







Michael Heazle

# COUNTERING CHINA'S GREY ZONE INCURSIONS THROUGH BETTER MANAGEMENT AND POLICING OF ILLEGAL FISHING IN THE SOUTH CHINA SEA

Michael Heazle Griffith Asia Institute

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'Countering China's grey zone incursions through better management and policing of illegal fishing in the South China Sea'

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Dr Heazle has published in the areas of energy, human, and environmental security; policy making and the treatment of specialist advice; China–Japan relations; and Northeast Asia security. His publications include a collection of books and edited volumes with several university presses and international publishers (University of Washington Press, Cambridge University Press, Earthscan/Routledge, Edward Elgar) in addition to numerous articles in various peer reviewed journals including *Marine Policy, Environmental Science and Policy, Intelligence and National Security, The Pacific Review, The Australian Journal of International Affairs,* and *Marine Studies.* His latest book is *China's Rise and Australia–Japan–US Relations: Primacy and Leadership in East Asia* (co-edited with Andrew O'Neil; Edward Elgar, 2018). Dr Heazle is the co-founder of GAI's annual Australia–Japan Dialogue, which he convened from 2011–2017. He also co-convened the Australia–India–Japan Trilateral Dialogue in 2017 and 2018.

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## **EXECUTIVE SUMMARY**

The significance and importance for Australia and Japan of maintaining and strengthening the rulesbased order in the Indo-Pacific and beyond has been made clear by governments in both countries regularly citing it as the lynchpin of their respective national security interests. As maritime trading nations, both countries rely on the authority of the United Nations Convention on the Law of the Sea (UNCLOS) in supporting freedom of maritime navigation and its rules and principles for the peaceful settlement of maritime rights disputes. But with the rules-based order and the maritime rights it grants under increasing threat from China's incremental erosion of UNCLOS's authority in the South and East China seas, the need for both countries and their Quad partners to more effectively confront China's successful employment of grey zones tactics is also very clear.

While a stronger/more frequent military presence by the Quad states in and around the first island chain has been made essential by China's growing military capability and assertiveness, the very nature and logic of the grey zone tactics employed by China make military responses ineffectual unless the Quad states are ultimately willing to meet China's asymmetrical challenges through military escalation. In addition to imposing unthinkable costs on the region, doing so would signal the Quad's collective inability to avoid the escalation trap set by Beijing; thereby severely damaging not only the credibility and reputations of the US and its Quad partners but also the value and desirability of the liberal rules-based order itself.

Beijing's efforts to undermine the current order and the maritime rights of other states through the grey zone deployment of maritime fishing militia vessels, however, exposes these vessels to legitimate maritime law enforcement action under UNCLOS. The Australian and Japanese governments therefore should take the lead in ensuring a significant and coordinated increase in Quad support for MLE (Maritime Law Enforcement) capacity building and cooperation among the ASEAN states most at threat

from China's maritime claims, in addition to supporting and co-funding the development of better national and cooperative fisheries regulation and research.

By collectively supporting the Philippines, Malaysia, Vietnam and Indonesia to more effectively regulate and police illegal, unreported and unregulated (IUU) fishing and other illegal Exclusive Economic Zone (EEZ) and territorial incursions, the Quad states can indirectly push back on China's grey zone encroachments while also helping the coastal states to better manage a long-standing threat to the region's socio-economic security and future prosperity. Moreover, enhanced civilian MLE by the coastal states to police illegal maritime fishing militia incursions will also:

- Further dispel Beijing's accusations of external interference in the South China Sea's maritime disputes;
- ii) Further counter Beijing's accusations that the Quad's main purpose is containment of China;
- Place the onus for escalation on China by imposing grey zone dilemmas on China's leadership, especially in terms of its conflict threshold calculations;
- iv) Assuage ASEAN fears of being sidelined by great power competition while also meeting the Goldilocks balance in US policy hoped for by South East Asian states: that is, a US presence that is neither too confrontational with China, nor too weak;
- Make the Quad a more inclusive grouping via the development of a mini-multilateral grouping/coalition targeting IUU fishing through more effective inter-state cooperation on MLE and fisheries regulation, which could become a model for cooperation on other regional issues and threats;
- vi) Further affirm both the relevance and authority of UNCLOS and the wider rules-based order it underpins.

## INTRODUCTION

Five years on from the international arbitration tribunal's rejection of China's expansive South China Sea claims in 2016, the international rules-based order in East Asia is clearly in trouble. China is continuing to consolidate its control over the Paracel Islands and most of the Spratleys group while increasing its encroachments on the recognised Exclusive Economic Zone (EEZ) rights of most of the South China Sea's other littoral states with relative impunity. The Philippines and Vietnam in particular have suffered numerous Chinese incursions, while Indonesia's Natuna Islands and more recently Malaysia's EEZ also have been targeted in China's bid to control the southern waters of the first island chain.

The region's maritime order under the United Nations Convention on the Law of the Sea (UNCLOS) is central to the rules-based order Australia, Japan, the US, India and other likeminded states hold to be of central importance to regional security and prosperity. Yet China's grey zone tactics are continuing apace, weakening the authority and relevance of UNCLOS in the absence of a coordinated and unified regional stance supporting its rules and authority both in principle and in practice. Major disagreements within ASEAN over how to respond to China's claims and behaviour in the South China Sea have emerged while the US, Japan, Australia, and others in the region appear no closer to stopping China from consolidating the rights it illegally claims via its rapidly growing number of maritime militia and coast quard incursions, or to winding back the gains China already has made at the expense of other littoral states.

