COC as China “considers COC consultations to be under the framework for DOC implementation and emphasizes that the top priority is to continue to implement the DOC, especially through maritime cooperation”.²⁴⁸ Thus, no real progress on the COC was made until the 24 May 2012 ASEAN Senior Officials’ Meeting (SOM), where ASEAN member States agreed on an internal document entitled “ASEAN’s Proposed Elements of a Regional Code of Conduct in the South China Sea between ASEAN Member States and the People’s Republic of China”. It contains the following key elements²⁴⁹:

1. Respect for and adherence to the UN Charter, the UNCLOS, the TAC, the DOC, and the Five Principles of Peaceful Co-Existence;
2. Establish an appropriate mechanism to monitor and review the implementation of the COC;
3. Prohibit reservation to the COC;
4. Establish a mechanism for settling disputes relating to the interpretation and application of the COC
5. Stipulate the provisions for the respect of the COC by other countries
6. COC to remain in force indefinitely

This document was later unanimously adopted at the 9 July 2012 ASEAN Ministerial Meeting (AMM) plenary session. A few days later, ASEAN adopted the “Six-Point Principles where it affirmed that it would prioritize the early adoption of a COC.”²⁵⁰ In September of that

²⁴⁷ *supra*.

²⁴⁸ Tran Truong Thuy, Code of Conduct and Prevention and Management of Incidents at Sea, Power Law and Maritime Order in the South China Sea (Tran truong Thuy and Le Thuy Trang, eds.), Maryland, 2015), p. 322.

²⁴⁹ Carlyle A. Thayer, *ASEAN’s Code of Conduct (Unofficial)*, Thayer Consultancy Background Brief, 11 July 2012.

²⁵⁰ ASEAN’s Six-Point Principles on the South China Sea (20 July 2016), available from <http://www.cfr.org/asia-and-pacific/aseans-six-point-principles-south-china-sea/p28915>.

same year, Indonesia circulated the first workable draft (designated as the “Zero Draft”) for a regional code of conduct, which built on ASEAN’s Proposed Elements.²⁵¹ According to Valencia²⁵² and Thayer²⁵³, the Zero Draft contained a number of new provisions, to wit:

- Apart from reiterating the basic undertakings of the States parties in the DOC, Articles 1 to 3 of the Zero Draft adds three key commitments: (i) respect for the EEZ and continental shelf of the coastal States, (ii) respect for the COC and the taking of actions consistent therewith, and (iii) the encouragement of other countries to respect the COC.²⁵⁴
- Article 4 stipulates that the COC applies to unresolved maritime boundary areas of the parties concerned in the South China Sea.²⁵⁵
- Article 5 stipulates that nothing in the COC will be interpreted as: (i) renunciation by any party of previously asserted rights of or claims to territorial sovereignty in the South China Sea; (ii) Prejudicing the position of any party as regards to its recognition or non-recognition of any other State’s right of or claim or basis of claim to territorial sovereignty in the South China Sea; (iii) comprising the position or claim of any party to territory in the South China Sea.²⁵⁶
- Article 5 also provides that no acts or activities taking place while the COC is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in the South China Sea or create any rights of sovereignty in the South China Sea. Moreover,

²⁵¹ The “Zero Draft” has been kept confidential and copies have not been circulated outside of the representatives of the States parties as well as a few advisers and consultants.

²⁵² Carlyle A. Thayer, South China Sea in Regional Politics: Indonesia’s Efforts to Forge ASEAN Unity on a Code of Conduct, Paper for 3rd Annual CSIS Conference on “Managing Tensions in the South China Sea”, CSIS, Washington DC, 5-6 June 2013.

²⁵³ Mark J. Valencia, *Navigating Differences: What the ‘Zero Draft’ Code of Conduct for the South China Sea Says (and Doesn’t Say)*, GLOBAL ASIA Vol. 8, No. 1 (Spring 2013).

²⁵⁴ Thayer, *supra* at note 251, 6; Valencia, *supra* at note 252, 75.

²⁵⁵ Thayer, *supra* at note 251, 6; Valencia, *supra* at note 252, 75.

²⁵⁶ Thayer, *supra* at note 251, 5; Valencia, *supra* at note 252, 75.

parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the UNCLOS.

- Article 6 stipulates that parties to the COC agree to enhance mutual trust and confidence by, among others, refrain from: conducting military exercises, military surveillance or other provocative actions in the South China Sea; occupying or erecting new structures on the islands and land features (presently occupied or not); inhabiting the presently uninhabited islands and land features; and conducting activities that threaten navigational safety and/or polluting the environment.²⁵⁷
- Article 6 also references the COLREGS and other international agreements for preventing incidents and collisions at sea. It details, among others, procedures in case of breakdown, procedures for assisting distressed persons at sea, reporting mechanisms, and modes of communication (including hotlines). Parties must also agree to refrain from: (i) simulating attacks by aiming guns, missile launchers, torpedo tubes or other weapons in the direction of other vessel/aircraft; (ii) launching objects or firing signal flares in the direction of any ship or aircraft so as to pose a danger, constitute a hazard, or interfere with navigation and flight of other ship or aircraft; (iii) using laser in such a manner so as to cause injury to personnel or damage to equipment aboard of other ship or aircraft; and (iv) intentionally interfering with communication systems of other ship or aircraft.²⁵⁸

²⁵⁷ Thayer, *supra* at note 251, 6-7; Valencia, *supra* at note 252, 75.

²⁵⁸ Thayer, *supra* at note 251, 7; Valencia, *supra* at note 252, 76.

- Article 7 stipulates that the COC shall be monitored through a mechanism agreed upon by ASEAN and China to oversee its implementation and reporting.²⁵⁹
- Article 8 stipulates that in case of disagreement, the TAC dispute settlement mechanism will be used first. If the dispute cannot be resolved within such an ASEAN framework, the parties can then use the mechanisms provided in international law, including but not limited to UNCLOS.²⁶⁰

The first formal ASEAN-China meeting on the COC was later held in Suzhou, China from 14-15 September 2013, on the occasion of the sixth ASEAN-China SOM and the ninth ASEAN-China Joint Working Group Meeting on the Implementation of the DOC.²⁶¹ Although the parties agreed to put the COC (and the ASEAN-side proposals) on the agenda of all subsequent SOMs and working group meetings, discussions still did not take any substantial moves forward.

How would a COC facilitate de-escalation?

At its core, a COC will simply be another set of rules that, at least theoretically, express accepted legal principles and rules of behavior. The two main differences between a COC and the current DOC are that a COC would be: (1) binding and (2) more specifically drawn to address emergent issues and concerns. Assuming it accurately sums up stakeholder expectations, a COC could thus potentially limit behavioral unpredictability as well as diminish the likelihood of misperception and misunderstanding. Unfortunately, the complexity of current South China Sea dynamics coupled with states' intractable (and often incompatible) interpretations of laws and facts mean that the attainment of these basic objectives is likely to be wishful thinking. On its face, a COC would only have de-escalatory value if all State parties recognize its binding nature, comply with their stated obligations, and adhere to the instrument's stated principles. Moreover, any future

²⁵⁹ Thayer, *supra* at note 251, 7; Valencia, *supra* at note 252, 75.

²⁶⁰ Thayer, *supra* at note 251, 7; Valencia, *supra* at note 252, 77.

²⁶¹ Tran Truong Thuy, *Code of Conduct and Prevention and Management of Incidents at Sea*, in POWER LAW AND MARITIME ORDER IN THE SOUTH CHINA SEA (Tran Truong Thuy and Le Thuy Trang, eds., 2015).

COC will be a product of political will and, as such, subject to intense negotiations and compromise. It is therefore doubtful that the final instrument will skew too much for or against any State party.

However, one should also recognize that negotiated political-legal instruments like the COC function as a “focal point” for coordinating behavior.²⁶² Blandford built upon Schelling’s work on focal points and likened the adoption of such instruments to the installation of a traffic light. According to Blandford, “When the traffic light is red, the law expresses a highly visible signal that the driver is expected to stop. Even in the absence of a police officer to sanction violators, it is often more efficient to coordinate by following the law’s signals, and drivers ignore those signals at their peril.”²⁶³ What this means is that the COC can provide a clear means for identifying rule-breakers/violators, which could in turn amount to costs for the non-compliant country. Blandford further explains that “costs” in this case refer to “strategic reputational costs” – (1) adverse alliance formation, (2) rivals’ increased armament, and (3) the denial of informal cooperation.²⁶⁴ The assumption is that countries would be less inclined to engage in escalatory behavior if such strategic reputational costs will be incurred. Unlike the DOC or the UNCLOS, a COC will more likely trigger this outcome due to the nature of the instrument as being the most recent, most context-specific, and dynamic expression of South China Sea stakeholder positions. The COC is thus a necessary behavioral check that could potentially encourage countries to comply with its terms since an unequivocal defection from the instrument invites immediate condemnation and possible isolation. China, in particular, would likely be hesitant to incur the strategic reputational costs described above given that it has repeatedly indicated that its foreign policies taken seriously. To that end, recent behavioral trends seem to show that China is highly sensitive to any blowback that calls into question its status as a rising power. It would certainly not want its neighbors to “balance” against it using new and possibly more intractable “minilateral” groupings, nor would it want U.S.-centric alliances to continue flourishing in the

²⁶² Schelling defined a “focal point” as a “clue for coordinating behavior” that helps crystallize “each person’s expectation of what the other expects him to expect to be expected to do.”(Schelling, *supra* at note 1, p. 57); Andrew C. Blandford, *Reputational Costs Beyond Treaty Exclusions: International Law Violations as Security Threat Focal Points*, 10 Wash. U. Global Stud. L. Rev. 669 (2011); and Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 Va. L. Rev. 1649, 1651 (2000).

