

STATEMENT OF
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The Struggle for Law in the South China Sea

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Seapower and Projection Forces in the South China Sea

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Introduction

Chairman Forbes, thank you for the invitation to speak today. And I want to thank you personally for your interest and support for the rule of law in the oceans, which provides the normative basis for Seapower and force projection throughout the world. There is a continuous struggle to shape and maintain the norms and rules in the global commons, and your support is vital.

Ranking Member Courtney, Chairman Forbes, distinguished committee members, thank you for the opportunity to have me appear today to discuss Seapower and projection forces in the South China Sea.

The South China Sea presents several issues of vital importance to U.S. national security, including strategic risk, military threat, and political challenge. There is also an important international law dimension to these issues. As a retired U.S. Navy judge advocate and international law professor, I focus on the law of the sea and maritime security. In my view China's expansive maritime claims present the greatest test to the rules based order of the oceans and freedom of navigation since the unrestricted U-boat campaign of World War II.

It is a vital U.S. interest to promote and strengthen the rules, norms, regimes and laws that support an open order of the oceans, and these standards are formed by and reflected in customary international law and the United Nations Convention on the Law of the Sea (UNCLOS).¹ The rules undergird freedom of navigation and overflight in the global commons, which is essential for the primacy of American military power and a key enabler of U.S. grand strategy.

For more than one hundred years, the cornerstone of U.S. national security strategy has focused on preventing the rise of a hegemonic power in Europe or Asia. Freedom of the seas is essential to this strategy because the seas connect the United States with its allies, friends, and partners in both regions.

The South China Sea is the maritime fulcrum in East Asia, where the United States has treaty commitments to Japan, Korea, Thailand, Australia, and the Philippines, and legislative obligations to Taiwan. The rule of law in the oceans provides an important force multiplier for U.S. military operations and diplomacy. Consequently, the navigation and overflight rules accepted in the region have great strategic consequence.

This testimony provides analysis of U.S. Freedom of Navigation Operations (FONOPS) and the impact of the South China Sea tribunal award on U.S. force projection policy and strategy in the region, and ventures a few suggestions in light of recent developments. U.S. FONOPS are an important component for building the rule of law in the oceans because they shape interpretations of UNCLOS and the law of the sea, and guide the development of associated norms and legal regimes.

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

Likewise, the July 12, 2016, Arbitration Award for China and the Philippines under Annex VII of UNCLOS brought greater clarity to the situation in the South China Sea. The findings and decision of the Arbitration Tribunal promote the rule of law in the oceans, and undergird a rules-based order in East Asia that enhances international security and stability. As the principal security provider in East Asia, the United States has a profound interest in supporting international laws and institutions that provide greater stability and predictability.

No national security issue today is more important. Freedom of movement on, above, and below the seas has been a core national security interest since the founding of the Republic. Disputes over freedom of navigation and overflight have been a principal driver of conflict between the United States and other states. The United States has gone to war to vindicate its rights in the global commons.

The first four wars that the United States fought as an independent country were largely over the right of freedom of navigation – the Quasi War with France (1798-1800), the First Barbary War (1801-05), the War of 1812 and the Second Barbary War (1815-16). In 1917, President Wilson proclaimed, “The freedom of the seas is the *sine qua non* of peace, equality, and cooperation.”² In his January 8, 1918, speech on peace terms to end World War I, he declared freedom of the seas as the second of his Fourteen Points.

In a 1941 radio address, President Franklin Roosevelt captured most eloquently the importance of freedom of navigation to the United States, exclaiming:

Yes, all freedom—meaning freedom to live, and not freedom to conquer and subjugate other peoples—depends on freedom of the seas. All of American history—North, Central, and South American history—has been inevitably tied up with those words, “freedom of the seas.”³

President Roosevelt and Prime Minister Churchill signed the Atlantic Charter on the war aims of the Allied powers and the basis for a new peacetime order. The seventh of eight principles states that all nations enjoy the right to traverse the high seas and oceans without hindrance. This principle was explicitly endorsed in the Declaration of the United Nations of January 1, 1942, which was signed by 25 nations, including China, and subsequently incorporated into article 3 of the Charter of the United Nations in 1945.

Freedom of navigation was also an element of the Cold War. The Gulf of Tonkin incident on August 2, 1964 and the Cambodian seizure of the SS Mayaguez, May 12-15, 1975, serve as bookends for U.S. involvement in the Vietnam War. The prospects for war between China and the United States, although remote, increase each time Beijing attempts to impede U.S. naval and air operations at sea.

International law, including customary law, the Arbitration Award under UNCLOS and the U.S. Freedom of Navigation (FON) program offer some of the best tools for averting

² Woodrow Wilson, Address to the Senate of the United States: A World League for Peace, Jan. 22, 1917.

³ Franklin Delano Roosevelt, Dep’t of State Bull. IV Bull. No. 101 647-650. (May 31, 1941), reprinted in Whiteman 4 Dig. Int’l L. 507-08 (1963).

conflict in the South China Sea. It appears China is on an inexorable march to try to subdue the area and dominate the sea.

This testimony suggests four major lines of effort to better ensure a liberal order of the oceans, and advocates a recalibration of FON operations to improve U.S. foreign policy.

First, the United States should implement lawful countermeasures against China as a means to induce Chinese compliance with its duties under UNCLOS and other international instruments.

Second, the United States should implement changes to the Freedom of Navigation (FON) program that will magnify its effect.

Third, the United States should incorporate the salient findings of the Philippine-China Arbitration Award into U.S. policy.

Fourth, the United States should join UNCLOS, which undergirds all of these efforts.

* * *

1. Implement U.S. Policy on Countermeasures to Induce Compliance

The first recommendation is for the United States to implement lawful countermeasures against states that violate the rules reflected in UNCLOS, as envisioned by President Reagan in 1983.

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

Reagan's 1983 three decisions still resonate. First, the United States would accept the rules reflected in UNCLOS as a restatement of the law relating to the traditional uses of the oceans, such as navigation and overflight and other internationally lawful uses of the sea associated with the operation of ships and aircraft. Second, the United States stated that it would exercise its rights of navigation and overflight on a worldwide basis in accordance with UNCLOS. Third, the United States proclaimed a 200-mile Exclusive Economic Zone (EEZ).

Of these three pronouncements, the first is the most critical. The provision is important to reproduce in its entirety, because it contains a caveat that has been lost on recent U.S. administrations:

[T]he United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans – such as navigation and overflight.

