International Law in the Obama Administration's Pivot to Asia: The China Seas Disputes, the Trans-Pacific Partnership, Rivalry with the PRC, and Status Quo Legal Norms in U.S. Foreign Policy

Jacques deLisle
University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the American Politics Commons, International Law Commons, International Relations Commons, International Trade Law Commons, and the Law of the Sea Commons

Repository Citation
deLisle, Jacques, "International Law in the Obama Administration's Pivot to Asia: The China Seas Disputes, the Trans-Pacific Partnership, Rivalry with the PRC, and Status Quo Legal Norms in U.S. Foreign Policy" (2016). Faculty Scholarship at Penn Law. 2420.
https://scholarship.law.upenn.edu/faculty_scholarship/2420

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.
INTERNATIONAL LAW IN THE OBAMA ADMINISTRATION’S PIVOT TO ASIA:
THE CHINA SEAS DISPUTES, THE TRANS-PACIFIC PARTNERSHIP,
RIVALRY WITH THE PRC, AND STATUS QUO LEGAL NORMS IN U.S. FOREIGN POLICY

Jacques deLisle*

The Obama administration’s “pivot” or “rebalance” to Asia has shaped the Obama administration’s impact on international law. The pivot or rebalance has been primarily about regional security in East Asia (principally, the challenges of coping with a rising and more assertive China—particularly in the context of disputes over the South China Sea—and resulting concerns among regional states), and secondarily about U.S. economic relations with the region (including, as a centerpiece, the Trans-Pacific Partnership). In both areas, the Obama administration has made international law more significant as an element of U.S. foreign policy and has sought to present the U.S. as defending and promoting status quo international legal norms, largely against challenges posed by China. This approach has been somewhat more plausible on security / South China Sea issues than on economic / TPP issues. At the end of the Obama administration, significant uncertainty looms about the prospects for this aspect of the Obama-era approach international law and the international and domestic conditions that helped to produce it.

CONTENTS

I. THE CHINA SEAS DISPUTES—TERRITORIAL SOVEREIGNTY, MARITIME JURISDICTION, AND REGIONAL SECURITY ..................... 146

II. THE TRANS-PACIFIC PARTNERSHIP—INTEGRATION AND RIVALRY IN THE EAST ASIAN AND GLOBAL ECONOMY ....................................... 162

III. AFTER OBAMA AND UNDER A ‘NEW NORMAL’? ............................... 174

The Obama administration framed its “pivot” or “rebalance” to Asia primarily in terms of geopolitics and foreign policy. Yet, the

* Jacques deLisle is the Stephen A. Cozen Professor of Law, Professor of Political Science and Deputy Director of the Center for the Study of Contemporary China at the University of Pennsylvania.
policy also has had significant international legal elements and implications. The promise to rebalance the U.S.’s efforts and attention toward Asia—implicitly, toward East Asia—may have fallen short of expectations,1 but the pivot did push East Asia-related questions much more toward the center of the U.S.’s practice of, and approach to, international law. The Obama administration’s response to disputes over territorial sovereignty and maritime rights in the South China Sea (and the East China Sea), and its quest for the Trans-Pacific Partnership as a “twenty-first century” trade agreement (and a pact that reaches well beyond trade in regulating an increasingly global economy) are primary legal aspects of the pivot or rebalance.

The U.S.’s “pivot” or “rebalance” toward East Asia (including Southeast Asia) was also a shift away from a focus on another geographic area: the Middle East (or West Asia, including Iraq) and South Asia (more specifically, South-Central or Southwest Asia, including Afghanistan and Pakistan). As is often the case, these different parts of the world have presented different political and, in turn, legal challenges for the United States. Thus, the pivot also meant a shift in the subject matter focus of the U.S.’s practice and agenda in international law. During the George W. Bush administration, the defining issues in international law for the United States centered on the fall-out of 9/11 and the wars in Iraq and Afghanistan: the rights and obligations of states in combatting terrorist organizations, the use of military force—with and without UN Security Council authorization—to intervene in states that were

found to support terrorism or harbor terrorists, the rules governing treatment of combatants who were not members of the conventional armed forces of states, targeted killings of individuals identified as terrorists, the resort to “enhanced interrogation” or torture, and the imposition of limits on civil liberties—some of which overlap international human rights—under the proffered justification of preventing terrorist acts and disrupting terrorist organizations.2

To be sure, many of these issues persisted into the Obama presidency, and the Bush administration’s interactions with international law were not confined to military intervention- and terrorism-related issues. Although the contrast between the two administrations, therefore, should not be overdrawn, the pivot-related shift in the principal geographic and doctrinal concerns for the U.S. in international law is striking. The two most high-profile legal dimensions of the turn to (East) Asia under Obama have had significant similarities and served interdependent policy goals. The Trans-Pacific Partnership (TPP) constitutes much of the economic leg of the mostly security-focused pivot.3 The strategic pivot—including especially the elements focused on the South and East China Seas—undertakes to provide the security underpinnings for open trade and economic ties in the region and beyond.

In both contexts—the TPP and related issues of international economic law, and the China Seas disputes and associated issues of maritime zones, sovereignty, and security-related international law—the U.S. cast itself as the defender of status quo international legal norms in the face of Chinese positions that have pressed or may portend a revisionist agenda. The U.S.’s stances on both sets of legal issues have been entwined with efforts to assure and engage other regional states and to advance U.S. interests and aims. But the two issue areas also differed in significant ways, including the clarity and robustness of the legal status quo that the U.S. has purported to defend, and the responses to U.S. moves by regional states living in the shadow of frictions, and possibly sharpening rivalry, between the U.S. and the People’s Republic of China (PRC).


