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*The Sino-US Confrontation in the South China Sea:  
Insights from International Order Perspective*

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Abstract

Conventional accounts of the South China Sea territorial disputes identify China's assertive behaviour as the primary cause of the rising tension since the early 2010s. This paper goes beyond this traditional view of the disputes by arguing that the territorial disputes are an expression of the broader contestation between two order-building projects by China and the US. China's assertive behaviour originates in its desire to promote a 'historical' and 'post-colonial' maritime order that is premised on its Sino-centric historical narrative of the Sea and on its emphasis on the historical legitimacy of the regional order of 1943-1945. The US-led 'liberal' maritime order is underpinned by a post-war legal framework built on the San Francisco Peace Treaty and the United Nations Convention on the Law of the Sea, and the notion and practice of freedom of navigation. Since October 2015 the US has enhanced its Freedom of Navigation Operations to challenge China's 'excessive' maritime or territorial claims. We conclude that as a result of the uneasy co-existence of these two order-building projects, which fundamentally disagree over the foundations of maritime order in the South China Sea, the disputes have reached an open-ended impasse.

Keywords: South China Sea, international order, San Francisco Peace Treaty, UNCLOS, freedom of navigation

## **Introduction**

English-language literature on the territorial and maritime disputes in the South China Sea is extensive, but much of the recent debate focuses on China's allegedly assertive behaviour and its 'salami-slicing' strategy to change the status quo incrementally in China's favour (Johnston 2013, O'Rourke 2017, 25, Swaine and Fravel 2011, Thayer 2011, Yahuda 2013, Zhou 2016).<sup>1</sup> These authors interpret Beijing's shift towards assertiveness in the South China Sea as a reaction to the Obama administration's decision to rebalance to Asia. From this perspective, the reversal of China's long-standing policy of moderation, which prioritised maintaining regional peace and stability, was brought about by US intentions to regionalise the South China Sea disputes, and by Washington's push for their management, if not resolution, through the Association of Southeast Asian Nations (ASEAN). To safeguard its legitimate sovereign rights, the argument continues, China was forced to act to establish credible deterrence to forestall further 'provocative' behaviour of other claimant states. The surge of (maritime) nationalism and the growth of Chinese naval capacity also contribute to the increasingly assertive approach.

In contrast, the Chinese government argues in their policy papers and mass media outlets that it simply defends its sovereign rights to the South China Sea. From this perspective, China views its behaviour as defensive, not aggressive or expansive. In its May 2009 *note verbale* to the Secretary-General of the United Nations, Beijing declared, 'China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters ...' (Permanent Mission of the People's Republic of China to the UN 2009). The Chinese Ministry of Foreign Affairs has argued that 'the essence of the South China Sea issue is the territorial sovereignty dispute caused by others' *invasion* of some islands of China's Nansha [Spratly] Islands .... [consequently,] China has the right to *defend* its territorial and maritime rights and interests as other countries do' (emphasis added) (Gao and Jia 2013, 120).

These contrasting understandings about sovereignty over, or occupation of, the disputed territories in the South China Sea are treated by many scholars and policy-makers as the primary source of the rising tension. These accounts on their own, however, cannot explain the

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<sup>1</sup> Another line of inquiry is pursued by Bill Hayton (Hayton 2018) who investigates the historical and social construction of China's maritime geo-body and its changing boundaries, based on an imagined emotional discourse about space (see also: Hayton (2017)). Hayton, in turns, draws on Callahan and Winichakul (Callahan 2009, Winichakul 1994).

deeper connection between the maritime disputes and geopolitics. Specifically, what drives China's dogged determination to pursue an assertive strategy to protect its rights? One may ask why China believes that it is legitimate to claim its self-proclaimed rights to the largely uninhabited archipelagos, even in the face of mounting resistance from stake-holding states. Similarly, what underpins US modifications in its traditional policy of neutrality by declaring the South China Sea a matter of US national interest in 2010 (Clinton 2010)? One may consider why the US similarly believes that it is legitimate to contest China's claims, even though it simultaneously pledges that it takes no position on the sovereignty disputes (Dolven, Manyin and Kan 2014, 1).

We offer a fresh perspective by examining the foundations of the disputes rather than the superficial details of the disputes themselves, and conclude that the disputes are evidence of growing contestation between two order-building projects by China and the US in the South China Sea. The deeper foundations are manifest by the direct attempts each makes to delegitimise the other's claims and actions as a means to safeguard their own preferred regional maritime order. This paper uses an under-researched 'international order' perspective to explore the contestation between the Chinese 'historical' and 'post-colonial' order<sup>2</sup> and the American-led post-war 'liberal' order.<sup>3</sup> We investigate both the action and socially produced representations of 'reality' employed by China and the US in their respective regional maritime order-building projects.

The Chinese narrative, or socially constructed memories of past events (Lamont 2015, 43), attaches significance to history, international order and their collective impact on the territorial disputes. To defend and safeguard its sovereign rights to the South China Sea, China is attempting to fashion a contemporary maritime order that harks back to the 'legitimate' regional maritime order of 1943-1945.<sup>4</sup> Dai Bingguo, former Chinese senior diplomat and State Councillor (2008-2013), expressed clearly that 'the return of Nansha [Spratly] Islands to China is part of the post-war *international order* and relevant territorial arrangements' (emphasis

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<sup>2</sup> It is a historical order because it is based on the alleged historical governance by imperial Chinese governments and a post-colonial order because of China's allegation that freedom of navigation by warships was a Western colonial practice (Zhang 2010, 37).

<sup>3</sup> Morton (2016) also views the South China Sea dispute from the perspective of maritime order. While protection of the global commons, including freedom of the seas, forms a strand of the 'liberal international order', as noted by Nye (2019, 71-72), the liberal elements of the American order are often exaggerated. The Truman Proclamation on the Continental Shelf of 1945, which unilaterally extended US jurisdiction over the natural resources towards the high seas, is a case in point (Tanaka 2015, 137).

<sup>4</sup> The order was built on the Cairo Declaration of November 1943 and the Potsdam Declaration of July 1945.

added) (Dai 2016). To justify its preferred order and to delegitimise the US-led order, Beijing expends much effort in eroding the UN Convention on the Law of the Sea (UNCLOS), a chief pillar of the rules-based maritime order, through its contestation of the regulatory rules of warship navigation in the Sea. The US, in contrast, defends a rules-based regional maritime order underpinned by the Treaty of San Francisco (1951) – to which China was not a signatory – and contemporary international maritime law, especially UNCLOS (yet to be ratified by the US Senate),<sup>5</sup> and reinforced through its system of regional bilateral security alliances and partnerships. The American-led regional maritime order emphasises customary international maritime practices, such as freedom of navigation (FON) and the rule of law. By framing China’s activities as contravention of international law (UNCLOS), and by corralling support from allies and friends across the Indo-Pacific region in support of its freedom of navigation operations (FONOPs), Washington seeks to delegitimise the foundations of Beijing’s preferred order in the South China Sea.

