International Law as a Driver of Confrontation? UNCLOS and China's Policy in the South China Sea

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Abstract

Could international law contribute to interstate maritime conflicts? A close tracing of the People's Republic of China's (PRC) policies in the South China Sea suggests so. China's early interactions with the emerging maritime legal order in the 1970s expanded the scope of its interests from disputed island territories to comprehensive jurisdiction over vast swathes of maritime space. Ratifying the United Nations Convention on the Law of the Sea (UNCLOS) in 1996 prompted Beijing to develop new bureaucratic and enforcement capabilities designed to realize sweeping claims inspired by, though not limited to, UNCLOS entitlements. When these capabilities came to fruition in the mid-2000s, they enabled a sustained, increasingly coercive push for control over the PRC's maritime periphery, which has continued to the present. Four representative cases of China's new and ongoing patterns of behaviour demonstrate in specific detail how China's interactions with the legal regime have contributed to its confrontational on-water behaviour. In short, the PRC's campaign to control vast swathes of East Asian maritime space was rooted in the party-state's internalization of concepts of maritime rights through the UNCLOS process, coupled with a rejection of its corresponding limitations.

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1. Introduction

Could international law contribute to interstate conflict at sea? Most scholarship on the Law of the Sea has assumed not, focusing instead on whether legalization and judicialization processes have generated cooperation or the resolution of disputes, and if so, the mechanisms that would explain how.[1] The lack of debate on relationship between law and confrontational state maritime behaviour is surprising, not least because several decades of critical legal scholarship has drawn attention to the ways in which conflict is integral to international law.[2] Policy specialists have extensively examined the escalating maritime "lawfare," notably in the 2013-2016 *Philippines vs. China* South China Sea arbitration case,[3] and critics of the UNCLOS have pinpointed the Convention's reification of an "extractive imaginary" of the marine environment, its inattention to climate change, and the dire implications for the health of the oceans, among other shortcomings.[4] Yet little systematic consideration has so far been given to the linkages between the legal regime and specific conflictual state actions on the water.

The lacuna is mirrored in both liberal and realist accounts of international law in the field of international relations. Institutionalists argue legal frameworks reveal information that renders the anarchic international environment more predictable, reducing the costs of cooperation.[5] Realists tend to view international law as reflecting the interests of powerful states, but offer little reason to expect it to contribute to conflict.[6] In the case of the UNCLOS, empirical studies based on large quantitative

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[1] Koh, 'Negotiating a New World Order for the Sea Commentary', 24 *Virginia Journal of International Law* (1983) 761; Goldstein et al., 'Introduction: Legalization and World Politics', 54 *International Organization* (2000) 385; Duong, 'Following the Path of Oil: The Law of the Sea or Realpolitik', 30 *Fordham International Law Journal* (2006) 1098; Oxman, 'The Territorial Temptation: A Siren Song at Sea', 100 *American Journal of International Law* (2006) 830; Mitchell and Owsiak, 'Judicialization of the Sea: Bargaining in the Shadow of UNCLOS', 115 *American Journal of International Law* (2021) 579; Alter, 'Introduction to the Symposium on Sara McLaughlin Mitchell & Andrew P. Owsiak, "Judicialization of the Sea: Bargaining in the Shadow of UNCLOS"', 115 *AJIL Unbound* (2021) 368.

[2] Koskenniemi, 'The Politics of International Law', 1 *European Journal of International Law* (1990) 4; 'The Politics of International Law - 20 Years Later', 20 *European Journal of International Law* (2009) 7; D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (2016); Hakimi, 'The Work of International Law', 58 *Harvard International Law Journal* (2017) 1.

[3] I. Kardon, *China's Law of the Sea: The New Rules of Maritime Order* (2022); Guilfoyle, 'The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea', 95 *International Affairs* (2019) 999; Goldenziel, 'Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare – Cornell Law Review', 106 *Cornell Law Review* (2021); Song and Tønnesson, 'The Impact of the Law of the Sea Convention on Conflict and Conflict Management in the South China Sea', 44 *Ocean Development & International Law* (2013) 235.

[4] Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary', 30 *European Journal of International Law* (2019) 573; 'Decolonization and International Law: Putting the Ocean on the Map', 23 *Journal of the History of International Law* (2021) 161; Freestone and McCreath, 'Climate Change, the Anthropocene and Ocean Law: Mapping the Issues', in *Research Handbook on Climate Change, Oceans and Coasts* (2020).

[5] Mitchell and Owsiak, *supra* note 1; Goldstein et al., *supra* note 1, 391-393.

[6] H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1997); Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', 36 *International Organization* (1982) 185; Mearsheimer, 'The False Promise of International Institutions', *International Security* (1994). As Richard Steinberg points out, few realists have actually claimed international law is simply epiphenomenal to power. While realists expect international law to reflect the interests of

datasets have claimed its aggregate effect has been the prevention of new maritime conflicts by bringing states' maritime practices into greater alignment, and an increased likelihood of dispute settlement due to the shadow of its binding dispute resolution mechanisms.[7] Puzzlingly, however, the same data also indicate conflict over maritime claims has not declined in the post-1982 UNCLOS period, and that disputes between UNCLOS signatories may even be more likely to become militarized.[8] The qualitative evidence presented below sheds light on why this might be so.

China specialists have referred in passing to UNCLOS as a factor influencing China's behaviour in the South China Sea. Jian Zhang, for example, has noted that China's increased assertiveness in the South China Sea was partly driven by "an increasing recognition of the importance and legitimacy of international law of the sea such as UNCLOS, and the more serious consideration of seeking a future diplomatic and even legal solution to the dispute."[9] PRC legal scholars Bing Bing Jia and Zhiguo Gao write that Beijing's policy in the dispute has been "informed by developments in the law of the sea, including its own ratification of UNCLOS."[10] A US Navy-affiliated think tank report from 2011 noted a "new layer of issues in China's maritime boundary disputes" that followed China's accession to the treaty.[11] However, no study has systematically delineated the political and policy processes linking UNCLOS with specific cases of assertive behaviour at sea.

This Article shows how the international legal regime for the world's oceans has influenced state conduct in ways quite unlike those expected by either its proponents or sceptics. Tracing in turn the development of China's key maritime policies, and their specific implementation on the South China Sea's disputed waters, reveals a story of international law's constitutive and enabling relationship with confrontational state behaviour, consistent with interactionist accounts of the nature of law in international politics.[12] In Harold Koh's theory of "transnational legal process," international law's effects emerge through complex interactions in which emergent norms are internalized into domestic legal and political structures.[13] While Koh's stated focus was on "how law influences why nations obey," the central process of

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powerful states, and non-compliance by powerful states where it contradicts their key interests, there are still many examples where "international law may make states better off than otherwise." Steinberg, 'Wanted – Dead or Alive: Realism in International Law', in J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012) 146.

[7] Nemeth et al., 'Ruling the Sea: Managing Maritime Conflicts through UNCLOS and Exclusive Economic Zones', 40 *International Interactions* (2014) 711. At 733.

[8] Mitchell, 'Clashes at Sea: Explaining the Onset, Militarization, and Resolution of Diplomatic Maritime Claims', 29 *Security Studies* (2020) 637. At 663. Nemeth et al., *supra* note, at 725; Mitchell and Owsiak, *supra* note, at 608.

[9] Zhang, 'China's Growing Assertiveness in the South China Sea: A Strategic Shift?'', in L. Buszynski and C. Roberts (eds.), *The South China Sea and Australia's Regional Security Environment* (2013) 18.

[10] Gao and Jia, 'The Nine-Dash Line in the South China Sea: History, Status and Implications', 107 *American Journal of International Law* (2013) 98. At 103.

[11] T. J. Bickford, *Uncertain Waters: Thinking About China's Emergence as a Maritime Power* (2011), available at https://apps.dtic.mil/sti/citations/ADA552565 (last visited 31 December 2022]. At 16.

[12] J. Brunnée and S. J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010); A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); C. Reus-Smit, *The Politics of International Law* (2004).

[13] Koh, 'Transnational Legal Process', 75 *Nebraska Law Review* (1996) 181.

norm internalization need not necessarily apply only to compliant states.[14] This Article argues the formation and implementation of China's push to control vast swaths of East Asian maritime space is rooted in the party-state's internalization of concepts of maritime rights through its interactions with the UNCLOS process, coupled with a rejection of its corresponding limitations.

The international legal regime was, of course, not a singular cause of the PRC's assertive policy in the South China Sea. The four case studies below make plain that China's increasing material capabilities, the escalating value of the region's resource endowments, and other new challenges to China's position in key areas were important factors behind different aspects of China's general policies and particular actions. However, close examination of both Chinese government sources and PRC maritime actors' behaviour over the South China Sea demonstrates in detail how, intertwined with these well-known factors, China's interactions with the Law of the Sea regime have enabled, shaped and in some cases driven its specific on-water behaviours.

The section below reviews the PRC's evolving relationship with the Convention, drawing on yearbooks, chronologies, and other documents from PRC maritime agencies. Next, four carefully chosen representative case studies illustrate the processes behind the PRC's confrontational maritime behaviours in the South China Sea, drawing from Chinese-language maritime law enforcement agency materials, government reports and advisory papers, supplemented by US State Department cables and other foreign sources on China's maritime conduct. The final section assesses the significance of the international legal regime's influence on China's policy by reflecting on key counterfactuals, and distils several implications of these findings for scholars, lawyers, policymakers and citizens.

2. "Opportunities and Challenges": China and the UNCLOS

The story of China's assertive maritime policy is part of the larger story of the territorialization of the seas.[15] Throughout the 20th century, while international law chipped away at state authority over the earth's landmasses, the opposite process was occurring at sea. In Bernard Oxman's memorable phrasing, the "territorial temptation" of states to seek maximum discretion for themselves "thrust seaward with a speed and geographic scope that would be the envy of the most ambitious conquerors in human history."[16] Oxman traced this displacement of the once dominant principle of *mare liberum* to the US's unilateral assertion of sovereign rights on its "continental shelf" in 1945, which ostensibly aimed to facilitate investment in offshore hydrocarbon exploitation. Far from objecting to Washington's radical expansion of state jurisdiction, other governments widely emulated it.[17]

The UNCLOS concluded in 1982 stands as the defining expression of the territorialization of the world's oceans. That year in Montego Bay, Jamaica, 107 state

[14] *Ibid.*, at 184. Indeed, Koh acknowledged that noncompliant states may try to make their noncompliance as "a new governing international rule." At 205.
[15] I.e. "analogising the oceans as territory and performing sovereignty over the sea as they would land." See Strating and Wallis, 'Maritime Sovereignty and Territorialisation: Comparing the Pacific Islands and South China Sea', 141 *Marine Policy* (2022), at 1.
[16] Oxman, *supra* note 1. At 832.
[17] Ranganathan, *supra* note 4.

governments agreed to subject nearly 50 per cent of the world's maritime space to claims of state jurisdiction. Not surprisingly, most other governments quickly joined the regime; today it has 170 state parties. As Oxman and others have observed, these new sovereign *rights* were quickly understood in "quasi-territorial terms," and have been subject to regular attempts at further expansion since that time.[18] Yet the possibility of newly territorialized legal claims themselves spilling out into conflictual real-world behaviours has remained largely unexplored.[19]

Since the UNCLOS came into effect in 1994, official PRC discussions of the Convention have revolved around the unprecedented "opportunities and challenges" to the advancement of China's "maritime rights and interests" in the context of the new international legal regime. These two crucial linguistic artefacts encapsulate the party-state's ambivalent relationship with international law in general, and the UNCLOS in particular. "Opportunities and challenges" (机遇与挑战) reflects the party's recognition of the international legal regime as a variable that can work either to its advantage or to its disadvantage. As shown below, since the 1990s, official PRC statements on the matter express a belief that Chinese maritime policymakers consider the challenges to have been growing relative to the opportunities. The second formulation, "maritime rights and interests" (海洋权益), denotes that Beijing understands the notional distinction between rights and interests, but treats them as identical for policy implementation purposes. Within PRC policy discourse, assertive actions in disputed area of the South China Sea are understood as the protection or safeguarding (维护) of the state's "maritime rights and interests."

Mainstream views within the PRC party-state regard "the weapon of international law" as a vital tool for advancing state interests in the current international system.[20] In the words of Chinese military researchers Xiao Xunlong and Li Shouqi, in maritime disputes "whoever grasps the use of international law gains the initiative."[21] The point reflects the party-state's longstanding instrumentalist approach to international law. During the decade-long negotiation process leading up to the treaty's conclusion (1973-1982) China was a strong advocate for a 200nm EEZ against less expansive proposals. At that time of intense security threats from the Soviet Union, any initiative that could help build opposition to the activities of extra-regional militaries in East Asia stood to increase Beijing's security.

However, the 200nm EEZ strongly legitimized coastal-based claims of Malaysia, Vietnam, the Philippines, and Brunei over vast maritime spaces to which the PRC was just beginning to formulate claims.[22] China's delegation leader Ling Qing recalled realizing this only in 1976 after a foreign delegate gave him a dossier of

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[18] Oxman, *supra* note 1, at 839–840; Bateman, 'UNCLOS and Its Limitations as the Foundation for a Regional Maritime Security Regime', 19 *The Korean Journal of Defense Analysis* (2007) 27; Schofield, 'Parting the Waves: Claims to Maritime Jurisdiction and the Division of Ocean Space', 1 *Penn State Journal of Law & International Affairs* (2012) 40; Kardon, *supra* note 3; Strating and Wallis, *supra* note 15.