ASEAN's role in the disputes remains hamstrung by internal divisions over its responsibility as a regional institution for protecting individual state maritime rights despite various ASEAN statements affirming UNCLOS as the basis for resolving maritime entitlement disputes. 1 Many in ASEAN are fearful of the consequences of being forced to choose between the US and China, of ASEAN becoming marginalised by great power politics in its own backyard, and the region becoming more militarised and conflict prone. The lack of a unified ASEAN stance and response on China's claims can also be explained by fence sitting among member states who are not directly affected by the South China Sea disputes and/or prioritise the benefits of not antagonising Beijing.<sup>2</sup> Rival maritime claimants in ASEAN holding conflicting interpretations of UNCLOS's provisions has been an additional obstacle to developing a common ASEAN position.<sup>3</sup>

Inconsistent readings and applications of UNCLOS rules and principles among its supporters, including the Quadrilateral Security Dialoque (Quad) states,<sup>4</sup> further undermine UNCLOS's authority and provide Beijing with additional "lawfare" ammunition to obscure and muddy the illegality of its claims.<sup>5</sup> If the South East Asian states with maritime territory and rights at stake remain unable or unwilling to employ UNCLOS as the basis for resolving their long running disputes with each other, the relevance and authority of UNCLOS, one of the world's most important sources of international law—and by implication also the idea of a "rules-based" order—will become highly questionable, as some already arque.<sup>6</sup>

This paper argues that the long-standing problem of illegal, unreported, and unregulated (IUU) fishing in the South China Sea presents an important opportunity for the South China Sea states most at threat from China's illegal maritime claims—the Philippines, Vietnam, Malaysia, and Indonesia—to:

- i) collectively develop, with greater Maritime Law Enforcement (MLE) capacity building and regulatory support from the Quad states, an effective, UNCLOS based and nonmilitary means of pushing back against China's claims and grey zone tactics;
- ii) ensure that regional, rather than external, actors take the lead in upholding and affirming their maritime rights;
- iii) provide a broad and unambiguous affirmation of UNCLOS's authority and relevance, and thus also that of the rules-based order, in contemporary inter-state relations.

Genuine effort by the ASEAN claimants to set aside their own sovereignty disputes and cooperate on fisheries management and MLE is, moreover, essential *if* one of the region's most important socio-economic resources is to be saved from either almost certain collapse. unilateral Chinese control, or both. Indeed, and aside from the geo-strategic threat a Chinese takeover poses, the alternatives to cooperative EEZ regulation and better MLE are: i) the increasing likelihood of a Chinese controlled South China Sea extinguishing, or severely limiting, in practice both the resource and freedom of navigation rights of all other states in addition to making any plans for cooperative, multilateral management of those resources and rights redundant; and/or ii) the future collapse of the region's biggest fisheries resource due

either to Chinese mismanagement, or continued overfishing resulting from increased competition, conflict, and insufficient/ ineffective regulation. Either of these outcomes will almost certainly mean more overfishing in South East Asia's already mostly depleted coastal waters, which will lead to more illegal fishing in the EEZs of other states, including Australia and Japan. The Australian and Japanese governments therefore should take the lead in ensuring a significant and coordinated increase in Quad support for MLE capacity building and cooperation among the ASEAN states most at threat from China's maritime claims, in addition to supporting the development of better national and cooperative fisheries regulation and research.

The wider regional implications of China continuing to unilaterally impose its own maritime laws and denying fishing and other maritime rights to other states<sup>7</sup> provide several compelling reasons for the Quad states, and others, to work harder to ensure the rights and entitlements of all the South China Sea littoral states under UNCLOS are protected. They include not only the further erosion of the rulesbased order's authority and legitimacy, perhaps to an irreparable degree, but also a major increase in Beijing's political and economic leverage over the many South East Asian states that nevertheless will continue to rely on fishing for food and employment. Allowing Beijing to further expand its already significant presence and influence in the South China Sea will, as a consequence, make it much more difficult for the US, Australia, and Japan to build regional diplomatic support against China's actions in the South China Sea, thereby making great power military conflict in the region much more likely.



## THE QUAD AND MARITIME SECURITY

The Quad grouping began as a joint disaster relief effort between Australia, India, Japan, and the US following the 2004 tsunami. The partnership then attempted to build a basis for expanded maritime security cooperation in 2007 with the Quad Plus Singapore Malabar exercises. However, differing views and priorities among the Quad governments over the grouping's purpose and Beijing's strong opposition to it caused the grouping to disband in early 2008. The Quad was relaunched in 2017 due to a gradual post-2007 increase in security cooperation among the four states and, in particular, converging US-Japan-India-Australia concerns over China's destabilizing influence on the region's security environment and rulesbased order (see below).

Quad 2.0 thus is based on a much closer level of strategic alignment between its members and a more clearly articulated, but also much broader, set of issues beyond only disaster relief and maritime security. These issues include trade and development, regional connectivity, climate change, and more recently assistance with COVID-19 containment and recovery among others. All of these issue areas are existentially

important for the region, and are also important for the Quad to be actively addressing if China's is to be prevented from further leveraging its political influence over the ASEAN and other states through its One Belt One Road strategy and other efforts to expand China's influence on trade and investment in the Indo-Pacific (e.g., the Asian Infrastructure Investment Bank; the Regional Comprehensive Economic Partnership).

Indeed, the Quad's overarching goal is maintaining and further developing a "free and open Indo-Pacific" (FOIP) based on the existing liberal rules-based order.8 It is, therefore, no coincidence the Quad was relaunched shortly after Japanese Prime Minister Shinzo Abe announced and the Trump administration adopted the FOIP doctrine in 2016-2017; a time when Australian, Indian, and US relations with China were entering a period of sharp decline. As noted above, maintaining a FOIP and the rule of international law requires the Quad to engage in a range of issue areas beyond only maritime security if it is to balance China's growing influence—the biggest threat to the FOIP goal especially development, trade, humanitarian assistance and disaster relief. Diplomatically, a

broader agenda also has helped the Quad states to find areas of mutual interest to cooperate on (a challenge Quad 1.0 was unable to overcome), and provides the grouping with strong grounds to rebuff accusations it is primarily about building an Asian NATO and marginalising ASEAN.

