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THE BUILDING OF CHINA'S GREAT WALL AT SEA

*Raul (Pete) Pedrozo**

I. INTRODUCTION

On October 15, 1962, photographs from a U-2 reconnaissance aircraft revealed that the Soviet Union was secretly assembling intermediate-range nuclear weapons in Cuba.¹ A week later, President Kennedy publicly revealed the discovery of the missiles and announced that the United States was imposing a maritime quarantine to prevent the introduction of additional missiles and materials to Cuba.² Following a number of confrontations at sea, on October 28, 1962, Nikita Khrushchey gave in to U.S. demands for the removal of nuclear weapons from Cuba.³ As Secretary of State Dean Rusk stated: "We're eyeball to eyeball, and I think the other fellow just blinked."⁴

Nearly fifty years later, two rival powers once again stood eyeball to eyeball, but this time it was the United States that "blinked." China, in recent years, has strenuously objected to U.S. intervention in the South China, East China, and Yellow Seas. Despite proclaiming an interest in

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1. *Cuban Missile Crisis*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <http://www.jfklibrary.org/JFK/JFK-in-History/Cuban-Missile-Crisis.aspx> (last visited Apr. 6, 2012).

2. *Id.*

3. *Id.*

4. Thomas Blanton, *Annals of Blinkmanship*, NAT'L SEC. ARCHIVES, GEORGE WASHINGTON UNIV., http://www.gwu.edu/~nsarchiv/nsa/cuba_mis_cri/annals.htm (last visited Mar. 4, 2012).

the region and voicing support for its regional partners, the United States, until recently, has largely failed to demonstrate its support by taking action. China's neighbors have been forced to succumb to Chinese pressure, with no actual assistance from the United States. By engaging its "anti-access strategy," China has been the victor in numerous high profile showdowns with neighboring claimants in this region. China has flexed its newfound muscle and has been successful in using force and threatening economic sanctions to accomplish its goals.

These events mark the beginning of the final phase of China's effort to erect a new great wall at sea—a wall that has been under construction since the end of World War II. China has built walls since the fifth century B.C. to protect itself from invasion.⁵ While previous wall-building efforts were confined to land, China has turned its attention to the sea and is attempting to assert sovereignty over disputed islands and vast maritime resources, to protect and expand its southern and eastern maritime boundaries, and to enhance its naval capabilities to counter U.S. Navy dominance in the Pacific. Unless the United States and its allies take immediate, proactive steps to counter Beijing's resurgence in its self-proclaimed zone of influence, any hope of keeping China from dominating the western Pacific will be lost.

II. THE HISTORY OF CHINA'S PRESENCE IN THE SOUTH CHINA SEA: CREATION OF THE WALL

A. *The Origins of the Wall—the U-shaped Line in the South China Sea*

The foundation for the southern portion of the wall was first laid when China officially issued a map that claimed the Pratas, Paracel, and Spratly Islands, as well as the Macclesfield Bank, as part of China.⁶ Using a U-shaped "eleven-dotted line," frequently referred to as the "Cow's Tongue," China claimed an area extending south to James Shoal, 4° north latitude.⁷ Use of the U-shaped eleven-dotted line was initially reaffirmed by the newly established government of the People's Republic of China in 1949, but was subsequently replaced by a nine-

5. See *Great Wall History*, GREAT WALL OF CHINA, <http://www.greatwall-of-china.com/51-90/the-great-wall-of-china.html> (last visited Apr. 6, 2012).

6. Li Jinming & Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEV. & INT'L L. 287, 290 (2003).

7. *Id.* at 289-90.

dotted line in 1953 after Zhou Enlai authorized the elimination of the two-dotted line portion in the Gulf of Tonkin.⁸

Although it is unclear from the map and subsequent official statements whether China is claiming the U-shaped line as a maritime boundary or is simply claiming sovereignty over the land features and adjacent waters within the line, efforts to reinforce the southern wall through the enactment of domestic legislation, diplomatic protests, and threats and coercion have continued over the past sixty years.⁹ Maps depicting the U-shaped line appeared most recently in Chinese protests to Vietnam's and Malaysia's extended continental shelf submissions to the Commission on the Limits of the Continental Shelf in 2009.¹⁰

B. Strengthening the Wall

China reaffirmed its sovereignty over the South China Sea islands when it declared a twelve nautical mile (nm) territorial sea in 1958.¹¹ Similar assertions were made in 1992,¹² twice in 1996,¹³ and in 2009.¹⁴

8. *Id.* at 290.

9. *Id.* at 292-93.

10. See Letter from the People's Republic of China to the U.N. Secretary-General Referencing the Joint Submission by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf (May 7, 2009), available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; see also Letter from the People's Republic of China to the U.N. Secretary-General Referencing the Submission By the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf (May 7, 2009), available at http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

11. Resolution of the Approval of the Declaration of the Government on China's Territorial Sea (1958) (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 4, 1958) (China), available at <http://www.asianlii.org/cn/legis/cen/laws/rotscotnrcpotaotdotgocts1338/>.

12. Law on the Territorial Sea and the Contiguous Zone (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 1992), art. 2 (1992) (China), available at <http://www.asianlii.org/cn/legis/cen/laws/tsatcz392/>.

13. See U.N. Office of Legal Affairs Div. for Ocean Affairs & the Law of the Sea, *Declarations and Statements*, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited Mar. 4, 2012); see also Statement of the Chinese Government on the Baseline of the Territorial Sea (promulgated by the State Council, May 15, 1996, effective date May 15, 1996), art. 2 (China), available at <http://www.asianlii.org/cn/legis/cen/laws/sotgotbotts659/>.

14. See Law of the People's Republic of China on Island Protection (decree of the President of the People's Republic of China, Dec. 26, 2009), available at http://www.procedurallaw.cn/english/law/201001/t20100110_300174.html.

China asserted its sovereignty over all of the South China Sea islands and their adjacent waters and continental shelves in two diplomatic protests filed with the United Nations in 2009.¹⁵ The first protest was filed after the Philippines enacted Republic Act No. 9522, defining the new Philippine archipelagic baselines and reasserting Filipino sovereignty over the Kalayaan Island group and Scarborough Shoal in the South China Sea.¹⁶ The second protest was in response to Vietnam's submission¹⁷ and Vietnam and Malaysia's joint submission¹⁸ to the United Nations Commission on the Limits of the Continental Shelf, both claiming extended continental shelves in the South China Sea.

The seawall was further strengthened when China enacted various laws over the course of a decade: the 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, which illegally claimed security jurisdiction in the contiguous zone;¹⁹ the 1998 Law on the Territorial Sea and the Contiguous Zone, which illegally required foreign warships to give prior notice before transiting the Chinese territorial sea in innocent passage;²⁰ the 1999 Marine Environment

15. Letter from the People's Republic of China to the U.N. Secretary-General Referencing the Republic Act No. 9522 to Define the Archipelagic Baselines of the Philippines (Apr. 13, 2009), *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn69_2009_chn.pdf; Letter from the People's Republic of China Referencing the Joint Submission by Malaysia and the Socialist Republic of Viet Nam, *supra* note 10; Letter from the People's Republic of China Referencing the Submission by the Socialist Republic of Vietnam, *supra* note 10.

16. An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines and For Other Purposes, Rep. Act No. 9522 (2009) (Phil.), *available at* http://www.lawphil.net/statutes/repacts/ra2009/ra_9522_2009.html.

17. U.N. Secretary-General, Letter dated May 11, 2009, Receipt of Submission Made by the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_clcs37_2009e.pdf.

18. U.N. Secretary-General, Letter dated May 7, 2009, Receipt of Joint Submission Made by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mysvnm_clcs33_2009e.pdf.

19. *See* Law of the People's Republic of China on the Territorial Sea and Contiguous Zone, *supra* note 12, art. 13. This law violates part II of the UNCLOS, which limits coastal state jurisdiction in the contiguous zone to customs, fiscal, immigration, or sanitary laws. United Nations Convention on the Law of the Sea, art. 19 (2)(g), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

20. Law on the Territorial Sea and the Contiguous Zone, *supra* note 12, art. 7. This law violates part II of UNCLOS, which guarantees the right of innocent passage to all ships, including warships, without prior notice or consent of the coastal state. *See* UNCLOS, *supra* note 19, art. 19, at 404.

Protection Law, which illegally applied China's environmental laws to all ships, including warships, in waters under Chinese jurisdiction;²¹ and the 2002 Surveying and Mapping Law, which illegally regulated all marine data collection, including hydrographic surveys and military data collection, in waters under Chinese jurisdiction.²² Many of the provisions of these laws are inconsistent with international law, exemplifying China's ongoing lawfare²³ strategy to misstate or misapply international legal norms to accommodate its anti-access strategy.

Finally, in March of 2010, Beijing announced that the South China Sea was a "core interest" for China, a characterization China had previously reserved for its most sensitive internal security concerns—Tibet, Xinjiang, and Taiwan.²⁴ Despite the fact that some Chinese officials are in disagreement about the merits of taking such a strong action,²⁵ this announcement demonstrated that Beijing no longer sees room for compromise with the other South China Sea claimants and will likely resort to force to protect its interests in the region if necessary.

In 1974, capitalizing on Washington's pre-occupation with the United States' withdrawal from Vietnam, China invaded the Paracel Islands, easily overwhelming the South Vietnamese garrison and illegally occupying the islands.²⁶ Over the next thirty years, China

21. Marine Environment Protection Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 25, 1999), art. 2 (China), available at <http://www.asianlii.org/cn/legis/cen/laws/meplotproc607/>. This law violates many of the provisions of part XII of UNCLOS, including article 236, which exempts sovereign immune vessels from compliance with the environmental provisions of the convention. See UNCLOS, *supra* note 19, art. 236, at 494.

22. Surveying and Mapping Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2002), art. 2 (China), available at <http://www.asianlii.org/cn/legis/cen/laws/samlotproc506/>. This law violates parts V and XIII of UNCLOS, which distinguish between coastal state jurisdiction over marine scientific research in the exclusive economic zone and user state freedoms to engage in other survey/marine data collection activities in the exclusive economic zone. See UNCLOS, *supra* note 19, pts. V & XIII.

23. Lawfare is a form of asymmetrical warfare that can be defined as the use or misuse of international law to attack or condemn an opponent's position or actions in order to win a public support. See Charles Dunlap, *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 JOINT FORCES Q., 34, 35 (2009), available at <http://www.dtic.mil/cgibin/GetTRDoc?AD=ADA515192>.

24. Peter Lee, *US Goes Fishing for Trouble*, ASIA TIMES ONLINE, July 29, 2010, <http://www.atimes.com/atimes/China/LG29Ad02.html>.

25. Edward Wong, *China Hedges Over Whether South China Sea is a 'Core Interest' Worth War*, N.Y. TIMES, Mar. 30, 2011, <http://www.nytimes.com/2011/03/31/world/asia/31beijing.html>.