3. See generally, Kurt Campbell & Brian Andrews, Explaining the US ‘PIVOT’ TO ASIA 3-5 (2013) (describing the TPP, strengthening existing alliances in the region, and improving relations with emerging regional powers as the three priorities of the pivot); Mark E. Manyin et al., Pivot to the Pacific? The Obama Administration’s Rebalancing Toward Asia 20 (2012) (“Economics and trade are both causes of and instruments for the pivot toward the Asia-Pacific.”).
I. THE CHINA SEAS DISPUTES—TERRITORIAL SOVEREIGNTY, MARITIME JURISDICTION, AND REGIONAL SECURITY

The Obama administration presented the “pivot”—later dubbed the “rebalance” and sometimes described as a “return”—to Asia primarily in terms of redefining U.S. priorities and reallocating U.S. resources in ways that were more consistent with the U.S.’s national interests, which were especially great in then-recently neglected but strategically and economically vital East Asia. Underlying Washington’s shift, and its welcome reception in much of the region, was China’s rapid rise in power and China’s actions in pursuit of an agenda that appeared, at best, uncertain and, at worst, assertive and even aggressive. In terms of international security and perhaps more generally, the biggest sources of concern about Beijing’s aims and behavior were the disputes over territory and related rights in the East China Sea (with Japan over the Senkaku / Diaoyu islands and adjacent ocean zones) and in the South China Sea (with Vietnam, the Philippines, Malaysia, and others over various subsets of four groups of islands and rocks, and rights in appurtenant maritime areas).

The disputes between China and its neighbors were long-standing and they produced significant discord which has led to sporadic violent incidents since the 1970s. A relatively long period of relative


calm came to an end near the beginning of Obama’s presidency, and recurrent tensions and occasional crises have roiled regional relations since then. With China adopting stronger rhetoric, making bolder legal claims, and moving to exercise greater physical control over the contested areas, regional states—ranging from enduringly close formal U.S. allies (such as Japan) to states that had not previously pursued security ties with the United States (such as Vietnam), and others in between (such as the Philippines and Singapore)—pursued or welcomed support from Washington in the face of perceived Chinese threats and challenges.

Although the pivot was articulated largely in terms of geostrategic considerations and somewhat in terms of values, it also was cast in legal terms and conjoined with legal arguments. Those legal arguments presented the United States as a champion of established norms and valuable international public goods—including regional stability and, in turn, prosperity. Often implicitly, at times


9. See, e.g., Tom Donilon, National Security Advisor, Press Release, Remarks on The United States and the Asia-Pacific in 2013 (Mar. 11, 2013), https://www.whitehouse.gov/the-press-office/2013/03/11/remarks-tom-donilon-national-security-advisor-president-united-states-an [http://perma.cc/5688-M95J] (“[T]he U.S. rebalance toward the Asia-Pacific is also a response to the strong demand signal from leaders and publics across the region for ... sustained attention to regional institutions and defense of international rules and norms . . . . The United States is firmly opposed to coercion or the use of force to advance territorial claims. Only peaceful, collaborative and diplomatic efforts, consistent with international law, can bring about lasting solutions that will serve the interests of all claimants and all countries in this vital region.”); John Kerry, Sec’y of State, Remarks on
explicitly, and sometimes in response to China’s stated opposition to the U.S.’s role, the Obama administration depicted China as the party that was violating or undermining existing international legal norms.\(^{10}\) U.S. stances on international legal issues relevant to the China Seas disputes are part of this pattern.

The U.S. has long insisted that it takes no official position on the question of who has sovereignty over the landforms—and, thus, who can claim the limited but valuable rights over adjacent waters and continental shelves that a state with territorial sovereignty may enjoy under the international law of the sea.\(^{11}\) In the South China Sea context, Washington coupled this agnosticism on sovereignty with sharp criticism of what the U.S. saw as crisis-risking unilateral moves—predominantly by China—to disrupt the status quo, including actual control.\(^{12}\) In the East China Sea setting, the U.S.’s position was

10. See, e.g., President Barack Obama, Remarks at the University of Queensland (Nov. 15, 2014) (transcript available at https://www.whitehouse.gov/the-press-office/2014/11/15/remarks-president-obama-university-queensland [http://perma.cc/CW47-A6GM]) (“[I]f, in fact, China is playing the role of a responsible actor that is peaceful and prosperous and stable, that is good for this region, it’s good for the world, it’s good for the United States... [W]e are also encouraging China to adhere to the same rules as other nations . . . because America will continue to stand up for our interests and principles . . .”).

11. See e.g., Hillary Rodham Clinton, Sec’y State, Remarks With Chinese Foreign Minister Yang Jiechi (Sept. 5, 2012) (transcript available at http://www.state.gov/secretary/20092013clinton/rm/2012/09/197343.htm [https://perma.cc/T2BF-U4CM]) (Clinton, stating, “I reiterated, as I have on many occasions, the United States does not take a position on competing territorial claims.”).

more complex and assertive. Although declining to take sides in the sovereignty dispute between China and Japan, the U.S. affirmed and reaffirmed—including in statements by President Obama and Secretary of State Hillary Clinton—its interpretation of the U.S.-Japan security treaty as extending the U.S.’s commitments to defend the existing arrangement of Japanese administrative control over the Senkaku / Diaoyu. This posture added another international legal dimension, inescapably casting the U.S.’s backing for Japan as an interpretation of an internationally lawful mutual security treaty.

