
INTERNATIONAL LAW STUDIES

— *Published Since 1895* —

Is a South China Sea Code of Conduct Viable?

Raul (Pete) Pedrozo

97 INT'L L. STUD. 937 (2021)

Volume 97



2021

Published by the Stockton Center for International Law

ISSN 2375-2831

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* Captain Raul (Pete) Pedrozo, USN (Ret.). Captain Pedrozo is the Howard S. Levie Chair on the Law of Armed Conflict and Professor of International Law at the Stockton Center for International Law, U.S. Naval War College. Captain Pedrozo was the former senior legal advisor at U.S. Pacific Command and was a special assistant to the Under Secretary of Defense for Policy.

The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

Following China's illegal occupation of Mischief Reef in January 1995, the Association of Southeast Asian Nations (ASEAN) issued a Joint Communiqué in 1996 expressing concern over the situation in the South China Sea (SCS) and calling "for the peaceful resolution of the dispute and self-restraint by parties concerned."¹ The ASEAN ministers further "endorsed the idea of concluding a regional code of conduct in the South China Sea, which will lay the foundation for long term stability in the area and foster understanding among claimant countries."²

Over the next three years, ASEAN member States finalized a draft code of conduct, which was provided to the People's Republic of China (PRC) in 1999 for consideration at the first meeting of the Working Group of the ASEAN-China Senior Officials Consultations on the Code of Conduct. After three years of painstaking negotiations, the two sides concluded an aspirational, non-binding Declaration of Conduct of Parties in the South China Sea (DOC) on November 4, 2002.

The DOC was intended to be an important first step towards setting the conditions for a peaceful and durable solution to the long-standing territorial and maritime disputes in the SCS, and each party undertook to respect and take actions consistent with its provisions. In addition, the parties affirmed the need to adopt a binding Code of Conduct to further promote peace and stability in the SCS and agreed "to work, on the basis of consensus, towards the eventual attainment of this objective."³

Regional leaders instantly hailed the DOC as a momentous achievement between ASEAN and the PRC. This euphoria, however, was short-lived as China routinely ignored the DOC's provisions by resorting to threats and use of force against the other SCS claimants and engaging in activities that raised tensions and undermined regional peace and stability by occupying, reclaiming, and militarizing a number of uninhabited SCS features.⁴ Two

1. Joint Communiqué of the 29th ASEAN Ministerial Meeting ¶ 11 (1996), https://asean.org/?static_post=joint-communication-of-the-29th-asean-ministerial-meeting-amm-jakarta-20-21-july-1996.

2. *Id.*

3. Declaration on the Conduct of Parties in the South China Sea, Nov. 4, 2002, https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

4. The DOC provides, in part, that:

decades later, thanks to Chinese stonewalling and blatant disregard of the DOC's provisions, the elusive binding Code of Conduct has yet to materialize. Preoccupation with the ongoing coronavirus pandemic has also brought negotiations to a standstill. Nonetheless, in August 2020, Chinese officials called on their ASEAN counterparts to resume Code of Conduct negotiations as soon as possible, which begs the question—is a Code of Conduct still relevant given that China has significantly changed the status quo in the SCS over the past decade? After careful examination, the answer to that question is no.

II. CHINESE TRANSGRESSIONS

There are too many Chinese transgressions in direct violation of its voluntary commitment to observe the provisions of the DOC to document in a single paper. As ASEAN diplomats struggled to achieve consensus on a binding Code of Conduct that would appease Chinese demands, Beijing engaged in a series of malign activities that have interfered with the resource rights of other claimants in their respective exclusive economic zones (EEZ) and continental shelves by sinking fishing boats, harassing survey vessels and offshore oil rigs, illegally seizing fishing equipment and fish catches, and coercing foreign oil companies to abandon offshore projects.⁵ This provocative behavior clearly violated China's commitment in the DOC to resolve the SCS disputes by peaceful means and without resorting to the threat or use of force.

Most notably, however, China established a series of military outposts on reclaimed artificial islands that have forever changed the landscape and status quo of the SCS. China's militarization of its SCS outposts violated its

4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

Id. ¶¶ 4, 5.