26. ENERGY INFO. ADMIN., DEP'T OF ENERGY, COUNTRY ANALYSIS BRIEFS – SOUTH CHINA SEA 2 (2008), available at http://www.eia.gov/EMEUCabs/South_China_Sea/

dramatically increased its military presence in the Paracels, constructing a large military airfield on Woody Island and an intelligence monitoring facility on an adjacent island that would serve as forward operating bases for combat operations in the South China Sea.²⁷ In 1988, another clash between China and Vietnam at Johnson South Reef resulted in the sinking of several Vietnamese ships and the death of seventy Vietnamese sailors.²⁸ Following this engagement, China occupied six additional key islets in the Spratly archipelago.²⁹ In 1995, China secretly occupied Mischief Reef,³⁰ an islet located within the Philippine exclusive economic zone (EEZ), 130 miles from Palawan Island, and strategically situated astride one of Asia's most important sea lanes—the Palawan Strait.³¹ China's presence on the reef gave it the ability to disrupt maritime traffic transiting the Malacca and Singapore straits to the Philippines and northern Asia. Despite Filipino protest calling for China's withdrawal from the islet, China has continued its illegal military build-up of the reef since 1999.³²

As another means of projecting power in the South China Sea, China continues to improve its naval base on Hainan Island.³³ Press reports have also indicated that China intends to deploy its new anti-ship ballistic missile (DF-21D “carrier killer”), currently in production, at a new military base in Guangdong Province.³⁴ With a reported range of

pdf.pdf; Eleanor Duckwall, *China's Naval Buildup – Mischief Reef and More*, ELEANOR DUCKWALL'S SPOTLIGHT (July 7, 2009), <http://sixthcolumn.typepad.com/duckwalls/2009/07/chinas-naval-buildup-mischief-reef-and-more.html>; ICE Case Studies, *Spartly Island Dispute*, TRADE & ENV'T DATABASE (1997), <http://www1.american.edu/TED/ice/spratly.htm> (last visited June 21, 2012); Le Duc, *History of Chinese Imperialism in Vietnam: From Viet Nam to Paracel/Spratly*, PARACEL & SPRATLY ISLAND FORUM, <http://paracelspratlyislands.blogspot.com/2008/01/history-of-chinese-imperialism-in.html> (last visited June 21, 2012).

27. Andrei Chang, *Analysis: China's Air-Sea Buildup*, SPACE WAR (Sept. 26, 2008), http://www.spacewar.com/reports/Analysis_Chinas_air-sea_buildup_999.html.

28. *Military Clashes in the South China Sea*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/war/spratly-clash.htm> (last modified Nov. 7, 2011).

29. See Duckwell, *supra* note 26; ICE Cast Studies, *supra* note 26.

30. See Duckwell, *supra* note 26.

31. *Id.*

32. David G. Wiencek, *South China Sea Flashpoint*, CHINA BRIEF, Dec. 31, 2001, http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=3735&tx_ttnews%5BbackPid%5D=191&no_cache=1.

33. See Duckwell, *supra* note 26.

34. Wendall Minnick, *China Builds First Anti-Ship Ballistic Missile Base?*, DEF. NEWS, Aug. 5, 2010, <http://www.defensenews.com/article/20100805/DEFSECT01/8050301/China-Builds-First-Anti-Ship-Ballistic-Missile-Base->

up to 2,000 kilometers, the DF-21D would be able to cover most of the Spratly Islands.³⁵

Chinese aggression against Vietnam has continued unabated in the twenty-first century. For example, in January 2005, Chinese naval vessels fired on Vietnamese fishing boats in Vietnam's territorial sea, killing nine and injuring seven others.³⁶ China justified its actions as acts of self-defense against armed pirates.³⁷ Similar incidents have continued over the past several years, culminating in 2009 with the seizure of 33 Vietnamese fishing vessels and 433 crew members in the South China Sea.³⁸ Additionally, in April 2010, China issued a unilateral fishing ban for the South China Sea in an effort to assert control over the region's depleted fish stocks and seized a Vietnamese fishing boat and its crew in the vicinity of the Paracels.³⁹ Five months later, China seized a second Vietnamese fishing vessel and its crew for allegedly fishing with explosives.⁴⁰ Despite Hanoi's repeated calls for immediate and unconditional release of the vessel and its 9 crew members, China did not release the crew until the 12th of October.⁴¹ The most recent spat occurred in March 2012, after China detained 2 Vietnamese fishing boats and their crews near the Paracels.⁴² Hanoi has called for the immediate and unconditional release of the two boats and their twenty-one crewmembers, refusing to pay the 70,000 yuan fee and demanding that Beijing stop hindering Vietnamese fishermen in the South China Sea.⁴³ Interestingly enough, Beijing's reaction during these incidents is completely inconsistent with its position following the September 7,

35. *Id.*

36. Thi Q. Lam, *Latest Gulf of Tonkin Incident Reveals China's Imperialist Designs*, PACIFIC NEWS SERV., Feb. 13, 2005, http://news.newamericamedia.org/news/view_article.html?article_id=48b8f8c6203529cbd50b4ca149abeac4#.

37. *Id.*

38. *China Seizes Vietnamese Fishing Boat*, ASIA-PACIFIC NEWS, Apr. 19, 2010, http://www.monstersandcritics.com/news/asiapacific/news/article_1549166.php/China-seizes-Vietnamese-fishing-boat.

39. *Id.*

40. *After Senkaku Dispute, China-Vietnam Crisis Looms in South China Sea*, ASIA NEWS, Oct. 6, 2010, <http://www.asianews.it/news-en/After-Senkaku-dispute,-China-Vietnam-crisis-looms-in-South-China-Sea-19651.html#>.

41. *China Claims Release of fishermen Who Remain at Large*, VIETNAM TODAY, Oct. 16, 2010, <http://www.dztimes.net/post/social/china-claims-release-of-fishermen-who-remain-at-large.aspx>.

42. *Vietnam, China in New Spat Over Fishermen Detentions*, YAHOO!NEWS.COM, Mar. 22, 2012, <http://news.yahoo.com/vietnam-china-spat-over-fishermen-detentions-160611101.html>.

43. *Id.*

2010 arrest of the Chinese trawler captain by Japanese authorities in the vicinity of the Senkakus.⁴⁴ Following the captain's arrest, Chinese authorities demanded the immediate release of the captain and his boat claiming that Japan had infringed on China's territorial sovereignty and violated the captain's human rights.⁴⁵

China has also resorted to economic coercion by threatening U.S. and international oil and gas companies, including Exxon/Mobil in 2008 and BP in 2007, with loss of business opportunities in mainland China if they did not stop joint exploration ventures with Vietnam in the South China Sea.⁴⁶ Most recently, in March 2011, two Chinese patrol boats harassed a Philippine Department of Energy vessel—the *M/V Veritas Voyager*—that was conducting a seismic survey for oil and gas in the vicinity of Reed Bank, ordering the vessel to leave the area.⁴⁷ The Chinese patrol boats departed the area after Manila dispatched an OV-10 Bronco bomber and a navy reconnaissance plane to investigate the incident and deter further Chinese aggression.⁴⁸ Manila lodged a strong diplomatic protest with Beijing over the incident and indicated that it would upgrade the military airfield on Pag-asa (Thitu) and acquire new patrol ships, aircraft, and radars to better defend its South China Sea claims.⁴⁹ The survey was completed at the end of March with the assistance of a Philippine Coast Guard vessel that was deployed to the area to deter further Chinese interference with the *Voyager's* work.⁵⁰ The Reed Bank oil and gas fields are located well within the Philippine-

44. See Martin Fackler & Ian Johnson, *Japan Retreats With Release of Chinese Boat Captain*, N.Y. TIMES, Sept. 24, 2010, <http://www.nytimes.com/2010/09/25/world/asia/25chinajapan.html?pagewanted=all>.

45. *Id.*

46. Jason Folkmanis, *China Warms Some Oil Companies on Work with Vietnam, U.S. Says*, BLOOMBERG, July 16, 2009, <http://www.bloomberg.com/apps/news?pid=20670001&sid=ak.1QfkkDStU>; Peter Navarro, *China Stirs Over Offshore Oil Pact*, ASIA TIMES, July 23, 2008, <http://www.atimes.com/atimes/printN.html>; *U.S. Sees No Recent China Pressure on Global Oil Companies in South Sea*, Bloomberg, Aug. 17, 2010, <http://www.bloomberg.com/news/2010-08-18/u-s-sees-no-recent-china-pressure-on-global-oil-companies-in-south-sea.html>.

47. Jamie Laude, *AFP to Maintain Presence in Spratlys*, PHILIPPINE STAR, Mar. 29, 2011, <http://www.philstar.com/Article.aspx?articleId=670842&publicationSubCategoryId=>

48. *Id.*

49. *Philippines to Bolster Watch in Disputed Spratlys*, BLOOMBERG, Mar. 28, 2011, <http://www.businessweek.com/ap/financialnews/D9M89S6G1.htm>.

50. *Id.*; Florantes S. Solmerin, *Military to Install Radars on Nine Spratly Islands*, MANILA STANDARD TODAY, Mar. 8, 2011, <http://www.manilastandardtoday.com/insideneews.htm?f=2011/march/8/news1.isx&d=2011/march/8>.

claimed EEZ, approximately 80 nm west of Palawan Island.⁵¹ The events off of Palawan were repeated in May 2011 off the coast of Vietnam when China Marine Surveillance vessels cut the exploration cable of the *Binh Minh 02*, a survey ship being operated by Petro Vietnam.⁵² The ship was approximately 116 nm off Dai Lanh, which is well within Vietnam's claimed EEZ.⁵³ Two weeks later, on June 9, 2011, a Chinese fishing vessel that was operating with two China Maritime Surveillance patrol vessels intentionally rammed the survey cable of the *Viking 2*, which was conducting a seismic survey approximately 60 nm off the southern coast of Vietnam well within Vietnam's EEZ and over 1,000 km from Hainan Island.⁵⁴ However, Chinese aggression has not been limited to Vietnam. Admiral Willard, Commander of the U.S. Pacific Command, testified before Congress in January of 2010 as to China's increased aggressiveness, stating that "[t]he [People's Liberation Army (PLA)] Navy has increased its patrols throughout the [South China Sea] region and has shown an increased willingness to confront regional nations on the high seas and within the contested island chains."⁵⁵ In March of 2010, six PLA ships conducted a training exercise in the vicinity of Fiery Cross Reef.⁵⁶ A month later, China began escorting its fishing vessels in the contested area after a Malaysian warship allegedly removed the cover of its gun mount and shadowed Chinese fishing vessels that were operating near Layang Island in the Spratly archipelago.⁵⁷ Finally, China reasserted its "indisputable sovereignty" over the South China Sea by conducting an unprecedented military exercise involving ships and aircraft from all

51. Scott Weeden, *Palawan Gas Development Sparks Chinese Protest*, E&P, Nov. 14, 2011, http://www.epmag.com/Production-Drilling/Palawan-Gas-Development-Sparks-Chinese-Protest_91573#.

52. *VN Demands China Stop Sovereignty Violations*, VIETNAM PLUS, May 29, 2011, <http://en.vietnamplus.vn/Home/VN-demands-China-stop-sovereigntyviolations/20115/18615.vnplus>.