This paper proceeds in four steps. First, it introduces an international order approach to the study of the South China Sea territorial disputes. It is followed in Sections 2 and 3 respectively by discussions of China’s and the US’s competing conceptions of the South China Sea maritime order. At the centre of Section 4 is how China, as a re-emerging power in the Asia-Pacific, attempts to unsettle the post-1951 American-led order; it focuses on the divergent interpretations of some key norms and articles of UNCLOS with regard to FON, and the increasing use of FONOPs by the US to counter China. It concludes that the disputes remain deadlocked because of the uneasy co-existence of these two order-building projects.

### **Creating, contesting and recreating order**

International politics can be understood as ‘a succession of *ordered* systems created by leading – or hegemonic – states that emerge after war with the opportunities and capabilities to organize the rules and arrangements of interstate relations’ (emphasis added) (Ikenberry 2014, 3-4). A central question in the study of international relations concerns how order in a world of sovereign states is created, maintained, contested, broken down and recreated (Ikenberry 2001,

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<sup>5</sup> Both the US government and Senate do not hold any principled opposition to UNCLOS. The disagreement centres on the implementation of Part XI of UNCLOS concerning deep seabed mining and the associated principle of the ‘common heritage of mankind’ and the developing world’s call for a New International Economic Order (Malone 1983). The American government adheres to the rest of UNCLOS as part of customary international law. Malone was the chairman of US delegation to UNCLOS III.

3, 22-23). This section elucidates the concept of international order and discusses the relevance of order contestation to the evolution of Chinese polity as well as the international law of the sea.

Bull (2002) studied international order and society from both analytical and historical angles, with the latter emphasising the importance of historically-constructed understandings of international society. As Hurrell points out, ‘All human societies rely on *historical stories* about themselves to legitimise notions of where they are and where they might be going’ (2002, x-xi, xiii).<sup>6</sup> A weakness of Bull’s analytical approach is that he was concerned more about how international order can be maintained within the society of states,<sup>7</sup> rather than about contestation between different order-building projects. This paper seeks to fill this gap by using an international order approach to discuss how Chinese and American competing order projects have unsettling effects on one another. In so doing, we consider how the Chinese and US maritime orders in the South China Sea have emerged in conception and practice, how each justifies the extension of the norms and rules they espouse and how they have constructed historical stories to legitimise their respective preferred maritime order.

The working definition of an international order in this paper is ‘a political formation in which *settled* rules and arrangements exist between states to guide their interaction’ (emphasis added) (Ikenberry 2011, 36). Crucial to the formation of an international order is not the fact that it is often created by leading state(s) – hence a hierarchy – but also the dominant norms and rules of that order must be broadly mutually acceptable to both the leading and secondary states (see also Lebow (2018, 8)). The norms and rules are designed not only to preserve the unrivalled interests of the leaders but also to facilitate cooperation between states within the order, as well as stability, durability and predictability in their interactions (Ikenberry 2001, 3-20, 22-23). This is echoed by Acharya, who argues that global order is founded on a set of ideas that ‘help to limit conflict, induce cooperation and stability, and expand legitimacy through representation and participation’ (Acharya 2018a, 11). However, because of power asymmetries between leading and secondary states, these primary goals, albeit beneficial to all parties, are not decided upon naturally in practice. The leading state not only determines the course of interaction, it also regulates the rules of the game in its favour. Broadly speaking, in

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<sup>6</sup> Quotation on p. xiii. Emphasis added.

<sup>7</sup> See chapters 3, 5-9.

an order characterised by the liberal tradition, the leading state sets up and exercises power through negotiated rules and institutions, which prevent it from exerting power arbitrarily. It both provides other states with public goods such as security, freedom (of navigation) and an open trade and financial regime in exchange for their participation and cooperation, and gives secondary states ‘voice opportunities’ in the collective policy-making process (Ikenberry 2011, 73-75).

The process of US order-building after 1945 was characterised by the establishment of binding rules-based institutions. In the Asia-Pacific, the US-led order was predicated on the San Francisco Peace Treaty (SFPT) (1951) with Japan – a treaty whose reach was not limited to Japan but covered the territories in the Asia-Pacific formerly occupied by Japan during the war (Hara 1999, 517-518). This Treaty, along with hub-and-spokes security arrangements, established the regional political structure and reflected the strategic interests of the US, as the principal drafter of the Treaty (Hara 1999, 517-518). Several regional states were drawn into the US Cold War security umbrella through bilateral alliances and with American assurances they would not be dominated or abandoned: with Taiwan (up to 1979), South Korea and Japan (in Northeast Asia), the Philippines and Thailand (in Southeast Asia), and with Australia and New Zealand (ANZUS) (in Oceania) (Miller and Wich 2011, 106-109). Due to the political complexities of the region as a frontier against communist expansion in the early post-war years, and unlike the order that was fostered in Europe after 1945, less emphasis was placed on nurturing East Asian regional multilateralism. Consequently, weaker regional organisations such as the Southeast Asia Treaty Organization (SEATO), 1954-77, and the Association of Southeast Asian Nations (ASEAN), from 1967 onwards, were established. In short, the post-war American-led order, incorporating Northeast and Southeast Asia, was hierarchical, centred on anti-communist security alliances and supported by weak multilateral institutions (Ikenberry 2011, 297, Katzenstein 2005, 44-50).

More concerned with the pressing need to stabilise regional security and limit the spread of communism, the SFPT sowed the seeds for many of the unresolved territorial disputes in the region with direct consequences for the regional maritime orders in the East and South China Seas. The Treaty was neither specific in naming the recipients of islands renounced by Japan, nor did it define the maritime delimitation of the islands. Rather than viewing the control of the islands as of secondary importance, Hara asserts, Washington deliberately left the territorial issues unresolved as part of its Cold War China containment strategy (Hara 2012). Not only

were those directly concerned with the territories not party to the Treaty,<sup>8</sup> but the problems created multilaterally by third parties in 1951 have been passed down onto subsequent generations in the form of unresolved territorial disputes, which have come to dominate the regional maritime sphere (Hara 2012).