5. MICHAEL GREEN ET AL., COUNTERING COERCION IN MARITIME ASIA: THE THEORY AND PRACTICE OF GRAY ZONE DETERRENCE (2017), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/170505_GreenM_CounteringCoercionAsia_Web.pdf.

commitment to exercise self-restraint in conducting activities that could complicate or escalate the ongoing disputes and affect regional peace and stability. China's artificial island-building also caused extensive environmental damage to the fragile ecosystem in-and-around Cuarteron, Fiery Cross, Gaven (North), Johnson, Hughes, Subi, and Mischief Reefs,⁶ and breached China's treaty obligations under the UN Law of the Sea Convention (UNCLOS).⁷ Moreover, China's construction activities on Mischief Reef, which is a low-tide elevation within the Philippine EEZ/continental shelf and therefore not capable of appropriation by China, violated the Philippines' sovereign rights and breached China's obligations under UNCLOS.⁸

Although land reclamation by the other SCS claimants has occurred over the past forty years, it pales in comparison to China's activities. Between 2013 and 2015, the PRC reclaimed over 3,200 acres of land on seven⁹ of the eight features it occupies in the Spratly Islands.¹⁰ By comparison, the other claimants reclaimed 172 acres in forty years. That means Chinese activities account for over 95 percent of all reclaimed land in the Spratlys.¹¹

Beginning in 2015, the PRC transitioned from land reclamation to infrastructure development on each of its reclaimed outposts. Shore-based infrastructure improvements have been completed on its four smallest outposts—Johnson, Gaven, Hughes, and Cuarteron Reefs—to include fixed-land-based naval guns, administrative buildings, sensor emplacements, and improved communications facilities.¹² More substantial improvements have been made to Fiery Cross, Subi, and Mischief Reefs, including new airfields, deep channels to improve access, large port facilities with berthing areas for larger ships, water and fuel storage facilities, fighter-sized hangars, fixed-

6. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award ¶¶ 818–993, (Perm. Ct. Arb. 2016).

7. United Nations Convention on the Law of the Sea arts. 192, 194(1), 194(5), 197, 123, 206, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

8. South China Sea Arbitration, *supra* note 6, ¶¶ 994–1043; UNCLOS, *supra* note 7, arts. 60, 80.

9. These features include Fiery Cross, Subi, Mischief, Johnson, Gaven, Hughes, and Cuarteron Reefs.

10. U.S. DEPARTMENT OF DEFENSE, ASIA-PACIFIC MARITIME SECURITY STRATEGY 16 (2015) [hereinafter ASIA-PACIFIC MARITIME SECURITY STRATEGY].

11. *Id.*

12. U.S. DEPARTMENT OF DEFENSE, ANNUAL REPORT TO CONGRESS, MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 12 (2017) [hereinafter DOD ANNUAL REPORT (2017)]; U.S. DEPARTMENT OF DEFENSE, ANNUAL REPORT TO CONGRESS, MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 17 (2018) [hereinafter DOD ANNUAL REPORT (2018)].

weapons positions, administration buildings, communication and surveillance facilities, and barracks.¹³ These improvements will give the PRC the “capacity to house up to three regiments of fighters in the Spratly Islands”¹⁴ and increased capabilities to support military operations throughout the SCS and beyond.¹⁵

By significantly enhancing and militarizing these features, the PRC has established a robust power projection presence in the SCS, unilaterally changed the physical status quo in the region, and bolstered its de facto control of the Spratlys. New airfields with combat-capable aircraft, larger port facilities, and improved logistics hubs have allowed the China Coast Guard (CCG) and People’s Liberation Army-Navy (PLAN) to establish a more flexible and continuous presence in the SCS. This persistent presence improves “China’s ability to detect and challenge activities by rival claimants or third parties, widens the range of capabilities available to the PRC, and reduces the time required to deploy them.”¹⁶ This further complicates diplomatic initiatives aimed at reducing tensions and ultimately resolving the underlying territorial disputes.

The United States has made it clear that it views Chinese militarization and territorial expansion in the South China Sea as “illegal and dangerous.”¹⁷ These actions threaten “the sovereignty of many nations and endanger the prosperity of the world.”¹⁸ Accordingly, the United States has “called on China to withdraw its missile systems from disputed features in the Spratly Islands, and reaffirmed that all countries should avoid addressing disputes through coercion or intimidation.”¹⁹

13. DOD ANNUAL REPORT (2017), *supra* note 12, at 12; U.S. DEPARTMENT OF DEFENSE, ANNUAL REPORT TO CONGRESS, MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 13 (2016) [hereinafter DOD ANNUAL REPORT (2016)].

14. DOD ANNUAL REPORT (2017), *supra* note 12, at 12.

15. DOD ANNUAL REPORT (2018), *supra* note 12, at 17.

16. DOD ANNUAL REPORT (2016), *supra* note 13, at 13; DOD ANNUAL REPORT (2017), *supra* note 12, at 12; DOD ANNUAL REPORT (2018), *supra* note 12, at 17.

17. Michael R. Pence, Vice President of the United States, Remarks at the East Asia Summit Plenary Session (Nov. 16, 2018), <https://asean.usmission.gov/prepared-remarks-for-vice-president-pence-at-the-east-asia-summit-plenary-session/>.