²⁶³ Andrew C. Blandford, *Reputational Costs Beyond Treaty Exclusions: International Law Violations as Security Threat Focal Points*, 10 Wash. U. Global Stud. L. Rev. 669 (2011), p. 687.

²⁶⁴ *supra*, p. 669.

region. It has decried the “militarization” of the region and has expressed concern over the way that other South China Sea stakeholders have ratcheted up their respective arms procurement programs. Finally, its highly public identification of “allies” and “supporters” in its condemnation of the Philippines-China arbitration indicates its desire to have its actions validated by the international community. Assuming that a COC is negotiated in the near future, it can thus go a long way to tempering a country’s escalatory behavior precisely to avoid the repercussions described above, while at the same time constraining the behavior of other stakeholders, minimizing the need to react in a more defensive manner.

CHAPTER 2: INDIRECT CBMs – DIALOGUES AND NETWORKS FOR CONFIDENCE BUILDING

Indirect CBMs tend to be more concerned with long-term engagement and cooperation rather than immediate crisis resolution.²⁶⁵ Perhaps the best example of indirect CBMs are formal regional dialogues and networks relating to maritime security issues. Such dialogues and networks provide a platform for stakeholders to “pursue maritime interests in a collegial environment and explore common approaches to in ensuring maritime security.”²⁶⁶ Their main value lies in countering feelings of fear and distrust with openness and transparency of intention, as well as with potentially constructive interaction. In the Asia-Pacific region, such Track I/official²⁶⁷ dialogues and networks are usually ASEAN-driven²⁶⁸, including the ASEAN Regional Forum (ARF) and the Asian Defense Ministers’ Meeting/Asian Defense Ministers’

²⁶⁵ See Medcalf and Heinrichs, *supra* at note 199, 27.

²⁶⁶ Maritime CBMs, Trust and Managing Incidents at Sea, CSCAP MEMORANDUM NO 25 (June 2014), para. 2.1, available from <http://www.cscap.org/uploads/docs/Memorandums/CSCAP%20Memorandum%20No.25%20-%20Maritime%20CBMs,%20Trust%20%20and%20Managing%20Incidents%20at%20Sea.pdf>.

²⁶⁷ Track I diplomacy to “Official discussions typically involving high-level political and military leaders and focusing on cease-fires, peace talks, and treaties and other agreements.” This is distinguished from Track 2 diplomacy which refers to “Unofficial dialogue and problem-solving activities aimed at building relationships and encouraging new thinking that can inform the official process. Track 2 activities typically involve influential academic, religious, and NGO leaders and other civil society actors who can interact more freely than high-ranking officials.” (See Glossary of Terms for Conflict Management and Peacebuilding, United States Institute for Peace, available from <http://glossary.usip.org/resource/tracks-diplomacy>).

²⁶⁸ Sam Bateman, *Solving “Wicked” Problems of Maritime Security: Are Regional Forums Up to the Task?*, CONTEMPORARY SOUTHEAST ASIAN Vol. 33, No. 1 (April 2011), p. 17.

Meeting Plus Three (ADMM/ADMM+3). One important dialogue – the Shangri la Dialogue (SLD) – is notable for being organized outside the ASEAN framework and entirely by an extra-regional private organization (i.e. the London-based International Institute for Strategic Studies). Although Track II forums likewise exist (e.g. the Council for Security Cooperation in the Asia Pacific or CSCAP) and make significant contributions to confidence-building and cooperation endeavors in the region, they will not be central to the discussion in this Chapter which is limited only to the potential de-escalatory impact of official diplomatic/political interaction.

The de-escalatory significance of dialogues and networks lies in what Bisley and Taylor observes as their capacity to “socialize” the participants in modes of thought and habits of mind that reflect underlying values that in turn change behavior.²⁶⁹ Bisley and Taylor add that “socialization, in which members of multilateral processes change their behavior and policy choices due to the incorporation of the values, principles and goals of the process, is a core goal of many regional and global institutions.”²⁷⁰ In the context of the highly volatile South China disputes, socialization can go a long way towards plugging the massive trust deficit among stakeholders since repeated rational engagement of controversial issues can crystallize previously ambiguous positions and shed light on heretofore opaque intentions. This is consistent with the constructivist appreciation of international relations where “people and societies construct, or constitute, each other.”²⁷¹ Adler and Barnett also observe that socialization “allows for the possibility that under the proper conditions, actors can generate shared identities and norms that are tied to a stable peace”, leading in turn to the creation of a “security community” wherein they have long-term interests.²⁷²

As in the case of other CBMs, dialogues and networks are not silver bullets. According to Tan and Emmers, “finding general agreement on common objectives is a troubling matter as deep

²⁶⁹ Nick Bisley and Brendan Taylor, *China's Engagement of Regional Security Multilateralism: The Case of the Shangri-la Dialogue*, CONTEMPORARY SOUTHEAST ASIA: A JOURNAL OF STRATEGIC AND INTERNATIONAL AFFAIRS, p. 36.

²⁷⁰ *supra*.

²⁷¹ NICHOLAS ONUF, WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS 38 (1989).

²⁷² EMMANUEL ADLER AND MICHAEL BARNETT (EDS.), SECURITY COMMUNITIES 10, 31 (1998); *See also* Emmanuel Adler, *Seeds of Change: the OSCE's Community-Building Model*, in SECURITY COMMUNITIES 119.

division exist between the participants.”²⁷³ This is particularly true in the context of the complex South China Sea disputes, where country claimants have been historically unable to agree on crucial aspects of both fact and law. Moreover, while dialogue and network formation may ultimately lead to de-escalation, one has to ask: at what cost? It should be recognized that these platforms are susceptible to exploitation if states are able to hide behind “consensus-building” and “process” to lock-out values which may not be aligned to their strategic interests.

Using the foregoing framework, the following paragraphs provide an overview as well as critical analysis of some of the existing regional dialogues and networks:

ASEAN Regional Forum (ARF)

According to some scholars, the ARF was originally formed to maintain US military engagement in the region while still maintaining cooperative relationships with external powers such as China.²⁷⁴ Over time, the ARF evolved into the most important intergovernmental forum for multilateral security in the Asia-Pacific region. It has held one ministerial meeting every year since its inaugural meeting on 25 July 1994 in Bangkok, Thailand, and is currently comprised of 27 members: all 10 ASEAN member states (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam), 10 ASEAN dialogue partners (Australia, Canada, China, the European Union, India, Japan, South Korea, New Zealand, Russia, and the United States), two ASEAN observers (Papua New Guinea and Timor Leste), as well as North Korea, Mongolia, Pakistan, Bangladesh and Sri Lanka.

The ARF approaches the various security issues in the region using a three-stage process: Stage I is the “promotion of confidence-building measures” (*Table 2.a*), Stage

²⁷³ Seng Tan and Ralf Emmers, *Security Architecture and Institutionalism in the Asia Pacific*, in *ASSESSING TRACK 2 DIPLOMACY IN THE ASIA PACIFIC REGION* 198 (Desmond Bell and Kwa Chong Guan, eds., Singapore, 2010).

²⁷⁴ *supra*, p. 10.

II is the “development of a preventive diplomacy²⁷⁵ mechanism” (*Table 2.b*), while Stage III is the “development of conflict-resolution mechanisms”.²⁷⁶ Because the ARF places great importance on “moving at a pace comfortable to all participants”²⁷⁷, critics have been quick to point out that it has largely been unable to progress beyond Stage I activities and, to a very minor extent, Stage II activities. This reality was in large part due to the lack of homogeneity in the interests of the participants. It was even observed that – “As useful as the ARF is, its unwieldy membership of 27 States and entities is a liability when it comes to practical cooperation. Its inherent diversity makes it unsuited for the role of enhancing Southeast Asian security as its *raison d’être* extends beyond the region.”²⁷⁸ Notwithstanding this failing, it is undeniable that the ARF has helped stabilize the region and has “securely engaged and involved all relevant powers in a cooperative manner.”²⁷⁹ According to Emmers et al., the ARF has been particularly useful in getting China to participate in formal consultative security dialogues as it saw the forum as a way to counter US dominance in the region.²⁸⁰ They further observe that the ARF established a supplementary security structure to the existing bilateral alliances crisscrossing the region. They finally conclude that as a dialogue mechanism, the ARF has been a useful vehicle for establishing and promoting multi-polarity in the region.²⁸¹ On the other hand, Katsumata describes the ARF (as well as its various inter-sessional meetings and sub-groups) as a “norm-brewery”²⁸² and as an “arena for tactical cooperation between its participants in dealing with various regional security issues”²⁸³.

