Mare Interpretatum:
Continuity and Evolution in States' Interpretations of the Law of the Sea

by

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Submitted to the Department of Political Science
in Partial Fulfillment of the Requirements for the Degree of

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Abstract

Disagreements over how to interpret the international law of the sea have caused contention among the United States, China, and other Asian nations as the regional balance of power has shifted in recent decades. This dissertation examines the sources of those disagreements, investigating why states favor *mare liberum* ("the free sea"), claiming limited jurisdiction over the oceans, or *mare clausum* ("the closed sea"), claiming expansive authority at sea, and how their interpretations change over time. I argue that countries interpret the law of the sea in ways that serve their strategic interests, treating the ocean as neither *mare liberum* nor *mare clausum*, but instead *mare interpretatum*. In their legal interpretations, states balance their interests in protecting against perceived threats along their own coasts with their interests in conducting operations near other states' coasts, while also seeking legitimacy in the international community. States are reluctant to change their interpretations lest they incur hypocrisy costs, but they still often find ways to adapt to shifting material circumstances by exploiting ambiguity in their past rhetorical positions to alter their claims subtly.

I illustrate this argument by analyzing how countries have interpreted the law of the sea across time and space, coupled with in-depth qualitative case studies of China, Japan, the United States, and the Soviet Union, drawing upon archival materials, government statements, legal commentaries, and interviews with more than 100 officials and experts in six countries. My principal case study traces evolution in China's interpretations of the law of the sea governing foreign military activities in territorial seas, straits, and exclusive economic zones; maritime entitlements of islands; and historic rights and waters. I find that despite the history of U.S.-China competition over the meaning of "freedom of navigation," China's interpretation of this principle has begun converging with the U.S. interpretation as its own naval power has grown. At the same time, facing perceived threats to its maritime interests, Beijing has made expansive legal claims in the South China Sea, damaging its legitimacy among its neighbors. These dynamics will play a crucial role in shaping prospects for maritime peace and security in Asia.

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I am most grateful to my family. My parents and grandparents instilled in me a love of learning, a commitment to education, and a deep and abiding curiosity about world affairs. Their belief in me has carried me from the potato farm in Idaho where I was privileged to be raised to field research on three continents and a PhD. My siblings have also provided important love and support. I'm especially grateful to my younger sister for always being there whenever we needed help through a health crisis or just a weekend away. Above all, I thank my husband and son for their unfailing love, patience, and trust. My husband has always been my greatest intellectual partner and my strongest emotional support, even while completing his own PhD simultaneously. My son has been an unending source of joy, hope, and wonder, brightening every step of this journey. It has been a blessing to travel the world as a family for our research and to make meaning of this experience together. I dedicate this dissertation to the two of them.

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List of Tables and Figures

Note: Sources for several of the following tables and figures are provided in a caption adjacent to the respective table or figure; otherwise, tables and figures were created by the author.

List of Abbreviations

ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
CCP	Chinese Communist Party
CLCS	Commission on the Limits of the Continental Shelf
CNOOC	China National Offshore Oil Corporation
EEZ	exclusive economic zone
EFZ	exclusive fishery zone
FONOP	freedom of navigation operation
G-77	Group of 77
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICNT	Informal Composite Negotiating Text
ILA	International Law Association
ILC	International Law Commission
IMO	International Maritime Organization
IR	international relations (academic discipline)
ISNT	Informal Single Negotiating Text
JDA	Japan Defense Agency
JMSDF	Japan Maritime Self-Defense Force
LTE	low-tide elevation
MFA	Ministry of Foreign Affairs (People's Republic of China)
MND	Ministry of National Defense (People's Republic of China)
MSR	marine scientific research
nm	nautical mile

NPC	National People's Congress
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PLA	People's Liberation Army
PLAN	People's Liberation Army Navy
PRC	People's Republic of China
ROC	Republic of China
RSNT	Revised Single Negotiating Text
SLOCs	sea lines of communication
SOA	State Oceanic Administration
SSBN	ballistic missile submarine
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNGA	United Nations General Assembly
USNS	U.S. Naval Ship
WTO	World Trade Organization

Note on Place Names

When referring to disputed land features in the South China Sea, I generally use the English terms for the islands and reefs (for example, the Paracel Islands, the Spratly Islands, and Scarborough Shoal). However, when referring specifically to China's claims and its interpretations of the law of the sea applying to those islands, I use the Chinese terms (for example, Xisha Qundao, Nansha Qundao, and Huangyan Dao). See note 9 in chapter 8 for further details on these islands and the terminology used by various claimants.

When referring to the islands claimed by both Japan and China in the East China Sea, I generally use both their Chinese and Japanese names (Diaoyu and Senkaku), leading with the Chinese name in the chapters on China's interpretations of the law of the sea and with the Japanese name in the chapter on Japan's interpretation of the law of the sea. On limited occasions when referring specifically to one country's claims, I use only the name used by that country's government.

None of my terminology is meant to express a normative judgment of the superiority of any country's claims to sovereignty over disputed land features. It is instead meant to accurately reflect the terminology used by the claimants whose interpretations are being analyzed.

Preface

"A pragmatic researcher will acknowledge that the main purpose of research is the generation of useful knowledge with a particular research interest in mind. … [T]he interest of the researcher should always be clearly stated. It will then be up to the relevant evaluators and the peer community at large to establish whether and to what extent some research serves a legitimate, useful, and socially relevant purpose."

> – Jörg Friedrichs and Friedrich Kratochwil, "On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology," *International Organization* 63 (4): 715–716

With this dissertation, I aspire to a pragmatic scholarly purpose: to generate knowledge about a particular issue of importance to the world that may be useful in helping humanity to pursue a course of action that will reduce suffering and enhance flourishing. Specifically, I seek to increase our collective national and global understanding of the nature and sources of disagreements between China and the United States over the meaning of "freedom of navigation" and related concepts in the law of the sea, and to place those disagreements in broader historical and comparative context. I seek this understanding to enable evaluation of whether or not there is room for mutual compromise on these issues that can serve, or at least not harm, the fundamental interests of each side. I seek to uncover insights that could minimize bilateral antagonism in the maritime domain and prevent it from spilling over into the broader relationship by contributing to generalized distrust, resentment, and hostility or precipitating crises at sea that escalate into broader conflict.

Such undesirable and potentially grave outcomes would be particularly senseless if there is in fact room for what American IR theorists often call "positive-sum" approaches, or what Chinese strategists often dub "win-win" (*shuangying*, 双赢) solutions, between the United States and China in the maritime realm. But even if such positive-sum outcomes are not in the offing, the suffering that could result from unmitigated U.S.-China maritime hostility requires us to explore whether or not there may be room for a mutually acceptable bargain. In such a bargain, the United States and China may both have to give up something they want—such as unfettered access or unchallenged control—in order to obtain outcomes they want even more—maritime order, bilateral peace, and regional and global stability. This will likely require greater acceptance of mutual vulnerability on the part of both a resentful China seeking to use its growing power to escape its historical defenselessness against foreign powers and an intransigent America striving to preserve its unchallenged dominance in an irrevocably altered world.

As the following chapters reveal, I perceive these U.S.-China dynamics through an intellectual framework that emphasizes both the strategic ways that countries use international law to promote their interests, and the social and conceptual ways in which law shapes their behavior (for better or worse). I have developed this intellectual approach over the course of more than a decade of research and practice, beginning with a college internship in the China Affairs bureau at the Office of the United States Trade Representative. As I conducted research for a World Trade Organization (WTO) dispute brought by the United States against China regarding market access for audiovisual products, I became interested in the way these two countries made use of international law to promote their national interests and the narrower interests of particular sectors and corporations. I subsequently decided to write my undergraduate senior honor's thesis

on China's involvement in the WTO dispute settlement mechanism. In that thesis, I evaluated China's experience in the WTO through then-conventional theoretical lenses in IR from both the "rationalist" and "constructivist" schools, and ultimately felt mildly dissatisfied with both approaches. It seemed obvious based on both my first-hand observations of China's practices and my in-depth research that China's behavior was both rational and social, both strategic and constructed, and that these oft-juxtaposed "paradigms" were in fact two sides of the same coin rather than mutually exclusive theoretical explanations. Purely rationalist explanations failed to capture the richness of the social environment in which China was enmeshed and the significance of the social incentives it faced, while constructivist explanations underappreciated the banally calculating nature of states' engagement in the WTO dispute settlement mechanism.

More damningly, the liberal formulations of constructivism that then predominated tended to treat China (and other developing, non-Western states) as an object to be socialized into Western institutions by those institutions' enlightened liberal architects and technocratic stewards. Perhaps due to my anti-elitist conservative upbringing in rural Idaho, this struck me as a somewhat self-justifying and naïve explanation for liberal academics to promulgate. Rather, it seemed clear that China was a strategic actor in its own right seeking to pursue its interests, just as surely as American and European actors were seeking to pursue theirs, while China was doing so on institutional grounds it did not design and in which it was structurally disadvantaged as a function of language, legal culture, and social networks. Standard liberal approaches to understanding and "shaping" a rising China's role in the world thus seemed a recipe for disappointment and resentment rather than a path toward productive and peaceful coexistence.

These interests were further piqued during my years spent studying crisis management between the United States and China as a Research Analyst at the Carnegie Endowment for International Peace. As I studied the potential risks of escalation during crises arising from close encounters between U.S. and Chinese military vessels in the air and waters near China's coasts, I was struck by the exacerbating role of disagreements over what was permissible in those areas under international law. Both sides insisted that their interpretation of the law was correct—with China contending that U.S. surveillance in waters off its coasts was a violation of the United Nations Convention of the Law of the Sea, and the United States asserting that its activities fell under the umbrella of high seas freedoms to which it was fully entitled under customary international law.

In time I would also come to better understand the military strategies that underlay each country's position: a desire on China's part to establish a security buffer zone not only around Chinese territory in general but also around China's most important and sensitive naval base on Hainan Island in the South China Sea, and a desire on the United States' part to monitor Chinese military growth and survey China's near seas with the particular objective of bolstering its anti-submarine warfare capabilities and tracking Chinese nuclear-armed submarines. But the conflict between these military strategies itself presented an obstacle to the overarching shared objective of managing crises, preventing conflict, and promoting cooperation between the two sides. Although it was possible to conceive of alternative military strategies and bilateral arrangements that could reconcile these oppositional objectives and serve the interests of both nations, it struck me that moralistic arguments about legal rights and entitlements were serving to entrench each side in their oppositional strategies and unreconciled positions.

Unbeknownst to me, my thinking echoed the words of British academic and naval observer Ken Booth, which I would encounter nearly a decade later in the course of my dissertation research:

> Those who see the law of the sea issues as theology rather than politics will cling to positions with more determination than objective interests might dictate. In addition, differing viewpoints will tend to be dismissed as illegitimate, and their holders seen as evil, rather than simply different. … It is therefore important to divest our thinking of maritime theologies. This is easier said than done, for the mighty tend to dress up their interests in ideological garb, as indeed do the meek.[1]

Ultimately, this dissertation aspires to equip analysts and policymakers in Washington, Beijing, and beyond with the theoretical and empirical tools that will enable them to "divest [their] thinking of maritime theologies" in order to better serve our separate and collective "objective interests." I hope this research will aid scholars and statespersons alike in looking beyond paeans to "liberal international order" and "freedom of the seas," beyond accusations about "maritime hegemony" and "militarization" of the seas, to see how our national maritime interests do and do not coincide and to identify paths forward that are both rational and constructive.

[1] Booth 1985, 17.

Chapter 1: Why States Interpret the Law of the Sea

"With the joint efforts of China and the states bordering the South China Sea, the overall situation in the South China Sea is peaceful. Freedom of navigation and overflight has never been a problem, and it will not be a problem in the future, because first of all China needs unobstructed navigation in the South China Sea. China will work directly with the involved parties to resolve disputes through negotiations and consultations, in adherence to the basis of respecting historical facts and in accordance with international law."[1]

– Chinese President Xi Jinping, speech at the National University of Singapore, November 7, 2015

"China has taken some expansive and unprecedented actions in the South China Sea, pressing excessive maritime claims contrary to international law. … The United States is … determined to stand with partners in upholding core principles, like freedom of navigation and overflight, free flow of commerce, and the peaceful resolution of disputes, through legal means, in accordance with international law."[2]

– U.S. Secretary of Defense Ash Carter, speech at the U.S. Naval Academy, May 27, 2016

In the growing peacetime naval contest between the United States and China, the divergence in the two countries' interpretations of the law of the sea has become a locus of contention. Washington insists on its right to operate its government vessels in the air and waters near China's coasts largely unimpeded, while Beijing has claimed that foreign military vessels in such areas are subject to its jurisdiction and must seek permission before conducting surveillance

[1] Xi Jinping, "深化合作伙伴关系共建亚洲美好家园 (Shēnhuà hézuò huǒbàn guānxì gòng jiàn yàzhōu měihǎo jiāyuán) [Deepen Cooperative Partnerships to Build a Beautiful Home in Asia]," speech at the National University of Singapore, http://www.fmprc.gov.cn/web/ziliao_674904/zyjh_674906/t1312922.shtml, accessed May 21, 2017, excerpt trans. by the Author.

[2] U.S. Secretary of Defense Ash Carter, "Remarks at U.S. Naval Academy Commencement," Annapolis, Maryland, May 27, 2016, https://www.defense.gov/News/Speeches/Speech-View/Article/783891/remarks-at-us-naval-academy-commencement, accessed May 21, 2017.

In a speech delivered seven months earlier, coincidentally on the same day as Xi Jinping's speech cited above, Carter also stated:

> The principles that serve as [the international] order's foundation – including peaceful resolution of disputes, freedom from coercion, respect for state sovereignty, freedom of navigation and overflight – are not abstractions, nor are they subject to the whims of any one country. … The United States … [knows] the good that a principled international order has done, and will do. But in the face of Russia's provocations and China's rise, we must embrace innovative approaches to protect the United States and strengthen that international order.

U.S. Secretary of Defense Ash Carter, "Remarks on 'Strategic and Operational Innovation at a Time of Transition and Turbulence,'" Reagan National Defense Forum, Simi Valley, California, November 7, 2015, https://www.defense.gov/News/Speeches/Speech-View/Article/628146/remarks-on-strategic-and-operational-innovation-at-a-time-of-transition-and-tur, accessed May 21, 2017.

there. Both states maintain that they prioritize "freedom of navigation" (*hangxing ziyou*, 航行自由) and have done nothing to obstruct it, and each side insists that its position is firmly grounded in international law. Chinese leaders imply that the U.S. emphasis on freedom of navigation is a pretext for the United States to intervene in the South China Sea disputes and reassert its military power in the region, while U.S. officials suggest that China's claims and behavior in the maritime realm are a threat to the international order.

This dueling rhetoric reveals that the United States and China clearly disagree over how to interpret the meaning of freedom of navigation as a principle in the international law of the sea. What explains these disagreements? The standard rule of thumb used by most maritime legal experts to account for how states interpret the international law of the sea draws upon the binary distinction between "maritime powers" and "coastal states."[3] The group of maritime powers especially includes those states that possess strong blue water navies, though it sometimes also encompasses states with large long-range and deep-sea fishing fleets and shipping industries. These powers are likely to make limited jurisdictional claims and advocate a broader norm of minimal coastal state jurisdiction. Meanwhile, "coastal states" is a term used to refer to essentially all non-landlocked countries who lack strong navies (or extensive far-seas fishing and shipping industries).[4] These states are expected to claim more jurisdiction over the oceans as a means of limiting their vulnerability to threats and augmenting their control of resources. Their interpretations of the law of the sea will be designed to justify such expansive claims.

[3] Bateman 2006; Churchill 2005; Kraska and Pedrozo 2013.

[4] Scholars employing the terms "maritime powers" and "coastal states" rarely explicitly define these terms. The United Nations Convention on the Law of the Sea itself refers to all non-landlocked states in the world as "coastal states" in the context of those maritime zones that are adjacent to the coasts of the state. The actual convention does not use the term "maritime states" or "maritime powers"; nonetheless, observers and analysts of the law of the sea have applied these labels to a subset of coastal states and have juxtaposed their interests, preferences, and behaviors to those of other coastal states.

Another distinction stressed by legal and diplomatic historians in their accounts of countries' varying attitudes during negotiations over the law of the sea is that between developed and developing states.[5] Like the geographic model, this explanation is dichotomous, but it defines the categories in terms of economic development status rather than geography, naval power, or maritime economic dependence. This economic model posits that developing states will argue for wide territorial seas and exclusive economic zones (EEZs) with expansive sovereign ownership and regulatory control of marine resources in those zones.[6] Scholars employing this model primarily emphasize the economic dimensions of the law of the sea, but also contend that developing states are likely to advocate greater coastal state jurisdiction over military vessels for security and environmental reasons.[7]

Finally, scholars also stress the role that states' particular geographical features played in shaping their attitudes during the Third United Nations Conference on the Law of the Sea (UNCLOS III). For example, states with large continental margins formed a negotiating group that bargained against groups of states with narrow continental shelves. States that straddled key straits, states composed of islands or with offshore island groups, and states adjacent to semi-enclosed seas all had particular interests resulting from those unique geographical features and often formed blocs based on those shared characteristics. These factors presumably continue to shape those states' interpretations of the convention that resulted from that conference, the United Nations Convention on the Law of the Sea (UNCLOS).

[5] Galdorisi and Vienna 1997; Morell 1992; Rothwell and Stephens 2010.

[6] This model also explains support or opposition to the International Seabed Authority, a redistributive regime established by UNCLOS to govern the deep seabed beyond EEZs and continental shelves, wherein mineral resources are seen as "the common heritage of mankind" and the profits from exploiting them are shared among nations, with transfers of mining technology from developed to developing states.

[7] Galdorisi and Vienna 1997.

Where the Conventional Wisdom Falls Short: Processes and Puzzles

There is a baseline of logical and empirical truth to these conventional wisdoms about why states interpret the law of the sea in favor of greater or lesser coastal state jurisdiction at sea. To be sure, distinctions they draw are highly simplified and imprecise, and when applied to individual cases, these explanations will often break down. This is reflected in observers' reports that the divisions among states at UNCLOS III were highly complex and did not necessarily correlate across issue area, particularly across military and economic matters.[8] But to some extent, this is true when any ideal-typical model is applied to actual cases in the real world: numerous outliers will crop up, and very few cases will align exactly with the prediction of the model. This does not necessarily invalidate the model, as long as it still is able to tell us something useful about the forces and interests that shape the outcomes we observe.

The real problem with the standard models of how different states interpret the law of the sea arises instead when those interpretations are evaluated not only at the outset of the new UNCLOS regime, but also over time. Seen in this light, the models lose their practical utility, as they are unable to explain the processes and mechanisms by which states' interpretation will persist or evolve as their own maritime power and interests wax and wane. Though these models identify some of the material interests that might lead states to interpret the law of the sea in favor of more or less coastal state jurisdiction at sea differently over time, they cannot explain how states change their interpretations. In other words, though they may able to explain that A plus B will lead a state to change its interpretation from Y to Z, they cannot explain the mechanisms by which the state will shift from Y to Z. This lack of process-oriented detail makes it difficult to evaluate whether the model's predictions are coming to pass because of causes A

[8] Miles 1977; Morell 1992; Sebenius 1984.

and B or because of different factors entirely (say, C and D) that just happened to coincide with those causes. It also makes it difficult for practitioners to understand what levers and tools might be most helpful in crafting their own interpretations and responding to those of other states.

Even more damningly, the standard models fail to account for the legal interpretations of the People's Republic of China (PRC), the case that lies at the heart of the escalating twenty-first century maritime competition. At the time that UNCLOS III concluded in 1982, China was decidedly a coastal power with very little naval power to speak of. In the four decades that have passed since that time, China has become one of the world's foremost naval powers, with more ships in its navy than the United States. The People's Liberation Army Navy (PLAN) frequently operates beyond China's near seas, as do China's numerous civilian marine scientific research fleets and long-distance fishing fleets. These expanding operations reflects the PLAN's expanding missions to defend the sea lines of communication upon which China's economy depends and protect China's growing overseas investments and diaspora population, especially along the Maritime Silk Road (the "road" in China's Belt and Road Initiative). They also reflect China's desire to explore the oceans both for resource exploitation purposes and to facilitate operations for China's growing submarine fleet, including its ballistic missile submarines (SSBNs) that form a crucial part of its nuclear deterrent. And they reflect its growing economic interests in resources located far from its own shores. China's geographical position also complicates the ability of its navy to access the open ocean, hemmed in as it is by the "first island chain," which consists of several U.S. allies and naval partners, including Japan, Taiwan, the Philippines, and Singapore.

However, notwithstanding these strong incentives to adopt a more limited approach to coastal state jurisdiction that ensures freedom of navigation and access for PLAN vessels

through key chokepoints and waterways in the first island chain and beyond, China has largely hewed to its longstanding coastal state approach. Although some of its interpretations, especially regarding the issues of transit passage in straits and foreign military activities in the EEZ, have evolved in subtle ways over the past decade, China has doubled down on its interpretations favoring expansive jurisdiction in other areas, such as requiring permission for innocent passage of warships in its territorial sea, claiming expansive maritime entitlements from offshore archipelagoes, and asserting historic rights in extensive sea areas.

In other words, China has not fully updated its maritime claims and legal interpretations in reflection of its evolving interests as a maritime power. This is the puzzle that this dissertation sets out to explain. I combine an in-depth within-case analysis of China's interpretations of the law of the sea with a comparative case study of Japan, another Asian power whose claims to maritime jurisdiction are more limited than China's, though less limited than commonly presumed. I supplement these in-depth case studies with shadow cases of how other major maritime powers, the United States and Russia, have interpreted the law of the sea over time. I also situate all of these cases within a broader historical context and cross-national description of states' maritime jurisdictional claims. Through this empirical analysis, I am able to develop answers to the following questions: What explains whether states interpret the law of the sea in favor of *mare liberum* ("the free sea") or *mare clausum* ("the closed sea")?[9] And what shapes the evolution in their interpretations over time? My research demonstrates that countries treat the sea as neither *mare liberum* nor *mare clausum*, but *mare interpretatum*—interpreting the law of the sea to serve their strategic interests and establish their legitimacy before international actors.

[9] *Mare liberum* is a term famously coined by Hugo Grotius in 1609 when he was defending Dutch piracy against Portuguese imperial control in the waters of the "East Indies." *Mare clausum* is a term used by John Selden in his rejoinder to Grotius asserting England's claims to sovereignty over its adjacent waters. This Grotius-Selden exchange is discussed in greater detail in chapter 3.

Overview of the Argument and Dissertation Structure

To begin, I argue that states interpret the international law of the sea for both constitutive and strategic reasons. Regarding the former, they interpret the law of the sea because doing so is a basic social requirement of states in the international system situated in a physical environment of land, sea, and air. Such interpretations *constitute* states as social actors relative to other states and their own people. At the same time, states proactively seek to interpret the law of the sea in ways that promote their *strategic* interests. These strategic interpretations will be informed in part by states' efforts to balance between their competing interests in expansive jurisdiction along their own coasts and free access to waters and airspace near other states' shores. However, states will also seek to use these interpretations to bolster their legitimacy in the eyes of other states in order to enhance their power and influence with those states.

I situate these basic dynamics within historical context. I argue that states form their initial interpretations of the law of the sea when either their own domestic political regime is first forming or when they are first negotiating relationships with other states operating in their waters. States base those initial interpretations on their strategic interests at the time, weighing the balance between their maritime threat perceptions along their own coasts and their interest in conducting operations in other states' waters, as conditioned by their maritime geography. At the same time, states will also seek to interpret the law in ways that bolster their legitimacy in the international community, especially in the eyes of other states that form part of their social reference group. Those efforts at rhetorical legitimation in turn reinforce states' initial interpretations and make them resistant to change. If states are seen as altering their interpretations in response to their narrow shifting geopolitical interests, they risk incurring

hypocrisy costs, especially if those interpretations are seen to be self-serving, unfair, or otherwise illegitimate to other states within the state's social reference group.

Although legitimation strategies impose constraints, they do not serve as iron cages preventing states from any strategic adaptation to changing material circumstances. If a state's material circumstances change—such as the growth or increased presence of a foreign power operating near its shores, or an expansion in its own overseas interests and naval power—pressures will arise that can counteract the path dependency of legitimation. Without abandoning its initial interpretations, leaders, bureaucrats, and other state actors may find ways to exploit ambiguity and silences in the state's own past rhetorical interpretations to subtly alter its overall interpretive stance. This occurs through mechanisms of displacement, layering, drift, and conversion (terms that will be described in greater detail in chapter 2). These processes of interpretive evolution risk introducing legitimacy gaps, as they often entail inconsistency between a state's past and present interpretations, between its rhetoric and behavior, and among the interpretations of different actors within the state. These risks will thus constrain the state from more dramatic interpretive change, unless there is a new critical juncture in the overall maritime regime or a fundamental shift in the state's social reference group.

I develop this theoretical argument and illustrate it empirically over the course of eleven chapters. In the remainder of this first chapter, I explain the need for this dissertation to address misconceptions in the policy world and inattention in the scholarly world. Then I expound upon the basic theoretical assumptions that undergird my argument by describing why states interpret the law of the sea in the first place. After this introductory chapter, the second chapter establishes the project's theoretical foundation. The chapter begins with a detailed expansion of the standard model of how states interpret the law of the sea. I argue that although this model contains

important insights about the basic incentives state face as a result of their geopolitical positions, it is incomplete, as it cannot account for both processes of change in states' interpretations and actual observed patterns in those interpretations, especially lag and continuity. The chapter then presents a theoretical explanation of how states' interpretations of the law of the sea evolve over time. I conclude the chapter by describing my empirical strategy and research design, including case selection, measurement, sources, and how I evaluate evidence for my theory.

After laying the theoretical foundations of the dissertation, I establish its empirical foundation in the following three chapters. Chapter 3 narrates the history of how sovereigns and states have sought to order the oceans from antiquity to the present. I begin by analyzing how sovereigns used force and norms to govern the pre-modern maritime trade networks of the Indo-Mediterranean and medieval Europe, before describing how European imperialism shaped the emergence of key early concepts in the law of the sea, such as "freedom of the seas" and the territorial sea. The chapter then traces the development of the modern law of the sea through the codification efforts of the early to mid-twentieth century, culminating in UNCLOS III and the United Nations Convention on the Law of the Sea. The following chapter provides more detail on the negotiations that took place at UNCLOS III, describing the complex compromises, ambiguities, and omissions entailed in the final convention text. The chapter then conducts a focused analysis of the negotiating history and current contestation in four key controversial areas of the law of the sea, including (1) innocent passage and transit passage of foreign warships in territorial seas and straits, (2) foreign military activities and marine scientific research in the exclusive economic zone, (3) islands, rocks, archipelagoes, and their maritime entitlements; and (4) historic bays, waters, and rights. This analysis draws upon archival documents, official records, legal commentaries, and interviews with law of the sea experts from six countries.

Chapter 5 provides quantitative evidence from a new global dataset constructed for this dissertation of states' *de jure* maritime jurisdictional claims, coupled with shadow case studies of the United States and Russia. The cross-national data focuses on states' interpretations of the law of the sea in the four issue areas highlighted in the preceding chapter, among other topics. I then provide a number of caveats about how to interpret the quantitative data through analysis of the negotiating history of the issue of innocent passage of warships in the territorial sea and of the maritime jurisdictional claims of three South American states: Chile, Ecuador, and Peru. This analysis is based on primary and secondary sources and interviews conducted with fifteen South American policymakers, diplomats, and legal experts in May through August 2018. The shadow cases then investigate in greater depth how the maritime legal interpretations of the United States and the Soviet Union evolved as their naval power grew in the twentieth century. This analysis focuses on how these states interpreted the issues of territorial seas and innocent passage of warships, in the context of their broader approaches to "freedom of the seas."

The sixth through ninth chapters present an in-depth primary case study of China, while the tenth chapter presents a comparative case study of Japan. These chapters conduct careful discourse analysis and process tracing of how these two states have interpreted the law of the sea over time in the four focus areas. In chapter 6, I describe the overall historical evolution of China's relationship to the law of the sea, focusing on how China's legitimation strategies evolved over time as its social reference groups shifted, especially during the negotiations at UNCLOS III. In the following three chapters, I then trace the formation and evolution of China's interpretations of the law of the sea regarding innocent passage of warships in the territorial sea and foreign military activities in the EEZ (chapter 7), the maritime entitlements of islands and archipelagoes (chapter 8), and historic rights (chapter 9), respectively. Chapter 10 does the same

with Japan's interpretations of the law of the sea in each of those issue areas. I evaluate the original motivations of each state's interpretations in those areas, then explain how standard geopolitical incentives have interacted with legitimation pressures to shape patterns of continuity and evolution in those interpretations over time. The sources for this research include nearly 70 total interviews conducted in China and Japan from June 2015 through August 2019; hundreds of primary source documents gathered from UN and national databases, compendia, websites, and archives; and secondary sources such as peer-reviewed books and articles and policy analyses published by analysts within each country.

The concluding chapter of the dissertation explains the implications of the foregoing analysis for great power relations between the United States and China and for China's relationships with its maritime neighbors in a time of shifting power in the Indo-Pacific region. Reflecting on the long historical pattern of competition and convergence between established and rising great powers over the meaning of "freedom of the seas," I argue that China's interpretation of this principle has already started to converge with that of the United States. However, that convergence will likely be incomplete unless the United States accommodates some of China's core security concerns about U.S. military activities along its coasts. At the same time, I describe the ways in which China's interpretations of the law of the sea, especially in its claims to resources in the South China Sea, are damaging its legitimacy in the eyes of its neighbors. I reflect on whether China is likely to accommodate its neighbors' concerns as its power grows. I then highlight the ways in which U.S. interpretations of military activities at sea also conflict with those of most Asian nations. Finally, I conclude by arguing that states paradoxically must recognize the incomplete, partial, and contested nature of the maritime legal regime in order to

ensure that the law of the sea acts not as a site of conflict, but instead as a facilitator of maritime conservation, safety, and peace.

How States' Interpretations of the Law of the Sea Are Viewed in Practice and Scholarship

This dissertation meets urgent needs in both the realm of policy and practice and the realm of international relations scholarship.

Policymakers' Understanding of Contestation of the Law of the Sea

In the former, policy analysis and media reporting on the law of the sea in English-language sources is often ignorant of the wide diversity and complex history of states' interpretations of the law of the sea. Analyses of law of the sea issues frequently display an unwitting American or Western-centric bias, describing views that diverge from American interpretations as rarer or more isolated than they are in reality. American pundits rarely reflect on the reasons behind other countries' maritime jurisdictional claims or how they view U.S. interpretations of the law of the sea. Highly contested and multi-faceted norms such as "freedom of navigation" are treated as self-evident concepts that need little explanation. References to freedom of navigation seldom even distinguish between commercial and military navigation, much less between navigation and other types of activities at sea (such as military exercises or surveillance) or navigation in different maritime zones. By failing to place individual countries' interpretations of the law of the sea in broader historical and cross-national context or develop theoretically informed understandings of those interpretations, analysts often end up mischaracterizing or exaggerating those interpretations.

Given increased U.S.-China tensions in the maritime domain, this tendency is most common in how pundits describe China's maritime legal interpretations and claims. For

example, American journalists, policy analysts, and even some current and former U.S. officials incorrectly assert that China has claimed the South China Sea as "internal waters" or "territorial waters," or that it requires permission for foreign military vessels to pass through those waters.[10] Such mischaracterizations may serve narrow tactical purposes by helping to inflate threat perceptions of China in order to mobilize the American public for confrontation of Beijing. But since they distort reality, they risk needlessly exacerbating the security dilemma between the two countries by making Chinese officials feel that U.S. policymakers are operating in bad faith and unwilling to fairly communicate to resolve disputes. Such false characterizations also render American policy less credible to other nations that have a more accurate understanding of China's claims and in some cases actually share Beijing's interpretations of the law of the sea. This will likely undermine even a strategy of containment and competition, as other countries will hesitate to balance with the United States against China lest they become entrapped by a declining major power that does not accurately perceive the complex nature of the threats and opportunities posed by Beijing. Thus, whether pursuing a broader strategy oriented toward cooperation or competition, policymakers are ill-served by inaccurate portrayals of Chinese interpretations of the law of the sea that lack comparative and historical context. This dissertation seeks to equip analysts and policymakers with a more accurate understanding of why and how states—including but not limited to China—interpret the law of the sea, in order to enable the United States and other nations to more effectively craft their policies toward the maritime order.

Legal and International Relations Literature on China's Interpretations of the Law of the Sea

[10] See, for example, Patrick M. Cronin and Ryan Neuhard, *Total Competition: China's Challenge in the South China Sea* (Center for a New American Security, January 2020), https://www.cnas.org/publications/reports/total-competition; and James Stavridis, "A Cold War Is Heating Up in the South China Sea," *Bloomberg Opinion*, May 21, 2020, https://www.bloomberg.com/opinion/articles/2020-05-21/u-s-china-tension-over-trade-covid-19-rises-in-south-china-sea. I have also heard these claims in personal conversations with senior U.S. officials.

In addition to its policy-oriented purposes, this dissertation (especially chapters 6 through 9) represents a significant contribution to the academic literature on China's interpretations of the law of the sea. Much useful literature on China's approach to the law of the sea has been produced by legal experts, including edited volumes and monographs published by Martinus Nijhoff/BRILL,[11] Routledge/Taylor & Francis/Ashgate,[12] and the U.S. Naval War College,[13] innumerable articles in peer-reviewed journals dedicated to international law and marine policy in China and abroad, and a couple of edited volumes and law journal special issues during the *Philippines vs. China* arbitration case that present quasi-official views from Chinese scholars.[14] My analysis draws upon and cites this work. However, much of these analyses of China's interpretations neglect to analyze nuanced shifts in China's official discourse over time and give short shrift to some aspects of China's approach to the law of the sea, such as its stance on transit passage in straits used for international navigation. Analyses of China's interpretation of the law on military activities and navigation at sea are also outdated, with few studies of how its positions on these issues may (or may not) have changed over the past five to ten years as China's own naval and marine scientific research activities have expanded dramatically. Some of these studies are written more as defenses of China's position rather than analyses thereof.

Moreover, most of this literature is historical and descriptive in nature, rather than explanatory and theoretical. Few international relations (IR) scholars have devoted much attention to China's approach to the law of the sea, except for in relation to its behavior in

[11] Nordquist, Moore, and Fu 2006; Nordquist, Koh, and Moore 2009; Nordquist et al. 2012; Zou 2005.

[12] Hong and Wu 2014; Song and Zou 2014; Wu, Valencia, and Hong 2015; Wu and Zou 2013; Zou and Wu 2014; Wu and Zou 2016; Hong 2012.

[13] Dutton 2009; Dutton 2010; Xue 2008.

[14] Talmon and Jia 2014; Chinese Society of International Law 2018.

disputes over island territories and maritime jurisdiction in the East and South China seas.[15] This focus on China's maritime disputes rather than squarely on its approach toward the law of the sea leads scholars to focus on how China uses the law of the sea to defend its position in those disputes. This tends to obscure important developments in China's approach toward the law of the sea, including how it uses the law to shape the perceived legitimacy of both foreign and Chinese military and government vessels' activities in waters near its coasts and far afield.

The three most prominent exceptions to this neglect are a book by Nanjing University researcher Li Lingqun based on her dissertation in political science and international relations at the University of Delaware,[16] a dissertation by Isaac Kardon completed for his PhD in political science at Cornell University,[17] and a dissertation by Peter Dutton for a PhD in war studies from King's College London.[18] Li studies how China's legal positions on the South China Sea issue have evolved over time from the PRC's early years through the South China Sea arbitration case, along with analyses of China's regional political context, maritime law enforcement, and dispute management processes. Kardon focuses on the ways in which China has incorporated the international law of the sea into its domestic legal system and maritime law enforcement structures and practices. Dutton studies Chinese strategic attitudes toward maritime security and jurisdiction from imperial China through to the present, with case studies of its approach to the territorial sea and the East and South China Seas.[19]

[15] IR analyses of China's behavior in maritime disputes include Zhang 2018; Fravel 2008; Wang 2018. There is also a brief discussion of China's use of international law to bolster its legitimacy in the context of the South China Sea disputes in Goddard 2018.

[16] Kardon 2017.

[17] Ibid.

[18] Dutton 2019.

[19] Another important treatment of China's relationship to the law of the sea is Greenfield 1992. Greenfield assesses the PRC's approach to the law of the sea through June 1989. However, given this book's publication before China had ratified UNCLOS or even issued its 1992 law on the territorial sea and contiguous zone, Greenfield largely focuses on China's attitudes toward the law of the sea before and during UNCLOS III, rather than the evolution in

Each of these works contains valuable empirical treatments of China's relationship to the modern law of the sea regime. However, they focus largely on China's interpretations of maritime law related to the disputes in the South China Sea and East China Sea, neglecting China's interpretations of the law of the sea related to military activities in the territorial sea, straits, and EEZ. This is problematic because, as described above, China faces increasingly conflicting incentives to use its growing power to claim more jurisdiction in its near seas, on one hand, and to assert more freedom of access for its naval, fishing, and research fleets to operate in other states' waters, on the other. Omitting analysis of China's attitudes toward its own military and other activities farther afield risks distorting the overall picture of China's interpretations. It also leads these authors to miss some of the most significant examples of evolution in China's interpretations—evolution that at least in theory has the potential to boost its legitimacy among the reference group of major maritime powers, even while incurring hypocrisy costs among the reference group of weaker coastal states in China's neighborhood and beyond.[20]

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its views since that time, which is the focus of my study. Similarly, Samuel Kim's study of the PRC's early years in the United Nations devotes some attention to China's positions on the law of the sea during the Seabed Committee and UNCLOS III, but his study ends partway through 1978, several years before UNCLOS III concluded. Kim 1979, 444–57.

[20] In part due to our differing empirical strategies, my theoretical argument also diverges from those of Li, Kardon, and Dutton. Li acknowledges the interacting role of geopolitics and law, but she focuses on the role that the broader maritime regime has played in driving evolution in China's interpretations. By contrast, I stress the ways that China has strategically interpreted the law in order to defend its maritime interests, with a focus on how Beijing's desire to legitimate itself before other actors, rather than the design of the maritime regime itself, has constrained it from adopting interpretations that would incur large hypocrisy costs.

In a different theoretical mode, Kardon relies on transnational legal theory to emphasize the ways in which China's domestic marine legal regime is ultimately subordinate to the political imperatives of the party-state. However, my realpolitik lens and broader comparative approach lead me to stress the ways in which all countries interpret international law in ways that strategically serve their perceived interests, constrained by their need to retain legitimacy within their reference group. China's approach to doing so is not particularly unique. Nor are China's interpretations shifting uniformly in the direction of "creeping jurisdiction," as Kardon argues. I instead see more fundamental continuity in China's claims, as well as a more mixed direction of change.

Finally, Dutton applies geostrategic theory to analyze how China has strategically interpreted the law of the sea in ways that support its continentalist grand strategy to exercise greater control over its maritime periphery. Although I agree with his basic thesis, my theoretical argument combines such geopolitical factors with relational factors, stressing the way that China's interpretations are a function of its desire not only to enhance its security but also to bolster its legitimacy.

IR Literature on the Law of the Sea in General

Finally, this dissertation also seeks to rectify a long-standing neglect of the law of the sea in the international relations literature. Aside from a surge of interest in the law of the sea during the UNCLOS negotiations in the 1970s and 1980s, IR has largely neglected the law of the sea, in both its conventional and customary forms.[21] Moreover, the research from the 1970s and '80s that did address the law of the sea dealt primarily with economic and environmental issues involved in UNCLOS, including commercial shipping, seabed mining, fishing, and technology.[22] Only a small number of studies directly addressed security issues related to freedom of navigation, coastal state jurisdiction, and military activities at sea.[23]

In the decades since UNCLOS was concluded, some authors have analyzed UNCLOS as a case study in international negotiation, using it to test theories related to "multilateralism in large numbers," two-level games and domestic interests, and negotiator leadership styles.[24] Goldsmith and Posner discussed the evolution in the standard breadth of the territorial sea over the course of the nineteenth century as a case study of how customary international law evolves

[21] Perhaps the high-water mark of attention to the law of the sea in the IR literature was in the spring of 1977, when *International Organization* published a special issue devoted to the law of the sea. But in addition to this special issue, many foundational works on international order and international regimes published in the mid- to late 1970s and early 1980s highlighted as a prime example of their arguments the ongoing efforts to negotiate new rules to govern the oceans. Hedley Bull, writing in 1977, argued that despite international society being in a period of "inevitably contracting consensus," states were nonetheless committed to adhering "to some common terms of international law, *symbolized above all by the great world conventions on the law of the sea*, diplomatic and consular relations, and the law of treaties." Bull 1977, 154, emphasis added. Similarly, John Ruggie, in the same article in which he first employed the concept of a "regime" to assess international politics, referred to ongoing efforts to negotiate new rules surrounding fisheries and shipping as one of his main examples of a regime. See Ruggie 1975. In a special issue of *International Organization* on international regimes, Ernst Haas studied the evolution in the law of the sea regime as a case through which to evaluate several different theoretical approaches to regimes, with his own "evolutionary epistemology" attributing change in the law of the sea regime over time to new ways of thinking about the physical and social world and its interconnectedness. See Haas 1982.

[22] Brown and Fabian 1975; Conybeare 1980; Wijkman 1982.

[23] Booth 1985; Burke 1977.

[24] Kahler 1992; Moravcsik 1999; Sebenius 1983; Young 1991.

over time in accordance with the rational preferences of the most powerful state actors.[25] However, no scholars have assessed the ways that states have interpreted the jurisdictional and navigational rules of UNCLOS since it was signed in 1982 and went into effect in 1994, nor have they developed a theoretical explanation of how those interpretations evolve over time. In fact, the only two articles published in *International Organization* in the past decade that even mention the law of the sea do so in footnotes.[26]

Moreover, despite the close relationship between maritime law and naval power, the role of so-called legal warfare in anti-access/area-denial (A2AD) and counter-A2AD strategies, and the controversies surrounding U.S. military activities and freedom of navigation operations in the Western Pacific and Persian Gulf, relatively little work on the law of the sea has been published in the security studies subfield of IR or the related field of strategic studies. Paul Kennedy, in his study of the rise and fall of British naval power, touches only briefly upon British attitudes toward "freedom of the seas."[27] Barry Posen, in his seminal article on maritime security, does not address the way that America's "command of the commons" relies upon, employs, shapes, or otherwise interacts with maritime law.[28] Some important exceptions are works by James Kraska, who argues that expanding coastal state jurisdiction poses a threat to U.S. naval power, and Ken

[25] Goldsmith and Posner 2005.

[26] Brake and Katzenstein 2013; Milewicz and Snidal 2016. Brake and Katzenstein discuss the ways in which American legal practices are diffused into international institutions and other states through the legal education of international lawyers in U.S. law schools. The authors observe in a footnote that, in contrast to legal bodies in international financial institutions such as the World Bank and the World Trade Organization, relatively few members of the International Tribunal for the Law of the Sea, an arbitration body established by UNCLOS, were educated in U.S. law schools (only four of 21). Milewicz and Snidal erroneously list UNCLOS as an example of a treaty the United States has signed but not ratified. (In actuality, the United States signed an agreement on the implementation of Part XI of UNCLOS in 1994, but it did not sign the convention itself.)

There were similarly sparse references to the law of the sea in *International Organization* in the first decade of this century, consisting of only a handful of sentences on the law of the sea in articles on legalization in world politics, rational design of international institutions, and economic interdependence and war in 2000 and 2001, plus a footnote in a 2004 article on the international regime for plant genetic resources.

[27] Kennedy 1976.

[28] Posen 2003.

Booth, who challenges this conventional wisdom by arguing that growing territorialization of the oceans could enhance strategic stability and facilitate clearer signaling.[29] More recently, Nevers identifies a relationship between open shipping registries and maritime powers' approaches to sovereignty at sea,[30] and Nemeth et al. evaluates the role that UNCLOS and its exclusive economic zone regime play in exacerbating or mitigating interstate maritime or territorial disputes.[31] However, none of these scholarly works provides a systematic theoretical explanation for why states interpret the law of the sea in favor of more or less jurisdiction or for how those interpretations change over time.

In contrast, the disciplines of international law and legal history have devoted considerable attention to the law of the sea, with numerous institutes (such as the Center for Oceans Law and Policy at the University of Virginia), textbooks and handbooks,[32] and journals (such as *Ocean Development and International Law* and *Marine Policy*) devoted to the subject. However, although legal historians have studied the development of the modern law of the sea,[33] this work has focused on relating the details of the UNCLOS negotiations, with particular attention to the set-up and design of the negotiations themselves, without developing broader causal theories or explanations for why states adopted certain negotiating positions or interpreted the agreement in particular ways. Instead, to the extent that this specialized literature does discuss state attitudes toward the law of the sea both during the UNCLOS negotiations and since their conclusion, it generally treats them as self-evident on the basis of the aforementioned simplistic conventional wisdoms.

[29] Kraska 2011; Booth 1985.
[30] Nevers 2015.
[31] Nemeth et al. 2014.
[32] Churchill and Lowe 1999; Rothwell et al. 2015; Rothwell and Stephens 2010; Kraska and Pedrozo 2013.
[33] Morell 1992; Sebenius 1984.

Straddling these two disparate literatures, this dissertation develops a theoretically informed and empirically rich explanation of how states interpret the law of the sea and how those interpretations evolve over time. It merges theoretical insights from international relations scholarship, which has largely neglected the law of the sea, with empirical insights from international law scholarship, which has neglected to fully explain the maritime legal interpretations it has observed. In the process of doing so, the dissertation develops an argument that challenges standard liberal-rational institutionalist IR theory about compliance with international law and the legalization of the international order.[34]

Countering the basic assumptions of this compliance literature, I argue that states are not passive recipients of a received international regime choosing whether or not to comply with that regime's rules and norms. They are instead active subjects defining the law through the very process of interpreting it. Such interpretation is a basic feature of states' interaction with international law, as laws that supposedly demand "compliance" are themselves often ambiguous and contested, even in the presence of detailed treaties and robust institutional infrastructure. This does not reduce international law to an epiphenomenon, a mere tool used by the powerful to bend the world to its will[35] or an institution that has no independent effect on behavior.[36] International law does act as a constraint on state behavior, but only indirectly by serving as a site where states seek to rhetorically burnish their legitimacy in the eyes of key reference groups, while avoiding the hypocrisy costs that attend inconsistencies between behavior and rhetoric.

Theoretical Assumptions: Why States Interpret the Law of the Sea

[34] Guzman 2008; Chayes and Chayes 1993; Goldstein et al. 2000; Hathaway 2003; Lutmar, Carneiro, and Mitchell 2016; Raustiala and Slaughter 2002; Simmons 2010; Simmons 1998; Young 1979.

[35] Mearsheimer 1994.

[36] Downs, Rocke, and Barsoom 1996; Stein 2005.

Before presenting my theoretical argument about why states interpret the law of the sea in ways that favor greater or lesser state jurisdiction over the oceans and how those interpretations evolve over time (questions I will address in chapter 2), it is first necessary to understand why states interpret the law of the sea in the first place. This preliminary question requires a focus on the reasons that states go to the effort of interpreting what international law means. Answering this question will enable me to expound upon what I mean by "interpretation" of international law. It will also enable me to make explicit the assumptions underlying my ensuing explanatory theory of why states interpret a particular law (the international law of the sea) in a particular way. Finally, it will enable me to justify why interpretations of the law of the sea—as opposed to simply states' behavior at sea in isolation, their preferences during bargaining over the law of the sea, or their formal domestic maritime laws—are phenomena worthy of analysis.

The question is not easily legible when viewed through the lenses of dominant American approaches to international relations theory.[37] Structural realism would dismiss the question as unimportant, reasoning that discourse and rhetoric about the meaning of international law are mere epiphenomenal reflections of an underlying material reality—superstructural smokescreens for states' pursuit of wealth and military power. But such dismissal would sidestep the prima facie puzzle that this question presents: If the international system is one characterized by anarchy wherein no state can afford to recognize a sovereign legal authority higher than its own and animated by states' thirst for material security and prosperity, then why do states devote so much of their time and energy to arguing over the meaning of abstract concepts or words on paper—especially ones that purport to establish legal authority that constrains the state? If such

[37] I use the word "school" rather than paradigm since, as Jackson and Nexon argue, these intellectual traditions in American IR do not actually resemble paradigms in the Kuhnian sense. That is, as elaborated further below, they are not mutually incommensurable. See 2009.

interpretive efforts truly exert no independent or intervening effect on outcomes, then it makes little sense from a materialist-realist perspective why states engage in them.

At the same time, the question also presents a puzzle from a rational institutionalist perspective. If states engaged in a rational bargaining process accede to an international treaty or agree to be bound by a body of international law in order to promote certain concrete interests, why do they so vigorously contest the meaning of those agreements in their interpretations thereof? If states' accession to an agreement represents convergence on a point in the bargaining range, then it is puzzling from a strict rationalist perspective why they interpret that point as being located in different places.

More recent developments in IR theory, however, have sought to overcome the limitations of these strict so-called paradigms by reorienting IR theory categories toward cross-cutting research programs[38] focused on topics such as power politics[39] and repertoires of statecraft.[40] Scholarship in this vein "takes for granted that non-military instruments matter a great deal for power politics"[41] and argues that states employ diverse instruments to pursue power: economic, diplomatic, cultural, and symbolic, in addition to military. Rather than treating international institutions as either epiphenomenal superstructures or as rigid, objective, discrete structures, scholars are instead increasingly studying how states execute power politics through and in international institutions.[42] Such comprehensive attention enables a big-tent *realpolitik*

[38] Ibid.
[39] Goddard and Nexon 2016.
[40] Goddard, MacDonald, and Nexon 2019.
[41] Goddard and Nexon 2016, 5.
[42] Wivel and Paul 2019.

research program that encompasses (*inter alia*) realist, rationalist, and constructivist approaches while rejecting some of their more artificial constraints.[43]

This syncretic *realpolitik* approach provides a much more suitable lens through which to approach the question of why states interpret international law. Working largely within this research program, then, and building on its assumptions, I conceive of interpretation of international law as a discursive social practice states employ to make meaning of international law. Interpretation of international law is one type of discursive social practice in international relations. I will thus begin by explaining my overall understanding of the role of discursive social practices in international relations, before turning to a more specific discussion of how interpretation of international law operates in the international arena. I will then conclude this section by applying these insights to why states interpret the international law of the sea.

Doing and Being: Discursive Social Practices in International Relations

In international relations, states are intrinsically social actors. They engage in relations with other states (and nonstate actors) in ways that are simultaneously strategic and constitutive. That is, states seek to bolster their power and accomplish their preferences vis-à-vis other states, but they also interact with states because they exist as "states" only in relationship to other "states" and to their own citizens.[44] In international relations, then, states are simultaneously

[43] This *realpolitik* research program has in many ways taken the baton from the "realist constructivist" approach advocated by Barkin (2003) and developed further in Jackson et al. (2004), even while shedding the connotative strictures of that label.

[44] I conceive of the state as a political institution that exists in relationship to people who reside within and without their physically delimited territory and/or who otherwise have defined legal relationships to the state. I will frequently employ the term "state" because I believe it is a "real" constructed social actor in international relations—especially in international law—that is more than the mere sum of its human parts, while also recognizing that states are in fact collections of human beings operating as individuals and in small groups, according to a set of formal and informal rules. In light of this latter recognition, I will at times disaggregate the state, referring to discursive practices engaged in by its leaders or by certain bureaucratic units thereof. Likewise, I will not only refer to the targets or objects of a state's discursive practices as other states, but also foreign government officials, international jurists, corporations, citizens of other states, the state's own citizens, etc.

doing things to manipulate their social relationships to others and *being* members of a social landscape. They are neither merely products of social structures (whether material or discursive), nor simply producers of social outcomes, but both at the same time.

Whether doing or being, I consider the actual substance of states' relationships with other states to revolve around *discursive practices*. I define discursive practices, in turn, as social patterns of action that are understood and executed through language (i.e. discourse). In doing so, I take for granted the conclusion reached in post-structural philosophy and social theory that no social action exists purely independent of the language that makes meaning of that action. In the words of Neumann, "Practices are discursive, both in the sense that some practices involve speech acts… and in the sense that practice cannot be thought 'outside of' discourse."[45] However, rather than reduce the stuff of international relations to discourse alone, as many post-structural IR theories have done, I adopt a more pragmatic and holistic approach to analysis that studies the "dynamic interplay between discourse and practice" [46] and embraces the indivisibility of language and materiality. In this view, while an "aircraft carrier" is a term that only has meaning insofar as that meaning is explained and interpreted through words, it also refers to a material thing that can exert material effects on other material things. A "territorial sea" is a legal concept that can only be defined and understood through other words and concepts such as "nautical mile," "baseline," and "sovereignty," but it also refers to an area of physical space in the ocean adjacent to a state's land territory. When a state articulates its view that the law of the sea prohibits foreign warships from entering its territorial sea without receiving prior permission, it is engaging in a discursive practice. When that state deploys its own warships to prohibit an

[45] Neumann 2002, 628.
[46] Ibid., 630.

uninvited foreign warship from entering the territorial sea through verbal warnings and threats by ship-to-ship radio, perhaps accompanied by blocking maneuvers or the firing of weapons, it is engaging in a continuation and extension of that same discursive practice. The discourse and the practice of this pattern of action—the talk and the walk—cannot be disentangled. As a consequence of this interrelationship between discourse and practice, discourse plays both constitutive and strategic roles in relations among states. States engage in discourse because it is an intrinsic part of their relations with their own peoples and with other states and peoples, but they also utilize discourse to enhance their power and security vis-à-vis other states.[47]

Discourse constructs international relations through its centrality to the process by which states interpret the actions and perceive the intentions of other states. Even when states undertake the most material of actions—acquiring arms, deploying military assets, or firing weapons—other states and their own publics can only decide how to respond to such actions by interpreting their meaning. In turn, the meaning of those actions is generally interpreted through talk,[48] whether such discourse is privately voiced within the state apparatus, publicly aired before domestic audiences, or privately or publicly articulated in diplomatic and international settings. This is not to deny the importance of material dimensions of international relations such as bombs and bullets, foodstuffs and fuel, human bodies and physical space, but rather to emphasize the indivisible interrelationship between materiality and the discursive text that makes

[47] As Goddard and Nexon write, states' "efforts to enhance relative position through the use of—and on the terrain of—wealth, legitimation, diplomatic ties, and other nonmilitary resources are … the very stuff of power politics" (2016, 6).

[48] The meaning of actions can be interpreted by individuals *in the moment* without verbal speech through mental reference to analogies, reasons, and tropes, which may contain both linguistic cognitive and non-verbal emotive elements. Such mental images may be shared to some extent across groups of individuals and thus could inform initial shared nonverbalized interpretations to events. However, in order for a social group to sustain action in response to those events, verbal interpretation will almost always occur.

meaning out of that context.[49] Such meaning-making creates the very epistemic lens through which states perceive the world and shapes the way they think of their relationships with others.

These observations about the constitutive role of discourse in IR are not new. They are integral to much heterodox IR theory over the past three decades, including varieties of sociological constructivism and critical IR theory.[50] This function of discourse is labeled in Barnett and Duvall's four-fold typology of power as "Productive Power," which they define as "the socially diffuse production of subjectivity in systems of meaning and signification."[51] Likewise, scholars writing in the new *realpolitik* research program such as Stacie Goddard, Ronald Krebs, and Daniel Nexon explicitly acknowledge and even take as a given this constitutive function of discourse. The constitutive consequences of language play an important role in Goddard's account of territorial bargaining in Northern Ireland and Jerusalem,[52] in Nexon's study of the emergence of cross-cutting ideologies and their associated vocabularies in early modern Europe,[53] and in Krebs' analysis of how narrative has shaped the evolution of U.S. national security policy.[54]

However, in contrast to some work in the prior linguistic/constructivist turn in IR theory, these scholars stress the importance of viewing this constitutive function of language in

[49] In the words of Goddard and Krebs, "There are of course brute facts in the world. … But processes of legitimation impart meaning to those developments and thus shape how other nations respond" (p. 13). They further ground this constitutive nature of rhetoric in "two premises regarding human nature: that human beings are both meaning-making and deeply social animals," drawing upon research in cognitive and social psychology (see pp. 13-14). Goddard and Krebs 2015.

[50] Much of this work follows in the traditions of Ludwig Wittgenstein, Louis Althusser, Michel Foucault, Pierre Bourdieu, and Jürgen Habermas, among others. For a list of citations to some of this work, see Ibid., note 2, p. 7. See also Goddard 2018, chap. 1, note 40, p. 201-02.

[51] Barnett and Duvall 2005, 43.

[52] Goddard 2006; Goddard 2010.

[53] Nexon 2009.

[54] Krebs 2015.

conjunction with its more strategic function.[55] They are skeptical of earlier sociological constructivism and critical discourse theory that overstressed the structural constraints of language and elided the role of international actors as agents.[56] Actors are *constituted by* language, but they also *use* language; discourse about security is a social construct, but it is also a tool of states seeking power. In the words of Krebs:

> In politics, language is a crucial medium, means, locus, and object of contest. It neither competes with nor complements power politics: it *is* power politics. Through language, actors exercise influence over others' behavior. Through language, political subjects are produced and social relations defined.[57]

At the same time, they diverge from liberal constructivists such as Finnemore and Sikkink, Checkel, Johnston, and Risse[58] by emphasizing coercive strategies of language over persuasive strategies, contending that the type of deliberative communication theorized in Habermasian normative discourse ethics is relatively rare in international politics.[59] I follow this more recent trend in IR theory toward emphasizing the interconnectedness between the constitutive and strategic functions of discursive practices, while placing special emphasis on the previously neglected coercive strategies of discourse.

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[55] For example, Goddard and Nexon 2016. emphasize both "the causal *and* constitutive pathways linking efforts at mobilization with enhanced power" (p. 5, emphasis added).

[56] See, for example, Goddard and Krebs 2015., who critique past IR scholarship in the vein of Foucault that reduced international relations to language alone and viewed discourse as an iron cage of constraint. "Rather," they argue, "legitimation proves powerful through a complex interplay between text and context, between what is said and where and when it is said. Existing discursive formations do not eliminate all space for choice and contingency, and thus agency" (p. 17). Likewise, Jackson and Nexon 2019. dispute the dichotomy in Wendt 1999. between individualistic, agent-centered theory and holistic, structure-centered theory, promulgating a relational approach to theory that begins with "neither an essential entity with characteristics that explain its behaviour, nor an equally essential structure with characteristics that establish the parametric constraints within which entities behave, but a *relation between* entities" (p. 585).

[57] Krebs 2015, 2.

[58] Risse 2000; Finnemore and Sikkink 1998; Checkel 2001; Johnston 2008; Johnston 2001.

[59] Goddard and Krebs 2015, 16–17; Krebs and Jackson 2007. To underscore this point, Krebs and Jackson (2007) call their approach "coercive constructivism."

States employ discourse strategically to bolster their legitimacy in the eyes of both domestic and international audiences.[60] Such public talk aimed at persuasion is called rhetoric, and is often utilized by state actors as a means of garnering support, neutralizing criticism, and countering opposition from their own people and from other nations and peoples. Responding to the common sentiment among scholars of international security that such rhetoric is "meaningless posturing, unworthy of serious analysis," Goddard and Krebs write in their introduction to a special edition of *Security Studies* on rhetoric and grand strategy:

> [P]oliticians the world over devote substantial material resources and political capital to rhetorical battle, in implicit recognition that legitimation shapes the fate of political projects, from the welfare state to national security. This special issue sides with the politicians—not because the world of politics is a genteel debating society, whose participants politely puzzle over the central issues of the day, but because it is a political contest with very real consequences.[61]

Goddard and Krebs and the other authors writing in this special edition focus on the domestic purposes of such legitimation strategies. When the members of the domestic public view their government's foreign policies and grand strategy as legitimate, they are more likely to tolerate the sacrifices that might be required to enact those policies. Thus, the government will have to expend fewer resources to extract those sacrifices.[62]

By contrast, Goddard (2018a) theorizes the international purposes of such legitimation strategies. In the international arena, when a state can convince other states (and their publics)

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[60] The state can also use discourse as a means of signaling its preferences to other actors, especially other states, in order to coerce those actors to behave in ways that align with the state's preferences. However, this project focuses on the legitimation function of discourse, as the more basic role of discourse in signaling is more taken for granted in standard IR theory literature.

Legitimation is distinct from the concept of reputation prevalent in much rationalist and neorealist IR theory on compliance. Reputation focuses more on states' concerns over how other states' perception of their past or current behavior will influence those states' judgments of their likely future behavior Downs and Jones 2002; Guzman 2008., whereas legitimation focuses less on discrete and iterated acts and more on how states employ discourse to shape their image as a pro-social actor within relevant reference groups in order to promote their strategic interests.

[61] Goddard and Krebs 2015, 6.

[62] In the words of Goddard and Krebs, "The greater the government's demand for resources, the greater its need to engage in legitimation." Ibid., 18.

that its behavior is legitimate, then those states are less likely to perceive it as a threat and thus less likely to balance against it. Goddard studies how rising powers in particular employ rhetoric to portray their behavior as they rise as legitimate in an effort to prevent great powers from mobilizing to contain or confront them.[63]

In light of these "very real consequences" of discourse in international relations, through both its strategic functions and its inherent and constitutive role in social relations among states and peoples, I view debates that sometimes occur in IR theory over whether or not discourse "matters" in international politics as pragmatically useless. Discourse is central to social practices among states. It is indispensable, unavoidable, inevitable, and ubiquitous in international relations. Dismissals of it as "epiphenomenal" stem from the IR discipline's insufficient engagement with cognitive psychology and philosophy of science, and its resultant outdated ontology of mind-world dualism, materialist bias, and overemphasis on causal inference and singular causation.[64]

Interpretation of International Law as Discursive Social Practice

Interpretation of international law is a quintessential discursive social practice of states. As such, it exhibits both the constitutive and strategic features of discursive social practices more generally. In the first place, states must interpret international law as an intrinsic task of statehood. Particularly in the modern, globalized international system, although states can devote

[63] Goddard identifies three mechanisms by which such rising power legitimation strategies can affect mobilization: First, they can signal to the great power that the rising power has benign intent and only limited revisionist aims. Second, they can divide both the international community and the domestic populace in the great power, bolstering the arguments of doves advocating accommodation over hawks promoting confrontation. Third, they can appeal to the great power's sense of identity in order to coerce or reassure them (pp. 21-27). The efficacy of these rising power legitimation strategies will affect how the great power responds, in turn influencing the prospects of major power war and shaping future patterns of international dominance, subordination, and cooperation.

[64] See Jackson 2008; Friedrichs and Kratochwil 2009.

more or less attention to interpreting the details of international law, they cannot avoid interpreting it entirely, even if they only interpret it in order to reject it. This imperative emerges from the previously stated observation that states only exist in relation to other states. Other states and international actors, and usually actors within the state itself as well, will expect and even demand an answer as to how the state interprets the international laws that purport to govern relations among states. Although states may respond to those social demands with belated, vague, partial, or contradictory interpretations, it is nearly impossible for them to ignore those demands indefinitely and completely given the inherently social and discursive setting of international relations. At the same time, when states do interpret the law, they will seek to promulgate meanings of the law that enhance their power vis-à-vis both domestic and international audiences. As with discourse more generally, states will interpret the law in an effort to legitimate their behavior in the eyes of others, thereby dampening opposition to that behavior and building support for the state.

I thus conceive of international law as both a construct that *acts upon* states by requiring their attention and a tool that states can *use to act* in pursuit of their interests. Interpretation, in turn, is the process through which states both respond to and exploit international law, making meaning out of the law in their particular circumstances. It is a social site where states define their relationships to other states and international actors, as well as to their own citizens. My theoretical assumptions about why states interpret international law thus draw from the broad IR theory tradition of what Jackson and Nexon call social-relationalism or simply relationalism.[65]

This understanding of international law is reflected in growing trends in both international legal theory and IR scholarship on law and norms. Traditionally, the discipline of

[65] 2013; 2019.

international law has understood interpretation of international law in largely positivist terms, insisting that the act of interpretation involves no more than ascertaining the law according to a predetermined set of rules and with reference to widely accepted foundational sources. Over time, however, legal theorists have critiqued this perspective from a number of angles, highlighting the political and subjective nature of the interpretive act and emphasizing the creative and generative dimensions of interpretation as a discursive practice.[66] Critical legal theorists have highlighted the structural indeterminacy of international law, since according to its own principles it is created by sovereign states subject to no higher authority, and yet those sovereign states are supposed to be bound by it.[67] Although international legal theory sometimes seeks to escape this indeterminacy by reference to substantive theories of justice, those efforts will always confront the lack of an objective, universal standard by which justice can be measured.[68] Legal realists and pragmatists adopt some of the same epistemological assumptions as critical legal theorists, agreeing that there is no objective "pre-existing meaning" of the law that stands outside of states' interpretations thereof. However, they resist the more radical skepticism that sometimes flows from critical approaches, emphasizing that international law can "exercise normative force… in a conditional manner" and conceiving of international law "in terms of power operating in tension with reason."[69] Venzke, for example, commends a view of

[66] Bianchi, Peat, and Windsor 2015; Bogdandy and Venzke 2014; Ratner 2015.

A leading encyclopedia of public international law encompasses both of these understandings in its definition of interpretation in international law:

> Interpretation in international law essentially refers to the process of assigning meaning to texts and other statements for the purposes of establishing rights, obligations, and other consequences relevant in a legal context. Interpretation is both a cognitive and a creative process. On the one hand, interpretation purports to establish a pre-existing meaning. On the other hand, the interpretative process has a creative dimension. Creative elements flow from the necessary interconnection and balancing of relevant criteria as well as from the selective focus on facts deemed relevant from the interpreter's point of view. (Herdegen, 2013)

[67] Kennedy 1980.

[68] Koskenniemi 2005.

[69] Shaffer 2015, 205–06.

interpretation of international law as "an exercise that rests on a choice which involves the preferences of the speaker and that is at the same time constrained by past practices."[70] This latter element of constraint is fundamentally relational, since "for any interpretation to be successful it has to find the acceptance of other actors in the community of interpreters."[71] In a related but more empirical vein, Roberts questions whether or not international law is in fact "international," highlighting how Western and Anglo-American legal approaches have traditionally dominated negotiation, interpretation, and education in international law, even while other major powers such as Russia and China have developed alternative understandings of the meanings of international law.[72] Roberts stresses that as global power shifts and a more multipolar system develops, the meaning of international law itself may shift in reflection of more expansive and diverse membership in the relevant interpretive communities.

This pragmatic and relational understanding of international law has also been adopted by many IR scholars who study international institutions and norms. Ian Hurd stresses that international law should be viewed through a "disenchanted" lens that acknowledges how international law serves as "a resource that increases state power" by imbuing the state's actions

[70] Venzke 2012, 48.

[71] Ibid., 55. It is also worth noting that some more positivist international legal scholars do not see customary international law as being *necessarily* subject to interpretation per se, since customary law resides first and foremost in the patterns of state practice. See Herdegen 2013; Treves 2006. However, other legal scholars reject the possibility that customary international law can exist separate from interpretations thereof. As Venzke notes: "[I]n comparison to treaty law, customary international law is considered much more dynamic and also, in part precisely because of its dynamics, much more prone to reflect projections of power. It is also in the field of customary international law where the thought has found currency that interpretations contribute to creating what they find" (2015, p. 14, see also notes 51 and 52).

In light of this recognition, international legal scholars are beginning to investigate how international jurists, legal experts, and government officials determine and interpret the substance of customary international law—the logic they employ, the courts and precedents they are most likely to prioritize, the expert sources they generally draw upon, how they evaluate and weigh state practice by the identity of the state actor and the length of time of the practice, etc. See Scoville 2015; Talmon 2015. Some scholars are also beginning to apply behavioral methods to investigate how international legal scholars interpret customary international law, influenced by such psychological tendencies as egocentric bias. See Cohen and Meyer forthcoming; Scoville 2017.

[72] Roberts 2017.

with legitimacy.[73] Hurd and others in what Lantis calls the "second generation" of constructivist norms scholars treat the state as an agent capable of deliberately interpreting, contesting, and utilizing norms in ways that support its interests.[74] In contrast to prior liberal interpretations of the emergence and effects of norms,[75] these scholars study cases of how norms decay as a result of powerful states' efforts to weaken them[76] and how conservative states and advocacy networks resist liberal norm revision.[77] Much like the "coercive constructivist" scholars working in the *realpolitik* research program, these scholars acknowledge the role of discursive practices of international laws and norms in constituting international politics, but they generally place stronger emphasis on actors' strategic and proactive engagement with those laws and norms.[78]

Since they view states as subjects rather than objects, these scholars critique the very concept of "compliance" prevalent in much liberal IR scholarship in both the rationalist/institutionalist and constructivist traditions.[79] They reject this concept's implication that international laws and norms are discrete constructs that exist prior to and outside of

[73] 2016; Hurd 2017a; Hurd 2017b, 1.

[74] Lantis 2017.

[75] Finnemore 2003; Finnemore and Sikkink 1998; Tannenwald 1999; Tannenwald 2005; Tannenwald 2007.

[76] Hurd 2007; Lantis 2016; McKeown 2009.

[77] Bloomfield and Scott 2017; Bob 2012.

[78] Indeed, this second generation approach to norms is fully resonant with the *realpolitik* research program framework established by Goddard and Nexon 2016. However, despite this theoretical resonance, there has thus far been little direct engagement between the norm contestation literature and the "coercive constructivism" of Goddard, Nexon, Krebs, and Jackson, as evidenced by scant cross-citation of each other's works. This is perhaps due to their attention to different "dependent variables" or international phenomena—patterns in the development of international institutions and norms as opposed to states' efforts to mobilize domestic publics and the international community in their pursuit of power—and their associated embeddedness in the different IR subfields of international organization and international security. In this project, I combine attention to both of these elements by studying how an international institution (the law of the sea) and its component norms serve as a site for states' mobilization efforts. I thus draw upon and integrate both of these strands of scholarship.

Moreover, while the second generation of norms scholars primarily is reacting against liberal IR theory's "enchanted" attitudes toward international law and norms, the realpolitik constructivists are taking principal aim at realist IR theory's dismissal of the role of discursive practices in power politics. I concur in both of these reactions, though I also exercise care not to overreact and overly downplay the constraints that result from international law's constitutive role. I do so by drawing upon insights from historical institutionalism, as articulated below.

[79] Wiener 2004.

ongoing politics, as a function of either past agreements made during historical bargaining processes or their supposedly self-evident normative superiority. Rather, they stress that the immense diversity of nation-states in the late-modern globalized world means that virtually all international laws and norms are contested, particularly when they are applied in specific contexts.[80] Seen in light of this diversity, "noncompliance" is a concept that reflects the discursive power of the "empire of international legalism"[81] rather than an objective descriptor of violations of universally legitimate global standards.[82] Instead, norms scholars have replaced the concept of (non)compliance with the concept of "contestation,"[83] defined as a "social practice [that] entails objection to specific issues that matter to people,"[84] conducted primarily through discourse.[85] My theory embraces this critique of compliance, though I use the concept of "interpretation" rather than "contestation," in order to explicitly encompass behavior that involves defense of—not only objection to—dominant understandings of norms and laws.[86]

One final note is in order: Although this disenchanted approach to understanding the strategic and constitutive role of international law in world politics has emerged largely from

[80] Wiener 2014.

[81] Hurd 2018.

[82] Hurd 2017a. writes: "States strive to fit their policies into the categories of international law, showing themselves to be compliant with their obligations. But in doing so, they appear to depoliticize their choices. Compliance with the law becomes the marker for acceptable policy, masking the substantive politics of the situation and the law itself" (pp. 2-3).

[83] Deitelhoff and Zimmermann 2013; Deitelhoff and Zimmermann 2016; Lantis 2017.

[84] Wiener 2014, 1.

[85] Wiener 2014. defines contestation in international relations as "the range of social practices which discursively express disapproval of norms" (p. 1). She distinguishes between contestation "as a social activity (reactive contestation) and a mode of critique (proactive contestation)" 2017, 109., developing a normative theory of the role that proactive contestation can play in filling the "legitimacy gap between fundamental norms and standardised procedures" and enabling "a critical redress of the rules of the game" 2014, 2–3..

[86] I acknowledge that Wiener's concept of contestation is broad enough to encapsulate efforts to preserve or maintain norms in their dominant status quo formulations (what Bloomfield and Scott 2017. call "norm antipreneurship"), since such antipreneurs are in a sense contesting the efforts of norm entrepreneurs to revise those norms. However, I find the ordinary connotation of interpretation to be more neutral and more inclusive of both offensive and defensive postures in normative conflict.

more constructivist or critical approaches to IR theory, it is by no means inconsistent with realism. Although some variants of structural realism in the tradition of Kenneth Waltz do tend to compartmentalize sources of national power and then focus exclusively on material sources of power,[87] other variants of realism such as the classical realism of Hans Morgenthau and the dynamic realism of Robert Gilpin, do not share this same tendency.[88] Morgenthau placed international law under the rubric of "political ideologies," which he conceived of as "weapons that may raise the national morale and, with it, the power of one nation; and in the very act of doing so may lower the morale of the opponent."[89] And although Gilpin acknowledged that great powers establish their ascendancy in the "hierarchy of prestige" primarily through economic and military strength, he argued that they also accrue power by establishing a set of "rights and rules that govern or at least influence the interactions among states."[90] Scholars who advocate a new *realpolitik* research program build on these observations to argue that in order to understand the momentous ongoing changes in world politics, attention must be paid not only to shifts in the material balance of power but also to the ways that discursive social practices such as interpretation of international law are shaping those processes of change.

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[87] Waltz 1979.

[88] Wohlforth 2011. Rather, as Wohlforth maintains, the sense that realism must be incompatible with constructivist logic is an artifice that emerged in the blind spots of the IR theory debates of the 1980s and '90s, in particular their tendency to see realism primarily through the lens of Waltzian neorealism and to define the "isms" of IR theory as mutually exclusive and distinct schools of thought in the vein of philosopher of science Imre Lakatos.

[89] Morgenthau 1956, 82. Morgenthau further highlighted both the strategic function of ideologies and their function in constituting and situating actors and audiences in international politics: "Politicians have an ineradicable tendency to deceive themselves about what they are doing by referring to their policies not in terms of power but in terms of either ethical and legal principles or biological necessities. In other words, while all politics is necessarily pursuit of power, ideologies render involvement in that contest for power psychologically and morally acceptable to the actors and their audience" (p. 81). This incisive observation could pass as a rallying cry for coercive constructivists such as Goddard and Krebs who study the role of rhetorical performance in states' legitimation strategies.

Morgenthau went on to observe that such ideologies can serve as "either the ultimate goals of political action," or "the pretexts and false fronts behind which the element of power is concealed" (p. 81). This further underscores the fact that he did not view such ideologies as merely epiphenomenal to underlying material structures, but rather integral elements of holistic power struggle.

[90] Gilpin 1981, 34.

Interpreting the Law of the Sea: Physical Space, Social Context, and Strategic Interests

These theoretical observations about the constitutive and strategic reasons why states interpret international law can be readily extended to the international law of the sea. However, some adaptations are necessary due to the partially unique nature of this domain of law, which deals especially with physical space. In this section, I will thus explain the unique reasoning for these assumptions in the law of the sea context, noting the ways that geography interacts with social context and strategic interests in states' interpretations of the law of the sea.

First and foremost, states interpret the law of the sea because they must do so as political units located *both* in a social environment of interacting nation-states *and* in a physical environment of land, sea, and air. This is true for customary legal norms such as innocent passage and high seas freedoms, which states must interpret when determining where and how their own vessels will operate at sea and in response to the commercial operations, military activities, and diplomatic inquiries of other states and nonstate actors operating near their coasts. This is doubly true for treaty law in the modern globalized international system, where the law of the sea has been formalized in the United Nations Convention on the Law of the Sea (UNCLOS). Not only are states expected to interpret this convention in the course of their communications with other states and nonstate actors regarding their physical interactions at sea, but they also are constantly confronted with demands to interpret the law in formal institutional settings. All UN member states had to actively choose whether or not to participate in the UNCLOS negotiations, which spanned three distinct efforts and several decades from the 1950s through 1982. Throughout the negotiation process, they were repeatedly called upon to express their interpretations of the preexisting customary law of the sea and their preferences for how that law should be codified, revised, and expanded. At the conclusion of the negotiation process, states were primed for a new

round of interpretation, as they had to decide whether or not to sign and ratify the convention and whether or not to issue formal interpretive declarations upon doing so. Furthermore, they had to determine whether or not and how they would modify their domestic laws to harmonize with the convention and implement the provisions of the convention in their maritime administration and naval operations. States are also expected under UNCLOS to share their relevant domestic maritime legislation with the United Nations for inclusion in its public (and now online) database. Finally, states have participated in various institutional frameworks established by UNCLOS, such as the International Seabed Authority, Commission on the Limits of the Continental Shelf, and the International Tribunal for the Law of the Sea; in frequent recurring meetings, including the Meeting of States Parties to UNCLOS that has met once or twice per year since the convention entered into force in 1994 and the Open-ended Informal Consultative Process on Oceans and the Law of the Sea (open to states who have not ratified UNCLOS) that has convened annually since 2000; and in negotiations on supplementary agreements regarding particular issues in the law of the sea, including deep seabed mining, straddling fish stocks and highly migratory fish, and biodiversity in ocean areas beyond national jurisdiction. In each of these institutional settings, there are frequent opportunities and even demands for states to express their interpretations of various issues in the law of the sea.[91]

In all of these ways, states' interpretations of the law of the sea emerge from how they are situated in both the physical world and the social international system. In turn, their interpretations of that law create them as subjects in the physical and social world, defining what kind of actors they are—sovereign states with claims to authority over persons, legal entities

[91] In these formal institutional settings, issues related to military activities rise to the agenda infrequently relative to natural resource and environmental concerns, due in part to those institutions' mandates to administer and facilitate negotiations on issues related to resource extraction and marine science.

(such as corporations), and demarcated physical space and resources. At the same time, their interpretations also create the law of the sea by giving it meaning and imbuing it with relevance and therefore power. Finally, their interpretations shape perceptions of physical space (and the natural resources therein) by mapping legal boundaries, rights, and duties onto that space, defined in terms of actors and their interests under the law. Interpretation of the law of the sea as a discursive social practice thus serves to constitute states, physical space, and the law itself.

Despite the importance of these constitutive effects, however, states' interpretations of the law of the sea should not only be understood as emergent properties of the structural interactions between states' social and physical settings. States also interpret the law of the sea for strategic purposes, in an effort to enhance their legitimacy in the minds of their domestic populaces and other states. For example, many states issued declarations upon signing or ratifying UNCLOS that insisted the convention did not prejudice a state's right to require advance notification or permission from foreign warships before they conducted innocent passage in the state's territorial sea.[92] In so doing, they signaled their preference against foreign warships conducting innocent passage in their territorial seas without advance notice, coupled with an implicit threat of enforcement against violation of the requirement.[93] However, these states were not only sending signals but were also seeking to persuade other states, UN administrators, and international jurists of the legitimacy of their stances. Their interpretations sought to portray their domestic laws requiring prior notification or permission for innocent passage, as well as possible future actions to enforce those laws, as being in full harmony with the convention. States thus sought to use such

[92] It is worth noting that for the most part these statements issued by states upon signing or ratifying UNCLOS were not "reservations" asserting exceptions or carve-outs from the convention, which the text of UNCLOS had largely prohibited, but rather "declarations" asserting interpretations of the meaning of the convention.

[93] This was true despite the fact the credibility of that threat would be contingent upon each state's maritime enforcement capacity and reputation for resolve in plausibly analogous situations.

interpretations to build support or at least neutralize opposition in the international community for their laws and enforcement actions in the case of future disputes or even binding arbitration. These interpretations also worked to persuade domestic audiences that the state would be justified in opposing any unwelcome incursions by foreign militaries into the territorial sea, which could require mobilization of domestic resources, a feat that is much easier with a willing populace.

A final important matter for discussion is the relationship between states' interpretations of the law of the sea and their actual behavior at sea, both in terms of how they enforce their interpretations in the waters and airspace near their coasts, and in terms of navigation and operations by their own government vessels and aircraft in other states' waters and airspace. Such behavior, unaccompanied by discourse, does not itself constitute an interpretation of the law of the sea. If accompanied by discourse that justifies the behavior in terms of the law of the sea, the behavior and discourse operating in tandem are discursive social practices. The U.S. Freedom of Navigation Program is the paradigmatic example of such an integrated discursive social practice of interpretation coupled with action. However, in many cases, states' behavior at sea may not be accompanied by such deliberate interpretive discourse. Behavior may be enacted by bureaucratic or local actors within the state that are ignorant of or do not have a particular interpretive stance on the law of the sea. Such actors may be operating according to their own interpretation of the law of the sea that differs from that of other state actors or the central government.[94]

In such instances, however, domestic and especially international actors will direct attention to the hypocrisy or internal incoherence between states' behavior and their interpretations of the relevant maritime legal norm. This can lead to what IR scholars call a

[94] As will be discussed in chapter 7, one example of such behavior may be marine scientific research conducted by Chinese Academy of Sciences vessels in India's exclusive economic zone without prior permission and without the knowledge of China's Ministry of Foreign Affairs.

"legitimacy gap,"[95] a phenomenon that will be discussed further in chapter 2. In order to close that gap and enhance their legitimacy, state actors will feel pressure to change either their behavior or their interpretations to eliminate the inconsistency between them. Or they could alter their interpretations so significantly as to interpret the norm as invalid or illegitimate and thus worthy of rejection, perhaps in favor of an alternative legal norm or in favor of unilateral domestic justifications.

In sum, my theoretical assumptions are that states interpret the law of the sea because their social and strategic interests demand it. They interpret it because doing so is a basic requirement of statehood in a social system of states situated on a physical planet comprised of one-third land and two-thirds sea and enveloped in airspace. And they interpret the law of the sea because they seek to enhance their security and power as states in relation to other actors in physical space. In the following chapter I will build upon these foundations to present my theoretical explanation of why states interpret the law of the sea in favor of more or less coastal state jurisdiction and how those interpretations are likely to evolve over time.

[95] Goddard 2018, chap. 2, note 23.

Chapter 2: Continuity and Evolution in Interpretations of the Law of the Sea

This dissertation seeks to answer two related questions: why do states interpret the law of the sea in ways that favor more or less coastal state jurisdiction, and how are those interpretations likely to develop over time? As explained in chapter 1, I define interpretation of international law as a discursive social practice whereby states make meaning of international law. Concretely, an act of interpretation is a use of language by state actors to describe to themselves, domestic audiences, and international interlocutors what they think an international law means and how that should guide the behavior of others and themselves. Such interpretations can include both *de jure* interpretations enshrined in laws, decrees, and regulations, as well as official interpretations in the form of speeches, statements, and remarks to the media. They do not include behavior itself, which may or may not be an interpretation of the law of the sea (action may be taken by some state actors without regard to the law), nor do they include interpretations of actors who are not duly authorized by the state to issue such interpretations.

In the previous chapter, I explained my theoretical assumptions about why states interpret the law of the sea. In this chapter I draw upon that theoretical foundation to articulate a theory of why states interpret the law of the sea how they interpret it, and how their interpretations develop over time. Since this theory builds upon and modifies intuitions about states' material preferences, I begin by first describing the basic geopolitical incentives that influence states' interpretations of the law. This amounts to an elaboration on the standard model of coastal states versus maritime powers introduced in the first chapter.

After elaborating this standard model, I argue that this model, while instructive, is incomplete, as it cannot account for the complex reality of stickiness in countries' interpretations of the law of the sea, nor does it describe processes of change. I then proceed to develop a more

comprehensive theory of how states' interpretations of the law of the sea change over time, which I overlay on the standard geopolitical model. I explain how mechanisms of international legitimation constrain change in states' interpretations of the law of the sea over time, even while geopolitical incentives motivate them to find ways to implement change around the margins through subtle processes of gradual evolution.

Building the Standard Model: Balancing Security and Access in Light of Geography

A basic geopolitical[1] model of why states would interpret the law of the sea in favor of more or less coastal state jurisdiction begins with the starting assumption that states interpret the law of the sea in order to promote their strategic material interests, while also bolstering their legitimacy before international audiences. For states with a maritime coastline, those interests can be encompassed within two overarching competing considerations: (1) their desire to maximize their territorial security, domestic order, and access to resources by claiming and exercising more jurisdiction and sovereign rights over the waters adjacent to their coasts, and (2) their need to maintain free access for commercial shipping and military vessels in important sea lines of communication (SLOCs) and littorals and to maximize access to marine resources beyond nearby waters. Because international law is generally meant to have global, reciprocal application, states cannot ordinarily "have it both ways," interpreting the law in order to support their own expansive claims to jurisdiction over nearby waters, while limiting other states' right to stake similarly expansive claims. Of course, states can and often do try to have it both ways when they interpret international law, but in the very act of doing so they undermine the legitimation purpose of such interpretation, as most states will perceive this as an illegitimate

[1] I define "geopolitical" incentives as factors related to the interaction between geography and states' political relationship to other states and economies.

violation of principles of fairness and reciprocity.[2] Thus, under a standard geopolitical model, states' interpretations of the law of the sea at any given moment in time should reflect efforts to balance between their competing interests in expansive jurisdiction along their own coasts and free access to waters and airspace near other states' shores (perhaps with as much of both as they can get away with[3]).

That balance will be slightly different for every state depending on its particular overseas interests, threat perceptions, technological capabilities, and geographical situation. (See Figures 2.1 and 2.2.) However, some general principles and patterns about how that balance will play out for different states can be deduced. In analyzing those principles and patterns, I will treat matters related to navigation and resources separately, as the modern law of the sea has largely separated these two matters, enabling states to adopt different interpretive stances on each. That is, a state could claim expansive ownership to resources while opposing intrusive jurisdiction over navigation, or vice versa. Indeed, the central compromise undergirding the United Nations Convention on the Law of the Sea (UNCLOS) was that resource ownership (*dominium*) would

[2] Of course, some international legal regimes are literally designed to enable some states to have it both ways. The nonproliferation regime is perhaps the most prominent example of such a regime, as it simultaneously legitimizes nuclear weapons states' possession of weapons, while prohibiting non-nuclear-weapons states from obtaining them. The law of the sea does not have such expansive carve-outs, and most of the norms within the regime are meant to apply globally to all states. However, in practice there are some exceptions to this observation, the most obvious being the extraordinary advantages afforded to coastal states over landlocked states, as well as other states whose physical geography enables them to benefit disproportionately from the regime, such as states with islands located far from continental landmasses who can claim much larger EEZs as a result, and states with continental landmasses that extend gradually under the ocean in continental shelves and which are thus able to claim sovereign rights over the resources in extended continental shelves. These states could be seen as being legally authorized by UNCLOS to have it both ways—claiming expansive rights for themselves, while disallowing such claims for other states.

[3] States that interpret the law of the sea primarily for its utility as a signaling mechanism rather than as a legitimation tool may be more likely to try to have it both ways, as they be may be less sensitive to the hypocrisy costs that come from such contradictory interpretations. Such states could include both hegemonic superpowers with expansive coercive power that renders them less vulnerable to other states' judgments, as well as revolutionary or highly revisionist states who do not recognize the legitimacy of the prevailing legal order in the first place.

be decoupled from political sovereignty (*imperium*).[4] Legal scholars have described this distinction as the defining feature of UNCLOS and postwar international maritime law more broadly.[5]

Interpretation on Navigational Matters: Balancing Security and Access

Focusing first on issues related to navigation and security, states are likely to perceive private and commercial vessels and aircraft differently than foreign government vessels and aircraft, especially warships and military aircraft (see Table 2.1). Vessels in the former category will ordinarily be less threatening to the state than vessels in the latter category. To be sure, states will have an interest in enforcing customs, sanitary, and immigration regulations on vessels approaching their shores and ports, whether private or government. And in narrow straits, they will have a strong interest in regulating vessel traffic in order to prevent accidents and the resultant environmental damage and navigational hazards. Indeed, the territorial sea and contiguous zone regimes, as well as various rules regarding passage through straits, have developed in large part as a means of addressing these concerns by states.

Farther out to sea, states will want sufficient jurisdiction and authority to prevent acts of piracy by private ships against merchant vessels traveling to and from their shores. They will also desire authority to regulate private ships to control marine pollution and protect maritime resources under the state's jurisdiction. Due to the rapid speed of airplanes and the greater potential security risks they pose, states are likely to be somewhat more sensitive to the potential threat of aircraft in airspace adjacent to their coasts and thus more likely to prefer to regulate the

[4] As a result, even as UNCLOS allowed states to claim greatly expanded sovereign rights to extract and manage natural resources in the EEZ and continental shelves, their rights to assert jurisdiction over navigation and other activities besides resource extraction were to remain limited. Koh 2009; Shearer 2014.

[5] O'Connell 1982, vol. 1; Shearer 1983; Shearer 2014.

activities of such aircraft even beyond the territorial sea and airspace. Indeed, in each of these cases, states, companies, and international organizations have collaborated over time to develop a body of international legal and regulatory standards governing the activities of private ships and aircraft at sea, including marine pollution controls, anti-piracy rules, and civilian aircraft standards. These regulations are determined and overseen by bodies such as the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO) and integrated with the law of the sea, including the UN Convention on the Law of the Sea, as well as states' domestic laws. International law requires all merchant ships to be registered with a sovereign state and to fly that state's flag. On this basis, anti-piracy regulations are generally applied with reference to individual ships and their state of registry, rather than with regard to their presence in proximity to a country's shores (again, in areas beyond the territorial sea and contiguous zone). As for pollution, the IMO issues rules governing pollution by vessels. In the high seas beyond national jurisdiction, these rules are supposed to be enforced by the flag state, though there is often little enforcement of these rules in practice. However, under UNCLOS, coastal states do possess authority to enforce marine pollution controls in their exclusive economic zones (EEZs). Finally, the ICAO maintains a regime governing communications among civilian aircraft, governments, and air traffic controllers around the world. This regime divides the planet into flight information regions with designated airports in each region responsible for air traffic control. In addition, the Chicago Convention on International Civil Aviation negotiated in 1944 sets out standards for military intercepts of civilian vessels.[6]

But beyond these types of coordinating standards, any potential abstract interest states might have in, for example, taxing merchant ships passing through nearby waters or otherwise

[6] Neither the Chicago Convention nor the ICAO's other regulations, however, specifically outline rules for air defense identification zones or for intercepts of military vessels beyond a state's sovereign airspace.

imposing extraordinary burdens on commercial vessels and aircraft will usually be outweighed by most non-autarkic states' strategic interests in maintaining free and uninhibited navigation for commercial vessels and aircraft that transport goods and persons to and from their own markets to other parts of the world. Thus, aside from the various regulatory regimes and caveats just noted, most states will tend to favor largely uninhibited navigation for commercial ships and civilian aircraft and will interpret the law of the sea in ways that uphold that interest.

Table 2.1 International Legal Regimes Governing Private vs. Government Vessels

	Private/Commercial Ships & Aircraft	**Government/Military Ships & Aircraft**
International legal regime	Governed by technical conventions and regulations, laws of the sea on vessel registry, integration into UNCLOS	Governed by UNCLOS, other treaties, and customary international law
Function of regime	Coordinated standard setting and regulatory oversight	Bargains and distribution of sovereign rights to jurisdiction and access
Main regime actors	States, private companies, international specialized agencies tasked with regulatory and technical functions	States, international organizations of member states

However, freedom of navigation for foreign government and military vessels and aircraft is likely to be much more controversial. All states have the incentive to maintain a security buffer around their coasts by claiming more jurisdiction at sea to keep foreign military vessels and aircraft at a safer distance. But very few states also have blue water navies entrusted with the mission to protect expansive overseas interests, including financial investments, diasporas, and military alliances. Those states that do have such expansive overseas interests and large power

projection forces will likely prioritize freedom of navigation and access for their navies and aircraft. And even though they will still have an interest in maintaining a security buffer in their near seas, their powerful militaries will make them comparatively less vulnerable to threats emanating from the sea. Thus, the balance of their interests should lead them to favor more limited coastal state jurisdiction and interpret the law of the sea to reflect that preference.

By contrast, those states lacking powerful far seas navies are unlikely to strongly favor freedom of navigation for foreign military vessels given the inherent military risk presented by such vessels. States' perceptions of such risk may be heightened by their unique histories of subjugation at the hands of foreign naval powers or their fear of military intervention by foreign powers into their domestic affairs. However, states may also recognize the benefits of freedom of navigation for powerful states' military vessels that provide public goods in keeping SLOCs and straits open and free from piracy or threats from rogue states. This will be especially true if they are formally allied or partnered with those maritime powers. But even if not allies of the maritime powers, they may wish to avoid antagonizing those more powerful states by strongly opposing their freedom of navigation or making jurisdictional claims that they cannot enforce against such powerful states.

Thus, for those states lacking powerful far seas navies, their interpretations of the law of the sea regarding coastal state jurisdiction over foreign military vessels are likely to reflect the extent to which they perceive threats from foreign militaries at sea. If such threat perceptions are high, they are likely to strongly espouse more expansive interpretations of coastal state jurisdiction under the law of the sea. If states do not perceive significant threats, they are more likely to favor—or at least acquiesce in—more limited interpretations of the law of the sea regarding coastal state jurisdiction. Their threat perceptions will be fundamentally relational in

nature—allies of maritime powers will not fear threats from them, while rivals of maritime powers will.

Finally, states' interpretations will be conditioned by their maritime geography. States who are in a geographically constricted maritime environment—for example, whose only access to the open oceans or major SLOCs is through semi-enclosed seas or through narrow straits adjacent to other states—will have a different orientation toward maritime jurisdiction than states with direct access to the open ocean or whose territory straddles important straits or surrounds busy SLOCs. States composed of numerous islands are likely to have a different approach than continental states. These geographical characteristics will interact with both the state's interests in maximizing access to distant waters and its interest in establishing a security buffer. The permutations are as numerous as are states, thus rendering generalizable prediction impossible. However, some illustrative examples can be furnished.

For instance, a state whose only access to the open oceans is through straits controlled by other states and whose perceptions of threat from foreign military powers is strong, but who nonetheless does not possess a military power projection capability or a particularly strong interest in developing one (due to lack of extensive foreign overseas investments, resource self-sufficiency, inland trade routes, minimal diaspora networks, etc.) is likely to interpret the law of the sea in favor of greater coastal state jurisdiction so that it can create a buffer for itself or a near-seas bastion for its coastal defense forces. But a similarly constrained state who has a strong interest in projecting military power abroad is likely to interpret the law of the sea in ways that limit coastal states' abilities to restrict the navigation of military vessels through straits—so that it can more easily egress to the open ocean. Conversely, an island state that straddles key straits or is highly exposed to the open ocean and perceives a threat from foreign military vessels is

likely to claim more jurisdiction at sea in order to create more security in its near seas, though this will be constrained if it also needs to project power abroad through waters adjacent to other states. Finally, a state whose coasts are located far from other major maritime powers will be less likely to perceive threats from maritime powers and thus will be less likely to claim expansive jurisdiction at sea, particularly if they have an interest in projecting power.

Figure 2.1 Standard Model for How States Will Interpret the Law of the Sea (Navigation/Military Activities)

$$\mathbf{Int_{CSJ} = (MTP + BWN)*C_{Geo}}$$

Where:

Int_{CSJ} = Interpretation of law of the sea favoring less or more coastal state jurisdiction
MTP = Maritime Threat Perception (i.e. threat from foreign navies)
BWN = Blue Water Navy (a result of growing overseas interests)
C_{Geo} = Geographical Situation of State (a constant)

Relationships:

MTP generally has a **positive** relationship with **Int_{CSJ}**, conditional on specific **C_{Geo}**
BWN generally has a **negative** relationship with **Int_{CSJ}**, conditional on specific **C_{Geo}**

Interpretation on Resource Matters: Balancing Exclusive Rights and Maximum Access

Beyond these issues related to navigation and security, states also must make similar calculations when interpreting international law regarding marine resources, such as fisheries, offshore hydrocarbons, and seabed minerals. There is a trade-off between claiming jurisdiction over one's coastal waters for the purposes of securing exclusive rights to natural resources and supporting a reciprocal norm of limited jurisdiction in order to maintain the ability to extract natural resources from the coastal waters of other states. That trade-off is complicated, however,

by the rival nature of marine resource exploitation, states' unequal technological capacity to exploit those resources, and the danger of unsustainable depletion of fish stocks and other living marine resources. Indeed, as will be explained further in chapter 3, these technological and ecological factors led states to claim much more expansive sovereign jurisdiction and rights to resources at sea in the decades after World War II. These developments tipped the balance quite squarely in the direction of more expansive coastal state ownership of resources. This was codified at the Third United Nations Conference on the Law of the Sea (UNCLOS III) in the exclusive economic zone and continental shelf regimes, which grants states exclusive rights to all natural resources within 200 nautical miles (nm) of their coasts, and in some cases to the resources in the seabed and subsoil of the continental shelf extending beyond 200 nm. Beyond these areas of national jurisdiction, UNCLOS subjects the natural resources of the seabed and subsoil to management by the International Seabed Authority, with fisheries in the high seas largely being managed (or not) on a more ad hoc, regional basis. States arrived at this arrangement due to an acknowledgment that the previous free-for-all approach to resource extraction in the global oceanic commons had led to dramatic resource depletion, especially of fish stocks, and had unfairly disadvantaged those states without long-distance fishing fleets or the technological capacity to extract resources from the seabed and subsoil.

However, as will be explained in chapter 4, there is still some ambiguity in the law of the sea regarding the extent to which states can expand their EEZ and continental shelf claims in particular instances. As a result of these ambiguities, states still face some of those same trade-offs in their claims to more jurisdiction over more maritime space and sovereign rights to the resources therein, since such claims can also lead other states to justify claiming more exclusive rights to resources in broader areas of maritime space. And as with concerns related to security

and navigational rights, here too, states' trade-offs will be conditioned by their maritime geography. Thus, a state whose only coastline is short and located on a semi-enclosed sea surrounded by several other nations also laying claim to resources should be less likely to interpret the law in a way that favors expansive exclusive resources than island states at a far remove from other states who are able to claim largely undisputed and fully realized claims to large 200 nm exclusive economic zones.

Figure 2.2 Standard Model for How States Will Interpret the Law of the Sea (Resources)

$$\mathbf{Int_{CSJ} = (MTP + Tech)*C_{Geo}}$$

Where:

- **Int_{CSJ}** = Interpretation of law of the sea favoring less or more coastal state jurisdiction
- **MTP** = Maritime Threat Perception (i.e. threat from foreign navies)
- **Tech** = Technological capacity to extract marine resources in far seas (e.g. far seas fishing fleets, deepwater oil rigs, etc.)
- **C_{Geo}** = Geographical Situation of State (a constant)

Relationships:

MTP generally has a **positive** relationship with **Int_{CSJ}**, conditional on specific **C_{Geo}**
Tech generally has a **negative** relationship with **Int_{CSJ}**, conditional on specific **C_{Geo}**

Change Over Time in the Standard Model

This account of how states' geopolitical interests are likely to influence their interpretations of the law of the sea provides many useful insights into the question of why states interpret the law of the sea in favor of greater or lesser coastal state jurisdiction. In principle, this theory can be adapted *mutatis mutandis* to predict changes in states' interpretations over time.

That is, states' interpretations of the law of the sea over time ought to reflect the change in the balance of their interests in maintaining unrestricted access to waters near other states' shores and their interests in preserving a security buffer around their coasts against foreign threats. Thus, as a state's overseas interests grow—its foreign direct investment stocks abroad, its diaspora communities, its dependence on foreign natural resources or long-distance fishing—and its power projection capabilities grow to defense those interests, it should be expected to interpret the law of the sea in ways that increasingly favor limited coastal state jurisdiction. Such interpretations will enable its own government vessels and aircraft, and those of its private citizens and corporations, more uninhibited access to waters around the globe. Conversely, as a state's perceptions of threat from foreign naval powers grows, it should be more likely to interpret the law of the sea in ways that support greater claims to coastal state jurisdiction at sea. In so doing, the state would be able to both signal to the threatening foreign power and persuade its public and international actors that any incursions by the foreign power into waters or airspace near the state would be illegitimate and thus potentially subject to armed resistance. Physical geography would continue to play an important role in influencing states' interpretations. But in most situations it would not change over time, and thus would not exert a separate influence on states' interpretations over time, except through its interaction with states' access requirements and threat perceptions (see Figures 2.1 and 2.2).

Modifying the Standard Model: Legitimacy Constraints and Creative Evolution

This standard geopolitical model is an intuitively plausible baseline predictor for how states' interpretations are likely to evolve over time. However, it is incomplete in two significant ways. First, as signaled in the introduction and as will be explained in the empirical case studies of this manuscript, the standard model is not able to adequately capture outcome patterns in the

variation of states' interpretations over time. States' interpretations of the law of the sea do not in fact evolve in direct relationship to their evolving geopolitical interests. I argue that this is because the standard model does not adequately account for the way that states' interpretations are constrained by their efforts to be seen as legitimate by other states. It is rarely a simple matter for a state to back away from a claim to expansive jurisdiction over the oceans, or to back down from a past legal affirmation of unrestricted "freedom of the seas." Doing so can incur hypocrisy costs and create a legitimacy gap that damages states' international status and diminishes the power, security, and other benefits they derive from being perceived as legitimate by relevant international others.

Second, although the standard model may tell us what patterns of outcomes to expect in states' interpretations over time, it cannot tell us *how* a state's interpretations will change over time. It cannot explain the processes or mechanisms by which a state's attitudes toward the law of the sea will change over time. Such details are necessary at an intellectual level because they enable evaluation of whether a theory's predictions are coming to pass because of the causes identified in the theory or because of different factors entirely that just happened to coincide with those causes. A theory that black-boxes processes is also less pragmatically useful, as it cannot provide the type of insights that scholars and practitioners need to assess and shape processes of change as they are happening. This is particularly problematic with the law of the sea, in light of the high level of contestation and uncertainty as to the future of the maritime order. Practitioners do not just need predictions about what states' interpretations of the law might be in the future; they also need more detailed insights into how those interpretations are going to get from where they are now to where they will be then. Only then can they understand what levers and tools might be most helpful in shaping both their own interpretations and those of other states.

It is thus necessary to overlay atop the standard geopolitical model a more complete theoretical explanation for how states' interpretations of the law of the sea will evolve over time. This more complete theory maintains that although states do interpret the law of the sea strategically in an effort to promote their interests, the process of interpretation is shaped and constrained by their interest in maintaining legitimacy in the eyes of other states. This search for legitimacy shapes states' initial interpretations of the law of the sea, as they seek to interpret the law in ways that will be seen as fair, correct, and consistent by other states—especially states that the interpreting state wishes to persuade of its legitimacy. Over time, this thirst for legitimacy also makes states sensitive to the risk of being seen as illegitimate if they opportunistically back away from their past principled interpretations just because their geopolitical circumstances have changed. This concern introduces a stickiness into states' interpretations that can lead to significant discrepancies between those interpretations and their geopolitical interests in the standard model.

At the same time, such stickiness is neither fully determinative nor comprehensive. It does not preclude states' strategic adaptation to alterations in the balance of their geopolitical interests. When faced with compelling material incentives, states are likely to exhibit a capacity for creative innovation in their interpretive approach toward the law that seeks to enable reinterpretation even while portraying such interpretive shifts as legitimate. Pioneering leaders and bureaucrats will creative tactics that may include elevating certain international legal concepts over others (*displacement*), applying the law of the sea in new circumstances (*layering*), deliberately avoiding interpreting the law of the sea in new circumstances (*drift*), or using past maritime legal interpretations for new strategic purposes (*conversion*).[7] Such tactics,

[7] As will be explained in greater detail below, these four labels are derived from Streeck and Thelen 2005.

however, may introduce inconsistencies and tensions in states' overall interpretive stance toward the law of the sea. Such inconsistencies can themselves create legitimacy gaps that constrain states from pushing these measures too far, instead opting to maintain some interpretive ambiguity that enables them to plausibly deny the existence of a gap.

Initial Interpretations

States generally articulate their first maritime jurisdictional claims and accompanying interpretations of the law of the sea at times when either their own domestic political regime is first forming or when they are first negotiating relationships with other states operating in their waters. This is because, as stated in chapter 1, interpreting the law of the sea is a basic constitutive requirement of states' existence in the international system. States with coastlines must determine how much jurisdiction to claim over how much of the ocean adjacent to their coasts. Since those claims affect the activities of private and government vessels from other states in those waters, other states will expect costal states to explain how they justify their claims relative to prevailing practice and attitudes (the core components of customary international law) and any applicable international conventions and treaties.

As will be explained further in chapter 3, for most of international history, this process has occurred through domestic decrees and laws, diplomatic communications, or formal bilateral treaties. In the twentieth century, efforts to codify customary international law of the sea eventually resulted in four separate Geneva conventions on the law of the sea in 1958. These were then followed by a more unified and extensive United Nations Convention on the Law of the Sea in 1982. When these conventions were concluded, states had to choose whether or not to sign and ratify them. Whether accepting or rejecting the conventions, states had to interpret them and their key provisions. They did so through speeches delivered in the concluding sessions of

the convention negotiations, through formal interpretive declarations issued upon signing or ratifying the conventions, through public statements and press conferences delivered before the media, in debates within domestic legislative assemblies, and in regulations, orders, and laws incorporating or responding to the conventions.

States base their initial interpretations of the law of the sea in part on the geopolitical incentives in the standard model—that is, the balance between their maritime threat perceptions along their own coasts and their interest in conducting operations in other states' waters, as conditioned by their maritime geography. Thus, a state that perceives a maritime threat in its near seas—whether a foreign naval power or the depletion of fish stocks through foreign fishing—will be more likely to interpret the law in ways that favor more expansive coastal state jurisdiction. A state that has a blue water navy or far seas fishing fleets and yet is hemmed in by straits or the territorial seas and EEZs of other states or has limited ocean space along its coasts will be more likely to promulgate interpretations that favor limited jurisdiction.

At the same time, states' interpretations will also be shaped by their strategic interest in portraying themselves as legitimate actors in the international community. Leaders, diplomats, and bureaucrats responsible for crafting states' legal interpretations will thus select and craft the discourse they use in interpreting the law based on what they perceive to be most effective in persuading international audiences. These legitimation efforts will be targeted—that is, they will be designed to bolster the state's legitimacy in the eyes of those other states that the state views as part of its relevant social in-group.[8] If a state is seeking to build alliances, partnerships, or coalitions with states who espouse a particular interpretation of the law, then the state will be more likely to espouse that same interpretation in order to signal cooperative intent and to be

[8] Goodman and Jinks 2004; Johnston 2008.

seen as a pro-social actor by the states in the reference group. Conversely, a state may reject or criticize the legal interpretation of an adversary or rival in order to weaken that adversary's legitimacy in the eyes of third parties.

Legitimation as a Mechanism of Constraint

The discourse that state actors employ to make the state's initial interpretations of international law will then form the basis of the state's future rhetorical repertoires—the concepts, phrases, logics, and narratives they will draw upon to explain and defend their interpretations of the law in the future. When these rhetorical repertoires are enshrined in official policy and legislation, they become particularly enduring resources for informing future interpretations. In so doing, they serve to entrench states within their initial interpretations through processes of path dependency.

It is necessary, however, to further unpack the precise mechanisms by which this path dependency unfolds in particular settings—in this case, the law of the sea. Of course, one obvious mechanism of path dependency is pure policy inertia. At a domestic level, the ratification of UNCLOS and the harmonization of domestic maritime laws and policies with those agreements was generally a politically difficult and time-consuming exercise for most states. Whatever interpretation of the international law of the sea that states codified is thus likely to have developed a degree of inertia. Any future revision to those laws would itself require a lengthy political and legal process, raising the barriers to change in the state's formal interpretations of the law of the sea. However, policy inertia cannot in and of itself explain why states' interpretations of the law of the sea would fail to update as their interests changes. Policy inertia only exists where strong or unanimous political will to change the policy is lacking. In a strictly rational geopolitical theory, if a states' material interests are genuinely changing,

domestic political actors should perceive that change; although some actors may resist change in the interpretation due to their particular interests, other actors who favor change in interpretation due to the states' changing interests should ultimately win out as the risks of insufficient change become increasingly acute and apparent.

Rather, I argue that states' efforts to interpret the law of the sea in ways that bolster their legitimacy in the eyes of international actors introduces constraints that reinforce their initial interpretations and make them resistant to change over time. National leaders maintain the state's relationships to other states based upon the rhetorical constructs they have erected. If they change their interpretations in response to their shifting geopolitical interests, especially if those interpretations are seen to be self-serving and unfair to other states within the state's social reference group, their states will incur hypocrisy costs. Other countries will see their behavior as violating norms of reciprocity and fairness, and a legitimacy gap—a discrepancy between the state's interpretations and other states' expectations of them—will emerge. In order to avoid such costs and minimize such gaps, states will thus be resistant to explicitly changing their past interpretations of the law of the sea.

These dynamics of constraint are especially likely to operate when states interpret the law of the sea in order to bolster their legitimacy among specific reference groups. When a state espouses shared interpretations of the law with other states, its rhetorical emphasis on their common interpretation may create a social "in-group" comprised of states who espouse that same interpretation. States may seek to foster such shared group identities in order to enhance opportunities for cooperation within the group, build solidarity against external threats, or simply enhance their own social status.[9] Conversely, if a state is seeking to build a balancing coalition

[9] Similar dynamics operate in Dudden's account of how imperial Japan employed the discourse of Western international law to justify and legitimize its colonization of Korea. By using these legal interpretations, Japanese

against an adversary, it may challenge that adversary's interpretation of the law as illegitimate in order to depict it as part of a social "out-group." In so doing, the state will seek to create a sense that the adversary threatens the in-group that shares a more "correct" interpretation of the law.[10]

When such social groupings form, they often do so precisely in order to overcome lesser-order material or ideological divergence within the in-group in order to establish solidarity toward a higher-order strategic priority. But in relying on such social mechanisms, states may reduce their freedom to adjust their interpretations of the law in ways that reflect evolving maritime geopolitical interests over time. Such reinterpretations could incur hypocrisy costs among the in-group, impeding the state's goals in other areas. And such reinterpretations may also be epistemically difficult, since discursive social mechanisms have been used over time by the members of the in-group (whether that be an alliance, partnership, or broader coalition) to legitimize the shared interpretation of the law and render other interpretations normatively suspect ("extreme," "incorrect," passé, hegemonic, reactionary, etc.)—and even unthinkable, if the logic of those alternatives has never even been entertained among the group.

These dynamics are highly salient in the law of the sea, evident in the ways in which states formed social groupings in negotiating the law and scholars classify states according to those social groupings. As will be discussed in greater detail in chapter 4, these social groupings emerged during the period from the late 1960s through early 1980s when the UN Convention on the Law of the Sea was negotiated. Of special note, UNCLOS III provided one of the first major multilateral conferences for decolonized and developing states to pursue their effort to build a

officials sought to establish their country as part of an in-group of imperialist powers together with those Western states that only a few decades before had treated Japan as part of the out-group of "uncivilized" nations. Dudden 2005.

[10] Although I often use the term "the state" as a shorthand, these relational dynamics operate at the level of individual leaders and officials and small groups within the state, and in their interactions with communities of experts, ranging from retired military officers and diplomats to policy advisers, scholars, and international lawyers.

"new international economic order" and to turn the oceans into "zones of peace." This movement sought to reshape the law of the sea to ensure equitable access to the mineral resources of the seabed beyond national jurisdiction especially, as well as to strengthen coastal state jurisdiction over foreign military activities. These matters provided a rallying point for decolonized states, as historical colonialism had been oriented around extracting natural resources from colonized lands, based upon a foundation of military coercion through naval power projection.[11] Post-colonial ideology thus proved to be a powerful cross-cutting force around which these states coalesced, even though they also diverged on issues more pertinent to their narrower geopolitical circumstances. Similarly, major maritime powers also formed their own negotiating bloc at the conference, creating a coalition that cut across Cold War lines, encompassing the United States, the Soviet Union, Japan, and the United Kingdom, among others. These groups shared key material interests in expanding or limiting coastal state jurisdiction, respectively, but their groupings also consisted of social alliances and expectations.[12]

Critical Junctures: Regime Transformation and International Realignment

A caveat about the constraining effect of legitimacy concerns is in order, however. Legitimation mechanisms will be less likely to impose constraints when new international regimes are forming or when an old regime is being fundamentally transformed by exogenous shocks. At such times, the state is likely to face fewer legitimacy costs if it adopts a stance toward a legal issue that is unusual or extreme, since general international consensus about what

[11] As Manjari Miller argues, issues related to sovereignty and boundaries are even more salient to states who have been subjected to colonialism, since imperialist powers systematically violated their sovereignty and often arbitrarily and imprecisely imposed boundaries during decolonization. Miller 2013.