18. *Id.*

19. Media Note, U.S. Department of State, U.S.-China Diplomatic and Security Dialogue (Nov. 9, 2018), <https://2017-2021.state.gov/u-s-china-diplomatic-and-security-dialogue-3/index.html>.

III. RECENT DEVELOPMENTS

Notwithstanding countless setbacks since 2002, Code of Conduct enthusiasts routinely say that there is hope on the horizon. Even China, which has slow-rolled the Code of Conduct discussions for the past twenty years, now appears eager to quickly conclude the negotiations.

*A. Agreed Framework*²⁰

In May 2017, ASEAN and the PRC adopted a Framework of a Code of Conduct in the South China Sea intended to “facilitate the work for the conclusion of an effective Code of Conduct on a mutually-agreed timeline.”²¹ The Joint Communiqué further recognized that a Code of Conduct would contribute to “peace, stability and prosperity” in the SCS.²² The Framework was endorsed by the foreign ministers of the PRC and ASEAN on August 6, 2017.²³ The Framework is divided into three broad sections—preambular provisions, general provisions, and final clauses.

The preambular provisions include three subtopics, which are not controversial: (1) bases of the Code of Conduct; (2) an undefined linkage between the DOC and the Code of Conduct; and (3) importance of the Code of Conduct and aspirations of the participants.

The general provisions also have three subtopics: (1) objectives, (2) principles, and (3) basic undertakings. The first objective is “to establish a rules-based framework containing a set of norms to guide the conduct of parties and promote maritime cooperation in the South China Sea.”²⁴ The second objective is “to promote mutual trust, cooperation and confidence, prevent incidents, manage incidents should they occur, and create a favourable environment for the peaceful settlement of disputes.”²⁵ Similar to the

20. For a detailed assessment of the Framework for the Code of Conduct, see Ian Storey, *Assessing the ASEAN-China Framework for the Code of Conduct for the South China Sea*, ISEAS (Aug. 8, 2017), https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2017_62.pdf [hereinafter Storey, *Assessment*].

21. Joint Communiqué of the 50th ASEAN Foreign Ministers’ Meeting, Partnering for Change, Engaging the World (Aug. 5, 2017), https://asean.org/wp-content/uploads/2017/08/Joint-Communique-of-the-50th-AMM_FINAL.pdf.

22. *Id.*

23. Storey, *Assessment*, *supra* note 20, at 2.

24. *Id.* at 4.

25. *Id.*

DOC, the third objective is “to ensure maritime security and safety and freedom of navigation and overflight” in the SCS.²⁶

In the first principle, the parties make clear that the Code of Conduct is “not an instrument to settle territorial disputes or maritime delimitation issues,” which will need to be resolved by the claimants via other dispute settlement mechanisms.²⁷ In the second principle, the parties commit to the “purposes and principles” of the UN Charter, UNCLOS, the Treaty of Amity and Cooperation in Southeast Asia (TAC),²⁸ the Five Principles of Peaceful Coexistence,²⁹ and “other universally recognized principles of international law.”³⁰ In the third principle, the parties commit “to full and effective implementation of the DOC” but do not specify how that will be done.³¹ The fourth principle is taken from the Five Principles of Peaceful Coexistence and provides that the parties will respect “each other’s independence, sovereignty and territorial integrity in accordance with international law,”

26. *Id.*

27. *Id.*

28. Article 1 provides that: “The purpose of this Treaty is to promote perpetual peace, everlasting amity and cooperation among their peoples which would contribute to their strength, solidarity and closer relationship.” Article 2 provides that:

in their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles:

- a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- b. The right of every State to lead its national existence free from external interference, subversion or coercion;
- c. Non-interference in the internal affairs of one another;
- d. Settlement of differences or disputes by peaceful means;
- e. Renunciation of the threat or use of force;
- f. Effective cooperation among themselves.

Treaty of Amity and Cooperation in Southeast Asia, Feb. 24, 1976, 1025 U.N.T.S. 297, as amended by the Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, Dec. 15, 1987, 27 INTERNATIONAL LEGAL MATERIALS 609 (1988), and the Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, July 25, 1998, <http://agreement.asean.org/media/download/20140117142023.pdf> [hereinafter TAC].

29. The five principles are mutual respect for each other’s territorial integrity and sovereignty, mutual non-aggression, mutual non-interference in each other’s internal affairs, equality and cooperation for mutual benefit, and peaceful coexistence. Trade and Inter-course between Tibet Region of China and India, China-India pmbl., Apr. 29, 1954, 299 U.N.T.S. 57.