[19] Oxman raises fleetingly the prospect of "costly and occasionally bloody unilateralism," as against strict implementation of the UNCLOS. Oxman, *supra* note, at 850.

[20] Kardon, *supra* note 3.

[21] Xiao Xunlong & Li Shouqi, *Haishang Weiquan Douzheng Yulun Duice Sikao [Thoughts on public opinion warfare responses in the maritime rights struggle* 34 GUOFANG KEJI [NAT'L DEF. SCIENCE & TECH.] 99 (2013). At 101.

[22] J. Chen, 'China's ASEAN Policy in Deng Xiaoping's Era: Major Political and Security Issues and General Trends' (1994) (available at Australian National University). At 154.

detailed calculations of how resources would be apportioned under the 200nm scheme. By this time, according to Ling, the PRC's position was too entrenched for major change to be politically feasible.[23] The "opportunities and challenges" and "maritime rights and interests" formulations reflect the party-state's recognition of how its position in the South China Sea has been complicated by this legacy. As shown below, China has refused to limit its claims to those authorized by the Convention, even as the Convention provided both the conceptual foundation and the direct impetus for their enactment in domestic laws, bureaucratic structures, and enforcement capabilities.

China's claims in the South China Sea are depicted on its (in)famous "nine-dash line" map (Figure 1). The map pre-dates the UNCLOS regime by 35 years — it was inherited from Chiang Kai-shek's Republic of China — but not as a claim to maritime space, rather, as a claim to the island territories within the line.[24] This is explicit in the official title of the map: *Location Map of Islands in the South China Sea* (南海诸岛位置图).[25] It was only after the conclusion of the UNCLOS in 1982 that the line began to acquire a specific geographical significance for PRC maritime actors as the scope of China's "maritime rights and interests."[26] The state's newly emerging interest in the line's outer margins is clearly evident in the routes of the centrally organized exploratory resource survey missions between 1984 and 1987, depicted in Figure 2.

[23] Shan Xu, "Lianheguo Haiyangfa Gongyue tanpan shimo"
[24] Hayton, 'The Modern Origins of China's South China Sea Claims', *Modern China* (2017).
[25] The PRC has continued to refer to the title of the map as evidence of Chinese sovereignty over the islands. See, for example, Chinese Government, *Position Paper*, *supra* note, par.20.
[26] This is precisely the reading of the nine-dash line deemed contrary to the Convention in the 2016 ruling by the *Philippines vs. China* arbitral tribunal constituted under Annex VII. Permanent Court of Arbitration (registry), *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, 12 July 2016, available at https://pca-cpa.org/en/cases/7/.

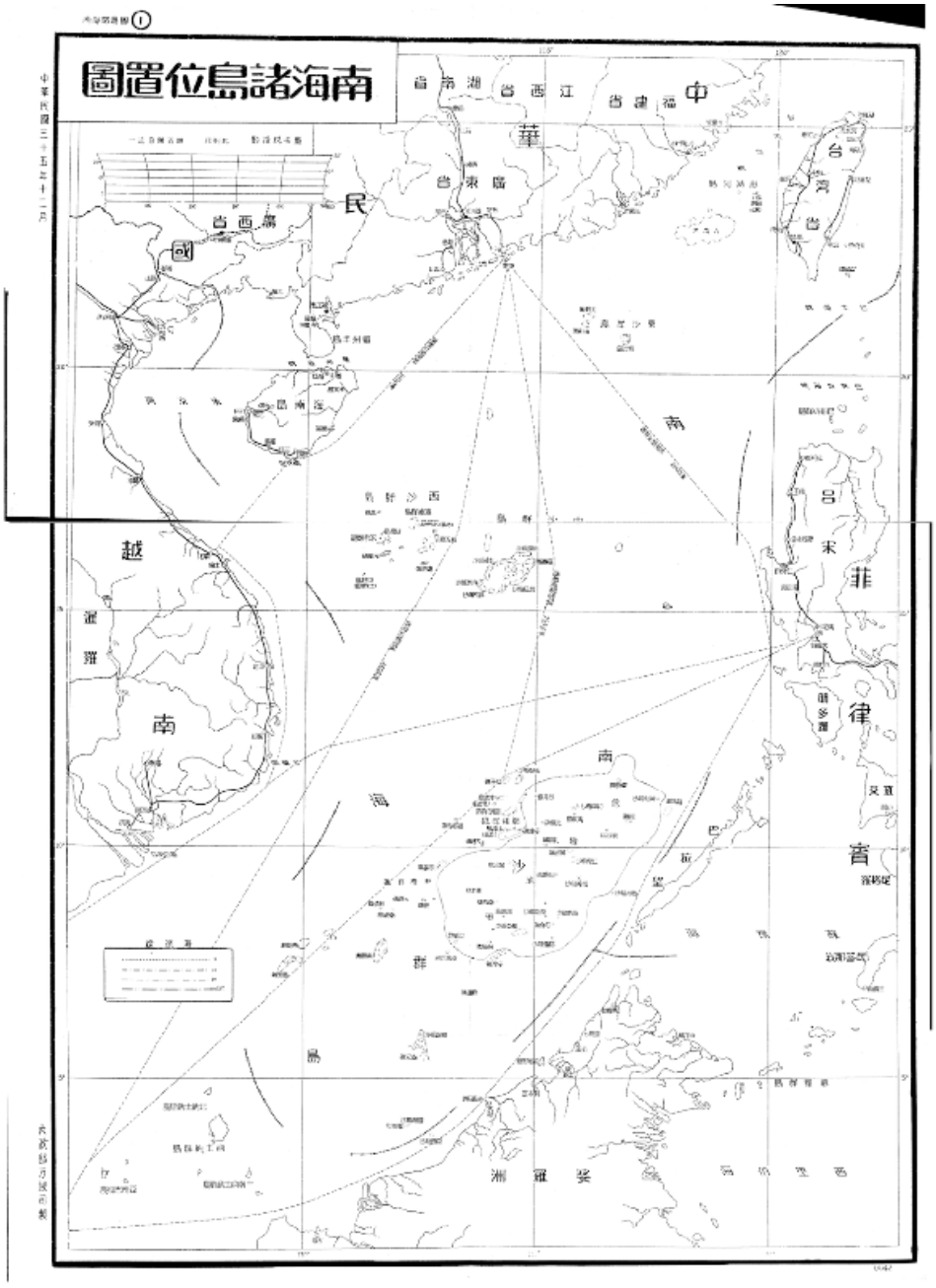

Figure 1: *Location Map of Islands in the South China Sea*, the first official U-shaped line map, published in December 1947 by the Republic of China under the Kuomintang.

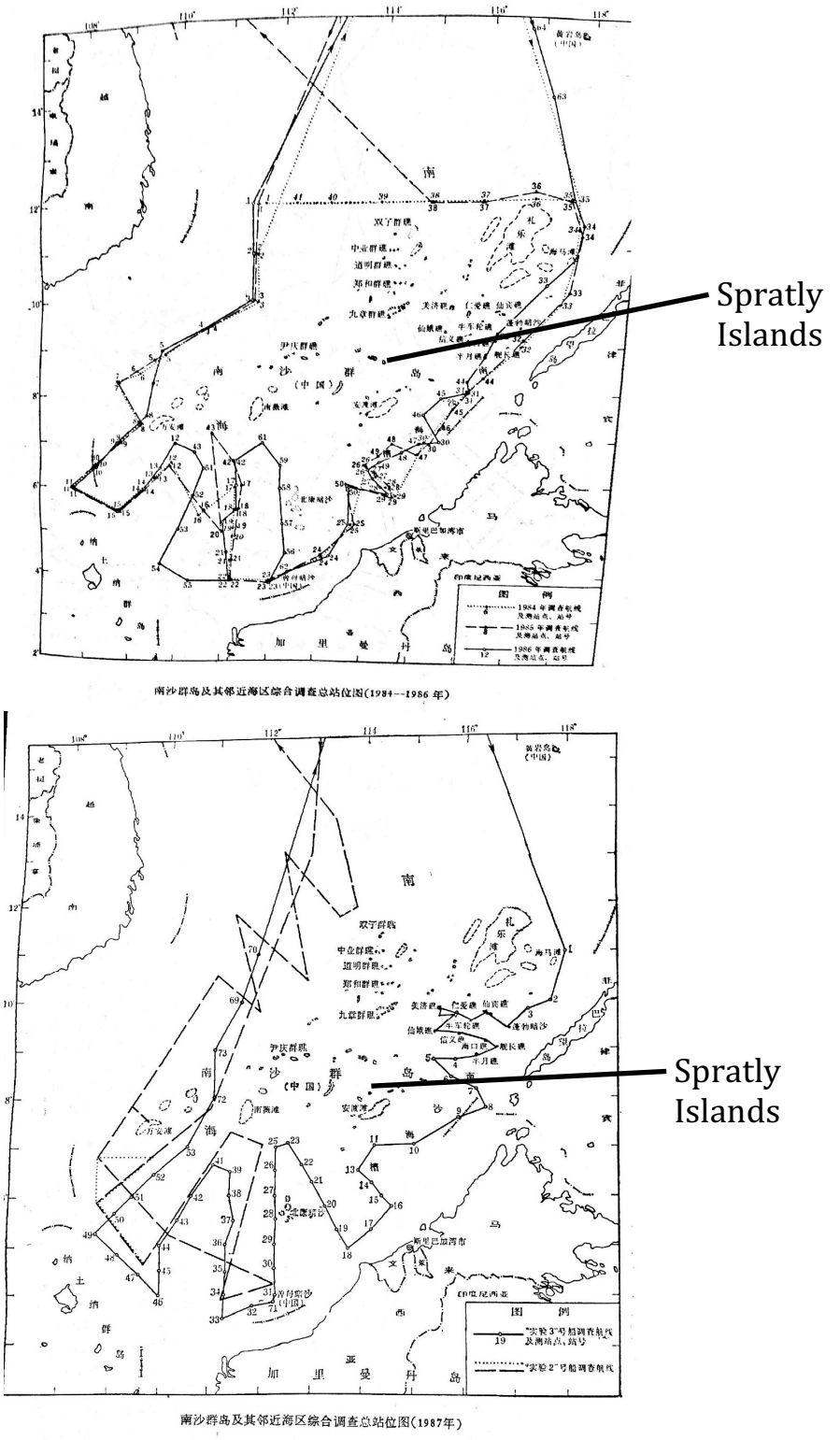

Figure 2: *Route of 1984-1986 (top) and 1987 (bottom) Spratly Islands Comprehensive Surveys (Zhongguo Kexue Yuan [Chinese Academy of Sciences], Nansha Qundao Ji Qi Linjin Haiyu Zonghe Diaocha Yanjiu Baogao [Research Report on Comprehensive Survey of the Spratly Islands and Nearby Maritime Areas]*, (Beijing: Kexue Chubanshe, 1989).

Although the nine-dash line's precise meaning and coordinates have never been officially delineated, official statements have indicated that it includes sovereignty over the disputed territories, plus the EEZ and continental shelf that the Convention assigned to "islands" under Article 121, as well as unspecified "historic rights" derived from sources beyond the Convention's framework.[27] Such "historic rights" have only been asserted since the Convention's entry into force and China's subsequent ratification in 1996, and were reasserted in response to the 2016 *Philippines vs. China* arbitration ruling.[28] Ratification prompted the rapid enactment body of a domestic law designed to, in Isaac Kardon's words, "proces[s] the various new rights and interests created by China's accession to UNCLOS." In turn, as the next section shows, these legal instruments produced the domestic mandate, bureaucratic organizations, and core capabilities required for the physical implementation of the PRC's claims, legal and otherwise.

A. New Laws, New Capabilities

The constitutive, rather than merely constraining, role of international law in shaping state behaviour is readily apparent in the domestic legal instruments that have given specific form to China's "maritime rights and interests" in the South China Sea.[29] In China's maritime policymaking system, laws are considered a prerequisite for extending control over maritime spaces in which the state's rights are held to exist.[30] By Kardon's count, in the first two decades after ratification of the treaty, PRC organs issued 156 legal instruments (laws, rules, regulations, measures etc.) on the UNCLOS-mandated Exclusive Economic Zone alone.[31] These domestic legal and administrative acts have not only claimed their authority from UNCLOS, they were direct responses to the PRC's ratification of the international legal regime.

Three key examples illustrate the connection with subsequent conflictual state actions. First, Article 8 of the 1992 *Law on the Territorial Sea and Contiguous Zone* ("*1992 Territorial Sea Law*"), enacted in preparation for the coming into effect of UNCLOS, elevated the legal status of China's disputed territorial claims, and gave authority to the Chinese government to use "necessary measures" against "non-innocent passage" by foreign vessels through the territorial seas around all of the disputed islands, many of which were (and still are) controlled by other states.[32]

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[27] UN document number CML/18/2009, May 7, 2009. Another diplomatic note two years later further specified, "China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone and Continental Shelf." UN document number CML/8/2011, April 14, 2011.
[28] Gao and Jia, *supra* note 10.
[29] Kardon, *supra* note 3.
[30] For example, SOA's chronologies describe the *2001 Sea Areas Law* as "a crucial move to strengthen comprehensive maritime management," to "further strengthen the construction of national rights in contiguous areas," and create a "scientific comprehensive management system, defend national maritime rights." Zhongguo Haiyang Ju [State Oceanic Adminsitration], Dashiji [Chronicle of Major Events]: 2001, at http://www.soa.gov.cn/memo/index.html, *available in* Archive.org. Noted hereafter as SOA, *Dashiji (year)*.
[31] Kardon, 'China's Maritime Rights and Interests: Organizing to Become a Maritime Power', (2015) , available at https://www.cna.org/archive/CNA_Files/pdf/china-maritime-rights.pdf , at 27.
[32] Article 8, *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*, February 25, 1992.