The U.S. standpoint on sovereignty provided a basis for rejecting Beijing’s assertions that the U.S. should not attempt to “internationalize” the “local” disputes in China’s near seas, or “interfere” in a place where the U.S. had no territorial claims. It also undergirded U.S. moves to convey support for Japan when Chinese vessels and aircraft challenged Japan’s hitherto exclusive control over from naturally-formed land features in accordance with customary international law, as reflected in the Law of the Sea Convention” and that “[i]f one country selectively ignores these rules for its own benefit, others will undoubtedly follow, eroding the international legal system and destabilizing regional security and the prosperity of all Pacific states”); Prashanth Parameswaran, US Not “Neutral” in South China Sea Disputes: Top US Diplomat, DIPLOMAT (July 22, 2015), http://thediplomat.com/2015/07/us-not-neutral-in-south-china-sea-disputes-top-us-diplomat/ [http://perma.cc/56J9-KYLU] (explaining that U.S. Assistant Secretary of State Daniel Russel “encouraged all actors – not just China – to cease actions that run contrary to [resolving disputes], including reclaiming land, building facilities and militarizing features”); Kristina Wong, Defense Chief to Beijing: No ‘Militarization’ in the South China Sea, HILL (Mar. 1, 2016), http://thehill.com/policy/defense/271372-carter-warns-china-against-militarizing-the-south-china-sea [https://perma.cc/DFQ8-DC49].


The U.S.’s consistent eschewal of a position on territorial sovereignty has been conjoined with other law-related positions. Under Obama, the U.S. has called broadly on all parties to the South and East China Sea disputes to observe international law, and has emphasized support for two more specific and fundamental international legal principles in the South and East China Sea contexts: first, the rival claimants should handle their disputes peacefully; and, second, nothing should impede the rights of free passage of ships—including the U.S. navy—that the law of the sea confers in the high seas, international straits, and waters under the (limited) jurisdiction of coastal states.\footnote{Hillary Clinton, Sec’y State, Discussing U.S.-Vietnam relations, the ASEAN Forum, and North Korea in Hanoi, Vietnam (July 23, 2010) (transcript available at \url{http://iipdigital.usembassy.gov/st/english/texttrans/2010/07/2010072364658su0.4912989.html#axzz3qT0pLkyY}); see also Daniel R. Russel, Assistant Sec’y, Bureau E. Asian & Pac. Affairs, Testimony before the House Committee on Foreign Affairs (Feb. 5, 2014) (transcript available at \url{http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm} (stating that U.S. taking “no position” on claims to sovereignty over disputed land features coexists with U.S. insistence that states forego “intimidation, coercion or force” and that “maritime claims must accord with customary international law,” and stating that “[i]n support of these principles...the United States continues to oppose claims that impinge on the rights, freedoms, and lawful uses of the sea”).}

Here too, the legal face of U.S. policy helped the U.S. to portray itself as the defender of status quo norms and as legitimately asserting collective international interests against a possible Chinese challenge. It perhaps served also to undercut the possible force of a pair of Chinese arguments: that China was itself adhering to international law (albeit under a different and very controversial view of law’s content, as is discussed below);
and that China had no intention of challenging the free transit of ships “in accordance with international law” (while leaving troubling ambiguity about whether China saw such restraint as legally obligatory rather than discretionary, or as extending to certain operations by U.S. military vessels that Beijing has often denounced as unlawful).17

Moves by China and its antagonists—and interpretations of Chinese behavior by U.S. observers18—helped the U.S. present its positions as legally principled, while also offering U.S. friends and allies in the region the strategic support that the Obama administration’s pivot promised. Although characterizations of the complex pattern of disputes in the South and East China Seas are themselves subject to dispute, versions that have gained traction in the U.S.—and that have been sharply rejected by China—depict China as the more disruptive actor and challenger to the status quo.19

In these accounts, the principal moments of escalation in the conflict between China and the Philippines include: Chinese state ships stringing a net across the mouth of Scarborough Shoal in 2012 to deny Filipino fishing boats access to the long-disputed area and thereafter maintaining patrols to ward off Filipino ships;20 Chinese


vessels’ harassment of efforts to resupply the handful of Filipino servicemen stationed on the decrepit ship Sierra Madre grounded atop a disputed reef; China’s refusal to engage in the international arbitration proceeding—a venerable peaceful dispute resolution process under international law—that the Philippines initiated in 2013 and pursued in a way that steers clear of the territorial sovereignty and maritime boundary delimitation issues that are outside the scope of the tribunal’s jurisdiction (partly because of the limited scope of China’s submission to jurisdiction); and indications in early 2016 that China might be preparing to undertake large-scale land-reclamation at Scarborough Shoal.

For the East China Sea, prominent assessments in the U.S. view China as having engaged in retaliatory escalation against Japan in 2012 when it dispatched naval ships, state maritime service vessels, and non-state fishing boats to the Senkaku / Diaoyu area after Japanese Premier Noda’s government acquired the privately owned land on the islands—a move that sought, according to accounts sympathetic to Japan, to avoid conflict by preventing purchase, and provocative use, of that land by ardent Japanese nationalists, led by


Tokyo Governor Ishihara. This narrative of an assertive and status quo-threatening China was reinforced by Beijing’s subsequent declaration, in November 2013, of an unusually restrictive air defense identification zone (ADIZ) over much of the East China Sea, including over the Senkaku islands.