30. Storey, *Assessment*, *supra* note 20, at 5.

31. *Id.*

and reiterates the “principle of non-interference in the internal affairs of other states.”³²

The basic understandings section contains six topics: (1) duty to cooperate (as required by UNCLOS); (2) promotion of practical maritime cooperation (e.g., search and rescue, maritime scientific research, environmental protection, and combating transnational crime at sea); (3) self-restraint/promotion of trust and confidence (albeit undefined); (4) prevention of incidents (confidence-building measures and hotlines); (5) management of incidents (hotlines); and (6) “other undertakings in accordance with international law, to fulfill the objectives and principles of the [Code of Conduct].”³³

The Framework concludes with five final clauses: (1) encourage other countries to respect the principles contained in the Code of Conduct, (2) necessary mechanisms for monitoring of implementation (albeit undefined), (3) review of the Code of Conduct, (4) nature, and (5) entry into force (in accordance with each party’s domestic processes).

B. *Single Draft Negotiating Text*

A year after endorsing the Framework, ASEAN and the PRC announced that they had reached an agreement on a Single Draft South China Sea Code of Conduct Negotiating Text (SDNT), which would serve as a point of departure for future Code of Conduct negotiations.³⁴ A Malaysian proposal for inclusion in section 2 on “general provisions” makes clear that the Code of Conduct is not intended to address the long-standing territorial and maritime boundary disputes in the SCS: “The Parties . . . acknowledge that the Code of Conduct does not address nor affect the Parties’ position on legal questions relating to the settlement of disputes, maritime boundaries, or the permissible maritime entitlements of the Parties under international law of the sea and . . . reflected in . . . UNCLOS.”³⁵

Although considered a monumental achievement by some, the nineteen-page SDNT is riddled with problematic provisions that call into question

32. *Id.*

33. *Id.*

34. For a detailed assessment of the SDNT, see Carl Thayer, *A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct*, THE DIPLOMAT (Aug. 3, 2018), <https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/>.

35. *Id.*

China's motivation for agreeing to negotiate a Code of Conduct. Of note, an international arbitral tribunal ruled that "China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect . . ."³⁶ Accordingly, the tribunal concluded that UNCLOS "superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein."³⁷

Nonetheless, China's negotiating position on the SDNT relies on the nine-dash line as the basis for cooperation. China should not be allowed to defy the tribunal's award by trying to force an agreement premised on a claim that an international tribunal has invalidated. As a result, some countries have called on ASEAN and the PRC to ensure that the Code of Conduct is "consistent with existing international law, as reflected in UNCLOS; . . . [does] not prejudice the interests of third Parties or the rights of all states under international law; . . . reinforce[s] existing regional architecture; and . . . strengthen[s] Parties' commitments to cease actions that would complicate or escalate disputes."³⁸

1. Geographic Scope

The first glaring omission from the SDNT is the geographic scope of the Code of Conduct. During the first round of negotiations, both Malaysia and Singapore recommended that the geographic scope of the Code of Conduct be defined. Vietnam proposed that the Code "shall apply to all disputed features and overlapping maritime areas claimed under . . . UNCLOS" in the SCS.³⁹ Indonesia suggested that "the Parties are committed to respect the exclusive economic zone and continental shelf of the coastal states as provided for in . . . UNCLOS."⁴⁰ These proposals all have one thing in common—ASEAN expects that the Code of Conduct's scope of application will include all waters and features encompassed by the PRC's infamous nine-

36. South China Sea Arbitration, *supra* note 7, ¶ 278; *see also id.* ¶¶ 169–278.

37. *Id.* ¶ 278.

38. Media Note, U.S. Department of State, Australia-Japan-United States Trilateral Strategic Dialogue Joint Ministerial Statement (Aug. 5, 2018), <https://2017-2021.state.gov/australia-japan-united-states-trilateral-strategic-dialogue-joint-ministerial-statement/index.html>.

39. Thayer, *supra* note 34.

40. *Id.*

dash line. Given that the Paracel Islands and Scarborough Shoal are bilateral disputes with Vietnam and the Philippines, respectively, Beijing may seek to limit the geographic scope of the Code of Conduct to the Spratly Islands. Of note, the DOC is similarly silent on the issue of geographic scope.

2. Dispute Settlement

Although a number of the general provisions in the Framework speak in terms of preventing and managing incidents, monitoring full and effective implementation of the Code of Conduct, and peaceful settlement of disputes, the SDNT fails to require compulsory third-party dispute settlement should bilateral efforts to resolve the issues fail. Moreover, proposals by the participants similarly fail to address the issue of compulsory dispute settlement.