Second, in June 1996, one month after ratifying UNCLOS, the PRC issued its *Rules on Foreign Marine Scientific Research* ("*1996 MSR Rules*"), with the explicit aim of "safeguarding the State's security and its maritime rights and interests" in all "waters under China's jurisdiction."[33] This State Council document declared explicitly, and with unprecedented political authority, the PRC's long-held position opposing military reconnaissance in its claimed EEZ and beyond. These rules were soon cited as the authority for new forms of assertive action against foreign vessels in disputed waters.[34]

Third, and most consequentially, in June 1998 the PRC's *Law on the Exclusive Economic Zone and Continental Shelf* ("*1998 EEZ Law*") enshrined China's claims to the maritime rights assigned by UNCLOS in national law for the first time – while also for the first time reserving unspecified "historic rights" (历史性权利) beyond the treaty.[35] This move not only broadened the scope of the PRC's "maritime rights and interests," it also provided the basis for enforcement action. The associated hardening of the PRC's position in is evident in the designation of foreign activities in the disputed area of the South China Sea as "illegal" in its agencies' yearbooks from this time forward.[36] Subsequent allocations of organizational and material resources would give specific form to this new position.

China's UNCLOS-inspired maritime laws led directly to the creation and equipping of the maritime law enforcement (MLE) agencies that have been at the forefront of China's assertive policy shift. In June 1998, the same month as the National People's Congress enacted the *1998 EEZ Law*, the State Council issued new rule assigning the State Oceanic Administration (SOA) responsibility for "upholding maritime rights and interests in accordance with the law."[37] In response, the SOA established China Marine Surveillance (CMS) in January 1999 as an "integrated central-regional administrative law enforcement force" tasked with patrolling the PRC's claimed jurisdictional waters. The SOA had operated a Marine Environment Surveillance Fleet since 1983, but the 1999 reorganization created three new national-level air and sea squadrons whose purpose was explicitly political. SOA Director Zhang Dengyi stated in a 1999 speech that the new force was established "to increase the force of maritime law enforcement and strengthen comprehensive maritime management."[38] The SOA's in-house newspaper surmised that CMS was designed as a "special police

[33] *Regulations of the People's Republic of China on the Management of Foreign-Related Marine Scientific Research*, June 18, 1996, at http://1997-2001.state.gov/www/global/oes/oceans/ntrvo124.html

[34] For example, in October-November 1999, "on the basis of the 1996 MSR Rules the SOA East Sea Branch sent the *Shijian* and *Haijian-47* to conduct special surveillance (专项监视) of a foreign survey vessel that illegally entered waters under Chinese administration." Guojia Haiyang Ju (State Oceanic Administration) ZHONGGUO HAIYANG NIANJIAN [CHINA OCEAN YEARBOOK] *1999-2000*, at 314. Noted hereafter as SOA, ZGHYNJ (year).

[35] Gao and Jia, *supra* note 10; Hayton, 'The Modern Creation of China's 'Historic Rights' Claim in the South China Sea', 49 *Asian Affairs* (2018); Kardon, *supra* note 3, at 120–121.

[36] SOA, ZGHYNJ 1997-1998, at 206.

[37] SOA, *Dashiji: 1998*, see *supra* note 34.

[38] Zhang Dengyi, *Zai disan ci quanguo keji xinghai jingyan jiaoliu hui kaimushi shang de jianghua zhaiyao [Summary of speech at opening of Third National Science-Invigorates-the-Ocean forum for the exchange of experiences]*, 875 ZHONGGUO HAIYANG BAO [CHINA OCEAN NEWS], December 17, 1999, at http://www.coi.gov.cn/oceannews/hyb875/875.htm, *available in* Archive.org.

force" for maintaining and protecting China's maritime rights and interests, and implementing UNCLOS.[39]

The year 2000 was, according to the SOA, "the year of the full launching of the new force's work." In particular, this included the construction of new ocean-going patrol ships and aircraft, and the establishment of laws and regulations to govern their use against foreign targets.[40] The CMS fleet's initial focus appears to have been on capacity building and demonstrating China's opposition to foreign military surveillance in the EEZ. In 2000, the SOA authorized CMS to take "necessary measures" against foreign marine research activities in China's claimed maritime areas, primarily the shadowing of US military reconnaissance vessels.[41] The actions were carried out with caution, "strictly following orders and with a high degree of political responsibility and consideration of the overall situation."[42]

By the end of the decade this type of "shadowing" operation had become routine,[43] and the agency was beginning to engage in more coercive enforcement actions. In the March 2009 *Impeccable* incident off Hainan, CMS vessels oversaw an operation that physically forced a US reconnaissance ship to cease its military surveillance operations. Significantly, however, the new policy of on-water interceptions from 2002 was not targeted exclusively at the US or its allies: government publications also detail similar actions against two Russian ships in May 2002, and against warships from three different countries in 2004.[44] Rather than being a simple function of Sino-American relations, then, the agency's behaviour marked a general shift towards a more assertive stance on the issue.

The most directly consequential decision was the approval of a 10-year, multi-stage program to construct ocean-going patrol vessels that could stay at sea for the prolonged periods required to maintain a presence across the vast expanses of China's claimed waters. To this end, in 1999 the State Council allocated ¥1.6 billion to equip CMS with 13 large new long-range patrol boats and five aircraft. The two-stage project was personally approved by Premier Zhu Rongji and Vice-Premier Wen Jiabao.[45] The first stage included four ships in the 1000-ton class, plus one 1500-ton and one 3000-

[39] Xu Zhiliang, *"Zhongguo Haijian" – haiyang de "tejingdui" ["China Marine Surveillance" – a "special police unit" for the oceans]*, 914 ZHONGGUO HAIYANG BAO [CHINA OCEAN NEWS], May 9, 2000, at https://web.archive.org/web/20010309143435, *available in* Archive.org.
[40] SOA, ZGHYNJ 2001, at 108 (see *supra* note).
[41] *Shewai haiyang keyan zhifa jiancha youzhangkexun (There are rules to follow in foreign-related marititime scientific research law enforcement),* 919 ZHONGGUO HAIYANG BAO (CHINA OCEAN NEWS), May 26, 2000, at http://www.soa.gov.cn/zfjc/919.htm, *available in* Archive.org; SOA, ZGHYNJ 2003, at 186.
[42] SOA, ZGHYNJ 2003, at 182.
[43] SOA, ZGHYNJ 2006, at 164; US State Department, *USN activities in China's Exclusive Economic Zone (EEZ)*, cable #08STATE43018, April 23, 2008, *available in* Wikileaks.
[44] SOA, ZGHYNJ 2003, at 186; SOA, ZGHYNJ 2005, at 193.
[45] Premier Zhu and Vice Premier Wen personally instructed the State Planning Commission to organize the project's implementation. The SOA quickly established a ship construction leading small group to begin program establishment and reporting preparation work, and in March 2000 submitted the proposal to build 13 ships. The SPC issued its in-principle approval in October of that year. Su Tao, *Zhongguo Haijian xinxing chuanbo, feiji jianzao ceji [Profiling CMS's new vessel and aircraft construction]*, ZHONGGUO HAIYANG BAO [CHINA OCEAN NEWS], December 17, 2007 at http://www.zzofa.cn/news_view.asp?newsid=412.

ton vessel, along with two aircraft.[46] The project was a complex one, involving extensive research before procurement began, and it appears to have encountered some delays, with the first ship only delivered in late 2004.[47]

The CMS force also needed time to develop the organizational and logistical capacities, and operational experience, to make effective use of its new equipment in disputed areas. After testing the waters closer to home in the East China Sea, by the end of 2006 CMS proclaimed its readiness to more boldly assert China's claims across the larger and much more distant expanses of the South China Sea.[48] Stage two of the same shipbuilding project, which had also been planned and approved in 1999 in order to implement the EEZ Law, commenced in 2009. This delivered a further seven large, high-endurance cutters by 2011.[49] A subsequent third phase of law enforcement vessel construction project followed, this one aimed at equipping provincial CMS detachments with large ships to participate in maritime rights defence. The shiny new "great white fleet" was evidently not simply an outgrowth of Chinese power; plans for its creation were only launched after accession to the UNCLOS prompted the enshrinement of China's expansive "maritime rights and interests," the domestic legal mandate for their realization across disputed areas, and the bureaucratic organization responsible.

Another key capacity-building move in this period was the establishment of a new national-level organ for fisheries law enforcement. The Fisheries Law Enforcement Command (中国渔政指挥中心) was established specifically to "adapt to the implementation of the new international maritime regime" by coordinating fisheries law enforcement actions, particularly in the newly generated EEZ.[50] In August 1998, almost immediately after the enactment of the *1998 EEZ Law*, the State Planning Commission authorized funding for 14 mid-to-large sized fisheries law enforcement ships.[51] Perhaps reflecting the Fisheries Administration's greater existing level of experience in law enforcement work, and its superior administrative rank compared with the newly formed CMS force, the FLEC's new 1000-ton ships began to be delivered by 1999.[52]

If China's construction of these bureaucratic systems and large oceangoing civilian maritime law enforcement fleets had been a simple function of its increasing economic and military power, rather than accession to the emerging maritime legal regime, then it should have begun years or even decades earlier than it did. China's

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[46] Zhang Xudong, *Zhongguo jijiang wancheng 13 sou qiandunji haijian chuan jianzao zengqiang haiyang weiquan nengli [China will soon complete 13 1000t-class marine surveillance ships, will strengthen maritime rights defence capabilities]*, Xinhua, January 6, 2011, at http://news.xinhuanet.com/mil/2011-01/06/c_12953441.htm

[47] Once the State Planning Commission had allocated the funds, numerous studies were conducted to "scientifically" discover the best way to proceed. SOA, ZGHYNJ 2001, at 109.

[48] ZGHYNJ 2007, at 173.

[49] Zhongguo Haijian Nanhai Zongdui [China Marine Surveillance South China Sea Branch], *Zhongguo Haijian Nanhai Zongdui jiang jian 4000-dun ji zhifa chuan jiaqiang haixun [CMS South Sea Branch to construct 4000t-class law enforcement ship to strengthen maritime patrol]*, July 21, 2009 at http://www.scsb.gov.cn/html/2/13/article-15.html *available in* Archive.org.

[50] Nongye Bu [Ministry of Agriculture], *ZHONGGUO YUYE NIANJIAN 2001 (CHINA FISHERIES YEARBOOK 2001)*, (Beijing: Nongye Chubanshe, 2001), at 123. Noted hereafter as, MOA, ZGYYNJ (year).

[51] SOA, *Dashiji: 1998*.

[52] SOA, *Dashiji: 1999.* FLEC was a bureau-level (正局级) unit, equivalent in rank to the CMS force's parent institution, the State Oceanic Administration.

naval strategy – as distinct from law enforcement – had shifted outward from "coastal defence" to focus on regional "near seas" (近海) under Admiral Liu Huaqing from 1985, while economic growth averaged around 10 per cent for the entire decade of the 1980s and 1990s. Evidence of coordinated effort towards enforcing disputed claims against other regional states becomes apparent only after the PRC's ratification of the Convention, and the subsequent establishment of domestic laws and bureaucratic systems, particularly the 1998 *EEZ Law* and the establishment of China Marine Surveillance in 1999. Nor can China's rapidly deepening dependence on imported resources explain these decisions: after decades of net oil exports, the PRC became a net energy importer for the first time in 1993.[53] Instead, as the case studies will illustrate in detail, the capabilities that enabled Beijing's assertive shift in the South China Sea emerged directly from the Chinese policymaking system's internalization of the Convention's maritime rights, together with its corresponding rejection of the Convention's limitations thereon.

