Griffith UNIVERSITY
Queensland, Australia
Griffith Asia Institute

Australian Government

豪日交流基金
Australia-Japan FOUNDATION

South China Sea issue: Enhancing the rule of law under the US-China competition

Chihiro Shikata

SOUTH CHINA SEA ISSUE: ENHANCING THE RULE OF LAW UNDER THE US-CHINA COMPETITION

Chihiro Shikata
Japan Institute of International Affairs

About the Griffith Asia Institute

The Griffith Asia Institute (GAI) is an internationally recognised research centre in the Griffith Business School. We reflect Griffith University's longstanding commitment and future aspirations for the study of and engagement with nations of Asia and the Pacific.

At GAI, our vision is to be the informed voice leading Australia's strategic engagement in the Asia Pacific—cultivating the knowledge, capabilities and connections that will inform and enrich Australia's Asia-Pacific future.

We do this by: i) conducting and supporting excellent and relevant research on the politics, security, economies and development of the Asia-Pacific region; ii) facilitating high level dialogues and partnerships for policy impact in the region; iii) leading and informing public debate on Australia's place in the Asia Pacific; and iv) shaping the next generation of Asia-Pacific leaders through positive learning experiences in the region.

About the publication

The Griffith Asia Institute's 'Research Papers' publish the institute's policy-relevant research on Australia and its regional environment. The texts of published papers and the titles of upcoming publications can be found on the Institute's website: www.griffith.edu.au/asia-institute

'South China Sea issue: Enhancing the rule of law under the US-China competition'

ISBN: 978-1-922361-45-5 (print)
978-1-922361-46-2 (online)

Cover image: Floating offshore oil rig off the coast of Vung Tau Vietnam in the disputed waters of the South China Sea, which fall within Vietnam's exclusive economic zone. (Shutterstock)

Photography: Images sourced from Shutterstock and Creative Commons.

About the author

Chihiro SHIKATA is a research fellow at the Japan Institute of International Affairs (JIIA). Her research interest includes East Asian security, regional cooperation in the Asia-Pacific, and the role of communication. Before joining JIIA, she covered public outreach regarding the security policy of Japan at the Japanese Ministry of Foreign Affairs and US-Japan security cooperation at the Carnegie Endowment for International Peace. She received her MA in International Affairs at American University in Washington, DC and BA in International Liberal Studies at Waseda University in Tokyo.

CONTENTS

INTRODUCTION

South China Sea, which used to be a location of regional maritime dispute in Asia has become a global focal point in recent years. Active engagement among the ASEAN countries and between ASEAN countries and the countries of the neighboring region take place to respond to this situation. The background behind this is multifold. Economically, the stability of the South China Sea is of many countries' interests because it is an important sea-lane with heavy marine traffic. Strategically, reflecting the intensifying US-China competition, the region has become the sight of diplomatic, economic—and in some cases physical—clash of the major powers.

To tackle the issue which has its roots in territorial and maritime dispute, the rule of law has continuously been emphasised in the South China Sea. Leaders of the claimant and non-claimant countries have been vocal about the importance of the rule of law in various international settings. Upholding the international legal order is of immense importance to the region because it allows the concerned countries, large or small, to tackle their differences without resorting to force.

The matter is, however, made even more complicated by the US-China competition. As the competition intensifies, the US and its allies started to understand this competition in the scope of the maintenance of the "rules-based order." This concept of the rules-based order has quickly gained popularity within the US and among its allies because the narrative of China challenging the rules-based order fits in the larger recent narrative that sees China as a major strategic rival of the United States and a revisionist power. The recent activities by China including the land reclamation and the construction of facilities, as well as its coercive actions resonates well with this narrative about China. As a result, the actions taken by China in the region is now seen in the context of this narrative.

Because the concept of the rules-based order is not strictly defined and it is often used to vaguely include various elements such as freedom, transparency, and the rule of law,[1] the concept of the rule of law easily gets confused with the rules-based order. However, the rules-based order and order based on international law is not the same. The vague way the rules-based order includes international law in its concept is often criticised by legal scholars.[2]

Even though existing order and the rule of law itself is strongly interrelated, when looking at the situation in the South China Sea, it is important to differentiate the two and take concrete actions required to uphold the rule of law. Failure to do so may not only have negative effect on the resolution of the dispute but also may lead to the weakening of international law. With weak international law, the lack of predictivity in the region may rise, and as a result, the risk of unwanted clashes between the claimant countries or serious disturbance of the global trade may rise.

The remainder of this paper is structured as follows. Firstly, this paper looks at the background and recent situation in the South China Sea to understand how the issue developed and what implications it has to the immediate region and to the world. Secondly, it explores why the rule of law in the region is important. Thirdly, it examines what rules-based order, which is often coincided together with the concept of the rule of law, is and why and how it has become such a repeatedly used term. Finally, it explores how likeminded countries that strive to maintain rule of law, such as Japan, Australia and United States can cooperate to strengthen the rule of law in the South China Sea.

