



Competing Visions of International Order in the South China Sea

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Principal Findings

What's new? Strategic competition between China and the United States increasingly overshadows the South China Sea's seemingly intractable multiparty sovereignty disputes. China's growing capacity and determination to protect its interests has alarmed its neighbours and spurred a U.S.-led international effort to push back against Beijing's interpretations of international law.

Why does it matter? China's assertiveness in the South China Sea feeds U.S. perceptions of a revisionist challenge to what it calls the "rules-based international order". Beijing objects to what it sees as containment obstructing its rightful international role. How these tensions are managed matters for international law, maritime order and conflict risks.

What should be done? The U.S. and China should manage conflict risks through the development of a law-based regional order that both support. The U.S. should ratify and China comply with the Law of the Sea convention. The parties should reduce friction through high-level dialogue, agree on incident management mechanisms and clarify red lines.

Executive Summary

Intensifying competition between China and the United States increasingly overshadows the intractable sovereignty disputes in the South China Sea. This contest is commonly, if simplistically, cast as a rising China challenging the U.S.-led “rules-based international order”, driven by an epochal power transition. Thus, China seeks influence commensurate with its growing economic and military might, starting with a regional order that reflects its preferences. Meanwhile, the U.S. aims to preserve the post-World War II order that it believes has underpinned relative peace and prosperity in Asia while also serving its own interests. These paradigms clash in the South China Sea, where some observers see a new cold war that may turn hot. The competition carries implications for the rights of littoral states, international law and conflict risks. China and the U.S. share an obligation to work with each other and smaller claimant states to develop a regional order that can absorb friction and avoid conflict.

In 2016, an ad hoc tribunal constituted under the UN Convention on the Law of the Sea (UNCLOS) invalidated China’s expansive maritime claims in the South China Sea, in a case brought by the Philippines. Beijing, which had refused to participate in the legal proceedings, rejected the ruling. China doubled down on its claims, including by changing the physical environment in a material way, most visibly through the construction and militarisation of seven artificial islands in the Spratly Islands. These islands have in turn facilitated the pervasive maritime presence of the People’s Liberation Army Navy, the Chinese Coast Guard and China’s maritime militia. China’s actions impinge on the rights of other claimants to maritime entitlements in their claimed exclusive economic zones. For years, Malaysia, the Philippines and Vietnam have been unable to prospect for hydrocarbons in waters they claim without risking harassment by Chinese vessels.

The material changes wrought by China are accompanied by novel legal arguments, which point to China’s ambition to shape the international order along its periphery. Under the rubric of “community of common destiny”, and aided by projects under the Belt and Road Initiative, China is attempting to develop a regional order in which neighbouring countries will defer to Beijing in exchange for benevolence. The U.S. and its allies, unsettled by China’s growing power and assertive behaviour, have reacted by advancing the idea of a Free and Open Indo-Pacific, largely pitched to South East Asia as an alternative to China’s dominance.

There is no near-term prospect of resolution for the sovereignty disputes in the South China Sea. In theory, this fact should not preclude provisional cooperative arrangements among claimants on mechanisms to provide order in the South China Sea, from conducting scientific research to jointly protecting the environment and apportioning its resources. The reality, however, is that China’s determination to enforce its sweeping claims over most of the sea, along with the resulting boost to nationalist sentiment in littoral states and an abiding lack of trust among claimants, makes the necessary compromises particularly complex.

Meanwhile, China’s assertiveness and the burgeoning U.S.-led pushback against it raises the risk of escalation at sea and in the air. Pushback may be a strategy for impressing upon China that other states will not accept its unilateral interpretations

of the law. But it is just as likely to confirm Beijing's fears of containment and spur the Communist Party to intensify its efforts to secure China's near seas in the interest of national security.

The U.S. appears to view China's dominance in the South China Sea as a greater risk than the prospect of conflict, while China's actions demonstrate a judgment that its interests in securing its periphery trump concerns about how its neighbours perceive its behaviour. In this febrile environment, the great powers need to think carefully about conflict risks and shore up the existing UNCLOS regime. The U.S. and its allies need to walk a fine line between pressuring China and painting it into a corner. China needs to respect the sovereign rights of its littoral neighbours, enshrined in the convention, and more generally internalise that the achievement of many of its regional goals requires buy-in from its neighbours. At the bilateral level, both powers should intensify high-level dialogue in order to minimise misunderstandings, establish incident management mechanisms and foster greater stability; the November 2021 virtual meeting of the two countries' leaders was a welcome first step. Both should look for ways to support cooperation among claimant states on matters such as law enforcement, environmental protection and fisheries.

Recourse to international law, namely UNCLOS, to manage and resolve disputes in the South China Sea certainly appears unrealistic, given China's unilateral interpretations of the treaty's provisions and rejection of the 2016 arbitral award, and entrenched resistance in the U.S. to acceding to the very convention it insists China must uphold. But alternatives to resolution within the scope of the law tend to be based on brute power; entertaining them will only increase the risk of conflict between two nuclear-armed states. By contrast, China and the U.S. each stand to gain by submitting to the constraints of international law. For China, bringing its South China Sea claims into conformity with the Law of the Sea would reassure its neighbours and relieve some of the anxiety that is motivating a burgeoning multinational pushback against Beijing's behaviour in the South China Sea. For the U.S., acceding to the Law of the Sea treaty would reinforce both its own credibility and the treaty regime's strength and validity, making it more likely that an eventual resolution could be achieved within its framework.

Bangkok/Brussels, 29 November 2021

Competing Visions of International Order in the South China Sea

I. Introduction

The disputes in the South China Sea are manifold. In the first instance, they are conflicts over sovereignty, involving China, Brunei Darussalam, Malaysia, the Philippines, Taiwan and Vietnam. Although South East Asian claimants have conflicting claims with each other, the asymmetry in power between the People's Republic of China and the other claimants, and the broad scope of Beijing's assertion of sovereignty over most of the Sea, is the central feature of the disputes. It helps account for their intractability and the forlorn character of resolution efforts. Meanwhile, rivalry between China and the U.S., which has been the guarantor of the regional security order since World War II, increasingly loads the disputes with geopolitical significance.

The South China Sea is a semi-enclosed sea of some 3.5 million sq km linking the Indian Ocean and the western Pacific. A third of global shipping transits the Sea, through the Straits of Malacca and Singapore Strait, or the Sunda Strait in the south east and the Taiwan Strait or Luzon Strait in the north west.¹ There are three main groups of land features (islands, islets, rocks and reefs): the Pratas Islands in the north west, the Paracels in the north east and the Spratlys in the east. While the Pratas are administered by Taiwan, the Paracels are administered by China but also claimed by Taiwan and Vietnam. The Spratlys are claimed in part or in full by China, Brunei, Malaysia, the Philippines, Taiwan and Vietnam. These features are small, and many are submerged at high tide. In the Spratlys, for example, one commentator noted in 2013 that “the total land area of the thirteen largest islands is less than 1.7 sq km. (By way of comparison, Central Park in Manhattan is 3.41 sq km)”.²

This report updates Crisis Group's reporting on the South China Sea.³ It examines the impact of arbitration proceedings brought by the Philippines against China and the award that the arbitral tribunal issued in July 2016. It also focuses on the intensifying competition between China and the U.S., long a latent contest that over the past few years has become pronounced, and on how great power competition is animated to a degree by a conviction that the rules ordering international relations, at least in the region, are at stake.

This report is a companion to contemporaneous Crisis Group reports that examine how the Philippines and Vietnam each contend with the dilemma of attempting to maintain their claims to sovereignty over land features and maritime jurisdiction in

¹ One estimate puts the value of trade transiting the sea in 2016 at \$3.4 trillion. “How much trade transits the South China Sea?”, China Power, 25 January 2021.

² Robert Beckman, “The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea”, *The American Journal of International Law*, vol. 107, no. 1 (January 2013), p. 143.

³ See Crisis Group Asia Reports N°s 275, *Stirring Up the South China Sea (IV): Oil in Troubled Waters*, 26 January 2016; 267, *Stirring Up the South China Sea (III): A Fleeting Opportunity for Calm*, 7 May 2015; 229, *Stirring up the South China Sea (II): Regional Responses*, 24 July 2012; and 223, *Stirring Up the South China Sea (I)*, 23 April 2012.

the South China Sea, in defiance of China's claims, while simultaneously preserving friendly and economically beneficial relations with Beijing.⁴ It offers regional context in addition to examining the interplay between the South China Sea territorial and jurisdictional disputes and great power competition. It is based on an extensive literature review, media reporting, official statements and select interviews with analysts, scholars and officials.

⁴ See Crisis Group Asia Reports, *The Philippines' Dilemma: How to Manage Tensions in the South China Sea*; and *Vietnam Tacks Between Cooperation and Struggle in the South China Sea*, both forthcoming.

II. Imbroglia in Brief

A. *Variety of Disputes*

The South China Sea disputes are fundamentally about competing claims of sovereignty over hundreds of small maritime features and competing claims to jurisdiction over maritime zones that may be associated with these features. China, Taiwan and Vietnam each claim the Paracel Islands and the Spratly Islands in their entirety, but China has controlled the Paracels since seizing them from South Vietnam in 1974. The locus of contention now is the Spratly Islands, which are also claimed in part by Malaysia and the Philippines, while Brunei Darussalam claims a single submerged reef. Indonesia insists it has no territorial dispute in the Sea, but objects to incursions into waters under its jurisdiction, particularly by foreign fishermen.

Land features may generate various kinds of maritime zones, over which the littoral claimants have overlapping and competing claims to jurisdiction. These are specified in the 1982 UN Convention on the Law of the Sea (UNCLOS), which entered into force in 1994. Under UNCLOS, islands over which a state has sovereignty generate the same maritime zones as mainland territory: a 12-nautical mile territorial sea; a 200-nautical mile exclusive economic zone (EEZ); and a continental shelf. Coastal states enjoy sovereignty over their territorial seas and jurisdiction over the resources in the sea and seabed in their EEZ.⁵ These zones are measured from the low-tide coastlines of coastal states but in some cases may be measured from straight baselines drawn from offshore features. Waters landward of the baselines are “internal waters” subject to domestic law. All claimants in the South China Sea disputes are party to UNCLOS, save Taiwan, which has nonetheless declared itself bound by its provisions under customary international law.⁶

The EEZ regime helps explain why claimant states have invested so much in claiming such insignificant specks of land. By providing for layered sovereignty, UNCLOS has encouraged states to make territorial claims, thus instigating disputes.⁷ Littoral states began to occupy land features in the South China Sea in earnest in the 1970s, while UNCLOS was still being negotiated, following reports of oil and gas deposits in the late 1960s and advances in offshore drilling technology. Today, Vietnam occupies at least 21 features in the Spratly Islands; the Philippines, nine; Malaysia, five; Taiwan, one (Itu Aba, the largest feature in the Spratlys); and China, seven.⁸ China did not begin

⁵ Coastal states enjoy sovereignty over internal waters and the 12-nautical mile (nm) territorial sea, where domestic law applies. A contiguous zone extends seaward for an additional 12nm, in which coastal states may enforce customs, fiscal, immigration or sanitary laws and regulations. The EEZ affords coastal states sovereign rights to explore, exploit, conserve and manage the living and non-living resources of the maritime space extending 200nm from the coastline or baseline. Coastal states have sovereign rights to resources in the seabed and subsoil of the continental shelf, which may extend up to 350nm from shore. See UNCLOS, Articles 33, 58 and 76.

⁶ UNCLOS alone is unable to resolve all the disputes because it does not speak to the issue of acquisition of territorial sovereignty.

⁷ Rebecca Strating, “Maritime Disputes, Sovereignty and the Rules-Based Order in East Asia”, *Australian Journal of Politics and History*, vol. 65, no. 2 (2019), p. 464. For more on these conflicting claims, see Crisis Group Report, *South China Sea (II)*, Appendix B, pp. 36-38.

⁸ Some sources put the number of Vietnamese occupied features at 27 or more, but the discrepancy appears to arise from differing definitions of “feature”. Some outposts are constructed on submerged

occupying Spratly features until 1988, by which time other claimants had already occupied the largest; it then seized Mischief Reef from the Philippines in 1995. The following year, Beijing established its coastal baselines, and enclosed the Paracels in straight baselines.⁹ It reserves the right to draw baselines around the Spratlys but has not yet done so.

Like other claimants, China has an interest in the South China Sea's resources, but these are far more consequential to the smaller claimants' economies than its own.¹⁰ More importantly, China wants to exert greater control over its periphery, particularly its "near seas", in the interest of national security.¹¹ The paramount aim is to prevent encirclement, a longstanding source of anxiety within the ruling Communist Party.¹² Achieving this goal entails China's ability to militarily dominate within what is known as the "first island chain", a line stretching north to south from the Kuril Islands, past Japan, the Ryukyus, Taiwan, the Philippines, Borneo and the Natuna Islands.¹³ In addition, analysts speculate that China covets the Sea for its nuclear submarines.¹⁴ Control would facilitate any operation to take control of Taiwan. China's position in the Sea is also a reflection of its aim to become a greater maritime power, both an instrument and symbol of the Party's larger goal of "national rejuvenation", a concept referring to restoration of China's pre-eminence following the "century of humiliation" at the hands of the West and Japan.¹⁵

The contemporary phase of South China Sea contention may be traced to 2009, when China publicised expansive sovereignty claims. In response to two declarations

features. Alexander Vuving, "South China Sea: Who occupies what in the Spratlys?", *The Diplomat*, 6 May 2016.

⁹ "Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China", People's Republic of China, 15 May 1996.

¹⁰ Crisis Group online interview, Bill Hayton, UK, March 2021. Bill Hayton, "Two Years On, South China Sea Ruling Remains a Battleground for the Rules-Based Order", Chatham House, 11 July 2018; Patricia Lourdes Viray, "China blocks ASEAN from \$2.5 trillion in South China Sea oil – US", *Philippine Star*, 18 October 2019.

¹¹ These are the Bohai, Yellow, East China and South China Seas.

¹² China's security concerns are linked to the narrative of the "century of humiliation", the period stretching from the Opium Wars in 1839 to the victory of the Communist Party of China in 1949, which is the lens through which the Party and state media represent the disputes.

¹³ The People's Liberation Army Navy set out a strategic vision in the 1980s, attributed to Admiral Liu Huaqing (1916-2011), that planned for China to extend its reach to the first island chain by the 2000s and into the second island chain (the Pacific islands of the Bonins, the Marianas and the Carolines) by 2020. By 2050, the Chinese navy would rival the U.S. Navy in the Pacific. Crisis Group interview, analysts, Singapore, Hawaii, April-May 2021. Andrew Scobbell, "The South China Sea and U.S.-China Rivalry" in Huiyun Feng and Kai He (eds.), *US-China Competition and the South China Sea Disputes* (New York, 2018), p. 209.

