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**Reassessing the U.S. Freedom of Navigation Program
in a Complex Competitive Environment**

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Abstract

The United Nations Convention on the Law of the Sea represents the distillation of centuries of customary international law regarding the use of the high seas. It codifies acceptable territorial claims by coastal states and provides for universal access to the maritime commons. The United States upholds and defends these common laws and universal rights through its Freedom of Navigation Program. Under the Freedom of Navigation Program, the U.S. Departments of Defense and State collaborate to protest excessive claims of territory and attempts to restrict rights to navigation as outlined in the Convention. At nearly 40 years old, the Freedom of Navigation Program is a product of the bipolar Cold War era. This paper evaluates its effectiveness in the current age of eroding international norms and a strategic competitive environment, specifically focusing on the complex web of territorial disputes and geopolitical ambitions within the South China Sea. The evaluation results in recommendations to increase information operations surrounding the Program and to take deliberate steps to multilateralize freedom of navigation operations. By taking these steps, the U.S. Freedom of Navigation Program will improve the likelihood of a peaceful solution to the disputes in the South China Sea that is in accordance with the U.N. Convention on the Law of the Sea.

Introduction

Since its earliest history, the United States has depended on access to and use of the oceans to promote its economy, engage in free trade and protect itself. As global populations grew and technologies for harvesting and extracting maritime resources advanced, so did the pressures from nations claiming parts of the maritime commons. To combat these unregulated and often inconsistent claims, nations around the globe drew together in a series of U.N. conferences to codify the historical laws of the sea and ensure universal rights for all nations. Nearly 40 years ago the U.S. implemented its own approach, the Freedom of Navigation Program, to support and defend these agreed upon rights and discourage other nations from making claims in excess of global norms or restricting access to the global commons. The geopolitical makeup of the world has changed significantly since the program was developed, leading to the argument that the program isn't effective in the current global competitive environment. This competitive environment is particularly apparent in the South China Sea, where some of the most contentious disputes surrounding claims of territory and maritime resources are found. Recommendations are provided for improving the program's effectiveness in this competitive environment through increased information operations and a dedicated multilateral approach.

Background on the Freedom of Navigation Program

The maritime claims of nations within the South China Sea (SCS) form a complex web of historical usage, overlapping boundaries, and ongoing border disputes. Six countries - Malaysia, Vietnam, China, Taiwan, Brunei, and the Philippines - all have unresolved territorial claims within the SCS. These claims are intertwined with the pressures of politics and economics at domestic, regional and international levels. The U.S. is not a party to any of the competing

maritime claims within the SCS, nor does it take a position on the unresolved border disputes there. It does, however, have significant national security interests in the SCS, particularly in ensuring that freedom of navigation is maintained for commercial and military vessels, and that territorial claims are consistent with customary international law.

Customary international law as applied to maritime claims is reflected in the United Nations Convention on the Law of the Sea (UNCLOS).¹ While the U.S. has signed but not ratified UNCLOS, it still abides by the terms of the treaty and expects the same from other nations. All six of the nations with disputed borders in the SCS have ratified or acceded to UNCLOS, as have all but one of the Association of Southeast Asian Nations (ASEAN) states. The one outlier ASEAN nation is Cambodia, which has signed but not ratified UNCLOS. In effect, all nations within the SCS and those that have interests in the region are bound by the conditions of UNCLOS. Differing interpretations of this agreement, or outright disregard for it, are the driving factors behind the freedom of navigation concerns that the U.S. has in the SCS.

Within UNCLOS, 'freedom of navigation' refers specifically to shared navigation rights on the high seas and in a country's exclusive economic zone. The general U.S. interpretation, reflected in this paper, is that 'freedom of navigation' broadly refers to a number of rights afforded by UNCLOS, including sailing and overflight rights and the rights of passage through defined straights and archipelagic sea lanes.² The U.S. Freedom of Navigation (FON) Program refers specifically to the joint effort by the Departments of Defense and State to address claims the U.S. views to be inconsistent with its interpretation of UNCLOS. This program operates on

¹ John Burgess et al., eds., "Law of the Sea: A Policy Primer," The Fletcher School, Tufts University, published September 5, 2017, <https://sites.tufts.edu/lawofthesea/files/2017/07/LawoftheSeaPrimer.pdf>, 10.

