

# HOW CHINA'S ACTIONS IN THE SOUTH CHINA SEA UNDERMINE THE RULE OF LAW

LYNN KUOK

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## EXECUTIVE SUMMARY

This paper argues that China's actions in the South China Sea have contributed to a weakening of the international law of the sea. This hurts all countries, including China, which have an interest in ensuring that competition stays within the parameters of international law, which helps promote stability and minimizes the risk of conflict. It provides an overview of the South China Sea dispute and the 2016 arbitral tribunal ruling in a case the Philippines brought against China under the United Nations Convention on the Law of the Sea. The paper identifies actions China has taken to pursue its territorial and maritime claims and control around features, including encroaching on coastal states' exclusive economic zones, increasing its military presence around features, seeking to deny the United States and other countries navigational and other freedoms of the seas, and escalating its militarization of features it occupies. These actions have allowed China to gain military advantages in the event of conflict and, significantly, non-military advantages in situations short of outright conflict, by deterring other claimants from putting up a strong resistance to Chinese incursions and undermining U.S. credibility in the region. The paper examines the responses of Vietnam, the Philippines, and Malaysia.

The paper concludes with recommendations for the United States, positing that China has not yet won in the South China Sea. Recommendations include regularly asserting maritime rights and freedoms and encouraging others to do so; continuing to hold bilateral and multilateral drills in the region with allies

and partners; strengthening ties with its regional allies and partners, the Philippines in particular; communicating to China that building on Scarborough Shoal would have serious repercussions; supporting coastal states' efforts to stand up to incursions into their exclusive economic zones; and cooperating with its allies and partners to promote development in the region — the South China Sea cannot be viewed in isolation and how Southeast Asian countries position themselves there will depend on the broader strategic and economic landscape. These measures are imperative to giving the countries of Southeast Asia greater agency, not least in supporting the rule of law.

## INTRODUCTION

China's growing clout in East Asia has corresponded with a weakening of the international law of the sea. Its actions in the South China Sea where it has aggressively pursued its territorial and maritime claims, undermine the rules-based order. International pressure on China has been inconsistent; periods of neglect have corresponded with further Chinese incursions. The erosion of the rule of law hurts all countries, including the United States and China, which have an interest in ensuring stability and keeping competition, however fierce, within the parameters of the law to minimize the risk of conflict. It also damages China's reputation, though Beijing appears willing to suffer reputational damage to achieve military and strategic gains. Beijing, moreover, calculates that it can influence outcomes through coercion and, in the economic realm, inducements. While China maintains that the situation in the South China Sea is "calm" and the

region is “in harmony,” any “stability” has largely been the result of smaller countries in the region resigning themselves to a “new normal” in the South China Sea.

## THE DISPUTE

The South China Sea dispute concerns competing territorial and maritime claims. Four groups of geographic features in the South China Sea are contested: the Pratas Islands, the Paracel Islands, Macclesfield Bank and Scarborough Shoal, and the Spratly Islands. The greatest source of tensions is the Spratly Islands, claimed in their entirety by China, Taiwan, and Vietnam, and in part by the Philippines, Malaysia, and Brunei. The Paracel Islands, claimed by China, Taiwan, and Vietnam, are also hotly contested.

The maritime dispute has at its roots China's controversial nine-dash line, which made its first official appearance in a map Beijing submitted to the United Nations in 2009.<sup>1</sup> Beijing has never provided coordinates for the dash line, but it appears to encapsulate much of the South China Sea. The line can be read as laying claim to everything within it or merely land features (features that are visible at high tide) and maritime zones compliant with the United Nations Convention on the Law of the Sea (UNCLOS).

## THE SOUTH CHINA SEA ARBITRATION

In January 2013, the Philippines brought a case against China over its expansive claims and activities in the South China Sea. The case was heard by an arbitral tribunal constituted under UNCLOS. The award, which was issued in July 2016, was a major victory for the Philippines. Its main significance was to clarify resource rights.

The tribunal ruled on China's controversial nine-dash line and determined that insofar as China was claiming historic rights to resources within line, any such rights were extinguished when China ratified UNCLOS in 1996 given incompatibility with the exclusive economic zones (EEZs) of other coastal states.

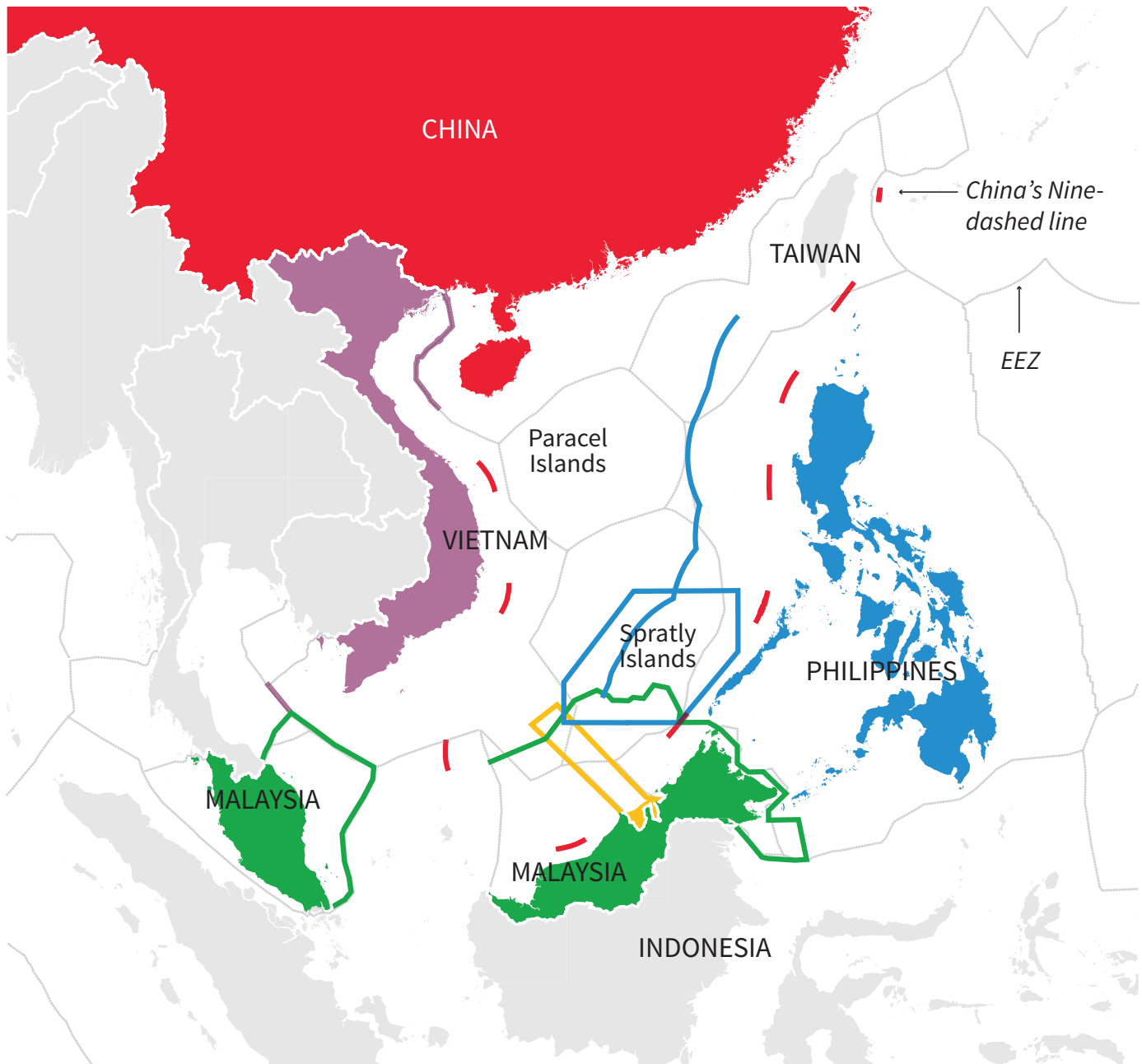
The tribunal also ruled on the status and maritime entitlement of features in the Spratlys. The tribunal found that, based on the geographic conditions laid out in UNCLOS, all features in the Spratlys are at most “rocks” entitled to a 12-nautical-mile territorial sea; none of the features are entitled to a 200-nautical-mile EEZ. This included the largest naturally formed feature, Itu Aba, which is occupied by Taiwan.