For example, Indonesia and Vietnam suggested that disputes be resolved pursuant to Chapter IV of the TAC. Reliance on the TAC dispute settlement mechanisms is problematic given that it is a consent-based process. Article 14 establishes a High Council comprised of members from each of the States parties that is responsible for taking cognizance over “disputes or situations likely to disturb regional peace and harmony.”⁴¹ If the parties cannot settle the dispute through direct negotiations, the High Council shall then take cognizance of the dispute. However, the High Council can only make “recommendations” on the appropriate means of settlement, such as “good offices, mediation, inquiry or conciliation.”⁴² Additionally, the High Council may only offer its good offices upon agreement of the parties in dispute. Moreover, Article 16 provides that the dispute settlement provisions of the TAC “shall not apply to a dispute unless all the Parties to the dispute agree to their application to that dispute.”⁴³

Indonesia offered an alternative proposal that, if a resolution cannot be achieved under the TAC, then the matter could be referred to an appropriate third-party dispute settlement mechanism, but only with the consent of the concerned parties. Nevertheless, any dispute settlement mechanism based on consent is doomed to failure. To be effective, the Code of Conduct must contain a compulsory, binding dispute settlement mechanism similar to that found in UNCLOS, Part XV, but one that can be enforced without the consent of the parties by the International Court of Justice, the International

41. TAC, *supra* note 28, art. 14.

42. *Id.* art. 15.

43. *Id.* art. 16.

Tribunal for the Law of the Sea (for maritime issues), the TAC, or other international judicial body created by the Code of Conduct.

China has demonstrated its proclivity not to abide by its international legal obligations under UNCLOS by rejecting the jurisdiction and refusing to abide by the unanimous decision of the South China Sea arbitral tribunal. As parties to UNCLOS, the award is final and binding on the Philippines and China, as set out in Article 296 and Article 11 of Annex VII.⁴⁴ Nonetheless, the Chinese Ministry of Foreign Affairs declared that the “award is null and void and has no binding force” and that “China neither accepts nor recognizes it.”⁴⁵

3. Legal Status

To achieve its desired end state and proper implementation, the Code of Conduct must be a legally binding international instrument. Granted, even if legally binding, China may still not comply. As previously discussed, the arbitral tribunal found that China had willfully violated its treaty obligations under the COLREGS⁴⁶ and UNCLOS by engaging in aggressive, unsafe, and unprofessional maneuvers in the proximity of Philippine fishing vessels at Scarborough Shoal. It also found China was in breach of its obligations under UNCLOS by conducting large-scale reclamation activities in the Spratlys, thereby causing damage to the marine environment. Nevertheless, unless the Code of Conduct is a binding treaty on all parties that can be enforced through a compulsory dispute resolution mechanism, it will fail.

Recognizing the importance of a legally binding instrument, Vietnam submitted a proposal indicating that the contracting States “have consented to be bound by the present Code of Conduct.”⁴⁷ The Vietnamese proposal additionally provides that the Code of Conduct “be subject to ratification in accordance with the respective internal procedure of the signatory States” and that States deposit their instrument of ratification with the ASEAN Secretary-General.⁴⁸ Ultimately, the Secretary-General would be responsible for

44. UNCLOS, *supra* note 7, art 296, annex VII, art. 11.

45. Ministry of Foreign Affairs of the People’s Republic of China, Statement of the Government of the People’s Republic of China on China’s Territorial Sovereignty and Maritime Rights and Interests in the South China Sea (July 12, 2016), www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm.

46. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. No. 8587, 1050 U.N.T.S. 16.

47. *Quoted in* Thayer, *supra* note 34.

48. *Id.*

registering the Code of Conduct with the United Nations. Finally, both Vietnam and Brunei have proposed that, like Article 309 of UNCLOS, no reservations may be made by a contracting State when signing the Code of Conduct.⁴⁹

4. Duty to Cooperate

Some of the more controversial proposals by the PRC regarding the duty to cooperate appear in the basic understandings sub-section of the general provisions. Regarding cooperation on the marine economy, which includes aquaculture, marine culture, and oil and gas development, Beijing proposed that cooperation may only be carried out by the littoral States “and shall not be conducted in cooperation with companies from countries outside the region.”⁵⁰ Malaysia countered the Chinese proposal, suggesting that nothing in the Code of Conduct “shall affect . . . rights or ability of the Parties to conduct activities with foreign countries or private entities of their own choosing.”⁵¹

China has additionally submitted six proposals regarding self-restraint/promotion of trust and confidence. If implemented in accordance with international law, five of the six points are not controversial:

- “Military activities in the region shall be conducive to enhancing mutual trust.”
- Defense and military forces will conduct exchanges, including “mutual port calls of military vessels and joint patrols on a regular basis.”
- China and ASEAN member States will undertake joint military exercises on a “regular basis.”
- Military ships and aircraft enjoy sovereign immunity and are “immune from the jurisdiction of any State other than the flag state,” and that military ships and aircraft are entitled to self-defense “but should have due regard for the other side’s military vessels and military aircraft.”
- All persons who are in danger or distress at sea in the SCS are entitled to “just and humane treatment.”⁵²