That said, the biggest *immediate* challenge to keeping the Indo-Pacific "free and open" is keeping the South China Sea "free and open", which requires pushing back on, not merely protesting, China's claims and growing control there. If China gains control over the first island chain, which further consolidating its gains in the South China Sea will all but guarantee, the Quad will have little or no relevance, or influence, in the region, and the idea of a FOIP will become similarly irrelevant.

So, while development, trade, environmental issues, and humanitarian assistance, and other pressing regional issues should remain as key areas of engagement and support for the Quad, the Quad needs to collectively prioritise maritime security and the protection of sovereign rights in the South China Sea for all the littoral states, as the 2021 Quad Leader' Joint Statement claims. <sup>9</sup> China's ongoing erosion of sovereign maritime rights in the South China Sea through coercion and intimidation of the other coastal states is a direct challenge to not only the rights and entitlements of those states under UNCLOS, but also to the rules-based order upon which the FOIP doctrine is based.

TAIWAN CHINA Hanoi Hong Kong Hainan Scarborough Shoal Paracel Islands THAILAND Manila VIETNAM Sprath CAMBODIA IPPINES Island Ho Chi Minh City 500 km 0 OUTH CH Kuala umpur BRUNEI MALAYSIA SINGAPORE INDONESIA Philippines Taiwan China Malaysia Vietnam Brunei

Figure 1. South China Sea claims map

Source: Wikimedia Commons



## SOUTH EAST ASIA'S IUU FISHING CRISIS AND ITS CAUSES

The South China Sea is by far East Asia's largest fishery, with an estimated total catch between 1950 and 2014 of 504.6 million tons. 10 In 2011 seafood accounted for approximately 38 percent of the animal protein consumed in ASEAN countries; the average daily intake of seafood among these states is estimated to be nearly double the global average. In 2014 the ASEAN states collectively accounted for 18.3 percent (30.6 million tons) of global fish production. 11 Ensuring the sustainability of its marine life and ecosystems therefore is vital for the region's future economic and food security. However, over the last fifty years the South China Sea also has become one of the world's most over fished and under regulated fisheries.

In 2015, its waters accounted for only 12 percent of global fish catch but had half the world's fishing vessels operating there, <sup>12</sup> many of which are engaged in IUU fishing. The Asia-Pacific Fishery Commission (APFIC) has estimated that IUU fishing in the Gulf of Thailand

and the South China Sea in 2019 represented almost US\$5.5 billion and a catch of about 1.5 million tonnes. The main causes of IUU fishing include over capacity, declining stocks, and increasing competition; insufficient national and regional regulation and corruption; and weak MLE. HEZ demarcation disputes between the littoral states, moreover, not only lead to many of the illegal fishing or poaching claims between states, thereby heightening the risk of conflict, but also are a major obstacle to developing more effective inter-state fisheries cooperation. To

The region's growing overcapacity is due in large part to government subsidies, particularly in China, supporting the production and operation of more and more fishing vessels. China has by far the world's largest fishing fleet and is the most subsidised. <sup>16</sup> But although Chinese fishing boats now greatly outnumber those from other nations, China's actual catch numbers in the South China Sea remain unclear (see below)

because many are present as part of China's fishing militia rather than as fishers. <sup>17</sup> Other Chinese boats are reportedly fishing illegally or not reporting catches <sup>18</sup> but the actual number and catches involved are difficult to confirm—a common problem in IUU fishing research. IUU fishing by fishers from other states, in particular Vietnam, also has been widely reported, adding to the difficulty of producing accurate catch estimates.

Beijing's increased "grey zone" deployments of fishing fleets and coastguard vessels into the EEZs of neighbouring states are further escalating competition and conflict between fishing crews and undermining the authority and effectiveness of the region's limited IUU fishing surveillance and enforcement capabilities. IUU fishing under the COVID-19 pandemic likely has increased due to reduced surveillance and enforcement. <sup>19</sup> Under the current tensions,

South East Asia's commercial fishing and maritime environment more broadly is becoming even more anarchical at a time when cooperative fisheries management in the South China Sea, and elsewhere, has become more urgent than ever.<sup>20</sup>

But despite the obstacles to more accurate catch numbers, fisheries experts agree that increasing fishing effort and competition are causing stock numbers in the South China Sea to rapidly decline. Many species are currently only between 5–30 percent of their 1950s abundance estimates and the decline in stock numbers is continuing to accelerate. According to Sumaila and Cheung (2015) coral reef catches of some species declined by nearly 100 percent between 2007 and 2015 while relative abundance on reefs declined by 80 percent in the same period.<sup>21</sup>



Vietnamese fishermen near Hoi An (Photo by Tilea/ CC-BY-SA-3.0)



## DELEGITIMISING CHINA'S GREY ZONE CHALLENGE TO THE MARITIME ORDER: IUU FISHING AND COOPERATIVE MARITIME LAW ENFORCEMENT AND REGULATION

China's grey zone tactics and the ongoing problem of IUU fishing are linked by China's use of its large fishing militia to assert fishing and MLE rights throughout most of the South China Sea. China's grey zone tactics utilise People's Armed Forces Maritime Militia (PAFMM) deployments to blur the civilian-military distinction and keep conflict and coercion levels below expected thresholds of military escalation when encroaching on the maritime rights of other states. China's low level conflict approach depends on: i) non-military coercion and confrontation through the deployment of its large PLAN controlled maritime fishing militia with Chinese coast guard support; and ii) a maritime law enforcement narrative that seeks to legitimise the enforcement of Chinese fisheries law in the EEZs of other states. China's low-intensity coercion approach to expanding its maritime rights also includes harassment of resource exploration vessels and sometimes also US naval vessels, but in many cases PAFMM

fishing vessels are the main force deployed by Chinese authorities.

