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Hearing on “Rule by Law: China’s Increasingly Global Legal Reach”

1. “How is China trying to change the rules or make new rules for maritime issues, in particular regarding boundaries and entitlements, access to resources, navigation, and dispute resolution?”

People’s Republic of China (PRC) domestic law enforcement and policy implementation in disputed maritime zones are the practical methods by which China seeks to change maritime rules. These organized assertions of China’s claimed maritime rights are effective mainly in maritime East Asia, where we can observe: (1) PRC maritime law enforcement (MLE) vessels (2) enforcing PRC maritime law and regulations and (3) implementing maritime and boundary policies issued by the state bureaucracy (including executive, legislative, and judicial organs) (4) under the political direction of central Chinese Communist Party (CCP) leadership. Collectively, these patterns of PRC practice can be understood as “China’s law of the sea,” a creeping process that is transforming regional maritime order.¹

The law of the sea is the primary body of international rules affected by China’s maritime practices. Legally meaningful changes may arise through (a) revised interpretation and application of the United Nations Convention on the Law of the Sea (UNCLOS) in East Asia, and/or (b) formation of new regional or local customary international norms relating to maritime jurisdiction and territorial sovereignty. Empirical analysis alone cannot determine whether legal rules have formally changed.² Nonetheless, we can consider the stated intent of China’s party-state leadership to change (interpretations of) several specific rules. We can further analyze how effectively those preferred rules are put into practice, operationally and diplomatically.

Maritime disputes involving the PRC demonstrate where China’s desired law of the sea rules diverge from those of other states. These disputes give rise to PRC efforts to “manifest” (显示) or “embody” (体现) its sovereign rights and jurisdiction through deliberate, repetitive acts in disputed maritime space.³ Analysis of PRC state practice to prescribe, enforce, and adjudicate domestic law in contested waters, airspace, and seabed reveals certain preferred norms that distinguish elements of China’s law of the sea from that practiced by other states:

¹ This testimony draws primarily from the author’s book, *China’s Law of the Sea: The New Rules of Maritime Order* (Yale University Press, 2023). Unless otherwise indicated, that volume is the source of arguments and evidence presented below.

² Only sovereign states and authorized international organizations like courts and tribunals may render authoritative judgments about the international law governing any particular situation.

³ See, e.g., PRC State Council, “Summary of China’s Maritime Industries” [中国海洋事业综述] (July 2005), http://www.gov.cn/test/2005-07/01/content_11653.htm.

Maritime boundary, baseline, and entitlement rules. China has no fully settled maritime jurisdictional boundaries with any of its littoral neighbors. Despite a remarkable record of resolving territorial boundary disputes (often on terms favorable to the other party),⁴ China has negotiated only one, partial maritime boundary (with Vietnam in the Gulf of Tonkin). The rest of the East Asian maritime littoral – the East China Sea, Yellow Sea, South China Sea, and Taiwan Strait – remains undelimited. No agreed line separates China’s claimed maritime jurisdiction from that of Japan, North and South Korea, Taiwan, the Philippines, Malaysia, Brunei, Indonesia, and Vietnam. In general, these regional disputants object to PRC practices that (a) enclose disputed “island groups” within straight territorial sea baselines, (b) project entitlements from artificial and submerged features, (c) deny other states’ lawful maritime claims from their mainland coastlines, truncating foreign exclusive economic zone (EEZ) and continental shelf entitlements, and (d) assert an undefined “dashed line” as a provisional boundary or historically-based jurisdictional claim. (These elements of China’s boundary, baseline, and entitlement claims are represented in the appendix, titled **Map 1**.)