¹⁴ Crisis Group interview, Bill Hayton, March 2012. Kheng Swe Lim, Hailang Ju and Mingjiang Li, "China's Revisionist Aspirations in Southeast Asia and the Curse of the South China Sea Disputes", *China: An International Journal*, vol. 15, no. 1 (February 2017), pp. 205-206.

¹⁵ Xi Jinping described "the great rejuvenation of the Chinese nation" as the essence of the "Chinese dream". "Xi calls for persistently pursuing Chinese dream of national rejuvenation", Xinhua, 26 September 2017. Katherine Morton, "China's Ambition in the South China Sea: Is a Legitimate Maritime Order Possible?", *International Affairs*, vol. 92, no. 4 (2016), pp. 910-911, 932; Christian Wirth, "Emotions, International Hierarchy and the Problem of Solipsism in Sino-US South China Sea Politics", *International Relations*, vol. 34, no. 1 (2020), pp. 1-21.

to the UN Commission on the Limits of the Continental Shelf, one by Vietnam and the other jointly by Malaysia and Vietnam, Beijing immediately submitted its own declarations, which included a map depicting what has come to be known as the “nine-dash line”, encompassing about 85 per cent of the Sea (see map in Appendix A).¹⁶ China’s submissions asserted “indisputable sovereignty over the islands of the South China Sea and adjacent waters” and “sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof”.¹⁷ The phrases “adjacent waters” and “relevant waters” do not appear in UNCLOS, but appear to refer to territorial waters and EEZs, respectively.

Beijing has never clarified the coordinates of the nine-dash line, or precisely what it signifies, instead maintaining calculated ambiguity about its claims. According to two authoritative Chinese scholars, it signifies both China’s claim to sovereignty over islands and rocks within the line and historic rights to fish and other resources in the water and seabed.¹⁸

China’s approach to disputes with the other South China Seas claimants is to seek resolution with each claimant through bilateral consultations.¹⁹ Meanwhile, Beijing has offered joint resource development of disputed zones to Vietnam, Malaysia and the Philippines, but given the asymmetries in power, the response to such overtures has been far from enthusiastic.

The sweeping nature of China’s claims to the South China Sea often eclipses the disputes among other claimants. The Philippines’ and Malaysia’s claims to parts of the Spratlys conflict with each other, as well as with Vietnam’s claim to the entire group. For example, the Philippines and Vietnam occupy Commodore Reef and Amboyna Cay, respectively, both of which Malaysia claims. Malaysia, meanwhile, occupies Vietnam-claimed Swallow Reef, Investigator Shoal and Erica Reef; the latter two are also claimed by the Philippines.²⁰ Overlapping claims have led to sometimes violent maritime encounters, with Vietnamese vessels, in particular, involved in incidents with Malaysian and Indonesian law enforcement. In April 2019, a Vietnam Coast Guard ship rammed an Indonesian Navy ship that was attempting to detain Vietnamese

¹⁶ “The impetus for their actions was the need to submit information regarding the limits of the continental shelf beyond 200 nm to the Commission on the Limits of the Continental Shelf (CLCS) before the deadline of May 13, 2009”. Beckman, “The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea”, *op. cit.*, p. 147.

¹⁷ Notes Verbales, Permanent Mission of the People’s Republic of China, CML/17/2009 and CML/18/2009, 7 May 2009. The claims are reiterated in Note Verbale, Permanent Mission of the People’s Republic of China, CML/8/2011, 14 April 2011, which adds that “China’s Nansha [Spratly] Islands is fully entitled to Territorial Sea, Exclusive Economic Zone and Continental Shelf” and that “China’s sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence”.

¹⁸ Gao Zhiguo and Jia Bing Bing, “The Nine-Dash Line in the South China Sea: History, Status and Implications”, *American Journal of International Law*, vol. 107, no. 98 (2013), pp. 123-124.

¹⁹ Crisis Group Report, *Stirring up the South China Sea (I)*, *op. cit.*, p. 4.

²⁰ J.N. Mak, “Sovereignty in ASEAN and the problem of maritime cooperation in the South China Sea” in Sam Bateman and Ralf Emmers (eds.), *Security and International Politics in the South China Sea: Towards a Cooperative Management Regime* (Abingdon, 2009), p. 113.

fishermen. In August 2020, the Malaysia Coast Guard shot and killed a Vietnamese fisherman.²¹

Another dimension of the imbroglio is the U.S. interest in freedom of navigation. As the world's pre-eminent maritime power, the U.S. opposes what it calls "excessive maritime claims". These are claims to jurisdiction unsupported by UNCLOS or efforts to deny rights afforded to other states provided by international law, also known as restrictive claims.²² A main sticking point is China's assertion of a right to regulate the activities of foreign military ships in waters over which it claims jurisdiction. In 2010, then-Secretary of State Hillary Clinton declared in Hanoi that the U.S. had a "national interest" in freedom of navigation. The U.S. maintains that it is neutral in territorial disputes, insisting only on no use of force and respect for defining maritime rights based on distance from coasts, rather than historic rights.

Washington signed the treaty but it has not acceded to UNCLOS. At the time of signature, President Ronald Reagan argued that the provisions on deep seabed mining "do not meet United States objectives", and though subsequent administrations have sought to change course and accede to the treaty, the U.S. Senate has resisted these efforts. The U.S. has made clear that it regards all of UNCLOS's substantive provisions as expressions of customary international law.²³

In 2015, the U.S. Navy began Freedom of Navigation operations (FONOPs) in the South China Sea to uphold the principle, challenging excessive maritime claims by China and other littoral states.²⁴ The FONOPs steadily increased under President Donald Trump and have continued under President Joe Biden. Some, including high-ranking U.S. Navy officers, have criticised the practice of FONOPs in the Sea, arguing that these have conflated the discrete legal and diplomatic function of the operations with an exercise meant to signal U.S. resolve and reassure allies.²⁵ U.S. messaging

²¹ Crisis Group interviews, analysts in Singapore, Kuala Lumpur and Jakarta, April, July 2021. "Indonesia, Vietnam to probe reported skirmish in disputed waters", Reuters, 23 May 2019; Laura Zhou, "Why fishing boats are on the territorial front lines of the South China Sea", *South China Morning Post*, 12 January 2020; Bhavan Jaipragas, "South China Sea: Asean states set course for Beijing's red line", *South China Morning Post*, 22 August 2020.

²² Jonathan G. Odom, "Maritime Claims in the South China Sea and Freedom of Navigation Operations", in Tan Truong Thuy, John B. Welfield and Le Thuy Trang (eds.), *Building a Normative Order in the South China Sea: Evolving Disputes, Expanding Options* (Cheltenham, 2019), p. 173.

²³ Ronald Reagan, "Statement on United States Actions Concerning the Conference on the Law of the Sea", 9 July 1982. The Reagan administration objected to, among others, "stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits". Subsequently both Republican and Democratic administrations revisited that finding and sought Senate approval, which is required for ratification, but resistance (particularly among Republican sceptics who would see ratification as impinging on U.S. sovereignty) was too strong to overcome. The Obama administration's 2015 National Security Strategy noted that "the ongoing failure to ratify this Treaty undermines our national interest in a rules-based international order". U.S. National Security Strategy, February 2015.

²⁴ Freedom of Navigation operations began in 1978. The U.S. routinely conducts FONOPs around the world, sometimes to contest excessive claims by allies, such as Australia and Japan, and partners, such as India and Vietnam.

²⁵ Admiral Scott H. Swift (USN, Ret.), "Maritime Security in the Indo-Pacific and the UN Convention on the Law of the Sea", Testimony before the House Committee on Armed Services Subcommittee on Seapower and Projection Forces and House Committee on Foreign Affairs Subcommittee on Asia, the Pacific, Central Asia and Nonproliferation, 29 April 2021; Christian Wirth and Valentin

about excessive maritime claims has become muddied, especially in the Spratlys where no claimant has made clear claims to jurisdiction by declaring baselines.²⁶ Beijing regards the operations as provocations and evidence of Washington's policy to contain China.²⁷

B. *Dispute Resolution and Cooperative Regimes*

There are several oft-discussed ways in which the sovereignty and jurisdictional disputes involving China in the South China Sea may be resolved. First, the most powerful claimant may use force to expel the others and maintain its control. Secondly, claimants could individually cede sovereignty to China in exchange for economic or other benefits. Thirdly, all claimants could agree to judicial arbitration.²⁸ The first option is undesirable, the second is not considered viable by South East Asian governments and the third is anathema to Beijing.

A fourth option, which falls short of dispute resolution, is to shelve the sovereignty disputes for now and agree to a cooperative regime for managing and apportioning the Sea's resources. South East Asian claimants could conceivably accept an outsized role for China in such a scenario, provided that Beijing credibly bound itself to rules that would prevent its use of such a cooperative regime to deepen its strategic advantage in the disputes. In view of the intractability of sovereignty and maritime boundary disputes, cooperation on managing the sea may be the most viable alternative to a regrettable combination of contestation, continued environmental degradation and unjust outcomes.²⁹ The question is how to go about it.

In cases where the boundaries between states' EEZs have not been yet delimited, UNCLOS binds its signatories to "make every effort to enter into provisional arrangements of a practical nature".³⁰ Scholars and analysts have, over the past 30 years,

Schatz, "South China Sea 'Lawfare': Fighting over Freedom of Navigation", *GIGA Focus Asia*, no. 5 (August 2020), p. 1.

²⁶ "FONOPs are not primarily designed to send targeted signals of resolve, reassurance, commitment, deterrence or any other of the many political-military signals the United States sends through its naval operations. A FONOP is a specialized tool to protect discrete legal norms that underpin the order of the oceans". Peter A. Dutton and Isaac B. Kardon, "Forget the FONOPs – just fly, sail and operate wherever international law allows", *Lawfare* (blog), 10 June 2017.

²⁷ Crisis Group interview, analyst, Beijing, July 2021.

²⁸ Michael McDevitt, "Forward" in Raul (Pete) Pedrozo, "China versus Vietnam: An Analysis of the Competing Claims in the South China Sea", Center for Naval Analysis, August 2014, p. iii. For a proposal on how historical documents could be used to help resolve the disputes, see Bill Hayton, "History as Problem, History as Solution: A Means to Resolve the South China Sea Disputes", in Jörg Thomas Engelbert (ed.), *The South China Sea Conflict after the Arbitration of July 12, 2016: Analyses and Perspectives* (Berlin, 2020).

²⁹ Sam Bateman, "Conclusion: The Prospects for a Cooperative Management Regime", in Bateman and Emmers, *Security and International Politics in the South China Sea*, op. cit., p. 242. Trends indicate that overfishing and environmental degradation will lead South China Sea ocean species to decline up to 59 per cent by 2045. Amanda Hsiao, "Opportunities for Fisheries Enforcement Cooperation in the South China Sea", *Marine Policy* (June 2019); James Borton and Jackson Ewing, "As nations fight for control, South China Sea coral reefs are dying in silence", *South China Morning Post*, 29 December 2018.

³⁰ UNCLOS, Article 74, paragraph 3, cited in Robert Beckman, "Legal Regimes for Cooperation in the South China Sea", in Bateman and Emmers, *Security and International Politics in the South*

formulated many such arrangements on how the South China Sea could be cooperatively managed. Most proposals involve mechanisms to manage, protect, harvest and equitably apportion resources. Such mechanisms could take a variety of forms, for example, treaties among the claimants to manage fisheries, energy, maritime safety and environmental protection.³¹ There is precedent for such arrangements, such as the 1920 Svalbard Treaty, which gives primary sovereignty over the Svalbard archipelago to Norway but resource rights to all signatories, and the 1959 Antarctic Treaty, which sets aside territorial claims and provides that cooperation under the treaty does not prejudice sovereignty claims.³²

For the moment, however, proposals for comprehensive cooperation regimes appear impractical. Cooperative management is based on the proposition that there is an urgent need to preserve the South China Sea's environment and exploit its resources, energy in particular. But for now, at least, access to the Sea's resources is less important to each of the claimants than the risk that they might jeopardise their claims to sovereignty and jurisdiction through joint exploitation with Beijing in areas China also claims. Association of Southeast Asian Nations (ASEAN) claimants are, in the words of one commentator, wary of agreements that may "inadvertently recognise China's territorial and jurisdictional claims" or "lend legitimacy to the deployment of China's capabilities and facilities in the disputed features and waters".³³ Appearing to give ground on sovereignty claims would cost all claimant governments domestic support, which constrains policy options.

It is likely more feasible in the short term for claimant states, including China, to improve coordination of their individual efforts to manage resources, rather than trying to build a comprehensive, binding regional regime. Such "minilateral" coordination around marine environment protection and fisheries management is particularly important for all claimants' fishing industries. It is also more viable than jointly developing energy resources.

China Sea, op. cit., p. 223. Article 74 further stipulates: "Such agreements shall be without prejudice to the final delimitation". Article 123 of UNCLOS also obliges signatories to cooperate.

³¹ See, for example, Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, *Sharing the Resources of the South China Sea* (The Hague, 1991); CSIS Expert Working Group on the South China Sea, *Defusing the South China Sea Disputes: A Regional Blueprint*, Center for Strategic and International Studies, 2018; Huaigao Qi, "Joint Development in the South China Sea: China's Incentives and Policy Choices", *Journal of Contemporary East Asia Studies*, vol. 8, no. 2 (2019), pp. 220-239.

³² Beckman, "Legal Regimes for Cooperation in the South China Sea", op. cit., p. 229.

³³ Hoang Thi Ha, "Pitfalls for ASEAN in Negotiating a Code of Conduct in the South China Sea", *ISEAS Perspective*, 23 July 2019, p. 5.

III. Arbitration Reverberations

A new chapter in the disputes opened in January 2013 when the Philippines initiated compulsory arbitration proceedings against China over maritime jurisdiction in the South China Sea, under Article 287 and Annex VII of UNCLOS. The Philippines asked the Arbitral Tribunal to resolve fifteen questions of interpretation bearing on China's claims. The tribunal decided it had jurisdiction and took up fourteen, leaving out one that touched on military matters. The tribunal did not squarely address sovereignty, which is not within the UNCLOS remit, focusing instead on the issue of claimants' sovereign rights. China refused to participate, insisting that the tribunal lacked jurisdiction.³⁴

On 12 July 2016, the Arbitral Tribunal issued its final award, which represented a thorough victory for the Philippines. The award found that China's claim to historic rights within the nine-dash line is unlawful and that none of the features in the Spratlys meet the legal definition of "island", and therefore cannot generate entitlements to an EEZ or continental shelf.³⁵ It also ruled that the Spratlys cannot generate maritime zones as a unit.³⁶ The award was a bitter defeat for Beijing, as it comprehensively dismissed its legal arguments for sovereignty and jurisdiction in the South China Sea.