So too, when China, in 2014, temporarily deployed a massive oil exploration rig in waters near Vietnam’s coast and small landforms claimed by China, and used water cannons to repel Vietnamese ships, the storyline that took hold in the U.S. portrayed China as the disturber of the status quo. The same pattern recurred, in a much


stronger form after China began, in 2014, to undertake massive land reclamation projects at seven landforms and maritime features China controls in the South China Sea. U.S. government statements and Western media coverage have been highly critical of China’s actions and have had little patience with Beijing’s arguments that other claimant states had on other occasions undertaken land reclamation (although not recently or on so massive a scale), or that the purposes of China’s island-building were limited to providing bases for maritime rescue, protection for fishing fleets, and other such benign purposes.27

Official statements from the Obama administration and inferences from Washington’s support for China’s rivals have entailed or implied the U.S.’s rejection of several specific Chinese claims that have been inconsistent with legal rules governing maritime rights and related security interests or, at least, interpretations of those rules that are widely shared internationally and are strongly backed by the United States. Although the U.S. has long called on China to clarify the nature of the claim associated with its famous “9-dash line” enclosing the vast bulk of the South China Sea, the issue sharpened during the Obama years.28 China placed renewed emphasis on the 9-dash line—

---


especially in the context of China’s opposition to claims filed by Malaysia, the Philippines, and Vietnam with the United Nations Commission on the Limits of the Continental Shelf—the international body that addresses delimitation of overlapping continental shelf zones.29

When the Obama administration included free international passage through the South China Sea among the U.S.’s three principal policies on the South China Sea, it implied a challenge to the legal validity of the strongest readings of China’s frustratingly ambiguous 9-dash line claim.30 The U.S. position was partly rooted in the view that China had no plausible legal claim that all the waters within the line were Chinese sovereign waters, akin to a territorial sea, or that the vast majority of those waters was part of a territorial sea ostensibly derived from baselines that—by the standards of U.S. and mainstream international views of relevant law—China had drawn too expansively around landforms that were too scattered, too small, and too unsettled in ownership to support such claims.31


31. See Office Ocean & Polar Affairs et al., China: Maritime Claims in the South China Sea, LIMITS IN SEAS Dec. 5, 2014, at 14-15,
Another of the U.S.’s core policy positions—that disputants (especially including China) must adhere to international law—swept somewhat more broadly and, again, cast China’s positions as at odds with established legal norms. This policy, too, implied rejection of the “sovereign waters” claim that China had never definitively repudiated despite repeated U.S. calls. It also entailed a rebuff of the less radical—but still revisionist—and more recently emerging Chinese line of argument that the PRC has “historic rights” or “historic title” over the waters that are rooted in customary international law and that survived the advent of the United Nations Convention on the Law of the Sea (UNCLOS)-centered regime and the contemporary customary international law embodied in UNCLOS’s substantive provisions.\(^{32}\)

Amid growing friction over the maritime disputes between Washington and Beijing in late 2014, the U.S. State Department’s authoritative *Limits in the Seas* series issued an elaborate analysis that rejected the 9-dash line, including China’s “historic” claims the area, as unsustainable under international legal rules governing maritime zones.\(^{33}\)

The Obama administration’s calls for freedom of navigation (and overflight) and adherence to international law framed other Chinese legal arguments and actions as at odds with existing principles of international law, specifically those concerning the limits of coastal states’ rights to regulate activities in their exclusive economic zones (EEZ) or on the high seas. The U.S. rejected China’s objections that U.S. practices of sending naval vessels and aircraft into areas near

http://www.state.gov/documents/organization/234936.pdf
[http://perma.cc/UHW6-4DVQ] (rejecting Chinese claim to the waters in the 9-dash line as inconsistent with international law); Office Ocean & Polar Affairs et al., *Straight Baselines Claim: China*, LIMITS IN SEAS, July 9, 1996, at 4-8,
http://www.state.gov/documents/organization/57692.pdf


Chinese-claimed landforms were, variously, unauthorized maritime scientific research in China’s EEZ, infringement of security rights of China in its EEZ, abuse of law-of-the-sea rights—including the expansive rights that states enjoy on the high seas—by showing a lack of due regard for China’s rights and interests, or non-peaceful uses of the sea that threatened China’s sovereign autonomy or territorial integrity or contravened other international legal limits. Instead, the U.S.’s position—consistent with prevalent but contested (by China and others) understandings of international legal norms—continued to be that close-in surveillance and reconnaissance in China’s EEZ were lawful acts, and that the U.S. Navy’s presence and activities in the region did not violate international legal rules on peaceful use and respect for other states’ rights.

Many of these were long-standing points of disagreement that had surfaced dramatically in pre-Obama-administration incidents such as the collision of a Chinese air force jet with a U.S. Navy surveillance plane off the Chinese coast in the early days of the George W. Bush administration, and instances of Chinese navy ships harassing U.S. surveillance vessels in China’s asserted EEZs. But, the Obama-era
pivot was accompanied by a reaffirmation of familiar positions and a new emphasis on these issues, as well as high-profile confrontations by Chinese vessels of U.S. Navy ships, including the USS John McCain and the USNS Impeccable in 2009 and the Impeccable again in 2013.\footnote{See generally Raul Pedrozo, Close Encounters at Sea: The USNS Impeccable Incident, 62 U.S. NAVAL WAR COLL. REV.101-11 (2009); Ji Guoxing, The Legality of the Impeccable Incident, 5 CHINA SEC’Y 16-21 (2009); O’Rourke, supra note 34, at 12 (listing U.S.-China incidents at sea in last several years).} Initially framed by the perception that China was generally becoming more assertive in the region, the Obama administration’s heightened emphasis on freedom of navigation for the U.S. Navy—and others—became more pointed in response to the specific issue of China’s island-building project during the Obama presidency’s final years.

and inconsistent with international law.  