*In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in [UNCLOS], so long as the rights and freedoms of the United States and others are recognized by such coastal states [italics added].*⁴

Reagan's policy reflects a classic quid pro quo – the United States agrees to respect other states maritime claims only if they respect U.S. claims. This statement expresses a willingness to invoke countermeasures against states that are not in compliance with UNCLOS. Although the Reagan policy was never renounced, in practice it has fallen into desuetude. The caveat is an important, but unutilized tool of U.S. global oceans policy and a potential key enabler of U.S. grand strategy.

The United States should adhere to the 1983 Statement on Oceans Policy and withdraw recognition of coastal state rights under UNCLOS to the extent that they do not respect reciprocal U.S. rights in international law. Instead, the United States has afforded all other states, including China, their full rights to operate freely on the oceans, and in the U.S. territorial sea in innocent passage and in the U.S. EEZ without restriction, while the same states dangerously impede and hamper U.S. warships and military aircraft operating in their claimed maritime zones.

Chinese warships, for example, conducted innocent passage in the U.S. territorial sea in the Aleutian Islands, and have engaged in maritime intelligence operations inside the U.S. EEZ off the coast of Guam and Hawaii. In September 2015, a flotilla of five PLA Navy warships transited through the Bering Sea north of the Aleutian Islands, and then headed south to conduct innocent passage between two of the Aleutian Islands.⁵ A Pentagon spokesperson stated that the operation "...was a legal transit of U.S. territorial seas conducted in accordance with [UNCLOS]."⁶

Chinese warships have also conducted military activities, including intelligence collection, in the U.S. EEZ near Guam and Hawaii. In the aftermath of a 2015 Chinese maritime intelligence operation near Hawaii, a Pacific Fleet spokesperson stated, "... it is a fundamental right of all nations for military ships and aircraft to operate in international waters and airspace in accordance with well-established international law."⁷ The view that ships of all states enjoy full rights under UNCLOS, however, does not reflect the 1983 U.S. policy that indicates that the United States will only recognize those rights to the extent that other countries respect U.S. rights.

Although the United States recognizes China's navigational rights and freedoms, China routinely purports to deny U.S. warships and military aircraft those same rights. These acts by China constitute a breach of legal obligations under UNCLOS and customary international law, and are internationally wrongful acts within the law of state responsibility.

In the maritime domain, an internationally wrongful act can arise from a violation of UNCLOS, such as denial of high seas freedoms for warships in the EEZ, or from the

⁴ Statement by the President, 19 Weekly Comp. Pres. Doc. 383 (Mar.10, 1983).

⁵ Page and Lubold, Chinese Navy Ships Came Within 12 Nautical Miles of U.S. Coast, Wall St. J., Sept. 4, 2015.

⁶ Page and Lubold, Chinese Navy Ships Came Within 12 Nautical Miles of U.S. Coast, Wall St. J., Sept. 4, 2015.

⁷ Wyatt Olson, Report: China dispatching surveillance vessels off Hawaii, Stars and Stripes, Sept. 4, 2015.

customary norms that are reflected in the treaty, or from a violation of other accepted rules, such as the 1972 International Regulations for Preventing Collisions at Sea (COLREGS).⁸

The United States should take lawful countermeasures to induce compliance against states that violate U.S. maritime rights by denying them that same right. This is not a “tit-for-tat” or demand for reciprocal treatment, but rather a lawful measure short of coercion or the use of force to induce compliance on the part of a state that has breached its legal obligations.

Countermeasures flow from the customary international law of state responsibility, as reflected in the International Law Commission’s Articles of State Responsibility.⁹ States bear responsibility for acts that are attributable to them under international law, and that constitute a breach of an international obligation under either treaty law or customary law.¹⁰ The injured state may invoke countermeasures against the responsible state to induce compliance. The situation involving China presents a classic model of countermeasures, since countermeasures must be proportionate,¹¹ not affect the rights of third states,¹² and not involve violation of preemptory norms, such as basic standards of human rights.¹³

The United States should act true to its 1983 Oceans Policy of observing and respecting foreign maritime claims only to the extent that other coastal states respect U.S. rights at sea. In particular, since China does not respect UNCLOS rules governing innocent passage of warships in its territorial sea or high seas freedoms of navigation and overflight of military vessels and aircraft in its EEZ, the United States should withhold those rights from Chinese military ships and aircraft until such time as China conforms its policy to UNCLOS. Such U.S. action constitutes lawful countermeasures in international law, and serves an instrumental function to induce compliance by China.¹⁴

The United States should also work with allies, friends and partner states in East Asia to encourage them to adopt similar countermeasures. These countermeasures could have a real and even dispositive impact on Chinese maritime behavior because China lacks access to the open ocean, except through transit of its neighbors’ EEZ. In particular, China may enter the Pacific Ocean through the Sea of Japan and East China Sea only by transiting Japan’s EEZ, which stretches from Hokkaido to Okinawa and the Ryukyu Islands in the South. Chinese warships are unable to reach the Pacific Ocean without traversing the Japanese EEZ. Japan and the United States would regain diplomatic initiative if they denied Chinese naval and air forces the legal right to traverse their EEZ as a temporary measure to induce China to restore freedom of navigation and overflight to foreign warships and military aircraft in its EEZ.

⁸ 1972 Convention on the International Regulations for Preventing Collisions at Sea, 1050 U.N.T.S. 16.

⁹ International Law Commission, Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 annex, U.N. Doc. A/RES 56/83 (12 Dec. 2001).

¹⁰ Articles on State Responsibility, Arts. 1-2.

¹¹ Articles on State Responsibility, Art. 59.

¹² Articles on State Responsibility, Art. 47(3).

¹³ Articles on State Responsibility, Art. 50.

¹⁴ Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Rep. 1997, p. 7, and pp. 56-57, para. 87.

2. Bolster the FON Program for U.S. Forces Projection

The second set of recommendations suggests reforms to the U.S. approach to freedom of navigation and overflight in the global commons.

In 1979 President Carter initiated the Freedom of Navigation (FON) program to formally create an interagency process to take action to actively resist illegal claims by states seeking to impair the rights and freedoms of navigation and overflight. The FON program consists of three elements: (1) diplomatic demarches to protest unlawful maritime claims and illegal conduct at sea; (2) bilateral military-to-military engagement to provide greater clarity and understanding among armed forces; and (3) freedom of navigation operations (FONOPS) as a tangible expression of U.S. rejection of unlawful maritime claims. It was clear from the very beginning that diplomatic demarches would not be sufficient to contain unlawful claims, and that actual FONOPS would be necessary to demonstrate U.S. resolve.¹⁵

With the end of the Cold War, the number of U.S. FONOPS declined precipitously, from about 35 per year in the 1980s to as few as five or six in the early- and mid-2000s. Meanwhile, the United States failed to counter Chinese interference with foreign civilian vessels and warships in the South China Sea. Beginning in the late-1990s, China began to harass U.S. military survey ships, but it was not until the aggressive interception of a U.S. EP-3 aircraft in April 2001 that it was clear that China was intent on controlling the South China Sea. The EP-3 incident should have been a wake-up call, but the number of FONOPS continued to stagnate due to the focus on the wars in Iraq and Afghanistan and the declining Naval force structure. Only in the past several years with the Pacific pivot has the number of FONOPS crept higher.

