



China's Global Influence: Perspectives and Recommendations



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12 Understanding China's Legal Gamesmanship in the Rules-Based Global Order

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1 The views and recommendations expressed in this chapter are those of the author and do not necessarily reflect the policy or position of the Daniel K. Inouye Asia-Pacific Center for Security Studies, US Department of Defense, or US Government.

INTRODUCTION

In the contemporary era of international relations, it is not a novel argument to posit that twenty-first century People's Republic of China (PRC) is a rising power that challenges the existing, rules-based global order. For more than a decade, national leaders of other states, including voices within the United States (US) government, have expressed concerns about the PRC having such negative intentions. Additionally, a number of non-government observers, including experts in the disciplines of international relations and law, have also discussed this matter. Yet many times these expressed concerns and discussions are accompanied by minimal to no supporting information or insufficient examples. Without such specifics, what might be a truism could verge closely on becoming a rhetorical cliché.

This chapter will seek to examine the PRC's approach to the rules-based component of the global order more closely. To be clear at the outset, it would be an oversimplification to argue that the PRC always seeks to undermine this rules-based component. One must first realize that rules within the rule-based component of the global order do not have a singular purpose. Instead, laws and rulesets, including those of international law, can serve several different purposes or fulfill different roles, depending upon the circumstances. Two such roles of law worth understanding are the normative role of law and the instrumental role of law. The former focuses on laws and rulesets as standards of behavior, while the latter focuses on the use of law as a tool to achieve particular objectives. This chapter will argue that the PRC seeks to shape and reshape the normative aspects of the rules-based component of the global order, while also attempting to leverage the instrumental aspects of that same component.

As a starting point, this chapter will assume that the PRC is competing with other states within a complicated international system composed of complex relationships. Yet while international conflict is undesirable and international cooperation can be appealing, sandwiched in between the two is international competition, which is not inherently bad or evil. For example, economic competition can benefit states, industries, business organizations, and consumers. Moreover, a relationship between two states is not necessarily simple. Any two states, including but not limited to the PRC and the US, can share a complex, bilateral relationship, which consists of both cooperative and competitive elements simultaneously.

In the competitive aspect of relationships between states, individual states can and will use a range of tactics to further their own interests, to include tactics involving law and rulesets. Over the past two decades, American legal scholars coined the portmanteau “lawfare”² and Chinese military strategists have developed the concept of “legal warfare,”³ both of which are defined as “using law as a weapon.” These labels, however, might be too warlike, provocative, or under inclusive in nature. They can overgeneralize or overdramatize other rule-related actions by states—actions that are nowhere near conflict along the spectrum of international relations, but rather reflect competition.

If a primary goal of any competition is to win, then one must consider what might be the best way to characterize tactics employed by players for the purpose of winning. In the competitive context of sports and leisure games, particular behavior by participants could be labelled as “gamesmanship,” which has been defined as “the art of winning games without actually cheating.”⁴ In the context of the PRC and its actions in relation to the existing rules-based global order, one must consider how the PRC is utilizing various “legal gamesmanship” tactics in different situations for a competitive advantage. The PRC’s choice among “legal gamesmanship” tactics appears to depend upon several factors, including: (a) whether the PRC views an existing international ruleset as favorable or unfavorable to its national interests, (b) whether a ruleset actually exists and applies to the specific situation affecting the PRC’s national interests, and (c) whether the PRC intends for its tactical actions to affect the behavior of others in its favor.

This chapter will explore several of the common “legal gamesmanship” tactics employed by the PRC, offer specific examples of those employed tactics, and analyze the purposes of those tactics. Readers should hopefully understand that the PRC’s approach to international law is more nuanced than any cliché might suggest, but which remains troubling nonetheless. Thus, this chapter will conclude by showing why those tactics should be concerning to other states, and recommend counter-tactics for other states to employ in order to counter the PRC’s “legal gamesmanship.”

2 Charles J. Dunlap, Jr., “Lawfare: A Decisive Element of 21st-Century Conflicts?” *Joint Force Quarterly* 54 (2009): 34.

3 Song, Yunxia, *Under Informatized Conditions: Legal Warfare* (PRC, 2007).

4 Stephen Potter, *The Theory and Practice of Gamesmanship or, the Art of Winning Games without Actually Cheating* (London: Rupert Hart-Davis, 1947), 15.