The re-emergence of powerful non-Western states in the past two decades, most notably China, has produced assertions that the American ordering may not be normatively acceptable. Aspiring non-Western powers may therefore want to undertake order-building to promote new norms in a global order as a means to improve their social standing and rankings in international normative hierarchy.<sup>9</sup> All powers, especially the dominant hegemon, are tempted to build an order that accords closely with their own interests, which can also be viewed as an investment or insurance against future contingencies (Ikenberry 2001, 55, Ikenberry 2011, 108). Even as its material power declines, '[i]nstitutions can both conserve and prolong the power advantage of the leading state', thereby safeguarding its interests, preferences and international status (Ikenberry 2011, 108). Contestation over order-building is *per se* a battle for legitimacy as well as interests for both the rising and incumbent powers.

Order contestation is not new to China. It faced a similar acrimonious confrontation when European International Society, aided by imperialism and 'gunboat diplomacy', expanded into East Asia in the nineteenth century. In its expansion, according to a refined and nuanced English School account, European International Society demanded homogeneity whereby an 'uncivilised' non-European state had to comply with the European 'standard of civilisation' in order to be admitted to the Society. However, China's state response was to reject that demand for homogeneity while seeking military modernisation (Gong 1984, Suzuki 2009). As will be discussed in more detail below, the American-led post-war liberal order with regard to the South China Sea has also sought homogeneity by imposing so-called 'universal' maritime norms and rules on non-Western China, and China's response is the same: to reject that top-down demand by advancing its own ordering project. Indeed, China took issue with the Eurocentric composition of the South China Sea Arbitration Tribunal, constituted under Annex

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<sup>8</sup> Due to disagreement among the allies over which Chinese government had official recognition – the People's Republic of China (PRC) or the Republic of China on Taiwan, neither was invited. In addition, neither North nor South Korea was present. The implications for the post-war order of their non-participation is explored in more detail in the next section.

<sup>9</sup> Towns argues that social hierarchy is a core feature of international society, which itself is 'a stratifying society in which states are socially ranked and ordered' and that norms generate social hierarchy and ranking (Towns 2010, 41, Towns 2012).



VII to UNCLOS, questioning whether the appointed judges, all from or living in Europe, acquainted themselves enough with Asian culture and the South China Sea dispute (Ministry of Foreign Affairs, PRC 2016). China's contemporary project is to *unsettle* the American order and replace it with a modern version of the Sino-centric East Asian International Society prior to its encounter with Europeans.

It is equally fruitful to apply an international order contestation approach to the study of maritime territorial disputes. The international law of the sea historically originated in more than a single source and was never an exclusive product of European powers. Non-Western states had a significant role to play in its historical evolution. A major source, according to Anand (1982), was the Indo-Asian seafaring practices and norms up to the end of the fifteenth century when the Portuguese, the Spaniards and the Dutch competed for the spice trade in Asia. In the early seventeenth century, Grotius drew on the Indo-Asian maritime traditions to develop his doctrine of *mare liberum* (free sea). He was countered by, among others, the Englishman John Selden who advocated *mare clausum* (closed sea) (Tanaka 2015, 17). Contemporary law of the seas is largely shaped by the competing ordering principles of *mare liberum* and *mare clausum*.

Booth (1985) argues that in its attempts to bring order to seafaring, UNCLOS is a compromise between the naval powers and the coastal/littoral states. While it preserves the vested interests of naval powers, UNCLOS retains this tension between *mare liberum* held by prominent naval powers, and the US in particular, and *mare clausum* favoured by littoral states (this principled conflict is also explored by Anand (1982) and Sanger (1987)). In Booth's words, '[h]istorically ocean regime development has swung between pressure for enclosure of parts of the sea on the one hand, and the desire for freedom of navigation on the other' (Booth 1985, 14). *Mare clausum* is primarily manifest in the 'territorialisation' provisions for the 12-nautical mile (nm) territorial sea, the 200-nm exclusive economic zone, and the deep seabed mining regime. These competing doctrines lead to contestation over the norm of freedom of navigation between the naval powers of the North and the littoral states of the South, in particular China, Brazil and India, which wish to restrict foreign military activities near their coastal waters (Morton 2016, 926). The rise of these powers may force a repositioning within the hierarchy, or ultimately lead to the transformation of order as a means to obtain those privileges currently enjoyed by the US or the West more broadly (Stuenkel 2016, 11).

Since international order is always in a process of becoming through contestation, the question is whether the American-led order can be transformed into an order with more representation and participation that can better integrate rising powers. The offensive realist, John Mearsheimer, refutes this possibility. In his words, ‘the United States ... played a key role in preventing imperial Japan, Wilhelmine Germany, Nazi Germany, and the Soviet Union from gaining regional supremacy’ (Mearsheimer 2014, 41). Other academics from constructivist approaches offer a less binary vision for order transformation. Kupchan asserts that the coming transition is likely to lead to ‘multiple versions of modernity’ (Kupchan 2012, 5). Similarly, both Acharya and Flockhart outline an international system consisting of several different orders, with the liberal order being only one of them (Acharya 2018b, Flockhart 2016). The coming transformation proposes a potentially politically diverse landscape, in which ‘the western model will offer only one of many competing conceptions of domestic and international order’ (Kupchan 2012, 5).

If multiple versions of order are going to exist simultaneously, how is China’s contestation of the US-led rules-based order likely to manifest? Since contestation tends to occur over supposedly *settled* rules and arrangements, attention now turns to how China contests the settled rules and arrangements. China maintains that the initially *settled* regional maritime order, based on international agreements made between 1943 and 1945, was ‘illegitimately’ *unsettled* by the post-war order based on the SFPT, which was underpinned by the US’s anti-Communist strategy. China’s re-emergence as a regional power has not only re-ignited China’s contestation over the US-dominated order as a means to overcome the political trauma in the national psyche caused by foreign invasion but also its will to assert its own conception of regional order as a means to restore its historical regional leadership position. As it restores its regional authority, China vows to *unsettle* the regional maritime order enforced by the US after 1951.

### **Humiliated China: The imperative of restoring the unsettled Sino-centric South China Sea order**

The maritime domain of the South China Sea is an issue-area in which China contests the US rules-based order, supported by Sino-centric historical storytelling, the downplaying of contemporary international law of the seas, and increasingly backed up by military means to strengthen its presence in the four major groups of islands or archipelagos in the Sea.