Marine resource rules. Lacking agreed boundaries with China, regional states also contest China’s putative rules for developing (and conserving) marine resources across the Yellow, East China, and South China Seas. PRC domestic law claims sovereign rights and jurisdiction in undefined “other” jurisdictional sea areas,⁵ and further asserts indeterminate “historic rights” associated with its nine-dashed line map.⁶ In general, China’s disputed resource claims remain unrealized. However, China has come to exercise what might be called “veto jurisdiction” in much of the East Asian littoral. China’s enforcement of its claims has amounted to an effective veto over the activities of other states to utilize, lease, survey, explore, and exploit marine resources in disputed waters and seabed. By mobilizing the world’s largest fishing and MLE fleets in tandem,⁷ China has denied foreign fishing in disputed areas while facilitating its own exploitation of this scarce resource. While bilateral fisheries agreements are in effect between the PRC and Japan, South Korea, and Vietnam, these arrangements govern only a small portion of the disputed waters and seabed, and regulate only a narrow range of maritime activities. Oil and gas resources in disputed areas have not been comprehensively surveyed, explored, or developed due to persistent and increasingly effective PRC objection. Employing offshore oil and gas survey vessels and production platforms, law enforcement vessels, and persistent diplomatic objection, China has effectively curtailed other littoral states’ rights to develop hydrocarbon resources in their jurisdictional waters. (See **Map 2** depicting China’s resource claims).

⁴ M. Taylor Fravel, *Strong Borders, Secure Nation: Cooperation and Conflict in China’s Territorial Disputes* (Princeton University Press, 2008).

⁵ See, for example, a Supreme People’s Court “judicial interpretation” finding that China has jurisdictional waters beyond those described under the UNCLOS treaty, but failing to specify what those should be: Supreme People’s Court of the PRC, “Supreme People’s Court Issues Judicial Interpretation for Trial Of Cases Related to Sea Area’s Under National Jurisdiction” [最高法院发布审理我国管辖海域相关案件司法解] (2 August 2016) <<https://archive.ph/HbjY6>>.

⁶ See U.S. Department of State, “People’s Republic of China: Maritime Claims in the South China Sea,” *Limits in the Seas* no. 150 (January 2022). For a quasi-authoritative PRC rendering of the possible international legal implications of the line, see Gao Zhiguo and Jia Bingbing, “The Nine-Dash Line in the South China Sea: History, Status, and Implications,” *American Journal of International Law* 107, no. 1 (2013): 98–124.

⁷ For sound analysis on these forces and their integration, see Ryan Martinson, “Echelon Defense: The Role of Sea Power in China’s Maritime Dispute Strategy,” *CMSI Red Book*, no. 15 (May 2018); Ryan Martinson, “Catching Sovereignty Fish: Chinese Fishers in the Southern Spratlys,” *Marine Policy* 125 (March 2021).

Navigation rules. China’s boundary and resource claims generate further disputes over the nature of navigational freedoms in its jurisdictional waters. As a general principle, Beijing asserts broad discretion for “coastal states” to regulate the navigation of foreign “flag state” vessels in their jurisdictional waters. In practice, this entails ad hoc judgments about whether and when to enforce PRC authority – especially concerning military activities in its claimed EEZs and territorial seas. Navigation is the rule-set that has most directly engaged U.S. interests to date, drawing routine assertions of navigational rights and freedoms. China’s “countermeasures” are somewhat less routine, asserting shifting legal bases for restricting a range of foreign activities.⁸ China’s navigational rules limiting innocent passage, however, are more consistent and uniform in its state practice. PRC innocent passage restrictions are also not directly contested by regional states, and therefore reflect an emerging regional customary norm that could be recognized as international law. America’s persistent objections alone appear insufficient to check this trend. (See **Map 3** representing PRC navigational rules, highlighting the locations of key incidents involving U.S. vessels and aircraft).