Just as the assertions of freedom of navigation and overflight in the Gulf of Sidra in 1981 and 1989, and the Black Sea Bumping incident in 1988 elevated tension to preserve an open order of the oceans, FONOPS in the South China Sea may generate blowback from Beijing that worsens the U.S.-China relationship, at least temporarily. Accepting such costs and weathering Chinese criticism are essential if the United States seeks to preserve the rule of law and maintain strong links to friends and allies in the Indo-Asia-Pacific region.

The United States can take additional steps to bolster U.S. FONOPS: (A) increase the type and number of FONOPS; (B) conduct combined FONOPS with other states; (C) prioritize challenges to illegal claims that have been long ignored; (D) observe only lawfully declared territorial seas, rather than putative or theoretical territorial seas; and, (E) synchronize interagency effort for a more effective FON program.

A. Increase the Type and Number of FONOPS

First, not all U.S. warship transits and military overflight in areas subject to unlawful maritime claims are recorded as FONOPS, even though by their very presence they promote and strengthen international norms and challenge unlawful maritime claims. These operations occur, but are absent from the record. The operations should be counted as

¹⁵ Elliott Richards, *Power, Mobility, and Law of the Sea*, 58 *Foreign Affairs* 902, 902 (1979-1980).

FONOPS – otherwise, they are legally nugatory even if they generate strategic benefits by virtue of the assurance value U.S. forces.

Second, more FONOPS should be conducted. More FONOPS require more ships present forward. Over the past two decades the number of U.S. ships in the region declined from 192 to 182, while China’s force expanded to some 300 surface ships and submarines.¹⁶ The fact that one U.S. warship today has the war-fighting capability of ten warships of the past is immaterial in international law, which requires actual physical presence to contest unlawful claims. The decline in U.S. force structure jeopardizes the forward fleet presence to demonstrate such state practice.

The United States should maintain a force level in the region that is not just lethal, but with sufficient numbers of warships and aircraft present to be legally material and relevant. From 2011 through 2015 the United States conducted only seven FONOPS in the South China Sea.¹⁷ Two more FONOPS were conducted in 2016.¹⁸ Although there is no single metric for the number of operations to satisfy the legal element of state practice in customary international law, it is doubtful that this number is sufficient. Even quarterly operations in my view are below the threshold sufficient to maintain legal rights and freedoms in the face of daily assertions of sovereignty by China.

Third, U.S. forward naval operations should become routinized, and include the full range of platforms individually, in squadrons, and in joint and combined formations. FONOPS should be conducted not only by single ships and individual aircraft sorties, but also by squadrons, such as surface action groups and aircraft carrier and expeditionary strike groups or their components. For example, in 2015 China sent a flotilla of five warships through the Aleutian Islands.

Fourth, U.S. Coast Guard and U.S. Army assets can join the Navy and Air Force effort to maintain forward presence in East Asia. The U.S. Coast Guard has been particularly absent in a theater that favors deployment of white-hulled law enforcement assets as a means of signaling national resolve without ratcheting up military risk. The Coast Guard has not attempted a FONOP since the 1960s. Likewise, the eight U.S. Army logistic support vessels have a range of 5,500 nm and can deploy worldwide. All five branches of the armed forces should be afforded the resources to participate in the FON program.

B. Conduct Combined FONOPS with Like-minded States

Like all military operations that generate international public goods, burden sharing among U.S. allies, friends, and partner states should be assessed. Other states should be encouraged to conduct their own freedom of navigation assertions, either independently, in collaboration with other states or international organizations, or in combined operations with the United States.

¹⁶ Audrey McAvoy, US Pacific Fleet Smaller, Even as China’s Military Grows, Associated Press, Jan. 5, 2016,

¹⁷ Secretary Ash Carter letter to Senator John McCain, Dec. 21, 2015.

¹⁸ On January 30, USS Curtis Wilbur transited within 12 nautical miles of Triton Island in the Paracel Island and on May 10, USS William P. Lawrence conducted innocent passage within 12 nautical miles of Fiery Cross Reef.

Japan and India, for example, have large maritime forces capable of conducting these types of operations. Foreign freedom of navigation assertions are an unleveraged force multiplier waiting to be tapped more effectively.

Just as the European Union (EU) and NATO contributed to counter-piracy operations in the Indian Ocean, they have capability to conduct FONOPs independently or in collaboration with the United States or other regional states. The United States should NATO and the EU to do so.

In 2014 the United Kingdom expressed a willingness to conduct “demonstrations of UK counter-practice” against illegal maritime claims.¹⁹ In July 2016, France urged its allies in the European Union – and in particular Germany and the United Kingdom (despite Brexit) – to maintain a “regular and visible” naval presence in the South China Sea to defend freedom of navigation against Chinese encroachment.²⁰

Furthermore, naval forces of the states situated on the South China Sea – Vietnam, Malaysia, Indonesia, Singapore, and the Philippines – have an interest in the maintenance of freedom of navigation in the region. These states should be invited to conduct FONOPs with the United States and other partners as well. Broadening the pool of forces that conduct FONOPS contributes to the CNO’s fourth line of effort to expand maritime partnerships, enhance interoperability, and develop new opportunities for forward operations.

Combined FONOPS remove the optic that freedom of the seas is about a U.S.-China major power dispute, and converts the issue into one of China standing against the rights and freedoms of the international community. Furthermore, state practice by several states or many states reinforces customary international law more powerfully than state practice by a single state.

C. Prioritize Illegal Claims that Have Been Long Ignored

The United States appears largely self-deterred in challenging some of China’s most egregious maritime claims. The United States should prioritize FONOPS that challenge unlawful claims that have not been subject to recent assertions. China purports to close off Hainan Strait with strait baselines, for example, and this claim has not been challenged.

The right to transit through some Asian littoral areas is being effectively abandoned out of concern that China will react and create an incident. But forgoing the right to be present in these areas makes it more likely that it will be impossible to reenter them later. Indeed, the cost of doing so now is higher than it would have been had the United States continuously exercised its rights; the cost tomorrow will be even greater unless action is taken now. China’s expectation and sense of entitlement to “own” parts of the global commons increases each year they remain unchallenged.