² Lynn Kuok, "The U.S. FON Program in the South China Sea: A lawful and necessary response to China's strategic ambiguity," Center for East Asia Policy Studies, Brookings, published June 7, 2016, <https://www.brookings.edu/wp-content/uploads/2016/07/Limits-of-Law-in-the-South-China-Sea-2.pdf>, 2.

three tracks: bilateral diplomatic engagement, operational assertions by the U.S. military, and bilateral and multilateral consultations to promote conformity with international law.³ The Department of Defense portion of the FON Program is designed to not only assert the ‘freedom of navigation’ rights afforded under UNCLOS, but to also challenge excessive maritime claims that are not consistent with customary international law.⁴

In President Reagan’s 1983 Oceans Policy statement he declared that the nation’s objectives “have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans”.⁵ This statement also outlined the nation’s policies of asserting its navigational and overflight rights, and non-acquiescence to excessive claims. This formed the framework for the FON Program and codified that assertions are done “in a manner that is consistent with the balance of interests reflected in the convention”,⁶ that is supporting the universal rights of UNCLOS. This approach has been consistent with throughout policy statements spanning multiple administrations as well as being reflecting in academic writings.⁷ The 2018 Ocean Policy issued by President Trump is less specific regarding its national objectives but states that is the policy for the U.S. to exercise its rights consistent with customary international law.⁸ It may be inferred that the FON Program policies established

³ “Maritime Security and Navigation,” Office of Ocean and Polar Affairs, Department of State, accessed October 22, 2018, <https://www.state.gov/e/oes/ocns/opa/maritimesecurity/>.

⁴ “U.S. Department of Defense Freedom of Navigation (FON) Program,” DoD Annual Freedom of Navigation Reports, Department of Defense, published February 28, 2017, <https://policy.defense.gov/Portals/11/DoD%20FON%20Program%20Summary%2016.pdf?ver=2017-03-03-141350-380>.

⁵ “Statement on United States Oceans Policy,” The Public Papers of President Ronald W. Reagan, Ronald Reagan Presidential Library, accessed October 22, 2018, <https://www.reaganlibrary.gov/research/speeches/31083c>.

⁶ Reagan Library, “Statement.”

⁷ Ryan Santicola, “Legal Imperative? Deconstructing Acquiescence in Freedom of Navigation Operations,” *National Security Law Journal*, 5, no. 1, (2016): 64, 67.

⁸ Exec. Order No. 13840, *Federal Register*, 83 no. 121 (June 22, 2018), 29431.

under President Reagan are still applicable to meeting the objectives and policy established by President Trump.

Evaluating the Effectiveness of the FON Program in a Competitive Environment

The FON Program has limited strategic usefulness, particularly given the limited and arguably vague objectives of the 2018 Ocean Policy. Its effectiveness is constrained to identifying and protesting excessive claims. In both its current and historical states, it has not proven effective in convincing states making excessive claims or infringing upon freedoms of navigation to act in accordance with customary international law. The Program does nothing to reduce the complexity of freedom of navigation issues in the South China Sea and may decrease the likelihood of a resolution consistent with global norms. Improvements need to be made to the FON Program so that it is better poised to effect change; advancing rather than attempting to sustain the international world order that is currently under threat. While an ideal first step would be to update the current Ocean Policy to reflect this needed change, the analysis required to bring about that change falls outside of the scope of this paper. Instead, recommendations for improvements to the Program have been focused on what can be implemented by the Departments of Defense and State.

The Departments of Defense and State have a good record of engaging all three tracks of the FON Program. In an assessment conducted by Joshua Root, a U.S. Navy JAG writing in the *Syracuse Journal of International Law and Commerce*, he states that “over one hundred diplomatic protests” and “three hundred operational assertions” were carried out within the first twenty years of the program and that there have been hundreds more since then.⁹ The third track

⁹ Joshua L. Root, “The Freedom of Navigation Program: Assessing 35 Years of Effort,” *Syracuse Journal of International Law and Commerce* 43, no. 2 (2016): 323.

of the Program, bilateral and multilateral engagement to “promote maritime stability and consistency with international law”¹⁰ has been conducted with U.S. representation on a number of international and regional forums. For all of the engagement, assertions and representations that the U.S. has conducted, what has been the outcome?

Root’s assessment of the Freedom of Navigation Program conducted in 2016 found that, in 35 years of using of FON assertions and bilateral protestations to compel nations to abide by the terms of UNCLOS and retract excessive claims, “the program is arguably a failure.”¹¹ Inarguably several states have rolled back excessive claims during that time but there is little evidence that the rollback of those claims was a result of the operations of the Program. In some cases, the U.S. has been conducting regular assertions and diplomatic engagement with the same states for over thirty years without any change in claims.

The best argument for the success of the FON Program, and its continuation in the current state, is the Soviet Union’s 1989 change in stance regarding the restriction on the innocent passage of warships following the 1988 Black Sea bumping incident¹². In this incident, two U.S. Navy ships conducting a FON assertion in the Black Sea were intentionally bumped by two Soviet ships, resulting in minor damages but no injuries. After this incident, the Soviets expressed a desire to reach an agreement with the U.S.,¹³ resulting in the 1989 “Uniform Interpretation of the Rules of Innocent Passage” agreement signed by both states. In signing this, the U.S.S.R reversed their interpretation of UNCLOS and adopted the U.S. view on the innocent

¹⁰ Department of State, “Maritime Security and Navigation.”