BRIEF OVERVIEW OF THE ISSUE OF THE SOUTH CHINA SEA

The issue of South China Sea started as a dispute between coastal states concerning territorial sovereignty over the small land areas located in the South China Sea and jurisdiction over the South China Sea itself. Following some decades of occasional clash between the claimant countries,[3] with the adoption of the UN Convention on the Law of the Sea (UNCLOS) four decades ago, the dispute went into a new stage. Based on UNCLOS, countries needed to submit information on the limits of continental shelf beyond 200 nautical miles by May 13, 2009 to the Commission of the Limits of the Continental Shelf (CLCS). With this in mind, Vietnam and Malaysia made submission to the CLCS[4], clarifying their exclusive economic zone (EEZ) and continental shelf claims. In protest, China and the Philippines, who did not make submission to the CLCS, submitted notes verbales to the UN, in which they asked CLCS to not consider the submission by Vietnam and Malaysia arguing that the maritime boundaries in the area are under dispute. The significance of the notes verbales of China is that China attached to them a map which depicts the "nine-dash line." While China's claim had always been ambiguous, the map indicated that China claimed large portion of the South China Sea based not only on UNCLOS but also on history.

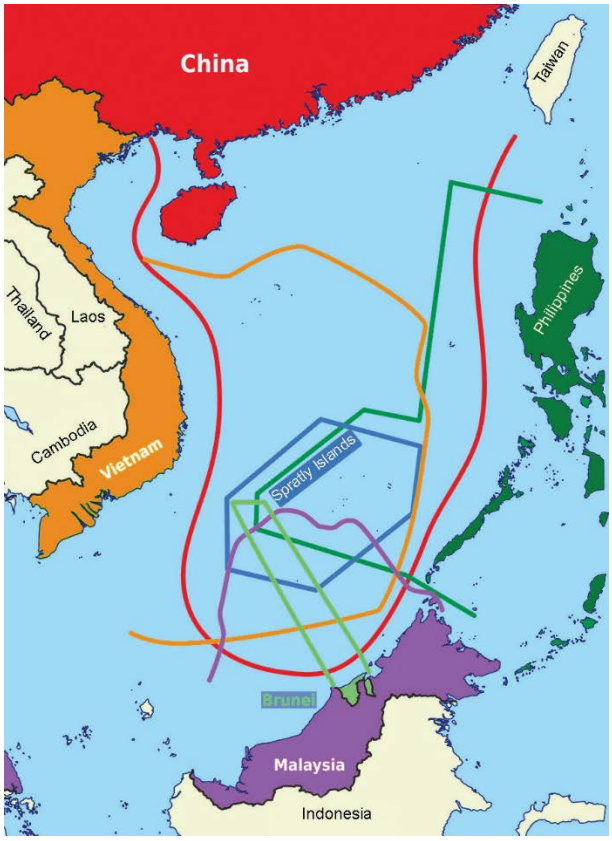
Against such claim by China, South East Asian countries with major dispute in the South China Sea—Malaysia, the Philippines, and Vietnam—aligned their claims to international law, especially UNCLOS. Considering the power gap between them and China as well as the claim that has weak ground on international law as the one China was making, they decided that it would be in their interest to make their claims as

law-abiding as it could be.[5] As well know, in 2013, the Philippines brought its dispute with China to international arbitration under UNCLOS. The arbitral tribunal rendered a decision in 2016 that China's claim of nine-dash line had no legal basis and the land features in the Spratly Islands are either reefs or rocks, which cannot generate EEZs.

The actions of China since the tribunal's decision is not considered to be law-abiding. China continued its land reclamation in the South China Sea and its activities to build facilities on them. It is reported that China's island building activities were completed by early 2016 in the Spratlys, but it continued in the Paracels by mid-2017.[6] Moreover, China went onto continue building up permanent facilities on these islands including the military related infrastructure[7] and deploying anit-ship and anti-aircraft missile system to some of these islands.[8] China has also conducted what appears to be seismic surveys in the area claimed by other states.[9]

Moreover, in recent years, China has been active at intimidating its neighbors employing its military, coast guard and maritime militia to coerce them into accepting China's position.[10] China Coast Guards have repeatedly been harassing Malaysia and Indonesia's oil and gas activities. Most recently, in November 2021, Chinese Coast Guard blocked two commercial vessels carrying food supply for the military personnel stationed in Second Thomas Shoal and fired water cannons at them.[11] It was also reported around the same time, that Indonesia was told to stop its drilling because it was taking place in the territory of China.[12] In the meantime, China has passed Chinese Coast Guard Law which allows the Coast Guard to use force on foreign vessels operating in the waters claimed by China in January 2021, and started requiring certain type of vessels to provide detailed information before entering the sea area where they considers to be their territorial waters.[13]

Instability in the region has implications to the regional and extra-regional states too. Economically, the South China Sea is home to major sea lanes of communication. It is said that about one third of global shipping, including energy supply such as oil, goes through the South China Sea.[14] Not only the Asian countries, including China, Singapore, Vietnam, and Japan relies on the trade that passes through South China Sea, but the extra-regional economies such as the United States, Germany, and the United Kingdom are dependent on the South China Sea trade route.[15] Because such large amount of trade relies on these sea routes, it is likely to have grave impact on the international economy if it is disturbed. A study by Cosar and Thomas suggest that in case of a complete shutdown of maritime shipping through the South China Sea and all the east-west passages in the Indonesian archipelago, countries all over the world would face negative effects on economic welfare.[16] While theoretically some countries with limited trade ties to the region could experience welfare gains in such situation, the study shows that all countries in the data but Ireland is negatively affected, with countries with ports in the affected region incurring most loss.