A. *China's Response*

Beijing immediately rejected the ruling, declaring it "null and void", and responded with a campaign to delegitimise it.³⁷ Perhaps the strongest of Beijing's arguments is that the tribunal, in effect, decided issues of territorial sovereignty and maritime

³⁴ China rejected the process, returning the Philippines' Notification and Statement of Claim on 13 February 2013. The Philippines appointed a judge of the International Tribunal on the Law of the Seas (ITLOS) as its arbitrator. As China did not participate, the Philippines requested the president of ITLOS to appoint an arbitrator to represent China as well as the three remaining arbitrators for the ad hoc tribunal. The Arbitral Tribunal appointed the Permanent Court of Arbitration as the registry for the case. China's ministry of foreign affairs issued a position paper in December 2014 that the tribunal treated as objection to its jurisdiction. The final award is binding on the Philippines and China. S. Jayakumar, Tommy Koh, Robert Beckman, Tara Davenport and Hao Duy Phan, "The South China Sea Arbitration: Laying the Groundwork" in S. Jayakumar et al., (eds.), *The South China Sea Arbitration* (Cheltenham, 2018), pp. 12-13.

³⁵ According to UNCLOS, Article 121: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide", and is differentiated from rocks, "which cannot sustain human habitation or economic life of their own" and "shall have no exclusive economic zone or continental shelf".

³⁶ The tribunal ruled that China violated Philippines' sovereign rights by interfering with fishing and energy activity within the Philippines' EEZ, and that Chinese constructions on Mischief Reef are illegal as the feature is part of the Philippine continental shelf. The tribunal also found that China's island building "aggravated and extended" the disputes and was incompatible with obligations of states during dispute resolution. Case No. 2013-19, South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award, 12 July 2016 (hereafter Arbitral Award).

³⁷ "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines", 12 July 2016. Influential Chinese voices on the South China Sea maintain that the U.S. "orchestrated" the arbitration using the Philippines as a "puppet". "Wu Shicun on Recent South China Sea Situation: Probability is Growing for Accidentally Triggered Incidents", China-Southeast Asia Research Center on South China Sea, 27 July 2020.

boundary delimitation, which should not be possible without China's consent.³⁸ Critics also faulted the tribunal for arriving at an overly restrictive definition of "island", which precluded the possibility of any Spratly feature generating an EEZ.³⁹ China's fiercest critics of the tribunal allege that the award, rather than China's actions, is the real threat to international order: "In essence, while making a sweeping denial of China's rights and claims under the disguise of UNCLOS and driven by the ulterior motives of the U.S. and the Philippines, the arbitral tribunal challenged the existing international order and rules and undermined the authority and sanctity of the UN institutions and UNCLOS".⁴⁰

Whatever the perceived deficiencies of the ruling, it is binding on China and the Philippines, meaning that China is required as a matter of international law to abide by it.⁴¹ According to a maritime law expert: "In essence, we have an issue where one of the parties to an UNCLOS tribunal did not in good faith comply with what it had agreed to when it ratified the Convention".⁴²

On the day of the award, Beijing issued a statement describing its claims in the South China Sea in four parts: 1) sovereignty over the land features in the South China Sea, including Dongsha Qundao (Pratas), Xisha Qundao (Paracels), Zhongsha Qundao (Macclesfield Bank) and Nansha Qundao (Spratlys); 2) sovereignty over the internal waters, territorial seas and contiguous zones based on the above features; 3) sovereign rights and jurisdiction in the EEZ and continental shelves based on the above features; and 4) historic rights over the South China Sea.⁴³ Importantly, China has not declared baselines around the Spratly Islands, so the extent of maritime zones that might be associated with these features is unknown.

This statement illustrates how, after the award, the emphasis of China's legal arguments shifted away from the nine-dash line toward two other concepts that are also unsupported by conventional readings of UNCLOS: outlying archipelagos and historic rights. In 2018, the Chinese Society of International Law published a 500-page

³⁸ Douglas Guilfoyle, "The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea", *International Affairs*, vol. 94, no. 5 (2019), p. 1013. China issued a declaration in 2006, under UNCLOS Article 298, opting out of compulsory dispute settlement for certain categories of disputes, including maritime boundary delimitation and historical bays and titles. The tribunal decided that China's 2006 declaration did not apply to the issues raised by the Philippines. *Arbitral Award*, pp. 59-60, 85-86.

³⁹ Stefan Talmon, "The South China Sea Arbitration and the Finality of 'Final' Awards", *Journal of International Dispute Settlement*, (2017), vol. 8, pp. 397-401; Myron Nordquist, "UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: A Correct Interpretation?" in Jayakumar et al., *The South China Sea Arbitration*, op. cit., pp. 176-204.

⁴⁰ Wu Shicun, "South China Sea arbitral award should be buried at dustbin of history", *Global Times*, 12 July 2021.

⁴¹ Arbitration rulings do not constitute precedent in international law, but may have the practical effect of precedent in future litigation. Crisis Group interview, Douglas Guilfoyle, 22 June 2021. "The Award may be used as a subsidiary means for determination of rules of law under Article 38 of the ICJ Statute". Tara Davenport, "The implications of the Award's reasoning on offshore archipelagos", *China-US Focus*, 29 July 2016.

⁴² Andrea Ho, "Professor Robert Beckman on the Role of UNCLOS in Maritime Disputes", *Georgetown Journal of International Affairs* (online), 6 May 2021.

⁴³ Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea, 12 July 2016.

rebuttal of the award entitled “The South China Sea Arbitration Awards: A Critical Study”. The document asserts that the Spratly Islands are an “outlying archipelago” under customary international law, forming a single unit that may therefore be enclosed by straight baselines and generate the full complement of maritime zones: internal waters, territorial sea, contiguous zone, EEZ and continental shelf.⁴⁴

This interpretation, however, positions China, a continental state, to enjoy the entitlements of archipelagic states such as Indonesia and the Philippines, which most governments argue is contrary to UNCLOS.⁴⁵ Commentators note that even if China were entitled to draw straight baselines around the Spratlys, Article 47(1) stipulates that archipelagic baselines are legal only where “the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1”.⁴⁶ One conservative estimate of the Spratlys’ water-to-land ratio, employing the most restrictive method of drawing baselines, is 275 to 1.⁴⁷

China has also emphasised the notion of “historic rights”, which refer to entitlements to certain practices “by virtue of a state’s long-standing and authoritative activities that have been acquiesced to by other states”.⁴⁸ Beijing’s argument relies on the assertion that UNCLOS shall not affect China’s historic rights, which are preserved in Article 14 of China’s 1998 Law on the Exclusive Economic Zone and Continental Shelf.⁴⁹ The UNCLOS tribunal, however, found that any historic rights China may have had were superseded by “the limits of maritime zones provided for by the convention”.⁵⁰ The tribunal reasoned that historical Chinese navigation and fishing in the South China Sea constituted the exercise of high seas freedoms, but did not support an argument for

⁴⁴ Chinese Society of International Law, “The South China Sea Arbitration Awards: A Critical Study”, *Chinese Journal of International Law* (2018), pp. 475-479.

⁴⁵ Beijing argues that UNCLOS does not prohibit the drawing of straight baselines around an outlying archipelago, pointing to instances where other states have done so, such as Denmark’s Faroe Islands and Ecuador’s Galapagos Islands, which could be interpreted as an emerging rule of customary international law. Nong Hong, “The Applicability of the Archipelagic Regime in the South China Sea: A Debate on the Rights of Continental States’ Outlying Archipelagos”, *Ocean Yearbook*, vol. 32 (2018), pp. 80-117. “The counter-argument to this is that the straight baseline claims of these offshore archipelagos have been protested by other states, and is not sufficiently consistent, uniform or widespread to establish customary international law”. Davenport, “The implications of the Award’s reasoning on offshore archipelagos”, *op. cit.*

⁴⁶ Rebecca Strating, “Defending the Maritime Rules-Based Order: Regional Responses to the South China Sea Disputes”, East-West Center, 2020, p. 43.

⁴⁷ “Reading between the Lines: The Next Spratly Legal Dispute”, AMTI, 21 March 2019. Another argument against China’s interpretation of offshore archipelagos is that the land in the Spratlys is so small – the thirteen largest features combined are 1.7 sq km – that analogies to the Faroe Islands (1,400 sq km), Galapagos Islands (8,000 sq km) and other instances are inapposite. Guilfoyle, “The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea”, *op. cit.*, p. 1015.

⁴⁸ Justin D. Nankivell, “The Role of History and Law in the South China Sea and Arctic Ocean”, National Bureau of Asian Research, 7 August 2017.

⁴⁹ One scholar argues that China’s “historic rights” assertion may be traced to a Taiwanese scholar in the 1990s, who made a statement subsequently adopted by the People’s Republic of China. Bill Hayton, “The Modern Creation of China’s ‘Historic Rights’ Claim in the South China Sea”, *Asian Affairs*, vol. 19, no. 3 (2018), pp. 374-375, 379.

⁵⁰ Arbitral Award, para. 282, p. 111.

historic rights.⁵¹ The historical record may show evidence of China's regulation in the South China Sea, but not necessarily acquiescence by other peoples or states.⁵²

After the initiation of arbitration, China began to build artificial islands in the Spratlys. By 2015 it had, by dredging sand and coral reefs, created some 1,300 hectares (3,200 acres) of land on seven reefs, and fortified the islands with harbours and military structures including missile batteries. On Fiery Cross, Subi and Mischief reefs, China built climate-controlled hangars and runways capable of handling all types of Chinese military aircraft.⁵³ China describes the deployment of military assets to the artificial islands as defensive, and thus not "militarisation".⁵⁴ The islands give China the capacity to base fighters and to provide logistical support for air and sea operations, though some analysts question their military utility in case of actual conflict.⁵⁵ Says one observer, the artificial islands may be "better understood for the symbolic political capital they provide the Chinese regime than their straightforward military value".⁵⁶ Other analysts argue that the artificial islands afford China intelligence, surveillance and reconnaissance capabilities that could give it "information superiority" in the event of armed conflict.⁵⁷

China has also asserted sovereignty through administrative manoeuvres. In April 2020, China's ministries of natural resources and civil affairs jointly released a list of names for 80 geographical features in the South China Sea, including more than 50 that are submerged, which a Chinese scholar said was intended to "reiterate [China's] sovereignty claims".⁵⁸ Later the same month, China announced establishment of two new administrative districts in the South China Sea: Xisha district, covering the Paracel

⁵¹ "In practice, to establish the exclusive historic right to living and non-living resources within the 'nine-dash line', which Beijing now appears to claim, it would be necessary to show that China had historically sought to prohibit or restrict the exploitation of such resources by the nationals of other States and that those States had acquiesced to such restrictions. In the Tribunal's view, such a claim cannot be supported." *Arbitral Award*, para. 270, p. 114.

⁵² Douglas Guilfoyle, "A new twist in the South China Sea arbitration: The Chinese Society of International Law's critical study", *EJILTalk!* (blog), 25 May 2018.

⁵³ "Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2016", Office of the U.S. Secretary of Defense, p. 13.

⁵⁴ A Chinese navy officer explained: "We will certainly not seek the militarization of the islands and reefs, but we won't not set up defenses. How many defenses completely depends on the level of threat we face". "Beijing says South China Sea militarization depends on threat level", *Reuters*, 21 January 2016.

⁵⁵ "Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2020", Office of the U.S. Secretary of Defense, p. 80; Drake Long, "China's naval aviation force shows up at Fiery Cross Reef", *Benar News*, 13 May 2020; Gregory B. Poling, "The conventional wisdom on China's island bases is dangerously wrong", *War on the Rocks*, 10 January 2020; Olli Pekka Suorsa, "The conventional wisdom still stands: America can deal with China's artificial island bases", *War on the Rocks*, 6 February 2020.

⁵⁶ Steven Stashwick, "China's South China Sea militarization has peaked", *Foreign Policy*, 19 August 2019.

⁵⁷ J. Michael Dahm, "Introduction to South China Sea Military Capability Studies, South China Sea Military", Johns Hopkins University Applied Physics Laboratory, 2020.

⁵⁸ Yan Yan, director, Research Centre of Oceans Law and Policy, National Institute for South China Sea Studies, quoted in Kristin Huang, "Beijing marks out claims in South China Sea by naming geographical features", *South China Morning Post*, 20 April 2020.

Islands and Macclesfield Bank, based on Woody Island, and Nansha district, covering the Spratly Islands, based at Fiery Reef.⁵⁹

In just a few years, China has built the world's most formidable coast guard fleet, which dwarfs the navies of most other claimants. A new law governing the China Coast Guard took effect on 1 February 2021, permitting its ships to use force against illegal foreign vessels in China's "jurisdictional waters", and to demolish structures on features China claims. In theory, the aspects of the law permitting and regulating use of force accord with international standards, but the ambiguous scope of "jurisdictional waters" raises concerns among other claimant states that it may encourage use of force by the China Coast Guard in their respective EEZs, particularly against their fishermen. Beijing has also expanded its People's Armed Forces Maritime Militia, an armed reserve force of civilians, mostly fishermen.⁶⁰ The government has modernised and expanded the maritime militia fleet in recent years, and its ships have been involved in harassing and intimidating other claimants' vessels.

China uses its coast guard and maritime militia fleets to change the status quo in the South China Sea by employing "grey zone tactics", or actions carried out below a threshold that would risk triggering a forceful response from the U.S.⁶¹ The coast guard and maritime militia perform escort missions for a variety of Chinese vessels, including fishing trawlers and seismic survey ships. China considers the defence of Chinese economic exploitation of the sea's resources as a form of "rights protection", through which it demonstrates and defends sovereignty. As one maritime law enforcement official summed up: "Development equals presence, presence equals occupation and occupation equals sovereignty".⁶²

Malaysia, the Philippines and Vietnam have all been subject to China's "grey zone tactics", with oil and gas projects in particular subject to harassment by Chinese vessels. China's actions in the South China Sea have made it more difficult for other claimants to fully exercise their rights to their maritime entitlements, effectively preventing them from consummating new hydrocarbon exploitation in areas that fall within the nine-dash line.⁶³ Recent instances of China's tactics include standoffs with Vietnamese vessels at Vanguard Bank in 2019 and 2020, harassment of a drilling rig in Malaysia's EEZ at Luconia Shoals in 2020, and "swarming" of Whitsun Reef in the Philippine's EEZ in 2021. Whereas China views the other claimants' economic activity in and around the Spratlys as encroachment on its jurisdictional waters, its "rights protection" policy has the effect of dismissing other claimants' EEZs and flouting UNCLOS.⁶⁴

⁵⁹ Huong Le Thu, "Fishing while the water is muddy: China's newly announced administrative districts in the South China Sea", AMTI Update, 6 May 2020.