²⁷⁵ The ARF defines “preventive diplomacy” as “consensual diplomatic and political action taken by sovereign states with the consent of all directly involved parties to: (a) help prevent disputes and conflicts from arising between States that could potentially pose a threat to regional peace and stability; (b) help prevent such disputes and conflicts from escalating into armed confrontation, and (c) help minimize the impact of such disputes and conflicts on the region. (See ARF Concept and Principles of Preventive Diplomacy, adopted at the 8th ARF, July 2001, available from <http://aseanregionalforum.asean.org/library/arf-chairmans-statements-and-reports/159.html>.)

²⁷⁶ The ASEAN Regional Forum: A Concept Paper, p. 2, available from <http://aseanregionalforum.asean.org/files/library/Terms%20of%20References%20and%20Concept%20Papers/Concept%20Paper%20of%20ARF.pdf>.

²⁷⁷ *supra*.

²⁷⁸ Tang Siew Mun, *Prospects and Challenges of the ADMM*, in *THE FUTURE OF THE ADMM/ ADMM-PLUS AND DEFENSE DIPLOMACY IN THE ASIA PACIFIC 13* (Sarah Teo and Bhuhindar Singh. eds., February 2016).

²⁷⁹ Ralf Emmers et al., *The East Asia Summit and the Regional Security Structure*, MARYLAND SERIES IN CONTEMPORARY ASIAN STUDIES 11, No. 3 -2010 (202).

²⁸⁰ *supra*.

²⁸¹ *supra*.

²⁸² Hiro Katsumata, *Establishment of the ASEAN Regional Forum: Constructing a Talking Shop or Norm Brewery?*, *THE PACIFIC REVIEW*, p. 181.

²⁸³ *supra*, p. 182.

Table 2.a: Indicative List of Confidence Building Measures in 1995 ARF Concept Paper

Near Term	Medium to Long Term
Dialogue on security perceptions, including voluntary statements defense policy positions;	Regional security studies center/ coordination of existing security studies activities
Defense Publications such as Defense White Papers or equivalent documents as considered necessary by respective governments;	Maritime information data bases
Enhanced contacts, including, high level visits and recreational activities	Cooperative approaches to sea lines of communication, beginning with exchanges of information and training in such areas as search and rescue, piracy and drug, control
Exchanges between military academies, staff colleges and training	Mechanism to mobilize relief assistance in the event of natural disasters
Observers at military exercises, on a voluntary basis	Establishment of zones of cooperation in areas such as the South China Sea
Annual seminar for defense officials and military officers on selected international security issues	Systems of prior notification of major military deployments that have region-wide application

Table 2.b: Indicative List of Measures in the 2001 ARF Concept and Principles of Preventive Diplomacy

Category	Comments
Confidence-Building Efforts	<p>These include efforts to build mutual trust and confidence between states (overlapping with Stage I). The successful application of PD has to be built upon continuous efforts to maintain and enhance trust and confidence. Without a high degree of trust among ARF participants, it is unlikely that PD in the later stages of any conflict can be carried out. While the ARF has succeeded in fostering dialogue among ARF members over the past few years, it is now time to look into strengthening the habit of cooperation. Cooperation among ARF members can preempt disputes as well as prevent disputes from developing into conflicts by enhancing trust and understanding.</p>
Norms Building	<p>These include the nurturing of accepted codes or norms of behavior guiding the relationships among states in the Asia-Pacific region. To the extent that the codes enhance predictability and strengthen cooperative behavior in ensuring regional peace, norms building enhances trust between and among states in the region. The ARF could consider measures in this area, such as developing a code of conduct governing relations among ARF members which is consistent with existing codes such as the TAC and the UN Charter.</p>
Enhancing Channels of Communication	<p>These include open, easy and direct communications or channels among ARF participants which serve to</p>

	promote transparency with a view to avoid misperception or misunderstanding. Such channels would advance information-sharing, provide early warning and facilitate dialogue.
Role of the ARF Chair	To be determined by the ARF members.

ASEAN Defense Ministers' Meeting (ADMM) and ADMM+

During the 10th ASEAN Summit, held in Vientiane, Laos on 29 November 2004, States parties adopted the ASEAN Security Community (ASC) Plan of Action. Section III.1(c) of its stated Areas of Activities provides that “ASEAN shall work towards the convening of an annual ASEAN Defense Ministers’ Meeting (ADMM)”. Two years later, in May 2006, the first ADMM was formally held in Kuala Lumpur, Malaysia. Since then, ten ADMMs have been held, with the most recent being the ADMM in Vientiane, Laos, on 25 May 2016.

The ADMM was intended to complement other regional efforts (e.g. the ARF) geared towards the promotion of security cooperation and dialogue. Its specific objectives are: (1) To promote regional peace and stability through dialogue and cooperation in defense and security; (2) To give guidance to existing senior defense and military officials dialogue and cooperation in the field of defense and security within ASEAN and between ASEAN and dialogue partners; (3) To promote mutual trust and confidence through greater understanding of defense and security challenges as well as enhancement of transparency and openness; and (4) To contribute to the establishment of an ASC as stipulated in the Bali Concord II and to promote the implementation of the Vientiane Action Program (VAP) on ASC.²⁸⁴

²⁸⁴ See Concept Paper for the Establishment of an ASEAN Defense Ministers’ Meeting, adopted at the inaugural ADMM, Kuala Lumpur, Malaysia, 9 May 2006, available at

Since its establishment, the ADMM was used to “collectively address regional security issues through open and constructive dialogue, and through practical cooperation.”²⁸⁵ In the years that followed, however, the political and security environment of Asia changed significantly, prompting the ASEAN to expand its membership to include eight extra-regional actors: Australia, China, India, Japan, New Zealand, Russia, South Korea, and the U.S. The Concept Paper for the ADMM+ was adopted during the 2nd ADMM in Singapore in 2007 and outlined the meeting’s objectives:

- a. To benefit ASEAN member countries in building capacity to address shared security challenges, while cognizant of the differing capacities of various ASEAN countries.
- b. To promote mutual trust and confidence between defense establishments through greater dialogue and transparency.
- c. To enhance regional peace and stability through cooperation in defense and security, in view of the transnational security challenges the region faces.
- d. To contribute to the realization of an ASEAN Security Community which, as stipulated in the Bali Concord II, embodies ASEAN’s aspiration to achieve peace, stability, democracy and prosperity in the region where ASEAN member countries live at peace with one another and with the world at large.
- e. To facilitate the implementation of the VAP, which calls for ASEAN to build a peaceful, secure and prosperous ASEAN, and to adopt greater outward-looking external relation strategies with our friends and Dialogue Partners.²⁸⁶

Unlike the ADMM, the ADMM + would only convene every two years.²⁸⁷ The first ADMM+ was subsequently convened in Hanoi, Vietnam, on 12 October 2010. At

<https://admm.asean.org/dmdocuments/1.%20Concept%20Paper%20for%20the%20Establishment%20of%20an%20ASEAN%20Defence%20Ministers.pdf>

²⁸⁵ ASEAN Defense Ministers’ Meeting Plus Concept Paper, available from

https://admm.asean.org/dmdocuments/4.%20Annex%20G_ADMM-Plus%20Concept%20Paper.pdf.

²⁸⁶ ASEAN Defense Ministers’ Meeting Plus Concept Paper, available from https://admm.asean.org/dmdocuments/4.%20Annex%20G_ADMM-Plus%20Concept%20Paper.pdf.

²⁸⁷ The ADMM+ was originally planned to meet every three years but this was later changed to every two years in order to allow participants more opportunities for responsive interaction.

that meeting, the Defense Ministers formed five Experts' Working Groups (EWGs) to address five areas of practical cooperation: (1) maritime security, (2) counter-terrorism, (3) humanitarian assistance and disaster management, (4) peacekeeping operations and (5) military medicine.²⁸⁸

Unlike the more general ARF, both the ADMM and the ADMM+ were specifically intended to focus on practical cooperation measures as a form of CBM. These measures include, for example, the ASEAN Defense Industry Collaboration Network and the ASEAN Peacekeeping Centers Network. According to Tang Siew Mun, the ADMM and ADMM+ were uniquely suited to this focus thanks in large part to its more streamlined membership.²⁸⁹ He observed that “as useful as the ARF is, its unwieldy membership of 27 states and entities is a liability when it comes to practical cooperation. Its inherent diversity makes it unsuited for the role of enhancing Southeast Asian security as its *raison d'être* extends beyond the region.” With respect to the ADMM, he said that “the value of the ADMM stems from its geographical cohesiveness, which provides an avenue for regional security cooperation. The ADMM Serves the regional interest and provides an avenue for the ASEAN defense ministers to discuss and exchange views on Southeast Asian security issues and concerns.”²⁹⁰ On the other hand, Tang Siew Mun believes that the ADMM+ provided a geographical focus that was lacking in the ARF, which in turn enabled ASEAN's eight dialogue partners to engage with ASEAN directly and more effectively.²⁹¹

Shangri-la Dialogue (SLD)

The Shangri-la Dialogue is the Asia-Pacific's “preeminent forum for defense diplomacy, and is one of the most strongly supported multilateral mechanisms in the

²⁸⁸ About the ASEAN Defense Ministers' Meeting Plus, ASEAN (14 January 2015), available from <https://admm.asean.org/index.php/about-admm/about-admm-plus.html>.