China claims that the Paracel (Xisha) Islands in the west, Macclesfield Bank and Scarborough Shoal (Zhongsha) in the middle, the Pratas (Dongsha) Islands in the east, and the Spratly (Nansha) Islands in the south were historically Chinese territories since they were first discovered by Chinese in the Han dynasty (206 BC – 220 AD) (Gao and Jia 2013, 99). China exercised sovereign jurisdiction over them from the Ming dynasty (1368 – 1644) until they were invaded and occupied by French and Japanese forces from 1930 up to the end of World War II in 1945 (Fu and Wu n.d., 4-5n).<sup>10</sup> In accordance with the Cairo and Potsdam Declarations, the Republic of China (ROC) recovered the islands from the Japanese imperial government in December 1946, establishing sovereign control over major island groups in the South China Sea and stationing troops on Woody Island and Itu Aba Island (Taiping Island) in the Paracels (Fu and Wu n.d., 6, Hong 2012, 10). In 1947 the ROC government published an 11-dash-line map, demarcating its ‘ownership’ of approximately 90 per cent of the South China Sea. Following the Chinese civil war, the People’s Republic of China (PRC) claimed inherited territorial rights to the South China Sea from the ROC in 1949.

As previously discussed, with the onset of the Cold War in East Asia and in the midst of the Korean War, sovereign control over the islands was not explicitly returned to China under the SFPT due to their strategic significance in the Cold War context. Neither the ROC government (in Taipei) nor the PRC government (in Beijing) were invited to the San Francisco Peace Conference due to a disagreement between the organisers over which government officially represented China (Matsumura 2013). Ultimately, neither government was present nor party to the resultant Treaty. France and the State of Vietnam under Bo Dai pressed their claims to the Paracel and Spratly Islands at the Conference and the issue was left unsettled (Hong 2012, 12). Accordingly, Article 2(f) of the Treaty only declared that ‘Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands’ without specifying to whom they would be returned (Taiwan Documents Project 1951). The consultations that followed in Washington, Manila and Taipei showed American primary concerns over Communist Chinese control over the islands, although the US recognised ‘Chinese’ sovereignty over them (Fu and Wu n.d., 13-

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<sup>10</sup> Hayton challenges the authenticity of this Chinese historical narrative (Hayton 2014, Hayton 2017). Fu and Wu is an internal publication without the name of publisher and year of publication. However, the two authors are authoritative in the subject matter. Fu Ying is now serving in the Foreign Affairs Committee of China’s legislature, the National People’s Congress, and was formerly China’s ambassador to the Philippines, Australia and the UK and a Vice Minister of Foreign Affairs. Wu Shicun is the President of the National Institute of South China Sea Studies, <http://en.nanhai.org.cn/index/survey/motto.html> (accessed 4th September 2018).

16). This is echoed by Hara (2012) who argues that the SFPT made sure that the Paracels and Spratlys, which lie along the ‘Acheson Line’, the US Cold War line of defence in the Western Pacific, would not fall into the hands of Chinese Communists.

What China had considered *settled* arrangements for the post-war order in the South China Sea quickly became *unsettled*. The failure to name China as the recipient state provided the Philippines and South Vietnam with the grounds for occupying the islands in the years following the SFPT. The PRC found it difficult to convince other littoral states of the legitimacy of its version of maritime order. The Philippines interpreted Japan’s renunciation without assigning any recipient as equivalent to a transformation of the status of the islands into *res nullius* (literally meaning ‘nobody’s property’), open to acquisition by other states (Aguda and Arellano-Aguda 2009, 583). Beijing initially believed the North Vietnamese Communists were an ally when Pham Van Dong, North Vietnam’s prime minister, promised to ‘fully respect’ Chinese sovereignty over the Paracel and Spratly Islands in September 1958 in response to the PRC declaration on its territorial waters unveiled in the same month (Fu and Wu n.d., 17, Hayton 2014, 96).<sup>11</sup> ‘Inheriting’ the French claim to the islands, South Vietnam attempted to expel the PRC from the Paracels but the PRC retained control of them following a short battle in January 1974 (Gao and Jia 2013, 105). Following unification in 1975, the communist regime of Vietnam changed its policy stance and publicly announced its claim to the Paracels. Malaysia followed suit by announcing its own continental shelf, covering some of the Spratly islands and their adjacent waters, in 1979, thereby shifting the territorial disputes into the wider maritime arena (Fu and Wu n.d., 19).

Another severe blow to the legitimisation of the Chinese preferred regional order was the adoption of UNCLOS in December 1982, even though the PRC was party to UNCLOS III negotiations. UNCLOS does not define or recognise the concepts of ‘historic waters’, ‘historic sovereignty/ownership’ and ‘historic rights/title’.<sup>12</sup> By ratifying UNCLOS in 1996, according to a non-Chinese interpretation, China had “signed away its rights to claim ‘historical rights’ in other countries’ [exclusive economic zones]” (Hayton 2014, 117). However, China has

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<sup>11</sup> Fu and Wu admit that as a token of friendship to the North Vietnamese regime, China removed two dashes in the Gulf of Tonkin from the initial 11-dash line in 1953 (Fu and Wu n.d., 20). For a similar argument, see Gao and Jia (2013, 103, n37) .

<sup>12</sup> Historic rights may be defined as ‘rights over certain land or maritime areas acquired by a State through a continuous and public usage from time immemorial and acquiescence by other States, although those rights would not normally accrue to it under general international law’ (Tanaka 2015, 223). For the Chinese perspective on historic rights, see Li & Li (2003) and Zou (2001).

repeatedly argued that it possesses historic rights which were derived from ‘the practice of the Chinese people and the Chinese government throughout the long course of history’ (The Government of the People’s Republic of China 2016, para. 3). The historic rights were established *prior* to the entry into force of UNCLOS by the fact that China was the first country that discovered, named, explored and exploited the resources (The Government of the People’s Republic of China 2014, para. 4). Historic rights are enshrined in Chinese domestic law. Article 14 of the 1998 Law of the People’s Republic of China on the EEZ and Continental Shelf reaffirms that while certain (restricted) freedoms are permissible in China’s EEZ, ‘[t]he provisions in this Law shall not affect the rights that the People’s Republic of China has been enjoying ever since the days of the past.’<sup>13</sup>

UNCLOS instead codifies the 200nm EEZ and redefines the continental shelf, which facilitated moves by some littoral states (namely the Philippines, Vietnam and to a lesser degree, Malaysia, Indonesia and Brunei) to assert territorial jurisdiction over some of the islands and waters in the Sea, giving rise to overlapping claims. Through UNCLOS, Southeast Asian claimant states were formally able to challenge Chinese claims to the islands in the South China Sea, and, from China’s perspective, to ‘further consolidate their illegitimate encroachment’ under the framework of international maritime law (Fu and Wu n.d., 63). UNCLOS has effectively provided Malaysia and Vietnam with the legal mechanism to jointly submit their claims to the continental shelf beyond 200nm from their coastal lines to the Commission on the Limits of the Continental Shelf in May 2009, without needing to stipulate ownership of the disputed islands (Hayton 2014, 119). In addition, as discussed above, the old tension between *mare liberum* and *mare clausum* remains unresolved. China’s narrow interpretation of UNCLOS’s Article 58 asserts that the right of freedom of navigation is not unrestricted and that it has the right to regulate the operations of foreign military vessels in its EEZs. According to China, what is not clearly authorised in UNCLOS is not permitted (Ji 2009). By using a mix of domestic legislation, Chinese-specific interpretations of UNCLOS and claims derived from its historic rights, China has engaged in ‘legal layering’ using three intersecting and contradictory sources of legitimacy (Kraska 2011, 315).