⁶⁰ "Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2020", op. cit., p. 71.

⁶¹ China's takeover of Scarborough Shoal in 2012 is a prime example of grey zone tactics and use of fishing boats and maritime militia to deny access to the Philippines.

⁶² Quoted in Ryan D. Martinson, "Shepherds of the South Seas", *Survival*, vol. 58, no. 3 (2016), p. 190.

⁶³ Strating, "Maritime Disputes, Sovereignty and the Rules-Based Order in East Asia", op. cit., p. 458.

⁶⁴ Rebecca Strating, "Norm Contestation, Statecraft and the South China Sea: Defending Maritime Order", *The Pacific Review* (2020), pp. 5-7.

B. South East Asian Responses

All of the South East Asian claimants seek to balance their economic interests in maintaining good relations with Beijing with the preservation of their maritime claims, but there has been a perceptible hardening of positions in recent years.

Vietnam has been the most determined to build up a military deterrent to Chinese adventurism and to internationalise the South China Sea disputes. In the Philippines, President Rodrigo Duterte reversed his predecessor's confrontational approach and sought to pivot to China, but that effort did not diminish popular nationalist sentiment attached to what Manila refers to as the West Philippine Sea, also reflected by senior officials.⁶⁵

Malaysia has traditionally been cautious in asserting its claims, largely in view of China's importance to its economy. In exchange, Beijing generally took a soft line toward Kuala Lumpur. But the two sides have in recent years adopted more confrontational stances. In June 2018, Malaysian Prime Minister Mahathir Mohamad said: "China claims the South China Sea is theirs, but those islands have always been regarded as ours for a long time. So, we want to retain them".⁶⁶ Malaysia's first defence white paper, released in 2019, described China's actions in the South China Sea as "aggressive".⁶⁷ China has undertaken hydrographic surveys in Malaysian-claimed waters. On 31 May 2021, a formation of sixteen People's Liberation Army Air Force transport planes lawfully, but provocatively, flew within 60 nautical miles of Malaysia's Sarawak coast. Malaysia's foreign minister, Hishammuddin Hussein, called this a breach of sovereignty.⁶⁸ The flight may have been linked to a Malaysian operation to install a wellhead at the Kasawari gas field off Sarawak, which has been regularly challenged by the China Coast Guard.⁶⁹

As the smallest of claimant states, and the least equipped to push back against Chinese assertiveness, Brunei has been called the "silent claimant". Brunei and Malaysia settled their common boundary through an exchange of letters in 2009.⁷⁰ In July 2020, Brunei's foreign ministry released a statement emphasising that resolution of disputes in the South China Sea should be pursued through bilateral consultations between the countries involved, based on UNCLOS and other sources of international law.⁷¹ But some of Brunei's neighbours are suspicious of a joint venture that the gov-

⁶⁵ See Crisis Group Asia Reports, *The Philippines' Dilemma: How to Manage Tensions in the South China Sea*; and *Vietnam Tacks Between Cooperation and Struggle in the South China Sea*, both forthcoming.

⁶⁶ "Malaysia wants to continue occupying its South China Sea islands", *The Straits Times*, 21 June 2018. Later, Mahathir said China should define its claims of "so-called ownership" of islands in the South China Sea. "Mahathir: China should define its claims in the South China Sea", Associated Press, 8 March 2019.

⁶⁷ Ngeow Chow Bing, "Xinjiang and the South China Sea complicate Malaysia-China relations", *East Asia Forum*, 24 February 2020.

⁶⁸ Euan Graham, "Aerial manoeuvres in the South China Sea", IISS (blog), 9 June 2021.

⁶⁹ Crisis Group interview, analyst, June 2021. "Contest at Kasawari: Another Malaysian gas project faces pressure", AMTI, 7 July 2021.

⁷⁰ Robert C. Beckman and Clive H. Schofield, "Defining EEZ Claims from Islands: A Potential South China Sea Change", *The International Journal of Marine and Coastal Law* vol. 29 (2014), p. 201.

⁷¹ Sofia Tomacruz, "Brunei, the quiet claimant, breaks its silence on the South China Sea", Rappler.com, 22 July 2020.

ernment has undertaken with a Chinese company to develop a fish-landing complex, which will bring greater numbers of Chinese fishing vessels to the southern part of the South China Sea.⁷²

Not directly involved in the territorial disputes, Indonesia has long tried to position itself as a disinterested honest broker between ASEAN and China. Foreign incursions into Indonesia's EEZ around the Natuna Islands (which lie between the Malaysian peninsula to the west and the island of Borneo to the east) and elsewhere, including suspected Chinese underwater drone activity, have however prompted Jakarta to bolster defences in the area and to rename the waters the North Natuna Sea in 2017. In December 2019, dozens of Chinese fishing vessels, with a China Coast Guard escort, entered Indonesia's EEZ. Jakarta summoned China's ambassador and sent warships to the area. In early 2020, it scrambled jets to drive off the Chinese boats, and in November announced the establishment of a navy "combat squad" headquarters on the Natuna Islands.⁷³

Barring Taiwan and Brunei, other claimant governments have all referred to the 2016 arbitration award to push back against China's expansive claims. In December 2019, Malaysia submitted a note verbale to the UN that implicitly rejected China's "historic rights" claim.⁷⁴ A slew of notes followed, including from the Philippines, Vietnam and Indonesia, each citing UNCLOS and the 2016 award.⁷⁵ The flurry of notes sparked by Malaysia's submission demonstrates that the 2016 arbitral award – denounced by Beijing, shelved by Manila and enforced by no one – poses what one analyst refers to as "a continuing obstacle" to the legitimacy of China's maritime ambitions, even as Beijing refuses to comply with it.⁷⁶

C. *The Code of Conduct*

Another apparent impact of the arbitral award was Beijing's change of heart on negotiating a Code of Conduct with ASEAN on the South China Sea. The Code is envisaged as a vehicle for establishing norms and rules (whether they would be binding or non-binding is unresolved) that would help manage tensions among the claimants. The Code of Conduct saga began in 1992, when ASEAN proposed the idea, to which China agreed in 1999. Negotiations resulted in a Declaration on the Conduct of Parties in 2002, but preliminary guidelines on its implementation were not agreed until 2011. Consultations on a Code began in 2013, only to be derailed by China's island building. But in August 2016, a month after the arbitral award, China agreed to resume negotiations. A framework text was agreed a year later.

⁷² Crisis Group interview, analyst, June 2021. "Brunei-China joint venture to develop, operate largest local fishing complex", Xinhua, 22 December 2020.

⁷³ "Indonesian Navy to move combat squad's HQ to Natuna Islands", Benar News, 23 November 2020.

⁷⁴ "Malaysia Partial Submission to the Commission on the Limits of the Continental Shelf, Part 1: Executive Summary", 12 December 2019. The submission to the CLCS was part of Malaysia's effort to establish an extended continental shelf. It was an individual partial submission following the 2009 Vietnam-Malaysia joint submission. Nguyen Hong Thao, "Malaysia's new game in the South China Sea", *The Diplomat*, 21 December 2019.

⁷⁵ Notes verbales in response to Malaysia's December 2019 partial submission are accessible at the UN's Division for Ocean Affairs and the Law of the Sea website.

⁷⁶ Guilfoyle, "The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea", *op. cit.*, p. 1016.

In July 2018 the parties agreed on a Single Draft Negotiating Text, reflecting a compilation of proposals from nine governments rather than a negotiated consensus.⁷⁷ This compilation included a number of irreconcilable points that offered little prospect of middle ground. For example, Vietnam proposed a list of 27 “do’s and don’t’s” for parties to the Code, including prohibitions on resorting to threats of force or coercion, constructing artificial islands, conducting simulated attacks and militarising occupied features; these proposals appeared to be levelled at China. Beijing, meanwhile, sought a veto over joint military exercises involving ASEAN members and “countries from outside the region” – generally understood to be countries other than ASEAN members or China – and prohibition of commercial development of natural resources with entities from outside the region. Though these may represent tough opening bids rather than China’s bottom line, they have nevertheless reinforced the impression that Beijing is attempting to exclude extra-regional actors from engaging in the South China Sea.

There are other challenges, too. China and the South East Asian claimants are at odds over the Code’s geographical scope, legal status, and dispute resolution and enforcement mechanisms. Chinese Premier Li Keqiang in November 2018 set a three-year timetable for completion of the Code. In July 2019, participants reached an agreement on the first reading, but the pandemic soon stymied talks, depriving Beijing of its talking point that China and ASEAN are making progress.⁷⁸

From Beijing’s perspective, conclusion of the Code remains desirable – provided that happens on Beijing’s own terms – and the main impediments to progress are suspicion of China within ASEAN and a perceived U.S. shift from supporting to obstructing the Code negotiations.⁷⁹ Successfully concluding a Code of Conduct would allow China to declare that the dispute has been managed and bolster the argument that extra-regional powers, particularly the U.S., should not intervene. It would also confer a degree of legitimacy on China’s maritime claims and regional status. According to Wu Shicun, president of China’s National Institute for South China Sea Studies, “neighbouring countries’ anxiety and hostility toward China’s rise have not been dispelled and they continue to have concerns over China’s control over regional rule-making through the Code consultations”.⁸⁰

Still, observers have little confidence that ASEAN member states and China will be able to resolve their differences to bring about an effective Code of Conduct. Many analysts have noted China’s capacity to exploit the divide between ASEAN member states that are claimants and those that are not.⁸¹ China does this to deflect pressure

⁷⁷ “Single Draft Code of Conduct in the South China Sea Negotiating Text”, 26 July 2018. On file with Crisis Group.

⁷⁸ On 7 June 2021, Indonesia offered to host the next round of negotiations, but the COVID-19 pandemic means there is little likelihood of a face-to-face meeting in the near term.

⁷⁹ Hu Bo, “Sino-US Competition in the South China Sea: Power, Rules and Legitimacy”, *Journal of Chinese Political Science* (2021), p. 15. An authoritative Chinese scholar has asserted that the U.S. is undermining the talks through its alleged “agent”, Vietnam. Wu Shicun, “Preventing Confrontation and Conflict in the South China Sea”, *China International Strategy Review* (July 2020), p. 4.

⁸⁰ Wu Shicun, “Several characteristics and development trends of the current situation in the South China Sea”, speech at the 6th Earth System Science Conference, Shanghai, 9 July 2021 (Chinese).

⁸¹ Crisis Group online interview, analyst, Canberra, March 2021. At the ASEAN foreign ministers’ meeting in July 2012, for example, Cambodia blocked mention of China’s takeover of Scarborough Shoal, scuppering the traditional joint communiqué for the first time in ASEAN’s 45-year history.

on it to include unwanted provisions that are attractive to claimant states. Referring to the ongoing talks, an analyst observed: “Everything about it shines a light on ASEAN weakness”.⁸² But while diplomats from the region wish for a “substantive and effective” Code, negotiations are more likely to provide a venue for claimants to air issues than a legally binding agreement on managing disputes.⁸³ Still, there is little alternative for the ASEAN member claimants but to continue participating in the process, which, at the least, provides a forum for the claimants to keep talking with one another.⁸⁴

Crisis Group Report, *Stirring Up the South China Sea (II)*, op. cit., pp. 31-32; Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (New York, 2019), p. 176. “Likewise, in 2016 at a special meeting in Kunming, ASEAN diplomats took offence at being handed a 10 point ‘consensus’ document drafted by the Chinese to sign without prior consultation”. Robert Yates, *Understanding ASEAN’s Role in Asia-Pacific Order* (Cham, 2019), p. 262. Of particular concern to some observers in ASEAN is that Myanmar is slated to become the ASEAN China country coordinator at the end of 2021. Some doubt Yangon’s impartiality given Beijing’s support for the junta. Crisis Group online interview, analyst, Jakarta, June 2021.

⁸² Crisis Group online interview, analyst, Melbourne, March 2021.

⁸³ Crisis Group online interviews, analysts, March and April 2021.

⁸⁴ “The idea of a code has been cemented in ASEAN’s agenda to the point that an outright failure to achieve even a platitudinous text could be seen as a failure of the association itself”. Donald K. Emmerson, “‘Ambiguity is Fun’: China’s Strategy in the South China Sea”, in Donald K. Emmerson (ed.), *The Deer and the Dragon: Southeast Asia and China in the 21st Century* (Stanford, 2020), p. 153.

IV. Whose Rules-Based Order?

The U.S. and its allies perceive Beijing's behaviour in the South China Sea as a litmus test of how China will inhabit its role as an increasingly influential great power. They are focused in particular on whether it will be a stakeholder or challenger to the post-World War II international system, which U.S. and other Western policymakers often referred to during the Cold War as the "liberal international order" but increasingly refer to as the "rules-based international order".⁸⁵ China, meanwhile, believes it should lead on norm-building in the South China Sea, and that such a role is not only essential to its national security but befits its current global status. As a consequence, the South China Sea disputes are entwined with the weighty issue of international order in flux.⁸⁶

In the West, the Sino-U.S. competition is conventionally understood as arising from a power transition, as China increasingly challenges the U.S. status as regional, if not global, hegemon, stoking anxieties that Beijing will impose a Sino-centric version of order on the region.⁸⁷ Some commentators object to understanding Sino-U.S. competition in this manner.⁸⁸ Nonetheless, policymakers and strategists in the U.S. and likeminded countries tend to frame the competition with Beijing as a contest in which the international order is at stake. This perception heightens the risk that competition could crystallise into conflict in the South China Sea, as the theatre (along with

⁸⁵ Ben Scott, "Rules-based order: What's in a name", *The Interpreter* (Lowy Institute), 30 June 2021, positing that "The LIO [liberal international order] really came into being during the dark days of the Cold War. It described the order that liberal democratic states created between themselves. It was international but never global. No one ever claimed that the Soviet Union was part of the liberal order. By contrast, the RBO [rules-based order] was coined in a wave of post-Cold War optimism. It was then widely assumed that, with the collapse of communism, it was only a matter of time before all states would come to accept the Washington Consensus [on economic policy], and the LIO would expand to cover the globe".

⁸⁶ Nick Bisley, "The South China Sea as Symptom of Asia's Dynamic Security Order", in Huiyun Feng and Kai He (eds.), *US-China Competition and the South China Sea Disputes* (New York, 2018), pp. 108-109.

⁸⁷ See, for example, Christopher Layne, "The US-Chinese Power Shift and the End of the Pax Americana", *International Affairs*, vol. 94, no. 1 (2018).