53. *Id.*

54. *See Sea Spat Raises China-Vietnam tensions*, NAMVIET NEWS, June 10, 2011, <http://namvietnews.wordpress.com/2011/06/10/sea-spat-raises-china-vietnam-tensions/>.

55. *U.S. Pacific Command: Statement Before the House Armed Services Committee on U.S. Pacific Command Posture* (Mar. 23, 2010) (Statement of Admiral Robert F. Willard, U.S. Navy, Commander), available at http://www.pacom.mil/web/pacom_resources/pdf/willard_statement_HASC_032510.pdf.

56. Brian Cross, *The Spratly and Paracel Islands: Issues in the South China Sea*, SUITE101.COM, June 7, 2010, <http://news.suite101.com/article.cfm/the-spratly-and-paracel-islands-issues-in-the-south-china-sea-a245756>.

57. Koichi Furuya et al., *China Ratcheting up Regional Tension*, ASAHI SHIMBUN, July 24, 2010, <http://www.asahi.com/english/TKY201007230527.html>.

three of its fleets, in response to Secretary of State Hillary Clinton's statement before a July 2010 meeting of the Association of Southeast Asian Nations (ASEAN) regional forum that "[t]he United States, like every nation, has a national interest in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea" and that "[t]he United States supports a collaborative diplomatic process by all claimants for resolving the various territorial disputes without coercion."⁵⁸

Further, Chinese ships and aircraft routinely harass and interfere with U.S. military ships and aircraft conducting lawful activities in and over China's EEZ in the South China Sea. Although there have been countless confrontations between U.S. and Chinese ships and aircraft at sea, the two most notable incidents receiving extensive media coverage were the EP-3 incident in 2001 and the *Impeccable* incident in 2009.

On April 1, 2001, two Chinese F-8 fighter aircrafts intercepted a U.S. EP-3 that had been conducting a routine reconnaissance flight about seventy miles southeast of Hainan Island.⁵⁹ While making a close approach to the EP-3, one of the F-8s lost control and collided with the EP-3, forcing the U.S. aircraft to make an emergency landing at the Lingshui military airfield on Hainan.⁶⁰ The crew was detained by the PLA for eleven days before being released and the aircraft was not returned until July 2001.⁶¹ In March 2009, five Chinese vessels—three government ships and two small cargo ships—harassed the *Impeccable* (T-AGOS 23) while the vessel was engaged in lawful military activities in the South China Sea approximately 75 nm from Hainan Island.⁶² The cargo ships intentionally stopped in front of the *Impeccable*, forcing the U.S. ship to make an emergency all-stop to avoid a collision.⁶³ It is clear

58. Greg Torode & Minnie Chan, *For China, War Games are Steel Behind the Statements*, SOUTH CHINA MORNING POST, July 31, 2010, http://viet-studies.info/kinhte/China_war_games.htm;

Secretary of State Hillary Clinton: On Her Way Back to the States, FREEDOM'S CHOICE BLOG, (July 23, 2010), <http://secretaryclinton.wordpress.com/2010/07/23/secretary-of-state-hillary-clinton-on-her-way-back-to-the-states/>.

59. SHIRLEY A. KAN ET AL., CONG. RESEARCH SERV., RL 30946, CHINA-U.S. AIRCRAFT COLLISION INCIDENT OF APRIL 2001: ASSESSMENTS AND POLICY IMPLICATIONS 1 (2010), available at www.fas.org/sgp/crs/row/RL30946.pdf.

60. *Id.*

61. *Id.* at 1, 8.

62. Ann Scott Tyson, *China Draws U.S. Protest Over Shadowing of Ships*, WASH. POST, Mar. 10, 2009, at A8.

63. See *Chinese Ships Approach USNS Impeccable – Raw Video #3*, YOUTUBE, (Mar. 20, 2009), http://www.dailymotion.com/video/x8qapt_chinese-ships-approach-usns-impecca_news.

from the video tape of the incident that the cargo ships were acting as proxies for the Chinese government vessels. What is more, in June 2009, a Chinese submarine collided with the *USS John S. McCain's* (DDG 56) as it was towing sonar array off the Philippine coast approximately 144 nautical miles from Subic Bay.⁶⁴ It is unknown whether the collision was intentional or just another example of poor seamanship by the PLA.

Many of the above actions took place after China agreed to abide by the 2002 Joint Declaration of Conduct of Parties in the South China Sea, which requires the various claimants to “undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or the use of force.”⁶⁵ There is little evidence that China had any intention of abiding by the declaration, but rather, it seems China used the declaration to buy time to strengthen its existing outposts, as well as occupy further features in the South China Sea.⁶⁶

C. *The Eastern Portion of the Wall—the East China Sea*

The foundation for the eastern bastions was laid in 1958 with the Resolution of the Standing Committee of the National People's Congress of the Approval of the Declaration of the Government of China's Territorial Sea, where article 1 identified Taiwan as Chinese territory.⁶⁷ The wall was significantly strengthened in 1972 with adoption of the “One-China” policy by the United States, confirmed in 1978 and 1982, which recognized Beijing as the legitimate government of China.⁶⁸

64. Barbara Starr, *Sub Collides with Sonar Array Towed by U.S. Navy Ship*, CNN.COM, June 12, 2009, www.cnn.com/2009/US/06/12/china.submarine/.

65. Assoc. of Southeast Asian Nations, *Declaration on the Conduct of Parties in the South China Sea* (Nov. 4, 2002), <http://www.aseansec.org/13163.htm>.

66. See, e.g., Kenji Minemura, *China's Scenario to Seize Isles in South China Sea*, CHINA MILITARY NEWS, Jan. 1, 2011, <http://www.china-defense-mashup.com/chinas-scenario-to-seize-isles-in-south-china-sea.html> (discussing the PLA's internal tactical plan to seize control of the South China Sea islands that are currently occupied by other claimants).

67. Resolution of the Approval of the Declaration of the Government on China's Territorial Sea, *supra* note 11.

68. *Joint Communiqué of the United States of America and the People's Republic of China, Feb. 28, 1972*, TAIWAN DOCUMENTS PROJECT, <http://www.taiwandocuments.org/communiqué01.htm> (last visited June 12, 2012); *Joint Communiqué of the United States of America and the People's Republic of China, Jan 15, 1978, Establishment of Diplomatic Relations, U.S. & China*, TAIWAN DOCUMENTS PROJECT, <http://www.taiwandocuments.org/communiqué02.htm> (last visited June 12, 2012); *Joint Communiqué of the United States of America and the People's Republic of China, Aug. 17, 1982, Arms Sales to Taiwan, U.S. & China*, TAIWAN DOCUMENTS PROJECT, <http://www.taiwandocuments.org/communiqué03.htm> (last visited June 12, 2012).

China re-affirmed its claim to Taiwan in article 2 of the 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone.⁶⁹ And in 1998, China fortified the wall by enacting the Law on the Territorial Sea and the Contiguous Zone of the Republic of China, which illegally provides in article 13 that "China may enact laws and regulations relating to transit passage of foreign vessels and aircraft" through the Taiwan Strait.⁷⁰ This law violates the law of the sea, reflected in article 36 of UNCLOS, which guarantees freedom of navigation through straits that contain a high seas or EEZ corridor.⁷¹

In 1995 and 1996, China took further steps to strengthen the eastern seawall around Taiwan by conducting a series of military exercises off the Taiwanese coast in an effort to dissuade the Kuomintang party's independence movement, designed to influence the March 1996 presidential election.⁷² From July 21-28, 1995, the PLA conducted a series of exercises off the coast of Taiwan, including the launching of six surface-to-surface missiles that landed within 100 miles of Taiwan.⁷³ There was no visible United States response to the exercises. Although the *USS Nimitz* transited the Taiwan Strait in December 1995, the first transit of a U.S. carrier since 1979, in actuality the ship was diverted through the strait due to bad weather, not as a show of support for Taiwan.⁷⁴ In March 1996, the PLA conducted a second and more aggressive round of exercises; surface-to-surface missiles were again fired off the coast of Taiwan, some of which impacted within twenty miles of the northern port of Keelung.⁷⁵ U.S. Secretary of Defense Perry suggested deploying a carrier battle group to the Taiwan Strait as a deterrent.⁷⁶ Unfortunately, he was overruled by the National Security Council and, instead, the Administration ordered two carrier battle

69. Law on the Territorial Sea and the Contiguous Zone, *supra* note 12.

70. *Id.* This provision violates part III of UNCLOS, which provides in article 36 that high seas freedoms of navigation and over-flight (not the more restrictive transit passage regime) apply in straits that have a high seas or EEZ corridor. *See* UNCLOS, *supra* note 19, art. 36, at 410.

71. *See* UNCLOS, *supra* note 19, art. 36, at 410.

72. Kristie Wang, *Chronology of Recent Events in U.S.-Taiwan and U.S.-China Relations*, CTR. FOR TAIWAN INT'L REL., <http://www.taiwandc.org/hst-9596.htm> (last visited Mar. 4, 2012).

73. *Id.* *See also* Michael Richardson, *Chinese Missile Tests Seen as Intimidation*, N.Y. TIMES, July 21, 1995, http://www.nytimes.com/1995/07/21/news/21ihtchina_9.html?scp=1&sq=Michael%20richardson,%20Chinese%20Missile%20tests%20seen%20as%20intimidation&st=cse.

74. Robert S. Ross, *The 1995-1996 Taiwan Strait Confrontation: Coercion, Credibility, and Use of Force*, 25 INT'L SECURITY 87, 104 (2000).

75. *Id.* at 107.

76. *Id.* at 110.

groups—the *Independence* and *Nimitz*—to the region to observe the PLA exercises.⁷⁷ Although the U.S. carrier presence provided a temporary deterrent to China, the ships remained outside the strait, and as a result, the wall inched higher.⁷⁸

The extension of the wall to the northeast began in earnest in the 1970s when the dispute between Japan and China over ownership of the Senkaku Islands took on a new dimension after a 1969 report by the United Nations Economic Commission for Asia and the Far East indicated the possibility of large oil and gas reserves in the vicinity of the islands.⁷⁹ Despite having returned the islands to Japanese administrative control in 1971 under the Okinawa Reversion Treaty,⁸⁰ U.S. ambivalence over the underlying sovereignty claims emboldened China to re-assert ownership over the Senkakus and claim an extended continental shelf to the limits of the Okinawa Trough.⁸¹ For example, when submitting the Okinawa Reversion Treaty to the Senate for advice and consent, the Department of State specifically indicated that reversion of the Senkakus to Japanese administrative control did not prejudice the underlying sovereignty claims to the islands.⁸² Subsequent Administrations have retained this neutral stance.⁸³ In short, despite acknowledging that the Japan-U.S. Security Treaty⁸⁴ applied to the Senkakus, the United States has done little to support its treaty ally on this important and sensitive issue.⁸⁵

Chinese incursions into the waters around the Senkakus significantly increased in number, as well as intensity, after Japan declared an EEZ

77. *Id.*

78. *Id.* at 118.

79. *Senkaku/Diaoyutai Islands*, GLOBAL SECURITY (Aug. 6, 2010), <http://www.globalsecurity.org/military/world/war/senkaku.htm>.

