

# BENEDICT'S MARITIME BULLETIN

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## REPRESENTATIVE MORTGAGEES IN PREFERRED SHIP MORTGAGES

By Glen T. Oxton<sup>\*</sup>

Ship mortgage law in the United States (and in the Marshall Islands, Liberia and Vanuatu, which have adopted the general maritime law of the United States) is often difficult to ascertain. The relevant statutes lack detail, leaving many questions unanswered. As courts often say, there is no federal law of mortgages. Instead, courts look to analogous state laws to interpret the federal mortgage statute. As a consequence, change in the practice of ship finance occurs slowly. Rules are followed and forms are used because things have always been done that way, and outdated theories enjoy an unjustifiably long lifespan.

Two notions that ought to be retired are the fiction that a ship mortgage transfers title in the vessel to the mortgagee and its corollary that only a trustee and not a mere agent may be a representative mortgagee for multiple lenders.

The corollary is said to result from the fictional transfer of title in the vessel to the mortgagee, and that an agent may not hold title to property.<sup>1</sup> The first proposition reflects obsolete chattel mortgage law, and the second is simply wrong. Ship mortgages have evolved from a

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<sup>1</sup> The latter might be based on the concept that an agent cannot be the record owner of a vessel because the statute requires the owner's name to be recorded. A mortgage lien, however, does not convey title to the mortgagee, as discussed below.

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## MANAGING EDITOR'S INTRODUCTORY NOTE

We begin this edition with an interesting article by Glen Oxtan on the slow changing law and practice relating to ship mortgages. Glen points out that many forms in current use invoke concepts that are outdated and no longer reflective of the law, including the concept that a mortgage transfers title to the mortgagee, and that there can be no representative mortgagees. Glen reviews the history behind these concepts and discusses the current law that does away with these archaic concepts.

Our next offering is our usual column by Bryant Gardner, "Window on Washington." This time, Bryant gives a very detailed review of current Chinese outlook, practices, and intentions with respect to advancing its interests in the South and East China Seas. He also gives a detailed look at U.S. and international reactions to these ambitious Chinese plans.

Next we present a very interesting article by Marissa Henderson on developments in the way seaman personal injury claims can be handled and how the exposure to large awards against owners and their insurers can be managed and reduced. Both defense and plaintiffs' counsel should be aware of this more recent approach to the handling of these claims.

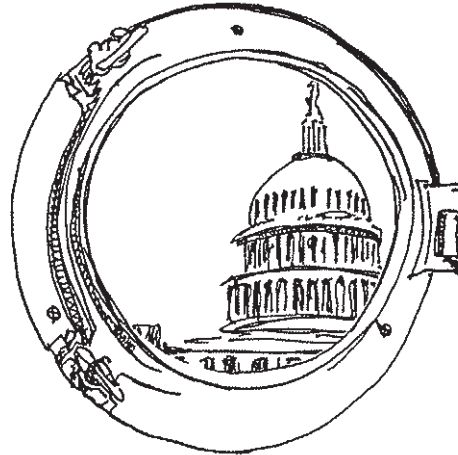
Last but not least, we conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

Once again, we encourage our readers to submit photos, artwork, poems, or thought pieces to enhance the enjoyment of reading our publication.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

**Robert J. Zapf**

## WINDOW ON WASHINGTON



### BIG TROUBLE IN LITTLE CHINA

By Bryant E. Gardner

Over the last decade, the Chinese Communist Party (CCP) has increasingly turned its eyes toward the sea—looking to protect and control essential trade lanes, establish a protective perimeter off its coast which envelops Taiwan, develop force projection capabilities, and ensure dominion over near sea resources. By 2015, China's Military Strategy declared:

The traditional mentality that land out-weighs sea must be abandoned, and great importance has to be attached to managing the seas and oceans and protecting maritime rights and interest. It is necessary for China to develop a modern maritime military force structure commensurate with its national security and development interests, safeguard its national sovereignty and maritime rights and interests, protect the security of strategic SLOCs (sea lines of communication) and overseas interests, and participate in international cooperation so as to provide strategic support for building itself into a maritime power.<sup>1</sup>

The CCP's maritime and expansionist goals have not gone unnoticed in Washington. Opening a hearing of the Senate Foreign Relations Committee in March 2019, new Chairman Senator Jim Risch (R-ID) stated "Today, China steals our intellectual property and uses it to put our people out of work. It intimidates its neighbors, including close U.S. allies while increasing its military capabilities in the South and East China Seas. China exports corruption and its authoritarian model across the globe. It uses cheap financing as a debt trap, and has built a police state that the Chinese Communist Party uses to limit free expression that contradicts the party line."<sup>2</sup> Senator Risch's concerns are shared by many U.S. lawmakers.