The upshot of these findings is that the 200-nautical-mile EEZ entitlements of the Philippines and, by implication, the other coastal states in the region, are unencumbered by China's nine-dash line or any claimed EEZ from features or groups of features in the Spratlys.

Although Beijing decried the ruling as “null and void” and of “no binding force,” it broadly kept to its letter if not its spirit in the first year after the award.<sup>2</sup> This could in part be explained by a desire to avoid direct confrontation before its critical 19th Party Congress in September 2017. But it was also likely a response to collective pressure. The United States and its allies and partners called for China to respect the ruling (Australia, Japan, New Zealand) and/or comply with UNCLOS (India). None of the statements issued by ASEAN member states specifically mentioned the ruling; many, however, urged respect for UNCLOS and/or international law. Given that they were issued in the immediate aftermath of the award, such statements indicated broad support for it, even if the award was not directly mentioned.

# Overlapping claims in the South China Sea

Six nations contest all or parts of the South China Sea, which has led to a series of confrontations between China and some of its neighbours over the potentially oil-and-gas rich area. Here is a look at how each claim compares with the official exclusive economic zones (EEZ), the waters extending 200 nautical miles from the coast.



Sources: U.S. State Department; UN Division for Ocean Affairs and the Law of the Sea; U.S. Energy Information Administration; Reuters

Staff, 12/07/2016

REUTERS

## WORRYING DEVELOPMENTS

Things, however, started coming undone shortly after the ruling's one-year anniversary when international attention waned.

### **1. Strengthening of maritime claims and control around features**

China has sought to strengthen its maritime claims and control around features. This has taken several forms. First, encroaching on coastal states' EEZs, which flies in the face of the tribunal ruling. Second, increasing its presence around features with vessels from its navy, coast guard, and maritime militia. Chinese presence around these features is not necessarily unlawful — user states have a right of innocent passage through any territorial seas and high sea freedoms outside of it, but the numbers and persistence of Chinese vessels are aimed at consolidating Chinese control. Third, China has objected to U.S. and other warships exercising navigation and other freedoms of the seas. Such behavior is inconsistent with the maritime rights and freedoms vested under UNCLOS, which China ratified in 1996 and the United States abides by as a matter of customary international law and domestic policy.<sup>3</sup> (The United States should of course finally accede to UNCLOS to quell criticism that it is guilty of double standards when it insists on compliance with a convention to which Washington itself is not party).

#### **(a) EEZ encroachments**

In July 2017, Beijing reportedly threatened Vietnam with military action if Hanoi did not stop drilling in Vietnam's EEZ. Its threats related to Block 136-03, which China calls Wanan Bei-21.<sup>4</sup> In March and May 2018, Vietnam again attempted to drill for oil and gas in its EEZ, and Beijing issued similar warnings. China's March 2018 warnings concerned an area called Red Emperor block, which is adjacent to Block 136/03;<sup>5</sup> its May 2018 threats took aim at Lan Do or "Red Orchid" block.<sup>6</sup> The main players, United States and ASEAN, averted their gaze and failed to condemn China's threats.

This July, Beijing went further and sent its survey vessel Haiyang Dizhi 8 and escort vessels to actively conduct seismic surveys of oil and gas blocks off the Vietnamese coast. Over months, the Haiyang Dizhi 8 expanded its

operations in Vietnam's EEZ.<sup>7</sup> The survey vessel and its escort vessels only withdrew at the end of October.<sup>8</sup> Beijing's active encroachments on Vietnam's EEZ harken back to 2014 when the presence of a Chinese oil rig sparked anti-Chinese riots in Vietnam.<sup>9</sup>

China has also unlawfully interfered with the resupply of the BRP Sierra Madre, a dilapidated Philippines naval vessel the Philippines deliberately grounded on Second Thomas Shoal in 1999 to prevent China from occupying it. The most recent reported incident was in May when Chinese Coast Guard blocked three Philippine civilian vessels on a resupply mission.<sup>10</sup> The tribunal had found that Second Thomas Shoal is a low-tide elevation forming part of the Philippines' EEZ and continental shelf and that, under UNCLOS, the Philippines therefore has jurisdiction and control over it.