80. *Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands, U.S.–Jap., June 17, 1971*, RYUKYU-OKINAWA HISTORY & CULTURE, <http://www.niraikanai.wvma.net/pages/archive/rev71.html> (last visited June 12, 2012).

81. Daniel Dzurek, *The Senkaku/Diaoyu Islands Dispute* (Oct. 18, 1996), www-ibru.dur.ac.uk/resources/docs/senkaku.html#note4; Thomas R. Ragland, *A Harbinger: The Senkaku Islands*, 10 SAN DIEGO L. REV. 664, 668-69 (1973).

82. LARRY A. NIKSCH, CONG. RESEARCH SERV., 96-798, SENKAKU (DIAOYU) ISLANDS DISPUTE: THE U.S. LEGAL RELATIONSHIP AND OBLIGATIONS 3 (1996), available at http://assets.opencrs.com/rpts/96-798_19960930.pdf.

83. *Id.* at 4.

84. *Treaty of Mutual Cooperation and Security Between Japan and the United States of America*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, <http://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html> (last visited June 22, 2012).

85. NIKSCH, *supra* note 82, at 4.

around the islands in 1996.⁸⁶ For example, between 2003 and 2004, the number of incursions into Japanese waters by Chinese naval and other government vessels jumped from six to thirty-four.⁸⁷ Chinese aggressiveness has likewise increased.⁸⁸ For instance, in April of 2010, a PLA helicopter buzzed a Japanese surveillance vessel, which had been monitoring Chinese military exercises in waters off Okinawa, coming within ninety meters of the Japanese ship.⁸⁹ Similarly, in May of 2010, a Japanese oceanographic survey vessel, *Shoyo*, was pursued by a Chinese inspection ship, *Haijian 51*, and ordered to leave “Chinese waters” about 198 miles northwest of Amani Oshima Island.⁹⁰

Japan-China relations dipped to an all-time low following an incident in September 2010 between a Chinese fishing trawler and two Japanese patrol vessels.⁹¹ Following several high-level demands and threats of strong countermeasures if the captain was not unconditionally released, Tokyo ultimately succumbed and released the captain, who had been held for two weeks.⁹² Citing diplomatic considerations, Japanese prosecutors suspended investigation of the charges—obstructing officials on duty—which it had initially brought against the captain.⁹³ Although Japan’s decision to confront Chinese aggression was admirable, it failed to achieve its intended purpose when Tokyo gave in to Chinese demands.⁹⁴ Unfortunately, despite assurances by Secretary of State

86. Raul (Pete) Pedrozo, *Preserving Navigational Rights and Freedoms: the Right to Conduct Military Activities in China’s Exclusive Economic Zone*, 11 CHINESE J. INT’L L. 9, 16-18 (2010); NIKSCH, *supra* note 82, at 4. See also James J. Przystup, *Japan-China Relations: Not The Best of Times*, 6 COMP. CONNECTIONS 117, 119 (2004), available at <http://csis.org/publication/comparative-connections-v6-n3-japan-china-relations-not-best-times>; John J. Tkacik, Jr., *China’s New Challenge to the U.S.-Japan Alliance*, HERITAGE FOUNDATION (July 13, 2004), <http://www.heritage.org/research/asiaandthepacific/wm533.cfm>.

87. Peter A. Dutton, *International Law and the November 2004 “Han Incident”*, 2 ASIAN SECURITY 87, 96 (2006).

88. Dutton, *supra* note 86; Tkacik, *supra* note 86.

89. Malcolm Foster, *Japan, China Test Each Other’s Diplomatic Resolve*, SAN DIEGO UNION TRIB., Sept. 27, 2010, <http://www.utsandiego.com/news/2010/sep/27/japan-china-test-each-others-diplomatic-resolve/>.

90. *Japan Protests To Beijing Over Chasing in East China Sea*, NEWS352, Apr. 5, 2010, <http://hello.news352.lu/edito-39130-japan-protests-to-beijing-over-chasing-in-east-china-sea.html?p=movies>.

91. Martin Fackler, *Japan Retreats with Release of Chinese Boat Captain*, N.Y. TIMES, Sept. 24, 2010, <http://www.nytimes.com/2010/09/25/world/asia/25chinajapan.html>.

92. *Id.*

93. *Id.*

94. *See id.*

Clinton and Secretary of Defense Gates that article 5 of the U.S.-Japan Security Treaty applied to the Senkakus, there was little in the way of actual U.S. support for Japan during this incident.⁹⁵

*D. The Northern Portion of the Wall—Gulf of Bo Hai
and the Yellow Sea*

The initial bricks for the northern wall were also laid in 1958. article 2 of the Declaration of the Government of the People's Republic of China identified the waters of the Bohai Bay as Chinese inland waters.⁹⁶ In 2001, the wall was extended seaward when a PLA Jianheu III-class frigate aggressively confronted the *Bowditch* (T-AGS 62), which was legally conducting a routine military survey in the Yellow Sea.⁹⁷ The unarmed hydrographic survey ship was ordered to leave the Chinese EEZ or suffer the consequences.⁹⁸ Being an unarmed auxiliary, the *Bowditch* complied with the order, but returned several days later with a naval escort to complete its mission.⁹⁹

Eight years later, Chinese vessels once again harassed a U.S. ship that was conducting routine surveillance operations in the Yellow Sea.¹⁰⁰ In May of 2009, two Chinese fishing vessels came within ninety feet of the *Victorious* (T-AGOS-19), prompting the unarmed ship to use its water hose to ward off the Chinese boats.¹⁰¹ As in the earlier case of the *Impeccable*, video tapes of the *Victorious* incident clearly demonstrate that the Chinese trawlers were acting as proxies for the PLA Navy.¹⁰²

The wall was extended further east and north in July 2010, after China voiced strong objections to the planned deployment of the *George Washington* (CVN 73) to the Yellow Sea, where it was to conduct a joint

95. *Japan, U.S. Affirm Cooperation on Disputed Senkaku Islands*, JAPAN TIMES, Oct. 12, 2010, <http://www.japantimes.co.jp/text/nn20101012a4.html>.

96. Resolution of the Approval of the Declaration of the Government on China's Territorial Sea, *supra* note 11.

97. Chris Plante, *U.S. Quietly Resumes Surveillance Flights Off China*, CNN.COM, May 15, 2001, http://www.articles.cnn.com/2001-05-15/us/us.china.plane_1_transport-plane-navy-ep-3-chinese-coast?_s=PM:us; KAN, *supra* note 59, at 14.

98. *Id.*

99. *Id.*

100. *Pentagon Reports Naval Incident in Yellow Sea*, VOICE OF AMERICA, May 5, 2009, <http://www.voanews.com/english/news/a-13-2009-05-05-voa24-68787162.html>.

101. *Id.*

102. For an account of the incident, see Barbara Starr, *Chinese Boats Harassed U.S. Ship, Officials Say*, CNN.COM, (May 5, 2009), <http://edition.cnn.com/2009/WORLD/asiapcf/05/05/china.maritime.harassment/>.

military exercise with South Korean forces.¹⁰³ After it was announced in July 2010 that the U.S. aircraft carrier would participate in “Invincible Spirit,” a joint U.S.-South Korea exercise intended to send a message to North Korea for its alleged sinking of the South Korean warship *Cheonan* earlier that year, China voiced strong objections to the presence of the carrier in the Yellow Sea, indicating that deploying the carrier to the Yellow Sea would be seen as provocative and a threat to Chinese national security, even though the U.S. carrier had conducted operations in the Yellow Sea earlier in the year without incident.¹⁰⁴ Despite statements from the Pentagon that the United States reserved the right to operate in the Yellow Sea, the carrier was ultimately deployed east of the Korean peninsula in an apparent effort to appease China’s concerns.¹⁰⁵ Rather than acknowledge the U.S. gesture, Beijing responded to the decision to keep the carrier east of the Korean peninsula with a live-fire naval exercise of its own in the East China Sea from June 30 to July 5.¹⁰⁶

The northern wall was further strengthened in August 2010 when the United Nations Command in Seoul announced that the *George Washington* would not participate in “Ulchi Freedom Guardian,” a second joint exercise with South Korea in mid-August, despite statements by the Pentagon in early August that the *George Washington* would take part in a sequence of exercises with South Korea, “including exercising in the Yellow Sea.”¹⁰⁷ China responded to these U.S. press statements by announcing that the PLA Navy would conduct a live-fire exercise in the Yellow Sea.¹⁰⁸ On August 31 of that year, the United

103. See Christopher Bodeen, *USS George Washington Visit Poses a Dilemma for China*, HUFFINGTON POST, Nov. 26, 2010, http://www.huffingtonpost.com/2010/11/26/uss-george-washington-vis_n_788671.html; see also Al Peesin, *US Aircraft Carrier to Exercise in Yellow Sea*, VOICE OF AMERICA, Aug. 5, 2010, www.voanews.com/english/news/usa/us-aircraft-carrier-to-exercise-in-yellow-sea-100061074.html; see generally John Hemmings, *Cheonan Raises Tensions with China*, E. ASIAN FORUM (Aug. 19, 2010), <http://www.eastasiaforum.org/2010/08/19/cheonan-raises-tensions-with-china/>; Jim Garamone, *U.S. Korean Defense Leaders Announce Exercise Invincible Spirit*, DEP’T OF DEF. (July 20, 2010), <http://www.defense.gov/news/newsarticle.aspx?id=60074>.

104. See Peter J. Brown, *China’s Pro-Missile Navy Sinks Carriers*, ASIA TIMES, July 23, 2010, <http://www.atimes.com/atimes/china/LG23Ad01.html>.

105. Bill Gert, *Inside the Ring: Chinese Carrier Pressure*, WASH. TIMES, July 21, 2010, <http://www.washingtontimes.com/news/2010/jul/21/inside-the-ring-300362848/?page=all>.

106. John Chan, *US Naval Exercise Heightens Tensions in Asia*, WORLD SOCIALIST WEB SITE, July 24 2010, <http://www.wsws.org/articles/2010/jul2010/kore-j24.shtml>.

107. Dep’t of Def. News Briefing with Geoff Morrell, Pentagon Press Secretary (Aug. 5, 2010), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=53001>.

108. Gillian Wong, *Chinese Navy to Hold Drills in Yellow Sea*, YAHOO NEWS, Aug. 29, 2010, http://news.yahoo.com/s/ap/20100829/ap_on_re_as/as_china_naval_drills.

States announced, yet again, that the *George Washington* would not take part in an anti-submarine exercise in the Yellow Sea that had been planned to take place from September 5-9.¹⁰⁹ Finally, in late November of 2010, the *George Washington* deployed to the Yellow Sea to conduct a joint exercise with the South Korean Navy.¹¹⁰ However, the deployment was pre-announced by the U.S. administration and was the subject of a Chinese diplomatic protest well in advance of the exercise.¹¹¹ In short, as was the case with the lack of U.S. carrier presence in the Taiwan Strait during the 1990s, every day that passes without a routine unannounced U.S. carrier presence in the Yellow Sea adds another brick to the northern wall.