discussion of a possible Chinese ADIZ over the South China Sea.\textsuperscript{43} U.S. assessments tellingly and predictably warned that if China were to proclaim an ADIZ over regions so remote from its own substantial and undisputed territory, it would portend a more serious breach of—and challenge to—international norms, including legal ones.\textsuperscript{44} Agreements on improved military contacts and incident-avoidance reached during Xi Jinping’s September 2015 state visit and before may have reduced the risks of accidental incidents and escalation, but they did not close the gaps on these legal principles.\textsuperscript{45}

As the foregoing indicates, while the Obama administration has presented the U.S. as a supporter and defender of established international legal norms when pursuing its strategic pivot to Asia, China has rejected implications or accusations that it is flouting international law. The PRC has insisted that its actions are supported by law (for example, giving China “indisputable” sovereignty over all of the contested landforms and related maritime rights, or “historic” rights over contested waters, or rights to limit U.S. navy operations

\begin{footnotesize}
\begin{enumerate}


\end{enumerate}
\end{footnotesize}
off China’s coast), or do not threaten interests that other states claim as legal rights (such as open sea lanes of communications in the South China Sea).46

International law on issues of territorial sovereignty, maritime rights, and other matters implicated in the China Seas disputes is in some respects ambiguous and potentially unstable. But, overall, the U.S. has been able to benefit from and support its pursuit of the goals associated with the Obama administration’s pivot to Asia by having the better of the argument with China over whose positions are more consistent with established rules and interpretations of international law.

For China’s maritime neighbors and rival claimants to the South and East China Sea areas, their interests have aligned with the U.S.’s strategic pivot and the stance the U.S. has taken on key international legal issues during the Obama administration. For those states and for the wider region (including China), the U.S.’s security commitments and the legal order that those commitments underpin have long served as public goods.47 Crucial questions for the post-pivot and post-Obama years are whether the U.S. will sustain the capacity and the will to play its traditional roles in international security and related legal regimes in East Asia, and whether a more powerful China with more diverse and far-flung interests might become more supportive of the status quo or more willing to become a provider of international public goods in the region.

46. China’s Indisputable Sovereignty over the Xisha and Nansha Islands, FOREIGN MIN. CHINA (January 1980); The Issue of the South China Sea, FOREIGN MIN. CHINA (June 2000); H.E. Mr. Ban Ki-moon, Sec’y-Gen., U.N., Remarks in New York (May 7, 2009) (transcript available at http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf [https://perma.cc/5CQG-2DGA]); see generally THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE (Stefan Talmon & Bing Bing Jia eds., 2014) (setting forth, in great detail, pro-China positions; see Michael D. Swaine, Chinese Views and Commentary on the East China Sea Air Defense Identification Zone, CHINA LEADERSHIP MONITOR, Spring 2014, at 6 (explaining that “authoritative Chinese sources have sought to provide further clarifications on the nature and function of the ADIZ, emphasizing the conventional and non-threatening nature of the Chinese zone”).

II. THE TRANS-PACIFIC PARTNERSHIP—INTEGRATION AND RIVALRY IN THE EAST ASIAN AND GLOBAL ECONOMY

Among the impetuses to the U.S.'s pursuit of the TPP was that the TPP would serve as the economic leg of the Obama administration's pivot, or rebalance, to Asia. With its origins in proposals that predated the Obama administration, and after protracted negotiations that spanned the first several years of Obama's presidency, the TPP final agreement was reached by the U.S. and eleven other states (including Japan, Malaysia and Vietnam) on October 5, 2015 and signed by the U.S. on February 3, 2016. The pact is massive; its charter members engage in one-third of world trade and produce 40% of global GDP. It is also ambitious, with provisions addressing traditional trade issues, international investment, intellectual property, currency policy, and many aspects of domestic economic regulation, including labor rights and environmental protection. With its original and likely expanding


membership in East Asia, the TPP promises to link the U.S. more closely to major economies in the region and thereby strengthen the U.S.’s economic presence and interests in the part of the world that Obama-era policies have identified as singularly important to the U.S.’s international interests, economic as well as geostrategic.

Along with earlier-established free-trade agreements with Korea and Singapore, the TPP provides an economic dimension to rebalancing that has offered reassurance to the U.S.’s allies and partners and others in the region that Washington’s security commitments are durable. 52 Absent a robust economic component, the more prominent security side of the pivot would risk looking like a “sucker’s bet” for the U.S.—and one that regional states could not count on the U.S. making over the long run. That is, the United States would be bearing the considerable costs of underwriting regional security, and it would be doing so with diminished resources and perhaps weakened will in the post-Iraq War and post-Global Financial Crisis era. Without the TPP and other arrangements to bolster economic ties between the U.S. and regional states, China would reap a more rapidly growing share of the economic benefits of East Asian stability and integration as the increasingly preeminent trade partner and fast-rising investment partner for most states in the region. TPP-deepened and TPP-strengthened economic ties between the U.S. and regional states promised to exert some counterforce to China’s economic gravitational pull, and to bind the U.S. and East Asian states to the mast in their commitments to one another by giving them economic reasons to support the status quo in the region, including the U.S. security commitments that, while offensive to China, underpin that status quo.

As this suggests, the TPP, and the economic face of the pivot more generally, also have responded to China’s rise as an economic power. That rise has been accompanied—and aided and reflected—by major regional trade agreement initiatives, including the ASEAN-China Free Trade Agreement, the Cross-Strait Economic Cooperation Framework Agreement (and numerous follow-on accords), the pursuit of free trade agreements with Korea and Japan, and a Regional Cooperative Economic Partnership (RCEP) that will include several

---

TPP members and rival the TPP in scale. China’s initiatives in the 2010s have gone beyond those centered on trade agreements. Beijing increasingly has sought to take a leading role in establishing new regional institutions with functions similar to those of the World Bank, the International Monetary Fund, and the Asian Development Bank. Prominent among these are the Shanghai-based Asian Infrastructure Investment Bank (AIIB), the BRICS-linked New Development Bank (NDB), and an International Monetary Fund (IMF)-like lending facility.