South China Sea claims map. (Wikimedia Commons)


Wikimedia Commons

SOUTH CHINA SEA AND THE RULE OF LAW

Facing such pressing issues in South China Sea, rule of law has increased importance to the region. Traditionally, rule of law is understood to be based on international law, which is a set of legally binding rules that is created through consent of each States. Legally binding agreements "offer forms of accountability through specific rules and methods of interpretation, while breaches engage international state responsibility, up to and including sanctions and/or third party dispute settlement mechanisms under specific legal regimes."[17] International law works as a mechanism of the international system, and it provides states with basis of inter-state interaction with shared understanding and agreement founded on legal objectivity.[18] In such system, by acting lawfully, states can enjoy legitimacy.[19]Although it has its limitations, the region can benefit from the certainty, predictability and stability provided by the international law, or in other words, international legal order.[20] International law ensures that all countries are treated equally, and it is therefore, a globally accepted tool to realise peaceful resolution of differences and promote cooperation.[21]

Looking at the overall picture of the South China Sea, we can see that several subjects are disputed in the area. These subjects are closely interrelated but can be separated into four categories which are: sovereignty over the islands and rocks, control of low-tide elevation and submerged features, baselines and archipelagic waters, and natural resources including fish, oil and gas. In addition to these four, the difference of stance on freedom of navigation and overflight has been another major subject in and around the South China Sea. The US has been using Freedom of Navigations Operations (FONOPs) to challenge excessive maritime claims regarding the freedom of navigation in the South China Sea.[22] Two legal orders, one concerning territory and sovereignty and another concerning the sea, maintained especially through UNCLOS have the most relevance to the dispute in the South China Sea.[23] This is why UNCLOS, constitution of the oceans, is of such importance concerning the South China Sea.

RULES-BASED INTERNATIONAL ORDER

The term "rules-based order," a concept that emerged fairly recently, in the early 1990s and gain popularity around 2014,[24] at a glance may appear to have similar meaning to the rule of law. However, examining the use of the term, we can understand that it is of a different nature. While the rules-based order lacks concrete definition, and different users and observers have different understanding of the concept, many seem to agree that it is established as a concept for defending the current global order led by the United States.[25]

Despite its popularity in the political scene, analyzing the use of the term, many scholars question this concept. Joshi, for example, questions the "rules" of this order, and argues that "there is no agreement on which rules, whose rules, and indeed the term itself."[26] Jorgensen, also points out that there is a gap between political and legal voices concerning the concept of the rule-of law as follows:

> What is clear is that primarily political voices advocate in these terms, while often assuming that they also embody lawyers' principal commitment to the 'international rule of law.' Much of legal scholarship has in contrast remained sceptical regarding both the meanings of the RBO and the perils of uniting legal and non-legal rules within a single normative ideal.[27]

German Legal Advisor to the Federal Foreign Office's explanation may be helpful at understanding what the rules-based order is and how different it is from the international law. According to this explanation, "international law refers to the legally binding rules on the relations between subjects of international law such as states. The political term rules-based order encompasses the legally binding rules of international law, but extends also to non-binding norms, standards and procedures in various international fora and negotiating processes."[28] Such inclusiveness of the concept alerts legal scholars. Jorgensen cautions that allowing non-legal informal rules and promises to shape the legal rules may lead to harming universality and stability which the current

international legal order enjoys.[29] In a similar note, Talmon cautions that the concept of rules-based order makes the distinction between binding and non-binding rules even more difficult, which as a result may lead to an "order of the strong or an order by dictate of the majority."[30]

If rules-based order is a concept that draws so many cautions and criticisms, why and how did it become so widely used? How did it come to get associated so closely with the idea of the violation of the rule of law? Breuer and Johnston explain this effectively from the relationship it has with the narrative of China as a revisionist state.[31] According to their study, the concept of rules-based order serves as a "meme," an element that builds a narrative and facilitates the spread of that narrative by being shared over the internet again and again.[32] Being repeatedly shared over the internet, a storyline that rules based order is threatened by China, and China is therefore a revisionist state, and as a revisionist state it is a major strategic rival of the US."[33]

Breuer and Johnston suggest that one of the sub-narratives closely related to the meme of the rules-based order is the idea that "challenger to the rules-based order is violating the law."[34] In this context, they explain that:

> To oppose or challenge the RBO means to support partiality and preferential (self-serving) treatment and to impose arbitrary solution to disputes. Arbitrary solutions undermine the principle of *pacta sunt servanda*. This leads to a world that is unpredictable and chaotic. At the extreme, the challenge is an outlaw.[35]

Therefore, from this perspective, it is not difficult to understand why the term rules-based order has been used in place of languages such as the "international legal order," "international law," or "rule of law" in the government documents.[36] However, mixing these concepts up has its risks. Firstly, just as cautioned by the legal scholars, it may in the long run undercut the power of international legal system. In addition, as the original dispute is a matter that requires to be resolved based on international law, the distraction from the international law could delay the resolution of the issue even further. Moreover, by getting caught up by the strategic aspects and overly focusing on the constructed threatening "Other," the actions taken to strengthen the rule of law to enhance the stability, may ultimately lead to power competition in the region.[37]

SOUTH CHINA SEA AND THE NECESSARY COOPERATION TO PROTECT THE RULE OF LAW

Because South China Sea has become one of the areas of the global concern, there has been many ways likeminded countries are lending their hands. Looking at the regional cooperation in the South China Sea from the perspective elaborated above, we can understand what kind of support to the region would be more effective at protecting the rule of law in the South China Sea. To not get caught up by the power competition and to uphold the rule of law in the region, it is necessary for the actors to cooperatively and clearly send a message that not any rule but the international law—and in case of South China Sea, especially UNCLOS—is what needs to be upheld. Although these three certainly would not cover the entire variety, I focus on three categories as possible ways to send such message: diplomatic messaging, maritime capacity building, FONOPs and military presence.