SEEKING TO SHAPE OR RESHAPE THE NORMS OF LAW

The PRC has engaged in the past and is currently engaging in a number of “legal gamesmanship” tactics for the purpose of shaping and reshaping the normative aspects of the rules-based component of the global order. At a minimum, the PRC employs seven such tactics. First, the PRC makes ambiguous allegations of illegal activities by other states that contravene the PRC’s preferences. Second, the PRC ignores the meaning of treaty provisions when they inconveniently undercut the PRC’s preference. Third, the PRC quotes phrases from treaties out of their proper context to mean something other than their intended meaning. Fourth, the PRC ignores, dismisses, or disregards the negotiating history of treaty provisions when they inconveniently undercut the PRC’s preference. Fifth, the PRC alleges that specific actions by other states violate international law, when the PRC engages in the same types of actions under similar circumstances. Sixth, the PRC avoids third-party forums for resolving its disputes with other states, but it is fully willing to take an active part in such third-party forums for adjudicating similar disputes between other states. Seventh, the PRC insists upon resolving its disputes with other states through negotiations, which can constitute a legal impossibility for many of those disputes. Each of these “legal gamesmanship” tactics is discussed below in more detail, along with real-world examples.

First, the PRC makes ambiguous allegations of illegal activities by other states that contravene the PRC’s preferences. These allegations are general in nature and fail to specify the applicable provisions of international law that have purportedly been violated. A good example of this tactic can be found in the PRC’s public statements about the maritime activities by other states, including ones conducted by the US, within the East China Sea and South China Sea that the PRC would prefer not to occur. Official PRC spokespersons will publicly describe the undesirable behavior as “illegal” and “a violation of international law.”⁵ But those same representatives rarely if ever specify which body of international law has been violated or which specific provision of law has been violated.

5 See, e.g., “Spokesman Zhu Bangzao Gives Full Account of the Collision between US and Chinese Military Planes,” 4 April 2001, http://www.china-embassy.org/eng/zmgx/zmgx/Military_Relationship/t35748.htm; “Violation of China’s Sovereignty Never Allowed,” *China Daily*, 10 March 2009; Ma Zhaoxu, “PRC MFA Spokesperson, Regular Press Conference, March 20, 2009,” *China Daily*; “China Opposes Any Military Acts in Its Exclusive Economic Zone without Permission,” *Xinhua News Agency*, 26 November 2010.

Second, the PRC ignores the meaning of treaty provisions when they inconveniently undercut the PRC's preference. In general, the international law of treaties requires that the text of a treaty "shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of the object and purpose."⁶ One body of international law that the PRC seeks to shape or reshape through the employment of this tactic is the law of the sea, as reflected in the United Nations (UN) Convention on the Law of the Sea (UNCLOS). Consider, for the example, the right of innocent passage. The text of UNCLOS states that "all ships"⁷ of "all states"⁸ enjoy the right of innocent passage through the territorial seas of other states. The PRC accepts that non-military foreign ships enjoy the right of innocent passage through its territorial sea;⁹ however, the PRC prefers that the warships of other states not have that same right. But rather than expressly prohibiting foreign warships from exercising that right in its territorial sea, the PRC seeks to reshape international law by mandating foreign warships to "obtain permission" from the PRC government.¹⁰ As a practical matter, would the PRC government grant such permission in *every* instance? If not, then the PRC's requirement for prior permission would violate the ordinary meaning of another provision of UNCLOS, which prohibits coastal states from "impos[ing] requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage."¹¹ In this instance, the PRC disregards the ordinary meaning of a treaty provision to which it is obligated to follow.

Third, the PRC quotes phrases from treaties out of their proper context to mean something other than their intended meaning. As previously mentioned, the international law of treaties specifies that the text of a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in

6 "Vienna Convention on the Law of Treaties," entry into force date: 27 January 1980, *United Nations Treaty Series*, registration no. I-18232, art. 31(1). Emphasis added.

7 "United Nations Convention on the Law of the Sea" (UNCLOS hereafter), entry into force date: 16 November 1994, *United Nations Treaty Series*, registration no. I-31363, Part II, Section 3, Subsection A—"Rules Applicable to All Ships."

8 UNCLOS, art. 17. "Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

9 PRC, Law of the Territorial Sea and Contiguous Zone (25 February 1992), art. 6.

10 PRC, Law of the Territorial Sea and Contiguous Zone, art. 6.

11 UNCLOS, art. 24(1).

the light of the object and purpose.”¹² The text of UNCLOS states that all states enjoy the freedoms of navigation and overflight and “other internationally lawful uses of the sea related these freedoms” in the exclusive economic zone (EEZ) of other states.¹³ The PRC would prefer that foreign militaries not conduct activities within the PRC’s EEZ.¹⁴ PRC representatives will argue that foreign military activities, such as surveillance and exercises, in the PRC’s EEZ violates the “peaceful purpose” and “peaceful use” provisions of UNCLOS.¹⁵ However, when those phrases are read in their proper context within the treaty, one immediately sees that they also apply to activities on the high seas.¹⁶ Therefore, if the PRC’s argument was taken to its logical conclusion, then it would mean that militaries would be prohibited under international law from conducting activities on the high seas anywhere around the world.