²⁸⁹ Tang Siew Mun, *Prospects and Challenges of the ADMM*, in *THE FUTURE OF THE ADMM/ADMM-PLUS AND DEFENSE DIPLOMACY IN THE ASIA PACIFIC* 13 (Sarah Teo and Bhubhindat Singh, eds., Feb. 2016).

²⁹⁰ *supra*.

²⁹¹ *supra*.

region.”²⁹² Unlike the ARF or the ADMM/ADMM+, the SLD is run by an extra-regional non-governmental organization – the London-based International Institute for Strategic Studies (IISS). The SLD currently has 28 participants: Australia, Brunei, Cambodia, Canada, Chile, China, France, Germany, India, Indonesia, Japan, Laos, Malaysia, Mongolia, Myanmar, New Zealand, Pakistan, the Philippines, Russia, South Korea, Sri Lanka, Singapore, Sweden, Thailand, Timor Leste, United Kingdom, United States, and Vietnam. Defense ministers representing these countries annually meet at the Shangri-la Hotel in Singapore to discuss security issues of common concern. The SLD is structured into three components: three on-record plenary meetings, off-record break-out groups, and off-record bilateral meetings. Although primarily a Track I dialogue, Track II participants are also included in the discussions during each of these components in order to offer their perspectives and supplementary opinions on active issues.

Unlike other dialogues and fora which are “closed-door”, “opaque”, and “stilted”²⁹³, the SLD has a reputation for being the only platform for cordial and candid discussion on highly sensitive security issues. It has been said that “frank talk (among participants) is an important step toward de-escalating regional tensions by providing a clear starting point for future negotiations” and that “greater openness reduces the risk that misunderstanding and misperception could lead to miscalculation and conflict.”²⁹⁴

²⁹² Bisley and Taylor, *supra* at note 268, p. 132.

²⁹³ See Blair Versatz and Rudy de Leon, *Revisiting the Shangri-law Dialogue: Candid and Heated Conversations are Encouraged*, CENTER FOR NEW AMERICAN PROGRESS (14 August 2014).

²⁹⁴ *supra*, p.1.

Engagement of the South China Sea disputes

The South China Sea disputes have long been mainstays of the agenda of the various regional networks and dialogues that make up the Asia-Pacific security architecture. However, the level of engagement of the topic has varied across the ARF, the ADMM, the ADMM+ and the SLD.

ARF

At the end of the last ARF held in Vientiane, Lao PDR on 26 July 2016, the Chairman's Statement reflected the high degree of concern that the participants all had for the peaceful resolution of the South China Sea disputes, and reaffirmed "the importance of maintaining and promoting peace, security, and stability, safety and freedom of navigation in and overflight above the South China Sea."²⁹⁵ Crucially, it further noted that "several ministers remain seriously concerned over recent and ongoing developments and that the ministers took note of the concerns expressed by some ministers on the land reclamations and escalation activities in the South China Sea, which have eroded trust and confidence in the region, increased tensions and may undermine peace, security and stability in the region."²⁹⁶ The inclusion of such a strong statement underlines the fact that the participants have a clear understanding of the triggers of the conflict and that discussions going forward have to be based on that premise. Statements of this nature undermine the widely-held belief that the ARF shies away from potentially controversial topics. The ARF's reputation as a "norm-brewery" was also reaffirmed during the recent round of inter-sessional meetings and workshops where the countries were able to freely and openly discuss specific aspects of the disputes during thematic sessions, as well as highlight possible opportunities for confidence building. At the ARF Seminar on Confidence Building and the Law of the Sea, for example, the participants had the opportunity to examine UNCLOS provisions relating to maritime delimitation, the compulsory dispute settlement procedure, the obligation of self-restraint, and the obligation to cooperate.²⁹⁷ At the 8th ARF Inter-sessional Meeting on

²⁹⁵ See Chairman's Statement of the 23rd ARF, Vientiane Lao PDR (26 July 2016).

²⁹⁶ *supra*.

²⁹⁷ See Co-Chairs' Summary Report, ARF Seminar on Regional Confidence Building and the Law of the Sea, Tokyo, Japan (4 December 2015).

Maritime Security, the participants discussed the possible expansion of the CUES and the potential for establishing a marine peace park in the disputed areas.²⁹⁸

ADMM and ADMM+

The South China Sea disputes were only acknowledged for the first time in the 5th ADMM's Joint Statement in 2011. It stated that the ADMM:

8. Reaffirm ASEAN Member States' commitment to fully and effectively implement the Declaration on the Conduct of the Parties in the South China Sea, and to work towards the adoption of a regional Code of Conduct in the South China Sea that would further promote peace and stability in the region.

*9. Reaffirm also the importance of regional peace and stability, and freedom of navigation in and overflight above the South China Sea as provided for by universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea.*²⁹⁹

These two paragraphs were reiterated in the 6th ADMM Joint Statement in 2012³⁰⁰, the 7th ADMM Joint Statement in 2013³⁰¹, the 8th ADMM Joint Statement in 2014³⁰², the 9th ADMM Joint Statement in 2015³⁰³, and the 10th Joint Statement in 2016³⁰⁴. The 2012 reiteration was

²⁹⁸ See Co-Chairs' Summary Report, 8th Inter-session Meeting on Maritime Security, Makati, Philippines (7 April 2016).

²⁹⁹ Joint Declaration of the ASEAN Defense Ministers' Meeting on Strengthening Defense Cooperation of ASEAN in the Global Community to Face New Challenges (19 May 2011, Jakarta, Indonesia).

³⁰⁰ See Joint Declaration of ASEAN Defense Ministers on Enhancing ASEAN Unity for a Harmonized and Secure Community (29 May 2012, Phnom Penh, Cambodia).

³⁰¹ See Joint Declaration of the ASEAN Defense Ministers: Securing Our People, Our Future (7 May 2013, Bander Seri Begawan, Brunei Darussalam).

³⁰² See Joint Declaration of the ASEAN Defense Ministers on Defense Cooperation Towards a Peaceful and Prosperous ASEAN Community (20 May 2014, Nay Pyi Taw, Myanmar).

³⁰³ See Joint Declaration of the ASEAN Defense Ministers on Maintaining Regional Security and Stability for and by the People (16 March 2015, Langkawi, Malaysia).

particularly notable because during that same year, the ASEAN Foreign Ministers' Meeting failed for the first time ever to issue a Joint Statement due to a stand-off over the inclusion of the South China Sea dispute in the final document.³⁰⁵ The 2014 reiteration also included a call on all parties "to exercise self-restraint and non-use of force, as well as refrain from taking actions that would further escalate tension"³⁰⁶, as well as statement "welcoming confidence building measures of communication lines and hotlines and non-use of force commitments among ASEAN member states that will further promote peace and stability."³⁰⁷ The recent 2016 reiteration is even more expansive and includes declarations to: (i) Practice and observe international protocols such as the CUES and commence work on crafting protocols of interaction to maintain open communications, to avoid misunderstanding and prevent undesirable incidents, and (ii) Reiterate the importance of maintaining peace, stability and security as well as upholding freedom of navigation in, and overflight above, the South China Sea as provided for by the universally-recognized principles of international law, including the UNCLOS.³⁰⁸

In sharp contrast, the ADMM+ has yet to yield a Joint Statement that explicitly acknowledges the South China Sea disputes. The 2nd ADMM+ in Hanoi, Vietnam, only made oblique references that might be broadly applicable to the issue, to wit:

Be guided in our relations by the fundamental principles in the TAC, especially the renunciation of the threat or use of force and exercise of self-restraint, while conforming to international norms of behavior, and sustaining the international institutions and laws that underpin a stable international order; and

³⁰⁴ See Joint Declaration of the ASEAN Defense Ministers on Promoting Defense Cooperation for a Dynamic ASEAN Community (25 May 2016, Vientiane, Lao PDR).

³⁰⁵ See ASEAN nations fail to reach agreement on the South China Sea, BBC News (13 July 2012), available from <http://www.bbc.com/news/world-asia-18825148>.

³⁰⁶ *supra* 2014 Joint Declaration at note 291.

³⁰⁷ *supra*.

³⁰⁸ *supra* 2016 Joint Declaration at note 293.

*Establish practical measures that reduce vulnerability to miscalculations and avoid misunderstanding and undesirable incidents at sea.*³⁰⁹

The 3rd and latest ADMM+ was unable to come up with a Joint Declaration due in large part to the inability of China and the U.S. to agree on the inclusion of a reference to the South China Sea disputes in the final document.³¹⁰ The participants decided not to release a Joint Statement even though according to news reports, the South China Sea disputes dominated the discussions.³¹¹ Notably, the South China Sea disputes do figure prominently in all three ADMM+ Chairman's Statements, which do not require consensus before release. The Chairman's Statements are actually a more accurate summary of the degree of attention given to the issue during the meetings. During the 1st ADMM+ in Hanoi, Vietnam, the Chairman reported that:

*The Meeting noted that the Member States are interested in maritime security cooperation and agreed that the collective efforts are required to address the challenges of piracy, sea robbery, and trafficking in persons and disasters at sea. Some delegates touched upon traditional security challenges, such as disputes in the South China Sea. The meeting welcomed efforts by concerned parties to address the issue by peaceful means in conformity with the spirit of the DOC and recognized principles of international law, including UNCLOS.*³¹²

This observation was more or less repeated in the 2nd ADMM+ Chairman's Statement.³¹³ Interestingly, the 3rd ADMM+ Chairman's Statement also reiterated this and even emphasized

³⁰⁹ See Bandar Seri Begawan Joint Declaration of the 2nd ASEAN Defense Ministers Meeting Plus, Bandar Seri Begawan (29 Aug. 2013).