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If such actions on China's part constitute a stick, Beijing has also held out an alternative model of carrots. In November 2018, China and the Philippines signed a Memorandum of Understanding on Cooperation on Oil and Gas Development.<sup>11</sup> Both sides had aimed to reach a framework for joint oil and gas development by November this year, but this looks unlikely.<sup>12</sup> Top officials I spoke to on a visit to Manila in July take the view that Beijing looks ready to agree to an oil and gas development deal that would implicitly accept that the Philippines enjoys sole sovereign rights in its EEZ. The agreement would be structured as a service contract, with a Chinese company providing services and the Philippines paying it for work done. Whether Beijing agrees to this structure remains to be seen.

#### **(b) Increased presence around features occupied or administered by other states**

In addition to EEZ encroachments, China has upped its presence around features in the South China Sea. In the first half of this year, hundreds of Chinese naval,



coast guard, and maritime militia vessels swarmed the waters around Thitu Island, the largest Philippines-occupied feature in the Spratlys.<sup>13</sup>

China has also, since 2013, maintained its near-constant coast guard presence around Luconia Shoals, a low-tide elevation that Malaysia administers.<sup>14</sup>

### **(c) Attempts to exclude U.S. and other warships from South China Sea**

China has also objected to U.S. and other warships exercising navigation and other freedoms of the seas. Its insistence on treating vast swathes of international waters as territorial or internal waters has heightened the risk of incidents in the South China Sea. When the United Kingdom challenged China's illegal straight baselines around the Paracels in September 2018, Beijing complained that the British ship "infringed on China's sovereignty."<sup>15</sup> When France sailed a warship through the Taiwan Strait in April, Beijing accused France of "illegally entering Chinese waters."<sup>16</sup>

If all China were doing was issuing verbal warnings, that would be one thing. But its behavior has been more reckless of late with its navy failing to comply with agreed upon rules of behavior with the United States, thereby increasing the risk of incident and conflict. In September 2018, against a backdrop of worsening U.S.-China relations, a Chinese warship came within 45 yards of the USS Decatur while it was conducting a freedom of navigation operation or "FONOP" in the Spratlys. The USS Decatur was forced to maneuver to prevent a collision.<sup>17</sup> The incident was significant as it was the first "unsafe and unprofessional" encounter at sea reported since November 2014, when the U.S. Department of Defense and China's Ministry of National Defense signed a memorandum of understanding regarding the rules of behavior for safety of air and maritime encounters.<sup>18</sup> China's failure to comply with this bodes poorly for adherence to any code of conduct at sea or air that would help to minimize the risk of conflict.

## **2. Consolidation of territorial claims**

Quite apart from strengthening its maritime claims and control around features, China continues to aggressively consolidate its territorial claims, a pursuit begun in December 2013, when China began large-scale reclamation work on features it occupies,

converting small rocks and reefs into large artificial islands, and building facilities on them.

By the end of 2017, China effectively had operational naval and air facilities in the South China Sea.<sup>19</sup> Beijing's militarization of features escalated in 2018: in April, it deployed anti-ship and anti-aircraft missiles and electronic jammers to Fiery Cross Reef, Subi Reef, and Mischief Reef in the Spratlys; in May, it landed long-range bombers on Woody Island in the Paracels; and in November, it built a platform on Bombay Reef, also in the Paracels, later outfitting it with radar and communications interception capabilities.<sup>20</sup>

Beijing repeatedly claims, as it did most recently in its Defense White Paper, that "China exercises its national sovereignty to build infrastructure and deploy necessary defensive capabilities on the islands and reefs in the South China Sea."

But repetition does not make it so. Sovereignty over features in the South China Sea is fiercely contested. Further, at least one feature in the Spratlys, Mischief Reef, is clearly not China's territory. The international tribunal made clear in its ruling that Mischief Reef, like Second Thomas Shoal, is a low-tide elevation forming part of the Philippines' EEZ and continental shelf and that the Philippines therefore has jurisdiction and control over it. Accordingly, the tribunal ruled that China's construction of an artificial island and installations at Mischief Reef violated the Philippines' sovereign rights and jurisdiction.

## **CHINA'S UPPER HAND**

Beijing's aggressive militarization of the South China Sea is often dismissed as inconsequential in the event of outright conflict: naval experts say that installations and deployments on the sea's features are "extremely vulnerable to attack from [U.S.] ships, subs, and aircraft."<sup>21</sup>

But we should not discount the advantages China has gained in situations short of outright conflict. Admiral Phil Davidson, then commander-designate of U.S. Pacific Command, testified in April 2018 that China is now capable of controlling the South China Sea "in all scenarios short of war with the United States."<sup>22</sup> This overstates the extent of Chinese control in non-conflict situations — the United States and others continue to

assert maritime rights and freedoms, but Davidson's statement underscores China's strong hand in the South China Sea.

A Japanese Ministry of Defense report found that China's naval and air facilities in the South China Sea allow for a more robust maritime presence, boosting China's intelligence, surveillance, reconnaissance, and other mission capabilities; runways for aircraft enable China to forward-deploy various aerial platforms, improving air power-projection capabilities and possibly allowing China to enforce an Air Defense Identification Zone (ADIZ) should it declare one in the future.<sup>23</sup> All this goes some way towards realizing what are likely China's broader strategic goals: achieving strategic depth and reach to defend against adversaries, protecting access to the critical Strait of Malacca, and facilitating deployment of its embryonic submarine-based second-strike nuclear capability. None of this, of course, precludes China from entertaining more ambitious strategic objectives in the future.

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China has also gleaned *non-military* advantages from its actions that are often overlooked. They have deterred other claimants from putting up strong resistance. Significantly, China's success in consolidating its position in the South China Sea has also undermined U.S. credibility in the region. The perception in the region is that while Washington was asleep at the wheel, China built huge fortresses in the sea and presented the world with a *fait accompli*. As a former Singapore diplomat and astute observer of the region notes, the artificial islands are “a potent reminder to ASEAN that China is a geographic fact whereas the U.S. presence in the SCS is the consequence of a geopolitical calculation.”<sup>24</sup> The point is that while U.S. commitment can waver according to calculations of national interest (or an administration's whim and fancy), China is in the region to stay.

## TEPID REGIONAL RESPONSES

The response of Southeast Asian states to increased Chinese assertiveness in the South China Sea has generally been one of restraint.

### Vietnam

Of the four Southeast Asian claimants in the South China Sea, Vietnam has been the most forward-leaning in pushing back against Chinese encroachments. But its responses are a far cry from the fierce battle the naval forces of South Vietnam waged against Chinese naval forces in 1974 over control of the Paracels.