Dispute resolution rules. China’s practices also challenge the compulsory dispute resolution mechanism (DRM) of UNCLOS. The PRC’s proposed rules radically limit the scope of disputes that can be submitted for binding, third-party dispute resolution. The PRC’s rejection of the Philippines’ UNCLOS (Article VII) arbitration (the “SCS Arbitration”) is a vivid illustration of this rule in practice.⁹ However, that choice also reflected a longer-standing, categorical PRC objection to any DRM regarding matters that can be construed to touch upon its territorial sovereignty. During the UNCLOS negotiations (1973-1982), PRC delegates opposed the creation of any compulsory or mandatory mechanism, and the PRC government later ratified the treaty with a restatement of its objection. However persistent the other claimant states objections to China’s application of its preferred rules on boundaries, resources, and navigation, their recourse to resolving their maritime disputes with China through the law of the sea’s rules on dispute settlement is severely constrained. Beijing consistently permits only “dialogue and consultation” (协商对话) on politically sensitive matters. This circumstance could be recognized as an emerging regional norm related to the maritime disputes, hindering formal legal resolution to any of the disputed rules. By sharply restricting formal dispute resolution under the treaty, China’s practice is probably not making the rules – but it is likely making them less effective.

Rather than changing the rules, China is gradually changing the international environment in which those rules take effect. The effective scope of UNCLOS is observably narrower where China is involved. Especially within maritime East Asia, the agreed rules of the international law of the sea simply have less bearing on what states actually do in practice. Claimant states cannot draw normal maritime boundaries; they struggle to exploit resources and navigate freely within those undelimited boundaries; they are systematically denied legal avenues for resolving these disputes. In general, China’s practices have not altered these rules in a way that other states will accept – rather they have undermined their application and narrowed their functional scope. China’s law of the sea is still evolving – especially the navigational regime in the Taiwan Strait – but its overall effects are to dilute public international law across the East Asian littoral.

⁸ For example, attempting to regulate U.S. military surveys as “marine scientific research” (MSR) is one way that creeping PRC jurisdiction has been applied to navigation in EEZs.

⁹ For detailed analysis of China’s position on the arbitration, see Isaac Kardon “China Can Say ‘No’: Analyzing China’s Rejection of the South China Sea Arbitration,” *Asian Law Review* 13, no. 2 (2018).

2. “Describe how China’s view of its sovereignty vis-à-vis its international treaty obligations poses challenges for the integrity of international law and treaties. How do its assertions and behavior make relevant international law less applicable and effective?”

The PRC’s treaty practice is characterized by a general resistance to binding norms. Its official interpretations of international treaty obligations are often ad hoc and selective.¹⁰ However, that evident selectivity is the product of a more fundamental and systematic method of international legal interpretation. Unfettered by domestic legal constraints, Chinese diplomats and international lawyers nearly always construe the *discretion of the sovereign state* in its broadest terms. In the context of the law of the sea, this means granting coastal states wide latitude to decide whether and how they will assert their maritime jurisdiction.

Regarding the sovereign state as the fundamental subject of international law, Beijing resists all of the swirling normative currents that may challenge the inviolability of its claimed sovereign sphere. This “hyper-sovereigntist” response to the many transnational, universalizing, seemingly invasive elements of contemporary international law is not unique to the PRC.¹¹ Authoritarian governments are generally hostile to international legal norms that purport to override their exclusive domestic authorities (human rights law is perhaps the starkest example).¹²

Ratified treaties do not necessarily create legal obligations within Chinese law. The PRC Constitution does not define “treaties” nor differentiate them from other “important agreements.”¹³ It was not until 1990 that the PRC adopted a Law on the Procedure for the Conclusion of Treaties (after four decades of PRC practice within bilateral and multilateral treaty regimes). The PRC’s sitting judge on the International Court of Justice herself observed that “[a]lthough the Chinese Constitution and laws do not set forth a general provision on the status of treaties in the domestic legal system, China implements its international obligations in good faith.”¹⁴ Lacking formal mechanisms by which those treaties bind domestic actors, good faith is not sufficient in cases where treaty obligations are at odds with important CCP political interests.

The UNCLOS treaty is problematic for CCP leadership. The urgency of China’s perceived “core interest” in sovereignty over disputed islands (and sovereign rights in disputed maritime space) perhaps displaces the requisite good faith. Chinese leaders tend to apply the fullest measure of sovereign discretion. This practice frustrates the direct application of UNCLOS in respect of anything with some nexus to “PRC sovereignty” – that is, the waters of the Yellow Sea, East China Sea, Taiwan Strait, and South China Sea, which wash the shores of disputed territories.