¹¹ Root, “Freedom,” 347.

¹² J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, Third ed. (Leiden: Martinus Nijhoff Publishers, 2012), 638.

¹³ William J. Aceves, “Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea,” *Naval War College Review* 46, no. 2 (1993), 71.

passage of warships through territorial seas. This change cannot be fully explained by the U.S. FON Program alone. There were already internal debates in the Soviet Union about the innocent passage of warships and the change in policy came during a warming of relations between the U.S. and U.S.S.R.¹⁴ The two nations had been discussing Law of the Sea issues for several years prior to the 1988 incident¹⁵ and the U.S. had been conducting freedom of navigation assertions, without any changes in Soviet policy, for many years prior to the 1988 incident. It's more likely that the incident between the two Navies brought the issue to the forefront of discussion¹⁶ and was only partially responsible for the withdrawal of the excessive claim.

It is valuable to compare the marginal effectiveness of the U.S. FON Program in resolving one of the issues with the U.S.S.R. to the current freedom of navigation issues in the South China Sea. The South China Sea is vastly more complex, with six nations having competing claims and the U.S. viewing five of those claims as excessive. The 1989 Uniform Interpretation agreement was built upon the successful bilateral framework of the "Incidents at Sea" (INCSEA) agreement, a confidence-building document providing guidelines for encounters between U.S. and Soviet military units. Part of the success for the INCSEA can be attributed to its bilateral, as opposed to multilateral, nature.¹⁷ INCSEA also contains a framework for raising concerns about inappropriate actions and a yearly meeting to review the agreement and discuss disputes. Within the SCS region there are two confidence-building documents similar in substance to INCSEA; the "Code for Unplanned Encounters at Sea" (CUES) signed by 21 Asia-Pacific nations, and the "Declaration of the Conduct of Parties in the South China Sea" (DOC)

¹⁴ Lawrence Juda, "Innocent Passage by Warships in the Territorial Seas of the Soviet Union: Changing Doctrine," *Ocean Development & International Law* 21, no. 1 (1990): 111, 113.

¹⁵ Erik Franckx, "Innocent Passage of Warships," *Marine Policy* 14, no. 6 (1990): 484.

¹⁶ Franckx, "Innocent," 484.

¹⁷ David F. Winkler, *Cold War at Sea: High-Seas Confrontation between the United States and the Soviet Union*, (Annapolis: Naval Institute Press, 2000), 167.

signed by the ASEAN member nations and China. While similar in intent, both documents are multilateral documents and neither contains any real enforcement or dispute resolution mechanisms. In addition, neither CUES nor DOC are legally binding, whereas INCSEA is. Consequently, neither has proven effective in resolving or containing the complex disputes within the SCS, unlike INCSEA's effectiveness in reducing U.S. and Soviet incidents. The 1989 agreement was conducted under warming relations between the two countries, whereas today's SCS incidents come at a time of increased competition between the U.S. and China. This increase in competition has forced the other nations in the SCS to strike a delicate balance between turning to the U.S. for security and relying upon China for economic prosperity,¹⁸ rather overtly supporting the U.S. interpretation of international norms. The FON Program was perhaps partially effective after the Black Sea incident because it was suited to the nature of the Cold War, whereas the complex nature of today's issues in the SCS requires a different approach.

It has been shown that the FON Program in its current state is not effective in getting nations to withdraw their excessive claims. This raises the question of whether or not it is useful at all. Root suggests that the "chief benefit of the program may be in maintaining the status quo."¹⁹ However numerous incidents within the South China Sea show that the status quo has not even been maintained. These include China's 2009 declaration of rights over the islands and waters contained within the infamous 'Nine-Dashed Line', China's extensive island building campaign, and the Philippine's decision to bring the Chinese territorial claims to arbitration. One

¹⁸ Mária Strašáková and Alfred Gerstl, "Conclusion," in *Unresolved Border, Land and Maritime Disputes in Southeast Asia: Bi- and Multilateral Conflict Resolution Approaches and ASEAN's Centrality*, eds. Alfred Gerstl and Mária Strašáková (Leiden: Brill, 2017), 310

¹⁹ Root, "Freedom," 348.

can argue that when the “chief benefit” of the FON Program isn’t even effective, it needs to be updated to be more applicable in the current climate of strategic competition.

Improving the Effectiveness of the FON Program in a Competitive Environment

There are two significant areas in which the U.S. FON Program needs to make changes to be successful in this current “resilient, but weakening, post-WWII international order.”²⁰ The first is that the FON Program needs to proactively engage in information operations in support of the U.S. interpretation of UNCLOS and the second, which follows directly from the first, is that the Program needs to be multilateralized – to be effective it must be a truly international effort supporting universal rights.