Hanoi scrapped an oil drilling project with Spain's Repsol after Beijing warned of military action in July 2017.<sup>25</sup> This was reportedly prompted by concerns that Washington did not have its back.<sup>26</sup> It cancelled another project with Repsol after a similar warning was issued in March 2018. Hanoi, however, has shown shrewdness in licensing oil blocks to Russia's Rosneft. Despite opposition from Beijing in May 2018, drilling in these blocks are currently proceeding apace.<sup>27</sup> As one analyst notes, China is in “no mood to antagonize the only power [Russia] that cuts it slack in the South China Sea.”<sup>28</sup>

While its project with Rosneft appears to be moving forward, doubts hang over the fate of the Blue Whale gas-to-power project off central Vietnam with U.S. company ExxonMobil. There are rumors that ExxonMobil will be divesting its 63.75% share of the project under pressure from China. A final investment decision is expected next year.<sup>29</sup> If ExxonMobil does indeed quit, there could be other reasons, including divestments to streamline its portfolio;<sup>30</sup> the extent of Chinese pressure, if any, would be difficult to determine. Yet, if Beijing were indeed pressuring ExxonMobil, it would not be the first time: in September 2007, China forced three U.S. energy companies, Chevron, ExxonMobil, and ConocoPhillips, to suspend their production sharing agreements with PetroVietnam in the South China Sea.<sup>31</sup>

Before the Haiyang Dizhi 8 withdrew in late October, Vietnam sent its coast guard to register objections to Chinese survey activity in Vietnam's EEZ. (There were reports of it sending naval vessels,<sup>32</sup> but Vietnamese I spoke to ruled this out as too escalatory.) The Vietnam

Ministry of Foreign Affairs also issued several strong statements protesting Chinese survey operations.<sup>33</sup>

Ultimately, however, Vietnam is limited in its options for responding to its powerful neighbor. At the U.N. General Assembly at the end of September, Vietnamese Foreign Minister Pham Binh Minh raised “concerns over the recent complicated developments in the South China Sea, including serious incidents that infringed upon Vietnam’s sovereignty,” without explicitly mentioning China.

### **Philippines**

The Philippines, one of the United States’ two treaty allies in Southeast Asia (the other being Thailand), has adopted a conciliatory approach towards China under President Rodrigo Duterte’s administration. It has shelved the South China Sea tribunal ruling and focused efforts on concluding the agreement to cooperate on oil and gas development.

Beijing has generally faced little push-back for its increased presence in the Philippines’ EEZ and around Philippines-occupied features allowing it to increase pressure and coercion on the country and other coastal states, all of which are monitoring developments with concern.

When hundreds of vessels swarmed Philippines-occupied Thitu Island in the first half of this year, this might have gone under the radar if the alarm had not first been sounded by the U.S.-based Asia Maritime Transparency Institute in February.<sup>34</sup>

In June, a Chinese fishing vessel hit and sank an anchored Filipino fishing boat near Reed Bank, a submerged feature within the Philippines’ EEZ. In what Philippines Secretary of National Defense Delfin Lorenzana condemned as a hit-and-run,<sup>35</sup> the Chinese vessel left the Filipino fishermen to languish at sea. Duterte downplayed the incident and described it as a “little maritime accident”;<sup>36</sup> the Palace focused on criticizing the Chinese fishermen for abandoning the Filipino vessel, rather than any determination that the collision was intentional.<sup>37</sup>

Indeed, Manila may be said in some cases to be needlessly ceding ground to China,<sup>38</sup> such as when Duterte explained the presence of the Chinese fishing

vessel in the Philippines’ EEZ after their respective fishing vessels collided by claiming that he had verbally agreed with Beijing in 2016 that China had a right to fish in the Philippines’ EEZ. In doing so, he reinforced China’s claims to fishing rights in the Philippines’ EEZ to the detriment of the Philippines and its people.

### **Malaysia**

Malaysia, like the Philippines, has sought to minimize tensions in the South China Sea. It has also expressed statements in keeping with Beijing’s narrative.

Malaysian Foreign Minister Saifuddin Abdullah has denied seeing an increase in Chinese navy vessels,<sup>39</sup> despite reports of increased sightings of Chinese naval, coast guard, and maritime militia vessels in the South China Sea. He has also expressed that he is “very hopeful” about the timely conclusion of a Code of Conduct for the South China Sea after concerns were expressed at the ASEAN Foreign Ministers’ Meeting in Bangkok at the end of July about “the land reclamations, activities and serious incidents in the area, which have eroded trust and confidence, increased tensions and may undermine peace, security and stability in the region.”<sup>40</sup> The United States (as well as other superpowers) was urged to respect any agreed-upon Code of Conduct,<sup>41</sup> suggesting that Washington might be a disruptor.

In September, Malaysia and China announced a bilateral consultation mechanism on maritime affairs. Though it is not meant to resolve the territorial and maritime dispute,<sup>42</sup> this is a positive development. Yet, as experts have rightly observed, it also helps to strengthen the narrative that “Asian countries are working to resolve Asian security problems and that there’s no need for ‘outsiders’ such as the United States to get involved.”<sup>43</sup> This line is supported by Malaysia’s repeated calls for major powers to limit the use of their navy in the region.<sup>44</sup>

## **RECOMMENDATIONS**

Some argue that the “game” is over in the South China Sea and China has won. This argument is wrong. It is also dangerous: taking this stance could well be self-fulfilling. China has gained advantages, but the United States and its allies, through their assertions of maritime rights and freedoms, have thus far

successfully pushed back against Beijing's attempts to assert control over the waters of the South China Sea. Moreover, while China has consolidated control over the features it occupies, it has not built on Scarborough Shoal, a rock located just over 200 miles from the Philippines' capital, despite China being in control of it since 2012. A Chinese base on Scarborough Shoal would hurt U.S. interests: it would allow Beijing the third corner of a three-pronged security triangle in the South China Sea and one that sits close to a U.S. military facility in the Philippines.<sup>45</sup> This would complicate U.S. military planning.



**As a matter of law, regular assertions of maritime rights and freedoms ensure that rights are not lost through acquiescence to excessive maritime claims.**

How should the United States position itself on the South China Sea? The following are some suggestions.