[12] Other negotiating groups formed as well around particular interests, such as straits states, archipelagic nations, states with wide continental shelves, and more, but these tended to be more oriented around shared geophysical features and interests only, rather than shared social identity as well.

constitutes a legitimate stance is itself lacking. They will also have more leeway to change their interpretations, since many countries will be doing the same. In fact, in such times, a "regime" around which actors' expectations converge arguably does not even exist, which is why the regime is being challenged or renegotiated.[13] Thus, at such times, the state does not necessarily "interpret" the law per se, since no law clearly exists, though it will continue to interpret various concepts present in the normative milieu, including older formulations of the law. Instead, in such moments, states primarily engage in processes of bargaining, negotiation, and contestation over what principles, rules, norms, and decision-making procedures will compose the new regime.[14] However, once a regime re-crystallizes and states articulated their interpretations of the new regime, the hypocrisy costs of reinterpretation of will grow and states will again have to mind the legitimacy gaps.

These dynamics operated in the law of the sea from the late 1940s through the 1970s, especially in the last decade of that period, as the previous equilibrium law of the sea, a piecemeal regime of treaties and customary law, began to collapse. As will be discussed further in chapter 3, this collapse was driven by exogenous shocks including technological change, demographic booms, and decolonization, as well as the endogenous processes of an accumulating number of states reinterpreting the law and claiming ever more jurisdiction at sea. During the negotiations at the Third United Nations Conference on the Law of the Sea from 1973 to 1982, state practice related to maritime jurisdiction was particularly dynamic as many

[13] I thus draw upon the definition of international regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actor expectations converge in a given area of international relations," as articulated in Krasner 1982; Krasner 1983. Although this definition of regime was debated in the years after its consensus articulation by a group of IR scholars, it has remained the most widely employed definition. See Hasenclever, Mayer, and Rittberger 1997.

[14] See previous footnote. The group of scholars who developed this consensus definition of regime further defined principles as "beliefs of fact, causation, and rectitude," norms as "standards of behavior defined in terms of rights and obligations," rules as "specific prescriptions or proscriptions for action," and decision-making procedures as "prevailing practices for making and implementing collective choice." Krasner 1982; Krasner 1983..

countries changed their maritime claims and legal interpretations in response to developments at the conference. But once a final UNCLOS text was approved at the end of UNCLOS III and states staked out their interpretations thereof, they were once again subject to the constraining effects of legitimation.

Finally, legitimation may impose less of a constraint on a state's interpretations of the law of the sea if the state ceases to identify with the social reference group that its legitimation strategy has traditionally targeted. In such a scenario, a state may reinterpret the law of the sea in order to instead appeal to a new target state or coalition, without caring as much how their previous reference group views their shift. Such social realignments may happen as a result of regime change or defeat in war, or they could happen through more gradual processes whereby a country forms new coalitions or alliances, while its old social connections and identities atrophy or are explicitly abrogated. Such social identification patterns will likely exhibit some of the same stickiness that states' interpretations of the law of the sea exhibit, however, due to similar mechanisms of inertia, ideology, and socialization.

Geopolitical Incentives and Processes of Interpretational Change

The foregoing section argued that, generally speaking, legitimacy concerns will constrain states' from abandoning past interpretations of the law of the sea, with the exception of periods of transformation in the broader maritime regime or when states shift their social alignments. Up to this point, then, the theory resembles punctuated equilibrium theory, which argues that institutions and policies that form during rapid periods of change are prone to continuity over time due to assorted mechanisms of path dependence.[15] However, this account is incomplete, as

[15] Baumgartner and Jones 1993; Pierson 2000.

even outside those periods of broader change, states' interpretations of the law of the sea can also evolve in creative, subtle ways around the margins. When confronted with shifting geopolitical circumstances, such as increased maritime threats or growing overseas interests and blue water naval capacity, continuity in states' interpretations of the law of the sea will result in heightened dissonance and friction. Individual leaders and government officials will play an important role in recognizing those changing incentives and crafting innovative policies that are able to evade or overcome the constraining effect of legitimation.[16]

In other words, although interpretation as a discursive social practice tends to create self-reinforcing dynamics, those dynamics do not themselves wholly structure states' realities. States and the individual leaders and bureaucratic small groups that compose them are still strategic actors. They will still assess their environments and calculate the best ways and means to accomplish what they perceive to be their interests. As a state's geopolitical circumstances evolve—especially the growth or increased presence of a foreign power operating near its shores, or an expansion in its own overseas interests and naval power (see Figure 2.1)—leaders and pioneering bureaucrats will seek out creative ways to evolve their position, even while attempting to mitigate potential hypocrisy costs to the states' legitimacy.

Historical institutionalist scholars have identified a number of patterns of gradual change in domestic political economic institutions that are also evident in states' interpretations of the law of the sea over time. Streeck and Thelen summarize and label four of these processes as displacement, layering, drift, and conversion.[17] I will explain how states reinterpret the law of the sea according to these patterns, working around the constraints imposed by the constraining

[16] Samuels 2005.

[17] Streeck and Thelen 2005.

legitimation mechanisms described above to create change that is responsive to their geopolitical requirements. It is worth noting that although this change usually begins in marginal issue areas or in subtle ways, it does not necessarily have to remain "marginal"—these gradual mechanisms can, in fact, lead to quite fundamental alterations in the state's overall interpretation of the law of the sea over time, shifting them from a position predominantly in favor of state enclosure of the oceans toward a stance generally in favor of freedom of the seas. However, in the particular case of the modern law of the sea regime, since the regime itself has only existed since the early 1980s (when UNCLOS III concluded) or even the mid-1990s (when UNCLOS went into effect), continuity still predominates over change in many states' positions.

Displacement: Drawing upon Alternative Legal Sources

First, through the process of ***displacement,*** states elevate certain international legal sources over others. In so doing, they can avoid abandoning previous interpretations based in one mode of legal reasoning, while supplementing those previous interpretations with interpretations based in alternative legal foundations. These different sources or modes of international law often coexist alongside each other, not necessarily competing or contradicting each other, but not unambiguously harmonized with each other either. For example, a newer international convention may not perfectly align with previous international conventions on the same subject, or with international agreements on different topics that nonetheless overlap somewhat with the new convention in some areas. Bilateral or multilateral treaties designed to address a particular subset of issues or a particular region can also provide alternative sources of law. Customary international law, which is based in both state practice and *opinio juris*—that is, the subjective belief of states that they are bound by certain legal principles—provides another particularly

amorphous source of international law. States may also seek to draw upon highly subjective ideas of "natural law" or "international order."

Each of these legal sources and concepts can serve as rhetorical resources in debates over the law of the sea. Although the United Nations Convention on the Law of the Sea that was opened for signature in 1982 and went into effect in 1994 stands as the most prominent source of the law of the sea, customary international law is also frequently cited by states, especially those that have not ratified UNCLOS, but also by other states. Likewise, bilateral or multilateral treaties governing particular straits or semi-enclosed seas such as the Dardanelles or the South China Sea also serve as important sites for interpretation. As will be discussed in the next chapter, Hugo Grotius drew heavily upon natural law in his pamphlet *Mare Liberum* published in 1609 to defend the Dutch East India Company's bid to supplant Portuguese maritime dominance of Southeast Asian waters. With so many discursive resources to draw upon, states seeking to evade the constraints imposed by their long-standing interpretations of one form of law may draw upon another source of law to justify a supplementary or alternative interpretation. As that alternative interpretation gains prominence over time through deliberate cultivation and emphasis, it may effectively come to displace the original interpretation.

Layering: Applying the Law to New Circumstances

A second way that states' interpretations of international law may change over time is through ***layering***. This occurs when new circumstances arise that require the state to decide how to apply the law in an area that either international treaties have not explicitly addressed or that the state itself has not previously encountered and thus has not taken a position on. This provides leaders, bureaucrats, and military officers seeking for ways to respond to shifting geopolitical incentives with opportunities to interpret the law in novel ways. These new interpretations,

although layered on top of past interpretations, may diverge from the spirit of past interpretations. Over time, the accretion of such interpretations can lead to significant change in the overall interpretive stance of the state toward the international legal regime in question.

In the case of the law of the sea, this can occur due to environmental or technological change, as new threats to marine resources or new opportunities for extraction arise that require the state to decide how to apply the law given these new realities. It can also occur as a function of geopolitical shifts—for example, as a government begins operating its naval vessels more frequently in straits and EEZs adjacent to other states. This may provide a necessity—and an opportunity—for a coastal state that has not previously clarified its views on what foreign military activities are permissible within straits and EEZs to do so. These new interpretations will not *necessarily* conflict with states' past interpretations. However, if states' perceptions of their threats or their need for access to other states' waters, then the state may use this as an opportunity to articulate a new interpretation that differs in spirit from their past interpretations on different issues in the law of the sea.

Drift: Declining to Apply the Law in New Circumstances

By contrast, states may deliberately avoid interpreting international law in new circumstances, which can lead to ***drift***. As new environmental, technological, or geopolitical pressures emerge, leaders and government agencies may decline to extend its past interpretations to those new circumstances. Or they may gradually deemphasize a past interpretation, referring to it less frequently in its public statements and diplomatic conversations. Instead of referring to legal reasoning in its statements, the state may seek to sidestep legal interpretation entirely by instead to other forms of reasoning, such as reference to historical patterns or moral values. As a

consequence of these discursive shifts, the state's overall attitude toward the legal regime may begin to drift in a different, more ambivalent direction.

In the law of the sea context, states' legal interpretations may begin to drift for reasons similar to those described above with regard to layering. For example, a state that has traditionally interpreted the law of the sea in favor of expansive coastal state jurisdiction by complaining about foreign military surveillance in its EEZ but whose own military vessels are now operating more regularly in the EEZs of other countries may over time stop emphasizing the legal rationales for its objections to foreign military activities in its own EEZs. Leaders and spokespersons may avoid officially interpreting the law of the sea on this issue, instead using non-legal rationales or evasive language. Due to concerns over legitimacy gaps, the state will be unlikely to explicitly repudiate its past interpretations, and it may continue to uphold its more expansive interpretations on other law of the sea issues. But in at least this one area of the law of the sea, its position may drift over time away from such an expansive interpretation.

Conversion: Adapting the Interpretation for New Purposes

Finally, states may redeploy legal interpretations for new strategic purposes, leading to effective ***conversion*** of the original interpretation. States may initially interpret the law primarily for a particular purpose—for example, to signal cooperative intent toward an ally and build a shared sense of in-group identity with that ally. However, over time they may find that the same interpretation is useful for different strategic reasons, such as countering a threat from a new challenger or mobilizing a nationalist domestic population against that challenger. This mode of evolution is somewhat distinct from the first three in that the state's interpretation may not appear to change at a superficial level. However, the rhetorical arguments and narratives that are used to support that interpretation will evolve. This can produce subtle changes in the way that

the law is interpreted and applied by the state, as the new purposes will lead the state to engage in different forms of discursive legitimation or enforcement behavior when the interpretation is challenged or violated by other states.

In the case of the law of the sea, this process of evolution will likely unfold for those states that have the same overall balance of interests at sea over time, with changes in the underlying factors that produce that balance. Thus, for example, a state may initially interpret the law of the sea in ways that favor expansive coastal state jurisdiction in order to claim greater ownership of marine resources and demonstrate solidarity with other developing nations. Over time, although it maintains or even strengthens that same interpretation of the law of the sea, its primary reason for doing so may instead be a growing perception of threat from a rising naval power operating in its waters. Similarly, a maritime power with a large blue water navy that initially favors limited coastal state jurisdiction in order to maximize its access to key straits may over time find that interpretation especially useful in justifying its access to the waters alongside the shore of a new peer competitor or sending signals to that competitor in geopolitical disputes.

Interpretive Evolution, Legitimacy Gaps, and Reference Groups

In each of these processes of evolution, inconsistencies are likely to emerge in states' positions. Some degree of inconsistency in states' overall approaches toward the law of the sea will not necessarily lead to a "legitimacy gap." Since the law of the sea is so complex and multifaceted, states commonly will adopt some positions that are more typical of a "coastal state" at the same time they endorse positions typical of a "maritime power." This was in fact the case during the UNCLOS negotiations, as states sought to balance their competing interests in buffering for security and exercising exclusive control over offshore resources against their interests in maintaining access for military vessels and resource extraction in distant waters,

tailored to their particular geographical circumstances. For example, some states favored expansive jurisdiction over marine resources, while favoring limited jurisdiction over navigation. Some states advocated for security jurisdiction within the contiguous zone, even while endorsing high seas freedoms for military vessels in the EEZ. After the convention was concluded, some of this same inconsistency between states' interpretations of one aspect of the law of the sea and other aspects of the law of the sea persisted, reflecting their individual balances of interests.

However, as states' attitudes evolve over time, other forms of inconsistency beyond this mix-and-match approach could also emerge that could be more likely to create a "legitimacy gap" for the state. Examples of such inconsistency include:

- Inconsistency between formal interpretations and actual enforcement behavior,
- Inconsistency between the state's own behavior and its rhetorical stance or enforcement actions toward other states' behavior,
- Inconsistency in the state's enforcement behaviors and attitudes toward different states depending on their relationship to the state, and
- Inconsistency among the interpretive stances of different actors within the state, such as military officers and foreign ministry lawyers, state-owned oil companies and transportation ministries, and central and local government officials.

This legitimacy gap could render the states more vulnerable to charges of hypocrisy from international actors. In response, leaders, bureaucrats, spokespersons, and other state actors will draw upon the state's rhetorical repertoires, including both legal and non-legal reasoning, to explain or justify the inconsistency.

This behavior is similar to that identified by Krasner in his accounts of how states in nineteenth-century Asia and beyond habitually violated norms in practice that they continued to

uphold in their rhetoric, a phenomenon he dubs "organized hypocrisy."[18] At the same time, states' desire for legitimacy among key reference groups can also constrain and shape their willingness to tolerate the legitimacy gaps created by discrepancies between practice and rhetoric. If the targeted social reference group does not prioritize consistency between rhetoric and practice in part because of their own inconsistencies, then the pressure to eliminate that inconsistency will be relatively minimal, as Krasner observes. But when a state's reference group judges others according to not only their rhetorical embrace of certain interpretations, but also their behavioral compliance with those interpretations, then the state will face greater pressure to eliminate those legitimacy gaps, whether through rhetorical or behavioral shifts.

New Critical Junctures: Opportunities for More Dramatic Interpretive Shifts

Even as states' interpretations of the law of the sea gradually evolve through these processes of displacement, layering, drift, and conversion, the aforementioned legitimation mechanisms will likely continue to generate continuity in the most formal and prominent of the states' past interpretations. Thus, continuity will coexist with gradual change. As noted previously, due to those legitimation constraints, the state will be unlikely to explicitly repudiate or alter its previously articulated formal interpretations of the law of the sea unless (1) they cease to identify with the social reference group that their legitimation strategy has traditionally targeted; or (2) there is a broader transformation in the overall maritime regime.

Such critical junctures could come about in time through mechanisms that are either exogenous or endogenous to the maritime regime. Mechanisms that are relatively exogenous to the international maritime regime include major power war, domestic regime change, alliance

[18] Krasner 1999; Krasner 2001.

formation and abrogation, technological inventions, and environmental change.[19] Broader regime transformation could also emerge due to more endogenous mechanisms such as the accumulation of inconsistency and noncompliance *within* many individual states' approaches toward the regime and widespread contestation *among* states about the proper interpretation of the regime. Tipping points could be reached as such positions accumulate, especially if many nations who have not previously taken a strong position on an issue due to their own ambivalence and desire to avoid antagonizing major maritime powers shift their attitudes *en masse* when it becomes more politically expedient to do so.

Indeed, these types of processes produced the mid-twentieth-century critical juncture that led to UNCLOS III and the negotiation of a new law of the sea convention. Such processes could occur again in the future due to exogenous factors such as climate change and marine environmental degradation or technological advances in ocean resource exploitation or maritime navigation. Or endogenous dynamics, such as the accumulation of states' claims to "creeping jurisdiction" based on their expansive interpretations of UNCLOS, could lead to a tipping point that produces breakdown in the extant regime and widespread divergence therefrom, perhaps precipitating calls for a new international agreement. This new critical juncture would thus provide an opportunity and incentive for states to break from their past interpretations entirely in order to adapt to changing geopolitical circumstances.

Empirical Strategy

[19] Of course, none of these factors are likely to be truly exogenous, as they will be influenced by the current norms and rules that shape the maritime domain.

As explained in the preface, this project is grounded in a pragmatic epistemology advocated by Friedrichs and Kratochwil.[20] In line with such an epistemology, the foregoing theory of how states' interpretations of the law of the sea evolve over time has been developed over the course of years of empirical observation and research. Thus, this section on research design should not be seen as an articulation of how I will test the theory just presented. Rather, both the original theory and the original research design I developed years ago have undergone iterative revision over the course of this project. This section instead summarizes the structure of the empirical analysis that I have used to develop and refine the theory presented above, the outcomes of which I present in ensuing chapters.[21]

Research Design

My research design consists of two overall components: first, a mapping of the broad historical and cross-national context of how states interpret the law of the sea, and second, in-depth qualitative case studies of how individual states interpret the law of the sea. The broad mapping component consists of a historical narrative of the law of the sea throughout history (presented in chapter 3), focusing in on the negotiations at UNCLOS III and key contested issues in the contemporary law of the sea regime (chapter 4), followed by a quantitative descriptive summary of states' interpretations in key areas of the law of the sea (chapter 5).

[20] Friedrichs and Kratochwil 2009.

[21] This chapter (and the broader dissertation) thus follows a "logic of presentation," rather than a "logic of discovery" (Van Evera 1997, 106). It presents the outcomes of the theory development and empirical research process, rather than dragging the reader through the project's abductive twists and turns. This advice from Van Evera is sometimes taken to justify not merely straightforward presentation of one's research outcomes, but outright misrepresentations of the research process itself, wherein researchers present a theory as an intellectual creation that they invented *a priori* without any "peeking" at the real world, and which they will then subject to testing, which testing serendipitously affirms the accuracy of the theory. I instead aim to more honestly present my theory as explanation rather than deductive prediction, channeling the recommendation of Friedrichs and Kratochwil 2009.

My historical narrative begins in chapter 3 by tracing the long-term history of states' claims to jurisdiction over the oceans around the world, before analyzing the influence of European colonialism on the development of the law of the sea and the concept of "freedom of the seas." I describe the developments around the turn of the twentieth century that produced the modern distinction today known as "the law of the sea" as distinct from admiralty law and the law of naval warfare, including various codification conferences convened before, between, and after World Wars I and II. Upon reaching the mid-twentieth century, I describe the key developments that further destabilized what had already been only a partial and contested maritime legal regime and led to the critical juncture of the Third United Nations Conference on the Law of the Sea. In chapter 4, I then describe the deliberations and outcomes of that conference, which produced the UN Convention on the Law of the Sea. This narrative concludes with a focused description of the debates at the conference regarding four key issue areas: (1) innocent passage in the territorial sea and transit passage in straits of foreign warships, (2) foreign military activities and marine scientific research in the exclusive economic zone, (3) islands, rocks, archipelagoes, and their maritime entitlements; and (4) historic bays, waters, and rights. I have selected these issue areas due to the ongoing contestation over how the law of the sea should be interpreted in each of those areas and due to their importance to contemporary maritime competition, especially in the Indian and Pacific Ocean regions.

After presenting this historical narrative, I then construct and present the findings of a new dataset of state's *de jure* interpretations of international law, as reflected in their formal domestic laws and regulations and their declarations to the United Nations. I focus on the same issue areas analyzed in the historical narrative, supplemented with data on several other issues. This quantitative description gives insight into how states officially interpret the law of the sea in

key areas, helping to provide "orientation in a complex field of research."[22] However, such a quantitative snapshot also has major limitations and caveats, which I illustrate with findings from field research conducted on the maritime legal interpretations of Chile, Peru, and Ecuador.[23] This micro-comparison demonstrates the problems with relying solely upon a quantitative dataset of formal interpretations to understand how states interpret the law of the sea, especially over time. In the first place, interpreting silence in the data is fraught with difficulty, given the likelihood of missing data and the probability that silence could be a form of "hiding" by states seeking to avoid controversy. In addition, states' interpretations of the law of the sea often diverge in subtle ways from their *de jure* interpretations. It is often impossible to capture this subtler variation without much more fine-grained qualitative case study research. Analyzing only *de jure* interpretations of the law would lead one to overstate the stability of states' interpretations and preferences. Due to these various limitations, I have deliberately refrained from conducting statistical regression analysis of this data.

Rather, in order to provide greater descriptive and explanatory insight into how states interpret the law of the sea across time, I employ a strategy of in-depth qualitative case studies, including both within-case analysis and cross-case comparison. My principal within-case study focuses on how the People's Republic of China has interpreted the law of the sea (chapters 6 through 9), coupled with a comparative case study of Japan (chapter 10) and comparative shadow cases of the United States and Soviet Union (chapter 5). In the China and Japan case

[22] Friedrichs and Kratochwil 2009, 720. In their exposition of a pragmatic epistemology for IR research, Friedrichs and Kratochwil note that although "formal methods can be helpful to control complexity, avoid biases, and analyze data," they should only be employed with "a healthy dose of skepticism," keeping in mind that "[t]he ultimate goal … is not statistical sophistication but orientation in a complex field of research" (p. 720).

[23] I originally selected these cases for field research because they are important cases in the history of the development of the law of the sea and because they are well-suited for comparison to illustrate different patterns in how countries' attitudes toward the law of the sea change over time, as will be explained more in chapters 3-5. In addition to informing the historical narratives in chapters 3 and 4, these cases also have proved useful for contextualizing and qualifying my quantitative data.

studies, I evaluate the state's interpretation of the law of the sea in each of the four areas discussed in chapter 4, while in the shadow cases I focus on the first issue of territorial seas and innocent passage. I employ a combination of process-tracing and discourse analysis to evaluate how these states initially interpreted the law of the sea in these issue areas and how their interpretations have evolved over time.[24]

Evaluating Evidence for the Theory

Within my case studies, I analyze how the state's initial interpretations of the law of the sea were influenced by the geopolitical factors in the standard model, as well as by its efforts to bolster its legitimacy in the eyes of reference groups of other states. In order to do so, I examine public discourse, memoirs, and archival evidence to assess whether each state's maritime threat perceptions and overseas interests in the context of its maritime geography played a role in the state's interpretation. I also evaluate those sources to determine whether or not and how each state sought to establish its legitimacy in the eyes of other reference groups through diplomatic overtures and rhetoric in international venues when staking out its initial interpretations.

I then evaluate how each state's interpretations of each of the four issue areas has evolved over time. I assess whether or not their geopolitical interests, including maritime threat perceptions and overseas naval and maritime operations, have evolved over time, and whether or not those shifting interests have motivated change in the state's interpretations. If the state has not changed its interpretations over time, despite shifting geopolitical interests, I evaluate its

[24] Friedrichs and Kratochwil describe such an approach as lying at the heart of the pragmatic empirical strategy of abduction: "In a nutshell, abduction is a comparative case study method. It starts with a research interest that relates to some relevant purpose. The specific field of research is constituted by a limited number of core concepts. A variety of conceptual distinctions is applied to divide the field into a number of domains. The researcher examines the most important or most typical cases in each domain to establish whether and how each distinction is important in structuring the field under examination. To that end, cross-case analysis is combined with within-case analysis" (2009, 719–20).

discourse and behavior to determine why its interpretations have remained constant. If the state reaffirms its past interpretations in response to objections and criticisms from states within its targeted social reference group, I count this as evidence of the constraining effect of legitimacy (i.e. as confirming evidence for the theory). Conversely, if a state's interpretations have in fact evolved over time, I assess whether or not that evolution involved explicit repudiation or change in past formal interpretations. If so, and if this took place outside the context of a critical juncture, then I count this as evidence that legitimation does not in fact impose a significant constraint in that area (i.e. as disconfirming evidence for the theory). But if the state's interpretations evolved in more subtle ways short of such explicit change, I characterize that evolution according to one of the four patterns introduced above—displacement, layering, drift, or conversion. I then assess discourse and trace sequences of events to determine whether or not the state's legitimacy concerns channeled its interpretations into those patterns and prevented more overt reinterpretation.

In the primary China case study, I devote chapter 6 to assessing how geopolitical factors and legitimacy concerns have influenced China's relationship to the law of the sea over time. In chapters 7 through 9, I conduct an in-depth analysis of China's interpretations of the four main areas of the law of the sea, from when they first emerged through to the present. In each of those issues areas, I evaluate the evidence for how geopolitical factors and legitimacy concerns have both motivated and constrained interpretive evolution and for how legitimacy concerns have shaped the particular processes of evolution. In the comparative Japan case studies, I conduct more concise assessment structured solely around the four issue areas, evaluating initial interpretations and patterns of change and assessing evidence for the theoretical argument in each area. Meanwhile, in the shadow cases of the United States and Soviet Union in chapter 5, I

focus on how shifting geopolitical interests interacted with legitimacy constraints to shape their interpretation of the first of the four issues—that is, the evolution in each states' interpretations of customary and conventional law on the territorial seas and innocent passage of warships.

Case Selection

I selected my primary and comparative case studies of China and Japan based largely on a "most important" case selection logic, in line with Friedrichs and Kratochwil's recommendation for pragmatic research design.[25] These two countries are especially critical cases for understanding how maritime competition and jurisdiction is likely to unfold in the twenty-first century. The sea lines of communication and littorals of the Western Pacific is one of the geographical areas where issues related to freedom of navigation are most contested in the post-UNCLOS era. China and Japan are both increasing their presence in the seas and airspace in the Western Pacific and beyond, and each state is involved in contentious island territorial and maritime jurisdictional disputes with each other and other states.

More conventionally, these cases also capture varying patterns in change in the main variables in the standard model since the conclusion of UNCLOS III. As a maritime power at UNCLOS III, Japan's threat perceptions were moderate and stable in the midst of the detente of the 1970s and 80s. Although Tokyo felt anxiety over Soviet operations in its straits, especially near the disputed Northern Territories (Kuril Islands), these disputes were fairly stable during the period of UNCLOS III. Since that time, although Japan's overseas interests and naval power have remained largely constant, its threat perceptions have increased dramatically as China's power has grown. By contrast, as a developing state at UNCLOS III surrounded by largely hostile or unfriendly powers and just emerging from years of Cultural Revolution, China's threat

[25] Ibid., 718.

perceptions were high during the UNCLOS III period. Over time, although its threat perceptions have not changed significantly, its overseas interests and naval power have grown dramatically.

I selected my shadow cases of the United States and the Soviet Union during the periods of their rise to naval power not only because of their intrinsic importance, but also because of their salience to the context of China's own naval rise. The study of the U.S. case provides insight into how "freedom of navigation" became central to America's strategy of command of the commons and how the United States became the self-appointed enforcer of freedom of navigation through its unilateral Freedom of Navigation Program, which it formalized in the waning years of UNCLOS III. As the United States has increasingly used both freedom of navigation rhetoric and actual freedom of navigation operations ("FONOPs") in the twenty-first century to target China's maritime jurisdictional claims, analyzing the U.S. case is essential to understanding U.S.-China disagreements over the law of the sea. Meanwhile, the USSR is a particularly informative foil to the China case, since, like China's threat perceptions today, the USSR's threat perceptions vis-à-vis the United States were significant during this period, while its naval development in those decades also followed a somewhat similar trajectory to that of Beijing's in the twenty-first century. Studying the conditions under which the Soviet Union's maritime jurisdictional claims changed, and how that shaped U.S.-Soviet relations and the broader world order, can thus shed light on the ways in which Beijing's interpretations of the law of the sea and the broader U.S.-China maritime competition might unfold.

Measurement

In order to measure an interpretation of the law of the sea, I evaluate a combination of states' *de jure* interpretations enshrined in laws, decrees, and regulations about a states' maritime jurisdictional claims, as well as official interpretations issued in the form of speeches, statements,

and remarks to the media. I only consider an interpretation to be an official government interpretation if it issues from a leader or entity duly authorized to speak for the state, not from other actors within the country, even if they are closely affiliated with the government as advisors, or even as employees speaking in an unofficial capacity. I interpret off-the-cuff remarks to the media by government leaders and officials, as opposed to formal speeches, with caution, as they may or may not represent official interpretations; I triangulate such remarks against other statements to detect whether or not they are repeated or supported elsewhere from any other official sources. I generally evaluate states' interpretations of the law of the sea on a spectrum ranging from favoring less to more coastal state jurisdiction, though the details of this measurement vary across the four key issue areas evaluated in each case.

Sources

The global historical narrative and analysis in chapters 3 and 4 of the dissertation draws upon both primary and secondary sources. For history prior to the twentieth century, I rely primarily upon secondary accounts of how sovereigns around the world, especially those located along the littorals of the Indian and Pacific Oceans, Mediterranean Sea, and western and northern European seas, approached maritime jurisdiction. I supplement this with my own analysis of some primary sources, including essays by jurists such as Hugo Grotius, William Welwod, and John Selden. For the events of the twentieth century—including the 1930 League of Nations Codification Conference, the Seabed Committee's work from 1967-1973, and the three United Nations Conferences on the Law of the Sea held in 1958, 1960, and 1973-1982—I draw more heavily upon primary sources, including official League of Nations and United Nations conference records, national laws and statements, quasi-official commentaries by participants, and interviews with several individuals who participated in the UNCLOS III negotiations.

To create the database for the quantitative description of states' contemporary maritime jurisdictional claims, I coded states' claims based upon their national legislation or executive decrees and their submissions to UN institutions. I found these sources either in UN databases and compendia or cited and quoted in either the U.S. military's *Maritime Claims Reference Manual* or the U.S. State Department's *Limits of the Seas* series. For some measures, especially regarding islands and archipelagoes, I also drew upon scholarly analyses of states' maritime jurisdictional claims supplemented with my own independent research in primary sources. In order to avoid introducing a U.S.-centric bias into the dataset, I did not use the U.S. government sources' more subjective analysis of other states' claims in my coding, but rather only used them as reference sources for states' laws and policies. Even with these strict coding rules, certain precautions must be taken in interpreting the data, which I explain at length when presenting my summary of the data in chapter 5.

For both my principal case study of China and my comparative case study of Japan, my analysis focuses mainly on primary sources, supplemented with secondary sources. For my shadow case studies of the United States and Soviet Union, I draw primarily on secondary sources, supplemented with primary sources. Primary sources examined in the research include official state discourse, whether public or diplomatic, such as government legislation and decrees; white papers, public statements, and press conference remarks from government officials and ministries; and diplomatic communications and demarches. Other primary sources include internal government records and strategy documents, as well as private notes, reflections, and memoirs from state officials responsible for deciding the states' interpretation of the law of the sea. In some cases, I have also analyzed commentary generated by policy analysts and political elites in each country as a primary source in and of itself, as a means of exploring the

range of attitudes toward the law of the sea among the broader unofficial domestic interpretive communities within each country. In order to access these various categories of official, quasi-official, and unofficial discourse, I have conducted research in published and online compendia, government websites and archives, personal archives and memoirs, and online databases of peer-reviewed journals. Due to broad archival access restrictions in some of my study countries and the relatively recent date of the period under study, many internal government documents and personal notes are difficult to access. However, United Nations records have been well-maintained, assembled, and published. The papers of Elliot Richardson, who was the lead U.S. negotiator during UNCLOS III during the Carter administration, held at the Library of Congress, have proven particularly invaluable.

In addition to these written primary sources, this dissertation also draws on over 100 research interviews that I conducted with current and former government officials, government advisors, legal experts, and policy analysts in six countries, including the United States, Japan, Chile, Peru, India, and China. Most of these interviews took place between October 2017 and August 2019, though a dozen were conducted in 2015 at a more exploratory stage of the research. The balance among official, internal, private, and unofficial expert sources, as well as the seniority of the officials I was able to interview, varies across countries depending upon accessibility and availability of sources. I describe the sources used in each case in more detail in the case study chapters. (See also List of Research Interviews in the Bibliography.)

Chapter 3: A Brief History of the Law of the Sea

The "law of the sea" today is a term used to refer to the body of public international law pertaining to states' jurisdiction over the oceans. As with other domains of international law, the law of the sea includes both conventional law, which is also known as treaty law, and customary law, which is derived from the combination of states' repeated behavior (i.e. "state practice") and states' subjective "belief that such behaviour depends on a legal obligation" (i.e. *opinio juris*).[1] In its modern formulation, the international law of the sea is distinct from both admiralty law (often called "maritime law"), which is the body of private international law and domestic laws governing ships at sea, and the laws of naval warfare, which are a combination of customary and conventional laws that form a subset of the laws of armed conflict.[2] These distinctions, however, are very recent phenomena. In fact, prior to the twentieth century, although there were ubiquitous rules and institutions governing maritime commerce, there was no comprehensive or uniform international maritime legal regime. Moreover, as chapter 4 will show, even after the monumental effort of the twentieth century to negotiate new rules to govern the oceans, the law of the sea remains ambiguous and contested in many aspects.

In this chapter, I will sketch an historical overview of how human civilizations and their governments across time and space have sought to structure their activities at sea through institutions and norms. Given the immensity of the subject and the imperative for brevity in this chapter, this overview is far from comprehensive. In a sense I instead portray snapshots of

[1] Treves 2006.

[2] There are certainly places of overlap and tangency among these three bodies of law. However, the law of the sea deals principally with matters such as the extent and nature of sovereignty and jurisdiction that states can claim over the ocean, the relationships and boundaries between states at sea, and the rights and duties of military and commercial vessels in various ocean spaces during peacetime, as opposed to the torts and contracts of ships at sea (the focus of admiralty law) and the limits on naval warfare (the focus of the laws of armed conflict).

various societies' approaches to maritime jurisdiction in different times and places, highlighting commonalities and drawing comparisons, and illustrating how these snapshots connect across time and space. My objective in adopting such a broad global and temporal approach to this history is to counteract common trends in historical summaries of the law of the sea's development written by policy analysts, legal experts, and the few international relations scholars who have discussed the law of the sea. The common narrative, which emphasizes the origins of the modern law of the sea in Hugo Grotius' concept of *mare liberum* ("the free sea") and the later embrace of "freedom of the seas" by the British Empire and the United States, is simultaneously highly Western-centric, while also understating the temporal and spatial contradictions in how European imperialism and colonialism both produced and contested the doctrine of "freedom of the seas."[3]

More fulsome context, by contrast, will illustrate the basic theoretical assumption outlined in chapter 1 that states use law to promote their interests at sea, even though those efforts did not take the form of contestation and interpretation of "international law" until the modern period in Europe as colonial powers feuded over control of maritime trade networks, fisheries, and the rights of neutrals at sea. This broader context will also illustrate the theoretical argument in chapter 2. Even though that theory is more tailored to the modern law of the sea regime established after the Third United Nations Conference on the Law of the Sea (UNCLOS

[3] This common narrative goes something as follows: Ancient Roman law saw the sea as a common good, but early European colonial powers such as the Spanish and Portuguese Empires sought to divide up the seas. Then around 1600, Hugo Grotius, the father of modern international law, introduced the concept of "freedom of the seas" (mare liberum) based on ideas of natural law. Although it was met with initial resistance from scholars like John Selden, who advocated *mare clausum*, eventually the *mare liberum* approach won out. By the nineteenth century, customary international law coalesced around the combination of freedom of the seas with a narrow territorial sea, approximately the breadth of a cannon shot (or 3 nautical miles). Efforts to codify that customary law in the twentieth century eventually resulted in the United Nations Convention on the Law of the Sea, which itself embraced a significant expansion in coastal state jurisdiction driven by technological and environmental change and decolonization. An example of this basic historical summary can be found in Rothwell and Stephens 2016, 9–15. (This is a standard English-language textbook of the international law of the sea.)

III), it applies in general terms to how sovereigns have approached maritime jurisdiction across time. Throughout history, sovereigns' approaches to jurisdiction over the oceans and maritime trade in particular—whether favoring a more open, monopolistic, or autarkic approach—have evolved in response to their changing material interests.[4] At the same time, their approaches have at times exhibited lag and stickiness as states search for legal or normative arguments that enable them to change their interpretations while preserving their legitimacy in the eyes of reference groups.[5]

Seaborne Navigation and Maritime Jurisdiction from Antiquity to the Fifteenth Century

Throughout the long history of humanity's engagement in maritime commerce and travel, human civilizations have developed institutions to regulate seaborne trade and navigation. These institutions have included not only informal norms but also highly formalized rules for at least 2,000 years. During much of this human history, the distinction between public and private vessels and between military and nonmilitary vessels carried less meaning, as traders engaged in maritime shipping sometimes independently and at other times on behalf of or in partnership

[4] This is, of course, a massive oversimplification. Complex domestic politics, often stimulated by environmental change, technological innovation, demographic shifts, and religious/ideological trends, were part and parcel of these processes. But material incentives—economic and security motivations—have been clear drivers of trends in states' approaches toward maritime jurisdiction throughout history.

[5] To inform this narrative, I draw from numerous secondary sources, and some primary sources, especially for the section on twentieth century developments. One of the principal secondary sources I draw upon in the first two sections is Anand 1982. Anand's work is especially valuable with regard to historical and empirical data, though I am more cautious in drawing upon his interpretations of that data. His avowed post-colonial perspective, while enabling him to excavate invaluable empirical context and arrive at unique critical insights, at times leads him into a form of historical revisionism, portraying the European Other as uniquely avaricious, monopolistic, warlike, and hypocritical. Reading between the lines, however, it is evident that maritime powers in the Indo-Pacific region, such as the Srivijaya Empire in Indonesia, Tamil Chola Kingdom in southern India, Aksum Kingdom on the Horn of Africa, Arab rulers along the Gulf of Aden, and Yuan and Ming Dynasties in China also sought to use both military and legal-normative means to monopolize, restrict, or extract rents from maritime trade, and/or engaged in naval warfare. In the shadow of these efforts to exercise legal control, piracy and smuggling, sometimes by private actors but sometimes with tacit state approval (such as with the *wokou* pirates in Japan), was also a common phenomenon in the Indian Ocean and Western Pacific from antiquity onward.

with sovereigns. Many laws and regulations developed by maritime city states and trade leagues dealt primarily with complex commercial details related to liability, ownership, and partnership that enabled far-flung trade among individuals and entities without personal knowledge of one another to flourish (resembling more of what is known today as admiralty law). These rules thus served to "create order and reduce uncertainty in exchange," key functions described by North in his classic description of institutions.[6]

Other institutions developed by sovereigns, including both continental powers with ports and a smaller number of thalassocratic empires oriented around dominance of the sea, were designed to regulate and tax maritime shipping and trade goods. States extracted compulsory fees from this trade and sometimes restricted its contents, while at the same time often protecting and facilitating it by suppressing piracy and hosting markets for exchange and resupply. In other cases, coastal sovereigns claimed jurisdiction over waters in more spatial terms, especially in areas adjacent to their coasts or in nearby straits or semi-enclosed seas. At times, these empires and states exercised more informal maritime spatial jurisdiction founded on military dominance and norms of behavior, while less commonly they used formal decrees and treaties to demarcate the boundaries of their claimed maritime domains.

Development of Maritime Commerce, Navigation, and Jurisdiction in Antiquity

Humankind's seaborne navigation and shipping began to emerge in the Neolithic era and then flourish in the Bronze Age. Austronesian peoples invented sailing technologies and began to colonize areas across the Pacific and Indian Oceans in the period between 3000 and 1500 BCE, establishing spice and jade trading networks among insular Southeast Asia, Sri Lanka, and

[6] North 1991.

southern India during the period of 1000 to 500 BCE. These Indian Ocean networks in turn became interlocked with trade routes extending to the Persian Gulf, Red Sea, and Mediterranean by around 500 BCE.[7] Around this same period, the Mediterranean also became a site of robust maritime trade during the ascendancy of the Minoan civilization, a naval power centered on the island of Crete from 3000 to 1100 BCE. As the Minoan civilization faded, other maritime civilizations emerged in the Mediterranean. The Phoenicians used oarsmen-powered galleys to develop their wide-ranging maritime empire of interlinked colonies and city-states in the period from 1500 to 500 BCE, the unidentified "sea peoples" raided Egypt from around 1200 to 900 BCE, and the Greek city-states developed ocean-going commerce and naval power of their own starting in the eighth century BCE.

In the Indo-Pacific region, more extensive trade networks began to flourish in the last few centuries BCE, building on Austronesian spice and jade trade networks. During the Hellenistic period following the conquests of Alexander the Great in the late fourth century BCE, these networks developed into a broader "maritime silk road" connecting Asia with East Africa and the Mediterranean world (see Figure 3.1). Greek settlements in Ptolemaic Egypt along the Red Sea, such as Berenike Troglodytica, as well as the Arab port of Aden on the southern Arabian Peninsula, served as important trading hubs on the Indo-Mediterranean trade routes, where Greeks purchased spices, incense, and silks from Asia sold by Arab and Indian traders. These ports were especially important before Greek traders began to conduct regular maritime expeditions of their own to India in the mid-first century BCE upon learning how to exploit the Indian Ocean's monsoon winds.[8] At the same time, a still largely self-contained maritime trade

[7] Campbell 2016.

[8] Kotarba-Morley 2019; Schneider 2014.

also began to emerge in Northeast Asia, along with more frequent internecine naval warfare along the Chinese coasts.[9]

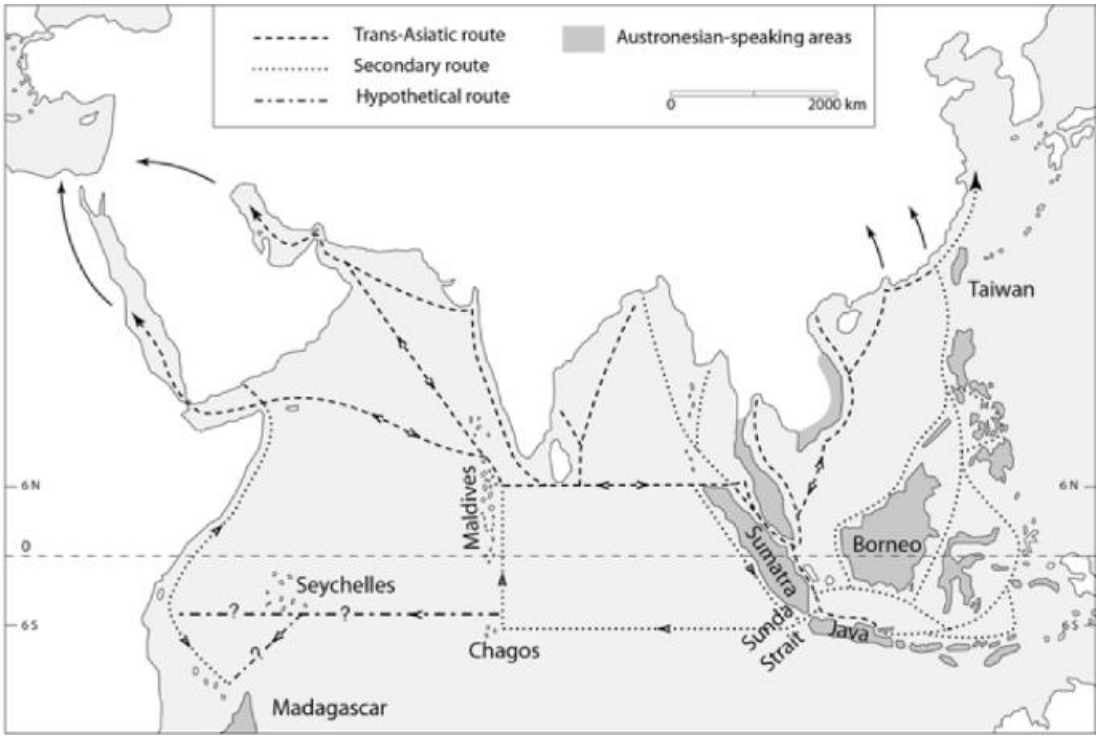
Sovereigns along these trade routes developed rules to govern and facilitate this seaborne trade. For example, the city-state civilization on the island of Rhodes became a major maritime power, acting as a trade hub between the Mediterranean world and Asia. According to later Roman sources, Rhodes developed laws or customs governing issues related to maritime trade and shipping, while using its naval force both to suppress piracy in the Mediterranean and maintain a balance of power among the Hellenistic states and their successors.[10] Further east, Indian kingdoms developed their own legal regimes to govern trade along their coasts. The Sanskrit political text the *Arthasastra*, likely first compiled in west-central India in the second century BCE, contained an entire chapter dedicated to shipping. It established a board of admiralty and naval department under the Maurya emperor headed by a superintendent of ships charged with administering navigation. Other Sanskrit texts from this period, such as the *Manusmriti*, also addressed matters related to shipping and port duties.[11] Importantly, these customary regimes and written rules probably did not develop in isolation from one another, as the ship captains and traders that traversed these routes likely would have disseminated norms and practices among their destinations.

[9] Schottenhammer 2012.

[10] Benedict 1909; Schomberg 1786.

[11] Anand 1982, 12–13.

Figure 3.1 Austronesian Maritime Trade and Navigation Routes, c. 500 BCE – 1500 CE



Source: Manguin 2016, 66.

These commercial connections within and between the Mediterranean world and Asia deepened and were bolstered by diplomatic exchanges among sovereigns over the next few centuries, facilitated by the Roman Empire's consolidation of power, conquest of Egypt in 30 BCE, and subsequent suppression of piracy in the Red Sea.[12] During this period, the Tamil Kingdoms of southern India became major commercial centers, establishing direct diplomatic relationships with Rome, while Greek traders established permanent presences in Indian ports. Southern India and Sri Lanka became important nodes for the transshipment of goods westward to the Roman Empire's domain and back, as China gradually became more integrated into the

[12] Ibid., 14–16; Schneider 2014.

broader maritime trade networks.[13] Kingdoms in the horn of Africa, such as the Kingdom of Aksum, as well as city-states such as Rhapta further south in Azania along the Swahili coast, also played a significant role in Indo-Mediterranean seaborne trade in this period.[14] The various laws and practices of the sovereigns governing the port-nodes in the maritime silk road provided for a system of free navigation subject to compulsory port duties. The more powerful sovereigns in Rome, Arabia, Aksum, and India undertook efforts to stifle piracy along their coasts in order to preserve the flow of commerce, while controlling and taxing trade in their ports.[15] These trade duties applied not only to goods that had arrived at their final destination, but also to goods that were in transit to other ports. The Roman Empire in particular viewed the Mediterranean as subject to its military hegemony, dubbing it "*Mare Nostrum*" (Our Sea).[16] However, these sovereigns apparently did not purport to exercise formal legal dominion over wide swaths of ocean space, instead applying their laws and regulations to humans, vessels, and goods passing through nearby straits or entering their ports.

Trends in Maritime Commerce, Navigation, and Jurisdiction in the Post-Classical Era

Mediterranean Sea and Europe, c. 400-1450 CE

Later Byzantine Roman law codified first under Justinian in the sixth century explicitly described the sea as a *res communis*, a good for common use not subject to ownership, while also adopting sea laws governing seaborne commerce purportedly modeled on Rhodian precedents [17]. Ironically, however, these laws were codified at a time of decline in maritime commerce in the

[13] Anand 1982, 14–18.
[14] Campbell 2016; Cartwright 2019.
[15] Schneider 2014.
[16] Tellegen-Couperus 1993, 32.
[17] Ashburner 1909; Fenn 1925.

Mediterranean. From the fifth through ninth centuries CE, successive waves of Germanic tribes and Muslim Arabs and Moors conducted sea-borne invasions between the Iberian Peninsula, North Africa, and Italy, while the Byzantine Empire intermittently sought to reassert its imperial claims in the western Mediterranean through naval expeditions. The decline in seaborne trade prompted by this maritime anarchy was further accelerated by the Mediterranean incursions of Viking raiders from the ninth through eleventh centuries CE.

Then, in the late Middle Ages, ocean-borne commerce in the Mediterranean, as well as the North and Baltic Seas, began to revive, with the rise of wealthy city-states in Italy, the Low Countries, and the Hanseatic League. These city-states and associations thereof formed naval forces designed to defend commercial shipping—though they were on occasion contracted into the service of high politics, as in the case of the Venetian fleet's role in the conquest of Constantinople in the Fourth Crusade in 1204 CE. At the same time, more traditional kingdoms and empires, such as the Norman kingdom of England and their French rivals, increasingly used naval warfare and privateering as an integral part of their approach to warfare and revenue-raising.[18] These city-states and kingdoms developed intricate legal codes governing their trade and shipping arrangements, codes that drew upon the Byzantine Rhodian Sea-Laws and influenced the development of each other. These included the Rolls of Olerón promoted in France and England by Eleanor of Aquitaine, the Laws of Wisbuy enacted by the Hanseatic League in the Baltic, and the Book of the Consulate of the Sea originating in Barcelona. These laws and other treaties of the time focused on the feudal relationship between the lord and his liege, addressing questions related to piracy and privateering, ownership and liability, and

[18] Davies 1996.

responsibility for acts at sea. Generally sovereigns were deemed responsible for the acts of their subjects at sea, rather than responsible for exercising jurisdiction in spatial areas.[19]

Exceptions to this rule were also evident in this period, however, as some European sovereigns referred to seas near their coasts as domains under their control or jurisdiction. For example, in the laws ordained in the eleventh century CE by Canute, the Viking king of England, Norway, and Denmark, and in the Gothings Law of the Kingdom of Norway, kingdoms conceived of maritime jurisdiction in spatial terms, drawing median lines between their shores and those of other countries to demarcate the realm of their rights and responsibilities.[20] Similarly, in the fourteenth century, England's Edward II at times revealed a belief in his responsibility to exercise jurisdiction in a roadstead, or sheltered coastal area, near Kent known as the Downs, on the grounds that piracy in that area happened "within this realm whilst under the king's protection."[21] A treaty Edward II signed in 1320 with the count of Flanders also settled a claim by Flemish merchants seeking redress for an act of piracy near Brittany within the English Channel not simply on the basis that the pirates were English but rather on the basis that Edward II was "lord of the sea" and the area of the attack was "within his power."[22] The Italian city states of Venice and Genoa in this period also laid claim to jurisdiction over the Adriatic and Ligurian Seas, including rights to levy tribute on vessels entering therein, as they sought to prevent piracy and control trade.[23]

[19] Lewis 1937.
[20] Theutenberg 1984.
[21] Lewis 1937, 88.
[22] Ibid., 83–84.
[23] Anand 1982, 84–85; Ryan 2019.

Indian Ocean, c. 300 to 1500 CE

At the same time maritime order in the Mediterranean floundered, trade and navigation in the wider Indian Ocean world also suffered a decline from around 300 to 900 CE, likely due to socio-environmental factors, including disease, deforestation, aridification, and a resulting weakening in the monsoon winds. However, toward the end of this period, climate change led to a resurgence in the monsoon winds that contributed to the revival of Indian Ocean trade,[24] a few centuries before the recovery of Mediterranean and European trade. Arab Muslim powers rose to fill the vacuum left by the declining Byzantine Empire in North Africa, also defeating the weakened Persian Sassanid Empire. They assumed control over the western Indian Ocean trading routes connecting to both the Red Sea and the Persian Gulf and thence to the eastern and southern Mediterranean. They also developed a robust maritime culture, with Arab traders traveling as far east as China.[25] While establishing effective monopoly control in some parts of the trade routes, they also generally maintained local trade customs and formed synergistic relationships with Indian, Southeast Asian, and Chinese traders operating throughout the Indian Ocean and China Seas and Venetian traders operating in the Mediterranean. And while claiming jurisdiction in areas along the coast akin to a territorial sea and in distinct sea areas such as the waters along the Hijaz coast of the Red Sea, Islamic rulers did not seek to claim broad jurisdiction over the "high seas."[26]

At the same time, the Srivijaya Empire emerged on the island of Sumatra around the seventh century CE and reigned supreme in insular Southeast Asia for several centuries. The empire built its wealth and power on its suppression of piracy and its domination of seaborne

[24] Campbell 2016.
[25] Ibid.
[26] Khalilieh 2019.

trade in the key Malacca and Sunda Straits and adjacent shipping lanes. It secured these objectives through both its naval warfare preventing the diversion of trade to ports in continental Southeast Asia and through its development of institutions to regulate, service, and levy fees on trading ships passing through its waters. Srivijaya thus used its naval hegemony to enforce its trade monopoly within a spatial realm, especially within key straits, compelling ships to enter its ports, use its services, and pay its fees. Even so, its regulatory institutions were apparently designed more to extract rents from the ships passing through its ports rather than to formally assert its maritime dominion in spatial terms. The Tamil Chola dynasty in southern India and the Mataram and then Majahapit kingdoms based in Java vied for naval supremacy with Srivijaya, while Indian cities along the Malabar coast and further north in Gujarat also played ongoing key intermediary roles in trade with Arab Muslims. By the end of the thirteenth century, both the Chola Kingdom and the Srivijaya Empire declined in part as a consequence of their destructive warring with each other.[27]

Then, in the early 1400s, a powerful new city-state emerged at Malacca on the Malay coast of the Strait of Malacca, nurtured at first by Chinese patronage during the brief period of the early Ming Dynasty's naval voyaging. Malacca, which became Islamicized in its early years, came to perfect the role that the Srivijaya Empire had previously played, developing secure warehouses, fixed customs duties, and standard weights and measures to regularize and facilitate trade through the Strait of Malacca. The Sultan Mahmud Shah of Malacca also compiled a written set of Maritime Codes of Macassar and Malacca based on both preexisting Indian codes and customary laws. These codes ascribed authority at sea to ship captains, whose activities were

[27] Anand 1982, 19–23, 26–27.

in turn to be governed by the rules of the state to whom the ship belonged. However, when the ship entered harbor, it became subject to the jurisdiction of the harbor-master, or *shahbander*.[28]

Northeast Asia, c. 300 to 1800 CE

Maritime commerce became increasingly important in Northeast Asia in this period, as Sino-Korean-Japanese trading networks merged more seamlessly with the wider Indian Ocean trade networks. Persian and Arab Muslim traders established permanent presences in Canton (Guangzhou), Quanzhou, and other Chinese ports, coming to rely more upon sea routes than overland routes for trade with China.[29] Buddhist monks, pilgrims, and scholars sailed throughout Northeast, Southeast, and South Asia from the third century onward. China's Tang Dynasty began registering and regulating all trade ships arriving in China by the year 713 CE and came to rely upon import duties for state revenue. Chinese ports served as transshipment points for goods from Korea and Japan, and Chinese rulers formed a tributary-patronage relationship with the Srivijaya Empire to their south.[30]

After a period of trade closure and piracy in the tenth century during the Tang Dynasty's waning years, these foreign trade relationships deepened during the ensuing Song Dynasty, managed by increasingly robust customs institutions and regulations. Song rulers built up a shipping fleet and established trading colonies in Southeast Asia.[31] They also established China's first standing navy to defend the empire's borders, though its naval forces were still largely used in riparian and coastal battles against continental enemies such as the forces of the Jin Dynasty and the Mongols. Once the Mongols conquered China and established the Yuan Dynasty in 1271

[28] Ibid., 28–31.
[29] Schottenhammer 2012.
[30] Anand 1982.
[31] Schottenhammer 2012.

CE, Kublai Khan standardized Tang and Song-era customs institutions, while restricting private trade in luxury goods to prevent outflows of gold and silver. Direct Chinese engagement in maritime trade increased in this period, with Chinese traders establishing alternate shipping lines to compete with Arab Muslim traders and developing strong presences of their own in Indian ports. This may have been enabled by the concomitant decline of the Srivijaya Empire, which had lost control of the trade routes between India and China.[32] At the same time, Kublai Khan also (unsuccessfully) waged naval warfare against Japan, the first time that the East China Sea had become a major naval battleground.[33]

As the short-lived Yuan Dynasty declined due to disease and rebellion, *wokou* pirates based in Japan began to target Chinese shipping routes and raid the eastern Chinese coast. The newly established Ming Dynasty responded to this problem with a ban on private maritime trade (*haijin*, 海禁) in 1368, which only further stimulated piracy from Japanese people desperate for Chinese goods.[34] The Ming's Yongle Emperor coupled the sea ban with efforts to monopolize all foreign trade through official government tribute missions. He commissioned a massive commercial-military-diplomatic fleet in 1403 that conducted seven treasure voyages across the traditional Indian Ocean sea lanes over the next three decades. Under commander Zheng He, this fleet employed military force to suppress piracy and coerce compliance to the Chinese fleet's tributary demands, but without endeavoring to directly control or exclusively monopolize ports or shipping routes. These voyages ceased, however, as domestic political opposition to the Ming rulers' trade monopoly and associated ban on private maritime trade grew.[35]

[32] Anand 1982, 19–25; Campbell 2016.

[33] Schottenhammer 2012. These developments were commented upon in the records of two Mediterranean sojourners in Asia, Marco Polo and Ibn Batutta.

[34] Li 2010.

[35] Lo 1958; Ray 1987.

Over the next few centuries, the sea ban was unevenly enforced, at times being loosened and at other times strengthened. During periods of stricter enforcement, piracy accelerated and became indigenized, as Chinese merchants and coastal inhabitants whose economy had depended on trade sought ways to evade the ban.[36] Chinese emigrants in foreign ports, as well as Indian and Southeast Asian Muslim traders, came to replace Arab and Persian traders as the primary intermediaries in the trade that did continue, while the Ryukyu Islands played an important intermediary role in Northeast Asian trade.[37] As with earlier Chinese laws and regulations regarding maritime trade, the Ming- and Qing-era sea bans were mostly executed and enforced from land and at the port of entry. The "coast guards" established to enforce the sea ban were principally land-based, not oceangoing, garrisoned in forts rather than posted to ships. Chinese officials wrote of the reluctance of the Chinese military to engage in naval battles given their unfamiliarity with fighting at sea.[38] The bans were expressed as prohibitions on the trade and travel of the Ming's human subjects, rather than as a closure of the seas adjacent to China in spatial terms. Indeed, they were not exclusively oriented toward the oceans but were part of a broader autarkic regime that also banned the land-based horse trade with the Mongols and tea trade with "western barbarians."[39]

Japan under the Tokugawa shogunate adopted a similar autarkic orientation beginning in the 1630s, also adopting a port-based enforcement approach. The shogunate's trade restrictions were part of an effort to exercise greater central control by excluding the disruptive influence of Spanish and Portuguese religious proselytizing and limiting the ability of local *daimyos* (lords) to

[36] Kung and Ma 2014; Li 2010.
[37] Schottenhammer 2012.
[38] Li 2010, 49.
[39] Ibid., 19.

amass independent wealth and power through foreign trade. However, the shogunate did maintain limited and controlled trade relations with Dutch, Chinese, Korean, and Ryukyuan traders over the coming two centuries.[40]

Pre-Colombian Americas

Meanwhile, during the pre-Colombian period in the Americas, maritime trade and travel also occurred between the Andean region and Mesoamerica, as well as among Caribbean islands and between those islands and northeast South America. The volume of these contacts seems to have been lower than in Eurasia and northern and eastern Africa, though it is impossible to know with certainty given the incompleteness of the archaeological record and the paucity of written sources that survived destruction by Spanish conquistadors.[41] The same scarcity of sources makes it difficult to know what laws and norms these civilizations may have developed to regulate maritime trade or other ocean activities such as fishing.

Implications of European Colonialism for Maritime Jurisdiction and the Law of the Sea

As expanding European maritime trade morphed into colonialism and mercantilism in the early modern period and fisheries in some European seas became depleted, feuding European empires began to claim broader jurisdiction over maritime space. These claims were often part and parcel of claims to monopoly trading and colonization rights in geographical areas.

Portugal and Spain Divide the World into Spheres of Dominion

[40] Gordon 2003, 17–19.

[41] Arbagi 2011; Smith 2010.

This approach was exemplified in the earliest imperial conquests of the Portuguese and Spanish Empires in the late fifteenth and sixteenth centuries. Portugal and Spanish Castile, having finally vanquished the Moors after centuries of crusading on the Iberian Peninsula, set their sights on more distant lands. Envious of the wealth of Asia, but unable to break the Venetian-Arab monopoly on goods transported via the Indo-Mediterranean routes, they began exploring alternate routes to Asia. In treaties signed at Alcáçovas in 1479 and Tordesillas in 1494 and brokered by the Roman Catholic pope, Portugal and Spain in effect divided the world and control of its resources between them along latitude and longitude lines drawn in the Atlantic.[42]

With the imprimatur of these treaties, which granted legitimacy relative to its Catholic European reference group, the Portuguese Empire used military force to subjugate ports across the Indian Ocean littorals to its control and break the Arab Muslim monopoly on trade routes in the region. In 1510-11, Portugal seized control of Goa on the Malabar Coast and Malacca on the Malay Peninsula. This enabled it to dominate trade through the pivotal Strait of Malacca, forcing ships passing through the strait to obtain Portuguese passes and pay customs duties.[43] Portuguese traders also began conducting trade in Chinese ports in the early sixteenth century. At first they did so on an illicit basis in violation of the Ming's *haijin* trade ban, but eventually China granted them official authorization to establish a permanent settlement at Macao.[44] The Macao port also became a crucial node of support for Portugal's trade with Japan, which Portugal declared a

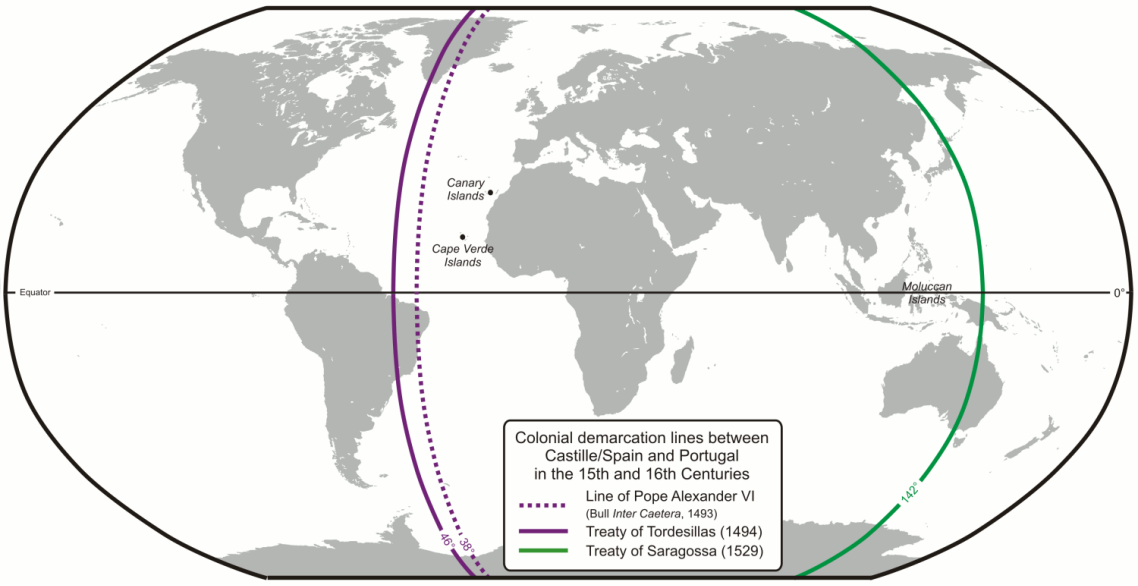
[42] The Treaty of Alcáçovas signed in 1479 confirmed Castile's ownership of the Canary Islands off the northwest coast of Africa, while assigning to Portugal all lands south of that point. After Christopher Columbus' "discovery" of the Caribbean islands in 1492 on behalf of the Spanish crown, Portugal responded by insisting that the islands fell under its control under the Treaty of Alcáçovas. The pope initially interpreted the dispute by not only bringing into question Portugal's control over the newly discovered lands, but also over India, which was Portugal's primary colonial objective. To address the dispute, the two empires met again to negotiate a new longitudinal boundary, signing the Treaty of Tordesillas in 1494. This treaty purported to divide the world into separate areas of control along a meridian 370 leagues west of the Cape Verde Islands, with Portugal assigned dominion over the world west of that line and Castile assigned dominion over the world to its east.

[43] Anand 1982, 40–60.

[44] Schottenhammer 2012.

"crown monopoly" in 1550, connecting that trade to its network of ports at Malacca, Goa, and Hormuz. Spain briefly contested Portuguese dominance in the "East Indies" before the two Iberian Powers negotiated the Treaty of Zaragoza in 1529, which defined an antemeridian dividing Portuguese and Spanish control in the Pacific (see Figure 3.2). Spain would go on to colonize the Philippines in 1571, however, establishing trade with Ming China via Manila and a shipping route across the Pacific.[45]

Figure 3.2 Treaties of Tordesillas and Zaragoza



Source: Wikimedia Commons, by creator Lencer, accessed August 2, 2020, https://commons.wikimedia.org/wiki/File:Spain_and_Portugal.png.

Mare Liberum, Mare Clausum, and Europe's Feud over Dominion Near and Monopolies Afar

[45] In the Treaty of Zaragoza, Spain effectively agreed to cede monopoly control of the East Indies to Portugal. It was willing to do so in exchange for monetary compensation, which it used to fund its war (allied with the Holy Roman Empire) against Britain, France, and Italy. Even though the treaty line of demarcation between the two empires' domains was east of the Philippines, Spain colonized the Philippines anyway four decades later, not long before Portugal and Spain formed the Iberian Union under the Hapsburg King Philip II.

Toward the end of the sixteenth century, the Netherlands and England challenged Iberian dominance over trade in the East Indies and Americas. The Netherlands, resentful of the rule of the Hapsburg King Philip II, who also ruled over the Iberian Union of Spain and Portugal, declared an independent Dutch Republic in 1581. The Dutch then sought to leverage their commercial and maritime navigational prowess to challenge Portuguese dominance of the "East Indies," commencing trade with local inhabitants and provoking violent clashes with Portugal.[46] In 1603, the Dutch East Indies Company attacked and seized a Portuguese galleon called the *Santa Catarina* near Singapore traveling from Macao to Malacca that was loaded with an immensely valuable cargo of Chinese silk, musk, and porcelain. The cargo increased the capital of the Dutch East India Company by 50 percent and was equal to double the capital of the English East India Company.[47] However, the seizure of the *Santa Catarina* was of dubious legality under Dutch law and many Dutch Mennonites opposed the seizure on moral grounds as an act of piracy, preferring that the Dutch East Indies Company confine itself to the more genteel business of commerce.

Against this backdrop, the Dutch East Indies Company contracted the publicist Hugo Grotius to write a legal treatise to justify the legitimacy of its actions. A portion of this treatise was published in 1609 as *Mare Liberum* (The Free Sea), in which Grotius defended Dutch seizure of the *Santa Catarina* by arguing that the Portuguese were unlawfully seeking to possess the oceans and restrict free trade. He cited three sources of law to this effect—Roman law, "natural law," and a form of customary law. His citations of Roman and natural law were closely intertwined. He highlighted Roman descriptions of water as a thing that is "*publica juris*

[46] Anand 1982, 72–77.
[47] Borschberg 2002, 35.

gentium, that is, common to all and proper to none." He then argued that since by nature the sea could not be occupied or possessed, and since it naturally connected the different parts of the world, it was thus intended by God to be open to the use of all, "whether we respect navigation or fishing."[48] These two arguments are often summarized as the bases for Grotius' *mare liberum* doctrine. But in addition to citing Roman and natural law, Grotius also highlighted what was in effect a form of customary law—the practices of the peoples inhabiting the islands of the East Indies. Specifically, he wrote, "These islands we speak of have, and always had, their kings, their commonwealth, their laws and their liberties. Trading is granted to the Portugals as to other nations."[49] Grotius cited this as evidence of the sovereign autonomy of the islands' occupants and a refutation of Portugal's right to claim dominion over them. But in so doing he favorably elevated their practices, suggesting that the concepts of free navigation and trade he was advocating were not in fact solely Roman or "natural" ideas, but also norms prevalent in the Indian Ocean world.[50]

In any event, Grotius' argument itself proved to be an interpretation of convenience for the Dutch, who themselves went on to seek monopoly control over the East Indies spice trade, suppressing competition through both treaties and military force as part of a strategy of *coophandel met force*, "trade supported by force of arms."[51] They seized control of Malacca from Portugal in 1641 and forced the Portuguese out of Sri Lanka in 1654. Then, like the Portuguese before them, they began requiring vessels passing through the strait to carry Dutch passes and to

[48] Grotius 2004, 24–25. He also argued that nature, by dividing different goods among different countries, intended for nations to trade amongst themselves. See pp. 10-11.

[49] Ibid., 13. He continued: "Therefore, when they [the Portuguese] both pay tribute and obtain liberty of trade of the princes, they testify sufficiently that they are not lords but arrive there as foreigners, for they do not so much as dwell there but by entreaty."

[50] Anand 1982, 77–89; Khalilieh 2019.

[51] Borschberg 2002, 33.

call in the Malacca port to pay duties. They signed agreements with local rulers throughout the Indian Ocean prohibiting them from engaging in commerce with other European powers. They built up an empire in the Indonesia-Malay archipelago, suppressing indigenous trade and shipping through force and restricting spice production to drive up prices. The Makassarese ruler in the Sultanate of Gowa on the island of Sulawesi resisted these efforts, desirous to maintain simultaneous trade with Britain, citing in 1615 an argument nearly identical to Grotius' own.[52] Likewise, as the British sought to expand their operations in the East Indies and met with Dutch resistance, they too used Grotius' arguments to assail Dutch monopoly control. The Dutch, including Grotius himself in negotiations with the British, grappled with the legitimacy gap that arose from their hypocrisy with further interpretive efforts, arguing that they were protecting native inhabitants from Portuguese predation, and it would be wrong for them to renege on their contracts with local rulers.[53]

At the same time, Britain exhibited spatial and temporal hypocrisy of its own in its interpretations of the law of the sea. Although Queen Elizabeth advocated *mare liberum* in the East Indies where Dutch hegemony held sway and in the North Sea where British fishermen were operating in waters claimed by Denmark, Britain came to embrace *mare clausum* ("closed seas") in the waters along the British and Irish coasts. King James I in 1609 prohibited foreign fishing along those coasts and ordered ships passing through the "English seas" to lower their top-sails and strike their flags.[54] Scotsman William Welwod in his 1613 essay "Of the Community and Propriety of the Seas" and Englishman John Selden in his treatise *Mare Clausum* (*Closed Seas*) each rebutted Grotius's arguments in defense of British practices by

[52] Anand 1982, 89–94; Khalilieh 2019.

[53] Anand 1982, 94–99, 114; Fulton 1911, 340–41.

[54] This reinforced similar requirements in an early thirteenth century edict of King John on combating piracy that had been somewhat less spatial in nature. Anand 1982, 85.

reasserting states' right to sovereign jurisdiction over waters adjacent to their coasts.[55] Welwod insisted through evidence of overfishing that the ocean could in fact be possessed and thus maritime dominion was merited.[56] Selden asserted that Britain's seas extended to "the very shores or ports of the neighbouring sovereigns" on the south and east, and to "the farthest extent of the most spacious seas which are possessed by the English, Scots, and Irish" in the north and west.[57]

Oliver Cromwell's Navigation Act of 1651 and an ensuing series of navigation acts imposed further monopolistic restrictions on shipping designed to undergird a mercantilist trade policy. At the same time, the Royal Navy increased its enforcement of England's flag-striking laws in the seas between Britain and the continent, precipitating naval wars with the Dutch, who again cited the doctrine of *mare liberum* to oppose Britain's laws.[58] Meanwhile, as Britain's presence in India gradually expanded in the seventeenth century, the British East India Company sought to impose monopolistic systems of passes on trading vessels akin to those of the Portuguese and Dutch, suppressing "piracy" by local Indian rulers, Arab traders, and European vessels alike who had not purchased such passes. Such "piracy" in turn became a means by which inhabitants of the Indian Ocean world resisted the monopolistic predation of European colonizers, whom they reciprocally viewed as pirates.[59]

Britain was not alone in its preference for expansive control over the waters near its coasts. Many European powers favored such expansive jurisdiction, though these claims varied according to the state's particular geographical circumstances, threat perceptions, and maritime

[55] Selden 1663.
[56] Welwod 2004 version.
[57] Quoted in Fulton 1911, 374.
[58] Anand 1982, 107–09.
[59] Maloni 1991; Subramanian 2016b; Subramanian 2016a.

capabilities. Several Italian and Portuguese scholars also published rebuttals to Grotius' *Mare Liberum* defending Venice's and Portugal's claims to dominion and jurisdiction at sea. Scandinavian sovereigns vigorously enforced their dominion at sea, with regard to both fishing and navigation. The king of Denmark began charging tolls for vessels to pass through the Danish straits in 1429, enforcing the tolls under threat of cannon fire. Spanish scholars published critiques of Italian claims to expansive jurisdiction over the seas, but these works ran contrary to the Spanish crown's own claims.[60] Even Grotius in his 1625 work, *De Jure Belli Ac Pacis* (*On the Law of War and Peace*), though reaffirming his view of the sea as a common, granted that countries could exercise some jurisdiction over the sea, insofar as they could establish effective control through military force.[61]

Emergence of "Territorial Seas" and "Freedom of the Seas" in the Eighteenth Century

In the early to mid-seventeenth century, these debates over the proper norms for states' jurisdiction at sea focused on rights to establish monopolies over shipping routes and exclusive ownership of fisheries in adjacent seas. In the mid-seventeenth through mid-eighteenth centuries, these controversies persisted but were increasingly accompanied by debates over the proper breadth of the "maritime belt" or "territorial sea" and the rights of neutrals in war. Some earlier Italian jurists had argued that states should be able to claim jurisdiction over waters within two days' navigation, or 100 miles, while several European treaties in the sixteenth and seventeenth centuries recognized coastal state jurisdiction within visual horizon of the shore. In time, however, Grotius' logic in *De Jure Belli Ac Pacis* endorsing states' jurisdiction as far as they

[60] Indeed, Spaniard Francisco de Vitoria had directly critiqued his own government's claims to dominion in the Americas through arguments advocating free trade and commerce based on natural rights and *jus gentium* (the law of nations); this work, published in the mid-sixteenth century decades prior to *Mare Liberum*, had exerted a major influence on Grotius' thought. See Fernández-Sánchez 2013; Hernández 1991; Izbicki and Kaufmann 2019.

[61] Brown 1923, 22; Grotius 1814 version.

could exercise effective control was increasingly embraced by European states as a suitable compromise between their interests in both expansive jurisdiction for security and fishery reasons and their interests in open oceans. The Dutch jurist Cornelius von Bynkershoek summed up emerging custom when he argued in his 1703 book, *Dominion of the Sea*, that states could claim jurisdiction over the waters extending from their ports as far as a cannon shot.[62] Bynkershoek himself was not necessarily advocating national sovereignty over a "maritime belt" of uniform breadth extending from the coast, but eventually such a perspective came to hold greater sway. In 1782, the Italian jurist Galiani suggested that territorial waters should be 3 nm wide, based on ranges of then-extant cannons.[63]

This debate over the breadth of the territorial sea unfolded in the context of the fierce naval wars between England and the Netherlands, France, and Spain from the mid-1600s through early 1800s. Neutral nations desired to preserve areas off their coasts that would be off limits to naval battle that could disrupt local commerce and fishing and endanger coastal settlements. Claiming territorial waters enabled them to establish neutral buffer zones along their coasts through legal and discursive means, rather than through direct enforcement that would risk entangling them in foreign conflicts. At the same time, neutral states also wanted their ships to remain free to traverse the high seas beyond their claimed territorial waters without harassment by belligerents. A variety of treaties negotiated between European powers in the seventeenth and eighteenth centuries included provisions regarding the neutrality of shipping and the rules of contraband.

[62] He wrote, "the dominion of the land ends where the power of arms terminates." Quoted in Anand 1982, 138.
[63] Ibid., 137–39.

It was in the latter half of the eighteenth century and early nineteenth century that the term "freedom of the seas" developed the specific connotation of the rights of vessels at sea to be free from arrest or attack, impressment of their sailors, and confiscation of their goods.[64] In this period, "freedom of the seas" became one of the chief rallying cries used by continental European nations and the United States alike to resist Great Britain's maritime hegemony. In addition to asserting the rights of neutrals at sea, these nations argued that blockades were only legally valid when they could be made effective at port. In so doing, they challenged the legitimacy of Britain's use of "paper blockades" applying to entire coasts to justify search and seizure of any neutral ships on the high seas. These principles were embodied in the League of Armed Neutrality formed by Russia, Denmark, and Sweden in 1780 and joined by several other states during the American Revolutionary War.[65] This advocacy of freedom of the seas against British naval domination was also common in revolutionary and Napoleonic France, where politicians such as Bertrand Barère advocated for a European navigation act to counter Britain's navigation acts, even while contradictorily favoring French hegemony in the Mediterranean.[66] Similarly, Napoleon justified his own paper blockade against Britain in the Berlin Decree of 1806 on the basis of Britain's infringement of various principles related to freedom of the seas.[67]

[64] This trend is evident in a search for "freedom of the seas" in the Eighteenth Century Collections Online, Gale, Harvard Library. The search results from the latter part of the century deal more with issues related to the neutrality of shipping, while the earlier documents cite the more general principle in reference to the debates between Grotius and Selden and in historical discussions of the East Indies trade.

[65] Heckscher 1922, 30–31.

[66] Sellaouti 2015, 98–99. For another example, see Boissy d'Anglas, François Antoine, Comte de. The speech of Boissy D'Anglas, on the political situation of Europe. London, 1795. Eighteenth Century Collections Online. Gale. Harvard Library. 6 Aug. 2020.

[67] See https://www.napoleon.org/en/history-of-the-two-empires/articles/the-berlin-decree-of-november-21-1806/. This blockade, which inaugurated the so-called Continental System, was effectively a boycott and self-blockade, since France's naval forces had been destroyed at the Battle of Trafalgar in 1805 and were thus incapable of enforcing it. It was meant to strike at the British economy by restricting its exports to the continent, while also highlighting the absurdity of Britain's paper blockades, which were explicitly condemned in the preamble. See Heckscher 1922, 88–97. Alexander's Russia soon joined the Continental System, justifying its action in part by

French and British infringement of the United States' neutral shipping and seafaring were also *casus belli* of the undeclared French-American quasi-war of 1798 and of the British-American War of 1812.

Ascendance of "Liberal" Ideology, Discourse, and Law to Legitimate Late Colonialism

Within a matter of decades, however, the British Empire itself soon began to champion a version of freedom of the seas, at least rhetorically. As the British Royal Navy established unrivaled hegemony at sea following the 1805 Battle of Trafalgar and naval warfare in Europe declined after the final defeat of Napoleon in 1815, freedom of the seas receded as a point of contention. Britain no longer felt a significant naval threat from other nations and stopped enforcing its flag-striking laws. It also ceased impressing American sailors after the War of 1812, as its need for sailors to fight France had ebbed following Napoleon's defeat in Russia. In the 1856 Paris Declaration after the Crimean War, Britain gave a partial concession to neutrals in war by agreeing not to seize enemy goods on neutral ships in war, nor neutral goods on enemy ships—while maintaining the broad exception of "contraband," goods specifically banned by the belligerents. This declaration, which was eventually endorsed by 55 nations, also required naval blockades to be effective at ports and outlawed privateering. Paul Kennedy explains this "incredible gesture by the world's strongest sea power in favor of the continental states' view" by observing that Britain not only saw the prohibition of privateering as a compensatory quid pro quo, but also "felt that it would be unwise to defy world opinion upon this heated issue."[68] Thus,

Britain's threat to freedom of the seas. See Napoleonic Wars - The Continental System and the blockade, 1807–11 2020.

[68] Kennedy 1976, 174–75.

even imperial Britain at the height of its powers in *Pax Britannica* desired to bolster its legitimacy among nations through adopting a legal interpretation.[69]

These reasons alone were not the only or even primary causes of Britain's embrace of freedom of the seas, however. Of even greater significance was how the Industrial Revolution and the rise of *laissez faire* economic ideas caused a sea-change in the economic models of Britain and other Western powers.[70] Instead of seeking monopoly control over trade routes and imports, European colonialism in the nineteenth century shifted toward increasing the efficiency of trade, securing markets for exports, and colonizing broader swaths of territory for investment of excess capital. Resentful of the trade imbalances with Asia that were draining Europe of its gold and silver, Western powers increasingly sought to bring foreign populations under direct control in order to neutralize those imbalances through forced taxation, destruction of local economic systems, and forced dependency on imported European goods, especially opium in the case of China.[71] This late colonialism of the latter half of the nineteenth century relied upon a liberal discourse of "open" markets, "free" trade, and "freedom of the seas," which was closely coupled with an increasingly racialized ideology of the "white man's burden" to "protect" and spread "civilization" to non-white peoples and nations.[72] It also entailed the conversion of the British Royal Navy from one oriented toward fighting wars with European powers to one

[69] See the text of the Paris Declaration at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=473FCB0F41DCC63BC12563CD0051492D and the list of signatories at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=105. As will be noted in the shadow case study in chapter 5, the United States refused to affirm the Paris Declaration out of the belief it did not go far enough in protecting neutral shipping; America also wanted to maintain the right to engage in privateering given its comparatively limited naval power.

[70] Kennedy 1976, 175.

[71] Anand 1982, chap. 5.

[72] Anand 1982; Mulligan 2009; Stubbings 2019; Coates 2016.

designed to police shipping lanes and suppress piracy, the slave trade, and other forms of resistance from colonized subjects in the global South and the East.[73]

As Western economic dependence on overseas trade grew and long-distance shipping technologies such as steamships developed, the lingering practices of some coastal states of charging tribute or tolls on passing vessels also ceased in this period, voluntarily in Europe and by force elsewhere. The United States and Sweden fought wars with the Barbary states of North Africa to resist their efforts to exact tribute in the first decades of the nineteenth century. After decades of paying this tribute on a negotiated basis, Britain and France then also stopped paying after 1815 and participated in the suppression of Barbary "piracy" with naval bombardments, culminating in the French conquest of Algiers and Tunis in 1830-31. On a more voluntary basis, Denmark then abolished its Sound Dues in 1857, in exchange for one-time upfront payments from user states in Europe and America, and in recognition of how the dues were harming Copenhagen's own merchants. In addition, as the fisheries between England and Holland were exhausted, Britain also backed away from extensive claims to fishery dominion in those waters. Instead, it shifted to join France in advocating free seas in Danish-claimed waters further north, which remained rich fishery grounds. In efforts to resolve these and other conflicts over fishing, several states negotiated agreements that set the limits of exclusive fishery zones at 3 nm, following the increasingly common breadth of the territorial sea.[74]

These "liberal" ideologies of free trade, freedom of the seas, and protection and civilization of colonized states became enshrined in an increasingly systematized body of European interstate treaties and customary law that colonial powers used to legitimate their

[73] Kennedy 1976, chap. 6; Ryan 2019.
[74] Anand 1982, 146.

actions before their own Western reference group.[75] This body of law was used to justify the British Empire's thorough colonization of India and the scramble for Africa among European powers.[76] It provided a cloak of legitimacy to the efforts of America, Britain, and others to force Japan and China to open their markets to trade through "unequal treaties" that afforded Western governments extraterritorial jurisdiction. And within a matter of decades, ascendant Meiji Japan used these same laws to justify its own annexation and colonization of Korea, as part of an effort to bolster its legitimacy with the reference group of European and American powers.[77]

Twentieth Century Developments: From Codification to a "Constitution" for the Oceans

It was during the twentieth century that international maritime law assumed its modern form, developing into three distinct tracks: (1) the public international law of the sea, from early studies of the territorial sea to interwar League of Nations negotiations over the territorial sea, high seas, and fishery limits to the three major post-World War II UN conferences on the law of the sea; (2) admiralty law, in the form of efforts to codify private international maritime law and develop agreements and regulations to facilitate commercial shipping, ensure safety at sea, and minimize pollution; and (3) the laws of naval warfare, with codification efforts at the start of the century that fell by the wayside amidst the upheavals of two world wars and a dramatically altered military technological and geopolitical environment.

Early Efforts to Codify Customary Law on the Territorial Sea, Bays, and Fisheries

[75] Anghie 2005; Koskenniemi 2002.
[76] Linden 2017.
[77] Dudden 2005.

At the dawn of the twentieth century, European nations maintained diverse claims to maritime jurisdiction within their near seas. Most countries, especially the United States, Great Britain, and Japan, ascribed to a limit of 3 nm (equivalent to one marine league) for the territorial sea. But the Scandinavian nations claimed territorial seas of 4 nm, Spain and Portugal claimed 6 nm, Italy claimed 10 nm, and Russia rejected the 3 nm limit, instead claiming wider yet varying breadths of jurisdiction for different purposes.[78] As a consequence, jurists at the start of the twentieth century observed that there was no clear customary law prescribing a 3 nm limit. On the contrary, in a 1911 survey of state practice and opinion, Thomas Fulton argued that most Western authorities on the subject, especially outside Britain and the United States, supported the expansion of territorial seas or other forms of coastal state jurisdiction.[79] This tendency toward expansion was driven in part by increases in the range of coastal weaponry beyond 3 nm due to the adoption of rifled cannons over the preceding half-century. It was also driven by fisheries depletion, which had accelerated after a doubling in Europe's population during the preceding century and the development of trawling technologies.[80]

This persistent heterogeneity in state practice complicated efforts that emerged in late nineteenth century trans-Atlantic jurisprudence circles to "codify" the growing body of customary international law, including the law of the sea. European legal experts associated with the newly founded International Law Association and the Institut de Droit International established commissions to study questions related to the breadth of territorial waters, bays, and straits less than 12 miles wide. They surveyed their members and eventually produced guidelines on these matters in 1894-95, recommending, *inter alia*, that the breadth of the territorial sea be

[78] Anand 1982, 140–41.

[79] Fulton 1911, chap. 4.

[80] Rothwell and Stephens 2016, 316–17; Haines 2020.

extended to 6 nm, with territorial sea baselines in bays drawn at 12 nm from the shoreline. These recommendations were primarily oriented toward fishery conservation and building consensus among states, including the Iberian and Scandinavian nations.[81] The idea of a contiguous zone adjacent to the territorial sea where states could exercise customs enforcement or claim fisheries jurisdiction also emerged and gained traction in this period. However, Great Britain in particular resisted any expansion of the territorial sea beyond 3 nm or the establishment of a contiguous zone or exclusive fishery zone that extended beyond that limit.

Codification of Admiralty Law and the Laws of Naval Warfare

Despite the lack of progress on questions related to states' sovereignty and jurisdiction over the waters in zones adjacent to their coasts, progress was made in codifying the other two main areas of customary maritime law—admiralty law and the laws of naval warfare. In the domain of admiralty or private maritime law, the Comité Maritime International, another private lawyers' association, was founded in 1897 and proceeded to draft several conventions governing matters such as bills of lading and salvage. The International Maritime Organization (IMO), an intergovernmental organization established in 1958 under United Nations auspices, eventually assumed many of the functions of the Comité Maritime International. The IMO has since overseen the drafting and implementation of several more conventions governing matters related to the safety of life at sea, prevention of collisions at sea, maritime pollution, search and rescue, and the safe handling and transport of containers at sea.

Progress was also made around the turn of the twentieth century toward codification of the laws of naval warfare, which encompassed many of the key issues entailed in the "freedom

[81] Fulton 1911, 689–92.

of the seas" debates of the preceding century and a half. The Hague Conference of 1907 produced a dozen treaties, several of which dealt with matters such as the rights and duties of neutral powers and the status of enemy merchant ships in naval war. Many controversial issues related to neutral shipping and the definition of contraband remained unresolved by these conventions, however, so the following year, ten major powers, including eight European nations, the United States, and Japan met in London to continue negotiating a follow-on agreement to the Hague Conventions. These negotiations resulted in the London Declaration concerning the Laws of Naval War, which incorporated provisions of past treaties such as the Paris Declaration and codified customary law regarding blockades, contraband, neutrality, and prizes. Twelve of the thirteen Hague Conventions were ratified and entered into force in 1910. But the London Declaration, though signed by all 10 negotiating powers,[82] was rejected by the British House of Lords, which refused to accept the declaration's limits on the Royal Navy's ability to wage economic warfare. After this rejection, the other signatories also declined to ratify the declaration.[83]

Within a few short years, upon the outbreak of hostilities in World War I, Britain declared a distant blockade against German ports that violated many provisions of the Paris and London Declarations and associated customary law. In doing so, Britain deployed various legal interpretations and arguments in an attempt to justify and legitimate these violations.[84] Germany responded by declaring unrestricted submarine warfare against vessels in the waters around Britain, also endeavoring to justify its actions with resort to legal argumentation. The United

[82] See list of signatories at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesSign&xp_treatySelected=255

[83] See full text and brief negotiating history at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=E08DDA302F7397ADC12563CD002D68C5&action=openDocument

[84] Neff 2018.

States initially called upon all nations to respect the London Declaration and the immunity of private property at sea, in conjunction with its declaration of neutrality. However, British naval superiority effectively meant that neutral U.S. shipping disproportionately benefited Britain, eventually leading Germany to launch attacks on American ships and inducing the United States to enter the war against Germany in 1917.[85]

At the end of World War I, the second point in U.S. president Woodrow Wilson's "Fourteen Points" war aims speech advocated "absolute freedom of navigation upon the seas." Germany, France, and Italy accepted all fourteen of Wilson's points, while Britain rejected this point on freedom of the seas and some Americans expressed skepticism of it.[86] The Covenant of the League of Nations subsequently did not refer to freedom of the seas.[87] Wilson's Fourteen Points speech represented the high-water mark for freedom of the seas as a reference to the rights of neutral powers and merchant ships during wartime, which had been its dominant formulation during the "long nineteenth century."[88] No further progress toward codification of those principles was made in the interwar years, as evolving military technologies and land-based infrastructure made naval powers even less willing to accept restrictions on blockades.[89] And upon entering World War II, the United States abandoned its previous position on this issue when it declared unrestricted submarine warfare against all Japanese vessels, including merchant ships and fishing trawlers. Naval warfare has continued to be governed largely by customary

[85] Young, Jr. 2014.

[86] Ibid.

[87] Instead, Article 23 referred only to "freedom of communications and of transit and equitable treatment for the commerce of all Members of the League." See the full text at https://avalon.law.yale.edu/20th_century/leagcov.asp

[88] This term was used by British historian Eric Hobsbawm to refer to the period from the French Revolution to World War I, a period that also roughly corresponds to the dominance of this conception of freedom of the seas.

[89] Crawford 2017; Fraunces 1992.

international law since that time.[90] From 1988 through 1994, a group of international lawyers and naval experts convened by the International Institute of Humanitarian Law drafted the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea,* an updated statement of customary laws related to the law of the sea with some progressive provisions, but this manual is not binding on states.[91]

Development of Public International Law of the Sea from the League of Nations to UNCLOS III

While codification of the laws of naval warfare lost steam after World War I, efforts to codify what would become known as public international law of the sea—or the law governing states' rights and duties at sea during peacetime—gained steam. These efforts were taken up by the League of Nations, interrupted by World War II, and then resumed under UN auspices after the war. The law of the sea underwent a dramatic transformation in this period amidst changing technological, environmental, and geopolitical circumstances, including decolonization and the expansion in UN membership. Faced with these new circumstances, states interpreted the law of the sea in novel ways, often rejecting old norms entirely and advocating new concepts and approaches. As a result, the United Nations Convention on the Law of the Sea ultimately adopted in 1982 entailed significant progressive development in the law of the sea in addition to its codification of long-standing customary law.

[90] The Geneva Conventions of 1949 addressed issues related to humanitarian treatment of civilians and of wounded, sick, and shipwrecked sailors, updating and replacing one of the 1907 Hague Conventions, but did not address issues such as the law of blockade, contraband, and the rights of merchant ships as discussed in the Paris and London Declarations.

[91] See brief history of the *San Remo Manual* and the full text at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=5B310CC97F166BE3C12563F6005E3E09&action=openDocument

The 1930 League of Nations Codification Conference at The Hague

In 1924, the League of Nations passed a resolution establishing a committee of experts to prepare recommendations for the areas of international law susceptible to codification. The committee proposed five issue areas as "ripe for international agreement," and in 1927 the League of Nations decided to take up three of those issues at an international conference, one of which was territorial waters.[92] That conference convened at The Hague over the course of a month in 1930, with participation from 47 countries, including non-members in the League of Nations, such as the United States.[93] The general topic of territorial waters encompassed many inchoate subjects within the law of the sea, including the breadth of the territorial sea; whether or not the territorial sea included superjacent airspace, seabed, and subsoil; the nature of states' sovereignty or rights in the territorial sea; the establishment and characteristics of a contiguous zone; baselines for measuring the territorial sea; how to measure territorial seas from islands or groups of islands; the right of innocent passage of foreign merchant ships and warships in the territorial sea; and hot pursuit from territorial waters into the high seas.[94]

Due to the complexity of these issues and the wide variation in opinions, the conference ultimately did not adopt a convention on the territorial sea. However, it did adopt a resolution on the legal status of the territorial sea that included 13 provisional articles as an appendix addressing some, but not all, of the issues on the agenda.[95] The most fundamental issues,

[92] The committee also studied and queried states regarding a number of other issues, including the "exploitation of the products of the sea," which it emphasized was in "urgent need of action." However, the committee ultimately did not recommend this issue for consideration at the codification conference. See Part 3: The First Conference for the Codification of International Law 1947, 68–69, 74.

[93] International Law Commission 2017.

[94] Miller 1930.

[95] See Annex 10: Report of the Second Committee: Territorial Sea, Rapporteur: M. François, and Appendix I: The Legal Status of the Territorial Sea in League of Nations, *Acts of the Conference for the Codification of International Law*, Geneva, August 19, 1930, Official No. C. 351. M. 145. 1930. V., pp. 123-31, https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf.

including the breadth of the territorial sea and the permissibility of a contiguous zone, had proved too contentious for inclusion in those provisional articles. But the delegations did informally express their views on those issues in a roll call procedure. The clear majority of countries favored either a territorial sea broader than 3 nm or a 3 nm territorial sea with a contiguous zone (also referred to as an "adjacent zone"); only Great Britain and Japan explicitly rejected an adjacent zone beyond 3 nm.[96] (See Table 3.1.) Though failing to adopt a convention on the law of the sea, the 1930 Hague conference was the first occasion when a large number of countries convened to share perspectives on the territorial sea and exchange information about their relevant national laws and distinctive geographical circumstances.[97] And the provisional draft articles adopted at the conference laid a foundation for the codification efforts that would resume under United Nations auspices after World War II.[98]

See also Appendix II: Report of Subcommittee No. II, Ibid., at pp. 131-34 for a set of articles on baselines, roadsteads, bays, islands, groups of islands, straits, passage of warships through straits, and mouths of rivers. Unlike the articles in Appendix I, these articles were not adopted by the states at the conference on even a provisional basis, but the rapporteur appended them to his report on the meeting for informational purposes.

[96] Great Britain's delegate stated that he was also speaking for Australia. Canada may have also been endorsing this position; see note 105.

[97] Miller 1930.

[98] Part 3: The First Conference for the Codification of International Law 1947.

Table 3.1 Territorial Sea Preferences Expressed by States at 1930 Hague Conference[99]

States' preferred breadth of the territorial sea (TS) in nautical miles (nm),[100] plus attitudes on a contiguous zone (CZ)[101]							
3 nm TS, *no* CZ	**3 nm TS**	**3 nm TS + CZ**	**4 nm TS**	**4 nm TS + CZ**	**6 nm TS**	**6 nm TS + CZ**	**12 nm TS**
Great Britain (& Australia)	South Africa	Germany	Iceland	Finland[102]	Chile[103]	Cuba	Portugal[104]
Japan	USA	Belgium	Sweden[105]	Norway[106]	Colombia	Spain	
	Canada[107]	Chile			Italy	Latvia	
	China	Egypt			Romania	Persia	
	Denmark[108]	Estonia			Uruguay	Turkey	
	Greece[109]	France			Yugoslavia		
	India	Poland			Brazil[110]		
	Irish Free State						
	Netherlands						

[99] Based on the Provisional Minutes of the Thirteenth Meeting held on Thursday, April 3, 1930, at 9:15 A.M., in Appendix III of League of Nations, *Acts of the Conference for the Codification of International Law*, Geneva, August 19, 1930, Official No. C. 351. M. 145. 1930. V., pp. 134-37, available at https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf.

[100] Two states did not state explicit preferences on the breadth of the territorial sea (or the matter of the contiguous zone): Czechoslovakia, on the grounds that it was landlocked, and the USSR, which instead emphasized "[t]he great diversity of view" on the territorial or adjacent zones, where "[t]he exercise of such rights for all purposes or for certain purposes is admitted sometimes within the limit of three, sometimes four, six, ten or twelve miles."

[101] The terms "adjacent zone" or "adjacent waters" were used interchangeably with "contiguous zone" at the conference. When expressing support for such a zone, most states did not identify a specific limit for the zone, except for Portugal (see note 102). Moreover, most states who did not express an explicit preference for a contiguous zone also did not express explicit opposition to such a zone, except for Great Britain and Japan, and possibly Canada (see note 105). The Netherlands, Romania, Uruguay, and Yugoslavia expressly reserved their positions on the contiguous zone until further discussions could be held on the matter.

[102] Finland expressed a preference for a 4 nm territorial sea, but also expressed openness to a 3 nm territorial sea, along with a contiguous zone in either case.

[103] Chile expressed equal preference for either a 3 nm territorial sea with a contiguous zone or a 6 nm territorial sea.

[104] Portugal stated a preference for a 12 nm territorial belt, but said it would be willing to accept a 6 nm territorial sea and a 6 nm contiguous zone instead.

[105] Sweden favored a territorial sea of 4 nm, but expressed a willingness to accept "the other historic belts at present in force" of varying width, including 3 nm and 6 nm zones.

[106] Norway endorsed the 4 nm breadth for the territorial sea over the 3 nm limit, while expressing openness to recognizing a greater width of territorial waters if such a claim was "based on continuous and ancient usage."

[107] Canada's statement favored a 3 nm territorial sea limit, but may have also been directly repudiating a contiguous zone: "The Government of Canada is in favour of the three-mile territorial limit for all nations and for all purposes."

[108] Denmark supported a 3 nm limit only reluctantly, expressing that the unresolved matter of bays was of utmost importance to Denmark and interconnected with the question of territorial sea breadth.

[109] Greece expressed a preference for a 3 nm territorial sea without a contiguous zone, but also expressed openness to either a 2 nm territorial sea (the only nation to mention this option) or to a 3 nm territorial sea with a contiguous zone, noting that Greece's current laws actually reflected that lattermost permutation.

[110] Brazil may have been endorsing a 6 nm territorial sea explicitly in exclusion of a contiguous zone. The Brazilian delegate declared: "The Brazilian Delegation accepts a territorial belt of six miles for all purposes."

Postwar Codification Efforts of UNCLOS I and II amidst Rapidly Evolving State Practice

During the international upheavals of the 1930s and the ensuing breakdown in the functioning of the League of Nations, no further progress was made toward codification of the law of the sea. However, after World War II and the establishment of the United Nations, the UN General Assembly (UNGA) established a new International Law Commission (ILC) in 1947 to resume the work of codification, picking up where the Hague Conference left off nearly two decades before. The ILC took up the topics of the territorial sea and high seas at its first session and then prepared a set of draft articles on the law of the sea over the next seven sessions held between 1950 to 1956.[111] Upon receiving the ILC's final report and draft articles, the UNGA adopted Resolution 1105 in February 1957 calling for the convening of a conference on the law of the sea.

The first United Nations Conference on the Law of the Sea (which would later become known as UNCLOS I) met in Geneva over the course of two months in early 1958 and was attended by 86 states. Due to the varying degrees of consensus across different issues, the conference opted to adopt four separate conventions rather than a single comprehensive text.[112] These conventions engaged in a combination of "codification and progressive development of international law":[113]

[111] The ILC appointed J.P.A. François of the Netherlands as special rapporteur for these matters. As Mr. François had served as the rapporteur for the discussions on territorial waters at the 1930 Hague Conference, this appointment further underscored the direct continuity between the League of Nations' codification efforts in the interwar years and the UN-directed postwar codification work of the ILC.

[112] The full texts of all four conventions, as well as the lists of signatories and any of their reservations issued upon signing, are available at https://treaties.un.org/doc/Treaties/1964/11/19641122%2002-14%20AM/Ch_XXI_01_2_3_4_5p.pdf.

[113] See preamble to Resolution 1307 adopted by the UN General Assembly after UNCLOS I at the 783rd plenary meeting on December 10, 1958, available at https://legal.un.org/diplomaticconferences/1960_los/docs/english/vol_1/a_res_1307_xiii.pdf.

1. **The Convention on the Territorial Sea and the Contiguous Zone** was signed by 44 states in 1958 and entered into force in 1964 after ratification by the twenty-second state.[114] Most crucially, the convention failed to set a maximum limit for the breadth of the territorial sea, as the conference was unable to reach agreement on this point. At the same time, the convention did address many other issues; *inter alia*, the convention:
    - allowed states to draw straight baselines for the territorial sea along their coasts in certain circumstances,
    - set out rules for the enclosing of bays within straight baselines,
    - defined islands and granted them territorial seas,
    - affirmed and described the right of innocent passage for foreign ships in the territorial sea,[115]
    - prohibited charges on merchant ships that were only passing through the territorial sea unless specific services were rendered to the ship,
    - provided for a contiguous zone extending up to 12 miles from shore where states could exercise control for customs, fiscal, immigration, or sanity purposes,
    - and stipulated that a median line equidistant between baselines should be used to delimit the boundaries between overlapping or adjacent territorial seas and contiguous zones, unless otherwise agreed by the states involved.
2. **The Convention on the High Seas** was signed by 49 states in 1958 and entered into force on September 30, 1962, after ratification by the twenty-second state.[116] Among the four Geneva conventions adopted in 1958, this convention was the most oriented toward

[114] 52 states are now parties to this convention, whether through ratification, accession, or succession. See list of current signatories (different than the original signatories due to some states no longer existing) and parties at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-1&chapter=21. For those states parties who have ratified the UN Convention on the Law of the Sea (UNCLOS), that latter convention supersedes this prior convention.

[115] Besides the breadth of the territorial sea, one of the other most controversial issues in the negotiations over this convention was whether or not the right of innocent passage extended to warships and whether or not such warships could be subject to requirements for prior authorization before entering the territorial sea. Article 14 on the right of innocent passage did not distinguish between different types of foreign ships and instead explicitly applied to "all ships," while later sub-sections distinguished among merchant ships, government ships other than warships, and warships. However, the convention was silent on the issue of prior authorization, although Article 23 on warships stated that coastal states could require warships to leave the territorial sea if they were not complying with regulations or if they were disregarding requests for compliance.

[116] 63 states are now parties to this convention, whether through ratification, accession, or succession. See list of current signatories (different than the original signatories due to some states no longer existing) and parties at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21. For those states parties who have ratified UNCLOS, that latter convention supersedes this prior convention.

codification of widely recognized customary law governing the high seas rather than progressive development of the law of the sea, as signaled in the preamble.

3. **The Convention on Fishing and Conservation of the Living Resources of the High Seas** was signed by 37 states in 1958 and entered into force on March 20, 1966, after ratification by the twenty-second state.[117] This convention contained general provisions on fisheries conservation, endorsing measures that would render possible the "optimum sustainable yield." It garnered the weakest support of the four conventions and was signed by less than a majority of states at the conference.
4. **The Convention on the Continental Shelf** was signed by 46 states in 1958 and entered into force on June 10, 1964, after ratification by the twenty-second state.[118] This convention granted states sovereign rights to the minerals and non-living resources in the seabed and subsoil of the continental shelf extending seaward from their territory and the living sedentary species on the seabed. However, it did not set out a clear outer limit for states' claims to the continental shelf, instead suggesting it could extend to the depth of 200 meters or "beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources." Many developing nations objected to this provision, since it effectively permitted more technically capable states to claim wider continental shelves.[119]

[117] 39 states are now parties to this convention, whether through ratification, accession, or succession. See list of current signatories (different than the original signatories due to some states no longer existing) and parties at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-3&chapter=21. For those states parties who have ratified UNCLOS, that latter convention supersedes this prior convention.

[118] 58 states are now parties to this convention, whether through ratification, accession, or succession. See list of current signatories (different than the original signatories due to some states no longer existing) and parties at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-4&chapter=21. For those states parties who have ratified UNCLOS, that latter convention supersedes this prior convention.

[119] Rothwell and Stephens 2016, 8.

In addition to these four conventions, UNCLOS I also adopted an optional protocol on dispute settlement signed by 30 states, as well as several resolutions on other matters, including, *inter alia*, nuclear tests on the high seas, international and coastal fisheries, the regime of historic waters, and the convening of another conference to continue negotiations on unresolved matters.

The UN General Assembly subsequently passed a resolution deciding to convene a second conference to discuss the breadth of the territorial sea and fishery limits.[120] This Second UN Conference on the Law of the Sea (UNCLOS II), held in 1960, failed to reach a breakthrough on those issues. The 87 states at the conference were largely split between those who favored a 6 nm limit for the territorial sea and those who favored a 12 nm limit. A U.S. and Canadian "Six Plus Six" proposal for a 6 nm territorial sea coupled with a 6 nm fishery zone achieved substantial support but fell one vote short of the two-thirds vote necessary for adoption.[121] The conference thus deferred these matters for later action.[122]

Key dynamics in early postwar international affairs shaped the negotiations at UNCLOS I and II. Soviet and Warsaw Pact countries aligned on many issues during the negotiation process. Likewise, a growing number of post-colonial states had joined the United Nations by 1958, and they along with other developing nations objected to provisions that they felt privileged the interests of industrialized states and military powers.[123] These dynamics contributed to the failure of the conferences to produce a single comprehensive text, to marshal broader support for the four conventions, or to resolve key issues such as the breadth of the territorial sea.

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[120] UN General Assembly Resolution 1307, adopted at the 783rd plenary meeting on December 10, 1958, available at https://legal.un.org/diplomaticconferences/1960_los/docs/english/vol_1/a_res_1307_xiii.pdf.

[121] Rothwell and Stephens 2016, 9.

[122] The conference instead only adopted two general resolutions on records from the conference and instructing UN specialized agencies to render fisheries-related assistance to coastal States. See Final Act of the Second United Nations Conference on the Law of the Sea, April 26, 1960, A/CONF.19/L.15, https://legal.un.org/diplomaticconferences/1960_los/docs/english/vol_1/a_conf19_l15.pdf.

[123] Rothwell and Stephens 2016, 7.

Beyond these geopolitical dynamics, rapidly accelerating technological, environmental, and demographic developments were unsettling the prevailing maritime regime. Increasingly sophisticated military technologies, such as submarines, aircraft, and ballistic missiles, had fundamentally undermined the logic of the old 3 nm cannon-shot rule. Similarly, the technology to extract offshore petroleum from the continental shelf and conduct marine scientific research and salvage was rapidly improving, along with technologies of drag-net fishing by large distant-water fishing fleets. At the same time, population growth was driving growing demand for oil, minerals, and fish, as the world's population doubled from 1.65 billion in 1900 to 3.34 billion in 1965.[124] Meanwhile, state membership in the UN continued to climb as decolonization accelerated, growing from 82 members in 1958 to 127 members in 1970.[125]

These developments led many states to claim more expansive sovereignty and jurisdiction over wider swaths of ocean space and the resources therein. These developments in state practice were rendering past customary law increasingly obsolete even as the ILC was attempting to develop articles that would codify that older regime. This process was in many ways inaugurated by the 1945 Truman Proclamation, wherein the United States claimed "jurisdiction and control" over the resources of the seabed and subsoil of the continental shelf adjacent to its coasts, without specifying an outer limit to the claim.[126] Other states soon issued similar claims, including Kuwait and Saudi Arabia in the Persian Gulf, as well as several Latin American states.

[124] World Population Over 12000 Years (Various Sources (2019)), https://ourworldindata.org/world-population-growth, accessed August 3, 2020.

[125] See "Growth in United Nations membership, 1945-present," https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html, accessed November 2, 2020.

[126] See full text of the declaration at https://www.gc.noaa.gov/documents/gcil_proc_2667.pdf.

The claims of Latin American states, however, innovated further on the precedent set by the Truman Proclamation. In 1946, Argentina claimed not only the continental shelf but also the epicontinental sea above it. Meanwhile, Chile, Peru, and Ecuador situated along the Pacific coast of South America felt threatened in this period by distant-water whaling and fishing by vessels from Norway, Japan, and the United States in the rich waters of the Humboldt Current near their coasts. Since these states have little natural continental shelf due to the way the adjacent ocean floor drops off quickly to the depths of the Pacific, they instead claimed full "national sovereignty" in an arbitrary spatial zone of 200 nm from their coasts—Chile and Peru in 1947 in successive unilateral declarations,[127] and then all three nations jointly in the Santiago Declaration of 1952.[128] Although Peru and Ecuador effectively treated this claim as a territorial sea until at least the twenty-first century, Chile came to view it more as an exclusive economic zone by the mid-1970s.[129] In that latter vein, other Latin American states, such as Colombia, Argentina, and Mexico, supported the rights of states to claim sovereignty and jurisdiction, especially over natural resources, in waters out to 200 nm, while extending their formal territorial sea claims to 12 nm only, in part due to the difficulty of enforcing full territorial sovereignty beyond that extent.[130]

[127] Gabriel Gonzalez Videla, Declaration by the President of the Republic of Chile regarding Chilean Territorial Claims, June 23, 1947, in *The International Law Quarterly* 2 (1): 135–137; Jose Luis Bustamante y Rivero and Enrique Garcia Sayan, Peruvian Decree regarding National Sovereignty and Jurisdiction over the Continental and Insular Shelf, Supreme Decree No. 781, August 1, 1947, in *The International Law Quarterly* 2 (1): 137–138.

[128] Chile, Ecuador, and Peru, Declaration on the Maritime Zone, signed at Santiago, Chile, August 18, 1952, United Nations Treaty Series, vol. 1006, no. 14758, pp. 326–27, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201006/volume-1006-I-14758-English.pdf.

[129] Ecuador ratified UNCLOS in 2012, at which point it formally claimed a 12 nm territorial sea and 200 nm EEZ. The Peruvian Foreign Ministry endorsed maritime zonation in UNCLOS as customary international law in its 2014 boundary delimitation arbitration case at the ICJ against Chile. See more detailed discussion in chapter 5.

[130] Santa-Pinter 1971.

Several other states in Africa, the Middle East, and Eastern Europe also claimed 12 nm territorial seas soon after World War II.[131] And as the postwar decades unfolded, a growing number of states claimed exclusive fishery zones (EFZs) or "patrimonial seas" extending as far as 200 nm, emulating the South American standard. Several regional or bilateral treaties were also negotiated to manage growing fishery disputes. Iceland's claims to a steadily expanding EFZ precipitated its "Cod Wars" with the United Kingdom, which joined with Germany in 1972 to sue Iceland at the International Court of Justice (ICJ) over its claim to a 50 nm EFZ. (Iceland refused to participate in the case.) The ICJ countenanced a 12 nm EFZ, nodding to the precedent set in the 1964 European Fisheries Convention, but also observed that a coastal state could claim "preferential fishing rights" beyond that limit.[132] These developments underscored the absence of settled customary law governing coastal states' sovereign rights to natural resources, especially fisheries, and the urgency of a more comprehensive regime on this subject.

"Common Heritage of Mankind," Peaceful Uses of the Seabed, & the Seabed Committee

During the 1960s there was also a growing interest in mineral resources on the floor of the seabed, as well as growing concern over military activities at sea. On November 1, 1967, Malta's ambassador to the United Nations, Arvid Pardo, delivered a speech raising concerns about the dangers from potential military uses of the seabed and pollution from radioactive wastes at sea. Citing estimates of vast mineral wealth available on the seabed from American geologist John Mero, he also called for the establishment of an international institution to govern those resources as part of the "common heritage of mankind."[133] Mero turned out to have

[131] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations 1998.

[132] Rothwell and Stephens 2016, 317–20.