³¹⁰ See for example Charles Ramendran, *ADMM-Plus Fails to Sign Joint Declaration*, THE SUN DAILY (5 November 2015), available from <http://www.thesundaily.my/news/1603510>.

³¹¹ See for example Thitinan Pongsudhirak, *ASEAN's Disunity Undermines its Centrality*, THE STRAITS TIMES (21 June 2016).

³¹² Chairman's Statement of the 1st ASEAN Defense Ministers' Meeting Plus: "ADMM-Plus: Strategic Cooperation for Peace, Stability and Development in the Region" (12 Oct. 2010, Hanoi, Vietnam)

³¹³ Chairman's Statement of the 2nd ASEAN Defense Ministers' Meeting Plus (29 Aug. 2013, Bandar Seri Begawan, Brunei Darussalam).

the importance of the early conclusion of the COC as a confidence-building measure, even though that same meeting failed to produce a Joint Statement containing a similar emphasis.³¹⁴

The contrasting situations in the ADMM and the ADMM+ highlight two things: (1) The ASEAN member states can and have come up with a relatively united position on certain aspects of the South China Sea disputes, particularly insofar as it relates to the observance of established international legal norms enshrined in both customary and conventional law; and (2) Outside of the ASEAN, consensus is difficult to achieve due to a more pronounced lack of homogeneity among states, and ultimately the occurrence of a greater degree of distrust. Although this manifests in the inability to come up with a representative outcome document, it does not necessarily mean that participants totally shy away from potentially constructive dialogue on the issue.

SLD

The South China Sea disputes are a recurring area for spirited discussion in the SLD. Interestingly, country positions are more clearly fleshed out during the SLD precisely because contentious issues are approached in a frank yet respectful manner. As a result, other countries are better able to use the SLD outcome as a benchmark for behavior and respond in a constructive way. This productive exchange was most recently exemplified during the 2016 SLD Special Session 5, which was attended by senior defense officials from China, Vietnam and the Philippines, as well as highly respected members of the academe and civil society. The participants touched on a number of issues, the highlights of which include:

- The adoption of a CUES-type agreement for coast guards
- Stricter adherence to the DOC, particularly with respect to the provisions encouraging self-restraint

³¹⁴ Chairman's Statement of the 3rd ASEAN Defense Ministers' Meeting Plus (4 Nov. 2015, Kuala Lumpur, Malaysia).

- Clarification of China’s nine-dashed-line claim vs maintaining a deliberately ambiguous position
- Countries’ respective understanding of the term “freedom of navigation”
- Countries’ respective understanding of the term “historic waters” and “historic fishing rights”
- Countries’ respective understanding of rights and allowed activities in the EEZ.

CONCLUSION

Much has been said and written about the complex issues in the South China Sea. Most research has focused on trying to figure out who gets what according to international law, whether it be as specific as waters and land features or as vague as “rights” and “powers”. A second strand of research has sought to untangle the complicated socio-historical narrative of the region in order to better understand the notion of property and ownership. A third and final strand of research uses classical international relations theories as a lens to explain how the shifting power dynamics in the region affects each stakeholder’s engagement of the ongoing disputes. This paper contributes to this vast body of scholarly research by focusing instead on two questions: “What can escalate tensions in the South China Sea to the point of all-out war?” and “How can such an escalation be avoided or mitigated?” These queries accept, as a starting point, that the region is currently in a state of crisis. It also accepts that the prospects for the near-term resolution of the various legal claims advanced by each of the six claimant countries remain very dim. This research thus focused on breaking down the prospects of “escalation” and “de-escalation” in the South China Sea into specific components. By analyzing each component in isolation, this research was able to trace how certain escalatory behaviors/activities could exacerbate the tensions existing in the current state of crisis and usher in an unprecedented state of war. It then showed how CBMs could be used to prevent or at the very least mitigate the consequences.

The two instrumental escalatory acts that this research examined at length – island-building and the possible declaration of an ADIZ – shared a number of common characteristics. The most important of these characteristics is that they both attempt to assert a form of *de facto* area-denial, which in turn has the potential to significantly improve China’s strategic position *vis a vis* other South China Sea stakeholders. In relation to this, it is worth repeating an observation earlier made in this paper: these acts apparently represent attempts to alter the facts on the ground, which could ultimately impact the application or interpretation of the applicable law (i.e. they can be used as a basis for a claim of right under the UNCLOS where previously there may have been none). The possible path to conflict/war thus lies in the type of response that these instrumental escalatory acts are likely to trigger. This is best illustrated by the increased frequency of “pushback” operations from countries that feel the need to register some form of official objection to China’s actions. The United States FONOPs, in particular, are typical of such pushback. It goes without saying that the ensuing confrontations increase the likelihood of misperception and/or miscalculation, inevitably contributing to the rising tensions in the region. In the same manner, the two suggestive escalatory acts discussed in this research – i.e. engaging in a spectrum of threats and conducting enforcement actions in disputed waters – also shared the key characteristic of signaling the possibility of future harm against opposing countries. Simply put, China’s actions are well on their way to laying a groundwork of fear and distrust in the region. These in turn have prompted other South China Sea stakeholders to take preemptive-defensive measures, including spending more on military modernization and strengthening defensive alliances. These reactions are likely meant to “balance” against China, which is increasingly perceived as the most urgent regional security threat.

The study of de-escalation is often overlooked. But as this research has shown, it is the counterpoint to any conflict analysis. The reality is that one must first rationally understand why and under what conditions escalation happens. Then and only then can one reasonably hope to prevent, mitigate or halt its inexorable march to war.

Direct CBMs take a practical approach to de-escalation. According to functionalist theory, they usually go after “low-hanging fruit” where cooperation and coordination can come more easily to parties. In the case of the South China Sea, this might pertain to measures for minimizing

misperception and miscalculation during unplanned encounters in disputed areas. Whatever the disagreement causing such confrontations, it can be safely said that all South China Sea stakeholders want to minimize the escalatory repercussions of such confrontation. The tangible outcome is likely to take the form of a negotiated political document outlining acceptable behavior in such situations. Instruments such as the INCSEA, COLREGS and the CUES are important to the de-escalation process for the reason that they represent relatively non-controversial areas for cooperation which can, over time, help build the trust and confidence need for more controversial endeavors. On the other hand, indirect CBMs such as Track I dialogues and networks are important for countering feelings of fear and distrust among stakeholders through continuous socialization and constructive interaction. The simple idea behind this is that trust and confidence can be built among countries if there is greater transparency among them and if they believe that they are part of a greater “security community”.

In the final analysis, this research has shed light on the “action-reaction” dynamics in the South China Sea. By identifying specific behaviors as “escalatory”, it then becomes easier to formulate a “de-escalatory response”. It is ultimately hoped that such an understanding can become a useful tool for regional policymakers and for scholars interested in the South China Sea disputes.

BIBLIOGRAPHY

Treaties, Agreements, Memoranda, and Declarations

Agreement Between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety, U.S.-China, 19 January 1998.

Charter of the United Nations, San Francisco, 26 June 1945, United Nations Treaty Series, Vol. 1, No. XVI, available from <http://www.un.org/en/charter-united-nations/>.

Collision Regulations of 1960, in International Convention for the Safety of Life at Sea, United Nations Treaty Series, Vol. 1184, No. 2.

Convention on the High Seas, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. 450, No. 11.

Convention on International Civil Aviation, Chicago, 7 December 1944, United Nations Treaty Series, Vol. 15, No. 295, available from <https://treaties.un.org/doc/Publication/UNTS/Volume%2015/volume-15-II-102-English.pdf>.

Convention on the International Regulations for Preventing Collisions at Sea, London, 20 October 1972, United Nations Treaty Series, Vol. 1050, No. 16.

Convention Relating to the Regulation of Aerial Navigation, Paris, 13 October 1919, *League of Nations Treaty Series*, Vol. 11, No. 173.

Convention on the Territorial Sea and Contiguous Zone, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. No. 516, No. 205.

Code for Unplanned Encounters at Sea, 17 June 2014, available from <https://news.usni.org/2014/06/17/document-conduct-unplanned-encounters-sea>.

Declaration on the Conduct of Parties in the South China Sea, Phnom Penh, 4 November 2002, available from http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, U.S.-China, 10 November 2014.

Mutual Defense Treaty Between the Republic of the Philippines and the United States of America, Washington D.C., 30 August 1951, United Nations Treaty Series, Vol. 17, No. 133.

Protocol to the Agreement on the Prevention of Incidents On and Over the High Seas, U.S.-U.S.S.R., 22 May 1973, 24 U.S.T. 1063.

Treaty of Amity and Cooperation in Southeast Asia, Bali, 24 February 1976, United Nations Treaty Series, Vol. 1025, No. 15063, available from <http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/>.

United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations Treaty Series Vol. 1822, No. 3, available from http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *United Nations Treaty Series*, Vol. 1155, No. 331, Art. 31(3)(b), available from <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

Cases

Aegean Sea Continental Shelf Case (Greece v. Turk.), Interim Protection Order, 1976 I.C.J. 3 (11 September).