¹⁹ UK National Strategy for Maritime Security, para. 3.4.

²⁰ David Roman, France to Push for Coordinated EU Patrols in South China Sea, Bloomberg News, June 5, 2016.

D. Observe Only Lawfully Declared Territorial Seas

The United States should not observe theoretical or putative territorial seas that have not been lawfully established by a coastal state.

First, only a coastal state with lawful title over territory, such as a rock, may establish a territorial sea. No nation, for example, could establish a territorial sea from Antarctica.

Second, even when a state has lawful title to an oceanic feature, a territorial sea must be affirmatively established through promulgation of baselines, which normally run along the low water line along the coast. Under article 3 of UNCLOS states may establish a 12 nm territorial sea measured from properly designated baselines, but such baselines must be established – they are not automatic. Yet neither China nor any other claimant has established baselines in the Spratly Islands.

The absence of baselines in the Spratly Islands is not a mere oversight. China's territorial sea law provides that the 12 nm territorial sea will be "designated with the method of straight baselines."²¹ China has declared straight baselines along its mainland coast and Hainan Island,²² as well as around the Paracel Islands and portions of Japan's Senkaku Islands.²³

Since neither China nor any other claimant has taken the requisite affirmative action under international or domestic law to establish baselines and a territorial sea around any of the features they claim, no territorial seas exist in that region. U.S. warships err when they observe requirements of innocent passage during transits within 12 nm of features that lack an established territorial sea.

E. Synchronize the Interagency FON Effort

From its inception, the FON program was idealized as a partnership between Department of Defense and Department of State. In reality, however, the two institutions were not synchronized.²⁴ Nearly forty years later, the FON program still suffers from a lack of shared vision and priority within the U.S. government interagency community.

The original FON program afforded the Department of Defense the lead role for FONOPS, and required it to submit to the National Security Council plans for exercises, transits, and overflight by U.S. naval and air forces. The Pentagon led the interagency effort on FONOPS, subject to an obligation to "consult with the State Department on how this objective can be

²¹ Article 3, Law on the Territorial Sea and the Contiguous Zone, Feb. 25, 1992.

²² Maritime Zone Notification 7, July 1996, Geographical coordinates as contained in the Declaration on the Baselines of the Territorial Sea of the People's Republic of China of May 15, 1996.

²³ 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, Sept. 19, 2012, transmitted by Note verbale Sept. 13, 2012 from the Permanent Mission of the People's Republic of China to the United Nations addressed to the Secretariat of the United Nations, 80 Law of the Sea Bull. 30 (2013).

²⁴ National Security Council Memorandum for David Aaron from Thomas Thornton, Navigational Freedom and LOS, June 25, 1979 (Confidential; declassified Aug. 22, 2000).

most effectively attained.”²⁵ The Department of Defense and the Department of State, however, emphasize different and sometimes competing aspects of bilateral relations with states that have unlawful claims.

Furthermore, the country desks within the departments have too much sway over decision making on actual FONOPS, and they often have a parochial view of U.S. global strategic interests. When the issue of freedom of navigation is viewed as a bilateral problem managed by the country desks in Washington, D.C. and the U.S. embassy country teams, it typically becomes subordinate to other issues in the bilateral relationship. Ambassador Elliott Richards, for example, recalled constant pressure and pleas from within the Department of State to forgo FONOPS to avoid the repercussions with the claimant state.²⁶ The long-term cumulative impact of the reticence to exercise navigational freedoms is inimical to U.S. global interests.

3. Leverage the South China Sea Arbitration for U.S. Force Projection

The third set of my recommendations flow from the Philippines-China Arbitration Award announced on July 12, 2016.

China’s expansive and unlawful claims over the South China Sea were challenged by the Philippines under the mandatory dispute resolution procedures in Part XV of UNCLOS. Mandatory or compulsory dispute resolution procedures are legally binding on China and the Philippines by virtue of their accession to UNCLOS, and the dispute resolution procedures are one of the greatest benefits of the treaty. The Arbitration Award fulfills the mandate of UNCLOS to resolve disputes peacefully and in accordance with universal standards that apply equally to states large and small.

The July 12, 2016, Arbitration Award rejected China’s outlandish claims to the South China Sea. Presidential press secretary Josh Earnest and Secretary of State Kerry have stated that the decision is “final and binding” on the parties.²⁷ Although China has stated that it would not comply with the decision, the Award has permanently changed the legal and political seascape of the South China Sea. Over time, I believe the normative force and authority of the Award decision and UNCLOS will grow. The United States should facilitate that process by promoting the Award decision and UNCLOS as a matter of policy.

The Arbitration Award is comprised of four main elements, and each element affects the U.S. freedom of navigation and overflight and regional security.

To get greater mileage from the Award, the United States should: (A) amplify the Tribunal’s rejection of the Nine-dash Line; (B) adjust FONOPS based on the legal status of the features, as clarified by the Tribunal; (C) engage multilateral institutions on specific Chinese violations; and (D) understand that China’s aggravation of the dispute pending the outcome of the Arbitration Award suggests it is a revisionist power.

²⁵ Zbigniew Brzezinski, The White House, Memorandum Navigational Freedom and U.S. Security Interests, Mar. 20, 1979 (Confidential; declassified Jan. 17, 2001).

²⁶ Elliott Richards, *Power, Mobility, and Law of the Sea*, 909.

²⁷ The White House, Press Briefing by Press Secretary Josh Earnest, July 13, 2016.

Each of the four elements should inform U.S. policy, and are assessed, below.

A. Amplify the Tribunal’s Rejection of the Nine-dash Line

First, the tribunal decision struck down China’s Nine-dash Line, rejecting *in toto* Beijing’s vast and illegal claims over some 90 percent of the South China Sea.

In 2009 China issued a Note Verbale to the Secretary-General of the United Nations in which it claimed “indisputable sovereignty” over the islands in the South China Sea, and the “adjacent waters,” as well as “sovereign rights and jurisdiction over relevant waters” and the “seabed and subsoil thereof.” As these areas overlap Philippines claims, the Philippines brought an arbitration case against China under mandatory dispute settlement procedures in Part XV of UNCLOS.