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

Indonesia and Vietnam made similar proposals. Indonesia suggested: “dialogues between defense and military officials, humane treatment of persons in distress, voluntary notification of impending joint/combined military exercises, and the exchange of relevant information on a regular basis.”⁵³ Vietnam proposed that all parties respect “the maritime zones as provided for and established in accordance with . . . UNCLOS,” which would in effect nullify the PRC’s nine-dash line claim, and that the parties provide sixty days notification of “impending joint/combined military exercise/drill” in the SCS.⁵⁴

The PRC’s sixth point, however, is highly controversial: “The Parties shall establish a notification mechanism on military activities, and to notify each other of major military activities if deemed necessary. The Parties shall not hold joint military exercises with countries from outside the region, unless the Parties concerned are notified beforehand and express no objection.” This provision, if accepted, would give the PRC a veto over ASEAN member States’ military exercises with the United States and other non-regional military forces, like Australia, India, and Japan.

Given China’s misbehavior discussed above, Vietnam also proposed that contracting States be prohibited from constructing artificial islands, militarizing any features, blockading vessels carrying provisions or personnel for rotation, declaring an air defense identification zone, and conducting simulated attacks at the vessels and aircraft of other countries.⁵⁵ The Philippines similarly added a provision to protect its fishermen: “respect of the exercise of traditional fishing rights by fishermen . . . [and] access to features and fishing grounds.”⁵⁶

IV. ANALYSIS AND CONCLUSION

During a speech in Singapore on November 13, 2018, Chinese Premier Li Keqiang stated that he was optimistic that the PRC and ASEAN could conclude the Code of Conduct negotiations within three years.⁵⁷ ASEAN agreed to the three-year timeline proposed by China at the 22nd ASEAN-China

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Ian Storey, *Chinese Premier Li Calls for South China Sea Code of Conduct by 2021*, ISEAS (Nov. 15 2018), <https://www.iseas.edu.sg/media/commentaries/chinese-premier-li-calls-for-south-china-sea-code-of-conduct-by-2021-by-ian-storey/>.

summit in Thailand in 2019.⁵⁸ The impact of the global coronavirus pandemic has slowed down the negotiations, but it still begs the question—after nearly twenty years of dithering over the Code, why is China now interested in quickly concluding the negotiations? Moreover, will ASEAN diplomats be so obsessed with concluding the illusive Code of Conduct that they will lose their objectivity and accept a bad agreement rather than no Code at all?

Given that the PRC has complete control of the Paracels and de facto control of Scarborough Shoal and has completed its reclamation projects and militarization of its occupied features in the Spratlys, the answer should be obvious. At this point, the PRC has nothing to lose and everything to gain by concluding a Code of Conduct that solidifies its claims and advances its national security and economic interests in the SCS, all at the expense of ASEAN and a free and open Indo-Pacific region. As a precondition to further negotiations, ASEAN should insist that China demilitarize its SCS outposts and remediate the damage to the marine environment caused by its reclamation activities.

All the SCS claimants have conducted limited land reclamation projects on their claimed features over the past fifty years. The Philippines reclaimed fourteen acres of land to extend the runway on Thitu Island during the 1970s and 1980s.⁵⁹ Malaysia similarly reclaimed land to build an airfield on Swallow Reef in the 1980s.⁶⁰ Additionally, Vietnam reclaimed about sixty acres of land and built new structures on seven of its outposts between 2009 and 2014, while Taiwan reclaimed about eight acres of land to improve the airstrip on Itu Aba Island.⁶¹ However, these modest improvements pale in comparison to the PRC reclamation and militarization activities in the Paracels and Spratlys. Between 2013 and 2015, China reclaimed over 3,200 acres of land on several of the features it occupies in the SCS.⁶² Militarization of these outposts with large airfields and deep-water ports draws into question

58. Luchi de Guzman, *ASEAN Targets Completion of Code of Conduct Within Three Years*, CNN PHILIPPINES (Nov. 4, 2019), <https://www.cnnphilippines.com/news/2019/11/4/asean-china-code-of-conduct-south-china-sea.html>.

59. ASIA-PACIFIC MARITIME SECURITY STRATEGY, *supra* note 10, at 15.

60. *Id.*

61. *Id.*

62. *Id.*; DOD ANNUAL REPORT (2016), *supra* note 13, at 13; U.S. DEPARTMENT OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA (2019); James N. Mattis, U.S. Secretary of Defense, Remarks at Plenary Session of the 2018 Shangri-La Dialogue (June 2, 2018), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1538599/remarks-by-secretary-mattis-at-plenary-session-of-the-2018-shangri-la-dialogue/>.

China's true intentions in the SCS. Under a binding Code of Conduct, future improvements to their SCS outposts to counter the PRC's extensive militarization of the region would be prohibited, a significant infringement on the sovereignty and territorial integrity of the other claimants.