Aegean Sea Continental Shelf Case (Greece v. Turk.), Judgment, 1978 I.C.J. 3 (19 December).

Guy. v. Surin., UN Law of the Sea Annex VII Arb. Trib., 17 September 2007.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (8 July).

Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment, 1924 P.C.I.J. (Ser. A) No. 2 (August 28).

Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (27 June).

North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3 (20 February).

Phil v. China, Award on Jurisdiction and Admissibility, 29 October 2015 (Perm. Ct. Arb. 2015).

Phil v. China, Award, 12 July 2016 (Perm. Ct. Arb. 2016).

Official Documents and Statements

2016-2020 Plan of Action to Implement the Joint Declaration on the ASEAN-China Strategic Partnership for Peace and Prosperity

Announcement Regarding South China Sea Exercises, available from <http://www.msa.gov.cn/html/xinxichaxungongkai/gkml/HXJG/Hainan/20160703/DA5AB846-B3D6-4054-8D53-A9222BA3C9A4.html> (in Chinese)

Announcement of the Air Defense Identification Rules for the East China Sea Air Defense Identification Zone of the PRC, XINHUANET (23 November 2013) http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm

ARF Concept and Principles of Preventive Diplomacy, adopted at the 8th ARF, July 2001, available from <http://aseanregionalforum.asean.org/library/arf-chairmans-statements-and-reports/159.html>

ASEAN Defense Ministers' Meeting Plus Concept Paper, available from https://admm.asean.org/dmdocuments/4.%20Annex%20G_ADMM-Plus%20Concept%20Paper.pdf

ASEAN Defense Ministers' Meeting Plus Concept Paper, available from https://admm.asean.org/dmdocuments/4.%20Annex%20G_ADMM-Plus%20Concept%20Paper.pdf

Bandar Seri Begawan Joint Declaration of the 2nd ASEAN Defense Ministers Meeting Plus,
Bandar Seri Begawan (29 Aug. 2013)

Chairman's Statement of the 3rd ASEAN Defense Ministers' Meeting Plus (4 November 2015),
Kuala Lumpur, Malaysia

Chairman's Statement of the 1st ASEAN Defense Ministers' Meeting Plus: "ADMM-Plus:
Strategic Cooperation for Peace, Stability and Development in the Region" (12 October
2010, Hanoi, Vietnam)

Chairman's Statement of the 2nd ASEAN Defense Ministers' Meeting Plus (29 August 2013,
Bandar Seri Begawan, Brunei Darussalam).

China's Note Verbale to the Department of Foreign Affairs of the Philippines (19 February
2013), <https://www.documentcloud.org/documents/2165478-phl-prc-china-note-verbale.html>

China Note Verbale to UN Secretary General Ban Ki-moon (7 May 2009),
<http://www.documentcloud.org/documents/1341871-prc-note-against-malaysian-vietnamese-submission.html>

China's Defense White Paper (May 2015)

Co-Chairs' Summary Report, ARF Seminar on Regional Confidence Building and the Law of
the Sea, Tokyo, Japan (4 December 2015)

Co-Chairs' Summary Report, 8th Inter-sessional Meeting on Maritime Security, Makati,
Philippines (7 April 2016)

Chairman's Statement of the 23rd ARF, Vientiane Lao PDR (26 July 2016).

Foreign Ministry Spokesperson Hong Lei's Regular Press Conference (12 November 2015),
available from
http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1314306.shtml

Foreign Ministry Spokesperson Hua Chunying's Remarks on Indonesian Navy Vessels
Harassing and Shooting Chinese Fishing Boats and Fishermen (19 June 2016), available
from http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1373402.shtml

Foreign Ministry Spokesperson Lu Kang, Remarks on USS Lassen's Entry into Waters near
Relevant Islands and Reefs of China's Nansha Islands (27 October 2015), available from
http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1309567.shtml

Foreign Ministry Spokesperson Lu Kang, Regular Press Conference (1 February 2016), available from http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1337080.shtml

Foreign Ministry Spokesperson Lu Kang, Regular Press Conference (10 May 2016), available from http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1362106.shtml

Guidelines for the Implementation of the DOC (2011), available from <http://www.asean.org/storage/images/archive/documents/20185-DOC.pdf>

International Law Commission, *The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session, A/CONF.13/4* (24 February to 27 April 1958), available http://legal.un.org/diplomaticconferences/lawofthesea-1958/docs/english/vol_I/7_A-CONF-13-4_PrepDocs_vol_I_e.pdf.

John Kerry, *Statement on the East China Sea Air Defense Identification Zone* (23 November 2013), available from <http://www.state.gov/secretary/remarks/2013/11/218013.htm>

Joint Declaration of the ASEAN Defense Ministers' Meeting on Strengthening Defense Cooperation of ASEAN in the Global Community to Face New Challenges (19 May 2011, Jakarta, Indonesia)

Joint Declaration of ASEAN Defense Ministers on Enhancing ASEAN Unity for a Harmonized and Secure Community (29 May 2012, Phnom Penh, Cambodia)

Joint Declaration of the ASEAN Defense Ministers: Securing Our People, Our Future (7 May 2013, Bander Seri Begawan, Brunei Darussalam)

Joint Declaration of the ASEAN Defense Ministers on Maintaining Regional Security and Stability for and by the People (16 March 2015, Langkawi, Malaysia).

Joint Declaration of the ASEAN Defense Ministers on Promoting Defense Cooperation for a Dynamic ASEAN Community (25 May 2016, Vientiane, Lao PDR).

Joint Declaration of the ASEAN Defense Ministers on Defense Cooperation Towards a Peaceful and Prosperous ASEAN Community (20 May 2014, Nay Pyi Taw, Myanmar)

Joint Statement of the 19th ASEAN-China Summit to Commemorate the 25th Anniversary of ASEAN-China Dialogue Relations

Joint Statement of the 19th ASEAN-China Summit to Commemorate the 25th Anniversary of ASEAN-China Dialogue Relations

Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the DOC (25 July 2016)

Joint Statement on the Application of the Code of Unplanned Encounters at Sea in the South China Sea

Maritime CBMs, Trust and Managing Incidents at Sea, CSCAP MEMORANDUM NO 25 (June 2014), available from <http://www.cscap.org/uploads/docs/Memorandums/CSCAP%20Memorandum%20No.25%20-%20Maritime%20CBMs,%20Trust%20%20and%20Managing%20Incidents%20at%20Sea.pdf>

Michael Pilger, *ADIZ Update: Enforcement in the East China Sea, Prospects for the South China Sea, and Implications for the United States*, US-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 7 (2 March 2016). http://origin.www.uscc.gov/sites/default/files/Research/ADIZ%20Update_0.pdf

Permanent Court of Arbitration, *Arbitration between the Republic of the Philippines and the People's Republic of China: Arbitral Tribunal Establishes Rules of Procedure and Initial Timetable*, 27 August 2013, <http://www.pcacases.com/web/sendAttach/227>

Philippines' Notification and Statement of Claim (22 January 2013), <http://www.philippineembassy-usa.org/uploads/pdfs/embassy/2013/2013-0122-Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.a.pdf>

Position Paper of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (7 December 2014), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml

President Barack Obama, Remarks in Joint Press Conference with Chinese President Xi (25 September 2015), available from <https://www.whitehouse.gov/the-press-office/2015/09/25/remarks-president-obama-and-president-xi-peoples-republic-china-joint>

Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (12 July 2016), available from http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm

The ASEAN Regional Forum: A Concept Paper, available from <http://aseanregionalforum.asean.org/files/library/Terms%20of%20References%20and%20Concept%20Papers/Concept%20Paper%20of%20ARF.pdf>

United Nations, Comprehensive Study on Confidence Building Measures, Department of Political and Security Council Affairs, United Nations Center for Disarmament, Report of the Secretary General, A/36/474, New York, 1982, available from <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/HomePage/ODAPublications/DisarmamentStudySeries/PDF/SS-7.pdf>

U.S. Department of Defense, Freedom of Navigation Program Fact Sheet 1 (March 2015), [http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20\(March%202015\).pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20(March%202015).pdf)

Books

Adler, Emmanuel and Michael Barnett (eds.) (1998), *Security Communities*, Cambridge: Cambridge University Press.

Brechler, Michael and Jonathan Wilkenfeld (1997), *A Study of Crisis*, Michigan: University of Michigan Press.

Brownlie, Ian (1963), *International Law and the Use of Force by States*, Gloucestershire: Clarendon Press.

Byman, Daniel and Matthew Waxman (2002), *The Dynamics of Coercion: American Foreign Policy and the Limits of Military Might*, Cambridge: Cambridge University Press.

Freedman, Lawrence (1998), *Strategic Coercion: Concepts and Cases*, Oxford: Oxford University Press.

George, Alexander L. and William E. Simmons, eds. (1994), *Limits of Coercive Diplomacy*, 2nd ed., Colorado: Westview Press.

Kahn, Herman (2009), *On Escalation: Metaphors and Scenarios*, New Jersey: Transaction Publishers.

Kraska, James and Raul Pedrozo (2013), *International Maritime Security Law*, Leiden: Martinus Nijhoff Publishers.

Nordquist, Myron H. et al. (1995), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Leiden: Brill.