[133] See the text of Pardo's speech in Official Records of the UN General Assembly Twenty-Second Session, First Committee, 1515th and 1516th Meetings, November 1, 1967, New York, available at https://www.un.org/depts/los/convention_agreements/texts/pardo_ga1967.pdf.

overestimated the prevalence of mineral nodules on the ocean floor, and seabed minerals proved to be too cost-prohibitive to exploit on a large scale for the next several decades.[134] Nonetheless, at the time nations felt acute anxiety that companies from a handful of industrialized countries would exploit their technological and capital advantages to extract these minerals for private gain. Pardo's speech thus served as a rallying cry for the UNGA, which passed Resolution 2340 in December 1967 establishing a committee to study "the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction."[135]

This Seabed Committee prepared reports and issued recommendations to the UNGA over the next few years, expanding from 36 to 42 member states in 1968.[136] At the committee's recommendation, the UNGA approved a moratorium on seabed mining in areas beyond national jurisdiction in 1969 pending the establishment of an international regime to govern such mining.[137] The UN's disarmament body, the Eighteen-Nation Committee on Disarmament (enlarged to 26 nations and renamed as the Conference of the Committee on Disarmament in 1969), then took up the effort to develop a treaty governing the military uses of the sea-bed. This effort resulted in the Seabed Arms Control Treaty, a treaty of more limited scope than envisioned by Pardo that only banned the placement of nuclear weapons or weapons of mass destruction on the ocean floor beyond 12 miles from the baselines of the territorial sea.[138] The treaty was

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[134] Lodge 2017. For a thorough review of the more recent developments in seabed mining, see Miller et al. 2018.

[135] See UN General Assembly Resolution 2340, adopted at the 1639th plenary meeting in the 22nd session of the UNGA on December 18, 1967, available at https://legal.un.org/diplomaticconferences/1973_los/docs/english/res/a_res_2340_xxii.pdf.

[136] See UN General Assembly Resolution 2467, adopted at the1752nd plenary meeting in the 23rd session of the UNGA on December 21, 1968, https://undocs.org/en/A/RES/2467(XXIII). This resolution expanded the committee and removed its ad hoc status.

[137] See UN General Assembly Resolution 2574 (D), adopted at the 1833rd plenary meeting of the 24th session of the UNGA on December 15, 1969, https://undocs.org/en/A/RES/2574(XXIV), p. 11.

[138] See U.S. State Department, Bureau of International Security and Proliferation, "Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof – Narrative," available at https://2009-2017.state.gov/t/isn/5187.htm, accessed August 9, 2020. Nuclear tests in the atmosphere, underwater, and at space had already been banned in 1963 by the Partial Test

approved by the UNGA in December 1970, with the United States, Soviet Union, and United Kingdom acting as depositary governments. The treaty entered into force in 1972 after ratification by twenty-two states and was eventually ratified by another 91 countries.[139]

The Seabed Committee also recommended that the UN convene a conference to address not only the seabed mining regime but also a host of other issues in the law of the sea that had remained unresolved after the 1958 Geneva Conventions or become unsettled since that as a result of the changes in state practice. In response, the UNGA passed Resolution 2750 on December 17, 1970, calling for the convening of a third comprehensive conference on the law of the sea in 1973 to address not only matters related to the seabed but also "a broad range of other issues."[140] The resolution charged the Seabed Committee with preparations over the intervening three years, adding another 44 member states to the committee (another five members were added the following year). The Seabed Committee met in six sessions and various other meetings from 1971 to 1973, submitting a final report to the General Assembly that included a list of subjects to be addressed at the conference.[141] In Resolution 3067 on November 16, 1973, the General Assembly called for the conference to convene forthwith in an organizational session, followed by a second substantive session in 1974 and additional sessions if necessary. The resolution stated that "the mandate of the Conference shall be to adopt a convention dealing with

Ban Treaty, which was signed by the United States, Soviet Union, and United Kingdom and eventually ratified by 123 nations.

[139] See the full text of the treaty at http://disarmament.un.org/treaties/t/sea_bed/text.

[140] This included matters "concerning the régimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment (including, *inter alia*, the prevention of pollution) and scientific research." See UN General Assembly Resolution 2750, adopted at the 1933rd plenary meeting of the 25th session of the UNGA on December 17, 1960, https://undocs.org/en/A/RES/2750(XXV), p. 26.

[141] See *Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Volume III, General Assembly Official Records: Twenty-Eighth Session*, Supplement No. 21 (A/9021), New York, 1973, available at https://digitallibrary.un.org/record/725188. See also Koh and Jayakumar 1985, 32–36.

all matters relating to the law of the sea… bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole."[142]

UNCLOS III and the United Nations Convention on the Law of the Sea

The Third United Nations Conference on the Law of the Sea ended up being a mammoth diplomatic undertaking that extended long past 1974, but it ultimately succeeded in producing the landmark United Nations Convention on the Law of the Sea (UNCLOS). The conference stretched over a nine-year period from December 1973 to December 1982, taking place across eleven formal sessions with participation from more than 150 countries. The final text of UNCLOS contains 320 articles in seventeen parts with nine annexes. While incorporating many elements of the 1958 Geneva Conventions, UNCLOS also broke new ground in a number of areas by, *inter alia*, defining maximum limits for the territorial sea and continental shelf and establishing an exclusive economic zone, an archipelagic states regime, an international machinery to govern seabed mining, and a compulsory dispute settlement mechanism (albeit with significant exclusions). These developments, as well as the ambiguities and omissions in the text and the negotiating dynamics that produced them, will be discussed further in the following chapter.

Conclusion

The history of the law of the sea outlined in this chapter illustrates the complex ways that sovereigns and states across history have utilized rhetoric and norms to promote their geopolitical interests and bolster their legitimacy in the eyes of social reference groups. In the

[142] See UN General Assembly Resolution 3067, adopted at the 2169th plenary meeting of the 28th session of the UNGA on November 16, 1973, https://legal.un.org/diplomaticconferences/1973_los/docs/english/res/a_res_3067_xxviii.pdf, p. 14.

premodern era, sovereigns tended to use maritime norms as a means to facilitate trade, generate revenue, and manage conflict. As maritime trade expanded along the Indo-Pacific and Mediterranean littorals, and later in the North Atlantic, city states and trade leagues utilized laws and norms to regulate and facilitate commercial exchange across vast expanses. Meanwhile, continental powers and maritime empires developed coast guards and naval forces that enabled them to secure dominance of key straits and shipping lanes. They used that power to protect and facilitate commercial shipping, while developing norms and rules to regulate and extract rents from the trade that entered their ports (entry that was often compulsory even if not the final destination on a ship's journey). In more limited cases, especially in medieval Europe, coastal sovereigns claimed jurisdiction over waters in their near seas in more spatial terms, as a means of claiming exclusive fishery rights and regulating their conflicts with nearby powers.

During the period of European expansion and colonialism, key concepts in the modern law of the sea emerged as means whereby Western powers prosecuted and managed their internecine rivalries, structured their evolving economic systems, and justified their subjugation of non-Western peoples and sovereigns. The concept of the territorial sea as a uniform maritime belt of 3 nm was a product of some weaker European states' desire to maintain neutrality during frequent European wars by excluding foreign warships from a spatial zone subject to coastal defense. Similarly, the concept of "freedom of the seas" was used by weaker powers seeking to leverage rhetoric to strengthen their hand against established naval powers. During the age of mercantilism, this took the form of rising powers justifying their efforts to break up the militarized trade monopolies of more established rivals. In the late eighteenth and early nineteenth centuries, freedom of the seas became a means for weaker Western powers to defend the rights of neutral merchant shipping at sea, especially against British naval power. Then, in

the mid-nineteenth century, after *laissez faire* economic theory supplanted mercantilism and Great Britain established unrivaled maritime hegemony, even Britain accepted freedom of the seas. It did so in part as a means to bolster its legitimacy among its social reference group of other Western powers, while also employing the concept along with other liberal discourse to justify its suppression of piracy and other forms of resistance from the colonized world.

Up until the twentieth century, these maritime legal concepts were based largely in bilateral treaties, diplomatic custom, and state practice. As the long nineteenth century drew to a close, however, efforts emerged in Europe and North America to "codify" those customs in the form of international conventions. During this period, maritime law separated into more distinct branches, with admiralty law governing private shipping, the laws of naval warfare governing maritime jurisdiction during times of war, and the law of the sea governing state jurisdiction at sea during peacetime. Admiralty law proved the least controversial and most susceptible to technocratic management. Meanwhile, efforts to codify the laws of naval warfare peaked with the London Declaration of 1908 (which was never ratified after being rejected in the British House of Lords) and then collapsed after World War I. This collapse coincided with the abandonment of the nineteenth-century and Wilsonian conception of "freedom of the seas" as a doctrine for protecting neutral rights at sea during wartime.

The first major effort to codify the law of the sea as such took place at the League of Nations Codification Conference in 1930. Although the conference failed to produce an agreement, its work resumed after World War II, culminating in the adoption of four conventions on the law of the sea at UNCLOS I at Geneva in 1958. These four Geneva conventions struggled to achieve universal support, however, and ultimately proved inadequate to keep up with the rapid shifts in state practice at sea after World War II. These shifts were driven by diverse forces,

including decolonization, technological change, demographic pressures, and environmental degradation. As a particular result of pressure from developing nations, the United Nations convened a third conference on the law of the sea from 1973 to 1982 that produced a more extensive and unified UN Convention on the Law of the Sea. Although this convention carried over many elements of past customary and conventional law, it also broke new ground in expanding coastal states' jurisdiction and establishing institutions to govern the mineral resources of the high seas. As such, it represented a complex compromise between and among industrialized maritime powers and developing and decolonized states. The next chapter will analyze the history of UNCLOS III and the status of the contemporary law of the sea in closer detail, demonstrating how despite the widespread support for UNCLOS, many aspects of the law of the sea remain highly contested among states.

Chapter 4: Contestation in the Contemporary Law of the Sea

The contemporary international law of the sea is anchored in the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS has achieved near universal adoption, having been ratified by 168 parties, with an additional 14 states that have signed but not ratified the convention, and only 16 states that have neither signed nor ratified the convention. The States Parties of UNCLOS continue to meet on a regular basis, as does the Open-ended Informal Consultative Process open to non-parties, to discuss matters related to the implementation of UNCLOS and other aspects of the law of the sea. UNCLOS also established three new specialized international institutions, including the International Seabed Authority, the Commission on the Limits of the Continental Shelf, and the International Tribunal for the Law of the Sea, that implement various provisions within the convention.

Despite the broad-ranging scope of UNCLOS and the institutional infrastructure it established, the contemporary law of the sea regime remains contested and incomplete. Numerous bilateral and regional treaties on locally specific issues and disputes continue to act as sources of the law of the sea alongside UNCLOS, the text of which in some places defers to or recommends such agreements. Customary international law, an inherently elusive concept, also coexists with treaty law as a source of the law of the sea, overlapping with conventional law in some areas and filling in gaps in others.[1] In areas that remain undefined, ambiguous, or unaddressed in UNCLOS or other interstate treaties, customary law is supposed to answer the

[1] Some states, such as the United States and Peru (neither of which have ratified UNCLOS), argue that much of UNCLOS, particularly its provisions related to navigation and zonation, now represents customary international law. Other states dispute this position, arguing that the convention's more progressive components (such as the regime of transit passage in straits used for international navigation) that did not exist prior to UNCLOS III are exclusively reserved for those states that have ratified the convention.

uncertainty. As discussed in chapters 2 and 3, customary law is a function of both state practice and *opinio juris*, or states' beliefs about what norms are right and legally binding. In principle, practice and beliefs can be deduced from a study of states' laws, decrees, diplomatic communications, and behavior vis-à-vis both their own maritime claims and those of others. Even so, both state practice and *opinio juris* are difficult to measure with objectivity and are often themselves the subject of conflicting interpretations.[2] This is especially the case in the not-uncommon context of interstate disputes over land borders near coasts, sovereignty over offshore islands, and boundaries between overlapping maritime zones. States often interpret the law of the sea in the context of such disputes, employing legal arguments that are most likely to bolster their position or undermine that of their opponent. Since such interpretations are shaped by states' particularistic interests in the situation, it is often unclear how broadly states intend those interpretations to apply to other analogous settings.

This chapter unpacks some of the contestation in the modern law of the sea regime. It does so by first picking up where the previous chapter left off to provide more in-depth background on the negotiations at the Third United Nations Conference on the Law of the Sea (UNCLOS III) and the nature of the final UNCLOS text, highlighting the consensus-based character of the negotiations and the complex compromises that were included in the convention. The chapter then delves into greater detail on the negotiating history and current status of four key areas of the law of the sea that remain ambiguous and contested: (1) innocent passage of foreign warships in territorial seas and straits, (2) foreign military activities in the exclusive economic zone, (3) the maritime entitlements of islands and archipelagoes, and (4) historic bays, waters, and rights. The shadow cases of the United States and Russia in chapter 5 focus on the

[2] For a discussion of theory and recent research on customary international law, see note 71 in chapter 1.

first of these issues, while the primary case study of China in chapters 6 through 9 and the comparative case study of Japan in chapter 10 are structured around all four of these issue areas. In addition, chapter 5 will also present large-N cross-national evidence of states formal *de jure* maritime jurisdictional claims in these issue areas, among a handful of others, drawing from a dataset constructed for this dissertation. The following analysis draws upon a combination of primary sources, including records and negotiating histories from UNCLOS III and quasi-official commentaries on UNCLOS, as well as secondary sources by international legal experts and historians.

Negotiating History and Dynamics at UNCLOS III

The Third United Nations Conference on the Law of the Sea convened over a nine-year period from December 1973 to December 1982, taking place across eleven formal sessions that convened for a month or so at a time, between once and thrice yearly. At the opening session held in New York in December 1973, conference officers were elected and the three main committees of the conference were established. At the second session held in Caracas, Venezuela, the First Committee was tasked with the regime governing the seabed beyond national jurisdiction, the Third Committee was tasked with preservation of the marine environment, and the Second Committee was charged with a large subset of other matters, including the various zones of national jurisdiction, the high seas, and the status of landlocked and geographically disadvantaged states.[3] Another informal plenary committee formed to deal with other miscellaneous provisions, including those related to dispute settlement, a preamble, and the Final Act. A Drafting Committee would also come to play a prominent role in the later

[3] See Codification Division, Office of Legal Affairs, United Nations, "Third United Nations Conference on the Law of the Sea (1973-1982)," Diplomatic Conferences, https://legal.un.org/diplomaticconferences/1973_los/.

sessions of the conference. The second session also saw the adoption of unique rules of procedure designed to discourage votes on discrete substantive issues or draft texts before broad consensus had been reached. These rules had been adopted at the special impetus of the United States, Soviet Union, and other maritime powers that feared their interests would be overridden by the greater numerical power of developing nations. The rules succeeded in preventing any votes on substantive issues until the penultimate session of the conference in 1981.[4]

The remaining sessions over the next eight years took place in either New York or Geneva, until the final part of the concluding session, which was held in Montego Bay, Jamaica. Over the course of these sessions, the delegations negotiated on the basis of draft texts that were continuously revised to reflect progress in the negotiations. During the third session in 1975, the chairs of the three main committees collaborated to prepare an initial set of articles to serve as the basis for negotiation, known as the informal single negotiating text (SNT or ISNT). A revised single negotiating text (RSNT) was prepared at the next session in 1976, followed by an informal composite negotiating text (ICNT) at the sixth session in 1977. At the seventh session in 1978, the conference identified the main outstanding issues that required more in-depth negotiations and established seven groups to work on those issues. Based on the work of those negotiating groups, the conference leadership revised the ICNT during the ensuing sessions, preparing an official draft convention after the tenth session held in 1981. Some final changes were made at the eleventh session, prior to the provisional adoption of the convention by the conference by

[4] Koh and Jayakumar 1985, 99–104. Developing nations, including China, did play an important role in reducing the threshold for such votes from three-fourths, as favored by maritime powers, to two-thirds.

recorded vote on April 30, 1982. After minor drafting changes, the final convention text was formally adopted by the conference and opened for signature on December 7, 1982.[5]

Although the conference continued to hold plenary sessions and formal committee meetings at each session, much of the negotiating work took place in informal, off-the-record meetings.[6] Beyond the seven formal negotiating groups established in 1978, there were also numerous informal groups. Some of these groups were organized around shared interests, such as coastal states, landlocked and geographically disadvantaged states, straits states, archipelagic states, broad-shelf states, and major maritime powers.[7] Other groups, such as the Evensen Group, Castañeda Group, and Private Group on Straits, deliberately included state delegates with divergent interests in order to facilitate cross-cutting discussion and progress in reconciling competing perspectives.[8] In addition, bilateral diplomacy among individual states both between and during sessions played an important, though less visible, role in the negotiation process.[9]

Developing countries played a particularly important role in the negotiations, especially in advocating for a new comprehensive convention, innovating the concept of an "exclusive economic zone" (EEZ), and promoting a robust seabed mining regime over the objections of the industrialized powers. After the initial establishment of the Seabed Committee, Latin American states such as Chile actively lobbied for a new conference that would address a broad array of issues, not only those related to the seabed beyond national jurisdiction. Their intent in doing so was to open up a venue where a 200 nm economic zone could receive official sanction.[10] They

[5] Codification Division, Office of Legal Affairs, United Nations, "Third United Nations Conference on the Law of the Sea (1973-1982)," Diplomatic Conferences, https://legal.un.org/diplomaticconferences/1973_los/; and Koh and Jayakumar 1985.

[6] For details on the negotiation process, see Sebenius 1984; Koh and Jayakumar 1985, chap. 3.

[7] For a discussion of the role these groups played in the conference, see Koh and Jayakumar 1985, chap. 2.

[8] For a discussion of the role these groups played in the conference, see Ibid., chap. 4.

[9] Ibid., 57–58.

[10] Ibid., 36–37. Interview 3.7 with Fernando Zegers, June 21, 2018, Santiago, Chile.

devoted substantial diplomatic effort to building consensus around this concept in the years preceding the conference among developing nations in Latin America, Africa, and Asia,[11] including China (see chapter 6).[12] Moreover, the Group of 77 ("G-77") developing nations (which actually included more than 100 nations by the time of UNCLOS III) united behind a robust new seabed mining regime, including technology transfer and fair distribution of profits.[13] These principles embodied the zeitgeist of the "new international economic order" that was being advocated by the Non-Aligned Movement and G-77 in the 1970s. At the same time, there were important divisions within the G-77, especially on the issue of the exclusive economic zone. These divisions were evident in 1974 when the G-77 held a separate conference in Nairobi, Kenya, in an effort to achieve consensus on law of the sea issues, but failed to produce a declaration due to disagreements about how much coastal states should be required to share the resources of the EEZ and continental shelf with geographically disadvantaged or landlocked states. (By the end of the conference, coastal states were widely perceived to have won the advantage in this regard, contributing to a lower rate of ratification among landlocked states.)

At many points, it was unclear if the conference would be able to overcome the divisions and differences among the national delegations in order to reach a successful conclusion. After the Reagan administration came to power in the United States in the final stretch of the negotiations, the U.S. delegation came out in opposition to the final convention text due to

[11] Hollick 1981, 171.

[12] These efforts included two major conferences of Latin American states in 1970, one held in Montevideo, Uruguay, and the other in Lima, Peru, each of which resulted in declarations on the law of the sea. A group of Caribbean countries also met in June 1972, issuing the Santo Domingo Declaration, while groups of African states met in 1972 and 1973, producing the Organization of African Unity Declaration on the Law of the Sea. The Afro-Asian Legal Consultative Committee also met through the UNCLOS III negotiations to discuss many issues related to the law of the sea. See Koh and Jayakumar 1985, 58–60.

[13] The G-77 at UNCLOS III operated somewhat separately from the G-77 at the UN General Assembly, with its own distinct leadership, staff, and procedures. Ibid., 81.

qualms with its seabed mining regime. The United Kingdom and France also expressed opposition to the part on seabed mining as then written. At that point, many countries expressed concerns about the ability of the convention to be an effective mechanism of ocean governance without participation from these key industrialized powers. Nonetheless, over 100 states signed the convention on the day it opened for signature, followed by another few dozen states within the next two years before the signature window closed. Ratifications followed more slowly, but twelve months after the sixtieth state (Guyana) submitted its instrument of ratification to the United Nations, the convention entered into force on November 16, 1994. That same year, an agreement relating to Part XI that amended some of the convention's provisions on seabed mining was negotiated in response to industrial nations' concerns, precipitating ratification by the United Kingdom and France. (Although U.S. president Bill Clinton signed the agreement, the U.S. Senate still declined to ratify the convention.) There was then a flood of ratifications in the mid-1990s, and the number of UNCLOS states parties doubled by the end of 1997. As of mid-2020, 168 parties[14] have now ratified the convention, while another 14 states (half of which are landlocked) signed the convention but have never ratified it.[15] Only 16 UN member and observer states have neither signed nor ratified UNCLOS; nine of these are landlocked, and the other seven include Eritrea, Israel, Peru, Syria, Turkey, the United States, and Venezuela.

The Content and Character of the UNCLOS Text

[14] This includes 164 UN member states, plus the Cook Islands, Niue, UN observer state Palestine, and the European Union.

[15] Besides the seven landlocked states, the other seven states that signed but have not ratified the convention are Cambodia, Colombia, El Salvador, Iran, North Korea, Libya, and the United Arab Emirates. Meanwhile, 27 landlocked states have ratified the convention.

The text of UNCLOS contains 320 articles in seventeen parts with nine annexes. The English version of the text stretches beyond 200 pages and 80,000 words, while the Chinese version has over 100,000 characters. Two follow-on agreements relating to the implementation of different parts of UNCLOS were negotiated in the 1990s. The aforementioned agreement relating to the implementation of Part XI on seabed mining was adopted in 1994 and entered into force in 1996. Another agreement relating to the conservation and management of straddling and highly migratory fish stocks was adopted in 1995 and entered into force in 2001. In the twenty-first century, a new effort emerged to develop a third agreement to address an area that was largely unregulated by UNCLOS: conservation of living resources in the high seas. This resulted in Resolution 72/249, wherein the General Assembly decided to convene an Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ) beginning in 2018.

While incorporating many elements of the 1958 Geneva Conventions, the new 1982 UNCLOS also broke new ground in a number of areas. It elaborated the multi-zonal approach to coastal state jurisdiction over the oceans, with specific maximum breadths attached to those zones. It authorized a broader maximum breadth for the territorial sea of 12 nm, along with an additional 12 nm wide contiguous zone extending beyond the territorial sea. At the same time, it created a special regime of transit passage, less restrictive than the regime of innocent passage, to apply in straits that would be newly enclosed with states' territorial seas upon their expansion to 12 nm. Beyond the territorial sea and contiguous zone, UNCLOS confirmed the right of states to claim an exclusive economic zone extending up to 200 nm from the baselines of the territorial sea, wherein states would possess sovereign rights and jurisdiction over all living and nonliving marine resources in the water column, seabed, and subsoil. It also authorized states to claim an

extended continental shelf, if supported by the geomorphological characteristics of the seabed, extending no further than 350 nm from the state's baselines. It established a technical institution, the Commission on the Limits of the Continental Shelf, to review submissions from states seeking to claim such an extended continental shelf according to specific technical criteria. The convention also created a new archipelagic states regime, allowing for states composed wholly of islands to draw straight baselines around their archipelagoes and outlining rules to govern the archipelagic waters within those baselines. And it created a system for governing marine scientific research and the exploitation of hydrocarbons and minerals in the deep seabed beyond zones of national jurisdiction, dubbed "the Area."

UNCLOS was fundamentally a compromise agreement. Often this manifested in the inclusion of mutually balancing provisions arrayed against each other or the concession of one point in return for another in a quid pro quo fashion. Acknowledging this aspect of the convention, conference participants regularly referred to the negotiating text as a "package deal."[16] One of those key compromise packages was the coupling of an expanded 12 nm breadth for the territorial sea together with the new transit passage regime. Similarly, although the convention established a binding mechanism for resolving disputes over how to apply the law of the sea, it allowed for significant carve-outs. (In particular, Article 298 allows states to declare themselves exempt from binding dispute resolution over maritime boundaries, historic bays or titles, or military activities.) Another fundamental compromise was that in the EEZ and extended continental shelf, "sovereign rights and jurisdiction" over ocean resources would be decoupled from full sovereignty. As a result, even as states claimed greatly expanded sovereign rights to extract and manage natural resources in the EEZ and continental shelves, their right to assert

[16] Koh and Jayakumar 1985, 41–42.

jurisdiction over navigation and other activities besides resource extraction was to remain limited.[17]

Other compromises in UNCLOS involved the adoption of vague or imprecise language about contentious issues that would quite deliberately permit diverse interpretations. Alternatively, when no agreement on any language could be reached, states simply tabled issues completely, leaving them unaddressed in the convention text. As a result of those compromises, many aspects of coastal state jurisdiction remain ambiguous in UNCLOS. Short of formal amendments, supplements, or agreements regarding the convention, the most authoritative source of international law regarding those matters that are unambiguous or unaddressed in UNCLOS is customary international law. As the function of both state practice and *opinio juris*, however, the customary international law of the sea is itself highly contestable. Moreover, in part due to the aforementioned exceptions to compulsory jurisdiction, international courts have few occasions to issue rulings interpreting those matters, and when they do engage in interpretation, their judgments are only binding on particular contexts and cases.

Key Contested Issues in the Contemporary Law of the Sea

Some of the most controversial areas of the law of the sea that remain hotly contested among states include: (1) innocent passage in the territorial sea and transit passage in straits by foreign warships, (2) foreign military activities and marine scientific research in the exclusive economic zone, (3) islands, rocks, archipelagoes, and their maritime entitlements; and (4) historic bays, waters, and rights. This, of course, should not be considered exhaustive of the controversial issues in UNCLOS. For example, another controversial and ambiguous area of the

[17] Koh 2009; Shearer 2014.

law of the sea where there is widely varying state practice has to do with the standards for drawing straight baselines for the territorial sea instead of using the normal low water line.[18] However, these are the issues around which I structure the analysis in my shadow cases in chapter 5 and my principal and comparative case studies in chapters 6 through 10.

Thus, in this section, I conduct a more in-depth discussion of these issues in order to lay the foundation for that analysis. This includes analyzing what the UNCLOS text does and does not say about the issue, recounting the UNCLOS III negotiating history relevant to the issue, and describing the range of state practice in the issue area. It bears repeating that these issues are not controversial because UNCLOS is ambiguous or silent about them; rather, they are ambiguous or absent in UNCLOS because they were controversial during the convention negotiations and remain so today. In addition to being unclear in UNCLOS, these issues remain largely unadjudicated by international courts due to the intense political sensitivities of these issues and enabled by the dispute settlement carve-outs in the text itself.[19]

Innocent Passage of Warships in Territorial Seas and Transit Passage in Straits

[18] Article 7 of UNCLOS allows states to declare straight baselines for the territorial sea, as opposed to the normal method of using the low water line, in "localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." However, the terms "deeply indented and cut into," "a fringe of islands," and "immediate vicinity" are not defined. In practice, many states have interpreted this norm very flexibly. See Churchill 2005.

This wide variation in practice prompted the International Law Association, a professional association of international legal experts, to establish a committee to study straight baselines to develop consensus standards for their use. The committee report issued in 2018, however, essentially confirmed that the ambiguity in UNCLOS on baselines had been deliberate on the part of the conference negotiators, so the legal validity of such baselines was dependent largely on state practice and protests. In most cases, the report suggested that disputes over baselines would need to be addressed through "diplomatic means" rather than formal arbitration. See https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Baselines.pdf. See also the Sydney Conclusions subsequently adopted by the ILA on the basis of the report, available at https://www.ila-hq.org/images/ILA/Resolutions/ILAResolution_1_2018_BaselinesundertheInternationalLawoftheSea.pdf.

[19] For discussions of the range of contestation in various matters related to the law of the sea, see Bateman 2006; Churchill and Lowe 1999; Elferink 2005; Gao 2009b; Kaye 2014; Pedrozo 2009; Skaridov 2009. More citations to the legal literature on contested issues in the law of the sea are cited below.

Innocent Passage of Warships in the Territorial Sea

The question of innocent passage for warships in the territorial sea emerged simultaneously with the concept of the territorial sea itself. The draft articles prepared by the codification committee for the 1930 League of Nations Codification Conference at The Hague and adopted on a provisional basis at the conclusion of the conference stated, "As a general rule, a Coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorisation or notification," while also granting coastal States the right "to regulate the conditions of such passage." The commentary on this article observed that it was "existing practice" for states not to forbid innocent passage for warships, but that it was also existing practice for states to have the power to prohibit such passage "in exceptional cases." The articles also gave coastal states the right to require foreign warships to leave the territorial sea if they did not comply with the coastal states' regulations.[20] These articles thus sought to navigate the tensions and trade-offs in the question of innocent passage for warships by permitting it without notice or permission as a general rule, but allowing states to prohibit it on an undefined "exceptional" basis.

This basic approach was modified substantially in the final text of the 1958 Convention on the Territorial Sea and the Contiguous Zone adopted at the First United Nations Conference on the Law of the Sea (UNCLOS I). First, instead of including an article that explicitly confirmed warships' right of innocent passage "as a general rule," the convention simply applied this right to "all ships." (Like the 1930 articles, the convention did not extend this right to aircraft, and it required submarines to navigate on the surface rather than remaining submerged

[20] Appendix I: The Legal Status of the Territorial Sea in League of Nations, *Acts of the Conference for the Codification of International Law*, Geneva, August 19, 1930, Official No. C. 351. M. 145. 1930. V., pp. 130-31, https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf.

when passing through the territorial sea.) The ensuing subsections then broke down the category of "all ships" into merchant ships, government ships other than warships, and warships.[21] Afterward, some states argued the text thus implied warships had the right of innocent passage, while other states strongly disagreed with this interpretation based on the conference proceedings and the preferences expressed by the majority of states at the conference.[22] In a related vein, the delegations at UNCLOS I did not support the previous proposal that would have prohibited a requirement for prior authorization or notification for innocent passage for warships. On the contrary, the majority of states favored adding a provision allowing states to require warships to obtain prior notification or authorization before passing through the territorial sea.[23] However, as this provision did not receive support from the requisite two-thirds majority, it was not included in the final convention.[24]

[21] The sole article applying only to warships echoed the provision from the 1930 Hague Conference's provisional articles allowing coastal states to require warships to leave the territorial sea for noncompliance with the coastal states' regulations.

[22] The head of the Danish delegation, Max Sørensen, afterwards averred, "The actual text of the Convention would therefore warrant the conclusion that warships have the same rights in this respect as other ships, but the proceedings of the Conference leave no room for doubt that this was not the intention of the majority of the delegates." Quoted in Lawrence 1965, n. 128.

[23] An initial set of draft articles prepared by the International Law Commission in 1954 during the preparations for UNCLOS I adopted the same basic approach from the 1930 provisional articles, recommending that "passage should be granted to warships without prior authorization or notification." However, the ILC revised this proposal after receiving critical responses from some governments and reviewing the matter further. The revised ILC proposal included an article adopting the contrary position: "The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 17 and 18." See International Law Commission, Report to the General Assembly, "Commentary to the articles concerning the law of the sea," 1956, https://legal.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf, pp. 276-77.

[24] Lawrence 1965, 76–77. Seven states upon signing the convention also issued reservations to Article 14 or 23 asserting the right to subject passage for warships through the territorial sea to prior authorization or, in the case of Czechoslovakia, denying the right of innocent passage for warships altogether. At least five states objected in turn to these stated reservations upon ratifying the convention. See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-1&chapter=21. At UNCLOS II in 1960, Ghana also proposed an amendment that would have required warships to provide prior notification before passing through the territorial sea. See Ibid., 77.

This basic formula for innocent passage was also adopted at UNCLOS III, though only after great controversy. Like the 1958 convention, Part II, Section III of UNCLOS guarantees ships the "right of innocent passage" in the territorial sea, with the sub-section heading applying the right to "all ships." There was debate over whether or not to limit this right to non-military ships, but ultimately, the conference settled upon retaining this approach. However, Article 18 explicitly requires that such passage "shall be continuous and expeditious" (something only implied in the 1958 convention). Article 19 also provides an enumerated list of activities that are not considered innocent, a much more explicit definition of non-innocent passage than in the 1958 convention, which had adopted a vaguer approach. There is disagreement among states about whether or not that list represents an exhaustive list of all forms of non-innocent passage; the United States and Soviet Union issued a joint statement in 1989 asserting that it does,[25] but it is unclear how broadly this interpretation is shared.

Moreover, despite providing a precise definition of innocent passage, UNCLOS does not specify whether or not coastal states can require other governments to provide prior notification or permission before passing through. This issue was one of enduring controversy at UNCLOS III that remains an area of divergent state practice. In the preparatory discussions held by the Seabed Committee and at the second session in 1974, many states had expressed their sense that a provision allowing states to require prior notification or permission for warships to conduct innocent passage ought to be included in the convention. The issue was then placed on the backburner for the next several years, while negotiations in the Second Committee instead focused on issues related to the EEZ and the passage regime in straits, among other matters. As

[25] "Joint Statement by the United States and Soviet Union, with Uniform Interpretation of Rules of International Law Governing Innocent Passage," September 23, 1989, adopted in Jackson Hole, Wyoming, USA, available at https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1989-USA-USSR-Joint-Statement-with-Attached-Uniform-Interpretation-of-Rues-of-International-Law-Governing-Innocent-Passage.pdf.

the negotiations grew more focused at the seventh session in 1978, a group of nine developing countries revived the issue, co-sponsoring a proposal to require foreign military vessels to "give prior notification to or obtain prior consent" from the coastal state before passing through the territorial sea. However, this proposal did not gain enough traction to be incorporated into the next revision of the ICNT.[26]

Then, in August 1979, U.S. media reports revealed the existence of the U.S. Freedom of Navigation Program, an initiative recently formalized by the Carter administration that used U.S. military assets to conduct operational protests against territorial sea claims that the U.S. government deemed excessive. This program generated considerable pushback among coastal states at the conference, which issued a joint statement expressing concern about the program's use of unilateral military transits to target states' territorial sea claims.[27] The question of innocent passage for warships then became a major source of controversy in the remaining negotiating sessions. In 1980, seven of the states that had submitted the 1978 proposal introduced a new proposal to add language granting coastal states "the right to require prior authorization or notification" of warships' passage through the territorial sea, garnering many expressions of support in the plenary meetings held in 1980-81. The proposal was then reintroduced at the eleventh session in 1982 with 20 co-sponsors, with statements of support from at least 19 other states.[28] This proposal was not incorporated into the official draft convention by the drafters,

[26] Nandan and Rosenne 2003, vol. 2, 249, 251. Text of proposal labeled as C.2/Informal Meeting/30 (1978), co-sponsored by Argentina, Bangladesh, China, Democratic Yemen, Ecuador, Madagascar, Pakistan, Peru, and the Philippines, reproduced in Platzöder 1982, vol. V, 39. This proposal aimed to include this provision as part of a reworked version of the article defining warships.

[27] See the statement by the Mexican delegate on behalf of the coastal states group, 118th Plenary meeting, August 23, 1979, A/CONF.62/SR.118.

[28] Nandan and Rosenne 2003, vol. 2, 186, 195.

however, as some states warned that such a change "could be a conference-breaker for maritime powers and their allies."[29]

Undeterred, advocates of greater coastal state jurisdiction over foreign warships' passage in the territorial sea sought to force the issue in April 1982 after the convention was opened for formal amendments. Gabon introduced an amendment echoing the 20-state proposal (though changing "or" to "and"), while 28 states tried a new angle by co-sponsoring an amendment to allow states to prevent infringements of their laws and regulations related to "security," in addition to customs, immigration, fiscal, or sanitary matters. The majority of states who addressed these amendments in the plenary spoke in favor of them, though several states spoke against them. Concerned that these amendments might pass and would then doom the chances of the convention receiving the crucial support of maritime powers, conference president Tommy Koh persuaded the sponsors of the two amendments to withdraw them from consideration. They ultimately agreed to do so, conditional upon entering into the record their view that the amendments were not even necessary anyway, as the convention text as it stood already gave them the right to regulate the passage of warships. Accordingly, upon reporting that the 28-state amendment had been withdrawn, Koh stated in a plenary meeting:

> Although the sponsors of the amendment… had proposed the amendment with a view to *clarifying* the text of the draft convention, in response to the President's appeal they have agreed not to press it to a vote. They would, however, like to reaffirm that their decision is without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, *in accordance with articles 19 and 25 of the draft convention*.[30]

[29] This warning was included in a statement made by the representative of Canada at the 164th plenary meeting in 1982, cited in Ibid., vol. 2, 197–98.

[30] Emphases added. Articles 19 and 25 dealt with the right of innocent passage and the rights of protection of the coastal state. See summary record of 176th plenary meeting on April 26, 1982, A/CONF.62/SR.176, https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_16/a_conf62_sr176.pdf.

Many states also issued interpretive statements during the convention and upon signing or ratifying the convention reiterating their view that UNCLOS allowed states the right to require prior notification or authorization for warships to conduct innocent passage, statements that elicited opposition from some other states in turn.[31] As will be explained in the quantitative summary in chapter 5, at least 46 states today include such requirements in their domestic legislation.[32]

Passage of Warships and Aircraft through Straits

A corollary to this issue relates to the passage of military ships and aircraft through straits. Since the mid-nineteenth century, several treaties for specific straits in Europe had been negotiated to eliminate strait fees and ensure safe passage for merchant ships.[33] The non-binding provisional articles adopted at the 1930 Hague Conference included language that stated that

[31] See Nandan and Rosenne 2003, vol. 2, 197–99. See also the declarations of states upon signing or ratifying the convention available at https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf; some of these declarations directly refer to Koh's statement at the April 1982 session.

[32] At the opposite end of the spectrum, U.S. Naval War College professor James Kraska has put forward a unique interpretation of the law of the sea to argue that warships, including submarines, may be able to lawfully engage in "non-innocent passage" in the territorial sea. Kraska acknowledges that submerged submarine transit in the territorial sea is not consistent with innocent passage under UNCLOS, and thus submarines thus do not have the "right" to pass through another state's territorial waters submerged. However, he argues that this does not prohibit warships from engaging in "non-innocent passage," including submerged submarine espionage in the territorial sea. He further contends that the law of the sea does not grant coastal states clear jurisdictional authority to enforce prohibitions on such passage and that states may not use force or invoke the doctrine of self-defense against such intrusions. Kraska 2015.

[33] Another area of occasional controversy is the issue of fees for passage through straits. The provisional articles adopted at the Hague Conference proposed prohibiting states from levying charges on ships passing through the territorial sea, unless specific services such as pilotage or towage were rendered. This provision was incorporated into the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 UNCLOS. The language regarding fees for ships passing through straits is somewhat vaguer but follows this same general principle. In the Malacca Strait, Indonesia and Malaysia have periodically raised the prospect of imposing some sort of fees in order to recoup the costs of administering traffic and responding to environmental damage in the strait. In response, Japan began providing some aid to these states in the 1990s, as the most significant user state in the straits at that time. Van Dyke 2009; Cundick 1975.

On the subject of pilotage, Australia implemented a compulsory pilotage regime in the navigationally challenging Torres Strait on environmental conservation grounds in 2006 that was met with strong opposition from Singapore and the United States in particular. However, these states have worked out a *modus vivendi* for shipping in the strait over time. See Rothwell and Stephens 2016, 263–66.

"under no pretext" could coastal states interfere with passage of warships "through straits constituting a route for international maritime traffic between two parts of the high sea."[34] In a similar vein, the newly established International Court of Justice decided in the 1949 *Corfu Channel* case that under customary law warships during peacetime had the right of innocent passage through "straits used for international navigation between two parts of the high seas." Furthermore, the court set a relatively low bar for which straits would be considered "used for international navigation," considering both the volume of traffic through the strait and the geographical status of the Corfu Channel as a corridor between two different countries.[35] In a somewhat more far-reaching adaption of this provision, Article 16 of the 1958 Convention on the Territorial Sea and the Contiguous Zone allowed coastal states to temporarily suspend innocent passage in their territorial seas, while prohibiting such suspension in "straits which are used for international navigation between one part of the high seas and another part of the high seas *or the territorial sea of a foreign State*" (emphasis added). But similar to the *Corfu Channel* decision, the 1958 convention did not include specific, replicable criteria for what constitutes a "strait used for international navigation."

The issue of passage through straits became newly controversial at UNCLOS III as momentum grew for an expansion of the territorial sea to 12 nm. Such an expansion would render over one hundred additional straits newly susceptible to full enclosure within states'

[34] The written "observations" on Article 12 in the provisional articles approved at the Hague Conference included this language after noting that states could regulate the passage of warships through the territorial sea. Appendix I: The Legal Status of the Territorial Sea in League of Nations, *Acts of the Conference for the Codification of International Law, Geneva*, August 19, 1930, Official No. C. 351. M. 145. 1930. V., p. 130, https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf. See also the article on "Passage of Warships through Straits," discussed but not adopted by the conference, included at p. 134 of Appendix II: Report of Subcommittee No. II, Ibid.

[35] Accordingly, the court ruled in this case—incidentally the first case heard by the ICJ—that British warships had the right of innocent passage through the Corfu Channel, located between Greece and Albania, notwithstanding Albania's argument that the channel was an alternate and not necessary navigational route. See Rothwell and Stephens 2016, 246–47.

territorial seas.[36] Maritime powers such as the United States, Soviet Union, and Italy made it clear that they would only agree to support expansion in the territorial sea to 12 nm on the condition that straits narrower than 24 nm would not become subjected to the restrictions of innocent passage, since that regime excludes overflight of aircraft and requires submarines to surface, along with restrictions on the operations of surface warships. Meanwhile, many developing nations and straits states objected to allowing unfettered navigation of warships in any part of their territorial seas, including straits, and instead suggested that the regime of nonsuspendable innocent passage from the 1958 convention was sufficient for those straits.

At the second session of UNCLOS, the United Kingdom put forward a compromise proposal for a new regime of "transit passage" to apply in straits used for international navigation connecting two parts of the high seas or EEZs, while innocent passage would apply in other straits. This proposal was an important breakthrough that was ultimately incorporated into the UNCLOS text in revised form. In addition to being nonsuspendable, the transit passage regime in the final text allows for overflight of aircraft in straits and for warships to transit straits in their "normal modes of continuous and expeditious transit." However, the articles on transit passage do not define "normal modes," and states disagree over how it ought to be interpreted. In particular, although major naval powers such as the United States insist that it means submarines may remain submerged and aircraft carriers may conduct launches and landings of aircraft, such interpretations are disputed by some strait states.

Beyond the ambiguity of "normal modes," there are several other remaining areas of disagreement over how to interpret and apply the regime of transit passage. For example,

[36] The Annotated Supplement to the U.S. Navy Commander's Handbook on the Law of Naval Operations estimates that there are approximately 52 straits narrower than six nm, 153 straits wider than six nm but narrower than 24 nm (and thus possibly wide enough to include high seas corridors under the 3 nm territorial sea rule but not with 12 nm territorial seas), and another 60 straits wider than 24 nm. See Thomas and Duncan 1999, 207–08.

UNCLOS does not lend any further specificity to the definition of a "strait used for international navigation." Today, some states such as the United States insist all straits capable of such use are eligible for transit passage, while others, such as Japan and Canada, assert the phrase only refers to straits regularly or traditionally used for international navigation. In addition, some strait states, such as Iran, contend that the regime only extends to those states who have ratified UNCLOS. Finally, the United States insists transit passage also applies in the territorial seas approaching straits, an interpretation rejected by some straits states, such as those adjacent to the Straits of Magellan and Hormuz.[37]

Foreign Military Activities in the Exclusive Economic Zone

Historical Context for UNCLOS III's Approach to Foreign Military Activities in the EEZ

Another contested area of the law of the sea pertains to the jurisdictional rights states possess in the EEZ, particularly over foreign military activities. Prior to UNCLOS III, few states purported to claim jurisdiction over foreign military activities in spatial terms beyond a relatively narrow territorial sea during peacetime.[38] However, there were some exceptions, especially in the declarations of some South American states. As noted in the previous chapter, Chile and Peru were the first states to claim a 200 nm zone adjacent to their coasts. In their initial decrees issued in 1947, the states claimed "national sovereignty" in that zone, but also affirmed that their claim

[37] For discussions of these and other areas of controversy regarding straits and transit passage, see Roach and Smith 2012; Grunawalt 1987, 456; Rothwell and Stephens 2016, 251–56.

[38] During wartime, states had claimed more spatial jurisdiction over foreign military activities, through neutrality zones and blockade zones alike. In the early stages of World War II, for example, twenty-one countries in Latin America and the Caribbean had joined with the United States to issue the Panama Declaration, which established a Pan-American Security Zone of neutrality extending hundreds of miles surrounding the Americas south of Canada. See Fenwick 1941. See also Figure 5.1 in chapter 5. In addition, Germany had declared a spatial blockade zone in World War I (somewhat distinct from Britain's long-distance blockade), targeting all enemy and neutral ships indiscriminately within the zone, and both Allied and Axis powers declared blockade zones in World War II. See Fraunces 1992.

would "not affect the right to free navigation of ships of all nations."[39] However, the trilateral Santiago Declaration issued by Chile, Peru, and Ecuador in 1952 replaced that language with a promise only to "permit the innocent and inoffensive passage of vessels of all nations" within the 200 nm zone.[40] Given the restrictive nature of innocent passage relative to high seas navigational freedoms, this shift implied possible opposition to any foreign military activities in the zone besides innocent passage. Other Latin American countries that subsequently claimed 200 nm zones, such as Argentina and Mexico, were more reluctant to assert full "sovereignty" in those zones and were more explicit that freedom of navigation would not be inhibited in those areas.[41]

As the post-war decades unfolded, the dynamics of decolonization and changes in military technology and activities began to shift global sentiment on this issue. After being subjected to the naval power projection of colonial empires, many formerly colonized states desired to flip the script on the legitimacy of foreign military activities in the waters along their coasts. U.S. nuclear weapons and missile testing in the Pacific and South Atlantic in the decade after World War II, along with the advancing naval technologies and Cold War rivalries of maritime powers more generally, further heightened anxiety about military uses of the oceans, especially within the Non-Aligned Movement. Thus, although states' expanding claims to coastal state jurisdiction in this period were primarily designed to bolster control over natural resources, they at times assumed a security dimension as well. One prominent example of this was the UN General Assembly resolution adopted in 1971 declaring the Indian Ocean to be a

[39] Jose Luis Bustamante y Rivero and Enrique Garcia Sayan, Peruvian Decree regarding National Sovereignty and Jurisdiction over the Continental and Insular Shelf, Supreme Decree No. 781, August 1, 1947, in *The International Law Quarterly* 2 (1): 137–138. See also Gabriel Gonzalez Videla, Declaration by the President of the Republic of Chile regarding Chilean Territorial Claims, June 23, 1947, in *The International Law Quarterly* 2 (1): 135–137.

[40] Chile, Ecuador, and Peru, Declaration on the Maritime Zone, signed at Santiago, Chile, August 18, 1952, United Nations Treaty Series, vol. 1006, no. 14758, pp. 326–27, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201006/volume-1006-I-14758-English.pdf.

[41] Santa-Pinter 1971.

"zone of peace." This resolution called for the elimination of "any manifestation of great Power military presence in the Indian Ocean conceived in the context of great Power rivalry" and prohibited warships and military aircraft from using the Indian Ocean "for any threat or use of force" against the nations in the region.[42] This resolution, like the decrees of many nations claiming newly expanded territorial seas, exclusive economic or fishery zones, or patrimonial seas, did reassure that navigational rights in the zone would be unaffected. However, the meaning of "freedom of navigation" itself was subject to varying interpretations. Did it apply to all vessels and aircraft, military and merchant alike? And if it did include military navigation, did it include other activities such as military surveillance, exercises, and tests?

The uncertainty involved in these questions was in turn a source of anxiety for the naval powers, such as the United States, Soviet Union, United Kingdom, France, and Italy. By the start of UNCLOS III, most developed nations and industrial powers had accustomed themselves to the idea of some sort of mostly or fully exclusive economic zone extending out as far as 200 nm (Japan being a prominent exception, as explained in chapter 10). But they were concerned that coastal states would be tempted to reach past economic jurisdiction to claim authority over navigation and foreign military activities in that zone. Thus, they would only support the new 200 nm EEZ regime on the condition that high seas freedoms, including for military vessels and aircraft, would not be affected in the EEZ. The United States' refusal to accept the general maritime disarmament proposal of the Soviet Union in negotiations over the Seabed Arms Control Treaty contemporaneous with the preparations for UNCLOS III had also set the tone.

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[42] UN General Assembly, "Declaration of the Indian Ocean as a Zone of Peace," December 16, 1971, A/RES/2832(XXVI), available at https://www.refworld.org/docid/528c9f6b4.html, accessed August 13, 2020.

The South Atlantic was also declared a zone of peace in 1986. See UN General Assembly, "Declaration of a zone of peace and co-operation of the South Atlantic: resolution," October 27, 1986, A/RES/41/11, available at https://www.refworld.org/docid/3b00f00480.html, accessed August 13, 2020.

The much more limited scope of that final agreement, prohibiting only the emplacement of weapons of mass destruction on the ocean floor beyond 12 miles from the coast, made it clear that restrictions on military activities *beyond* 12 miles were a nonstarter for the Americans.

Meanwhile, developing nations were desirous above all for exclusive control of the marine resources in the waters, seabed, and subsoil off their coasts, in order to promote their economic development. They were cognizant of the basic power realities that would require conceding to the naval powers on this point in order to obtain their desired economic concessions from those powers. Already working against the grain of past customary law that deemed waters beyond no more than 12 miles from the shore as unambiguous high seas, they could only presume to gain so much ground by enclosing much of those waters for economic purposes. Thus, for the most part, they did not strongly or vocally contest military activities beyond the territorial sea during the conference. Foreign military activities in the EEZ do not figure strongly in the records of the plenary and committee meetings or in the negotiating histories and convention commentaries prepared by conference delegates.[43] At the same time, despite bowing to political realities during the negotiations, many developing and postcolonial states never fully accepted the legitimacy of military activities in the EEZ, especially live fire exercises and surveillance. They pushed for the inclusion of general, vague provisions that would enable them to contest the legitimacy of military activities that they viewed as threatening, even while

[43] This was also confirmed by interviews I conducted with negotiators at the conference, including delegates from Japan and India, who noted that foreign military activities in the EEZ were not a prominent subject of discussion at the conference, particularly in comparison to innocent passage for warships in the territorial sea. Interview 2.20 with Shunji Yanai, November 17, 2017, Tokyo, Japan; Interview 5.4 with O.P. Sharma, March 8, 2019, New Delhi, India. However, a Chilean delegate to UNCLOS III suggested this was in fact still an important issue at the conference, albeit one that was resolved in the direction of military freedoms in the EEZ as part of the "package deal" emphasized by Tommy Koh. Interview 3.5 with Francisco Orrego Vicuña, June 7, 2018, Santiago, Chile.

avoiding provoking the opposition of naval powers to what they would view as undue restrictions on military freedoms at sea.

Areas of Ambiguity in UNCLOS on Foreign Military Activities in the EEZ

As a result of these unresolved tensions, the convention is ambiguous on this highly political subject. This is most evident in four areas: (1) the tense balance between Articles 56 and 58 on the rights and duties of coastal states and other states, respectively, in the EEZ;[44] (2) the granting of authority to the coastal state to regulate marine scientific research (MSR) in its EEZ, without defining what MSR entails or whether or not it includes military surveys; (3) the granting of jurisdiction to the coastal state regarding environmental conservation in the EEZ, without defining what if any limits apply to such authority; (4) the vagueness of general provisions on matters such as "the peaceful uses of the seas"; and (5) an ill-defined provision that calls for conflicts over jurisdiction in the EEZ to be resolved on the basis of "equity."[45]

On the first of these issues, Article 56 grants coastal states "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources," along with the duty to "have due regard to the rights and duties of other States." Article 58, conversely, extends to other states operating in the EEZ the freedoms in Article 87 (which is the article on "freedom of the high seas"), and also extends 28 other articles from the part on the high seas to the EEZ, "in so far as they are not incompatible with this Part." Article 58 also stipulates that states "shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this

[44] The authors of the definitive Virginia Commentary on UNCLOS write, "There is a mutuality in the relationship of the coastal State and other States, and articles 56 and 58 taken together constitute the essence of the regime of the exclusive economic zone." Nandan and Rosenne 2003, vol. 2, 556.

[45] Boczek 1989; Li and Amer 2013.

Convention and other rules of international law in so far as they are not incompatible with this Part." The pairing of these articles seeks to grant coastal states broad jurisdiction over the EEZ for regulating marine resources, even while constricting its jurisdiction in other respects. Its language is imprecise enough, however, to have permitted diverse interpretations of what "due regard" means, especially related to foreign military activities.

In a related vein, Article 56 also endows coastal states with jurisdiction over "marine scientific research" in the EEZ, while Part XIII of the convention explicitly indicates that MSR in the EEZ and continental shelf may only be conducted with the consent of the coastal state.[46] The greatest source of controversy in this regard lies in the convention's lack of a definition of "marine scientific research." The United States insists that military surveys are distinct from marine scientific research and thus do not require the consent of the coastal state but instead fall under the general rubric of high seas freedoms. However, hydrographic surveys and other information gathering conducted by foreign military or government vessels are often nearly impossible to distinguish from the types of surveys carried out for marine scientific research.[47] On these grounds, some states insist that such surveys, whether or not performed by military vessels, require the consent of the coastal state.

Third, some states have also justified bans on live-fire military exercises in the EEZ particular on environmental grounds. Article 56 of UNCLOS grants states sovereign rights for

[46] Part XIII of UNCLOS stipulates that coastal states have the right to "regulate, authorize, and conduct" MSR in both their EEZ and continental shelf, and that such research must be done with the consent of the coastal state. At the same time, it includes a concomitant expectation that coastal states will, "in normal circumstances," grant consent for research carried out "exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind" (Article 256). Although states may deny consent if the project does not meet certain criteria, foreign ships may also assume implied consent if the coastal state does not reply to a request for permission within six months (Article 252). And such consent may not be denied for research on the continental shelf beyond 200nm except in areas where the coastal state indicates that active exploration or exploitation of the natural resources of the seabed is taking place. In addition, coastal states may require that they be allowed to participate in the research and receive the data obtained during the research (Article 249).

[47] Bateman 2009; Zou 2013.

not only “exploring and exploiting” but also “conserving and managing” the natural resources of the EEZ, as well as jurisdiction for “the protection and preservation of the marine environment.” Some states argue that live-fire military exercises endanger marine life and thus fall within their authority to regulate, while naval powers contend that the high seas freedoms extended to other states within the EEZ under Article 58 include such exercises, with minimal lasting effect on the living environment.

Fourth, various provisions of the convention require that the oceans be reserved for “peaceful purposes.” In addition to the aforementioned requirement that MSR in the EEZ and continental shelf be conducted “exclusively for peaceful purposes,” several articles related to “the Area” (the seabed beyond national jurisdiction) include a similar requirement. Article 88 also states that “The high seas shall be reserved for peaceful purposes.” And in a general provision at the end of the convention, Article 301 prohibits states 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.” (Similar language had been included in the Indian Ocean Zone of Peace declaration in 1971.) These various provisions have been used by some states to justify their opposition to the military uses of the ocean in general, including within the EEZ. Maritime powers, on the other hand, argue that military activities such as exercises and surveillance in the high seas or EEZ are not in and of themselves threats or uses of force and are wholly consistent with the UN Charter. The United States, in particular, had strongly resisted the proposal for general disarmament in the oceans during the negotiations over the Seabed Treaty, and other naval powers and their allies likewise did not favor such an approach. Thus, the ambiguity of

these "peaceful uses" provisions was in effect a compromise between these two otherwise irreconcilable attitudes toward military activities at sea.

Finally, Article 59 of UNCLOS stipulates that conflicts between coastal states and other states over rights or jurisdiction in the EEZ should "be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole." Coastal states at times cite the concepts of equity and "the respective importance of the interests involved" as tilting in their favor according to the rationale that geographic proximity lends extra relative weight to their interests. Nonetheless, as with the balance between and within Articles 56 and 58, the language in this provision adopts a tone of balancing competing interests, stressing the interests of not only the parties involved but also "the international community as a whole."

Islands, Rocks, Archipelagoes, and Their Maritime Entitlements

The Regime of Islands and the Entitlements of Small, Remote, or Uninhabited Islands

Another contested issue under the law of the sea has to do with the maritime entitlements of islands, especially small islands and island groups. The regime of islands and archipelagoes has been a matter of debate since at least the 1930 Hague Conference. At that conference, the committee addressing law of the sea issues produced a report with an appendix not officially adopted by the full conference that included proposed language on the regime of islands. This language stipulated that every island is entitled to its own territorial sea, defining an island as "an area of land, surrounded by water, which is permanently above high-water mark."[48] Although

[48] Appendix II: Report of Subcommittee No. II in League of Nations, *Acts of the Conference for the Codification of International Law*, Geneva, August 19, 1930, Official No. C. 351. M. 145. 1930. V., p. 133, https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf.

this initial report suggested including artificial islands in this definition, as long as they were not "merely floating works, anchored buoys, etc.," the Convention on the Territorial Sea and the Contiguous Zone ultimately adopted in 1958 specified that this area of land had to be "naturally-formed." In both the report and the 1958 convention, land features only above water at low tide ("low-tide elevations") could be used in determining baselines if located within the territorial sea of a more substantial land feature, but were not deemed "islands" and thus not independently entitled to a territorial sea. In addition, Article 1 of the 1958 Convention on the Continental Shelf explicitly stated that islands were entitled to a continental shelf.

Most of these basic principles in the 1958 Geneva Convention were adopted into the text of the 1982 UNCLOS. However, in light of the new EEZ regime included in UNCLOS, greater scrutiny was directed to the maritime entitlements of islands. Some countries, especially landlocked and geographically disadvantaged states, objected to other states claiming vast exclusive economic zones or continental shelves extending from small, remote, or uninhabited islands. As a result, the third paragraph of Article 121 of UNCLOS on the regime of islands limits such claims, stipulating, "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." The text includes no clear guidelines for determining which islands were rocks incapable of meeting that standard, nor even any further definition of "rocks." More specific constraints had been considered by the conference, such as limiting EEZ-eligible islands to a certain minimum surface area, a minimum number of inhabitants, or a maximum distance from the state's main territory. However, these proposals were criticized as too arbitrary by many delegations. Several states, such as France, Greece, Japan, and the United Kingdom, actively lobbied for the deletion of paragraph 3 entirely on these grounds. Other states, such as Venezuela, Trinidad and Tobago, and Fiji, opposed strict,

specific limits on the maritime entitlements of small or uninhabited islands, while suggesting that remote islands under colonial control ought to be treated differently than islands adjacent to a continental state or islands belonging to an island nation. Ultimately, the conference ended up maintaining this deliberately vague language, without any reference to colonial status.[49] In the wake of this persistent ambiguity, many states, including the United States, France, Norway, Brazil, Venezuela, and Japan, claim EEZs and continental shelves extending from small, remote, or uninhabited island features. (See statistical summary below.)

The award issued in the *Philippines v. China* case regarding the South China Sea disputes in 2016 was the first major occasion in which an international court or tribunal directly interpreted Article 121(3). The tribunal set a high bar for islands to meet in order to be entitled to EEZs and continental shelves, determining that all of the land features in the Spratlys are low-tide elevations or "rocks" rather than fully entitled islands.[50] This is despite the fact that several islands in the Spratlys, including the largest, Itu Aba or Taiping Island, are permanently occupied (though largely by government or military personnel) and perform economic functions. Indeed, the tribunal's reasoning on this issue has proven controversial among international legal scholars, particularly for its disregard of the deliberately ambiguous stance adopted at UNCLOS III and of

[49] See Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations 1988. See also Nordquist 2018.

A closely related subject of debate at UNCLOS III was regarding what affect islands should have on maritime delimitation in areas of overlapping zones, including how heavily small islands should weigh relative to continents or large islands. Some of the original proposals about limiting the maritime entitlements of small, uninhabited, or distant islands were originally proffered by states seeking to reduce the potential for conflict between the zones extending from such islands and the maritime claims extending from their territories. However, the language regarding the effect of islands in delimitation was ultimately removed from the Part on the regime of islands, leaving only the language in 121(3) about the inability of rocks to generate EEZs or continental shelves. This issue is instead governed by customary international law, which generally affords less weight in delimitation to small islands relative to larger land masses, even if those islands are capable of generating EEZs.

[50] *Philippines v. China*, PCA Case No. 2013-19, Award in the matter of the South China Sea Arbitration before an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, July 12, 2016, https://pcacases.com/web/sendAttach/2086, pp. 175-260, especially paragraph 646.

state practice in this area.[51] Moreover, in addition to China's categorical rejection of the award, including the tribunal's interpretation of Article 121 (see chapter 8), other states such as Japan and the United States with claims that likely do not meet the tribunal's standard have argued that the ruling only applies to the specific South China Sea context considered in the case. Accordingly, the award has not yet led to any significant change in state practice or interpretations of Article 121(3).

The Regime of Island Groups and the Special Case of Offshore Outlying Archipelagoes

Another contested issue in the law of the sea related to islands is whether or not states can treat archipelagoes, or groups of islands, as units enclosed within straight baselines, and what the regime within those baselines would consist of. The 1930 Hague Conference committee report touched upon this question briefly, but with highly ambiguous and imprecise language. The report did suggest that such islands could be treated as a unit entitled to a territorial sea,[52] but noted that the subcommittee discussing this matter had abandoned the effort to draft text on the

[51] Nordquist 2018; Talmon 2017. This surprise at or skepticism of the tribunal's interpretation of Article 121 was also evident in interviews I conducted in 2017: Interview 1.4 with Mark Rosen, October 13, 2017, Arlington, VA; Interview 1.6 with Ashley Roach, October 16, 2017, Arlington, VA; and Interview 2.21 with Kentaro Nishimoto, November 17, 2017, Tokyo, Japan.

[52] On the question of territorial seas around archipelagoes, the report read, "With regard to a group of islands (archipelago) and islands situated along the coast, the majority of the Sub-Committee was of opinion that a distance of 10 miles should be adopted as a basis for measuring the territorial sea outward in the direction of the high sea." Appendix II: Report of Subcommittee No. II in League of Nations, *Acts of the Conference for the Codification of International Law*, Geneva, August 19, 1930, Official No. C. 351. M. 145. 1930. V., p. 133, https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf.

It is unclear what exactly this meant. A literal reading of the text suggests that archipelagoes could treated as a unit and enclosed within straight baselines from which a 10 nm territorial sea could extend. This seems an unlikely meaning, however, since there was little enthusiasm at the conference for a territorial sea limit as expansive as 10 nm adjacent to ordinary coastlines (see Table 3.1 in chapter 3). Alternatively, it could have meant that segments of straight baseline around island groups should not be longer than 10 miles. Although the language does not clearly point in that direction, this was the limit that the same report recommended for straight baselines in the mouths of bays. There had also been in the preceding decades arguments for limiting straight baselines segments to 10 nm, such as in the *North Atlantic Coast Fisheries Case* between Britain and the United States decided by a tribunal established by the Permanent Court of Arbitration in 1910. In that case, the tribunal ruled that baseline segments did not have to be limited to 10 nm in length. See https://pca-cpa.org/en/cases/74/.

matter "owing to the lack of technical details." The subcommittee also "did not express any opinion with regard to the nature of the waters included within the group."[53] Likewise, although a proposal for an archipelagic regime was considered at UNCLOS I, no consensus was reached on this issue and the 1958 Geneva Conventions remained silent on the question of archipelagoes.[54]

The 1982 convention did deal with this question, though not entirely comprehensively. In particular, Part IV of UNCLOS allows states that are wholly constituted by islands to draw straight baselines around those islands, subject to certain limitations. The waters within these baselines are defined as "archipelagic waters," with their own navigational and jurisdictional regime, and the territorial sea extends outward from those baselines. It includes precise rules constraining the length of the baseline segments and the water-to-land ratio of the space enclosed within the baselines.[55] The archipelagic states regime was included due to the strong advocacy of island nations such as Fiji, Indonesia, and the Philippines. At the same time, several continental states with outlying archipelagoes, including Canada, Chile, Ecuador, France, India, Norway, Peru, and Spain (among others), advocated for the archipelagic baseline regime to also apply to outlying archipelagoes belonging to continental states. When that proposal failed to gain traction, they instead advocated for the inclusion of language stipulating that the archipelagic state provisions apply "without prejudice to the status of oceanic archipelagoes" of continental states. However, ultimately the archipelagic state regime was limited to those states wholly constituted

[53] Appendix II: Report of Subcommittee No. II in League of Nations, *Acts of the Conference for the Codification of International Law*, Geneva, August 19, 1930, Official No. C. 351. M. 145. 1930. V., p. 133, https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf.

[54] Nandan and Rosenne 2003, vol. 2, 399–400; Rothwell and Stephens 2016, 248–49.

[55] These rules are spelled out in Article 47 and stipulate, *inter alia*, that the water-to-land ratio in the baselines must be between 1:1 and 9:1, and that "The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles."

by islands, and the "without prejudice" article was dropped, as consensus in favor of such a provision was lacking.[56]

Although the convention did not explicitly prohibit continental states from drawing straight baselines around offshore island groups, Article 5 did stipulate that unless "otherwise provided in this Convention," the baseline for the territorial sea must be the low water line. In this vein, the tribunal in the *Philippines v. China* case in 2016 argued that the convention prohibits continental states from drawing straight baselines around outlying archipelagoes by omission on the grounds that none of the convention's provisions on straight baselines make allowance for them.[57] Two years later, an International Law Association (ILA) committee established to study straight baselines issued a report that formed the basis of the Sydney Conclusions on Baselines under the International Law of the Sea subsequently adopted by the ILA.[58] The Sydney Conclusions interpreted this issue in a fashion similar to but somewhat laxer than the *Philippines v. China* tribunal, reiterating that a state cannot draw "archipelagic baselines" unless it is an archipelagic state, but suggesting continental states could draw straight baselines around offshore archipelagoes in some cases under the regular Article 7 provision on straight baselines.[59]

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[56] Nandan and Rosenne 2003, vol. 2, 407–12.

[57] *Philippines v. China*, PCA Case No. 2013-19, Award in the matter of the South China Sea Arbitration, July 12, 2016, https://pcacases.com/web/sendAttach/2086, pp. 235–37, especially paragraph 575.

[58] See the full text of the Sydney Conclusions at https://www.ila-hq.org/images/ILA/Resolutions/ILAResolution_1_2018_BaselinesundertheInternationalLawoftheSea.pdf and the ILA committee report at https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Baselines.pdf.

[59] Specifically, they granted that "an offshore coastal archipelago may be capable of being enclosed by Article 7 straight baselines subject to the controls set by Article 7 being met." (Article 7 sets out the basic rules for straight baselines, suggesting that they can be drawn in "localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity," or in areas where "the coastline is highly unstable" due to "the presence of a delta and other natural conditions.") The ILA committee report had defined an "offshore coastal archipelago," located within the continental state's territorial sea or EEZ, as distinct from an "offshore outlying archipelago," located beyond that distance. Thus, the Sydney Conclusions seem to suggest that states may not draw straight baselines around offshore archipelagoes at a considerable distance from a state's shores (especially not beyond a state's continentally derived EEZ).

Notwithstanding these interpretations, state practice effectively adopts a much more permissive approach to this issue. Around three-fourths of the states that claim sovereignty over outlying archipelagoes have either drawn straight baselines around them or claimed the legal authority to do so.[60] The precise nature of these baselines vary widely: In some cases, they are primarily drawn around one large island, with a water-to-land ratio less than one to one, while in others, they are drawn around a large number of islands, with a high water-to-land ratio and baseline segments over 100 nm long. The majority of these baseline systems have not drawn protest from other states, and "in a majority of the instances where there was an objection, the

Although the Sydney Conclusions were forwarded by the ILA to the States Parties of UNCLOS and other international tribunals, it is important to note that they do not form an official source of international law. It is also worth noting the heavily Western composition of the ILA baselines committee and the political context for this report, coming on the heels of the high-profile ruling in the *Philippines vs. China* case and China's vociferous rejection of both the award, including its reasoning on the issue of maritime entitlements of archipelagoes, and the jurisdictional authority of the tribunal to rule in the case. Notably, the ILA committee that issued this report contained 34 members, 27 of which were European, American, Canadian, or Australian (including the rapporteur and the chair, the latter of whom is a prominent American lawyer formerly employed by the U.S. government who has long catalogued U.S. objections to straight baseline claims worldwide), 2 of which were Japanese, 3 of which were Latin American (Argentinian, Brazilian, and Chilean), one of which was Indonesian, and one of which was Chinese. The Chinese member of the committee, Yee Sienho, issued a dissent to the report that rejected the report's rationale on offshore archipelagoes, instead arguing that "the regime of continental States' outlying archipelagos as units is already established under customary international law." See further discussion of China's interpretation of this issue in chapter 8.

[60] There are varying estimates of the number of continental states that claim sovereignty over offshore outlying archipelagoes. One study found that fifteen of eighteen such continental states have drawn straight baselines around outlying archipelagoes. See Roach 2018. See also the response to this article from Whomersley 2018. Meanwhile, a rebuttal of the 2016 *Philippines v. China* award produced by the Chinese Society of International Law (see more details in chapter 8) identified seventeen examples of continental states drawing "straight and/or special baselines" for outlying archipelagoes and/or explicitly affirming archipelagic unity in their national legislation (para. 575). As described in note 75 of chapter 5 in the table presenting data on states' claims on this subject, I cross-checked these estimates against external primary sources and found that the estimate of seventeen is more accurate and is thus the number I use.

However, the Chinese Society of International Law also identified "some 20 continental States possessing outlying archipelagoes," highlighting the United States, Russia, and New Zealand as the limited examples of states that do *not* treat their outlying archipelagoes as units (para. 579). This number of twenty states is less certain, and in four particular respects is manifestly inaccurate. That is, four countries with island territorial disputes with China—including Japan, Vietnam, the Philippines, and Malaysia—were not included in this list but also should be categorized as states possessing outlying archipelagoes (the Philippines is technically an archipelagic state, not a continental state). These states do not apparently treat the island groups they dispute with China as a unit in their baselines or legislation. But Vietnam and the Philippines have both historically referred to the Paracels and Spratlys as groups or "archipelagoes," and in the case of the Philippines, its precise interpretation of this issue remains ambiguous.

United States was the sole objector (four out of seven)."[61] To underscore this political complexity, the ILA's Sydney Conclusions noted that "the legality and validity of straight and archipelagic baselines" are subject to their conformity with both UNCLOS and customary international law, including whether or not they have been protested by other states. They also observed that since international arbitration regarding straight baselines is rare outside of arbitration over associated maritime boundary disputes (which is itself rare and non-compulsory under UNCLOS), states largely must rely upon "diplomatic means" to negotiate disputes over such baselines.

A final note is that it is unclear under international law what regime should apply in the case of waters enclosed by straight baselines drawn around an outlying archipelago. If these do not qualify as "archipelagic waters" under Article 47 of UNCLOS, but are instead drawn under the general straight baselines provisions of Article 7, then the waters are, technically speaking, internal waters. In this case, however, Article 8(2) of UNCLOS requires that states recognize the right of innocent passage of foreign ships within internal waters newly enclosed within straight baselines.[62] The ILA baselines committee's 2018 report observed that this provision was "not contentious," judging in part by the "absence of extensive state practice," such as explicit contrary interpretations or legislation, contrary enforcement, or protests thereto.

Historic Bays, Waters, and Rights

A final area where the international law of the sea is particularly indeterminate is with regard to historic waters, historic bays, historic title, and historic rights. UNCLOS largely avoids delving into any detail on these matters, with no articles explicitly defining them or setting out

[61] Whomersley 2018, para. 12.

[62] This provision echoed Article 5(2) of the 1958 Convention on the Territorial Sea and the Contiguous Zone.

their boundaries. However, in places it does mention such concepts, thus alluding to their existence and validity, even while doing little to regulate or define them. Instead, the basis for historic waters and rights exists largely in either specific treaties or customary international law.

Negotiating History on the Topic of Historic Claims to Maritime Jurisdiction

This issue first became a topic of discussion at the 1930 Hague Conference, when some states expressed concern that codification of a uniform territorial sea belt could negatively affect their jurisdiction over bays, sounds, straits, and other waters where they had long traditionally exercised control. The adjective "historic" proved controversial from its inception: The U.S. instead favored language that would sanction states in continuing to treat as internal waters those areas that they had previously treated as such, and Norway expressed that it was a principle of "status quo" maintenance.[63] (The Dutch rapporteur J.P.A. Francois thus appended the term "so-called" to the word "historic" in his report.) Despite this controversy, conference participants generally agreed that some bays and other waters had a certain historic status and that "[t]he work of codification could not affect any rights which States may possess over certain parts of their coastal sea."[64] At the same time, the Italian delegate expressed opposition to "the creation of any new historic situations" in the interest of preserving freedom of navigation.[65] Moreover, when the possibility of establishing a commission to create a list of all recognized historic bays was floated, the U.S. delegation flatly rejected such an approach. Instead, the U.S. representative

[63] Miller 1930, 690–91.

[64] Annex 10: Report of the Second Committee: Territorial Sea, Rapporteur: M. François, in League of Nations, *Acts of the Conference for the Codification of International Law*, Geneva, August 19, 1930, Official No. C. 351. M. 145. 1930. V., p. 125, https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf.

[65] Text of the Debates: Eighth Plenary Meeting, April 12, 1930, in Ibid., p. 53. Speaking of "historic" bays or waters, the Italian delegate stated: "It will be the first time that this adjective used in this sense will appear in official documents" (p. 53).

insisted that recognition of such waters had to be negotiated directly between governments and could not be decided by any international convention, committee, or tribunal.[66]

When the codification efforts initiated with the Hague Conference finally came to fruition at UNCLOS I nearly three decades later, the 1958 Convention on the Territorial Sea and the Contiguous Zone still did not provide much clarity on the standards or definitions for historic waters. Instead, the convention included two provisions referring to historic waters in a way that essentially reserved their status. One article outlined a method for drawing straight baselines enclosing bays, before noting that the provision would not apply to "so-called 'historic bays.'" And another article prescribing a median line for the delimitation of opposite or adjacent territorial seas allowed for deviation from the equidistance principle in cases of "historic title or other special circumstances."[67]

UNCLOS III followed in this same general vein, neglecting to address concepts of historic rights in any further detail. The language from the two articles of the 1958 convention regarding historic bays and titles was largely repeated in Article 10(6) and Article 15 of the 1982 UNCLOS, respectively.[68] In addition, in Part XV on dispute settlement, Article 298 also allows states to exempt themselves from disputes involving "historic bays or titles." Beyond these three explicit references to "historic" rights, the general principle of traditional, customary, or habitual use also appears in a few other UNCLOS provisions. Article 51 requires archipelagic states to recognize the "traditional fishing rights" of neighboring states in their archipelagic waters, to be

[66] Miller 1930, 691.

[67] These provisions can be found in Article 7 and Article 12, respectively, of the 1958 Convention on the Territorial Sea and the Contiguous Zone, available at https://treaties.un.org/doc/Treaties/1964/11/19641122%2002-14%20AM/Ch_XXI_01_2_3_4_5p.pdf, pp. 4-5.

[68] Article 10 enables states to enclose bays within straight baselines so long as the mouth does not exceed 24 nautical miles in width and the area of the bay is at least as large as a "semi-circle whose diameter is a line drawn across" its mouth. Such Article 10 bays are sometimes referred to as "juridical bays," in contradistinction to historic bays.

regulated by bilateral agreements between them. Part V on the EEZ enjoins states to respect "habitual" fishing patterns when granting foreigners access to surplus fish catches in their EEZs. And the section on innocent passage in the territorial sea admonishes states to take into account "customary" navigation routes when establishing sea lanes in their territorial seas, also acknowledging such navigation in more general terms in the regimes of transit passage and archipelagic sea lanes passage.

Historic Rights and Waters in Customary International Law

Due to the lack of specificity in UNCLOS, then, historic rights and waters are largely governed by bilateral and regional agreements and by customary international law. In general, the concepts of "historic waters" and "historic bays" have been used to refer to waters over which a state claims and exercises sovereignty akin to the regime of internal or possibly territorial waters, whereas the concepts of "historic title" or "historic rights" traditionally have more ambiguous connotations. These latter terms have both sometimes been employed as more general umbrella terms for any kind of historic claims, while on other occasions historic title has been used interchangeably with historic waters to refer to a claim to sovereignty and historic rights has been used to connote a weaker form of rights to jurisdiction or resources short of sovereignty. In all of these cases, some of the generally understood basic principles behind historic claims are summed up by Irish law of the sea expert Clive R. Symmons as follows: they must be based on a formal, official claim; the official claim must be clear and consistent; the claim must be publicized to other states; the claim must be continuous over time; states must exercise effective jurisdiction in the claimed waters; and other states must both be aware of and acquiesce in the claim.[69] However, due to the complexity of judging historic claims according to

[69] Symmons 2019.

these standards, no authoritative listing of historic bays or waters has ever been approved or adopted by an international organization. Various lists of historic bays have been drawn up by legal scholars, though these lists differ widely in the bays they include.[70]

The tribunal in the 2016 *Philippines v. China* case was one of the first international courts to directly address the question of how historic rights relate to UNCLOS. In its final award, the tribunal adopted a highly restrictive position on historic rights, arguing that such rights are largely superseded by UNCLOS and its maritime jurisdictional zones.[71] This argument was rejected by the Chinese government and roundly critiqued by the Chinese Society of International Law, as will be explained in chapter 9. In addition, some aspects of the tribunal's reasoning on historic rights have been critiqued by non-Chinese scholars of the law of the sea. Kopela, for example, argues that historic rights cannot be said to be have been superseded by UNCLOS as a general statement in the abstract, as the very nature of historic rights requires that each situation must be considered on a case-by-case basis. She affirms that historic claims instead ought to be judged by the "definitiveness and duration of the assertion and the acquiescence of foreign powers."[72]

Conclusion

Despite being more codified, conventional, and institutionalized than at any previous point in human history, the contemporary law of the sea remains a highly contested international regime. Although the United Nations Convention on the Law of the Sea has achieved near-universal acceptance since its adoption at UNCLOS III in 1982, shared interpretations of various

[70] For an example of such a listing, see the appendix of Symmons 2008.

[71] *Philippines v. China*, PCA Case No. 2013-19, Award in the matter of the South China Sea Arbitration, July 12, 2016, https://pcacases.com/web/sendAttach/2086, pp. 97–117.

[72] Kopela 2017, 186–87.

ambiguous or undefined issues in the convention text have proved much more elusive. On one hand, that ambiguity is a significant reason the convention has succeeded in winning such widespread support. It allows states to interpret controversial issues in the law of the sea related to military activities, the status of islands, and historic claims in ways that protect their interests, while capturing many of the other benefits from the convention, including the international legitimacy that comes from ratifying the convention and participating in its various institutional frameworks. As the twentieth century negotiating history of the law of the sea demonstrates, this ambiguity was itself often the only means by which drafters and negotiators were able to move past stalemates and achieve consensus.

On the other hand, this ambiguity also leaves room for a wide range of interpretations of the law of the sea to persist and proliferate. While states risk incurring hypocrisy costs from espousing interpretations blatantly at odds with clear provisions in the convention, this risk is less acute in highly ambiguous areas of the law of the sea. This chapter has laid the historical foundation to illustrate how such contestation operates across several issue areas in the law of the sea. The next chapter will present data that demonstrates how coastal states around the world interpret these and other issues in the law of the sea in the form of *de jure* maritime legislation and decrees. This cross-national empirical information will in turn lay the foundation for case studies of how several different states interpret the law of the sea.

Chapter 5: Cross-National Interpretations and U.S. and USSR Cases

This chapter builds on the historical analysis of the preceding chapters to present an empirical overview of how countries around the world interpret key controversial issues in the law of the sea, before focusing in on shadow case studies of the U.S. and Soviet interpretations of territorial seas and innocent passage, one of the most controversial issues of all. The first section (together with the appendix) presents the findings of a new cross-national dataset constructed for this dissertation that codes states' formal maritime jurisdictional claims across a range of key issues in the contemporary law of the sea regime. This dataset is based upon states' domestic maritime legislation, as compiled in United Nations, national government, and scholarly sources. After summarizing and describing that data, I present a number of caveats in interpreting the data. Specifically, I highlight the difficulty in interpreting silence in the data, which does not necessarily represent agreement with major-power or peer-group interpretations but could be due to missing data or "hiding" behavior. I also emphasize the likelihood of gaps between formal legislation (as represented in the dataset) and official interpretations below that level in the form of government statements, diplomatic communications, and minor regulations. I illustrate these caveats through analysis of the debate at the Third United Nations Conference on the Law of the Sea (UNCLOS III) over innocent passage of warships and evidence from field research I conducted on the cases of Chile, Ecuador, and Peru. These caveats in turn highlight the need for further qualitative case studies in order to investigate how states interpret the law of the sea outside of the context of formal legislation.

To that end, in order to set the stage for the more in-depth case studies of China and Japan conducted in chapters 6 through 10, the second half of this chapter conducts shadow case studies of how the mid twentieth century's two superpowers, the United States and the Soviet

Union, interpreted the law of the sea over time. This discussion focuses on the evolution in their attitudes on coastal state jurisdiction from the early twentieth century through the negotiation and implementation of the United Nations Convention on the Law of the Sea (UNCLOS). This section draws upon primary sources, including records of U.S. and Soviet speeches at international conferences on the law of the sea, U.S. and Soviet government domestic laws and policies, and U.S. government data about its freedom of navigation operations (FONOPs), supplemented with secondary sources.

Cross-National Summary of States' Interpretations of the Law of the Sea

Having described at length the history and current state of debate over several key issue areas in the law of the sea in the previous chapter, this chapter now will present a cross-national quantitative summary of how all coastal states in the world interpret those and other issues in the law of the sea. In order to present this large-N descriptive summary, I have constructed a new global dataset called the Maritime Jurisdictional Claims Dataset. In this section, I first describe how I built this dataset and present a descriptive summary of the data. I then raise a number of caveats regarding the interpretation of this data using illustrative examples from the history of states' approach toward the innocent passage of warships and from the cases of Chile, Peru, and Ecuador. I conclude this section by explaining why I have opted not to conduct statistical regression analysis using this data and to instead conduct in-depth qualitative case studies.

Maritime Jurisdictional Claims Dataset

Although there are some U.S. government handbooks and legal texts that catalog states' maritime jurisdictional claims, up until now there has been no centralized dataset that quantifies, standardizes, or summarizes that information on a cross-national basis. The Maritime

Jurisdictional Claims Dataset fills that gap. To construct this dataset, I coded all coastal states' claims to maritime jurisdiction across several issue areas. These areas include each of the subjects discussed in detail above (marked in the following list with an asterisk), along with a few other measures:

- the breadth of the territorial sea;
- treatment of outlying archipelagoes as units for purposes of drawing baselines*;
- claim of an exclusive economic zone (EEZ) or continental shelf extending from remote, small, and uninhabited or sparely populated islands*;
- the use of straight baselines for measuring the territorial sea;
- notification or permission required for foreign military vessels to pass through the territorial sea*;
- claims to security jurisdiction within the contiguous zone;
- restrictions on foreign military activities in the exclusive economic zone*;[1]
- restrictions on the transit of nuclear-powered vessels or vessels carrying nuclear weapons, hazardous waste, or other toxic materials in the territorial sea or EEZ.

This dataset depicts the most recent version of each state's jurisdictional claims in each of these areas, in effect serving as a snapshot of how states apply and interpret the international law of the sea in their formal jurisdictional claims.

In constructing this dataset, I only included claims made in states' national legislation, official executive decrees and regulations, or formal declarations upon signing or ratifying UNCLOS. For references to these sources, I relied first upon the U.S. military's *Maritime Claims Reference Manual*,[2] which contains summaries of all coastal states' claims in various areas of the

[1] Most *de jure* restrictions on foreign military vessels in the EEZ consist of bans on live-fire military exercises or maneuvers, though a few states regulate the mere passage of warships (or even all foreign vessels) or aircraft in the EEZ.

[2] U.S. Department of Defense Representative for Oceans Policy Affairs 2014.

law of the sea as stated in their maritime legislation. I supplemented the data from this manual with reference to original translations of state laws, orders, and declarations as available on the UN website and as referenced in the U.S. State Department's *Limits of the Seas* series (Nos. 1-43) (U.S. Department of State Office of Ocean and Polar Affairs, 1970-).[3] For the measures regarding states' (1) claims to EEZs or continental shelves from remote, uninhabited islands, and (2) claims to treat outlying archipelagoes as units for the purposes of territorial sea baselines, I relied upon scholarly compilations of data and independent research, as will be cited below.

Detailed tables depicting the information in this new dataset are included in Appendix A. However, I will also describe the data in brief in the following section, including the regional and developed vs. developing make-up of the group of states with claims in each category. This description will focus on issue areas discussed in detail in chapter 4.

Summary of the Data

Innocent Passage for Warships in the Territorial Sea. Thirty-one countries require foreign warships to seek authorization to pass through their territorial seas, and another 15 states require advance notification for such passage. In total, at least 46 states require advance notification or permission for foreign warship passage in the territorial sea (see Table 5.5). The countries that espouse these requirements are distributed throughout the world. Almost one-third

[3] In order to avoid introducing a U.S.-centric bias into the dataset, I did not rely upon the U.S. Navy's or U.S. State Department's more subjective analyses of states' claims in my coding, but rather only used it as a reference for states' policies and laws. The one exception is in my provision regarding straight baselines, where I coded states with straight baselines that exceeded the U.S. government's standards. This is not meant to imply any degree of normativity for this standard. Rather, I employ this method for illustrative purposes and due to the lack of a widely agreed upon concrete, objective benchmark in conventional or customary international law.

For greater clarity or detail, I also occasionally referred to information in Roach and Smith, *Excessive Maritime Claims*, 3rd edition, an encyclopedic volume written by two former U.S. State Department lawyers. However, I only coded data based upon this volume when the information therein was with reference to national legislation, decrees, or formal declarations to the UN, not diplomatic communications alone.

of these states are in Asia or Oceania, a quarter are in Europe, 22 percent are in Africa, 17 percent are in Latin American and the Caribbean, and 9 percent are in the Middle East. This group includes eight members of the Organization for Economic Cooperation and Development (OECD) and 35 members of the G-77 group of developing nations. It includes nine members of the European Union and 13 U.S. treaty allies. Referring back to the UNCLOS III negotiations on this issue discussed in chapter 4, this group includes 12 of the 20 states that sponsored the proposal in 1982 to amend the draft convention to enable states to require prior notification or authorization for warships to pass through the territorial sea, and 16 of the 28 states that sponsored the formal amendment in the April 1982 session to add "security" to the list of matters that the state could regulate in the territorial sea.

Restrictions on Foreign Military Exercises in the EEZ. The laws of eighteen countries impose restrictions on foreign military exercises in the EEZ (see Table 5.7). All but one of these states is a member of the G-77; only one state (Portugal) is an OECD member. Nearly half of these countries are located in Asia: four in South Asia (Bangladesh, India, the Maldives, and Pakistan), three in Southeast Asia (Malaysia, Thailand, and Vietnam), and one in East Asia (North Korea). Of the other ten states claiming this authority, half are located in South America, three are in Africa, one is in the Middle East, and one is in Europe.

Most of these states have explicit provisions in their domestic legislation regulating live-fire military exercises or maneuvers in the EEZ. Nine of them stated this interpretation in formal declarations upon signing or ratifying UNCLOS; conversely, four of them have not ratified UNCLOS. In one case (Kenya), this restriction takes the form of a claim to authority to regulate mere passage of warships through the EEZ, while in another case (Maldives), it takes the form of a requirement for all foreign vessels, warships or not, to obtain permission before entering the

EEZ. In the case of Vietnam, it forbids any act in its EEZ "threatening [its] sovereignty, defense and security," a term that echoes language usually reserved only for the territorial sea. In the case of Portugal, its 1977 legislation applies a regime of innocent passage and overflight to the EEZ, rather than high seas freedoms; innocent passage ordinarily excludes military exercises. Two of these states still have de jure claims to 200 nm territorial seas, which I have coded as equivalent to a restriction on military activities in the EEZ due to the more restrictive norms of such zones.

Offshore Outlying Archipelagoes as Units. Compared to states that place restrictions on foreign military activities, developed states are overrepresented in the group of states that claim baselines around outlying archipelagoes or EEZs from small, remote, largely uninhabited islands. In many cases, this is due to these states' legacies of colonialism, as imperial powers often laid claim to offshore islands and archipelagoes during their periods of colonization. On the first issue, 17 continental states treat offshore outlying archipelagoes as units for purposes of claiming maritime jurisdiction (see Table 5.2). This includes 12 states that have drawn straight baselines around archipelagoes, seven of which are OECD members. Of these 12 states, half are in Europe, a third in Asia or Oceania, and one-sixth in Latin America. These states have drawn baselines around archipelagoes sometimes in one circumscribing set, sometimes in separate sets, and sometimes in mixed combinations of straight and normal (i.e. low-water mark) baselines. In the case of India's baselines along the west side of the Andaman and Nicobar Islands, the baselines do not (yet) form a complete enclosure around the archipelago. However, India has drawn complete baselines around the Lakshadweep Islands to the southwest of the subcontinent. In addition to these 12 states, this measure also includes five states that have declared the concept of archipelagic unity in their legislation, but have not yet drawn straight baselines around their outlying archipelagoes. All five of these states are in the Middle East or Northeast Africa.

EEZ Claims from Small, Remote, or Uninhabited Islands. Due to the lack of centralized records or clear standards on this matter, the measure in the dataset on states' claims to EEZs, continental shelves, or comparable fishing or environmental zones around small, remote, and uninhabited or sparsely populated islands is likely incomplete. For this measure, I drew upon scholarly analyses and my own independent research in primary sources to compile an initial list of select countries and the relevant islands (see Table 5.3). This list includes ten states, several of which claim EEZs from more than one such island. Seven of these ten states are OECD members. Four are South American states (Argentina, Brazil, Chile, and Venezuela), three are European (France, Norway, and the United Kingdom), and the remainder include Australia, Japan (see detailed discussion of its claim in chapter 10), and the United States.

Territorial Sea Breadth and Other Measures. Beyond these issue areas, the data reveal that the vast majority of coastal states (147) now claim 12 nm as the maximum breadth for their territorial sea (see Table 5.1). Two states (Greece and Lebanon) claim narrower maximum limits for their territorial sea, and only four states still claim maximum limits wider than 12 nm, as most states that previously extended their territorial seas have rolled back their claims upon ratifying UNCLOS, instead declaring 200 nm EEZs. (These latter cases, including Benin, Peru, Philippines, and Togo, will be discussed in greater detail below).[4] In addition, seventeen countries claim "security" jurisdiction in the contiguous zone, in addition to the UNCLOS-prescribed jurisdictional authority over customs, fiscal, immigration, and sanitary matters within this zone (see Table 5.6). Finally, 31 countries restrict the passage of vessels that are either

[4] In addition, 47 countries have drawn baselines from which to measure their territorial seas and other maritime zones that, in the eyes of the U.S. government, are "excessive" in some way or another (see Table 5.4).

nuclear-powered, equipped with nuclear weapons, or are carrying toxic materials or hazardous wastes (including nuclear waste) in the territorial sea (see Table 5.8).[5]

Caveats to the Data, with Illustrative Cases of Warship Passage, Chile, Peru, and Ecuador

Some caveats in interpreting this data are in order, in particular regarding (1) how to interpret the absence of a claim to jurisdiction, and (2) the difference between state's interpretation of the law of the sea and their claims to maritime jurisdiction in their formal legislation. In order to illustrate each of these caveats, I will provide analytical examples using the issue of states' attitudes toward prior permission or authorization for warships passing through the territorial sea, along with the maritime jurisdictional claims of Chile, Ecuador, and Peru, and brief reference to the territorial sea claims of Benin, Togo, and the Philippines. My analysis of the warship passage issue draws from my research in UNCLOS III primary sources, as first presented in the previous chapter. My analysis of the South American cases is based on field research I conducted from May to August 2018, including interviews with fifteen experts and officials in Santiago and Viña del Mar, Chile, and in Lima, Peru.

As explained in chapters 3 and 4, these three Andean states initially made expansive jurisdictional claims in the early postwar years, becoming the first countries to declare national sovereignty extending out to 200 nm. However, over time, their interpretations of the law of the sea evolved in diverging ways. Chile qualified its jurisdictional claims, signing the UNCLOS treaty in 1982 upon the conclusion of negotiations, rolling back its claim to the standard 12 nm in 1986, and ratifying UNCLOS in 1997. By contrast, it was not until recently, in 2012, that Ecuador ratified UNCLOS and rolled its territorial sea claim back to 12 nm. Finally, Peru has

[5] Ten states require prior notification of the transit of such vessels, fifteen require prior permission, and six prohibit them from entering the territorial sea entirely. Four states restrict the transit of such vessels in the EEZ.

never ratified UNCLOS and remains one of only four countries that still claims a territorial sea greater than 12 nm in width. However, upon closer examination, significant complexities appear in each of these state's interpretations, revealing that the measurement of their maritime jurisdictional claims in the database tells only a partial story.

How to Interpret Silence in the Data: Neutrality and "Hiding"

First, states that have not explicitly adopted a particular interpretation should not be assumed as having adopted the opposing interpretation. Thus, for example, if a state does not require prior permission for warships to enter their territorial seas, it should not be assumed that they oppose other states' laws to this effect. They may instead adopt a more neutral stance on the issue. Oftentimes, whether due to differing geographical circumstances, relationships or agreements with neighbors, security alliances, or technological and military capabilities, states will eschew maritime jurisdiction for themselves that they are content with other states claiming. States may also want to avoid creating tension entirely by omitting any reference to a controversial issue in their formal legislation. In the parlance of Schroeder,[6] states' lack of adoption of such requirements could be a form of "hiding" rather than either bandwagoning with naval powers or balancing against more expansive-jurisdiction states. Ignoring these possibilities, the default in American discourse about the law of the sea is often to assume that supposed customary legal norms in favor of high seas freedoms that emerged before UNCLOS III are defaults embraced by the vast silent majority, while those who seek to restrict military activities in their adjacent waters are outliers not supported by the *opinio juris* of most states around the world.[7] This assumption is not justified empirically.

[6] Schroeder 1994.

[7] See, for example, Kuok 2018.

In the first place, as chapters 3 and 4 demonstrated, the so-called pre-UNCLOS III customary law was itself much less settled than this narrative acknowledges. For example, there was never a strong customary legal norm in favor of a narrow 3 nm territorial sea, as many states claimed broader jurisdiction. Moreover, the provisional articles adopted at the 1930 Hague Conference only gave warships the right to conduct innocent passage as a general rule, allowing for undefined exceptions. And although the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone afforded the right of innocent passage to all ships, several delegations declared upon signing the convention that they reserved the right to require prior authorization in the case of foreign warships—not to mention the fact that the convention was signed by only around half of the participants at UNCLOS I.

This fundamental dynamic of contestation around this issue was even more vividly illustrated in the debate at UNCLOS III. As discussed in the previous chapter, a larger number of nations spoke in favor of allowing coastal states to exercise more robust jurisdiction over warships in their territorial sea than spoke against it. In fact, the reason why conference president Tommy Koh exerted such effort to persuade states to withdraw amendments on this issue in April 1982 rather than pressing them to a vote is precisely because he feared the amendments would garner substantial support, and in so doing limit the chances for the agreement to obtain support from major maritime powers, which, though relatively few in number, were crucial to the effectiveness of the convention. In the years since UNCLOS III, 46 states have adopted formal requirements for foreign warships to provide notification or obtain permission before passing through their territorial seas, as the above data summarizes. Several coastal states have responded by explicitly stating in their domestic law or diplomatic communications that they do not require prior authorization or notification, with some states explicitly arguing that UNCLOS

does not give states the right to impose such a requirement. However, the large majority of states instead have not explicitly addressed these issues in their domestic legislation or communications to the United Nations or other states, and there is little evidence to suggest they would automatically support the interpretation and preferences of the major naval powers over those of the states claiming more jurisdiction. If anything, it is probably more likely that since most of the states in the "silent majority" are themselves lacking significant naval capacity, they would have little compelling interest in forbidding states from imposing such requirements, and in fact they themselves may be somewhat uncomfortable with the idea of foreign navies operating in close proximity to their shores without advance notification or permission.

How to Interpret Silence in the Data: The Possibility of Missing Data

In addition, the dataset may omit relevant provisions that appear in minor or older regulations and not in landmark legislation submitted to the United Nations or identified by U.S. State Department or U.S. Navy lawyers. I encountered a vivid example of this by happenstance when I was conducting field research in Chile. Based on the national legislation Chile has submitted to the United Nations and that has been analyzed in the *Maritime Claims Reference Manual* and in Roach and Smith's volume on *Excessive Maritime Claims*,[8] I coded Chile in the dataset as having no requirements for prior notification or permission for the passage of warships through Chilean territorial seas, nor any requirements for foreign militaries to obtain permission prior to conducting live-fire military exercises in the EEZ. However, in an interview I conducted in August 2018, the former chief Navy Judge Advocate General of the Chilean Navy (the top lawyer in the Chilean Navy) explained to me that Chile does in fact require warships to obtain permission three days before passing through the territorial sea dating to a 1951 rule that remains

[8] Roach and Smith 2012.

in effect.[9] He further explained that Chile also does not allow live-fire military exercises in its EEZ without consent in order to preserve the marine environment.[10]

Chile espouses these regulations despite the fact that it has one of the most powerful navies in Latin America that works closely with the U.S. Navy. In fact, this close partnership may be one of the reasons that the United States Navy and State Department have directed less critical scrutiny to Chile's legal regulations at sea. Since the United States does not conduct unilateral military activities in Chilean waters, and Chile does not seek to unilaterally restrict U.S. naval activities in its waters, there is little occasion for friction between them regarding interpretations of the law of the sea. Similar dynamics could also contribute to the omission of other states' regulations on controversial law of the sea issues from the databases and compendia used for this dataset. Identifying such omissions would require in-person field research in all coastal states, an impossible task for a single researcher. Instead, in order to preserve consistency in coding methods across cases, I opted not to re-code Chile on these measures in my dataset. Instead, I raise it here as a caveat, both for the interpretation of this particular case and as an example of the limitations of the dataset itself.

The Gap Between Legislation and Interpretation

Another caveat is that this dataset of states' claims to maritime jurisdiction cannot necessarily be interpreted as directly representative of states' official interpretations of the law of the sea. In presenting data on states' claims to specific forms of maritime jurisdiction in their major maritime legislation and declarations to the United Nations, it can at most serve as a proxy for how states have interpreted the law of the sea on these singular occasions. But this database

[9] Interview 3.9 with Félix García Vargas, August 24, 2018, La Academia de Guerra Naval, Viña del Mar, Chile. He also stated that in his opinion, "it's not possible for a warship to do innocent passage."
[10] Ibid.

does not reflect how states' interpret the law of the sea on an ongoing, official basis, outside of the context of national legislation. In many cases, states' domestic legislation does not necessarily represent the sort of innovative evolution that I predicted in chapter 2. My theory instead expects such evolution frequently to unfold in more marginal ways—through states' diplomatic discourse or public statements, rather than through the adoption or amendment of legislation or official decrees. The problems with conflating legislation or formal UN declarations with interpretations is evident in the cases of Ecuador, Peru, and other states with claims to territorial seas wider than 12 nm.

Ecuador, UNCLOS Ratification, and "Maritime Spaces." After a three-decade delay, Ecuador finally ratified UNCLOS in 2012 and formally amended its maritime legislation to claim a 200 nm EEZ and a 12 nm territorial sea. Hence, I coded its territorial sea claim as now being only 12 nm. A more detailed qualitative analysis of this case reveals a more complicated story, however. Contrary to the apparent rollback of Quito's claims, Ecuador's decision to ratify UNCLOS was actually motivated by its desire to expand its maritime jurisdiction. Specifically, Quito wished to avail itself of the formal extended continental shelf provision available to UNCLOS parties as a means of connecting its continental territory to the Galapagos Islands.[11] Moreover, upon ratifying the convention, Ecuador issued a lengthy declaration asserting expansive jurisdiction in its "maritime spaces," without differentiating among zones. It declared those "maritime spaces" to be "zones of peace" wherein all military exercises or maneuvers are

[11] The Galápagos are located approximately 500 nm west of continental Ecuador, so the 200 nm EEZs extending east from the islands and west from the mainland leave a corridor of high seas around 100 nm wide. In its 1985 Declaration on the Continental Shelf, Ecuador already claimed an extended continental shelf covering the 100 nm gap between the 200 nm limits surrounding the Galápagos and the mainland. But Ecuadorean politicians emphasized that ratifying UNCLOS and converting the 200 nm territorial sea to an EEZ would enable them to create continuity between the Galapagos and the mainland in ways that would be deemed legitimate by the international community. Interview 3.4 with Alberto van Klaveren, June 6, 2018, Santiago, Chile; and Interview 4.3 with Pablo Moscoso, June 26, 2018, Lima, Peru.

banned without its express consent, while subjecting warships and aircraft to prior authorization and permission for passage as well as liability for any environmental damage they cause.[12] These declared exceptions are so significant as to make Ecuador's "EEZ" highly territorial in nature.

Ecuador's interpretation of UNCLOS upon ratification thus was an example of *conversion*,[13] whereby Ecuador innovated to ratify the convention even while converting the purpose of its zones in a way that supported its territorial approach to maritime jurisdiction. Moreover, in more recent years, in objection to the operations of large distant-water Chinese fishing fleets in the 100 nm gap between the EEZs of the Galápagos and the Ecuadorean mainland, Ecuador's government raised the possibility of unilaterally extending its EEZ to 350 nm to enclose that corridor.[14] In depicting Ecuador's territorial sea claim as 12 nm instead of its past 200 nm, the Maritime Jurisdictional Claims dataset is thus essentially capturing a rhetorical shift made for purposes of legitimation, rather than a significant shift in attitude toward maritime jurisdiction or shift in practice. In particular, due to its expansive claims to jurisdictional authority within the EEZ, the EEZ in Ecuador's case is quite dissimilar to most other states' EEZ claims and instead represents something more akin to a 200 nm territorial sea, even though it is not coded as such in the dataset. This illustrates that apparently identical dependent variable measurements in the dataset are in fact not the same, which renders statistical regression analysis and especially causal inference impossible.

[12] See the full text of Ecuador's declaration at https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf, pp. 12-14.

[13] Conversion is one of the general patterns of interpretive change described in chapter 2, additional examples of which will be discussed further below in the U.S. shadow case and in the Japan case study in chapter 10.

[14] Dan Collyns, "Alarm over discovery of hundreds of Chinese fishing vessels near Galápagos Islands," *The Guardian*, July 27, 2020, https://www.theguardian.com/environment/2020/jul/27/chinese-fishing-vessels-galapagos-islands.

Peru and the Meaning of *Dominio Maritimo*. In the case of Peru, I have coded its territorial sea as one of the only four remaining territorial sea claims extending beyond 12 nm. Peru's claim to national sovereignty over the waters, airspace, seabed, and subsoil of a 200 nm zone is based not only on its 1947 decree and the 1952 Santiago Declaration, but also later legislation adopted in 1965.[15] The new Peruvian constitution adopted in 1979 underscored this stance with a claim to sovereignty over a 200 nm *dominio maritimo* (maritime domain) as part of its national territory.[16] When UNCLOS III concluded, Peru did not sign the convention and remains to this day one of only 16 to have neither signed nor ratified UNCLOS, due to domestic nationalist sentiment that rolling back this 200 nm claim would be an abdication of sovereignty.[17] Accordingly, Peru has never formally disaggregated this *dominio maritimo* into a distinct territorial sea and EEZ. In the past decade, however, the Peruvian government has emphasized a more nuanced interpretation of this issue below the level of official legislation or constitutional revision. During Peru's boundary delimitation arbitration case against Chile that was concluded in 2014, the Peruvian Foreign Ministry issued memorials to the International Court of Justice recognized the maritime zonation in UNCLOS as customary international law. In those memorials, the Peruvian government affirmed that the more general term *dominio maritimo*

[15] "Peru: Summary of Claims," U.S. Department of Defense Representative for Oceans Policy Affairs, *Maritime Claims Reference Manual*, May 2014, https://www.jag.navy.mil/organization/documents/mcrm/Peru2014.pdf.

[16] This was coupled with a qualified assurance that Peru's sovereignty and jurisdiction in the *dominio maritimo* would be "without prejudice to the freedoms of international communication in accordance with the law and ratified treaties of the State." See Constitución para la República del Perú, 12 de Julio de 1979, http://www4.congreso.gob.pe/comisiones/1999/simplificacion/const/1979.htm. The 200 nm *dominio maritimo* was maintained in the revised 1993 version of the constitution. See Constitución Política del Peru, December 29, 1993 https://www.oas.org/juridico/spanish/per_res17.pdf.

[17] Although Peru did not sign the convention, the Peruvian representative to UNCLOS III, Alfonso Arias-Schreiber, did vote in favor of the convention against the instructions from his government. Interview 3.7 with Fernando Zegers, June 21, 2018, Santiago, Chile.

(maritime domain) was employed in the constitution instead of the term *mar territorial* (territorial sea) deliberately in order to preserve the option of ratifying UNCLOS in the future.[18]

Other Territorial Sea Claims Beyond 12 nm. Similarly, the other countries in the dataset with claims to territorial seas greater than 12 nm also complicate this simple narrative. For example, Benin's *de jure* territorial sea claim is still 200 nm wide dating to national legislation adopted in 1976. However, after Benin ratified UNCLOS in 1997, its Foreign Ministry notified U.S. State Department officials that Benin's territorial sea claim was now 12 nm, in line with UNCLOS. Similarly, Benin's neighbor Togo still formally claims a 30 nm territorial sea dating to legislation adopted in 1977. Since this legislation predated Togo's ratification of UNCLOS in 1985, it is unclear if it still maintains its 30 nm claim, even though its formal legislation on the subject has not been amended.[19] The Philippines, meanwhile, adopted legislation in 1961 that extended its territorial sea up to 285 nm from Philippine land territory in places. The Philippines was among the first states to ratify UNCLOS (in 1984) and in 2009 adopted legislation revising its baselines to bring them into line with the convention. However, this legislation did not address the breadth of the territorial sea, thus effectively leaving the

[18] *Maritime Dispute (Peru v. Chile)*, Memorial of the Government of Peru, vol. 1, March 20, 2009, International Court of Justice, para 3.4, p. 62, available at https://www.icj-cij.org/public/files/case-related/137/17186.pdf; and *Maritime Dispute (Peru v. Chile)*, Reply of the Government of Peru, vol. 1, November 9, 2010, International Court of Justice, "Part II. Peru and the Law of the Sea," pp. 8-13, available at https://www.icj-cij.org/public/files/case-related/137/17190.pdf. A Peruvian Foreign Ministry official explained in an interview with the author in 2018 that this *dominio maritimo* concept had been adopted as a compromise between those who favored ratifying the pending law of the sea convention and those who favored a more territorialist approach than was included in the draft convention. Interview 4.3 with Pablo Moscoso, June 26, 2018, Lima, Peru. See also Interview 4.6 with Beatriz Ramacciotti, July 10, 2018, Santiago, Chile.

[19] This relates to how states adopt different attitudes toward international law. Some states adopt the position that once they have ratified an international treaty, it becomes integrated with the body of domestic law and supersedes all past domestic laws at variance therewith. Other states, by contrast, are of the view that domestic legislation still takes precedence and thus must be formally amended to harmonize with the international treaty.

territorial sea claim from 1961 in place. Legislation formally revising its territorial sea claim to 12 nm was introduced in 2011, but has since languished in the Philippine congress.[20]

The Unviability of a Statistical Approach

These various examples illustrate the intrinsically complex and contingent way in which states relate to the international law of the sea regime—and they likely only scratch the surface of the complexities in states' interpretations of the law of the sea. As I argued in chapters 1 and 2, states interpret the law in ways that promote the balance of their particular geopolitical interests, constrained by their efforts to maintain legitimacy in the eyes of the international community. But states' perceptions of their "geopolitical interests" and their methods for pursuing legitimacy are shaped by innumerable domestic and international political, economic, technological, and demographic forces, by their particular physical environments, and by the interaction of those forces with the environment. Both the incentives states face and their interpretations of the law of the sea are so particular, in fact, that the basic requirements of statistical causal inference such as unit homogeneity, no interference between units, and no different versions of treatments would be impossible to satisfy. This is further exacerbated by the aforementioned problems of measurement error and non-randomly missing data.

As a result, I do not conduct statistical analysis using this data, beyond the simple descriptive summary presented above and in the appendix. Instead, as explained in the research design section of chapter 2, the remainder of the dissertation conducts several case studies to

[20] U.S. Department of State 2014. See also DJ Yap, "House passes bill defining PH territorial waters," *Philippine Daily Inquirer*, December 19, 2014, https://globalnation.inquirer.net/115950/house-passes-bill-defining-ph-territorial-waters, accessed October 25, 2020. As this article reports, the House passed the bill, but the Senate did not follow suit. As of mid-2020 the bill still had not passed into law. See Overview, 17th Congress Senate Bill No. 93, "Philippines Maritime Zones Act," filed on June 30, 2016 by Antonio "Sonny" F. Trillanes, http://legacy.senate.gov.ph/lis/bill_res.aspx?congress=17&q=SBN-93, accessed October 25, 2020.

enable me to study states' interpretations of the law of the sea through in-depth discourse analysis and process tracing that is more sensitive to the nuances of different states' particular circumstances. The second half of this chapter presents shadow case studies of the United States and Russia. The analyses of these cases will set the stage for the following chapters' more in-depth case studies of the maritime legal interpretations of China and Japan, two countries that, together with the United States, are the largest naval powers and key players in the twenty-first century multipolar maritime order in the Western Pacific.

Shadow Case Studies: The "Two Superpowers" of the United States and Russia

Gerring and Cojocaru define shadow cases as cases that "provide brief points of comparison for the case(s) of primary interest."[21] Accordingly, instead of providing a systematic analysis of interpretations across all of the key issue areas described above, this analysis of U.S. and Russian interpretations of the law of the sea focuses solely on the interrelated issues of breadth of territorial sea, innocent passage in the territorial sea, and transit passage in straits used for international navigation. I first describe how U.S. interpretations of these issues have evolved over time, tracing the evolution in U.S. advocacy for "freedom of the seas" for private merchant vessels in the face of British maritime hegemony and Germany's asymmetric U-boat campaign in World War I, to its post-World War II advocacy for freedom of navigation for military vessels and aircraft, represented most directly in the Freedom of Navigation Program and the patterns of U.S. freedom of navigation operations (FONOPs). I then trace how Russia's interpretations gradually evolved over time from favoring relatively expansive coastal state jurisdiction to embracing limits on coastal state jurisdiction, especially over foreign military activities in straits

[21] Gerring and Cojocaru 2016.

and territorial waters. In both cases, I illustrate how these powers' interpretations of maritime law evolved over time in conjunction with their growing naval power and overseas interests. Despite their significant hard power advantage over other states, they nonetheless engaged in elaborate efforts to justify their behavior using legal interpretation. These legitimation efforts were especially targeted toward states they perceived to be within the most relevant reference groups for their interests—primarily, other major maritime powers and developed states.

Shadow Case #1: The United States' Interpretation of the Law of the Sea

The Rise and Inconspicuous Fall of "Freedom of the Seas."

The evolution of the meaning of "freedom of the seas" described in chapter 3 is evident in the evolution of U.S. attitudes toward the law of the sea. In the first decades after America's independence, disputes over maritime freedoms were central *casus belli* in three of its early wars. After the United States refused to pay tribute to the Barbary States in northern Africa, naval wars broke out between the United States and Tripoli (1801-1805) and Algiers (1815-16) that the fledgling U.S. Navy won.[22] In addition, as noted in chapter 3, French infringement of the United States' neutral shipping precipitated the French-American quasi-war of 1798, while the British Royal Navy's impressment of American sailors at sea provoked the War of 1812, respectively. In these conflicts, the comparatively weak United States joined with weak European nations in embracing the rhetorical-legal concept of "freedom of the seas" as a way to defend the rights of neutrals from infringement by more powerful European navies, especially the Royal Navy.[23] This position was further evident during negotiations over the Paris Declaration of 1856, when the

[22] *Barbary Wars, 1801–1805 and 1815–1816* n.d.
[23] Rappaport and Weeks 2020.

United States proposed the Marcy Amendment that would have further strengthened the rights of neutrals. When this amendment was rejected, the United States declined to join the declaration.[24]

This position persisted through World War I, when the United States objected vociferously to both British and German violations of the Paris Declaration and the 1908 London Declaration, but especially the unrestricted submarine warfare accelerated by Germany in the later years of the war. As noted in chapter 3, the second point in Woodrow Wilson's "Fourteen Points" speech outlining allied war aims at the end of World War I called for "absolute freedom of navigation upon the seas." However, this point was rejected by Great Britain and American politicians and commentators.