Fourth, the PRC ignores, dismisses, or disregards the negotiating history of treaty provisions when they inconveniently undercut the PRC’s preference. The international law of treaties specifies that, if the meaning of a treaty provision is “ambiguous or obscure,” then “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion” may be considered.¹⁷ The negotiating history of UNCLOS shows that states intended to establish the EEZ for the purpose of protecting the sovereign, resource-related rights for a coastal state within its EEZ zone. It was not established as some form of security zone for the coastal state to regulate or restrict. But as mentioned previously, the PRC prefers that other states not conduct military activities within its EEZ. For that reason, the PRC either ignores that negotiating history of UNCLOS, or argues that the body of

12 “Vienna Convention on the Law of Treaties,” art. 31(1). Emphasis added.

13 UNCLOS, art. 58(1).

14 For a compilation of previous statements by the PRC government regarding the illegality of foreign military activities within the PRC EEZ, see Jonathan G. Odom, “A China in the Bull Shop?” *Ocean & Coastal Law Journal* 17 (2012): 201, 216-217.

15 See, e.g., Ren Xiaofeng and Cheng Xizhong, “A Chinese Perspective,” *Marine Policy* 29 (2005): 142-44.

16 UNCLOS, art. 88. “The high seas shall be reserved for peaceful purposes;” art. 301, “*Peaceful uses of the seas* In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”

17 Vienna Convention on the Law of Treaties, art. 32.

international law should be “improved” to suit this aim without proposing textual amendments.¹⁸

Fifth, the PRC alleges that specific actions by another state violate international law, when the PRC engages in the same types of actions under very similar circumstances. For nearly two decades, the PRC has alleged that foreign military activities within its EEZ, such as military surveillance and exercises, is a violation of international law.¹⁹ In recent years, however, the PRC has been conducting military activities, including surveillance and exercises, in the EEZs of other coastal states.²⁰ These include the EEZs of Australia, India, Indonesia, Japan, Malaysia, the Philippines, the US, and Vietnam.²¹ When questioned about the PRC military's activities within the EEZs of other states, PRC officials have attempted to distinguish the circumstances—but those efforts have been specious or highly tenuous. Likewise, the PRC established an Air Defense Identification Zone (ADIZ) over portions of the East China Sea in late 2013, which attempted to restrict the freedom of overflight and uses of international airspace enjoyed by all aircraft of other states, including military aircraft.²² Yet, PRC military aircraft continue to overfly and operate within the ADIZs of its neighbors, such as Japan and the Republic of Korea.²³ Once again, the PRC fails to apply international law consistently.

18 *People's Daily*, Dec. 11, 1982, quoted in Paul C. Yuan, “The New Convention on the Law of the Sea from the Chinese Perspective,” Jon M. Van Dyke, *Consensus and Confrontation: The United States and the Law of the Sea Convention* (Honolulu: Law of the Sea Institute, 1985), p.185. Source discusses that during the final session of UNCLOS negotiations, the head of PRC's delegation stated: “There are still quite a number of articles in the Convention which are imperfect or even have serious drawbacks. We are not entirely satisfied with the Convention.”

19 For a compilation of previous statements by the PRC government regarding the illegality of foreign military activities within the PRC EEZ, see Jonathan G. Odom, “A China in the Bull Shop?”

20 *Id.*, 231.

21 For a graphic depiction of where the PLA has conducted these activities, see “Uninvited PLA Operations in Foreign EEZs,” <https://media.defense.gov/2018/Aug/16/2001955282/-1/-1/1/2018-CHINA-MILITARY-POWER-REPORT.PDF>

22 “Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the P.R.C.,” *Xinhua News Agency*, 23 November 2018, http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm. For a legal analysis of the PRC ADIZ, see Jonathan G. Odom, “A ‘Rules-Based Approach’ to Airspace Defense: A U.S. Perspective on the International Law of the Sea and Airspace, Air Defense Measures, and the Freedom of Navigation,” *Belgium Review of International Law* 1 (2014).