B. New opportunities

The challenges the UNCLOS has posed to China's claims raise the obvious question of why Beijing would have gone ahead with ratification. Yet in 1996, and for some years beyond, Chinese maritime policy makers and diplomats shared a strong view that the opportunities associated with the regime's emergence outweighed the challenges. In debates over the draft *EEZ Law* in 1996, Vice Foreign Minister Li Zhaoxing argued that "implementing the international maritime legal system" in domestic legislation was key to safeguarding China's "maritime rights and interests."[54] A detailed collective statement of this optimistic view is found in a little-studied SOA document released immediately prior to the PRC's ratification of the Convention, titled *China's Maritime Agenda for the 21st Century*.[55]

The *Agenda* document identified the Convention first and foremost with an expansion in the scope of China's maritime rights and interests: "UNCLOS has brought opportunities for the development and exploitation of the oceans over a wider area." At the same time as expanding the scope of China's maritime interests on paper, the new legal regime had also granted international legitimacy to real-world action to assert them. The UNCLOS, according to the *Agenda*, had "established a formal international legal basis for comprehensive management of the oceans, defence of maritime rights, and protection of maritime environment and resources."[56] Specifically, it had assigned China "approximately 3 million square kilometers of waters" in which to claim and exercise jurisdiction – an area that, consistent with Oxman's observations, has assumed an increasingly territorial quality ever since.[57] In fact, the 1996 *Agenda* document presciently noted that waters within 200nm of shore were "gradually becoming territorialized" (逐步国土化), a trend that the PRC appears to have viewed in generally

[53] PRC official statistics and World Bank figures are consistent on this point.
[54] Kardon, *supra* note 3, at 124.
[55] SOA, *Zhongguo Haiyang 21 Shiji Yicheng [China's Maritime Agenda for the 21st Century]*, March 1996, at http://sdinfo.coi.gov.cn/hyfg/hyfgdb/fg8.htm *available in* Archive.org (noted hereafter as SOA, *Yicheng*).
[56] SOA, *Yicheng*, Chapter 10.
[57] SOA, *Yicheng*, Preamble.

positive terms at that time.[58] The *Agenda*'s authors even described UNCLOS as "beneficial to breaking maritime hegemonism" – a glowing accolade within the CCP's Marxist-Leninist-Maoist ideological system.[59]

China's first White Paper on maritime affairs, released in May 1998, retained this generally positive outlook on the new opportunities afforded by the ascendant legal regime, describing "safeguarding the principles of international maritime law as defined in the UNCLOS" as the "common mission of all mankind."[60] However, it also foreshadowed a progressively hardening approach to enforcement in disputed areas. First among the basic policies and principles outlined in this authoritative document was "safeguarding the new international marine order and the state's marine rights and interests." After asserting the specific maritime rights assigned by the Convention, the White Paper vowed to resolve overlapping claims through "consultations on the basis of international laws and the principle of fairness." It then went on to state China's sovereignty over "all archipelagoes and islands" listed in the *1992 Territorial Sea Law* – which, as noted above, was enacted in anticipation of the UNCLOS coming into effect, and included various disputed maritime territories controlled by other countries. This reflected an emerging view among Chinese policymakers that intensified zero-sum competition was set to ensue *within* the new international legal framework.[61]

The PRC's top maritime policymakers have subsequently expressed the belief that unilateral demonstrations of on-water administrative presence are a necessary condition for advancing claims under the new international maritime regime. CMS Party Secretary Sun Shuxian made a clear statement of this view in a 2008 speech marking the 10th anniversary of his maritime law enforcement fleet's founding. Sun stated that there are two legal principles regarding state authority in disputed waters, the first being "effective administration" (有效管理), the second "actual control" (实际控制). Without either of these, Sun argued, claiming the area in question was meaningless, thus it was crucial that CMS "embody present jurisdiction" (体现存在管辖) in the disputed areas.[62] This line of thinking is evident in China's determination to steadily increase its regular patrols in the South China Sea examined in detail below, which are understood as "embodying jurisdiction."[63]

Coercive actions against other states, too, are referred to in internal materials as having the effect of "displaying presence and embodying jurisdiction."[64] Rightly or wrongly, then, the relevant PRC agencies appear to believe increased presence in disputed areas constitutes state administration of such maritime spaces, and that this strengthens China's maritime jurisdictional claims within the UNCLOS framework.

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[58] SOA, *Yicheng*, Chapter 1.
[59] SOA, *Yicheng*, Chapter 10.
[60] See State Council Information Office, *Zhongguo Haiyang Shiye de Fazhan [The Development of China's Marine Programs]*, May 1998, at http://www.scio.gov.cn/zfbps/ndhf/1998/Document/307963/307963.htm *available in* Archive.org
[61] SOA, ZGHYNJ 1997-1998, at 206.
[62] Yu Wei, *Zhongguo Haijian youwang cheng haijun yubeiyi budui [CMS may become naval reserve force]*, *Nanfang Dushibao [Southern Metropolis Daily]*, October 20, 2008, AA16, at http://news.southcn.com/china/zgkx/content/2008-10/20/content_4657509.htm *available in* Archive.org
[63] SOA, ZGHYNJ 2010, at 127; SOA, ZGHYNJ 2005, at 193.
[64] Zhongguo Nanhai Yanjiuyuan [National Institute for South China Sea Studies], 2007 NANHAI XINGSHI PINGGU BAOGAO [EVALUATION REPORT ON THE SITUATION IN THE SOUTH CHINA SEA IN 2007] (2008), at 38. Noted hereafter as NISCSS, (year) NHXSPGBG.

One reason for this may be the absence in the Convention of a clear refutation of such an idea, which is consistent with international legal principles regarding territorial acquisition on land.[65] Article 77 of the Convention stated that *continental shelf* rights "do not depend on occupation, effective or notional." No equivalent provision was included in the section on the EEZ (Articles 55-75), allowing PRC maritime officials to advance the claim that, in areas with overlapping EEZ claims, unilateral acts of administration could bolster a state's legal claims at sea.

PRC maritime agencies regarded UNCLOS as creating incentives, if not a mandate, for unilateral actions in disputed areas. In addition to the new 200nm EEZ, UNCLOS assigned states exclusive rights to the resources on or beneath the seabed – including hydrocarbon and mineral deposits – on their "outer continental shelf" up to 350nm from their territorial sea baselines. Articles 76 and 77 set out specific geological criteria that define a continental shelf, and established the Commission on the Limits of the Continental Shelf (CLCS) to assess states' claims beyond 200nm on this basis. The Convention set a deadline of 10 years after ratification, later extended to May 13, 2009, for states to submit geological data to substantiate outer continental shelf claims. Elsewhere in the Convention, however, Article 246 assigned exclusive jurisdiction over marine scientific research activities, including geological surveys, to coastal states. In the South China Sea, as detailed in the case studies, this formed the basis for PRC coercive on-water actions aimed at preventing Vietnam from strengthening its claims. By this time, Chinese officials' views of the balance between opportunities and challenges presented by the UNCLOS had shifted decisively.

C. Increasing challenges

The party-state's top leaders were aware of the significance of the 1998 EEZ Law's reservation of "historic rights," which placed China explicitly at odds with both the UNCLOS's rules and the reality on the water in the South China Sea.[66] This was made clear in a January 1999 speech by Minister of Land and Resources, Zhou Yongkang, who went on to join the Politburo Standing Committee in 2007:

> ". . . according to UNCLOS rules *and* our country's claims (按《联合国海洋法公约》的规定和我国的主张), we possess (拥有) around 3 million sq km of jurisdictional waters. Of course, there is a significant area that is in dispute, which is to say, there is a long way to go and much difficult work to be done to genuinely roll out our maritime undertakings over 3 million sq km of blue territory (emphasis added)."[67]

Zhou's formulation was evidently not accidental, given its repetition verbatim by other officials.[68] It demonstrated that CCP authorities fully intended to expand China's maritime undertakings over the entire, still undefined, expanse of "blue territory." But it also signaled an emerging recognition from the top of the system that, in addition to

[65] Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, DUKE L. J. 1779 (2004). at 1782-1792.
[66] Kardon, *supra* note 3, at 121–122.
[67] SOA, ZGHYNJ 1999-2000, at 10-11.
[68] See, for example, SOA Director Wang Shuguang's 2001 speech printed in SOA, ZGHYNJ 2002, at 39-40.

the challenges of advancing its rights *within* the new global legal framework, the PRC would be engaged in a simultaneous struggle for its interests *against* UNCLOS.[69]

In 2001, on the fifth anniversary of China's ratification of the Convention, SOA Deputy Director Sun Zhihui delivered a programmatic speech in which he observed that since UNCLOS came into effect the "international struggle over maritime rights," had intensified due to countries around the world enacting legislation, drawing up maritime strategies, and strengthening the their maritime rights defence and management programs.[70] Still, at this point, positive affirmations continued to invoke earlier, less ambiguous relationships with the Convention. SOA Director Wang Shuguang, for example, stated in 2001 that "peace-loving countries will definitely use the UNCLOS as a weapon to defeat maritime power politics."[71] But by 2003, internal advisory reports were already warning decisionmakers in Beijing that the PRC's rivals in the South China Sea were "using UNCLOS" as a basis for enforcement actions to curtail Chinese activities in disputed areas, particularly fishing in the Spratlys.[72] By the tenth anniversary of the PRC's ratification, the assessment of its anti-hegemonic significance was notably absent from party and government statements. A joint MFA-SOA forum commemorating the occasion observed that the "challenges and opportunities" of the new legal regime were leading all countries to "continuously strengthen on-water law enforcement forces and elevate administrative control (管控) capabilities in claimed waters."[73]

A milestone in China's evolving relationship with the UNCLOS was its official rejection in August 2006 of the Convention's dispute resolution procedures for overlapping maritime boundaries.[74] The declaration was intended to preclude the possibility of the PRC's rivals seeking international legal rulings against its activities in disputed areas. The belief in this preclusive effect was, according to party-state researchers, so strong that the Philippines' resort to arbitration in 2013 took many PRC maritime policy officials and scholars completely by surprise.[75] Some observers regard the 2006 declaration's timing as a deliberate move in preparation for the subsequent increase in assertive actions in the South China Sea, particularly areas subject to PRC claim beyond what would hypothetically be permissible under the median line/equitable adjustment principle frequently used by international courts in maritime boundary demarcation.[76] Whatever the immediate motivation for the 2006 declaration,

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[69] The precise origins of the "historic rights" concept in the 1998 EEZ Law are unconfirmed, but Bill Hayton's research suggests it was inspired by an unsuccessful attempt by a group of scholars in Taiwan to include reference to "historic waters" in the Republic of China's maritime legislation in the early 1990s. Hayton, *supra* note 35.

[70] SOA, ZGHYNJ 2002, at 26.

[71] SOA, ZGHYNJ 2002, at 40.

[72] Hainan Nanhai Yanjiu Zhongxin [Hainan Centre for South China Sea Studies], 2002 NANHAI DIQU XINGSHI PINGGU BAOGAO [EVALUATIVE REPORT ON THE SITUATION IN THE SOUTH CHINA SEA REGION IN 2002] (2003), at 37. Noted hereafter as HCSCSS, 2002 NHDQXSPGBG.

[73] *Jinian woguo pizhun 'Lianheguo Haiyangfa Gongyue' shizhounian zuotanhui zai jing zhaokai [Forum marking 10th anniversary of our state's ratification of UNCLOS held in Beijing],* 1505 ZHONGGUO HAIYANG BAO (CHINA OCEAN NEWS), May 17, 2006, at http://www.cso.org.cn/Xhdt/xuehuitongzhi/2013/0507/969.html; SOA, ZGHYNJ 2006, at 164.

[74] "China: declarations and statements," United Nations Division for Ocean Affairs and the Law of the Sea, August 25, 2006, at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China

[75] Author interview, Beijing, April 2016.

[76] Author email exchange with Vietnamese official, March 2016.

the PRC's formal rejection of compulsory dispute resolution closely preceded a rapid intensification of its confrontational behaviours in disputed areas.

3. Tracing China's Policy Shift: Four Case Studies

English language analysis typically dates the switch in China's maritime policy towards more confrontational on-water actions to the Xi Jinping era (2012 onwards). However, multiple quantitative analyses of China's behaviour in the South China Sea have converged on 2007 as the turning point at which China's current patterns of conduct were established.[77] Government analysts in the two main target states, Vietnam and the Philippines, as well as their interlocutors in the US State Department, concur.[78] The four case studies below are therefore selected to be typical of the broad shifts in China's policy that began in 2007, based on a fine-grained time series of year-on-year changes in China's conduct — specifically, the rapid and ongoing expansion of unilateral administrative presence, and the regular application of coercive on-water actions against rival claimant states.[79] In this broad sense, each case is representative of a key aspect of China's surge toward control of its maritime periphery that is, at the time of writing, approaching its third decade.

The first three cases — the Triton 626 oil survey confrontation, the campaign of economic coercion against transnational corporations involved with offshore oil and gas developments in the South China Sea, and operations to interfere with Vietnam's continental shelf surveys — are chosen on the basis of the newly coercive quality of China's actions. As shown elsewhere, this type of action accounts for most of the quantitative change in the PRC's overall level of assertive activity from 2007 onwards.[80] The fourth case — the rollout of "regular rights defence patrols" – is representative for a different reason: its frequent repetition throughout the post-2007 period. This program of patrols in China's claimed maritime areas began in the South China Sea in 2007 and appears to have intensified every year thereafter, into Xi Jinping's assumption of power in 2012.[81] Tracing the emergence of this line of Chinese conduct on the water, together with the patterns of coercive action mentioned above, offers maximum leverage for understanding the broad features of PRC's behaviour in the South China Sea from 2007 onwards.

A. The Triton-626 Incident

[77] Chubb, 'PRC Assertiveness in the South China Sea: Measuring Continuity and Change, 1970-2015', 45 *International Security* (2021) 79; Zhang, 'Cautious Bully: Reputation, Resolve, and Beijing's Use of Coercion in the South China Sea', 44 *International Security* (2019) 117.
[78] Hai and Linh, 'In Retrospect of China's Policy in the South China Sea Since 2007', 85 *Vietnam Journal of International Studies* (2011).
[79] Chubb, *supra* note 77.
[80] *Id*. The dataset identifies four cases of coercive actions that intensified the PRC's overall level of assertiveness in 2007 and 2008, of which three are examined here. The fourth, crackdowns on Vietnamese fishing in the Paracel Islands, is set aside because, although this line of activity intensified in 2007, it had previously been observed in 2004 and 2005, well before the more general assertive shift. See MOA, ZGYYNJ 2005, at 144 and MOA, ZGYYNJ 2006, at 160.
[81] Chubb, *supra* note 77.