In the current era of strategic competition, the U.S. must use all of its instruments of national power to achieve its policy aims. The instrument of information is not being utilized to its full capabilities when dealing with freedom of navigation issues. Historically FON operations were a relatively unknown event, intentionally conducted as routine business and not raised to the level of public discourse.^{21 22} Within the current FON Program, all three tracks of effort – bilateral protestations, military assertions, and bilateral/multilateral engagement are undertaken with a relatively passive public affairs approach. This passive approach is employed first to preserve existing relationships with countries having excessive maritime claims and secondly to give the impression that FON assertions are regular, routine operations that don’t justify

²⁰ U.S. Department of Defense, *Summary of the 2018 National Defense Strategy of The United States of America: Sharpening the American Military’s Competitive Edge* (Washington, DC: Office of the Secretary of Defense, 2018), 2.

²¹ Santicola, “Legal,” 93.

²² Steven Groves, “Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms,” The Heritage Foundation, published Aug 24, 2011, https://thf_media.s3.amazonaws.com/2011/pdf/bg2599.pdf, 7.

extraordinary attention.^{23 24} When information about FON assertions does make its way into the public media, as has been occurring recently with operations in the South China Sea, there appears to be some confusion about what is being asserted, and why.²⁵ Furthermore, the current DoD policy of not discussing FON operations²⁶ does little to accurately inform the public about the purpose of the FON Program. This is a missed opportunity to engage in positive information operations about the U.S. view on freedom of navigation as a universal right and the role of assertions in defending it. An updated FON Program should upend the current passive approach, seeking instead to provide clear messaging from both military and diplomatic sources as to the purpose of an operation, and what specific excessive claims were being protested. This argument is supported by Lynn Kuok, a fellow at the Brookings Institution, who advocates for consistent, clear messaging associated with FON assertions²⁷ as well as a publicizing a comprehensive list of diplomatic protests that the U.S. has conducted.²⁸ Both will clarify the intentions of the FON Program and assist the U.S. in building global support for the defense of customary international law.

The lack of adequate messaging on the part of DoD and DOS is only part of the problem. The other part of the problem is the content of the messaging. The Chinese Foreign Ministry has publicly stated that through the FON Program “the US places its own interests above

²³ CDR Brett Troyan, Oceans Policy Advisor, Office of the Secretary of Defense, telephone conversation with author, September 25, 2018.

²⁴ Linnea Duvall, Bureau of East Asia and Pacific Affairs, Department of State, telephone conversation with author, October 1, 2018

²⁵ Santicola, “Legal,” 84.

²⁶ Sam LaGrone, “China Chides U.S. Over Latest South China Sea Freedom of Navigation Operation,” USNI News, U.S. Naval Institute, published October 11, 2017 4:36 PM, <https://news.usni.org/2017/10/11/china-chides-u-s-latest-south-china-sea-freedom-navigation-operation>.

²⁷ Kuok, “U.S. FON,” 23.

²⁸ Kuok, “U.S. FON,” 24.

international law.”²⁹ It is difficult to argue the Chinese claim when the U.S. states that FON operations “support the longstanding U.S. national interest of freedom of the seas”³⁰ and that it conducts FON assertions to “maintain global mobility of U.S. forces.”³¹ Furthermore, the perceived U.S. attitude of FON operations being “an ‘in your face,’ ‘rub your nose in it’ operation, that lets people know who is the boss”³² doesn’t accurately reflect Reagan’s purpose of assertions as upholding the common interests of UNCLOS. This message likely won’t resonate with many other countries, who may view the U.S. freedom of navigation assertions as provocative at best, or continued symbols of American hegemony. The U.S. should change its messaging to reinforce the fact that FON assertions are carried out to assert the rights of all nations, not just for the benefit of the U.S. military. The U.S. needs to proactively counter “China’s impression that international law is merely an American tool.”³³ Appropriate messaging in robust information operations will bolster the support that exists around the world, even in pockets of the moderate Chinese security community³⁴, for respecting and complying with international norms. Ultimately the purpose of the FON Program is to assert universal maritime rights and this needs to be clearly communicated to the world, not only to compete in

²⁹ “Foreign Ministry Spokesperson Lu Kang’s Regular Press Conference on May 10, 2016”, Spokesperson’s Remarks, Ministry of Foreign Affairs of the People’s Republic of China, published May 10, 2016, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1362106.shtml.

³⁰ “Department of Defense Report to Congress Annual Freedom of Navigation Report Fiscal Year 2017,” DoD Annual Freedom of Navigation Reports, Department of Defense, published December 31, 2017, <https://policy.defense.gov/Portals/11/FY17%20DOD%20FON%20Report.pdf?ver=2018-01-19-163418-053>, 2.

³¹ “Department of Defense Report,” 2.

