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Narrowing “The Gap”: Counter Gray Zone Operations

Raul (Pete) Pedrozo

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*Raul (Pete) Pedrozo**

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* Captain Raul (Pete) Pedrozo, JAGC, U.S. Navy (Ret.), is the Howard S. Levie Professor of the Law of Armed Conflict at the Stockton Center for International Law, U.S. Naval War College. After retirement from the U.S. Navy, he was a Professor of International Law at the Naval War College and Principal Deputy Staff Judge Advocate, U.S. Indo-Pacific Command. On active duty, he served in senior positions in the Department of Defense, including Staff Judge Advocate, U.S. Pacific Command, and Special Assistant to the Under Secretary of Defense for Policy.

The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

It is universally recognized that all States may use force in self-defense.¹ To be lawful, however, the force used must be necessary and proportionate to the nature of the threat being addressed.² Nonetheless, there is an ongoing debate between States regarding whether the right of self-defense applies against any illegal use of force or only against an “armed attack,” as reflected in Article 51 of the UN Charter.³

In determining whether self-defense is legally justified, the International Court of Justice (ICJ) has determined that it is “necessary to distinguish the most grave forms of the use of force . . . from other less grave forms.”⁴ Accordingly, the court concluded in *Nicaragua v. United States* that a State may only exercise its right of self-defense against the “most grave” forms of use of force—i.e., “those constituting an armed attack.”⁵ The ICJ reached a similar conclusion in the *Oil Platforms* case. Specifically, the court found that the U.S. attacks on Iran’s oil platforms could only be justified as an exercise of self-defense if the United States showed that it had been attacked by Iran “and that those attacks were of such a nature as to be qualified as ‘armed attacks’ within the meaning of . . . Article 51.”⁶

Most States, including U.S. partners and allies in the Asia-Pacific region, subscribe to the “Gap Theory” pronounced by the ICJ. The United States, however, considers that customary international law allows States to exercise the right of self-defense against any illegal use of force.⁷ By requiring that

1. U.N. Charter art. 51.

2. Kraska et al., *Newport Manual on the Law of Naval Warfare*, 101 INTERNATIONAL LAW STUDIES 1, 32 (2023); William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE JOURNAL OF INTERNATIONAL LAW 295, 304 (2004); OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 1.11.5 (rev. ed. July 2023) [hereinafter DOD LAW OF WAR MANUAL (2023)].

3. Article 51 provides that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

4. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶¶ 191, 247 (June 27).

5. *Id.*

6. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶¶ 51, 64 (Nov. 6).

7. Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MILITARY LAW REVIEW 89, 92–94 (1989) (The United States has “always construed the phrase ‘armed attack’ in a reasonable manner, consistent with a customary practice that enables any State

“an attack reach a certain level of gravity” before the right of self-defense is triggered, the United States believes that revisionist States like China, Russia, North Korea, and Iran will exploit the “Gap” by engaging in malign activities that fall below the threshold of an “armed attack,” anticipating that they can conduct gray zone operations without being subject to a decisive military response.⁸

This article examines possible options States can use to counter China’s gray zone operations that fall below the level of an “armed attack.” Given that diplomatic protests are not having their intended effect on curbing Chinese transgressions, if properly applied the proposed options will allow States to use gray zone operations to counter China’s provocative behavior. The article, in Part II, reviews China’s recent aggressive behavior in the East China Sea, Taiwan Strait, and South China Sea. In Part III it addresses the use of countermeasures under the law of State responsibility as a tool to induce China to comply with its international legal obligations. In Part IV the article discusses various counter-piracy tactics, techniques, and procedures (TTP) successfully used against Somali pirates that could be modified to effectively counter China’s gray zone activities. These TTPs use non-lethal technologies that fall below the threshold of a “use of force” or an “armed attack” within the meaning of Article 2(4) and Article 51 of the UN Charter and, therefore, qualify as lawful countermeasures under international law.

II. CHINA’S GRAY ZONE OPERATIONS

A. East China Sea

For the past decade, China Coast Guard (CCG) ships have increasingly engaged in a concerted effort to “change the status quo by force and coercion in the waters around the Senkaku Islands.”⁹ This provocative behavior has included attempts to exercise maritime law enforcement jurisdiction against Japanese fishing vessels operating in Japan’s contiguous zone and territorial

effectively to protect itself and its citizens from every illegal use of force aimed at the State.”); DOD LAW OF WAR MANUAL (2023), *supra* note 2, §§ 1.11.5, 1.11.5.2.

8. Taft IV, *supra* note 2, at 300–1.

9. Ministry of Foreign Affairs of Japan, *Trends in China Coast Guard and Other Vessels in the Waters Surrounding the Senkaku Islands, and Japan’s Response* (Aug. 1, 2024), https://www.mofa.go.jp/region/page23e_000021.html [hereinafter *Trends in CCG Vessels and Japan’s Response*].

sea, as well as a near persistent presence of armed CCG ships in these waters.¹⁰ For example, between 2012 and 2022, CCG and other Chinese vessels operating in Japan’s contiguous zone around the Senkakus increased from 428 to 1201.¹¹ Chinese vessels operating in the territorial sea increased from 73 to 103.¹² These vessels maintained a nearly continuous presence in the contiguous zone—336 days in 2022 (compared to 91 days in 2012)—as well as increased intrusions into the territorial sea—37 days in 2022 (compared to 23 days in 2012).¹³ For the first four months of 2024, there have been 33 territorial sea and 577 contiguous zone intrusions.¹⁴ These malign activities are not a legal exercise of navigational rights and freedoms or a valid exercise of maritime law enforcement jurisdiction, but rather are purportedly undertaken to demonstrate that Japan is not exercising effective administrative control of the islands and their surrounding waters.