⁸⁸ Among the objections that some experts have made with respect to this framework are that the dichotomy of "China vs. the rules-based order" may lead some to overstate the extent to which China has diverged from the international order, given, for example, China's support for aspects of the UN system, particularly those that are protective of state sovereignty. Secondly, some argue that it minimises the extent to which the extant order is based on U.S. primacy and Washington's corresponding ability to shape and interpret rules to suit its interests, as well as U.S. and allied disregard for the law when national interests dictate. Thirdly, it suggests a coherence and universality to a single "international order" that may be misleading, given, for example, the extent to which norms and formal rules may conflict and the inconsistency with which rules are enforced. Greg Raymond, "Fragile and Fracturing or Evolving and Adaptive: Prospects for the Rules-Based Global Order", Strategic and Defence Studies Centre, Australian National University (2017), p. 6; Malcolm Chalmers, "Which Rules? Why There is No Single 'Rules-Based International System'", Royal United Services Institute, April 2019; Alastair Iain Johnston, "China in a World of Orders: Rethinking Compliance and Challenge in Beijing's International Relations", *International Security*, vol. 44, no. 2 (2019), p. 12, note 8; Strating, "Maritime Disputes, Sovereignty and the Rules-Based Order in East Asia", *op. cit.*, p. 463.

the Taiwan Strait) where both countries' militaries are most likely to come into direct confrontation, even accidentally.

A. *A Community of Common Destiny*

China's leaders assert that in part because of China's rise, the existing international order has been undergoing a profound transition amid "changes unseen in a century".⁸⁹ Scholars have argued that the additional shock of the COVID-19 pandemic is accelerating these changes, pushing the world into a period of chaotic "non-polarity" in which "the old order is perhaps unsustainable but a new world order has yet to be built".⁹⁰ Since 2017, China's leaders have been explicit about playing a more active role in international politics and China's perceived obligation, in Chinese President Xi Jinping's words, to "guide international society to collectively shape a more just and rational new international order".⁹¹ With regard to the South China Sea, an influential Chinese scholar noted that there is "tension between a new rules-based regional order built by China and joined by other countries in the region, and the US-led security structure based on alliances and power".⁹²

In late October 2013, China's senior-most leaders met to discuss foreign policy specifically related to its periphery, a first since the founding of the People's Republic.⁹³ They sought means of building relations with neighbouring countries that would serve the aim of national rejuvenation. The Communist Party sought to conceive a foreign policy suitable for a richer, more powerful and more confident country – one that would offer its neighbours an alternative to liberal internationalism, which Beijing sees as serving primarily Western interests and values. Since 2012, China's vision for the world has been embodied in the idea of a "community of common destiny".⁹⁴ The concept, more recently translated in China's official discourse as "community of a shared future for mankind", emphasises lofty and seemingly anodyne themes such as sovereignty, inclusivity, diversity and mutual benefit in the interest of maintaining peace and economic development. The monumental Belt and Road Initiative, announced in November 2013, is one manifestation of this vision.⁹⁵

⁸⁹ "China's National Defense in the New Era", The State Council Information Office of the People's Republic of China, July 2019.

⁹⁰ Yuan Peng, "The coronavirus pandemic and a once-in-a-century change", *asixiang.com*, 17 June 2020, translated by David Ownby, at *readingthechinadream.com*.

⁹¹ Graham Webster, "China's 'new world order'? What Xi Jinping actually said about guiding international affairs," *Transpacifica*, 23 February 2017.

⁹² Wu Shicun, "Preventing Confrontation and Conflict in the South China Sea", *China International Strategy Review* (July 2020), p. 5.

⁹³ Stephen N. Smith, "Harmonizing the Periphery: China's Neighborhood Strategy under Xi Jinping", *The Pacific Review*, vol. 34, no. 1 (2021), pp. 1-2, 13.

⁹⁴ Xi Jinping, "Let the Sense of Community of Common Destiny Take Deep Root in Neighbouring Countries," Ministry of Foreign Affairs of the People's Republic of China, 25 October 2013; "The CCP first mentions the 'community of a shared future for mankind', advocating peaceful development and common development", *Xinhua*, 10 November 2012.

⁹⁵ Baogang He, "Security Regionalism: A New Form of Strategic Competition or Cooperation between the United States and China in the South China Sea?" in Huiyun Feng and Kai He (eds.), *US-China Competition and the South China Sea Disputes* (New York, 2018), p. 156.

The “community of common destiny” appears to consciously draw on classical Chinese thought and harks to the imperial past when China engaged in tributary relations with its neighbours, exchanging trade and patronage for acts of deference. As one analyst describes it: “Xi Jinping’s neighbourhood strategy rests on an asymmetric bargain: respect China’s core interests in exchange for benevolence”.⁹⁶ It underlines China’s intention to actively shape the regional order, placing itself at the centre of “the community”, and de facto pushing the U.S. “to the periphery, if not out of the region altogether”.⁹⁷ Another analyst said that China’s leaders feel it is “natural” for China to predominate in its immediate neighbourhood: “The logic is, ‘When other powers operate in Asia, they must follow the rules, and these rules will be made by China with other powers in the region’”.⁹⁸

China’s South China Sea policy exemplifies how Beijing is, like a great power, attempting to carve out for itself exceptions to conventional readings of international law to suit its regional interests.⁹⁹ In the process, it is offering new norms, such as novel interpretations of UNCLOS and the notion of its historic rights to the South China Sea. Some analysts believe that China’s efforts to institutionalise its unilateral interpretations of UNCLOS undermine the international rule of law, with alarming implications for the predictability of inter-state relations.¹⁰⁰ These criticisms in some respects echo complaints lodged against the United States for perceived liberties that it has taken with international law in the prosecution of the war on terror.¹⁰¹

B. *A Free and Open Indo-Pacific*

If China would like a free hand to reshape the international order as it is observed in its region, the United States shows little inclination to defer to its wishes. In November 2017, speaking in Vietnam, President Donald Trump announced a new approach to Asia, the Free and Open Indo-Pacific, which the Biden administration has since endorsed. It is based on four principles: respect for sovereignty and independence; peaceful dispute resolution; reciprocal trade based on open investment, transparent agreements and connectivity; and “adherence to international rules and norms, including those of freedom of navigation and overflight”.¹⁰² The Indo-Pacific concept, which was adopted first in Japan and Australia, places the South China Sea at the

⁹⁶ Stephen N. Smith, “Harmonizing the Periphery: China’s Neighborhood Strategy under Xi Jinping”, *The Pacific Review*, vol. 34, no. 1 (2021), p. 4.

⁹⁷ Aaron L. Friedberg, “Competing with China”, *Survival*, vol. 60, no. 3 (June-July 2018), p. 24.

⁹⁸ Yun Sun, comments in webinar, “The United States and China in Southeast Asia: Is Confrontation Inevitable?”, Georgetown University Initiative for U.S.-China Dialogue on Global Issues, 26 May 2021.

⁹⁹ Crisis Group interviews, analysts, March-April 2021.

¹⁰⁰ Crisis Group interviews, analysts, March-April 2021. Malcolm Jorgensen, “Equilibrium and Fragmentation in the International Rule of Law: The Rising Chinese Geolegal Order”, Berlin Potsdam Research Group, November 2018, pp. 10-14; Isaac B. Kardon, “China Can Say ‘No’: Analyzing China’s Rejection of the South China Sea Arbitration”, *University of Pennsylvania Asian Law Review*, vol. 13, no. 2 (2018), p. 43.

¹⁰¹ See, for example, Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York, 2017).

¹⁰² “Indo-Pacific Strategy Report 2019”, U.S. Department of Defense, p. 3.

centre of a strategic image of the region spanning the waters from the east coast of Africa to the U.S. west coast.¹⁰³

Despite the new branding, there is a degree of continuity between the Free and Open Indo-Pacific and the earlier U.S. policy under President Barack Obama, known as the pivot, or rebalance, to Asia, of which one of the objectives was “to dissuade China from making a bid for hegemony and thereby preserve the existing power balance in the region, in which the United States held the superior position”.¹⁰⁴ The shift in U.S. policy that began under Obama coincides with a turn away from the strategy of engagement that, for decades, sought to integrate China into the liberal world order.¹⁰⁵ Kurt Campbell, President Biden’s Indo-Pacific coordinator, noted there was a consensus in the U.S. “that the period that was broadly described as ‘engagement’ has come to an end [and] that we are now embarking on a new set of strategic parameters. ... the dominant paradigm is going to be competition”.¹⁰⁶ Within only a few years, the concept has come to inform the policies of many countries, including, but not limited to, U.S. allies.

The notion that the U.S and China are in competition to determine international order is reflected in official U.S. rhetoric. The 2017 U.S. National Security Strategy identified China as a “revisionist power,” which aims to “displace the United States in the Indo-Pacific region, expand the reaches of its state-driven economic model and reorder the region in its favour”, shaping “a world antithetical to U.S. values and interests” in the process.¹⁰⁷ In 2018, the State Department warned of “Beijing’s revisionist ambitions and coercive actions that threaten continued stability of a rules-based order in the region”.¹⁰⁸ The Biden administration’s interim national security guidance identified China as “the only competitor potentially capable of ... a sustained challenge to a stable and open international system”.¹⁰⁹

The Free and Open Indo-Pacific strategy aims to counter China’s challenge to U.S. dominance in the region by developing a network of partnerships with likeminded countries, distinct from but connected to the traditional hub-and-spoke alliance system. It emphasises the role of large democracies in the region, namely, Australia, India and Japan. These countries are linked with the U.S. through the Quadrilateral Security Dialogue, commonly referred to as the Quad, so far the most concrete expression of the Free and Open Indo-Pacific framework. Japan initiated the dialogue in 2007, but Australia’s exit in 2009 over concerns about alienating China meant the Quad

¹⁰³ Japanese Prime Minister Shinzo Abe introduced the phrase in 2007. The U.S. Department of Defense renamed the Pacific Command, headquartered in Hawaii, to Indo-Pacific Command in May 2018.

¹⁰⁴ Nina Silove, “The Pivot before the Pivot: U.S. Strategy to Preserve the Power Balance in Asia”, *International Security*, vol. 40, no. 4 (Spring 2016), p. 46.

¹⁰⁵ David Arase, “Free and Open Indo-Pacific Strategy Outlook”, ISEAS – Yusof Ishak Institute, September 2019, p. 15.

¹⁰⁶ Kurt M. Campbell, comments on webinar, “Kurt M. Campbell and Laura Rosenberger on U.S.-China Relations”, 2021 Oksenberg Conference, 27 May 2021.

¹⁰⁷ “National Security Strategy of the United States of America”, White House, December 2017, p. 25.

¹⁰⁸ “Joint Regional Strategy: East Asia and the Pacific State Department – Bureau of East Asian and Pacific Affairs”, U.S. Department of State, 20 November 2018.

¹⁰⁹ “Renewing America’ Advantages: Interim National Security Guidance”, White House, March 2021, pp. 7-8.

was dormant until 2017. The informal quasi-alliance serves as the diplomatic ballast to the raft of joint military exercises conducted among the members.¹¹⁰ In their first summit-level meeting, in March 2021, the Quad leaders published a joint statement declaring an intention to uphold UNCLOS and collaborate to “meet challenges to the rules-based maritime order in the East and South China Seas”.¹¹¹

C. Sino-U.S. Security Dilemma

As Beijing and Washington clash over rules and values, a Sino-U.S. security dilemma is taking shape. Beijing and Washington both see evidence of malign intent in the other’s moves to advance its interests. Countermoves appear to corroborate worst-case analysis, deepening mistrust and raising the risk of confrontation.

With its rapid military modernisation over the past four decades, China has become the dominant power in the South China Sea. In 2017, President Xi set the People’s Liberation Army two goals: to complete modernisation by 2035 and to become a “world-class” military by 2049.¹¹² China’s navy has already surpassed the U.S. in ship numbers.¹¹³ Beijing also has, according to an analyst, an “overwhelming advantage in land-based cruise and ballistic missiles” to support an anti-access/area denial strategy, heightening U.S. concerns about China’s ability to hold U.S. ships in the South China Sea at risk.¹¹⁴

But in spite of China’s rapid military modernisation, and the advantages it now enjoys in the South China Sea, the U.S. remains the world’s dominant military power, with an extensive footprint across South East and North East Asia, and a network of regional allies.¹¹⁵ Washington has alliances with Japan and the Republic of Korea, maintaining military bases in both countries, as well with the Philippines and Thailand. It has a strong defence relationship with Singapore, where the U.S. Navy maintains a logistical command unit and bases littoral combat ships and P-8 Poseidon aircraft.

It has also taken an increasingly tough line with China concerning the South China Sea. In July 2020, U.S. Secretary of State Mike Pompeo issued a statement declaring

¹¹⁰ Frederick Kliem, “Why Quasi-Alliances Will Persist in the Indo-Pacific: The Fall and Rise of the Quad”, *Journal of Asian Security and International Affairs* (2020), p. 2.

¹¹¹ “The Spirit of the Quad”, Quadrilateral Dialogue Leaders’ Joint Statement, 12 March 2021.

¹¹² The latter goal coincides with the centenary of the People’s Republic of China.

¹¹³ The People’s Liberation Army Navy has approximately 350 ships and submarines, including more than 130 major surface combatants, making it the largest navy in the world in numerical terms. The U.S. Navy’s battle force is roughly 290 ships. China also possesses the world’s largest coast guard with more than 130 large patrol ships. “Military and Security Developments Involving the People’s Republic of China 2020”, U.S. Department of Defense, September 2020, pp. 44, 71.

¹¹⁴ In August 2020, China launched DF-21D and DF-26B anti-ship ballistic missiles from Zhejiang and Qinghai provinces into the South China Sea; these missiles are dubbed “carrier killer” and “Guam express”, respectively. The DF-26B puts U.S. bases in Asia within the Chinese military’s reach. David Lague, “Special report: U.S. rearms to nullify China’s missile supremacy”, Reuters, 6 May 2020; Steven Stashwick, “Chinese ballistic missiles fired into South China Sea claimed to hit target ship”, *The Diplomat*, 17 November 2020.