In late June and early July 2007, a serious on-water skirmish occurred between Chinese and Vietnamese ships in waters between the disputed Paracel Islands and the Vietnamese coast. Accounts of the events from the PRC side begin on June 26 and June 27 when armed Vietnamese ships reportedly blocked a survey ship from China's state-owned oil company CNPC from conducting a seismic survey looking for signs of oil and gas beneath the seabed.[82] The operation was scheduled to take place in an area referred to as the "626 Work Area," approximately 47nm west of Triton Island, the most westerly land feature of the Paracels, and the closest to the Vietnamese coast. After turning back the Chinese survey ship, the Vietnamese vessels positioned themselves at this location, preventing the Chinese survey from proceeding.[83]

Figure 3: *(L) Approximate location of the June 2007 confrontations, and (R) on-scene footage of deliberate ramming of Vietnamese ship, filmed from CMS ship (CCTV, "Lan jiang weishi").*

In response, the SOA sent patrol boats from the CMS East Sea and South Sea regional branches to act as escorts for the survey ship. On June 29 the two cutters arrived in the area, and a standoff ensued that lasted into the following day, with the Vietnamese ships refusing to leave. According to a Chinese state media account, the Vietnamese ships' presence was preventing the survey ship from lowering its seismic cables, so "the Chinese maritime commander decisively issued the order to ram the other side's vessels." This ramming action was performed repeatedly until all the Vietnamese vessels were forced to leave (Figure 3).[84] As Scott Bentley writes: "These maneuvers began at the lower end of the spectrum with shouldering, but subsequently escalated to direct bow to bridge ramming," which carries a serious risk of casualties among the crews.[85]

The Chinese seismic survey that triggered the confrontation was certainly an assertive action, but it was the coercive actions in support that constituted a change in China's behaviour. The survey itself arguably continued a pattern of periodic surveys near the edge of the PRC's area of claimed jurisdiction that had already been apparent for around a decade. The SOA's yearbook describes the objective of the 2007 operation

[82] *Lan jiang weishi: nanhai jixing di ba ji [South China Sea chronicle, part 8: defenders of the blue domain]*, Zhongyang Dianshitai [China Central Television], December 31, 2013, at http://news.cntv.cn/special/nhjx (accessed March 22, 2016); and NISCSS, 2007 NHXSPGBG, at 37, 52.
[83] *Lan jiang weishi, supra* note.
[84] *Id*.
[85] Scott Bentley, *Vietnam and China: a dangerous incident*, THE DIPLOMAT, February 12, 2014, at http://thediplomat.com/2014/02/vietnam-and-china-a-dangerous-incident

as being aimed at "realizing our offshore oil exploration strategy" – a policy whose application to the disputed areas of the South China Sea dates back to the 1992 *Territorial Sea Law*.[86] In March 1997, the PRC had sent an exploration rig into waters about halfway between Hainan Island and Vietnam's coast, drawing a diplomatic protest from Vietnam, to which the PRC retorted that the location was within China's "continental shelf and EEZ."[87] In November 2004, the same rig, *Kantan-03*, reappeared in a near-identical location, near the mouth of the Gulf of Tonkin.[88] The 2007 incident took place about 160nm southeast of this spot. But while the decision to undertake the seismic survey continued an existing policy of periodic explorations in that general area, the coercive methods of enforcement of China's claimed right to conduct the survey — ramming the Vietnamese ships — were absent in earlier operations, and thus constituted a qualitative change in China's behaviour.

This incident was a milestone for the CMS force, and may have been the first time the newly equipped agency had gone beyond surveillance or shadowing operations to engage in a genuinely coercive enforcement action. The comments of CMS officials indicate this was the first time the CMS South Sea Regional fleet had been used in this way. The branch's Deputy Director-General, Chen Huaibei stated that the commanders found ordering the ramming "extremely stressful" because "we normally teach our crews to observe safety and try to avoid collisions." This time, however, "we were ordering them to actively initiate collisions." Chen concluded: "as glorious as the objective was, the action itself created a degree of risk to our staff's safety."[89] Another suggestion of the significance of the operation is the special awards ceremony for the "South China Sea Special Rights Defence Law Enforcement Operation," held in Beijing on September 26 to commend participants and hear reports on the incident. The national-level SOA party committee bestowed shared honors on four of the CMS vessels involved, and gave individual commendations to 95 staff members. SOA Party Secretary Sun Zhihui delivered an "important speech" at the event, further underscoring its national-level significance and the approval of the top leadership.[90] What lay behind the decisions to deploy CMS ships in this newly coercive way?

The action was ostensibly targeted at unilaterally securing oil and gas resources in a context of favourable changes in the regional balance of power, coupled with unfavourable local developments. PRC authorities perceived China's local position in the South China Sea to be weakening in 2007, particularly in relation to the area's oil and gas resources, due to the stalling of a trilateral joint exploration program, and a raft of new Vietnamese offshore projects with third-country energy companies. At the same time, China's strong fiscal position and maritime capabilities enabled the allocation of the significant resources required for the unilateral oil operation, as well as the on-water escort, just as Vietnam's increasing dependence China's economy reduced the risk of further escalation from Hanoi. Meanwhile, the PLA Navy's advanced warships have been present "over the horizon" during coercive enforcement actions by Chinese

[86] SOA, ZGHYNJ 2008, at 128. See also Hayton, *supra* note 35, at 375–376.
[87] Frederik Balfour, *Analysts puzzled as China moves into territorial fray with Vietnam*, AFP, March 17, 1997, *available in* Factiva; *Economics, geopolitics fuel Vietnam-China row*, REUTERS, March 20, 1997, *available in* Factiva.
[88] *China rejects Vietnamese complaints over oil drilling in South China Sea*, YAHOO NEWS, November 23, 2004, at http://www.spratlys.org/news/nov04/23a.htm
[89] *Lan jiang weishi*, *supra* note.
[90] SOA, ZGHYNJ 2008, at 128, and photo section.

civilian agencies, so it is likely that the PRC's increased naval capabilities since the 1980s were also an enabling condition for this risky coercive law enforcement action.[91]

The process of China's internalization of the new maritime legal regime created the conditions for these factors to come together to produce the newly coercive practices, which became a regular occurrence thereafter.[92] The CMS agency's account of the 2007 oil survey escort operation characterizes the Chinese ships (and support aircraft) as having "handled a foreign country's rights-infringing behaviour in South China Sea waters according to the law." Bureaucratically, the operation was categorized a "special rights defence law enforcement action" – a category of operation that draws legal authority from the *1992 Territorial Sea Law*, *1998 EEZ Law*, and the *1996 MSR Rules*, each of which were prompted by accession to the international maritime legal regime.[93] The domestic laws prompted by UNCLOS straightforwardly provided an authority for this coercive enforcement action in a disputed maritime area that did not previously exist.

China only possessed the organizational and on-water capabilities for such kinds of operation after delivery of its long-range patrol boats – a project initiated in 1999 to assert China's maritime rights following its accession to the UNCLOS. The key decision that precipitated the 2007 confrontation was the SOA's dispatch of patrol ships from two different regional branches to break the initial standoff. The East Sea branch's 2000-ton *Haijian-51* and the South Sea region's 3000-ton *Haijian-83* had both been completed in 2005, and both were products of the CMS shipbuilding project approved in 2000. Another large new CMS ship commissioned that year, the 1000-ton class *Haijian-71*, also took part in the operation, meaning at least 3 of the 6 newly-built cutters from the first stage of the CMS shipbuilding project participated in the Triton 626 operation. This type of high-endurance law enforcement ship – as distinct from Naval warships – was clearly crucial at least one was called in from the CMS East Sea Branch based more than 2,000km away. The South Sea Branch had two new ships of its own, but this was not judged sufficient to ensure the operation's success. It is no exaggeration to say that the availability of these new law enforcement assets enabled the operation.

B. Threatening Third-Country Oil and Gas Companies

On April 10, 2007 MFA spokesperson Qin Gang, prompted by a state TV reporter, stated that Vietnam's "new moves" in opening up offshore energy exploration bidding and a proposed pipeline involving British Petroleum (BP) were "not conducive to peace."[94] The area in question was the Nam Con Son Basin, which lies around 150nm from Vietnam's southern coast, but partially within the area enclosed by China's nine-

[91] As another CCTV news special put it, "CMS boats patrol, military deters." *Haijian xunhang, jundui weishe: Zhongguo zhanshi zuida hu dao juexin [CMS patrols, military deters: China displays maximum island-protection resolve],* Zhongyang Dianshitai Huanqiu Shixian [CCTV Global View], September 14, 2012, at http://news.cntv.cn/china/20120914/107367.shtml

[92] Chubb, *supra* note 77.

[93] SOA, ZGHYNJ 2008, at 128.

[94] *Zhongfang dui Yuenan zai Nansha xilie xin xingdong tichu yanzheng jiaoshe [Chinese side makes stern representations over Vietnam's series of new moves in Spratlys]*, China News Service, April 10, 2007 at http://news.sina.com.cn/c/2007-04-10/174112744688.shtml; US State Department, *April 10 MFA Press Briefing*, cable 07BEIJING2360, April 10, 2007, *available in* Wikileaks.

dash line. The PRC had lobbied third-country oil companies over the issue as early as 2000, but from 2006 onwards the PRC stepped up its campaign with a series of official diplomatic protests.[95] In 2007, this verbal assertiveness became much more threatening, and now directly targeted Vietnam's international partners. After Qin's news conference, Chinese diplomats delivered warnings of possible economic sanctions to numerous foreign companies working with Vietnam in the South China Sea, including BP, ConocoPhillips, ExxonMobil, Chevron and a Japanese consortium involving Idemitsu, Nippon and Teikoku.[96] In at least one of these instances PRC diplomats reportedly raised the possibility of physical harm to foreign companies' staff working in the disputed area.[97] China's handling of this longstanding issue had thus acquired a newly coercive character.

The PRC's position was a clear policy shift. It concerned geographical areas where it had once tolerated such activities. Foreign companies had signed numerous resource exploration deals with Vietnam over the Nam Con Basin area dating back to the 1980s, and had in some cases even started production without prompting equivalent objections from the PRC.[98] Relevant Chinese agencies were aware of these activities: reports from a government research institution state that between 1992 and 2002 Vietnam signed 33 oil and gas development deals with foreign companies, and that exploitation of offshore resources in the South China Sea intensified in 2002, 2003 and 2004.[99] But China's new protests from 2006 related to numerous areas around and even beyond the extent of the nine-dash line claim.[100] Thus, while they were prompted by the new agreements between Vietnam and its foreign partners over the disputed area, the PRC's pattern of responses to such developments had changed. Moreover, since the MFA was the main actor, and the campaign unfolded in various locations over a period of years, it is unlikely to have been the result of over-zealous sub-state actors. We can be fairly certain it constituted an intentional policy change.

China's threats were successful in convincing several companies to abandon their partnerships with Vietnam in key areas. In mid-2007, BP suspended a survey in Block 5-2, a highly promising concession straddling the implied path of the nine-dash line (see Figure 4). The following year BP and its partner ConocoPhillips withdrew

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[95] The PRC made diplomatic representations to foreign oil companies on at least 18 occasions in 2006 and 2007. See Fravel, 'China's Strategy in the South China Sea', 33 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* (2011) 292. At 302-303. In 2000, according to a BP insider, MFA Asian Affairs Director-General Fu Ying made very strong private representations to BP's London-based management regarding the company's prospective involvement in Vietnamese offshore energy Block 6.1, which was located just inside the nine-dash line. Hayton, 'The South China Sea', in *The South China Sea* (2014). At 136.

[96] See US State Department, "Sino-Vietnam territorial dispute entangles multiple multinational energy firms," cable #07HANOI1599, September 7, 2007, *available in* Wikileaks; US State Department, "2008 recap of the Sino-Vietnam South China Sea territorial dispute," cable #09HANOI52, January 20, 2009, *available in* Wikileaks; Do Thanh Hai & Nguyen Thuy Linh, *In Retrospect of China's Policy in the South China Sea Since 2007*, 85 VIETNAM J. INT'L STUDIES (2011). At 3.

[97] According to a company insider, in a meeting London on May 18, 2007, senior PRC diplomat Fu Ying told BP CEO Tony Hayward that China "could not guarantee the safety of BP staff working in the disputed area." Hayton, *supra* note, at 137.

[98] See Korea National Oil Corporation (KNOC), *Vietnam Acreage Map*, February 1, 2011, at http://www.vungtaujobs.com/story/vietnam-acreage-map (via Archive.org)

[99] HCSCSS, 2002 NHDQXSPGBG, at 29-30; NISCSS, 2003 NHDQXSPGBG, at 36; NISCSS, 2004 NHXSPGBG, at 12-14.

[100] For example, Block 11-2 and Block 112. For a list of the relevant diplomatic protests in Fravel, *supra* note, at 302.

from the US$2 billion project altogether, with BP reportedly absorbing a $200 million loss as a result. The Japanese consortium also halted its activities in nearby blocks, 5-1b and 5-1c. Chevron suspended operations in Block 122, an area adjacent to the Vietnamese coast further north that is bisected by the nine-dash line, after an MFA political counselor from the Washington consulate read a prepared statement informing the company that continuing with the project would be a "grave violation of China's sovereignty." US government cables narrate how a Chevron executive privately admitted the company's interests on the Chinese mainland had "helped persuade the company to quietly accede to China's demands and suspend operations in 122."[101] A lower-level lobbying effort through the PRC's local consulates in the United States was less successful. ExxonMobil executives assessed the warnings they received over Blocks 156-159 to be "routine," and did not alter their plans for offshore cooperation with Vietnam there.[102]

[101] US State Department, *supra* note ENTANGLES.
[102] US State Department, *Vietnam negotiates deal with Gazprom, bypasses Exxonmobil*, cable #08HANOI1241, November 6, 2008, *available in* Wikileaks.