Diplomatic messaging

Words are often dismissed as mere rhetoric. However, in upholding the international legal order, it should be meaningful to repeat through clearly targeted statements that claims and actions that do not abide by international law, such as UNCLOS, cannot be accepted. It also is important to support the regional effort to create a binding treaty through fair process. In this regard, Code of Conduct (COC) which has been negotiated

between ASEAN countries for more than 25 years since its conception,[38] has a potential to become one. Legally binding COC is desired by South East Asian claimants because it would put constraints on China. Some experts warn though that if the COC ends up as non-binding slogan it would not be very meaningful.[39] Even worse, if it becomes something that ignores the Arbitral Award, or if third parties are excluded from the region, it can be counterproductive.[40]It is therefore necessary for the non-claimant countries to stay vocal about COC as well.

Among recent examples, the statement of the US and the *Note Verbale* of Australia dismissed unlawful act through clear and targeted statements. Traditionally, the US did not take side in the sovereignty dispute concerning South China Sea.[41] However, on July 13 2020, the stance has changed as the statement issued by then Secretary of State. It clearly stated that China's claim was unlawful based on UNCLOS.

> The PRC has no legal grounds to unilaterally impose its will on the region. Beijing has offered no coherent legal basis for its "Nine-Dashed Line" claim in the South China Sea since formally announcing it in 2009. In a unanimous decision on July 12, an Arbitral Tribunal constituted under the 1982 Law of the Sea Convention—to which the PRC is a state party—rejected the PRC's maritime claims as having no basis in international law. The Tribunal sided squarely with the Philippines, which brought the arbitration case.[42]

It also made clear of its commitment to protect South East Asian allies' "sovereign rights to offshore resources, consistent with their rights and obligations under international law."[43] Australia followed the US abandoning is neutral stance by issuing a *Note Verbale* to the CLCS ten days after the above statement of the US.[44] The *Note Verbale* said that, "the

Australian government rejects any claims by China that are inconsistent with the 1982 United Nations Convention on the Law of the Sea .... The Tribunal in the 2016 South China Sea Arbitral Award found these claims to be inconsistent with UNCLOS and, to the extent of that inconsistency, invalid."[45]

While others are more reserved at voicing clear support on the tribunal Award, it does not mean they remain quiet. Spokesperson of the EU, following the tension at the Whitsun Reef issued a statement in April 2021 recalling the Arbitral Award. Although the statement did not align EU with the tribunal award, it is noteworthy that it expressed support for "legally binding Code of Conduct, which should not prejudice the interests of third parties."[46]

The diplomatic statements do not have to be limited to direct support of international legal system. Public attribution of an unacceptable actions based on international law can be of meaningful to protect the rule of law. In this regard, Yiallourides points to the example of a powerful use of a statement by the Defense Ministers of Australia, Japan, and the US in the occasion of Defense Ministers meeting.[47] In the joint statement, they "expressed strong opposition to the use of force or coercion as well as unilateral action to alter the status quo, and to the use of disputed features for military purposes in the South China Sea."[48] According to Yiallourides, wording of "coercion" in this statement "is important and may carry far-reaching implication" because it implies that such action violates international law, specifically Article 2 (4) of the UN Charter.[49]

Maritime capacity building

Maritime Capacity Building, especially the ones that aims at law enforcement agency and their personnel is becoming increasingly important. China's tactics to use non-military forces such as CCG and maritime militia to expand their area of influence or to intimidate other claimants are referred to as gray zone tactics. In such move, China acts slowly and carefully to not cross the threshold so their actions will not lead to war.[50] The consequence of each gray zone activities appears to be small, but after repeated attempts, it can create fait accompli. Although it is not easy to say all activities of this nature is against international law, gray zone activities have negative effect on the applicability of international law.[51] Gray zone activities, according to Brooks, "exploit and create legal ambiguity, and collectively, state gray-zone activities represent a significant challenge to the international rule of law."[52]

In addition to the gray zone activities conducted by China, there are issues such as piracy, IUU fishing, and other international crimes, which are occurring in the region as well. With such situation as a backdrop, an increasing number of responsibilities are now falling upon the coast guard agencies.[53] Littoral states, to protect their rights and resources from such activities, need sufficient maritime law enforcement capabilities. ASEAN states have been accommodating to the change and improving their law-enforcement capabilities.[54] ASEAN states, in addition to working unilaterally to enforce laws of the sea, cooperate within the region trough initiatives including the Malacca Strait Patrols and the sea-air trilateral security agreement in the Sulu and Celebes seas.[55] Although there have been progresses made through their own efforts, some raise concerns about the insufficiency of some states' capacity to carry out their missions most effectively.