¹¹⁵ In 2020, U.S. military spending accounted for 39 per cent of all defence spending globally, as much as the next ten biggest spenders combined. Diego Lopes da Silva, Nan Tian and Alexandra Marksteiner, “Trends in World Military Expenditure, 2020”, Stockholm International Peace Research Institute, April 2021.

that the U.S. position on China's maritime claims would align with the 2016 arbitral award.¹¹⁶ The statement marked a shift in tone, from studied neutrality with respect to territorial claims to greater alignment with South East Asian claimants. The following month, the U.S. Commerce Department imposed sanctions on 24 Chinese construction companies that had engaged in building artificial islands in the South China Sea.¹¹⁷

In addition to "naming and shaming" Chinese companies and individuals involved in what it considers illegal activities in the South China Sea, the U.S. is likely to increase efforts to build capacity among claimant states to deter China's coercion, through defence and law enforcement cooperation, and to redouble efforts in forging an international consensus to oppose China's claims that are inconsistent with UNCLOS.¹¹⁸

Indeed, since the U.S. announced sanctions in 2020, there have been signs of a nascent informal alignment of states with the U.S. to counter China's coercive behaviour.¹¹⁹ Since Pompeo's July 2020 statement, U.S. allies and partners, including Australia, Japan, New Zealand and a joint submission by France, Germany and the UK, joined South East Asian claimants in issuing notes verbales citing the 2016 award.¹²⁰ The European Union (EU) followed with a statement on "challenges to peace and stability" in the South China Sea in April 2021.¹²¹ The navies of six of the G7 countries announced plans to transit the South China Sea in 2021.¹²² The June 2021 G7 communiqué stated: "We remain seriously concerned about the situation in the East and South China Seas and strongly oppose any unilateral attempts to change the status quo and increase tensions".¹²³ In September 2021, Australia, the UK and the U.S. announced

¹¹⁶ "U.S. Position on Maritime Claims in the South China Sea", press statement, U.S. Department of State, 13 July 2020.

¹¹⁷ The sanctions prohibit U.S. companies from exporting to targeted companies without a U.S. licence. Jeanne Whalen, "U.S. slaps trade sanctions on more Chinese entities, this time for South China Sea island building", *The Washington Post*, 27 August 2020. Some analysts criticised the blacklisting for targeting past behaviour, rather than ongoing illicit activity. Greg Poling and Zach Cooper, "Washington tries pulling economic levers in the South China Sea", AMTI Update, 28 August 2020.

¹¹⁸ "U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress", Congressional Research Service, 28 January 2021, p. 27; Wendy He Qingli and Haridas Ramasay, "Naming and Shaming China: America's Strategy of Rhetorical Coercion in the South China Sea", *Contemporary Southeast Asia*, vol. 42, no. 3 (2020), pp. 317-345; Veerle Nouwens and Blake Herzinger, "Above the law: Holding China to account in the South China Sea", ORF Online, 12 April 2021.

¹¹⁹ Tobias Burgers and Scott Romaniuk, "Is China done with salami slicing?", *The Diplomat*, 1 May 2021.

¹²⁰ These notes verbales, in response to Malaysia's December 2019 partial submission, are accessible at the UN's Division of Oceans and the Law of the Sea website.

¹²¹ "South China Sea: Statement by the Spokesperson on Challenges to Peace and Stability", European Union, 24 April 2021.

¹²² Bill Hayton, comments on webinar, "Update on the South China Sea Disputes: A Transatlantic Approach", Royal United Services Institute, 18 May 2021; Masaya Kato, "European navies build Indo-Pacific presence as China concerns mount", *Nikkei Asia*, 4 March 2021.

¹²³ "Carbis Bay G7 Summit Communiqué", White House, 13 June 2021. A North Atlantic Treaty Organization (NATO) communiqué issued the following day noted: "China's stated ambitions and assertive behaviour present systemic challenges to the rules-based international order and to areas relevant to Alliance security". "Brussels Summit Communiqué Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels", NATO, 14 June 2021.

the establishment of an “enhanced trilateral security partnership” called AUKUS; its first initiative will be to help Australia acquire nuclear-powered submarines.¹²⁴

All indications are that the U.S. will seek to impose greater costs on China for behaviour that Washington deems aggressive or bullying. President Biden clearly stated the U.S. would engage in “extreme competition” with China. Colin Kahl, the U.S. under secretary of defence for policy, said: “We will have a more competitive and, at times, ... adversarial relationship with Beijing”.¹²⁵ Ely Ratner, assistant secretary of defense for Indo-Pacific security affairs and leader of the Pentagon’s China task force, wrote in 2017: “[U]ncontested Chinese dominance, not major power war, is the biggest threat facing the United States ... in Asia today”.¹²⁶

Specifics from the report drafted by the Pentagon’s China task force, created by the administration to review the Defense Department’s policies toward Beijing, have not been publicised, but among its proposals are reportedly a named operation for the Indo-Pacific, which would make it easier for the Indo-Pacific Command to secure resources, and a dedicated naval task force.¹²⁷ The Biden administration’s 2022 budget request for the Pentagon submitted in May 2021 included \$5.1 billion for the Pacific Deterrence Initiative, aimed at signalling U.S. commitment to strengthening deterrence and maintaining an advantage over China in the Indo-Pacific.¹²⁸

To Beijing, U.S. military activity in the South China Sea is evidence of “gunboat diplomacy”, and its broader regional designs are unwelcome.¹²⁹ China has complained of an increase in surveillance flights near its coast and alleged that U.S. military aircraft have “electronically impersonated civilian aircraft”.¹³⁰ China’s leaders, perceiving a policy of encirclement pursued by the U.S., Japan, India and others, are unwilling to defer to the U.S. and its allies to police the region, saying that this arrangement would “outsource” the security of China’s international trade. Instead, Beijing is modernising

¹²⁴ “Joint Leaders Statement on AUKUS”, White House, 15 September 2021.

¹²⁵ Quoted in Jim Garamone, “Official talks DOD policy role in Chinese pacing threat, integrated deterrence”, Defense.gov, 2 June 2021.

¹²⁶ Ely Ratner, “The false choice of war or accommodation in the South China Sea”, *The Interpreter* (Lowy Institute), 30 June 2017. Ratner led the Department of Defense task force that reviewed China policies. Empanelled in February, it delivered its report in mid-June 2021.

¹²⁷ Lara Seligman, “Pentagon considering permanent naval task force to counter China in the Pacific”, *Politico*, 15 June 2021. Some sense of the Pentagon’s approach may be discerned from Ratner’s view that “the task for US policymakers is ... to devise a set of consequences and incentives for China (at acceptable cost to the United States) such that tactical Chinese military success in the South China Sea would be a Pyrrhic victory for China’s economy, security, and standing in the world”. Ely Ratner, “Making sense of the known unknowns in the South China Sea”, *The Interpreter* (Lowy Institute), 3 August 2017.

¹²⁸ “Pacific Deterrence Initiative, Department of Defense Budget, Fiscal Year 2022”, Office of the Under Secretary of Defense (Comptroller), May 2021. Many lawmakers have criticised the Initiative for emphasising procurement of military “platforms” over logistics and interoperability with allies, and for falling short of Indo-Pacific Command’s requests. Ryo Nakamura, “Pacific deterrence budget creates rift between Biden and Congress”, *Nikkei Asia*, 22 June 2021.

¹²⁹ Guo Yuandan and Liu Xuanzun, “US military activities in S. China Sea in 2020 unprecedented”, *Global Times*, 12 March 2021.

¹³⁰ “60 sorties of US surveillance planes flew ‘upwind’ to spy on China in September”, South China Sea Probing Initiative, 12 October 2020.

its military “so that it would be capable of taking full control of its trade interests worldwide”.¹³¹

Chinese officials have also become quite vocal in their objections to the U.S. role in both the regional and global order. China’s 2019 defence white paper noted that “the international security system and order are undermined by growing hegemonism, power politics, unilateralism and constant regional conflicts and wars” for which the U.S. was primarily responsible.¹³² State officials regularly identify the U.S. as the source of militarisation and “the most dangerous external factor endangering peace and stability” in the South China Sea.¹³³ China’s ministry of foreign affairs spokesperson said on 16 September that AUKUS would “seriously damage regional peace and stability”.¹³⁴

In Beijing’s eyes, U.S. indignation about what it sees as excessive maritime claims is only a smokescreen for the United States’ desire to perpetuate its military primacy and its strategy of containment, while Washington’s failure to ratify UNCLOS lays bare the hypocrisy of U.S. sanctimony on international law.¹³⁵ From China’s point of view, without the U.S. policy decision to intensify its focus on Asia, “regional states would not be so eager to challenge China’s interests” in the South China Sea.¹³⁶ Moreover, China argues it has exercised restraint in the Sea, refraining from escalatory measures at its disposal in the interest of maintaining peace and stability.¹³⁷

The China-U.S. rivalry and the unsettling of the region’s security order complicates policy for ASEAN claimants and member states. While the Quad members are careful to pay respect to the notion of ASEAN centrality, the grouping’s reinvigoration is also an indictment of ASEAN’s failures to deal more effectively with China’s assertiveness in the South China Sea.¹³⁸ ASEAN’s Outlook on the Indo-Pacific, a policy framework endorsed at the Association’s summit in June 2019, sought to reassert ASEAN centrality and endorse existing ASEAN-led mechanisms for regional cooperation, but also betrayed anxiety about its marginalisation.¹³⁹ China’s economic heft and geo-

¹³¹ Zhiguo Kong, *The Making of a Maritime Power: China’s Challenges and Policy Responses*, (Singapore, 2017), pp. 102-103. In 2016, 39.5 per cent of China’s international trade transited through the South China Sea. “How much trade transits the South China Sea?”, op. cit.

¹³² “China’s National Defense in the New Era”, State Council Information Office of the People’s Republic of China, July 2019.

¹³³ “Statement by Spokesperson of the Chinese Embassy in the Philippines on the China-related Remarks of the US National Security Advisor”, 24 November 2020.

¹³⁴ “Biden announces defense deal with Australia in a bid to counter China”, *The New York Times*, 15 September, updated 16 September 2021.

¹³⁵ “US the peace destroyer, South China Sea troublemaker: Chinese FM”, *Global Times*, 14 July 2020.

¹³⁶ Wang Wen, “Debunking 10 myths about China and the South China Sea”, *South China Morning Post*, 10 July 2016.

¹³⁷ Crisis Group online interview, analyst, Beijing, July 2021. Zhou Fangyin, “Between Assertiveness and Self-Restraint: Understanding China’s South China Sea Policy”, *International Affairs*, vol. 92, no. 4 (2016); Feng Liu, “The Recalibration of Chinese Assertiveness: China’s Responses to the Indo-Pacific Challenge”, *International Affairs*, vol. 96, no. 1 (2020).

¹³⁸ The concept of “ASEAN centrality” emerged in the 1990s to refer to a conviction that ASEAN should remain central to the Asia-Pacific’s institutional architecture, embodied in the ASEAN Regional Forum, the East Asia Summit and ASEAN Plus Three, among others.

¹³⁹ Richard Javad Heydarian, “Why Biden should pursue ‘minilateralism’ with ASEAN”, AMTI Update, 26 March 2021.

graphical proximity mean ASEAN member states will remain ambivalent about great power balancing in the region and opposed to anything that smacks of containing China. But at the same time, most South East Asian claimants are likely to quietly, perhaps silently, welcome a greater U.S. and allied presence in the Sea.¹⁴⁰ Indeed, China's assertiveness has had the perverse effect of underscoring the rationale for the U.S. security role in Asia.¹⁴¹

¹⁴⁰ A survey of 1,032 academics, government officials, civil society representatives and business-people from the ten ASEAN countries between November 2020 and January 2021 found that 62.4 per cent were most concerned about China's militarisation and assertive actions in the South China Sea, while only 12.5 per cent cited the U.S. military presence as a concern. "The State of South Asia: 2021 Survey Report", ISEAS-Yusof Ishak Institute, 10 February 2021, p. 15.

¹⁴¹ Crisis Group interviews, analysts, April-May 2021. Morton, "China's Ambition in the South China Sea: Is a Legitimate Maritime Order Possible?", *op. cit.*, p. 940.

V. Great Powers, Great Responsibility

With Sino-U.S. competition now ripening into outright rivalry, confidence in the longstanding security order in South East Asia is declining, raising uncertainty. China and the U.S. must give special consideration to how their rhetoric, policies and commitments can help reduce tensions and bring about conditions for greater cooperation among South China Sea claimants.

Ideally, the U.S. and China would each see that it is better served by policies that reduce the threat perceptions of the other state's policymakers. Rather than policies that foreclose cooperation and fuel the security dilemma, the two powers could actively seek to reduce mutual mistrust and reassure each other of their benign intentions.¹⁴² But while this approach would be rational for both of them, it discounts the perceptions of national interests, and the influence of values, narratives and identity on those perceptions on both sides. As discussed above, for China, the prevalent narrative includes a determination to rectify what it perceives as a "century of humiliation", making it a matter of national honour. For the U.S., the narrative includes a conviction that Washington must remain a credible guarantor of Indo-Pacific security if it is to maintain the regional and global military primacy that it has enjoyed since World War II. U.S. policymakers are deeply wary of accommodations that could be seen as compromising on values that the U.S. sees as universal and has championed, however imperfectly, in the post-war era.

The framing of Sino-U.S. tensions in the South China Sea in such stark terms, with such high stakes, appears to put compromise all but out of reach. The nature of international order is much debated, but there is little doubt that China's rise and the end of the post-Cold War unipolar moment has, over the past fifteen years, unsettled long-established patterns of relations among great powers. As noted in Section IV, policymakers in Beijing and Washington see their countries in a competition to determine which will shape the rules for international order in Asia and view the Sea as an arena for that competition.

But even if each side currently sees the quest for a new regional order as a battle to be won, this focus also presents certain opportunities. For all their efforts, neither side will likely be able to impose a durable set of rules and norms purely through hard power or other coercive means, at least without incurring prohibitive costs. Rather, the price of such an order is likely to be cooperation and concession, both in relation to each other and to other regional actors. As commentators widely note, one dimension of an enduring and effective international order is legitimacy, or the extent to which states consent to it, not primarily out of fear of coercion or expediency, but

¹⁴² Scholars have proposed, for example, that the U.S. reduce its forward military presence in Asia and the frequency of its FONOPS targeting China's claims, while China could declare no use of force against Taiwan or agree to binding arbitration to resolve its territorial disputes. Joshua R. Itzkowitz Shiffrinson, "Neo-Primacy and the Pitfalls of US Strategy toward China", *The Washington Quarterly*, vol. 43, no. 4 (2020), pp. 79-104; Peter Harris, "China and the United States: The Case for Smart Appeasement", *Australian Journal of International Affairs*, vol. 75, no. 1 (2021), pp. 129-135. See also Anisa Heritage and Pak K. Lee, *Order, Contestation and Ontological Security-Seeking in the South China Sea* (Cham, 2020), pp. 210-219.

because they regard the order as sufficiently fair.¹⁴³ Stephen Walt recently observed that “to gain others’ compliance, [China and the U.S.] will still have to give other states at least some of what they want, too”.¹⁴⁴ In that sense, as China and the U.S. vie for legitimacy in South East Asia, each has a motive to bind itself to commonly agreed rules and allow itself to be constrained by the law, starting with UNCLOS.¹⁴⁵

A. *Beijing’s Legitimacy Deficit*

China’s gains in the South China Sea have come at the cost of alienating its littoral neighbours. In that regard, Beijing’s aggressive pursuit of its interests has arguably been self-defeating in the longer term because it has failed to generate buy-in from other claimants.¹⁴⁶ As the multiplication of diplomatic protests from the region clearly indicates, none of the ASEAN claimant states has yet signed on to China’s vision of maritime order.¹⁴⁷ Despite earning some good-will through vaccine diplomacy in 2021, Beijing has shown little capacity to generate or wield normative influence or soft power.¹⁴⁸ Its policies and actions elsewhere, including allegations of gross human rights abuses in Xinjiang, restriction of civil rights in Hong Kong, sabre-rattling over Taiwan, belligerence on the Indian border, economic coercion of Australia and the EU, and combative Wolf Warrior diplomacy, all contribute to perceptions, particularly in the West, that the ruling Communist Party is despotic and predatory.