23 See “Military and Security Developments Involving the People's Republic of China,” Office of the Secretary of Defense, May 2018, <https://media.defense.gov/2018/Aug/16/2001955282/-1/-1/1/2018-CHINA-MILITARY-POWER-REPORT.PDF>

Sixth, the PRC avoids third-party forums for resolving its disputes with other states, when it is fully willing to take an active part in third-party forums for adjudicating similar disputes between other states. While states have an obligation to resolve their disputes with other states “by peaceful means,”²⁴ there is no general requirement that states utilize third-party mechanisms for resolving those disputes. In the context of territorial and maritime disputes, the PRC has repeatedly refused to submit any of its disputes in the East China Sea and South China Sea to legitimate third-party mechanisms, including the International Court of Justice (ICJ),²⁵ the International Tribunal for the Law of the Sea (ITLOS),²⁶ arbitral tribunals duly constituted under UNCLOS,²⁷ or conciliation under UNCLOS.²⁸ At the same time, however, the PRC has nominated and been represented by Chinese judges for decades on both the ICJ²⁹ and the ITLOS³⁰ to adjudicate similar disputes between other states. This inconsistent legal approach begs the question: if those third-party forums are legitimate for adjudicating the disputes of other states, then why are those forums not legitimate for adjudicating the PRC’s disputes?

Seventh, the PRC insists upon resolving its disputes with other states through negotiations, but for a number of them in a way that constitutes a legal impossibility. Consider the competing territorial and maritime claims that the PRC has in the South China Sea with several of its geographic neighbors. The PRC insists that these disputes should be resolved by negotiations with those neighbor states and prefers that those negotiations be bilateral in nature. However, the international law of treaties makes clear that a bilateral agreement may not bind any third

24 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art. 2(3).

25 *Ibid.*, art. 36.

26 UNCLOS, Annex VI.

27 *Ibid.*, Annex VII.

28 *Ibid.*, art. 284.

29 For the past 25 years without interruption, a combination of three judges from the PRC have served as a member of the International Court of Justice: Judge Ni Zhengyu (1985-1994), Judge Shi Jiuyong (1994-2010), and Judge Xue Hanqin (2010-present). See All Members, International Court of Justice, available at <https://www.icj-cij.org/en/all-members>.

30 Since the International Tribunal for the Law of the Sea was first convened in 1996, a combination of three judges from the PRC have served as a member of the Tribunal: Judge Zhao Lihai (1996-2000), Judge Xu Guangjian (2001-2007), and Judge Gao Zhiguo (2008-present). See Members of the Tribunal since 1996, International Tribunal for the Law of the Sea, available at <https://www.itlos.org/the-tribunal/members-of-the-tribunal-since-1996/>.

party without the consent of that third party.³¹ Thus, with any South China Sea islands to which more than two states claim sovereignty or maritime areas for which more than two coastal states have overlapping maritime zones, the PRC could not bind any third state in its bilateral negotiations. Nonetheless, this legal impossibility does not prevent the PRC from continuing to insist upon bilateral negotiations for resolving its territorial and maritime disputes.

ATTEMPTING TO LEVERAGE THE INSTRUMENT OF LAW

In addition to engaging in “legal gamesmanship” tactics to shape and reshape the normative aspects of the rules-based global order, the PRC also attempts to leverage the instrumental aspects of that same order. At a minimum, the PRC employs five such tactics. First, the PRC selectively adopts the legal actions by other governments of China, only when those actions are advantageous to the PRC. Second, the PRC enacts laws codifying national policy, thereby creating the appearance of removing all discretion and compelling actions. Third, the PRC enacts and invokes its national laws as the legal authority to restrict the actions of other states, when such authority is highly questionable under existing international law. Fourth, the PRC combines ambiguous territorial claims with artificial maritime claims, for the intended purpose of asserting control of more geographic space and restricting the actions of other states in that space. Fifth, the PRC takes actions that are incremental in nature and carried out by deniable agents, in order to remain below the legal threshold that might justify a forceful response by other states. Each of these tactics is discussed below in more detail, along with real-world examples.

The PRC selectively adopts the legal actions by other governments of China, including actions taken prior to the founding of the PRC in 1949 and ones by the Republic of China³² (ROC) after 1949. In general, the body of international law governing succession to treaties (i.e., when a successive power is obligated to follow agreements concluded by its predecessors) is not fully settled. There are certain general principles that apply, but the rules are “not easy to determine.”³³ The PRC has leveraged this legal uncertainty to its advantage. When Mao

31 “Vienna Convention on the Law of Treaties,” art. 34.

32 “Republic of China” and “ROC” are used here as historical terms, and do not connote a change in policy by the U.S. Government.