¹⁰ See, for example: Congyan Cai, *The Rise of China and International Law* (Oxford University Press, 2019); Samuel S. Kim, “The Development of International Law in Post-Mao China: Change and Continuity,” *Journal of Chinese Law* 1, no. 2 (1987): 117-160; Pitman B. Potter, “China and the International Legal System: Challenges of Participation,” *The China Quarterly*, no. 191 (2007): 699–715.

¹¹ Alastair Iain Johnston, *Social States: China in International Institution 1980-2000* (Princeton University Press, 2008).

¹² See Tom Ginsburg, “Authoritarian International Law?” *American Journal of International Law* 114, no. 2: 221-260; Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017).

¹³ Constitution of the PRC, Adopted Dec. 4, 1982, Amended Mar. 11, 2018.

¹⁴ Xue Hanqin and Jin Qian, “International Treaties in the Chinese Domestic Legal System,” *Chinese Journal of International Law* 8, no. 2 (2009), 322.

3. “The Commission is mandated to make policy recommendations to Congress based on its hearings and other research. What are your other recommendations for Congressional action related to the topic of your testimony?”

1) Ratify the United Nations Convention on the Law of the Sea in order to augment American power and leadership standing in the “rules-based international order.”

If the United States is to succeed in maintaining a stable maritime order, we will have to invest in the law of the sea. The current policy of adherence to customary international law does not meet the challenge posed by China in the present, competitive international environment. Our self-exemption from certain binding rules is too legalistic to provide leadership to the international community. Senate advice and consent on UNCLOS – as well as the new High Seas Treaty – would signal renewed American capability to bolster and rejuvenate the “rules-based international order” against cynical appeals to sovereign self-interest from China (and Russia).

China, despite it all, is a State Party in good standing in the UNCLOS treaty framework. This status remains intact even after Beijing’s brazen disrespect for the Philippines 2013 UNCLOS arbitration. Until the U.S. joins that same treaty framework and becomes subject to the same risk of unwanted arbitration, we will lack legitimate standing to criticize the PRC. The audience for that foreign policy choice should be the wider international community. The U.S. message that China is “violating” UNCLOS simply does not resonate with many vital nations, which have hardly failed to recognize that America has not even ratified the instrument. Indeed, critical foreign observers perceive the U.S. as serially “violating” those elements of the treaty we do not accept. This is an unfortunate and unnecessary liability for U.S. power, which can be exercised more effectively over the long term within multilateral institutional restraints like UNCLOS.¹⁵

Accepting the mild discipline of the law of the sea would cost little and achieve significant momentum in long-term strategic competition with China. The PRC has proven adept at achieving “paper compliance” with various legal obligations,¹⁶ and has championed majoritarian organizations (like the UNGA) and multilateral treaties that the U.S. now shuns. However, its rapid industrialization and rapacious demand for ocean resources may push China out of step with new developments in the international law of the sea regime. The PRC’s distant-water fishing fleet, deep seabed mining industry, and blue water navy risk re-enacting the “maritime hegemony” that that an earlier generation of Chinese diplomats reviled.¹⁷ Beijing’s post-colonial branding may not survive its desire for minerals and hydrocarbons from the seabed, fish from the water column, and access to strategic maritime areas.

The U.S. can seize the high ground in this emerging competitive arena by ratifying both UNCLOS and the High Seas Treaty at the earliest opportunity.

¹⁵ G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton University Press, 2012).

¹⁶ Timothy Webster, “Paper Compliance: How China Implements WTO Decisions,” *Michigan Journal of International Law* 35 (2014): 548-562;

¹⁷ PRC delegates denounced American and Soviet maritime hegemony throughout the United Nations Conference on the Law of the Sea (1973-1982). Records of these meetings and Conference documents are available and searchable in full-text here: UN Codification Division, “Third United Nations Conference on the Law of the Sea (1973-1982),” <https://legal.un.org/diplomaticconferences/1973_los/dtSearch/Search_Forms/dtSearch.html>.