First, the United States should continue to regularly assert maritime rights and freedoms and encourage others to do so. As a matter of law, regular assertions of maritime rights and freedoms ensure that rights are not lost through acquiescence to excessive maritime claims; as a matter of practice, they guard against the South China Sea becoming a Chinese lake.<sup>46</sup> The involvement of countries other than the United States helps to take the edge off U.S.-China rivalry and sends the important message that these countries care about maintaining open seas and rules matter. It also helps debunk Beijing's claim that the dispute is one that only concerns claimants to territorial features and that other powers have no valid interests in the South China Sea.

Germany was reportedly considering sending a ship through the Taiwan Strait,<sup>47</sup> but in recent conversations senior German officials dismissed this report. The involvement of other Western and non-Western powers, such as India, would underscore that an international coalition is willing to stand up for a rules-based order.

Second, together with other maritime powers, the United States should seek to persuade China that its interests as a fast-growing maritime power with economic and military interests that span the globe lie in upholding maritime rights and freedoms, rather than undermining them.<sup>48</sup> While U.S. FONOPS are absolutely essential in making clear to China that its efforts to carve out different rules for the South China Sea will not bear fruit, the United States should not neglect the other prongs of its Freedom of Navigation Program, including discussions to achieve greater uniformity in the interpretation of UNCLOS.<sup>49</sup> China must be prodded as well as persuaded to adopt an enlightened view of its interests.

Third, the United States should continue to hold bilateral and multilateral drills in the region with allies and partners. These are important particularly in the context of the Code of Conduct negotiations wherein Beijing seeks to exclude the involvement of "countries from outside the region" on the basis that they have no legitimate interests in the South China Sea. Specifically, China seeks the agreement of parties to agree not to hold joint military exercises with countries from outside the region.<sup>50</sup>

Fourth, the United States should continue working alone and with others (including Australia, Japan, and India) to boost regional capacity, particularly in the maritime domain. Increased capacity to monitor and patrol their EEZ will give coastal states greater confidence to shine light on unlawful and coercive behavior.

Fifth, the United States should continue to strengthen ties with its regional allies and partners. In particular, Washington needs to foster better ties with the Philippines, an important Southeast Asian ally.

In March, following Philippines Secretary of National Defense Delfin Lorenzana's call for a review of the 1951 U.S.-Philippines Mutual Defense Treaty (MDT), whose continued relevance he questioned, Washington clarified that reference to "Pacific" in the treaty included the South China Sea.<sup>51</sup> This was positive in that it has paved the way for greater progress under the 2014 Enhanced Defense Cooperation Agreement (EDCA), which allows the U.S. military to construct facilities, pre-position defense assets, and deploy troops on a rotational basis on five Philippine military bases.



In contrast, the promotion of human rights in the Philippines, while important, requires a more nuanced approach. Recent efforts to amend the 2020 State and Foreign Operations appropriations bill to bar certain Philippine officials responsible for the detention of Senator Leila de Lima from entering the United States on the basis that the United States has a right to interfere because of the “amounts of aid to the Philippines” gave rise to deep indignation in Manila,<sup>52</sup> while achieving little of note. Such posturing has, moreover, scuppered attempts to put the U.S.-Philippines relationship on a firmer footing.

Sixth, Washington should communicate to China that building on Scarborough Shoal would have serious repercussions. The view by many I spoke to in the Philippines is that Beijing is likely to attempt building on Scarborough Shoal before the end of Duterte's term as president. The Obama administration had privately warned China that building on Scarborough Shoal was a red line; there are no indications that the Trump administration has issued similar warnings. Scarborough Shoal does not technically fall within the U.S.-Philippines Mutual Defense Treaty since the tribunal did not rule on whether it is part of Philippines territory and the United States takes no position on competing claims to sovereignty. Yet, a failure by the United States to act to stop China from building on Scarborough Shoal would nonetheless give the impression that the United States is a paper tiger and an unreliable ally.

Seventh, the United States should support coastal states' efforts to stand up to incursions into their EEZs, including any legal action initiated by coastal states. Washington has championed open seas, but for many Southeast Asian coastal states access to fish and oil and gas resources in their EEZs is their bread and butter and therefore their priority. After failing to call out China's attempts to get Vietnam to stop oil and gas exploration in Vietnam's EEZ in July 2017 and again in March and May 2018, the United States is belatedly taking steps in the right direction. A Department of State statement in July this year condemned “China's interference with oil and gas activities in the South China Sea (SCS), including Vietnam's long-standing exploration and production activities.” In August, the State Department issued another statement expressing that it was “deeply concerned that China is

continuing its interference with Vietnam's longstanding oil and gas activities in Vietnam's EEZ claim.”

If it turns out that Beijing is pressuring ExxonMobil to back out of the Blue Whale project off central Vietnam, Washington should issue strong statements denouncing this; what action it should take in the event that ExxonMobil proceeds with drilling and China physically interferes is a more difficult question. What is clear, however, is that Beijing's attempts in Code of Conduct negotiations to exclude cooperation on the marine economy with “companies from countries outside the region”<sup>53</sup> gives added impetus to the need for strong support for the exclusive economic rights of coastal states.

Eighth, Washington should renew calls for China to abide by the tribunal's ruling. Recent statements of concern over China's activities in the South China Sea could be bolstered by reference to the tribunal ruling, which clearly highlights the rights of coastal states to their EEZs unencumbered by any nine-dash line claims or claims from features in the South China Sea. But Washington went quiet on the ruling partly because of Manila's reticence, but also because of the ruling's implications for U.S. claims to EEZs from small, uninhabited features in the Pacific (these would not generate EEZs). The United States should not miss out on the opportunity to demonstrate consistency in supporting the rule of law both within and outside of the South China Sea. In this vein, the United States should finally accede to UNCLOS. Supporting international law strengthens rather than hurts U.S. interests, not least because it allows other countries to coalesce behind the United States when they might otherwise balk at a grouping perceived as anti-China.

Finally, the United States must keep in mind that events in the South China Sea cannot be viewed in isolation: countries in the region are holding their finger up to determine which way the wind is blowing in the broader strategic and economic landscape. This will affect their positioning and decisions in the South China Sea. While there is much talk about push back against the Belt and Road Initiative and Southeast Asian countries are cautious about Belt and Road projects, they remain open to it.<sup>54</sup> This openness to Chinese capital is already changing the region's strategic environment. Both China's actions in the South China Sea and the

Belt and Road Initiative are related in that they are part of China's wider efforts to extend its influence in the region. The United States must cooperate with its allies and partners to promote development, including ensuring viable options for infrastructure development and growth beyond Chinese money.