Across Capitol Hill at a hearing before the Asia and Pacific Subcommittee of the House Committee on Foreign Relations, Chairman Ted Yoho (R-FL) observed that during the 19th Communist Party Congress in October 2017, Xi Jinping proclaimed a new era in which China would make greater contributions to mankind, including "the spread of socialism with Chinese characteristics." Rep. Yoho remarked, "I think

<sup>1</sup> U.S. DEFENSE INTELLIGENCE AGENCY, CHINA MILITARY POWER: MODERNIZING A FORCE TO FIGHT AND WIN, 64 (2019) (quoting CCP STATE COUNCIL, CHINA'S MILITARY STRATEGY (May 2015)). See also PEOPLE'S REPUBLIC OF CHINA, VISION AND ACTIONS ON JOINTLY BUILDING SILK ROAD ECONOMIC BELT AND 21ST-CENTURY MARITIME SILK ROAD (2015).

<sup>2</sup> *Hearing before the Senate Foreign Relations Comm., U.S.-China Competition*, 116th Cong. (March 13, 2019) (Statement of Chairman Sen. Jim Risch (R-ID)).



that's still called communism," and acknowledged that his hopes the Chinese model would be a compromise between communist leadership and free market liberalization have increasingly given way to a realization that the Chinese model is a byword for one-party authoritarian rule.<sup>3</sup> Yoho also noted that, "[if] the developing world believes [CCP General Secretary Xi Jinping]'s lies, Xi may succeed in building an alternative order of subservient strongmen who will meekly go along with China's global ambitions in exchange for patronage in their own spheres of influence."<sup>4</sup>

More tangibly, the United States' 2018 National Defense Strategy marks a reorientation from international terrorism toward peer and near-peer threats posed by China and Russia, and a return to the era of great power competition:

Today, we are emerging from a period of strategic atrophy, aware that our competitive military edge has been eroding. We are facing increased global disorder, characterized by a decline in the long-standing rules-based international order—creating a security environment more complex and more volatile than any we have experienced in recent memory. Inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security.

China is a strategic competitor using predatory economics to intimidate its neighbors while militarizing features in the South China Sea.

...

China is leveraging military modernization, influence operations, and predatory economics to coerce countries to reorder the Indo-Pacific region to their advantage. As China continues its economic and military ascendance, asserting power through an all-of-nation long-term strategy, it will continue to pursue a military modernization program that seeks Indo-Pacific regional hegemony in the near-term

and displacement of the United States to achieve global preeminence in the future.<sup>5</sup>

Upon reviewing the 2018 Strategy, former Chairman of the Senate Armed Services Committee John McCain (R-AZ) remarked: "The National Defense Strategy offers a new framework for thinking about the global challenges we face and that places China squarely at the top of our priority list. As we turn our focus to great power competition and near-peer threats, we must face up to the true nature of the reality of Chinese power and ambition."<sup>6</sup>

Like all aspiring great powers, China's maritime ambitions are instrumental towards both its regional and global goals. In the first instance, the CCP appears to seek undisputed domination over its near seas; in the second, it seeks to establish a long-term global maritime transportation infrastructure and aid network through its "Belt Road Initiative" (BRI).

#### **Territorial Expansion & Dispute in the South China Sea & East China Sea**

The strategic importance of the South China Sea (SCS) and East China Sea (ECS) is hard to overstate. The SCS abuts the Strait of Malacca, one of the major choke points of global maritime commerce, and the SCS and the ECS together form a protective arc around the coast of The People's Republic of China, enveloping the "renegade" Republic of China (Taiwan). Trillions of goods transit through the SCS and ECS annually, as raw materials come into China and manufactures go out to Europe, the United States, and the world. The SCS alone has 190 trillion cubic feet of natural gas and 11 billion barrels of oil and is one of the top five most productive fishing zones.<sup>7</sup> The Department of Defense states that, "the South China Sea plays an important role in security considerations across East Asia because Northeast Asia relies heavily on the flow

<sup>3</sup> *Hearing before the House Comm. on Foreign Affairs, Subcomm. on Asia and the Pacific, U.S. Responses to China's Foreign Influence Operations*, 115th Cong. (Mar. 21, 2018) (Statement of Chairman Ted Yoho (R-FL)).