2) Forget the FONOPs and focus on the maritime rights and interests of Japan, South Korea, Taiwan, the Philippines, Malaysia, Brunei, Indonesia, and (especially) Vietnam.

American policy in the South and East China Seas has become one-dimensional and ill-suited to our broader national interests in maritime East Asia. Freedom of navigation operations (FONOPs) are the poster-child for an ineffective policy that prioritizes our narrow self-interest in military navigation over a strategic interest in maintaining good order and access to the region. Even as U.S. allies like Japan, Australia, the United Kingdom, France, and Germany cautiously volunteer to commit their vessels to limited navigational actions in disputed regions, these modest naval forces confer few operational advantages. Meanwhile, foreign forces only augment China's counter-narrative of "American-led militarization" of the South China Sea.

American military access will not be denied by PRC domestic law. Quiet assertions of U.S. rights on a regular but infrequent basis are enough to sustain a legal objection.¹⁸ Such FONOPs are necessary but insufficient to the actual strategic purpose of sustaining a credible, deterrent force in the region. Greater U.S. focus on non-navigational rules is long overdue – especially because regional states are generally not interested in challenging China in its territorial seas, nor capable of projecting power from its EEZs.

Resource rights are the basic political and economic motivations for states pursuing their claims in maritime disputes with China. China's law of the sea is most detrimental to these states because it is non-military coercion designed to "veto" their rights to exploit valuable marine resources. For China these resources are relatively insignificant, but for the smaller regional states they are clearly the main stakes under dispute. Aligning U.S. policy more closely with the interests of these regional allies and partners will position us to be more effective in maintaining a free and open maritime order in East Asia and beyond.





China's maritime policy has exploited the clear asymmetries between American interests and those of regional states. The U.S. fixation on freedom of military navigation in a region where commercial navigation is not clearly threatened is a misalignment. PRC forces challenge the genuine interests of claimant states without using military vessels and aircraft. This "gray zone" operational package is quite effective without any symmetric American and allied counterweight. The PRC has stayed below the threshold of conflict, and showed the limitations of U.S. regional power to uphold the resource rights of coastal states promised by UNCLOS.¹⁹

The Congress should encourage full-spectrum cooperation with regional states on issues related to upholding *their* maritime rights and interests under international law. The U.S. navy cannot serve as the main instrument of that integrated diplomatic, economic, and informational effort.