Japan views China’s actions as a violation of international law and has, on countless occasions, conveyed its position through diplomatic channels, expressing strong concern to Beijing over its provocative behavior and demanding that China prevent such incidents from re-occurring.¹⁵ Additionally, on-scene Japan Coast Guard ships routinely intercept and order CCG ships intruding into Japanese territorial waters to leave the area immediately.¹⁶ For example, on June 7, 2024, four armed CCG vessels conducted a “routine patrol” in the territorial sea around the Senkakus to allegedly “safeguard sovereignty, security, and maritime rights,” ensure “peace and stability,” and counter Japan’s recent “negative moves.”¹⁷ Tokyo strongly protested the intrusion as a “breach of international law,” demanding China immediately withdraw the vessels.¹⁸

10. *Id.* (thirty-seven incidents between 2018 and 2022); JAPAN MINISTRY OF DEFENSE, DEFENSE OF JAPAN 2023 at 1, 72 [hereinafter DEFENSE OF JAPAN 2023], https://www.mod.go.jp/en/publ/w_paper/wp2023/DOJ2023_EN_Full.pdf (last visited Aug. 9, 2024).

11. DEFENSE OF JAPAN 2023, *supra* note 10, at 2, 72.

12. *Trends in CCG Vessels and Japan’s Response*, *supra* note 9.

13. *Id.*

14. *Id.*

15. *Id.*; DEFENSE OF JAPAN 2023, *supra* note 10, at 72.

16. *Trends in CCG Vessels and Japan’s Response*, *supra* note 9; DEFENSE OF JAPAN 2023, *supra* note 10, at 72.

17. *Chinese Armed Vessels Patrol Waters Around Disputed Islands, Angering Japan*, REUTERS (June 7, 2024), <https://www.reuters.com/world/asia-pacific/chinese-armed-vessels-patrol-waters-around-disputed-islands-angering-japan-2024-06-07/>.

18. *Id.*

Japan incorporated the Senkaku Islands in 1895 and has ever since exercised effective administration and control over the islands, except for the twenty-year period between 1951 and 1972 when the islands were placed under U.S. administration pursuant to the San Francisco Peace Treaty.¹⁹ Placing the islands under U.S. administration in 1951 acknowledged that the islands were considered sovereign Japanese territory prior to the conclusion of the Peace Treaty. The United States transferred administrative control of the Senkakus back to Japan in 1972 pursuant to the Okinawa Reversion Treaty.²⁰ Thus, effective May 15, 1972, Japan assumed “full responsibility and authority for the exercise of all and any powers of administration, legislation, and jurisdiction over the territory and inhabitants of the said islands,” including the surrounding waters.²¹ Further evidence of exclusive Japanese authority over the Senkaku Islands is found in Article II of the Okinawa Revision Treaty,²² which extends U.S. defense obligations under Article V of the U.S.-Japan Mutual Cooperation and Security Treaty²³ to the islands. Continued Chinese provocations in the vicinity of the Senkakus over the years

19. Treaty of Peace with Japan art. 3, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 (“Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 deg. north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.”).

20. Agreement between the United States of America and Japan concerning the Ryukyu Islands and Daito Islands, Japan-U.S., art. I, June 17, 1971, 23 U.S.T. 446 (1971).

21. *Id.* art. I, ¶ 1 (“With respect to the Ryukyu Islands and the Daito Islands, as defined in paragraph 2 below, the United States of America relinquishes in favor of Japan all rights and interests under article 3 of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, effective as of the date of entry into force of this Agreement. Japan, as of such date, assumes full responsibility and authority for the exercise of all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of the said islands.”).

22. *Id.* art. II (“It is confirmed that treaties, conventions and other agreements concluded between the United States . . . and Japan, including, but without limitation, the Treaty of Mutual Cooperation and Security between the United States of America and Japan signed at Washington on January 19, 1960, and its related arrangements and the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan signed at Tokyo on April 2, 1953, become applicable to the Ryukyu Islands and the Daito Islands . . .”).

23. Treaty of Mutual Cooperation and Security Between Japan and the United States of America, Japan-U.S., art. V, Jan. 19, 1960, 11 U.S.T. 1632, T.I.A.S. No. 4509, 373

have prompted the United States to reaffirm its defense obligations under Article V on numerous occasions, most recently in April 2024.²⁴

B. *Taiwan Strait*

In January 2021, China enacted a new Maritime Police Law to regulate the duties of its maritime police agencies, including the CCG, and safeguard China’s sovereignty, security, rights, and interests in sea areas under Chinese jurisdiction.²⁵ The law authorizes the CCG to use all necessary measures, including the use of weapons, to stop infringement of China’s sovereignty, sovereign rights, and jurisdiction.²⁶ It additionally allows for the establishment of maritime security zones that allow the CCG to restrict or prohibit the passage of ships in waters subject to China’s jurisdiction.²⁷ Three months later, China enacted revisions to the 1983 Maritime Traffic Safety Law to expand the application of the original law from “coastal waters” to “sea areas under the jurisdiction of the People’s Republic of China.”²⁸ Like the Maritime Police Law, the revised law allows the maritime administrative agency

U.N.T.S. 186 (“Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.”).

24. “President Biden . . . reaffirmed that Article V applies to the Senkaku Islands. We reiterated our strong opposition to any attempts by the People’s Republic of China (PRC) to unilaterally change the status quo by force or coercion in the East China Sea, including through actions that seek to undermine Japan’s longstanding and peaceful administration of the Senkaku Islands.” Press Release, The White House, United States-Japan Joint Leaders’ Statement (Apr. 10, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/10/united-states-japan-joint-leaders-statement/>.

25. Maritime Police Law of the People’s Republic of China arts. 1, 3, 5, 10 (promulgated by Standing Committee, 13th Nat’l People’s Cong., Jan. 22, 2021, effective Feb. 1, 2021), XINHUA NEWS AGENCY, (Jan. 22, 2021), <http://politics.people.com.cn/n1/2021/0123/c1001-32009344.html>.