<sup>4</sup> *Id.*

<sup>5</sup> U.S. DEPARTMENT OF DEFENSE, SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA: SHARPENING THE AMERICAN MILITARY'S COMPETITIVE EDGE, Introduction (2018).

<sup>6</sup> *Hearing before the Senate Armed Services Comm., Hearing on the United States Pacific Command*, 115th Cong. (March 15, 2018) (Statement read by Sen. Inhofe (R-OK)).

<sup>7</sup> *Hearing before the Senate Foreign Relations Comm., U.S.-China Competition*, 116th Cong. (March 13, 2019) (Statement of Oriana Mastro, Assistant Professor of Security Studies, Edmund A. Walsh School of Foreign Service, Georgetown University, Washington, D.C.).

of oil and commerce through South China Sea shipping lanes, including more than 80 percent of the crude oil flowing to Japan, South Korea, and Taiwan.”<sup>8</sup>

The CCP's apparent goal, for at least the last decade, has been to establish dominion over the SCS and ECS. CCP strategy in the SCS and ECS has been characteristically Chinese. The strategy, not unlike what it is pursuing with the BRI, is to incrementally inch forward such that no one movement is sufficient to politically justify retaliation from the United States or its allies, but which in the end results in Chinese domination—sometimes referred to by analysts as “shaving the salami.” In the SCS and ECS, the CCP began by setting out fishing and merchant vessels, then around December 2013, the CCP commenced building up various reefs and islands and building structures and lengthy runways upon them to service that activity, and then ultimately integrating the entire cluster to achieve what is generally referred to as Anti-Access Area-Denial (A2AD).

The A2AD strategy involves deploying asymmetric, low cost capabilities to erode U.S. military supremacy and complicate any otherwise black and white conflict issues, blocking the U.S.'s ability to come to the aid of allies or to respond to incidents before the incident is effectively over. There is a gradual and even imperceptible shift in presence toward the disputed area to develop critical mass and presence, followed by a rapid overrun or pivotal shift in control over the area, relying upon the political unpalatability and intimidation of conventional war to deter any effective counter offensive sufficient to uproot the occupying party—similar to what was seen with the “little green men” operating without uniforms in the Crimea before its absorption by Russia. The strategy seeks to counter America's Desert Storm / Shield type operations in which it masses forces and then attacks decisively—by never giving time for such a logistical build-up, instead making the operation an effective *fait accompli* before the United States can mass a decisive countering force.

In China's asymmetrical SCS / ECS campaign, the CCP deploys a maritime militia of lightly armed merchant and fishing vessels called the People's Armed Forces

Maritime Militia (PAFMM)<sup>9</sup> and Chinese Coast Guard vessels, backed up at a distance by the rapidly developing People's Liberation Army Navy (PLAN). The CCP prefers to deploy the PAFMM, and sometimes the Chinese Coast Guard, in order to avoid escalation and direct conflict.<sup>10</sup> These “civilian” vessels—operating in a gray area between combatant and non-combatant status—effectively harass and block U.S. Navy vessel movements in conjunction with rapidly evolving cyber and anti-satellite weapons, while PLAN and island-based installations in the area are increasingly able to mount a credible kinetic defense short of a major U.S. action.

U.S. Navy Admiral Philip Davidson, testifying in April 2018 before the Senate Armed Services Committee in connection with his nomination to become Commander, U.S. Pacific Command (PACOM), revealed that “China is now capable of controlling the South China Sea in all scenarios short of war with the United States.”<sup>11</sup> The new Chairman of the Senate Armed Services Committee, James Inhofe (R-OK), analogized what China is doing in the South China Sea to something “like you're preparing for World War III.”<sup>12</sup>

Disagreements between the United States allied nations and China in the SCS and ECS are rooted in both territorial disputes and in disagreement about coastal states' rights under the law of the sea.