In the TPP and related contexts, the Obama administration framed its agenda partly in legal terms and sought to depict its positions as supporting or fostering core legal—and broader—status quo norms for the international economy. The TPP, after all, will be a legally binding international agreement that sets forth legal rules, many of which build on commitments member states have made in earlier trade agreements concerning their domestic laws governing foreign trade and investment. In pressing for the TPP, as with the security dimension of the pivot, the Obama administration asserted or implied contrasts between its generally status quo-supporting approach and China’s agenda and behavior.

Yet, the Obama administration’s claim to be defending the legal status quo has been on shakier ground with respect to the TPP and East Asian regional economic institutions than in the context of the issues related to international security in the South and East China Seas. In the areas addressed by the TPP, the relevant international legal norms and rules became unsettled before and during the Obama administration, and some of the goals that U.S. policy pursued were


54. The significance of these institutional developments is discussed in greater detail later in this article.


164
not clearly or securely among the values or principles embedded in existing laws and related institutions.

The World Trade Organization (WTO) became the centerpiece of the international economic legal regime beginning in the early 1990s, when it succeeded—and extended into areas well beyond trade in manufactured goods—the original General Agreement on Tariffs and Trade, which had been the most significant (although institutionally weak) component of the postwar legal order for the international economy. The WTO was not, however, a significant feature in the Obama administration’s quest for the TPP. This was largely due to the WTO’s stark decline, following the collapse of the Doha Round negotiations, as the locus for liberalizing international trade, and the WTO’s limitations in addressing many of the other international economic issues—such as intellectual property rights, investment regulation, and labor and environmental standards—that were on the U.S.’s agenda for the TPP.56

From early in the TPP negotiating process, it was relatively clear that the agreement would in some fundamental respects seek to further the values and extend the rules that were already embodied in the WTO and the WTO-centered regime for international economic law.57 It is at least plausible to claim that this is the case with respect to further liberalizing trade in manufactured goods and agricultural products, enhancing market access, extending trade-facilitating rules more deeply into service sectors and the digital economy, improving transparency of trade-limiting rules and procedures, coordinating competition laws, limiting non-market behavior by state enterprises, reducing barriers to foreign investment (in part by adopting a “negative list” approach that provides for openness except in sectors specifically identified in host-country law), offering procedural protections for foreign investors (including dispute settlement through international arbitration) that should encourage international investment, providing robust protection for intellectual property, and restricting problematic domestic practices (including lax restrictions on pollution or protection of workers’ rights) that can confer arguably


57. Much of the specific content of the TPP had remained unknown until late in the process because of the secrecy of the negotiating process and repeated delays in reaching a final agreement. Nonetheless, numerous leaks had revealed many of the key elements early on, and the final text largely confirmed expectations.
unfair competitive advantages. Such features have underpinned the Obama administration’s claim that the TPP is a “twenty-first century” trade agreement and that the TPP would give the U.S. a leading role in writing the rules for the international economy for the century ahead, much as the U.S. had shaped the economic and legal-economic regimes for the postwar world.

But, as such forward-looking rhetoric implicitly concedes, writing new rules—even rules that are generally consistent with the principles or values embodied in existing rules—is not the same thing as defending or supporting the status quo legal order. The TPP is in tension with the WTO’s core “most favored nation” principle (of equal treatment for all WTO member trading partners). In this respect, however, the TPP does not depart from the status quo. The WTO’s aspiration for universal rules has long given way to extensive use—and not infrequent abuse—of provisions that allow preferential trade agreements among groups of WTO members.

Many of the TPP terms that have been most divisive internationally and in the U.S. are controversial in part because they depart from existing international economic legal rules, including ones with roots in the WTO. For example, the Obama administration’s drive for stronger protection for intellectual property rights has been a distinctively (if not uniquely) American aim, resisted by other parties


and potential parties to trade agreements. So too, Obama administration-supported TPP provisions—specifically, the Investor-State Dispute Settlement (ISDS) process—that would allow international arbitral bodies to hear challenges to a state’s legal rules have drawn fire from the left (for favoring multinational companies) and from the left and right (for undermining American sovereignty by subjecting U.S. laws to challenge in non-U.S. tribunals). Much the same can be said about the long-incompletely-disclosed and highly contentious sections concerning environmental and labor rights.


protection, with U.S. critics on the left worried that new international legal rules will offer standards or enforcement mechanisms that are too weak, and U.S. critics on the right concerned that the Obama administration might use TPP commitments to increase regulatory burdens and costs for U.S. industry. On both sides, the concern is not about international legal stasis but about international legal change.

Along with this mix of status quo-supporting, norm-extending, and rule-revising aims, the Obama administration’s pursuit of the TPP, including its distinctly legal elements, has entailed rivalry with China and has included efforts to portray China’s aims as in tension with existing or evolving international legal norms. When the U.S.


began to pursue the TPP in earnest under Obama, PRC observers characterized it—not without reason—as an “ABC” (“anyone but China”) pact.66 In its drive for congressional support for the “fast track” trade promotion authority (TPA) that long has been essential for U.S. presidents to achieve trade agreements, the Obama administration strikingly emphasized rivalry with China, specifically in terms of assuring that the U.S., not China, will “write the rules” for the Asian and global economies.67 Even with TPA and a freshly completed TPP agreement in hand (but still facing opposition in Congress in a future up-or-down vote on the pact), Obama reprised this theme, declaring the TPP essential to avoiding an outcome in which “competitors that don’t share our values, like China, will write the rules for the global economy.”68 The President reiterated this

“warn[ed] China that it must ‘play by the rules’ as its international influence increases”).