26. *Id.* art. 22.

27. *Id.* art. 25.

28. Maritime Traffic Safety Law of the People’s Republic of China art. 2 (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 2, 1983, rev’d Nov. 7, 2016, rev’d Apr. 29, 2021, effective Sept. 1, 2021) (English translation available at JAPAN P&I CLUB,

to establish traffic control areas and restricted navigation areas where passage is prohibited.²⁹ New regulations issued by the CCG that took effect on June 15, 2024, authorize the boarding and inspection of ships operating in waters under Chinese jurisdiction. If a vessel refuses to cooperate with the inspection, CCG officials “may conduct a compulsory inspection,” and if the noncompliant vessel flees the scene, CCG officials are authorized to “take necessary measures to intercept and pursue it.”³⁰ The new regulations also allow for the establishment of temporary maritime warning zones in accordance with Article 25 of the Maritime Police Law, where the CCG can prohibit or restrict the passage of ships.³¹ Of particular concern is Article 257, which allows for the detention of foreign nationals “suspected of violating entry and exit control” restrictions for up to sixty days without trial.³²

Many of the provisions in the two laws and new regulations are inconsistent with international law (particularly as they are applied to foreign-flagged vessels) and unlawfully impede navigational rights and freedoms of the international community.³³ Moreover, the scope of application of the two laws and regulations is purposefully vague (i.e., waters under China’s jurisdiction), which allows China to engage in provocative gray zone operations throughout the First Island Chain to advance its illegal claims and intimidate its neighbors and other user States. In June 2022, a spokesperson for the Ministry of Foreign Affairs indicated that China exercises sovereignty, sovereign rights, and jurisdiction over the waters of the Taiwan Strait consistent with the UN Convention on the Law of the Sea (UNCLOS).³⁴

https://www.piclub.or.jp/wp-content/uploads/2021/08/Maritime-Traffic-Safety-Law-of-the-Peoples-Republic-of-China_Revised-in-2021-1.pdf.

29. *Id.* arts. 19, 44.

30. China Coast Guard Order No. 3, Provisions on Administrative Law Enforcement Procedures of Coast Guard Organizations art. 33 (issued May 15, 2024, effective June 15, 2024), <https://m.055110.com/law/1/31824.html>.

31. *Id.* art. 35.

32. *Id.* art. 257.

33. For an analysis of the Maritime Police Law and Maritime Traffic Safety Law, see Raul (Pete) Pedrozo, *Maritime Police Law of the People’s Republic of China*, 97 INTERNATIONAL LAW STUDIES 465 (2021); Raul (Pete) Pedrozo, *China’s Revised Maritime Traffic Safety Law*, 97 INTERNATIONAL LAW STUDIES 956 (2021).

34. “According to UNCLOS and Chinese laws, the waters of the Taiwan Strait . . . are divided into several zones including internal waters, territorial sea, contiguous zone, and the Exclusive Economic Zone. China has sovereignty, sovereign rights and jurisdiction over the Taiwan Strait.” Press Release, Foreign Ministry of the People’s Republic of China, Spokesperson Wang Wenbin’s Regular Press Conference (June 13, 2022), <https://>

Thus, China believes that the entire strait is comprised of “sea areas under the jurisdiction of the People’s Republic of China” within the meaning of both the Maritime Police Law and Maritime Traffic Safety Law, as well as the new CCG regulations.

Since 2020, China has increased its military presence around Taiwan, to include firing ballistic missiles over the island, conducting military flights into Taiwan’s air defense identification zone (ADIZ), and engaging in large-scale military exercises around the island.³⁵ For example, 2022 saw a 79 percent increase in ADIZ incursions—1,700 compared to 972 in 2021—including 1,500 center line incursions.³⁶ Similarly, center-line incursions by the People’s Liberation Army (PLA) Navy have also increased.³⁷ On June 12, 2024, China sent nine warships and thirteen fighter aircraft to encircle and intimidate Taiwan.

The CCG has also been called on to play a more prominent role in the Taiwan Strait. Following an incident in February 2024 that left two Chinese nationals dead, the CCG increased its law enforcement patrols around Taiwan-occupied Kinmen Island.³⁸ A few days after the fatal accident, several CCG cutters entered restricted waters southeast of Kinmen Island and boarded a Taiwanese tour boat while carrying out “regular law enforcement inspections” near Kinmen.³⁹ Later that week, seven Chinese vessels, including two CCG patrol ships, two surveillance ships, one fisheries law enforcement ship, and two Ministry of Transport rescue vessels, conducted an ex-

www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202206/t20220613_10702460.html.

35. U.S. DEP’T OF DEFENSE, REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 136–37 (2023) [hereinafter DOD REPORT (2023)].

36. *Id.* 136; CAITLIN CAMPBELL ET AL., CONG. RSCH. SERV., R48044, TAIWAN DEFENSE ISSUES FOR CONGRESS 3 (updated May 10, 2024), <https://crsreports.congress.gov/product/pdf/R/R48044>.

37. CAMPBELL ET AL., *supra* note 36, at 3.

38. Jesse Johnson, *China Coast Guard Conducts Patrols in Waters Near Taiwan’s Kinmen Islands*, JAPAN TIMES (Feb. 25, 2024), <https://www.japantimes.co.jp/news/2024/02/25/asia-pacific/politics/china-coast-guard-kinmen-patrol/>.