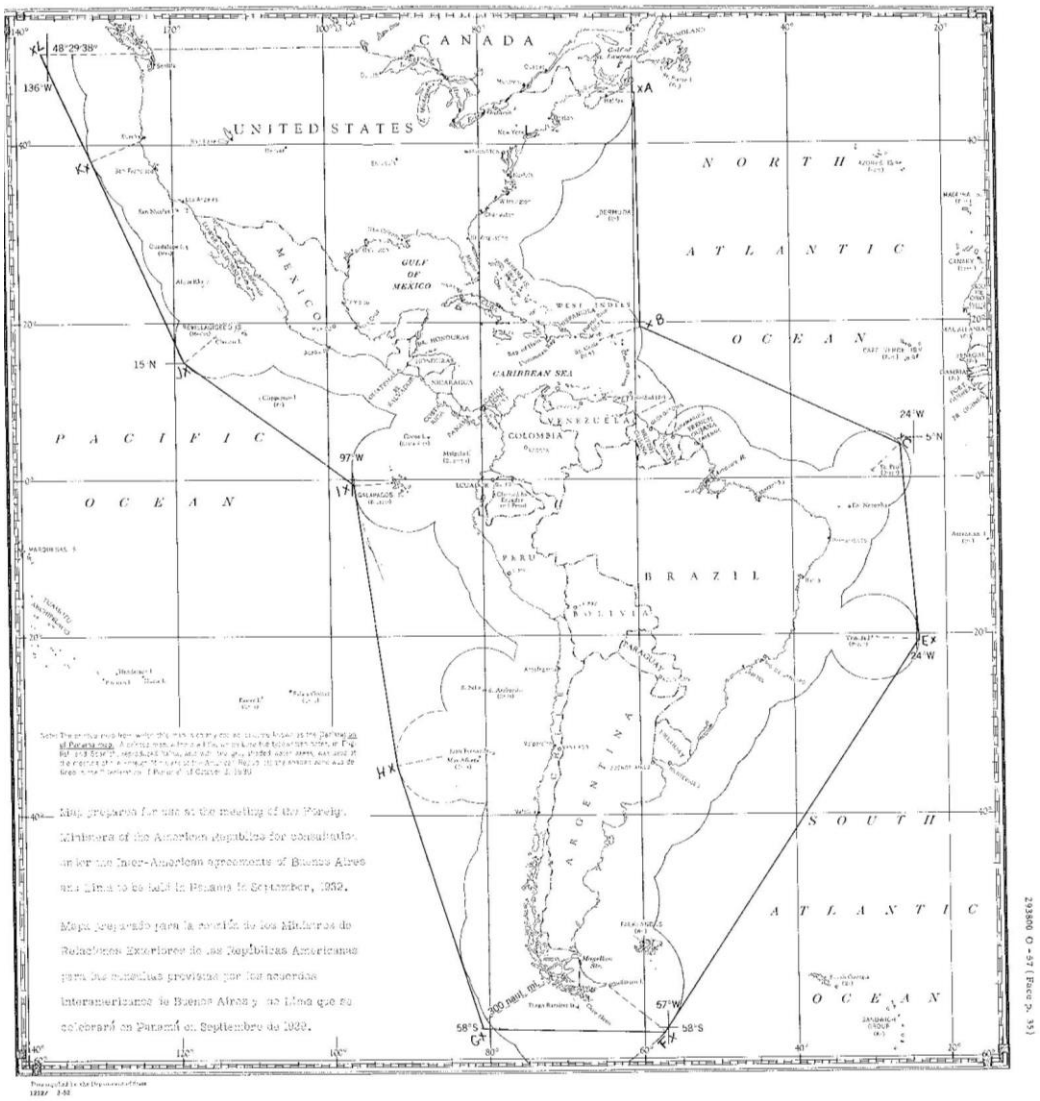
After that defeat, the United States itself started to back away from this long-nineteenth-century conception of "freedom of the seas" as a doctrine emphasizing the rights of neutrals at sea during war due to technological and geopolitical change. In the years before World War II, it joined with Latin American nations to declare a vast neutrality zone surrounding the American continents south of Canada.[25] This zone extended a minimum of 300 nm from the coastline, though much further in many places (see Figure 5.1). After joining the war, the United States also declared a blockade zone in the Pacific against all Japanese ships that violated many of the basic principles it had long defended in the nineteenth century through World War I. In the decades since World War II, U.S. government attitudes on the laws of naval warfare, neutrality, and blockade largely abandoned the previous long-nineteenth-century, Wilsonian perspective. Despite the abandonment of this former conception, however, the United States has continued to

[24] The Marcy amendment called for the complete immunity non-contraband private property at sea. In addition to advocating for the inclusion of this principle, Washington also objected to the declaration's outlawing of privateering, on the grounds that it unfairly disadvantaged states without large navies that used privateering to supplement their minimal naval forces. Ibid.

[25] Fenwick 1941; Ryan 2019.

place strong rhetorical emphasis on freedom of the seas, and especially "freedom of navigation," though for very different purposes, as explained below.

Figure 5.1 The Pan-American Security Zone



Note: This map was produced by the U.S. government to illustrate the method used for drawing the zone. The inner fainter lines drawn as arcs around land features depict the 300 nm limit from the American coasts, while the security zone itself is represented by the darker straight lines connecting the outermost point of those arcs. Thus, for substantial stretches, this zone extended beyond double the 300 nm limit.

Source: "Explanatory Note Regarding Declaration of Panama Map," in Matilda F. Axton, et al., eds., *Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics*, Vol. V (Washington: U.S. Government Printing Office, 1957), available at https://history.state.gov/historicaldocuments/frus1939v05/d60. See also "Declaration of Panamá, October 3, 1939," in Matilda F. Axton, et al., eds., *Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics*, Vol. V (Washington: U.S. Government Printing Office, 1957), available at https://history.state.gov/historicaldocuments/frus1939v05/d60.

Breadth of the Territorial Sea

On issues related to the territorial sea specifically, the United States position also began to evolve in the years before and after World War II. First, on the subject of territorial sea breadth, the United States had claimed a 3 nm territorial sea from its earliest days as a nation. In a note sent to foreign ministers in 1793, U.S. Secretary of State Thomas Jefferson stated that although "[t]he character of our coast… would intitle us in reason to as broad a margin of protected navigation as any nation whatever," President George Washington had nonetheless instructed his officers that their authority was restrained to "one sea-league or three geographical miles from the sea shores." The letter averred that such a distance "can admit of no opposition" due to its recognition and use by other states. This suggested the United States espoused this breadth over more expansive limits because it did not want to provoke objection from other states, demonstrating its sensitivity to the interaction between legitimacy and maritime security.[26]

Although Jefferson's letter reserved "the ultimate extent" of U.S. territorial protection at sea for "future deliberation," this early provisional claim to a 3 nm territorial sea solidified over the next two centuries in various treaties and case law, including disputes between the states and the federal government.[27] The U.S. delegations to the 1930 Hague Conference and the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958 also strongly supported a 3 nm limit for the territorial sea.[28] After the 3 nm maximum limit was quite clearly rejected at

[26] Jefferson had prefaced this claim by describing the range in state practice on this issue as follows: "The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of 20. miles, and the smallest distance I believe, claimed by any nation whatever is the utmost range of a cannon ball, usually stated at one sea league. Some intermediate distances have also been insisted on, and that of three sea-leagues has some authority in its favor." "To Certain Foreign Ministers in the United States," Germantown, Nov. 8, 1793, in Jefferson 1997.

[27] See additional reference information under "Territorial Sea" at NOAA Office of General Counsel, "Maritime Zones and Boundaries," https://www.gc.noaa.gov/gcil_maritime.html.

[28] See Telegram From the Department of State to the Embassy in Greece, June 16, 1955, Document 274, in Lisle A. Rose, ed., *Foreign Relations of the United States Diplomatic Papers, 1955-1957, United Nations and General International Matters*, vol. XI (Washington: U.S. Government Printing Office, 1988), available at

UNCLOS I, however, Washington began indicating a willingness to accept a somewhat broader limit. At the Second United Nations Conference on the Law of the Sea (UNCLOS II) in 1960, the United States jointly proposed with Canada a "Six Plus Six" proposal for a 6 nm territorial sea coupled with a 6 nm fishing zone. As noted in chapter 3, however, this proposal failed by one vote to obtain the requisite two-thirds majority and thus was not adopted.[29]

In the preparations for UNCLOS III, the United States signaled willingness to accept extension of the territorial sea to 12 nm, coupled with free passage for warships in straits enclosed within territorial seas (see below). In the meantime, however, it still maintained that customary law supported a 3 nm limit. In the 1960s the Atlantic Fleet began conducting operational assertions in waters claimed by other states as territorial seas beyond 3 nm from their shores as a means of protesting those claims. Those activities would eventually become formalized in 1979 by U.S. president Jimmy Carter as the U.S. Freedom of Navigation Program. At that stage, the United States was still conducting freedom of navigation operations (FONOPs) against territorial seas wider than 3 nm, even though the negotiations at UNCLOS III had already largely resolved the controversy over territorial sea breadth and transit passage.[30] After UNCLOS III concluded, however, the United States extended its own territorial sea to 12 nm in 1988,

https://history.state.gov/historicaldocuments/frus1955-57v11/d274. In this telegram, Under Secretary of State Herbert Hoover, Jr., expressed support for a proposal being explored by the International Law Commission ahead of UNCLOS I for a 3 nm territorial sea limit, coupled with limited acknowledgment of some states' wider claims as provided for in treaties and tribunal awards.

[29] On the related subject of the contiguous zone, in the U.S. Tariffs Act of 1922, the United States asserted the authority to exercise jurisdiction in an undefined area adjacent to the territorial sea for purposes of customs enforcement. Ryan 2019. Although the U.S. delegation did not proactively advocate for a contiguous zone at the 1930 Hague Conference, it was less opposed to it than was Great Britain. And by the time of UNCLOS I, the United States supported allowing for a contiguous zone extending up to 12 nm from the baseline, a provision that was included in the 1958 Convention on the Territorial Sea and the Contiguous Zone.

[30] Outside of these deliberate operational assertions, however, the United States generally started avoiding exercising high seas freedoms within 12 nm of other states' coasts in the 1960s and 1970s in order to avoid controversy with allies and adversaries alike. Grunawalt 1987, 450.

officially acknowledging that breadth as "the limits permitted by international law."[31] Its post-UNCLOS FONOPs thus targeted only territorial sea claims wider than 12 nm. According to a dataset of U.S. FONOPs I built for a separate research project on this topic [32], the United States conducted at least 53 such operations targeting claimed territorial seas wider than 12 nm between 1991 and 2018.[33]

Innocent Passage for Warships in the Territorial Sea

Although the United States had long endorsed a narrow breadth for the territorial sea, this position must be understood in the context of its changing interpretation of freedom of the seas. In the period when Washington advocated for the rights of neutral merchant ships during wartime, it did not extend this same approach toward the navigational rights of warships. Instead, the U.S. government argued that the territorial sea was a zone of protection wherein warships had no right to enter, whether in times of war or peace. Representing the United States in oral arguments during the *North Atlantic Coast Fisheries* arbitration between Great Britain and the United States, U.S. Senator Elihu Root explained in 1910 that the territorial zone had arisen in customary law for the purpose of protection of coastal inhabitants. Accordingly, he argued, "Warships may not pass without consent into this zone, because they threaten. Merchantships

[31] Proclamation 5928 of December 27, 1988, "Territorial Sea of the United States of America," *Federal Register*, vol. 54, no 5, January 9, 1989, p. 777, available at https://www.gc.noaa.gov/documents/terr_sea_54_fr_777.pdf, accessed October 25, 2020. The United States then declared a contiguous zone extending from the territorial sea outward to 24 nm from the shore in 1999. See Proclamation 7219 of September 2, 1999, "Contiguous Zone of the United States," *Code of Federal Regulations*, Title 3 – Presidential Documents, 2000, available at https://www.govinfo.gov/content/pkg/CFR-2000-title3-vol1/pdf/CFR-2000-title3-vol1-proc7219.pdf, accessed October 25, 2020.

[32] Odell 2019a.

[33] Reports on freedom of navigation operations conducted prior to 1991 remain classified; my efforts to request their declassification and release under FOIA have not yet succeeded.

may pass and repass, because they do not threaten."[34] Similarly, the second point in Wilson's Fourteen Points speech explicitly excluded the territorial sea, advocating for "Absolute freedom of navigation upon the seas, *outside territorial waters*, alike in peace and in war…" (emphasis added). This position had softened only slightly by the time of the Hague Codification Conference in 1930, when the U.S. delegate declared, "The right of innocent passage is one of commerce primarily and, so far as warships are concerned, the question is one of usage and comity of nations wholly."[35]

However, by the time efforts to codify the law of the sea resumed after World War II, the United States' position had completely shifted in favor of warship rights. Thus, during negotiations at UNCLOS I and II, the United States supported the right of innocent passage in the territorial sea for all ships, including warships, without prior notification or authorization. Then, when it became clear that momentum for a 12 nm sea was building in the late 1960s, the United States directed its attention to the particular problems posed by the more than 100 straits wider than 6 nm but narrower than 24 nm that would become newly enclosed by wider territorial seas.[36] As part of the Seabed Committee's preparations for UNCLOS III, the United States worked with the Soviet Union and Italy to propose a regime of high seas freedoms for ships and submarines in straits used for international navigation, coupled with freedom of overflight under slightly more restrictive conditions.[37] The U.S. delegation to UNCLOS III reiterated this position

[34] See *Proceedings in the North Atlantic Coast Fisheries Arbitration*, S. Doc. No. 870, 61st Congress, Third Session 2007, Volume XI (Washington: Government Printing Office, 1912), p. 2006-07, https://www.biodiversitylibrary.org/page/19165935, accessed August 16, 2020.

[35] Miller 1930, 690.

[36] See information from a detailed estimate of straits of varying widths in chapter 4, note 36.

[37] See Nandan and Rosenne 2003, vol. 2, 284–85.

at the start of negotiations.[38] However, after the United Kingdom introduced the compromise proposal for a regime of transit passage in straits, the United States came to accept that regime.

The Reagan administration's ultimate refusal to sign UNCLOS did not stem from its dissatisfaction over the navigational regimes in the convention, but instead its opposition to the provisions in Part XI on the seabed mining regime.[39] The 1983 Statement on United States Oceans Policy avowed that America would respect coastal states' rights under the convention, on the condition that those states respected the rights of navigation and overflight of the United States and others. The statement also signaled a further elevation of the U.S. Freedom of Navigation Program as a means of protesting unilateral claims that restricted those navigational freedoms.[40] Despite still not being a party to the convention, the U.S. government now avows that it views many provisions of UNCLOS, including those regarding maritime zones and navigational regimes, as customary international law.[41] It also interprets "straits used for international navigation" broadly to encompass all straits capable of being used for international

[38] In the first U.S. statement on matters of substance at UNCLOS III, U.S. delegate John Stevenson stated America's support for a 12 nm territorial sea on the condition that it would be coupled with the "non-discriminatory right of unimpeded passage through, over and under straits used for international navigation." Likewise, he expressed support for a 200 nm economic zone only on the condition that coastal states would not unjustifiably interfere with "navigation, overflight and other non-resources uses." See summary record of the 38th plenary meeting of UNCLOS III held on July 11, 1974, A/CONF.62/SR.38, https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_1/a_conf62_sr38.pdf, pp. 160-61.

[39] See statement by U.S. delegate James Malone at the 182nd plenary meeting of UNCLOS III held on April 30, 1982, A/CONF.62/SR.182, https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_16/a_conf62_sr182.pdf, pp. 155-56. See also President Ronald Reagan, Statement on United States Actions Concerning the Conference on the Law of the Sea, July 9, 1982, https://www.reaganlibrary.gov/research/speeches/70982b, accessed August 16, 2020.

[40] President Ronald Reagan, Statement on United States Ocean Policy, March 10, 1983, https://www.reaganlibrary.gov/research/speeches/31083c. The statement promised that the United States would "exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention," and would not "acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses." This statement was also the first U.S. policy statement to declare a 200 nm EEZ extending from the U.S. coast.

[41] Duff 2005, 10–16.

navigation, regardless of frequency of use.[42] More generally, the United States proactively rejects any efforts of coastal states to require warships to provide prior notification or obtain prior authorization before passing through the territorial sea. Under the U.S. Freedom of Navigation Program, the U.S. State Department has lodged formal diplomatic objections to such claims and endeavored to persuade other states not to adopt such provisions in their domestic law. In addition, it has frequently targeted such claims with freedom of navigation operations. The United States has used FONOPs to target states' requirements for warships to obtain permission before passing through territorial seas more than 111 times between 1991 and 2018, while also targeting prior notification requirements more than 47 times in that same period.[43]

U.S. Conversion of "Freedom of Navigation" to Serve Shifting Strategy

In the early decades of the twentieth century, the United States was in the process of transitioning toward a more modern and powerful standing navy. This development had been stimulated by a shift in U.S. grand strategy under William McKinley and Theodore Roosevelt toward a more imperial posture, as represented by the Monroe Doctrine in the Western Hemisphere, the Spanish-American War, and colonial expansion in the Philippines and Hawaii. The growth in naval power served these new priorities and was fostered by the enthusiastic patronage of Theodore Roosevelt as assistant secretary of the Navy and later president. It was further inspired by the writings of strategist Alfred Thayer Mahan advocating for sea power.

[42] Grunawalt 1987, 456; Roach and Smith 2012. Among other interstate disagreements regarding straits, this has led to a longstanding dispute with Canada over navigational rights in the Northwest Passage, where the United States insists transit passage applies but which Canada treats as internal waters where passage is subject to its regulation and authorization.

[43] The U.S. government's annual reports on FONOPs do not indicate how many times in each year a specific claim was targeted, only suggesting that in some cases individual claims are targeted multiple times. Thus, these requirements for prior permission and notification have been targeted a minimum of 111 times and 47 times, respectively, but due to multiple FONOPs targeting the same claim some years, the actual number of FONOPs against such claims is likely much higher.

As the power of the U.S. Navy grew from middling to second only to the Royal Navy, America faced growing incentives to embrace a more British interpretation of freedom of the seas—that is, as a rhetorical facilitator of *laissez faire* trade in peacetime and a justification for unfettered naval actions in times of war and peace alike. Nonetheless, there was a certain stickiness evident in Washington's attitude toward military freedoms at sea. The United States under Woodrow Wilson continued to emphasize freedom of the seas as a means to *restrict* unfettered military uses of the sea in defense of neutral merchant shipping in World War I. Similarly, under both the Republican administrations of Theodore Roosevelt and Howard Taft and the Democratic administration of Woodrow Wilson, Washington expressed opposition to the passage of foreign warships in the territorial sea.

During and after World War II, however, the United States finally abandoned its previous interpretation of freedom of the seas. Although its rhetoric during and after the war continued to emphasize "freedom of the seas," using this term increasingly interchangeably with the term "freedom of navigation," the strategic purpose behind the term came to mean something entirely different. Having surpassed the power of the British Royal Navy during the war, the United States did not retrench but instead built up a military structure capable of sustaining "command of the commons" throughout the Cold War and beyond [44]. As states' claims to coastal state jurisdiction expanded in those years—ironically stimulated in part by the United States' own 1945 Truman Proclamation claiming sovereign rights to the resources of the continental shelf adjacent to U.S. shores—the United States used its rhetorical interpretation of "freedom of navigation" to ensure those expanding claims to resources did not impinge upon its military freedoms at sea.

[44] Posen 2003.

Evolution in U.S. nuclear strategy was a central impetus driving this shift. Starting in the late 1950s, ballistic missile submarines (SSBNs) emerged as the crucial third leg of the U.S. nuclear triad. Coupled with America's nonpareil anti-submarine warfare capabilities, SSBNs were central to U.S. efforts to bolster both the survivability and counterforce capabilities of U.S. nuclear forces. These technologies in turn depended on unfettered and undetected uses of the sea, above all in straits used for international navigation. U.S. nuclear strategy could not countenance requirements to surface its SSBNs in straits or to seek permission to conduct surveillance and reconnaissance essential for anti-submarine warfare in EEZs and continental shelves. Nor could it tolerate restrictions that had been advocated by some states on the passage of nuclear-powered or nuclear-armed vessels. Nuclear strategy thus acted as a key driver behind America's unbending resolve to defend navigational freedoms at UNCLOS III, and an important motivation for the U.S. Freedom of Navigation Program.[45]

U.S. interpretations of the law of the sea in the twentieth century thus illustrate the theoretical argument from chapter 2. As the United States' overseas interests and blue water navy grew during the shift toward a more imperialist grand strategy and sea-power-centric military strategy in the McKinley-Roosevelt years, its incentives to alter its interpretation of the law of the sea grew. However, this shift was delayed by America's reluctance to abandon its longstanding interpretation of freedom of the seas that restricted military activities in favor of merchant shipping during wartime.[46] Eventually, however, the United States found ways to repurpose freedom of navigation in service of its new strategy of military primacy at sea and its

[45] The importance placed on straits due to U.S. nuclear strategy is evident in the papers of Elliot Richardson, the head of the U.S. delegation to the United Nations from 1976-1980, as will be discussed further in the Japan case study in chapter 10, pp. 418.

[46] More in-depth research would be necessary to evaluate whether or not this stickiness was directly attributable to America's concern over its legitimacy in the eyes of key reference groups, as my theoretical argument posits and as I observe in my case studies in later chapters.

triadic and counterforce nuclear strategy. This evolution thus exhibited a pattern of *conversion*, the pattern described in chapter 2 whereby states convert past rhetorical positions on the law of the sea to serve new strategic purposes. As noted above, this pattern was evident in Ecuador's process of ratifying UNCLOS and, as will be demonstrated in chapter 10, it is also evident in Japan's approach to marine scientific research and foreign military activities in its EEZ.

Shadow Case #2: Russia's Interpretation of the Law of the Sea

Breadth of the Territorial Sea

Of the major European powers in the nineteenth century, the Russian Empire had long expressed the strongest opposition to a narrow 3 nm limit for the territorial sea, instead favoring more flexible and expansive coastal state jurisdiction. In 1837, Russian forces detained a British ship, the *Lord Charles Spencer* in the Black Sea; in response to British objections, Russia apologized and compensated the ship, while also officially protesting Great Britain's presumption of a 3 nm jurisdictional limit. Instead, Russia insisted that "each states reserves the right… to resolve this question in accordance with its own convenience and interests."[47] Some Russian laws in the nineteenth century employed a 3 nm limit, while some of its treaties with other European powers endorsed a cannon-shot rule, without specifying the precise breadth of that rule. But the Russian government did not concede that the cannon-shot rule equated to 3 nm,

[47] Quoted in Butler 1968, 53. See also Commons Hansard, Official Report of debates in United Kingdom Parliament, 14 December 1837, vol. 39, pp. 1093-113, https://api.parliament.uk/historic-hansard/commons/1837/dec/14/russia. A decade later, the Russian government resisted pressures from domestic industry to claim an expansive fishing zone of forty Italian miles, not on the grounds that it exceeded 3 nm, but that it would meet with protest as "no clear and uniform agreement has yet been arrived at among nations in regard to the limits of jurisdiction at sea," qtd. in Fulton 1911, 585.

nor that the 3 nm limit was normative under customary international law.[48] Rather, as the twentieth century dawned, Russia began to officially claim a 12 nm limit for various maritime jurisdictional purposes. It declared a 12 nm customs zone in 1909, wherein "every vessel" was subject to its jurisdiction, followed shortly thereafter by 12 nm fisheries jurisdiction in some areas adjacent to the Russian coast.[49]

This basic stance in favor of a 12 nm limit at sea and in favor of a more flexible interpretation of customary international law on the matter persisted after the Russian Revolution. In the early 1920s, Moscow claimed a 12 nm fisheries limit in the Arctic and the White Sea, along with an undefined cannon-shot rule for the regulation of navigation within its coastal waters. The USSR's 1927 state boundary statute claimed a 12 nm limit at sea, without describing that maritime space as a territorial sea.[50] At the League of Nations Codification Conference at the Hague in 1930, the representative of the USSR declared its interpretation of the breadth of the territorial sea under customary international law as follows:

> … it is necessary to recognise the great diversity of view which exists regarding the extent in which the exercise of the rights of the Coastal State exists in the waters called territorial and adjacent. The exercise of such rights for all purposes or for certain purposes is admitted sometimes within the limit of three, sometimes four, six, ten or twelve miles. The reasons, both historical and theoretical, invoked by some States and disputed by others, cannot be put into opposition to these facts and the rule or actual necessity for States to ensure their needs, particularly in waters along the coast which are not used for international navigation. … Under these conditions it would be better to confine oneself to a general statement to the effect that the use of international maritime waterways must under no conditions be interfered with.[51]

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[48] As the century concluded, prominent Russian jurist F.F. Maartens argued that the cannon-shot rule was desirable precisely because of its adaptability to advances in coastal artillery, which at that late date extended as far as 10 miles from shore. Butler 1968, 54.

[49] Ibid.

[50] Butler 1967, 18.

[51] See Provisional Minutes of the Thirteenth Meeting held on Thursday, April 3, 1930, at 9:15 A.M., in Appendix III of League of Nations, *Acts of the Conference for the Codification of International Law*, Geneva, August 19, 1930, Official No. C. 351. M. 145. 1930. V., p. 137, available at https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf.

By the time of UNCLOS I in 1958, the Soviet Union's interpretation of its own claim was that it had claimed a territorial sea 12 nm in breadth dating back "half a century ago" (presumably to the 1909 customs limit). The USSR delegate to the conference rejected efforts to impose the 3 nm limit on all states as "a cover for the special interests of individual maritime powers." At the same time, he did not insist on the 12 nm limit for all states, but instead advocated that the conference adopt a provision that would allow individual states to claim territorial seas "ordinarily ranging" from 3 to 12 nm, "after taking into account historical circumstances, geographical, economic and security interests and also the interests of international shipping."[52] At UNCLOS II two years later, the Soviet Union modified this proposal in response to criticism that it was too ambiguous, instead simply proposing that states be permitted to claim territorial seas up to 12 nm in width.[53] The Soviet delegate described this breadth as a maximum and as a right of states rather than an obligation, arguing that this approach reflected actual state practice.[54] In this same year, the USSR formally codified its claim to territorial waters out to 12 nm, except as otherwise defined in treaties.[55]

In the coming decade, the Soviet Union came to recognize the risks to its own interests of a more universal adoption of a 12 nm limit, given its own growing navy's dependence on passage through narrow straits for access to the high seas. However, Moscow felt it could not

[52] See summary record of the 12th meeting of the First Committee at UNCLOS I, March 12, 1958, A/CONF.13/C.1/SR.11-15, in *Official Records of the United Nations Conference on the Law of The Sea, Volume III (First Committee (Territorial Sea and Contiguous Zone))*, https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_3/sr_11_15.pdf, pp. 31-32.

[53] The Soviet proposal also allowed states claiming territorial seas less than 12 nm wide to claim fishery zones extending up to 12 nm.

[54] See summary record of the second meeting of UNCLOS II, March 22, 1960, *Official Records of the Second United Nations Conference on the Law of the Sea (Committee of the Whole – Verbatim Records of the General Debate)*, https://legal.un.org/diplomaticconferences/1960_los/docs/english/vol_2/a_conf19_2.pdf, pp. 15-16.

[55] Butler 1968, 62.

back down from its position in favor of 12 nm, having so prominently defended it at the 1958 and 1960 conferences on the law of the sea.[56] To resolve this dilemma, the USSR would pursue a more creative solution in close collaboration with its erstwhile Cold War foe, the United States.

Innocent Passage for Warships in the Territorial Sea

Tsarist Russia's attitude toward the passage of warships within its territorial sea is unclear. Indeed, since the Russian Empire lacked a single uniform territorial sea or maritime limit, the question of innocent passage in the territorial sea had not yet arisen in a literal sense. As noted above, however, the 1909 customs decree did subject "every vessel" within 12 nm of the coast to Russian supervision. Soon after the founding of the USSR, more concrete evidence of a restrictive attitude toward foreign warships in the territorial seas emerged. In 1924, the Soviet Union adopted rules that granted merchant ships "the right of unhindered navigation within territorial waters, except for special zones," but these instructions made no mention of warships enjoying this same right.[57] Later that same year, the Soviet Union formally objected to the entry of an American warship within its territorial waters along the Chukchi Peninsula near the Bering Sea "without appropriate authorization."[58]

At the first and second UN Conferences on the Law of the Sea, the Soviet Union made this restrictive attitude more explicit. At UNCLOS I in 1958, the USSR's delegate endorsed the right of innocent passage for merchant ships, without extending it to warships. Instead, he expressed disagreement with "the contention that foreign warships could pass through the

[56] Hollick 1981, 175.

[57] For the purposes of these rules, the territorial waters extended as far as the range of coastal artillery. Butler 1967, 19.

[58] Quoted in Butler 1968, 67. Butler also explains that the USSR adopted Provisional Rules for Foreign Warships Visiting USSR Waters in 1931 that required prior authorization for foreign warships to visit Soviet ports; however, these rules did not explicitly apply to ships merely passing through the territorial sea. See pp. 66-67.

territorial sea without the consent of the coastal State, because that could entail a security risk for the latter and had in practice given rise to abuse."[59] Accordingly, he favored a provision allowing states to require warships to obtain prior authorization before entering the territorial sea. Although this provision failed to garner the requisite two-thirds majority support for inclusion in the final text of the territorial sea convention, the USSR, along with five other Soviet and Warsaw Pact states, issued a reservation upon signing the convention insisting that "the coastal State has the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters."[60] Then, in the same 1960 statute formally codifying its 12 nm territorial sea claim, the Soviet Union also enshrined this requirement for prior authorization. The law required foreign warships to apply for permission to pass through Russia's territorial sea 30 days in advance of the proposed passage and imposed strict limitations on those ships' behavior during passage.[61]

As the decade of the 1960s unfolded, however, Moscow began to worry about the implications of the more widespread adoption of 12 nm territorial seas for its own naval power projection. The Soviet Navy underwent significant growth during these years, and its access to the high seas was uniquely constricted by several strait and maritime chokeholds (including vast expanses of Arctic sea ice). Meanwhile, the Cold War was starting to thaw as Moscow and Washington began to engage in talks about arms control. As part of this thaw, the Soviet Union began collaborating with the United States to develop a mostly shared approach to the

[59] See summary record of the 12th meeting of the First Committee at UNCLOS I, March 12, 1958, A/CONF.13/C.1/SR.11-15, in *Official Records of the United Nations Conference on the Law of The Sea, Volume III (First Committee (Territorial Sea and Contiguous Zone))*, https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_3/sr_11_15.pdf, p. 32.

[60] See signatures and reservations to the 1958 Convention on the Territorial Sea and the Contiguous Zone, available at https://treaties.un.org/doc/Treaties/1964/11/19641122%2002-14%20AM/Ch_XXI_01_2_3_4_5p.pdf, pp. 47-77, especially p. 74.

[61] See details in Butler 1968, 63–64.

interrelated issues of passage through international straits and the breadth of the territorial sea, which at that point remained unresolved in international treaty law.[62] As noted above in the U.S. case study, the two sides jointly developed a proposal in the Seabed Committee (along with Italy) for a 12 nm territorial sea, coupled with high seas freedoms for ships and a more regulated right of overflight in straits used for international navigation enclosed within territorial seas.[63] When this approach met with strong resistance from some straits states at UNCLOS III, the Soviet Union eventually accepted the compromise regime of transit passage, as it still ensured its sought-after military navigational freedoms.[64]

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[62] Hollick 1981, 173–75. These collaborations took place in the shadow of a number of operational collisions and incidents between Soviet naval vessels and U.S. (and British) Navy ships in the 1960s. After a U.S. destroyer was bumped and damaged by a Soviet destroyer during exercises in the Sea of Japan in 1967, the Johnson administration sought to defuse tensions by negotiating a set of understandings with the Soviet Union about how to prevent the recurrence of such incidents, resulting in the Incidents at Sea Agreement (INCSEA) in 1972. Winkler 2000.

[63] It is worth noting that the USSR delegation to the Seabed Committee did not advocate applying this regime to all straits, but rather only to straits "which had over a considerable period of history served as waterways for international shipping and consequently were open for unhindered passage by all vessels." The USSR delegate stated:

> It went without saying that not all international straits should be measured with the same yardstick. There were straits which had never been used for international navigation; and there was all the difference in the world between them and major international waterways which had been freely used for international shipping. Clearly, the two types of waterway could not be regarded as being in the same legal category and it would be perfectly reasonable for them to have different régimes.

Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Subcommittee II, Summary Record of the Sixth Meeting held on Friday, 30 July 1971, A/AC.138/SC.II/SR.6, pp. 22-23. Digitized record obtained October 26, 2020 from the United Nations Dag Hammarskjöld Library.

This position differs from the United States government's interpretation of "straits used for international navigation." See discussion in chapter 4, p. 167.

[64] It is unclear if Russia today views this regime as applying to the straits enclosed within its own territorial seas. Writing in 1978 before the conclusion of UNCLOS III and Russian ratification thereof, Young and Sebek alleged that Russia did not advocate for the same free passage regime in its own straits that it sought in the straits of others, since it advocated the exemption of straits enclosed in territorial seas prior to UNCLOS I from that regime. However, to substantiate this claim, they cited evidence from the Seabed Committee, which had by that point been overcome by events. Young and Sebek 1978, 256.

In addition, it is important to note that the USSR's overtures to the United States on the issue of free passage in straits did not necessarily signal a broader Soviet support for unfettered military uses of the oceans. The Soviet Navy remained at a significant power disadvantage to the U.S. Navy. As a result, at the same time the Soviet Union was negotiating the issue of passage through straits with the United States, it was also advocating for the complete demilitarization of the seabed beyond national jurisdiction in the Seabed Arms Control Treaty. Such a ban would have served Soviet interests by disproportionately constraining the United States, given the latter's greater reliance on naval power, SSBNs, and undersea warfare. The United States recognized this, of course, which is why it would only agree to a much more limited scope for the treaty, banning only the placement of nuclear weapons and other weapons of mass destruction on the seabed.

The USSR's interpretation of the issue of innocent passage for warships in the territorial seas outside of straits during and after UNCLOS III was somewhat more ambivalent. When discussing the breadth of the territorial sea and advocating freedom of passage through major international straits at the Seabed Committee in 1971, the Soviet delegate did not express an opinion on the rights of military vessels to conduct innocent passage in territorial seas outside of straits, with or without permission.[65] In later years, the Soviet delegation did oppose efforts to amend the draft UNCLOS text to explicitly allow states to require prior notification or authorization for warship passage or to enhance states' security jurisdiction in the territorial sea, arguing that the text already represented a satisfactory compromise that "safeguarded the security interests of coastal States and the interests of international navigation."[66] Although this suggested that Moscow had abandoned its previous insistence upon prior authorization for innocent passage, it soon became clear that it had only moderately modified this stance. A new State Council of Ministers decree issued by the Soviet Union in 1983—soon after it had signed UNCLOS, but before it had ratified it, which it would eventually do in 1997—adopted a mixed approach on this issue. Although it omitted any requirement for prior notification or permission for innocent passage of warships, it simultaneously circumscribed the right of innocent passage of warships to only those "routes ordinarily used for international navigation" in the Baltic Sea, Sea of Okhotsk, and Sea of Japan. This positive listing omitted, *inter alia*, the Black Sea.

[65] Rather, the Soviet delegate noted that "The right of innocent passage through territorial waters could – and had been – interpreted in many various ways." Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Subcommittee II, Summary Record of the Sixth Meeting held on Friday, 30 July 1971, A/AC.138/SC.II/SR.6, p. 23. Digitized record obtained October 26, 2020 from the United Nations Dag Hammarskjöld Library.

[66] See the summary records of the 148th plenary meeting of UNCLOS III on April 15, 1981, A/CONF.62/SR.148, https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_15/a_conf62_sr148.pdf, p. 20; and the 170th plenary meeting on April 16, 1982, A/CONF.62/SR.170, https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_16/a_conf62_sr170.pdf, p. 102.

In objection to this effort to limit the passage of warships, the U.S. Navy conducted repeated freedom of navigation operations in Soviet territorial waters in the Black Sea.[67] In 1988, the conflict between these differing interpretations came to a head when a Soviet warship bumped against a U.S. Navy vessel in Soviet territorial waters adjacent to the Crimean Peninsula and outside of ordinary routes of international navigation.[68] In the wake of this incident, the United States and Soviet Union negotiated a Uniform Interpretation of Rules of International Law Governing Innocent Passage. This bilateral statement affirmed the right of innocent passage for warships in the territorial sea without prior notification or authorization, among other interpretive positions.[69] This statement represented the culmination of the USSR's evolution away from a restrictive stance on warship passage to a more limited approach to coastal state jurisdiction on this matter.

Even after this agreement, however, there were still some limits to Russia's willingness to accept U.S. military activities close to sensitive onshore facilities, as evident in a 1992 collision between a U.S. submarine and a Russian submarine in the Barents Sea near Russian naval bases at Murmansk. The American submarine, which was likely conducting an intelligence mission, was struck from beneath by the Russian submarine as it was surfacing. Although the U.S. submarine was operating 14 nm from shore and thus was outside of the Russian territorial sea, Russia complained that the area was restricted. The United States asserted that it was fully within its rights to operate in international waters, but Russia's objection relied more on a

[67] Juda 1990.

[68] Ibid.

[69] "Joint Statement by the United States and Soviet Union, with Uniform Interpretation of Rules of International Law Governing Innocent Passage," September 23, 1989, adopted in Jackson Hole, Wyoming, USA, available at https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1989-USA-USSR-Joint-Statement-with-Attached-Uniform-Interpretation-of-Rues-of-International-Law-Governing-Innocent-Passage.pdf. See also Nandan and Rosenne 2003, vol. 2, 177–78.

security rationale than an alternative interpretation of the law of the sea.[70] Finally, it is worth noting that despite the Soviet embrace of an interpretation of innocent passage more aligned with that of the United States, Russian maritime jurisdictional claims remain quite expansive in other respects. This is especially the case in the Arctic seas and Peter the Great Bay, where Russia claims expansive historic waters and bays.

Shifting Soviet Interests and the Change in the USSR's Legitimation Reference Group

During the two decades spanning the late 1960s to the late 1980s, the Soviet Union's interpretation of the rights of warships in straits and territorial seas underwent a dramatic shift in favor of more limited coastal state jurisdiction. This shift was motivated by the Soviet Union's growing naval power, which interacted in a potent way with its particular maritime geographical constraints, along with the lines of the theoretical argument in chapter 2.[71]

How was the Soviet Union's position able to transform so completely, without regard for the potential hypocrisy costs of this interpretive shift? To some extent, the change in position was enabled by the dramatic overall change in the law of the sea regime. As noted in chapter 2, states have more leeway to abandon past interpretations during such times of more general flux in international regimes. Nonetheless, despite the change in the overall regime, the Soviet Union

[70] John H. Cushman, Jr., "Two Subs Collide Off Russian Port," *New York Times*, February 19, 1992, https://www.nytimes.com/1992/02/19/world/two-subs-collide-off-russian-port.html. In addition, from time to time, Russian forces still harass U.S. ships and planes operating in proximity to Russian territory in the Baltic and Black Seas, despite the ordinary conformity of those U.S. operations with the 1989 joint uniform interpretation and other agreements. See Helene Cooper, "Russian Jet Buzzed American Spy Plane Over Black Sea, U.S. Says," *New York Times*, January 29, 2018, https://nyti.ms/2Gr0yJP.

[71] As the Soviet Union was building out its SSBN fleet in the 1960s and aspiring to deploy anti-submarine warfare capabilities, its initial anxiety over free passage through straits may have been motivated by its own evolving nuclear strategy, much as in the U.S. case. However, this motive likely became less compelling over time, as it became apparent the Soviet Union could not compete effectively against the United States in the undersea domain due to Soviet technical inferiority. By the mid-late 1970s, it was evident that Soviet nuclear strategy would continue to rely much more heavily on the Strategic Rocket Forces' land-based missile deterrent over the seaborne leg of its triad. At the same time, the USSR sought to use its uniquely restrictive maritime geography to its advantage by employing semi-enclosed seas wherein the Soviet Navy exercised control as "bastions" where its SSBNs could operate in relative safety. Breemer 1989.

was still vulnerable to charges of hypocrisy and inconsistency from nations at UNCLOS III that continued to advocate for stronger coastal state jurisdiction over foreign warships. Indeed, as will be explored in following chapters, China lambasted Soviet hypocrisy on this issue at UNCLOS III as part of its effort to position itself as the more legitimate ally and leader of the Third World.

This shadow case instead illustrates the importance of the reference group in determining a state's legitimation strategies. As the early period of the Cold War waned, the Soviet Union was no longer primarily concerned with spreading international communism and building alliances in the developing world. Instead, its growing interests in military navigational freedom, coupled with its heavy dependence on far-seas fisheries, made it a more natural ally of other maritime powers at UNCLOS III than of the G-77. As a result, its legitimation strategies during and after the conference prioritized appealing to the former over the latter. This became especially pronounced in the twilight of the Cold War as Soviet president Mikhail Gorbachev pursued a policy of perestroika and embraced a less antagonistic relationship with the United States [72]. As will be argued in the following chapter, a shift in legitimation reference group also precipitated a softening in China's insistence on expansive coastal state jurisdiction at UNCLOS III, though this shift was later and much less pronounced than that of the USSR.

Conclusion

Both the cross-national data and the shadow case studies presented in this chapter provide both an important empirical contribution and an illustration of the core features of my theoretical argument. First, despite the fact that important caveats in interpreting the cross-national data render it unsusceptible to regression analysis, the data succeeds in illustrating a significant

[72] Juda 1990.

degree of contestation among states over how to interpret the law of the sea. Some of this contestation is overt, while some may be missing or hidden from the data or may operate below the level of formal legislation. This contestation emerges from the ambiguity and omissions in the contemporary maritime regime described in the previous chapter. More fundamentally, however, it is a product of states' efforts to use interpretation of the law of the sea to legitimize their advocacy for their geopolitical interests.

Such efforts are evident in the cases of Chile, Ecuador, and Peru that I used to contextualize and qualify the quantitative data. Although all three of these states originally interpreted the law of the sea in ways that supported their expansive claims to maritime jurisdiction, their interpretations diverged over time. When they succeeded in achieving recognition for their EEZ concept, Chile—more oriented toward the reference group of Western, developed nations, and possessing the most powerful navy in its neighborhood—ratified UNCLOS and rhetorically embraced a more limited approach to security jurisdiction. Despite this shift, however, Chile's attitudes toward foreign military activities in its territorial sea and EEZ are more restrictive than meets the eye. Meanwhile, Ecuador and Peru have maintained a more territorialist, security-motivated approach to the law of the sea. Although Ecuador ratified the convention in 2012, it only did so after effectively converting the purpose of UNCLOS to its more nationalistic ends. Meanwhile, although Peru has now recognized the maritime zones of UNCLOS as customary law, it has been unable to overcome domestic opposition to formally ratify the convention or roll back its claim to a 200 nm zone of sovereignty.

The shadow cases of the United States and Russia in the second half of the chapter illustrate how changing geopolitical incentives—especially growing overseas interests and rising naval power—motivate states to alter their interpretations of the law of the sea. As U.S. naval

power expanded in the twentieth century, eventually becoming dominant after the upheavals of World War II, Washington converted its interpretation of freedom of navigation to advocate for military navigational freedoms in territorial seas, straits, and beyond. Likewise, as Soviet naval power grew in the 1960s, Moscow began to second-guess its past opposition to the innocent passage of warships in territorial seas, especially in international straits. Consequently, it partnered with its erstwhile foe, the United States, to advocate for passage regimes that would preserve freedom of navigation for its ships and aircraft. At the same time, there is often lag and stickiness in states' interpretations. This pattern was evident in the way America's shift toward advocating military freedoms at sea lagged a few decades behind its naval expansion. It was also evident in how the Soviet Union's embrace of the innocent passage of warships in the territorial sea was not consummated until its 1989 joint statement with the United States.

Furthermore, this analysis demonstrated that this lag is more likely to be overcome during times of significant flux in the overall international legal regime. The flux in laws of naval warfare in the period of the World Wars enabled the United States to abandon its past conception of "freedom of the seas" that favored the rights of neutral merchant ships over the unfettered operations of military forces. Likewise, amidst the flux in the public international law of the sea during the preparations for and negotiations of UNCLOS III, the Soviet Union changed its approach to navigational freedoms for warships in the territorial sea and especially key straits. Even amidst this critical juncture, however, the Soviet Union still was challenged over the legitimacy gap generated by its changing interpretations. But because the USSR's more salient reference group was shifting away from the developing world and toward the West amidst détente with the United States of the 1970s and the perestroika of the 1980s, the hypocrisy costs borne by Moscow were relatively minimal.

Appendix to Chapter 5: Summary Tables for Maritime Jurisdictional Claims Dataset

List of Tables in Appendix

Table 5.1 Maximum Breadth of the Territorial Sea[73]

Breadth in nautical miles (nm)	Number of states[74]
< 12	2
12	147
13-199	2
200+	3

[73] Some states claim different breadths for different portions of their territorial seas; these summary statistics reflect the maximum breadth of any portion of the state's territorial sea. For example, Japan claims 12 nm territorial seas in most places along its coast but restricts its territorial sea to 3 nm in five key straits. It is coded in the dataset as having a maximum territorial sea breadth of 12 nm. (See further discussion of Japan's approach in chapter 10.)

[74] Lebanon claims a 3 nm territorial sea and Greece claims a 6 nm territorial sea. At the other extreme, Benin and Peru claim 200 nm territorial seas. Between those two poles, Togo claims a 30 nm territorial sea. The Philippine territorial sea claim associated with its original baselines based on the 1898 Treaty of Paris (new baselines were drawn in 2009) is defined such that, according to the *Maritime Claims Reference Manual* and the State Department's *Limits in the Seas*, its formal territorial sea extends beyond 12 nm in places, up to as far as 285 nm from Philippine land territory. See above for a discussion of the caveats to each of these cases, illustrating how these states' *de facto* claims are in fact much more moderate than their *de jure* outer territorial sea limits imply, and are thus in many ways exceptions that prove the 12 nm rule.

Bosnia and Herzegovina does not yet have a finalized territorial sea claim; its claim is pending the signing of a previously negotiated maritime boundary agreement with Croatia. Once this agreement is concluded, Bosnia and Herzegovina will likely be in the unique position of having its territorial sea completely surrounded by Croatian internal waters. This is due to the combination of its narrow and unique coastal geography, which is surrounded on three sides by Croatia, and Croatia's use of straight baselines to enclose the waters in the approach to Bosnia and Herzegovina as internal waters.

Table 5.2 Continental States with Straight Baselines around Outlying Archipelagoes (12) or Legislation Declaring Unity of Archipelagoes (5)[75]

State	**Baselines**	**Unity** (but no baselines drawn yet)
Argentina	x	
Australia	x	
China	x	
Denmark	x	
Ecuador	x	
Eritrea		x
France	x	
India	x	
Iran		x
Myanmar	x	
Norway	x	
Portugal	x	
Spain	x	
Sudan		x
Syria		x
United Arab Emirates		x
United Kingdom	x	

[75] The source for this data is Chinese Society of International Law 2018, paras 574–575 and Table 1 on p. 492. It was further cross-checked against Roach 2018. All of the cases Roach identifies are included in the critical study by the Chinese Society of International Law, while Roach inexplicably omits the Australia and India cases included in that study. I independently verified that those two states do in fact draw straight baselines around outlying archipelagoes. For Australia's straight baselines around the Abrolhos Islands, see "Management of the Houtman Abrolhos System," Compiled by Kim Nardi and prepared on behalf of the Minister for Fisheries by the Abrolhos Islands Management Advisory Committee, Draft version: December 1997, Fisheries Management Paper No. 104, http://www.fish.wa.gov.au/Documents/management_papers/fmp104.pdf, p. 24, and Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2016, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/AUS/Australia_TerritorialSeaBaseline2016.pdf, p. 19. For India's straight baselines around the Lakshadweep Islands and its incomplete baselines around the western side of the Andaman and Nicobar Islands, see Ministry of External Affairs, Notification, New Delhi, May 11, 2009, in *The Gazette of India*: Extraordinary, Part II, Sec. 3(ii), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/ind_mzn7x_2009.pdf, pp. 12-14, and "India: Straight Baseline Claim," in U.S. Department of Defense Representative for Oceans Policy Affairs, *Maritime Claims Reference Manual*, https://www.jag.navy.mil/organization/documents/mcrm/IndiaChart.pdf.

Table 5.3 Select States that Claim EEZs, Continental Shelves, or Similar Zones from Small, Remote, and Uninhabited or Sparsely Populated Islands[76]

Argentina (Islas Aurora [Shag Rocks] and Black Rock, South Sandwich Islands[77])
Australia (Heard Island and McDonald Islands)
Brazil (Rocas Atoll, Trindade and Martim Vaz, Saint Peter and Saint Paul Archipelago)
Chile (Desventuradas Islands)
France (Clipperton Island and Tromelin Island)
Japan (Okinotorishima and Minamitorishima)
Norway (Jan Mayen and Bouvet Island)
United Kingdom (Peros Banhos, Saloman Islands, and Egmont Islands in the Chagos Archipelago; South Sandwich Islands)[78]

[76] Some of the sources for this table include Yann-huei Song, "Will Others Respect Precedent Set in the Philippines' Case?" CSIS Asia Maritime Transparency Initiative, March 24, 2016, https://amti.csis.org/will-others-respect-precedent-set-philippines-case/ (accessed August 17, 2020), and Chinese Society of International Law 2018, paras 686–694. I also conducted additional independent research in primary sources, including government documents and charts, UN deposits, and CLCS submissions, especially regarding the claims of Argentina, Australia, Brazil, Chile, Japan, and the United Kingdom. (Sources cited in dataset.) This list should not be considered exhaustive.

As described in chapter 4, there is little international agreement about precisely what standards islands must meet to satisfy the conditions of eligibility for an EEZ and continental shelf according to UNCLOS Article 121(3). This list thus should not be interpreted as a list of "rocks" as per Article 121(3). Rather, for the purposes of this list, I have included islands that have no permanent population or are only populated by government and military personnel and researchers, from which governments have made *explicit* claims to EEZs (or similar 200 nm maritime zones) or continental shelves. This list also does *not* include uninhabited or sparsely populated islands that form part of archipelagoes that are enclosed in straight baselines that serve as the basis for an EEZ claim.

In addition, most of these islands are less than 5 square kilometers in land surface area. Above that threshold, Wake Island and Trindade are between 5 to 10 sq km in surface area. All islands in this list larger than 10 sq km are uninhabited subantarctic or Arctic islands. In the subantarctic region, Bouvet Island and seven of the South Sandwich Islands are 10 to 50 sq km in size, Montagu Island (the largest of the South Sandwich Islands) is 110 sq km in size, and Heard Island is 368 sq km in area. In the Arctic Ocean, Jan Mayen has a surface area of 373 sq km.

[77] Argentina considers Islas Auroras and Black Rock to be part of the South Georgia Islands. The South Georgia and South Sandwich Islands are located in the South Atlantic Ocean east of the Islas Malvinas/Falkland Islands and are disputed by the United Kingdom and under UK control. Argentina claims an EEZ and extended continental shelf from these islands, including the tiny Islas Auroras/Shag Rocks and Black Rock. The UK claims an EEZ and extended continental shelf from the main South Georgia Island and the South Sandwich Islands, but not from Shag Rocks and Black Rock. See the following note.

[78] In 2003 the United Kingdom claimed an "Environment (Protection and Preservation) Zone," followed by a marine protection area in 2010, extending approximately 200 nm around the islands of the Chagos Archipelago, which it claims as part of British Indian Ocean Territory. (For purposes of evaluating coastal state jurisdiction, this claim is functionally equivalent to an EEZ, as states may not unilaterally declare environmental protection zones that extend beyond UNCLOS-based jurisdictional limits.) The Chagos Archipelago includes Diego Garcia as well as the Peros Banhos, Saloman Islands, and Egmont Islands (and other smaller reefs and atolls). The latter three islands are small islands that are today uninhabited (due in part to forced resettlement by the British).

Mauritius, an archipelagic state, also claims sovereignty and an EEZ around these islands. The conflict between the British marine protected area and the Mauritian EEZ was the subject of an international arbitration case concluded in 2019, wherein the tribunal ruled the marine protected area illegal under UNCLOS. As an archipelagic

United States (Johnston Atoll, Wake Island, Jarvis Island, Howland Island, Baker Island, Kingman Reef)
Venezuela (Aves Island)

Table 5.4 States (47) with Straight Baselines (including Archipelagic Baselines or Bay Closing Lines) that Exceed U.S. Standards[79]

Albania	Djibouti	Libya	Portugal
Argentina	Dominican Republic	Lithuania	Russia
Australia	Ecuador	Maldives	South Korea
Bangladesh	Egypt	Malta	Sri Lanka
Cambodia	Gabon	Mauritania	Sudan
Cameroon	Guinea-Bissau	Mexico	Taiwan
Canada	Haiti	Myanmar	Thailand
China	Honduras	Nicaragua	Tunisia
Colombia	Iran	North Korea	Uruguay
Costa Rica	Italy	Oman	Venezuela
Cuba	Japan	Pakistan	Vietnam
Denmark	Kenya	Peru	

state under Part IV of UNCLOS, Mauritius has declared archipelagic baselines around the Chagos Archipelago and claims an EEZ on the basis of those archipelagic baselines

The United Kingdom declared a 200 nm maritime zone around South Georgia Island and the South Sandwich Islands in 1993 and made a submission to the CLCS regarding an extended continental shelf from the islands in 2009. South Georgia Island is larger and sustains a meager population, while the South Sandwich Islands are uninhabited. Argentina also claims sovereignty over South Georgia and the South Sandwich Islands and has also claimed an EEZ and extended continental shelf around these islands. See additional details in the preceding note.

[79] These are unilateral U.S. standards, not necessarily widely accepted or shared by other states. See chapter 4 for a discussion of the issue of straight baselines, including the Sydney Conclusions on Baselines under the International Law of the Sea adopted by the International Law Association in 2018.

Table 5.5 States (46) that Require Foreign Warships to Provide Notification (15) or Receive Permission (31) before Passing through the Territorial Sea

State	Notification	Permission
Albania		x
Algeria		x
Antigua & Barbuda		x
Argentina	x	
Bangladesh		x
Barbados		x
Cape Verde		x
China		x
Colombia		x
Croatia	x	
Denmark	x	
Ecuador		x
Egypt		x
Estonia	x	
Finland	x	
Guyana	x	
India	x	
Indonesia	x	
Iran		x
Latvia	x	
Libya	x	
Lithuania		x
Maldives		x
Malta		x
Mauritius	x	
Montenegro	x	
Myanmar		x
North Korea		x
Oman		x
Pakistan		x

Peru		x
Romania		x
Seychelles		x
Sierra Leone		x
Slovenia		x
Somalia		x
South Korea	x	
Sri Lanka		x
St. Vincent and the Grenadines		x
Sudan		x
Syria		x
Taiwan	x	
United Arab Emirates		x
Vanuatu		x
Vietnam	x	
Yemen		x

Table 5.6 States (17) that Claim Security Jurisdiction in the Contiguous Zone[80]

Bangladesh	India	Sudan
Cambodia	Iran	Syria
China	Myanmar	United Arab Emirates
Colombia	Pakistan	Venezuela
Egypt	Saudi Arabia	Yemen
Haiti	Sri Lanka	

[80] This includes states that explicitly claim "security" jurisdiction in their domestic laws or decrees on the contiguous zone. It does not include states that claim jurisdiction over military activities in the EEZ (of which the contiguous zone could be said to be a part) unless they also explicitly claim security jurisdiction in the contiguous zone.

In addition to these seventeen states, as noted in the next note, Guyana also claims a form of security jurisdiction in the continental shelf. Since the continental shelf extends a minimum of 200 nm from shore, this claim arguably technically includes the contiguous zone. Guyana's claim to security jurisdiction in the continental shelf appears to be especially directed toward artificial installations on the continental shelf.

Table 5.7 States (18) with Restrictions on Foreign Military Exercises in the EEZ[81]

State	Prior Notification	Prior Permission	Prohibition (or 200 nm TS)
Bangladesh	x		
Benin			x (200 nm TS)
Brazil	x		
Cape Verde	x		
Ecuador		x	
India		x	
Iran			x
Kenya	[x][82]		
Malaysia		x	
Maldives		x[83]	
North Korea			x
Pakistan		x	

[81] In addition to these 18 states, several other states have legislation that claims the authority to regulate the navigation or activities of foreign vessels in the EEZ and/or continental shelf in general or vague terms or claims security jurisdiction in those zones.

- For example, in Articles 23 and 30 of its Maritime Zones Act of 2010, **Guyana** claims the right to establish "fairways, sea lanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of Guyana" in the continental shelf and EEZ. Article 25(1) of this law also claims security jurisdiction over the continental shelf. Available in *Law of the Sea Bulletin* No. 74 (United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, New York, 2011), https://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin74e.pdf, pp. 32-62.
- Also, **Myanmar**'s 2017 Territorial Sea and Maritime Zones Law states that one of the purposes of the law is to provide for "security, rule of law and tranquility for the interests" of Myanmar in the territorial sea, contiguous zone, EEZ, and continental shelf alike. Available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/Myanmar_MZL_2017.pdf.
- Another example can be found in **Sierra Leone**'s 1996 Maritime Zones Decree, which states that other states may exercise the freedom of navigation and overflight "subject to the laws of Sierra Leone." Available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SLE_1996_Decree.pdf.

[82] Kenya's 1989 Maritime Zones Act includes a provision claiming the authority to implement regulations "providing for the passage of warships or other military vessels through the exclusive economic zone and the conduct of any military maneuvers therein." It is unclear what precise regulations, if any, Kenya has adopted to this effect. Available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN_1989_Maritime.pdf.

[83] The Maritime Zones of Maldives Act. No. 6/96 states, "No foreign vessel shall enter the exclusive economic zone of Maldives except with prior authorization from the Government of Maldives in accordance with the laws of Maldives." Available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MDV_1996_Act.pdf. Thus, the Maldives technically requires not only warships but also any foreign vessel to receive prior permission before entering its EEZ, much less before conducting military exercises.

Peru			x (200 nm TS)
Portugal			x[84]
Thailand		x	
Uruguay		x	
Venezuela		x	
Vietnam			[x][85]

[84] Article 3 of Portugal's 1977 act on the territorial sea and EEZ, still in effect, states, "Establishment of the exclusive economic zone shall take into account the rules of international law, namely those concerning innocent passage and overflight." Available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PRT_1977_Act.pdf. The regime of innocent passage ordinarily excludes military exercises or surveillance.

[85] Article 37 of the 2012 Law of the Sea of Vietnam stipulates, "When exercising the freedoms of navigation and overflight in the exclusive economic zone and on the continental shelf of Vietnam, organizations or individuals are not permitted to… [c]onduct any act threatening the sovereignty, defense and security of Vietnam." See English translation of the law at https://vietnamlawmagazine.vn/the-2012-law-of-the-sea-of-vietnam-4904.html.

This provision could be interpreted to imply a restriction on foreign military activities in the EEZ. At a minimum, it claims a form of defense and security jurisdiction in the zone that surpasses what is explicitly prescribed in UNCLOS. The term "defense" appears only twice in UNCLOS, both times in Article 19 on innocent passage in the territorial sea (where it is coupled with "security"), and state "sovereignty" is limited to the territorial sea and archipelagic waters.

Table 5.8 States (32) with Restrictions on Nuclear-Powered Vessels, Nuclear Weapons, and/or Hazardous Wastes

	In the Territorial Sea			In the EEZ		
State	**Notification**	**Permission**	**Prohibition**	**Notification**	**Permission**	**Prohibition**
Argentina	x					
Bangladesh	x					
Colombia		x				
Croatia	x					
Djibouti	x					
Dominican Republic			x			
Ecuador		x			x	
Egypt		x			x	
Estonia		x				
Guinea			x			
Guyana	x					
Haiti			x			x
India				x		
Iran		x				
Italy	x					
Japan			x			
Latvia		x				
Malaysia		x				
Maldives		x				
Malta		x				
Mexico			x			
Montenegro		x				
Oman		x				
Pakistan	x					
Romania			x			
Samoa		x				
Saudi Arabia		x				
Seychelles		x				
Syria		x				
Taiwan	x					
UAE	x					
Yemen	x					

Chapter 6: China and the Law of the Sea

In the past four decades since the conclusion of the Third United Nations Conference on the Law of the Sea (UNCLOS III), China's interpretations of the law of the sea have been characterized by competing impulses. During UNCLOS III and beyond, China has perceived a range of threats to its security, sovereignty, and "maritime rights and interests" (*haiyang quanyi*, 海洋权益) in the seas near its coasts. These threats include jockeying by neighboring states in disputes in the South China Sea and East China Sea over island territories, marine resources, and maritime jurisdictional boundaries, as well as frequent reconnaissance, surveillance, and operations by the United States military near China's coasts.

At the same time, the decades since UNCLOS III—which coincided with the start of China's economic opening and legal reforms—have also witnessed dramatic growth in China's own maritime power and capacity in a wide range of military, technological, economic, and political-legal areas. The size and sophistication of China's naval forces and maritime law enforcement fleet have increased exponentially, as has its technological capacity to conduct maritime scientific research and offshore oil and gas exploration and extraction. China's far-seas fishing fleets, which were largely nonexistent at the time of UNCLOS III, have grown to be the largest in the world, while the near-seas activities of Chinese fishing vessels have also burgeoned. Meanwhile, China's now complex domestic legal and administrative regime for governing maritime space has been created almost from scratch and its investment and engagement in international legal institutions and organizations related to the law of the sea has expanded dramatically. After 40 years of fundamental transformation in China's enforcement,

technological, and legal capacity, China is now indisputably one of the world's foremost maritime powers.

China's dramatic maritime transformation has had important and complex implications for Chinese government views of legal norms at sea. China's original preference for a maritime order characterized by expansive coastal state jurisdiction—albeit fairly typical and in some ways even moderate relative to its developing nation peers—has not thus far shifted significantly in the way that America's did in the interwar period or the Soviet Union's did in the periods of détente and perestroika. Simple legislative inertia is not enough to explain this continuity, as China's maritime laws and regulations have undergone multiple rounds of revision since the early 1980s. Rather, I argue that China's threat perception in its near seas, shaped by its concurrent desire for legitimacy among the international community, have led Beijing to shore up its commitment to expansive jurisdiction at sea even as its distant naval operations and maritime activities in other states' maritime zones have proliferated. In particular, China's expansive interpretations of the maritime entitlements of islands and of its historic rights in the South China Sea, coupled with its growing enforcement and extraction capacity, have come at the expense of the jurisdiction of neighboring states in their own coastal waters, damaging China's international legitimacy, as will be explained in chapters 8 and 9.

At the same time, there are important exceptions to this picture, especially in China's changing approach to foreign military activities in the exclusive economic zone (EEZ) and transit passage in straits, as will be explained in chapter 7. As China's warships and marine scientific research vessels have begun operating more in waters adjacent to other states' coasts, Beijing's official interpretations of international law on these topics have evolved in subtle ways. Examining how China has accounted for the inconsistency of its new behavior with its past

interpretations and the discrepancy between its attitudes toward its own waters and its behavior in other states' waters provides insight into how states change their interpretations of the law of the sea around the margins to accommodate their changing interests, even amidst overall stickiness due to their desire to be deemed legitimate within important reference groups.

Overview of the China Case Study Chapters

To illustrate these arguments, I conduct a close examination of China's interpretations of the law of the sea over time, divided across four chapters. This chapter provides an overview of how the relationship of the People's Republic of China (PRC) to the law of the sea has evolved over time, describing how both its geopolitical interests and its search for legitimacy within the international community have shaped that relationship. The chapter begins with a review of the literature on the PRC's relationship with the law of the sea. It then provides an historical overview of China's relationship to the law of the sea from its founding through to the present.

In the first section of the chapter, I describe how China's maritime threat perceptions shaped Beijing's basic orientation toward maritime jurisdiction and the law of the sea in the first two decades after China's founding. In the second section, I describe how China's efforts to obtain international legitimacy shaped its engagement in negotiations during the pivotal decade of the 1970s, bookended by the PRC's admission to the United Nations and the beginning of its reform and opening process. This section breaks the most new ground relative to previous literature, as I provide a detailed and systemic analysis of China's evolving engagement in the broader maritime order at the Third United Nations Conference on the Law of the Sea. In the third section, I discuss the Chinese government's attitudes toward the law of the sea during the debates over ratification of the United Nations Convention on the Law of the Sea (UNCLOS) and the subsequent systematic construction of Chinese maritime power in the twenty-first

century. This section illustrates the complex ways China's evolving geopolitical interests, including both its maritime threat perceptions and its growing overseas and far-seas interests, have interacted with its efforts to burnish its legitimacy in the international community.

Then, in chapters 7, 8, and 9, I conduct in-depth analysis of how China's interpretations of four key areas of the law of the sea have evolved over time since the critical juncture of UNCLOS III: (1) innocent passage and transit passage for foreign warships and (2) foreign military activities and marine scientific research in the exclusive economic zone (both addressed in chapter 7); (3) the regime of islands and unity of outlying offshore archipelagoes (chapter 8); (4) historic bays, historic waters, and other historic rights at sea (chapter 9).[1] In each of these areas, I conduct careful discourse analysis and process tracing of how the Chinese government's official interpretations of the law of the sea have stayed the same or evolved in ways subtle or significant. I situate my descriptive analysis in the context of the theory articulated in chapter 2 about mechanisms of continuity and patterns of change in states' interpretations of the law of the sea. These chapters illustrate how China's interpretations have been constrained by its efforts to legitimate itself to the international community, especially those within its evolving reference group. At the same time, they demonstrate that China's evolving material and security interests have stimulated gradual evolution in Beijing's interpretations in key issues areas through

[1] See chapter 4 for an introduction to the controversy surrounding each of these concepts and norms and a discussion of the range in attitudes globally on these issues. As noted in chapter 4, there are of course innumerable other controversial and ambiguous elements of the law of the sea, some of which are highly relevant in China's case, including the extent and nature of compulsory dispute settlement procedures under UNCLOS and the appropriate method for delimiting maritime boundaries in areas of overlapping maritime entitlements. However, the former has less to do with attitudes toward the extent of coastal state jurisdiction over the oceans and more to do with attitudes toward international arbitration; hence, it lies largely outside the scope of my study. As for the latter, although I touch briefly upon China's attitudes on maritime delimitation in explaining the delay in its ratification of UNCLOS and will address it briefly in chapter 9 in discussing the dotted line in the South China Sea, the broader issue is not a focus of this project.

processes of layering, drift, and displacement. These changes have at times created legitimacy gaps that Beijing has sought to fill through various legal, political, and security arguments.

Summary of Sources

This chapter draws upon a combination of secondary literature and primary sources, including memoirs and published interviews of three deputy heads of China's delegation to UNCLOS III, China's working papers submitted and statements made at the Seabed Committee and UNCLOS III,[2] legislation, speeches, and statements issued by PRC officials and institutions; articles and analyses of trends in *Renmin Ribao* (People's Daily), the official daily newspaper of the Central Committee of the Chinese Communist Party (CCP); and articles from the 1970s in *Peking Review*, an English-language weekly magazine produced by the CCP as a primary means of public communication with international audiences.

In chapters 7 through 9, in order to establish a baseline for China's initial interpretations of the law of the sea during and at the conclusion of the critical juncture of UNCLOS III, I draw from the same primary sources noted above (working papers and statements at UNCLOS III, as well as memoirs by and published interviews with three deputy heads of China's delegation). For the evolution in China's interpretation since UNCLOS III, my discourse analysis draws upon Chinese domestic legislation, *notes verbale* and letters submitted to the United Nations Secretary General, major formal speeches by senior PRC leaders, and statements and briefings by officials and spokespersons of the Ministry of Foreign Affairs (the agency tasked with coordinating and

[2] Specifically, I read, analyzed, and compiled the official summary records of all statements made by Chinese representatives at UNCLOS III in all Plenary meetings and Second and Third Committee meetings from the First Session in 1973 through to the final meeting of the Eleventh Session in 1982, as listed in Office of the Special Representative of the Secretary-General for the Law of the Sea, United Nations 1985. The summary records themselves are accessible at https://legal.un.org/diplomaticconferences/1973_los; I will cite them below by their official UN record numbers. I can also make my compilation of Chinese statements available upon request.

promulgating China's formal interpretations of the law of the sea[3]). On issues related to People's Liberation Army (PLA) activities at sea, I also analyze statements issued by the Ministry of National Defense.

The analysis in this chapter and the following three chapters is also informed by 45 interviews with Chinese legal experts and political scholars in universities and government research institutes attached to the State Council, Foreign Ministry, Ministry of State Security, and State Oceanic Administration/Ministry of Natural Resources. My interviewees included former Foreign Ministry officials and PLA officers/Ministry of National Defense officials, as well as experts who regularly advise and consult with policymakers responsible for determining China's stance on maritime legal affairs, including one individual who was involved in drafting China's 1958 territorial sea declaration and one of the earliest Chinese textbooks on the law of the sea in the 1980s. Most of these interviews were conducted in Beijing, Nanjing, and Hainan in summer 2019, while some were conducted during a previous research trip in China in summer 2015. Most Chinese interviewees spoke with me on background, while several were on the record and a few were off the record. These interviews oriented me within my research subject, alerted me to relevant literature and primary sources, and directed me to new avenues of research and analysis. I also cite some of those interviews that were on background or on the record on specific issues in these chapters.[4]

China's Maritime Context and Relationship to the Law of the Sea

[3] Interview 6.2 with Chinese scholar of law of the sea issues, July 2, 2019, Beijing, China.

[4] My conclusions in these chapters are also informed by dozens of additional interviews I conducted on law of the sea matters in the United States, Japan, Chile, Peru, and India between 2015 and 2019 (see List of Research Interviews in the Bibliography), and by conversations I had with Chinese experts during track II dialogues I participated in from 2011-2015 through my work as a research analyst at the Carnegie Endowment for International Peace.

The following historical narrative of China's relationship to the law of the sea is divided into three overarching periods: (1) Founding through Cultural Revolution; (2) Entry into UN through Ratification of UNCLOS; and (3) Post-UNCLOS III Debates over Ratification and Twenty-First Century Growth in Maritime Power. Chinese interpretations of the law of the sea in these periods were driven by its persistent maritime threat perceptions, coupled with its growing interests in maritime access and operations in distant waters. At the same time, China's desire to burnish its image as a legitimate participant in the international legal order, particularly in the eyes of key reference groups of states whose approval Beijing prioritizes, has constrained the degree of evolution in China's interpretations of the law of the sea over time.

Founding Through Cultural Revolution

During the first two decades of the existence of the People's Republic of China, Beijing's fundamental attitude toward maritime jurisdiction and the law of the sea was forged in the crucible of its efforts to consolidate its territorial control and bolster China's security against foreign intervention. In the 1930s and again in the late 1940s after World War II, the Nationalist Party leadership of the Republic of China (ROC) had engaged in efforts to shore up China's claim to maritime jurisdiction after periods of colonial domination and Chinese weakness. This included a survey, listing, and map of the land features in the South China Sea issued in 1947 and publicized in 1948, which included a dotted line encompassing much of the South China Sea. This map named and identified four archipelagoes (*qundao,* 群岛) in the South China Sea—Nansha Qundao (the Spratly Islands), Xisha Qundao (the Paracel Islands), Dongsha Qundao (the Pratas Islands), and Zhongsha Qundao. The lattermost of these "archipelagoes" was in fact not a group of islands but merely a collection of fully submerged seamounts and shoals (including Macclesfield Bank, a large sunken atoll), plus the above-water Scarborough Shoal (Huangyan

Dao). This map also identified the southernmost Chinese feature as Zengmu Ansha (James Shoal), a fully submerged shoal close to the island of Borneo. As Bill Hayton explains, the application of the "qundao" label to the Zhongsha features and the identification of James Shoal as a form of territory may have resulted from confusion over the nature of the features and map labeling methods in the 1930s and '40s.[5]

During this same time period, Communist Party forces were engaged in a civil war with the Nationalists that had begun in the late 1920s, paused in 1937 as both sides united to fight Japan, and then resumed and escalated after World War II. Communist forces eventually gained the upper hand, defeating Chiang Kai-shek's Nationalist regime, which fled to the island of Taiwan, and establishing the People's Republic of China in 1949. Over the next decade, PRC leadership prioritized the goal of asserting the status of the PRC as the sole legitimate government of China, even while striving to finish the civil war they had started and consolidate control over Taiwan and nearby islands. As Peter Dutton argues, Beijing's naval weakness made this latter task nearly impossible, especially after the United States became involved in supporting Chiang Kai-shek's defense. During this time, China had a largely arms-length relationship to international institutions, including negotiations over the international law of the sea taking place in the UN, as the Republic of China on Taiwan still held China's UN seat. Despite their exclusion from the UN, however, PRC officials, including Zhou Enlai, followed developments in the rapidly changing maritime regime, including the First United Nations Conference on the Law of the Sea held in Geneva in 1958, which produced four conventions on different aspects of the law of the sea, but left many key issues unresolved, including the crucial questions of the breadth of the territorial sea and the methods for drawing straight baselines.

[5] Hayton 2019. See also Tai and Tsai 2014; 郑志华 (Zheng Zhihua) and 吴静楠 (Wu Jingnan) 2020.

It was in that same year that China issued its Declaration on the Territorial Sea, which asserted a territorial sea extending 12 nautical miles (nm) from straight baselines, baselines that themselves remained unspecified in terms of charts and coordinates.[6] Dutton explains how this decision was intended by Chinese leadership to force U.S. naval vessels to cease their efforts to aid Republic of China forces in breaking the PRC's blockade against Quemoy (Jinmen) during the 1958 Taiwan Strait Crisis—or to at least delegitimize those efforts. In addition, he also highlights how China used the declaration to underscore its sovereignty over Taiwan and nearby islands (the declaration includes a statement to this effect), and explains that the declaration was informed by China's awareness of the growing number of countries who had declared 12 nm territorial seas, and their advocacy for that position at the First United Nations Conference on the Law of the Sea.[7] This represents how China's foundational interpretations of the law of the sea emerged from its efforts to protect itself against maritime threats by deterring the United States from intervening in the conflict over Taiwan and implementing a wider security buffer for itself, as well as its efforts to gain broader international legitimacy as the sovereign of Taiwan.

In addition to its territorial sea declaration, the PRC also issued various other regulations on maritime traffic safety and fisheries in the first decade and-a-half of its existence.[8] Perhaps most notable of these is its 1964 Rules for the Control of Non-Military Vessels of Foreign Nationality Passing through the Qiongzhou Strait.[9] Then, however, the PRC's domestic legal regime, including its nascent maritime legal order, was largely eviscerated during the political

[6] "Declaration of the Government of the People's Republic of China on China's Territorial Sea," Beijing, September 4, 1958, available as Enclosure 1 in UN General Assembly Document A/72/552 (English), available at https://digitallibrary.un.org/record/1326671. The provisions of this law will be described in further detail in chapter 7.

[7] Dutton 2019, 160–88.

[8] Zou 2005.

[9] Available at http://xxgk.mot.gov.cn/jigou/fgs/201807/t20180727_3051183.html. These rules are analyzed in further detail in chapter 7.

upheavals of the Cultural Revolution starting in 1966, as formal legal institutions were dismantled and legal experts were exiled or killed.[10] During this period, China's foreign policy also took on a highly revolutionary character, as Beijing disbanded its diplomatic corps and doubled down on efforts to support communist insurgencies in the developing world.

China Negotiates the New Maritime Order

Over the coming decade, a number of developments unfolded that would fundamentally transform China's relationship to the law of the sea: (1) the explosion of maritime disputes in the East and South China seas; (2) China's entry into the United Nations and participation in the Third United Nations Conference on the Law of the Sea in the waning years of the Cultural Revolution; and (3) China's shift away from revolutionary foreign policy at the start of reform and opening in the latter years of UNCLOS III.

Explosion of Maritime Disputes in the East and South China Seas

First, starting around 1970, disputes between China and its neighbors over small islands and reefs in the East and South China Seas, as well as jurisdiction and ownerships over the maritime space and resources in those seas, began to emerge as flashpoints of contention in the region. This ferment in turn was a microcosm of the growing global upheaval in the maritime regime, as growing awareness of offshore hydrocarbon and mineral resources and exacerbating depletion of fisheries led to proliferating sovereign claims over wider expanses of ocean space. In the East China Sea, a United Nations survey of hydrocarbon resources in the seabed conducted in 1968 heightened states' awareness of the economic potential of that area.[11] The

[10] Zou 2005; Lubman 2000; Lubman 1999.
[11] Emmers 2013, 40–41.

Republic of China on Taiwan staked a claim to sovereignty over a group of small uninhabited islands northeast of Taiwan and north of the southernmost islands of Okinawa (known in Chinese as Diaoyu and in Japanese as Senkaku) and the oil resources in their surrounding seabed in 1969. This prompted a counter-claim of sovereignty over the islands from Japan in 1970, and a formal assertion of sovereignty from the PRC government in 1971. The reversion of Okinawa to Japan from U.S. military control in 1971 further complicated the sovereignty dispute over the islands.[12] Then, in 1974, China objected to an agreement between Japan and South Korea to jointly develop hydrocarbons in the East China Sea on the grounds that the development zone was situated on China's continental shelf.[13]

At the same time, disputes in the South China Sea began to flare up in the 1970s, also provoked in part by a growing awareness of the potential hydrocarbon resources present in the area. Since customary international law and the 1958 Geneva Conventions indicated that ownership of seabed resources depended on sovereignty over land features, states surrounding the South China Sea felt a particular urgency to assert their sovereignty to the sea's many largely uninhabited islands. In the Spratly Islands (known as Nansha Qundao in Chinese) in the southern reaches of the South China Sea, the largest island, Itu Aba (or Taiping Island), had been continuously occupied by Republic of China forces since 1956, the only island in the Spratlys to be so occupied. But in 1970-71 the Philippines moved into five smaller islands and reefs, followed by Vietnam occupying six islands in 1973, as each country sought to bolster their recent claims to seabed resources in the surrounding areas. The Philippines and Vietnam

[12] Fravel 2008, 276.

[13] Miyoshi 1999, vol. 2, 45; Gao 2009a, n. 8; Hong and Van Dyke 2009, 56–57.

occupied several more features in the 1980s, when Malaysia also staked a claim to twelve features in the southern Spratlys and occupied several of them.

The PRC government objected to these occupations, eventually establishing its own presence in the Spratlys with occupations of six features in 1988 and another in 1994.[14] At the same time, it modified its rhetorical and legal positioning in the disputes. Li Lingqun observes a distinct shift around the time the PRC began participating in UNCLOS III (see more below), when the Chinese government went from asserting sovereignty over the South China Sea islands to claiming sovereignty and jurisdiction over the islands *and* their "adjacent waters." This shift reflected an awareness on China's part of the need to stake a more explicit claim to the waters surrounding those islands in order to secure its access to the resources therein under evolving international law.[15]

Finally, in contrast to the disputes over the Diaoyu/Senkaku Islands, which remained below the level of armed conflict, the disputes in the South China Sea entailed the use of force and loss of life. A clash broke out between China and Vietnam in 1974 over control of the Paracel Islands (known as Xisha Qundao in Chinese) in the more northerly part of the South China Sea. The PRC had occupied Woody Island in the northeastern Paracels since 1950, while French and then South Vietnamese forces had controlled Pattle Island in the southwestern Paracels, with control over other islands in the Paracels fluctuating throughout the 1950s, 1960s, and early 1970s. But as Vietnam began expanding its presence and staking claims to resources in the South China Sea in the early 1970s, China responded by increasing its own tempo of operations in the Paracels, culminating in a naval battle that resulted in 18 Chinese and 18

[14] Fravel 2008, chap. 6.
[15] Li 2018, 55–57; Lo 1989.

Vietnamese sailors killed, with dozens more wounded and missing. Then, in 1988, another series of skirmishes broke out in the southwestern Spratlys when Vietnamese forces opposed China's occupation of previously unoccupied features in the vicinity, culminating in a violent battle wherein PLA Navy forces sunk three Vietnamese ships and killed 74 Vietnamese sailors.[16]

China Joins the United Nations: PRC Participation in UNCLOS III, 1971-1978

The second transformative development in China's relationship to the law of the sea began when the People's Republic of China was recognized in the United Nations in place of Chiang Kai-shek's government-in-exile in October 1971. Beijing's first major experience with multilateral negotiation in the UN system was in 1972 as a member of the UN Seabed Committee, which was functioning as a preparatory commission for a Third UN Conference on the Law of the Sea.[17] Beijing participated actively in Seabed Committee negotiations, submitting three working papers in 1973—one on the territorial sea, exclusive economic zone, and continental shelf, another on marine scientific research (MSR), and another on the resources of the seabed beyond national jurisdiction. These working papers were largely based on preexisting proposals from Latin American states and other developing nations,[18] but they nonetheless themselves became the basis for important debates in the negotiations and in some cases for draft articles in the conference's negotiating texts.[19] When UNCLOS III convened in late 1973, China

[16] Fravel 2008, chap. 6.

[17] One of the deputy heads of China's delegation to the law of the sea, Xu Guangjian, explained in a 2012 interview that a member of the State Council established and led a central-level leading small group (*lingdao xiaozu*, 领导小组) for the negotiations, which in turn oversaw a delegation composed of representatives from the Ministry of Foreign Affairs, National Geological Administration, State Oceanic Administration, PLA Navy, Ministry of Transport, and other units. See 山旭 (Shan Xu) 2012.

[18] Kardon 2017, 93–94.

[19] Nordquist 1985.

continued to engage as an active and vocal participant, positioning itself first and foremost as a staunch ally of the "Third World" as represented by the G-77 group of developing nations.[20]

China engaged in these efforts as part an effort to bolster its legitimacy among the specific social reference group of the Third World, at a time when its relations with both of the major superpowers remained frosty at best. During the first few chaotic years of the Cultural Revolution, China's diplomatic corps had been decimated as it recalled its ambassadors from postings around the world. As Beijing began redeploying those ambassadors in 1969-70, it launched a campaign to gain diplomatic recognition from countries around the world in lieu of Chiang Kai-shek's regime and to woo China's seat in the UN away from the Republic of China.[21] As part of this effort, PRC leadership placed a high priority on winning Latin American support. Prior to 1970, the only country in the Western Hemisphere to recognize the PRC as the sole legitimate government of China had been Fidel Castro's Cuba in 1960.[22] With recognition by Chile in December 1970 and Peru a year later, followed closely by Mexico and Argentina in early 1972, China began making significant diplomatic inroads in this world region.[23] One of the major mechanisms by which China won support from Latin American nations was by supporting their stance on law of the sea issues, which were top diplomatic priorities for Chile and Peru in particular. As noted in chapter 3, Latin American countries were prime movers in the expansion

[20] Kim 1979, 447–49, 457.

[21] By the end of 1969, China only had formal diplomatic relations with 55 governments, all but two of which had recognized China prior to the start of the Cultural Revolution. In the single year between October 1970 and October 1971, when the United Nations General Assembly voted to recognize the PRC as the rightful holder of China's seat in the UN, China established, re-established, or elevated diplomatic relations with eighteen nations. See Ibid., 101–05, Appendix A.. By the end of 1979, China had diplomatic relations with 120 countries, including thirteen Latin American nations. See People's Republic of China, Ministry of Foreign Affairs, "The third wave of establishing diplomatic relations with other countries," n.d., https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18014.shtml.

[22] See Appendix A of Kim 1979.

[23] Canada also established diplomatic relations with the PRC in 1970.

of coastal states' maritime jurisdiction out to 200 nm. Chile and Peru became the first countries to stake such a claim in 1947, which was followed with the trilateral Santiago Declaration together with Ecuador in 1952 affirming their rights to a 200 nm maritime zone.

Chinese diplomat Ling Qing, who was deputy head and de facto leader of the PRC's delegation to the Seabed Committee and early sessions of UNCLOS III, emphasizes the significance of Latin American countries' influence on the position China adopted on law of the sea issues in the 1970s.[24] He highlights two anecdotes to illustrate this dynamic. First, Ling notes that consistent guidance from party leadership affirmed support of Latin America's maritime claims. He refers to editorials published in *Renmin Ribao* both before and after PRC participation in the Seabed Committee that explicitly linked support for Latin America's claims to 200 nm maritime rights to the global struggle against great-power hegemony, which was China's main diplomatic line at the time. A search of *Renmin Ribao* articles from this period bears out Ling's recollection, with dozens of editorials in the early to mid-1970s affirming the maritime claims of Latin American countries as righteous fronts in the struggle against superpower imperialism.[25] In fact, aside from a 1955 article on Great Britain's strategy pre-World War I, the first *Renmin Ribao* article to use the term "maritime hegemony" (*haiyang baquan*, 海洋霸权)—which would become a major leitmotif in China's rhetoric in its first seven years of engagement in UN law of the sea negotiations—was a November 1970 editorial issued by Xinhua News Agency entitled, "Latin American countries are right!" This article affirmed the claims of Latin American states to 200 nm territorial waters against "U.S. aggression" and "social-imperialist plunder" (a reference to the Soviet Union), declaring:

[24] 凌青 (Ling Qing) 2008, chap. 7.

[25] I conducted this search on June 1, 2020, in the *Renmin Ribao* database published by Oriprobe Information Services that includes articles from 1946 through the present day.

> No matter what kind of conspiracy the American imperialists, in collusion with another superpower, continue to play, no matter what kind of pressure they exert, as long as the Latin American people dare to persevere in the struggle, the hegemonic conspiracy of the two hegemons to divide the ocean is destined to fail.[26]

The timing of this article was noteworthy in three respects. First, the article came three months after a landmark Latin American conference on law of the sea issues held in Lima, Peru, which was referenced in the opening sentence.[27] Second, it was published the same day that the UN General Assembly debated and voted on resolutions related to the PRC assuming China's seat in the UN. Although the effort did not succeed, the PRC received its greatest support yet, including favorable votes and speeches by Chile's delegation,[28] capturing the attention of Beijing and renewing its determination to lobby for the UN seat.[29] Third, the article was published just a few weeks prior to the PRC's normalization of relations with Chile.[30] This points to the strong connection between China's position on law of the sea issues and its effort to attract diplomatic support from Latin America and position itself as their ally.[31]

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[26] "拉美国家顶得对！" (*Lāměi guójiā dǐng dé duì*!) [Latin American Countries Are Right!], 人民日报 (*Renmin Ribao*), 5th ed., November 21, 1970, accessed in 人民日报图文数据库 (*Rénmín rìbào tú wén shùjùkù*) [People's Daily Graphic Database] (1946-2020), Oriprobe Information Services, Inc., excerpts trans. by the Author.

[27] Latin American Meeting on Aspects of the Law of the Sea: Declaration and Resolutions 1971; Verner 1981.

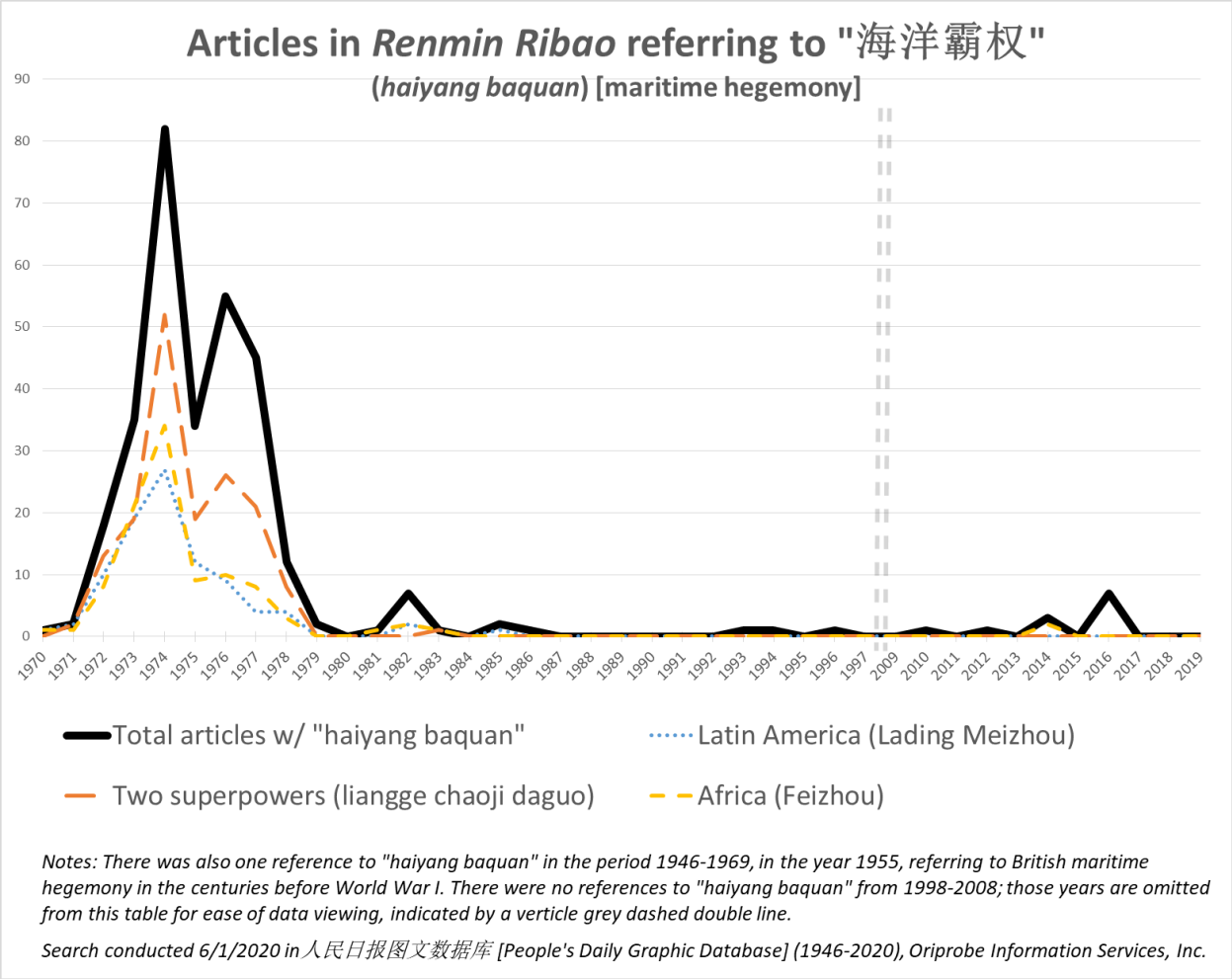
[28] See United Nations General Assembly Official Records, 1913th Plenary Meeting, November 20, 1970, New York, A/PV.1913, https://undocs.org/A/PV.1913, pp. 4-5, speech by Chilean UN delegation representative, Fernando Zegers. Zegers' remarks came shortly after Salvador Allende had assumed office as president of Chile. His position was not solely due to Allende's socialist politics, however; the previous month, Gabriel Valdés, Minister of Foreign Affairs of Chile under the previous president, Christian Democrat Eduardo Frei, had also delivered a speech in which he advocated that the PRC be admitted to the United Nations – though it is worth noting that Valdés delivered this speech after Allende had narrowly won a plurality in the election but while the results of the election were still being negotiated. See United Nations General Assembly Official Records, 1876th Plenary Meeting, October 21, 1970, New York, A/PV.1876, https://undocs.org/A/PV.1876, pp. 21-22.

[29] See Index to the Proceedings of the General Assembly, Twenty-fifth session – 1970, ST/LIB/SER.B/A.21, https://library.un.org/sites/library.un.org/files/itp/a25_0_0.pdf. See also Grant 2009, 164–66; Kim 1979, 102–104.

[30] "Joint Communique of Government of People's Republic of China and Government of Republic of Chile on Establishment of Diplomatic Relations Between China and Chile," in *Peking Review* 14 (2), January 8, 1971, p. 3, available at http://massline.org/PekingReview/PR1971/PR1971-02.pdf.

[31] Writing in his landmark study of China's behavior in the United Nations in the 1970s, Samuel Kim also remarked upon China's law of the sea positions by noting that "a close examination of the Chinese press shows a strong Latin American connection." Kim 1979, 449.

Figure 6.1 Articles in *Renmin Ribao* Referring to *haiyang baquan* (1970-1997, 2009-2019)



Notes: There was also one reference to "haiyang baquan" in the period 1946-1969, in the year 1955, referring to British maritime hegemony in the centuries before World War I. There were no references to "haiyang baquan" from 1998-2008; those years are omitted from this table for ease of data viewing, indicated by a verticle grey dashed double line.

Search conducted 6/1/2020 in 人民日报图文数据库 [People's Daily Graphic Database] (1946-2020), Oriprobe Information Services, Inc.

Over the coming years, references to "maritime hegemony" in *Renmin Ribao* exploded in frequency. The majority of these articles referenced Latin America, as well as Africa, where the newly decolonized coastal states largely followed Latin America's lead in claiming expansive maritime jurisdiction. (See Figure 6.1.) As in the first November 1970 editorial quoted above, these articles were designed to position China as an advocate of the Third World's maritime rights in opposition to the United States and Soviet Union, the world's two maritime hegemons. In fact, over half of the *Renmin Ribao* articles referring to maritime hegemony also include the phrase "the two superpowers" (*liangge chaoji daguo*, 两个超级大国), a term the Chinese

government used to articulate its identity in relation to the rest of the world, especially post-colonial and developing nations, by favorable contrast with the imperial powers headquartered in Washington and Moscow. (See Figure 6.1.)

Secondly, in addition to highlighting the way *Renmin Ribao* affirmed China's support for Latin American maritime claims, Ling Qing notes that China was very clear in expressing its position of support on this issue when establishing diplomatic relations with Latin American countries during this period. He recounts that during the process of drafting a joint communique for normalization of relations between China and an unnamed Latin American country, a Foreign Ministry leader instructed that a sentence affirming the country's 200 nm maritime claim be added to the document, noting "What they want is just this sentence."[32] Ling was evidently referring to China's communique with either Peru or Argentina, as each of them include a statement affirming those states' "sovereignty" (in the case of Peru) or "jurisdiction" (in the case of Argentina) "over the maritime zone adjacent to its coasts within the limit of 200 nautical miles." In each case, these sentences immediately precede or follow sentences wherein the Peruvian or Argentine government recognizes the PRC government as "the sole legal Government of China" and "takes note" of China's position that Taiwan is "an inalienable part" of PRC territory.[33] The prominent juxtaposition of these statements, with no other affirmations of

[32] The original Chinese is "人家要的就是这句话。" See 凌青 (Ling Qing) 2008, 165–66, excerpt trans. by the Author.

[33] See "Joint Communique on Establishment of Diplomatic Relations Between China and Peru," in *Peking Review* 14 (45), November 5, 1971, p. 3, available at http://massline.org/PekingReview/PR1971/PR1971-45.pdf; "Diplomatic Relations Established Between China and Argentina," *Peking Review* 15 (7–8), February 25, 1972, pp. 26–27, available at http://massline.org/PekingReview/PR1972/PR1972-07-08.pdf.

Other joint communiques during this period between China and Latin American governments, such as Chile, Mexico, Venezuela, and Brazil, do not include explicit references to the maritime claims of the latter. The Mexico statement instead includes a Chinese affirmation of support of Mexico's position on the establishment of a nuclear-weapons free zone in Latin America. See "Diplomatic Relations Established Between China and Mexico," *Peking Review* 15 (7–8), February 25, 1972, p. 26, available at http://massline.org/PekingReview/PR1972/PR1972-07-08.pdf; "Joint Communique of Government of People's Republic of China and Government of Republic of Chile on Establishment of Diplomatic Relations Between China and Chile."

unique Chinese, Peruvian, or Argentine priorities, connotes a quid pro quo, as Ling implies in his memoir.

Most tellingly, Ling writes that not only did he receive instructions to affirm the positions of Latin American countries, but that he also felt such a stance was *tianjing diyi*, 天经地义—a phrase meaning "a matter of course" or "right and proper," signifying a certain taken-for-grantedness to the position. Later, after a small developed country shared data with him illustrating that the 200 nm economic zone regime would disadvantage China relative to other countries, Ling raised this concern with other members of the delegation and was dismissed by colleagues who believed he had been "politically shaken" (*zhengzhi shang dongyao*, 政治上动摇). At the conclusion of the negotiations in 1982, after Ling was no longer on the delegation, he again raised his concerns about the EEZ, proposing that China make certain reservations about the EEZ. His concern once again failed to gain any traction, as "it was obviously impossible for China to turn suddenly (*turan zhuanxiang*, 突然转向) after more than a decade of unconditional and high-profile support [for the EEZ regime]. No leader could make such a decision."[34] This

However, the *Renmin Ribao* editorial heralding the establishment of relations with Venezuela does note, "Together with many other Latin American countries, Venezuela has worked and struggled persistently against the superpowers' maritime hegemonism and in defence of the 200-nautical-mile maritime rights and sea resources. The Chinese people deeply admire and firmly support this." Quoted in "China Establishes Diplomatic Relations with Venezuela," *Peking Review* 17 (27), July 5, 1974, p. 5, available at http://massline.org/PekingReview/PR1974/PR1974-27.pdf.

Likewise, the *Renmin Ribao* editorial announcing the establishment of relations with Brazil affirms, "We appreciate the just stand taken by Brazil with the majority of countries at a number of recent international conferences, and firmly support Brazil's efforts and struggle against superpower maritime hegemony and in defence of 200-mile maritime rights." Quoted in "China Establishes Diplomatic Relations with Brazil," *Peking Review* 17 (34), August 23, 1974, p. 4, http://massline.org/PekingReview/PR1974/PR1974-34.pdf. Similar references were included in *Renmin Ribao*'s editorials on the establishment of diplomatic relations with Suriname in 1976 and with Ecuador in 1980. See "China Establishes Diplomatic Relations with Surinam," *Peking Review* 19 (23), June 4, 1976, p. 6, http://massline.org/PekingReview/PR1976/PR1976-23.pdf; "Diplomatic Relations with Ecuador," *Beijing Review* 23 (1), January 7, 1980, pp. 4–5, available at http://massline.org/PekingReview/PR1980/PR1980-01.pdf.

[34] 凌青 (Ling Qing) 2008, chap. 7, excerpts trans. by the Author.

suggests that the PRC was constrained by the blow to its legitimacy that would result if it backed away from its previous support for the EEZ regime.

Another deputy head of China's delegation to UNCLOS III, Chen Degong, also confirmed that China's basic stance at the negotiations was one of solidarity with the developing world.[35] And indeed, such affirmations are present throughout the official record of the Chinese delegations speeches in the plenary and committee meetings at UNCLOS III.[36] Peter Dutton argues that these recollections of Chinese negotiators at UNCLOS III provide clear evidence of

[35] In a 2012 interview, Chen Degong stated, "We were firmly on the side of developing countries." ("我们坚决站在发展中国家一边。") 山旭 (Shan Xu) 2012.

[36] Vice Minister of Foreign Trade Chai Shufan made this clear from the start in the Chinese delegation's first major speech on substantive matters at UNCLOS III:

> The super-Powers were trying to exploit certain differences among the developing countries in order to control, dominate and plunder them. All developing countries, although they might differ on specific issues, must unite against hegemonist policies. The fundamental and vital interests of developing countries were closely linked, and unity would bring victory in the protracted and unremitting struggle. China was a developing socialist country belonging to the third world. Its Government would, as always, adhere to its just position of principle, resolutely stand together with the other developing countries and all countries that cherished independence and sovereignty and opposed hegemonist policies, and work together with them to establish a fair and reasonable law of the sea that would meet the requirements of the present era and safeguard the sovereignty and national economic interests of all countries. A/CONF.62/SR.25

This sentiment was echoed the following year by Bi Jilong at the 55th plenary meeting of UNCLOS III held on April 18, 1975, A/CONF.62/SR.55. Another emblematic example can be found in the records of the 76th plenary meeting on September 17, 1976, which summarize the speech of Ling Qing as follows:

> The basic contradiction of the present work on the law of the sea was that, while the third world countries wanted to safeguard their maritime rights and interests, the one or two super-Powers were not reconciled to the loss of their privileged position of monopolizing the seas. Quite clearly, it was the hegemonist position of the super-Powers that constituted the basic reason why the Conference failed to make due progress. … His delegation was confident that, so long as the developing countries continued to strengthen their unity, they would be able to advance the development of the Conference in the correct direction, so as to establish a new convention on the law of the sea that was fair and reasonable and genuinely in accord with the fundamental interests of the peoples of all countries. His delegation was ready to continue working towards that goal together with the numerous developing countries and the countries that respected the principle of equity. A/CONF.62/SR.76

At the final meeting of UNCLOS III in December 1982, just prior to signing the convention on behalf of the PRC, Vice Foreign Minister Han Xu delivered a speech that returned to these themes:

> The Chinese Government has always supported the third-world countries in their struggle against maritime hegemonism, stood for the formulation of a new convention on the law of the sea which ensures the legitimate rights of States, and actively participated in the work of drafting the Convention. … As a member of the third world, China will continue to make joint efforts with the other third-world countries and all peace-loving and justice-upholding countries in a persistent endeavour against any maritime hegemonist acts, in order to maintain world peace and international security and promote the progressive cause of mankind. A/CONF.62/SR.191

how "China considered geopolitics and its overarching security as its primary motivation as it helped shape and develop international law of the sea."[37] I concur with Dutton's assessment that China's strategic and security interests motivated its behavior in aligning so strongly with the developing world. However, his analysis understates the most compelling implication of Chinese strategy in this period: China was willing to subordinate some of its narrow material interests that would be expected under the standard geographical model (such as a privileging of the continental shelf regime over the exclusive economic zone, or non-exclusive rights in the EEZ), instead using rhetorical appeals to identity and ideology and relational quid-pro-quos to bolster its legitimacy within a particular social reference group in order to promote what it perceived to be its "overarching security." These relationships, to the Third World and the two superpowers alike, provided the constitutive structure within with China operated strategically.

An Expansion in China's Social Reference Group in an Era of Reform and Opening

The third transformative change in China's relationship to the law of the sea took place in the late 1970s as a result of a dramatic shift in China's domestic political environment and foreign policy outlook. After a power struggle following Mao Zedong's death in 1976, Deng Xiaoping consolidated control in late 1978 and ushered in an era of *gaige kaifang* (改革开放), or "reform and opening." This development coincided with China's establishment of diplomatic relations with the United States in January 1979 and its initial steps toward normalization of relations with the Soviet Union in 1979. As the PRC abandoned its past Maoist revolutionary stance toward the international order, its reference group expanded from beyond the Third World to include powers in the so-called first and second worlds. This critical juncture in China's

[37] Dutton 2019, 189–91.

domestic regime and international reference group also resulted in a marked shift in its rhetorical posturing and negotiating approach at UNCLOS III.

Prior to this time, nearly every speech made by Chinese delegates included tirades against maritime hegemonism and imperialism on the part of "the two superpowers,"[38] echoing the editorial stance of official CCP publications such as *Renmin Ribao* and *Peking Review*. Specifically, at the outset of the negotiations, China dismissed the concept of a "package deal" compromise as a trick of the two superpowers to win their way on warship passage with impunity in straits enclosed in states' territorial seas.[39] At the Eighth Session of UNCLOS III

[38] In all substantive sessions held from 1974 through 1978, Chinese delegates delivered speeches that condemned the efforts of one or both superpowers to seek hegemony at sea. For example, in the first substantive speech of the conference, Chai Shufan declared:

> The seas had long been the arena for the rivalries between colonial Powers, and the two super-Powers were now struggling for control of the seas by building up naval forces, establishing military bases, and plundering other countries' off-shore fishery and sea-bed resources. … A struggle against super-Power maritime hegemony was being waged across the world. That struggle was an important aspect of the efforts of developing countries to safeguard their sovereignty and to develop their national economy.
>
> The central issue of the Conference was whether or not super-Power control and monopoly of the seas should be ended and the sovereignty and interests of small and medium-sized countries defended. The super-Powers had long advocated the freedom of the high seas which in effect meant their monopoly over the high seas. A/CONF.62/SR.25 (See also note 36 in this chapter ["Vice Minister of Foreign Trade…"].)

Similar rhetoric persisted throughout the ensuing years. For example, see plenary meeting remarks by Ling Qing at the Second Session on July 3, 1974, A/CONF.62/SR.28; by Bi Jilong at the Third Session on April 18, 1975, A/CONF.62/SR.55; by Lai Yali at the Fourth Session on April 6 and 23, 1976, A/CONF.62/SR.60 and A/CONF.62/SR.67; by Ling Qing at the Fifth Session on September 17, 1976, A/CONF.62/SR.76; and by Shen Zhizheng at the Sixth Session on June 28, 1977, A/CONF.62/SR.78.

Continuing in this vein, at the Seventh Session on May 15, 1978, during a discussion of the preamble text, An Zhiyuan testified that the new convention "should contribute to the struggle of the Third World and indeed of all countries against maritime hegemonism." A/CONF.62/SR.98

Then, at the Resumed Seventh Session in September 1978, Ke Zaishuo lamented "the obstacles raised by the great Powers," condemning the unilateral threats of the United States, questioning "the real motives and intentions" of the other great Power, i.e. the Soviet Union, and decrying the risk of "a scramble by the great Powers for the resources of the seabed." A/CONF.62/SR.109

[39] For example, summary records of the 13th meeting of the Second Committee on July 23, 1974, report Ling Qing's remarks as follows:

> The super-Powers had advocated free passage through straits for all ships, including warships, as a precondition for a package settlement of various issues relating to the law of the sea. His delegation believed that, since there were certain interrelationships between the various aspects of that law, due consideration should be given, in the course of dealing with a certain item, to other related items. However, that should never be done at the expense of the sovereignty of the States concerned and the interest of international peace and security. Any attempt to exchange recognition of the legitimate demands of the

beginning in March 1979, however, China's representatives adopted a much milder tone.[40] The Chinese delegation began to specifically highlight the value of compromise in this period, extolling the importance of treating UNCLOS as a "package deal."[41] Reflecting this perspective, China voted in favor of the agreement in April 1982, despite its serious qualms with some components of it, and signed it on the day it opened for signature in December 1982.

This shift in China's approach was probably due in part to the changing nature of the negotiations in this period, which entered into a new phase where much of the action shifted from public plenary and committee debates into smaller, off-the-record informal working groups. However, plenary debates continued and in some cases addressed highly sensitive topics such as foreign warships' passage in the territorial sea, especially after news broke in August 1979 of the formalization of the U.S. Freedom of Navigation Program, whereby U.S. warships would conduct operational assertions to challenge what America deemed to be states' excessive territorial sea claims. Notwithstanding the fact that this issue was a core PRC priority, China's

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developing countries for free passage through straits by military vessels would not be tolerated. A/CONF.62/C.2/SR.13

He reiterated this position at the 24th and 26th Second Committee meetings in August 1974. See A/CONF.62/C.2/SR.24 and A/CONF.62/C.2/SR.26.

[40] For example, in China's first plenary remarks at the March 1979 session, An Zhiyuan affirmed support for the G-77 position on the seabed, but instead of attacking the "maritime hegemonism of imperialism and the super Powers" as he had done the previous year or decrying the great powers' scramble for seabed resources as Ke Zaishuo had done the previous September (see note 38 in this chapter), he expressed hope "that all countries would respond to the appeal made by the Group of 77 and refrain from such action and that, as a result of common endeavours and co-operation, the present session would achieve positive results. His delegation was ready to contribute to that objective." A/CONF.62/SR.110

[41] See the summary record of Ke Zaishuo's remarks at the 113th and 114th plenary meetings on April 26, 1979, A/CONF.62/SR.113 and A/CONF.62/SR.114, as well as Liang Yufan's remarks at the 156th plenary meeting on March 8, 1982, A/CONF.62/SR.156. Ke noted demurely that "there were still important points which required further negotiation" in Part XIII on marine scientific research, while also conceding that negotiations should take care not to result in "substantial changes [that] could endanger the delicate balance already achieved in the negotiating text." Later, Liang stated that it was "regrettable" that the United States was rejecting Part XI on the seabed, since they "were a package which reflected a great deal of compromise, particularly on the part of the developing countries."

delegate Ke Zaishuo nonetheless employed strikingly measured rhetoric in debates on this subject that contrasted radically with his own stance at earlier meetings.[42]

Observing these same trends in China's rhetoric at UNCLOS III, Li Lingqun argues that the shift was a result of China's growing socialization into the processes and norms of multilateral diplomacy and international law, having started in 1972 from a position where rigid ideology and rhetoric compensated for a lack of diplomatic experience and legal expertise. There is likely some truth to this assessment, and indeed, Ling Qing's memoirs bear this explanation out to some degree. However, it is worth noting that the rhetorical shift was very abrupt, not gradual. At the sessions in May and September 1978, the Chinese delegation was still using language in plenary meetings decrying maritime hegemonism and impugning the motives of the superpowers/great powers.[43] But starting at the Eighth Session beginning in March 1979, Chinese delegates' language became much more moderate, diplomatic, and technocratic.[44] In all nineteen of the Chinese delegates' plenary speeches delivered between 1979 and the last substantive session in April 1982, they did not once refer to "maritime hegemony" or even use the terms "superpowers" or "great powers." Tellingly, *Renmin Ribao* articles also dropped most of the polemical attacks on the maritime hegemony of the two superpowers after 1978 (see Figure 6.1), even though the authors of those articles would not have been the ones participating

[42] At the 118th Plenary meeting on August 23, 1979, after a statement by the Mexican delegate on behalf of the coastal states group expressing concern over the news about the U.S. Freedom of Navigation Program, the summary records report that Chinese delegate Ke Zaishuo followed up by stating:

> [H]is delegation could not but express some concern at the recent press reports mentioned in the statement of the group of coastal States. It had noted the statement made by the representative of the United States and hoped that, in future, no action would be taken which adversely affected or threatened the sovereignty of the coastal States or the smooth operation of the Third Conference on the Law of the Sea. A/CONF.62/SR.118.

It is not difficult to imagine how differently this revelation would have been received by the Chinese delegation only a year earlier. See note 38 in this chapter ("In all substantive sessions…").

[43] See note 38 in this chapter ("In all substantive sessions…").

[44] See note 40 in this chapter ("For example, in China's first…").

in and being directly socialized by the UNCLOS III process. Given the role that Chinese official media played in setting the tone for CCP officials, including diplomats, and communicating the line they should adopt (also explicitly acknowledged in Ling's memoirs), this evidence suggests that the Chinese delegation received instruction from leaders in Beijing at the start of the opening and reform era to adopt a more conciliatory stance in the UNCLOS negotiations.

In the final speech delivered by Vice Foreign Minister Han Xu upon signing the convention in December 1982, he did return to some of the past themes, noting the way "third-world countries waged unremitting struggles to oppose maritime hegemonism and reform the unreasonable and unjust old maritime regimes." However, unlike in past diatribes, Han did not attack the United States or Soviet Union as "superpowers" or "great powers," instead including milder references to how the old maritime regime served the interests of "a few big Powers." Han also emphasized the value of the convention in promoting "the legitimate maritime rights and interests of all States," and underscored China's active and responsible participation in the conference.[45] Finally, Han noted some points of dissatisfaction with elements of the convention, especially regarding the issues of innocent passage of foreign warships in the territorial sea, maritime delimitation in overlapping EEZs, and how some provisions of the new seabed regime privileged "a few industrialized nations." But rather than reject the convention, he instead pledged that China would "continue to make joint efforts" with both "the other third-world countries and all peace-loving and justice-upholding countries" on such maritime issues.[46]

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[45] Han declared:

> The Chinese Government has always supported the third-world countries in their struggle against maritime hegemonism, stood for the formulation of a new convention on the law of the sea which ensures the legitimate rights of States, and actively participated in the work of drafting the Convention. The Chinese delegation voted in favour of the present Convention at the Conference in New York last April. Now, the Chinese Government has decided to formally sign the United Nations Convention on the Law of the Sea. A/CONF.62/SR.191

[46] Summary records of 191st plenary meeting, December 9, 1982, A/CONF.62/SR.191.

This change was a microcosm of China's shift from being a revolutionary state in global affairs to one more supportive of the status quo.[47] China remained committed to bolstering its legitimacy as an ally of the developing world, but it sought to do so by upholding international law in defense of those interests, rather than by attacking the order as a product of superpower hegemonism. As will be explained in chapter 7, this stance likely contributed to some evolution on PRC positions on key issues toward the end of the conference and influenced the ultimate interpretations of the law they adopted (or did not adopt) at the end of the conference.