66. See, e.g., Guoyu Song & Wen Jin Yuan, China’s Free Trade Agreement Strategies, WASH. Q., Fall 2012, at 110 (explaining that, “most Chinese scholars claim its successful implementation will have a negative impact on China”); Mei Xinyu, TPP No Better than ‘Imperial Preference’, CHINA DAILY (Oct. 12, 2015, 7:34 PM), http://usa.chinadaily.com.cn/opinion/2015-10/12/content_22159826.htm [https://perma.cc/JQ24-T9CG] (“Be it launching the negotiations on the TPP, or reaching agreement on the Transatlantic Trade and Investment Partnership with Europe, all the US’ moves have the intention of maintaining its hegemony in international trade rulemaking while excluding China.”); Elizabeth Shim, China’s Exclusion from Trans-Pacific Partnership Provokes Reactions, UPI, (Oct. 6, 2015, 1:29 PM), http://www.upi.com/Top_News/World-News/2015/10/06/Chinas-exclusion-from-Trans-Pacific-Partnership-provokes-reactions/7151444150517/ [https://perma.cc/UT7W-8MUM] (“China’s exclusion from the finalized Trans-Pacific Partnership has provoked a range of responses from the world’s second-largest economy, and an analyst said the deal is driven by political motivations to encircle China.”).

67. See Tanya Somander, President Obama: “Writing the Rules for 21st Century Trade”, WHITE HOUSE (Feb. 18, 2015, 3:01 PM), available at https://www.whitehouse.gov/blog/2015/02/18/president-obama-writing-rules-21st-century-trade [https://perma.cc/WA5C-T5CD] (“We have to make sure the United States -- and not countries like China -- is the one writing this century’s rules for the world’s economy”); President Barack Obama, Remarks by the President in State of the Union Address (Jan. 20, 2015, 9:10 PM) (transcript available at https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015 [https://perma.cc/F3K6-L4T9]) (“But as we speak, China wants to write the rules for the world’s fastest-growing region”).

point, nearly verbatim, in his final State of the Union address and in his statement on signing the TPP.  

The Obama administration often moderated its tone concerning China and the TPP, declaring that the TPP was open to all who could satisfy its relatively exacting standards—something that China was far from achieving. China softened its position as well, indicating that it was potentially interested in eventual accession. Even amid such less confrontational stances, however, the international law-related point remained the same: the TPP was a demanding treaty that was a qualitative step forward for established international norms of trade liberalization, and that remained beyond China’s capacity and will. U.S. official and mainstream sources contrasted the TPP as a “high quality” trade-plus accord with the China-centered RCEP, which limited itself more narrowly to trade issues, imposed weaker overall obligations, and permitted greater variance among the obligations of members. Such traits were familiar from the much-criticized “spaghetti bowl” or “noodle bowl” of

---

69. President Barack Obama, State of the Union Address as Delivered (Jan. 13, 2016) (transcript available at https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address [https://perma.cc/A7XU-BZWG]) (“With TPP, China does not set the rules in that region; we do. You want to show our strength in this new century? Approve this agreement.”); Statement on the TPP, supra note 49 (“TPP allows America – and not countries like China – to write the rules of the road in the 21st century, which is especially important in a region as dynamic as the Asia-Pacific”).


overlapping and diverse trade pacts that were prevalent in Southeast Asia.⁷²

The Obama administration’s partly self-proclaimed competition with China over the legal and law-related institutions of the international economy, and its efforts to present the U.S. as supporting established law or the further development of the legal norms embodied in the existing order, extends beyond trade pacts. The Obama administration, along with like-minded critics, cast the AIIB and other new PRC-backed international institutions as potential threats to venerable organs of the international economic-legal order, including the World Bank and the IMF.⁷³ The Obama administration strove, with strikingly little success, to dissuade U.S. friends and allies from joining the AIIB.⁷⁴ A rare exception to the


74. Jane Perlez, U.S. Opposing China’s Answer to World Bank, N.Y. TIMES (Oct. 9, 2014) [hereinafter U.S. Opposing China’s Answer],
pattern of Washington’s failure was Japan, which has been a pivotal member of the Asian Development Bank—the entity perhaps most immediately in potential competition with the AIIB.

Although political and economic calculations do much to explain the rush by many states in East Asia and the developed world to join the AIIB and to reject Washington’s entreaties, the Obama administration’s inability to claim credibly that it was defending a robust status quo in international economic law did not help the U.S.’s case. Beijing strongly insisted that it was not challenging status quo norms. The PRC explained that it was offering the AIIB and other institutional initiatives as supplements to existing entities, not as substitutes for them or competitors to them. Chinese sources explained that much of the lending from the new bodies would be based on the standards established by existing institutions under rules already in place.75 In a particularly sharp poke at the U.S.’s case, Beijing asserted that its moves were made necessary by the failure—largely attributable to the U.S.’s congressionally-induced inability to move forward—to reform the IMF and the World Bank to realign those institutions with new realities.76 Those realities principally included the greatly increased economic importance of China, India, and other large emerging economies, and the greatly increased need to


mobilize much greater resources if the World Bank and IMF were to perform their functions adequately in a global economy with vast infrastructure needs and many countries at risk for balance of payment difficulties.77