The grey zone advantages China derives from blurring the civilian-military distinction, however, can be countered, given sufficient support and resources and multilateral commitment, 22 by responding in kind; that is, at the civilian level. A coordinated MLE campaign to reduce IUU fishing by the coastal states most at risk from China's grey zone tactics could legitimately target PAFMM vessels found loitering or harassing other vessels within the EEZs of coastal states. More aggressive nonmilitary policing of foreign fishing vessels by a coalition of coastal states would reduce the grey zone advantages China gains from its maritime militia deployments by placing the onus for escalation on China's leadership and further highlighting the illegal nature of the PAFMM's activities and presence in the EEZs of other states; thereby inflicting reputational damage on China by presenting the MLE state actors as

defenders of law and stability and criminalising China as the outlaw actor threatening stability. More effective cooperative policing and more uniform fisheries regulation by the coastal states offers the additional advantages of not only standing as a clear, collective assertion of their sovereign maritime rights and mutual recognition of those rights, but also as a collective indictment of China's maritime rights claims and activities as illegal under UNCLOS and the broader liberal rules-based order.

Contrary to some arguments denying or questioning the existence of an international liberal rules-based order, <sup>23</sup> this paper takes the position there is an, albeit fragile, international order <sup>24</sup> guided by a well-developed and large system of rules and principles, many well established and some tacit and still evolving, that most states follow most of the time. <sup>25</sup> Furthermore, the political nature of the order, in terms of its most fundamental rules (i.e., peremptory norms in international law or *jus cogens*), is distinctly liberal; notwithstanding the sometimes illiberal behaviour of states seeking

to bend or reinterpret the rules for their own advantage.<sup>26</sup>

Aside from the unmistakably liberal nature of the international order's core rules and principles governing inter-state relations (not domestic political systems), as set out in the United Nations Charter (equality, self-determination, non-interference, inalienable human rights and freedoms), the order's liberal character is further demonstrated by China's concerted efforts to make the international political order less liberal. So, while China, like all states. prefers the relative stability, predictability, protection, and economic benefits provided by the international order's basic rules and institutions (e.g., sovereign state rights; the global economy), it does not want to participate in an order guided by liberal values. China's challenge to the current US led order thus stems in large part from the Chinese Communist Party's (CCP) concerns that becoming more enmeshed in the existing order ultimately will erode the Party's domestic authority and control.



A Chinese fishing vessel is anchored next to Filipino fishing boats at the disputed Scarborough Shoal April 6, 2017. Picture taken April 6, 2017 (REUTERS/Erik De Castro/File Photo)



Fishing village in Vietnam (Erwin Verbruggen CC-BY-SA-2.0)

The current global governance system ... privileges liberal values such as freedom, democracy, binding international law, and inalienable individual rights. From Beijing's perspective, that is a problem, because as China becomes increasingly integrated with the global system, integration exposes Chinese citizens to a set of ideals their current leaders do not intend to meet.<sup>27</sup>

However, because of the many important benefits the Party continues to derive from the order, economic benefits in particular, the Party does not want to overturn the order's rules and norms, or admit to acting outside them; China's foreign policy ambitions are not revolutionary in this sense. The CCP instead is challenging the legitimacy of some rules and how other rules are understood and applied. By doing so, the Party leadership seeks to justify its actions as

legitimate by arguing its own, often unique, interpretation of international law and opposing unwelcome decisions made by international institutions like the Permanent Court of Arbitration Tribunal.

Indeed, China, like all great powers, sees international law as important, if only for the legitimacy claiming to act in accordance with it might grant and the protections it can offer when needed. Attempting to maintain a veil of legal legitimacy for its actions in the South China Sea, and elsewhere, is a key feature of contemporary Chinese statecraft with Beijing's use of grey zone tactics having become an important means to that end. So, while grey zone tactics are commonly described as nonmilitary attempts at strategic coercion crafted to remain below the (expected) military response threshold, they are also about building a political narrative intended to condition or limit the likely type of response from the targeted state by influencing perceptions of legitimate behaviour and proportionate response.<sup>28</sup> In

addition to reducing the risk of a military response, grey zone acts of aggression and coercion, such as occupying disputed waters with fishing militia and coast guard vessels, place the onus of escalation on the targeted states while allowing China to promote its actions as law enforcement rather than military aggression. <sup>29</sup> The more times these acts and their branding can be repeated, the more entrenched Beijing's narrative of events becomes. As Nye (2018) notes, paraphrasing John Arquilla, "... in today's global information age, victory often depends not on whose army wins, but on whose story wins."<sup>30</sup>

But since both political and legal legitimacy for state actions can only be granted by other states, China's already widely rejected legal arguments can more effectively be exposed as self-interested hubris rather than legitimate claims if states are willing and able to act collectively against them as some ASEAN claimant states are now beginning to do. China's maritime claims and actions in the South China

Sea, and elsewhere, are highly vulnerable to legal attack and law enforcement responses based on UNCLOS, thereby creating a "target rich environment" for states willing and able to exploit it.