This makes cooperation of neighboring states, such as Japan, Australia, and the US important. Many of the neighboring countries has long history providing support to the ASEAN states in maritime capacity building. For example, Japan has been engaging the ASEAN states for more than half a decade being one of the top countries offering capacity building training to the South East Asian countries.[56] While it started as a commercial-oriented initiative, it now takes a wider-range approach providing equipment and training for the coastguards of the ASEAN states.[57] The assistance provided by the US has been the largest scaled.[58] Although its assistance has traditionally been directed to its allies, its recipients now include some other partners, such as Vietnam,

Singapore, and Indonesia.[59] Australia too, has been an active partner of the ASEAN states, providing its support mostly bilaterally through its partnership with countries like Indonesia, Malaysia and the Philippines.[60]

Although there have been some efforts made to coordinate the capacity building efforts,[61] it is often pointed out that their efforts need further synchronization.[62] It is therefore, necessary for these countries to find ways to most effectively support the capacity building of the ASEAN states, combining each countries strength. Also, along the various capacity building assistance such as the transfer of equipment and joint exercises, training on law enforcement based on international law should be given priority. It is essential for the coast guard officers to have good understanding about the international law, especially UNCLOS, to maintain rule of law at sea. Japan offers a master's program for the officials of the coast guard agencies across the region.[63] Such effort maybe enhanced through combining regional knowledge and resources to serve a larger group of officials.[64]

FONOPs and other military presence

Freedom of Navigation operation (FONOP) has been used by the US as one of the ways to challenge excessive maritime claims. It has conducted FONOPs since 1979 against "unilateral acts of other states designed to restrict the rights and freedom of the international community." The list of claimants challenged through FONOP in general are not limited to China but includes the countries all over the world.[65] FONOPs conducted in the South China Sea are just a fraction of the whole. At the meantime, the operations conducted in South China Sea are increasing its weight over the past decade. The operations are now conducted with more frequency and clarity in the recent years.[66] In addition to the US, like minded countries, including Australia, Japan, France, UK, Germany, Canada, and India are now joining the United States by sending their Naval vessels to resist the claims made by China in the South China Sea.

FONOPs and other military presence in the South China Sea is a powerful way the US and other likeminded countries can demonstrate that they are opposed to the claims not in accordance with the international law. Although such action itself sends powerful message regarding their commitment for the maintenance of the rule of law in the region, it would be more effective to clearly send out a message what claims they are opposing through such actions. China's strategy is to paint the picture that through such operations, countries are fruitlessly engaging in provocative actions, and China ultimately gets its way.[67] China tends to accuse such operations as an infringement of China's sovereignty and often claims that the vessels conducting such operation were "expelled" out of the South China Sea after escalating the tension in the region for no good reason, even though the reality is that Chinese navy ships tails them until they leave the waters. This is a frequently used technique to make China's action appear justifiable. In this regard, the recent statements issued by the US Navy has been effectively stating the specific claims they are challenging and denying the Chinese claims of expulsion from the area.[68]

The actions taken in the South China Sea is not limited to the waters. Countries send their aircrafts over the South China Sea, where China is often said to criticise and warn the military aircrafts of other countries flying over the South China Sea.[69] While individually, the position of South East Asian countries on the freedom of navigation and overflight are not analogous,[70] they jointly emphasise the importance of maintaining freedom of navigation in and overflight above the South China Sea at the ASEAN summit meeting every year.[71] The US and other likeminded countries will be able to support such ASEAN's position through their military presence in the air and sea combined with clear messaging emphasizing their support for the freedoms of navigation and overflight in the region.

CONCLUSION

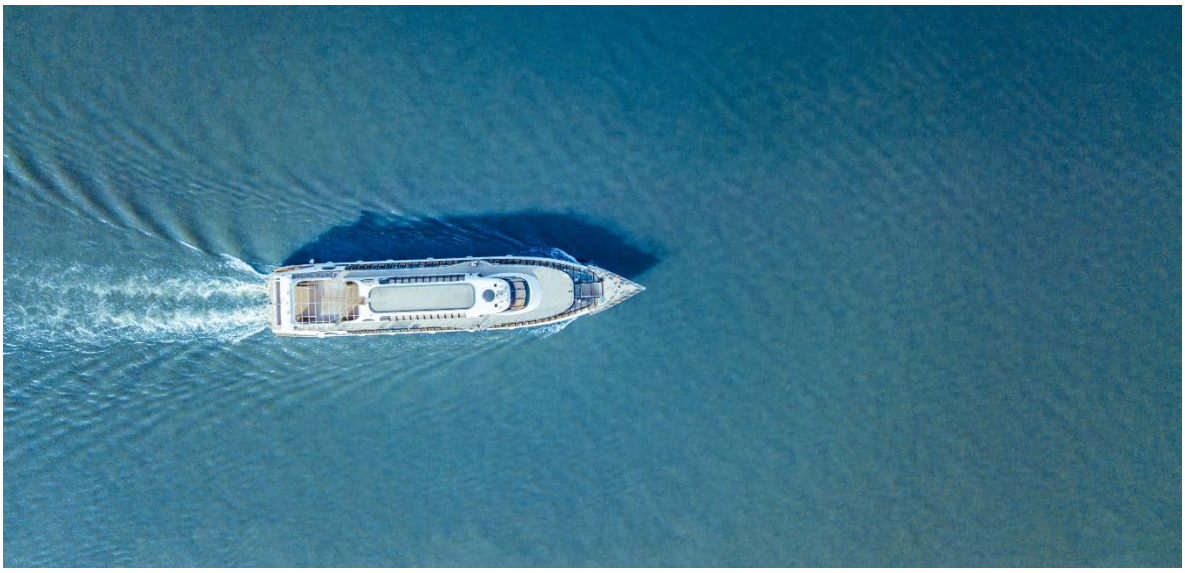
The above three categories only touch on limited ways of cooperation and what needs to be emphasised or kept in mind to make such cooperation more effective in maintaining the rule of law in the region. There are of course other ways to cooperate, and there may be more creative efforts needed in the future as China's approach develops. Nevertheless, the importance to keep our focus on the maintenance of the rule of law would remain the same.