China and the Law of the Sea After UNCLOS III

During the years following UNCLOS III, China's domestic maritime legal regime took shape, even as the country's elites debated whether or not to formally ratify the convention. China's perception of maritime threat and encirclement continued to dominate its strategic perspective throughout the end of the twentieth century and into the twenty-first, though the PLA Navy's own major expansion and the growth of its operations in the waters of other nations started to challenge this mindset.[48] At the same time, China's broader search for international legitimacy among countries of the East and West and in the Global North and Global South led it to prioritize active participation in international institutions and to strive to be seen as an adherent to international law.[49] The tension between China's competing interests in maritime security and control in its near seas and freedom of access in the waters of other states, coupled with its efforts to bolster its legitimacy, shaped the way Beijing interpreted the law of the sea.

[47] Johnston 2003; Zhao 1996.
[48] Ross 2009.
[49] Johnston 2008.

A New Domestic Marine Legal Regime Is Built Amidst Debates Over Ratification

In addition to major shifts in foreign policy, China's "reform and opening" period led to a dramatic transformation in its domestic legal regime. That regime was rebuilt from the ground up after the CCP's Central Committee issued its December 1978 Communique declaring "there must be laws for people to follow."[50] In the same year UNCLOS III concluded, China issued its first major maritime law, the Marine Environment Protection Law, which was followed by a steady stream of laws and regulations governing various aspects of marine administration. These included Regulations on Sino-Foreign Cooperative Exploitation of Offshore Petroleum Resources, also in 1982, the Maritime Traffic Safety Law in 1983, the Fisheries Law in 1986, Provisions Governing the Laying of Submarine Cables and Pipelines in 1989, Regulations on the Investigation and Handling of Maritime Traffic Accidents in 1990, and the Surveying and Mapping Law in 1992. Most significantly, in 1992, nearly ten years after signing UNCLOS, China passed its Law on the Territorial Sea and Contiguous Zone. Among other things, this law reaffirmed the 12 nm limit of the territorial sea originally declared in 1958 and restated the requirement that foreign warships needed to obtain permission before passing through China's territorial sea. It also claimed a continuous zone extending another 12 nm beyond the territorial sea, wherein China would have authority over matters related to customs, immigration, fiscal, and sanitary affairs, as well as security.[51]

[50] "Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of China," *Peking Review* 21 (52), December 29, 1978, p. 6–16, available at http://massline.org/PekingReview/PR1978/PR1978-52.pdf. See also Lubman 1999.

[51] Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China, adopted at the 24th meeting of the Standing Committee of the National People's Congress on 25 February 1992, available at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf. See the list of Primary Sources at the end of the dissertation for information on where to access the other major pieces of PRC maritime legislation and regulations mentioned here.

For more information on these developments in China's marine legal regime, see Zou 2005; Takeda 2014.

Even while thus busily constructing a new domestic marine legal regime, Beijing adopted a holding pattern toward UNCLOS ratification, as Chinese experts and leaders debated the wisdom of formally binding China to the convention. The convention required 60 states to ratify it before entering into force, and in the early years following UNCLOS III, it was not certain that the treaty would clear that hurdle. Although 115 states signed it the day it opened for signature, with another 34 signing within the next two years, the withdrawal of U.S. support for the convention at the end of UNCLOS III under the newly elected Reagan administration had raised questions about whether or not it would be an effective and equitable regime without U.S. accession. However, as progress was made on negotiating a new agreement on the implementation of Part XI on the resources of the seabed beyond national jurisdiction—the key U.S. sticking point—a sense emerged that the convention's entry into force was all but inevitable.[52]

Hong Nong argues that the reasons for China's delay in ratifying were two-fold: first, it felt uncertain about the financial obligations associated with ratification, and second, it was concerned about some provisions in the convention, especially regarding the issue of innocent passage in the territorial sea.[53] Li Lingqun instead emphasizes the growing domestic concerns over how the convention would disadvantage China by weakening its access to resources in the surrounding semi-enclosed seas.[54] In a similar vein, Kardon highlights how Chinese scholars expressed concern over how UNCLOS could both exacerbate China's maritime disputes by

[52] Hong 2015.
[53] Ibid.
[54] Li 2018, 92.

provoking countries to take actions to consolidate their sovereignty and jurisdictional claims, even while weakening China's position in the disputes.[55]

These concerns were relevant in both the East and South China Seas. In the former, customary international law had previously favored states like China with broad continental shelves. However, Chinese commentators feared that the EEZ regime in UNCLOS would strengthen Japan's position in favor of dividing the seabed of the East China Sea according to a median line rather than according to the margin of the continental shelf, which extends from China to the Okinawa Trough along the Japanese island chain. Likewise, Chinese observers worried that the EEZ regime would also bolster the claims of Southeast Asian countries to maritime rights and jurisdiction relative to China in the more southerly portions of the South China Sea. The intensification of the South China Sea disputes in the 1980s and early to mid-1990s exacerbated these fears. Malaysia and Brunei claimed continental shelves encompassing parts of the Spratly Islands in 1979 and 1984, respectively, while the Philippines, Vietnam, Malaysia, and eventually China all expanded their presence in the Spratlys in that decade, precipitating a violent naval clash between China and Vietnam in 1988.[56]

Debate also arose during this period over the nature and meaning of the 1947-48 dotted-line map of the South China Sea that had been produced by the ROC government.[57] This period coincided with an increase in cross-strait tensions in the mid-1990s, applying pressure on the PRC to assert and defend its status as the rightful guarantor of China's sovereignty and security, including in the South China Sea, where Taiwan's control of the largest island in the Spratlys, Taiping Island (Itu Aba), contrasted sharply with Beijing's weak presence in that region. Indeed,

[55] Kardon 2017, chap. 3.
[56] Li 2018, chaps 4–5.
[57] Johnson 1997.

the PRC increasingly found itself in the position of having to defend and explain the dotted-line map first promulgated by the ROC government in 1948. In the early 1990s, some prominent Taiwan-based scholars of the law of the sea claimed that the dotted line indicated a claim to "historic waters," without providing great detail on the implications of that claim.[58] During this same period, some Chinese scholars, such as Pan Shiying, a think tank researcher affiliated with the PLA Navy, and Zhao Lihai, a Beijing University law professor and one of China's foremost law of the sea experts, also staked out expansive interpretations of the dotted line as a claim to "historic title" or "historic waters."[59] All of these factors combined to apply pressure on the Chinese government to, if not reject the convention, at least interpret it in a way that would protect China's sovereignty and "maritime rights and interests," whether drawing upon UNCLOS itself or historic arguments and general international law.

By 1994, a new agreement on the implementation of Part XI had been struck, which received the signature of the Clinton administration (though it ultimately failed to garner sufficient support in the U.S. Senate), and the convention entered into force on November 16, 1994, upon its sixtieth ratification. These developments created enough momentum to help the CCP leadership to overcome its anxieties, and on May 15, 1996, the Standing Committee of the Eighth National People's Congress (NPC) ratified UNCLOS. On this occasion, Premier Li Peng affirmed that "the general aspects of the convention conform with our claims and requirements" and ratification "conforms with our consistent position."[60] Vice Foreign Minister Li Zhaoxing

[58] See discussion in Hayton 2018. See also Song 1994.

[59] Pan paper cited in Hong and Van Dyke 2009, 63–64. 赵理海 (Zhao Lihai) 1995. As will be discussed in chapter 9, Zhao walked back his claim the same year China ratified UNCLOS. See 贾宇 (Jia Yu) 2015.

[60] Peng's comments in Chinese were, "《公约》总的方面符合我国的主张和要求。批准《公约》符合我国的一贯立场。" Quoted in 汪金福 (Wang Jinfu) and 刘思扬 (Liu Siyang), "国务院提请审议批准《联合国海洋法公约》" (*Guówùyuàn tíqǐng shěnyì pīzhǔn "liánhéguó hǎiyáng fǎ gōngyuē*) [State Council submits UNCLOS for

was then charged by the State Council to deliver a speech before the Standing Committee that explained the pros and cons of ratification, ultimately arguing that the benefits outweighed the risks. Li argued that the benefits included not only that it would support expanded maritime jurisdiction for China as for other coastal states and enable China to become a pioneer investor in the international seabed, but also that it would enable China to participate in international institutions and "maintain our country's image" (*weihu woguo de xingxiang*, 维护我国的形象). Meanwhile, Li argued that the risks could be mitigated through "corresponding countermeasures" (*xiangying duice*, 相应对策) and "appropriate follow-up actions" (*shidang houxu xingdong*, 适当后续行动).[61] This statement highlighted how China's desire for legitimacy in the eyes of the international community was a key motivating factor in its decision to ratify the convention, even while it recognized the need to mitigate the concomitant disadvantages for important Chinese interests related to sovereignty, security, and maritime resources.

Some of the countermeasures Li alluded to were implemented that same day. China issued a formal declaration to accompany its ratification affirming, *inter alia*, its sovereignty over all "all its islands and archipelagoes" listed in the 1992 territorial sea law and its position that UNCLOS did not prejudice a state's right to require warships to obtain prior notice or

ratification consideration], 人民日报 (***Renmin Ribao)***, 2 ed., May 12, 1996, accessed in 人民日报图文数据库 (*Rénmín rìbào tú wén shùjùkù*) [People's Daily Graphic Database] (1946-2020), Oriprobe Information Services, Inc., excerpts trans. by the Author.

[61] Quoted in Ibid. Chinese law of the sea expert Hong Nong provides somewhat more detail about the matters that Li identified as needing follow-up actions than reported in *Renmin Ribao*. She reports that Li specifically highlighted the problems posed by the Convention related to South China Sea issues, while noting that the provisions of the convention regarding historic rights could actually be used to strengthen China's position in the Spratly Islands. She also notes that Li acknowledged concerns with the convention regarding discrepancies between the convention and China's laws and regulations regarding innocent passage for warships, maritime boundary delimitation with Japan, and compulsory dispute settlement. Hong 2015.

consent before entering the territorial sea.[62] It followed up with another declaration in 2006 exempting itself from compulsory jurisdiction on matters related to maritime boundary delimitation. Also on the same day the NPC Standing Committee ratified UNCLOS, the PRC government declared a set of straight baselines extending from the west side of Hainan Island in the south up to Chengshan Cape on the Shandong Peninsula in the north, as well as a set of straight baselines enclosing the Paracel Islands in the South China Sea (see Figure 8.1 in chapter 8). Later that year, the State Council issued Provisions on the Administration of Foreign-Related Marine Scientific Research. Finally, two years later, the Standing Committee of the Ninth NPC also passed the Exclusive Economic Zone and Continental Shelf Act, which declared these maritime zones while asserting that the declaration would not affect China's claims to "historical rights."[63] In these ways, China sought to bolster its legitimacy as a responsible power committed to abiding by international law and working within the established maritime order, while also protecting itself against perceived maritime threats from other state actors and the UNCLOS regime itself.

Growing Power, Tension, and Clarity in a New Century

China's relationship to the law of the sea since the start of the twenty-first century has been characterized by three interrelated developments: (1) China's own growing naval and maritime law enforcement power; (2) heightened tensions in disputes in the East and South

[62] Declaration by the People's Republic of China upon ratification of the United Nations Convention on the Law of the Sea, available at https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf, p. 11.

[63] Exclusive Economic Zone and Continental Shelf Act, adopted at the Third Meeting of the Standing Committee of the Ninth National People's Congress on June 26, 1998, and promulgated and implemented by Order No. 6 of the President of the People's Republic of China on June 26, 1998, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf. Chapters 7 through 9 assess the implications of these various actions and statements for China's interpretations of key law of the sea issues.

China seas; and (3) increased clarity and specificity of China's legal claims driven in large part by the first two dynamics. As Kardon explains, around the time China ratified UNCLOS, the National People's Congress had published an influential planning document entitled "Oceans Agenda 21", which called for stronger efforts to protect China's "maritime rights and interests" (*haiyang quanyi*, 海洋权益), employing UNCLOS as a means to that end, as well as efforts to "perfect" (*wanshan*, 完善) China's maritime bureaucracy and administration. Two years later, the State Council published a white paper entitled "The Development of China's Marine Programs," that expounded further upon that agenda. Then in 2001, the Tenth Five Year Plan approved by the NPC instructed the State Council to oversee efforts to "strengthen use and management of maritime areas and defend maritime rights and interests," a theme that was increasingly emphasized in subsequent Five Year Plans.[64] In a similar vein, at the two sessions (*lianghui*, 两会) meeting of the NPC and the National Committee of the CPPCC in 2000, Chinese president Jiang Zemin declared, "Building a maritime power (*haiyang qiangguo*, 海洋强国) is an important historical task, which we must study carefully." This concept was increasingly elevated in Chinese political documents over the coming years, including in a 2008 State Council document, "Planning Outline for the Development of National Maritime Activities,"[65] and in Hu Jintao's work report to the Eighteenth Party Congress in 2012.[66]

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[64] Kardon 2017, chap. 4.

[65] Chubb 2019.

[66] Hu Jintao, "Firmly March on the Path of Socialism with Chinese Characteristics and Strive to Complete the Building of a Moderately Prosperous Society in All Respects," Report to the Eighteenth National Congress of the Communist Party of China on November 8, 2012, available at http://www.china-embassy.org/eng/zt/18th_CPC_National_Congress_Eng/t992917.htm. This work report stated, "We should enhance our capacity for exploiting marine resources, develop the marine economy, protect the marine ecological environment, resolutely safeguard China's maritime rights and interests, and build China into a maritime power."

Xi Jinping has continued to emphasize the importance of building China's maritime power. 邓志慧 (Deng Zhihui)、钟焯 (Zhong Zhuo), "世界海洋日，感受习近平建设海洋强国的'蓝色信念'" (*Shìjiè hǎiyáng rì, gǎnshòu xíjìnpíng jiànshè hǎiyáng qiángguó de "lán sè xìnniàn"*) [On World Oceans Day, Feel Xi Jinping's "Blue

Additional legislation passed during this period included the Law on the Administration of the Use of Sea Areas in 2001 and the 2009 Law on Island Protection, along with several important revisions to earlier maritime laws, including a significant expansion of the Surveying and Mapping Law in 2002.

These high-level political instructions from top decision-making organs of the party and government provided a clear set of marching orders for China's various maritime agencies, led by the efforts of the State Oceanic Administration (SOA), to redouble their efforts to protect China's "maritime rights and interests" and build China into a "maritime power" in the twenty-first century.[67] Under the direction of the State Council, the SOA began conducting more systematic surveying and naming of islands, establishing administrative zones at sea, organizing maritime law enforcement units, and implementing guidelines for the protection of islands through conservation, sustainable tourism, and managed construction. The SOA worked closely with local and provincial governments in coastal areas, especially Hainan Province in the South China Sea, to bolster their maritime administration efforts.[68] In 2009, the PLA Navy (PLAN) and

Faith" in Building Maritime Power], 人民网 (Renmin Wang), June 7, 2020, http://politics.people.com.cn/n1/2020/0607/c1001-31738010.html, accessed November 9, 2020. See also McDevitt 2016.

[67] "国家海洋局副局长 孙志辉 在海南省海洋经济工作会议上的讲" (*Guójiā hǎiyáng jú fù júzhǎng Sūn Zhìhuī zài Hǎinán shěng hǎiyáng jīngjì gōngzuò huìyì shàng de jiǎng*) [Speech by Sun Zhihui, Deputy Director of the State Oceanic Administration, at the Hainan Marine Economic Work Conference], August 26, 2005, http://www.hainan.gov.cn/data/hnzb/2006/02/315/, accessed June 10, 2020.

[68] Ibid. For an overview of China's activities in marine governance since 1956, including its advances in marine scientific research and other forms of ocean governance, exploitation, and conservation between 1996-2006, see 孙志辉 (Sun Zhihui), 国家海洋局局长 (Director of the State Oceanic Administration), "回顾过去 展望未来——中国海洋科技发展 50 年" (*Huígù guòqù zhǎnwàng wèilái—zhōngguó hǎiyáng kējì fāzhǎn 50 nián*) [Looking back on the past and looking forward to the future—50 years of China's marine technology development], September 1, 2006, accessed in 省部长言论信息数据库 (*Shěng bù zhǎng yánlùn xìnxī shùjùkù*) [Database of Provincial and Ministry Leaders' Remarks and Messages], 中国政府资料库 (*Zhōngguó zhèngfǔ zīliào kù*) [Archives of the Chinese Government], Oriprobe Information Services, Inc.

State Oceanic Administration also established a formal partnership and began working together more closely.[69]

A key component of the SOA's work, including in its partnership with the PLAN, has been to "improve the entire nation's maritime awareness" (*tigao quan minzu haiyang yishi*, 提高全民族海洋意识) and develop China's "maritime culture" (*haiyang wenhua*, 海洋文化).[70] Beginning in 2008, the SOA sponsored an annual "National Maritime Awareness Day" and spearheaded an initiative to educate high school students about ocean science and China's maritime interests through an annual youth summer camp and National Maritime Knowledge Competition, supplemented with a national essay contest starting in 2009.[71] In late 2011, the SOA, in collaboration with the PLAN Political Department, released a major eight-part CCTV documentary entitled *Toward the Sea* (*Zouxiang Haiyang*, 走向海洋), along with a new website, www.chinaislands.gov.cn, devoted to propagating information about China's island claims.[72]

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[69] Kardon 2017, chap. 5.

[70] See, for example, "首次全国海洋宣传工作会议在北京召开 (First National Maritime Propaganda Work Conference Held in Beijing)," State Oceanic Administration, March 24, 2010, http://www.soa.gov.cn/xw/ztbd/2010/2010nqghyxcgzhy/hybd_652/201212/t20121203_19104.html, accessed December 2015; and Liu Cigui, "Human Resources, Overcoming Difficulty, Struggling to Win New victories in the Development of the Maritime Industry," Report to the National Maritime Work Conference, State Oceanic Administration, December 26, 2011, http://www.soa.gov.cn/xw/hyyw_90/201211/t20121109_1111.html, accessed December 2015. Then-SOA Director Liu Cigui also identified this work of "doing good maritime advocacy work and strengthening society's maritime awareness" (*zuohao haiyang xuanchuan gongzuo, zengqiang quan shehui de haiyang yishi*, 做好海洋宣传工作，增强全社会的海洋意识) as one of the six key tasks of the SOA: "国家海洋局局长刘赐贵拜会国家发展改革委主任张平 (State Oceanic Administration Director Liu Cigui Met with National Development and Reform Commission Chairman Zhang Ping)," State Oceanic Administration, April 22, 2011, http://www.soa.gov.cn/xw/ldhd/wh/201211/t20121107_5114.html, accessed December 2015.

[71] Yu Jianbin, "二十九名少年踏浪出海, 全国海洋知识夏令营开营 (29 Youth Breathe the Sea, National Maritime Knowledge Summer Camp)," 人民日报 (*Renmin Ribao*), July 27, 2008, section 4; Yu Jianbin, "第二届全国大中学生海洋知识竞赛启动 (The Second National High School Student Maritime Knowledge Competition Started)," 人民日报 (*Renmin Ribao*), September 18, 2009, section 2; 第二"届全国"爱我蓝色家园"征文活动获奖名单 (Winners of the Second 'Love Our Blue Home' essay contest)," State Oceanic Administration, October 15, 2010, http://www.soa.gov.cn/xw/ztbd/2010/2010nsjhyrjqghyxcrxlhd/xlhd_646/201212/t20121203_19277.html, accessed December 2015.

[72] 《走向海洋》 (*Zouxiang Haiyang) [Toward the Sea]*, transcript in 《中国海洋报》 (*Zhongguo Haiyang Bao*), April 12, 2012, http://www.soa.gov.cn/xw/ztbd/2012/zxhy/jscjx/201211/t20121128_10043.htm, accessed December 2015; Liu Cigui, December 26, 2011.

In this time period, China's marine scientific research and naval operations began to accelerate, as China's MSR and naval fleets expanded. China began conducting more marine scientific research in the East and South China sea starting in the late 1990s, and those activities accelerated in pace in the early 2000s.[73] From around 2004, PLA Navy warships began transiting through Japanese straits en route to the open ocean beyond the first island ocean, and from 2005 onward, the PLA Navy also began conducting much more frequent training, exercises, transits, and patrols in the South China Sea.[74]

As China strengthened its maritime administrative capacity, maritime law enforcement vessels from various local government and national agencies, especially the Fisheries Administration and SOA, also began conducting more regular maritime law enforcement patrols in China's near seas. Fisheries Administration vessels began conducting maritime security patrols around 2000, as part of efforts to enforce a new fishing ban China had implemented in the South China Sea for conservation and replenishment of shrinking fish stocks. After China strengthened its fishery regulations in 2005, those patrols—often in disputed waters around disputed islands—became ever more frequent, and Fisheries Administration ships began to detain Vietnamese fishermen and occasionally ram or shoot at Vietnamese and Philippine vessels. In 2009, China lengthened its fishing ban and applied it to foreign boats. Then, in 2013, the Chinese Coast Guard was formed, consolidating several distinct law enforcement agencies into one centralized entity charged with enforcing China's maritime legal regime in the waters near its coasts.[75]

[73] Manicom 2014, chap. 4.
[74] Swaine and Fravel 2011.
[75] Kardon 2017, chap. 5.

In addition to emerging from China's longer-term strategy to build its maritime power, some of these enforcement actions were responses to unilateral actions taken by other nations adjacent to the South China Sea, particularly Vietnam and the Philippines.[76] Likewise, the United States military had begun conducting more frequent reconnaissance activities in the air and waters near China, especially in early 2001 under the new George W. Bush administration. These activities provoked anxiety in the PLA, which dispatched aircraft to monitor U.S. spy planes' flights. On one occasion, a U.S. EP-3 spy plane flying in airspace south of Hainan Island was approached by a PLA fighter jet, and the two planes collided, leading to the death of the Chinese pilot and damaging the U.S. EP-3. The U.S. aircraft made an emergency landing in Hainan, where the crew and plane were detained briefly before being released.[77] Similarly, non-commissioned U.S. Naval Ship (USNS) research vessels began conducting more frequent surveys in the waters near China, including in potential submarine routes near Chinese naval bases. Beijing objected to those activities, and Chinese civilian ships and fishing vessels began to harass these research vessels, most notably in incidents in 2003 and 2009 involving the USNS *Bowditch, Impeccable,* and *Victorious* (discussed in greater detail in the next chapter).

The year 2009 also marked the definitive end of the lull in tensions in the South China Sea dispute that had prevailed between the mid-1990s and mid-2000s. Although tension had already been building over the previous few years, it came to a head after a 2009 deadline for states to submit scientific data on the limits of their extended continental shelves beyond the boundaries of the EEZ to a UN Commission established in UNCLOS to evaluate such terms on their geomorphological merits.[78] Vietnam and Malaysia submitted a joint claim in part of the

[76] Swaine and Fravel 2011. See the appendix of this article for a list of activities by Vietnam and the Philippines to which China was responding.

[77] Swaine and Zhang 2006, chaps 11–12.

[78] Fravel 2011; Fravel 2014; Fravel 2017.

South China Sea, and Vietnam submitted another separate claim as well. China objected to both of those claims in a note verbale to the UN Secretary General, asserting sovereignty over the islands in the South China Sea and their adjacent waters, seabed, and subsoil and appending a map that included a dotted line surrounding most of the South China Sea (echoing the 1947-48 map mentioned at the beginning of the chapter).[79] China's note in turn provoked objections from several countries abutting the South China Sea.

This development heralded the arrival of a new period of heightened tensions in the South China Sea disputes over sovereignty and marine resources. Frequent standoffs erupted between fishing boats, seismic exploration vessels, drilling rigs, and maritime law enforcement and naval vessels from the various neighboring countries. Around 2011, China's maritime law enforcement vessels began interfering with the seismic exploration activities of Vietnamese and Philippine ships. In 2014, China began conducting oil drilling in waters near the Paracels, which was met with outrage in Hanoi, and in 2019, China conducted seismic exploration activities in Vanguard Bank in the southwest stretches of the South China Sea, in an area where China had first made oil concessions in the early 1990s. China also began conducting fisheries enforcement activities as far south as the waters near the Natuna Islands, within Indonesia's EEZ, provoking objections from Jakarta. At the same time, there were also flare-ups in the China-Japan dispute over the Diaoyu/Senkaku Islands in the East China Sea in 2010- 2012, first when a Chinese fishing boat collided with a Japanese Coast Guard vessel near the islands, followed by Chinese objections to the purchase of the islands by the Japanese government from a private Japanese citizen. In the wake of these tensions, China established a regular presence near the islands, challenging Japan's exclusive administrative control thereof.

[79] This note verbale and the attached map will be discussed in greater detail in chapters 8 and 9.

The most dramatic tensions in this period emerged from a fisheries-related standoff between China and the Philippines near the Scarborough Shoal in 2012, which precipitated the Philippines' decision to initiate arbitration against China under UNCLOS. China refused to participate in the arbitration process, and while it was unfolding, conducted major land reclamation and construction activities on the seven land features it already controlled in the Spratlys. In the years after the Scarborough Shoal incident and the Philippines' arbitration case, the United States also significantly increased the frequency and publicity of its freedom of navigation operations (FONOPs) in the immediate vicinity of the Paracel and Spratly Islands.

Finally, in this most recent decade, China's naval and marine scientific research fleets have ballooned in size, becoming the largest in the world in numerical terms. Their operations beyond China's own maritime zones in the territorial seas, archipelagic waters, and EEZs of other states and in the high seas have increased dramatically. Over the course of these various incidents and developments, especially the South China Sea arbitration case and China's increased naval and MSR operations in other states' EEZ, China has been challenged to clarify its legal positions. As a result, a much greater degree of clarity and specificity has emerged in China's interpretations of the law of the sea, in some ways that support more limited coastal state control, and in other ways that support expansive jurisdiction. These developments in China's legal interpretations will be carefully traced and analyzed in the next three chapters, which examine China's attitudes toward military activities in territorial seas and EEZs, the maritime entitlements of island and archipelagoes, and historic rights in maritime space, respectively.

Conclusion

This chapter has provided an historical overview of China's relationship to the maritime order, situated in the context of key developments in its security environment, participation in

international institutions, domestic political shifts, maritime disputes with neighbors, and growth in naval power. In so doing, it has demonstrated how China's earliest and most foundational interpretations of the law of the sea, as represented in its 1958 declaration claiming a 12 nm territorial sea and prohibiting foreign warships from entering without permission, emerged from China's sense of acute maritime threat and its efforts defend its sovereignty and territorial integrity against that threat. Then, as China joined the United Nations and participated actively in UNCLOS III, its efforts to build its legitimacy in the eyes of other states played a crucial role in shaping its position in the negotiations over the law of the sea. Prior to 1979, China's legitimation strategy revolved around expressing revolutionary solidarity with the developing world in opposition to the imperialist super-powers, the United States and Soviet Union, whom China attacked as plunderers of ocean resources and purveyors of maritime hegemony. However, after China's reform and opening began in late 1978, Beijing shifted its social reference group, reaffirming its identity as an ally of the developing world but jettisoning its virulent opposition to the maritime powers, while portraying itself as an active and constructive participant in the development of the new law of the sea convention.

Finally, in the process of debating, ratifying, and interpreting UNCLOS in the decades after signing the new convention, China's interpretations of the law of the sea have been shaped by both its persistent perceptions of maritime threat and China's own expanding naval, coast guard, fishing, and marine scientific research operations in other states' waters. As China has doubled down on efforts to defend its "maritime rights and interests," especially in the South China Sea, it has incurred growing hypocrisy costs as other states object to the expanding operations of Chinese research and fishing vessels and warships. As I will argue in the next three chapters, a desire to minimize these hypocrisy costs has motivated relative continuity in China's

overall interpretations of the law of the sea. However, the growth in China's own maritime power over the past two decades is applying countervailing pressure against these factors, leading to subtle evolution in some areas of China's interpretations of the law of the sea.

Chapter 7: China's Legal Interpretations of Military Activities at Sea

The previous chapter described the historical dynamics, including the geopolitical incentives and legitimation strategies, that provide the backdrop for the relationship of the People's Republic of China (PRC) to the law of the sea. This chapter and the next two perform close discourse analysis of Chinese government legislation, diplomatic notes, and statements to illustrate how China's interpretations of the law of the sea have evolved from the critical juncture of the Third United Nations Conference on the Law of the Sea (UNCLOS III) up to the present. This chapter analyzes China's interpretations of two related issues: (1) innocent passage and transit passage for foreign warships in the territorial sea (and archipelagic waters); and (2) foreign military activities and marine scientific research in the exclusive economic zone (EEZ).

I argue that China's basic attitude toward innocent passage in the territorial sea has remained largely consistent over time, constrained by China's perception of maritime threat and desire to maintain a legal security buffer against those threats. At the same time, China's interpretation of the specific legal regimes of transit passage have evolved through a process of *layering*, as China has encountered new circumstances as a consequence of its own growing naval operations beyond its coasts and interpreted these issues in ways that favor more limited coastal state jurisdiction. In between these two regimes, China has agreed to consult in advance with the Philippines before conducting warship passage through the latter's archipelagic waters and associated territorial seas, in response to Philippine accusations of hypocrisy. However, Beijing's reasoning for doing so is political and diplomatic, and it has expressly not conceded that it is under legal requirement to do so.

In the second issue area, China's positions regarding marine scientific research in the EEZ have remained relatively consistent over time, constrained by its effort to maintain

legitimacy among international audiences. By contrast, its positions on foreign military activities in the EEZ have evolved through a process of *drift*, whereby China has declined to extend its past interpretations as the new circumstance of China's own expanded military operations in foreign EEZs have expanded, deemphasizing those interpretations in the process. In all of these areas—innocent passage, transit passage, marine scientific research, and foreign military activities in the EEZ—China has faced legitimacy gaps as it struggles to explain and navigate the various inconsistencies that have arisen between China's interpretations of the law in application to its own waters and those of other countries, as well as the different preferences of different actors within China.

I illustrate this argument by analyzing discourse in working papers and statements at UNCLOS III, Chinese domestic legislation, notes verbale and letters submitted to the United Nations Secretary General, major formal speeches by senior PRC leaders, and statements and briefings by officials and spokespersons of the Ministry of Foreign Affairs (MFA),[1] and, on issues related to People's Liberation Army (PLA) activities at sea, statements by the Ministry of National Defense (MND).[2] I conducted a systematic review of these materials, compiling

[1] I accessed Foreign Ministry spokespersons' statements in 外交部发言人言论数据库 (*Wàijiāo bù fāyán rén yánlùn shùjùkù*) [Database of Foreign Ministry Spokespersons' Remarks], 1997-present, 中国政府资料库 (*Zhōngguó zhèngfǔ zīliào kù*) [Archives of the Chinese Government], Oriprobe Information Services, Inc. I performed over 30 key term searches related to various aspects of the law of the sea, including, among others, "innocent passage" (*wuhai tongguo*, 无害通过), "transit passage" (*guojing tongxing*, 过境通行), "freedom of navigation operation" (*hangxing ziyou xingdong*, 航行自由行动), "exclusive economic zone" (*zhuanshu jingji qu*, 专属经济区), "contiguous zone" (*pilian qu*, 毗连区), and "marine scientific research" (*haiyang ke[kao/xue]*, 海洋科[考/学]), which collectively generated hundreds of results. I analyzed all the results from these searches both quantitatively and qualitatively and compiled relevant excerpts into master files, which are available upon request.

I will cite these statements and press conference excerpts below as "*Waijiao Bu Fayan Ren Yanlun*, [DATE]." All of these statements were accessed in May or June 2020 via the Oriprobe Information Services Chinese Government Archives online database and translated by myself unless otherwise indicated. (For example, I accessed some more recent Chinese or English versions of Foreign Ministry statements on the MFA website, and for older statements, I on occasion tracked down the English version in Xinhua articles housed in the LexisNexis database.)

[2] I accessed these on the MND website, http://www.mod.gov.cn. The MND began holding regular press conferences in April 2011. As of May 2020, transcripts of all press conferences from 2015 onward were easily accessible via

relevant excerpts into a 330-page chronological master document organized by issue area that enables me to trace China's interpretations in each area over time.[3] I will briefly recapitulate the legal issues in each section below, but see chapters 4 and 5 for a more detailed explanation of the history, controversy, and global range of interpretation surrounding these issues.

Innocent Passage and Transit Passage for Foreign Warships in the Territorial Sea

One of the most controversial issues in the law of the sea is the question of whether or not foreign warships have the right of innocent passage in the territorial seas of other states, and regardless, whether or not the coastal state may require foreign warships to receive authorization or notification prior to passing through the territorial sea. Article 17 of the United Nations Convention on the Law of the Sea (UNCLOS) assures that "ships" (not aircraft) have the right of innocent passage in the territorial sea, without prohibiting that right to warships, but the convention is silent on the issue of prior permission or notification.[4] A corollary to this issue relates to the passage of military ships and aircraft in straits that are nonetheless wholly enclosed in the bordering states' territorial seas. This was a major controversy at the outset of UNCLOS III, when maritime powers only agreed to support territorial seas extending as wide as 12 nm—rather than 3 nm, which had once been more prevalent—on the condition that straits narrower than 24 nm would not become subjected to the restrictions of innocent passage. UNCLOS ultimately included a new regime called transit passage that allows ships *and* aircraft to pass

navigation menus on the MND website; press conferences and statements prior to that date were accessible via Google search of the MND website.

[3] This master document is available upon request.

[4] See UNCLOS, Part II, Section 3: Innocent Passage in the Territorial Sea. Article 18 requires that such passage "shall be continuous and expeditious," and Article 19 states, that "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State," followed by additional elaboration on the meaning of innocent passage. See further discussion in chapter 4.

through "straits used for international navigation" in their "normal modes of continuous and expeditious transit," which is usually interpreted to mean that submarines may remain submerged (though UNCLOS is not explicit on this subject). However, the definition of a "strait used for international navigation" is unclear, with some states such as the United States insisting that all straits capable of such use are eligible for transit passage, with other states, such as Japan and Canada, asserting that the phrase only refers to straits regularly or traditionally used for international navigation.[5]

China's Positions at UNCLOS III and Final Interpretations of the Text

China's interpretation of the issue of foreign warship passage in the territorial sea has since its inception been motivated by its perception of maritime threat. As described in the previous chapter, the PRC first stated its view on this matter in its territorial sea declaration in 1958, when it declared that "No foreign vessels for military use and no foreign aircraft may enter China's territorial sea and the air space above it without the permission of the Government of the People's Republic of China."[6] As Dutton explains, this declaration was issued in the context of the Second Taiwan Strait Crisis and was a means whereby the PRC sought to establish a security buffer against the United States, deter U.S. forces from aiding Republic of China forces in the conflict, and establish its sovereignty over the islands.[7]

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[5] See UNCLOS, Part III: Straits Used for International Navigation, and further discussion in chapter 4.

A third related issue, discussed in chapter 4, has to do with passage through archipelagic waters. The archipelagic State regime in UNCLOS allows states primarily composed of islands to draw straight baselines for the territorial sea encompassing their islands. The waters within those baselines are "archipelagic waters." Article 52 specifies that ships of all states have the right of innocent passage through archipelagic waters, while Article 53 provides for a regime of archipelagic sea lanes passage, which is similar to transit passage, in sea lanes designated by the state or in "routes normally used for international navigation." See UNCLOS, Part IV: Archipelagic States.

[6] "Declaration of the Government of the People's Republic of China on China's Territorial Sea," Beijing, September 4, 1958, available as Enclosure 1 in UN General Assembly Document A/72/552 (English), available at https://digitallibrary.un.org/record/1326671.

[7] Dutton 2019.

This issue was in turn one of China's highest and most persistent priorities at UNCLOS III. The PRC's initial working paper submitted to the Seabed Committee in 1973 contained language extending the right of innocent passage only to "foreign non-military ships," while authorizing the coastal state to require military ships to provide prior notification or seek prior permission before passing through the territorial sea.[8] In the Seabed Committee and early years of UNCLOS III, Chinese delegates directed particularly strong ire against the related US-Soviet joint proposal (discussed in chapter 5) that warships retain high seas freedoms in straits enclosed in territorial seas. China instead advocated for all straits the same regime as existed elsewhere in the territorial sea.[9] However, after the transit passage regime was proposed and generally accepted by delegates at the fourth session in 1976, China appears to have dropped the issue.[10] At the end of UNCLOS III, the government of Spain—which had long resisted the transit passage regime due to its interests in the Strait of Gibraltar—forced a vote on an amendment to Article 39 that would strengthen coastal states' control over navigation in the strait. Twenty-one states

[8] "Working paper submitted by the Chinese delegation: Sea area within the limits of national jurisdiction," in *Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Volume III, General Assembly Official Records: Twenty-Eighth Session*, Supplement No. 21 (A/9021), New York, 1973, pp. 71-74, available at https://digitallibrary.un.org/record/725188; originally issued as document A/AC.138/SC.II/L.34.

[9] For China's position in the Seabed Committee, see Ibid., which stipulated that "A strait lying within the territorial sea, whether or not it is frequently used for international navigation, forms an inseparable part of the territorial sea of the coastal state." See also the statements of China's delegation in Office for Ocean Affairs and the Law of the Sea, "The Law of the Sea: Straits Used for International Navigation," *Legislative History of Part III of the United Nations Convention on the Law of the Sea, Volume I*, United Nations, New York, 1992, pp. 58-60, 96, 104.

For China's statements on this issue at UNCLOS III, see the summary records of statements by Chinese delegates at the 25th plenary meeting on July 2, 1974, A/CONF.62/SR.25; the 13th and 14th meeting of the Second Committee on July 23, 1974, A/CONF.62/C.2/SR.13 and A/CONF.62/C.2/SR.14; the 24th meeting of the Second Committee on August 1, 1974, A/CONF.62/C.2/SR.24; the 26th meeting of the Second Committee on August 5, 1974, A/CONF.62/C.2/SR.26; the 55th plenary meeting on April 18, 1975, A/CONF.62/SR.55; the 48th meeting of the Second Committee on May 2, 1975, A/CONF.62/C.2/SR.48; the 67th plenary meeting on April 23, 1976, A/CONF.62/SR.67; and the 76th plenary meeting on September 17, 1976, A/CONF.62/SR.76. As a summation of China's early rigid stance on this issue, Ling Qing declared in the Second Committee on August 5, 1974 that "[h]is delegation resolutely opposed the use of the principle of the free passage of warships through straits as a precondition for a package deal."

[10] See previous note; see also Nandan and Rosenne 2003, vol. 2, 287–89.

voted in favor of this amendment, with 55 opposed and 60 abstentions. Notably, China neither supported nor opposed the amendment, but instead abstained.[11] And although China never explicitly and specifically endorsed the concept, it did vote for the broader convention after acknowledging that the convention was a "package deal." Vice Foreign Minister Han Xu did not raise any objections to transit passage in straits during his final speech on the convention in December 1982, despite enumerating other objections, nor did China address the issue in its declaration upon ratifying the convention in 1996.

Instead, after this issue of transit in straits subsided after 1976, the issue of innocent passage for warships in the territorial sea more generally became prominent in the later years of UNCLOS. China raised this issue at the seventh session in 1978, co-sponsoring an informal proposal with eight other developing countries to require foreign military vessels to "give prior notification to or obtain prior consent" from the coastal state before passing through the territorial sea.[12] This proposal was not incorporated into the working draft of the convention. However, two years later, China joined with most of these same states to reintroduce it in altered form at the ninth session in 1980.[13] By this point, the U.S. Freedom of Navigation Program had come to light in August 1979, generating considerable pushback among coastal states at the

[11] This vote followed a speech by the Spanish delegate in which he "regretted that instructions from his government preluded him from withdrawing" the amendment, and a declaration by the U.S. delegate that his delegation would not vote in favor of the convention as a whole if the amendment passed (though, ironically, the United States ended up not voting in favor for other reasons). See summary records of 176th plenary meeting on April 26, 1982, A/CONF.62/SR.176, pp. 132-33.

[12] See the summary of Shen Weiliang's remarks at the 53rd meeting of the Second Committee on April 17, 1978, A/CONF.62/C.2/SR.53 and the 103rd plenary meeting on May 18, 1978, A/CONF.62/SR.103. See also Nandan and Rosenne 2003, vol. 2, 249, 251.

[13] On April 2, 1980, Ke Zaizhuo stated that "[h]is delegation also had serious reservations concerning the rules in the revised negotiating text on passage in the territorial sea. The question of foreign warships passing through territorial seas affected directly the sovereignty and security of the coastal countries, and the relevant clauses of the new convention must take that point into account. In fact, the question of warships passing through territorial seas required further negotiation." 126th plenary meeting, A/CONF.62/SR.126. See also the remarks by Shen Weiliang about the reintroduction of this proposal at the 135th plenary meeting on August 25, 1980, A/CONF.62/SR.135.

conference, which jointly issued a statement expressing concern about the program's use of unilateral military transits to target states' territorial sea claims.[14] Perhaps in part due to this new context, China's co-sponsored proposal generated considerably more support at this juncture, and was revised and reintroduced the following year, this time co-sponsored by 20 states, with statements of support from at least 19 other states.[15] Speaking at a plenary meeting on March 31, 1982, Chinese delegate Shen Weiliang commented on this proposal, arguing that it "was in full conformity with the principles of international law" and "widely supported."[16]

China was also among the core group of states that forced this issue to come to a head in April 1982 after the convention was opened for formal amendments (see discussion in chapter 4). The PRC delegation supported an amendment proposed by Gabon that echoed its previous proposal, while also co-sponsoring with 27 other states a new proposed amendment to allow states to prevent infringement of their laws and regulations related to "security," in addition to customs, immigration, fiscal, or sanitary matters.[17] When both of those amendments were ultimately withdrawn before being pressed to a vote, China, along with many other states, delivered a speech in which it declared that the convention text's existing "provisions governing innocent passage through the territorial sea did not prejudice the right of the coastal State to require prior authorization or notification for the passage of foreign warships through the territorial sea in accordance with its laws and regulations."[18] Vice Foreign Minister Han Xu

[14] See chapter 6, p. 259–60 and note 42.

[15] Nandan and Rosenne 2003, vol. 2, 186, 195.

[16] See summary records of 161st plenary meeting, A/CONF.62/SR.161.

[17] See Shen Weiliang's remarks at the 173rd plenary meeting on April 17, 1982, A/CONF.62/SR.173, where he expressed Gabon's proposed amendment and also expressed that "[h]e was puzzled by the opposition of a small number of delegations to so modest a proposal; their attitude appeared to imply that they were not willing to respect the security of a coastal State. He had been generally disappointed that no progress had been made with respect to article 21; it had been amply demonstrated that the article as it stood was not a consensus text…"

[18] See remarks of Shen Weiliang at the 182nd plenary meeting on April 30, 1982, A/CONF.62/SR.182. See also Nandan and Rosenne 2003, vol. 2, 197–99.

reiterated this stance in his speech the following December upon signing the convention.[19] In other words, China interpreted the final convention text to allow coastal states to require permission or notification before warships could pass through their territorial seas, never explicitly conceding that military ships enjoy the same right of innocent passage as other vessels, Article 17 notwithstanding.

China's Interpretations Post-UNCLOS III

China's approach to the regime of innocent passage has demonstrated marked continuity in the decades since UNCLOS III. This continuity has been, in a sense, overdetermined. China's longstanding continentalist mindset has inspired its fears of encirclement and wariness of U.S. naval operations along its shores, especially in the context of the Taiwan issue and its islands disputes in the East and South China Seas. This mindset motivates China's determination to deny foreign warships the right of innocent passage in order to maintain a security buffer along its coasts.[20] At the same time, given China's strong advocacy on this issue at UNCLOS III, Beijing has also faced motivations to maintain this interpretation for legitimation reasons, lest it be seen as hypocritically backing down from its past position due to its own expanding naval operations.

[19] Summary records of 191st plenary meeting, December 9, 1982, A/CONF.62/SR.191. Han stated:

> At the previous sessions of the Conference we repeatedly pointed out that in the articles of the Convention relating to innocent passage through the territorial sea there were no clear provisions regarding the regime of the passage of foreign warships through the territorial sea. A considerable number of States, including China, time and again submitted an amendment in this regard. To respond to the call of the President of the Conference, those sponsors of the amendment did not insist on a vote at the session held last April so that the draft convention on the law of the sea could be adopted by consensus. The statement made by the President of the Conference at that session showed clearly that this would not affect the principled position of the sponsors demanding that their security be ensured.

[20] This basic security rationale resembles the protection reasoning espoused by U.S. Senator Elihu Root when he denied that warships had the right to enter the territorial sea, arguing on behalf of the U.S. government in 1910 in the *North Atlantic Coast Fisheries* case; see chapter 5. Root, however, placed more of an emphasis on defense of coastal inhabitants rather than security and sovereignty more broadly defined.

These hypocrisy costs would be especially likely among the reference group of developing nations that China allied with at UNCLOS III in ultimately unsuccessful efforts to amend the convention. One such state was the Philippines. Although the Philippines does not today have a formal legal requirement for prior notification or authorization for warships passing through its territorial sea or archipelagic waters, Philippine military officers and pundits have expressed alarm at China's increasing naval operations in the straits between Philippine islands. Confronted with objections over this behavior in 2019, China backed down, offering to arrange for prior notification or permission (despite no Philippine legal requirement that it do so). This suggested China did not wish to delegitimize itself among the reference group of developing states in its near abroad with which it is currently seeking to nurture positive ties.

In contrast to the regime of innocent passage, China's approach to the regime of transit passage has evolved over time in a pattern of *layering*. Since China never publicly indicated its position for or against the regime, it has had the opportunity to stake out a new interpretation on this issue more conducive to foreign warship passage without risking a large legitimacy gap. This new interpretation has enabled its warships to transit more freely through Japanese straits in particular, where China is less concerned about legitimizing itself to authorities in Tokyo than it is about securing its interests in free military navigation against possible restriction by Japan. These new interpretations, although layered on China's more restrictive interpretation of innocent passage, diverge from the underlying purpose of those past interpretations.

Innocent Passage of Warships in the Territorial Sea

In the years following China's signature of UNCLOS, it doubled down on this position in its domestic legislation. The Maritime Traffic Safety Law passed in 1983 soon after China signed UNCLOS prohibited foreign military vessels from entering PRC territorial waters without

approval.[21] A decade later, the 1992 Law on the Territorial Sea and Contiguous Zone only extended the right of innocent passage to "non-military foreign ships," while requiring that "foreign military ships must obtain permission" to enter the PRC's territorial sea.[22] Although this law did not explicitly deny the right of innocent passage to warships, it effectively did so by omission, instead only allowing them entry into the territorial sea with permission. Then, upon ratifying UNCLOS in 1996, China issued a declaration "reaffirm[ing]" that the convention "shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state."[23]

Since ratifying UNCLOS, China has continued to uphold its past interpretation on the issue of foreign warships passing through the territorial sea. China does not explicitly deny foreign military vessels the right of innocent passage, but it still has not yet issued detailed regulations on how countries could request permission for their warships to enter the territorial sea.[24] This became an increasingly prominent issue in the second decade of the twenty-first century as the United States increased its freedom of navigation operations (FONOPs) targeting China's requirement for prior permission by passing through China's claimed territorial seas,

[21] See Article 11 of the 1983 Maritime Traffic Safety Law of the People's Republic of China, available at http://www.asianlii.org/cn/legis/cen/laws/mtsl239/. This same language was maintained in the 2016 revision of the Maritime Traffic Safety Law, available at http://en.pkulaw.cn/display.aspx?cgid=9b0e9dbfcb70bc33bdfb&lib=law

[22] Article 6 of the Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China, adopted at the 24th meeting of the Standing Committee of the National People's Congress on 25 February 1992, available at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf.

[23] Declaration by the People's Republic of China upon ratification of the United Nations Convention on the Law of the Sea, available at https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf, p. 11. See also pp. 266–68 in chapter 6, including note 61, which recounts how Vice Foreign Minister Li Zhaoxing, in a speech before the NPC Standing Committee on the occasion of ratification, acknowledged the discrepancies between UNCLOS and China's domestic legislation regarding innocent passage for foreign warships in the territorial sea, but indicated that certain countermeasures or follow-up actions could be taken to address that problem, presumably referring, *inter alia*, to the declaration China issued.

[24] Interview 6.19 with retired Chinese military lawyer, August 13, 2019, Beijing, China.

especially in the South China Sea, without seeking permission or providing prior notification. China's Foreign Ministry and Defense Ministry spokespersons have persistently denounced these FONOPs as illegal *both* with regard to China's own domestic laws and the "relevant" international law.[25] In a briefing to the media in May 2016, shortly before the issuance of the arbitration award in the *Philippines v. China* case, Xu Hong, director general of the Ministry of Foreign Affairs' Department of Treaty and Law, gave a detailed exposition of China's stance on this issue in response to a question about U.S. FONOPs. His explanation harmonized with China's past official position, but also added additional legal argumentation in defense of that position. He suggested that UNCLOS contains "no clear provision on whether foreign military ships enjoy the right of innocent passage in other States' territorial sea," noting that many states require foreign warships to obtain prior approval or give prior notification before entering the territorial sea in order to "safeguard the peace and security of the coastal State" (an allusion to Article 19 of UNCLOS, which defines innocent passage). In other words, as with China's 1992 territorial sea law, Xu did not explicitly deny that warships have the right of innocent passage, instead pointing to the ambiguity of international law on the matter, while also arguing that international law supports states' prior authorization and notification requirements. He then condemned the U.S. FONOPs as being neither "innocent" nor merely "passage," on the grounds that U.S. vessels go out of their way to enter the areas around China's maritime features, and that they have admitted FONOPs are "a challenge, and a show of force." Xu thus implied that *even if*

[25] For example, *Waijiao Bu Fayan Ren Yanlun*, October 22, 2016; July 2, 2017; July 3, 2017; October 11, 2017; May 27, 2018; and September 27, 2018. The spokespersons accused the United States, and on the September 2018 occasion, the UK, of "violating Chinese laws and relevant international laws" (*weifan Zhongguo falu ji xiangguan guoji fa*, 违反中国法律及相关国际法). See the Ministry of National Defense spokesperson's statement along similar lines in May 2018 at http://www.mod.gov.cn/info/2018-05/27/content_4815407.htm.

foreign warships enjoy the right of innocent passage in the territorial sea, U.S. FONOPs do not meet the requirements of that regime.[26]

Transit Passage in Straits Used for International Navigation

Where China's interpretations on this matter do make more of a departure from its initial stance at UNCLOS III is with regard to the issue of transit passage in straits used for international navigation, as well as, possibly, archipelagic sea lanes passage. China's interpretations in these areas represent examples of layering. As noted above, after the transit passage regime was proposed and included in the UNCLOS draft text, China never publicly indicated its position for or against the regime, nor its interpretation of how it should apply. As new circumstances have arisen since that time—namely, PLA Navy passages through other states' straits and archipelagic waters—Beijing has had to decide how to apply the law in this area. This has provided China with opportunities to interpret the law in novel ways in order to serve its interests in free passage through straits and archipelagic waters, an especially important requirement given China's constrained geographic position, entirely encircled by straits and archipelagoes (see Figure 7.1). These new interpretations, although layered on China's more restrictive interpretation of innocent passage, diverge from the spirit of those past interpretations.

[26] Briefing by Xu Hong, Director-General of the Department of Treaty and Law on the South China Sea Arbitration Initiated by the Philippines, May 12, 2016, https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1364804.htm, accessed May 2020. Chinese version: 外交部条法司司长徐宏就菲律宾所提南海仲裁案接受中外媒体采访实录, https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1364804.htm, accessed May 2020.

Figure 7.1 A Continental View of China's Constraining Maritime Geography

China's Own Straits. First of all, it is important to note that the only Chinese strait where the transit passage regime could conceivably apply is the Qiongzhou Strait between the mainland southern coast and the island of Hainan, the width of which is between 10 and 22 nm wide. (The Taiwan Strait is 100 nm wide at its narrowest point, and the channels between the mainland and other smaller Chinese islands near the mainland likely would not qualify for transit passage even if China had not drawn straight baselines around them, due to provisions in Articles 36, 38, and 45 of UNCLOS.) But ever since its 1958 Declaration on the Territorial Sea, China has treated Qiongzhou Strait as *internal* waters, enclosed within straight baselines, rather than territorial waters.[27] Under international law, the right of innocent passage for foreign ships in the territorial

[27] Article 2 states, in part:

sea generally does not extend to internal waters.[28] The 1964 Rules for the Control of Non-Military Vessels of Foreign Nationality Passing through the Qiongzhou Strait, which remain in effect, make this explicit. Referring to the 1958 territorial sea declaration, they reiterate that "the Qiongzhou Strait is an inland sea of China, which is closed to all military vessels of foreign nationality," and that non-military foreign vessels must apply for passage through the strait.[29] The 1964 rules also establish an administrative area within the strait for purposes of managing traffic, but actual coordinates for basepoints of the straight baselines of the territorial sea were not published until 1996.[30] It is also worth noting that China has not yet publicized basepoints on the west side of Qiongzhou Strait, as that maritime area adjacent to the Gulf of Tonkin (Beibu Bay) was still under dispute with Vietnam when the other basepoints around Hainan were declared in 1996.[31] (See Figure 7.2)

> China's territorial sea along the mainland and its coastal islands takes as its baseline the line composed of the straight lines connecting base-points on the mainland coast and on the outermost of the coastal islands; the water area extending twelve nautical miles outward from this baseline is China's territorial sea. The water areas inside the baseline, including Bohai Bay and the Qiongzhou Straits, are Chinese inland waters. …

[28] In the 1982 UNCLOS, foreign ships have no right of innocent passage in a state's internal waters, *except* for those enclosed within straight baselines which have "the effect of enclosing as internal waters areas which had not previously been considered as such" (Article 8(2)). Chinese legal experts I spoke with in summer 2019 explained that China does not consider this provision as applicable to Qiongzhou Strait because those baselines were established in 1958 (or at least claimed, as actual basepoints were not published until 1996) well before UNCLOS was negotiated, though I have not been able to find any explicit official statement of this interpretation.

[29] The Chinese version of these rules is available at http://xxgk.mot.gov.cn/jigou/fgs/201807/t20180727_3051183.html. I have quoted from the English translation available on the Food and Agriculture Organization's website at http://www.fao.org/faolex/results/details/en/c/LEX-FAOC011895, though beware that this version incorrectly lists the coordinates for the administrative area in article 3. These rules have been amended slightly since 1964, but not in ways that affect the quoted provisions.

[30] See Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China, 15 May 1996, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf. The segment between basepoints Dafanshi and Qizhouliedao encloses Qiongzhou Strait on the east within PRC internal waters; see Figure 7.2.

[31] China and Vietnam have since reached an agreement delimiting their maritime boundary in the Gulf of Tonkin in 2000, but the baselines of each side's territorial sea were not specified in the agreement.

Figure 7.2 China's Qiongzhou Strait Regime: Administrative Area and Straight Baselines

Setting aside the issue of whether or not China's straight baselines have been drawn in accordance with UNCLOS regulations on this subject,[32] China has nonetheless established a domestic regime under which it treats Qiongzhou Strait as internal waters, wherein foreign warships and aircraft have no right of passage, whether innocent passage, transit passage, or otherwise. In other words, by a process of deduction, it can be assumed that China does not view any of its straits as "straits used for international navigation" under Part III of UNCLOS.[33]

[32] The United States has challenged China's straight baselines as being out of compliance with international law, and South Korea has disputed parts of China's straight baselines in the Yellow Sea.

[33] It is possible that China would also cite Article 38 of UNCLOS to justify such a position: "if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics." However, I have not found any instances of such explicit reasoning in official PRC government sources.

Initial Ambiguity and the 2004 Ishigaki Strait Incident. Perhaps in part due to this interpretation, China apparently never went on the record about its views on the transit passage regime in the first two decades following UNCLOS III. As the PLA Navy (PLAN) began to expand in size and operations in the first decade of the new millennium, however, this issue began to arise in a way that it could no longer ignore. In 2004, for example, Japan protested the presence of a PLAN *Han*-class submarine in the Ishigaki Strait in the Ryukyu Island chain. As Peter Dutton explains, Japan does not view Ishigaki Strait, a relatively remote and infrequently traversed strait, as a strait used for international navigation under UNCLOS and does not see transit passage (which allows submarines to remain submerged) as applicable there. The Foreign Ministry apologized in response to Japan's complaint, recognizing that the submarine had been out of line in entering Japan's territorial sea submerged and attributing it to technical error. Indeed, it is unclear if the submarine's presence in the area was intentional or approved by senior leaders, much less vetted by government lawyers.[34] Nor is it uncontestably clear that the submarine's behavior would have qualified under the transit passage regime, which requires "continuous and expeditious transit." But a retired Chinese military lawyer I interviewed in summer 2019 explained that he felt this was a missed opportunity for China to assert its position in favor of transit passage.[35]

Staking Out a Position on Transit Passage. A decade later, however, China seized upon new opportunities to assert such an interpretation. In response to a media question about PLAN ships' passage through the U.S. territorial sea in the Tanaga Strait near Alaska after conducting a joint exercise with Russian forces, a spokesperson for the Ministry of National Defense stated,

[34] Dutton 2009.

[35] Interview 6.19 with retired Chinese military lawyer, August 13, 2019, Beijing, China.

"It needs to be pointed out that, according to relevant international laws, the Tanaga Strait is a strait for international navigation. The military ships and aircraft of all countries enjoy the rights of transit passage."[36] The retired PLA lawyer I interviewed explained that this terminology was a deliberate decision, intended to refute the U.S. characterization of the PLAN vessels' activities as "innocent passage," in order to assert China's transit passage rights.

The following year, the Ministry of Defense repeated this stance in response to a media question about a PLAN vessel's transit through Tokara Strait, declaring that the strait is "a territorial strait used for international navigation" and defending Chinese warships' right to transit the strait in accordance with "the freedom of navigation principle" of UNCLOS. This position directly challenged Tokyo's more restrictive interpretation of the relevant provisions.[37] Two days later, Foreign Ministry spokesperson Hua Chunying further elaborated on this interpretation, explicitly noting that "According to the provisions of UNCLOS and relevant international practice, all ships within the territorial straits used for international navigation enjoy the right of transit passage *without prior notification to the coastal State*" (emphasis added).[38]

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[36] "Defense Ministry's regular press conference on Sept. 24," September 24, 2015, http://eng.mod.gov.cn/TopNews/2015-09/24/content_4622121.htm; Chinese version: "9月国防部例行记者会文字实录," http://www.mod.gov.cn/jzhzt/2015-09/24/content_4622179.htm.

A Foreign Ministry spokesperson reiterated this stance, referring to the MND spokesperson's statement, in a press conference the following month. *Waijiao Bu Fayan Ren Yanlun*, October 27, 2015.

[37] See a more detailed explanation of Japan's views on this incident and the broader issue in chapter 10.

[38] *Waijiao Bu Fayan Ren Yanlun*, June 17, 2016. Hua reiterated this position a few days later and further explained that "this type of strait is geographically connected on both sides to the high seas or the exclusive economic zone, and is used for international navigation," echoing language from Article 37 of UNCLOS on the scope of transit passage. *Waijiao Bu Fayan Ren Yanlun*, June 20, 2016.

On this particular issue, the MND spokesperson may have initially been more well-briefed and forward-leaning than his Foreign Ministry counterpart. The same day that the MND spokesperson issued its statement on this matter, MFA spokesperson Lu Kang responded to a question on the incident by referring to the MND statement and affirming Tokara Strait is a strait used for international navigation. However, he may have then accidentally referred to the PLAN's transit there as "innocent passage": this phrase is included in the English translation of the press conference available on the MFA website, while the Chinese version uses the phrase "transit passage." Compare English version at https://www.fmprc.gov.cn/nanhai/eng/fyrbt_1/t1372569.htm vs. the Chinese version, *Waijiao Bu Fayan Ren Yanlun*, June 15, 2016.

It is unclear if this was a translation error, or if Lu did in fact misspeak and the Chinese version was corrected, while the English version was left uncorrected. Foreign Ministry spokesperson Hua Chunying's remarks at the press

The next year, there was yet another episode with a PLA vessel transiting a Japanese strait where China staked out a legal position challenging Japan's more restrictive interpretation. As noted in chapter 4, there is controversy in international law over whether or not warships approaching a strait where a high seas corridor exists may enter part of the territorial sea during their approach in normal transit mode (as in transit passage), or whether they may only do so in innocent passage mode (with or without permission or notification). The United States insists that they may continue in normal mode, while Argentina and Chile, for example, deny this right. On July 2, 2017, a PLAN vessel entered Japan's territorial sea while approaching Tsugaru Strait (see Figure 7.3). Tsugaru is one of the five major straits wherein Tokyo has limited the width of its territorial sea to 3 nm, so as to allow for a high seas corridor to exist, and it does not acknowledge the right of transit passage in the territorial seas abutting that strait (though, technically, its laws allow *innocent* passage for warships without prior permission in the territorial sea).[39] On this occasion, a PRC MND spokesperson defended the warship's passage as being "in accordance with international law," as Tsugaru Strait is a strait where all ships, including military ships, "enjoy the right of normal passage" (*xiangyou zhengchang tongguo de quanli*, 享有正常通过的权利).[40] This specific phrase does not appear in UNCLOS, but it does echo the text in Article 39(c) stipulating that ships in transit passage may continue in "their normal modes," and with the customary international law that the United States cites to justify its

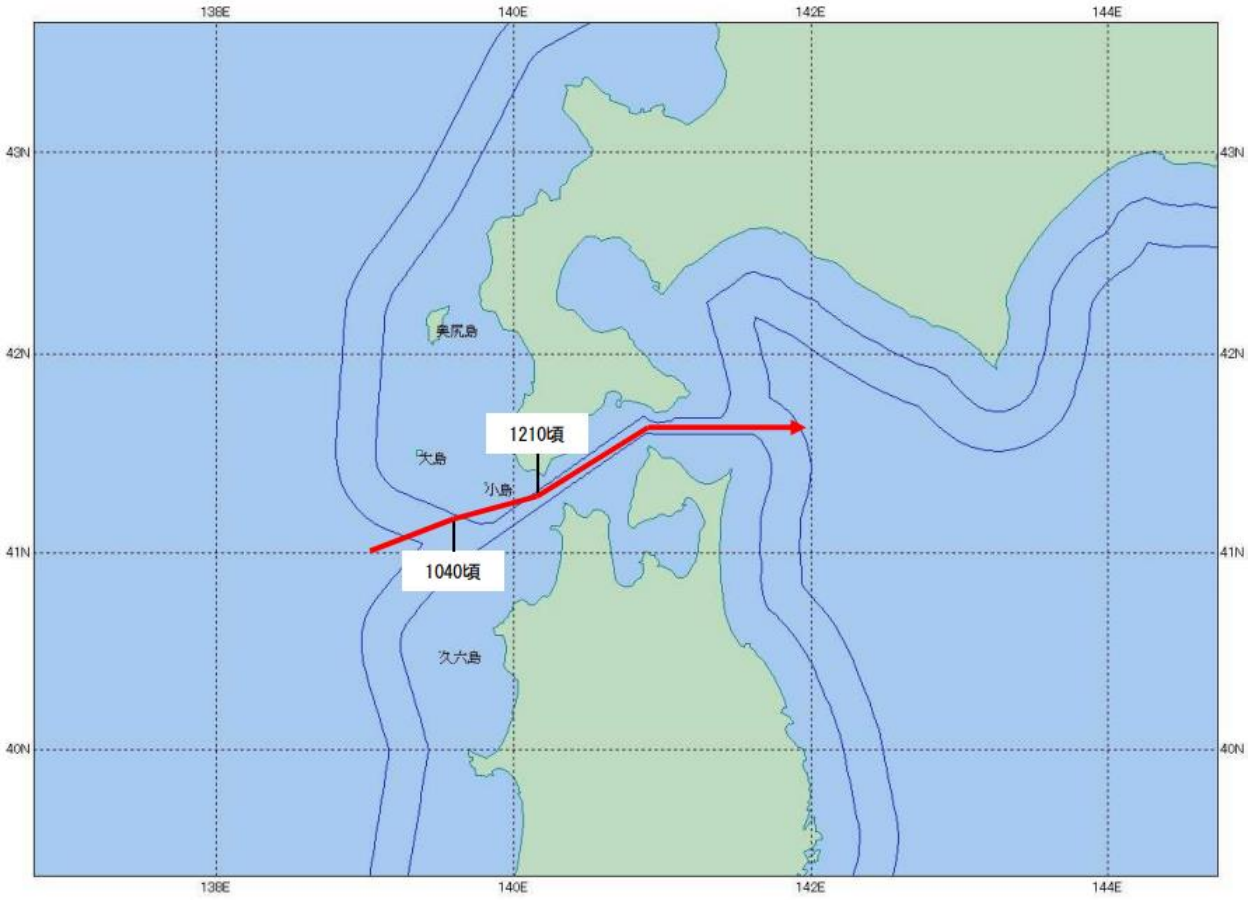
conference two days later suggest the latter may have been true, as she went to pains to explain that "the right of transit passage for ships in straits used for international navigation and the right of innocent passage for ships in the territorial sea should not be confused." *Waijiao Bu Fayan Ren Yanlun*, June 17, 2016.

[39] See more details on Japan's approach to this issue in chapter 10.

[40] "国防部新闻局就我军舰正常通过津轻海峡答问 (The Information Bureau of the Ministry of National Defense answers questions about our warships passing through the Tsugaru Strait)," July 3, 2017, http://www.mod.gov.cn/info/2017-07/03/content_4784579.htm. See also *Waijiao Bu Fayan Ren Yanlun*, July 3, 2017, wherein MFA spokesperson Geng Shuang answers a question on this incident by referring the questioner to the military and affirming "that Chinese naval vessels carry out activities in relevant sea areas in accordance with international law."

own stance on the issue. Thus, the MND's statement seems to have been designed to deny that China was merely exercising innocent passage, instead challenging Japan's interpretation of the rules governing the strait.

Figure 7.3 PLA Navy Intelligence Ship's Passage through Tsugaru Strait, July 2017



Source: Japanese Ministry of Defense, as cited in Ankit Panda, "Chinese Navy Type 815 Intelligence Ship Transits Tsugaru Strait in Northern Japan," *The Diplomat*, July 4, 2017, https://thediplomat.com/2017/07/chinese-navy-type-815-intelligence-ship-transits-tsugaru-strait-in-northern-japan.

Persistent Ambiguity in China's Interpretation. Although China has begun asserting the right of transit passage for its ships in straits used for international navigation, and it has clearly rejected Japan's more restrictive interpretation of that provision, it remains unclear how exactly

China interprets the meaning of "straits used for international navigation." Specifically, China has not explicitly endorsed the U.S. view that transit passage applies in any strait that could be used for international navigation. China's ambiguity on this matter is most evident its unclear stance toward Canada's attitude toward the Northwest Passage. Canada has drawn straight baselines around within the Arctic Archipelago, including portions of the Northwest Passage, claiming the waters within those baselines as internal waters and requiring all ships (military or otherwise) passing through the area to be subject to Canadian control and authorization. The United States instead views the waters of the Northwest Passage to constitute a "strait used for international navigation." As climate change hastens and the ice in the Arctic melts, allowing for more navigation through the Northwest Passage, this issue is becoming ever more salient, including for China, which especially hopes to use the route to shorten shipping times to Europe and the East Coast of the United States.

In April 2016, after the Ministry of Transport published an Arctic Navigation Guide for the Northwest Passage, Foreign Ministry spokesperson Hua Chunying answered a question about China's interpretation of the legal regime applying in that waterway by briefly summarizing her understanding of the international dispute, suggesting that China was studying the issue and would "make the appropriate decision based on various factors."[41] Then, in the Arctic White Paper published by China's State Council in 2018, China was more forward-leaning on the need for navigational freedom in the Arctic, even while maintaining some ambiguity. The white paper acknowledged the authority of the Arctic States "in the waters subject to their jurisdiction," while calling for the Arctic shipping routes to be managed "in accordance with treaties including the UNCLOS and general international law" and stressing that "[t]he freedom of navigation

[41] *Waijiao Bu Fayan Ren Yanlun*, April 20, 2016.

enjoyed by all countries in accordance with the law and their rights to use the Arctic shipping routes should be ensured."[42]

Passage Through Archipelagic Waters and the Surrounding Territorial Seas

One final area of ambiguity in China's position that has evolved in a similar but perhaps even more revealing direction has to do with China's position on passage through the territorial seas and archipelagic waters of archipelagic States without prior permission or notification. This issue erupted in August 2019, just prior to a visit by Philippine president Rodrigo Duterte to Beijing. Throughout 2019, PLAN vessels had, according to the Philippine military, conducted at least 13 passages through Philippine waters without prior notification or permission. Philippine defense secretary Delfin Lorenzana acknowledged that China was not violating Philippine law with these passages, but explained that the Philippines had nonetheless lodged diplomatic objections to them on the grounds that China was violating "protocol or common courtesy" by not communicating about the passages in advance or responding to communications by Philippine forces on site. Lorenzana also claimed the PRC ambassador to the Philippines had suggested in July that the PLAN would begin providing prior notice, but at least one ship passed through Sibutu Passage after that point without doing so.[43] This incident led to a public outcry,

[42] State Council Information Office of the People's Republic of China, "China's Arctic Policy," white paper, January 2018, http://english.www.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm. Chinese version: 中国的北极政策, 中华人民共和国国务院新闻办公室, January 2018, https://www.fmprc.gov.cn/ce/cefi/chn/xwdt/t1529966.htm.

[43] Jeanette Andrade, "China ships stop passing through PH waters," *Inquirer*, August 26, 2019, https://globalnation.inquirer.net/179295/china-ships-stop-passing-through-ph-waters; JC Gotinga, "Xi says China not required to seek permission for ships' passage – Lorenzana," *Rappler*, September 4, 2019, https://www.rappler.com/nation/239373-lorenzana-says-xi-china-not-required-seek-permission-ships-passage.

The Philippines has declared archipelagic baselines under Part IV of UNCLOS; these encompass Sibutu Passage, so the waters within that passage are archipelagic waters. See note 5 in this chapter for an explanation of the passage regimes for archipelagic waters. In addition, it is worth noting that Sibutu Passage is approximately 16 nm wide, and thus in a non-archipelagic context could be a strait fully enclosed by the territorial seas extending from the land on either side of the strait.

and Duterte reportedly issued an "order" requiring foreign warships to seek prior permission before passing through Philippine waters.[44]

When asked about this incident, Foreign Ministry spokesperson Geng Shuang replied, "Regarding the issue of the so-called (*suowei*, 所谓) Chinese ships' passage through the Philippines' territorial waters, what I want to emphasize here is that we are willing to carry out dialogue and communication with the relevant country on the basis of international law to jointly safeguard security and order at sea."[45] Then, after Chinese president Xi Jinping's meeting with Duterte on August 29, Defense Secretary Lorenzana claimed that Xi told Duterte that prior permission for warship passage akin to the PLAN's passages in Philippine waters was not required under international law. At the same time, Philippine Foreign Minister Teddy Locsin reported that China had agreed to seek prior permission from Manila on political grounds, despite the fact that UNCLOS included no such requirement.[46]

In other words, over the course of this brouhaha, China apparently articulated an interpretation of the law of the sea that it had not explicitly endorsed in the past—namely, that

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[44] It is unclear what form this "order" took, and whether it was actually a formal decree or just a political demand. Soon after Duterte issued this "order," prominent Philippine jurists and military officials pushed back, arguing it would be inconsistent with UNCLOS.

[45] *Waijiao Bu Fayan Ren Yanlun*, August 23, 2019. This vague statement did not explicate China's legal interpretation of the issue, but did cast doubt on the notion that this passage consisted, strictly speaking, of passage through Philippine territorial waters (though, of course, China would have passed through Philippine territorial waters as it was entering the archipelagic waters).

A few days later, the PRC Embassy to the Philippines posted on its website an article written by Yan Yan, the director of the Research Center of Oceans Law and Policy at the National Institute for South China Sea Studies, a think tank under the auspices of the Foreign Ministry. This article defended the PLAN ship's passage with an explanation of the complex provisions of UNCLOS related to archipelagic waters, noting that ships enjoyed the right to conduct archipelagic sea lanes passage (similar to transit passage) in "routes normally used for international navigation," which she said exist in Sibutu Passage. Yan also noted that Philippine law does not require prior permission or notification for innocent passage through the territorial sea or archipelagic waters, but noted that "China respects PH domestic legislation and will notify relevant authorization if there's such a legal requirement." Yan Yan, "Chinese Vessels through Sibutu Passage Well-Grounded in Law," Embassy of the People's Republic of China in the Philippines, August 27, 2019, http://ph.china-embassy.org/eng/sgdt/t1692224.htm.

[46] JC Gotinga, "Xi says China not required to seek permission for ships' passage – Lorenzana," *Rappler*, September 4, 2019, https://www.rappler.com/nation/239373-lorenzana-says-xi-china-not-required-seek-permission-ships-passage.

foreign warships are not required by international law to seek permission before passing through archipelagic waters or their associated territorial seas, unless the archipelagic state's domestic laws require it. At the same time, it conceded to seek such permission for diplomatic and political reasons. This position contrasted with its approach toward transit passage in Japanese straits, where it was less willing to make concessions on diplomatic grounds and instead stuck to legal principle.[47] These two trends—a growing distinction between China's legal positions and political stances, as well as differences in China's behavior in different geographical areas with reference to different states—are also evident in China's evolving stance on foreign military activities and marine scientific research in the EEZ, a subject to which I now turn.

Foreign Military Activities and Marine Scientific Research in the Exclusive Economic Zone

Much like the issue of straits used for international navigation, the question of coastal state jurisdiction over foreign military activities in the EEZ lies at the heart of the compromise "package deal" embodied in UNCLOS. Maritime powers such as the United States, Soviet Union, Germany, United Kingdom, Italy, and others, would only support the new 200 nm EEZ regime on the condition that high seas freedoms, including for military vessels and aircraft, would not be affected in the EEZ. However, many developing and postcolonial states never fully accepted the legitimacy of military activities in the EEZ, especially live fire exercises and surveillance, on both environmental/economic and security grounds, instead preferring the EEZ and high seas alike to be "zones of peace." As a result of these unresolved tensions, the convention is ambiguous on this highly political subject. As explained in greater detail in chapter

[47] This discrepancy in China's reactions toward Japanese and Philippine objections to PLAN passages is likely a result of the differential power gaps and historical context in the two relationships, the difference in geographical proximity and PRC strategic attitudes toward the two areas, the different applicable international law, and political considerations at the time the incidents occurred.

4, this is most evident in five elements of the convention: (1) the tense balance between Articles 56 and 58 on the rights and duties of coastal states and other states, respectively, in the EEZ;[48] (2) the granting of authority to the coastal state to regulate marine scientific research (MSR) in its EEZ, without defining what MSR entails or whether or not it includes military surveys; (3) the right of coastal states to take measures to protect the marine environment in the EEZ, and whether or not that gives them authority to ban live-fire exercises; (4) the vagueness of general provisions on matters such as "the peaceful uses of the seas"; and (5) the appeal to "equity" in Article 59 as a means of resolving conflicts over rights and jurisdiction in the EEZ. The first two of these rationales have played the most prominent role in China's evolving interpretations of military activities in the EEZ.

China's Positions at UNCLOS III and Final Interpretations of the Text

China's overall stance at UNCLOS III was to favor strong coastal state authority in the EEZ, even while preserving basic navigational freedoms in the zone. Thus, while endorsing much more expansive jurisdiction in the EEZ than the major maritime powers, China did not go as far as many developing countries in this regard. To be sure, in the early years of the negotiations, China lent strong rhetorical support to countries such as Peru who asserted full sovereignty over a 200 nm maritime zone, even while making no such claim itself.[49] The PRC delegation also on occasion took rhetorical aim at freedom of navigation in the EEZ in the context of attacking "the super-powers," especially the Soviet Union, for their "maritime

[48] The authors of the definitive Virginia Commentary on UNCLOS write, "There is a mutuality in the relationship of the coastal State and other States, and articles 56 and 58 taken together constitute the essence of the regime of the exclusive economic zone." Nandan and Rosenne 2003, vol. 2, 556.

[49] See remarks by Ke Zaishuo at the 48th meeting of the Second Committee, May 2, 1975, A/CONF.62/C.2/SR.48. See also "Joint Communique on Establishment of Diplomatic Relations Between China and Peru," in *Peking Review* 14 (45), November 5, 1971, p. 3, available at http://massline.org/PekingReview/PR1971/PR1971-45.pdf.

hegemonism."[50] In one plenary debate on the topic of the peaceful uses of ocean space, Chinese delegate Lai Yali became engaged in an extended back-and-forth squabble with the Soviet delegate. In response to an accusation that China was sabotaging world disarmament efforts, Lai issued a challenge to the Soviet Union to prove it was not "hypocritical and deceptive" by promising "not to stage military manoeuvres in the economic zones of other countries" and "to discontinue its military espionage and spying activities carried out under the name of scientific research in the off-shore seas of other countries," among other commitments.[51]

Notably, however, this was the only instance in the conference's records when China directly condemned military maneuvers or exercises in the EEZ. In practice, China did not actively lobby for restrictions on military maneuvers or exercises in the EEZ, and it favored preserving navigational freedoms in the EEZ. In a working paper submitted to the Seabed Committee in 1973, China included a provision that "[t]he normal navigation and overflight on the water surface of and in the airspace above the economic zone by ships and aircrafts of all states shall not be prejudiced," coupled with an expectation that other states "observe the relevant laws and regulations of the coastal State." China affirmed this basic dual stance of favoring normal navigational freedoms in the EEZ while expecting other states to abide by the laws of the coastal state in the EEZ on other occasions as well.[52]

At the same time, while not opposing "normal navigation" or even exercises by foreign military ships and aircraft, the PRC was a strong critic of military *surveillance* in the EEZ. In the early sessions of UNCLOS, the Chinese delegation assailed proposals for unrestricted foreign military surveillance in the EEZ under the "pretext" or "guise" of marine scientific research.

[50] See, in particular, Bi Jilong's remarks at the 55th plenary meeting, April 18, 1975, A/CONF.62/SR.55 and Lai Yali's remarks at the 67th plenary meeting, April 23, 1976, A/CONF.62/SR.67.

[51] See Lai Yali's remarks at the 67th plenary meeting, April 23, 1976, A/CONF.62/SR.67.

[52] See Ling Qing's remarks at the 24th meeting of the Second Committee, A/CONF.62/C.2/SR.24.

These critiques were often embedded in piqued polemical attacks on "the super-powers."[53] This position dovetailed with China's support for the G-77's position favoring expansive coastal state jurisdiction over MSR.[54] Although concerned about coastal state jurisdiction over marine resources and environmental protection in the EEZ,[55] China's demand that MSR be subjected to coastal state authorization and regulation was grounded, first and foremost, in its concern that "[m]arine research, like any other scientific research, directly or indirectly served definite political, economic or military purposes,"[56] and that it could threaten the "sovereignty and security" of the coastal state.[57] Although this issue did not feature prominently in China's plenary meeting speeches from 1978 onward, PRC delegates did continue to press for stronger coastal state jurisdiction in the EEZ in 1978 and 1980.[58] By the end of UNCLOS III, however, China stopped raising the issue entirely in public statements. The Chinese delegation did not express

[53] See, for example, the summary of remarks by Ling Qing at the 30th meeting of the Second Committee, August 7, 1974, A/CONF.62/C.2/SR.30, where Ling criticized a Soviet draft proposal by lambasting Soviet espionage activities at sea "on the pretext of 'fundamental scientific research' or 'freedom of scientific research'." See also the remarks by Luo Youru (Lo Yu-ju) in the 8th meeting of the Third Committee on July 19, 1974, A/CONF.62/C.3/SR.8; the 21st meeting of the Third Committee on April 17, 1975, A/CONF.62/C.3/SR.21; and the 30th meeting of the Third Committee on September 14, 1976, A/CONF.62/C.3/SR.30; and the remarks by Ling Qing in the 76th plenary meeting on September 17, 1976, A/CONF.62/SR.76.

[54] See the working paper on MSR China submitted to the Seabed Committee in 1973, which proposed: "To conduct marine scientific research in the sea area within the national jurisdiction of a coastal State, prior consent of the coastal State concerned must be sought, and the relevant laws and regulations of the coastal State must be observed." Also of note, China's working paper proposed that MSR in the international seabed beyond national jurisdiction "must be exclusively for peaceful purposes," a reference to a theme in developing country discussions of the international seabed. Working Paper on Marine Scientific Research, Submitted by the Chinese Delegation, July 19, 1973, Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Subcommittee III, A/AC/138/SC.III/L.42.

See also remarks of Luo Youru at the 22nd meeting of the Third Committee, April 25, 1975, A/CONF.62/C.3/SR.22.

[55] See Ling Qing's remarks at the 24th meeting of the Second Committee, A/CONF.62/C.2/SR.24.

[56] See remarks by Luo Youru in the 8th meeting of the Third Committee on July 19, 1974, A/CONF.62/C.3/SR.8.

[57] See remarks of Luo Youru at the 21st meeting of the Third Committee on April 17, 1975, A/CONF.62/C.3/SR.21. As described in chapter 4, this problem of distinguishability is recognized by many international legal experts as a source of legal ambiguity for foreign military surveillance in the EEZ.

[58] See Shen Weiliang's remarks at the 53rd meeting of the Second Committee on April 17, 1978, A/CONF.62/C.2/SR.53; You Mengjia's remarks at the 38th meeting of the Third Committee on May 12, 1978, A/CONF.62/C.3/SR.38; An Zhiyuan's remarks at the 100th plenary meeting on May 17, 1978, A/CONF.62/SR.100; and Ke Zaishuo's remarks at the 126th plenary meeting on April 2, 1980, A/CONF.62/SR.126.

any dissatisfaction with the convention text in this regard in its concluding speeches, apparently satisfied with the ultimate balance struck, and perhaps with the ambiguity preserved.

China's Interpretations Post-UNCLOS III

In the first two decades after signing UNCLOS, China laid a legal foundation for the EEZ. This new domestic legal regime required foreign ships and aircraft conducting any surveying, mapping, or marine scientific research in China's maritime zones, including the EEZ and continental shelf, to obtain prior consent from the PRC government. However, it did not impose any limitations on foreign military exercises in the EEZ, and the 1998 EEZ law explicitly affirmed states' freedom of navigation and overflight, conditional on observance of domestic and international law. The basic tenets of this regime represented a continuation and codification of China's mixed and relatively moderate interpretations at UNCLOS III.

As the twenty-first century dawned, however, these provisions soon became a source of conflict with the United States. An increase in U.S. reconnaissance flights near Chinese coasts precipitated the EP-3 incident in 2001, and China objected to or harassed U.S. Naval Ship (USNS) surveillance ships conducting hydrographic surveys on several occasions in China's EEZ in the first decade of the twenty-first century. In China's public protests on these occasions, it objected to U.S. activities on the grounds of UNCLOS, general international law, and domestic law. However, in the second decade of the century, China's objections to U.S. surveillance and reconnaissance began to fade as its own military activities in other states' EEZs expanded. When challenged about the legitimacy gap stemming from the inconsistency between its behavior and its criticism of U.S. behavior, Beijing blamed the United States of engaging in military activities on a much larger scope, frequency, and number. It criticized U.S. activities for inflaming tensions and risking accidents, even while avoiding criticizing them on legal grounds.

Meanwhile, China increasingly cited international law to justify its own military navigational operations in other states' waters. This overall evolution in China's legal interpretations of foreign military activities in the EEZ has thus exhibited a pattern of drift across the past two decades, as China has declined to extend its past interpretation to new circumstances.

At the same time, in the area of marine scientific research in the EEZ, China's positions have exhibited more continuity than change, despite the dramatic increase in its MSR activities around the world over the past two decades. Although China's compliance with the UNCLOS-based requirement to seek coastal states' permission before conducting MSR in their EEZs or continental shelves has been incomplete, this noncompliance has apparently been due more to failures in coordination by the Chinese government than deliberate violation. When challenged on this noncompliance, China has obfuscated and changed course, reluctant to admit guilt but not willing to challenge the basic tenets of coastal state consent for MSR. China's behavior in this regard provides perhaps the clearest example of how China's desire to maintain legitimacy as a responsible and fair maritime power that does not seek to impose its will on weaker states has constrained evolution in its interpretations.

Establishing the Legal Framework for the EEZ

In the two decades after UNCLOS, the issue of foreign military surveillance and marine scientific research in the EEZ did not feature prominently in Chinese debates over ratification of the law of the sea. In fact, China did not even formally declare an exclusive economic zone until 1998. In the meantime, though, China had begun building the basic domestic legal framework that would eventually govern its EEZ, including marine scientific research therein. In the early 1980s, China passed laws on marine environmental protection and maritime traffic safety, as well as regulations governing exploitation of offshore petroleum resources, followed by a

fisheries law in 1986, regulations on submarines cables and pipelines in 1989, and a Surveying and Mapping Law in 1992. These laws and regulations applied, variously, to the tidal flats, internal waters, territorial waters, continental shelf, and, invariably, to the "other sea areas under national jurisdiction/the jurisdiction of the PRC" (*Zhonghua Renmin Gonghe Guo/guo guanxia de qita haiyu,* 中华人民共和国 / 国管辖的其他海域). This latter phrase was likely meant in part to be a catch-all term for any areas over which China might claim jurisdiction, including a hypothetical or future EEZ.[59] Most notably, the Surveying and Mapping Law stipulated that any surveying or mapping done by a foreign entity in the "territorial air, land and waters, as well as other sea areas under the jurisdiction" of the PRC must be subject to government approval.[60]

In addition, as explained previously, the 1992 law on the Territorial Sea and Contiguous Zone, wherein the PRC laid claim to a 12 nm contiguous zone beyond the 12 nm territorial sea, claimed authority for China to exercise powers to prevent or punish infringement of its security in the zone, in addition to its customs, immigration, fiscal, and sanitary laws and regulations. (Article 33 of UNCLOS explicitly permits most of these authorities in the contiguous zone, but it does not mention "security.") China's 1992 law does not specify what is meant by this phrase, however, and Beijing has never officially clarified how its jurisdiction over security differs in the territorial sea, contiguous zone, and exclusive economic zone.[61] Nor has Beijing regularly cited

[59] However, revisions of these laws after 1998 retained this phrase, implying some residual jurisdictional claims to sea areas beyond the UNCLOS maritime zones. This will be discussed further in chapter 9. For example, the Marine Environment Protection law was revised in 1999 to include explicit reference to the EEZ, though it retained the phrase "other sea areas under the jurisdiction of the PRC"; this remained unchanged in the most recent 2017 revision. Likewise, the Fisheries Law was revised in the early 2000s to include reference to EEZ, while retaining the "other sea areas" catch-all phrase. The 2002 and 2017 revisions of the Surveying and Mapping Law, by contrast, did not add explicit references to the EEZ (or continental shelf), but continued to solely refer to PRC "territorial air, land, or waters," and the catch-all "other sea areas under its jurisdiction."

[60] This law was revised substantially in 2002 and again in 2017, with many more detailed provisions, but those revisions did not change this basic requirement included in the original 1992 law.

[61] Although some Chinese experts maintain there is a substantive and legal difference among these zones in terms of China's security jurisdiction, other Chinese interviewees I queried about this in summer 2019 could not explain what that difference entailed specifically. One think tank scholar I interviewed stated that the security provision "doesn't

this provision of the law to justify its enforcement behaviors against U.S. freedom of navigation operations or other foreign military activities.[62]

Four years later, China's declaration upon ratifying UNCLOS in 1996 asserted PRC sovereign rights and jurisdiction in a 200 nm EEZ extending from its coasts. Notably, however, unlike several other developing countries such as Bangladesh, Brazil, Cape Verde, India, Malaysia, Thailand, and Uruguay, China's declaration upon ratification did not prohibit or require permission or notification for military exercises or maneuvers in the EEZ.[63] This represented a continuation of its stance at UNCLOS III, where China's delegation conspicuously avoided expressing opposition to military exercises in the EEZ, despite its general stance of solidarity with developing nations. The next month, the State Council issued Provisions on the Administration of Foreign-Related Maritime Scientific Research, which stipulated that any foreign party wishing to conduct MSR for peaceful purposes (*heping mudi*, 和平目的) in China's internal waters, territorial sea, or other sea areas under national jurisdiction must apply for China's consent six months in advance and abide by various requirements related to joint research and information sharing.

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mean anything" and thus ought to be jettisoned from China's territorial sea and contiguous zone law. Interview 6.14 with Chinese scholar of South China Sea issues, July 19, 2019, Haikou, Hainan, China. Another researcher who shared a similar view noted that many scholars and some Foreign Ministry officials have discussed eliminating this provision in a future comprehensive maritime basic law, in part because the PLA Navy is increasingly operating in other countries' contiguous zones. However, the PLA Navy itself remains generally resistant to such a change. Interview 6.11 with Chinese researcher on South China Sea issues and international law, July 19, 2019, Haikou, Hainan, China.

[62] The references to the contiguous zone (*pilian qu*, 毗连区) in Foreign Ministry or Ministry of National Defense press conferences generally refer to a few specific contexts: the entry of Chinese and Japanese vessels into the contiguous zone around the Diaoyu/Senkaku Islands; China's drilling activities in 2014 in the contiguous zone of the Xisha (Paracel) Islands, which provoked vociferous objection from Vietnam; or general references to the 1992 law, which contains the term in its title. I was not able to find any instances of PRC officials citing the specific security provision in its 1992 law to justify its exercise of authority in the contiguous zone. China did object to Japan's ships' entry into the contiguous zone around the Diaoyu/Senkaku Islands, though without citing any specific legal reasoning such as this provision. See *Waijiao Bu Fayan Ren Yanlun*, June 13, 2016; January 15, 2018.

[63] See chapter 5 for more cross-national context on this issue.

Then, during the next National People's Congress two years later, the Standing Committee passed the 1998 Exclusive Economic Zone and Continental Shelf Act. This was the first PRC law to formally establish China's claim to a 200 nm EEZ.[64] Among other provisions, it required foreign entities to obtain approval before engaging in marine scientific research in the EEZ or continental shelf and to comply with the regulations of the PRC when doing so. In addition, Article 11 stated:

> Any State, provided that it observes international law and the laws and regulations of the People's Republic of China, shall enjoy in the exclusive economic zone and the continental shelf of the People's Republic of China freedom of navigation and overflight and of laying submarine cables and pipelines, and shall enjoy other legal and practical marine benefits associated with these freedoms. The laying of submarine cables and pipelines must be authorized by the competent authorities of the People's Republic of China.[65]

There are two elements of particular note in this article. First, it explicitly affirms that "any state" enjoys freedom of navigation and overflight in the PRC's EEZ and continental shelf, *provided* that it observes both international law and China's own laws and regulations. On one hand, this language reflects the balance that UNCLOS established in the EEZ and continental shelf as *sui generis* zones distinct from either the territorial sea or the high seas, where coastal states have jurisdiction over marine resources and associated matters, even while user states retain various

[64] As Kardon notes, China has yet to specify the exact outer limit lines of its EEZ in terms of geographical coordinates or charts. Kardon 2017, 5, 13–14, 224. Such specification is a requirement included in Article 75 of UNCLOS.

China's delay in this regard is probably in part because the EEZ is measured from the baselines of the territorial sea, but China has not yet publicized baselines for all of its coastal areas (such as the areas in the Gulf of Tonkin, in the Bohai Bay/Yellow Sea north of Chengshan Cape, and the Spratly Islands or Scarborough Shoal, not to mention Taiwan and affiliated islands claimed by China but controlled by the ROC government, though the Taiwan government did declare such baselines in 1999). The same likely reason that China has not yet declared many of those baselines is also probably why it has not publicized the precise geographical boundary of its claimed EEZ: such a declaration would be highly provocative, especially since every part of China's EEZ overlaps with another country's claimed EEZ and/or extends from island territories where China's claim to sovereignty is under dispute.

[65] Exclusive Economic Zone and Continental Shelf Act, adopted at the Third Meeting of the Standing Committee of the Ninth National People's Congress on June 26, 1998, and promulgated and implemented by Order No. 6 of the President of the People's Republic of China on June 26, 1998, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf.

other rights and freedoms. At the same time, it preserves leeway for China to determine what its jurisdiction in those zones will entail and establishes an expectation that states will submit to that jurisdiction. Secondly, this article's explicit requirement that states receive authorization before exercising the freedom of laying cables and pipelines[66] highlights what is absent: a concomitant requirement that states receive permission prior to exercising their freedoms of navigation or overflight in China's EEZ or continental shelf. In other words, this law assiduously avoids requiring that foreign vessels or aircraft receive China's permission before exercising navigational freedoms in those areas. It also does *not* include any provisions about regulating foreign military maneuvers or live-fire exercises in the EEZ. In sum, much like China's stance during UNCLOS III, the 1998 EEZ law seeks to carve out space for expansive coastal state jurisdiction in the EEZ, especially over marine scientific research, while preserving basic freedoms of navigation and overflight and even, by omission, freedom of military maneuvers.

Increased Tensions over U.S. Reconnaissance and Surveillance

In the first decade of the twenty-first century, the issue of foreign military activities in the EEZ became a much more prominent focus in China's discourse on the law of the sea, beginning with the EP-3 incident in the EEZ south of Hainan Island, as described in the previous chapter. In response to this incident, PRC Foreign Ministry spokesperson Zhu Bangzao articulated a three-part legal rationale for its opposition to U.S. surveillance activities in the exclusive economic zone, which had increased significantly in the months following George W. Bush's

[66] This requirement is itself stated somewhat more expansively than the jurisdiction explicitly granted to states in UNCLOS, though the provisions in UNCLOS are themselves somewhat ambiguous. Article 79 of UNCLOS states: "Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines." It also stipulates that the delineation of the course of pipelines on the continental shelf is subject to the consent of the coastal state.

inauguration in January 2001. He acknowledged that "UNCLOS and general international law" allow for the freedom of overflight in the EEZ, but argued that they "provide that in exercising this freedom, due regard shall be given to the rights of the coastal states." He further argued that U.S. reconnaissance flights along the coast of China had "long ago went beyond the scope of 'overflight' and abused and violated the principle of 'freedom of overflight.'" Finally, he stated that it was legitimate (*zhengdang*, 正当) for Chinese aircraft to monitor U.S. surveillance aircraft in order to protect China's national security.[67]

Zhu's rationale suggested that China took issue not with the isolated reconnaissance flight itself as much as with the frequency and intrusiveness of U.S. flights in aggregate. He argued that the scope of such flights went beyond what was permitted by international law in a way that failed to provide due regard to China's rights in accordance with Article 58 of UNCLOS. Moreover, Zhu's statement specifically appealed to the concept of legitimacy under international law, wielding the concept to lay blame for the accident on the United States by portraying U.S. behavior as illegitimate judged against the law.

The public controversy over reconnaissance flights subsided in the following years, as the United States and China worked to reach better understandings about military encounters at sea. Instead, hydrographic surveys by U.S. oceanographic research vessels in China's EEZ became a subject of contention. Between 2001 and 2003, China objected on several occasions to surveys by the USNS *Bowditch* in China's EEZ in the Yellow Sea and elsewhere. On one such occasion, Foreign Ministry spokesperson Zhang Qiyue denounced *Bowditch*'s activities as "a violation of the international law of the sea and of China's relevant rights and interests and jurisdictional rights in the EEZ." However, she did not elaborate on the legal rationale for this position through

[67] *Waijiao Bu Fayan Ren Yanlun*, April 3, 2001.

references to coastal state jurisdiction over MSR or other UNCLOS rules.[68] Several years later, a more serious incident occurred when several Chinese ships interfered with the activities of another U.S. research vessel, the USNS *Impeccable*, which was conducting surveillance in the EEZ south of Hainan Island. On this occasion, China's Foreign Ministry spokesperson Ma Zhaoxu explicitly accused the U.S. vessel of conducting activities without permission in China's EEZ in violation of "clear provisions" (*mingque guiding,* 明确规定) of UNCLOS, China's 1998 EEZ law, and China's Provisions on the Administration of Foreign-Related Marine Scientific Research.[69] Ma repeated this same position two months later after Chinese fishing vessels interfered with the operations of another U.S. research vessel, the USNS *Victorious*, in the Yellow Sea.[70]

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[68] *Waijiao Bu Fayan Ren Yanlun*, September 26, 2002.

[69] *Waijiao Bu Fayan Ren Yanlun*, March 10, 2009. See also *Waijiao Bu Fayan Ren Yanlun*, March 12, 2009.

[70] *Waijiao Bu Fayan Ren Yanlun*, May 6, 2009. See also *Waijiao Bu Fayan Ren Yanlun*, May 7, 2009.

Prominent Chinese government lawyers have offered more extended legal arguments about military surveys and other activities in the EEZ in academic journals, which outside observers have sometimes pointed to as evidence of China's more detailed interpretation of this issue. For example, Peter Dutton cites an article written by two PLAN officers in the journal *Marine Policy* in 2005 as an "authoritative" statement of China's interpretation of international law regarding military activities in the EEZ, noting that the authors distributed the article at two US-China track 1.5 events and described it as representing the Chinese government's position. Dutton 2019, 235. The authors draw upon various provisions of UNCLOS to argue that foreign military activities in the EEZ must be for "peaceful purposes" and must not threaten force against other states (under Articles 58/88 and 301, respectively). Relatedly, they contend that surveillance and related military activities do not count as "other internationally lawful uses of the sea" under Article 58. They also point to the "due regard" provisions of UNCLOS Articles 56 and 58, arguing that due regard for the coastal states' sovereign rights in the EEZ is of greater weight. Finally, they contend that the convention subjects marine scientific research to coastal state jurisdiction, and with the increasing indistinguishability of military surveys, MSR, and other forms of marine data collection, this means that military surveys should also be subject to coastal state jurisdiction lest the MSR regime be unduly weakened. Ren Xiaofeng and Cheng Xizhong 2005.

Writing five years later, Zhang Haiwen, then a senior researcher at the China Institute for Marine Affairs, a think tank affiliated with China's State Oceanic Administration (SOA), who has since become a senior official in the SOA's successor agency housed within the Ministry of Natural Resources, made some of these same arguments. Zhang 2010.

It is worth noting, however, that the Chinese government has never officially cited many of these legal arguments when objecting to either foreign military reconnaissance or MSR in its EEZ, except for the "due regard' principle highlighted by Zhu Bangzao in 2001, as well as the implied conflation of military surveys and MSR in its objections to USNS research vessels' activities. Especially given the apparent evolution in China's official rhetoric on military activities in the EEZ over the past decade, I believe caution is in order in viewing the legal interpretations presented in these articles as fully official Chinese government positions.

The next year, China raised an anomalous objection to foreign military exercises in its EEZ. General Ma Xiaotian, the Deputy Chief of Staff of the PLA criticized impending U.S.-South Korea joint military exercises in the Yellow Sea during an interview with a television reporter, stating that he was "extremely opposed" to such activities because of their proximity to China's territorial sea.[71] MFA spokespersons had up until that point assiduously avoided taking a position on the exercises, but soon affirmed General Ma's position by coming out against them.[72] However, in doing so, the spokesperson was careful not to characterize the exercises as illegal, whether according to domestic or international law.[73] Indeed, as the only occasion on which China has ever officially objected to foreign military exercises in its EEZ, this incident, a product of civil-military coordination gone awry, is in many ways the exception that proves the rule. That rule is that Beijing does not, in fact, interpret such exercises as violations of the law of the sea—even though it may occasionally object to them on political/security grounds.

[71] "解放军副总长：非常反对美韩在黄海举行军演 (PLA Deputy Chief of Staff: Extremely Opposed to U.S.-ROK Military Exercises in the Yellow Sea)," Phoenix TV, available at http://news.ifeng.com/mainland/detail_2010_07/01/1702694_0.shtml, accessed May 22, 2016.

[72] Fravel 2015.

Compare *Waijiao Bu Fayan Ren Yanlun*, June 22, 2010, where MFA spokesperson Qin Gang merely expressed concern and urged "all parties concerned" to avoid exacerbating the situation, vs. *Waijiao Bu Fayan Ren Yanlun*, July 6, 2010, where Qin repeated the same stance as previously in response to a question about Gen. Ma's remarks, vs. *Waijiao Bu Fayan Ren Yanlun*, July 8, 2010, where Qin declared, "We resolutely oppose foreign military warships going to the Yellow Sea and other Chinese near seas to engage in activities that affect China's security interests." Qin repeated this stance in the press conference on July 15, 2010.

[73] In the statements in summer 2010 (see previous note), the spokesperson never referred to China's EEZ, instead only opposing foreign military warships conducting these activities in the Yellow Sea and other near seas. But after the exercise was cancelled and rescheduled later that year, MFA spokesperson Hong Lei reformulated China's position to refer to the EEZ: "China's position on relevant issues is consistent and clear. We oppose any party taking any military action in China's exclusive economic zone without permission." He still did not declare such exercises to be contrary to the law of the sea or China's domestic laws. *Waijiao Bu Fayan Ren Yanlun*, November 26, 2010.

Tellingly, when asked about a U.S. aircraft carrier entering the Yellow Sea a few months later, spokesperson Jiang Yu simply described the Yellow Sea as a "sensitive area" and expressed hope the US would act cautiously, without expressing any actual objection to the carrier's presence. *Waijiao Bu Fayan Ren Yanlun*, March 1, 2011.

Fading of Objections to ISR, Heightened Opposition to FONOPs near Disputed Features

Over the past decade, even as U.S. military ISR and operations in China's EEZs have increased, China's objections to them have increasingly faded to the background as Chinese and U.S. vessels have become more accustomed to operating in proximity to one another, developing more routinized forms of interaction. In fact, a search of all Foreign Ministry press conferences through May 2020 for the term "EEZ" (*zhuanshu jingji qu*, 专属经济区) generated no instances of spokespersons explicitly objecting to foreign military reconnaissance in the EEZ on legal grounds since the EP-3 incident and the objections to USNS surveillance ship incidents in 2003 and 2009.[74] This more routinized relationship between PLA and U.S. Navy vessels and aircraft was negotiated and formalized in a 2014 U.S.-China Memorandum of Understanding on the Rules of Behavior for the Safety of Air and Maritime Encounters, with a supplementary annex on safety in air-to-air encounters finalized in 2015.[75]

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[74] In a media briefing in May 2016, the director general of MFA's Treaty and Law Department did gesture in this general direction when he asserted the distinction between the territorial sea, contiguous zone, EEZ, and high seas, arguing that freedom of navigation does not mean "absolute freedom without any restrictions." Although he was referring to U.S. FONOPs in the South China Sea, most of which had been conducted in the territorial waters of land features, he also referred back to "due regard to other States' rights," likely a reference to Article 58 of the convention on the EEZ. "Briefing by Xu Hong," May 12, 2016.

Similarly, China's position paper on the South China Sea issue published in July 2016 stated, "China maintains that, when exercising freedom of navigation and overflight in the South China Sea, relevant parties shall fully respect the sovereignty and security interests of coastal states and abide by the laws and regulations enacted by coastal states in accordance with UNCLOS and other rules of international law." This made a general argument about how freedom of navigation and overflight in the South China Sea ought to be subject to coastal state jurisdiction. Although this statement did not explicitly refer to the EEZ, almost all, if not all, of the South China Sea is enclosed within coastal states' EEZs, especially if the islands therein are considered entitled to EEZs (see chapter 8), so this was likely alluding in part to China's understanding of the balance in Articles 56 and 58 of UNCLOS. State Council Information Office of the People's Republic of China, "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea," white paper, July 13, 2016, https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm, accessed May 2020. Chinese version: "中国坚持通过谈判解决中菲在南海争议白皮书," http://www.scio.gov.cn/37236/38180/Document/1626701/1626701.htm, accessed May 2020.

[75] Memorandum of Understanding between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, November 9, 2014, Washington, November 10, 2014, Beijing, available at https://archive.defense.gov/pubs/141112_MemorandumOfUnderstandingRegardingRules.pdf; Supplement to the Memorandum of Understanding on the Rules of Behavior for Safety of Air and Maritime Encounters between the Department of Defense of the United States of America and the Ministry of National Defense of the People's

U.S.-China disagreements over the law of the sea on military activities over the past several years have instead been most acute regarding U.S. FONOPs within the territorial waters of the Paracel Islands and in close proximity to the Spratly Islands. These activities increased significantly after the Scarborough Shoal incident in 2012, the Philippine arbitration case, and China's land reclamation and construction in the Spratlys.[76] By contrast, in the past decade, when China has objected to U.S. military reconnaissance activities generally, it has done so more often on political or security grounds rather than legal grounds.[77] For example, in 2014, MND spokesperson Geng Yansheng critiqued U.S. reconnaissance activities as follows:

> [F]or a long time, U.S. warships have conducted high-frequency reconnaissance activities in and over the sea areas under Chinese jurisdiction. This practice has seriously affected China's national security and is prone to cause sea and air accidents. The activities of Chinese naval ships, whether in scope, number, or method, are different from the frequent reconnaissance of U.S. naval vessels coming close to China.[78]

Geng argued that U.S. activities were illegitimate not because of any particular legal reason, but because they were qualitatively and quantitatively excessive, thereby endangering China's security and risking accidents.[79]

Republic of China, September 15, 2015, Beijing, September 18, 2015, Washington, available at https://china.usc.edu/sites/default/files/article/attachments/US-CHINA_AIR_ENCOUNTERS_ANNEX_SEP_2015.pdf.

[76] See discussion earlier in this chapter on pp. 287–89 ("Since ratifying UNCLOS…") and note 25 ("For example, *Waijiao Bu*…").

[77] This shift was noted by several interviewees, including a retired Chinese military lawyer and two leading Chinese law of the sea experts. Interview 6.2 with Chinese scholar of law of the sea issues, July 2, 2019, Beijing China; Interview 6.18 with Chinese scholar of international maritime law, August 13, 2019, Beijing, China; Interview 6.19 with retired Chinese military lawyer, August 13, 2019, Beijing, China. For an example of Chinese government critiques of U.S., Japanese, and Australian activities in the South China Sea on political/security grounds, see *Waijiao Bu Fayan Ren Yanlun*, April 20, 2016; March 14, 2017; and "Regular Press Conference of the Ministry of National Defense on Apr. 30," http://eng.mod.gov.cn/focus/2020-05/04/content_4864649.htm, accessed May 2020; Chinese version: "国防部：坚决反对美澳在南海强化军事存在," http://www.mod.gov.cn/info/2020-04/30/content_4864559.htm, accessed May 2020.

[78] "国防部：对社会各界给予军演的理解支持表示感谢 (Ministry of National Defense: Thank you to all sectors of society for your understanding and support of military exercises)," July 31, 2014, http://www.mod.gov.cn/affair/2014-07/31/content_4533261.htm, accessed August 19, 2020.

[79] This argument echoes the argument made by MFA spokesperson Zhu Bangzao in 2001 after the EP-3 incident. See discussion on pp. 309–10 above.

Increases in China's Military Activities and MSR in Other States' EEZs

This statement also points to a key factor in the alteration in China's discourse about foreign military activities in the EEZ: an increase in China's own military activities and marine scientific research in other states' EEZs. Even as U.S.-China tensions over marine surveys began to accelerate in the early 2000s, China had already begun conducting more frequent marine scientific research survey activities of its own in Japan's EEZ beginning in the late 1990s. China and Japan had exchanged a note verbale in 2001 agreeing to notify one another of marine scientific research conducted in each other's waters, but the terms of the agreement were vague.[80] After the note was signed, Chinese vessels continued to conduct MSR without providing prior notification in areas where Beijing's claims to an EEZ and continental shelf overlap with Tokyo's claims, including in areas near the Diaoyu/Senkaku Islands, as well as within Japan's claimed EEZ around Okinotorishima, a tiny island south of Japan that China does not recognize as being entitled to an EEZ or continental shelf (see further discussion in chapters 8 and 10). In so doing, China simultaneously affirmed coastal state jurisdiction over MSR in the EEZ, while using MSR in disputed areas to underscore its maritime claims and to gather information.[81]

[80] Manicom 2014, chap. 4.

[81] See *Waijiao Bu Fayan Ren Yanlun*, May 13, 2004; July 4, 2006; February 6, 2007; February 8, 2007; September 27, 2011. For a discussion of Japan's reaction to these Chinese MSR activities, see chapter 10.

Another relevant incident in this period happened in April 2002, when the Japanese Coast Guard chased a North Korean spy ship conducting surveillance in its EEZ and eventually sank the vessel on the Chinese side of the median line between the two side's coasts (treated as a de facto boundary between the two states' EEZs, though the continental shelf boundary remains disputed). Japan then salvaged the vessel, after requesting and obtaining permission from Beijing. MFA spokespersons at the time emphasized China's rights to supervise Japan's salvage activities in accordance with UNCLOS and China's own Maritime Traffic Safety and Marine Environment Protection Laws. When a reporter asked the spokesperson if this would set a precedent whereby Japan would need to seek permission prior to entering China's EEZ, the spokesperson rejected the premise, instead noting that China would continue to adhere to its past position in future diplomatic practice. *Waijiao Bu Fayan Ren Yanlun*, June 18, 2002. See also *Waijiao Bu Fayan Ren Yanlun*, April 30, 2002; September 12, 2002. See more details on this incident in chapter 10.

In the most recent decade, China's rapidly expanding navy and marine scientific research fleet have also begun to conduct much more frequent military activities and MSR in the EEZs beyond the areas where its own maritime jurisdictional claims overlap with other states' claims. PRC vessels have conducted such activities in the undisputed EEZs of Japan, the Philippines, India, Australia, and the United States, among others. Although many of these activities go unreported publicly and are likely beyond the ken of coastal states with low maritime domain awareness, some of them have been publicized in the media, occasionally becoming sources of controversy in China's relations with other nations.

Defending PLAN Activities in Other States' EEZs. When called out on these activities, China has adopted different stances depending on whether or not the activities being challenged consisted of military activities by PLAN warships or marine scientific research by civilian vessels. With regard to the PLA Navy's increased operations in other countries' EEZs, China has often vigorously defended such activities as consistent with international law. This is most notable in reports of PLAN activities in the EEZs of Japan and the United States. Those states in turn have either tried to thread the needle between expressing discomfort at China's behavior while not denying the legality of such activities in the EEZ (see chapter 10 for Japan's position in this regard) or to use China's behavior to push back on China's objections to foreign military surveillance in its own EEZ as hypocritical.[82]

For example, in 2013, Ministry of National Defense spokesperson Geng Yansheng responded to a question about Japanese media reports that a Chinese submarine had entered Japan's contiguous zone by asserting, "In international waters, submarines of all countries have

[82] For an article calling upon the U.S. to push more strongly on this angle in order to reduce its asymmetrical disadvantage to China, see Martinson and Dutton 2018.

the right to freedom of navigation."[83] Geng's use of the term "international waters" (*guoji shuiyu*, 国际水域) is particularly noteworthy, as this term does not appear in UNCLOS or relevant Chinese legislation but instead is often used by the United States to interpret customary international law in a way that supports U.S. military operations in any ocean space beyond the territorial sea. Similarly, a PLA Navy ship loitered in the U.S. EEZ to observe the multi-nation Rim of the Pacific Exercises in 2012 and again in 2014 and 2018. When news of this came to light in 2014, MND spokesperson Geng Yansheng responded:

> Chinese naval vessels sailing outside the territorial waters of the United States comply with relevant international law and the relevant provisions of the domestic laws of the United States. China hopes that the US will respect the rights enjoyed by Chinese ships in accordance with law.[84]

Although Geng did not use the same "international waters" phrase he had used the previous year,[85] he did refer to "the waters beyond the territorial sea" rather than the EEZ, language that is more aligned with the "international waters" interpretation. The following year, MND spokesperson Yang Yujun used a similar phrase in response to Japanese Ministry of Defense comments about the passage of a PLAN reconnaissance ship close to Japan's Boso Peninsula.[86]

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[83] "国防部新闻发言人答记者问 (The spokesperson of the Ministry of National Defense answers questions from reporters)," May 30, 2013, http://www.mod.gov.cn/affair/2013-05/30/content_4453538.htm, accessed June 2020. Geng also noted that submarines from many countries are active in the waters of the northwest Pacific and criticized Japan for exaggerating the "China military threat."

[84] "国防部：对社会各界给予军演的理解支持表示感谢 (Ministry of National Defense: Thank you to all sectors of society for your understanding and support of military exercises)," July 31, 2014. Some observers point to statements such as these wherein China defends its activities on the basis of more permissive U.S. domestic law to highlight China's willingness to hypocritically exploit the differences between the more liberal standards of some other states and China's more restrictive jurisdictional claims. At least in this instance, however, this does not seem to be Geng's principal argument. Instead, as cited above, Geng goes on to argue that U.S. activities are illegitimate not because they violate any specific Chinese domestic law, but because they are excessive in scope (*fanwei*, 范围), number (*shuliang*, 数量), and method (*fangshi*, 方式), thereby endangering China's security and risking accidents.