The 2016 arbitration ruling, for example, confirmed several serious cases of illegal Chinese actions and claims to maritime rights and rejected the legal fictions upon which the Chinese government has sought to legitimise them. Some of China actions, moreover, would remain illegal even if its territorial sea and EEZ claims had been upheld—in particular, the intentional ramming and harassment of other ships and the extensive ecological devastation caused to marine reefs by Chinese island building and illegal giant clam fishing.<sup>31</sup>

China's fishing fleets, the world's largest and most subsidised, operate in many of the world's oceans and seas, often illegally in the EEZs of other states. And as the size and reach of China's fleets has grown, so too has the already



Chinese fishing boats heading out to sea from Zhoushan in Zhejiang province. (Photo via China Foto Press)

large body of evidence implicating China in various acts of state sponsored illegal fishing. The Illegal Unreported and Unregulated Fishing Index (2019), for example, in addition to ranking Asia as the region where IUU fishing is most prevalent, ranks China—followed by Taiwan, Cambodia, Russia, and Vietnam—as the worst performing country based on the prevalence of IUU fishing by China's fleets and also China's vulnerability and response to IUU fishing. China and Taiwan rank first and second worst for flag state responsibility with China also ranking the worst for port state responsibility.<sup>32</sup>

In the South China Sea, however, establishing clear evidence of illegal Chinese fishing, as opposed to incursions and illegal occupation, is sometimes made difficult by China's use of its large maritime militia, made up of Chinese fishing boats of various sizes, to establish an ongoing presence in the EEZs of other states. That is, while there is clear evidence of illegal Chinese fishing in some cases, for example in Indonesia's internationally recognised Natuna Sea EEZ, it is sometimes unclear how much, if any, actual fishing the militia boats are doing at other times. China's tactic of swarming the Philippines EEZ with fishing vessels controlled by the PAFMM is well documented. But often the militia vessels are not fishing but rather loitering, as occurred in March 2021 when 220 large Chinese ships anchored side by side at Whitsun Reef, which the 2016 arbitration tribunal had determined was within The Philippines' EEZ.<sup>33</sup>

The legal grounds under UNCLOS for MLE action against foreign ships entering a coastal states EEZ are dependent on what foreign vessels do while in the EEZ since UNCLOS allows foreign vessels, including fishing vessels, free passage through EEZs provided they do not infringe on, or threaten, the resource rights and security of

the coastal state.<sup>34</sup> However, coastal states have the right to board and investigate suspicious vessels loitering in, as opposed to simply passing through, their EEZs. States also have the responsibility, under UNCLOS, to sustainably regulate and manage the marine resources in their EEZs (UNCLOS 1982: Art. 56 & 61) and UNCLOS allows for a wide range of possible regulatory measures.<sup>35</sup> In the case of fishing, these measures could include (but are not limited to) regulating and policing ship size and type, the type of gear being carried, flagging and Automatic Identification System (AIS) monitoring requirements, prohibiting ship to ship transfer of catches, random illicit catch inspections, and the route taken through the EEZ. Australian law, for example, requires foreign fishing vessels to travel by the "shortest possible route" through Australia's EEZ. Foreign vessel captains suspected of taking different routes can be apprehended and required to demonstrate in court the route they chose was in fact the shortest available to them. 36

There are then a range of means by which coastal states can employ civilian resources to legally enforce their fisheries laws under UNCLOS. Coastal states are entitled to pursue, board and inspect, and detain foreign fishing vessels in their EEZs if foreign fishing boats are suspected of engaging in fishing or otherwise threatening sovereign rights or security. Policing the activities of foreign fishing vessels in EEZs not only helps prevent IUU fishing but also demonstrates the coastal state's legitimate authority in those waters. And because Chinese fishing vessels not expeditiously passing through a coastal state's EEZ can reasonably be suspected of illegal fishing, they also legitimately become subject to the above kinds of maritime policing and enforcement measures.



## SUPPORTING COALITION BUILDING AND MLE CAPACITY IN SOUTH EAST ASIA: THE ROLE OF THE LITTORAL STATES

As has been argued elsewhere the South China Sea's fisheries need multilateral governance and cooperation if the region is to avoid a future food security crisis and the economic collapse of the region's fishing industries.<sup>37</sup> A Regional Fisheries Management Organisation (RFMO), supported by more effective MLE and more uniform national regulation and policy, could reduce illegal and overfishing by coordinating fishing regulation and surveillance within EEZs and creating uniform regulation and standards for fishing in international waters. The obstacles to this happening, however, are manifold and cannot be overcome without some compromise on South East Asia's long running maritime boundary disputes and a shared political willingness to replace increasing competition over fast declining catches with a commitment to the long-term sustainability of the region's fish stocks.<sup>38</sup> Furthermore, an effective RFMO would require Chinese participation and the negotiation of rules acceptable to all states. But

because China already controls many parts of the South China Sea, there is little incentive for Beijing to compromise on its position that only China is entitled to set and enforce maritime law in the areas it claims sovereign rights over, which includes most of South China Sea. As Perry (2020) notes:

Presently, noncooperation [in the South China Sea] persists because China has calculated it is better off using its MLE [Maritime Law Enforcement] strength to unilaterally impose its own laws in the SCS [South China Sea], rather than submitting to terms acceptable to the other bordering states.<sup>39</sup>

Cooperation within ASEAN too is becoming less likely due to differing interests and threat perceptions and mounting pressure from Beijing and Washington to take sides. China's ongoing

maritime incursions are clearly a major concern for ASEAN, in particular Vietnam, the Philippines, Malaysia, and Indonesia, but the very real risk of states alienating themselves from China and its huge development assistance resources and domestic market will remain a major factor in determining whether the grouping can, or will ever, respond with a unified voice on China's claims and behaviour. But as China continues to press its maritime claims and maritime laws and regulation throughout most of the South China Sea, the littoral ASEAN states with rights and territory at risk nevertheless are now being forced to respond to China's encroachments in spite of the potential economic consequences of opposing Beijing. As Hass and Dong (2020) observe, "Even though top US and Chinese diplomats likely will continue to mouth platitudes about not forcing other countries to choose between them, space for countries to remain neutral will shrink with each discrete decision."40