39. *China’s Coast Guard Sails Near Neighbor’s Front-Line Islands*, NEWSWEEK (May 3, 2024), <https://www.newsweek.com/china-coast-guard-sails-near-taiwan-frontline-islands-1896957>; CAMPBELL ET AL., *supra* note 36, at 3.

ercise with three Chinese fishing vessels in the prohibited and restricted waters off Kinmen, while four other CCG ships entered the prohibited and restricted waters from the south of Dadan Island.⁴⁰

By normalizing military exercises around Taiwan, the PLA is eroding Taipei's readiness and its ability to assess whether an apparent "exercise" is being used to obscure preparations for an actual invasion. Routine exercises "also provide the PLA with training and intelligence-gathering opportunities" and put increasing political pressure on Taiwanese leaders to acquiesce to China's reunification efforts.⁴¹

Between 2022 and 2024, the PLA conducted three large-scale military exercises around Taiwan to demonstrate various options available to China should it decide to invade the island.⁴² The last exercise, Joint Sword-2024A, was intended to "punish" Taiwan for its "separatist acts" after the inauguration of President Lai.⁴³ For the first time, the exercise included military and law enforcement coordination between the PLAN and CCG around Taiwan and its outlying islands. CCG units intruded into the restricted and prohibited waters of Dongyin and Wuqiu Islands and conducted law enforcement drills east of the main island, including the use of water cannons and the visit and search of a Chinese-flagged fishing vessel.⁴⁴ The United States expressed deep concern over the provocative maneuvers, noting that China's actions risk escalation and erode "longstanding norms that for decades have maintained peace and stability across the Taiwan Strait, which is critical for regional and global security and prosperity and a matter of international concern."⁴⁵

Like Taiwan, the Philippines has also expressed concerns over how the new CCG regulations will be applied in the South China Sea. One week after

40. Hung Hsueh-kuang & Sean Lin, *11 Chinese Vessels Detected in Taiwan-controlled Waters Off Kinmen*, FOCUS TAIWAN (May 9, 2024), <https://focustaiwan.tw/cross-strait/202405090019>.

41. CAMPBELL ET AL., *supra* note 36, at 3.

42. DOD REPORT (2023), *supra* note 35, at 141.

43. Helen Davidson, *China Announces 'Punishment' Drills Around Taiwan After Inauguration of New President*, THE GUARDIAN (May 23, 2024), https://www.theguardian.com/world/article/2024/may/23/china-taiwan-punishment-military-drills-president-inauguration?CMP=oth_b-aplnews_d-1.

44. Christopher Johnstone & Bonny Lin, *Responding to a More Coercive Chinese Coast Guard and a Potential PRC Quarantine of Taiwan*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (June 7, 2024), <https://www.csis.org/analysis/responding-more-coercive-chinese-coast-guard-and-potential-prc-quarantine-taiwan>.

45. Press Statement, U.S. Dep't of State, PRC Military Drills Near Taiwan (May 25, 2024), <https://www.state.gov/prc-military-drills-near-taiwan/>.

the regulations were adopted, Philippine Defense Secretary Gilberto Teodoro labeled the new rules as provocative and a violation of UNCLOS and the UN Charter, which requires States to “refrain from the use of force or aggression to enforce . . . illegal territorial claims in the maritime domain.”⁴⁶ House Deputy Minority Leader France Castro added that “if any country has a right to arrest foreigners, it is the Philippines. China is the one trespassing in our territorial waters and our exclusive economic zone.”⁴⁷

C. South China Sea

In 1994, China illegally occupied Mischief Reef, a low-tide elevation located within the Philippines’ exclusive economic zone (EEZ). China may not legally claim sovereignty or sovereign rights over low-tide elevations (such as Mischief Reef and Second Thomas Shoal) that are located within the EEZ or continental shelf of another country.⁴⁸ Nonetheless, since 1994, China has systematically engaged in a protracted campaign of aggressive conduct against Philippine interests in the South China Sea (SCS). Despite countless diplomatic protests by the Philippines and bilateral talks between the two countries, China’s malign behavior towards the Philippines (and other SCS claimants) has been unrelenting. China’s coercive actions include interfering with Philippine resource rights in its EEZ and continental shelf (e.g., Reed Bank), ramming and sinking Filipino fishing vessels, illegally seizing fishing equipment and fish catches (e.g., Scarborough Shoal), using water cannons against Philippine vessels, reclaiming and militarizing features within the Philippines EEZ, causing extensive environmental damage in the Philippines EEZ, and blocking the resupply of Filipino Marines at Second Thomas Shoal.⁴⁹

46. *Philippines Says China Coast Guard Rules a Provocation*, REUTERS (May 23, 2024), <https://www.reuters.com/world/asia-pacific/philippines-says-china-coast-guard-rules-provocation-2024-05-24/>.

47. Camille Elemia, *Philippines Blasts Beijing’s New Trespass Rule in Contested Waters As ‘Illegal’*, EURASIA REVIEW (May 18, 2024), <https://www.eurasiareview.com/18052024-philippines-blasts-beijings-new-trespass-rule-in-contested-waters-as-illegal/>.

48. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, ¶¶ 305, 309, 1040 (Perm. Ct. Arb. 2016) [hereinafter *South China Sea Arbitration*].

49. *Id.* ¶¶ 649–1181; Raul (Pete) Pedrozo, *Is a South China Sea Code of Conduct Viable?*, 97 INTERNATIONAL LAW STUDIES 937, 939–41, 950–51 (2021); Raul (Pete) Pedrozo, *Does the Revised U.S. South China Sea Policy Go Far Enough?*, 99 INTERNATIONAL LAW STUDIES 72, 75–77 (2022).