Previously China had exercised an optional exception for compulsory dispute resolution in article 298 for disputes concerning “historic bays or titles.” But the tribunal ruled that China’s claims, even if accepted as completely true, were evidence only of historic fishing in the region, and did not assert a claim of historic title. China’s historical navigation and fishing in the Spratly Islands were determined to be merely an exercise of high seas freedoms and produced no basis for historic title.²⁸ By joining UNCLOS, China relinquished its former high seas freedom to fish in areas now enclosed within other states EEZs, while it acquired exclusive rights in its own EEZ.²⁹

Moreover, China’s claim of historic title does not meet the three-part test contained in customary international law and promulgated by the Secretary-General of the United Nations in 1962, to wit: (1) exercise of authority over the area, (2) continuity of such exercise of authority, and (3) acquiescence of neighboring states.³⁰

The tribunal found that UNCLOS contains a comprehensive system of maritime zones, which does not accommodate any external type of zone, such as a zone of historic waters.³¹ If there were any preexisting or earlier rights or agreements concerning historic rights to the waters, they were superseded by UNCLOS if they are incompatible.³² Similarly, the legal regimes of the continental shelf and the EEZ are incompatible with another state enjoying historic rights to the same resource.³³ This finding simply reflects a longstanding norm in

²⁸ In the Matter of the South China Sea Arbitration, PCA Case N° 2013-19, July 12, 2016 (Arbitration Award), para. 270.

²⁹ Arbitration Award, para. 271. The Tribunal followed previous international cases in distinguishing between historic fishing rights and historic titles. Arbitration Award, para. 224, Qatar v. Bahrain (historic pearl fishing was not the same as quasi-territorial right to fishing grounds themselves or superjacent waters) and para. 224, Continental Shelf Tunisia v. Libya (historic rights were not equivalent to the continental shelf regime).

³⁰ Juridical Regime of Historic Waters, including Historic Bays UN Doc. A/CN.4/143 (1962) and Memorandum from Bernard H. Oxman, Dep’t of State Ass’t Legal Adviser for Ocean Affairs (Sept. 17, 1973), excerpted in Digest of U.S. Practice in International Law 1973, at 244 (A.W. Rovine ed.).

³¹ Arbitration Award, para. 231.

³² Arbitration Award, para. 246-47.

³³ Arbitration Award, para. 243, para. 244.

international law, indeed in all legal systems, that the later legal authority prevails over earlier laws or treaties.³⁴

As a matter of statutory construction of UNCLOS, the origin and purpose of the treaty suggests that outside states may not encroach on the EEZ or continental shelf of a coastal state.³⁵ Also, China's negotiating behavior is consistent with this finding. Both preceding and during the negotiations for UNCLOS, China never advanced a claim of historic rights to the waters of the South China Sea, even as it contested Philippine and Vietnamese claims over the Spratly Islands.³⁶ In fact, during the debates over UNCLOS, Japan and some other distant water fishing nations sought to retain a right of historic fishing in the EEZ – a position resolutely opposed by China.³⁷

All coastal state rights over adjacent waters may be generated only from islands or a mainland. The arbitration tribunal upheld the ancient proposition of international law that “the land dominates the sea,” and rejected the Nine-dash Line. Consequently, the tribunal's decision should be referenced in U.S. bilateral and multilateral diplomatic venues and channels, military engagement, and communications with China. In particular, the United States should integrate the Arbitration Award into its responses to challenges by authorities of the People's Liberation Army Navy (PLAN) concerning alleged encroachments on “Chinese sovereignty” or “Chinese waters” in the South China Sea. The United States should also encourage other states to promote the decision through diplomatic engagement and naval responses to challenges by Chinese authorities.

By pressing the importance of the Award and UNCLOS as a key foundation of a rules-based international order, the United States and other states can magnify its normative force, much as the repeated references to liberty and freedom in the 1990 Copenhagen Document of the Helsinki Process outlined norms of a free society that helped to transform Soviet bloc states.

B. Adjust FONOPS Based on the Status of the Features

Second, the tribunal determined the legal status of some of the most important features in the South China Sea, seven of which have been converted by China into massive artificial islands. These determinations are based on objective criteria rather than outcome-based decisions rooted in the power disparity between China and the Philippines.

The natural features of the Spratly Islands are minuscule – comprising only 2 km² (490 acres) of land area spread over 425,000 km² (164,000 sq. mi) of ocean space.

The legal status of the features is important to determine whether an entitlement exists to a maritime zone of sovereignty, or sovereign rights and jurisdiction, and therefore the navigational regime for U.S. warships and military aircraft. In particular, the legal status determines whether a feature is submerged or a low-tide elevation (LTE), and has no

³⁴ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980., Art. 30.

³⁵ VCLT Art. 30(2).

³⁶ In challenging the Philippines claim to the Spratly Islands in the UN Seabed Committee, and in similar discussions with Vietnam during the UNCLOS negotiations, China never advanced a claim of historic rights. Arbitration Award, para. 252.

³⁷ Arbitration Award, para. 251.

maritime entitlement to a territorial sea, a “rock” entitled to a territorial sea only, or an “island” that can “sustain human habitation” and entitled to an EEZ and continental shelf.

There are only three types of features in the Spratly Islands, each with distinct legal and political consequences that affect U.S. FON:

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

(2) Low-tide elevations (LTEs) are underwater at high tide, but above water at low tide.³⁸ Such features also are incapable of appropriation by any state, as they are also part of the seabed. Low-tide elevations normally do not generate a maritime zone, unless they are situated within the territorial sea of an island or mainland.

(3) Rocks are features above water at high tide, and may generate a territorial sea of up to 12 nm. The territorial sea is under the sovereignty of the coastal state, and sovereignty extends to the airspace above the territorial sea, on the surface of the water and in the water column, and on the seabed. Foreign warships may exercise innocent passage in the territorial sea. There is no right of over flight, and submarines that operate in innocent passage must travel on the surface and show their flag.³⁹

Islands that can sustain human habitation are entitled to a territorial sea, as well as an EEZ of up to 200 nm and continental shelf. The tribunal determined, however, that there are no such features in the Spratly Islands. In doing so, the tribunal provided greater clarity on what constitutes “human habitation or an economic life of their own,” in a way that makes it much more difficult for a coastal state to claim an EEZ or continental shelf. The tribunal reasoned that “human habitation” does not mean occasional visits by fishermen from distant ports.⁴⁰ Military personnel stationed on a feature also do not constitute “human habitation.”⁴¹ The tribunal relied heavily on historical evidence, and found that there was no history of sustained human habitation or an independent economy in the Spratly Islands.⁴²

The tribunal decision promotes freedom of navigation and overflight in two major ways.

First, it invalidates the idea that LTEs have any entitlement to generate a territorial sea or territorial airspace.

Second, the decision provides greater fidelity to the test in UNCLOS Article 121(3) concerning what types of features may generate an EEZ. The tribunal determined that no feature in the region is an island that can sustain human habitation.

³⁸ Arbitration Award, para. 280.