33 Anthony Aust, *Modern Treaty Law and Practice*, 3rd Ed (Cambridge: Cambridge University Press Textbooks, 2013).

Zedong proclaimed the establishment of the Central People's Government of the PRC on October 1, 1949, he expressly declared, "[I]his government is sole legal government representing all the people of the People's Republic of China."³⁴ What this means for international matters was specified in the *Common Guideline*, which stated in part: "For the treaties and agreements concluded by the Kuomintang government with foreign governments, the Central People's Government of the People's Republic of China should examine them, according to their contents, to recognize, abolish, revise, or re-conclude them respectively."³⁵ Senior legal advisors within the PRC have subsequently acknowledged, "Recognition is a *special concept* in China's treaty practice."³⁶ They explain it as "recognizing the validity of the legal action taken on a treaty that was previously signed, ratified or acceded to by past Chinese governments."³⁷ After the establishment of the PRC, the PRC government has decided to disavow a number of international actions that the ROC had undertaken, including certain international agreements that the ROC had entered with other states. For example, in dismissing the ROC's role in negotiating the multilateral Outer Space Treaty,³⁸ a PRC representative told the UN General Assembly in 1972, "As from October 1, 1949, the Chiang Kai-shek clique has no right at all to represent China," and hence declared the ROC's signature on the treaty to be "illegal and null and void" for the Chinese government.³⁹ At the same time, however, the PRC government has decided to recognize a number of international legal actions taken by the ROC. For example, once the parties to the multilateral San Francisco Conference concluded negotiations of the UN Charter in 1945, the ROC delegate was the first representative of any party to

34 Mao Zedong, "Proclamation of the Central People's Government of the People's Republic of China," 1 October 1949, quoted in "The Consul General at Peiping (Club) to the Secretary of State," *Foreign Relations of the United States, 1949, The Far East: China, Volume VIII*, accessed 24 July 2019, <https://history.state.gov/historicaldocuments/frus1949v08/d619>.

35 Chinese People's Political Consultative Conference, *Common Guideline* (29 September 1949), art. 55, quoted in Xue Hanqin, Hu Zhiqiang, and Fan Kun, Duncan B Hollis, Merritt R Blakeslee, and Benjamin Ederington, *National Treaty Law and Practice* (Leiden: Martinus Nijhoff Publishers, 2005).

36 *Id.*, 156. Emphasis added.

37 *Id.*

38 "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies," entry into force date 10 October 1967, *United Nations Treaty Series*, registration no. I-8843.

39 Chen Chu, PRC Ministry of Foreign Affairs, China's Statement on Question of Outer Space (27 October 1972), reprinted in Chiu Hungdah, and Jerome Alan Cohen, *People's China and International Law: A Documentary Study*, (Princeton: Princeton University Press, 1974), 425.

sign the new treaty.⁴⁰ When the PRC was established four years later, the Communist government immediately sought to be seated in the UN as the government of China under the UN Charter.⁴¹ Twenty-five years later, that political goal was achieved, when the PRC assumed China's seat in the UN and the associated privileges, including the designation as a permanent member of the Security Council wielding the unique veto power of resolutions.⁴² This selective adoption of ROC actions when they benefit the PRC, however, is not limited to actions involving treaties. For example, the ROC conducted a survey of the South China Sea islands in 1946 and generated a map first containing the ambiguous "U-shaped line" (a.k.a., the "eleven-dash line," the "nine-dash line"); subsequently, the PRC has asserted that ROC map as reflecting China's long-standing historic claims within that body of water.⁴³ More recently, to support the PRC's territorial and maritime claims in South China Sea, it has invoked the military, civilian, and administrative actions of "the Taiwan authorities of China" on Taiping (Itu Aba) island, all of which notably occurred after 1949.⁴⁴

The PRC enacts laws codifying national policy, which purportedly forces its hand into taking actions. One of the best of examples of this tactic is the Anti-Secession Law of 2005.⁴⁵ Enacted by the 10th National People's Congress, this legislation formalized the long-standing policy of the PRC towards Taiwan. Specifically, the law mandates the use of force against Taiwan if either the political leaders of Taiwan declared

40 See "1945: The San Francisco Conference," <https://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html>. "The next day [26 June 1945], in the auditorium of the Veterans' Memorial Hall, the delegates filed up one by one to a huge round table on which lay the two historic volumes, the Charter and the Statute of the International Court of Justice. Behind each delegate stood the other members of the delegation against a colorful semi-circle of the flags of fifty nations. In the dazzling brilliance of powerful spotlights, each delegate affixed his signature. *To China, first victim of aggression by an Axis power, fell the honour of signing first.*" Emphasis added.