[85] It is possible the MND stopped using that particular term on purpose after internal Chinese government objections. In fact, in a media briefing three years later, the director general of the Foreign Ministry's Department of Treaty and Law explicitly criticized the U.S. use of the term "international waters" to conflate the contiguous zone and EEZ with the high seas. "Briefing by Xu Hong," May 12, 2016.

[86] "Defense Ministry's regular press conference on Dec.31," December 31, 2015, http://eng.mod.gov.cn/Press/2015-12/31/content_4634720.htm, accessed May 2020. Chinese version: "12 月国防部例行记者会文字实录,"

And in April 2020, an MND spokesperson defended the exercises of a Chinese aircraft carrier group passing through Miyako Strait, an area within Japan's uncontested EEZ, arguing that they were "in full compliance with international law and international practice."[87]

Obfuscating and Complying Under Pressure in MSR Activities. With regard to MSR, by contrast, China has generally obfuscated or apologized when challenged about conducting such activities in other states' EEZ or continental shelves without authorization, while defending its rights of MSR under UNCLOS.[88] For example, in 2017, the Philippines criticized the activities of a Chinese marine scientific research vessel over Benham Rise, a region of the continental shelf to the northeast of the island of Luzon. Foreign Ministry officials first defended its activities by contending the vessel had been engaged in "normal freedom of navigation" (*zhengchang de hangxing ziyou*, 正常的航行自由) and "innocent passage" (*wuhai tongguo*, 无害通过) consistent with international law. They also denied that the vessel had conducted "maritime operations or other activities" (*haishang zuoye huo qita huodong*, 海上作业或其他活动).[89] After the Philippines rejected this excuse and insisted that China was indeed conducting MSR in the area, China's Foreign Ministry spokesperson Lu Kang avoided denying the accusation, instead acknowledging that MSR in the EEZ and continental shelf did require the

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http://www.mod.gov.cn/jzhzt/2015-12/31/content_4638441_3.htm, accessed May 2020. Yang stated: "The navigation of the Chinese naval ships in waters out of the territorial sea of other countries is in line with relevant international law and international practice. China respects the rights and interests enjoyed by relevant littoral states in accordance with international law. We also hope that relevant parties can respect China's rights of freedom of navigation and over-flight."

[87] "Regular Press Conference of the Ministry of National Defense on Apr. 30." At times, China has also simply ignored public reports and questions about PLAN activities in other countries' EEZs, for example, in the case of ISR it conducted in Alaska's EZZ in July 2017 during U.S. testing of the THAAD missile defense system. See *Waijiao Bu Fayan Ren Yanlun*, July 14, 2017. Although the MFA spokesperson denied understanding of the situation and refers the questioner to the military, I was unable to find any reference to this incident in any MND press conferences or statements.

[88] For a general statement defending China's rights to conduct MSR in the Western Pacific "in full compliance with the relevant provisions of UNCLOS," see *Waijiao Bu Fayan Ren Yanlun*, April 19, 2019.

[89] *Waijiao Bu Fayan Ren Yanlun*, March 10, 2017; March 16, 2017; March 23, 2017.

consent of the coastal state.[90] Then, the following year, news broke that China applied to the Philippines to conduct MSR in the latter's continental shelf jointly with the University of Philippines, which MFA spokesperson Geng Shuang explained was done under the framework of UNCLOS.[91]

Similarly, in late 2019, India objected to the MSR activities of the *Shiyan 1*, a vessel in the Chinese Academy of Sciences' research fleet, in India's EEZ near the Andaman and Nicobar Islands. At first, the spokesperson of the Chinese Embassy in India denied that the vessel had conducted MSR in India's EEZ, instead maintaining it had only navigated normally through (*zhengchang hangxing tongguo*, 正常航行通过) India's EEZ and restricted its MSR to the high seas.[92] According to media reports, the MFA spokesperson in Beijing also denied it had conducted MSR in India's EEZ, insisting its hydrographic research activities had remained confined to the high seas in the Indian Ocean.[93] Interestingly, however, I was not able to locate this statement anywhere on the MFA website or in the Oriprobe database of MFA press conferences, suggesting that Beijing may have retracted it. Then, within a week after India went public with its complaint, the PRC Foreign Ministry issued a notice on its website regarding "Further Strengthening Management of Scientific Research in Sea Areas under Foreign Jurisdiction."[94] This notice outlined a set of regulations for Chinese government entities to follow

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[90] *Waijiao Bu Fayan Ren Yanlun*, March 29, 2017; March 31, 2017.

[91] *Waijiao Bu Fayan Ren Yanlun*, January 16, 2018; February 6, 2018.

[92] See "中国驻印度使馆发言人嵇蓉参赞就印媒报道"印海军'驱离'中国科考船"事答记者问 (Counselor Ji Rong, Spokesperson of the Chinese Embassy in India, answered reporters' questions about the Indian media's report, "Indian Navy 'expels' the Chinese scientific research ship")," December 7, 2019, http://in.china-embassy.org/chn/sgxx/t1722425.htm, accessed May 2020.

[93] Cited in C. Raja Mohan, "China at sea: For Delhi, Shiyan incident is a reminder to invest more in maritime scientific research," *The Indian Express*, December 10, 2019, https://indianexpress.com/article/opinion/columns/india-china-maritime-diplomacy-indian-navy-chinese-ship-on-indian-water-6158812/.

[94] Ministry of Foreign Affairs of the People's Republic of China, "关于对赴外国管辖海域开展科学研究进一步加强管理的通知 (Notice on Further Strengthening Management of Scientific Research in Sea Areas under Foreign

when conducting MSR in territorial seas, EEZs, and continental shelves "that are claimed by foreign countries in accordance with international law and have no sovereignty or jurisdiction disputes with China." These regulations required such entities to conduct their activities in accordance with UNCLOS.[95] It also required all Chinese government entities to apply for permission to conduct such MSR through the MFA, which would review the application and forward it to the foreign country only if the application met the MFA's requirements and if the entity had not previously violated these regulations. The issuance of these regulations shortly after India's complaint, coupled with the MFA's apparent retraction of its initial denial, suggests the *Shiyan 1* may in fact have been operating in India's EEZ without permission, unbeknownst to the MFA. Regardless, the regulations represent an effort by the MFA to exercise greater oversight of these burgeoning activities and thus prevent future diplomatic dust-ups.[96]

Drift in China's Legal Interpretations of Military Activities & MSR. In other words, despite now having the most extensive national MSR fleet in the world, China seems to be

Jurisdiction)," December 10, 2019, https://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/zcwj_674915/t1723270.shtml. See also Liu Zhen, "China steps up compliance with UN sea law after ship expelled by India," *South China Morning Post*, December 11, 2019, https://www.scmp.com/news/china/diplomacy/article/3041693/china-steps-compliance-un-sea-law-after-ships-expulsion-india.

[95] Article 8 requires:

> The unit or individual undertaking the scientific research task shall carry out activities in accordance with the United Nations Convention on the Law of the Sea and in accordance with the research plan agreed upon by the coastal state, and shall not arbitrarily apply for foreign Conduct scientific research activities in the jurisdictional sea area.

In addition, the regulations set out in the notice echo UNCLOS provisions on MSR, stipulating that MSR in the territorial sea of a coastal state must have express consent, while MSR in the EEZ and continental shelf should be approved by the country, unless no reply is received from the coastal state, in which case the MFA had to confirm approval before the activity could commence. They also require units to apply through the MFA seven months in advance of the proposed research date, which would enable China to meet the six months' advance request requirement in UNCLOS.

[96] This basic concession to coastal states' jurisdiction over MSR is also evident in China's 2018 Arctic White Paper. The paper asserts the rights and freedoms of non-Arctic states, including the freedom of scientific research on the high seas of the Arctic Ocean, but states that "China respects the Arctic States' exclusive jurisdiction over research activities under their national jurisdiction" and argues that scientific research in such areas "should be carried out through cooperation in accordance with the law." "China's Arctic Policy," January 2018.

endeavoring to conform its MSR activities to the requirements of UNCLOS, especially in the EEZs and continental shelves of weaker states that challenge the legitimacy of China's behavior in demanding compliance. (Chinese research vessels conduct MSR in the U.S. EEZ without seeking consent, but the U.S. has liberal rules on MSR, is not a state party to UNCLOS, and thus far has not demanded China seek permission for such activities.[97]) Although compliance of Chinese research vessels with the MSR provisions of UNCLOS has not been universal, China has never explicitly defended such noncompliance as valid under the law of the sea.

This contrasts sharply with China's discourse about its expanding naval operations in other countries' undisputed EEZs, which Beijing defends as being fully compliant with international law and not subject to coastal state permission. In fact, the PLA's growing recognition of the utility of international law for defending the legitimacy of its military operations at sea is likely responsible for the shift noted above in the nature of China's opposition to foreign military activities in its EEZ. That shift has involved China largely ceasing to condemn such activities on legal grounds and instead criticizing them on political and security grounds, contending that they are excessive in scope and frequency, rather than violations of any particular provision of UNCLOS.

China's deemphasizing of its previous strident opposition to foreign military activities in its EEZ represents an example of *drift*. As new circumstances have emerged—namely, China's own increasing operations in other state's EEZs—Beijing has declined to extend its past interpretations to those new circumstances. At the same time, China has gradually deemphasized its past interpretations of U.S. military activities in its own EEZ, objecting to U.S. surveillance and reconnaissance less frequently in its public statements and diplomatic conversations. Instead

[97] Martinson and Dutton 2018.

of referring to legal reasoning in its statements, China is now sidestepping legal interpretation entirely by relying more on other forms of reasoning, such as political and security-based arguments. As a consequence of these discursive shifts, China's overall attitude toward the legality of foreign military activities in the EEZ is drifting in a different, more ambivalent direction.

As China drifts in this new direction, it is of course facing charges of hypocrisy over the inconsistencies in its position. However, as this analysis has illustrated, China has never explicitly *prohibited* military navigation, overflight, exercises, or even ISR in its EEZ on legal grounds, nor has it insisted that warships and aircraft receive permission prior to conducting such activities in its EEZ (with the exception of the anomalous 2010 Yellow Sea example). Most of China's past objections have been to USNS surveys that it suggested were indistinguishable from MSR and thus subject to coastal state jurisdiction. The few times when it has cited other UNCLOS provisions, such as the "due regard" principle, it has linked those provisions to a critique of the *scope and frequency* of U.S. surveillance, without condemning all reconnaissance as illegal *ipso facto*.[98] Thus, although China's rhetoric has subtly evolved over the past two decades, in some ways it reflects China's longstanding efforts going back to UNCLOS III to assert robust coastal state jurisdiction at sea, especially over MSR, even while carving out

[98] It is possible that China views the activities of its civilian and military vessels differently, with the former subject to coastal state jurisdiction under UNCLOS, while the latter are not so constrained. But of course China itself has always argued that regardless of whether conducted by a civilian or military research vessel, MSR generates information with dual civilian and military utility. It could also be that China's approach is to treat MSR and similar hydrographic surveys as distinct from other forms of intelligence gathering, such as imagery intelligence (IMINT) and signals intelligence (SIGINT) collection. This would be consistent with the observations above about how China objected most vociferously to hydrographic surveys conducted by USNS research vessels, but has been less vocal in opposing other forms of more passive intelligence collection by U.S. military vessels and aircraft on legal grounds since the EP-3 incident (unless it is in close proximity to disputed features).

It is possible, for example, that China is increasingly dividing labor by bifurcating its MSR and survey activities to its civilian fleet and IMINT and SIGINT collection to its military fleet, while sharing the information internally. However, at least in the first decade of the twenty-first century, PLAN vessels were apparently conducting both surveys as well as more passive intelligence collection. See Manicom 2014, chap. 4.

protections for freedom of navigation and overflight and permitting foreign military maneuvers in the EEZ.

Conclusion

This chapter has illustrated how some of China's interpretations of the law of the sea related to military activities at sea have remained largely consistent over time. This is most evident with China's persistent objections to the passage of foreign warships in its territorial sea without permission. This is perhaps China's most foundational interpretation of the law of the sea, dating back to its 1958 declaration. This interpretation is grounded in China's persistent perception of maritime threat, especially in the context of U.S. surveillance and freedom of navigation operations close to Chinese shores and disputed islands. China's interpretation of the issue of marine scientific research has also proven fairly consistent over time. Beijing continues to recognize coastal state jurisdiction over MSR, despite now having the most robust national MSR program in the world. This is a direct consequence of China's desire to maintain positive diplomatic relationships consistent with its identity as a law-abiding power that does not exercise maritime hegemony but stands as an ally of the developing world.

However, in other areas, China's position has evolved in subtle but significant ways. In the areas of transit passage and archipelagic passage, China's interpretations have evolved through a process of layering as the PLAN has begun operating more in other states' straits and archipelagic waters. China's interpretations of the law of the sea on these matters now align more with those of maritime powers such as the United States than with China's initial attitudes at UNCLOS III. Likewise, on the issue of foreign military activities in the EEZ, Beijing's interpretations have drifted such that it no longer publicly denounces foreign military surveillance in its EEZ on legal grounds, criticizing U.S. surveillance activities less frequently

and only on the basis of politics and national security rather than on the basis of law. This has accompanied the rise in the PLAN's own operations in other countries' EEZs, which China has vigorously defended as consistent as international law.

China's efforts to maintain consistency with its past interpretations of UNCLOS regarding innocent passage and MSR, even while gradually liberalizing its legal interpretation of transit passage and military activities in the EEZ, reflects both the constraining and permissive nature of international law as a cite for states' rhetorical legitimation strategies. It illustrates how Beijing seeks to interpret the law in ways that promote its narrow material interests even while remaining sufficiently reciprocal and consistent for China to be seen as a legitimate international actor that respects international law.

Chapter 8: China's Legal Interpretations of Island Entitlements

This chapter performs a close discourse analysis of Chinese government legislation, diplomatic notes, and statements to illustrate how China's interpretations of the law of the sea related to the maritime entitlements of islands and archipelagoes have evolved from the critical juncture of the Third United Nations Conference on the Law of the Sea (UNCLOS III) through to the present. I argue that the core priorities underlying China's interpretations of these issues have remained constant: The government of the People's Republic of China (PRC) has always espoused preferences for expansive interpretations on these issues as a result of its perception that its "maritime rights and interests" (*haiyang quanyi*, 海洋权益), in its near seas, especially the South China Sea, have been threatened by other claimants and meddling Western powers. However, China's precise initial interpretations of some of these issues were unclear or unstated at the conclusion of UNCLOS III. The inconsistencies that resulted from this position of ambiguity placed pressure on China to clarify its interpretation. Thus, over the past decade in particular, China has gradually made its interpretations explicit.

In the process of justifying its approach of treating outlying groups of islands as units, Beijing has elevated some sources of international law, including general international law and customary international law, alongside the United Nations Convention on the Law of the Sea (UNCLOS), in a process of supplementary *displacement*. This pattern has been intertwined with a pattern of layering in China's interpretation of the regime of islands, as China has interpreted Article 121 of UNCLOS to apply to the new circumstance of Japan's exclusive economic zone (EEZ) and continental shelf claim around the isolated reef of Okinotori.

This displacement pattern in China's legal interpretation of the unity of outlying archipelagoes has occurred in the shadow of what Beijing has perceived as threats to its sovereignty and maritime jurisdiction and to the sustainability of marine resources, especially in the South China Sea. As other countries submitted formal claims to continental shelves to the Commission on the Limits of the Continental Shelves at the time of its 2009 deadline and began exploring and extracting resources in areas that China also claimed, Beijing perceived its standing in the disputes and the resources in the area to be at risk. China then took efforts to bolster its legal standing in its maritime and island disputes, including with the submission of a note verbale and an attached map with a nine-dotted line enveloping the South China Sea to the United Nations in 2009. However, the ambiguity of China's claims met with opposition from neighboring countries, who pressed China to clarify its legal interpretations, especially in 2013-16 through the arbitration case that the Philippines initiated against China after the Scarborough Shoal incident. It was during this period from 2009 and especially 2013-16 that China's claims regarding archipelagoes began to exhibit a pattern of displacement. Rather than explicitly repudiating UNCLOS, which would have dealt too great a blow to China's objective of being seen as a legitimate actor in the international maritime order, China instead elevated other sources of law to justify its positions.

Conversely, the layering pattern in China's interpretation of Article 121(3) on the entitlements of small, remote, uninhabited islands has been motivated by its expanding interests and capacity to operate beyond its near seas. As China's distant-water fishing fleets grew, alongside its ability to operate beyond the first island chain with its naval and marine scientific research fleets, Beijing articulated a new legal interpretation as a means to challenge the legitimacy of Japan's claim to an EEZ and continental shelf from Okinotorishima.

As in chapter 7, I demonstrate these patterns by analyzing discourse in working papers and statements at UNCLOS III, Chinese domestic legislation, notes verbale and letters submitted to the United Nations Secretary General, major formal speeches by senior PRC leaders, and statements and briefings by officials and spokespersons of the Ministry of Foreign Affairs (MFA).[1] Many of the most significant sources for China's interpretations of the international law regarding its island entitlements were generated in response to a few key events: the 2009 deadline for the Commission of the Limits of the Continental Shelf (CLCS) to receive submissions from states regarding the geomorphological continental shelf extending beyond 200 nm and the CLCS submissions by Vietnam and Malaysia regarding their claims in the South China Sea and Japan in the East China Sea; and the South China Sea arbitration case initiated by the Philippines in 2013 as a result of the fallout from the 2012 Scarborough Shoal incident. Other incidents such as the China-Vietnam dispute in 2014 over Chinese oil drilling near the Paracel Islands and Japan's 2012 nationalization of the Diaoyu/Senkaku Islands also provided impetuses for China to clarify its legal positions in those disputes.

The most significant of these developments for the evolution and clarification of China's legal interpretations was the Philippine arbitration case. In response to that case, China initially

[1] I accessed Foreign Ministry spokespersons' statements in 外交部发言人言论数据库 (*Wàijiāo bù fāyán rén yánlùn shùjùkù*) [Database of Foreign Ministry Spokespersons' Remarks], 1997-present, 中国政府资料库 (*Zhōngguó zhèngfǔ zīliào kù*) [Archives of the Chinese Government], Oriprobe Information Services, Inc. I performed numerous key term searches related to these aspects of the law of the sea, including, among others, "Article 121" (*di 121 tiao*, 第 121 条), "Okinotori" (*Chongzhi niao*, 冲之鸟) , "Taiping Island" (*Taiping dao*, 太平岛), "South China Sea islands" (*Nanhai zhudao*, 南海诸岛), "James Shoal" (*Zengmu Ansha*, 曾母暗沙), and "exclusive economic zone" (*zhuanshu jingji qu*, 专属经济区), which collectively generated hundreds of results. I analyzed all the results from these searches both quantitatively and qualitatively and compiled relevant excerpts into master files, which are available upon request.

I cite these statements and press conference excerpts below as "*Waijiao Bu Fayan Ren Yanlun*, [DATE]." All of these statements were accessed in May or June 2020 via the Oriprobe Information Services Chinese Government Archives online database and translated by myself unless otherwise indicated. (For example, I accessed some more recent Chinese or English versions of Foreign Ministry statements on the MFA website, and for older statements, I on occasion tracked down the English version in Xinhua articles housed in the LexisNexis database.)

avoided addressing substantive questions about its specific claims in the South China Sea, instead rejecting the jurisdiction of the tribunal, in part on the grounds that the issues in the dispute were fundamentally intertwined with disputes over territory and maritime boundaries, matters that were not subject to compulsory arbitration under UNCLOS.[2] However, after the arbitral tribunal determined it had jurisdiction and proceeded with consideration of the Philippines' arguments, China began to address the more substantive issues in the case. Beijing did so through public statements and diplomatic commentary, rather than through direct participation, since it continued to reject the jurisdiction of the tribunal. Finally, immediately after the tribunal issued its award, the State Council issued a white paper detailing China's position in the South China Sea dispute and its interpretations of the relevant law. Then, in 2018, the Chinese Society of International Law, China's premier professional society for international lawyers in academia and government, organized under the auspices of the PRC Ministry of Foreign Affairs, published a special volume of the *Chinese Journal of International Law* that conducted a systematic rebuttal of the tribunal's award. Although not a formal publication of the Chinese government akin to an official white paper, this volume had input from dozens of government and academic lawyers and was overseen by government entities, and thus can be seen as a quasi-official interpretation of the law of the sea issues involved in the dispute.[3] I draw upon all of these sources in my analysis below.

[2] "Position Paper of the Government 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," Xinhua News Agency, December 7, 2014, available at https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm, accessed November 1, 2020; Chinese version: "中华人民共和国政府关于菲律宾共和国所提南海仲裁案管辖权问题的立场文件," http://www.gov.cn/xinwen/2014-12/07/content_2787663.htm, accessed November 1, 2020.

[3] Chinese Society of International Law 2018. The thirty-nine drafters, twenty-one reviewers, and nineteen other contributors involved in producing this study are listed on p. 748 at the end of the volume. I also interviewed around a dozen of these individuals during field research in China in summer 2019.

The Issue of Archipelagoes, Rocks, Islands, and their Maritime Entitlements

One controversial and contested issue under the law of the sea has to do with the maritime entitlements of islands, especially small islands and island groups. UNCLOS defines any naturally formed land feature surrounded by water that is above water at high tide as an island entitled to a territorial sea, but it places some limitations on which islands are entitled to exclusive economic zones or continental shelves. These limitations, outlined in Article 121(3), stipulate that "[r]ocks which cannot sustain human habitation or economic life of their own" are not entitled to EEZs or continental shelves. However, that language is itself ambiguous, with no further definition or elaboration in the convention and no clear standard in state practice for determining which islands (or "rocks," implicitly a subset of islands) should be subject to those limitations. As explained in chapter 4, various more concrete standards were considered at UNCLOS III, including limitations based on land surface area, but ultimately those were dismissed by states as being overly arbitrary and the more ambiguous approach in Article 121(3) was embraced.[4]

Part IV of UNCLOS allows states that are wholly constituted by islands to draw straight baselines around those islands, subject to certain limitations; the waters within these baselines are defined as "archipelagic waters," and the territorial sea extends outward from those baselines. However, the convention is silent on the question of whether or not continental states with offshore island groups may draw straight baselines around those islands. As noted in chapter 4, this issue was debated at UNCLOS III, with some states advocating for the archipelagic baseline

[4] As further explained in chapter 5, today at least ten states, including Argentina, Australia, Brazil, Chile, France, Japan, Norway, the United Kingdom, the United States, and Venezuela, claim EEZs (or similar maritime zones) and continental shelves extending from small, remote, and uninhabited or sparsely populated land features. The tribunal's award in the *Philippines v. China* case in 2016 set a rather high bar for islands to meet in order to be entitled to EEZs and continental shelves, but this award has not yet led to any significant change in state practice around this issue. See discussion in chapter 4, pp. 175–77.

regime to also apply to offshore island groups belonging to continental states, or at least for the archipelagic state provisions to be applied "without prejudice to the status of oceanic archipelagoes" of continental states. However, ultimately the archipelagic state regime was limited to those states wholly constituted by islands, and the "without prejudice" article was dropped. At the same time, the convention did not explicitly prohibit continental states from drawing straight baselines around offshore island groups. It could be argued that the convention prohibits such baselines by omission on the grounds that none of the convention's provisions on straight baselines make allowance for them, though this interpretation is contested.[5]

China's Positions at UNCLOS III and Final Interpretations of the Text

Interpretations Regarding the Unity of Outlying Archipelagoes

The People's Republic of China has since its inception treated several of its offshore islands groups as units geographically and conceptually, especially in the South China Sea. The term *qundao* (群岛) that is included in Chinese names for many of these island groups—for example, the Xisha Qundao, known in English as the Paracel Islands, and the Nansha Qundao, known in English as the Spratly Islands—can be translated as "islands" but literally means "group of islands." It is also the most common translation of the English word "archipelago," and is in fact the term used in the Chinese version of UNCLOS to mean archipelago.[6] As noted in chapter 6, China's use of the term *qundao* in the names of groups of islands in the South China Sea predated the PRC; these names were included in pre-1949 Republic of China maps and

[5] Indeed, as noted in chapter 5, seventeen continental states today draw straight baselines around outlying island groups or claim the legal authority to do so.

[6] The term *liedao* (列岛), which literally means "chain of islands" is another term translated as "archipelago," and is used by China to refer to the Penghu Islands ("Penghu Liedao"), a group of islands in the Taiwan Strait.

charts.[7] In 1951, Chinese premier Zhou Enlai used these names in a statement commenting on the San Francisco Peace Treaty. These terms were also employed in the 1958 Declaration on the Territorial Sea and various other PRC statements dating to the 1950s and 1960s.[8]

Not only has China long conceived of these islands as group units, but the PRC has also treated them as such for the purposes of claiming entitlements to maritime zones since the first decade after its founding. This position was evident in the 1958 territorial sea declaration (for context on this declaration, see chapter 6). Article 1 of that declaration set the breadth of China's territorial sea at 12 nm extending from all PRC territories, "including the Chinese mainland and its coastal islands (*yanhai daoyu*, 沿海岛屿), as well as Taiwan and its surrounding islands (*zhouwei gedao*, 周围各岛), the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands (*daoyu*, 岛屿) belonging to China which are separated from the mainland and its coastal islands by the high seas."[9] Article 2 then

[7] See, for example, *Nan Hai Zhu Dao Wei Zhi Tu* (Location Map of the South China Sea Islands), in *Zhong Hua Min Guo Xing Zheng Qu Yu Tu* (Map of the Administrative Districts of the Republic of China), February 1948, reprinted in "Facts and Policy of the China-Philippine Dispute in the South China Sea: China publishes a white paper on the South China Sea dispute," *Beijing Review*, July 13, 2016, http://www.bjreview.com/World/201607/t20160713_800062259_1.html, accessed November 1, 2020. Labeled with the overall term "Nanhai Zhudao," a more general term meaning "the various islands of the South China Sea," or simply "the South China Sea islands," this map also included place names for the Xisha Qundao, Dongsha Qundao, Zhongsha Qundao, and Nansha Qundao. Earlier imperial Chinese maps also marked these islands as groups on various maps but called them by different names, such as "Qianlichangsha" and "Wanlishitang." See the position paper the PRC issued after the 2016 tribunal award in the *Philippines v. China* case: State Council Information Office of the People's Republic of China, "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea," white paper, July 13, 2016, https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm, accessed May 2020. Chinese version: "中国坚持通过谈判解决中菲在南海争议白皮书," http://www.scio.gov.cn/37236/38180/Document/1626701/1626701.htm, accessed May 2020. For additional discussion of the naming of these islands, see Hayton 2019; 郑志华 (Zheng Zhihua) and 吴静楠 (Wu Jingnan) 2020.

[8] "中华人民共和国中央人民政府外交部部长周恩来关于美英对日和约草案及旧金山会议的声明 (Statement of Zhou Enlai, Minister of Foreign Affairs of the Central People's Government of the People's Republic of China, on the Draft U.S.-British Peace Treaty with Japan and the San Francisco Conference)," August 15, 1951, 人民日报 (*Renmin Ribao*), August 16, 1951.

[9] "中华人民共和国政府关于领海的声明 (Declaration of the Government of the People's Republic of China on China's Territorial Sea)," Beijing, September 4, 1958, available as Enclosure 1 in UN General Assembly Document A/72/552 (Chinese), available at https://digitallibrary.un.org/record/1326671.

made provisions for straight baselines extending from the mainland to enclose coastal islands, while Article 4 stipulated that the principles (*yuanze,* 原则) in Article 2 also applied to "Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands, and all other islands belonging to China." Thus, while this 1958 declaration did not explicitly enclose these island groups within straight baselines—in fact, the PRC never promulgated specific charts or coordinates for any straight baselines until 1996—it did extend the "principle" of straight baselines to those groups. As noted in chapter 6, the relatively expansive approach to jurisdiction adopted in this declaration was driven by China's perception of maritime threat from the United States in the Second Taiwan Strait Crisis. However, China also perceived maritime threat from the United States outside of the narrower context of the Jinmen and Matsu Islands involved in that crisis. It perceived Washington to be meddling in the disputes over the islands in the South China Sea, making deals with France to trade away China's sovereignty and prompting the Philippines to challenge China's claims to the Nansha Islands.[10]

Just over a decade later, China's maritime threat perceptions would come to encompass concerns over not only security and sovereignty but also threats to its rights to marine resources adjacent to other contested islands in the South and East China Seas. As noted in chapter 6, in the

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The Penghu Islands, also known as the Pescadores, are a group of islands in the Taiwan Strait under the control of the ROC government, while the Dongsha, Xisha, Zhongsha, and Nansha Islands, collectively known as the "four sha" (*si sha*, 四沙), are four island groups located in the South China Sea. The Dongsha, known in English as the Pratas Islands, are located in the northeast South China Sea and are under the control of the ROC (Taiwan). The Xisha, known in English as the Paracels and in Vietnamese as the Hoang Sa, are located in the northern half of the South China Sea and south of Hainan Island and are under control of the PRC. The Nansha, known in English and Malay as the Spratlys, in Vietnamese as the Truong Sa, and a subset known in Tagalog as Kalayaan, are located in the southern portion of the South China Sea, with different land features occupied by Vietnam, the Philippines, the PRC, the ROC (Taiwan), and Malaysia. Finally, the Zhongsha encompass several fully submerged shoals and reefs, including Macclesfield Bank, as well as Scarborough Shoal (known in Chinese as Huangyan Dao, in Spanish as Bajo de Masinloc, and in Tagalog as Panatag), a shoal that has some limited surface area above water at high tide.

[10] Lu 1989.

early 1970s, disputes over the Paracels, Spratlys, and Diaoyu/Senkaku Islands began to heat up as new offshore oil and gas resources were discovered and explored. In this context, China made its position on enclosing archipelagoes within straight baselines explicit in a working paper it submitted to the Seabed Committee in 1973 as part of the final stages of preparations for UNCLOS III. The sixth point in the first section of the working paper addressing the territorial sea stated, "An archipelago or an island chain consisting of islands close to each other may be taken as an integral whole in defining the limits of the territorial sea around it."[11] This position did not limit straight baselines to states that were constituted wholly by islands, but instead stated the archipelagic baselines principle more generally. The same working paper then asserted that states had a right to claim an EEZ of up to 200 nm extending from the state's territorial sea baselines, with the deductive implication that islands enclosed within straight baselines could be entitled to not only a territorial sea but also an EEZ.

However, after this initial statement of China's position, the PRC delegation did not participate actively in the public debates over the archipelagic regime at UNCLOS.[12] Upon voting for, signing, and ratifying the convention, China did not raise explicit objections to the convention's exclusion of offshore archipelagoes of continental states from the Part on archipelagic states, nor did it object to the omission of such archipelagoes from any of the straight baselines provisions. At the same time, China also never explicitly backed away from its initial position in favor of allowing straight baselines around archipelagoes, whether those

[11] "Working paper submitted by the Chinese delegation: Sea area within the limits of national jurisdiction," in *Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Volume III, General Assembly Official Records: Twenty-Eighth Session*, Supplement No. 21 (A/9021), New York, 1973, pp. 71-74, available at https://digitallibrary.un.org/record/725188; originally issued as document A/AC.138/SC.II/L.34.

[12] Based on a systematic review of China's public statements at the UNCLOS III public sessions, as well as of the account of the debates over the archipelagic states regime in the quasi-official Virginia Commentary on UNCLOS, Nandan and Rosenne 2003, vol. 2, 399–487, esp. 399–415. There are no instances of China issuing a proposal or statement on this matter in these sources.

belonging to island nations or continental states. It continued to treat the Xisha and Nansha Islands, as well as the Dongsha and Zhongsha, as island groups in domestic administration and diplomatic communications,[13] including remarks made at UNCLOS III,[14] and its 1958 declaration, including the provisions applying straight baselines to island groups, remained in effect.

Interpretations of the Regime of Islands and Article 121(3)

In contrast to the issue of archipelagoes, China did not indicate its views on what, if any, limitations should be placed on EEZ or continental shelf claims from small, remote, or uninhabited islands before or during UNCLOS III. China's 1973 working paper did note that "the breadth and limits of the territorial sea as defined by the coastal State are, in principle, applicable to the islands belonging to that State."[15] However, although China strongly advocated for the rights of coastal states to claim exclusive jurisdiction over economic zones and continental shelves, the Chinese delegation did not indicate its views on whether such regimes should apply to all land features or only those meeting a certain substantive threshold. A systematic review of China's public statements at UNCLOS III, the memoirs and interviews of three deputy chairs of China's delegation, and of the quasi-official Virginia Commentary on the debates over the convention text reveals that China did not engage in debates over the wording of Article 121(3), which stipulates that "[r]ocks which cannot sustain human habitation or economic life of their own" are not entitled to EEZs or continental shelves. Nor did China

[13] See "China's Indisputable Sovereignty Over the Xisha and Nansha Islands," Document of the Ministry of Foreign Affairs of the People's Republic of China, January 30, 1980, Annex to UNGA Document A/35/93, UN Security Council Document S/13788; Chinese version: "中国对西沙群岛和南沙群岛的主权无可争辩"; both versions available at https://digitallibrary.un.org/record/10691.

[14] See remarks by PRC delegate Chai Shu-fan at the 25th plenary meeting, July 2, 1974, A/CONF.62/SR.25.

[15] "Working paper submitted by the Chinese delegation: Sea area within the limits of national jurisdiction," in A/9021.

participate in debates on related matters such as the maritime entitlements of islands located on other states' continental shelves or the effect of islands on the delimitation of overlapping maritime claims.

China's Interpretations Post-UNCLOS III

China's interpretations of the law of the sea on these two interrelated issues have evolved in different ways over the ensuing decades. As China's disputes over island territories and marine resources in the South and East China Seas have persisted across the decades, its perception of threats to those interests have not diminished. China's power in those regions has increased, but the disputes themselves have become more heated, especially in the second decade of the twenty-first century. As a result of this sustained threat perception, Beijing has not fundamentally changed its position that continental states may treat their outlying or offshore archipelagoes as units. However, in order to bolster its position against ongoing challenges, it has made that position increasingly explicit in application to its own archipelagoes through the publication of straight baselines in some areas and through legal argumentation. This legal argumentation has exhibited a displacement pattern, as China has elevated principles of "general international law" and customary international law (including state practice) alongside UNCLOS, since the convention does not include provisions supporting Beijing's stance.

As for the regime of islands and the maritime entitlements of small islands or rocks, China avoided this issue until approximately 2004, when it began to challenge Japan's claim to an EEZ and continental shelf extending from Okinotorishima, a tiny land feature in the ocean hundreds of miles to the south of Japan's home islands and east of Taiwan. China's evolved position on this issue represented an example of *layering*, whereby China overlaid legal interpretations in new issue areas where it had not previously taken a position. This evolution

was driven by China's growing ability to conduct activities such as marine scientific research and resource extraction in waters beyond its near seas. It was further motivated by China's unique geography, as Okinotorishima and the 200 nm radius surrounding it straddles the main corridor whereby China would egress from the first and second island chains to the open ocean, giving China strategic incentives to bolster the status of those waters as high seas subject to no coastal state's jurisdiction, whether over economic or military matters. (See Figure 10.3 and a more detailed discussion in chapter 10.) China's strong advocacy on this point presents a contrast to its own claims to expansive sovereign rights on the basis of small islands in the South China Sea, introducing a legitimacy gap that other claimant states have highlighted. However, China has sought to sidestep that legitimacy gap largely by arguing that its claims are based on groups of islands that meet the requirements of Article 121(3), rather than on individual land features.

Interpretations Regarding the Unity of Outlying Archipelagoes

In the years after UNCLOS III, China continued to refer to island groups in the South China Sea as *qundao*, treating them as units for administrative purposes. For example, in March 1988, when China upgraded the status of Hainan to a province, Minister of Civil Affairs Cui Naifu delivered a speech to the Seventh National People's Congress (NPC) explaining that the new Hainan Province would have jurisdiction over the "the islands and reefs of the Xisha, Nansha, and Zhongsha Qundao and their sea areas."[16] The Law on the Territorial Sea and

[16] 民政部部长 崔乃夫 (Minister of Civil Affairs Cui Naifu), "关于设立海南省的议案的说明 (Explanation of the Proposal to Establish Hainan Province)," March 31, 1988, at the first meeting of the Seventh National People's Congress, accessed in 国家政策信息库 (*Guójiā zhèngcè xìnxī kù*) [National Policy Information Database], 中国政府资料库 (*Zhōngguó zhèngfǔ zīliào kù*) [Archives of the Chinese Government], Oriprobe Information Services, Inc.

For another example, see "附件：中华人民共和国外交部 1988 年 3 月 23 日对越南社会主义共和国外交部 1988 年 3 月 17 日照会的复照" (English version: ANNEX: Note of reply of 23 March 1988 from the Foreign Ministry of the People's Republic of China to the note of the Foreign Ministry of the Socialist Republic of Viet Nam dated 17 March 1988), UNGA Document A/43/240, UN Security Council Document S/19683, available at https://digitallibrary.un.org/record/159643.

Contiguous Zone passed on February 25, 1992, included language similar to the 1958 territorial sea declaration listing the land included in PRC territory, including "the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoyu Island, Penghu Islands, Dongsha Islands, Xisha Islands, Nansha Islands and other islands that belong to the People's Republic of China."[17] One key difference between the 1958 declaration and the 1992 law was the addition of the phrase "including Diaoyu Island" (*baokuo Diaoyu dao*, 包括钓鱼岛).

Xisha Qundao (Paracel Islands)

Then, at the same time the National People's Congress ratified UNCLOS in 1996, the Chinese government issued its first formal straight baselines in separate sets. The first set stretched from the southwest side of Hainan Island all the way up to the Shandong Peninsula. The second set enclosed the Paracel Islands, or Xisha Qundao (see Figure 8.1), further enshrining China's position of treating its archipelagoes as a unit for the purpose of declaring maritime zones. This baselines declaration also indicated that the Chinese government "will announce the remaining baselines of the territorial sea of the People's Republic of China at another time."[18] The PRC declaration accompanying UNCLOS ratification also reaffirmed China's "sovereignty over all its archipelagoes and islands as listed in article 2" of the 1992

[17] In Chinese, the term for offshore islands was the same as the term used in the 1958 declaration—*yanhai daoyu*, 沿海岛屿. However, official Chinese sources translate the term in the 1958 declaration as "coastal islands" and the term in the 1992 law as "offshore islands," so I have used those official translations.

As in the 1958 declaration and other official sources and common usage, the terms used for "islands" in the 1992 law were "*liedao* (列岛)" in the case of the Penghu Islands and "*qundao* (群岛)" in the case of the "four shas" in the South China Sea. Diaoyu Island was simply "*Diaoyu Dao* (钓鱼岛)," while "other islands" was "*qita … daoyu* (其他 … 岛屿)."

[18] Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China, 15 May 1996, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf; Chinese version: 中华人民共和国政府关于中华人民共和国领海直线的声明 1996 年 5 月 15 日.

territorial sea law.[19] As noted in chapter 6, this declaration and the straight baselines were likely some of the "corresponding countermeasures (*xiangying duice*, 相应对策) and "appropriate follow-up actions" (*shidang houxu xingdong*, 适当后续行动) that China planned to take to mitigate the downsides of ratification referred to by Vice Foreign Minister Li Zhaoxing in his speech to the NPC Standing Committee on the occasion of ratification.

Two years later, the PRC EEZ law declared an EEZ and continental shelf "extending to a distance of 200 nm from the baselines from which the breadth of the territorial sea is measured."[20] Although China did not at that time and has not since issued precise coordinates or charts depicting the limits of its EEZ, this claim effectively extended a 200 nm claim extending from the straight baselines enclosing the Paracel Islands, among China's other claimed baselines. The law also noted that in areas where China's EEZ and continental shelf claims conflicted with claims extending from the territory of other states, China would negotiate agreements with those states to delimit boundaries "on the basis of international law and in accordance with the principle of equity." Thus, by 1998, China had effectively claimed a 200 nm EEZ extending from a set of straight baselines surrounding the Xisha Qundao as a unit. This claim was in principle subject to delimitation with Vietnam, not on the basis of Vietnam's claim to sovereignty over those islands, which China does not even officially acknowledge, but on the basis of the proximity of Vietnam's mainland territory to the Paracels.[21]

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[19] Declaration of the National People's Congress of the People's Republic of China upon ratification of UNCLOS, 15 May 1996.

[20] Exclusive Economic Zone and Continental Shelf Act, adopted at the Third Meeting of the Standing Committee of the Ninth National People's Congress on June 26, 1998, and promulgated and implemented by Order No. 6 of the President of the People's Republic of China on June 26, 1998, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf.

[21] It is approximately 120 miles at the narrowest point from Vietnam's claimed baselines along its mainland coast at Lý Sơn islet to China's claimed baselines around the Paracels. By contrast, the ocean area between China's Xisha baselines and the Philippine island of Luzon is never narrower than 400 nautical miles, preventing any overlap

During a period of tensions with Vietnam in 2014 over China's drilling activities near the Paracel Islands, China also explicitly defended its activities by noting that the drilling was taking place within the contiguous zone 17 miles from the territorial baselines of the Xisha Islands.[22] In response to Vietnam's challenge to the legality of China's straight baseline claims around the Paracels, the PRC argued in a December 2014 position paper that its baselines were "in complete compliance with international law, China's domestic law and relevant international practice." China noted that it had deposited the chart of its baselines with the UN Secretary General the same year they were issued (such deposits are a requirement of Article 16 of UNCLOS). Beyond this detail, China did not offer details to explain its claim that its baselines complied with international law. However, the phrase "relevant international practice" foreshadowed the interpretive displacement that would become more explicit in coming years as China defended its approach to outlying archipelagoes on the basis of customary international law and state practice instead of UNCLOS.[23]

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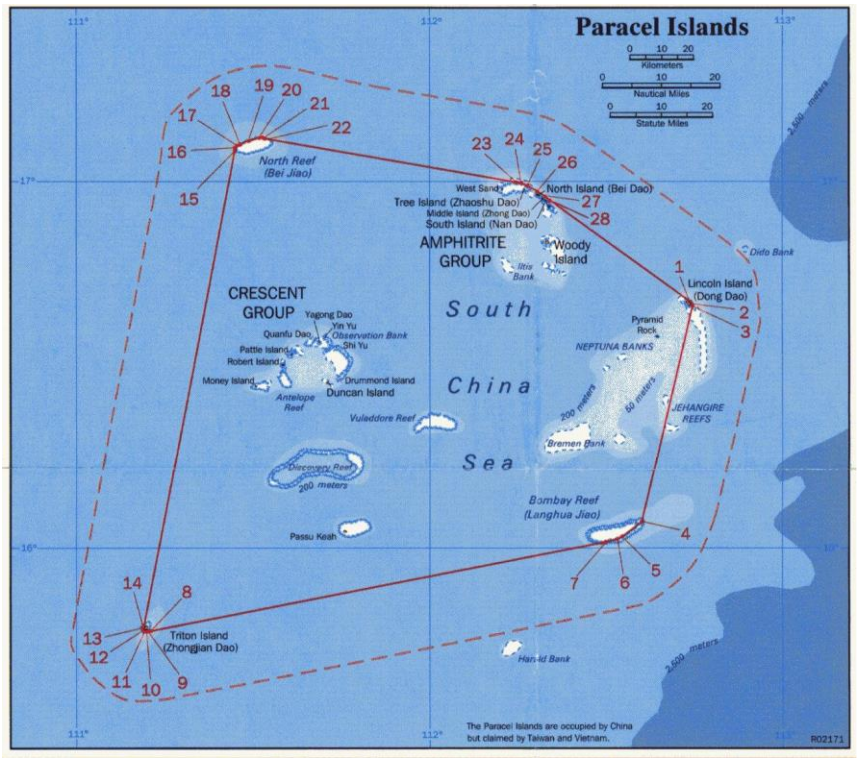
between the two countries' EEZs, if one leaves aside the PRC-Philippine sovereignty dispute over Scarborough Shoal, which lies between the Paracels and Luzon.

[22] *Waijiao Bu Fayan Ren Yanlun*, June 5, 2014. China's letters to the UN Secretary General over the course of this incident reveal a subtle but interesting progression in how Beijing characterized its jurisdictional justification. Its May 22 letter stated that its drilling activities were taking place "17 nautical miles from Zhongjian Island of the Xisha Islands," while its letter sent later in June stated that they were "17 nautical miles from both Zhongjian Island of China's Xisha Islands and the baseline of the territorial waters of the Xisha Islands," and its letter in July stated only that they were "located 17 nautical miles off the baseline of the territorial waters of the Xisha Islands."

The letters thus shifted from emphasizing the proximity of the drilling activities to one particular feature in the Xisha group (Zhongjian Island, aka Triton Island) to emphasizing their proximity to both that feature and the baselines of the broader island group to only mentioning the latter. Given that the baselines dated back to 1996, this shift may have been the result of internal recognition and correction of an error within the PRC diplomatic bureaucracy. Compare "Annex to the letter dated 22 May 2014 from the Chargé d'affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General," UNGA Document A/68/887 – English; "Annex to the letter dated 9 June 2014 from the Chargé d affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary General," UNGA Document A/68/907 – English; and "Annex to the letter dated 24 July 2014 from the Permanent Representative of China to the United Nations addressed to the Secretary General," UNGA Document A/68/956 – English.

[23] "Annex to the letter dated 8 December 2014 from the Permanent Representative of China to the United Nations addressed to the Secretary General," UNGA Document A/69/645 – English.

Figure 8.1 China's Claimed Straight Baselines Around the Xisha Qundao (Paracel Islands)



Source: "Straight Baseline Claim: China," *Limits in the Seas* No. 117, July 9, 1996, Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State.

Nansha Qundao (Spratly Islands)

In the Spratly Islands, China has not yet promulgated specific straight baselines. Nonetheless, beyond its longstanding practice of referring to these islands as a group by the name of "Nansha Qundao," China has also increasingly underscored its approach of treating them as a unit. This was evident, for example, in a note verbale the PRC submitted to the United Nations Secretary General in 2011 objecting to claims in a preceding Philippine note verbale. In the English translation of this note, China used the singular pronoun and verb form in connection with the Nansha Islands, declaring that, "Since 1930s, the Chinese government has given publicity several times the geographical scope of China's Nansha Islands and the names of *its*

components. China's Nansha Islands *is* therefore clearly defined" (emphases added). In this same note, China also explicitly claimed that "China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ), and Continental Shelf."[24] When asked about particular features in the Spratlys over ensuing years, such as Ren'ai Jiao (Second Thomas Shoal), Meiji Jiao (Mischief Reef), Yongshu Jiao (Fiery Cross Reef), or Taiping Dao (Itu Aba), PRC officials responded by explicitly identifying those features as parts of the broader Nansha Islands.[25]

In response to the Philippine arbitration case, China made this position even more explicit. In a December 2014 position paper denying the tribunal's jurisdiction in the case, China rejected the Philippines' efforts to "dissect" the Nansha Islands, declaring that the PRC had "sovereignty over the Nansha Islands as a whole." The paper went on to state:

> The Nansha Islands comprises many maritime features. China has always enjoyed sovereignty over the Nansha Islands in its entirety, not just over some features thereof. … It is plain that, in order to determine China's maritime entitlements based on the Nansha Islands under the Convention, all maritime features comprising the Nansha Islands must be taken into account.

The statement also suggested that low-tide elevations in the Nansha should be considered "components of an archipelago."[26] During the final months in 2016 when the tribunal was considering the case, China engaged in a major public relations effort, including numerous

[24] Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to a Note Verbale from the Republic of the Philippines, New York, April 14, 2011, CML/8/2011, English translation. In Chinese, pronouns and verbs are generally not conjugated differently depending on the singular or plural status of the subject, which is evident with the corresponding pronouns and verbs in the Chinese version of this statement. However, as explained above, the term *qundao* does have a more singular connotation in Chinese.

[25] *Waijiao Bu Fayan Ren Yanlun*, May 28, 2013; April 9, 2015; March 24, 2016; June 3, 2016; "Annex to the letter dated 28 January 2016 from the Permanent Representative of China to the United Nations addressed to the Secretary General," UNGA Document A/70/702 – English. See also the discussion below about Taiping Island, pp. 359–60.

[26] "Position Paper of the Government 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," December 7, 2014. The quasi-official rebuttal of the 2016 arbitration award expounded on this argument, laying out a more detailed justification for why low-tide elevations are in fact susceptible to appropriation, especially as components of an archipelago but even as individual features. Chinese Society of International Law 2018, paras 622–644.

briefings and statements that doubled down on this position of treating the Nansha Islands as a whole.[27] On June 3, Foreign Ministry spokesperson Hua Chunying declared, "The Nansha Islands of China as a whole have territorial waters, exclusive economic zone, and continental shelf."[28] The next month, MFA spokesperson Hong Lei criticized efforts to "split the Nansha Islands into its constituent parts" as being "inconsistent with generally accepted international law (*bu fuhe gongren de guoji fa*, 不符合公认的国际法)."[29] This also was evidence of China's efforts to broaden the sources of international law used to justify its interpretation beyond UNCLOS, in some ways displacing the primacy of UNCLOS by supplementing it with general/customary international law.

The displacement pattern was most evident in the special volume of the *Chinese Journal of International Law* published in 2018 rebutting the tribunal's award. The fifth chapter of this volume argued that since UNCLOS did not address the status of outlying archipelagoes of

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[27] For example, the director general of the Foreign Ministry's Treaty and Law department gave a briefing in May 2016, wherein he argued, "China has all along been maintaining territorial sovereignty claims over the Nansha Islands as a whole. The islands, reefs, islets and shoals in the Nansha Islands, as an integral part thereof, all belong to China's land territory." Briefing by Xu Hong, Director-General of the Department of Treaty and Law on the South China Sea Arbitration Initiated by the Philippines, May 12, 2016, https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1364804.htm, accessed May 2020; Chinese version: 外交部条法司司长徐宏就菲律宾所提南海仲裁案接受中外媒体采访实录, https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1364804.htm, accessed May 2020.

Another example can be found in an op-ed in *Foreign Policy* written by Fu Ying, then chairperson of the Foreign Affairs Committee of the PRC's National People's Congress. She wrote, "China has not yet presented specific claims with individual islands: Instead, it has always treated them as part of its Zhongsha Islands or Nansha Islands in the South China Sea." Fu Ying, "Why China Says No to the Arbitration on the South China Sea, *Foreign Policy*, July 10, 2016, https://foreignpolicy.com/2016/07/10/why-china-says-no-to-the-arbitration-on-the-south-china-sea/.

[28] In Chinese: "*Zhongguo Nansha Qundao zuowei zhengti, yongyou linghai, zhuanshu jingji qu he dalu jia* (中国南沙群岛作为整体，拥有领海、专属经济区和大陆架)." *Waijiao Bu Fayan Ren Yanlun*, June 3, 2016.

[29] Hong Lei's full remarks on the subject were as follows: "From the perspectives of history, geography, politics, economy, and law, the islands, reefs, beaches, sands, and related waters in the Nansha Islands of China are closely related to each other and have always been regarded as a whole. According to China's domestic laws and international laws, including the United Nations Convention on the Law of the Sea, China's Nansha Islands as a whole have maritime rights in the territorial sea, exclusive economic zone and continental shelf. Some countries ignore this basic fact and split the Nansha Islands into their constituent parts in an attempt to deny the integrity and maritime rights and interests of the Nansha Islands, which is inconsistent with generally accepted international law." *Waijiao Bu Fayan Ren Yanlun*, July 8, 2016.

continental states, this subject qualifies under the UNCLOS preamble as one of the "matters not regulated by this Convention" that is thus subject to the "rules and principles of generational international law."[30] This chapter further argued that customary international law supported China's stance, as relevant state practice and attitudes aligned with China's position, with seventeen of the twenty continental states with outlying archipelagoes treating their island groups as a unit or using straight baselines to enclose some or all of them.[31]

From "Islands" to "Qundao"

Then, in the position paper China released in July 2016 immediately after the tribunal issued its award, China's official English translations of its statements began to leave the term "Islands" untranslated, referring to the Spratlys by the name "Nansha Qundao," likely to underscore their unity and avoid the awkwardness in English of juxtaposing singular pronouns and verbs with the plural noun "Islands."[32] This approach has been maintained in statements and letters in the ensuing years.[33] These statements have also adopted the same approach toward leaving "Islands" untranslated as "Qundao" in the names of the other island groups China claims in the South China Sea, including the Xisha Qundao, Zhongsha Qundao, and Dongsha Qundao.

[30] Chinese Society of International Law 2018, para. 565.

[31] Ibid., 473–510. See note 60 in chapter 4 for an analysis of these numbers, especially the problems with the estimate of twenty total continental states with outlying archipelagoes.

[32] "China Adheres to the Position," July 13, 2016.

[33] For examples, see "Annex to the letter dated 25 October 2017 from the Chargé d'affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General," UNGA Document A/72/552 – English; "Annex to the letter dated 2 April 2018 from the Permanent Representative of China to the United Nations addressed to the Secretary-General," UNGA Document A/72/818 – English; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to the Submission by Malaysia to the Commission on the Limits of the Continental Shelf, New York, December 12, 2019, CML/14/2019, English translation; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to Notes Verbales from the Republic of the Philippines, New York, March 23, 2020, CML/11/2020, English translation; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to Notes Verbales from the Socialist Republic of Viet Nam, New York, April 17, 2020, CML/42/2020, English translation.

This has served to underscore the fact that China also views the so-called Zhongsha Islands as a *qundao*, even though Chinese officials often refer to Huangyan Dao (Scarborough Shoal) in isolation, likely because it is the only non-submerged feature in the Zhongsha group (which also includes many submerged shoals, banks, and seamounts) and sovereignty over that particular feature is hotly contested by the Philippines.[34] China treats the Dongsha Islands (Pratas Islands) as an archipelago alongside the other three South China Sea *qundao*, but these rarely come up in China's discourse, largely because those more northerly Taiwan-controlled islands are not disputed by any Southeast Asian nations. China has not (yet) issued straight baselines around either the Zhongsha Qundao or the Dongsha Qundao, and it is unclear what form such baselines would take.

Nanhai Zhudao (South China Sea Islands)

In addition to China's claims to these specific island groups, Beijing has also often asserted its sovereignty more generally over the "islands of the South China Sea" (*Nanhai zhu dao*, 南海诸岛), an umbrella term that encompasses the four *qundao* of Xisha, Nansha, Zhongsha, and Dongsha (referred to colloquially as the *si sha*, 四沙, or "four sands"). The term *zhu dao* has a looser and more generic connotation than *qundao*, connoting "all the various islands" rather than archipelago or group of islands. This term was used in the title of the abovementioned 1947 Republic of China charts depicting the South China Sea, which first included the dotted line surrounding the sea. It was also used on occasion by the PRC government over the coming decades, including in the 1988 speech given by Minister of Civil

[34] See, for example, Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to Notes Verbales from the Republic of the Philippines, New York, March 23, 2020, CML/11/2020, English translation.

Affairs Cui Naifu at the Seventh National People's Congress upon establishment of the province of Hainan, as well as in a speech by China's representative at the United Nations General Assembly in 1996.[35] China's note verbale responding to Vietnam's and Malaysia's submissions to the Commission on the Limits of the Continental Shelf in 2009 and its statements on the arbitration case initiated by the Philippines in 2013 also employed this term.[36]

After the final arbitration award was issued, the Chinese government began placing a subtly greater emphasis on this term in the official English translations of its statements. In an MFA statement issued the same day as the award, China attacked the award for "selectively tak[ing] relevant islands and reefs out of the macro-geographical framework of Nanhai Zhudao (the South China Sea Islands)." Whereas previously the term "*Nanhai zhu dao* (南海诸岛)" had been translated as either "South China Sea Islands" or "islands of the South China Sea," the term was now left untranslated and presented as the Romanized Chinese phrase "Nanhai Zhudao," with the term *zhu dao* capitalized in addition to the term *Nanhai*. This approach was designed to enhance the impression of the islands of the South China Sea as a cohesive whole, or a "macro-geographical framework" (*hongguan dili beijing*, 宏观地理背景). China's 2016 position paper

[35] 民政部部长 崔乃夫 (Minister of Civil Affairs Cui Naifu), "关于设立海南省的议案的说明 (Explanation of the Proposal to Establish Hainan Province)"; Official Records of the UN General Assembly, Fifty-first Session, 77th plenary meeting, December 9, 1996, New York, A/51/PV.77 – English.

[36] Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, New York, May 7, 2009, CML/17/2009 – Chinese and English; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to the Submission by the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, New York, May 7, 2009, CML/18/2009 – Chinese and English; "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines," October 30, 2015, https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml, accessed November 1, 2020; Chinese version: "中华人民共和国外交部关于应菲律宾共和国请求建立的南海仲裁案仲裁庭关于管辖权和可受理性问题裁决的声明（全文）," http://www.xinhuanet.com/politics/2015-10/30/c_1116991261.htm, accessed November 1, 2020; "Annex to the letter dated 3 March 2016 from the Permanent Representative of China to the United Nations addressed to the Secretary General," UNGA Document A/70/774 – English and Chinese.

on the South China Sea issued the next day further declared, "China has, based on Nanhai Zhudao, internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf." The precise meaning of this statement was unclear, but it does not seem the Chinese government intended to go so far as to treat the South China Sea Islands as a singular unit in the same fashion as the Nansha or Xisha Islands. The English version of the position paper used plural verb forms and pronouns in reference to the Nanhai Zhudao (e.g. "the Nanhai Zhudao *consist* of…" and "Nanhai Zhudao and *their* surrounding waters," emphases added), rather than the singular forms used for Nansha Qundao, and did not identify the South China Sea Islands as an archipelago.[37] Moreover, China had already declared straight baselines around the Paracel Islands in 1996, and never has given any indication that it intends to draw straight baselines around all of the islands included within the "Nanhai Zhudao." In the interviews of Chinese experts conducted for this project, such an option was also never put forward, although various possible permutations of baselines around the Nansha Islands (Spratlys) were mentioned.

Diaoyu (Senkaku) Islands

It is worth noting that China has adopted a slightly different approach to the Diaoyu (Senkaku) Islands in the East China Sea. As noted above, the 1992 territorial sea law stipulates that Diaoyu Island is among those islands "affiliated" (*fushu*, 附属) with Taiwan. In turn, although Diaoyu Island is the largest of a cluster of several islands, China does not call the

[37] This plural form was repeated in "Annex to the letter dated 25 October 2017 from the Chargé d'affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General," UNGA Document A/72/552 – English.

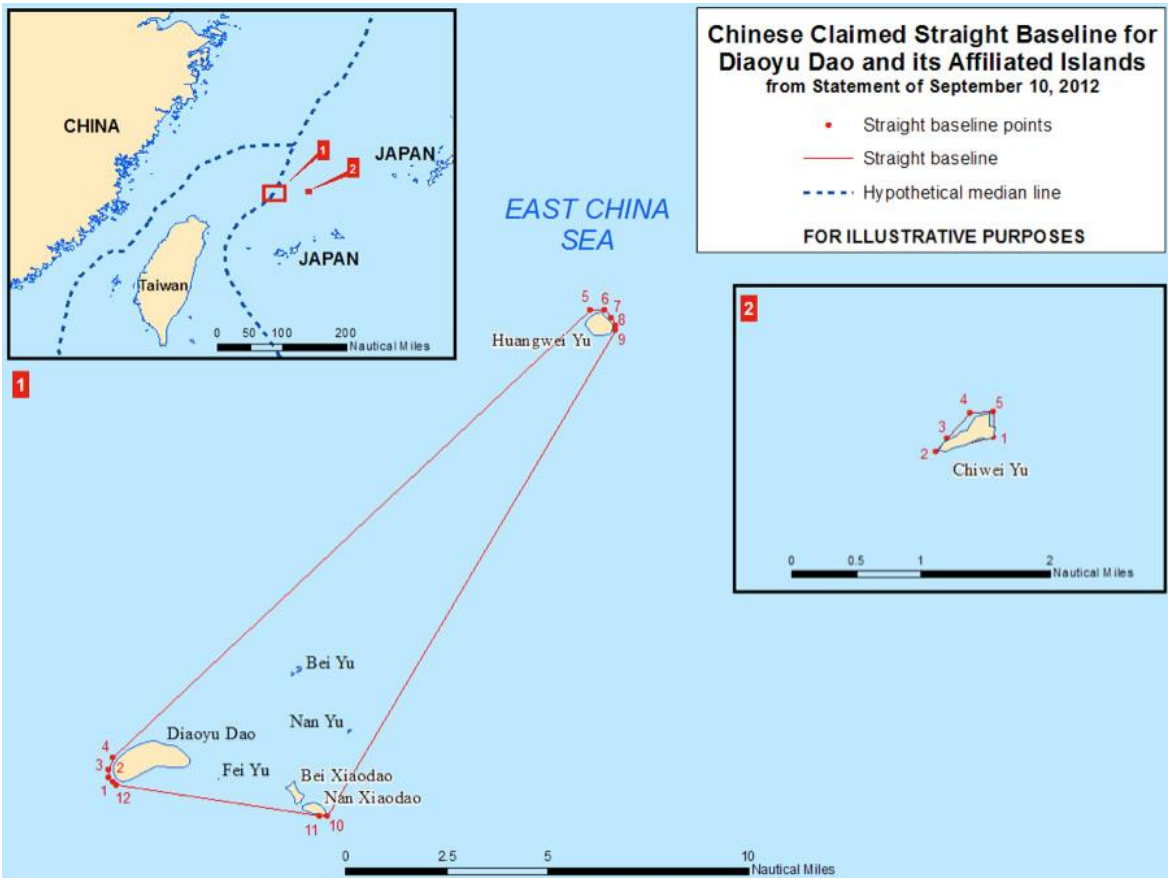
It is worth noting that a letter to the UN Secretary General in April 2018 used the singular verb form to refer to "Nanhai Zhudao." See "Annex to the letter dated 2 April 2018 from the Permanent Representative of China to the United Nations addressed to the Secretary-General," UNGA Document A/72/818 – English. ("Since the Tang Dynasty, Nanhai Zhudao *has* been placed under China's administrative jurisdiction," emphasis added.) This is the only instance of such a singular form in reference to Nanhai Zhudao that I have been able to clearly identify in the PRC's official English statements or letters, however.

Diaoyu Islands as a whole a *qundao* or use singular verb forms in conjunction with them, instead referring to them by the term "Diaoyu Island and its affiliated islands" (*Diaoyu Dao ji qi fushu daoyu*, 钓鱼岛及其附属岛屿).[38] After escalation in those disputes in 2012, when the Japanese national government purchased the islands from their private Japanese owner (which ownership China did not acknowledge in the first place), Beijing responded by issuing two sets of straight baselines around the Diaoyu Islands (see Figure 8.2). One set of straight baselines enclosed Diaoyu Dao and several nearby land features, including Huangwei Yu, Beixiao Dao, and Nanxiao Dao, while another set surrounded Chiwei Yu, a smaller island located approximately 47 miles to the east of Diaoyu Dao.[39]

[38] See Letter Dated 27 December 1996 from the Permanent Representative of the People's Republic of China to the United Nations Addressed to the Secretary-General, A/51/645/Add.1; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to a Note Verbale from Japan, New York, January 7, 2013, CML/001/2013.

[39] See "Statement of the Government of the People s Republic of China On the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands," September 10, 2012, *Law of the Sea Bulletin* No. 80 (United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, New York, 2013), https://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin80e.pdf, pp. 30-31, and M.Z.N.89.2012.LOS (Maritime Zone Notification), "Deposit by the People's Republic of China of a chart and a list of geographical coordinates of points, pursuant to article 16, paragraph 2, of the Convention," Circular Communications from the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York, September 21, 2012, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn89ef.pdf; "The Chart of Baselines of Territorial sea of Diaoyu Dao and Its Affiliated Islands of the People's Republic of China," The Navigation Guarantee Department of the Chinese Navy Headquarters, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/chn_mzn89_2012_00220.jpg.

Figure 8.2 China's Claimed Straight Baselines around the Diaoyu (Senkaku) Islands



Source: J. Ashley Roach, "China's Straight Baseline Claim: Senkaku (Diaoyu) Islands," *American Society of International Law Insights* 17, no. 7 (February 13, 2013), https://www.asil.org/insights/volume/17/issue/7/china%E2%80%99s-straight-baseline-claim-senkaku-diaoyu-islands#_edn26.

Increased Clarity, Persistent Ambiguity

In sum, China's precise legal reasoning and positions regarding offshore archipelagoes have become clearer over the past few decades. However, Beijing's basic position of treating archipelagoes (*qundao*) as units for the purposes of determining maritime entitlements has been basically consistent since the 1958 territorial sea declaration and its 1973 Seabed Committee working paper. In specific terms, China has not only maintained its position of treating the four *qundao* in the South China Sea as archipelagic units; in more recent years, it has also explicitly

drawn straight baselines and claimed maritime zones around the Xisha (Paracel) Islands and has explicitly identified the Nansha (Spratly) Islands as a cohesive whole entitled to its own maritime zones. It has also drawn baselines around the Diaoyu (Senkaku) Islands in the East China Sea in two separate sets. At the same time, China has never claimed that the Xisha baselines, the Diaoyu baselines, or any hypothetical future baselines around the Spratlys would enclose "archipelagic waters" in the formal sense under UNCLOS, bowing to the reality that Part IV of UNCLOS limits such a regime to states wholly composed of islands. Instead, China has pointed to "general international law" and state practice to justify its drawing of straight baselines around its claimed outlying archipelagoes.

In a related vein, there are still some points of ambiguity in China's interpretation of the regime governing outlying archipelagoes. In particular, it is unclear what standards China believes ought to govern the drawing of straight baselines and what regime it applies within those baselines, especially regarding the passage of foreign vessels. Regarding the former, Part IV of UNCLOS on archipelagic states outlines a number of specific restrictions on archipelagic baselines, requiring that the water-to-land ratio within the baselines be between 1 to 1 and 9 to 1 and prohibiting individual baseline segments from exceeding 100 nm in length, with the allowance that up to 3 percent of the segments can be up to 125 nm long. China's baselines around both the Xisha and Diaoyu Islands do not exceed those length limitations, but they do exceed the 9-to-1 water-to-land ratio limitation. The baselines around the Xisha Islands enclose a surface area with a water-to-land ratio of approximately 26.1 to 1, while the baselines around the main Diaoyu Islands enclose an area with a water-to-land ratio of 27.1 to 1.[40] Since China does not claim authority for its baselines around its outlying archipelagoes based on Part IV of

[40] Roach 2013; U.S. Department of State 1996, n. 21. Meanwhile, the baselines around the Chiwei Yu component of the Diaoyu Islands appears to be less than 1 to 1.

UNCLOS, it apparently does not seem to believe that its baselines must be subject to the strictures outlined therein. At the same time, China drew separate sets of baselines around the two distinct subgroupings of the Diaoyu/Senkaku Islands, suggesting that it is at least somewhat sensitive to the risk of drawing excessive straight baselines around outlying archipelagoes.[41] But it remains unclear what water-to-land ratio, segment limits, or other specific quantitative or qualitative limitations China would argue should apply to straight baselines around outlying archipelagoes. This is particularly significant in the context of the Spratlys, where over 200 small land features are spread out over a large area of the ocean. Baselines enclosing all of these features would have a very large water-to-land ratio, possibly as high as thousands to 1. As a result, there is active debate within Chinese expert and official circles about how baselines in Spratlys should be drawn, with some advocating that baselines be drawn around individual islands and others advocating that baselines be drawn around smaller groups of islands within the Nansha Qundao.[42] In other words, even though China views the Nansha as a cohesive archipelago, it should not be assumed that China intends to draw straight baselines around the entirety of the Spratlys; on the contrary, it is possible or even likely that Beijing would draw smaller baselines around subsets thereof.

Moreover, China is unlikely to publish such straight baselines short of some sort of significant escalation on the part of another claimant, such as the seizure of new land features or the initiation of another arbitration case. Not only would such baselines be provocative, but they

[41] By contrast, the straight baselines around the Paracels that China announced in 1996 enclosed all of the islands in that group, rather than being drawn around the separate island groupings in the Paracels, such as the Amphitrite Group in the northeast or the Crescent Group in the west.

[42] Interview 6.8 with Chinese scholar of Southeast Asia and South China Sea issues, July 16, 2019, Beijing, China; Interview 6.11 with Chinese researcher on South China Sea issues and international law, July 19, 2019, Haikou, Hainan, China; Interview 6.13 with Chinese scholar, July 19, 2019, Haikou, Hainan, China; Interview 6.18 with Chinese scholar of international maritime law, August 13, 2019, Beijing, China; Interview 6.24 with Chinese scholar of the law of the sea, August 30, 2019, Washington, DC.

would also be difficult to enforce without a change in the status quo of control over the islands, which are occupied by four different powers besides the PRC. And China has no immediate or unanimous appetite for using force to assert such control over all of the Spratlys.[43] Of course, China did publish straight baselines around the Diaoyu/Senkaku Islands despite Japan's exercise of administrative control thereon, but such issuance was in direct response to what China viewed as a significant escalation by Japan when the latter nationalized the islands.

Finally, it remains unclear what regime China applies within the baselines enclosed by its baselines around outlying archipelagoes. As explained in chapter 4, ordinarily waters within straight baselines are considered internal waters, while waters within archipelagic baselines drawn under Part IV of UNCLOS are archipelagic waters. Foreign ships ordinarily do not have the right to pass through internal waters, except in areas newly enclosed within a state's internal waters by straight baselines drawn under the provisions of UNCLOS. Meanwhile, in archipelagic waters, foreign ships *do* have the right to exercise innocent passage in archipelagic waters, and foreign ships and aircraft also have the right to conduct archipelagic sea lanes passage—akin to the transit passage regime that applies in straits used for international navigation—in sea lanes designated by the archipelagic state, or in normal navigational routes passing through archipelagic waters if such sea lanes have not been publicized.

In practice, China does not restrict the innocent passage of foreign nonmilitary vessels through the waters enclosed by its 1996 straight baselines in the Paracels. In fact, commercial

[43] As explained in chapter 6, China did use deadly force against Vietnam to consolidate control over the Paracel Islands in the 1970s and in parts of the Spratlys in the 1980s. However, in an interview I conducted with Wu Shicun, the director of the National Institute for South China Sea Studies, Wu argued that the window of opportunity for further action in this vein had long since closed. Even though China's power is growing, its ability to escape international scrutiny and blowback for such action has evaporated. Thus, whereas there was little international objection to China's actions against Vietnam in the Spratlys in the 1980s, it would face steep international consequences for such actions today. Interview 6.12 with Wu Shicun, July 19, 2019, Hainan, China.

cargo vessels regularly transit those waters without any regulation by the Chinese government.[44] Thus, in effect the PRC is at a minimum observing Article 8(2) of UNCLOS affording foreign ships the right of innocent passage in waters newly enclosed by straight baselines, though it has never explicitly affirmed this article in its laws or statements. Some of my Chinese interviewees with knowledge of domestic maritime legal processes and debates indicated that such a provision or other rules regarding foreign ships' operations in waters within outlying archipelagoes may be included in future domestic Chinese maritime laws and regulations.[45]

Interpretations of the Regime of Islands and UNCLOS Article 121(3)

China's approach to the regime of islands and its interpretation of Article 121 of UNCLOS is closely interrelated with its stance of treating archipelagoes as a unit. The evolution of China's interpretation of Article 121 is characterized by a pattern of layering. As the new millennium dawned, China adopted a new position in favor of interpreting Article 121(3) strictly in order to push back on Japan's claim to an EEZ around the tiny and remote reef of Okinotorishima. This new position layered on top of its past positions regarding outlying archipelagoes was in response to both its own perceptions of potential threat from Japan in that

[44] Interview 6.10 with Chinese scholar of South China Sea issues, July 19, 2019, Haikou, Hainan, China; Interview 6.11 with Chinese researcher on South China Sea issues and international law, July 19, 2019, Haikou, Hainan, China. See also the live shipping maps at https://www.shipmap.org/ and https://www.marinetraffic.com/en/ais/home/centerx:112.1/centery:16.5/zoom:7, which depict commercial vessels frequently transiting through the area of the Xisha baselines en route from the strait of Malacca to southern China and vice versa. Further empirical support for this can be found in the fact that a foreign cargo vessel carrying cars ran aground in the Paracels in February 2018. See Mikhail Voytenko, "Car carrier GLOVIS SPRING aground in South China sea Black Hole, *FleetMon*, February 20, 2018, https://www.fleetmon.com/maritime-news/2018/21545/car-carrier-glovis-spring-aground-south-china-sea-/ In our interviews, these Chinese researchers noted that there had been discussion in China after this 2018 incident about possibly implementing regulations to govern commercial traffic in the Paracels, including something akin to archipelagic sea lanes, but that there was acknowledgement that such regulations would meet with international objection due to the sensitivity of the Paracels dispute and freedom of navigation issues in the South China Sea.

[45] Interview 6.11 with Chinese researcher on South China Sea issues and international law, July 19, 2019, Haikou, Hainan, China.

strategically and economically significant area and China's own growing maritime capabilities to operate in that area. Then, when other states began to challenge China's claims in the South China Sea on the basis of Article 121, quoting Beijing's own affirmations of this principle against it, China defended its claims by pointing to its longstanding position in favor of treating archipelagoes—such as the Xisha and Nansha Islands in the South China Sea—as a unit, a status not relevant in the case of Okinotorishima.

China Challenges Japan's Claim on Article 121(3) Grounds

China remained silent about its views on the difference between a rock and an island fully entitled to an EEZ and continental shelf of its own until as late as December 2004. In this period, China began conducting marine scientific research (MSR) in the waters within 200 nm of Okinotorishima, a Japanese reef with two rocks exposed at high tide totaling less than 10 square meters in surface area. When Japan objected to these activities, the Chinese Foreign Ministry spokesperson responded by asserting that "China and Japan have different views on the nature of the sea area" involved and that in China's view, the waters where it was conducting MSR were "high seas" (*gonghai*, 公海).[46] In a press conference the following day, the spokesperson responded to another question on the matter by asserting that Article 121 of UNCLOS stipulated that rocks are not entitled to an EEZ and quoting the language of Article 121(3).[47] A few years later, a Foreign Ministry spokesperson criticized Japan's efforts to artificially reinforce Okinotorishima, arguing that such practices "do not comply with generally accepted rules of international law" (*bu fuhe gongshi de guoji falü guize*, 不符合公认的国际法规则) and they

[46] *Waijiao Bu Fayan Ren Yanlun*, December 9, 2004.

[47] *Waijiao Bu Fayan Ren Yanlun*, December 10, 2004. This same argument was repeated in an MFA press conference the following March: *Waijiao Bu Fayan Ren Yanlun*, March 31, 2005.

"affect the interests of the international community" (*yingxiang le guoji shehui de liyi*, 影响了国际社会的利益).[48]

In 2009, there was a deadline for states to submit claims to an extended continental shelf to the Commission on the Limits of the Continental Shelf, a technical body established under UNCLOS to evaluate states' claims continental shelves beyond the EEZs according to set geomorphological criteria. As that deadline approached, Japan submitted to the CLCS a claim to an extended continental shelf, which included areas extending beyond 200 nm from Okinotorishima. In a note verbale responding to that submission, China asserted that Okinotori was a rock that "on its natural conditions, obviously cannot sustain human habitation or economic life of its own" and thus was not entitled to an EEZ or continental shelf, much less an extended continental shelf. On these grounds, China requested that the commission not issue any recommendation on that portion of Japan's submission.[49] Chinese diplomatic representatives also objected to Japan's claim on these same legal grounds in speeches at the 15th session of the International Seabed Authority in Kingston, Jamaica, and the 19th meeting of the States Parties on the Law of the Sea, both held in June 2009.[50]

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[48] *Waijiao Bu Fayan Ren Yanlun*, June 19, 2007.

[49] Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to the Submission by Japan to the Commission on the Limits of the Continental Shelf, New York, February 6, 2009, CML/2/2009, English translation.

[50] At the International Seabed Authority meeting, Chinese Ambassador to Jamaica Chen Jinghua cited the warning of Arvid Pardo, an ambassador from Malta who had played a catalytic role in the development of UNCLOS, that if states were able to claim 200 miles of jurisdiction from "uninhabited, remote, or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired." Cited in Note Verbale from the Permanent Mission of the Republic of Indonesia to the United Nations responding to a circular note from the People's Republic of China, New York, July 8, 2010, No. 480/POL-703/VII/10. See also *Philippines v. China*, PCA Case No. 2013-19, Award in the matter of the South China Sea Arbitration before an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, July 12, 2016, https://pcacases.com/web/sendAttach/2086, pp. 197–99.

Over the coming months and years, MFA spokespersons repeated China's objections to Japan's claim and its activities around Okinotorishima, emphasizing the illegitimacy of Japan's position and the consistency of China's own stance. They described Japan's position as "not in conformity" (*bu fuhe*, 不符合) with the international law of the sea, harmful to the interests of the "international community" (*guoji shehui*, 国际社会), and out of step with "mainstream international views" (*guoji shang de zhuliu guandian*, 国际上的主流观点).[51] The spokespersons highlighted the objections of South Korea alongside China's, while also pointing to the opposition of "many countries" (*xuduo guojia*, 许多国家) to Japan's "illegal claim" (*feifa zhuzhang*, 非法主张).[52] They also affirmed that China's position on this issue was "consistent" (*yiguan*, 一贯) and that China had expressed clear and open opposition to Japan's position on this issue on multiple occasions from very early on.[53] These condemnations became stronger over time as Japan expanded its legal and practical efforts to shore up its claim and the CLCS considered Japan's submission. When the CLCS decided not to rule on that portion of Japan's submission due to its lack of authority to interpret Article 121, China framed it as a vindication of Beijing's view that Okinotorishima was not eligible to an EEZ or continental shelf and applauded the decision for "safeguarding the overall interests of the international community" (*weihu le guoji shehui zhengti liyi*, 维护了国际社会整体利益).[54]

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[51] *Waijiao Bu Fayan Ren Yanlun*, June 19, 2007; September 15, 2009; January 7, 2010; January 19, 2010; April 28, 2012; May 24, 2016.

[52] *Waijiao Bu Fayan Ren Yanlun*, May 16, 2012; June 8, 2012; June 12, 2012.

[53] *Waijiao Bu Fayan Ren Yanlun*, September 15, 2009; January 19, 2010. See also *Waijiao Bu Fayan Ren Yanlun*, January 2, 2019, when MFA spokesperson Lu Kang defended Chinese marine scientific research near Okinotorishima by arguing that Japan's claim to an EEZ near Okinotori was inconsistent with UNCLOS and "had never been recognized by China" (*Zhongfang congwei yuyi chengren*, 中方从未予以承认).

[54] Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General, New York, August 3, 2011, CML/59/2011; *Waijiao Bu Fayan Ren Yanlun*, May 16, 2012; June 8, 2012; June 12, 2012; September 29, 2014; May 24, 2016. See also *Waijiao Bu Fayan Ren Yanlun*, May 12, 2016,

China's Conflicted Stance on Territorial Status of Submerged Features and Low-Tide Elevations

Around the same time, China began to articulate its interpretation of the territorial status of low-tide elevations (LTEs)—land features submerged at high tide but partially above water at low tide—and underwater land features. The PRC's 2009 Law on Island Protection employed the definition of an island used in UNCLOS Article 121(1), "naturally formed land areas surrounded by seawater and above the surface of the water at high tide," except it explicitly noted that this included both inhabited and uninhabited islands.[55] This usage thus clearly excluded LTEs from the definition of an "island," though it did not address whether or not LTEs had territorial status.

A few years later, the PRC Ministry of Foreign Affairs did state that land features that were fully submerged within the ocean were *not* entitled to territorial status. It made this clarification in the context of its dispute with South Korea over jurisdiction over Socotra Rock (*Suyan Jiao*), a submerged reef in the Yellow Sea in an area where China's and South Korea's EEZ claims overlap.[56] At the same time, China did not explicitly concede that submerged land features that are situated within groups of islands—such as James Shoal (Zengmu Ansha) in the southern extreme of the South China Sea, which China considers to be part of the Nansha Qundao[57]—are not eligible for territorial status. On the contrary, China has continued to treat

when MFA spokesperson Lu Kang cited the CLCS recommendations to criticize Japan's claims around Okinotorishima in the context of highlighting Japan's hypocrisy in its complaints about China's claims in the South China Sea.

[55] Article 2 of Law of the People's Republic of China on Island Protection, adopted at the 12th meeting of the Standing Committee of the 11th National People's Congress on December 26, 2009, available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/85808/96278/F383034778/CHN85808.pdf; Chinese version: 中华人民共和国海岛保护法, available at http://www.gov.cn/flfg/2009-12/26/content_1497461.htm.

[56] *Waijiao Bu Fayan Ren Yanlun*, March 12, 2012; December 9, 2013.

[57] References to Zengmu Ansha in official Chinese sources often explicitly situate it in the context of the broader Nansha Qundao, as in the phrase, "Zengmu Ansha of the southern end of Nansha Qundao" (*Nansha Qundao nan duan de Zengmu Ansha*, 南沙群岛南端的曾母暗沙). See, for example, "疆域" (Jiāngyù) [Territory], *People's Daily Online*, available on the website of the Embassy of the People's Republic of China in Kazakhstan, August 4, 2010, https://www.fmprc.gov.cn/ce/ceka/chn/gyzg/zggk/guotu/t721707.htm.

James Shoal as subject to its sovereign jurisdiction. In addition to rhetorical references to Zengmu Ansha as the "southernmost point of Chinese territory" *(Zhongguo lingtu de zui nan duan*, 中国领土的最南端) in government propaganda,[58] the feature continues to be labeled on official maps of China and PLA Navy and Chinese maritime law enforcement vessels have periodically visited the shoal and deposited symbolic stone markers on the submerged feature.[59] However, China has not made a detailed legal argument about James Shoal's territorial status, nor has it explicitly based any of its claims to maritime jurisdiction or marine resources on that submerged feature in particular, as opposed to the Nansha Qundao more generally.

China Responds to Challenges to Its Claims on Article 121(3) Grounds

Amidst Beijing's vociferous opposition to Japan's Okinotorishima claim, China itself began to be challenged by other countries for making excessive claims to EEZs and continental

[58] Several Foreign Ministry embassy websites contain a description of the extent of China's territory as extending in the south to Zengmu Ansha at the southern end of Nansha Qundao. See Ibid.; "Understanding China: China Briefing—Physical Geography, Profile," available on the website of the People's Republic of China in Lithuania, n.d., https://www.fmprc.gov.cn/ce/celt/chn/ljzg/zgjk/zrdl/t122458.htm; Another example can be found in a statement from the Municipal Bureau of Land and Resources of Sanming City in Fujian Province: "我国陆地面积有多大？领土的最北端、最南端、最西端、最东端的四至点大概在哪里?" (Wǒguó lùdì miànjī yǒu duōdà? Lǐngtǔ de zuì běiduān, zuì nánduān, zuì xīduān, zuì dōng duāndì sìzhì diǎn dàgài zài nǎlǐ) [How big is the land area of our country? Where approximately are the northernmost, southernmost, westernmost, and easternmost four points of the territory?], 三明市国土局 (*Sanming Shi guo tu ju*) [Sanming City Municipal Bureau of Land and Resources], September 26, 2018, http://www.sm.gov.cn/wz/hdjlzsk/gtj/chdlxxgl/201809/t20180926_1205904.htm.

These references notwithstanding, official Chinese government discussions of the South China Sea do not frequently refer to Zengmu Ansha. In fact, a search for the term 曾母暗沙 (Zengmu Ansha) in the Archives of the Chinese Government database hosted by Oriprobe Information Services turned up only one result: a discussion of the extent of a 2009 solar eclipse in the southernmost and northernmost parts of China, Zengmu Ansha and the Mohe area respectively. "国务院办公厅关于妥善做好应对日全食工作的通知" (Guówùyuàn bàngōng tīng guānyú tuǒshàn zuò hǎo yìngduì rì quánshí gōngzuò de tōngzhī) [Notice of the General Office of the State Council on Properly Responding to the Total Solar Eclipse], 国办发明电 (Guoban faming dian) No. 14, July 20, 2009, accessed in 国家政策信息库 (*Guójiā zhèngcè xìnxī kù*) [National Policy Information Database], 中国政府资料库 (*Zhōngguó zhèngfǔ zīliào kù*) [Archives of the Chinese Government], Oriprobe Information Services, Inc. Neither the database of ministry and provincial leaders' remarks, nor the database of Foreign Ministry spokesperson remarks contained any speeches referring to this feature.

[59] See Bill Hayton, "How a non-existent island became China's southernmost territory," *South China Morning Post*, February 9, 2013, https://www.scmp.com/comment/insight-opinion/article/1146151/how-non-existent-island-became-chinas-southernmost-territory; Hayton 2019.

shelves from small uninhabited islands and reefs in the South China Sea. Indonesia raised such an objection in 2010 in a note verbale to the UN Secretary General, responding to a PRC note verbale that asserted vague jurisdictional claims to the waters, seabed, and subsoil adjacent to all of the islands within a nine-dotted line area sketched on a Chinese map (see more below on the issue of the dotted-line map) by citing China's own objections to Japan's claim.[60] The Philippines also raised such objections in the international arbitration case it filed against China in early 2013 regarding issues in the South China Sea disputes, including the questions of whether or not specific land features in the Spratlys are entitled to EEZs under Article 121(3) and whether or not low-tide elevations (such as Mischief Reef, a PRC-occupied feature located within 200 nm of the Philippine island of Palawan) could be claimed as territory. Finally, in July 2016, the tribunal in the *Philippines v. China* case determined that none of the features in the Spratly Islands met the standards in Article 121(3) and thus none of them were entitled to EEZs or continental shelves. The tribunal award specifically highlighted China's interpretations of Article 121(3) in the context of the Okinotorishima issue, while noting Beijing had not specified how its interpretations of this issue would apply to the land features in the South China Sea.[61]

In the wake of these developments, Beijing was increasingly pressed to clarify its position on the maritime entitlements of specific features in the South China Sea and to explain its apparent inconsistency on this issue. At first, China avoided addressing the question of its claims to maritime zones around specific islands in the South China Sea. Instead, as noted above, China rejected the arbitration outright, in part on the grounds that questions about the territorial status of LTEs and the maritime entitlements of land features were fundamentally intertwined

[60] Note Verbale from the Permanent Mission of the Republic of Indonesia to the United Nations responding to a circular note from the People's Republic of China, New York, July 8, 2010, No. 480/POL-703/VII/10.

[61] *Philippines v. China*, PCA Case No. 2013-19, Award in the matter of the South China Sea Arbitration, July 12, 2016, https://pcacases.com/web/sendAttach/2086, pp. 197–99.

with disputes over territory and maritime boundaries, areas that were not subject to compulsory arbitration under UNCLOS.[62] However, after the arbitral tribunal determined it had jurisdiction in the case and then issued an award in the case in 2016, the Chinese government addressed many of the more substantive issues in the case.

Specifically, beginning in spring 2016 as the arbitration process was drawing to a close, the Chinese government began publicly rebutting criticisms on this issue. It did so by asserting its above-mentioned position that its claimed maritime zones emanated from the islands as a whole, rather than individual land features. However, it also affirmed that those islands as a whole, as well as Taiping Island specifically, were capable of meeting the threshold in Article 121(3) that would entitle them to an EEZ and continental shelf. In March 2016, the Republic of China (ROC) government on Taiwan issued a white paper and the Chinese (Taiwan) Society of International Law submitted an amicus brief in the arbitration case asserting that the ROC-occupied Taiping Island (also known as Itu Aba), the largest island in the Spratlys, met the Article 121 definition of an island fully entitled to an EEZ and continental shelf. China responded to a question about this position by asserting:

> The Nansha Islands, including Taiping Island, have been Chinese territory since ancient times, and the Chinese people have lived and engaged in productive activities there for a long period of time. China treats the Nansha Islands as a whole to claim maritime rights and interests.[63]

This response alluded to Article 121(3) by asserting that Chinese people had long inhabited the islands and engaged in productive activities thereon. However, it also avoided staking this claim on Taiping Island alone, instead underscoring the PRC position described above of treating the

[62] "Position Paper of the Government 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," December 7, 2014.

[63] *Waijiao Bu Fayan Ren Yanlun*, March 24, 2016. The next month, MFA spokesperson Lu Kang reiterated this stance of treating Taiping Island as part of the Nansha Islands as a unit in response to another question about Taiwan's positioning in the arbitration case. *Waijiao Bu Fayan Ren Yanlun*, April 18, 2016.

Nansha Islands as a unit. Then, in May 2016, MFA spokesperson Hua Chunying elaborated further on this position, explicitly affirming that "the Nansha Islands of China as a whole have territorial waters, exclusive economic zones and continental shelf," even while also highlighting evidence that Taiping Island had long been inhabited by Chinese fisherfolk and used for various productive activities, proving that "Taiping Island is an island fully capable of sustaining human habitation or economic life of its own."[64] Likewise, in response to specific questions about Fiery Cross Reef, another PRC-occupied feature in the Spratlys, Foreign Ministry spokesperson Hong Lei reaffirmed China's claim to maritime zones from the Nansha Islands as a whole before complaining, "Some countries ignore this basic fact and split the Nansha Islands into their constituent parts in an attempt to deny the holistic integrity and maritime rights and interests of the Nansha Islands, which is inconsistent with *generally accepted international law.*"[65]

The Chinese Society of International Law's 2018 rebuttal of the tribunal award similarly argued that the tribunal's interpretation of Article 121(3) was at odds with customary international law, which supported China's position.[66] The rebuttal also argued that low-tide elevations could be entitled to territorial status, especially as components of a broader archipelago but also possibly as individual features.[67] At the same time, the rebuttal did not address whether wholly submerged features within an archipelago (such as James Shoal) could

[64] *Waijiao Bu Fayan Ren Yanlun*, June 3, 2016.

[65] *Waijiao Bu Fayan Ren Yanlun*, July 8, 2016, emphasis added.

[66] Chinese Society of International Law 2018, paras 686–694. This study cited the opinions of Western legal scholars such as Oude Elferink, who commented in an article on the tribunal's interpretation of Article 121(3) a few months after the tribunal issued its award that "At the moment, there is an abyss between the tribunal's approach and the practice of many States" (cited in Ibid., para. 686).

[67] Ibid., paras 622–644. It is also worth noting that despite arguing that LTEs are susceptible of appropriation as territory, this rebuttal did not contend that LTEs are entitled to territorial seas or other maritime zones as individual features (rather than as part of a broader archipelago). It thus avoided directly contradicting Article 13 of UNCLOS, which stipulates that LTEs that are wholly situated outside of the territorial sea of another land feature have no territorial seas of their own. However, China's implied position that LTEs within an "archipelagic unit" but beyond 12 nm from other islands (such as Mischief Reef) could serve as baselines for maritime zones does effectively contradict this article.

be entitled to appropriation as sovereign territory, leaving China's stance on this matter somewhat ambiguous.

In addition, the rebuttal took aim at the award for "implying that China was applying double standards" on Okinotori and the South China Sea islands, dismissing that implication as "completely wrong." The rebuttal noted that the former was "a stand-alone rock in the western Pacific Ocean," in contrast to the Nansha Qundao, which contains nearly 200 land features and "constitutes an archipelagic unit." It also argued that the "natural conditions of component features of Nansha Qundao are much better than those of the rock of Oki-no-Tori," highlighting that the former has "only two small portions naturally protruding above water high tide, no larger than two king-size beds." In other words, China rebutted the implication of hypocrisy on two fronts: by drawing attention to the differing maritime geographical contexts of Okinotori and the Nansha Islands and highlighting the differences in their substantive size and quality.[68]

These legal arguments illustrate the ways in which the displacement and layering of China's interpretations of the law of the sea regarding outlying archipelagoes and the regime of islands, respectively, were intertwined. Beijing has sought to minimize the legitimacy gap posed by its apparent efforts to have it both ways on the regime of islands—opposing Japan's claims to large maritime zones around Okinotorishima on the basis of UNCLOS, while asserting expansive claims from small islands in the South China Sea—by stressing not only the size differences between Okinotori and some of the Nansha Islands, but also and especially that those islands ought to be treated as a whole, and that as a whole they meet the criteria for an EEZ and continental shelf. Meanwhile, its arguments that the islands ought to be treated as a whole depended not on UNCLOS but on general international law and customary international law.

[68] Ibid., paras 717–721.

Conclusion

This chapter has illustrated how Beijing's interpretations of the legal entitlements of islands and archipelagoes have been motivated by cross-cutting geopolitical incentives and shaped by its efforts to portray its claims as legitimate to the international community. On one hand, China has long perceived its maritime interests, especially in the vicinity of disputed islands and archipelagoes in the East and South China Seas, to be under threat due to both the efforts of other disputants to bolster their claims and the meddling of countries outside the region. In order to shore up its interests in those disputes, the PRC has long asserted the right to treat outlying archipelagoes as a unit, and after ratifying UNCLOS, it began declaring straight baselines and claiming EEZs and continental shelves on the basis of those archipelagoes. Even as China's own maritime power has grown, its threat perception has not abated. On the contrary, after the South China Sea disputes began heating up again in 2009, China perceived growing threats to interests, leading it to reiterate its claims. The ambiguity and expansiveness in those claims led to pushback from other states, however. In response, China has clarified the nature of its claims to South China Sea archipelagoes as units, while also elevating alternative sources of international law alongside UNCLOS in a process of supplementary displacement.

On the other hand, China's growing maritime power and interests in operating beyond its near seas generated cross-cutting incentives for Beijing to maximize its freedom of navigation, marine scientific research, and fishing in the waters beyond its near seas. Thus, when Japan declared an EEZ and formally claimed expansive jurisdiction based on the islets of Okinotori, located in the waters between the first and second island chains surrounding China, Beijing objected to that claim using the discourse of international law. This consisted of China interpreting Article 121(3) of UNCLOS to argue that Okinotorishima was only entitled to a

territorial sea, not an EEZ and continental shelf. This interpretation favoring limited coastal state jurisdiction in an area of the law of the sea where China had not previously adopted a position was layered on top of China's previous interpretations that are more favorable toward expansive jurisdiction. The juxtaposition of these conflicting interpretations has introduced a legitimacy gap for China. When challenged about the apparent inconsistency between these positions, however, Beijing has highlighted its stance on treating archipelagoes as a unit in an effort to blunt this criticism, portraying its own claims to maritime space around small reefs and atolls in the South China Sea as qualitatively distinct from Japan's claim around Okinotorishima.

Chapter 9: China's Legal Interpretations of Historic Rights

This chapter builds upon the analysis in the previous chapter to illustrate how the People's Republic of China (PRC) has combined its relatively longstanding position on archipelagic unity with a newer claim to historic rights and an old but newly resurfaced map as part of a broader effort to interpret international law in ways that support its position in the South China Sea disputes. The key motivations behind China's interpretations of the law of the sea regarding historic rights are similar to the drivers of its interpretation favoring the unity of outlying archipelagoes discussed in the previous chapter. Beijing has long perceived that its "maritime rights and interests" in its near seas, especially the South China Sea, are under threat from other claimants and Western powers. Moreover, as China debated ratifying the United Nations Convention on the Law of the Sea (UNCLOS) in the years following the Third United Nations Conference on the Law of the Sea (UNCLOS III), it came to feel that its claims were at a relative disadvantage under the maritime zonation regime of UNCLOS, further exacerbating its sense of maritime threat.

However, China's stance on historic rights was largely unstated in the years before, during, and immediately after UNCLOS III. It was not until 1998, two years after China ratified UNCLOS, that Beijing asserted an explicit claim to historic rights, though without any specific legal reasoning or interpretation of that concept. This new claim represented a form of *layering*, as China interpreted an issue in the law of the sea where it had not previously taken a position. This novel position was layered on top of China's past advocacy at UNCLOS III for the right of coastal states to claim exclusive sovereign rights to the resources within 200 nm of their shores, subject to delimitation in cases of overlap. China's new claim to historic rights, vague as it was, suggested that Beijing was seeking a way to resist the exclusive jurisdictional claims of other

littoral states in the South China Sea in order to justify its own growing demand for resources and maritime presence in the region. At the same time, Beijing also stopped short of claiming exclusive rights in the form of "historic waters," as some Chinese scholars had advocated.

A decade later, as the disputes in the South China Sea escalated, Beijing attached a map with nine dashes surrounding the South China Sea to a note verbale to the UN Secretary General as a means of illustrating its claims in the region. China's neighbors and others outside the region pressed Beijing to clarify the meaning of this dotted line, which, though newly resurfaced, originated in a map generated by the Republic of China government in 1948-49. In response to the pushback China received over the map, Beijing began to interpret the map in a way that deemphasized the dotted line itself and instead increasingly stressed China's historic rights within the South China Sea more generally. Meanwhile, to justify its claim to historic rights, Beijing elevated general international law alongside UNCLOS in a process of supplementary *displacement*, similar to the pattern in its interpretation of the unity of outlying archipelagoes.

As in chapters 7 and 8, the sources for my discourse analysis in this chapter include working papers and statements at UNCLOS III, Chinese domestic legislation, notes verbale and letters submitted to the United Nations Secretary General, major formal speeches by senior PRC leaders, and statements and briefings by officials and spokespersons of the Ministry of Foreign Affairs (MFA).[1] As in the previous chapter, many of the official and quasi-official Chinese

[1] I accessed Foreign Ministry spokespersons' statements in 外交部发言人言论数据库 (*Wàijiāo bù fāyán rén yánlùn shùjùkù*) [Database of Foreign Ministry Spokespersons' Remarks], 1997-present, 中国政府资料库 (*Zhōngguó zhèngfǔ zīliào kù*) [Archives of the Chinese Government], Oriprobe Information Services, Inc. I performed numerous key term searches related to historic rights, including, among others, "South China Sea islands" (*Nanhai zhudao*, 南海诸岛), "exclusive economic zone" (*zhuanshu jingji qu*, 专属经济区), "Natuna [Islands]" (*Natuna*, 纳土纳), "dotted line/9-dashed line" (*duanxu xian/jiu duan xian*, 断续线/九段线), and "historic rights" (*lishi xing quanli*, 历史性权利), which collectively generated hundreds of results. I analyzed all the results from these searches both quantitatively and qualitatively and compiled relevant excerpts into master files, which are available upon request.

I cite these statements and press conference excerpts below as "*Waijiao Bu Fayan Ren Yanlun*, [DATE]." All of these statements were accessed in May or June 2020 via the Oriprobe Information Services Chinese Government

sources cited in this analysis are from the period following key events in the South China Sea dispute, including the 2009 deadline for the Commission of the Limits of the Continental Shelf and the South China Sea arbitration case initiated by the Philippines in 2013. Confrontations and standoffs at sea between China and other claimant states over marine resources have also often served as impetuses for Beijing to expound upon its legal interpretations of historic rights and related issues, including the dotted line in China's maps of the South China Sea and the meaning of "other sea areas under national jurisdiction."

Historic Rights, The U-Shaped Dotted Line, and "Other Sea Areas"

Among the four overarching issues this dissertation has studied in depth, the international law of the sea is perhaps most ambiguous on the topic of historic waters, historic bays, and historic rights. UNCLOS touches upon some of these issues, but in so doing refers to legal sources and concepts outside of the text that are themselves ill-defined and based largely on specific treaties or customary international law. As noted in chapter 4, UNCLOS refers to "so-called 'historic' bays" and "historic title," but without defining them and in a way that largely reserves them from the juridical regimes otherwise established in the convention. UNCLOS also requires archipelagic states to recognize the "traditional fishing rights" of neighboring states in their archipelagic waters and enjoins states to respect "habitual" fishing patterns when granting foreigners access to surplus fish catches in their exclusive economic zones (EEZs). Finally, the convention admonishes states to take into account "customary" navigation routes when

Archives online database and translated by myself unless otherwise indicated. (For example, I accessed some more recent Chinese or English versions of Foreign Ministry statements on the MFA website, and for older statements, I on occasion tracked down the English version in Xinhua articles housed in the LexisNexis database.)

establishing sea lanes in their territorial seas, also acknowledging such navigation in more general terms in the regimes of transit passage and archipelagic sea lanes passage.

In customary international law, the concepts of historic waters and bays generally refer to waters over which a state claims and exercises sovereignty akin to the regime of internal or possibly territorial waters, whereas the concepts of historic title or rights traditionally have more ambiguous connotations. These latter terms have both sometimes been employed as more general umbrella terms for any kind of historic claims, while on other occasions "historic title" has been used interchangeably with historic waters to refer to a claim to sovereignty and "historic rights" has been used to connote a weaker form of rights to jurisdiction or resources short of sovereignty. In all of these cases, some of the generally understood basic principles behind historic claims are summed up by Irish law of the sea expert Clive R. Symmons as follows: they must be based on a formal, official claim; the official claim must be clear and consistent; the claim must be publicized to other states; the claim must be continuous over time; states must exercise effective jurisdiction in the claimed waters; and other states must both be aware of and acquiesce in the claim.[2] The tribunal in the 2016 *Philippines v. China* case was one of the first international courts to directly address the question of how historic rights relate to UNCLOS; in its final award, the tribunal adopted a highly restrictive position on historic rights, arguing that such rights are largely superseded by UNCLOS and its maritime jurisdictional zones.[3] (See more details on the issue of historic rights under the law of the sea in chapter 4.)

[2] Symmons 2019.

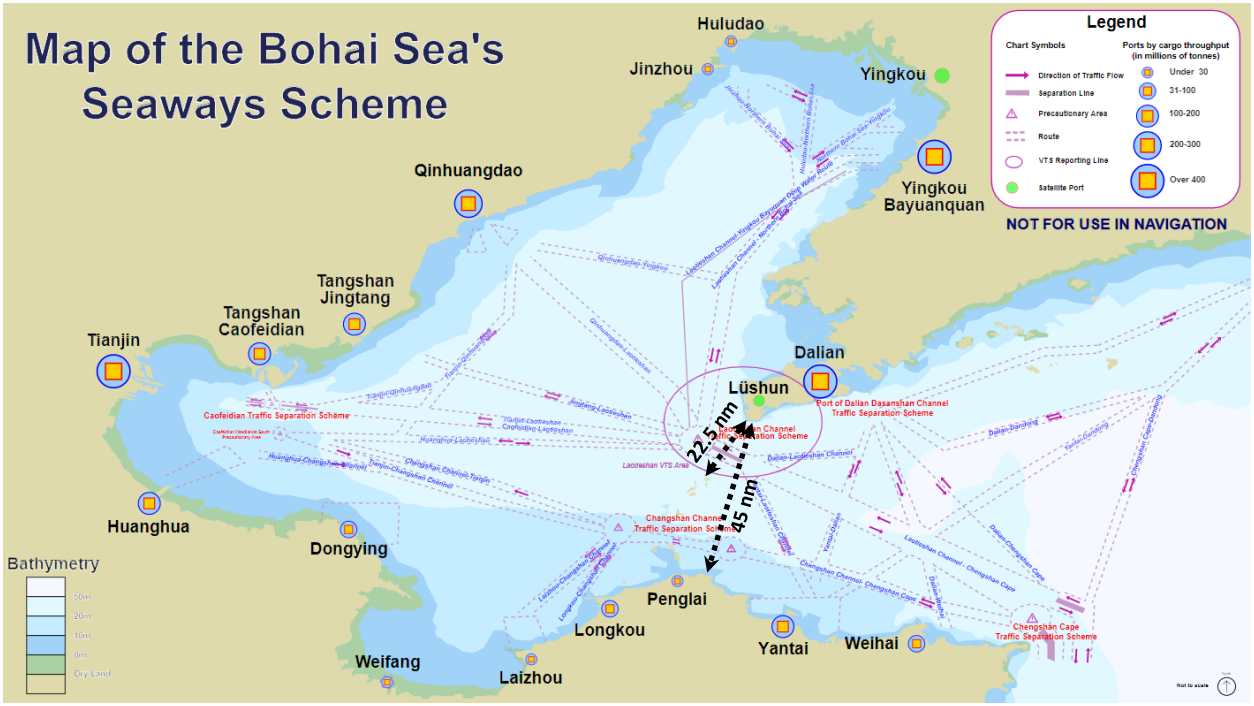
[3] *Philippines v. China*, PCA Case No. 2013-19, Award in the matter of the South China Sea Arbitration before an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, July 12, 2016, https://pcacases.com/web/sendAttach/2086, pp. 97–117.

China's Positions at UNCLOS III and Final Interpretations of the Text

Before and during UNCLOS, China did not make any explicit claims to historic bays, titles, waters, or rights. However, it did treat some of its waters in effectively the same way as historic waters. For example, as early as 1864 during the Qing Dynasty, China referred to the Bohai Bay—the bay fronting Tianjin and Beijing and surrounded at its neck by the Shandong and Liaoning peninsulas—as an "inner ocean under China's jurisdiction."[4] In addition, China's 1958 territorial sea declaration identified Bohai Bay and Qiongzhou Strait as internal waters (*neihai*, 内海) to be enclosed within straight baselines, an approach that resembles that of historic bays. But the PRC government has apparently never explicitly called Bohai Bay its "historic bay" nor dubbed Qiongzhou Strait "historic waters." The PRC approach of enclosing Bohai Bay within straight baselines preceded UNCLOS and was done at a time when state practice regarding straight baselines was in flux and governed by few clear standards. (It is also important to note that China has only enclosed Bohai Bay in straight baselines in principle in its territorial sea declarations, but has not yet publicized coordinates or charts depicting specific straight baselines in this area north of the Shandong Peninsula.) UNCLOS did establish some standards and principles for straight baselines more generally, which included rules regarding closing lines in the mouths of bays, as well as a general provision on straight baselines in Article 7 indicating that straight baselines could be drawn in areas "where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity."

[4] 史春林 (Shi Chunlin) 2005.

Figure 9.1 Geographical Configuration of Bohai Bay



Source: Wikimedia Commons, "Bohai Sea's Planned Seaways Scheme 2015," May 1, 2012, created and submitted by Wikimedia user Arrorro, https://commons.wikimedia.org/wiki/File:Seaways_Plan_for_the_Bohai_Sea.svg. Dashed black lines and distance measurements between Laotieshan Peninsula and nearest points on the island and the mainland added by the author.

Some Chinese scholars specifically argue that Bohai Bay qualifies as internal waters under three possible legal justifications: (1) as a historic bay, (2) as a juridical bay under Article 10 of UNCLOS, because even though the bay is 45 nm wide at its mouth measuring from points on the mainland, thus exceeding the 24 nm maximum in Article 10(4), there are several islands in the mouth, so the Laotieshan Channel between Laotieshan Peninsula and one of the islands in the mouth of the bay is only 22.5 nm wide; and (3) simply because it is enclosed within straight baselines under the fringing islands principle.[5] (See Figure 9.1 for a depiction of the geographical configuration of Bohai Bay and the Laotieshan Peninsula.) In a systematic study of historic

[5] Ibid.; 赵丽霞 (Zhao Lixia) 1999.

rights in the international law of the sea, Jia Yu, a senior researcher in the State Oceanic Administration's China Institute for Marine Affairs, identified Qiongzhou Strait and the areas within the (declared or future/hypothetical) baselines of China's four outlying archipelagoes in the South China Sea as historic waters. She did *not* include Bohai Bay in this list; this omission may be because she considers Bohai Bay to be a juridical bay under Article 10 of UNCLOS, and/or as legitimately encompassed within China's straight baselines under Article 7 of UNCLOS.[6] In any event, despite this scholarly speculation about China's historic waters, the PRC government has never officially and explicitly declared any of these sea areas as historic waters or bays. But China has recognized other states' claims to historic waters—for example, the PRC was the only state to recognize the Soviet Union's 1958 claim to Peter the Great Bay near Vladivostok as a historic bay.[7]

Perhaps in part because China did not specifically claim any historic bays or waters for itself, the PRC delegation to UNCLOS III did not take an active role in the debates over the limited references to historic or traditional concepts in the convention.[8] China did not advocate the inclusion of such concepts, but neither did it register opposition to them.[9] At a much more general level, China did advocate for robust protections for the sovereignty and exclusive

[6] 贾宇 (Jia Yu) 2015.

[7] 林雨桐 (Lin Yutong) and 顾郡雯 (Gu Junwen) 2019; Zou and Liu 2015.

[8] As the tribunal in the *Philippines v. China* case noted, the Chinese delegation at UNCLOS did advocate strongly for the exclusivity of the 200 nm economic zone, insisting that the large fishing fleets of "the superpowers" should not be able to maintain rights in areas where they had previously been "plundering" the resources of coastal states. *Philippines v. China*, PCA Case No. 2013-19, Award in the matter of the South China Sea Arbitration, July 12, 2016, https://pcacases.com/web/sendAttach/2086, pp. 105–06, especially paragraph 251. However, this commentary did not directly touch upon the issues of historic waters or rights, nor was the kind of industrial-scale far seas fishing conducted by major fishing fleets from the Soviet Union and the United States generally discussed in "historic" or "traditional" terms at UNCLOS III.

[9] This assessment is based on a review of China's public statements at the plenary meetings and committee meetings, as well as a review of the Virginia Commentary volumes on the negotiating history of UNCLOS III and the accounts of China's priorities at the conference recounted by three deputy heads of China's delegation to UNCLOS III.

"maritime rights and interests" (*haiyang quanyi*, 海洋权益) of coastal states, especially developing nations.[10] In particular, in its initial 1973 Seabed Committee working paper on sea areas under national jurisdiction, the PRC emphasized the right of states to make their own laws governing their maritime zones. This working paper also did not endorse a specific breadth for the territorial sea, advocating instead that states be allowed to determine their own territorial sea breadth.[11] Isaac Kardon points to this position as evidence of Beijing's desire to maintain maximum flexibility to claim as much sovereignty over maritime space as possible.[12] However, in light of China's relational priorities described in chapter 6, it seems more likely that this was a way for Beijing to bolster its legitimacy in the eyes of Third World countries that it was trying to court diplomatically in the 1970s. China claimed a 12 nm territorial sea for itself, dating back to its 1958 declaration, but it also supported countries who claimed 200 nm of sovereignty, such as Peru and other Latin American states.[13] This flexible position thus enabled Beijing to both adhere to its own preferred 12 nm limit while also currying favor with those states by supporting their wider claims. At the same time, China never gave any indication of support at UNCLOS for coastal state jurisdiction beyond 200 nm (other than the UNCLOS-permitted extended continental shelf), whether on a historic basis or otherwise. And although China did not initially

[10] For references to "maritime rights and interests," see remarks by Ling Qing at the 76th plenary meeting on September 17, 1976, A/CONF.62/SR.76 and in the speech by Vice Foreign Minister Han Xu at the 191st plenary meeting, December 9, 1982, A/CONF.62/SR.191. In this latter speech explaining China's decision to sign the convention, Han stated, "The new Convention has laid down a number of important legal principles and regimes for safeguarding the common heritage of mankind and the legitimate maritime rights and interests of all States and brought about a change in the former situation, in which the old law of the sea served only the interests of a few big Powers."

[11] "Working paper submitted by the Chinese delegation: Sea area within the limits of national jurisdiction," in *Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Volume III, General Assembly Official Records: Twenty-Eighth Session*, Supplement No. 21 (A/9021), New York, 1973, pp. 71-74, available at https://digitallibrary.un.org/record/725188; originally issued as document A/AC.138/SC.II/L.34.

[12] Kardon 2017, 95–96.

[13] See the section in chapter 6, "China Joins the United Nations: PRC Participation in UNCLOS III, 1971-1978."

endorse a specific maximum limit for the territorial sea, in one of its earliest speeches at UNCLOS III, the Chinese delegation did support the basic goal of negotiating such a limit at the convention,[14] and it ultimately endorsed the 12 nm maximum for territorial seas and the 200 nm maximum for EEZs.