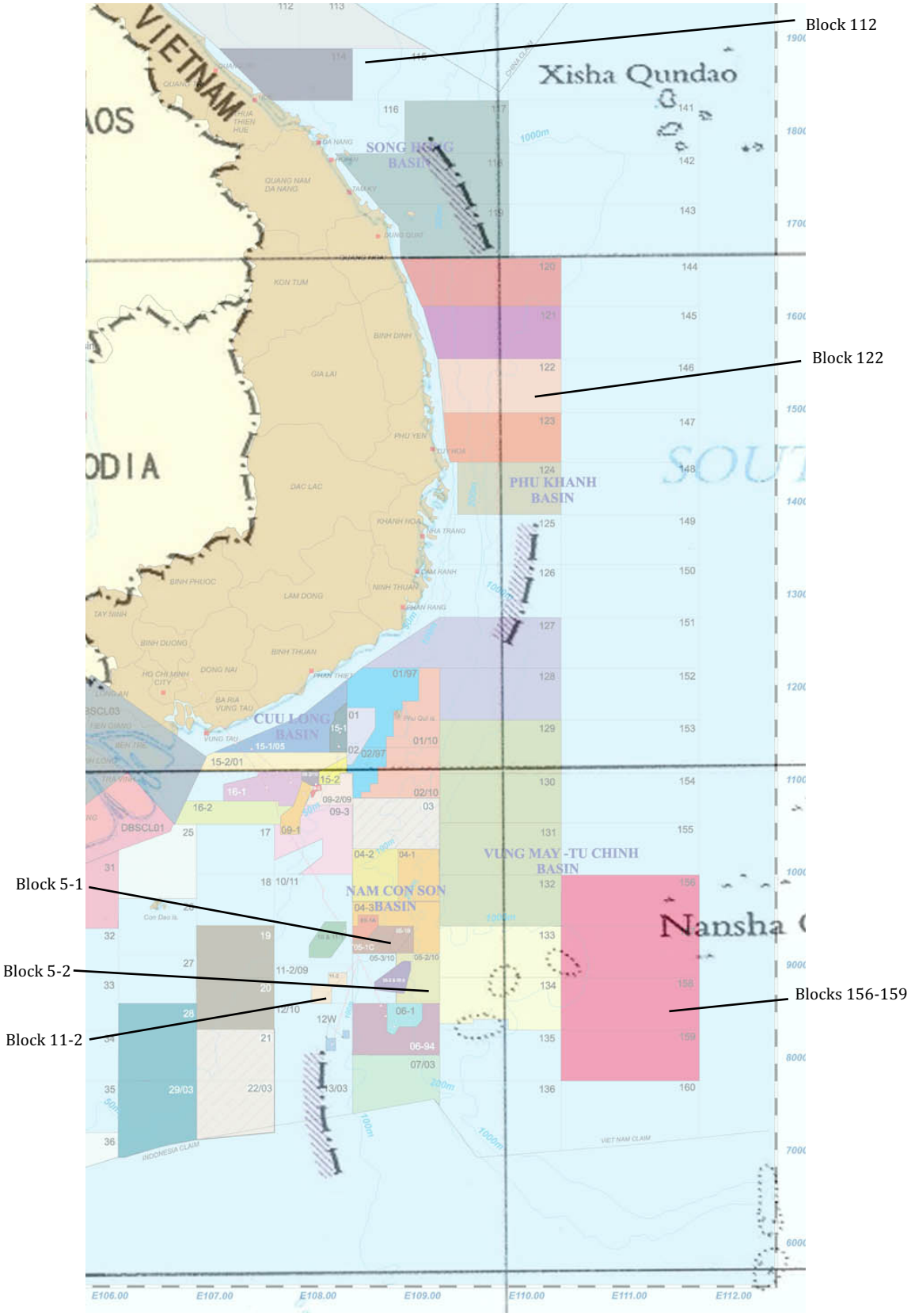

Figure 4: *Vietnamese offshore energy exploration blocks, superimposed with PRC official nine-dash line map* (adapted by author from Korean National Oil Corporation, 'Vietnam Acreage Map', undated.)

Access to oil and gas resources was obviously Beijing's immediate concern. The monetary and strategic importance of the South China Sea's resources was rapidly rising, with the value of China's energy imports having trebled between 2004 and 2006.[103] The high administrative rank of the official approaches over the already-producing Nam Con Son Basin, compared to those over the speculative prospects of the Phu Kanh Basin (Blocks 122-124) further suggests alleviation of China's growing resource insecurity was a priority. Several new discoveries had also been made in the Nam Con Son Basin in 2006.[104] The immediate goal was not unilateral PRC control of the resources, but *joint development* with Vietnam. This is apparent, first of all, in the targets of the actions – Vietnam's existing partners developing the resources. After BP's withdrawal, PRC officials reportedly asked the company to facilitate talks between Vietnam and China's state oil conglomerates regarding joint development of the concessions.[105] Government research reports from this period also repeatedly emphasized the need for actions "to force Vietnam to engage in bilateral joint development."[106] If Beijing was willing to escalate the conflict in this way for a chance at joint development, this is a strong indication of the importance with which it viewed *access* to the area's resources at that time.

China's growing material power provided it with necessary coercive leverage, yet these factors were insufficient to prompt the coercive campaign.[107] A simple but revealing insight into the thinking behind China's actions is an internal government advisory report recommending increased presence to "maintain the dispute" (维持争议).[108] As Figure 5 indicates, part of the Nam Con Son Basin lies inside the nine-dash line, but the entire area is well outside what the PRC could plausibly hope to receive under the PRC's preferred "median line/equitability" maritime boundary delimitation principle – even if the Spratly Islands were regarded as legitimate islands under UNCLOS Article 121. This helps explain why, shortly before commencing its international campaign over these areas, the PRC invoked its right under UNCLOS Article 298 to refuse any compulsory dispute resolution on boundary issues. Contemporaneous internal research by party-state analytic organs explicitly emphasizes the need for China to "slow down maritime border delimitation."[109] For Beijing, resolution of the dispute in accordance with the UNCLOS was an outcome to be *avoided* until its position in the "legal struggle" could be strengthened, it believed, through expanding administrative presence.[110] Backed by a strong international legal mandate, the new Vietnamese-foreign agreements signed in the lead up to 2007 threatened to remove the PRC's last hope of gaining access to the area's increasingly valuable resources.

[103] PRC official statistics and World Bank figures are consistent on this point.
[104] In November 2006, Australian company Santos announced the discovery of oil in Block 12E, but discoveries had been made regularly in this area over the preceding two decades, so the discovery is unlikely to have been an independent influence.
[105] Hayton, *supra* note, at 139.
[106] NISCSS, 2007 NHXSPGBG, at 40-41; NISCSS, 2008-2009 NHXSPGBG, at 50-53.
[107] Approaches by MFA diplomats over the same fields had left BP unmoved in 2000. See Hayton, supra note, at 136.
[108] NISCSS, 2007 NHXSPGBG, at 39 and 41.
[109] NISCSS, 2006 NHXSPGBG, at 31-32; NISCSS, 2007 NHXSPGBG, at 40.
[110] NISCSS, 2007 NHXSPGBG, at 40.

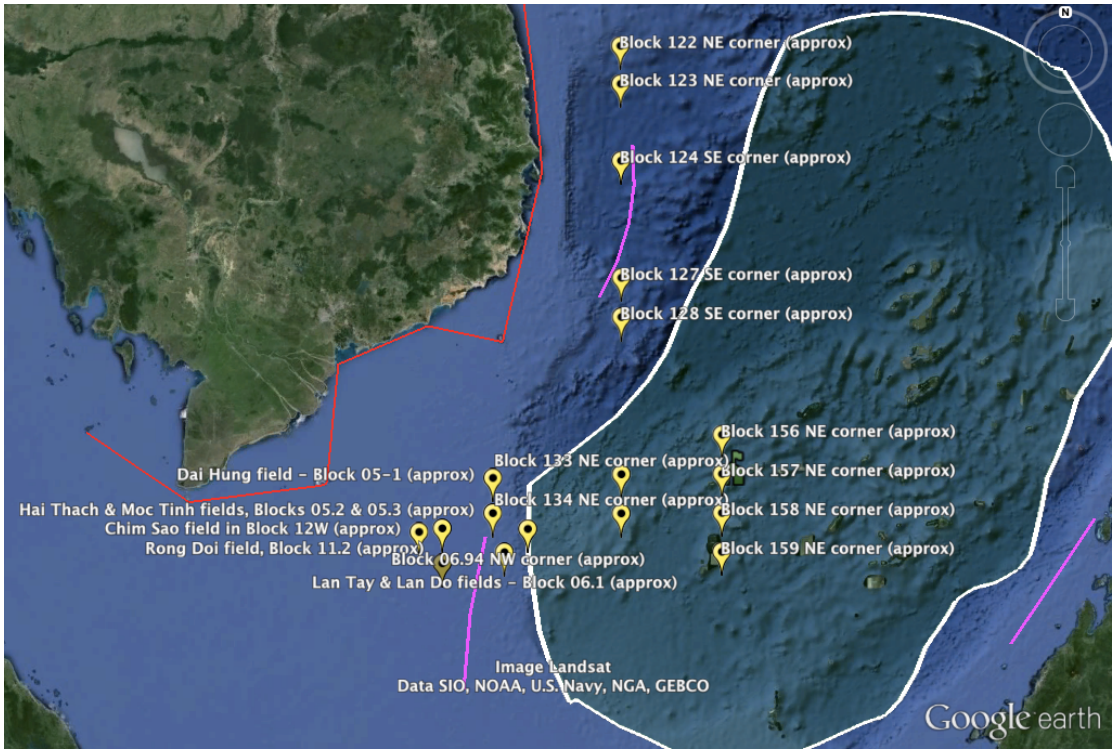

Figure 5: *Energy developments protested by Beijing, with theoretical median line between Vietnamese coast and Spratly Island shown in white* (adapted by author from GIS files provided by Gregory Poling, *The South China Sea in Focus: Clarifying the Limits of the Maritime Dispute* (2013).

The contrast between China's actions in relation to the Nam Con Son Basin blocks and ExxonMobil's holdings in Blocks 156-159 offers a vivid illustration of China's special concern with "maintaining the dispute" in those areas where its claim was weakened by the international legal regime. Blocks 156-159 lie much nearer to the PRC-claimed land territories in the Spratlys than the Vietnamese coast, and well within a hypothetical median line (Figure 5). The PRC's legal claim to resources in this area was notionally much stronger than its claim to the Nam Con Son Basin. Given the area's proximity to disputed territory (one block even covers the 12nm territorial seas around Spratly Island), we might expect new moves towards energy development in these areas to be among the most provocative to Beijing. Yet the approaches to ExxonMobil over its involvement in these areas were much milder, being delivered by junior officials from the Houston consulate, and there is no indication that they escalated after the company ignored them.[111] Instead, the PRC's most vigorous and threatening lobbying efforts focused on precisely those areas *beyond* what it could plausibly hope to claim under the international legal regime. China's resort to economic coercion in these areas was related not only to the challenge posed by the "new moves" it claimed Vietnam

[111] US State Department, *supra* note VIETNAM NEGOTIATES. In June 2009 ExxonMobil and PetroVietnam signed a production sharing contract covering the area. Hayton, *supra* note, at 142.

was taking, but also to the weakness of its claim to these areas as UNCLOS came into effect.

In short, rising resource insecurity increased the importance to China of access to the South China Sea's known resources, while rapid economic development in the early 2000s provided the leverage over large transnational corporations that made economic threats a viable policy. Yet neither was sufficient to prompt PRC coercion over Vietnamese oil and gas developments; rather it was the foreign-invested projects in the Nam Con Son Basin, manifesting strong external recognition of Hanoi's UNCLOS-backed claim, which threatened to extinguish China's last possibility of realizing a claim to "historic rights" over the resources in the area per the *1998 EEZ Law*. China resorted to coercion as part of its emerging struggle *against* the international maritime legal regime.

C. Disrupting Vietnam's Continental Shelf Surveys

From the perspective of those involved in China's policy in the South China Sea, the 2008 Beijing Olympics was a challenge to both maritime rights defence and regional stability.[112] The requirements of maintaining a positive international image and friendly regional relations, along with specially assigned Olympics-related tasks such as guarding undersea fiber optic cables, created a temporary reduction in China's ability to conduct assertive maritime rights defence operations. Once the Olympics had passed, the National Institute of South China Sea Studies recommended, China would need to make up for lost time by "choosing an opportunity" (择机) to "interfere with and block neighbouring countries' activities in the South China Sea's disputed waters."[113]

Prominent among these neighboring countries' activities were Vietnamese government surveys gathering geological data ahead of the May 2009 submission deadline for preliminary scientific data on continental shelf claims beyond 200nm under UNCLOS. Hanoi had been concerned by the vigor of China's diplomatic objections to these activities since April 2007 – the same time as the abovementioned. campaign against its oil and gas projects began in earnest – and the PRC carried out at least one operation to interfere with the geological surveys at some point that year.[114] However, China apparently refrained from on-water interventions for several months ahead of the Beijing Olympics.[115] In September 2008, one month after the Olympics had concluded, CMS launched another "special rights defence law enforcement action," this time with the explicit aim of disrupting foreign continental shelf surveys in the South China Sea. Another operation followed in November 2008.[116] Party-state materials confirm Vietnam was the target.[117]

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[112] NISCSS, 2007 NHXSPGBG, at 39.
[113] *Id*., at 41.
[114] US State Department, *China-Vietnam: Beijing pressuring Hanoi on energy details near Spratly Islands*, cable #07BEIJING2670, *available in* Archive.org; NISCSS, 2007 NHXSPGBG, 38.
[115] Whether this involved Vietnam suspending its activities is unclear. US State Department, *Some in GVN apparently unworried about situation in South China Sea*, cable #08HANOI464, April 22, 2008, *available in* Wikileaks.
[116] SOA, ZGHYNJ 2009, at151.
[117] NISCSS, 2008-2009 NHXSPGBG, at 49.