The political divisions generated by US-China tensions within ASEAN also are making the conclusion of fisheries management and maritime security agreements with China more unlikely. China and ASEAN, for example, are yet to agree on a Code of Conduct (COC) in the South China Sea after a decade of ongoing draft discussions. Negotiations on the COC restarted in 2013, following The Philippines' lodgement of its arbitration case against China, but are currently stalled over a 2019 draft containing few points of agreement. Some in ASEAN suspect Beijing is trying to strengthen its control of disputed areas and the maritime territory of some ASEAN states during the COVID-19 pandemic in order to build more leverage in the COC negotiations. 41

Given that China now has effective, albeit illegal, control over much of the South China Sea, Beijing already has gained a great deal of negotiation leverage; certainly enough to make China's catch numbers and types of catch less rather than more transparent and any future fisheries management negotiations heavily biased in favour of China's interests. Further

attempts at regional maritime negotiations involving China, therefore, are unlikely to succeed without some prior compromise on its expansive claims, which ultimately would require Beijing accepting the limits imposed by UNCLOS. Both of these conditions were extremely unlikely before the COVID-19 pandemic, and now appear all but impossible in the current climate of increasing Chinese incursions.

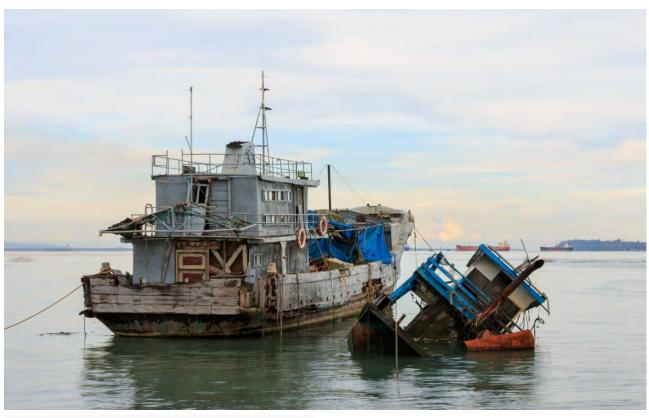
The obstacles to reaching consensus within ASEAN and China's unwillingness to compromise on its far-reaching claims, make the goal of a South China Sea RFMO unattainable under the current circumstances at least. Efforts to further build MLE capacity and regulatory capacity should, therefore, focus on establishing a minilateral coalition comprising the five ASEAN states whose maritime rights are most at risk. In addition to countering China's tactical use of bilateral negotiations to leverage maritime concessions from individual states, a coalition of littoral states cooperating on fisheries regulation and MLE would be a clear and forceful rejection of Beijing's attempts to rewrite the maritime order's rules while still claiming to be upholding China's international legal obligations. Doing so will require not only a willingness to confront China, but also the ASEAN claimant states and Indonesia (Indonesia regards itself as a nonclaimant in the South China Sea disputes) to set aside their own long standing maritime disputes, which until recently has looked unlikely, and negotiate compromises on their conflicting EEZ claims to allow cooperation on their legal responsibilities as mandated by UNCLOS's enclosed or partially enclosed sea provisions.<sup>42</sup>

Brunei has remained ambivalent on China's claims and appears set on building closer economic ties with Beijing. Brunei thus is unlikely to take any steps that would antagonise the Chinese government in relation to maritime claims and boundary recognition. However, signs of a willingness to cooperate on MLE and other maritime issues are beginning to appear among the other states. An agreement between Indonesia and the Philippines on their overlapping EEZs in the Celebes Sea was ratified

by both governments in 2014.43 Vietnam and Malaysia plan to sign a Memorandum of Understanding (MoU) on maritime security cooperation in late 2021 addressing several problem areas including illegal Vietnamese fishing in Malaysian waters. 44 Vietnam and Indonesia, meanwhile, are continuing negotiations to establish provisional boundaries in overlapping areas of their claimed EEZs in the North Natuna Sea. As an example of a negotiation model the other claimant states could follow, the negotiations are aimed at resolving fisheries disputes between the two countries without having to reach agreement on the more difficult bi-lateral territorial dispute. Indeed, the significance of this agreement stretches well beyond only Indonesia and Vietnam's respective EEZ rights. In addition to allowing Indonesia and Vietnam's MLE authorities to cooperate on repelling Chinese incursions, both countries also see the agreement as a joint rejection of China's nine dashed line argument.<sup>45</sup>

Finding work-around solutions to their yet-to-be resolved sovereignty disputes is a strong affirmation of UNCLOS principles (which can only address sovereign maritime *rights* entitlements, not questions concerning sovereign territory), and can also serve as a more unified response to China's claims (as the Vietnam-Indonesia agreement demonstrates). However, the opportunity these compromises present for more and better cooperative fisheries regulation and enforcement must be more fully embraced if the littoral ASEAN states are themselves to take the lead in challenging Chinese incursions and the broader problem of IUU fishing.