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<sup>13</sup> The 1998 Law is available at [http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383573.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383573.htm) (accessed 27 February 2019).

Making matters worse for China, direct American involvement in the South China Sea territorial disputes intensified during the Obama Administration. In May 2010, at a Sino-US Strategic and Economic Dialogue (S&ED) meeting in Washington, Dai Bingguo allegedly told Secretary of State Hillary Clinton privately that the South China Sea constituted China's 'core interest' (Swaine 2011, 8-9, Fu and Wu n.d., 72-73).<sup>14</sup> In the Ministerial Meeting of the ASEAN Regional Forum (ARF) in Hanoi in the following July, Clinton openly expressed that 'the United States 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 'claimants should pursue their territorial claims and accompanying rights to maritime space in accordance with the UN Convention on the Law of the Sea' (Clinton 2010). Clinton's official statement introduced new elements to US policy that to Beijing only emphasised the dissipation of US neutrality over the disputed territories. Clinton's suggestion that the US 'would be prepared to facilitate initiatives and confidence-building measures' implied to Beijing that the US was prepared to be party to the disputes (Clinton 2010).

By internationalising the disputes as a matter for international law, the US was officially declaring that it did not recognise China's claims to the disputed territories and openly rejected China's conception of order. With its preferences delegitimised at the ARF meeting (twelve of the 27 countries present favoured the American approach), followed by a stand-off between Chinese fishing vessels and the Philippine navy in Scarborough Shoal in April 2012, Beijing resorted to coercive measures to reassert its claims. Since September 2013, China has intensified land reclamation activities around the Spratly Islands, increasing its *de facto* control over the disputed islands (Dolven, Elsea, et al. 2015, 1).<sup>15</sup> These were supposed to enhance China's bargaining power while agreeing to resume code of conduct negotiations with ASEAN in the same month (Fu and Wu n.d., 103-107, 114-115).

Therefore, the current impasse primarily relates to China's vision of a regional order based on the Cairo and Potsdam Declarations at the end of World War II as the basis for its sovereignty claims to the islands in the South China Sea and its contestation over the enforced regional order derived from the post-war SFPT. China holds that American anti-communist ideological concerns over China's rise have encouraged encroachment on Chinese sovereignty over the

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<sup>14</sup> Fu and Wu contend, however, that there was no official record of this statement.

<sup>15</sup> The Chinese government did not acknowledge the reclamation until June 2015 (Dolven, Elsea, et al. 2015, 1).

South China Sea. In maintaining the story of its claims based on its sovereignty over the islands and the unspecified historic rights to the maritime areas within the ‘nine-dash line’, China’s primary goal is to delegitimise the claims made by the Philippines, which are derived from the SFPT, and Vietnam.<sup>16</sup>

The second point of contestation concerns China’s challenge to post-war international law from which the US draws legitimacy for its maritime order in the South China Sea. Post-war international agreements with relevance to the South China Sea undermine Chinese territorial interests. UNCLOS, in particular, does not recognise China’s historic rights to the waters in the South China Sea that, according to China, preceded the advent of UNCLOS by ages (Gao and Jia 2013, 121, 123). Moreover, China rejects an exclusive reliance on UNCLOS to resolve the disputes, as UNCLOS does not rule on territorial sovereignty over insular features, which are at the heart of the South China Sea disputes. Both custom and history matter (Gao and Jia 2013, 119).

Beijing views UNCLOS as only the ‘*first* step towards the establishment of a new international legal order for the oceans’ (emphasis added) (Gao 2009, 294-295), and wants to play a greater role in the development of international maritime norms once it ratified UNCLOS in 1996. While acknowledging that historic rights may *not* conform to the prevailing international rules, some Chinese scholars have advanced an argument that China’s state practice regarding historic rights may influence the development of that concept in international law by using a principle enshrined in the preamble of UNCLOS, viz. ‘matters not regulated by this Convention continue to be governed by the rules and principles of general international law’ (Li and Li 2003, Zou 2001). They argue that historic rights are ‘contained in customary international law outside the ambit of, and unaffected by, UNCLOS (Symmons 2016, 261-262). In implementing and enforcing its domestic legal framework for managing its own maritime zones, China is testing international regulation on the EEZ and actively pushing the boundaries and meaning of UNCLOS. Furthermore, Beijing’s response to the July 2016 ruling by the South China Sea Tribunal as ‘just a piece of waste paper’ (Ministry of Foreign Affairs, PRC 2016) and its continued use of force to overturn the legal rights of its neighbours is a concerted effort to

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<sup>16</sup> The SFPT was designed to manage later claims of non-contracting parties. Article 25 states that the Treaty ‘shall not confer any rights, titles, or benefits on any state which is not an Allied Power.’ Further, rights, titles and benefits can only be bestowed upon *states which had signed and ratified the treaty* (emphasis added) (Lee and Van Dyke 2010, 759).

reinterpret or renegotiate UNCLOS. A change to the current understanding of FON in the EEZ in China's favour and the addition of Chinese self-proclaimed practice to the current international law of the sea would fundamentally alter the settled rules of navigation in international waters.

To conclude, China's order-building project entails a restoration of the 1943-45 order that recognised Chinese sovereignty over the islands, nullifying the void left by the SFPT, supplementing UNCLOS with Chinese historical practice with regard to historic rights in the South China Sea, and reinterpreting UNCLOS in favour of *mare clausum*. This irredentist and expansionist project inevitably sets China on a collision course with the US's preferred rules-based ordering project, based primarily on international treaty and law. In the following sections we consider how the US seeks legitimacy for its order by presenting itself as the upholder of international maritime law, while delegitimising China as a threat to the rules-based order. The practice of freedom of navigation has come to represent the source of contestation between the two order-building projects and has taken centre stage in the regional strategies of both the Obama and Trump administrations.