- Oduntan, Gbenga (2012), *Sovereignty and Jurisdiction in the Airspace and Outerspace*, Abingdon: Routledge.
- Onuf, Nicholas (1989), *World of Our Making: Rules and Rule in Social Theory and International Relations*, South Carolina: University of South Carolina Press.
- Pape, Robert A. (1996), *Bombing to Win: Air Power and Coercion in War*, Cornell: Cornell University Press.
- Schelling, Thomas C. (2008), *Arms and Influence*, New Haven: Yale University Press.
- Stürchler, Nicholas (2007), *The Threat of Force in International Law*, Cambridge: Cambridge University Press.
- Sweijts, Tim et al. (2016), *Back to the Brink: Escalation and Interstate Crisis*, The Hague: The Hague Center for Strategic Studies.
- Tanaka, Yoshifumi (2012), *The International Law of the Sea (2nd ed.)*, Cambridge: Cambridge University Press.

Journals and Reports

- Andrew C. Blandford, *Reputational Costs Beyond Treaty Exclusions: International Law Violations as Security Threat Focal Points*, 10 Wash. U. Global Stud. L. Rev. 669 (2011)
- Christopher K. Lamont, *Conflict in the Skies: the Law of Air Defense Identification Zones*, AIR AND SPACE LAW VOL. 30, No. 3, 200 (2014)
- David Mittrany, *The Functionalist Approach to World Organization*, INTERNATIONAL AFFAIRS XXIV (July 1948)
- Desmond Bell and Kwa Chong Guan (eds.), *Assessing Track 2 Diplomacy in the Asia Pacific Region*, CSCAP Reader (2010)
- Elizabeth Cuadra, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, 18 VA. J. INT'L. 485, 486
- Erik French, *Improving Order in the East China Sea*, MAKING WAVES, Vol. 33, No. 5.1. (15 May 2015)
- Forrest E. Morgan et al., *Dangerous Thresholds: Managing Escalations in the 21st Century*, RAND Corporation (2008)

- Jaemin Lee, *China's Declaration of an Air Defense Identification Zone in the East China Sea: Implications for Public International Law*, 18 AM. SOC'Y. INT'L. L. 17 (19 August 2014)
- Mark J. Valencia, *Navigating Differences: What the 'Zero Draft' Code of Conduct for the South China Sea Says (and Doesn't Say)*, GLOBAL ASIA Vol. 8, No. 1 (Spring 2013)
- Nick Bisley and Brendan Taylor, *China's Engagement of Regional Security Multilateralism: The Case of the Shangri-la Dialogue*, CONTEMPORARY SOUTHEAST ASIA: A JOURNAL OF STRATEGIC AND INTERNATIONAL AFFAIRS
- Peter Dutton, *Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace*, 103 AM. J. INT'L L. (2009)
- Ralf Emmers et al., *The East Asia Summit and the Regional Security Structure*, MARYLAND SERIES IN CONTEMPORARY ASIAN STUDIES 11, No. 3 -2010 (202)
- Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 Va. L. Rev. 1649, 1651 (2000).
- Roncevert Almond, *Clearing the Skies Above the East China Sea*, HARVARD NATIONAL SECURITY JOURNAL VOL. 7 (2016) pp. 126-198, p.133
- Sam Bateman, *Solving "Wicked" Problems of Maritime Security: Are Regional Forums Up to the Task?*, CONTEMPORARY SOUTHEAST ASIAN Vol. 33, No. 1 (April 2011)
- Sarah Teo and Bhuhindat Singh (eds.), *The Future of the ADMM/ADMM-Plus and Defense Diplomacy in the Asia Pacific*, RSIS Policy Report (February 2016)

News, Presentations, etc.

- Abdul Ruff, *China-Indonesia Clash of Interests in the South China Sea*, FOREIGN POLICY NEWS (22 June 2016), <http://foreignpolicynews.org/2016/06/22/china-indonesia-clash-interests-south-china-sea/>
- Alexander Vuving, *ADIZ in the South China Sea: Nine-Dash-Line 2.0*, THE NATIONAL INTEREST (25 July 2016). <http://nationalinterest.org/feature/adiz-the-south-china-sea-nine-dash-line-20-17121?page=5>
- Amitav Acharya, *The ASEAN Regional Forum: Confidence Building* (not officially published) (on file with the author on his website), p. 7-8. Available from

<http://www.amitavacharya.com/sites/default/files/ASEAN%20Regional%20Forum-Confidence%20Building.pdf>

Angry China Warns Against Cradle of War in the South China Sea After Hague Ruling, STRAITS TIMES (13 July 2016), available from <http://www.straitstimes.com/asia/east-asia/china-vows-to-protect-south-china-sea-sovereignty-after-hague-ruling>

ASEAN hotline for Maritime Disputes, BRUNEI TIMES (12 February 2014), available from <http://www.bt.com.bn/news-national/2014/02/12/asean-hotline-formaritime-disputes>

ASEAN's Six-Point Principles on the South China Sea (20 July 2016), available from <http://www.cfr.org/asia-and-pacific/aseans-six-point-principles-south-china-sea/p28915>

Bill Gertz, *Pentagon Warns of Conflict Over Chinese Build-up On Disputed Island*, FREE BEACON (29 April 2016) <http://freebeacon.com/national-security/pentagon-warns-conflict-chinese-buildup-disputed-island/>

Blair Versatz and Rudy de Leon, *Revisiting the Shangri-la Dialogue: Candid and Heated Conversations are Encouraged*, CENTER FOR NEW AMERICAN PROGRESS (14 August 2014).

Carlyle A. Thayer, *Standoff in the South China Sea*, YALE GLOBAL ONLINE (12 June 2012), <http://yaleglobal.yale.edu/content/standoff-south-china-sea>

Carlyle A. Thayer, *ASEAN's Code of Conduct (Unofficial)*, Thayer Consultancy Background Brief, 11 July 2012

Carlyle A. Thayer, *South China Sea in Regional Politics: Indonesia's Efforts to Forge ASEAN Unity on a Code of Conduct*, Paper for 3rd Annual CSIS Conference on "Managing Tensions in the South China Sea", CSIS, Washington DC, 5-6 June 2013

Charlie Campbell, *China Launches Naval Drills In the South China Sea Before Key Maritime Ruling*, TIME (4 July 2016), available from <http://time.com/4392502/south-china-sea-beijing-philippines-court-ruling/>

Charles Ramendran, *ADMM-Plus Fails to Sign Joint Declaration*, THE SUN DAILY (5 November 2015), available from <http://www.thesundaily.my/news/1603510>

Chiara Zambrano, *Chinese Vessels Block Pinoy Fishermen in Scarborough Shoal*, ABS-CBN NEWS (14 July 2016), <http://news.abs-cbn.com/news/07/14/16/chinese-vessel-blocks-pinoy-fishermen-in-scarborough-shoal>

China, Russia Start Joint Navy Drill in the South China Sea, XINHUA (13 September 2016), available from http://news.xinhuanet.com/english/2016-09/13/c_135685439.htm

China's Continued Military Build-Up on Contested Islands in the South China Sea is Boosting Risk of Conflict, NATIONAL SECURITY NEWS (5 May 2016), available from <http://www.nationalsecurity.news/2016-05-05-the-pentagon-said-that-chinas-continued-military-build-up-on-contested-islands-in-south-china-sea-is-boosting-risk-of-conflict-2.html>

China's ADIZ to improve identification: FM Spokesman, XINHUA (3 December 2013) http://news.xinhuanet.com/english/china/2013-12/03/c_132938467.htm

China Power, Center for International and Strategic Studies, available from <http://chinapower.csis.org/maritime-forces-destabilizing-asia/>

Chris Summers, *China's Blunt Warning to America: 'We're Ready for Repeat of Korean War or Vietnam if US Military Stirs Up Any Conflict in the South China Sea'*, THE DAILY MAIL (20 May 2016), available from <http://www.dailymail.co.uk/news/article-3600609/China-warns-U-S-ready-repeat-Korean-War-Vietnam-American-military-stirs-conflict-South-China-Sea.html>

Center for Strategic and International Studies, *Map of Chinese Detection/Defense Capabilities in the South China Sea*, available from https://csis.carto.com/viz/4c461308-d73e-11e5-9a49-0e3ff518bd15/embed_map

Daniel Wagner et al., *China, the Philippines and Scarborough Shoal*, THE WORLD POST (20 May 2012), <http://www.huffingtonpost.com/daniel-wagner/china-the-philippines-and-b-1531623.html>

David Twee, *Shoal may Become Military Line in Sand in South China Sea*, BLOOMBERG (5 June 2016), <http://www.bloomberg.com/news/articles/2016-06-05/small-shoal-risks-becoming-line-in-sand-on-south-china-sea-spats>

Dean Cheng, *China's ADIZ as Air Denial*, NATIONAL INTEREST (4 December 2013) <http://nationalinterest.org/commentary/chinas-adiz-area-denial-9492>

DFA Conveys Protest to Beijing Over Chinese Vessels, GMA NEWS ONLINE (4 June 2011), <http://www.gmanetwork.com/news/story/222526/news/nation/dfa-conveys-protest-to-beijing-over-chinese-vessels>

Duterte in China: Xi Lauds Milestone Duterte Visit, BBC NEWS (20 October 2016), available from <http://www.bbc.com/news/world-asia-37700409>