While the term "rules-based order," a popular phrase for leaders and experts, has a potential to bring countries together by putting the South China Sea situation into a global context, it is necessary to keep in mind that the weakness of the phrase lies in its ambiguity. The term, when used carelessly blurs what rules are the rules to be adhered. One of the tactics used by China is to justify its actions through stretching the international law into their advantage and justify its actions. What is being tested, therefore, in the South China Sea is, how countries can cooperate to maintain rule of law and oppose abusive use of international law.

The efforts made by ASEAN and extra-regional countries, should therefore be focused on sending a clear message that not any rule but the international law, especially UNCLOS, need to be respected in the South China Sea. Without doing so, there is a risk that the international legal system to be weakened or the resolution of the conflict to be further complicated, which may lead to unwanted clash in the region.

RECOMMENDATIONS

- Countries that strive to maintain the rule of law in the South China Sea, including Japan and Australia, should pay careful attention to the difference between the rule of law and the rules-based order. Because the rules-based order may have wider scope than the rule of law, it is important to differentiate the two and take concrete actions required to uphold the rule of law.
- To strengthen the rule of law in the South China Sea, countries such as Japan and Australia should put emphasis on cooperatively and clearly sending a message that not any rule but the international law, especially UNCLOS is what needs to be upheld. Such messages can be sent out through efforts such as diplomatic messaging, capacity building of maritime law enforcement agencies, and FONOPs and other military presence in the region.
- Diplomatic messaging: In upholding the international legal order, clearly targeted statements should repeatedly be put out. The statements should emphasise that claims and actions that do not abide by international law, such as UNCLOS, cannot be accepted. Moreover, the regional effort to create binding treaties, including the legally binding COC, through fair process should be supported utilizing diplomatic opportunities.
    - Maritime capacity building: Neighboring countries, including Japan, Australia and the US should continue its cooperation with littoral states of South China Sea to enhance the capabilities of their law enforcement agencies. In doing so, coordination among the partner countries should be pursued to synchronise such efforts.
    - FONOP and other military presence: Military presence in the South China Sea would be even more effective when it is accompanied with clear messages. Such messages should outline what excessive claims are made, and how they are opposing through such actions. Clear messaging will also be a good way to counter China's tactics to paint a picture through misleading claims that their actions are justifiable.



NOTES AND REFERENCES

1 For example, Japanese ministry of foreign affairs (MOFA) states in its document that the rules-based order includes "the rule of law, freedom of navigation and overflight, peaceful settlement of disputes, and promotion of free trade." Ministry of Foreign Affairs of Japan, 'Free and Open Indo-Pacific Basic Thinking Material,' accessed January 26, 2022, https://www.mofa.go.jp/mofaj/files/000430632.pdf.

2 Stefan Talmon, 2019, 'Rules-based order vs international law?', *German Practice in International Law*, January 20, https://gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law/.

3 For more on the history of the South China Sea dispute, see, for example, Stein Tønnesson, 2002 'Why are the disputes in the South China Sea so intractable? An historical approach,' *Asian Journal of Social Science,* vol. 30, no. 3, pp. 570–601; Leszek Buszynski, 'Four aspects of the crisis in the South China Sea', and Stein Tønnesson, 'ASEAN and the South China Sea' in Leszek Buszynski and Do Thanh Hai, Abingdon (eds), 2020, *The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition,* Oxon, New York: Routledge.

4 Vietnam and Malaysia made a joint submission regarding the continental shelf in the southern part of the South China Sea on May 6. Vietnam also submitted information on the continental shelf in the northern part of the South China Sea on May 9.

5 Robert Beckman, 2013 'The UN convention on the law of the sea and the maritime disputes in the South China Sea', *American Journal of International Law*, vol. 107, no. 1, p. 152.

6 'A constructive year for Chinese base building', Asia maritime transparency initiative, December 14, 2017, https://amti.csis.org/constructive-year-chinese-building/.

7 Ibid.

8 Congressional Research Service, 'China primer: South China Sea disputes', updated February 2, 2021, https://crsreports.congress.gov/product/pdf/IF/IF10607.

9 'The economic and security implications of China's activities in the South China Sea', IISS, November 2021, https://www.iiss.org/publications/strategic-comments/2021/the-economic-and-security-implications-of-chinas-activities-in-the-south-china-sea.

10 Patrick Cronin and Ryan Neuhard, 2020, 'Total competition: China's challenge in the South China Sea', Center for a New American Security, January 8, https://www.cnas.org/publications/reports/total-competition. For more details on China's use of maritime militia, see 'Pulling back the curtain on China's Maritime Militia', Asia Maritime Transparency Initiative, November 18, 2021, https://amti.csis.org/pulling-back-the-curtain-on-chinas-maritime-militia/.

11 'Philippines tells China to 'back off' after South China Sea clash', *Aljazeera*, November 18, 2021, https://www.aljazeera.com/news/2021/11/18/philippines-tells-china-to-back-off-after-south-china-sea-clash.

12 Tom Allard, Kate Lamb and Agustinus Beo Da Costa, 2021, 'Exclusive: China protested Indonesian drilling, military exercises', *Reuters*, December 1, https://www.reuters.com/world/asia-pacific/exclusive-china-protested-indonesian-drilling-military-exercises-2021-12-01/.

13 Sam Cohen and Alex Vivona, 2021, 'Water wars: "AUKUS is born"', *Lawfare*, October 5, https://www.lawfareblog.com/water-wars-aukus-born.

14 China Power Team, 2017, 'How Much Trade Transits the South China Sea?', *China Power*, August 2, Updated January 25, 2021. Accessed January 31, 2022. https://chinapower.csis.org/much-trade-transits-south-china-sea/.