So too, China has been able to parry U.S. critiques of China’s international economic and legal-economic initiatives, thanks in part to the Obama administration’s resort to China-excluding rhetoric when it was cultivating domestic support for the TPP.78 China’s case—and rebuttal of the U.S.’s case—also benefited from Beijing’s ability to present the RCEP, in comparison to the TPP, as an equally lawful and not innately rivalrous regional economic agreement that advances (albeit somewhat modestly) widely accepted international norms of trade liberalization and international economic integration.79

The interests and preferences of East Asian states (most of which are members or potential members of the TPP, the RCEP, or both) have generated complex and ambivalent stances toward the Obama administration’s agenda on regional economic issues and their legal aspects. Many states in the region have reacted positively. They have endorsed parts of the U.S.’s agenda. They have pursued the TPP as a legal framework for promoting trade, investment and economic integration. They have welcomed the opportunity to balance their growing economic dependence on China with more ties to the United States. They have taken comfort in the U.S.’s signal of an economic


78. As with the TPP, the Obama administration backed off its initial criticism in the context of the AIIB, indicating (in an echo of its shift toward welcoming China’s potential eventual membership in the TPP) that that the U.S. was prepared to cooperate with the AIIB, provided it observed “best practices.” Ian Talley, Obama: We’re All for the Asian Infrastructure Investment Bank, WALL ST. J. (Apr. 28, 2015, 3:56 PM), http://blogs.wsj.com/economics/2015/04/28/obama-were-all-for-the-asian-infrastructure-investment-bank/ [https://perma.cc/Y8P4-7ZH3].

79. See, e.g., Transcript: Li Keqiang, FIN. TIMES (Apr. 15, 2015, 1:46 PM), http://www.ft.com/intl/cms/s/0/3a12d156-e288-11e4-a1d-00144feab7de.html [https://perma.cc/V3VT-9N0W] (providing an interview with Chinese Premier Li Keqiang, stating that RCEP and other regional FTAs including the TPP and ASEAN-China FTA “can all work in parallel” and calling for “full compliance with the WTO”).
commitment to complement and reinforce its security commitment to the region. Yet, these states have not wanted closer economic and related legal ties with the United States to undermine their economic relations with China, which have offered considerable benefits as well, and which could be expected to grow with China’s continued economic rise and the new opportunities offered by China’s RCEP, AIIB, and other economic initiatives and associated legal frameworks and institutional structures.

As the Obama years near their end, fundamental questions remain unanswered. They include the prospects for congressional passage of—and public reaction to—the just-completed and still-controversial TPP. Assuming Congress eventually approves the TPP (and even if it does not), U.S. policy in the post-Obama period will have to grapple with uncertainty about where along the spectrum from complementarity to systemic conflict will lie the relationships between the TPP and long-standing institutions such as the IMF, the World Bank, and the ADB, on one side, and the RCEP, and other emerging, more Chinese-influenced entities such as the AIIB and the NDB, as well as China’s “one belt, one road” policy (for developing overland and maritime transportation infrastructure to link China southward and westward all the way to Europe), on the other.

III. After Obama and under a ‘New Normal’?

As the Obama administration enters its final months, many of the unanswered questions about the legacy of the pivot—including the response to still-evolving security challenges in the South and East


China Seas, the unfinished and beleaguered quest for the TPP, and the legal dimensions of those policy agendas—reflect the uncertainties of long-term trends in the relative capacities and evolving preferences of the United States, China, and other states in East Asia.

Among the factors now contributing to the uncertainty is the possibility that the recent troubles in the Chinese economy reflect problems that will be serious and lasting and that may have significant political consequences. It may be that slowing growth rates, a tumultuous stock market, a sharply fluctuating currency, and government policy measures that have appeared to be less effective than in the past will be more than transient or manageable problems. If that is the case and China falls well short of the lowered expectations of a “new normal” of 7% to 7.5% growth—or the further lowered target of 6.5% growth to be adopted in the 13th Five Year Plan—or faces internal weakness and instability, then a fundamental underpinning for the pivot and its legal component—the challenge of an inexorably and rapidly rising China—will be called into question. If so, and, along with it, the Obama-era policies and related legal tactics that have responded to China’s rapid rise will need to be reconsidered.

Another near-term event with potentially long-term consequences is the presidential election in the United States that will bring Obama’s successor to power in January 2017. Especially in China, Democratic Party frontrunner Hillary Clinton is widely seen as likely to be tougher on China than Obama was. Accurate or not, this


expectation is based in part on her central role as Secretary of State in articulating the pivot policy, including its security-related international legal components. On the Republican side, contenders for the nomination seem to be reprising a U.S. presidential campaign tradition of the out-of-power party criticizing the incumbent party for being too soft on China. The leading GOP hopefuls for 2016 seem to be doing this in especially strong forms.  

Possible changes in policy toward China are only part of the issue for the post-Obama prospects for the pivot and its legal sequelae. Changes in presidents can also bring changes in U.S. views on the importance and roles of international law. The Obama administration placed significantly greater emphasis on international law and presenting its foreign policy actions as conforming to international legal norms and rules than did the Bush administration. As we have seen, portraying the pivot in terms that emphasized or asserted the U.S. agenda’s consistency with the international legal status quo arguably served the U.S.’s aims and interests during the Obama years. The next American president may, or may not, have a significantly different perspective. The challenges he or she faces in the East Asian region and the wider world may, or may not, be ones for which U.S. claims to support or advance established international legal principles and values will dovetail with U.S. interests and administration policy.

be a responsible stakeholder—including on cyberspace, human rights, trade, territorial disputes, and climate change—and hold it accountable if it does not…”).