In addition to South East Asia's territorial disputes, the patchy and inconsistent nature of national fisheries regulation in the region also is widely recognised as a major obstacle to reducing IUU fishing and fishing overcapacity in the South China Sea. <sup>46</sup> Because many fish stocks migrate across EEZs (known as transboundary



Lahad Datu, Sabah: Fishing vessels, anchoring off Lahad Datu (Photo by CEphoto, Uwe Aranas / CC-BY-SA-3.0)

stocks), between an EEZ and the high seas (straddling stocks), or both, better regulation at the national level needs to be uniformly and consistently adopted across the inter-state level to address the many national regulatory gaps and maximise cooperative inter-state regulatory and enforcement potential. According to Williams. 47

The biggest problem in regard to managing fisheries resources are South East Asian countries' lack of management and enforcement capacities and the conflicts of interests regarding, on the one hand, the economic benefits of fishing and, on the other hand, the protection of marine resources. The gaps in effective management of fisheries and enforcement capacities are widely acknowledged in South East Asia, even by state fisheries management actors themselves.

Vietnam continues to struggle to control IUU fishing and Vietnamese vessels often are implicated in illegal fishing activities in neighbouring EEZs, which are in part the result of the government's efforts to uphold Vietnam's maritime claims in disputed areas. 48 In contrast, Indonesia, under the Jokowi administration's National Plan of Action against IUU fishing, has been aggressively targeting foreign fishing vessels found in its waters, including the sinking

of illegal vessels. In addition to more aggressive enforcement, the Jokowi government has enacted laws against trans-shipment of catches outside designated ports, limited the number of domestic fishing licenses issued, and signalled its willingness to engage in joint patrols and information exchange with other nations. 49 Malaysia and the Philippines also have committed to strengthening domestic fisheries regulation, especially in relation to curbing IUU fishing. 50

Many littoral states moreover already have begun increasing their MLE capacity with support from Japan and the US. Vietnam, Malaysia, the Philippines, and Indonesia all have increased spending on their coast guards and are building or acquiring larger coast guard vessels. MLE capacity building among the littoral states has been underway for some time due to the proliferation of maritime security threats over the last twenty years but is now driven also by an appreciation of the role coast quard assets can play in responding to grey zone contingencies while lessening the risk of military escalation.<sup>51</sup> But despite these efforts, MLE capacity remains uneven, under resourced in relation to the large coastal and blue water areas that need to be policed, and much smaller than China's coast guard resources in terms of both size and number. Another concern is the fiscal impact of the COVID-19 pandemic, which may become an obstacle to future spending on MLE capacity building for some governments.



## SUPPORTING COALITION BUILDING AND MLE CAPACITY IN SOUTH EAST ASIA: THE ROLE OF THE QUAD STATES

The trend towards cooperation and compromise on fishing rights, MLE, and regulation can produce lasting gains in maritime security for the ASEAN littoral states, which by implication also means greater protection from China's incursions and claims. But higher levels of maritime security, including better fisheries policing and regulation, in the South China Sea requires all of the Quad states to quickly and significantly increase their maritime capacity building assistance in South East Asia under a coordinated MLE based strategy that treats China's maritime militia incursions as an IUU fishing problem. Indeed, the ongoing success of China's grey zone tactics is evidenced by its growing influence and control via the presence of its numerous PLAN and PLAN controlled para-military assets in both the South China Sea and the East China Sea. China's ability to intimidate and coerce littoral states in the South China Sea has been further bolstered by the building of several artificial islands now serving

as military bases and Beijing's omnipresent threat of economic retaliation against states opposing China's maritime encroachments and claims.

But despite the Quad states repeatedly emphasising the broader strategic threat posed by grey zone tactics (see for example, Australian Government, 2020 Defence Strategic Update, 2020), the Quad governments are yet to develop, either individually or cooperatively, an effective strategy for countering China's ongoing and, so far, successful use of these tactics in East Asia's maritime domains.<sup>52</sup>

The Australian government highlighted the importance of the threat posed by grey zone coercion and tactics in the South China Sea and elsewhere in its *2020 Strategic Update<sup>53</sup>* but still has not articulated a strategy to deal with the growing incorporation of asymmetric tactics into the statecraft of competitor states such as

China. Japan continues to use its highly developed MLE and military capabilities to repel China's persistent incursions around the Senkaku Islands, but has no plan for applying non-military enforced costs and measures likely to cause China to wind back its grey zone attacks on Japan's maritime rights and territory. In the US, strategists and analysts in and outside government continue to debate grey zone counter measures. Under the Trump administration, the US increased its freedom of navigation operations (FONOPs) in the South China Sea and the Biden administration is so far continuing this approach. No clear strategy for the region, however, so far has emerged other than more FONOPs. While important in affirming freedom of navigation rights, FONOPs alone are little more than protests against China's claims and have not dissuaded China from continuing to expand its control and influence in the South China Sea.

India meanwhile remains under pressure on its northern border as China continues to attempt incremental strategic gains in the border dispute between the two countries. However, India, unlike the other Quad states, has long experience with countering and employing grey zone tactics in its often-tense relationship with Pakistan. Pakistan's weaker position in its rivalry with India, in addition to both countries wanting to avoid escalation, has made managing and employing grey zone coercion tactics a central part of Pakistan and India's strategic thinking. This experience may, as Bratton arques, prove valuable as India attempts to counter China's grey zone coercion on its northern border, particularly given India's weaker position in its rivalry with China.<sup>54</sup>

Confronting illegal Chinese claims and encroachments by helping the ASEAN littoral states to better manage IUU fishing as a minilateral grouping can create a powerful narrative that more clearly demonstrates the illegitimate nature of China's behaviour under the maritime order by affirming the authority and legitimacy of UNCLOS. In addition to helping lower the risk of great power

confrontation over China's salami slicing tactics in the region, and protecting the region's fisheries from depletion and/or unilateral Chinese control, developing better regulation and MLE against IUU fishing in the South China Sea will also help the Quad states better manage a number of related challenges facing the Quad's goal of keeping the Indo-Pacific free and open, including the need to:

- Dispel Chinese accusations of external interference in the South China Sea's maritime disputes;
- Counter Chinese accusations that the Quad's main purpose is containment of China;
- iii) Place the onus for escalation on China by imposing grey zone dilemmas on China's leadership, especially in terms of its conflict threshold calculations;
- iv) Assuage ASEAN fears of being sidelined by great power competition while also meeting the Goldilocks balance in US policy hoped for by South East Asian states: that is, a US presence that is neither too confrontational with China, nor too weak;
- v) Make the Quad a more inclusive grouping via the development of a mini-multilateral grouping/coalition targeting IUU fishing through more effective inter-state cooperation on MLE and fisheries regulation, which could become a model for cooperation on other regional issues and threats.