The PRC's proposal to prohibit the parties from engaging in oil and gas exploration and exploitation with companies from countries outside the region equally infringes on the other claimants' sovereign rights in their EEZ. It would, in effect, give the China National Offshore Oil Corporation (CNOOC) a de facto monopoly over hydrocarbon development in the SCS. The PRC's proposal that extra-regional companies be excluded from participating in oil and gas joint ventures in the SCS creates uncertainty for international firms that may want to bid on oil and gas contracts and gives CNOOC the upper hand in any joint venture arrangements.

It should also be noted that the South China Sea arbitral tribunal specifically found that China had violated its obligations under UNCLOS, Article 77, with respect to the Philippines' sovereign rights over the non-living resources of its continental shelf in the vicinity of Reed Bank.⁶³ Nonetheless, the PRC and CNOOC continue to systematically interfere with Vietnam's, Malaysia's, and the Philippines' sovereign rights in their respective EEZs in the vicinity of Vanguard Bank, Laconia Shoal/Breakers, and Reed Bank, respectively.⁶⁴

The United States has expressed concern over China's continuing interference with other SCS claimant's oil and gas activities in their respective EEZs, calling into question Beijing's commitment in the DOC to resolve its maritime disputes peacefully. Specifically, China has deployed government-owned survey vessels with armed PLAN, CCG, and maritime militia escorts to intimidate other claimants from developing resources in their EEZs and coerce these nations to reject partnerships with foreign oil and gas companies and work exclusively with CNOOC. These malign actions not only undermine regional peace and security but demonstrate China's total disregard

63. South China Sea Arbitration, *supra* note 7, ¶¶ 651–716.

64. Steve Mollman, *The US Says China is Blocking \$2.5 Trillion in South China Sea Oil and Gas*, QUARTZ (Aug. 24, 2019), <https://qz.com/1694322/south-china-seas-oil-and-natural-gas-pretty-important-after-all/>; Helen Clark, *Oil and Gas Fueling South China Sea Tensions*, ASIA TIMES (July 22, 2020), <https://asiatimes.com/2020/07/oil-and-gas-fueling-south-china-sea-tensions/>; Philip Heijmans, *High-Sea Energy Fight Off Malaysia Draws U.S., Chinese Warships*, BLOOMBERG (Apr. 23, 2020), <https://www.bloomberg.com/news/articles/2020-04-23/high-seas-energy-fight-off-malaysia-draws-u-s-chinese-warships>.

for the rights of other nations under UNCLOS to conduct economic activities in their EEZs. Moreover, China's interference has imposed enormous economic costs on its neighbors by blocking their access to over \$2.5 trillion in unexploited oil and gas resources.⁶⁵

Finally, the PRC's proposal prohibiting the parties from holding joint military exercises with countries from outside the region unless the parties concerned are notified beforehand and express no objection, will have a chilling effect on a free and open Indo-Pacific. It could also adversely impact the Department of Defense, given that the United States has defense treaties with the Philippines and Thailand, as well as a defined, albeit limited, defense relationship with Taiwan under the Taiwan Relations Act⁶⁶ that requires military-to-military engagement to maintain readiness and interoperability and enhance partner capacity and capabilities to deter and, if necessary, defeat a common enemy.

The SCS is also home to some of the world's busiest and most strategic sea lines of communication (SLOC). The importance of these SLOCs to Asian economic growth, as well as the global economy, cannot be overemphasized:

- Eight of the world's ten busiest container ports are in the Asia-Pacific region.
- Nearly one-third of the world's maritime trade transits the SCS annually.
- Over one-half of the world's annual merchant fleet tonnage passes through the SCS annually.
- Approximately \$5.3 trillion in ship-borne trade (\$1.2 trillion bound for the United States) transits through the SCS annually.
- About two-thirds of the world's oil shipments transit through the Indian Ocean to the Pacific Ocean through the SCS annually (over fifteen million barrels of oil pass through the Malacca Strait per day).⁶⁷

65. U.S. "Deeply Concerned" by China's Interference in Vietnam Oil and Gas Activity, REUTERS, Aug. 22, 2019, <https://www.reuters.com/article/us-usa-vietnam-china/u-s-deeply-concerned-by-chinas-interference-in-vietnam-oil-and-gas-activity-idUSKCN1VC1T3>.

66. 22 U.S.C. §§ 3301–3316.

67. ASIA-PACIFIC MARITIME SECURITY STRATEGY, *supra* note 10, at 1; U.S. Energy Information Administration, *South China Sea* (Feb. 7, 2013), https://www.eia.gov/international/content/analysis/regions_of_interest/South_China_Sea/south_china_sea.pdf.

Consequently, the United States has an enduring interest in preserving free and open maritime access to the SCS to protect our economic and security interests, as well as those of all Indo-Pacific nations.