³² Amitai Etzioni, “Freedom of Navigation Assertions: The United States as the World’s Policeman,” *Armed Forces & Society* 42, no. 3 (2016): 502.

³³ Iskander Rehman, “India, China, and differing conceptions of the maritime order,” Project on International Order and Strategy, Brookings, published June 20, 2017, https://www.brookings.edu/wp-content/uploads/2017/06/rehman-india_china_and_differing_conceptions_of_the_maritime_order.pdf, 19.

³⁴ Xin Chen, “Sea Power and Maritime Disputes: China’s Internal Discourses,” in *Maritime Security in East and Southeast Asia: Political Challenges in Asian Waters*, eds. Nicholas Tarling and Xin Chen, (Palgrave Macmillan, 2017), 243.

the information environment but also to improve international acceptance of the U.S. interpretation of UNCLOS.

Writing for *Foreign Affairs*, Mira Rapp-Hooper, a Senior Fellow at the Center for a New American Security, makes the counter-argument that if FON operations are to be considered a normal operation, then they should not be publicized and should be conducted without fanfare. There is nothing that prevents normal operations from being conducted openly, and publicized as such, particularly when other nations proactively bring negative media attention to them. No argument has been presented as to why FON assertions shouldn't be publicized after being conducted. Publicizing them is particularly important in light of Kuok's argument that "explicitly stating the rights being asserted will help throw into sharper relief the nature of the dispute".³⁵ Clarity of messaging and greater publicity are exactly what FON operations need. Rapp-Hooper makes the claim that details of FON operations shouldn't be made public because "the precise legal rationales behind FONOPS are often incredibly nuanced, and it can be difficult to communicate them to even the most expert audiences."³⁶ If the U.S. government can't or won't adequately explain the rationale behind the assertions to the American public, how do we expect our international partners to accept it as well? Rapp-Hooper goes on to argue that "[t]he American public should not expect to learn the intricate operational details behind each exercise, and it should not be surprised when top officials do not offer them."³⁷ The detail missing here is that the American public doesn't necessarily need to be convinced of the FON Program. Instead, the international community should be convinced that FON operations are not just about protecting the rights of the U.S. military, but asserting universal rights. International support for

³⁵ Kuok, "U.S. FON," 23.

³⁶ Mira Rapp-Hooper, "Make No Mistake," *Foreign Affairs*, published November 25, 2015, <https://www.foreignaffairs.com/articles/2015-11-25/make-no-mistake>.

³⁷ Rapp-Hooper, "Make No Mistake."

the FON Program and its defense of universal rights won't be built by keeping the international, or domestic, public in the dark about what the operations are intended to do, and why. Instead, a robust information campaign is necessary and takes on even greater importance when supporting FON operations in the South China Sea, given the significant negative media coverage provided by Chinese information operations.

A second major change to update the FON program would be an unambiguous step towards multilateralization of the program; that is getting broad international support for the protection and assertion of universal rights that are at the core of UNCLOS. Currently, worldwide FON assertions are carried out almost unilaterally by US military forces³⁸ with a few allied nations increasingly taking steps to develop their own programs.³⁹ By deliberately multilateralizing the program, the US has much to gain and little to lose.

Within the South China Sea, China bears an outsized influence compared to the rest of the regional powers. The solution for the Southeast Asian nations seeking equal footing is to internationalize their disputes with China.⁴⁰ The corresponding reaction from China is to push for bilateral solutions instead of a multilateral approach⁴¹ and to weaken any international organizations involved in the dispute.⁴² Multilateralizing freedom of navigation issues provides several benefits, particularly if done in a manner that doesn't focus on specific states, but rather as a general approach to international norms. It reinforces the point that freedom of navigation issues in the SCS are a microcosm of universal rights as opposed to a product of Great Power

³⁸ Rehman, "India," 19.

³⁹ Tuan Anh Luc, "Are France and the UK Here to Stay in the South China Sea?" *The Diplomat*, published September 14, 2018, <https://thediplomat.com/2018/09/are-france-and-the-uk-here-to-stay-in-the-south-china-sea/>.

⁴⁰ Filip Kraus, "Border Disputes in Southeast Asia and Their Impact on the Regional Integration Process," in Gerstl, *Unresolved*, 47.

⁴¹ Alica Kizeková, "Multitrack Diplomatic Approaches to Border and Territorial Disputes in Southeast Asia and Soft Balancing," in Gerstl, *Unresolved*, 158.

⁴² Kraus, "Border Disputes," 47.

struggles. Ultimately, freedom of navigation is a right afforded to all nations and as such, it should be defended and upheld by all nations, not just the U.S. and a few allies. One immediate step towards this is to convince non-traditional allies, particularly those with strategic interests in the SCS region like India and Russia, to publicly support universal freedom of navigation rights. Independent freedom of navigation assertions and overt diplomatic support of those ideals will accomplish that and both can be achieved without the appearance of American influence.