Precise details on the location of these incidents and their progression are not publicly known, as neither Beijing nor Hanoi have commented on them officially. However, the available information leaves little doubt they were coercive in nature. The CMS operation's official title was, "Action to Interfere and Block Vietnam's Outer Continental Shelf Geological Survey."[118] The SOA's yearbook states that the CMS actions "halted" (制止了) the survey operations, strongly suggesting some kind of forcible effect on the other side's behaviour.[119] According to a Vietnamese government researcher, in mid-2007 the CMS ship *Haijian-51* rammed an escort of the Singaporean survey ship *Geo Surveyor*.[120] Additionally, a leaked US diplomatic cable cites a Vietnamese diplomat confirming Chinese ships had "harassed" Russian and Norwegian vessels contracted by Vietnam to survey the continental shelf in late 2008.[121] The English term "harass" generally covers both shadowing at a distance – not necessarily overtly coercive – as well as more dangerous manoeuvers to directly interfere with the target's operations. However, if the Chinese side's actions had been limited to non-confrontational hailing and shadowing, they would not have constituted a "special operation." It is reasonable, therefore, to infer that the "interference" against the Vietnamese continental shelf surveys was of a coercive nature.

Several close linkages between the UNCLOS and China's confrontational actions are evident from even the limited information available on the case. First, the relevant Chinese law enforcement agency specified the basis of its "timely handling of various behaviours violating our country's maritime rights and interests, effectively defending the state's maritime rights and interests" as the *1998 EEZ Law* and *1996 MSR Rules* – two of the key instruments through which the PRC internalized UNCLOS-derived maritime rights.[122] While the specific details are not known, in at least one instance *Haijian-51* (commissioned in November 2005) was identified as ramming Vietnamese ships, as it had done in the Triton 626 energy survey case. Given the critical importance of CMS's new advanced long-range patrol ships to the coercive operations in 2007, it is highly likely the actions against Vietnamese continental shelf surveys were also enabled by the shipbuilding project initiated in 2000 to enable enforcement of China's "maritime rights and interests" claims.

The operations to disrupt Vietnam's geological surveys were aimed at bolstering disputed claims under the international legal regime. As suggested in the internal title of the operation – "Action to Interfere With and Block Vietnam's Outer Continental Shelf Geological Survey" – China's objective was to forestall Vietnam's collection of evidence that would strengthen its claims to maritime jurisdiction over the resources in the area under UNCLOS. Despite Beijing's unwillingness to limit its claims to those mandated by the Convention, the fact that it would conduct coercive operations with the aim of preventing a rival from advancing its legal claims underscores the importance the PRC attaches to maximizing the legal strength of its claims. The subsequent flurry of diplomatic notes issued in response to Malaysia and

[118] In Chinese: 越南外大陆架地质调查的干扰与阻止行动. See NISCSS, 2007 NHXSPGBG, at 38.
[119] SOA, ZGHYNJ 2009, at 151. In addition, at the beginning of September 2008, the PLA General Staff Department organized joint exercises for CMS and rescue authorities to practice "responding to fast-breaking on-water incidents," possibly in preparation for the risky actions that were to follow. See SOA, ZGHYNJ 2009, photos section.
[120] Vietnamese researcher communication via email, September 11, 2015.
[121] US State Department, *PRC: cow's tongue claim not licked, despite objections from the Philippines and Vietnam*, cable #09BEIJING579, March 5, 2009.
[122] SOA, ZGHYNJ 2009, at 151.

Vietnam's submission to the CLCS in 2009 further bears out Beijing's belief in the significance of international law to its claims in the South China Sea. The actions against Vietnam's continental shelf surveys appear, by their nature, to be a clear example of a state engaging in on-water maritime assertiveness in an attempt to advance or maintain the legal strength of its claims.

D. Regular Rights Defence Patrols

One of the most consistent aspects of China's assertive maritime policy after 2007 has been the buildup of its patrolling presence of maritime law enforcement vessels in disputed areas. The explicit purpose of the program of "regular rights defence patrols" (定期维权巡航), rolled out by CMS in the South China Sea in 2007, was to verbally state China's claims, collect information, and "embody" China's jurisdiction.[123] CMS South Sea Branch Deputy Director Chen Huaibei explained his fleet's three key objectives as 1.) patrol and declare presence 2.) understand the situation 3.) strengthen China's administration of waters within the nine-dash line. Huang Yong, a CMS mariner who performs these declarations of presence (喊话), concurred that the main tasks are to monitor and collect information and state the country's position, which is "an embodiment of the state's intention, and of our surveillance administration, so it is a most important law enforcement method."[124]

Unlike the coercive "special operations" detailed above, regular rights defence patrols initially sought deliberately to avoid on-water confrontation and displayed no visible weaponry such as deck guns. As CMS South Sea Branch Rights Defence and Law Enforcement Detachment official Pang Hailong explained, when CMS ships on regular patrol discover foreign boats infringing on China's claims, "we can't use extreme methods" but instead "use language" to state China's official position over the radio airwaves. It was precisely because of the CMS fleet's lack of overt weaponry, according to Pang, that its patrols could "show up more in sensitive areas of water" whilst maintaining the country's "diplomatic flexibility."[125] Despite this non-coercive quality, regional states were immediately perturbed by the conspicuously increasing official PRC presence, which also directly facilitated the increase in coercive operations.

The rollout of regular rights defence patrols was methodical and cautious. The system was first introduced in the East China Sea in June 2006. Once its feasibility had been proven there, CMS extended the scope to cover the Yellow Sea and the northern part of the South China Sea from February 2007. Nine months later this was expanded again to include the southern part of the South China Sea. Thus, by December 2007, the regular patrol system theoretically covered all of "the 3 million square kilometres of waters under China's administration."[126] Thereafter, the CMS South Sea Fleet

[123] SOA, ZGHYNJ 2009, at 151.
[124] *Lan jiang weishi*, *supra* note.
[125] *Lan jiang weishi*, *supra* note.
[126] Qian Xiuli, *Woguo jianli quan haiyu weiquan xunhang zhidu, 300 wan pingfang gongli guanxia haiyu naru dingqi weiquan xunhang zhidu guanli fanwei [China establishes rights defence patrol system for all waters, 3 million sq km of administrative waters brought into administrative scope of regular rights defence patrol system]*, *Zhongguo Haiyang Bao [China Ocean News]*, August 5, 2008, at http://www.soa.gov.cn/xw/hyyw_90/201211/t20121109_1902.html

claimed to maintain at least two ships on patrol in the South China Sea at all times.[127] And as Figures 6 and 7 illustrate, regular rights defence patrols in the South China Sea have increased not only in geographic scope, but also in frequency. Why did the party-state roll out these new regular patrolling activities in disputed maritime areas at this time?

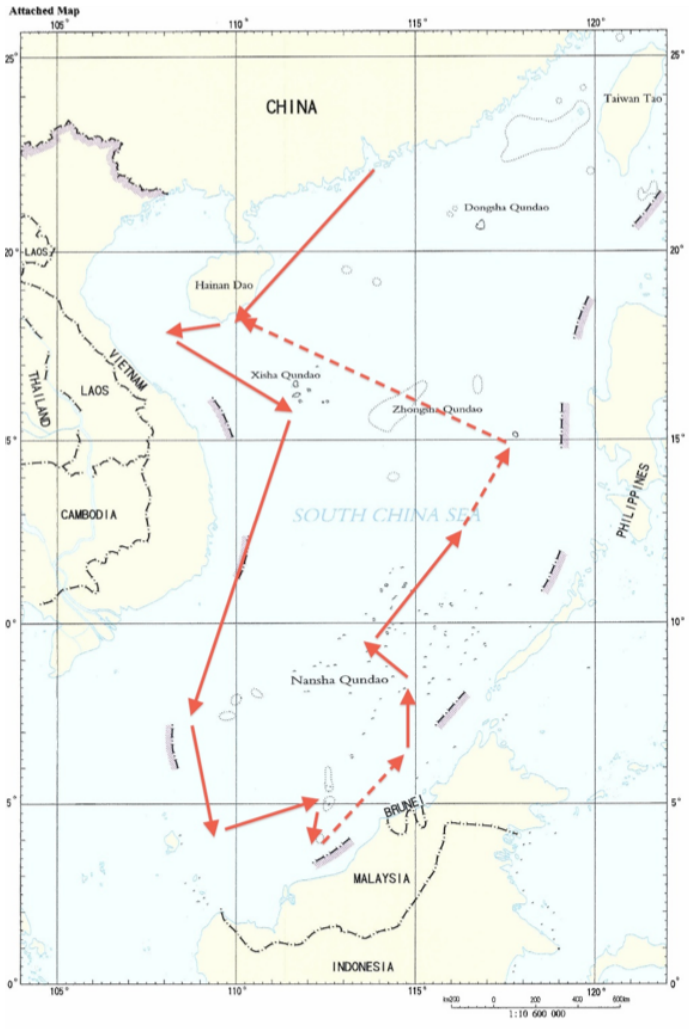

Figure 6: *Approximate route of a 2012 'regular rights defense patrol',* adapted by author using MFA nine-dash line map and footage shown in China Central Television documentary report *Xunhang Nanhai* (see note 131).

[127] China Marine Surveillance South China Sea Branch, *supra* note.

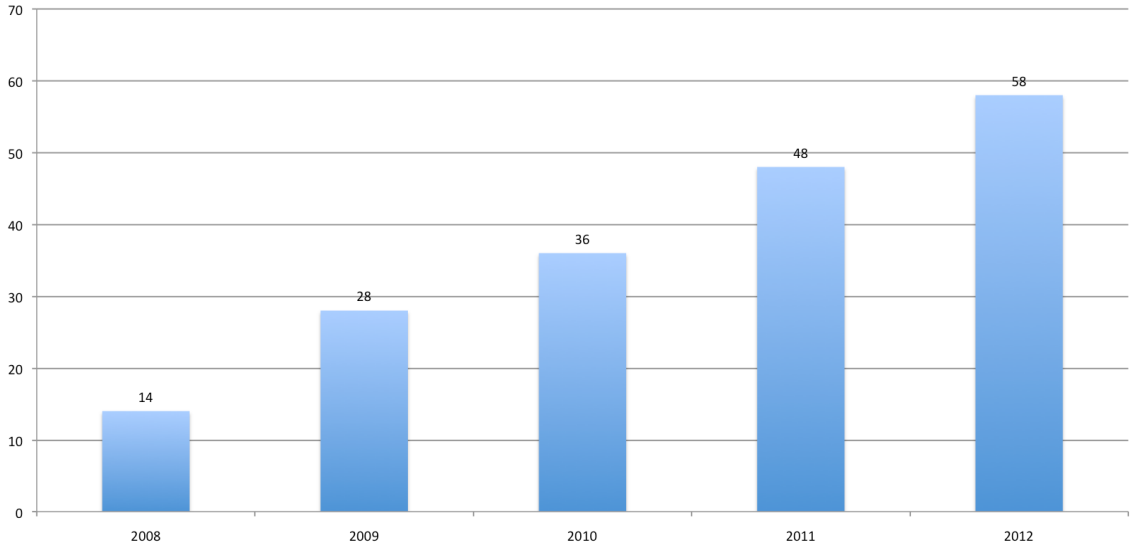

Figure 7: Yearly number of 'regular rights defence patrols' in South China Sea, 2008-2012 (*Lan jiang weishi*, *supra note* 82.)

This component of China's more-assertive policy was central to party-state's response to the opportunities and challenges it perceived from the new maritime legal regime. The UNCLOS-inspired laws provided the domestic authority for the "regular rights defence patrols," and the ships built to enforce those laws have been the key to the system's implementation. A 2007 report from the SOA states that "according to such maritime rules and regulations as the *1992 Territorial Sea Law*, *1998 EEZ Law* and *1996 MSR Rules*, CMS in 2007 implemented relatively strong rights defence patrol law enforcement in all waters."[128] New administrative rules issued by the State Council in 2008 explicitly assigned CMS the function of "upholding the state's maritime rights and interests in accordance with the law" by "enacting a system of regular rights protection patrols in waters under our country's administration."[129] The fact that program was already in full swing by this time shows that these 2008 guidelines were not the reason for the new behaviour — rather, it was the suite of key maritime laws enacted in the 1990s. Yet the patrols could not happen until the required on-water capabilities were available.