After bilateral consultations failed, the Philippines initiated arbitration proceedings against China on January 22, 2013, pursuant to Articles 286 and 287, and Article 1 of Annex VII of UNCLOS to address some of these transgressions.⁵⁰ The Philippines requested that the Tribunal determine the validity of China's claimed historic rights based on the Nine-Dash Line in the SCS, the status of the SCS maritime features and the maritime entitlements these features can generate, and the lawfulness of China's actions that allegedly violated China's obligations under UNCLOS and other international conventions. As a party to UNCLOS, China is subject to the compulsory dispute settlement provisions of the Convention, yet Beijing refused to participate in the proceedings. Nonetheless, on July 12, 2016, the Tribunal issued a unanimous Award in favor of the Philippines invalidating China's expansive Nine-Dash Line claim in the SCS.⁵¹ Although the decision is final and binding on both parties,⁵² China has refused to comply with the Tribunal's decision, stating that the Award is "null and void" and has "no legal binding force" on China.⁵³

Of note, regarding CCG law enforcement operations, the Tribunal found that blocking and harassment maneuvers conducted by CCG vessels "created serious risk of collision and danger to Philippine ships and personnel; and . . . that China's operation of its law enforcement vessels . . . violated Rules 2, 6, 7, 8, 15, and 16 of the Convention on the International Regulations for Preventing Collisions at Sea, 1972 [COLREGS]."⁵⁴ The Tribunal therefore declared that China had "breached its obligations under Article 94 of the Convention."⁵⁵

Over the past year, Second Thomas Shoal has re-emerged as one of the centerpieces of friction between China and the Philippines. In 1999, the Philippines intentionally grounded the BRP *Sierra Madre* (LT-57) at Second Thomas Shoal and stationed a detachment of Filipino Marines on the Navy ship. The outpost has been a constant source of tension between the two nations each time the detachment is resupplied or replacement personnel are

50. United Nations Convention on the Law of the Sea, arts. 286, 287, annex VII, art. 9, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

51. South China Sea Arbitration, *supra* note 48, ¶¶ 1203(A)(1), 1203(B)(2).

52. UNCLOS, *supra* note 50, art. 296, annex VII, art. 11.

53. Press Release, Ministry of Foreign Aff. of the People's Republic of China, Statement on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, CHINA.ORG (July 12, 2016), http://www.china.org.cn/world/2016-07/12/content_38864668.htm.

54. South China Sea Arbitration, *supra* note 48, ¶¶ 1090–1109, 1203(B)(15).

55. *Id.* ¶ 1203(B)(15).

assigned. Attempts by CCG and People’s Armed Forces Maritime Militia (PAFMM) vessels to block or harass Philippine resupply ships have led to numerous dangerous confrontations between the two nations over the years.⁵⁶ Second Thomas Shoal is a low-tide elevation that is located within the Philippine EEZ. Therefore, like Mischief Reef, China may not legally claim sovereignty or sovereign rights over Second Thomas Shoal.⁵⁷

Since August 2023, CCG and PAFMM vessels have attempted to block resupply missions to the Marine contingent on board the BRP *Sierra Madre* eleven times.⁵⁸ Chinese interference has involved an increasing number of CCG and PAFMM vessels and more aggressive tactics to block Philippine vessels from reaching the *Sierra Madre*. On March 23, 2024, for example, CCG cutters and PAFMM vessels blocked a Philippine resupply convoy from delivering supplies to the Marine detachment on board the *Sierra Madre* at Second Thomas Shoal. The CCG vessels used their water cannons against the civilian supply boat *Unaiyah May 4*, which was being escorted by two PCG cutters (MRRV 4407 and 4409), resulting in significant damage to the supply boat and injuring two Philippine Navy personnel on board.⁵⁹ The resupply and rotation of personnel were subsequently accomplished using small boats.⁶⁰ Japan and the United States denounced China’s aggressive behavior, highlighting the threat posed by CCG’s use of water cannons and blocking maneuvers against the unarmed resupply ship.⁶¹

56. Michael Green et. al., *Counter-Coercion Series: Second Thomas Shoal*, ASIA MARITIME TRANSPARENCY INITIATIVE (June 9, 2017), <https://amti.csis.org/counter-co-2nd-thomas-shoal/>; Aaron-Matthew Lariosa, *Timeline of Chinese Harassment of Second Thomas Shoal Resupply Missions*, USNI NEWS (Apr. 2024), <https://news.usni.org/2024/04/04/timeline-of-chinese-harassment-of-second-thomas-shoal-resupply-missions> [hereinafter Lariosa, *Timeline of Chinese Harassment*].

57. South China Sea Arbitration, *supra* note 48, ¶¶ 305, 309, 1040.

58. Lariosa, *Timeline of Chinese Harassment of Second Thomas Shoal Resupply Missions*, *supra* note 56; Aaron-Matthew Lariosa, *Philippine Marines Drew Firearms as China Seized Second Thomas Shoal Airdrop, Says Philippine Military Chief*, USNI NEWS (June 4, 2024), <https://news.usni.org/2024/06/04/philippine-marines-drew-firearms-as-china-seized-second-thomas-shoal-airdrop-says-philippine-military-chief>; Aaron-Matthew Lariosa, *Chinese Small Boats Attempted to Block Philippine Medical Evacuation, Scientific Mission in the South China Sea*, USNI NEWS (June 10, 2024), <https://news.usni.org/2024/06/07/chinese-small-boats-attempted-to-block-philippine-medical-evacuation-scientific-mission-in-the-south-china-sea>.

59. *China Coast Guard Injures Philippine Crewmembers With Water Cannon*, MARITIME EXECUTIVE (Mar. 24, 2024), <https://maritime-executive.com/article/china-coast-guard-injures-crew-of-resupply-boat-with-water-cannon>.