E. The Inner Defensive Wall—China's Straight Baseline Claims

Anticipating that the outer wall may someday be breached, China has also constructed an inner defensive wall along its entire coastline. The initial foundation for the inner defenses was laid in 1958.¹¹² Article 2 of the Declaration of the Government of the People's Republic of China on China's Territorial Sea indicated that the territorial sea would be measured from baselines "composed of straight lines connecting bas [sic]-points on the mainland coast and on the outermost coastal islands," and that all waters landward of the baselines, as well as all of the islands inside the baselines (including Tungyin Island, Kaoteng Island, the Matsu Islands, the Paichuan Islands, Wuchiu Island, the Greater and Lesser Quemoy Islands, Tatan Island, Erhtan Island, and the Tungting Islands), were considered internal waters.¹¹³ Article 3 of the 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone likewise indicated that the territorial sea would be

109. *S. Korea and US to Stage Joint Naval Drill*, AGENCE FRANCE-PRESSE, Aug. 31, 2010, <http://www.google.com/hostednews/afp/article/ALeqM5j3rg8MRGsoEnYyexjijpvz36aww>.

110. Brandon Place, *USS George Washington Headed for the Yellow Sea*, SUITE101.COM, Nov. 26, 2010, <http://www.suite101.com/content/uss-george-washington-heading-for-yellow-sea-a313179>.

111. *Id.* See also Jeremy Page, *China Warns U.S. as Korea Tensions Rise*, WALL ST. J., Nov. 26, 2010, <http://online.wsj.com/article/SB10001424052748704008704575638420698918004.html>.

112. See Resolution of the Approval of the Declaration of the Government on China's Territorial Sea, *supra* note 11.

113. *Id.*

measured twelve nautical miles out from straight baselines along the coast, but did not define the base points.¹¹⁴

China solidified its straight baseline claims in 1996 with the Statement of the Chinese Government on the Baseline of the Territorial Sea, which identified forty-nine base points along mainland China and twenty-eight base points around the Xisha Islands.¹¹⁵ However, most of the Chinese coast does not meet the geographic conditions articulated in the UNCLOS for applying straight baselines.¹¹⁶

The normal baseline for measuring the breadth of the territorial sea is the low-water line.¹¹⁷ Straight baselines may only be used where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.¹¹⁸ China's straight baseline claims are therefore illegal under international law.¹¹⁹ Although the United States has diplomatically protested China's claim, it has been nearly fifteen years since the U.S. Navy has operationally challenged the illegal baselines under the Freedom of Navigation (FON) Program.¹²⁰

III. MORE "WORDS" FROM THE UNITED STATES

There is an old Chinese Proverb which states that "talk doesn't cook rice."¹²¹ Domestic laws, diplomatic protest, and sovereignty claims are meaningless unless backed with some level of implementation. When words have been insufficient to adequately advance China's interest, Beijing has not been reluctant to use force and coercion to advance its position (e.g., the 1974 invasion of the Paracels, the 1988 skirmish with Vietnam off Johnson South Reef, the 1995 occupation of Mischief Reef, interference with Vietnamese and Filipino survey vessels and fishing

114. U.N. Office of Legal Affairs Div. for Ocean Affairs and the Law of the Sea, *supra* note 13.

115. Statement of the Chinese Government on the Baseline of the Territorial Sea, *supra* note 13.

116. UNCLOS, *supra* note 19, art. 7, at 401.

117. *Id.* art. 5, at 400.

118. *Id.* art. 7, at 400.

119. OFFICE OF OCEAN AFFAIRS, BUREAU OF OCEANS & INTL. ENVTL. & SCIENTIFIC AFFAIRS, U.S. DEP'T OF STATE, LIMITS IN THE SEAS NO. 117 STRAIGHT BASELINE CLAIM: CHINA 3-4 (1996), *available at* <http://www.state.gov/documents/organization/57692.pdf>.

120. DEP'T OF DEF., MARITIME CLAIMS REFERENCE MANUAL, CHINA, PEOPLE'S REPUBLIC OF CHINA SUMMARY OF CLAIMS 126 (2008), *available at* <http://www.dtic.mil/whs/directives/corres/html/20051m.htm>.

121. *Food Quotations - Chinese Philosophers/Proverbs*, ABOUT.COM, <http://chinesefood.about.com/library/blquotationsch.htm> (last visited Apr. 6, 2012).

boats in their respective EEZs, etc.).¹²² Unfortunately, the United States has normally been slow to respond to Chinese imperialism at sea over the past forty years. However, in 2010, several U.S. officials unexpectedly engaged in a new war of words with China over its illegal claims in the South China Sea.¹²³ This begs the question: is the United States ready to match words with action?

Following China's announcement in March 2010 that the South China Sea was now a "core interest" for China, Defense Secretary Robert Gates responded by stating that the South China Sea was an "area of growing concern" for the United States.¹²⁴ Addressing the annual meeting of defense ministers in Singapore (Shangri-La Dialogue) in June 2010, Secretary Gates indicated, *inter alia*, that it was a longstanding policy of the United States to defend freedom of navigation and that the United States would continue to do so.¹²⁵ He further emphasized that the South China Sea was "not only vital to those directly bordering it, but to all nations with economic and security interests in Asia" and that U.S. policy was clear:

[I]t is essential that stability, freedom of navigation, and free and unhindered economic development be maintained. We do not take sides on any competing sovereignty claims, but we do oppose the use of force and actions that hinder freedom of navigation. We object to any effort to intimidate U.S. corporations or those of any nation engaged in legitimate economic activity. All parties must work together to resolve differences through peaceful, multilateral efforts consistent with customary international law. The 2002 Declaration of Conduct was an important step in this direction, and we hope that concrete implementation of this agreement will continue.¹²⁶

A month later at the annual meeting of the ARF in Vietnam, Secretary of State Hillary Clinton also took the opportunity to re-emphasize the importance of the South China Sea to the United States, indicating that the "United States, like every nation, has a national interest in freedom of navigation, open access to Asia's maritime

122. *See supra* Part II.

123. *See e.g.*, Secretary of Def. Robert M. Gates, Remarks at the Shangri-La Hotel, Singapore (June 5, 2010), *available at* <http://www.defense.gov/speeches/speech.aspx?speechid=1483>.

124. *Id.*

125. *Id.*

126. *Id.*

commons, and respect for international law in the South China Sea.”¹²⁷ She further elaborated that the United States supported a “collaborative diplomatic process by all claimants for resolving the various territorial disputes without coercion,” and that the United States opposed “the use or threat of force by any claimant.”¹²⁸ She re-emphasized U.S. neutrality on the sovereignty issue, indicating that “the United States does not take sides on the competing territorial disputes over land features in the South China Sea.”¹²⁹ However, she stressed that the “claimants should pursue their territorial claims and the company and rights to maritime space in accordance with [UNCLOS]” and that, “[c]onsistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features.”¹³⁰ She finally expressed support for the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea and encouraged “the parties to reach agreement on a full code of conduct,” offering U.S. assistance “to facilitate initiatives and confidence building measures consistent with the declaration.”¹³¹ She concluded by stating that “it is in the interest of all claimants and the broader international community for unimpeded commerce to proceed under lawful conditions” and suggesting the importance of “[r]espect for the interests of the international community and responsible efforts to address these unresolved claims [to] help create the conditions for resolution of the disputes and a lowering of regional tensions.”¹³²

These statements, although welcomed, are really not that different from the position the United States has been articulating for the South China Sea since the mid-1990s. In a statement issued by the State Department in May 1995, the United States made similar statements:

The United States is concerned that a pattern of unilateral actions and reactions in the South China Sea has increased tensions in that region. The United States strongly opposes the use or threat of force to resolve competing claims and urges all claimants to exercise restraint and to avoid destabilizing actions.

The United States has an abiding interest in the maintenance of peace and stability in the South China Sea. The United States

127. *Secretary of State Hillary Clinton: On Her Way Back to the States*, *supra* note 58.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

calls upon claimants to intensify diplomatic efforts which address issues related to the competing claims, taking into account the interests of all parties, and which contribute to peace and prosperity in the region. The United States is willing to assist in any way that the claimants deem helpful. The United States reaffirms its welcome of the 1992 ASEAN Declaration on the South China Sea.

Maintaining freedom of navigation is a fundamental interest of the United States. Unhindered navigation by all ships and aircraft in the South China Sea is essential for the peace and prosperity of the entire Asia-Pacific region, including the United States.

The United States takes no position on the legal merits of the competing claims to sovereignty over the various island, reefs, atolls, and cays in the South China Sea. The United States would, however, view with serious concern any maritime claim or restriction on maritime activity in the South China Sea that was not consistent with international law, including the 1982 United Nations Convention on the Law of the Sea.¹³³

Similarly, on June 16, 1995, the Assistant Secretary of Defense for International Security, Joseph Nye, stated in Tokyo that "[i]f military action occurred in the Spratlys and this interfered with the freedom of the seas, then we would be prepared to escort and make sure that navigation continues."¹³⁴ In addition, a Pentagon study conducted in the same year re-affirmed U.S. neutrality on the sovereignty issue, but also indicated that the United States had a "strategic interest in maintaining the lines of communication linking South-East Asia, North-East Asia and the Indian Ocean" and that the United States would "resist any maritime claims beyond those permitted by the Law of the Sea Convention."¹³⁵ The only real difference between the 1995 and 2010 positions is the reference to the 2002 declaration, but, of course, the 2002 declaration was not in existence in 1995. Additionally, the specific reference to multilateral

133. Christine Shelly, U.S. Dep't of State Daily Press Briefing (May 10, 1995), *available at* http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1995/9505/950510db.html.

134. Bahukutumbi Raman, *Re-Visiting the South China Sea*, Paper No. 222, SOUTH ASIA ANALYSIS GRP. (Apr. 3, 2001), [http://www.southasiaanalysis.org/%5Cpapers3%5Cpaper 222.htm](http://www.southasiaanalysis.org/%5Cpapers3%5Cpaper%20222.htm).

135. *Id.*

discussions and the offer to act as a mediator to the dispute is also a new development and is a strong position going forward.

IV. IS THE WALL IMPREGNABLE?

Like all of China's previous walls, the seawall can be breached. However, it will take a concerted effort on the part of the United States and its international partners to do so. Those who believe appeasement is the answer and that China will react as a responsible state actor are seriously misplaced. Having sat across the table from Chinese counterparts during numerous negotiations, including at the International Maritime Organization, the Military Maritime Consultative Agreement, and the United Nations Office at Vienna, my experiences suggest that China does not respect appeasement. On the contrary, Beijing sees weakness as an opening to be exploited. In short, China only respects power, not concessions.

Not only is appeasement counterproductive, it undercuts the naval power and capabilities of the United States. As Senator Webb correctly observed in 2009, "only [the] United States has both the stature and the national power to confront the obvious imbalance of power that China brings to [the South China Sea dispute]."¹³⁶ Senator Webb also correctly stated that, based on previous U.S. reactions to events in the South China Sea, "it appears the United States is responding to maritime incidents as singular tactical challenges, while China appears to be acting with a strategic vision."¹³⁷ In short, the United States has been disengaged in the South China Sea since the 1960s, choosing instead to remain neutral with regard to the various conflicting sovereignty claims, while at the same time stressing the importance of freedom of navigation throughout this strategic waterway. Until recently, the U.S. response to China's aggression in the South China Sea has been feeble at best, resulting in steady reinforcement of the southern portion of China's seawall for a period lasting over sixty years.