<sup>9</sup> The Defense Intelligence Agency has reported that “The PAFMM is a subset of China's national militia, an armed force of civilians available for mobilization to perform basic support duties. Militia units organize around towns, villages, urban sub districts, and enterprises, and they vary widely from one location to another. The composition and mission of each unit reflects local conditions and personnel skills. In the South China Sea, the PAFMM plays a major role in coercive activities to achieve China's political goals without fighting, part of broader Chinese military doctrine that states that confrontational operations short of war can be an effective means of accomplishing political objectives.” U.S. DEFENSE INTELLIGENCE AGENCY, CHINA MILITARY POWER: MODERNIZING A FORCE TO FIGHT AND WIN, 79 (2019).

<sup>10</sup> The Chinese Coast Guard has rapidly increased and modernized its forces. The force's large patrol ship fleet has doubled since 2010 to more than 130 vessels, making it by far the largest coast guard force in the free world. In 2018, the CCP transferred the Chinese Coast Guard from the State Oceanic Administration to military control. *Id.* at 78.

<sup>11</sup> CONGRESSIONAL RESEARCH SERVICE, CHINA'S ACTIONS IN SOUTH AND EAST CHINA SEAS: IMPLICATIONS FOR U.S. INTERESTS, SUMMARY (Jan. 31, 2019) (quoting DEPARTMENT OF DEFENSE, ANNUAL REPORT TO CONGRESS [ON] MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA at 41 (May 15, 2017)).

<sup>12</sup> *Hearing before the Senate Armed Services Comm., China and Russia*, 116th Cong. (January 29, 2019) (Statement of Sen. Inhofe (R-OK)).

<sup>8</sup> CONGRESSIONAL RESEARCH SERVICE, CHINA'S ACTIONS IN SOUTH AND EAST CHINA SEAS: IMPLICATIONS FOR U.S. INTERESTS, SUMMARY (Jan. 31, 2019) (quoting DEPARTMENT OF DEFENSE, ANNUAL REPORT TO CONGRESS [ON] MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA at 41 (May 15, 2017)).

In the first instance, the U.S. challenges China's basic territorial claims over its ECS and SCS "island" outposts. Every land feature claimed or occupied by China is challenged by another neighboring claimant state—such as the Philippines, Japan, or Vietnam—often with a clearer line of title from Spanish, British, or French Colonial rule. And even assuming one or another state may have lawful title, other states are not required to confer upon either claimant the right to unilaterally assert interference with freedom of navigation until proper title is resolved. Even if title had been resolved, many of the features occupied by China are low-tide elevation features (submerged at high tide) or artificial islands or installations, which do not generate maritime zones of sovereignty. And, at all events, assuming the feature in question is an island with clear title and deserving of a maritime zone, coastal state maritime zones are determined from the baselines of the coastal state, which may not be from every coastal rock—contrary to the CCP's apparent assertions.

Beyond the territorial disputes, the CCP disagrees with the U.S. and the broader international community over whether a nation has a right under international law to freely navigate military vessels within the exclusive economic zone (EEZ) of a coastal state—assuming for argument that the Chinese-manufactured features are actually China's and that they do generate sovereign maritime zones. The U.S. and its allies contend that international law gives coastal states the right to regulate economic activity such as mining and fishing, but it does not give coastal states the right to regulate military activities in the EEZ beyond their 12 nautical mile territorial waters. China and a small minority of nations,<sup>13</sup> on the

other hand, contend that the United Nations Convention on the Law of the Sea (UNCLOS) gives them the right to regulate military activities in their EEZ. This dispute appears to be the root of numerous air and water navigational run-ins between the United States and China, including most notoriously the 2001 incident during which a Chinese fighter collided with a U.S. Navy EP-3 electronic surveillance aircraft flying approximately 65 miles off the coast of China, forcing the EP-3 to crash land on Hainan Island, China. Observers have generally disagreed on the question of whether the U.S. position would benefit from ratifying UNCLOS. On the one hand, ratification would give the U.S. greater standing and help lock-in the U.S. position on navigational rights. On the other hand, China's position far exceeds UNCLOS as reflected by its total disregard of a July 12, 2016 award issued under UNCLOS, which ruled strongly against China and in favor of the Philippines' claims, and commentators have speculated that ratification of UNCLOS would do little in the Chinese disputes.