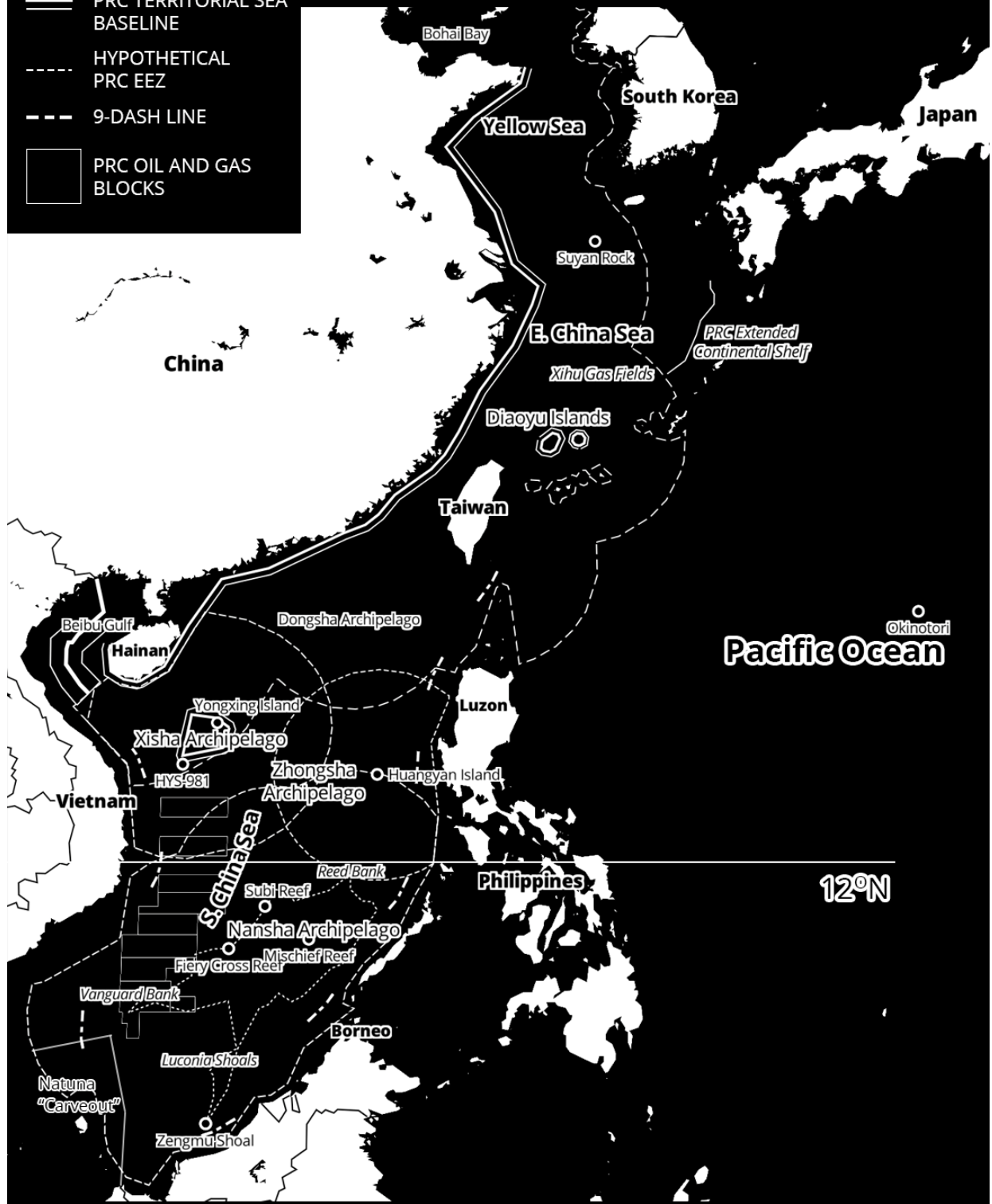
¹⁸ For a brief discussion of the narrow legal purposes of the FON program and its strategic limitations, see Peter Dutton and Isaac Kardon, "Forget the FONOPs – Just Fly, Sail, and Operate Wherever International Law Allows," *Lawfare* (10 June 2017).

¹⁹ Chinese officials have written extensively on the role of maritime law enforcement as an alternative to the navy. One PRC Maritime Safety Administration officer wrote that "[t]o avoid escalation, frontline law enforcement is usually carried out by maritime law-enforcement ships and aircraft." Wu Qiang [吴强] and Zhao Shngru [赵胜汝] [Zhao Shengru], "An Analysis of Measures for Law Enforcement to Safeguard Maritime Rights and Interests" [海洋权益维护执法对策分析], *Ocean Development and Management* [海洋开发与管理], no. 6 (2004): 41.