Multilateralizing freedom of navigation issues helps reduce some of the nationalism and domestic politics that challenge the resolution of border disputes and maritime claims in the SCS region.⁴³ Multilateralizing the issues would also remove some pressure on the ASEAN states to resolve the disputes within their own sphere. The influence of China upon Cambodia to not discuss SCS issues during the 2012 ASEAN Summit⁴⁴ fractured the cohesion of the ASEAN group and reduced its ability to effectively negotiate as a bloc with China. China has also used its economic influence to produce a similar effect within the European Union.⁴⁵ An internationalization of the issues would remove pressure from ASEAN and enable it to cohesively focus on other regional issues that have less international complexity, while collectively supporting the U.S. interpretation of UNCLOS.

Changing its approach from a mostly unilateral one to a multilateral one, the U.S. would be demonstrating the global leadership that other nations have come to rely upon. Accepting the assertion that ASEAN members wait for the U.S. and China to move on policy issues before acting themselves,⁴⁶ the U.S. has an opportunity to gain broad regional support by leading an

⁴³ Kraus, "Border Disputes," 71.

⁴⁴ Kraus, "Border Disputes," 73.

⁴⁵ Rehman, "India," 19.

⁴⁶ Kizeková, "Multitrack," 147.

international, not unilateral, opinion on the issues of freedom of navigation in the SCS.

Furthermore, China has shown a willingness to refrain from controversial operations that have met with widespread negative public reactions. For example, after the international outcry over the destruction of the Chinese weather satellite in 2007, the Chinese never conducted another debris-creating test. Similarly, after the 1997 dispute over China's placement of an oil rig in contested waters off Vietnam, pressure from the ASEAN nations caused China to back down.⁴⁷ Despite ASEAN being the second-most successful regional organization in the world,⁴⁸ and having some success in getting China to act in accordance with regional norms, even when cohesive it is still unable to exert enough soft power to balance China.⁴⁹ ASEAN can be supported by the internationalization of the SCS dispute, with a large international cohort having greater ability to compel China to adhere to global norms.

In his analysis on the effectiveness of the unilateral U.S. FON Program, Root suggests that it may be counterproductive in getting states to withdraw excessive claims.⁵⁰ This is particularly the case with some nations in the SCS where the resolution of border disputes is complicated by internal domestic or nationalistic pressures.⁵¹ No state wishes to be seen retracting its excessive claims and "[b]ending to the wishes of America because its Navy shows off the coastal state's shore".⁵² This is another case where multilateralizing the issues of freedom of navigation can have a significant benefit. States that choose to retract their excessive claims

⁴⁷ Kizeková, "Multitrack," 160.

⁴⁸ Richard Q. Turcsányi and Zdeněk Kříž, "ASEAN and the Thai-Cambodian Conflict: The Final Stage at Preah Vihear?" in Gerstl, *Unresolved*, 83.

⁴⁹ Kizeková, "Multitrack," 160.

⁵⁰ Root, "Freedom," 11.

⁵¹ Kraus, "Border Disputes," 71.

⁵² Root, "Freedom," 11.

won't be submitting to a perceived American hegemony but instead can be seen bringing their claims in concert with global norms.

One could argue that by multilateralizing the issues of freedom of navigation, the US would effectively be admitting its inability to unilaterally compel foreign nations to adopt existing international norms, and thereby reflect a decline in its international status. However, the historical record shows that after 35 years of trying and failing, most nations have probably already figured this out. A second counter-argument is that multilateralization in complex environments like the SCS is not an effective strategy. Vietnam's attempts to multilateralize its maritime border disputes with China within the ASEAN community have been so far unsuccessful⁵³ but ASEAN has generally been unsuccessful in resolving disputes⁵⁴ so the multilateralization cannot be considered the only issue.

The fact that China rejects attempts to multilateralize the issues within the South China Sea⁵⁵ and "embraces cooperation solely in spheres which do not compromise its main national interests"⁵⁶ is perhaps the best argument for increased multilateralization. Multilateral pressure could provide an avenue for the preferred Chinese cultural approach of "informal conciliation outside courts, with 'saving face' and the ending of conflicts being primary concerns".⁵⁷ International influence could enable China's compliance with the terms of UNCLOS and global norms without the need to appear to be bowing to U.S. interests.

⁵³ Alfred Gerstl, "The South China Sea Dispute: A Shift to a More Proactive Role in ASEAN's Discourse and Policies since 2012?" in Gerstl, *Unresolved*, 210.

⁵⁴ Strašáková, "Unresolved," 308.

⁵⁵ Gerstl, "South China," 190-191.

⁵⁶ Kizeková, "Multitrack," 145.