### **American universalism: The US preference for a rules-based South China Sea order**

As highlighted by the conceptual discussion of international order above, order-building projects reflect the values and interests of the main power. The character of the post-1945 regional security order has been principally shaped by American leadership, using a mix of 'persuasion, incentives and coercion' (Patrick 2016, 8). The American regional rules-based maritime order has come to be settled on the US hub-and-spokes alliance system and partnerships with regional states, supported by the guiding principles of international maritime law, including, but not limited to, territorial sovereignty, freedom from intervention and freedom of navigation in international waters, all underpinned by US naval power and operational bases across the Pacific. 'Defending, deepening and extending' this order has been the mainstay of US foreign policy (Nye 2017, 12).

The rules-based maritime order in the South China Sea is not only crucial for US naval access to the Indian Ocean and the Middle East, but also enables the US to fulfil its role as the regional security provider, to provide free and open access to the global commons (O'Rourke 2018, 3-4). There are several reasons why protecting the tenets of this order, and the status quo, is



fundamental to Washington. First, is the US Navy's requirement to maintain free and open access to the world's oceans, one of the global commons. A Department of Defense report published in August 2015 noted that EEZs covered by the US Pacific Command (USPACOM) – renamed the US Indo-Pacific Command (USINDOCOM) in May 2018 – presented 38% of the world's oceans. Unchallenged excessive maritime claims would impede US naval activity in over one-third of the world's oceans and restrict the freedom of the seas (US Department of Defense 2015, 23-24). Second, protecting the international rules-based maritime order is fundamental to maintaining America's preeminent status within the hierarchical regional order. Any significant changes to the existing maritime order in the South China Sea by a challenger to that order is likely to encourage other challenger states to push for changes in other maritime spaces, which would potentially undermine the US-led order and the US leading position within it. Consequently, the American goal in the South China Sea is to deter, or at a minimum, to delay, the advance of a new regional order shaped by China's values and interests.

Defending this South China Sea order is complicated by several factors rooted in the process of US post-war order-building. First, the maritime order continues to be defined by Washington's Cold War anti-communist strategy which enabled the equivocal wording of the post-war SFPT with regard to the ownership and delimitation of islands, including those of the South China Sea. Second, UNCLOS, principally the rules governing EEZs and the continental shelf, exacerbated the territorial problems, since ownership of the disputed territories could determine who would manage lucrative EEZs. Finally, the interests and military priorities of the naval powers took precedence over the concerns of those coastal states who wanted to regulate military freedom of navigation and overflight in their EEZs during the UNCLOS negotiations. As the dominant state, the US has dictated how, and to what extent, rising powers should be integrated in the US-led order, often insisting upon adherence to the settled rules and norms, with rising powers expected to assume responsibility for maintaining and defending – rather than changing – the order (Patrick 2016, 20). The fundamental American belief in the universality of US values and norms is viewed by some states, which are only partially embedded within, or external to, the American order, as inherently transformative and threatening. More importantly, for these states, the US-led order appears exclusive rather than inclusive. Consequently, a source of dissatisfaction and now contestation among re-emergent or rising powers is the so-called universally applicable character of the broader US-led rules-based order (Ikenberry 2011, 189, Lind 2017, 78).

To ‘universalise’ the American rules and to get them settled, the Obama and Trump administrations aim to assert and defend Washington’s preferred notion of regional maritime order by securing freedom of navigation for military vessels. At the same time, they strive to marginalise the alternative position posited by some coastal states who seek to restrict the activities of naval powers in their EEZs. Yet the US position on defending UNCLOS as a foundation of regional maritime order is constrained by its own non-ratification of this Convention, although it adheres to the main principles of UNCLOS (Bateman 2006, 2). The following discussion focuses on the Obama administration’s strategic rebalance and the Trump administration’s ‘Free and Open Indo-Pacific’ (FOIP) strategy, which is the most recent strategy through which the US seeks to defend against the threat that China’s activities present to the rules-based order and free and open access to the global commons in particular.

From 2009 Washington openly demonstrated regional leadership to counteract China’s excessive territorial and maritime claims against the Philippines and Vietnam and also to counter the harassment of US naval vessels (such as the USNS *Impeccable* in March 2009) across the South China Sea. As Clinton’s conversation with Dai Bingguo at the May 2010 Strategic and Economic Dialogue in Washington attests, Beijing felt it was in a stronger position to reject American diktats on the shape or terms of China’s rise, especially with regard to its ‘core interests’ in the South China Sea (Clinton 2014, 75-76). The Obama administration’s announcement of the strategic rebalance in November 2011 signalled US intentions to remain at the heart of the regional order. The rebalance was a means to protect US trade and maritime interests and safeguard the American-led regional security order, especially in the maritime sphere.

The Trump administration has been stark in setting out its twin objectives of deterring China’s contestation of the existing maritime order in the South China Sea, and creating a collaborative regional buttress to counter China’s order-building activities. Both the December 2017 *National Security Strategy* (NSS) and the January 2018 *National Defense Strategy* (NDS) frame China as a revisionist state (along with Russia) and as a threat to the rules-based order. The 2017 NSS declares that ‘China seeks to displace the United States in the Indo-Pacific region, expand the reaches of its state-driven economic model, and reorder the region in its favor’ (White House 2017, 25). The 2018 NDS proclaims that the US is ‘facing increased global disorder, characterized by decline in the long-standing rules-based international order’ (US Department of Defense 2018, 1). Both official documents emphasise the administration’s

assessment of China's aims which are to dislodge the US and to upend the US-led rules-based order. By inferring that China has taken advantage of the inclusive (and universal) nature of the US order, the 2017 NSS rejects conventional US strategy that has sought to engage rivals (White House 2017, 3). Moreover, the adversarial nature of the 2017 NSS appears to preclude China's attempts to rise peacefully with 'Chinese characteristics' in the existing order.

The most recent strategic incarnation of US order-building and maintenance is the Trump administration's FOIP strategy. The vision was initially outlined by President Trump at the November 2017 Asia-Pacific Economic Cooperation summit in Da Nang, Vietnam, with the details of the strategy being fleshed out seven months later by then-Secretary of Defense, James Mattis, at the June 2018 Shangri-La Dialogue in Singapore.<sup>17</sup> Mattis confirmed an ongoing US commitment to the Indo-Pacific region, rooted in shared principles and values, the safeguarding of 'sovereignty and territorial integrity' and the 'protection of maritime orders and interests' through improved interoperability with partners (Mattis 2018b).

It is significant that the strategy was illuminated by the Pentagon and not the State Department, and at a regional security summit attended primarily by defence and security officials, to emphasise the security feel to the FOIP. The security element of the FOIP strategy, in addition to the economic and trade elements, is expected to act as an overarching security architecture containing the alliance system, the burgeoning mini-lateral groupings developing across the region (for example mini-lateral cooperation between Australia-Japan-India, US-Japan-South Korea, and the revived Quad [Australia, India, Japan and US]), in addition to other strategic partnerships (US-Singapore and US-Vietnam). Consistent with previous regional strategies, the aims are to protect US alliance system and liberal norms, and to strengthen US naval supremacy.