MAP LEGEND





-  PRC TERRITORIAL SEA BASELINE
-  HYPOTHETICAL PRC EEZ
-  9-DASH LINE
-  PRC OIL AND GAS BLOCKS

Map 1: Boundary Claims in China's Law of the Sea

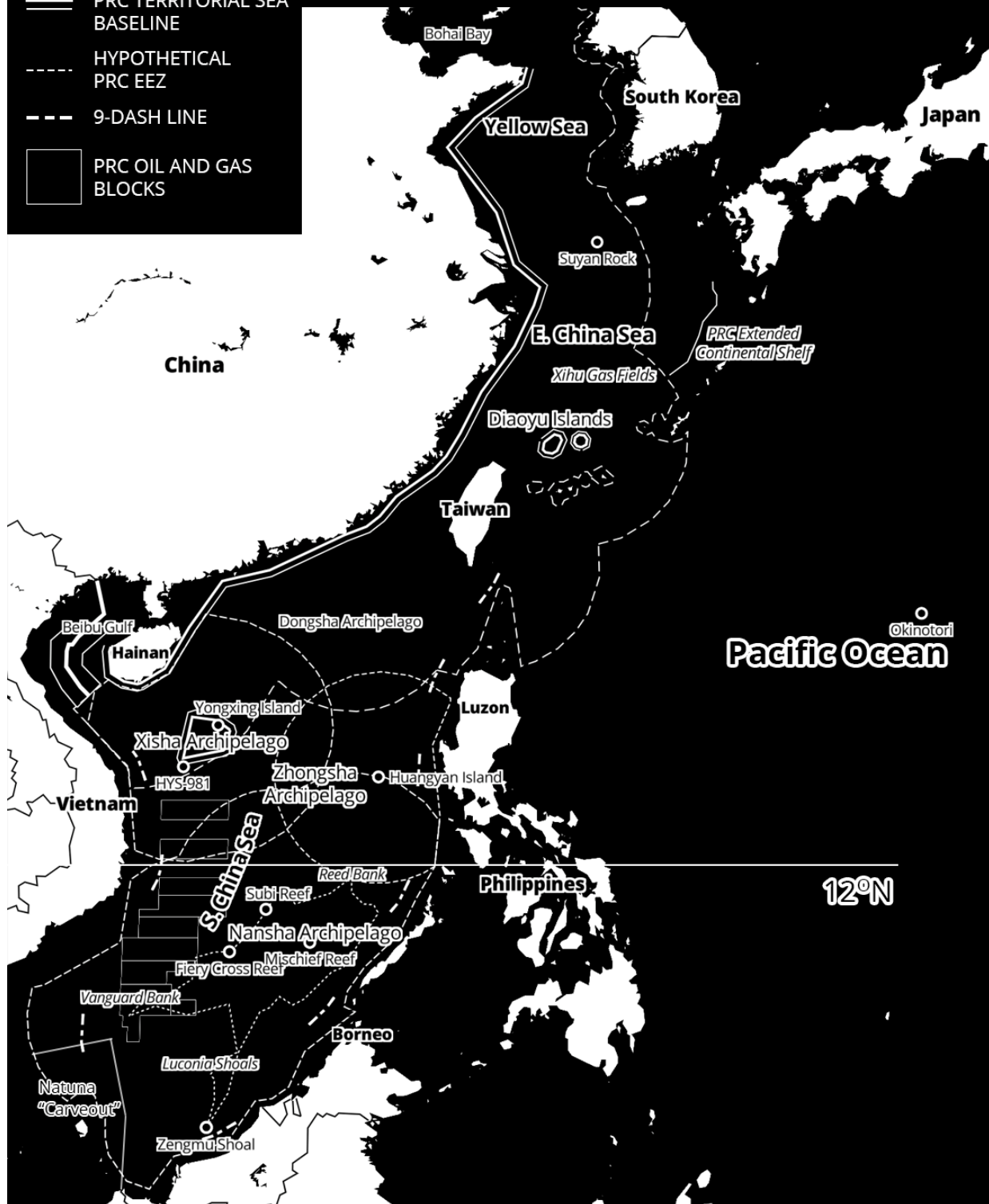


Source: Kardon, *China's Law of the Sea*, 75.

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



-  PRC TERRITORIAL SEA BASELINE
-  HYPOTHETICAL PRC EEZ
-  9-DASH LINE
-  PRC OIL AND GAS BLOCKS

Map 2: Resource Claims in China's Law of the Sea



Source: Kardon, *China's Law of the Sea*, 119.

MAP LEGEND

-  PRC TERRITORIAL SEA BASELINE
-  HYPOTHETICAL PRC EEZ
-  PRC ADIZ
-  9-DASH LINE
-  NAVAL INCIDENTS

Map 3: Navigational Claims in China's Law of the Sea



Source: Kardon, *China's Law of the Sea*, 171.