Since the end of World War II, the Indo-Pacific region has enjoyed unprecedented economic growth, a prosperity that would not have been possible without a robust U.S. military presence to facilitate the unimpeded flow of trade and commerce through the SCS SLOCs. U.S. presence has therefore played a key role in buttressing regional peace, stability, and security, and it is in the interests of all nations that the United States maintain a robust presence to deter and prevent conflict in this vital region. The Chinese proposal, if adopted, would impede U.S. military access to the region, which would have a destabilizing effect on the regional and global economies. The United States is therefore committed to maintaining “the necessary military presence and capabilities to protect our interests and those of our allies and partners against potential threats in the maritime domain.”⁶⁸

Additionally, adoption of the PRC’s proposal would further Chinese efforts to undermine the rule of law and liberal order of the world’s oceans. As a Pacific nation, Pacific leader, and Pacific maritime power, the United States has a national interest in countering the PRC’s efforts in this regard. One way to counterbalance this threat is to maintain a robust military presence in the region; strengthen partnerships with like-minded allies and partners in the region; and encourage all States, including the PRC, to abide by the rule of law.

In 2018, Secretary of Defense James Mattis made clear at the Shangri-La Dialogue that the Indo-Pacific region is America’s “priority theater,” and that, as a Pacific nation, the United States is “in the Indo-Pacific to stay.”⁶⁹ While intended to reassure regional allies and partners, as well as ASEAN, of America’s commitment to a “safe, secure, prosperous and free Indo-Pacific”⁷⁰ region, the secretary’s speech also sent a clear message to the PRC—adhere to the international rules and norms that have brought relative peace and prosperity to the region for the past seventy years or face the consequences.

Moreover, the secretary openly chastised the PRC for its aggressive behavior in the SCS, calling into question Beijing’s stated intentions and broader policy goals for the region. Specifically, he criticized China’s militarization of its artificial features in the SCS, stating that, despite China’s claims

68. ASIA-PACIFIC MARITIME SECURITY STRATEGY, *supra* note 10, at 2.

69. Mattis, *supra* note 62.

70. *Id.*

to the contrary, the deployment of anti-ship and surface-to-air missiles, electronic jammers, and bomber aircraft was “tied directly to military use for the purposes of intimidation and coercion.”⁷¹ Moreover, these actions were in direct contradiction to President Xi’s public assurances to President Trump that China would not militarize its SCS features.

The U.S. National Security Strategy emphasizes that Chinese “efforts to build and militarize outposts in the South China Sea endanger the free flow of trade, threaten the sovereignty of other nations, and undermine regional stability.”⁷² China’s rapid military modernization also threatens U.S. access to the region and enhances Beijing’s political and security agenda. Accordingly, the United States seeks to expand and strengthen Indo-Pacific alliances and partnerships in order to preserve a free and open Indo-Pacific region that provides prosperity and security for all nations. This new security architecture will be “capable of deterring aggression, maintaining stability, and ensuring free access to common domains” to “preserve the free and open international system” that has brought peace and prosperity to all nations in the region since 1945.⁷³

The 2019 Indo-Pacific Strategy Report builds on the 2017 National Security Strategy and 2018 National Defense Strategy. It re-emphasizes that the Indo-Pacific region is the priority theater for the Department of Defense and implements a strategy to increase forward presence, improve capabilities, enhance posture in the region, and leverage and strengthen allies and partners to deter Chinese aggression, maintain regional peace and stability, and preserve a free and open Indo-Pacific.⁷⁴

In short, regional friends and allies are looking to the United States to exercise leadership to maintain a regional order that respects all nations’ sovereignty, independence, and economic well-being. A weak, non-binding Code of Conduct that allows the PRC to continue to intimidate and harass its neighbors will not preserve peace and stability in the region. A weak Code

71. *Id.*

72. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 46 (2017), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

73. U.S. DEPARTMENT OF DEFENSE, SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2018), <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

74. U.S. DEPARTMENT OF DEFENSE, INDO-PACIFIC STRATEGY REPORT: PREPAREDNESS, PARTNERSHIPS, AND PROMOTING A NETWORKED REGION (2019), <https://media.defense.gov/2019/Jul/01/2002152311/-1/-1/1/DEPARTMENT-OF-DEFENSE-INDO-PACIFIC-STRATEGY-REPORT-2019.PDF>.

of Conduct will additionally enhance and legitimize China's position and dominance over the SCS and ASEAN and allow China to continue to unravel the rules-based order that has been the foundation of the region's growth for the past five decades. Accordingly, unless these issues are satisfactorily resolved, the United States should actively oppose, and encourage other nations to oppose, the negotiation and conclusion of a Code of Conduct for the SCS.