Chinese officials, aware of this perception, publicly lament it. A prominent Chinese scholar wrote: “To facilitate the construction of a new regional order, China needs not only to provide more public goods, but also to reassure its neighbours about its intentions and present an appealing vision of a future regional system”.¹⁴⁹ President Xi told a study session of the Politburo in May 2021 that it is “necessary to make friends, unite and win over the majority, and constantly expand the circle of friends [when it comes to] international public opinion”.¹⁵⁰

One way that China could reassure its neighbours would be to progressively bring its claims in line with UNCLOS, including as a first gesture stepping away from its ambiguous “historic rights” claim in both rhetoric and practice. Beijing could, for in-

¹⁴³ Stewart Patrick, “World Order: What, Exactly, are the Rules?”, *The Washington Quarterly*, vol. 39, no. 1 (Spring 2016), p. 9.

¹⁴⁴ Stephen M. Walt, “The choice between a U.S.-led rules-based order and a Chinese ‘might-makes-right’ one is false”, *Foreign Policy*, 31 March 2021.

¹⁴⁵ Evelyn Goh, *The Struggle for Order: Hegemony, Hierarchy and Transition in Post-Cold War East Asia* (Oxford, 2013), p. 9; Morton, “China’s Ambition in the South China Sea: Is a Legitimate Maritime Order Possible?”, op. cit., p. 913; Nico Krisch, “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order”, *The European Journal of International Law*, vol. 16, no. 3 (2005), p. 378.

¹⁴⁶ Crisis Group interviews, analysts, April-May 2021. David Groten, *How Sentiment Matters in International Relations: China and the South China Sea Dispute* (Opladen, 2019), pp. 311-317; Heritage and Lee, *Order, Contestation and Ontological Security-Seeking in the South China Sea* op. cit., p. 42; Emmerson, “‘Ambiguity is Fun’: China’s Strategy in the South China Sea”, op. cit., p. 157.

¹⁴⁷ Crisis Group online interview, security analyst, Singapore, April 2021.

¹⁴⁸ Emmerson, “‘Ambiguity is Fun’: China’s Strategy in the South China Sea”, op. cit., p. 157.

¹⁴⁹ Wu Xinbo, “China in Search of a Liberal Partnership Order”, *International Affairs*, vol. 94, no. 5 (2018), p. 1018.

¹⁵⁰ Shi Jiangtao and Laura Zhou, “Xi Jinping wants isolated China to ‘make friends and win over the majority’”, *South China Morning Post*, 2 June 2021.

stance, end its practice of deploying survey vessels and large fleets of fishing vessels in the EEZs of the other littoral states. It could also eventually drop (among other things) its legal argument that the Spratly Islands can be treated as a single unit around which it can draw straight baselines and claim a territorial sea, contiguous zone and an EEZ. Such a reconciliation of its claims with UNCLOS would be politically difficult and could take place only gradually, so that Beijing could avoid appearing overly accommodating before its nationalist domestic audience. But it would not be impossible, because of the ambiguity maintained thus far around China's claims in the Spratlys. While deviation from the present course appears highly unlikely under Xi, China's leaders may have reason to reconsider this approach, as they confront the costs of failing to generate legitimacy, including the resulting backlash against Beijing that is gaining momentum.

B. *International Law or Rules-based Order?*

For its part, the U.S. should consider framing its hopes for a regional order more in terms of "international law" and less in terms of a "rules-based order." One problem with the latter term is that, even though it is widely used, it is nowhere authoritatively defined.¹⁵¹ Like the phrase "liberal international order", it appears to refer to the post-World War II international legal system, complemented by various institutions of the same vintage as well as norms, values and standards in global governance.¹⁵² But while this terminology seems intended to portray the U.S. as the leader of an impartial system grounded in international law, commentators note that it is amorphous, includes non-legal elements and embraces features that Beijing sees as objectionable.¹⁵³

As a former senior Singaporean diplomat pointed out: "[The rules-based order] ... is useful [as a diplomatic tool] precisely because it is ambiguous".¹⁵⁴ One such use for the term, according to an Australian analyst, is as "a way to talk about China without

¹⁵¹ The first use of the phrase by a U.S. official in the context of U.S. China policy appears to have been in a statement issued by U.S. Secretary of State Hillary Clinton and Australian Foreign Minister Kevin Rudd in November 2010. "[I]n the space of about five to six years, the RBO meme moved from being non-existent to being an aspiration for all countries (in, but not exclusive to, the Asia-Pacific region), to being an established entity that was six or seven decades old and finally to being an established entity that China was challenging". Adam Breuer and Alastair Iain Johnston, "Memes, Narratives and the Emergent US-China Security Dilemma", *Cambridge Review of International Affairs*, vol. 32, no. 4 (2019), pp. 440-441.

¹⁵² Malcolm Jorgensen, "The Jurisprudence of the Rules-Based Order: Germany's Indo-Pacific Guidelines and the South China Sea Code of Conduct", *KFG Working Paper Series*, no. 49 (May 2021), p. 13.

¹⁵³ See Hans Kudnani, "What is the Liberal International Order", German Marshall Fund of the United States, 3 May 2017. Kudnani states that in the post-Cold War period, "it is Western democracies rather than authoritarian, non-Western, or rising powers that have been the 'revisionist' powers" and that the Western democracies drove innovations that qualified the concept of sovereignty in sometimes controversial ways – eg, through the creation of the International Criminal Court (though the U.S. has not joined it), the idea of a responsibility to protect and the resuscitation of "humanitarian intervention". Against this backdrop, he observes that "sovereignist powers such as China and Russia have a point when they argue that it is they rather than Western powers that are defending the principles of the liberal international order — albeit the 1945 version of it".

¹⁵⁴ Bilhari Kausikan, "What (and whose) rules based order?", *Asialink*, 2 August 2021.

talking about China”.¹⁵⁵ Another analyst observes: “[I]t is not surprising that the ‘rules-based order’ might also be seen as a euphemism for preserving the entrenched interests of the status quo”.¹⁵⁶ Yet another notes that “almost any policy can be justified as part of this effort [to defend the rules-based order]. For example, the 2016 [Defence] White Paper explains Australia’s military commitments outside its region, especially to the Middle East, as support for the ‘global rules-based order’”.¹⁵⁷

Against this backdrop, Beijing has seized on the term as a cudgel against Washington. In July 2021, for example, Vice Foreign Minister Xie Feng told the deputy U.S. secretary of state, Wendy Sherman: “The United States has abandoned the universally recognised international law and order and damaged the international system it has helped to build. And it is trying to replace it with a so-called ‘rules-based international order’”.¹⁵⁸

One way the U.S. could counter this point, and position itself to advocate for a regional order with broad regional support, would be to pivot away from its rhetorical emphasis on a “rules-based order” and focus instead on international law. For all that international law is unevenly interpreted, applied and enforced, it is a more concrete and readily understood concept than “rules-based order”. In addition, the ideal of law’s universality gives smaller states a lexicon and, in theory, a lever for challenging larger powers. Such a rhetorical shift, reflected in official statements, could enhance Washington’s credibility, though of course it would be more meaningful if accompanied by U.S. actions that demonstrate a willingness to be bound by UNCLOS.¹⁵⁹

In this regard, a second, concededly more difficult, step the U.S. could take to affirm its commitment to a regional order grounded in international law would be to accede to UNCLOS.¹⁶⁰ That affirmation would put to rest the argument that Washington is hypocritically criticising China for non-compliance with a treaty that it has not even ratified and make it more difficult for Beijing to deflect calls for its own compliance. True, accession would be a tall order, if not outright infeasible. In spite of broad support for accession within the U.S. national security establishment, political divisions in the U.S. Senate, which would need to approve ratification, make the treaty’s path forward in the U.S. forbiddingly difficult, at least at present. Still, UNCLOS’s proponents should not give up.

¹⁵⁵ Crisis Group online interview, security analyst, March 2021.

¹⁵⁶ Caitlin Byrne, “Securing the ‘Rules-Based Order’ in the Indo-Pacific”, *Security Challenges*, vol. 16, no. 3 (2020), p. 11.

¹⁵⁷ Scott, “Rules-based order”, op cit.

¹⁵⁸ “Xie Feng: The U.S. side’s so-called ‘rules-based international order’ is designed to benefit itself at others’ expense, hold other countries back and introduce ‘the law of the jungle’”, Ministry of Foreign Affairs of the People’s Republic of China, 26 July 2021.

¹⁵⁹ Monica Hakimi, “Why We Should Care about International Law”, *Michigan Law Review*, vol. 118, no. 6 (2020) p. 1294.

¹⁶⁰ Crisis Group online interviews, former U.S. officials, September 2021. “An early push by the next administration can capitalize on enduring bipartisan support for UNCLOS”. Rebecca Lissner and Mira Rapp-Hooper, *An Open World: How America Can Win the Contest for Twenty-First Century Order* (New Haven, 2020), p. 143.

U.S. unwillingness to join the convention undermines both its own moral authority and the treaty regime as a whole.¹⁶¹ Unless the U.S. becomes a party, it cannot persuasively argue that it is in the same situation as those states that are. Even if it already observes UNCLOS's substantive provisions as a matter of custom, becoming a party to the treaty would require the United States to take the crucial step of submitting to the convention's compulsory remediation provisions. Without taking that step, as one U.S. analyst put it: "We are insisting that China behave as we ourselves could not be ordered to behave".¹⁶²

While U.S. ratification of the treaty would not necessarily shift China's behaviour in the near term, it could help over the longer term. It would bolster the treaty regime, raising the reputational costs to China for flouting the law and making it more likely that an eventual resolution of the disputes can be achieved within its framework.¹⁶³

There is inevitably something quixotic about advocating for international law in a case where one party flouts the law and the other refuses to be bound by it. But the likeliest alternatives – the carving out of spheres of influence, coercion and the use of force – are grim.¹⁶⁴ As one analyst argued: "It is still difficult to think of a basis on which to address [the South China Sea disputes] ... that would be preferable to that of respect for the ideal of international law".¹⁶⁵ UNCLOS may be an imperfect solution to the impasse, largely because right now mutual adherence to all of its elements seems so far beyond reach, but there is no better system for the peaceful resolution of maritime claims.¹⁶⁶

South East Asian littoral states could also contribute to strengthening the treaty regime by bringing their own claims into conformity with UNCLOS. They would first need to declare the baselines from which their maritime zones (internal waters, territorial sea, EEZ and continental shelf) are measured and the extent of these zones, in accordance with conventional readings of the Convention. Indonesia and the Philippines each declared UNCLOS-compliant baselines in 2009, Malaysia has yet to publish a definitive articulation of its baselines and Vietnam's declared baselines do not conform to UNCLOS.¹⁶⁷ Considering that all four have already indicated that they do not regard Spratly Islands features as entitled to generate any maritime zone other than a 12nm territorial sea, the scope of intra-ASEAN disputes in the archipelago could, in

¹⁶¹ Crisis Group online interview, former high-ranking U.S. official, September 2021. Paul Gewirtz, "The Limits of Law in the South China Sea", Center for East Asia Policy Studies at Brookings, May 2016, p. 14.

¹⁶² Gewirtz, "The Limits of Law in the South China Sea", op. cit.

¹⁶³ A former U.S. official noted that ratification of UNCLOS would also make it more difficult for China to walk away from the Convention. Crisis Group online interview, September 2021. "Beijing indicates it may exit U.N. sea convention if South China Sea ruling disappoints", *The Japan Times*, 21 June 2016; Mark J. Valencia, "Might China withdraw from the UN Law of the Sea Treaty?", *The Diplomat*, 3 May 2019.

¹⁶⁴ Jorgensen, "The Jurisprudence of the Rules-Based Order: Germany's Indo-Pacific Guidelines and the South China Sea Code of Conduct", op. cit., p. 32.

¹⁶⁵ Shirley V. Scott, "The Decline of International Law as a Normative Ideal", *Victoria University of Wellington Law Review*, vol. 49, no. 4 (2018), p. 643.

¹⁶⁶ Guilfoyle, "The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea", op. cit., p. 1006.

¹⁶⁷ On Vietnam's baselines, see Crisis Group Report, *Vietnam Tacks Between Cooperation and Struggle in the South China Sea*, forthcoming, p. 28.

principle, be reduced enormously through such steps: in essence, the only outstanding disagreements would be overlapping territorial seas generated by high-tide elevations, making a long-term solution more feasible.¹⁶⁸

C. *Pushing Back without Pushing Too Far*

Although it remains outside the treaty regime, the U.S. clearly intends to continue pressing China to meet its UNCLOS obligations.¹⁶⁹ Vice President Kamala Harris, visiting Vietnam in August 2021, said: “We need to find ways to pressure ... Beijing to abide by the [UNCLOS], and to challenge its bullying and excessive maritime claims”.¹⁷⁰ The hope is that, confronted with blowback, China’s leaders could develop a deeper appreciation for the need to pursue their goals through means that others in the region see as legitimate. Some analysts believe that through such pressure, China could be induced to change course and pursue a “good neighbour” policy. One pointed out that artificial islands, for example, are costly, easily damaged, difficult to maintain and may not appreciably enhance China’s national security given their vulnerability to U.S. strikes. By this logic, they could be sacrificed to mollify China’s neighbours.¹⁷¹ While that seems unlikely, some argue that of all of China’s territorial disputes, the South China Sea is the one in which it could most easily make concessions due to the variety of actors and interests involved.¹⁷²

But the U.S. should be careful not to overestimate the strength of its hand. Just as China needs some degree of buy-in from its neighbours for its order-building efforts, so, too, the region’s rules of the road will need China’s support if it is to be stable and legitimate. Rush Doshi, now senior director for China on Biden’s National Security Council staff, wrote with Kurt Campbell that: “Preserving the [international] system’s balance and legitimacy will therefore require ... a degree of acquiescence and acceptance from China”.¹⁷³ An expectation of China’s acquiescence, however, seems to discount the very dilemma requiring a new strategy, namely, a shifting balance of power in China’s favour.¹⁷⁴

The burgeoning U.S.-led pushback against China also comes with risks beyond the risk of failure. First, there is the possibility of escalation after an incident at sea

¹⁶⁸ Clive Schofield, “Competing Maritime Claims and Enduring Disputes in the South China Sea”, in Keyaun Zou (ed.), *The Routledge Handbook of the South China Sea* (London, 2021), pp. 104-122.