By formally adopting the concept of 'Indo-Pacific', the US is catching up with other states in the region – including Japan, Australia, India and Indonesia – all of whom have grasped the significance of the Indo-Pacific maritime space in the past decade.<sup>18</sup> The US is advocating not only the expected safeguarding of maritime order in the Pacific Ocean but is also recognising

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<sup>17</sup> Japanese Prime Minister Abe first presented the concept of a free and open Indo-Pacific at the sixth Tokyo International Conference on African Development, held in Kenya in August 2016 See: [https://www.mofa.go.jp/afr/af2/page4e\\_000496.html](https://www.mofa.go.jp/afr/af2/page4e_000496.html) (accessed 10 January 2019).

<sup>18</sup> While officially, 'Asia-Pacific' remained the preferred construct during the Obama Administration, Hillary Clinton first linked the Indian and Pacific Oceans in her "America's Pacific Century" article (Clinton 2011).

the significant connectivity between the Indian and Pacific Oceans, including the maritime spaces and coastal states within these two oceans, and acknowledging the role of India as a strategic partner to the US and as a crucial actor in the Indo-Pacific region (Pant 2018).

Underwritten by the Obama administration's strategic rebalance strategy and now incorporated into the FOIP strategy, the regional security order is expanding to include previously excluded states such as Vietnam, and to partially integrate non-aligned states, such as India (Ikenberry 2011, 232), although not necessarily within the framework of a formal alliance – at least not initially. From Washington's perspective, as emphasised by former Secretary of Defense Mattis, states who share principles that are aligned with and adhere to international law such as 'respect for sovereignty and independence' and who support 'peaceful resolution of disputes without any coercion, free and fair trade and investment without practicing predatory economics against poorer countries trying to develop,' are welcome (Mattis 2018a). Keen to promote a shared vision and shared principles with Southeast Asian nations, US Vice President Mike Pence also championed that the US stands 'shoulder to shoulder with you [ASEAN members] for freedom of navigation...to ensure that your nations are secure in your sovereign borders on land [and] at sea' when he attended the sixth US-ASEAN Summit in Singapore in November 2018 (Pence 2018).

Pence also decisively asserted, 'we all agree that *empire* and aggression have no place in the Indo-Pacific' (emphasis added) (Pence 2018). This statement was aimed at countering China's 'historical' order-building, which justifies land reclamation activities, and hybrid salami-slicing and grey zone operations (activities teetering between war and peace) in the South China Sea, using coast guard, fishing and paramilitary vessels to threaten and coerce local fishermen. More importantly, the goal of such tactics, as seen from Washington, is to gradually strengthen China's presence and position in the South China Sea, and ultimately, to undermine the principle of freedom of the seas and specifically, to prevent the US Navy from operating freely in EEZ waters – 'an application of the principle of freedom of the seas' – as outlined in international law through UNCLOS (O'Rourke 2018, 3-4). As a naval power, for whom the right to operate freely in EEZ waters is essential, UNCLOS 'does not give coastal states the right to regulate foreign military activities in the parts of their EEZs beyond their 12-nautical-mile territorial waters'; only the ability to regulate economic activities (O'Rourke 2018, 8).

As will be explored in the section below, FONOPs are integral to the protection and maintenance of the existing liberal maritime order but are also a source of tension between the US and China in relation to access to what China considers its EEZs around the contested islands in the South China Sea. Since 2010, the US has walked a fine line between maintaining neutrality over the sovereignty issue, and upholding international law; however, since 2014, priority has been given to protecting maritime public goods by conducting routine FONOPs in the South China Sea. The US position on Chinese island-building activities and its ‘excessive’ claims based on historic rights are clear as they relate to UNCLOS: they contravene international maritime law. As its regional authority expands, China, however, refutes both aspects of the US maritime order and openly asserts a competing interpretation of key rules and norms, which is discussed below.

### **Freedom of navigation: The front line of China-US order contestation**

In this section, we consider how China actively contests the US, through the exploitation of UNCLOS’s ambiguity over customary practice involving military activities in the EEZ and FON, and how the US asserts FON in response. China’s dissatisfaction with the status quo was, to a large extent, determined by its relatively low international status during the UNCLOS III negotiations; it was not party to the formation of UNCLOS I and II, as the PRC was not recognised as the sole legal government representing China by the UN until October 1971. China argues that the first four Conventions in 1958<sup>19</sup> did not reflect the interests of many developing states and only the interests of the naval superpowers, namely the US and the Soviet Union (Gao 2009, 267-270).

US-China competing order-building activities in the South China Sea centre on their differing interpretations of customary practice and international law and principally relate to what FON activities can be ‘legally’ conducted by a third party in a coastal state’s EEZ. Allowing a coastal state jurisdiction over the exploration and exploitation (and protection) of natural resources within the 200nm EEZ originated in the UNCLOS III negotiations. It was an attempt by coastal states to have greater access to their maritime resources to redress the balance, as international law had long been shaped by imperial conquerors or explorers (Hayton 2014, 120). As a

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<sup>19</sup> The Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources of the High Seas.

compromise between *mare liberum* and *mare clausum*, freedom of navigation and overflight in the EEZ is, according to the US, recognised under UNCLOS to include military vessels and aircraft. Although this freedom is not explicitly affirmed, Article 58 appears to protect, or at least not prohibit, it (Tanaka 2015, 396).

Having suffered from the trauma of Western invasion from the sea before 1949, China expresses a narrower interpretation of FON that precludes foreign naval vessels' innocent passage through its territorial seas and FON through its EEZs. This interpretation is enshrined in its domestic law, notably its Law on the Territorial Sea and the Contiguous Zone (1992) and Law on the Exclusive Economic Zone and the Continental Shelf (1998).<sup>20</sup> In its statement upon its ratification of UNCLOS in 1996, China reaffirmed its position on restricting innocent passage through its territorial sea.<sup>21</sup> China's objections concern FON and overflights in the EEZ, including definitions of the EEZ vis-à-vis the high seas (Articles 58, 78, 86 and 88 of UNCLOS), and interpretations of 'peaceful purposes' (Article 301), which relates to Chinese interpretation of any military activity as potentially falling within the 'threat of force against a coastal state' (Article 301) (Gao 2009, 293-294). Maintaining that the EEZ differs from the high seas in nature (by referring to Article 86), China takes issue with the legitimacy of US military activities within its self-defined South China Sea EEZs because of security concerns. The need to curtail or even cease freedom of navigation and overflight has become overwhelmingly important to Beijing since the installation of a naval base and a spacecraft launch site in Hainan, the southernmost province of China (You 2016, 649). Jurisdiction over the Paracel Islands (to the southeast of Hainan), including the adjacent waters, is now a matter of Chinese national security, requiring Beijing's continued push for the legal status of an EEZ to approximate that of the territorial sea in international law. This is shown in the *Impeccable* incident of March 2009 in which China contended that it had the right to deny the USNS *Impeccable*'s entry into its EEZ off Hainan Island because UNCLOS grants Chinese jurisdiction over the EEZ (Ji 2009).<sup>22</sup> Ideologically, China also alleges that freedom of

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<sup>20</sup> Available at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN\\_1992\\_Law.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf); and [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn\\_1998\\_eez\\_act.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf) (accessed 24 July 2018). For the first time China officially raised the notion of historic rights in Article 14 of the 1998 Law.