⁵⁷ Xinjun Zhang, "International Law in Managing Unsettled Maritime Boundaries: A Report on the Sino-Japanese Dispute Over the East China Sea," in *Maritime Border Diplomacy*, eds. Myron H. Norquist and John Norton Moore (Leiden: Martinus Nijhoff Publishers, 2012), 313.

Conclusion

China has been successful in using lawfare and strategic ambiguity to broaden its claims and territory within the SCS while gradually eroding the established international order. By operating below the level of armed conflict and using asymmetrical naval forces, it has taken a strategic advantage which the U.S. cannot successfully contest with our current doctrine on the use of military forces⁵⁸ and an ineffective FON Program. The U.S. should take an equally asymmetrical approach by employing information operations to challenge the Chinese narrative, build greater international support for our view of the global commons and compel, through the weight of international concurrence, nations to adhere to UNCLOS. The issues of freedom of navigation in the South China Sea are not just about China, though. An effective new U.S. approach to preserving universal freedom of navigation rights and a common set of territorial claims in line with UNCLOS will address the issues with both China and the rest of the nations in the South China Sea. By publicizing and multilateralizing the Freedom of Navigation Program, the U.S. stands a much better chance of getting nations in the South China Sea region, particularly China, to accept the greater global commons. UNCLOS represents a significant achievement of the liberal, rules-based order that the U.S. contributes to and as such, deserves to be publicly supported and defended by both the U.S. FON Program as well as other global partners.

⁵⁸ Peter A. Dutton "Conceptualizing China's Maritime Gray Zone Operations" (Unpublished paper presented at the CMSI Conference on "China's Maritime Gray Zone Operations," 2-3 May 2017, Newport, RI), 5.

BIBLIOGRAPHY

Aceves, William J. "Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea." *Naval War College Review* 46, no. 2 (1993): 59-79.

Burgess, John, Lucia Foulkes, Philip Jones, Matt Merighi, Stephen Murray, and Jack Whitacre, eds. "Law of the Sea: A Policy Primer." The Fletcher School. Tufts University. Published September 5, 2017.
<https://sites.tufts.edu/lawofthesea/files/2017/07/LawoftheSeaPrimer.pdf>.

Cable, James. *Gunboat Diplomacy, 1919-1991: Political Applications of Limited Naval Force*. Third ed. New York: St. Martin's Press, 1994.

Chen, Xin. "Sea Power and Maritime Disputes: China's Internal Discourses." in *Maritime Security in East and Southeast Asia: Political Challenges in Asian Waters*. eds. Nicholas Tarling and Xin Chen, 207-249. Palgrave Macmillan, 2017.

"Department of Defense Report to Congress Annual Freedom of Navigation Report Fiscal Year 2017." DoD Annual Freedom of Navigation Reports. Department of Defense. Published December 31, 2017.
<https://policy.defense.gov/Portals/11/FY17%20DOD%20FON%20Report.pdf?ver=2018-01-19-163418-053>.

Dutton, Peter A. "Conceptualizing China's Maritime Gray Zone Operations." Unpublished paper presented at the CMSI Conference on "China's Maritime Gray Zone Operations," 2-3 May 2017, Newport, RI.

Etzioni, Amitai. "Freedom of Navigation Assertions: The United States as the World's Policeman." *Armed Forces & Society* 42, no. 3 (2016): 501-517.

Exec. Order No. 13840. "Ocean Policy To Advance the Economic, Security, and Environmental Interests of the United States." *Federal Register* 83, no. 121 (June 22, 2018): 29431-29434.

"Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on May 10, 2016." Spokesperson's Remarks. Ministry of Foreign Affairs of the People's Republic of China. Published May 10, 2016.
https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1362106.shtml.

Franckx, Erik. "Innocent Passage of Warships." *Marine Policy* 14, no. 6 (1990): 484-490.

Gerstl, Alfred. "The South China Sea Dispute: A Shift to a More Proactive Role in ASEAN's Discourse and Policies since 2012?" In Gerstl, *Unresolved*, 183-230.

Gerstl, Alfred, and Mária Strašáková, eds. *Unresolved Border, Land and Maritime Disputes in Southeast Asia: Bi- and Multilateral Conflict Resolution Approaches and ASEAN's Centrality*. Leiden: Brill, 2017.

Groves, Steven. "Accession to the U.S. Convention of the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms." The Heritage Foundation. Published August 24, 2011. https://thf_media.s3.amazonaws.com/2011/pdf/bg2599.pdf.

Hollick, Ann L. *U.S. Foreign Policy and the Law of the Sea*. Princeton: Princeton University Press, 1981.

Juda, Lawrence. "Innocent Passage by Warships in the Territorial Seas of the Soviet Union: Changing Doctrine." *Ocean Development & International Law* 21, no. 1 (1990): 111-116.

Kwiatkowska, Barbara. "Innocent Passage by Warships: A Reply to Professor Juda." *Ocean Development & International Law* 21, no. 4 (1990): 447-450.