60. Lariosa, *Timeline of Chinese Harassment*, *supra* note 58.

61. *Chinese Coast Guard Uses Water Cannons on Philippine Boats in the Disputed South China Sea*, MARINE INSIGHT (Mar. 25, 2024), <https://www.marineinsight.com/shipping-news/>

Two months later, six CCG vessels interfered with the medical evacuation of a sick Marine from the *Sierra Madre*. A Philippine Navy rigid-hulled inflatable boat (RHIB) that was transporting the sick Marine to a PCG high-speed response boat was swarmed by Chinese small boats despite being informed that the RHIB was on a humanitarian mission. The Chinese boats engaged in a series of blocking maneuvers, and one Chinese RHIB rammed the two Philippine boats. Philippine officials described the Chinese attempt to prevent the sick Marine from receiving medical attention as “barbaric and inhumane.”⁶² Later that day, Marines on the *Sierra Madre* drew their weapons on a Chinese RHIB as a “precautionary measure” in self-defense after the Chinese boat, which intercepted a resupply airdrop destined for the outpost, came within five meters of the Philippine ship.⁶³

Another incident occurred on June 16, 2024, when a Philippine sailor on board BRP *Bacagay* (MRRV 4110) was severely injured during an attempted resupply at Second Thomas Shoal. While attempting to deliver humanitarian supplies to the outpost, PLAN, CCG, and PAFMM vessels took a series of dangerous and provocative measures against the *Bacagay*, to include the use of water cannons, ramming, towing, and blocking maneuvers. This is the third time a Philippine crew member delivering supplies to the *Sierra Madre* has been injured by Chinese aggressive actions. China blamed the collision on the *Bacagay*, indicating that it was justified in using lawful “control measures” against the Philippine ship.⁶⁴ The United States condemned China’s “escalatory and irresponsible actions . . . to deny the Philippines from executing a lawful maritime operation in the South China Sea,”⁶⁵ indicating

chinese-coast-guard-uses-water-cannons-on-philippine-boats-in-the-disputed-south-china-sea/.

62. Aaron-Matthew Lariosa, *Chinese Small Boats Attempted to Block Philippine Medical Evacuation, Scientific Mission in the South China Sea*, USNI NEWS (June 10, 2024), <https://news.usni.org/2024/06/07/chinese-small-boats-attempted-to-block-philippine-medical-evacuation-scientific-mission-in-the-south-china-sea>.

63. *Id.*; Aaron-Matthew Lariosa, *Philippine Marines Drew Firearms as China Seized Second Thomas Shoal Airdrop, Says Philippine Military Chief*, USNI NEWS (June 4, 2024), <https://news.usni.org/2024/06/04/philippine-marines-drew-firearms-as-china-seized-second-thomas-shoal-airdrop-says-philippine-military-chief>.

64. Aaron-Matthew Lariosa, *Philippine Sailor Severely Injured, Vessels Damaged as Chinese Block South China Sea Mission*, USNI NEWS (June 17, 2024), <https://news.usni.org/2024/06/17/philippine-sailor-severely-injured-vessels-damaged-as-chinese-block-south-china-sea-mission>.

65. *Id.*

that such malign behavior endangers “the lives of Philippine service members, is reckless, and threatens regional peace and stability.”⁶⁶

Previously, in March 2024, the United States reaffirmed its defense commitments under the U.S.-Philippine Mutual Defense Treaty, stating that Article IV of the Treaty “extends to armed attacks on Philippine armed forces, public vessels, or aircraft—including those of its Coast Guard—anywhere in the South China Sea.”⁶⁷ A month later, at the 11th Philippines-United States Bilateral Strategic Dialogue, Washington and Manila reiterated their shared interests in a maritime order based on international law and called on China

to comport its maritime claims in the South China Sea with the international law of the sea . . . as reflected in [UNCLOS], to respect the Philippines’ sovereign rights and jurisdiction, to comply with the final and binding July 12, 2016 judgment in the Philippines v. China arbitration, and to cease its aggressive and dangerous actions that are inconsistent with its obligations under the Convention, including its unlawful interference with the Philippines’ freedom of navigation in the South China Sea.⁶⁸

III. LAW OF STATE RESPONSIBILITY

In March 2024, Philippine President Ferdinand Marcos Jr. indicated that Manila would impose countermeasures on China for repeated “illegal, coercive, aggressive, and dangerous attacks” by CCG vessels in his country’s EEZ.⁶⁹ Although he did not specify what countermeasures would be implemented,

66. Neil Jerome Morales & Bernard Orr, *China and Philippines Quarrel Over South China Sea Collision*, REUTERS (June 17, 2024), <https://www.reuters.com/world/asia-pacific/china-coast-guard-says-philippine-supply-ship-illegally-intruded-waters-second-2024-06-16/>.

67. Press Statement, U.S. Dep’t of State, U.S. Support for the Philippines in the South China Sea (Mar. 23, 2024), <https://www.state.gov/u-s-support-for-the-philippines-in-the-south-china-sea-9/>. For a similar statement, see Press Statement, U.S. Dep’t of State, U.S. Support for the Philippines in the South China Sea (June 17, 2024), <https://www.state.gov/u-s-support-for-the-philippines-in-the-south-china-sea-10/>.

68. Press Release, U.S. Dep’t of State, Joint Statement on the Philippines-United States Bilateral Strategic Dialogue (Apr. 24, 2024), <https://www.state.gov/joint-statement-on-the-philippines-united-states-bilateral-strategic-dialogue/>.

69. Neil Morales & Yew Lun Tian, *Philippines Ups Stakes in China Row, Vows Countermeasures to Coastguard ‘Attacks’*, REUTERS (Mar. 28, 2024), <https://www.reuters.com/world/asia-pacific/us-defence-chief-reaffirms-support-philippines-chides-dangerous-chinese-conduct-2024-03-28/>.