To make this "UNCLOS versus China's illegal activities" narrative effective, the Quad states *collectively* need to do more sooner. The US and Japan have for many years provided coast guard training, funding, logistical support, and material assets, including ships, to South East Asia's littoral states. As a result, both countries already have well developed programs in place with Indonesia, the Philippines, Malaysia, and Vietnam, and have been boosting funding over recent years. <sup>55</sup> In addition to the joint military exercises Australia, Japan, the US, and India are

now conducting with South East Asian states, <sup>56</sup> and recent US-Japan coast guard exercises in the Philippine Sea, <sup>57</sup> the Quad states should similarly coordinate a rapid expansion of existing MLE capacity building and maritime security programs with these states, with a particular focus on MLE and IUU fishing.

Doing so will require larger contributions from India and Australia towards civilian MLE capacity building efforts in the region, especially given the existing increases in US and Japanese funding and support and the additional COVID imposed fiscal restraints on regional budgets. India has been increasing its maritime security engagement in South East Asia since 2015 but mainly through joint naval exercises, training, and port visits. 58 The Australian Department of Defence, meanwhile, runs several maritime security initiatives in South East Asia, including the long running Operation Gateway aerial surveillance program and the more recent Indo-Pacific Endeavour, intended to develop bilateral and multilateral security cooperation with regional states. But like India, Australian maritime security engagement in South East Asia is largely based around military-to-military cooperation and support. Australian aid to South East Asia, moreover, has decreased since 2014 under successive conservative governments.<sup>59</sup> Australian governments therefore need to "step up" foreign aid spending in South East Asia more broadly and support for civilian MLE in particular.

Australia and Japan taking the lead in creating a Quad backed MLE capacity building program across South East Asia also is an opportunity for both countries to provide more support to the US commitment in East Asia. Focusing on civilian MLE capacity additionally offers the benefits of addressing regional militarisation and escalation concerns among the South East Asia states, which have been deepened by the increased US naval presence and more recently Australia's plan to buy nuclear powered submarines under the AUKUS agreement.

South East Asian concerns about greater Quad involvement in the South China Sea, however, are not uniform and have been over-blown by some commentators. 60 Indonesia, the Philippines, Malaysia, and Vietnam, like their ASEAN partners, understandably remain very careful not to *overtly* signal any great power bias given China's economic leverage and their wider concerns about great power confrontation in East Asia. Malaysia's diplomatic ambivalence, for example, over the presence of a US carrier group during a stand-off between Chinese and Malaysian vessels in Malaysia's EEZ in 2020, or Malaysia and Indonesia's consternation over the AUKUS announcement thus is to be expected. But by jointly supporting the littoral states in developing MLE capacity against IUU fishing, the Quad states can help them to avoid the problem of appearing to take sides against China while also ensuring they, and not external powers, take the lead in protecting their sovereign maritime rights.

### CONCLUSION

The immense significance and importance for Australia and Japan of maintaining and strengthening the rules-based order in the Indo-Pacific and beyond has been demonstrated by governments in both countries regularly citing it as the lynchpin of their respective national security interests. As maritime trading nations, both countries rely on the authority of UNCLOS in supporting freedom of maritime navigation and its rules and principles for the peaceful settlement of maritime rights disputes. And as middle powers closely allied with the US, both countries also heavily rely on the broader US led political order and military presence to provide the kind of secure and stable regional environment required by international institutions like international law if they are to have relevance and meaning.

But with the rules-based order under increasing threat from China's incremental erosion of UNCLOS's authority, the need for both countries and their Quad partners to more effectively confront China's successful employment of grey zones tactics is also very clear. While a stronger military presence by the Quad states in and around the first island chain has been made essential by China's growing military capability and assertiveness, the very nature and logic of grey zone tactics make military responses ineffectual unless the US and its partners are willing to meet China's asymmetrical challenges through military escalation. In addition to

imposing unthinkable costs on the region, doing so would signal the Quad's collective inability to avoid the escalation trap set by Beijing; thereby severely damaging not only the credibility and reputations of the US and its partners but also the value and desirability of the liberal rulesbased order itself. Beijing's narrative portraying China as a state using peaceful civilian means to restore its legitimate rights and entitlements therefore needs to be countered with a nonmilitary-based strategy implemented around an UNCLOS informed narrative that affirms the current maritime order while clearly placing the onus for escalation with China's leadership. Helping build a Quad backed mini-coalition with Indonesia, the Philippines, Malaysia, and Vietnam to more effectively combat the serious and ongoing threat posed by IUU fishing can provide a strong foundation for that strategy and narrative.

Indeed, helping the South East Asia states most at risk to jointly call out China's claims as self-serving legal pretence by proactively engaging in genuine dispute resolution guided by UNCLOS's enclosed or semi enclosed seas provisions and improving cooperative fisheries management may be the only remaining option — other than accepting the growing risk of direct military confrontation — for preventing the South China Sea eventually becoming sovereign Chinese territory.

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