After Secretary Clinton's recent statements at the ARF,¹³⁸ the United States has an opportunity to end its long-storied ambivalence and take a more active approach to countering Chinese dominance in the South

136. Press Release, Sen. Jim Webb, Senate Hearing on Maritime & Sovereignty Disputes in Asia (July 15, 2009), available at <http://webb.senate.gov/newsroom/pressreleases/06-10-2011-01.cfm>.

137. *Id.*

138. See *Secretary of State Hillary Clinton: On Her Way Back to the States*, *supra* note 58.

China Sea. Impending U.S. defense cuts, however, have raised concerns that, like the official position of the United States in 1995, nothing will come of Secretary Clinton's statements to the ARF.¹³⁹ If the United States is going to maintain its credibility in the region, it needs to dispel the international community of that notion by matching its words with action. Fortunately, the Obama Administration is off to a good start.

In June 2011, Secretary of State Hillary Clinton met with Philippines' Secretary of Foreign Affairs, Albert del Rosario, in Washington to discuss Chinese aggression in the South China Sea.¹⁴⁰ At a joint press conference following the meeting, Secretary Clinton stated

[t]he Philippines and the United States are longstanding allies, and we are committed to honoring our mutual obligations. . . . We are concerned that recent incidents in the South China Sea could undermine peace and stability in the region. We urge all sides to exercise self-restraint, and we will continue to consult closely with all countries involved, including our treaty ally, the Philippines. [T]he United States has a national interest in freedom of navigation, respect for international law, and unimpeded, lawful commerce in the South China Sea. We share these interests not only with ASEAN members but with other maritime nations in the broader international community. The United States does not take sides on territorial disputes over land features in the South China Sea, but we oppose the use of force or the threat of force to advance the claims of any party. We support resolving disputes through a collaborative diplomatic presence and process without coercion. We believe governments should pursue their territorial claims and the accompanying rights to maritime space in accordance with customary international law, as reflected also in the Law of the Sea Convention. The United States supports the 2002 ASEAN China Declaration on the Conduct of Parties in the South China Sea, and we encourage the parties to reach agreement on a full code of conduct. We look forward to having discussions on these issues at the upcoming ASEAN Regional Forum in July.¹⁴¹

139. Julianna Goldman & Margaret Talev, *Obama Says U.S. Military Presence in Asia Won't Diminish with Budget Cuts*, BLOOMBERG, (Nov. 16, 2011), <http://www.bloomberg.com/news/2011-11-16/obama-says-budget-constraints-won-t-lesser-u-s-military-plans-in-pacific.html>.

140. Secretary of State Hilary Rodham Clinton, Remarks with Philippines Foreign Secretary Albert del Rosario After Their Meeting (June 23, 2011), *available at* <http://www.state.gov/secretary/rm/2011/06/166868.htm>.

141. *Id.*

In response to a question regarding China's position that the United States did not have a role to play in helping resolve the South China Sea dispute, Secretary Clinton responded that the U.S. position remained the same:

We support a collaborative diplomatic process by all claimants to resolve their disputes without the use or threat of force. We're troubled by the recent incidents in the South China Sea. . . . These reported incidents clearly present significant maritime security issues, including the freedom of navigation, respect for international law, and the lawful, unimpeded economic development and commerce that all nations are entitled to pursue. We support the ASEAN China declaration on the conduct of parties in the South China Sea. And . . . we encourage the parties to reach a full code of conduct. . . . [T]he United States [does not] take a position on competing sovereignty claims over land features. . . . But the United States is prepared to support the initiatives led by ASEAN and work with the South China Sea's claimants to meet their concerns.¹⁴²

More importantly, in response to a question regarding U.S. intentions under the mutual defense treaty (MDT), Secretary Clinton responded that the United States would honor its commitments under the defense treaty.¹⁴³ She added that the United States would endeavor "to support the Philippines in their desires for external support for maritime defense and the other issues" and was "determined and committed to supporting the defense of the Philippines," which includes "trying to find ways of providing affordable material and equipment that will assist the Philippine military to take the steps necessary to defend itself."¹⁴⁴

Later that week, Secretary del Rosario met with U.S. Defense Secretary Robert Gates at the Pentagon.¹⁴⁵ At that meeting Secretary Gates echoed Secretary Clinton's assurances, indicating that the United States was prepared to help the Philippines strengthen their capabilities to secure their maritime territory.¹⁴⁶ And on June 24, 2011, Secretary del

142. *Id.*

143. *Id.*

144. *Id.*

145. *US Defense Secretary Gates Expresses Readiness to Strengthen PH's Capability on Maritime Security; National Intel Director Clapper Pledges Assistance in Maritime Surveillance*, EMBASSY OF THE PHILIPPINES, WASHINGTON, D.C. (June 24, 2011), <http://www.philippineembassy-usa.org/news/1904/300/US-Defense-Secretary-Gates-Expresses-Readiness-to-Strengthen-PH-s-Capability-on-Maritime-Security-National-Intel-Direc>.

146. *Id.*

Rosario met with U.S. National Director for Intelligence James Clapper, who pledged to enhance intelligence-sharing with Manila to improve the Philippines' maritime domain awareness in the South China Sea.¹⁴⁷ A week later, Philippine and U.S. naval forces, including the *Chung-Hoon* (DDG 93), *Howard* (DDG 83), and *Safeguard* (T-ARS 50), began the 17th Cooperation Afloat Readiness and Training (CARAT) exercise in Puerto Princesa, Palawan.¹⁴⁸ This is only the second time that CARAT has been held on Palawan.¹⁴⁹ The eleven-day exercise focused on "Visit, Board, Search and Seizure (VBSS) exercises; diver training; salvage operations; joint medical, dental and civic action projects; and aircrew familiarization exchanges," as well as "operations planning, search and rescue practices, humanitarian assistance and disaster relief missions, interagency cooperation and public affairs . . . , maritime interdiction operations, information sharing, combined operations at sea, patrol operations and gunnery exercises, plus anti-piracy exercises and anti-smuggling exercises."¹⁵⁰ Two months later, on August 17, the United States made good on its earlier promise to enhance Manila's military capabilities by delivering a Hamilton-class Coast Guard cutter to the Philippine Navy.¹⁵¹ A second cutter will be provided in the first or second quarter of 2012.¹⁵² The United States also continues to support and finance the completion of the Coast Watch South (CWS) project.¹⁵³ Once finished, the network of seventeen radar and communication stations will provide the Armed Forces of the Philippines (AFP) the ability to better monitor activities in the South China Sea and the Sulu Sea.¹⁵⁴

The Administration has likewise stepped up bilateral military interaction with Vietnam. In July 2011, for example, Vietnamese naval units participated in a bilateral exercise off Danang with units from the

147. *Id.*

148. *U.S., Philippine Navies Join for CARAT Exercise in Palawan*, EMBASSY OF THE UNITED STATES—MANILA, <http://manila.usembassy.gov/carat2011.html> (last visited Apr. 1, 2012).

149. *See id.*

150. *Id.*

151. Alexis Romero, *Second Hamilton-Class Ship to be Deployed to West Phl Sea*, PHILIPPINE STAR, Nov. 9, 2011, <http://www.philstar.com/Article.aspx?articleId=746122&publicationSubCategoryId=63>.

152. *Id.*

153. RENATO DE CASTRO & WALTER LOHMAN, BACKGROUNDERS NO. 2593, U.S.—PHILIPPINES PARTNERSHIP IN THE CAUSE OF MARITIME DEFENSE 9 (2011), available at <http://www.heritage.org/research/reports/2011/08/us-philippines-partnership-in-the-cause-of-maritime-defense>.

154. *Id.*

U.S. Seventh Fleet—*Chung-Hoon* (DDG-93), *Preble* (DDG-56), and a rescue and salvage ship.¹⁵⁵ The exercise, which was designed to strengthen military ties between the two former enemies, included a number of non-combat activities, including a search and rescue exercise, navigation training, and several community-service projects.¹⁵⁶ A similar exercise, involving the *John S. McCain* (DDG-56), was conducted in 2010,¹⁵⁷ a few months before Vietnam's Prime Minister Nguyen Tan Dung announced at the closing of the 17th ASEAN summit that his country was reopening Cam Ranh Bay to foreign navies.¹⁵⁸

Following these bilateral exercises with the Philippines and Vietnam, the Chairman of the U.S. Joint Chiefs of Staff Admiral Mike Mullen – visited China at the invitation of the PLA. At a speech at Renmin University on July 10, 2011, the Admiral stated that “now more than ever the United States is a Pacific nation and it is clear that our security interests and our economic well-being are tied to Asia’s [well-being].”¹⁵⁹ He additionally emphasized that the United States was “deepening its commitment to this region and the alliances and partnerships that define our presence here [and] . . . we will remain a Pacific power, just as China is a Pacific power.”¹⁶⁰ More specifically, in response to a question regarding U.S. military exercises in the region, Admiral Mullen indicated that the United States has “had a presence in this region for decades, and . . . certainly the intent is to broaden and deepen our interests here and our relationships here.”¹⁶¹ Finally, the Admiral repeated the U.S. policy that the “United States doesn’t take a position on resolution of the disputes between two countries, but is very focused on working towards solutions which are peaceful and don’t result in conflict.”¹⁶²

155. Patrick Barta, *U.S., Vietnam in Exercises Amid Tensions with China*, WALL ST. J., July 16, 2011, <http://online.wsj.com/article/SB10001424052702304223804576447412748465574.html>.

156. *Id.*

157. Starr, *supra* note 64.

158. *Vietnam to Reopen Cam Ranh Bay to Foreign Fleets: PM*, BANGKOK POST, Oct. 31, 2010, <http://www.bangkokpost.com/news/asia/204055/vietnam-to-reopen-cam-ranh-bay-to-foreign-fleets-pm>.

159. Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, Speech on U.S.-China Relations at Remin Univ. (July 10, 2011), *available at* <http://iipdigital.usembassy.gov/st/english/texttrans/2011/07/20110712154723su0.2862622.html#axzz1fZF85UfC>.