41 Chiu Hungdah, *The People's Republic of China and the Law of Treaties* (Cambridge, MA: Harvard University Press, 1972), 93.

42 "Restoration of the Lawful Rights of the People's Republic of China in the United Nations," G.A. Res. 2758, 25 October 1971.

43 See Chris P.C. Chung, "Drawing the U-Shaped Line: China's Claim in the South China Sea, 1946-1974," *Modern China* 42, no.1 (2016): 38.

44 See, e.g., "PRC State Council Information Office, China Adheres to the Position of Settling through Negotiation the Relevant Disputes between China and the Philippines in the South China Sea," 13 July 2016, http://www.china.org.cn/government/whitepaper/2016-07/13/content_38869762.htm. "Since the 1950s, the Taiwan authorities of China have maintained a military presence on Taiping Dao of Nansha Qundao. For a long time, they have also maintained civil service and administration bodies and carried out natural resources development on the island."

45 Anti-Secession Law, adopted at the 3rd Session of the 10th National People's Congress, 13 March 2005, http://en.people.cn/200503/14/eng20050314_176746.html.

independence from China or “possibilities for a peaceful reunification should be completely exhausted.”⁴⁶ Enacting this law was intended to send a political message to Taiwan and the international community that the PRC government no longer has discretion on whether to act in those situations or conditions. While that law has remained relatively dormant over the past fifteen years, some observers have characterized it as the PRC’s counter-move to the Taiwan Relations Act⁴⁷ enacted by the US government in 1979, which is arguably an example of the US employing this same tactic.

The PRC leverages the enactment and invocation of its national laws as the authority to govern certain actions of other states, even though the invocation of such national laws is questionable for one of several reasons. First, it can be questionable because, like ambiguously alleging “a violation of international law,” official PRC spokespersons will characterize undesirable actions by other states without specifying which of the PRC’s national laws applies or which provision of law has been violated. This becomes important, especially when the PRC has a national law that purportedly governs one type of behavior by other states in its maritime zones (e.g., a national law restricting foreign surveys in its EEZ), but which is not actually triggered by other types of behavior (e.g., foreign military exercises or air surveillance in the PRC’s exclusive economic zone). Second, the PRC’s invocation of its national laws can be questionable when the only national laws enacted by the PRC that other states are obligated to respect are the ones that fully conform to applicable international law. For example, UNCLOS obligates states to comply with national laws of a coastal state, but specifies that such laws must be “in conformity with” or “adopted in accordance with the provisions of” the treaty. This frequent legal precondition in UNCLOS means that coastal states such as the PRC does not have unlimited authority to enact national laws affecting their maritime zones and that user states are not necessarily obligated to comply with every law enacted by that coastal state.

The PRC combines ambiguous territorial claims with artificial maritime claims, for the intended purpose of asserting authority or control over more geographic space. Under the international law of the sea

46 Id., art. 8. “In the event that the ‘Taiwan independence’ secessionist forces should act under any name or by any means to cause the fact of Taiwan’s secession from China, or that major incidents entailing Taiwan’s secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China’s sovereignty and territorial integrity.”

47 Public Law 96-8, 22 U.S.C. 3301 et seq.

as reflected in UNCLOS, the geographic features for which a state has sovereignty have maritime entitlements corresponding to the specific characteristics of the particular feature: submerged features and low-tide elevations have no maritime entitlements; islands are entitled to a territorial sea; islands capable of human habitation or economic life are entitled to an EEZ.⁴⁸ Islands are naturally formed areas of land above water at high tide,⁴⁹ and artificial islands are not entitled to a territorial sea or an EEZ.⁵⁰ In the South China Sea, the PRC claims it has sovereignty of both the Paracel Island group and the Spratly Island group. Yet a number of the geographic features in those two island groups are either not islands under the definition of UNCLOS or, if they are actually islands, they are not entitled to an EEZ. In addition, a number of the other claimant states occupy the geographic features in the South China Sea that are more likely entitled to a territorial sea. In contrast, the PRC decided to occupy features at a later date, and therefore found itself with fewer islands entitled to a territorial sea but submerged features not entitled to one.⁵¹ Realizing this dilemma, the PRC has decided to generally characterize its sovereignty claims to the two major island groups, without specifying which geographic features within those groups are actual islands.⁵² Additionally, the PRC has engaged in unprecedented levels of human modification to those features it occupies, regardless of whether the features are entitled to maritime zones.⁵³ The net result is

48 UNCLOS, art. 121.

49 Ibid.

50 Ibid., art. 60.

51 Bill Hayton, *South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014): 106. “By the time the People’s Republic of China moved into the Spratly Islands in 1987-8, all the dry real estate had been occupied. Only barren reefs remained, clearly unable to sustain human life without the addition of hundreds of tons of concrete and steel and the provision of regular supply boats.”