The EEZ freedom of navigation issue is particularly thorny because it has implications beyond the China near seas. Overturning the principle of freedom of the seas for all EEZs would overthrow hundreds of years of legal tradition and significantly change the legal regime governing a huge portion of the world's surface, including some of its most strategically important waters.

The dispute is not without pedigree. Hugo Grotius, largely considered the father of international law, was a proponent of the idea that the world's seas should be treated as global commons, whereas John Selden, in his 1635 book "Closed Sea," put forth the idea that the sea could be appropriated by the coastal sovereign. As a contemporary commentator observed:

A very old debate has been renewed in recent years: is the sea a commons open to the free use of all seafaring states, or is it territory subject to the sovereignty of coastal states? Is it to be freedom of the seas, as Dutch Jurist Hugo Grotius insisted? Or is it to be closed seas where strong coastal states make the rules as Grotius' English archnemesis John Selden proposed?

Customary and treaty law of the sea sides with Grotius, whereas China has in effect become a partisan of Selden. Just as England claimed

<sup>13</sup> Argentina, Brazil, China, Indonesia, Iran, Malaysia, the Maldives, Oman, and Vietnam contend that warships have no automatic right of passage; 23 other developing countries (including Brazil, Malaysia, and Vietnam) insist that military activities such as close-in surveillance and reconnaissance within the EEZ infringe upon coastal states' security rights and are therefore not protected by freedom of navigation principles. *Hearing before the Senate Foreign Relations Comm., U.S.-China Competition*, 116th Cong. (March 13, 2019) (Statement of Oriana Mastro, Assistant Professor of Security Studies, Edmund A. Walsh School of Foreign Service, Georgetown University, Washington, D.C.). The U.S. Navy Office of Legislative Affairs, however, provided different nations to the Congressional Research Service when specifying countries with restrictions inconsistent with UNCLOS that would limit the exercise of high seas freedoms by foreign navies operating outside the 12-mile limit. CONGRESSIONAL RESEARCH SERVICE, CHINA'S ACTIONS IN SOUTH AND EAST CHINA SEAS: IMPLICATIONS FOR U.S. INTERESTS, No. R42784 at 8-9 (Jan. 31, 2019).

dominion over the approaches to the British Isles, China was to make the rules governing the China seas. Whose view prevails will ultimately determine not just who controls waters, lands, and atolls, but also the nature of the system of maritime trade and commerce. What happens in Asia could set a precedent that ripples out across the globe. The outcome of this debate is a big deal.<sup>14</sup>

According to the U.S. National Oceanic and Atmospheric Administration (NOAA), EEZs account for approximately 30.4% of the world's oceans.<sup>15</sup> They are also the most strategically and economically valuable ocean spaces, and permitting coastal states to control navigation through them would have far reaching ramifications for U.S. strategic doctrine and potentially threats to trade routes as well.

#### **Belt-Road Initiative & the Maritime Silk Road**

China's maritime and extraterritorial ambitions do not stop at the ECS and SCS. More recently, China has embarked upon the BRI to reestablish infrastructure linking China with Europe and the world beyond. From a global trade and power projection viewpoint, the most significant portion of the BRI is the "Maritime Silk Road." Seventy percent of the world's container traffic already flows through Chinese owned or invested ports,<sup>16</sup> and the Maritime Silk Road would build upon that to establish greater Chinese influence all along and at both ends of Chinese trade and supply chains.

A recent witness before the Senate Foreign Relations Committee described the BRI as being, at its core, about the CCP's attempts to use its growing economic clout to establish itself as the preponderant regional

power without provoking a countervailing military response.<sup>17</sup> She described the BRI as "the most significant initiative for building and exercising power globally," and since 2013 over 70 countries have signed contracts for projects under BRI, with China investing over \$614 billion in ports, railways, airports, and other infrastructure hubs.<sup>18</sup> The Commander of PACOM testified in 2018 that BRI is five times the amount of funding provided by the United States under the Marshall Plan—but whereas the Marshall Plan was designed to lift up Europe, BRI is designed to lift up China.<sup>19</sup> The Assistant Secretary of Defense for Indo-Pacific Security Affairs opined in March 2019 that China is using BRI "to erode the sovereignty of other countries and induce them to behave in accordance with Chinese interests,"<sup>20</sup> and Admiral Phil Davidson, the new Commander of PACOM (since rechristened the "Indo-Pacific Command" (INDOPACOM)), testified:

Beijing offers easy money in the short term, but these funds come with strings attached: unsustainable debt, decreased transparency, restrictions on market economies, and the potential loss of control of natural resources. Beijing's actions in this regard have military ramifications as well. Beijing touts its need to safeguard its citizens abroad and defend its expanding global interests in order to justify increased permanent PLA overseas basing and presence. Beijing is also exploiting growing debt burdens to access strategic infrastructure in the region.<sup>21</sup>

<sup>14</sup> CONGRESSIONAL RESEARCH SERVICE, CHINA'S ACTIONS IN SOUTH AND EAST CHINA SEAS: IMPLICATIONS FOR U.S. INTERESTS, No. R42784 at 5 (Jan. 31, 2019) (quoting James R. Holmes, *Has China Awoken a Sleeping Giant in Japan?* THE DIPLOMAT (March 1, 2014)).

<sup>15</sup> *Id.*

<sup>16</sup> *Hearing before the Senate Foreign Relations Comm., U.S.-China Competition*, 116th Cong. (March 13, 2019) (Statement of James Talent, Commissioner, U.S.-China Economic and Security Review Commission, Washington, D.C.). The U.S.-China Economic and Security Review Commission was created by Congress in 2000 to provide oversight regarding the impact China's World Trade Organization (WTO) accession would have on the U.S. economy and national security.

<sup>17</sup> *Hearing before the Senate Foreign Relations Comm., U.S.-China Competition*, 116th Cong. (March 13, 2019) (Statement of Oriana Mastro, Assistant Professor of Security Studies, Edmund A. Walsh School of Foreign Service, Georgetown University, Washington, D.C.).

<sup>18</sup> *Id.*

<sup>19</sup> *Hearing before the Senate Armed Services Comm., United States Pacific Command*, 115th Cong. (March 15, 2018) (Statement of Adm. Harris, Commander PACOM).

<sup>20</sup> *Hearing before the House Armed Services Comm., Indo-Pacific U.S. Military Activities / Security Challenges*, 116th Cong. (Mar. 27, 2019) (Statement of Randall Schriver, Assistant Secretary of Defense, Indo-Pacific Security Affairs, Office of the Secretary of Defense).

<sup>21</sup> *Hearing before the House Armed Services Comm., Indo-Pacific U.S. Military Activities / Security Challenges*, 116th Cong. (Mar. 27, 2019) (Statement of Admiral Philip Davidson, Commander, INDOPACOM).



Rep. Ted Yoho (R-FL), Chairman of the Asia and Pacific Subcommittee of the House Committee on Foreign Affairs in 2018, opined that the CCP sells the BRI as “a new option for other countries and nations who want to speed up their development while preserving their independence,” which appears to be a dog whistle for nations looking for development aid without the strings of democratic liberalization so often conditional to U.S. aid packages.<sup>22</sup>

Testifying in April 2018 before the Senate Armed Services Committee in connection with his nomination to become the next Commander of PACOM, Admiral Davidson stated:

Ultimately, BRI provides opportunities for China's military to expand its global reach by gaining access to foreign air and maritime port facilities. This reach will allow China's military to extend its striking and surveillance operations from the South China Sea to the Gulf of Aden. Moreover, Beijing could leverage BRI projects to pressure nations to deny U.S. forces basing, transit, or operational and logistical support, thereby making it more challenging for the United States to preserve international orders and norms.<sup>23</sup>

From a maritime perspective, BRI appears to still be in its early stages, but the marks of progress are hard to miss.

Chinese investment in Africa, which touches three of the world's eight major maritime choke points, has sparked great interest in Western capitals, and Washington is no exception. In 2009, China surpassed the United States as Africa's largest trading partner, and one fifth of African government external debt is owed to China alone.<sup>24</sup> In 2017, the PLAN opened its first overseas military base in Djibouti, Africa, almost adjacent to the U.S.