³⁹ Article 19(2), UNCLOS. Foreign states also may enjoy a right of assistance entry into the territorial sea in response to cases of force majeure. See Commander’s Handbook on the Law of Naval Operations (U.S. Naval War College July 2007), para. 2.5.2.1.

⁴⁰ Arbitration Award, para. 618.

⁴¹ Arbitration Award, para. 620.

⁴² Arbitration Award, para. 616-623.

Consequently, regardless of which state has lawful title to the territorial features in the Spratly Islands, none of them generate an EEZ. About half of the features occupied by China are LTEs that are not entitled to a territorial sea, and about half are rocks entitled to a territorial sea.

China has built transformed seven features into artificial islands.

Rocks occupied by China. The tribunal determined that (1) Cuarteron Reef, (2) Fiery Cross Reef, (3) Johnson Reef, and (4) Gaven Reef (North) are “rocks” that may be used to claim a territorial sea.

LTEs occupied by China. The tribunal also determined that (1) Hughes Reef, (2) Subi Reef and (3) Mischief Reef are LTEs.⁴³ LTEs are not entitled to a territorial sea and are not subject to appropriation or territorial title by any state.⁴⁴

Under Article 13 of UNCLOS, LTEs normally cannot independently generate a territorial sea.⁴⁵ Some of the LTEs, such as Mischief Reef and Second Thomas Shoal, for example, are solely within the Philippine EEZ.

In the special circumstances when an LTE lies within the territorial sea of the mainland or an island it may be used to establish a 12 nm territorial sea, so long as the LTE and the mainland or island are owned by the same state.⁴⁶ For example, Subi Reef may acquire a territorial sea by virtue of its position within the territorial sea of Sandy Cay, but only by the state with lawful title to Sandy Cay.

China has unlawfully converted Mischief Reef into a massive naval airbase complex with 5.58 million m² of land, complete with a runway, radar, and loading piers. As there is no basis as a matter of law for China to make any maritime claims on or from Mischief Reef, the United States should exercise its right of high seas freedoms and freedom of overflight within 12 nm of the feature. The tribunal determined Chinese activities and construction at Mischief Reef were illegal. In doing so, the tribunal bypassed China’s presumptive optional exclusion of military activities since these were only tertiary or secondary to the overall dispute, and China had claimed on numerous occasions that Mischief Reef was not developed for military purposes.

China has also impeded Philippine activities at Second Thomas Shoal, an LTE or submerged feature within the Philippine EEZ and on its continental shelf. Like Mischief Reef, Second Thomas Shoal is incapable of appropriation by China or any other state.⁴⁷ In 1999, the Philippines grounded the warship BRP *Sierra Madre* on Second Thomas Shoal, located just 21 nm from Mischief Reef.⁴⁸ Chinese Coast Guard ships have maintained a continuous patrol around the BRP *Sierra Madre* since 2013, and even intercepted supply ships carrying

⁴³ Arbitration Award, para. 1203(6)(B)(3)(c).

⁴⁴ Arbitration Award, para. 1203(6)(B)(3)(b). As a subset of islands, rocks are not entitled to an EEZ.

⁴⁵ Arbitration Award, para. 1203(6)(B)(3)(c) and para. 1203(6)(B)(4).

⁴⁶ Arbitration Award, para. 1203(6)(B)(5).

⁴⁷ Arbitration Award, para. 1025.

⁴⁸ Jeff Himmelman, A Game of Shark and Minnow, *New York Times Magazine*, October 27, 2013.

provisions for the Philippine Marine Detachment stationed on the stranded vessel in March 2014.⁴⁹

The arbitration tribunal declined to assert jurisdiction over Chinese military activities surrounding Second Thomas Shoal to prevent resupply of the BRP *Sierra Madre*. In doing so, the tribunal presumed that China's optional exception for military activities applied since the clashes at sea between China and the Philippines were "quintessentially" military in nature.⁵⁰

The upshot of the tribunal's decision is that even if China were to own every island in the South China Sea, it would be restricted to territorial sea claims based upon them. The restriction of rocks to only a 12 nm territorial sea is important because it vastly limits the area over which a claimant state may assert some form of jurisdiction. While a rock generates a maximum territorial sea of 452 nm², an island that can sustain human habitation generates the same territorial sea, plus a potentially massive EEZ of 125,664 nm².

China has stated that military activities in its EEZ require its permission, but after the tribunal Award, no feature in the Spratly Islands generates an EEZ. Since there are no natural land features capable of sustaining human habitation in the Spratly Islands, there are no EEZs based upon the Spratly Islands.

C. Engage at Multilateral Venues on Specific Chinese Violations

The third set of issues addressed by the tribunal examined China's unlawful maritime activities in the South China Sea in violation of UNCLOS and other international legal obligations. The United States should raise the diplomatic costs of Chinese misconduct in the South China Sea by pursuing U.S. complaints, either individually or in concert with other states, in multilateral institutions.

China's violations undermine international peace and security, and therefore are appropriate agenda items at the United Nations Security Council, NATO and the European Union (EU).

The United States should raise the issue of freedom of navigation and overflight at the UN Security Council as one of the most compelling threats to international peace and security. Even if other members decline to join the United States in this effort, doing so conveys to other states the gravity of the issue. Similarly, the United States should seek NATO and the EU diplomatic and operational support to uphold norms and rules of freedom of navigation and overflight.

The United States should also pursue China's violations of multilateral UN treaties at the appropriate UN organization exercising Secretariat functions or cognizance over the instrument, including:

⁴⁹ Greg Poling, Potential New Runway Presents New Headaches, Asia Maritime Transparency Initiative, Sept. 9, 2015.

⁵⁰ Arbitration Award, para. 1161.

Treaty or Instrument	Associated Institution(s)
UNCLOS	International Maritime Organization and UN General Assembly
Convention on the International Maritime Organization ⁵¹	International Maritime Organization
International Regulations for Preventing Collisions at Sea (COLREGS) ⁵²	International Maritime Organization
Constitution of the UN Nations Food and Agricultural Organization ⁵³	UN Food and Agricultural Organization
UN GA Resolution 2997 ⁵⁴	UN Environment Program and UN General Assembly
Convention on International Civil Aviation ⁵⁵	International Civil Aviation Organization

Figure: Instruments and Institutions concerning China’s violations in the South China Sea

China committed numerous violations Chapter V (EEZ), Chapter VI (Continental Shelf) and Part VII (High Seas) of UNCLOS, and COLREGS,⁵⁶ which should be brought before the IMO.

First, China interfered with the Philippine exclusive right to fish and exploit the living resources in the Philippine EEZ.