160. *Id.*

161. *Id.*

162. *Id.*

The next day, in response to a statement by General Chen Bingde, Chief of the General Staff of the PLA, at a joint press conference in Beijing that U.S. naval exercises with Vietnam and the Philippines were “extremely inappropriate,” Admiral Mullen reiterated that the United States would maintain its presence in the Asia Pacific and emphasized that U.S. reconnaissance flights and other military operations and exercises “are all conducted in accordance with international norms, and essentially we will continue to comply with that in the future.”¹⁶³ Rear Admiral Tom Carney, Commander Logistics Group Western Pacific/Commander Task Force 73, speaking in Danang, Vietnam later that day, echoed Admiral Mullen’s statement, indicating that the United States has “had a presence in the Western Pacific and the South China Sea for 50 to 60 years, even going back before World War II [and] [w]e have no intention of departing from that kind of activity.”¹⁶⁴ Finally, on his return trip to Washington, Admiral Mullen told reporters at a press conference in Tokyo on July 15, 2011, that “the United States is a Pacific power [and] we are not going away.”¹⁶⁵ More specifically, in response to a question regarding Chinese aggression in the South China Sea, the Chairman re-stated that the United States does not take a position with respect to resolving the disputes.¹⁶⁶ However, he stressed that the United States takes a “very strong position with respect to the international standard of freedom of navigation. And it isn’t whether or not the United States is involved in a freedom of navigation issue, because a violation of a freedom of navigation issue by anybody is of concern to many, many countries internationally.”¹⁶⁷ Admiral Mullen concluded the press conference by stating that peace and stability in the Asia Pacific region “is critical to those who live here, but also to the United States.”¹⁶⁸

Several months later, in November 2011, the United States and the Philippines marked the 60th anniversary of the U.S.-Philippines MDT with the signing of the Manila Declaration on board the *Fitzgerald* (DDG

163. Michael Martina, *China Raps U.S. Over Military Drills in Disputed Seas*, REUTERS, July 11, 2011, <http://www.reuters.com/article/2011/07/11/us-china-us-military-idUSTRE76A25J20110711>.

164. Barta, *supra* note 155.

165. Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, Remarks at the U.S. Embassy in Tokyo, Japan (July 15, 2011), *available at* <http://www.jcs.mil/speech.aspx?id=1631>.

166. *Id.*

167. *Id.*

168. *Id.*

62) in Manila Bay on November 16, 2011.¹⁶⁹ In the declaration, the Philippines and the United States reaffirm “the continuing relevance of the treaty for peace, security, and prosperity in the Asia-Pacific region . . . [and] reaffirm the treaty as the foundation of our relationship for the next 60 years and beyond.”¹⁷⁰ In this regard both sides “expect to maintain a robust, balanced, and responsive security partnership including cooperating to enhance the defense, interdiction, and apprehension capabilities of the Armed Forces of the Philippines.”¹⁷¹ Both sides also indicated that they “share a common interest in maintaining freedom of navigation, unimpeded lawful commerce, and transit of people across the seas and subscribe to a rules-based approach in resolving competing claims in maritime areas through peaceful, collaborative, multilateral, and diplomatic processes within the framework of international law.”¹⁷²

Three days later, at the East Asian Summit (EAS) in Bali, Indonesia, Asia-Pacific leaders stressed the importance of regional cooperation to address the region’s political and security challenges, including maritime security.¹⁷³ President Obama’s participation in the event underscored the U.S. commitment, previously articulated by Secretary Clinton and other administration officials, to remain actively engaged in the region. With regard to maritime security issues, the President emphasized that

[t]he Asia-Pacific region is home to some of the world’s busiest ports and most critical lines of commerce and communication. Recent decades of broad regional economic success have been underpinned by a shared commitment to freedom of navigation and international law. At the same time, the region faces a host of maritime challenges, including territorial and maritime disputes, ongoing naval military modernization, trafficking of illicit materials, piracy, and natural disasters.¹⁷⁴

The President also articulated a “principles-based U.S. approach to maritime security, including freedom of navigation and overflight and

169. Press Release, U.S. Dep’t of State, Signing of the Manila Declaration on Board the USS Fitzgerald in Manila Bay, Manila (Nov. 16, 2011), *available at* <http://www.state.gov/r/pa/prs/ps/2011/11/177226.htm>. Philippines.

170. *Id.*

171. *Id.*

172. *Id.*

173. See generally Office of the Press Sec’y., White House, *Fact Sheet: East Asia Summit* (Nov. 19, 2011), <http://www.whitehouse.gov/the-press-office/2011/11/19/fact-sheet-east-asia-summit>.

174. *Id.*

other internationally lawful uses of the seas, as well as use of collaborative diplomatic processes to address disputes.”¹⁷⁵ He additionally “expressed strong opposition to the threat or use of force by any party to advance its territorial or maritime claims or interfere in legitimate economic activity” and reiterated U.S. support for the 2002 ASEAN Declaration of Conduct and encouraged all parties to conclude a full code at the earliest opportunity.¹⁷⁶ The President further stated that the United States is working with its partners in the Asia-Pacific region to build capacity and promote cooperation on maritime security issues by:

- Providing training, assistance, and equipment to regional maritime police and civil authorities to enhance their capabilities to secure the maritime space and address transnational security challenges such as piracy, illicit trafficking, and illegal fishing;
- Building facilities and providing equipment and technical support to enhance the ability of Southeast Asian nations to monitor the maritime domain and assess and share information;
- Hosting regional workshops to promote adherence to standard operating procedures and protocols that ensure safety at sea, help build a shared vision of international norms and behaviors in the maritime domain, and foster discussion of interpretations of customary international law; and
- Hosting and co-hosting multinational capacity-building exercises with regional military partners.¹⁷⁷

Then on November 16, 2011, President Obama announced that the United States intended to increase its military presence in Australia beginning in mid-2012.¹⁷⁸ Speaking at a joint press conference in Canberra on November 16, 2011, Australian Prime Minister Julia Gillard stated that the two long-time allies had agreed

175. *Id.*

176. *Id.*

177. *Id.*

178. U.S. President Barack Obama & Austl. Prime Minister Julia Gillard, Remarks at Joint Press Conference in Canberra, Australia (Nov. 16, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/11/16/remarks-president-obama-and-prime-minister-gillard-australia-joint-press>.

to expand the existing collaboration between the Australian Defence Force and the U.S. Marine Corps and the U.S. Air Force . . . [Beginning in] mid-2012, Australia will welcome deployments of a company-size rotation of 200 to 250 Marines in the Northern Territory for around six months at a time.¹⁷⁹

The total force is expected to grow to around 2,500 personnel over the next few years. In addition, a second component of the initiative grants

greater access by U.S. military aircraft to the Royal Australian Air Force facilities in our country's north. This will involve more frequent movements of U.S. military aircraft into and out of northern Australia. Now, taken together, these two initiatives make our alliance stronger, they strengthen our cooperation in our region.¹⁸⁰

Prime Minister Gillard added that the U.S.-Australia alliance

has been a bedrock of stability in our region. So building on our alliance through this new initiative is about stability. . . . It will be good for our Australian Defence Force to increase their capabilities by joint training, combined training, with the U.S. Marines and personnel. It will mean that we are postured to better respond together, along with other partners in the Asia Pacific, to any regional contingency, including the provision of humanitarian assistance and dealing with natural disasters.¹⁸¹

V. RECOMMENDATIONS

There are a number of measures the United States should take to continue to reassure friends and allies that it is committed to maintaining a long-term presence in the Pacific as a counter-weight to growing Chinese military power and aggressive behavior.

First, the United States should follow Indonesia's lead and diplomatically protest China's U-shaped line claim in the South China Sea.¹⁸² This can be done without taking sides on the underlying territorial disputes between China and the other Spratly claimants. The

179. *Id.*

180. *Id.*

181. *Id.*

182. Letter from the Permanent Mission of the Republic of Indonesia to the U.N. Secretary General Referencing the May 2009 Circular Note of the People's Republic of China (July 8, 2010), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf.

United States should also encourage its regional partners (e.g., Australia, Japan, New Zealand, South Korea, Thailand, and Singapore) and other maritime states (e.g., United Kingdom, Germany, France, Norway, Netherlands, Panama, Liberia, Cyprus, Marshall Islands, and the Bahamas) to do the same. Indonesia does not have a dog in the fight over the Spratly Islands, yet it has already filed an official protest to China's nine-dotted line claim in the South China Sea, indicating that claim has no basis in international law.¹⁸³

Secondly, the United States must maintain a robust and visible naval presence in the region through frequent deployments and routine FON operations,¹⁸⁴ particularly in the vicinity of the islets occupied by China. A good starting place for such operations would be in the Paracel Islands and in the vicinity of Mischief Reef, both of which are occupied by Chinese military forces. There is evidence of possible Congressional support for such an initiative. For example, on June 27, 2011 Senate Resolution 217 passed by unanimous consent, providing in part that the Senate "supports the continuation of operations by the United States Armed Forces in support of freedom of navigation rights in international waters and air space in the South China Sea."¹⁸⁵ Increased bilateral exercises with the Philippines and Vietnam in the South China Sea discussed above, as well as the rotational deployments of U.S. Marines to Australia, are also a step in the right direction. The Administration must also not give in to Chinese pressure to stop or reduce U.S. surveillance operations in and over the EEZ. As Admiral Mullen reiterated in his last

183. *See id.*

184. The U.S. FON Program was established in 1979 by the Carter Administration to exercise and assert navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the international law of the sea. *See generally* DEP'T OF DEF., MARITIME CLAIMS REFERENCE MANUAL (2005), *available at* www.jag.navy.mil/organization/documents/mcrm/MCRM.pdf. The Program is designed to challenge excessive maritime claims and demonstrate U.S. non-acquiescence in unilateral acts of other states that are designed to restrict navigation and overflight rights and freedoms of the international community and other lawful uses of the seas related to those rights and freedoms. *Id.* The FON Program operates on a triple track, including diplomatic representations by the Department of State and operational assertions by U.S. naval and air assets, as well as bilateral and multilateral consultations with other governments in order to promote maritime stability and consistency in applying the law of the sea. *Id.* In short, the Program underscores the U.S. commitment to a stable legal regime for the world's oceans. *Id.* Since its inception, hundreds of operational challenges and diplomatic protests have been conducted to demonstrate U.S. non-acquiescence in excessive maritime claims. *Id.*

185. S. Res. 217, 112th Cong., (2011), *available at* www.gpo.gov/fdsys/pkg/BILLS-112sres217ats/pdf/BILLS-112sres217ats.pdf.

trip to the Pacific, the United States has “operated in the South China Sea for many decades . . . [and] will continue to do that, and I’m sure other countries will as well.”¹⁸⁶ Accordingly, the United States should continue to conduct lawful military operations and exercises in the region, including surveillance and reconnaissance flights.¹⁸⁷

Third, the United States should also use economic sanctions to warn China that it will not tolerate further threats. Threats against the United States and other international entities or corporations that seek to do business with other South China Sea claimants, particularly Vietnam, should be answered with targeted economic sanctions and reciprocal treatment of Chinese business interests in the United States. Vietnam is of heightened concern because of the particularly egregious Chinese interference with Vietnamese survey activities within Vietnam’s EEZ, referenced above.¹⁸⁸ Chinese marine surveillance ships have interfered with Vietnamese survey ships despite the fact that the targeted Vietnamese vessels were operating within Vietnam’s 200 nm EEZ and there was no Chinese land feature or disputed territory within 200 nms of where the incident occurred.¹⁸⁹ Vietnam has the exclusive right under international law to explore, exploit, and manage the living and non-living resources located within its EEZ and continental shelf and such a blatant disregard of Vietnam’s rights in its own EEZ by China are especially disconcerting.¹⁹⁰

Fourth, the United States must officially protest and make public each and every incident where Chinese ships and aircraft aggressively interfere with U.S. military ships and aircraft in violation of international law, including the UNCLOS and the Collision Regulations.¹⁹¹ Similar protests should be filed when cargo ships and fishing vessels are used as government proxies to interfere with U.S. ships. Sporadic, non-public demarches by the United States give the wrong impression to the international community and the American public that unlawful and unsafe Chinese interference with U.S. ships and aircraft, like the *Bowditch*, EP-3, *Impeccable*, and *Victorious*, are isolated incidents. In

186. Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, Remarks at the U.S. Embassy, Tokyo, Japan (July 15, 2011), available at <http://www.jcs.mil/speech.aspx?id=1631>.