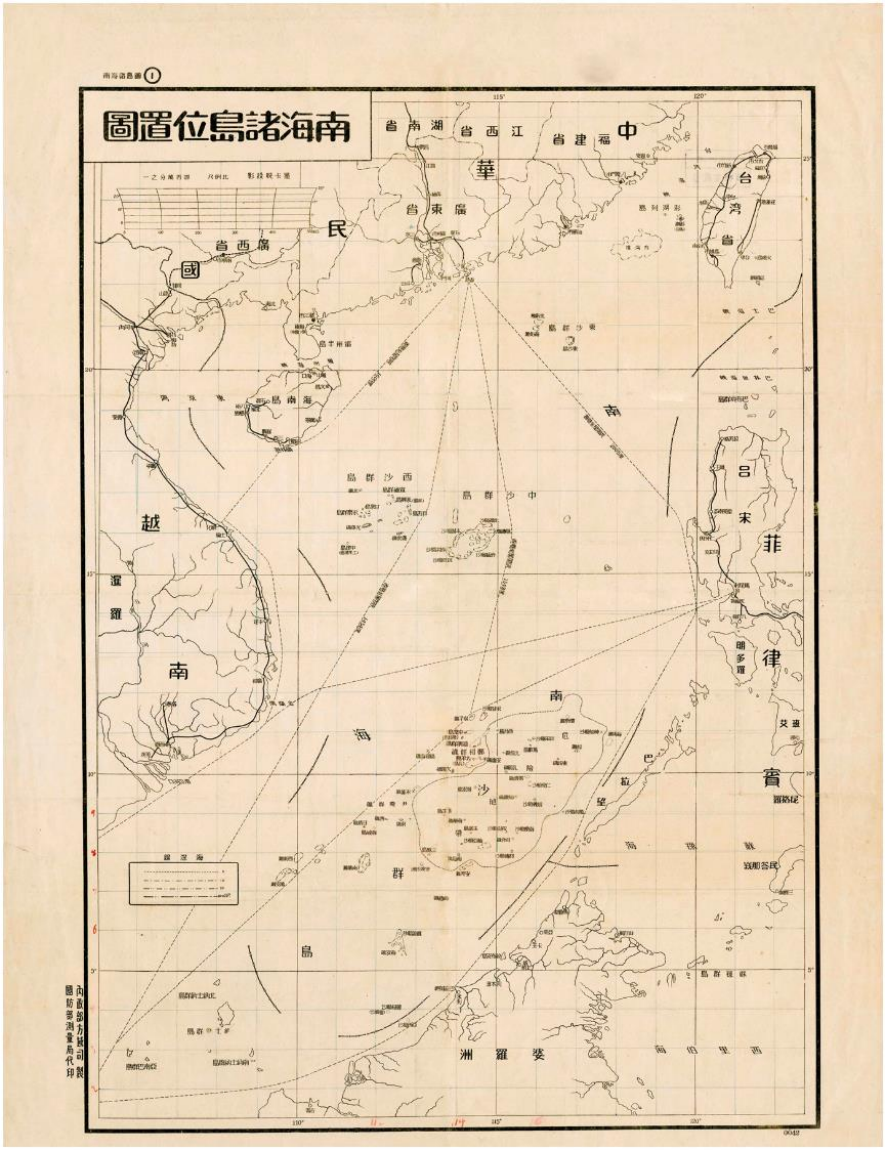
One final note on China's pre-UNCLOS III claims related to historic rights is in order. As recounted in chapter 6, the Republic of China government produced a map depicting a U-shaped dotted line encircling much of the South China Sea in 1947, publicizing it in 1948 (see Figure 9.2).[15] However, the PRC never attached any specific interpretation to that map upon inheriting it. In particular, Beijing did not claim the waters within the map's dotted line as historic waters or internal waters. Indeed, the map itself did not play a prominent role in China's public discourse about its claims to the South China Sea during the first several decades of the PRC's existence. A deputy head of China's UNCLOS III delegation, Chen Degong, did claim in a 2012 interview that the fact no one objected to the dotted line map at UNCLOS III supported the map's validity generally speaking.[16] However, this claim seems to be an anachronistic projection backward in time, as there is no evidence China presented that map at the conference, nor is it clear the subject of that map would have been likely to arise at the conference.

[14] See remarks by PRC delegate Chai Shu-fan at the 25th plenary meeting, July 2, 1974, A/CONF.62/SR.25. Chai stated, "The question of fixing a maximum limit for territorial seas should be decided by all countries jointly on an equal footing."

[15] For discussions of how this map was produced and some of its antecedents in the 1930s, see Hayton 2019; Tai and Tsai 2014; 郑志华 (Zheng Zhihua) and 吴静楠 (Wu Jingnan) 2020.

[16] 山旭 (Shan Xu) 2012.

Figure 9.2 *Nanhai Zhu Dao Wei Zhi Tu* (Location Map of the South China Sea Islands) Published by Republic of China in 1948



Source: Map produced by the Republic of China's Ministry of the Interior, printed by the Survey Bureau of the Ministry of National Defense in 1947, and publicly released in February 1948. Image reproduced in 郑志华 (Zheng Zhihua) and 吴静楠 (Wu Jingnan) 2020, see note 9.

China's Interpretations Post-UNCLOS III

In the decades after UNCLOS, China's approach toward historic waters and rights maintained some continuity, while also undergoing a significant shift after China ratified

UNCLOS. As already noted, China to this day has never explicitly claimed any historic bays or waters. However, Beijing did stake out a new claim to unspecified "historical rights" in 1998, while also maintaining some more general expansive ambiguity in its maritime laws. As with its claim to straight baselines around outlying archipelagoes, China later justified its claim to historic rights on the basis of customary international law, arguing that such law existed as a source for the law of the sea alongside UNCLOS rather than being fully superseded by UNCLOS. This claim thus exhibited an intertwined pattern of layering and displacement, whereby China issued new interpretations of concepts in the law of the sea (namely, historic rights) in response to changing circumstances (namely, its ratification of UNCLOS), while supporting those new interpretations by elevating alternative sources of the law of the sea alongside the primary conventional source, UNCLOS. This interpretive evolution was driven by China's perception of maritime threat, as China feared that the ratification of UNCLOS by itself and other littoral states along the South China Sea would disadvantage China in the dispute over sovereignty and marine resources in that area. At the same time, China's efforts to find new forms of legal reasoning to mitigate the hypocrisy costs of such a claim exhibited its concern about the need to maintain some semblance of international legitimacy (even if those efforts have arguably met with limited success).

Domestic Maritime Laws and "Other Sea Areas under China's Jurisdiction"

As described in chapter 6, in the decade and a half immediately following the PRC's signing of UNCLOS in 1982, China adopted a number of domestic maritime laws. Several of these laws referred not only to specific maritime zones such as the territorial sea or continental shelf, but also referred to the more generic "other sea areas under China's jurisdiction" (*Zhonghua Renmin Gongheguo guanxia de yiqie qita haiyu,* 中华人民共和国管辖的其他海域).

For example, Article 2 of the 1982 Marine Environment Protection Law specified, "This Law shall apply to the internal seas and territorial seas of the People's Republic of China and all other sea areas under the jurisdiction of the People's Republic of China."[17] Offshore petroleum regulations issued the same year contained similar language,[18] as did the 1986 Fisheries Law.[19] This phrase echoed the title in the 1973 working paper China submitted to the Seabed Committee on "sea area within the limits of national jurisdiction," which contained three sections addressing the territorial sea, "exclusive economic zone or exclusive fishery zone," and continental shelf, respectively. In the 1980s, this phrase may have been included in part because both the international law of the sea regime and China's own domestic maritime legal regime were still somewhat in flux. When the Marine Environment Protection Law and offshore petroleum regulations were adopted in 1982, UNCLOS had not yet even been finalized. Even after UNCLOS was opened for signature in December 1982, it remained unclear for several years

[17] See Marine Environment Protection Law of the People's Republic of China, adopted at the 24th meeting of the Standing Committee of the Fifth National People's Congress on August 23, 1982, promulgated by Order No. 9 of the Standing Committee of the National People's Congress on August 23, 1982, and effective as of March 1, 1983, English translation available at http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100050463.html.

[18] Regulations of the People's Republic of China on Sino-Foreign Cooperative Exploitation of Offshore Petroleum Resources, adopted at the executive meeting of the State Council on January 12, 1982, promulgated by the State Council on January 30, 1982, and effective as of date of promulgation, English translation available at http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100050358.html. Article 2 of these regulations stated, "All petroleum resources in the internal waters, territorial sea and continental shelf of the People's Republic of China and in all sea areas within the limits of national jurisdiction over the maritime resources of the People's Republic of China are owned by the People's Republic of China." This rather contorted English is the official translation of the following phrase in Chinese: "中华人民共和国的内海、领海、大陆架以及其他属于中华人民共和国海洋资源管辖海域的石油资源，都属于中华人民共和国国家所有。" See original Chinese version, 中华人民共和国对外合作开采海洋石油资源条例, available at http://www.reformdata.org/1982/0130/420.shtml.

[19] Fisheries Law of the People's Republic of China, adopted at the 14th Meeting of the Standing Committee of the National People's Congress and promulgated by Order No. 34 of the President of the People's Republic of China on January 20, 1986, and effective as of July 1, 1986, available at http://www.china.org.cn/environment/2007-08/20/content_1034340.htm. Article 2 of this law states: "All productive activities of fisheries, such as aquaculture and catching or harvesting of aquatic animals and plants in the inland waters, tidal flats and territorial waters of the People's Republic of China, or in other sea areas under the jurisdiction of the People's Republic of China, must be conducted in accordance with this Law."

whether or not the convention would receive sufficient ratifications to enter into effect. In addition, China itself had not yet formally claimed an exclusive economic zone. Thus, those early laws made no reference to that zone, only referring to internal waters, territorial seas, and/or the continental shelf, in which case the "other sea areas" term may have initially been meant as a generic term that would enable the law's application to any future EEZ or similar zone.

However, as these laws were revised in later years following China's ratification of UNCLOS in 1996 and its passage of the 1998 EEZ law, references to the EEZ were added where applicable, but the "other sea areas" phrase was generally maintained as well. Kardon reported that as of 2014 this phrase appeared in at least 69 legal instruments in a database of Chinese laws, regulations, and rules.[20] The phrase has also been cited on occasion by Foreign Ministry officials objecting to the resource extraction or exploration activities of other claimant states in the South China Sea or defending China's own such activities.[21] The retention of this phrase in these laws alongside the formal UNCLOS-based zones may imply that China claims, or reserves the right to claim, jurisdiction in areas beyond those UNCLOS zones. The PRC government has never officially made that claim explicit—for example, by connecting this phrase to historic rights or the area within the dotted line in the South China Sea. However, the quasi-official rebuttal of the tribunal's award in the *Philippines v. China* case by the Chinese Society of International Law did make such a connection explicit. In the fourth chapter addressing the issue of historic rights, the rebuttal cited several PRC domestic laws that include the "other sea areas"

[20] Kardon 2017, 236.

[21] *Waijiao Bu Fayan Ren Yanlun*, July 13, 2012; August 19, 2019; August 23, 2019; and September 18, 2019. The 2012 statement was objecting to Philippines' auctioning of oil blocks in the South China Sea near Palawan, while the 2019 statements were in defense of China's oil exploration activities in Wan'an Beach (Vanguard Bank) and in criticism of Vietnam's drilling operations in that vicinity.

phrase in order to support a contention "that the maritime zones under the jurisdiction of China comprise not only the maritime zones that China is entitled to under the Convention, but also those areas in which China has historic rights."[22]

Controversy over the Dotted-Line Map in the 1990s

Then, in the early 1990s, controversy arose as China reportedly presented a map depicting its claims in the South China Sea at a workshop series convened by Indonesia among the claimants to islands and resources in the South China Sea. Ian Storey writes that this map was likely a version of the U-shaped 1947 map, and he claims that Beijing asserted that the map depicted China's "historic waters" in the South China Sea.[23] However, I have not been able to independently verify this claim, and the PRC government has not otherwise made an explicit connection between historic rights and the dotted line, nor has Beijing ever claimed the South China Sea as "historic waters" in any official sources. In any event, whatever the precise nature of China's claim at the workshop, since the area China claimed on the presented map overlapped with Indonesia's EEZ extending from the Natuna Islands, the map caused consternation in Jakarta, which sought further clarification from Beijing.[24]

Beyond this particular controversy, as noted in chapter 6, there was considerable scholarly debate in Taiwan and China in the early to mid-1990s on the historic status of the South China Sea and the meaning of the dotted-line map. As Bill Hayton details, the Republic of China government on Taiwan established a committee in 1989 to propose boundaries for Taiwan's territorial sea and EEZ. One member of this committee, legal scholar Fu Kuen-Chen,

[22] Chinese Society of International Law 2018, para. 520.

[23] Storey 2011, 199. See also Johnson 1997. Johnson instead describes China's claims on the basis of the map presented at the 1993 workshop as "historic claims" more generally, not "historic waters" specifically.

[24] Johnson 1997; Storey 2011; Suryadinata and Izzuddin 2017.

applied the concept of "historic waters" to the South China Sea in a paper published by the government in 1992. The ROC Ministry of the Interior then incorporated this concept into its "Policy guidelines for the South China Sea" issued in 1993.[25] The following year, Yann-Huei Song, another prominent Taiwan-based scholar of the law of the sea, echoed this position by claiming that the dotted line indicated a claim to "historic waters," although Song acknowledged at a conference in 1995 that the PRC government had never claimed historic waters in the South China Sea.[26] At that same conference, Pan Shiying, a think tank researcher affiliated with the People's Liberation Army Navy, interpreted the dotted line as a claim to "historic title."[27]

Also in 1995, Zhao Lihai, a Beijing University law professor and one of China's foremost law of the sea experts, wrote a paper arguing the dotted-line was a "traditional maritime boundary line" (*chuantong haijiang xian,* 传统海疆线) that implied the South China Sea was part of China's historic waters (*lishi xing shuiyu,* 历史性水域), wherein it possessed *lishi xing quanli* (历史性权利), ordinarily translated as "historic rights," but which Li translated within parentheses in the article as "historic title." He emphasized that "the Taiwan authorities" had claimed the South China Sea as historic waters, arguing the PRC thus also "must unswervingly maintain" (*bixu jianchi buyu,* 必须坚持不渝) the traditional maritime boundary line. He also stressed that the South China Sea's name itself was evidence the sea had long been considered a "Chinese Lake" (*Zhongguo hu,* 中国湖).[28] This latter infamous suggestion has been held up by both Chinese nationalists and alarmed foreigners as evidence of China's expansive claims in

[25] Hayton 2018. These policy guidelines stated, "The South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China possesses all rights and interests." Cited in Ibid., p. 377.

[26] Hong and Van Dyke 2009, 64; Song 1994.

[27] Pan paper cited in Hong and Van Dyke 2009, 63–64.

[28] 赵理海 (Zhao Lihai) 1995.

ensuing years, despite the fact the PRC government never endorsed Zhao's view, and Zhao himself walked back his position the following year, the same year China ratified UNCLOS.[29]

First Explicit Assertion of Historic Rights in the 1998 EEZ Law

This unofficial debate provided the backdrop for the most significant development to date in China's approach to historic claims. In the Exclusive Economic Zone and Continental Shelf Act adopted by the Standing Committee of the Ninth National People's Congress (NPC) in June 1998, a concluding article stated, "The provisions of this Act shall not affect the historical rights of the People's Republic of China."[30] This was the first occasion in which Chinese maritime legislation had used the "historic" terminology, but by adopting the term "historic(al) rights" (*lishi xing quanli*, 历史性权利), this law adopted a weaker form of historic claim than the

[29] See discussion in 贾宇 (Jia Yu) 2015. Similarly, in more recent years, the speeches and propaganda pieces of some senior officials, especially in the State Oceanic Administration, have sometimes referred to the ocean as "blue territory" (*lanse guotu*, 蓝色国土). However, this is a metaphorical and rhetorical concept, perhaps revealing of the continentalist mindset of those who employ it, but not indicative of any sort of official legal claim. See Liu Cigui, "国家海洋局党组书记、局长刘赐贵：管好海域资源 构建生态文明" (*Guójiā hǎiyáng jú dǎngzǔ shūjì, júzhǎng liúcìguì: Guǎn hǎo hǎiyù zīyuán gòujiàn shēngtài wénmíng*) [Manage Marine Resources to Build an Ecological Civilization], 《中国海洋报》 (*Zhongguo Haiyang Bao*), March 12, 2012, http://www.soa.gov.cn/xw/hyyw_90/201211/t20121109_475.html; see also "中共中央政治局常委国务院副总理李克强作重要批示" (*Zhōnggòng zhōngyāng zhèngzhì jú chángwěi guówùyuàn fù zǒnglǐ Lǐ Kèqiáng zuò zhòngyào pīshì*) [Vice Premier Li Keqiang of the CCP Central Committee and Politburo Standing Committee made important instructions], 《中国海洋报》 (*Zhongguo Haiyang Bao*), December 27, 2011, http://www.soa.gov.cn/xw/ztbd/2011/qghygzhy/hybd_qghygzhy/201211/t20121130_18477.htm.

[30] Exclusive Economic Zone and Continental Shelf Act, adopted at the Third Meeting of the Standing Committee of the Ninth National People's Congress on June 26, 1998, and promulgated and implemented by Order No. 6 of the President of the People's Republic of China on June 26, 1998, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf. The original Chinese sentence is as follows: "本法的规定不影响中华人民共和国享有的历史性权利." See the Chinese version, 中华人民共和国专属经济区和大陆架法, available at http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004707.htm. Although the term "*lishi xing quanli* (历史性权利)" is translated as "historical rights" in the official English version of the 1998 EEZ law China submitted to the United Nations, the Chinese government has used the English terms "historical rights" and "historic rights" interchangeably to refer to that provision in the intervening years.

"historic waters" position endorsed by Taiwan and by some scholars.[31] This article was likely one of the "corresponding countermeasures (*xiangying duice,* 相应对策) and "appropriate follow-up actions" (*shidang houxu xingdong,* 适当后续行动) foreshadowed by Vice Foreign Minister Li Zhaoxing in his 1996 speech to the NPC Standing Committee upon China's ratification of UNCLOS. Hong Nong writes that Li expressed particular concern over how ratification might disadvantage China's standing in the South China Sea issue, but that he had also expressed optimism that the provisions of the convention alluding to historic rights could be used to strengthen China's position in the Spratly Islands.[32] This claim to "historical rights" (*lishi xing quanli,* 历史性权利) in the EEZ law two years later thus was likely intended as a mechanism for China to shore up its claims to jurisdiction and rights in the South China Sea, even in areas that were squarely within other littoral states' EEZs and continental shelves and far from the Chinese mainland. At the same time, China exhibited a cautiousness by eschewing a more robust "historic waters" formulation, perhaps eager to avoid an excessive blow to its legitimacy. This law also did not attach any particular geographical scope to China's historic rights claim, whether within the dotted line or elsewhere. (As explained below, it would be nearly two more decades before China would specifically attach this claim to the South China Sea in official government statements, and even then it did not explicitly link historic rights to the area enclosed by the dotted line.)

[31] As Hayton explains, the ROC government on Taiwan backed away from this claim after the Taiwan Strait Crisis of 1995-96 and the subsequent marginalization of scholars and politicians, including Fu Kuen-Chen, who had advocated for strong coordination of Taiwan's maritime claims with the PRC. Hayton 2018.

[32] Hong 2015.

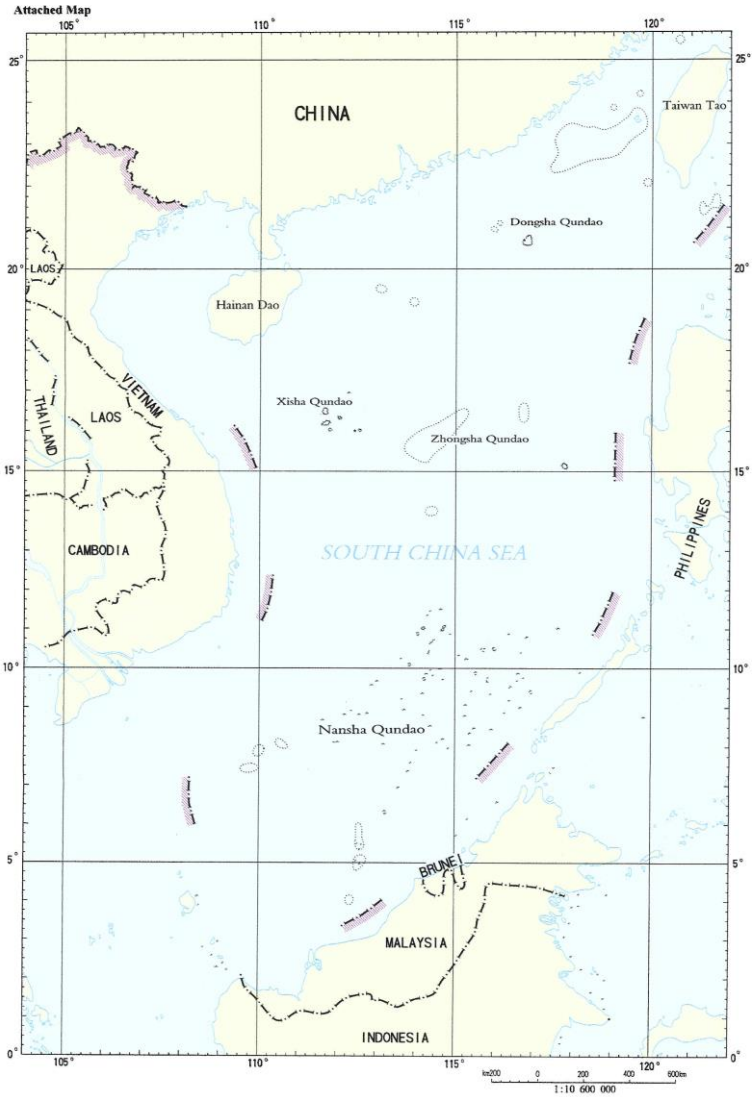
Meanwhile, in the coming decade, China did not offer any elaboration or clarification on the meaning of its claim to historical rights, nor did it refer frequently to the dotted-line map.[33] Then, in 2009, China issued its abovementioned note verbale to the UN Secretary General objecting to Vietnam's and Malaysia's submissions to the Commission on the Limits of the Continental Shelf. This map included a new version of the dotted-line map as an attachment (see Figure 9.3).

This note verbale did *not*, however, make any reference to historic rights within the area of the dotted line or otherwise; in fact, the text of the note did not refer at all to the dotted lines or their meaning. On the contrary, the note referred primarily to maritime rights and jurisdiction extending from the islands within the South China Sea, stating "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)."[34] This language was itself somewhat ambiguous, however—in particular the phrase "relevant waters" (*xiangguan haiyu*, 相关海域), which could have been referring to land-based maritime zones or the waters of the South China Sea more generally.

[33] One of the limited examples of a reference to the dotted line by a PRC official was in a speech by Sun Zhihui, the director of the State Oceanic Administration, in 2006, when he referred to a survey of the islands within the dotted line that had been conducted by the SOA between 1984 to 1995. 孙志辉 (Sun Zhihui), 国家海洋局局长 (Director of the State Oceanic Administration), "回顾过去 展望未来——中国海洋科技发展 50 年" (*Huígù guòqù zhǎnwàng wèilái—zhōngguó hǎiyáng kējì fāzhǎn 50 nián*) [Looking back on the past and looking forward to the future—50 years of China's marine technology development], September 1, 2006, accessed in 省部长言论信息数据库 (*Shěng bù zhǎng yánlùn xìnxī shùjùkù*) [Database of Provincial and Ministry Leaders' Remarks and Messages], 中国政府资料库 (*Zhōngguó zhèngfǔ zīliào kù*) [Archives of the Chinese Government], Oriprobe Information Services, Inc.

[34] Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, New York, May 7, 2009, CML/17/2009 – Chinese and English. See also Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to the Submission by the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, New York, May 7, 2009, CML/18/2009 – Chinese and English

Figure 9.3 Map Attached to China's 2009 Notes Verbale to the UN Secretary General



Source: Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to the Joint Submission by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, New York, May 7, 2009, CML/17/2009, Attached Map. See also Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to the Submission by the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, New York, May 7, 2009, CML/18/2009, Attached Map.

Downplaying the Dotted Line in Favor of Broader Legal-Historical Reasoning

Almost as soon as China resurfaced this map in its 2009 note verbale, PRC officials began to situate the map in ways that downplayed its unique significance. In response to the

international controversy generated by China's submission of this note verbale and its attached map, Foreign Minister Yang Jiechi delivered a speech at the 18th Association of Southeast Asian Nations Regional Forum (ARF) Foreign Ministers' Meeting in 2011 wherein he directly addressed the dotted line. In his speech, he articulated a logic that would become the standard explanation of China's dotted line and its broader historical claims in the South China Sea:

> The South China Sea dotted line was officially announced by the Chinese government in 1948. China's sovereignty, rights, and related claims in the South China Sea were formed and developed in a long-term historical process and have always been upheld by the Chinese government.

This statement served to deemphasize the dotted-line map itself as a source of China's claim to sovereignty and rights in the South China Sea, instead situating that map as one piece of evidence of a more longstanding historical claim. Yang also employed a dualistic rhetorical formula, arguing that "China's claims in the South China Sea have full *historical and legal basis*" (*lishi he fali yiju*, 历史和法理依据, emphasis added) and affirming China's commitment to negotiating the disputes "on the basis of respecting historical facts and international law" (*zai zunzhong lishi shishi he guoji fa jichu shang*, 在尊重历史事实和国际法基础上).[35]

The rhetorical formulae in this speech would become standard in China's diplomatic statements over the coming years, as PRC officials tended to deemphasize the dotted-line map in favor of a more general historical argument. For example, a lengthy statement delivered by Foreign Ministry spokesperson Jiang Yu in September 2011 in response to a question about whether or not China's South China Sea claims violated UNCLOS quoted the above-cited

[35] "杨洁篪外长在第 18 届东盟地区论坛外长会上的发言" (*Yáng Jiéchí wàizhǎng zài dì 18 jiè dōngméng dìqū lùntán wàizhǎng huì shàng de fā yán*) [Statement by Foreign Minister Yang Jiechi at the 18th ASEAN Regional Forum Foreign Ministers' Meeting], July 23, 2011, accessed in 省部长言论信息数据库 (*Shěng bù zhǎng yánlùn xìnxī shùjùkù*) [Database of Provincial and Ministry Leaders' Remarks and Messages], 中国政府资料库 (*Zhōngguó zhèngfǔ zīliào kù*) [Archives of the Chinese Government], Oriprobe Information Services, Inc.

portions of Yang's speech verbatim.[36] In February 2014, MFA spokesperson Hong Lei responded to a question about the nine-dashed line by evading the question of the map entirely, instead stating that "China's maritime rights and interests in the South China Sea are historically formed and protected by international law."[37] Such evasion became common in Foreign Ministry spokesperson responses to questions about the dotted-line map or "nine-dashed line."[38] Echoing themes from Yang's speech, a position paper issued by the Chinese government in late 2014 rejecting the tribunal's jurisdiction in the Philippines-initiated arbitration case did refer to the issuance of the dotted-line map in 1948, but it situated the issuance of that map in a longer paragraph describing a history of "Chinese activities in the South China Sea dat[ing] back to over 2,000 years ago."[39]

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[36] *Waijiao Bu Fayan Ren Yanlun*, September 15, 2011.

[37] *Waijiao Bu Fayan Ren Yanlun*, February 8, 2014.

[38] For examples of MFA spokespersons citing some variant of Yang Jiechi's speech in responding to questions about the dotted-line map or, more commonly, avoiding defending or mentioning the map entirely, see *Waijiao Bu Fayan Ren Yanlun*, December 11, 2014; March 11, 2015; July 24, 2015; April 18, 2016; July 4, 2016; December 13, 2016; July 14, 2017; and October 18, 2019.

[39] "Position Paper of the Government 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," Xinhua News Agency, December 7, 2014, available at https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm, accessed November 1, 2020; Chinese version: "中华人民共和国政府关于菲律宾共和国所提南海仲裁案管辖权问题的立场文件," http://www.gov.cn/xinwen/2014-12/07/content_2787663.htm, accessed November 1, 2020. At the same time, this position paper also acknowledged, "It is a general principle of international law that sovereignty over land territory is the basis for the determination of maritime rights," which arguably may undercut China's claim to historic rights and traditional fishing rights in the South China Sea.

By contrast, the Foreign Ministry statement issued in response to the tribunal's initial award on admissibility and jurisdiction in the case in October 2015 did not mention the dotted-line map at all, instead repeating Yang Jiechi's language about China's sovereignty and related rights forming "in the long historical course." "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines," October 30, 2015, https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml, accessed November 1, 2020; Chinese version: "中华人民共和国外交部关于应菲律宾共和国请求建立的南海仲裁案仲裁庭关于管辖权和可受理性问题裁决的声明（全文）," http://www.xinhuanet.com/politics/2015-10/30/c_1116991261.htm, accessed November 1, 2020.

In a similar vein, in remarks upon the issuance of the tribunal's final award, Foreign Minister Wang Yi rejected the award and insisted that China's claims in the South China Sea, including the dotted line, were not new but were instead formed in the "long course of history," using the standard rhetorical formulation. See "中国外长王毅就所谓南海仲裁庭裁决结果发表谈话" (*Zhōngguó wàizhǎng Wáng Yì jiù suǒwèi nánhǎi zhòng cái tíng cái jué jiéguǒ fābiǎo tánhuà*) [Chinese Foreign Minister Wang Yi Delivered Remarks on the So-Called South China Sea Arbitration Tribunal's Award Outcome], July 12, 2016, accessed in 省部长言论信息数据库 (*Shěng bù zhǎng*

The PRC government soon became even more explicit in pushing back against what it perceived as an exaggerated focus on the dotted-line map. A PRC letter to the UN Secretary General in October 2014 rebutting a Philippine proposal on the South China Sea issue noted that "The Philippines asserts that China claims sovereignty over nearly the entire South China Sea through the nine dash line," before rejecting that assertion as "a complete distortion of China's position." The letter then repeated Yang's 2011 ARF speech nearly verbatim, arguing that China's claims in the South China Sea had been "formed over the long course of history."[40] Thus, rather than doubling down on a defense of the dotted-line map, this letter instead aggressively denied that China used the dotted-line map as a basis for claiming sovereignty over the entire South China Sea and then bypassed the map entirely in its defense of China's actual claims. This position was repeated in June 2015 by Foreign Ministry spokesperson Hua Chunying, who denounced the Philippines for making "wild accusations" (*wangjia zhize*, 妄加指责) about China's dotted line in the South China Sea. Hua also echoed both Yang's speech and the December 2014 position paper on the tribunal's jurisdiction when she insisted that Chinese people's activities in the South China Sea dated back to the second century BCE and China's sovereignty and related rights there had "been gradually formed over a long period of history and adhered to by the Chinese government for generations." She then explicitly argued, "The purpose of the South China Sea dotted line was to reiterate China's sovereignty and related rights; it was not because China drew this line that it has sovereignty and related rights."[41] In so

yánlùn xìnxī shùjùkù) [Database of Provincial and Ministry Leaders' Remarks and Messages], 中国政府资料库 (*Zhōngguó zhèngfǔ zīliào kù*) [Archives of the Chinese Government], Oriprobe Information Services, Inc.

[40] "Annex to the letter dated 7 October 2014 from the Permanent Representative of China to the United Nations addressed to the Secretary General," UNGA Document A/69/429 – English and Chinese.

[41] This statement in Chinese was as follows: "南海断续线是为了重申中国的主权和相关权利，而并非是因为划了这条线中国才拥有相关主权和权利。" *Waijiao Bu Fayan Ren Yanlun*, June 29, 2015.

doing, Hua made explicit the argument implied in Yang's speech and the 2014 position paper: China does not view the dotted-line map as the basis for its claims to sovereignty and rights in the South China Sea, but instead sees that map as simply one piece of evidence among many of its more longstanding claims.

Finally, in a May 2016 briefing amidst the final stages of the arbitration case, the director general of the Foreign Ministry's Treaty and Law Department Xu Hong made the same argument. He responded to a question about the nine-dashed line by first stressing the same "long course of history" formula from Yang Jiechi's 2011 speech before noting that the mapping of the dotted line in 1948 was "a confirmation of China's rights in the South China Sea formed throughout the history, instead of creation of new claims."[42] Chinese official references to the dotted line in ensuing years have reflected this position, as several statements have described the 1948 map as intended to "reaffirm China's territorial sovereignty and relevant rights and interests in the South China Sea" as one node in a longer history.[43] At the same time, despite this legal de-emphasis and historical contextualization of the dotted-line map, Beijing has by no means disavowed the map. On the contrary, in some ways, it has reified it, as evident in a 2017

[42] Briefing by Xu Hong, Director-General of the Department of Treaty and Law on the South China Sea Arbitration Initiated by the Philippines, May 12, 2016, https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1364804.htm, accessed May 2020. Chinese version: 外交部条法司司长徐宏就菲律宾所提南海仲裁案接受中外媒体采访实录, https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1364804.htm, accessed May 2020. Xu also briefly noted that "the dotted line came into existence much earlier than the UNCLOS, which does not cover all aspects of the law of the sea," which was an allusion to the "intertemporal law" argument stressed by Taiwan scholars and officials, including President Ma Ying-jeou. (On this subject, see also *Waijiao Bu Fayan Ren Yanlun*, April 18, 2016.) However, this argument was more of an afterthought than a primary emphasis in Xu's briefing.

[43] See "Annex to the letter dated 25 October 2017 from the Chargé d'affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General," UNGA Document A/72/552 – English and Chinese; and "Annex to the letter dated 2 April 2018 from the Permanent Representative of China to the United Nations addressed to the Secretary-General," UNGA Document A/72/818 – English and Chinese. In the 2017 letter, China also accused Vietnam of attacking the dotted line in bad faith: "The real intention of Vietnam's attack on China's dotted line is to deny China's territorial sovereignty over Nanhai Zhudao and cover up the fact that it has invaded and illegally occupied some islands and reefs of China's Nansha Qundao," an argument that also echoed China's response to Philippine criticisms of the dotted line.

notice on "problem maps" (*wenti ditu,* 问题地图) issued by the Ministry of Land and Resources and the State Bureau of Surveying and Mapping that enjoined all government entities to ensure maps of the South China Sea portray the dotted line according to "relevant national regulations."[44]

More generally, the dual formulation grounding China's maritime claims in history and law employed by Yang in his 2011 ARF speech has become ubiquitous in China's statements on the issue.[45] Chinese officials portray the historical and legal foundations of China's claims as mutually reinforcing, citing international legal principles that assign sovereignty based upon historical use and occupation. For example, Xu Hong, director general of the MFA Treaty and Law Department, rebutted a BBC reporter's implication that China's claim appeared weaker than that of the Philippines given that the disputed areas are much closer to the latter than to the Chinese mainland by citing international law to argue that "whether a piece of land is under the sovereignty of a particular State has nothing to do with its distance from the mainland," but instead relates to the long-standing historical nature of claims and their recognition by the

[44] "国土资源部 国家测绘地理信息局关于开展全覆盖排查整治 '问题地图' 专项行动的通知" (*Guótǔ Zīyuán Bù Guójiā Cèhuì Dìlǐ Xìnxī Jú guānyú kāizhǎn quán fùgài páichá zhěngzhì 'wèntí dìtú' zhuānxiàng xíngdòng de tōngzhī*) [Notice of the Ministry of Land and Resources and the State Bureau of Surveying and Mapping on Launching a Special Action to Comprehensively Investigate and Rectify 'Problem Maps'], August 21, 2017, in 国土资发 (*Guotu Zifa*) 2017, no. 99, accessed in 国家政策信息库 (*Guójiā zhèngcè xìnxī kù*) [National Policy Information Database], 中国政府资料库 (*Zhōngguó zhèngfǔ zīliào kù*) [Archives of the Chinese Government], Oriprobe Information Services, Inc.

[45] For examples, see *Waijiao Bu Fayan Ren Yanlun*, April 18, 2012 and April 24, 2012; "2013 年 2 月 19 日外交部发言人洪磊主持例行记者会" (*2013 nián 2 yuè 19 rì wàijiāo bù fāyán rén Hóng Lěi zhǔchí lì xíng jìzhě huì*) [February 19, 2013 Foreign Ministry Spokesperson Hong Lei Hosts Regular Press Conference], https://www.mfa.gov.cn/web/fyrbt_673021/jzhsl_673025/t1014798.shtml; *Waijiao Bu Fayan Ren Yanlun*, February 8, 2014; November 12, 2015; April 11, 2019; September 18, 2019. See also "Annex to the letter dated 28 January 2016 from the Permanent Representative of China to the United Nations addressed to the Secretary General," UNGA Document A/70/702 – English and Chinese; and "Annex to the letter dated 25 October 2017 from the Chargé d'affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General," UNGA Document A/72/552 – English and Chinese. This approach was also employed in the PRC's 2016 position paper on the South China Sea issued in response to the final tribunal award in the Philippines arbitration case, as will be discussed further below.

international community.[46] Related dual formulations often cited by Chinese officials in their rhetoric on maritime disputes and freedom of navigation defend PRC claims as consistent with "international law and international practice" (*guoji fa he guoji guanli*, 国际法和国际惯例)[47] or "Chinese law and international practice" (*Zhongguo falü he guoji guanli*, 中国法律和国际惯例).[48] These formulations all reflect China's efforts to link international and domestic law closely with history and practice in its rhetorical defenses of its maritime claims.

In addition to these claims referring to history and practice, China has also asserted "traditional fishing" (*chuantong buyu*, 传统捕鱼) rights in the South China Sea on occasion, particularly in reference to the dispute with the Philippines over the Scarborough Shoal (Huangyan Dao)[49] and the dispute with Indonesia over fishery jurisdiction in the waters near the Natuna Islands.[50] In the latter case, China has also repeatedly stressed that there is no territorial sovereignty dispute with Indonesia,[51] instead describing the problem as one of "different views" (*butong kanfa*, 不同看法) over the waters involved,[52] where the two countries have "overlapping claims to maritime rights and interests" (*haiyang quanyi zhuzhang chongdie*, 海洋权益主张重叠).[53]

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[46] "Briefing by Xu Hong," May 12, 2016.

[47] See *Waijiao Bu Fayan Ren Yanlun*, June 5, 2014.

[48] See *Waijiao Bu Fayan Ren Yanlun*, June 27, 2012. This statement referred to the issuance of CNOOC's oil and gas bidding blocks in the South China Sea.

[49] *Waijiao Bu Fayan Ren Yanlun*, April 18, 2012.

[50] *Waijiao Bu Fayan Ren Yanlun*, March 21, 2016; June 19, 2016; and June 20, 2016. MFA spokesperson Lu Kang also basically made this claim without using the specific phrase "traditional fishing" when he argued in April 2019, "For thousands of years, Chinese fishermen have been fishing in the relevant waters of the South China Sea, and their rights cannot be challenged." *Waijiao Bu Fayan Ren Yanlun*, April 11, 2019.

[51] *Waijiao Bu Fayan Ren Yanlun*, November 12, 2015; March 21, 2016; March 23, 2016; June 20, 2016; and June 23, 2016.

[52] *Waijiao Bu Fayan Ren Yanlun*, May 30, 2016; and June 3, 2016.

[53] *Waijiao Bu Fayan Ren Yanlun*, June 19, 2016; June 20, 2016; June 23, 2016; and January 8, 2020.

First Specific Assertions of "Historic Rights" in the South China Sea

Around the same time that Yang Jiechi delivered his ARF speech in 2011, the Chinese Embassy in the Philippines also delivered a note verbale to the Philippines objecting to petroleum blocks Manila had issued in an area of the Spratly Islands. This note asserted that the blocks were "situated in the waters of which China has historic titles including sovereign rights and jurisdiction."[54] This note was not issued made public at the time, only coming to light as a piece of evidence presented by the Philippines during the arbitration case it brought against China and cited by the tribunal in its final award in summer 2016. Aside from this note, the PRC government has not used the term "historic title" to characterize its claims on any other occasions in the public record. Indeed, despite the PRC's strong emphasis on the historical foundations of its claims in this period, the Chinese government did not even start regularly referring to its "historic rights" in the South China Sea until mid-2016 immediately before the tribunal in the *Philippines v. China* arbitration case issued its final award.

PRC Foreign Ministry spokesperson Hong Lei offered a full-throated defense of China's claim to historic rights in a press briefing on July 6, 2016, less than a week before the tribunal issued its award. He stated upfront that "China's historic rights in the South China Sea are not inconsistent with UNCLOS," before offering a more detailed two-prong defense. This defense argued, first, that "historic rights are a concept of general international law" (*lishi xing quanli shi yiban guoji fa de gainian*, 历史性权利是一般国际法的概念), and that UNCLOS does not fully exhaust the law of the sea but itself refers to general international law outside of the convention. Second, Hong highlighted language in UNCLOS itself that refers to rights of a historic nature,

[54] Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No. (11) PG-202 (6 July 2011) (Annex 202), cited in *Philippines v. China*, PCA Case No. 2013-19, Award in the matter of the South China Sea Arbitration, July 12, 2016, https://pcacases.com/web/sendAttach/2086, pp. 88 (para. 209), 268 (para. 667), 277 (para. 688(c)).

such as historic bays and historic title. He concluded by repeating the standard "formed in the course of history" and "full historical and legal basis" language and insisting that China's historic rights are "protected by international law, including UNCLOS."[55] This statement revealed that, as with its legal rationale for treating outlying archipelagoes as a unit, the PRC government has not so much sought to *displace* UNCLOS with general international law as much as *supplement* it. This approach represents a subtle evolution in China's legal argumentation toward diminishing the weight of UNCLOS relative to other sources of international law. At the same time, Chinese government officials have nonetheless continued to stand by UNCLOS, in fact arguing that "China's refusal to accept or participate in the so-called arbitral tribunal is precisely in order to safeguard UNCLOS and the Declaration on the Conduct of Parties in the South China Sea,"[56] since Beijing viewed the arbitration process itself as an "illegal political farce" (*feifa de zhengzhi naoju*, 非法的政治闹剧)[57] that violated both UNCLOS and the DOC. They have repeatedly defended China's position and claims in the South China Sea as "consistent with international law, including UNCLOS."[58]

The day after the tribunal issued its award, the PRC State Council issued a position paper articulating what has since become China's standard formulation for expressing its claims in the South China Sea:

> Based on the practice of the Chinese people and the Chinese government in the long course of history and the position consistently upheld by successive Chinese governments, and pursuant to China's national law and under international law … China has, based on Nanhai Zhudao, internal waters, territorial sea, contiguous zone, exclusive

[55] *Waijiao Bu Fayan Ren Yanlun*, July 6, 2016.
[56] *Waijiao Bu Fayan Ren Yanlun*, July 8, 2016.
[57] *Waijiao Bu Fayan Ren Yanlun*, July 12, 2016.
[58] *Waijiao Bu Fayan Ren Yanlun*, August 23, 2019; January 2, 2020; and April 21, 2020.

> economic zone and continental shelf. In addition, China has historic rights in the South China Sea.[59]

This formulation employs and expands upon the earlier language introduced in Yang Jiechi's 2011 ARF speech. It has been employed regularly by the PRC government in press conferences and letters sent to the UN Secretary General regarding the South China Sea dispute in ensuing years.[60] In a lengthy section outlining the history of China's claims, the 2016 position paper also briefly mentioned the maps commissioned and published by the Chinese government in 1947-48, "on which the dotted line is marked," but it did not ascribe any particular meaning to that line or otherwise refer to it. However, the paper did reject the Philippines' "completely false assertion that China lays an exclusive claim of maritime rights and interests to the entire South China Sea," echoing China's above-cited October 2014 letter to the UN Secretary General.

Aside from this denial that China's claim amounted to an exclusive claim to the entire South China Sea, neither this position paper nor other Chinese government statements issued

[59] State Council Information Office of the People's Republic of China, "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea," white paper, July 13, 2016, https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm, accessed May 2020. In Chinese, this formulation is as follows: "基于中国人民和中国政府的长期历史实践及历届中国政府的一贯立场，根据国内法以及国际法，。。。中国南海诸岛拥有内水、领海、毗连区、专属经济区和大陆架。此外， 中国在南海拥有历史性权利。" See Chinese version: "中国坚持通过谈判解决中菲在南海争议白皮书," http://www.scio.gov.cn/37236/38180/Document/1626701/1626701.htm, accessed May 2020. This formula was also previewed almost verbatim in a statement by MFA spokesperson Hong Lei in a briefing the previous week. See *Waijiao Bu Fayan Ren Yanlun*, July 7, 2016. Foreign Minister Wang Yi also previewed the last two sentences in his statement responding to the tribunal award the day before. See "中国外长王毅就所谓南海仲裁庭裁决结果发表谈话" (*Zhōngguó wàizhǎng Wáng Yì jiù suǒwèi nánhǎi zhòng cái tíng cái jué jiéguǒ fābiǎo tánhuà*) [Chinese Foreign Minister Wang Yi Delivered Remarks on the So-Called South China Sea Arbitration Tribunal's Award Outcome], July 12, 2016.

[60] For example, see *Waijiao Bu Fayan Ren Yanlun*, December 31, 2019; and April 21, 2020; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to the Submission by Malaysia to the Commission on the Limits of the Continental Shelf, New York, December 12, 2019, CML/14/2019, Chinese and English; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to Notes Verbales from the Republic of the Philippines, New York, March 23, 2020, CML/11/2020, Chinese and English; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the UN Secretary-General responding to Notes Verbales from the Socialist Republic of Viet Nam, New York, April 17, 2020, CML/42/2020, Chinese and English.

since 2016 have offered further clarity about what China means by "historic rights." However, the Chinese Society of International Law's 2018 rebuttal of the tribunal award did provide more quasi-official insights into China's interpretation of the meaning of historic rights under international law and in the South China Sea. The fourth chapter made arguments similar to those cited above by Foreign Ministry spokesperson Hong Lei that historic rights are governed by the rules of "general international law," while also not being incompatible with UNCLOS. The volume went further, arguing that historic rights can apply not only to marine resources, but also to geographical areas, and that "China's historic rights and entitlements to exclusive economic zone and continental shelf co-exist and are cumulative."[61] The volume further argued that each regime of historic rights is *sui generis* and its precise character must be determined on a case-by-case basis. Notwithstanding this contention, however, the volume stopped short of presenting such a precise description of the nature of China's historic rights, instead marshalling a historical narrative to argue more generally that China's historic rights to the ocean space in the South China Sea are inseparable from its claim to sovereignty over the South China Sea Islands.

Remaining Ambiguity about the Meaning of "Historic Rights" and the Dotted Line

In the wake of China's doubling down on its claim to historic rights in the South China Sea, several key outstanding questions remain about the nature of that claim, including what are the exact limits of the spatial extent of China's claimed historic rights, whether these rights apply in practice only to fisheries or also hydrocarbon resources and navigation, and whether the PRC claim to historic rights is exclusive or non-exclusive of other states' rights. First, the exact spatial extent of China's claim to historical rights claim remains unclear. In the South China Sea, the

[61] Chinese Society of International Law 2018, para. 503.

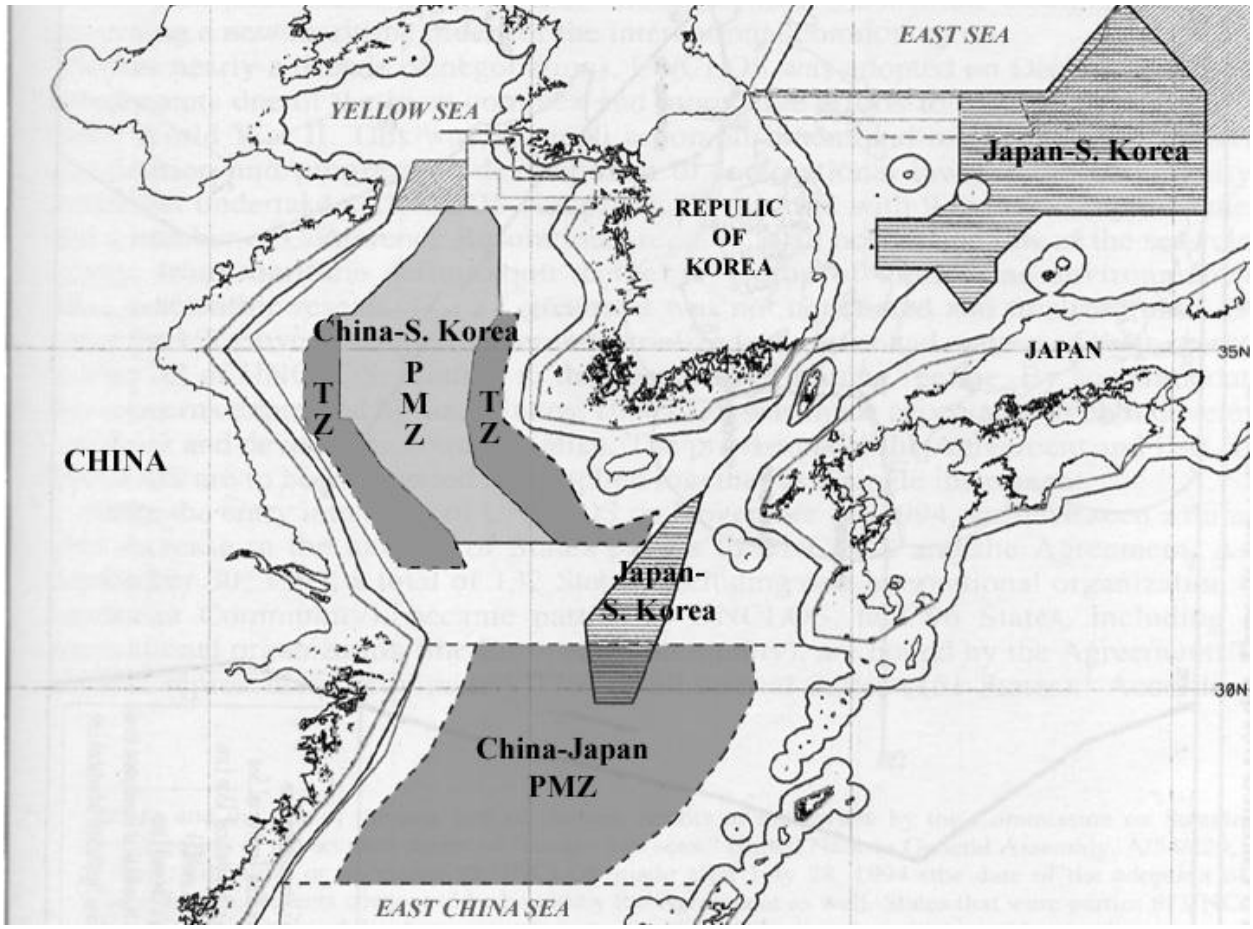
PRC government has never explicitly claimed historic rights *within the dotted line*. In technical terms, official government statements have claimed "historic rights in the South China Sea" more generally, without attaching or limiting those claims to the area of the dotted line. But it is unclear what China considers the precise limits of the South China Sea and how far its historic rights extend, especially relative to other states' coastlines and declared UNCLOS-based zones. In practical terms, most of the South China Sea is theoretically encompassed within EEZs and continental shelves China claims based on either the Chinese mainland or the Xisha or Nansha archipelagoes, which Beijing treats as units, as detailed in chapter 8. But there are some areas of the South China Sea, especially in its more southwestern reaches, that lie outside of such zones, where China presumably also claims historic rights.

In addition, it is unclear if the historical rights reserved in the 1998 EEZ law only apply to the South China Sea or also extend to other sea areas. Beijing has never made any specific claim to historic rights in any sea areas outside of the South China Sea, but neither has it explicitly denied or disavowed such a claim. Instead, in other seas along China's coasts, including the East China Sea and Yellow Sea, China reached new provisional fisheries arrangements with Japan and South Korea in 1997 and 2000, respectively, shortly after those countries ratified UNCLOS and declared EEZs. (These were examples of the type of "provisional arrangements of a practical nature" enjoined in UNCLOS Article 74 for countries with overlapping EEZs and unresolved maritime boundary disputes.) These agreements made no explicit reference to historic rights, but the rules governing resource sharing in provisional and transitional zones under the agreements did take into account traditional fishing patterns.[62] (See Figure 9.4.) In addition, the China-Japan agreement included provisions allowing for traditional

[62] Xue 2005.

Chinese squid fishing in areas now enclosed within Japan's EEZ in the Sea of Japan and North Pacific, subject to Japanese permits but fee-free within 1996 catch limits for a period of five years.[63] Although these agreements are not permanent and leave many issues unresolved, including some overlap in the Sino-Japanese and Sino-Korean fishing zones, they have generally served to maintain somewhat more stability relative to disputes in the South China Sea.

Figure 9.4 China-Japan and China-South Korea Provisional Fisheries Arrangements



Source: Guifang (Julia) Xue (2005), p. 368, modified from H. K. Park, *The Law of the Sea and Northeast Asia* (The Hague: Kluwer Law International, 2000, p. xxix.).

[63] Ibid.

Another area of ambiguity in China's claim to historic rights is precisely what resources, activities, or jurisdictions Beijing is asserting rights to, and on how exclusive a basis. The quasi-official critique of the *Philippines v. China* award by the Chinese Society of International Law seemed to explicitly resist the reduction of China's historic rights claim to resources alone, instead characterizing it as having a more general spatial meaning.[64] But in practical terms, it is unclear if China views these spatial historic rights as including rights to exploit and regulate only the living marine resources within that space or also the non-living marine resources, such as offshore hydrocarbons and minerals. Jia Yu, the abovementioned senior researcher at the China Institute for Marine Affairs, a government think tank, argued in a scholarly article in 2015 that historic rights only encompass rights to living marine resources (non-exclusive in other state's UNCLOS zones) and navigational access, while rights to offshore oil and minerals are tied *ipso facto* and *ab initio* to a state's continental shelf.[65] By contrast, prominent Chinese law of the sea experts Gao Zhiguo and Jia Bing Bing argued in a 2013 article that China's historic rights in the South China Sea encompass rights to not only fishing but also mineral and other resources, as well as navigation.[66]

Focusing on official government positions, the PRC has explicitly claimed traditional fishing rights in the waters near the Natuna Islands, near Huangyan Dao (Scarborough Shoal), and in the South China Sea more generally, as noted above. Some of China's fisheries

[64] Chinese Society of International Law 2018, paras 499–535, esp. para. 512.

[65] 贾宇 (Jia Yu) 2015.

[66] Gao and Jia 2013. In addition, one leading PRC legal scholar I interviewed in summer 2019 floated the theory that the dotted line could represent a claim to a "historical territorial sea," wherein a much less restrictive jurisdictional and navigational regime than that of a juridical modern territorial sea applies—for example, something more akin to transit passage than innocent passage. This interviewee based this theory in part on a 1933 French diplomatic note referring to the South China Sea as a territorial sea. Interview 6.3 with Chinese scholar of international law, Beijing, China, July 3, 2019. This type of interpretation has never been reflected in official statements, however, and remains a minority perspective among Chinese legal scholars.

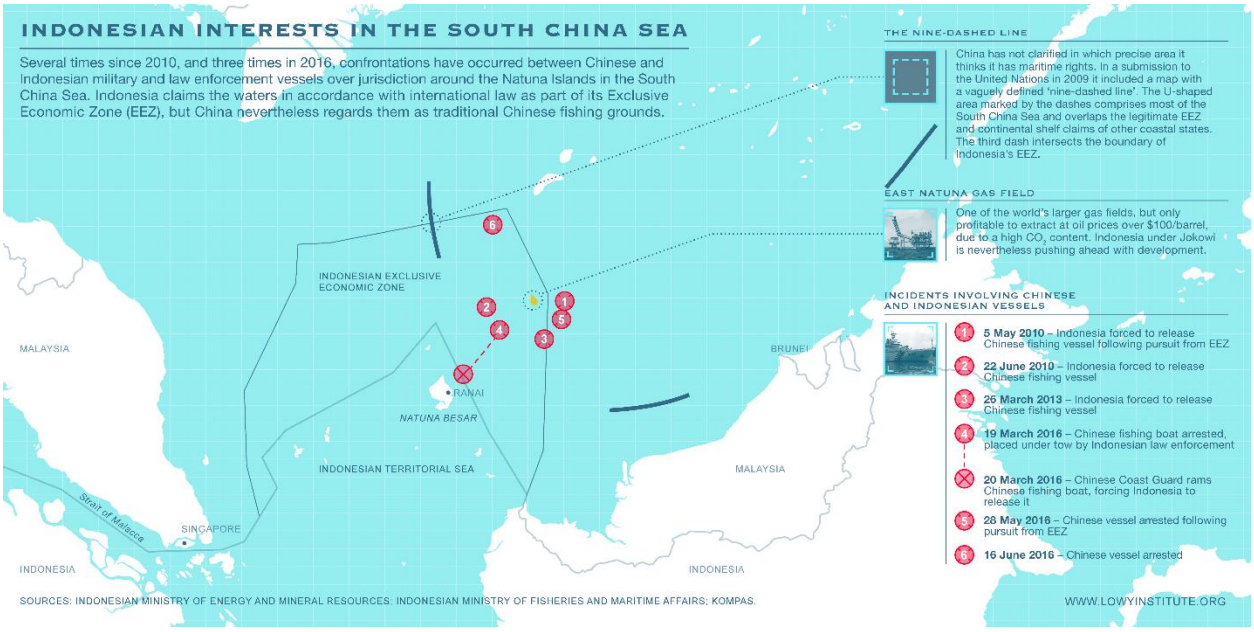
enforcement activities near the Natuna Islands have taken place in ocean space that is located beyond 200 nm from the Spratly Islands, suggesting they are justified on the basis of historic rights rather than to jurisdiction based on UNCLOS zones (see Figure 9.5 for an example of the location of such activities during a 2016 standoff).[67] At the same time, China's enforcement activities in the waters near the Natuna Islands have consisted of Chinese Coast Guard ships defending the activities of Chinese fishing vessels against interference by Indonesian law enforcement, rather than on interfering with the activities of Indonesian fisherfolk.[68] This approach to enforcement supports the scenario that China views its historic rights to fishery resources in such areas outside of its own claimed EEZ (and within the EEZ of Indonesia) as non-exclusive. And indeed, China's annual fishing ban in the South China Sea does not extend to Indonesian waters, remaining limited to ocean space north of the 12th parallel, where most of the waters are within 200 nm of China's claimed territory.

[67] China's activities in this area may be spatially connected to the area enclosed by the dotted line on an unofficial or internal basis, but the Chinese government has not publicly justified them on the basis of the dotted line. In response to queries about the 2016 standoff, PRC officials instead asserted more generally that the area was China's "traditional fishing grounds." *Waijiao Bu Fayan Ren Yanlun*, March 21, 2016; June 19, 2016; and June 20, 2016. In addition, when MFA spokesperson Geng Shuang was asked in 2017 a direct question about the overlap between China's nine-dashed line and Indonesia's EEZ, he avoided any defense of or reference to the dotted line in his response. See *Waijiao Bu Fayan Ren Yanlun*, July 14, 2017.

Then, in another flare-up in the dispute in late 2019, Geng repeated the formula from the 2016 South China Sea position paper affirming China's sovereignty over the Nansha Islands, sovereign rights and jurisdiction over their relevant waters, and historic rights in the South China Sea. In this case, Geng defended Chinese fishing boats operating in the waters near Natuna escorted by the Chinese Coast Guard on the basis of both historic rights and the proximity of the fishing activities to the Nansha Islands. See also *Waijiao Bu Fayan Ren Yanlun*, December 31, 2019; and January 8, 2020.

[68] For details on several incidents between 2010 through 2016, see Suryadinata and Izzuddin 2017; Connelly 2016.

Figure 9.5 2016 PRC Fisheries Enforcement in Indonesian EEZ Past 200 nm from Spratlys

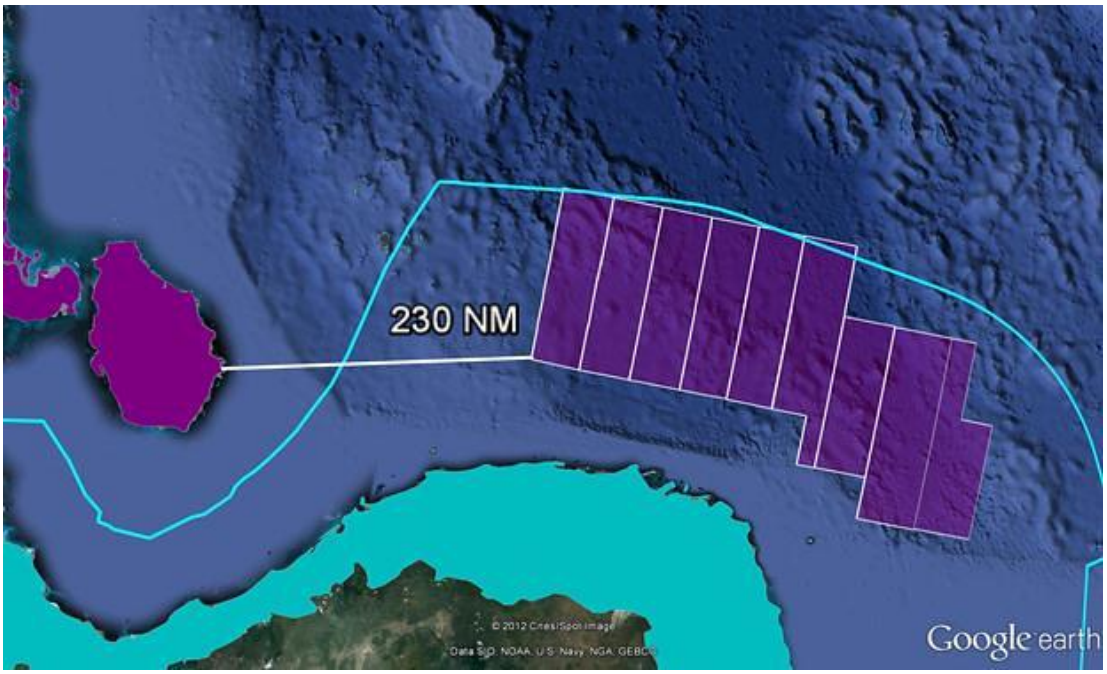


Source: Connelly, Aaron L. "Indonesia in the South China Sea: Going It Alone." Lowy Institute for International Policy, December 2016. https://www.lowyinstitute.org/publications/indonesia-south-china-sea-going-it-alone.

China has been less explicit in staking its claims to offshore oil and gas resources in the South China Sea on a historic rights basis. Aside from the above-noted 2011 note verbale from the PRC Embassy in the Philippines objecting to Manila's petroleum blocks on the basis of China's "historic titles," Beijing has never explicitly tied either its own oil and gas exploration or its objections to other states' hydrocarbon exploitation in the South China Sea to historic rights or the dotted line. That said, it is possible that some of China's claims to offshore oil and gas resources have been *internally* justified based on the dotted line. This was particularly evident in 2012, when the China National Offshore Oil Corporation (CNOOC) issued nine blocks for oil and gas bidding in the South China Sea, in retaliation for Vietnam's passage of a new maritime law that reasserted Hanoi's claim to sovereignty over the Paracel and Spratly islands. These blocks were almost entirely located within 200 nm of Vietnam's mainland coastline and baselines (see Figure 9.6), and they seemed to follow the precise contours of the dotted line.

These blocks were contiguous with earlier concessions issued by CNOOC in 1992 in the Vanguard Bank (Wan'an Beach) area southwest of the Spratlys (see Figure 9.7).[69] In neither case did China offer an official or detailed legal justification for the location of the blocks upon their issuance. One prominent Chinese expert I interviewed in China in summer 2019 suggested the dotted line was probably the internal justification for the location of the blocks,[70] but this justification was never publicly endorsed by the Chinese government.

Figure 9.6 China's 2012 CNOOC Blocks relative to Vietnam's 200 nm Limit (blue line)



Source: Gregory B. Poling, "CNOOC Pulls Back the Curtain: The South China Sea Frame-by-Frame, No. 2," CSIS Commentary, August 17, 2012, https://www.csis.org/analysis/cnooc-pulls-back-curtain.

[69] For a discussion of the 1992 concession blocks and their possible relationship to China's "historic rights" claims, see Hayton 2018.

[70] Interview 6.12 with Wu Shicun, July 19, 2019, Haikou, Hainan, China.

Whatever the initial justification for these blocks, there is evidence that Beijing is now emphasizing a more UNCLOS-based justification for PRC claims therein. For example, the Chinese Society of International Law's rebuttal of the *Philippines v. China* award criticized the tribunal award for assuming that the CNOOC blocks were based on China's claim to historic rights, insisting that "other possible bases" included "China's treatment of Nansha Qundao as a unit for the purposes of sovereignty and maritime entitlements together with historic rights."[71] This volume also downplayed the reference to "historic titles" in the 2011 note verbale from the PRC Embassy in Manila, instead insisting that broader context, including statements from the Foreign Ministry in Beijing, suggested that China's objection to the Philippines' petroleum blocks were based on its sovereignty over Nansha Qundao rather than on historic rights.[72]

In addition, when China was challenged on survey activities it conducted in the vicinity of the CNOOC blocks in mid-2019,[73] MFA spokesperson Geng Shuang responded by affirming China's "sovereignty over the Nansha Qundao and its adjacent waters," including "the waters near Wan'an Beach in the Nansha Qundao." Geng did *not* refer to the dotted line or China's historic rights, and defended China's activities as being consistent with UNCLOS.[74] Indeed, a close examination of the blocks relative to the islands China claims in the South China Sea reveals that it is theoretically possible Beijing could justify these blocks on claims to 200 nm EEZs extending from islands or baselines surrounding the Xisha and Nansha archipelagoes,

[71] Chinese Society of International Law 2018, paras 505–506.

[72] Ibid., para. 507.

[73] For a map and description of these survey activities, see "Update: China Risks Flare-Up Over Malaysian, Vietnamese Gas Resources," CSIS Asia Maritime Transparency Initiative, December 13, 2019, https://amti.csis.org/china-risks-flare-up-over-malaysian-vietnamese-gas-resources/.

[74] *Waijiao Bu Fayan Ren Yanlun*, August 23, 2019; and September 18, 2019. At the same time, Geng also defended China's survey activities by arguing that they were conducted "in the sea areas under Chinese jurisdiction," the above-mentioned general term used in PRC domestic law, including its offshore petroleum regulations.

rather than on the nine-dashed line or claims to historic rights (see Figure 9.7).[75] Even in this scenario, of course, the CNOOC blocks extend far beyond a hypothetical median line between the Spratly or Paracel islands and the Vietnamese mainland. This could imply that China views its historic rights and/or the dotted line as carrying extra weight or exerting a residual effect in maritime delimitation, an argument that has in fact been made unofficially by some prominent PRC law of the sea experts.[76] Or it could simply represent China pressing its claim to the maximum extent in the absence of a negotiated boundary, in response to Vietnam's own drilling activities in the area.

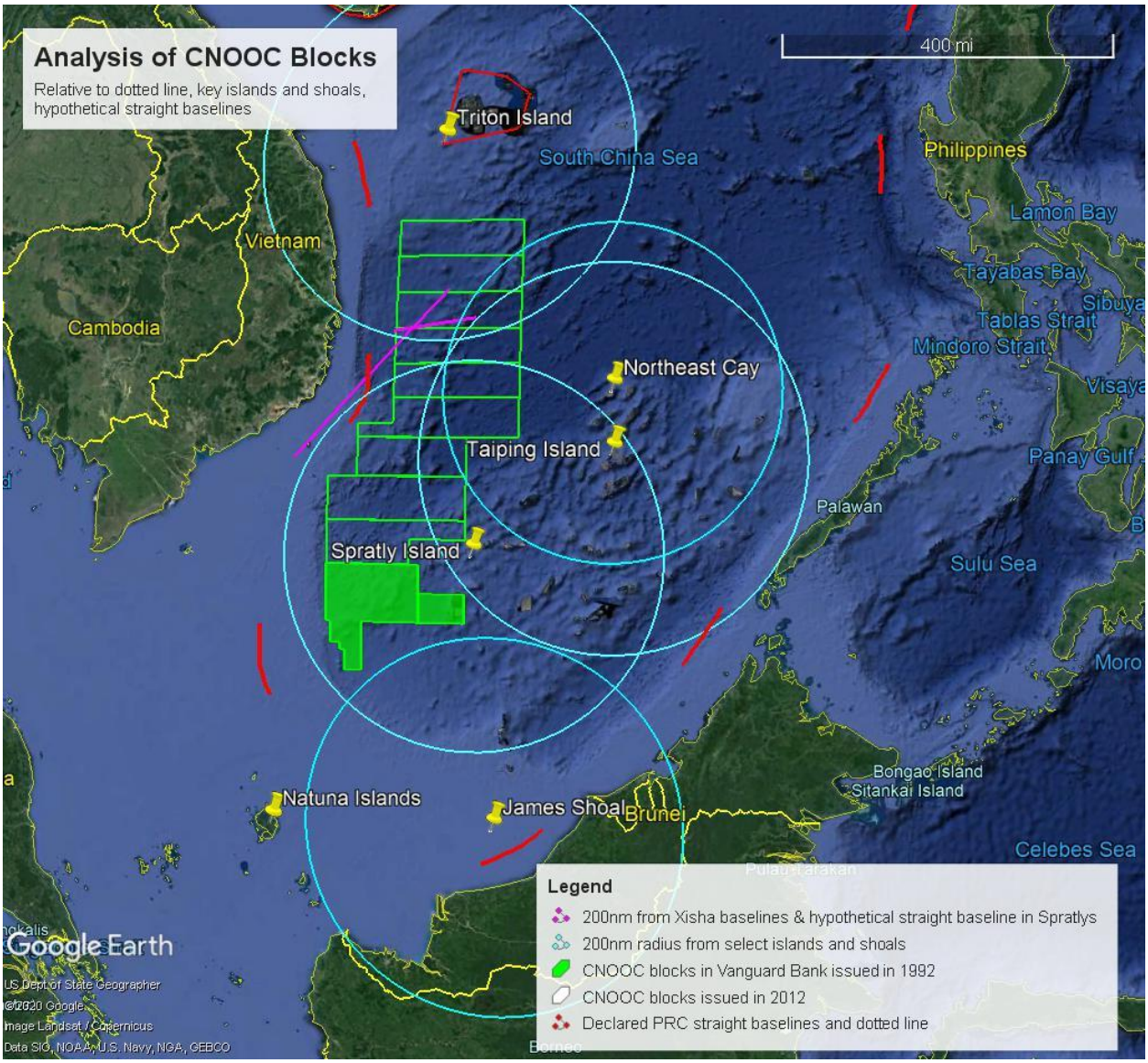
And what of the current status of the dotted line? Some prominent Chinese scholars argue that the dotted line now can be said to represent a Chinese claim to sovereignty over the islands and archipelagoes within the line, plus UNCLOS maritime zones extending from those islands, plus historic rights within the line.[77] This is in some sense the formulation China adopted in its 2016 South China Sea position paper. However, as noted above, the position paper did not tie those claims explicitly to the dotted line. Rather, the most that can be definitively said about China's official interpretation of the dotted-line map is based on those statements cited above: namely, that China views the map as one piece of evidence of its more longstanding historical claims to sovereignty and rights in the South China Sea, rather than as the source of those claims, and that it definitively does *not* claim sovereignty or exclusive rights to the entire area within the dotted line.

[75] It is worth noting that under international law, a median line would probably not even be the appropriate boundary, as continental landmasses tend to weigh more than islands in maritime delimitation.

[76] Gao and Jia 2013. The argument in the Chinese Society of International Law's 2018 critical study of the arbitration award suggesting that the 2012 CNOOC blocks were based on both China's maritime entitlements from the Nansha Qundao "together with historic rights" may also be hinting at this interpretation.

[77] Interview 6.12 with Wu Shicun, July 19, 2019, Haikou, Hainan, China.

Figure 9.7 Analysis of CNOOC Blocks Relative to PRC-Claimed Features & Dotted Line



In other words, contrary to the claims of some Western commentators,[78] the PRC government has officially disavowed an interpretation of the map as a claim to internal or territorial waters (which are zones of sovereignty under the law of the sea) within the entire

[78] James Stavridis, "A Cold War Is Heating Up in the South China Sea," *Bloomberg Opinion*, May 21, 2020, https://www.bloomberg.com/opinion/articles/2020-05-21/u-s-china-tension-over-trade-covid-19-rises-in-south-china-sea.

South China Sea. This approach to the dotted line has not so much changed over time—the PRC has never strongly emphasized the dotted-line map in its rhetoric about its claims in the South China Sea, nor has it ever claimed sovereignty to the entire area within the line—as it has been clarified. This evolution toward greater clarity has in turn been a response to challenges from other states about the illegitimacy of China potentially basing its claims on the dotted-line map, which they deem as inconsistent with UNCLOS. By clarifying the meaning of the dotted line in a way that downplayed its significance, China has sought to mitigate the hypocrisy costs it faced because of that legitimacy gap.

Conclusion

This chapter has illustrated how Beijing's claim to historic rights, especially in the contentious waters of the South China Sea, has been motivated by its maritime threat perceptions, even while being constrained and shaped by its efforts to portray its claims as legitimate to the international community. China employed a new claim to historic rights emerging in 1998, layered on top of its past strong advocacy for the exclusive economic zone regime at UNCLOS III, to enable it to mitigate the disadvantages presented by the new UNCLOS regime to Chinese interests in the South China Sea. At the same time, China's desire to maintain some semblance of legitimacy in its maritime claims has led it to stop short of embracing the most expansive interpretations of historic rights, eschewing exclusive claims to sovereignty or resources within the entire South China Sea.

A parallel pattern has unfolded with regard to China's approach to the dotted-line map in the South China Sea. Some U.S. observers have observed that China has downplayed the dotted-

line map since the 2016 tribunal award was issued.[79] However, this chapter illustrates that the PRC government has in fact never placed a primary emphasis on the map in its official claims. Moreover, soon after the initial pushback it received to its inclusion of the map in its 2009 note verbale, the Foreign Ministry began downplaying the map's significance and situating it instead within a broader historical context and legal argument. When China did begin explicitly claiming historic rights in the South China Sea in 2016, it did so not on the basis of the dotted line map nor explicitly within the ocean space enclosed by the dotted line, but rather on the basis of both UNCLOS and "general international law" and in the area of the South China Sea more generally. This more general claim to historic rights in the South China Sea instead has become the key mechanism by which Beijing has sought to both promote its strategic interests in the wake of perceived threats to its maritime rights and interests, while also mitigating the hypocrisy costs of claiming expansive rights to marine resources throughout the entire South China Sea.

[79] Julian Ku and Chris Mirasola, "The South China Sea and China's 'Four Sha' Claim: New Legal Theory, Same Bad Argument," *Lawfare*, September 25, 2017, https://www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument.

Chapter 10: Japan's Interpretations of the Law of the Sea

After a U.S. Navy destroyer conducted a freedom of navigation operation (FONOP) near Chinese-held Subi Reef in the Spratly Islands in late October 2015, Japanese Prime Minister Shinzo Abe expressed support for the U.S. move and indicated that Japan would consider dispatching its Self-Defense Forces to conduct FONOPs in the South China Sea as well.[1] However, Abe soon backed away from the possibility of Japan conducting FONOPs in the South China Sea,[2] and before long the idea had largely dropped out of public conversation. Japanese policymakers and maritime law experts interviewed for this chapter indicated that Abe's informal proposal never had serious traction.[3] Some attributed this to the constitutional and political constraints on the Self-Defense Forces,[4] while others argued that in fact the principal obstacle to Japanese FONOPs in the South China Sea is concern over how they would harm ties

[1] Junichiro Ishii, "Abe, Obama agree to bolster cooperation against China's maritime advances," *Asahi Shimbun AJW*, November 20, 2015, http://ajw.asahi.com/article/behind_news/politics/AJ201511200029, accessed December 6, 2015. Abe's comments echoed those made by Chief of the Joint Staff of the Japan Self-Defense Forces, Admiral Katsutoshi Kawano, in a June 2015 interview with the *Wall Street Journal*, when Kawano suggested that Japan might consider conducting regular patrols in the South China Sea in light of the "very serious potential concerns" raised by Chinese construction on islands and reefs in the Spratly Islands. Chieko Tsuneoka and Yuka Hayashi, "Japan Open to Joining U.S. in South China Sea Patrols," *Wall Street Journal*, June 25, 2015, http://www.wsj.com/articles/japan-may-join-u-s-in-south-china-sea-patrols-1435149493, accessed December 8, 2015. Some hawkish Japanese scholars have also advocated that Japan begin conducting its own FONOPs to combat China's so-called "legal warfare" at sea. See Kotani 2011.

[2] "Abe rules out joining South China Sea operations days after telling Obama he would consider it," *The Japan Times Online* (Jiji Press), November 23, 2015, http://www.japantimes.co.jp/news/2015/11/23/national/politics-diplomacy/abe-rules-joining-south-china-sea-operations-days-telling-obama-consider, accessed December 6, 2015.

[3] Interview 2.19 with Japanese Ministry of Foreign Affairs official, November 17, 2017, Tokyo, Japan; Interview 2.21 with Kentaro Nishimoto, November 17, 2017, Tokyo, Japan. Not only did FONOPs in the South China Sea lack traction, but according to multiple interviewees, Japan's domestic debates over whether to conduct FONOPs have never considered the possibility of conducting FONOPs anywhere, much less a formalized freedom of navigation program akin to that of the United States that targets excessive maritime claims of multiple countries on a more regularized basis. See also Ishii, "Abe, Obama agree to bolster cooperation against China's maritime advances."

[4] Interview 2.4 with Mariko Kawano, November 10, 2017, Tokyo, Japan; Interview 2.7 with Hideaki Kaneda, November 14, 2017, Tokyo, Japan; Interview 2.21 with Kentaro Nishimoto, November 17, 2017, Tokyo, Japan.

with Beijing.[5] In particular, they highlighted the concern that China would respond to any Japanese FONOPs in the South China Sea by horizontally escalating its dispute with Japan over the Senkaku/Diaoyu Islands.[6] Recognizing these concerns, the U.S. Indo-Pacific Command has apparently reached a tacit understanding with Japanese counterparts that the alliance division of labor on freedom of navigation in the South China Sea will be characterized by U.S. operational assertions coupled with Japanese diplomatic and rhetorical support.[7]

This incident illustrates dynamics that lie at the heart of Japanese interpretations of the international law of the sea. Japanese politicians frequently proclaim Tokyo's dedication to freedom of navigation, implying complete alignment with Washington on this principled legal matter. In reality, however, Japan's interpretation of key legal issues related to freedom of navigation is complex and differs from that of its American ally in many respects. This was less true during the Third United Nations Conference on the Law of the Sea (UNCLOS III), when Japan's preferences for limited coastal state jurisdiction dovetailed more with those of the United States. Even at that time, however, there were important ways in which Japan adopted a more expansive approach to coastal state jurisdiction, including its views on transit passage in straits, innocent passage of nuclear-armed vessels, and the maritime entitlements of small, remote, uninhabited islands. This divergence in U.S. and Japanese attitudes toward key law of the sea issues has grown wider over time, as China's naval operations in Japan's waters expand and Japan seeks to exercise more jurisdiction over its near seas in response. Increasingly, Japan's interpretations toward the law of the sea are marked by tension, friction, and ambiguity. Tokyo's overall stance on law of the sea issues remains constrained by its strategic imperative to maintain

[5] Interview 2.2 with Masahiro Akiyama, November 9, 2017, Tokyo, Japan; Interview 2.22 with Tetsuo Kotani, November 20, 2017, Tokyo, Japan.

[6] Interview 2.16 with Masufumi Iida, November 16, 2017, Tokyo, Japan.

[7] Interview 1.3 with Jonathan Odom, October 4, 2017, via telephone.

legitimacy in the eyes of its most importance social reference target, the United States. However, its interpretations of specific areas of the law of the sea also exhibit patterns of conversion, drift, and layering, as pioneering Japanese bureaucrats and politicians seek out ways to expand Japan's jurisdiction at sea in response to their shifting maritime threat environment.

In order to illustrate these arguments, this chapter presents a detailed case study of how Japan's interpretations of the law of the sea formed and have evolved over time. The chapter begins with an overview of Japan's relationship to the law of the sea in the years leading up to, during, and after UNCLOS III. The bulk of the chapter is then organized around the four key issue areas discussed in chapter 4 and analyzed in the China case in chapters 7 through 9. These include Japan's attitudes toward (1) innocent passage and transit passage in territorial seas and straits; (2) foreign military activities and marine scientific research in the exclusive economic zone (EEZ); (3) rocks, islands, archipelagoes, and their maritime entitlements; and (4) historic bays, waters, and rights. In each of these areas, I describe how the legitimacy constraints and processes of change described in chapter 2 have played out in the Japan case over time as its geopolitical environment has shifted.

In order to conduct this case study, I have drawn upon Japanese domestic law, UNCLOS III and Seabed Committee official records, contemporary and quasi-official accounts of Japan's participation in the Third United Nations Conference on the Law of the Sea, original records of debates held in the Japanese Diet,[8] and archival research at the United Nations and U.S. Library of Congress (in the papers of lead U.S. UNCLOS negotiator Elliot Richardson). I also conducted interviews with 22 Japanese maritime law experts, including current and former government and military officials, lawyers, legal scholars, and a sitting justice on the International Tribunal for

[8] Records of debates in the Diet were accessed at https://kokkai.ndl.go.jp. All excerpts included in this chapter were translated from Japanese to English by the Author.

the Law of the Sea who was also a lead member of Japan's negotiating team at UNCLOS III. I conducted all but one of these interviews in Tokyo in November 2017 as a Visiting Research Fellow at the Graduate School of Asia-Pacific Studies at Waseda University; the other interview took place in the United States in October 2017.[9] Some of these findings are also informed by interviews with several U.S. maritime legal experts with familiarity with Japanese maritime jurisdictional claims; these interviews were conducted in October and December 2017.

Japan and UNCLOS: Competing Security Imperatives of Control, Access, and Legitimacy

Over the course of Japan's relationship with the modern law of the sea regime, its interpretations of the law have been shaped by conflicting incentives. Japan feels an acute sense of vulnerability as an island nation with limited natural resources and dependence on exposed sea lines of communication. It is a nation surrounded by middle and major powers with which it has several territorial and maritime boundary disputes or other conflicts. For many decades, Japan perceived an acute threat from Russian naval power, and in more recent years, that threat perception has shifted to China. Finally, Japan is dependent on its alliance with the United States for its security, a dependence that is simultaneously intentional on its part but also anxiety-inducing.[10]

These various sources of vulnerability create two conflicting security imperatives for Japan in the maritime realm. First, Tokyo has a strong incentive to advocate maximal freedom of navigation in key straits that it depends upon for oil and other goods. Japan's incentive to support a norm of limited coastal state jurisdiction is not only important for commercial shipping,

[9] I am indebted to Kayuki Nakahara and Reona Kasuya for their assistance with interpretation and interview preparation during my field research in Japan.

[10] Samuels 2007, chap. 1.

however, but also for the unencumbered transit of the military platforms of its powerful ally. At the same time, Japan also has a strong incentive to claim stronger jurisdiction over its numerous straits and other coastal waters in order to exercise greater maritime awareness and prevent any threats to its security, especially from Russia in the time of UNCLOS III and especially from China and North Korea today.

Beyond these narrow material interests, Japan also perceives a broader strategic need to nurture its legitimacy in the international community in order to promote its interests. It prioritizes targeting its legitimation efforts within its reference group of industrialized maritime powers and, above all, in the eyes of the United States. In addition, at the level of domestic politics, Japan's interpretations of the law of the sea are also shaped by Tokyo's efforts to build support among various domestic audiences, ranging from the far-seas fishing industry to traditional coastal fishermen, from fractious opposition politicians to powerful bureaucratic agencies. These factors have interacted in complex ways to create continuity in many aspects of Japan's attitudes toward the law of the sea. At the same time, as Japan's geopolitical environment has evolved—especially the rise of Chinese naval power—Tokyo has found ways to pragmatically innovate around the margins of those constraints in order to respond to that development.

Japan at UNCLOS III

In the late 1960s, on the threshold of the Third United Nations Conference on the Law of the Sea, Japan was already among the ranks of the developed nations, with one of the world's largest far seas fishing fleets, an important shipping industry, and robust international trade. In reflection of these interests, Japan's negotiating positions during UNCLOS III were in most ways supportive of limited coastal state jurisdiction, in order to render its far seas maritime interests

less vulnerable to interference. This was especially true on issues related to fisheries resources and the regulation of marine pollution.[11] In fact, at the first substantive session of UNCLOS III in Caracas in 1974, Japan was the only country to express active opposition to the concept of a 200 nm economic zone. Japan instead tended to favor the regulation of a wide range of issues, including marine pollution and the exploitation of anadromous fish stocks, by international or regional organizations rather than coastal states.[12] Japan also participated in formal negotiating blocs with other major maritime powers, allying with those states on most issues.

Over the course of UNCLOS III, Japan gradually adjusted its negotiation strategies to accept greater coastal state jurisdiction as it became increasingly clear that it was in the minority on a range of issues. Oftentimes, it made these adjustments only after the United States, Soviet Union, and other major maritime powers made changes in that direction, and even then, it only did so reluctantly and after lobbying those maritime powers to avoid making such changes. This dynamic led Japan to pass a Territorial Sea Law in 1977 extending its territorial seas to 12 nm in most places, as well as to declare 200 nm fishery zones in some areas adjacent to its coasts. Japan had initially wished to wait to unilaterally extend its jurisdictional claims until the conference was concluded, but after the Soviet Union and the United States took unilateral action to expand their fisheries jurisdiction in 1976, Japan felt it had no choice but to follow, especially given the rival nature of fish stocks in the waters between Japan and the USSR.

The crux of Japan's difficulty at UNCLOS III was that it was a maritime power in terms of its shipping interests and distant-water fishing industry, but it did not have a blue water navy

[11] Nandan and Rosenne 2003, vol. 2, 536, 616, 622, 669, 788.

[12] Minister of Foreign Affairs of Japan, August 27, 1970, Folder Number: S-0444-0020-960, Folder Title: Views of Member States on the Desirability and Feasibility of an International Treaty or Treaties in Promoting effective Measures for the Prevention and Control of Marine Pollution, United Nations Archives and Records Management Section (UN ARMS), New York, NY. See also Akaha 1985.

that sought to project power across the globe. Thus, when Washington and Moscow made quid-pro-quo package deals, exchanging control over marine resources for freedom of navigation for their military vessels, Tokyo often felt as though it was getting the short end of the stick, being forced to make major concessions without reaping significant rewards. In reality, Japan actually stood to benefit from the new EEZ regime more than most other states, as Japan's unique geographical position entitled to it to the seventh-largest EEZ on the planet. However, as Tsuneo Akaha argues, the habits and technological investments of Japan's domestic constituencies in both industry and bureaucracy bound it to a form of "grooved thinking," preventing Tokyo from seeing beyond its dependence on high seas fishing.[13]

Japan After UNCLOS III

In fact, Japan's interest in maintaining unrestricted access to the ocean's resources, coupled with its alliance with the United States, initially made it reluctant to sign the United Nations Convention on the Law of the Sea (UNCLOS) when it was finalized. Although Japan voted in favor of the convention in April 1982, it did not sign it immediately when it was opened for signature as did most states, instead waiting a couple months until February 1983 to sign. This delay was in part due to Japan's concern over the provisions regarding technology transfer and other aspects of the deep seabed regime,[14] and in part due to explicit pressure applied by the United States on Japan not to sign.[15] Likewise, even after signing the convention, Japan's

[13] Ibid.; Blaker 1993. Akaha attributes the concept of "grooved thinking" or "theoretical thinking" to John Steinbruner, see p. 68.

[14] See remarks by the Japanese delegate Mr. Nakagawa at the 182nd plenary meeting of UNCLOS III held on April 30, 1982, A/CONF.62/SR.182, available at https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_16/a_conf62_sr182.pdf, p. 156; Statement of by the delegation of Japan dated 9 February 1983, A/CONF.62/WS/38, available at https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_17/a_conf62_ws_38.pdf. See also Iguchi 1986.

[15] Ogiso 1987; Akaha 1989.

concerns about these matters made it reluctant to fully embrace UNCLOS in the years immediately following its signing. Tokyo preferred to adopt a wait-and-see approach before passing final judgment on the agreement, waiting to begin the ratification process until the agreement had already come into force in 1994.[16] Once Japan did ratify UNCLOS on June 20, 1996, it also passed a new Territorial Sea Law and a Law on the Economic Zone and Continental Shelf. The new territorial sea law established a more extensive system of baselines, while the EEZ law established an EEZ extending from all of Japan's territorial sea baselines. In some ways, this represented Japan's final capitulation—and adaption—to the reality of the new maritime order, in which expanded coastal state jurisdiction was the order of the day.

The common narrative of Japan as an inveterate opponent of creeping jurisdiction in UNCLOS—itself an amplification of Japan's self-narrative—is in many ways overstated, however. Although Japan was initially grudging in its acceptance of the significant changes represented by UNCLOS, its own domestic fishing industry had suffered from overfishing and damages from Soviet fishing operations in the Sea of Japan and was beginning by the mid- to late 1970s to clamor for Japan to exercise more control over its waters. This shifting pressure, combined with the cascading precedents set by other nations, including the Soviet Union and the United States, led Japan to declare 12 nm territorial seas and a 200 nm fishery zone in 1977. Moreover, Japan also advocated a regime of islands that would allow any island above water at high-tide of any size to be fully entitled to an EEZ and continental shelf, a position that would enable significant additional enclosure of the high seas.

Likewise, on the security front, there were important nuances and caveats in Japan's positions, oftentimes most evident in the positions and roles that Japan did *not* advocate. As will

[16] Hayashi 1997.

be explained further below, Japan notably did not take a strong stance or active role on a number of key issues that other major maritime powers such as the United States and Soviet Union prioritized, including the debates over foreign military activities in the EEZ or prior notification or authorization for innocent passage of warships in the territorial sea. Moreover, despite being a state with numerous straits and with heavy dependence on shipping through straits within other states' territorial waters, Japan remained largely aloof from the debates on straits used for international navigation.[17]

And ultimately, Japan's interpretations of the straits regime under UNCLOS differed from those of other major maritime powers in two key ways—regarding which straits are eligible for the less restrictive transit passage regime and regarding restrictions on the innocent passage of nuclear-armed vessels in the territorial sea. This difference was driven first and foremost by Japan's sense of vulnerability as an island nation composed of innumerable straits and surrounded by hostile great and middle powers. It was also a means whereby the government was able to conceal the uncomfortable accommodations it had made with the United States regarding the issue of nuclear-armed vessels operating in its territorial sea.

Japan's Interpretations of UNCLOS Over Time in Four Key Issue Areas

The flexibility, complexity, and ambiguity in Japan's initial interpretations of UNCLOS have given it the room to maintain consistency in its interpretations over time, even while its strategic and material incentives have shifted. Japan's approach to the law of the sea still on balance reflects many of the dominant interpretations espoused by the United States and other maritime powers, with the same caveats that applied when Japan first signed UNCLOS in

[17] Based upon a detailed review of the commentaries on these provisions as published in volume 2 of the semi-official Virginia Commentary on the UNCLOS text and negotiating history. Nandan and Rosenne 2003, vol. 2.

February 1983. However, there have also been some developments in Japan's position since that time that have shifted it toward more expansive interpretation of coastal state jurisdiction in subtle ways.

Some of the most significant developments occurred in 1996, when Japan formally ratified UNCLOS and passed and issued several domestic laws and Cabinet orders harmonizing its domestic maritime law with the UNCLOS regime. These developments included Japan's drawing of straight baselines around parts of its coasts, as well as a dramatic expansion in Japan's claim to exclusive jurisdiction over the economic resources of the ocean in the form of an exclusive economic zone. Neither of these developments contradicted Japan's previous interpretations of the final UNCLOS text, though they did represent an evolution in Japan's overall approach toward maritime jurisdiction, which had in the 1970s been much more limited.

Innocent Passage and Transit Passage of Warships in Territorial Seas and Straits

The area where Japan's interpretations of the law of the sea evolved the least over time is also the main area of the law of the sea where Japan has long claimed fairly expansive jurisdiction relative to other maritime powers—the matter of foreign warships and aircraft operating in Japan's territorial seas and straits. On this issue, the Japanese government carefully and creatively designed its interpretations to optimize its security interests, in part by insulating them from domestic political pressure. First of all, innovative Japanese leaders, such as Minister of Agriculture, Forestry, and Fisheries Zenko Suzuki, found creative ways to interpret and apply the law of the sea regarding straits in ways that enabled Japan to publicly prohibit passage by nuclear-armed warships in its territorial sea, even while secretly allowing such passage by U.S. vessels. Second, members of the Japanese Diet and leaders in the Japan Defense Agency also supported maintaining a high seas corridor in key straits as a means for Japan to effectively and

counterintuitively claim a wider security buffer in those straits than would be possible under the transit passage regime, while excluding many other straits from the regime entirely. Finally, confronted with the need to enforce its jurisdiction in its newly expanded territorial sea, Japan also innovated institutionally to invest greater responsibility in the Coast Guard and thereby sidestep political sensitivities related to empowering the Maritime Self-Defense Force. As Japan's maritime threats have increased, heightening its vulnerability, these three innovative interpretations have proved increasingly central to Japan's security strategy.

Positions before and during UNCLOS III and Interpretations of UNCLOS

For the first few decades of the postwar era, Japan's territorial sea remained limited to 3 nm, and it did not require prior authorization or notification for warships to conduct innocent passage through its territorial sea. However, in the late 1960s, Japan made a determination that the passage of warships armed with nuclear weapons was not "innocent" and prohibited such passage in its territorial sea.[18] This position was an application of Japan's three non-nuclear principles, the third of which stipulates that nuclear weapons cannot be introduced into Japanese territory.[19] Notwithstanding public affirmations of this determination, the Japanese government made exceptions to this exception to its innocent passage rules during the Cold War in secret agreements with the United States reached in 1960 to allow U.S. nuclear-armed warships to enter

[18] Japan's position on this issue remains unique among states. Although some states prohibit the transit of nuclear materials through their territorial seas, Japan seems to be the only state that opposes the transit of nuclear weapons but advocates the unhindered innocent passage of vessels with non-weaponized nuclear materials. Roach and Smith 2012. UNCLOS does not explicitly prohibit such discrimination, but the United States and Soviet Union have long insisted that "all ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage." See "Joint Statement by the United States and Soviet Union, with Uniform Interpretation of Rules of International Law Governing Innocent Passage," September 23, 1989, adopted in Jackson Hole, Wyoming, USA, available at https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1989-USA-USSR-Joint-Statement-with-Attached-Uniform-Interpretation-of-Rues-of-International-Law-Governing-Innocent-Passage.pdf.

[19] Akaha 1985; Crawford and Rothwell 1995; Tanaka 2012; Tanaka 2015.

Japan's territorial sea and in 1969 to allow the United States to reintroduce nuclear weapons in Okinawa in an emergency.[20]

The intense sensitivity of the issue of nuclear-armed warships entering Japan's territorial waters, including the fact of these then-secret arrangements, likely was one factor that led Japan to keep a low profile on both the issue of innocent passage in the territorial sea and the issue of straits used for international navigation at UNCLOS III, despite the critical importance of straits to Japan. In the Seabed Committee and at UNCLOS III, Japan was not heavily involved in debates over either of these issues. When Japan did touch upon the issue of straits, it did not take a position, but simply reserved the right to do so in the future. For example, at one of the final sessions of the Seabed Committee prior to the start of UNCLOS III in April 1973, Japanese delegate Ogiso Moto simply stated, "Japan reserves its right to speak at a later stage with respect to the question of passage through straits used for international navigation."[21]

As UNCLOS III was unfolding, Japan faced growing pressure domestically to expand its territorial sea law to 12 nm in order to bolster the rights of Japanese fishermen competing with unrestricted Korean and Russian fishing near Japan's shores. At the same time, the government was loathe to expand its territorial seas lest it be seen as violating the three non-nuclear principles and risk bringing heightened scrutiny that would reveal that it was already abetting their violation through its secret agreements with the United States. Amidst this state of deadlock, Prime Minister Fukuda appointed Zenko Suzuki as Minister of Agriculture, Forestry, and Fishing and tasked him with finding a compromise solution. The solution Suzuki negotiated

[20] Wampler 2009.

[21] A/AC.138/SC.II/SR.60, quoted on pp. 240-41 of Oda 1977, vol. 2 (The United Nations Seabed Committee, 1968-1973).

became known as the "shelving formula," as it enabled Japan to shelve some of the issues involved "for the time being" (*tobun nokan,* 当分の間).[22]

Under this proposal, Japan expanded its territorial seas generally to 12 nm, while limiting its territorial seas in five of its straits to 3 nm in order to leave a high seas corridor and obviate the need for transit passage to apply in each of those straits. Those five straits included Osumi Strait between Kyushu and the northern Ryukyu Islands; the western channel of Tsushima Strait between Japan's Tsushima Island and South Korea; the eastern channel of Tsushima Strait between Tsushima Island and Kyushu; Tsugaru Strait between Honshu and Hokkaido; and Soya Strait between Hokkaido and Russia's Sakhalin Peninsula. (See Figures 10.5 and 10.7 in the Appendix.) In other straits where Japan claimed wider 12 nm territorial seas, Japan maintained that the more restrictive innocent passage regime applies, which, *inter alia*, requires submarines to surface instead of remaining submerged during transit of the territorial sea and prohibits freedom of overflight. With this move, Japan effectively asserted a right to limit the applicability of the transit passage regime in straits adjacent to or between its islands. (As noted in chapter 4, the United States insists that all straits that connect two high seas or EEZ areas are international straits under the transit passage regime, and coastal states cannot designate some straits as international and exempt others from the transit passage regime.[23])

The debates that occurred in the Diet in the early months of 1977 indicated the central role that the issue of the three non-nuclear principles played in domestic political considerations

[22] Akaha 1985, 121–27.

[23] Dutton 2009. International law is ambiguous on this question. Rothwell and Stephens emphasize that the law of the sea applies transit passage not necessarily in all straits but rather in "straits used for international navigation," suggesting both geographical and functional criteria. They argue that "it is doubtful whether infrequent or irregular use of a strait would suffice to meet the functional criterion," an argument that runs counter to the more maximal interpretation of the United States. However, they also note that "it is unclear as to what level of international navigation is required for a strait to be appropriately classified as an 'international strait'." Rothwell and Stephens 2016, 252.

at this time. The Fukuda government's domestic legitimacy depended upon maintaining the appearance of adherence to the non-nuclear principles, which were broadly supported among all political parties in Japan. Opposition parties were especially critical and suspicious of the government's reasoning for keeping the territorial seas limited to 3 nm, which they decried as an abandonment of Japan's sovereignty (*shuken no hoki*, 主権の放棄) and its responsibility to protect coastal fishermen (*engan gyomin no hogo*, 沿岸漁民の保護).[24] Socialist Party Diet member Takatoshi Fujita accused the Fukuda cabinet of trying to avoid the three non-nuclear principles by creating a loophole in those principles.[25]

Faced with such vociferous domestic political questioning on this matter, Japan's government was eager to diminish scrutiny directed toward the activities of U.S. nuclear-armed vessels near Japan, which unbeknownst to the public were in fact already operating in Japan's territorial seas. The shelving formula embodied in the 1977 law did not satisfy many of these critics, who decried it as a humiliating sacrifice of Japan's sovereignty in exchange for allowing U.S. nuclear warships to transit Japan's straits freely. Nonetheless, it enabled the government to continue to plausibly (though falsely) maintain that they were abiding by the non-nuclear principles, as there remained high seas corridors where such vessels could pass through the Japanese island chain without entering into Japanese territorial waters.[26]

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[24] See Socialist Party Diet member Takatoshi Fujita's back-and-forth exchange with Prime Minister Fukuda and Foreign Minister Ichiro Hatoyama in 80th Diet, Budget Committee No. 6, February 14, 1977, https://kokkai.ndl.go.jp/#/detail?minId=108005261X00619770214. See also comments by Komeito Party politician Yuichi Ichikawa and Kosuke Ito of the New Liberal Club party (an LDP breakaway party), 80th Diet, 16th Plenary Session, April 7, 1977, https://kokkai.ndl.go.jp/#/detail?minId=108005254X01619770407.

[25] Fujita declared: "ですから、私の方からあえてお尋ねしますが、こういう回答になったということは、非核三原則を避けて通るために、非核三原則に政府みずからが風穴をあけるためにこういう統一見解を示したのかどうか。" 80th Diet, Budget Committee, No. 12, February 23, 1977, https://kokkai.ndl.go.jp/#/detail?minId=108005261X01219770223.

[26] Interview 2.2 with Masahiro Akiyama, November 9, 2017, Tokyo, Japan; Interview 2.20 with Shunji Yanai, November 17, 2017, Tokyo, Japan; Akaha 1985.

This political calculation is further reflected in talking points prepared for U.S. ambassador Elliot Richardson, the head of the American delegation to the Law of the Sea, in his meetings with Japanese Foreign Ministry officials in Tokyo in December 1978. The talking points, newly discovered in Richardson's papers in the Library of Congress and not previously reported, strongly suggest that this was a U.S. priority, and that the United States used this argument to persuade Japan to continue to avoid expanding the limit in Tsugaru Strait in particular (the second northernmost of the five straits):

> Our assessment is that Tsugaru problem is primarily not a security problem, but a political question. Our assessment further is that extension of the Japanese territorial sea in straits could produce new political problems with the USSR *or unhelpful domestic demands in Japan for an explanation of U.S. activities*. This solution may therefore create even more severe political problems.[27]

The Diet debates in 1977 surrounding the territorial sea law also point to another motivation for Japan's decision to limit its territorial waters to 3 nautical miles in its main straits. Specifically, Japanese politicians were aware that the transit passage regime as it was unfolding at UNCLOS III might allow foreign military aircraft the right to overfly the strait anywhere between the baselines of the territorial sea. By contrast, the status quo regime only allowed those aircraft to enter the airspace above the high seas corridor. In Diet debate in February, Komeito Party member Ichiro Watanabe challenged Asao Mihara, director general of the Japan Defense Agency (JDA), on this subject, noting that under the status quo regime, the high seas corridor in Tsugaru was too narrow for safe overflight due to the bend in the strait (see Figure 10.5). Watanabe thus expressed concern that if Japan allowed transit passage to apply in Tsugaru, Soviet airplanes would have a wider space over which to fly and thus would be able to overfly

[27] Document from Folder I:391 Dec-78, Trips and Meetings, 11-16 Dec 1978 Tokyo, Elliot L. Richardson Papers, Manuscript Division, Library of Congress, Washington, D.C. Emphasis added.

the strait.[28] A few weeks later, he elaborated on this perspective, expressing concern that if a strait becomes designated as an international strait, it could become a "free-navigation zone" (*jiyu koko-tai*, 自由航行帯), and "the actual territorial waters will be equal to zero nautical miles," which he feared would "cause various problems from a security standpoint."[29] Watanabe thus expressed his preference for the 3 nm shelving formula on these grounds. JDA director Mihara acknowledged Watanabe's concern and Prime Minister Fukuda said they would study it further.

A couple of months later when the draft territorial sea law was presented to the Diet, JDA Director General Mihara reported the findings of the JDA on the subject as follows:

> Extending the width of the territorial sea is advantageous for defense. In addition, as for the waters such as the so-called international straits, which will be maintained at 3 nautical miles for the time being, the Defense Agency would prefer to choose as few as possible. However, from a national standpoint, and from the standpoint of national interests, after a large-scale deliberation, the decision was made to select the specific waters of these five straits for the time being. Meanwhile, we have no objection to keeping the width of the territorial waters at 3 nautical miles, as it does not cause any new defense problems compared to the current situation.[30]

This statement indicated the clear "defense advantage" that the JDA perceived in extending the territorial seas to 12 nm, and also revealed that security considerations and JDA preferences

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[28] 80th Diet, Budget Committee, No. 12, February 23, 1977, item 119, https://kokkai.ndl.go.jp/#/detail?minId=108005261X01219770223.

[29] 80th Diet, House of Representatives, Foreign Affairs Committee, No. 2, March 2, 1977, item 95, https://kokkai.ndl.go.jp/#/detail?minId=108003968X00219770302.

[30] This statement in Japanese was as follows: "領海の幅員が拡張されることは、防衛上有利であります。また、当分の間、現状維持となってまいりまするいわゆる国際海峡のような水域につきましては、防衛庁といたしましては、できるだけ少なくお決め願いたいという考え方でおるわけでございます。しかし、国家的な立場から、その国利の立場から、大局的な判断をされて御決定になりました五海峡のいわゆる特定海域に対しましては、当分の間、領海の幅を三海里にとどめることにつきましては、現状に比較いたしまして、防衛上新たな問題が起こるわけではございませんので、異存はございません。" 80th Diet, 16th Plenary Session, April 7, 1977, item 31, https://kokkai.ndl.go.jp/#/detail?minId=108005254X01619770407&spkNum=31&single. See also Akaha 1985, 127–29.

played an important role in keeping the number of straits designated as international and limited to 3 nm to no more than five.

In other words, Tokyo's decision to limit the territorial seas in five of its straits to 3 nm, though it had the appearance of a uniquely liberal "free seas" approach to straits and was portrayed by Japan's government as such, in effect enabled Japan to limit the freedom of action of foreign warships and aircraft within those very straits. Simultaneously, Tokyo selected the smallest number possible of straits to designate as international straits, expanding its territorial seas to 12 nm in all other straits and denying transit passage rights in those straits.[31] In so doing, it further strengthened its legal jurisdiction in its straits and reduced its vulnerability to foreign warships, which could only exercise innocent passage in those areas, and to foreign aircraft, which have no right of innocent passage.

At the same time, Japan also had to grapple with the question of how to enforce its jurisdiction within its newly expanded territorial seas. In his same statement to the Diet on April 7 on the draft territorial sea law, Mihara also explained that the Defense Agency did not feel it necessary to revise the Law on the Self-Defense Forces to expand the role of the Japan Maritime Self-Defense Force (JMSDF). As Tsuneo Akaha explains, this was the culmination of a controversy that had erupted after the JDA said in January it might need to undertake such a

[31] The precise criteria the Japanese government used in deciding upon these five straits are unclear. Before the territorial sea law was introduced, members of the Diet queried government representatives about the criteria that would be used to decide upon certain straits and received no concrete indications. See statement by Minister of Agriculture, Fisheries, and Forestry, Zenko Suzuki, 80th Diet, Budget Committee No. 6, February 14, 1977, https://kokkai.ndl.go.jp/#/detail?minId=108005261X00619770214&spkNum=25&single. At one point, the Diet did discuss the numbers of American and Soviet warships passing through those main straits each year.

When the proposed bill was introduced, Foreign Minister Iichiro Hatoyama responded to a question on this matter with the vague explanation that "we have selected five locations after carefully considering the locations of the passage of foreign vessels and whether or not they are the main routes for international navigation." ("この五カ所を設けました理由は、外国船舶の通航の状況、国際航行のための主要なルートに当たっているかどうかということを慎重検討いたしまして五カ所を選定いたした次第でございますので、御了承いただきたいと思います。") The 80th Diet, 16th Plenary Session, April 7, 1977, item 39, https://kokkai.ndl.go.jp/#/detail?minId=108005254X01619770407&spkNum=39&single.

revision in order to enforce Japan's jurisdiction in the expanded territorial sea. In response to political objections, the Fukuda Cabinet had decided that such enforcement responsibilities would remain with the Maritime Safety Agency (MSA), which operated Japan's Coast Guard, though the JMSDF would provide information to the MSA on infringements of Japan's sovereignty. Meanwhile, the MSA was instructed to concentrate its as-yet limited capacity in the northern seas near Hokkaido, Tsushima Strait, and the area around the Senkaku Islands. This division of labor would presage the manner in which Japan would increasingly come to rely upon and strengthen the capacities of its Coast Guard to enforce Japan's jurisdictional claims, in part as a way around the political restrictions imposed on the JMSDF.[32]

Evolution Since UNCLOS III

Japan's interpretation of the transit passage regime and its approach to jurisdiction over warships in its straits has not varied significantly from the basic approach it devised in 1977. The territorial sea law passed that year stated that the limitation of the five selected straits to 3 nm in breadth was only "for the time being" (*tobun nokan*, 当分の間).[33] This highlights that Suzuki's shelving formula was not intended to be a permanent solution, but only a provisional measure put in place until the passage regime of straits used for international navigation was clarified and settled in the UNCLOS negotiations.[34] But even after that issue was resolved at UNCLOS III and the transit passage regime was included in the final version of UNCLOS, Japan's 1996 amendment of the territorial sea law maintained its original approach to those five straits,

[32] Akaha 1985, 128–29.

[33] Government of Japan, Law on the Territorial Sea and the Contiguous Zone (Law No. 30 of 1977, as amended by Law No. 73 of 1996), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law.pdf.

[34] Akaha 1985; Hayashi 1997; Yanai and Asomura 1977.

including the language "for the time being." Thus, in effect, to this day there are no Japanese straits in which Tokyo acknowledges the right of transit passage under Part III of UNCLOS.

Of course, this continuity in Japan's position represents, first and foremost, a continued reluctance to revive controversy over the three non-nuclear principles and the U.S.-Japan alliance. In theory, once the transit passage regime was established under UNCLOS, Japan could have expanded its territorial sea to 12 nautical miles uniformly, including in those five straits, without presenting a serious challenge to its three non-nuclear principles. Since nuclear-armed warships would be exercising normal transit passage, rather than innocent passage, the Japanese government's original determination that passage of nuclear-armed warships would not be considered innocent would not be directly relevant under the new transit passage regime.[35] This issue also diminished somewhat in salience after the end of the Cold War, in part due to the denuclearization of the U.S. surface fleet.

However, the domestic political sensitivities surrounding the nuclear issue have persisted. Concerns over the relationship between the three non-nuclear principles and the territorial sea reemerged in 2009 when evidence of the secret Nixon-Sato nuclear agreements came to light under a DPJ government. Within a decade, though, after the LDP had reconsolidated control and tensions with North Korea were on the rise, there was some debate in Japan in fall 2017 over a proposal from a former defense minister and current influential member of the Japanese Diet, Shigeru Ishiba. Ishiba proposed that the third principle of non-introduction of non-nuclear weapons be relaxed to allow U.S. nuclear-armed vessels and/or aircraft to enter Japan's territorial sea or airspace in light of North Korea's growing nuclear threat to Japan. In the face of

[35] Kuribayashi 1982.

domestic political opposition, however, this proposal for "2.5 non-nuclear principles" failed to gain significant traction,[36] at least in public.

At the same time, it is unclear even now whether or not U.S. nuclear-armed ballistic missile submarines (SSBNs) or bombers continue to enter or fly over Japan's territorial sea—in particular, whether or not they transit Japanese straits other than the five straits Japan has designated as international. At a minimum, such transits would not be inconsistent with U.S. understandings of international law. If such SSBN transits or nuclear bomber overflights do occur, it is also unclear if the Japanese government would be aware. At this point, the issue of U.S. nuclear-armed vessels or aircraft entering or overflying Japan's territorial waters now seems to be governed by a de facto "don't ask, don't tell" approach.[37]

Whether out of suspicion or ignorance of this dynamic, some members of the opposition in the Japanese Diet have in recent years called for Japan to extend its territorial sea universally to 12 nm, thus enclosing those five major straits within Japan's territorial sea. The pushback against this proposal has hearkened back to the second motivation for Japan's approach to these straits discussed above. Specifically, members of the Self-Defense Forces have objected on the grounds that if Japan were to enclose these straits within its territorial sea, then the transit passage regime would apply to those straits (as opposed to high seas freedom of navigation). This would in turn allow foreign submarines to transit submerged anywhere in the strait between the baselines of the territorial sea, just as it would allow foreign aircraft to overfly anywhere

[36] Interview 2.2 with Masahiro Akiyama, November 9, 2017, Tokyo, Japan; Interview 2.22 with Tetsuo Kotani, November 20, 2017, Tokyo, Japan.

[37] Interview 2.21 with Kentaro Nishimoto, November 17, 2017, Tokyo, Japan. Another interviewee stated that he thought there was an agreement between the United States and Japan now under which the United States would have a responsibility to declare that they have nuclear warheads before they enter into the Japanese territorial sea. Interview 2.3 with Kentaro Furuya, November 10, 2017, Tokyo, Japan. However, I have not been unable to verify this.

between those baselines.[38] By contrast, under the status quo, submarines can remain submerged when passing through these five straits, but they must stay within the narrow high-seas corridors and cannot enter within 3 nm of Japan's coast. Thus, under the status quo, Japan is able to maintain at least some buffer against submarines, which, *inter alia*, could be disruptive to Japanese anti-submarine warfare infrastructure located on the seabed of the littoral.