Second, China purported to establish a fishing ban in the Philippine EEZ around Mischief Reef in 2012 and took control of the Philippine EEZ in the vicinity of Second Thomas Shoal in 2013.⁵⁷

On March 9 2014, two China Coast Guard ships intercepted a Philippine civilian-contracted resupply vessel (AM700), preventing it from reaching BRP *Sierra Madre*, a Philippine warship intentionally grounded on Second Thomas Shoal. China Coast Guard vessels blocked the passage of AM700. Similar incidents occurred on April 28 and May 26, 2012.⁵⁸ On April 28 2102, PRC vessel FLEC-310 violated COLREGS when it passed within 200 yards of SARV-

⁵¹ 1948 Convention on the International Maritime Organization, 289 U.N.T.S. 48.

⁵² 1972 International Convention for Preventing Collisions at Sea, 1050 U.N.T.S. 16.

⁵³ I Basic Texts of the Food and Agricultural Organization of the United Nations 3 (2015).

⁵⁴ UN General Assembly resolution 2997 (XXVII) of 15 December 1972.

⁵⁵ 1944 Convention on International Civil Aviation, 15 U.N.T.S. 295.

⁵⁶ Arbitration Award, para. 1123.

⁵⁷ Arbitration Award, para. 671-673, and para. 679-680.

⁵⁸ Memorial of the Philippines, Republic of the Philippines v. People’s Republic of China, Vol. VII, 30 Mar. 2014, Annex 239, (19 Mar. 2014) (“Allen Report”).

002 and 600 yards of SARV-003 at a speed of more than 20 knots. Similarly, on May 26 2012, Chinese public vessels CMS/MSV-71, FLEC-303 and FLEC-306 violated COLREGS when they made multiple attempts to cross the bow of Philippine vessel MSC-3008 at a distance of only 100 yards and at speeds of up to 20 knots.⁵⁹ These incidents are a violation of COLREGS and should be addressed as such at the International Maritime Organization in London.

Third, China failed to uphold Part VII (High Seas, articles 92-94) of UNCLOS, which requires flag states to ensure that all ships that fly its flag operate in accordance with international rules. China's interference with Philippine rights in the EEZ and on the continental shelf were a coordinated civil-military campaign of direct action by state-sanctioned and directed Chinese fishing vessels and cooperatives operating in conjunction with and under the direction and protection of the Chinese Coast Guard.

The tribunal also ruled that Chinese vessels failed to show "due regard" for the rights of Philippine fishermen, especially at Scarborough Shoal, where both Philippine and Chinese fishermen were found to have a valid right to fish within the territorial sea based upon historic private rights.

China has international legal responsibility for the actions of its civilian fishing fleet and maritime militia. Flag states must exercise effective jurisdiction over their ships, and maintain effective control over their operations. If an incident occurs at sea, such as a vessel mishap or collision, the flag state has a duty to conduct an investigation and cooperate in an investigation with other flag states of affected vessels. The flag state also has a legal obligation to exercise administrative and technical oversight over ships that fly its flag, ensuring that the crews are properly trained and certified to international standards of safe seamanship. China's maritime militia orchestrated numerous violations of flag state rules.

Chinese Coast Guard ships also violated COLREGS, a fundamental norm for safety and security at sea. The IMO has cognizance over COLREGS, and China's dangerous activities should be offered as an agenda item at the Flag State Implementation (FSI) subcommittee of the Maritime Safety Committee of IMO.

China's maritime militia also does not comply with Food and Agricultural Organization (FAO) guidelines for the handling of commercial fishing vessels and illegal unregulated, unreported (IUU) fishing. Flag states have a legal duty to take measures to ensure fishing vessels that fly their flag are not conducting IUU fishing.⁶⁰

The tribunal held that China's fishing techniques and artificial island construction destroyed the fragile marine environment and intentionally killed endangered species of coral, turtles, and giant clams. These issues should be brought before the United Nations Environment

⁵⁹ Allen Report, p. 2.

⁶⁰ Fisheries Advisory Opinion, ITLOS 2015, para.741.

Program (UNEP) as inconsistent with China's obligations under the East Asian Seas initiative.⁶¹

Finally, China's commercial aircraft flights to its occupied features in the South China Sea traverse the Ho Chi Minh Flight Information Region (FIR) air traffic control area without proper clearance, endangering civil aviation in violation of the 1944 Chicago Convention and FIR rules set forth by the International Civil Aviation Organization (ICAO). In January 2016, for example, Vietnam complained to ICAO about 46 Chinese flights that failed to obtain proper clearance.⁶² The United States and other nations should support Vietnam in this effort at ICAO to protect the integrity and safety of the worldwide civil aviation system.⁶³

In each case above, China breaches its legal obligations affecting the global commons. The United States should unilaterally and in concert with other states pursue these violations at the appropriate multilateral venues. China's pattern of activity, however, suggests something greater about the trajectory of China as a state in the international system.

D. Accept that China is a Revisionist Power

Fourth, the tribunal concluded that China had aggravated the disputes in the South China Sea pending a final outcome of the decision in violation of international law. This aspect of the Arbitration Award underscores that not only did China decline to participate in the Arbitration even though it was legally obligated to do so, but that it took concrete action to impede the work of the Tribunal and make the job of rendering a decision more difficult.

While the tribunal stopped short of charging China with bad faith, it nonetheless expressed dismay that China had irreparably changed the physical features in the region in a way that made determination of their natural state more difficult.

This misconduct is tantamount to "tampering with the evidence" during pending litigation, and it calls into question whether China is prepared to act as a responsible stakeholder in the existing international order. The steps taken by China to aggravate the disputes pending legal determination by the tribunal suggests that China is not a status quo power invested in the international system based on universal norms, but rather a revisionist power intent on creating a new maritime order with special exemptions carved out for China.

4. Conclusion

Ambassador John D. Negroponte argued twenty years ago: "The freedom of the seas was not given to mankind. It was won – won through scholarly and legal debate and in naval engagement."⁶⁴

⁶¹ Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region (1983) and Action Plan for the Protection and Sustainable Development of the Marine and Coastal Areas of the East Asian Region (1994). China and nine other states are members of the East Asian Seas Action Plan.

⁶² Vu Trong Khan, Vietnam Says China's Flights to South China Sea a Threat to Air Safety, Wall St. J. Jan. 9, 2016.

⁶³ Hanoi Slams 'Erroneous Statements' on China Island Flights, Daily Mail, Jan. 13, 2016.

⁶⁴ John D. Negroponte, Who Will Protect Freedom of the Seas?, 86 Dep't of State Bull. 41 (Oct. 1986).

The United States should take the lead as champion for the freedom of the seas, and the international laws, rules, norms and regimes that support it.