Africa Command's (AFRICOM) headquarters at Camp Lemonnier. The installation is situated along the Bab-el-Mandeb Strait in the Gulf of Aden, with 12.5% to 20% of global trade passing by.<sup>25</sup> Already there have been reports of tensions between the U.S. and Chinese at the location, including allegations of military grade lasers used to disable U.S. pilots. In May 2018, AFRICOM Commander Tomas Walhauser told Congress he is concerned with Chinese takeover of the commercial port in Djibouti restricting U.S. access.<sup>26</sup> In connection with China's investment in the port project, Djibouti has taken on public debt equivalent to 88% of its gross domestic product. This raises questions about how Djibouti will reject Chinese demands for more influence, more control, priority docking and customs processing, other insidious A2AD measures available to a host client state. Furthermore, China plans to invest in ports in Cameroon, Guinea, Madagascar, Mozambique, Namibia, and Madagascar.<sup>27</sup>

That China's BRI may be a predatory “loan to own” program is not wholly fanciful. Unable to get financing from other frequent lenders such as India, Sri Lanka turned to China to develop Port Hambantota. The financing required use of a designated Chinese construction company, without open competitive bidding, and the Chinese made clear that they expected intelligence sharing regarding activities at the port. The local port operators were unable to generate revenues from the port sufficient to service their debt to the Chinese, which bore increasingly onerous terms as Sri Lanka fell deeper into the debt trap. Ultimately the debt burden became unsustainable, and in December 2017 Sri Lanka handed over the port and 15,000 acres of surrounding land to China under a ninety-nine-year lease. The port is strategically situated along a key commercial and military sea lane, a few hundred miles off the coast of India, a major Chinese rival.<sup>28</sup>

Unlike the original Silk Road, China's Maritime Silk Road and BRI extend to the American backyard once embraced by the Monroe Doctrine. Originally, the BRI was not supposed to extend across the Atlantic. But in January 2018, at a meeting in Santiago, Chile, between

<sup>22</sup> *Hearing before the House Comm. on Foreign Affairs, Subcomm. on Asia and the Pacific, U.S. Responses to China's Foreign Influence Operations*, 115th Cong. (Mar. 21, 2018).

<sup>23</sup> CONGRESSIONAL RESEARCH SERVICE, *CHINA'S ACTIONS IN SOUTH AND EAST CHINA SEAS: IMPLICATIONS FOR U.S. INTERESTS* at 29 (Jan. 31, 2019).

<sup>24</sup> *Hearing before the Senate Armed Services Comm., Subcomm. on Emerging Threats and Capabilities, China's Presence / Investment in Africa*, 115th Cong. (Dec. 12, 2018) (Statement of Judd Devermont, Director of the Africa Program, Center for Strategic and International Studies).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, NEW YORK TIMES (June 25, 2018).

China and 33 members of the Community of Latin and Caribbean States (CELAC), China announced its expansion of the BRI into the region. Offering \$250 billion in Latin America investment over the next decade, China is already the leading trade partner of many Latin American nations, including Argentina, Brazil, and Chile.<sup>29</sup> In December 2018, Panama became the first Latin American country to formally join the BRI.

On Grand Bahama Island, fifty-five miles from the U.S. mainland, a Hong Kong company has invested \$3 billion in a deepwater container port expected to reap the benefits of a widened Panama Canal.<sup>30</sup> Florida Senator Marco Rubio (R-FL), who chairs the Western Hemisphere Subcommittee of the Foreign Relations Committee, has indicated he is “very concerned” about Chinese influence in the Caribbean and Latin America, noting, “It’s a big problem. We’re focused on it.”<sup>31</sup> In June 2013, CCP General Secretary Xi Jinping committed \$3 billion to the Caribbean region. So far, at least five Caribbean nations have signed up for the BRI: Trinidad and Tobago, Dominica, Antigua and Barbuda, Grenada, and the Dominican Republic, which received \$600 million for power grid upgrades in November 2018.<sup>32</sup>