<sup>21</sup> China's statement, dated 7 June 1996, is available at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#China%20Upon%20ratificati](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratificati) on (accessed 27 February 2019).

<sup>22</sup> The Chinese line of argument is countered by the claim that the EEZ is *sui generis* and the coastal state's jurisdiction is confined to the exploration and exploitation of living and non-living resources within the zone only. Jurisdiction is not equivalent to sovereignty (Dutton 2011, 49-50, Franckx 2011, 200, Tanaka 2015, 130).

navigation by warships was a Western colonial practice, facilitating European colonialisation of Asian states (Zhang 2010, 37).

The US Department of Defense executes the FONOP program to globally enforce FON. The conduct of FONOPs, for the US, has both ‘legal and practical’ obligations so as to ensure that the hard-fought compromises on open maritime access to EEZs achieved during the arduous UNCLOS III negotiations continue to be upheld in ‘word and deed’ (Kuok 2016, iii). Aiming to challenge maritime claims which the US believes to be excessive, the FONOP programme was established in 1979, in the midst of the UNCLOS III negotiations, to protect US interests around the world in light of its stance on the insufficiency of international law to safeguard US navigational freedoms (Aceves 1996). Since UNCLOS neither explicitly sets out whether and what military activities can be conducted in the EEZ nor clarifies the relationship between the EEZ and the high seas, the US uses its FONOP programme to help ‘interpret’ UNCLOS through its own operational practices (Aceves 1996).<sup>23</sup> It vows to uphold the basic principles governing the liberal order in the Asia-Pacific, namely ‘the peaceful resolution of disputes, the right of countries to make their own security and economic choices free from coercion, and the freedom of overflight and navigation guaranteed by international law’ (Carter 2016, 66). The conduct of FONOPs are also significant in light of China’s ‘strategic ambiguity’ over its as yet unspecified claims incorporated within its nine-dash line claims (either to the entire South China Sea or to the islands within it) (Kuok 2016, iii).

The FONOP in October 2015 deserves particular attention for its direct challenge to the legality of Chinese activities in the Sea. USS *Lassen* sailed within 12 nm of Subi Reef, which was transformed into an artificial island by the Chinese in the Spratlys. The US argued that as an originally submerged reef, Subi was not qualified for having a 12nm territorial sea, according to UNCLOS (Green, Glaser and Poling 2015). While the US Navy and the Trump administration announced in June 2017 that it would no longer publicise the operations, the practice would continue (Clover 2017). In November 2018 US Vice President Pence assured his Southeast Asian audience in Singapore, ‘*The South China Sea doesn’t belong to any one nation. And ... the United States will continue to sail and fly wherever international law allows and our national interests are advanced*’ (emphasis added) (White House 2018). President

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<sup>23</sup> Article 86 implies that high seas are ‘all parts of the sea which are not included in the EEZ, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic State’. The scope of the high seas therefore depends on whether a coastal state claims its EEZ (Tanaka 2015, 22-23, 155).

Trump signed into law the Asia Reassurance Initiative Act (ARIA) of 2018 in December 2018 which authorises the spending of \$1.5 billion a year for five years (2019-2023) to enhance the US presence in the Indo-Pacific, including the enforcement of FON.<sup>24</sup> The first FONOP after the signing of the ARIA was conducted by USS *McCampbell* in January 2019 when it transited under innocent passage within 12nm of the Paracels (Reuters 2019). In addition, the US is rallying international support and legitimacy for its FONOPs. Similar FON patrols were performed by other non-claimant states such as Australia, France, Japan and the UK in 2018 (Greene 2018, Luc 2018, Panda 2018).<sup>25</sup>

### **Conclusion**

At the beginning, we asked why both China and the US are equally determined to defend their respective ordering projects, even risking direct confrontation. At the heart of the South China Sea disputes, we argue, is not whether Chinese behaviour is assertive or aggressive, but is instead a contestation between Chinese and American order-building projects. This paper has unravelled China's and US's competing attempts to defend and promote their preferred maritime order in the South China Sea. China lays claim to sovereignty over the islands in the South China Sea by pursuing an irredentist approach that would revert the regional international order to the one accepted by the then major world powers, including China, at the Cairo and Potsdam conferences in 1943-1945 (before the Chinese Communists' ascent to power). However, its historic notions of order have been undermined by, and are therefore currently incompatible with, the international 'liberal' order promoted by the US post-1951, which no longer recognises Chinese historic rights/titles to the islands (and/or the sea). Regional states have employed the legal framework presented by the post-war SFPT and UNCLOS to lay claims to the islands. The US, on the other hand, maintains that it is fiercely opposed to an increasingly assertive China that aims to unsettle the broadly accepted American-led maritime order, built on international treaty and law and the principle of freedom of navigation, enshrined in UNCLOS.

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<sup>24</sup> For the details of the ARIA of 2018, see: <https://www.congress.gov/115/bills/s2736/BILLS-115s2736enr.pdf> (accessed 23 February 2019).

<sup>25</sup> China was enraged at the British Defence Secretary Gary Williamson's suggestion in February 2019 that a British aircraft carrier HMS Queen Elizabeth be deployed to the Pacific and the South China Sea in 2021 (Liu 2019).



This order-contestation perspective helps understand why the disputes appear to have reached deadlock. International order is by its nature hierarchical. On the one hand, the US is unable to co-opt China into its order-building project; on the other, China fails to establish a negotiated and mutually agreeable order between itself, the US, regional states and ASEAN. Without committing itself to a set of *contemporary* international norms and rules, China can at best thwart the continuation of the American order without representing a more viable and legitimate regional order to ‘lock in’ other regional states. With limited scope of legitimacy, the two ordering projects presently co-exist uneasily within the South China Sea and in contention with each other. The disputes have thus reached an open-ended impasse.

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