President Marcos indicated that they would be “proportionate, deliberate, and reasonable” in response to China’s “open and unabating attacks.”⁷⁰

Under generally accepted principles of international law, States incur responsibility for their internationally wrongful acts.⁷¹ An internationally wrongful act occurs when an act or omission is attributable to a State under international law and constitutes a breach of an international obligation of that State.⁷² A State breaches its international obligations when an act of that State does not conform to what is required by those obligations.⁷³ The State responsible for the internationally wrongful act is under an obligation to cease that act if it is continuing and to offer appropriate assurance and guarantees of non-repetition if required by the circumstances.⁷⁴

The conduct of any State organ, such as the CCG, is considered the act of that State under international law.⁷⁵ Similarly, the conduct of an entity that is not an organ of the State but is empowered by that State to exercise elements of governmental authority, like the PAFMM, is considered an act of the State under international law.⁷⁶ Additionally, the conduct of a group, like the PAFMM, is considered an act of a State under international law if that group is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.⁷⁷ The PAFMM is trained and equipped to provide paramilitary support to the CCG and the PLAN in times of peace and war. As part of the People’s Armed Forces, the PAFMM is under the direct command and control of local PLA military commanders and can be integrated into the PLAN or CCG to support forward deployed forces and defend Chinese interests.⁷⁸ Therefore, any official acts committed

70. *Id.*

71. Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 56 U.N. GAOR Supp. No. 10, art. 1, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf. [hereinafter *Articles on State Responsibility*].

72. *Id.* art. 2.

73. *Id.* art. 12.

74. *Id.* art. 30.

75. *Id.* art. 4.

76. *Id.* art. 5.

77. *Id.* art. 8.

78. Law of the People’s Republic of China on National Defence art. 22 (adopted by the Eighth Nat’l People’s Cong., Mar. 14, 1997); Military Service Law of the People’s Republic of China art. 4 (amended by the Ninth Nat’l People’s Cong., Dec. 29, 1998); People’s Republic of China Militia Work Regulations arts. 2, 3(3), 5 (amended by Order No. 588 of the State Council on Jan. 8, 2011).

by the CCG and PAFMM to project Chinese maritime and sovereignty claims are attributable to China.

China’s continued provocative behavior in the East China Sea, Taiwan Strait, and South China Sea—e.g., ramming, shouldering, use of water cannons, blocking maneuvers, interference with coastal State resource rights, seizing fishing gear and catch, illegally asserting law enforcement authority in foreign territorial seas and EEZs, illegally exercising jurisdiction over foreign-flagged vessels beyond its territorial sea, and violating coastal State sovereignty and sovereign rights—have been adjudicated by an international tribunal and found to violate China’s treaty obligations under COLREGS and UNCLOS.

China’s assertion of law enforcement authority against foreign-flagged vessels beyond its territorial sea (except as provided in Articles 33 and 56 of UNCLOS) also violates one of the cardinal principles of the law of the sea—exclusive flag State jurisdiction.⁷⁹ International law, as reflected in UNCLOS, Article 92, provides that “ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”⁸⁰ The Maritime Police Law, Maritime Traffic Safety Law, and CCG regulations discussed above that authorize the exercise of maritime law enforcement against foreign-flagged vessels clearly violated China’s treaty obligations under UNCLOS.

Finally, as a party to UNCLOS, China is subject to the compulsory dispute settlement provisions of the Convention.⁸¹ China’s continuing failure to comply with the SCS Arbitration decision violates its obligations under

79. In the contiguous zone a “coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.” UNCLOS, *supra* note 50, art. 33. In the EEZ, coastal States have exclusive sovereign rights over the living and non-living resources, as well as jurisdiction over resource-related off-shore structures and artificial islands, marine scientific research, and protection and preservation of the marine environment. *Id.* art. 56.

80. *Id.* art. 92.

81. *Id.* art. 286 (“Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”). None of the exceptions in Article 297 applied in the SCS Arbitration case.

Article 296 and Annex VII (Article 11), which provide that decisions rendered by a court or tribunal shall be final (and without appeal unless otherwise agreed) and shall be complied with by all the parties to the dispute.

China's continued violations of its treaty obligations under UNCLOS and COLREGS are clearly internationally wrongful acts for which China bears State responsibility.⁸² Before taking countermeasures the injured State must "call on the responsible State . . . to fulfil its legal obligations" and "notify the responsible State of any decision to take countermeasures and offer to negotiate with that State," unless "urgent countermeasures are necessary to preserve" the rights of the injured State.⁸³ China has been repeatedly informed of its malign behavior and the steps it should take to cease its unlawful acts but has chosen to ignore these diplomatic efforts to correct its behavior.⁸⁴ Thus, given China's total and continuing disregard for the rules-based order, aggrieved States may take lawful countermeasures against China for its internationally wrongful acts to induce Beijing to comply with its legal obligations.⁸⁵

Countermeasures may not involve the use of force and must be commensurate with the injury suffered, the gravity of the international wrongful act, and the rights of the injured State being violated.⁸⁶ The use of non-lethal technologies discussed below falls below the use of force threshold and, therefore, would be appropriate countermeasures to convince China to comply with its international obligations. Even if the use of these technologies by an aggrieved State would be prohibited under normal circumstances, to

82. Articles on State Responsibility, *supra* note 71, art. 28 ("The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.").

83. *Id.* art. 52.

84. *Id.* art. 43 ("1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State. 2. The injured State may specify in particular: (a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing; (b) what form reparation should take in accordance with the provisions of part two.").

85. *Id.* art. 49 ("1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two. 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.").

86. *Id.* arts. 50–51.

the extent that the use of non-lethal technologies constitutes a lawful countermeasure, it would not be precluded.⁸⁷

IV. COUNTER-PIRACY TACTICS, TECHNIQUES, AND PROCEDURES

Diplomatic protests and third-party dispute settlement are not having their intended effect of curbing China’s aggressive behavior. If victim States are going to regain the initiative against Chinese aggression, they must be prepared to take more affirmative action to counter Chinese encroachments on their sovereignty.