This pushback also points to how Japan is seeking to use its interpretation of international law to shore up its security in its straits as Chinese military vessels and aircraft expand their operations through Japanese straits. Japan has often expressed uneasiness regarding People's Liberation Army (PLA) Navy transits through straits adjacent to its islands, which have become increasingly frequent over the past decade and a half. For the most part, PLA Navy vessels have avoided entering Japan's territorial seas en route to the open Pacific, instead navigating through the high seas corridors left by Japan's narrower 3 nm seas in its five main straits or through the wider Miyako Strait and Bashi Channel in the Ryukyu Islands. However, there have been some revealing exceptions. For example, in 2004, Japan objected strongly after a Chinese submarine remained submerged upon entering Japanese territorial waters in the Ishigaki Strait, which is *not* one of Japan's five designated international straits (see black dashed arrow in Figure 10.8 in the Appendix). Ultimately, the Chinese government "expressed regret" for the incident, claiming that the submarine had accidentally strayed into Japan's territorial sea due to a technical issue.[39]

[38] Interview 2.21 with Kentaro Nishimoto, November 17, 2017, Tokyo, Japan.

[39] 2009. Dutton argues that from a U.S. perspective, submerged submarine passage through the Ishigaki Strait would be legal under the transit passage regime of UNCLOS. However, even if the strait were deemed to be one in which transit passage applies, this submarine would still have been subject to the strictures of the transit passage regime, which include entering the strait "solely for the purpose of continuous and expeditious transit" (UNCLOS Article 38) and not loitering within Japan's territorial sea longer than necessary for transit nor conducting surveillance or research therein. The submarine likely did not abide by those strictures.

As detailed in chapter 7, over a decade after the 2004 *Han* submarine incident, a somewhat similar event unfolded, but this time China was unapologetic in asserting its right to transit passage. In June 2016, a PLA Navy vessel transited through Tokara Strait between Yakushima and the northern Tokara Islands (see red dashed arrow in Figure 10.8 in the Appendix). This strait, just to the south of Osumi Strait, is enclosed within Japan's territorial sea and, unlike Osumi, it is not one of those five that Japan has deemed as a "strait used for international navigation." China defended its passage through this area as being consistent with international law and the right of transit passage in straits used for international navigation. The next year, on July 2, 2017, a PLA Navy vessel entered Japan's territorial sea while approaching Tsugaru Strait (see Figure 7.3 in chapter 7). Since Tsugaru Strait has a high seas corridor, Japan does not acknowledge the right of transit passage in the territorial seas abutting that strait, though some countries, such as the United States, maintain that transit passage also applies in the territorial seas approaching straits if necessary for navigational reasons.[40] Technically, Japan's laws allow innocent passage for warships without prior permission in the territorial sea, but it can be difficult to know whether the activities of a military surveillance surface ship are consistent with innocent passage or the more "normal" transit passage.

Perhaps in light of this ambiguity, Japan has generally not objected to such transits on legal grounds, even though some of these passages have arguably violated Japan's interpretations of international law. However, these incidents have exacerbated Tokyo's geostrategic angst, and Japan has responded by closely monitoring and tracking PLA Navy vessels' movements. Moreover, while exercising care to avoid legally grounded accusations, the Japanese government

[40] See discussion of this issue in chapter 4.

has at times expressed alarm on political and diplomatic grounds.[41] In the case of the 2016 Tokara Strait transit, for example, Japan even summoned the Chinese ambassador, despite the fact that China's transit did not necessarily violate international law since its passage could also have been interpreted as being consistent with innocent passage.[42]

On balance then, Japan's interpretations of the law of the sea governing straits have changed very little since the 1970s. In this case, continuity has been driven less by legitimation constraints and instead simply by Japan's desire to continue using its original interpretation—despite its professed provisional, temporary nature—to buffer itself against perceived maritime threats along its coasts. These geopolitical incentives have thus served to shore up Japan's claims to relatively expansive jurisdiction over its straits.

Foreign Military Activities and Marine Scientific Research in the EEZ

Unlike on the subject of straits used for international navigation, Japan traditionally adopted a more conventional maritime power orientation on the issue of coastal state jurisdiction in the EEZ. It opposed the EEZ regime entirely at the start of UNCLOS III and worked to water down coastal state authority therein, including over high seas freedoms and marine scientific research (MSR). As Japan's interests have changed over time, it has found it difficult to back away from these positions outright due to both its security interest in preserving a norm of free navigation for the military forces of its ally and its desire to maintain its legitimacy in the eyes of the United States and other major maritime powers. However, compelling geopolitical

[41] Interview 2.3 with Kentaro Furuya, November 10, 2017, Tokyo, Japan; Interview 2.6 with Yurika Ishii, November 14, 2017, Tokyo, Japan; and Interview 2.19 with Japanese Ministry of Foreign Affairs official, November 17, 2017, Tokyo, Japan.

[42] Interview 2.22 with Tetsuo Kotani, November 20, 2017, Tokyo, Japan.

circumstances—especially the rise of China's operations in Japanese waters—are leading Japan to allow its position on military activities in the EEZ to drift in a new more ambivalent direction, even while converting its initial lukewarm acceptance of coastal state jurisdiction over MSR in the EEZ into enthusiastic insistence upon coastal state jurisdiction.

Initial Positions at UNCLOS III and Interpretation of UNCLOS

As noted above, Japan's general stance toward the EEZ at UNCLOS III was to advocate for minimal and non-exclusive coastal state jurisdiction. Such advocacy was largely oriented toward issues related to resources, especially fisheries resources. Japan also advocated a liberal regime for marine scientific research in the EEZ and high seas, especially during the preparatory negotiations at the Seabed Committee in the early 1970s.[43] In addition, Japan did occasionally underscore the importance of more general high seas freedoms pertaining to the EEZ. For example, after the convention had been approved by the conference delegations but before it had been opened for signature, four Latin American states, Chile, Peru, Ecuador, and Colombia, circulated a letter to the conference lauding their role in the creation of the EEZ regime. In response, the Japanese representative submitted a letter to the conference president in September 1982 reaffirming the importance of the "the fundamental balance between the rights and duties of coastal and other States" envisioned in the final convention text, noting that in addition to the coastal state's "specific resource-related rights and jurisdiction" in the EEZ, "all States continue to enjoy in that zone the high seas freedoms of navigation and over-flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.[44]

[43] Akaha 1985, 80–82; Oda 1977, vol. 2 (The United Nations Seabed Committee, 1968-1973).

[44] Letter dated 24 September 1982 from the representative of Japan to the President of the Conference, A/CONF.62/L.157, https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_17/a_conf62_l157.pdf.

Notwithstanding these references to general high seas freedoms, the Japanese government did not explicitly take a position on the permissibility of foreign military activities in the EEZ at the conference.[45] As noted in chapter 4, the final convention text remained silent about whether or not foreign military activities in the EEZ beyond general freedom of navigation and overflight, such as surveillance or exercises, could be subject to coastal state jurisdiction. A number of developing countries explicitly claimed the right to restrict such activities in their speeches and declarations interpreting the convention, often with reference to the stipulation in Article 58 that other states operating in the EEZ shall have "due regard" to the rights and duties of the coastal state when exercising their high seas freedoms. In response, several maritime powers affirmed their rights to conduct military exercises and other activities in the EEZ without seeking prior permission from the coastal state in their declarations upon ratifying UNCLOS. Notably, Japan made no such declaration.

By contrast, the final text of UNCLOS was more explicit in granting coastal states jurisdiction over marine scientific research in the EEZ, including requiring other states to apply for permission from coastal states before conducting such MSR, even though the definition of MSR itself remained unclear. Tokyo voted for that convention text, including its MSR provisions, in April 1982, and upon signing the convention the following year, the Japanese delegation only raised specific objections to issues related to Part XI on exploration and exploitation of the resources in the international seabed area. Thus, it implicitly conceded to granting jurisdiction over MSR in the EEZ to coastal states as part of the overall package deal of UNCLOS, even while not explicitly or vocally embracing that approach to MSR.

[45] Akimoto 2013; Kotani 2011.

Evolution Since UNCLOS III

During UNCLOS III in the 1970s and early 1980s, Japan perceived a significant threat from Soviet fishing trawlers fishing near Japan's coasts. This threat, as noted above, led Japan to declare a 200 nm fishery zone in certain of its adjacent waters in 1977, followed eventually by the declaration of a 200 nm EEZ in 1996. In this same period, Japan also perceived a moderate maritime security threat from the Soviet Union, especially in the north near islands disputed between the two sides. However, by that late date in the Cold War, the security threat was not particularly acute. During UNCLOS III, Tokyo had worked closely with not only Washington but also Moscow to promote certain shared interests, notwithstanding ongoing tensions with Moscow over fisheries issues and territorial disputes. In the decade following UNCLOS III, that dynamic did not fundamentally change, aside from a general easing in tensions after the collapse of the Soviet Union. Thus, between the time Japan signed UNCLOS in 1983 and ratified it in 1996, the question of the legality of foreign military activities in Japanese waters, especially in waters beyond the territorial sea and straits, did not become a point of controversy.

By the turn of the twenty-first century, however, those dynamics began to change, as Japan declared an EEZ in 1996 and then began grappling with challenges to its jurisdiction in those areas. Those challenges stemmed both from Chinese and South Korean research vessels conducting more frequent marine scientific research in disputed maritime areas near Japan and from North Korean vessels conducting surveillance in waters near Japan. In the past 10 to 15 years, such activities have also been accompanied by a significantly increased tempo of Chinese naval operations in Japan's EEZ. In response to these changing geopolitical circumstances, Japan's interpretation of marine scientific research and military activities in the EEZ have evolved over time through processes of *conversion* and *drift*, respectively.

Around the late 1990s and especially in the early 2000s, there was a significant uptick in Chinese and South Korean military and civilian vessels conducting marine scientific research in disputed EEZ areas in the East China Sea and near Okinotorishima. Japan objected to these activities, on the grounds that this type of research is subject to coastal state jurisdiction under UNCLOS.[46] However, Manicom argues that Tokyo's objections to Chinese research activities were motivated in large part by security concerns, rather than efforts to preserve marine economic resources and rights, which was the intention of UNCLOS in allowing coastal state jurisdiction over marine scientific research in the EEZ.[47] At a minimum, Tokyo's diplomatic objections reveal its discomfort with China conducting activities in the Japanese EEZ that are very similar to those conducted by the United States in China's EEZ, to which Beijing strongly

[46] Manicom 2010; Manicom 2014. See also the section on foreign maritime survey activities in the annual reports of the Japan Coast Guard (海上保安レポート, *Kaijō Hoan Repōto*), which reports the annual number of surveys conducted in Japan's EEZ with and without consent. The annual reports are available online at the following:
2008 report: https://www.kaiho.mlit.go.jp/info/books/report2008/honpen/p058.html;
2009 report: https://www.kaiho.mlit.go.jp/info/books/report2009/Degital/honpen/p060.html;
2010 report: https://www.kaiho.mlit.go.jp/info/books/report2010/html/honpen/p058_02_01.html;
2011 report: https://www.kaiho.mlit.go.jp/info/books/report2011/html/honpen/p058_02_01.html;
2012 report: https://www.kaiho.mlit.go.jp/info/books/report2012/html/honpen/p066_02_01.html;
2013 report: https://www.kaiho.mlit.go.jp/info/books/report2013/html/tokushu/toku13_02-6.html;
2014 report: https://www.kaiho.mlit.go.jp/info/books/report2014/html/honpen/1_11_chap8.html;
2015 report: https://www.kaiho.mlit.go.jp/info/books/report2015/html/honpen/1_08_chap7.html;
2016 report: https://www.kaiho.mlit.go.jp/info/books/report2016/html/tokushu/toku16_01-3.html;
2017 report: https://www.kaiho.mlit.go.jp/info/books/report2017/html/tokushu/toku17_01-2.html;
2018 report: https://www.kaiho.mlit.go.jp/info/books/report2018/html/honpen/1_03_chap2.html;
2019 report: https://www.kaiho.mlit.go.jp/info/books/report2019/html/tokushu/toku19_01.html.

In practice, it is very difficult to tell when a foreign vessel is conducting "marine scientific research" as opposed to intelligence gathering, as such activities often involve the same types of technical operations. As described in chapter 7, this is one of the main justifications that China has used object to U.S. surveillance within its EEZs, arguing that such surveillance is indistinguishable from "marine scientific research."

[47] Manicom 2014. Manicom writes, "Both parties viewed the legality of marine surveys in the context of the wider strategic implications for their freedom of action in disputed waters. Policymakers in Tokyo viewed Chinese intrusions into its EEZ as a strategic threat to its national security." As evidence for this argument, he points to the role that the Japanese defense establishment (as opposed to the Fisheries Agency or Agency of Natural Resources and Energy) played in pressuring central policymakers to adopt a more assertive stance on China's research in disputed EEZ areas. See chapter 7.

objects.[48] Moreover, they differ in significant respects from the much less restrictive regime of marine scientific research that Tokyo originally advocated early in the UNCLOS negotiations.[49] This shifting position on MSR in the EEZ thus represents an example of *conversion*. Japan originally gave only a lukewarm implicit endorsement of UNCLOS' provisions of coastal state jurisdiction over marine scientific research for the purpose of endorsing the broader package deal of UNCLOS. But in the wake of significantly increased threat perceptions in its waters, Japan is now embracing those provisions much more enthusiastically, and for more concrete security and defense purposes.

In the gray zone between marine scientific research, fishing activities, and military surveillance, North Korean surveillance vessels (also referred to as "mystery ships"), oftentimes disguised as Japanese or Chinese fishing boats, have also made occasional incursions into waters near Japan over the past several decades.[50] In 1999 Japan's Coast Guard fleet began actively opposing these incursions, both in the territorial sea and in the EEZ, usually by chasing the ships away. In November 2001, Japan amended its laws to allow the Coast Guard to use force against such ships. Then, a month later, after a JMSDF P3C surveillance aircraft identified a vessel believed to be a North Korean spy ship operating in Japan's EEZ off of Amami Oshima in the East China Sea, the Japanese Coast Guard began pursuing the vessel, firing on the boat and engaging in a six-hour chase. This chase ultimately crossed the median line of the East China

[48] This approach represents an evolution from Japan's historical position; at the outset of the Third United Nations Conference on the Law of the Sea in 1974, Japan was the only nation in the world to actively oppose the concept of a 200 nm exclusive economic zone. See Akaha 1985, 92–3. This original position was informed largely by the commercial significance of Japan's long-distance fishing fleet, which desire to retain access to the abundant fish stocks along the coasts of other states. Interview 2.2 with Masahiro Akiyama, November 9, 2017, Tokyo, Japan; Interview 2.8 with Atsushi Sunami, November 15, 2017, Tokyo, Japan. However, Japan eventually acquiesced to the regime as it was incorporated into the final convention concluded in 1982. Over the intervening years, Japan's fishing industry has adjusted to new jurisdictional realities—which include a vast swath of ocean space falling under Japanese ownership. Interview 2.20 with Shunji Yanai, November 17, 2017, Tokyo, Japan.

[49] Ibid., 80–82.

[50] Kotani 2012.

Sea into China's undisputed EEZ before it ended in further exchange of fire and the sinking of the North Korean boat.[51]

In response to these events, Japan did not explicitly state that foreign government surveillance in the EEZ is illegal writ large. Nonetheless, Bateman cites Japan's approach to North Korean spy ships in its EEZ as evidence of Japan's support (alongside China and India) for "thickening jurisdiction" of coastal states in their EEZs. [52] This can be characterized as an instance of *drift*, as new geopolitical circumstances arose to which Japan neglected to extend its past support for freedom of the high seas in the EEZ. Although it has not denied such freedoms outright, due to the constraints of its identity as a maritime power and its grand strategic commitment to the U.S. alliance, its effective position has drifted away from its original overall stance in favor of high seas freedoms in the EEZ.

Furthermore, it is important to note that it was not solely North Korean behavior that drove this shift in Japanese behavior. Instead, Samuels argues that Japanese officials used the North Korean spy ship threat as justification for revising the Coast Guard Law and bolstering the "warfighting" capabilities and authorities of the Coast Guard. In so doing, Japan boosted its defensive capabilities in its near seas, sidestepping the domestic scrutiny and legal restrictions imposed on the JMSDF, much as it did after passing the 1977 territorial sea law.[53] This represents an example of how innovative government officials use their agency to find creative ways to evade the constraints of path dependency in order to shift the state's interpretation of the law of the sea over time in ways that suit the state's changing strategic interests.

[51] For additional details on this event and a discussion of the debate as to whether or not the boat scuttled itself or was sunk by the Japan Coast Guard vessels, see Samuels 2008; Black 2014.

[52] Bateman 2006.

[53] Samuels 2007; Samuels 2008.

This drift toward ambiguity in Japan's stance toward foreign military activities in the EEZ has continued as China's navy has increased its operations in Japan's EEZ dramatically over the past 10 to 15 years. The Japanese Foreign Ministry has not taken a position on whether military surveys fall under the category of "marine scientific research." On military exercises, one Ministry of Foreign Affairs official formulated Japan's position as follows: "Our view is that UNCLOS does not prohibit military exercises in the EEZ, as long as states exercise due regard to the rights of the coastal state. How to interpret 'due regard' must be decided on a case-by-case basis."[54] At the same time, Japanese experts on the law of the sea who advise the government acknowledged in interviews that the JMSDF conducts surveillance in China's exclusive economic zone, including beyond the median line in the East China Sea, and that Japan has also conducted military exercises in other countries' EEZs.

Japanese maritime legal experts attribute this ambiguity to the conflict between Japan's geopolitical incentives and its relationship with the United States as its key social referent.[55] On one hand, many Japanese policymakers, particularly within the JMSDF, desire to stand by the United States in defense of robust freedom of navigation, including high seas freedoms in the EEZ. This attitude is motivated both by Japan's desire to maintain legitimacy in the eyes of its ally and its interest in supporting U.S. operations that enhance Japan's security. Relationships forged between officers and lawyers in the Japan Maritime Self-Defense Force and the U.S. Navy also serve to socialize JMSDF officers into pro-freedom of navigation positions.[56] As a

[54] Interview 2.19 with Japanese Ministry of Foreign Affairs official, November 17, 2017, Tokyo, Japan. The official also noted that most of Japan's military exercises with other countries take place in the high seas, suggesting that the freedom to conduct such exercises was not particularly salient for Self-Defense Forces operations—though she clarified that this was not an official government view.

[55] Interview 2.2 with Masahiro Akiyama, November 9, 2017, Tokyo, Japan; Interview 2.5 with Kazumine Akimoto, November 13, 2017, Tokyo, Japan; and Interview 2.21 with Kentaro Nishimoto, November 17, 2017, Tokyo, Japan.

[56] Many Japanese maritime legal experts, especially within the JMSDF, engage in frequent contact with U.S. Navy lawyers, receiving training from Navy JAGs, conducting joint workshops on issues related to freedom of navigation, and engaging in semester-long academic exchanges at military colleges. JMSDF experts interviewed for this

consequence of this socialization, many JMSDF officers believe that explicit restrictions on foreign military activities in the EEZ are illegitimate, as they run counter to prevailing customary international law. In this way, Japan's legitimation efforts vis-à-vis the United States are both strategic and constitutive.

On the other hand, Japan feels increasingly insecure as Chinese naval operations within Japan's EEZ become ever more frequent. Indeed, the ambiguity in Japan's stance on the EEZ may not simply be a result of policy indecision, but rather a deliberate non-position adopted by the Ministry of Foreign Affairs, in part to leave open the option of adopting a more restrictive position in the future should Chinese activities in Japan's EEZ become more threatening.

Rocks, Islands, Archipelagoes, and Their Offshore Entitlements

Two interrelated issues at UNCLOS had significant implications for the maritime entitlements of islands, especially island nations such as Japan. The first was the question of whether or not countries could draw straight baselines around groups of islands, and whether or not such archipelagic baselines would apply solely to states wholly composed of islands or also to continental states that claimed sovereignty over offshore island groups. The second was about what type of land features were entitled to a full 200 nm EEZ and continental shelf as opposed to only a territorial sea (or even just a 500-meter safety zone). As explained in chapter 4, Part IV of the final text of UNCLOS establishes a regime for archipelagic states that enables countries composed wholly of islands to draw straight baselines, with certain limitations and provisions for normal passage by foreign ships and aircraft within those baselines. In addition, Article 121 of UNCLOS defines an island as "any naturally formed area of land, surrounded by water, which is

research often cited their relationships and conversations with U.S. maritime lawyers in proffering their interpretations of maritime legal issues.

above water at high tide," granting that any such feature would be entitled to a territorial sea. At the same time, paragraph 3 of this article stipulates that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

Japan's interpretations of these two issues reveals the ways in which its mixed initial stances have remained constant over time, as it has maintained its opposition to expansive coastal state jurisdiction over archipelagic waters alongside its own claim to expansive jurisdiction in an EEZ and continental shelf around small, remote islands in the Pacific. At the same time, in the wake of its ratification of UNCLOS III, Japan has also had to innovate a new interpretation on the entitlements of small islands, since its opposition to Article 121(3) was unsuccessful in excluding that provision from the convention. Its new legal interpretations on this issue have been layered on top of its past opposition the EEZ regime.

Initial Positions at UNCLOS III and Interpretation of UNCLOS

During UNCLOS III, despite being an island nation itself, Japan opposed the regime of archipelagic waters. Instead, it allied with other major maritime powers, such as the United Kingdom, to express concerns that the regime would allow archipelagic states to impose unilateral and onerous regulations on pollution and transit in large swaths of waters that were previously high seas.[57] This issue was particularly concerning to Tokyo because the nations most actively advocating for the regime included Indonesia and the Philippines, the waters of which include multiple straits upon which Japan is critically dependent for shipments of oil and other goods and resources. Thus, rather than seeing the archipelagic regime as an opportunity for Japan to expand its own jurisdiction, it saw the regime as a threat to its interests as a maritime power.

[57] Nandan and Rosenne 2003, vol. 2, 423, 451, 459; Akaha 1985, 70–71.

Indeed, under the archipelagic states regime ultimately adopted in UNCLOS, Japan is likely not even eligible to claim archipelagic status, since Article 47 requires the water-to-land ratio within archipelagic baselines to be greater than 1 to 1 (and less than 9 to 1), while limiting the length of individual baseline segments. Compliant straight baselines drawn surrounding the main Japanese islands would probably enclose a surface area with more land than water. Meanwhile, though Japan advocated for a weak archipelagic states regime, it did not go on the record with its views on straight baselines around outlying island groups of non-archipelagic states.

However, in the debates at UNCLOS III over whether or not remote islands should be entitled to EEZs and continental shelves, Japan sided in favor of allowing such islands full entitlement. Accordingly, at the seventh session in 1978, the Japanese delegation proposed an amendment that would delete the third paragraph of Article 121 entirely. In proposing this amendment, the representative of Japan "considered that it was not right to make distinctions between islands according to their size or according to whether or not they were habitable." In support of this argument, the representative referred to both the precedent of the 1958 Convention on the Continental Shelf, which entitled islands to continental shelves without distinction as to habitability, and how many states had also by that point already claimed EEZs from islands without such distinctions.[58] Japan continued to advocate for this position through the eleventh session of UNCLOS III in 1982, supporting a proposal by the United Kingdom to delete paragraph 3 of Article 121.[59] However, after these proposals failed to achieve traction and the final text retained paragraph 3, Japan did not issue any formal statements or declarations interpreting this matter at the final session or upon signing or ratifying UNCLOS.

[58] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations 1988, 89–90.
[59] Ibid., p. 105.

Evolution Since UNCLOS III

With its new territorial sea law and associated Cabinet order in 1996, Japan declared an expanded system of straight baselines that applied such baselines more broadly than its original 1977 closing lines. Most of these baselines were around parts of the four Japanese home islands, in some cases connecting them to small fringing islands near those four larger landmasses. Some of the baselines also surrounded smaller island clusters in the Ryukyu Islands, such as some of the Okinawa Islands. (See Figures 10.4-8 in the Appendix.) However, Japan did not declare these as archipelagic baselines, but rather as ordinary straight baselines under Part II of UNCLOS, using the "fringe of islands" principle, among others, from Article 7.

Around this same time, Japan also laid claim to an exclusive economic zone with its new EEZ law of 1996. Prior to 1996, Japan had claimed a 200 nm fishery zone in some areas off its coasts dating to a 1977 law. However, with its new EEZ law, Japan claimed an EEZ extending 200 nm from all its baselines. Since Japan did not specify the geographical limits of its EEZ on charts or with coordinates, nor did it limit the land from which it claimed an EEZ, this had the effect of establishing EEZ claims emanating from remote, uninhabited Japanese land features, including reefs and shoals in the far southeastern Ogasawara Island chain, such as Minamitorishima (Marcus Shoal) and, most notably, Okinotorishima. The latter is a Japanese territory several hundred miles south of the home islands consisting of an atoll with two islets totaling under 10 square meters in size (excluding their concrete encasements).[60] (See Figure

[60] I was unable to independently verify that Japan explicitly claimed an EEZ from Okinotorishima beginning in 1996. The Japanese government now dates its claim to its 1996 EEZ law, which established an exclusive economic zone extending 200 nautical miles from Japan's territorial sea baselines. Government of Japan, Law on the Exclusive Economic Zone and the Continental Shelf (Law No. 74 of 1996), in *Law of the Sea Bulletin* No. 35 (United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, New York, 1997), https://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE35.pdf, pp. 94-96. However, the earliest evidence I have been able to find that explicitly establishes Japan's view that Okinotorishima is entitled to a 200 nm EEZ is the Japanese government's formal objections to China's marine surveys conducted within 200 nm of Okinotorishima in early 2004, on the grounds that such surveys were in Japan's EEZ and thus required

10.1.) Since Okinotorishima is so remote, this EEZ claim does not overlap with that of any other land features and thus entitles Japan to sovereign rights and jurisdiction over an additional 400,000 square kilometers of ocean space, exceeding the total land surface area of the Japanese islands. Japan expanded this claim even further when it delivered a submission to the Commission on the Limits of the Continental Shelf in 2008 that outlined its claims to an extended continental shelf to the south and west of Okinotorishima.

This development aligned with Japan's stance at UNCLOS III opposing Article 121(3). However, due to Japan's status as a party to UNCLOS and its desire to be seen as a legitimate upholder of the law of the sea, it does not now explicitly reject Article 121(3). Instead, it has sought to develop both legal arguments and facts on the ground that would enable Okinotorishima to pass muster as more than a "rock" under that provision. Moreover, Japan's claim to an EEZ and continental shelf from Okinotorishima represents a massive expansion in its claim to jurisdiction over ocean space, striking an ironic contrast to its singular opposition to the EEZ regime just two decades before. This evolution represents an example of *layering*, as actors within Japan adapted to the new UNCLOS regime itself as well as to exogenous shifts in Japan's security environment by applying new interpretations of the law to those new circumstances.

Japanese permission. Song 2009, 152–53. The earliest public reference by the government of Japan to this claim that I have been able to verify is from a Ministry of Foreign Affairs press conference in February 2005. The Ministry of Foreign Affairs of Japan 2005. One of the most thorough scholarly treatments of the subject was also unable to verify whether or not Japan made its EEZ claim around Okinotorishima explicit in the late 1990s. Song 2009, 157.

All this said, the Japanese government had clearly been contemplating the potential EEZ entitlements of Okinotorishima dating back to at least the 1980s, when it began efforts to shore up the two rocks protruding from the reef and prevent their complete erosion. See Clyde Haberman, "Japanese Fight Invading Sea For Priceless Speck of Land," *New York Times*, January 4, 1988, p. A1, available at https://www.nytimes.com/1988/01/04/world/japanese-fight-invading-sea-for-priceless-speck-of-land.html; Jon Van Dyke, "Speck in the Ocean Meets Law of the Sea," *New York Times*, June 21, 1988, p. A26, letter to the editor, available at https://www.nytimes.com/1988/01/21/opinion/l-speck-in-the-ocean-meets-law-of-the-sea-406488.html.

Figure 10.1 Aerial View of Okinotorishima, Japan

Source: 国土交通省関東地方整備局京浜河川事務所, 沖ノ鳥島の航空写真 (Aerial view of Okinotorishima, Japan), http://www.ktr.mlit.go.jp/keihin/keihin_index005.html, via Wikimedia Commons, https://commons.wikimedia.org/wiki/File:Okinotorishima20070602.jpg, accessed June 16, 2020.

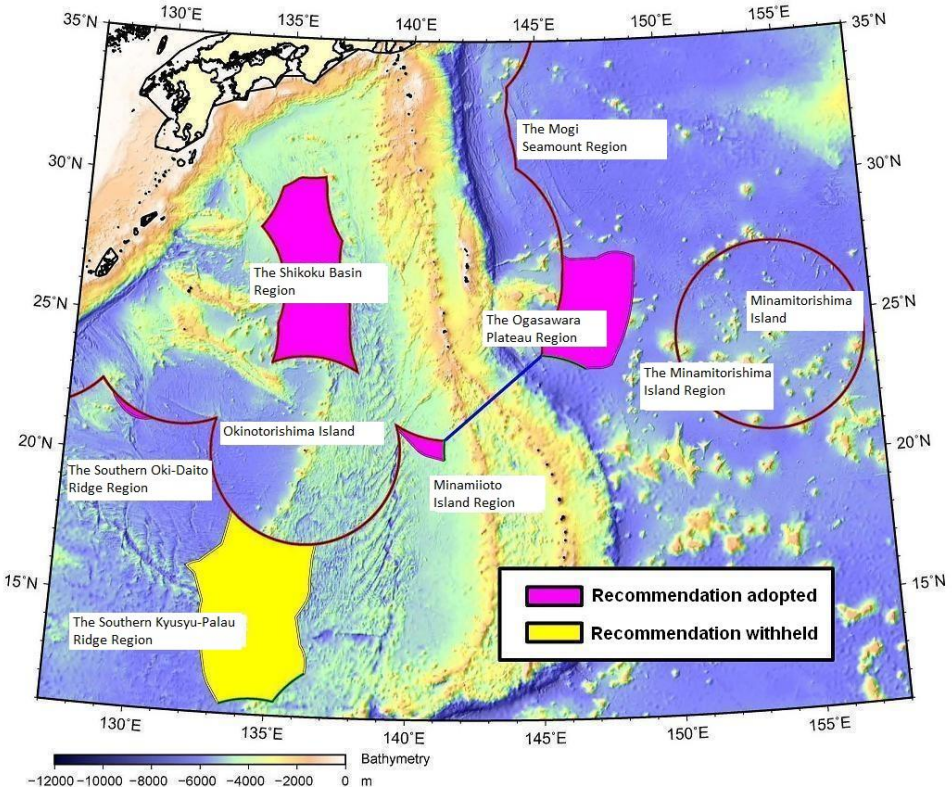
In the first place, since the conclusion of UNCLOS III, Japan's fishing industry has evolved considerably, away from distant-water fishing and toward coastal and offshore fisheries and aquaculture, in part because of changing fisheries conditions but also due to the changed incentive structure imposed by UNCLOS itself.[61] The fishing industry and the Fisheries Agency, which in the 1960s and '70s were major opponents of the exclusive economic zone regime, are now enthusiastic proponents of more expansive Japanese jurisdiction at sea, including in the EEZ.[62] Already in the 1980s these changing constituencies had led Japan to commence activities

[61] Schmidt 2003; Tickler et al. 2018.

[62] Interview 2.20 with Shunji Yanai, November 17, 2017, Tokyo, Japan; Interview 2.21 with Kentaro Nishimoto, November 17, 2017, Tokyo, Japan.

to shore up the eroding islets at Okinotorishima in order to bolster claims to maritime zones surrounding them. In the 2000s, the Ministry of Land, Infrastructure, Transport, and Tourism drew up development schemes to both artificially protect and naturally expand the islands.[63]

Figure 10.2 Japan's Submission to the Commission on the Limits of the Continental Shelf



Source: Yumiko Iuchi and Asano Usui, "The Functions and Work of the Commission on the Limits of the Continental Shelf: How It Responds to Disputed Island Claims Among Coastal States," *Review of Island Studies*, September 19, 2013, https://www.spf.org/islandstudies/readings/b00005.html.

However, the Japanese government did not press its claim to the EEZ surrounding those islets until China began to conduct marine surveys in the waters within 200 nm of the islets in early 2004. At that time, Japan formally protested to China for not obtaining permission prior to

[63] Likewise, in 2012 the Japanese business federation Keidanren came out in support of preserving and developing Okinotorishima with the objective of strengthening its claim to an EEZ. "Keidanren Calls for Stronger Governance of EEZ, Islands," Jiji Press, July 10, 2012.

conducting such surveys as mandated by UNCLOS. As noted in chapter 8, China responded by stating that it did not recognize Okinotorishima as being entitled to an EEZ, citing UNCLOS Article 121(3). Taiwan and Korea joined China in this protest in coming months. In part due to these protests, the Commission on the Limits of the Continental Shelf indefinitely postponed the publication of its findings regarding Japan's claim to an extended continental shelf from Okinotorishima.[64] (See Figure 10.2.)

Seen in the context of Japan's conversion of the MSR regime for the purpose of exercising more security-related jurisdiction, as discussed in the previous section, the security-related implications of Japan's EEZ claim around Okinotorishima become evident.[65] As the map in Figure 10.3 illustrates, Okinotorishima is located in an area of the Pacific that is viewed as highly strategically salient by Japan, as it encompasses much of the so-called Tokyo-Guam-Taiwan Triangle, as well as by China, since it is located in the center of the open ocean between the so-called first and second island chains. This area could be particularly salient in a Taiwan conflict, as it encompasses the most direct route between Guam and Taiwan and China's most direct exit to the open Pacific Ocean.[66]

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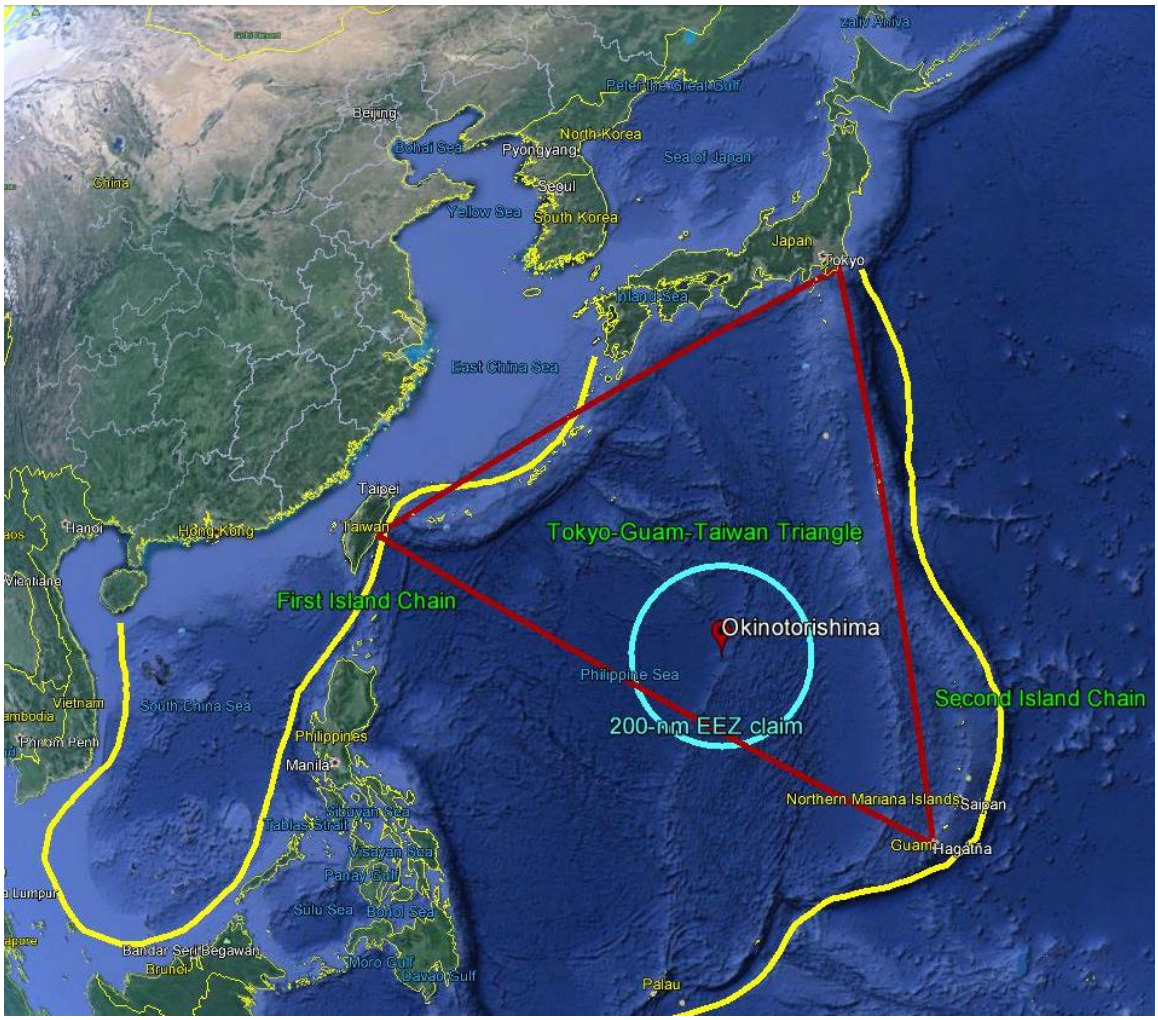
[64] United Nations Convention on the Law of the Sea, Commission on the Limits of the Continental Shelf, "Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Japan 12 November 2008," adopted by the commission on April 19, 2012, available at https://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/com_sumrec_jpn_fin.pdf; United Nations Convention on the Law of the Sea, Commission on the Limits of the Continental Shelf, "Progress of Work in the Commission on the Limits of the Continental Shelf," Statement by the Chairperson, April 30, 2012, CLCS/74, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/326/32/PDF/N1232632.pdf, pp. 4-5.

[65] There is evidence that these arguments may be somewhat of a smokescreen for more political or geostrategic motivations, since Japan's commerce and trade ministry, METI, has opposed the development schemes proposed by the transport ministry, MLIT, on the grounds that the marine resources in the vicinity of Okinotorishima are too costly to extract given the reef's remote location and the depth of the rare earth nodules. Ryuji Kudo, "With China in mind, Japan building port on distant atoll," *Asahi Shimbun AJW*, March 21, 2013, http://ajw.asahi.com/article/behind_news/politics/AJ201303210092, accessed December 10, 2015.

[66] This is particularly true since most of the ocean between Okinotorishima and the main home islands of Japan is already encompassed in Japanese EEZs extending from the Ogasawara Islands. Of course, Okinotorishima would only actually be strategically relevant in a conflict if (1) Japan were able to build the reef up into a military base of some sort that would enable it to extend its maritime domain awareness or power projection capability (and even then, it would be highly vulnerable and difficult to defend), or (2) Japan were able to justify efforts to exclude

Figure 10.3 Okinotorishima's Strategically Significant Location



Underscoring the irony of this claim, in 2014-15, Japan objected to China's land reclamation in the Spratly Islands and supported U.S. FONOPs that objected to any claim of a territorial sea extending from artificial islands built on low-tide elevations.[67] Then, the 2016

Chinese forces from Okinotorishima's EEZ on legal grounds—which, as discussed above, is not currently Japan's official policy.

[67] The legal status of low-tide elevations in UNCLOS is different from that of "rocks," which China claims applies to Okinotorishima. Specifically, in UNCLOS Article 13, low-tide elevations are defined as land features that are above water at low tide but not at high tide, and they are not entitled to even a territorial sea, much less an EEZ or continental shelf. Two of the islets at Okinotorishima are above water at high tide and thus are at a minimum entitled

award of an arbitral tribunal in the *Philippines v. China* case set a notably high bar for land features' eligibility for EEZs and continental shelves, deciding that none of the Spratly Islands met the definition of a fully entitled "island" under Article 121(3) of UNCLOS. Since dozens of those islands are significantly larger than Okinotorishima, and some even have fresh water sources and abundant flora and fauna, with a significant human presence, this ruling serves to further underscore the weakness of Japan's claim.[68] Nonetheless, rather than backing down on its claim, Japan has doubled down on its position, arguing that the tribunal's award in the *Philippines v. China* case is binding only on those two nations.[69] The economic and security rationales for Japan's claim around Okinotorishima, now bound up with nationalist significance among the Japanese public and key elites, are creating their own inertia.

Historic Bays, Waters, and Rights

Japan has not explicitly claimed historic bays, waters, or rights. However, some of its positions at UNCLOS III and its claims to internal waters are historic in character. Japan's initial positions in this vein at UNCLOS III were designed to preserve Japan's access to fishery resources in other countries' EEZs, even while its claim to internal waters in the Seto Inland Sea and other bays in its 1977 territorial sea law were designed to shore up its exclusive claims to

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to territorial seas. See chapter 8 for more details on China's views on the maritime entitlements of islands in the South China Sea.

[68] As noted in chapters 4 and 5, international legal scholars and national governments remain divided on the issue of how to define an island, with many expressing surprise at or opposition to the arbitral tribunal's unexpectedly rigorous standard. See Talmon 2017; Nordquist 2018. This was also evident in several interviews I conducted in 2017: Interview 1.4 with Mark Rosen, October 13, 2017, Arlington, VA; Interview 1.6 with Ashley Roach, October 16, 2017, Arlington, VA; Interview 2.21 with Kentaro Nishimoto, November 17, 2017, Tokyo, Japan.

However, the consensus among scholars nonetheless seems to be that Okinotorishima is such an extreme case as to be clearly unentitled to an EEZ or continental shelf, reasoning in part from an analogy to a similar claim to a small islet named Rockall that Britain dropped under protest in the 1990s. Rosen 2013; Song 2009.

[69] Mie Ayako, "Japan steps up rhetoric over Okinotorishima in wake of Hague ruling," *The Japan Times*, July 15, 2016, https://www.japantimes.co.jp/news/2016/07/15/national/politics-diplomacy/japan-steps-rhetoric-okinotorishima-wake-hague-ruling/#.XD3y3FxKhPY, accessed January 15, 2019.

jurisdiction and resources in its own waters. Japan's interpretations of the law on this issue have not shifted dramatically since UNCLOS. However, Tokyo did claim larger areas of internal waters, some of which were inspired by a traditional fishing grounds rationale, upon implementing a revised territorial sea law in 1996. That intermediate evolution largely represents Japan's consolidation of its initial interpretation upon ratifying UNCLOS, an interpretation that has not shifted since that time. Japan has maintained this interpretation despite objections to its baseline claims by its ally, the United States, which has conducted several freedom of navigation operations targeting what it deems as Japan's excessive straight baselines. This illustrates how Japan interprets international law in a way that protects key domestic constituencies—in this case, coastal fishermen—from maritime threats, while revealing the limitations of Japan's concerns with legitimizing itself in the U.S. view in every respect.

Initial Positions at UNCLOS III and Interpretation of UNCLOS

During the negotiations of UNCLOS III, Japan did not take a public position on the issue of historic bays or waters. However, it was a strong advocate of some of the provisions in UNCLOS that are designed to protect the traditional fishing rights of other states within waters newly placed under the jurisdiction of coastal states. This advocacy was one component of its broader effort to lobby for the convention to permit external user states' continued access to fisheries within the economic zone, a stance motivated by Japan's interest in preserving leeway for its large far seas fishing industry to continue operating off the coasts of other states. Japan generally made these arguments by relying on principles of high seas freedoms, maximum utilization, and conservation,[70] but some aspects of its arguments reflected a customary or traditional use principle. For example, in the Seabed Committee, Japan advocated that new

[70] See, for example, A/AC.138/SC.II/L.12, cited in Nandan and Rosenne 2003, vol. 2, 622.

fisheries regulations in any waters beyond the territorial sea should be designed "without causing any abrupt change in the present order of fishing which might result in disturbing the economic and social structures of States."[71] Similarly, Japan was a strong opponent of granting coastal states special jurisdiction over anadromous species such as salmon that spawn within their rivers and then migrated to the high seas. Ultimately, coastal states were granted such authority, but Japan was part of a group of states that negotiated a compromise solution in the final text that instructed coastal states to implement such regulations in cooperation with other states that traditionally fish those stocks in order to "minimiz[e] economic dislocation" in those states.[72] Aside from these provisions, Japan does not today claim "historic rights" to fishing.

In addition to these positions at UNCLOS III, Japan's 1977 Law on the Territorial Sea, passed during the negotiations when the convention's fate was still uncertain, also included an article that allowed for the drawing of straight baselines for the territorial sea across the mouths of bays and specifically designated Seto Naikai (the Seto Inland Sea) as "internal waters." Seto Naikai is the ocean area between the Japanese islands of Honshu, Shikoku, and Kyushu. On the northwest, it includes the Shimonoseki or Kanmon Strait between Honshu and Kyushu, connecting Tsushima Strait to the Seto Naikai. On the southwest, it includes Bungo Channel between Kyushu and Shikoku, and in the east, it includes Kii Channel between Honshu and Shikoku. (See Figure 10.7 in Appendix.) Closing lines for Seto Naikai were specified in Cabinet Order No. 210 of June 17, 1977, along with other closing lines for rivers and bays.[73] Neither the law nor the cabinet order made reference to the "historic" nature of Seto Naikai, which

[71] A/AC.138/SC.II/SR.43 (1972, mimeo.), at 57, cited in Ibid., vol. 2, 599.

[72] See A/AC.138/SC.II/L.12 (1972) and A/CONF.62/C.2/L.46 (1974), Ibid., vol. 2, 669, 671, 676, 678.

[73] The U.S. government objects to Japan's enclosure of the Seto Naikai within straight baselines. It also contends that the Shimonoseki and Bungo straits are straits used for international navigation and thus "this area in and between these two international straits should be governed by" the part of UNCLOS relevant to such straits. U.S. Department of State 1998, 9.

apparently has never been officially claimed as historic waters. However, as these waters were claimed by Japan as internal prior to the finalization of the UNCLOS text and its opening for signature, Japan does not recognize the right of innocent passage in those waters under Article 8(2) of UNCLOS.[74]

Evolution Since UNCLOS III

In a law passed in 1996 to amend the 1977 territorial sea law, Japan adopted a much more extensive system of straight baselines, citing the relevant provisions of UNCLOS as justification.[75] These baselines include 162 segments, 46 of which are longer than 24 nm, and the longest of which is 85.2 miles.[76] (See Figures 10.4-10.8 in the Appendix.) As noted above, these baselines are not archipelagic baselines, but rather regular straight baselines for the territorial sea drawn under provisions of Part II of UNCLOS. Several of these baselines serve to enclose bays within Japan's internal waters under the provisions of Article 10 of UNCLOS, which makes specific provision for baselines in bays. Japan apparently justifies the baselines enclosing its other bays and waters, such as the waters around the southwest side of Kyushu, under the more general provisions of Article 7, which allows states to apply straight baselines in areas "where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its

[74] Interview 2.3 with Kentaro Furuya, November 10, 2017, Tokyo, Japan. This is somewhat similar to how China does not recognize the right of innocent passage in the Qiongzhou Strait or Bohai Bay, as they had been declared as internal waters enclosed within straight baselines in the 1958 Declaration on the Territorial Sea prior to UNCLOS. See chapter 7.

[75] Government of Japan, Law on the Territorial Sea and the Contiguous Zone (Law No. 30 of 1977, as amended by Law No. 73 of 1996), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law.pdf; Enforcement Order of the Law on the Territorial Sea and the Contiguous Zone (Cabinet Order No. 210 of 1977, as amended by Cabinet Order No. 383 of 1993, and Cabinet Order No. 206 of 1996), in *Law of the Sea Bulletin* No. 35 (United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, New York, 1997), https://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE35.pdf, pp. 78-94.

[76] U.S. Department of State 1998.

immediate vicinity."[77] Japan has apparently never explicitly claimed any of these areas as historic bays or waters.[78]

The area enclosed within straight baselines that seems to be Japan's most expansive interpretation of the relevant law of the sea provisions is the area near Sado Island in the waters to the northwest of Honshu (see Figure 10.6 in Appendix). According to Kentaro Furuya, Japan put these baselines in place to protect the interests of small-scale coastal fishermen operating in that area.[79] Although Japan has not explicitly claimed this area as historic waters, its rationale for straight baselines in this area reflects a historical logic, as the baselines are drawn for the purposes of enclosing an area of traditional fishing grounds within Japan's internal waters. At the same time, in areas that were newly enclosed within straight baselines in 1996, including the waters near Sado Island, Japan adheres to Article 8(2) of UNCLOS, which allows ships to exercise the right of innocent passage in internal waters newly enclosed by straight baselines. This is a less restrictive approach than ordinary historic internal waters.[80]

Conclusion

This chapter has described the factors that influenced Japanese interpretations of the international law of the sea during the critical juncture of UNCLOS III, as well as the patterns of continuity and change in those interpretations over time. In so doing, this research has

[77] The United States government maintains that many of Japan's straight baselines are inconsistent with the law of the sea. For a detailed analysis of Japan's straight baselines according to U.S. interpretations of the provisions of UNCLOS, see Ibid. The State Department protested these baselines and the U.S. military conducted freedom of navigation operations against them in 1999, 2010, 2012, 2016, and 2018. See Odell 2019b.

[78] See Appendix in Symmons 2008, 301–04.

[79] Interview 2.3 with Kentaro Furuya, November 10, 2017, Tokyo, Japan.

[80] Interview 2.3 with Kentaro Furuya, November 10, 2017, Tokyo, Japan; Interview 2.6 with Yurika Ishii, November 14, 2017, Tokyo, Japan; Interview 2.9-15 with group of seven international maritime law experts in the Japan Maritime Self-Defense Force, November 16, 2017, Tokyo, Japan. In practice, it is likely that no foreign warships besides those of the United States have ever exercised this right in the relevant areas of Japan's internal waters since the declaration of these baselines in 1996.

underscored a dynamic highlighted by Richard Samuels in his account of Japanese grand strategy: Tokyo's security policy cannot be reduced to a story of domestic politics nor of great power politics. Rather, complex factors both international and domestic come into play in shaping its foreign policy.[81] This dynamic is plainly evident in Japan's relationship to the international law of the sea.

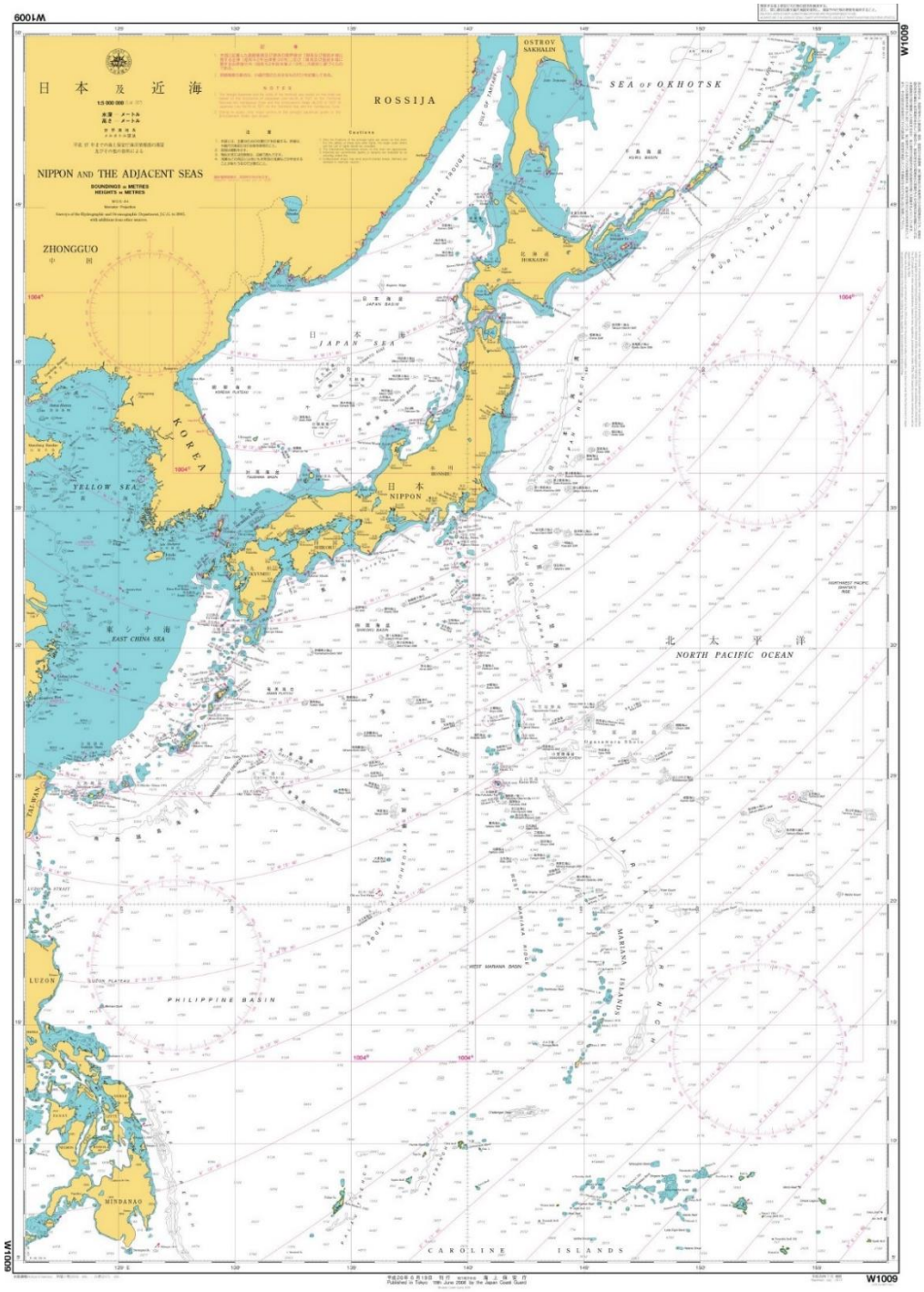
At the outset of the UNCLOS negotiations, Japan largely acted in a bloc with other maritime powers and was an outlier in its advocacy for drastically limiting coastal state jurisdiction over matters such as fishing, pollution, and marine scientific research. As the international context shifted, both in terms of other states' practice (especially those of the United States and Soviet Union) and in terms of Japan's domestic sectoral interests, Tokyo eventually accommodated itself to the UNCLOS compromise text, including the EEZ regime. It also adjusted its own domestic laws to claim more maritime jurisdiction in these areas, first in 1977 and then again upon ratifying UNCLOS in 1996. At the same time, Japan did not take a strong stand at UNCLOS III on issues related to innocent passage of warships in the territorial sea and transit passage in straits, nor on the issue of foreign military activities in the EEZ, reflecting its grand strategic ambivalence on these issues as a vulnerable island nation with several unfriendly neighbors. And in its 1977 territorial sea law, Japan sought to safeguard its secret deals with the United States regarding nuclear weapons on vessels in the territorial sea by insulating them from domestic sensitivities regarding its three non-nuclear principles. To do so, Tokyo innovated an approach that enabled it to exercise relatively maximal jurisdiction in its straits, even while appearing to be endorsing a uniquely "liberal" approach to its straits.

[81] Samuels 2007, chap. 1.

In the twenty-first century, Japan began to proactively embrace more expansive coastal state jurisdiction, both as a means of increasing its exclusive control over economic resources and in order to defend itself against North Korean threats and growing Chinese military power. It demanded that China and South Korea seek its permission before conducting marine scientific research in disputed waters, first and foremost as a means of managing the security challenges such activities posed. This represented an example of conversion, whereby Japan shifted from accepting coastal state jurisdiction over MSR in the EEZ in order to sign on to the overall package deal of UNCLOS to strongly embracing such jurisdiction in order to enhance its own security and defend its sovereignty. Meanwhile, as North Korea and China began conducting ever more surveillance and military activities in Japanese waters, Japan's attitude toward freedoms of the high seas for warships in the EEZs has drifted in a more ambivalent direction. Japan has not decried such activities as illegal, constrained in part by its self-image as a maritime power and its strategic alliance with the United States. However, it has protested them on political and security grounds, deliberately adopting a non-position on their legality in order to preserve the option of shifting toward a more restrictive stance in the future. Finally, Japan's expansive claim to an EEZ and extended continental shelf around Okinotorishima represents an example of layering. Although Japan opposed limitations on such claims at UNCLOS, its position was not adopted by the conference. Thus, Japan had to innovate novel arguments to justify its claim and mitigate the hypocrisy costs that attend its claims on the issue.

Appendix to Chapter 10: Maps of Japanese Islands, Baselines, and Territorial Sea Limits

Figure 10.4 Official Japan Coast Guard Map of Japan and the Adjacent Seas



Source: 日本及近海 (Nippon and the Adjacent Seas), Japan Coast Guard, June 19, 2008, Tokyo, W1009, Surveys of the Hydrographic and Oceanographic Department, J.C.G. to 2005, with additions from other sources.

Note: Figures 10.5-8 below are excerpted sections of this map

Figure 10.5 Hokkaido, Soya Strait, and Tsugaru Strait

Figure 10.6 Honshu (east/central portion) and Internal Waters near Sado Shima

Figure 10.7 Southwest Honshu, Shikoku, and Kyushu; Seto Inland Sea, Tsushima and Osumi Straits

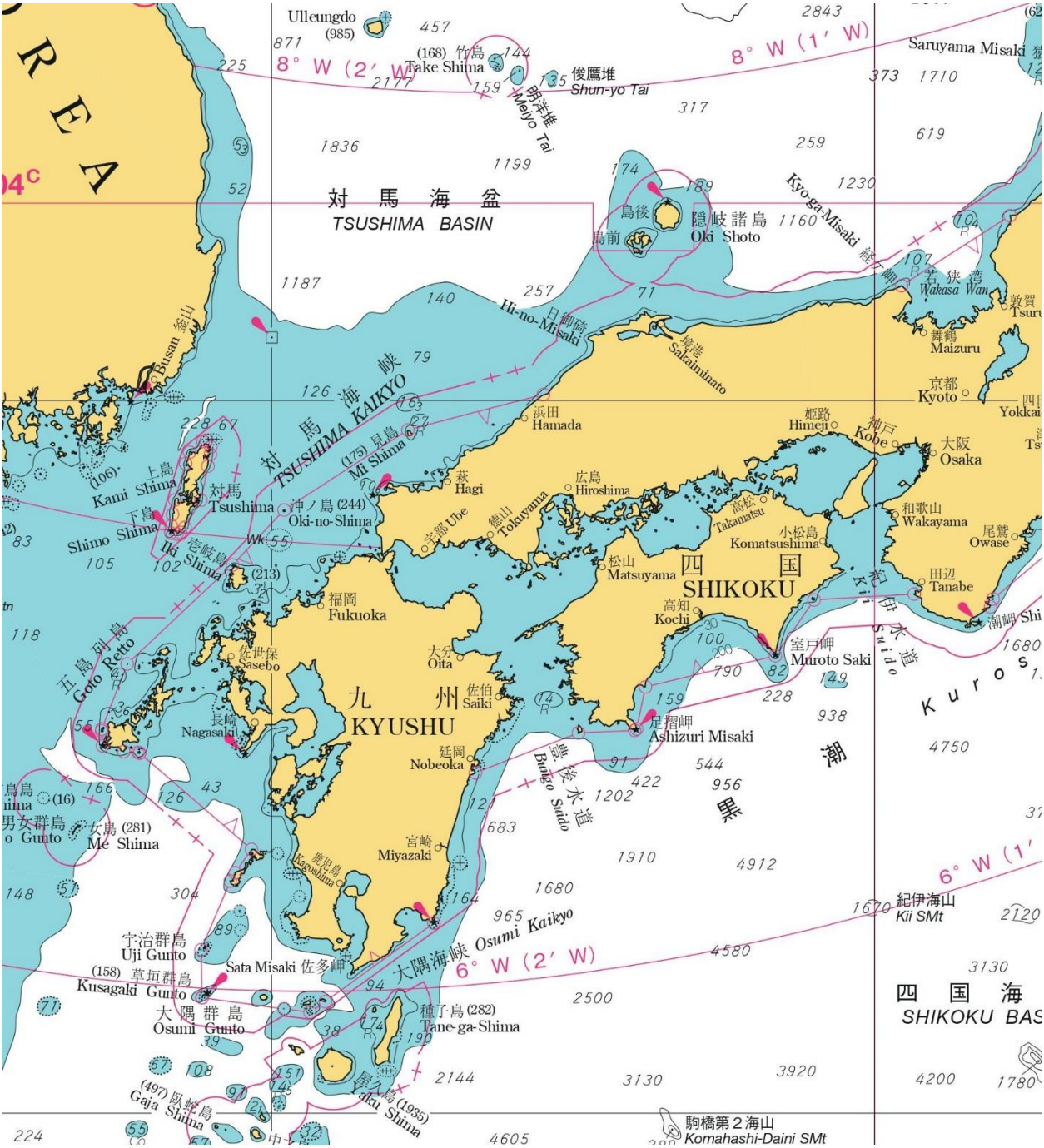
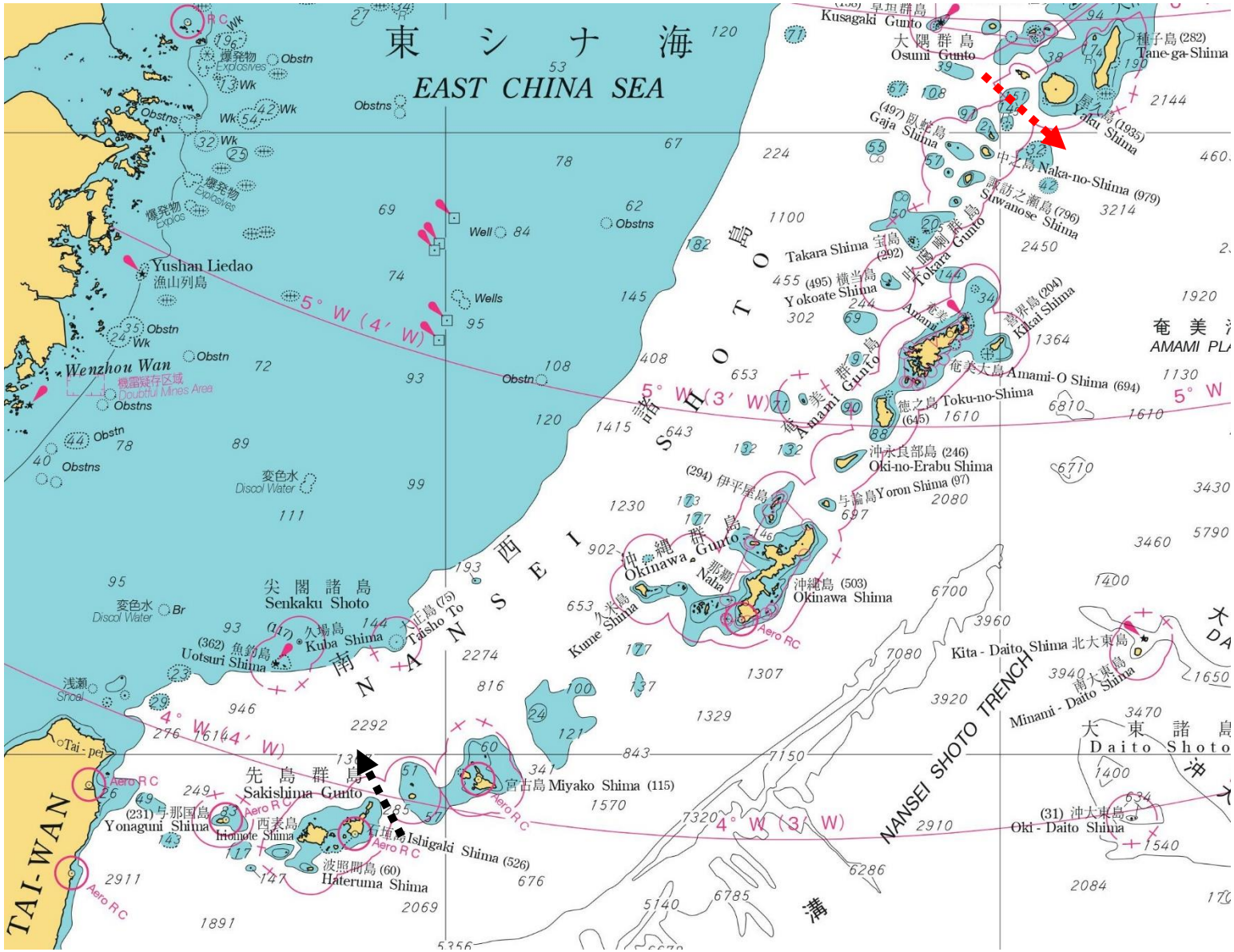


Figure 10.8 Ryukyu Islands, including Okinawa & Miyako Strait; PLAN Passages in Ishigaki (2004) & Tokara (2016) Straits



Chapter 11: Interpreting the Law of the Sea in a Time of Shifting Power

"International law did not descend from the sky to settle our conflicts or to provide a 'neutral framework' for our debates. Its rules and institutions, ideas and symbols, its cultural and professional mores bear the history of a divided and unjust world."

– Martti Koskenniemi, Foreword to Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017)

The twenty-first century is witnessing unprecedented transformations in the international order. Over the past several decades, a globally interconnected world composed largely of self-governing nation states has emerged for the first time in human history. This world is more integrated through trade, communications, and transportation linkages than ever before. Former global centers of economic and demographic gravity, such as China and India, are reemerging as powerful countries, surpassing most Western nations in terms of total economic size. More generally, countries throughout the Global South are rapidly developing and integrating more with one another. At the same time, states in western Europe, North America, and East Asia that were economically preeminent in the previous century remain powerful today. Similarly, many of the norms and institutions established in the twentieth century after World War II remain central to international order in the twenty-first century, even while rising nations seek to exercise more influence within those institutions and erect supplementary or alternative institutions in some areas.

In many ways, the maritime realm lies at the heart of this contemporary geopolitical and economic order. More than 80 percent of global merchandise trade by volume occurs through

shipping at sea.[1] Over a quarter of oil and gas production comes from offshore drilling.[2] The globe-spanning military power of the United States rests in large part upon its command of the commons, especially critical sea lines of communication.[3] Marine fisheries employ tens of millions of people and provide around 15 percent of global animal protein consumption,[4] while rising demand for rare earth minerals and renewable energy is stimulating growth in offshore mining and wind, solar, and hydrokinetic energy generation.[5] The economic activity central to this global order is also transforming the ocean environment, causing pollution, acidification, warming, sea ice melting, and sea level rise—changes that in turn affect human life and economic activity in coastal areas and beyond.[6]

At the same time, despite the significant agreements enshrined in the United Nations Convention on the Law of the Sea in the late twentieth century, the international regime governing the world's oceans remains partial and contested. Ambiguities in the law of the sea regarding coastal states' authority over foreign military activities in waters along their coasts, their rights to claim maritime space around islands, and the status of claims to historic rights in specific ocean areas have persisted as sites of conflict. As power balances shift, those conflicts are becoming more acute and central to maritime competition among great powers. This is

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[1] United Nations Conference on Trade and Development, *Review of Maritime Transport 2019* (United Nations, Geneva, October 2019), UNCTAD/RMT/2019, https://unctad.org/en/PublicationsLibrary/rmt2019_en.pdf, p. 4.

[2] International Energy Agency (IEA), *Offshore Energy Outlook 2018*, World Energy Outlook Special Report (IEA, Paris, May 2018), https://www.iea.org/reports/offshore-energy-outlook-2018.

[3] Posen 2003.

[4] The World Bank, "Blue Economy," Understanding Poverty – Topics (2020), https://www.worldbank.org/en/topic/oceans-fisheries-and-coastal-economies and World Health Organization, "3.5 Availability and consumption of fish," in "Nutrition Health Topics: 3. Global and regional food consumption patterns and trends" (n.d.), https://www.who.int/nutrition/topics/3_foodconsumption/en/index5.html.

[5] Hydrokinetic energy includes energy derived from ocean currents, tides, and waves.

[6] See Intergovernmental Panel on Climate Change (IPCC), "Summary for Policymakers," in H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (2019), https://www.ipcc.ch/srocc/chapter/summary-for-policymakers/.

evident first and foremost in the U.S.-China relationship, but it was also a salient source of conflict in the U.S.-USSR relationship during the Cold War. Beyond great power relations, differing interpretations of the law of the sea are also a growing source of tensions in the relations between China as a rising great power and its neighbors, especially Japan and several Southeast Asian states bordering the South China Sea.

In this concluding chapter, I will discuss how these dynamics are playing out in detail. In so doing, I will summarize and recapitulate key findings from earlier chapters regarding the geopolitical incentives and strategic legitimation concerns that shape patterns of continuity and evolution in states' interpretations of the law of the sea. The findings from the primary case study of the People's Republic of China (PRC) and the comparative case study of Japan in chapters 6 through 10 are also summarized in Table 11.1. This conclusion will draw connections across these cases, the shadow cases in chapter 5, and the broader historical narrative in chapters 3 and 4. These connections will help illustrate how trends in states' individual interpretations of the law of the sea could shape relations among great powers and between rising powers and their weaker neighbors in the twenty-first century. I will then conclude by discussing the implications of this analysis for theory and praxis related to maritime disputes, power transitions, and international law.

Table 11.1 Patterns and Drivers of Continuity and Evolution in Interpretations of the Law of the Sea in Primary and Comparative Case Studies

	China's Interpretations		**Japan's Interpretations**	
	Temporal Pattern	***Driver of Pattern***	***Temporal Pattern***	***Driver of Pattern***
Innocent passage in territorial sea	Continuity	threat perception & legitimacy concerns	Continuity	legitimacy concerns
Transit passage in straits	Layering	growth in naval power	Continuity	threat perception
Marine scientific research in EEZ	Continuity	legitimacy concerns	Conversion	threat perception
Foreign military activities in EEZ	Drift	growth in naval power	Drift	threat perception
Islands vs. rocks, Article 121(3)	Layering	growth in naval power	Basic Continuity plus Layering	threat perception
Unity of outlying archipelagoes	Basic Continuity plus Displacement	threat perception	Continuity	overseas interests (SLOC dependence)
Historic waters and rights	Layering and Displacement	threat perception	Mainly continuity	threat perception

Great Power Competition and Convergence over "Freedom of the Seas"

The concept of "freedom of the seas" has always been a discursive site of great power competition. However, its purpose and function in that competition has changed dramatically across the centuries.

"Freedom of the Seas" as a Normative Weapon of Rising Powers

For the first several hundred years of the concept's usage, it was wielded by rising European powers against established imperial rivals as a normative "weapon of the weak." As explained in chapter 3, the fledgling Dutch Republic at the turn of the seventeenth century first used the concept to justify its effort to usurp Portuguese monopoly control of trade in the East Indies. After using force to seize a fabulously valuable Portuguese carrack, the Dutch East Indies Company hired the publicist Hugo Grotius to defend its actions. Grotius drew on natural and Roman law, as well as the practices of Asian and Arab powers in the Indo-Pacific region, to furnish the idea of "the free sea" as the normative justification for Dutch actions. Once the Dutch had succeeded in their designs, however, England used the concept to protest the Dutch's own monopoly control and to secure a British toehold in Indo-Pacific trading and extraction networks. But upon gaining that foothold, Britain proceeded to establish a semi-monopoly of its own by suppressing competition from local Indian traders (which it dubbed "piracy"), even while rejecting a free seas doctrine in its near seas in favor of claims to sovereign dominion over fisheries and demands for homage to its naval power.

In the eighteenth century, weaker Western powers continued to use "freedom of the seas" as a normative weapon against stronger competitors. However, rather than wielding it to assault trade monopolies in distant colonized lands, they began brandishing it to defend neutral shipping in the waters of the Atlantic and its adjacent seas. This was most evident in how continental European powers and the United States sought to defend neutral shipping against British blockades and impressment. By accusing the Royal Navy of interfering with the free and open flow of commercial shipping, these weaker naval powers sought to portray such behavior as illegitimate. Britain long rejected the substance of these demands and resisted any limitations on its use of its hard-won naval mastery. Eventually, however, it partially acquiesced in the concept,

joining with other Western empires to embed the concept in a broader liberal normative architecture constructed to legitimize a new *laissez faire* economic model and expanded colonization and extraction in Africa and Asia.

Even while wielding this freedom of the seas concept, European powers began to claim sovereign jurisdiction over uniform belts of territorial waters along their shores. These claims were often based on their same desire to preserve rights of neutrality during recurring European wars. As explained in chapter 5, even as American naval power waxed in the early twentieth century, the United States prohibited warships from entering the territorial sea. It justified this prohibition on the grounds that sovereigns had a compelling need to protect their coastal inhabitants from the danger posed by warships operating close to shores. At the same time, Washington maintained its advocacy for freedom of the high seas—especially of neutral commercial shipping—beyond that coastal maritime belt. While advocacy for freedom of the high seas and claims to robust sovereignty in coastal waters may seem discordant, they were both weapons of the weak that served essentially the same purpose—to limit states' vulnerability to maritime threats from naval powers.

This "long-nineteenth-century" formulation of freedom of the seas began to wane amidst the great power conflagrations of the twentieth century. When World War I broke out, the United States again used the concept to assert its neutral rights and protest both British and German infringements upon American shipping. Britain, however, had once more turned its back on the principle, asserting its own "freedom" to apply naval force however and wherever it deemed fit. That conflict sounded the death knell for the long-nineteenth-century formulation of freedom of the seas, as Britain resoundingly rejected Woodrow Wilson's proposal to include the concept in the Treaty of Versailles and the Covenant of the League of Nations. In the ensuing decades and

especially in World War II, the United States finally updated its own interpretation of the concept in order to take full advantage of its own ascendant naval power. Even while maintaining a rhetorical obeisance to the concept in abstract terms, Washington joined Britain in rejecting the restrictions on naval force previously entailed in "freedom of the seas."

Post-World War II Repurposing of "Freedom of Navigation" by the U.S. and USSR

Despite the demise of the old vision of freedom of the seas, this concept continued to be a site of strenuous great power competition in the postwar era. As the United States emerged from World War II as the unrivaled maritime hegemon, it repurposed the concept to serve its new strategic purposes. Washington became alarmed at the potential operational limitations that could result from the efforts of the Soviet Union and Soviet-aligned states or other decolonizing nations to expand their territorial seas to 12 nm and prohibit foreign warships from entering those waters without consent. Such limitations could endanger the U.S. military's navigation and overflight in key straits and sea lines of communication spanning the globe, which operations were in turn central to both U.S. nuclear strategy and conventional military power projection. In order to counter those expanded claims to coastal state jurisdiction, the United States rejected them as illegitimate impositions on "freedom of navigation."

The Soviet Union, building on Russia's longstanding hedging on coastal state jurisdiction dating back to Tsarist rule, initially defended its expanded jurisdictional claims as legitimate protective measures, using logic not dissimilar to that previously employed by the United States to justify prohibitions on warships' entry into the territorial sea. Moscow argued that these measures were justified under customary international law, which provided for neither a specific normative limit of the territorial sea nor a right of innocent passage for foreign warships in territorial waters. However, as the Soviet Navy's own capacity grew, it began to second-guess

this stance as it confronted its own geographical vulnerability as a state with all of its major naval ports mostly located on semi-enclosed seas that could only be egressed through narrow straits bordered by other states. As a result, the USSR gradually altered its stance on "freedom of navigation" for warships in the territorial sea, collaborating directly with its rival, the United States, to champion rules that were more favorable to the free navigation of naval forces, as described in greater detail in chapter 5.

Recurring Pattern of Competition and Convergence

The history of great power relations regarding "freedom of the seas," despite the dramatic evolution in the meaning of that concept over time, thus exhibits a repeating pattern of competition followed by convergence. The Dutch Republic initially used the notion of the free sea as a tool to compete against the Portuguese Empire. However, its approach to maritime trade routes soon converged with the position of the Portuguese as it established monopoly control of its own, contradicting its past advocacy for the "free seas." England then used that concept to oppose the Dutch monopoly in the East Indies. However, as it established its own foothold in the Indo-Pacific region, England likewise embraced a monopolistic approach to maritime trade, while simultaneously claiming dominion over the seas near Britain's coasts. As the British Empire established its naval mastery around the turn of the nineteenth century, weaker European powers and the United States then sought to delegitimize British maritime hegemony by accusing it of infringing "freedom of the seas." A century later, the United States continued to leverage this principle against Britain and Germany alike during World War I in an effort to protect its neutral shipping. But it was not long before expanding U.S. naval power prompted the U.S. position to converge with that of Great Britain, as America rejected the past formulation of freedom of the seas as an impractical limitation on the use of its naval power.

Even after the United States dramatically repurposed freedom of the seas as a normative means to preserve operational freedoms for its own naval and air forces, this same pattern of competition and convergence unfolded in its relationship with the Soviet Union. Initially, Moscow rejected the new U.S. vision of freedom of navigation, arguing that rights of innocent passage in the territorial sea did not extend to warships and that more expansive territorial seas were justified on security grounds. But as Soviet naval power grew, its interpretation of "freedom of navigation" eventually converged with that of the United States. It was during this period that the standard geopolitical model laid out in chapter 2 began to hold most clearly: a country with a blue water navy is likely to favor "freedom of navigation" for its naval forces in the waters adjacent to other states' coasts, while countries with more limited naval forces that perceive threats from naval powers are likely to claim more jurisdiction over nearby waters.

Implications for U.S.-China Maritime Competition

This observed pattern raises an obvious question in application to twenty-first century great power relations at sea: Will the U.S.-China maritime competition over the meaning of "freedom of navigation" highlighted in the introductory chapter eventually give way to growing convergence in the interpretations of these states as China's naval power grows? This dissertation argues that such convergence has already begun. As detailed in chapter 7, as the People's Liberation Army (PLA) Navy has operated with ever more regularity in the waters along other states' coasts over the past decade, it has increasingly cited principles in the law of the sea to justify and defend those operations, layering new interpretations of the law of the sea on top of its past ambiguity or silence on those issues. Meanwhile, China's previous denunciations of U.S. military surveys and reconnaissance along its coasts as violations of international law have given way to objections on the grounds of scope, scale, frequency, and the

riskiness of such operations, rather than illegality. By declining to extend its past legal interpretations, China's attitude is thus drifting in a direction that favors greater military freedom of navigation. It is likely that such trends will continue as the PLA Navy's operations in seas further from its own coasts continue to expand.

However, this convergence is unlikely to be complete barring a more dramatic breakdown in the broader maritime order or shift in China's interstate social reference group. The significant transformation in the Soviet Union's interpretation of freedom of navigation that enabled its position to converge with that of the United States took place during a time of dramatic flux in the broader maritime regime. This enabled Moscow to escape some of the hypocrisy costs it would have accrued from such a significant reversal in times of greater normative stability. Furthermore, the shift in the Soviet Union's interpretations took place in the context of détente and perestroika, international and domestic developments that shifted the social reference group of the Soviet Union. In this period, the Soviet Union became less concerned with winning friends in the developing world and more eager to establish warmer relations with the United States and other Western powers, bolstering its legitimacy in their eyes. Moreover, even after shifting its legal interpretation on military activities at sea to largely align with that of Washington, Moscow continued to occasionally object to close-in intelligence gathering by U.S. vessels on security grounds and maintained its expansive historic waters claims in the Arctic.

In China's case, given the country's persistent sense of maritime threat, its attitude toward freedom of navigation is unlikely to fully converge with the U.S. position, unless the United States makes at least some movement in its direction. In particular, while China increasingly interprets the law of the sea in ways that uphold some aspects of military freedom of

navigation—such as transit passage through straits and normal military navigation and associated passive reconnaissance in the exclusive economic zone (EEZ)—and may continue moving in this direction over time, it is much less likely to accept freedom of navigation operations (FONOPs) in the waters close to its coasts, especially those of disputed islands. In fact, U.S. FONOPs may make China less likely to jettison its requirement for foreign warships to obtain permission before entering its territorial seas, as they will keep China's sense of maritime threat high. This high threat perception will thus continue to overpower the growing incentives China has to drop that requirement in order to render more legitimacy to its own warships' passage through other states' territorial seas, as the United States and Soviet Union did as their navies grew in the twentieth century. Contra the logic of the U.S. Freedom of Navigation Program, then, it is possible that if the United States were to cease such operations, the reduced threat China would perceive could make room for Beijing to change its attitudes toward the innocent passage of warships.

This would especially be the case if the broader U.S.-China relationship shifted in a much friendlier direction or if domestic changes in China were to change the PRC's attitude toward the United States. At present, China is increasingly being accused by U.S. observers of applying a double standard—restricting military activities in its own waters while expanding its military activities in other states' waters, including those of the United States. However, Beijing has not been particularly concerned about this legitimacy gap, due to China's treatment of the United States as a social "other." But if shifts in China's overall attitude toward and relationship with the United States were to materialize, Beijing's desire to demonstrate its legitimacy to Washington and other major powers may grow, such as happened during the détente and perestroika period in the Soviet Union. Of course, trends in U.S.-China relations should not

necessarily be expected to emulate those of the U.S.-Soviet relationship due to the dramatically different international and domestic contexts in the two cases.

In this process, China is subject to a legitimacy double-bind. On one hand, it bears growing hypocrisy costs due to the gap between its claims to jurisdiction over warships in its own waters, and its expanded naval operations in other states' waters. This applies pressure on China to either cease the behavior (unlikely given its growing overseas interests and capabilities) or change its domestic legal requirements to match its behavior. However, if China were to shift its longstanding interpretation on the issue of foreign warship passage through territorial seas, it would be vulnerable to accusations of inconsistency across time—changing its position as a matter of convenience when its own naval power grew—especially by weaker countries that oppose such passage.

China's Legitimacy Gaps in Maritime Asia and Potential Future Developments

Beyond the U.S.-China great power naval competition, China's interpretations of the law of the sea are further complicated by its relationships with its maritime neighbors. This is evident both in tensions over military navigation and marine scientific research (MSR) and in disputes over claims to sovereign rights and jurisdiction over marine resources.

Legal Interpretations of Military Navigation and Marine Scientific Research

In the first area, as China's naval operations and marine scientific research have expanded over the past decade, states such as Japan, the Philippines, and India are drawing upon more restrictive interpretations of the law of the sea to establish more of a security butter against the threat they perceive from Beijing. China has, in turn, reacted differently to the objections of these different countries regarding different issues.

In the case of Japan, PLA Navy vessels are now frequently transiting through Japanese straits and territorial seas and operating in Japan's contiguous zone and EEZ. China has also used its MSR fleet to deliberately exercise jurisdiction on the continental shelf in the East China Sea in disputed areas east of the median line and to protest Japan's claim to an EEZ around the remote Japanese reef of Okinotorishima. China's legal rationale for opposing Japan's claim based on Article 121(3) represented a new layer in China's interpretation of the law of the sea, adopted after both countries ratified the United Nations Convention on the Law of the Sea (UNCLOS) and Japan declared its EEZ. On occasions when MSR vessels have operated in disputed waters or PLA Navy vessels have passed through Japanese straits that Tokyo does not consider to be "straits used for international navigation," Japan has formally protested such passage. In other cases, when PLA Navy vessels have operated in waters adjacent to but outside Japan's territorial sea, the Japanese government has instead raised less formal political objections on security grounds, rather than legal grounds. Rather than being cowed by Japan's complaints, however, China has drawn upon rhetoric and legal interpretations that echo the positions of the United States to defend navigational freedoms for its military vessels against Japanese objections. To some extent, this reflects China's social positioning toward Japan: on military-related issues, China does not perceive itself to be in Japan's reference group, but instead views Japan as a threatening "other." However, China's legitimation strategy also reflects the fact that Japan's own social reference group is that of major maritime powers. China is, in essence, trying to appeal to the norms of Japan's own reference group to push back against its objections.

When confronted by the objections of states embedded in different social reference groups, China has been more deferential. This is evident in the way that Beijing has responded to objections from both the Philippines and India over the operations of Chinese MSR vessels in

their EEZs and continental shelves. It is also evident in the way that China responded to objections by the Philippines to PLA Navy operations through Philippine archipelagic waters in the Sibutu Passage. In these instances, when Manila and Delhi called attention to the legitimacy gap between China's behavior and its own requirements for prior consent for such operations, Beijing sought to minimize the hypocrisy costs by realigning its behavior with its past interpretations and those of other states in its social reference group. It did so as part of its effort to legitimize itself as a pro-social and benevolent naval power that would never seek to exercise "maritime hegemony" against weaker states but instead would respect their sovereignty.

It is also worth noting that even in Japanese waters, China's activities are not perfect analogues to those of the U.S. Navy. The PLA Navy apparently does not engage in the same type or level of surveillance and reconnaissance operations in other states' waters that the U.S. Navy habitually conducts. While it likely engages in passive intelligence gathering during its navigation through other states' waters, the PLA does not conduct frequent reconnaissance flights or military hydrographic surveys in other countries' undisputed EEZs. However, the activities of its marine scientific research fleet are now more expansive and coordinated than U.S. research efforts. Although performed by civilian vessels, such MSR would have dual-use functionality and would most likely be shared with the PLA Navy, even if it was not being conducted for purely military purposes.

Legal Interpretations Regarding Maritime Space and Resources

In the area of China's claims to rights and jurisdiction over maritime space and resources in the South China Sea, China's interpretations of the law of the sea have long been designed to support its expansive claims. However, China's precise initial interpretations of relevant issues in the law of the sea, such as the maritime entitlements of islands and the issue of historic waters

and traditional rights, were unclear or unstated at the conclusion of the Third United Nations Conference on the Law of the Sea (UNCLOS III). The inconsistencies that resulted from this position of ambiguity placed pressure on China to clarify its interpretation. Thus, over the past decade in particular, China has gradually made its interpretations explicit. As it has done so, Beijing has elevated some sources of international law, such as "general international law," customary international law, and intertemporal law, over other sources (namely, UNCLOS), in a process of supplementary displacement.

These expansive interpretations have been driven by China's acute perception of threat to its "maritime rights and interests" in the region. Such a threat perception may seem incongruous with China's increasingly dominant power in the South China Sea vis-à-vis other claimants. However, China has nurtured a sense of victimization in its historical narrative about the disputes. As explained in chapter 6, China believes its longstanding position of legitimate sovereignty to island territories and broader jurisdiction in the South China Sea has been a victim of provocative revisionism by other claimants in the South China Sea, especially Vietnam and the Philippines, and of meddling by outside powers such as Japan, France, and the United States. This sense inspired the PRC to explicitly treat offshore island groups in the South China Sea as unitary archipelagoes as early as its 1958 territorial sea declaration and in its initial working paper at the outset of preparations for UNCLOS III. Such a claim was designed to bolster China's claims not only to disputed island territories, but also to conceptualize those territories as a more cohesive and substantial basis for claiming maritime entitlements, even though the individual islands themselves were generally small and uninhabited.

During the internal process of debating the ratification of UNCLOS, China also identified the convention itself as a potential threat to its claims in the region. This was based on the fact

that UNCLOS enabled coastal states surrounding the South China Sea to claim 200 nm EEZs that extended far enough to envelope certain island features in the Spratly Islands that were far beyond 200 nm from China's undisputed territory in Hainan or the mainland. To mitigate this risk, China made a new jurisdictional claim to "historic rights," layering this claim on top of its past strong support for the EEZ regime at UNCLOS III. Unilateral acts by other claimant states to bolster their legal standing, symbolic political claims, or physical presence in the year since ratification have further exacerbated China's sense of vulnerability and victimhood in the disputes. For example, submissions by Vietnam and Malaysia to a UN commission claiming extended continental shelves in the South China Sea in 2009 prompted China to submit a note verbale to the UN Secretary General in 2009 that attached the notorious dotted-line map in the South China Sea, followed by notes verbale that began adopting verbiage that explicitly referred to the Nansha Islands as a singular unit. The arbitration case initiated by the Philippines in 2013 dramatically enhanced this sense of threat, leading China to double down on its claims to expansive jurisdiction, explicitly claiming historic rights in the South China Sea and claiming maritime entitlements from island groups as a whole.

Legitimacy Gaps, Hypocrisy Costs, and Potential for Compromise

China's interpretations of the law of the sea in disputes with its neighbors have incurred hypocrisy costs for China across multiple dimensions. There is a temporal legitimacy gap between China's initial strong pro-EEZ stance at UNCLOS III and its subsequent claims to historic rights in other countries' EEZs, where coastal states' rights are meant to be almost completely exclusive, with some limited allowance for traditional fishing activities largely at the coastal states' discretion. There is a spatial legitimacy gap between its claims to expansive rights to resources in near seas and its efforts to limit other states' resource claims, such as in the case

of its opposition to Japan's claim to an EEZ and continental shelf around Okinotorishima. More generally, as China's fishing fleet has become the largest in the world, conducting operations as far afield as the waters in the 100 nm gap between Ecuador's mainland territory and Galapagos islands, its exploitation of fishery resources afar coupled with its jealousy for fishery resources in its near seas makes its claims seem nonreciprocal. China also incurred significant hypocrisy costs for refusing to participate in the arbitration case initiated by the Philippines in 2013 and then rejecting its results.[7]

Most of China's efforts to mitigate the legitimacy gaps in its maritime claims through legal argumentation in fact have served to call attention to the legitimacy gap by underscoring the expansiveness of China's claims at the direct expense of other states' rights and jurisdiction. This is particularly egregious in the case of China's historic rights claim. China's insistence on the long historic foundation for its claims in the South China Sea, punctuated by illegal imperialist usurpation, ignores the perspectives of Southeast Asian nations, which were even more thoroughly subjected to Western and Japanese colonization than China. China's discounting of Southeast Asian nations' experiences in this regard undermines its broader claim to be an anti-imperialist great power that will never seek hegemony. In addition, China's nationalist telling of history betrays a certain Sino-centric disregard for the past power and autonomy of Southeast Asian states, which in some cases were more robust naval powers and maritime traders than China, as described in chapter 3.

[7] In addition, China's various actions at sea and its official legal interpretations at times exhibit some possible inconsistencies, suggesting a failure of coordination among different actors. Examples included possible lack of coordination between the Chinese Academy of Science's MSR fleet and the Ministry of Foreign Affairs (MFA), evident in late 2019 MSR activities in India's EEZ, or between China's state-owned oil company CNOOC and legal advisers in the MFA or State Oceanic Administration (SOA), evident in CNOOC's oil blocks that seem to be based on a dotted line/historic rights logic that is at odds with how the MFA and SOA have framed China's claims.

These legitimacy gaps are weighing down China's rise, subjecting it to accusations of "revisionism" and "bullying." They make China's depiction of itself as a benevolent provider of maritime public goods such as counterpiracy, environmental protection, and natural disaster response seem disingenuous. Within Southeast Asia, China's hypocrisy costs generate resistance, anger, and opposition.[8] They also feed into the anxieties and confrontational strategies of great powers outside of East and Southeast Asia, including the United States, European nations, Australia, and India. This, in turn, exacerbates China's sense of victimhood and vulnerability, contributing to a vicious cycle.

Notwithstanding these negative dynamics, China is also finding some ways to use diplomacy, compromise, and positive incentives, as opposed to legal argumentation, to more effectively counter or outweigh the hypocrisy costs it has incurred. For example, after the tribunal issued its award in the *Philippines v. China* case, China took advantage of a new, friendlier administration in Manila to build a more cooperative relationship on a different track, separate from the legal dispute. Returning to a version of Deng Xiaoping's dictum of shelving disputes and pursuing joint development, Xi Jinping has negotiated an agreement with Philippine president Rodrigo Duterte for joint development of oil and gas resources in disputed areas of the South China Sea. More generally, Beijing often affirms its openness to negotiation and compromise in the disputes, especially in the Spratly Islands (less so in the Paracels) and in various resource-related conflicts, and continues to engage in negotiations with the Association of Southeast Asian Nations (ASEAN) over a binding Code of Conduct in the region.

In addition, the "Maritime Silk Road" investments that form part of China's Belt and Road Initiative are also helping to strengthen its relationships with Southeast Asian nations,

[8] Interview 6.8 with Chinese scholar of Southeast Asia and South China Sea issues, July 16, 2019, Beijing, China.

deepening their economic ties and blunting their geopolitical hostility in the South China Sea. As a result, Southeast Asian nations have adopted a careful balancing act in their approach to the South China Sea disputes. On one hand, ASEAN has shown increasing willingness to band together to call for the South China Sea disputes to be resolved on the basis of UNCLOS—an implicit pushback on China's claim to historic rights and unitary archipelagoes on the basis of general or customary law.[9] On the other hand, Southeast Asian countries distanced themselves from the U.S. State Department's statement in July 2020 that condemned China's claims, suggesting they do not want to openly antagonize China or be forced into a position of choosing sides between Washington and Beijing.[10] Perhaps most tellingly, despite building up some naval, coast guard, and maritime domain awareness capacity, most Southeast Asian nations are not engaging in significant hard balancing against Beijing.[11]

As China's power advantage in the South China Sea continues to grow, it is possible that Beijing may become more willing to make substantive compromises in the disputes over territory and maritime jurisdiction in the South China Sea. Taylor Fravel's research on PRC behavior in its territorial disputes found that China has tended to compromise more in territorial disputes when it is in a stronger position on the ground. However, Fravel also observed that China is more likely to escalate a dispute when it feels its position is being challenged or

[9] "Cohesive and Responsive ASEAN," Chairman's Statement of the 36th ASEAN Summit, June 26, 2020, https://asean.org/storage/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf. See also Jim Gomez, "ASEAN takes position vs China's vast historical sea claims," Associated Press, June 27, 2020, https://apnews.com/094a46218f808f6943e326200e6452a7, accessed September 2, 2020.

[10] Richard Javad Heydarian, "US fails to build regional coalition against China," *Asia Times*, August 7, 2020, https://asiatimes.com/2020/08/us-fails-to-build-regional-coalition-against-china, accessed September 2, 2020. For the U.S. statement referenced in this article, see U.S. Secretary of State Mike Pompeo, "U.S. Position on Maritime Claims in the South China Sea," Press Statement, July 13, 2020, https://www.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea. See also remarks delivered the next day by Assistant Secretary of State David R. Stilwell, "The South China Sea, Southeast Asia's Patrimony, and Everybody's Own Backyard," July 14, 2020, https://www.state.gov/the-south-china-sea-southeast-asias-patrimony-and-everybodys-own-backyard.

[11] Kang 2017; Karim and Chairil 2016.

weakened.[12] This is consistent with my argument about the centrality of China's threat perceptions in motivating its expansive claims. As a result, even if China's power advantage grows, Beijing is probably only likely to engage in genuine compromise if its threat perceptions decline. This is unlikely to happen if the United States or other major powers not party to the disputes continue to intervene in the disputes and challenge the legitimacy of China's claims. Likewise, if other countries in the region press their claims unilaterally, including through arbitration in which China refuses to participate (as Vietnam is reportedly preparing to do), then China's threat perceptions will remain high, notwithstanding its hard power advantage.[13]

Asian States' Preference for Thicker Coastal State Jurisdiction

Finally, it is important to note that the resistance among China's neighbors to Beijing's interpretations of the law of the sea does not imply a concomitant concurrence with the interpretations of the United States. On the contrary, as described in the cross-national analysis in chapter 5, virtually all littoral Asian countries—including Japan, South Korea, North Korea, China, Taiwan, the Philippines, Vietnam, Cambodia, Malaysia, Indonesia, Thailand, Myanmar, India, Pakistan, Bangladesh, and Sri Lanka—adopt interpretations of the law of the sea that diverge from the standards that the United States has identified as central to freedom of navigation. Even Australia has espoused interpretations contrary to those of the United States, treating one of its outlying archipelagoes as a unit enclosed by straight baselines and imposing compulsory pilotage regimes in sensitive sea areas on environmental grounds.

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[12] Fravel 2008.

[13] Laura Zhou, "South China Sea: if Vietnam files suit, China may take part in legal proceedings," *South China Morning Post*, June 20, 2020, https://www.scmp.com/news/china/diplomacy/article/3089806/south-china-sea-if-vietnam-files-suit-china-may-take-part, accessed September 2, 2020. See also Mark J. Valencia, "Should Vietnam Take China To Arbitration Over the South China Sea?" *Lawfare*, August 18, 2020, https://www.lawfareblog.com/should-vietnam-take-china-arbitration-over-south-china-sea, accessed September 2, 2020.

This is perhaps most prominent in the case of Japan. As explained in the preceding chapter, although Japan is sometimes seen as an outlier in this regard, an Asian state uniquely committed to freedom of navigation, this narrative belies a much more complex reality. Japan has long interpreted the law of the sea in ways that seek to apply a security buffer against the operations of military vessels and aircraft within its straits. In fact, as power balances shift and China's military power grows, Japan is deliberately maintaining room to espouse more restrictive interpretations of the law of the sea related to passage in straits and foreign military activities in the EEZ in the future if necessary. Japan has been constrained from shifting overtly to a more expansive stance in part by its desire to maintain legitimacy vis-à-vis the United States, which places a high premium on military freedom of navigation. However, this constraint may not operate indefinitely, especially if Japan perceives a need to bolster its independent defensive capacity in response to a drawdown in the U.S. military presence in Asia.

More generally, as time goes on, Asian states may assert more jurisdiction over foreign military activities along their coasts in order to manage the risks of multipolar military competition and bolster their security and neutrality amidst growing U.S.-China great power rivalry. Such an approach to the law of the sea could be the legal and normative complements to a strategy of mutual denial. Although such efforts run counter to the current preferences of the United States, the future of America's own strategy in the region is itself uncertain. As the United States reevaluates its interests in Asia in an era of shifting relative power, it may find that a defense-dominant balance of power in the region—and the military navigational norms that accompany that posture—serves its interests as well.[14] If so, it may shift toward endorsing at least compromise norms on military activities at sea, such as the Guidelines for Navigation and

[14] On mutual denial strategies and the potential for a defense-dominant military balance in the Western Pacific, see Beckley 2017; Gholz 2016; Heginbotham and Heim 2015; Gholz, Friedman, and Gjoza 2019.

Overflight in the Exclusive Economic Zone published in 2005 by the EEZ Group 21, a group of experts from several countries in the Indo-Pacific, including Japan, China, and the United States, among others, convened by a Japanese think tank.[15] Although this effort lost traction amidst the heightened maritime tensions of the past decade, it could provide the basis for future discussion on how states' conflicting interests in security and military access at sea could be reconciled.

Implications for Theory and Praxis

This dissertation has illustrated how states interpret the law of the sea in ways that reflect both their geopolitical interests and their desire for legitimacy in the eyes of other states. The principal implication of this basic argument is that states ought to be aware of how their divergent interpretations of the law of the sea are grounded in their divergent interests. If states lack such strategic empathy, they may, in the words of Ken Booth, dismiss differing viewpoints as illegitimate and see them as "evil, rather than simply different."[16]

Such strategic empathy is especially essential in the context of disagreements over how to interpret sensitive aspects of the law of the sea that are bound up in military competition and disputes over maritime resources and boundaries. As Stacie Goddard argues in her analysis of territorial disputes in Jerusalem and Northern Ireland,[17] when political actors employ legitimation strategies that emphasize the indisputable moral rectitude of their claims, they tend to increase the indivisibility of a dispute, making peaceful compromise more difficult. Likewise, if states

[15] EEZ Group 21 2005. When these guidelines "met with some criticism due to concerns that they restricted unduly the freedoms of navigation and overflight available in an EEZ," the Ocean Policy Research Foundation, the Japanese think tank that had convened the original EEZ Group 21, issued a new set of revised principles in 2013, developed in consultation with several members of the original group. The goal—as yet unsuccessful—of these revised principles was to address those outstanding concerns in order to gain more support for the principles among states and in regional intergovernmental forums. Ocean Policy Research Foundation 2013. See also Bateman 2006; Akimoto 2013.

[16] Booth 1985, 17. See full quotation in the preface of this dissertation.

[17] Goddard 2010.

treat their interpretations of the international law of the sea as nonnegotiable legal-moral absolutes, they risk increasing the indivisibility of maritime disputes.

These dynamics are evident in the ways both the United States and China approach the law of the sea. When the United States demonizes any deviation from its interpretation of freedom of navigation as "excessive" or an offense against the "rules-based international order," it risks treating its interpretation of the law as an end unto itself—a "maritime theology," in Booth's terms. This can lead to an obstinate determination to defend a particular vision of freedom of navigation, even at great cost and risk and even if U.S. interests could be protected through other means, such as negotiation and bargaining. Conversely, China's conviction of the inviolability of its "maritime rights and interests," and its attachment to the legal interpretations it uses to defend them, represents a maritime theology of a different sort. It nurtures and exacerbates Beijing's sense of resentment and victimhood in maritime disputes, which may make it less willing to entertain compromise that would be more conducive to its interests on balance than a posture of moralistic inflexibility.

In a world of shifting relative power, these dynamics are proving particularly fraught. As China's power in its near seas grows, its confrontations with its neighbors over maritime disputes and the law of the sea are endangering its aspirations to rise peacefully and be seen as "a new type of great power."[18] China's use of its increasingly robust naval and maritime law enforcement capacity to enforce its claims to maritime space and resources in the South and East China Seas is leading to structural tension with other states that make rival claims. In a bid to bolster the legitimacy of its position in those disputes, Beijing has interpreted the law of the sea

[18] During the early years of his tenure as president, Xi Jinping advocated a concept of a "new type of great power relations" (*xinxing daguo guanxi*, 新型大国关系), designed especially to envision a positive model of U.S.-China relations during a time of power transition. When the concept failed to gain lasting traction in the United States, however, China eventually stopped referring to it.

in ways that justify its expansive claims. Ironically, however, by underscoring how China's expansive claims come at the direct expense of the maritime space and resources of its neighbors, these legal interpretations have widened rather than narrowed the legitimacy gap in Beijing's position, incurring even greater hypocrisy costs.

China's rising maritime power is also leading it to interpret the law of the sea in ways that favor norms of limited coastal jurisdiction with regard to navigation and marine scientific research, standing at odds with some of its own more expansive jurisdictional claims. For example, China has used its growing marine scientific research fleet not only to assert its jurisdiction in disputed waters, but also to protest Japan's claim to an EEZ around the remote and undisputed Japanese island of Okinotorishima. Littoral states in the South China Sea such as Indonesia and the Philippines have seized upon this interpretation to accuse China of hypocritically opposing Japan's expansive claims even while making expansive claims to resources around small islands in the South China Sea. Similarly, China's own growing maritime power is leading it to soft-pedal some of its past condemnations of great power maritime hegemony, instead asserting the principle of freedom of navigation to defend its expanding naval operations in other states' waters. This has invited accusations of hypocrisy from nations whose waters Beijing is traversing. All these various legitimacy gaps make China's neighbors wary of the downsides of a *Pax Sinica* and more eager to entangle Washington, the region's erstwhile hegemon, in their disputes with Beijing.

Meanwhile, as America's power in the Western Pacific declines relative to China's, the contradictions in its own approach to the law of the sea underscore the hypocrisy embedded in its grand strategy. This is especially evident in how the United States criticizes China's claims in the South China Sea. Washington excoriates Beijing for violating a convention (UNCLOS) that the

United States has refused to ratify, attacks Beijing for not participating in an international arbitration process to which Washington itself would never submit, and endorses the tribunal's award in that arbitration despite the fact that America's own claims to maritime jurisdiction around remote islands in the Pacific would not pass muster according to the award's standards. More generally, U.S. military forces conduct freedom of navigation operations targeting what the U.S. government deems to be the "excessive" maritime claims of nearly every single coastal state along the Indo-Pacific littorals, including several U.S. allies and partners, revealing the unilateral and military-centric nature of the U.S. interpretation of "freedom of navigation." Washington also increasingly uses such FONOPs to police the status of territorial disputes over remote and largely uninhabited islands in which America has little stake and in which it purports to not take a side. Perhaps most dangerously, the U.S. military uses its interpretation of freedom of navigation to justify its frequent, close-in reconnaissance operations near Chinese naval bases in support of preparations to implement offensive operational strategies in a hypothetical war against China and in service of its first-use nuclear policy that seeks to undermine Beijing's nuclear retaliatory capability. These strategies and policies risk sparking inadvertent escalation and precipitating maritime crises and accidents.

In these ways, the law of the sea, rather than acting as a mechanism for ensuring predictability and preventing conflict, is increasingly functioning as a site of contention and zero-sum jockeying for legitimacy among the United States, China, and other states along the Asian littorals. This is occurring at a time when the need for international collaboration in ocean governance, especially among the great powers, is greater than ever. Climate change, global economic transformations, and evolving technologies are contributing to worsening scarcity in marine resources, growing congestion in sea lanes, exacerbated environmental damage, and the

emergence of new shipping routes as sea ice melts. These developments require strong coordination among states to prevent irreversible environmental damage, promote the functioning of the global economy, and mitigate international conflict.

Counterintuitively, states must recognize the incomplete, partial, and contested nature of the maritime legal regime in order to ensure that the law of the sea acts not as a site of conflict but instead as a facilitator of such coordination. As Anthea Roberts writes, if diplomats and international lawyers are "more humble, open, and reflexive" in their approach to international law, it can become a site for exchanging views and understanding the interests of other states.[19] This exchange can then provide a foundation for the only sustainable and peaceful means of resolving disputes, diplomacy attuned to political reality. Such realistic diplomacy may in turn require states to be flexible with their legal claims in the process of negotiating mutually acceptable compromise. Through such an approach, while international law cannot replace politics, it can aid a productive political process. If states instead expect the law to solve their political problems for them or, even worse, wield the law as a tool for self-justification, blaming, or coercion, peaceful resolution of disputes will remain beyond reach.

[19] Roberts 2017, 325.

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[845] UNCLOS III records have a document identifier that begins with A/CONF.62. For documents and summary records of the plenary meetings, that preface is followed by XX for plenary documents, L.XX for letters, or SR.XX for summary records (where XX represents a chronological number). For documents and summary records of the committee meetings, the preface is followed by BUR (for the General Committee), C.1, C.2, or C.3 (for the First, Second, and Third Committees, respectively), and then by L.XX for letters or SR.XX for summary records. Citations in the dissertation of UNCLOS III records and documents often include only the document identifier. These documents are available at https://legal.un.org/diplomaticconferences/1973_los, unless otherwise noted.

[846] Notes verbales from the People's Republic of China include a document number formatted as CML/XX/YYYY, where YYYY is the year the note was sent and XX is the sequential number of the note in that year.

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Maritime Claims Reference Manual, Representative for Ocean Policy Affairs, U.S. Department of Defense, Instruction S-2005.01, Freedom of Navigation (FON) Program (U), October 20, 2014.

List of Research Interviews

No.	Date	Medium / Location	Name / Background[847]
1.1-10	***Interviews with U.S. Experts***		
1.1	12/15/2015	Telephone	Jonathan Odom
1.2	12/15/2015	Telephone	Mike McDevitt
1.3	10/4/2017	Telephone	Jonathan Odom
1.4	10/13/2017	Arlington, VA	Mark Rosen
1.5	10/13/2017	Washington, DC	[off the record]
1.6	10/16/2017	Arlington, VA	Ashley Roach
1.7	10/18/2017	United States	[off the record]
1.8	10/18/2017	United States	[off the record]
1.9	12/19/2017	Telephone	Paul Reichler
1.10	5/29/2019	Cambridge, MA	Scott Swift
2.1-22	***Interviews with Japanese Experts***		
2.1	10/18/2017	United States	[off the record]
2.2	11/9/2017	Tokyo, Japan	Masahiro AKIYAMA
2.3	11/10/2017	Tokyo, Japan	Kentaro FURUYA
2.4	11/10/2017	Tokyo, Japan	Mariko KAWANO
2.5	11/13/2017	Tokyo, Japan	Kazumine AKIMOTO
2.6	11/14/2017	Tokyo, Japan	Yurika ISHII
2.7	11/14/2017	Tokyo, Japan	Hideaki KANEDA
2.8	11/15/2017	Tokyo, Japan	Atsushi SUNAMI
2.9-15	11/16/2017	Tokyo, Japan	Group of 7 international maritime law experts in the Japan Maritime Self-Defense Force
2.16	11/16/2017	Tokyo, Japan	Masufumi IIDA
2.17	11/17/2017	Tokyo, Japan	[off the record]
2.18	11/17/2017	Tokyo, Japan	Senior Japanese Ministry of Foreign Affairs official
2.19	11/17/2017	Tokyo, Japan	Japanese Ministry of Foreign Affairs official
2.20	11/17/2017	Tokyo, Japan	Shunji YANAI
2.21	11/17/2017	Tokyo, Japan	Kentaro NISHIMITO
2.22	11/20/2017	Tokyo, Japan	Tetsuo KOTANI

[847] For on-the-record interviews, I include the interviewee's name; for on-background interviews, I include the interviewee's background (the wording of which was stipulated by the interviewee in most cases); and for off-the-record interviews, I omit name and background details and instead include the label "[off the record]."

3.1-9	***Interviews with Chilean Experts***		
3.1	5/25/2018	Santiago, Chile	[off the record]
3.2	6/1/2018	Santiago, Chile	[off the record]
3.3	6/5/2018	Santiago, Chile	Joaquín Fermandois
3.4	6/6/2018	Santiago, Chile	Alberto van Klaveren
3.5	6/7/2018	Santiago, Chile	Francisco Orrego Vicuña
3.6	6/13/2018	Telephone	María Teresa Infante
3.7	6/21/2018	Santiago, Chile	Fernando Zegers
3.8	7/9/2018	Santiago, Chile	[off the record]
3.9	8/24/2018	Viña del Mar, Chile	Félix García Vargas
4.1-6	***Interviews with Peruvian Experts***		
4.1-2	6/25/2018	Lima, Peru	[two interviewees, off the record]
4.3	6/26/2018	Lima, Peru	Pablo Moscoso de la Cuba
4.4	6/27/2018	Lima, Peru	Gonzalo Romero
4.5	6/28/2018	Lima, Peru	[off the record]
4.6	7/10/2018	Santiago, Chile	Beatriz Ramacciotti
5.1-12	***Interviews with Indian Experts***		
5.1	3/6/2019	New Delhi, India	Manoj Joshi
5.2	3/7/2019	New Delhi, India	Vinai Kumar Singh
5.3	3/8/2019	New Delhi, India	Sarabjeet S Parmar
5.4	3/8/2019	New Delhi, India	O.P. Sharma
5.5	3/11/2019	New Delhi, India	Narinder Singh
5.6	3/12/2019	New Delhi, India	H.P. Rajan
5.7	3/13/2019	New Delhi, India	Anup Singh
5.8	3/14/2019	New Delhi, India	Abhijit Singh
5.9	3/15/2019	New Delhi, India	Himanil Raina
5.10	3/15/2019	New Delhi, India	Gurpreet S Khurana
5.11	3/15/2019	New Delhi, India	Shekhar Sinha
5.12	3/22/2019	Telephone	Deepak Shetty
6.1-24	***Interviews with Chinese Experts***		
6.1	6/25/2019	Beijing, China	Zha Daojiong
6.2	7/2/2019	Beijing, China	Chinese scholar of law of the sea issues
6.3	7/3/2019	Beijing, China	Chinese scholar of international law
6.4	7/9/2019	Beijing, China	Liu Nanlai
6.5a-b	7/11/2019 7/23/2019	Nanjing, China Beijing, China	Zhu Feng
6.6	7/11/2019	Nanjing, China	Chinese scholar of South China Sea issues
6.7	7/11/2019	Nanjing, China	Chinese scholar of South China Sea issues
6.8	7/16/2019	Beijing, China	Chinese scholar of Southeast Asia and South China Sea issues
6.9	7/17/2019	Beijing, China	[off the record]

6.10	7/19/2019	Haikou, Hainan, China	Chinese scholar of South China Sea issues
6.11	7/19/2019	Haikou, Hainan, China	Chinese researcher on South China Sea issues and international law
6.12	7/19/2019	Haikou, Hainan, China	Wu Shicun
6.13	7/19/2019	Haikou, Hainan, China	Chinese scholar
6.14	7/19/2019	Haikou, Hainan, China	Chinese scholar of South China Sea issues
6.15	7/24/2019	Beijing, China	[off the record]
6.16	7/24/2019	Telephone	Retired Chinese diplomat and State Oceanic Administration official
6.17	7/31/2019	Beijing, China	Yang Xiyu
6.18	8/13/2019	Beijing, China	Chinese scholar of international maritime law
6.19	8/13/2019	Beijing, China	Retired Chinese military lawyer
6.20	8/14/2019	Beijing, China	Chinese scholar of China-Japan relations
6.21-22	8/15/2019	Beijing, China	[two interviewees, off the record]
6.23	8/15/2019	Beijing, China	[off the record]
6.24	8/30/2019	Washington, DC	Chinese scholar of the law of the sea

21 Additional Interviews with Chinese Experts: In addition, my research for the primary case study of China's interpretations of the law of the sea was also informed by the following:

- an interview I conducted with a Chinese law of the sea expert in summer 2012 during my participation in a Track II project on U.S.-China crisis management;
- 10 interviews I conducted with Chinese experts in Beijing, China, in summer 2015 as part of exploratory research on Chinese attitudes toward the international law of the sea and the role of Chinese media in PRC foreign policy signaling; and
- 10 additional interviews I conducted with Chinese experts in Beijing, China, in summer 2019 for a related research project on U.S.-China relations.