187. See Martina, *supra* note 163.

188. See *VN Demands China Stop Sovereignty Violations*, *supra* note 52; see also *Sea spat raises China-Vietnam tensions*, *supra* note 54.

189. *Id.*

190. See UNCLOS, *supra* note 19, arts. 56, 77, at 418, 429-30.

191. International Regulations for Preventing Collisions at Sea, 33 U.S.C. §§ 1601-08 (2006).

reality, unlawful Chinese interference with U.S. military activities in the EEZ has become a matter of routine.

Fifth, the United States must re-examine its position from 1995 with regard to the Philippine claims in the South China Sea,¹⁹² and continue to reiterate its defense commitments under the U.S.-Philippine Mutual Defense Treaty,¹⁹³ particularly with respect to Scarborough Shoal and the Kalayaan Island Group. By not taking a position on the Philippine claims, the United States is, in effect, taking a position in support of China's illegal claims. Because the Philippines have a superior claim to these islands, under articles IV and V of the Treaty, the United States must acknowledge its obligation to protect the Armed Forces of the Philippines, its public vessels, and its aircraft "in the Pacific."¹⁹⁴ U.S. support would counter Chinese "checkbook diplomacy" and prevent the AFP from falling under China's sphere of influence. Bilateral exercises between the AFP and U.S. Armed Forces should focus on developing contingency plans to confront Chinese aggression in the South China Sea. Exercises conducted off Palawan in 2011 and 2012 appear to be headed in the right direction.

Finally, the United States should encourage the other claimants to resolve their sovereignty disputes so that they can present a unified front against China in any future negotiations. One possible option would be to recognize respective sovereignty claims over islands that are currently occupied by the various claimants. Unless the other claimants can resolve their differences, they will be unable to present a unified position towards China, allowing the Chinese government to continue to apply its "divide and conquer" strategy while insisting on bilateral negotiations.

U.S. actions must not, however, be limited to the South China Sea. The United States must apply equal pressure along the entire seawall to prevent further fortification by China.

To the north, the United States must reiterate its commitment to a peaceful settlement of the Taiwan issue in accordance with the Taiwan Relations Act,¹⁹⁵ which provides that "any effort to determine the future of Taiwan by other than peaceful means . . . [would be] of grave concern

192. When asked in 1995 whether the South China Sea issue was applicable to the U.S.-Philippine Mutual Defense Treaty, the State Department spokesperson responded: "We do have the defense treaty, and of course the United States honors its treaty commitments. But I don't have anything beyond that related to the possible relationship of that to the maritime issues." Shelly, *supra* note 133.

193. Mutual Defense Treaty Between the Rep. of the Phil. and the U.S., Aug. 20, 1951, 3 U.S.T. 3947, available at <http://www.vfacom.ph/resource/mdt1951.pdf>.

194. *Id.* arts. IV, V.

195. Taiwan Relations Act, 22 U.S.C. §§ 3301-16 (2006).

to the United States.”¹⁹⁶ Furthermore, U.S. warships, including carriers and big deck amphibious ships, must conduct routine and frequent transits through the Taiwan Strait. The days of worrying about how China will react to the transit of a U.S. aircraft carrier through an international strait with a large high seas/EEZ corridor must cease immediately.

With regard to the Senkakus, the time has come for the United States to back its treaty partner and recognize Japanese sovereignty over the islands. This issue has taken on a new meaning following the September 2010 incident between the Chinese fishing boat and the Japanese coast guard.¹⁹⁷ The islands were placed under U.S. trusteeship pursuant to article 3 of the San Francisco Peace Treaty¹⁹⁸ and were administered by the United States from 1953 to 1971, without Chinese objection.¹⁹⁹ In 1971, the United States returned administrative control over the Senkakus to Japan under the Okinawa Reversion Treaty.²⁰⁰ If the Senkakus had been considered Chinese territory at the end of the Second World War, the islands would not have been placed under U.S. administration in 1953. The United States has made it clear to Japan that the Senkaku Islands are covered by the U.S.-Japan Mutual Security Treaty.²⁰¹ However, the United States must also make clear to China that continued incursions in the vicinity of the Senkakus are unacceptable and that U.S. defense commitments under article V of the Japan-U.S. Security Treaty, which provides that “[e]ach [p]arty recognizes that an armed attack against either [p]arty in the territories under the administration of Japan would be dangerous to its own peace and safety and . . . that it would act to meet the common danger in accordance with

196. *Id.* § 3301.

197. Calum MacLoad, *China's Aggressive Posture Stuns Japan, Experts*, USA TODAY, Sept. 28, 2010, http://www.usatoday.com/news/world/2010-09-28-japanchina28_ST_N.htm.

198. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, *available at* <http://www.taiwandocuments.org/sanfrancisco01.htm>. Although Article III does not explicitly mention the Senkakus, later proclamations defined the boundaries of “Nansei Shoto south of 29 degrees north latitude” to include the Senkakus) *Id.*; NIKSCH, *supra* note 85, at 1.

199. *See generally* NIKSCH, *supra* note 85.

200. Agreement Between Japan and the U.S. Concerning the Ryukyu Islands and the Daito Islands, June 17, 1971, 23 U.S.T. 446, *available at* <http://www.niraikanai.wvma.net/pages/archive/rev71.html>.

201. Hillary Clinton & Pham Gia Khiem, Remarks at the East Asia Summit (Oct. 30, 2010), *available at* <http://www.america.gov/st/texttrans-english/2010/October/20101031105353su0.604421.html&distid=ucs>.

its constitutional provisions and processes," apply to the Senkakus.²⁰² Additionally, routine military exercises should continue to be conducted with the Japanese Maritime Self-Defense Force (JMSDF) and contingency plans developed to counter Chinese aggression in the East China Sea. Bilateral and multilateral exercises with the JMSDF in the East China Sea in December 2010 (Keen Sword),²⁰³ January 2011 (Yama Sakura),²⁰⁴ April 2011 (Malabar),²⁰⁵ and October/November 2011 (Annual)²⁰⁶ are a step in the right direction.

Moving to the high north, the Chinese reaction to the proposed joint military exercises off the Korean Peninsula is consistent with the Chinese government's untenable position that foreign military activities in the EEZ are subject to coastal notice and consent. While China's position on the EEZ is clearly inconsistent with international law, including UNCLOS, the fact that the United States failed to send the *George Washington* into the Yellow Sea after Chinese objections to the joint exercises bolsters China's position on the EEZ internationally and undermines U.S. FON interests, not only in the Pacific, but worldwide.²⁰⁷ The Administration's decision to keep the carrier to the east of the Korean Peninsula for the first exercise was viewed as a sign of weakness, which will embolden Chinese officials to raise similar objections to future U.S. operations in the Pacific, and will be exploited by the Chinese Government, both domestically and internationally, as part of its lawfare strategy. The Administration's failure to include the *George Washington* in the second and third round of exercises, and providing prior notification for the November exercise, only exacerbates the problem. As a matter of priority, the United States must continue to conduct frequent and unannounced exercises and operations in the Yellow Sea, including carrier operations.

202. Treaty of Mutual Cooperation and Security, Japan and the U.S., art. 5, Jan. 19, 1960, available at <http://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html>.

203. Capt. D. Herndon, *Sun Sets on Keen Sword Exercise*, AIR FORCE PRINT NEWS TODAY, Dec. 10, 2010, <http://www.af.mil/news/story.asp?id=123234381>.

204. B. J. Weiner, *U.S.-Japan Bilateral Exercise Begins in Japan*, ARMY NEWS FRONT PAGE, Jan. 22, 2011, <http://www.army.mil/-news/2011/01/22/50761-us-japan-bilateral-exercise-begins-in-japan-with-senior-japanese-leader-visits/>.

205. *India, Japan, U.S. Navies to Hold Military Exercises Off Okinawa Coast, Japan*, INDIA DEFENCE.COM, Feb. 16, 2011, <http://www.india-defence.com/reports-5023>.

206. U.S. 7th Fleet Public Affairs, U.S. Navy, *U.S. 7th Fleet to Participate in ANNUAL Exercise 2011*, COMMANDER U.S. 7TH FLEET, Oct. 18, 2011, <http://www.c7f.navy.mil/news/2011/10-october/024.htm>.

207. For a discussion of the illegality of China's claims with regard to military activities in the EEZ, see generally Pedrozo, *supra* note 86.

Finally, although the United States has diplomatically protested many of China's excessive maritime claims, it has not operationally challenged these claims under the FON Program for more than ten years. For instance, the United States has not challenged China's excessive baselines or prior permission requirement for innocent passage since 1997.²⁰⁸ The only exception to this paucity of FON challenges is U.S. intelligence and marine data collection activities in and above China's EEZ by U.S. Special Mission Ships (SMS) and sensitive reconnaissance operations (SRO) aircraft.²⁰⁹ While the United States must continue a robust and visible SMS and SRO program in the South China, East China, and Yellow Seas, U.S. ships and aircraft must also challenge China's excessive territorial sea and straight baseline claims at the earliest opportunity.

VI. CONCLUSION

A renowned Singaporean diplomat and scholar—Ambassador Tommy Koh—recently wrote that although “China may be up and the US down at the moment . . . in the near term the US will ‘bounce back from this adversity as it had from all its previous adversities’ . . . and it will rebound not as a hegemon but as the ‘undisputable leader of the world.’”²¹⁰ I agree with the Ambassador, but the United States can only reassert its role in the Pacific and counter China's growing influence in the region by increasing its naval presence and demonstrating support for its regional partners with actions, not words. Continuing to appease China will ultimately embolden Beijing to further solidify its seawall and fully implement its anti-access strategy and illegal maritime claims in the South China, East China, and Yellow Seas. As President Obama remarked in November 2011, the United States welcomes

a rising, peaceful China. . . . [However,] with their rise comes increased responsibilities. It's important for them to play by the rules of the road. . . . So where China is playing by those rules . . . I think this is a win-win situation. There are going to be times where they're not, and we will send a clear message to them that we think that they need to be on track in terms of

208. Dep't of Defense, *supra* note 120.

209. See Dep't of Def., MARITIME CLAIMS REFERENCE MANUAL, CHINA, PEOPLE'S REPUBLIC OF 2 (2011), available at <http://www.jag.navy.mil/organization/documents/mcrm/china.pdf>.

210. PAUL EVANS, SINGAPORE DEBATES AMERICA (2010), available at <http://www.rsis.edu.sg/publications/Perspective/RSIS1042010.pdf>.

accepting the rules and responsibilities that come with being a world power.²¹¹

211. President Barack Obama, Remarks by President Obama and Prime Minister Gillard of Australia in Joint Press Conference, (Nov. 16, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/11/16/remarks-president-obama-and-prime-minister-gillard-australia-joint-press>.