52 See “China Adheres to the Position of Settling through Negotiation.” “China has, based on Nanhai Zhudao, internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf.” See also Bill Gertz, “Beijing Adopts New Tactic for S. China Sea Claims,” *Washington Free Beacon*, 21 September 2017, https://freebeacon.com/national-security/beijing-adopts-new-tactic-s-china-sea-claims/?utm_source=Freedom+Mail&utm_campaign=8ecc33a1cd-EMAIL_CAMPAIGN_2017_09_21&utm_medium=email&utm_term=0_b5e6e0e9ea-8ecc33a1cd-46149317. Gertz recounts how a PRC Ministry of Foreign Affairs delegation announced during an official maritime law dialogue with the US government that the PRC is asserting sovereignty in the South China Sea via the “Four Sha” island groups through several legal claims, including China’s historical territorial waters, part of China’s 200-mile Exclusive Economic Zone, and part of China’s extended continental shelf. For a legal analysis of this “Four Sha” theory, see Julian Ku and Chris Mirasola, “The South China Sea and China’s ‘Four Sha’ Claim: New Legal Theory, Same Bad Argument,” *Lawfareblog*, 25 September 2017, <https://www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument>.

53 See “Military and Security Developments Involving the People’s Republic of China,” Office

that the PRC now implicitly asserts that these artificial islands are entitled to maritime zones, including a territorial sea, and challenges other states that transit or operate in the vicinity of those features as if they were entitled to maritime zones.⁵⁴

The PRC takes actions that either are incremental in nature or are carried out by agents who provide plausible deniability, both of which for the purpose of remaining below the legal threshold that would justify a forceful response by other states. Under international law reflected in the UN Charter, states are generally prohibited from “the threat or use of force” in their relations with other states.⁵⁵ If one state uses force against another state, then that second state is justified under the same body of international law to use force in self-defense.⁵⁶ But what if the first state takes actions in a certain way that deliberately do not rise to the level of a “threat or use of force?” Some experts have labelled these actions to be “salami tactics”⁵⁷ or “gray zone activities.”⁵⁸ Regardless of what might be the best label, they involve several common approaches. One approach is gradualism or incrementalism, in which a series of smaller actions are taken over a period of time. Standing alone, none of those individual actions rising to the level of a *casus belli*; but, when taken together, they achieve the desired effects without ever incurring a defensive response from the second state. A second approach is for a state to employ actors for which attribution to that state is extremely difficult or nearly impossible. Recent and ongoing instances of the PRC employing these tactics can be seen in the South China Sea. For example, the PRC employs its vast fleets of maritime militia boats to challenge its neighbors, while

of the Secretary of Defense, April 2016, p. 13, <https://dod.defense.gov/Portals/1/Documents/pubs/2016%20China%20Military%20Power%20Report.pdf>. The PRC has added 3,200 acres of artificial land to the features it occupies in the Spratly Island group, compared to only 50 acres of artificial land added by other South China Sea claimant states.

54 See, e.g., “PRC Ministry of Foreign Affairs Spokesperson Hua Chunying, Regular Press Conference, February 11, 2019,” https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1637013.shtml. When asked to comment about a recent freedom of navigation operation conducted by two US Navy ships within 12 nautical miles of Mischief Reef and Second Thomas Shoal – neither of which is an island entitled to sovereign territorial seas – she responded, “The trespass of US warships *infringed on China’s sovereignty* and disrupted the peace, security and good order in *relevant waters*.” Emphasis added.

55 United Nations, *Charter of the United Nations*, art. 2(4).

56 *Ibid.*, art. 51.

57 Thomas C. Schelling, *Arms and Influence* (Westport, CT: Praeger, 1966).

58 Michael J. Mazarr, *Mastering the Gray Zone* (Carlisle Barracks, PA: Strategic Studies Institute and US Army War College Press, 2015).

attempting to characterize them as merely patriotic Chinese fishermen.⁵⁹ Additionally, it deploys its disproportionately large and equipped “white hull” (i.e., Coast Guard) ships against its neighbors’ inferior “gray hull” (i.e., Navies) ships to advance its maritime interests. Given that any actions by China Coast Guard are *ipso facto* attributable to the PRC, Beijing attempts to message that its use of superior white hulls is not escalating those disputes to a military-to-military confrontation. The net result of these activities is to strengthen its political position in these disputes with its neighbors, without triggering a legal threshold that would allow those competing states to use force in response.