Kizeková, Alica. "Multitrack Diplomatic Approaches to Border and Territorial Disputes in Southeast Asia and Soft Balancing." In Gerstl, *Unresolved*, 143-167.

Kraus, Filip. "Border Disputes in Southeast Asia and Their Impact on the Regional Integration Process." In Gerstl, *Unresolved*, 46-82.

Kuok, Lynn. "The U.S. FON Program in the South China Sea: A lawful and necessary response to China's strategic ambiguity." Center for East Asia Policy Studies. Brookings.

Published June 7, 2017. <https://www.brookings.edu/wp-content/uploads/2016/07/Limits-of-Law-in-the-South-China-Sea-2.pdf>.

LaGrone, Sam. "China Chides U.S. Over Latest South China Sea Freedom of Navigation Operation." USNI News. U.S. Naval Institute. Published October 11, 2017 4:36 PM. <https://news.usni.org/2017/10/11/china-chides-u-s-latest-south-china-sea-freedom-navigation-operation>.

Luc, Tuan Anh. "Are France and the UK Here to Stay in the South China Sea?" The Diplomat. Published September 14, 2018. <https://thediplomat.com/2018/09/are-france-and-the-uk-here-to-stay-in-the-south-china-sea/>.

"Maritime Security and Navigation." Office of Ocean and Polar Affairs. Department of State. Accessed October 22, 2018. <https://www.state.gov/e/oes/ocns/opa/maritimesecurity/>.

Noyes, John E. "The United States, the Law of the Sea Convention, and Freedom of Navigation." *Suffolk Transnational Law Review* 29, no. 1 (2005): 1-24.

Rapp-Hooper, Mira. "Make No Mistake." Foreign Affairs. Published November 25, 2015. <https://www.foreignaffairs.com/articles/2015-11-25/make-no-mistake>.

Rehman, Iskander. "India, China, and differing conceptions of the maritime order." Project on International Order and Strategy. Brookings. Published June 20, 2017.

<https://www.brookings.edu/wp-content/uploads/2017/06/rehman-india-china-and-differing-conceptions-of-the-maritime-order.pdf>.

Roach, J. Ashley, and Robert W. Smith. *Excessive Maritime Claims*. Third ed. Leiden: Martinus Nijhoff Publishers, 2012.

Roach, J. Ashley and Robert W. Smith. *United States Responses to Excessive Maritime Claims*. Second ed. The Hague: Martinus Nijhoff, 1996.

Rolph, John W. "Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" must Innocent Passage be?" *Military Law Review* 135 (1992): 137-165.

Root, Joshua L. "The Freedom of Navigation Program: Assessing 35 Years of Effort." *Syracuse Journal of International Law and Commerce* 43, no. 2 (2016): 321-351.

Santicola, Ryan. "Legal Imperative? Deconstructing Acquiescence in Freedom of Navigation Operations." *National Security Law Journal* 5 no. 1 (2016): 59-95.

"Statement on United States Oceans Policy." The Public Papers of President Ronald W. Reagan. Ronald Reagan Presidential Library. Accessed October 22, 2018.
<https://www.reaganlibrary.gov/research/speeches/31083c>.

Turcsányi, Richard Q. and Zdeněk Kříž. "ASEAN and the Thai-Cambodian Conflict: The Final Stage at Preah Vihear?" In Gerstl, *Unresolved*, 143-167.

U.S. Department of Defense. *Summary of the 2018 National Defense Strategy of The United States of America: Sharpening the American Military's Competitive Edge*. Washington, DC: Office of the Secretary of Defense, 2018.

"U.S. Department of Defense Freedom of Navigation (FON) Program." DoD Annual Freedom of Navigation Reports. Department of Defense. Published February 28, 2017.
<https://policy.defense.gov/Portals/11/DoD%20FON%20Program%20Summary%202016.pdf?ver=2017-03-03-141350-380>.

U.S. Joint Chiefs of Staff. *Joint Concept for Integrated Campaigning*. Washington, DC: Joint Chiefs of Staff, 2018.

U.S. Joint Chiefs of Staff. *Joint Planning*. Washington, DC: Joint Chiefs of Staff, 2017.

U.S. Office of the Chief of Naval Operations. *The Commander's Handbook on the Law of Naval Operations*. Washington, DC: Department of the Navy, Office of the Chief of Naval Operations, 2017.

Winkler, David F. 1958. *Cold War at Sea: High-Seas Confrontation between the United States and the Soviet Union*. Annapolis: Naval Institute Press, 2000.

Zhang, Xinjun. "International Law in Managing Unsettled Maritime Boundaries: A Report on the Sino-Japanese Dispute Over the East China Sea." In *Maritime Border Diplomacy*, edited by Myron H. Nordquist and John Norton Moore, 309-320. Leiden: Martinus Nijhoff Publishers, 2012.