Beginning in 2007, pirate attacks off the coast of Somalia escalated dramatically. The shipping industry responded by developing TTP and deploying non-lethal technologies on ships to prevent pirate attacks. Today, merchant ships operating in areas affected by acts of piracy and armed robbery at sea are equipped with non-lethal weapons that can be employed by the crew to prevent pirates from gaining access to their ships.⁸⁸ Some of the more prominent devices include:

(1) Water Cannons/High-Pressure Fire Hoses. Water cannons are a CCG weapon of choice in the South China Sea. As discussed above, in March 2024, CCG cutters used their water cannons against the civilian supply boat *Unaiḡab May 4*, resulting in significant damage to the supply boat and injuring two Philippine Navy sailors.⁸⁹ Water cannons deliver “a powerful and impenetrable stream of water” that can be used to prevent persons from boarding a vessel or to impede an approaching boat’s maneuverability.⁹⁰ Water cannons or high-pressure fire hoses could, therefore, be used to fend off approaching CCG or PAFMM vessels.

87. *Id.* art. 22 (“The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three.”).

88. Raunek, *18 Anti-Piracy Weapons for Ships to Fight Pirates*, MARINE INSIGHT (Jan. 18, 2019), <https://www.marineinsight.com/marine-piracy-marine/18-anti-piracy-weapons-for-ships-to-fight-pirates/>.

89. *China Coast Guard Injures Philippine Crewmembers with Water Cannon*, MARITIME EXECUTIVE (Mar. 24, 2024), <https://maritime-executive.com/article/china-coast-guard-injures-crew-of-resupply-boat-with-water-cannon>.

90. Raunek, *supra* note 88.

(2) Dazzle Guns/Laser Devices. Dazzle guns and other laser devices can be used during the day, as well as at night. The dazzle gun uses a concentrated blast of “green light to disorient and temporarily blind” individuals.⁹¹ Anti-piracy laser devices similarly use a non-lethal laser beam “to provide a visual warning” and temporarily distract approaching individuals.⁹² The CCG has used lasers in the past to interfere with foreign vessels and aircraft. In February 2023, for example, a CCG ship used a military grade laser on two occasions to temporarily blind the crew of a PCG vessel that was involved in a resupply mission at Second Thomas Shoal, forcing the PCG vessel to withdraw.⁹³ Such devices could similarly be used to repel CCG or PAFMM vessels engaged in provocative maneuvers.

(3) Active Denial Systems (electromagnetic wave). The ADS, also known as the Pain Ray, transmits a non-lethal “narrow beam of electromagnetic energy” that heats the skin “without causing permanent damage.”⁹⁴ The electromagnetic wave penetrates the skin, causing “an unbearable burning sensation” and forcing the target to jump overboard.⁹⁵ The ADS provides a viable option to ward off CCG and PAFMM vessels being used in blocking or shouldering movements.

(4) Long-Range Acoustic Devices (sonic weapons). LRADs induce pain by emitting a high-pitched sound beam “that is higher than the tolerance level of an average human being.”⁹⁶ Like the ADS, the LRAD also provides a possible non-lethal technology for use against CCG and PAFMM vessels conducting blocking or shouldering maneuvers.

(5) Nets/Boat Traps. Ballistic nets can be used to ensnarl the propeller of a nearby vessel, thereby disabling and preventing the vessel from moving forward.⁹⁷ Such devices could be used against CCG and PAFMM vessels that are in proximity of a target vessel.

91. *Id.*

92. *Id.*

93. Joel Guinto, *South China Sea: Philippines Says China Used ‘Military-grade’ Laser Against Boat*, BBC NEWS (Feb. 13, 2023), <https://www.bbc.com/news/world-asia-64621414>.

94. Raunek, *supra* note 88.

95. *Id.*

96. *Id.*

97. *Id.*

(6) Foul-Smelling Liquid (Liquid Deterrent System). The LDS showers approaching ships with a “slick, foul-smelling green liquid, which stinks and burns,” forcing the crew to jump into the water to alleviate the burning sensation and unpleasant smell.⁹⁸ Like the ADS and LRAD systems, the LDS can be used against CCG and PAFMM vessels engaged in blocking or shouldering actions.

V. CONCLUSION

During the late 1970s, the United States realized that diplomatic protests were insufficient to counter excessive maritime claims and that a tangible demonstration of U.S. resolve was needed to effectively challenge these claims. As a result, the Carter Administration instituted the Freedom of Navigation (FON) Program in 1979.⁹⁹ President Reagan reaffirmed the importance of the FON Program in 1983, indicating that the United States would not “acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight,” and that the United States would “exercise and assert its rights, freedoms, and uses of the sea on a worldwide basis in a manner that is consistent with the balance of interests” reflected in UNCLOS.¹⁰⁰

Like the United States in the 1970s, nations in Asia are at an inflection point. It is abundantly clear that diplomatic protests and third-party dispute settlement are not having their intended effect on halting China’s aggressive behavior to advance its revisionist policies. If States wish to preserve their national interests, they must be prepared to do more than just diplomatically protest China’s bullying and continued disregard for the rules-based international legal order. If China is going to continue to engage in aggressive gray zone operations against its neighbors, there must be a cost associated with that behavior.

Use of non-lethal technologies as a countermeasure to convince China to curtail its unlawful conduct will demonstrate the unwavering commitment of Asian States to a stable, rules-based legal regime for the world’s oceans, as well as preserve their sovereignty and sovereign rights and uphold their ability to use the world’s oceans free of Chinese coercion. By closing “The

98. *Id.*

99. Memorandum from Lincoln P. Bloomfield, Nat’l Sec. Council Staff to Zbigniew Brzezinski, U.S. Nat’l Sec. Advisor (July 31, 1979).

100. Presidential Statement on United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983), *reprinted in* 22 INTERNATIONAL LEGAL MATERIALS 464 (1983).

Gap” using more assertive counter gray zone operations, Japan, Taiwan, and the Philippines will be better positioned to convince China to desist from engaging in provocative actions and comply with its international obligations under COLREGS and UNCLOS.