CONCLUSION

The definition of gamesmanship should perhaps be refined for international relations. For sports and leisure games, gamesmanship is the art of winning *without cheating*. But for competition between states in the rules-based global order, gamesmanship might be the art of winning *with impunity*. In the context of sports and games, cheating implies that (a) there is a referee, umpire, or judge who is authorized to determine whether the rules of such competition have been violated, and (b) there are penalties established by the rules of the game that are imposed against a participant for a player’s substantiated violations of the rules. By contrast, international relations occur in an anarchic system, in which (a) there is no “referee” or “judge” (i.e., centralized governing authority over all states), and (b) the bodies of law that govern the relations between states contain either no or minimal penalties for substantiated violations of the rules. Aggravating the circumstances of international relations is that some of the applicable rules are not fully codified, such as those reflected in customary law. To be sure, the PRC is aware of these institutionalized weaknesses of the rulesets within the rules-based global order. This further encourages or enables the PRC’s “legal gamesmanship” in its competition with other states.

Admittedly, many of these examples identified and discussed above are related to the PRC’s maritime activities in the Asia-Pacific region. This focus is due, in part, to the author’s greater familiarity with that domain. But there is a strong possibility that the PRC is engaged in the same or similar “legal gamesmanship” tactics in other regions of the world (e.g., Africa, the Americas, Europe), in other domains (e.g., cyber, space), and involving other concerns (e.g., economics, human rights, en-

59 Jonathan G. Odom, “Guerrillas in the Sea Mist,” *Asia-Pacific Journal of Ocean Law and Policy* 3, no.1: 31-94, doi: 10.1163/24519391-00301003.

vironment). Therefore, cross-talk among experts who focus their attention on other regions of the world and on other domains could help to identify additional examples. Such intellectual collaboration might also spot additional “legal gamesmanship” tactics that the PRC is employing.

To counter the PRC’s “legal gamesmanship” tactics within the rules-based global order, what exactly should other states—including the US—do? Just as there is not merely one gamesmanship tactic employed by the PRC, so too is there more than one counter-tactic for other states to employ. Actually, different tactics might call for different, tailored counter-tactics. To maximize the likelihood of effectiveness, these counter-tactics should be employed by other states individually and collectively (e.g., ASEAN, European Union, Group of Seven, Australia-India-Japan-US “Quad”). These counter-tactics should be employed publicly (e.g., joint communiqués and press statements) and privately (e.g., bilateral dialogues). Recommendations could include the following:

- Other states should challenge the PRC to specify the applicable law when it generally alleges that those states are violating international law.
- Other states should insist that the PRC strictly follow the established rules of treaty interpretation, rather than disregarding the ordinary meaning of treaties or ignoring their negotiating histories.
- Other states should publicize situations in which the PRC is following a double standard in relations with other states, such as when the PRC is acting one way as a coastal state but a contradictory way using the maritime zones of other states.
- Other states should oppose the election of Chinese judges to the ICJ and the ITLOS, until the PRC agrees to submit its territorial and maritime disputes to these legitimate third-party forums or complies with binding rules by duly constituted tribunals.⁶⁰
- Other states should oppose the PRC’s invocation of its national laws for governing the behavior of other states when those national laws do not conform to applicable international law.

60 For example, an arbitral tribunal duly constituted under UNCLOS issued two arbitral awards (one procedural, one on the merits) in the South China Sea disputes involving the Republic of the Philippines and the People’s Republic of China. As a matter of international law, these arbitral awards are binding on both of the states. See UNCLOS, arts. 288(4) and 296. To date, however, the PRC has refused to comply with either of these arbitral awards.

- Other states should routinely conduct transits of ships and aircraft, as well as conduct activities, that challenge the PRC's artificial maritime claims that it derives from modifying geographic features not legally entitled to maritime zones.

Of course, there might be other actions that states could and should take to counter the PRC's "legal gamesmanship" tactics. But the list above is a starting point.

Regardless of which counter-tactics *could* be utilized, the important take-away is that other states *must* do something. Otherwise, inaction further enables the employment of "legal gamesmanship" tactics by the PRC, and incentivizes other states who might be watching to consider following the PRC's example. In short, inaction in the face of "legal gamesmanship" will destabilize the rules-based global order that is worth protecting and preserving.