

# USALI Perspectives

## Lawfare in the South China Sea: The Latest US Moves

By [Pham Ngoc Minh Trang](#)  
Published February 17, 2022

The US kicked off the new year with two challenges to China's claims in the South China Sea. It sent the USS Benfold into waters near the Paracel Islands on a new freedom of navigation operation. And it provided legal ammunition for its right to do so by publishing a new Limits in the Sea report.

The report, [No. 150](#) in a series issued by the Department of State, takes effective aim at new arguments that China has developed to defend its South China Sea claims since its resounding defeat before an international arbitral tribunal in 2016.

An earlier report in the series, [No. 143](#) published in 2014, rejected China depiction of its South China Sea claims in the form of an infamous nine-dash-line map. The 2016 tribunal award also rejected the map as inconsistent with the UN Convention on the Law of the Sea (UNCLOS), to which China is a party. Since 2016, China has shifted to describing its maritime claims in terms of four island groups. This is what the Limits in the Sea Report No. 150 addresses.

In this report, Washington divides Beijing's South China Sea claims into four categories: its sovereignty claims over the islands and other maritime features, the coastal baselines it draws

around these features, the maritime zones it claims extending out from the features, and China's historic rights. The report meticulously negates most of China's claims.

### **Sovereign claims over maritime features**

The report begins by analyzing China's sovereignty claims over four South China Sea island groups: the Dongsha, Xisha (or Paracel), Zhongsha, and Nansha (or Spratly), in English sometimes called the "Four Sha" but in Chinese referred to as the Nanhai Zhudao. These groups' maritime features include not only islands but also low tide elevations (such as Mischief Reef and Second Thomas Shoal) and entirely submerged features (such as Reed Bank, Vanguard Bank, and James Shoal). China treats these group as archipelagos and asserts sovereignty over them in entirety. The US report rejects this claim based on article 121 of UNCLOS, which says that submerged features and low-tide elevations "cannot be subject to sovereignty of the coastal State" if they are located outside its territorial sea.

It is necessary to distinguish two different legal questions: whether a state can legally claim sovereignty over offshore maritime features, and which countries actually own the features. The former question can be answered independently from the latter, and the

US report only addresses the first question. In this way, it avoids contradicting the long-held US position of not taking sides in the South China Sea sovereignty disputes.

### **Baselines**

Baselines are important because, as the name suggests, states' claims to maritime rights are based on how these lines are drawn. The US report argues that with respect to the baselines of islands and other land features in the South China Sea, normal baseline rules (UNCLOS article 5) should be applied by default unless certain geographical conditions exist. For example, straight baselines can be used when a coastline is deeply indented or if there is a fringe of islands in the immediate vicinity of the coast (UNCLOS article 7). Archipelagic states can draw archipelagic baselines connecting the outermost points of their outmost islands (UNCLOS article 47).

China applies a system of straight baselines around the Xisha and intends to apply three other systems of straight baselines around Dongsha, Zhongsha, and Nansha. The US report points out several legal flaws in this practice.

First, not all features in the Nanhai Zhudao can be classed as islands that can have baselines and generate maritime zones. The 2016 tribunal decision found that none of the

Nansha's maritime features qualify as islands.

Second, even if some maritime features are islands, their coastlines are generally smooth, and cannot meet the article 7 conditions for applying a straight baseline.

Third, even if a straight baseline is applicable to an individual island in the Nanhai Zhudao, this baseline cannot be connected to the baselines of other maritime features. Archipelagic states are entitled to apply a system of baselines around its claimed groups of islands, but China is not an archipelagic state.

Fourth, even if China is able to draw a system of straight baselines around its claimed island groups like an archipelagic state, the Nanhai Zhudao are so geographically distant from each other that the ratio between waters and land exceeds what is allowed by UNCLOS article 47.

Fifth, looking beyond UNCLOS, there is no provision in customary international law that supports a system of straight baselines around a coastal state's offshore island groups.

### **Maritime zones**

Because not all maritime features claimed by China are islands that can generate maritime zones, and because

the systems of straight baselines that China has drawn around those island groups are unlawful, the maritime zones claimed by China around the Nanhai Zhudao are also unlawful.

### **Historic rights**

The 2016 arbitral tribunal decision rejected the legality of China's historic rights claim in the South China Sea. Since then, China has not clarified its claim. Hence, the US maintains the position it took in the Limits of the Sea Report No. 143: such historic rights claim is not recognized by the UNCLOS.

This is the first report debunking China's Four Sha claims in the South China Sea with adroit legal arguments backed up by substantive geographical and geological evidence of maritime features in the South China Sea, such as illustrative maps and statistics on the water-to-land ratio of enclosed water areas of the Nanhai Zhudao. It systematically refutes the argument of China that some practices of China in the South China Sea are regulated by international law other than the UNCLOS.

The report once again shows that a big part of the South China Sea consists of international waters open to freedom of navigation. Thus it provides a strong legal basis for the US's freedom of

navigation operations in the South China Sea.

The report is written clearly and concisely, making it easy to read and disseminate beyond the scholarly community. This is how the U.S. strikes back at China’s lawfare in the South China Sea.

Unsurprisingly, China criticized the USS Benfold’s passage as violating its sovereignty. It also rejected the Limits in the Sea report, pointing out that the US has never joined the UNCLOS on which it bases its analysis. “The US should ratify the UNCLOS first before acting like the police of the world,” the official *Global Times* argued. Perhaps it is high time for the US to consider ratifying the convention.



*Pham Ngoc Minh Trang is a research fellow at the Max Planck Foundation for International Peace and the Rule of Law. All views expressed here are her own and do not necessarily represent those of the foundation.*

**Suggested citation:**

Pham Ngoc Minh Trang, “Lawfare in the South China Sea: The Latest US Moves,” in *USALI Perspectives*, 2, No. 15, Feb. 17, 2022, <https://usali.org/usali-perspectives-blog/lawfare-in-the-south-china-sea-the-latest-us-moves>.

The views expressed in USALI Perspectives are those of the authors, and do not represent those of USALI or NYU.

This work is licensed under a [Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