China’s ambitions are not limited to developing nations. In 2016, China’s state-owned China Ocean Shipping Company (COSCO) took a controlling interest in Athens’ Piraeus Harbor, signaling it intends to use it as a main platform for the maritime silk road, with Chinese companies now using the COSCO-controlled asset as their principal port of entry to Southern Europe.<sup>33</sup> The deal went forward in the face of strong

local opposition because Greece, after receiving multiple bail-outs, was under European Union pressure to sell off state assets including the Piraeus port.<sup>34</sup> After investing \$600 million euros in the port, it has become the fastest-growing port and COSCO expects Piraeus to become the number one port in the Mediterranean.<sup>35</sup> COSCO also owns majority stakes in Port Zeebrugge, Belgium and Valencia, Spain, and COSCO or other Chinese entities hold sizeable stakes of 20%-40% in terminals located in the ports of Valencia, Spain; Genoa, Italy; Bilbao, Spain; Rotterdam, Netherlands; Istanbul, Turkey; and Antwerp, Belgium.<sup>36</sup> On March 23, 2019, Italy became the first G7 and largest European country to formally join BRI, expected to lead to \$2.8 billion worth of Chinese investments in port infrastructure in Trieste, Genoa, and Palermo.<sup>37</sup> Italy’s announcement came the day after French President called for a unified European approach in response to China, and will likely lead to increased friction between Italy and the European Union.

On the heels of the Italy announcement, U.S. Secretary of State Mike Pompeo tied China’s SCS/ECS campaign together with its BRI initiative as part of the same expansionist effort and indicated the U.S. is “saddened” to see countries signing up for the BRI because he thinks the counterparties to China ultimately end up with the short end of the stick. Of course, expressions of disappointment and chastisement are not enough to check China’s maritime aspirations. America’s “pivot to Asia” remains a work in progress. To date, U.S. action in the South and East China Seas relies largely on “freedom of navigation” exercises. In response to the BRI, the U.S. Congress recently passed the BUILD Act, which aims to overhaul U.S. foreign assistance.<sup>38</sup>

The BUILD Act consolidates and aligns much of the U.S.’s current foreign investment assistance machinery

<sup>29</sup> Fabian Cambero & Dave Sherwood, *China Invites Latin America to Take Part in One Belt, One Road*, REUTERS (Jan. 22, 2018).

<sup>30</sup> Rachel Oswald, *Caribbean Islands Becoming Hot Spots for Chinese Investment*, CONGRESSIONAL QUARTERLY (Mar. 25, 2019).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Hearing before the House Comm. on Foreign Affairs, Subcomm. on Europe, Eurasia, and Emerging Threats, Chinese Investment and Influence in Europe*, 115th Cong. (May 23, 2018) (Statement of Phillippe Le Corre, Senior Fellow, Mossavar-Rahmani Center for Business and Government at Harvard University’s John F. Kennedy School of Government).

<sup>34</sup> *Piraeus Port: Dragon’s Head on the Belt and Road*, HELLENIC SHIPPING NEWS (Nov. 26, 2018).

<sup>35</sup> *Id.*

<sup>36</sup> Joanna Kakissis, *Chinese Firms Now Hold Stakes in Over a Dozen European Ports*, NPR (Oct. 9, 2018) (China Merchant Port Holdings also holds large stakes in Casablanca, Dunkirk, Istanbul, Le Havre, Malta, Marseilles, and Nantes.)

<sup>37</sup> Andrew Chatzky, *China’s Belt and Road Gets a Win in Italy*, COUNCIL ON FOREIGN RELATIONS (Mar. 27, 2019); Holly Ellyatt, *Is Italy Playing with Fire When it Comes to China?*, CNBC (Mar. 27, 2019).

<sup>38</sup> Better Utilization of Investments Leading to Development Act of 2018, Pub. L. No. 115-254, Division F, 132 Stat. 3186, 3485 (Oct. 5, 2018).

in a new International Development Finance Corporation (IDFC) which will be the successor to the Overseas Private Investment Corporation (OPIC). Working in coordination with the US Agency for International Development (USAID), the IDFC will have increased flexibility and additional funding authority to deploy new financial products and incorporate more private capital into infrastructure products in developing nations. To the extent the BUILD Act hews true to its benevolent aims, it may be playing by different rules than the BRI, which many contend exists to project

China's influence along key trade routes with the dedicated goal of developing the "Maritime Silk Road". No matter how this all breaks, it is a good bet that China will be a growing force in the maritime sector in coming years, and will continue to attract close scrutiny from Washington.

*"It's all in the reflexes."*

Jack Burton, *Big Trouble in Little China*