The shipbuilding project initiated in 2000 to enforce China's new UNCLOS-inspired laws were the critical enabler of the regular rights defence patrol system. As CMS South Sea Branch Director Li Lixin admitted in 2009, even with 11 ships and 3 helicopters the fleet still "could not completely cover the central and southern parts" of the sea.[130] The fact that the CMS South Sea Branch continued to struggle to cover its whole area of responsibility, even two years after the patrol system's implementation, points to the importance of the these specific capabilities, as distinct from general

[128] SOA, 2007 NIAN ZHONGGUO HAIYANG XINGZHENG ZHIFA GONGBAO [2007 CHINA MARITIME ADMINISTRATIVE LAW ENFORCEMENT REPORT] (2008), at http://www.soa.gov.cn/zwgk/hygb/zghyxzzfgb/2007nzghyxzzfgb/201212/t20121217_22966.html; see also SOA, ZGHYNJ 2009, at 151.
[129] Hai Tao, *"Wu long zhi hai" bu liyu Zhongguo haiyang weiquan ["Five dragons governing the sea" not good for China's maritime rights defence]*, GUOJI XIANQU DAOBAO [INTERNATIONAL HERALD LEADER], November 26, 2010, at http://news.xinhuanet.com/herald/2010-11/26/c_13623320.htm
[130] China Marine Surveillance South China Sea Branch, *supra* note.

material (military and economic) power, in enabling this new layer of Chinese on-water assertiveness. As demonstrated above, the PRC's intent to develop such capabilities emerged only with accession to the Convention and internalization of its new concepts of maritime rights. Further confirmation is found in a television news report that identified the particular ships involved in one regular rights defence patrol in April 2012: all four were large new cutters created in the shipbuilding program approved in 2000 by Premier Zhu Rongji and Vice Premier Wen Jiabao.[131] It took the rollout of even more new patrol ships, along with the conversion of several ex-naval vessels, for the regular rights defence patrol system to finally expand out to the full extent of the nine-dash line. Thus, the capabilities created in response to the PRC's internalization of the Convention's rights — while rejecting its corresponding limitations — made the new assertive actions in the disputed area possible.

Bolstering China's weak international legal claims in the area was a direct objective of the new regular rights defence patrol program. CMS party secretary Sun Shuxian stated in 2008 that regular patrolling was crucial to "embodying present jurisdiction" and thereby establishing the state's legal authority over a maritime area under international law.[132] Other state officials concur with this assessment. According to South Sea Branch Deputy Director Chen Huaibei, patrolling in disputed waters and stating the country's position over the radio "has real significance in legal terms."[133] This verbal testimony, together with other SOA literature characterizing regular patrols as "embodying jurisdiction,"[134] strongly suggests that these real-world assertive actions were motivated at least in part by advancing claims to disputed areas under international legal regime.

As with the case of economic coercion against Vietnam's third-country offshore oil and gas partners, China's regular rights defence patrols in the South China Sea appear to have been concentrated on those areas where China's claims were weakest under the UNCLOS regime. Figure 7 above shows the path of one regular rights defence patrol, as captured in a state media documentary in 2012. It suggests that the main task of CMS patrols is to assert China's sovereign rights in areas around the margins of the nine-dash line area. In fact, the captain of the CMS vessel leading the patrol explicitly described the route as proceeding "along the nine-dash line," and an official with the CMS South Sea Branch separately states that "our patrol area is the whole area within the nine-dash line."[135] An official newspaper described the patrols as a response to "increasingly serious situation of our country's maritime rights." This suggests that, much like the campaign of economic coercion against foreign oil and gas companies from 2007, the regular rights defence patrols were in some measure intended to compensate for the weakness of China's claims in those areas around the edge of the nine-dash line under the UNCLOS.[136]

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[131] *Xunhang Nanhai (Patrolling the South China Sea)*, ZHONGYANG DIANSHITAI [CHINA CENTRAL TELEVISION], July 22, 2012, at http://news.cntv.cn/china/20120722/108221.shtml. The vessels were the 3000-ton class *Haijian-83*, and 1000-ton class *Haijian-71*, *Haijian-84* and *Haijian-66*.
[132] Yu Wei, *supra* note.
[133] *Lan jiang weishi*, *supra* note.
[134] E.g. SOA, ZGHYNJ 2010, at 127; SOA, ZGHYNJ 2009, at 151.
[135] *Xunhang Nanhai*, *supra* note; *Lan jiang weishi*, *supra* note.
[136] *Zhongguo Haijian: lanse dunpai [CMS: the blue shield]*, RENMIN ZHENGXIE BAO (CPPCC NEWS), March 8, 2010, at http://epaper.rmzxb.com.cn/2010/20100308/t20100308_307606.htm

Accession to the Convention prompted the enactment of domestic legal authority and construction of specific capabilities necessary for the shift towards comprehensive control across a vast sweep of maritime space unrestricted by the Convention's provisions. Yet as shown above, it was the UNCLOS coming into effect in 1994 that prompted the drafting of the PRC legal instruments that provided the basis for the policy's implementation from 2007, as well as its development of a fleet of long-range cutters capable of conducting the 10,000km, 40-day patrol voyages that form its core activity. Official accounts also show a perception that such patrols would strengthen China's weak legal claims, and a desire to "maintain the dispute" around the margins of the nine-dash line. In short, the system of regular rights defence patrols embodies China's internalization of UNCLOS concepts and rights even as it rejected, and ultimately struggled against. its limitations. The concluding section below considers the crucial counterfactual scenario of no formalized UNCLOS treaty, or no PRC accession to it, and assesses the practical implications of the findings outlined above.

4. Conclusion: Counterfactual and Practical Implications

It is telling that none of the assertive changes in PRC policy in the South China Sea in 2007-2008 concerned control of disputed island territories, the original object of the Chinese claims in the area as depicted by the nine-dash line. Instead, they concerned control of maritime spaces and resources — the very areas in which state competition is regulated by the UNCLOS.[137] This Article's retracing of the PRC's interactions with the Law of the Sea regime and the key changes in Chinese maritime dispute behaviour illustrates how confrontations and coercion resulted not only from the Beijing party-state's growing general capabilities, but also from its perceptions of the particular challenges and opportunities presented by the implementation of the "global constitution for the world's oceans." Yet one could still legitimately ask whether the UNCLOS *mattered* in explaining China's assertive practices. To address this question it is necessary to consider a world in which the UNCLOS III negotiations had never produced a treaty.

In one plausible scenario, expansive unilateral EEZs and continental shelf declarations would have become widespread state practice even without the 1982 UNCLOS treaty.[138] With this in view, in China's case the regime appears to have accelerated what would otherwise have been a prolonged process. As we have seen, when China joined the UNCLOS III negotiations in 1973, state personnel had virtually no consciousness of offshore maritime jurisdictional claims, much less formulated official positions or claims. The fact that China acceded to the Convention only after it came into effect in 1994 further suggests its legal and administrative frameworks would have taken even longer to form in the absence of any agreement. Moreover, given the reservations about the 200nm limit the PRC expressed during the UNCLOS III negotiations, the PRC may well have been happy to see a more circumscribed limit

[137] See also the datasets associated with Zhang, *supra* note 77; Chubb, *supra* note 77; A. Chubb, *Dynamics of Assertiveness in the South China Sea:China, the Philippines, and Vietnam, 1970–2015* (2022), at 23–24.
[138] Ranganathan, *supra* note 4; Rothwell, 'The Law of the Sea, International Courts, and Judicialization', 115 *AJIL Unbound* (2021) 373; Schofield, *supra* note 18.

such as 100nm become the norm in the absence of the treaty.[139] Most consequentially, the nine-dash line may have remained as a claim to island territories, as per its original meaning.

A second important counterfactual concerns the domestic mobilizational resource the 1982 UNCLOS provided. The PRC, according to many China specialists, continues to operate on a mobilizational system of governance.[140] Throughout the 1990s and 2000s, Beijing's maritime policy authorities consistently lamented the party, state and population's lack of "maritime consciousness," that is, awareness of the various, cross-domain ways in which humans can exploit and own sea areas.[141] Beijing has recognized a need to systematically construct such a "consciousness" among strategic groups including maritime policy agencies, economic interests and the general population, in line with its general mobilizational mode of policymaking and governance. Given Beijing's extensive use of the UNCLOS in its propaganda campaign to build "maritime consciousness,"[142] it is reasonable to suggest this goal may have taken much longer in the absence of UNCLOS's explicit elaboration and authorization of maritime rights and quasi-territorial imagination of maritime space as "blue territory."

The scenarios above are by definition speculative. Yet even if UNCLOS had no substantive causal influence on Chinese conduct, understanding the processes of interaction, internalization and implementation outlined above still holds real-world significance. Assuming for argument's sake – and against the weight of evidence presented above – that the Convention's contribution to the sequence of events was immaterial, the processes elucidated still carry important theoretical and normative implications. E.H. Carr's famous parable of the unfortunate pedestrian run over by a drunk-driver on a dangerous road while shopping for groceries was not to deny that his desire for groceries led to his death: manifestly, it did.[143] Rather, Carr's point was that meaningful arguments about historical processes need to have useful implications for how to deal with present or future problems.[144] Bans on grocery shopping would not help prevent pedestrians being mown down by drunken drivers of faulty cars on dangerous roads. By contrast, recognizing the linkages between the UNCLOS and confrontational PRC behaviour at sea holds the potential to help scholars, lawyers, policymakers and citizens better understand and respond to contemporary interstate confrontation.

The clearest overall implication concerns the failure of the Law of the Sea to pacify state contestation in the South China Sea, one of the world's most important bodies of water. If we assume the changing regional power ledger – together with growing Chinese resource insecurity – would eventually have generated the observed changes in the PRC's policy, we are nonetheless left with the question of why the Law of the Sea has not restrained confrontational state behaviour in Asia's maritime fulcrum. Proponents of the pacifying effects of formal international law could

[139] Chief negotiator Ling Qing's comments quoted earlier indicated that by 1976 Beijing had still not calculated the specific area of entitlements that a 200nm EEZ would generate.
[140] S. Heilmann and E. Perry, *Mao's Invisible Hand: The Political Foundations of Adaptive Governance in China* (2011).
[141] Mallory, Chubb and Lau, 'China's Ocean Culture and Consciousness: Constructing a Maritime Great Power Narrative', 144 *Marine Policy* (2022) 105229.
[142] *Ibid.*
[143] E. H. Carr, *What Is History?* (1990), at 104–105. The specific grocery in question was cigarettes, which leaves the parable liable to confuse.
[144] Ironically Carr derided counterfactuals as "parlour games." *Ibid.*, at 97.

justifiably point to the Beijing regime's selective and instrumental approach to international law as the true cause of the developments examined above. Yet as realist accounts of international law have pointed out, the PRC would in this regard be far from unique among the contemporary world's states, especially great powers. Based on the observations above, three main factors seem likely candidates as potential conditions giving rise to the observed linkages between the Convention and China's conflictual behaviours as detailed above.

First, the incentives Beijing perceived for assertive actions aimed at bolstering legal claim strength point to some specific limitations in the design of the treaty. As the interference with Vietnamese continental shelf surveys indicated, this may have resulted from the Convention's assignment of exclusive authority over marine scientific research activities to coastal states, while also mandating all claimants undertake activities within that scope in order to substantiate their claims. The root of this problem may be the absence of sufficiently specific language affirming the legality of activities undertaken for the purpose of submissions under the Convention. If UNCLOS had, for example, assigned the CLCS the minor additional function of receiving and publicizing the registration of such activities, this might have avoided the unfavourable outcomes on the water in the South China Sea in 2007 and 2008.[145] Alternatively, given the Convention's expressed intention to promote cooperation among state parties, a provision may have been added to Article 76 or Annex II requiring the gathering of geological data for the CLCS Outer Continental Shelf adjudication process to be carried out collaboratively between contending parties, or by a neutral operator acting on behalf of both parties.

Second, and relatedly, Chinese bureaucrats and jurists' perception that competing EEZ claims are, or might be, subject to a prescriptive use-it-or-lose-it principle, has encouraged, and arguably even impelled, its efforts to exercise unilateral jurisdiction in areas of overlap. As noted earlier, Article 77 of the Convention made explicit that Continental Shelf rights "do not depend on occupation, effective or notional." Had a similar provision been included in the section on the EEZ (Articles 55-75), this may well have eased the anxiousness of states with overlapping EEZ claims to maximize their unilateral administrative activities in those disputed areas. At a minimum, in China's case it would have prevented maritime agency officials from making such arguments in favour of greater demonstrative assertiveness.

Third, while past research has highlighted the UNCLOS's role in reifying an extractive view of the "global commons,"[146] the findings here illustrate the perils of a simultaneous process of expanding territorialization. This suggests renewed caution from citizens, activists and civil society organizations regarding the conceptual and especially geographic expansion of state authority. With territory identified as a key cause of war over several centuries, it should not be surprising that the "territorialization" of maritime space might become a driver of inter-state conflict.[147] The processes traced in this paper imply that civil society groups participating in the creation of new global regimes ought perhaps to fight harder against the view that problems of the global commons will be best resolved through expansions in territorial

[145] One way to do this might have been to insert a mention of the CLCS in Article 247, on "Marine scientific research projects undertaken by or under the auspices of international organizations."
[146] Ranganathan, *supra* note 4.
[147] John Vasquez & Marie T. Henehan, *Territorial disputes and the probability of war, 1816-1992*, 38 JOURNAL OF PEACE RESEARCH 123 (2001).

states' authority than they did in the leadup to 1982. As cyber space and outer space increasingly become subject to state capabilities and contestation, it will be worth bearing in mind Oxman's cautionary observation on the difficulties of overcoming "the power of emotional appeals to territorial sovereignty by those who would resist international restraints."[148]

[148] Oxman, *supra* note, at 844-845.