¹⁶⁹ See, for example, Ely Ratner, “Course Correction: How to Stop China’s Maritime Advance”, *Foreign Affairs* (July/August 2017), pp. 64-72; and Hal Brands and Zack Cooper, “Getting Serious about Strategy in the South China Sea”, *Naval War College Review*, vol. 71, no. 1 (Winter 2018), pp. 12-32; Bonnie S. Glaser and Gregory Poling, “How to Build a Coalition to Confront Beijing”, *Foreign Affairs*, 20 August 2021.

¹⁷⁰ “U.S., China accuse each other of ‘bullying’ nations”, Reuters, 25 August 2021.

¹⁷¹ Stein Tønnesson, “Four Aspects of the Crisis in the South China Sea”, in Leszek Buszynski and Do Thanh Hai (eds.), *The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition* (Abingdon, 2020), p. 21.

¹⁷² Crisis Group online interview, security analyst, Canberra, April 2021.

¹⁷³ Kurt M. Campbell and Rush Doshi, “How America Can Shore Up Asian Order: A Strategy for Restoring Balance and Legitimacy”, *Foreign Affairs*, 12 January 2021.

¹⁷⁴ Itzkowitz Shiffrin, “Neo-Primacy and the Pitfalls of US Strategy toward China”, op. cit., pp. 88-93.

or in the air.¹⁷⁵ Secondly, there is the risk that this strategy strengthens the hand of China's hardliners, confirming their worst fears about containment, inflaming nationalism and pushing the relationship further into cold war territory.

The dangers associated with a more hostile bilateral relationship make it urgent for the U.S. and China to intensify high-level Track I dialogues that were suspended during the Trump administration.¹⁷⁶ The contentious meetings between senior U.S. and Chinese officials in Anchorage in March and in Tianjin in July 2021 illustrate the need for more frank and frequent discussions to address potentially dangerous disconnects between the parties; since then, the November 2021 Xi-Biden virtual meeting positively signalled interest in the resumption of bilateral dialogue mechanisms.¹⁷⁷ Candid exchanges behind closed doors can also help the parties to resolve possible misunderstandings and to communicate clearer red lines.

It is particularly important that the parties talk given evolving dynamics in the South China Sea. Announced in July 2020, Washington's policy of more vigorously supporting the 2016 arbitral award – coupled with an increased U.S. military presence in the region – is fuelling distrust in Beijing regarding U.S. intentions. Beijing's steady build-up of its military capacity and normalisation of its military and paramilitary presence is doing the same in Washington. High-level strategic dialogue should advance an understanding that, in the words of one legal expert, “affords stability and gives space for a long-range approach to regional accommodation of interests”.¹⁷⁸ Meanwhile, it is necessary to improve mechanisms to manage incidents at sea and in the air that have been neglected in recent years, including through the Military Maritime Consultative Agreement and Defense Policy Coordination Talks.¹⁷⁹

D. *Fostering Regional Cooperation*

Even as they jockey for position bilaterally, China and the U.S. can each pursue policies to help bring about cooperation among claimants and others in the South China Sea.

South East Asian claimants are hedging against China in part because of Beijing's seeming unwillingness to bind itself to existing and future laws and rules. Beijing

¹⁷⁵ “Report to Congress 2020”, U.S.-China Economic and Security Review Commission, December 2020, pp. 62-64.

¹⁷⁶ The High-Level Diplomatic and Security Dialogue last convened in November 2018. Beijing referred to the March 2021 meeting with U.S. officials in Anchorage as a “high-level strategic dialogue”. Secretary of State Anthony Blinken early declared that the meeting was “not a strategic dialogue”. Tsuoshi Nagasawa and Tsukasa Hadano, “US and China play mind games over how to frame Alaska meeting”, *Nikkei Asia*, 12 March 2021.

¹⁷⁷ “Secretary Antony J. Blinken, National Security Advisor Jake Sullivan, Director Yang and State Councilor Wang at the Top of Their Meeting”, U.S. Department of State, 18 March 2021; Chris Buckley and Steven Lee Myers, “Biden's China strategy meets resistance at the negotiating table”, *The New York Times*, 26 July 2021; “President Xi Jinping Had a Virtual Meeting with US President Joe Biden”, Ministry of Foreign Affairs of the People's Republic of China, 16 November 2021.

¹⁷⁸ Crisis Group online interview, U.S. legal expert, March 2021.

¹⁷⁹ The Military Maritime Consultative Agreement, signed in 1998, aims to enhance military maritime safety at the operational level. A related dialogue scheduled for December 2020 was cancelled amid mutual recriminations. The Defense Policy Coordination Talks started in 2006 to discuss policy differences and is conducted between senior defence officials. The sixteenth of these dialogues was held on 28-29 September 2021 by video conference, the first since January 2020. “U.S., Chinese military officials hold ‘frank, in-depth’ talks – Pentagon”, Reuters, 29 September 2021.

could, for a start, reassure its South East Asian neighbours by stating its openness to a legally binding Code of Conduct and discussing how to address South East Asian concerns over China's disproportionate military and law enforcement capacity.¹⁸⁰ China's Foreign Minister Wang Yi has spoken of the possibility of a "more binding" Code, which, while short of committing to a legally binding instrument, suggests a trace of flexibility.¹⁸¹ Scepticism over whether the Code of Conduct negotiations will ever produce a substantive and enforceable set of rules is merited, but it remains the only process to which China and ASEAN member states have agreed, and therefore is worth the continued investment of time and effort.

The U.S. has soured on the Code of Conduct due to the inertia that has characterised its negotiation and a perception that Beijing dominates the process.¹⁸² But ASEAN claimants see no better alternatives. Washington should accordingly support the negotiations from a distance by encouraging ASEAN members, and especially claimant states, to be more proactive in proposing their own visions of how the South China Sea should be collectively managed. Beyond the Code of Conduct process, there is scope for the U.S. to encourage claimants to cooperate on a less than comprehensive "minilateral" basis, particularly on marine scientific research, fisheries conservation and environmental protection. Such cooperation could profitably be organised around fisheries, agreements on humane treatment of fishermen by law enforcement agencies and scientific research on fish stocks.¹⁸³

China and South East Asian littoral states should also explore mechanisms to help prevent incidents at sea involving maritime law enforcement and fishing vessels. These law enforcement vessels, sometimes tasked with the assertion of sovereignty and sovereign rights in contested waters, are often involved in low-level incidents that have the potential to escalate. Littoral states are commonly vested in ensuring that such encounters remain safe and professional. They could consider developing a set of operational principles based on existing international rules to guide law enforcement behaviour at sea, including in their treatment of fishermen. Such initiatives could be modeled on existing bilateral frameworks, such as the one that already exists between the Philippines and Vietnam on humane treatment of fishermen by law enforcement. The region could additionally consider creating a forum where coast guards operating in the South China Sea convene regularly to exchange information, raise concerns and identify ways to cooperate on transnational maritime issues, similar to those created for the Arctic and the North Pacific.

¹⁸⁰ Examples of language can be found in a leaked 2018 version of the Single Draft Negotiating Text in which Vietnam proposed "Contracting States shall not" militarise occupied features in the South China Sea, blockade vessels carrying provisions or personnel for rotation, declare an Air Defence Identification Zone, or conduct simulated attacks at other countries.

¹⁸¹ "Wang Yi Responds to Four Questions on the Consultations on the Code of Conduct in the South China Sea", Ministry of Foreign Affairs of the People's Republic of China, 1 August 2019; "Wang Yi Stresses 'Four Respects' on South China Sea Issue", Ministry of Foreign Affairs of the People's Republic of China, 5 August 2021.

¹⁸² Crisis Group online interview, former U.S. official, September 2021.

¹⁸³ For more on potential areas of collaboration among claimant states using minilaterals, see Crisis Group Reports, *The Philippines' Dilemma: How to Manage Tensions in the South China Sea*, pp. 32-33; and *Vietnam Tacks Between Cooperation and Struggle in the South China Sea*, p. 27, both forthcoming.

VI. Conclusion

Clear-eyed analysis of the South China Sea demands acknowledgment of irreducible facts about the situation in the near term. First, China is not going to abandon either its artificial islands or its expansive claims. Secondly, the U.S. is not going to relinquish its commitment to upholding Freedom of Navigation or its role as guarantor of its Asian alliance system. Thirdly, the South East Asian claimants lack the capacity to enforce their claims and have not yet evinced the will to resolve their intra-ASEAN disputes. Under these circumstances, the ASEAN claimants should bring to bear greater determination to work together, and, with China and Taiwan, to reduce tensions and cooperate where and when possible.

The U.S. and China, meanwhile, should accelerate and deepen high-level dialogue, to minimise misunderstanding and lower the temperature in the South China Sea. South East Asian states are anxious about fallout from Sino-U.S. rivalry. Those within each system who are positioned to do so should also coax their governments toward the steps that each will need to make for both to join together in a regional order based on international law, including UNCLOS accession by the U.S., and UNCLOS compliance by China. As great powers, China and the U.S. have a particular obligation to prevent their contention from tipping into conflict that would drag the region in its wake.

Bangkok/Brussels, 29 November 2021

Appendix A: Map of the South China Sea



Features/Occupied by:

- | | | |
|-----------------------------|-------------------------|---------------------------|
| 1. Woody Island (CHI) | 5. Subi Reef (CHI) | 9. Fiery Cross Reef (CHI) |
| 2. Commodore Reef (PHI) | 6. Itu Aba Island (TAI) | 10. Swallow Reef (MAL) |
| 3. Amboyna Cay (VIE) | 7. Mischief Reef (CHI) | |
| 4. Investigator Shoal (MAL) | 8. Erica Reef (MAL) | |

Appendix B: Recommendations

This report is one in a three-part series treating important aspects of the maritime disputes in the South China Sea: *Competing Visions of International Order in the South China Sea*; *The Philippines' Dilemma: How to Manage Tensions in the South China Sea*; and *Vietnam Tacks Between Cooperation and Struggle in the South China Sea*. The recommendations below are common to all three.

To better manage tensions arising from conflicting claims to sovereignty and jurisdiction in the South China Sea:

To the governments of all claimant states:

1. Bring claims to jurisdiction in the South China Sea into conformity with international law by declaring baselines and maritime zones that accord with conventional readings of the UN Convention on the Law of the Sea (UNCLOS).

To the governments of ASEAN member states and China:

2. Accelerate negotiations on a substantive and legally binding Code of Conduct in the South China Sea.

To the government of the Philippines:

3. Encourage the establishment of risk management mechanisms among claimant states in order to reduce the risk of escalation during incidents at sea. These could include clear rules of engagement for non-navy vessels such as coast guard ships in the region.
4. Promote minilateral structures for negotiations focusing on issues of common interest among claimant states, such as scientific research or law enforcement. Increased cooperation on fisheries management is another vital tool to both build confidence and tackle the dwindling stocks in the South China Sea.
5. Maintain dialogue with China through the Bilateral Consultative Mechanism; and use this communication channel to negotiate rules of access to Scarborough Shoal and develop ground rules of interaction between both countries' vessels therein. Manila should also use the mechanism to clearly communicate its red lines in the maritime domain to China.

To the government of Vietnam:

6. Accelerate negotiations with China on delimitation of the waters outside the mouth of the Gulf of Tonkin.
7. Expedite talks with Indonesia to delimit the two countries' overlapping maritime claims.
8. Replicate and expand existing mechanisms of bilateral coast guard and fisheries cooperation at the regional level, including through minilateral structures.
9. Promote marine scientific collaboration with other littoral states to build confidence and nurture cooperation.

10. Push for the establishment of technical working groups on fisheries and environmental protection to support negotiations on a Code of Conduct in the South China Sea.

To the government of China:

11. Bring maritime claims into line with UNCLOS by:
 - a) Stepping away from its claim to “historic rights”;
 - b) Ending its practice of deploying survey vessels and large fishing fleets of vessels in the exclusive economic zones of the other littoral states.
12. Relinquish the legal argument that the Spratly Islands is a single unit that can be enclosed by straight baselines and generate an exclusive economic zone.
13. Reassure South East Asian neighbours by expressing willingness for a legally binding Code of Conduct in the South China Sea.
14. Explore with other littoral states mechanisms to prevent incidents at sea involving maritime law enforcement and fishing vessels, and develop operational principles to guide law enforcement behaviour at sea, including in their treatment of fishermen.

To the government of the United States:

15. Accede to UNCLOS to bolster U.S. credibility, strengthen the treaty regime and raise the reputational costs to China of flouting the law.
16. Calibrate efforts, alone and with partners, to pressure China through Freedom of Navigation operations, military exercises in the South China Sea and other means that increase the risk of unplanned incidents, which could escalate and reinforce Beijing’s fears of encirclement.
17. Encourage cooperation among South East Asian claimant states on marine scientific research, fisheries conservation and environmental protection.

To the governments of China and the United States:

18. Intensify high-level dialogue to resolve possible misunderstandings and to communicate clear red lines.

Appendix C: About the International Crisis Group

The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organisation, with some 120 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

Crisis Group's approach is grounded in field research. Teams of political analysts are located within or close by countries or regions at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, it produces analytical reports containing practical recommendations targeted at key international, regional and national decision-takers. Crisis Group also publishes *CrisisWatch*, a monthly early-warning bulletin, providing a succinct regular update on the state of play in up to 80 situations of conflict or potential conflict around the world.

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November 2021

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Seven Opportunities for the UN in 2019-2020, Special Briefing N°2, 12 September 2019.

Seven Priorities for the New EU High Representative, Special Briefing N°3, 12 December 2019.

COVID-19 and Conflict: Seven Trends to Watch, Special Briefing N°4, 24 March 2020 (also available in French and Spanish).

A Course Correction for the Women, Peace and Security Agenda, Special Briefing N°5, 9 December 2020.

Ten Challenges for the UN in 2021-2022, Special Briefing N°6, 13 September 2021.

North East Asia

The Korean Peninsula Crisis (I): In the Line of Fire and Fury, Asia Report N°293, 23 January 2018 (also available in Chinese).

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After Sri Lanka's Easter Bombings: Reducing Risks of Future Violence, Asia Report N°302, 27 September 2019.

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Twelve Ideas to Make Intra-Afghan Negotiations Work, Asia Briefing N°160, 2 March 2020.

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