15 Ibid.

16 Kerem Cosar and Benjamin Thomas, 2021, 'Disruption of seaborne trade in South East Asia: A quantitative analysis', *Vox*, January 4, https://voxeu.org/article/disruption-seaborne-trade-south-east-asia.

17 Malcolm Jorgensen, 2021, 'The jurisprudence of the rules-based order: Germany's Indo-Pacific guidelines and the South China Sea code of conduct', *KFG Working Paper Series 2021*, No. 49; Berlin Potsdam Research Group 'The international rule of law – rise or decline?', pp10-11.

18 Shirley V Scott, 1994, 'International law as ideology: Theorizing the Relationship between International Law and International Politics', *European Journal of International Law*, vol. 5, no. 3, pp. 313–25.

19 Douglas Guilfoyle, 2019, 'The rule of law and maritime security: Understanding lawfare in the South China Sea', April 13, p. 1002.

20 Stephane Beaulac, 2009, 'The rule of law in international law today'.
21 Ibid.
22 On the freedom of navigation and overflight, while most countries including the United States take an approach based on the liberal interpretation of UNCLOS, China and some other countries take more restrictive positions. For more details on the different interpretation and related debates, see, for example, Rebecca Strating, 2020 *Defending the Maritime Rules-Based Order: Regional Responses to the South China Sea Disputes*, Honolulu: East-West Center, https://www.eastwestcenter.org/publications/defending-the-maritime-rules-based-order-regional-responses-the-south-china-sea, and Sam Bateman, 2020, 'Rights and freedoms in the South China Sea–a practical perspective,' *Policy Forum*, January 21, https://www.policyforum.net/freedom-of-navigation-and-the-law-of-the-sea/
23 Starting, *Defending the Maritime Rules-Based Order,* pp. 32-3.
24 Ben Scott, 2021, 'Rules-based order: What's in a name?', *the Interpreter*, June 30, https://www.lowyinstitute.org/the-interpreter/rules-based-order-whats-in-a-name.
25 Australian Committee of The Council for Security Cooperation in the Asia Pacific (CSCAP), 'Perspectives on the rules-based order', accessed February 1, 2022, https://asialink.unimelb.edu.au/stories/perspectives-on-the-rules-based-order.
26 Manoj Joshi, 2021, 'The rules-based order', *Observer Research Foundation*, March 16, https://www.orfonline.org/research/the-rules-based-order/.
27 Jorgensen, 'The jurisprudence of the rules-based order,' p. 8.
28 'Notable statements on international law during March 2020,' *German Practice in International Law*, May 12, 2020, https://gpil.jura.uni-bonn.de/2020/05/notable-statements-on-international-law-during-march-2020/.
29 Jorgensen, 'The jurisprudence of the rules-based order', p. 13.
30 Talmon, 'Rules-based order v international law?'.
31 Adam Breuer and Alastair Iain Johnston, 2019, 'Memes, narratives and the emergent US–China security dilemma', *Cambridge Review of International Affairs*, vol. 32 no. 4, pp. 429-55.
32 Ibid. p. 433.
33 Ibid. p. 431.
34 According to Breuer and Johnston, memes constitute sub-narratives, and sub-narratives constitute master narratives; Ibid. p. 445.
35 Ibid. p. 445.
36 Talmon, 'Rules-based order v international law?'.
37 Breuer and Johnston, 'Memes, narratives and the emergent US–China security dilemma,' 395.
38 Bill Hayton details the development and prospect in his article. Bill Hayton, 2021, 'After 25 years, there's still no South China Sea code of conduct', *Foreign Policy*, July 21, https://foreignpolicy.com/2021/07/21/south-china-sea-code-of-conduct-asean/.
39 'ASEAN, China struggle on South China Sea code of conduct', *BenarNews*, November 22, 2021, https://www.benarnews.org/english/news/indonesian/code-issues-11222021160226.html.
40 Jagannath P Panda, 2020, 'Code of conduct needed for South China Sea', *Institute for Security & Development Policy*, September https://isdp.eu/publication/code-of-conduct-needed-for-south-china-sea/.
41 Julian Ku, 2017, 'Why the US can't take sides in South China Sea sovereignty disputes, even against China', *Lawfare*, June 19, https://www.lawfareblog.com/why-us-cant-take-sides-south-china-sea-sovereignty-disputes-even-against-china.
42 'US position on maritime claims in the South China Sea', *US Department of State*, July 13, 2020, accessed February 4, 2022, https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/index.html
43 Ibid.
44 *Note Verbale* dated July 23, 2020, from the Permanent Mission of the Commonwealth of Australia to the United Nations, addressed to the Secretary-General. https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_23_AUS_NV_UN_001_OLA-2020-00373.pdf
45 Ibid.
46 'South China Sea: Statement by the spokesperson on challenges to peace and stability', *European Union External Action Service*, April 24, 2021, https://eeas.europa.eu/delegations/china/97196/south-china-sea-statement-spokesperson-challenges-peace-and-stability_en.

47 Constantinos Yiallourides, 2020, 'International law, force and coercion 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, Oxon; New York: Routledge.

48 'Australia-Japan-United States defense ministers meeting joint press statement,' June 2, 2018, https://media.defense.gov/2018/Jun/03/2001926147/-1/-1/0/20180602%20AUS-JPN-US%20JOINT%20PRESS%20STATEMENT%20(002).PDF.