Attempts to defend a rules-based order in a region where development needs are high are likely only to gain wider traction if economic opportunities are afforded as well. Thus far, there appears to only be glacial progress under the BUILD Act, which the United States passed in 2018, to facilitate private sector participation in the development of low or lower-middle income economies, and under the Trilateral Partnership for Infrastructure Investment in the Indo-Pacific between the United States, Japan and Australia.<sup>55</sup>

China's growing clout in East Asia has corresponded with a weakening of the international law of the sea. Those who seek to counter this, including the United States, must respond both in the South China Sea, where sustained efforts must be made to persuade

China that its interests lie in upholding maritime rights and freedoms rather than undermining them, and in the broader region where infrastructure and development needs are high. All this, of course, assumes that the United States is interested in promoting a world where rules matter. Washington's imposition of tariffs on dubious national security grounds, as well as the almost daily reports of serious domestic misconduct at the very highest levels, suggest otherwise. If international law is a casualty of the actions (and omissions) of the two superpowers, we can expect a far less stable order. Already, we are facing instability arising from the seams of that order being violently tugged at. All countries should be working to ensure that the fabric of our international order is not completely torn asunder.

## REFERENCES

- 1 Note Verbale, CML/17/2009, Permanent Mission of the People's Republic of China to the United Nations, (May 7, 2009), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mysvnm\\_e.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mysvnm_e.pdf).
- 2 Lynn Kuok, "Progress in the South China Sea?: A Year After the Hague Ruling," *Foreign Affairs*, July 21, 2017, <https://www.foreignaffairs.com/articles/east-asia/2017-07-21/progress-south-china-sea>.
- 3 Ronald Reagan, "United States Ocean Policy," National Oceanic and Atmospheric Administration, March 10, 1983, [https://www.gc.noaa.gov/documents/031083-reagan\\_ocean\\_policy.pdf](https://www.gc.noaa.gov/documents/031083-reagan_ocean_policy.pdf).
- 4 Bill Hayton, "South China Sea: Vietnam halts drilling after 'China threats,'" BBC News, July 24, 2017, <https://www.bbc.com/news/world-asia-40701121>.
- 5 Bill Hayton, "South China Sea: Vietnam 'scraps new oil project,'" BBC News, March 23, 2018, <https://www.bbc.com/news/world-asia-43507448>.
- 6 James Pearson, "Exclusive: As Rosneft's Vietnam unit drills in disputed area of South China Sea, Beijing issues warning," Reuters, May 17, 2018, <https://www.reuters.com/article/us-rosneft-vietnam-southchinasea-exclusv/exclusive-as-rosnefts-vietnam-unit-drills-in-disputed-area-of-south-china-sea-beijing-issues-warning-idUSKCN1I09H>.
- 7 "China Risks Flare-Up over Malaysian, Vietnamese Gas Resources," Asia Maritime Transparency Initiative, July 16, 2019, <https://amti.csis.org/china-risks-flare-up-over-malaysian-vietnamese-gas-resources/>.
- 8 Khanh Vu, "Chinese ship leaves Vietnam's waters after disputed South China Sea surveys," Reuters, October 24, 2019, <https://www.reuters.com/article/us-vietnam-southchinasea/chinese-ship-leaves-vietnams-waters-after-disputed-south-china-sea-surveys-idUSKBN1X30EK>.
- 9 "Vietnam anti-China protest: Factories burnt," BBC News, 14 May 2014, <https://www.bbc.com/news/world-asia-27403851>.
- 10 "China Coast Guard blocked resupply mission to Ayungin Shoal — DND," September 19, 2019, *The Philippines Star*, <https://www.philstar.com/headlines/2019/09/19/1953204/china-coast-guard-blocked-resupply-mission-ayungin-shoal-dnd>.
- 11 "Memorandum of Understanding on Cooperation on Oil and Gas Development between the Government of the Republic of the Philippines and the Government of the People's Republic of China," Rappler, November 20, 2018, <https://www.rappler.com/nation/217559-memorandum-understanding-philippines-china-oil-gas-development-deal>.
- 12 Teodoro Locsin Jr, "The Philippines through challenges and opportunities in current regional geopolitics," (speech, Singapore, November 6, 2019), <https://www.iiss.org/events/2019/11/fullerton-lecture-philippines-challenges-and-opportunities>.
- 13 Niharika Mandhana, "China's Fishing Militia Swarms Philippine Island, Seeking Edge in Sea Dispute," *The Wall Street Journal*, April 4, 2019, <https://www.wsj.com/articles/chinas-fishing-militia-swarms-philippine-island-seeking-edge-in-sea-dispute-11554391301>.
- 14 "Tracking China's Coast Guard Off Borneo," Asia Maritime Transparency Initiative, April 5, 2017, <https://amti.csis.org/tracking-chinas-coast-guard-off-borneo/>; telephone conversation with Malaysian official, May 9, 2019.
- 15 Zhou Jin and Zhang Zhihao, "Beijing protests UK naval incursion," *China Daily*, September 7, 2018, <http://www.chinadaily.com.cn/a/201809/07/WS5b91b8e2a31033b4f4654b08.html>.