The instability in the South China Sea is in no small part a symptom of the uneven and sometimes lackadaisical U.S. approach to freedom of the seas. Contemporary challenges and a new Administration provide an opportunity to reconsider past assumptions that freedom of the seas is a cost-free public good that will persevere on the strength of its own logic and without more robust U.S. action.

While some parts of the Department of Defense have promoted freedom of navigation and overflight, principally the Navy leadership and some geographic commanders and component commanders, support elsewhere in Washington, D.C. often has been tepid.

The U.S. Government generally has been reticent to speak plainly and honestly about unlawful coastal state claims, with China being just the most glaring example. To refocus the problem, the United States should change the way it describes and challenges maritime claims that lack a basis in international law. Such claims currently are described as “excessive” maritime claims because they exceed the limits or rules of the law of the sea reflected in UNCLOS.⁶⁵ The term “excessive,” however is unnecessarily ambiguous and equivocating. The term “excessive” suggests that reasonable people can differ on what is excessive, and that the line between “reasonable” and “excessive” is quite blurred. In reality, the standards for lawful claims in UNCLOS are rather forthright and simple. In any event, while there may be reasonable disagreement about the scope of maritime claims under UNCLOS, most of the disputes, especially concerning China, are not of that type.

In fact, the maritime claims challenged by U.S. FONOPS lack a basis in the law of the sea or UNCLOS and should be characterized as “unlawful,” which more concisely and accurately describes the status of the claim and U.S. rejection of it.

Shaping the law of the sea and UNCLOS is a strategic imperative for the United States. The role of international law in the South China Sea is important to the U.S. position in East Asia, and more importantly, to U.S. global strategy because the seas form a single, coherent, interconnected geography, subject to a single set of norms, rules, laws, and institutions. The global ocean constitutes the world’s largest domain of maneuver, and command of the global commons is the linchpin of American military power.⁶⁶

Forty percent of the seas lie under some form of coastal state jurisdiction, so the United States has a critical interest in a rules-based order of the oceans that accommodates global military operations on the surface of the water, in the water column, on the seabed beneath the seas, and in the airspace above it. Nowhere is this interest more apparent than the Indo-Asia-Pacific maritime domain.⁶⁷ American grand strategy and the U.S. global security

⁶⁵ See, e.g., Limits in the Seas No: 112: “United States Responses to Excessive National Maritime Claims,” U.S. Dep’t. of State, Mar. 9, 1992.

⁶⁶ Barry Posen, *Command of the Commons*, 28 *International Security* 5 (2003).

⁶⁷ “The [U.S. Pacific] fleet’s vision is one that sustains an Indo-Asia-Pacific maritime domain where the established and enduring framework of international norms, standards, rules, and laws is preserved.” Admiral Scott Swift, Commander, U.S. Pacific Fleet, *My Guidance to Pacific Fleet Sailors*, Aug. 23, 2016.

architecture depend on unimpaired connection to partners, friends and allies around the world that is facilitated by a functional, stable, inclusive, liberal order of the oceans.

The challenges in the South China Sea form an inflection point in the international law of the sea. The rule of law in the oceans has been a source of security, prosperity and stability since UNCLOS entered into force in 1994. If the United States (and other nations) fail to take seriously freedom of navigation and overflight, the liberal order of the oceans will unwind. China will establish hegemony in East Asia, and the implications of a deteriorating maritime order will spread throughout the globe. Nations in other areas of the world are keen to know whether China will persist to redefine the regimes of the law of the sea, or whether the United States and other nations are prepared to protect the contemporary order of the oceans. This is a contest that the United States and the rest of the world cannot afford to lose.

I believe the United States can more effectively counter the challenges to U.S. Seapower and Projection Forces in the South China Sea, and indeed worldwide, through four lines of effort.

First, the United States should implement legal countermeasures against China to induce compliance with international law, as reflected in UNCLOS. These countermeasures were outlined in 1983 by President Reagan, but have not been faithfully implemented, and include denying China the freedom of navigation in water under U.S. jurisdiction. This approach will be especially effective if other states, such as Japan, join the United States in this effort since China is zone-locked and its warships are unable to reach the open ocean without traversing the EEZs of its neighbors.

Second, the United States can take additional steps to strengthen the FON program. These are: (A) increase the type and number of FONOPS; (B) conduct combined FONOPS with like-minded states; (C) prioritize challenge to illegal claims that have been long ignored; (D) observe only lawfully declared territorial seas; and (E) improve U.S. Government interagency synchronization.

Third, the United States should leverage and promote the July 12 Arbitration Award as a powerful and enduring restatement of international norms in the South China Sea. The four major elements of the Award promote international peace and stability in the oceans by restricting unlawful maritime claims and admonishing unlawful and unsafe activities at sea. The United States already has asserted that the Arbitration Award is final and binding between China and the Philippines, and it should now make the tribunal decision a principal component of regional security.

Fourth and finally, the United States should join UNCLOS. While the legal norms of freedom of the seas are derived from customary international law and binding on all states, these rights and freedoms are more recently, clearly and explicitly codified and reinforced throughout the terms of the treaty. If the United States joins UNCLOS, China will not suddenly begin to comply with international norms at sea. However, UNCLOS has had an unmistakably positive effect on restraining states' unlawful claims. The regimes and rules reflected in UNCLOS badly need shoring up, and they would be strengthened greatly by U.S. participation.

Ultimately, the United States relies on its armed forces to guarantee the right to operate in the global commons, but UNCLOS ensures that we do so under color of law, and within an internationally accepted, rules-based order.⁶⁸ Like any law, and in particular, any international law, compliance by other states can be problematic. But UNCLOS cloaks U.S. freedom of navigation and overflight in legal and moral authority that reflects our Constitution and resonates with friends, partners and allies, and therefore the treaty affords the United States a unique locus of power that has not been leveraged.

Joining UNCLOS is not the end of the process, but rather one milestone in the long struggle to shape the law. Just as political realists describe a struggle for power in the international system, there exists a corresponding struggle for law.⁶⁹ The United States is best positioned to fashion and influence international law of the sea as a member of UNCLOS.

Thank you for the opportunity to present these views.

I especially thank the committee for raising visibility and awareness of the importance of a rules based order of the oceans and freedom of navigation and overflight in American grand strategy, and the critical role of Seapower and Projection Forces to uphold American interests.

⁶⁸ John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 88 (Jan. 1980).

⁶⁹ John Norton Moore, *The Law of the Sea Negotiations and the Struggle for Law*, in *Proceedings of the Conference on Deep Seabed Mining and Freedom of the Seas* 21, 23 (F. T. Chen, ed. 1981).