- Ely Ratner, *Learning the Lessons of Scarborough Reef*, THE NATIONAL INTEREST (21 November 2013), <http://nationalinterest.org/commentary/learning-the-lessons-scarborough-reef-9442?page=2>
- Euan Graham, *Maritime Hotlines in East Asia*, S. RAJARATNAM SCHOOL OF INTERNATIONAL STUDIES POLICY BRIEF, Nanyang Technological University (May 2014), p.3
- Frances Mangosing, *PH Proposes to Expand Agreement on Air, Naval Encounters*, INQUIRER NEWS (27 May 2016), available from <http://globalnation.inquirer.net/139720/ph-proposes-to-expand-agreement-on-air-naval-encounters>
- Greg Torode, *Chinese Coast Guard is responsible for 2/3 of clashes in the South China Sea*, REUTERS (7 September 2016), <http://www.businessinsider.com/chinese-coast-guard-reponsible-majority-clashes-south-china-sea-2016-9>
- Harry J. Kazianis, *Is China Deploying Anti-Ship Missiles in the South China Sea?*, THE NATIONAL INTEREST (23 March 2016), available from <http://nationalinterest.org/blog/the-buzz/china-deploying-anti-ship-missiles-islands-the-south-china-15577>
- Hiro Katsumata, *Establishment of the ASEAN Regional Forum: Constructing a Talking Shop or Norm Brewery?*, THE PACIFIC REVIEW, p. 181
- Humphrey Hawksley, *Beaten up by China for Going Fishing*, BBC NEWS (8 January 2016), <http://www.bbc.com/news/magazine-35234183>
- Ian Storey, *China and the Philippines: Implications of the Reed Bank Incident*, CHINA BRIEF Vol. 11, Issue 8, May 2011
- J Ashley Roach, *Air Defense Identification Zones*, THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (February 2015) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e237>
- James Hookway, *Philippine Survey Ship Confronted by China, Spurring New Dispute*, WALL STREET JOURNAL (4 March 2011), <http://www.wsj.com/articles/SB10001424052748703300904576178161531819874>.
- Jane Perlez, *Rodrigo Duterte and Xi Jinping Agree to Reopen South China Sea Talks*, NEW YORK TIMES (20 October 2016), available from <http://www.nytimes.com/2016/10/21/world/asia/rodrigo-duterte-philippines-china-xi-jinping.html>

- Jay Batongbacal, *Scarborough Shoal: A Red Line?*, ASIA MARITIME TRANSPARENCY INITIATIVE (25 April 2016), <https://amti.csis.org/scarborough-shoal-red-line/>
- Jesse Johnson, *China Flies Nuclear-Capable Bomber Near the Scarborough Shoal, Vows to Make South China Sea Patrol Regular Practice*, JAPAN TIMES (19 July 2016), available from <http://www.japantimes.co.jp/news/2016/07/19/world/china-announces-closure-part-south-china-sea-waters-due-military-exercises/#.WCCYEOErIdU>
- Julian Ku, *Why the US is not invoking international law to oppose China's ADIZ*, OPINIO JURIS (8 December 2013), <http://opiniojuris.org/2013/12/08/china-correct-adiz-necessarily-violate-international-law-doesnt-make-right/>
- Katie Hunt and Steven Jiang, *South China Sea: China may Establish an Air Defense Zone After Losing Court Ruling*, CNN (13 July 2016), <http://www.cnn.com/2016/07/13/asia/south-china-sea-ruling-reaction-adiz/>
- Kimberly Hsu and Craig Murray, *China's Expanding Military Operations in Foreign Exclusive Economic Zones*, US-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH BACKGROUNDER (19 June 2013).
- Kor Kian Beng, *China, ASEAN Agree to Examine S'pore Proposal on South China Sea*, STRAITS TIMES (2 March 2016), available from <http://www.straitstimes.com/asia/east-asia/china-asean-agree-to-examine-spore-proposal-on-south-china-sea>
- Lisa Nemeth, *The Use of Pauses in Coercion: An Examination in Theory* (21 May 2009) (unpublished monograph, School of Advanced Military Studies, United States Army Command and General Staff College)
- Mark Valencia, *The U.S.-China MOU on Air and Maritime Encounters*, THE DIPLOMAT (17 November 2014), available at <http://thediplomat.com/2014/11/the-us-china-mou-on-air-and-maritime-encounters/>
- Matthew Waxman, *China's ADIZ at 1 Year: International Legal Issues*, ASIAN MARITIME TRANSPARENCY INITIATIVE (25 November 2014), <https://amti.csis.org/chinas-adiz-at-one-year-international-legal-issues/>
- Peter Symonds, *China Issues Warning to Australia Over South China Sea*, WORLD SOCIALIST WEBSITE (2 August 2016), available from <https://www.wsws.org/en/articles/2016/08/02/aust-a02.html>

- PH, Vietnam to put up Permanent Hotline vs Illegal Fishing*, SUN STAR MANILA (26 July 2015), <http://www.sunstar.com.ph/manila/local-news/2015/07/26/ph-vietnam-put-permanent-hotline-vs-illegal-fishing-421032>)
- Prashanth Parameswaran, *Malaysia Wants Expanded Naval Protocol Amid South China Sea Disputes*, THE DIPLOMAT (4 December 2015), available from <http://thediplomat.com/2015/12/malaysia-wants-expanded-naval-protocol-amid-south-china-sea-disputes/>
- Prashanth Parameswaran, *Singapore Wants to Defuse South China Sea Tensions with Naval Protocol*, THE DIPLOMAT (2 March 2016), available from <http://thediplomat.com/2016/03/singapore-wants-to-defuse-south-china-sea-tensions-with-naval-protocol/>
- Prashanth Parmawesan, *ASEAN Sets Up New Hotline amid South China Sea Tensions*, THE DIPLOMAT (4 November 2015). Available at <http://thediplomat.com/2015/11/asean-sets-up-new-hotline-amid-south-china-sea-tensions/>
- Prashanth Parameswaran, *China Enforcing Quasi-ADIZ in the South China Sea: Philippine Justice*, THE DIPLOMAT (13 October 2015), <http://thediplomat.com/2015/10/china-enforcing-quasi-adiz-in-south-china-sea-philippine-justice/>
- Richard Heydarian, *Philippines: Rodrigo Duterte's Pivot to China*, AL JAZEERA (14 October 2016), available from <http://www.aljazeera.com/indepth/opinion/2016/10/philippines-rodrigo-duterte-pivot-china-161012062518615.html>
- Robert Beckman and Hao Duy Phan, *Air Defence Identification Zones: Implications for Freedom of Overflight and Maritime Disputes*, paper presented in December 2014 at the “South China Sea: Cooperation for Regional Security and Development” at Da Nang, Vietnam
- Rommel C. Balaoi, *A Functionalist Approach to the Management of Conflicts in the South China Sea: Option for China and ASEAN Claimants*, Paper presented during the 4th China-ASEAN Research Institutes Roundtable, University of Hong Kong (18-20 October 2001)
- Rory Medcalf and Raoul Heinrichs, *Crisis and Confidence: Major Powers and Maritime Security in Indo-Pacific Asia*, LOWY INSTITUTE FOR INTERNATIONAL POLICY 26 (June 2011)

- Ross Logan, *Will the China and the US be at War Next Week? Beijing Set to Defy Hague Ultimatum*, EXPRESS (9 July 2016), available from <http://www.express.co.uk/news/world/687897/China-US-war-next-week-Beijing-defy-Hague-sea-ultimatum>
- Shannon Tiezzi, *Revealed: China's Reasons for Island-Building in the South China Sea*, THE DIPLOMAT (10 April 2015), <http://thediplomat.com/2015/04/revealed-chinas-reasons-for-island-building-in-the-south-china-sea/>
- Stephen Chen, *Could China Build the World's Smallest Nuclear Power Plant and Send it to the South China Sea?*, SOUTH CHINA MORNING POST (11 October 2016), available from <http://www.cnbc.com/2016/10/11/could-china-build-the-worlds-smallest-nuclear-power-plant-and-send-it-to-the-south-china-sea.html>
- Steven Stashwick, *South China Sea: Conflict Escalation and Miscalculation Myths*, THE DIPLOMAT (25 Sept 2015). Available at <http://thediplomat.com/2015/09/south-china-sea-conflict-escalation-and-miscalculation-myths/>
- Thitinan Pongsudhirak, *ASEAN's Disunity Undermines its Centrality*, THE STRAITS TIMES (21 June 2016)
- Todd Crowell, *A Coast Guard Arms Race*, Real Clear Defense (23 May 2016), http://www.realcleardefense.com/articles/2016/05/23/a_coast_guard_arms_race_109386.html
- VTFU *Slams China's Fishing Ban*, VIETNAM NEWS (21 May 2016), <http://vietnamnews.vn/politics-laws/297056/vftu-slams-chinas-fishing-ban.html#6wdd78ZDVLfiKcgu.97>
- Wilson Lee Flores, *How Duterte Conquered Beijing with his Maverick Style and Bold Diplomacy*, PHILIPPINE STAR (30 October 2016), available from <http://www.philstar.com/sunday-life/2016/10/30/1638593/how-duterte-conquered-beijing-his-maverick-style-bold-diplomacy>