- 16 Kathrin Hille and Victor Mallet, "China accuses France of illegally sailing warship in Taiwan Strait," *Financial Times*, April 25, 2019, <https://www.ft.com/content/12f4ff22-674d-11e9-9adc-98bf1d35a056>.
- 17 Ben Werner, "Destroyer USS Decatur Has Close Encounter With Chinese Warship," USNI News, October 1, 2018, <https://news.usni.org/2018/10/01/37006>.
- 18 "Memorandum of Understanding Between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters," U.S. Department of Defense, November 9, 2018, <https://archive.defense.gov/pubs/141112MemorandumOfUnderstandingRegardingRules.pdf>. The bilateral memorandum committed parties to implementing "in good faith" the Code for Unplanned Encounters at Sea (CUES), an agreement reached in April 2014 between the naval forces of 21 Western Pacific Naval Symposium countries, including China and the United States.
- 19 Pia Ranada, "2018: Year of China military deployments in South China Sea – U.S. think tank," Rappler, December 26, 2018, <https://www.rappler.com/nation/219458-gregory-poling-2018-chinese-military-deployments-south-china-sea>.
- 20 Ben Blanchard and Gao Liangping, "China building on new reef in South China Sea, think tank says," Reuters, November 21, 2018, <https://www.reuters.com/article/us-china-southchinasea/china-building-on-new-reef-in-south-china-sea-think-tank-says-idUSKCN1NQ08Y>; Pia Ranada, "2018: Year of China military deployments in South China Sea – U.S. think tank."
- 21 See, for instance, Robert Farley, "Would China's South China Sea Bases Be Wiped Out In A War?," *The National Interest*, May 9, 2019, <https://nationalinterest.org/blog/buzz/would-chinas-south-china-sea-bases-be-wiped-out-war-56577>.
- 22 "Advance Policy Questions for Admiral Philip Davidson, USN Expected Nominee for Commander, U.S. Pacific Command," U.S. Senate Armed Services Committee, April 17, 2018, [https://www.armed-services.senate.gov/imo/media/doc/Davidson\\_APOs\\_04-17-18.pdf](https://www.armed-services.senate.gov/imo/media/doc/Davidson_APOs_04-17-18.pdf).
- 23 "China's Activities in the South China Sea (China's development activities on the features and trends in related countries)," Japan Ministry of Defense, April 2019, [https://www.mod.go.jp/e/d\\_act/sec\\_env/pdf/ch\\_d-act\\_201904b\\_e.pdf](https://www.mod.go.jp/e/d_act/sec_env/pdf/ch_d-act_201904b_e.pdf), 22-23.
- 24 Bilahari Kausikan, "Dealing with an Ambiguous World – Lecture III: ASEAN & U.S.-China Competition in Southeast Asia," (speech, Singapore, March 30, 2016), [https://lkyspp.nus.edu.sg/docs/default-source/ips/mr-bilahari-kausikan-s-speech7d7b0a7b46bc6210a3aaff0100138661.pdf?sfvrsn=cec7680a\\_0](https://lkyspp.nus.edu.sg/docs/default-source/ips/mr-bilahari-kausikan-s-speech7d7b0a7b46bc6210a3aaff0100138661.pdf?sfvrsn=cec7680a_0).
- 25 Bill Hayton, "South China Sea: Vietnam halts drilling after 'China threats,'" BBC News, July 24, 2017, <https://www.bbc.com/news/world-asia-40701121>.
- 26 Bill Hayton, "The Week Donald Trump Lost the South China Sea," *Foreign Policy*, July 21, 2017, <https://foreignpolicy.com/2017/07/31/the-week-donald-trump-lost-the-south-china-sea/>.
- 27 Tan Hui Yee, "Vietnam digs in on South China Sea oil and gas projects amid Chinese pressure," *The Straits Times*, September 13, 2019, <https://www.straitstimes.com/asia/se-asia/vietnam-digs-in-on-south-china-sea-oil-and-gas-projects-amid-chinese-pressure>.
- 28 Bennett Murray, "Vietnam's Strange Ally in Its Fight With China," *Foreign Policy*, August 1, 2019, <https://foreignpolicy.com/2019/08/01/vietnams-strange-ally-in-its-fight-with-china/>.
- 29 Helen Clark, "Rumours ExxonMobil to quit Vietnamese gas field," *Energy News Bulletin*, September 11, 2019, <https://www.energynewsbulletin.net/finance-legal/news/1371306/rumours-exxonmobil-to-quit-vietnamese-gas-field>.



- 30 Tim Daiss, "All the reasons ExxonMobil may leave Vietnam," *Asia Times*, September 17, 2019, <https://www.asiatimes.com/2019/09/article/all-the-reasons-exxonmobil-may-leave-vietnam/>.
- 31 "Foreign Ministry summons ambassador to discuss Sino-Vietnam South China Sea dispute," classified U.S. Department of State cable published by Wikileaks, September 11, 2007, [https://wikileaks.org/plusd/cables/07HANOI1623\\_a.html](https://wikileaks.org/plusd/cables/07HANOI1623_a.html).
- 32 Khanh Vu, "Chinese ship inches closer to Vietnam coastline amid South China Sea tensions," Reuters, August 24, 2019, <https://www.reuters.com/article/us-vietnam-china-southchinasea/chinese-ship-inches-closer-to-vietnam-coastline-amid-south-china-sea-tensions-idUSKCN1VE068>.
- 33 Le Thi Thu Hang, "Remarks by MOFA Spokesperson Le Thi Thu Hang on comments on the remarks made by the Spokesperson of the Ministry of Foreign Affairs of China on 17 July 2019 regarding the developments in the East Sea," Vietnam Ministry of Foreign Affairs, July 19, 2019, [http://www.mofa.gov.vn/en/tt\\_baochi/tcbc/ns190719190308](http://www.mofa.gov.vn/en/tt_baochi/tcbc/ns190719190308); Le Thi Thu Hang, "Statement of the MOFA Spokesperson on the violations of Viet Nam's EEZ and Continental shelf by the Chinese survey ship, Haiyang Dizhi 8, and its escort vessels," Vietnam Ministry of Foreign Affairs, July 26, 2019, [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns190726103258](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns190726103258); Le Thi Thu Hang, "Statement by the spokesperson of the Vietnamese Ministry of Foreign Affairs Le Thi Thu Hang regarding the Chinese vessel Haiyang Dizhi 8's resumption of its violation of the Vietnamese Exclusive Economic Zone and Continental Shelf," Vietnam Ministry of Foreign Affairs, August 16, 2019, [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns190816235538](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns190816235538); "The 14th Regular Press Conference," Vietnam Ministry of Foreign Affairs, September 12, 2019, [https://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns190919132344](https://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns190919132344); "Statement of the MOFA Spokesperson on the violations of Viet Nam's EEZ and Continental shelf by the Chinese survey ship, Haiyang Dizhi 8, and its escort vessels," Vietnam Ministry of Foreign Affairs, October 3, 2019, [https://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns191003214402](https://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns191003214402); Le Thi Thu Hang, "Remarks by MOFA Spokesperson Le Thi Thu Hang on comments on the remarks made by the Spokesperson of the Ministry of Foreign Affairs of China on 18 September 2019," Vietnam Ministry of Foreign Affairs, October 3, 2019, [https://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns191003220058](https://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns191003220058).
- 34 Niharika Mandhana, "China's Fishing Militia Swarms Philippine Island, Seeking Edge in Sea Dispute," April 4, 2019, *The Wall Street Journal*, <https://www.wsj.com/articles/chinas-fishing-militia-swarms-philippine-island-seeking-edge-in-sea-dispute-11554391301>.
- 35 "Hit-and-run: Chinese vessel abandons Philippine boat after collision," *Philippine Daily Inquirer* / Asia News Network, June 13, 2019, <https://www.asiaone.com/china/hit-and-run-chinese-vessel-abandons-philippine-boat-after-collision>.
- 36 Alexis Romero, "Duterte on sinking: It was a little maritime accident," *The Philippine Star*, <https://www.philstar.com/headlines/2019/06/18/1927498/duterte-sinking-it-was-little-maritime-accident>.
- 37 Catherine Valente, "Palace asks China to probe 'barbaric' abandonment of Filipino fishermen," *The Manila Times*, June 13, 2019, <https://www.manilatimes.net/2019/06/13/second-headline/palace-asks-china-to-probe-barbaric-abandonment-of-filipino-fishermen/568967/>.
- 38 Lynn Kuok, "The Philippines Is the Frontline in the U.S. Competition with China," *The National Interest*, September 19, 2019, <https://nationalinterest.org/feature/philippines-frontline-us-competition-china-81896>.
- 39 "Malaysia voices trust in South China Sea pact," *The Straits Times*, August 5, 2019, <https://www.straitstimes.com/asia/se-asia/malaysia-voices-trust-in-south-china-sea-pact>.
- 40 "Malaysia voices trust in South China Sea pact," *The Straits Times*; "Joint Communiqué of the 52<sup>nd</sup> ASEAN Foreign Ministers' Meeting," Association of Southeast Asian Nations, July 31, 2019, <https://www.asean2019.go.th/en/news/joint-communique-of-the-52nd-asean-foreign-ministers-meeting-bangkok-31-july-2019/>.