49 Yiallourides, 2018, 'International law, force and coercion in the South China Sea', What qualifies as a prohibited threat or use of force under UN Charter Art.2 (4) remains to be unsettled. For more on this, see, Christine Gray, *International Law and the Use of Force,* Oxford: Oxford University Press.

50 Peter Layton, 2021, 'Bringing the grey zone into focus', *The Interpreter*, July 22, https://www.lowyinstitute.org/the-interpreter/bringing-grey-zone-focus.

51 Pacific Forum, 2021, 'Maritime discussion series #8: Rule of law and gray zone activities in the East and South China Seas', April 26, https://pacforum.org/events/maritime-discussion-series-8.

52 Rosa Brooks, 2018, 'Rule of law in the gray zone', July 2, https://mwi.usma.edu/rule-law-gray-zone/.

53 David Brewster, 2019, 'It's time for a "Quad" of coast guards', *The Interpreter*, August 12, https://www.lowyinstitute.org/the-interpreter/time-quad-coast-guards.

54 Coyne, John, Ashleigh Sharpe, and Dione Hodgson, 2018, 'Mice that roar: Patrol and coastal combatants in ASEAN', *Australian Strategic Policy Institute*, August 1, http://www.jstor.org/stable/resrep23092

55 Ibid.

56 Kentaro Furuya, 2021, '

[the new role of the capacity building training provided by the Coast Guard as an effect of the challenges on maritime order by China]', International Information Network Analysis, July 1, https://www.spf.org/iina/articles/furuya_05.html

57 Ibid.

58 John Bradford, 2021, 'Maritime governance capacity building: A US-Japan alliance agenda for rule of law in the Indo-Pacific', *Issues & Insights,* vol. 21, SR 2, July, p. 41.

59 Ken Jimbo, 2015, 'Japan-US-Australia cooperation on capacity building in South East Asia', in *US-Japan-Australia Security Cooperation: Prospects and Challenges,* Stimson Center.

60 Ibid.

61 Ibid.

62 Brewster, 'It's time for a "Quad" of coast guards'.

63 Furuya, "the new role of the capacity building training provided by the Coast Guard as an effect of the challenges on maritime order by China."

64 Some scholars suggest a creation of regional institution in this regard. For more detail, see Anthony Bergin, 2021, 'Boosting regional cooperation and training in maritime law enforcement', *The Strategist*, Mar 22, https://www.aspistrategist.org.au/boosting-regional-cooperation-and-training-in-maritime-law-enforcement/.

65 List of FONOPs conducted by the US can be found in 'DoD Annual Freedom of Navigation (FON) Reports,' available at https://policy.defense.gov/ousdp-offices/fon/.

66 Gregory Poling, 2016, 'South China Sea FONOP 2.0: A Step in The Right Direction', *Asia Maritime Security Initiative*, February 2, https://amti.csis.org/south-china-sea-fonop-2-0-a-step-in-the-right-direction/.

67 Bill Hayton, 2021, 'The carrier strike group in the South China Sea,' *Council on Geostrategy*, July 27, https://www.geostrategy.org.uk/research/the-carrier-strike-group-in-the-south-china-sea/.

68 For the most recent example of such statement, see '7th Fleet Destroyer conducts Freedom of Navigation Operation in South China Sea,' *Commander, US 7th Fleet*, Jan. 20, 2022, accessed February 4, 2022, https://www.c7f.navy.mil/Media/News/Display/Article/2904786/7th-fleet-destroyer-conducts-freedom-of-navigation-operation-in-south-china-sea/.

69 Shannon Tiezzi, '"Nearly all" Australian patrols in South China Sea are challenged by China: Australia's air force chief said more and more Australian patrol flights were being warned away by China', *The Diplomat*, February 5, 2016, https://thediplomat.com/2016/02/nearly-all-australian-patrols-in-south-china-sea-are-challenged-by-china/', [China protests against the overflight near the Mischief Reef', *Nippon News Network*, February 26, 2021, https://news.ntv.co.jp/category/politics/b8bc0e5259a7435fbf865be44875c9fd; Cate Cadell, 2021, 'China says US military in South China Sea not good for peace', *Reuters*, January 25, https://www.reuters.com/article/us-china-usa-security-idUSKBN29U0P0.

70 Euan Graham, 2017, 'Southeast Asia's neglected navigational and overflight challenges', *The Interpreter*, February 27, https://www.lowyinstitute.org/the-interpreter/southeast-asia-s-neglected-navigational-and-overflight-challenges#:~:text=and%20overflight%20challenges,-Euan%20Graham&text=Southeast%20Asian%20coastal%20states.&text=As%20the%20new%20US%20administration,the%20freedom%20of%20navigation%20issue.

71 In the most recent Chairman's statement, it is said that the leaders "reaffirmed the importance of maintaining and promoting peace, security, stability, safety, and freedom of navigation in and overflight above the South China Sea and recognised the benefits of having the South China Sea as a sea of peace, stability, and prosperity" (Paragraph 98), Chairman's Statement of the 38th And 39th ASEAN Summits, October 26, 2021, https://asean.org/wp-content/uploads/2021/10/FINAL-Chairmans-Statement-of-the-38th-and-39th-ASEAN-Summits-26-Oct....pdf.

Griffith Asia Institute
Griffith University Nathan campus
Nathan Queensland 4111, Australia
Email: gai@griffith.edu.au
LinkedIn: griffith-asia-institute
Facebook: griffithasiainstitute
Twitter: @GAIGriffith

griffith.edu.au/asia-institute

CRICOS No. 00233E