- 41 “Malaysia voices trust in South China Sea pact,” *The Straits Times*.
- 42 Tashny Sukumaran, “How will Malaysia and China’s maritime consultation mechanism affect the South China Sea dispute?,” *South China Morning Post*, September 22, 2019, <https://www.scmp.com/week-asia/explained/article/3029732/how-will-malaysia-and-chinas-maritime-consultation-mechanism>.
- 43 Tashny Sukumaran, “How will Malaysia and China’s maritime consultation mechanism affect the South China Sea dispute?”
- 44 Catherine Wong, “South China Sea ‘likely to top agenda’ when Malaysian foreign minister visits Beijing next week,” *South China Morning Post*, September 6, 2019, <https://www.scmp.com/news/china/diplomacy/article/3026081/south-china-sea-likely-top-agenda-when-malaysian-foreign>.
- 45 Seth Robson, “Facility for US forces opens on Philippines’ main island; another slated for Palawan,” *Stars and Stripes*, January 31, 2019, <https://www.stripes.com/news/pacific/facility-for-us-forces-opens-on-philippines-main-island-another-slated-for-palawan-1.566695>.
- 46 For a discussion of the importance of asserting maritime rights and freedoms in the South China Sea, see Lynn Kuok, “The U.S. FON Program in the South China Sea: A lawful and necessary response to China’s strategic ambiguity,” (Washington, DC: The Brookings Institution, June 2016), <https://www.brookings.edu/research/the-u-s-fon-program-in-the-south-china-sea/>.
- 47 John Vinocur, “Germany’s military maneuvers,” *Politico*, June 5, 2019, <https://www.politico.eu/article/germanys-military-maneuvers/>.
- 48 For the lessons China should be taking from the Soviet approach to the law of the sea, see Lynn Kuok, “China can learn from Soviet approach to the law of the sea,” The Brookings Institution, March 27, 2018, <https://www.brookings.edu/blog/order-from-chaos/2018/03/27/china-can-learn-from-soviet-approach-to-the-law-of-the-sea/>.
- 49 For a further discussion of this, see Lynn Kuok, “The U.S. FON Program in the South China Sea: A lawful and necessary response to China’s strategic ambiguity.”
- 50 Carl Thayer, “A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct,” *The Diplomat*, August 3, 2018, <https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/>.
- 51 Michael R. Pompeo, “Remarks With Philippine Foreign Secretary Teodoro Locsin, Jr.,” U.S. Department of State, March 1, 2019, <https://www.state.gov/remarks-with-philippine-foreign-secretary-teodoro-locsin-jr/>.
- 52 Pia Lee-Brago, “Philippines ambassador to U.S.: Interference a bane to ties,” *The Philippine Star*, October 2, 2019, <https://www.philstar.com/headlines/2019/10/02/1956765/philippines-ambassador-us-interference-bane-ties>.
- 53 Carl Thayer, “A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct.”
- 54 Lynn Kuok, “Shangri-La Dialogue: South-east Asia’s cautious embrace of the Belt and Road Initiative,” *The Straits Times*, June 1, 2019, <https://www.straitstimes.com/opinion/s-e-asias-cautious-embrace-of-the-belt-and-road-initiative>. For an in-depth discussion, see Lynn Kuok, “Chapter Six: The Belt and Road Initiative and Southeast Asia,” in *IJSS Asia-Pacific Regional Security Assessment 2019: Key development and trends*, (London: International Institute for Strategic Studies, May 2019).
- 55 “Joint Statement of the Governments of the United States of America, Australia, and Japan,” The White House, November 17, 2018, <https://www.whitehouse.gov/briefings-statements/joint-statement-governments-united-states-america-australia-japan/>.

## ABOUT THE AUTHOR

**Lynn Kuok** is a senior research fellow at the University of Cambridge. From January, she assumes the position of Shangri-La Dialogue Senior Fellow for Asia-Pacific Security with the International Institute for Strategic Studies (IISS). She was recently a visiting scholar at Yale Law School's Paul Tsai China Center. She is a former Brookings expert and has held fellowships at Harvard Law School, the Harvard Kennedy School, the Center for Strategic and International Studies, and the Centre for International Law at the National University of Singapore. Earlier this year, Kuok gave evidence before the U.K. House of Commons Defence Committee on the Security Situation in the "Far East." Her analysis has featured in *Foreign Affairs* and *The Wall Street Journal*, amongst other publications. She sits on the World Economic Forum's Global Future Council on Geopolitics and was formerly a council member on its Global Future Council on International Security. She served as editor-in-chief of *The Cambridge Review of International Affairs* and the *Singapore Law Review*.

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